



## CAS and Vancouver 2010

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June 2010



A few years ago I was visiting a beautiful country - lovely people, incredible history, lovely weather. This country had a different style of government to that with which I have grown up. I was there for a sport and law conference. I had asked to meet some of their women's teams and had spent the day with one of the coaches. The enthusiasm of the young women was the same enthusiasm I often see at my local club; the training and equipment were much the same. The head coach and I spoke about the athletes, their school, their training and competitions, the facilities, all the universal aspects of sport.

I then asked about the process they have in place for their athletes who might want to appeal a selection decision or some other sport related issue. The coach said to me: 'Well we just tell them that they didn't make it this time and to go home and try again.' I said 'Yes I get that, but what if they don't agree and want to appeal?' 'Well,' he said, 'we just explain they won't be on the team.' 'Right' I said, thinking maybe we had a language issue. Then I remembered where I was. In the familiar and easy going back and forth of our conversation I had forgotten about my cultural lens. Obviously I was applying my own Canadian cultural heritage to a different country.

My own defining culture was the Canadian culture of the '70's, '80's, '90's. Each decade has built on the previous. Equality between men and women was paramount in the '70's. Accountability between administrators and athletes was paramount in the '80's. Systems were put in place, such that athletes were able to hold administrators accountable for their decisions. In my experience as an athlete in Canada, we generally had recourse, formal or otherwise, from decisions with which we may not have agreed; and I generally observed a reasonable process for actions to be taken against activities that were contrary to the rules and spirit of sport and fairplay.

The International Olympic Committee (IOC) created the International Court of Arbitration for Sport (CAS) in 1984. Originally proposed by the IOC President Juan Antonio Samaranch to address disputes arising during the Olympic Games, (currently the Ad Hoc Court) the use of the CAS has expanded so that it is now used by all Olympic International Federations for all sports related disputes.

CAS has gained increasing credibility worldwide. Its authority and decisions have been confirmed by Appellant Courts. Not only do all Olympic sports recognize the jurisdiction of CAS and have reference in their statutes referring all disputes to CAS; other organizations such as FIFA, the governing body of international football, utilize CAS in their disputes.

Subsequent to an appeal of a CAS decision to the Swiss Federal Court regarding the question of the independence and impartiality of CAS, the IOC gave up any direct links to CAS in 1994 when the International Council of Arbitration for Sport (ICAS) was created to oversee the CAS. ICAS oversees an Ad Hoc Court division at each Olympic and Commonwealth Games. Not surprisingly, decisions in cases before the Ad Hoc Court have to be made in a matter of hours. A dispute about participation or disqualification may have to be decided before the start of the Games or before the next day's round of competition.

I am a member of the Board of the ICAS and was appointed by its President to be the ICAS liaison between ICAS and the Vancouver Organizing Committee for the Vancouver Olympic and Paralympic Games. My role was to assist the President in representing ICAS during the Games



and to manage any issues related to the Ad Hoc Court in preparation for and during the Games. I was also a local resource for ICAS and the Ad Hoc Court where needed.

One of the initiatives I put in place early on was a process to invite local senior counsel to participate as pro bono counsel at the Games. This initiative was started at the 2000 Sydney Games by my fellow ICAS member John Coates of Australia. The counsels' role would be to represent parties (athletes, international federations, national Olympic committees etc.) before the Ad Hoc Court, and in other matters on an as needed basis. Patrick Poyner of Poyner Baxter volunteered to coordinate this group which included George Macintosh Q.C., Marvin Storrow Q.C., Maria Morellato Q.C., Glenn Urquhart Q.C., Michael Armstrong, Timothy Dickson, Jeffrey Hand and John McIntyre; counsel who were called upon reportedly did an excellent job. Thanks again to all of them.

The ICAS Ad Hoc Court was led by the Honorable Judge Juan R. Torruella. The following is a summary taken, with permission, from Judge Torruella's report on the ICAS operations at the Games.

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### The CAS Court Office

The CAS Court Office was operational in Vancouver commencing 2 February, 2010 and through the 28th of said month. The hearing room, I consisted of a large room in which was configured a square shaped table. It was provided with microphones and two enclosed booths for the translators.

The composition of the CAS Court Office consisted, in addition to ICAS Secretary General, Mr. Reeb, of 3 CAS counsel and 3 CAS secretaries.

### The Arbitrators and their work

Eight arbitrators were appointed by the ICAS to sit in Vancouver taking into account geographical distribution, their qualification as CAS arbitrators, and their experience in arbitration law as well as sports in general. All were either law professors and/or practicing lawyers. The arbitrators were: Mr. Henri Alvarez (Canada); Mr. Oliver Carrard (Switzerland); Mr. Yves Fortier (Canada); Professor Michael Geistlinger (Austria); Mr. David Grace (Australia); Professor Ulrich Haas (Germany); Mr. Chi Liu (China) and Mr. José Juan Pinto (Spain).

The following is a summary of the proceedings heard by the various panels at the Vancouver Games:

[I- Australian Olympic Committee \(AOC\) \(Applicant\) and Fédération Internationale de Bobsleigh et de Tobogganing \(FIBT\) \(Respondent\) and Ms Astrid Loch-Wilkinson & Ms Cecilia McIntosh, International Olympic Committee \(IOC\), Vancouver Committee for the Olympic Winter Games \(VANOC\), Olympic Council of Ireland, and Confederação Brasileira de Desportos no Gelo \(CBDG\), CAS Arbitration No. OG 10/1 AOC v/FIBT](#)

The panel of arbitrators was constituted with Prof. Michael Geistlinger (Austria), as president, and Prof. Ulrich Hass (Germany) and Mr. Henri Alvarez (Canada).

The AOC filed an application against the decision of the FIBT to not allocate a continental representation quota place to the AOC in the Women's Bobsleigh event. The AOC requested that their athletes be allowed to participate in the Women's Bobsleigh event.

The matter related to the interpretation of the FIBT's qualification system for participation in the Vancouver Games, approved by the IOC, which provided for the allocation of a total of 170



athletes for participation in the discipline of bobsleigh, 130 positions were assigned to men and 40 to women. Pursuant to this qualification system, the women's bobsleigh event was limited to 20 crews.

The panel concluded that the clear wording of the qualification system implemented by the FIBT reflected the intention of allowing representation of one men's bobsled team and one women's bobsled team from non-represented continents, and could not be interpreted otherwise. Accordingly, the application of the AOC was granted and the FIBT was ordered to allocate a continental representation quota place to the AOC for participation in the two-man Women's Bob Event of the Games. Considering this outcome effectively removed the Irish team from participating, because the women's team quota of 20 would be exceeded by the addition of the Australian team unless the 20th team, which was the Irish team, was removed, the panel recommended that a 21st team be added to the event.<sup>1</sup>

II- Confederação Brasileira de Deporto no Gelo (CBDG) (Applicant) and Fédération Internationale de Bobsleigh et de Tobogganing (FIBT) (Respondent) and Ms Fabiana Santos & Daniela Riberto Santos, International Olympic Committee (IOC), Olympic Council of Ireland, and Australian Olympic Committee (Interested Parties), CAS Arbitration No. OG 10/02 CBDG v/FIBT

Because this was an application whose subject-matter was related to the first case heard, the same panel of arbitrators was appointed to also hear this matter.

This application requested that the Brazilian Women's bobsleigh team be admitted to compete in the Games, replacing the Irish Women's team. Alternatively, the CBDG requested the CAS to direct the IOC to offer an additional place in the competition to the Brazilian Women's team. The CBDG claimed that on 26 January, 2010, the FIBT wrongly admitted the Irish team to compete in the Games due to alleged errors committed in the ranking and allocation of points during the 2008-2009 and 2009-2010 qualifying seasons.

The panel concluded that the source of the dispute between the parties was the FIBT's decision of 26 November 2009 to admit the Irish Women's bobsleigh team to the World Cup to replace the French team in that event. The Ad Hoc Division panel concluded that its scope of review did not extend to the 26 November 2009 decision of the FIBT, and that it would be inappropriate to review the FIBT's 26 January 2010 decision on the basis of the alleged errors of that first decision.

The panel further found that, on the merits, the decision of 26 November 2009 was within the power of the FIBT, and that it was neither unreasonable nor arbitrary for it to replace the withdrawing French team with the next ranked Irish team. The CBDG's request to direct the IOC to offer an additional place in the Women's bobsleigh event was rejected.

II- Virgin Islands Olympic Committee (VIOC) (Applicant) and International Olympic Committee (IOC) (Respondent) and Fédération Internationale de Bobsleigh et de Tobogganing (FIBT) (Interested Party), CAS Arbitration No. OG 10/03 Virgin Islands Committee v. IOC

An application was filed by the VIOC which proposed that the Women's skeleton competition should have its number of entries increased to 21 rather than its allotted number of 20. This contention was based on the fact that the Men's skeleton competition's allocation of 30 positions had not been filled. The VIOC proposed that the unused Men's skeleton quota be transferred to the Women's skeleton competition, thus allowing the VIOC's skeleton athlete to compete in the Games.

The panel was composed of Mr. David Grace, QC (Australia), as president, and Mr. Juan Jose Pinto (Spain) and Mr. Liu Chi (China).



The panel concluded that the allocation provisions of the FIBT Qualifications System clearly differentiated between Men's and Women's competitions, and clearly indicated that there can be no transfer of unallocated quota positions from one event to another. It thus dismissed the VIOC's application.

#### *ICAS Ad Hoc Procedures*

The normal course of Ad Hoc Division proceedings can be generally summarized as follows: (1) the Ad Hoc Division's services are initially invoked by the filing of an application for arbitration, which may be filed by any participant in the Games, a National Olympic Committee, an International Sports Federation or an Organizing Committee for the Olympic Games, provided the dispute arises during the Olympic Games or the ten day period immediately preceding the Opening Ceremony of the Games, and also provided that the claimant has exhausted all internal remedies effectively available pursuant to the statutes or regulations of the sports body concerned (Art.1, Arbitration Rules For The Olympic Games)(AROC); (2) upon filing, the application is served on all interested parties together with a notice of the hearing date; (3) the President of the Ad Hoc Division constitutes the arbitral panel of three arbitrators from the arbitrators that have been designated to sit at the Games and appoints the President of the Panel (Art.11, AROC); in cases where there are related cases pending before the Ad Hoc Division, the President of the Ad Hoc Division may consolidate them and assign the related disputes to the same panel of arbitrators; (4) a hearing is held before the panel at which, at the discretion of the panel when it deems it necessary to aid in reaching a decision, the parties are given the opportunity to present evidence and argument to the panel (Art. 15, AORC); (4) except in unusual circumstances by extension of this time period by the President of the Ad Hoc Division, the panel must give a decision within 24 hours of the lodging of the application (Art. 18, AROC); the decision of the panel shall be in writing and briefly state the reasons for its conclusions; it is reviewed as to form only by the President of the Ad Hoc Division before it is issued (Art. 19, AROC).

#### IV- Ms Claudia Pechstein (Applicant) and Deutscher Olympischer Sportbund (DOBSB) and International Committee (IOC) (Respondent) and Deutsche Eisschnelllauf-Gemeinschaft e.V. (DESG) and International Skating Union (ISU), CAS Arbitration No. OG 10/04 Claudia Pechstein v / DOSB & IOC

Ms. Claudia Pechstein filed an application requesting that the DOSB (the German Olympic Committee) "nominate the Applicant for participation in the competitions of the female speed skaters during the Olympic Winter Games in Vancouver," and for the IOC to allow her participation therein. Prior to this, the ISU had filed a complaint with its Disciplinary Committee accusing Applicant of having used a prohibited substance and /or a prohibited method in violation of the ISU's Anti-Doping Rules.

Thereafter, the said Committee concluded and declared Ms. Pechstein ineligible to compete for the next two years, which decision was appealed by the Applicant and the DESG to CAS. On 25 November, 2009 CAS dismissed the appeal and upheld the decision of the Disciplinary Committee of the ISU. The Appellant, on 7 December 2009, appealed the CAS's opinion to Swiss Federal Tribunal. The Swiss Federal Tribunal dismissed the Applicant's appeal.

The panel to hear Applicant's case was composed of Yves Fortier, QC (Canada) as its president, and Oliver Carrard (Switzerland) and José Juan Pinto (Spain).

The panel concluded that it was without jurisdiction to hear the application because in fact it was an appeal from the CAS decision and thus not an appealable decision to the Ad Hoc Division. It thus dismissed the application.

The Vancouver 2010 Games were a tremendous success for Canada and for the world of sport. The Ad Hoc Court of Arbitration is one piece of the multi layered and multi dimensional puzzle that made the Games such a success but certainly one that we should never take for granted.