IN THE MATTER OF AN ARBITRATION UNDER THE *ADR Sport RED PROGRAM*

BETWEEN

BRANDON UNIVERSITY
(hereinafter called the "Claimant or Brandon")

-and-

CANADIAN INTERUNIVERSITY SPORT
(hereinafter called the "Respondent or CIS")

SOLE ARBITRATOR Prof. Richard H. McLaren, C.Arb

COUNSEL FOR THE CLAIMANT: Grant Mitchell, Q.C
Jeffrey Palamar, Esq.
9th Floor 400 St. Mary Ave.
Winnipeg, MB R3C 4K5

COUNSEL FOR THE RESPONDENT: Ms. Marg McGregor
801 King Edward, Suite N205
Ottawa, ON K1N 6N5

HEARINGS in RELATION to this MATTER were HELD in WINNIPEG, MANITOBA on 23 October 2003 then ADJOURNED and CONTINUED at a HEARING by CONFERENCE CALL on 12 November 2003.

DECISION OF THE ADR Sport RED TRIBUNAL
ON THE APPEAL APPLICATION OF BRANDON UNIVERSITY

AWARD

I. BACKGROUND

1.1 The Brandon University men's hockey team played two ineligible players in an exhibition hockey series in Thunder Bay with Lakehead University in December of 2001. Brandon Athletic Director Ken Friesen {"Friesen"} in a report dated the 20th of December 2001 to Don Wilson, the President of Canada West Athletic, disclosed the use of one ineligible player {"Player1"}. On 29 January 2002, following a hearing into the activities of Player1,the CIS Discipline Committee found a breach of the CIS Policies and imposed a suspension on hockey coach Jim Fuyarchuk {"Fuyarchuk"}.

1.2 Through an internal investigation by Brandon in early 2002 the use of a second ineligible player {"Player2"} was discovered. On 21 February 2002 Brandon submitted to CIS a further self-disclosure statement advising that they had used Player2 in the exhibition hockey games at Lakehead University. The CIS Complaints and Investigation Committee set out the formal charges in a report submitted to the CIS Discipline Committee on 30 April 2002. That document was copied to the President, the Athletic Director and the hockey coach of Brandon. It reads in part as follows.

. . .

> It is the Committee's view that Brandon University breached the following CIS regulations, specifically when Brandon University men's head hockey coach Jim Fuyarchuk knowingly invited and allowed Chris Low to participate in a non-Conference competition against Lakehead University on December 7 & 8 2001...

The CIS Discipline Committee hearing for the 30 April 2002 charge was convened on 23 July 2002 and adjourned until 4 November 2002. On 3 December 2002, the Discipline Committee rendered a decision with respect to the involvement of the coach in the participation of Player2. It was determined that no further sanctions were to be imposed on the coach.

1.3 In the interval between January and April when the formal charges quoted above were set out the University had taken the following actions by letter from the President of 1 March 2002.

- On 1 March 2002 a suspension without pay of men's hockey team coach Fuyarchuk.
- The dismissal of Fuyarchuk as hockey coach effective 22nd March 2002.

On the same date by a further letter, the President wrote a disciplinary warning to Athletic Director Friesen for his "passive response" to the actions of Fuyarchuk.

1.4 In addition to the foregoing the teaching contract for Fuyarchuk expired on the 19th of April 2002 and was not renewed. Therefore, he was as of that date no longer an employee of Brandon. Later in the year the contract for Athletic Director Friesen expired and his employment was not renewed. As a result a new Athletic Director David Shyiak {"Shyiak"} was appointed in July of 2002.

1.5 On the 19th of December 2002 the CIS Discipline Committee received another formal charge. That charge was in respect of the involvement of Athletic Director Friesen in the participation of two ineligible players against Lakehead University. The allegation was that Athletic Director Friesen drove Player2 to the airport in Winnipeg for his departure to Thunder Bay. The notice of these proceedings was different than the 30 April 2002 charge, as it does not specifically allege a breach of CIS regulations by Brandon. It reads:

> . . .
> In accordance with Section 90.40 – Conduct and Enforcement: Complaints, Investigation and Discipline Policy of the 2002 Canadian Interuniversity Sport (CIS) Policies and Procedures, I have considered a complaint submitted by Clint Hamilton, Chairperson, CIS Discipline Committee. The complaint details the involvement and/or negligence exercised by the then Athletic Director, Ken Friesen, with respect to the participation of two ineligible men's hockey players in a non-conference competition against Lakehead University.
>
> An investigation is not deemed necessary with respect to this matter. Please accept this notice as a formal charge regarding the complaint, which involves a breach of the following regulations:…

1.6 On 21 January 2003 the CIS Discipline Committee rendered a decision in relation to the charge to the following effect:

1. Friesen was prohibited from representing the University in any capacity at a CIS sanctioned event or function for a period of one year.
2. Brandon was fined $ 5,000 for breach of CIS regulations.
3. Brandon was ordered to "… undertake such procedural, structural or other changes as may be required to minimize the chance of future violations, and shall provide a progress report regarding its efforts to the CIS…".
4. Brandon was to cover the costs of CIS associated with the proceedings.

1.7 By letter of 5 February 2003 Brandon appealed the CIS Discipline Committee decision. Brandon filed a request for arbitration with the ADRsportRED program on 3 June 2003. The parties mutually agreed to the appointment of the arbitrator. The parties also mutually agreed to the hearing of this matter outside of the time frames provided for by their own and the ADRsportRED rules for an arbitration hearing. At the hearing, counsel agreed that the Arbitrator had been properly appointed and there were no objections as to jurisdiction. They're being no preliminary objections the matter proceeded to a hearing held in Winnipeg, Manitoba on 23 October 2003 at the offices of Taylor McCaffrey.

1.8 At the hearing for the Claimant University were: Dr. Louis P. Visentin, the President and Vice-Chancellor of Brandon University (by telephone conference call) and Scott Lamont Vice-President (Administration and Finance) and their counsel Grant Mitchell, Q.C. and Jeffrey Palamar, Esq. Present by telephone conference call for the CIS was its spokesperson Ms. Marg McGregor who is the Chief Executive Officer of the CIS and Tom Huisman, Director of Operations and Development of the CIS.

II. PROCEEDINGS

2.1 The Claimant provided Will Say statements on 30 September 2003. The Respondent followed with their Will Say statement on 15 October 2003. The matter was adjourned at the hearing in Winnipeg because of unforeseen testimony in chief of Mr. Huisman which neither side had anticipated nor could reasonably have done so. The University wanted to review the testimony with Mr. Shyiak whom they had not interviewed or prepared and planned to call as a witness. An adjournment was granted on the basis of natural justice and fair procedure and the University after production by both parties filed a Will Say statement for Shyiak on 5 November 2003. The statement was very fairly prepared by the University and essentially confirmed what Mr. Huisman had said in chief at the previous day of hearings. The University's counsels are commended for the integrity that they showed in preparing this statement.

2.2 On the first day of hearings the witnesses for the Claimant were Louis P. Visentin

President and Vice-Chancellor of Brandon University and Scott Lamont, Vice-President (Administration and Finance) of Brandon University. The sole witness for the Respondent was Tom Huisman, Director of Operations and Development, CIS.

2.3 The continuation of the hearing took place by conference call on 12 November 2003 commencing at 7:00 p.m. (EST). The Will Say statement of Shyiak was accepted by the CIS at that time without cross-examination. Mr. Huisman completed his evidence followed by argument from both parties with the hearing adjourning at approximately 9:40 p.m. The parties were advised that the hearing was closed and a written decision would be issued.

2.4 The Will Say statement of Dave Shyiak reads in part as follows:

. . .

- Dave became employed with Brandon University for a one year contract, in mid July of 2002. This position was half-time status as Athletic Director and half-time status as an Instructor in Physical Education.

- Between starting his position in mid July 2002 and December 2002, Dave generally recollects three or four discussions with Tom Huisman from CIS on these issues. Dave came to understand from Tom that CIS was considering sanctions regarding the second disclosure by Brandon University. Dave's impression was that the sanctions would more than likely be against the individual (Ken Friesen) as opposed to the University, as the University had: 1) fired the hockey coach; 2) dropped the hockey program; and 3) "removed" the Athletic Director. In fairness though, Tom had not told him that directly, and had indeed indicated that it was at least possible that there could be sanctions against the University itself.

- In the week of December 16, 2002, likely on Friday the 20th, Dave had a brief informal conversation with the President of Brandon University. This took place in the gymnasium at Brandon University, and Dave told the President that CIS was considering further sanctions against the University as a result of the second disclosure.

- Dave informally told this to the President after receiving an e-mail of December 20, 2002 from Tom Huisman indicating an upcoming hearing in January 2003. He does recollect that the President was quite upset on hearing his comments and

suggested in response the possibility of involving the University's lawyers in the matter, if the University itself was at risk. Things were left unresolved as the conversation was quite informal and brief.

. . .

- At some stage in the process (and Dave is not positive on the date but believes it likely was January 6, 2003) Dave and Tom spoke about what could happen as a result of the hearing scheduled for January 10, 2003. Dave recollects asking Tom what the University could expect, and Tom responded to him that he could not answer specifically but he could advise Dave as to what had happened in the past in other cases. Tom said that the individual involved could be sanctioned. Tom also indicated that there could be possible sanctions against the University. Dave in his own mind believed that the University had done all that could be expected of them and that all further punitive measures would be directed at the individual (i.e. Ken Friesen).

- Dave indicated to Tom that perhaps we (Brandon University) should get legal representation involved and Tom indicated that he would get back to Dave on that. He did, and indicated that if Brandon University were to have a lawyer present then CIS would also have a lawyer present. Dave's response to this was that common sense must prevail. Conceivably, the best decision would be rendered by knowledgeable University personnel rather than legal counsel. Also, expenses related to legal counsel was a contentious issue for Brandon University's Athletic Department. He reiterated what Brandon University had done as a result of the second disclosure and sent an e-mail on January 9, 2003, confirming that the University's Athletic Department would not participate.

. . .

2.5 None of the parties raised any objections to the way in which the arbitration proceedings were carried out, nor as to the appointment of the Arbitrator or his jurisdiction to issue a final and binding decision.

III. ARGUMENTS

Arguments of the Claimant

3.1 The first of three arguments was that the CIS failed to provide clear notice that Brandon itself, rather than its former hockey coach and Athletic Director, was being considered or addressed with charges by the CIS.

> *McGarrigle* v. *Canadian Interuniversity Sport*, [2003] O.J. No. 1842 (S.C.J.).

3.2 Apart from the issue of notice, it was submitted that this case was not an appropriate one for the application of vicarious liability to Brandon for the conduct of the coach and the Athletic Director. The Claimant also questions why the CIS Discipline Committee only imposed sanctions on the coach in his case, but extended vicarious liability to the University for the actions of the Athletic Director.

> *E.D.G.* v. *Hammer*, [2003] S.C.J. No. 52; *671122 Ontario Ltd.* v. *Sagaz Industries Canada Inc.*, [2001] 2 S.C.R. 983; *Bazley v. Curry*, [1999] 2 S.C.R. 534; *T. (G.) v. Griffiths*, [1999] 9 W.W.R. 1 (S.C.C.); and *Caron* v. *Allport*, [1995] O.J. No. 4220.

3.3 If Brandon was unsuccessful on the first two arguments, it was submitted that imposing the maximum sanction was inappropriate and without proper consideration of the mitigating factors. The mitigating factors brought forward by the Claimants were: (1) the self-disclosure of Brandon; (2) the actions of the University after the breach, including its internal investigation, the cancellation of the hockey program and the removal of the former coach and the Athletic Director; (3) the prior record of the institution; (4) the fact that the University was an innocent victim and could not have predicted or prevented the breach; (5) the nature of the games (exhibition v. regular season or playoff games); (6) the harm imposed on the CIS or others from the breach; and (7) the fact that the University did not condone what had occurred. The consideration of such factors means that the CIS did not apply equity and equality and thus imposed a disproportionate penalty in relation to prior proceedings of the Discipline Committee.

> CIS Discipline Committee Rulings: University Laval (20 June 2002); Memorial University (20 January 2003); Lakehead University (9 April 2003); and University of Calgary (2 June 2003.

Arguments of the Respondent

3.4 The CIS submits that it provided clear notice that Brandon was subject to discipline. Brandon told us to whom the CIS was to correspond. They did so with the designated person who was the Athletic Director. The communications with Brandon were the same way that CIS communicates with all of its other members. Brandon is not a new member to CIS and knows the process and procedures used.

3.5 The second argument is that Brandon does share in the responsibility for this breach. They submit that this case was an extremely serious one as correspondence between the President of the University, Dr. Visentin, and the hockey coach indicated that there were issues of "… gross professional misconduct, a cover-up, a willful and pre-mediated intent to circumvent regulations, and an inability to understand ethical responsibilities…". This was not a breach by a junior person at the University. The person had the word "Director" in his title. Therefore, the University should share in responsibility.

3.6 The Respondent submits that it was "neither capricious nor arbitrary in its decision-making when CIS imposed a $5,000 fine on Brandon University." The sanctions imposed were within the proper range of penalties and the policies of the CIS. This was not the maximum sanction that could have been given, since CIS policy enables the Discipline Committee to put an institution on probation and suspend a member from participating for a period of up to two years. The Respondent further submits that according to policy 90.40.6.3 regarding the determination of the sanction, it does not require them to consider remedial actions taken by an institution.

IV. RELEVANT POLICIES AND PROCEDURES

CIS Policy 40.30.1.1
"Each member institution shall put in place an eligibility verification system to accurately monitor the academic status and eligibility of its Canadian Interuniversity Sport student-athletes on an on-going basis. While the Director of Athletics is ultimately responsible for determining eligibility of all athletes at their respective institution, the success of any eligibility verification system is reliant on the combined efforts of the institutions administrators, coaches, and student-athletes."

CIS Policy 90.10.1
CIS Policy 90.10.2.2
CIS Policy 90.40.2.2
CIS Policy 90.40.3.3
CIS Policy 90.40.6.1 (j,n,o)
CIS Policy 90.40.6.2 (b)
CIS Policy 90.40.6.3

V. ISSUES

5.1 Did the University receive adequate notice that it was possibly in jeopardy for the conduct of its Athletic Director?

5.2 If notice was sufficient, can the University be found vicariously liable for the breach of CIS policies by its Athletic Director?

5.3 Is the sanction of $5,000 consistent with prior sanctions and were the relevant mitigating factors considered?

VI. DECISION

Issue #1: Did the University receive adequate notice that it was possibly in jeopardy for the conduct of its Athletic Director?

6.1 The formal charge on 30th April 2002 over the signature of the Chair of the Complaints and Investigation Committee of the CIS indicated that:

> "…Brandon University breached the following CIS regulations, specifically when Brandon University men's head hockey coach Jim Fuyarchuk knowingly invited and allowed Chris Low to participate in the non-Conference competition against Lakehead University on December 7 & 8 2001. This breach of CIS regulations also contradicts some of Mr. Fuyarchuk's earlier statements that were provided during the proceedings related to the December 20, 2001 Brandon University self-disclosure:…"

6.2 The University could be in doubt that it was involved in the proceeding involving the hockey coach for it was directly referred to as having breached the CIS regulations. The University Athletic Director was copied as the designated person under the CIS regulations to receive such documents. The University had notice of the proceeding.

6.3 The formal charge on 19th December 2002 over the signature of the designate of the CIS President with copies to the new replacement Athletic Director of the University Shyiak and also the former Athletic Director as well as the President of the University indicated that:

> "… the complaint details the involvement and / or negligence exercised by the then Athletic Director, Ken Friesen, with respect to the participation of two ineligible men's hockey players in a non-conference competition against Lakehead University.

An investigation is not deemed necessary with respect to this matter. Please accept this notice as a formal charge regarding the complaint, which involves..."

6.4 It is immediately apparent that in comparing the second charge it is at the very least elliptical and ambiguous as to the matter of whether the University is directly involved. The first formal charge refers to the University the second does not. There is unquestionably a lack of formal precision in the subsequent charge. This lack of precision gives rise to the first issue. Did Brandon have notice of the proceeding and understand that it was in jeopardy and might wish to attend the hearing?

6.5 In examining just the language of the December 02 charge it must be found that notice to the University is insufficient. A reasonable person would not necessarily conclude from reading the charge that the University ought to take notice that it is directly involved. The CIS argues that the University has notice by looking at the first charge. The two charges are not linked in any obvious way.

6.6 It is the ambiguity of the second charge that led to a series of discussions between Shyiak, as the replacement Athletic Director and Tom Huisman of the CIS. Shyiak was told by Huisman that "CIS was considering sanctions regarding the second disclosure by Brandon University". Shyiak understood that the University was in jeopardy. Although, as his Will Say statement indicates, he believes that the outcomes are more likely to be against the individual than the University because of the fact the hockey coach had been fired; the program was dropped and the former Athletic Director had been "removed". Therefore, I would conclude that the possibility of sanctions was recognized by the official representative of the University to whom notices should go from the CIS. The oral discussions may be referred to as clarifying the ambiguous notice.

6.7 Shyiak also conveyed his knowledge informally to the President apparently in a social setting. Hardly the best way to apprise one's President of such information. Nevertheless, I must conclude that the President was apprised that sanctions might arise against the University as a result of the second disclosure and charge. The possibility of sanctions against the University was raised again in discussions between Shyiak and Huisman on the 6th January 2003. On that date Shyiak heard for the second time that the University should get legal representation and be involved in the matter. The first was when the President responded to the informal comments of the Athletic Director in December 2002. Nevertheless, the Athletic Director made a decision not to attend. That is how it comes to pass that the University is not at the January 03 hearing and then receives the sanction following the hearing.

6.8 I must conclude that the University realizing that the second charge was ambiguous and different in language than the first charge requested clarifications. They received them in clear terms that there was jeopardy and they might wish to consider the attendance of legal counsel. The University through its Athletic Director then made a decision not to attend. While that judgment may have been ill informed and inappropriate the Athletic

Director had the authority to make the decision and did so. Therefore, I find the facts are not such as to conclude that the University was without notice of the CIS disciplinary hearing. They knew or ought to have known that the University was likely to be implicated in the hearing. Therefore, it is concluded that the University had knowledge of the potential jeopardy in the proceedings or ought to have had such knowledge. It chose not to attend at its peril. There was no denial of natural justice in the notice of a hearing on the December 02 charge, The University had notice of the proceedings through the discussions between Shyiak and Huisman and Shyiak and the President. They elected not to attend.

Issue #2: If notice was sufficient, can the University be found vicariously liable for the breach of CIS policies by its Athletic Director?

6.9 Vicarious liability is a legal principle that holds one party liable for the misconduct of another because of the relationship between the party who is liable and the party who caused the liability. There are many relationships that could attract vicarious liability but the most common one is between an employer and an employee. This case involves the traditional relationship of employer and employee and the application of vicarious liability.

6.10 The Supreme Court of Canada in *Bazley* v. *Curry*, *supra,* established principles which serve as a guide in determining whether a particular relationship ought to attract vicarious liability for an employee's unauthorized, intentional wrong. The main principle is stated at para 41 of the case and reads:

> The fundamental question is whether the wrongful act is sufficiently related to conduct authorized by the employer to justify the imposition of vicarious liability. Vicarious liability is generally appropriate where there is a significant connection between the creation or enhancement of a risk and the wrong that accrues there from, even if unrelated to the employer's desires. Where this is so, vicarious liability will serve the policy considerations of provision of an adequate and just remedy and deterrence. Incidental connections to the employment enterprise, like time and place (without more), will not suffice. Once engaged in a particular business, it is fair that an employer be made to pay the generally foreseeable costs of that business. In contrast, to impose liability for costs unrelated to the risk would effectively make the employer an involuntary insurer.

Therefore, in order to justify the imposition of vicarious liability on Brandon, the actions of the Athletic Director Friesen must have been sufficiently linked to his employment.

6.11 The argument of the University was centered on both the hockey coach and Friesen as being the cause of the vicarious liability. The 21st of January 2003 ruling of the Discipline Committee only makes reference to the Athletic Director. It apparently

considered the hockey coach situations to be concluded and did not give rise to grounds justifying the application of vicarious liability.

6.12 The Athletic Director is at the apex of the hierarchy of employees and student-athletes within the pyramid that makes up the athletic function of the University. He is a Director who reported at the time to the Vice-President (Administration and Finance) at Brandon. The Athletic Director was assisting the hockey team and the coach employed by the University by driving hockey players to the airport. It is at the core of the functions of the Athletic Director to assist others in the hierarchical pyramid. The misadventure was that the athlete was an ineligible player. While assisting in transportation may not be an important part of his employment duties, it is squarely within them. This is precisely the relationship and circumstances for which vicarious liability ought to be imposed to provide "an adequate and just remedy and deterrence", in the words of the Supreme Court of Canada.

6.13 The University gives the Athletic Director the responsibility of student-athlete eligibility. The CIS of which the University is a member also places that responsibility on the Athletic Director through its regulations.

> "While the Director of Athletics is ultimately responsible for determining eligibility of all athletes at their respective institution, the success of any eligibility verification system is reliant on the combined efforts of the institutions administrators, coaches, and student-athletes." [CIS Policy 40.30.1.1]

6.14 The Athletic Director knew or ought to have known the player he drove to the airport was ineligible. Indeed, it is more likely that an Athletic Director would be aware of who ineligible players were at the University because the system had rejected the athlete and he is at the core of the information flow regarding that decision. Therefore, the Athletic Director ought to have known the player was ineligible.

6.15 The student is likely to develop the impression that it is all right to play in the hockey tournament despite his ineligibility, because the University employee in charge of eligibility and with the overall authority in all athletics at the University is driving him to the airport. If the player had any doubts about the request of the hockey coach and his own decision to play they would be dispelled by the action of the Athletic Director. The player is likely to believe that he is justified in playing because he has the implicit approval of the Athletic Director to play despite his ineligibility. Thus, the Athletic Director fails to administer the University and CIS rules on eligibility. But worse than that, his conduct sets an extremely improper example to the student-athlete and his leadership role with student-athletes is likely to mislead the ineligible player.

6.16 The Athletic Director is assisting and abetting the coach being able to play an ineligible player by delivering the player to the airport to travel to the exhibition series. He ought

to have been taking action to stop the breach of the rules not to appear to be giving it his implicit apparent approval. The fact the tournament is an exhibition series and not a regular season game does not make any difference to the fact that a breach of the eligibility rules is occurring and he is involved in facilitating it to happen.

6.17 The Claimant submits as part of its argument that the sanction is "quasi-criminal". This cannot be the case. The University wants to enter inter university athletic competitions. To participate in such competitions it agrees to be a member of CIS and to extend a power to it to make the rules and administer them in regard to all interuniversity athletic competitions. CIS acquires its authority by the contract with its members. The fact that monetary fines may be imposed is something to which all members agreed and is promulgated in the CIS rules. Therefore, the sanctions are matters of contract not quasi-criminal.

6.18 Given the jurisprudence on vicarious liability and the specific facts of this case, I find that the actions of Friesen were directly related to his responsibilities as Athletic Director and of such a nature as to justify the imposition of vicariously liability on the University. This is why the University should be fined for someone else's actions. The contractual arrangement providing for fines for rule breaches is a scheme to which they agreed as member of the CIS.

Issue #3: Is the sanction of $5,000 consistent with prior sanctions and were the relevant mitigating factors considered?

6.19 The table below summarizes the cases relied upon by the Claimant. Brandon claims the fine imposed on it was not consistent with prior cases and the maximum fine of $5,000 should only be imposed for the worst offences.

University	Laval	Dalhousie*	Memorial	Calgary	Lakehead
Breach	-Ineligible student-athlete, entire season	-Ineligible student-athlete, 5 CIS-sponsored games	-Ineligible student-athlete, 5 conference competitions	-Ineligible student-athlete, non-conference tournament	-Ineligible student-athlete, 5 non-conference and 2 conference competitions
Fine	$5,000	$5,000	$1,000	$1,000	$1,000
Declaration of the breach	-Laval aware of breach from coach of another institution -Self-disclosure by Laval	-Self-disclosure	-Self-disclosure	-Self-disclosure	-Self-disclosure
Cause for the breach	-Inadequate system for effective monitoring of	-Inability to effectively determine and monitor	-Error in assessment of student transcript	-Verification system did not accommodate for the	-Univ. erred in applying CIS regulations

	athlete eligibility	academic eligibility of students	-Shortcoming in athlete verification system	possibility of a waiver or revision of standard Univ. admissions	

* The sanction imposed on the coach by the CIS Discipline Committee and the ruling of the CIS Appeal Panel was challenged by the coach before the Ontario Supreme Court of Justice (*McGarrigle* v. *Canadian Interuniversity Sport, supra*). The Court quashed the Appeal Panel Decision because it erred in law, acted in excess of jurisdiction and failed to comply with principles of natural justice.

6.20 Considering the prior cases described above and the specific facts of this case, I find that the fine of $5,000 was appropriate and is consistent with earlier fines imposed by the CIS Discipline Committee for the following reasons. The Athletic Director is at the apex of the hierarchy. The Athletic Director is vested with the authority to administer and apply the eligibility rules. An Athletic Director plays a key leadership role and as such their conduct sets an example for all the employees and student-athletes in the pyramid. To the student, the Athletic Director is all-powerful. There is an implicit belief by the student that if the Athletic Director is driving him, an ineligible player, to the airport it is alright to play in the tournament. The Athletic Director's behaviour created a wrong impression for the student and is a bad example of leadership.

6.21 The maximum fine is also justified because as I have found Friesen knew or ought to have known that the player was ineligible. In such circumstances he willingly encouraged a breach of the CIS rules by driving the player to the airport. He should never have done so and ought to have inquired into the purpose of the player's departure for Thunder Bay.

6.22 This is egregious conduct for which a fine is appropriate. The potential impact on the student places it in the more severe range of conduct. The CIS Discipline Committee placed it at the extreme end. It is not for the Arbitrator to second-guess the precise level of the fine having determined that the conduct is within the extreme range of misconduct.

6.23 The mitigating factors presented by the Claimant are valid and should be considered by the Discipline Committee. However, the University chose not to be at the hearing. It is not for the Arbitrator in reviewing the matter to listen and apply mitigating factors that were not argued and put before the Discipline Committee by the University because of its decision not to attend. Therefore, I reject the claim that the sanction ought to be mitigated by consideration of the various factors they put forward. The place to have argued those considerations was before the Discipline Committee. Then they could have been reviewed by the Arbitrator. It is not for the Arbitrator to ameliorate the consequences of the University's own misjudgment in not being before the Discipline Committee.

O R D E R S

Based upon the foregoing grounds and decisions.

1 It is found that the CIS did provide adequate notice to Brandon University in regards to a Discipline hearing on 10 January 2003.

2 Brandon University is vicariously liable for the actions of its Athletic Director Ken Friesen.

3 The sanction imposed on Brandon University was consistent with prior sanctions. Mitigating factors are not to be taken account of when the University chose not to argue those matters to the Discipline Committee in the first instance.

4 The CIS is awarded a contribution towards its costs of $500.

DATED at LONDON, ONTARIO, CANADA, THIS 21ST DAY of NOVEMBER, 2003.

____

Prof. Richard H. McLaren, C.Arb
Co-chief Arbitrator
ADRsportRED