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

by Louise R. Guerrette, SDRCC *pro bono* lawyer



In 2010, I decided to represent parties via the SDRCC *pro bono* program. It came to me naturally. Considering my background as a former athlete (Canadian rhythmic gymnastics team), practising lawyer since 1989 and eventually a certified mediator, I fully supported the SDRCC's mission to implement and maintain an

accessible, low-cost and efficient sport dispute resolution service in Canada. Over the years, the SDRCC has demonstrated its value as a credible alternative to a court of law which does not adequately meet the needs of the sport community. Little did I know how much of my professional life would be devoted to the SDRCC.

To be honest, I came to appreciate the passion and competitive spirit of athletes and other claimants whom I represented. In fact, it's hard for me to turn down a mandate due to lack of time or other professional commitments. Claimants are intense, genuine and reject all forms of dis-

crimination. They are an exceptional group of clients to which fair play and the notion of justice or injustice speak to something deep inside. That said, how likely are they to succeed in challenging a decision from a national sport organization (NSO) based on the trend of arbitral awards since the establishment of the SDRCC in 2004?

A Trend Since 2004

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

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

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"I believe there is a progressive trend since 2004 whereby NSOs and their executives are invariably given a margin of error by arbitrators..."

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Deference at the SDRCC: A Trend? Reflecting on the Future *(continued)*

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

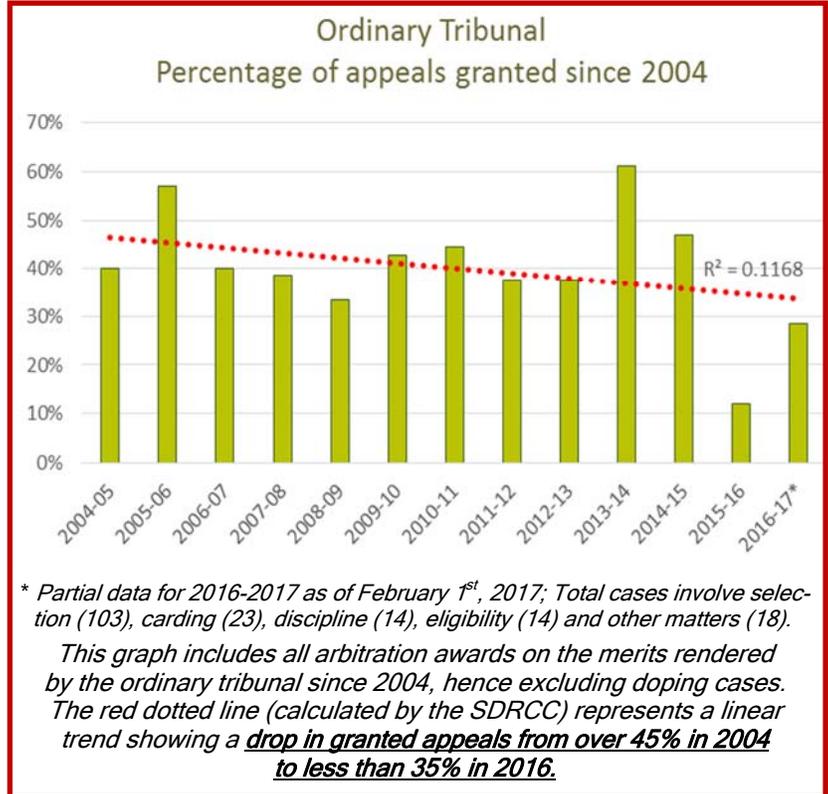
The Administrative Rigor of NSOs

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

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

Food for Thought for the Future

Can we truly claim fair play for athletes who must fend for themselves against publicly funded NSOs who benefit from near absolute deference on the part of certain SDRCC arbitrators? What will be the impact to the reputation of the SDRCC if the rate of denial of appeals reaches above 65% or even 70% despite evidence of prejudicial irregularities? Will granting near absolute deference to NSOs undermine the credibility of NSOs and the SDRCC? We need to reflect on this matter be-



cause no ruling will ever restore such credibility in the eyes of the well-meaning claimants whose legitimate rights have been violated and who are, in theory, the bread and butter of NSOs and, ultimately, of the SDRCC.

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

I invite you to ponder this matter in 2017! ■

¹ *Dunsmuir v. New Brunswick*, 2008 SCC 9.

² https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2733751&download=yes, from the Honourable David Stratas, Federal Court of Appeal, whose February 2016 article caused quite a stir: "The Canadian Law of Judicial Review: A Plea for Doctrinal Coherence and Consistency."



SDRCC Roster Member Profile: Learning More About our Arbitrators and Mediators

They come from every region of Canada and have extensive experience in alternate dispute resolution and sports-related issues, but how much do we really know about them? The SDRCC has an impressive list of 40 mediators and arbitrators and we will slowly be introducing you to some of them through our regular installments of "SDRCC Roster Member Profiles". In this edition we would like to present, **Jeffrey Palamar, Arbitrator from Winnipeg, Manitoba.**



What led you to a career in ADR?

My work presents time sensitive and challenging problems which require solutions that often cannot be obtained in court. My challenge had been to creatively solve the problem or pick the right process which solves it. Routinely I found myself in negotiations or hearings, face-to-face or in front of neutral third parties such as under the ADRsportRED system, and later the SDRCC system. The work was similar to what happened in our court system, but much quicker, less costly and more focused on closure than formality.

I considered myself as having some ability to listen, fairly consider the important stuff while ignoring the rest and then make a reasonable decision. I sought formal training as an arbitrator, tried out the role of decision-maker and liked it. I now arbitrate grievances under collective agreements, unjust dismissals under the *Canada Labour Code* and sport disputes with the SDRCC, while continuing my ongoing law practice as a partner in a law firm in Winnipeg.

Specialization/Area of Expertise:

My non-sport work is all about the workplace, including labour relations, employment standards, wrongful dismissals, human rights, safety and health,

collective bargaining, harassment, etc. Often I get the call before things hit the fan, and really enjoy being able to consider possible solutions before things become unmanageable. Sometimes though, it is more damage control.

I have been fortunate to have been a past Ombudsperson with the Canadian Paralympic Committee and now volunteer as Chair of the Board with Sport Manitoba.

As an arbitrator with the SDRCC, I...

... strive to be respectful, helpful and fair. I do what I can to ensure that even without legal representation, parties get a reasonable process that solves the existing dispute and helps for the future too.

Favorite Sport(s):

Golf is a passion, but sometimes feels more like a punishment. I enjoy yoga, cycling and just generally "working out".

Dispute Prevention Tip for Athletes and Federations:

I am positive by nature but understand that "bad stuff" can happen. To be ready for that, I say know the rules and how they apply to you. If they don't make sense, ask questions. Always be a "team player" (reasonable) and not the problem yourself. Be prepared, informed and empowered. ■

In our next edition, look for the profile of an SDRCC mediator.



Follow us on LinkedIn Stay current on the publication of new decisions while keeping up with the Sport Dispute Resolution Centre of Canada's activities!



SDRCC Decisions Now on SOQUIJ

As part of its initiative to make its jurisprudence more accessible, the Centre reached an agreement with SOQUIJ, a legal database that publishes the decisions of Québec's courts and tribunals. SOQUIJ will make available to its users all decisions rendered by the SDRCC in both official languages as well as sharing the content of its database with other suppliers across Canada such as CanLII and LexisNexis. The decisions of the Centre will be progressively made available in the SOQUIJ database at the following link: <http://soquij.qc.ca/fr/english>. ■

Addition to the SDRCC Team!

The Centre will welcome a new permanent employee in the coming weeks. The Partnerships and Promotion Coordinator will be responsible for coordinating national partnerships and promotional initiatives, including the Centre's kiosk tour at major sporting events.

The Centre also welcomes the return of Cynthia Colas Livernois in her role as Education and Communication Coordinator. ■

SDRCC Workshops now Available via Webinar!

The Centre has successfully delivered its dispute prevention and resolution presentations by webinar in the past few months.

A session on "Identify and Avoid Conflict of Interests in Sports-Related Decisions" was held in May 2016 for BC Hockey, and then Acadia University 3rd and 4th year kinesiology students enrolled in the "Sport and the Law" course were the second group to benefit from remote teaching by Centre's staff. In January 2017, BC Hockey offered a second webinar, this time on "Main Causes of Disputes and Prevention Strategies". Participants had this to say about the latter:

"I found this webinar awesome, I have conflict resolution courses and was kind of expecting to hear a lot of the same information but I found this very informative and something that I believe all minor hockey executives should have to see as the information is of benefit on so many levels. Could help avoid a lot of conflicts within organizations. Very well done and thank you to [BC Hockey] for setting this one up!!!" East Kootenay Minor Hockey Association

"I sat in on an excellent [BC Hockey] sponsored Webinar the other night. Perhaps some of you did as well. It provides a guide to effective dispute resolution and prevention strategies. I recommend the attached content from the Webinar for all MHAs because disputes certainly arise in our world where emotionally charged parents and or coaches often clash with their MHA executive. [...] It is worth the read for any MHA wanting to improve its dispute resolution and prevention strategies." North Island Minor Hockey Associations

Visit our website soon to find out about the next webinars of the Centre or contact us at education@crdcs-sdrcc.ca to book one for your own organization!!! ■

Public Sessions of the 2017 SDRCC Mediator and Arbitrator Conference

The Centre will once again hold public sessions at its Annual Mediator and Arbitrator Conference to be held at the Hotel Le Concorde in Quebec City, Quebec, on **Friday, May 5, 2017**. The preliminary program is now available on: <http://www.crdsc-sdrcc.ca/eng/public-conference-2017>.

The content will be relevant to lawyers, arbitrators and mediators interested in sport law and sport ADR, law students and sport administrators with an interest in ADR and sport, as well as sport leaders, administrators, athletes agents and representatives. The previous year's program has been recognized by several provincial bar associations and this year's program is already recognized for continuing education points by the ADR Institute of Canada. The registration form can be found at the above link.

Places are limited and the deadline to register is April 4, 2017, but the "early bird" rate will expire on February 10, 2017. ■

Notable Dates:

- **February 10-12, 2017:** Series of 4 SDRCC workshops for Sport Yukon (Whitehorse, YT);
- **March 16, 2017:** SDRCC presentation by webinar for viaSport BC (Montreal, QC);
- **April 5, 2017:** SDRCC Presentation at the Algonquin College (Ottawa, ON);
- **April 25-27, 2017:** SDRCC kiosk at the M2 meeting of the Canada Games (Winnipeg, MB);
- **May 4-6, 2017:** 2017 SDRCC Arbitrator and Mediator Conference (Quebec City, QC);
- **May 10-11, 2017:** SDRCC Kiosk at the National Aboriginal Physical Activity Conference 2017 (Guelph, ON). ■



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