

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

No.: SDRCC 22-0616

IN THE MATTER OF AN ARBITRATION HEARING BETWEEN

ASSOCIATION DE SOCCER DE BROSSARD

(Claimant)

AND

CANADA SOCCER

(Respondent)

AND

SOCCER QUEBEC

(Affected Party)

COSTS AWARD WITH REASONS

ARBITRATOR: Robert Néron, LL.B., LL.M., C.Arb.

APPEARING:

For Claimant: Vincent Dubuc-Cusick, Simon De Andrade and Rosalie Caillé-Lévesque

For Respondent: Sean Bawden and Michael Leaver

For Affected Party: Andrée-Anne McInnes

Introduction

Following my decision to allow the Claimant's appeal, the Claimant filed an application for costs pursuant to Subsection 5.14 of the Canadian Sport Dispute Resolution Code (the "SDRCC Code"). Both parties have filed submissions in this matter.

Submissions

Claimant's Submissions

The Claimant submits that costs should be awarded for the following reasons: the outcomes of the proceeding; the conduct of the Parties and the abuse of the process; the respective financial resources of the Parties; and the alleged breach of the Code by the Respondent.

According to the Claimant, the outcome of the proceedings should be a factor in awarding costs to the Claimant. It submits that, had Canada Soccer followed its internal procedures and rules in a reasonable manner, this dispute would have been avoided, including the legal costs incurred by the Claimant in enforcing its rights. Therefore, the financial burden of the legal challenge that the Claimant had to make to obtain its National License should be borne by Canada Soccer.

Moreover, the Claimant submits that Canada Soccer committed an abuse of process by submitting an objection to the jurisdiction of the SDRCC, and the costs incurred by the Claimant in defending the claim should be borne by Canada Soccer.

The Claimant adds that it should not assume financial responsibility for Canada Soccer's failures in adopting and interpreting its own rules that have led to a multiplicity of legal actions for the Claimant. Therefore, Canada Soccer's abuse of process should be considered to justify awarding costs.

The conduct of the parties and attitudes adopted by Canada Soccer justify also awarding costs. According to the Claimant, Canada Soccer has adopted improper conduct, which frustrated, lengthened, and rendered unduly complex the proceeding before the SDRCC.

The Claimant adds that Canada Soccer has consistently shown a lack of good faith, as it demonstrated its intention to refuse to comply with the arbitration process and objectives, to abide by the SDRCC's arbitral decision, and to respect the SDRCC's authority over this dispute.

As of today, and despite the Claimant's numerous requests, Canada Soccer still refused to enforce the SDRCC's decision, which is final and binding upon both parties, pursuant to Subsection 6.12 (c) of the Code. According to the Claimant, Canada Soccer has indeed clearly shown its intention to not comply with the SDRCC's decision.

Canada Soccer confirmed to the Claimant that, unless a Court of Justice compels it to do so, it would not comply with the SDRCC's decision. Therefore, the Claimant submits that the Respondent is acting in bad faith and unduly multiply the proceedings in order not to comply with the SDRCC's decision.

With respect to financial resources, the Claimant submits that it has limited financial resources compared with those of Canada Soccer. It points out that Canada Soccer had revenues of \$33 million in 2021, and, because of Canada's participation in the FIFA World Cup Qatar 2022, it received a USD \$10.5 million.

In contrast, the Claimant had a budget of \$637,257 in 2021; further, the financial burden of the legal costs of a challenge is significant on its finances and annual budget.

The Claimant is cognizant that this tribunal has stated in its rulings that the money should not go to legal challenges but to athletes and members. However, due to Canada Soccer's significant financial resources to defend itself before the SDRCC, the complexity of the case and the multiplication of legal proceedings initiated by Canada Soccer, the Claimant had no choice but to retain legal services to assert its rights. Moreover, because of the disproportionate financial resources between the parties, the Claimant adds that it should not have to bear the financial burden for its appeal.

In closing, the Claimant submits that the decision that I have rendered on January 7, 2023, is final and enforceable by Canada Soccer without delay and until such time that a Court of Justice decides to stay its application if deemed fit.

Therefore, Canada Soccer is in violation that I have issued by knowingly refusing to grant the National License to the Claimant, contrary to subsection 6.12 (c) of the Code. Thus, the breach of that subsection by Canada Soccer is against the principle of fairness, which should be an aggravating factor in this matter and, because it is done intentionally, Canada Soccer's conduct amounts to exceptional circumstances that justify costs award on a solicitor-client basis to the Claimant.

The total of the legal fees requested is \$53,986.53 (before taxes), as confirmed in their reply, plus \$500 SDRCC filing fees. For the breakdown of the legal fees, the amount requested for having appeared before the SDRCC in this matter is \$39,361.56, and the legal fees occurred after the SDRCC to appear before the Ontario Superior Court in this matter is \$14,624.97.

Respondent's Submissions

The Respondent submits that the general rule is that costs will be awarded on a partial indemnity basis and substantial indemnity are awarded only in two circumstances: namely, through the effect of *Rule 49* or where there has been a clear finding of reprehensible conduct.¹ The Respondent adds that the courts have made it clear that the fixing of costs is not a mechanical exercise. The objective is to fix an amount that is fair and reasonable to the unsuccessful party to pay and not just to pay whatever costs were incurred.

According to the Respondent, partial indemnity costs must be less than two thirds of a party's full indemnity costs and pursuant to Rule 1.03 of the *Rules of Civil Procedure*, substantial indemnity costs are defined as 1.5 times that of partial indemnity costs. The quantum of costs being "*fair and reasonable*" has to be proportionate to what was involved in the particular proceeding in view of

¹ *Dia v. Calypso* (2020 ONSC 5191) at para 12 and 13.

the complexity of the issues and the amount at stake. Partial indemnity is 55%–60% of a reasonable actual rate.

In the case at bar, this was a written hearing and there was no witness testimony. However, the Claimant is seeking compensation for 212.47 hours of times for that amount of work. The Respondent is of the view that it would be inequitable to make Canada Soccer pay full indemnity costs of the fee submitted by the Claimant. Therefore, for a quantum of costs to be “*fair and reasonable*,” it has to be proportionate to what was involved in the particular proceeding and the complexity of the issues.

With respect to the request from the Claimant for costs occurred after the release of the decision of the SDRCC on January 7, 2023, this falls outside the jurisdiction of the Arbitrator. In addition, the Respondent reminds the panel that the Claimant in seeking costs has an obligation to accurately detail what work was done and when.

According to the Respondent, the Claimant’s failure to accurately detail what work was done by their counsels and when means that they have failed to meet their burden to show what costs were actually occurred. Thus, given the excessive number of hours by the Claimant’s multiple lawyers, it is a reasonable assumption that there was duplication of work.

The Respondent added the Claimant should not be allowed to introduce “evidence,” i.e., their dockets in their reply. They had an obligation to do so but did not meet their burden to show what reasonable costs were incurred.

In closing, the Respondent submits that the Claimant seeks reimbursement for fees that are grossly excessive for the matter at hand: there was no witness testimony; no cross-examination; no discoveries; nor mediation.

Finally, the Claimant has not provided any actual evidence of their costs incurred. There are no bills nor dockets – nothing outlining what steps were taken and cost incurred. The Claimant should only be awarded partial indemnity costs based upon a reasonable full indemnity cost figure. Therefore, as the Claimant has not shown what their reasonable costs are, they cannot be awarded anything for costs.

Reply

The Claimant submits that the Respondent solely relied on the Ontario Superior Court’s jurisprudence in its submission, while the SDRCC is an independent arbitral body with full jurisdiction and powers that have been recognized by both parties. Moreover, the SDRCC has established its own rules and procedures that are applicable when awarding costs, which is different than those of the Ontario Superior Court. In sum, in awarding costs in this matter, the arbitrator should refer to the relevant provisions found in the Code and the SDRCC’s jurisprudence, as submitted by the Claimant.

The Claimant confirmed that the total hours spent in this matter is 212.47 and added that, due to the Respondent’s conduct, namely, by multiplying and complexifying the procedures, the Claimant encountered additional costs in preparing this case.

The Claimant also mentioned that the Respondent suggested that the general rule is that costs are awarded on a partial indemnity basis, according to a decision of the Ontario Superior Court. However, the Claimant reminded the tribunal that the SDRCC, as an independent judicial body, has its own general principle for awarding costs and that the arbitrator must adhere to the criteria set out in Section 6.13 of the Code and follow the principles mentioned in the SDRCC's jurisprudence.

The Claimant added that the Respondent is trying to add a different legal analysis framework when referring to the Ontario Rules of Civil Procedure, therefore limiting an arbitrator's power in awarding costs.

With respect to the costs requested, the Claimant said that these are reasonable in the circumstances of the case and its complexity. Therefore, the legal costs incurred by the Claimant are consistent with the complexity of the case, the many flaws in the Respondent's process, and the fact that the Claimant was challenging the decision of one of the wealthiest NSOs in Canada.

In conclusion, the Claimant reiterated that they are asking for a total of \$53,986.53 in total costs to adjudicate this matter until January 31, 2023, plus \$500 in SDRCC filing fees.

Analysis

I agree with the Respondent that I do not have jurisdiction over the legal fees incurred by the Claimant after January 7, 2023. The Ontario Court of Justice has sole jurisdiction to adjudicate the legal costs in the matter related to the judicial review of my decision. Therefore, I determine the legal cost to which the Claimant is entitled, if any, related to his appeal before the SDRCC, not before or after the appeal.

The relevant factors to be considered in awarding costs are found in subsection 6.13(a) of the SDRCC Code:

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

Therefore, to determine when costs are appropriate, the factors in subsection 6.13(a) must be present. Costs cannot be awarded unless some combination of the factors in subsection 6.13(a) have been shown. Moreover, awarding costs may be appropriate when one party's conduct was without merit and caused financial harm to the opposite party.

As mentioned, the Claimant submitted that costs should be awarded based on the outcome of the proceeding, the conduct of the Respondent, the abuse of process, the respective financial resources of the Parties, and the alleged breach of the Code by the Respondent.

I agree that the systemic opposition of Canada Soccer to this appeal, from the jurisdiction of the SDRCC to the merits of the appeal, is an important factor that I must consider in this matter.

The unwillingness of Canada Soccer to resolve this dispute prior to arbitration and the financial resources of the parties are also important factors that I must consider. However, the fact that Canada Soccer has filed a judicial review of my decisions does not have any impact on my decision whether to award costs to the Claimant.

I am also cognizant that costs are only awarded on an exceptional basis so that sports funds may be spent on athletes, coaches and teams rather than on disputes. However, the Claimant is a sports organization with limited resources compared to the Respondent, and the funds spent to adjudicate this matter adversely impact the funds available for its activities for its athletes, coaches and teams. Therefore, the Claimant has shown the exceptional circumstances required for a costs award in this matter.

In other words, a local sports organization with limited financial resources is opposing a national sports organization that has been unwilling to settle this matter and that has systematically challenged the Claimant at every step of the process thereby causing the Claimant to incur significant legal fees.

In this case, the Claimant is asking for \$39,361.56 in legal costs incurred in this matter before the SDRCC. Despite not having the docketed time for the legal fees, I find it reasonable based on the limited timeframe to present this case and the complexity of the issues that legal counsel have worked 165.48 hours @ \$225/hour and an article student 12.67 hours @ \$168.00, for a total of \$39,361.56, plus applicable taxes.

This is the maximum amount of costs that can be granted in this case. As mentioned, the subsequent legal work is related to the judicial review of this case before the Ontario Superior Court. Also, there is no indication how much time legal counsel have spent to prepare this application for legal costs, not having a breakdown to that effect.

Despite having shown exceptional circumstances in this case, the Claimant did not show that costs should be awarded as full indemnity, namely that all the Claimant's legal costs should be totally paid by the Respondent.

Costs awarded on a solicitor-client basis or as full indemnity, is a rare remedy in litigation that is awarded when the conduct of the unsuccessful party is reprehensible, scandalous or outrageous. The conduct of the Respondent is far from this. Moreover, I agree with the decision of Arbitrator Banack in the decision of the Canadian Centre for Ethics in Sport (CCES) and Jeffrey Adams² that stated that the Claimant in that case was not entitled to full indemnification based on the bill of costs filed.

² SDRCC DT 10-0117.

As in this case, nothing in the circumstances warrants a full indemnity of the legal fees sought by the Claimant. In the CCES case, the costs requested were \$81,872.79, and \$40,000 were awarded by the Arbitrator as a Cost Award.

In the present case, based on the above relevant factors to consider in awarding costs, reasonable costs are warranted. Thus, despite not being bound by the *Ontario Rules of Civil Procedure*, the SDRCC being an independent arbitral tribunal, this gives me an indication as to what are reasonable costs to be awarded in this case on a party/party basis or as partial indemnity.

Therefore, I find based on the principle of proportionality having regard to the nature and importance of the issues in dispute that 60% is a reasonable amount that should be awarded. Moreover, the Costs Award should only partially indemnify the Claimant for the legal costs incurred and for the time spent appealing before the SDRCC, related to appeal the decision of Canada Soccer rejecting its application for a National Youth Club License.

Based on the amount of incurred legal fees \$39,361.56, I find that a partial indemnity of \$23,616.93 plus applicable taxes is reasonable in this matter considering *inter alia* the conduct, the financial resources of the parties, the unwillingness of the Respondent to settle this matter at any stage of this arbitration process and the length of this arbitration, justify the awarding of costs in that amount.

Therefore, in light of the foregoing, I grant partially the Claimant's request for costs, including the filing fee.

FOR THESE REASONS, THE TRIBUNAL:

GRANTS the Claimant's request for costs; and

ORDERS the Respondent to reimburse the Claimant the amount of \$23,616.93, plus applicable taxes, in addition to \$500 in SDRCC's filing fees, within 30 days of receipt of this decision.

I reserve my jurisdiction pursuant to the Code to deal with any matters arising from the interpretation of this Order.

Signed at Ottawa, this 3rd day of February, 2023.



Robert Néron, LL.B., LL.M., C.Arb.
Arbitrator