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RULES OF A SPORT-SPECIFIC ARBITRATION PROCESS AS AN INSTRUMENT OF POLICY MAKING

HILARY A. FINDLAY*

INTRODUCTION

Disputes in sport are inevitable, particularly in the areas of team selection and eligibility and particularly before a major competition such as the Olympic Games.1 An increasing number of such disputes are being heard by way of sport-specific independent arbitration. James Nafziger calls it a “growth industry” 2 and views the expanded role of the Court of Arbitration for Sport (CAS) as one of the most important developments in sports law during the past several years.3 And over the recent past, programs for sport-specific independent arbitration have emerged in a number of countries including the United States, New Zealand, Great Britain, and Canada.4 The advantages of sport-specific independent arbitration are well established; however, 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 will look at the intersection between certain rules of the arbitration mechanism and the underlying policy rationale for such a mechanism in the first place. It will begin however, with a review of the advantages of implementing a specific arbitration program in the sport context.

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3. Id.
4. See Paul Hayes, Current Problems in the Resolution of Sporting Disputes in Australia, 2 INT'L SPORTS L. REV. 22 (2004); Nafziger, supra note 2, at 357.
I. ADVANTAGES OF ARBITRATION OVER LITIGATION

The advantages of independent arbitration of sport disputes, over the litigation of such disputes, are now generally accepted.\(^5\) The advantages have typically been identified as the ability to obtain a timely hearing, lower overall costs than litigation, the ability to have the decision made by an independent expert familiar with sport issues, and, in general, a dispute resolution process that is more sensitive to sport needs.\(^6\)

**A. Timely Hearing**

Many disputes involving selection issues inevitably arise on the eve of a competition, leaving little time for the parties to seek redress. Last minute hearings, while not necessarily the most desirable,\(^7\) can nonetheless be accommodated by independent arbitration – and indeed have been.\(^8\) Rules for arbitration typically allow for the abridgement of timelines and hearings can be accommodated either by *vive voce* presentation (in person or by telephone/video conference call) or by a documentary review (or a combination of both). A pool of adjudicators is typically available, and where a major multi-sport event such as the Olympic Games is happening, adjudicators can be located at the site of the actual competition.\(^9\)

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6. Arbitration is but one type of alternate dispute resolution process; however, it seems to be the central focus of the sport’s system of dispute resolution. Nonetheless, the general attraction of arbitration, not just in sport, but in other environments as well, relates to cost efficiencies, timeliness of the process, the potential for flexibility within its procedures, and its topic or area specific sensitivity, among other factors. *See* Marvin J. Huberman, *Integrating Alternative Dispute Resolution Into Administrative Justice Systems: Improving Society and Justice* (Mar. 1997) (unpublished final report for L.L.M., Osgoode Hall Law School, Toronto, Ontario, Canada) (on file with author).

7. It may be, however, that time exigencies could make even such programs of arbitration inappropriate for certain sport disputes. Already it is becoming evident that the CAS Ad Hoc Tribunal may not provide sufficient time for an acceptable hearing involving alleged doping infractions during a major event such as the Olympic Games. *See* Richard McLaren, *The CAS Ad Hoc Division at the Athens Olympic Games*, 15 MARQ. SPORTS L. REV. 175 (2004). The Canadian experience in arbitrating selection disputes during the lead up to the Athens Olympics may suggest that certain, more complex last minute selection arbitrations cannot properly and fairly be heard.

8. While it is possible to obtain last minute injunctions from the courts, the process can be difficult to navigate and virtually impossible to do so without legal counsel and can rarely accommodate the geographic separation of many of the parties, particularly where athletes and other personnel are getting ready to travel to a competition – or have already departed.

B. Reduced Cost

Often, although certainly not always, costs of arbitration can be much less than those involved in litigation. Of course, there are many variables to consider in adding up the costs of arbitration – the complexity of the matter, the number of parties involved, the time spent in a hearing, whether legal counsel is involved and the format of the hearing (in person or telephone/video conference call) to name but a few. And while costs may be less than those of litigation, this does not mean arbitration is necessarily inexpensive, particularly for the vast majority of amateur athletes who have limited financial resources.\(^\text{10}\)

C. Independent Expert Adjudicator

A significant factor affecting the ability of sport organizations to resolve disputes using their own internal appeal procedures is the inherent bias, whether perceived or actual, of such a procedure.\(^\text{11}\) Within the context of the sport organization and the selection of an athlete to a team, it is typically the organization that establishes the selection criteria and process, makes the selection, establishes the appeal policy, and manages the appeal hearing. The athlete who may be appealing some aspect of a selection process sees himself or herself battling a decision of the organization (or a decision of a person such as a coach whom it is perceived the organization will support and defend) using the process of the organization often before decision-makers appointed by the organization.\(^\text{12}\)

Further, in an arbitration process, adjudicators can be selected for their legal expertise as well as their knowledge of the sport system and sport-related issues.\(^\text{13}\) It has been noted that "sport-related disputes tend to rest on issues of

\(^{10}\) Under the ADRsportRED arbitration program, costs can range from the $200 application fee to thousands of dollars in legal fees. Further, the awarding of costs under the rules of arbitration may impact the relative inexpensiveness of the process. In Wilton v. Softball Can. (SDRCC July 16, 2004), http://www.adrsportred.ca/resource_centre/pdf/english/S-947124.pdf, the adjudicator awarded costs to both the complainant ($1,500) and the affected third parties (each of the six affected parties were awarded $500 each).

\(^{11}\) Haslip, supra note 1, at 253; Hayes, supra note 4, at 30. Of course, organizations, including sport organizations are fully entitled to deal with matters internally. Indeed, as a principle of law, complainants must, where feasible, exhaust their internal remedies before seeking the assistance of the courts. SARA BLAKE, ADMINISTRATIVE LAW IN CANADA 157 (3d ed. 2001).

\(^{12}\) There are ways organizations can reduce such concerns. For example, the organization can seek persons outside the organization to sit as adjudicators or athletes can nominate adjudicators.

\(^{13}\) While intuitively it makes sense that it is advantageous in a sport-specific arbitration process to have adjudicators who are sensitive to the contingencies and vagaries of sport, the nature and form of this expertise is not so clear, nor is the criteria for measuring such expertise.
fact, rather than on complex issues of law,” and very often involve the interpretation or application of an organization’s policy. Thus, familiarity with sport governance and policy could be an asset. Some of the sport-specific issues to which adjudicators must be sensitive include: the timing of the hearing, particularly where competitive timelines loom; power imbalances between parties including coaches, athletes, and organizational representatives; prior sport decisions of a similar nature; the expertise of coaches and others in the selection process and the role of their discretion in such matters; the situation faced by affected third parties, particularly in selection matters where the affected party is often a teammate of the complainant; the location of parties, who are often attending competitions and thus not physically available; the nature and availability of documentation that may need to be disclosed; the fact that many athletes are not familiar with the adjudicative process and may not have the resources to seek counsel, to name but a few.

For all these reasons and others, the case for a system of arbitration to deal with the increasing number of disputes being raised in the sport domain is powerful and has, in large part, been borne out in practice as measured against the factors mentioned above. Arbitrations, on the whole, have been carried out quickly, relatively inexpensively, and by expert arbitrators. All of these factors relate to how an arbitration system should be carried out and the advantages of so doing. A more fundamental, and arguably more important, question revolves around the role or function of such arbitration in the broader dispute resolution program of the sport system. The arbitration process, 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 its structure must be carefully designed to support that function and thus meet the need.

II. THE FUNCTION OF ARBITRATION IN THE CANADIAN SPORT SYSTEM

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 be a form of judicial review of internal organizational decisions? Or, is it intended to be a second tier of appeal after the internal appeal of the sport organization, or even a replacement of the internal appeal? What is the appropriate scope of review and standard of

review to be used: that of the organization in its own internal procedures; that used by the courts in a judicial review; or some other independently determined standard? Is the arbitration system intended to be a review for errors that may have been made within the internal appeal process, or a whole new review of the situation, such as in a hearing de novo? 15 What can or should be reviewed?

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, hopefully, stated) function of the system of arbitration that has been put in place. Indeed, it is argued here that such considerations should inform, if not determine, the very procedures and rules of arbitration. Structure should follow function, not the other way around. The arbitration process, and most particularly the rules of arbitration, should be structured so as to fulfill the function contemplated for such arbitration and ensure it plays not only an appropriate role in the sport system but, as well, the intended role in the resolution of disputes in sport.16

The case of Matt Lindland, a United States Olympic wrestler, stands as a clear example of a case where “function followed form”17 in a dispute resolution system and as a case that eventually led to significant unintended consequences, chaos for all parties involved, and a total of some fifteen judicial or quasi-judicial interventions.18 During the course of the 2000 United States Olympic wrestling trials, 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, and as a result, his opponent was named to the U.S. Olympic Wrestling team (thus now also involving the U.S. 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.19 Unfortunately, the rules of arbitration did not allow for the affected athlete, Keith Sieracki, who had now 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.

15. This largely turns on the grounds permitted for an appeal.
16. The same comments are appropriate for the development of an appeal policy within a sport organization – the form of the appeal process should follow the function the appeal mechanism is to fill. For example, will the appeal review the merits of the original decision or will it be a review for errors made in the original decision-making process?
17. Nafziger, supra note 2, at 361.
Each applied to the courts to have his arbitral decision upheld. The U.S. Wrestling Association and the USOC were now in an uncomfortably untenable position 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 James Nafziger, "[t]he problem lay not in the second arbitration [i.e., that of Sieracki] itself but in the structure of dispute resolution that encourages proliferation and, worse yet, redundancy of proceedings."\(^{20}\)

The case clearly 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).\(^{21}\) Also, where an adjudicator finds in favor 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 unintentionally, the underlying rules or policies of the organization from which the original decision emanated? The answers to all these questions, it is suggested, flow from a careful and necessary consideration of the intended function of each stage of a dispute resolution system – from original decision to appeal to independent arbitration, and should be answered in the careful design of the rules under which the arbitration mechanism operates.

Now may be an opportune time to consider just such considerations in the context of rules of arbitration in sport disputes, as Canada implements its national dispute resolution system specifically for sport. In particular, the next sections of this article will question: first, what the appropriate scope of review of a decision is for an arbitrator acting within the context of an independent arbitration of a sport dispute; second, what standard of review should be applied to such a review, and third, what scope of authority should an arbitrator have in applying a remedy where an error is found in the original decision? 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).

Given that the answers to these questions should flow from, and be

\(^{20}\) Id. at 371.

\(^{21}\) See id.
congruent with the underlying rationale for the implementation of such an independent arbitration system (i.e., the function of the system in terms of how it contributes to a larger process or outcome), it is important to briefly examine the origins of the program and the existing dispute resolution procedures within the Canadian system (which, in fact, are similar to that in many other domestic sport systems).  

From a historical perspective, the Canadian sport community has long considered a dedicated sport-specific national dispute resolution system to be desirable. In 1994, the Canadian Sport Council (an umbrella organization made up of national sport governing organizations) initiated a two-year pilot project of such a program. Unfortunately before the end of the pilot project, the Council was dissolved, effectively ending the program. It was not until January 2000 that serious efforts were once again made towards development of another formal alternate dispute resolution system for sport. Then-Secretary of State for Amateur Sport, Denis Coderre, appointed a Work Group to develop such a system. The Report of the Work Group became the blueprint from which Canada's new dispute resolution system for sport evolved. Consequently, legislation was drafted, and subsequently passed into law, establishing a non-profit corporation called the Sport Dispute Resolution Centre of Canada (SDRCC), the purpose of which was to house the new program and provide resources to Canadian sport organizations. The focal element of the system is an independent arbitration mechanism. The rules and regulations of the arbitration mechanism were devised and developed by a specifically appointed Implementation Committee and were

22. Hayes, supra note 4, at 27.
23. Haslip, supra note 1, at 263.
24. Id. In 1994, the now defunct Canadian Sport Council initiated a process to put in place an independent, voluntary arbitration and mediation system intended to serve exclusively the Canadian sport community.
26. Id.
27. The program includes both arbitration and mediation services. Few mediations have been done as most disputes revolve around selection issues, and because they come on the eve of a major competition, they are not open to mediation.
29. Id.
30. The Sport Dispute Resolution Centre of Canada's (SDRCC) website is found at www.adrsportred.ca.
31. A mediation component is available as well as a web-based resource centre.
embedded into the program with few modifications as it was officially
launched in April 2004.

The Report of the Work Group (Report) included in its recommendations
the implementation of most, if not all, of the beneficial factors of an
independent arbitration system previously described;\footnote{32}{WORK GROUP TO THE SEC'Y OF STATE, supra note 25, at 12 (Recommendation 3).} that is, the arbitration
process should be sport specific, independent, cost efficient, timely, and
confidential.

It also addressed, to some extent, the function of such a system of
arbitration within the dispute resolution process of the Canadian sport
community, at least at the national level. In doing so it acknowledged the
right of athletes and coaches in the sport system to due process or “natural
justice”\footnote{33}{Id. at 4.} in the treatment they receive from sport organizations. But, it also
noted that in too many instances those rights were being violated or even
ignored. The Report looked to the reasons for this. “Sometimes the
infringement of rights is a result of the substance of a rule or regulation.
Sometimes it is as a result of the procedures – or a lack of – used to enforce
the rules. Sometimes it simply results from poor or unfair decision-making.”\footnote{34}{Id. at 8.} Further, the Report stated, “[w]here the Work Group saw the need for
dramatic improvement is where the right to natural justice is jeopardized by
inconsistencies and deficiencies in an organization's policies and procedures
or where decision-makers lack proper knowledge”\footnote{35}{Id.} to make decisions in
accordance with the principles of natural justice.

Thus, the Work Group pointed to problems not only in the manner in
which decisions were sometimes made within sport organizations, but also
found that the very policies guiding such decision-making were, at times,
flawed. With respect to this latter source of problems, the Report stated:

The Work Group acknowledges the right of a sports body to develop
and implement its own policies through a democratic process and this
Report is not intended to infringe on that process in any way.
Disputes over the substance of a policy should continue to be dealt
with through the decision-making processes of each sport
organization.\footnote{36}{Id.}

It would seem the Work Group, within the Report, defined to a large
extent what it saw as the role or function of the anticipated independent

arbitration process as part of the dispute resolution systems of national sport organizations. Substantive policy was to remain the prerogative of the sport organization. The role of the arbitrator was to ensure decisions were made fairly, in compliance with the rules of procedural fairness, and in conformance with the policies of the organization. This view precisely reflects the minimum application of the law as it applies to private tribunals and thus, to sport organizations. The difficulty, of course, arises where the rules or policies are poorly crafted as suggested in the Report. When this occurs, should the arbitrator note the ambiguity and send the matter back to the initial decision maker? Or should the arbitrator correct the ambiguity or flaw and in so doing run the risk of re-writing the rule or policy? The Work Group was not clear on the role of the adjudicator in such circumstances.

In McCaig v. Canadian Yachting Ass’n (CYA), a case heard before the introduction of the current sport-specific arbitration program, the court recognized its jurisdiction to rectify an error of drafting but refused to rewrite the selection policy. In that case, the CYA had failed to incorporate into its selection policy any contingency for inclement weather. As a result, when one of the three regattas was cancelled due to foul and unsafe weather conditions, CYA had not been able to follow the selection policy as it had originally been written. The court wrote: “Apart from a claim of rectification, I know of no basis upon which a Court can rewrite a contract inserting a fresh clause in an agreement, no matter how desirable it might be.”

Similarly, in Roberge v. Judo Canada, a decision of three arbitrators (preceding the current national arbitration program) sitting in review of a decision of an internal appeal, the adjudicators refused to alter or rewrite the tie breaking mechanism set out in the selection policy when it did not operate in the manner intended (or at all, as it turned out). In that case the

38. Id.
40. Id.
41. Id.
42. Id.
43. Id. at 6.
45. Id.
Adjudicative Panel wrote:

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. 46

Both decisions reflect the past pattern of decision-makers who were not willing to make changes to policy, even policy that was seriously flawed, however desirable that might have been in the circumstances. It remains to be seen how the rules of the new arbitration system will affect this past practice.

III. SPORT ORGANIZATIONS AS PRIVATE TRIBUNALS

The vast majority of sport organizations are private tribunals 47— that is, they are autonomous, 48 self-governing, private organizations that have the power to write rules, make decisions, and take actions that affect their members, participants, and constituents. 49

As private tribunals with the power to make their own rules, sport organizations 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. 50 This contract is the foundation of the organization’s structure and contains the rules by which the organization and the members govern themselves. It provides the organization with the legal authority to establish the rights, privileges, and obligations of membership.

Ideally, every sports organization should have policies relating to the key areas of governance. Included in these should be policies relating to the areas of eligibility and team selection (the awarding of privileges), conduct and discipline (the removal of privileges), and appeals, mediation, and arbitration

46. Id.
47. Also referred to as domestic or consensual tribunals (as opposed to statutory tribunals)
48. Typically incorporated as a non-profit corporation.
49. Blake, supra note 11, at 1.
SPORT-SPECIFIC ARBITRATION

In Canada, every national sport organization receiving federal funding must have an appeal policy as well as a provision for independent arbitration of those disputes that have exhausted the internal appeal mechanisms of the organization but which continue to be contentious.

While sport organizations are autonomous and have the authority to govern themselves and their members, they also have a fundamental obligation to do so in accordance with the principles of procedural fairness and natural justice. This was clearly laid out by Lord Denning in *Lee v. Showmen's Guild of Great Britain*:

> Although the jurisdiction of a domestic tribunal is founded on contract, express or implied, nevertheless the parties are not free to make any contract they like. There are important limitations imposed by public policy. The tribunal must, for instance, observe the principles of natural justice. They must give the man notice of the charge and a reasonable opportunity of meeting it. Any stipulation to the contrary would be invalid. They cannot stipulate for a power to condemn a man unheard. ... Another limitation arises out of the well known principle that parties cannot by contract oust the ordinary courts of their jurisdiction. They can of course, agree to leave questions of law, as well as questions of fact, to the decision of the domestic tribunal. They can, indeed, make the tribunal the final arbiter on questions of fact, but they cannot make it the final arbiter on questions of law.

The decisions of a sport organization are thus open to judicial review where they breach the rules of natural justice. It should be noted, however, that 'judicial review' is not the same as an appeal. In general, unless explicitly delegated, the courts do not have the right to substitute their appraisal of the merits of a lawfully made decision of a decision-maker as they might in the

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51. These are policies dealing with the awarding and revocation of rights and privileges that a member enjoys and disputes over the allocation or revocation of such rights and privileges and obligations, respectively.

52. Such requirements come as part of the Federal Sport Funding and Accountability Framework for each sport organization and are a prerequisite for funding. This requirement for an arbitration clause was mandated by the federal government in 1999. At that time, the nature of the arbitration was not defined nor was a common forum for such arbitration available to the sport community. See Haslip, *supra* note 1, at 246.

53. Blake, *supra* note 11, at 13. In Canada, these are virtually synonymous.

54. 2 Q.B. at 342.

55. *Id.* (citations omitted).
context of an appeal. The courts, unless granted a broader scope of review, are limited to errors of jurisdiction.

IV. GROUNDS FOR APPEAL

This section addresses the nature of appeals. While examining the appeal mechanism incorporated by most national sport organizations, the grounds upon which an initial decision may be appealed within a sport organization can be defined either narrowly or broadly. Typically, narrow grounds of appeal reflect the same grounds available for judicial review, i.e., errors in procedure or errors of jurisdiction. Alternatively, an organization 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 a matter. A model appeal policy made available to sport organizations through the Interim National Dispute Resolution Program for Amateur Sport, which is the same as, or close to, the already existing appeal policies of many of the national sport organization across Canada, incorporates these narrow grounds for review. Very few organizations use the broad grounds of review.

The rationale behind using a narrow scope of appeal is set out in the annotation to the model appeal policy:


57. Errors of jurisdiction include errors of law, procedural errors, a lack of consideration of relevant matters or a consideration of irrelevant matters, abuse of discretion, and acting ultra vires. Id. at 7.

58. An interim alternate dispute resolution program was initiated pursuant to the Report of the Work Group. WORK GROUP TO THE SEC'Y OF STATE, supra note 25. It was known as the ADRsportRED Program and ran from December 2001 to April 2004 when the permanent program came on line. As a part of the interim program a number of resources, including policy resources, have been made available to the sport community. The “Model” Appeal Policy Template can be found at: SDRCC, APPEAL POLICY PACKAGE 13-36 (2004), available at http://www.adrsportred.ca/resource_centre/SDRCCAppealPackage_e.doc [hereinafter APPEAL POLICY PACKAGE].


60. APPEAL POLICY PACKAGE, supra note 58, § 9.1 at 44 (setting out the grounds for appeal and includes: lack of authority or jurisdiction to make the decision, failing to follow procedures as set out in a policy, making a decision influenced by bias, an exercise of discretion for an improper purpose and making a decision that is grossly unfair or unreasonable).

61. The members of the Alternative Dispute Resolution Work Group, of which the author was one, received and reviewed the policies of sixteen national sport organizations (NSO) and four multi-sport organizations (on file with the author). For appeal policies of an additional twenty NSO’s, see Appeals Policies, supra note 59.
Appeals are not for re-deciding matters. They are for correcting errors in decision-making. An appeal policy exists to make sure that decision-makers make only those decisions they have the power to make, that decision-makers are unbiased, and that decisions are made fairly and according to the organization's policies and procedures. An Appellant cannot 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 organization. It does not 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 organization, it should not be the subject of appeal by an individual member who does not support such a policy. Such differences should more properly be addressed through democratic channels within the governance and policy-making structure of the organization.

Thus, the typical dispute resolution system operating within Canadian sport governing organizations initially involved three levels of decision-making: an initial forum for decision-making, typically done in accordance with the terms and conditions set out in a policy (for example, selection decisions, conduct decisions, and athlete carding decisions); a second level providing an opportunity to appeal that decision within the organization; and where a jurisdictional or procedural error is alleged, a third and subsequent opportunity to seek judicial review of the appeal decision before the courts. Added to these three layers in 1999 was, for some, the opportunity to seek independent arbitration of an appeal decision. The nature of the arbitration was not specifically mandated by Sport Canada (a unit of the federal government) nor, in most cases, defined by the sport organization and, by and large, was used by a small handful of national sport organizations.

V. INTRODUCING A PROCESS OF ARBITRATION

Rules of arbitration need to be carefully crafted so that the Canadian arbitration system in fact addresses the issues identified by the Work Group.

62. Appeal Policy Package, supra note 58, § 9.1 at 44.

63. For example, in Hall & Samuel v. Bobseigh Can. (an independent appeal of the 1998-99 National Team selection, Aug. 19, 1999) (on file with the author), the Appeal Panel found the organization had acted improperly in the manner in which it had introduced its selection policy.

64. Athletes may be carded by their sport organization. Carded athletes receive funding, the amount of which is determined by the level of carding accorded the athlete.


66. Id.
After all, arbitration was one of the main mechanisms identified to help ameliorate the problems identified by the Work Group. The next sections will address three important areas of rule-making that have a direct bearing on how the arbitration process is, or is not, designed to address those issues.

A. Scope of Review in Sport Arbitration

Under the new Canadian alternative dispute resolution program for sport (known as the ADRsportRED Program), an arbitration mechanism was introduced in April 2004 to operate between the second and third levels of hearing discussed above. While such a mechanism cannot completely oust the jurisdiction of the courts, it is certainly a mechanism that has been established to be "final and binding" on the parties. The program operates on a voluntary basis; however, its acceptance and use has been made contingent on the receipt of government funding. Essentially, most national sport organizations in Canada could not operate without federal government funding assistance, making this program virtually mandatory.

Article RA-15 of the rules of procedures adopted for the ADRsportRED Program sets out the scope of review for the adjudicator(s). It 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 that gave rise to the Sports-related dispute and may substitute such measures and grant such remedies or relief that it deems just and equitable in the circumstances.

The program contemplates a full hearing de novo of the original matter. The effect of this rule is that the arbitration is a complete new hearing of a
matter and gives the adjudicator broad decision-making powers. It has in fact, theoretically changed the dispute resolution process at the national level in sport in Canada from that of a pyramid where, as previously described, the breadth of review narrows at each subsequent level of hearing, to that of an hourglass where, once the review leaves the purview of the sport organization and goes to independent arbitration, it is completely open for a rehearing and the adjudicator has full discretion to substitute his or her decision for that of the original decision-makers within the organization.

The question arises, how broad is the scope of review under the rules of procedure for the new system of arbitration for sport in Canada? There are a number of aspects of Article RA-15 of the rules of procedure that speak to the breadth of authority of the arbitrator. First, an arbitrator may rehear a matter following an appeal within the sport organization (or, if the parties to a dispute agree, they may bypass the internal appeal of the sport organization and move directly to independent arbitration). On a rehearing, the adjudicator has authority to issue subpoenas, arrange for examination of witnesses and expert witnesses where necessary, request the disclosure of documents, and call its own witnesses and expert witnesses. Thus, under the rules of arbitration, the arbitrator has very broad scope and ability to review any internal decision of a sport organization. Indeed, in many cases, the adjudicator has even greater scope of review than the internal appeal panel of the sport organization where the organization 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 review process (i.e., independent arbitration) 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 the first level of legal challenge is narrow, the second level is wide open – thus raising the question, why would an appellant bother with the first level – and the third level is

73. Theoretically, because, for example, in the case of a team selection dispute where the selection criteria required the decision-maker, i.e., the coach or team of coaches, to observe the athletes over time in a number of competitions on a series of criteria, the adjudicator of course cannot actually engage in a hearing de novo. With regard to other disputes (e.g., disciplinary or contractual disputes) a hearing de novo may be possible.

74. ADR-SPORT-RED CODE, supra note 69, art. RA-15.
75. Id. art. RA-1(b).
76. Id. art. RA-14.4(d).
77. Id. art. RA-14.4(b).
78. Id. art. RA-14.4(a).
79. Id. art. RA-14.4(c).
narrow once again.

B. What is the appropriate standard of review?

Having considered the scope of review of a decision, the question now arises as to what standard of review an adjudicator should use in determining that an error has taken place. At its root, a discussion of the standard of review is about what constitutes an error. Any party challenging a decision is in fact 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: "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."81

There are two categories of errors: procedural errors and substantive errors. Clearly, a procedural error (e.g., not following the procedure as set out in a policy such as one of selection or discipline) would constitute a breach of procedural fairness or due process and would typically result in an adjudicator quashing or reversing the decision. This does not mean that there is no leeway for the adjudicator to assess the circumstances and other factors at play in defining what constitutes fairness in the circumstances. There is room for some degree of deference to be given to the procedures used by the tribunal. For example, the rules of a discipline policy may allow for various time limitations within the hearing to be abridged or extended. What is fair in terms of a decision to abridge or extend a timeline will depend on the circumstances and, in proper circumstances, the reviewer of a decision may accord deference to such a decision. In Fernandes v. Sport North Federation,82 the court noted the principles of natural justice are flexible and depends on the circumstances in which the question arises; "[t]he ultimate question is whether the procedures adopted were fair in all the

80. This is not to be confused with the standard of proof a complainant must meet in order to make out their case. Standard of proof, also referred to as the burden of proof, is "[t]he obligation of a party to establish by evidence a requisite degree of belief concerning a fact in the mind of the trier of fact or the court." BLACK'S LAW DICTIONARY 178 (5th ed. 1979).

81. FRANK A. V. FALZON, STANDARD OF REVIEW ON JUDICIAL REVIEW OR APPEAL 6-7 (2001), available at http://www.gov.bc.ca/ajo/down/standard_of_review.pdf. Thus, this question of what standard of review to apply concerns internal appeals as well as external arbitrations.

82. Fernandes v. Sport N. Fed'n, [1996] N.W.T.R. 118 (Can.). There being no policy or rule to govern the specific situation, the Respondent Organization improvised with ad hoc rules. While not the most desirable situation, the Court nonetheless upheld the decision of the Organization as being made in accordance with the principles of natural justice.
circumstances." In other words, the standard of review for a procedural error is what a reasonable person would view as fair given the circumstances.

A substantive error — that is errors of fact, law, or discretion — lends itself to an entirely different kind of review. In these cases, reviewers of decisions must make sure they clearly understand their role.

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 — or would this be going beyond his/her intended jurisdiction?

Should the reviewer defer to the original decision-maker's decision, even if he/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?

The Canadian 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, three standards have been identified as "major signposts." At the one extreme is the most deferential standard reflected in the "patently unreasonable" test. Using this standard, only decisions that are "clearly irrational" will be overturned. At the other extreme is the least deferential standard reflected in the "correctness" test. Using this standard, a decision may be overturned if the reviewer simply disagrees with the original decision-maker. The third, or intermediate standard is reflected in the "reasonableness simpliciter" test. Using this test, a decision will be overturned if it is unreasonable.

There is no explicit rule within the Code of Procedures of the ADRsportRED Program of arbitration relating to the standard of review. Perhaps the closest reference comes from Article RA-15 of the Rules quoted

83. Id. ¶19.
84. FALZON, supra note 81, at 6 n.9.
85. JONES & VILLARS, supra note 56, at 7.
86. Int'l Forest Products Ltd. v. British Columbia, No. A970934, 80 A.C.W.S. (3d) ¶ 43 (B.C.S.C. June 3, 1998). "One concludes that the number of 'standards' on the spectrum is theoretically infinite but that, practically, we require major signposts marking credibly distinctive standards."
88. Id. at 963-64.
90. Id. at 765.
previously in a discussion of the remedy granting power of the adjudicator. The pertinent part of Article RA-15 reads: "In particular, the Panel may substitute its decision for the decision that 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." If an error is found, then the adjudicator can substitute a remedy that is just and equitable, implying that the previous decision was not just and equitable. It may thus be inferred the standard of review may be that the decision be "just and equitable," except in the case of a doping appeal (which is now heard under the ADRsportRED Program) where the standard of review is explicitly that of "unreasonableness." The Canadian Anti-Doping Regulations stipulate in Section 9.1 "[a] decision of the Doping Tribunal or TUEC will only be reversed if it is unreasonable."

While the subject of the standard of review has been, and continues to be a topic of vigorous discussion within the legal community, it has, in general, not been argued in sport cases coming before arbitrators or even the courts in Canada. There are a couple of exceptions to this, the first being a sport doping case in which the adjudicator, applying the test of the Supreme Court of Canada in Canada v. Mossop, found the appropriate standard of review to be one of correctness. In Roberge, an arbitration occurring prior to the current program, the correctness standard was also explicitly used. The same standard of correctness was also explicitly followed in an arbitration case heard under the Interim ADRsportRED Program. However, in most of the cases heard thus far under the ADRsportRED Program, as well as in previous arbitrations of sport disputes in Canada, it would appear this standard has not been consistently applied. In fact, the standard of review has not been raised as an issue in most arbitrations under the program (or in previous arbitrations

93. ADR-Sport-RED Code, supra note 69, art. RA-15.
94. Id. (emphasis added).
95. Appeals of Canadian Anti-doping decisions are now heard under the ADRsportRed arbitration system using its rules, except where modified by the regulations of the Canadian Anti-Doping Program (2004).
96. ADR-Sport-RED Code, supra note 69, art. AD-9.1.
99. Id. ¶ 49.
100. Roberge, supra note 44.
Michael Lynk\textsuperscript{103} identified a number of Canadian statutory tribunals that have adopted a modified standard of review – one of substantial compliance with natural justice, which he suggests, is a more realistic standard for many private tribunals.\textsuperscript{104} Using a standard of review of correctness he suggests may lead to an outcome vastly different than that originally intended by the governing documents of an organization when interpreted literally.\textsuperscript{105} The governing documents forming the contract between the sport organization and its members are often not prepared by experts in drafting and thus are not always precise or clear in their drafting.\textsuperscript{106} As well, many of these governing documents, such as constitutions and by-laws, are long term and enduring in their nature, and thus perhaps, he suggests, ought not always be interpreted as one would interpret a contract that may be easily changed by the parties.\textsuperscript{107}

But, how far can an arbitrator go in reviewing the substance of a dispute under the ADRsportRED Program (or in any arbitration for that matter)? It is argued here that although the rules of procedure of the Canadian program give the arbitrator broad discretion to hear matters and, indeed, even authority to review the merits of a dispute (as opposed to a review purely for procedural or jurisdictional errors), nevertheless, decision-makers within organizations should be given deference particularly in decisions involving the use of discretion. Selection to teams is one obvious example of a decision that has a large discretionary element. As stated previously, discretion assumes a range of decision choices and such choices ought to be respected by the adjudicator, provided the discretion has been exercised properly. Such a position was affirmed by Arbitrator Pound in the decision of \textit{Blais v. WTF Taekwondo Ass'n of Canada}\textsuperscript{108} where he wrote, "[i]t is not, however, within the scope of the powers of an arbitrator to re-write or re-design a selection process that has been developed by experts within the sport (including its coaches), approved by its constituent authorities and validated by the COC [Canadian Olympic Committee] for purposes of team selection."\textsuperscript{109}

\begin{itemize}
  \item[102.] See Roberge, supra note 44.
  \item[104.] \textit{Id.}
  \item[105.] \textit{Id.} at 169-71.
  \item[106.] \textit{Id.}
  \item[107.] \textit{Id.}
  \item[109.] \textit{Id.} at 5-6.
\end{itemize}
In *Boylen v. Equine Canada*\(^{110}\) Pound wrote:

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 the standard at a level of patent unreasonableness before I could intervene. Similarly, I believe that sufficient deference is warranted to decisions made by expert bodies, absent clear misdirection, that mere correctness is too low a standard for overturning such decisions.\(^{111}\)

The national arbitration system in Canada is fairly new and there have not yet been a large number of cases heard before it. Nonetheless, certain trends are emerging. It is clear that the rules of procedure for the arbitration of disputes are broad in nature and give the arbitrator wide authority to review prior decisions of an organization as well as wide discretion in crafting remedies, even to the extent of affecting and altering, or having the effect of altering, policies of the organization. The rules describe a broad process producing an hourglass form of dispute resolution in the Canadian sport resolution system essentially allowing adjudicators a much wider scope of review than is afforded to internal decision-makers at the lower level or to court judges at the upper level.

However, in reality, it is clear that the arbitrators within the program have been reluctant to go so far. The arbitrators have limited their reviews and have examined only whether or not organizations have followed their own policies and have exercised their discretion properly.\(^{112}\) They have essentially acted with restraint and in accordance with a narrow form of review.\(^{113}\) They have not ventured so far as to affect the policies of organizations even where such policies are seemingly flawed or where the arbitrator takes issue with such policies.\(^{114}\) Arbitrators have respected the authority of sport organizations to determine their own 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

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\(^{111}\) *Id.* at 12.

\(^{112}\) For example, see *Sergerie v. WTF Taekwondo Ass'n of Can.* (SDRCC Dec. 5, 2003) *available at* [http://www.adrsportred.ca/resource_centre/pdf/english/S-915758.pdf](http://www.adrsportred.ca/resource_centre/pdf/english/S-915758.pdf), where the adjudicator was of the view the selection criteria were not crafted to select the best athlete, but nonetheless felt he did not have the jurisdiction to interfere with the criteria themselves.

\(^{113}\) *See id.*

\(^{114}\) *Id.*
sport in Canada as they affect the scope of review of decisions made within the sport organization.

As noted by one legal scholar, thinking about questions, such as what standard of review is appropriate for what questions, forces policy-makers to think carefully about the fundamental purpose of the decision-making tribunal and implications of that purpose for its design. While speaking words of warning directly to legislators, the words of Frank Falzon resonate clearly for policy-makers of both systems of arbitration as well as internal organizational appeal mechanisms:

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

C. What remedies should be available to the adjudicator?

In keeping with the practice of respecting a narrow scope of appeal, adjudicators in appeals are also 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 for a new decision correcting the error or, where time, lack of clear procedure, or lack of neutrality precludes the decision from being remitted back to the original decision-maker, allow the adjudicator to vary the original (impugned) decision and substitute his or her own. 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 rewrite a policy (for example, by altering selection criteria or inserting new clauses in a selection process). As well, the substitution of a decision can create havoc for an organization.

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

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115. FALZON, supra note 81, at 47.
116. Id.
117. Id.
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 other concerns, 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, intended, or even recognized by the adjudicator.

The arbitrator under the rules of the ADRsportRED Program may substitute his or her decision for that of the prior decision-maker. However, to date the arbitrators of the program seem to have given deference to the policy-making function of the organization 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 organization). As noted by Arbitrator Pound in refusing to substitute his own decision for that of the original decision-maker in a selection dispute:

The Respondent [sport organization] has organizational 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 any 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 in 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 CAWA

118. The exercise of discretion often draws allegation of bias, some of which may be founded and others not. This speaks clearly to the need to provide a clear and transparent rationale for the exercise of any discretion in decision-making.

119. In Rolland v. Swim/Natation Can., supra note 68, and Piere v. Swimming/Natation Can. (SDRCC, June 23, 2002), available at http://www.adrsportred.ca/resource_centre/pdf/english/S-906303.pdf, two separate appeals involving the same competition and selection criteria, two separate adjudicators rendered decisions that appeared initially to the respondent sport organization to be incompatible, requiring it to select two athletes where there was but one position available. Complainant Rolland eventually sought enforcement through the court.
officials in a matter of this nature.120

Where a substituted decision of an arbitrator would have the effect of modifying a policy of the sport organization, or even when a decision infringes on the discretion given to the coach or other organizational 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.121 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.

What of the case in which an arbitrator finds the selection criteria entirely unrealistic or nonsensical? Does the arbitrator have the power to substitute his or her version of better criteria (which would, in fact, have the effect of changing the actual policy of the organization)?122 Clearly, selection criteria are not one hundred percent protected from review under the current rules of the ADRsportRED Program, although arbitrations have, and it is argued should, shown a high degree of deference to the decisions of expert sport tribunals. Nonetheless, this deference is not absolute and there clearly is a point at which an arbitrator would be permitted to intervene and amend the selection criteria adopted by a sport organization. One would trust that such a point would be approached with great caution and reluctance, and it would probably be a situation of impossibility or complete absurdity.

It is interesting to note the arbitrator’s decision in Sergerie v. WTF Taekwondo Ass’n,123 a matter involving an appeal of the selection of athletes to the 2002 Olympic Games.124 The selection criteria of the respondent sport organization had the effect of totally precluding the highest ranked athlete, and defending Olympic champion, from participating in the Olympic trials.125 The arbitrator commented on the ill-conceived nature of the selection criteria but also noted that the respondent sport organization had properly adopted the


121. Medwidsky, supra note 120.

122. Policy formation is clearly the domain of the sport organization, if done properly.

123. Sergerie, supra note 112.

124. See id.

125. See id.
criteria and had followed its own rules in the selection process. That being the case and in the absence of any malice or bad faith on the part of the sport organization, the arbitrator determined he had no basis on which to overturn the selection process.

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 organization set out in its own appeal policies. There is emerging, however, a compilation of decisions, a body of jurisprudence, which is in effect describing the bounds of review of an independent arbitrator more narrowly in a way that seems to respect the organization’s decision-making role but, as well, requires that such decisions be made properly and fairly.

CONCLUSION

The underlying premise of this paper is that the design of a sport-specific arbitration mechanism must support and, indeed, further the desired function of such a mechanism. Three rules of Canadian sport arbitration have been identified as being particularly important in this regard: the scope of review afforded the adjudicator, the standard of review in order to determine an error and, lastly, the scope of authority of the adjudicator in assessing any remedy.

These three rules are not just rules of procedure. They also affect policy and in so doing, they must be crafted carefully and explicitly, so as to ensure the arbitration system fulfills the function intended by the creators. At the same time, even if well crafted, such rules may nonetheless have some unintended consequences, which must be addressed as the program matures.

The rules of arbitration within the Canadian alternate dispute resolution system for sport were written to reflect (or “modeled after”) the rules of the CAS. Consistency in rule making and decision-making is clearly a desirable goal both domestically and internationally. Indeed, a global and harmonized system of dispute resolution, as there now is with doping, may be an appropriate and desirable outcome. Nonetheless, the Canadian system is built on domestic needs and circumstances. An international system of dispute resolution (i.e., CAS) is built on different needs and goals. It is suggested the function of CAS within the international sport community is different than that

126. See id.

127. See id.


129. Hayes, supra note 4, at 35.
of a domestic one, such as the Canadian system, within the domestic context. There may be some overlap but that needs to be carefully analyzed and the rules of procedure carefully developed to reflect the similarities, but more particularly, to reflect domestic outcomes.

The rules of arbitration were also crafted to address a number of shortcomings identified by the Work Group in the prevailing dispute resolution structure of the Canadian sport system. Specifically, problems within organizational policies and procedures and a lack of appreciation or use by decision-makers of the principles of natural justice were identified. Little has been written on the intersection of the rules of arbitration and the function and desired outcome of the process. The Canadian program is a new one and a full analysis of the program has not yet been done. There is, however, one segment of the Interim Program Report that does speak to the nature of the rules of arbitration vis à vis the function of arbitration. An Interim Report was written as the Interim Program, running since December 2001, folded into the permanent program in April 2004. It gives some indication as to the rationale for at least the nature of the hearing contemplated and the scope of review accorded to arbitrators under the program:

The Work Group, the Implementation Committee and the Committee all concur that the ADR program should be based on the concept of trial de novo. While considerable discussion has surrounded the possibility of limiting the scope of review to the traditional grounds of appeal, there was recognition of the lack of sophistication of parties that warranted a full review and examination by an arbitrator. The Committee urges the SDRCC to continue with the practice of trial de novo. 130

If a "lack of sophistication" requires the sort of policy initiative that essentially usurps the reviewing role of the sport organization, 131 it does beg the question about the nature of this lack of sophistication and the impact on organizational decision-making.

A comprehensive understanding of the reasons or rationale underlying the implementation of at least the three policy-based rules discussed in this paper is necessary, particularly to ensure it is the right mechanism for the purposes

130. INTERIM PROGRAM REPORT, supra note 128, at 27.
131. ADRSportRed Steering Comm., Report on the Major Games Team Selection Cases 28 (Sept. 10, 2002) available at http://www.adrsportred.ca/pdf/major_games_eng.pdf. This suggests reviews of selection decisions, except for those involving discretionary decisions, be forwarded directly to the arbitration process without first going through the internal appeal process of the sport organization. This, it is suggested, would be a substantial policy shift, not only for the sport organization but as well in the traditional manner in which decisions of independent tribunals are reviewed.
desired and that its rule structure is in fact accomplishing what it, along with other measures within the Sport Dispute Resolution Centre of Canada were put in place to do.