

LEGAL TIPS FOR ATHLETES

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TABLE OF CONTENTS:

Legal Tips for Athletes 2

INTRODUCTION 2

 LEGAL TIP #1 - BIAS 3

 LEGAL TIP #2 - EVIDENCE 4

 LEGAL TIP #3 - AGE DISCRIMINATION 5

 LEGAL TIP #4 - PROCEDURAL FAIRNESS 6

 LEGAL TIP #5 - DOPING 7

 LEGAL TIP #6 - DECISIONS BY ARBITRATOR: 8

 LEGAL TIP #7 - CARDING APPEAL 9

 LEGAL TIP #8 - THE ATHLETE AGREEMENT: 10

Legal Tips for Athletes

This booklet was compiled from a series of legal tips written for the Athletes Can newsletter by the Program Co-ordinators at the Sport Solution.

INTRODUCTION

The Sport Solution is a not-for-profit program at the University of Western Ontario that helps Canadian high performance athletes resolve legal conflicts. The service is available at no cost to all national team athletes who are members of Athletes CAN.

Sport Solution's Mission Statement:

By counselling Canadian amateur athletes and providing guidance and direction, Sport Solution strives to put sport back in the hands of athletes and enables them to take action with respect to sports-related legal issues.

Sport Solution offers Canadian amateur athletes access to free information, assistance and advice on sport-related issues. These issues *may* require legal counsel; however, oftentimes a solution can be found before the situation finds its way to a courtroom. Sport Solution helps prepare athletes in resolving sport-related disputes and is committed to helping athletes find effective solutions.

It is important for athletes to remember that caseworkers at the Sport Solution are law students. This being said, we are not qualified to give out legal advice, solely legal assistance. Should your issue require legal advice, Sport Solution may refer you to a lawyer at Osler, Hoskin & Harcourt, a national law firm which has been providing legal advice to athletes since 1996.

We hope this booklet helps answer some of your questions and concerns. If you need assistance, please contact the Sport Solution toll free at 1-888-434-8883 or e-mail law.sportsolution@uwo.ca.

Thanks,

Erin and Amanda
Program Co-ordinators

LEGAL TIP #1 - BIAS

What is bias?

Bias is a lack of neutrality on the part of a decision maker with regard to the issue under consideration. If a member of a tribunal is biased, the decision reached by that tribunal can be overturned upon judicial review.

There are two kinds of bias- actual bias and reasonable apprehension of bias. Examples of actual bias include financial interest in the outcome of the decision or a close, personal connection with one of the parties. The clearest example of a bias would be where an individual sitting on a tribunal is involved in the decision that is being appealed. Reasonable apprehension of bias is less straightforward. It is defined by S. Blake in *Administrative Law in Canada* as:

“a situation where a reasonable person, knowing facts concerning the member of the tribunal, would suspect that the member may be influenced, albeit unintentionally, by improper considerations to favor one side in the matter he or she is to decide.”

Reasonable apprehension of bias is more of a notion that bias exists. While there may not be clear facts revealing the bias, a strong argument will support allegations of bias.

Once the issue of bias has been raised, it is up to the tribunal to determine whether or not the bias actually exists.

Who can be biased?

Anyone sitting on the tribunal may be biased.

When do you raise the issue of bias?

It is best to raise the issue of bias prior to the tribunal hearing so that the biased individual can be replaced. Any allegations of bias after the fact will be ineffectual.

How do you raise it?

Contact the person or organization that has set up the tribunal hearing and informed you of it. Determine who is sitting on the tribunal and what role or function they fulfill. If you believe that one of these tribunal members has actual bias or you have a reasonable apprehension of bias, notify the person or organization in charge of the tribunal hearing.

LEGAL TIP #2 – EVIDENCE

What is evidence?

Evidence is information that is used to prove a fact, disprove a fact or support or contradict an argument. Evidence can be in the form of writing (documents, e-mails) or verbal testimony.

Types of evidence

Direct evidence pertains to the incident itself. Examples include a recording of an event or an eyewitness testimony.

Indirect evidence is evidence from which a person must draw an inference. Indirect evidence is one step removed from direct evidence. An example would be a letter describing the events of an incident.

Hearsay evidence is evidence obtained from third parties. Hearsay evidence is rarely admitted by a panel or committee making a decision because it is often difficult to prove. Facts and details often change when the account is passed from one person to another.

Circumstantial evidence is not based on personal knowledge or observations of the facts in dispute, but on other facts and observations that, through reasoning and deduction, show the same outcome as if it had actually been observed.

Corroborative evidence supports, strengthens or confirms other evidence.

Contradictory evidence weakens other evidence because it is contradictory.

What can athletes do to make sure they have all the evidence in any particular dispute?

Follow these five steps if you ever find yourself in a position to seek an appeal.

1. Keep a journal of all the events pertaining to your sport each year. Be very specific with dates and times.
2. Never delete any e-mails pertaining to your sport.
3. If you have any important telephone conversations, make a note of what transpired immediately after hanging up. This will ensure you don't forget the details.
4. Keep a file of any mail correspondence you receive.
5. At the end of each year, print off your e-mails, gather your letters and phone call transcriptions and sit down with your journal. Order all the material and then file it away – just in case.

LEGAL TIP #3 – AGE DISCRIMINATION

Sports organizations receive a limited amount of funding and like to see that money directed to athletes who demonstrate the potential to excel at the international level. On the other hand, an older athlete, who may or may not be a superstar internationally, but is consistently one of the top athletes in Canada, deserves the carding and benefits that go along with that achievement. As a result, the sport organization will sometimes bring an age category into the selection criteria in order to allow some room for younger athletes who are a few years away from being truly competitive at the national level. At face value, this is a legitimate goal because the essence of funding in sport is development, which is often associated with youth. However, this is not the only function of funding; it is also in place to support Canada's best athletes.

In short, a decision by a sport organization cannot be based solely on age, which means it should not even give the appearance of being based solely on age. Age can be a part of the criteria, but it should not be given any more value than any other criteria. We would go so far as to assert that if it came down to selecting the final member of a national team, and the two competing athletes that had the exact same results at the competition it should not automatically mean the youngest athlete is the best for that final spot. Just like youth is often essential to development, maturity and experience is often essential to winning.

It is imperative that athletes contact the Sport Solution as soon as they think something is wrong with a decision their sport organization has made. This is particularly important for a selection issue as very often, a team is selected very close to the actual event or competition.

LEGAL TIP #4 – PROCEDURAL FAIRNESS

What is procedural fairness?

The requirement of fairness applies to all decisions within an organization including decisions of eligibility, selection, and discipline. If a decision is made that affects you, your organization is legally bound to be fair in exercising that decision.

First you have to determine if the decision made was within the scope of the organization. If the organization does not have the jurisdiction to make the decision, then it cannot enforce it. If the organization has the jurisdiction, then the decision is binding subject to its duty of fairness. You can find the jurisdiction of your National Sports Organizations in your Athlete Agreements.

Procedural fairness is broken up into two parts – the right to a hearing and the rule against bias.

When does it apply?

Procedural fairness always applies unless it is expressly stated in your Athlete Agreement that it does not.

How can you tell if something is fair or not?

It is very difficult to establish what is fair and what is not. In fact, fairness is established on a case by case basis and what is fair in one case may not be fair in another. What determines the degree of fairness is the impact the decision has on you as an athlete. The greater the repercussion of the decision, the more fairness is required. If you believe a lack of fairness was demonstrated – ask! It is a very difficult determination to make on your own.

What happens if there is an absence of procedural fairness?

If there is an absence of procedural fairness, then the decision will, in most cases, be successfully appealed. There are different levels of appeal so an absence of procedural fairness at one level will often be corrected at the next level. Don't give up and don't get discouraged. If you think you are being treated unfairly, ask someone for help. Even if you are wrong, it is best to know for sure.

LEGAL TIP #5 – DOPING¹

A Brief History

Doping in sport is not a new phenomenon. Increasing competitiveness combined with advancing technology, however, has given rise to ever more sophisticated attempts to create undetectable performance enhancing drugs and various other doping methods.

In the biggest doping scandal in American sports history, Victor Conte of the Bay Area Laboratory Co-operative (BALCO), admitted developing a steroid known as THG and other performance enhancing substances that went undetected until drug testers ultimately caught up with BALCO's activities in 2003. Since then, many athletes have been unmasked and sanctioned for using the banned substances and sweeping measures are being taken in the U.S. to combat drug use in sport.

Canadian Anti-Doping Policy:

The Canadian Policy Against Doping in Sport (2004) is the most comprehensive policy to date and applies to athletes and athlete personnel alike (coaches, doctors, support staff etc.). The Canadian Policy Against Doping in Sport is also consistent with WADA's World Anti-Doping Policies (www.pch.gc.ca/progs/sc/pol/dop/index_e.cfm). The purpose behind WADA, established in 1999, is the harmonization of all policies and bodies regulating drug use in sport.

National Sport Organizations must adopt the Canadian Policy Against Doping in Sport as a condition of receiving federal government funding. As an athlete, you can be required to submit to drug testing by an event organizer, or by a foreign governmental agency under the mandate of the local law. If required to provide a sample you should bring a team manager or a legal representative with you to ensure that collection procedures are completed in the appropriate manner and that there is no chance for contamination. Once the sample is out of your hands however, there are few protections for you as an athlete. You should be aware of prohibited substances in other jurisdictions as well as those in your own.

In 2004, the Canadian Centre for Ethics in Sport (CCES) enacted a new Canadian Anti-doping Program. Since this time, the Sport Dispute Resolution Centre of Canada (SDRCC) has had jurisdiction over doping-related disputes in Canada. The new regulations can be found at www.cces.ca/pdfs/cces-policy-cadp-e.pdf.

Violation of the Code:

If you are found in contravention of the anti-doping rules and regulations you will receive a notice of violation from the CCES. If you receive a notice of violation you must respond as soon as possible and contact your athlete representative, Sport Solution, or legal counsel immediately. A hearing should occur within 30 days. Proceedings are confidential and you have the right to bring counsel or a representative/support person with you. The burden of proof lies with the CCES, meaning that CCES must establish that an anti-doping rule violation occurred.

****The decisions of a Doping Appeal Tribunal are final and binding.***

¹ Note: The Sport Solution in no way condones or supports the use of drug in sport. However, we recognize that it is an issue so if you find yourself in a situation where you need advice we can provide assistance.

LEGAL TIP #6 – DECISIONS BY ARBITRATOR:

Decisions by a committee or arbitrator:

What kinds of decisions can a selection committee make?

Based on a published set of standards, selection committees are granted the power to name athletes that they feel will perform best on a team. Most standards can be measured but each decision-maker has discretion to name athletes to a team despite the standards used. This discretion is not used lightly, but it is often required when assessing attributes such as “leadership,” “potential” and other subjective qualities.

What kinds of decisions can an arbitrator make?

As a rule, arbitrators cannot simply overturn the decision of a selection committee (or other NSO committees) and replace that decision with their own. What they can do is examine the decision made by the committee and investigate whether or not that group stayed within the boundaries of the power conferred to it by their NSO in making that decision. If a committee goes beyond its power in making a decision, that decision can be quashed and sent back to the committee for resolution. Arbitrators can also decide that a previous decision was biased or unfair.

What is the difference between a binding and non-binding decision?

A binding decision is often a decision made by an arbitrator or appeal committee. Binding means that both parties must comply with the outcome of the decision whether or not they agree with that outcome. Binding decisions cannot be appealed unless it is specified otherwise. If a decision is final and binding then the only recourse is a court of law.

A non-binding decision is more like a recommendation. All parties receive the decision by the decision maker but have no obligation to follow the recommendations. Mediators often suggest non-binding solutions to problems between parties. Sometimes committees and arbitrators will provide a binding decision as well as non-binding recommendations.

What can be done if you don't agree with a decision?

If a decision is made that affects you and it is not a final and binding decision then you can appeal that decision. Each sport is operated under different parameters, so contact Sport Solution to discuss your particular situation.

If a decision is final and binding, the only form of appeal is judicial review by a court of law. Judicial review only looks to the fairness of the final and binding decision to make sure it is not unreasonable or biased. A lawyer is required to take a case to court for judicial review.

LEGAL TIP #7 - CARDING APPEAL

If you have not been nominated for carding by your NSO, you may appeal the decision. This appeal must be filed before the deadline as outlined in your Athlete Agreement. Generally, you have 30 days from the date you are informed about not being nominated for carding in which to file an appeal. The appeal should be in the form of a printed letter, but it is also advisable to send an email backup to ensure it is received and reviewed on time.

Step One:

- In your letter, outline the official reasons, based on procedural grounds, for your appeal. (See Legal Tip #4 – pg #6). If you feel the carding criteria are unfair, you may include this point in your letter. If you have already signed your Athlete Agreement, however, you will not have a strong case since your signature on the agreement indicates you have agreed with all its provisions. Do not make this a main point in the appeal as it will detract from your stronger procedural arguments.
- Make sure your letter is well organized and check for spelling errors. If you would like Sport Solution to help with your appeal allow enough time for it to be sent, reviewed and for the necessary changes to be made.

Step Two:

- If you are unsuccessful in your initial appeal, further action may be taken.
- If you were carded, Sport Canada automatically reviews your NSO's decision. If you want to be a part of this process contact Sport Canada and request a participatory role.
- If you were not carded, Sport Canada does not review your NSO's decision. However, you may still file an appeal with Sport Canada. This also needs to be completed within a time limit, again generally 30 days from the time you receive notice of the decision.
- This appeal must also be in printed form and received—not sent—before the deadline.
- Be concise and organized. Put forward your strongest arguments first. Do not include irrelevant issues.

Step Three:

- If you are unsuccessful in your appeal to Sport Canada your final recourse is with the Sport Dispute Resolution Centre of Canada. Fill out an online request for arbitration and send it. Again, it must be within the relevant time period. For more information see www.adrsportred.ca

LEGAL TIP #8 – THE ATHLETE AGREEMENT:

What is an Athlete Agreement?

- An athlete agreement is an agreement or contract between an NSO and its athletes that creates and states the rights, privileges and obligations of both parties.
- An athlete agreement provides an avenue of recourse if rights, privileges, and obligations are not respected or enforced. This “avenue of recourse” is very similar to what we refer to in law as a remedy.
- A few other important points to note:
 - The term of an athlete agreement is usually one year. Generally you wouldn’t want one that lasts for a period much longer than a year as your circumstances might change and you and your NSO will want to re-negotiate terms on a fairly regular basis.
 - Agreements usually make reference to other ancillary and secondary documents such as the NSO By-laws, Code of Conduct, etc...
 - A final point about what is included in athlete agreements is the right to **procedural fairness**. This is an implied right. While Athlete Agreement’s seldomly include this term explicitly, it has long been established by law that the right to procedural fairness exists in sports organizations and it is a powerful legal remedy because it is a standard to which all organizations are held.

Why are Athlete Agreements Important?

- (1) **Law unto Itself**: The athlete agreement establishes the internal rules and laws of the NSO, some refer to this as the “law unto itself.”
- (2) **Reliance and Enforceability**: this has to do with the avenue of recourse or concept of remedy should a right, privilege or obligation not be respected or enforced.
- (3) **Starting Place**: for virtually all disputes that athletes have their athlete agreement is the starting place or launch pad for many of the subsequent steps, e.g. codifies how the appeal procedure is structured.
- (4) **Authority**: the athlete agreement gives the NSO the authority to establish the subject matter of the agreement, e.g. authority to establish selection criteria, discipline policies, etc...

What you should know before signing your athlete agreement:

You should not sign an agreement you have not read, understood or with which you are uncomfortable. Before reaching for your pen and signing on the dotted line, read through the agreement carefully, jotting down any questions you may have or portions you don’t agree with or understand. Approach your athlete rep and sport organization with any questions you may have. Do not wait until the last minute to voice concerns. By then it may be too late to make a difference.

What to look for in your agreement:

Look at the athlete obligations. Know what is expected of you and know your rights. If you know your obligations and rights you will be much better equipped to deal with any future problem.

Make sure there is an appeals policy in the agreement and that it is clear and detailed. Lack of an appeals policy may indicate an incomplete agreement and a lack of concern or appropriate recourse for the athlete. If your current athlete agreement lacks an appeals procedure, ask that it be added in the future. Take the time to know everything about the appeals policy. This is crucial as deadlines for appeals, format and procedure are all outlined in the policy. Failure to follow the appeal guidelines may result in a dismissal of your appeal, regardless of its merit.

Look at the disciplinary procedures. Make sure you are comfortable with penalties and that the punishment fits the crime. For example, an athlete should not be subject to indefinite suspension for missing one practice.

Additional Points of Interest in your Athlete Agreement:

NSO Obligations: Team Selection and Selection Criteria:

- Team selection is probably the most important obligation of an NSO and being selected to a representative team is among the single most important benefits of participation in sports.
- It is also a benefit that can be awarded in accordance with fair procedures and the legal principle known as the rule of law requires that the conduct of individuals be based upon known principles or established rules.
- The legal principles suggest that the following elements are essential to an athlete selection program:
 - (1) Authority: the selection criteria must be established by the body having authority. As mentioned, this authority is usually derived from the athlete agreement.
 - (2) Criteria must be clear, reasonable, and objective
 - (3) Subjective discretion must be confined and athletes must be protected from bias.
 - (4) Criteria must be published in timely manner.
 - (5) There must be an opportunity for a timely appeal.

Some of the other important obligations of the NSO include:

- (1) Carding/Funding Assistance
- (2) Athlete Development and Eligibility: NSO should be active in your development and should make reasonable efforts to protect your eligibility under the appropriate rules.
- (3) Athlete Representation: this section should be the most important to you as athlete reps for your respective sports. It is from the athlete agreement that you are given your privileges and responsibilities as an athlete rep. and indeed the agreement should provide that as a representative:
 - i) You are Elected: were elected by a majority of National Team Members
 - ii) Voting Member: will sit as a voting member of the NSO Board of Directors and any designated NSO committees such as the discipline committee or appeal committee.

Discipline Policy and Procedure

- The need for a discipline policy stems from the notion that NSO's want to ensure that their athletes conduct themselves properly.
- Application and Scope: the first issue that needs to be addressed is the scope of the policy and to whom it applies. While it's obvious that the policy applies to athletes some policies are

unclear as to whom the policy applies to and how far it extends. E.g. can an athlete use an NSO's discipline policy against a coach, a volunteer who works with the athletes?

- As in the case of selection criteria, the principles of procedural fairness require that certain principles be followed in a discipline program:
 - (1) Rules must be clear and concise
 - (2) Penalties or Sanctions must be appropriate for the severity of the infraction: this is mainly achieved by outlining which type of behaviour is considered to be a minor or major infraction.
Minor Infractions: a single incident or disrespectful behaviour or comments, unsportsmanlike behaviour, non-compliance with rules and regulations, etc...
Major Infractions: repeated unsportsmanlike conduct, use of banned performance enhancing drugs or methods.
 - (3) The NSO must hold a hearing and follow the rule against bias in imposing sanctions.
- NSO's are notorious for vagueness in these sections, eg.:
 - Athletes will be penalized for "unsportsmanlike conduct";
 - Athletes will be penalized for conduct "injurious to the image of the sport."
- Usually, the type of "conduct" is not defined
- Thus, rules must be stated in a way that the NSO members have no difficulty applying them to specific fact patterns and understanding the limits of acceptable behaviour.

One thing to remember: if you have signed your athlete agreement there is a presumption that you agree with its provisions. If this is not the case you must be able to prove that you signed your athlete agreement under duress or coercion.

PLEASE SEE A COPY OF OUR ATHLETE AGREEMENT TEMPLATE