SUPREME COURT OF NOVA SCOTIA

Citation: Saint Mary's University v. Atlantic University Sport Association, 2017 NSSC 294

Date: 2017 11 12
Docket: *Hfx No. 470240*
Registry: Halifax

Between:

Saint Mary's University

Applicant

v.

Atlantic University Sport Association

Respondent

and

Acadia University

Intervener

LIBRARY HEADING

Judge: The Honourable Associate Chief Justice Deborah K. Smith

Heard: November 11th and 12th, 2017, in Halifax, Nova Scotia

Oral Decision: November 12th, 2017

Written Decision: November 20th, 2017

Subject: Emergency interim injunction motion due to the cancellation of a university level championship football game.

Summary: Acadia and Saint Mary's Universities had each earned the right to participate in a championship football game known as the Loney Bowl. The winner of that game would advance to the national semi-finals. An

issue arose as to whether Saint Mary's was using an ineligible player. The Atlantic University Sport Association (which governs university sport in Atlantic Canada) cancelled the game two days prior to its scheduled date. As a result, Acadia automatically advanced to the semi-finals. Saint Mary's applied to the court for, *inter alia*, an emergency interim injunction requiring the Atlantic University Sport Association (AUS) to sanction the game and further requiring that AUS direct that Acadia play Saint Mary's University no later than November 14th, 2017. Further, Saint Mary's sought an order providing that, should Acadia be unwilling or unable to host the said game, Saint Mary's would be offered the opportunity to do so.

Issues: Was it appropriate to deal with this matter on an emergency basis and to abridge the timelines under the Nova Scotia *Civil Procedure Rules*? Does the court have the jurisdiction to judicially review a decision of the AUS? If so, was this an appropriate case for injunctive relief to be granted?

Result: The court held that it was proper to deal with this case on an emergency basis and to abridge the timelines under the Rules. The court found that it had jurisdiction to deal with the matter. The court conducted the analysis set out in ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1994] S.C.J. No. 17 and concluded that it was appropriate to grant interim injunctive relief.

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Oral Decision:	November 12th, 2017	
Written Decision:	November 20th, 2017	
Counsel:	For the Applicant:	Robert G. Bellieveau, Q.C. Michelle C. Awad, Q.C. Kevin D. Gibson, Esq. Michael P. Blades, Esq.
	For the Respondent:	D. Bruce Clarke, Q.C.
	For the Intervenor:	John A. Keith, Q.C. Jack K. Townsend, Esq. John T. G. Boyle, Esq.

By the Court:

[1] Football is a game. Some would suggest that it is only a game. For a talented few, however, it can become a profession. Competition determines who will succeed as a professional. Teams compete and the best rise to the top.

[2] On November 11th, 2017, the football teams from Saint Mary's and Acadia Universities were scheduled to participate in the Loney Bowl. The winner of that game would have the right to advance to the national semi-finals. That game did not take place. The Atlantic University Sport Association (AUS) cancelled the game with no prior notice to Saint Mary's. As a result, Acadia, which was the team that Saint Mary's was scheduled to play, automatically advanced to the next level of the playoffs. The winner was not determined by way of competition. The winner was determined by the actions of the Respondent.

[3] This court was asked to intervene and grant an interim injunction requiring the AUS to sanction the AUS men's football playoff championship game and further requiring that the AUS direct that Acadia play Saint Mary's no later than Tuesday, November 14th, 2017. Further, Saint Mary's sought an order providing that, should Acadia be unwilling or unable to host the game, Saint Mary's would be offered the opportunity to do so.

[4] The complete facts of this case are set out in the materials that have been filed. The most salient facts for the purpose of this motion follow.

[5] U SPORTS is the national governing body of university sport in Canada.

[6] AUS is a Nova Scotia body corporate, incorporated under the *Societies Act*, R.S.N.S. 1989, c. 435. It governs university sport, including men's football, among member universities in Atlantic Canada.

[7] Saint Mary's University is a U SPORTS member and competes in the AUS conference in men's football.

[8] Mr. Archelaus Jack commenced his first year as a Saint Mary's student athlete in 2017. He began participating as a member of SMU's men's football team in August of this year. Mr. Jack had been listed on a CFL non-active practice roster at various times in 2016.

[9] On October 24th, 2017, U SPORTS wrote to Saint Mary's indicating that as a result of having Mr. Jack on their team, Saint Mary's appeared to be in breach of U SPORTS's policies and stating that Mr. Jack may be ineligible for U SPORTS participation. U SPORTS added that Saint Mary's might have to forfeit previously-won games, with the result that it might be ineligible for the playoffs.

[10] On October 26th, 2017, counsel for Saint Mary's wrote to U SPORTS contesting the suggestion that Mr. Jack was ineligible to play. Saint Mary's requested confirmation by October 27th, 2017, that the concerns raised by U SPORTS would not be pursued any further. If this confirmation was not received, Saint Mary's intended to bring a proceeding in the Nova Scotia Supreme Court to have the matter determined. It is suggested by Saint Mary's that it subsequently reached a settlement agreement with U SPORTS whereby U SPORTS agreed not to pursue a complaint against Saint Mary's with respect to the eligibility of Mr. Jack and Saint Mary's would not proceed with its court application.

[11] On November 1st, 2017, athletic directors from four universities (Mount Allison, St. F.X., Acadia and Bishops) laid a formal complaint with AUS asserting that Saint Mary's was in violation of AUS Standards of Conduct and U SPORTS's policies in relation to Mr. Jack. They claimed that Mr. Jack had played five games as an ineligible player.

[12] On November 3rd, 2017, the Chair of the Judicial Committee of the AUS wrote to the President of Saint Mary's University indicating that a committee had been constituted for the purpose of dealing with this complaint. That same day, U SPORTS wrote to Saint Mary's, enclosing a formal charge for alleged breaches of U SPORTS's policies. The charge related to the eligibility of Mr. Jack to play university football.

[13] On November 6th, 2017, SMU informed U SPORTS that it would be applying for an order in the Ontario Superior Court of Justice enforcing the settlement agreement that it says it had made with U SPORTS. I should indicate that U SPORTS's by-laws require that any court proceedings against that organization be brought in the province of Ontario.

[14] On November 8th, 2017, SMU filed a Notice of Motion in Ontario seeking, among other things, interim and interlocutory orders preventing U SPORTS from convening or continuing any hearing, or making any decision, regarding any complaint against Saint Mary's in relation to Mr. Jack's eligibility.

[15] That same day, U SPORTS convened a tribunal by conference call to deal with the formal charge laid against Saint Mary's.

[16] On November 8th, 2017, counsel for Saint Mary's and for U SPORTS attended before the Honourable Justice Todd Archibald of the Ontario Superior Court of Justice to schedule Saint Mary's injunction motion. Justice Archibald ordered that, pending adjudication of the motion before him, the U SPORTS tribunal was not to release its decision concerning Mr. Jack's eligibility to play to anyone.

[17] The hearing for interim and interlocutory relief in Ontario took place on November 9th, 2017. During the afternoon of that day (before Justice Archibald's decision was given) the Executive Director of AUS sent out an email advising that the Executive Committee of AUS had decided to cancel the Loney Bowl. AUS subsequently issued a press release indicating that Acadia University would automatically advance to the semi-finals.

[18] On the evening of November 9th, 2017, the Acting Co-Director of Athletics and Recreation for Saint Mary's wrote to the Executive Director of Athletics at Acadia, stating as follows:

> As you are aware, Saint Mary's University and U SPORTS appeared today before Justice Todd Archibald in Toronto in the motion brought by Saint Mary's University for an interim order preventing U SPORTS from, among other things, conveying or continuing any hearing regarding any complaint or charge in relation to Archelaus Jack. This afternoon, Justice Archibald issued an endorsement stating his intention to issue a decision tomorrow in what he has described as a very important matter.
>
> I write to advise that Saint Mary's University is now taking immediate steps in our Court to challenge the decision of the AUS Executive Committee to cancel the 2017 Loney Bowl. **Justice Archibald explicitly suggested that we advise your institution not to stand down in its preparations for Saturday's game should Saint Mary's pursue this relief. I am conveying that request to you through this communication, and ask for your immediate acknowledgement of same.**
>
> [Emphasis added]

[19] On November 10th, 2017, Justice Archibald sent an email to counsel involved in the Ontario proceeding indicating that Saint Mary's request for an interim injunction would be granted. His reasons were released on the afternoon of

November 10th, 2017, and are reported at ***Saint Mary's University v. U Sports,*** 2017 ONSC 6749. Justice Archibald found that there was a strong *prima facie* case that there is a binding settlement agreement between Saint Mary's and U SPORTS concerning Mr. Jack's eligibility to play football.

[20] On November 10th, 2017, Saint Mary's filed an application in the Nova Scotia Supreme Court for an injunction prohibiting AUS from cancelling the championship game scheduled for the next day. At paragraph 35 of the application, Saint Mary's seeks:

> (a) an Order quashing the Playoff Cancellation Decision;
>
> (b) an injunction prohibiting AUS from cancelling the AUS men's football championship game originally scheduled for Saturday, November 11, 2017;
>
> (c) an injunction prohibiting AUS from taking any steps to prevent, restrict or inhibit SMU from participating in the AUS men's football championship game, or any games thereafter should SMU prevail in the AUS men's football championship game;
>
> (d) Costs of this Application in Chambers on a solicitor and client basis; and
>
> (e) Such further and other relief as This Honourable Court deems appropriate.

[21] Counsel for Saint Mary's wrote to the court on November 10th, 2017 requesting an emergency hearing of the matter.

[22] Later that same day, Saint Mary's filed a Notice of Motion for an interim injunction pursuant to Civil Procedure Rule 41, seeking an order restraining AUS from cancelling the men's football championship game that had been scheduled for Saturday, November 11th, 2017, until such time as SMU's Application in the within proceeding could be heard and determined. It further sought an interim injunction restraining AUS from taking any steps to prevent, restrict or inhibit SMU from participating in the AUS men's football championship game. Finally, it sought an abridgement of time for the filing and service of the Motion and supporting materials.

[23] A number of conference calls were held throughout November 10th, 2017 to deal with preliminary matters and to provide directions. During the course of that day, Acadia was given notice of this proceeding and, with the consent of all parties, was added as an intervener.

[24] The matter was heard before me on November 11th and 12th, 2017. Prior to the commencement of the hearing, the Executive Director of AUS filed an Affidavit in which it is stated that if AUS is obliged by court order to sanction the championship game, there is no assurance that Saint Mary's would be selected by the Executive Committee of the AUS Board of Directors to participate in the game.

[25] During the course of the hearing before me, Saint Mary's amended its request for relief. It was now seeking an order requiring AUS to sanction the AUS men's football playoff championship game forthwith and requiring that AUS direct Acadia to play Saint Mary's no later than Tuesday, November 14th, 2017. As indicated, it was also asking the court to order that Saint Mary's be offered the opportunity to host the game if Acadia was unwilling or unable to host it.

[26] There were two main issues before me at the hearing. First, I had to decide whether it was appropriate to deal with this matter on an emergency basis and to abridge the timelines under the Nova Scotia *Civil Procedure Rules*. My second task was to determine whether the Applicant should be granted the interim injunctive relief that it was seeking.

[27] Due to the urgent nature of the matter, I released a brief oral decision late in the day of November 12th, 2017, indicating that I was satisfied that it was appropriate to deal with this matter on an emergency basis. Further, I indicated that I was prepared to grant the relief requested and would provide written reasons at a later date. These are my reasons.

[28] AUS argued that this matter should not have been heard on an emergency basis. It noted the limited time that it had to prepare for the hearing and submitted that the gravity of the situation did not outweigh the inconvenience (see CPR 28.02(a) and (c)) and the prejudice that it would suffer in having the matter heard so quickly.

[29] The burden was on the Applicant to satisfy me that this was an appropriate case to abridge the timelines under the *Rules* and proceed on an emergency basis.

[30] There is no doubt that this was a rushed hearing and that none of the parties (or the court) had a great deal of time to prepare. I was satisfied, however, that the gravity and urgency of the situation outweighed the inconvenience and prejudice to the Respondent.

[31] During the course of submissions, counsel for AUS noted that we were only dealing with a football game, the implication being that the gravity of the situation did not warrant proceeding on an urgent basis. As I indicated at the time the comment was made, the fact that eight lawyers sat through two days of hearings on a weekend to argue this case, one of those days being Remembrance Day, gives a good indication of the seriousness of the matter to the schools involved and, more importantly, to the athletes who were affected by the sudden AUS decision.

[32] As indicated previously, the Loney Bowl was scheduled to be played on November 11th, 2017 (the day after this motion was filed). The winner of that game would proceed to the national semi-finals the following Saturday, November 18th, 2017. A delay in hearing the matter would render any relief obtained in relation to the game itself moot. I was therefore satisfied that it was appropriate to proceed on an emergency basis and, further, that it was appropriate to abridge the timelines under the *Rules*.

[33] That takes me to the motion for interim injunctive relief. As I indicated when I gave my brief oral decision on November 12th, 2017, I am satisfied that the Applicant has satisfied all of the requirements of CPR 41.04(2). I was, therefore, in a position to grant the motion should I determine that it was appropriate to do so.

[34] I must begin by dealing with the suggestion made by the AUS that this court does not have the ability to intervene or judicially review the decision by the AUS to cancel the Loney Bowl.

[35] During the course of the hearing, the court was referred to a number of decisions dealing with this issue. In ***Vancouver Hockey Club Ltd. v. 8 Hockey Ventures Inc.***, (1987) 47 D.L.R. (4th) 51 (B.C.S.C.) the court stated at p. 56:

> The review by the court of orders made by an unincorporated association such as the N.H.L. through its president and chief executive officer (a domestic tribunal as it were) is limited. The power in no way includes the right in the court to substitute its decision for that of the domestic tribunal. The court is not a court of appeal. Rather, its power is narrow and it may only interfere if the order was made without jurisdiction (or against the rules) or if it was made in bad faith or

> contrary to the rules of natural justice. In addition, the courts will be reluctant to interfere with the decisions of a domestic tribunal where it is shown that internal remedies have not been exhausted. And there is even greater reluctance to interfere if the decision is based upon opinion regarding the standards of propriety and conduct appropriate for members of a particular association. *Dawkins v. Antrobus* (1881), 17 Ch. D. 615 (C.A.); *Lee v. Showmen's Guild of Great Britain*, [1952] 2 Q.B. 329, [1952] 1 All E.R. 1175 (C.A.); *Harelkin v. Univ. of Regina*, [1979] 2 S.C.R.561, [1979] 3 W.W.R. 676, 96 D.L.R. (3d) 14, 26 N.R. 364 [Sask.]. These well-known principles provide the foundation for the court's review.

[36] In ***McGarrigle v. Canadian Interuniversity Sport***, [2003] O.J. No. 1842 (Sup. Ct. J.), Aitken J., who was dealing with the predecessor of U SPORTS, stated at ¶¶ 22-23:

> 22 CIS is a federal corporation of which post-secondary institutions of learning within Canada, and various advisory, consultative, educational and professional organizations involved with universities or athletics, are members. Its function is to regulate interuniversity sports in Canada. It does so, not by virtue of any statutory authority, but by virtue of the authority given to it by its members. As such, it is a "domestic tribunal" that provides, in essence, a quasi-public function.
>
> 23 **Even though domestic tribunals do not exercise statutory power, their decisions are nevertheless subject to review by the court for errors of law, acting in excess of jurisdiction and failure to comply with the principles of natural justice** (*Nicholson v. Haldimand Norfolk (Regional) Police Commissioners*, [1979] 1 S.C.R. 311; *Ripley v. Investment Dealers' Association*, [1991], N.S.J. No. 452, 108 N.S.R. (2d) 38 at 45 (N.S.S.C.A.D.); *Chyz v. Appraisal Institute of Canada*, [1985] S.J. No. 820 (C.A.)). The decisions taken by CIS can have a profound effect on the careers of university athletes, university athletic coaches and interuniversity athletic programs in Canada. This power in the educational and athletic domain in Canada supports the conclusion that this Court has the jurisdiction to grant a declaration quashing the CIS Appeal Panel Decision should I find that the Appeal Panel made an error of law, exceeded its jurisdiction or failed to comply with the principles of natural justice.
>
> [Emphasis added]

[37] Reference was also made to the more recent decision of ***Gymnopoulos v. Ontario Assn. of Basketball Officials***, 2016 ONSC 1525, where L. Bird J. stated at ¶¶ 39 and 40:

> 39 While this case does not involve a professional sports organization, the importance of high school athletics was recognized by the court in *Milne v. Nipissing District Secondary School Athletic Assn.*, [1998] O.J. No. 4678 (Ont. Div. Ct.). *Milne* involved an application by a high school student who had been declared ineligible to participate in sports at his current school. In granting an interim injunction, Valin J. found that the loss of an opportunity to participate in school sports can be immeasurable, irreparable and not something that can be compensated for in monetary damages (at paragraph 21).
>
> 40 Although Mr. Gymnopoulos is a coach and not a player, he has dedicated a large portion of his life to basketball, and particularly to coaching youth. It is part of his identity and something he is deeply committed to. The sanctions imposed by OABO do not prevent him from coaching the team but do mean that he cannot be behind the bench for any games. Every competitive sports team hopes to be in a position to vie for a championship. That is the purpose of the long hours of practice and the preparation in games leading up to the playoffs. I find that being prevented from coaching from the bench in the playoffs is significant not only [to] Mr. Gymnopoulos but also to his players. If I do not grant leave to hear this application, the 2015/2016 basketball season will be over before the matter is heard by the Divisional Court. The loss of the opportunity to coach in the playoffs, and perhaps in OFSAA, is something that cannot be given back to Mr. Gymnopoulos or the Vaughan Voyageurs. For that reason, I find that this matter does fall within Section 6(2) of the *JRPA* and, accordingly, grant leave for the application to be heard in the Superior Court of Justice.

[38] AUS takes the position that this court is being asked to intrude into a business or operational decision of AUS, not an adjudicative decision. It says that administrative law remedies are not available in relation to business decisions. It is upon this basis that it distinguishes the above cases.

[39] The decision that was made by AUS to cancel the Loney Bowl was, in my view, much more than a "business" or "operational" decision. It was a decision that, in effect, eliminated an entire football team from playing in an important championship game that its players had earned the right to play in. It was, in my view, for all practical purposes, a disqualification decision. I appreciate that on its face it does not appear to have the usual characteristics that one would expect of such a decision. The interested parties were not provided with notice of the matter. No hearing was held. The entire process was bereft of the procedural features that one would normally expect with a decision of this nature. The fact that AUS proceeded with such a decision, in this manner, should not allow it to characterize it

solely as a "business decision" that the court should not interfere with. The only reason that it does not look like an adjudicative decision on its face is because none of the usual and expected features of such a decision were present. That does not make it an "operational" decision. It was much more than that.

[40] I recognize that Saint Mary's has not alleged a breach of natural justice in its pleadings. I must be careful not to decide the injunction request on an issue that has not been raised. I am satisfied, however, that I can refer to these facts when analyzing AUS's position that this was not an adjudicative decision which is subject to review.

[41] Saint Mary's has argued that the committee that made the decision to cancel the game lacked the jurisdiction to do so. It has also argued, *inter alia*, that this decision was not permitted under the rules or procedures that govern the AUS. In these circumstances, I am satisfied that the court has the jurisdiction to deal with the matter.

[42] That takes me to the heart of the motion, the request for injunctive relief.

[43] An application for an interim injunction will be granted when the court is satisfied that there is a serious issue to be tried; the applicant demonstrates the likelihood that it will suffer irreparable harm if the injunction is refused; and the balance of convenience is in the applicant's favour. The onus is on the applicant to satisfy the court that all three branches of this test have been met.

[44] The first part of the test is generally not considered to be particularly onerous. In ***RJR-MacDonald Inc. v. Canada (Attorney General)***, [1994] S.C.J. No. 17, the Court described the "serious question to be tried" test as having a low threshold requiring only a preliminary assessment of the merits of the case. At ¶ 50 the Court stated:

> Once satisfied that the application is neither vexatious nor frivolous, the motions judge should proceed to consider the second and third tests, even if of the opinion that the plaintiff is unlikely to succeed at trial. A prolonged examination of the merits is generally neither necessary nor desirable.

[45] A higher test applies, however, when the result of the motion will amount to a final determination of the matter (***RJR MacDonald Inc. v. Canada (Attorney***

General), *supra*, at ¶ 51). In that case, a higher test of a strong *prima facie* case will apply.

[46] In addition, a higher test is said to apply when the court is being asked to issue a mandatory injunction (as compared to a prohibitive injunction). In ***D.E. & Son Fisheries Ltd. v. Goreham***, 2004 NSCA 53, the Court of Appeal stated at ¶ 10:

> ..... At issue was the strength of case the applicant must demonstrate in order to succeed on an application for a mandatory injunction. It is generally accepted that the test is more rigorous than that applied where a prohibitory injunction is sought .....

[47] In that same case, the Court stated the following in relation to the test that should be applied in an application for a mandatory interim injunction at ¶ 11:

> . . . It was error here for the judge to roughly equate the tests for granting summary judgment and that for a mandatory interim injunction. Because summary judgment ends the litigation without a trial, the test is an onerous one. The plaintiff must "prove the claim clearly" and the defendant must be unable to set up a *bona fide* defence or raise an issue against the claim which ought to be tried (per Cromwell, J.A.: *D.E. Fisheries and Sons*, *supra*, at para 2). An application for a mandatory interim injunction, in contrast, is not a final determination and is eventually superceded by the result after trial. Appropriately, the threshold test which the plaintiff (applicant) must meet is a lower one. The requirements for a mandatory interim injunction have been discussed and debated in numerous authorities. It suffices, here, to say, that the plaintiff is not required to "clearly prove" his claim to the exclusion of any defence which may be set up by the defendant. The application is, instead, assessed by the strength of the applicant's case coupled with a consideration of the issues of irreparable harm and the balance of convenience. We agree with the submission of the appellant that the judge erred at law in failing to make an independent inquiry into the merits of the application and to clearly recognize that the test for a mandatory interim injunction differs from that for summary judgment.

[48] In ***Injunctions and Specific Performance*** (Toronto: Canada Law Book, looseleaf), Sharpe J. warns against taking too formalistic an approach when dealing with an injunction motion, stating at 2.600 to 2.630:

> Although reference has been made throughout the discussion to the *American Cyanamid* formula, it now seems clear that neither it nor its adoption by the Supreme Court of Canada should be applied mechanically. As already noted, there has been a significant retreat from the assertion that consideration of the merits should never play an important role. The seeming rigidity of the remaining items in the formula is also regrettable, and the direction given by *Cyanamid* and *RJR-MacDonald* should be seen as guidelines rather than firm rules. The terms "irreparable harm", "*status quo*" and "balance of convenience" do not have a precise meaning. They are more properly seen as guides which take colour and definition in the circumstances of each case. More importantly, they ought not to be seen as separate, water-tight categories. These factors relate to each other, and strength on one part of the test ought to be permitted to compensate for weakness on another. The Manitoba Court of Appeal has quite properly held that "it is not necessary . . . to follow the consecutive steps set out in the *American Cyanamid* judgment in an inflexible way; nor it is necessary to treat the relative strength of each party's case only as a last step in the process". A similar view was expressed by the Saskatchewan Court of Appeal:
>
> > . . . the strength of case, irreparable harm and balance of convenience considerations, although prescribed and necessary parts of the analysis mandated by the Supreme Court, are nonetheless not usefully seen as an inflexible straightjacket. Instead, they should be regarded as the framework in which a court will assess whether an injunction is warranted in any particular case. The ultimate focus of the court must always be on the justice and equity of the situation in issue. As will be seen, there are important and considerable interconnections between the three tests. They are not watertight compartments.
>
> Treating the checklist of factors as a "multi-requisite test" will often produce results which do not reflect the balance of risks and do not minimize the risk of non-compensable harm. As Lord Hoffman stated, a "box-ticking approach does not do justice to the complexity of a decision as to whether or not to grant an interlocutory injunction".
>
> The list of factors which the courts have developed – relative strength of the case, irreparable harm and balance of convenience – should not be employed as a series of independent hurdles. They should be seen in the nature of evidence relevant to the central issue of assessing the relative risks of harm to the parties from granting or withholding interlocutory relief.
>
> [Citations omitted]

[49] In keeping with this guidance, I will comment on the justice and equity of the situation before me. I will then conduct the analysis set out in ***RJR-MacDonald***

Inc. v. Canada (Attorney General), *supra*, to determine whether injunctive relief is available.

[50] After a season of regular play, the football teams from Acadia and Saint Mary's Universities earned the right to play in the semi-final championship game known as the Loney Bowl. A dispute arose in relation to the eligibility of one of Saint Mary's players. Mechanisms are in place to deal with such disputes and proceedings were underway to handle that issue. Rather than wait for that process to play out, AUS cancelled the Loney Bowl two days prior to the scheduled game. The result of the cancellation was that Acadia automatically advanced to the next round of the playoffs. Saint Mary's lost the opportunity to participate in an important semi-final game and to possibly advance to the national championship. In other words, a group of young athletes were denied an opportunity to play a championship game that they had earned the right to participate in.

[51] The court's ability to intervene in situations such as this is limited. Further, injunctive relief is an extraordinary remedy which should only be granted in appropriate circumstances. After considering the strength of the Applicant's case, the issue of irreparable harm, and the balance of convenience, I am satisfied that the interim injunction requested by the Applicant should be granted.

[52] I will deal first with the strength of the Applicant's case. Counsel for Saint Mary's argues that while, on its face, the order being sought appears mandatory, it should be considered to be prohibitive and the test that the Applicant should have to meet is the "serious issue to be tried" test. Ms. Awad suggests that had Saint Mary's known that the AUS was considering cancelling the game, it could have come to court seeking a prohibitive injunction and would only have to meet the "serious issue to be tried" test. She suggests that for policy reasons, Saint Mary's should not be required to satisfy the higher test.

[53] Regardless of the test that is employed (a serious issue to be tried or a strong *prima facie* case), I am satisfied that Saint Mary's has fulfilled the first part of the test to obtain injunctive relief.

[54] Saint Mary's states that AUS is an association of universities who have banded together to regulate university sport in Atlantic Canada. They have agreed on a common set of rules that will apply to all members. The Association's powers are derived from its incorporating documents.

[55] Section 2.1.1 of the AUS By-Laws provides that members of the Association shall be institutions of higher learning or affiliates thereof who are members in the Association of Atlantic Universities and are located in the Atlantic provinces.

[56] Section 3.1.1 of the By-Laws indicates that the Board of Directors shall consist of the President of each member.

[57] Section 3.1.2 of the By-Laws grants the Board of Directors the jurisdiction, power and authority to realize the objects of the Association and indicates that the Board shall normally delegate the implementation of policy decisions to a Management Council.

[58] The By-Laws of the Association provide for only two committees of the Board of Directors – a Human Resources Committee and a Finance Committee.

[59] The By-Laws also provide for a Management Council. The Management Council consists of two delegates appointed by the President of each member university. The Management Council has the jurisdiction, power and authority to implement policy decisions as directed by the Board of Directors and to make recommendations to the Board of Directors.

[60] The By-Laws also provide for an Executive Committee of the Management Council (ECMC). The ECMC is made up of six individuals. The By-Laws specify how the ECMC members are determined.

[61] Mr. Phillip M. Currie, the Executive Director of AUS, filed two Affidavits in response to this motion. In his first Affidavit, he states that the decision to cancel the Loney Bowl was a decision of the Executive Committee of the Board of Directors of AUS. This Committee is said to consist of four individuals who, at the present time, are the Presidents of Mount Allison University, St. Francis Xavier University, St. Thomas University and the University of Prince Edward Island. There is no representative of Saint Mary's on this Committee.

[62] Saint Mary's alleges, and AUS acknowledges, that there is nothing in the AUS By-Laws that authorizes the formation of an Executive Committee of the Board of Directors.

[63] Saint Mary's submits that the By-Laws of the Association were designed so that each member university has a say at the AUS table. It further submits that the

committee that decided to cancel the Loney Bowl has no legal existence and had no power to take the action that it took.

[64] Further, Saint Mary's submits that there is nothing in the AUS By-Laws or its Operations Manual that would authorize the cancellation of the Loney Bowl. It refers, *inter alia*, to Section 2 of the Manual (relating to football) which provides:

> **b. Playoff/Championship Format**
>
> . . . . .
>
> The Atlantic University Sport championship and semifinal game are Atlantic University Sport events managed by a host university or Atlantic University Sport, and the host of the championship is to comply with Atlantic University Sport policies.
>
> Format:
>
> The top three (3) teams following regular season play qualify for the Atlantic University Sport playoffs, with the first place team receiving a bye into the championship game.
>
> **AUS Semifinal Game**:
>
> - The second place team will host the third place team in a playoff game on the weekend immediately following regular season play.
>
> **AUS Championship Game (Loney Bowl)**:
>
> - The first place team will host the winner of the playoff game on the weekend immediately following the semifinal playoff game to determine the Atlantic University Sport champion.
>
> . . . . .

[65] In response, counsel for AUS argued that the Board of Directors of the Association had the power to make this decision regardless of what the Operations Manual indicates about the playing of championship games. The AUS further submits that its Board of Directors had the power to form an Executive Committee of the Board and that that Committee had the power to take the action that it did.

[66] The AUS gave evidence that the uncertainty surrounding who was going to play in the Loney Bowl required it to make the decision that it made.

[67] Reference was made by AUS to Section 1.5A(v) of the Operations Manual which provides:

> **5. <u>SCHEDULING</u>**
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> . . . . .
>
> (v) The AUS executive committee is empowered to amend (and to extend in terms of league play) league and championship schedules and/or formats as may be required in extenuating circumstances.

[68] Further, reference was made to Section 1.1.A of the Operations Manual which provides:

> **1. <u>PREAMBLE</u>**
>
> A. Atlantic University Sport ("AUS") may adopt any general operating procedures deemed necessary for the proper conduct of its business.
>
> . . . . .

[69] In addition, reference was made, *inter alia*, to Section 1.6.B (iii) of the Operations Manual which states:

> B. <u>Levels of Competition</u>
>
> . . . . .
>
> (iii) As per U SPORTS regulations, AUS is responsible to determine the organization of each sport within the AUS where a U SPORTS sanctioned championship is conducted, and how the representatives of the AUS for those U SPORTS championships shall be declared.

[70] While not referred to by any party, I also take note of Section 1.6.L of the AUS Operations Manual dealing with forfeiture which provides:

> Atlantic University Sport and its members are committed to ensuring that all regular season and championship games take place as scheduled.

[71] In my view, it is neither necessary, nor appropriate at this early stage of the proceeding, for me to conduct a detailed analysis of the merits of the various arguments that have been made. My role is to simply determine whether the Applicant has satisfied the first stage of the test for interim injunctive relief. In determining that issue, I have taken into consideration all of the evidence that was put before me and, in particular, the following:

- The AUS is not a traditional corporation. It is a group of Atlantic universities who have formed an association to regulate university sport in Atlantic Canada.

- AUS's powers are set out in their incorporating documents.
- The By-Laws that govern the AUS provide for a Board of Directors plus two committees (the Human Resources Committee and the Finance Committee). In addition, a Management Council is formed consisting of two delegates appointed by the President of each member. The By-Laws also provide for an Executive Committee of Management Council (ECMC). The ECMC consists of six members as set out in the By-Laws.

- The decision to cancel the Loney Bowl was not made by the Board of Directors of AUS. Nor was it made by the ECMC. It was made by only four individuals who have been referred to by the Respondent as the "Executive Committee of the Board of Directors".

- The By-Laws of the AUS do not provide for an Executive Committee of the Board of Directors.

[72] Based on the materials before me, I am satisfied that there is a strong *prima facie* case that the committee that decided to cancel the Loney Bowl did not have the

authority to do so. I am therefore satisfied that the Applicant has satisfied the first part of the test to obtain interim injunctive relief.

[73] I turn now to the second stage of the analysis. The Applicant has satisfied me that it will suffer irreparable harm if this interim injunction is not granted. Saint Mary's University and, more importantly, its players earned the right to play in the Loney Bowl. I acknowledge that there is an issue about the eligibility of one of the members of its team. Mechanisms are available to deal with that issue including, if appropriate, forfeiture of the game. If an interim injunction is not granted, Saint Mary's University will lose the opportunity to play in this championship game and to possibly move on to the playoffs. That is a loss that cannot be compensated for by way of damages.

[74] That takes me to the balance of convenience aspect of the analysis.

[75] During submissions, Mr. Clarke referred me to the affect that he says an interim injunction would have on AUS and the students that will be playing the Loney Bowl if the relief requested is granted. He suggested that these considerations are relevant to the irreparable harm issue. In my view, these considerations are best dealt with at the third stage of the analysis dealing with the balance of convenience (see ***RJR-MacDonald Inc. v. Canada (Attorney General)***, *supra*, at ¶ 57).

[76] AUS argued that if the Loney Bowl was played by a team that was later determined to be ineligible, AUS's reputation would be seriously impaired. Further, it referred to the issue of "football preparedness". In particular, the need for players to come to a game with a clear and focused mind without being challenged by the uncertainty that has surrounded this game. It also raised the issue of player safety and the need for the winner of the Loney Bowl to rest up before the next scheduled championship game.

[77] Counsel for Acadia submitted that his client is an innocent party that would bear the brunt of any injunction that may be granted. He submitted that Acadia has done nothing wrong in the circumstances of this case and it should not be penalized by having to play the Loney Bowl only days before the next championship game. He commented upon the difficulties that could be experienced in getting the game organized after it had been cancelled and suggested that it would be impossible to restore the parties to the position that they were in before AUS made its decision.

[78] Counsel for Acadia noted that if the Loney Bowl is played, Acadia loses and Saint Mary's was subsequently found to have been ineligible, Acadia would have lost the opportunity to advance to the championship game on November 18th, 2017. The argument was made, *inter alia*, that the right to go straight to the Uteck Bowl was properly conferred upon Acadia by AUS and that this court should not intervene in that decision.

[79] I will deal first with the Respondent's argument that if the Loney Bowl is played by a team that is later determined to be ineligible, the reputation of AUS will be seriously impaired.

[80] While I accept that such a situation would be less than desirable, the AUS Operations Manual provides for this possibility. It indicates that if U SPORTS determines that a member has used an ineligible player, that situation can give rise to sanctions including the forfeiture of a game. In addition, I note that AUS was in the same position on November 4th, 2017, when Saint Mary's University played St. Francis Xavier University in the semi-final game leading up to the Loney Bowl. On November 1st, 2017, the Athletic Directors from four universities laid a formal complaint with AUS suggesting that Saint Mary's was in violation of U SPORTS policies in relation to Mr. Jack. Nevertheless, Saint Mary's was permitted to play the November 4th, 2017, game against St. Francis Xavier.

[81] I am satisfied that the harm that will accrue to Saint Mary's if the Loney Bowl is not played outweighs any harm that may accrue to AUS.

[82] That takes me to the issue of Acadia. I will deal first with the suggestion that if Acadia plays the Loney Bowl and loses, and Saint Mary's is subsequently found to have been ineligible to play, Acadia will have lost its opportunity to advance in the championships. This factual statement is correct. However, this is the same position that Acadia was in on the morning of November 9th, 2017, before AUS cancelled the game.

[83] With respect, I disagree with the suggestion that the right of Acadia to go straight to the Uteck Bowl was properly conferred upon it by the AUS and, therefore, this court should not intervene. I have concluded that based on the evidence before me, there is a strong *prima facie* case that the group of four individuals who made this decision did not have the power to do so.

[84] Both Saint Mary's and Acadia Universities earned the right to play in the Loney Bowl on November 11th, 2017. The decision by four members of the AUS to cancel the game took away that right for Saint Mary's. Without an interim injunction, the Applicant's opportunity to move into the next round of the playoffs would be lost. While I accept that Acadia will be prejudiced by the granting of the injunction, I am fully satisfied that the balance of convenience weighs in favour of granting the interim relief requested.

[85] Saint Mary's has also argued that the decision to cancel the Loney Bowl constitutes contempt *ex facie curiae* by AUS. It goes on to suggest that the Respondent wrongly attempted to circumvent the Ontario proceedings by cancelling the game.

[86] I have found that the Applicant has satisfied the test for interim injunctive relief. It is not necessary nor, in my view advisable, for me to go on at this stage to consider the other allegations set out in the Notice of Application.

[87] That takes me to the request that Saint Mary's be given the opportunity to host the Loney Bowl in the event that Acadia is unwilling or unable to do so.

[88] As the first place team in the regular season, Acadia earned the right to host the Loney Bowl. During the course of the hearing, Acadia suggested that there was a serious question about whether they would be able to organize the playing of the game if an injunction was granted. While I appreciate that Acadia has earned the home-field advantage, in my view, it is of greater importance that this championship game be played. Accordingly, if Acadia is unable or unwilling to organize the game, Saint Mary's will be given the opportunity to do so.

[89] I will hear from the parties on costs in the event that they are unable to reach an agreement in this regard.

Deborah K. Smith
Associate Chief Justice