

IN THE NEUTRAL ZONE

www.adrsportred.ca

October 2007

The right to be represented by Carol Roberts, arbitrator/mediator

As a party to a hearing, you have a right to "natural justice". This means that you must be informed of the case against you and have the opportunity to respond to it. It also includes the right to have a case heard by an unbiased decision maker.

There are a number of reasons parties appear at a legal proceeding without the assistance of a lawyer or an advocate. One reason may be that the party cannot afford counsel. Also, some people believe that they are able to represent themselves better than anyone else. The proliferation of television programs that make the conduct of legal proceedings appear simple and straightforward may also be another reason people chose to represent themselves. Sometimes a party has had a lawyer in the past and found that experience to be less than satisfactory.

The fact is that many self represented parties underestimate the challenges involved in presenting their case, often making simple cases difficult and difficult cases even more complex. As an arbitrator on a wide variety of matters, I have witnessed non-lawyers who have ably represented themselves in various legal contexts. However, that has been the exception rather than the rule.

Unfortunately, I have also witnessed a number of hearings

where a self represented party had an excellent case but failed to prevail because he/she misunderstood the important and "winning" issue and focused on an "unwinnable" one. And in other instances, I have observed individuals make an excellent presentation on an entirely irrelevant issue.

While facts of a case are best known to the athlete, the law and relevant arguments are best appreciated by an experienced advocate. Your sporting career is far too important for you not to prepare fully and properly for any SDRCC hearing you might find yourself involved in. This is your best assurance that your case will be advanced in the best way possible.

When I was a young lawyer I asked a seasoned litigator what his advice would be for a young advocate who was preparing her first case. His reply was: "Three things come to mind: preparation, preparation and preparation". There is simply no substitute for hard work whether in administrative law or athletics. It can trump many other shortcomings. ♦

Visit www.adrsportred.ca for the long version of this article!



"Your sporting career is far too important for you not to prepare fully"

In this issue:

Representation in mediation	2
The 7 most common mistakes made by unrepresented parties	3
IN THE NEUTRAL ZONE turns eco-friendly!	4

Representation in mediation

by David Bennett, mediator



This article focuses on the advantages and disadvantages of being represented when participating in a **mediation** process. While some of it may also apply to **arbitration**, it is important to recognize the differences between the two processes. Arbitration is a formal legal proceeding with special rules of evidence

to follow in which the arbitrator makes a final and binding decision; mediation is more informal and participants have input into the agreement. At an arbitration hearing parties must not only provide evidence, but also have the ability to cross examine witnesses. It is my opinion that it is simply not a wise decision to attend an arbitration hearing unrepresented.

The number and percentage of cases resolved through mediation as compared to arbitration has steadily increased since the establishment of the Sport Dispute Resolution Centre of Canada (SDRCC).

Mediation may be used to resolve any type of dispute involving Canadian athletes, coaches, officials, or volunteers who come under the jurisdiction of a National Sport Federation. This could include matters of carding, team selection, eligibility, discipline, certification, or harassment. The goal of mediation is for parties to reach a voluntary settlement with the assistance of a mediator.

A major decision that participants must make is whether or not they need to be represented by counsel at mediation. The real question that should be asked is: How can the possibility of resolution be maximized? Can you do it yourself or do you need assistance in the mediation process?

To be effective in a mediation process, you need to:

- communicate clearly;
 - express yourself clearly, speaking about concerns, needs, and desires;
 - be willing to listen to the other parties' concerns, needs, and desires (to put yourself in their shoes);
 - be respectful of all participants no matter how much "bad blood" there may be between you - another goal of mediation is to mend fences, not burn bridges;
 - be prepared to examine as many different ways as possible of resolving the problem;
 - be flexible and prepared to make concessions, if appropriate;
 - be prepared to choose the best available option that meets every party's needs;
 - be prepared to commit to the agreed upon resolution;
- and
- trust the mediator to manage the conflict and emotions in the room.

"The real question that should be asked is: How can the possibility of resolution be maximized?"

So far, it sounds easy enough to do alone, and you may think you can do it yourself - after all, you are the best equipped to express all of the above more effectively than any outside representative. However, there are some elements of mediation for which

you may require assistance. It is essential that you:

- know your legal rights (the mediator is not supposed to advise you of them);
- have a good understanding of what happens if you don't reach a resolution and walk out the door;
- have realistic expectations; and

On the Sidelines

- Congratulations to **Suzanne Dandenault**, Board member, who gave birth to her first child this summer.
- Welcome to our five new Board members: **Anne Benedetti, Alexandre Charbonneau, Aimable Ndejuru, Clayton Miller** and **Carla Qualtrough**.
- Congratulations to SDRCC's arbitrator **Ms. Paule Gauthier** for her recent nomination as arbitrator by the Court of Arbitration for Sport.

Representation in mediation (continued)

- are able to recognize a good resolution; a good resolution is one that meets your needs in a better fashion than by walking out the door or letting a third party arbitrator (or even a judge) impose a decision.

You can accomplish this in one of two ways: either by consulting a specialist in sports law to get advice on how to prepare yourself and on what happens if you don't reach an agreement, or by retaining someone to **assist** you at the mediation. Notice that I did not use the term "represent you", as your representative at the mediation cannot identify your needs, concerns, and desires as effectively as you can, nor is your representative going to be committing to the agreement reached during the mediation. However, this person can be of invaluable assistance to you in all of the above-mentioned elements of mediation.

When choosing someone to assist you, ensure that they have expertise in amateur sport. The SDRCC has a list of legal representatives at:

http://www.adrsportred.ca/resource_centre/list_representatives_e.cfm

Talk with the person first and make sure that he or she understands that it is important to be conciliatory and willing to explore all available options; these are very different skills than what makes someone effective counsel for arbitration or court cases.

Finally, relax - mediation is a very informal process. The mediator will assist you in expressing yourself regardless of whether you come alone, with counsel, or with a friend/family member for support. The mediator's job is to make everyone feel as comfortable as possible, and negotiate the best possible resolution for all participants. ♦



SURVEY OF ARBITRATORS AND MEDIATORS The 7 most common mistakes made by unrepresented parties

This list was compiled with the collaboration of 19 arbitrators and mediators from the SDRCC. We wish to sincerely thank those who have taken the time to respond to our survey and we hope that their wisdom and experience will serve you well.

Being unrepresented in either mediation or arbitration can have serious consequences on the outcome of the process. We have asked the SDRCC arbitrators and mediators what they thought were the most frequent mistakes made by unrepresented parties. Below is the result of our survey. To complement the text of David Bennett's article above, each mistake is accompanied by comments and by some advice on how to avoid them, this time focussing more on the context of arbitration rather than mediation.

1

Fail to clarify what the real issues at stake are

Unrepresented parties often misunderstand the issues and do not focus on the relevant ones. Before engaging into the process, you should clearly specify what you hope to accomplish with it or what questions you want the arbitrator/mediator to address. You must also remember to submit all the issues in your original application to allow the other parties to be informed/prepared to address these issues.

2

Do not present facts and issues properly

Unrepresented parties fail to present facts that are relevant to the issues and to do so clearly and completely. They often let emotions blur the facts when explaining their position and tend to eagerly talk without really listening. Instead, you should prepare to summarize the facts, to bring out only those that are relevant to the issues, and to show how the impugned decision was based on the correct/wrong principles or criteria.

The 7 most common mistakes made by unrepresented parties (continued)

3

Misunderstand the powers (jurisdiction) of the Tribunal

Unrepresented parties often misunderstand the role of the arbitrator/mediator. They may have unrealistic expectations about what the arbitrator/mediator can do. For example, they think that the arbitrator/mediator will provide independent legal advice or will gather and prepare the relevant documentation. In arbitration, the parties, not the arbitrator, are responsible to meet the standard of proof. In mediation, a mediator will not render a decision; instead, the parties must come to an agreement.

4

Mishandle cross-examination of the witnesses

Unrepresented parties unfortunately argue with witnesses when they do not agree with their replies. They often become unnecessarily accusatory and personal. Instead of asking questions in cross-examination, they sometimes make comments, observations and submissions to the witnesses. During testimonies or cross-examinations of witnesses, it is important for you to listen carefully to the responses and to take detailed notes to better prepare to raise your own arguments at a later stage.

5

Lack knowledge of their rights at law and the legal procedures

Unrepresented parties fail to take advantage of the resources available to assist them in understanding the rules applicable to their situation and applying those rules to get the desired result. Because they do not know their rights at law, they may insist on too much or accept too little. Make sure that you research your rights, the applicable rules, and the procedures to take full advantage of them when the time comes. In arbitration, you must present the text of the rules against which you believe the decision should be made.

6

Fail to prepare adequately

Unrepresented parties are too often simply ill-prepared to handle the case on their own. They leave out essential information and documentation, they fail to bring forward the best available evidence in a coherent, integrated way, and their presentation of facts/events is often disorganised in chronology. When participating in proceedings unrepresented, you must ensure that you have researched the legislation and/or the jurisdiction under which your case falls. You should also gather and prepare all the documentation in a logical order for a more efficient presentation.

7

Confuse submissions, evidence, and arguments

Unrepresented parties often mingle evidence and arguments throughout their case or present what is essentially testimony when making legal arguments. Consequently, they miss the opportunity to present facts in evidence; because if they wait until final arguments to do so, it is already too late. When preparing your case, you should recognize that all submissions must be made before the hearing. The presentation of evidence is at the heart of the hearing while the arguments will form its conclusion. ♦

IN THE NEUTRAL ZONE

turns eco-friendly!

The SDRCC newsletter will, from now on, be available solely in electronic format. The intent of this change is to allow for a wider distribution and most particularly contribute to saving trees. It will be published on the SDRCC website three times a year, in October, February, and June. SDRCC will produce some printed versions for special events only.

This newsletter is written for all members of the Canadian sport community. We will be pleased to receive your suggestions for themes and topics that you would like addressed in it. And if you have any comments or reactions, you are welcome to share them with us, using our contact information below. ♦

SDRCC

Sport Dispute Resolution Centre of Canada
3100, Le Carrefour blvd, Suite 560, Laval (Quebec) H7T 2K7
Telephone (450) 686-1245 / 1-866-733-7767
Fax (450) 686-1246 / 1-877-733-1246

www.adrsportred.ca

The SDRCC wishes to thank Sport Canada for its generous financial contribution.



Canadian Heritage
Patrimoine canadien



ISSN 1712-9923