

Article

# Prospects for a Sports Ombudsman in Canada

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Academic Editor: Frank Pasquale

Received: 8 September 2016; Accepted: 9 March 2017; Published: 14 March 2017

**Abstract:** This article examines the potential of using an Ombudsman to resolve sports related disputes, and further researches underway in Canada to incorporate an Ombudsman scheme. The article looks at the various types of Ombudsmen, the existing Ombudsman or Ombudsman-like dispute resolution schemes concerning sport, and provides guidance on the establishment of a nation-wide scheme for Canada. The article finds that the addition of a sports Ombudsman to ADR services already provided by the Sport Dispute Resolution Centre of Canada would be of benefit to athletes and the sports community.

**Keywords:** Ombudsman; Canada; sport dispute resolution; Olympic Games; Court of Arbitration for Sport; Sport Dispute Resolution Centre of Canada

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## 1. Introduction

This paper will examine three topics: the role of an Ombudsman generally; the use of Ombudsman and Ombudsman-like entities in sport; and considerations for a Sport Ombudsman systems design in Canada.

## 2. What Is an Ombudsman [1]?

The word *Ombudsman*<sup>1</sup> is not gender specific. Its specific meaning has since been adopted into English as well as other languages, and *Ombudsmen* have been instituted by many other governments and organisations [2].

An Ombudsman is an independent, objective investigator of people's complaints against government agencies and other organisations, both public and private sectors. After a fair, thorough review, the Ombudsman decides if the complaint is justified and makes recommendations to the organisation in order to resolve the problem [3].

Ombudsmanship came into being in 1809, when the Swedish Parliament appointed the first Ombudsman to protect citizens from the excesses of bureaucracy [4]. The word Ombudsman consists of two parts: *ombuds*, meaning representative; and *man*, a gender-non-specific term meaning the people. Historically, an Ombudsman has been the representative of the people in dealings with bureaucracy. In Quebec, the Ombudsman is referred to as "The Protector of the Citizens"; while, in France, the Ombudsman is called "The State Mediator".<sup>2</sup>

Ombudsmen are generally concerned with the fair treatment of members of their constituency by the bureaucracy or agency they oversee. Ombudsmen are generally characterized as being independent,

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<sup>1</sup> Terms such as Ombuds, ombudsperson, and even ombuddy are also used by practitioners.

<sup>2</sup> Protecteur du Citoyenne; Mediateur de L'Etat.

impartial, and neutral advocates neither for the agency nor the complainant, but rather for the principles of administrative fairness. It is worthwhile to consider the distinction between substantive fairness, which can be defined as a fair outcome of an administrative process, and procedural or administrative fairness, which is defined in the following paragraphs.

Ombudsmen are generally concerned with administrative fairness, as opposed to results in regulatory or criminal processes. Ombudsmen deal with the redress of unfair situations rather than the administration of compliance frameworks. The Code of Administrative Justice by the British Columbia Ombudsman lists at least 16 criteria for administrative fairness. These include issues such as unreasonable delay and unfair procedures [5].

The Sport Dispute Resolution Centre of Canada has used the Code of Administrative Fairness as a basis to develop a “Guide to Administrative Fair Play”. The guide was primarily written by Anna Nicholas, a Masters level student while on an externship, and lists twelve criteria for fairness in sports administration [6].

This paper relies primarily on that Code of Administrative Justice to provide a working definition of administrative fairness that can be applied consistently and universally for Ombudsman purposes. Fairness can have different meanings across context, culture, language, and tradition. The Code of Administrative Fairness provides an excellent example of describing “being fair” in neutral and explicit terms.

Administrative fairness has been defined in the following manner:

“...our judges have had an historic association with the concept which we call “due process of law”. The phrase, which has its roots in the Magna Carta, sums up our attachment to civility no less than to legality. In popular terms, it means fair play: assuring a hearing on the pros and cons of an issue to those affected; apprising them of what they have to meet or, in a criminal case, of the charges against them; giving them an opportunity to produce witnesses and to counter evidence adduced against them; allowing them to present argument on the facts and legal issues raised in the litigation; and assuring them finally of a considered decision by an impartial judge. What is important about due process is the fact that its rationale has taken hold beyond the courtroom and has been applied in administrative proceedings and to public affairs generally. It has, in short, become a social norm, implying both a right of individuals and groups in our society, who have grievances to air, or demands to press, or claims to litigate, to make themselves heard; and correlatively, an obligation to advance their causes through rational procedures which, after painful experience, have displaced naked force as the means through which the case is made for change and the redress of wrongs [7].

Ombudsmen can be important actors in the overall operation of the civil justice system. They provide alternative dispute resolution [8] services, which may reduce the propensity for costly and time-consuming grievances and litigation. Their existence and presence ensures that administrative fairness is supported in a wide variety of civil and business institutions.

### 3. Types of Ombudsmen

Ombudsmen are generally classed in one of three categories: *classical or legislative, organisational, and executive*.<sup>3</sup>

*Classical or legislative* Ombudsmen are appointed by a national, state or provincial, or municipal legislative body to ensure the fair treatment of the population by the administration. There are numerous examples of classical Ombudsmen across the globe. These would include the many municipal, state, provincial, or national Ombudsmen appointed by the appropriate level of government. They are located

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<sup>3</sup> There is a category for Advocate Ombudsman, but the research failed to identify any such programs in existence.

outside of the structure of the agency they oversee, and receive complaints from the external users of services provided by the agency. Classical Ombudsmen receive wide-ranging powers to investigate complaints, to make reports, and to make recommendations to the authority to resolve matters.

*Organisational* Ombudsmen are appointed by their respective agencies to receive complaints about fairness issues within the organisation. These internal Ombudsmen service a community within an organisation, such as staff, patients, or students. Organisational Ombudsmen are an informal resource and do not conduct investigations, nor do they make reports or recommendations.

*Executive* Ombudsmen are appointed by their agency as an internal dispute resolution resource for complaints generated by an external community. Examples of executive Ombudsmen would be bank or insurance Ombudsmen, newspaper Ombudsmen, or consumer protection Ombudsmen.

While executive Ombudsmen are located within specific agencies, as are organisational Ombudsmen, they deal with an external public and conduct investigations, and may make reports and recommendations, as do classical Ombudsmen. The American Bar Association (ABA) Standards define an executive Ombudsman as:

An executive Ombudsman may be located in either the public or private sector and receives complaints from the general public or internally and addresses actions and failures to act of the entity, its officials, employees, and contractors ([9], p. 8).

#### **4. Confidentiality**

A key difference between Ombudsmen and other ADR mechanisms is confidentiality. By tradition, practice, policy, and law, the work that an Ombudsman does is confidential. This fact alone makes the use of the Ombudsman an attractive alternative to courts, arbitration, and to some extent even mediation. For example, one party to a dispute can come to an Ombudsman and receive advice; issue evaluation; conduct role playing, etc. without the other party being involved or notified.

Parties to an Ombudsman process are informed that it is a confidential process, and information given to the Ombudsman should not normally be provided to the other without expressed consent. The results of an Ombudsman process are not shared by the Ombudsman, except with consent, or in a generic non-identifying manner. The Ombudsman is usually not compellable to any court process relating to the subject matter of the complaint they have dealt with.

Parties to a dispute may find that this confidentiality is extremely beneficial. First, they can reveal information to the Ombudsman knowing that it will not be further disseminated. Secondly, the confidentiality of the results of an Ombudsman process may encourage parties to come to agreements knowing that they are not creating precedents, and that the media and other parties will be unaware of the process and the outcomes. In sport, one can see the advantage to both athletes and sport organisations having the Ombudsman as a no fee, confidential and private resource.

#### **5. No Fee Is Charged**

An advantage of the Ombudsman process, especially for athletes and small or local sporting organisations, is that no fees are charged. The Ombudsman is normally funded by the government, agency, or organisation as part of the overall operating expense of the entity.

The fact that no fee is charged also helps to promote the Ombudsman's independence, neutrality and impartiality. As no fee is charged, there can be no inference that the Ombudsman has received a benefit from a party, or is extending the Ombudsman process in order to incur fees or to dissuade one of the parties in the process.

#### **6. Legal Representation Not Required**

Parties who come to the Ombudsman for assistance are not required to have a legal representative. If parties do come to an Ombudsman process with counsel, it is important for counsel to remember that an Ombudsman process is not a legal process; it is an informal, private and confidential resolution process.

## 7. Roles for the Ombudsman [10]

What does an Ombudsman do?

- Listen in an impartial, supportive, and active manner.
- Help develop options to resolve problems and complaints
- Provide information and make suggestions about how to solve problems both informally and expeditiously.
- Help clients to help themselves.
- Facilitate discussions between individuals.
- Provide informal and formal mediation services.
- Suggest referrals to appropriate resource persons.
- Bring issues to the attention of those with authority to address concerns, to expedite administrative processes, and to make recommendations for change in policy or practice when appropriate.

What doesn't an Ombudsman do?

- Advocate for a particular party.
- Intervene in formal grievances or appeals unless there is a specific agreement to do so.
- Make formal or binding decisions.

What might an Ombudsman do?

- Carry out formal investigations.
- Act as an official office of report for misconduct

## 8. The Ombudsman versus Judicial Processes

The American Bar Association speaks of Ombudsmen as follows:

Ombuds receive complaints and questions from individuals concerning people within an entity or the functioning of an entity. They work for the resolution of particular issues and, where appropriate, make recommendations for the improvement of the general administration of the entities they serve. Ombuds protect: the legitimate interests and rights of individuals with respect to each other; individual rights against the excesses of public and private bureaucracies; and those who are affected by and those who work within these organizations ([9], p. 1).

There are significant differences between judicial processes and the role and functioning of an Ombudsman program.<sup>4</sup> First, as noted above, the role of an Ombudsman is to act as a mechanism

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<sup>4</sup> An entity undertaking to establish an ombuds should do so pursuant to a legislative enactment or a publicly available written policy (the "charter") which clearly sets forth the role and jurisdiction of the ombuds and which authorizes the ombuds to ([9], pp. 2–3):

- (1) receive complaints and questions about alleged acts, omissions, improprieties, and systemic problems within the ombuds's jurisdiction as defined in the charter establishing the office
- (2) exercise discretion to accept or decline to act on a complaint or question
- (3) act on the ombuds's own initiative to address issues within the ombuds's prescribed jurisdiction
- (4) operate by fair and timely procedures to aid in the just resolution of a complaint or problem
- (5) gather relevant information and require the full cooperation of the program over which the ombuds has jurisdiction
- (6) resolve issues at the most appropriate level of the entity
- (7) function by such means as:
  - (a) conducting an inquiry
  - (b) investigating and reporting findings
  - (c) developing, evaluating, and discussing options available to affected individuals

to resolve issues, and not to create determinative decisions. While a judicial process creates enforceable judgments, the Ombudsman makes non-binding recommendations. The Ombudsman mediates, facilitates, and negotiates, and, where appropriate, uses the power of moral suasion or good offices to promote resolution.

Judicial processes follow well established rules of procedure. An Ombudsman process is meant to be flexible in order to meet the needs and capacity of the participants. To a much greater extent than a judicial process, participants in an Ombudsman process help to create the outcome. Judicial processes are zero sum gain—someone wins, and someone loses. By nature of the activity, Ombudsman processes attempt to create a win-win outcome.

Judicial processes are often slow to hear or deal with matters due to backlogs. Ombudsman processes are nimble and can deal with urgent matters as a matter of course. For example, in sport, some decisions have immediate effect, i.e., a dispute concerning the selection of an athlete to participate in an international competition can happen within 24–48 h before having to depart for the competition. Judicial processes may involve a decision maker who does not have a sports background. Sport ADR processes are able to deal with such matters, and with requisite expertise, in short order.

The open court principle means that judicial processes are part of the public record. Ombudsman processes are private and confidential, and the uses of a dispute resolution process out of the public view may be advantageous to participants who wish to keep contractual arrangements, sponsorships, or performance payments confidential.

The role of the judicial processes is fundamentally to hear the facts and the law concerning an issue and to render a decision. As noted in footnote 15, the role of the Ombudsman is much wider. The Ombudsman uses a wide variety of tools towards the resolution of a matter: investigation, mediation, negotiation, moral suasion, education, making non-binding recommendations, identifying trends to deal with systemic issues, issuing public reports, etc. The Ombudsman has full autonomy to decide on which tools (s)he will use in any particular case.

Finally, Ombudsman processes may look at a wider spectrum of disputes requiring resolution than simply matters of law. Ombudsman routinely look at inter-personal relationships, cultural or linguistic gaps, harassment, systemic matters, etc. This indicates that the Ombudsman uses a wide variety of tools to look at a wide variety of matters, and does so in a private and confidential manner.

## 9. Alternative Dispute Resolution [ADR] and the Ombudsman ([9], p. 3)

ADR is the alternative to formal processes such as grievances, administrative appeals, tribunals, or courts. The Ombudsman has the capacity to use a wide range of ADR techniques in order to deal with issues raised. These techniques may include [11]:

- Negotiation
- Mediation
- Shuttle diplomacy
- Good Offices
- Fact finding
- Formal or Informal investigation

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- (d) facilitating, negotiating, and mediating
  - (e) making recommendations for the resolution of an individual complaint or a systemic problem to those persons who have the authority to act upon them
  - (f) identifying complaint patterns and trends
  - (g) educating
  - (h) issuing periodic reports, and
  - (i) advocating on behalf of affected individuals or groups when specifically authorized by the charter

- Active listening
- Coaching
- Issue evaluation and feedback
- Role playing
- Creating referrals
- Making recommendations
- Advocating for due process and procedural fairness
- Giving advice

### 10. Why do Ombudsmen Get Created?

There are a wide variety of Ombudsman operations across the world. However, there are only a few reasons why these offices are created. They may be developed as part of a democratization process or in response to developing human rights efforts; one notes the growth of Ombudsman institutions in the former Communist Bloc countries. Jurisprudence may require institutions or governments to create citizen complaint mechanisms. Similarly, legislation may require this; for example, the growth of Ombudsmen inside of American financial institutions following the Sarbanes—Oxley Act. Ombudsman offices may take their origin in specific sectors as an organisational norm; for example the rise of Ombudsmen in universities (Canada's first Ombudsman scheme was at Simon Fraser University). An example of the 'organic' development for an Ombudsman program comes from an online petition in Australia which states:

To: Australian sports lovers and participants

Dear Tony Abbott

Would you please appoint an independent sports Ombudsman to deal fairly, transparently and honestly with issues in sport?

If an athlete is unable to afford legal representation there is nowhere for him/her to go for justice—apart from appealing overseas to CAS.

### 11. Why Is This Important?

Sporting organisations do not always operate with integrity. Athletes, parents, whistleblowers, etc. need someone they can trust and have faith their voices will be heard. With so many significant issues in sport, e.g., drugs, match fixing, deception, bullying, corruption, fraud, tanking, suicide—we need an independent arbiter and tribunal. All other major industries have systems in place to protect their workers or participants, Athletes and their families need to be able to trust their sport, if it is to continue to have a valued place in their community [12].

A second call for an Australian sport Ombudsman stated:

An alternative mechanism of voicing complaints is required, perhaps even the notion of a "sporting Ombudsman". Players and athletes invest considerable time, passion, love, and in many cases, money, in pursuing their sporting dreams. Being disenfranchised from that journey is not in the interests of the athlete or the sporting organisation.

Such a position could provide an independent forum to voice complaints without the expense or adversarial nature of the courts. It would avoid public slanging matches and ensure procedural fairness.

The Ombudsman could possess the ability to choose which complaints to investigate, and hold the power to issue recommendations to the relevant organisation. It would not act as a representative of the complainant, but be entitled to reach any finding [13].

Finally, Ombudsman schemes may be created in reaction to crisis as a way forward; this can be seen in a number of American industries following the 2008 financial crisis. Sport related Ombudsmen have been founded in many ways, but often as a response to crisis.

The Board of Control for Cricket in India (BCCI) recently appointed its first Ombudsman as a result of corruption and match fixing in the Indian Premier League [14].

Following what was considered a disappointing performance at the 2014 Glasgow Commonwealth Games (a crisis in Australia...) Athletics Australia commissioned a review, which stated:

That AA establish processes to elicit and respond to regular feedback and input from athletes and coaches including a strengthened Athletes Commission. This will also be an outcome of stronger stakeholder engagement as recommended. In the short term, there could be a role for...(A)n Honorary Ombudsman to receive feedback and progress the resolution of issues through the CEO as an initial mechanism to build trust [15].

The National Collegiate Athletic Association (NCAA) began consideration of an Ombudsman program following the 2012 Penn State Football sexual molestation crisis [16,17].

## 12. The Perceived Need for a Canadian Sports Ombudsman

In 2015, Marcel Aubut, the President of the Canadian Olympic Committee (COC) resigned following accusations of sexual harassment at the workplace [18]. In 2016, the COC was widely criticized for lavish spending on its headquarters, as opposed to funding athletes [19]. These events created a great deal of negative publicity for the COC. In the wake of these events, Tricia Smith, an Olympian, lawyer, International Olympic Committee member, and arbitrator with the SDRCC was elected COC President.

The SDRCC was created under a 2003 federal law, the *“Physical Activity and Sport Act”*. Section 10 of the Act states: (1) the mission of the Centre is to provide to the sport community (a) a national alternative dispute resolution service for sport disputes; and (b) expertise and assistance regarding alternative dispute resolution.

In mid-2016, using its authority under subsection b above, the Sport Dispute Resolution Centre of Canada (SDRCC) struck an ad hoc committee to consider a sport Ombudsman scheme and the COC is a key stakeholder. The committee consists of: former Olympians; the former United States Olympic Committee Athlete Ombudsman; a representative from the Canadian Association for the Advancement of Women and Sport and Physical Activity; current and former SDRCC Directors and staff; staff from Sport Canada, representatives from the Canadian Olympic Committee and the Canadian Paralympic Committee; and several experienced Ombudsmen. The committee is gender, geographically; and linguistically balanced, and several of the members are lawyers.

The committee will consider such matters as the type of Ombudsman required for the Canadian Sport System; identifying the depth and breadth of the sport community who can access Ombudsman services; systems design; the use of technology; and the qualifications required to be appointed as the Ombudsman. The committee will likely complete its work and make recommendations to the Minister for Sport and stakeholders in mid-2017.

## 13. Sport and Existing Ombudsman Schemes as a Method of Redress

In Canada, there are a number of existing Ombudsmen programs which may be accessed by athletes, coaches, administrators, parents, sporting organisations, fans, and others. None of these are sport specific Ombudsmen, and they will have precise or limited jurisdiction to look into sports related complaints, conflicts or disputes.

*Municipal Ombudsmen*—In Canada, municipal governments may have an Ombudsman program that is (a) created by local bylaw and is housed and funded at the municipal level, or (b) part of the jurisdiction of the provincial Ombudsman when there is specific jurisdiction established over municipal affairs. For example, Winnipeg, Toronto, and Montreal all have municipal Ombudsman as

part of the city government. In British Columbia, the Provincial Ombudsman has jurisdiction over Vancouver, Victoria, and all municipalities incorporated under the Municipal Affairs Act. Municipal Ombudsmen would be considered to be classical Ombudsmen as they have wide powers to consider the full extent of governmental activity within their jurisdiction.

Thus, persons who are involved in sport at a municipal level would have access to a municipal level Ombudsman. This could include recreational sports leagues, sports held in municipal facilities, and local government funding for sport. This may also include sports conducted at the school level where there is a municipal school board that falls under the municipal Ombudsman's jurisdiction.

*University Ombudsmen*—Most colleges and universities in Canada have Ombudsmen. These Ombudsmen may offer their services not just to students, but also to staff and faculty. Student athletes have access to Ombudsman programs. In fact, a widely used athlete participation agreement specifically states that: "If there is a dispute related to the provision of an AFA (Athlete Funding Agreement), that dispute is to be resolved through the LOI (Letter of Intent) Institution's Ombudsman or equivalent."<sup>5</sup> College and university Ombudsmen are considered to be organisational Ombudsmen.

As universities are established by provincial authority student athletes, coaches, etc. affected by a university's action or decision may escalate their complaints, disputes, or conflicts with the university to some provincial Ombudsmen (such as in British Columbia) who have jurisdiction over post-secondary education institutions established in their provincial Ombudsman statute.

*Workers' Compensation or Fair Practices Ombudsmen*—Persons who are in receipt of a sport related salary and who are injured 'on the job' generally have access to an Ombudsman scheme on a provincial level. For example, a paid coach who is injured while coaching may have access to a specialized Ombudsman within the Workers' Compensation or Fair Practices institution dealing with compensation matters. These Ombudsman schemes are considered to be executive Ombudsman schemes as they have the attributes of a classical Ombudsman's power of enquiry, but with the limited jurisdiction of the compensation scheme. Beneficiaries may usually escalate complaints to the provincial Ombudsman.

*Ombudsman-like entities*—Sport participants may look for redress with Ombudsman-like schemes such as human rights bodies and privacy commissioners. These institutions exist at both the federal and provincial levels, and would be considered executive Ombudsman-like authorities.

*Provincial and Territorial Ombudsmen*—These classical Ombudsman offices can consider the entirety of provincial government activity. This includes the activities of provincial ministries looking after sport. As such, matters such as provincial carding programs, team selections, etc. may be examined by the provincial Ombudsman. For example, the 2015 Ontario Ombudsman's Annual Report [20] indicates that there were five complaints investigated concerning the Minister Responsible for The 2015 Pan and Parapan American Games, and 25 concerning the Ministry of Tourism, Culture and Sport.

Sport Northern Ireland makes a specific reference to its provincial Ombudsman in its Service Charter:

If you still consider that Sport Northern Ireland has not dealt with the matter either properly or fairly, you can refer your complaint to the Ombudsman (Commissioner for Complaints). The Ombudsman is entirely independent of government and deals with any complaint of poor administration or of rules being applied wrongly. The Ombudsman does not normally investigate policy but considers how a policy has been put into practice.

The Ombudsman will normally expect you to have given Sport Northern Ireland the opportunity to investigate the matter before it is referred to the Ombudsman's office [21].

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<sup>5</sup> Canadian Interuniversity Sport—2016–2017 Letter Of Intent (LOI).

*Media Ombudsmen*—Sports coverage is a central part in the media. Media rights for sporting events such as the Olympic Games or The World Cup of Football are worth hundreds of millions of dollars. Media Ombudsman may consider the fairness of particular coverage to ensure that there is journalistic integrity in reporting. Examples of media Ombudsmen (which are executive Ombudsmen) include media outlets such as the CBC, Radio Canada, ESPN, and the Globe and Mail.

*Canadian Heritage Ombudsman*—Sport Canada is an agency of Canadian Heritage that maintains an organisational Ombudsman:

The Ombudsman is also the Senior Integrity Officer (SIO). As such, his responsibility, pursuant to the Policy on the Internal Disclosure of Information Concerning Wrongdoing in the Workplace, is to hear employees' disclosures of alleged wrongdoing. It should be noted that the functions of the Ombudsman and SIO complement one another. The purpose of both positions is to help employees discuss concerns, situations of conflict and alleged wrongdoing in a confidential and constructive manner [22].

*Canadian Forces Sports Ombudsmen*—The Canadian Forces are made up of 95,000 regular and 51,000 reserve members [23]. They define a Sport Patron program:

The role of a CF Sports Patron is to foster, promote and develop “their” sport at the Regional and National level within the Canadian Forces. A Patron recognizes the value of fitness and sports in the CF and supports the objectives of the CF Sports Program. As the sport's Ombudsman, and by virtue of their rank, CF Sports Patrons are in a unique position to solicit and elicit change within their sport, to encourage participation, and to resolve issues on behalf of the athletes they represent [24].

#### 14. Examples of Sport Ombudsman Schemes

A review of the literature has identified a number of sport related Ombudsmen, including those previously mentioned. In this section a number of Ombudsmen schemes will be presented as examples.

*Sport Specific Ombudsmen*—i.e., USA Fencing has an Ombudsman role which:

will develop a panel with one person in each region to determine the issues that exist for the referee corps and work with the members of the FOC to develop solutions. The Ombudsman must ensure that the panel includes representation for all weapons and both genders. The Ombudsman will lead a group comprised of six additional individuals [25].

*Sport Specific Ombudsmen*—i.e., The United Kingdom's Independent Football Ombudsman:

is appointed by the Football Association, the Football League and the Premier League (hereafter, the football authorities), in consultation with the Department for Culture, Media and Sport. The IFO provides independent external scrutiny of complaints within a transparent, accountable and effective system of self-regulation by the football authorities [26].

*Sport Integrity Ombudsman*—i.e., The Austrian Fair Play Code Ombudsman is:

a professional and confidential first point of contact for athletes and other stakeholders in sport who have information on past or planned match fixing activities.

The Ombudsman office advises and offers guidance on how to best handle suspicious and potentially dangerous situations in relation to match fixing. [27]

*Club Specific Ombudsman*—i.e., a skating program in Oakville, Ontario has an Ombudsman who:

is an individual club member who is not a member of the club's Board of Directors and is not a staff member. He or she will investigate concerns and complaints from all skating club members in a confidential manner. The role of the Ombudsman is to assist, wherever

possible, in finding a suitable resolution to the problem that satisfies all parties concerned, and that is in keeping with Skate Oakville's core values of integrity, inclusiveness, innovation and passion for excellence. [28]

*Suppliers Ombudsman*—In the United Kingdom, there is a retail Ombudsman which acts in a similar role to the Better Business Bureau in North America. The Retail Ombudsman lists individual sporting goods stores as members.

*National Olympic Committee Ombudsmen*—The United States Olympic Committee (USOC) is a best in class example of a sports Ombudsman program. The USOC Athlete Ombudsman is a product of federal law and has been in existence since March 1999 ([29], p. 157). The purpose of the Athlete Ombudsman is:

to serve athletes by offering cost-free, confidential and independent advice regarding opportunities and rights to participate in protected competition, and the various policies and procedures associated with participating in sport at an elite level [30].

The Athlete Ombudsman assists athletes with matters such as:

- Athlete rights
- Team selection
- Anti-doping
- Access to services
- Athlete agreements, codes of conduct, direct athlete support agreements
- Commercial terms
- Citizenship and other eligibility concerns
- SafeSport
- Athletes' voice in the governance of sport
- Ted Stevens Act, USOC and NGB bylaws and policies, International Olympic Committee and International Paralympic Committee rules and guidelines
- Informally resolving disputes with coaches, administrators or other athletes
- Pursuing a formal grievance [30]

*Sport Dispute Resolution Centre of Canada (SDRCC)*—While the SDRCC is not an Ombudsman scheme, its Resolution Facilitation (RF) process is Ombudsman-like:

Resolution facilitation is an assistance process that allows the parties involved in a dispute to communicate more effectively and work towards an agreement. The resolution facilitator is a neutral "process manager", whose role is to try to help the parties to better communicate with each other and to resolve their dispute through an amicable settlement. Should such a settlement not be possible, the resolution facilitator helps the parties understand the other options offered by the SDRCC to settle the dispute [31].

*Multi-Sport Games Team Ombudsman*—The Canadian Olympic Committee (COC), the Canadian Paralympic Committee (CPC), and Commonwealth Games Canada (CGC) all have Ombudsmen or Athlete Advocates which attend the relevant multi-sport games as part of Team Canada. In 2006 the SDRCC published a newsletter, "In the Neutral Zone" [32], dedicated to the experiences of Patrice Brunet—COC Ombudsperson, and Michael Smith CGC Athletes Advocate, as both the Winter Olympics and the Commonwealth Games took place that year. These are volunteer positions with Team Canada and the dedication of the team Ombudsmen to attend multisport games on behalf of Canada must be underlined. Smith served as the Ombudsman—Athlete Advocate at seven international Games (Commonwealth and Commonwealth Youth Games, Pan Ams, Olympics, and Jeux De La Francophonie), and Brunet at three.

Brunet, who served as COC Ombudsman at three Olympic Games, observed that the Ombudsman had four roles: international sport disputes (appeals to the Court of Arbitration for Sport), local criminal matters, internal administrative issues, and internal administrative sport disputes ([32], p. 2). Of these four roles, only the last one is truly an Ombudsman role. The remaining three would more properly belong to a Team Canada Legal Advisor, or Athlete Advocate.

Peter Lawless is a Victoria, British Columbia based lawyer who serves as the Canadian Paralympic Committee Ombudsman. His experiences at the Paralympic Games are similar to those of Brunet. He had a loosely defined role that was in part related to being a team conflict resolution mechanism, and as the team's legal advocate in handling appeals on behalf of the team to the CAS.

### 15. Establishing a Sport Ombudsman for Canada

As the above research indicates, the prospect of a sport Ombudsman for Canada is neither unique nor new. In 1988, a book chapter "The Ombudsman for Sport: An Idea Whose Time Has Come" called for the establishment of a Canadian Sport Ombudsman [33]. In 2000, a report prepared for Canada's Secretary of State for Amateur Sport made the following recommendations concerning a sport Ombudsman:

- That the Secretary of State (Amateur Sport) establish a federally legislated and funded appointment of an ombudsperson for the national amateur sport system, and
- That the ombudsperson follow a traditional model with traditional powers.
- That the ombudsperson be accessible to all participants in National Sport Bodies.
- The ombudsperson operates in conjunction with the ADR system but that it be housed separately [34].

This was a clear call to establish a classical Ombudsman program for sport in Canada. The Ombudsman program was not instituted in favor of the establishment of the SDRCC.

There are a number of simultaneous questions which need to be considered in developing an Ombudsman scheme. Some of these questions may well become points of discussion for the SDRCC ad hoc committee on the Ombudsman (previously noted). The Committee's Terms of Reference state:

The Sport Dispute Resolution Centre of Canada (the "Centre") fully supports the will of the sport community to create an ombudsperson program and is committed to assist in its establishment. Recognizing that an ombudsperson role was one of the initial recommendations of the working group that formed the basis for the Centre's foundation, the Board of Directors considers it a natural evolution of the Centre to play a leadership role in this initiative.

The general purpose of the Ad Hoc Committee—Ombudsperson (the "Committee") is to engage in a consultative process to clarify needs and expectations of the sport community with regards to an eventual ombudsperson program, and to formulate recommendations pertaining to the scope of service of an ombudsperson and to evaluate the resources required to establish such program.<sup>6</sup>

There are six key questions which would bear consideration in establishing a Sport Ombudsman for Canada: what is the jurisdiction of the Ombudsman; who are its clients; how will the services be delivered and measured (systems design); where will it be located; how will it be funded; and the qualifications for the Ombudsman.

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<sup>6</sup> SDRCC, Ad hoc Committee—Ombudsperson, March 2016.

## 16. Jurisdiction

The jurisdiction of an Ombudsman is defined by two characteristics: the issues that fall in the Ombudsman's authority to investigate or act; and the clients who can bring those complaints forward. A potential list of matters that a sport Ombudsman may act on includes:

- Sport Integrity
- Anti—Doping
- Harassment or discrimination
- Respectful training or competition environment
- Access to information
- Carding—athlete funding
- Equipment
- Sponsorships
- Scholarships
- Team selection
- Access to athlete services
- Discipline
- Suspensions
- Athlete agreements
- Codes of Conduct
- Ethical comportment
- Whistleblowing
- Conflict Resolution Training
- Interpersonal conflict within sport
- Governance
- Referrals to the SDRCC or CAS

## 17. The Clients

Clients are the second factor that determines Ombudsman jurisdiction. In other words, who can bring a complaint forward to the Ombudsman? The following are potential clients:

- Athletes
- Coaches
- Parents
- Legal representatives
- Employees
- Volunteers
- Boards of Directors
- Referees and officials
- Unions
- Teams, clubs and associations
- National Sport Organisations
- Provincial Sport Organisations
- Canadian Olympic Committee (COC)
- Canadian Paralympic Committee (CPC)
- Commonwealth Games Canada (CGC)
- Canadian Interuniversity Sport (CIS)
- Canada Games

- Provincial Sport Ministries and Agencies, i.e., Sport BC or ViaSport
- Sport Canada
- Francophonie Games
- Canadian Centre for Ethics in Sport
- World Anti-Doping Agency (WADA—insofar as it is housed in Montreal)
- Multisport games occurring in Canada
- Team Canada competing internationally
- Non- Sport Canada related games, i.e., World Police and Fire Games

## 18. Systems Design

Designing an Ombudsman system is not an easy process. The working group establishing an Ombudsman scheme has to take several factors into account.

First, there needs to be a firm decision on the most appropriate type of Ombudsman: classical, executive, or organisational. This necessary step is required in order to have an Ombudsman scheme which fits the needs and diversity of the jurisdiction and potential clients of the Ombudsman.

A classical Ombudsman scheme operating at a national level would require authority under legislation, regulation, or ministerial directive. It is possible that an Ombudsman scheme could be set up under the authority of *the Physical Activity and Sport Act* [35]. This act establishes the Sport Dispute Resolution Centre of Canada. Section 10 of the Act states:

10 (1) The mission of the Centre is to provide to the sport community (a) a national alternative dispute resolution service for sport disputes;

The Act does not define the “alternative dispute resolution service for sport disputes”. Presently, SDRCC alternative dispute resolution service for sport disputes include: resolution facilitation, mediation, med/arb, and arbitration services [36]. Thus, it may be possible for the SDRCC to offer sport Ombudsman services without any legislative change.

However, an underlying question which must be examined is whether or not the SDRCC is the appropriate location for the sports Ombudsman to be housed. It may well be that the sport Ombudsman is an entity separate and apart from SDRCC.

In that case, the sport Ombudsman may be an executive Ombudsman program. The authority for an executive Ombudsman may come from a ministerial directive (such as the establishment of the Canadian Forces Ombudsman [37]) or by agreement with relevant stakeholders.

Finally, an organisational Ombudsman scheme may be established in individual stakeholder bodies. For example, the Canadian Olympic Committee could establish an organisational Ombudsman program on its own initiative, and could determine the scope and terms of reference for such a program. Potentially, it could offer these Ombudsman services to other members of the Canadian sport system on a voluntary or fee for service basis.

In establishing any Ombudsman scheme, there should be a clearly defined and easily understood chartering document. This can take the form of an act, a regulation or directive, terms of reference, or even a job description. The purpose of the chartering document is to provide the basic information about what the Ombudsman does. This is usually crafted by the agency that is creating the Ombudsman scheme.

The second key document, an Ombudsman Framework, is a document written by the Ombudsman to describe how the Ombudsman will implement the chartering document, provide services, and report findings [38].

The third key document is the Ombudsman Results Based Management Accountability Framework (RMAF). The RMAF lays out a long-term evaluation strategy for the Ombudsman operations [39,40]. The RMAF provides direction on how to communicate to stakeholders what the Ombudsman did and also provides content for the fourth key document, the Ombudsman’s annual report.

In crafting all of these documents, the four key standards of Ombudsmanship must be kept in the forefront: Independence, Impartiality, Confidentiality, and a Credible Review Process [41].

*Independence:* The Ombudsman's office, in structure, function and appearance, should be free from outside control or influence. This standard enables the Ombudsman to function as an impartial and critical entity that reports findings and makes recommendations based solely on a review of facts and law, in the light of reason and fairness.

*Impartiality:* The Ombudsman should receive and review each complaint in an objective and fair manner, free from bias, and treat all parties without favor or prejudice. This standard instills confidence in the public and agencies that complaints will receive a fair review, and encourages all parties to accept the Ombudsman's findings and recommendations.

*Confidentiality:* The Ombudsman should have the privilege and discretion to keep confidential or release any information related to a complaint or investigation. This standard balances the need to protect sensitive information so that a complainant can come forward, and witnesses and subjects can speak openly, with the need to disclose information as a part of an investigation or public report.

*Credible Review Process:* The Ombudsman should perform his or her responsibilities in a manner that engenders respect and confidence and be accessible to all potential complainants. This standard is necessary for the work of the Ombudsman to have value and to be accepted by all parties to a complaint.

A literature review [1] found 54 individual characteristics that should be considered in the development of these three documents. The 54 characteristics are attached as an Appendix A.

The working group should also take into consideration the International Organisation for Standardization (ISO) documents on complaint handling ([1], pp. 87–91). ISO is a network of national standards institutes in 157 countries. The ISO develops international technical standards for industry, businesses, and governmental bodies. These international standards are adopted as the national standards bodies of the member states; i.e., American Standards Association (ASA) or Standards Australia to provide for the continuity of standards in manufacturing and other industries at a local level [42].

The ISO has developed two international standards that are relevant to Ombudsman operations:

- ISO 10002 *Quality management—Customer satisfaction—Guidelines for complaints handling in organisations*; and
- ISO 10003 *Quality management—Customer satisfaction—Guidelines for dispute resolution external to organisations* [43].<sup>7</sup>

These two documents provide operating standards, which, if met, would mean that the Canadian sports Ombudsman is a best in class operation.

Guidance for the establishment of a Sport Ombudsman can also be obtained from the American Bar Association Report—Standards for the Establishment and Operation of Ombuds Offices [9].

## 19. Where Should It Be Located?

Related to systems design and jurisdiction is the important question of the physical location of the Ombudsman's Office. Consideration should be given to two disparate considerations: the proximity of other stakeholders, and the need to create sport representation in other parts of Canada.

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<sup>7</sup> Both standards are available for purchase through the ISO website [44].

With respect to the former, Montreal and Ottawa contain headquarters for the Sport Dispute Resolution Centre of Canada, the Canadian Olympic Committee, Sport Canada, Commonwealth Games Canada, many National Sports Organisations, and others. There would be a certain scale of economy in being present in this region.

Alternatively, Vancouver, which hosted the 2010 Olympic and Paralympic Winter Games, and which has sport legacy tradition, may be a viable alternative. The present Minister for Sport and Persons with Disabilities, the Honourable Carla Qualtrough, represents a suburban Vancouver riding.

## 20. How Is It Funded?

Funding the Ombudsman is a key consideration of the development of an Ombudsman scheme. There are two key concepts for funding the Ombudsman: there should be no cost to stakeholders to use the Ombudsman service, and the Ombudsman should be sufficiently funded by the core budget of whatever entity it is embedded in (i.e., the core budget of the SDRCC, COC, or Sport Canada should have sufficient funds to support the Ombudsman). Ombudsmen are generally not fee-for-service based, although there are examples of private businesses which offer Ombudsman services that would create fees for the business entity being complained about [44]. For example, if the working group determined that the sports Ombudsman should be housed within the SDRCC, the Sport Canada core funding for SDRCC would then have to include the whole cost of the sport Ombudsman operations.

## 21. Qualifications for the Ombudsman

When looking at appointing an Ombudsman, the following list of qualifications may be helpful:

- Advanced university education in conflict resolution, law, management sciences, counseling, psychology or other related field
- Experience in the Canadian Sport System
- At least three years' experience in sport dispute resolution
- At least five years' experience in Ombudsman—related work, including online dispute resolution (desirable—to have had experience in setting up a new Ombudsman program)
- Certification, accreditation and/or membership in a relevant Ombudsman association and/or the ADR Institute of Canada
- Fluent in English or French and competent in the other language
- Must have an arm's length relationship with stakeholder or client groups
- Willingness to travel on short notice
- Management experience
- Excellent presentation skills (bilingually)
- Experience in writing annual reports
- Credibility in the Canadian Sport System.

## 22. Conclusions

Canada has had a long tradition of Ombudsmen in government and business: provincial and territorial governments, financial institutions, Revenue Canada, The Canadian Forces and Veterans, universities, hospitals, municipalities, and even Olympic teams have benefitted from Ombudsman programs. Canada has been the host nation to the Summer and Winter Olympics, the Pan American Games, the Commonwealth Games, and numerous world sporting championships. With that tradition of Ombudsmanship, a recent crisis at the COC, the fact that Canada is a sporting nation, and with Canada's vastness and bilingual diversity, there is a strong argument for Canada to adopt a sports Ombudsman program to resolve sports related disputes.

**Conflicts of Interest:** The author declares no conflict of interest.

## Appendix A. 54 Characteristics That Impact Ombudsman Systems Design

Alignment

Autonomy—arm's length—Independence

Due process—Natural Justice Principles applied

Sufficient resources

Access to Information, documents, staff

Community buy-in

Clear mandate

Recourse—moral suasion—public criticism

Accessibility (promotion—availability to the community)

Power of own motion

Annual report

Established terms of reference (TOR)

Qualified—knowledgeable incumbent

Advisory group

Active public relations campaign—community education

Structural autonomy and accountability

Filing system

Database

Balanced time management

Reporting relationship with advisory and budget group

Review of startup policy—TOR

Independence

Impartiality and fairness

Credibility of the review process

Confidentiality

Independence established by higher jurisdiction

Independence—Separate from the organisation it reviews

Independence—Appointed by super majority

Independence—Long fixed term—reappointment possible

Independence—For cause removal by supermajority

Independence—High fixed salary

Independence—Appropriate budget—accountability of spending

Independence—Sole authority to hire staff

Independence—Someone can always exercise the Ombudsman role

Independence—Decisions not reviewable

Impartiality and fairness—Qualifications

Impartiality and fairness—Supermajority to hire or remove

Impartiality and fairness—No conflict of interest in activities

Impartiality and fairness—Direct access to ombuds no fee required

Impartiality and fairness—Power of recommendations and public criticism

Impartiality and fairness—Required to consult on adverse findings

Impartiality and fairness—Ombuds is an advocate for fairness, not the parties

Credible review—Broad jurisdiction

Credible review—No parties exempt from complaining

Credible review—Organisation not permitted to impede

Credible review—Grounds for review are broad, and focus on fairness

Credible review—Reports problems and recommendations, has ability to publish

Credible review—Findings not reviewable

Credible review—Ombuds cannot make binding orders

Confidentiality—Ombudsman has power to decide level of information to be disclosed

Confidentiality—Ombudsman will resist testifying

Broad range of enquiry available

Discretionary power to refuse complaints and to publicize

Identify complaint patterns and trends

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