

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

Citation: Keith v. Equestrian Canada, 2024 CASDRC 57

NO: SDRCC 24-0743

CHERYL KEITH and [REDACTED]

(CLAIMANTS/APPELANTS)

AND

EQUESTRIAN CANADA

(RESPONDENT)

AND

[REDACTED]

(INTERESTED PARTY/COMPLAINANT)

**REASONS FOR DECISION ON JURISDICTION
AND WHETHER TO ORDER A HEARING *DE NOVO***

A. BACKGROUND

1. The Claimants co-own a farm where they are in the business of coaching riders and boarding horses for clients. They are license holders and registered members of Equestrian Canada.
2. The Interested Party is a former working student at the farm. She made a complaint concerning the Claimants to Equestrian Canada on May 16, 2022 (the “**Complaint**”). She alleged behavior by the Claimants while she was working and living at the farm that was contrary to Equestrian Canada's Code of Conduct and Ethics effective March 22, 2020 (“**Code of Conduct and Ethics**”). She was a minor at the time. The majority of the alleged conduct took place between August 2019 and February 2021.

3. Pursuant to Equestrian Canada's Discipline, Complaint and Appeal Policy in effect at the time (the "**2021 Policy**"), the Complaint was lodged with the Equestrian Canada's Complaint Manager. The Complaint Manager was appointed by the President of Equestrian Canada and, among other things, is responsible for overseeing the complaint, discipline and appeal processes set out in the 2021 Policy.

4. After receiving the Complaint, the Complaint Manager appointed an investigator to investigate the allegations and issue a report (the "**Investigator**"). While the investigation was ongoing, Equestrian Canada replaced its 2021 Policy with a new Discipline, Complaint and Appeal Policy (the "**2023 Policy**").

5. After receipt of the Investigator's report, the Complaint Manager appointed a Hearing Panel. The Hearing Panel issued two decisions: one on July 5, 2024, concerning the merits of the Complaint ("**Merits Decision**"), and another on August 8, 2024, concerning sanctions ("**Sanctions Decision**").

6. As provided under both the 2021 Policy and the 2023 Policy, the Claimants applied to the Complaint Manager to appeal both decisions. Given the time between the Merits Decision and the Sanctions Decision, the Claimants made two separate applications to ensure their timeliness under the Policies. The Complaint Manager denied both applications to appeal.

B. PROCEDURAL HISTORY BEFORE THE SDRCC

7. The Claimants lodged appeals of the Merits Decision, the Sanctions Decision and the decision of the Complaint Manager to deny their application to appeal the Merits Decision to the SDRCC. Equestrian Canada objected to the jurisdiction of the SDRCC to hear these appeals on the basis that no such appeals were provided for under the 2021 Policy.

8. On August 26, 2024, with the agreement of the Claimants and Equestrian Canada, I was appointed by the SDRCC to hear the appeals. An initial procedural conference was held on August 27, 2024.

9. The Claimants and Equestrian Canada agreed that the jurisdiction of the SDRCC should be decided as a preliminary issue and that they would provide written submissions on the issue in

accordance with an agreed timetable. Those submissions were completed on September 13, 2024. I asked the Parties questions in writing and they provided written responses. Submissions on the issue of jurisdiction closed on September 18, 2024.

10. On September 17, 2024, the Interested Party applied to intervene in the proceedings.

11. On September 25, 2024, I issued a short decision holding that the SDRCC had the jurisdiction to hear the appeals. My reasons for that decision are set out in section D below.

12. On October 21, 2024, with the agreement of all Parties I issued a consent order granting the Claimants' application for conservatory measures on the terms set out therein.

13. At a procedural conference following the issuance of the short decision on jurisdiction, the Parties agreed that the next issue to be determined after jurisdiction was whether the appeals should proceed as a hearing *de novo*, that is, by way of a fresh hearing, instead of a review. The Parties also agreed on a schedule for written submissions. Those submissions were lengthy and were completed on November 15, 2024. The Interested Party did not make written submissions. The Claimants requested an opportunity to make oral submissions which was granted. On November 22, 2024, the Claimants, Equestrian Canada and the Interested Party all made oral submissions. For the reasons set out below in section E, I have decided that the appeals will proceed as a hearing *de novo* on certain terms.

C. APPLICABLE LAW AND RULES

14. These appeals to the SDRCC are governed by the Canadian Sport Dispute Resolution Code, effective October 1, 2023 (the "**Code**"). The Code provides that the applicable law is the law of the Province of Ontario (Section 5.1).

D. JURISDICTIONAL ISSUE

15. The issue to be determined is if the 2021 Policy does not expressly provide for these appeals to the SDRCC, does the SDRCC have jurisdiction over them.

(a) Potential Sources of the SDRCC's Jurisdiction

(i) The Code and PASA

16. The Code states it applies to a "Sports-Related Dispute" where the SDRCC has jurisdiction to resolve it. There is no issue that these appeals fall within the meaning of a Sports-Related Dispute.

17. The Code sets out the bases on which SDRCC's jurisdiction to resolve a dispute can be established. Section 2.1(b) provides:

This Code applies to a Sports-Related Dispute where the SDRCC has jurisdiction to resolve the dispute. This Code will therefore apply to any Sports-Related Dispute:

(i) in relation to which an agreement exists between the Parties to bring the dispute to the SDRCC, whether by virtue of a policy, contract clause or other form of agreement binding the Parties;

(ii) that the Parties are required to resolve through the SDRCC; or

(iii) that the Parties and the SDRCC agree to have resolved using this Code.

18. Jurisdiction over a Sports-Related Dispute can, therefore, be established by agreement (section 2.1(b)(i) or (iii)) or requirement (section 2.1(b)(ii)).

19. In *Cricket Canada v. Alberta Cricket Council*, 2020 ONSC 3776 ("**Cricket Canada**") the Ontario Court discussed the establishment of jurisdiction by "requirement". The Court found that the SDRCC had jurisdiction over a dispute concerning whether an organization should be a member of Cricket Canada by virtue of the *Physical Activity and Sport Act*, SC 2003, c 2 ("**PASA**"), section 10 which provides:

10 (1) The mission of the Centre is to provide to the sport community

(a) a national alternative dispute resolution service for sport disputes; and

(b) expertise and assistance regarding alternative dispute resolution.

(2) For the purposes of subsection (1), a sport dispute includes disputes among sport organizations and disputes between a sport organization and persons affiliated with it, including its members. [Emphasis added.]

20. The Court in *Cricket Canada* found that section 10 was broad enough to include the dispute in question because section 10 must be interpreted in a way that furthers the stated purpose of PASA.

21. Section 4 of PASA sets out the purpose of the Act as follows:

4 (1) The Government of Canada’s policy regarding sport is founded on the highest ethical standards and values, including doping-free sport, the treatment of all persons with fairness and respect, the full and fair participation of all persons in sport and the fair, equitable, transparent and timely resolution of disputes in sport. [Emphasis added].

22. The Court concluded at paragraph 27:

The Centre’s exercise of jurisdiction over a dispute which determines whether a particular organization should or should not be a member of Cricket Canada is consistent with the overall purpose for which the Centre was created namely to ensure the “full and fair participation of all persons in sport and the fair, equitable, transparent and timely resolution of disputes” relating to the participation of a person in a sports organization.

23. Given the conclusion that section 10 of PASA is broad enough to establish jurisdiction for the SDRCC over a dispute as to whether an organization should be a member of Cricket Canada, it must also establish jurisdiction for the SDRCC in the express circumstances set out in the section. Those circumstances include a sport dispute between a sport organization and its members. In the language of section 2.1(b) of the Code, SDRCC’s jurisdiction over a dispute between a sport organization and its members is “required” by section 10 of PASA.

(ii) Government of Canada Funding Requirements for National Sport Organizations

24. There are potential sources of jurisdiction for the SDRCC based on agreement in this case. One is the federal government’s requirements or “Contribution Guidelines” for National Sport Organizations (“**NSOs**”) such as Equestrian Canada if they agree to receive government funding through its Sport Support Program. They provide:

If your organization receives support from us, you must:

- endorse the principles of the Canadian Policy against Doping in Sport and adopt the Canadian Anti-Doping Program (2021).
- have discipline and appeal procedures in place that include access to an independent dispute resolution through the Sport Dispute Resolution Centre of Canada (SDRCC).

- be a Program signatory of the Abuse-Free Sport, including the services of Office of the Sport Integrity Commissioner (OSIC) to provide individuals affiliated with the NSO with access to an independent third party to address allegations of maltreatment.
- ensure that individuals affiliated with the NSO complete appropriate mandatory training on preventing and addressing maltreatment.¹

(iii) Contribution Agreement

25. Another potential source of jurisdiction by agreement in this case is the Contribution Agreement between His Majesty the King in Right of Canada and Equestrian Canada (“**Contribution Agreement**”). The Contribution Agreement states that it provides funding for programming and “covers the activities described in Annex A of this Agreement for the period commencing on April 1, 2024 and ending on March 31, 2025”. Annex A was not produced.

26. The Contribution Agreement states the following at section 5.2:

5.2.1 The Recipient [Equestrian Canada] hereby agrees and commits to providing its athletes the right to appeal any decisions regarding (a) the implementation and delivery of the Recipient’s national team programs; (b) their nomination or non-nomination to the Athlete Assistance Program; or (c) the selection of athletes to a team representing Canada at international multisport events, to the Sport Dispute Resolution Centre of Canada, in accordance with the rules and procedures of the Canadian Sport Dispute Resolution Code, once its internal appeal process has been exhausted.

5.2.2 Carding disputes shall be governed by Sport Canada's Athlete Assistance Program policies and procedures.

5.2.3 The Recipient hereby agrees and commits to providing its national team coaches the right to appeal sport-related decisions to the Sport Dispute Resolution Centre of Canada in accordance with the rules and procedures of the Canadian Sport Dispute Resolution Code, once its internal appeal process has been exhausted.

5.2.4 The Recipient undertakes to amend their bylaws and policies, as may be needed, in a manner consistent with the commitments undertaken in articles 5.2.1, 5.2.2 and 5.2.3. [Emphasis added.]

¹ <https://www.canada.ca/en/canadian-heritage/services/funding/sport-support/national-organization/application-guidelines.html>.

(b) Jurisdictional Challenge and Analysis.

(i) Jurisdictional Challenge

27. Equestrian Canada argues that “the facts of this case do not justify the SDRCC assuming jurisdiction” over this dispute pursuant to section 2.1(b) of the SDRCC Code and/or PASA.

28. It asserts that the Contribution Agreement is the source of the SDRCC’s jurisdiction in this case and that it only requires Equestrian Canada to provide appeals to the SDRCC for its athletes and national team coaches (see the underlined portions of the excerpt from the Contribution Agreement above). As the Claimants are neither of these, Equestrian Canada argues that they have no right of appeal to the SDRCC.

29. Equestrian Canada further contends that other SDRCC decisions such as *Devlin v. Karate Canada*, SDRCC 22-0566 (“**Devlin**”), *Vachon v Canada Snowboard*, SDRCC 15-0267 (“**Vachon**”) and *Lengkeek v Canada Snowboard*, SDRCC 15-0269 (“**Lengkeek**”), which address the SDRCC’s jurisdiction, are distinguishable and are not binding in any event.

30. Specifically, Equestrian Canada argues that the reasoning in *Devlin*, where the Arbitrator found the SDRCC had jurisdiction to hear an appeal where none was provided in the appeal policy, was based on *Vachon*. In *Vachon* the result turned on whether, in light of Canada Snowboard’s agreement to Sport Canada’s “Contribution Guidelines”, Canada Snowboard could adopt an appeal policy that deprived an athlete of the right to be heard by the SDRCC. The Arbitrator in *Vachon* found it could not. A similar conclusion was reached by the Arbitrator in *Lengkeek v Canada Snowboard* SDRCC 15-0269 (“**Lengkeek**”).

31. Equestrian Canada argues that unlike in the cases of *Vachon* and *Lengkeek*, here I have the benefit of the actual Contribution Agreement between Equestrian Canada and Sport Canada. It contends that, as a contract, it is the Contribution Agreement that is legally binding and not the Contribution Guidelines. The Contribution Agreement requires only that national team program athletes and coaches be given the right to appeal sports-related decisions to the SDRCC.

32. Equestrian Canada cautions that the SDRCC’s jurisdiction should not be inferred or presumed and that the SDRCC does not have any inherent jurisdiction.

(ii) Analysis

33. In my view, the SDRCC has jurisdiction over these appeals.

34. Section 2.1(b) sets out alternative sources of jurisdiction over Sports-Related Disputes based on either agreement or requirement. I find that the SDRCCS's jurisdiction in this case is "required". The "requirement" is found in section 10 of PASA which establishes the jurisdiction of the SDRCC over sport disputes between a sport organization and its members based on the Ontario Court's reasoning in *Cricket Canada*. As a result, the SDRCC has jurisdiction over the appeals pursuant to section 2.1b(ii) of the Code.

35. This conclusion is consistent with the Arbitrator's decision in *Devlin* which I interpret as also finding jurisdiction pursuant to section 2.1(b)(ii) based on PASA as interpreted in *Cricket Canada*. At paragraph 61 the Arbitrator concluded:

I find that section 2.1(b)(ii) of the Code grants jurisdiction to the SDRCC over this Sports-Related Dispute and the parties are required to resolve this through the SDRCC, having exhausted all internal dispute resolution procedures provided by the rules of the Respondent. I conclude this based on the logic in Smerek, Gao and Cricket Canada. The SDRCC exists to provide a fair, equitable, transparent and timely resolution of disputes in sport. Its mission is to provide the sport community with a national dispute resolution service for sport disputes. [Emphasis added]

36. As an aside, I note the references in the second underlined sentence to the decisions in *Smerek* and *Gao* concerned a different issue being whether the dispute in that case constituted a Sports-Related Dispute.

37. While *Devlin* also discusses *Vachon* and *Lengkeek*, I do not interpret *Devlin* as finding jurisdiction based on the reasoning in those cases which both pre-dated *Cricket Canada* and focused on jurisdiction based on agreement. The agreement in question in those cases was the NSO's agreement to accept funding pursuant to the Contribution Guidelines that required providing access to dispute resolution through the SDRCC.

38. Equestrian Canada's arguments based on the Contribution Agreement fail to consider the distinct sources of jurisdiction under section 2.1(b). Once jurisdiction from one source is established, it is unnecessary to evaluate the other. Put differently, once jurisdiction is established under PASA, as it is here, it is unnecessary to consider the Contribution Guidelines or

the Contribution Agreement to establish jurisdiction. For the same reason, it is unnecessary to consider any of the other arguments made by the Claimants in support of jurisdiction based on the 2021 Policy and the actions of the Complaint Manager.

E. WHETHER TO HOLD A HEARING *DE NOVO*

(a) Procedural History Before the Hearing Panel

39. In January 2024, the adjudicator who decided this matter was appointed by the Complaint Manager. The adjudicator is referred to under the 2021 Policy as a “Hearing Panel”.

40. On April 8, 2024, without holding a procedural conference or consulting with the Parties, the Hearing Panel issued a Procedural Order (“**Procedural Order No. 1**”). In Procedural Order No. 1, the Hearing Panel explained that “section 38 of the Policy” did not require a procedural conference and “given the procedure I have chosen below, I find that one is not necessary here”.

41. The Hearing Panel’s chosen procedure was “a review” of the Investigator’s report with a combination of written and oral submissions from the Parties. He stated:

Pursuant to section 43 of the Policy, I will rely upon the findings in the Report, subject to any party successfully demonstrating that the Report should not be relied upon...

A party who does not agree with the findings of the Report can demonstrate that the Report should not be relied upon in one of three ways:

- (a) That there was a significant flaw in the process followed by the Investigator,
- (b) That the Report contains conclusions which are not consistent with the facts as found by the Investigator, or
- (c) That the Investigator's determinations that there were violations of the Code of Conduct and Ethics were significantly flawed.

The parties are invited to provide written submissions, limited to ten pages double spaced, addressing those three issues...

If a party can successfully demonstrate that the Report, or a part of the Report, should not be relied upon, then I shall determine to what extent the Report will be accepted as evidence and to what extent a witness or party may be required to give fresh evidence at a subsequent hearing. If a party is not successful, then I will rely upon the findings of the Report.

42. The Hearing Panel gave the following reason for proceeding as he did:

...there has been a significant amount of work done investigating the allegations in the Complaint. It would not be consistent with the purposes of the Policy to automatically start a fresh hearing and conduct numerous interviews. Such a process would not be fair or expeditious to the parties as a fresh hearing may be unnecessary.

43. The Claimants objected to the process established by the Hearing Panel but both they and Equestrian Canada provided written and oral submissions to the Hearing Panel on the Investigator's report. On July 5, 2024, the Hearing Panel issued the Merits Decision. In it the Hearing Panel decided to accept the findings in the Investigator's report.

44. As set out in the Merits Decision, the Claimants had argued that the report should not be relied upon by the Hearing Panel for the following reasons:

- (a) The Investigator improperly collected and weighed evidence;
- (b) The Investigator showed bias in how she weighed evidence;
- (c) The Investigator failed to interview key witnesses for the Claimants;
- (d) The Claimants were not given an opportunity to respond to new evidence; and
- (e) The Investigator ignored many of the allegations.

45. The Hearing Panel reviewed these grounds and concluded that, although the Claimants raised some concerns with the Investigator's report, they had not met the burden set out in Procedural Order No 1. In the result, the Hearing Panel accepted the findings that the Claimants were in breach of the Conduct and Ethics Code.

46. After providing the Parties an opportunity to make further written submissions, the Hearing Panel issued the Sanctions Decision on August 8, 2024. In the Sanctions Decision, the Hearing Panel imposed a number of sanctions against the Claimants including, in the case of Cheryl Keith, a suspension from all Equestrian Canada activities for 2 years and 6 months and, in the case of [redacted], a suspension for one year.

47. The Claimants applied to the Complaint Manager to appeal the Merits Decision and the Sanctions Decision under the 2021 Policy (and 2023 Policy). The Complaint Manager dismissed those applications.

(b) Positions of the Parties

48. The Claimants take the position that the appeals should proceed as a hearing *de novo* to remedy the breaches of procedural fairness. They contend (1) that the Investigator's report is "fundamentally flawed and biased"; and (2) that the Hearing Panel "determined that the [Claimants] had no right to respond to the specific evidence that arose in the course of the investigation, had no right to cross examine witnesses and had no right to present witness evidence that was not canvassed by the Investigator". They argue a hearing *de novo* is required by the Code. Alternatively, they argue I should exercise my discretion under the Code to order a hearing *de novo*.

49. Equestrian Canada takes the position that the appeals should proceed as a review of the merits and not as a hearing *de novo*. It argues:

No violations of procedural fairness or natural justice occurred that justify a full new hearing into a complaint that was made in 2022 about allegations of prior abuse. The Claimants have not demonstrated that their rights were violated.

50. Equestrian Canada submits that the appeals should instead proceed on the basis of a review for reasonableness.

51. I address below whether a hearing *de novo* is required by the Code in section (c); whether there have been breaches of procedural fairness in section (d); and, based on the breaches of procedural fairness found, whether there should there be a hearing *de novo* in section (e).

(c) Is a Hearing *de novo* Required by the Code?

52. Section 6.11 of the Code is entitled "Scope of Panel's Review". Subsection 6.11(b) concerns hearings *de novo*. The first sentence of subsection 6.11(b) provides the Panel with the discretion to hold a hearing *de novo*. The balance of the subsection sets out when a Panel is required to do so. The subsection states:

6.11(b) The Panel shall have the full power to conduct a hearing *de novo*. The hearing must be *de novo* where:

(i) the [Sport Organization] did not conduct its internal appeal process or denied the Claimant a right of appeal without having heard the case on its merits; or

(ii) if the case is deemed urgent, the Panel determines that errors occurred such that the internal appeal policy was not followed or there was a breach of natural justice.

53. The Claimants argue that a *de novo* hearing is required in this case because their right of appeal was denied without their case being heard on the merits as set out in subsection 6.11(b)(i). They assert that their appeals were improperly dismissed by the Complaint Manager and so they could not be heard by an Appeal Panel as is provided for under the 2021 Code. Further, the Complaint Manager could not assess the substantive appeal himself under the 2021 Code. As a result, they contend that their appeals were denied without being heard on their merits, by either the Complaint Manager or an Appeal Panel and so a hearing *de novo* is required under subsection 6.11(b)(i).

54. In response, Equestrian Canada argues that the Claimants were not denied a right of appeal. Instead, the Claimants' appeals did not pass the screening phase that is provided under the 2021 Policy for an appeal to be heard by the Appeal Panel. For a hearing *de novo* to be required, the Claimants must have been denied the right of appeal outright, which did not happen here.

55. In my view, this argument misinterprets the phrase "denied a right of appeal without having heard the case on its merits". The provision requires that the case itself be denied a hearing on the merits, not just the appeal. To interpret it otherwise ignores the use of the word "case" as opposed to "appeal" a second time in the phrase.

56. This is not a situation where there was no consideration of the merits of the case, even given the Claimants assertions of flaws in the process. Therefore, I find a hearing *de novo* is not required by subsection 6.11(b)(i). Instead, whether to order a hearing *de novo* is a matter of discretion.

(d) Alleged Breaches of Procedural Fairness

(i) Applicable Law

57. In their written submissions discussing whether there were breaches of procedural fairness in this case, the Parties agreed that administrative tribunals are subject to a general duty of fairness and that the content of the duty can vary based on the factors set out in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817 (“*Baker*”). The Parties initially approached the issue of whether there were breaches of the duty of fairness in this case by applying the factors identified in *Baker*.

58. However, the Parties also agreed that the Hearing Panel is not a statutory or administrative tribunal and that the process under the 2021 Policy is consensual. Given this, I asked for further submissions on the appropriate approach to determining the required standard of procedural fairness in assessing whether there has been a breach.

59. I have concluded the applicable standard in this case is not the one applied to administrative tribunals. Instead, the applicable standard is the one provided for in the *Arbitration Act*, 1991, SO 1991, c 17 (“*Arbitration Act*”) as the *Arbitration Act* applies to consensual dispute resolution processes like this one (see section 1 of the *Arbitration Act* and the definition of “arbitration agreement” and section 2 entitled “Arbitrations conducted under agreements”).

60. Section 19 of the *Arbitration Act* sets out the following requirements in terms of procedural fairness:

19 (1) In an arbitration, the parties shall be treated equally and fairly.

(2) Each party shall be given an opportunity to present a case and to respond to the other parties’ cases.

61. The Court in *The Tire Pit Inc. v. Augend 6285 Yonge Village Properties Ltd.*, 2022 ONSC 6763, (“*The Tire Pit*”) at paragraph 23 describes the duty of fairness in the context of an arbitration as follows:

...The obligation to treat parties “equally and fairly” in both ss. 19(1) and 46(1)6 of the *Act* incorporates the requirements of natural justice and procedural fairness. In the context of these provisions, procedural fairness generally refers to the right to be heard and the right to an independent and impartial hearing. It is important

to remember that the duty of fairness is concerned with ensuring that adjudicators act fairly in the course of making decisions, not with the fairness of the actual decisions they make. [Citations omitted.]

62. I will assess the alleged breaches with these principles in mind.

(ii) Adopting the Investigator’s report was not permitted under the 2021 Policy

63. The Claimants argue that nothing in the 2021 Policy provides that the Hearing Panel “can abandon the hearing process and elect to rely solely on the findings of the investigation report” and that the Hearing Panel incorrectly relied on the 2023 Policy when it purported to do so.

64. In response, Equestrian Canada argues that this issue was not raised before the Hearing Panel and, in any event, the Hearing Panel was “entirely within its authority” to rely on “this documentary evidence exclusively”.

65. The Claimants respond that the Hearing Panel’s reliance on the incorrect policy only became apparent with the issuance of the Merits Decision. They note that at the May 9, 2024 hearing, the Hearing Panel specifically stated that the 2021 Policy would govern the proceedings.

66. In my view, it is clear that the Hearing Panel mistakenly relied on sections of the 2023 Policy instead of the 2021 Policy². Specifically, in Procedural Order No. 1, the Hearing Panel cited section 43 of the 2023 Policy as authority for relying solely on the findings in the report to make its decision. Section 43 of the 2023 Policy provides: “The Hearing Panel may rely upon the findings of the investigation report”. No similar provision appears in the 2021 Policy.

67. That said, the Hearing Panel has a broad discretion under the 2021 Policy as to how it conducts a hearing process. For example, section 31 of the 2021 Policy provides “[t]he Hearing Panel is responsible for the structure, conduct, and timing of the Hearing” and section 36 of the 2021 Policy provides “the Hearing Panel will determine how the Hearing will be conducted (such as through presentation of witnesses, documentary evidence, or a combination of the two)”.

68. The Hearing Panel’s broad discretion found in the 2021 Policy is rooted in the provisions of the *Arbitration Act*. Section 20(1) provides: “[t]he arbitral tribunal may determine the procedure to be followed in the arbitration, in accordance with this Act”. Section 21 adopts

² The Hearing Panel acknowledged as much in a footnote to the Merits Decision.

certain provisions of the *Statutory Powers Procedure Act* including section 15 which provides, in part: “a tribunal may admit as evidence at a hearing, whether or not given or proven under oath or affirmation or admissible as evidence in a court ... any document or other thing”.

69. However, although the Hearing Panel has a broad discretion to decide how a proceeding will be conducted, that discretion must be exercised “in accordance with the Act” meaning that it cannot be exercised in a way that denies the Claimants their basic participatory rights. The Hearing Panel must ensure, whatever process it adopts, that “[e]ach party shall be given an opportunity to present a case and to respond to the other parties’ cases” as required by section 19(2) of the *Arbitration Act*. Section 3 of the *Arbitration Act* provides section 19 cannot be varied or excluded by the agreement of the Parties. In this case, that means it cannot be varied by the 2021 Policy and the discretion provided to the Hearing Panel under it. The issue here is whether the procedure adopted by the Hearing Panel in relying solely on the Investigator’s report violated section 19(2) of the *Arbitration Act*.

70. At paragraph 87 of their written submissions, the Claimants assert the following issues with the investigation:

- (i) the Claimants did not receive notice of the specific evidence used to substantiate the allegations and therefore did not have a chance to respond to them;

- (ii) the investigator did not provide specific place, time or detail of the general allegations;

- (iii) the investigation was biased;

- (iv) the Investigator did not properly represent the evidence put forward by the witnesses in that she omitted important context or simply included evidence that was not given by witnesses;

- (v) the Investigator interviewed the Interested Party’s two main supporting witnesses together and as such, compromised the independence of their witness testimony. The investigator placed significant weight on the evidence of these two witnesses and relied on their evidence to substantiate her findings on violation; and

- (iv) the investigator considered the evidence of anonymous witnesses, hearsay evidence and evidence of past conduct that did not relate to the allegations.

71. They also say the Investigator failed to interview a number of their proposed witnesses and so they were not given an opportunity to present evidence.

72. In my view, allegations (iv) through (vi) do not concern whether the Claimant's participatory rights as provided for in the *Arbitration Act* were interfered with by the process. Instead, they relate to the Investigator's consideration and weighing of the evidence and so concern the merits of the fact finding. As stated in *The Tire Pit* "the duty of fairness is concerned with ensuring that adjudicators act fairly in the course of making decisions, not with the fairness of the actual decisions they make". I find these allegations do not constitute breaches of procedural fairness as a result. I consider the remaining alleged breaches of procedural fairness below.

(iii) Failure to Interview Witnesses Identified by the Claimants

73. The Claimants alleged that the Investigator failed to interview witnesses identified by the Claimants. They point out that only two of the 13 witnesses put forward by them were interviewed. This allegation was addressed by the Hearing Panel in the Merits Decision. The Hearing Panel noted that the Claimants did not identify "what the witnesses would have said or how their evidence could have impacted a central finding of the Investigator" and that those witnesses provided "witness letters" and those letters would have been reviewed by the Investigator. The Hearing Panel concluded: "I am not prepared to find that it was a significant flaw to only interview the fifteen witnesses she did. Investigations are, by their nature, limited. An investigator cannot interview everyone."

74. In my view, the Hearing Panel did not focus on the correct question. The issue is not the nature of an investigation. Rather the question is whether the investigation process, if adopted as the basis for decision making by the Hearing Panel, allowed the Claimants the opportunity to make their case as required by section 19(2) of the *Arbitration Act*. In my view, it did not. The Investigator, without explanation, failed to interview a significant number of the witnesses put forward by the Claimants and the Hearing Panel gave the Claimants no other opportunity to provide that evidence. This is a breach of procedural fairness contrary to section 19(2) of the *Arbitration Act*.

(iv) No Opportunity to Respond to the Evidence Relied on by the Investigator

75. The Claimants argue the Investigator relied on evidence in arriving at the findings in the report that was never put to them or disclosed to them and that this was a violation of procedural fairness, as they did not know the case to be met.

76. The Hearing Panel addressed this issue in the Merits Decision and acknowledged that the Claimants did have the right to know the case that was to be met. However, the Hearing Panel pointed out that the Claimants had the Complaint and that they were “alive” to the issues being investigated as demonstrated by correspondence they sent to the Investigator. The Hearing Panel concluded:

In any event, even if allegations were not specifically set out, I do not find that this affected the [Claimants’] ability to fully answer. The Investigator was clear that the [Claimants] denied all of the allegations. Any further denials would not have affected the Investigator's findings.

77. In my view the Hearing Panel, by simply adopting the Investigator’s report, did not afford the Claimants an opportunity to exercise their participatory rights as provided for under the *Arbitration Act*. Section 19(2) of the *Arbitration Act* provides that the Claimants have a right to respond to the “case”, not just the allegations, against them. Here, the Investigator relied on evidence in making findings against the Claimants that was not put to them. The Hearing Panel did not provide the Claimants an opportunity to provide evidence in response. This is a breach of procedural fairness contrary to section 19(2) of the *Arbitration Act*.

(v) Denial of Opportunity to Cross Examine

78. The Claimants argue that the Hearing Panel by adopting the Investigator’s report denied them the opportunity to cross examine witnesses which resulted in a breach of natural justice.

79. The Claimants argue that “where persons are accused of serious allegations, they must be able to test the credibility of their accusers” and “[i]f the Interested Party is not willing to be subject to cross-examination, then there can be no complaint and no discipline action.” They cite *Paterson v Skate Canada*, [2004] A.J. No. 1542 (“**Paterson**”); *Re County of Strathcona No. 20 et al. and MacLab Enterprises Ltd.* (1971), 20 D.L.R. (3d) 200 (Alta. S.C.A.D.) (“**County of Strathcona**”); and *M.(S.)S. v. Company of the Cross*, [2002] A.J. No. 891 (Q.B.) in support.

80. Here there is no doubt that the allegations made in the Complaint, and the findings made by the Investigator and adopted by the Hearing Panel, are serious in nature as they involve maltreatment of a minor. The Claimants assert that the consequences in this case are also serious as the suspensions that were ordered by the Hearing Panel would interfere with their ability to earn a living. Given this, they say they should have been afforded the opportunity to cross examine, specifically the Interested Party, for the purpose of testing her credibility. They do not assert, at least they did not before me, that cross examination would have been necessary to adduce evidence to prove their case.

81. The Claimants acknowledge that the Investigator had the opportunity to question the Interested Party and assess her credibility but contend:

...This is not an effective way to test credibility, nor is there any evidence in the Investigation Report that the Investigator even attempted to test the Interested Party's credibility based on the evidence given by the [Claimants] and other witnesses.

82. In response, Equestrian Canada argues that the Hearing Panel has exclusive authority over the format of hearing. It argues it does not say anywhere in the 2021 Policy that a hearing must be *viva voce* and include cross examinations. It argues the Hearing Panel was entirely within its authority to determine that the hearing would proceed on the basis that it did. It contends that natural justice does not always require cross examination citing *Armstrong v. Canada (Commissioner of the Royal Canadian Mounted Police) (C.A.)*, 1998 CanLII 9041 (FCA), [1998] 2 FC 666 and *Lipkovits v. CRTC*, 1982 CanLII 5250 (FCA), [1983] 2 FC 321.

83. Equestrian Canada challenges the seriousness of the consequences claimed by the Claimants. It states that it does not have any authority to prevent the Claimants from earning a living in their chosen profession. It only has authority over its own registrations and events. It argues the Claimants are fully able to run their business, but if suspended, they will only not be able to do so as Equestrian Canada licence holders. It argues that this consideration makes it distinguishable from cases in which professionals such as accountants or lawyers are completely unable to practice in their chosen professions if their credentials are suspended.

84. The Claimants reply, in the case of Cheryl Keith, that if suspended, the clients that she trains will seek a different trainer as she will not be able to attend Equestrian Canada events or

United States Equestrian Federation (“USEF”) events (which upholds Equestrian Canada’s sanctions) and these events are critical for her clients’ progress and point accumulation within the Canadian rankings. In the case of [redacted], the Claimants assert that competing in and training clients for Equestrian Canada and USEF events constitutes [redacted]’s full-time livelihood.

85. The authorities cited by both Parties are consistent. Cross-examination is not necessarily required for there to be fair hearing. In *Paterson*, which was cited by the Claimant and is the case most factually similar case to this one, cross-examination was found to be required. However, it is distinguishable from this case because in *Paterson* Skate Canada’s constitution provided that its proceedings had to meet the requirements of “due process”. That fact was material to the outcome. There is not such requirement here.

86. In *County of Strathcona* the Court found that that the denial of cross-examination did not result in a breach of natural justice. However, it stated that what is required for a fair hearing is that the “parties must know the case being made by the opposing side and be given an opportunity to reply; they must be given a fair opportunity to correct or controvert any relevant and prejudicial statement”. [Emphasis added.]

87. The opportunity to cross examine is not specifically required by the 2021 Policy or by the Equestrian Canada constitution or the *Arbitration Act*. However, I find that a breach of procedural fairness occurred because the Claimants were denied the opportunity to cross-examine and they were not provided any alternative means to correct or controvert the evidence against them. Section 19(2) of the *Arbitration Act* states “[e]ach party shall be given an opportunity... to respond to the other parties’ cases”. The denial of the ability to correct or controvert the evidence against them because no cross-examination was allowed and no alternative was provided is a breach of procedural fairness contrary to section 19(2) of the *Arbitration Act*.

(vi) Investigator was biased

88. Though typically an investigator is not a decision maker, in this case, as the Hearing Panel adopted and relied exclusively on the Investigator’s report in arriving at the Merits Decision, the alleged bias of the Investigator is relevant.

89. The right to be heard includes the right to be heard by an unbiased decision-maker: *Campbell v. The Bloom Group*, 2023 BCCA 84, at para. 48.

90. To set aside a decision because of bias, it not necessary to demonstrate actual bias on the part of a decision maker. Only a “reasonable apprehension” of bias need be shown.

91. The test for a reasonable apprehension of bias is: “what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly”: *Wewaykum Indian Band v. Canada*, 2003 SCC 45, [2003] 2 S.C.R. 259, at para. 60. It is an objective standard.

92. The Claimants argue that the Investigator “exhibited bias” by:

- (a) selectively relying on testimony from witnesses favorable to the Interested Party while disregarding similarly flawed testimony from those supporting the Claimants;
- (b) treating witness testimonies unequally;
- (c) interviewing the Interested Party’s two main witnesses together and so impairing their independence.
- (d) failing to interview key witnesses identified by the Claimants without compelling justification.

93. However, even assuming the Claimants’ allegations are correct, I cannot conclude that they are sufficient to meet the test. This is because the Claimants’ arguments focus on the Investigator’s weighing and treatment of the evidence. A decision maker can make a decision that is wrong on the evidence, or conduct a flawed evidentiary process, or both, without raising a reasonable apprehension of bias. In the absence of any other evidence indicating bias, in my view, the alleged errors are not of a quality or number that would cause an informed person to conclude that it is more likely than not that the Investigator would not have decided fairly.

(e) Should there be a Hearing *de novo*?

94. The decision whether or not to grant a hearing *de novo* in this case is discretionary and involves a balancing of interests. In my view, the discretion is similar to the discretion of the Court

to set aside an arbitral award on procedural fairness grounds under the *Arbitration Act*. I find the principles set out in *Popack v. Lipszyc*, 2016 ONCA 135 in that context instructive here. The Court of Appeal stated that the purpose of the discretion was “the prevention of ‘real unfairness and real practical injustice’ flowing from the failure to conduct the proceedings in accordance with the proper procedure” (para. 35). It found that relevant considerations included the seriousness of the breach of procedural fairness, its impact on the fairness of the result of the arbitral proceedings, as well as the potential prejudice flowing from a re-hearing (paragraph 36). The Parties agreed in oral argument that these were relevant considerations in this case.

95. In my view, the failure of the Investigator to interview the witnesses put forward by the Claimants and to allow the Claimants the opportunity to know and respond to the evidence that was being relied on against them, had a real and practical affect on the fairness of the process. This is because, with the adoption of the Investigator’s report by the Hearing Panel, the Claimants were effectively prevented from presenting their case and knowing and responding to the case against them. While the Claimants have not demonstrated the materiality of the evidence of the witnesses that were not interviewed nor the nature and importance of the evidence that they might have marshalled in response to the evidence relied on by the Investigator, that is not determinative here. It was the denial of the opportunity, in each case, that is sufficient to demonstrate the real unfairness in the process.

96. At the same time, it is clear that a re-hearing will cause prejudice. The majority of the allegations at issue occurred over five years ago and concern maltreatment of a minor. This decision will inevitably cause further delay to a final resolution. I understand that further delay in an already lengthy process may undermine the legitimacy and effectiveness of the complaint process in the eyes of the Interested Party and some members of the public especially those considering coming forward with similar complaints. I also recognized that a great deal of time, effort, and resources have already been spent by the Parties on the proceedings. Although these are all significant considerations, on balance, I do not find that they outweigh the procedural fairness issues that have undermined the process to date.

97. For these reasons, I exercise my discretion to conduct the appeals as a hearing *de novo* and there will be a fresh consideration of the matter. However, the hearing process will focus on

alleviating the issues identified above with the previous process. The Investigator's report will be accepted as part of the evidentiary record, but the Parties are free to argue the weight, if any, that any particular aspect of it should be given. The Claimants will have the opportunity, in support of their case, to present additional documentary evidence or written witness evidence relevant to the merits or possible sanctions. The Parties opposite will also be given the opportunity to provide evidence on the same basis. The evidence will be followed by written argument.

98. Within two business days of the date of this decision, I ask that the Parties provide the SDRCC with their availability for a procedural conference.

Dated December 9, 2024 and signed at Calgary, Alberta,

Per: Julie G. Hopkins, Arbitrator

Appearances:

Elizabeth Cordonier and Jill Wiberg on behalf of the Claimants on Jurisdiction;

Alexandre Matas and Jill Wiberg on behalf of the Claimants on Hearing *de novo*

Michelle Kropp on behalf of Equestrian Canada

[Redacted] on behalf of the Interested Party