IN THE MATTER OF AN ARBITRATION UNDER THE *ADR Sport RED PROGRAM*

BETWEEN

TEAM McAULAY
(hereinafter called the "Team")
comprised of the following
Greg McAulay, Bryan Miki, Brent Pierce, Jody Sveistrup
(hereinafter the Claimant)

-and-

CANADIAN CURLING ASSOCIATION
(hereinafter called the "Respondent or CCA")

SOLE ARBITRATOR Prof. Richard H. McLaren, C.Arb

COUNSEL FOR THE CLAIMANT: Robert J. Lesperance
410 - 900 Howe Street
Vancouver, BC V6Z 2M4

COUNSEL FOR THE RESPONDENT: Paul J. Conlin
1678 Bank Street
Ottawa, ON K1V 7Y6

HEARINGS in RELATION to this MATTER were HELD in VANCOUVER, BRITISH COLUMBIA on 19, 20 & 21 January 2003. Continuation of the Hearings by telephone conference call took place on 6 February 2003. Written argument was completed with the filing of the Reply on 21 March 2003.

DECISION OF THE ADR Sport RED TRIBUNAL
ON THE APPLICATION OF TEAM McAULAY

AWARD

I PARTIES

1.1 The Claimants Greg McAulay, Bryan Miki, Brent Pierce, and Jody Sveistrup {hereinafter "Team"} comprise an elite curling team based in British Columbia.

1.2 The Respondent, The Canadian Curling Association {"CCA"} is a non-profit corporation incorporated under *Part II of the Canada Corporations Act*. It is the national sport governing body of curling in Canada. It represents Canada on the World Curling Federation {"IF"}. The members of the CCA are the various Provincial Curling Associations across Canada.

1.3 Sport Canada {"SC"} is a branch of the International and Intergovernmental Affairs Sector within the Federal Department of Canadian Heritage. It is responsible for the administration of an Athlete Assistance Program {"AAP"}. By correspondence from the Arbitrator, Sport Canada was invited to participate in these proceedings. They declined to do so in a letter to the arbitrator dated 13 January 2003.

II FACTS & PARTIES' POSITIONS

II.1 *Undisputed Facts*

2.1.1 The Team won the national men's curling championship, the Labatt Brier, in 2000. As a consequence, they participated in the world championships and won the 2000 Ford World Curling Championships.

2.1.2 The performance results of the Team in the 99/00 season entitled them to become: both, a member of the National Team of the CCA; and, upon recommendation by the CCA a participant in the AAP administered by SC. This is known as the carding program.

2.1.3 The AAP is a federal government program set up and administered by SC. The participants are the various national sports organizations {"NSO"} in Canada like the CCA and the athletes of the NSO who are eligible to be assisted by the program. Under the conditions of the AAP, the NSO proposes the athletes whom it believes to be entitled to participate and receive carding. SC has its own independent role within the program. Thus, the program is a tripartite arrangement between SC, an NSO and an eligible athlete. The program is designed to alleviate some of the financial burden incurred by Canada's elite athletes in the course of preparation for sanctioned major international sporting events such as the Olympic, Commonwealth, Pan Am

and Paralympic Games and World Championships.

2.1.4 On the recommendation of the CCA, Sport Canada carded the members of the Team at the commencement of the new program year on 1 July 2000. Under the AAP the carding runs for a two year term meaning it would expire on 30 June 2002. As a result of the A carding, each member of the team should receive $ 1,100 per month allowance as well as other benefits. It is the second year of the funding which is at issue in these proceedings.

2.1.5 To be eligible to receive the benefits of the carding each member of the Team was required to complete two documents. The first is a National Team Athlete's Agreement drawn up by the CCA {"Aagr"}. The AAP requires an NSO to have such an agreement containing certain provisions. The CCA has created its own Aagr which is also in conformity with the AAP requirements of SC. The second document required to be in place is a signed SC AAP Application and Declaration to Accept/Decline AAP Financial Support.

2.1.6 As a result of signing the two documents referred to in par. 2.1.5 the Team must submit a training and competitive program which has been approved by the CCA and SC for each carding year.

2.1.7 Each member of the Team signed the National Team Aagr in May of 2001[1]. The relevant provisions of the Aagr for this arbitration are:

> *CCA OBLIGATIONS*
>
> *1. The CCA shall:*
>
> . . .
>
> *j) provide a hearing and appeal procedure with regard to any dispute the Athlete may have with the CCA with respect to clauses in this agreement and such hearing and appeal procedure shall be in conformity with the generally accepted principles of natural justice and due process (Appendix 1 attached).* [NOTE: Not Attached.]
>
> . . .
>
> *ATHLETE'S OBLIGATIONS*
>
> *2. The Athlete Shall:*
>
> *a) follow the National Team Program training and competitive schedule as identified in the planning component;*

[1] Found at pp. 76 to 91 of Exhibit #1 the Joint Document Book {"JDB"}

b) provide the National Program Coach or his or her designate, by mail sent to the National Office, with an annual training chart and monthly updates of changes to the chart or any other appropriate information that the CCA may request;

. . .

DEFAULT OF AGREEMENT AND PROCESS OF RESOLUTION

3. (a) Where one of the parties to this Agreement is of the opinion that the other party has failed to confirm with its obligations under this Agreement, it shall forthwith

(i) notify that party in writing of the alleged fault;

(ii) indicate in the notice to that party the steps to be taken to remedy the situation; and

(iii) indicate in the notice a reasonable period of time within which such steps shall be taken.

(b) Where the party which has given the notice referred to in paragraph 3(a) is of the opinion that the other party has not remedied the situation, it shall file a complaint through the hearing and appeal procedure referred to in paragraph 1(j) and as outlined in 3 (c).

. . .

2.1.8 Each member of the Team signed the AAP Application in May of 2001[2]. The relevant provisions of the form for this arbitration are:

. . .

AAP support is subject to athletes' availability to represent Canada in major international competitions, including World Championships, Olympic Games and Paralympic Games; participation in preparatory and annual training programs; and adherence to their Athlete/National Sport Organization (NSO) Agreement.

. . .

2.1.9 The documentation of SC and of the CCA require the completion of a training and competition program for the carding year. The Team filed its program for the second year of the carding (1

[2] Found at pp. 1 to 20 of Exhibit #2 the Supplementary Document Book {"SDB"}.

July 2001 until 30 June 2002) with the CCA in May of 2001.[3] At the request of Gerry Peckham, the High Performance Manager of the CCA {hereafter Peckham"}the competition schedule was reconfirmed and included the Provincial Playdowns in January 2002 and the Finals in February.[4] At the further request of Peckham, Brent Pierce {hereafter "Pierce"} wrote a letter as Team spokesperson in which he states: "the schedule you have is our final schedule".[5] On 3 January of 2002, the Team altered its competitive program by withdrawing from the provincial playdowns, the Nationals and the Worlds. In place of these events they proposed to compete in the Grand Slam of Curling #2 & #3 and the Tournament of Champions.[6]

2.1.10 During 2001 a professional curling tour known as the "Grand Slam Tour" was developed by I M G Canada Ltd. {"IMG"}. This program was placed under the control of an organization known as the World Curling Tour {"WCT".} The organizer required the participants to sign an agreement prohibiting them from competing in CCA provincial and national playdowns and in the World Championships. The participants were represented by an organization known as the World Curling Players Association {"WCPA"}. Brent Pierce, one of the members of the Team, is the Vice-President of the West for the WCPA.

2.1.11 Three members of the Team executed contracts with the WCT in May of 2001[7]. The relevant portions of the contract read:

> *GRAND SLAM OF CURLING - 2001/2002 PARTICIPATION AGREEMENT*
>
> *Contract Term Jan 01,2002 to Jan 30, 2002*
>
> *In order to acquire an official World Curling Tour "Grand Slam Card" allowing the competitor to be eligible to play in, or to qualify for all 2001/02 Grand Slam or Curling events. I hereby agree with the following terms:*

---

[3] See pp. 118 to 165 of the JDB. The schedules were converted into another document by Gerry Peckham showing the results of the Team's performance Exhibit # 4.

[4] Document created by Peckham at p. 183 JDB.

[5] See Exhibit A to the affidavit of Brent Pierce in the Team Affidavit Evidence filed in accordance with the Procedural Orders in this proceeding.

[6] Page 184 of the JDB. The Grand Slam #2 was Jan. 9-14; #3 Jan. 30-Feb.3; and the Champions was Feb. 26-Mar. 3, 2002.

[7] Page 21 to 23 of the SDB. Jody Sveistrup never executed the contract.

- *I will not compete in any televised curling events, national or international that have not been sanctioned by World Curling Players' Association (WCPA) and the World Curing Tour (WCT).*

  Events include the World Curling Championships, all national men's curling championships (i.e.: The Brier) and all qualifying stages including provincial playdowns for the above-mentioned events.

  . . .

- *Grand Slam Cards will not be afforded to, or available to any competitor (or team) that chooses not to acquire cards for the 2001/02 season, until the 2003/04 season.*

  . . .

  The 2001/02 four majors will have a minimum total purse of $100,000 for each of the first 3 major events and a minimum total purse of $150,000 for the final major, the Player's Championship. Participation agreements must be signed by 90% of the top 20 official world ranked teams by June 1, 2001 for Sportsnet and IMG-Canada, Ltd. to establish the joint venture for the Majors. The joint venture arrangement between Sportsnet and IMG is anticipated to be for a minimum of 3 years.

- *In consideration for being permitted to participate in the Majors, I hereby grant and assign to WCT any and all media and promotional rights in connection with my name, likeness and performance related to my participation in the Majors.*

  . . .

  Date
  May 28, 2001

2.1.12 In May and June of 2001, the CCA reviewed the status of the Team both from a carding perspective and from a training and competitive program perspective. This review was

triggered by the loss in the provincial playdowns in January of 2001 and knowledge gleaned by SC and the CCA from the media and other sources regarding the restrictive prohibition of the WCT about participation in the provincial and national playdowns of the CCA. See para. 2.1.11.

2.1.13 The Canadian Olympic Trials were held in early December 2001. The Team was eliminated thereby ending its opportunity to participate in the Salt Lake Winter Olympic Games. The AAP funding cheques were not delivered on time in December. The matter was eventually corrected[8].

2.1.14 On 3 January 2002, Brent Pierce, Team spokesperson, e mailed Peckham providing a revised schedule of the Team's competitive program for the last half of the 01/02 season. In that revised schedule, the Team was no longer to appear in the provincial playdowns. See para. 2.1.9. Peckham advised by e mail to Pierce on 14 January 2002 that he had communicated with SC as to "... your status [of the Team] with our National Team Program[9]."

2.1.15 On 16 January 2002, each member of the Team received a registered letter from SC stating that it had been advised by the CCA "...that you had withdrawn from the National Team Program and they [CAA] have recommended that your name be removed from the 2001-20002 carding list".[10] This letter also advised that the recommendation could be appealed by contacting Peckham within 30 days and "...an appeal process will be set up." This decision was appealed and has led to the present proceeding.

2.1.16 Under the AAP program the Team was entitled to transition funding for a withdrawal which resulted in their receiving the appropriate cheques for January and February of 2002.

2.1.17 The Team had entered into a Trust Deposit Agreement[11] with IMG Canada Ltd, one of the sponsors of the WCT and the Grand Slam Curling events to the following effect.

TRUST DEPOSIT AGREEMENT

This Trust Deposit Agreement dated for reference November 19, 2001.

---

[8] There seems to have been an error in SC taking action to discontinue the funding; although the matter does not need to be decided in this proceeding. See SC explanation by letter of 31 December 2001 to CCA at pp. 212 of JDB. The Team never received a copy of this letter.

[9] P. 215 JDB.

[10] See pp. 216 to 223 of the JDB.

[11] See pp. 24 to 27 of the SDB.

BETWEEN:

GREG McAULAY of Team McAulay, BRENT PIERCE of Team McAulay, BRYAN MIKI of Team McAulay and JODY SVEISTRUP of Team McAulay

(together referred to as "Team McAulay")

AND:

IMG-CANADA, LTD., a company incorporated under the laws of Ontario having its head office at 175 Bloor Street East, South Tower, Suite 400, Toronto, Ontario M4W 3R8

("IMG")

AND: *JONES EMERY HARGREAVES SWAN, a partnership for the practice of law with offices at 1200 - 1175 Douglas Street, Victoria, British Columbia, V8W 2E1.*

(The "Trustee")

WHEREAS:

A. . . .

B. *Team McAulay's participation in IMG's Grand Slam of Curling exclude them from participating in the Canadian Curling Association's national playdown process, including zone playdowns, provincial playdowns and the Brier;*

C. *Team McAulay's failure to participate in the Canadian Curling Association's national playdown process may jeopardize its funding from the Canadian Curling Association (Sport Canada) for the second half of the year;*

D. . . .

E. *This Agreement is to provide a basis for security for payment, if required, by IMG for Team McAulay;*

F. This agreement shall be held in confidence for all parties involved.

. . .

3.0 PAYMENT OF TRUST CAPITAL

3.1 CCA Payments - Team McAulay is entitled to receive from the Canadian Curling Association (Sport Canada) three (3) payments in the amount of Eight Thousand Eight Hundred Dollars ($8,800) for the second half of the period July 1, 2001 to June 30, 2002.

3.2 Instructions to Pay - In the event that Team McAulay does not receive one or more payments from the Canadian Curling Association (Sport Canada) within fourteen (14) days from the date for payment, team McAulay shall so advise the Trustee in writing and the Trustee shall, upon receipt of the notice, promptly pay out of the Trust Capital to Team McAulay the amount of the payment otherwise payable by the Canadian Curling Association (Sport Canada).

3.3 Appeal of Non-payment - Team McAulay shall provide whatever assistance IMG may require in any appeal IMG may undertake of the Canadian Curling Association's (Sport Canada's) failure to make any payment to Team McAulay provided that IMG pays any and all costs associated with any such appeal including, without limitation, any disbursements, expenses and fees.

. . .

II. PARTIES SUBMISSIONS

II.2 Facts pleaded by the Claimant

2.2.1 The Claimant alleges that the CCA and Sport Canada made a decision to decard the Team from the AAP program at a carding review meeting on 5 June of 2001 and merely implemented that decision in January of 2002 after the Team spokesperson filed the revised competitive schedule for the balance of the 01/02 season.

2.2.2 The Claimant alleges that the Team was threatened by the CCA by phone calls and interviews with the media which contributed, at least in part, to the relatively poor curling season the Team

had through 01/02.

2.2.3 The Claimant alleges that the CCA discriminated against Team McAulay. The differential treatment of Team Law is demonstrable evidence of such discrimination.

2.2.4 Diane (Nelson) Dezura, a carded athlete in the sport of Women's Curling and a member of Team Law submitted an affidavit on behalf of the Claimant in which she states that she participated in Team Law's decision to opt out of the Provincial playdowns in December of 2001 with the advice and consent of CCA representatives Peckham and Jim Waite {"Waite"}, the National Coach/Team Leader with the CCA.

II.3 Facts pleaded by the Respondent

2.3.1 Team McAulay was one of the best teams the CCA had "traveled with", meaning they were always outgoing, friendly and cooperative. Dave Parkes {"Parkes"} CEO of the CCA believed he had a good working relationship with the Team and Pierce in particular as the Team spokesperson. The Team was highly thought of by the CCA as to how they represented themselves and the CCA.

2.3.2 From the time of an article in the Globe & Mail concerning the WCT on 24 May 2001, the relationship between Pierce and Parkes deteriorated. As the dialogue continued between them from May 2001, Parkes denies that any of his comments were made with any tone or implication of retaliation that might be construed as threatening.

2.3.3 The Respondent alleges that from the date of the Globe & Mail article onwards the Team was aware that if they did not play in the national playdowns in the later half of the 01/02 season after the Olympic Trials that they would no longer be on the National Team and they would lose their carding status.

2.3.4 The Respondent alleges that the arbitration should be limited to the National Team Program status of the Team. The Respondent alleges that the notice issues were not raised by the Claimant in the request for arbitration, but that due to its relevance to the Team's National Team status, it agrees with the inclusion of these issues.

2.3.5 The Respondent does not agree with the inclusion of the issues of whether or not a proper appeal procedure was in place or whether or not damages should be awarded for breach of contract or breach of fiduciary duty.

2.3.6 The Respondent alleges that it acted correctly in determining the 3 January 2002 communique as a withdrawal of their National Team status.

2.3.7 The Respondent alleges that the obligation to compete in the playdowns was an expressed term of the Aagr and, if not an expressed term, it is an implied term of the Aagr.

2.3.8 The Respondent alleges that it has the right to approve the Team's schedule and that it had the right not to approve schedules that did not include National Team events. Changes to the schedule can only be achieved by mutual agreement between the CCA and the Team.

III. PROCEEDINGS

3.1 On 10 February 2002 a letter[12] was sent on behalf of the Team to the CCA setting out its desire to appeal the loss of carding. This was in reply to the registered letter of SC advising of the decarding recommendation of the CCA (See para 2.1.15).

3.2 The AAP requires an NSO to have an "appeal procedure (based on due process) for the resolution of AAP related complaints"[13]. The CCA did not have such a process[14].

3.3 The AAP provides that after an NSO appeal "athletes have the right to request a final review by SC"[15].

3.4 The parties agreed to use the ADRsportRed program and by-pass any internal appeal procedure of the CCA.[16]

3.5 The Arbitrator was mutually selected by the parties under the provisions of the ADRsportRed Code {"Code"} and notified of his appointment on 7 August 2002.

3.6 The lack of availability of the parties resulted in the pre-hearing conference call not being held until 7 October 2002. Following the pre-hearing conference call the first Procedural Order was issued on 9 October 2002 setting out the process to be followed leading up to the arbitration hearings scheduled for 19 to 21 January 2003 at Vancouver, British Columbia.

3.7 Extensions of time for doing various steps in the Procedural Order No.1 were requested and dealt with by Procedural Orders: No. 2 of 16 October 2002, No. 3 of 31 October 2002; No. 4 of 28 November 2002 and No. 5 of 5 December 2002. Further oral agreement was reached to modify the Procedural Order by conference call on 8 January 2003.

3.8 In accordance with Procedural Order No. 1 a further pre-hearing conference call had been set up and occurred on 14 January 2003. Even at this late date there were outstanding production orders required by the CCA. The late production required the filing of a supplementary joint exhibit book which was not available until the first day of the arbitration. The arbitrator was

---

[12] See pp. 224-225 JDB.

[13] See Section 9.1 of program materials at p. 36 of the JDB.

[14] Three emails, the first on 16 February 2002 to Mr. Pierce (exhibit #9), a second on 13 March 2002 to Gwen Prillo (p. 228 of the JDB), and a third on 19 March 2002 to Mr. Pierce (p. 229 of the JDB) support this conclusion. Mr. Peckham had never been "down this path before" and did not know the steps of the appeal process because none had been established.

[15] Ibid.

[16] The Team discovered the existence of the ADRsportRED and suggested that it be used as the appeal process in this case by specific agreement of the parties.

further advised that two athlete witnesses would not be available for cross-examination[17] A decision was made to proceed with the hearing as scheduled in recognition that it could not be completed at that time.

3.9 The arbitration hearing was held on 19 & 20 January 2003 at the Empire Landmark Hotel in Vancouver, British Columbia. Mr. Robert J. Lesperance represented the Claimant and Mr. Paul J. Conlin represented the Respondent.

3.11 The following witnesses were heard:

For the Claimant	For the Respondent
• Jody Sveistrup	• Dave Parkes
• Brent Pierce	• Gary Peckham

The following sworn witness statements were received but no cross-examination was undertaken.

For the Claimant	For the Respondent
• Diane (Nelson) De Zura	• Jim Waite
• Glen Pierce	• Jack Boutilier
• Ken McArdle	• Randy Ferbey
• Misty Thomas	• Scott Pfeifer
	• Marcel Rocque
	• David Nedohin
	• Colleen Jones
	• Nancy Delahunt
	• Kim Kelly
	• Mary-Anne Waye
	• Kelley Law
	• Robert Price

3.12 On 20 January 2003, following two days of hearings, the proceedings were adjourned to a date to be set for telephone conference call cross-examination of the two missing witnesses. Procedural Order No. 6 was issued to established the procedure for the completion of the arbitration and the filing of written argument.

3.13 The CCA witness Kelley Law refused to participate in the cross-examination contemplated by

---

[17] In order to truncate the hearing time Procedural Order No. 1 had required the parties counsel to submit sworn witness statements of all witnesses who were to give evidence On the conference call counsel had identified those witnesses whom they would cross-examine.

Procedural Order No. 6 and advised the Arbitrator by correspondence of the 29 January 2003. Team witness Ms. Nelson was willing to be cross-examined but counsel for the CCA waived its right to do so. A conference call was held on 6 February 2003 in which it was ruled that the proper evidentiary and fair way of proceeding was to exclude the Affidavit of Ms. Law.

3.14 None of the parties raised any objections to the way in which the arbitration proceedings were carried out, nor as to the appointment of the Arbitrator or his jurisdiction to issue a final and binding decision.

3.15 The written argument was completed on 21 March 2003 in accordance with Procedural Order No. 6. The parties were advised by the Arbitrator that the hearings were closed and that a written decision would be issued.

IV. ARGUMENT

4.1 The process of written argument was concluded on 21 March 2003. The arguments are extensive and part of the record. I do not propose to summarize the arguments.

4.2 The cases relied upon in argument by the Claimant were:

Hillis Oil & Sales Ltd. v. Wynn's Canada Ltd., [1986] 1 S.C.R. 57; *Playland Amusement Park Ltd. v. Pacific National Exhibition*, [1993] BCJ No. 1729; *Ev's Truck & Equipment Inc. v. Mack Canada Inc*., [1993] BCJ No. 1272; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Boarelli v. Flannigan*, (1973) 36 D.L.R. (3d) 4 (Ont. C.A.); *Ratych v. Bloomer*, [1990] 1 S.C.R. 940; *City of Guleph v. Hoffman*, [1955] O.R. 965 (H.C.J.); *John Doe v. Roman Catholic Episcopal Corp. of St. John's*, [2001] N.J. No. 31; *G. Ford Homes Ltd. v. Draft Masonry* (York) Co. Ltd., (1983) 43 O.R. (2d) 401 and 1 D.L.R. (4th) 262 (Ont.C.A.); *ter Neuzen v. Korn*, [1995] 3 S.C.R. 674 and [1995] S.C.J. No. 79 (S.C.C.); *The Law of Contract in Canada* (3rd ed. 1994), Fridman, G.H.L., p. 500 - 651; *Decro-Wall International SA v. Practitioners in Marketing Ltd.*, [1971} 2 All E.R. 216 (C.A.).

4.3 The cases relied upon in argument by the Respondent were.

Clausen v. Canada Timber and Lands Ltd., [1923] 4 D.L.R. 751 (Jud. Com. Of Privy Council); *Canadian Pacific Hotels Ltd. V. Bank of Montreal*, [1987] I.S.C.R. 711; *Farquhar v. Butler Brothers Supplies Ltd.* [1988] B.C.J. No. 191 (BCCA); M.J.B. *Enterprises Ltd. V. Defence Construction* (1951) Ltd. [1999], 1 S.C.R., 619; *Norwood Construction Ltd v. Post 83 Cooperative Housing Association* [1998] B.C.J. No. 1602 (BCCA); *Raso v. Dionegi*, [1993] O.J. No. 670 (Ont. Ct. of Appeal); *Stacey v. Consolidated*

Foods Corp. of Canada Ltd. [1977] N.S. J. No. 5 (N.S. Sup. Ct.); *Shirlaw v. Southern Foundries* (1962) Ltd., [1939] 2 All E.R. 113 p. 124; Waddams, S.M. The Law of Contracts 2nd ed. Toronto: 1977 at p.308.

V. ISSUES

5.1 Did the Claimant breach the Aagr?

5.2 If there was a breach by the Claimant what obligation did the Respondent have? Were those obligations breached?

5.3 What remedies should be granted for any breach of contract?

VI. DECISION

6.1 DID the CLAIMANT BREACH the Aagr?

6.1.1 The carding program is a federal government initiative. The program is a tripartite arrangement between government, an NSO and an athlete of the NSO. SC administers the program for the government of Canada. SC is, however, not in a contractual relationship with the athlete. Instead it requires the NSO, the CCA in this particular case, to do two things if it is to participate in the tripartite arrangement. First, the CCA must have an appeal procedure to deal with carding appeals; and, second, the CCA must have an Aagr. This latter document is a bilateral one between the NSO and the athlete. SC appears to be careful not to be a contractual party to this arrangement. The only arrangement between SC and the athlete is the application form accompanying an avowal of wishing to decline or accept should you be recommended for AAP financial support. SC also has no contract with the NSO. Instead it sets up criteria for a sport like curling to be eligible to participate in the AAP. That eligibility is then assessed by SC and the two requirements referred to above are key elements. SC has no express contractual agreements in the tripartite arrangements. A key player with the money but without any contractual obligations.

6.1.2 The SC aspect of the tripartite arrangement is set out in the *"Sport Canada Athlete Assistance Program Policies, Procedures and Guidelines"* publication[18] in Section 1 in the "Note" emphasizes that support "... is subject to the athletes' availability to represent Canada in major international competitions, including ...participation in preparatory and annual training programs; and adherence to their Athlete/National Sport Organization (NSO) Agreement"[19].

---

[18] JDB at p. 1 and subsequent.

[19] An athlete must also be eligible under the International Federation {"IF"} rules to represent Canada. In the case of curling the IF has citizenship and doping requirements.

Therefore, from SC's perspective availability internationally and appropriate training are key elements of the program. One would expect the Aagr to reflect these requirements.

6.1.3 The CCA only became eligible to participate in the tripartite arrangement with SC following the 1998 Olympics in which curling participated for the first time as a recognized medal sport at the Winter Olympic Games. The CCA aspect of the tripartite arrangements is to have a National Team Program package of which the Aagr is one component. The CCA consults regularly with SC to ensure that its policies and guidelines reflect the intent of the SC AAP policies and guidelines relative to eligibility and other matters.

6.1.4 The CCA National Team Program[20] for 2001-2002 provides that senior athletes are included on a two-year cycle subject to the athletes' ability to meet the National Team Program standards and guidelines which will be reviewed on an annual basis.

6.1.5 The only contractual obligation in the entire tripartite arrangement is the Aagr. That agreement attempts to fix the CCA and the individual athlete's respective rights and obligations. Indeed, neither the CCA or the athlete, can participate in the AAP unless an Aagr is executed. There can be no AAP assistance without it.

6.1.6 The Aagr references the National Team Program in clause 2(a). In the Standards & Guideline section of the CCA document competition is defined as
"All athletes shall compete in a minimum of 8 high quality national and international competitions as approved by the CCA ... may include ...all competitions that lead to a Canadian men's or women"s championship, international invitational events, national invitational events, and 'made-for-television' competitions".
It can be seen that the scope of the availability aspect of the National Team Program for curling is similar to the statement in the documents of SC but includes national competitions not just international ones. The Team filed its program for the second year of the carding cycle with the CCA 15 May of 2001 having signed their Aagr earlier.

6.1.7 The Aagr does not define the phrase "planning component" in clause 2(a); nor does it define "annual training chart" or "monthly updates" in clause 2(b). Equally it can be said that the use of the phrase "Training/Competition plan" is undefined. Therefore, these phrases must take on a meaning ascribed to it by the parties' conduct and by their documents used to fulfill the obligations. There is in this Aagr no provision that the written contract is the entire arrangement between the parties. Furthermore, this provision is at the core of the contract. There is no reason to construe it against the party who drafted it according to the *contra proferentum* rule. It is a provision which is capable of interpretation by the parties conduct and practice and ought to be determined by their actions. The competition schedules, while not specifically referring to competitions, set out the dates of competitions. Both Peckham and the Team knew which events the dates encompassed. Therefore, I find that the parties by their conduct and the documents filed defined the general intention behind the words in paragraph 2 of the Aagr.

---

[20] JDB at p.267 and subsequent sets out the November 2000 version.

6.1.8 On 24 May 2001 the Grand Slam initiative of the WCT was announced in a newspaper article in the Toronto Globe & Mail which came to the attention of Parkes on that day. This triggered a series of telephone calls between officials of the CCA and the Team. Pierce, as spokesperson for the Team, states in his affidavit that he knew from these phone calls that the Team could lose its AAP funding if it joined the Grand Slams. Mr. Pierce was at the time a Vice-President for the West of the WCPA He had also signed a "Grand Slam of Curling 2001/2002 Participation Agreement"on 28 May 2002. By that agreement he, and two other members of his Team who also signed such agreements, had promised the WCPA and in turn the WCT that they would not compete in

> *"... all national men's curling championships (i.e.: the Brier) and all qualifying stages including provincial playdowns ..."*

They had in effect provided the WCT with an exclusivity agreement which would preclude them from entering the provincial playdowns sponsored by the CCA. The two sporting sponsors were in effect competing for talented competitors to be exclusively part of their program.

6.1.9 On 27 June 2001, the CCA submitted its carding recommendation to SC for the regular annual review provided for in the AAP. On 11 July 2001 by e mail, Peckham attempts to obtain a competitive schedule "Leading up to the Trials"[21] from Bryan Miki despite fact he had a schedule for the entire season from the Team spokesperson Pierce and despite the fact that he had been dealing all along with Pierce on behalf of the Team. Peckham explains it was SC which wanted reconfirmation of this information despite a 1 June 2001 e mail from Peckham to Bob Price of SC, in which he had stated that he advised the two mens teams that carding would remain in place until the Olympic Trials and if they were not successful and did not enter the Canadian Championship Playdowns process then carding privileges would be terminated

6.1.10 Through the e mail correspondence of Miki it is learned by Peckham that the team intention as far as Miki understood it was to compete in both playdowns and Grand Slam. Following this confusion, on 9 August 2001 Pierce re-confirmed the Team schedule filed with the CCA in May which included the provincial playdowns. On this basis following discussions between Bob Price of SC and Peckham, Price acknowledges that the funding for the AAP can go ahead. In his e mail to this effect he advises, however, that funding is not for the current year but only up to December when the results of the Olympic Trials would be known. In effect SC through Price had approved funding under the AAP for only one half of the year as indicated in

---

[21] I note that throughout the testimony of Peckham I find that such subtle phrases are imbedded in his e mail correspondence. He does not ever directly convey the SC and CCA mutual understanding to review the carding of the Team after the results of the Olympic Trials are known. This understanding between these two pillars of the tripartite arrangements of the AAP was made on 5 June of 2001 but never communicated directly. It is later communicated in a fashion such as the one noted here. Then later again Peckham comes to believe he has communicated the understanding to the Team.

his e mail of 28 August 2001. The Team was unaware of this non AAP Guideline limitation on the funding for their Team[22]

6.1.11 Relevant to understanding and interpreting any contractual agreement is the parties intention as expressed by the words of the agreement. To the extent that intent cannot be determined from the contractual words then the surrounding circumstances, such as the tripartite arrangement of the parties and their conduct is also relevant in interpreting the agreement and the intention of the parties. By the beginning of the second year of the AAP carding the Team had a potentially conflicting set of contractual obligations. They had their Aagr with the CCA and their exclusivity agreement with the WCT. The Claimant argues by referring to the National Team Program document of the CCA that they have fulfilled its printed words by competing in 8 high quality national and international level competitions by 31 December 2001. They had formed this view sometime over the course of the summer and autumn. Yet in June of 2001 the Team had conflicting obligations although perhaps not on their later interpretation of the National Team Program. Then in January 2002 they opted out of the provincial playdowns in favour of their exclusivity agreement with the WCT. It is clear that at some time in January of 2002, the Team was going to have to choose which contract it was going to honour.

6.1.12 I find that the course of conduct between the CCA officials and the Team representative and another member of the Team made it clear that in respect of this Team their approved program included an understanding that they were to compete in the provincial playdowns. The National Team Program document could have been more explicit. The communications could have been clearer from Peckham. However, Pierce was a Vice-President of WCPA. He knew what was bothering the CCA. It was the exclusivity agreement which was all part of the larger turf war between WCT and the CCA. When he wrote the letter of 9 August 2001 saying "The schedule you have is our final schedule", he was agreeing that the specific schedule filed in May which included the provincial playdowns was to be his Team's schedule of competitions and not the provision now argued and contained in the National Team Program document referred to above. Of course, competitive results could change the schedule and did as the Team did not do well at the Olympic Trials. Otherwise, they were bound by the schedule filed in May of 2001. They had a specific schedule of competitions and reaffirmed it in order to obtain the funding of the AAP. The Team claims that they did fulfill the Aagr by participating in 8 national or international events. However, the requirement of 8 is a minimum. The Team was bound to follow the schedule they submitted which had more than 8 events. Therefore, I conclude that when the Team advised of the schedule change so as to participate in the Grand Slams of WCT

---

[22] As per Gwen Prillo's email on p.200 of the JDB, Mr. Peckham suggested that he would prepare a letter for the athletes to communicate the decision made during the 5 June 2001 meeting between the CCA and SC. This letter would have clearly communicated the decision of SC and the CCA in regards to the Team's AAP funding. However, it was never prepared by Mr. Peckham.

they were in breach of their Aagr as it is embodied for this particular Team a specific commitment to compete in the provincial playdowns. I add in reaching that conclusion that in the future it would be better for the relationship between the CCA and its athletes if it engaged in full frank and complete discussion and disclosure of what was going on in the tripartite arrangement. The behind the scenes player was too influential in its vigilance of the program. At the same time the CCA was less than clear in seeking out the athlete's intentions and frequently communicated information to them in a rather obtuse fashion. These considerations are however, equally weighed against the Team's less than frank disclosure of what it would do if things went unfavorably competitively. Furthermore, it certainly never revealed its conflicting exclusivity agreement with the WCT. Indeed, the particular contracts were only produced at the first day of the hearing despite earlier production orders.

6.1.13 The Claimant also submits that Team Law was given differential treatment, because Team Law played in the Olympic Trials but was not required to compete in the playdowns leading to the Scott Tournament of Hearts. There are no grounds of discrimination proven in the facts.

6.1.14 Following the breach of the Aagr with the filing of the revised competition schedule the CCA informed SC that the Team had withdrawn from the National Team Program. They were entitled to and indeed in recognition of the tripartite nature of the AAP obliged to report the revisions to the schedule. That information resulted in the cessation of the assistance with the two months of termination payments required by the program being paid for the months of January and February 2002.

.

6.2 IF THERE WAS A BREACH BY THE CLAIMANT WHAT OBLIGATION DID THE RESPONDENT HAVE? WERE THOSE OBLIGATIONS BREACHED?

6.2.1 The Aagr has a section entitled "Default of Agreement and Process of Resolution" set out in paragraph 2.1.7. The essence of that procedure is to provide notice to the other party when in its opinion a party has "failed to conform with its obligations" under the Aagr. The purpose of the notice is to push the conflict out into the open for discussion before the conflict becomes a dispute with legal or other consequences. The CCA could have used this provision during the period it was having the discussions with SC. It certainly should have used it after the discussions in June when SC unilaterally altered its program obligations with the Team because it felt that there was validity to the newspaper stories. Of course, given the evidence in this proceeding it is now very clear that the Team had contractual commitments to both the WCT and the CCA and later entered into further arrangements with the WCT before it breached its agreement with CCA. I find the CCA could have used the procedure in the summer and it might have assisted everyone in having open frank discussion of the issues. They did not take up the opportunity to use the Aagr and its prophylactic provisions for conflict resolution before the matter became a dispute.

6.2.2 The second occasion in which the notice provisions could have been utilized was when the change in the Team competition schedule was filed with the CCA. Unlike the summer, this time it was mandated under the clause. Instead the CCA notified SC that the Team was no longer

on the National Team Program. The announcement of the schedule change triggered the termination of the AAP. It might be that this was a breach of the Aagr of such magnitude that it gave the CCA the right to immediately repudiate the Aagr. However, the CCA too had contractually agreed to a default notice and process of resolution which by the terms of the contract meant that the CCA was required to go through this process provided for in the Aagr before it repudiated the contract. Therefore, I find the CCA in acting immediately without notice to the Team breached the provisions of clause 3(a) of the Aagr. Notice would have resulted in discussion of the conflict and possibly resolution. Instead the Team became the victim of the turf war. Although perhaps it did not feel it was a victim because of the agreement it had with IMG to be reimbursed for lost carding funds. See the Trust Deposit Agreement set out in part at paragraph 2.1.17. This document seems to have allowed them to become the cannon fodder in the turf war.

6.2.3 The CCA also breached clause 1(j) of the Aagr in that it failed to provide a hearing and appeal procedure "with regard to any dispute the Athlete may have with the CCA" as is specifically referred to in the resolution of disputes provision in paragraph 3(c). One might say that this breach is remedied by this proceeding. However, this proceeding is the direct result of the absence of such a procedure in the CCA Program and Guidelines despite SC review and approval of them and the AAP clear requirement that such a hearing and appeal procedure must be in place. This breach makes a mockery of the AAP program and the compliance review by SC. The absence of this process and the ensuing confusion and posturing that took place on all sides explains why this procedure does not even begin until more than a year after the breach of the Aagr.

6.2.4 It was submitted in the Claimants' Brief of Arguments and the Claimants' Reply Argument that the CCA had a fiduciary obligation towards the Team, that it failed to meet its obligation and that remedies should flow from this breach. After analyzing the relationship between the Team and the CCA, I cannot classify it as a fiduciary one. The CCA's responsibility towards the team is one of support and assistance, a role somewhat similar to being a chief cheerleader. It is a relationship of mutual support. Such a relationship is not within the principles of a fiduciary duty as set out in *Hodgkinso*n v. *Simms, supra*. Therefore, no fiduciary obligation was breached and no remedy should flow from this issue.

6.3 WHAT REMEDIES SHOULD BE GRANTED FOR BREACH OF CONTRACT?

6.3.1 The loss suffered by the CCA for the breach of the Aagr by the Team was the loss of their expectation interest of having the elite Team participate in the national playdown and championships. It would be very difficult to quantify these damages and they would probably be of nominal value. In these proceedings, the CCA did not request any damages. Therefore, none will be given for this breach. The loss of the expectation interest is at the core of the contract, as the primary benefit of the Aagr is their appearance in the competitions outlined in their schedule. Therefore, the CCA had a right to end the Aagr, subject to the provisions of the Aagr. It was

entitled to consider the action as amounting to a withdrawal from the National Team Program. Therefore, it acted appropriately when telling SC that they had withdrawn. It was SC's decision to determine if funding would cease.

6.3.2 There are two breaches by the CCA for which remedies must be assessed. The first is the breach of their obligation to have a dispute resolution system as required by clause 1(j) of the Aagr. I do not find that the existing disciplinary procedures of the CCA to be appropriate appeal procedures for this kind of dispute. To the extent that there was a breach, it has been remedied by these proceedings. No other required or appropriate remedy should be granted under the circumstances.

6.3.3 While I have found that it is appropriate for the CCA to treat the breach by the Team as a withdrawal from the National Team Program, the CCA had contractually agreed to follow the procedures in clause 3(a) of the Aagr. The very purpose of that clause is to enable parties to discuss disputes to eliminate or mitigate their effect. The Team lost this prophylactic effect of the clause when the CCA failed to provide notice. We will never know if the Team may have changed their schedule given the opportunity to do so. The remedy for this breach might have been to continue funding for a period of notice or longer. Further, the Team had an indemnity from IMG, which means it felt no monetary loss. However, the Team suffered no loss as a result of the breach. If I were to award damages they would be over-compensated because of the Trust Deposit Agreement with IMG. Therefore, the breach of clause 3(a) gives rise to an award of nominal damages of $1.

6.3.4 On the basis of my findings and the remedies granted, there is no reason to give punitive damages. An award of punitive damages requires extraordinary circumstances, which are not present in this case.

6.3.5 In the circumstances where one party has been manipulative and the other has been less than forthright in its own actions, there is no basis for awarding any costs. Each party shall bear their own costs.

O R D E R S

Based upon the foregoing grounds and decisions.

1. It is found that the CCA did appropriately treat the Team breach of the Aagr as a withdrawal from the National Team Program.

2. There are to be no damages as a result of the breach of the Aagr by the Team.

3. Each party is to bear their own costs. There is no order as to costs.

DATED at LONDON, ONTARIO, CANADA, THIS DAY of APRIL, 2003.

_____

Prof. Richard H. McLaren, C.Arb
Co-chief Arbitrator, ADR sport RED