

Report on the Major Games Team Selection Cases

September 10th, 2002

Prepared by ADRSPORTRED Steering Committee



Alternative Dispute Resolution for Sport

www.ADRsportRED.ca



| INTRODUCTION |
|--|
| PARTICIPANTS A. Acknowledgements |
| EXECUTIVE SUMMARY A. Recommendations B. Observations |
| REVIEW OF THE SELECTION CASES I. Interim ADRSPORTRED Program: An Overview A. Background B. Administration of ADRsportRED |
| II. Review of Team Selection Cases A. Overview of Cases B. Selection for a World Cup Event C. Selection for the 2002 Olympic Winter Games |
| 1. SUMMARY 2. Cases |
| Biathlon Snowboard Bobsleigh Alpine Skiing |
| |





| 14 | 3. Administration | | |
|----|---|--|--|
| 15 | D. Selection for the 2002 Paralympic Winter Games | | |
| | 1. Administration | | |
| | E. Selection for the 2002 Commonwealth Games | | |
| | 1. Summary | | |
| 17 | 2. SWIMMING CASES | | |
| | Context | | |
| | Concerns | | |
| 18 | i. Joinder of Cases | | |
| | ii. Supplementary Decisions | | |
| 19 | iii. Judicial Challenge | | |
| 20 | iv. Administrative Process | | |
| 21 | v. Internal Appeal Process | | |
| 22 | vi. Independence of the System | | |
| 23 | 3. WRESTLING CASE | | |
| | | | |

III. Recommendations

- 24 CONCLUSION
- 25 Appendix 1 Summary of Cases 2002
- 26 Appendix 2 COA Team Selection Appeal Procedures
- **31** Appendix 3 Notice of Appeal
- **33 Appendix 4** Intervention of an Added Party
- **34 Appendix 5** Notice of Confirmation by COA
- 35 Appendix 6 Standard Letter Initiating Process
- **38** Appendix 7 Outline of Facts and Sequence of Events
- 40 Appendix 8 Code Revision





introduction

The purpose of this report is to provide a review, assessment and analysis of the selection cases heard to date by ADRsportRED, including those cases related to the selection of the Canadian Olympic Team for the 2002 Olympic Winter Games in Salt Lake City, the Canadian Paralympic Team for the 2002 Paralympic Winter Games in Salt Lake City and the 2002 Commonwealth Games in Manchester. This report provides some suggestions for improvement to existing procedures as well as an opportunity for users of the program to better understand how the program works.



participants

This report has been prepared by the members of the ADRsportRED Steering Committee, with input from the Co-Chief Arbitrators, Richard H. McLaren and L. Yves Fortier, C.C., Q.C., for the Secretary of State (Amateur Sport), the Honourable Paul DeVillers, P.C., M.P., and the Canadian sport community.

The members of the Steering Committee, followed by their appointing body, are:

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- Mr. Gordon Peterson Chair
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 Commonwealth Games Canada
- Ms. Carla Qualtrough AthletesCAN
- Dr. Bruce Kidd ADR Implementation Committee
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6

- Mr. Joseph de Pencier Canadian Centre for Ethics in Sport (CCES)
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CO-CHIEF ARBITRATORS

- Mr. L. Yves Fortier, C.C., Q.C.
- Mr. Richard H. McLaren

A. ACKNOWLEDGEMENTS

The Steering Committee would like to recognize and acknowledge the significant amount of input received from members of the sport community. Many of the participants in the selection cases to date were invited to provide information on their experiences and to make recommendations to the Steering Committee on ways to improve the system.

ADRsportRED is a new system and the Steering Committee has been charged with the responsibility to improve the system over time and to oversee the implementation of such improvements.



executive summary

"It is always unfortunate

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As noted by the Honourable Paul DeVillers, Secretary of State (Amateur Sport), in a press release issued July 10, 2002, "It is always unfortunate when disputes arise between athletes and sport organizations, especially over participation at major games. The interim Alternative Dispute Resolution for Sport Program (ADRsportRED) was created to give athletes and sport organizations access to timely resolution of conflicts."

The creation of the ADRsportRED program was considered necessary because of the lack of consistency of approach for dealing with sport disputes, inherent conflicts and questionable outcomes. The program was introduced as an alternative to litigation, an often costly, timeconsuming process which destroys relationships and takes a huge personal toll on those involved. Selection cases, in particular, have frequently been the subject of litigation and have also demonstrated a wide variance in the expertise of panel members and the procedural fairness for parties involved when handled outside the courts.

Since its inception, the ADRsportRED

program has heard eight cases related to team selection, including those relating to selection to the Canadian Olympic Team for Salt Lake City, U.S.A. and the Canadian Commonwealth Games Team for Manchester, U.K. In addition, prior to its official opening, a test case involving a national sport federation (NSF), a selection dispute for a world cup event was dealt with on an ad hoc basis. In all cases, ADRsportRED has rendered its decisions in a timely manner, utilizing qualified, experienced sport arbitrators.

A table describing those cases, the parties involved, identifying the arbitrators and indicating the time periods over which they were resolved, is attached as Appendix 1. All decisions for those cases are public and are available on the ADRsportRED Web site (www.ADRsportRED.ca) in the Resource Centre

section.

The initial experience with the ADRsportRED program in selection matters occurred prior to the Olympic Winter Games in Salt Lake City. Four selection cases were handled in a timely, cost-effective manner using specially prepared procedural rules. No controversies arose out of the cases handled and parties appeared relatively content with the outcomes reached.

Unlike the specially prepared procedural rules for the Olympic Winter Games, the Commonwealth Games in Manchester offered an opportunity to use the regular procedural rules in the ADRsportRED Code for selection cases. Although cases were still

handled in a timely manner and on a cost-effective basis, the need for some improvements was identified.

ADRsportRED has established an objective to create expertise in a body of arbitrators for selection disputes. Each new case proceeding through the ADRsportRED



program provides experience that can lead to improvements in the program. While the program has performed well to date in delivering considered outcomes to disputes on a timely basis, ADRsportRED has made some observations and developed some recommendations for improvements to the system as a result of its recent experience with selection disputes. These improvements are identified in the recommendations and observations which follow.

A. RECOMMENDATIONS ARE:

- Revise initiating process. "Friendly" user forms to be developed which provide relevant and essential instructions to the user of the form. Consider adapting the forms used for Salt Lake City (specially prepared initiating process) to the existing initiating process under the Code. Each form should contain a provision outlining the names of others who may be affected by the appeal. For selection cases, the Respondent shall certify that it is not aware of any other parties likely to be affected.
- Ongoing education of the users is required. A communication plan has been developed but implementation may need to be accelerated – the ADRsportRED Program needs to do more in order to familiarize people with the program and how it works. Suggestions include enhancing the website and providing informative booklets.

- 3. A checklist needs to be developed for the Court Office to outline the sequence of events to be performed in a typical arbitration and a special chart for expedited measures similar to that prepared for Salt Lake City selection. Additional checklists for the Court Office should also be developed to enable a new case administrator to pick up a case in midstream if necessary.
- The Court Office must maintain close contact with the Executive Director to ensure a smooth transition in the event of staff turnover.
- The Court Office is to review its filing system (prefereably using a "per case and per piece" system) to ensure that documents are readily accessible to any added parties.
- 6. Given the inexperience of the users, the ADRsportRED program should be open to clarifying, as much as reasonably possible, the intent of its decisions. If a party requests clarification, rather than assuming it is clear, the ADRsportRED should outline the reasons for the decision in clear, unambiguous language. Where it involves interpretation of more than one decision, the decision should be made by the Chief Arbitrator and the Code shall be amended to permit interpretation of decisions for clarification purposes by the Co-Chief Arbitrator.
- 7. The Court Office is to create a distribution list, containing all of the parties, intervenors and arbitrators. The Court Office is the primary liaison between the parties and the arbitrator needs to be able to organize the pre-hearing, hearing, assist the arbitrator and distribute the award.



- 8. The initiating process shall require the appellant to indicate all persons known to the appellant who might be affected by the remedy sought. Since the NSF is the most aware of who might be affected by a decision, the NSF must also certify at the time it responds to an appeal that all persons who might be affected have been notified. Furthermore, each arbitrator shall have a checklist requiring a further inquiry to be made at the pre-trial hearing as to what parties could be affected if the remedy sought was granted. A consistent pre-hearing conference agenda shall be established, including a check that no other parties need to be notified once the issues have been identified and that all applicable selection criteria are before the panel.
- 9. Additional training of Arbitrators should be organized to ensure that specific selection issues (such as impact of decisions on team size, event entries or other questions relevant to decisions on selection issues) are canvassed. The objective is to develop a body with significant selection expertise.
- 10. The Chief Arbitrator role be expanded on a temporary basis for selection cases for major games. All cases would be referred initially to the Chief Arbitrator and the Chief Arbitrator, pursuant to his authority under the Code, would appoint a panel of three arbitrators where complexity required. All decisions shall be reviewed by a Chief Arbitrator for cases where there is no internal appeal conducted. The purpose of the review by the Chief Arbitrator would be to assist in providing clarity where required.

B. OBSERVATIONS ARE:

- A recommendation should be made to the COC (and to the CPC, if applicable) to consider charging NSFs an application fee for the nomination of any individuals who have not achieved the agreed-upon criteria, provided that such fee be returned for successful appeals. Such fees should approximate the expenses COC (or CPC, if applicable) incurs in hiring counsel to represent the COC (or CPC, if applicable) at the hearing in addition to management time required to prepare arguments.
- COC (and CPC, if applicable) might want to consider amending its criteria to require all appeals to be filed within a maximum of seven days following the naming of the team.
- Although numerous recommendations were received regarding establishing criteria or thresholds for access to the system, it was decided that it is better to have a few cases proceed where they are not warranted than to have one case refused where it was warranted.
- 4. The parties have a responsibility to ensure all facts are before the arbitrators and to emphasize the critical facts to ensure the arbitrators make decisions focussing on the important elements.
- 5. The Rolland situation underscores that court is not avoided by the arbitration process but that it is merely a part of the ADR process – some cases can (and should) be enforced in court. Failure to honour an arbitration award constitutes a breach of agreement and does not mean the arbitration process failed.



- 6. A further learning is that each case is a private agreement and one case cannot overrule another. The arbitrator is only able to direct the parties appearing before him or her, not other persons who have not appeared or otherwise agreed to be bound by the decision.
- 7. Other than for discretionary decisions regarding selection for team sports, it is recommended that NSFs consider by-passing their internal appeals for selection issues and that such disputes proceed immediately to ADR. This approach would save time, resources, and the potential problems of NSF appeals panels not having the understanding and expertise to deal with the complex issues of team selection and leave it to those qualified arbitrators who are developing an expertise in the field. It would reduce the cost to the parties, simplify the NSF role as a party (and

not as the one responsible for establishing the appeal panel, thereby avoiding any allegations of conflict of interest) and reduce the time to final decision. It is important to note the exception because some team sports may wish to have internal appeals heard because the appeals panel may be comprised of people more familiar with that sport who have an understanding of the discretion to be exercised (e.g. team chemistry). This is in comparison to individual sports where criteria is established as objectively as possible to permit the athletes and coaches to know what is required to qualify for a team and an individual who is not intimately familiar with the sport may be better positioned to hear the dispute.

 Although the ADRsportRED program may encounter some growing pains, it is essential that its independence be maintained.



ADR SP RT RED

review of the selection cases

I. INTERIM ADRsportRED PROGRAM: AN OVERVIEW

A fully operational Dispute Resolution System for Amateur Sport has been established. This system has a disputes secretariat and is developing a resource centre to deal with a full range of sport arbitration and mediation matters.

The objective of the program is to offer mediation or arbitration alternatives to members of national sports organisations, including, among others, athletes, coaches, officials, directors and managers. Recourse to the ADRsportRED is currently accessible only by members of the national sport community and then only after exhausting any internal dispute resolution mechanisms or by agreement.

A. BACKGROUND

Former Secretary of State (Amateur Sport), the Honourable Denis Coderre, created a Work Group in January 2000 to develop a national Alternative Dispute Resolution (ADR) system for amateur sport in Canada. In October 2000, the Secretary of State (Amateur Sport) established a second group to formulate recommendations for the implementation of the system. In October 2001, the Secretary of State (Amateur Sport) approved the recommendations of an implementation committee and requested assistance from the Canadian Centre for Ethics in Sport ("CCES") to establish and supervise the implementation of an interim phase of the program. Upon accepting the mandate, CCES formed a steering committee, comprised of representatives from the sport community, to supervise and govern the ADRsportRED program. CCES also retained the services of the consulting firm AMG inc. to implement the program.

The program officially commenced on January 13, 2002 in time to adjudicate appeals relating to the selection of the Canadian Olympic Team to the 2002 Winter Olympic Games in Salt Lake City.

B. ADMINISTRATION OF ADRsportRED

A fundamental principle of the ADRsportRED program is to provide a fair and unbiased dispute resolution process. The ADRsportRED program is managed by an Executive Director, Mr. Benoit Girardin, and by an independent professional arbitration and mediation centre ("CACNIQ"). CACNIQ, headquartered in Montreal with alliances in British Columbia and Ontario, serves as the Court Office and assists members of the Tribunal and the parties in the administration of their disputes. The Court Office also functions as an information centre for the sport community seeking to utilize the services of the program through its toll free number 1-877-909-3794.

The regulations on procedures and statutes of the ADRsportRED program are contained in its Code which is based upon the Code of Sports-related Arbitration (and mediation rules) developed by the international Court of Arbitration for Sport, with the necessary adaptations for Canada. The Code and the awards from cases heard by ADRsportRED are available free of charge on the web at www.ADRsportRED.ca.



II. REVIEW OF TEAM SELECTION CASES

A. OVERVIEW OF CASES

Eight team selection cases have been adjudicated in the ADRsportRED program. A summary of the cases appears in Appendix 1. The full text of all cases is available on the website at www.ADRsportRED.ca in both official languages. Case decisions are posted on the website promptly after the awards by the arbitrators have been rendered and communicated to the parties involved (although there may be a short delay for the translated version).

B. SELECTION FOR A WORLD CUP EVENT

This first selection case occurred prior to the formal inception of the ADRsportRED program. It was managed by Mr. Benoit Girardin, Executive Director of ADRsportRED, and his management team. The case was an appeal by athletes regarding their eligibility to participate at a World Cup cross country ski event in Switzerland.

12

This case served as a "test event" for the ADRsportRED program. Although no formal procedural rules had been established, the matter was handled efficiently and effectively. Three bilingual arbitrators heard the appeal, permitting participants to choose in which of the official languages they wanted to prepare and file their documents. The hearing was held by teleconference with eight persons in attendance. All affected parties were notified by the National Sport Federation (NSF) and all participants received an opportunity to be heard. This case was the first opportunity to utilize the arbitrators under consideration for appointment to the ADRsportRED program. A considerable amount of time, effort and resources went into ensuring the matter was handled properly. It appeared to have been successful, primarily because of the people involved, all of whom were professional and diligent.

The written decision was rendered by the President of the panel, Mr. L. Yves Fortier, rejecting the appeal. A post-mortem on the case resulted in changes to the Code being developed. The use of a single arbitrator for most cases was the most significant change.

C. SELECTION OF THE CANADIAN TEAM FOR THE 2002 OLYMPIC WINTER GAMES

1. Summary

In accordance with the International Olympic Committee Charter, which governs all Olympic Games and Olympic Winter Games, the Canadian Olympic Association (now the "COC") has the exclusive right to name qualified athletes to the Canadian Olympic Team.

The COC and ADRsportRED agreed that all appeals of decisions made by the COC Team Selection Committee for selection to the Canadian Team at the 2002 Olympic Winter Games in Salt Lake City would proceed through an Ad-Hoc Division established by ADRsportRED to handle appeals.

National Sport Federations (NSFs) were requested to nominate athletes, who had met agreedupon criteria, to the COC for the athletes to



be named to the Canadian Olympic Team. All names had to be submitted by January 13, 2002. An agreement had been entered into by the COC and the NSFs to utilize ADRsportRED for any appeals regarding the members named to the Canadian Olympic Team. This agreement permitted the COC to by-pass appeals to its Executive Committee for the first time, resulting in a single hearing to resolve selection cases. This new approach allowed the COC to avoid conflicts of interest and to accelerate the decision-making time frame.

Specific procedures, "Canadian Olympic Team Selection Appeal Procedures," were created for the appeals and a conscious decision was made by ADRsportRED not to charge a fee to any athlete who appealed a decision. A copy of the procedures is contained in Appendix 2. All appeals were to be heard and decisions rendered by ADRsportRED between the naming of the Canadian Team by the COC on January 17 (based on the nomination of the athletes made by the NSFs) and the commencement of the Olympic Winter Games in Salt Lake City in early February.

Seven prominent arbitrators across the country were recruited to serve as arbitrators in the Ad-Hoc Division, including active members of the International Court of Arbitration for Sport who reside in Canada. These arbitrators were requested to be available on little notice between January 18-25, during which week most of the appeals were to be filed. In early January 2002, prior to the COC team announcement, the arbitrators all received an orientation training and workshop on selection disputes.

The Ad-Hoc Division for the Salt Lake City Games successfully managed four team selection files: Biathlon, Snowboard, Alpine Skiing and Bobsleigh. All cases were handled efficiently, permitting the appeals to be heard and decisions rendered prior to the commencement of the Olympic Winter Games. The program, utilizing specially prepared selection rules, functioned very smoothly. One appeal, made by a Biathlon athlete (Robin Clegg), was accepted and he was named to the Canadian Olympic Team. All cases were heard through telephone conference calls and under expedited procedures.

The nature of the appeals, however, suggested a problem in the system: all of the appeals were made by athletes who had not met the agreedupon criteria (one athlete subsequently achieved the criteria - after the qualification deadline) but were nominated to the team by their respective NSFs in breach of the COC/NSF team selection agreement.

NSFs used the ADRsportRED program to appeal selection criteria contained in the team selection agreements. The NSFs and their athletes had the criteria for approximately two years and did not object to the criteria until the time for selection (when it was clear that their athletes had not achieved such criteria). With no cost to the NSF or athletes to appeal, there was nothing to lose in appealing the COC's refusal to accept the nominations made by the NSF.



Observation 1: A recommendation should be made to the COC (and to the CPC, if applicable) to consider charging NSFs an application fee for the nomination of any individuals who have not achieved the agreed-upon criteria, provided that such fee be returned for successful appeals. Such fees should approximate the expenses COC (or CPC, if applicable) incurs in hiring counsel to represent the COC (or CPC, if applicable) at the hearing in addition to management time required to prepare arguments.

It is anticipated that as case law develops within ADRsportRED, fewer NSFs will challenge the adherence to team selection agreements. This acceptance would make any application fee largely irrelevant.

2. Cases

In accordance with the International Olympic Committee Charter, which governs all Olympic Games and Olympic Winter Games, the Canadian Olympic Association (now the "COC") has the exclusive right to name members to the Canadian Olympic Team.

BIATHLON

Robin Clegg / Martine Albert / Marijke Ciaramidaro v. COA

Biathlon Canada nominated the three appellants in this case despite the fact that they had not achieved the performance criteria and standards agreed between Biathlon Canada and the COC. It was alleged that the selection criteria were too demanding.



Arbitrator Ratushny denied the appeal and accepted that the COC Team Selection Agreements with the NSFs were the cornerstone of team selection. He noted they would be meaningless if agreements could simply be ignored to allow Canadian athletes who had not qualified on agreed upon criteria to participate in the Olympics. He further noted that the agreements "are the product of discussion, negotiation and approval by the Board of Directors of the COA [now COC] on which various sports, including biathlon, are represented. Their purpose is to maintain objectivity and avoid arbitrariness."

Regarding appellant Robin Clegg, the arbitrator considered an additional argument. Mr. Clegg met the performance standard twelve days after the qualification deadline date. Arbitrator Ratushny concluded that the deadline was necessary on an administrative basis but did not constitute a performance criteria. Relying on a precedent established in the sport of Bobsleigh Skeleton, in which the COC Team Selection Committee considered performances obtained after the stated deadline, as well as on the principle of merit in selection, the arbitrator allowed the appeal by Robin Clegg and ordered him named to the Canadian Olympic team.



SNOWBOARD

Mélissa Barclay / Hélène Cloutier v. COA

Despite not having met the COC performance selection criteria, these athletes appealed on the basis that Canada had two additional quota places available in their sport, as designated by their international federation. As the best available Canadian Snowboard athletes, they asked to be allowed to fill these quota spots. The request was denied on the basis that they did not meet the agreed-upon selection criteria. Arbitrator Ratushny again noted that the Olympic criteria under Schedule A in the COC/NSF agreements were negotiated, signed and communicated to athletes long before the selection deadline.

BOBSLEIGH

Christine Fraser / Lesa Stringer v. COA

Application was filed by these athletes to the COC as an appeal of their NSF's refusal to nominate them to the Canadian Olympic Team because they had not met the agreed-upon selection criteria.

Vice President Lachance of the Ad-Hoc Division denied the request for appeal on the basis that the matter had not come before the COC Team Selection Committee. Since no nominations had been made to the COC and no decision had been made by the COC Team Selection Committee (which was a requirement under the Canadian Olympic Team Selection Appeal Procedures), there was no basis for an appeal.

ALPINE SKIING Britt Janyk v. COA

Following the result of the Biathlon Canada appeal for Robin Clegg, Alpine Skiing requested the inclusion of Britt Janyk on the Canadian Olympic Team despite the fact that she had not met performance criteria by the deadline that was established for selecting members to the Olympic team.

The appellants alleged extenuating circumstances. Arbitrator Smith noted that the Appellants had acknowledged that Ms. Janyk did not meet the specific performance standards set out in Schedule A of the COC/NSF agreement prior to the qualification date and that, accordingly, Alpine Canada had not submitted Ms. Janyk's name for selection. Alpine Canada suggested that, despite not achieving the agreed-upon criteria, Ms. Janyk's performance had been hampered by injuries during the qualification period and her performance in competitions since the qualification date had achieved the standard which "in spirit" demonstrated a reasonable probability of achieving top 16 and top 1/2 at the Olympic Winter Games and therefore justified her inclusion on the Canadian Olympic Team.

Arbitrator Smith reiterated earlier arbitration findings that the COC/NSF Team Selection Agreements are the cornerstone of team selections and would be meaningless if they could simply be ignored to allow athletes who have not qualified to participate in the Olympics.



It is important to note that the Notice of Appeal was not truly an appeal of a decision by the COC in accordance with the COC/NSF agreement. Alpine Canada requested the inclusion of Britt Janyk to the team almost two weeks after nominations to the team had to be submitted by the NSFs and the COC Team Selection Committee had rendered its decision regarding inclusion of athletes to the Canadian team.

In response to a letter from Alpine Canada regarding Ms. Janyk, the COC Team Selection Committee observed that it could not make a decision to include Ms. Janyk on the team because Alpine Canada had not submitted her name to the Team Selection Committee in accordance with the requirements. The Team Selection Committee went on to say that had it been submitted in time, it would have been rejected because Ms. Janyk had not met the agreed-upon criteria.

In reviewing the appeal, President Dubin and Vice President Lachance of the Ad-Hoc Division agreed to allow the appeal to proceed on the basis that the Team Selection Committee's response to Alpine Canada constituted a decision by the Team Selection Committee; there was no requirement in the selection procedures which required decisions to relate only to decisions made on names submitted by the deadline date. Recognizing the significance of the situation for the athlete and rather than risk denying a legitimate appeal prior to a hearing, the President and Vice President of the Ad-Hoc Division agreed that the appeal could proceed. **Observation 2:** COC (and CPC, if applicable) might want to consider amending its criteria to require all appeals to be filed within a maximum of seven days following the naming of the team

Observation 3: Although numerous recommendations were received regarding establishing criteria or thresholds for access to the system, it was decided that it is better to have a few cases proceed where they are not warranted than to have one case refused where it was warranted

3. Administration

Appeals of the COC Team Selection Committee decisions were heard under the auspices of the Canadian Olympic Team Selection Appeal Procedures set out in Appendix 2. This policy provided exclusive jurisdiction to the ADRsportRED Ad-Hoc Division over appeals regarding COC Team Selection Committee decisions. To initiate an appeal, the parties only had to complete the forms within the timeframe prescribed by the procedural rules. The procedural rules required the transmission of a Notice of Appeal (Appendix 3) identifying the elements necessary in order for the Court Office to initiate the case and have the COC respond by way of a Notice of Confirmation (Appendix 5). A form for an intervener was also available (Appendix 4).

All forms and the procedural rules were also available on the ADRsportRED web site. All documents were submitted to and pleadings exchanged though the Court Office; parties were not permitted to exchange documents directly between the parties or with the arbitrator.



All selection cases for the 2002 Olympic Winter Games were dealt with expeditiously and efficiently, within very tight timeframes. All decisions rendered by ADRsportRED were respected by the parties and no controversy arose.

D. SELECTION OF THE CANADIAN TEAM FOR THE 2002 PARALYMPIC WINTER GAMES

By agreement between the Canadian Paralympic Committee ("CPC") and ADRsportRED, the Ad-Hoc Division, governed by its President, the Honourable Charles Dubin, and Vice President, Victor Lachance, had jurisdiction over any selection cases arising from nomination to the Canadian Paralymic Team for Salt Lake City.

Unlike in the Canadian Olympic Team Selection cases, no specific procedural rules were established. In the absence of specific regulations, the ADRsportRED Code applied. No appeals to selection to the Canadian Paralympic Team occurred. Since there were no cases, the ADRsportRED Code was not tested to determine whether it was appropriate for selection cases.

There was no mediation or arbitration required for the selection of the Canadian Paralympic team. Nevertheless, ADRsportRED and the CPC agreed to use the ADRsportRED Code with the seven arbitrators of the Ad-Hoc Division, if necessary.

1. Administration

There were no specific forms applicable for the Paralympic Cases. A standard letter was available as shown in Appendix 6.

E. SELECTION FOR THE 2002 COMMONWEALTH GAMES

1. Summary

Unlike the COC and CPC agreements whereby appeals were heard by the ADRsportRED Ad-Hoc Division, cases regarding selection to the Commonwealth Games were under the jurisdiction of the ADRsportRED Ordinary Division and utilized the ADRsportRED Code for procedural guidance.

Two Co-Chief Arbitrators govern the Ordinary Division: Mr. L. Yves Fortier, a member arbitrator of the Ad-Hoc Division for the Court of Arbitration for Sport for the Salt Lake City 2002 Olympic Winter Games and a former member of the United Nations, and Mr. Richard H. McLaren, a member arbitrator of the Ad-Hoc Division for the Court of Arbitration for Sport for the Olympic Winter Games in Nagano, the Olympic Games in Sydney and the Commonwealth Games in Manchester.

Three cases were handled by ADRsportRED relating to selection to the 2002 Commonwealth Games in Manchester, England. The appeals dealt with disputes regarding the selection of a coach (Wrestling) and selection of athletes (Swimming).

These cases proved to be the first real test of utilizing the Ordinary Division for team selection issues. The results evidence certain deficiencies in the initiating documentation under the ADRsportRED Code, the lack of experience of the users of the system with arbitration and the need for ADRsportRED to educate the potential



users and to provide some helpful aids to assist the inexperienced in maximizing the benefits of the ADRsportRED program.

Recommendation 1: Revise initiating process. "Friendly" user forms to be developed which provide relevant and essential instructions to the user of the form. Consider adapting the forms used for Salt Lake City (specially prepared initiating process) to the existing initiating process under the Code. Each form should contain a provision outlining the names of others who may be affected by the appeal. For selection cases, the Respondent shall certify that it is not aware of any other parties likely to be affected.

Recommendation 2: Ongoing education of the users is required. A communication plan has been developed but implementation may need to be accelerated – the ADRsportRED Program needs to do more in order to familiarize people with the program and how it works. Suggestions include enhancing the website and providing informative booklets.

In addition to errors resulting from the inevitable growing pains of implementing a new system, there were also some circumstances exacerbating the problems. With the primary case administrator leaving CACNIQ immediately prior to the appeals being filed, a new case administrator was thrust into the situation with few policies and procedures in place. This unexpected event initially caused some difficulty in the administration of the selection cases for the 2002 Commonwealth Games and emphasized the need for better liaison with the Court Office. Fortunately, the new case administrator, Ms. Odette Legace, was an experienced administrator, the Co-Chief Arbitrator, Mr. Richard McLaren, was able to step in to assist and together they worked above and beyond the call of duty, or the situation would have been much worse.

Recommendation 3: A checklist needs to be developed for the Court Office to outline the sequence of events to be performed in a typical arbitration and a special chart for expedited measures similar to that prepared for Salt Lake City selection. Additional checklists for the Court Office should also be developed to enable a new case administrator to pick up a case in midstream if necessary.

Recommendation 4: The Court Office must maintain close contact with the Executive Director to ensure a smooth transition in the event of staff turnover.

Recommendation 5: The Court Office is to review its filing system (prefereably using a "per case and per piece" system) to ensure that documents are readily accessible to any added parties.



2. Swimming Cases:

Nadine Rolland v. Swimming/Natation Canada (SNC)

Annamay Pierse / Gord Veldman / Doug Wake v. SNC

An outline of the facts and the sequence of events for the two swimming cases is contained in Appendix 7.

It is not our intent to review the decisions made by the arbitrators or Appeal Panel members – those decisions have been made within the bounds of the system and are not subject to change. Our focus is on matters which can be changed and specifically on matters where we can effect change.

CONTEXT

It is unfortunate that the needs of the athletes appear to have been ill-served throughout the entire process. The status of some athletes changed a total of five times – first on the team (Selection Committee decision), then off the team (Appeals Panel decision), then on the team (Selection Committee decision utilizing discretionary authority following the Appeals Panel decision), then off the team (Selection Committee decision because it ignored the intent of the Appeals Panel decision) and, finally, on the team (Selection Committee decision following ADRsportRED arbitrator decision). Even more unfortunate was the one athlete who had his status change six times as he was removed from the team following a settlement in a related case.



The Steering Committee feels badly for all of the athletes involved. No one, least of all SNC, wanted to put athletes through an on-againoff-again process. Everyone was attempting to do their respective best: the athletes swam as fast as they could; the criteria was established well in advance; no questions were raised about the criteria in advance; the interpretation or the criteria after the fact was dealt by an Appeals Panel comprised of respected individuals who are intimately familiar with the sport scene but independent from SNC; the decisions made by the members of the Appeals Panel and, subsequently, by the arbitrators were made in good faith with a view to ensuring fair and impartial treatment to all. Despite all these good intentions, the athletes were subjected to emotional stress and uncertainty.

CONCERNS

Concern has been expressed that the ADRsportRED program compounded the problems experienced by SNC and that many people involved in swimming were totally opposed to the decisions ultimately rendered using the ADRsportRED program. Some of the concern was directed towards needed improvements in the system. Some was borne of frustration with dealing, over a lengthy period of time, with a process resulting in uncertainty created by disparate decisions.



i. Joinder of Cases

A great deal of comment from the swimming community has been volunteered regarding the decision to have two arbitrators hear the appeals separately. A request by SNC was made to hear the matters together because, in the minds of SNC, the issues all related to a single matter: the selection of the swim team to the Commonwealth Games. In submissions to the Co-Chief Arbitrator, it was determined that one situation involved an interpretation of the criteria within a category while another situation related to a comparison of categories (but not including the category involved in the other matter). In addition, one matter was to be conducted in French and the other in English. The Co-Chief Arbitrator was faced with a discretionary decision with no "right" answer.

Based on the information presented, the Co-Chief Arbitrator chose to have the cases arbitrated separately, with two different arbitrators. The responsibilities of the parties to present the necessary information to the Co-Chief Arbitrator cannot be understated. At no time was the fact that a decision in one matter could affect the participants in the other matter - the very situation which occurred - presented. Although the participants had been struggling with the issues for over two months and may have been aware of all the facts and nuances, the Co-Chief Arbitrator was new to the situation and reliant upon the parties to communicate the issues and facts in order to make a decision. There were a number of options open to parties who strenuously objected to the decision made but those options were not taken and, in fact, no questions regarding the need of participants to be involved in both hearings were raised.

Observation 4: The parties have a responsibility to ensure all facts are before the arbitrators and to emphasize the critical facts to ensure the arbitrators make decisions focussing on the important elements.

ii. Supplementary Decisions

Arbitration is a private remedy. The parties must agree to have the matter go before an arbitrator. Agreement can be reached on an ad-hoc basis (with respect to a specific matter) or in advance of any disputes arising so that all matters will be referred automatically to arbitration. Because of its private agreement nature, decisions rendered are only enforceable against the parties participating. It is widely recognized by those familiar with arbitration that a decision cannot bind people who were not parties to the case (even though they may have been involved in a similar or related decision).

Some confusion arose in these cases when the outcomes of the initial arbitration decisions appeared to be in conflict and SNC requested assistance regarding which decision took precedence. From the arbitrators' perspective, there was no need to make such a clarification – they were separate decisions which could easily be accommodated. From SNC's perspective, it only wanted to follow the rules established by the arbitrators but was uncertain what those rules were.



(SNC had already experienced some controversy following the Appeals Panel decision when the Selection Committee chose initially to invoke the discretionary category to permit the athletes originally selected to remain on the team. This decision was subsequently revoked.) SNC was confused because the decisions appeared to contradict one another – in the one instance, the Selection Committee was told it had discretion to make the selection; in the other, the Selection Committee was told it had to select a swimmer.

SNC was looking for clarification from the arbitrators to ensure that the Selection Committee followed the seemingly conflicting requirements of the decisions. To the arbitrators, the decision appeared clear: SNC had to follow the decisions in each case. All SNC wanted was someone to say exactly that – in unambiguous language. Unfortunately, no one did because the arbitrators thought it was clear and did not want to restate it in another way (for fear it might create confusion).

Recommendation 6: Given the inexperience of the users, the ADRsportRED program should be open to clarifying, as much as reasonably possible, the intent of its decisions. If a party requests clarification, rather than assuming it is clear, the ADRsportRED should outline the reasons for the decision in clear, unambiguous language. Where it involves interpretation of more than one decision, the decision should be made by the Chief Arbitrator and the Code shall be amended to permit interpretation of decisions for clarification purposes by the Co-Chief Arbitrator.

iii. Judicial Challenge

A further confusion appears to revolve around the use of the court process by Ms. Rolland to enforce her decision. It is important that people understand that resort to the court is part of the ADRsportRED process and not a failing of the ADRsportRED program. The Code specifically contemplates a party enforcing a decision in court. In this situation, the parties agreed to abide by the decision of the arbitrator. When Arbitrator Clement rendered his decision requiring Ms. Rolland to be named to the team, SNC (because of its confusion over which decision took precedence) did not abide by that decision and the matter was taken to court by the aggrieved party. Although parties who have chosen to proceed by way of arbitration are prevented from going to court with respect to adjudication of that decision, enforcement of a decision usually proceeds to court because the arbitrator has limited powers to sanction the offending party.

Observation 5: The Rolland situation underscores that court is not avoided by the arbitration process but that it is merely a part of the ADR process – some cases can (and should) be enforced in court. Failure to honour an arbitration award constitutes a breach of agreement and does not mean the arbitration process failed.

Observation 6: A further learning is that each case is a private agreement and one case cannot overrule another. The arbitrator is only able to direct the parties appearing before him or her, not other persons who have not appeared or otherwise agreed to be bound by the decision.



iv. Administrative Process

We understand that many people anticipate our determination of whose fault the situation was. Fault is not something that can easily be attributable because of the very different perspectives involved. The ADRsportRED program did not administer the disputes as efficiently as anticipated or as efficiently as it had done in the past. Part of this inefficiency was the result of the change of personnel at the Court House; part was the lack of adequate documentation for initiating selection appeals developed by the program; and part was attributable to the lack of experience in arbitration matters by the parties and the fact that the system was better suited for experienced users.

Recommendation 7: Communication is an essential part of the administration of the appeal. The Court House shall create a contact list per name (name, address, fax, phone, cell, email), create a distribution list and transmit this list to the parties, the director, the co-chief arbitrator and the arbitrator.

Recommendation 8: The initiating process shall require the appellant to indicate all persons known to the appellant who might be affected by the remedy sought. Since the NSF is the most aware of who might be affected by a decision, the NSF must also certify at the time it responds to an appeal that all persons who might be affected have been notified. Furthermore, each arbitrator shall have a checklist requiring a further inquiry to be made at the pre-trial hearing as to what parties could be affected if the remedy sought was granted. A consistent pre-hearing conference agenda to be established, including a check that no other parties need to be notified once the issues have been identified.

ADRsportRED program did provide qualified arbitrators who heard the appeals and rendered decisions within a very limited period of time. A number of people went beyond their responsibilities in an effort to rectify the issues which constantly arose.

Part of the problem may have been the fact that SNC had been struggling with the selection for some time before it reached the ADRsportRED program. SNC may have taken for granted that everyone was aware of the facts. The arbitrators, however, can only reach a decision based on the facts presented to them. This approach places a heavy burden upon the parties to ensure that all salient facts are before the arbitrators and all critical facts have been emphasized. Unfortunately, the most important fact in these cases - that there were a maximum of 40 swimmers to be named to the team - was not emphasized, neither before the Co-Chief Arbitrator who made the decision on joinder nor before either of the arbitrators who heard the cases. The only mention of this critical fact was contained amongst the written documents filed.

Recommendation 9: Additional training of Arbitrators should be organized to ensure that specific selection issues (such as impact of decisions on team size, event entries or other questions relevant to decisions on selection issues) are canvassed. The objective is to develop a body with significant selection expertise.



Recommendation 10: Consideration be given to expanding the Chief Arbitrator role on a temporary basis for selection cases for major games. All cases would be referred initially to the Chief Arbitrator and Chief Arbitrator has the authority under the Code to appoint a panel of three arbitrators where the complexity requires. All decisions would be reviewed by a Chief Arbitrator for cases where there was no internal appeal conducted. The purpose of the review by the Chief Arbitrator would be to assist in providing clarity where required.

v. Internal Appeal Process

Certainly the athletes did not benefit from the lengthy time between the trials and the ultimate decision with the attendant uncertainty. Selection for the 2002 Commonwealth Games also revealed a potential problem for NSFs regarding their internal appeals process.

Currently, all NSFs are required to have an internal appeal process to hear disputes. SNC utilized its internal appeal process and selected three very well respected individuals to its Appeal Panel. With a 30 day window to appeal, it took approximately 45 days from the date the selection trials were held until the date of the Appeal Panel hearing. Like SNC, many NSFs name prominent, credible individuals from their sport (or who know their sport well) to hear appeals.

It is intended that all NSFs who receive Federal Government funding be required to utilize the ADRsportRED system for final appeals. Accordingly, internal appeal decisions made by a NSF appeals committee are no longer final and either of the disputing parties can elect to pursue the ADR process.

In the SNC cases, a worst case scenario occurred, whereby the internal SNC Appeals Panel decision was appealed by two separate parties to two separate ADRsportRED arbitration hearings. This process took almost three months to complete and caused significant confusion and disharmony within the sport. This disharmony was compounded by the arbitrator's decision in one of the two cases, to overrule the SNC Appeals Panel and order three athletes who had been "de-selected" by the SNC Appeals Panel, to be named to the team. In the arbitrator's ruling, he described the errors in the SNC Appeals Panel decision as "patently unreasonable".

These cases should cause some reflection on the logic and necessity to establish an internal NSF appeals panel when their decision has no finality or ability to bind both parties, can extend the length of time to resolve the dispute (thereby increasing the likelihood of creating hard feelings amongst the participants) and the members who agree to volunteer for the appeals committee can be criticized for their conduct, perhaps making it more difficult to entice others to agree to participate on internal panels in the future.



Observation 7: Other than for discretionary decisions regarding selection for team sports, NSF internal appeals be discontinued for selection issues and disputes proceed immediately to ADR. This approach would save time, resources, and the potential problems of NSF appeals panel not having the understanding and expertise to deal with the complex issues of team selection and leave it to those qualified arbitrators who are developing an expertise in the field through repetition. It would reduce the cost to the parties, simplify the NSF role as a party (and not as the one responsible for establishing the appeal panel, thereby avoiding any allegations of conflict of interest) and reduces the time to final decision.

It is important to note the exception because some team sports may wish to have internal appeals heard because the appeals panel will be comprised of people more familiar with that sport who have an understanding of the discretion to be exercised. This is in comparison to individual sports where criteria is established as objectively as possible and an individual who is not familiar with the sport may be better positioned to hear the dispute.

It is observed that the COC chose to abandon its internal appeal mechanism for selection to Canadian Olympic Teams for many of the above reasons and that doping currently has a single mechanism of appeal.

vi. Independence of the System

We would also like to make an observation regarding the role of the Secretary of State (Amateur Sport) in the SNC cases. The office of the Secretary of State was instrumental in establishing the ADRsportRED system to handle matters such as the team selection appeals for the 2002 Commonwealth Games. Despite a significant amount of media and political pressure, including a province taking the unusual step of providing direct financial assistance to a swimmer for a court action, Secretary of State DeVillers maintained a hands-off approach and allowed the system to do its job. The Steering Committee thanks the Secretary of State for demonstrating confidence in the program and for remaining "hands off" despite the attendant pressures.

Observation 8: Although the ADRsportRED program may encounter some growing pains, it is essential that its independence be maintained.



3. Wrestling Case:

Moore v. Canadian Amateur Wrestling Association

In this case, a dispute arose between a certified coach and his NSF concerning the selection of an assistant coach for the 2002 Commonwealth Games in Manchester. The applicant stipulated that the NSF did not follow its own selection policy because it did not take into account some of the factors contained in the policy and it did not discuss nor evaluate the coaching qualifications during the selection process. The NSF argued that it followed its policy. The arbitrator dismissed Mr. Moore's application and found that the NSF had complied with its policy.

The case was resolved within the stipulated timeframe and all parties who were involved or could have been affected were notified by the NSF.

III. RECOMMENDATIONS

 The preceding eight observations and ten recommendations will guide the ADRsportRED program on its improvement and transition to the permanent organization.

Many of the recommendations (such as those involving communication of information, education of the users and additional training of arbitrators) merely involve accelerating plans already in place. Others (such as revisions to initiating process and Court Office procedures) involve a review of existing procedures or policies.

In addition, a number of recommendations have been made to amend the Code. These suggestions will be submitted to the Co-Chief Arbitrators for consideration. Appendix 8 contains the suggestions currently under consideration.





conclusion

The ADRsportRED program has completed its first eight months of operation. This program will remain in place pending the transition to the proposed national Sport Dispute Resolution Centre outlined in Bill C-54, *An Act to Promote Physical Activity and Sport*. The focus to date of the ADRsportRED program has been on ADR service delivery. The Centre should have an important role in addressing some of the educational concerns identified in this report.

This report allows us to take stock of the relevance and usefulness of the ADRsportRED program and to identify areas where the program can be improved with respect to selection cases. All of the people who provided comments for consideration emphasized the need for this program despite identifying some concerns regarding certain aspects of the program. The Steering Committee has tried to address all of these concerns with its recommendations but recognizes that the ADRsportRED program is in its infancy and will require constant review in order to continue to serve the needs of the sporting community.

The resulting action plan includes the implementation of these recommendations. Code revision, as well as the drafting and modification of the forms and administrative procedures are already under way. An educational campaign will be spread out over the next eight months and has already commenced. Administrative processes are being developed to address the shortfalls identified in this report.

It is important to note that the Steering Committee is of the opinion that the program is functioning well overall and that many of the deficiencies identified surfaced largely because of unusual circumstances and a gap in the initiating process that can be readily corrected. The Steering Committee echoes the confidence expressed this summer by the Secretary of State (Amateur Sport) in the ADRsportRED program.

The Steering Committee would like to thank all the participants for their information, comments and recommendations.



summary of cases - 2002

| # | Name of Athlete(s) | Name of Arbitrator(s) | Case # | Date Notice of Appeal | Date Decision | Sport |
|----|--|--------------------------|-----------|--------------------------|------------------|-----------|
| 01 | Robin Clegg Martine Albert Marijke Ciaramidaro | Edward Ratushny | # 02-0001 | Jan 21, 2002 | Jan 28, 2002 | Biathlon |
| 02 | Christine Fraser Lesa Stringer | Victor Lachance | # 02-0002 | Jan 23/24, 2002 | Jan 24/25, 2002 | Bobsleigh |
| 03 | Mélissa Barclay Hélène Cloutier | Edward Ratushny | # 02-0003 | Jan 22/24, 2002 | Feb 1, 2002 | Snowboard |
| 05 | Britt Janyk | Tricia Smith | # 02-0005 | Feb 1, 2002 | Feb 6, 2002 | Alpine |
| 07 | Robert Moore | Graeme Mew | # 02-0007 | May 28, 2002 | June 21, 2002 | Wrestling |
| 09 | Annamay Pierse | Michel Picher | # 02-0008 | June 7, 2002 | June 26, 2002 | Swimming |
| 10 | Gord Veldman | Michel Picher | # 02-0009 | June 7, 2002 | June 26, 2002 | Swimming |
| 11 | Doug Wake | Michel Picher | # 02-0010 | June 7, 2002 | June 26, 2002 | Swimming |
| 12 | Nadine Rolland | Jean-Guy Clément | # 02-0011 | June 5, 2002 | June 26, 2002 | Swimming |



COA team selection appeal procedures rules

GENERAL

- 1 In these Rules, unless the context otherwise requires:
 - (a) Arbitration Code means the Code of Procedures developed under the ADR Interim Program, as may be amended from time to time;
 - (b) Rules means these Rules.
- 2 The purpose of the present Rules is to provide, in the interests of the athletes and of sport, for the resolution by arbitration of any appeals from decisions of the Canadian Olympic Association (COA) Team Selection Committee relating to the selection of athletes to the 2002 Canadian Olympic Winter Games Team (Team) in Salt Lake City, Utah, U.S.A..
- For the months of January, 2002 and February up to the commencement of the 2002 Winter Olympic Games (Games), the Steering Committee of the Interim ADR Program (Steering Committee) established by the Canadian Centre for Ethics in Sport (CCES) will establish an *ad hoc* division (Ad Hoc Division), the function of which is to provide for the resolution by arbitration of disputes relating to the selection of athletes to the Team by means of Panels set up in accordance with the present Rules. The Ad Hoc Division consists of arbitrators appearing on a special list, a President, a Co-president and an Arbitration Court Office.
- 4 These Rules govern the Appeal unless they are in conflict with any provision of the Arbitration Code or any other law or rules applicable to the

Appeal as agreed by the parties, in which case such law or rules shall prevail over these Rules. The present Rules may be amended by the Steering Committee, acting as the Council defined therein, pursuant to the Arbitration Code.

- 5 The Steering Committee shall draw up the special list of arbitrators referred to in Section 3. This special list of arbitrators shall be published on or before December 31, 2001. It may be subsequently modified by the Steering Committee where necessary.
- 6 The Steering Committee shall elect the President and the Co-president of the Ad Hoc Division from among the members of the Steering Committee and the CCES Board of Directors. The President shall perform the functions conferred upon him or her by the present Rules and all other functions relevant to the proper operation of the Ad Hoc Division. The Co-president may substitute for the President at any time. The President and the Co-president must be independent of the parties and, where necessary, disqualify themselves in one another's favour.
- 7 The Appeal shall be conducted in English or French as determined by the President of the Ad Hoc Division.
- 8 The seat of the Ad Hoc Division and of each Panel is in Ottawa, Ontario. However, the Ad Hoc Division and each Panel may carry out all the actions in every other place in Canada they deem appropriate.

COMMENCING THE ARBITRATION

9 Should an athlete nominated to be a member of the Team have his or her nomination rejected by the COA Team Selection Committee, or accepted but subject to conditions or restrictions that themselves are unacceptable to the athlete in question, then the athlete and his or her National Sport Federation (NSF) both have the right to appeal the decision of the COA Team Selection Committee to the ADR Ad Hoc Division. There shall be only one appeal but the appeal may be initiated by either the athlete nominated or his or her NSF or by both jointly.



REPORT ON THE MAJOR GAMES TEAM SELECTION CASES

appendix 2

- 10 In order to proceed, an NSF appeal must have the signed endorsement of the athlete nominated. Where an appeal is initiated by the athlete nominated, he or she need not have the endorsement of his or her NSF in order that the appeal proceed.
- 11 In all cases a Notice of Appeal, in such form as may be prescribed by the Ad Hoc Division, or in a reasonably similar form, shall be delivered to the Court Office no later than midnight of the third day following the date when both the athlete and his or her NSF have been advised of the decision of the COA Team Selection Committee (e.g., if both the NSF and the athlete are advised on a Saturday of the decision, a Notice of Appeal must be delivered to the Court Office, i.e., received at the Court Office, no later than midnight of the following Tuesday; if the NSF is advised on a Saturday of the decision and the athlete is advised on the following day, Sunday, of the decision, a Notice of Appeal must be delivered to the Court Office no later than midnight of the following Wednesday).
- 12 The Notice of Appeal shall be in the form attached as Schedule A and shall include the following information:
 - (a) A statement that the nominated athlete or NSF, or both jointly, or the added party wish to refer the matter to arbitration;
 - (b) The names, addresses (including e-mail), telephone and fax numbers of the athlete and his or her NSF or of the added party, as the case may be.
 - (c) A description of the dispute the athlete/NSF or added party has with the decision of the COA Team Selection Committee and a brief statement of the facts of the case that is to be arbitrated.

- (d) A statement of the ruling requested by the athlete/NSF or added party on the Appeal.
- (e) The name of the arbitrator from the list of arbitrators who is suggested by the athlete/NSF or added party to hear the appeal, along with the name of up to two arbitrators from the list of arbitrators who shall not hear the Appeal.
- 13 Within 24 hours of receipt of the Notice of Appeal, the Court Office shall deliver to the COA, by e-mail, personal delivery or by fax, a copy of the Notice of Appeal and a request for Notice of Confirmation.
- 14 Within 48 hours of receipt of the Notice of Appeal the COA shall deliver, by personal delivery, e-mail or fax, a Notice of Confirmation to the athlete, his or her NSF, and added party, if any, and the Court Office the following:
 - (a) A statement stating whether or not the COA accepts the arbitrator named in the Notice of Appeal to be the sole arbitrator, and if not, naming up to two arbitrators from the pecial list of arbitrators who shall not hear the Appeal.
 - (b) A statement accepting as correct the brief statement of the facts of the case as set forth in the Notice of Appeal or identifying the points of disagreement on the facts and any additional facts the COA believes need to be set forth to properly, although briefly, frame the case.
 - (c) A statement of the ruling requested by the COA on the Appeal.
- 15 If the COA accepts the arbitrator named in the Notice of Appeal as the arbitrator, he or she shall be the sole arbitrator on the arbitration and shall be hereinafter referred to as the "Panel".



- 16 If the COA does not accept the named arbitrator in its Notice of Confirmation, the arbitrators named by each party not to hear the Appeal shall be struck from the special list of arbitrators and the President shall name a panel of three arbitrators from the remaining members on the special list of arbitrators who shall hear the Appeal and shall be hereinafter referred to as the "Panel". The President shall also name the Chair of each Panel.
- 17 Any document required to be delivered for the purpose of the Appeal may be sent by fax, e-mail or personal delivery, provided that the original of any e-mailed or faxed document that requires signatures shall be produced for verification of authenticity at the hearing of the Appeal.

ARBITRATORS

- 18 An appointed arbitrator, whether acting as a sole arbitrator or as a member of a panel of three, must be independent of the parties.
- 19 An arbitrator must disqualify himself or herself on his or her own initiative or, failing that, may be challenged by a party if circumstances give rise to legitimate doubts as to his or her independence. The President of the Ad Hoc Division is competent to take cognizance of any challenge requested by a party. He shall decide it immediately after giving the parties and the arbitrator concerned the opportunity to be heard, insofar as circumstances permit. The challenge must be brought as soon as the reason for the challenge becomes known.
- 20 Any arbitrator may be removed by the President of the Ad Hoc Division if such arbitrator is prevented from carrying out the assignment or fails to perform his or her duties in accordance with the present Rules.

21 If an arbitrator disqualifies himself or herself on his or her own initiative or if the President of the Ad Hoc Division accepts a challenge by a party or removes an arbitrator, the President shall immediately appoint an arbitrator to fill the vacancy

PARTIES

- 22 The Panel may, on its own motion or on the request of any party to the Appeal, add a party to the Appeal who, in the opinion of the Panel, is a proper and necessary party to the Appeal in order that the Appeal fully and effectively dispose of any issue or matter related to the Appeal.
- 23 The parties to the Appeal shall be the athlete (or Team of athletes), his or her NSF, and the COA, as well as any parties who were added to the Appeal by the Panel. The Panel may request or permit any other person or agency to be present and make submissions on the hearing of the Appeal as the Panel deems appropriate.
- 24 In the case of a Team event, the procedure described herein equally applies except that in that case notice of the COA Team Selection Committee decision to any one member of the nominated Team shall be deemed to be notice to all members of the nominated Team, and any one member of the nominated Team may initiate the Appeal in the case of a Team-initiated appeal, and in the case of an NSF-initiated appeal only one member of the Team need sign the Notice of Appeal endorsing the Appeal, and on the hearing of the Appeal the Team shall be limited to representation by two of its nominated members, and an attorney or other agent, unless the Panel in its discretion agrees to permit more than two Team members to participate in the hearing of the Appeal.



CONDUCT OF THE APPEAL

- 25 The Appeal shall be conducted in all respects in accordance with the provisions of the Arbitration Code applicable to the Appeal, these Rules, and any other agreement of the parties applicable to the conduct of the proceedings.
- 26 Any defence of lack of jurisdiction of the Panel must be raised at the start of the proceedings or, at the latest, at the start of the hearing.
- 27 The Panel shall have authority to give such directions as to procedural matters as may be fair, just and convenient, including directions with respect to adjournments, exclusion of witnesses, disclosure of documents from parties, provision of position statements, submissions and presentation of documents, evidence, and argument, and admissibility of evidence.
- 28 Preliminary meetings and motions, as well as the Appeal hearing itself, may be heard in whole or in part by teleconference or other electronic audio or audiovisual communication devices as the Panel may direct. Preliminary motions and/or the Appeal may be conducted via e-mail or wholly in writing with the consent of all the parties and the Panel.
- 29 The Panel organizes the procedure as it considers appropriate while taking into account the specific needs and circumstances of the case, the interests of the parties, in particular their right to be heard, and the particular constraints of speed and efficiency specific to the hearing. The Panel shall have full control over the hearing of the appeal.
- 30 At the hearing, the Panel shall hear the parties and take all appropriate action with respect to evidence. The parties shall introduce at the hearing all the evidence they intend to adduce and produce the witnesses, who shall be heard immediately.

- 31 The Panel may at any time take any appropriate action with respect to evidence. In particular, it may appoint an expert and order the production of documents, information or any other evidence. It may also, in its discretion, decide whether to admit or exclude evidence offered by the parties and assess the weight of evidence. The Panel shall inform the parties accordingly.
- 32 If a party fails to appear at the hearing or to comply with injunctions, summonses or other communications issued by the Panel, the Panel may nevertheless proceed.

AWARD

- 33 The Panel shall give a decision within 24 hours of the hearing of the appeal. Exceptionally, this time limit may be extended by the President of the Ad Hoc Division if circumstances so require.
- 34 The decision is taken by a majority or, in the absence of a majority, by the Chair of the Panel. It shall be written, dated and signed by the Chair of the Panel and, in principle, brief reasons will be stated.
- 35 Before the award is signed, it shall be 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.
- 36 Upon completion of the Appeal, a copy of the award or decision together with supporting reasons shall be delivered by the most expeditious means available (fax or e-mail if possible) to all parties to the Appeal. The Panel may decide to communicate the holding of the award, prior to the reasons.



- 37 The award shall be final from such communication.
- 38 If the National Sport Federation concerned is not a party to the proceedings and does not receive a copy of the award in that capacity, this award shall be communicated to it for information purposes.

COSTS AND EXPENSES

- 39 The NSF and COA shall be jointly and severally responsible (and shall share equally as between themselves) for the reasonable fees, costs, charges and expenses of the Panel.
- 40 The Panel shall not have any power or authority to award costs.

CONFIDENTIALITY

41 Unless otherwise provided by the parties, all information received by the Panel and disclosed by or on behalf of the parties during the Appeal, shall be deemed to be confidential information and shall not be disclosed by the Panel. Notwithstanding the foregoing, any decision by the Panel, along with any reasons for decision, shall not be confidential unless so ordered by the Panel upon request of a party.

EXTENSIONS OF TIME AND IRREGULARITIES

42 Upon the request of the parties, the Panel may extend or abridge any time prescribed by these Rules on such terms as are just. Any such ruling however shall have regard to the fact that it is the intention of all the parties to the Appeal to have the final award rendered prior to the deadline for delivery of entries to the Olympic Games in respect to which the dispute relates. 43 Failure to comply with the Rules is an irregularity and does not render the Appeal or a step, document or proceeding in the Appeal a nullity and the Panel may grant all necessary relief on such terms as are just to secure the just determination of the real matters in dispute between the parties in a just and expedient manner.

BINDING EFFECT OF ARBITRAL AWARD

44 The award or determination of the Panel shall be binding upon the parties and their respective heirs, executors, administrators and assigns.

NO APPEAL

45 There is no appeal from the arbitral award or determination.

LANGUAGE

46 The French and English texts are authentic. In the event of any discrepancy, the English text shall prevail.



notice of appeal
(pursuant to the rules)

A. PARTIES TO THE DISPUTE

| (1) Name of athlete/Team | |
|---|--|
| Complete postal address | |
| Telephone | |
| Fax number | |
| E-mail address | |
| (2) Name of Team authorized representative | |
| Complete postal address | |
| Telephone | |
| Fax number | |
| E-mail address | |
| (3) Name of National Sport Federation | |
| Complete postal address | |
| Telephone | |
| Fax number | |
| E-mail address | |
| (4) Name of National Sport Federation authorized representative | |

B. ATHLETE/TEAM DECLARATION

"This is an appeal from a decision of the Team Selection Committee of the COA"

| (5) Date of decision appealed from | |
|--|--|
| (6) Date athlete/Team representative was advised of decision appealed from | |
| (7) Name of the person who advised athlete/Team representative | |
| (8) Date NSF was advised of decision appealed from | |
| (9) Name of the person who advised NSF | |



33

C. DECISION APPEALED FROM

| (10) Please describe decision appealed from. | |
|--|--|
| (11) Please describe what you believe should have been the decision of the Team Selection Committee. | |
| (12) Please describe the grounds of appeal: what you believe was wrong with the decision and why it was wrong. Attach as many addi- tional pages as you feel are necessary to fully set forth your arguments. | |

D. CHOICE OF THE ARBITRATOR

| (13) Name of the Arbitrator you choose and coming from the list of accredited arbitrators (link to make on web site or attached if faxed) | |
|---|--|
| (14) Name of 2 arbitrators you wish to be struck from the list of accredited arbitrators. | |

DATE: Insert the date _____

Signature of the athlete/Team representative _____

Signature of the National Sport Federation (if applicable) (see important notices)

IMPORTANT NOTICES:

- 01 An athlete or Team initiated appeal may, but need not have the signature of the NSF endorsing the appeal.
- 02 A National Federation initiated appeal must have the signature of the athlete or Team representative.
- 03 It is important that you provide accurate address, telephone, fax numbers and e-mail addresses so that you can be notified of the hearing of the appeal and the decision on the appeal in an expeditious manner.



intervention of an added party (pursuant to the rules - article 12 (d))

A. IDENTIFICATION OF THE ADDED PARTY

| (1) Name of the Added Party and his (her) capacity in relation with the Appeal | |
|--|--|
| Complete postal address of the Added Party | |
| Telephone | |
| Fax number | |
| E-mail address | |

B. IDENTIFICATION OF THE APPEAL IN WHICH THE ADDED PARTY WISHES TO INTERVENE OR BE HEARD

| Name of athlete/Team who registered the Notice of Appeal |
|--|
| Date you have been informed of the decision appealed from and the Appeal |
| Please provide any additional information in order to identify correctly the decision appealed from |

C. DECLARATION OF THE ADDED PARTY

| Please describe briefly your interests in the decision appealed from. | |
|---|--|
| | |
| | |
| | |

DATE: Insert the date _____

Signature of the Added Party



35

notice of confirmation by COA (pursuant to the rules – articles 14 to 17)

| Name and capacity of the COA's authorized representative | |
|--|--|
| Telephone | |
| Fax number | |
| E-mail address | |

A. DECLARATIONS OF COA

| (1) Choice of the arbitratoral | |
|---|--|
| (1) Choice of the arbitrator | |
| COA accepts the arbitrator named in the Notice of Appeal as the sole arbitrator | |
| OR | |
| COA does not accept the named arbitrator in the Notice of Appeal as the sole arbitrator | |
| In this case, please name two (2) arbitrators to be struck from the special list of accredited arbitrators (link to be made to the list on CACNIQ's web site) | |
| Arbitrator #1 to be struck: | |
| Arbitrator #2 to be struck: | |

B. BRIEF DESCRIPTION OF THE POINTS OF DISAGREEMENT ON THE FACTS AND ANY ADDITIONAL FACTS THE COA BELIEVES NEED TO BE SET FORTH TO PROPERLY FRAME THE CASE.

Please provide your own summary version of the facts in relation with the Appeal.

C. OTHER COMMENTS OR INFORMATION

Please indicate any other comments or information that may be relevant to this arbitration procedure.

D. RULING REQUESTED BY THE COA ON THE APPEAL

Please indicate the ruling requested by the COA.

DATE: Insert the date _____

Name of the representative authorized to act and sign on behaf of COA:_____

Signature of the authorized representative of the COA: _____



standard letter - initiating process



Alternative Dispute Receiption for Sport Réglement estrajediciaire des différends pour le sport

www.ADRsportRED.ca

Head Office / Siège social CCES, 2197 promenade Riverside, bureau 300, Ottawa (Ontario) Canada K1H 7X3 Info@cces.ca • www.cces.ca

Court Office for ADRsportRED / Greffe du ADRsportRED CACNIQ, 1 Place Ville Marie, bureau 2825, Montréal (Québec) Canada H38 4R4 T (514) 876-9002 Info: 1-877-909-3794 + F (514) 876-9003 + Info@cacnig.org + www.cacnig.org

BY FAX

DATE, 2002

No: ADR 02-0000

NAME Ordinary Division

Claimant **vs. NAME** Respondent

Arbitration Agreement signed by the parties

From the Court Office, to NAME OF CLAIMANT and NAME OF RESPONDENT:

- 1. The Court Office received, on Tuesday, DATE, 2002, a copy of the Arbitration Agreement by which the parties identified in title agree to submit to arbitration the dispute briefly described as "......".
- 2. As referred to in the Arbitration Agreement signed by the parties, the dispute shall be resolved pursuant to the Program's Code of Procedure. The parties are strongly recommended to download their own copy of the **Code of Procedure** from the Programs' web site www.adrsportred.ca .

Request for Arbitration

- 3. According to section RA-12 of the ADRsportRED Code, the party intending to submit a reference to arbitration (...) shall file a request with the Tribunal containing:
 - a. The name and address of the respondent;
 - b. A brief statement of the facts and legal argument, including a statement of the issue to be submitted to the Tribunal for determination;
 - c. The claimant's request for relief;
 - d. A choice of arbitrator in accordance with Article RA-15 of the present Code;
 - e. A copy of the applicable rules of any NSO involved in the dispute.



- 4. Name of Claimant is hereby invited to file her Request with the Court Office at the latest on Wednesday, DATE, 2002. There are no specific requirements with regard to the format of the Request and it may be filed via e-mail, fax or post. Any relevant documents and information should be joined to the Request.
- 5. Upon receipt by the Court Office of the Request for Arbitration, the Court Office shall deliver a copy of the document(s) to Name of the Respondent. The Respondent will then be notified of the delay in which its Answer to the Request for Arbitration shall be submitted.

Formation of the Panel

6. The parties may choose, by mutual agreement, an arbitrator whose name appears on the list of arbitrators established by the Steering Committee of the Canadian Centre for Ethics in Sport (CCES). This list is reproduced hereunder.

Arbitrators of the Ordinary Division:

Mr. Richard H. McLaren - Co-Chief Arbitrator (London) Mr. L.Yves Fortier - Co-Chief Arbitrator (Montreal) <u>not available until mid-March 2002</u> Mr. Michel Picher (Toronto) Mr. Jean Guy Clément (Montreal) Mr. Edward Ratushny (Ottawa) Mr. Graeme Mew (Toronto) Ms. Tricia Smith (Vancouver)

- (Parties may view a curriculum vitae for each of these arbitrators on the web site of the Program at www.ADRsportRED.ca).
- 7. The parties may submit to the Court Office, for confirmation, the name of the arbitrator they have agreed upon.
- 8. If in the time limit set by the Court Office, the parties have not appointed an arbitrator or agreed upon a method of appointment, a sole arbitrator shall be appointed according to section 15.2 of the Code. The parties will be notified of the time limit on a future correspondence from the Court Office.
- 9. The arbitrator selected by the parties shall only be deemed appointed after confirmation by the Court Office. Before proceeding with such confirmation, the Court Office will verify the arbitrators' availability and impartiality. The Arbitrator will be asked to fill out a form titled "Declaration of Independence".



Procedural matters

- 10. Pursuant to section RA-8(c)of the ADRsportRED Code, "all notifications and communications from the parties intended for the Tribunal or the Panel, including all written submission, shall be sent to the Court Office of the Tribunal in as many copies as there are parties, counsel and arbitrators, together with one additional copy for the Tribunal itself". Notifications and communications made via e-mail are acceptable and do not need to be sent more than once.
- 11. Furthermore and since this case will be handled via the Court Office facilities located in the Province of Quebec, all correspondence should be sent to the following addresses:

| CACNIQ – Court Office for ADRsportRED | E-mail: info@cacniq.org |
|---------------------------------------|-------------------------|
| 1 Place Ville Marie, suite 2825 | |
| Montréal (Québec) H3B 4R4 | Fax: (514) 876-9003 |

The parties or their representatives, within North America, may also contact the undersigned by using the Court Office's toll free number (1-877-909-3794).

- 12. The Panel has the authority to determine its own procedure with regard to the Arbitration. The matters submitted to his/her authority include: submission of arguments, examination of witnesses, date, time and location of hearing, extension of time limits, etc.
- 13. The proceedings under the ADRsportRED Code are **confidential**. However, the Award shall be made public unless all parties, the Panel and the Co-Chief Arbitrators agree otherwise (section RA-18).
- 14. The Court Office would like to know if the parties will be represented during the arbitration procedure. If so, the Court Office needs to be informed of the name, e-mail and postal addresses, telephone and fax numbers of such representative.
- 15. Each party shall advance its own costs and that of its witnesses and interpreters (section RA-22).
- 16. Pursuant to section S5 of the Code, the Court Office encloses herewith for the Claimant, a request for Tribunal fees (\$250). Payment of the sum requested should be made by cheque and sent to the Court Office, in Montreal at the latest on Wednesday, DATE, 2002.
- 17. Enclosed, is an agenda of the upcoming proceedings suggested by the Court Office. The parties may agree on a different agenda which would best serve their interests and submit it to the Court Office or the Arbitrator for approval.

Marie-Andrée Marquis, Case Administrator

Enclosures



outline of facts and sequence of events

CASES:

Nadine Rolland v. Swimming / Natation Canada (SNC) Annamay Pierse / Gord Veldman / DougWake v. SNC

1. Original team selection by the SNC Selection Committee

- a. On March 24, 2002, SNC selected athletes Annamay Pierse, Gord Veldman and Doug Wake.
- 2. Appeal against the decision of the SNC Selection Committee
 - a. On or around May 1st, 2002, Kurtis MacGillivary, Chad Murray and Karley Stutzel appealed the decision of the SNC Selection Committee.
 - b. An Appeal Panel was formed by SNC.
 - c. The appeal was heard on May 10, 2002.
 - d. On May 13, 2002, the SNC Appeal Panel rendered its decision, interpreting the selection criteria and requiring categories to be sequentially considered.
 - e. On May 15, 2002, the Selection Committee confirmed the selection of Annamay Pierse, Gord Veldman and Doug Wake, despite Appeal Panel decision, claiming a different category exemption.

f. On May 21, 2002, the Selection Committee overturned their May 15 decision and de-selected Annamay Pierse, Gord Veldman and Doug Wake in favour of appellants Kurtis MacGillivary, Chad Murray and Karley Stutzel to better comply with the intent of the Appeal Committee decision.

3. ADRsportRED request for arbitration

- a. On June 5, Nadine Rolland filed her request for arbitration of the Appeal Panel decision.
- b. On June 6, appellants Annamay Pierse, Gord Veldman and Doug Wake filed their request for arbitration to appeal the Appeal Panel decision.

4. Preliminary request from SNC

- a. On June 17, 2002, SNC Legal Counsel and Chair of its Selection Committee, Marco Veilleux, asked that the same arbitrator hear the cases of Pierse et al. and Rolland, stating that it would be "more convenient, efficient and less costly to have Michel Picher hear all cases together" and asked that the matter be referred to the co-chief arbitrator. No arguments about quotas were submitted.
- b. On June 19, 2002, Co-Chief Arbitrator Richard McLaren decided to refuse the request for a joinder and ordered that separate hearings take place because the matters were to be conducted in different languages and appeared to deal with different issues (interpretation across categories versus the interpretation of a single category not involved in the other dispute).



5. Hearing

- a. On June 20, 2002 a hearing was held between Nadine Rolland and SNC
- b. On June 20, 2002 a preliminary pre-hearing teleconference was held between Pierse, Veldman, Wake, MacGillivary, Murray, Stutzel and SNC
- c. On June 23, 2002 a hearing was held by teleconference in the Pierse et al. v. SNC case.

6. Arbitration awards

- a. On June 21, 2002, Arbitrator Jean Guy Clement rendered his award ordering SNC to add Nadine Rolland to the team for the 2002 Commonwealth Games
- b. On June 23, 2002, Arbitrator Michel Picher rendered his award quashing the decision of the SNC Appeal Panel and reinstating Wake, Pierse and Veldman on the team.

7. Requests for interpretation

- a. On June 24, 2002, SNC sent a request to Chief Arbitrator Richard H. McLaren requesting an interpretation of the Rolland Award.
- b. On June 25, 2002, Chief Arbitrator McLaren accepted the request of SNC and asked Arbitrator Jean Guy Clement to issue a supplementary decision.

8. Supplementary decisions

a. On June 26, 2002, Arbitrator Jean Guy Clement rejected SNC request for interpretation in a supplementary decision; Arbitrator Michel Picher rendered a supplementary decisi confirming the Selection Committee discretion.

9. SNC' s interpretation and team selection

a. SNC interpreted the Picher supplementary decision to overrule Clement's award and therefore de-selected Nadine Rolland.

10. Request for homologation before the Quebec Superior Court

- a. On July 15th, 2002, Nadine Rolland presented a request for injunction and homologation before the Quebec Superior Court enforcing the award of Jean Guy Clement.
- b. On July 14th, 2002, SNC decided to reinstate Nadine Rolland on the team, deselected Doug Wake and therefore choose to not dispute the legal request before the Quebec Superior Court.
- c. On July 16th, 2002, Doug Wake appealed SNC decision before the Alberta courts, request was denied.



41

code revision

The following provisions have been identified for possible amendment:

- RA-8. Instead of requiring a proof of receipt, a proof of service would be more appropriate.
- Upon the filing of an appeal relating to team selection, athlete or coach accreditation or any other interest which may involve an adverse impact on another athlete or coach, the federation involved shall identify the athlete, athletes, coach, coaches or other person who will be adversely affected in the event that the appeal should succeed. The federation should further be responsible for providing notice to the identified athletes, coaches or other persons of the appeal and arbitration proceedings, indicating clearly to the individuals concerned that they have a right to participate in the arbitration and to be represented.
- RA-22 (request for interpretation) should be clarified so that the parties and all arbitrators understand that the retainer of jurisdiction to resolve post decision disputes is automatic in all cases, subject to the judgement of the Chief Arbitrator as to the need for a supplementary decision in any given case. Arbitrators to retain jurisdiction to implement their decisions. Modify reference power more broadly to deal with conflicting decisions. Permit drafts of awards to be read over for process and procedural deficiency before being issued.
- S2 General provisions : The seat of arbitration should be discussed and if needed determined.
- RA-10 It would be necessary to specify who should hear the application of provisional or conservatory measures (need to be read with rules RA-19).
- RA-12: This provision should include the presentation of exhibits with the request of arbitration. Also at RA-12 a) (v) it should be added "or any arbitration agreement, or agreement that includes an arbitration clause".

- RA-12: Affected parties should be identified in the request of arbitration.
- RA-13: Time limit: Expedited or urgent measures should be identified and explained in that section or elsewhere in the Code.
- RA-16.2: Does the interpretation of affected party includes all the rights of a party to the proceedings under the Code?
- RA-16.5: The wording of 16.5 (a) needs to be clarified and simplified. It should not put the burden of notification on the Court Office when the affected party is unknown. Its must be clarified that the parties have that obligation under the Code.
- In general provisions RA-16 to RA-16.5 should be clarified and simplified.
- S1 Definitions: definition of parties does it include interveners? Similarly, RA-18 Confidentiality: Are the interveners "parties" – if so, undertaking not to disclose proceedings or facts, since the terminology "party" is used under the intervener and joinder provisions (RA-16). Also, are the interveners involved in the proceeding like a party? Do they have the right to receive communication of all the proceedings and exchange of documentation? What is the extent of their rights, to be heard only, to respond to the request, to provide a response?
- RA-21: award (b) ... it is not open to question or review in a court... judicial review or homologation is a legal right under the Canadian judicial system. Consider if this provision should be modified to specify the limited grounds for judicial review and homologation.

