IMPORTANT NOTE: *This version constitutes a summary of the original 39-page decision.*

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

No: SDRCC ST 23-0005

AB
(Claimant)

and

CD
(Respondent)

and

DIRECTOR OF SANCTIONS AND OUTCOMES (DSO)
(Party)

Representatives:

For AB: Julia Miller and Kate Martini (counsel)

For CD: Angelo P. Fazari (counsel) and Jennifer Johnson-Kelly

For the DSO: Dasha Peregoudova

Sole Arbitrator: Jeffrey Palamar

Date of Decision: September 11, 2023

SUMMARY DECISION

INTRODUCTION

1. On June 28, 2023, the Claimant filed his Request with the Sport Dispute Resolution Centre of Canada ("SDRCC") in which he challenged the June 8, 2023 determination by the Director of Sanctions and Outcomes (the "DSO") that the Respondent had violated the Universal Code of Conduct to Prevent and Address Maltreatment in Sport ("UCCMS").

2. Pursuant to section 8.6(c) of the 2021 Canadian Sport Dispute Resolution Code (January 1, 2021 – amended June 30, 2022) (the "Code"), this challenge of a Finding on a Violation was heard by way of documentary review.

3. To ensure the identity of the Claimant is protected, the Arbitrator anonymized his Decision and did not identify him by name. He also did not identify anyone else (including the Respondent) by name and also removed other names. This was done so as to lessen the likelihood of the Claimant's identity being determined indirectly.

BACKGROUND

4. The DSO's Report on Violations and Sanctions stated in part as follows:

IV. INVESTIGATION FINDINGS

The Investigator made the following findings of fact, a summary of which is contained starting on page 101 of the Investigation Report:

(a) Before September 2, 2022

- In early summer, 2022, AB was selected to play on the […] Niagara Rapids volleyball team being coached by CD. Although AB and his family had met CD previously, this was the first time that CD would be coaching AB. AB was sixteen years old at the time and CD was in his late twenties.

- CD reached out to AB via Instagram on July 25th but AB did not respond. CD tried again on August 14th and AB responded this time; CD asked AB for his cell phone number that same day. The following day (August 15th, 1:53 p.m.) CD sent an email to Mr. and Mrs. B and asked them to pass on his cell number to AB. In that email, CD told Mrs. B that he wanted to get together with AB "for an hour or so and go over some things." At 3:44 p.m. Mrs. B, confirmed to CD that he [sic] had passed on the number and at 3:40 p.m. AB reached out to CD via text.

- From August 15th through to September 2nd, CD and AB communicated via text message. It is clear from the messages that CD wanted to get together with AB to go over "some skill stuff," but was unclear about where this would take place. CD was not clear about the plans for their meeting, other than the fact that CD would be driving to pick AB up. CD also told AB that he had "done it with a few already too."

(b) September 2, 2022 Trip to CD's Home

- CD and his roommate had previously discussed that AB would be coming to their home on either Thursday or Friday of that week and they thought that the roommate would be there. CD noticed that his housemate was gone when he woke. CD later admitted that he should have cancelled the meeting with AB.

- When CD picked up AB at his home at 9:45 a.m., CD spoke to Mrs. B on the doorstep for about fifteen minutes. CD did not tell Mrs. B what the plans for the meeting were. Neither AB or his mother were aware that the plan was to go to CD's home and that they would be alone. Aside from CD's message in the August 15th email to Mr. and Mrs. B that he was hoping to meet AB "for an hour or so," there was no other discussion about how long the meeting would be.

- CD drove AB twenty-five to thirty minutes to his residence.

- Upon arrival at CD's home, AB and CD initially spoke in CD's living room for about an hour. AB was on an L- shaped couch for this conversation and CD was on a separate chair. During this conversation, they discussed volleyball tactics and AB and CD wrote in a notebook that AB had brought to the meeting. At some point during this conversation, CD commented that AB had big hands. The discussion of hand size is common in the sport of volleyball and for setters in particular.

- AB and CD moved upstairs to the home office area, where they could watch game video on a laptop connected to a monitor; they stayed there for about forty minutes.

- CD and AB moved across the hallway to CD's bedroom where CD proceeded to tape AB's wrists and both of his ankles.

- AB had not mentioned any injury to CD nor there was any therapeutic need to have the taping done.

- Although CD does do taping for both his university and youth players, he does not have any certification in taping.

- For the wrists taping, AB sat in the rolling chair (that had been moved from the office) and CD sat on the bed.

- For the double ankle-taping, AB was lying down on the bed and CD was on the rolling chair.

- CD commented about the size of AB's "huge" hands for a second time put his own hand up to AB's to compare hand sizes.

- While taping AB's ankles, CD ended up tickling AB's foot and making a comment about AB being ticklish while he was working on the foot with the sock off.

- At some point during the ankle-taping, AB noticed a camera on a shelf in CD's bedroom, approached the shelf and started to ask CD about it. AB was very worried about what was happening in CD's bedroom and later told his father than [sic] he was hoping that he would be strong enough to get out of CD's bedroom.

- The camera was the property of [the] [u]niversity and had not been working since it had been hit at a volleyball practice in July. CD was trying to see if the camera could hold a charge. The camera was on but not recording.

- CD and AB spent approximately two hours and five minutes at CD's home before CD drove him back to his home. It took longer to get back to AB's home because of traffic. AB had been dropped off at 1:00 p.m. exactly three hours after he was picked up.

- When Mrs. B phoned home from work in the middle of the afternoon, she was surprised when her daughter told her that AB had only been home for about an hour; she had expected him home much earlier, given his 10:00 a.m. departure.

- Once AB returned home, he became panicked over what had just happened with his coach. When Mrs. B came home, she initially heard what had happened from her daughter as AB would not come out of his room.

- Since this event, AB has developed an aversion to having his feet touched or to be alone with males.

(c) Reporting to [the Volleyball Club]

- Mrs. B advised the volleyball club about what had happened to AB on Sunday, September 4th. Ms. EF reached out the CD that same day to advise him of the family's concerns and he was suspended from his coaching role with the team at that time. CD provided his first written statement of what occurred on September 6th.

- The [volleyball]club initially sought assistance from Ms. GH, another coach in the club, who is a paralegal. GH assisted the volleyball club in drafting the allegations that were submitted to OSIC.

(d) November 4, 2022 High School Tournament at [the] University

- AB's school was invited to this tournament and that CD's name was noted as the organizer for the tournament on the information that went to AB's school.

- This tournament did not take place and CD was not in contact with AB at the tournament.

(e) December 3, 2022, 2022 (sic) Club Volleyball Tournament at [the] University

- A flyer with CD's name on it as the December 3rd tournament organizer was sent to AB's family.

- The B family believed that it was possible that they could run into CD at the tournament and took the precautions of preparing AB that morning for this

possibility. It was only when they arrived that the event that they were told that CD was away.

- CD was not in attendance as he was at an away game with the [university] team. CD's counsel explained that CD had been "listed as the contact due to the bidding process of the tournaments at venues and is listed on all hosted tournaments as part of the bidding process."

(f) Contact with Members from AB's Team

- CD only disclosed the reason for his departure from the team as being for "personal reasons."
- After the September 2, 2022 incident, CD has had contact with members of AB's team as follows:
  - A conversation with S's parents at which CD told them that he was stepping away from the team for personal reasons around September 16, 2022.
  - A conversation with T's parents in November 2022 at a Pub.
  - A brief conversation with players S and D (and their parents) when they attended a [u]niversity game on November 25th.
  - A text conversation with A[B]'s mother on December 2, 2022 about a different team (15U) attending a [u]niversity game in January 2023.
  - A conversation with J's father in Tim Horton's on December 3, 2022.

(g) Information provided to the Investigator about the Camera

- When the Investigator interviewed CD on December 1, 2022, he told the Investigator three times that he had to buy a new camera for his [u]niversity team because the first camera (that he [sic] been in his bedroom on September 2nd) was destroyed. CD told the investigator that he had thrown the camera out approximately two weeks after the September 2, 2022 incident.
- CD changed his information about the whereabouts of the camera in early January 2023, after purporting to have found the camera in a bag on December 27, 2022. It was now clear that the camera had not been thrown out, nor had it been replaced.

(collectively, the "**Factual Findings**").

VI. FINDINGS ON VIOLATION

Having carefully reviewed and considered the Factual Findings, I find that CD engaged in Prohibited Conduct under UCCMS, and in particular, that he engaged in several instances of Boundary Transgressions as set out in Section 5.7 of the UCCMS.

The following actions (both as independent actions, and cumulatively) are deemed to have constituted Boundary Transgressions based on an [sic] a reasonable observer standard, and taking into account the presumptive and evident Power Imbalance that existed between CD and the Complainant, AB:

1. Contacting AB directly by Instagram on several occasions prior to contacting AB's parents to ask for his cell phone number and permission to correspond with AB directly;

2. Advising AB that he would "pick him up" and drive him to their planned meeting, prior to discussing this plan with AB's parents;

3. Failing to cancel the meeting with AB at CD's home when CD woke up and realized that his roommate was gone, which necessarily (or, at the very least, very likely) meant that AB and CD would be alone in CD's home for their scheduled meeting;

4. Failing to advise AB's parents, and in particular, his mother, that there would be a one-on-one meeting at CD's home during the discussion had with her upon picking up AB at his home. While independently, the actual failure to advise does not necessarily constitute a Boundary Transgression, it adds important context regarding CD's actions and cumulatively, the committal of Boundary Transgressions;

5. Having a meeting with AB at CD's home, which was not in either an open, nor an observable environment. This is considered to have been a serious Boundary Transgression;

6. Within the context of the meeting, moving to areas of CD's home that were even less observable and open than the initial part of the meeting, which was in the living room. While in said spaces, and in particular, CD's bedroom, CD engaged in taping AB (despite there being no apparent therapeutic reason for doing so), which necessarily required physical contact with AB. For part of the taping, AB was on CD's bed. For clarity, the taping in itself is not found to be a breach of the UCCMS. It is the location and context of the taping that, on a reasonable observer standard, constitutes a serious Boundary Transgression; and

7. Tickling AB and commenting on the fact that he was "ticklish" while taping his foot.

While AB's perception of the interactions at CD's home were certainly exasperated by the presence of the charging video camera in CD's bedroom, based on the Factual Findings, and in particular, the findings regarding the camera, the presence of the camera does not constitute an independent Boundary Transgression.

VII. SANCTIONS

In the event of a finding or findings of a violation of the UCCMS, sanctioning considerations are guided by Section 7.4 of the UCCMS. Section 7.4 indicates that any sanction imposed against a participant must be proportionate and reasonable,

relative to the maltreatment that has occurred, and provides a non-exhaustive list of factors that are relevant to determining appropriate sanctions.

In this particular matter, I deem the following factors, per Section 7.4 and otherwise, to be of particular relevance:

1. The existence of the Power Imbalance between CD and AB. Though CD was only newly stepping into a coach-athlete relationship with AB, that arguably exasperates the Power Imbalance given that AB was not yet familiar with CD.

2. Based on the available information and on the preponderance of the available evidence, the Respondent, CD, does not have any prior history or pattern of Prohibited Behaviour or other inappropriate conduct, and there have not been any previous disciplinary findings regarding, or sanctions against, CD.

3. CD appears to have a strong record of leadership and professionalism both in his coaching activities, and in his community. Outside of the [sic] his actions giving rise to this Complaint, on the totality of evidence, I do not find that CD poses a presumptive known threat to the safety of others. In the circumstances, I find that, subject to acceptance of and compliance with the sanctions outlined below, CD's continued participation in the sport community is appropriate.

4. CD has been remorseful about his actions, particularly with respect to the one-on-one meeting with AB at his home, including the taping and other interactions in his bedroom. In that sense, it appears that CD has, at least in part, accepted responsibility for what I deem to be the most series [sic] Boundary Transgression that is the subject of this Complaint.

5. CD has cooperated with the Complaint Management and investigation processes. While I note that in several instances outlined in the Investigation Report, the Investigator preferred the evidence of AB to that of CD, and in particular, found that CD's evidence regarding what had happened to the video camera was inconsistent, none of the findings suggested that CD's actions during the Complaint Management process amounted to a frustration, nor a blatant disregard for the ongoing process. With respect to the evidence, the Investigator weighted the credibility of the parties, and made her findings on which this Report is based.

6. AB and his family have been negatively and significantly impacted by the actions giving rise to the Complaint. AB is, justifiably, struggling with feelings of distrust and has an aversion to being touched by males.

7. The Imposed Provisional Measures have been in place since September 30, 2022 while the Complaint Management process was ongoing. This is a significant amount of time, and one that I deem sufficient to serve as a deterrent to CD engaging in future similar actions.

8. There are no additional aggravating or mitigating circumstances beyond what has been mentioned above that are specific to sanctioning CD.

Section 7.2 of the UCCMS provides for a list of the types of sanctions that can be considered in the event of a finding of a breach of the UCCMS. No presumptive sanctions outlined in Section 7.3 are applicable in the present matter.

Having regard to the sanctioning considerations outlined above, I find that the following sanctions are appropriate in the circumstances and impose them on CD:

1. CD is formally warned about the seriousness of the committed Boundary Transgressions. This formal and written warning shall remain on file with the Club, the NSO, and with the OSIC. CD is further warned that future violations of the UCCMS will result in additional disciplinary measures, and this warning may be deemed an aggravating circumstance in respect of future sanctioning.

2. CD is instructed to provide a confidential written apology to AB and his parents, acknowledging the commitment of Boundary Transgressions and the impact on AB. This apology should be provided, either by CD or through his representative, to the OSIC (and not to AB or his parents directly) to be shared with AB's parents. Any response to the letter or discussion with CD is the prerogative of AB and his parents.

3. CD is instructed to educate himself on (or refresh his education on) the Rule of Two, and confirm that he has done so either personally or through his representative to the OSIC no later than July 15, 2023. If CD requires more time to complete this requirement, he or his representative should advise the DSO as soon as possible. CD is strongly cautioned to respect the Rule of Two at all times, particularly and especially when coaching or interacting with Minors, as defined in the UCCMS. Coaching related meetings should always take place in an open and observable environment.

(collectively, the "**Imposed Sanctions**").

As mentioned above, the Imposed Provisional Measures, which have included broad contact restrictions on CD have been in place since September 30, 2022 while the Complaint Management process was ongoing. In light of this, no further formal period of probation is imposed on CD. However, the lack of a further formal probation period should not be taken to mean that future similar actions or violations of the UCCMS and related sanctioning will not consider the outcome of this Complaint or this Report.

APPLICABLE RULES

5. The request by the Claimant was filed pursuant to sections 8.7(a)(i), (iv) and (v) of the Code.

6. The Arbitrator considered the following sections of the UCCMS to be relevant to the analysis: 1 Purpose, 5.1 Violations of the UCCMS, 5.3 Physical Maltreatment, 5.5 Sexual Maltreatment, 5.6 Grooming, 5.7 Boundary Transgressions, 7.2 Types of Sanctions, 7.3 Presumptive Sanctions, 7.4 Sanctioning Considerations, and 8 Public Disclosure.

7. The Arbitrator also considered the following sections of the Code to be relevant to the analysis: 5.7 Procedures of the Panel, 6.11 Scope of Panel's Review, 8.4 Parties before the Safeguarding Tribunal, 8.6 Challenge of a Finding on a Violation, 8.7 Grounds for Challenging a Finding on a Violation, 8.8 Challenge of a Consequence, 8.9 Conduct of the Proceedings and 8.13 Burden and Standard of Proof.

8. Section 6.11 (a) of the Code grants the Arbitrator the full power to review the facts and apply the law, and to substitute his decision for the decision that gave rise to the dispute or to substitute such measures and grant such remedies or relief that he deems just and equitable in the circumstances.

9. However, the Arbitrator established that he did not have any inherent powers or jurisdiction and so he could not just do what anyone (including himself) might possibly consider to be the "right" thing required in all the circumstances. His powers and jurisdiction are limited to those granted by the Code.

OVERVIEW OF PARTIES' POSITION

Claimant

10. In this case, the Claimant submitted that the DSO made an error of law by misinterpreting and misapplying the UCCMS by failing to:

    a. consider all the relevant factors under section 5 to make findings against the Respondent;

    b. adopt all the considerations under section 7 to determine an appropriate sanction for the Respondent; and

    c. require the Respondent be added to a searchable database or registry pursuant to section 8.

Respondent

11. The Respondent disputed all claims. He maintained that the DSO did not misinterpret the UCCMS nor failed to consider stricter Sanctions, and that her determinations were reasonable.

12. He argued that the Claimant was attempting to:

    a. use the appeal process to seek an alternate decision from the Safeguarding Tribunal based on the same evidence and without sufficiently establishing grounds; and

    b. thwart the Code's provisions on standing, by requesting that Sanctions (Consequences) be reviewed, contrary to section 8.8 of the Code on "Challenge of a Consequence."

Director of Sanctions and Outcomes

13. The DSO asserted her Findings of Violation and imposed Sanctions should be maintained.

ISSUE #1 – APPLICATION OF SECTION 5 OF THE UCCMS

Claimant's Position

14. Section 5 of the UCCMS lists the Prohibited Behaviours that constitute a violation of the UCCMS, including Physical Maltreatment, Sexual Maltreatment, Grooming and Boundary Transgressions.

15. The Claimant submitted that the DSO in this matter failed to:

    a. find violations under the UCCMS going beyond Boundary Transgressions;

    b. find Physical Maltreatment, where the Respondent provided "therapeutic or medical interventions with no specific training or expertise";

    c. find Sexual Maltreatment, broadly defined as any series of comments of a sexual nature that is unwelcome, and would be objectively perceived to be unwelcome, in addition to tickling the Claimant's feet, which he did not enjoy nor consent to, in the particular context where a coach and a Minor were alone in the coach's private home, and in the coach's bedroom; and

    d. find Grooming, a Prohibited Behaviour defined as a gradual process and involves building trust and comfort, beginning with subtle behaviours that may not appear to be inappropriate, then slowly and increasingly test the boundaries. This includes where the perpetrator engages in repeated Boundary Transgressions towards a Minor, such as the Respondent repeatedly contacting the Claimant directly by Instagram and text message to get together, picking up the Claimant in his car, driving him to his private residence, bringing him to his bedroom, taping his wrists and ankles, and tickling him.

16. As such, the Claimant believed the DSO's decision should be reversed, and a finding of Sexual Maltreatment, Physical Maltreatment and Grooming should be adopted.

Respondent's Position

17. The Respondent highlighted that the Statement of Allegations by the Office of the Sport Integrity Commissioner (OSIC) alleged the Respondent had violated section 5.7 of the UCCMS and committed Boundary Transgressions. It did not allege Sexual Maltreatment and Grooming.

18. The Respondent submitted that after the DSO reviewed the 182-page Investigation Report, she released to the parties her Report on Violations and

Sanctions finding that the Respondent had engaged in seven instances of Boundary Transgressions, two of which were deemed serious.

19. The Respondent mentioned that as part of her Report, the DSO reviewed mitigating evidence provided by the Respondent which included reference letters from other athletes, parents, colleagues and friends.

20. The Respondent disputed that his comments about the size of the Claimant's hands or about the Claimant being ticklish should have been deemed Sexual Maltreatment and that he was not properly trained or certified when he taped the Claimant's ankles and wrists. The Respondent argued that the DSO reviewed the facts and determined these did not occur in a sexual manner and were not breaches of the UCCMS, but it was rather their location and context that constituted Boundary Transgressions.

21. The Respondent maintained that his communication with the Claimant between August 15 and September 2, 2023, does not meet the definition of Grooming under the UCCMS. The Respondent contacted the Claimant on Instagram and the Claimant did not respond. It was after an email was sent to the Claimant's family that the Respondent’s number was provided to the Claimant, who initiated contact. Several of these messages were initiated by the Claimant and included general questions such as what ball was used in the age group in order for the Claimant to purchase one, and a congratulations text initiated by the Claimant when the Respondent won a medal at a national competition as a coach.

22. The Respondent submitted that the DSO findings fell well within the reasonableness standard required by the Code and based on common law authorities. He also claimed that the DSO’s Report more than adequately demonstrated the process and reasoning for her findings.

23. The Respondent argued that there was no requirement or duty, legal or otherwise, for a decision-maker to address all possible and theoretical ranges of findings and specifically accept or reject them in a decision. In the event the issues of Sexual Maltreatment and Grooming had been specifically alleged by the Claimant, he believes then the DSO would have had an obligation to address those. Those issues were not raised however.

DSO’s Position

24. In response to the Claimant referring to “facts as found by the DSO in the Decision,” the DSO clarified that her Report made it clear that the DSO’s role is not to make factual findings. It is the role of the investigator to make such findings.

25. While the DSO is not bound by the UCCMS or the Code to consider only those Prohibited Behaviours which were alleged in a complaint, in this matter, the DSO submitted that the Claimant only alleged breaches of section 5.7 of the UCCMS, namely Boundary Transgressions. In any event, the DSO stated that the factual findings of the Investigation Report did not make findings consistent with, or rise

to the level of, Physical Maltreatment, Sexual Maltreatment or Grooming under the UCCMS. Specifically:

a. With respect to Physical Maltreatment under section 5.3 of the UCCMS, based on the Investigation Report, the DSO concluded the action of taping did not amount to a breach of the UCCMS, but the context and physical location of the taping constituted the most serious Boundary Transgression;

b. With respect to Grooming, while it was concluded the Respondent had engaged in several Boundary Transgressions, these were found to be close in proximity and appeared to be part of a short pattern of poor judgment by the Respondent, but there was no prior or other history of Boundary Transgressions towards the Claimant or others; and

c. Finally, the factual findings of the Investigation Report were not consistent with a finding of Sexual Maltreatment under section 5.5 of the UCCMS. The Investigation Report did not make any findings of behaviour of a sexualized nature.

Arbitrator's Analysis

26. By section 8.6(b) of the Code, when assessing a challenge of a Finding on a Violation, the Arbitrator must apply the standard of reasonableness, but only in the context of the enumerated grounds listed in section 8.7 of the Code, as follows:

a. a misinterpretation or misapplication of a section of the UCCMS (s.8.7(a)(i));

b. acting on a view of the facts which could not reasonably be entertained (s.8.7(a)(iv); or

c. failing to consider all the evidence that is material to the finding (s.8.7(a)(v)).

27. The Arbitrator cannot simply substitute his own judgment for that of the DSO. To intervene at all, he must firstly be convinced by the Claimant on the balance of probabilities that the DSO has acted unreasonably as contemplated in sections 8.7(a)(i), (iv) or (v) of the Code.

28. The Claimant argued that the Respondent had taped the Claimant's wrists and ankles without having specific certification or expertise to do so. The Arbitrator agreed that the Respondent taped the Claimant's wrists and ankles without having specific certification to do so, but found that there is no finding of fact that he had no expertise to do so. Rather, the evidence found as a fact that the Respondent does taping for both university and youth players, and that the taping of the Claimant was not a therapeutic or medical intervention. The Arbitrator found no misapplication of section 5.3 of the UCCMS.

29. The Claimant submitted that the Respondent making comments about the Claimant's "big hands" and tickling his feet while taping the Claimant constituted

Sexual Maltreatment. The Claimant said the Respondent's attention towards him was not only unwanted and unwelcomed, but also directed towards a Minor. Sexual Maltreatment is broadly defined in the UCCMS, but at its core, the comments or actions in question have to be of a sexual nature that is unwelcome, and objectively would be perceived to be unwelcome.

30. On this particular question, the Respondent took issue with the Claimant having provided no evidence of certain positions advanced. The Arbitrator found that in the context of this documentary review process, it is not incumbent on any party to provide evidence unless section 8.7(c) of the Code is in issue. Instead, it is the Investigator who is tasked with the duty of conducting a thorough investigation, and setting out a finding of facts. The DSO undertakes no investigation and makes no finding of facts. She is obliged to work with what is presented to her by the Investigator. The Arbitrator found that the parties in the present process were free to make whatever representations they wished based on the facts as found by the Investigator, whether or not they were relied upon by the DSO in her determinations.

31. The Investigator specifically addressed the comment about the "big hands" and made no finding that they were of a sexual nature, and it would have been inappropriate for the DSO to make such a finding herself.

32. As to the tickling, the Investigator specifically said in her report that she was not prepared to distinguish whether this was an incidental tickling as the Respondent had suggested, or a purposeful tickle.

33. The Arbitrator concluded that, in other words, there was no clear finding of fact by the Investigator and certainly no clear finding of fact the tickling was of a sexual nature, which was unwelcome and would objectively be perceived as unwelcome. It would therefore have been inappropriate for the DSO to make such a finding herself and the Arbitrator found no misapplication of section 5.5 of the UCCMS.

34. In terms of failing to find Grooming, the Claimant noted the DSO found the Respondent had engaged in repeated Boundary Transgressions towards a Minor. The Claimant argued these transgressions were designed to build trust and comfort, and to subtly and increasingly test the boundaries with the Claimant. The Claimant said the Respondent's inappropriate behaviours escalated and amounted to Grooming as per the UCCMS (including subtle behaviours that may not appear to be inappropriate at first, but then slowly and increasingly test boundaries).

35. The Arbitrator found the definition of Grooming in the UCCMS to be very broad, and that the comments or conduct would have to be of such a character so as possibly to sexualize a relationship, reduce sexual inhibitions, or normalize inappropriate behaviour. While this may include the testing of boundaries, that is not required. He further noted that the definition states that repeated Boundary Transgressions toward a Minor or vulnerable participant <u>may</u> also be deemed to

be Grooming, even in the absence of deliberate intention to facilitate a sexual relationship [emphasis added].

36. The Arbitrator did not support the Respondent’s argument that, since the Claimant and/or his family initially described what occurred as alleged Boundary Transgressions, this prevented the DSO (or potentially the Arbitrator) from coming to a different conclusion and finding it to be a more serious Prohibited Behaviour.

37. It suffices to require a claimant or a claimant's family to come forward with concerns over what has occurred and raise a formal complaint. It is completely unreasonable to expect them to be bound by their initial description of what such conduct might amount to in the range of Prohibited Behaviours. It is up to the DSO to make that legal determination.

38. The DSO considered the Investigator’s findings and, in her judgment, considered them to be properly classified as Boundary Transgressions, even though it was open to her to conclude this constituted Grooming.

39. The Arbitrator commented that, had he been called upon in first instance to assess and classify what had occurred, he might possibly have considered this as Grooming. However, his role was not to substitute his personal judgment for that of the DSO, but rather to consider whether, on the balance of probabilities, her judgment was not reasonable and has one or more errors of law as set out in section 8.7 of the Code. He could not conclude that her judgment was unreasonable and contains such an error. Simply because there might be different possible conclusions does not necessarily make either one incorrect or even unreasonable.

Arbitrator’s Ruling

40. Taking into account the role of the DSO, the Arbitrator could not conclude that her assessment of the misconduct as Boundary Transgressions, as opposed to Grooming, Physical Maltreatment or Sexual Maltreatment, was unreasonable. Based on what was before him, the Arbitrator could not accept any of the three findings warranted intervention.

ISSUE #2 – APPLICATION OF SECTION 7 OF THE UCCMS

Claimant’s Position

41. The Claimant stated that if a violation of the UCCMS was found, Sanctions would have to be imposed against the perpetrator.

42. He also submitted that should the DSO have properly concluded that the behaviour of the Respondent amounted to Physical Maltreatment, Sexual Maltreatment or Grooming, this would have warranted heavier Sanctions under section 7, proportionate to those findings.

43. The Claimant argued that even if the DSO had correctly applied section 5 of the UCCMS, she should have:

    a. Recognized that the Respondent posed a risk to the welfare of Minors; and

    b. Imposed heavier sanctions against the Respondent for his Boundary Transgressions, in a newly formed coach-athlete relationship in which the age difference exacerbated the power imbalance.

44. Based on Sexual Maltreatment against a Minor, the Claimant believed that a presumptive Sanction of permanent ineligibility should apply. In the alternative, if the Panel found no Sexual Maltreatment against a Minor occurred but Physical Maltreatment or Grooming did occur, he submits that a presumptive period of suspension or ineligibility should apply.

45. The Claimant argued that a period of eight months was not a sufficient suspension and was one season at most and that it simply was the length of the investigation and so did not send a strong message to athletes as to how they will be protected. He claimed that to set a strong precedent that abuse will not be tolerated under Canada's new safe sport regime and especially not against Minors, a longer period of 10 years would be more reasonable in the circumstances given the Respondent's position of a coach of Minors and his breach of trust.

46. The Claimant mentioned that Section 7 of the UCCMS provided the range of possible Sanctions for violations of the UCCMS and the considerations to be adopted when determining an appropriate sanction for such violations. These considerations related to the proportionality and the reasonableness of the Sanction, including but not limited to the nature of the relationship between the perpetrator and the victim, the age of the victim, and the impact of the incident on the victim.

47. The Claimant asserted it was clear the Respondent posed a risk to the welfare of Minors and it was therefore open to the Arbitrator to impose Consequences.

48. He also submitted that a lifetime period of ineligibility should be imposed on the Respondent and in the alternative, a period of suspension of no less than 10 years should be imposed.

49. Additionally, the Claimant filed a Victim Impact Statement and asked that it be considered as part of the documentary review.

Respondent's Position

50. The Respondent said the DSO addressed Sanctions pursuant to section 7.4 of the UCCMS, removing the Provisional Measures that had been imposed on the Respondent and implementing the additional Sanctions which she had

determined were appropriate. He submitted that the Request does not provide any grounds for this review pursuant to section 8.7 of the Code.

51. The Respondent claimed that in her report, the DSO carefully considered the Sanctions to be imposed and set out both the aggravating and mitigating factors.

52. He stated that since the imposed Provisional Sanctions were in place for some months by the time the Investigation Report was completed, the DSO deemed the Sanctions described in section IV of the DSO Report, as quoted above, were appropriate in the circumstances.

53. The Respondent also maintained that given the severity of the incident, he acknowledged and accepted the findings and expressed remorse for the situation. He completed all sanctions imposed.

54. The Respondent submitted that Section 8.6(b) of the Code mandates that on a challenge of a Finding of a Violation, the Safeguarding Panel shall apply the standard of review of "reasonableness." In support of this, the Respondent cited *Dunsmuir v. New Brunswick* 2008 SCC 9; *Sattva Capital Corp. v. Creston Moly Corp.* 2014 SCC 53; the headnote of Canada (*Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII); the headnote of *Clifford v. Ontario Municipal Employees Retirement System*, 2009 ONCA 670 (CanLII); *Beaulieu and Gardner and Canadian Snowboard Federation* No. SDRCC 13-0214; and Section 8.13(a) and (b) of the Code.

55. The Respondent maintained that the Claimant had not met the required burden on a balance of probabilities and had not established the determinations and findings in the DSO's report were unreasonable.

56. The Respondent objected to the Claimant filing a Victim Impact Statement.

DSO's Position

57. The DSO refuted the Claimant's allegation that she had determined that the Respondent's already-served eight-month suspension was sufficient as a deterrent for the Respondent, and that she did not impose further sanctions. The DSO submitted this was incorrect since three distinct Sanctions were imposed on the Respondent, who complied with all three, and the Claimant had been made aware of that compliance.

58. The DSO submitted that the Claimant's challenge was advanced pursuant to section 8.7 of the Code on "Grounds for Challenging a Finding on a Violation" and should correctly pertain to the Findings of Violation, and not to the imposed Sanctions (or lack thereof). Pursuant to section 8.8 of the Code on "Challenge of a Consequence," only the Respondent can appeal the imposed Sanctions.

59. The DSO considered the Claimant's submissions placed a great deal of emphasis on the fact the sanctions imposed on the Respondent were not severe enough.

However, the Claimant's challenge was appropriately limited to a challenge of the Findings on Violation pursuant to section 8.8 of the Code.

Arbitrator's Analysis

60. The Arbitrator noted that he does not have carte blanche to do whatever he chooses. Section 8.6(a) of the Code allows a challenge of a Finding on a Violation to be advanced by the alleged victim. In contrast, in the Code as it presently reads, challenge of a Consequence can only be advanced by a Respondent.

61. Accordingly, even though the Claimant took serious issue with the Consequences (Sanctions) imposed by the DSO, the Claimant did not have status under the Code to challenge directly such Consequences (Sanctions). However, he noted that this is a two-step process, and that if any such challenge of a Finding on a Violation is successful, then in theory the Arbitrator could consider the Consequences (Sanctions) imposed by the DSO and potentially alter those.

62. The Arbitrator noted that the Victim Impact Statement would only be admissible in the event he was to hear the parties on the application of 8.8 of the Code for a "Challenge of a Consequence." In such a case, he would be required to allow the Claimant to provide a written impact statement, and possibly allow him to read it aloud at the hearing.

Arbitrator's Ruling

63. Since the Claimant had not achieved the first step in the process, there was no need for the Arbitrator to review the Sanctions imposed by the DSO.

64. Concerning the Victim Impact Statement, as section 8.9(f) of the Code applies in the context of a challenge of a Consequence, which this is not, it would not apply here.

ISSUE #3 – APPLICATION OF SECTION 8 OF THE UCCMS

Claimant's Position

65. The Claimant submitted that pursuant to section 8.1 of the UCCMS, regardless of the period of suspension imposed, the Respondent's name, prohibited behaviours, and Sanction should be added to a public database or registry, along with a brief summary of the events (with the Claimant's name redacted).

66. He estimated that by failing to require the Respondent's name be added to a public registry, the DSO misapplied section 8 of the UCCMS.

DSO's Position

67. The Sanctions Registry is derived from Section 8.1 of the UCCMS and is fully operated and maintained under the OSIC's jurisdiction. Once a finding of violation of the UCCMS is found by the DSO and corresponding sanction imposed, if any,

that information is presumptively added to the Sanctions Registry, which is accessible by Program Signatories pursuant to the applicable rules and policies in place by the OSIC. The DSO is not required to impose a sanction corresponding to an addition to the Sanctions Registry in order for this to occur. Nor is an addition to the Sanctions Registry a type of sanction, or sanctioning consideration under Sections 7.2 and 7.4 of the UCCMS, respectively.

68. Both the Claimant and Respondent have submitted as part of their preliminary submissions that it would not be appropriate for the Respondent to coach the Claimant in any future seasons, games or activities. The DSO was not aware that this was still a possibility and, as such, agreed that the Respondent not be permitted to coach the Claimant on a go-forward basis.

Arbitrator's Analysis

69. Firstly, the Claimant asserted the DSO had improperly failed to require the Respondent's name be added to a Public Registry and so misapplied section 8 of the UCCMS. As this was not expressly addressed in the DSO's Report on Violations and Sanctions, the DSO specifically explained how the Registry works in the context of this proceeding. As a result, information on these events and the Respondent has already been added to this Registry.

70. Secondly, like the DSO, the Arbitrator noted that both the Claimant and the Respondent had submitted that it would not be appropriate for the Respondent to coach the Claimant in any future seasons, games or activities. The DSO agreed with the appropriateness of a variation of her Report on Violations and Sanctions.

Arbitrator's Ruling

71. In terms of practical implementation of this "no-coaching" condition and ensuring there would be no re-victimizing of the Claimant, the Arbitrator required that any future hardship arising from this necessarily be borne by the Respondent and not the Claimant. In other words, in case of any conflict it would be the Respondent who would be required to turn down the coaching opportunity and not the Claimant who would be required to turn down the opportunity to participate.

72. The Arbitrator left it to the DSO to amend her Report appropriately and take steps to ensure that variation occurs forthwith and is published as need be to ensure implementation.

ARBITRATOR'S CONCLUSION

73. The Arbitrator highlighted the reality that he did not have any inherent powers or jurisdiction and so could not just do what anyone (including him) might possibly consider to be the "right" thing required in all the circumstances. He only had those powers and jurisdiction granted to him by the Code.

74. The Arbitrator further noted that, had he been called upon in first instance to assess and classify what had occurred, he might possibly have considered the Respondent's behaviour as Grooming. However, he determined that his role was not to substitute his personal judgment for that of the DSO but rather to consider whether, on the balance of probabilities, her judgment was not reasonable and had one or more errors of law as set out in section 8.7 of the Code. He could not conclude that the DSO's judgment was unreasonable and contained such an error so to warrant his intervention.

75. The Request by the Claimant was dismissed.