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

Nº: SDRCC DT 18-0290
(DOPING TRIBUNAL)

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)
U SPORTS

AND

KARLA GODINEZ
(Athlete)

AND

GOVERNMENT OF CANADA
WORLD ANTI-DOPING AGENCY (WADA)
(Observers)

Before:

David Bennett (Arbitrator)

Appearances and Attendances:

On behalf of the Athlete:	Emir Crowne (Counsel) Amanda Fowler (Counsel)
On behalf of CCES:	Meredith MacGregor (Counsel) Alexandre Maltas (Counsel)

WADA and the Government of Canada did not participate in any of the proceedings.

COST AWARD

October 24, 2018

On September 6, 2018, I issued a decision to vary the sanction imposed on Karla Godinez (the "Athlete") for a positive test of a banned substance. The Athlete submits that she should be entitled to recover costs pursuant to section 6.22(c) of the *Canadian Sport Dispute Resolution Code* (the "SDRCC Code"). For the following reasons, I reject the Athlete's request for legal fees but award the Athlete $1,000 for the cost of hiring an expert.

The basic rule of the SDRCC is that costs are not awarded in sports disputes. This is so that time and sport funds are spent on athletes, coaches and teams, rather than disputes. This is reflected in the SDRCC Code. There are additional rules that apply because of Section 7.9 of the SDRCC Code, which excludes legal fees from cost awards in doping disputes. In this case, there were exceptional circumstances that required the Athlete to retain the services of an expert.

Submissions

Athlete's Submissions

The Athlete submits that costs should be awarded on an exceptional basis under Subsection 6.22(c) of the SDRCC Code. The Athlete is seeking costs related to legal fees totalling $27,120 and to the cost of hiring the expert Dr. Charles S. Wong ("Dr. Wong") for an additional $1,000. A second expert witness, Mr. Paul Scott, also provided expert evidence, however, he waived his fee. The Athlete has argued that because she was successful in having her period of ineligibility reduced from 48-months to 12-months, it is reasonable that she would be awarded three-quarters of the total costs of $28,120.

The Athlete submitted that, because the athlete consumed a contaminated product that led to her testing positive for a banned substance, the case is exceptional.

The Athlete gave the following reasons for awarding costs: (i) the outcome was in the Athlete's favour; (ii) that the Athlete's conduct showed that she was seeking to make the proceedings as efficient as possible; and, (iii) the relative disparity of financial resources between the Athlete and the Canadian Centre for Ethics in Sport (the "CCES").

In addition, the Athlete submitted that there is ambiguity in the wording of Rules 8.2.4(b) and (h) of the *Canadian Anti-Doping Program* (the "CADP") that should be resolved in her favour. The Athlete submits, in the alternative, that if I find that there is no ambiguity the rule is unconscionable and should be interpreted in favour of the athlete. The Athlete submitted that there is a conflict of laws between the CADP, the *World Anti-Doping Code* (the "WADA Code") and the SDRCC Code, that should be resolved in her favour and should permit the recovery of costs including legal fees.

CCES's Submissions

CCES submitted that the Athlete is prohibited from claiming costs for legal fees under Rules. 8.2.4(b) and (h) of the CADP:

> 8.2.4 The Doping Tribunal shall act in a fair and impartial manner towards all parties at all times. More specifically,

[…]

(b) An *Athlete* or other *Person* participating in a proceeding before the Doping Tribunal has the right to retain and receive assistance from legal counsel **at his or her own expense**. (emphasis added)

[…]

(h) Subject to Rule 8.2.4b (**excluding legal counsel fees**), the Doping Tribunal may award costs to any party, payable as it directs (emphasis added)

CCES' position is that the CADP Rules are determinative of the issue of costs: While costs may be awarded, the Athlete has the right to retain legal counsel before a Doping Tribunal but may not recover the cost for legal counsel they have retained. This means that costs for legal counsel are excluded from any cost award I might exercise my discretion to grant. According to CCES' submissions, other types of costs may be compensable.

CCES submits that in this case, the other costs should not be awarded. CCES submits that based on the factors for consideration outlined in Subsection 6.22(c) of the SDRCC Code, the Athlete should not be permitted costs as the case is unexceptional.

Relevant SDRCC Code Sections

The relevant sections from the SDRCC Code are as follows:

6.22 Costs

[…]

(c) The Panel shall determine whether there is to be any award of costs and the extent of any such award. When making its determination, the Panel shall take into account the outcome of the proceedings, the conduct of the Parties and their respective financial resources, intent, settlement offers and each Party's willingness in attempting to resolve the dispute prior to or during Arbitration. Success in an Arbitration does not mean that the Party is entitled to be awarded costs.

[…]

7.1 Application of Article 7

In connection with all Doping Disputes and Doping Appeals, the specific procedures and rules set forth in this Article shall apply in addition to the rules specified in the Anti-Doping Program. To the extent that a procedure or rule is not specifically addressed in this Article or in the Anti-Doping Program, the other provisions of this Code shall apply, as applicable.

7.9 Conduct of Hearing

Pursuant to Rule 8.2.4 and Rule 13.2.2.2.1 of the Anti-Doping Program, hearings shall be conducted as follows:

[…]

(e) A Person participating in a proceeding before the Doping Dispute Panel has the right to retain and receive assistance from legal counsel at his or her own expense pursuant to Rule 8.2.4 b) of the Anti-Doping Program.

(f) Subject to Subsection 7.9(e) hereof (excluding legal counsel fees), the Doping Dispute Panel may award costs to any Party, payable as it directs pursuant to Rule 8.2.4 h) of the Anti-Doping Program.

Analysis

The issue of whether Rules 8.2.4(b) and (h) of the CADP prohibits me from awarding costs for legal expenses must be addressed before I can consider the relevant factors for consideration in awarding costs.

a) Which Costs Can be Awarded?

With regard to this matter, I find there is no conflict of laws at play. Subsection 6.22(c) of the SDRCC Code gives me discretion to award costs, however, Subsections 7.9(e) and (f) of the SDRCC Code clearly and unequivocally limit that discretion when it comes to awarding legal costs in doping disputes. As a result there is no need to consider Rules 8.2.4(b) and (h) of the CADP, since the SDRCC Code clearly outlines that legal costs are excluded from these types of awards.

While it was argued by the Athlete that there is no consistency between the SDRCC Code and the CADP, the language in Subsections 7.9(e) and (f) of the SDRCC Code clearly mirrors the language contained in Rules 8.2.4(b) and (h) of the CADP. As such, there is no conflict of laws at play, but a uniformity across the SDRCC Code and the CADP that clearly limits my discretion to award costs for legal expenses.

In essence, I am also being asked to find that this is an unfair provision and to rewrite the CADP and SDRCC Code concerning costs for legal counsel. I am being asked to award legal costs on this basis. I cannot make this finding. I find that the exclusion of legal costs is clearly articulated and fairly written. There is a uniformity with the exclusion of legal costs across the CADP and the SDRCC Code with CCES clearly exercising powers given to it by the WADA Code governing costs with regard to a Doping Dispute. I do not find anything to be unfair in this case with regard to this rule. This exclusion is the product of consultation with stakeholders within the athletic community and is in keeping with the purpose of the SDRCC, which is, as Arbitrator Pound held in *Hyacinthe v Athletics Canada & Government of Canada (Sport Canada)* ("Hyacinthe"), "[…] to provide an easily accessible means to resolve sport related disputes […]."[1]

This provision clearly prohibits me from awarding legal costs and forces me to consider only the cost of the Athlete's expert.

[1] SDRCC/CRDSC 06-0047 [Hyacinthe] at page 8.

In the matter at hand, the only cost the Athlete may seek is the $1,000 she paid to retain the services of Dr. Wong.

b) The Relevant Factors for Consideration in Awarding Costs

I now turn to the relevant factors for consideration in awarding costs as outlined in Subsection 6.22(c) of the SDRCC Code. As I have previously outlined in *Pyke v Taekwondo Canada* ("Pyke"), these factors include the following:

(i) The outcome of the proceedings;
(ii) The conduct of the parties;
(iii) Financial resources;
(iv) Intent;
(v) Settlement offers; and,
(vi) Willingness in attempting to resolve the dispute prior to arbitration.[2]

In *Jacks v Swimming Natation Canada* ("Jacks"), I wrote the following with regard to the application of these factors:

> Costs will generally be negligible and should not require costs awards; however, there are some circumstances in which costs might be appropriate. Specifically, costs awards may be appropriate where one party's conduct was without merit and caused financial harm to the opposite party. To determine when costs are appropriate, the factors in 6.22(c) must be present.[3]

I will now provide an analysis of the factors.

(i) The Outcome of the Proceedings

While I granted the Athlete's motion in part, which resulted in varying the sanction from a 48-month suspension proposed by the CCES to a 12-month suspension, I find that both parties were successful before me. The athlete's sanction was reduced, however it was still longer than the 0-4 months advocated for by her counsel.

(ii) The Conduct of the Parties

I find the conduct of both parties was to advance this matter as quickly as possible without harming the interests of any of the parties.[4] Both parties acted professionally. I therefore find that the conduct of both parties was such that it does not contribute to the costs decision.

(iii) Financial Resources of the Parties

In *Pyke*, I wrote: "Where these is a disparity in resources between the parties that may affect one party's ability to defend their interests, it will be considered in awarding costs."[5]

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[2] SDRCC 15-0273 [*Pyke*], Costs Award with Reasons at para 8.
[3] SDRCC 17-0324 [*Jacks*], Costs Award with Reasons at para 11.
[4] *Pyke* at para 13.
[5] *Ibid* at para 15.

In this matter, I have been presented with evidence and am content to conclude that the Athlete is vulnerable and has limited resources with which to represent her interests. The Athlete is currently a full-time university student at the University of Fraser Valley and her financial resources are extremely limited.

In general, there will always be a disparity in resources between the CCES and an athlete against whom an anti-doping rule violation is alleged. However, there is nothing in the SDRCC Code which indicates that CCES is to be treated differently than any other National Sport Organization.

(iv) Intent

According to *Hyacinthe*, the issue to be considered under this factor is whether either side operated in bad faith.[6]

I have been provided with no evidence to suggest that either side acted in bad faith in this matter.

While it was suggested that CCES was provided with expert evidence in a manner that left it unable to prepare, I do not see this as evidence that the Athlete acted in bad faith, nor do I see CCES' actions to seek the full four-year suspension as bad faith. I see both sides as seeking to advance this matter as quickly as possible so that a decision could be given.

As a result, I find that both parties operated in good faith and I will not consider this factor in the award of costs.

(v) Settlement Offers

As I wrote in *Pyke*: "In some cases, unreasonable attempts at settlement may factor against a party."[7] I have not been presented with evidence that shows whether settlement offers were made in this dispute.

I will not be considering this factor in the award of costs.

(vi) Willingness in Attempting to Resolve the Dispute Prior to Arbitration

Both parties in this matter had some discussions in an attempt to resolve this dispute. However, these discussions failed to result in a settlement and the matter was heard. I have not been presented with any evidence showing that either party avoided resolution or acted in a manner showing a "stubborn refusal to entertain such overtures".[8] The evidence that I have been given shows that there was a breakdown during settlement discussions that did not result in a resolution.

I will not consider this factor in the award of costs.

[6] *Hyacinthe* at page 14.
[7] *Pyke* at para 18.
[8] *Ibid* at para 19.

Conclusion

I am not awarding costs for legal fees in this matter. I am prohibited from doing so by Subsections 7.9(e) and (f) of the SDRCC Code and by Rules 8.2.4(b) and (h) of the CADP. As was acknowledged by CCES, the CADP Rules permit the awarding of costs, with the exception of legal fees.

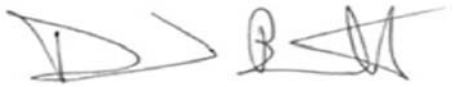
I award the Athlete costs totalling $1,000 for the cost associated with Dr. Wong's testimony at hearing.

The expert testimonies provided by Dr. Wong and Mr. Scott were instrumental in varying the period of the Athlete's suspension. These experts established that the supplement taken by the Athlete had been contaminated. In normal circumstances, this may not be exceptional, however, the evidence provided by Dr. Ayotte that she was initially unable to detect the contaminant during testing of the sample provided by the Athlete. It was only when Dr. Ayotte was provided findings by Mr. Scott that she analyzed her sample at a higher concentrate and was able to detect the contaminant.

While Mr. Scott was the one who analyzed the sample and provided the findings, it was Dr. Wong's testimony that provided an understanding that the trace amounts of the contaminant were in a low-level and difficult to detect, which is consistent with a contaminated product. Dr. Wong's testimony established that these trace amounts of contaminant are not consistent with an intentional self-contamination.

Without having spent the money to have an independent laboratory verify that she had consumed a contaminated product, it very likely that this positive result for a banned substance would have ended the Athlete's career. It would not be fair that athletes incur this expense to successfully challenge the findings of a WADA accredited lab. Therefore the Athlete is entitled to the $1,000 that she spent proving that the product was contaminated.

Signed in Ottawa on October 23, 2018



David Bennett, Arbitrator