PREPARING FOR BEIJING: ARE YOU DISPUTE-READY?

A Workshop for National Sport Organizations

Sport Information Resource Centre (SIRC)
Tuesday, April 8, 2008
14th Floor, 180 Elgin Street, Ottawa

Presenters:

Rachel Corbett, Centre for Sport and Law
Hilary Findlay, Centre for Sport and Law & Brock University
Steven Indig, Centre for Sport and Law
David Lech, Centre for Sport and Law
Leanne Standryk, Lancaster Brooks & Welch
Brian Ward, Lawyer and Sports Agent

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AGENDA

1.	Welcome and Introductions	Rachel Corbett	9:00
2.	The "Legal" Olympics/Paralympics	Rachel Corbett	9:10
3.	Improving Selection Decision-Making	Hilary Findlay	9:20
4.	Managing Your Internal Appeals	Rachel Corbett	9:45
5.	The Importance of the Appeal Decision	Steve Indig	10:00
6.	The SDRCC Experience	David Lech & Leanne Standryk	10:10
7.	Other Parties in the Arbitration	Brian Ward	10:45
8.	Closing	Rachel Corbett	11:00
9.	Q and A and Discussion	All	11:05
10.	Adjourn	Rachel Corbett	11:30

BIOGRAPHICAL NOTES

Rachel Corbett, MEDes, RPP

A founder of the Centre for Sport and Law, Rachel helps sport organizations manage change by providing consulting services in planning, policy development and risk management. As a change agent, she works with national and provincial sport bodies on strategic planning, organizational restructuring and risk management initiatives. Rachel also helps sport organizations to draft clear and concise policy documents to improve governance and business practices. She has served as an investigator, dispute administrator and adjudicator in sport-related disputes. Rachel publishes widely and also lectures in several subjects in the Department of Sport Management of Brock University. As a True Sport Champion, Rachel is committed to helping organizations promote safe, positive and inclusive sport experiences.

rmc@sportlaw.ca | 905-228-3710

Hilary A. Findlay, PhD, LLB

Hilary is a partner with the Centre for Sport and Law and an Associate Professor in the Department of Sport Management at Brock University. She teaches in the areas of negotiation techniques and dispute resolution, contract drafting and analysis, intellectual property and licensing and, in general, legal issues facing sport managers. Hilary also continues to practice law specifically with the Canadian sport community and acts as both an advocate and an adjudicator in various sport dispute situations. Hilary has published a number of articles and columns focusing on legal issues facing the sport community. Recipient of the 2007 Faculty of Applied Health Sciences (Brock University) award for teaching excellence, Hilary is also active as volunteer Chair of the Judicial Committee of Ontario University Athletics (OUA).

haf@sportlaw.ca | 905-329-2421

Steven J. Indig, BRec, LLB

Steve is the Managing Director of the Centre for Sport and Law. A lawyer based in Toronto, Steve is a certified sports agent representing professional athletes in the CFL, NFL, OHL and MLS. Steve has worked with numerous national and provincial sport organizations providing consulting services relating to governance, contracts, policies, disputes, investigations and privacy. In addition, he has acted as an adjudicator on issues relating to eligibility, conduct of athletes, coaches and membership. Steve has significant first-hand knowledge of sport from competitive swimming at the national level, coaching with the Vaughan Aquatic Club and refereeing basketball. Steve is also a member of the Yarmouth, Nova Scotia Sports Hall of Fame.

sji@sportlaw.ca | 905-482-8987

David W. Lech, LLB

David is a lawyer based in Ottawa who is associated with the Centre for Sport and Law. His work focuses on business and commercial issues affecting amateur sport organizations. Previously he practiced with an Ottawa law firm and has served as an advocate, adjudicator and tribunal member in numerous sport-based disputes. He has specific expertise as an advocate in administrative hearings resulting from sport disputes, particularly in the doping area, and in commercial transactions, contracts and employment law. David has been an alpine ski racer, a national coach and a Master Course Conductor with the National Coaching Certification Program.

david.lech@sympatico.ca | 613-230-6245

Leanne Standryk, BA, LLB

Leanne is a partner with the Niagara law firm, Lancaster Brooks & Welch, LLP. She specializes in labour and employment law, and advises management in matters of human rights, contract negotiation, wrongful dismissal, privacy and risk management. Leanne's practice also includes sport and entertainment law, and she regularly provides advice to amateur sports association on risk management and employment issues. In her local community, Leanne is active as a True Sport Champion and is a volunteer with the Royal Canadian Henley Regatta, Hospice Niagara, and Big Brothers/Big Sisters. Leanne is also involved in youth educational initiatives through 'Courts in the Classroom' and in 2007 was a lecturer in the Department of Sport Management at Brock University.

lstandryk@lbwlawyers.com | 905-641-1551, ext 347

Brian Ward, LLB, BCL

Brian is a sport agent and lawyer based in Ottawa. He has represented both athletes and NSOs before administrative and judicial tribunals in a variety of sport matters including team selection, athlete discipline and contract enforcement. Brian has also conducted individual contract negotiations and sponsorship agreements on behalf of athletes and NSOs in the sports of alpine skiing, baseball, basketball, rugby union, softball and swimming. He has represented Canada before the International Rugby Football Board, the International Baseball Federation and at the World Baseball Classic. Brian is a professor in the Algonquin College Sport Business Management program teaching *Legal and Ethical Issues in Sport.*

brianward@globalserve.net | 613-834-3632

Discretion in Selection Decisions

Hilary A. Findlay

The Goal

The goal of selection criteria is to choose the best mix of people to fit the competitive circumstances. Particularly at the elite level, this often means discerning among subtle and often intangible characteristics that do not lend themselves to an objective analysis. Selectors must use their discretion to interpret these qualities.

Issue of concern

A significant number of selection decisions are appealed because the discretion given to the selectors by the selection policy is not exercised properly.[1]

Discretion allows an array of selection choices

There are two key aspects to selection (whether athlete, coach, official, etc.) that make the use of discretion necessary:

1. It is difficult, within a selection policy, to contemplate all the circumstances that may arise and affect performance (illness, weather conditions, changes in IF rules and various other unforeseen circumstances); and,
2. It is difficult to describe with sufficient precision a particular performance element unless the performance deals specifically with a purely objective criterion (time, distance, weight, etc.). Attitude, injury, experience, strategic thinking, poise, rapport, ability to perform under pressure, among others, may all be important – in both team and individual sports. Many team sports have the added dimension of 'positional considerations' – for example, a softball team might favour a utility player over a specialist, a badminton team might be looking for players who can compete in both singles and doubles events, and a track team might favour individuals who can compete in individual events as well as relays.

Discretion implies making a choice among a number of valid options. This means that any decision made within that array of options is a proper decision. Another decision-maker may exercise his or her discretion differently and arrive at a different decision. But, as long as the discretion was exercised properly, i.e., within the bounds set out by the organization, that alternate decision is equally proper.

Discretion is very rarely absolute or unfettered – it must typically be exercised within certain limits or parameters. The exercise of unfettered discretion may result in an arbitrary decision. An arbitrary decision is one a selector makes on any basis he or she desires! This is obviously improper. A selection policy should define the boundaries, or limits on the discretion of a selector. The exercise of discretion may also be influenced by the high performance strategic plan of the organization, the mandate of a program, or various other policies statements of the organization, such as the athlete development plan or a gender equity policy.

[1] There are, of course, other reasons selection decisions are appealed, some of the more common being failing to follow the process set out in the selection policy and the alleged bias of one or more of the selectors.

The responsibility to make selection decisions is typically given to those with expertise within the sport - those who understand and can recognize the subtleties of the more intangible and often subjective qualities that underlie the best selection choices. It is to this expertise that adjudicators often give deference; however, the discretion in every instance must be exercised properly.

Establishing criteria

The primary rule here is that discretion should be used to promote the objectives of the selection. In order to focus the objectives or goals of the selection, sport organizations set out in their selection policies considerations and criteria by which the discretion will be guided. Discretionary decisions must therefore be based on the factors set out in the selection policy. In doing this, irrelevant evidence must not be considered but, by the same token, all evidence relevant to the criteria must be considered. Ideally the factors should be weighted: in the absence of weighting, all factors should be considered to carry the same weight.

Discretion means individual differences

As noted above, discretion implies choice among a number of options. Each of the options is equally viable. On any particular criterion, for a particular participant, each selector may choose a different option (selector A may give a score of 5, selector B may give a score of 4 and selector C may give a score of 3). This may well happen for each participant. Overall, each criterion is still weighted the same way for each participant (criterion 1 may be worth 50% of the total score, criterion 2 may be worth 30% of the total score criterion 3 may be worth 20% of the total score). Each selector has applied his or her expertise and particular perspective[2] to assessing each participant on each criterion.

As noted above, each selector must have access to the same pertinent information or evidence from which to make his or her assessment. But people are not clones – they bring their own views to the assessment and invariably there will be some difference in the outcome. This is one of the problems with the use of discretion. It means accepting differences of opinion – on the understanding that the assessments are still based on the same evidence and measured against the same criteria.

Weighting of Criteria

This is different than the issue of discretion but is typically part of a selection process and usually involves the exercise of discretion. Some selection criteria may be more important than others. If this is so, the weighting of the criteria must be established before the selection takes place. If it is not then each criteria is presumed to receive equal weighting. This speaks to the weighting of each criterion in the overall selection process. Where there is more than one selector, the selectors must each adhere to the weighting apportionment; however, each selector may view a participant's performance on any particular criterion differently from another selector. This is both the essence of discretion as well as one of the potential pitfalls in using discretion to select athletes.

[2] Research shows that people have different approaches that they bring to discretionary decisions. Three main styles have been identified: a rule-driven approach, a value-driven approach and a results-driven approach. There may be more. Each approach may lead to some difference in an outcome.

Coming to a Single Score

The three hypothetical selectors from the example above ("Discretion means individual differences") must still somehow corral their scores and emerge with a score for each criterion. The single scores must then be combined based on their percentage weight for a final score. Selectors need to determine before-hand how they are going to combine their individual scores on each criterion for a single criterion score. Will the scores be averaged? Will the selectors seek consensus through discussion? Will this have previously been set out for them by the sport organization's policy?

Suggestions for best practices

Thinking about this whole idea of discretion, and weighting criteria and the inherently different approaches to decision-making (and thus, potentially, different decision out comes) suggests that those establishing selection criteria need to think about who will be making the decisions, how much discretion to give them, how to constrain the discretion granted, how to work towards consistency in decision-making, and how to document all this so that the results can ultimately be defended, if necessary. This starts long before the actual selection criteria and process are established.

Once a selection policy/criteria document has been written, approved and published, it must be followed. To quote one adjudicator, *"Selection criteria are important and highly technical documents. They should say what they mean and will be interpreted to mean precisely what they say".*

Moving forward, here a number of steps that may help ensure discretion is properly exercised:

1. Read the policy carefully and understand where discretion is available, how it may be applied and how it is to be constrained.
2. Where there are gaps (there should be no gaps if careful thought has been invested in the creation of the policy), work with the other selectors (presuming there are others) and devise your own guidelines or ways of assessing the criteria – determine what the criteria mean using ordinary and reasonable interpretation, identify the weighting of each criterion, determine how the criteria will be measured, and resolve how differences will be dealt with, then write all this down.
3. Establish a chart where scores and comments can be compiled. This will be evidence that permissible factors were in fact considered in the exercise of discretion.
4. In the end be able to provide a rationale for each candidate on each criterion - WRITE IT OUT (if there is an appeal, this is an essential and required piece of the disclosure each appellant is entitled to)
5. Debrief each candidate for selection afterwards to ensure transparency.

What We Are Learning About Managing Appeals

Rachel Corbett

Fifteen years ago the Centre for Sport and Law began writing appeal policies for sport organizations. In 1995 we published a handbook on the topic (*Administrative Appeals - A Handbook for Sport Organizations*) and in 2000 we did a second handbook (*So You've Got a Complaint – The Hearing Process from Start to Finish*). Now, in 2008, we find ourselves reviewing these early policy documents and recommending improvements.

Over the years, personnel from the Centre for Sport and Law have been involved in some capacity in hundreds of internal appeals. We have represented parties in appeals, we have sat as appeal panel members, we have advised appeal panels and sometimes we have managed the entire appeal process on behalf of the respondent organization.

As many NSOs now beginning the process of team selection for Beijing, we thought it might be useful to share some of our observations from this experience, and also share some new 'best practices' in writing appeal policies and managing appeals.

Have an independent professional manage your appeal

While there is a cost to this, there are ample benefits. There are two reasons for contracting someone to perform this function: one, as a party to an appeal it is difficult for the sport organization to maintain an appearance of impartiality while also managing the appeal: and two, running a smooth appeal requires experience and skill. Consider writing into your appeal policy a role for an 'appeal administrator' or 'case manager' or whatever you wish to call it – this person can be a volunteer or a paid consultant. This person can do the heavy administrative work, organize logistics and provide support to the appeal panel, leaving you, as the sport organization, free to focus your energies on being a respondent in your own appeal process.

Leave some flexibility to appoint your appeals panel

If your policy says that appeal panel members must be members of your organization or must meet other affiliation requirements, you may find yourself unable to put together an appeal panel quickly. We recommend that your appeal policy be flexible enough to allow an appeal panel to be made up of any persons you choose to appoint. In fact, it has been our experience that people from outside your sport can provide an excellent independent perspective and improve the quality of your appeal decisions. You also might want to consider who should appoint the appeal panel – perhaps the Appeals Administrator should have this role, so that it does not appear that the appointment by the sport organization itself might be biased one way or the other. The Appeals Administrator can also move more quickly and can likely put an appeal panel in place more quickly than, say, the President.

Appoint one panel member who is experienced in law and procedure

If your appeal is contentious or complex, which most are, this experience can be invaluable. Such people can also be an excellent resource when it is time to write the appeal decision. Over time, your sport organization should strive to cultivate ongoing relationships with such unique volunteers. Consider offering them an honorarium in exchange for their important services: the cost will prove to be well worth it.

Should the appeal panel include someone who is a 'peer' of the appellant?

Many sport organizations have appeal policies that call for the respondent to name one member of the panel, the appellant to name one member, and those two members to name the third member of the panel, or some variations on this general concept. While this effort to constitute an appeal panel that is representative of the parties in the dispute is to be applauded, the reality is that such a method is cumbersome and time-consuming. Instead of mandating that a member of the appeal panel is an athlete, consider making it standard practice that appointees to appeal panel will be representative of parties generally and will bring a broad base of experience to the issue to be decided.

Allow flexibility in the format and timing of your appeal

It is difficult to anticipate all the dispute circumstances that you will face. Your appeal policy should permit flexibility in terms of how the appeal is to be run, and the timelines it should follow. In terms of format, appeals can be through documents alone, by telephone, in person or by a combination of all these methods. In terms of time, some appeals need to happen in hours, while others may unfold over weeks or months, without prejudice to a party. Decisions on format and timing should be decided by appeals panel or by your Appeals Administrator.

Include a confidentiality clause in your appeal policy

It never occurred to us that this would be important until we managed a high profile appeal during which the appellant waged a separate campaign through the sport community while the appeal was underway. The appellant, quite correctly, pointed out that the appeal policy of the organization had no requirement of confidentiality. While it is standard practice in arbitrations and court proceedings that those proceedings are confidential to the parties, such a clause is not common in appeal policies. We think it should be there – because an appeal cannot proceed properly and fairly in a public fishbowl.

Think about what is NOT appealable

Not every decision can be appealed. Good policies specify what may be appealed and what may not. Internal appeal policies are not the appropriate forum to deal with issues such as budgeting, staffing, governance structure, program design, or any matter normally decided by the membership as a whole. As well, employment, discrimination and commercial matters are common disputes best left to traditional dispute resolution methods. Generally, appeal policies in sport organizations should be limited to eligibility, selection, discipline and carding matters. For sure, do not include employment matters within your appeal policy: employment law and common law relating to employment matters are the best-suited forum in which to deal with issues of employee conduct, discipline, rewards and termination.

Don't confuse 'grounds for an appeal' with 'merit of the appeal'

Most appeal policies have a screening step, where someone first decides whether an appeal may be allowed. Such screening steps may serve to exclude a number of appeals. It is important that this screening function be properly exercised and be restricted to examining the *grounds* of the appeal, not its merits or its likelihood of winning. A very common and fatal mistake is for the person doing the screening to assess the worth of the appeal, and if the appeal is weak, to not allow it. Proper grounds mean simply that the issue or error raised by the appellant is a valid one – regardless of whether the

appellant can ultimately prove it. A practice worth considering is to delegate this screening step to someone else – perhaps the Appeals Administrator, or to someone who is independent. The threshold for allowing an appeal is fairly low – basically, any allegation of a procedural error should be sufficient. Also, every decision on screening an appeal should be a written decision and should include reasons. In particular, a decision to disallow an appeal for lack of grounds must be supported by written reasons.

Consider requiring appellants to clarify their issues

Most appeal policies simply require appellants to list the grounds of their appeal. This is fairly easy to do no matter what the issue, because a notice of appeal can simply state, for example, 'the committee failed to implement the selection properly'. It's better for all concerned to have the appellant provide details of their issues in the notice of appeal – then there are fewer surprises later. The more details you ask for up front from an appellant, the more you will be successful in narrowing the scope of an appeal so that it is manageable. If an appeal is complex, your appeal panel might have to convene a preliminary meeting with the parties with the sole purpose of defining the issue in dispute. Preliminary meetings are also useful to determine other preliminary and procedural matters and are highly recommended when an appeal is not straightforward.

Think carefully before bypassing your internal appeal to go to arbitration

The SDRCC (Sport Dispute Resolution Centre of Canada) will hear arbitrations of disputes without them first going to an internal appeal, if the parties consent. Many NSOs choose this route because they believe it to be quicker and less costly. However, other factors should be considered when choosing to go to SDRCC directly – including the fact that the SDRCC rules are very different from normal appeal rules. There is a reversed onus of proof (for selection disputes), a different standard of review and broad remedies available, all of which put the sport organization at a distinct disadvantage in this forum. As well, recent cost awards from the SDRCC Tribunal might suggest that this avenue is not the low-cost mechanism for dispute resolution that it professes to be.

Be informed in the arbitration process

If you do forego your internal appeal process to pursue direct arbitration of a dispute, inform yourself fully about the SDRCC Code and SDRCC practices. You may need legal advice to pursue this route. If lawyers are involved, a SDRCC arbitration can become quite legalistic. As well, the SDRCC arbitrator has considerable powers – including the power to assign costs against a party, and to order a remedy that he or she considers 'just and equitable in the circumstances'. Such remedies might be far different than those permissible under your internal appeal policy. A legal advisor can help you to understand this process, to draft an arbitration agreement that puts some limits on the otherwise broad powers of the tribunal, and to anticipate potential surprises relating to costs and damages.

What are the Qualities of a Good Decision?

Steven Indig

Decision-making is an "art". An appeal tribunal must make its decision by balancing, meshing and reconciling policy and facts. The tribunal will have to sift through all the sources of evidence (good, bad and ugly), and will have to exercise logic, good judgment and common sense. At the end of the day, this exercise must produce a decision that takes into account policy and facts in a way that seems reasonable and right.
In summary, a good tribunal decision is one that:

- Correctly interprets the governing policy or rule;
- Sets out the correct legal test to be satisfied;
- Describes the facts of the case based upon relevant evidence;
- Justifies the decision based on both policy and facts; and
- Is written clearly so the reasoning process is transparent to the reader of the decision.

Format of the decision

General Richard T. Sherman, a decorated United States Civil War General, is reputed to have said:

> *"I apologize for the length of this letter but I didn't have time to write a shorter one".*

Writing a decision is not easy. A decision must be both comprehensive and concise – objectives that on the surface appear to be at odds. The following suggested format for written decisions may be helpful:

Part 1 - Issue(s) to be decided
This should be a clear and concise statement of the issue being put before the tribunal to decide.

Part 2 - Background of the case
Background information would include the parties' names, dates and locations of the incident in question, and other factual and non-controversial information about the matter being heard.

Part 3 - Statement of the facts
This section summarizes facts as determined by the tribunal. It is based on the evidence that was put before the tribunal and the weight that the tribunal has assigned to this evidence. Often in an appeal, there is no disagreement about the facts. If this is the case, this should be stated and the basic facts summarized.

Part 4 - Authorities considered
This section would summarize the policy documents that were considered. It might also include precedent decisions that were influential on the tribunal.

Part 5 - The decision itself
This is the decision of the tribunal. It must be clear, complete and explicit. If there are conditions attached to the decision, they should be expressed clearly. A person reading the decision should not have to go back to the tribunal for any clarification about the terms or conditions of the decision.

Part 6 - Reasons for the decision

These are the detailed reasons that support the tribunal's decision. Reasons are based on policy and fact. A person reading the decision should be able to follow the tribunal's analytical and reasoning process.

Also, the decision should stand alone as a single, comprehensive document. This means that it might include appendices containing the relevant policies (or excerpts of them), precedent decisions, lists of evidence exhibits, lists of witnesses, and the investigation report. Alternatively, some of these items might be included directly in the body of text of the decision.

Furthermore, it goes without saying that the tribunal should write its own decision. While it might be tempting to ask someone else (an administrator, a staff person) – the tribunal should always write its own decision. Usually this involves one member of the tribunal preparing an initial draft, with the other members reviewing, adding and revising as appropriate, until a full and satisfactory final draft is achieved and approved by everyone.

Closing Words

Finally, remember that you are writing the decision for the unsuccessful party in the case, or for the 'loser' if you will. The winning party does not really care about your thought process, principles or how you have applied the relevant policies to the facts. The losing party does, and it is for them that you should take the extra time to produce a thoughtful, principled and reasoned decision. Such a decision is also most likely to withstand the scrutiny of a subsequent review, such as a review before the SDRCC arbitration process.

Jurisdiction, Arbitration Agreements – Gaining Control of the Remedy

David W. Lech

The goal

Parties who take part in arbitrations before the SDRCC Tribunal need to achieve practical and predictable results – with remedies largely consistent with internal rules and policies.

Background

Parties end up in the SDRCC arbitration process one of two ways:

(i) The NSO internal rules mandate a final appeal to the SDRCC or,

(ii) The parties, on consent, decide to waive internal hearing processes and submit to the jurisdiction of the SDRCC at an earlier stage in the dispute.

The jurisdiction of the SDRCC is set out in its Code at Article 2.1. In essence, sport disputes can be arbitrated at the SDRCC, subject to Article 2.1(c), if they are *required* to be resolved here or if the parties come to the SDRCC *on consent* – provided an arbitration agreement has been signed.

Issue of concern

Once an arbitration agreement is signed the dispute will be resolved pursuant to the SDRCC Code (see Article 6.18). The Code provides its arbitrators with extraordinarily wide latitude to review earlier decisions and to design a remedy for the dispute that is brought to them to resolve. The arbitrators have full power to 'review the facts and the law' and may substitute their decision for 'the decision that gave rise to the dispute.' In terms of designing a remedy at the conclusion of the arbitration, the arbitrators may 'substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.'

Query: What is a 'just and equitable' remedy? Must the remedy granted strictly comply with NSO internal policies? Can it be a 'fair' result as envisioned solely by the arbitrator after she hears the facts and the law? Are SDRCC arbitration outcomes and remedies predictable? Can 'global' remedies be granted to solve rather narrow disputes?

We have observed in earlier jurisprudence that SDRCC arbitrators have been rather reticent to exercise the full scope of the power and authority granted to them in the Code to impose decisions on the parties that they determine to be 'just and equitable'. In our view, this hesitation to exercise all their powers, and a level of deference to NSO rules and policies, may be changing.

Perhaps this trend – if it truly is a trend - is because of the increasing willingness of the parties to submit to SDRCC arbitration earlier in the dispute process, the growing complexity of the disputes, the inevitable presence of legal counsel, the more formal procedures followed in SDRCC arbitration, the involvement of many affected parties, the shortage of time in selection matters, or the arbitrators increasing comfort with the SDRCC arbitration process – or a combination of all these factors.

Regardless, before a Party engages in arbitration (in any forum) it needs to evaluate what result may be reached whether the Party wins or loses. This evaluation requires an understanding of the potential remedies that may be imposed.

Suggestions

There are strategies to consider that may allow the parties to obtain greater control over the remedy granted at a SDRCC arbitration. They are summarized below. Recall that the Code expressly limits the arbitrator's power to 'the decision that gave rise to the dispute.' In short, the SDRCC arbitrators have 'deep powers' but they are limited in breadth. This is sometimes forgotten by all.

***1. NSO internal Processes**:*

The NSO should ensure that its internal rules are clear and concise regarding how it wishes to resolve the various disputes that may arise under its jurisdiction. Without a clear 'road map' the process will inevitably be more complicated, more confrontational, more expensive and more divisive to resolve. At a minimum the NSO should:

- Make the rules clear. Set out clearly the various steps to go through to resolve each type of dispute and which parties are involved at each step. One size generally does not fit all. For example carding disputes involve a 3-step process (nomination by NSO, review by Sport Canada, appeal to SDRCC). Selection processes often involve meeting qualification standards, selection or nomination to a team, perhaps with confirmation of the athletes nominated by the COC, plus internal and external appeals for each stage. Often discipline disputes are treated differently depending if the conduct is serious or not or if the misconduct occurred at a competition (when a result is needed immediately) or during training when there is time to follow a full process.
- Make express in the rules and policies that the policy, selection criteria or carding criteria negotiated, designed and adopted by the NSO MUST be followed. The NSO needs to emphasize that these are valid internal policies of the organization and short a finding that they are unreasonable ought to be respected.
- State in the policy, rule or criteria that if an error is identified in the NSO decision-making the decision should be sent back to the NSO to re-make free from error.

***2. Arbitration Agreement**:*

Far too often the standard arbitration agreement template is signed with no thought given to using this document as a way to frame the nature and scope of the hearing. If the issues and decision appealed from are framed in a certain way in the arbitration agreement – this will affect the potential remedy possible at the conclusion of the hearing. The arbitration agreement will modify the provisions of the Code otherwise applicable to the dispute at hand and will certainly constrain the rather unlimited discretion of the arbitrator to design any remedy he or she feels is 'just and equitable'.

Here are some ideas for the arbitration agreement:

- Narrowly define the decision that is being appealed from. Only have parties to that decision sign this agreement.
- Narrowly define the relevant issues. Leaving open a host of issues may result in a 'global solution' as envisioned by the arbitrator in his or her determination of what is fair. This may not comply with internal policies or criteria.
- Try to import restrictions or constraints. Such as; "the selection criteria adopted by ABC may be interpreted but not altered"; "each party shall bear their own costs"; etc.

- Require that if an error occurred in the view of the arbitrator the initial decision maker will be allowed to re-make the decision free from error.
- Since there is no right to appeal a decision of the SDRCC arbitrator, any recourse is limited to the Courts seeking judicial review. If part of the claim is 'excess of jurisdiction' the arbitration agreement and the Code will be highly relevant.

3. Jurisdictional Arbitrators:

This is an important SDRCC resource that is underutilized. The jurisdictional arbitrator may be used to assist the parties with 'any issue they cannot resolve.' This includes negotiation over the terms of the arbitration agreement. When the parties are required to submit disputes to the SDRCC, issues surrounding the negotiation of the arbitration agreement will certainly fall into this class. Even when the parties agree to come to the SDRCC on consent (see Article 2.1 (b) (iii)) it is arguable that a jurisdictional arbitrator may assist to frame the terms of the arbitration agreement for the parties who wish to have their matter heard by an SDRCC arbitrator.

Costs in the SDRCC Regime: To the Victor Go the Spoils?

Leanne Standryk

Generally speaking, in most types of adversarial hearings the outcome as to costs is pretty simple – the unsuccessful party pays. How much you pay usually depends on a variety of factors, including the parties' conduct during the process, whether offers to settle were exchanged and on what terms, the ability of the party to pay, the complexity of the matter decided, the success enjoyed by a party, case law that has developed around the practice of awarding costs and whether there are any rules or tariffs that govern the award.

The process of determining costs before SDRCC is no different…or is it? The purpose of this brief is to provide a general overview of costs awards generally, and in sports-related disputes heard through the SDRCC dispute resolution process. Such an overview is important in making strategic decisions about the management of your sports-related dispute, and in estimating what your budget for such disputes should be.

An overview of costs

Costs or "court costs" in a matter of civil litigation sometimes causes confusion or misunderstanding. Costs are an amount required to be paid by one party to the successful party to defray or cover a portion of the successful party's legal expenses. If awarded by a court, costs may be on one of two scales:

- partial indemnity costs which will cover only a portion of a party's actual bill for legal fees, or
- substantial indemnity costs which are intended to cover most, but not all, of a party's bill for legal fees.

In civil matters a list of factors to consider in awarding costs is outlined in Rule 57 of the Rules of Civil Procedure, which was recently expanded to take into consideration the principles of indemnity and reasonable expectations of the parties. Rule 57[3] was amended to make it clear that the court may award costs in an amount that represents full indemnity (although rarely applied). In general, the Court has absolute discretion in award the amount of costs[4] but must do so with regard to the factors set out in Rule 57.01. The overall principle in the determination of costs is whether they are "fair and reasonable" in the circumstances.[5]

Two additional factors have been added to Rule 57.01 as considerations in determining costs:

- The principle of indemnity: including, where applicable, the experience of the lawyer for the party entitled to costs as well as the rates charged and the hours spent by the lawyer; and
- The expectations of the unsuccessful party: the amount of costs that an unsuccessful party could reasonably expect to pay in relation to the proceeding.

[3] Rules of Civil Procedure R.S.O. 1990, Reg. 194, Rule 57 and 58.
[4] Courts of Justice Act R.S.O. 1990, c.C.43 Section 131.
[5] *Boucher v. Public Accountants Council for the Province of Ontario* (2004), 71 O.R. (3d) 291 (C.A.)

The general rule of thumb is for Courts to award costs on a partial indemnity costs scale to a successful party. Costs are awarded on a substantial indemnity basis only in exceptional cases – for example, where the conduct of a party has unduly delayed the length of the proceeding or the complexity of the case, a party has acted in an unprofessional manner, has taken a step in a proceeding that was considered improper, vexatious or unnecessary, or where a losing party has refused reasonable offers to settle, etc. [6]

Costs in sports-related disputes: the SDRCC regime

In sports-related disputes before the SDRCC, there are no specific tariffs that specify the amount of costs that may be reasonable. It is a matter of discretion solely within the authority of the arbitrator deciding the matter. The trend in awarding costs has been to focus on the mandate of the SDRCC, which is to ensure access to independent alternative dispute resolution for all participants in the Canadian sport system at the national level which is fair and equitable for all and offers a low-cost mechanism throughout Canada in both official languages. Costs awards under the SDRCC regime typically fell within the range of $1,000.00 to $3,000.00. however, recently this seems to have changed. The recent decision of Arbitrator Picher in *Poss v. Synchro Canada* et al[7] appears to be a marked departure from the norm in cost awards before the SDRCC, requiring the Respondent national federation to pay 66 2/3% of the Claimant's costs despite an award dismissing her appeal.

Perhaps Arbitrator Picher is taking a step towards bringing cost awards in sports-related disputes in line with those awarded by courts in civil proceedings. No matter the objective or rationale behind the award, it will have serious consequences for NSOs and will change the landscape of cost awards within the SDRCC regime.

The jurisdiction to award costs

Key provisions

Proceedings before the SDRCC are governed by the Canadian Sport Dispute Resolution Code (the "Code") and, the laws of the Province of Ontario. The arbitrator derives his/her jurisdiction and authority from the Code and the Ontario Arbitration Act, 1991 S.O. 1991, C.17.

The Code provides the following provision with respect to costs giving the Arbitrator discretion to consider and award costs:

> **Section 6.23 Costs**
>
> (a) Subject to Subsection 6.23(b) below, each Party shall be responsible or his or her own costs and that of his or her witnesses. A party is entitled to French/English interpreter for Arbitration. Any interpreter requested for Arbitration shall be selected and paid for by the SDRCC.
> (b) The Panel shall determine whether there is to be any award of costs and the extent of any such award. When making its determination, the Panel shall take into account the outcome of the proceedings, the conduct of the Parties and their respective financial resources,

[6] *Hyacinthe* v. *Athletics Canada et. al*., ADR-Sport-Red Ordinary Division March 27, 2007 p. 18;
[7] ADR-Sport-Red Ordinary Division February 26, 2008

intent, settlement offers and each Party's willingness in attempting to resolve the dispute prior to Arbitration.

(c) The filing fee retained by the SDRCC can be taken into account by a Panel if any costs are awarded.

In addition to Subsection 6.23, further guidance may be taken from the provisions of the Ontario Arbitration Act as follows:

> **Power to award costs**
>
> **54.** (1) An arbitral tribunal may award the costs of an arbitration.
>
> **What constitutes costs**
>
> (2) The costs of an arbitration consist of the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration.

The provisions in both the Code and the Act are not intended to provide the Parties with an exhaustive list of factors that an Arbitrator will consider. In addition to the considerations outlined in the Code and the Arbitration Act, arbitrators will refer to the general principles of law, bearing in mind the purpose for which the Code has been adopted, namely for application in sport-related disputes in Canada,[8] maintaining focus on the cost effectiveness of, and accessibility to the SDRCC program.

Who may be entitled to an award of Costs?

Who then is entitled to costs? Subsection 6.12 is silent on who is entitled to an award of costs, however the general rule of thumb is that any Party may request costs of the proceeding. Party and/or Parties is defined in Article 1 subsection 1.1(bb) of the Code as follows:

> (bb) "Party or Parties" << PArtie ou Parties >> means:
>
> (i) Any Person or NSO participating in a Mediation, Arbitration or Med/Arb;
> (ii) Any Member or NSO using the services of the Resolution Facilitator to help resolve a dispute;
> (iii) Any Person who is accepted by the Panel as an Intervenor or Affected Party;
> (iv) In connection with Doping Disputes or Doping Appeals, (A) the Member whom the CCES asserts to have committed a violation of the Anti-Doping Program, (B) the CCES, (C) the Government of Canada, (D) the relevant international federation, (E) the World Anti-Doping Agency ("WADA"), or (F) an applicant for a Therapeutic Use Exemption ("TUE"), as applicable;
> (v) The Government of Canada, in connection with Sports related dispute related to the application of the Athlete Assistance Program ("AAP") managed by Sport Canada.
>
> (cc) "Person" << Personne>> means a natural person or an organization or other entity.

The Code therefore defines Party broadly and therefore a cost award could be requested and granted to any Party involved in the sports-related dispute. This is significant – consider the potential impact in a

[8] *Hyacinthe supra* p. 7

selection or carding matter, where the dispute may involve not only the two main parties but a multitude of Affected Parties, particularly in a team sport.

A practical look at the key provisions

The general principle under the Code, subsection 6.23(a), is that each party should be responsible for his or her own costs.[9] However the subsection must be read in its entirety. The language outlined in Subsection 6.23(b), "the Panel shall determine" is mandatory language requiring, through the use of the word "shall", the Panel to determine whether there is to be an award of costs. Therefore the presumption set out in 6.23(a) that each party shall be responsible for his or her own costs is a rebuttable presumption, requiring each party to prove their own entitlement to cost, taking into consideration those factors set out in the Code and the applicable case law.

Arbitrator Pound considered the application of 6.23 in its entirety stating:

> I think that the article must be read in its entirely and in the context of its purpose, which is to provide an easily accessible means to resolves port related disputes, many (if not most) of which will involve athletes. The overwhelming number of cases can be readily resolved by sport related individuals in the presence of an independent arbitrator. In such cases, the costs should not be significant and there has been a tendency on the part of arbitrators under the Code and its predecessor not to award costs, particularly when the athletes are the losing parties. I think that is generally a reasonable approach and it is certainly one that I have favoured in the great majority of cases in which I have acted as arbitrator.
>
> But there are cases in which sport organizations have acted in ways that have financially prejudiced athletes and in which it is appropriate that they assume some of the financial responsibilities for those actions. There has to my knowledge been a case in which the position taken by one athlete with respect to two others had been found to have been entirely without merit and which had caused financial prejudice to the other athletes. There it was appropriate that some contribution to the resulting expenses be assessed against the athlete that caused the problem[10].

Accordingly, costs are not awarded as a matter of right. A party wishing to pursue an award of costs must specifically request costs and provide evidence and/or factual support to the arbitrator on each of the factors he or she considers relevant to the determination. Keep in mind that the determination of the issue is carried out on a case by case basis, referencing factors outlined specifically in subsection 6.23(b), section 54 of the *Arbitration Act* and the case law that has developed on point and that may be similar in fact and nature.

The overall principle in the determination of costs is whether they are "fair and reasonable" in the circumstances[11]. In determining what is fair and reasonable the Ontario Court of Appeal in Boucher

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[9] *Supra*, p. 7

[10] Supra, p. 7-8, Arbitrator Pound referencing *Boylen v. Equine Canada et al*, SDRCC 04-0017 wherein it was found that the actions of the athlete contributed to the expenses of the Affected Athletes. See also *Zilberman v. Canadian Amatuer Wrestling Association*, SDRCC 03-0021; *Wilton v. Softball Canada*, SDRCC 04-0015, *Zielstra v. Softball Canada,* SDRCC 04-0007; *Adams v. Athletics Canada* 06-004 as referred to by Arbitrator Pound in *Hyacinthe supra.*

[11] *Boucher, supra*

stated that "the expectation of the parties concerning the quantum of a cost award is a relevant factor."[12] The Court declined to elaborate further on what is "fair and reasonable" by adding:

> I refrain from attempting to articulate a more detailed or formulaic approach. The notions of fairness and reasonableness are embedded in the common law. Judges have been applying these notions for centuries to the factual matrix of particular cases.

This statement provides us with little or no guidance and may, taking the liberty to paraphrase the comments of the Honourable Justice Armstrong in Boucher, be likened to the U.S. Supreme Court's definitional treatment of "obscenity" - "you cannot define it but you know it when you see it". This definitional approach may be of assistance to those individuals and their counsel who find themselves litigating within the formal trappings of the civil courts before Judges that have a wealth of experience in determining what is or is not reasonable in any given circumstances. However, this general principle which has been applied in the sport dispute arena provides little guidance to those parties before the SDRCC and what is fair and reasonable. How can we resolve this ambiguity?

The principle enunciated in *Boucher* was applied by Arbitrator Pound in the *Hyacinthe* case. Arbitrator Pound was requested to consider a cost award made on behalf of the Claimant for substantial indemnity costs. The Claimant had incurred approximately $30,000.00 in legal fees. In considering an appropriate award, the adjudicator confirmed that substantial indemnity costs are awarded in exceptional circumstances. The adjudicator also states that consideration of what is fair and reasonable must also focus on the mandate and purpose of the SDRCC. Arbitrator Pound concluded that the Claimant was entitled to an award of costs in the sum of $2,500.00.

In the case of *Zeilstra* v. *Softball Canada*[13], Arbitrator Smith awarded the Applicant "her costs, properly documented, relating to this proceeding in the amount not to exceed $2,500.00",

In *Wilton* v. *Softball Canada*[14], Arbitrator Smith awarded costs in an amount not to exceed $500.00 for each affected party, but made it very clear at paragraph 16 that "this would include only legal fees and disbursements related to the preparation for and attending the Arbitration. If the Parties did not incur such costs, no costs are payable."

Against this backdrop of determining what is fair and reasonable in the circumstances we turn now to the February 2008 decision of Arbitrator Michel Picher in *Poss* v. *Synchro Canada*, referred to earlier. As previously indicated, despite its success in having the Claimant Poss's application to SDRCC dismissed, Arbitrator Picher awarded the Respondent to pay 66 2/3% of the Claimant's "reasonable costs" and 100% of the Affected Parties "reasonable costs". Remember that although costs are not an automatic entitlement, it is the general rule that the successful party should be awarded its costs.

The decision in *Poss* has the potential to open the floodgates of increased liability for cost awards against national sport organizations, the Party perceived through natural assumptions to have deeper pockets and the ability the to pay, despite the reality that none of the parties involved in sport disputes at the amateur level have significant discretionary funds available to satisfy an award of costs. At the time of writing this paper the issue of costs in the *Poss* decision is still outstanding, however the following is offered as guidance to NSOs in arguing what is reasonable:

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[12] Supra. p. 38
[13] Supra note 8.
[14] Supra note 8.

- Where counsel is involved, consider requesting disclosure of the lawyer's account including a detailed account of the amount of time spent with respect to each docket entry together with counsel's hourly rate and year of call, and the hourly rates and experience of any law clerk and/or assistant who may have billed time to the file;
- Review the account to ensure that the time charged and included in the account relates only to the Arbitration before the SDRCC and not to any internal appeal that may have taken place pursuant to the NSO's internal appeal policy[15];
- Ensure that there is no duplication in the docket/time entries. It is common for amateur athletes to seek the support and assistance of family members who may be involved in instructing counsel. Time and/or entries may show that counsel has had to explain or discuss matters with several individuals other than the client;
- Dockets must be accurate. Review each docket or time entry to ensure that there is sufficiently precise description of the task performed. If counsel has not taken care to ensure that his/her dockets are accurate the claim of what is "reasonable" should diminish accordingly. Carefully scrutinize the dockets and challenge vague descriptions;
- Watch for double docketing of time.

When requesting costs payable by an unsuccessful party, maintain the above noted points in mind. Be prepared to address how much you will claim, the conduct of any party that tended to shorten the duration of the proceeding or that may have exacerbated the potential for settlement or diminished the standard of professionalism between the parties and their counsel. Consider whether any of the parties were in breach of the rule of confidentiality of proceedings as required by the Code.

What one must also consider is that despite the mission of the SDRCC to provide a cost-effective mechanism for resolving sports disputes in Canada, legal counsel is increasingly involved in advocating on behalf of the parties. Parties are more sophisticated, recognizing their entitlement to seek counsel in light of the significant consequences and/or impact of the tribunal award. Various cases are now requiring parties to make submissions concerning the application of the subsections of the Code, evidentiary issues that arise during the course of the hearing, questions regarding disclosure of relevant documents, etc. Several of the principles relevant to argument on these issues deal with rules and principles of law that are outside the expertise of the general layperson.

Accordingly, although the SDRCC process has the capability to and does achieve, in most cases, the mission of affordable dispute resolution, there is the very real potential that the expenses associated with resolving a dispute can escalate. As a result, the best offence on the issue of costs is ensuring that you come to the SDRCC prepared to prove what is fair and reasonable in the circumstances of your particular case.

[15] *Evi Strasser v. Equine Canad.a* ADR-Sport-RED Ordinary Division, 19 June 2007, Arbitrator McInnes

Affected Parties and Interveners – Just When You Thought it Could Not be More Complicated

Brian A. Ward

If an individual is disputing their non-selection, the issue extends beyond this Claimant and the NSO. The Claimant's potential reinstatement to the team may very well necessitate an overall philosophical and physical overhaul to the existing roster due to their particular skill set; whether the Claimant is athlete or coach. In team sports the issue of team chemistry should and cannot be discounted when considering who might be an affected party. From the point of view of this presentation, careful selection of an affected party will hopefully bring some finality to the selection process.

Who is an Affected Party

We should initially turn to the SDRCC Code for a definition of an "Affected Party":

> 1.1 (b) "**Affected Party**" means a Person who is affected or impacted by a decision of the Sport Dispute Resolution Centre of Canada (hereinafter "SDRCC");

If this were the sole criterion for defining an "affected party" we would all be seeing parents throughout Canada making application to be an affected party in situations involving their children, fortunately for us it is not. The definition of who an affected party is somewhat further restricted by the following;

> *1.1(ll) "**Sports related dispute**" means a sport dispute to which the Code applies as set out in Section 2.1. Such disputes may include (but are not limited to) those related to:*
>
> *(i) team selection;*
>
> *(ii) a decision made by a NSO board of directors, a committee thereof or an individual delegated with authority to make a decision on behalf of a NSO or its board of directors which affects any Member of a NSO;*
>
> *(iii) any dispute for which an agreement to arbitrate, mediate, conduct a Med/Arb or use the services of the Resolution Facilitator has been entered into by the Parties;*
>
> *and*
>
> *(iv) any dispute arising out of the application of the Anti-Doping program.*

To make things somewhat more complicated we must also reference the definition of a "member":

> *1.1(x) "**Member**" includes an athlete, coach, official, volunteer, director, employee, any other person affiliated with a National Sport Organization (hereinafter "NSO") and any participant in an event or activity sanctioned by a NSO;*

Why have we gone through these series of definitions -- because it would appear that just about everyone but a parent might be considered an affected party in a sports related dispute. I think we have all been conditioned to look at this type of scenario as simply a situation where one athlete is being substituted for another athlete. As with all matters involving lawyers it is not that simple.

Accepting that a wide variety of people may be identified as an affected party, how does an affected party become part of the process? Pursuant to Article 6.15 of the SDRCC Code, a person may "only" participate in Arbitration as an affected party if the parties to the arbitration agree in writing to allow the person to participate or if the Panel/Arbitrator determines that such person should participate. Let us begin with the latter situation, how does the Panel/Arbitrator make such a determination?

The jurisprudence is sparse. The affected party must be a member as defined by the SDRCC Code and be affected or impacted by the outcome of the proceeding (I think the parents are back in!).

This of course begs the question of how the existence of the potentially affected party is brought to the attention of the Panel/Arbitrator. We have some guidance in this respect when we examine the other way a person becomes an affected party -- on consent of the Parties. However, the most common way for potentially affected parties to come to the attention of the Panel/Arbitrator is when the Parties identify persons whom they believe to be affected but consent is not forthcoming, Argument for and against having this person declared an affected party takes place and an order is made.

As this juncture we must ask ourselves the most important question -- why is any of this important? The answer to this, unlike anything up until this point is simple: if a person is not an affected party to the Arbitration they will have a right to appeal any decision of the SDRCC. For this reason it is not in the best interests of the parties to take issue with any person proposed as an affected party.

Does this mean you can at least insure certainty of the outcome by agreeing to all possible candidates as an affected party? Alas the answer is no. The Code provides that anyone who is a Party to the proceeding, 'Party' being defined as including any person accepted as an affected party, is bound by the decision of the Panel. However, the SDRCC Code provides as follows at Article 6.13(b):

> *(b) Failure of an Affected Party to participate in the Arbitration will be a factor considered and should be given significant weight by any future Panel should that Affected Party file a subsequent Request in its own right relating to that matter.*

While it is counter intuitive that an affected party who chooses not to participate should be provided with more rights than an affected party who does participate, the SDRCC Code is very clear on this point.

Who is an Intervener

Imagine that the Parties to the Arbitration having finally agreed on something -- that a particular person should not be considered an affected party. The SDRCC Code allows for that person to make application to be an intervener. More surprisingly, the test to be applied to an intervener is relatively simple. The SDRCC Code provides as follows:

> *1.1(q)* ***"Intervener"*** *means a Person who wishes to participate in the Arbitration as an Intervener and make an Intervention application in accordance with Section 6.14 of the Code.*

As an intervener is defined as a party to the proceeding, they too will be bound by the decision.

Conclusion

While it may make for a simpler and more streamlined process to restrict entry to an arbitration to all but the main party and the NSO, it will not insure any certainty relative to the process.