



www.sdrcc.ca

October 2013

Team Selection Appeals: Top-5 FAQs

by James Lyle & Michael Tolmie, Sport Solution Program Managers

Sport Solution assists Canada's best athletes with a wide variety of sport-related legal issues. When it comes to appeals, team selections are the most common. Many of the issues that athletes face are similar and arise quite often during the appeal process.

Below are the top-5 questions that athletes consistently ask Sport Solution in relation to team selection appeals.



pects of the sport or the issue at hand. In other words, the decision makers may be in a better position to interpret the established selection policy to determine whether the selector followed it. This can be beneficial to appealing athletes because they will have a better chance of succeeding in the appeal by demonstrating that their athletic achievements qualify them according to the published selection criteria.

1) I was not selected to a team and I feel I should have been based on my National Sport Organization's (NSO) selection criteria. Can I appeal directly to the SDRCC?

Generally, no. Most NSOs have established internal appeal policies that must be exhausted before the SDRCC will hear an appeal. This might seem frustrating or a "lost cause" to some athletes, but this mechanism can be quite beneficial to the athlete. By letting the internal appeal process of the NSO take its course, the athlete shows faith in the ability of the NSO to be accountable for its decision and to correct its own error, if one was made, without engaging third parties to decide for them.

At the NSO level, the appeal is often decided by people who have knowledge of the technical as-

pects of the sport or the issue at hand. In other words, the decision makers may be in a better position to interpret the established selection policy to determine whether the selector followed it. This can be beneficial to appealing athletes because they will have a better chance of succeeding in the appeal by demonstrating that their athletic achievements qualify them according to the published selection criteria.

At the SDRCC level however, the decision makers are very familiar with sport law and procedure, but not necessarily the technical aspects of the relevant sport. Their role will not be to assess who is the better "athlete" in the sport *per se*. The SDRCC arbitrators will generally show "deference" to the decision of the NSO in these situations, but they will allow an appeal on enumerated grounds for appeal, such as procedural errors in the selection process or in the appeal process. If due process was followed, this may leave the athlete with a smaller window of opportunity to succeed in an appeal. The SDRCC arbitrators will be able to determine whether or not the policy is fair, was established properly by the NSO, and/or was applied correctly to the situation at hand.

(continued on page 2)

In this edition :

SDRCC Roster Member Profile: Stephen Gaon	3
Upcoming Opportunity to Join the SDRCC Roster	4
SDRCC Resource Library now Online!	4



Team Selection Appeals: Top-5 FAQs (continued)

(continued from page 1)

2) I was not selected to a team and the selector explained that it was due to subjective intangible factors, such as team chemistry. I disagree with the selector's assessment and I would like to appeal. Do I have a strong case?

Team selection appeals can be quite different depending on the sport. In individual sports (ex. taekwondo, luge, wrestling), the selection criteria is usually more clearly defined, in the sense that there is less "subjectivity" that gives selectors discretion to select the team. Selection in individual sports is typically based on the results of the individual athlete in competition. If the athlete achieves a defined level of success, he or she should be selected to the team as per the selection criteria. If the athlete meets the selection criteria and is not selected, the case for an appeal is strong, regardless of any intangible factors not mentioned in the selection policy.

On the other hand, it is quite common for the selection criteria in true team sports (ex. volleyball, basketball, cricket) to include intangible factors. It is only natural that elements such as team chemistry and leadership should be taken into account when selecting a sport team. Consequently, succeeding in an appeal in these sports often proves to be difficult. Selectors have wider discretion to select the team as they see fit. If an internal appeal panel does not overturn the decision after conducting a fair appeal procedure, it will prove to be extremely difficult to succeed at the SDRCC level. As explained above, the SDRCC decision makers are rarely experts of the sport in question and will therefore likely respect the technical expertise of the selectors. Unless the athlete can prove that there is, for example, inherent bias in the decision of the NSO, the case for appealing selections based on intangible factors in team sports is usually weak.

"Athletes always have the opportunity to defend themselves if an appeal is launched that will affect them."

Nonetheless, intangible factors cannot be irrelevant to sport performance or be discriminatory in nature. Athletes in sports that use subjective and intangible factors in their selection processes are well advised to ask their NSOs to clearly define what subjective factors will be used, and any weight they may carry in the decision, and hold their NSOs to it.

3) I was not selected to a team and I feel that the decision to select a different athlete was due to bias on the part of the selector. Can I appeal on these grounds?

Yes, bias is certainly a ground for appeal. With that said, the threshold for demonstrating bias in law is extremely high.

As athletes know, the reality of being involved in sports is that many of the people within an NSO or team will have close relationships. Some relationships will be closer than others. A selector merely having a strong relationship to a selected athlete is not sufficient to demonstrate bias.

In order to demonstrate bias, the appealing athlete will need evidence that the selector made a decision because it would directly serve the selector's individual interests, not simply the interests of an athlete that the selector has a close relationship with.

4) I was not selected to a team and I would like to appeal. However, I am concerned that doing so will hurt my chances of being selected to the team in future years. What should I do?

As previously noted, the situation may vary depending on whether the appeal concerns an individual sport or a team sport. For individual sports, making an appeal will be less of a concern because of the nature of the selection criteria, which gives less discretion to selectors to select the team as they see fit. The less discretion the team selector has, the less effect making an appeal will have for an athlete wanting to be selected in future years.

(continued on page 4)



SDRCC Roster Member Profile: Learning More About our Arbitrators and Mediators

They come from every region of Canada and have extensive experience in alternate dispute resolution and sports-related issues, but how much do we really know about them? The SDRCC has an impressive list of 43 mediators and arbitrators and we will slowly be introducing you to some of them through our regular installments of “SDRCC Roster Member Profiles”. In this edition we would like to present to you, **Mr. Stephen Gaon, Mediator from Ottawa, Ontario.**



What lead you to a career in ADR?

I am a lawyer who was called to the Bar of Ontario in 1989. I spent the first dozen years in practice working mostly as a civil litigator but in 1998, after being appointed to chair an administrative tribunal, I discovered how much I enjoyed acting as third party neutral. After that, I geared my career toward ADR, obtaining my mediator’s credentials in 2001, eventually becoming a Chartered Mediator in 2008. I initially blended ADR work (mediations, arbitrations and workplace investigations) in with my legal work but I am delighted to say that ADR eventually took over. I now have a limited law practice but remain very occupied with interesting and challenging ADR work, including sport dispute resolution.

Specialization/Area of Expertise:

I am an ADR generalist but I have 2 or 3 specific areas of expertise, including employment/labour relations and insurance matters (particularly personal injury and medical-related cases).

As a Mediator with the SDRCC I...

...am so pleased to have been associated with the SDRCC since 2009. The organization is always striving to be on the cutting edge of sport dispute resolu-

tion - which is highly specialized - and the use of technology to manage dispute resolution processes. I particularly enjoy handling ADR within sport disputes because it brings me into contact with elite athletes and coaches, and experts in sport administration - people who continually strive for excellence, trying to be the best in the world at what they do.

Favorite Sport(s):

Alpine skiing (powder where I can find it!), sailing and yacht racing.

Dispute Prevention Tip for Athletes:

Be prepared to negotiate. In my experience, athletes and coaches who challenge a decision by their NSO or by Sport Canada, often feel so aggrieved that their mind set is “I cannot possibly lose at arbitration”. This mindset sometimes applies to the NSO as well. This is wrong - you can and often will lose. Arbitrations are ‘win-lose’. A negotiated settlement is usually better than rolling the dice because you control your outcome, rather than leaving it in the hands of an arbitrator. There are other reasons to negotiate, including the idea of a ‘win-win’ solution (for instance, sending an additional athlete to a world championships).■

In our next edition, look for our first profile of an SDRCC Arbitrator

Notable Dates:

- **October 5, 2013:** SDRCC kiosk at the “Rendez-vous des entraîneurs 2013” (Laval, QC);
- **October 19, 2013:** SDRCC kiosk at the “Forum Équipe Québec 2013” (Sainte-Adèle, QC);
- **November 7-9, 2013:** SDRCC workshop and kiosk at the 2013 Sport Leadership Conference (Calgary, AB);
- **January 28-30, 2014:** SDRCC kiosk at the 2014 Canadian Sport for Life Summit (Gatineau, QC).



(continued from page 2)

For team sports, there is a greater likelihood that an appeal could affect your chances of being selected to a team in future years. This might not be fair, however it is the reality of being involved with NSOs that have wide discretion to select teams as they see fit. The appealing athlete can only hope that the NSO will act amicably in the future. At the same time, if the athlete feels that he or she was truly excluded unfairly, launching an appeal may be worthwhile because the NSO could make the same decision in future years anyway.

Sport Solution can assist in resolving issues without a formal appeal, in facilitating a dialogue between the athlete and his or her NSO about the situation, and in attempting to find alternative solutions. However in more complex cases, this service will require the assistance of professional mediators or resolution facilitators of the SDRCC. Resolving the dispute this way will help preserve personal relationships and reduce the chances that the athlete will suffer consequences for voicing his or her disagreement.



Toll Free: 1-888-434-8883
Tel: (519) 661-4163
Email: sportsolution@athletescan.com

5) I was selected to a team and have been informed that another athlete is appealing the decision, which will affect me should the appeal be allowed. How can I defend my position?

Athletes always have the opportunity to defend themselves if an appeal is that will affect them. Depending on how directly the athlete is being affected (i.e. being replaced by another athlete), the affected athlete can be heavily involved in the appeal process.

The NSO will often be the party defending its decision, and affected athletes are encouraged to be active in ensuring that their case is being represented properly. At the SDRCC level, affected athletes can testify during hearings and have their voice heard. Sport Solution can assist affected athletes with their position in the appeal. If Sport Solution is already assisting the appealing athlete, we can help in finding a pro bono lawyer for the affected athlete. ■

SDRCC Resource Library now Online!

The SDRCC has put online the index of its library, where you can **search over 1,300 titles** and find out which of them are also available in one or more of **25 university libraries across the country**. This **specialized library** constitutes a very rich source of information to any-

one interested in dispute prevention and dispute resolution. While some documents address general issues on alternative dispute resolution, a large number of publications also apply these general principles to the very particular situation of

sports-related disputes. Several publications in sport law, in sport management, and in management of not-for-profit organizations also provide useful information for dispute prevention. ■

www.crdsc-sdrcc.ca/eng/dispute-resource-databases.jsp

2014-2017 SDRCC Roster Renewal

Are you interested in becoming a part of the SDRCC Roster of Mediators and Arbitrators? If so, we may have a spot for you starting in 2014! Please look for the call for applications that will be announced early in 2014. For information please contact tribunal@crdsc-sdrcc.ca. ■

The SDRCC would like to thank the **Canada Games Council (CGC)** and **Canada Summer Games-Sherbrooke 2013** for an amazing 2 weeks of exciting events and positive sport atmosphere. The SDRCC is happy to have been a part of the Games and to have been able to assist the CGC and all of the provincial delegations with on-site dispute prevention and dispute resolution services. ■



Patrimoine
canadien

Canadian
Heritage

1080 Beaver Hall, Suite 950, Montréal, Québec, H2Z 1S8

Tél: (514) 866-1245 Fax: (514) 866-1246
1-866-733-7767 1-877-733-1246

The Sport Dispute Resolution Centre of Canada thanks Sport Canada for its generous financial contribution.