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INTERNATIONAL SPORTS LAW PERSPECTIVE

A CONSIDERATION OF THE NEED FOR A NATIONAL DISPUTE RESOLUTION SYSTEM FOR NATIONAL SPORT ORGANIZATIONS IN CANADA

SUSAN HASLIP*

I. INTRODUCTION

To date, discussion of the transnational trend toward dispute resolution in sport has virtually ignored the Canadian sport experience.¹ In this paper, I endeavour to inject a Canadian perspective into the “comparative scholarship”² in the area of dispute resolution in sport. In this paper, I consider the need for a national dispute resolution system for Canada’s “high performance” sport community.³ While the high per-

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1. James A. R. Nafziger, *International Sports Law: A Replay of Characteristics and Trends*, 86 AM. J. INT’L L. 443, 518 (1996) (noting “[a] trend toward more systematic and uniform administration, regulation and dispute resolution”); James A. R. Nafziger & Li Wei, *China’s Sports Law*, 46 AM. J. COMP. L. 453, 454 (1998) (describing a “transnational trend toward resolving sports disputes by a combination of administrative review within sports associations and specialized arbitration”).

Dispute resolution mechanisms at a national level exist in a number of countries. Law & Justice Foundation of New South Wales, at <http://www3.lawfoundation.net.au> (last visited Mar. 10, 2001) (Australia); Nafziger & Wei, *supra* note 1, at 453 (China); Using Alternative Dispute Resolution to Settle Sports Disputes, at http://www.adr.org/rules/guides/adr_for_sports_disputes.html (last visited Mar. 10, 2001) (United States).

2. Nafziger & Wei, *supra* note 1, at 455 (stating “there has been very little comparative scholarship on sports regimes outside the western industrialized countries”).

3. The Minister of State Fitness and Amateur Sport, *Sport: The Way Ahead – The Report of the Minister’s Task Force on Federal Sport Policy* 22 (1992) [hereinafter *Task Force Report*]. The *Task Force Report* defined ‘sport’ as “one part of a physical activity spectrum that includes play, fitness activities, recreational sport, organized competitive sport and high-performance sport. Sport is organized around skill levels, gender, age and jurisdictional authority.” *Id.*

Within sport, a distinction is made between ‘high performance,’ ‘recreational,’ and ‘competitive’ athletes. The term ‘athlete’ includes a range of individuals, from persons performing

formance sport community is comprised of athletes, national sport organizations (e.g., Canadian Amateur Boxing Association), multi-sport/service organizations (e.g., Coaching Association of Canada), and major games organizations (e.g., Canadian Olympic Association), this consideration focuses on the needs of athletes and national sport organizations (NSOs).⁴

In Part II of this paper, I critically assess the existing conflict resolution scheme in place at the high performance level.⁵ This assessment suggests that the existing process is flawed in ways that exacerbate the power differential between NSOs and athletes. I argue that to the extent that Canada's sport system claims to be "athlete-centered,"⁶ the existing weaknesses are unacceptable and could be addressed by the creation of a national dispute resolution system. In Part III, I consider the place of Canada's NSOs within the international sport movement, and consider how the decision-making of NSOs are influenced by that structure. The dispute that arose between Canadian boxer Pardeep Singh Nagra and his

physical activity sheerly for personal enjoyment through to those individuals seeking to perfect performance and compete internationally, including competing at the Olympic Games. In this paper, unless otherwise indicated, the term 'athlete' is understood to refer to 'high performance' athletes.

The term 'high performance' describes an athlete that has reached the highest level of sport performance through a variety of mechanisms including "training, skill, technical development and competitive success." *Id.* at 31. The driving force for high performance athletes is the "pursuit of excellence," and high performance athletes generally train more intensely and compete in more high-performance national and international competitions than 'competitive' athletes. *Id.* at 30. 'Recreational athletes' participate in a physical activity primarily for the sake of the activity itself, as well as for fun, but their interest in doing so is not to compete at an advanced level or to be highly trained. *Id.* at 29. 'Competitive athletes,' on the other hand, belong to a provincial or national sport organization and are involved in competitive, organized sport. Competitive athletes are considered more seriously committed to their sport than a recreational athlete. A competitive athlete generally displays a higher skill level than a recreational athlete. *Id.*

4. Since the dispute resolution mechanisms of some provincial sport organizations (e.g., Ontario Amateur Boxing Association) default to the rules of their respective NSO (e.g., Canadian Amateur Boxing Association), provincial sport organizations are also considered to fall within the ambit of the high performance sport community. Ottawa: Department of Canadian Heritage, *A Win-Win Solution: Creating a National Alternative Dispute Resolution System For Amateur Sport in Canada*, at <http://www.pch.gc.ca/coderre/report-rapport/Tofcontent.htm> (last visited Mar. 10, 2001).

5. The terms 'conflict resolution' and 'dispute resolution' will be used interchangeably in this paper.

6. *Task Force Report, supra* note 3, at 57 (defining athlete-centered "[a]s the core of the sport system, athletes must be supported in a holistic way – with care for the individual's growth and development, physical, moral, emotional and spiritual health").

NSO, the Canadian Amateur Boxing Association,⁷ is used to illustrate how an international sport federation influenced the resolution of that dispute, and how the result affected the athlete and the sport organization. The extent to which a national dispute resolution system could be of assistance to the athlete and sport organization in view of the international federation's influence on the dispute resolution process is also considered.

In Part IV, I present a model for a national dispute resolution system for high performance sport in Canada. A tripartite model for dispute resolution, consisting of mediation,⁸ arbitration,⁹ and mediation-arbitration¹⁰ is considered. Other components of such a system, including the structure of an organizational body responsible for a national dispute resolution system, the funding of this organization, the implementation of the system, and the qualifications of mediators and arbitrators are also considered. I conclude by suggesting that athletes and NSOs require a national dispute resolution system that is built on the Canadian sport experience. While the proposed system would not eradicate the existing power differential between sport organizations and athletes, it should provide a meaningful forum, sensitive to the needs of both sport organizations and athletes.

II. DISPUTE RESOLUTION IN HIGH PERFORMANCE SPORT AT PRESENT

Given the pervasive nature of sport¹¹ and "the enormous ambition" attached to participating in sport, the scarcity of available opportunities and resources, and the great diversity of background and experiences

7. *Nagra v. Canadian Amateur Boxing Ass'n*, 99-CV-180990 (Ont. Super. Ct. Dec. 1, 1999) [hereinafter *Nagra 1*]; *Nagra v. Canadian Amateur Boxing Ass'n*, 99-CV-180990 (Ont. Super. Ct. Jan. 12, 2000) [hereinafter *Nagra 2*].

8. Gil Fried & Michael Hiller, *Alternative Dispute Resolution Symposium: ADR in Youth and Intercollegiate Athletics*, *BYU L. REV.* 631, 635 (1997) (defining mediation as the use by disputing parties of a neutral third party to assist the parties in resolving their dispute).

9. *Id.* at 638 (defining arbitration as a process where the disputants engage a neutral third party or parties, in the form of a panel, to hear the evidence of all the parties and makes a final determination of the dispute. Arbitration is either binding or non-binding by prior agreement of the parties).

10. *Id.* at 641 (describing how the mediation-arbitration process works by attempting to use mediation to resolve the dispute between the parties, and if no resolution is accomplished, arbitration is used).

11. The Minister of State Fitness and Amateur Sport, *Sport: The Way Ahead - An Overview of the Task Force Report 9* (1992) [hereinafter *Task Force Overview*].

among participants, nationalities and regions in Canada,¹² it is not surprising to find that sport-related disputes exist both on and off the playing field. Conflict in sport as “inevitable,” regardless of how well the sporting enterprise is conducted.¹³ In the absence of a national dispute resolution system for sport, Sport Canada, the federal governmental department responsible for high performance sport,¹⁴ established two key criteria to assist in the resolution of disputes involving athletes and their respective NSOs. These two criteria, in essence, comprise the current dispute resolution scheme for NSOs and athletes. One of the criteria developed by Sport Canada is the Athlete Assistance Program (AAP).¹⁵ Pursuant to Sport Canada’s *Athlete Assistance Program, Policies, Procedures and Guidelines*, NSOs who receive funding from the AAP must specify the hearing and appeal procedure that will be used in any dispute between the organization and its “carded” athletes.¹⁶ The hearing and

12. Bruce Kidd, News Conference with Secretary of State for Amateur Sport and Others, at 4 (Jan. 5, 2000) (transcript available from Media Q Inc.).

13. *Id.*

14. Joseph De Pencier, *Law and Athlete Drug Testing in Canada*, 4 MARQ. SPORTS L.J. 259, 262 (1994) (stating federal government jurisdiction appears to hinge not on the actual subject matter of sport, *per se*, but rather on its funding of sport. Former Minister of National Health and Welfare Paul Martin, for example, considered sport to be a provincial and municipal responsibility). JOHN BARNES, *SPORTS AND THE LAW IN CANADA* 7 (2d ed. 1988) (noting that sports and recreation are related to health, culture and education, and that these responsibilities fall under the purview of provincial and municipal bodies). *But see* De Pencier, *supra* note 14, at 263 (noting that “the federal government may supplement private or provincial support by making grants in exercise of federal spending power, providing the intervention does not amount to a regulatory scheme relating to matters under provincial jurisdiction. The federal government’s presence in health and education, areas which it has little regulatory authority, rests on proper exercise of its spending powers”).

15. *Task Force Report*, *supra* note 3, at 306. The Athlete Assistance Plan “is a system administered by Sport Canada which provides monthly stipends to high-performance athletes who have been allocated cards based on their performance and given living and training allowance subsidies.” *Id.* Athletes may also be eligible for tuition expenses under the AAP.

16. Sport Canada, *Athlete Assistance Program: Background*, available at http://www.pch.gc.ca/sportcanada/SC_E/aapall.htm (last visited Mar. 10, 2001).

In order to be ‘carded,’ an athlete must be recommended by their sport’s governing body (i.e., NSO). *Task Force Report*, *supra* note 3, at 22. An athlete is eligible to be ‘carded’ based on a number of criteria including his or her performance at national and international competitions. *Id.* Athletes are carded at various levels depending upon performance. *Id.* ‘Carded’ status is important to an athlete since this status is required in order to receive monthly payments from their respective sport organization (monies provided from Sport Canada distributed by the NSO). *Id.* at 308. The most recent data available from the Secretary of State’s Office for Amateur Sport is that there are 1,263 athletes in 47 different sports that are currently carded. Sport Canada, *supra* note 16, available at http://www.pch.gc.ca/sportcanada/SC_E/aapall.htm.

In the United States, the national governing bodies (NGBs) for all sports (the Canadian equivalent of NSOs) derive their mandate from the Ted Stevens Olympic and Amateur Sports

appeal procedure are required to conform with natural justice and due process.¹⁷ In addition, pursuant to the AAP, all carded athletes and their respective NSOs sign an agreement (an Athlete/NSO Agreement) that sets out the rights, responsibilities, and obligations of the athlete and his or her NSO.¹⁸

The second criterion developed by Sport Canada is specifically related to arbitration. This criterion was likely formed, in part, by the observation of the Minister's Task Force on Federal Sport Policy concerning "the lack of an effective arbitration system within the sport community."¹⁹ The Task Force, for example, wrote:

[W]ith the exception of cases involving the use of banned substances, there is no effective neutral third-party mechanism to resolve disputes between the various participants in the sport system Once the internal redress procedures within a sport-governing body have been exhausted, the only remaining recourse is the courts.²⁰

All sport organizations that receive funding from Sport Canada are required to sign an Accountability Agreement with the department.²¹ The Accountability Agreement sets out minimum expectations that sport organizations are required to meet in order to be eligible for funding.²² Effective March 31, 1999, sport organizations were required to comply

Act (also referred to as the Amateur Sports Act of 1978). NGBs are required to include in their respective constitutions "procedures for the promotion and equitable resolution of grievances of [their] members." Stephen Netzle, *The Court of Arbitration for Sport: An Alternative for Dispute Resolution in U.S. Sports*, 10 ENT. AND SPORTS LAW. 1, 25 (1992) (citing 36 U.S.C. § 375(a)(1) (1991)).

17. Sport Canada, *supra* note 16, available at http://www.pch.gc.ca/sportcanada/SC_E/aapall.htm.

18. *Id.* In 1990, for example, the Dubin Inquiry, commissioned to consider the use of drugs and other banned practices that were used to increase athletic performance, recommended that NSOs "establish within their own rules a grievance process through which athletes may receive a fair hearing from the sport-governing body itself, including a mechanism for arbitration by an independent arbitrator mutually acceptable to the parties." THE HONOURABLE CHARLES L. DUBIN, COMMISSION OF INQUIRY INTO THE USE OF DRUGS AND [OTHER] BANNED PRACTICES INTENDED TO INCREASE ATHLETIC PERFORMANCE 556 (1990) [hereinafter DUBIN REPORT].

19. *Task Force Report*, *supra* note 3, at 61.

20. *Id.*

21. Accountability, when used in this context, does not refer to "strict audit accounting for funds." *Id.* at 236. Rather, accountability "refers to the setting of targets in high-performance and technical dimensions. The result is a narrower concept of accountability, translated into accountability to the federal government for high-performance success." *Id.*

22. 'Minimum expectations' allow Sport Canada to highlight specific areas that must be complied with by sport organizations in order for the organization to remain eligible for funding.

with a minimum expectation pertaining to arbitration in order to qualify for funding. The provision concerning arbitration provided that “[t]he NSO include a provision for independent arbitration as an element of its grievance procedures, for use by athletes and other members, for the settlement of disputes which have already exhausted the NSO’s internal appeals process. (The mechanism for independent arbitration must be lodged independent of any sport organization.)”²³

The response of NSOs to the requirement that they have internal appeal policies in place has resulted in a number of difficulties. In an effort to comply with this requirement, for example, many sport organizations opted for template documents to address the variety of disputes that may arise in relation to their organization (e.g., team selection, doping, discipline, harassment). While consistency in terms of documentation within, and across, sport organizations is generally to be encouraged, this cookie-cutter approach is problematic if an organization fails to appreciate its obligations under such policies. A national dispute resolution system could include an educational component that would assist with ensuring that an organization’s internal policies were meaningful for the organization and its athletes. Further, an educational component of such a system could assist in educating both organizations and athletes in terms of their rights and responsibilities.

The provision requiring sport organizations to have internal appeal policies did not provide for the reporting of the decisions made by sport organizations. In the absence of a national dispute resolution system for high performance sport, there is currently no body in place that collects the decisions of NSOs. The lack of a reporting mechanism is problematic from an athlete’s perspective since the uncertainty concerning whether decisions are consistent within the organization and across organizations raises fairness concerns. Inconsistent decision-making may arise in sport for a number of reasons. Inconsistency in decision-making may be attributed to the fact that many organizations do not know how to consistently apply an organization’s existing policies. Volunteers, for

23. *Task Force Report*, *supra* note 3, at 57. The United States Olympic Committee has chosen the American Arbitration Association as the body responsible for administering a number of classes of disputes in relation to the Olympics including: athlete eligibility for competition in the Olympics or Pan-American Games, general eligibility disputes, the determination of the appropriate national governing body for a particular sport, the right of an organization to be declared a national governing body for a sport, and positive tests for drug use for out-of-competition testing. Using Alternative Dispute Resolution to Settle Sports Disputes, available at http://www.adr.org/rules/guides/adr_for_sports_disputes.html (last visited Mar. 10, 2001).

example, may make inconsistent rulings, and may not be briefed when a legal decision impacts upon past practices. A component of a national dispute resolution system that would be responsible for collating decisions could address this void in the current system.

Prior to the requirement that NSOs amend their internal appeal policies to include a provision for mandatory arbitration, sport organizations were left to their own devices once they had exhausted the internal appeal processes of a sport organization. While athletes may have resorted to the court or the media to raise the profile of their case, these options were problematic since they served to distort focus from training and resulted in the parties hardening their respective positions.²⁴ The use of political pressure would likely raise similar concerns. Thus, the requirement that sport organizations include a provision for arbitration in their internal appeal policies provided a welcome addition to the conflict resolution scheme for high performance sport. While the provision for arbitration did provide the parties with an additional opportunity to resolve their dispute, rather than simply letting the dispute lay dormant or resorting to alternative routes such as raising the issue in the media, commencing legal proceedings, or the application of political pressure, the inclusion of a provision for arbitration by itself was also problematic.

One of the curious features of the arbitration provision, for example, is that it makes no allowance for mediation or a combination of mediation-arbitration prior to requiring that the parties enter the arbitration process. While arbitration, particularly binding arbitration, may be preferable on the surface in view of the relative certainty that accompanies such decisions when compared with mediation, mediation provides the parties with an opportunity to reach a creative solution acceptable to both parties.²⁵ Since a mediated decision is arrived at by the parties and agreed to by the parties, as opposed to being determined by a third party as is the case with arbitration, both parties may feel a greater sense of empowerment. Further, mediation would provide an athlete and their

24. Fried & Hiller, *supra* note 8, at 636-38. In addition, from an athlete's perspective, a court decision that agreed with an athlete's allegation that a team's selection criteria was unfair and that the sport organization must name that athlete to the team means that someone who has already been named to the team loses a position. Team chemistry is integral to success in competition, and such chemistry would be fundamentally altered by late additions and removals, particularly when the decision is not that of the coach, captain, or team member, but of an outside body.

25. Fried & Hiller, *supra* note 8, at 638, 641. The absence of direction in terms of the binding nature of arbitration suggests that certainty in terms of outcome was unlikely the motivating factor for requiring NSOs to include such a provision in their internal appeal policies.

sport organization with an opportunity for teamwork and team building. In addition, the opportunity to empower athletes, particularly in an athlete-centred system, would seem an important step due to the significant power imbalance that sport organizations enjoy over their athletes.²⁶ In view of the benefits that mediation has to offer disputants, a national dispute resolution system for NSOs should consider incorporating mediation as a component of conflict resolution.

The requirement that parties submit their dispute to arbitration following the exhaustion of the organization's internal appeal process also suffers from additional difficulties. In the absence of a coordinating mechanism at a national level that sport organizations and athletes can access to assist them with the arbitration process, sport organizations and athletes are once again left to their own devices to find a suitable arbitrator. In the case of athletes, this process can be problematic in view of the significant power imbalance between athletes and their respective NSOs.

[T]he athlete lives in a world where one misplaced word or action often threatens the immediate end of his [or her] athletic career. From Little League baseball through professional football, the correct attitude is as important as actual athletic skill, and once an athlete is labeled a troublemaker or uncoachable, his [or her] athletic career is usually doomed. For many years athletes perceived themselves as being in a powerless position within the sports world, and like most powerless groups, they survived by deferring to authorities - coaches, athletic directors, and professional team owners.²⁷

An athlete may be reluctant to speak out because of fear of reprisal from a sport governing body. Despite the legitimacy of any complaint, an athlete or coach 'whistleblower' can be cut from a team or expelled from an association.

Where an athlete decides to proceed to arbitration, he or she then needs to find an arbitration body that is sufficiently independent of the sport organization. Some NSOs in Canada, while not required to do so, have taken the step of naming either the Centre for Sport and Law in Ottawa, Ontario²⁸ or the Court of Arbitration for Sport (CAS) in Lau-

26. *Id.* at 650.

27. *Id.* (citing Robert L. McGahey, Jr., *A Comment on the First Amendment and the Scholar-Athlete*, 6 *HUM. RTS.* 155, 157 (1977), quoting JACK SCOTT, *THE ATHLETIC REVOLUTION* 209-10 (1971)).

28. Centre for Sport and Law Inc., <http://www.sportlaw.ca> (last visited Mar. 10, 2001). The Centre for Sport and Law has operated an alternative dispute resolution program for amateur sport in Canada since February, 1996. The Centre originally anticipated only dealing

sanne, Switzerland²⁹ as the organization responsible for arbitration. While on the one hand, the identification of a specific arbitral body to hear a dispute would seem to alleviate the concern that an athlete would need to find a suitable arbitrator(s), the identification of an arbitral body by sport organizations has raised additional concerns. While the Centre for Sport and Law, for example, has provided assistance to athletes, it has also been integral in assisting sport organizations with the drafting of their existing policies. This has led to the perception among some members of the sport community, predominantly athletes, that the Centre for Sport and Law is biased in favor of NSOs.³⁰

The choice of the CAS is also problematic in view of its location. The distance between the CAS in Switzerland and high performance athletes in most countries (with the possible exception of Switzerland) creates a considerable geographic and financial disincentive to proceed to the arbitration stage for many athletes. While the CAS does have a decentralized court located at the American Arbitration Association in Denver, Colorado, it would still be necessary for an athlete to travel to that location in order to have their dispute heard.³¹ The geographical distance

with disputes arising in the context of high performance amateur sport, and thus expected that its clients would be NSOs. While this is the case, the Centre also has provincial sport organizations and clubs as clients. Athletes also approach the Centre for Sport and Law for assistance.

The Sport Solution provides a forum for dispute resolution for athletes. Sport Solution, housed at the University of Western Ontario, is a combined project of Athletes CAN, the Sports Law Center and the Dispute Resolution Centre in conjunction with the Faculty of Law at the University of Western Ontario. Sport Solution provides free assistance to athletes embroiled in disputes. An Ottawa based law firm, Osler, Hoskin and Harcourt LLP, is affiliated with the Sport Solution. If the Sport Solution anticipates that an athlete requires legal assistance, the organization refers the athlete to the law firm. Faculty of Law: The University of Western Ontario, *The Sport Solution*, at <http://www.uwo.ca/law/admissions/programs/sportsolution.html> (last visited Mar. 10, 2001).

29. Nancy K. Raber, *Dispute Resolution in Olympic Sport: The Court of Arbitration for Sport*, 8 SETON HALL J. SPORT L. 75, 77-78, 82 (1998) (noting that the Court of Arbitration for Sport was created by the International Olympic Committee in 1983).

30. The writer expresses no opinion on this perception.

31. Court of Arbitration for Sport, *Guide to Arbitration*, <http://www.tas-cas.org/english/code/fracode.asp> (last visited Mar. 10, 2001). The CAS has a second decentralized court located at the National Dispute Centre in Sydney, Australia. *Id.* Assuming an athlete was prepared to travel to Denver, however, and was able to pay a court fee of Sfr. 500, the costs of the appeal proceedings are covered by the CAS. *Id.* at 22. The CAS covers the cost of arbitration submitted to the court via the "ordinary arbitration procedure." *Id.* at 10. This procedure is defined as "disputes arising from last instance decisions taken by the tribunals of the organization concerned or similar tribunals within sports federations, associations, or other sports bodies, when the statutes and regulations of these bodies or a specific agreement provide for the jurisdiction of the CAS." *Id.* The anticipated costs of a party's witnesses, experts or interpreters must be paid in advance by the party. *Id.* at 22. The Arbitration Panel determines how

between Canadian high performance athletes and the CAS's decentralized office would seem to contribute, at least symbolically, to the distance that already exists between some NSOs and their athletes.³²

For those sport organizations that have not identified a particular body responsible for the arbitration of disputes arising between the organization and its athletes, a national dispute resolution system that provided a pool of mediators would make sense from an economy of scale perspective. It would be of considerable benefit to an organization that has a minimal number of disputes to have access to such a pool rather than for a number of organizations to each go through the process of selecting an arbitrator.

The fact that sport organizations are free to designate an arbitral body of choice creates the further problem of ensuring consistency in decision-making in relation to similar disputes arising within the same organization and across organizations. In the absence of an independent national dispute resolution system, there is no body responsible for collating the decisions arising from arbitration (assuming the parties have agreed to the release of this information). Statistics concerning the use of mediation and arbitration in relation to sport disputes in Canada, for example, are sparse.³³ The patchwork effect created by a variety of arbitrators makes it difficult to strive for consistency of treatment of like situations in the dispute resolution process.

these costs are to be proportioned between the parties by considering the outcome of the appeal, the conduct of the parties and the parties' financial resources, and indicates the same in its award. *Id.*

32. An athlete would likely be unable to circumvent this process by going to court since a court would consider the internal policy of the organization and find that the athlete is required to follow the appeal process, including arbitration, prior to coming to court.

33. Ronald T. Rowan, *1996 AALS Sports Law Conference: Legal Issues And The Olympic Movement: Speech – Legal Issues and the Olympics*, 3 VILL. SPORTS & ENT. L.J. 395, 410 (1996); Melissa R. Bitting, *Comment: Mandatory, Binding, Arbitration for Olympic Athletes: Is the Process Better or Worse for "Job Security?"*, 25 FLA. ST. U. L. REV. 655, 662-63 (1998).

From January 1999 through October 1999, Sport Solution workers dealt with 137 complaints broken down as follows: sixty-seven team selection, twenty-two funding and carding issues, eight disciplinary action, two doping, and thirty-eight other issues. The Sport Solution itself is not an actual appeal body. The case workers there assist athletes in pursuing complaints against sport bodies. Forty-two of the 137 cases were pursued through to an appeal. Mediation was used in one of the cases and arbitration was used in two cases. Data on the resolution of the other ninety-two cases was not available. For the period 1996 through 2000, the Centre for Sport and Law has been contacted in relation to over sixty complaints. While the Centre for Sport and Law occasionally receives a request for assistance from a parent, coach, board member or athlete, the vast majority of calls are from "heads of sport organizations." Alternative Dispute Resolution Report, *Context: Dispute Resolution within Canadian Sport*, at <http://www.pch.gc.ca/coderre/report-rapport/context.htm> (last visited Mar. 10, 2001).

Where an athlete is prepared to take the dispute to the arbitration stage, he or she is faced with needing to decide whether to retain legal counsel. Since the arbitration process is less procedurally complex than the legal process, an athlete may decide that there is no need to retain or consult legal counsel, thereby saving an unnecessary legal expense.³⁴ In view of the increasingly complex issues being disputed,³⁵ however, athletes appearing at an arbitration hearing, particularly binding arbitration, without counsel may be at a significant disadvantage. Even where athletes could afford to retain counsel, they “may have a hard time finding competent representation; most of the knowledgeable lawyers represent

34. Bitting, *supra* note 33, at 663 (citing Richard C. Reuben, *And the Winner Is . . . Arbitrators to Resolve Disputes as They Arise at Olympics*, A.B.A. J., Apr. 1996, at 20). One basis for the more simplified arbitral process is that it generally precludes recourse to cross-examination. In relatively simple cases where there is no need for experts or witnesses, a quick decision would seem to be to the benefit of all parties. Where the issues in dispute are more complex, however, and require expert testimony, or where a decision may turn on the credibility of a witness, arbitration's cost saving mechanism - the absence of cross-examination - may pose a disadvantage to all of the parties to a dispute. Cross-examination, however, is one of the traditional methods of assessing the credibility of the person presenting evidence and the reliability of evidence.

35. The impetus for the dispute resolution procedures in the Amateur Sports Act of 1978, for example, was never designed with the intention of providing a mechanism by which to resolve a dispute between an athlete and a sport organization, but rather as a tool to resolve disputes between sport organizations vying for recognition as *the* national governing body (the equivalent of a NSO in Canada) for a particular sport. This mechanism was also thought to protect athletes from being adversely affected by the struggles that could ensue between such organizations. Thus, “the eligibility status of athletes was relegated to secondary importance from the start.” Edward E. Hollis III, *The United States Olympic Committee and the Suspension of Athletes: Reforming Grievance Procedures Under the Amateur Sports Act of 1978*, 71 IND. L.J. 183, 188 (1995).

David Mack notes that Nafziger has suggested that the *impetus* for the 1978 legislation was likely owed to: a number of errors made by an American doctor who failed to catch a drug that an American swimmer was taking contained a banned stimulant resulting in the swimmer losing his gold medal; a coach's failure to provide two athletes with the correct time for their respective races resulting in their disqualification; the unsuccessful and, it is suggested, potentially incompetent, appeal by American officials of a basketball game that the American team lost to a team from the former Soviet Union due to controversial officiating; and the disqualification of two American medalists following their refusal to face American flags during awards ceremony. David B. Mack, *Reynolds v. International Amateur Athletic Federation: The Need for an Independent Tribunal in International Athletic Disputes*, 10 CONN J. INT'L L. 653, 664 n.52 (1995) (citing JAMES A.R. NAFZIGER, *INTERNATIONAL SPORTS LAW* 165 (1988)); see also Anthony T. Polvino, *Arbitration as Preventative Medicine for Olympic Ailments: The International Olympic Committee's Court of Arbitration for Sport and the Future for the Settlement of International Sporting Disputes*, 8 EMORY INT'L L. REV. 347, 380 (1994) (noting that the American Act “was enacted to create a modern and competent Olympic program in the United States in response to prior inefficiency of the USOC.”); *but cf.* Rowan, *supra* note 33, at 401 (noting that prior to 1978 the USOC did have dispute resolution processes).

the governing bodies or other sports organizations that can afford to pay expensive legal fees.”³⁶

As athletes develop a greater understanding and awareness of their rights, and as sport becomes increasingly commercialized, increased demands will be placed on the existing conflict resolution scheme.³⁷ A consideration of the existing conflict resolution scheme in place for NSOs and their athletes has revealed a number of weaknesses that could be addressed by a national dispute resolution system.

III. HIGH PERFORMANCE SPORT STRUCTURE AND ITS SIGNIFICANCE

A. Overview of High Performance Structure

Canada's NSOs (e.g., the Canadian Amateur Boxing Association) are part of a “complex, multi-layered, interdependent entity” known as the international sport movement.³⁸ An understanding of the place of NSOs within this international movement is an important factor in understanding how that structure impacts upon decisions made at the national level and, therefore, upon the viability of a national dispute resolution system for NSOs. (A chart providing an overview of the sport system is located at Annex A.) The international sport movement consists of government and non-government agencies, organizations, and commercial interests.³⁹ Sport organizations fall under the umbrella of non-governmental organizations (NGOs).⁴⁰ There are currently four NGOs at the international sport level.⁴¹ The members of the “Olympic Movement” comprise one of these four groups.⁴² The Olympic Move-

36. Bitting, *supra* note 33, at 676-77.

37. Hollis, *supra* note 35, at 183, 196; Bitting, *supra* note 33, at 664-65; Nafziger & Wei, *supra* note 1, at 473. *Johnson v. Athletics Canada*, No. A4947/97, 1997 Ont. C.J. LEXIS 1702, at *1 (Ont. Ct. July 25, 1997). Justice Caswell noted that:

[c]ompetition among world class ‘amateur’ athletes provides the successful athlete with considerable financial rewards including support from his national body as a carded athlete and payments from companies whose products he endorses. In order to preserve the athlete’s amateur status, the monies that the athlete earns are deposited in an athlete reserve trust fund. In the 1980s and even after the Seoul Olympics, Mr. Johnson continued to be considered a world class athlete with lucrative endorsement contracts. *Id.* at *11.

38. *Task Force Report*, *supra* note 3, at 130.

39. *Id.*

40. *Id.* at 131.

41. *Id.*

42. *Id.* The international sport NGO category consists of three remaining bodies: international sport federations (e.g., the International Amateur Boxing Association) and the international sport federation’s national sport member (e.g., a NSO such as the Canadian Amateur Boxing Association), socio-professional organizations, and other multi-sport organizations

ment is made up of the International Olympic Committee (IOC), the National Olympic Committees of each country (e.g., the Canadian Olympic Association, the United States Olympic Committee)⁴³ and international sport federations (e.g., the International Amateur Boxing Association).⁴⁴ The IOC is the 'point person' of the Olympic Movement.⁴⁵ This position permits the IOC to control the development and regulation of high performance sport. In order for the IOC to effectively control the development and regulation of sport, the IOC delegates these tasks, including the conduction of international competitions and world championships and the resolution of technical issues, to its international sport federations and national Olympic Committees.⁴⁶ The specifics of this delegation are outlined in the Olympic Charter.⁴⁷ In view of this delegation of power, international sport federations are considered to be "powerful bodies with tremendous control over all aspects of their sport, subject only to the constraints of the Olympic Charter."⁴⁸

that organize major games. *Id.* The collective of international sport federations, therefore, is both an international sport NGO and a member of an international sport NGO (i.e., a member of the Olympic Movement).

43. Hollis, *supra* note 35, at 184; *Task Force Report, supra* note 3, at 131 (noting that the Olympic Congress and the organizing committee for a specific Olympic Games are also a part of the Olympic Movement).

44. *Id.*

45. Mack, *supra* note 35, at 656 (stating that the IOC was created on June 23, 1984 by the Congress of Paris and is responsible for the control and development of the Olympic Games of today). 'Point person' is a term used in basketball to refer to the player bringing the ball up the court and responsible for the offense alignment.

46. Hollis, *supra* note 35, at 185.

47. THE OLYMPIC CHARTER, at http://www.olympic.org/ioc/e/facts/charter/charter_intro_e.html (last visited Mar. 10, 2001). Nafziger & Wei, *supra* note 1, at 491 n.6 (quoting the Olympic Charter, Fundamental Principle 6 as "the codification of the Fundamental principles, Rules and Bye-laws adopted by the IOC. It governs the organization and operation of the Olympic Movement and stipulates the conditions for the celebration of the Olympic Games"). Rule 30 of the Olympic Charter provides that the role of an international sport's federation is to:

establish and enforce the rules concerning the practice of their respective sports and to ensure their application; ensure the development of their sports throughout the world; contribute to the achievement of the goals set out in the Olympic Charter; establish their criteria of eligibility to enter the competitions of the Olympic Games in conformity with the Olympic Charter, and to submit these to the IOC for approval; assume the responsibility for the technical control and direction of their sports at the Olympic Games and at Games under the patronage of the IOC; provide technical assistance in the practical implementation of the Olympic Solidarity program.

THE OLYMPIC CHARTER, *supra* note 47.

48. Hollis, *supra* note 35, at 185. THE OLYMPIC CHARTER, *supra* note 47 (Rule 29 of the Olympic Charter provides that subject to an international federation's statutes, practices and activities being in conformity with the Olympic Charter, "each [international federation] maintains its independence and autonomy in the administration of its sport"); Hilary Joy

While international sport federations provide a governing function for the development and regulation of sport at an international level, NSOs fulfill a similar function at the national level.⁴⁹ National governing bodies are “the agents of the [international federations] in their respective countries.”⁵⁰ NSOs are accountable to their respective international sport federations and must comply with the rules of their international federation. The failure to comply means that an international federation may not recognize the NSO as responsible for the development and regulation of the sport particular to that organization in the organization’s country. This lack of recognition has profound consequences for an athlete since an athlete, in order to compete at an internationally sanctioned event (e.g., the Olympic Games) must be a member of a recognized national sport body.⁵¹ Provincial sport organizations (PSOs), in turn, are accountable to their respective NSO and, by extension, the respective international sport federation. Where a PSO fails to comply with the rules of its NSO, the national organization may fail to recognize that provincial organization. Athletes and coaches seeking to belong to a national or provincial sport organization must agree to abide by the terms and conditions of the organization in order to receive membership in the organization.

The above overview of the international high performance sport movement indicates that in an effort to maintain control over the development and regulation of their respective sports, international sport federations exert considerable control over their respective NSOs. While this need for control may be understandable in view of the international sport movement’s desire to develop and regulate sport, a consideration of *Nagra v. Canadian Amateur Boxing Association* suggests that this control, particularly over the dispute resolution process, may have significant consequences for both the athlete and the sport organization. The policy issues raised by this example are also discussed below. The extent to which a national dispute resolution system could be of assistance to the athlete and sport organization in view of the international federation’s influence on the dispute resolution process is also considered.

Hatch, *On Your Mark, Get Set, Stop! Drug-Testing Appeals in the International Amateur Athletic Federation*, 16 LOY. L.A. INT’L & COMP. L. REV. 537, 555 (noting that the International Amateur Athletic Federation is of the opinion that it is “not amenable to suit anywhere” and “will never accept a decision of any court in the world against its rules”).

49. Bitting, *supra* note 33, at 659.

50. Mack, *supra* note 35, at 663.

51. In the world of sport, the term ‘sanction’ is used in two ways: (i) “[t]o approve, authorize, or support” or (ii) “to penalize . . .” BLACK’S LAW DICTIONARY 1342 (7th ed. 1999). In this paper, I use the term ‘sanction’ in the former context.

B. Illustration of Conflict

The conflict in *Nagra* concerned Mr. Nagra's eligibility to compete in the national boxing championships hosted by the Canadian Amateur Boxing Association (CABA) in December, 1999, in Campbell River, British Columbia.⁵² As an Olympic qualifying tournament, the national championship was governed by the rules of the CABA's international sport federation, the International Amateur Boxing Association, or Association Internationale de Boxe Amateur (AIBA).⁵³ The enforcement of the AIBA's rules at a national championship, however, was the responsibility of the national governing body responsible for that sport in the country where the national championship is held. Since the national championships were held in Canada, the CABA was responsible for enforcing the AIBA's rules.

Pursuant to the AIBA's rules, a boxer must receive a medical examination prior to the weigh-in stage of a competition.⁵⁴ In order to pass this stage a boxer must be clean shaven.⁵⁵ An exception is provided for a thin moustache that does not extend beyond the upper lip.⁵⁶ A boxer that is not clean shaven is found ineligible and is not permitted to box in the competition. Since the AIBA's rules provide that NSOs, as the governing bodies for the sport of boxing in their respective countries, must agree to accept and abide by the articles of the AIBA,⁵⁷ the CABA's own rules had a similar rule requiring boxers to be clean shaven.⁵⁸

Mr. Nagra, as Ontario's light-flyweight champion, was eligible to compete in the national championships in Campbell River, British Columbia. The tournament was scheduled December 1-4, 1999. Mr. Nagra,

52. At the time of writing, Mr. Nagra was the Ontario light-flyweight boxing champion (forty-eight kilogram weight class). James Christie, *Policy in Works on Bearded Boxers*, THE GLOBE & MAIL (Toronto), Dec. 8, 1999, available at <http://www.globeandmail.com> (last visited Mar. 10, 2001).

53. James Christie, *Sikh Group Wants Copps to Fight for Boxer*, THE GLOBE & MAIL (Toronto), Dec. 3, 1999, available at <http://www.globeandmail.com> (last visited Mar. 10, 2001). For the sake of consistency with other references in this section, from this point onward I will refer to this international sport federation by its French acronym, AIBA.

54. The 'weigh in' stage is necessary to confirm a boxer's weight to establish their eligibility to compete in a given weight class.

55. ASSOCIATION INTERNATIONALE DE BOXE AMATEUR, ARTICLES OF ASSOCIATION 30 (1999) [hereinafter ARTICLES].

56. *Id.* Rule IV(B) prohibits the wearing of beards but permits a "thin moustache" which is not permitted "to exceed the length of the upper lip." *Id.*

57. ARTICLES, *supra* note 55, at 3.

58. *Nagra 2*, *supra* note 7, at 2 (Justice Low refers to Rule 4:1m of the Articles and Rules Governing Amateur Boxing in Canada, and Article VI(7) of the MEDICAL RULES OF THE CABA, which refers to a Boxer's Dress in Relations to Medical and Weigh-In).

however, anticipated that he would be declared ineligible at the weigh-in at the national championships in Campbell River because of his beard.⁵⁹ As a practicing Sikh, Mr. Nagra was required to “maintain unshorn hair”⁶⁰ pursuant to the tenets of the Sikh faith. Mr. Nagra, therefore, sought and obtained an interim order from Justice Somers dated December 1, 1999, that required the CABA to permit Mr. Nagra to box in the Campbell River competition, regardless of whether Mr. Nagra ported a beard at that competition.⁶¹ While this interim order was a victory for Mr. Nagra, it left the CABA in a dilemma. If the CABA complied with the court order and permitted Mr. Nagra to box, it ran the risk of breaching the rules of its international federation and incurring a number of sanctions and repercussions.⁶² In addition, otherwise eligible boxers competing against Mr. Nagra could find themselves facing sanctions and declared ineligible under the so-called ‘contamination’ rule.⁶³ On the other hand, however, if the CABA elected to disregard the court order, a court would likely have found the CABA in contempt of court.

59. Mr. Nagra had experienced a similar difficulty during competition leading up to his Ontario light-flyweight title in 1999. The boxer filed a successful complaint with the Ontario Human Rights Tribunal in 1998 when the Ontario Amateur Boxing Association, operating under the rules of the CABA, attempted to prohibit him from fighting. The Tribunal decided that the no beard rule was contrary to Mr. Nagra’s rights and that Mr. Nagra could compete if he wore netting over his beard during the competition. James Christie, *Ministers Offer Support to Boxer*, THE GLOBE & MAIL (Toronto), Dec. 9, 1999, available at <http://media/991209/f00669bm.htm> (last visited Mar. 10, 2001). Mr. Nagra won the Ontario light-flyweight championship in 1999 which was the basis for his being eligible to compete in the national championships in Campbell River, British Columbia.

60. *Ontario Today: Bearded Etobicoke Sikh Boxer Shut Out* (CBC-R radio broadcast, Dec. 2, 1999).

61. *Nagra 1*, *supra* note 7, at 2.

62. ARTICLES, *supra* note 55. A national body’s failure to accept and abide by the rules renders the organization committing the breach “liable to suspension by the Executive Committee and to be deprived of membership of the AIBA at the next succeeding Congress.” *Id.* In order for this to occur, no less than two-thirds of voting members of the AIBA must vote in favor of the suspension, thus depriving a national body of membership in the AIBA. *Id.* The AIBA’s Congress is held every four years, and as at the time of writing, the next Congress is scheduled for 2002.

63. James Christie, *Beard Knocks Out Boxer’s Ring Plans*, THE GLOBE & MAIL (Toronto), Dec. 2, 1999, available at <http://www.globeandmail.com> (last visited Mar. 10, 2001); Diana Zlomislic, *Boxer Takes Fall in Beard Battle*, THE OTTAWA SUN, Dec. 2, 1999, at 4. Most, if not all, international sport federations have a similar rule permitting its international federation to levy sanctions (here used in the penalty sense) against otherwise eligible athletes participating in an event with an ineligible competitor. In essence, an otherwise eligible athlete that competes with an ineligible participant becomes ineligible themselves. National organizations, such as the CABA, have similar rules in relation to their branches (e.g., provincial boxing associations, such as the Ontario Amateur Boxing Association). Hollis, *supra* note 35, at 192 (discussing the International Amateur Athletic Federation’s (IAAF) threat to invoke the contamination rule against runners competing against Harry ‘Butch’ Reynolds, Jr.).

The CABA responded to this dilemma by postponing the light-flyweight division until the next scheduled tournament in January of 2000 in St. Catharines, Ontario.⁶⁴ This decision prompted Mr. Nagra to return to court to obtain a court order permitting him to fight in the St. Catharines tournament.

A court order issued from Justice Low on January 12, 2000, declaring the rules of the CABA which prohibited the wearing of a beard where the boxer did so for "legitimate and bona fide religious reasons" to be "inconsistent with the principles and tenets of Canadian human rights law and the Canadian Charter of Rights and Freedoms."⁶⁵ The court also ordered that the CABA permit Mr. Nagra to fight at the upcoming tournament in St. Catharines.⁶⁶ Justice Low's order indicated that the CABA neither consented to nor opposed the court order and that, while properly served, no one appeared on behalf of the CABA.⁶⁷

C. *Significance of International Sport Federation's Influence on Dispute Resolution*

The *Nagra* case illustrates the extent to which the control exerted by an international sport federation over its respective NSO affects the resolution of disputes between an athlete and a NSO. The impact of the

64. Christie, *supra* note 52, available at <http://www.globeandmail.com>. Hank Summers, president of the CABA, emphasized that the decision was to *postpone* rather than to *cancel* the light flyweight class as initially reported when the story first broke. *Id.* Several articles appeared referring to the CABA's cancelling the forty-eight kilogram weight class. Christie, *supra* note 63, available at <http://www.globeandmail.com>; J. Christie, *Boxer Caught Up in a Web of Rules*, THE GLOBE & MAIL (Toronto), Dec. 4, 1999, available at <http://www.globeandmail.com> (last visited Mar. 10, 2001); Zlomislic, *supra* note 63, at 4. The light-flyweight class was rescheduled for the next available tournament, the national intermediate championships, that were scheduled to be held in St. Catharines, Ontario from January 19-23, 2000. Mr. Nagra's side was obviously disappointed by the decision. One reporter, for example, referring to Chris Leafloor, one of Nagra's lawyers, wrote, "Nagra's camp was 'surprised and annoyed' that the CABA had first said it would heed the court's decision, then cancelled the weight class when the decision was unfavourable." Christie, *supra* note 63, available at <http://www.globeandmail.com>.

The World Sikh Organization, acting on Mr. Nagra's behalf, proposed to sue the CABA for "loss of opportunity" should Mr. Nagra be denied an opportunity to box. *Bearded Boxer Wins Courtroom Fight*, TOTAL SPORTS, Dec. 1, 1999, available at <http://sportinggreen.com/SG/box/box/news/ap/991201.0434.html> (last visited Mar. 10, 2001).

Since an athlete is required to be a member of their sport's national body in order to compete at a national and international level, Mr. Nagra did not have the option of attempting to circumvent the AIBA's rules and the CABA's rules by entering the competition as an 'independent' competitor. De Pencier, *supra* note 14, at 261.

65. *Nagra* 2, *supra* note 7, at 3.

66. *Id.*

67. *Id.* at 2.

AIBA's control over the dispute resolution process may have significant consequences for athletes and their respective sport organization. The extent to which an international sport federation can influence the resolution of a dispute between a NSO and an athlete suggests a possible limitation on the nature of disputes that could be addressed by a national dispute resolution system for high performance sport in Canada.

Absent an amendment to the AIBA policy concerning the wearing of beards (i.e., providing for the wearing of a net over the beard), any agreement between the CABA and the AIBA permitting Mr. Nagra to box within Canada, and permitting other boxers to fight against Mr. Nagra without fear of being declared ineligible pursuant to the contamination rule, would be a 'victory' without substance for Mr. Nagra. First, any such understanding between the CABA and the AIBA would impact only upon these two groups. Since athletes are frequently competing in international competitions held outside of Canada, Mr. Nagra would likely run into the same difficulties with the national boxing association in the host country. Further, if Mr. Nagra had succeeded in attaining the right to compete at the Olympics for Canada in Sydney, Australia in 2001, he would be outside of the ambit Justice Low's decision in *Nagra*. An international sport federation, therefore, has the power to relegate Mr. Nagra, or an athlete in his position, to a competitive vacuum, confining his [or her] participation to within Canada.

Mr. Nagra, however, was not the only athlete affected by his dispute with the rules of the CABA and AIBA. In the light-flyweight division, for example, there were four additional fighters that were impacted by the CABA's decision to postpone that division at the national championships.⁶⁸ One of the affected fighters was two-time Olympian Domenic Filane.⁶⁹ Mr. Filane expressed concern about the competition in the light-flyweight division being delayed and felt that the issue concerning Mr. Nagra's eligibility should have been addressed "a long time ago."⁷⁰ He indicated that this was his last opportunity to go to the championship and that he knew that "a guy with four fights (Nagra) [was] not going to beat a guy with [two hundred] fights (Filane)."⁷¹

68. Zlomislic, *supra* note 63, at 4.

69. *Id.*

70. *Id.*

71. *Id.*

IV. MODEL OF A NATIONAL DISPUTE RESOLUTION SYSTEM FOR HIGH PERFORMANCE SPORT

A. *History Informing Call for a National Dispute Resolution System*

Despite the fact that all activities that pertain to sport, and all activities arising out of the practice or development of sport, can lead to disputes,⁷² the national high performance sport community in Canada did not consider the use of dispute resolution mechanisms to resolve disputes until the early 1990s. The latest call for a national dispute resolution system for high performance sport was identified in a report prepared for the Secretary of State for Amateur Sport.⁷³ This report recommended that a national alternative dispute resolution (ADR) program for sport be developed in view of “widely acknowledged” problems within Canada’s high performance sport community.⁷⁴

Despite the fact that conflict in sport is inevitable, there was little concern given to the need for a national dispute resolution system for sport in Canada until the early 1990s. In 1994, an Alternative Dispute Resolution Committee, created by the former Canadian Sport Council, recommended that an “independent arbitration and mediation process [be established] to serve the [Canadian] sport community.”⁷⁵ The Centre for Sport and Law succeeded in the Council’s tendering process for proposals to develop and manage an independent ADR venue for national sport in October, 1994. The Centre for Sport and Law introduced an ADR program in February, 1996. The project was short-lived, however, and was disbanded prior to its completion in 1997 due to federal government cutbacks.⁷⁶ The demise of the Canadian Sport Council left a gap in the development of a formal group responsible for the development of a national program for ADR in Canadian Sport.⁷⁷

72. AARON N. WISE & BRUCE S. MEYER, *INTERNATIONAL SPORTS LAW AND BUSINESS* 673-74 (1997).

73. Alternative Dispute Resolution Report, *Executive Summary*, available at <http://www.pch.gc.ca/coderrr/report-rapport/executive-summary.htm> (last visited Mar. 10, 2001) [hereinafter *Executive Summary*].

74. *Id.* The Work Group’s report specifically refers to the “amateur sport community.” *Id.* The term ‘amateur sport community’ and ‘high performance sport community’ are interchangeable.

75. Joseph De Pencier, Address at the Tackling Ethical Issues in Drugs and Sport Seminar (Oct. 30, 1996), in UNITED KINGDOM SPORTS COUNCIL, *SEMINAR REPORT - TACKLING ETHICAL ISSUES IN DRUGS AND SPORT* 3 (1996).

76. Sport Canada, Background: National Dispute Resolution System for Amateur Sport Work Group 1 (on file with author).

77. In the meantime, however, the Centre for Sport and Law signed a contract with the Centre for Ethics and Sport “to do all of the doping hearings.” Hilary Findlay, *Address at the*

Following the demise of the Canadian Sport Council, there was little if any discussion of the need to develop, or the development of, a national dispute resolution system for high performance sport. In fact, all was relatively quiet on the dispute resolution front until January, 2000, when the Secretary of State for Amateur Sport announced his desire to develop an enhanced national ADR system and support structures for use by national high performance sport communities. An Alternative Dispute Resolution Work Group was formed, and it was tasked with providing the Secretary of State for Amateur Sport with a report detailing options for the development of a national ADR system and support structures for use by the national sport community.⁷⁸ This report, presented to the Secretary of State for Amateur Sport in June, 2000, recommended the creation of a national ADR program for sport.⁷⁹

B. Proposed Model of National Dispute Resolution System for High Performance Sport

The model for a national dispute resolution system proposed in this subsection considers: the structure and financing of an organization responsible for a national dispute resolution system; a tripartite model for dispute resolution (consisting of mediation, arbitration and mediation-arbitration); the qualifications of mediators and arbitrators; the reporting of decisions; and the implementation of such a system. While the model purports to be comprehensive, it is acknowledged that there are external factors (i.e., the influence of international sport organizations) that may impact upon the success of the model system.⁸⁰ In addition, the

Tackling Ethical Issues in Drugs and Sport Seminar (Oct. 30, 1996), in UNITED KINGDOM SPORTS COUNCIL, SEMINAR REPORT – TACKLING ETHICAL ISSUES IN DRUGS AND SPORT 7, 7-8 (1996). Provided that this contract continues to be renewed, a national dispute resolution system would not be responsible for mediation or arbitration arising in the context of doping related disputes since once a sport organization's internal appeal mechanism for a doping infraction is exhausted, any appeal of the matter is heard through the Centre for Sport and Law.

78. *Executive Summary*, *supra* note 73, available at <http://www.pch.gc.ca/coderre/report-rapport/executive-summary.htm>. The Secretariat function for the Work Group was filled by Sport Canada, the federal government branch responsible for amateur sport in Canada, at the request of the Secretary of State for Amateur Sport.

79. *Alternative Dispute Resolution Report, Recommendation 5*, available at <http://www.pch.gc.ca/coderre/report-rapport/appendixA.htm> (last visited Mar. 10, 2001).

80. In the case of team selection, for example, even if an athlete was to succeed in a dispute with his or her NSO over being eligible to be named to the national Olympic team, the national Olympic committee has the final say over team selection. Where a dispute arises in relation to a team selection decision made by the Canadian Olympic Association (COA), the COA has appointed the Court of Arbitration for Sport as its independent arbitral body.

fact that the internal dispute resolution policies of some PSOs provide that dispute resolution is to be in accordance with the dispute resolution policy of their respective NSO will impact upon the capacity of the proposed national dispute resolution system.⁸¹

1. Structure of Organization Responsible for National Dispute Resolution System

The organization of a body responsible for a national dispute resolution system for high performance sport in Canada is critical.⁸² “[I]f dispute resolution is largely left up to the sports associations or bodies closely related to them, the body that applies sanctions might be the same as, or closely associated with, a party to a dispute.”⁸³ The structure of an organization responsible for the management of a national dispute resolution system would be impacted by the constitutional legitimacy of the federal government’s involvement in sport.⁸⁴ The creation of the Canadian Centre for Drug-free Sport (CCDS) is illustrative of this situation. The CCDS is an independent agency, incorporated pursuant to Part II of the Canada Corporation’s Act.⁸⁵ The statutory creation of CCDS was thought to be problematic since the regulatory powers that the CCDS would require to fulfill its mandate may have intruded on provincial jurisdiction.⁸⁶ In addition, Section 90 of the Financial Administration Act⁸⁷ “precludes the creation of federal Crown corporations, except as authorized by statute.”⁸⁸ The incorporation route was considered preferable since it was felt “that an independent, federally incorporated and non-profit body would best respond to [Charles] Dubin’s recommendations while avoiding problems of legal constitution and capac-

81. Alternative Dispute Resolution Report, *A National ADR Model*, available at <http://www.pch.ca/coderre/report-rapport/ADR-model.htm> (last visited Mar. 10, 2001).

82. Fried & Hiller, *supra* note 8, at 652.

83. Nafziger & Wei, *supra* note 1, at 471. The Dubin Inquiry recommended that the Sport Medicine Council of Canada, considered by the Dubin Inquiry to be an independent and impartial body, be responsible for addressing anti-doping initiatives, including doping control. This was perceived as necessary since the policies developed by Sport Canada in relation to this area in 1983 and 1985 were “ineffective,” “resisted,” “not consistently enforced,” were ignored, and that despite the breach, provisions continued to be honoured. DUBIN REPORT, *supra* note 18, at 535-37.

84. De Pencier, *supra* note 14, at 262.

85. *Id.* at 269 n.33 (citing Corporations Act, R.S.C., ch. C-32, Part II (1970) (Can.)). De Pencier notes that the Centre was originally incorporated as the Canadian Anti-Doping Organization largely “to articulate a message that would be easily understood and supported by the public.” *Id.* at 269-70 n.35.

86. *Id.* at 269 n.33.

87. Financial Administration Act, R.S.C., ch. F-11, § 90 (1985) (Can.).

88. De Pencier, *supra* note 14, at 269 n.33.

ity.”⁸⁹ Thus, a national dispute resolution centre should likely be federally incorporated. Whether such an organization would need to be non-profit would need to be researched further.⁹⁰

The proposed national dispute resolution centre, in addition to the dispute resolution function, would also serve a resource and educational function. The resource function refers to the collecting and collating of decisions of individual sport organizations as well as decisions of arbitrators and mediators. The discussion concerning the polices of organizations revealed that there is currently no mechanism in place that collates the decisions of sport organizations. A national dispute resolution system could fill this void. The ability to access this information would be critical to ensure that decisions are fair and the decision-making structure is perceived to be accountable and consistent by both sport organizations and athletes. In addition, an athlete would know in advance whether a particular dispute that is impacting upon him or her has arisen with the organization, and if so, how the dispute has been dealt with by the organization. A physical office should exist, perhaps in Ottawa, that would have hard copies of all decisions.⁹¹ In addition, the decisions could be posted online to the dispute resolution system’s website. The Internet feature would reduce costs and allow virtually unlimited accessibility. Public access terminals, for example, in public libraries, would be of assistance to individuals that would use such a system, but for limited financial resources. Decisions of arbitrators and mediators would be posted in a similar fashion.

In addition, better use should be made of the Court of Arbitration for Sports’ ability to issue advisory opinions. The IOC, international federations, National Olympic Committees, and associations recognized by the IOC or Olympic Committee Organizing Games can request an opinion concerning any legal issue relating to the practice or development of sports or sport-related activity.⁹² An opinion may be published provided that the party requesting the opinion has provided consent in advance for the same.⁹³ An advisory opinion is not an arbitral award

89. *Id.*

90. In order to ensure that the national dispute resolution is perceived as neutral, it may be advisable to have an organization independent of that organization or, alternatively, an ombudsperson, assess whether such an organization is meeting the needs of athletes. Jeffrey Benz, *The 1998 Amendments to the Amateur Sports Act*, *THE SPORTS LAW* 11 (Jan.-Feb. 1999).

91. Copies of decisions made by other arbitral bodies such as the Court of Arbitration for Sport should also be collected and reviewed.

92. Court of Arbitration for Sport, *supra* note 31, at Rule 60.

93. *Id.* at Rule 62.

and is not binding.⁹⁴ The CAS' advisory opinions "provide a cost-free benefit to those parties seeking to avail themselves of this institution of legal expertise" and "are analogous to the submission of a dispute to an expert"⁹⁵

The educational function is also informed by the discussion of national sport policies in Part I above. This discussion revealed that while some sport organizations and athletes may understand their rights and responsibilities in relation to existing policies, the fact that many organizations simply copied template documents may mean that while they have such policies in place, and therefore satisfy an element of funding criteria, they may not be fully aware of the implications of those policies. Thus, a national dispute resolution system for high performance sport could fill an educational function and hold a series of seminars for organizations and athletes where policies are interpreted in terms accessible to the parties.

By clarifying the responsibilities of the national sport system and NSOs to athletes, coaches, and other stakeholders, a national dispute resolution system for sport may also serve to balance the relationship among athletes, coaches, and NSOs, particularly athletes and NSOs. In so doing, a national dispute resolution system could serve as a means by which to provide systematic recognition and protection of the rights of athletes in all areas. One of the goals of such a system would be for an athlete and sport organization to feel comfortable approaching the organization with a hypothetical fact situation informed by an anticipated conflict. While a power imbalance would still exist between the athlete and their NSO, it is hoped that an athlete would feel more comfortable, and thus be more willing to approach a neutral organization in relation to a concern he or she had rather than if he or she had to go through the onerous process of searching for an independent party to hear a dispute.

2. Funding

A key factor to the creation of a national dispute resolution system for high performance sport would be funding. Ideally, and in order to remain independent of government, alternatives to government funding would need to be explored. On the other hand, it may be possible to obtain a one time start-up amount and still remain independent of government. The CCDS, for example, receives government funding in exchange for conducting anti-doping activities. In that case, however, De

94. *Id.*

95. Polvino, *supra* note 35, at 370.

Pencier notes that the CCDS “has an independent board of directors who are *not* government nominees or appointments.”⁹⁶

3. Methods of Dispute Resolution

The proposed national dispute resolution system would be a tripartite model consisting of mediation, arbitration, and mediation-arbitration. The goal of this model is to provide the athlete and the sport organization with meaningful options sensitive to the needs of the athlete and the NSO. This would represent an improvement over the current structure which provides for resorting to non-binding arbitration. The system would need to be able to readily streamline disputes in terms of those matters requiring an urgent response, and those requiring a standard response. The standard response time, however, would need to be determined.

a. Mediation

Since disputants in a sport-related context will likely be working together in the future, mediation is a critical component of dispute resolution in the sport context as it permits the parties to come to a resolution while preserving their relationship.⁹⁷ Mediation provides a number of benefits including the reduction in conflict, reducing the time necessary to resolve the dispute, the use of an informal process, focusing the parties on the issue(s) rather than their respective personal positions, the identification of many solutions, and the production of a final agreement that can be structured as a contract.⁹⁸ Mediation in the context of the system presented here would be between private parties and occur prior to arbitration, or be part of a combined mediation-arbitration process. It is anticipated that a combination of conference and caucus mediation

96. De Pencier, *supra* note 14, at 270. If public funding is used, however, it should be noted that it would be targeted to a very small number of people. Data from Statistics Canada indicates that the total Canadian population in 1991 was 26,994,000. Statistics Canada, *Population by Religion, 1991 Census*, at <http://www.statcan.ca/english/Pgdb/People/Population/demo30a.htm> (last visited Mar. 10, 2001). However, only ten thousand to fifteen thousand individuals participate at a ‘high performance’ level. Of this number, there are between one thousand to two thousand national team athletes. *Task Force Overview*, *supra* note 11. This estimate reflects athletes competing at a ‘high performance’ level provincially and nationally. *Task Force Report*, *supra* note 3.

97. Fried & Hiller, *supra* note 8, at 636-37.

98. *Id.* at 636.

would be used to assist the parties in reaching a resolution to their dispute(s).⁹⁹

b. Arbitration

Arbitration is the main tool used, and envisioned, for resolving sport-related disputes.¹⁰⁰ Arbitration is either binding or non-binding by prior agreement of the parties. Binding arbitration means that the parties are prevented from taking the dispute further, except in situations where the arbitrator(s) abused their discretion, failed to act in good faith, or the decision was overbroad and addressed issues that were not the subject of arbitration pursuant to the prior agreement of the parties to the dispute.¹⁰¹ Benefits to the arbitration process include a more speedy process than the legal system, and a more informal, more private process than the open court.

In view of the power imbalance that exists between sport organizations and athletes, the issue of whether arbitration should be binding needs to be settled and that determination would be applicable to all disputes arising between NSOs and athletes.¹⁰² Binding arbitration does offer the certainty of a final answer. The finality of a decision in relation to a dispute over team selection, for example, would be of considerable benefit to a team. On the other hand, in the absence of binding arbitration, the parties at the outset of the independent dispute resolution process (i.e., from the mediation point of entry) know that the dispute may end up in court. To the extent that this would be an undesirable result, the parties may be more willing to come to an agreement during the mediation or arbitration process. In addition, non-binding arbitration may be useful since it would allow the parties to narrow the issues in dispute between them, as well as possibly have reached agreement on

99. In conference mediation, the parties stay in the same room throughout all or most of the mediation. In caucus mediation, on the other hand, the parties remain in separate rooms throughout most of the mediation while the mediator visits the parties separately and then jointly. *Id.*

100. *Id.* at 639. This comment was made in relation to professional sport disputes as well as Olympic disputes. At a high performance level within countries such as Canada and the United States it also appears to be the tool of choice. In the United States, for example, once the disputants have exhausted the internal appeal processes within the organization, and have attempted to resolve the dispute through the United States Olympic Committee, the parties are required to use the American Arbitration Association to resolve their dispute. *Id.* at 634. In Canada, the parties, following the exhaustion of the internal appeal processes of their sport organization are required to proceed to non-binding arbitration.

101. *Id.*

102. It has been suggested that athletes may wish to form unions with the authority to negotiate agreements with sport governing bodies. Raber, *supra* note 29, at 96-97.

some of the outstanding issues, resulting in less time and money spent in court.

c. Mediation-Arbitration

Mediation-arbitration is particularly useful “for complex disputes including multiple issues.”¹⁰³ Where a dispute that is not resolved through the use of mediation-arbitration, the parties would then proceed to arbitration. While the mediator can also serve as the arbitrator, this may not be advisable as parties that know this is the situation may not be as forthcoming with information and as creative with solutions to resolve the dispute due to concerns that the mediator, when acting as the arbitrator, may reach a decision using the information shared during mediation that would otherwise have remained confidential had different parties heard the mediation and arbitration.¹⁰⁴

4. Qualifications of Mediators and Arbitrators

A national dispute resolution system would need to establish clear parameters in terms of the types of disputes it would entertain.¹⁰⁵ A factor that would inform the setting of these parameters would initially be the experience and training of the mediators and arbitrators. While disputes arising in sport tend to focus on issues arising in relation to athletes from the “mainstream” sport system,¹⁰⁶ an increase in the number of disputes arising in sport for athletes with a disability is to be expected.¹⁰⁷ Since an arbitrator’s ability to inform him or herself on issues in relation to a dispute would make for a better decision, it would be critical that mediators and arbitrators commit to ongoing education on existing and emerging issues.

103. Fried & Hiller, *supra* note 8, at 641.

104. *Id.*

105. To the extent that arbitration matters related to doping are currently addressed by the Centre for Sport and Law pursuant to its contract with the Canadian Centre for Ethics in Sport, doping disputes would be outside the scope of a national dispute resolution system for high performance sport.

106. The term ‘mainstream’ is used to describe athletes competing in the traditional sport system. *Task Force Report, supra* note 3, at 22.

107. David Legg & Daniel S. Mason, *Autonomic Dysreflexia in Wheelchair Sport: A New Game in the Legal Arena?*, 8 MARQ. SPORTS L.J. 225, 236-37 (1998). This observation is made in the context of doping. However, to the extent that “many other problems have crept into the disability realm, often due to the adoption of characteristics and practices common to the dominant able-bodied sport system[.]” it is anticipated that additional problems will arise within the movement of sport for athletes with a disability. *Id.* at 226.

The extent to which sport experience should be a requisite characteristic of an arbitrator or mediator in a national dispute resolution system needs to be considered.¹⁰⁸ While the background knowledge such experience brings would be important, this would need to be weighed against the fact that at least some of the individuals that have participated in the sport system, and share the sport experience, have played an integral role in the maintenance of the insular high performance sport system and who perceive the need of sport organizations to develop and regulate their individual sport as more important than the rights of individual athletes.

5. Reporting of Decisions

The issue of whether to report decisions made by the national dispute resolution system for high performance sport is divisive. On the one hand, the reporting of decisions and the reasoning employed to arrive at those decisions is critical to ensuring that concerns with the transparency, consistency, and accountability of a decision-making process are addressed. On the other hand, non-reporting permits the parties to be more creative in resolving their disputes. While judicial decisions may become precedent setting, mediation avoids this possibility, thereby affording the parties greater flexibility in the interpretation and application of the organizations rules and regulations in future cases.¹⁰⁹ In the absence of reporting, however, different mediators within the same dispute resolution system may approach the same issue (e.g., classification standards for Paralympic athletes) from different positions which would yield different results.

Another concern that relates to the reporting of decisions concerns confidentiality. This concern, however, needs to be critically considered in view of the historically insular nature of the high performance sport movement and the imbalance of power that exists between NSOs and their athletes. Where an issue concerning confidentiality is raised, the question that needs to be explored is the reason for the confidentiality. These are significant factors to the "image-conscious sports industry, which traditionally faces a significant amount of media and public scrutiny."¹¹⁰ If these concerns inform the basis for the non-reporting of a

108. Fried & Hiller, *supra* note 8, at 639. An additional advantage of arbitration that is often cited is the ability of parties to choose an arbitrator that is familiar with the unique culture of sport.

109. *Id.* at 636.

110. *Id.* at 639.

decision, however, there is a concern that the national dispute resolution system would lose credibility in terms of transparency and accountability. If the concern is that the athlete is a minor, or involves a particularly sensitive issue (e.g., sexual orientation or a transgender issue), a balance could be struck where the information is reported, but the decision is referred to by the initials of the parties and the organization. Admittedly, the use of initials may not afford the desired degree of confidentiality in view of the small and insular world of sport. However, the use of initials (or possibly a number) to identify a case, provided the reasoning and decision are reported, would seem to provide a medium between the need for decisions to remain confidential and the need for a transparent decision-making system.

The foregoing illustrates the need for the reporting of decisions and the reasoning contained therein in successfully mediated and arbitrated decisions. A record of decisions that are accessible to the public, particularly where those decisions demonstrate consistent and fair responses, may not only result in the parties trying to work out their disputes prior to the issue reaching the point where arbitration is required or, where that is not possible, permit the parties to narrow the issues between them. In addition, it may prevent arbitrator shopping within the confines of an arbitral body.

6. Implementation

NSOs are currently required to have a provision in their internal policies that provides for resort to independent arbitration once the organization's internal appeal processes have been exhausted. This requirement could simply be amended to reflect the fact that the organization designated to hear such disputes is the national dispute resolution system. Sport Canada's program officers could follow up with NSOs pursuant to the terms of the Accountability Agreement in place between the organization and Sport Canada to ensure NSOs comply with such a requirement.

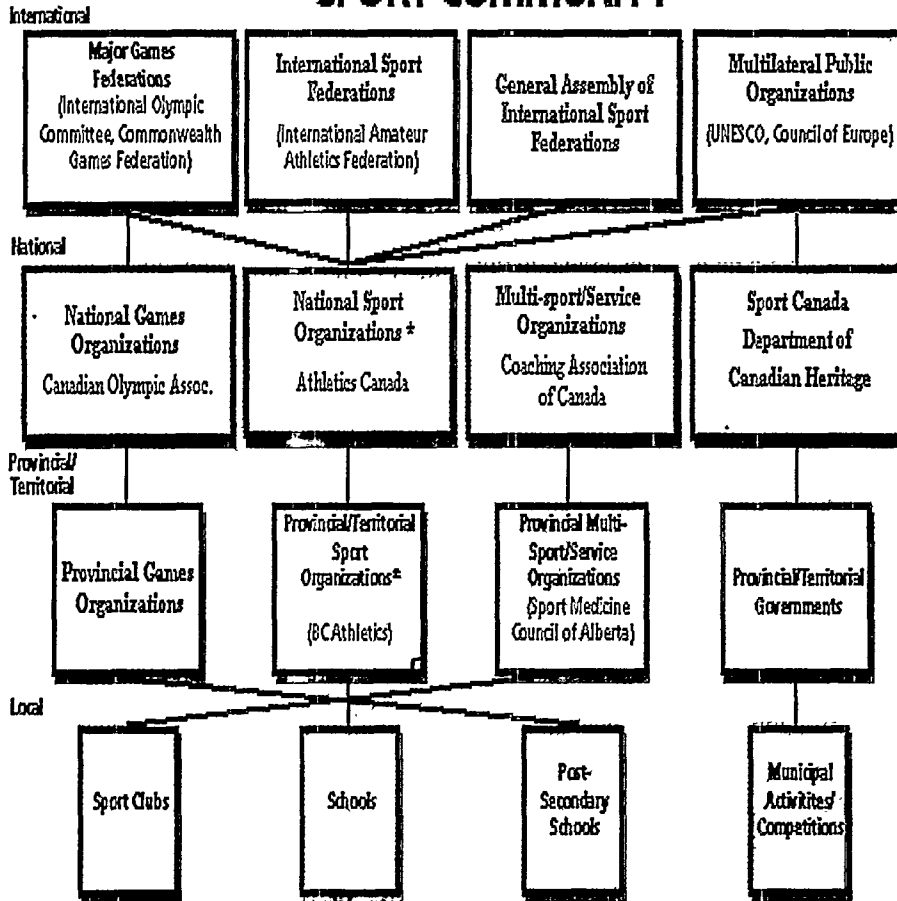
V. CONCLUSION

In this paper, I have considered the need for a national dispute resolution system for Canada's high performance sport system and argued that there is a need for the creation of such a system built on the Canadian sport experience. The comprehensive tripartite model would address the weaknesses inherent in the existing conflict resolution scheme. It is acknowledged that the influence exerted by international sport federations over their respective NSOs on the resolution of disputes be-

tween a NSO and its athletes may impact upon the scope of disputes heard by a national dispute resolution system. While the proposed system would not eradicate the existing power differential between sport organizations and athletes, it would significantly improve upon the existing mechanism by providing a meaningful forum in which to resolve conflict that is sensitive to the needs of both sport organizations and athletes.

ANNEX A

SPORT COMMUNITY



* Also includes associations for athletes with disabilities (e.g. Canadian Blind Sport Association)

NOTE: Normal font illustrates examples

Source: Sport Canada Website <http://www.sportcanada.ca>