

The NFL Deflategate Scandal — The Second Half

April 27, 2016

On April 25, 2016, the U.S. Court of Appeals for the Second Circuit reversed the District Court's decision and restored the suspension issued by NFL Commissioner Roger Goodell to New England Patriots' quarterback Tom Brady in the "Deflategate" scandal.

In September 2015, we reported on the U.S. District Court's decision to overturn ("vacate") the four-game suspension issued by NFL Commissioner Roger Goodell on Tom Brady of the New England Patriots for his role in the "deflategate" scandal ("[Fantasy Football – Lessons Learned from Deflategate](#)").

On April 25, 2016, the U.S. Court of Appeals for the Second Circuit (the "Court") reversed the District Court's decision and restored the suspension. The Court, which was critical of the lower court's decision, found that the Commissioner acted within the broad powers given to him by the NFL and the National Football League Players' Association ("Association") under the parties' collective bargaining agreement ("CBA"). The Court's discussion on the deference that should be given to arbitrators in the United States is relevant to the Canadian legal landscape as well.

A brief history of the bouncing football is in order.

During the second quarter of the American Football Conference Championship Game of January 18, 2015 between the Indianapolis Colts and the Patriots, a Colts' player suspected that a ball that he caught (intercepted) might have been under-inflated. At half-time, it was determined all eleven of the balls controlled by the home-team Patriots **actually measured below the permissible range of 12.5 - 13.5 psi.**

Within a few days after the game, the NFL retained Theodore V. Wells and a law firm to conduct an independent investigation into whether there had been improper ball tampering before or during the game. The 139 page "Wells Report" of May 6, 2015 concluded, among other things, that:

- It was more "probable than not" that two of the Patriots equipment managers had participated in a deliberate effort to release air from Patriots game balls after the balls were examined by the referee;

- It was more "probable than not" that Brady was at least generally aware of the actions, as it was unlikely that an equipment assistant and a locker room attendant would deflate game balls without Brady's "knowledge", "approval", "awareness" and "consent";
- **The investigation had been impaired by Brady's refusal "to make available any documents or electronic information (including text message and emails)..."**.

On May 11, 2015, Brady was notified by Troy Vincent, the NFL's Executive VP, that the Commissioner authorized a four-game suspension pursuant to Article 46 of the CBA for engaging in "conduct detrimental to the integrity of, and public confidence in, the game of professional football". The disciplinary notice referred to Brady's awareness and knowledge of the scheme and his "failure to cooperate fully and candidly with the investigation, including by refusing to produce relevant electronic evidence..."

Brady, through the Association, appealed the suspension and the Commissioner exercised his discretion under the CBA to act as the hearing officer (arbitrator). A series of motions were also filed by the Association, including one seeking to have the Commissioner step down from hearing the matter.

The motions were denied by the Commissioner, and on June 23, 2015, he held a lengthy hearing to address the Association's appeal of the suspension. Shortly before **the hearing, however, it was revealed that in early March, 2015 – on the same day he was to be interviewed by the investigative team – Brady instructed his assistant to destroy the cellphone that he had been using from early November, 2014 through to the AFC Championship game, despite knowing the investigators had requested it.**

In his award of July 28, 2015, the Commissioner found that Brady had not only failed to cooperate with the investigation, but he made a "deliberate effort to ensure" that the investigators would never have access to information that he had been asked to produce. The Commissioner, sitting as the arbitrator, drew an adverse inference that the cell phone would have contained damaging evidence regarding Brady's role in the scheme. In upholding the suspension, he found that Brady's conduct was analogous to **that of steroid users who tried to gain a competitive advantage to the game – thus the four-game suspension was justified.**

The NFL Management Council filed a motion to confirm the award while the Association sought to have it vacated by the District Court. The Association was successful. On September 3, 2015, Judge Berman of the District Court overturned the suspension, on the basis that there were "significant legal deficiencies" with the Commissioner's award. The NFL filed an appeal with the Court.

In a 2-1 decision of April 25, 2016, the Court reversed Judge Berman's judgment and restored the four-game suspension issued to Brady.

The Court first explained that because the dispute involved the assertion of rights under **a collective bargaining agreement, its analysis was governed by the Labor Management Relations Act ("LMRA") which established a federal policy of promoting industrial stabilization through the collective bargaining agreement and embodied clear preference for the private resolution of labour disputes without government intervention.** The Court confirmed that because collective bargaining agreements are negotiated and refined over time by the parties themselves to reflect their needs, and since arbitrators

are chosen by the parties because of their expertise in the particular business and their trusted judgment to interpret and apply the agreement, a court's review of an arbitration award is "very limited". Importantly, the Court stated that its jurisdiction is not to review the arbitrator's decision on the merits, or to determine whether the punishment was the most appropriate. Instead, the Court's role is to "inquire only as to whether the arbitrator acted within the scope of his authority", which in this case was the CBA.

Based on the above, the Court found that:

- The Commissioner's decision to discipline Brady was "plausibly grounded in the parties agreement", which was all the law required;
- The Commissioner's interpretation of the subject policies could easily withstand judicial scrutiny because his interpretation was at least "barely colourable", which was also all that the law required;
- The comparison drawn by the Commissioner between Brady's conduct and that of steroid users was within his discretion to make, and did not require advance notice to Brady;
- The Commissioner's conclusion that Brady participated in the scheme was a reasonable reassessment of the facts and information developed at the hearing, and was therefore within his jurisdiction;
- The adverse inference drawn by the Commissioner in regard to the destruction of evidence was within his discretion as well;
- Brady was not deprived of fundamental or procedural fairness.

In the end, the Court concluded that the "parties contracted in the CBA to specifically allow the Commissioner to sit as the arbitrator... knowing full well that (he) had sole power of determining what constitutes 'conduct detrimental', and thus knowing that the Commissioner would have a stake in both the underlying discipline and in every arbitration" brought under the CBA. The District Court's judgment therefore was reversed, and the arbitration award was confirmed.

Despite not having the LMRA (or four downs) in Canada, the decision shows how courts defer to arbitrators, or other specialized tribunals. Our Supreme Court has stated there are two standards to be applied on judicial review applications. The "standard of correctness" is used in respect of jurisdictional and other questions of law. However, the "reasonableness standard" is to be applied to decisions which involve questions of fact, discretion and policy, as well as questions where the legal issues cannot be easily separated from the factual ones. It is entirely possible, therefore, that a higher court in Canada would have followed the same path as the U.S. Court of Appeals.

By

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