THE RIGHTS OF ATHLETES, COACHES AND PARTICIPANTS IN SPORT

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PART 1. INTRODUCTION

There are many sources of law that apply to sport organizations, athletes, coaches and other participants in the sport setting. Both statute law and case law have a bearing on how sport organizations, and individuals participating in sport, should conduct themselves. For example:

- Most sport organizations are incorporated under provincial or federal legislation pertaining to societies or corporations, and this legislation stipulates how a sport organization must conduct certain business affairs;
- In terms of safety and injury prevention, sport organizations must meet an objective standard of care that is determined by the common law principles of negligence and by statutes relating to occupier's liability;
- In some cases, although not all, the actions of sport organizations must meet the requirements of human rights legislation for equal access to facilities, programs and services without discrimination;[1]
- Sport organizations must adhere to an array of other statutes relating to specific obligations such as product liability, occupational health and safety, environmental protection, workers compensation, employment standards, income tax, societies and business corporations, and the Criminal Code, among others;
- Lastly, sport organizations have an obligation to meet the requirements of procedural fairness in all of their decisions and actions as they relate to members.

It is this latter obligation, the "duty to be fair", that is the focus of this chapter.

The vast majority of Canadian sport organizations are "private tribunals" – that is, they are autonomous, self-governing, private organizations that have the power to write rules, make decisions and take actions that affect their members, participants and constituents. A body of law called "administrative law" prescribes the rules by which tribunals must operate in Canadian society and allows for legal remedies when these rules are not followed and someone is harmed as a result.

To understand the sport organization's legal duties and obligations, one must understand two important principles that apply to tribunals – the first is the notion of *contract* and the second is notion of *natural justice,* now almost synonymous in Canada with *procedural fairness*.[2] These

[1] The *Canadian Charter of Rights and Freedoms*, while an important source of human rights, has little impact on the sport community in Canada. This is because the *Charter* applies to "government action" and nearly all sport activities in Canada are organized by private and autonomous sport organizations, not by governments. Human rights in Canada are also protected in a variety of federal, provincial and territorial statutes that prohibit discrimination in the provision of goods, services, facilities and accommodations to the general public. In the past, many courts took the view that Canadian sport organizations did not provide services to the general public and thus were not required to comply with human rights legislation. More recently the courts have taken a more inclusive view of the term "public" by looking at the nature and quality of the relationship between the organization and the users of its services rather than simply the quantity of users. This has had the effect of bringing more so-called "private" organizations into the scope of human rights legislation. For a full discussion, see *Mediated Agreement Between David Morrison, the City of Coquitlam and the Deputy Chief Commissioner* (1999), available from the Centre for Sport and Law's web site at www.sportlaw.ca.

[2] In the past, a distinction was made between judicial and quasi-judicial decisions and administrative decisions. The first category of decisions were subject to the rules of "natural justice" while the second category were not. Making

principles were first highlighted in the 1952 landmark case, Lee v. Showmen's Guild of Great Britain[3]. Although this case had nothing to do with sport, it has been referred to by almost every athlete and amateur sport organization that have found themselves in court over a decision-making dispute.

Lee v. Showmen's Guild of Great Britain

This 1950s landmark case from England established two very important legal principles for private organizations. Although the case had nothing to do with sport, it has been quoted by almost every athlete and amateur sport organization that has ever gone to court over a decision-making dispute.

Very briefly the facts of the case are that Lee was a seller of pots and pans in a flea market and the Showmen's Guild was the voluntary association that operated the flea market. Lee was a member of the Guild and in fact, was required to be a member if he wanted to sell his pots and pans. One day Lee got into a scuffle with another vendor in the market over who was going to have the prime corner spot – upon receiving a complaint from the other vendor who alleged that Lee was the instigator of the scuffle, the Guild suspended him.

Lee was eventually successful in his court challenge to be reinstated as a member of the Guild, but more importantly, the court made two statements that have a direct bearing on how sport organizations must govern themselves:

- firstly, the court said that the jurisdiction of a domestic (or private) tribunal is founded on a contract that it has with its members , and
- secondly, the court said that domestic tribunals are subject to the rules of natural justice in how they deal with their members.

PART 2. CONTRACT

As private tribunals, sport organizations are self-governing and derive their authority from their constitution, bylaws, policies, procedures and rules. Taken together, these are the "governing documents" of the organization and form a contract between the organization and its members. This contract provides the sport organization with the legal authority to establish the rights, privileges and obligations of membership. As in any contract, the parties to the contract are expected to adhere to its terms and provisions, and failure to do so may result in a breach of the contract. In serious matters, such a breach of contract may give rise to disputes for which there may be legal remedies.

When an individual joins a sport organization, he or she accepts the inherent authority of the sport organization and the terms of the contract expressed in the organization's governing documents. In most cases athletes, coaches and officials are members of their respective sport organization and thus are parties to a contractual relationship with the sport organization. This contract works to the benefit of both parties by establishing and clarifying their respective rights and obligations. Occasionally, however, the contract may work to the detriment of the parties if the policies that make up the contract are poorly designed, vague, contradictory or ill-suited to the organization's needs, resources or realities.

A sport organization's governing documents are critical as they provide the foundation of the organization's structure and authority and contain all of the rules by which the organization and its members govern themselves. Typically, sport organizations pay too little attention to their governing documents and only realize their importance when the deficiencies in these documents land them squarely in the middle of a dispute with a member, such as an athlete. For many sport

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this distinction was tricky and often resulted in unfairness. The law has now evolved to impost a "duty of fairness" on those making administrative decisions, and this duty has replaced the rules of natural justice. As noted by Blake: *"The distinction is now meaningless: every tribunal making decisions that could adversely affect individual rights or interests must proceed fairly."* (Blake, Sara. Administrative Law in Canada. Toronto: Butterworths, 1992. p.13.)

[3] (1952) 1 All E.R. 1175. See case summary on this page.

organizations, "it is a sobering lesson to learn that policy is what's written on the paper and not what's in the mind of the drafters of the policy, or in the collective memory of the organization".[4]

If an organization and its members agree that they do not like the terms of their contractual relationship, then they can take steps to change the governing documents using conventional policy-making channels. If a group of members, such as athletes, takes the view that they do not like the terms of their contractual relationship with the sport organization, then they can take steps to influence the leaders and decision-makers of the organization using conventional democratic procedures.

A group of members, or one member alone, cannot unilaterally rewrite the terms of the contract with the sport organization, and a court cannot do this either. The courts are very reluctant to interfere with the internal matters of private tribunals, and will not rewrite the governing documents and policies of private organizations. However, an individual such as an athlete, may apply to the court and the court may intervene if these policies are ignored, not followed, improperly interpreted or wrongly applied. These issues are discussed more fully later in this chapter.

Lassen v. Yukon Weightlifting Association

Teenager Lassen was an accomplished junior weighlifter and a member of the Yukon Weightlifting Assocation (YWA). Following her silver medal performance at the Canada Games in 1995, she qualified for both the 1995 National Weightlifting Championships in Montréal and the 1995 Junior World Weightlifting Championships in Poland.

Shortly before the Montréal event, the YWA and the Canadian Weightlifting Federation got into a dispute over the national body's decision to not fund a team to attend the World Championships, and the choice of the Coach who would accompany those team members who could finance the trip themselves. The YWA advised Lassen that she could not attend the Worlds, even though funding was not an issue as Lassen's family had planned to pay for her trip.

A short while later Lassen was advised by the YWA that she could not attend the National Championships either, although airline tickets had already been purchased and arrangements made. When Lassen's parents asked YWA for an explanation of these decisions, the YWA responded by suspending Lassen's membership indefinitely, citing as reasons interference by her parents in the YWA's affairs, Lassen's lack of commitment to her sport and lack of maturity to compete at the national and world level.

Due to the shortness of time Lassen had no choice but to pursue the matter in court. The court found that the decision to suspend Lassen's membership was not authorized, as YWA lacked the authority in its bylaws or other governing documents to suspend or revoke any individual's membership. Lack of authority notwithstanding, the court also found the manner in which Lassen had been treated to be unfair. The YWA's dipute with the national body did not involve Lassen personally and she should not have been punished for matters clearly beyond her control. There was no factual basis to support YWA's claims that Lassen lacked commitment and maturity – in fact, evidence pointed to just the opposite. Procedurally, Lassen had not been given notice of the suspension of her membership, was not informed of the reasons for the suspension, was not given an opportunity to present her case, and was denied an appeal.

The court ordered that Lassen be reinstated as a member of YWA and that the YWA and the Canadian Weightlifting Federation allow her to compete at both the National Championships and the World Championships.

In addition to the contractual relationship described above, there may also be explicit contracts between an organization and its members. All high performance athletes who are members of national teams

[4] Rachel Corbett and Hilary A. Findlay (1998). Your Risk Management Program: A Handbook for Sport Organizations. Centre for Sport and Law. p. 14

in Canada enter into binding contracts with their national sport organization. The early rationale for these contracts was to set out the requirements and expectations of athletes who received financial assistance through Sport Canada's Athlete Assistance Program.

Today, these contracts typically include commercial and dispute resolution provisions in addition to specifying the respective responsibilities and entitlements of the athlete and the national sport organization. The rights and obligations in an athlete contract do not replace the rights and obligations that exist in the contractual relationship between the athlete and the sport organization, but rather incorporate, confirm and clarify them.

PART 3. PROCEDURAL FAIRNESS

The second fundamental legal principle highlighted by the Lee case is that private tribunals are subject to the rules of procedural fairness. In other words, a sport organization must be fair in how it exercises its powers and makes decisions. The organization that fails to be fair will ultimately find itself in the middle of a nasty dispute, and may ultimately find itself in a court room.

All of us generally have a good sense of what is fair and what is unfair. At law, *procedural fairness* (or the "duty to act fairly") has a specific meaning. Being fair means following a minimum of two basic rules:

- the decision-maker has a duty to give persons affected by the decision a reasonable opportunity to present their case (commonly referred to as the "right to a hearing"); and
- the decision-maker has a duty to listen fairly to both sides and to reach a decision untainted by bias (commonly referred to as the "rule against bias")

These two rules of procedural fairness are discussed below.

3.1 Right to a hearing

It is a long established rule of law that before an adverse decision can be made against a person, that person has a right to know the case against him or her and to be given a reasonable opportunity to respond on his or her own behalf. There are two obvious purposes for this rule: firstly, the person adversely affected by the decision has an opportunity to defend his or her interests or assert a claim and secondly, by allowing the person to have input, the decision-maker is better able to make a rational and informed decision.

Although all organizations have a duty to be fair and to follow these rules, the procedural safeguards that are required to satisfy the right to a hearing will vary with the circumstances. Such safeguards may be described as falling along a spectrum from simple and flexible at one end to complex and formal at the other. For example, in some circumstances an opportunity to make written submissions may be appropriate whereas fairness in other circumstances may require that the person be given the opportunity to make oral representations.

Even within these two types of hearing (written submission and oral presentation), there are ranges of formality and complexity. For example, written submissions can be as simple as a letter or series of letters stating one's position or as complex as a written application supported by documentary evidence and expert reports. Similarly, oral representations can be as simple as an interview or group discussion with the decision-maker(s) or as complex as a court-like proceeding with examination and cross-examination of witnesses. A hearing can also be a combination of written submissions and oral presentations wherein the decision-maker reviews documents and written arguments and then convenes a conference to ask questions and clarify any uncertain matters.

Kulesza v. Canadian Amateur Synchronized Swimming Association Inc.

Kulesza was a synchronized swimmer competing for a spot on the Canadian synchronized swimming team competing in the 1996 Olympics in Atlanta. As a member of the national team program of the Canadian Amateur Synchronized Swimming Association (Synchro Canada), Kulesza had entered into an athlete agreement the previous year which had specified the selection process, selection criteria and the identity of the selectors for the 1996 Olympic team.

Synchro Canada selected its Olympic team based upon a process and criteria set out well in advance. Kulesza was selected as a travelling alternate to the team. Kulesza launched an internal appeal of the selection decision, alleging bias on the part of selectors. Specifically, she alleged that three of the judges involved in the selection decision coached some of the individual athletes vying for selection, and were paid for their services and thus had a professional and financial association with Synchro Canada. The three judges in question were the Head Olympic Coach, the Assistant Olympic Coach and the National Team Director.

Before the appeal could be heard, Kulesza appeared in court seeking an injunction stopping the team from competing in the Olympics and declaring the team selection null and void. She asked the court to order a new selection before a panel of three independent judges including Olympic Games judges from 1988, 1992 and 1996.

The court did not grant the order. The court found no evidence that there was bias in the selection and in fact, took the view that it was entirely appropriate and sensible that coaches within Synchro Canada, who were familiar with the athletes, should make the selections. The court also observed that the Head Coach was the personal coach of Kulesza, a fact which greatly undermined Kulesza's complaint about bias of the selectors.

The court also observed that Kulesza's court action was not timely. She should have complained about the selection procedures and the identity of the selectors at the time she agreed to the terms of the athlete agreement the previous year. By entering into this contract, she waived her right to object to the selection process. She also failed to exhaust her internal remedies by abandoning her internal appeal. The court concluded that "it should be loathe to substitute its opinion on the selection process in the stead of those so clearly knowledgeable in the field".

Disclosure

The rule of the "right to a hearing" has one additional element. In order for a person potentially affected by a decision to make a full and meaningful response, that person must know the details of the case to be met. Thus, in addition to an affected person having the right to be heard, he or she must also be afforded the right to be informed. Just as procedural fairness occurs along a spectrum, what is required by the right to be informed will vary with the circumstances. In some cases it is sufficient to provide the affected person with a précis or

summary of the details of the case[5] and in other cases the person may have a right to review original documents and cross-examine witnesses. Again, fairness will dictate the nature and extent of the disclosure but to the greatest extent possible, disclosure should be as complete as possible.

In any given case, the information upon which a decision will be based may come from many sources. Some sources will produce more reliable information than others. It is critical that the parties affected by a decision have an opportunity to confirm, correct or contradict any information contrary to their interests. This can only happen if the information is disclosed to them.

Sport organizations often promise confidentiality to individuals providing information about another individual, particularly if such information is negative in nature.[6] Similarly, those providing information are often reluctant to do so unless it can be done anonymously. It is the very rare case where information should be withheld from an affected party. The details and completeness of the disclosure will depend on the complexity and seriousness of the case. At times, a summary of factual information may be sufficient, but where credibility is an issue, the identity of the source of the information and context in which the information was given may be necessary in order to allow the affected party to fully and completely respond.

Guidelines for determining appropriate procedures

There are a number of guidelines that can assist in determining what process and what extent of disclosure will meet the required threshold of the duty of fairness, given all the circumstances of the situation. These guidelines include:

Granting versus withdrawing privileges

As a general rule, decisions relating to withdrawing rights or privileges *already conferred* require greater procedural safeguards than decisions relating to withholding rights or privileges *not yet granted*, where such rights or privileges are equivalent. In other words, decisions about athlete conduct or discipline often require more stringent procedural safeguards than decisions about athlete eligibility or selection.

Effect of the decision

The guideline just described must be applied in conjunction with a second guideline, which is that procedural safeguards should be in direct proportion to the potential *consequences* of the decision -- in other words, to what is at stake. For the gifted amateur athlete, a great deal may be at stake. A sport organization differs from many voluntary organizations in that membership is compulsory (not voluntary) for any individual contemplating athletic pursuits within that particular sport discipline. The failure to award membership, or once awarded, the

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[5] At a minimum this would include disclosure of any information that will be taken into account in making the decision. However, it is prudent to disclose to all parties any information that is provided to the decision-maker, regardless of whether the decision-maker relies upon that information in making his or her decision.

[6] For example, athletes are sometimes reluctant to provide a negative performance review of a coach for fear it may harm their future relationship with the coach and opportunities within the sport. Individuals wishing to lodge a complaint of harassment are often reluctant to do so if their identity is revealed, out of fear of retaliation.

loss of membership, precludes such pursuits entirely. Therefore, denying or revoking membership to an amateur athlete requires strict procedural safeguards.

Denial of competitive opportunities to athletes, particularly elite athletes, may also have the effect of denying other more significant opportunities, including future income, employment and scholarship opportunities. Denial of these opportunities also demands careful attention to procedural safeguards.

Nature of the decision

The choice of procedure also depends upon the extent to which a decision is final and binding on a person. Procedural safeguards are generally higher with respect to a final decision than they are with respect to an interim decision. Also, although expediency is not an excuse to override the principles of fairness, it may be a consideration in determining the nature of the process. Thus, issues arising during the course of a tournament or competition may be dealt with differently than those arising outside of competition, so long as the fundamental principles, or rules of fairness, are respected.

Where an appeal is not available procedural safeguards must be more strictly observed because there is no opportunity for procedural errors to be corrected. For example, where a decision-maker of last resort makes a procedural error during the course of the hearing, it may be possible to correct or cure the default as part of the decision-making process. But if the error is not corrected, then the only other recourse is litigation in the courts. If the decision being made is not absolutely final and there are opportunities for further appeal, it is not so critical that procedural errors be promptly corrected as there are subsequent opportunities to correct them.

Garrett v. Canadian Weightlifting Federation

Garrett was an accomplished weightlifter and a member of the Canadian Weightlifting Federation (CWF). Garrett had been advised in writing of his selection to the Canadian team competing at the 1990 Commonwealth Games in Auckland, New Zealand. Garrett attended the team's final training camp in Vancouver, but two days into this camp was advised by the national team Coach (who was also the President of the CWF) that he was being removed from the team and being replaced by a reserve athlete, one whom Garrett had bettered throughout the year-long selection process.

Garrett was sent home from the training camp. When they learned of the coach's decision to replace Garrett with a reserve, the remaining directors of the CWF met by conference call and determined that the Coach's actions were unauthorized and invalid. The CWF ordered the Coach to reinstate Garrett to the team, but the Coach disregarded this order and took the reserve athlete to Auckland.

Garrett went to court seeking an order to reinstate him to the team. Due to the shortness of time and the great urgency, the court granted the order, having found that the decision to remove Garrett from the team was made arbitrarily and without proper authority. The court also noted that the decision was influenced by bias because the national Coach was also the personal coach of the reserve athlete who was placed on the team in Garrett's place.

In spite of the Court order, Garrett was not able to compete at Auckland because by the time the order was made, the national weightlifting team had already been constituted by the Commonwealth Games Association of Canada (CGAC), on the basis of recommendations from each national sport organization. CGAC had not been named in the order and was not subject to the order, and in this case chose not to follow the order of the court regarding the make-up of the team.

3.2 Rule against bias

The second rule of procedural fairness relates to the impartiality, or bias, of those making decisions. There are two types of bias:

- The first is *actual bias*, wherein a decision-maker is predisposed to deciding a matter in one particular way over any other. The decision-maker is said to have a "closed mind" and is unwilling or unable to take into consideration any other perspective.
- The second type of bias is *apprehended bias,* that is, one has a reasonable belief or apprehension the decision-maker is, or will be, biased. This type of bias is much more common than the first type.

Clearly, where a decision-maker has a direct material interest in the outcome of a decision, bias may be established and the decision-maker may be disqualified. However, situations involving allegations of bias are rarely so clear-cut or concrete. Typically, bias arises from the state of mind of the decision-maker. While a previous or existing friendship, business relationship or family relationship might be perceived as biasing a decision-maker, it is important to note that it is not the relationship itself that creates the bias, or the apprehension of bias, but rather the extent to which the relationship influences or is perceived to influence the decision-maker. This is often difficult to prove.

For bias to be found, the relationship must be direct, consequential and influential. The test used by the courts in these cases is whether "a reasonable person, knowing the facts concerning the person [i.e., the decision-maker] would suspect that the person would be influenced, albeit unintentionally, by improper considerations to favour one side in the matter to be decided"[7]. In other words, the test is an objective test: it is not what the person raising the allegations believes but rather what a reasonable and objective third party would believe, given all of the circumstances.

Relationships and elements that may result in bias or a reasonable apprehension of bias can be grouped into six broad categories:[8]

Personal Relational Bias

This would include personal relationships that might suggest favouritism such as friendship, kinship or a coach-athlete relationship. It also includes personal relationships that might invoke animosity or prejudice such as personality conflicts, a history of strained relations or involvement in a previous dispute. The cases of Garrett v. Canadian Weightlifting Federation[9] and Depiero v. Canadian Amateur Diving Association et. al.[10] are cases where personal relational bias influenced a sport organization's decision.

Non-personal Relational Bias

This category typically relates to a commercial or business relationship between a decision-maker and a party that might result in bias either in favour of or against a party. This might include an employee-employer relationship, competitors, or even one party's membership in a particular organization or interest group.

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[7] Blake, Sara. Administrative Law in Canada (Toronto: Butterworths, 1992) p. 92.
[8] Kligman, Robert D. Bias (Toronto: Butterworths, 1998).
[9] Unreported decision, January 1990. Alta. Q.B. (Edmonton). See case summary on page 8.
[10] (1985) A.C.W.S. (2d) 331. See case summary on page 10.

Informational Bias

This category involves situations in which the allegation of bias is made because a decision-maker learns details about a person or a relevant issue as a result of some prior involvement, perhaps through a previous dispute proceeding. This typically arises where a decision-maker has participated in an earlier hearing that involved the same person or issues.

Attitudinal Bias

This category of bias relates to whether a view or a position taken by a decision-maker in the past, although not specifically directed to the matter under consideration, suggests a predisposition on the part of the decision-maker towards one side or the other. This is a tricky issue. As noted by one court, "A person serving in an adjudicative role must have an open mind, but not necessarily a blank or void one".[11] Clearly, decision-making bodies can make policies and general statements regarding various issues and how they intend to deal with them. But they cannot be so entrenched in a position so as to have a "closed mind".

Depiero v. Canadian Amateur Diving Association

A diving meet in Brantford, Ontario was the final selection event to name three female divers to the Ontario team competing at the 1985 Canada Games in Saint John, New Brunswick. Two of the three divers had already been selected on the basis of previous competitions, one of whom was Depiero's sister.

Going into the final dive of the competition, Depiero was in first place and her selection to the team seemed certain. Depiero and her sister were coached by the same coach, and he directed that Depiero's sister pass on her final dive so as not to jeopardize Depiero's position. The meet concluded, Depiero remained in first place, and thus was selected to the Ontario team.

The Canadian Amateur Diving Association (CADA) determined that the coach's actions violated the rules of fair competition. The Board of Directors declared the results of the event invalid, disciplined the coach and named a third diver to the team in place of Depiero.

Depiero appealed this decision and the matter went before an Event Jury of Appeal that was organized by CADA in accordance with its bylaws. This Jury upheld Depiero's selection to the team but made recommendations for changing the rules of competition to prevent a similar situation from arising in the future.

The Board of Directors of CADA held a meeting and rejected the decision of the Event Jury of Appeal and voted to remove Depiero from the team

Depiero took the matter to court and asked the court to order CADA and the Ontario Ministry of Tourism and Recreation to revise the team roster to include Depiero instead of the third diver. The court granted the order, noting that CADA's bylaws and rules did not authorize the Board of Directors to overturn a decision of an Event Jury of Appeal, and even if they did, the actions of the Board were unfair.

In particular, one of the Board members who participated in the decision had a clear conflict of interest as he was the coach of the third diver. Depiero was being punished by the Board for actions that were not hers but rather were the coach's. As well, Depiero had no notice of the meeting of the Board at which the decision to drop her from the team was made, and was allowed no opportunity to make representations on her own behalf.

Institutional bias

This category of bias refers to the manner in which the organizational structure of an organization creates or builds in a bias or apprehension of bias. A classic case of such bias arises where a Board of Directors is authorized to make a certain decision and any appeal of such a decision is to be heard by the Executive Committee. In most sport organizations, the Executive

[11] *Thompson v. Chiropractors' Association (Saskatchewan)* (1966), 36 Admin. L.R. (2d) 273 (Sask. Q.B.)

is a sub-group of the Board and thus is in the position of hearing an appeal from its own decision.[12]

Another aspect of institutional bias is the degree of independence of the decision-maker, or the degree to which those appointing the decision-maker have a stake in the matter being heard. This occurs often in sport situations because directors of sport organizations are often parents of athletes. The case of Kulesza v. Canadian Amateur Synchronized Swimming Association Inc. et al[13], summarized in this chapter, is an example of a case where an athlete alleged bias because an employee who was making selection decisions held her job as Technical Director at the pleasure of the Board, which included among its membership the parent of one of the other athletes. This allegation failed as the athlete was unable to provide evidence of any influence arising from institutional bias.

Operational bias

This category of bias arises from the manner in which a hearing is conducted. More specifically, operational bias may be alleged where the procedure adopted by the decision-maker has created a situation of unfairness for one of the parties.

Where a decision-maker communicates with one of the parties in the absence of another, a reasonable apprehension of bias or preference to that party may arise. Any information discussed or exchanged with one party should be discussed or exchanged with all parties, so that all parties have the opportunity to address the decision-maker on the issues in dispute. While casual contact between a decision-maker and a party may be logistically unavoidable, the nature of the contact should not relate to the subject matter of the hearing.

Operational bias may also be alleged where the decision-maker becomes involved in the proceeding to such an extent as to appear to be an advocate for one side or another. Similarly, a decision-maker who takes an overly adversarial position in the conduct of the hearing may give rise to a claim of bias.

PART 4. ADMINISTRATIVE APPEALS

At law, sport organizations have no legal obligation to offer individuals an appeal of its decisions. As an athlete cannot seek recourse in the courts until he or she has exhausted internal remedies, it makes good sense to make internal remedies available. This is simply good risk management and good governance.

There are two exceptions to the general rule that an individual must first exhaust internal remedies before taking a matter to court: first, where time does not allow an internal appeal and there is insufficient flexibility in the appeal procedures to accommodate time considerations and second, where it is clear the athlete will simply not get a fair hearing from the organization. The onus is therefore on organizations to put fair appeal procedures in place and furthermore, to

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[12] This is a clear example of actual bias. In this situation it can be reasonably expected that the original decision-makers will be predisposed to up-hold their original decision.

[13] Unreported decision, June 1996. Ont. Ct. Gen. Div. (Ottawa). See case summary on page 6.

ensure that they are flexible enough to accommodate the short timelines that are typically associated with disputes relating to sport competitions and selection issues.

4.1 Scope of the appeal

What decisions may be appealed? This is up to the sport organization to decide -- provided, of course, that the matter under appeal lies within the powers that are vested in the organization through its bylaws and other governing documents. In other words, an organization cannot hear appeals on decisions over which it has no jurisdiction.[14]

Within its scope of powers, a sport organization may adopt either a narrow or a broad approach on appeals. A narrow approach would only allow appeals on decisions where the rules of procedural fairness require the greatest procedural safeguards. Thus, only decisions that result in the revoking of certain rights or privileges, such as discipline matters, would be open to appeal. A broad approach would allow appeals on decisions made by any committee or by the board of directors of the organization. This would mean that decisions about selection, eligibility, and certain personnel matters, in addition to discipline, could be appealed.

Keeping in mind that an important purpose of administrative appeals is to resolve disputes internally, the broad approach is highly recommended. This doesn't mean that the organization will be inundated with appeals, because not all decisions being challenged will reach the threshold for an actual appeal hearing. Thus, while the *scope* of appeal may be broad, the permissible *grounds* for an appeal may be more limited, thus restricting the number of appeals.

4.2 Grounds for the appeal

When may decisions be appealed -- that is, on what basis may a decision be challenged? The organization's appeal policy should clearly set out the "grounds" on which a decision may be appealed. Typically the grounds of appeal relate to issues of proper authority and issues of procedural fairness, as discussed in the first part of this chapter.

Such grounds of appeal presume that decisions will be based upon policy and that such policies reflect the will of the membership and have been properly approved and implemented. Underlying this approach is the presumption that decisions should not be appealed just because someone is dissatisfied with the outcome. To allow this would undermine the decision-making authority of individuals and committees properly entrusted with making decisions in the first place.

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[14] It is important to distinguish between those matters for which a sport organization makes *recommendations* and those matters for which it makes *decisions*. For example, a sport organization *recommends* athletes for carding and *recommends* athletes for selection to national teams competing in international multi-sport games. If a sport organization does not recommend an athlete for carding or selection, the athlete's recourse for appeal is to the sport organization. However, final *decisions* on carding are made by Sport Canada and final *decisions* for selection to international games are made by the Canadian Olympic Association or the Commonwealth Games Association of Canada. If the final decision on carding or selection has already been made, then the athlete's recourse of appeal is to these bodies, not to their sport organization.

The practice of limiting grounds of appeal also assumes that the policies of the organization are clearly written and reflect a rational, workable and fair approach to the subject matter in questions – whether that be selection, discipline or some other issue relating to the allocation of rights and obligations in sport. No individual should be able to appeal the substantive aspects of any policy that is properly made by an organization. The normal and democratic method of making policy is the appropriate avenue for reviewing the substance of an organization's policy.

A selection dispute before the 1996 Olympics nicely illustrates this distinction between procedure and substance. Leading up to the Atlanta Olympics, Judo Canada put in place a fairly complex point system for selection based upon international matches. Part of the process anticipated that there could be a tie in accumulated points in any weight division and thus, not one, but three tie-breaking procedures were incorporated. However, the association never tested the third tie breaking procedure to make sure it worked as anticipated.

As it happened, it was necessary to invoke the third tie-breaking procedure which itself then gave rise to a certain controversial, albeit unanticipated dilemma.[15] The Association was

<u>Kane</u> v. <u>Canadian Ladies Golf Association</u>

Kane was a highly-ranked amateur golfer and a member of the Canadian Ladies Golf Association (CLGA) in 1992. She was vying for one of three spots on the Canadian Ladies World Amateur Golf Team that was to compete at the World Amateur Championships in Vancouver.

Prior to 1992, the approved policy of CLGA had been to select teams solely on the basis of differential average scores in designated national and international tournaments over the previous two years. On the basis of differential average scores, Kane had ranked among the top four golfers in the country in the five years leading up to the World Amateur Championships in 1992, including ranking second in the country in 1991 and 1992.

In February of 1992 the Director of the Teams Committee issued a written memo that altered the original selection criteria by adding a number of subjective elements, including *exceptional performances in provincial and national championships, international experience* and *results from past performances*. On the basis of these revised criteria, Kane was selected as an alternate member, and not as a playing member, of the Canadian Ladies World Amateur Golf Team.

Kane challenged the revised criteria in court, arguing that the CLGA had failed to follow its own rules by relying upon a selection process that was not properly approved. The court agreed, finding no evidence that either the Executive Committee of the CLGA, or the Teams Committee had approved the revised criteria. Furthermore, the court observed that even if the revised criteria had been properly approved by either committee, they were not properly implemented. Specifically, the selections were to be made by the Executive with input from the Teams Director and the National Coach, which did not happen, and there was also inconsistency in the time-span over which the differential scores were considered for different players.

Kane also asked the court to declare a new Canadian team for the World Ladies Amateur Golf Tournament. The court declined to do this, instead referring the matter back to CLGA to make the decision according to its own properly authorized rules and procedures. Due to the shortness of time between the court hearing and the Vancouver event, CLGA had no choice but to revert to the previous practice of selecting teams based upon two years of differential average scores, which resulted in restoring Kane to the team.

[15] Essentially, byes were not counted in the final point total. The higher ranked athlete in a tournament would typically receive more byes. The two athletes in question ended up accumulating the same number of points from the tournaments in which they each competed (that is, they achieved the same end placing in each tournament). The athletes achieved these results competing in different tournaments from one another although of a relatively similar degree of difficulty. The athletes were ranked differently going into their own respective tournaments resulting in a different number of byes for each. Under the third tie-breaking procedure, the difference between their final point total was the difference in the number of byes each had.

bound by its policy and applied the tie-breaking provision as written, even though it didn't work as anticipated; however, the athlete adversely affected by the process appealed. The initial appeal panel found the tie-breaking policy to be unfair and essentially rewrote the tie-breaking process. The matter then went to independent arbitration where the appeal decision was overturned. The following rather extensive quote from the arbitration decision[16] illustrates the rationale of the arbitration panel:

> *What the [Appeal Panel] did, in effect, was to substitute its own decision as to who was the better athlete and accordingly manipulated the rules of the Handbook by reversing the order of the criteria to arrive at that conclusion. This is clearly inappropriate especially in a case such as this, where the tie-breaking formula contained criteria that were clear, concise, objective and non-discretionary. It is not within the jurisdiction of the [Appeal Panel] to intervene into the affairs of Judo Canada and re-write their selection rules based on what the [Appeal Panel] thinks is fair, or what it thinks the criteria should be in order to select the best possible athlete. The tie-breaking formula involved, in essence, the mechanical application of the criteria set out in the Handbook: adding up points, identifying the highest category of tournament and counting the number of wins. There was absolutely no room for the abuse of discretion, subjective evaluation or ambiguity. In such circumstances, it is not for the [Appeal Panel] to become involved in whether the selection criteria enable Judo Canada to identify the best possible athlete. It is up to the experts in the sport organization which, in this case, was the Technical Committee ...*
>
> *The tie-breaking formula was set out in the Handbook so that all athletes knew well ahead of time what the "rules of the game" were in the event of a tie ... Decisions with respect to clear and concise criteria cannot be appealed simply because an athlete does not like the outcome and feels they are a better overall athlete than the person who won the tie-breaker. [To do this] would be grossly unfair.*

This decision highlights several important points. First, it recognizes the value of clear, objective criteria known by athletes well ahead of time. In so doing it sets out those aspects of organizations' policies and procedures that typically cause problems and lead to appeals – the abuse of discretion, subjective evaluation and ambiguity in policies and procedures. But the decision also goes on to emphasize that review panels should not rewrite the policies of organizations. Just as our courts do not have jurisdiction to rewrite legislation, policy is the sole prerogative of the duly elected, duly appointed and properly authorized committees and boards of the organization.

We have described situations where appeals are not appropriate and should not be heard. In what situations are there legitimate grounds for an appeal? Such situations are described below.

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[16] Arbitration Decision, Judo Canada. June 21, 1996 at p. 7.

4.3 Appeals based on lack of authority

Those individuals and groups making decisions must be properly authorized to do so. This refers not only to the identities of those making decisions, but also to the policies, procedures and rules pursuant to which such decisions are made.

In Kane v. Canadian Ladies Golf Association[17], the Chair of the National Teams Committee had no authority to change selection criteria, and also did not follow the properly authorized procedure in applying the existing criteria. In Lassen v. Yukon Weightlifting Association[18], the association lacked the authority to discipline a member by means of suspension of membership. In another decision, Omaha v. British Columbia Broomball Society[19], three athletes were suspended from the association for rough-housing on a bus returning from a competition. As in the Lassen case, the Society had no code of conduct or discipline policy and its bylaws clearly stated that members could *only* be suspended for non-payment of membership fees. Thus there was no authority to suspend the athletes for misconduct.

Kelly v. Canadian Amateur Speed Skating Association

Kelly was a speed skater and a member of the Canadian Amateur Speed Skating Association (CASSA). Like many high performance athletes, Kelly had entered into an athlete agreement with CASSA. This agreement formed a part of CASSA's governing documents, and stated that CASSA must publish selection criteria for national teams at least three months before the selection date. The agreement further stated that the selection process must conform to the generally accepted principles of natural justice as well as substantive and procedural fairness.

The original selection process specified that the top four skaters at the Canadian Championships would be names to the national team competing at the 1995 World Sprint Championships. One week before the Canadian Championships, CASSA unilaterally changed the selection criteria to specify that only the top two skaters would be chosen at the Canadian Championships (an event taking place outdoors in uncertain weather conditions) and the remaining two would be chosen following a subsequent World Cup meet (an event taking place indoors in controlled conditions). The coaches were in favour of this change, as were all of the athletes vying for a spot of the team, with the exception of Kelly.

Kelly finished fourth at the Canadian Championships. It had been part of his training plan to qualify in the third or fourth position and then to "peak" at the World Spring Championships some seven weeks later. Under the original selection process, he would have been named to the national team competing at the World Sprint Championship. Under the revised criteria, he was not.

Kelly immediately filed a notice of appeal. His appeal was rejected on the grounds that the changes to the selection criteria were reasonable and justifiable. Kelly then filed an action with the court for judicial review. The court found that the basis of the relationship between Kelly and CASSA was contractual. The athlete agreement set out terms and conditions of this contract that CASSA had clearly breached. Specifically, CASSA had changed the selection process without giving the athletes three months notice. The court thus ruled that the revised selection criteria were void, and as such Kelly had qualified for the national team and was entitled to represent Canada at the World Sprint Championships.

4.4 Appeals based on failure to follow policies

As described in the opening of this chapter, the

[17] Unreported decision, September 1992. P.E.I. Trial Division (Charlottetown). See case summary on page 13.
[18] Unreported decision, May 1995. Yukon S.C. (Whitehorse). See case summary on page 4.
[19] (1981), 13 A.C.W.S. (2d) 373 (B.C.S.C.)

policies and procedures of an organization form a contractual relationship with athletes, and with other members. Without the consent of the other party, significant deviations from such policies and procedures represent a breach of that contract.

In the case of Kelly v. Canadian Amateur Speed Skating Association[20], in addition to finding that there had been a breach of the individual Athlete Agreement, the court also struck down the appeal decision that the Association had made (a decision to reject Kelly's appeal of the decision to not select him to the national team) because the executive had not followed the Association's own appeal policy. This raises an interesting side issue: what if an organization is asked for an appeal but does not have such a policy or the policy is ambiguous or inappropriate?

This was the case in Fernandes et. al. v. Sport North Federation et. al.[21], where the Sport North Federation had no set procedures for appealing an issue on eligibility for the Arctic Winter Games. The court found that if there is no set procedure and an ad-hoc procedure is followed, the rules of natural justice, or procedural fairness, are implied terms of such a procedure. The court looked at whether the procedures used were in accordance with natural justice:

> *The basic requirements are notice, opportunity to make representations, and an unbiased tribunal. But, as numerous tribunals have held, the content of the principle of natural justice is flexible and depends on the circumstances in which the question arises. I must consider the peculiar circumstances of this case. The ultimate question is whether the procedures adopted were fair in all the circumstances.*[22]

4.5 Appeals based on abuse of discretion

This ground for appeal is similar to the previous category, and typically arises in the context of team selection. "Discretion" means giving the selector, who is often a coach, an opportunity to exercise judgment and make a subjective choice in coming to a decision. Discretion is not absolute but exists in degrees. Viewing it on a continuum, at one end the selector is given no discretion, because selection is based entirely on objective criteria such as physical performance or rank. There is nothing to evaluate and there are no choices to be made. At the other end of the continuum, the selector may be given complete discretion to consider any factors the selector considers relevant.

Between these two extremes there are a range of situations where the selector has varying degrees of discretion. In other words, discretion is controlled to a greater of lesser extent by the organization's policies. Where the selector goes beyond the discretion that is granted, then he or she is said to have "abused their discretion" – in other words, they have gone outside the parameters prescribed or authorized by the organization.

In a recent appeal over selection to the Canadian team competing at the 1999 Pan-American Games, a number of athletes argued that the coach, who was duly authorized to make

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[20] Unreported decision, February 1995. Ontario Ct. Gen. Div. (Ottawa). See case summary on page 15.
[21] (1996) N.W.T.R. 118. (NWT S.C.) See case summary on page 20.
[22] Ibid. at p. 123.

selection decisions, had abused his discretion when he ignored one of the selection criteria incorporated into the selection process[23]. In its selection policy, the association had set out nine criteria for the coach to consider: however, it had given the coach absolute discretion as to how he wished to weigh or rank the criteria. In other words, the coach could put whatever emphasis he felt appropriate on each criterion (although proportionally the same for each athlete) but he had to at least consider each criterion. The coach acknowledged he felt one criterion to be irrelevant and had not considered it. The athletes were thus successful in their appeal.

In another appeal,[24] the selectors were found to have prejudged certain athletes and applied the selection criteria in an uneven and ad-hoc manner, if they applied them at all. The Appeal Panel characterized the selection process as being entirely subjective, almost a "we know one when we see one" approach to team selection. It went on to say:

> *Such subjective approaches to team selection are inevitably followed by allegations of bias, unfairness and impropriety ... Some criteria must be used to ensure that any personal biases are eliminated, and some method of scrutinizing the selection process should be in place to ensure that even the subjective elements are fairly and properly applied.*[25]

While there needs to be some flexibility in the selection process to deal with unexpected circumstances and the selectors should be afforded some degree of judgment, there is a danger that completely unfettered discretion can lead to arbitrary decisions. And if it doesn't lead to actual arbitrariness, it certainly can give the perception of arbitrariness. Arbitrary decisions are not fair decisions and are, without exception, open to review.

Arbitrariness can be controlled by controlling discretion, using objective criteria, defining subjective criteria as much as possible, using more than one selector and providing reasons for selection, among other measures.

4.6 Appeals based on other grounds

Further grounds for appeal include a decision-maker failing to consider relevant information or placing weight on irrelevant information; exercising discretion for an improper purpose or in bad faith; or arriving at a decision that was wholly unreasonable. Unreasonableness in this case does not relate to a state-of-mind or an intention to be unfair, but rather to the end-result of the decision. In the cases of Meli v. Canadian Kodokan Black Belt Association[26] and Blaney v. Canadian Kodokan Black Belt Association[27] a court found it unreasonable to require athletes, already selected on their merits, to attend with virtually no notice a three-week training camp which would result in lost income in one case and loss of a job in the other. A similar example of unreasonableness in a discipline matter might be exacting a punitive sanction far in disproportion to the nature of the misconduct.

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[23] Internal and confidential appeal decision, National Sport Governing Body, August 1999.
[24] Internal and confidential appeal decision, Bobsleigh Canada, August, 1999.
[25] Ibid. p. 18.
[26] Unreported decision. July 1987. Alta. Q.B.(Lethbridge)
[27] Unreported decision. July 1987. Alta. Q.B.(Lethbridge)

PART 5. JUDICIAL REVIEW

A member of an organization, including an athlete, is never barred from taking a matter to the courts. However, what the courts can or will do is very limited. As noted previously, courts are reluctant to interfere in private matters, and it is well established that a party must first exhaust their internal remedies before seeking an external remedy. This principle has been affirmed time and time again in the Canadian sport community.[28]

Judicial review is not an appeal. The courts will not review the merits of a matter, nor will they review the *substantial* fairness of a matter. The courts defer entirely to the expertise within the private organization and, as shown in the Kane case, will not substitute their own decisions for those decisions more properly made by those with the necessary expertise. Courts will only review a procedural error. As well, the courts will not intervene where an organization has acted properly according to its policies and rules, no matter how unfair the outcome may seem.[29]

In McCaig et. al. v. The Canadian Yachting Association et. al.[30], two athletes argued they were denied the opportunity to fully compete for selection to the 1996 Canadian Olympic Sailing Team. The selection procedure involved three regattas; however, weather conditions forced the cancellation of the third regatta shortly after its commencement. The selection process made no contingency provision for cancellation due to weather and the Association argued there were no suitable alternate regattas available prior to the selection

Stachiw v. Saskatoon Softball Umpires Association

Stachiw was a softball umpire and a member of the Saskatoon Softball Umpires Association (SSUA). The Executive of the Association received information that Stachiw had been drinking beer at a game that he was umpiring, a practice prohibited by SSUA's rules. The Executive suspended Stachiw and gave Stachiw notice of the hearing at which he could speak to the suspension and, if he wished, refute the allegations that he was drinking beer.

Stachiw did not attend the hearing and SSUA confirmed his suspension for one year. The constitution of SSUA provided that the Executive could suspend a member for just cause provided that the member was given an opportunity to appeal the suspension.

Stachiw appealed his suspension and denied drinking the beer. The Executive heard evidence from a number of witnesses, including those who changed their testimony about the beer-drinking and denied that they saw Stachiw drinking beer. However, the Executive also heard evidence that this recanting of testimony had been done under some duress. At the end of the day, the Executive considered all of the relevant evidence and denied Stachiw's appeal, thus upholding his one-year suspension.

Stachiw appealed to the court. The court ruled that he was bound by the rules of SSUA and that he had been given a reasonable opportunity to refute the allegations made against him. Unless fraud could be proven, the court would not intefere to reverse a decision of an elected Executive acting properly and within the scope of its powers as set out in the constitution and policies of the SSUA.

[28] Kulesza v. Canadian Amateur Synchronized Swimming Association Inc. et al (1996) Unreported decision, Ont. Ct. Gen. Div. (Ottawa), Smith v. International Triathlon Union (1999) Unreported decision, B.C.S.C. (Vancouver), Gray v. Canadian Track and Field Association (1986), 39 A.C.W.S. (2d) 483 (Ont. H.C.), re Dickie et. al. and British Columbia Lacrosse Association et. al. (1984), 28 A.C.W.S. (2d) 178 (B.C.S.C.), Trumbley v. Saskatchewan Amateur Hockey Association (1986) 49 Sask.R. 296 (Sask. C.A.)

[29] Stachiw v. Saskatoon Softball Umpires Association et. al. (1985) 5 W.W.R. 651 (Sask Q.B.). See case summary on this page.

[30] Unreported decision, April 1996. Man. Q.B. (Winnipeg). Simonsen, J. at p. 6.

deadline. Selection to the team was thus made on the basis of the two completed regattas. The court in its decision stated:

> *There was no provision in the agreement which provided for an alternative if, without fault on the part of either party, the event could not be completed.*
>
> *If the relief sought by the applicants were to be granted, it would, by necessary implication, require the court to write into the agreement a clause which does not exist. Apart from a claim for rectification, I know of no basis upon which a court can rewrite a contract by inserting a fresh clause into the agreement, no matter how desirable it might be.*

PART 6. DISPUTE MANAGEMENT

The most effective way for dealing with disputes in sport organizations is to prevent them from occurring in the first place. This can often be achieved by planning ahead and ensuring that governing documents and key policies are sound, and that elected boards, committees, volunteers and staff implement policies properly.

When a dispute does arise in the sport setting, common ways to address the dispute include:

- Relying upon the internal appeal policies of the organization to hear the respective sides of the dispute and to make a decision as to which side will prevail;
- Where internal appeal policies are lacking, looking to policies of the parent sport organization, including provincial or national sport governing bodies, where appropriate;
- Where the dispute cannot be resolved by the sport organization itself, seeking

Trumbley v. Saskatchewan Amateur Hockey Association

This case involved a coach, Trumbley, who was a member of the Saskatchewan Amateur Hockey Association (SAHA). Trumbley was suspended for coaching a midget team in a tournament that was not sanctioned by SAHA or by the Canadian Amateur Hockey Association. The constitution of SAHA permitted suspension of members for participation in unsanctioned tournaments. Prior to the tournament in question, Trumbley and his team were informed by SAHA that the tournament was not sanctioned and that they would face suspensions if they participated.

After being suspended, Trumbley submitted notice of his intention to appeal SAHA's decision. Shortly after, he withdrew his appeal and instead brought court action against SAHA. The Saskatchewan Non-Profit Corporations Act contains an unusual provision relating to discipline by private associations of their members, and allows an aggrieved member to apply to the court to issue an order when the member has been treated unfairly. Trumbley argued that SAHA's constitution and policies violated this statutory provision and that the decision to suspend him was unfair. The trial court agreed and overturned Trumbley's suspension.

SAHA appealed the trial court's decision and on appeal the court held that Trumbley could not seek judicial review of SAHA's decision until he had exhausted all other available remedies. SAHA had offered Trumbley and appeal, and in the court's view there was nothing to suggest that he would not have received a fair hearing by the appeals committee. As well, the court noted that the appeal could have been conducted in a timely manner as Trumbley had been suspended in the summer and the new hockey season was not yet underway. Finally, the court stated that the internal appeal hearing was clearly preferable to court action in terms of convenience, timeliness and cost to the parties.

assistance of government representatives or elected officials who have influence through their funding policies;

- Where political routes fail, gaining public support through coverage in the media; or
- As a last resort, seeking recourse to the courts.

Some additional options for resolving conflict that are often more appropriate and desirable than those listed above include various techniques of alternative dispute resolution, or ADR. In the sport community, the following three techniques of alternative dispute resolution are the most common and are being used more and more frequently by athletes, coaches and others:

Negotiation

This is a process where two parties in dispute work together without outside help to reach a mutually agreeable settlement.

Mediation

This is a process where an independent, neutral third person helps parties in a dispute reach a mutually agreeable settlement by facilitating negotiations between them. Mediation can be a powerful technique for dealing with conduct and discipline matters.

Arbitration

This is a process where the parties refer their dispute to a mutually acceptable, knowledgeable, independent person to determine a settlement. The parties usually agree beforehand to be bound by the arbitrator's decision. Binding arbitration is often the best option for resolving selection disputes, where compromise solutions or "win-win" outcomes are not suitable options.

In almost all cases, the above techniques are simpler, less costly, less adversarial and more timely than legal action in the court system. In many cases, they are also preferable to taking a dispute to the media or to government. As well, disputes are messy and referring a dispute to an outsider may mean that positive internal relationships and clear communication channels are preserved.

Fernandes v. Sport North Federation

This case involved a dispute about the eligibility of two figure skaters who had qualified for the NWT team competing at the 1996 Arctic Winter Games. There was some concern about their residency (and thus their eligibility to compete) and the Sport North Federation resorted to its usual practice of asking the Technical Committee of the host organization for a ruling.

The Committee ruled they were NWT residents and thus eligible. The governing body for figure skating in the NWT became concerned because if the skaters were later found to be ineligible, it could jeopardize the entire team. This body asked Sport North Federation to review the skaters' eligibility, which they did using ad-hoc procedures, ultimately determining that the skaters were not eligible.

The skaters went to court, arguing that the initial decision of the Technical Committee should stand. In particular, they claimed that Sport North Federation had no formal procedures for reviewing eligibility and no appeal mechanism, and that the usual practice of sending the matter to the Technical Committee should be relied upon in their case.

The court found that the process used by Sport North Federation, while ad-hoc and improvisational, was not inherently unfair in the circumstances. The basic requirements of fairness had been met because the skaters were given notice and were allowed to make representations before unbiased decision-makers. As well, Sport North Federation had not acted arbitrarily, in bad faith or otherwise outside its jurisdiction.

The court also pointed out that Sport North Federation might wish to correct and formalize its procedures, so as to avoid similar problems in the future.

Dispute resolution within an organization can be enhanced by putting in place the proper policies to keep a dispute from getting out of hand, going public or ending up in court. These policy tools are:

- Bylaws that gives the board explicit power to implement policies for dispute resolution and a statement that all disputes will be dealt with accordingly;

- Unambiguous, clearly written policies to guide all decision-making about granting and revoking of rights and privileges of sport (that is, policies for eligibility, selection, conduct, discipline, harassment and conflict of interest);

- An appeal policy to review decision-making where and when procedural errors may have occurred;

- A policy which indicates that at any time any dispute may be referred to mediation, where suitable for the issue in dispute and where the disputing parties consent (keep in mind that mediation isn't a solution to every problem, as some disputes, such as selection, simply do not lend themselves to a mediated resolution);

- A policy which states that beyond the appeal level, all disputes will be referred to independent, binding arbitration; and

- A provision in policy that prohibits any member from pursuing a dispute in court until all other internal and independent remedies, as set out above, have been exhausted. This may also be called a "privative clause" and even though a person always has the right to take a matter to court when a procedural error has occurred, such a clause will restrict the basis on which a court challenge may be made.

PART 7. CONCLUSION

In recent years we have witnessed an increase in litigation in amateur sport. Much of this litigation has occurred in the area of "athletes rights" – that is, the rights of participants in the sport experience to equitable opportunities and fair decision-making procedures and remedies. The willingness of today's amateur athletes, at all levels of the sport system, to resort to the extreme measure of litigation is likely the result of several factors, including:

- Athletes having a greater understanding and awareness of their rights;
- Athletes having more to lose financially by not protecting their rights (future sponsorship income, future scholarship opportunities, future employment income and opportunities);
- Strong public support, and growing political support for a sport system that is more "athlete-friendly"; and
- An overall societal trend towards greater litigation.

Many Canadian amateur sport organizations have taken steps to improve their governing policies and to incorporate fair procedures and alternate dispute resolution techniques into their decision-making systems. However, it is still generally the case that athletes remain in a disadvantaged position and are the weaker party when it comes to disputes with sports administrators. Although the funding policies of most governments require that sport organizations allow athletes to hold positions on boards and committees that make decisions affecting athletes, it is evident that many active athletes, through no fault of their own, do not have the knowledge, skills or time to be effective in policy-making or decision-making roles.

As well, the organizational structure of an average national sport governing body does not include athletes as "members" of the organization: rather, the actual members are local, regional, provincial and territorial sport bodies and these entities are represented at the national level by sport administrators and volunteers. As a result, athletes are often "disenfranchised", do not have a powerful membership voice and are unable to influence their organizations through conventional policy-making channels.

In light of the imbalance of power between organizations and athletes, the growing acceptance in sport of alternate dispute resolution techniques is a positive development.[31] Mediation and arbitration techniques are advantageous because they are quicker and less costly than litigation – but more importantly, they can be readily accessed by all parties. Managed properly, these technique can also go a long way to correcting the inherent imbalance of power between disputing parties so that disputes are heard more openly and resolved more equitably.

[31] In January 2000, the Secretary of State for Amateur Sport announced a Ministerial Work Group to develop a National Dispute Resolution System for Amateur Sport in Canada. A voluntary program has existed in Canada since 1995, and the Working Group will be looking at ways to improve this program, to make participation mandatory and to extend it to the provinces and territories.