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# *In Practice*

## Sport Mediation: Mediating High-Performance Sports Disputes

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*Conflicts in high-performance sports (HPS) are typically tense and emotionally charged experiences for the athletes, coaches, and sports organizations involved. Such disputes raise intriguing challenges for the mediators handling them. These disputes typically involve multiple parties who often have intensely competitive personalities negotiating a volatile mix of high-stakes win/lose issues. Mediators typically confront numerous process challenges and must operate within the rigid policy parameters of the various governing organizations involved.*

*Mediation can successfully manage and resolve these challenging disputes, often in creative ways that repair and preserve the parties' relationships. To be successful in this environment, however, mediators must adapt to and confront the unique dynamics of sports disputes described here.*

*In this article, I examine multiple case studies of mediations conducted through the Sport Dispute Resolution Centre of Canada (SDRCC) with the goal of identifying successful mediation strategies for HPS disputes. The centre, which has made mediation mandatory for almost all cases, had an overall settlement rate over a twelve-year period of 46 percent, with rates as high as 94 percent for mediations voluntarily requested by the parties. Mediation has been used only sparingly elsewhere in the world for resolving HPS disputes to date, although, I argue, it is a successful tool that should be increasingly used*

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*both nationally and internationally. In recognition of mediation's potential role, the Court of Arbitration for Sport introduced updated mediation rules in 2016 and is moving to increase the use of mediation in international sports disputes.*

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**Key words:** mediation, alternative dispute resolution, sports, conflict resolution, doping, facilitation, arbitration.

## **Introduction: Mediation in Sports Disputes**

Conflicts in high-performance sports (HPS) can be tense and emotionally charged experiences for athletes, coaches, and the national and international sports federations (NSOs and IFs) involved. Such disputes raise intriguing challenges for the mediators and arbitrators charged with handling them. These disputes typically involve multiple parties, many of whom have intensely competitive personalities, and may be spread across the globe. These issues are often high-stakes and win/lose in nature. And the mediator will typically confront numerous process challenges, such as timelines that are sometimes measured in hours, jurisdictional issues, and the rigid rules and standards of various governing bodies.

Mediation has proven to be a successful tool for both managing and resolving these challenging disputes, often in creative ways that repair and preserve relationships (Blackshaw 2002). The ability of good mediators to adapt to and deal with the peculiar challenges of high-performance sports disputes and to manage the unique dynamics of sports disputes is critical for mediation success in this arena. Two variables that, unsurprisingly, appear to affect mediation settlement rates significantly are the degree of difficulty of the issue, and whether it is a win/lose distributive problem such as team selection, although other factors also play a role.

In this article, I have examined cases mediated through the Sport Dispute Resolution Centre of Canada (SDRCC) to identify a range of successful mediation strategies for managing the challenges of these disputes. These best practices take into consideration my own experience as well as feedback from parties, national sports organizations, and fellow mediators.

Mediation is currently not widely used around the world for resolving amateur and professional sports disputes, but I believe that it will likely become increasingly useful both nationally and internationally (Mew and Richards 2005; Blackshaw 2009, 2013, 2014; Mavromati 2015). Currently, most professional sports do not widely use mediation as a formal part of their dispute resolution processes, although informal forms of dispute resolution may well be used, and parties do sometimes opt to mediate in individual cases

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(Bucher 2011). As a result, both amateur and professional sports represent tremendous growth areas for the use of mediation. In recognition of this opportunity, the Court of Arbitration for Sport (CAS) introduced newly amended mediation rules in 2013, which were updated further in 2016 after consultation with and input from CAS mediators. The court has also begun a push to increase the use of mediation by rejuvenating its mediation roster in the last several years and by educating the sports community about mediation (Blackshaw 2013, 2014; Mavromati 2015).<sup>1</sup>

## **Types of National-Level Amateur Sports Disputes**

The four main types of dispute that arise in national-level HPS in Canada, each of which raises its own challenges, include:

- funding disputes (in Canada often framed as “carding” disputes);
- team selection disputes;
- anti-doping and other non-doping disciplinary cases; and
- administrative, governance, and rules disputes with national sports organizations, internally, or between NSOs and athletes/coaches.

These types of disputes also arise in a number of other countries (Mew and Richards 2005; Blackshaw 2013). At the CAS, contract disputes are another common form of dispute, but they are not the focus of this article (Mavromati 2015). Nevertheless, many of the principles discussed herein could apply to contract disputes also.

### ***Funding Disputes***

Broadly speaking, funding disputes are complaints about the allocation of government funding and services to sports federations or athletes, which may arise in various forms around the world. Sport Canada is the government department responsible for national sports initiatives, providing funding to a broad range of national sports organizations such as Swimming Canada, Taekwondo Canada, and so on. A condition of receiving Sport Canada funding is that NSOs must accept SDRCC jurisdiction as the sports tribunal of final resort for its members.

In addition, Sport Canada provides athlete-specific funding in a variety of ways. One way is by issuing a fixed number of “cards” every year to each NSO. The NSO then distributes those cards to some of its elite high-performance athletes in accordance with the NSO’s pre-set funding selection criteria.

Each card represents a package of concrete benefits for the recipient athlete, including a monthly income, tuition remission, and other financial benefits; receiving a card can also improve access to resources such as physiotherapy, coaching, training, and training facilities. It also confers status

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in the sport: a “carded athlete” is typically either at the top tier of the sport or a rising young star.

Funding conflicts arise when one athlete complains that:

- the carding criteria were wrongly or unfairly applied (e.g., if the criteria allowed only one athlete per weight class to be carded, but the NSO carded two from one weight class and none from the complainant’s class);
- the criteria themselves were unfair, biased, or otherwise inappropriate (e.g., a gender imbalance); and/or
- an exception to the criteria should be made for the athlete on some grounds (e.g., a medal contender was sick or injured during a qualifying event).<sup>2</sup>

### ***Team Selection Disputes***

Team selection disputes involve one or more athletes claiming they were wrongly excluded from a given national team. Again, the basis of the complaint is usually that:

- the team selection criteria were wrongly or unfairly applied (e.g., when athletes are not advised of the criteria in time to adjust their training and competition schedules accordingly);
- the selection criteria themselves were unfair (for example, the athletes in one team sport were allowed to subjectively grade one another as part of the selection criteria, a method that can generate conflicts of interest, given the friendships and rivalries on the team);<sup>3</sup> and/or
- an exception to the criteria should be made for a particular athlete (e.g., when she/he is a world-ranked member of the “top ten” in that sport but did not compete enough that year while rehabilitating from injury to qualify under the basic criteria).<sup>4</sup>

### ***Anti-Doping and Disciplinary Disputes***

Anti-doping disputes arise from violations of applicable anti-doping regulations by athletes, coaches, medical professionals, sport officials, or related individuals. Most countries have a national body responsible for administering the World Anti-Doping Agency’s Code or their national equivalents. In Canada, the Canadian Centre for Ethics in Sport (CCES) administers the Canadian Anti-Doping Program (CADP), which is closely modelled on the World Anti-Doping Code. Violations include testing positively for the presence of prohibited substances or metabolites from prohibited substances; trafficking, using or possessing a prohibited substance or method; administering a prohibited substance or method to an athlete; and avoiding, refusing, or tampering with sample testing (see World Anti-Doping Code Articles 2.1-2.10).<sup>5</sup>

A variety of non-doping disciplinary allegations may generate disputes as well, including violations of codes of conduct, athlete agreements, federation

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policies, rules of play, etc. Such violations will generally be governed by the applicable rules and regulations of the relevant national or international sports organization.

### ***Administrative, Governance, and Rules Disputes***

A variety of other disputes can arise between an NSO and its many internal and external stakeholders. Typical examples include complaints:

- that NSO policies, such as athlete agreements, codes of conduct, or bylaws, are unfair;
- that administrative decisions made by the NSO, such as board elections, changing sponsors, etc. are inappropriate or biased;
- that NSO appointments to various posts, such as a national team coaching position, are inappropriate; and
- that NSO staff have acted inappropriately or corruptly.<sup>6</sup>

Disagreements could also occur within the sports organization itself, for example, if its board was deadlocked or in disarray.

## **The History and Background of the Sport Dispute Resolution Centre of Canada**

The SDRCC is a Canadian government-funded program for the resolution of sports-related disputes in Canada, including amateur sports disputes that involve national sports organizations (NSOs) and national level athletes, Canadian doping violation disputes, and other disputes by agreement of the parties. The mandate for the organization, which was originally founded in 2002, is set out in the Canadian Sport Dispute Resolution Code.<sup>7</sup> The SDRCC has established and maintains a roster panel of top-tier experienced Canadian mediators and arbitrators who also have experience and expertise in sports and sports law.

Most NSOs have developed their own internal ADR and appeals processes to deal with disputes, although with varying degrees of sophistication. Historically, these organizations have usually preferred to resolve issues internally within the sport. Since 2003, however, Sport Canada has required NSOs to build a right of appeal to an external body, the SDRCC, into their processes in order to receive funding. Most complaints involve the sports organization itself as an interested party, typically defending its own decision. Consequently, complainants often see NSO internal appeals processes as defensive, unfair, and biased. Instituting this kind of an external appeal process is thus seen as beneficial to both athletes and the sport.

Its creators initially envisioned the SDRCC as the final route of appeal by arbitration from decisions made by any Canadian NSO, with an independent panel to provide objectivity, expertise, and consistency in dealing with disputes. Even early on, however, the directors of the SDRCC believed that

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mediation should be included as a possible preliminary step to allow parties to create settlements based on their interests, rather than on a purely rights-based adversarial analysis.

Under Article 5 of the Canadian Sport Dispute Resolution Code, parties can request a standard mediation or a hybrid mediation/arbitration process (med/arb) if all parties consent. Parties can enter mediation as a stand-alone process if all parties agree without ever commencing arbitration proceedings. Alternatively, even after arbitration has begun, parties may initiate mediation on consent at any stage of the proceeding.

By 2006, another form of mediation process called resolution facilitation (RF) was included as a *standard* preliminary step in every non-doping case prior to arbitration, although under special circumstances such as extremely urgent external deadlines, the RF can be waived. An RF usually takes place within hours or days after the case is filed.

Parties in an RF are required to spend three hours with a mediator from the SDRCC roster selected for his or her expertise in and understanding of sports disputes and SDRCC rules and procedures. In that time, the mediator will work with the parties to resolve the dispute; if the mediation fails, the RF can be used to prepare the parties for the arbitration, which would be conducted by a different SDRCC arbitrator. Article 4 of the code gives the facilitator a broad and discretionary mandate to not only attempt resolution, but to help parties understand their procedural options, to give an opinion on the likely outcome at arbitration, to narrow the issues in dispute, and even to interpret a final arbitral decision for the parties.

Doping cases have been subject to a different variation of RF since 2008, but for doping cases participation is voluntary. When a doping violation is detected, the Canadian Centre for Ethics in Sport (CCES) notifies the infringing party of the alleged violation and of the SDRCC's procedures. Resolution facilitation has been used by the SDRCC in doping cases as a voluntary procedural option prior to arbitration, first as a pilot project and by 2011 as a permanent process mandated in the code. Few jurisdictions other than Canada use any form of mediation or facilitation for doping disputes, and none do so as a formal standard procedure.<sup>8</sup>

Resolution facilitations and mediations of any kind are usually conducted by phone conference with the facilitator using an online virtual mediation tool that allows for easy management of party conversations and caucuses, including the use of virtual caucus rooms.

The SDRCC also works with NSOs to prevent future disputes by providing feedback and advice to help them improve their own internal governance and decision-making processes. Indeed, NSO representatives have stated at SDRCC retreats and in private conversations with the author that such SDRCC resources as an online searchable decision database and guides on topics like designing team selection criteria, improved governance, and contract clauses have been valuable tools in improving NSO processes.<sup>9</sup>

***Sport Dispute Resolution Centre of Canada General Settlement Data***

From April 2004 to March 31, 2013, 192 ordinary (non-doping) tribunal cases were filed with the SDRCC, most of which were requests for arbitration. Twenty-four cases were requests specifically for mediation. A breakdown of settlement rates is set out in Tables One through Three, based on information provided by Marie-Claude Asselin, chief executive officer of the SDRCC (Asselin 2014).

Since April 2006, all ordinary cases that are not specifically filed for mediation or for med/arb normally go through a resolution facilitation process. Med/arb processes were not offered until after April 2006. Table One reflects this change in policy, with pre-RF and post-RF figures reported separately. (None of these breakdowns include doping cases.)

Across all non-doping cases from April 2004 to March 31, 2013, the overall average settlement rate for cases mediated in some form (whether as mediation, resolution facilitation, or during med/arb) was 43 percent (57 of 134 cases). For cases in which pure mediation was voluntarily requested by all parties, the settlement rate was 94 percent.

Interestingly, settlement rates in voluntary mediation processes, which include mediation and med/arb, have been significantly higher than rates for mandatory mediation processes, the RFs. The average settlement rate in voluntary mediation processes was 70 percent (33 of 47), whereas for the mandatory RF process, the rate was only 28 percent (24 of 87) or 36 percent (35 of 98) if we include cases withdrawn before arbitration).

**Table One  
Overall Case Numbers and Mediation Results**

<b>Time Period</b>	<b>Total Ordinary Cases Filed</b>	<b>Mediation Requests (Voluntary)</b>	<b>Cases Mediated</b>	<b>Cases Settled</b>	<b>Settlement Rate at Mediation (Percent)</b>
April 2004– March 31, 2006	42	5	4*	4	100**
April 1, 2006– March 31, 2013	150	19	14***	13	93
Overall	192	24	18	17	94

\*One complaint was withdrawn prior to mediation.

\*\*Of thirty-seven cases filed for arbitration, only one settled before arbitration (a settlement rate of 3 percent).

\*\*\*Five complaints were withdrawn prior to mediation.

**Table Two**  
**Med/Arb Cases for April 2006 through March 2013**

<b>Med/arb Requested (Voluntary)</b>	<b>Med/Arb Mediations Conducted</b>	<b>Cases Settled</b>	<b>Cases Arbitrated</b>	<b>Settlement Rate at Mediation (Percent)</b>
33	29	16	13	55*

\*Does not include cases withdrawn before arbitration.

**Table Three**  
**Remaining Arbitration Cases Undergoing a Mandatory RF for April 2006 through March 2013 Period**

<b>Cases with an RF</b>	<b>Cases Withdrawn</b>	<b>Cases Settled</b>	<b>Settlement Rate (Percent)</b>
98	11	24	28*

\*Not including cases withdrawn after the RF but before arbitration.

While 28 percent may sound like a low settlement rate for RFs, it is much higher than 3 percent, which was the settlement rate for un-mediated SDRCC cases prior to the introduction of RFs. According to Asselin, resolution facilitations yield other benefits even when cases don't settle at the RF. Such unresolved cases often eventually settle or get withdrawn prior to arbitration, as a result of discussions that began in the RF process. The resolution facilitation process can also help parties settle or narrow some issues, streamlining those cases for arbitration. Finally, Asselin cited the substantial intangible benefits of this process even when the cases don't settle, which include improving communication, generating mutual understanding, and repairing damaged relationships (Asselin 2016).

The sample set of cases that occurred prior to April 2006 is not large, but the overall settlement rate for all cases in that period was only 14 percent (six out of forty-two cases), and since the introduction in April 2006 of mandatory RFs and voluntary med/arb procedures, that overall settlement rate has more than tripled. Requiring people to participate in some form of mediation process appears to increase settlement rates significantly when compared to a purely voluntary mediation program.

The higher settlement rate for voluntary mediations noted above (70 percent versus 28 percent for mandatory RFs) suggests that the voluntariness of



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the process might be a major factor affecting settlement rates, but the literature that has examined this question is inconclusive. In a landmark study on this issue, Roselle Wissler concluded from empirical data in two studies that court-referred mediations can have slightly to significantly lower settlement rates than comparable voluntary mediations, but she acknowledged that several earlier empirical studies found no such impact (Wissler 1997).

During their annual retreats, SDRCC mediators have never identified lack of voluntariness as a significant factor preventing settlement. Inquiries of four of the busiest mediators at the SDRCC confirmed that lack of voluntariness was not a significant factor in their view.

As Tables One to Three show, pure mediation has the highest settlement rate, which is 94 percent. Med/arb is substantially lower at 55 percent, and resolution facilitation has the lowest settlement rate at 28 percent. The differences in settlement rate may reflect, and be caused in part by, different degrees of party optimism about the process and the likelihood of settlement. Parties more open to settlement and with a better opinion of mediation would presumably be more likely to voluntarily mediate and perhaps more likely to settle.

Parties may request pure mediation at the SDRCC without ever requesting an arbitration, and it seems likely that all parties proceeding by this route believe the issues are amenable to resolution (easier to resolve). Parties that request med/arb as their process may also see their issues as more amenable to resolution, although perhaps less so because they have specifically elected to arbitrate if the mediation fails. Parties that do not request a mediation at all and end up in a mandatory resolution facilitation are more likely to see their issues as difficult to resolve. The differences in party optimism for each process appear to correlate with observed settlement rates.

Parties forced to mediate may have more resistant attitudes to settlement, although, based on my own experience and that of most SDRCC mediators with whom I have spoken, overt resistance to discussing settlement is rare at the SDRCC. Parties may be dubious about the likelihood of settlement but are generally not opposed to trying to settle once they are in an RF.

Alternatively, actual differences arising from the difficulty of the issues in dispute may also be responsible for settlement rates differing for voluntary versus mandatory mediation processes. Table Four breaks down the results for all non-doping SDRCC cases up to August 1, 2016 by issue.

Team selection cases have significantly lower settlement rates, regardless of how they are handled, most likely because of their win/lose aspects—if there is only one spot on a team available, a resolution that satisfies all parties is more difficult to achieve. These SDRCC statistics suggest that the more difficult and more purely distributive (win/lose) the issue, the less likely it will be to settle without arbitration.

As Table Five shows, parties in team selection cases, which are the hardest to settle, went through mandatory RFs almost twice as often as they

**Table Four**  
**Results by Issue for SDRCC Cases through August 2016**

<b>Process</b>	<b>Result</b>	<b>Funding Cases</b>	<b>Selection Cases</b>	<b>Other Cases*</b>	<b>Total Cases</b>
No RF/med at all**	Arbitral award	6	50	26	82
	Settlement	8	12	8	28
	Percent settled	57	19	24	26
Mandatory RF	Arbitral award	15	41	24	80
	Settlement	13	12	6	31
	Percent settled	46	23	20	28
Voluntary mediation, med/arb, or RF***	Arbitral award	3	11	8	22
	Settlement	14	11	31	56
	Percent settled	82	50	80	72

\*Cases on eligibility, discipline, and other issues.

\*\*Includes significant number of cases that settle early before an RF is even appointed.

\*\*\*Although rare, an RF can be requested voluntarily.

**Table Five**  
**Proportion of Team Selection Cases in Each Process**

<b>Process</b>	<b>No RF/Med at All*</b>	<b>Mandatory RF</b>	<b>Voluntary Mediation, Med/Arb, or RF</b>
Percentage of cases that involve team selection	56	48	28

\*Includes significant number of cases that settle early before an RF is even appointed.

chose to voluntarily mediate. These data suggest that inherently difficult issues are more likely to go through the mandatory resolution facilitation process. Asselin (2016) told me that she is unaware of any team selection disputes in which the parties voluntarily chose to pursue a pure mediation process, although a number of team selection cases proceeded directly to med-arb. The remainder of the team selection disputes proceeded to

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arbitration following the mandatory RF process. Parties are much less likely to choose a voluntary facilitation process in cases with more difficult win/lose distributive issues like team selection. Such difficult cases tend to proceed toward pure arbitration, and since April 2006 would normally undergo a mandatory RF.

If proportionally more of the difficult cases go through the mandatory RF process, then this could also explain why the mandatory mediation process has a lower settlement rate than the voluntary mediation processes do. My analysis of the SDRCC data suggests that the difficulty of the issue being mediated has a significant impact both on parties' desire to choose mediation, and on settlement rates in cases mediated. While this does not directly contradict the role that voluntariness alone could play in settlement success, it certainly does complicate that explanation. The degree of voluntariness may merely be the indicator of a more significant underlying barrier to settlement, the difficulty of the issues.

Procedural characteristics may also explain why RFs lead to fewer settlements than do mediations and med/arbs. First, mediations are usually scheduled with more advance warning than RFs, allowing parties and the mediator to prepare more fully for settlement discussions. Mediations also tend to be scheduled for longer sessions or multiple sessions, although RFs *can* be extended if the parties and the mediator all agree and believe such an extension to be worthwhile. In tight timeline cases, however, RFs may actually be conducted in even less than the normal three hours, and they are more likely than mediations to be scheduled with a tight timeline for a final decision by arbitration. Furthermore, when parties request mediation and med/arb, they may select their mediator from the SDRCC panel. Resolution facilitations, on the other hand, are normally mediated by panelists assigned by the SDRCC from the roster panel on a rotational basis. Who the mediator is, and his or her style and approach, may have a significant impact. All of these factors could contribute in some way to the difference in settlement rates between RFs and entirely voluntary mediation processes.

Based on the SDRCC data above, analysis of the procedural context, and feedback from mediators on the SDRCC panel, I argue that the most significant factors actively affecting settlement rates at the SDRCC are the nature of the issue mediated, the skills and approach of the mediator, and important procedural differences between the processes. Voluntariness of the process and optimism of the parties may also be a factor.

### ***Settlement Rates for Doping Cases***

For doping cases, RFs were first made available in 2008 on a voluntary basis. If the parties would like an RF, the SDRCC generally appoints a resolution facilitator shortly after the initial administrative conference. As shown in Table Six below, overall settlement rates for doping cases have not changed since RFs were introduced in 2008, holding steady at 73 percent.

Despite the unchanged settlement rate from the pre- to post-RF period, however, I suggest that other factors indicate that the use of RFs in doping

**Table Six**  
**Settlement Data for Anti-Doping Cases**

<b>Time Period</b>	<b>RF Occurred?</b>	<b>Result</b>	<b>No. of Cases</b>	<b>Percentage of Cases</b>	<b>Overall Percent Settlements</b>
Before doping RF existed	N/A	No hearing necessary	60	73	73
		Arbitral award	22	27	
		Total	82	100	
After doping RF instituted	No*	No hearing necessary	77	85	73
		Arbitral award	14	15	
		Total	91	100	
	Yes	No hearing necessary	43	59	
		Arbitral award	30	41	
		Total	73	100	

\*Approximately one fifth of anti-doping cases that don't go through an RF involve an athlete who has elected not to go through an RF, and, in most of those cases, the athlete is represented by experienced sports law counsel (Asselin 2016).

cases is nonetheless having a positive impact. Since 2008, the relative proportion of less serious cannabis cases coming to the SDRCC has decreased, while the strictness of anti-doping sanctions has increased due to changes in anti-doping codes. Furthermore, experienced sports law representation has increased significantly in the post-2008 period, and represented parties tend to resist doping allegations more vigorously. As a result, post-2008 doping cases, overall, have been harder to resolve than pre-2008 cases, because the case issues are more challenging and represented parties tend to be more resistant to settlement (Asselin 2016).

Given the increased challenges of settling doping allegations in the post-2008 period, a drop in settlement rates would be expected. The absence of a drop could plausibly be attributed to the use of the doping RF. Mediators, SDRCC staff, athletes, athlete representatives, and CCES representatives have all reported at retreats and conferences that they believe the doping RF has generally improved levels of communication, comfort, and understanding of the issues, particularly for athletes.

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The data for cases that settle without an RF occurring provide a rough estimation of how many doping cases settle very early. As shown in the bottom rows of Table Six, the post-2008 data can be broken down into cases that did or did not have an RF. A significant majority of anti-doping cases that do not go through an RF close before an RF can even be requested, within days of filing, by the administrative conference or sooner. In such cases, the athlete (1) accepts the proposed CCES sanction; (2) formally waives the right to a hearing; or (3) fails to dispute the violation or participate in the SDRCC process, leading to a deemed admission of violation and waiver of a hearing (Asselin 2016). Seventy-seven out of one hundred-sixty-four total anti-doping cases in that period settled without arbitration or resolution facilitation. The vast majority of those seventy-seven cases settled within days of filing, by the administrative conference or sooner (Asselin 2016). Therefore, approximately 40 percent of doping cases appear to settle within days of notification of a violation, without any mediator or arbitrator intervention at all.

Given the many challenges of high-performance sports disputes, which I describe in detail in the next section of this article, the degree of conventional mediation success (i.e., settlement rates) in these sports cases is quite high overall. As I noted earlier, mediation may also generate intangible benefits beyond settlement by improving understanding and relationships and streamlining issues (Hann et al. 2001; Asselin 2016). When the parties voluntarily requested mediation, the settlement rates were extremely high indeed, in excess of 90 percent. Since the SDRCC began, 46 percent of all cases undergoing some form of mediation, whether voluntary or not, have settled. Interestingly, the international Court of Arbitration for Sport has a similar overall mediation settlement rate of approximately 50 percent over a wide range of case types (Mavromati 2015: 24–25).

## **The Challenges of High-Performance Sports Disputes**

Sports disputes at the SDRCC raise fascinating practical and theoretical challenges for mediators. Although some of these challenges crop up in other contexts, rarely do they arise in such potent combinations. Some challenges are issue-based, such as the win/lose and high stakes nature of the issues involved in the conflict, and the rigid rules of the relevant governing organizations. Others arise from the nature of the people involved, specifically their highly competitive orientations. Process challenges include urgency, the involvement of multiple parties, and the geographic range of the parties. The presence of parties unrepresented by legal counsel and parties who are minors create further difficulties. Finally, the policy challenges generated by inflexible sporting rules and public policy mandates may tie the hands of both parties and mediators.

### ***Win/Lose Context***

Many SDRCC disputes present as distributive issues that have stark win/lose outcomes with a fixed pie, at least when viewed through a rights-based lens.

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There may only be one spot on a team, so putting Athlete A in that spot means Athlete B is out. The same is true of competition for funding. Each NSO receives a fixed number of cards from Sport Canada, and cannot request more when a dispute arises, so if Athlete A wins the card at arbitration, another athlete loses that card and its benefits.

### ***Competitive Parties***

Parties in sports disputes are often competitive people. Athletes rarely reach the heights of national and international sport without having strongly competitive personalities. And most NSO boards of directors are heavily populated by former high-performance athletes and coaches who now volunteer their time and effort to the sports they love. Also, sporting circles can often seem small (even “incestuous”). These factors often combine to create a volatile mix.

### ***High Stakes***

For many HPS issues, the stakes are incredibly high. An athlete may train for ten to thirty years and get only one shot at the Olympics. Simple NSO decisions, such as dropping them from pre-Olympic qualifying events or denying their funding, can deny athletes their dreams. Increasingly, those dreams have major financial prizes attached in the form of endorsements, bonuses, and lifelong opportunities. Emotions run high on all sides, but particularly for the affected athletes and their families.

### ***Urgency***

Many HPS decisions are extremely time sensitive. National sports organizations often face tight fixed deadlines to comply with the requirements of international sports organizations and the organizers of international games or tournaments, such as the International Olympic Committee (IOC). In some cases, national team rosters are only announced a few days before the team departs for the event or before the international deadline for submitting the team list. Even several days of delay can render the issue moot: the event is over, or the external deadline has been missed. Further, every hour that the clock ticks is an hour that an athlete’s planning is on hold and her or his mental preparation declines, a factor that concerns not only the complainant athlete, but any athlete or team potentially affected by the decision in the case.

### ***Multiple Parties***

Sports disputes often involve more than two interested parties. A typical team selection dispute, for example, involves the NSO, which typically has a large board of directors that must approve any decision; a complainant athlete; one or more affected athletes (e.g., the initially selected athletes who might be displaced); athlete representatives such as personal coaches, relatives, and/or lawyers; and other potential stakeholders such as national team coaches. In one case involving a challenge to selection criteria, more than one hundred affected athletes had to be notified and provided an opportunity to intervene on the issues, all while a

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time-sensitive decision loomed ever closer. The SDRCC convened and facilitated a virtual town hall to bring them all quickly into the process.

***Geographic Spread***

Unfortunately, many parties to HPS disputes are spread across the country or the world in a variety of time zones, attending competitions, training camps, and so forth. Simply convening the necessary people on a conference call requires enormous effort, particularly when timelines are tight. Face-to-face sessions would be extremely difficult and costly to convene.

***Rigid External Criteria***

Many disputes are governed by the rigid external criteria of governing organizations beyond the control even of the NSO in question, and arguably beyond the effective reach of a single nation's court system. In a team selection case, for example, the number of athletes allowed on the team may be rigidly fixed by criteria externally imposed by an international foundation such as the International Association of Athletics Federations, or by an international multi-sport organization like the International Olympic Committee (IOC). A country's allotment of Olympic figure skating spots, for example, is dependent on criteria set by the International Skating Union and the IOC. The national sports organization cannot change those criteria. Similarly, in funding disputes, Sport Canada sets the number of cards for the NSO each year, and that number cannot be increased. Even a redistribution of existing cards requires Sport Canada approval. In doping allegation cases, the national anti-doping code *must* be applied.<sup>10</sup>

***Unrepresented Parties***

Many parties, particularly athletes, are not represented by legal counsel, and significant rights-based elements arise in these disputes at arbitration. The introduction of a roster of *pro bono* counsel several years ago, both by the SDRCC and the CAS, has helped tremendously, but cases still arise in which athletes or federations are unrepresented. Unrepresented parties may not fully understand their best alternative to a negotiated agreement (BATNA) and can take unrealistic positions as a result. Power imbalances may also arise.

***Non-Negotiable Issues***

Some cases raise non-negotiable issues. For example, the prosecuting party in anti-doping cases, which in Canada is the Canadian Centre for Ethics in Sports, has a strong public policy mandate to enforce the requirements in the Canadian Anti-Doping Program. Consequently, the CCES has taken the position that it cannot negotiate sanctions or plea bargain based on counterarguments by the accused. Effectively, the CCES will only settle if the athlete accepts the initially proposed finding and sanctions. As a result, anti-doping RFs are in effect facilitated information-sharing sessions designed to clarify questions, facts, and issues; they are not settlement negotiations. In funding cases, the number of cards issued to the NSO by Sport Canada is fixed. In team selection, the number

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of available spots on a team may be fixed and immutable, set by an external organization. The pie may not be expandable in such cases.

### ***Jurisdictional Issues***

In SDRCC sports cases, who has jurisdiction to mediate a case is not always obvious. Only parties authorized by the Canadian Sport Dispute Resolution Code can access the SDRCC's services. Further, unless the parties have mutually agreed to mediate, they can challenge the jurisdiction of the mediator and the SDRCC itself. For example, an NSO may argue that the SDRCC has no jurisdiction over a given dispute under its own rules and the code. Parties may argue that the NSO's own procedures have not been exhausted, or that there is no right of appeal from the NSO decision. When international parties are involved, the SDRCC may not have jurisdiction at all without the consent of the parties. Depending on the circumstances, the Court of Arbitration for Sport may have jurisdiction, but unlike the SDRCC, the CAS does not yet require parties to mediate as a standard step in sports disputes.<sup>11</sup>

## **Dynamics of Sports Disputes**

A number of factors, taken individually and as a package, make sports disputes somewhat different from other mediations in the commercial or legal world, and may affect how mediators work in these settings. Those factors include the challenges listed above, but also some particular dynamics of sports mediations described below.

### ***The Desire to Avoid Harm***

In the experience of SDRCC mediators, parties in the sports world generally don't want to harm one another or their sport, whether they be athletes, coaches, NSO officials, or even family members. In fact, they usually want to actively avoid causing harm to their colleagues if at all possible. Athletes don't want to hurt team members. Federations don't want rifts with or among their marquee athletes. These concerns can galvanize them to work intensely to find mutually agreeable solutions.

### ***Shared Goals***

In many sports disputes, parties' shared goals represent a resource that skilled mediators can exploit. These goals can unite parties as allies in developing solutions, and mediators can also evoke them to create affinities and empathy and repair relationships. In one dispute, a key shared goal of each athlete was to get as much income as possible so neither would need a part-time job, allowing them to focus purely on their training in an Olympic year. Not only did that goal form the focus of a productive brainstorming session, it created a bond between the athletes as they reminisced about their days scraping by in menial after-school jobs.



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### ***The Sports Family***

Another particular dynamic that sports mediators can enlist is the parties' ephemeral feeling that there is a "sports family." Parties often have deep loyalty to members of their sport, including team members, the team itself, coaches, the federation, and the sport as a whole. Concern about damaging that extended family with rifts or bad publicity can motivate athletes and other parties to make concerted efforts to find solutions. That concern also creates openness to options that might otherwise seem unthinkable, potentially breaking the deadlock in such win-lose disputes as team selection.

Canadian athlete Gilmore Junio demonstrated the significance of sport kinship during the 2014 Winter Olympics in Sochi, Russia. Junio was the qualified and uncontested Canadian representative in the men's one thousand meter speed skating race, but without even being asked he gave up his spot to teammate Denny Morrison, a higher ranked athlete who had fallen during the Canadian qualifying event. When asked why he gave up his spot, Junio told the *Globe and Mail* newspaper, "We wanted what was best for the team, what gave us the best chance to win. . . . He's a teammate, a friend, and that's his distance. I was the benefactor of unfortunate events at trials and this was the way to make it right" (Richer 2014). Morrison went on to win the silver medal for Canada.

### ***The Small World of Sports***

The small size of many sports communities can help or hurt in disputes. People are often closely connected, either by friendship, blood relation, or past experience. Board members, athletes, coaches, and their families may be interconnected in many ways. Board members of NSOs often have ties to individual athletes, coaches, or teams, because they have risen through the sporting ranks themselves or have children actively competing in the sport. On the plus side, positive relationships can be used to build bridges and to motivate parties not to burn them. On the challenges side, bad blood between parties can make an issue much harder to unravel.

### ***The Suspicion of Politics***

Many complainants are suspicious that decisions against them have been politically motivated. Suspicion of negative bias against them, or of favoritism toward other athletes is quite common because of the small-world dynamic of sports. Some NSOs are tight-lipped and defensive about their initial decisions when challenged, which can exacerbate such suspicions.

### ***Potentially Public Issues***

Given the high profile of many HPS disputants, some aspect of the dispute may be made public, perhaps even as front page news. As a result, parties may act in ways designed to save face and may feel locked into defending their reputations. Fear of damage to the reputations of the individuals or sport federation involved could also incentivize parties to resolve issues through a

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confidential mediation rather than risk a publicly reported arbitration or court case.

## **Case Studies**

The following case studies illustrate some key best practices and dynamics of HPS sports mediation, broken down by issue, drawing on my own experiences as an SDRCC mediator and those of my SDRCC colleagues.<sup>12</sup>

### ***Funding Dispute***

Athlete B filed a complaint claiming that he/she should have received a Sport Canada card that had been assigned by the NSO to Athlete A, alleging that the carding selection criteria had been unfair and/or was improperly applied. The parties scheduled the arbitration for several weeks following the date of the first RF session, which was limited to ninety minutes because of the parties' busy schedules. One athlete had already won an arbitration at the NSO level and felt confident of success at the next level, making a resolution more difficult. Prior to the RF, both parties told me that a mediated resolution was unlikely, although they were each willing to see if it was possible.

The earlier NSO arbitration had polarized each party into a rights-based stance, and both parties expressed the feeling that the arbitration had been a fight to prove who was the better or the more deserving athlete. The arbitration arguments damaged their relationship and left at least Athlete B feeling disrespected not only by the other athlete but by the NSO, which had sided with Athlete A.

To deal with this concern, I emphasized at the beginning that the goal was not to prove who was the better athlete, but to see if the parties could find a solution to the problem that would work for everyone in light of their goals. Further, even if they went to arbitration, the question would not be who was the better athlete, but "Were the criteria fair?" and "If so, which athlete met the NSO's selection criteria?"

This case illustrates the power of brainstorming solutions with parties. Although the first session was only ninety minutes long, by the end of it we had identified common goals for the athletes and had developed a range of attractive options. The primary identified goals included: (1) having an income stream to let the athletes maximize their time for training so they could reach for the next level in their sport and (2) defraying tuition costs to reduce the need for a part-time job. Although receiving the card conferred prestige, other benefits from the card were higher priorities for both athletes. One of these athletes also wanted access to better and higher level coaching.

In joint and private-caucus brainstorming sessions with me, the athletes and representatives of the NSO generated a suite of options that more than doubled the funding pool available to the athletes. The parties were extremely creative in finding ways to maximize the value of that pool of funds. For example, they realized that one athlete had higher tuition fees than

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the other, so the monetary value of the card's tuition remission would be greater if the athlete with the higher tuition received it. Also, event-related funding was available to one party but not the other, but only if that athlete did not have a card. The NSO assisted by nominating both of the athletes on an expedited basis for several streams of funding for which they might not otherwise have been eligible.

In the end, the parties equitably split a "pie" more than double the size of the original one in dispute. The resolution on the table was worth more to each athlete than an arbitration win would have been, and without the significant negative impact on relationships. The parties settled. By assisting with the resolution, the NSO helped rebuild a relationship with a star athlete that it genuinely wanted to support and demonstrated loyalty to the athletes with action, not just words. Interestingly, had the parties not been required to mediate under the SDRCC RF rules, they would likely not have chosen to do so themselves, and an opportunity would have been lost.

What are the best practice lessons of this mediation? Brainstorming solutions can work. It's important to focus on the underlying problem, which in this case was a lack of funding, not deciding which athlete was better. If possible, the mediator should help the parties avoid seeing and treating each other as adversaries.

### ***Team Selection Disputes***

In another RF mediated by a colleague, the two athletes vying for the spot on a team could not agree on who should get the one spot available, but they did agree to take back party control of that decision by creating a process-based settlement. Rather than sending the issue forward to arbitration and letting their representatives duke it out legally, they agreed to settle the matter themselves with an actual athletic competition. The federation and the athletes agreed that the winner of the event would make the team. This solution did not diminish the win/lose aspect of this dispute: there would still be only one winner, but the playoff resolution gave the athletes a greater sense of control over their own fate and left them feeling less dependent on the whims of a third party, the arbitrator.

Like the previous case, this one exemplifies the benefits of brainstorming and creativity. It also underscores the benefits of enhancing parties' sense that they control the process and the resolution. When agreement on a solution may not be possible, parties might be able to agree on a process that can move them toward resolution.

Another team selection case had an external midnight deadline, with an SDRCC arbitration scheduled to begin three hours after the RF began. That arbitration would have resulted in a win/lose decision. One of the athletes would have been left off the roster for a particular event. I asked the parties at the beginning to set aside the rights-based arguments, save them for the arbitration, and instead focus purely on attempting to identify a way to solve

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their problem. I asked each party to identify his key goals, and a single major common goal emerged: to maximize the participation of all affected athletes, and to leave no athlete at home, *if at all possible*. This shared goal became the key target for a three-stage, one-hour-long brainstorming session: generate the ideas, evaluate the ideas, and finally determine what parties could commit to.

The parties suggested such ideas as revisiting the selection criteria, taking both athletes to the games, having one athlete pay his own way to the competition, having one athlete attend with full participation rights in all events (team and individual) while the other athlete attended but only participated in team events, applying the selection criteria in different ways, and so on. In this competition, some events involved athletes competing individually on their own behalf as representatives of the national team, whereas others were team (group) events, with athletes competing as part of the national team's squad as a whole (as in gymnastics, for example). The parties reviewed the list of ideas, evaluating each one for how well it satisfied their interests and for its feasibility. Some options failed to address the goals or concerns of one or more parties, while others were strictly win/lose options because they would have left one of the athletes off the team for these games entirely. Some of the options that were acceptable to all parties were not feasible because of external constraints on team composition.

After thoroughly evaluating the options for thirty minutes, one plan emerged that would enable all the athletes to attend the competition. This plan was not a perfect solution for all parties. Both athletes would participate in the competition, with one particular athlete competing in both the individual and team events, whereas the other athlete would participate only in team events, not in individual events as he desired. Nevertheless, *only* this one route viably allowed all athletes to participate, so even the disadvantaged athlete and his representatives agreed to that solution. They wanted that athlete to participate in some form at the competition, and an arbitration decision might have gone against him. If either were to win at arbitration, it would have forced the other athlete to stay behind, which ran counter to their goals. No other option allowed both athletes to attend these games.

In this case, all parties agreed to a mutually satisfactory solution that met everyone's primary stated goal through a process that cleared up misconceptions and promoted cooperation. The team avoided the win/lose result of an arbitration, and prevented lasting acrimony.

Mediation added value in this dispute by giving the parties an opportunity to learn each other's perspectives and hear their explanations of key actions taken. In this RF, the NSO was represented by six of its board members, whose participation was critical in unifying all parties. They displayed sincerity and genuineness, which helped to alleviate the athletes' initial suspicions toward them. For the first time, athletes heard about the board's behind-the-scenes efforts to get *all* of the athletes to the games. That information established a tone of good faith for which the athletes expressed

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appreciation. And the federation's clear explanations of the complex array of national and international selection criteria helped the parties understand why some options were simply not feasible. That sharing allowed parties to agree on the only option that met their primary stated goal, and to regain some mutual respect.

This was yet another dispute in which brainstorming and the identification of common goals were critical best mediation practices. In this case, the sharing of perspectives and background information was also critical in helping the parties understand not only each other's perspectives but the full range of realistic and feasible options available to them.

### ***Doping Allegations***

Doping RFs primarily serve an information-sharing function and are neither typical settlement-focused mediations nor merely procedural pre-arbitration hearings. Like many other disciplinary bodies, the Canada Centre for Ethics in Sport has a strong public policy mandate to uphold, so its leadership was unwilling to participate in traditional settlement-focused mediations. Given the strict policies in the CADP and the World Anti-Doping Code, the CCES was not prepared to plea bargain sanctions, but was willing to engage in an information-sharing procedure to generate better understanding of the facts and issues in each case (Lech 2016).

Initially, even SDRCC mediators wondered if such a non-settlement-focused process had value, but the doping RF has been useful, according to what facilitators, CCES representatives, parties, and their representatives have stated at SDRCC retreats and during RFs, and in personal discussions with me. The doping RF began tentatively in 2008 as a pilot program limited to some cases, then a pilot applicable to all cases. Based on that experience, it has now been enthusiastically expanded by the CCES to be a standard process available in any doping case. For the CCES, the benefits of doping RFs include streamlined waivers of hearings, improved cost effectiveness, higher comfort for responding parties with the procedure and the CCES, the ability to learn new information that assists or changes the CCES analysis and investigations, and the narrowing of issues for arbitrations that do proceed (Lech 2016).

Doping RFs are confidential, so athletes are advised that the information shared during the RF is privileged and cannot be brought up at an arbitration or later proceeding, although parties are aware that the CCES representative in attendance will remember what is said.

In one typical anti-doping case, an athlete had tested positive for the presence of cannabis, a prohibited substance, and was notified by the CCES of the adverse finding, an alleged violation of the CADP. A doping resolution facilitation lasts about one hour but can be extended or continued if desired. During this RF, I began by explaining the process and its purpose, clarifying that the RF was not a settlement discussion but an information sharing session. Then the CCES representative reviewed the allegations, the underlying facts,

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the relevant procedures, and the likely next steps in the arbitration process. The representative explained the legal tests to be decided by the arbitrator, as well as the burden of proof. As the facilitator, I supplemented and clarified the information as needed to ensure it was a balanced description. The athlete and his representative asked questions about the process and the athlete's options, receiving clarification from both the CCES and from me. We pointed them to the relevant rules and cases for guidance.

The athlete was invited to share his perspective, and elected to speak freely about the circumstances leading to the adverse finding, acknowledging that he had used marijuana. When I probed for his goals, he was less interested in contesting the finding than in clarifying the consequences of accepting the proposed sanction. Would it interfere with his long-term ability to compete or to coach? What restrictions would he face with regard to competition, training, and associating with the sport and his team? How long would a ban last? When would it start and end?

We discussed possible routes under the anti-doping rules to minimize the duration and optimize the timing of any sanction (such as cooperating with the CCES in relation to other doping violations). We addressed the primary issues and concerns on both sides through a facilitated dialogue.

Plea bargains are not possible, but the athlete can settle an anti-doping case by accepting the sanction and waiving his or her right to an arbitration hearing, either at the RF or shortly after. The CCES sometimes learns new information that could warrant a revision of its proposed sanction if the information is verified, but no revision was applicable in this case.

I pointed out restrictions he needed to be aware of, and we discussed the timing that would apply if he accepted a sanction or if he went to arbitration. If he accepted the suspension, it would start on that date, whereas if he went to arbitration it would only start on the date of the decision. In his case, he preferred to have it start sooner, so that he could compete in certain future events. A delayed suspension would have barred him from those events.

After his questions were answered, he asked for time to think over his options before making a decision about waiving the hearing and accepting the sanction. The CCES representative explained the process for doing so.

I adjourned the RF after summarizing the next steps. Both the athlete and his representative expressed strong appreciation for the opportunity to clear the air and have their questions answered, especially about the future consequences. Within a week of the RF, the matter was resolved by a formal waiver and the case was closed.

As a best practice, the facilitator should encourage greater understanding of the doping disciplinary process, rules, issues, options, and constraints. Parties can hear the case against them and clarify their next steps, with a neutral voice to balance the views of the prosecuting body. While plea bargaining is not possible, the parties can explore areas in which there may be flexibility, for example, on the question of when a suspension starts. Reviewing how to avoid

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further negative sanctions is useful to parties. An RF also gives athletes input, even if not control, over the mandatory public announcement of their disciplinary sanctions.

In another anti-doping case, an athlete appealed a decision to the SDRCC. The original tribunal's written decision clearly indicated that the decision went against the athlete solely because her claim materials had not included enough relevant evidence on which to base a positive decision. During the RF, both the CCES and the athlete stated they just wanted the "right" decision to be made. Unfortunately, an SDRCC arbitrator would only have jurisdiction to consider whether the original tribunal's decision was "reasonable" in light of the earlier, inadequate evidence before it, not to conduct a fresh review of new evidence. I confirmed that both parties were open to the athlete making fresh submissions, with more complete and relevant evidence, to the underlying tribunal, if that was possible.

We adjourned the RF on consent for the CCES to clarify that the original tribunal could undertake a fresh review with the new, more complete evidence. Both parties stated that they would also seek clarification of what specific evidence the tribunal required and the athlete would compile that information. In a second RF, several days later, the CCES confirmed that such a fresh application was possible, and we came to an administrative resolution that would close this case, allowing the athlete to re-file a properly documented claim with the underlying tribunal.

This case highlights the importance of looking beyond narrow legal issues to focus on the practical issues and the parties' goals. It also underscores how helpful it can be to apply a creative solution to procedural issues as well as substantive ones.

### ***Other HPS Disputes***

A dispute arose between a group of national team members and their NSO over a variety of NSO policies and procedures that the athletes felt were unfair or inappropriate, including the NSO's own dispute resolution procedures. A fractious attempt to raise the matters internally failed, leaving the athletes polarized against the NSO board. The matter ultimately came to mediation.

Relationships among the parties, who had an adversarial history, were highly strained. In pre-mediation caucuses, each party explored its goals and relationships with the other party. The parties all recognized that, although they felt wronged, they needed and wanted to have good relations with the other side going forward. The athletes acknowledged that the NSO had significant impact on their sports careers, and the NSO acknowledged that a failure to repair its relationship with athletes on its marquee national team could generate stress for years to come.

With those realizations in mind, both sides agreed before the first joint session to focus on the future and their common goal to implement fair processes and procedures and have a better working relationship. The parties

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maintained that focus over several mediation sessions to arrive ultimately at a mutually agreeable set of policies and procedures.

As part of their effort to create new, fairer and more objective standards, the parties also consulted objective, outside sources (comparable or model policies from other organizations, and mutually respected experts) (Fisher, Ury, and Patton 1991; Godin 2009). The parties used those external comparables as a starting point for discussions and to define rational parameters, rather than just arguing about the language of a proposed clause. The use of these outside standards helped minimize positional arguments, even on contentious points. Mediating over multiple sessions and giving the parties time in between for research and analysis helped to minimize unproductive debate and crystallize agreeable solutions.

Some specific practices that helped resolve this dispute successfully included managing relationship issues early in the process; using a pre-mediation caucus to defuse antagonism and clarify relationships, consequences, and alternatives; helping parties identify common goals and focus on the future; and using objective criteria. In this case, mediating over multiple sessions was particularly helpful: it gave parties time to research and analyze the outside objective sources that proved useful in developing new, better policies.

## **Lessons from the SDRCC Program**

Over the first thirteen years of its operation, the SDRCC has demonstrated a commitment to the ongoing education of its mediators and arbitrators. A yearly retreat of the SDRCC roster of mediators has helped disseminate knowledge and lessons learned among the panelists to help improve SDRCC processes, foster a consistent but flexible approach to issues, generate useful tools, and further develop the panel's knowledge of national and international developments in sports ADR.

In these retreat discussions, SDRCC mediators have identified a number of best practices for mediating HPS disputes, some of which I described in the case analyses above. In addition, these retreats have enabled mediators to hear direct feedback from athletes, federation members, and sports lawyers about their own experiences with the SDRCC process.

A key conclusion from the SDRCC experience is that mediation and facilitation can work in high-performance sports disputes, whether disciplinary or non-disciplinary, whether voluntary or not. In non-doping cases, settlement rates have averaged 46 percent, from a low of 28 percent for mandatory resolution facilitations to a high of 94 percent when mediation was voluntarily requested on consent. Some of the difference in settlement rates appears connected to differences between mandatory RFs and voluntary mediations in terms of the difficulty of the issues faced, mediator selection and approaches, and applicable procedures, although the voluntariness of the process itself may play some role.



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The importance of brainstorming stands out among the best practices identified at SDRCC retreats and also among the cases discussed in this article. Brainstorming helps parties identify their goals and concerns and can lead to the development of creative resolutions to the dispute. Even disciplinary cases may yield a broad range of mutually beneficial resolutions that could supplement the applicable disciplinary responses.

Mediation of HPS disputes can have less tangible benefits even when it does not achieve resolution. For example, information-sharing and problem-solving efforts can help improve relationships and develop greater understanding among the parties which can have positive impacts throughout the sport. Even in disciplinary cases in which options for mutually satisfactory outcomes are limited, mediation has had those broader benefits.

### **Conclusion: A Role for Mediation in Sports**

At the SDRCC, mediation has often helped achieve stable mutually satisfactory settlements in a timely cost-effective manner, although not all HPS disputes can be settled at mediation. Mediation has added value even when disputes have not settled during the mediation, by improving understanding and respect among the parties and increasing the likelihood of a later settlement prior to arbitration. The broader impact has been improved relationships and a more positive, satisfying environment for parties.

While most HPS jurisdictions around the world do not yet mediate disciplinary or anti-doping cases, the SDRCC experience suggests that facilitation of disciplinary matters has real value for all parties. Extending mediation efforts into disciplinary disputes, I argue, should be seriously considered at both national and international levels.

I also draw another conclusion from the unique SDRCC experience: making mediation a mandatory component of the dispute resolution process should be seriously considered. Admittedly, this challenges the view that all mediation must be voluntarily chosen by all parties. Mandatory mediation exposes many parties rapidly to the process of mediation and its benefits. Despite the many challenges inherent in sports disputes such as the often distributive win/lose nature of the issues, the SDRCC experience suggests that mandatory mediation can still produce relatively high settlement rates and also have positive impacts on disputes that don't settle. Although mandatory RFs have lower settlement rates than voluntary mediations, overall settlement rates have more than tripled, from fourteen to 46 percent, since the introduction of mandatory RFs and voluntary med/arb processes.

Mediation can be conducted inexpensively, effectively, and expeditiously over the phone, within minutes or hours of a dispute being filed. The SDRCC experience is that the more sports parties are exposed to mediation, the more comfortable they become with using mediation in the future.

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Creating new opportunities to use mediation in HPS disputes warrants strong consideration. For example, mediation services could be introduced for disputes at major international sporting events, such as the Olympics, the Commonwealth Games, and soccer's World Cup. Such services could be provided by the Court of Arbitration for Sport as an extension of the *ad hoc* arbitration services it already provides, or by such neutral international bodies as the International Olympic Committee or even by the site-specific games organizing committees. The mediation role could be carried out by mediators or by dedicated ombuds personnel with an even broader dispute resolution mandate.<sup>13</sup> Some time-sensitive and/or disciplinary disputes, such as doping violations, will not be as amenable to mediation in that context, but many conflicts/issues (team selection, contract issues, personal conduct issues, etc.) could benefit from effective expedited mediation at major games.

## NOTES

I would like to acknowledge the help, support and devotion of the SDRCC staff and board in advancing the use of ADR in sport. I thank Marie-Claude Asselin for supplying detailed data from the SDRCC experience as well as her excellent thoughts on this article. My fellow panellists at the SDRCC have graciously shared their tremendous knowledge, experience, and insights through the years, making all of us better and more thoughtful practitioners.

1. The new CAS Mediation Rules, in force September 1, 2013 and amended on January 1, 2016, can be found at [www.tas-cas.org/en/mediation/rules.html](http://www.tas-cas.org/en/mediation/rules.html). See also [www.sportresolutions.co.uk](http://www.sportresolutions.co.uk) (United Kingdom) and [www.sporttribunal.org.nz](http://www.sporttribunal.org.nz) (New Zealand) and [www.teamusa.org/Athlete-Resources/Athlete-Ombudsman](http://www.teamusa.org/Athlete-Resources/Athlete-Ombudsman) (U.S.A). The CAS sponsored the First CAS Conference on Mediation in Lausanne, Switzerland on May 16, 2014. The CAS has provisions for mediation, for mediation/arbitration (med/arb) procedures, and for conciliation during arbitrations.

2. A sample of funding disputes includes *Palmer v. Athletics Canada*, SDRCC 08-0080, and *Dufour-Lapointe v. Canadian Freestyle Ski Association*, SDRCC 07-0065, both available at [www.crdsc-sdrcc.ca/eng/search-decisions-en.action](http://www.crdsc-sdrcc.ca/eng/search-decisions-en.action).

3. Team selection disputes include *Poss v. Synchro Canada*, SDRCC 08-0068, and *Island et al. v. Equine Canada*, SDRCC 04-0008, both available at [www.crdsc-sdrcc.ca/eng/search-decisions-en.action](http://www.crdsc-sdrcc.ca/eng/search-decisions-en.action).

4. For example, see *Forrester v. Athletics Canada*, SDRCC 10-0117, and *Tramble v. Athletics Nova Scotia Canada Games Appeal Committee*, SDRCC 09-0110, both available at [www.crdsc-sdrcc.ca/eng/search-decisions-en.action](http://www.crdsc-sdrcc.ca/eng/search-decisions-en.action).

5. See the World Anti-Doping Code 2015 at [www.wada-ama.org/en/resources/the-code/world-anti-doping-code](http://www.wada-ama.org/en/resources/the-code/world-anti-doping-code). See also for example, *CCES v. Youssef*, SDRCC 15-0225, available at [www.crdsc-sdrcc.ca/eng/search-decisions-en.action](http://www.crdsc-sdrcc.ca/eng/search-decisions-en.action).

6. As examples of governance and rules disputes, see *Taekwondo Manitoba v. Taekwondo Canada*, SDRCC 13-0208, and *Baert v. CanoeKayak Canada*, SDRCC 13-0207, both available at [www.crdsc-sdrcc.ca/eng/search-decisions-en.action](http://www.crdsc-sdrcc.ca/eng/search-decisions-en.action).

7. The code is available at [www.crdsc-sdrcc.ca/eng/dispute-resolution-code](http://www.crdsc-sdrcc.ca/eng/dispute-resolution-code); effective April 1, 2015. The SDRCC mandate is statutorily created by the *Physical Activity and Sport Act*, S.C. 2003, c. 2.

8. In the United States, the U.S. Olympic Committee Athlete Ombudsman is often involved in informal mediations with the U.S. Anti-Doping Agency (USADA).

9. These resources are available at [www.crdsc-sdrcc.ca/eng/team-selection](http://www.crdsc-sdrcc.ca/eng/team-selection), [www.crdsc-sdrcc.ca/eng/carding](http://www.crdsc-sdrcc.ca/eng/carding), [www.crdsc-sdrcc.ca/eng/appeal-policies](http://www.crdsc-sdrcc.ca/eng/appeal-policies), and [//www.crdsc-sdrcc.ca/eng/dispute-resource-contract-templates](http://www.crdsc-sdrcc.ca/eng/dispute-resource-contract-templates).

10. The World Anti-Doping Code contains various mandatory provisions that a national anti-doping code *must* incorporate in order for that country to be deemed compliant by the World Anti-Doping Agency.

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11. See note 1 *supra*.

12. Descriptions in the case studies in this article have been kept as general as possible and where appropriate have been modified in minor non-essential ways to maintain the confidentiality of the parties involved, while still accurately conveying the experiences and best practices involved.

13. I credit Gord Peterson and John Ruger for promoting the concept of a neutral major games ombudsman during the SDRCC/CAS conference entitled *Pursuing Excellence in Sport Dispute Resolution* in February 2016. Marie-Claude Asselin of the SDRCC has advised me that a Canadian national-level sports ombuds role is now under discussion.

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