IN THE MATTER OF SDRCC/CRDSC NO. 05-0030

Between

CANADIAN AMATEUR DIVING ASSOCIATION
(CADA)
Appellant

And

ARTURO MIRANDA
(The Athlete)
Respondent

DECISION

Ed Ratushny Q.C.
(Arbitrator)

October 4, 2005

1. Background

This arbitration arises out of disciplinary proceedings taken by the Canadian Amateur Diving Association (CADA) against its member, Arturo Miranda (the Athlete). These proceedings may be summarized as follows.

CADA Disciplinary Panel. In its decision dated March 14, 2005, the Disciplinary Panel found the Athlete in breach of the CADA Code of Conduct by engaging in "...unreasonable conduct which brings the sport of diving into disrepute...". The conduct in question was consensual sexual activity between the Athlete, who was 32 years of age at the time, and a female athlete (the Complainant), who was then 15 years of age. The encounter took place on March 27, 2004 in her hotel room while both were in Calgary following competition in the CADA Winter National Diving Championships. The Disciplinary Panel concluded that there was "an element of a coach/athlete relationship" between them. It suspended him from CADA membership and all of its activities for a period of six months. The suspension was held in abeyance pending the appeal.

CADA Appeals Panel. In its decision dated June 29, 2005, the Appeals Panel concluded that the process followed by the Disciplinary Panel was flawed and had denied procedural fairness to the Athlete. However, it ruled that this breach of fairness did "...not warrant a complete re-determination of the matter". It concluded that the finding that the Code of Conduct had been breached remained reasonable. However, it concluded that the six-month suspension was not reasonable in view of the procedural flaws. The

Appeals Panel held that the six-month sanction would be "confirmed, but suspended". As a result, the Athlete's record with CADA would indicate that a sanction had been imposed, but it would not be enforced.

I was selected as an Arbitrator by the parties and appointed by the Sport Dispute Resolution Centre of Canada (SDRCC) on July 26, 2005 and a Preliminary Hearing was conducted by telephone conference on July 28. Mr. Gary Boyd attended as counsel for CADA. Ms. Isabelle Schurman and Mr. David Schulze represented the Athlete. Mr. Benoit Girardin and Ms. Julie Audette were present on behalf of the SDRCC. It was agreed that I would proceed by conducting a "paper review" of the documentation already available as a result of the proceedings before the Disciplinary Panel and the Appeals Panel. The SDRCC undertook to compile the documentation with the co-operation of the Parties. Timelines were established for the Parties to make additional submissions ending on September 16, 2005. CADA and the SDRCC confirmed that the Complainant would not participate in this arbitration.

2. Mandate

The parameters of this arbitration were established in an Arbitration Agreement between the Parties. At the first stage, I am required to determine whether the Appeals Panel committed an error of the type set out in section 5 of the CADA Appeals Policy. The Grounds for Appeal listed in section 5 are as follows:

- making a decision for which it did not have authority or jurisdiction as set out in the governing documents.
- failing to follow procedures as laid out in the bylaws or approved policies of CADA.

- o making a biased decision where bias is defined as lack of neutrality to such extent that the decision-maker is unable to consider other views.
- o exercising its discretion for an improper purpose.
- o making a decision based on a policy that is illegal or contrary to a statutory provision.
- o making a decision which is grossly unreasonable and in no way supportable by the facts.

If no such error is found, the appeal (arbitration) is to be dismissed.

In the event such error is found, the next stage is described as follows in the Submissions on behalf of CADA:

> ...the arbitrator shall determine whether the error can be addressed by the arbitrator without the necessity of hearing evidence in the form of a *de novo* hearing of the original complaint.
>
> In other words, the arbitrator is placed in the position of the Appeals Panel and must determine whether or not the original appeal can be decided on the basis of the Record which was properly before the Appeals Panel.
>
> The requirement for the arbitrator to consider this appeal as if he were an Appeals Panel under the Appeal Policy is the same whether he determines the procedural errors alleged by the respondents have been made – or those alleged by the appellants. He must then consider the appeal – unbound by the determinations of the Appeals Panel – as if it were before him in the first instance.

Section 12 of the Appeals Policy authorizes the following decisions:

- o void or confirm the decision being appealed.
- o vary the decision where it is found that an error occurred and such error cannot be corrected by the original decision-maker for reasons which include but are not limited to, lack of clear procedure, lack of time, or lack of neutrality.
- o refer the matter back to the initial decision-maker for a new decision.

- determine how costs of the appeal shall be allocated, if at all.

Counsel on behalf of the Athlete did not take issue with this characterization of my mandate.

3. Reviewable Error

Both Parties agreed that the Appeals Panel had made errors that fell within section 5.

The Submissions on behalf of CADA contended that its decision was "grossly unreasonable and in no way supportable by the facts". Moreover, it "did not have authority or jurisdiction" for its decision. The Submissions on behalf of the Athlete contended the same errors on the part of the Appeals Panel.

In these circumstances, no further analysis is required of the Appeals Panel Reasons for Decision. Particularly since this is a consensual arbitration that is governed by the Arbitration Agreement between the parties, which is binding on me, I also accept their joint contention that reviewable error had been committed by the Appeals Panel.

It remains then for me to review the Decision of the Disciplinary Panel in the context of an appeal.

4. Decision of the Disciplinary Panel

These proceedings were initiated by an "Incident Report" and the hearing was conducted by telephone conference on November 5, 2004, November 25, 2004, and February 5, 2005. The Incident Report, signed by the Complainant on April 13, 2004, describes a sexual encounter between her and the Athlete in her hotel room on March 27, 2004. It also refers to a telephone call she received two days after the encounter from another athlete. It alleges the caller told her that the Athlete claimed to have had sex with a 15 year old and inquired whether she might know whom it was.

Counsel for the Athlete wrote to the Chairperson of the Disciplinary Panel on May 14, 2004, stating:

> It is absolutely unclear to me whether my client is being accused:
> (a) of having a sexual relationship with [the Complainant];
> (b) of having a non-consensual sexual relationship with [the Complainant];
> (c) of having a sexual relationship with someone under the age of 18;
> (d) of having a sexual relationship with a team member regardless of the respective ages of the individuals;
> (e) of committing an indecent act; or
> (f) of some other offence which has not been mentioned on this list.

The Chairperson replied by letter dated May 17, 2004, stating:

> ...I can only respond that the hearing will deal with the matters described in the Incident Report.

It was not until the hearings commenced on November 5, 2004, that the Athlete learned that the alleged breach of the Code of Conduct was based on section 7 that refers to "unreasonable conduct" resulting in the sport coming into "disrepute". Nor was the allegation of "the element of a coach/athlete relationship" specified in advance of the hearings.

The Submission on behalf of CADA is clear that:

> There has been no allegation by CADA of sexual abuse by Miranda. The complainant made a report of conduct which was found to include inappropriate sexual conduct.

In other words, there is no dispute that the sexual conduct was consensual.

The finding of misconduct by the Athlete is summarized in the following passage of the Decision of the Disciplinary Panel:

> The Panel finds that a sexual encounter between [the Complainant] and Mr. Miranda took place and given that: (i) [the Complainant] was 15 years of age and Mr. Miranda 32 years of age at the time; and (ii) the relationship between [the Complainant] and Mr. Miranda has an element of a coach/athlete relationship; - this constitutes conduct on Mr. Miranda's part which is unreasonable and which brings the sport of diving into disrepute.

There is nothing in the Code of Conduct that precludes or discourages sexual relations between athletes who are members of CADA. Therefore, any misconduct must be found in the age differential or the alleged coach/athlete relationship.

5. Analysis and Decision

<u>Age Differential</u>

In Canada, it is a criminal offence for an adult to have sexual relations with a person under the age of fourteen years. It is also a criminal offence for an adult to have sexual relations with a person who is of the age of fourteen to seventeen, where that adult "is in a position of trust or authority towards" that younger person. The legal age of consent is not in issue in this case.

The relative age of consenting partners might be considered to be a matter of propriety or even morality on the part of some. However, the choice is open to consenting partners. It cannot be used as a justification for a disciplinary finding of misconduct, particularly against the vague standard of "disrepute".

Coach/Athlete Relationship

At the CADA Winter National Diving Championships in Calgary at the time of this incident, the Complainant and the Athlete were simply fellow athletes. However, the Disciplinary Panel concluded that there was "an element of a coach/athlete relationship". This was the foundation for its finding of misconduct and consequent six month suspension. It explained its evidentiary basis for this conclusion as follows:

> Mr. Miranda states in his written statement: "Never in all the time he has known [the Complainant] was he ever her coach". Importantly, he does go on to state: "He coached her for five days in Germany in 2002 because her own coach was absent". Based solely on Mr. Miranda's acknowledgment that he coached [her] in Aachen, Germany, in 2002, albeit 2 years prior to the events described in the Incident Report, the Panel makes the fourth finding of fact...

With respect, merely filling in for a regular coach for a few days, some two years previously, cannot constitute "clear and convincing evidence" of a coaching "relationship". Indeed, the Panel hedged this finding by referring throughout to the existence of "elements" of a coaching relationship.

In *Gordon and Canadian Amateur Boxing Association* (ADR 02-0013), Adjudicator Graeme Mew made the following observations:

53. The Canadian Professional Coaches Association has a Coaching Code of Ethics. That document states that "responsible coaching" means that coaches recognize the power inherent in the position of coaching and are aware of their potential value and how these effect their practice as coaches. Responsible coaches should be "acutely aware of power in coaching relationships" and, therefore, avoid sexual intimacy with athletes, both during coaching and during that period following coaching during which imbalance in power could jeopardize effective decision making. (p. 14)

Such a relationship simply did not exist in this case. The Athlete was not a coach.

Pursuant to section 12 of the CADA Appeals Policy, as applicable by the Arbitration Agreement, the decision of the Disciplinary Panel as modified by the Appeals Panel, is rendered void.

6. Costs

Counsel for the Athlete requested that an order for costs be made in his favour in view of the prolonged proceedings and adverse publicity to which he had been subjected. Prior to this arbitration, the Athlete faced the hearing by the Disciplinary Panel over a number of intermittent days, the appeal before the Appeals Panel and an application to the Chief Arbitrator for expedited proceedings to prevent him from competing in the World Championships. Counsel for CADA opposed this request, essentially, on the basis that the Athlete brought all of this upon himself through his conduct and added that if any costs were to be awarded, they should go to CADA.

Article R –18 of the ADR-Sport-RED CODE provides:

(1) Each Party shall be responsible for its own costs and that of its witnesses and interpreters.

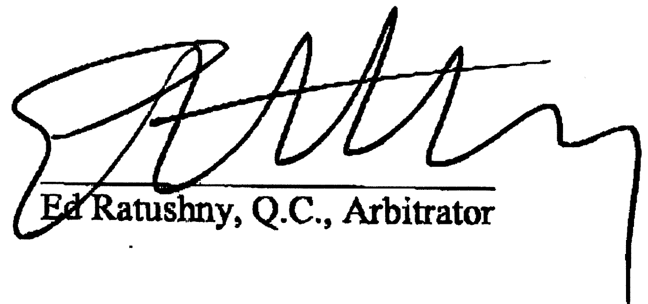
(2) The Panel shall determine if there shall be any award of costs and the extent of those costs. When granting such contribution, the Panel shall take into account the outcome of the proceedings, the conduct of the Parties and their respective financial resources.

In my view, the first subsection describes the situation that should prevail in the vast majority of cases. Sports federations should not be discouraged from carrying out their responsibilities nor athletes from pursuing their recourse, under the established processes, for fear of potentially debilitating cost awards against them. It follows that Subsection 2 should be reserved for exceptional situations. The term "contribution" also counsels some restraint.

Such exceptional circumstances existed in *Boylen and Equine Canada* (ADR 04-0017) where Arbitrator Richard Pound awarded costs against the Athlete and in favour of the Affected Parties, Holzer and Strasser in the sum of $1,000 each. In his reasons, the Arbitrator stated that, in spite of the pressures upon the resources available to national federations, he would be:

> ...most reluctant to award costs in favour of the federation and against an athlete. In that respect, the financial resources of the federation may reasonably be presumed to be much more significant than those of an individual athlete.

In the present case, the Appeals Panel concluded that the Disciplinary Panel had breached the "Rules of Natural Justice" in its conduct of the hearing at first instance. I am of the view that this denial of the principle of fairness was so exceptional that, together with the outcome of the proceedings and the quoted observations in relation to relative financial resources, costs are warranted. CADA is ordered to pay the sum of $2500, forthwith, as a contribution to the costs of the Athlete in relation to this arbitration.



October 4, 2005

Ed Ratushny, Q.C., Arbitrator