

ADRsportRED PROGRAM – ORDINARY DIVISION

BETWEEN:

KANE WASELENCHUK

(the “**Applicant**”)

AND:

RACQUETBALL CANADA

and

GOVERNMENT OF CANADA

and

CANADIAN CENTRE FOR ETHICS IN
SPORT (CCES)

(the “**Respondents**”)

AND:

WORLD ANTI-DOPING AGENCY (WADA)

and

INTERNATIONAL RACQUETBALL
FEDERATION

(“**Observers**”)

PRELIMINARY RULING

Dated: January 11, 2007
Matter adjudicated by telephone conference

Bernard A. Roy, Q.C.
Jurisdictional Arbitrator

A. BACKGROUND

1. On November 17, 2006, I was appointed by the SDRCC as Jurisdictional Arbitrator, under rule 6.11 of the Canadian Sport Dispute Resolution Code (April 1, 2006 revision), to deal with an issue of jurisdiction arising from a Request filed by Kane Waselenchuk, a Canadian Athlete who is also an international-level Athlete as defined under the Canadian Anti-Doping Program (CADP). In his Application, dated October 26, 2006, the Athlete submits that notwithstanding his Waiver to Request a hearing before a Doping Tribunal of the SDRCC following his alleged violation of an Anti-Doping Rule which was sanctioned by a two-year suspension from Sport and his permanent ineligibility from Federal funding, he has not been deprived of his right to challenge his purported Waiver and his right to a hearing before a Doping Tribunal under the Canadian Sport Dispute Resolution Code, as amended by the SDRCC from time to time. The Applicant takes the position that his Waiver was not a true and informed Waiver in as much as he was not properly informed, at the outset, of the consequences arising from his renunciation of his right to a hearing nor was he advised at the time he signed a Waiver of his right to be represented by Counsel. The Athlete as well as his Federation, Racquetball Canada, one of the Respondents, take the position that the SDRCC has the authority to set up a Doping Tribunal while Respondent Canadian Centre for Ethics in Sport (CCES) is of the view that SDRCC has no jurisdiction to appoint a Doping Tribunal and interpret the validity of a signed Waiver;
2. On October 31, 2006, the Athlete's Request was filed with the SDRCC;
3. On November 8, 2006, the SDRCC informed the Respondents and the Observers of the filing of the Request and provided them with a copy;
4. Answers to the Applicant's Request were filed by Respondents CCES and Racquetball Canada on November 17, 2006;
5. On November 20, 2006, the SDRCC acknowledged receipt of the filing of the Answers by Respondents CCES and Racquetball Canada and informed the parties of my appointment as jurisdictional arbitrator;
6. On November 23, 2006, I convened the parties to a conference call during which issues of procedure and general process were addressed;
7. On December 7, 2006, the Applicant filed an affidavit and submitted a brief outline of his arguments on the issue of jurisdiction;
8. On December 15, 2006, Respondent CCES produced an outline of its arguments dealing with the jurisdictional issue;

9. On December 18, 2006, a scheduled hearing for the presentation of oral arguments had to be postponed due to the absence of Claimant's Counsel as a result of a misunderstanding;
10. On January 8, 2007, Counsel for the Applicant and the Respondent, CCES, made their oral submissions by telephone conference. Counsel for Racquetball Canada, the other Respondent, chose not to plead orally and took no position on the issue of jurisdiction;
11. In its Answer, the CCES avers that it notified the Applicant in writing on June 26, 2006 of an alleged violation of Anti-Doping Rule and proposed a two-year period of ineligibility from the Sport of Racquetball as well as permanent ineligibility from Federal funding. In its notice, the CCES gave the Athlete the following options: provide more information to the CCES, request that the Dispute be submitted to arbitration under the SDRCC or waive his right to arbitration and in so doing, accept the sanctions suggested by the CCES;
12. In its Answer, the CCES opposes the Athlete's Request based on the lack of jurisdiction of the SDRCC. In essence, the CCES raises the following reasons in support of its position. First, the failure by the Athlete to file his Request within 21 days of a decision, as stipulated under rule 3.5 of the SDRCC Code, deprives him of his right to be heard and the reasons in support of his late filing are insufficient. Second, under rule 7.13 of the SDRCC Code of Procedure and rule 8.8 of the CADP, a Doping Appeal must be limited to questions of procedural error or unfairness committed by the Doping Tribunal. As the matter in dispute was not submitted to an arbitration panel as a result of the Athlete's Waiver to a hearing, no dispute panel was seized of the case. A third argument based on the fact that the Applicant classification as an international-level Athlete by the International Racquetball Federation (IRF) ousts any jurisdiction on the part of the SDRCC was subsequently dropped by the CCES;
13. The CCES has raised other grounds in support of its position both in its written pleadings and during oral arguments which I will not refer to in as much as they deal with substantive issues and matters unrelated to the issue of jurisdiction which I am asked to adjudicate upon;
14. In so far as Respondent Racquetball Canada, it is not disputing the jurisdiction and authority of the SDRCC to deal with the matter in dispute through arbitration under the Code. The two Observers, the WADA and the IRF have chosen not to participate in the debate;
15. As stated in its notice, during the course of its initial review under rule 7.25 of the CADP, the CCES provided the Applicant with an opportunity to explain how his sample contained prohibited substances;

16. On June 22, 2006 the Applicant sent a letter to the CCES in which he acknowledged using cannabis which he knew to be a prohibited substance but denied knowingly ever using cocaine in or out of any competition;
17. As part of its internal review, the CCES ascertained that the Applicant had not been granted a therapeutic use exemption (TUE) for any of the substances found in his sample and that there were no apparent departures from the doping control rules of the CADP or the laboratory analysis which could undermine the validity of these findings;
18. Following completion of its initial review and taking into account the Applicant's explanations which did not identify any departures from the doping control rules nor show that he had been granted a TUE for use of cannabis or cocaine, the CCES asserted by way of a notice sent to the Athlete on June 26, 2006 through his Federation, Racquetball Canada, that he had committed an Anti-Doping Rule Violation and proposed a sanction of two years ineligibility from Sport (rules 7.9 and 7.20 of the CADP) and permanent ineligibility of direct financial support from the Government of Canada (rule 7.37).

B. FACTS WHICH LED TO THE DISPUTE

19. Although the matter which I am asked to dispose of is one of jurisdiction and that my mandate does not extend to dealing with the main substantive issue(s) in dispute, it may be helpful to briefly review the salient facts of this case;
20. On June 26, 2006, the CCES notified Racquetball Canada of an adverse analytical finding involving the Applicant, under rule 7.46 of the Doping Violations and consequence rules of the Canadian Anti-Doping Program (CADP). A copy of said notice was sent the same day to the SDRCC;
21. In its notice, the CCES stated that the Applicant's sample which gave rise to the adverse analytical findings was collected on May 27, 2006 following a competition held at the Canadian National Racquetball Championship in Edmonton, Alberta on May 27, 2006. A copy of the certificate of analysis was attached to the notice. It showed that an analysis was conducted by the Laboratoire de contrôle du dopage INRS Institut Armand Frappier which disclosed in the urine sample given by the Athlete the presence of cannabis and cocaine metabolite which are classified as prohibited substances on the WADA's 2006 list of prohibited substances. In its notice forwarded to Respondent Racquetball Canada, the CCES informed the Athlete of the three options which he could choose from and the applicable process in each case. First, should the Athlete decide to challenge the Anti-Doping Rule Violation, a Doping Tribunal would be set up under the SDRCC to hear the Dispute. Reference was made to rules 7.53 to 7.69 of the CADP which deal with the hearing process. Rule 7.65

provides for the right of the Athlete to Counsel in a proceeding before the Doping Tribunal. In the interval, as pointed out in the notice, within five (5) days, the Athlete could request in writing that sample B be analyzed in his presence or that of his representative and that a copy of the A and B sample laboratory documentation package be given to him. The second option available to the Athlete, as described in the notice, was to waive his right to a hearing. A form of Waiver was attached to the notice provided to Racquetball Canada. In its notice, CCES drew the attention of the Athlete to the fact that by waiving his right to a hearing, he acknowledged the Anti-Doping Rule Violation and in so doing he accepted the proposed consequence(s), i.e. a two-year suspension from Sport from the date of the sample collection and permanent ineligibility of direct financial support from the Government of Canada. The Athlete was also invited to provide any additional information about exceptional mitigating circumstances, as defined in rules 7.38 to 7.46 of the CAPD, which are designed to eliminate or reduce the period of ineligibility. Finally, the Athlete was urged to consult the rules of CADP on its website;

22. The notice of June 26, 2006 from the CCES was followed on June 28, 2006 by the issuance of a letter of “inception of proceedings” from the SDRCC addressed to all parties, i.e. the Athlete, the Respondents and the Observers, in which it reiterated the options available to the Athlete and the issues of process under the various scenarios;
23. On July 6, 2006, the Athlete signed and returned a Waiver of hearing form in which he acknowledged the Anti-Doping Rule Violation as set out in the June 26, 2006 notice of the CCES but again denied using cocaine. He accepted the proposed sanctions;
24. Following receipt of the Athlete’s Waiver on July 11, 2006, the SDRCC wrote to all parties on July 12, 2006 to inform them that the file was closed.

C. NATURE OF DISPUTE

25. My purview as arbitrator is limited to the question of determining the authority of the SDRCC to decide whether the Applicant’s Waiver of his right to a hearing effectively deprives him of the right to request that a Dispute be submitted to a Doping Tribunal under the SDRCC;
26. In his Request under rule 3.4 of the SDRCC, the Applicant takes the position that he did not properly waive his right to a hearing, was not informed of the consequences of such Waiver and was not told of his right to receive advice from legal Counsel. According to him, such failures constitute breaches under the rules of procedural fairness and fundamental justice. The Applicant also postulates that he made reasonable efforts to act within the time limits of article 3.5 of the Code

and that under article 6.6(c) said time limits can be and ought to be extended for reasons given by him.

27. The CCES disputes the Applicant's position and argues that the SDRCC does not have any jurisdiction to deal with the Dispute. In support of its position on the issue of jurisdiction, the CCES advances two propositions. First, by filing his Request on October 31, 2006, Claimant failed to act within the 21-day delay prescribed under rule 3.5 of the SDRCC Code. The CEES posits that article 6.6(c) of the Code's General Rules does not apply to Doping Disputes which are governed by procedural rules under article 7 of the Code which do not provide for an extension of the prescribed time within which to file a Request. Moreover, the reasons given by the Applicant to justify his failure to act within the time delay are not sufficient. Second, the SDRCC has no jurisdiction to appoint a Doping Tribunal because the Applicant knowingly waived his right to arbitration and accepted the sanctions suggested by the CCES. Therefore, there was no Dispute which required a decision by a Doping Panel nor was there any sanction imposed by the CCES. The Waiver signed by the Applicant constitutes an absolute bar to the jurisdiction of the SDRCC which has no authority to interpret a Waiver.
28. During oral arguments, Counsel for the CCES acknowledged that under certain circumstances, it would still be within the SDRCC jurisdiction to examine and review the circumstances and context in which a Waiver had been signed.

D. DISCUSSION

29. Under rule 3.5 of the SDRCC Code, the time limit within which to file a Request is twenty-one days following the later of 1) the date on which the Applicant becomes aware of the existence of the Dispute, ii) the date on which the Applicant becomes aware of the decision being appealed, and iii) the date on which the last step in attempting to resolve the Dispute occurred, as determined by the SDRCC.
30. It might be helpful to note some milestone dates. On June 26, 2006, the CCES notifies Racquetball Canada of an alleged Anti-Doping Violation by the Athlete. On June 28, 2006, the SDRCC sends a letter of "inception of proceedings" to all parties advising the Athlete that he has until July 4, 2006 to file a Request or Waiver of his right to a hearing. On July 6, 2006, there was a telephone conference involving all parties. The same day, the Athlete signs a Waiver form. A Notice from the SDRCC was sent on July 12, 2006 informing the parties that it was closing its file. On August 31, 2006, the Athlete's Counsel wrote to the SDRCC to advise that the Waiver signed by the Athlete was not a true and informed Waiver and he requested that his client be given an opportunity to argue his case. On October 31, 2006 a Request was filed by the Applicant with the SDRCC and the parties were notified on November 8, 2006;

31. It is obvious that by filing his Request on October 31, 2006, the Applicant was clearly outside the prescribed delay. Together with his written submissions, the Applicant filed an affidavit dated December 5, 2006 in which he outlined the steps which he had taken, after signing his Waiver on July 6, 2006, to ascertain the impact of the two-year suspension on his professional status and IRT eligibility. In his affidavit, the Applicant states that before filing his Request with the SDRCC, he had received preliminary advice that his professional status and IRT eligibility would not be compromised by the two-year suspension. Initially he had been advised by the IRT of his two-year suspension from participating in all USA Racquetball sanctioned events. As it turns out, the Athlete was subsequently informed that he would be ineligible to play on the International Racquetball Tour (IRT) because of insurance coverage and sponsoring. He alleges that he took steps to regularize his status with the IRT and mitigate the result of his two-year suspension and that had he been successful, proceedings before the SDRCC would not have been necessary. On August 31, 2006, the Applicant's Counsel wrote to the SDRCC and advised that he had been instructed by him to challenge the Waiver signed by his client. A Request was filed before the SDRCC on October 31, 2006. The Applicant asks that the time to file his Request be extended pursuant to rule 6.6(c);
32. As previously stated, the arguments put forward by the CCES to assert the absence of jurisdiction of the SDRCC to hear the Dispute can thus be summarized. First, the CCEES postulates that under rule 3.5 of the SDRCC Code, the Applicant had to file his Request within twenty-one days after the date when he became aware of the existence of the Dispute which was in late June 2006. The CCES objects to the granting of any extension of time to the Applicant. The CCES argues that while article 6.6(c) does provide for the extension of time for the filing of a Request upon an application based on justified grounds, it is subject to the applicable rules of the Anti-Doping Program. The procedural rules and provisions applicable to Doping Disputes are dealt with separately in article 7 of the SDRCC Code and they do not allow for an extension of time to file a Request. The CCES argues that the procedural time limits applicable to Doping Violation must be applied very strictly. Subsidiarily, the CCES submits that the reasons raised by the Claimant in his Affidavit to justify the late filing of his Request do not constitute justified grounds;
33. It is correct to assert that, contrary to article 6.6(c) of the Canadian Sport Dispute Resolution Code which gives the SDRCC the right to extend time limits, article 7 which sets out the specific procedural rules applicable to Disputes and Doping Appeals does not contain a similar provision. Having said that, I am not convinced that upon an application on justified grounds, as jurisdictional arbitrator, I cannot extend or reduce the time limits. There is no provision in the procedural rules for Doping Disputes which specifically states that there cannot be, under any circumstances, situations which would warrant an extension of time limits to file a Request. Rule 7.1 does state that the specific procedures and rules

set forth therein apply in addition to the rules in the Anti-Doping Program and that in the absence of a rule or procedure specifically addressed in article 7, the general provisions of the Code apply. This leads me to conclude that in certain circumstances Rule 6.6(c) of the Code's general rules may apply and that it is within my discretion to extend the time limits to file a Request. Although the Code rules and the CADP were designed to ensure that analytical findings are dealt with expeditiously, they should not, as in the present case, be interpreted in such a way as to deny and deprive an athlete of his right to be heard and argue his case if he can demonstrate that there were justified reasons for not acting within the stipulated delays.

34. I am satisfied that the reasons given by the Athlete in his affidavit of December 5, 2006 constitute sufficient grounds in support of the late filing of his Request;
35. In resolving the issue of the SDRCC jurisdiction, one must determine the nature and scope of a signed Waiver as well as the consequences flowing from its execution. Does it constitute an absolute bar to the jurisdiction of the SDRCC, as argued by the CCES in its written submissions, or can the SDRCC or a Doping Tribunal set up by it, interpret its import and determine what constitutes a proper Waiver, as contended by the Claimant. The CCES takes the position that the Waiver is a binding agreement between the CCES and the Athlete who effectively waives all right to a Doping Tribunal hearing, acknowledges an Anti-Doping Rule violation and accepts the consequences of his violation. The CCES also takes the position that a signed Waiver deprives the SDRCC of jurisdiction and is consistent with the practice of the SDRCC which treated the matter as closed. The CCES refers to rule 7.53 of the CADP and article 7.3(a) of the SDRCC as further evidence that a signed Waiver eliminates the authority and jurisdiction of the SDRCC to appoint a Doping Tribunal;
36. Relying on article 8.8 of the CADP which provides that an appeal from a decision of a Doping Tribunal must be limited to questions of procedural error or unfairness by a Doping Tribunal or failure to properly interpret and apply the CADP, the Claimant submits that a Doping Tribunal must therefore have the authority to interpret and apply the CADP. The CCES disputes the interpretation given by the Claimant of article 8.8 of the CADP as going too far in that the scope of authority of a Doping Appeal Tribunal is not defined by implication or extrapolation from what is permitted of a Doping Appeal Tribunal. Therefore, it concludes that a Doping Tribunal has no authority, implied or express, to interpret what constitutes a valid signed Waiver.

E. DECISION

37. I have carefully reviewed the pleadings and the written submissions. I also raised a number of questions during oral arguments on the issue of jurisdiction. I am not prepared, at this juncture, to subscribe to the position advanced by the CCES that

the signing of a Waiver effectively estops the Applicant from seeking to have a Doping Tribunal rule whether or not his Waiver was properly given. I agree that there was no decision rendered which could be appealed from and the signed Waiver should have closed the matter. If the CCES is correct in arguing that a signed Waiver constitutes an absolute bar to the SDRCC jurisdiction and that a Doping Tribunal has no authority to interpret a Waiver, it leads to the following conclusion. It means that in the hypothetical situation of an Athlete signing a Waiver under duress or under false representations, he could not seek to have his Waiver set aside through a properly constituted Doping Tribunal. I believe that the narrow interpretation given by the CCES to the applicable rules and articles of the CADP and SDRCC on the issue of the jurisdiction of a Doping Tribunal would in effect deprive an Athlete of his right to argue that the Waiver was not properly given. During the presentation of oral arguments, Counsel for the CCES acknowledged that in certain situations, assuming that an Athlete was within the time limits prescribed under the procedural rules for Doping Disputes, he could file a Request before the SDRCC. However, in such a case, a Request should not be dealt with in the context of a hearing before a Doping Tribunal but before an Arbitration panel set up under the general provisions of the Code applicable to Non-Doping matters. Interestingly, if I were to accept that reasoning and conclude that the matter in dispute would have to be dealt with before a Non-Doping Tribunal, it follows that the Code's general rules including article 6.6(c) would then apply.

38. I am not, at this stage, asked to rule on some ancillary issues related to the issue of jurisdiction: whether or not the Applicant was properly informed of the consequences of waiving his right to a hearing, whether he was informed of his right to instruct and receive advice from legal Counsel, whether he obtained such advice and whether there was indeed an obligation on the part of the CCES to inform the Applicant that he was entitled to be represented by Counsel.

It will be incumbent on the Applicant to successfully argue before a Doping Tribunal to be set up by the SDRCC that his Waiver was not properly given because of alleged failures and omissions which were in breach of principles of natural justice and procedural fairness. A Doping Tribunal should first deal with the purported breaches before even hearing any technical evidence on the merits of the Dispute;

39. It is a well known principle of arbitration law that arbitrators have the power to examine and rule on their own competence. It is commonly described as the

principle of competence-competence which is also presented as the corollary of the principle of the autonomy of the arbitration agreement¹;

40. Relying on the documentary evidence in the file including the Applicant's affidavit, I conclude that, notwithstanding the Applicant's failure to file his Request within the prescribed time under Rule 3.5 of the SDRCC, under the general rules of the Code and subject to the applicable rules of the Anti Doping Program, I have the discretionary right to extend the time limits. I am also satisfied that the reasons set forth by the Applicant constitute sufficient and justifiable grounds for an extension of time to file his Request.
41. As the appointed jurisdictional arbitrator, seized of the issue of the SDRCC jurisdiction, I have come to the conclusion that the SDRCC has jurisdiction to appoint a Doping Tribunal to interpret the validity of the Waiver signed by the Applicant and that said Waiver does not constitute an absolute bar to the SDRCC jurisdiction;

Dated in Montreal, this 11th day of January, 2007



Bernard A. Roy, Q.C.
Jurisdictional Arbitrator

¹ Fouchard Gaillard Goldman on International Commercial Arbitration, published by Kluwer Law International, 1999 edition, at page 213 and following;
L'arbitrage commercial au Québec, Droit interne – Droit international privé par Sabine Thuilleaux, Éditions Yvon Blais Inc., page 56 and following;
L'intervention du juge canadien avant et durant un arbitrage commercial et international, par Frédéric Bachand, Librairie Générale de Droit et de Jurisprudence, page 310 and following.