

The Complicated Jurisdictional World of Sport

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The omission of female ski jumpers from the 2010 Olympic Winter Games is, according to the Supreme Court of British Columbia, discriminatory. However, even though the Games are on Canadian soil, Madame Justice Fenlon found in the 2009 case of *Sagen v. Vancouver Organizing Committee for the 2010 Olympics and Paralympic Winter Games* that the Court had no jurisdiction to remedy the situation – the *Canadian Charter of Rights and Freedoms* (the *Charter*), which the ski jumpers used to argue their case, did not extend to the International Olympic Committee (IOC). She wrote in her judgment: “I acknowledge that there is something distasteful about a Canadian governmental activity [which is] subject to the *Charter* being delivered in a way that puts into effect a discriminatory decision made by others [i.e., the IOC] ...”

Apparently, while the planning and staging of the 2010 Olympic Winter Games is a governmental activity and is subject to the *Charter*, the selection of participating sports is done under the authority of the IOC which is not within the jurisdiction of the *Charter*.

Canadians may recall another case that arose during the 1998 Winter Olympic Games in Nagano, Japan. Ross Rebagliati made Olympic history in those Games by winning the first ever gold medal in snowboarding; however, once again, jurisdictional issues intervened. Rebagliati tested positive for marijuana. He denied using a banned substance and successfully appealed the doping infraction (*Rebagliati v. IOC*, CAS O.G.

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1998) because marijuana was not a banned substance under the rules of the newly established snowboarding federation. (It was banned under the rules of a number of other sport federations and appeared on the IOC's own list of banned substances. However, the IOC had agreed for these Games to abide by the banned list of each international sport federation). In other words, neither the IOC nor the International Snowboarding Federation had any legal basis, or jurisdiction, to pursue the matter against the Canadian snowboarder – marijuana was not a banned substance.

Interestingly, the international body representing snowboarding at the time had not adopted its own doping policy and banned substance list, instead using those of Alpine Ski, a discipline within the Fédération Internationale de Ski (FIS). Alpine Ski did not ban marijuana although a number of other FIS disciplines such as Ski Jumping did ban marijuana by way of their own policies.

These cases, and there are many others, highlight the very complex labyrinth of jurisdictional boundaries and limitations that attach to sport. Jurisdiction refers to the scope of power and authority individuals have to interpret law, in this case, as it relates to sport organizations and athletes. Generally speaking, jurisdictional authority specifies *who* can do *what*, *where* and *when*. It identifies who has authority, the range of actions the grant of authority allows, when it can be applied, and the territorial boundaries of the authority. Such authorization is typically found in the governing documents of an organization (e.g., in an organization's by-laws, policies, and regulations). Many people think of these documents as dreary and not worth bothering about (many organizations themselves actually don't bother with them very much, to their detriment). They are, however, important living documents giving authority to the sport organization and those operating on its behalf – and defining the limits of such authority. This is true whether the organization is the local sport club, a national sport organization, an international sport federation, or the International Olympic Committee (IOC).

Multiple authorities operate simultaneously within their own jurisdictional boundaries during sport events such as the Olympic Games. There is a hierarchical structure to sport which dictates that national levels of sport must comply with the technical rules of their international counterparts (similarly, provincial/territorial bodies must comply with the technical rules of their national governing bodies). Lower level bodies will thus often incorporate such rules into their own rule or policy

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Canadian human rights laws have, for example, highlighted a conflict between an international body's rules and a national sport body's rules. In the 2002 case of *Nagra v. Canadian Amateur Boxing Association*, Pardeep Singh Nagra, a Sikh boxer, was initially barred from competition in Canada because he refused to shave his beard for religious reasons. The "clean-shaven rule" came from the International Amateur Boxing Association which threatened to impose sanctions against the Canadian Amateur Boxing Association (CABA) if it allowed Mr. Nagra to participate. Eventually, the international Association agreed not to impose sanctions if CABA was directed by way of a court order to allow Mr. Nagra to box. In this case, the parties obtained a court order from the Ontario Superior Court of Justice by consent, and the matter was resolved.

Where a negotiated settlement is not reached, Canadian courts would likely follow the approach taken by the English courts. For example, in *Cooke v. FA* (1972), the English court refused to consider itself bound by the regulations of the international governing body of football, known as FIFA, when applying the law to a restraint of trade case involving a player transfer. In other words, where they are in conflict, the laws of the domestic jurisdiction will trump those of a sport body whether they are national or international in origin. (Foster, K.) This is likely the basis of the appeal in the Women's Ski Jump case – can a Canadian company (VANOC) implement a foreign decision (that of the IOC) which, under Canadian law, is discriminatory?

Doping rules and regulations provide a good illustration of the multiple levels of jurisdiction that impact athletes and sport organizations. The creation of WADA (the World Anti-Doping Agency) in 1999 has gone a long way towards harmonizing a global anti-doping initiative. Prior to WADA, the IOC essentially led the initiative; however, across International Sport Federations (ISFs) and National Olympic Committees (NOCs), and between countries, policies varied radically (as demonstrated by the Rebagliati case in 1998). Some countries, like Canada, called for random out-of-competition testing; other countries did not. Some authorities suspended athletes immediately upon a positive finding; others allowed athletes to compete until all avenues of appeal had been exhausted. Sanctions varied wildly

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across policies for an athlete's first offence, from a warning in some cases, to four-year bans in others. Neither testing procedures nor results management was standardized. WADA brought a standard approach to detection and sanctioning. Now, the WADA Code, drafted in 2003, contains core articles that must be incorporated into *all* anti-doping policies, and non-core articles relating to the handling of anti-doping matters that allow some flexibility in individual policies.

Since it was drafted in 2003, almost 100% of all ISFs and NOCs have adopted the Code (Davis, P.). While neither governments nor NSOs may be direct signatories to the Code, they indirectly adopt and are bound by the Code, or a national variation of the Code, through agreements with the signatories. In Canada, the Canadian Centre for Ethics in Sport (CCES) is responsible for drafting and managing the "Canadian Policy Against Doping in Sport" (CPADS) and its associated rules and regulations in conformance with the WADA Code. NSOs adopt the Canadian Policy as part of their own policy regime. Similarly, provincial/territorial sport organizations are required to adopt the Canadian Policy through their relationships with their national counterparts.

Individual participants in sport (athletes, coaches, officials, etc.) become bound as members of sporting organizations that have implemented the CPADS. Often membership by-laws do not include individuals as members of the organization, (remember those dreary old by-laws and policies?) but individuals are nonetheless bound to the Policy through athlete or participant agreements.

The practical result of the acceptance of the CPADS is that such athletes, who are bound by the CPADS, can be subject to testing both in and out of competition. They must also fulfill other obligations in connection with the testing programme such as keeping the drug testers informed of their whereabouts at all times. This means that athletes are subject to the jurisdiction of their NSO and governing NOC (in Canada, the Canadian Olympic Committee), both of which subscribe to the Canadian anti-doping policy; the ISF, which has its own doping policy based on the WADA Code; and, through the ISF, the IOC, which also adopts the WADA Code. Depending on where the athlete is – whether in training with the NSO, at pre-Olympic activities, or competing at the Olympic Games, different organizations will have primary jurisdiction over the activities of the athlete but all will have jurisdiction of some sort – and the athlete needs to be knowledgeable and vigilant about them all.

Anti-doping initiatives always highlight the complexity of jurisdictional issues in sport, but such complexity is also evident in eligibility, selection, and discipline cases. Coming full circle and returning to the women's ski jumping case, while the Canadian Court determined it did not have jurisdiction over the IOC, it did find that it had jurisdiction over VANOC. So why not just order VANOC to run events for the women?

Madame Justice Fenlon identified three problems with forcing VANOC to disregard the IOC's decision to omit women's ski jumping from the Games and stage such events in any case within the Olympic programme. First, she noted that the IOC owns the Olympics. She wrote: "If an entity, including a government, tried to stage the 'Olympic Games' without the IOC's permission, no one would actually consider

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the event to be the Olympics. Similarly, if VANOC attempted to hold additional events during the 2010 Games, contrary to the decision of the IOC, no one would actually consider those events to be Olympic. Those events would be considered to be something else. The simple fact is that *only the IOC may grant the imprimatur of 'Olympic'* (emphasis added).”

Secondly, the staging of the Olympic Games requires the participation of ISFs and NOCs. NOCs are clearly under the authority of the IOC. ISFs are not under the authority of the IOC except for their engagement in Olympic Games. The Fédération Internationale de Ski, the ISF responsible for the discipline of ski jumping, specifically accepted the IOC’s decision. Madame Justice Fenlon summarized the position FIS took at the hearing: “The FIS ... has specifically stated that it has accepted the IOC’s decision with respect to women’s ski jumping; it has reiterated in the context of this litigation that the FIS is under the authority and instructions of the IOC; it says that the IOC determines the Olympic Programme and that it will not take instructions from VANOC in this regard.”

Thirdly, as put bluntly by Madame Justice Fenlon, “It is most unlikely that the national Olympic committees would act contrary to the direction of the IOC.” In other words, if women’s ski jumping were added to the competition in 2010, it is unlikely any country would send competitors.

None of these factors, in the view of Madame Justice Fenlon, were within the control or ability of VANOC to remedy. VANOC had no jurisdiction over what events would be included in the programme and the Canadian courts, using the *Charter*, do not have jurisdiction over the IOC. Of course, most ISFs are vigilant about their relationship with the IOC, and NOCs are unlikely to oppose the position of the IOC making any other recourse to a negotiated settlement unlikely in this matter.

Jurisdiction is an interesting concept – particularly in practice. It simply gives one the authority to act within a certain domain. However, while jurisdiction has legal roots, it is also about power and persuasion. Sport is very complex and much of that complexity is bound up in the power of jurisdiction.

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Sources

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