

SPORT BC

LEGAL ISSUES AND YOUR PROVINCIAL SPORT ORGANIZATION

May 26, 2011

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Strategy
Group

SOME OF OUR CLIENTS



FREESTYLE
SKI
ACROBATIQUE



Canadian Cycling Association
Association cycliste canadienne

CCES



CANADA

COACHES
of Canada



SYNCHRO
CANADA

EQUINE **CHIPPIQUE**
CANADA

SQUASH
CANADA



TRUE
SPORT
LIVES HERE



ONTARIO
BASKETBALL



—JEUX DU—
CANADA
—GAMES—



ONTARIO UNIVERSITY ATHLETICS
SPORTS UNIVERSITAIRES DE L'ONTARIO



SQUASH
ONTARIO



OVA
ONTARIO VOLLEYBALL



CANADA



SPORT CANADA



ONTARIO COLLEGES ATHLETIC ASSOCIATION
OCA
FOUNDED 1961



CABC
COACHES ASSOCIATION
OF BRITISH COLUMBIA



CCA
ACSC

Athletes**CAN**



RCGA
Royal Canadian Golf Association | Association Royale de Golf du Canada



PGA



SWIMMING/NATATION
CANADA

ABOUT ME...



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AGENDA

- 1. Negligence*
- 2. Risk Management*
- 3. Screening*
- 4. Directors and Officers Liability*
- 5. Complaints – Natural Justice*
- 6. Employee vs. Contractors*



NEGLIGENCE



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OUTLINE

Question 1 - *How does the law expect a coach to behave?*

Answer → negligence & liability

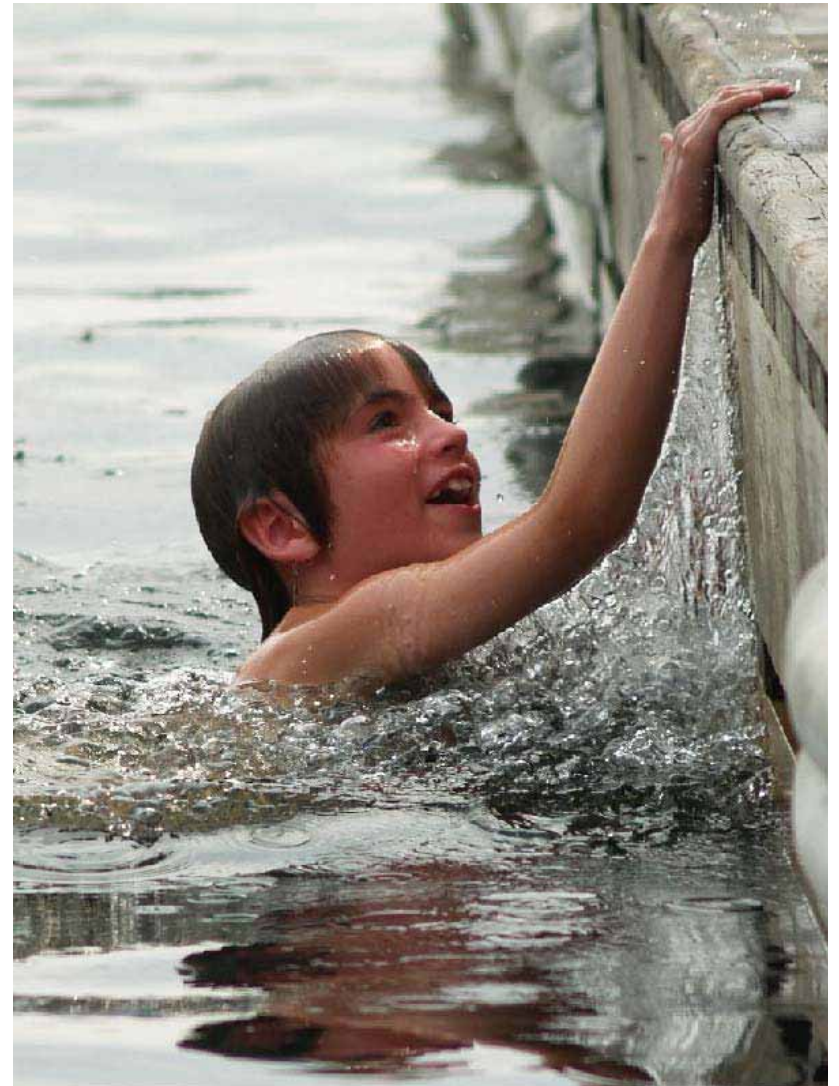
Question 2 - *Given what the law expects, how does a coach ensure that they behave appropriately?*

Answer → risk management

NEGLIGENCE/ACCIDENTS

Negligence occurs only when:

- **A Duty of Care is owed,**
- **The Standard of Care is breached,**
- **Harm or Loss occurs,**
- **The breach of the Standard causes or substantially contributes to the Harm or Loss**



DUTY OF CARE

A person owes a duty to anyone who they ought to know could be affected by his/her actions

COACHES → ATHLETES!

A duty arises by virtue of a “relationship” between two parties, and the coach-athlete relationship is clearly one which establishes a duty of care.

STANDARD OF CARE



- **Written/published standards**

- ✓ Equipment standards
- ✓ Organization policies & rules
- ✓ Facility rules
- ✓ Code of Conduct
- ✓ Coaching/teaching/leadership manuals

- **Unwritten/unpublished standards**

- ✓ New developments and Trends
- ✓ Network
- ✓ Pursue and Participate in Professional Development.

- **Case law**

- **Common sense**

- ✓ Intuition
- ✓ Knowledge
- ✓ Experience
- ✓ Gut

STANDARD OF CARE

*Behaviour is
not negligent*

Highest possible level of care
- risk is eliminated

*Behaviour is
negligent*

**Reasonable standard of care in the
circumstances** - risk is appropriately
managed

Failure to exercise any care
- risk is ignored

Myers v. Peel Country Board of Education (1981)

- ✓ Fifteen year old boy suffers broken neck while dismounting rings in a gymnastic class.
- ✓ Supervision of the rings by the teacher was impossible from the main floor.
- ✓ Defendant liable on two bases:
 - ✓ Failure to provide adequate matting
 - ✓ Failure to supervise

Myers Continued

- ✓ Standard of Care required of a coach is that of a careful or prudent parent.
- ✓ A prudent parent would not:
 - ✓ Use substandard mats when more protective mats available.
 - ✓ Permit a his/her child to practice dangerous maneuvers without adult supervision.

What we learned from *Myers*

- ✓ The potential for accidents will be reduced if the following four tests are met:
 1. Activity is suitable to the participant's age and condition (mental and physical);
 2. Participant is progressively trained to do activity properly;
 3. Equipment is adequate and suitably arranged; and
 4. The performance is properly supervised.

Hamstra v. BC Rugby Union (1989)

- ✓ Rendered quadriplegic when scrum collapsed.
- ✓ Sued coach for mismatching athletes playing the prop positions.
- ✓ Test for negligence is “whether [the coach] acted in accordance with the ordinary skill and care of a coach in similar circumstances.”

Hamstra Continued

- ✓ Written Standards
 - ✓ Court ruled coach acted in accordance with the Rules of the Game, safety regulations, and accompanying guidelines promoted by the sport's governing body.
- ✓ Unwritten Standards
 - ✓ Coach properly taught all players proper technique.

What we learn from *Hamstra*

- ✓ *Hamstra* disagreed with *Myers* decision.
- ✓ Standard of care is to act in accordance with the skill and care of a coach in similar circumstances and the laws of the game.
- ✓ Test requires the coach to:
 - ✓ Apply the laws of the game;
 - ✓ Act in accordance with the ordinary skill and care of a coach in similar circumstances.

Case Law Summary

- ✓ *Hamsta* establishes a lesser duty of care than the standard in *Myers*.
 - ✓ Coaches have an obligation to act within those parameters established by these two cases.
- ** Coaches should be prepared to act within the standard of a reasonable and careful parent, the higher standard of care established by the Supreme Court of Canada**

You Be the Judge!

Hussack v. School District No. 33 (Chilliwack), 2009

- Grade 7 Student was injured by a field hockey stick.
- Student had not attended school for the first few weeks of the field hockey unit.
- Student had a background in ice hockey and teacher felt for this reason the Student could participate.
- Teacher instructed student's not to stand behind a player taking a shot.
- Student was smacked in the face which led to a mental disorder.

HUMAN RIGHTS



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HUMAN RIGHTS LEGISLATION

BC Human Rights Code

Discrimination in accommodation, service and facility

Section 8

(1) A person must not, without a bona fide and reasonable justification,
(a) deny to a person or class of persons any accommodation, service or facility customarily available to the public, or

(b) discriminate against a person or class of persons regarding any accommodation, service or facility customarily available to the public because of the race, color, ancestry, place of origin, religion, marital status, family status, physical or mental disability, sex, sexual orientation or age of that person or class of persons.

LEGAL ANALYSIS

1. Is there differential treatment (discrimination)?
2. Is the discrimination based on a prohibited ground?
3. Is there justification?
4. Is reasonable accommodation possible?

GENERAL RULES

Distinguishing athletes on the basis of their skill level or athletic performance.

Risk Management



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EVOLUTION IN RISK MANAGEMENT

Traditional approach (1980s - 1990s)

*Preventing injury and liability
Avoiding legal issues and loss exposure*

Current Approach (Today)

To improve organizational performance: effective governance, efficient planning, relevant programs, safe, welcoming and rewarding environments

RISK MANAGEMENT 101

- ✓ **Identify risks** – ask, what are the things that can go wrong?
- ✓ **Measure and evaluate risks** – ask, what is the chance it will go wrong, what are the consequences if it does?
- ✓ **Control risks** – ask, what can I do about it?

IDENTIFY RISKS – obvious, foreseeable....



IDENTIFY RISKS – not obvious, not foreseeable....



IDENTIFY RISKS – foreseeable perhaps – but to this severity?



EVALUATE RISK

Minor: will have an impact on the achievement of the objective that can be dealt with through internal adjustments

Moderate: will have an impact on some aspect of the achievement of the objective that will require changes to strategy or program delivery

Serious: will significantly impact the achievement of the objective and the organization

Disastrous: will have a debilitating impact on the achievement of the objective and the organization

CONTROLLING THE RISK

- **Retain the risks** → you don't do anything because the risk is inherent in the sport
- **Reduce the risks** → you take steps to reduce the likelihood of occurrence, and/or the consequences, largely by changing human behavior
- **Transfer the risks** → you accept the level of risk but you transfer this risk to others through contracts (insurance, waivers, other business contracts)
- **Avoid the risks** → you decide simply to NOT do something

REMEMBER....

The law never expects perfection, it only expects reasonableness

Risk management is the same way - your risk management program is a reasonable mix of risk control measures suited to your organization's needs, circumstances and resources



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PARTICIPANT CHECKLIST

Participants

- Carefully monitor participants' skill levels and skill development
- Group your participants appropriately
- Demonstrate a “safety attitude” in all your interactions with participants
- Take every opportunity to advise your participants about risks -- verbally, during instruction, with signage

PERSONAL CHECKLIST

Facilities and Equipment

- Keep a written inventory of equipment, and develop a system to ensure all equipment is regularly inspected and repaired/replaced
- Develop your own routine for inspecting a facility prior to every practice or training session
- Document all deficiencies in writing and provide promptly to the facility owner/operator
- Ensure the facility has a phone or carry a cell phone with you at all times
- Know what instructions to give to emergency vehicles

SCREENING



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OBJECTIVES OF SCREENING

- ✓ Protect members/participants from harm
 - ✓ Physical
 - ✓ Emotional
 - ✓ Financial
- ✓ Protect organization from liability

GROWING CONSENSUS

Debate is not on whether we must screen (as it is widely accepted that we must) but on how it should be done, given the need to find a practical balance between the duty of an organization to provide a safe environment and the practical limits of what an organization can afford to do, or has time and resources to do.

SCREENING

- ✓ Deciding who should be screened
- ✓ Deciding what sort of record to obtain
- ✓ Deciding what offense you are screening for
- ✓ Deciding who looks at records and decides
- ✓ Deciding how often to collect a PRC
- ✓ Managing confidentiality and privacy
- ✓ The administrative burden of all of the above



Pre-Hiring Screening Tools

- ✓ Create Job Description
- ✓ Create application form
- ✓ 1st, 2nd or 3rd Interview
- ✓ Police Record Check
- ✓ Check References

Post-Hiring Screening Tools

- ✓ Orientation/Training
- ✓ Impose a Probationary Period
- ✓ Evaluations
- ✓ Follow up with participants and co-workers

TEN “SAFE STEPS” PROGRAM

- 1. Determine the risk**
- 2. Write a clear position description**
- 3. Establish a formal recruitment process**
- 4. Use an application form**
- 5. Conduct interviews**
- 6. Follow up on references**
- 7. Request a Police Records Check**
- 8. Conduct orientation and training sessions**
- 9. Supervise and evaluate**
- 10. Follow up with program participants**

CONCLUDING THOUGHTS

- ✓ Screening must find a balance between the individual's legitimate rights and the organization's legitimate need to protect clients, participants and the public
- ✓ There is a “sliding scale” of screening
- ✓ Screening is far more than police checks
- ✓ The process of screening is a process of managing risks
- ✓ Your screening procedures will be specific to your organization and circumstances

DIRECTORS



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WHAT IS A DIRECTOR?

- ✓ An individual who is a member of the governing board of an organization which manages the affairs of the organization
- ✓ Responsible for overseeing the operation of the organization on behalf of its members
- ✓ Section 24 (1) – Director may be elected or appointed
- ✓ A minimum of 3 directors (One of which must be resident of BC).
- ✓ Notice of a change of directors must be filed with the Registrar.
- ✓ If less than 3 members for more than 6 months, each director is personally liable for payment of debts of the society.

LEGAL DUTIES OF DIRECTORS

- ✓ **Diligence** → to act honestly, reasonably, prudently, in good faith and with a view to the best interests of the organization (Section 25 (1)) and as a reasonably prudent person.
- ✓ **Loyalty** → to not use one's position as a director to further private interests
- ✓ **Obedience** → to act within the governing bylaws and within the laws and rules that apply to the organization

Disclosure of Interests

Section 27 and 28:

- ✓ A director directly or indirectly interested in a contract or transaction must disclose fully the nature and extent of the interest to the Board.
- ✓ A director not disclosing will require the director to account to the society for any profits unless:
 - ✓ The director discloses the interest
 - ✓ After disclosure the contract is approved by the Board
 - ✓ The director abstains from voting on the approval

IN LAY PERSON'S TERMS ...

“A Board member agrees to undertake the legal and moral responsibility to perform their role as a Director at all times in the best interests of the organization, and to do so free from any conflict of interest or prospect of personal gain”

LIABILITY

- ✓ **Statute** → a law is broken. Consequence is fine, restrictions or jail
- ✓ **Contract** → a legally enforceable promise between 2 parties is breached. Consequence is performance or compensation
- ✓ **Tort** → act or failure to act, whether intentional or not, harms another. Consequence is compensation

INDEMNITY OF DIRECTORS

Indemnity - To restore someone to the same financial position as before

Section 30:

- ✓ A society may require a director to give a security sufficient for the faithful discharge of duties.
- ✓ A society may purchase liability insurance.
- ✓ A society may, with the approval of a court, indemnify a director against all legal costs and fees for settlement or judgment provided:
 - ✓ The director acted honestly and in good faith, in the best interests of the society.
 - ✓ Reasonable grounds to believe the conduct was lawful.

Protecting Yourself as a Director

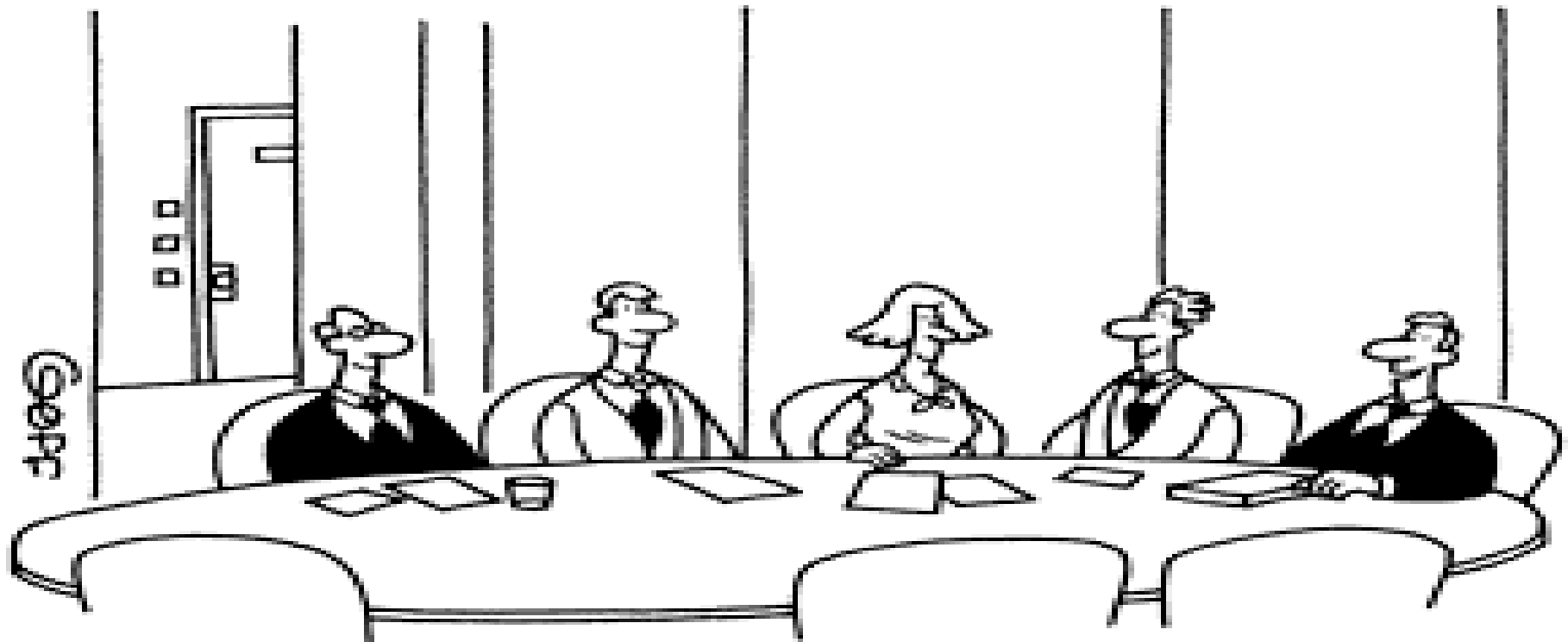
- ✓ Understand the mission of the organization.
- ✓ Commit to doing the job well.
- ✓ Ask for a written job description.
- ✓ Educate yourself about your legal duties.
- ✓ Ensure the board can govern effectively and provide competent direction.
- ✓ Confirm the organization indemnifies its directors and carries directors liability insurance.
- ✓ Disclose any real or perceived conflict of interests and ensure it is recorded in the meeting minutes.

Protecting Yourself as a Director

- ✓ Review regularly the financial reports and budgets.
- ✓ Know who is authorized to sign cheques.
- ✓ Ensure contracts entered into are reviewed.
- ✓ Have a copy of the organization's policy manual.
- ✓ Be familiar with the organization's constitution and bylaws.
- ✓ Support professional development.

Complaints





"We've decided to devote more people to ignoring the problem to make it go away faster."

OUR FOCUS.....

... Improving the effectiveness of internal hearings to resolve disputes about conduct, discipline, harassment, selection, eligibility, transfer, appeals and other issues

HOW CONFLICT BECOMES DISPUTE ...

Policies



none
contradictory
unclear
bad fit

Personalities



past history
miscommunication
lack of “people” skills
inherent bias

Lack of Knowledge



individual rights
dispute management
implementing policy
leadership

RE-EXAMINE CONFLICT

- Conflict should be viewed as a positive state
- Important change within organizations does not occur without conflict
- *“if we’re all thinking the same way, then we’re not thinking”*

A DISPUTE IS NOT STATIC

A dispute changes over time:

- Issues “mutate” and “multiply”
- Parties take positions
- Positions harden
- Trust dissolves

Thus timely intervention is key!!

GETTING AT THE UNDERLYING INTERESTS... (not positions)

- Independent perspective often required
- Exploratory approach (ask, listen, probe, reflect)
- Follow all clues, hunches and leads but don't be pushy
- Report and confirm back

WHEN YOU BECOME AWARE OF A DISPUTE ...

- Take the matter seriously
- Take action quickly ... and be seen to be taking action
- Be neutral
- Be confidential and discrete
- Define and focus the complaint
- Be forthright and transparent
- Be ***bold***....

DISPUTE RESOLUTION TECHNIQUES

NEGOTIATION -- a process where two parties in dispute work together without outside help to reach a mutually agreeable settlement

MEDIATION – a slightly more formal process than facilitation where an outside person brings the parties in a dispute together to understand and resolve their differences and find a mutually agreeable solution

INTERNAL HEARING – Parties present their dispute before an internal hearing panel or decision-maker

DISPUTE RESOLUTION TECHNIQUES

ARBITRATION -- a process where the parties refer their dispute to a knowledgeable, independent and external decision-maker to determine a settlement.

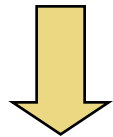
LITIGATION – Parties present their dispute to a judge in a court, who makes a decision. Must follow rules of court and requires the help of a lawyer

MANAGING YOUR DISPUTES

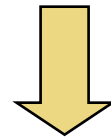
- 1. Prior planning** → ensure your governing policies are sound
- 2. Proper execution** → interpret and implement your governing policies properly
- 3. Appeals** → implement an appeals policy
- 4. Intervention** → consider the services of an outside hearing administrator, facilitator, mediator, arbitrator, consultant

DEALING WITH A COMPLAINT

- ✓ **STEP 1** - Receive complaint
- ✓ **STEP 2** - Investigation/fact-finding
- ✓ **STEP 3** - Clarify dispute
- ✓ **STEP 4** - Select options for resolution



Internal Hearing



Other D.R. Technique

INTERNAL HEARING

- 1) Procedural fairness
- 2) Format of hearing
- 3) Composition of Panel
- 4) Authority of Panel
- 5) Evidence
- 6) Decision

PROCEDURAL FAIRNESS

1. **Authority** - authority to make a decision has been delegated to the decision-maker
2. **Right to a hearing** - the person affected has a reasonable opportunity to present his case
3. **Rule against bias** - the decision-maker listens fairly to both sides to reach a decision untainted by bias

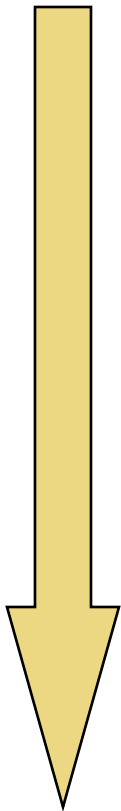
PROCEDURAL FAIRNESS

The content of “fairness” is not the same in every situation. It is a spectrum that depends on the seriousness of the sanction and the impact on the individual.

PROCEDURAL SAFEGUARDS

- Decisions to take away *rights already conferred* require greater safeguards than decisions to withhold *rights not yet granted*
- Safeguards should be in direct proportion to the *potential consequences* of the decision
- Safeguards will depend on the extent to which the decision is *final and binding*

FORMAT OF HEARING



- simple oral interview and response
- review of written documents
- review of documents, written arguments and conference call
- oral hearing in-person
- an oral hearing with formal, court-like procedures

IN-PERSON HEARING

- Usually the only reason to have an “in-person hearing” is to be able to assess the credibility of the person giving you evidence
- If evidence is not disputed, there is little reason to meet face-to-face

COMPOSITION OF PANEL

- Single decision-maker or panel?
- What skills/qualifications are required?
- Is there bias or prior involvement?
- Any evidence of a closed mind?
- Members v. non-members?
- Are lawyers required?

AUTHORITY OF PANEL

- To determine its own procedures
 - Settle procedural issues in advance
 - Abridge or extend timelines
- Render decision that is binding
- On an appeal, authority should not exceed that of original decision-maker

EVIDENCE

- Information that proves or disproves a fact, supports or contradicts an argument
- Not all information is evidence!
- Not all evidence is relevant!
- Not all evidence is good!

“ART” OF DECISION-MAKING

- Panel makes its decision based on **policy** and **evidence**
- Sift through all sources of evidence
- Use logic, good judgment, common sense
- Make decision based on what seems most probable, reasonable, right

FORMAT OF THE DECISION

1. Issue(s) to be decided
2. Background of the case
3. Statement of the facts
4. Written decision
5. Reasons for the decision

A GOOD DECISION ...

- Correctly interprets the governing policy or rule
- Sets out the correct legal test to be satisfied
- Describes the facts of the case based upon relevant evidence
- Justifies decision based on policy and facts
- Is written clearly so the reasoning process is transparent

Discipline Policies

- **Code of Conduct** -- a statement of the standard of behavior expected of members
- **Disciplinary Process** -- the mechanics of how to deal with a breach of a code of conduct
- **Harassment** -- essentially a discipline matter and best incorporated into code of conduct and discipline process

What should be in a Code of Conduct?

- A statement of the organization's values, beliefs and expectations of members and participants. This is usually a "positive" statement.
- The standard of behavior which is expected is further defined by giving examples of conduct which breaches that standard. This is usually a series of "negative" statements.

What should be in a Discipline Policy?

- Purpose
- Application
- Reporting an infraction/making a complaint
- Minor v. Major infractions
- Discipline Panel
- Preliminary meeting
- Hearing
- Decision as to whether there is a breach
- Sanctions in the event there is a breach
- Serious infractions and automatic sanctions
- Confidentiality
- Appeal

Appeal Policy

- What may be appealed and when?
- Grounds for appeal
- Who does what & when
- Scope of authority of decision-makers

GROUNDS FOR APPEAL

Procedural issues (*not* merit)

- No authority for decision
- Not following procedures
- Bias
- Grossly Unreasonable

CONCLUDING OBSERVATIONS

- Choose “appropriate” dispute management method
- Know when to seek help – and do it early
- Once a dispute goes “off the rails”, it is very hard to get it back on
- Keep ownership of your disputes

ONE PIECE OF ADVICE ...

When you receive a complaint ...

DO SOMETHING!

CONTRACTS



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What is a Contract?

- A Contract is:
 - A “deal” two or more parties have agreed to, are expected to abide by and be bound by their promises.
- Contracts may be formed orally or in writing.
- There is no single form of contract that can be used in every situation.

The Principles of Contract Offer and Acceptance – *Legal Principles*

- A valid contract requires:
 - A definite offer made,
 - A definite acceptance of that offer communicated, and
 - Consideration.
 - Contracts are valid only if the parties mutually promise to perform some act or undertake to perform some obligation for the other's benefit.
- It is important to remember:
 - A counter-offer is not an acceptance, and
 - Any change in an offer's terms on receipt of the offer is not an acceptance.

Proper Parties – *Legal Principle*

- **“Privity of contract.”**
 - This principle holds that only the parties to a contract will be bound by it.
- If an individual person or a legal entity does not enter the contract, it may be impossible to enforce the rights or obligations in the contract against that person or entity.

Privity Examples

COKE

- Coca-Cola Beverages Ltd.
- Coca-Cola Bottling Ltd.
- Coca-Cola Ltd.

Gatorade

- Manufactured by Quaker Oats, a division of PepsiCo. Trademark owned by STOKELY-VAN CAMP, INC.

Contract Length

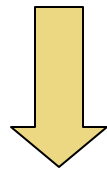
- Contracts should include a specific start date and end date.
- Length of term is usually a business decision rather than a legal decision.
- If a contract is for a set term, it will expire on the stated termination date.

Employment



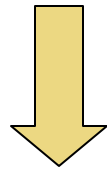
EMPLOYMENT RELATIONSHIP

- ✓ Employment Standards Legislation



(absolute minimums)

- ✓ Personnel policy of organization



(beyond the minimums)

- ✓ Individual employment contracts

(beyond the personnel policies)

EMPLOYMENT STANDARDS CODE

Overtime and Overtime Pay

- ✓ In each week, hours worked in excess of 8 per day must be totaled and the number of hours worked in excess of 40 per week are deemed overtime hours.
- ✓ An employer must pay an employee overtime pay at least 1.5 times the wage.

Overtime Agreements

- ✓ Employees and employers may enter into a written agreement re time in lieu of overtime (1.5 times).
 - ✓ Averaging Agreement must be in writing and signed.
 - ✓ Specify the number of weeks over which the agreement applies.
 - ✓ Specify the work schedule covered by the Agreement.
 - ✓ Specify a start date and end date.
- ✓ If the time off is not taken, the employer may pay the overtime.

Vacations and Vacation Pay

- ✓ 2 weeks' vacation with pay after 1-4 years of employment.
- ✓ 3 weeks' vacation with pay after 5 years of employment.

MANAGERS

Managers (supervisor or executive) are excluded from:

- ✓ Hours of work.
- ✓ Overtime
- ✓ Statutory Holiday Pay

Questions

- ✓ How much affect does the individual have on employment conditions for those who they supervise?
- ✓ What kind of responsibilities does the individual have with regard to resources even if there are certain checks.
- ✓ How much independence does the individual have using their own discretion. i.e. authorizing overtime, time off, work schedule, leave, hiring, budget, etc.

Termination of Employment – Employer (Without Cause)

Employers wishing to terminate to provide written notice or pay in lieu of notice:

- ✓ 1 week, if employed more than 3 months but less than 1 year
- ✓ 2 weeks, if employed 1 - 2 years
- ✓ 3 weeks, if employed 3 - 4 years
- ✓ 4 year or more: An amount equal to 3 weeks wages plus one additional week's wages for each additional year of employment to a maximum of 8 weeks wages.

Notice may be modified by:

- ✓ Personnel policy or Employment contract.
- ✓ Common law

(Availability of alternate employment, length of service, position with employer, age, salary, lack of good faith and fair dealing by the employer)

NO NOTICE REQUIRED

No Notice or pay in lieu of notice is required if:

- ✓ During first three months of employment
- ✓ Employee quits or retires
- ✓ Employment term is complete
- ✓ Cause - defined as “*willful misconduct or disobedience, or willful neglect of duty*”
 - ✓ Must issue warnings specific to termination
 - ✓ Must show progressive discipline and a paper trail
 - ✓ What is sufficient depends on the circumstances

JUST CAUSE

Examples of what may constitute just cause:

- ✓ Theft;
- ✓ Fraud and dishonesty;
- ✓ Assault or harassment of co-workers;
- ✓ Breach of duty;
- ✓ Serious willful misconduct;
- ✓ Conflict of interest, especially if it involves provable loss to the employer;
- ✓ Serious breach of company rules or practices;
- ✓ Chronic absenteeism or tardiness;
- ✓ Unsatisfactory performance.

CONSTRUCTIVE DISMISSAL

- ✓ Unilateral and fundamental change to the employment relationship (it must be “substantially altered”)
- ✓ Examples: less responsibility, significant change in duties, change in policy, new location of work, loss of status
- ✓ Notice is required if constructive dismissal is proven

ADVANTAGES FOR EMPLOYEE

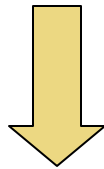
- ✓ Stable pay with no risk of loss
- ✓ Paid holidays, lieu days and sick pay
- ✓ Statutory protection (Employment Standards Act)
- ✓ Vicarious liability of employer
- ✓ Skills training
- ✓ Reasonable notice to terminate
- ✓ Tax deducted at source and submitted for you
- ✓ Pay into Employment Insurance scheme
- ✓ Employer contributes to EI, CPP
- ✓ Other employment benefits provided

DISADVANTAGES FOR EMPLOYER

- ✓ Expensive (about 20 percent higher due to statutory obligations)
- ✓ Less flexibility in staffing
- ✓ Vicarious liability
- ✓ Employer liability (termination, severance, other statutory requirements, administrative burden)
- ✓ Need to supervise/direct

CONTRACTOR RELATIONSHIP:

✓ The 'Contract'



✓ Contract law and language

Descriptors of a Contractor

- ✓ No deductions
- ✓ No statutory holidays
- ✓ No mention hours of work
- ✓ Chance of profit and some risk of a loss
- ✓ Works away from the employer's business.
- ✓ Incorporation
- ✓ No minimum notice of termination
- ✓ No job description
- ✓ Pay a "rental" for use of any employer's equipment
- ✓ Submit an invoice for payment each month
- ✓ Charge GST/HST
- ✓ No job title or a business card

EMPLOYEE or CONTRACTOR

- ✓ **Control test** (the worker's independence)
 - ✓ Is the person under the direction and control of another regarding the time, place, and way in which the work is done?
- ✓ **Integration test** (are worker's tasks integral to organization's day-to-day business)
- ✓ **Economic reality test** (control over work, ownership of tools, financial risk)
 - ✓ Does the person use tools, space, supplies and equipment owned by someone else?
 - ✓ Does the person have a chance of profit or lose if the cost of doing a job is more than the price charged for it?
- ✓ **Specific result test** (is work time-specific or ongoing)

EMPLOYEE or CONTRACTOR

No single test determines employment status, rather the tests are used in combination and are applied to the circumstances of each individual case. The purpose of the tests is to draw attention to the true nature of the relationship.



**Moose Jaw Kinsmen Flying
Fins v. Minister of National
Revenue**

Federal Court of Canada, 1988

FLYING FINNS ...

- ✓ Swimming instruction and training is integral to the business and the sole reason for the existence of the business
- ✓ Coach required to comply with bylaws and all rules
- ✓ Required to be available during the hours set by the Club
- ✓ Could be dismissed for misconduct
- ✓ Coach incurred no expenses, supplied no facilities, took no business risks

FLYING FINS ...

- ✓ Any financial gain or loss resulting from the Club's operations fell to the Club, not coach
- ✓ Certain degree of control was exercised by the Club
- ✓ Coach required to supply personal services to the Club – could not substitute the services of others for his own
- ✓ Canada Revenue Agency determined that the coach was an employee and not a contractor

EMPLOYEE v. CONTRACTOR DIFFERENCES

✓ **Liability**

- ✓ Employer is vicariously liable for employees and volunteers, while contractor is personally liable

✓ **Taxes, benefits, pensions**

- ✓ Employer deducts taxes and contributes to employment benefits, paid holidays, sick days, income security

✓ **Termination**

- ✓ Employer must give notice unless for cause, contractor typically requires no notice

THE PERILS OF GETTING IT WRONG

- ✓ Taxes have to be paid retroactively
- ✓ Employer and employee have to pay out EI and CPP contributions
- ✓ Employee must pay more taxes because of improperly-claimed expenses
- ✓ Directors may be personally liable
- ✓ Fines and penalties may be imposed on both employer and employee

WHICH DO YOU WANT

1. Employer perspective
2. Employee/contractor perspective

EMPLOYMENT CONTRACT

- ✓ Description of job duties
- ✓ Term of agreement
- ✓ Compensation, benefits, holidays
- ✓ Supervisory relationship
- ✓ Performance appraisal
- ✓ Termination and severance
- ✓ Confidentiality
- ✓ Link to personnel policies (if applicable)
- ✓ Proprietary Rights

CONTRACTOR AGREEMENT

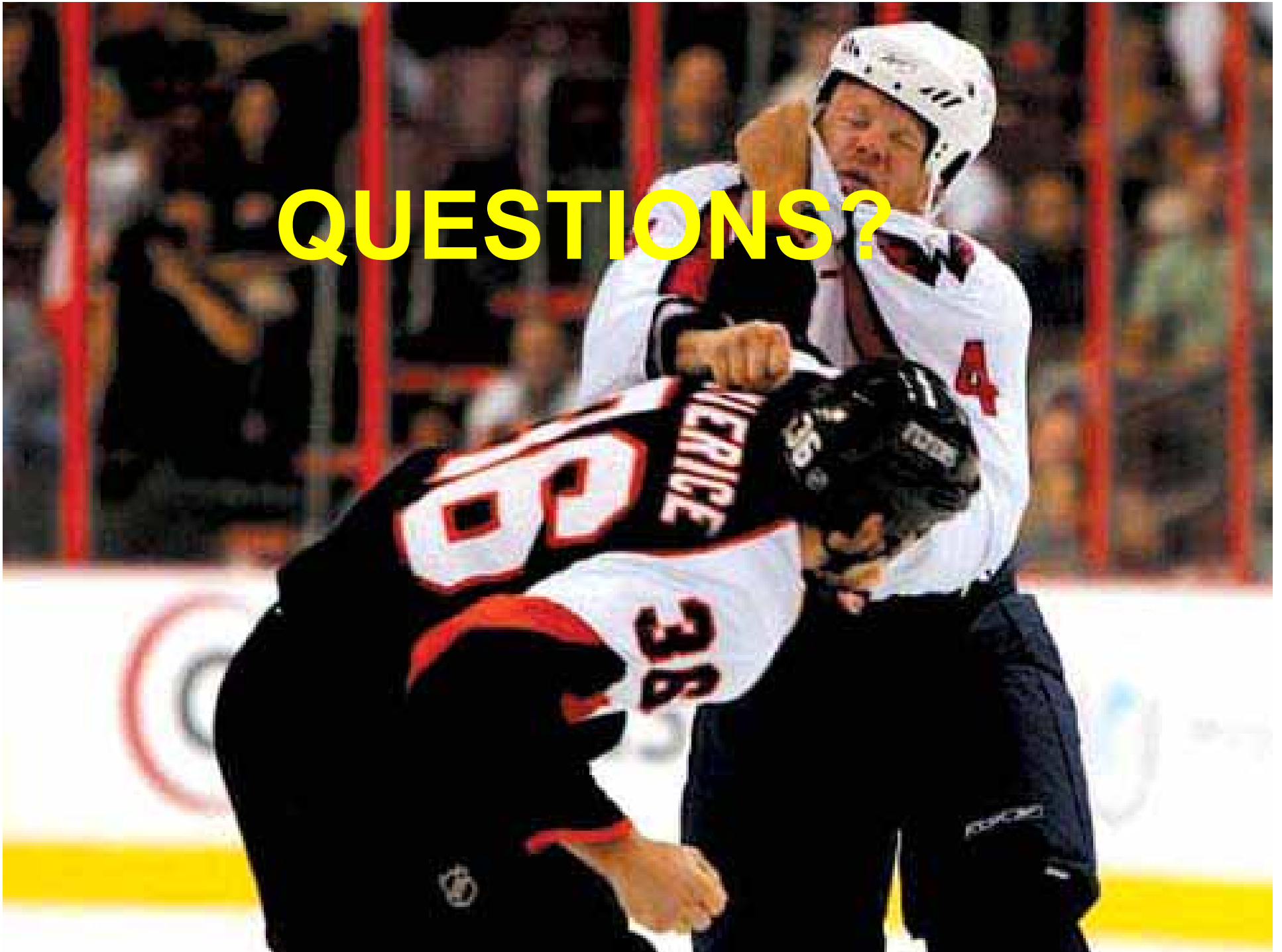
- ✓ Deliverables
- ✓ Term of agreement
- ✓ Compensation
- ✓ Reporting relationship
- ✓ Termination
- ✓ Risk, indemnification, insurance
- ✓ Confidentiality
- ✓ Proprietary Rights

MANAGING THIS RISK

For the business:

- ✓ Structure the relationship to be one of true contractor
- ✓ Ask contractor to provide an indemnity
- ✓ Or, play it safe and establish employment relationship

QUESTIONS?



Check it out!

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