

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

NO: SDRCC ST 24-0017

**ONTARIO VOLLEYBALL ASSOCIATION (OVA)
(Interested Party)**

AND

CARTER WALLS

(Respondent)

AND

DEPUTY DIRECTOR OF SANCTIONS AND OUTCOMES

Before

Aaron Ogletree
(Arbitrator)

DISCLOSURE DECISION

Appearances and Attendances:

On behalf of the Interested Party:	Elliot P. Saccucci Alessia G. Grossi Amanda Franker-Shuh
On behalf of the Respondent:	Tavengwa Runyowa
On behalf of the DDSO	David Kellerman

PROCEDURAL HISTORY

1. This Request for a Safeguarding Hearing was made by Ontario Volleyball Association (the “Interested Party”), a sport organization governing volleyball in Ontario, pursuant to the Canadian Sport Dispute Resolution Code (hereinafter the “Code”) to challenge the decision of the Deputy Director of Sanctions and Outcomes (hereinafter the “DDSO”) and collectively, hereinafter the “DDSO’s decision”) dated April 3, 2024, regarding its findings on violations pursuant to the Universal Code of Conduct to Prevent and Address Maltreatment in Sport (hereinafter the “UCCMS”) and sanctions regarding Mr. Carter Walls (hereinafter the “Respondent”), a volleyball coach.
2. The Interested Party filed a formal complaint with the Office of the Sport Integrity Commissioner (hereinafter the “OSIC”) on February 9, 2023 alleging that the Respondent engaged in Prohibited Behaviours and/or Maltreatment as set out in section(s) 5.2, 5.3, 5.5, 5.6, 5.7 and 5.13 of the UCCMS.
3. On March 23, 2023, the OSIC prepared a Statement of Allegations outlining the 19 allegations against the Respondent which occurred before September 2018.
4. On March 26, 2023, the Director of Sanctions and Outcomes (hereinafter the “DSO”) referred this matter and the OSIC’s recommendation to the DDSO.
5. On April 4, 2023, the DDSO imposed the following provisional sanctions on the Respondent:
 1. Eligibility Restriction: The Respondent is provisionally prohibited from engaging in any Program Signatory coaching activities with vulnerable parties or youth athletes (i.e. U25), including those affiliated with a P/TSO or the NSO.
 2. Prohibition on Contact: The Respondent is provisionally prohibited from being in contact (directly or indirectly, whether in person or by any means of communication) in any capacity with youth (i.e. U25) in Program Signatory activities (including in any club, P/TSO, and/or NSO level).
6. On April 18, 2023, the OSIC prepared a Statement of Additional Allegations concerning alleged incidents that occurred between 2020 and 2023 alleging that the Respondent: a) communicated confidential information received from the OSIC, b) enabled a coordinated campaign to express support for him, c) shared confidential information in breach of the OSIC Confidentiality Policy and misrepresented the context of information in the Complaint, and d) communicated one-on-one with Minor athletes.
7. On July 12, 2023, the OSIC prepared another Statement of Additional Allegations concerning incidents that occurred between May and June 2023 alleging that the Respondent again contravened OSIC Confidentiality by communicating information received from the OSIC.

8. Ms. Paula Butler of Southern Butler Price LLP (hereinafter the ‘Investigator’) conducted interviews with 11 individuals between August 23, 2023 and March 5, 2024.
9. On April 2, 2024, the Investigator submitted the Investigation Report to the OSIC. The Investigation Report outlines the investigation process regarding the 24 allegations of UCCMS made against the Respondent. The Investigator found that two (2) violations of the UCCMS were substantiated and provided reasons.
10. On April 3, 2024, the DDSO rendered the DDSO’s Decision finding that the Respondent committed Boundary Transgressions and Interference with or Manipulation of Process, but the Respondent did not commit Psychological Maltreatment, Physical Maltreatment, Sexual Maltreatment and Grooming. The DDSO’s Decision was based on the Investigation Report, Statement of Allegations dated March 23, 2023, Statement of Additional Allegation dated April 18, 2023 and July 12, 2023, the UCCMS, Investigation Guidelines, and materials he considered appropriate to understand the context of the framework and matters related to the Complaint.
11. The DDSO’s Decision also immediately lifted the provisional measures, but it required that Respondent to complete an accredited Ethics and Boundaries program within 3 months of receipt of the DDSO’s Decision.
12. On April 24, 2024, the Interested Party submitted an Appeal of the DDSO’s Decision dated April 3, 2024 and challenges the findings on violations under the UCCMS and sanctions contained in the DDSO’s Decision.
13. On April 25, 2024, the Interested Party wrote to the Investigator, stating that:

We are writing to you as counsel to the Ontario Volleyball Association to let you know that we have commenced an appeal of the Director of Sanctions and Outcomes’ (“DDSO”) decision dated April 3, 2024, which adopted the factual and violation findings outlined in your report of April 2, 2023.

In connection with this appeal, we are requesting that you provide us with your file entire file regarding your investigation into the above, including all recordings and transcripts made of interviews with witnesses. We request that you provide us with your file no later than May 23, 2024.
14. On April 26, 2024, the Investigator responded to the Interested Party’s request for her file stating that:

Hello – Please be advised that I am not authorized to release the information you have requested. Thanks.
15. On May 6, 2024, the SDRCC appointed me from its rotating list of arbitrators to make a determination on the Interested Party’s appeal.

16. On May 7, 2024, a preliminary conference call was held in which the Interested Party indicated that it intends to bring an application for a Disclosure Order in order to obtain a copy the Investigator's file. The parties all agreed to a timetable for the Application for Disclosure.
17. On June 3, 2024, the Interested Party filed its submissions for its Application for Disclosure.
18. On June 10, 2024, the DDSO filed its submissions on the Interested Party's Application for the Disclosure of the Investigator's file.
19. On June 14, 2024, the Respondent filed his submission on the Interested Party's Application for the Disclosure of the Investigator's file.
20. On June 21, 2024, a short decision on the issue of disclosure was issued by the Arbitrator.
21. On July 2, 2024, the Arbitrator issued a reasoned written decision on the issue of disclosure, stating that:

The Interested Party's request for the entire Investigator's file is denied, but the Interested Party shall receive access to or a copy of the following in the Investigator's file if within the possession or control of the Director of Sanctions and Outcome and Deputy Director of Sanctions and Outcomes:

 - a. The Investigator's notes with redactions of notes regarding the confidential personal information of witnesses and matters other than this one,
 - b. Documents submitted by witnesses that they wished to have considered with a redaction regarding confidential personal information of witnesses, and
 - c. Written or video recorded witness statements with a redaction of confidential personal information. (hereinafter the 'Records').
22. On July 18, 2024, the DDSO submitted Appendix D from the Investigator which is comprised of further particulars of the allegations Statement of Allegations document dated April 18, 2023, the Statement of Additional Allegations document dated April 18, 2023 and the Statement of Additional Allegations dated July 12, 2023.
23. On August 6, 2024, the second preliminary meeting was held and the notes of the preliminary state that:

The OVA's position that the DDSO has not complied with Arbitrator Ogletree's Decision with Reasons on Disclosure dated July 2, 2024. Therefore, she puts forward a request for the Arbitrator to order a timeline for the disclosure of such materials that have not yet been produced by the DDSO, and are or should be within his "possession or control" pursuant to the Office of the Sport Integrity Commissioner (OSIC) Guidelines Regarding Investigations of Complaints.

The DDSO contends that he has complied with the Arbitrator's decision since he has shared with opposing counsel the materials from the investigator's file that are under the "possession or control" of the DDSO or DSO. He elaborates on the relationship between the DDSO, the OSIC and the investigator within the complaint management process and argues that these functions are independent and, what these other functions have decided or will agree to disclose is outside of his control.

After having heard from the OVA's counsel and the DDSO, Arbitrator Ogletree reminds the parties that his order is clear and that, although he denied the Interested Party's request for access to the entire investigator's file, he nevertheless ordered the disclosure of the investigator's notes, documents submitted by witnesses and witness statement records, with appropriate redactions of the confidential personal information of witnesses and vulnerable parties. The Arbitrator adds that he would view the following as examples of "confidential personal information": names of minors, contact information [...]

The Arbitrator reminds the parties that "control" is not defined in the Abuse-Free Sport policies and guidelines, but he notes that for interpretation purposes, one can refer to the Oxford Languages dictionary's definition of 'control' which is "the power to influence or direct people's behavior or the course of events". [...]

24. On August 8, 2024, the DDSO requested an extension to comply with the order stating:

As discussed on August 2, I undertook to communicate with OSIC in order to clarify their position on providing the contents of the Investigator's file to the DDSO. I understand that OSIC has reached out to the investigator who has not yet responded.

Because I am not in a position to disclose further documents, I ask our arbitrator to grant DDSO an additional week to confirm:

1. whether OSIC grants DDSO authorization to do disclose the documents for which our arbitrator has ordered disclosure.
2. Provide the documents should permission be granted, and provided that the Investigator is in possession of the documents and materials in question.

25. On August 9, 2024, the Interested Party responded to the request by stating:

- 1) The Panel direct the DDSO to promptly comply with the Order by providing disclosure of the Records, which Records have been and continue to be under his control;
- 2) To the extent that a barrier does exist between the OSIC and the DSO/DDSO, which is not admitted and expressly denied, the Panel extends the Order to include not only Records within the possession or control of the DSO/DDSO, but also Records within the possession or control of the OSIC.

26. On August 10, 2024, the DDSO followed up regarding its efforts to comply with the order stating:

Further to our call on August 2nd and the decision in the above-mentioned matter, I am writing to inform you of the DDSO's position in this matter.

As mentioned, the documents listed in the arbitrator's order are not within my possession or control and never were. The OSIC has not provided them to me. I have followed up with the OSIC team following our last call and these documents are not in their possession either. Given the OSIC's independence from the DSO or DDSO, it is not within my power to order them to provide the documents to me.

27. On August 23, 2024, the arbitrator granted the extension of the deadline to produce documents requested by the DDSO.

28. On August 29, 2024, the third preliminary meeting was held and the notes of the preliminary state that:

The OVA submits that there has been no compliance with the Disclosure Order, while this is refuted by the DDSO. The DDSO maintains that he has provided all materials that were within his “control” and indicates that he has forwarded a copy of Arbitrator Ogletree’s Disclosure Order to the Office of the Sport Integrity Commissioner (“OSIC”). Further arguments are then presented by both parties regarding the level of “influence” or “control” that the DDSO has or should have over the investigation file materials in accordance with the applicable Abuse-Free Sport policies and guidelines.

Arbitrator Ogletree inquires about whether it is possible for the DDSO to contact the investigator directly to obtain the relevant materials pursuant to the Disclosure Order. Mr. Kellerman contends that this is not an option, since the investigator’s services are retained by the OSIC, and not the DDSO. The OVA then presents additional arguments to the effect that, without proper disclosure as ordered by the Arbitrator, a challenge of a decision on violations or sanctions pursuant to Section 8.6 of the Canadian Sport Dispute Resolution Code (“Code”) cannot effectively be made by a party. Following Arbitrator Ogletree’s invitation to share his position, Mr. Walls mentions that, in his opinion, the DDSO has complied with the Disclosure Order within the limitations inherent to his role, and that the matter should now proceed forward.

29. On September 3, 2024, the Plaintiff filed its submissions requesting this Tribunal to enforce the Order and order the DDSO to:

The Interested Party requests that this Tribunal enforce the Order and order the DDSO to:

- a) Request copies of the Records from the OSIC and/or the Investigator, and deliver copies of the Records to the OVA;
- b) Instruct the OSIC to disclose copies of the Records to the OVA pursuant to the Order, and ensure that such disclosure is made;
- c) Instruct the Investigator to deliver copies of the Records to the OVA pursuant to the Order, and ensure that such disclosure is made; or
- d) Use any other means of asserting its control over the Records to ensure that disclosure is made to the OVA in accordance with the Order.

In the alternative, should this Tribunal find that the DDSO does not have control of the Records, which is not admitted and expressly denied, or that it would be more expedient for the Tribunal to exercise its powers under the Code, the Interested Party requests that:

- a) The Tribunal expand the Order to require OSIC to disclose the Records, pursuant to s. 8.8(c) of the Code;
- b) The Tribunal expand the Order to require the Investigator to disclose the Records, pursuant to s. 8.8(c) of the Code; and/or c) The Tribunal make a request for the Records from the OSIC or the Investigator in order to ascertain the facts, pursuant to s. 8.8(a) of the Code.

30. On September 10, 2024, the DDSO filed its submissions.

31. On October 3, 2024, the Respondent filed his submissions.

32. On October 10, 2024, the Interested Party filed its reply submissions.

Relevant Provisions

OSIC Guidelines

33. Section 4(e) of the OSIC Guidelines Regarding Investigation of Complaints (hereinafter the “OSIC Guidelines”) governing the gathering of evidence states that:

The Independent Investigator(s) will take reasonable steps to investigate the Complaint on a fair and neutral basis, in accordance with the Policies & Procedures. In this regard, the Independent Investigator(s) will:

- determine what process should be used to gather the evidence (e.g. forms of interview(s), written questions, etc), considering in particular the privacy, safety and well-being of the interviewee(s), which witnesses to interview, what evidence is relevant and the weight to give the evidence;
- align with Section 8 of the Canadian Sport Dispute Resolution Code regarding admissibility of evidence provided by minors and vulnerable persons;
- in accordance with the OSIC Confidentiality Policy, provide appropriate details of the allegations to the complainant and to the respondent and provide a reasonable opportunity for the complainant and the respondent to consider and review the allegations before an interview begins;
- take appropriate steps to preserve a record of all interview(s) conducted;
- collect potentially relevant evidence from third parties and other available sources.

34. Section 4(h) of the OSIC Guidelines governing an Investigation Report outlines that:

Following their review and analysis, the Independent Investigator will provide a written Investigation Report to the OSIC that should include in particular:

- The mandate of the Independent Investigator;
- An overview of the process used to investigate the allegations;
- A summary of the evidence obtained – and the resulting findings of facts;
- If applicable, identification of relevant mitigating or aggravating circumstances; and
- If applicable, identification of any systemic or other issues identified.

A summary Investigation Report shall also be produced by the Independent Investigator.

35. Section 4(i) of the OSIC Guidelines governing the review of the Investigation Report provides as follows:

The OSIC shall review the Investigation Report to validate that it contains the elements required under section 4.h. above and that the Investigation was completed in accordance with the Policies & Procedures. The OSIC may take further steps as required to address any procedural concerns with the Investigation. However, the OSIC will not review or make an assessment on the merits of the findings, observations and/or conclusions, as applicable, of the Independent Investigator(s).

36. Section 4(k) of the OSIC Guidelines outlines the challenge of a finding in an Investigation Report as follows:

Any party who objects, during an ongoing Investigation, to an Investigation step or procedure, should promptly advise the OSIC of their objection, and may also advise the Independent Investigator. Such objection during the Investigation does not constitute independent grounds for challenge before the Safeguarding Tribunal. Any challenge to the Investigation step or procedure must be made as part of a challenge to the Safeguarding Tribunal pursuant to Sections 8.6 and 8.7 of the Canadian Sport Dispute Resolution Code on the decision regarding whether a violation of the UCCMS and/or other relevant code/policy is substantiated once this is

communicated to the party by the DSO. The Safeguarding Tribunal shall make no award of costs.

37. Section 5 of the OSIC Guidelines governing record keeping states that:

The Independent Investigator(s) must provide a copy of the Investigation records to the OSIC. Records of all Investigations will be maintained by the OSIC indefinitely, and will be maintained by the Independent Investigator(s), in accordance with applicable professional regulations, and by the DSO, in accordance with applicable policies and procedures of the DSO. All records will be kept confidential to the extent possible, subject to the Policies and Procedures, and as required by law. The records will not be disclosed unless necessary to administer the Complaint, take other action in accordance with OSIC policies and procedures, or otherwise as required by law.

38. Section 1 of the Abuse-Free Sport Policy Regarding Violations and Sanctions lists the background of the policy stating that:

1. BACKGROUND As part of the Abuse-Free Sport Complaint Management Process, once a Complaint or Report has been submitted to the Office of the Sport Integrity Commissioner (the “OSIC”) and an Investigation has concluded, the Independent Investigator will provide a written Investigation Report to the OSIC. The OSIC will provide the Investigation Report to the Director of Sanctions and Outcomes of Abuse-Free Sport, or, where applicable, the Deputy Director of Sanctions and Outcomes (the “DSO”). Pursuant to its authority granted by Abuse-Free Sport, the DSO shall review the findings of the Investigation Report and is obligated to (i) make a determination of whether there has been a violation of the Universal Code of Conduct to Prevent and Address Maltreatment in Sport (“UCCMS”); and (ii) determine and impose the appropriate sanction, if any. For a complete list of definitions used in this Policy, please refer to the Inventory of Abuse-Free Sport Definitions at Appendix I. Other defined terms in this Policy have the meanings ascribed to them in the UCCMS.

SDRCC Code Sections

39. Subsection 1.1(kk) of the Code defines the meaning of term, Party, as follows:

- (kk) “Party” « Partie » means:
- (i) any Person or SO participating in a Resolution Facilitation, Mediation, Arbitration or Med/Arb;
 - (ii) any Affected Party;
 - (iii) any Person designated as a Party in the CADP;
 - (iv) any Person designated as a Party entitled to make submissions before the Safeguarding Tribunal or before the Appeal Tribunal as it pertains to a Safeguarding Panel decision; or
 - (v) the Government of Canada, in a dispute related to a decision of Sport Canada in the application of its Athlete Assistance Program (“AAP”).

40. Subsection 1.1(ll) of the Code defines the meaning of term, Person, as follows:

- (ll) “Person” « Personne » means a natural person or an organization or other entity.

41. Section 8.4 of the Code governs the submission by Parties before the Safeguarding Tribunal states:

The Parties entitled to make submissions before the Safeguarding Tribunal are:

- (a) On a challenge of a DSO decision on a violation or a sanction pursuant to Section 8.6 of this Code, the Respondent; an Interested Party and the DSO;
- (b) On a challenge of a DSO decision on Provisional Measures pursuant to Section 8.5 of this Code, the Respondent and the DSO. An Interested Party may observe the hearing if they elect to do so and may only provide, pursuant to Subsection 8.8(f), a written impact statement.

42. Section 8.6 of the Code governs the challenge of a violation and/or sanction provides:

- (a) A challenge of a DSO decision on a violation or a sanction can be made by the Respondent or an Interested Party;
- (b) When assessing a challenge of a DSO decision on a violation or a sanction, the Safeguarding Panel shall apply the standard of reasonableness.
- (c) Notwithstanding Section 3.10, a challenge of a DSO decision on a violation or a sanction will be heard by way of documentary review only, except as agreed otherwise by the Safeguarding Panel.
- (d) In the event the Party challenging a violation establishes bias on the part of the Person having investigated the allegation or the Person having decided on the violation, a hearing de novo must be held before the Safeguarding Panel on the matter of the violation.
- (e) A decision of the Safeguarding Panel on a violation shall be final and binding and shall not be appealable to the Appeal Tribunal.
- (f) The Safeguarding Panel shall have the power to increase, decrease or remove any sanction imposed by the DSO, with due consideration being given to the UCCMS. In particular, where the Safeguarding Panel determines that the Respondent has presented or presents a risk to the welfare of Minors or Vulnerable Persons, the Safeguarding Panel shall impose such sanction and/or risk management measures as it deems fair and just.

43. Section 8.7 of the Code governs the application of the challenge of a provisional measure, as follows:

A DSO decision on a violation or a sanction may only be challenged on the following grounds:

- (a) Error of law, limited to:
 - (i) a misinterpretation or misapplication of a section of the UCCMS or applicable Abuse Free Sport policies;
 - (ii) a misapplication of an applicable principle of general law;
 - (iii) acting without any evidence;
 - (iv) acting on a view of the facts which could not reasonably be entertained; or
 - (v) failing to consider all the evidence that is material to the decision being challenged.
- (b) Failure to observe the principles of natural justice. The extent of natural justice rights afforded to a Party will be less than that afforded in criminal proceedings, and may vary depending on the nature of the sanction that may apply. Where a sanction involves the loss of the opportunity to volunteer in sport, the extent of those rights shall be even lower, as determined by the Safeguarding Panel; and
- (c) New evidence, limited to instances when such evidence:
 - (i) could not, with the exercise of due diligence, have been discovered and presented during the investigation or adjudication of the allegations and prior to the decision being made;
 - (ii) is relevant to a material issue arising from the allegations;
 - (iii) is credible in the sense that it is reasonably capable of belief; and
 - (iv) has high probative value, in the sense that, if believed, it could, on its own, or when

considered with other evidence, have led to a different conclusion on the material issue.

44. Subsections 8.8(a) and (c) of the Code governs the conduct of the proceedings provides that:

(a) In addition to the powers afforded a Safeguarding Panel under Section 5.7, the Safeguarding Panel shall also have the powers to conduct such enquiries as appear necessary or expedient in order to ascertain the facts.

(c) The Safeguarding Panel shall make such order as it deems appropriate in relation to the disclosure of relevant documents and/or other materials in the possession or control of any of the Parties.

ARGUMENTS

Interested Party's Position:

45. The Interested Party submits, and the fact is, that the OSIC's own policies, specifically the OSIC Guidelines and the Violations and Sanctions Policy, establish that the Records have, at all times, been within the control of the DDSO.
46. The Records have, at all times, been in the control of the DDSO, and the DDSO has declined to comply with the Order and provide the Records, despite a legal obligation to do so.
47. DDSO's refusal to provide the Records is a breach of the Order, but that such breach can be cured by the Tribunal exercising its broad jurisdiction under Subsections 8.8(a) and 8.8(c) of the Code.
48. The DDSO alleges that a "barrier" exists between the DDSO and OSIC, such that the DDSO does not have "control" of the Records. However, the DDSO and Respondent has not provided any written policy, procedure, guideline, or other document that establishes any such barrier. The policies that do exist tell the opposite story. No such barrier, in fact, exists and that the OSIC and DSO are empowered to information in the ordinary course. Moreover, the Interested Party has illustrated through multiple Abuse-Free Sport policies that there is a regular exchange of information between the OSIC, the Investigator, and the DSO and DDSO.
49. To the extent that the DDSO believes that it does not have such control, the Interested Party submits that any such belief is not grounded in fact, given the express written policies and procedures of the OSIC and DSO. Any belief to the contrary does not dissipate the control that the DDSO does, in fact, have over the Records, nor does it defeat the Order. It is merely an attempt – conscious or otherwise – to obfuscate a clear requirement to comply with the Order.

50. The DSO and DDSO are entitled to and are expected to receive copies of the investigation records. These records are obviously within the control of the DSO and DDSO as the intended guardian. The DSO and DDSO are thus legally obliged to comply with the Order and provide disclosure without further delay.
51. Because the Records are within its control, the DSO and DDSO are obliged to exercise its control and make the disclosure required by the Order. Its continued failure to do so is not compliance with the Order, it is contempt of the Order.
52. The submissions of both the DDSO and Respondent attempt to obfuscate the issue at hand and conflate the terms “investigation report” and “investigation records”. For certainty, the Order does not contemplate disclosure of the Investigation Report, nor does the Interested Party dispute that the Investigation Report was already disclosed.
53. Pursuant to Section 5 of OSIC Guidelines, the DSO is obliged to maintain records of all investigations (i.e., not just the investigation report). “Records of all Investigations will be maintained by the OSIC indefinitely, and will be maintained by the Independent Investigator(s), in accordance with applicable professional regulations, and by the DSO, in accordance with applicable policies and procedures of the DSO.”
54. If the intention of Abuse-Free Sport was for the DSO to maintain only the Investigation Report, it would have stated as much in the OSIC Guidelines. It did not.
55. Given the foregoing: “records of all investigations” cannot simply be equated to “investigation report” because the OSIC Guidelines very clearly distinguish between these two different things. Different words have different meanings, and equating these terms is contrary to the presumption of consistent expression and leads to a result contrary to the intention of Abuse-Free Sport. The DSO is thus obliged to maintain not merely the investigation report, but “records of all investigations”.
56. The express wording of Section 5 of the OSIC Guidelines obligates the DSO to maintain records of all investigations necessarily means that the DSO is entitled to receive copies of and has control over these records. To accept otherwise renders Section 5 meaningless.
57. The Interested Party seeks for the DDSO to carry out its mandate, comply with the policies of Abuse-Free Sport, retrieve copies of the Records that it is supposed to have already, and make the disclosure legally required by the Order. Had the DDSO taken possession of the Records as it is obliged to do so under the OSIC Guidelines, such disclosure would have already occurred. The fact that it has not is evidence of non-compliance with the Order and nothing more.
58. The claim that OSIC has not communicated an Investigator’s file to the DSO and DDSO since the summer of 2022 does not mean that the Records are not within its control. Similarly, the claim that the DSO and DDSO have not been asked to communicate the contents of an Investigator’s file does not mean that the Records are

not within its control. They are within its control, and a refusal to exercise control is not the same as a lack of control.

59. The DSO and DDSO's authority to request records from OSIC is consistent with its duty to disclose such records in light of the Order. The DDSO's existing authority to request records brings those records under the control of the DSO and DDSO. This is what "control" means. The DSO and DDSO have a legal obligation to exercise their control and make the disclosure required by the Order because they have control of the Records. That Order has already been made and the time to debate its merits have passed. Compliance is not optional.
60. The Interested Party is not attempting to expand the scope or intent of the Order by "imposing an evidence-gathering obligation on the DSO/DDSO".
61. The request for an alternative remedy, namely that the Safeguarding Tribunal order disclosure directly from OSIC and/or the Investigator, is entirely reasonable given this Tribunal's broad powers to make such orders pursuant to Subsections 8.8(a) and (c) of the Canadian Sport Dispute Resolution Code ("Code").
62. Without access to the evidence, namely the investigation records that the DDSO has been ordered to disclose, parties have no opportunity to review the evidence, and, therefore, no meaningful opportunity to advance an appeal under Section 8.6 of the Code. This is clearly contrary to the intent of the Code, which contemplates parties advancing such challenges. Finding that the DDSO has no control over these records immunizes them from ever being turned over to parties and thus renders both Sections 8.6 and 8.7 of the Code meaningless.
63. The DDSO's and Respondent's positions ignore the intention and application of the Code, and so cannot stand. In contrast, the correct approach is to construe the Code with reasonable regard to its object and purpose and to interpret the Code in a manner that best ensures the attainment of such object and purpose. This purposive analysis is grounded in the principle that, insofar as the language of the text permits, interpretations that are consistent with or promote the legislative purpose should be adopted, while interpretations that defeat or undermine legislative purposes should be avoided.
64. It follows, therefore, that parties must be allowed to access and review the evidence, including the investigation records, to make challenges before the Tribunal and give effect to the Code. Any other interpretation would lead to an absurd result that could not have been intended by the Code, effectively cutting off parties' rights to challenge findings on violations and insulating the DSO's decisions on violation from review. To allow the DDSO and Respondent's interpretation to stand would have a chilling effect on legitimate challenges of violation decisions.

65. Any decision of the Tribunal that serves to read out Sections 8.6 and 8.7 is contrary to the Code and the intention of its drafters and would lead to an absurd result. It is also prejudicial to all future parties to all future appeals to the Safeguarding Tribunal. The Safeguarding Tribunal should enforce the Order and, if required, or in the alternative, expand or make any other order that it determines to be appropriate to ensure compliance with its Order and the Code. The Safeguarding Tribunal must take such action to ensure that parties operating under the Code are able to access the evidentiary record to advance if challenges to decisions of the DSO and, in doing so, give effect to Sections 8.6 and 8.7 of the Code. The stakes could not be higher for these or future parties.
66. The Interested Party requests that this Tribunal enforce the Order and order the DDSO to: a) Request copies of the Records from the OSIC and/or the Investigator, and deliver copies of the Records to the Interested Party; b) Instruct the OSIC to disclose copies of the Records to the Interested Party pursuant to the Order, and ensure that such disclosure is made; c) Instruct the Investigator to deliver copies of the Records to the Interested Party pursuant to the Order, and ensure that such disclosure is made; or d) Use any other means of asserting its control over the Records to ensure that disclosure is made to the Interested Party in accordance with the Order.
67. In the alternative, should this Tribunal find that the DDSO does not have control of the Records, which is not admitted and/or expressly denied, or that it would be more expedient for the Tribunal to exercise its powers under the Code, the Interested Party requests that: a) The Tribunal expand the Order to require OSIC to disclose the Records, pursuant to Subsections 8.8(c) of the Code; b) The Tribunal expand the Order to require the Investigator to disclose the Records, pursuant to Subsection 8.8(c) of the Code; and/or c) The Tribunal make a request for the Records from the OSIC or the Investigator in order to ascertain the facts, pursuant to Subsection 8.8(a) of the Code.

DDSO's Position

68. The Disclosure Order creates a nuance in that it recognizes that DDSO cannot communicate what it doesn't have in its possession. But because the Arbitrator understood that possession should not be the sole criteria to determine whether or not documents are available to the DDSO, the Arbitrator added that the documents that DSO controls should also be communicated to the parties.
69. DDSO does not have the documents that are requested by the Interested Party. The reason for that is simple: since the program was created in the summer of 2022, OSIC has never communicated the Investigator's file to the DSO or DDSO.
70. The DSO and DDSO have never been asked to communicate the entire content of an Investigator's file.

71. The DSO does not receive the Investigator's file. The DSO only receives the Investigation Report and the exhibits or appendices that the investigator joins to the Report. This is not a random occurrence: it is rooted in Abuse-Free Sport's guidelines.
72. The OSIC Guidelines and policy both stipulate that OSIC sends the "Investigation Report" to DSO. The Investigation Report is not to be confused with the Investigator's file, or the Investigator's records.
73. Section 5 of the OSIC Guidelines states that the Investigator must provide a copy of the Investigation records to the OSIC. The Guidelines do not say that: a. the Investigator must provide a copy of the records to the DSO and b. that the OSIC must provide a copy of the records to the DSO
74. The "records of all investigations" that DSO is to maintain is governed by the DSO procedures and policies. The only documents that the DSO is meant to receive under the program guidelines is the Investigation Report and its related appendices. Those are what form part of the DSO's investigation records. The DSO has never in over two (2) years received additional documents than these from OSIC or the Investigator.
75. If the Abuse-Free Sport had wanted the DSO to receive the entire Investigation file or the records of all investigations, the Guidelines would have said so. They do not.
76. The parties cannot expand the mandate or the powers of the DSO. The DDSO respectfully submits that the Safeguarding Tribunal cannot redesign the powers of the DDSO either.
77. The DSO and DDSO relies on the Investigation Report to determine whether a violation occurred and if sanctions under the UCCMS are warranted.
78. The appeal of the DDSO's Decision on violations and sanctions does not afford a party to request that the Investigator disclose their entire file.
79. The Tribunal cannot give control over documents to DSO that the program specifically left out of DSO's control.
80. That logic is framed by policies that govern DSO's decision-making process which grant DSO access to the documents that are deemed necessary to make an informed decision after the Investigator has completed their Investigation. DSO is not entitled to look behind the curtain of the Investigator's process because the program was not designed as such and the policies and guidelines applicable to DSO do not afford such access.

Respondent's Position:

81. The DDSO and DSO do not have unrestricted access to Investigator's file. Whether or not the Interested Party may disagree with this prescribed restriction of the Abuse-Free Sport governing scheme, the DDSO and DSO cannot disregard or override that condition and demand that the OSIC or an investigator provides full access and custody over the investigator's materials. The DDSO cannot logically defy the Arbitrator's order that recognizes that the DDSO may not have possession of the relevant records and when the DDSO does not, in fact, possess such records.
82. The Interested Party's reliance on the DSO and DDSO's ability to provide final settlement agreements to OSIC after mediation is flawed because it has no bearing the DDSO and DSO's purported obligation to release the entire investigation record to the Interested Party even if the DDSO and DSO possessed all such records.
83. The Interested Party is attempting to unduly expand the scope and intent of the arbitrator's order by imposing an evidence-gathering obligation on the DSO, when the arbitrator's order merely required the DSO and DDSO's disclosure of records that may be in their possession.
84. The Interested Party fails to recognize the legal distinction between the DSO and DDSO's roles in relation to the OSIC.
85. Part of the confusion on this appeal arises from the fact that the Code does not provide a definition for the investigation report. However, Section 4(h) of the OSIC Guidelines does define Investigation Report.
86. Under the governing Abuse-Free Sport process, the DSO and DDSO do not receive the totality of all investigative materials from the investigator, and that the OSIC does receive these materials from investigators. The Interested Party is requesting the Tribunal's enforcement of a remedy against the DDSO that does not have the possession over such materials nor the legal entitlement to receive them.
87. The Interested Party has not provided a full contextual analysis justifying why beyond any purported failings in the investigation process, or in the Investigator's findings from the summary report, the Interested Party is still entitled to the entire investigative record.
88. The Tribunal should reject the Interested Party's alternative requested remedy because the OSIC and the investigator should not be subjected and subsumed into any decisions arising from an order that did not implicate them. Both OSIC and the Investigator were not parties to the underlying proceedings that gave rise to this appeal, and have not been given formal notice or the opportunity to make submissions regarding the requested

disclosure. The Interested Party's requested remedy is out of the scope of this appeal and the Tribunal does not have the jurisdiction to entertain it.

DECISION

89. The validity of the Interested Party's request to find that the DSO and DDSO has failed to comply with the Disclosure Order and if not order the OSIC or Investigator to provide the records depends on: a) the records are within the control of the DSO and DDSO and b) whether this panel has the powers pursuant to Subsections 8.8(a) and (c) of the Code to order the OSIC or Investigator to provide the records.

A. Are the Records within the control of the DSO and DDSO?

90. The Records are not within the control of the DSO and DDSO. The Section 5 of the OSIC Guidelines governs record keeping. The Interested Party states that the DSO pursuant to Section 5 of the OSIC Guidelines is obliged to maintain records of all investigations, not just the investigation report and its related appendices. Further, this means that the DSO is entitled and expected to receive copies of and has control over these records. The DDSO and Respondent did not provide any written policy, procedure, guideline, or other document that establishes any barrier between the DDSO and OSIC that prevents the DDSO from having control of the Records.
91. DDSO argues it has not had the type of documents that are requested by the Interested Party since the program was created over two (2) years ago, the OSIC has never communicated the Investigator's file to the DSO or DDSO. In fact, the DSO only receives the Investigation Report and the exhibits or appendices that the Investigator joins to the Report. Further, the only documents that the DSO is meant to receive or has actually received over the past 2 years under the OSIC Guidelines is the Investigation Report and its related appendices.
92. In this matter, the DDSO denied having the Records and that it has not had the type of records ordered in any matter in over 2 years more than the Investigation Report and appendices. On August 8, 2024, the DDSO represented to this Panel its efforts to communicate with the OSIC about providing the Records and the OSIC's response that it reached out to the Investigator. The DDSO even requested an extension so it could comply with the Order. The DDSO represented that the OSIC had not provided the Records to him. In fact, the DDSO stated that the OSIC team informed him that "these [Records] are not in their possession either." If this is true, it is clear that both OSIC and DDSO have expected only to receive the Investigator's Report and its related appendices because neither have more than this case pursuant to Section 5 of OSIC Guidelines. In addition, the DDSO added that it is not in the powers of the DSO or DDSO to order the OSIC to provide the [Records] to him.

93. In the third preliminary meeting, this Panel asked the DDSO whether it was possible for the DDSO to contact the Investigator directly to obtain the relevant Records pursuant to the Disclosure Order. The DDSO responded that this is not an option, since the Investigator's services are retained by the OSIC, and not the DDSO. The Interested Party even submitted an email exchange between it and the Investigator in which the Investigator refused to provide it with a copy of her file.
94. The DDSO made reasonable efforts to comply with the Disclosure Order. In doing so, the DDSO has complied with the Disclosure Order.

B. Whether this panel has the powers pursuant to Subsections 8.8(a) and (c) of the Code to order the OSIC or Investigator to provide the records?

95. This Panel does not have the powers pursuant to Subsection 8.8(a) and (c) of the Code to order the OSIC or Investigator to provide the relevant records. The Interested Party requests that this Panel expand the Order to require the OSIC or the Investigator to disclose the Records pursuant to Subsection 8.8(c) of the Code. In the alternative, Interested Party requests that the Panel make a request for the Records from the OSIC or the Investigator in order to ascertain the facts pursuant to Subsection 8.8(a) of the Code.
96. Subsection 8.8(c) of the Code is limited by Subsection 1.1(kk) of the Code which defines the meaning of the term Party. Pursuant to Subsections 1.1 (kk)(i)-(v) neither the OSIC nor the Investigator meet any of the definitions for being considered a Party in this case.
97. Subsection 8.8(a) of the Code provides this Panel with the power to make inquiries as appear necessary or expedient in order to ascertain the facts. However, there is a distinction between having the power to make an inquiry and ordering the production of Records which Subsections 8.8(a) and (c) of the Code establish. Further, this Panel utilized Subsection 8.8(a) of the Code when it inquired with the DDSO at the third preliminary meeting about whether it is possible for the DDSO to contact the Investigator directly to obtain the relevant materials pursuant to the Disclosure Order. In addition, this Panel at the second preliminary meeting clarified the definition of term "control" with the Parties which resulted in the DDSO making inquiries with the OSIC and, in turn, the OSIC making an inquiry with the Investigator. In contrast, this Panel utilized Subsection 8.8(c) of the Code when it made its previous Disclosure Order.

AWARD

98. The Disclosure Order has been enforced and Interested Party's requests are denied.

Signed in Detroit, Michigan, United States of America this 24th of October, 2024.

Aaron Ogletree, Arbitrator