

SPORT DISPUTE RESOLUTION CENTRE OF CANADA (“SDRCC”)
FILE NO. SDRCC 22-0556

IN THE MATTER OF AN ARBITRATION BETWEEN:

STEVE PRICE

Claimant

- and -

SWIMMING NATATION CANADA and ANDREA SCHWARTZ SMITH

Respondents

REASONS FOR DECISION RE SDRCC JURISDICTION

(Virtual Hearing June 1, 2022)

Arbitrator: Larry Banack

I. INTRODUCTION

1. This motion raises an issue of SDRCC'S jurisdiction by Swimming Natation Canada ("SNC") and Andrea Schwartz Smith ("Ms. Schwartz Smith") in respect of an outstanding appeal to the SDRCC of Steve Price ("Mr. Price") described below. The background concerning this motion is set out in the following paragraphs. There are a number of disputed facts which I do not need to resolve for the purpose of this motion.
2. For several years, Ms. Schwartz Smith competed as a member of SNC. SNC is the national governing body of competitive swimming in Canada. From 1991 to 1997, Mr. Price was Ms. Schwartz Smith's coach.
3. In October 2020, Ms. Schwartz Smith submitted a complaint to SNC alleging sexual harassment and abusive coaching practices by her former coach, Mr. Price, throughout 1991 to 1997 (the "Complaint").
4. SNC referred the matter to an external investigator and following the completion of its investigation in March 2021, appointed a Discipline Panel to conduct a hearing to determine whether Mr. Price had committed a major infraction and if so, the appropriate penalty. The parties agreed that the Discipline Panel would consist of a single arbitrator, Adam Klevinas ("Mr. Klevinas").
5. In September 2021, Mr. Price filed material requesting an order permanently staying or dismissing the Complaint.
6. On November 8, 2021, Mr. Klevinas released a decision denying Mr. Price's requests (the "Decision"). The Decision was provided to all parties and indicated that the arbitrator's reasons would follow as part of his ruling on the merits. The SNC Appeal Policy provides a deadline of 21 days to appeal the Decision.
7. On November 19, 2021, Mr. Price sent a letter to Mr. Klevinas advising of his intention to appeal the Decision and requested the arbitrator provide full reasons.
8. November 29, 2021 marks the 21st day following the Decision.
9. On December 15, 2021, the parties attended an administrative conference before Mr. Klevinas and Brian Ward ("Mr. Ward"), the appointed delegate of SNC's CEO, and agreed that the merits hearing be scheduled on February 23-24, 2022.

10. On February 16, 2022, Mr. Price served a notice of internal appeal to the SNC dated February 11, 2022, with respect to the Decision.
11. Also on February 16, 2022, Mr. Price served a notice of motion requesting, among other things, an adjournment of the hearing scheduled for February 23-24 in order to allow for the appeal of the Decision to be heard.
12. On February 18, 2022, Mr. Ward, on behalf of SNC, issued his determination (“Ward Determination”) denying Mr. Price’s internal appeal on the basis that:
 - a. the appeal is out of time as it was not filed in accordance with Swimming Canada’s Appeal Policy of 21 days from the date on which notice of the decision being appealed was received;
 - b. no reasons were provided by Mr. Price for an exemption from the 21-day time limit; and
 - c. alternatively, the Decision is interlocutory and so the appeal is premature and must be deferred until a decision on the merits and sanctions (if any) has been fully and finally determined by the Discipline Panel.
13. Mr. Ward noted that the Notice of Appeal was filed without the required deposit and it was delivered only one week before the merits hearing was scheduled to be heard on February 23-24, 2022. Mr. Ward also noted that Mr. Price did not raise the issue of the appeal at any time before February 16, 2022 including at the administrative conference held on December 15, 2021.
14. It is unclear on the material before me whether Mr. Ward was in receipt of Mr. Price’s letter to Mr. Klevinas dated November 19, 2021, advising of his intention to appeal the Decision. In any event, as explained below, the content of this letter and whether or not Mr. Ward received it, does not impact the outcome of this motion.
15. On February 21, 2022, Mr. Price served a third preliminary motion seeking a permanent stay of the hearing of the Complaint on the basis that SNC and Ms. Schwartz Smith have not established that Mr. Price was a member of SNC during the relevant period. By way of letter dated February 22, 2022, Mr. Klevinas declined to deal with that motion pending the outcome of Mr. Price’s appeal to the SDRCC.

16. On consent of the parties, Mr. Klevinas adjourned the merits hearing to allow Mr. Price to appeal the Decision to the SDRCC. On February 22, 2022, Mr. Price filed his Request for Dispute Resolution Form of the SDRCC which states

This request for Dispute Resolution covers the issues raised in the application for a permanent stay of September 13 and 16, 2021, and the improper dismissal of Price's Appeal by the CEO's delegate. [i.e. the Ward Determination]

17. In SNC's Answer Form of the SDRCC, SNC challenges the jurisdiction of the SDRCC on the basis that Mr. Price failed to commence an appeal of the Decision within 21 days, that the Decision is interlocutory and that Mr. Price failed to exhaust SNC's internal dispute resolution procedure.
18. In Ms. Schwartz Smith's Answer Form of the SDRCC, she similarly challenges the jurisdiction of the SDRCC on the basis that Mr. Price failed to file his appeal of the Decision within 21 days, failed to pay the \$150 deposit and that the Decision is interlocutory.
19. The hearing of the Respondents' jurisdictional motion took place on June 1, 2022. Following oral submissions of the parties, it became clear to me that during the hearing the parties had loosely referred to "decision" as sometimes meaning the Decision or the Ward Determination without clarity. However, upon reflection, it is clear that Mr. Price had put into issue the Ward Determination in his appeal to the SDRCC that had not been specifically addressed during oral argument by either party or by the Respondents' initial written submissions. Accordingly, I requested further written submissions from the parties in order to conclude my deliberations with respect to the Ward Determination, in particular whether the SDRCC has jurisdiction over that decision. The parties thereafter filed submissions addressing the issue of jurisdiction in relation to an appeal of the Ward Determination and their respective positions are set out below.

II. THE POSITION OF SNC

20. The SNC submits:

- a. that the SDRCC does not have jurisdiction to consider Mr. Price's appeal on the following grounds:
 - i. Mr. Price failed to submit an internal appeal of the Decision within the time prescribed and in accordance with the terms of the SNC's Appeal Policy; and
 - ii. the Decision was interlocutory and not final; and
- b. the SDRCC does not have jurisdiction over the Ward Determination.

(i) Mr. Price's appeal of the Decision is out of time

21. Section 3(a) of SNC's Appeal Policy provides:

Members who wish to appeal a decision shall have twenty-one (21) days from the date on which they received notice of a decision to deliver a written Notice of Appeal to the CEO. The Notice of Appeal must be received at the Swimming Canada National Office or personally served upon the CEO within the twenty-one (21) days specified herein.

22. Article 3.1(b) of the Canadian Sport Dispute Resolution Code (the "Code") provides:

Unless otherwise agreed or set out in this Code, before a Person applies (to the SDRCC) for the resolution of a Sports-Related Dispute, the Person must first have exhausted all internal dispute resolution procedures provided by the rules of the applicable SO. [sport organization]. An SO Internal dispute resolution procedure is deemed exhausted when:

- (i) the SO or its internal appeal panel has rendered a final decision;
- (ii) the SO has failed to apply its internal appeal policy within reasonable time limits or on reasonable grounds; or
- (iii) the SO has waived the requirement to exhaust its internal appeal processes.

23. SNC submits that by filing his Notice of Appeal on February 16, 2022, Mr. Price failed to meet the 21-day deadline that expired on November 29, 2021. Mr. Price further failed to file a written request for an exemption to file his appeal outside of this timeline. By failing to file a timely appeal of the Decision in accordance with Section 3(a) of the SNC's Appeal Policy, Mr. Price therefore failed to exhaust the internal dispute resolution procedures of SNC as required by Section 3.1(b) of the Code.
24. On this basis, SNC argues, it was reasonable and appropriate for SNC to reject Mr. Price's internal appeal of the Decision as out of time.

(ii) The Decision was Interlocutory and not Final

25. SNC submits it is well accepted that the SDRCC has no inherent jurisdiction. Rather, article 2.1(b) of the Code sets out the jurisdiction of the SDRCC as limited to the following Sports-Related Disputes:
- a. in relation to which an agreement exists between the Parties to bring the dispute to the SDRCC, whether by virtue of a policy, contract clause or other form of agreement binding the Parties;
 - b. that the Parties are required to resolve through the SDRCC; or
 - c. that the Parties and the SDRCC agree to have resolved using the Code.
26. SNC submits that the agreement to arbitrate is found in the SNC Appeal Policy and provides that:
- a. a dispute must first be appealed to SNC in accordance with the terms and conditions of its policy before it may be referred to the SDRCC;
 - b. where a party believes an error was made, that party may resort to independent arbitration through the SDRCC provided they do so within the prescribed timeline as set out by the SDRCC; and
 - c. the types of matters that may be considered and the terms under which the arbitration may be conducted will be determined by the SDRCC.
27. As previously mentioned, article 3.1(b) of the Code provides that a Claimant must first have exhausted the internal dispute resolution procedures provided by

the rules of the applicable SO before they may avail themselves of the processes provided by the SDRCC.

28. SNC submits that an SO internal dispute resolution procedure is deemed exhausted when the SO or its internal appeal panel has rendered a final decision. In the present case, SNC argues that the Decision was not a final order and Mr. Price failed to exhaust the internal dispute resolution procedures of the SNC as he did not file an appeal within the prescribed time limit to do so.
29. SNC relies on *Waldman v. Thomson Reuters Canada Limited*, 2015 ONCA 53, where the Court of Appeal explained that an order is interlocutory if the merits of the case remain to be determined. It is not enough for an order to only dispose finally of whatever issue was before the motion judge irrespective of whether the order terminates the action or resolves a substantive claim or defence of the parties as this would render the distinction between interlocutory and final orders as meaningless.
30. SNC submits that the Decision is interlocutory as the merits of the case remain to be determined.
31. Finally, SNC submits that failure to exhaust internal dispute resolution procedures support the SNC's position that the SDRCC does not have jurisdiction to consider an appeal; see SDRCC 12-0190 *Clattenburg v Canoe Kayak Canada*, Michael G. Picher, Arbitrator.

(iii) SDRCC does not have jurisdiction over the Ward Determination

32. SNC also submits that the SDRCC does not have jurisdiction over the Ward Determination pursuant to subsection 3(g) of SNC's Appeal Policy.
33. That Appeal Policy is separated into distinct parts. Article 3 is titled "Timing of the Appeal". Subsection 3(a) provides that a Notice of Appeal must be filed within 21 days of from the date the appellant receives the decision to be appealed. Subsection 3(f) states that within 3 days of receiving the Notice of Appeal, the

CEO will decide whether or not the appeal is based on one or more grounds described in SNC's Appeal Policy. Subsection 3(g) provides that:

If the appeal is denied on the basis of insufficient grounds, the member will be notified of this decision in writing, giving reasons. This decision is at the sole discretion of the CEO and may not be appealed.

34. SNC argues that subsection 3(g) applies to the Ward Determination which deals with the timing of Mr. Price's internal appeal and should not be confused with section 5(d) which is limited to whether the CEO erred in denying an appellant the right to appeal pursuant to article 4 of SNC's Appeal Policy that sets out enumerated grounds for an appeal.
35. SNC submits that the Ward Determination concerned an assessment of Mr. Price's appeal as contemplated by article 3 and not article 5. The Ward Determination is therefore final and article 5 does not apply to the present case.
36. In the alternative, SNC argues that if I find that I do have jurisdiction over the Ward Determination, that it is appropriate to dismiss the appeal as the Ward Determination is correct.

III. THE POSITION OF MS. SCHWARTZ SMITH

37. Counsel for Ms. Schwartz Smith largely takes the same position as SNC, that:
- a. the Decision is interlocutory and the SDRCC does not have jurisdiction to hear appeals of interlocutory decisions as set out in the Code;
 - b. Mr. Price did not exhaust all internal dispute resolution procedures provided by SNC pursuant to its Appeal Policy and the SDRCC does not have jurisdiction to resolve a dispute where an SO's internal disputes resolution procedures have not been exhausted;
 - c. Mr. Price did not commence an appeal under the SNC's internal procedure within the 21-day time limit as set out in SNC's Appeal Policy; and
 - d. the SDRCC does not have jurisdiction to hear an appeal of the Ward Determination.

38. Counsel for Ms. Schwartz Smith relies on many of the same facts as SNC in support of her position and I will not repeat them here.
39. Ms. Schwartz Smith submits that the only correspondence received from Mr. Price within the 21-day time limit to appeal was his November 19, 2021 letter to Mr. Klevinas, and that letter does not constitute a Notice of Appeal under SNC's Appeal Policy.
40. Further, Ms. Schwartz Smith submits the fact that the Decision did not provide reasons is not an exceptional circumstance that warrants an extension of time under the Appeal Policy and does not confer jurisdiction on the SDRCC.
41. Subsection 3(f) requires the CEO to render a decision within 3 days whether or not the appeal is based on any grounds set out in SNC's Appeal Policy. Further, subsection 3(g) provides that a decision rendered by the CEO rejecting an appeal at that stage cannot be appealed. Ms. Schwartz Smith submits that the Ward Determination rejected Mr. Price's appeal on the basis that he failed to comply with the requirements of article 3 of SNC's Appeal Policy.
42. Counsel for Ms. Schwartz Smith argues that to allow Mr. Price's appeal which was filed extremely late and without explanation would render the 21-day time limit established by SNC's Appeal Policy meaningless.
43. Accordingly, Ms. Schwartz Smith submits that the SDRCC does not have jurisdiction in this case and the appeal should be dismissed.
44. Ms. Schwartz Smith also submits as an alternative argument that Mr. Price's appeal of the Ward Determination should be dismissed on the basis that it is correct.

IV. THE POSITION OF MR. PRICE

45. Mr. Price argues that the SDRCC has jurisdiction over his appeal to the SDRCC on four grounds:

- a. SNC does not have jurisdiction over the Complaint;
- b. SDRCC has jurisdiction of the appeal by agreement;
- c. the internal processes provided in section 3.1(b) of the Code have been met; and
- d. Mr. Ward exceeded his jurisdiction in the Ward Determination.

(i) SNC does not have jurisdiction over the Complaint

46. Mr. Price submits that he was not a member of SNC from 1991 to 1997 and so was not bound by any policies, expectations or codes of conduct of SNC. As SNC had no contractual relationship with Mr. Price, it cannot discipline him for conduct before he became a member.

47. Mr. Price submits that between receiving the Decision on November 8, 2022 and filing his Notice of Appeal on February 16, 2022, was when he first learned he was not a member of the SNC during the relevant time, among other things.

48. If the internal dispute resolution procedures of the SO/SNC are not applicable, it follows that, Mr. Price argues, there are no internal dispute resolution procedures for him to exhaust under subsection 3.1(b) and so the SDRCC has jurisdiction in the present case.

(ii) SDRCC has jurisdiction of appeal by agreement

49. In the alternative, Mr. Price submits that article 5(d) of SNC's Appeal Policy provides that if the appellant believes the CEO or their Delegate has made an error in denying the appeal, the matter may be referred to arbitration or mediation under the Code. Mr. Price argues that this is a full answer to the question of the SDRCC's jurisdiction.

50. In the present case, Mr. Price is appealing the Ward Determination which inherently brings forward the Decision. Mr. Price's position is that the Ward Determination finally disposed of his internal appeal and was made in error. Mr. Price, therefore, appealed the matter to the SDRCC and all the issues that were before Mr. Klevinas are now before the SDRCC.

51. Section 3.1(b) of the Code provides that a person must have first exhausted all internal dispute resolution procedures provided by the rules of the applicable SO unless otherwise agreed or set out in the Code. Mr. Price's position is that the parties have "otherwise agreed" to refer the matter to the SDRCC by virtue of article 5(d) of SNC's Appeal Policy and so by extension, the SDRCC has jurisdiction over Mr. Price's appeal.

(iii) The internal processes provided in section 3.1(b) of the Code have been met

52. Mr. Price submits that he has satisfied the requirements of section 3.1(b) of the Code in exhausting the internal dispute resolution procedures. In particular, SNC's internal appeal panel rendered a final decision, SNC failed to apply its internal appeal policy within reasonable time limits and SNC failed to apply its internal appeal policy on reasonable grounds.

53. Mr. Price argues that while the Decision is an interlocutory order, the Ward Determination is a final decision in relation to the appeal. He argues that SNC and Ms. Schwartz Smith are incorrectly focused on this motion being about the Decision when it is also about the Ward Determination under article 5 of SNC's Appeal Policy.

54. Further, Mr. Price argues that SNC failed to apply its internal appeal policy reasonably and that Mr. Ward's exceeded his jurisdiction in denying Mr. Price's appeal. Mr. Ward was authorized only to screen the appeal to determine whether or not it set out sufficient grounds for appeal and to deny it if it did not. The reasons provided in the Ward Determination were not within Mr. Ward's jurisdiction and so the SDRCC has jurisdiction pursuant to s. 3.1(b)(ii) of the Code.

55. Mr. Price argues that he did address the timing of his appeal in his Notice of Appeal served in February 2022, specifically that the Decision did not provide reasons and that he should not be compelled to proceed to a hearing on the merits before the Discipline Panel without receiving reasons. Mr. Price argues that the failure to provide reasons impacted his ability to appeal and further, that SNC made incomplete disclosure of policy material to him at the time of the original application.
56. Mr. Price relies on SDRCC 17-0335 *Frazer v. Boxing Canada*, Peter R. Lawless, Arbitrator, where the jurisdictional arbitrator determined that the athlete could appeal the SO's rejection of the appeal before the SDRCC as the request to the SDRCC was filed within the 30-day time limit in accordance with subsection 6.2(a) of the Code. The arbitrator on jurisdiction found that he was not in a position to deny the claim and that this was to be determined at the merits hearing. Mr. Price argues the facts are similar in the present case.

(iv) Mr. Ward Exceeded his Jurisdiction

57. Mr. Price argues that Mr. Ward exceeded his jurisdiction in the Ward Determination. The only type of decision that SNC's CEO or delegate is permitted to make pursuant to SNC's Appeal Policy is a decision on grounds as set out in section 4. The Ward Determination dealt with whether the appeal was filed in time, whether written reasons for an exemption to the time limit were provided and whether the appeal was interlocutory, all of which are not covered by section 4 of SNC's Appeal Policy.
58. Mr. Price submits that while section 3(g) of SNC's Appeal Policy provides the CEO with discretion to deny an appeal on the basis of insufficient grounds, section 5(d) permits an appellant to appeal a decision of the CEO to SNC on the basis that the CEO made an error in denying the appellant a right to appeal. Mr. Price argues that Mr. Ward erred in the Ward Determination in denying Mr. Price the right to appeal the Decision and therefore section 5(d) of the SNC's Appeal Policy applies.

V. ANALYSIS AND CONCLUSION

59. My analysis starts with examining what this case is about? The answer is found in Mr. Price's Request for Dispute Resolution Form of the SDRCC dated February 22, 2022. The Complaint of Ms. Schwartz Smith relates to the conduct of Mr. Price as her coach from 1991 to 1997.
60. What followed from the Complaint was an investigation by an external investigator and the consensual appointment of Mr. Klevinas as sole arbitrator of the Discipline Panel to conduct a merits hearing. Although originally scheduled for February 23-24, 2022, the merits hearing was adjourned to allow Mr. Price to bring his appeal before the SDRCC, and it has not yet taken place.
61. What has taken place is the denial of Mr. Price's request for an order permanently staying or dismissing the Complaint by Mr. Klevinas (the Decision). Mr. Price then internally appealed the Decision and his appeal was dismissed (the Ward Determination).
62. The SDRCC derives its jurisdiction from section 3.1 of the Code. For completeness, I set out the entirety of section 3.1 as follows:

3.1 Availability of Dispute Resolution Processes

- (a) The Dispute Resolution Processes are available to any Person for the resolution of a Sports-Related Dispute, subject to Subsections 3.1(b) and 3.1(c).
- (b) Unless otherwise agreed or set out in this Code, before a Person applies for the resolution of a Sports-Related Dispute, the Person must first have exhausted all internal dispute resolution procedures provided by the rules of the applicable SO. An SO internal dispute resolution procedure is deemed exhausted when:
- (i) the SO or its internal appeal panel has rendered a final decision;

(ii) the SO has failed to apply its internal appeal policy within reasonable time limits or on reasonable grounds; or

(iii) the SO has waived the requirement to exhaust its internal appeal process.

(c) Where the Parties to a Sports-Related Dispute do not agree on the Dispute Resolution Process to be utilized, the Dispute Resolution Process will be Arbitration.

63. In my view, Mr. Price has not fulfilled the internal dispute resolution procedure of SNC pursuant to section 3.1(b)(i) of the Code. Although the issues underlying the Decision were appealed and Mr. Price's SNC appeal was final in the sense that it determined the questions raised by the appeal, the Ward Determination (and the Decision) are interlocutory as the merits of the Complaint remain to be determined. I find that the Decision and the Ward Determination are not a final decision as required by section 3.1(b)(i) of the Code so as to trigger the availability of the SDRCC's dispute resolution process.

64. The facts of this case are precisely the scenario described by the Ontario Court of Appeal in *Waldman*. Although Mr. Price's request for a permanent stay or dismissal of the Complaint was determined in the limited sense that it was final in the result of the Ward Determination, this is not sufficient to render either the Decision or Ward Determination a final decision. The merits of the Complaint, which is the very subject matter of the litigation, remain to be determined and indeed a merits hearing was consensually scheduled to be heard in February of this year. To find that the Ward Determination is a final order because it finally disposes of the issues raised by Mr. Price in his internal appeal irrespective of whether it resolved the Complaint, would render the distinction between interlocutory and final orders meaningless. Indeed, that is not the case here. It would in fact be an error of law to adopt the submissions of Mr. Price to undertake an appeal of either the Decision or the Ward Determination in the current circumstances.

65. It is possible that the SDRCC may have jurisdiction to hear an appeal from that yet-to-be-delivered decision on the merits, however, the subject of the present appeal by Mr. Price is premature.
66. Accordingly, whether or not Mr. Ward was in receipt of Mr. Price's letter to Mr. Klevinas dated November 19, 2021, advising of his intention to appeal the Decision, the outcome of this motion remains unchanged.
67. Further, the consequence if any, of whether Mr. Price was subject to SNC's jurisdiction at the relevant time or whether SNC made incomplete disclosure of policy material to him is not in evidence before me on this jurisdictional motion.
68. Further, I find that Mr. Ward merely exercised his gatekeeping function by rendering the Ward Determination and did not exceed his jurisdiction in doing so.
69. I find that subsections 3.1(b)(i) and (ii) of the Code do not apply here. There is no evidence that SNC failed to apply its internal policy within reasonable time limits or on reasonable grounds or that it waived the requirement to exhaust its internal appeal processes.
70. For the sake of completeness, I agree with the submission of Ms. Schwartz Smith that the mere fact that the Decision did not provide reasons is not an exceptional circumstance that warrants an extension of time under the SNC Appeal Policy and does not confer jurisdiction on the SDRCC.
71. In the result, I conclude that the SDRCC does not have jurisdiction over Mr. Price's appeal.

VI. FORMAL DISPOSITION

72. For all of the foregoing reasons, I conclude that the SDRCC does not have jurisdiction over Mr. Price's appeal relating to the Decision or Ward Determination and order that the present appeal to the SDRCC is dismissed.

ALL BY ORDER OF THIS ARBITRATION TRIBUNAL this 11th day of July,
2022 at Toronto.



Larry Banack

Arbitrator