IN THE NEUTRAL ZONE
News and Events of the Sport Dispute Resolution Centre of Canada
CRDSC SDRCC

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The CAS at the Sochi 2014 Olympic Winter Games

Robert Décary, SDRCC Arbitrator

In 1996, with an aim to settling disputes on site and as quickly as possible during or just prior to the Olympic Games, the International Council of Arbitration for Sport (ICAS), which is the supreme authority of the Court of Arbitration for Sport (CAS), decided that an ad hoc Division of the CAS would be established at the site of the Games. Since then, while regular business continues before the CAS in Lausanne, cases related to the Olympic Games are heard at the Games themselves.

The CAS, for all intents and purposes, splits in two during the Games. An entire team, generally comprised of its Secretary General, two assistants and two legal advisers, moves to the site of the Games. The International Olympic Committee (IOC) provides the team with office space, a hearing room as well as accommodation for staff and arbitrators in one of the Olympic hotels.

The ad hoc Division is headed by one or two ICAS members and includes CAS member arbitrators selected by the ICAS. Nine arbitrators usually attend the Winter Games, and about 12 attend the Summer Games. These arbitrators come from around the world. Although they do not represent their countries per se, they will not hear cases involving their own. Cases are normally heard by a Panel of three arbitrators assigned by the president. Arbitrators are not paid for their work, but their travel, accommodation and meal expenses are covered by the CAS.

> *"In an ideal world, selection cases should be decided by national tribunals, which are more aware of the realities of the country involved and which would hear cases in the country and language of the athlete."*

The ad hoc Division launches its operations ten days prior to the opening ceremony of the Games and ends its work the evening of the closing ceremony. It is governed by the *Arbitration Rules for the Olympic Games*, and its authority is limited to disputes that occur "during the Olympic Games or during a period of ten days preceding the Opening Ceremony of the Olympic Games" (Art. 1). The Panel must issue its decision "within 24 hours of the lodging of the application" (Art. 18). The decision must be briefly explained, but the operative portion of the award may be communicated to the parties prior to the rationale being given (Art. 19). As one might expect, hearings and deliberations can also take place during the night. An interesting fact is that before the award is signed, it is "reviewed by the President of the ad hoc Division, who may make amendments of form and, without affecting the Panel's freedom of decision, may also draw the latter's attention to points of substance" (Art. 19). The services of the ad hoc Division are provided free of charge, but parties must pay their own costs (Art. 22). In recent years, the CAS has worked to recruit lawyers who offer their services *pro bono*. There were four *pro bono* lawyers in Sochi who represented the athletes involved in the

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The CAS at the Sochi 2014 Olympic Winter Games (continued)

three first cases described.

The ad hoc Division heard five cases in Sochi. A few other cases kept the arbitrators and office in suspense, although they never materialized. There were, for example, five doping cases, but none were appealed.

Three of the cases heard involved selection issues. The other two were protests involving the same event.

The Selection Cases

To understand why selection cases come before the ad hoc Division, it is important to note that the Division has jurisdiction over disputes occurring during the 10-day period before the opening of the Games and that the applicant "must, before filing such request, have exhausted all the internal remedies available to him/her…unless the time needed to exhaust the internal remedies would make the appeal to the CAS ad hoc Division ineffective" (Art. 1). This fixed 10-day period is not as an objective test as one might think. The Panel has to assess when the dispute actually began; furthermore, the Panel is given a considerable margin of discretion in deciding what an "effective" solution is.

In an ideal world, selection cases should be decided by national tribunals, which are more aware of the realities of the country involved and which would hear cases in the country and language of the athlete. However, the fact is that in many disciplines the selection process is finalized within just days of the opening ceremony, and IOC administrative requirements therefore demand that the race against the clock take place on site and before the ad hoc Division.

Daniela Bauer v. Austrian Olympic Committee (CAS OG 14/01, February 4, 2014)

Daniela Bauer is an Austrian halfpipe freestyle skier. She was not included in her country's Olympic team and asked the ad hoc Division to order the Austrian Ski Federation (ASF) and Austrian National Olympic Committee (NOC) to name her to the Olympic team. She argued that she met the qualification criteria; that the athletes, herself in particular, were promised that Austria would use any quota spots offered; that a quota space was offered for her discipline; that she was the first on the list; and that the NOC nevertheless decided to decline the quota spot. On January 26, 2014, Ms. Bauer was advised that the NOC had decided not to accept the spot available. On January 27, she learned that the NOC had based its decision on the fact that she did not, in the opinion of the ASF, meet the athletic requirements needed to participate in the Olympic Games.

The CAS rejected the application. Based on evidence revealing that the ASF was unconvinced Ms. Bauer had the level of skill needed to achieve a strong showing at the Games, the CAS concluded that the people who made promises to Ms. Bauer had no authority to do so; that she was in no way discriminated against; and that in any case, according to applicable rules, the NOC was not authorized to select an athlete who had not been recommended by the ASF. The CAS did, however, express regret that the ASF did not have the qualification criteria in writing for freestyle skiing, which could have led to a highly subjective selection approach. The CAS stated it was satisfied that the ASF did not exercise its discretion in an arbitrary, unfair or unreasonable manner, as its decision was based on sports performance criteria. The Panel nevertheless "strongly" recommended that the ASF establish, identify and publish clear criteria for qualification and selection.

The question of the deadline was not raised. It would have been cause for dispute, but as it was not raised by the applicants, CAS jurisprudence prevents it from introducing the issue.

Clyde Getty v. International Ski Federation and Comite Olimpico Argentino (CAS OG 14/02, February 5, 2014)

Clyde Getty is an Argentinian freestyle skier. He competed in the Olympic Winter Games in 2002 and 2006. He believed he was eligible for the 2014 Games following a decision by the International Ski Federation (ISF) to allocate a place in the aerials discipline to the Argentinian National Olympic Committee (NOC). However, the ISF decision of January 24, 2014, was made in error. It was rescinded the same day, resulting in no Argentinian athletes being eligible to compete in this discipline.

The CAS rejected the application. Mr. Getty did not meet the international eligibility criteria; at no time did the ISF promise him that he would compete at the Games; and it is not up to the CAS to establish ISF policies, notably with respect to geographically-based qualification or the athlete's experience or commitment to the discipline in question.

The question of the deadline was not raised.

Maria Birkner v. Comite Olimpico Argentino and Federacion Argentina de Ski y Andisnismo (CAS OG 14/03, February 12, 2014)

The third selection case occurred during the Games. Maria Birkner represented Argentina at the 2002, 2006 and 2010 Winter Games. In a letter sent on January 20 and said to have been received on January 22, 2014, the Argentinean Ski Federation (ASF) advised Ms. Birkner she had not been selected for the Sochi Games. The letter explained that the main criterion not met was that of future prospect. This criterion had not been formally published. On February 11, 2014, Ms. Birkner submitted an application to

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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 43 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 to you, **Carol Roberts, from Vancouver (British Columbia).**

What lead you to a career in ADR?

I ended up in dispute resolution almost by accident. Curiosity and circumstance caused me to pursue an opportunity in that field. That opportunity led to other opportunities, each with different variations on the dispute resolution theme. I have been fortunate to participate in the expansion of ADR in a number of fields. I enjoy being exposed to different views of a position and trying to balance those views in a way that does justice to the parties. I am fortunate for having gone down this road as my experience has been extremely rewarding.

Specialization/Area of Expertise:

I have been an adjudicator for more than 25 years in a wide variety of areas, including forestry, property assessment, human rights and employment. For the past five years, my work has focused on adjudicating personal injury, employment and sports disputes. After assisting parties resolve disputes in an informal way for many years, I trained as a mediator about six years ago.

As an Arbitrator with the SDRCC I…

...am privileged to be among the best dispute resolution professionals in Canada, many of whom have also been provincially or nationally-ranked athletes, and who are managed by a Board that sets high standards. It is endlessly rewarding to interact with high-level athletes, coaches and other experts in sports administration, all of whom work to make Canada one of the fairest countries in the world for competitive athletes.

Favorite Sport(s):

While in elementary and junior high, I competed in track and field. I was involved in figure skating for over 30 years as a skater and as a judge. I competed in several Arctic Winter Games (a pan-Arctic competition) in both figure skating and winter triathlons. I began distance running in law school and have completed a number of marathons, including Boston and Iceland. I remain physically active, participating in cycling, running, inline skating, nordic skiing, snowshoeing and yoga. I am still an "armchair" skater, as it is one of the few competitive sports that combine artistry with extreme physical effort.

Dispute Prevention Tip for Athletes:

I suggest that athletes read past issues of SDRCC's newsletter "In the Neutral Zone." They contain articles written by experts in the field about dispute resolution and they contain more helpful tips for dispute prevention than I can express in this limited space. However, in general, I would say that the genesis of many disputes, in sports and in life in general, is a failure to communicate. Effective listening and communicating one's own views in a respectful manner are key to dispute avoidance.■

In out next edition, look for the profile of an SDRCC Arbitrator

Notable dates:

- **June 25-29:** SDRCC present with its kiosk at the Acadian Games in Bathurst, NB;
- **August 1-9:** SDRCC present with its kiosk at the Jeux du Québec in Longueuil, QC;
- **September 26-28:** SDRCC present with its kiosk and a presentation at the AthletesCAN Forum in Calgary, AB ;
- **September 26-28:** SDRCC present with its kiosk at the Sports Officials Canada's Conference in Ottawa, ON.

the ad hoc Division alleging she had been discriminated against because of a bias against her family.

The CAS ruled that the application was made too late. The dispute began as soon as the party was advised of the reasons for the disputed decision, and the evidence showed that the applicant had known the nature of the dispute since at least January 22, which was long before the 10-day period preceding the opening ceremony of the Games.

The CAS stated in obiter that it would have rejected the application on its merit regardless, given the absence of evidence supporting the allegation of discrimination. It nevertheless recommended that the Federation, as with the *Bauer* case, define its selection criteria in advance and in writing.

The Protests

Alpine Canada and Canadian Olympic Committee, and Olympic Committee of Slovenia v. Comité national olympique et sportif français, CAS OG 14/-4-05, February 23, 2014)

The Canadian Olympic Committee (COC) and the Olympic Committee of Slovenia (SOC) filed protests over actions by the French team competing in the men's ski cross event on February 20, 2014. The protests alleged that personnel on the French team had, just prior to the Big Final, modified the lower legs of the riders' suits in such a way as to create an aerodynamic effect and that contravened international free-style ski competition rules.

The competition ended at around 3 p.m. on February 20. The applicable regulations stipulate that protests must be filed within 15 minutes after the end of the competition. The SOC filed its protest at 9:47 p.m., with the COC filing its own at 10:33 p.m. The applicants maintained that it was simply impossible to decide on whether to file a protest within the allotted 15-minute time frame. The Panel rejected their claims. It stated that the 15-minute period does not require that the applicant already have the proof in hand that it believes it will need; that the examination of the videos revealed the actions of the French team as early as 4:20 p.m.; and that there was no basis for the SOC and COC to have waited another six hours before filing their protests. The Panel added that it was not its role to change the deadlines set by the international federations.

It is interesting to note that this case was heard during the night before the closing ceremony and that the decision was delivered the day of the ceremony, the last day on which the ad hoc Division had authority at the Games. The rules would, however, have made provision for a case such as this to continue in Lausanne before the same Panel, had it been necessary.

Anecdotally, I should add that I attended the ski cross final in the company of my French colleague Brigitte Stern. Our respective conflicts of interest enabled us to appreciate the end of the Games better than our three colleagues who heard the protest and deliberated through the night… ■

COMING SOON !!

NEW PUBLICATION

The *In the Neutral Zone* article from the June 2013 edition attracted so much interest that the SDRCC decided to turn it into a prevention tool for board members and managers of sport organizations. The publication, entitled "Main Causes of Disputes and Strategies for Prevention" will soon be available in a booklet format as well as in an interactive online version on the SDRCC website. ■

A PARTNERSHIP BETWEEN SDRCC AND CAC

The SDRCC is proud to partner with the Coaching Association of Canada to hold its 2014 SDRCC Arbitrator and Mediator Conference in conjunction with the Sport Leadership Conference on November 6 - 8, 2014 in Ottawa.

Registration information will be available very soon! ■

Catherine Meinrath

Catherine joined the SDRCC team on May 12, as Case Manager. She is responsible for handling tribunal cases. Apart from being a lawyer by training, Catherine has many years of experience as a case manager in a self-regulatory organization. She is also a versatile athlete. In fact, she is a member of a cycling club as well as a cross country ski club. She also takes part in competitions in summer and winter triathlons. ■

CRDSC SDRCC
Centre de Règlement des Différends Sportifs du Canada
Sport Dispute Resolution Centre of Canada

1080 Beaver Hall, Suite 950, Montréal, Québec, H2Z 1S8
Tél: (514) 866-1245 1-866-733-7767 Fax: (514) 866-1246 1-877-733-1246
www.sdrcc.ca

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