



Representing Affected Parties

by Emir Crowne

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Representing affected parties during the dispute resolution process is a complex task. From the outset it is essential to identify the affected party's interests and position. It cannot, and should not, be assumed that the affected party's interest(s) necessarily align with that of the respondent (usually the NSO).

Indeed, affected parties almost always arise in team selection or carding matters. They are rare in other types of sporting disputes dealt with by the SDRCC. To use the language of the Canadian Sport Dispute Resolution Code, an affected party is a person who "may be adversely affected" by a "decision of the [SDRCC]." Although one can query whether a mediated settlement falls under this definition, it is presumably intended to capture 'resolutions' (whether arbitral or mediated) that have been achieved through the machinery of the Code.

When a claimant athlete challenges a team selection decision, he/she is either arguing that he/she should have been named to the team in question, or the criteria/process used to nominate other athletes over the claimant was, in some way, defective, inappropriate or breached principles of fairness. Sometimes claimants argue both (i.e. team selection and criteria/process). Where a claimant argues that a discretionary spot should be filled, there may not necessarily be any affected parties at all, or as is becoming commonplace, the NSO identifies everyone as an affected party.

This is what I call the "*affected party dump*." It is a growing tactic among NSOs. NSOs never admit flaws in their selection process. It is always airtight and above reproach. How dare a claimant challenge them? In answering the claimant's request, the NSO then names virtually every athlete as being "affected." It leaves the claimant in a dark and awkward spot. The claimant is implicitly seen as a "trouble-maker" and the affected parties, mindful of their own self-interest and need for self-preservation, simply side with the NSO throughout the process. The *affected party dump* tactic also makes settlement nearly impossible, since all parties have to agree.

Tactics aside, it is also important for affected parties to articulate their position early in the process. Affected parties, and their representatives, must be candid and forthright with the panel/SDRCC. If they truly will not be "adversely" affected by a decision, they should state it. The Panel then has the authority to decide whether they should remain involved in the proceedings or not. I have seen cases where an "affected party" in an *affected party dump* situation would have actually been better off if the claimant succeeded. This is not what the Code intended. It was intended to capture situations of truly adverse impacts, like team de-selection.

In other cases, NSOs invoke the *affected party dump* to clean up their own internally flawed processes. Even today, there are NSOs who do not involve or notify affected parties during their internal dispute resolution processes. Only when the matter arrives at the SDRCC does the respondent NSO indicate that several/all athletes may indeed be affected. Those NSOs argue that it's either their "policy" not to notify affected parties for internal appeals, or are simply unable to administratively coordinate such parties. It is then left to the SDRCC to handle not only the increased administrative burden, but to the arbitrator to decide on whether such "no notification policies" violate principles of natural justice and fairness (which they almost certainly do). This practice also needs to stop. NSOs that continue to not involve affected parties in their internal dispute resolution process should have this weighed against them during arbitration proceedings, and costs awards.



In closing, it is important to note that affected parties have the same standing as claimants and respondents under the Code. In a recent dispute, counsel for the claimant indicated that the claimant and respondent were in agreement as to the SDRCC's jurisdiction, so how could an affected party challenge such concurrence? To which the arbitrator promptly reminded everyone that all "parties" under the Code have equal standing. In that vein, affected parties - athletes who are truly affected in an adverse way - should undertake their own independent submissions. They should not rely on either the claimant or the respondent to make their case for them.

Indeed, inaction on the part of an affected party will (and should) prevent that party from re-appealing the issue if the claimant succeeds, either on the basis of issue estoppel or sub-section 6.12 (d) of the Code. Affected parties should therefore take the matter as seriously as the claimant does, and seek legal counsel or help from the SDRCC's *pro bono* list, if necessary. ■

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