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## Rewriting the World Anti-Doping Code

By Lindsay Borrell, J.D. Candidate 2023 | Queen's University

*This article is a condensed version of the author's paper written in April 2022 for her "Introduction to International Sports Law" class at Queen's University. The full version, with all references, can be found on the SDRCC website. The opinions expressed are those of the author. They do not necessarily correspond to the SDRCC position on any of the issues.*

The Beijing Winter Olympics were not short of controversy. Five athletes were caught doping, but only one dominated the media – Kamila Valieva (Valieva). The contentious decision issued by the Court of Arbitration for Sport (CAS) on February 13th, 2022 reaffirmed Valieva's ability to compete in the Women's Single event after testing positive for a banned substance merely six days prior. The CAS Panel (the Panel) held that Valieva's Protected Person status, irreparable harm and delay of test results were factors that swayed in her favour.

### Provisional Suspension and CAS Appeal

On February 6th, 2022, Valieva became the first woman to land a quad jump at the Olympics and propelled the ROC team to win gold for the Figure Skating Team Event. Less than 24 hours later, the World Anti-Doping Agency (WADA) issued an "Adverse Analytical Finding" of a urine sample taken from her on December 25th, 2021, for the presence of trimetazidine (TMZ). On February 8th, 2022 Russian Anti-Doping Agency (RUSADA) notified Valieva of the positive test and provisionally suspended her.<sup>[1]</sup> The following day, the Russian Disciplinary Anti-Doping Committee (DADC) lifted the provisional suspension, allowing her to compete in the Women's Single event scheduled for February 15th, 2022. On February 13th, 2022, the Panel dismissed WADA and the International Olympic Committee's (IOC) appeal application to reinstate Valieva's provisional suspension.

### WADA's Statement

On February 18th, 2022, WADA released a statement criticizing the Panel's decision for ignoring "the clear and unambiguous terms of the 2021 World Anti-Doping Code" (WADC) and accused it of re-writing the WADC.<sup>[2]</sup> Despite WADA's disagreement, CAS is an independent body from any sport organizations, and the accusatory nature of the statement devalues the system of sport-related settlement. The accusations are also an irresponsible response considering the unusual circumstances surrounding Valieva's case.<sup>[3]</sup>

### Protected Person Status

Valieva falls under the definition of "Protected Person" since she has not reached the age of sixteen when the anti-doping rule violation was alleged to have occurred.<sup>[4]</sup> Within the WADC, special consideration is given to Protected Persons due to their age, lack of legal capacity, and immaturity.<sup>[5]</sup> Article 10.6.1.3 of the WADC states that if a Protected Person (1) is found guilty of an anti-doping rule violation that is not a substance of abuse, and (2) can show no significant fault or negligence, the punishment is at minimum a public reprimand to a maximum of two years of ineligibility.<sup>[6]</sup> However, the WADC remains silent on the treatment of Protected Persons regarding provisional suspensions. As per article 7.4.1, Valieva would be subject to a mandatory provisional suspension rather than an optional provisional suspension since she tested positive for a non-specified substance.<sup>[7]</sup> Thus, a Protected Person could receive a public reprimand and no period of ineligibility, yet be subject to a mandatory provisional suspension preventing them from competing until their case is heard.<sup>[8]</sup> Strict application of this article would likely result in a Protected Person serving a longer provisional suspension than the

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actual period of suspension.<sup>[9]</sup> This seems to be an unintended gap as it can exempt older athletes from a mandatory suspension but not Protected Persons, creating a harsher punishment for the latter despite the lower standards of evidence and sanctions provided for in other articles.<sup>[10]</sup> Despite WADC not providing an exemption to a mandatory provisional suspension for a non-specified substance, it is evident the WADC drafters intended for a more flexible approach towards Protected Persons.<sup>[11]</sup> The Panel did not depart from the “clear and unambiguous terms of WADC” considering there were inconsistent treatments towards Protected Persons regarding provisional suspensions. The Panel exercised its discretion to rectify a gap between the articles that govern provisional suspensions and articles that govern sanctions where a harsher punishment of Protected

Persons could result. The Panel determined that Valieva was entitled to benefit from being subject to an optional provisional suspension and that she met the criteria for lifting the provisional suspension at the DADC hearing.

### Irreparable Harm

The Panel considered the irreparable harm that could occur to Valieva should the suspension be reinstated.<sup>[12]</sup>

Two scenarios were considered. The first being if Valieva was barred from competing in the Women’s Single event but later exonerated, she would have lost the chance to compete with no remedy. In contrast, if she did compete but was found guilty later, which would have prevented her from competing, Valieva’s placement and medal could be stripped.<sup>[13]</sup> Considering the balance of interest, the harm to Valieva exceeds the harm to the IOC and WADA’s “Clean Sport” movement.<sup>[14]</sup>

### Delay of Test Results

The Panel considered the delay and untimely disclosure of the positive sample. Valieva was put on notice for the alleged anti-doping rule violation 40 days after the sample was received. WADA argued that 40 days is well within the acceptable range for laboratories to process samples as it is recommended they be processed within 20 days.<sup>[15]</sup> The Panel dismissed this argument and criticized how unfair it is for WADA to hold athletes to such high standards, but anti-doping authorities are subjected to mere recommendations on deadlines that are intended to protect athletes from late or inconveniently arising claims.<sup>[16]</sup> WADA responded that it is the responsibility of the National Anti-Doping Organizations to ensure the timely analysis of samples.<sup>[17]</sup> Regardless of where the responsibility is placed, Valieva should not be punished for a failure or mistake of anti-doping authorities. It is unfortunate that WADA failed to acknowledge any hardship that this untimely disclosure placed on Valieva.

*“The Panel was able to set aside the emotional aspect of the case and came to a fair and equitable decision that balanced the interests of all parties.”*

### Conclusion

This case contained exceptional circumstances. The Panel was able to set aside the emotional aspect of the case and came to a fair and equitable decision that balanced the interests of all parties. Specifically, Valieva’s Protected Person status, irreparable

harm she could experience and delay by the laboratory for reasons unattributable to her tipped the balance of interest decisively in Valieva’s favour. Whether the Panel made the “correct” decision will depend on the outcome of the anti-merits trial should Valieva receive a public reprimand or a definite period of ineligibility. Until then, an asterisk will remain next to ROC’s first place finish in the Team Event. ■

[1] CAS *supra* note 1 at paras 15-16.

[2] World Anti-Doping Agency, News Release, “WADA statement on CAS award confirming the lifting of the provisional suspension of a ROC figure skater” (18 February 2022), online: WADA Releases <https://www.wada-ama.org/en/news/wada-statement-cas-award-confirming-lifting-provisional-suspension-roc-figure-skater>. [WADA Statement].

[3] “Frequently Asked Questions”, online: CAS Court of Arbitration for Sport <https://www.tas-cas.org/en/general-information/frequently-asked-questions.html>.

[4] World Anti-Doping Agency, *World Anti-Doping Code*, 2021, Appendix 1 Definitions.

[5] CAS *supra* note 1 at para 184 and 199.

[6] *Ibid*.

[7] *Ibid* at para 193.

[8] *Ibid* at paras 194-195.

[9] *Ibid* at para 199.

[10] *Ibid* at para 196.

[11] *Art. 10.6.1.3 supra* at note 13.

[12] *Ibid* at para 205.

[13] *Ibid* at para 217.

[14] *Ibid* at paras 217 and 221.

[15] *Ibid* at para 211.

[16] *Ibid* at para 211.

[17] WADA Statement *supra* note 8.

To read the full original version of this article:

[www.crdsc-sdrcc.ca/eng/documents/LindsayBorrell\\_RewritingWorldAntiDopingCode\\_LongVersion.pdf](http://www.crdsc-sdrcc.ca/eng/documents/LindsayBorrell_RewritingWorldAntiDopingCode_LongVersion.pdf)



## SDRCC Roster Member Profile: Learning More About our Arbitrators and Mediators

They come from every region of Canada and have extensive experience in alternate dispute resolution and sports-related issues, but how much do we really know about them? The SDRCC has an impressive list of 58 mediators and arbitrators and we will slowly be introducing you to some of them through our regular installments of “SDRCC Roster Member Profiles”. In this edition we would like to present, **Robert Néron**, arbitrator from **Ottawa, in Ontario**.



### What led you to a career in ADR?

In 2000, the federal government appointed me to the Immigration Board, where I worked for 12 years. Over time, I grew to enjoy making informed decisions on matters affecting individuals in an efficient, fair and lawful manner.

In 2011, I was appointed adjudicator for the Independent Assessment Process for claims of physical and sexual abuse suffered by First Nations, Métis and Inuit individuals who attended Indian Residential Schools. Through this experience, I became aware of the intergenerational trauma inflicted on Indigenous people by the residential schools. I then decided to put my arbitration experience to use at the SDRCC, so I joined the organization as an arbitrator in 2017.

### Field of specialization/Area of expertise:

I specialize in grievance arbitration, as well as dispute resolution in the sports and construction industries. I also investigate workplace harassment complaints.

### As an SDRCC arbitrator, I...

...my primary mandate is to ensure procedural fairness. I also ensure that all parties, whether or not

they have legal representation, fully understand the issues and the arbitration process. As an arbitrator, I must be mindful of my role as a neutral third party, and I must consider all the evidence impartially and with an open mind. In addition, after 22 years in alternative dispute resolution, I have learned to be diplomatic, professional and respectful, and I have developed excellent writing skills. Finally, I ensure that the arbitration award is expressed clearly, using unambiguous language.

### Favourite sport(s):

I enjoy swimming and downhill skiing. I find daily physical activity to be very beneficial to both my physical and mental health.

### Dispute prevention tips for athletes:

All disputes should be resolved before reaching the arbitration stage. However, there are some disputes that can only be settled by arbitration. Therefore, in arbitration, it is important that athletes identify the issues in question and the remedy sought. If the issues and the remedies are not clearly identified, it is difficult for athletes to properly present evidence for any of the matters in dispute. In other words, for athletes to be able to present relevant evidence pertaining directly to the matters in question, it is imperative that they first clearly define the issues. ■

In our next edition, look for the profile of a SDRCC Med/Arb.

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## Canada's First Sport Integrity Commissioner Announced



Sarah-Ève Pelletier has been selected to serve as Canada's first Sport Integrity Commissioner, to oversee the central hub within Canada's new safe sport program. She is a former national team athlete in the sport of artistic swimming with years of experience as a strategic, business and legal professional in the global sport industry.

Sarah-Ève holds a Master's Degree from the University of California, Los Angeles, in Entertainment Law, Media Law and Policy, a Law Degree from Laval University, a Sport Law certificate from Montpellier I University and an MSC in International Business from the University of London, UK. She is a member of the Quebec bar and an accredited civil mediator by the Quebec bar.

In her most recent position of Director, Sport Business & Sustainability at the Canadian Olympic Committee (COC), she oversaw a wide array of portfolios, including athlete marketing and Olympian legacy, Games business strategy and operations, as well as ESG/sustainability. Her career as a professional includes such positions as Deputy General Counsel & Director, Business Affairs at the COC, as well as Media Rights Counsel at International Olympic Committee. ■

## New SDRCC Staff Members



**Claudine Lanouette** is joining SDRCC as Director of Finance. She has held various financial, accounting and operations management leadership roles throughout her career. She holds an Executive MBA from Université de Sherbrooke and is currently completing a Specialized Graduate Diploma (DESS) in Sport Management at HEC Montreal. Claudine is a passionate board member supporting local and regional speed skating organizations.

**Michael Vamelkin** is joining SDRCC as IT Technician. As owner of an IT consulting business and of a computer store, he acted as an external IT consultant for SDRCC for over 18 years. He received his college diploma in 1999 and completed several university courses and A+ certifications over the years. Michael now brings his experience in-house, to personalize his IT support to SDRCC.



**Maude Trevisan** is joining the SDRCC to support the Tribunal team, as an Assistant Case Manager. Having recently finished her athletic career, she pursues her professional career with the SDRCC. With a bachelor's degree in Industrial Relations and in the process of obtaining a master's degree in Industrial Relations, Maude wishes to participate in the development of the Canadian sports system.

**Kevin Farrell** is joining SDRCC to support the Resource Centre, serving as the Education and Policy Support Coordinator. He has previously worked for the Canadian Centre for Ethics in Sport (CCES). He received his bachelor and master's degrees from Wagner College (New York). As a professional educator and former athlete, Kevin is eager to leverage his experience to support SDRCC's mission. ■



## Notable Dates:

- **June 3, 2022:** Panel presentation at the International Academy of Mediators Conference, Montreal, QC;
- **June 7, 2022:** Virtual presentation at the 2022 ADRBC Symposium;
- **June 11, 2022:** Panel presentation on safe sport at the Canadian Olympic Committee Session, Montreal, QC;
- **June 14, 2022:** Virtual presentation to Sport Business Management students at Algonquin College;
- **June 20, 2022:** Launch of the first phase of operations of the Office of the Sport Integrity Commissioner;
- **June 28, 2022:** Virtual presentation to Sask Sport members;
- **August 6-21, 2022:** Kiosk at the 2022 Canada Games, Niagara Region, ON. ■



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