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

Nº: SDRCC 20-0445

DIANA WEICKER
(CLAIMANT)

AND

WRESTLING CANADA LUTTE (WCL)
(RESPONDENT)

AND

SAMANTHA STEWART
JADE PARSONS
(AFFECTED PARTIES)

Attendees at Hearing:

For the Claimant:	Diana Weicker, Erin Durant, Kanika Sharma, Christine Kucey
For the Respondent:	Lúcás Ó'Ceallacháin, Tamara Medwidsky
For the first Affected Party:	Samantha Stewart, Emir Crowne, Amanda Fowler
For the second Affected Party:	Jade Parsons, Keith Bannon, Myles Rosenthal
Sue Lambert and Brittany Bates:	Observers

INTRODUCTION

1. This appeal concerns three elite Canadian wrestlers: the Claimant, Diana Weicker; the first Affected Party, Samantha Stewart; and the second Affected Party, Jade Parsons, who all competed against each other in December 2019 at the Wrestling Canada Lutte ('WCL') National Wrestling Trials (the 'Team Trials'), an event hosted by the Respondent, for the opportunity to represent Canada in the 53 kg freestyle weight class at the Summer Olympic Games in Tokyo, Japan (the 'OGs'). The Team Trials resulted in Ms. Stewart placing first,

making her the official Olympic representative, Ms. Parsons placing second, making her the official Olympic alternate, and the Claimant not making the team.

2. The Claimant's Appeal arises out of the Respondent's February 3, 2020 decision not to grant her a retroactive Injury Provision Wrestle-Off which, if granted, would have allowed to her take part in a 'wrestle-off' against the Affected Parties. If successful in such wrestle-off, the Claimant would be named to the Canadian National Team, in lieu of one of the Affected Parties, thereby allowing her to compete for an Olympic Quota at the final Tokyo World OG Qualifier in Bulgaria (the 'Qualifier')

3. The Claimant alleges the Respondent did not properly apply its Concussion Policy and that, as a result, she should be entitled to apply the WCL Internal Nomination Procedures: 2020 Olympic Games ('INP') Injury Provision retroactively, which would then entitle her, as per the INP, to participate in a wrestle-off against one or both Affected Parties for the chance to compete at the Qualifier and the OGs.

4. The Claimant is a formidable athlete seeking an extraordinary remedy.

PROCEDURAL BACKGROUND

5. On February 3, 2020, WCL informs the Claimant that her request for a retroactive Injury Provision wrestle-off has been denied. On February 10, 2020, the Claimant files with the WCL a Notice of Intention to Appeal pursuant to the WCL's internal appeal process. On February 28, 2020, WCL appoints a Case Manager to review the file, whose Appeal Screening Decision finds that there are sufficient grounds for the Claimant's appeal.

6. On February 28, 2020, because the Qualifier is scheduled for April 30, 2020 (but has since been postponed as a result of COVID-19), both parties agree for the Claimant's appeal to bypass the WCL Appeal Policy and be heard directly by the Sport Dispute Resolution Centre of Canada (SDRCC), as provided in INP Article 15.

7. The SDRCC acknowledges receipt of the Claimant's Request for Arbitration on March 5, 2020. The parties agree on the participation of the two Affected Parties in these proceedings, and on March 11, 2020, all parties agree on my appointment to hear and resolve the dispute.

8. Further to a preliminary conference call on March 17, 2020, a procedural timetable is set which all parties respect. A teleconference hearing is later held over the course of two days on May 4 and 12, 2020.

9. On May 19, 2020, I issue the operative part of my decision and now render my full reasoned decision on the matter to the attention of all parties.

JURISDICTION AND ADMISSIBILITY

10. The SDRCC was established pursuant to subsection 9(1) of the *Physical Activity and Sport Act* (S.C. 2003, c.2).

11. Subsection 4(1) of the said *Act* states in part that the Government of Canada's policy regarding sport is founded on the fair, equitable, transparent, and timely resolution of disputes in sport. Paragraph 10(1)(a) of the *Act* specifies that the mission of the SDRCC is to provide to the sport community a national alternative dispute resolution service for sport disputes.

12. This Appeal has been brought before the SDRCC tribunal under agreement of all parties under Subsection 2.1 b) iii) of the *Canadian Sport Dispute Resolution Code (2015)* (the "Code"). Accordingly, all parties have accepted my appointment as arbitrator and mutually recognized both the admissibility of the appeal and the SDRCC's jurisdiction to resolve their dispute and to render a final and binding decision in the matter pursuant to Section 6.21 of the Code.

THE PARTIES

13. The Claimant, Diana Weicker, is a female athlete competing in the sport of Wrestling in the 53 kg weight class.

14. The Respondent, Wrestling Canada Lutte, is a registered Canadian Amateur Athletic Association and the National Governing Body for the sport of Wrestling in Canada (hereinafter referred to as the "Respondent" or "WCL").

15. The first Affected Party, Samantha Stewart , is also a female athlete competing in Wrestling in the 53 kg weight class. She currently holds the only available spot on the Canadian Wrestling team set to compete at the Qualifier. Should the Appeal be upheld, the Claimant would be granted the opportunity for a wrestle-off against Ms. Stewart and, if successful, would move Ms. Stewart down to the position of an alternate for the Qualifier.

16. The second Affect Party, Jade Parsons, is also a female athlete competing in Wrestling in the 53 kg weight class. She currently is the alternate for the team travelling to the Qualifier. Should the Claimant be successful both in this Appeal and her wrestle-off against Ms. Stewart, Ms.

Parsons would effectively be displaced off the Canadian Team for the Qualifier and lose her opportunity to try to compete at the OGs.

APPLICABLE LAW

17. WCL's Appeal Policy, the WCL Internal Nomination Procedures: 2020 Olympic Games ('INP'), the WCL Concussion Protocol ('the Concussion Protocol') and the 2020-2021 WCL Athlete Agreement ('the Athlete Agreement') are all applicable and relevant to the resolution of this matter.

SUBMISSIONS

I. The Claimant

18. The Claimant's submissions are summarized as follows, with other relevant facts or submissions referred to where relevant in my reasons.

19. The Claimant lists two grounds of appeal in her application before the SDRCC:
    i. The Respondent's failure to follow procedures as outlined in the Concussion Protocol; and
    ii. The Respondent's failure to consider all relevant information before declining her request for a wrestle-off.

20. The Claimant explains that she sustained a concussion on June 27, 2019 while training, and promptly informed her athletic therapist, Jim Bilotta, and her strength and conditioning coach, Vicki Bendus, both from Brock University, of her injury.

21. Although the Claimant did not experience any ongoing symptoms at the time, she sought an assessment as a precaution because she knew she would be competing in Turkey at an international competition a few weeks later. Her first assessment was conducted by Dr. Omar Khan, a sports physician at Brock University who is at times referred to by WCL when local athletes require support. Dr. Khan eventually cleared the Claimant to compete in Turkey, but instructed her to stop activity if her symptoms reoccurred.

22. Upon her return from Turkey, the Claimant's post-concussion symptoms returned. She continued to see Dr. Khan and sought out treatment at the Brock Medical Center and the Niagara Concussion Management Clinic, where she was treated by Marianna Varpalotai. Amidst sporadic communications with WCL and ongoing symptoms of varying severity, the Claimant followed her rehabilitation plan as directed by Dr. Khan and Ms. Varpalotai. She was

not cleared in July 2019 to compete at the Pan Am Games, but was later cleared to compete at the World Championships in September 2019.

23. The Claimant explains that prior to suffering the concussion in June of 2019, she was on an upwards trajectory in the international wrestling circuit, her pre-injury accomplishments rendered her one of the highest ranked female wrestlers in Canada, and she was on pace to be a member of the Canadian Olympic Team. She argues that with proper care and treatment, she could have maintained this trajectory. Unfortunately, she says she is now in the position of having to retroactively address her health concerns, as well as fight for her place on the Canadian Olympic Team.

24. The Claimant argues that the Respondent failed to follow its own Concussion Protocol by failing to connect her with a concussion specialist despite three requests on her part. The Respondent only referred her to a multidisciplinary concussion team after the Team Trials in February 2020, many months after she had sustained the concussion in June 2019. She submits that, had the Concussion Protocol been followed by the Respondent, she would have been promptly connected to a professional multidisciplinary care team at the Canadian Sport Institute Ontario (CSIO) and received appropriate treatment and assessment after her symptoms persisted beyond one to four weeks.

25. The Claimant submits that she was in the midst of a very intense part of her career in the lead up to the Olympics. Relying in good faith upon the recommendations from her medical team and from the Respondent, she continued to train. In hindsight, the Claimant realizes that she was not given appropriate guidance to manage the severity of her injury. She alleges that WCL and its medical team neither provided her with guidance related to its Concussion Protocol's Return-to-Sport (RTP) protocol, nor gave her any guidance about the amount or intensity of training that she should have been limited to pursuant to the Concussion Protocol. These breaches of the Concussion Protocol led to the Claimant being cleared for competition earlier than she should have been.

26. She relies on a medical assessment from Dr. Doug Richards, whom she was finally referred to in February 2020, which she says "*makes it clear that she was unable to compete*" at the time of the 2019 Canadian Team Trials. Specifically, Dr. Richards' conclusion, which he asserts "*with full confidence*", is that she was "*clearly medically unfit*" to compete in December 2019.

27. Now that she has been provided the proper treatment from Dr. Richards, whom she refers to as "*a physician with the necessary knowledge and expertise"*, and has undergone the necessary assessments, she understand that during the Team Trials she was competing under

the misapprehension that her concussion had healed and that her symptoms did not prevent her from competing.

28. The Claimant proffers that the Respondent's decision to deny her a wrestle-off was unfair and arbitrary in light of her circumstances and the contents of Dr. Richards' report. The Claimant argues that, had the Respondent respected in Concussion Protocol, she would have been in contact with Dr. Richards sooner, been aware of her ongoing post-concussion symptoms, and would have submitted the 'Inability to Participate Medical Form' in a timely manner – thereby fulfilling the Injury provisions criteria for a wrestle-off, and entitling her to a wrestle-off.

29. In the event that the Tribunal was to find that the Claimant does not satisfy her onus under Section 6.7 of the Code, the Claimant submits that this is an appropriate case for the Tribunal to apply Section 6.17 of the Code and to substitute its own decision for the Respondent's. She proposes that the appropriate remedy under the circumstances is to grant her a retroactive injury provision wrestle-off according to the INP's established procedure.

II. The Respondent

30. The Respondent's submissions are summarized as follows, with other relevant facts or submissions referred to where relevant in my reasons:

31. The Respondent rejects the Athlete's contention that its decision was unfair or arbitrary.

32. The Respondent recounts the factual elements and explains that the Claimant sustained a concussion incident in July 2019, during a practice at a local club, an activity that is not governed by the WCL Concussion Policy. The Respondent nonetheless immediately assisted the Athlete and referred her to Dr. Khan for treatment. Although the Claimant was cleared by Dr. Khan to compete in Turkey, it was only on the understanding that if her symptoms were to return, she would be pulled from competition. Because she experienced numerous symptoms after her weight cut and rehydration, the Claimant had to withdraw from the competition. Upon her return from Turkey as a result of some post-concussion symptoms returning, she again communicated with the Respondent and sought out treatment from Dr. Khan and also the Niagara Concussion Management Clinic. The Respondent followed her progress throughout. As a result of her symptoms persisting, Dr. Khan did not clear her to compete at the Pan Am Games being held weeks later as he felt that she had not yet successfully completed her rehabilitation.

33. Further to following her rehabilitation program in accordance with the Return-to-Sport strategy, the Claimant was again successfully cleared by Dr. Khan to compete at the World Championships in Kazakhstan in September 2019 and returned to action. On request of Dr. Jason Crookham, WCL's chief medical doctor, she was monitored by WCL therapist Maxim Hanna on site at the World Championships. Mr. Hanna performed two Scat tests specific to concussions. He did not report any serious symptoms and advised her to return to therapy with her medical team and follow the Return-to-Sport protocol.

34. After the World Championships, the Claimant returned to training where she prepared for the Canadian Team Trials from October to December. The Claimant made no further reports to the Respondent of a new injury, ongoing symptoms, or any incident in this period. The one exception was to find out if it would be possible to be referred to another specialist at the Canadian Sports Institute, if needed.

35. While the Respondent made some inquiries about getting her into the CSI in Calgary, in light of the fact that there were no new or recurring symptoms being reported by the Claimant, WCL did not pursue this further.

36. The Respondent explains that the Claimant continued to train as normal, as reflected in the summary notes and training plans provided by Vicki Bendus, the Brock Wrestling Strength and Conditioning Coach. This positive preparation is reflected in exchanges the Claimant had with the Respondent's staff on December 4, 2019.

37. The Respondent rejects the suggestion that the Claimant, who is a registered paediatric nurse and an experienced athlete in the system, was not aware of the Concussion Protocol until January 2020. The Athlete Agreement and the Concussion Guide for Athletes, which are mandatory entry forms addressing concussions signed by the Claimant in March and October 2019, attest to her understanding of the document and her obligations flowing therefrom.

38. The Respondent submits that whenever the Claimant looked for assistance, they responded accordingly and ensured that she got the care she needed. Because of its decentralization, the Respondent relies on its athletes seeking treatment and injury rehabilitation from their local clubs, all the while keeping tabs of the rehabilitation via their web-based Athlete Management System (Edge 10). The Respondent submits that when the Claimant returned to her daily training environment she did not seek further assistance from the Respondent, nor, as established in the Athlete Agreement, the Concussion Guide for Athletes and the Concussion Protocol, was it their responsibility to intervene directly in her rehabilitation as they had every reason to believe that she was in good hands with Dr. Khan.

39. Although the Claimant alleges that neither she nor her treating medical team were aware of, or had ever seen the WCL Concussion Protocol, at the local level, the Brock coaches have completed the Making Headway in Sport training and are governed by the Ontario Amateur Wrestling Association's (OAWA) concussion guidelines, not the WCL's. Brock Sport also has extensive RTP protocols. These are standardised protocols that are substantially identical to the Concussion Protocol. In any event, the Respondent submits that under the Athlete Agreement, it was the Claimant's responsibility to be aware of the Concussion Protocol.

40. According to the Respondent, its filed evidence shows that they have continued to work with medical professionals and the Claimant to assist her rehabilitation. During the period after the World Championships until the Team Trials (from September 2019 to December 2019), there were no further reports of injury from the Claimant. The Respondent submits that "*where an athlete does not speak up at the local level it is impossible for WCL to react".*

41. In addition, the Respondent reiterates that the well-established procedure for a wrestle-off is for it to be requested prior to the event in question, not after. The Respondent explains that this is to ensure that all athletes who compete at the Team Trials are aware of the outcome and pending wrestle-offs, so that schedules can be managed accordingly, and results finalised.

42. The Claimant was fully aware of the INP and the wrestle-off procedures, which are accessible to an athlete "*who is unable to compete*". The Respondent received no requests for a wrestle-off from the Claimant or her coaches prior to the Team Trials. They had and were given no information to suggest she may have still been injured at the time of the Team Trials. As a result, the Respondent submits that since the Claimant willingly took full part in the Team Trials on the approval of her local club and medical team, she was able to compete.

43. The request for a wrestle-off could not be granted because it was received after the Team Trials and thus did not meet the INP criteria. The Respondent submits that responsibility and accountability rests solely with the Claimant as it is she who took the decision to compete in the Canadian Team Trials.

44. The Respondent therefore requests that the Claimant's appeal be dismissed.

III. The Affected Parties

45. Both Affected Parties' submissions are summarized as follows, with other relevant facts or submissions referred to where relevant in my reasons.

Ms. Stewart

46. Ms. Stewart submits that the Claimant wrongfully alleged, two months after the Canadian Trials where she did not place, that she was not medically cleared to compete in the Canadian Wrestling Trials despite making no prior complaints or showing any medical evidence of an injury until she lost. As a result, her request for a "*do-over wrestle-off*" must be rejected.

47. Ms. Stewart submits that by signing the WCL Athlete Agreement, as she and all WCL Athletes have, the Claimant agreed to be aware of and comply with the WCL policies and procedures, including the Wrestle-Off Procedures 2019-2020 published in September 2018 and the INP published in September 2019. The Claimant's retroactive assertion that she was medically unable to compete prior to the competition in December 2019 is in itself a violation of the WCL policies and procedures.

48. Additionally, as a registered nurse with experience in the healthcare profession, she likely was and should have been aware of her responsibilities and the risks surrounding concussions. She is not a layperson in this situation with no medical knowledge or background.

49. Ms. Stewart submits that it is equally important that the Claimant wrestled in three matches during the Canadian Wrestling Trials without complaint. The complaint was only made after her ultimate loss.

50. She finally points to the weaknesses in Dr. Richards' reports, which is heavily relied upon by the Claimant. Yet, to Ms. Stewart, Dr. Richards' opinions are predominantly based on the Claimant's self-reporting and limited medical documentation obtained after January 2020. Dr. Richards was not provided with the Claimant's pre-January 2020 medical records or WCL's medical file, including its expert reports. Ms. Stewart respectfully submits that little weight or no weight at all should be placed upon Dr. Richards' report.

51. Overall, Ms. Stewart agrees with the Respondent that the INP criteria were appropriately established, and the selection of athletes was made in accordance with these same criteria.

52. Ms. Stewart also agrees that the denial of an injury provision wrestle-off per INP Section 10.2 was correctly applied by the Respondent as the Claimant competed at the Team Trials, failed to submit the appropriate paperwork prior to competing, and failed to report symptoms or injury during the event to WCL medical staff.

53. Ms. Stewart asks that the results of the Canadian Wrestling Trials be upheld, not only because it is her dream to compete in the next Summer Olympic Games but because it is fair.

Ms. Parsons

54. Ms. Parsons submits that by failing to request a wrestle-off prior to the Team Trials commencing, the Claimant is the author of her own misfortune.

55. Ms. Parsons underlines from the onset that the results of the Team Trials were fair. Significantly, the Claimant makes no allegations akin to cheating, sabotage, fraud, or bribery having taken place at the Trials. The Claimant simply failed to seek an injury provision wrestle-off prior to the Trials commencing, which could have allowed the Claimant to skip the Team Trials and wrestle Ms. Stewart and Ms. Parsons at a later date if she was truly injured. Instead, the Claimant chose to wrestle at the Trials and was defeated by both Ms. Stewart and Ms. Parsons.

56. The requirement to seek a wrestle-off prior to the start of the competition is clearly set out in Section 10.2 of WCL's INP. By virtue of not seeking the injury provisions prior to the Team Trials, the Claimant is prohibited from seeking a retroactive wrestle-off after choosing to wrestle at the Team Trials and then losing to Ms. Parsons and Ms. Stewart.

57. In December 2019, Ms. Parsons competed at the Team Trials for the opportunity to represent Canada at the OGs and defeated the Claimant. She placed second, losing only to the Ms. Stewart, who placed first. She explains that, as a result, Ms. Stewart is the official Olympic representative and Ms. Parsons is the official Olympic alternate in 53 kg weight class.

58. Ms. Parsons submits that the onus is on the Claimant to demonstrate that
    i. she ought to have been granted a wrestle-off in accordance with the INP, which she does not do because the decision that underlies this appeal was made in accordance with the established nominating procedures; and,
    ii. the Respondent's decision to deny her a retroactive wrestle-off is unreasonable, which Ms. Parsons says the Claimant fails to do *"for two reasons:*
        a. The decision was neither unfair nor arbitrary
        b. The Claimant brings this appeal with unclean hands".

59. Ms. Parsons submits that the INP neither contemplates a retroactive wrestle-off being granted to an athlete after the competition, nor should it.

60. Ms. Parsons says that the Claimant holds the responsibility to be aware of the Concussion Protocol and that by conceding that she was neither aware of the Concussion Protocol, including its Return-to-Sport strategy, nor their application to her recovery, she was in breach of her Athlete Agreement.

61. Relying on the "*clean hands doctrine*" which provides that a claimant must be denied the relief it seeks where the claimant's misconduct has *"an immediate and necessary relation to the equity*" being claimed[1], Ms. Parsons submits that even if this tribunal were to find that the decision underlying this appeal was unfair or arbitrary, the Claimant should nevertheless be denied her request for a retroactive wrestle-off because she came to the Appeal with "*unclean hands*".

62. For these reasons, Ms. Parsons requests that this tribunal dismiss the Claimant's appeal and affirm WCL's decision to deny her a wrestle-off.

THE HEARING

63. Because of scheduling difficulties and the amount of witnesses to be heard, examined, and cross-examined by all four parties actively participating in this proceeding, the teleconference hearing was held over two days: Monday, March 4, 2020 and Tuesday, March 12, 2020.

64. On Monday, March 4, 2020, after hearing brief opening statements from Counsel for each party, the Tribunal heard the Claimant's witnesses, Dr. Omar D. Khan, Dr. Doug Richards, Ms. Marianna Varpalotai, and the Claimant, Diana Weicker, who were in turn cross-examined by the Respondent and the Affected Parties.

65. The adjourned hearing resumed on March 12, 2020, at which time the Tribunal heard the Respondent's witnesses: Mr. Scott Vass, Dr. Jason Crookham and Mr. Maxim Hanna, who were in turn cross-examined by the Claimant and the Affected Parties.

66. While the Affected Parties reserved their right to call witnesses, they declined to do so during the course of the hearing, other than making succinct opening and closing statements in support of the Respondent's decision.

67. At the outset of the hearing, all parties confirmed and expressly stated that they had had a full and fair opportunity to be heard and that they were satisfied with the conduct of the proceedings.

---

[1] See *Hongkong Bank of Canada* v. *Wheeler Holdings Ltd.*, [1993] 1 S.C.R. 167 at para. 29.

ISSUES FOR DETERMINATION

68. The Canadian Sport Dispute Resolution Code reads at Section 6.7:

> *If an athlete is involved in a proceeding as a Claimant in a team selection or carding dispute, the onus will be placed on the Respondent to demonstrate that the criteria were appropriately established and that the selection or carding decision was made in accordance with such criteria. Once that has been established, the onus of proof shall shift to the Claimant to demonstrate that the Claimant should have been selected or nominated to carding in accordance with the approved criteria. Each onus shall be determined on a balance of probabilities.*

69. The Code reads at Section 6.17 (a):

> *6.17 Scope of Panel's Review*
> *(a) The Panel shall have full power to review the facts and apply the law. In particular, the Panel may substitute its decision for:*
> *(i) the decision that gave rise to the dispute; or*
> *(ii) in case of Doping Disputes, the CCES assertion that a doping violation has occurred and its recommended sanction flowing therefrom,*
> *and may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.*

70. Accordingly, the issues for determination are:

I. Has the Respondent satisfied its onus of proof pursuant to Section 6.7 of the Code?
II. Has the Claimant satisfied its onus of proof pursuant to Section 6.7 of the Code?
III. Is this a circumstance where the Tribunal should substitute its decision for the decision that gave rise to the dispute pursuant to Section 6.17 of the Code?

DELIBERATIONS

71. I have considered and deliberated on all the facts, evidence and allegations related thereto presented to me by the parties, together with their detailed and immensely helpful written and oral submissions and the testimony of their witnesses. In light of the significant amounts of submissions received, my decision refers solely to the submissions and evidence considered

necessary and pertinent to outline and explain my reasons. Other relevant facts or submissions, written and oral, shall be referred to where relevant below.

I. Has the Respondent satisfied its onus of proof pursuant to Section 6.7 of the Code?

72. All parties have conceded and it is not disputed that the Respondent has appropriately established and drafted criteria dealing with the Injury Provisions and Wrestle-Offs in its INP, thereby fulfilling its first onus under Section 6.7.

73. Therefore, if the Respondent 'reasonably' applied and respected its established INP criteria when refusing the Claimant's wrestle-off request, its onus of proof will be met.

74. The Respondent's decision citing Section 10.2 of the INP and denying the wrestle-off correctly refers to the wrestle-off provision criteria, which are unequivocal, and reads as follows:

> *"Any athlete who is unable to compete at the 2019 Canadian Wrestling Team Trials due to injury may still be considered for nomination, providing they meet the following criteria and satisfy the following conditions. Final approval for the wrestle-off is at the sole discretion of the High Performance Director.*
>
> *A. The official WCL "Inability to Participate Medical Form" is completed by an approved WCL physician and submitted to the High Performance Director no later than the 2019 Canadian Wrestling Team Trials technical meeting. (…)"*
>
> ***As such, [WCL finds that] you are not eligible for a wrestle-off because you did in fact compete; did not request an injury provision wrestle-off with the supporting documentation in the timeline outlined, as per the policy.***
>
> [Emphasis is mine]

75. On the facts, I find that the Respondent's decision was based on its properly established wrestle-off criteria and that its INP criteria were correctly followed. Its onus of proof is therefore met, thereby shifting the onus to the Claimant.

II. Has the Claimant satisfied its onus of proof pursuant to Section 6.7 of the Code?

76. All parties have conceded and it is not disputed that the applicable standard to be applied when reviewing the Respondent's decision not to grant the Claimant a retroactive INP Injury Provision Wrestle-Off is that of "*reasonableness*" as well established in ample SDRCC jurisprudence. I rely likewise on *Beaulieu v. Gardner*, SDRCC 13-0214 at para. 23, where it is stated that a Respondent's decision must fall "*within a range of possible, acceptable outcomes which are defensible in respect of the facts and of the policies at issue."*

77. The Claimant argues that the decision underlying this appeal is unfair, arbitrary and therefore unreasonable, because the Claimant relied in good faith upon the recommendations of her medical team and the Respondent and continued to train and compete, specifically at the Team Trials, as a result of such advice. Had she not done so, she would have still considered herself injured, filled out the injury form and fulfilled the INP criteria for a wrestle off.

78. The Respondent and Affected Parties argue that the Claimant does not satisfy her burden under Section 6.7 of the Code because the Respondent's decision to deny the wrestle-off was the correct one. Although all concede that the Claimant fulfills the ranking criteria of INP Section 10.2, the fact is she failed to fill out and remit an injury form prior to the medical meeting on the eve of the Team Trials, thereby failing to fulfill the properly established criteria that could have allowed her to be granted a wrestle-off. They fail to see how she should have been granted the wrestle-off based on the established INP criteria. I agree.

79. I find that the Claimant does not satisfy her onus of proof under Section 6.7 of the Code with regards to the INP. The INP criteria is clear, unambiguous, and properly established. The facts before me cannot lead to another other conclusion with regards to the INP criteria and the Respondent's decision was thus more than reasonable.

80. Where the appeal takes an interesting turn, as a result of the Claimant's unique and compelling approach to the case, is that she submits that because the Respondent's Concussion Protocol was not followed in their management of the Claimant's injury, they should be precluded from relying on their INP criteria in denying her an injury provision wrestle-off request.

81. She further submits that the High-Performance Director failed, upon receipt of Dr. Richards' medical opinion to the effect that she was unfit to compete during the Team Trials, to reconsider his decision denying her a wrestle-off. Such failure, she claims, was both unfair and arbitrary because it failed to consider all relevant medical information which would have been available to her had the Respondent followed its Concussion Protocol, thereby making its decision unreasonable.

82. The Claimant says that the fact that she did compete does not alter the fact that the WCL Concussion Protocol was not followed. For the Respondent to fall back on its Concussion Protocol to justify its decision not to allow a wrestle-off, when the Concussion Protocol itself was not properly followed, leads to an unjust result for the Claimant.

83. In support of this proposition, the Claimant relies upon the Screening Appeals Procedures decision which reads as follows:

> *[…] The Appellant has provided a compelling evidentiary basis to say that the Concussion Protocol was not followed in her case. Further, she has a strong basis to say that she should not have been cleared to participate (given Dr. Richards'*

> *letter) and, if the Protocol had been followed, she would have been deemed injured and thus allowed to rely on the wrestle-off.* ***It cannot be that in cases where the Respondent does not follow its protocol, it can rely on the result – that a wrestler who cannot truly "compete" due to injury – to deny a wrestler an opportunity he/she should have been accorded had that Protocol been followed.***
>
> [Emphasis is mine]

84. Conversely, the Respondent and Affected Parties argue that the Claimant's failure to respect her own engagements under the WCL Athlete's Agreement, Concussions Forms and Concussion Protocol should render her unable to rely on their application. They say that she failed to take responsibility for her injury, to follow the RTP protocol and to report her symptoms as they arose. The fact that she both disregarded many of her responsibilities as a WCL Athlete and then competed at the Team Trials must preclude her from now seeking an unprescribed remedy under the INP. Granting such a remedy would result in an unfair and unforeseen outcome.

85. It follows that the Tribunal's assessment of both the Claimant and Respondent's actions and inactions under applicable Agreements and Protocols is a necessary additional step to be taken in this case, in order to respect the spirit of Section 6.7 of the Code.

The Claimant and Respondent's Responsibilities under their Respective Policies/Agreements

86. SDRCC precedent confirms that National Sport Organisations (NSO), like the Respondent, have a responsibility to properly establish rules, criteria and procedures that govern their activities, selection processes, etc. It is also well established that NSOs will generally be held to the strict letter of their enacted rules and procedures.

87. However, the SDRCC has also in the past, (see SDRCC 17-0372 Plante & CFF, hereinafter '*Plante*'), acknowledged that an NSO may be allowed to follow processes that are generally agreed to as being the applicable norm even if not those outlined in their rules.

88. Where NSOs are expected to follow their rules and procedures, which the Claimant submits the Respondent has failed to do with regards to the Concussion Protocol, so too are athletes expected to follow their many responsibilities under various NSO policies and protocols. To the Respondent and the Affected Parties in this case, this includes the Claimant's responsibilities outlined in the WCL Athlete Agreement, Concussion Guide for Athletes and Concussion Protocol, which they submit she has failed to respect.

89. Where there are rules and procedures that are written for all to follow, they must be respected and followed, by all those to whom they apply.

90. I will thus briefly consider all the regulatory documents applicable here to determine if they were respected or breached by either party, to which extent, and whether any such breaches are material to the outcome of this dispute. Only then can I determine whether the Claimant establishes to the required standard that she should have been granted a retroactive wrestle-off as a result of the Respondent not reasonably following its Concussion Protocol.

i. The Athlete Agreement

91. As one of the conditions of participation in wrestling, the Athlete signs a yearly WCL Athlete Agreement. The relevant agreement for the purpose of this dispute was signed by the Claimant on May 3, 2019.

92. The Athlete Agreement at Article 6 b) expressly states:

> *The Athlete: (…)*
> *b) will be aware of and comply with all policies, rules and regulations of WCL, which may change from time to time and are posted online at: https://wrestling.ca/resources/policy-manual;*

93. If one were to click on this hyperlink, the drop-down menu under the very first tab entitled "General" provides a list of important WCL policies. This includes: the Appeal Policy, By-Laws, Canadian Anti-Doping Program, Code of Conduct, Concussion Protocol, Discipline Policy etc. Clearly, in light of the distinguished company the document keeps, WCL has placed a high level of importance on the Concussion Protocol and has made it easy for all WCL Athletes to access.

94. Therefore, I find that the Claimant has breached Article 6 b) of her Athlete Agreement by not being aware of the Concussion Protocol. The Respondent cannot be held responsible for failing to inform her of the same.

95. Article 16 of the Athlete Agreement also sets out the following:

> *16. In the event of an injury or illness, the Athlete will:*
>
> *a) notify the Designated Contact verbally within 24 hours, and WCL in writing within 48 hours, or as soon as possible thereafter, of becoming aware of any injury or illness that might prevent the Athlete from fulfilling any obligations under this Agreement.*
>
> *b) provide WCL with a certificate from a health professional describing the nature and diagnosis of the injury or illness which states the:*
> *i. date or estimated the injury or illness was incurred;*
> *ii. nature of the injury or illness, and whether it is an overuse or chronic injury;*

iii. rehabilitation protocol, if any;

iv. amount and type of training the Athlete can do during rehab – as a Return to Play Policy ("RTP policy"); and

v. expected date for return to full training and full recovery;

c) follow a recovery and rehabilitation program for the injury or illness that prevented the Athlete from fulfilling obligations under this Agreement, approved by the Athlete's personal physician and, at the HPD's discretion, a WCL designated medical doctor, to ensure his or her return to training and/or competition in a safe and timely manner.

96. The Respondent and the Affected Parties rely upon Article 16 a) of the Athlete Agreement to argue that the Claimant failed to respect her responsibilities under the Agreement by failing to bring forward to the Respondent her, allegedly, ongoing concussion symptoms.

97. I cannot find, as submitted by the Respondent and Affected Parties, that the Claimant failed to respect the Athlete Agreement by not reporting her symptoms to her medical team and the Respondent prior to the Team Trials. She did not, at the time, have symptoms to report. She brought forward her concussion symptoms to the Respondent and her medical team as they occurred. Such is the challenge of concussions: they are often unpredictable, inconsistent, and imponderable. The Athlete could only report the symptoms if and when they occurred and were acknowledged by her, which on the evidence, she did.

98. Because Articles 16 a) iii) and iv) make express reference to a rehabilitation protocol and a Return to Play (RTP) policy, as above, I find that the Respondent cannot be held responsible for the Claimant's own lack of awareness of the Concussion Protocol and RTP policy in treating her injury.

99. Of additional relevance to my later deliberations is that a simple interpretation of Article 16 c) makes it clear that a WCL athlete is ultimately responsible for his or her recovery and rehabilitation prior to returning to competition.

100. For the above reasons, I find that the Claimant breached her Athlete Agreement. Had she not done so and gotten acquainted with her obligations thereunder, this dispute might have been circumvented.

ii. <u>*Concussion Guide for Athletes*</u>

101. As a condition of entry to WCL activities, the Claimant has signed two Concussion Guide for Athlete Forms, as prepared by the organization Parachute Canada, on March 1, 2019 and on October 23, 2019.

102. The Respondent and Affected Parties explain that the Concussion Guide for Athletes, which the Claimant does not deny signing, outlines a myriad of concussion-related symptoms and

impose clear responsibilities on the athlete to report any such symptoms as well as the importance of following a Return-to-Sport strategy and getting proper clearance from a doctor before returning to active play.

103. Based on the wording of the Concussion Guide, I agree with the Respondent that it could not take action on something if it was not informed of it. The Claimant cannot deflect the responsibility for her lack of awareness of her possible concussion-related symptoms or of the mandatory Return to Play strategy when she clearly signed the Concussion Guide for Athletes on two occasions.

104. Nonetheless, I find the Claimant did not knowingly breach the Concussion Guide in the sense that she did bring forward symptoms to the Respondent and her medical team as they occurred - when she felt them occurring. Similarly, as per her responsibility under the Concussion Guide, *she only returned to sport after being cleared by her doctor,* Dr. Khan. But by executing these forms, she did recognize that she is ultimately responsible for her treatment and respect of the Return-to-Sport Protocol.

105. Finally, this Concussion Guide is expressly identified in the Concussion Protocol (discussed below) as the reference WCL relies upon to educate its athletes on concussions. The Claimant signed these forms on two occasions. She cannot now argue that the Respondent failed to educate her on applicable concussion protocols and Return-to-Sport strategies or that she was never made aware of their existence.

iii. *The Concussion Protocol*

106. During the hearing, supported by the evidence of her experts, the Claimant gave candid and credible testimony and enumerated various way in which she believes the Respondent failed to follow its Concussion Protocol. The Respondent, who was quick to refer to these contentions as seeking to misdirect and misinform the Tribunal, sought to support its contention that it had managed the Claimant's injury in accordance with said protocol by way of its own witnesses.

107. I will succinctly summarise and deliberate on the most salient points brought forward in written submissions and oral examinations and testimony and provide my findings.

Scope and Application of the Protocol

108. The protocol reads that it applies to "*WCL activities*"; which on the Respondent's evidence I understand to be National Competitions, where the Athlete is nominated and entered by her local club, and International Competitions, where the Athlete is nominated and entered by the Respondent.

109. The Respondent submits that the practice or training session at the Claimant's local Brock Wrestling Club, when her concussion occurred in June 2019, , is not considered to be a WCL

activity as defined in the outset of the Protocol. This in turn means that that the rehabilitation protocol she was to follow at that time should have been her Local Club's Concussion Protocol, and not WCL's. I accept this interpretation of the Concussion Protocol.

110. Nonetheless, the Respondent followed up with the Claimant upon being informed of her concussion and assisted her in seeking adequate medical attention from Dr. Khan, a reputable physician with extensive experience in treating concussions. I therefore find that the Respondent's management of the concussion from the onset went over and above what was strictly expected from it from a policy perspective.

111. The Respondent also explains that because WCL is decentralized, it always relies on local and regional clubs to carry out its own concussion protocols for their athletes. Scott Vass, IST Manager, acts to facilitate WCL athletes' injuries and other medical needs based on the clinical assessment of athletes' coaches and medical teams, and the advice of Dr. Crookham, WCL's head physician. This practice echoes the requirements of Article 16 c) of the Athlete Agreement which gives a sense of responsibility and empowers athletes for their own recovery and rehabilitation plans. In light of the decentralized nature of the Respondent's administration of its sport, the Respondent encourages its athletes to stick with their local medical teams (so long as they are certified and reputable) until they are recovered or released.

112. Still, for "WCL activities", the Respondent is to take a more active role in assisting the Athlete pursuant to its Concussion Protocol and I accept on the evidence that it did so.

113. The Claimant communicated with the Respondent after her competition in Turkey, a "WCL activity", at which time she was experiencing significant post-concussion symptoms. She felt that she required further concussion treatment and submits that the Respondent did not mention the Concussion Protocol and made no attempt to ensure it was followed. However, the ample text messages in the case file and the evidence of Dr. Khan and Ms. Varpalotai allow me to conclude that the Respondent was managing and well aware of the Claimant's rehabilitation strategy and offering its assistance to the Claimant to ensure that she was being followed by a qualified medical team. The Respondent rightly assumed that the Claimant's coaches, trainers, and medical team were all aware of her local club's Concussion Protocol and RTP policies as well as the Respondent's.

114. Later, prior to the World Championships in Kazakhstan, also a "WCL activity", Dr. Crookham, WCL's chief medical officer, advised Maxim Hanna, WCL's head therapist, to make sure the Claimant was assessed by way of a Scat 5 prior to competing, even though the Claimant had been cleared to compete by Dr. Khan in accordance with the Concussion Protocol. The evidence, which I accept, is that she was followed by Maxim Hanna before, during and after the competition. As per usual protocol, Mr. Hanna then reported the results of his scat tests back to Dr. Budwal, another WCL doctor, and also uploaded them to the Edge 10.

115. Finally, at the Team Trials, another "WCL activity", there was no reason for the Respondent to think the Claimant was injured or experiencing ongoing symptoms because she was entered into the event without issue from her local club and the Respondent had received no indication from the Claimant or her medical team prior or during the event that she could still be injured. However, as soon as she indicated her symptoms may have returned further to or as a result of the Team Trials, the Respondent immediately directed her to Dr. Richards, as she had requested.

116. I therefore find that the Respondent reasonably applied its Concussion Policy in relation to its management of the Claimant's injury.

Education

117. The Claimant argues that the Concussion Protocol dictates that athletes diagnosed with a concussion should be provided with education about the signs and symptoms of concussion, strategies about symptom management, the risks of returning to sport without medical clearance and recommendations regarding gradual return to sport activities, referred to as the "return-to-sport strategy", and that she did not receive this education.

118. The Respondent pleads that a flow chart at the last page of its protocol clearly identifies "How" WCL athletes are to be educated and solely refers to the Parachute Concussion Guide for Athletes education sheet, which the Claimant concedes she read and signed on two occasions.

119. The Claimant rejects the assertions made by the Affected Parties and the Respondent that she was aware of the Concussion Protocol. She submits that she was never provided with a copy of the Concussion Protocol, that she did not receive training on the Concussion Protocol and that a copy of the Concussion Protocol was not provided to her or her healthcare providers at any time during her treatment. At the hearing, she conceded that the first time she ever read the Concussion Protocol was in January 2020 when looking for information on injury provisions on the WCL website.

120. The Claimant argues that in all her communications with the Respondent, they did not provide her with a copy of the Concussion Protocol, which on the evidence I accept. However, as stated above, under the Athlete Agreement, the Claimant holds the responsibility to "*be aware of and comply with all policies, rules and regulations of WCL, which may change from time to time and are posted online at:* https://wrestling.ca/resources/policy-manual."

121. The Concussion Protocol is clearly listed as available for download under the section "Policy Manual" on the above hyperlink.

122. The Claimant signed the Athlete Agreement and the Concussions Guide for Athletes and thereby accepted her general obligations to be aware of WCL's policies, procedures, etc., including the Concussion Protocol and Return to Play strategy. Therefore, she cannot hold the

Respondent accountable for her own shortcomings in this regard. One would assume, as argued by the Respondent and Affected Parties, that as soon as she suffered her concussion, she would have had the forbearance to read, or re-read, these documents.

123. Although the Claimant argues that the Respondent's failure to inform her of the Concussion Protocol is a breach of the educational requirements of its Concussion Protocol, for the above reasons, I find that the Respondent fulfilled the education portion of its Concussion Protocol and that it is the Claimant who failed to inform herself of the same.

Return-to-Sport Strategy

124. The Claimant also relies on section 10 of the Concussion Protocol, which outlines that as an athlete diagnosed with a concussion, she should have been managed according to WCL's Sport-Specific Return-to-Sport Strategy ('the RTP strategy') which reads in part:

> *"WCL-Specific Return-to-Sport Strategy. The following is an outline of the Return-to-Sport Strategy that should be used to help athletes, coaches, trainers, and medical professionals to partner in allowing the athlete to make a gradual return to sport activities."*

125. She says that the Respondent improperly managed her RTP strategy. Yet, it appears from the case file and the oral submissions that the Respondent took many measures to follow the RTP strategy and its protocol and *to help the Claimant, her coaches, trainers, and medical professionals to partner to allow her to make a gradual return to competition.* The communications and evidence in the case file offer ample examples of the Respondent informing her of the importance of not returning to competition too quickly, following the program, following the return to play guidelines, having a long-term outlook and the importance of putting her health first.

126. Further, the Respondent's Concussion Policy RTP strategy expressly places the responsibility on the Athlete, her coaches, her trainers, and her chosen medical professionals to partner to oversee her RTP strategy, not on the Respondent.

127. The Respondent has filed a copy of the Brock Medical Center Concussion Protocol and the OAWA protocol with return-to-sport policies, which it says are largely identical to its own Protocol. The Affected Party Jade Parsons has filed a copy of the CSIO protocol, with a Return-to-Sport policy which she says is substantially identical to the Respondent's Protocol. All experts examined at the hearing agree and concede that concussion protocols are standardised.

128. The Respondent submits that the Brock Medical Center Concussion Protocol is the Protocol that would have been followed by the Claimant's medical team. Ms. Varpalotai and Dr. Khan were both involved in the drafting of the Brock Protocol, and both confirmed that although the WCL protocol has distinct wrestling-specific activities enumerated in its Return-to-Sport

strategy, all protocols are standardised. I am satisfied that because all protocols that have been added to the case record: a) have 'Return-to-Sport strategies'; b) have multidisciplinary approaches to rehabilitation; and c) follow a strict RTP strategy with steps to follow (as clearly evidenced in the Brock Concussion Treatment Protocol Chart), at all times, the Claimant's medical team substantially followed the WCL RTP strategy when applying their respective Brock, OAWA or CSIO RTP strategies.

129. The evidence before me, as confirmed by all experts examined in the course of the hearing, is that RTP strategies are standardised and compulsory for all coaches, trainers, healthcare professionals and medical staff to follow in carrying out all concussion protocols. On a balance of probabilities, I find that the Respondent respected its Concussion Protocol RTP strategy when overseeing the Claimant's post-concussion rehabilitation plan.

130. Although the Claimant argues and attempts to attribute to the Respondent the responsibility for her never being given a copy of the Concussion Protocol, as determined above, and to her own detriment, , the Claimant is accountable for inadvertently failing to become familiar with the Concussion Policy in material breach to the Athlete Agreement, and she is also accountable for inadvertently failing to become familiar with applicable RTP strategies in breach of the Concussion Guide.

On-Site Injury Management

131. The Claimant argues that she relied on the incorrect guidance and diagnosis of the Respondent's medical staff to her detriment. She says that she was "*reassured*" by the opinion of Mr. Hanna, the athletic therapist on site at the World Championships, that her "*symptoms were not a cause for concern*".

132. Mr. Hanna's evidence is that, other than complaining of the usual neck pain and general lack of energy that she normally experienced in the past during her weight cuts, the Claimant "*did not complain of any other signs or symptoms of a head injury".*

133. Section 3 of the Concussion Protocol provides that an onsite medical therapist may perform an SCAT 5 exam upon suspicion that an athlete has suffered a concussion during competition, and that if an on-site athletic therapist suspects that an athlete is suffering from a concussion, the athlete should follow up with a doctor or nurse practitioner and undergo a medical assessment.

134. Mr. Hanna's evidence is that he conducted Scat 5 tests both before her competition at the World Championships on September 16, 2019 and after her competition on September 19, 2020. He also checked up on her at least 3 times a day. Although the Claimant's Scat 5 results differed after the competition, they were not of grave concern to him. The evidence shows that prior to the competition, all her Scat 5 results, both subjective and objective, were zero on an ascending scale of 0-6 (supporting Dr. Khan's decision to clear her to compete). After the competition, she had some 2-6 results (neck pain) and up to 3-6 (headache), but these

were also consistent with her prior neck injuries, which Mr. Hanna knows very well, having treated the Claimant at prior events.

135. I accept that some of the Claimant's symptoms reoccurred following the World Championships, including headache, pressure in her head, neck pain, dizziness and feeling slowed down, none of which she experienced prior to competing when Mr. Hanna performed the baseline SCAT 5 exam. I also accept that Mr. Hanna then accurately reported his Scat 5 results based on his subjective and objective assessment of the Claimant's cognitive and physiological state. Upon noticing the change in the Claimant's results, he advised her to follow up with her medical team upon her return home, to consult her medical team and to follow the RTP strategy. He then uploaded these uncontested results in the Edge 10 software for the benefit of Respondent's IST's management of the Claimant's rehabilitation.

136. I accept Mr. Hanna's evidence that he advised the Claimant to "*follow up with her medical team when she got back home and follow the proper return to play guidelines*", thereby fulfilling the Concussion Protocol in this regard pursuant to its Section 3.

The Medical Clearance Letter

137. Section 7 of the Concussion Protocol reads as follows:

> "*Once the athlete has completed their […] Sport-Specific Return-to-Sport Strategy and are deemed to be clinically recovered from their concussion, the medical doctor or nurse practitioner can consider the athlete for a return to full sports activities and issue a Medical Clearance Letter."*

138. The Claimant submits that she never received such a 'Medical Clearance Letter' prior to competing and argues that Dr. Khan also never issued a formal Medical Clearance Letter. She says that for the Respondent to have allowed her to compete without having received a formal clearance letter from Dr. Khan was a breach of its Concussion Protocol.

139. The Affected Parties argue that pursuant to Section 5 of to the Concussion Protocol RTP strategy, it is the athlete who has been diagnosed with a concussion who must "*provide their coach with a standardized Medical Clearance Letter prior to returning to full contact sport activities"* (which would then be remitted to WCL), and that on the evidence the Claimant has never done so. It was therefore up to the Claimant to seek out a Medical Clearance Letter from her medical doctor and to ensure it was remitted to the Respondent. The Affected Parties submit that the Claimant never provided anyone with such Medical Clearance Letter in breach of the Concussion Protocol.

140. Therefore, on the one hand, the Affected Parties state that it was the Claimant's responsibility to obtain this Medical Clearance Letter and that she failed to do so in disregard of the Concussion Protocol and WCL's guidelines on the same. On the other hand, the Claimant

submits that she never received this Letter prior to competing in any event subsequent to suffering her concussion, and that in any event this was Dr. Khan's responsibility.

141. The evidence before me is that the Claimant neither sought out a Medical Clearance Letter nor provided such a Letter to her coach or the Respondent, and that the Respondent accepted Dr. Khan's clearance for the Claimant to compete without it having been issued by way of a formal Medical Clearance Letter.

142. Thus, I find that neither the Claimant nor the Respondent can be held accountable for equally failing to respect this requirement. Clearly, the Concussion Protocol is not being strictly followed in terms of medical clearance forms, which is something the Respondent must address and redress going forward.

143. What is not disputed is that under the Concussion Protocol, a medical clearance is necessary. Here, Dr. Khan cleared the Athlete to compete in Turkey by way of an email and the Respondent contacted Dr. Khan on numerous occasions to obtain a confirmation of the Claimant's clearance prior to allowing her to compete at the World Championships, which was either done by text or phone call, but which I accept was given as reflected in Mr. Vass' testimony and from Dr. Khan's notes in the case file:

> *September 10, 2019 - concussion follow up. Full resolution of symptoms with normalization of Impact testing results. Had followed thru on working with athletic therapist and physiotherapist on post-concussion care. Medical clearance provided for World Championships.*

144. It appears on the evidence that a formal medical assessment letter and formal Medical Clearance Letters are not typically required to fulfill the WCL requirements. The Respondent acknowledges that athletes typically do not seek these out and also that their therapists often do not have time to prepare them. As a result, clearance in the form of text, email and phone calls have all been deemed sufficient in the past and are now common practice.

145. To her competitive benefit, the Claimant was cleared for both the Turkey and Kazakhstan events without having to strictly follow this Medical Clearance Letter requirement. It would be difficult to find that the Claimant has established that the Respondent failed to follow its Concussion Protocol as a result of its flexible approach to medical clearance forms when she herself was neither aware of such a requirement under the Concussion Protocol, did not respect her own requirements in this regard under the Concussion Protocol, and in fact benefited from this flexible approach.

146. Dr. Khan cleared the Claimant on those two occasions, by way of text and possibly a phone call in lieu of the Medical Clearance Form. I have been given no reason to believe that his decision to clear the Claimant on either occasion was medically unsound or negligent. As argued by counsel for the Affected Parties, it is a matter of substance over form. I am satisfied

that the Respondent would never allow one of its athletes to compete without first obtaining medical clearance.

147. The Respondent's failure to respect the Medical Clearance Letter requirement thus cannot amount to a material breach of the Concussion Protocol. This is notably so because as in *Plante*, this has been generally agreed as being an applicable norm and usual practice.

The Referral to a Multidisciplinary Clinic

148. Finally, the Claimant submits that, having been informed of the Claimant's ongoing symptoms, the Respondent had an obligation under its Concussion Protocol to refer her to a multidisciplinary clinic. Because of the Respondent's failure to do so, the Claimant submits that she was not able to seek out adequate concussion treatment until after the Team Trials.

149. The Affected Parties' interpretation of the Athlete Agreement and Concussion Protocol is that it does not obligate the Respondent to make such referrals.

150. Specifically, as reproduced above, article 16 c) of the Athlete Agreement specifically reads that:

> *In the event of an injury or illness, the Athlete will*
>
> *c) follow a recovery and rehabilitation program for the injury or illness that prevented the Athlete from fulfilling obligations under this Agreement,* ***approved by the Athlete's personal physician and, at the HPD's discretion, a WCL designated medical doctor****, to ensure his or her return to training and/or competition in a safe and timely manner.*
>
> [Emphasis is mine]

151. Similarly, Section 6 of the Concussion Protocol provides that athletes who experience persistent post-concussion symptoms "***may*** *benefit from referral to a medically supervised multidisciplinary concussion clinic…".* Importantly, the referral to a multidisciplinary concussion clinic *"****should be made on an individualized basis at the discretion of the athlete's medical doctor or nurse practitioner***." [Emphasis is mine]

152. The Respondent got involved in the Claimant's RTP strategy from the onset, ensuring that the Claimant was being treated by a qualified physician in Dr. Khan. Pursuant to the Concussion Protocol and his own expertise in the matter, Dr. Khan, at his discretion, referred her to the Niagara Concussion Management Clinic for them to get involved in the Claimant's post-concussion rehabilitation treatment.

153. The applicable policies, agreements and protocol do not obligate the Respondent to refer the Claimant to a multidisciplinary concussion clinic (although the Claimant was in fact treated by the Niagara Concussion Management Clinic). The evidence before me is that the Respondent

made efforts to refer the Claimant to the CSI in Calgary in the fall of 2019, but that as the Claimant was not reporting new or ongoing symptoms, it elected not to proceed. The Respondent did eventually refer the Claimant to Dr. Richards at the CSIO as soon as the Claimant reported that some of her symptoms had returned after the Team Trials.

154. Although the Claimant may have made some requests to see other specialists, I also accept Dr. Crookham and Mr. Vass' evidence that requests for second opinions are the norm for athletes when "*things are not progressing as quickly they would like*". I appreciate why encouraging the Claimant to stick with her treating physician and medical team was the Respondent' preferred course of action and can find no fault in their decision to do so whilst, to their knowledge, the Claimant was in the process of successfully rehabilitating herself.

CONCLUSION

155. Concussions are very tricky to rehabilitate – I am well aware as now surely are all the parties to this dispute that there is no perfect formula with regards to treatment, rehabilitation, timelines for return to sport, side effects, triggers, etc. RTP strategies are not static. By virtue of the very complexity of concussions and the individual characteristics of every athlete that sustains them, they cannot be.

156. In assisting the Claimant manage her injury, I find that WCL reasonably applied its Concussion Protocol relying, as customary, on the Claimant's local club and medical team, to follow its own concussion protocol and provide WCL with the necessary clearances, updates and reports on a needs basis.

157. Under the Athlete Agreement, the Claimant must be presumed to accept her duty to acquaint herself fully with all applicable provisions of the Concussion Protocol, thereby assuming full responsibility for her conduct. She failed to do so and cannot now ascribe full responsibility for this failure to the Respondent.

158. Whether the Claimant was "*unfit to compete*" at the Team Trials will be discussed next as I feel that it is a critical element needing to be addressed for the Claimant's appreciation of my reasons. But, irrespective of the answer to that question, for the reasons above I do not find that the Claimant has established on a balance of probability that her decision to compete (unsuccessfully) at the Team Trials (thereby proscribing her from benefiting from the INP Injury Provisions), can be imputed on the Respondent's failure to adhere to its Concussion Protocol.

Was the athlete unfit to compete at the Team Trials?

159. The crux of the Claimant's appeal is that she alleges that she was not fit to compete at the Team Trials as a result of the Respondent's failure to respect its Concussion Protocol. A post-Team Trials medical report issued by Dr Richards is the foundation of the Claimant's allegations.

160. While the Claimant does provide a compelling evidentiary basis to support her claim, I have already found on careful review of all the evidence and written and oral submissions, that on a balance of probabilities the Respondent respected its Concussion Protocol. However, if she truly was unfit to compete, as she alleges, then she says granting her a retroactive wrestle-off would be a fair outcome under the circumstances.

161. While I do not challenge Dr. Richards' established expertise as a researcher in this field, my finding, specifically and especially when it comes to concussions, is that his report is not conclusive. I find that, as knowledgeable as he may be in this field, he cannot provide an exact medical diagnosis of whether or not the Claimant was fit to compete two months prior. This is particularly so considering his diagnosis is based solely on the Claimant's self-assessment and that he did not request, receive, rely on or take into consideration the data available to him in the WCL Athlete Management System logs, and most importantly in her documented clinical medical history, as recorded by Dr. Khan, an established clinical expert in the field.

162. I also cannot rely on Dr. Richards' conclusions regarding the Claimant's fitness to compete in December 2019 because of the ebbs and flows of concussions, post-concussion syndrome and the many symptoms that may or may not be attributed to it. The Claimant may or may not have been exhibiting similar symptoms of varying degrees two or three months prior to her diagnosis. There is an undeniable lack of certainty in this regard.

163. I also cannot fully accept the conclusions of his report because there appears to be many conflicting theories on concussions, weight cutting, dehydration and rehydration, etc. I find that, just as the Claimant may have been suffering from post-concussion syndromes during or after the Team Trials, she may also have been feeling the effects of her weight cut which, although apparently brought upon since she has had her concussion, are a weight management issue in and of their own for most wrestlers, and thus not an "injury" that would necessarily warrant the granting of a wrestle-off pursuant to the INP.

164. I am also unable to conclude that had the Claimant been referred to Dr. Richards when she was healthy, prior to the Team Trials, that his diagnosis would have been the same as it was in February 2020.

165. While it may certainly be that when diagnosed by Dr. Richards, some of the Claimant's post-concussion symptoms had returned, based on the factual, expert and medical evidence before me, the Claimant does not satisfy the requisite burden of proof that would allow me to conclude that she was "*unfit to compete"* at the Team Trials. This is especially so in light of the complex ebbs and flows of post-concussion symptoms, which again, recognizing my redundancy, all parties to this dispute and all experts heard on the topic have conceded to.

166. The simple fact is that the Claimant did not request an injury provision because at the time, she felt there was no reason for her to do so. Dr. Richards' report and testimony, although compelling in some regards and very informative, does not convince me otherwise.

III. Is this a circumstance where the Tribunal should substitute its decision for the decision that gave rise to the dispute pursuant to Section 6.17 of the Code?

167. The Claimant argues that even where it is determined that the Respondent made its decision in accordance with the Concussion Protocol and its INP, out of fairness to the Claimant, the Tribunal should nonetheless substitute the Respondent's decision with its own.

168. SDRCC precedent relied upon by all parties, SDRCC 19-0404/05 Browne & Nordiq Canada, identifies the paramount principles that apply in respect of appeals by athletes of team selection decisions based on several prior decisions referred by the parties. These principles are as follows, with number 2 being most relevant to the last determination I must make:

> *(1) "Generally, arbitrators should defer to the decisions of the [National Sports Organizations] who are comprised of men and women experienced in the sport in question, highly qualified to exercise good judgement and very knowledgeable about the athletes competing for selection."*
>
> *(2) "**Only in exceptional situations where bias is proven or the selection process is conducted unfairly or the decision is made in an arbitrary or discriminatory way or in bad faith, should an arbitrator set aside the decision of the [National Sports Organization].**"*
>
> [Emphasis is mine]

169. I have already found above that the Respondent's decision to not grant the Claimant a wrestle-off was correctly taken in accordance with its properly established INP. I have also already found that the Claimant did not meet her evidentiary burden under Section 6.7 of the Code to establish that the Respondent failed to reasonably apply its Concussion Policy to its management of the Claimant's injury. I also neither perceive this to be an exceptional situation where there has been unfairness, bias, discrimination or bad faith in the Respondent's decision nor that its decision was taken in an arbitrary way.

170. The WCL Athlete Agreement, Concussion Guide for Athletes, Concussion Protocol and other internal processes outline general reporting and commitment to rehabilitation responsibilities that all athletes and their treating physicians should respect and adhere to, and squarely place much of the responsibility in this regard on the Claimant and her coaches and local team of physicians. Such internal processes and regulatory documents also outline the general role of the Respondent in assisting its athletes manage their injuries, chosen rehabilitation plan and RTP strategies and policies. Unless expressly stated otherwise, it would be wholly impractical, illogical, and highly risky from a liability standpoint for an NSO to take on the sole responsibility for the rehabilitation of each of its athletes' injuries.

171. The Respondent's IST and High-Performance Director were in regular contact with the Claimant e.g. assessment, rehabilitation, and the RTP strategy. The evidence shows that the Respondent consistently emphasized that the Claimant put her long-term health first and treated her fairly in managing her concussion and navigating through all the turns of the intricate and complex road of concussion rehabilitation.

172. While I commend the Claimant on her resourceful and compelling way of approaching this appeal and seeking a remedy that would grant her a "*redo*" (to quote the Affected Parties), on the facts, I cannot logically find that after an athlete has realized, two or three months after the fact, that he or she may have been injured at the time of a qualification event, that they should be allowed to get another go. I also cannot legally find this to be an appropriate remedy since it is not prescribed. Finally, fairness to the INP and most importantly to all the other athletes she competed against at the Team Trials would render the remedy the Claimant seeks unequitable.

173. One simply cannot go back in time and get another chance at rewriting history. Allowing the Claimant to do so would be unfair to the Affected Parties, but would also set a dangerous precedent that could, in effect, result in various retroactive injury requests in various sports where a clinical opinion provided after the fact would allow athletes to get another "kick" at the proverbial can.

174. When the Claimant realized that she may have been unfit to compete at the Team Trials and requested a retroactive injury provision, the Respondent, rightly, relied on its established INP criteria and did not reconsider its decision. This was neither an arbitrary nor an unfair decision, it was a matter of fact and legally sound decision. The Claimant still simply did not fulfill the well-established and undisputed requirements of the INP in this regard.

175. While extraordinary and regrettable in many ways, the circumstances of this case do not warrant my substituting the Respondent's decision to deny the Claimant's retroactive wrestle-off request pursuant to Section 6.17 of the Code with the remedy that is sought.

176. Had the Respondent's conduct been egregious and sufficiently removed from the Concussion Policy so as to warrant my substituting their decision with mine, if it were just and equitable to do so, I would not have hesitated. However, as discussed, a review of the facts, the applicable law, and the evidence before me do not justify my doing so.

DECISION AND ORDER

177. The Respondent satisfies its onus of proof under Section 6.7 of the Code, but the Claimant does not.

178. I will not be substituting the Respondent's decision to deny the Claimant a retroactive wrestle-off pursuant to Section 6.17 of the Code.

179. The Claimant's Appeal is dismissed.

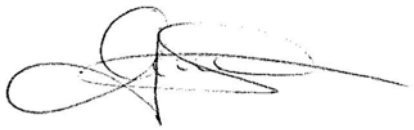
FINAL WORDS

180. It is always regrettable for athletes to be involved in such disputes, especially in an Olympic cycle. Participation in the OGs is what all amateur athletes dream of and strive for and to be deprived of a chance to participate, for whatever reason, is a bitter pill to swallow.

181. For the benefit and pride of both Affected Parties, I feel compelled to underline that "wrestle-offs" did occur between all these three athletes. They occurred during the Team Trials. Ms. Parsons and Ms. Stewart both fought the Claimant and won their fights fairly. As a result, they now have their sights set on the OGs. I wish them both the best of luck. I also, sincerely, wish Ms. Weicker a continued healthy and strong recovery.

182. I reserve the right to deal with all ancillary disputes to this appeal.

Signed in Beaconsfield, Québec, this 26th day of May, 2020.



Janie Soublière, Arbitrator