

## Lessons From A Decade Of Selection Disputes

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Anticipating that there might be some disputes over selection to the Canadian team competing at the Salt Lake City Olympics, the Centre for Sport and Law compiled a background binder of legal cases. We collected and reviewed about 30 cases taken from the courts as well as from private tribunals such as internal appeal panels and external arbitration panels.

In compiling these materials, we had the opportunity to look at them all with a fresh eye and to identify a number of emerging themes. These stand as good principles for arbitrators and other decision makers in sport disputes, and we thought it would be useful for coaches to have this information on hand when they make decisions about team selection, and more particularly, when they might later be called upon to defend those decisions.

**THE SCOPE OF AUTHORITY MUST BE CLEAR.** When a selection decision is being reviewed, what is the arbitrator's scope of authority? Are they reviewing a decision for errors in law, or are they hearing all the facts and making a new decision? Very rarely does an arbitrator possess the technical, sport-specific, and coaching expertise to make a selection decision. In almost all cases, the decision should be referred back to those who are knowledgeable. Coaches should emphasize that the role of the arbitrator is to correct errors of jurisdiction, law, and procedure, but it is not to interfere in the merits of any selection dispute.

**SELECTION DISPUTES ARE NOT A WIN-WIN SITUATION.** Coaches know this all too well, which is why cutting players from a team is perhaps the hardest part of a coach's job. Selection disputes are typically a win-lose proposition. If an arbitrator is going to place a previously non-selected athlete on a team, this will usually mean that a previously selected athlete will be removed. Potentially affected athletes should be brought into the arbitration as an "affected party" to ensure that their views are represented. Not doing this can result in a continuing cycle of appeals, hardly an effective use of the valuable time and resources of a coach, an athlete, or a panel member. As well, such win-lose situations almost never lend themselves to mediation.

**THERE ARE DIFFERENCES BETWEEN OBJECTIVE AND SUBJECTIVE CRITERIA.** Some selection processes involve objective criteria (speed, time, placings, points, rankings) while others are based on more subjective elements and involve the exercise of discretion. Both approaches are appropriate, but they give rise to vastly different disputes. Disputes over objective criteria tend to be fairly technical while disputes about subjective criteria involve issues of discretion, bias, and credibility. Related to this is our observation that selection in individual sports is often more straightforward than selection in team sports, or in sports that have both individual and team components. Arbitrators should be aware that the subjective considerations that go into selecting a team are very complex and subtle, and it is often part of the coach's job to communicate this perspective to the decision maker.

**BIAS IS OFTEN ALLEGED BUT SELDOM PROVEN.** Conflicts of interest do arise and typically involve coaches making decisions in situations where they are perceived to

have a conflict due to a relationship with other athletes who may be adversely or favourably affected by their decisions (whether or not they have an actual conflict). Coaches in such situations should be aware of this perception and should plan in advance what steps they can take to minimize or confine their bias.

DISCRETION MUST BE MANAGED CAREFULLY. Many selection policies and criteria give a coach broad discretion. It is good practice for the coach to think explicitly about what factors are being considered in the evaluation of an athlete, and to keep track of them in written notes. Some athletes who have challenged discretionary decisions have argued that the decision is arbitrary simply because a different coach would have arrived at a different result. However, such a different result does not mean that discretion has been exercised improperly. On the other hand, selection based only on a “we know a good one when we see one” approach will not meet the test of fairness.

DECISION MAKERS SHOULD NOT MEDDLE WHERE IT HAS BEEN DONE RIGHT. Courts and private tribunals have consistently supported sport organizations that devise reasonable rules and correctly apply them. On the other hand, courts and tribunals should intervene in a decision where rules have been incorrectly developed or implemented. Coaches are advised to be completely and thoroughly knowledgeable about the policies they are using and to follow them carefully and methodically.

THE APPROPRIATENESS OF COMPASSIONATE APPEALS MUST BE WEIGHED. Sometimes a tribunal will be asked to consider a compassionate argument. For example, an athlete may ask for more time to achieve a performance standard, may ask to have a missed deadline waived, or may ask to be placed on a team that is open ended in terms of numbers. At other times, an athlete may have been innocently misinformed or misled by officials or coaches, with adverse results, and may seek a remedy on compassionate grounds. There may be situations where compassion is appropriate: for example, where an athlete runs afoul of administrative requirements or timelines for reasons that are outside his or her control. A tribunal might waive the requirement provided other athletes are not harmed. However, compassion is not appropriate when it pertains to substantive performance, as opposed to administrative rules. Nor is compassion appropriate when it has the potential to harm other athletes, create an element of mischief in the overall selection system, or set a precedent that might hamstring future decision makers

AMBIGUITIES MUST BE CLARIFIED. Selection policies and criteria are often vague, incomplete, contradictory, or even silent on certain important points. Criteria are not weighted relative to each other and the selector must make an informed guess; tie breakers do not actually work in breaking a tie; provisions to deal with injuries or other unforeseen circumstances are not contemplated; criteria based on national, Olympic, and international performance standards are supposed to mesh together but do not; criteria and rules are not communicated to coaches and athletes; appeal procedures do not exist and so are improvised ... the list continues. Arbitrators are often asked to make interpretations in these, and other, ambiguous situations. Our advice to coaches is to plan ahead. Closely study the process and criteria that you are using to make selection decisions, and clarify any ambiguities you detect.