Deference at the SDRCC: A Trend? Reflecting on the Future

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In 2010, I decided to represent parties via the SDRCC *pro bono* program. It came to me naturally. Considering my background as a former athlete (Canadian rhythmic gymnastics team), practising lawyer since 1989 and eventually a certified mediator, I fully supported the SDRCC's mission to implement and maintain an accessible, low-cost and efficient sport dispute resolution service in Canada. Over the years, the SDRCC has demonstrated its value as a credible alternative to a court of law which does not adequately meet the needs of the sport community. Little did I know how much of my professional life would be devoted to the SDRCC.

To be honest, I came to appreciate the passion and competitive spirit of athletes and other claimants whom I represented. In fact, it's hard for me to turn down a mandate due to lack of time or other professional commitments. Claimants are intense, genuine and reject all forms of discrimination. They are an exceptional group of clients to which fair play and the notion of justice or injustice speak to something deep inside. That said, how likely are they to succeed in challenging a decision from a national sport organization (NSO) based on the trend of arbitral awards since the establishment of the SDRCC in 2004?

A Trend Since 2004

I believe there is a progressive trend since 2004 whereby NSOs and their executives are invariably given a margin of error by arbitrators, regardless if such mistakes result from incompetence, bad governance, lack of administrative oversight, inadvertence or even carelessness. Are mistakes committed by NSOs increasingly accepted and inconsequential? If so, does this deference favour NSOs to a point where a dispute becomes akin to a battle between David and Goliath?

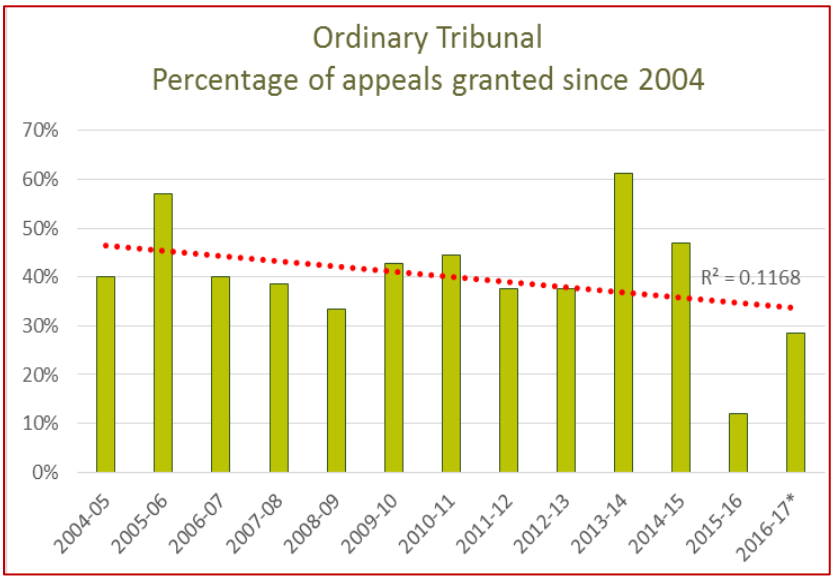
To confirm my suspicions, I delved into to the data and statistics kindly provided to me by the SDRCC staff from its database and the numbers speak for themselves [refer to graph on page 2].

The numbers clearly show that, since 2004, arbitrators are making things more difficult for claimants and, when represented, their lawyers. Perhaps this trend results from the unintended impact of the 2008 Supreme Court of Canada (SCC) case ***Dunsmuir v. New Brunswick*** in which the SCC granted a margin of error to administrative bodies, insofar as their decisions are reasonable and within a range of possible outcomes. In light of this decision, should we conclude that athletes have less and less hope of winning an appeal against an NSO unless they pay experienced lawyers and have ironclad proof? Doesn't this go against the very mission of the SDRCC?

The Administrative Rigor of NSOs

There is much conjecture on this matter beyond my own opinion. Furthermore, many judges believe the SCC's rationale in the *Dunsmuir* case was misconstrued and condemn its ill effects. Instead, they suggest, as I do here, that the "reasonableness "of arguments, or the grounds justifying an administrative tribunal's reasonable decision, is irrelevant. What matters most is: **Does the administrative decision produce a "reasonable "effect given the regulatory objectives and obligations of the organization?**

In other words, if the body of law governing and financing NSOs requires them to observe administrative discipline, governance standards and procedural fairness that are, at the least, reasonable when dealing with their members, then what is the point of diminishing these obligations by granting them near absolute deference via the SDRCC when they violate their own statutory obligations and internal regulations?



** Partial data for 2016-2017 as of February 1st, 2017; Total cases involve selection (103), carding (23), discipline (14), eligibility (14) and other matters (18).*

This graph includes all arbitration awards on the merits rendered by the ordinary tribunal since 2004, hence excluding doping cases. The red dotted line (calculated by the SDRCC) represents a linear trend showing a ***drop in granted appeals from over 45% in 2004 to less than 35% in 2016.***

Food for Thought for the Future

Can we truly claim fair play for athletes who must fend for themselves against publicly funded NSOs who benefit from near absolute deference on the part of certain SDRCC arbitrators? What will be the impact to the reputation of the SDRCC if the rate of denial of appeals reaches above 65% or even 70% despite evidence of prejudicial irregularities? Will granting near absolute deference to NSOs undermine the credibility of NSOs and the SDRCC? We need to reflect on this matter because no ruling will ever restore such credibility in the eyes of the well-meaning claimants whose legitimate rights have been violated and who are, in theory, the bread and butter of NSOs and, ultimately, of the SDRCC.

It might be time all stakeholders in the Canadian sport community pay attention to those questions. I truly believe that NSOs and claimants will eventually strike a balance when this trend for near absolute deference is reversed. In my experience, claimants will afford some degree of error and reasonable discretion to their NSO for the sake of administrative efficiency, but not to the point of granting them near absolute deference and compromising fair play.

I invite you to ponder this matter in 2017! ■