

# The Future of Athlete Agreements in Canada



The Association of Canada's  
National Team Athletes



AthletesCAN, the association of Canada's national team athletes, is the only fully independent and most inclusive athlete organization in the country and the first organization of its kind in the world. As the collective voice of Canadian national team athletes, AthletesCAN ensures an athlete centered sport system by developing athlete leaders who influence sport policy and, as role models, inspire a strong sport culture. For more information visit [www.athletescan.com](http://www.athletescan.com).



Sport Solution is committed to supporting an athlete centered sport system and strives to achieve this objective by counselling and advocating on behalf of Canada's high performance athletes so their voices are well represented when resolving sport related issues that affect them.

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# Table of Contents

|   |           |
|---|-----------|
| <b>Executive Summary .....</b>  | <b>1</b>  |
| <b>Introduction.....</b>  | <b>2</b>  |
| <b>Section 1: The Current State of the Athlete Agreement.....</b>             | <b>3</b>  |
| 1.0 Introduction .....  | 3         |
| 1.1 Sport Canada and funding agreements.....                                  | 4         |
| 1.2 Athlete development: balancing needs and rights .....                     | 5         |
| <b>Section 2: Summary of Contentious Issues.....</b>                          | <b>6</b>  |
| 2.1 Negotiation process is inadequate .....                                   | 6         |
| 2.2 Athletes are disadvantaged in the AA process .....                        | 6         |
| 2.3 Athletes increasingly give away rights .....                              | 7         |
| 2.4 Remedies are inadequate .....   | 10        |
| 2.5 Athlete Agreements and the Athlete Assistance Program .....               | 12        |
| 2.6 MSO, NSO and Athlete Sponsorship Arrangements.....                        | 13        |
| 2.7 Commercial rights and image rights.....                                   | 14        |
| <b>Section 3: Athlete Agreements in Other Nations.....</b>                    | <b>15</b> |
| The United States: USOC Olympic Athlete Agreements .....                      | 15        |
| Australian Fencing Team Athlete Agreement.....                                | 15        |
| United Kingdom Athletics .....  | 16        |
| New Zealand Golf – Nanjing 2014 Youth Olympic Games Event Contract .....      | 16        |
| Athletics New Zealand – Separated Agreement for the Commonwealth Games .....  | 17        |
| <b>Section 4: Proposed Structural Changes.....</b>                            | <b>18</b> |
| 4.1 Separate commercial obligations from performance obligations.....         | 18        |
| 4.2 Develop explicit and meaningful reciprocal obligations and remedies ..... | 20        |
| 4.3 Facilitate negotiation .....  | 21        |
| 4.4 Annotate Agreements (in plain English/French):.....                       | 22        |
| 4.5 Summary.....  | 23        |
| <b>Section 5: Next Steps.....</b>   | <b>24</b> |
| <b>Conclusion.....</b>  | <b>25</b> |

## Executive Summary

After doping, the majority of disputes in the Canadian sport system are team selection and carding eligibility cases.<sup>1</sup> These cases are often closely tied to the construction or enforcement of Athlete Agreements. Athlete Agreements (“AA”), adopted systemically in Canada, govern the daily relationships and mutual obligations between athletes and their National Sport Organizations (“NSOs”).

Disputes related to AAs, like any formal or informal dispute in Canadian sport, are distractions to the performance of Canada’s athletes and, ultimately, to reaching the goals of the Canadian Sport Policy. These disputes need to be minimized to optimize interactions between athletes and their NSOs and create high performance relationships that add value to the sport system and enhance the athlete experience.

It is for these reasons that in 2014 the AthletesCAN Board of Directors struck a working group to assess the current state of the AA in the Canadian sport system and, where necessary, propose possible interventions. This paper, titled *The Future of Athlete Agreements in Canada*, is a summary of that research and findings. It reviews the evolution of the AA from its origins in the early 1980s to the present, and examines the impact changes during that time have had on the rights of athletes.

This paper aims to begin a national conversation on changes that could help both National Sport Organizations and athletes better use AAs to manage their interdependent relationships. It aspires to improve sport performances in Canadian sport, through a targeted and measured modification of existing practices.

The first section discusses how the AA has changed as Canadian sport has evolved into a more sophisticated high performance system. In the second section, four emerging issues within the AA are identified: provisions regarding self-funded athletes, the integration of anti-doping provisions into AAs, use of social media clauses and relocation requirements. In particular and through these issues, the commentary focuses on an increasing power imbalance between the parties that has made the enforcement of AAs difficult to predict and has restricted athlete input into these and other pertinent matters. Concrete examples from the archives of the AthletesCAN Sport Solution Legal Clinic and published SDRCC decisions illustrate how particular instances of these issues have affected athletes and NSOs.

The third section explores the structures and experiences in other similarly situated jurisdictions, including the United States, Australia, New Zealand and the United Kingdom. The final section proposes specific solutions to identified issues, including separating commercial obligations from the main agreements, developing meaningful reciprocal obligations within the AA, facilitating negotiation, and annotating agreements in order to help both NSOs and athletes better use the AA to meet their respective and mutual needs.

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<sup>1</sup> Sport Dispute Resolution Centre of Canada, “10 Years in Review,” *Report on the Operations of the SDRCC 2013-2014* (31 July 2014) online: <<http://www.crdsc-sdrcc.ca>> at 4.

## Introduction

The Athlete Agreement is the primary document governing the relationship between athletes and their NSOs and is intended to include all pertinent matters needed to manage this relationship.

In the 1980s, various needs-based direct funding programs were replaced with a single consolidated training and living allowance across all sports, known as the Athlete Assistance Program (“AAP”).<sup>2</sup> The modern AA was born out of the *Sport Canada AAP Funding Mandate* wherein Sport Canada required all NSO athletes who were considered eligible for funding under the AAP model to sign an agreement with the NSO. This agreement required them to comply with the terms as set out by Sport Canada as well as any other terms required by the NSO.<sup>3</sup> Similarly, it bound the NSO to certain reciprocal terms.

While the structure of the agreement is similar for all athletes, this analysis proposes the AA ought not to be thought of as a standard form contract (a contract entered into by two parties where one party sets all of the terms and the other must accept them without the opportunity to negotiate). Instead, it should be thought of as a contract with each athlete with certain standardized terms, but other more customized terms depending upon the situation of the athlete and needs of the organization. The magnitude of the obligations the AA establishes suggests it is a contract that, in many respects, *should* be negotiated between the parties. However, since inception, the AA has evolved into a contract containing an ever-increasing list of non-negotiable burdens and obligations, most of which fall on the athlete.

The AthletesCAN Athlete Agreement Working Group (“Working Group”) has undertaken this research project as an evaluation of the AA's efficacy in reflecting both athlete and NSO needs and obligations.

The goal of this project is to raise awareness of the challenges that modern AAs create for athletes and NSOs. This paper aims to help both NSOs and athletes better understand how to use the AA to improve their relationship and, in turn, ultimately facilitate athlete performance. This paper also suggests that athletes should be empowered to assert their voices over the AAs they are required to sign in a manner that is fair, protects their rights and provides them with the flexibility they require to freely proceed with their athletic careers.

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<sup>2</sup> Rob Beamish & Janet Borowy, Q: *What Do You Do For A Living? A: I'm An Athlete* (Kingston: The Sport Research Group, 1988) at 24.

<sup>3</sup> Hilary Findlay & Brian Ward, “Increased Commercialization of Athletics Requires Sophisticated Athlete Agreements”, *The Lawyers Weekly* (13 October 2006) online: <<http://www.sportlaw.ca/>>.

## Section 1: The Current State of the Athlete Agreement

### 1.0 Introduction

The AA currently acts as the main legal mechanism defining the relationship between the athlete and his or her NSO by setting out the parties' obligations, responsibilities and rights. It now seems apparent that the breadth of the AA has increased exponentially over its duration and no longer represents its original intent. As such, it fails to fully account for the true nature of the relationship between the two parties. Indeed, it has morphed into an overly onerous and restrictive document to which athletes must consent, typically with little, if any, input.

As high performance sport continues to evolve, athletes require AAs that reflect their varying training plans, health and equipment needs, financial burdens and potentially burgeoning marketability.

The AA is a binding contract, but is often not presented as such to athletes. In many instances, athletes are instructed to sign their AAs, arguably under duress, to meet tight deadlines without proper education regarding the impact of the agreement or consequences of a potential breach by either party. As a result, athletes believe that signing the AA is their only option if they wish to represent the NSO as part of the national team and receive the applicable funding associated with that status. In addition, because there is often no option to negotiate the agreement, when a dispute arises after the athlete has signed the AA the athlete is bound to its terms, no matter the nature of those terms. It is important to note here that the organization holds all the power, and often uses it to actually eliminate an athlete from participation, either fully or temporally, but the athlete has few, if any, levers to hold the organization to its commitments.

In negotiating an agreement, athletes are often in a vulnerable position due to their inexperience with contract negotiations and the true meaning of their subsequent obligations. Ideal AA relationships should begin with adequate education starting with the presentation and review of the AA by both parties and then work towards the negotiation of various terms between the parties.

Inconsistencies also exist when a standard AA template, written for a certain sport is used by an NSO of a different sport. This tends to lead to AAs that do not reflect the high performance structure, environment or needs of particular athletes and unnecessarily limit athletes' rights or overestimate athletes' obligations. To ensure consistency, the varying needs and responsibilities of the athletes across sports, and even between specific sport disciplines, should be accommodated through specifically drafted AAs within a sport and sport discipline, despite certain standard expectations among AAs that are expected and appropriate.

In order for the AA to become a fluid, dynamic document that accommodates the changing needs of both parties while maintaining consistency, effectiveness and fairness, the Canadian sport community would benefit from understanding how contemporary issues have influenced the AA. The following information outlines the main issues with the AA that athletes have faced in recent history and discusses the consequences they have had on the current state of the AA.

## 1.1 Sport Canada and funding agreements

From Sport Canada's perspective, as outlined in its *AAP Policies and Procedures*,<sup>4</sup> the purpose of the AA is as follows: "To set out in writing the rights, responsibilities and obligations of the athlete and the NSO."<sup>5</sup> Below are the 2012 (most current) Sport Canada mandated requirements of an AA:

The [Athlete] Agreement must clearly specify the following:

- Benefits available to the carded athlete through his or her NSO;
- The NSO's obligations;
- The athlete's obligations, including a commitment to follow an agreed-upon training and competitive program;
- Any other commitments to the NSO that the carded athlete is required to make (for instance, time, promotional activities or financial commitments);
- The Agreement's duration (not to exceed one carding cycle);
- Specific Sport Canada and NSO policies the carded athlete must abide by, including the following:
  - The Canadian Policy Against Doping in Sport in effect,
  - The Canadian Anti-Doping Program,
  - The NSO's anti-doping policy,
  - AAP policies and procedures (this document),
  - Federal government sport policy regarding competitions where participation is not permitted, and
  - Completion of the AAP anti-doping education module as requested and available on the Canadian Centre for Ethics in Sport web site.
- The hearing and appeal procedure that will be used in any dispute between the carded athlete and the NSO. This procedure must conform to natural justice and procedural fairness principles and include access to the Sport Dispute Resolution Centre of Canada;
- Details, if applicable, of the carded athlete's trust fund;
- The lead time for the publication of the NSO approved AAP compliant carding criteria (i.e., how far ahead of the next carding cycle the selection criteria will be published).<sup>6</sup>

Many athletes believe that they are required to sign the AA in order to receive the funding for which they qualified under the AAP. However, the *AAP Policies and Procedures* state that AAP funds will *not* be withheld in a negotiation:

Where an athlete and the NSO cannot agree to the terms of their Athlete/NSO Agreement, an athlete's carding will *not* be withheld if the athlete agrees to all the terms required by Sport Canada. In this situation, the athlete and the NSO may avail themselves of the mediation services of the Sport Dispute Resolution Centre of Canada.<sup>7</sup>

This suggests an inherent expectation that athletes are entitled, even expected, to engage in a negotiation regarding the AAP terms of their AA. That said, the cases that have been

<sup>4</sup> Sport Canada, *Athlete Assistance Program Policies and Procedures*, (Ottawa: Public Works and Government Services, 2012) online: <<http://canada.pch.gc.ca/>> [Sport Canada AAP Policy].

<sup>5</sup> *Ibid* at 7-1.

<sup>6</sup> *Ibid*.

<sup>7</sup> *Ibid* [emphasis added].

managed by the AthletesCAN Sport Solution Legal Clinic suggest that while Sport Canada has the explicit ability to continue an athlete's AAP support in the face of an unsigned AA, it is highly reluctant to do so. This is likely because Sport Canada is in an uncomfortable position. Arguably, by awarding AAP without a signed AA, it is signalling that the terms imposed by an NSO may be unfair. On the other hand, by not awarding AAP without an executed AA *per* the policy above, Sport Canada allows NSOs to use tight timelines as a tactic to force athletes to sign AAs without negotiation or proper review and input or risk missing AAP support payments, which are typically crucial to athletes.

Further, Sport Canada requires only those athletes receiving AAP support to sign an AA.<sup>8</sup> It is important to understand that where NSOs require non-carded national team members, and sometimes development athletes to sign AAs, the NSO must provide "consideration" for the contract to be valid. Consideration is a legal contract law term, which in practice means that the contract must provide something in return to the contracting party. For athletes, this can come in the form of access to coaching, uniforms and entries into international events. Nonetheless, the athlete still has the right to be engaged in a fairly bargained process of negotiation when it comes to the contractual terms of the AA.

As this analysis unfolds, it becomes clear that the AAP is a small, yet highly influential part of the status of the AA landscape in Canada. Along with other factors outlined below, it is central to understanding how the AA operates in practice.

## 1.2 Athlete development: balancing needs and rights

As athletes grow their careers, they are able to participate in an increasing number of international competitions. As a condition of participation, athletes are often required to sign a separate contract with multisport organizations (MSOs) or event organizers with provisions dictating sponsorship restrictions, terms of performance and general codes of conduct. On top of these event-specific contracts, AAs with restrictive or limiting clauses can create difficulties. Although an athlete's AA will often overlap with an event contract, an athlete's potential lack of knowledge about contracts can prevent them from adhering to such multiple contractual requirements. This is particularly important, as penalties for breach of contract can be severe. As the sport system continues to become increasingly complex, it is important that NSOs not over-impose burdens on athletes, particularly where such athletes are subjected to multiple contracts and codes of conduct. Equally important, such tiered contracts very often limit the athlete's ability to enter into contracts on their own accord. Indeed, where an athlete has entered into a contract on his or her own behalf, these other contracts need to be co-ordinated so as to not disrupt the athlete's own contracts.

A shift in the way the NSO's AA and other similar agreements are executed contemporaneously can improve the relationship between all the parties, return the AA to a foundation based on an athlete's rights and support the NSO to help propel the athlete's career forward.

A summary of chronic and contentious issues that have perpetuated the unbalanced relationships are addressed in the next section.

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<sup>8</sup> *Ibid.*

## Section 2: Summary of Contentious Issues

This section identifies specific issues that have proven problematic within the contexts of AAs, which have been drawn from the case files of the AthletesCAN Sport Solution Legal Clinic, academic research, and the Sport Dispute Resolution Centre of Canada's ("SDRCC") published decisions. Possible solutions to these issues are proposed and explored in Section 4.

### 2.1 Negotiation process is inadequate

As a binding contract, AAs have become increasingly complex and detailed, yet athletes very rarely have the opportunity to participate in the negotiation of their terms. Even where an NSO has an Athlete Representative, they are rarely, if at all, given time or opportunity to review and discuss contract terms with athletes. When faced with the daunting task of actively engaging with AAs, athletes are often more focused on the field of play, inexperienced with contracts, or may feel they do not have a voice in the process.

#### Example from the Sport Solution case archives



An Athlete Representative undertook a significant effort to bring athletes together to oppose a proposed AA that severely cut into image rights of athletes. The NSO delayed the process and was reluctant to participate in SDRCC mediation (as required by Sport Canada AAP Policy s. 7). Athletes felt pressure due to the need for carding payments and upcoming competitions. Athletes signed the agreement although it was not in their best interests. While Sport Canada Policy dictates that Sport Canada will not withhold AAP if an athlete does not sign their AA, in practice, Sport Canada seems unwilling to release the AAP payments while a dispute is ongoing. In this case, Sport Canada did not release the payments. The NSO's delay, particularly in conjunction with the withholding of AAP funds, put significant pressure on the athletes to sign the AA.

Based on conversations with athletes and sport administrators, it is not uncommon for athletes to be presented with an AA at a training camp or competition and told that they must sign it immediately or by that evening. Terms are rarely explained and only a small percentage of the most high profile, or experienced athletes engage in negotiation. It is unclear, even when negotiation takes place, the extent to which proposed terms can or have been modified.

### 2.2 Athletes are disadvantaged in the AA process

Athletes are primarily focused on performance. As a result, they are inherently disadvantaged throughout the administrative and legal process of drafting the AA through to its implementation. First, there are numerous isolated individual athletes that are affected by an AA where input or bargaining would be best conducted collectively. Second, bargaining power is heavily weighted in favor of NSOs as athletes face more severe consequences if they do not sign or fulfill their obligations under an AA. If they do not sign their respective AA, athletes can be removed from national team activities and competition, which is a huge risk to their athletic careers. On the other hand, in the rare situation where an athlete chooses not to sign an AA as presented and attempts some negotiation of its terms, an NSO can delay the process, precluding an athlete from AAP funding, oftentimes with no adverse consequences (see example included in the previous section).

Athletes are focused on training and competing and therefore don't always have the time, focus or inclination to understand the significance of the terms of the contracts they are signing. The AA has become increasingly complex, now including terms around performance criteria, commercial rights and obligations, and NSO governance policies. For example, one particular AA includes athletes' collective right to have an Athlete Representative sit in on committee meetings. This type of clause should be in the NSO's by-laws or policies, not in an individual athlete's AA. How does the athlete monitor whether this is happening and how does the athlete enforce such a clause? As well, most clauses set out details of what the athlete will do often in order to keep his or her standing. There is typically little detail as to what the organization will do and the consequences flowing from a breach of those obligations.

Athletes typically do not have the resources to seek out legal advice prior to signing the AA, or access to meaningful remedies when NSOs include governance terms in an AA. Clearly, the AA has stretched far beyond what athletes can be expected to understand and negotiate, even if done on a level playing field at a time and place that allows athletes, or their representatives, to fully engage in the contractual process.

#### Example from the Sport Solution case archives



NSO threatened to remove an athlete from the elected position of Athlete Representative if the representative did not sign the proposed AA. The athlete was reluctant to sign the proposed AA because the NSO altered a clause in order to reduce the number of Athlete Representatives who sit on the High Performance Committee. The athlete signed and then appealed the decision. Not surprisingly, the appeal was denied.

## 2.3 Athletes increasingly give away rights

Athletes have little choice but to sign an AA if they wish to be part of the Canadian high performance system – a goal to which many aspire. The Working Group has identified the following problematic trends as emerging issues that need to be understood and addressed and that have bearing on the fairness of the AA.

### 2.3.1 Self-funding

In many sports, certain events are funded, or largely funded, by NSOs, while athletes themselves fund other important or even “mandatory” events. These are dealt with the same way under the AA; however, self-funding changes the nature of the AA in that the athlete is typically receiving less in return for fulfilling the same obligations. For example, there have been cases where self-funded athletes were required to use specific suppliers (such as hotels) when participating in competitions as representatives of the NSO and, in so doing, were not able to book less costly alternatives. Sometimes, athletes are not allowed to change itineraries to personal destinations at the conclusion of an NSO sponsored event (insurance can play a role and should be fully understood in these circumstances). As well, AAs typically deal with athlete image rights regardless of whether an athlete is funded or self-funded, precluding the athlete from making individual commercial arrangements.

If self-funding is a reality in a particular sport, expectations around the obligations and responsibilities of both parties should be laid out early on in a season, before an AA is signed and specific details around the unfunded activity separately negotiated by the parties.

### 2.3.2 *New doping regulations from WADA and the CADP*

Sport Canada calls for all AAs to include a requirement that athletes must abide by the Canadian Policy Against Doping in Sport and The Canadian Anti-Doping Program (“CADP”).<sup>9</sup> The increasingly onerous World Anti-Doping Agency (“WADA”) and CADP provisions have a serious impact on how an NSO seeks to regulate or restrict the conduct of their athletes. Athletes are being required to agree to follow an increasingly complicated anti-doping policy as part of their AA and, more recently, ancillary contractual requirements of the Canadian domestic doping authority, the Canadian Centre for Ethics in Sport (“CCES”). Specifically, the sharing of their personal information with law enforcement and border service agencies is being required as part of the AA.

Any requirements beyond those set out by WADA in the World Anti-Doping Code should be separately and specifically negotiated with athletes. Additionally, requirements should not be “tacked-on” as an appendix, or otherwise, to the AA. Any additional requirements, all of which have typically been restrictive obligations imposed on the athlete, should at the very least be demonstrably proportional to the real risk of doping *in Canada*. The onus of demonstrating this element should rest with CCES and/or the NSO. This is particularly relevant where such restrictions can have a dramatic and harmful impact on athletes (both professionally and personally) and where, as has been the case in the past, athletes have little or no opportunity to negotiate terms of the AA or any viable alternative to signing the AA.

As doping and anti-doping become more sophisticated, contractual fairness should keep pace in AAs. The newest CADP requires athletes to sign a secondary, independent contract known as “Annex B” to the CADP, while the WADA Code addresses information sharing between various law and quasi-law enforcement bodies. Such measures constitute a massive intrusion into the personal rights of athletes, which likely would not be acceptable in most other situations – certainly not in virtually any employment situation in Canada. Any incursion into the rights of Canadians should be well justified. In this instance, the CCES should show, at the very least, that such intrusions are demonstrably proportional to the real risk of doping in Canada. This is not a test foreign to Canadian legislators and nor should the CCES be held to any less a standard. This new obligation requiring athletes to consent to the sharing of information from Canadian law enforcement agencies is an especially egregious risk to an athlete falsely accused of doping by the CCES, or a partner law enforcement or border services agency. The future negative consequences to their freedom of movement between countries and future employment could be catastrophic.

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<sup>9</sup> *Supra* note 3.

### 2.3.3 Social Media

In recent years, many AAs have begun to address the use of social media by athletes through social media codes of conduct. These codes of conduct often limit athletes' abilities to publicly critique the actions of their NSO, or any competitions they enter, and can restrict any mention of athletes' personal sponsors who conflict with NSO or event sponsors. These policies attempt to regulate athletes' individual presence on social media and their right to free speech. For example, should Canadian athletes not be able to comment on issues that ordinary Canadians are free to comment on, such as Russian legislation that vitiates the rights of a certain segment of the population based on their sexual orientation, and is opposing to core Canadian values? Perhaps such comments are awkward for sponsors and others who wish to tread a more subtle line for commercial purposes. This is understandable, though regrettable. But it certainly should not diminish athletes' rights as Canadian citizens to use social media. More fundamentally, clauses that infringe freedom of speech are currently expressly forbidden by s. 7 of the Sport Canada AAP Policy in AAs that provide carding.<sup>10</sup>

Commentary on social items is not the main issue. More so, it is the policies or AA clauses that are so broad as to virtually muzzle an athlete. Much guidance can be gleaned from employment law on this matter. Clearly, athletes should not be able to disparage NSOs publically. Indeed, this follows public policy as applied to employment situations. That being said, athletes should not be silenced by organizations through their social media (or other) policies. Athletes ought to be able to critique an organization's policies and actions. They simply cannot "disparage" organizations, or individuals working within the organization. "Disparage" has a specific meaning: "to regard or represent as being of little worth." "Fair comment" is appropriate, and any policy needs to incorporate its tenets. When athletes and NSOs can demonstrate they are listening to each other internally, public critiques become far less tempting to both parties.

### 2.3.4 Relocation

Some AAs contain provisions that require athletes to relocate in order to train out of centralized training centres. Relocation has a substantial effect on an athlete's personal life, their ability to make a living beyond their activity in sport, and, in some cases, can affect their own preparation for significant events. Issues most commonly arise when athletes competing in individual events are required to move away from their already established training regimen in the location of their choice to a centralized national team training location.

#### Example from the Sport Solution case archives



A top internationally ranked individual athlete, who had a private coach, was told to relocate to the national training center located in another province. There was no discussion between athletes and the NSO before this policy was implemented and enforced through the AA. It greatly affected the athlete's personal and athletic situation and disrupted their training regime with a coach of choice.

<sup>10</sup> See Sport Canada AAP Policy, ss 7.1.

While relocation to a centralized training center may provide value, the potentially negative and disruptive impact that doing so has on an individual athlete, even and especially in a team sport where centralization is more prevalent, should be recognized by all parties involved. When an athlete is away from their home, that athlete is away from family, friends and support systems. Basic psychological wellbeing and physiological needs as simple as housing, transportation and food allowances need to be even more carefully considered in structuring a centralization scenario into an AA, or NSO policy. This becomes an obvious element of specialized negotiation between the NSO and those being required to centralize.

When an athlete is forced to relocate, there needs to be a specific and fair negotiation with that athlete. Relocation affects each athlete differently, and therefore his or her contract needs to reflect that difference. For example, this may mean negotiating a childcare option (perhaps the NSO should contribute), leave to attend mandatory professional development sessions, assistance in getting back into a profession, or loans or subsidies to move on. While centralization is recognized for stimulating sport performance, it is highly disruptive. Creative thinking to minimize negative consequences should be more fully explored to optimize sport results.

## **2.4 Remedies are inadequate**

Where athletes are seen to have breached their AA, they are often stripped of carding or removed from a team completely. NSOs can simply go to the next athlete waiting to qualify for an event or team. But, where the NSO breaches the AA there is seemingly no recourse. Indeed, the NSO seems to afford itself a curative period to undo its wrongs, which is not necessarily afforded to the athlete, not set out equally for the athlete and NSO, and often not part of the AA at all. In other words, the severity of breach of contract is not equal to both parties.

### Example from a published decision of the Sport Dispute Resolution Centre of Canada<sup>11</sup>



Three members of the women's National Soccer Team signed an AA, which contained a term obligating them to attend all National Team events. The Canadian Soccer Association (CSA) later implemented a 3-month training camp, the longest ever held, and gave athletes six days to confirm their mandatory attendance. Details were sparse, accommodation had not been secured, housing costs to the athletes were said to be "about \$200 per month" with no guarantee of actual cost. Meals and transportation would not be covered, training schedules were vague, and these terms were briefly set out in a bullet-point list in an email.

The three athletes involved wanted to wait on agreeing to attend the camp until more solid details were provided, and they believed that they had organized the entire team to do the same. One day before the confirmation deadline, the three team members in question learned most of the team had indeed confirmed attendance. The three then quickly confirmed attendance, had airline tickets booked by the NSO, but did not attend the camp or either a domestic or international National Team tour due to a series of dramatic confrontations with team staff. They were removed from the team and lost all funding on the basis that they did not show up to the camp and breached the AA that each would attend all National Team events.

The three players unsuccessfully appealed the enforcement of the AA to the SDRCC, on grounds that their removal was tainted by bias.

The athletes were not successful at the SDRCC in the above captioned case. Nonetheless, this example illustrates how the available remedies don't necessarily address the issues of the athletes. In a business relationship between two sophisticated parties, a part of the business process is that one party is able to walk away after a fundamental breakdown in the negotiations. The other party can then seek other opportunities. That basic business model breaks down when one party has an absolute monopoly over the other. Here, the three athletes could not coalesce support in a union-like group, emphasizing the power of the NSO and the lack of power of individual athletes, even where they stand to lose substantial future career opportunities.

The CSA has undergone radical public reform in the time period since this 2007 conflict. However, this is the most robust SDRCC decision laying out a formal dispute about AA terms, and stands for an important conflict in Canadian sport history from which to learn. Had the AA relationship begun on more solid grounds, perhaps the dispute would not have ended so dramatically.

The process of signing this AA was done in a hotel lobby, with one player at a time reviewing a contract proposed by the CSA, referring to a laptop screen, and signing a document.<sup>12</sup> The AA, according to the SDRCC arbitrator, was "drafted by a layman [the national team coach], in layman's terms"<sup>13</sup> and should have been easily understood. However, the relationship broke down. This could have been avoided in at least two ways.

<sup>11</sup> *Hooper et al. v Canadian Soccer Association (CSA) and Pellerud*, 2007 SDRCC 07-0051.

<sup>12</sup> *Ibid*, at 2.

<sup>13</sup> *Ibid*, at 25.

First, a blanket obligation for athletes to attend all national team events, without knowing in advance when they will occur or what the event will encompass, results in a vague contract and is certainly not fair to the athletes being required to accept such uncertainties. It is also questionable whether it would be enforceable at law given the monopolistic position of NSOs and the athletes' limited position to be able to negotiate any terms. It is an obligation that appears in many AAs system-wide. There is no question that an obligation like this benefits NSOs and their sponsors. Athletes should not be required to sign agreements that require such broad, unidentified and untimed requirements.

Furthermore, appearances need to be negotiated with athletes individually, unless a group appearance clause can be negotiated with the athletes. Precedent for such negotiated terms does exist in AAs, as well as being extremely common in most professional sport leagues. Individual and joint/group appearances, including timing and number of appearances, notice for an appearance and who pays the costs of appearances can all be negotiated as part of the AA. For example, NSOs could propose a generic number of appearance events, with as much detail as possible for agreement by athletes. A further clause could recognize that opportunities might arise at the last minute and which athletes might need to agree to attend within stated time parameters reasonable to the parties. Clearly, the detail is in the wording, which, again, is why athletes need assistance in drafting and reviewing the specific terms.

Second, a significant problem with the AA is that athletes seem to be subject to penalties for alleged infractions of the AA but NSOs, although not necessarily fulfilling their contractual obligations, seem in many cases to bear no consequences for such alleged infractions. More detailed reciprocal terms need to be negotiated, particularly with regard to the obligations of the NSO. Use of a "curative clause" would allow a party to repair a purported breach, failing which some stated remedy would be invoked. In the case mentioned above, a more meaningful negotiation would have yielded an appropriate remedial clause.

## **2.5 Athlete Agreements and the Athlete Assistance Program**

For an athlete to receive financial support from Sport Canada's AAP they must be nominated by their NSO to Sport Canada. Many NSOs require that the athlete sign the AA before their name is put forward. NSOs are "holding back" carding in order to ensure athletes sign their AAs. NSOs thus present the AA as the gateway to national team status and, as a result, carding. This creates a powerful bargaining imbalance to the detriment of athletes. Sport Canada, on their part, has stated that it will not withhold funding if an athlete does not sign an AA.<sup>14</sup> However, it is difficult to separate AAP provisions within the AA from those within Sport Canada's AAP policy and, as a result, athletes feel forced to sign their AAs to simply receive AAP funding.

Fundamentally, the AAP funding should not be used as a bargaining chip, or bribe, to have an AA signed. The AA should be fully negotiated and funding should be a separate issue (although confirmation of AAP funding may properly become a term in the AA). AAP funding could be announced separate from the signing of the AA and Sport Canada ought to ensure funding

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<sup>14</sup> The fact that Sport Canada would not withhold funding if an athlete does not sign their athlete agreement was confirmed by a Sport Canada representative during a conversation with Sport Solution on May 5, 2014 at a formal training session.

regardless of whether or not the AA has been signed. This may necessitate a separate focused agreement for AAP funding.

### Example from the Sport Solution case archives



A group of athletes were presented with a new AA that restricted individual sponsorship rights. The athletes, through their Athlete Representative, attempted to challenge the limiting provisions. The NSO was unresponsive and refused to go to mediation via the SDRCC. As time passed, athletes became concerned that they would not receive their AAP funding if they did not sign. The athletes cohesion broke and athletes began signing the AA and accepting the restricted individual sponsorship rights.

## 2.6 MSO, NSO and Athlete Sponsorship Arrangements

Athletes with a progressing athletic career can find themselves in a position where they are being required to sign their AA, a part of which requires them to deal with demands of their NSOs sponsors, and to sign other event-specific contracts for major national or global sporting events such as national championships or the Olympic/Paralympic Games, which may typically also include requirements around that parties' own sponsors. The restrictions imposed on the athlete by these multiple contracts have become increasingly more severe, thereby limiting the athlete's ability to successfully navigate their own career opportunities. Although many of the elements in these contracts may exist simultaneously without issue, there is often little coordination between the parties, the result being restrictive or disadvantaging to the athlete.

Affording an athlete more liberal rights under the AA is often seen by NSOs as lessening their opportunities to attract sponsorship. As well, Multiple Sport Organizations ("MSO") and event-specific AAs often implement "blackout" periods with respect to an athlete engaging in personal sponsorship and endorsement deals. The International Olympic Committee (IOC) has shown recent leadership in this area, with the International Paralympic Committee (IPC) following suit, lifting prohibitions on athletes promoting their personal sponsors in certain circumstances during the Olympic Games.<sup>15</sup> Nonetheless, AAs still bump up against this issue.

Commercial sponsorship provisions have little to do with the original intent of the AA in Canada. The interaction between these multiple fronts of commercial sponsorship is perhaps the most significant reason to separate sponsorship issues from the standard AA contract. The impact of commercial sponsorship deals has grown beyond simply that of the relationship between the athlete and the NSO, as originally contemplated by the AA. Further, the AA was never contemplated as a gateway toward the inclusion of a relationship with other external stakeholders through the NSO or event owner. As the commercial issues have become more conflated, attempts to remedy the commercial rights portion of the AA naturally make athletes more cautious and less apt to sign the AA, thereby impeding their ability to participate in various NSO organized training programs and events. It is important to identify and focus on the main relationship governed by AAs. Such an analysis suggests the main purpose is not commercial. Commercial interests ought to be coordinated and negotiated between the parties in a separate agreement.

<sup>15</sup> International Olympic Committee, *Olympic Charter* (December 2014) at s 2.2.1. online: <<http://www.olympic.org>>; All Points West, "IOC sponsorship rule change doesn't go far enough, says David Calder," CBC News (3 March 2015) online: <<http://www.cbc.ca>>.

### Example from the Sport Solution case archives



A high profile athlete contested the Sponsorship and Commercial Activities clause of their AA since it prevented him/her from exercising a contract with personal sponsors to its full force. Since the athlete did not consult any outside counsel for advice on whether accepting a personal sponsorship contract was acceptable under the AA, the athlete may subsequently have inadvertently breached the NSO contract.

## 2.7 Commercial rights and image rights

AA's have become increasingly restrictive of athletes' commercial and image rights. Many NSOs retain image rights in "perpetuity." Image rights refer to the right to use any "likeness" of the athlete and are the rights of the athlete. These image rights are often an athlete's most valuable commercial property. However, athletes, either unwittingly or through duress, forfeit these rights as a requirement of the AA. Leading up to the 2010 Vancouver Olympics, Hilary Findlay and Brian Ward stated the following in relation to athletes giving up these rights:

Few athletes have the knowledge to negotiate a commercial contract, nor do they have the resources to obtain professional assistance with the job. Many athletes thus find themselves unable to negotiate favourable commercial terms, and they end up ceding much or all of the control over the exploitation of their image to their sport organization.<sup>16</sup>

Typically, athletes are unable to use their image to promote themselves unless they have NSO permission. In many cases, NSO sponsors are permitted to use the likeness of NSO athletes to promote their own products and services without athlete consent (other than any general consent in the AA). The athletes most often do not receive anything in return for giving away these rights beyond what is given as consideration in the AA. These are valuable rights and constitute at least some of what individual athletes can sell to sponsors to earn income. Others leverage these rights as part of an athlete collective to sponsors. Athletes deserve fair compensation in both scenarios.

The use of a separate, stand-alone commercial agreement is discussed in detail in Section 4.

### Example from an elite Canadian athlete.

An athlete was asked by a friend if they were being sponsored by a particular company because the friend had seen the athlete's image on the company website. When the athlete contacted the company to inquire about the image use, the company stated that they had permission to use the image from the NSO and that because they were not representing themselves as the personal sponsor of the athlete, they did not owe the athlete anything.<sup>17</sup>

<sup>16</sup> *Supra* note 3.

<sup>17</sup> Craig L. Arsenault, *Bargaining Power Dynamics and the Negotiation of Commercial Rights and Obligations: A Case of Athlete Agreements* (M Sc Thesis, Brock University Faculty of Applied Health Sciences, 2013), online: <<https://dr.library.brocku.ca/>>.

## Section 3: Athlete Agreements in Other Nations

In conducting the analysis of AAs in Canada, a review has been undertaken of the structure of athlete agreements from other countries and jurisdictions. This review was to ensure that any recommendations outlined in this document were done so with the knowledge and guidance of best practices from other countries.

### The United States: USOC Olympic Athlete Agreements

The United States Olympic Committee (USOC) recognized that the competing interests of athletes and National Governing Bodies (NGBs) to protect their commercial interests would have to be addressed directly or it would continue to result in disputes before their arbitration committees. In response, the USOC changed the structure of their AAs by splitting the sport aspects and the commercial aspects into two separate contracts. This concept was first proposed in mid-2005 and formalized into an official USOC policy in early 2013 after feedback from the American sport community.<sup>18</sup>

In their policy on NGB commercial agreements, USOC advocates for the separation of commercial rights from the principal athlete agreement on the basis that there is sufficient material to warrant an individual contract. USOC also advocates strongly on behalf of an athlete's ability to protect their own rights over their image and potential commercial benefits. NGBs have the right to request athletes participating in an event or competition to sign a release for all commercial rights relating to that event for the benefit of the sport organization. However, this cannot be done for the direct financial benefit of any third party, nor may they imply that the athlete, however officially or unofficially, is directly endorsing a product.<sup>19</sup> Importantly, the policy strongly reinforces that an NGB may not condition participation in any major competition upon an athlete's signing of an agreement containing "commercial terms" which are defined in full in the subsequent provision.<sup>20</sup>

### Australian Fencing Team Athlete Agreement

The Australian National Fencing Team has purposefully written a preamble to their AA outlining the purpose of the contract's terms and responsibilities, including a focus on athlete support:

AFT members are part of the AFF High Performance Program (HPP) and have access to the National Training Program including training camps and coaching with the AFF HPP coaching staff, access to the AFT Competition Program with the opportunity to represent Australia at the highest level and as a member of the AFT there is the opportunity to pursue personal sponsorships, sporting scholarships and to benefit from any team sponsorships.<sup>21</sup>

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<sup>18</sup> United States Olympic Committee, "Policy Regarding NGB Commercial Agreements" (2013) at 2. See also United States Olympic Committee, "Commercial Rights and Social Media" (2015) online: <<http://www.teamusa.org/>>.

<sup>19</sup> *Ibid* at 3.

<sup>20</sup> *Ibid*.

<sup>21</sup> Australian Fencing Federation, "Australian National Fencing Team Athlete Agreement" (2013) at 2. online: <<http://www.ausfencing.org/>>.

Although the contract outlines the responsibilities and the consequences of breach of contract, the overall tone of the AA underlines the intended support from the organization to its registered team members.

Regarding commercial rights, the Australian AA does not set out any particulars surrounding the restrictions on the athlete but merely indicates that the organization will support any opportunity to pursue personal sponsorships, scholarships or any benefit to the entire team.

### **United Kingdom Athletics**

The United Kingdom's Athletics Organization (UKA) adopts a slightly different approach by immediately addressing any question about limitations on an athlete's right to engage in individual commercial endorsement:

(E) Nothing in this Agreement is intended to prevent the Athlete from having an existing third party personal sportswear sponsorship arrangement or to prevent Athlete entering into such arrangements during the term of the Agreement to the extent provided in this Agreement.<sup>22</sup>

Furthermore, the agreement is clearly stated as being intended to support an athlete in their "sporting career" so as to ensure not conflating the purpose of the relationship between the athlete and the UKA organization:

(D) This Agreement is designed to enable each member of the WCP to make the most of his or her sporting career and for UKA to continue to develop the WCP in support of high performance Athletics.<sup>23</sup>

The UKA emphasizes that the athlete agreement is not an employment contract but rather a governing document to establish the mutual terms of the relationship with the individual athlete. Although the UKA does not enforce strict limitations and restrictions, they strongly emphasize a code of conduct for athletes to adhere to preserve the culture of the sport.

### **New Zealand Golf – Nanjing 2014 Youth Olympic Games Event Contract**

New Zealand Golf prepared a separate application for consideration within their NSO for any athlete who wished to be a part of the Youth Olympic Games New Zealand Golf Team. Although the majority of the application contract reads like a normal AA that sets out the terms and obligations of both parties, this contract is distinct in its focus on policy knowledge. The first section of the contract reads as follows:

(a) I have been provided with access to a copy of the Agreement between the NZOC and my NSO ("NZOC/NSO Agreement"), the NZOC Selection Policy and, once confirmed, the Nomination Criteria for my sport for the Games, via the NZOC website [www.olympic.org.nz](http://www.olympic.org.nz), and I agree to comply with and be bound by the terms outlined in these documents...<sup>24</sup>

<sup>22</sup> United Kingdom Athletics, "World Class Performance Programme: Performance Athlete Agreement" (2009) at 2. online: <<http://www.britishathletics.org.uk>>.

<sup>23</sup> *Ibid.*

<sup>24</sup> New Zealand Golf, "Schedule A, Nanjing 2014 Youth Olympic Games, Athlete Application Form for Selection", (2014) online: <<http://www.golf.co.nz>>.

Through the chosen wording, the contract emphasizes the importance of athlete knowledge and awareness of policies, specifically outlining what documents the athlete must read, but also giving the athletes access to an initial template through the organization's website. It provides athletes an opportunity to review and engage with colleagues and other advisors before engaging with sport officials.

### **Athletics New Zealand – Separated Agreement for the Commonwealth Games**

Athletics New Zealand offers a fairly sparse AA to their athletes for their general annual sport cycle, advocating instead for particular agreement that are to be signed on an as-needed basis. For the athletes who participated in the 2014 Glasgow Commonwealth Games, Athletics New Zealand had them sign an agreement that pertained exclusively to the terms of travel for the Games and put forward a general code of conduct with standard provisions regarding representing their NSO and their country while abroad.<sup>25</sup>

While the multitude of contracts New Zealand athletes are expected to sign may become a distraction in itself, the Canadian solution should aim to incorporate the approval of discrete obligations achieved here.

The next section proposes solutions to help both NSOs and athletes better use the AA to meet their needs.

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<sup>25</sup> While the specific contract is no longer accessible, reference to it is made by Athletics New Zealand in "2014 Commonwealth Games Athletics Nomination Criteria: 23 July – 3 August, Glasgow", online: <<http://www.olympic.org.nz>>. See also New Zealand Olympic Committee, "Agreement Between NZOC and NSO", online: <<http://www.olympic.org.nz>>.

## Section 4: Proposed Structural Changes

The Working Group suggests that the following four changes be incorporated into the AA process and content across NSOs. While they do not address every specific contentious issue raised so far, the following section is offered as a reasonable departure for dialogue with the Canadian sport community and a potential road map to measured system-wide reform of the current AA itself, and a process for its execution.

### 4.1 Separate commercial obligations from performance obligations

As identified in Section 2, many AAs require that athletes either relinquish or limit the use of their image rights. In order to empower athletes and give them more control over their own personal commercial interests, it is our recommendation that the commercial aspects be removed from AAs and placed in a separate contract.

By splitting the two agreements, athletes would be able to negotiate and complete the performance side of an AA and continue training without having to be delayed by their wish to engage in commercial negotiations.

It is our recommendation that these separate agreements operate as parallel documents. Both would need to be agreed to, but the commercial agreement could follow after the main AA is signed.

The stipulation that an athlete cannot compete in sanctioned events or receive their funding until an AA is signed compels many athletes at this level to agree to whatever the NSO wants. Moreover, these athletes do not have the knowledge to understand their commercial value or negotiate a commercial contract, nor do they have the resources to seek legal advice to assist them.<sup>26</sup> Indeed, a general commercial agreement could form part of the AA for such athletes. Athletes could work with the assistance of their Athlete Representative or Athlete Council to draft such a clause. That said, if athletes who had commercial value could opt out of the generalized commercial terms of the AA, and such rights were separated out of the main AA, these athletes could, at the very least, sign the main AA, but go on to negotiate independent commercial clauses. This arrangement would allow top athletes to continue competing while commercial negotiations were ongoing and also alleviate the stress on NSOs to have all of the commercial negotiations completed before an AA is signed.

Moreover, by separating the commercial aspects into a separate agreement, the main AA could return to the more standardized and essential form it took in the past – delineating the obligations and responsibilities of athletes and the NSO relative to performance and competitive matters. The standardization of the AA would make the agreement more accessible to athletes as the performance clauses would be more easily explained and less likely to be the source of time and resource heavy negotiations, as has been the case as commercial clauses have become increasingly problematic.

Commercial agreements might require their own dispute resolution process. This dispute resolution clause would need to include timelines and criteria for moving to arbitration. At

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<sup>26</sup> *Supra* note 2.

present, the existing sport dispute resolution channel (the SDRCC) is not mandated or equipped to deal with commercial disputes. However, after consultation with the SDRCC, it has become clear that if the AA and Commercial Agreement were split, the SDRCC could hear commercial disputes if dispute resolution mechanisms were built into the Commercial Agreement between the athlete and NSO. The option to resort to SDRCC services could be included by way of either: a) the right to appeal through the internal process that points to SDRCC; or b) a clause that indicates that in the case of a disagreement, the parties agree to bring their dispute to the SDRCC.<sup>27</sup> There would be no charge for the SDRCC to hear cases between athletes and NSOs, but in dispute with third parties a fee would apply.

In a commercial dispute, the SDRCC can apply any remedies that are found to comply with section 6.17 of the Canadian Sport Dispute Resolution Code, which states:

#### 6.17 Scope of Panel's Review

(a) The Panel shall have full power to review the facts and apply the law. In particular, the Panel may substitute its decision for:

- (i) the decision that gave rise to the dispute; or
- (ii) in case of Doping Disputes, the CCES assertion that a doping violation has occurred and its recommended sanction flowing therefrom,
- (iii) and may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.<sup>28</sup>

Arbitrators will not award damages in commercial disputes before the SDRCC, but they may award costs (actual expenses incurred by a party to take part/defend itself against a party who is deemed to be at fault). That is covered by section 6.22:

#### 6.22 Costs

[...]

(f) The Panel does not have jurisdiction to award damages, compensatory, punitive or otherwise, to any Party.<sup>29</sup>

The inability to award damages is a significant drawback to the SDRCC's ability to function as the dispute resolution method of choice for conflicts arising between the sport system and third party commercial actors, and perhaps even as the dispute resolution method of choice within the sport system where there is a choice. This point is beyond the scope of this paper, but essential to note. The equitable remedies available under Rule 6.17(a)(iii) could, however, conceivably include monetary awards in rescission, equitable compensation or other forms of equity.

Finally, in order to ensure a fair and balanced commercial environment, NSOs should refrain from restricting an athlete's participation in an event as retribution for refusing to agree to a commercial obligation. The solution will be challenging, and may only apply to a small number of high profile athletes. For example, an athlete could have Adidas as a personal sponsor, and qualify for a national team of an NSO that is sponsored by Nike and has agreed to exclusivity.

<sup>27</sup> This information came through email communication with the Executive Director of the SDRCC in 2014.

<sup>28</sup> The Sport Dispute Resolution Centre of Canada, *Canadian Sport Dispute Resolution Code*, (11 February 2015) online: SDRCC <<http://www.crdsc-sdrcc.ca>> at 23.

<sup>29</sup> *Ibid* at 25.

The NSO could simply refuse the sponsored athlete selection to the competition, unless they break their sponsorship contract with Adidas.

Solutions to these kinds of situations will require strong relationships, and meaningful compensation to stimulate compromises. For example, if the NSO feels it must proceed in restricting an individual athlete's sponsorship, it should strive to find sufficient ways of compensating the athlete for value lost, in the way of services, opportunities or savings on NSO fees. Athletes should in turn respect the brands and exclusivity agreements of their NSOs and work with them and not against them in securing personal sponsorship. A singular attitude with regards to commercial obligations by either party will only continue to lead to distraction, lost time and resources, and missed objectives. A collaborative and reciprocal approach must be executed to produce mutually beneficial results both on and off the field of play.

#### 4.2 Develop explicit and meaningful reciprocal obligations and remedies

As a response to the imbalance of bargaining power that has previously been discussed, we propose that the obligations of both parties be made more explicit and evenly shared within each AA.

##### Example from a published decision of the Sport Dispute Resolution Centre of Canada<sup>30</sup>



A top Canadian Bowls player sent an email to six people within his organization viciously criticizing the non-selection of his brother (he nor his brother launched a selection appeal), pointing out failings of several athletes, coaches and administrators by name in a less than polite tone.

The National Team Committee (NTC) decided that the player breached his Athlete Agreement Code of Conduct, which requires, among other things, that all individuals associated with Bowls Canada Boulingrin the NSO:

[...]

(iii) always be courteous and objective in any dealings with other members;

(iv) refrain from unfavourable comments and criticism of other members unless done through proper means;

[...]

The AA did not outline a consequence for this breach. The NTC suspended the athlete for one year for sending the email. He appealed to his NSO Executive Committee some time later. The Executive cancelled the ban, reinstated him to the national team, issued him a reprimand letter, and fined him \$150. The NTC unsuccessfully appealed the Executive's decision at the SDRCC.

In the example above, the parties did not know how to act when a term of an AA was breached. The result was an exacerbation of deteriorating relationships between the athletes and administrators and time and resources spent on an appeal.

The SDRCC and NSO Executive Committee decision was a concrete example of why this recommendation should be adopted. The initial reaction to a breach of a code of conduct that

<sup>30</sup> *Stadnyk v Bowls Canada Boulingrin, 2009 SDRCC 09-0099.*

effectively voided the contract and unilaterally removed the athlete from the team was unreasonable. However, at the same time, it is imperative that athletes provide feedback in effective and respectful ways, regardless of the truth of allegations. Breaches of this code of conduct could have been outlined within the AA, as well as proposing a progressive regime of sanctions including, for example, a letter of reprimand, perhaps an apology, and the discretion to issue a nominal fine. Had that been outlined in the AA, many resources and relationships could have been saved in this case.

The AA should clearly lay out the consequences associated with each obligation. This will ensure that both athletes and NSOs are fully informed of the repercussions that can flow from a breach. Both athletes and NSOs would be bound to the entire agreement and would be encouraged to fulfill their obligations under it but, more particularly, in the event of a breach, parties would understand the consequences and/or have a way to remedy the breach.

### 4.3 Facilitate negotiation

#### 4.3.1 Individual Negotiation

All AA's, as with any contractual relationships, should be negotiated, or at least represent a fair bargain between the parties. It is the right of both parties to engage in good faith negotiations with regard to the AA. At present, most athletes are not aware of this right, or necessarily understand what such negotiations mean. Too many instances of athletes not being given the opportunity to negotiate their contract have arisen. Indeed, most often athletes are asked to engage in this contractual process collectively. This is simply unacceptable and contrary to the nature of "party to party" contracts. Where the athlete signs a contract with the NSO, that athlete ought to be able to negotiate the terms of that contract. Many of those terms can be "standard" terms as the circumstances of the contract are often uniform. But, even such terms must be negotiated and not imposed by the NSO.

#### 4.3.2 Collective Negotiation: Athlete Representative(s) / Athletes' Council Approval

Every NSO is required by Sport Canada's Sport Funding and Accountability Framework ("SFAF") to have an Athlete Representative as a part of their governance structure.<sup>31</sup> In some sports, athletes have organized an Athletes' Council or Commission to speak collectively for all of that sport's athletes. Depending on an NSO's governance structure, athletes in sports may have greater or less voice. This report recommends that AAs must be presented to some form of Athlete Representative or Athletes' Council before they are presented to the general pool of athletes. AAs should also be subject to the approval of such representative bodies. Indeed, rather than having to negotiate each AA individually with each athlete, NSOs have a better route to collectively negotiate certain standardized clauses of the AA. This stage of review would allow athletes to raise concerns before there is any pressure for individual athletes to sign the document.

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<sup>31</sup> Sport Canada, *Sport Funding and Accountability Framework (SFAF V: 2013-2017) National Sport Organizations Eligibility Criteria – Summer Sports Organizational Requirements*, online: <<http://www.pch.gc.ca>> s A1.7 at 3..

If a separate commercial agreement were used, standardized clauses could also be jointly negotiated. In both cases of the AA and the commercial agreement, individualized clauses would have to be negotiated with certain athletes.

#### *4.3.3 Informal Negotiation*

While it is a best practice to have an Athlete Representative and/or Athletes' Council within a sport, the ongoing development of these resources, especially for smaller NSOs, is not meant to bar an athlete in that sport, or the NSO, from adopting these recommendations. Currently, not all sports have formal athlete representation or an Athletes' Council. In these cases, it is proposed that as a best practice, the basic AA be voted on and approved by a majority of athletes who will be asked to sign it or alternatively, negotiated with a representative group of athletes for recommendation to all other athletes. This would be a first step to the process and individual negotiations could then ensue for those needing more specialized clauses.

AthletesCAN is able to and should be engaged to assist in the review process.

#### *4.3.4 Final Note on Negotiation and Approval*

Persistently, the important issues outlined in Section 2 of this paper are based on athletes being forced, or feeling that they are being forced, to agree to legal obligations and the consequences of their breach to which they do not want to agree or necessarily understand. One part of this issue is that NSOs, and the Canadian sport system generally, have limited resources. High performance sport in Canada is not a lucrative business, but nor should it be a system where athletes are asked to “park” their basic interests at the door. High performance is a monopoly. Those who control it have the power. This imbalance has been used to implement AAs that increasingly are not only onerous to the athlete but use the athlete as a proprietary asset. Athletes need a greater voice in the contractual arrangements to which they are currently being asked to adhere.

#### **4.4 Annotate Agreements (in plain English/French)**

The size and complexity of an AA can be overwhelming to an athlete. An annotated agreement would allow athletes to better understand the consequences of the provisions in their AAs. The annotations would walk them through each section of the agreement and facilitate knowledge transfer to the athlete. Ultimately, we are hoping to achieve a shift where athletes begin to understand their AA beyond what is written, which in turn will impact their future in sport and beyond.

## 4.5 Summary

In summary, the following specific initiatives have emerged in this analysis and should be enacted:

1. The AA should return to its original intent – an understanding between athlete and organization as to their rights and obligations *vis-a-vis* the properly adopted policies of the organization;
2. Sport Canada should uphold its policy that AAP funding will not be withheld where an athlete has not signed an AA – AAP funding nominations should be separated from the actual signing of the AA;
3. Rights, and particularly obligations, should be more explicitly and specifically defined, including reciprocal rights, obligations and meaningful remedies;
4. There should be a distinction between conduct issues and other breaches of the AA, the latter of which ought to include breaches by the NSO, and appropriate remedies determined for breaches;
5. Commercial obligations and opportunities should be removed from the AA and be contained in a separate agreement;
6. Standard clauses should be negotiated within NSOs, or even adopted across NSOs, but athletes should have the opportunity to negotiate and have access to proper consultation in agreeing to such standard clauses.

## Section 5: Next Steps

The Working Group is currently entering the next stage of this research project. The group will focus on the development of best practices, including an annotated AA, a database of successfully negotiated AAs, a “Preamble” template that can be included in any AA, as well as a template for notice of violation of an AA. The group will attempt to identify standard clauses that could be fairly and systemically implemented across AAs.

We welcome all feedback as this important project progresses.

## Conclusion

This analysis has revealed significant barriers and threats to the AA. The AA has morphed from the 1980 agreements that were intended to ensure athletes receiving Sport Canada funding were actually training, to major contracts covering training, competition, fees, logistics, coaching, commercial rights, basic speech, anti-doping protocols, travel, living locations and more.

Inadequate and incomplete negotiation of AAs is putting athletes at a daily disadvantage with respect to the administrative preferences of NSOs. Athletes are increasingly giving up rights and taking on obligations that affect their ability to perform to their full capacity and, more importantly, infringe their contractual and basic rights. When a national team athlete navigates the convoluted legal landscape of non-negotiated contracts with International Federations, MSOs, NSOs, Major Games, sponsors and Sport Canada, often all at once, contract law remedies available to them in their vulnerable position at the top of Canadian sport are inadequate. This is an abuse of the athletes' precarious position: someone who is not an employee, not a contracted worker, not a union member and without a collective agreement protecting his or her rights. Instead, the athlete is a singular person, most often focused on their athletic pursuit to the exclusion of all else, including negotiating an appropriate AA.

These threats are not insurmountable. A reasonable place to begin is to separate commercial obligations from AAs, develop explicit and meaningful reciprocal obligations and remedies, encourage real negotiation and promote full understanding of the content of AAs among athletes and NSOs.

Canada's national team athletes who are expected to perform at the highest level are more than mere instruments of the Canadian sport system. With appropriate contractual agreements, athletes can become active partners in building high performance relationships with those who are passionate and committed to propelling Canadian athletes to the top.