

SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)

N°: SDRCC 22-0544/45/46/48/49

**SÉBASTIEN BEAULIEU
KAYLIE BUCK
DARREN GARDNER
JENNIFER HAWKRIGG
JULES LEFEBVRE
(CLAIMANTS)**

AND

**CANADA SNOWBOARD
(RESPONDENT)**

AND

**ARNAUD GAUDET
(AFFECTED PARTY)**

Tribunal:

Patrice Brunet (Sole Arbitrator)

Appearances:

For Sébastien Beaulieu:

None

For Kaylie Buck and Jennifer Hawkrigg:

Dr. Emir Crowne
Amanda Fowler

For Darren Gardner:

None

For Jules Lefebvre:

None

For the Respondent:

Adam Klevinas
Cristy Nurse

For the Affected Party:

None

DECISION ON COSTS

I. INTRODUCTION

1. This is further to an application made by the Claimants, Ms. Kaylie Buck (“**Ms. Buck**”) and Ms. Jennifer Hawkrigg (“**Ms. Hawkrigg**”) (Ms. Buck and Ms. Hawkrigg hereafter referred to as the “**Claimants**”), to award costs in their favour in the present arbitration. It is adjudicated pursuant to Subsection 5.14(c) of the *Canadian Sport Dispute Resolution Code* (“**SDRCC Code**”).
2. This case pertains to a dispute between the Claimants and the Respondent, regarding the latter’s decision not to nominate them for the Beijing 2022 Olympic Winter Games.
3. On February 7th, 2022, I rendered a final and binding award on the merits, where I ordered that Mr. Jules Lefebvre, Mr. Sébastien Beaulieu and the Claimants be added to the Respondent’s team for the Beijing 2022 Olympic Winter Games, pursuant to Subsection 5.13(a) of the SDRCC Code.
4. Following my decision, on February 13th, 2022, the Claimants and their legal counsel informed the Panel and the Respondent that they were seeking costs, within the delay provided by Subsection 5.14(b) of the SDRCC Code.
5. On March 22nd, 2022, the Claimants filed written submissions.
6. On March 29th, 2022, the Respondent filed their reply.
7. Neither Mr. Sébastien Beaulieu, Mr. Darren Gardner, Mr. Jules Lefebvre nor the Affected Party informed the Tribunal in a timely manner that they were seeking costs.

II. POSITIONS OF THE PARTIES

8. This section summarizes the written submissions from the Parties. Although this is not a detailed record, I carefully examined all submissions and documents.

I. Position of the Claimants

9. The Claimants submit that costs should be awarded on an exceptional basis under Subsection 6.13 (a) of the SDRCC Code.
10. They argue that this matter concerned an Olympic team selection appeal, which outcome added several athletes to the Beijing 2022 Olympic Winter Games team. It was conducted under extraordinary time constraints and adjudicated entirely on written submissions. Following the decision *McInnis v. Athletics Canada*¹, the Claimants argue that there should be a deviation from the general rule which provides that each party is responsible for its costs since there were exceptional circumstances in this dispute.
11. Referring to *Hyacinthe v. Athletics Canada*², they claim that they should be awarded costs considering the outcome of the proceedings: they were successful and ended up being named to the 2022 Beijing Olympics Winter Games team.
12. They claim that the exceptional character of their application is justified by the addition of multiple athletes to Canada's Olympic Team, the time constraints of the proceedings and the fact that the case was argued solely on documentary evidence.
13. The Claimants also add that they have very limited financial means and that given the disparity in financial resources between them and the Respondent, costs should be awarded.
14. The Claimants acknowledge that the Respondent did not act in bad faith and cooperated in the proceedings. They also mention that settlement offers were impractical considering the time constraints involved, and the binarity of the sought outcome.

¹ *McInnis v. Athletics Canada*, SDRCC-19-0401, para. 33.

² *Hyacinthe v. Athletics Canada*, SDRCC-06-0047.

15. The Claimants seek the following costs:

Fees (Dr. Crowne)

Preliminary Call (0.5 hours): $\$600 \times 0.5 = \300.00

Written Submissions & Client Discussions (8.0 hours): $\$600 \times 8 = \$4,800.00$

Fees (Ms. Fowler)

Preliminary Call (0.5 hours): $\$400 \times 0.5 = \200.00

Written Submissions & Client Discussions (8.0 hours): $\$400 \times 8 = \$3,200.00$

Sub-total = $\$8,500.00$

HST on Fees (13%) = $\$1,105.00$

Total Professional Services Fees = $\$9,605.00$

Disbursements

SDRCC Filing Fee (Buck) = $\$500.00$

SDRCC Filing Fee (Hawkrigg) = $\$500.00$

Total Disbursements = $\$1,000.00$

Total (**Professional Services Fees + Disbursements**) = $\$10,605.00$

II. Position of the Respondent

16. The Respondent requests that the Panel reject the Claimants' claim to be awarded costs.

17. They reiterate the general principle found in Subsection 5.14(a) of the SDRCC Code, which states that each Party should be responsible for their own costs.

18. The Respondent acknowledges that the Claimants were successful in their proceedings to be added to Canada's Olympic team, but highlights the principle found in Subsection 6.13(a) of the SDRCC Code, which states that "[s]uccess in arbitration does not mean that the Party is entitled to costs".

19. Citing Arbitrator Stewart McInnes in *Strasser v. Equine Canada*³, the Respondent submits that costs are only awarded in unusual circumstances. There is nothing "unusual" about this matter.

³ *Strasser v. Equine Canada*, SDRCC 07-0056.

20. The Respondent recognizes that the case proceeded on an expedited basis, but denies the exceptional character of the proceedings, since selection disputes are frequently adjudicated on an expedited basis.
21. The Respondent also states that solicitor/client costs are awarded only in exceptional circumstances where the behaviour of a Party demonstrates unprofessional conduct or bad faith (*Christ v. Speed Skating Canada*⁴).
22. Further, the Claimants have not provided evidence of payment of the expenses.
23. If one was to follow *Jacks v. Swimming Canada*⁵, costs are only awarded on an exceptional basis so that sports funds may be spent on athletes, coaches and teams, rather than on disputes.

III. THE APPLICABLE LAW

The Canadian Sport Dispute Resolution Code

24. I am guided by, and compelled to apply, Subsections 5.14 and 6.13 of the SDRCC Code which read as follows:

5.14 Costs

(a) Except for the costs outlined in Section 3.8 and Subsection 3.7(e), and unless expressly stated otherwise in this Code, each Party shall be responsible for its own expenses and those of its witnesses.

(Emphasis added)

6.13 Costs

(a) The Panel shall determine whether there is to be any award of costs, including but not limited to legal fees, expert fees and reasonable disbursements, and the amount of any such award.

⁴ *Christ v. Speed Skating Canada*, SDRCC 16-0298.

⁵ *Jacks v. Swimming Canada*, SDRCC 16-0324.

In making its determination, the Panel shall consider the outcome of the proceeding, the conduct of the Parties and abuse of process, their respective financial resources, settlement offers and each Party's good faith efforts in attempting to resolve the dispute prior to or during Arbitration. Success in an Arbitration does not mean that the Party is entitled to costs.

(b) A Party may raise with the Panel any alleged breach of this Code by any other Party. The Panel may take such allegation into account in respect of any cost award.

(c) Any filing fee charged by the SDRCC can be taken into account by a Panel if any costs are awarded.

(Emphasis added)

IV. DECISION

25. I am bound to apply Subsection 6.13(a) of the SDRCC Code, and specifically the relevant factors that will be addressed in my analysis are as follows:

- i.* the outcome of the proceeding;
- ii.* conduct of the Parties and abuse of process;
- iii.* financial resources of the Parties; and
- iv.* settlement offers and each Party's good faith efforts in attempting to resolve the dispute prior to or during Arbitration.

26. Before proceeding with my analysis, it is relevant to recall the general rule that applies to applications for costs before the SDRCC.

27. As set out in Subsection 5.14(a) of the SDRCC Code, each Party is responsible for its own costs⁶. Only unique circumstances should give rise to an award for costs.

28. Arbitrator Bennett in *McInnis v. Athletics Canada*⁷ states that: "The basic rule of the SDRCC is that costs are not awarded. This is so that time and sport funds are spent on athletes, coaches and teams, rather than disputes".

⁶ *Boylen v. Equine Canada*, SDRCC 04-0017.

⁷ *Supra*, note 1, para. 2.

29. While the general rule is that each party bears its own costs, certain circumstances warrant an award for costs.

30. In *Corey v. Speed Skating Canada*⁸, Arbitrator Bennett further clarifies his analysis of Subsection 6.13(a) of the SDRCC Code (formerly Subsection 6.22(c) of the 2015 SDRCC Code):

Costs cannot be awarded unless some combination of the factors in subsection 6.22(c) have been shown. Costs will generally be negligible and should not require costs awards; however, there are some circumstances in which costs might be appropriate (*Jacks* at para. 11). Specifically, costs awards may be appropriate where one party's conduct was without merit and caused financial harm to the opposite party.

31. My analysis remains holistic, guided by the criteria found in Subsection 6.13(a) of the SDRCC Code, this Tribunal's jurisprudence and the facts and circumstances of each case. After considering all the Parties' submissions and in light of the factors found in Subsection 6.13(a) of the SDRCC Code, I find that the circumstances of this case do not justify awarding costs to the Claimants as is further detailed in the following sections.

i. the outcome of the proceeding;

32. In my reasoned award, I found that the Respondent's decision not to select the Claimants was unreasonable. I partially granted the Claimants' appeal by naming some of them to the 2022 Beijing Olympic Winter Games.

33. The Claimants believe that this factor should weigh heavily in my analysis because of the outcome of the decision in their favour and because the proceedings were *unique* and *exceptional*.

34. As found in Subsection 6.13(a) *in fine* of the SDRCC Code, [s]uccess in an Arbitration

⁸ *Corey v. Speed Skating Canada*, SDRCC 19-0416, para. 24.

does not mean that the party is entitled to costs. While the outcome of the proceeding remains an important factor, it alone is not a determining factor to award costs. Arbitrator Bennet writes eloquently in *Corey v. Speed Skating Canada*⁹:

“Success in an Arbitration does not mean that the Party is entitled to be awarded costs.” In the absence of the other enumerated factors, success alone at Arbitration will rarely fall within an exceptional case giving rise to a costs award.

35. The wording and intention of the SDRCC Code are clear. Cost determination is an overall case-by-case analysis guided by the factors listed in Subsection 6.13(a) of the SDRCC Code. The outcome alone cannot justify an award for costs and must be considered in light of the other factors. Only exceptional or unique circumstances should give rise to an award of costs.
36. Despite the Claimants’ claim that this case has been *exceptional* and that this justifies an award of costs, I disagree.
37. The Claimants state that my use of the terms “*exceptional situation*” in paragraph 5 and “*circumstances must be exceptional*” in paragraph 72 of my award justify the awarding of costs. This is not the correct interpretation of my words: the case was exceptional mainly because of the time constraints, but the legal issues and the proceedings did not stand out from a normal sports arbitration. It was about the exercise of authority by a national sports organization, which was challenged by athletes, and on which I ruled.
38. The terms “*exceptional situation*” used in my reasoned decision must be distinguished from its meaning in the context of an application in a costs dispute.
39. In a costs dispute, the expression “*exceptional circumstances*” will refer to facts or the complexity of a case or situations that are unique or exceptional and that justify departing from the primary consideration established by the SDRCC Code and the jurisprudence, namely that each Party is responsible for its own expenses.

⁹ *Id.* at para. 27.

40. The body of decisions have hinted at what would constitute “*exceptional and unique circumstances*”. For instance, it may be in cases of a breach of the principles of fairness or natural justice¹⁰, due to broader social factors and political climate in sport¹¹ or the conduct of the parties - which I will address in the next section.

ii. conduct of the Parties and abuse of process;

41. The Claimants state that the conduct of the parties should be a neutral factor in my analysis due to the mutual agreement to consolidate the matters.

42. Although Claimants did not make submissions on this factor, I still find this factor to be important.

43. Indeed, I found that all the Parties collaborated in this arbitration in an exemplary manner throughout the procedure. I did not find, nor was I informed of any bad faith nor vexatious behaviour from any party, despite the fact that the proceedings were conducted within a very tight timeline and that relevance of the issue was high.

44. As Arbitrator Pound wrote in *Boylen v. Equine Canada*¹², “[w]here, however, it is acknowledged that the conduct of an athlete who challenges a decision made by [the federation] is not frivolous or vexatious, even if the position of the athlete is held to be without merit [...], I would be most reluctant to award costs in favour of the federation and against an athlete”. Since I found no element of vexatiousness nor frivolity in the Parties’ behaviour, I am applying the principle of reluctance in the determination of costs.

45. Regarding legal fees, I also agree with Arbitrator Pound, in the decision *Hyacinthe v. Athletics Canada*¹³:

[Solicitor-client] costs are awarded only in exceptional cases, such as where the conduct of the other party has been unprofessional, or where the losing party has refused offers of settlement or has been otherwise

¹⁰ *Canadian Amateur Diving Association v. Miranda*, SDRCC 05-0030; *Phoenix et al. v. Equine Canada*, SDRCC 16-0301.

¹¹ *Supra*, note 1.

¹² *Supra*, note 6, p. 7.

¹³ *Supra*, note 2, p. 18

objectionable or in bad faith [...] Having no evidence as to bad faith on the part of either Respondent, I do not think that costs on a solicitor-client basis are appropriate in this matter.

46. To everyone's credit, there was no bad faith or lack of professionalism from the Parties. The arbitration, given the circumstances, was smooth and efficient. The execution of my award was also, I was told, equally smooth.

iii. financial resources of the Parties;

47. Turning now my analysis to the *financial resources of the parties*, I am mindful of the Claimants' limited financial resources, and the Respondent acknowledges this fact.

48. In most cases, the financial resources of the athletes would appear to be vastly different than those of a sport organization. Therefore, this criterion must be analyzed under a prudent lens, otherwise all successful athletes in an arbitration would have a legitimate claim to costs.

49. While there undoubtedly is a financial disparity between the Parties, I find that this criterion in and of itself is not sufficient to justify an award for costs. If I was to compare financial resources between the Parties, it would only be after I would have found that costs should be awarded because the conduct of one Party was reprehensible, the process was abused or good faith was questionable. Absent these findings, as in this case, costs should not be awarded and therefore the analysis becomes moot.

50. I am sensitive to the reality of athletes and their limited financial situation. An Olympic selection represents a unique opportunity in their career. However, these considerations alone do not justify awarding costs, and would in fact clash against the general principle that *each Party must bear its own costs*.

iv. settlement offers and each Party's good faith efforts in attempting to resolve the dispute prior to or during Arbitration

51. As explained earlier, this was a neutral factor because of the time constraints under which the dispute took place and the inability of the parties to resolve the dispute prior to or during Arbitration.

CONCLUSION

52. Having carefully considered the facts, the factors listed in Subsection 6.13(a) of the SDRCC Code and the combination of arguments submitted by the Claimants and Respondent on the *outcome of the proceedings* and the *financial resources of the Parties*, I find that the circumstances of this case are not sufficiently exceptional nor unique to derogate from the basic rule that each party must bear its own costs. Therefore, each Party shall bear its own costs.

I retain jurisdiction and reserve the right to hear any dispute relating to the interpretation or application of the present decision.

Signed in Montreal, on this 8th day of April 2022



Patrice Brunet, Arbitrator