

SDRCC/CRDSC 09-0099
Ordinary Division

CHRISTOPHER STADNYK

Claimant

v.

BOWLS CANADA BOULINGRIN

Respondent

and

SDRCC/CRDSC 09-0104
Ordinary Division

TEAM SELECTION COMMITTEE, BOWLS CANADA BOULINGRIN

Claimant

v.

CHRISTOPHER STADNYK

Respondent

before

Richard W. Pound, Q.C.
(sole arbitrator)

Introduction

There are two separate submissions to arbitration now before me. The first (File No. 09-0099), to which I will refer, when necessary, as the “first appeal,” is a request by Christopher Stadnyk (“Stadnyk”), a national athlete in the sport of bowls, to prevent the Respondent, Bowls Canada Boulingrin (“BCB”), the national governing body for the sport of bowls, from altering or adding to a decision of an Appeal Panel established by BCB to consider a disciplinary issue involving Stadnyk. The second (File No. 09-0104), to which I will refer, when necessary, as the “second appeal,” is a request by the National Team Committee (“NTC”) of BCB either to refer the disciplinary matter back to the NTC to correct what it considers to have been “procedural” issues identified in the decision of the Appeal Panel or, in the alternative, to refer the entire disciplinary matter to the Executive Committee of BCB, on the basis that it is the Executive Committee which has the proper jurisdiction to dispose of the matter.

The relevant facts are common to both the first and second appeals. The parties have agreed that the appeals should be heard together on common evidence. They also agreed that either a single Order will be entered in both files or separate Orders will be made to dispose of each file, depending upon which is the most appropriate disposition of the matters at issue.

Factual Background

Far more heat than light has been generated in the circumstances of these appeals. It is necessary, therefore, to review the facts and the actions which have occurred prior to the hearing.

Stadnyk is a 34-year old bowler of some considerable experience. He has been a member of the BCB national team since 2000 and has competed in international bowls

competitions over a number of years, including two Commonwealth Games, five Asia-Pacific Championships (as well as other competitions in Hong Kong) and the 2008 World Championships.

BCB organized a Selection Camp in 2008 for purposes of selecting its 2009 national team. Stadnyk and his brother, Ryan, were among the participants. Nothing in these appeals turns on the organization of the Selection Camp nor on the particular criteria used by BCB to select the 2009 national team, 50% of which were objective performance assessments and 50% of which were subjective, such as attitude, self-esteem, leadership, communications, honesty, one-on-one dynamics, competitiveness and discipline. Following the Selection Camp, Stadnyk was selected for the 2009 national team on the basis of his performance during that process. The announcement of the team was made on 7 November 2008. Ryan was not selected. Apparently Ryan did not appeal against his non-selection and the issue of whether or not he should have been selected is not before me.

The current NTC co-chairs are Shirley Lenarduzzi and Ron Wood, both of whom have represented BCB in these appeals. The general responsibility of the NTC is the overall planning and organization of the BCB high performance program and to ensure that the best possible roster and teams are selected to represent Canada and BCB in international competitions. In the Statement of Facts filed for purposes of the first appeal, BCB states that the NTC were authorized to select a National Team and that they were authorized to administer the Code of Conduct and the Athlete Agreement.

The current management and direction of the NTC represents a change, effective in 2008, from whatever had been its previous management and direction. I understand that there had been some perception, at least on the part of the new NTC, of player discipline and behaviour difficulties and related tensions in the past and it seems clear that those now in control of the NTC are attempting to put those matters (whatever they

may have been) behind them and to improve the international performance of BCB teams. I should say that such perceptions are not shared by Stadnyk, who asserts that both discipline and conduct of BCB teams under the previous NTC were satisfactory and that the international performance of Canadian teams had improved greatly under its direction and control. Fortunately, nothing in these appeals turns on this difference of opinion, since the evidence, especially that of BCB on the point, was almost entirely hearsay. The only evidence based on personal experience was that of Stadnyk. I say nothing turns on this, but it is equally obviously one of the elements that has led to the NTC's perception of Stadnyk as disruptive and as a threat to its authority.

To give an example of the current "flavour" around the new NTC, on the occasion of the Selection Camp, the past was addressed to all 39 bowlers who participated in the camp in the following terms:

- What happened in the past is history – we are starting with a clean slate!
- THERE WOULD BE ZERO TOLERANCE IN REGARDS TO THE CODE OF CONDUCT. [BCB emphasis]
- Specific examples were given, to ensure that all bowlers were aware that there was "a new Sherriff in town."¹
- The Director of Player Development reviewed his expectations of team play and chemistry.

The team was announced shortly after these pronouncements were made.

Had matters rested there, these appeals would have been unnecessary. But they did not. Stadnyk was, in particular, unhappy with the NTC decision not to select his brother, Ryan. Quite apart from what he may have discussed with others, on 9

¹ No examples were given, other than some general hearsay, to which I am reluctant to accord too much credibility, since the new NTC members have no direct knowledge and their comments were refuted by Stadnyk, who did.

November 2008, he sent what was regarded within BCB (and particularly the NTC) as an inflammatory e-mail to Wood and Lenarduzzi, which was copied to six other recipients. In retrospect, he might have been well-advised to have disconnected his "send" key and slept on the matter, but he did not.

Hello Everyone

I would like to take a moment to thank you all for your hard work and dedication to improving bowls in Canada. Everyone's time and money is important and taking personal time to dedicate it to a program in important to the advancement of our sport in Canada. There are however some glaring concerns of not just myself, but many others as players who attended this camp. I cannot sit back and not voice my concerns of this new program.

Of the 15 guys at camp, I can assure you that everyone of them was in shock you announced the team. Players have a firsthand look at who is performing, who can perform and who would win internationally. The first area of "shock" was the non-election of Ryan Stadnyk. Take a poll of the athletes at camp and everyone of them would include Ryan in an role internationally from the list of 12 you were to produce.

Problems with some of the people who were selected totally contradict what you were trying to preach all week long. Let's take a look at what you were trying to explain to us of how the new program will run.

1) Coachability - This term is now a laughing matter among athletes. We all discussed this later that night and would like an explanation of how you think some players are "coachable". Lyall Adams is on the last legs of his career and most definitely not more coachable than some of the players you left off this roster. Not to mention being old and hardly athletic (he can barely last a few days without talking pain and almost falling over while delivering a bow). Lyall even confessed to having his worst camp ever. To prove my case here, look at what happened in Scotland in 2004 in the World Bowls when he walked off Team Canada in mid stream during completion. This brings me to another problem regarding selecting people who embarrass the program in the past and somehow get another selection. Michel Larue not only embarrassed himself but also the 4 others and our program in his stint in Scotland for the Atlantic Rim Championships. The team and players did not even know if he was going to show up for some matches when they left (without him) for the greens that morning. Yet you deem these players "coachable".

2) Raw Talent. I am REALLY not sure what you guys were watching this week. When comparing "raw talent" Ryan Stadnyk and Terry O'Neil are not even in the same Universe. Not only did I play against him but due to my mishap with my foot I was also able to watch. There is no way you can justify selecting him over Ryan, simply no way. Ask anyone ! Not to mention he shouldn't even have been at the last 2 camps including this one, but somehow he was able to win some appeals to gain entry. If some people would practice as much as the play the system or dispute wording maybe they would improve. I think (actually I know) even Terry was shocked he was selected. There is more raw talent in each of the 4 people left off this roster.

3) Trust and Credibility – The new committee has this new vision in which they need to sell to the players. How can they gain trust when they flat out lie to players. Upon hearing the selections and trying to cope with the shock, people started to inquire about the thought process of the committee. I personally asked Brian McCartney how they can justify taking 4 of the selections over Ryan Stadnyk. He then told me personally he had “no input or influence” in the selection of the men’s team or teams and that he left it in the hands of the committee. I took that for what it was worth but then later in the evening, a bunch of us (Mark, Me, Jon, Ryan, Trevor) asked Steve Bezanson the same question. He then told us that “those people were selected were the people that Brian wanted and that they were given a list “. So who is telling the truth? How can we buy into a program that is contradicting itself and lying right to the players faces.

a) Also later that evening we learned that a non-selection may have occurred due to a “personal” issue of one of the selectors with a couple of other players from years gone by. This also stems from a personal vendetta due to geographical location.

b) It came to our knowledge that the committee told Jon Pituelly that he would most likely not travel with mark Sanford and I because we would be a bad influence on him. Can someone explain to me how we would be a bad influence? Mark and I have followed rules, programs, and code of conducts to the letter when travelling. If we are following program rules and specifics, how can we be a negative influence: On a side note, Mark and I always come prepared to play and we have the results internationally to back that up.

On a personal note that affected my trust of the program is the insult the World Bowls Team was given. We have produced the best results this country has ever seen. There is NO Bester factor in all the medals this country has won. I would like to make a point that I have not played 1 game with Ryan Bester internationally, yet “somehow” the teams I have been a part of have collected 5 international Medals. In this run, we also have won the Asia Pacific Overall and elevated our World Ranking to 5th. Yet this new committee failed to acknowledge our World Bowls achievements. How can this be? It was insulting to each and every one of us. You have even insulted Ryan Bester and he wanted me to convey that to you because he knows that achievements are a team process and that others have won medals and sacrificed for this program.

With all of these items, and not to mention others that other people are mulling over, how can you expect people to “buy” into this new program. All 15 players think that the selections were a joke and an insult to an athlete who excelled at camp and deserves a shot. There are lots of theories floating around why 3 people actually got selected, and some of us are thinking that the theories may be true. I surely hope I am wrong, but sometimes there is meaning behind these things. The players on this team are smart and most of us have seen 3,4 or even 5 committees come and go. And I can tell you that the veterans on this team will keep you accountable and responsible. I have no problem naming the people I have in this email, everything mentioned can be backed up with fact. It feels like the program took a few steps backwards this week, just when we thought we were heading for a top 3 ranking.

I realize and understand the “political” game in bowls and in the NTC. If speaking my mind as a veteran is going to come back to haunt me in selections for the future, so be it. For me, it is work the risk to make this program work and to excel in the near and far future. There are many “ass kissers” on the team, but I am not one of them. I speak my

mind and this is no exception. You guys have a lot of work to do, not only to get us to buy into your program but to fix the problems that just occurred.

Even though this happened, we must forge on to the future, we must find ways to make this work and to work together to fix it.

Things have changed over the years in the world of sport. Athletes are no longer required to accept blindly whatever sports officials may purport to decide on their behalf. Athlete representation is now a fact of life in almost all of the major sports organizations, domestically and internationally, including NSOs, NOCs, IFs and the IOC and such representation has proven invaluable in making known the issues considered important by athletes. On the other hand, the respective responsibilities of sports organizations and sports officials must also be recognized and respected when they are properly exercised. Stadnyk's e-mail and subsequent responses were certainly at or over the limits in this case. It is not something which I need to decide, since the parties have proceeded on the basis that there was a violation and, as mentioned, the only outstanding issue is the matter of the appropriate sanction(s).

BCB responded with a reprimand and decision of the NTC to suspend Stadnyk for a year. It is not entirely clear what procedural steps were involved in this decision but it is acknowledged that there was no formal disciplinary hearing held before the NTC took the decision to suspend Stadnyk. I conclude from the evidence that the decision was taken by consensus among the NTC members and that Stadnyk was given no opportunity whatsoever to appear or to make representations before the decision was taken.

It is obvious that you are on a confrontational course with the NTC and its support staff as demonstrated by your total disregard for the Code of Conduct, and your continued maligning of the National Team Players and Committee. You did perform, technically, in an excellent manner at camp. However, your unacceptable emails of November 11 & 25 to the Committee can only lead us to believe that this inappropriate attitude will

continue and will, more than likely, spill over to the team going to Johannesburg and have a negative impact on the team as a whole.²

As a result, the Committee has seriously considered the situation, and has decided that at this point you should take a break this year from international competition.³ We will, of course, entertain your application to re-join the team next year. You must remember the “zero tolerance” that was explicitly set forth and repeated several times at camp.

National Team Committee

Ron Wood
Brian McCartney
Margaret Fettes

Shirley Lenarduzzi
Steve Bezanson
Chris Grahame

On being advised of this decision, Stadnyk requested the NTC to change it, a request denied by the NTC.

The Committee has considered your request to reverse our decision, and have agreed to stand by our original position. “that at this point you should take a break this year from international competition. We will, of course, entertain your application to re-join the team next year.”

Your appeal, when submitted, will be considered in accordance with BCB’s Appeal Policy.

It is not difficult to conclude that there was bad blood between the NTC and Stadnyk and that the NTC was determined to make an example of him. I conclude this, as a matter of fact, on the basis of the remarks and comments made by the Chairs of the NTC during the several telephone conferences forming part of the arbitration proceedings (unsupported by other witnesses with direct knowledge of the circumstances), in addition to the written materials submitted by the parties.

In the event, Stadnyk appealed against the NTC’s self-confirmed decision. The applicable legal “landscape” regarding appeals includes the following:

² The extrapolation to future conduct is a troubling aspect of this communication and is indicative of the approach of the NTC to Stadnyk.

³ This is a somewhat euphemistic description for an extreme sanction for an athlete, namely suspension from the national team. It is also inconsistent with the intention of the NTC to seek an extension of the suspension for a further year from the BCB Executive Committee.

- (a) as is the case for all or almost all national governing bodies, BCB has a form of athlete agreement which its team members are required to sign and which contains a number of commitments on the part of the athletes;⁴
- (b) BCB also has a Code of Conduct, which contains a number of general provisions regarding the conduct of athletes; and
- (c) BCB has adopted an appeals policy which sets out the rights of appeal against decisions taken by BCB or any of its committees, the grounds for such appeals, the process by which the appeals are pursued and the possible dispositions of any appeal.

The athlete agreement provides that the NTC is responsible with respect to any breach of that agreement or of the Code of Conduct and that penalties for breaches of either are to be determined by the NTC. The relevant portions of the athlete agreement⁵ and Code of Conduct are as follows:

National Team Agreement

BCB shall:

...

1.8 Provide an appeal procedure that conforms to generally accepted principles of natural justice and due process for any dispute the Athlete may have with BCB in accordance with the appeals process established by BCB, a copy of which is attached to this Agreement as Appendix A.

...

3.0 **PENALTIES FOR INFRACTIONS**

⁴ There was some issue as to whether or not Stadnyk had actually signed the athlete agreement, since he had been travelling during the time that team members were signing their agreements. I am satisfied, however, that both Stadnyk and BCB operated on the basis that Stadnyk was governed by the terms of the athlete agreement. The conduct of the parties is consistent with this conclusion. It is also insufficient for BCB, if it intended to rely on the absence of such an agreement to support its argument that the whole matter should be dealt with by the BCB Executive Committee to come forward saying merely that it was not clear whether Stadnyk had signed the agreement and that they had been unable to locate a signed agreement.

⁵ I have not included the Athlete's obligations since there is no issue before me as to the fact that Stadnyk was in breach of certain of them. The only issue in the proceedings relates to the sanctions for the breach of the obligations.

Any player who refuses, or resigns, from their first international assignment will be automatically suspended from further National Team activities. Players are entitled to submit their reasons for withdrawing in writing to the National Team committee for reinstatement and/or elimination of the applicable National Team Assessment. Notwithstanding the above, [if] it is determined by the National Team Committee that an athlete is in breach of any term of this Agreement or the Code of Conduct of BCB, then the penalty for such breach shall be determined by the National Team Committee. This may range from a letter of reprimand to be placed in the athlete's file, to suspension or expulsion from the National Team or BCB.

Code of Conduct

A. All individuals affiliated with Bowls Canada Boulingrin (BCB) through their provincial association and participating in BCB activities or sanctioned events shall:

- (i) strive at all times to work towards the goals and objectives of BCB and the sport of lawn bowls, and towards the betterment of its members;
- (ii) attempt to heighten the image and dignity of BCB and the sport of lawn bowling, and to refrain from any behaviour which may discredit LBC or the sport as a whole;
- (iii) always be courteous and objective in any dealings with other members;
- (iv) refrain from unfavourable comments and criticism of other members unless done through proper means;
- (v) strive for excellence in all aspects of the sport while supporting the concepts of fair play and drug-free sport;
- (vi) show respect for cultural, social and political values of all members of the sport of lawn bowling in Canada and abroad;
- (vii) as a guest in a club, province or foreign country, abide by the laws of the sport and the host club, province or country and adhere to any social customs concerning conduct;
- (viii) refrain from using their membership or office within BCB for personal and/or material gains;
- (ix) not knowingly false, malicious or derogatory statements about or to any other member of BCB;
- (x) know and abide by all bylaws, policies and procedures of BCB;
- (xi) not counsel others to disregard or break the bylaws, policies and procedures of BCB;
- (xii) not act in such a manner as to dishonour, embarrass or disgrace BCB or any of its members;

B. The Executive Committee shall decide any further actions which may include letters of warning or reprimand, fines, payments of any cost, suspension or expulsion from BCB. Any member of BCB⁶ whose conduct is in question shall have the opportunity to defend their actions and respond to the Executive Committee of Bowls Canada Boulingrin or their designate.

⁶ Note that the Code of Conduct applies not only to athletes.

Stadnyk availed himself of the right of appeal referred to in the athlete agreement. The relevant portions of the BCB Appeal Policy include:

SCOPE OF APPEAL

1. Any member of BCB who is affected by a decision of the Board of Directors, of any Committee of the Board of Directors, or of any body or individual who has been delegated authority to make decisions on behalf of the Board of Directors, shall have the right to appeal that decision, provided there are sufficient grounds for the appeal as set out in Section 5 [6?] of this policy. Such decisions may include, but are not limited to, eligibility, selection, discipline, harassment, employment, and contract matters.

TIMING OF APPEAL

4. Members who wish to appeal a decision shall have 21 days from the date on which they received notice of the decision, to submit written notice of their intention to appeal, along with detailed reasons for the appeal, to the Director.

5. Any party wishing to initiate an appeal beyond the 21-day period must provide a written request stating reasons for an exemption to this requirement. The decision to allow, or not allow an appeal outside the 21-day period shall be at the sole discretion of the Director.

GROUNDINGS OF APPEAL

6. A decision cannot be appealed on its merits alone. An appeal may be heard only if there are sufficient grounds for the appeal. Sufficient grounds include the respondent:

- a) making a decision for which it did not have authority or jurisdiction as set out in governing documents;
- b) failing to follow procedures as laid out in the bylaws or approved policies of BCB;
- c) making a decision which was influenced by bias, where bias is defined as a lack of neutrality to such an extent that the decision-maker is unable to consider other views;
- d) exercising its discretion for an improper purpose;
- e) making a decision which was grossly unreasonable.

APPEALS PANEL

9. If the Director, or designate, is satisfied that there are sufficient grounds for an appeal, within 10 days of having received the original notice of appeal he or she shall establish an Appeals Panel (the "Panel") as follows:

- a) The Panel shall be comprised of three (3) individuals selected from among the members of the Executive Board of Directors.

- b) The Panel members shall have no significant relationship with the affected parties, shall have had no involvement with the decision being appealed, and shall be free from any other actual or perceived bias or conflict.
- c) The Panel's members shall select from themselves a Chairperson.

APPEAL DECISION

13. Within 7 days of concluding the appeal, the Panel shall issue its written decision, with reasons. In making its decision the Panel shall have no greater authority than that of the original decision-maker. The Panel may decide:
- a) To void or confirm the decision being appealed;
 - b) To vary the decision where it is found that an error occurred and such an error can not be corrected by the original decision-maker for reasons which include, but are not limited to, lack of clear procedure, lack of time, or lack of neutrality;
 - c) To refer the matter back to the initial decision-maker for a new decision; and
 - d) To determine how costs of the appeal shall be allocated, of at all.

ARBITRATION

20. All differences or disputes shall first be submitted to appeal pursuant to the appeal process set out in this policy. If any party believes the Appeal Panel has made an error such as those described in Section 6 of the Policy, the matter shall be referred to arbitration, such arbitration to be administered under the Alternate Dispute (ADR) Program for Amateur Sport and its Rules of Arbitration, as amended from time to time.

21. Should a matter be referred to arbitration, all parties to the original appeal shall be parties to the arbitration.

22. The parties to an arbitration shall enter into a formal Arbitration Agreement and the decision of any arbitration shall be final and binding and not subject to any further review by any court of competent jurisdiction or any other body.

Stadnyk's appeal was successful. The Appeal Panel concluded that there were elements of lack of neutrality in the NTC decision and that the penalties were excessive. It substituted its own view for what should have been appropriate in the circumstances, including a monetary penalty and a letter of apology from Stadnyk.

This, too, might have been an opportunity for the matter to end. But, the NTC, led by its Chairs, was not satisfied with the outcome. It filed a lengthy memorandum with the BCB president, complaining about the Appeal Panel decision and stated that the NTC planned to proceed as follows:

1. File a new appeal, bringing in additional witnesses to ensure that Mr. Marshall's e-mail and Chris's comments are dealt with appropriately. The NTC is prepared to proceed under an ad hoc arrangement as has been previously done.
2. File a complaint under the BCB harassment policy concurrently with the new appeal. This complaint is being file (*sic*) by the NTC on behalf of some of its members and a few of the NT [national team] members.
3. The NTC will pursue the Executive Committee in regards to their position and ruling on Code of Conduct and Mr. Stadnyk's flagrant abuse of same. These should be completed prior to commencing with the new appeal.
4. The NTC furthermore plan on proceeding to the SDRC of Canada for the appropriate final decision pending the outcome of this appeal.

Quite apart from its dissatisfaction with the Appeal Panel decision, the NTC also indicated that it would be requesting the BCB Executive Committee to impose an additional one-year suspension on Stadnyk, such request to be considered at an Executive Committee meeting scheduled for 5-6 February 2009. Notice of this intention on the part of the NTC led to the first appeal launched by Stadnyk, in which he sought an Order preventing BCB from acting contrary to the decision of the Appeal Panel. He said that he had complied with the decision of the Appeal Panel and that he was concerned that he would not get a fair hearing at yet another BCB internal process. For its part, BCB took the position that any resort to the SDRCC process was premature, since the internal process had not been exhausted. It also asserted, notwithstanding the provisions of the athlete agreement, that matters relating to violations of the BCB Code of Conduct were to be dealt with by the BCB Executive Committee and the Executive Committee had not considered this matter.

A preliminary telephone conference was held on 4 February 2009 to deal with the question of prematurity. I indicated, following submissions of the parties, that (without deciding) it appeared to me on the face of the material then before me that BCB had participated in the initial decision of the NTC, in the confirmation by the NTC of its original decision, in the constitution of the Appeals Panel and in the proceedings before the Appeal Panel. It was now saying that only the Executive Committee could decide the matter, notwithstanding clear language in the athlete agreement that it was the NTC which had the responsibility for disciplinary breaches of both the athlete agreement and

the Code of Conduct. I concluded, having resort also to section 20 of the appeal policy (which I thought was abundantly clear) that there was a fairly arguable case that the internal process had been completed and that, if the matter of additional sanctions was to be considered by the Executive Committee at its 5-6 February meeting, the arbitration should proceed forthwith. It was then agreed that the arbitration would proceed at a later date, on the understanding that no decisions regarding Stadnyk would be taken at the 5-6 February meeting. In addition, efforts were to be made by way of resolution facilitation to see if the dispute might be resolved by the parties without the need for arbitration.

In the interim, as it appeared that an amicable solution was not to be found, the NTC indicated that it would be filing – and did file – a separate request for arbitration, which takes the form of the second appeal. A telephone conference was held on 16 March 2009 to determine whether it was appropriate to proceed with the two appeals together. In addition, I requested clarification regarding the proper description of the Claimant in the second appeal, since I was not certain that the NTC, of and by itself, had proper standing in any proceeding. BCB subsequently provided written clarification that BCB is the real party and that it was acting, for purposes of the second appeal, by way of the NTC. Thus, the parties in both appeals are identical. A hearing by telephone conference was scheduled for 24 March 2009.

Issues for Determination

I am left with the following issues to be decided:

1. Was Stadnyk premature in bringing the first appeal?
2. Did the BCB Appeal Panel exceed its jurisdiction in disposing of Stadnyk's appeal?

3. Does the BCB Executive Committee have the right to impose additional penalties on Stadnyk arising from the particular events in November 2008?
4. What purpose, if any, is served by the second appeal?
5. Was the second appeal brought within the applicable delays?
6. What are the appropriate Orders in the circumstances?

Was Stadnyk Premature in Bringing the First Appeal?

The answer to this question is fundamental, since it is clear that resort to arbitration before the SDRCC can only occur once the party seeking arbitration has exhausted all of the internal recourses available to him.⁷ Stadnyk had committed a breach of the athlete agreement and the BCB Code of Conduct. Whatever may be his personal feelings about the seriousness of the breach, there was no suggestion before me that he contested the fact that he committed the breach. The sole issue was the matter of the appropriate sanction. The NTC had imposed a sanction. Stadnyk asked the NTC for reconsideration of the sanction. The NTC confirmed the sanction. Stadnyk then availed himself of the appeal procedure provided by BCB and referred to in the athlete agreement. The appeal proceeded in accordance with the appeal procedure and the Appeal Panel found in Stadnyk's favour. Stadnyk complied with the decision of the Appeal Panel and then learned that BCB intended to consider, at the Executive Committee level, an additional sanction (of suspension from the national team, and perhaps from all competitions), at the recommendation of the NTC, over and above the sanction originally imposed by the NTC for the same breach of the athlete agreement

⁷ See Canadian Sport Dispute Resolution Code, Article 3.1(b): Unless otherwise agreed or set out herein, and if the dispute involves a NSO, where a Person applies to the SDRCC for the resolution of a Sports related dispute, the Person must first have exhausted any internal dispute procedures provided by the rules of the applicable NSO.

and Code of Conduct. The stated basis was that sanctions for breaches of the BCB Code of Conduct were the responsibility of the BCB Executive Committee, not of the NTC. On that construction of the matter, the internal process had not been completed and Stadnyk should have waited until the BCB Executive Committee had disposed of the matter before resorting to arbitration.

In my view, the internal process called for under the athlete agreement and appeal policy had been completed once the Appeal Panel's decision had been rendered and Stadnyk had complied with the disposition contained in that decision.⁸ He had followed the process provided in the athlete agreement and that process had been completed. Any further recourse on the part of an aggrieved party was required to be by way of arbitration.

The fact that the NTC may have been unsatisfied with the outcome does not affect the assessment as to whether the process had been exhausted. Stadnyk was faced with a position on the part of BCB that, despite what was provided in the athlete agreement and appeal process as to resolution of disputes of a disciplinary nature, an entirely different internal view was now being advanced and that not only was his success before the Appeal Panel in jeopardy, but he was also at risk for an additional year of suspension in an internal procedure in which, in the circumstances, he could have had, at best, marginal confidence. The internal "process" had been exhausted. It was not premature to have resorted to arbitration to protect his position as determined through such process.

The timing and filing of the first appeal was properly accomplished. Under the Code, I have jurisdiction as arbitrator and the appeal has proceeded accordingly.

⁸ I do not have to decide whether such process may have been complete once the Appeals Panel's decision had been rendered, whether or not Stadnyk had complied with its dispositions, since it is common ground that he has complied.

Did the BCB Appeal Panel Exceed its Jurisdiction in Disposing of Stadnyk's Appeal?

This is a relevant concern, since if the Appeal Panel exceeded its jurisdiction, then its decision would be without effect and the decision of the NTC would remain in effect.

The BCB appeal policy is generally similar to that of many national governing bodies. A right of appeal is granted to those who may be affected by decisions of the body or its committees. While a right of appeal is granted, it is generally (and understandably) neither intended nor desirable that every decision made by the organization with which a party may be dissatisfied be subject to appeal. There are normally some limitations as to the basis for appeals, certain thresholds which apply, specified grounds on which appeals may be brought and prescriptions regarding the nature of decisions that may be rendered. In many respects, what is labelled as an "appeal" in such policies tends to have more in common with judicial review than with what would normally be termed an appeal.

This is clear from sections 6 and 13 of the appeal policy noted above. Stadnyk got through the first eye of the needle, establishing to the satisfaction of the responsible BCB official that the disciplinary decision affecting him was one which was the proper subject matter of an appeal pursuant to the BCB appeal policy. The Appeal Panel was duly struck and proceeded to hear the appeal. On 4 January 2009, it rendered its decision, the dispositive portion of which reads:

The panel has conducted an oral hearing via teleconference on December 30, 2008, involving Chris Stadnyk, athlete and appellant; and Ron Wood and Shirley Lenarduzzi, Co-Chairs of the National Team Committee.

Based on the information available to us, the Panel:

1. unanimously finds that the conduct of the athlete at the conclusion of the selection camp and in the content of a Nov. 9, 2008 email to the NTC members was inappropriate, unacceptable and constitutes breaches of the Code of Conduct.
2. unanimously finds, although with reservations, that the NTC was within its rights to penalize the athlete for the breaches of the Code of Conduct.
3. in the majority, finds that the process followed by the NTC leading up to it's (*sic*) email of November 29, 2008 does not meet the standard for due process expected of a disciplinary action.
4. in the majority, finds that the penalty imposed by the NTC is inappropriate and extreme for the circumstances associated with the breaches of the Code of Conduct.

It is therefore the decision of this Panel that:

- i. The November 29, 2008 decision of the NTC to suspend Chris Stadnyk from the National Team for 2009 is hereby revoked.
- ii. Chris Stadnyk be restored to the team scheduled to represent Canada in South Africa in 2009.
- iii. Chris Stadnyk is hereby subject to the following disciplinary actions:
 - (a) A letter of reprimand, as attached
 - (b) A fine in the amount of \$150, to be paid to BCB within 14 days of the date of this decision.

The Appeal Panel was conscious of its role to consider only certain aspects of the impugned decision of the NTC, especially:

- c) making a decision which was influenced by bias, where bias is defined as a lack of neutrality to such an extent that the decision-maker is unable to consider other views;
- ...
- e) making a decision which was grossly unreasonable.

It concluded that there was lack of neutrality involved,⁹ as well as a decision on sanction, holding that the sanction imposed by the NTC was grossly unreasonable. It was also conscious of its scope of action, opting to vary the decision on the basis of a flawed process and lack of neutrality, an option open to it under section 13 of the appeal process.

⁹ This is apparent from the terms of a Memorandum prepared by the Chair of the Appeal Panel (Gary Robinson), addressed to the BCB president, which Memorandum was forwarded to Stadnyk by the BCB president, with a note to say, "... that will likely answer a lot of your questions." While BCB urged that I disregard the Memorandum, it seems to me that if it was sent to Stadnyk in answer to his questions, it should not now be excluded from my consideration as arbitrator. If BCB wished to challenge the contents of the Memorandum, it could have called Mr. Robinson as a witness in the proceedings.

The NTC has a curious and evolving position regarding the Appeal Panel's decision. On the one hand, it claims that the NTC has no power to deal with disciplinary actions under the Code of Conduct and that such jurisdiction rests exclusively with the BCB Executive Committee, and on the other hand, wants the matter to be referred back (presumably to the NTC) to correct what it describes as "procedural" issues. Counsel explained that the BCB position is that if the NTC has the disciplinary jurisdiction, then the matter should be referred back to it for a new disposition, free of the "procedural" defects identified by the Appeal Panel. If not, the whole matter should instead be referred to the BCB Executive Committee which, he contends, is the body which does have jurisdiction in such matters.

BCB's litigious position in the two appeals is at odds with both its conduct and the governing policies and procedures. No explanation was offered for this contradiction. How is it possible for the NTC to take the disciplinary actions, confirm those actions, participate in an appeal from such decisions and then turn around to say that it never had any jurisdiction to take the actions in the first place?

The Appeal Panel found the existence of lack of neutrality. In my respectful opinion, lack of neutrality in this sense amounts to a bias (as identified in the BCB appeal policy), which cannot be dismissed as a mere procedural shortcoming. It is far more serious than the merely procedural and undermines confidence in the entire decision-making process of the organization. Faced with the evidence of lack of neutrality, the Appeal Panel could have voided the NTC decision, which would have had the same effect as another of its possible decisions, namely, to refer the matter back to the original decision-maker (the NTC) for a new decision. Having found the existence of lack of neutrality, however, the Appeal Panel undoubtedly concluded that neither of those alternatives would likely be as satisfactory as another open to it under the appeal process, namely, to vary the decision on the basis that an error had occurred

and that such error could not be corrected by the original decision-maker, for reasons which included lack of neutrality. In making that decision, the Appeal Panel did not purport to exercise any greater authority than the original decision-maker (NTC), but merely substituted the decision that, in its view, should have been reached by the NTC in the first place, had it been acting reasonably and without the bias flowing from the lack of neutrality.

I make no comment on the merits of the Appeal Panel's decision. I am not privy to the evidence presented before it. Nor, in the circumstances, is it my role in these arbitration proceedings to second-guess what its decision should have been. There is no palpable and overriding error on the face of that decision and no submissions on the existence of any such error were made on behalf of BCB, other than to insist that it was only a procedural issue. On the face of the decision as well, the Appeal Panel considered the NTC decision under appeal within the limits contemplated by the BCB appeal policy and rendered a decision within the range of outcomes open to it under the same policy. The party seeking to impugn a decision must assume the onus of proof or the burden of persuasion and BCB has failed to discharge either.

I see nothing which would suggest that BCB, in the course of the internal appeal, argued that the NTC was the wrong authority to impose the disciplinary sanction being appealed, that the NTC was the wrong party to such an appeal, that the appeal was premature and that the entire matter should have been before the BCB Executive Committee from the outset. These are positions adopted in retrospect, after the loss at the Appeal Panel stage. It is true, however, that some indication was given by the BCB president at or about the time of the Appeal Panel decision dated 4 January 2009 that the BCB Executive Committee would be considering additional sanctions, at the request of the NTC. It is difficult to assign any particular significance to this, other than to underline the obvious determination of the NTC to rid itself of Stadnyk.

In short, I conclude that the Appeal Panel did not exceed its jurisdiction in rendering its decision of 4 January 2009 and that BCB had the onus of demonstrating that its decision was unreasonable.

Does the BCB Executive Committee Have the Right to Impose Additional Penalties on Stadnyk Arising from the Particular Events in November 2008?

The basis on which BCB argues that its Executive Committee has the jurisdiction to impose additional penalties on Stadnyk in respect of Code of Conduct violations, other than by general reference to its corporate by-laws, is to be found in part B of the Code of Conduct, which I reproduce here for convenience.

- B. The Executive Committee shall decide any further actions which may include letters of warning or reprimand, fines, payments of any cost, suspension or expulsion from BCB. Any member of BCB whose conduct is in question shall have the opportunity to defend their actions and respond to the Executive Committee of Bowls Canada Boulingrin or their designate.

As I understand the argument, this is relied upon as the authority for the BCB Executive Committee to exercise exclusive jurisdiction in relation to Code of Conduct violations. There are, however, a number of inherent difficulties with this contention, some of which may be the result of imperfect drafting, some of interpretation and some in the nature of estoppel.

First is the inclusion of the word “further,” which occurs within a provision that contains no reference to any actions to be taken, which raises the question of further to “what” and determined by whom. It may simply mean that residual authority rests with the BCB board of directors and that this language is an inelegant means of delegating certain actions to the Executive Committee, but the implicit suggestion thereby becomes that the Executive Committee can override the board of directors,

which would, at the very least, be counterintuitive. Second, there is a reference to a “designate” of the Executive Committee. If it is only the Executive Committee which has jurisdiction in the matter, not only would there be no need for the BCB member to defend actions and respond to a designate of the Executive Committee, but also, in fact, it might well be quite inappropriate to respond to any body other than the one exclusively empowered to impose sanctions. Another possible interpretation is that the BCB Executive Committee may delegate some or all of its authority under the provision to some other body or committee. Finally, we have the athlete agreement and the appeal policy, which specifically provide that the NTC has the responsibility to deal with disciplinary matters under both the athlete agreement and Code of Conduct. These are documents issued by BCB, which cannot (and does not) deny their existence. The documents must be taken to have been issued with the intention on the part of BCB that they be relied upon by their athletes and other members. This is a classic example of estoppel, a legal principle which prevents BCB, in this case, from preventing someone from relying upon the very documents and procedures which BCB put out with the express intention that such documents and procedures be relied upon by those affected by them. In addition, without descending into the obsessively legal underworld, the athlete agreement is a specific application of the Code of Conduct under the authority of the NTC, which takes precedence over the more general expressions in the Code of Conduct and the role of the Executive Committee.

I conclude from this that the BCB Executive Committee, insofar as its national team athletes are concerned, has delegated the relevant disciplinary matters to the NTC. The NTC exercised its authority in the case of Stadnyk. Its decision was varied as a result of Stadnyk’s appeal in accordance with the applicable BCB internal rules. Neither the NTC nor the BCB Executive Committee can now purport to add to or to vary the sanction arising from the same rule violations, as so determined.

Another proposition was argued during the hearing, namely that the BCB board of directors (and, between meetings, the Executive Committee) has a residual power to examine and vary, if it deems appropriate, any internal decisions of its committees. In response to my question whether this organizational view extended to a decision of an Appeal Panel rendered pursuant to the appeal policy, its counsel said this was the position advanced. To be fair to counsel, I must say that while the argument was made, regardless of his level of hope, it was evidently not made with great expectation of success. I reject the argument. To accept it would render illusory and meaningless an appeal process specifically adopted by BCB, which was intended to provide at least a partially independent review of the actions of a BCB committee, in this case the NTC.

What Purpose, if Any, is Served by the Second Appeal?

I confess to having had some difficulty understanding why BCB instituted the second appeal. It seems to me that whatever it hoped to achieve by way of the second appeal could easily have been accomplished within the context of the first appeal and such possible outcomes, if not explicit, were certainly implicit in its litigious position in those proceedings. One might suppose that the second appeal was brought out of an excess of caution, in case there might have been insufficient flexibility within the first appeal to get BCB to where it hoped to end up when the litigious smoke cleared. As explained by counsel, the concern seems to have been that the first appeal may have been too narrow, if one were to take the view that an Order in the first appeal might be confined to a possible decision of the BCB Executive Committee at its 5-6 February 2009 meeting and it wanted to be sure that its first position, that the disciplinary matter should be referred back to the NTC and, as an alternative position, that the entire matter (arising as it did from a breach of the Code of Conduct) should be sent to the BCB Executive Committee for resolution were properly protected.

My inclination in matters of this nature is that, provided no prejudice is suffered by the opposing party, it is in the greater interests of justice to allow the parties to put forward whatever arguments they wish and not to become consumed by procedural matters. No such prejudice has been alleged or established. Therefore, even though there are significant elements of duplication, I would not, in the present circumstances, strike the second appeal, but will subsume it within the first by filing the same Order in each of the files.

Was the Second Appeal Brought Within the Applicable Delays?

Stadnyk's position with respect to the second appeal is that BCB has not brought it within the applicable delays. Both the first appeal and the second appeal arise from the same facts. The key date, argues Stadnyk, is the date of the Appeal Panel's decision, namely 4 January 2009. That is the date from which the time limit to request any arbitration should be computed, since that decision is the only decision that is relevant to the claim advanced by BCB. BCB seeks either referral back to the NTC or referral to the BCB Executive Committee, both the primary and alternative conclusions arising from its disagreement with the Appeal Panel decision. That being so, Stadnyk contends that BCB should have filed any request for arbitration not later than thirty days from 4 January 2009. At the preliminary conference on 16 March 2009, I requested BCB's counsel to be ready to address this issue. BCB acknowledges that the decision of 4 January 2009 is the relevant decision.

The Canadian Sport Dispute Resolution Code provides at Article 3.5:

Time Limits

(a) All days are included in the calculation of time limits hereunder, including weekends and holidays.

(b) In the absence of a time limit set by agreement or by statute, regulations or other applicable rules of a NSO, the time limit to file a Request shall be thirty (30) days following the later of:

(i) the date on which the Claimant becomes aware of the existence of the dispute;

- (ii) the date on which the Claimant becomes aware of the decision being appealed; and
- (iii) the date on which the last step in attempting to resolve the dispute occurred, as determined by the SDRCC. The SDRCC may, in its discretion, refer the issue to a Panel.

BCB's position is that, following the institution of the first appeal, efforts were made to arrange for a mediated settlement of the first appeal (as well as other outstanding issues between the parties) which involved steps to be taken prior to the end of February 2009. On 3 March 2009, the NTC, convinced that further efforts in this direction would be fruitless, requested that the arbitration proceed and on 8 March 2009, the second appeal was filed with the SDRCC. Its position is that the last step in attempting to resolve the dispute was 3 March 2009 and that the second appeal was, therefore, filed within the applicable time limit. Stadnyk took no issue with the factual recitations regarding off-line attempts to resolve the dispute.

The SDRCC has made no determination under Article 3.5 of the Code as to the date of the last step to resolve the dispute, so I have assumed that the matter has effectively been referred to me (if only by default) for such determination. While the mix of issues that exists between the parties is a complicating factor as it relates to the "dispute," it seems to me that a liberal interpretation is warranted, in the interests of encouraging parties to find a mutually satisfactory solution to their dispute and recognizing that litigation should be the last resort, indeed a recognition of a failure of sensible people to reach a sensible compromise. I conclude, therefore, that within the meaning of Article 3.5(b)(iii) of the Code, the last step in attempting to resolve the dispute occurred on or about 3 March 2009 and, accordingly, that the second appeal was commenced within the applicable time limit.

Orders

Based on the foregoing, I make the following Orders:

1. The decision of the BCB Appeal Panel dated 4 January 2009 is maintained and BCB is required to give effect to such decision, in particular, restoring Stadnyk to the national team.
2. No further sanctions against Stadnyk arising out of the violations of the athlete agreement or Code of Conduct giving rise to both the first appeal and the second appeal may be imposed by NTC or BCB, including removal of Stadnyk from the team which will participate in South Africa.
3. The second appeal (SDRCC 09-0104) is dismissed.
4. No Order is made as to costs.
5. A copy of this Order shall be filed in the records of both SDRCC 09-0099 and SDRCC 09-0104.

I reserve my right as Arbitrator to deal with any matters arising from this Order and the proceedings herein.

Montreal, 31 March 2009



Richard W. Pound, Q.C.
Arbitrator

Appearances:

Chris Stadnyk on his own behalf

Shirley Lenarduzzi

Ron Wood on behalf of Bowls Canada Boulingrin

Steve Indig