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# Scope of Review, Standard of Review and Authority to Grant a Remedy: An Analysis of Three Policy-Based Rules in a Sport-Specific Arbitration Process

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## ABSTRACT

*With an increasing number of sport disputes being heard by way of arbitration, some have called it a 'growth industry'. Much has been written on the relative benefits of sport-specific arbitration processes as compared to the litigation process but few contributions have probed more deeply to address the function*

*and design of such a process. The purpose of this paper is to examine how certain prescribed rules of an arbitration process can serve as instruments of sport policy.*

*Three rules of the arbitration process, each of which goes beyond a basic rule of procedure operation and has important policy implications for the sport organisation and sport in general, are discussed. The three rules relate to the proper scope of review of the adjudicator, the standard of review to be used in defining an error and the scope of authority of the adjudicator in crafting a remedy. Each of the rules can affect not just the outcome of a decision, but also the role decision-makers play within the sport organisation.*

*The underlying premise of this paper is the view that the arbitration process and, more specifically, the rules of arbitration should be designed to support and to facilitate the desired function of independent sport arbitration. What that function is must be considered in light of the sport organisation's own governance and policy-making role. Policy-based rules of procedure such as the three discussed here, can either support that role or make incursions into the independent functioning of the sport organisation.*

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## KEYWORDS

Sport - Sports Law - Policy - Arbitration - Canada

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## INTRODUCTION

An increasing number of sport disputes are being dealt with through private systems of justice. These systems have the potential to offer alternative methods that are often more responsive and more effective than litigation. In the sport context, arbitration has emerged as the dominant method of dispute resolution in several countries including the United States, the United Kingdom, New Zealand, Australia, Japan, China and Canada, as well as internationally through the international Court of Arbitration for Sport (CAS). James Nafziger (2001, p. 357) calls sport arbitration a 'growth industry' and views the expanded role of CAS as one of the most important developments in sports law in the past several years. 1

The advantages of sport-specific independent arbitration are well established and documented elsewhere (Haslip, 2001; Hayes, 2004; McLaren, 1998). The underlying premise of this paper is that the arbitration process and, more specifically, the rules of arbitration should be designed to support, and indeed, facilitate the desired function of independent arbitration. This paper discusses the intersection between certain rules of the arbitration mechanism and the underlying policy rationale for such a mechanism in the first place. Specifically, three questions will be asked and, hopefully, a start at carving out answers will be made: 2

Question one: what is the appropriate *scope of review* of a decision within the context of an independent arbitration of a sport dispute? In other words, how broad are the grounds upon which an original decision should be reviewed upon arbitration?

Question two: what *standard of review* should be applied to such a hearing – what is the threshold for a finding that an error has been made by the original decision-maker?

Question three, what *scope of authority* should an arbitrator have in applying a remedy where an

error is found in the original decision? That is, what kind of remedy can an adjudicator apply?

These three questions have been selected because together they constitute the crucial policy aspect of an arbitration system, as opposed to the distinctly procedural rules that allow the system to operate. They can affect not just the outcome of a decision, but also the role decision-makers play within the organisation and even the policies of the organisation. In other words, they can affect the autonomy of the organisation and the organisation's place within the sport system. 3

### THE FUNCTION OF ARBITRATION IN THE SPORT SYSTEM

It is suggested here that arbitration, apart from being a mechanism of dispute resolution, is also an instrument of policy. As such, its function must be clearly understood in terms of the purpose, or need, that arbitration is intended to meet and be consistent with other policy objectives of the sport system and the sport organisations that make up the system. Further, its structure must be carefully designed to support that function and, in so doing, meet the need. Thus, apart from making the adjudicative process more efficient, less costly and more sport friendly, what is the *function* of an arbitration process designed specifically for the amateur sport system? Where and how does it fit into the overall sport system? Is it intended to become a replacement of the internal appeal process of the sport organisation? Or is it intended to be a second tier of appeal after the internal appeal of the sport organisation; that is, an independent review of a decision already taken by the organisation and, technically, not an arbitration at all? Or is it intended to be a 'final and binding' determination of a dispute, meaning that the parties may not make a further appeal of the arbitration decision to a court of law and that the decision will be legally enforced against a party? Whichever of these functions is performed by the arbitration process, none of them precludes a party's right to judicial review in the face of a procedural or jurisdictional error (Chornencki, 1999). 4

Closely tied to and having an impact on the function of the arbitration process are questions concerning the appropriate scope of review and standard of review that should be used. Is the arbitration system intended to be a review for errors that may have been made within the internal appeal process of the sport organisation, or a whole new review of the situation, such as occurs through a hearing *de novo*? What can or should be reviewed? Should the standard of review be that of the organisation in its own internal procedures, that used by the courts in a judicial review or some other independently determined standard? And if an arbitrator does determine that an error has been made, what relief should the arbitrator be able to grant the aggrieved? Should the matter be sent back to the original decision-maker to correct the error and render a decision or should the arbitrator have the authority to substitute his or her own decision? 5

These are important questions to consider, particularly in the context of a multi-layered sport dispute resolution system and the answers will be dependent on the perceived (and, it is hoped, stated) function of the system of arbitration that has been put in place. In fact, such considerations should inform, if not determine, the very procedures and rules of arbitration. Form should follow function - not the other way around. The arbitration process, and more particularly, the rules of arbitration, should be constructed so as to fulfil the function contemplated for the arbitration process and ensure it plays not only an appropriate role in the sport system but also the intended role in the resolution of disputes in sport. 6

The case of the American Olympic wrestler, Matt Lindland, stands as a clear example of a case where, as Nafziger put it (2001, p. 361), 'function followed form' (not form following function) in a dispute resolution system and as a case which eventually led to significant unintended consequences, chaos for all parties involved, and a total of some 15 judicial or quasi-judicial interventions (Thompson, 2001, p. 407). During the course of the 2000 United States Olympic wrestling trials Mr. Lindland sought to appeal the outcome of one of his matches. He was denied at two levels of appeal within the United States Wrestling Association (USWA) and, as a result, his opponent was named to the United States Wrestling team (and in so doing, involved the United States Olympic Committee (USOC)). Lindland subsequently applied for independent arbitration of the matter, as he was entitled to do under the terms of the U.S. Amateur Sports Act 1978. Unfortunately, the rules of arbitration did not allow for the affected athlete, Keith Sieracki, (who by that time had been named to the Olympic team) to be a party to the proceedings. Sieracki eventually initiated his own arbitration in a wholly independent proceeding from that of Lindland. Lindland was successful in his arbitration as was Sieracki in his. Each applied to the courts to have their arbitral decisions upheld. 7

The USWA and the USOC were now in the untenable position of being faced with two completely incompatible decisions as a result of a multiplicity of different proceedings. Eventually, the two matters were consolidated and a single outcome achieved. However, as noted by Nafziger (2001, p. 371), '[The] problem lay not in the second arbitration (that is, that of Sieracki) but in the structure of dispute resolution that encourages proliferation and, worse yet, redundancy of proceedings'. Of particular concern in this case according to Nafziger, were issues concerning the scope of review of both adjudicators in 8

arbitrations and of the courts and the standard of review to be used in assessing certain decisions, particularly those of officials within the sport and those of a discretionary nature.

This case more generally highlights the need to consider and define carefully what sort of decisions ought to be reviewed (or not reviewed) and by whom; who the parties to an adjudication should be; and any limitations that should be put on the scope of a review by an adjudicator (that is, should an adjudicator be able to review a matter on its merits or should he or she be limited to simply a review of any procedural or jurisdictional errors that may have taken place in the preceding hearing). Also, where an adjudicator finds in favour of the complainant, should that adjudicator be able to substitute his or her own decision for that of the original but flawed decision, or should that flawed decision be sent back to the original decision-maker to correct the error and reconsider the matter? Should the adjudicator's authority extend to modifying, directly or indirectly, intentionally or even unintentionally, the underlying rules or policies of the organisation from which the original decision came? It is suggested that the answers to all these questions flow from a careful and necessary consideration of the intended function of each stage of a dispute resolution system – from original decision within the sport organisation to the appeal stage and finally, to the independent arbitration - and should be answered in the careful design of the rules under which the arbitration mechanism operates. 9

### GROUNDS FOR APPEAL WITHIN SPORT ORGANISATIONS

This next section addresses the nature of the internal appeal process of a sport organisation and leads into a discussion of where a system of arbitration might fit into such a structure. The grounds, or bases, upon which an initial decision made by a sport organisation may be appealed, can be defined either narrowly or broadly. Typically, narrow grounds of appeal reflect the same grounds available for judicial review, that is, errors in procedure or errors of jurisdiction in the original decision. Alternatively, an organisation can choose to broaden the grounds of appeal to allow a more extensive review of the initial decision to the point where an appeal can be a full rehearing of the matter. 10

The basic rationale behind the narrow grounds of appeal is that the appeals are viewed as necessary for correcting errors in decision-making, not for re-deciding matters. An appellant should not be able to challenge a decision simply because he or she disagrees with it. Essentially, the narrow scope of appeal recognizes the proper policy-making role of the organisation. It doesn't preclude appeals where a policy has been improperly adopted or adopted in bad faith but, where a policy has been properly and lawfully adopted by the organisation, decisions relying on the application of such policies should not be the subject of appeal by an individual member who simply does not support such a policy. Such issues should more properly be addressed through democratic channels within the governance and policy-making structure of the organisation. In Canada at least, very few sport organisations actually use the broad grounds of review (a compilation of the appeal policies of 21 national sport organisation can be found at ([http://www.adrsportred.ca/resource\\_centre/appeal\\_policies\\_e.cfm](http://www.adrsportred.ca/resource_centre/appeal_policies_e.cfm))). 11

Thus, the typical dispute resolution system operating within the Canadian national sport system and in many other jurisdictions, involves three levels. There is the initial forum within the organisation for decision-making, typically done in accordance with the terms and conditions set out in a policy (for example, decisions made pursuant to a selection policy or disciplinary matters dealt with in accordance with a conduct or discipline policy). At the second level, the initial decision may be appealed *within* the organisation (either on narrow grounds of appeal or more broad grounds as described above). Finally, at the third level, the appeal decision may be reviewed by the courts specifically where a jurisdictional or procedural error is alleged (Chornencki, 1999). Indeed, the courts have recognized this hierarchy of decision-making and review requiring that, except in exceptional circumstances where an internal appeal is impossible or futile, an aggrieved party exhaust any internal remedies available within the sport organisation before seeking redress before the courts (*Gray v Canadian Track and Field Association* (1986) 39 ACWS (2d) 483; *Smith v International Triathlon Union* (1999) Unreported Decision, BCSC (Vancouver)). 12

What happens when an independent system of arbitration is introduced into the structure? In April 2004 a formal dispute resolution program was introduced to the Canadian national sport system ([www.adrsportred.ca](http://www.adrsportred.ca)). Since 1995, efforts had been undertaken by the Canadian sport system to introduce an independent arbitration process specifically for sport (Haslip, 2001). In 2004 a formal, government funded process was instituted. The arbitration process was established to operate between the second (internal appeal process) and third (court-based review) levels of hearing discussed previously. While such a process of arbitration cannot completely oust the jurisdiction of the court (for example, where a procedural or jurisdictional error has occurred), it is certainly a mechanism that has been established to be 'final and binding' on the parties and thus constitute a final resolution to a matter in dispute (ADR-Sport-RED Code, 2004, RA-16 (b), ([http://www.adrsportred.ca/tribunal/doc/CodeFinal\\_E.doc](http://www.adrsportred.ca/tribunal/doc/CodeFinal_E.doc))). This is in contrast to most other sport-based programs, including those in the United Kingdom, Zealand, Australia 13

and the United States, which rules provide for a further appeal to CAS.

### WHAT IS THE APPROPRIATE SCOPE OF REVIEW?

Returning to the first of the three questions originally posed in this paper: what is the appropriate *scope of review* of a decision within the context of an independent arbitration of a sport dispute? How broad are the grounds upon which an original decision can be reviewed? Rule RA-15 of the rules of procedure ([http://www.adrsportred.ca/tribunal/doc/CodeFinal\\_E.doc](http://www.adrsportred.ca/tribunal/doc/CodeFinal_E.doc)) for the arbitration process in the Canadian sport system reads:

The Panel shall have full power to review the facts and the law. In particular, the Panel may substitute its decision for the decision which gave rise to the sports-related dispute and may substitute such measures and grant such remedies and relief that it deems just and equitable in the circumstances.

The key phrase is the first part of that rule – ‘[The] Panel shall have full power to review the facts and the law’. It can certainly be suggested that the program contemplates a full hearing *de novo* of the original matter even if it does not explicitly say so. Such an interpretation would be consistent with recommendations coming from the interim dispute resolution program as it ended and the permanent program was established. In its final report, the Interim Program Committee urged the newly established body responsible for the permanent arbitration process for sport to ‘continue with the practice of *trial de novo*’ that had been a part of the rule structure of the interim arbitration process (Girardin 2004 at p. 27). Rule RA-15 remained the same in the permanent program.

The effect of this rule is that the arbitration can be a completely new hearing of a matter and gives the adjudicator broad decision-making powers. It has, theoretically, changed the dispute resolution process at the national level in sport in Canada from that of a pyramid where, as previously described, the initial level of decision-making is wide open, limited only by the terms and conditions of the policies under which a decision, such as a selection decision, may be made. The breadth of review then typically narrows at the second, or internal appeal, stage considering only procedural errors or errors of jurisdiction that may have occurred during the course of the original decision-making process. The third and final level of review is a very limited review before the courts. The arbitration rule has changed the decision-making and review process to that of an hourglass where, once the review leaves the purview of the sport organisation and goes to independent arbitration, it is completely opened up for a rehearing and, as well, the adjudicator has full discretion to substitute his or her decision for that of the original decision-makers within the organisation.

Thus, under the rules of arbitration, the arbitrator has a very broad scope and ability to review any internal decision of a sport organisation. Indeed in many cases, the adjudicator has even greater scope of review than the internal appeal panel of the sport organisation where the organisation has adopted a narrow basis of review as a part of its own internal appeal policy. In these situations, it is clear that the structure of the arbitral review process has considerably broadened the scope of review of the traditional design of the appeal mechanism, disturbing what was an incremental model where the scope of review narrowed the further a challenge to a decision moved along the system. That model has been replaced by one where a challenge of a decision *within* the organisation by way of an appeal is narrow, the next level of challenge, external to the organisation, is wide open and the final level of challenge before the courts is once again narrow. It raises the question, and a number of sport organisations are already asking, why would an appellant (or a sport organisation) even bother with the internal level of appeal? Why not simply go directly to independent arbitration?

This raises a number of issues for the parties contemplating going to arbitration. *Vincent and Kiesner v Equine Canada* SRDCC 15 April 2005 involved a dispute between an equine sport organisation and a trainer. The issue involved the liability of the trainer for a doping infraction involving the horse. There was no disagreement on the facts, and indeed, counsel for the trainer acknowledged that the horse had been given a particular substance by the veterinarian which, if found in a doping test, would be categorized as a prohibited substance. That aspect of the matter was never raised as an issue at the doping hearing as it was accepted as fact by all the parties. The rules of the organisation state that where a horse is found to have tested positive, it is the trainer who is to be held responsible. Counsel for the trainer argued a due diligence defence at the original hearing, maintaining that the veterinarian should be held responsible, not the trainer. The rule of the organisation was interpreted by the Panel hearing the matter as one of strict liability and thus found the trainer liable. The trainer appealed. The parties agreed to waive the internal appeal process and go directly to arbitration. The question arose as the scope of review of the arbitrator.

Counsel for the trainer argued that the adjudicator had the power to order a hearing *de novo* and that anything that would be relevant to the matter if it were being heard for the first time should be on the table. Counsel for the organisation argued that this was far too wide a scope of review. The appeal policy

of the organisation was narrow, essentially allowing for a review of procedural or jurisdictional errors. Counsel for the organisation acknowledged that this scope of review was much narrower than that contemplated by the arbitration process; however, he also argued that the scope of review for the arbitration should be no wider than that of the original hearing. He set out three positions that could be taken with regard to the review: first, the adjudicator could consider all matters that were *actually* raised at the original hearing; second, the adjudicator could hear all those matter that *were raised or could have been* raised at the original hearing *but were not* (for example, the testing protocol itself, whether the substance was prohibited, and all those things that simply were not an issue at the first hearing) – this would be, it is suggested, a true ‘hearing *de novo*’; or, third, the adjudicator could hear anything that could have been raised, so long as it was relevant, but was precluded by the rules and policies of the organisation which would not allow consideration of such matters. This last position might be more theoretical than actual, although with regard to a selection matter, perhaps one might argue a particular factor was relevant to the selection performance but was excluded by the selection criteria; in other words, a factor outside of what the original decision-makers were permitted to consider because the policy precluded its consideration.

The dilemma is apparent. Not only is the rule broad in scope but its breadth can be interpreted in different 20 ways, and this makes it very difficult for the organisation and the decision-makers within the organisation. It is possible that a decision may be reviewed on grounds that were not even considered, or even permitted to be considered, by the original decision-maker or by the internal appeal panel.

What has become clear over time, and over the 56 decisions of arbitrators within the Canadian arbitration 21 process ([http://www.adrsportred.ca/resource\\_centre/jurisprudence/index\\_e.cfm](http://www.adrsportred.ca/resource_centre/jurisprudence/index_e.cfm)), is that adjudicators do not seem inclined to interfere with the rules and policies of the sport organisations. So, alternative number three as described above – ‘an adjudicator may consider anything that could have been raised except for the rules and policies of the organisation which would not allow consideration of such matters’ is not likely. In the *Vincent* case, the adjudicator was prepared to hear only what was raised at the original hearing. He chose alternative number one. He was not prepared to move to a full hearing *de novo*. In this case it was clear to all parties what had happened and the real issue rested on the interpretation of the rule. However, where it is not clear how a matter arose or there is disagreement with regard to the facts of the matter, the adjudicator could quite possibly, and probably will, broaden the scope of the hearing to alternative number two identified in *Vincent* – ‘all those matters that were raised or could have been raised at the original hearing but were not’. This becomes a particular issue where the parties agree to waive the internal appeal and go directly to arbitration. It behoves the parties (or at least the sport organisation) to very clearly identify and confirm the issue or issues to be reviewed by an adjudicator, if this is possible.

There are then, a number of issues to consider, not just in determining the scope of review, but, where a 22 broad scope of review has been determined, just how broad it is? The broader the scope of review the more it usurps the authority of the sport organisation as the adjudicator can, at least theoretically, move beyond the authority of the internal appeal panel as described in the organisation’s appeal policy, and consider matters not heard within the organisation’s own processes. Thus, a consideration of the appropriate scope of review very much has policy implications for the sport organisation and the sport system as a whole.

## WHAT IS THE APPROPRIATE STANDARD OF REVIEW?

Having considered the scope of review of a decision, the second question asks: what standard of review 23 should an adjudicator use in determining whether an error has occurred? At its root, a discussion of the standard of review is about what constitutes an ‘error’. Any party challenging a decision is alleging that the original decision-maker made an error. The question the adjudicator must ask is ‘what threshold of error must be met for the decision to be quashed or reversed?’ This is a very important question as the outcome of any arbitration can very well turn on the answer. As noted by one legal scholar (Falzon, 2001, p. 6): ‘[The] need to determine and apply the proper standard of review is inescapable in any legal system charging one decision-maker with the responsibility of reviewing the decisions of another decision-maker.’

The question here does not relate to procedural errors but to substantive errors, that is, errors of ‘fact’, 24 ‘law’ and ‘discretion’. In these cases, reviewers of decisions must make sure they clearly understand their role (Falzon, 2001):

- Is it the job of the reviewer to step into the shoes of the original decision-maker and uphold the decision only if he or she agrees with it?
- Should the reviewer ‘defer’ to the original decision-maker’s decision, even if he or she might have come to a different decision?

- If some degree of deference to the original decision-maker is appropriate, are there any limits to such deference?

These questions, of course, are asked within a context. In selection decisions for example, it is typically the coach and assistant coach along with others working in the area of high performance sport, who make the decisions about team membership. These people most often have years of expertise and a deep knowledge of their subject area. For example, one decision currently being appealed within the Canadian sport system deals with the funding, or 'carding', of an athlete. A monthly stipend is given to a certain number of athletes per sport who can demonstrate potential to reach the top 16 in the world in the quadrennial between Olympic Games. Top 16 is the performance standard that has been set by the Canadian Olympic Committee. How does one predict potential to make the top 16? This particular sport organisation has put together a committee consisting of the national coach and specific event coaches as well as elite athletes who have reached the top 16 in their discipline. These individuals look at the training environment, training partners, coaches, and past performance trends of the athletes, among other factors. Where a dispute arises over a funding decision and the parties ultimately go to arbitration, the arbitrator must consider on what basis the original decision should be reviewed. Who is in the best position to determine or interpret 'potential to reach top 16' and on what basis should such a determination be made? 25

The judicial system has recognized a spectrum of 'standards of review' for alleged substantive errors, each representing a different degree of judicial tolerance for what might be defined as an error. Within this spectrum, at least in Canada, three standards have been identified as 'major signposts' (*International Forest Products Ltd v British Columbia (Forest Appeals Commission)*, [1998] 12 Admin LR 45 at 53). At one extreme is the least deferential standard reflected in the 'correctness' test (*University of British Columbia v Berg* [1993] 2 SCR 353). Using this standard, a decision may be overturned if the reviewer simply disagrees with the original decision-maker, that is, what is 'correct' is the decision the adjudicator would have arrived at had he or she been making the original decision. At the other extreme is the most deferential standard reflected in the 'patently unreasonable' test (*Canada (Attorney General) v Public Service Alliance of Canada* [1993] 1 SCR at 690). Using this standard only decisions that are 'clearly irrational' will be overturned - decisions where there is absolutely no supporting evidence. 26

There are of course, theoretically, an infinite number of standards in between these two extremes; however, a third, or intermediate standard is reflected in the 'reasonableness simpliciter' test. Using this test, a decision will be overturned if it is 'clearly wrong' (*Canada (Director of Investigation and Research) v Southam Inc* [1997] 1 SCR. at 748). Put another way, if the decision is one based on a reasonable interpretation of the facts and the law, albeit not necessarily the only interpretation available, it will be upheld. 27

There is no explicit rule within the Code of Procedures (ADR-Sport-RED Code, 2004) of the Canadian arbitration process relating to what standard of review is to be used. Perhaps the closest reference comes from words in a rule relating to the remedy granting power of the adjudicator. The pertinent part reads: 28

The Panel may grant such remedies and relief that it deems *just and equitable* in the circumstances (ADR-Sport-RED Code, RA-16(b)).

If an error is found, then the adjudicator can substitute a remedy that is 'just and equitable' implying that the previous decision was unjust and inequitable. It may thus be inferred the standard of review may be that the decision be 'just and equitable', or essentially, reasonable, except in the case of a doping appeal (which, in Canada, is now heard under the arbitration process) and in which the standard of review is explicitly that of 'unreasonableness' (ADR-Sport-RED Code, AD-9.1). 29

While the subject of the standard of review has been, and continues to be a topic of vigorous discussion within the legal community (Blake, 2001 p. 174 - 177), it has in general not been argued in sport cases coming before either arbitrators (at least before the introduction of the sport-specific arbitration program in April 2004) or the courts in Canada (both seeming to have implicitly applied the reasonableness simpliciter standard). How far can an arbitrator go in reviewing the substance of a dispute? 30

It has been suggested (Blake, 1999 at p. 176) that where the reviewing tribunal has particular expertise in the area and the document being interpreted is non-statutory, for example a policy or regulation of the sport organisation, the appropriate standard of review is reasonableness simpliciter. Thus it may be argued that, even though the rules of procedure of the Canadian sport arbitration process give the arbitrator broad discretion to hear matters, including authority to review the merits of a dispute (as opposed to a review purely for procedural or jurisdictional errors), nevertheless, decision-makers within organisations may be given deference particularly in decisions involving the use of discretion by experts. Selection to teams is one obvious example of a decision area that can have a large discretionary element and is typically made by knowledgeable and expert people. Indeed, adjudicators have been prepared to 31

recognize the knowledge, expertise and skill of coaches, who typically make the selection decisions. In *Adam v Equine Canada* (SDRCC 21 July 2004) the Arbitrator acknowledges that:

In principle, Arbitrators should pay great deference to selection of specialized selection committees... If selection involves some discretionary decisions on the part of the selection body, again, those decisions should not lightly be interfered with, unless the Arbitrator finds there is no reasonable basis for the making of the discretionary decisions.

And in *Boylen v Equine Canada et al* (SDRCC 11 July 2004) the Arbitrator wrote at p. 12: 32

I believe the correct standard in these circumstances to be that of reasonableness and would be reluctant, absent full argument on more explicit facts, to set a standard at patent unreasonableness before I could intervene. Similarly, I believe that sufficient deference is warranted by decisions made by expert bodies. Absent clear misdirection, mere correctness is too low a standard for overturning such decisions.

Certain trends seem to be emerging within Canadian decision-making. Notwithstanding the very broad scope of review of the Canadian arbitration program and the wide authority given to its adjudicators, in reality, it seems clear that the arbitrators within the program have been reluctant to go so far. Arbitrators have limited their reviews and have examined only whether or not organisations have followed their own policies and they have exercised their discretion narrowly. They have essentially acted with restraint and in accordance with a narrow form of review. They have not ventured so far as to affect the policies of organisations even where such policies are seemingly flawed or where, as in the case of one matter, the arbitrator took issue with a selection policy which was so flawed in design that the best athlete could not be selected but, still, he upheld the selection decision. Thus, in *Sergerie v WTF Taekwondo Association of Canada* (SDRCC 5 December 2003 at p. 7) the Adjudicator wrote '[It] is not for this Panel to rewrite the rules that are believed to have been properly reviewed and adopted'. The criteria as drafted were applied properly and the Adjudicator therefore felt he did not have the authority to interfere. The application of the athlete failed. 33

Arbitrators have respected the authority of sport organisations to determine their own policies, even poor policies, so long as such policies have been made properly and in good faith. Such decisions of the arbitrators are now forming a substantial body of jurisprudence and are informing (and perhaps it can be said, constraining) the rules of procedure of this new system of arbitration for sport in Canada. 34

As described by the Arbitrator in *Dionne v Canadian Cycling Association* (SDRCC 16 July 2004 at p. 10), '[The] role of the arbitrator [in the Canadian sport arbitration process] is to ensure that the team selection process has been conducted in a manner that is manifestly fair and devoid of bad faith, arbitrariness or discrimination'. This view has been confirmed in a number of other cases including *Zilberman v CAWA* (SDRCC 28 July 2003 at p. 8) and *Martino v Canadian Cerebral Palsy Sports Association* (SDRCC 29 June 2004 at p. 13). 35

Thinking about questions such as 'what standard of review is appropriate for what circumstances', forces policy-makers to think carefully about the fundamental purpose of the decision-making tribunal and implications of that purpose for its design. Indeed, decisions about 'what standard of review' affect many other aspects of the system. As part of a system wide review of administrative tribunals in the Province of British Columbia in Canada Falzon (2001, p. 47) wrote: 36

Where legislators [or policy-makers] determine that an administrative tribunal serves 'core values', it will undermine those values to have the tribunal's decisions regularly and easily challenged by the courts. Thus, the decision about the standard of review will necessarily force legislators to think about critical antecedent questions such as whether the tribunal has the jurisdiction, procedures, qualifications, expertise and appointments necessary to carry out its functions effectively.

These words are useful guidance for those designing systems of arbitration but also those designing internal organisational appeal mechanisms. 37

## WHAT REMEDIES SHOULD BE AVAILABLE TO THE ADJUDICATOR?

The third question to be addressed asks 'what remedies should be available to the adjudicator'? Focusing on the internal sport organisation appeal and, in keeping with the practice of respecting a narrow scope of appeal, adjudicators of such appeals are typically limited in their scope of authority when ascribing remedies. Usually, where an appeal is upheld, an appeal policy will direct the decision-maker to refer the matter back to the original decision-maker, who is typically the expert in such matters, for a new decision correcting the error. Or, where time, lack of clear procedure, or lack of neutrality precludes the decision 38

from being remitted back to the original decision-maker, the policy will allow the adjudicator to vary the original (impugned) decision and substitute his or her own decision (examples of such clauses can be found in the appeal policies of 21 Canadian national sport organisations found at [http://www.adrsportred.ca/resource\\_centre/appeal\\_policies\\_e.cfm](http://www.adrsportred.ca/resource_centre/appeal_policies_e.cfm)). The rationale for limiting the scope of the decision-making authority of the adjudicator is the notion that appeal panels should have no greater authority than that of the original decision-maker and, as such, should not be able to change or re-write a policy by, for example, altering selection criteria or inserting new clauses in a selection process, or, as was requested in a number of appeals leading into the Athens Olympics, having the adjudicator essentially re-write the minimum eligibility standards negotiated between the national sport organisation and the Canadian Olympic Committee (see, for example, *Badminton Canada and Milroy v Canadian Olympic Committee* (SDRCC 18 July 2004); *Janyk v Canadian Olympic Association and Alpine Canada Alpin* (SDRCC 6 February 2002); *MacGillivray v SNC* (SDRCC 18 July 2004); *Blais v. Taekwondo* (SDRCC 9 May 2003). Rewriting criteria or eligibility standards not only re-writes organisational policy but as well, the substitution of a decision can potentially create havoc for an organisation.

In selection matters for example, there is very often an element of discretion. This is particularly so where selection cannot be based on an objective standard (such as speed, height, strength, time, and rank) or where selection of a number of individuals to a cohesive team is involved. The notion of discretion presumes there is a range of possible outcomes in the decision-making exercise. Provided the discretion is exercised properly, any one of the possible outcomes should be accepted (even if the reviewer would have chosen a different option). This is particularly important in selection decisions where a coach or panel of coaches may be juggling a number of considerations and concerns in selecting the best possible team. Team cohesion, team depth or bench strength, strategic or tactical considerations, athlete substitutions, among others, may be part of the decision-making matrix and can easily be compromised where a reviewing decision-maker substitutes his or her own decision for that of the coach. The substitution of an adjudicator's decision to place an athlete on a team (in place of another) can have a ripple effect well beyond that contemplated or intended, or even recognized, by the adjudicator. 39

While the Canadian rules allow an adjudicator to substitute his or her decision for that of the prior decision-maker, to date the arbitrators of the program seem to have given deference to the policy-making (ADR-Sport-RED, RA-15) function of the organisation and credence to the unique and specialized knowledge and skill of the coach or coaches in making selection decisions (provided such decisions are made in accordance with the properly determined selection criteria and procedures of the organisation). In *Medwidsky v Canadian Amateur Wrestling Association and Hedican* (SDRCC 8 October 2003, p. 5) the arbitrator, in refusing to substitute his own decision for that of the original decision-maker in a selection dispute, wrote: 40

The Respondent [sport organisation] has organisational goals that are performance-related as well and has particular objectives in mind as it selects athletes for various events. I have however, seen no evidence of bad faith in the selection of the World Cup team, and no evidence that would point to any discrimination with respect to the Claimant. There are many judgments to be made with respect to team selection, especially where there is no mechanical process (such as accumulated points, etc.) in place. I am not willing to substitute my personal judgment for that of the experienced wrestling coaches and the Wrestling Association officials in a matter of this nature.

Where a substituted decision of an arbitrator would have the effect of modifying a policy of the sport organisation, or even when a decision infringes on the discretion given to the coach or other organisational decision-maker, such a decision ought only to be imposed where the original decision-maker abused his or her discretion or where the policy itself was made in bad faith. Even where discretion has been abused, it may be argued the matter should be returned, if possible, to the decision-maker to make the decision again, correcting the error. In one selection matter leading into the Athens Olympics, the matter was returned to the sport organisation for a re-selection two times. Still, each time there was an appeal on the application of the selection criteria. On the third time and in the interests of time, both parties asked the adjudicator to make the actual selection herself. She finally did, but only with great reluctance. Indeed, it was the view of the Adjudicator that, '[i]n principle...where an error has been made the error should be identified and the matter sent back to the selection body for revision' (*Adams v Equine Canada et al* 21 July 2004, p. 5). 41

It is clear that the scope of authority of the arbitrator in assessing a remedy is being carefully applied under the new Canadian sport arbitration system. The rules allow a broad exercise of authority, far in excess of what the typical sport organisation set out in its own appeal policies. There is emerging, however, a compilation of decisions, a body of jurisprudence so to speak, which is in effect describing the bounds of review of an independent arbitrator more narrowly in a way that seems to respect the organisation's decision-making role but, as well, requires that such decisions be made properly and fairly. 42



In all then, the rules of procedure of the arbitration program allow for a very wide scope of review and vests the adjudicator with very broad authority to hear matters and craft an appropriate remedy. 43  
Nonetheless the adjudicators are acting with restraint and in a predictable fashion. All of this is perhaps where it should be. But, it should be noted, this is happening by practice not by policy. Perhaps, in the end the matter is moot. But it is important to think very carefully right from the beginning about the rules of the procedure and think about, at least some of them, as having fairly broad consequences and thus thinking very carefully about their implementation. What is the rationale for such a rule and what is the potential effect of implementing such a rule?

## CONCLUSION

The underlying premise of this paper is that the design of a sport-specific arbitration mechanism must support and, indeed, advance the desired function of such a mechanism. Three procedural rules of the arbitration process were identified as being particularly important in this regard – the rule determining the appropriate scope of review afforded to the adjudicator in an arbitration, the rule determining the appropriate standard of review to determine an ‘error’ in the original decision and, lastly, the rule determining the appropriate scope of authority of the adjudicator in crafting a remedy. 44

The underlying premise of this paper is that the design of a sport-specific arbitration mechanism must support and, indeed, advance the desired function of such a mechanism. Three procedural rules of the arbitration process were identified as being particularly important in this regard – the rule determining the appropriate scope of review afforded to the adjudicator in an arbitration, the rule determining the appropriate standard of review to determine an ‘error’ in the original decision and, lastly, the rule determining the appropriate scope of authority of the adjudicator in crafting a remedy. 45

These three rules are not just rules of procedure; they are also rules of substance. They affect policy of the sport organisation and thus must be crafted carefully and explicitly, so as to ensure that the arbitration process fulfils the functions that are intended. Yet even if this is achieved, such rules may nonetheless have unintended consequences which can have the effect of altering or distorting the organisation’s policy regime. Therefore, those overseeing such arbitration systems must understand the effect and impact of the rules on the operation of the sport organisation within the sport system and have the ability to accommodate unintended consequences as they occur, or change the rules if necessary. 46

Patterns in decision-making involving these three rules of procedure are emerging in the Canadian sport arbitration system. As a result of the breadth of the rules, adjudicators are afforded considerable authority which could result in incursions into the policy-making role of the sport organisation. However, a growing body of arbitral decisions suggests that little movement in that direction has occurred. Adjudicators have not been prepared to interfere with the policy making-function of the organisation. They have been clear that their role is not to alter or otherwise disturb organisational policy where such policy has been properly adopted by the organisation. Rather, their role to date has been to ensure that the rules and policies of national sport organisations are applied rationally, reasonably and fairly in the circumstances. Adjudicators have been prepared to give deference to expert bodies particularly in the area of selection decisions, and to scrutinize decisions on a standard of reasonableness. Furthermore, adjudicators have generally been reluctant to impose their own remedies where they have found in favour of claimants, preferring to refer matters back to the sport organisation to resolve properly. In so doing, they have declined to exercise the full scope of authority that the rules have granted to them. 47

It remains to be seen whether the internal appeal processes of sport organisations will slowly be replaced by the arbitration process as parties waive their right to an internal appeal and opt to go directly to arbitration, whether for reasons of cost and convenience or feelings of futility given the typically narrow scope of review of the appeal process and the broad scope of review of the arbitration process. Given current trends of adjudicators within the Canadian arbitration system to exercise a narrow scope of review in the arbitration process, parties may move directly to arbitration as a matter of efficiency and expediency. This could have the effect of eventually eliminating the role of the sport organisation in reviewing, internally, its own decisions. 48

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### LINKS TO EXTERNAL SOURCES

[http://www.adrsportred.ca/tribunal/doc/CodeFinal\\_E.doc](http://www.adrsportred.ca/tribunal/doc/CodeFinal_E.doc) - links to ADR-Sport-RED Code.

[http://www.adrsportred.ca/resource\\_centre/appeal\\_policies\\_e.cfm](http://www.adrsportred.ca/resource_centre/appeal_policies_e.cfm) - links to appeal policies of 21 Canadian national sport organisations.

[http://www.adrsportred.ca/resource\\_centre/jurisprudence/index\\_e.cfm](http://www.adrsportred.ca/resource_centre/jurisprudence/index_e.cfm) - links to arbitral decisions within the ADR-Sport-RED arbitration process.

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