

IN THE NEUTRAL ZONE

News and Events of the Sport Dispute Resolution Centre of Canada



October 2009

Resolving Disputes Internally

SDRCC's long-term strategy envisions a fair Canadian sport system. In line with the objectives of the Canadian Sport Policy pertaining to resource, the SDRCC is looking to "strengthen the capacity of leaders and participants in the Canadian sport system to develop and implement sound policies that will reduce the risk of disputes and acquire the knowledge and skills to deal with internal disputes more efficiently." Indeed, a sound, fair, and thorough internal appeal process is often where sports-related disputes are resolved.

This edition of *In the Neutral Zone* speaks equally to the athlete deciding whether to appeal a decision or preparing to file an appeal, to the administrator in charge of finding suitable candidates to act as panel members, or to volunteers who are entrusted with the task of hearing and ruling on the dispute.

Before getting into the heart of the subject in the following pages, the SDRCC would like to address the concerns voiced by several NSOs and MSOs about the challenge they face when looking for appeal panel members who are independent or at the very least free from perceived potential bias. The SDRCC recognizes that in most sport organizations, everyone knows each other

and there are several close ties between the members. The majority of organizations in this situation to whom the SDRCC staff spoke were receptive to the idea of sharing "human resources" with other organizations, in building a common multisport "pool" of potential appeal panel members.

While the SDRCC could not undertake to manage such pool, we are pleased to serve as the initial platform to put in touch NSOs and MSOs that are interested in participating in this initiative. Organizations willing to provide the names and contact information of one or more individuals from their sport who have a profile fitting of an appeal panel (see article on page 3 of this newsletter) are invited to let us know.

The role of the SDRCC will be limited to putting in touch the interested organizations for them to exchange the relevant information and work out between themselves the way in which they want to manage it. The invitation also extends to organizations that do not need to recruit panel members from among other sports, but have some of their members interested and qualified to sit on appeal panels of other sport organizations. If interested please email Fredy Luni at fiuni@crdsc-sdrcc.ca. ■

"A sound, fair, and thorough internal appeal process is often where sports-related disputes are resolved"

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Team Selection: Athlete Responsibilities

by Dave Reynolds and Dan Strickland, Sport Solution Managers



When Canadian athletes have sport-related legal concerns, they are encouraged to contact the Sport Solution, a free-of-charge program offered to athletes by AthletesCan.

Established in 1996, the Sport So-

lution is managed by two University of Western Ontario law students. The service offers guidance to athletes to help them solve problems that they may be having with their National Sport Organization (NSO), such as team selection disputes, doping infractions, disciplinary concerns, funding and other issues. As the managers of Sport Solution are not lawyers, when legal advice is required, athletes will be referred to a list of legal representatives who have made themselves available through the SDRCC website.

With the 2010 Vancouver Olympic / Paralympic Games approaching, many Canadian athletes will participate in final team selections for the upcoming Games. Team selection often leads to conflicts between athletes and their NSO, with athletes often left wondering why they were not selected and whether the right decision was made. In order to avoid a team selection issue, athletes are advised to thoroughly review their NSO's team selection criteria. As an athlete, if you are aware of what you need to accomplish to meet selection criteria you will be better able to focus your efforts to achieve those results and you will also better understand your NSO's selection decisions when they are published.

Athletes may be satisfied if their NSO simply explains more thoroughly how they arrived at their decision but often athletes believe the wrong decision was made and wish to challenge the decision through a formal appeal. Although the time frame available for athletes to appeal selection decisions may be short, this should not discourage athletes from exercising their right to appeal. If an athlete decides to submit an appeal they are encouraged to contact Sport Solution for assistance.

Filing an internal appeal can be very stressful for an athlete. Sport Solution would like to highlight three key tips that will help athletes ensure their appeal submissions go as smoothly as possible.

First, be aware of the proper submission channels. Internal appeals must be submitted to the sport specific NSO. The NSO's internal appeal policy will indicate the individual to which appeals should be submitted, and what an appeal will entail.

Second, timelines are crucial. In general, appeals must be submitted within 15 days of the team selection announcement (though check your NSO's appeal guidelines as some NSOs provide more or less time than this). With such a small window for appeal, it is crucial that you contact the Sport Solution immediately if you require assistance.

Third, decisions cannot be appealed simply because a different result is sought. Athletes must have sufficient grounds for their appeal in order for it to be heard. Grounds for appeal can be found in your NSO's appeal policy. They typically involve, but are not limited to: a decision influenced by bias; a failure by the NSO or its members to follow its own selection criteria; a failure to take into account relevant information or; a decision which is manifestly unreasonable.

For athletes who are selected to participate in the 2010 Olympic/Paralympic Games, you must remember that you are bound to a code of conduct that extends beyond your particular competition and the associated events. Athletes at the

Olympic/Paralympic Games have legally binding contractual obligations with both their NSO and the IOC/IPC. As such it is important that athletes familiarize themselves with these obligations, through a thorough reading of their athlete agreement and of the Olympic Charter (http://multimedia.olympic.org/pdf/en_report_122.pdf) or Paralympic Charter (http://www.paralympic.org/IPC/IPC_Handbook/Section_1/index.html), as a breach may have serious repercussions for athletes. For example, most athlete agreements prohibit athletes from consuming more than a specified amount of alcohol, or in some cases any alcohol at all, at events such as the Olympic/Paralympic Games. Also, under the Olympic/Paralympic Charters athletes have the obligation to not involve themselves with any demonstration or political, religious or racial propaganda while at the Games. A violation of an obligation may result in a selected athlete not being allowed to compete and as such athletes are advised to ensure that they understand and follow their obligations.

If you have any questions on these or other issues please contact Sport Solution Managers Dave Reynolds or Dan Strickland through email at law.sportsolution@uwo.ca or toll-free at 1-888-434-8883. ■

“ In order to avoid a team selection issue, athletes are advised to thoroughly review their NSO's team selection criteria. ”



Qualities to Look for in Recruiting Appeal Panel Members A Survey of SDRCC Arbitrators and Mediators

The SDRCC would like to thank those arbitrators and mediators who took the time to respond to our survey. We hope this information will help guide sport organizations in appointing individuals to their internal appeal committees.

Ethical Integrity and Neutrality - Panel members must be free of any potential or perceived bias, conflict of interest or agenda; those people making decisions should be neutral to both the proceedings and the outcome. There may be appearance of conflict of interest when a panel member: is a Board member or staff member, is a close relative of a Board member or staff member, is a close relative of the original decision-maker, or has a personal or business relationship with any of the parties involved in the dispute. Avoiding these situations will not only lend credence to the decision, but will also demonstrate to your members that appeals are taken seriously and with the utmost integrity.

Analytical Skills - Panel members should be able to sort out the complexities of the case, identify and define the issues in the factual context and against applicable regulations, and link the facts to the issues. A strong sense of relevance will help give relative weight to significant factors and is more likely to produce a reasonable and convincing decision. This skill-set will also aid in discerning “red herrings”, or deliberate attempts by parties to divert attention, from the real issue in dispute. Getting side-tracked in such a way can be a waste of time, money and effort.

Sense of Fairness - Panel members need to understand the concept of natural justice and what procedural fairness means. Ideally, at least one member of the panel would also have some knowledge or basic training in alternative dispute resolution.

Listening Skills - Good listening skills extend to and encompass a willingness to listen and read. Panel members cannot understand the facts, questions, documents or arguments before them if they are not willing to pay attention to all oral submissions and to read all written submissions. Missing only one important fact or argument can lead to a wrongful decision.

Open-Mindedness - Panel members must be willing to put in the effort to really understand all points of view that are being presented by the parties. Having an open mind should be contrasted with the idea of viewing an issue through one, narrowly defined, point of view. While this narrow view of the issue may be found to be correct, nevertheless it is imperative that a panel member understand all perspectives to ensure a proper and mindful decision is made.

Ability to Communicate Effectively - Good verbal and non-verbal communication skills are essential. Self-represented parties are common in internal appeals, so patience and courtesy are required during the hearing process to help those parties through an unfamiliar system. Parties must feel that they had a full opportunity to participate in the process. Moreover, the ability to provide a clearly written and reasoned decision is imperative; to explain how the decision was reached so that parties, and especially the losing party, recognize that the panel understood their concerns and considered their perspectives before rendering a final decision. ■

Understanding Your Responsibility as Internal Appeal Panel Member By L. Deborah Sword, Mediator / Arbitrator and SDRCC

You have been appointed a panel member of a NSO to hear an appeal from a decision of its executive committee. This comes with a responsibility to do what's right. This article does not constitute a how-to guide to hearing an appeal, but it provides a few ideas to help you work around some common issues with which appeal panel members grapple: jurisdiction vs. merits, natural justice, conflict of interest, standing, and communicating a decision.

Jurisdictional Issues versus Merits

There is a difference between the jurisdictional issues and the merits of the appeal. The merits of an appeal concern the issue

that is the subject matter of the dispute (i.e. team selection, carding, etc.). Merits go to the heart of the case or which party will win. Jurisdiction is a separate and distinct part of decision-making: jurisdictional arguments are preliminary matters limited to questions of what, how, who, and/or when the parties will proceed to the appeal. So, what is done and how it is done are just as important as the decision itself. A good decision made using a flawed process can create just as costly a dispute as a decision that someone believes is bad.

Jurisdiction means what you have the power, and the obligation, to do. If you don't have the power or authority to do something,

Notable Dates

- **Oct 1-4, 2009:** AthletesCan Forum, Vancouver, BC. The SDRCC will be there with an information kiosk.
- **Nov 13, 2009:** Petro-Canada Sport Leadership sportif, Vancouver, BC. The SDRCC will have a display at the Sport Exchange Forum and will hold a workshop on dispute prevention.
- **Nov 13-14, 2009:** SDRCC Arbitrator and Mediator Conference, Vancouver, BC.



and you do it anyway, you have exceeded your jurisdiction. As a result, what you did might be invalid, and your actions challenged. On the other hand, if you fail to do something that is within your jurisdiction, you might be challenged for breach of your duty to act. So knowing your jurisdictional limits and mandates are equally important.

Jurisdiction applies at every level of decision-making. Just as you must have jurisdiction to hear the appeal, so too must the body or person whose decision is being appealed to you also have had jurisdiction. Sometimes, the actual issue in dispute may not be appealed on its merits, but rather on the jurisdiction to decide the issue: as when the decision-making body was not entitled by policy to make that decision, or when the decision was made in breach of the rules of natural justice. Any decisions made under those conditions are ripe for jurisdictional challenges.

As an appeal panel, adhering to your own jurisdiction (i.e. exercising the power and the duties within the boundaries of the job) will avoid adding another layer of conflict. Acting outside your jurisdiction serves to escalate the dispute and enlarge the number of issues in dispute. Those issues can then become the grounds for the appeal of your own panel's decision.

Knowing and Following the Rules of Natural Justice

The rules of natural justice constitute another limit to authority. There is a careful balance between the rights of decision-makers to govern, and the rights of the governed to know that the governors will be fair, transparent, and accountable. The rules of natural justice include, among others, the right for all parties to be heard by an unbiased panel; to have advance notice of the proceedings; to know the case s/he has to meet; and to present one's case, ask questions, and contradict evidence. You should familiarize yourself with those principles at the outset of your appointment.

Managing Conflict of Interest

Being appointed to an appeal panel does not necessarily mean you are independent or free from conflict of interest. Moreover, once you review the case, you may realize that you are not unbiased or impartial after all. It is proper procedure to declare any relationship you may have with the parties, or to declare any per-

sonal interest that puts into question your impartiality. Failing to do so, or to recuse yourself voluntarily, may open the door for your panel's decision to be challenged.

Standing: Making Sure the Right Parties are Involved

Each level of the decision-making process takes its jurisdiction from the fact that the level below has made a decision that has been appealed by a party with 'standing' to bring that appeal. Standing means the party has a recognizable interest to stand before the judge. Without standing, the decision-makers will not hear from a party because that party has no reason to intervene in a dispute. Your appeal panel can canvas with the parties who else should be at the hearing, such as an athlete who risks losing a spot on a team as a result of the panel's decision. The question gives standing to other parties because their attendance is needed for a sound decision to be made and implemented.

Writing a Clear and Reasoned Decision

The best policies say that the tribunal must render decisions with reasons for coming to the conclusion it did; so any decision with inadequate reasons supporting the conclusion reached might be subject to a jurisdictional appeal. It is essential then, that the decision-maker ensures a written decision be both timely and comprehensive, reviews the evidence upon which the decision-making relies, and outlines the logic used to reach the conclusions reached. If this does not occur, the panel's decision may then be subject to appeal. When writing a decision be mindful of the need to be thorough in reasoning against preserving confidentiality about certain information revealed during hearing; this is especially true if the decision is to be made public.

Conclusion

Appeal panels take their jurisdiction from a lawful source of authority empowering that decision-making body, such as a policy, bylaw, or legal document passed at the Board of Directors or such other body. Once a conflict begins, people look to the bylaws and policies for direction on how to challenge or defend what was done. Conflict can be made worse when attempts to solve the problem are made contrary to a process laid out in the bylaws and policies. Be mindful of the jurisdictional limits of your authority, and know the importance of following applicable laws, rules, bylaws and policies. ■

A Thank You to Exiting Board Members

At the end of November 2009, the last three original SDRCC Board members will have completed their second and last term as Directors. Over the past 6 years, **Dianne Norman**, **Gordon Peterson** and **Allan Stitt** have dedicated their time, energy, leadership, and expertise in creating this unique and innovative



national dispute resolution system. Please join us in thanking them wholeheartedly for their invaluable contribution to fairness in Canadian sport. Special thanks go to our first Chairperson Allan Stitt who, as a world expert in ADR, has brought the SDRCC to the leading edge in resolving sports-related disputes. ■

ON BEHALF OF ALL OF US, THANK YOU!!!



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