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ORIGINAL

IN THE SUPREME COURT OF THE NORTHWEST TERRITORIES

BETWEEN:

KARANINA FERNANDES and MICHELLE FERNANDES, .
by their next friend, TERENCE FERNANDES

Applicants

- and -

SPORT NORTH FEDERATION, ARCTIC WINTER GAMES
INTERNATIONAL COMMITTEE, NORTHWEST
TERRITORIES FIGURE SKATING ASSOCIATION

Respondents

Transcript of the Proceedings held in Chambers before The
Honourable Mr. Justice J.Z. Vertes, at Yellowknife in the
Northwest Territories, on March 1, A.D., 1996.

APPEARANCES:

Ms. K. Peterson, Q.C.: Counsel for the Applicants
Mr. E. Johnson, Q.C.: Counsel for the Respondents
Sport North & N.W.T. Figure
Skating Assoc.
Mr. A. Wright: Counsel for Arctic Winter
Games International Committee

1 In this application, the Court is asked to
2 intervene in the internal operations of an amateur
3 sports organization. Essentially, the applicants are
4 seeking a public court remedy over a private
5 situation. I think it is, therefore, important to put
6 this issue in a broader perspective.

7 The courts are, of course, open to everyone. But
8 they are not necessarily available or suitable for
9 every situation. The organizations under scrutiny here
10 are not government bodies. They may receive grants
11 from different levels of government, but they are not
12 delegates of government carrying out some statutory
13 power. Hence, traditionally, the activities of such
14 private organizations are not subject to the control of
15 the Court's prerogative writs.

16 Traditionally, the Courts conceived that the
17 relationship among members or participants of a
18 voluntary organization was purely personal and the
19 Courts would not intervene unless there was something
20 more at stake than the mere right of membership or
21 participation unattended by any financial
22 considerations. Still today the rule is that Courts
23 should be slow to exercise jurisdiction over the
24 actions of a voluntary association unless some property
25 or civil right is affected thereby. This was most
26 recently stated by the Supreme Court of Canada in the
27 case of Hofer v. Lakeside Hutterite Colony, [1992] 3

1 S.C.R. 165.

2 I recognize that the modern view is that a Court
3 has the power to intervene to protect rights of
4 contract. This is premised on the theory that the
5 rules and constitution of a voluntary organization
6 constitute a contract between the member and the
7 organization. It follows from this that when an
8 organization purports to exercise a decision-making
9 power, it must comply with the rules of natural
10 justice. Even if there is no set procedure, the rules
11 of natural justice are incorporated as an implied term
12 of contract. The English case referred to by counsel,
13 Lee v. Showman's Guild, [1952] 1 E.R. 1175 (C.A.),
14 stands for the proposition that public policy requires
15 that a decision be made only upon fair procedures, at
16 least where the matters at stake are of great import,
17 as for example in that case a right to work.

18 I am, however, cognizant of admonitions from the
19 Supreme Court of Canada and elsewhere that to greatly
20 expand the scope of the Court's jurisdiction to
21 intervene in the conduct of individuals, to open up
22 private action to judicial review, could strangle
23 normal human society. I therefore approach this
24 application with a significant degree of skepticism
25 about the propriety of the Court even assuming
26 jurisdiction.

27 Having said that, and having regard to the

1 widespread public interest in these proceedings, I will
2 nevertheless assume I should exercise jurisdiction and
3 canvass the facts and issues.

4 The applicants are amateur figure skaters. They
5 wanted to compete in the upcoming Arctic Winter Games.
6 A question was raised as to their eligibility based on
7 residency. The Sport North Federation, being the body
8 with jurisdiction to determine eligibility, sought the
9 advice of the Technical Committee of the Arctic Winter
10 Games International Committee. They were told that,
11 based upon the information provided, "It appears as if
12 (the applicants) should be considered residents of the
13 N.W.T. for the purposes of the Arctic Winter Games".
14 There is no indication if any formal decision was
15 taken as a result of this advice. Nor is there any
16 evidence of what representation, if any, was made to
17 the applicants.

18 The applicants competed at trials in January and
19 won first and second place. They were thus placed on
20 the N.W.T. Team. Subsequently a letter was sent to
21 Sport North on behalf of the N.W.T. Figure Skating
22 Association seeking a review of the applicants'
23 eligibility status. It was alleged that minimal
24 evidence was considered initially by the Technical
25 Committee. The Association sought either confirmation
26 of the earlier opinion as to eligibility or a reversal
27 of the decision. The Association president wrote that

1 the ruling as to eligibility, "may result in
2 disruption, consequent appeals, and possibly
3 disqualification of the N.W.T. Arctic Winter Games
4 Figure Skating Team".

5 Sport North again sought the assistance of the
6 Technical Committee. The Committee declined to become
7 involved on the basis that while it may provide
8 eligibility opinions, it is up to Sport North to
9 exercise responsibility for team selection.

10 While there are written rules and policies
11 respecting eligibility, there are no set procedures for
12 either the determination of eligibility or appeals of
13 those determinations. Counsel have described the
14 practice of relying on Technical Committee advice as an
15 unwritten convention practiced for many years.

16 Sport North struck an ad hoc review committee.
17 They met; they reviewed the information available; and
18 they held a conference call with the father of the two
19 athletes. This review committee then decided that the
20 applicants were not eligible due to a failure to meet
21 residency requirements. Sport North then disqualified
22 the applicants and filled their positions with two
23 other athletes.

24 Unfortunately, time does not allow me to fully
25 canvass the issues raised on this application. The
26 team plane leaves for the Arctic Winter Games in 24
27 hours. It is obvious that my decision will be final

1 and irrevocable insofar as who gets to compete.

2 In deciding the eligibility status of the
3 applicants, I must determine whether they have been
4 validly disqualified. Ordinarily it is not incumbent
5 on a court to review the merits of such a decision.
6 The only questions which a court would ordinarily
7 entertain are first, whether the rules of the
8 organization have been observed; second, whether
9 anything has been done contrary to natural justice; and
10 third, whether the decision complained of has been made
11 bona fide.

12 The applicants seek the following remedies:

- 13 (a) a declaration that the decision to
14 disqualify them is void;
- 15 (b) a declaration that the N.W.T.
16 figure skating team remains as
originally selected with the
applicants included;
- 17 (c) an injunction preventing the
18 departure of the team without the
applicants.

19 All of these are, to say the least, extraordinary
20 remedies and subject to an overriding judicial
21 discretion.

22 The applicants also sought an order in the nature
23 of certiorari quashing the Sport North decision but,
24 because of what I said earlier, I think it is conceded
25 that such a remedy is not available in this case.

26 The applicants do not allege bad faith or
27 maliciousness. In their position, this is a case about

1 process and fairness. Their argument is that Sport
2 North decided on a process, that being reliance on the
3 opinion of the Technical Committee, and now they are
4 bound by that process. Since there are no provisions
5 for appeals, no structure for a review committee, no
6 rules on how to decide such things, then Sport North
7 was, in lawyers' terms, estopped from changing its
8 earlier eligibility ruling. The review committee
9 operated in a vacuum and this, it is argued, was
10 inherently unfair to the applicants.

11 In my opinion there was no inherent unfairness.
12 There may have been a lot of improvisation with ad hoc
13 procedures (something that should no doubt be rectified
14 in the future), but I have concluded that the review
15 committee and Sport North acted in a responsible manner
16 with a view to the broad interests of the organization
17 as a whole and all of its participants. There was a
18 legitimate concern raised about the applicants'
19 eligibility status. Sport North had the sole
20 responsibility to decide that question. The fact that
21 Sport North may have initially relied on the opinion of
22 the Technical Committee does not, in my opinion,
23 preclude them from reviewing the validity of that
24 opinion in the face of bona fide concerns.

25 Was the process in accordance with natural
26 justice? The basic requirements are notice,
27 opportunity to make representations, and an unbiased

1 tribunal. But, as numerous cases have held, the
2 content of the principles of natural justice is
3 flexible and depends on the circumstances in which the
4 question arises. I must consider the peculiar
5 circumstances in this case. The ultimate question is
6 whether the procedures adopted were fair in all the
7 circumstances.

8 In this case, the applicants received notice of
9 the concerns raised. They knew the scope of the
10 inquiry. There should have been no mystery as to what
11 was being inquired into, that being their eligibility
12 under the residency requirements, and the eligibility
13 criteria were known and public.

14 The applicants had an opportunity to make their
15 representations. Their father participated in a
16 discussion with the review committee.

17 Was there an unbiased tribunal? This question
18 takes on a different hue when dealing with private
19 organizations. It is often the case that given the
20 close relationship amongst members of a voluntary
21 organization, members of the relevant tribunal will
22 have had some previous contact with the issue in
23 question, and given the structure of voluntary
24 organizations, it is almost inevitable that the
25 decision makers will have at least an indirect interest
26 in the question under consideration. In this case,
27 there is no allegation of bad faith. There is no

1 evidence of arbitrariness in the decision-making
2 process. Furthermore, the issue was clearly one within
3 the jurisdiction of Sport North to make and nothing has
4 been said to me to suggest that it is an irrational
5 one.

6 I am satisfied, therefore, that there has been no
7 breach of natural justice.


8 Finally, given the short time frame and the
9 interests of the figure skating team as a whole
10 including the jeopardy should the eligibility of any of
11 its members be questioned at the games, I am satisfied
12 that the balance of convenience favours the
13 respondents. The applicants will not be participating
14 in these Arctic Winter Games, but their figure skating
15 careers are still open to them, and I am sure they will
16 have many opportunities in their future.

17 Having earlier expressed my doubts as to whether
18 this controversy should even be in the courts, now that
19 it is, I have concluded, for the reasons I have
20 outlined, that this application should be dismissed.

21 Again, I thank counsel for their excellent
22 submissions. Costs may be spoken to at some point in
23 the future if that becomes necessary.

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Certified Pursuant to Practice Direction
#20 dated December 28, 1987



Sandra Burns
Court Reporter