

**IN THE MATTER OF AN APPEAL BY DALHOUSIE UNIVERSITY PURSUANT
TO THE APPEAL POLICY OF CANADIAN INTERUNIVERSITY SPORT (CIS)
BETWEEN:**

Dalhousie University

Appellant

-and-

**Eligibility Committee (EC) of Canadian
Interuniversity Sport (CIS)**

Respondent

-and-

Saint Mary's University

Affected Third Party

DECISION

Appearances:

The Appeals Panel heard the appeal of Dalhousie University on Monday, December 19, 2005 by telephone conference call. Sitting as the Panel are Tom Allen (Bishops University, retired), Pat Pickard (Laurentian University) and Bob Dubeau (McGill University, retired). Appearing before the Panel were Al Scott (representing the Appellant, Dalhousie University), Tom Huisman (representing the Respondent,

Eligibility Committee) and Dave Murphy (representing the Affected Third Party, St. Mary's University). Also present on the conference call but not taking part in the submissions, were Bill Wedlake (Chair, Eligibility Committee), Marg McGregor (CEO, CIS) and Hilary Findlay (Counsel to Appeal Panel).

The following written documentation was filed before the Panel and becomes part of the record of this proceeding:

- Exhibit 1 Submission of the Appellant, Dalhousie University, in a letter (with Appendices "A" to "J") addressed to Marg McGregor and dated September 30, 2005
- Exhibit 2 Submission of the Respondent, Eligibility Committee, in a letter addressed to Marg McGregor and dated November 18, 2005;
- Exhibit 3 Disclosure to Appellant entitled "Associated University Program" and dated September 7, 2005;
- Exhibit 4 Revised Submission of Respondent, Eligibility Committee, dated November 23, 2005;
- Exhibit 5 Submission of Affected Third Party, St. Mary's University, dated November 14, 2005;
- Exhibit 6 Revised Submission of Appellant dated November 30, 2005;
- Exhibit 7 Appellant's Original Request for Appeal dated November 7, 2005;
- Exhibit 8 Draft Minutes of Preliminary Conference Call of November 1, 2005;
- Exhibit 9 Addendum to Draft Minutes of Preliminary Conference prepared by Appellant Dalhousie University and dated November 7, 2005.

Facts:

1. In an e-mail dated June 22, 2005 from Dave Murphy, Athletic Director at Saint Mary's University, to Tom Huisman, CIS Director (Operations & Development), Mr.

Murphy asked for an interpretation of the eligibility status of a student-athlete registered in the Associated University Program in engineering as he completed his Diploma in Engineering at St. Mary's University and progressed to Dalhousie University to complete a Bachelor of Engineering at that institution. [See Exhibit 2, page 4.]

2. As part of the Associated University Program, students complete a two-year certificate or diploma in engineering at one of the Associated institutions. Students may then apply for admission to the Faculty of Engineering at Dalhousie University to complete a Bachelor of Engineering (BEng.) at that institution.
3. The seven associated institutions are: Acadia University, Dalhousie University, Nova Scotia Agricultural College, Saint Francis Xavier University, St. Mary's University, University College of Cape Breton and University of Prince Edward Island.
4. In a clarifying interpretation dated July 20, 2005, the Eligibility Committee (hereafter referred to as "EC") reviewed the criteria set out in CIS Regulation 40.10.3.1.4 *Integrated Academic Programs – Multiple Universities* and the provisions of 40.10.5.2.2 – Participation (transfer rule) and concluded that the Associated University Program in Engineering (AUPE) and Dalhousie University's Bachelor of Engineering (BEng.) degree program were, together, "similar in nature" to an Integrated Program and that the eligibility status of the student was therefore

governed by the provisions of CIS Regulation 40.10.3.1.4 *Integrated Academic Programs – Multiple Universities*. [See Appendix A of Exhibit 1.]

5. Dalhousie University initiated an appeal of this interpretation on August 15, 2005. [See Appendix B of Exhibit 1.]
6. Invoking her authority under CIS Appeal Policy 90.50.5.3, Marg McGregor, CEO of CIS, sought an independent review of the merits of the Dalhousie University appeal from Mr. David Lech of the Centre for Sport and Law. [See Appendix C of Exhibit 1.]. The opinion of the independent assessor was that the EC had likely erred in making its interpretation and that the appeal would, in his view, succeed. [See Appendix E of Exhibit 1.]
7. On or about August 31, 2005, the EC subsequently rescinded its interpretation of July 20, 2005. As this resulted in the original interpretation of July 20, 2005 being voided, the appeal of Dalhousie University became moot.
8. During the course of the same meeting at which the EC rescinded its original interpretation, the EC commenced the process of a second interpretation of the status of the Associated University Program in Engineering (AUPE) and Dalhousie University's Bachelor of Engineering (BEng.) degree program. The EC subsequently rendered a second clarifying interpretation of the same matter dated September 7, 2005. In this second interpretation, the EC this time considered the provisions of CIS

Regulations 40.10.3.1.3 *Integrated Academic Programs – College and Universities* and 40.10.3.1.4 - *Integrated Academic Programs – Multiple Universities* in making its interpretation and, again, found the program to be an “Integrated Program”. [See Appendix F of Exhibit 1.] The EC found that the Associated University Program in Engineering (AUPE) and Dalhousie University’s Bachelor of Engineering (BEng.) degree program fit two of the three criteria for the determination of an Integrated Program set out in both Regulations and, as well, identified five additional criteria indicative of an Integrated Program which they said also applied in determining that the Associated University Program in Engineering (AUPE) and Dalhousie University’s Bachelor of Engineering (BEng.) degree program together was an Integrated Program.

9. On September 30, 2005 Dalhousie University initiated an appeal of this subsequent interpretation. [See Exhibit 1.]

Issues:

The Application for Appeal by Dalhousie University was accepted for hearing by Marg McGregor, pursuant to sections 90.50.5.1 of the CIS Appeal Policy.

The Appeal of Dalhousie University is based on three grounds:

1. The EC had neither the authority nor the jurisdiction to make the interpretation dated September 7, 2005 concerning the status of the Associated University

- Program in Engineering (AUPE) and Dalhousie University's Bachelor of Engineering (BEng.) degree program.
2. The EC failed to properly follow the appropriate by-laws and policies of the CIS in making its interpretation; and
 3. The interpretation of the EC is tainted by bias.

Reasons for Decision:

Issue 1:

- (a) Did the Eligibility Committee have the authority and the jurisdiction to make the clarifying interpretation dated September 7, 2005?*

CIS Regulation 80.40.4.2 (*Terms of Reference of Committees*) sets out as one of the responsibilities of the Eligibility Committee “[to] administer, interpret, and enforce the Eligibility Rules of Canadian Interuniversity Sport”. As such, this Appeal Panel finds that the Eligibility Committee had the authority to interpret the application of CIS Regulations 40.10.3.1.3 and 40.10.3.1.4 to the Associated University Program in Engineering (AUPE) and Dalhousie University's Bachelor of Engineering (BEng.) degree program.

The Eligibility Committee must, however, work within the parameters of the regulations it is interpreting or using to make an interpretation. It was required to interpret rules as written. The two provisions being interpreted by the EC are as follows:

40.10.3.1.3 Integrated Academic Programs ~ College and University

A student-athlete has the opportunity to participate with a CIS member institution in a CIS sport while attending a college provided the student is registered in an integrated academic program between the college and the

respective CIS member university, subject to all CIS regulations. The following guidelines will be utilized to determine if an “integrated program” exists (any one (1) of the following will suffice):

- Does it appear in the calendar of the schools?
- Is there a formal agreement between the schools?
- Will both schools registrar’s of student records office “sign-off” on the existence of the program?

40.10.3.1.4 Integrated Academic Programs ~ Multiple Universities

A student-athlete has the opportunity to participate with a CIS member institution in a CIS sport while attending a different university provided the student is registered in an integrated academic program between the respective CIS member universities, subject to all CIS regulations. The following guidelines will be utilized to determine if an “integrated program” exists (any one (1) of the following will suffice):

- Does it appear in the calendar of the schools?
- Is there a formal agreement between the schools?
- Will both schools registrars of student records office “sign-off” on the existence of the program?

In its interpretation the EC found that the first two of the three bullets from both Regulations applied to the Associated University Program in Engineering (AUPE) and Dalhousie University’s Bachelor of Engineering (BEng.) degree program. It then went on to identify five additional “elements” or criteria for declaring the Associated University Program in Engineering (AUPE) and Dalhousie University’s Bachelor of Engineering (BEng.) degree program as an Integrated Program.

Did the EC lose jurisdiction when it considered factors outside the three identified within each of the Regulations when making its interpretation? The Appeal Panel is of the view that the EC rested its interpretation on the first two bullets of the Regulations, i.e., “[the integrated academic program] appears in the calendars of the schools” and there is “a formal agreement between the schools”. Had the EC rested its interpretation solely on the other five factors set out in its interpretation, then it would have been of the view that the EC had in fact amended the criteria, which it has no authority to do, and it had considered

matters outside its jurisdiction (that is, outside those identified in the Regulations). To that extent then, the Panel would have been of the view that the EC had lost its jurisdiction to act.

The Respondent gave evidence, however, that the additional five factors were ancillary only and were not necessary for the interpretation. Thus, the Appeal Panel finds that the EC acted within its jurisdiction when it rested its interpretation on two of the three bullets listed in the two Regulations being interpreted but it does strike out all reference to the additional five factors.

The Panel is concerned however, that the EC in its written interpretation of September 7, 2005 simply repeated the criteria set out to interpret an integrated program. It did not actually apply the criteria in the actual circumstances of the Associated University Program in Engineering (AUPE) and Dalhousie University's Bachelor of Engineering (BEng.) degree program. During the course of this Hearing process (although not as part of the actual interpretation of September 7, 2005) the EC did produce the documentary evidence of the calendar entries (bullet number one of the Regulations) and a formal agreement between the various institutions (bullet number two of the Regulations) upon which their conclusions were based. The Appellant takes exception to this evidence. The Panel too is concerned that the Appellant has not had an opportunity to fully assess the evidence and respond to it. This aspect of the matter will be discussed more specifically with regard to Issue #2, set out later in this decision.

(b) *Did the EC have the jurisdiction to rescind its own initial interpretation?*

The EC can correct an interpretation, including rescinding an interpretation, where it is of the view it has erred. Whether in this case the act came as a result of a review of the Lech opinion [*Appendix C of Exhibit 1*] or after reviewing the content of the appeal filed by Dalhousie University or because of some other factor, is irrelevant. In *Mayer v. Canadian Fencing Federation et. al* (SDRC, ADR 04-0030 Ordinary Division, March 22, 2004) the sport organization voided its original selection decision and initiated a new selection process notwithstanding the Appellant had filed an appeal. Mr. Dick Pound, acting as Arbitrator in the case, wrote at p. 11:

...I see no reason why a party, the CFF in this case, should not be able to come to the same conclusion regarding a matter as would an adjudicator to whom proper submissions had been made. That being so, the CFF should not be prevented, as a result of the mere institution of proceedings, from acting pre-emptively to correct its mistake.

Issue 2: Did the Eligibility Committee fail to properly follow the appropriate by-laws and policies of the CIS in making its interpretation?

The Appellant has raised a number of arguments regarding this issue. The Appellant argues that the request for interpretation was not properly initiated (and queries whether there was even a request for a second interpretation) and that the information reviewed by the EC did not come from the party initiating the request as required by CIS Regulation 40.20.1.1, but instead was generated by the EC itself and came after August 31, 2005, the date the interpretation was actually made (as opposed to September 7, 2005, the date the

decision was released). The Appellant also argued that the EC information used by the EC was inaccurate, out of date, provided inappropriate comparisons of programs and, in at least one instance, was irrelevant (e.g., the “Uteck” letter dated June 1, 2000 regarding ‘transfer rule’ [*Exhibit 2, page 6*]) and that to not allow Dalhousie University the opportunity to review such information and respond to it was a significant breach of natural justice. Finally, the Appellant argues the decision was that of the Chair of the EC and not the EC as a whole.

The Respondent EC argues that, following the rescinding of the original interpretation on August 31, 2005, discussions were initiated around a second interpretation that same day. Based on those discussions an initial draft interpretation was produced. That draft went through two further iterations between September 1 and September 7, 2005. Through the process further information came to the attention of the EC. It was the evidence of the Respondent that the final interpretation was confirmed by all members of the EC on September 7, 2005 and that the EC as a whole was not in agreement with the full interpretation until that date. The Chair of the EC reviewed the final draft, ensuring it was consistent with the interpretation of the rest of the Committee and signed off on it on behalf of the Committee.

It was the evidence of the Respondent that the process followed by the EC was consistent with its past practices (at least over the past six years) and that it was consistent with CIS policies and regulations.

According to the Respondent, in the past, where a regional Review Officer has been faced with a somewhat atypical interpretation (“not run of the mill”) it has typically been brought directly to the EC’s attention for its determination.

(a) Was the request for interpretation made properly?

It was the evidence of all Parties that the initial interpretation came as a result of a request for interpretation submitted by St. Mary’s University [*Exhibit 2, page 4*]. CIS Regulation 40.20.1 – *Interpretation of Eligibility Rules* provides that “a member institution may request an interpretation of an eligibility rule”. CIS Regulation 40.20.1.1 sets out the procedure for such a request and reads as follows:

Regulation 40.20.1.1 - Procedure for a Request

A member institution requiring an interpretation of a Canadian Interuniversity Sport Eligibility Rule shall direct an e-mail request for same to the Eligibility Review Officer of its Regional Association, detailing the name of the athlete and the information required to enable an interpretation to be issued.

The regional Review Officer then makes the interpretation (Regulation 40.20.1.1) and any appeal of that interpretation goes to the Chair of the EC (Regulation 40.20.1.2) and is then dealt with by an Appeal Panel appointed pursuant to CIS Regulation 90.50 – *Appeal Policy*. Only in the instance of a request for an amendment to an eligibility rule (CIS Regulation 40.20.3) do all members of the EC become involved. The Panel notes that there is no provision for a request for interpretation to come directly to the EC.

The Panel accepts that this was not a request for an amendment but a request for an interpretation. As such, the request should normally have been made to the regional Review Officer, who, in this instance, was Dave Murphy, Athletic Director of St. Mary’s

University. It is the view of the Panel that it would have been inappropriate for Mr. Murphy as the regional Review Officer to have rendered an interpretation on the matter. The request was Mr. Murphy's and so for him to make an interpretation on his own request raises a serious issue of conflict of interest (which is discussed more fully in the context of Issue 3 below). The CIS Regulation 40.20.1.2- *Eligibility Review Officer's Duty*, allows for the Review Officer "or their designate" to make the interpretation. In other words, the Review Officer has the authority to make a delegation and in this instance did so to the EC. Thus, in the view of the Panel, the application for an interpretation directly to the EC was appropriate.

The Panel finds that the EC did have the authority to render an interpretation in place of the rescinded interpretation. Rescinding the initial interpretation (and thus voiding any potential errors inherent in it) and substituting it with the second one was entirely proper. Voiding the interpretation in essence removes the interpretation as though it had never been there in the first place but still leaves the request for an interpretation there. Thus, there was no need for a second request to be tendered by St. Mary's University. Further, the EC is entitled to initiate an entirely new interpretation unfettered by any aspect of the rescinded interpretation. The second interpretation need not be triggered by any new information although new information may be considered.

(b) Did the EC have proper information before it?

CIS Regulation 40.20.1.1 - *Procedure for a Request*, requires a member requesting an interpretation to provide "the name of the athlete and the information required to enable

an interpretation to be issued” to be provided as part of the application. There is no direction in any of the relevant Regulations that the body making the interpretation (in this instance the EC) is limited to the information coming as part of the application in making its interpretation. Where an interpretation involves the circumstances of an athlete and his or her university then typically the information would be available only to the applicant. However, where an interpretation involves circumstances pertaining to another, or several other, institutions it seems unlikely all the pertinent information would be in the possession of the Applicant.

Thus, in a case such as this, it is not unreasonable that information would come from other sources. The Panel is satisfied the EC could and should be able to seek all pertinent information in order to make the best-informed interpretation as possible.

It goes without saying that any interpretation must be made on the basis of information that is accurate, complete and relevant. The EC has a responsibility to use its best efforts to ensure the veracity of the information upon which it makes its decisions. At the very least, the party or parties who will be directly affected by any decision should be given an opportunity to review the information and to correct it or add to it where necessary. In this case Dalhousie University would be directly affected by any decision of the EC should have been given an opportunity to ensure the information was accurate and up-to-date.

(c) Should Dalhousie University have been given an opportunity to respond to the request for interpretation?

The request for interpretation was directed at the Associated University Program in Engineering (AUPE) and Dalhousie University's Bachelor of Engineering (BEng.) Program. Dalhousie University would be directly affected by the interpretation. The Applicant had an opportunity to submit information to the EC. It is the view of this Panel that fairness demanded Dalhousie University should have been given the same opportunity.

Issue 3: Was the decision of the Eligibility Committee tainted by bias?

The Panel finds (and all Parties agreed) that the original request for an interpretation came from St. Mary's University. Mr. Dave Murphy, Athletic Director at St Mary's University, is also the regional Eligibility Review Officer and a member of the Eligibility Committee. While requests typically go to the regional Eligibility Review Officer first, Mr. Murphy brought the request directly to the EC for review. This would seem appropriate given that the request for interpretation directly affected one of his athletes and as well as his institution, however, as stated previously, Mr. Murphy was also a member of the EC. *Prima facie*, this would appear to put Mr. Murphy in a position of conflict of interest.

In this case the Conflict of Interest Policy (CIS Regulation 80.20) is of no assistance as it relates only to Directors and Employees. In this instance, Mr. Murphy was acting as neither.

The Panel finds no evidence of bad faith or undue influence in the decision-making process, however that is not the test for a reasonable apprehension of bias. The test is whether a reasonable person facing the same fact situation would have a reasonable apprehension of bias. Given that the request for the interpretation was brought by St. Mary's University and the outcome of the interpretation would directly affect a St. Mary's athlete and St. Mary's athletes in general (whether negatively or positively), the answer must be yes. Under these circumstances, it would have been appropriate for Mr. Murphy to have removed himself from the decision-making process (i.e., the discussions leading to the interpretation).

The EC argues that, taken to the extreme, eligibility rules affect all member institutions and their student athletes and thus there would necessarily be a reasonable apprehension of bias regarding *any* decision-maker from within the CIS. This argument is perhaps even more poignant at the regional level where regional Eligibility Officers are asked to make interpretations with regard to athletes, and presumably other matters, concerning institutions within the region. The Panel appreciates there is concern where parties take on more than one role and the vigilance that is required to ensure there is not a reasonable apprehension of bias. Clearly, an EC member would not make decisions (e.g., compassionate relief from eligibility rules) from athletes from their own institutions. They may make decisions on requests from athletes from other institutions that are within their own region (although perhaps not when it involves a specific competition between the two institutions – that of the EC member and that of the athlete).

In any event, the case at hand can be distinguished. The interpretation in this case was being made in the context of a program of which St. Mary's University was a part and thus St. Mary's University would have been affected by the interpretation (no matter that only a small proportion of the student-athlete body might be affected). Similarly, Dalhousie University would have been affected (to a greater or lesser degree). A reasonable person would be concerned that a Saint Mary's representative was involved in the interpretation but a Dalhousie representative was not. The interpretation does not directly affect any other institution but for the seven 'associated' institutions. None should be a part of a 'self-interpretation'. The EC in its deliberations referred to the Sherbrooke/Bishops dual degree program. As an analogy, it would be improper for one of the Athletic Directors to be part of an interpretation of that program without the other Athletic Director also involved.

Decision:

For the reasons stated above the Panel voids the interpretation of the EC dated September 7, 2005.

The Appellant has asked that the Appeal Panel substitute its own interpretation for that of the EC. CIS Appeal Policy Regulation 90.50.12.1 (b) allows the Appeal Panel to:

vary the original decision under certain circumstances, specifically where the error cannot be corrected by the original decision-maker for reasons which include, but are not limited to, lack of clear procedure, lack of time, or lack of neutrality.

The Appeal Panel has found that the original interpretation of September 7, 2005 was flawed due to a number of errors. The Panel notes that some of the errors can be corrected and that time is not of the essence. Nonetheless, the Panel is cognizant of the concerns the Appellant has with regard to the interpretation of the criteria set out in CIS Regulations 40.10.3.1.3 *Integrated Academic Programs – College and Universities* and 40.10.3.1.4 - *Integrated Academic Programs – Multiple Universities*. While the Panel makes no comment with regard to the interpretation the Appellant gives to the criteria, the Panel sees the criteria as being ambiguous. This is particularly true of the first bulleted criteria, which states, “Does it appear in the calendar of the schools”. If ‘it’ refers to “an integrated program”, then there must be an initial, or *a priori*, evaluation of the program in order to determine whether ‘it’ (i.e., the integrated program) is referred to in the calendars. In other words, to find that there is reference in the calendars, one must have already come to the conclusion that the program is an integrated program.

While the Panel strongly urges the CIS (and perhaps more specifically, the EC) to review these Regulations, this interpretation must be made under the existing provisions.

Reluctantly, it is the view of this Panel that to send this matter back to the EC for a third interpretation, particularly in light of the ambiguous nature of the criteria to be used for such an interpretation, would not be in the best interests of the Parties or of the CIS as a whole. With all due respect to the EC, the ambiguity and vagueness inherent in the present criteria that must be used to interpret the Associated University Program in Engineering (AUPE) and Dalhousie University’s Bachelor of Engineering (BEng.) Program makes it an exercise fraught with difficulty. It is the view of this Panel that it is

in the best interests of the Parties and the CIS that this Panel undertakes such a task and brings this matter to a “final and binding” conclusion as opposed to returning it to the EC for a third interpretation and the possibility of a subsequent appeal. While the Panel recognizes this to be a highly unusual course and one to be undertaken in only few circumstances, it is prepared, under these very limited and specific circumstances, to vary the EC’s interpretation by substituting its own.

As agreed previously by the Parties in the second Preliminary Conference Call, in the event the Panel makes this finding and did decide to vary the original interpretation by substituting its own, the Panel will hear representations from the Parties at a time to be established by the CEO of the CIS in conjunction with the Parties. Until such time, this Hearing remains adjourned.

Decision rendered January 10, 2006.

Tom Allen (Panel Chair)

Pat Pickard

Bob Dubeau