SPORT DISPUTE RESOLUTION CENTRE OF CANADA

CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA

No.: SDRCC 23-0623

IN THE MATTER OF AN ARBITRATION (Jurisdiction)

BETWEEN:

Frank Fowlie	Claimant

AND

Wresting Canada Lutte	Respondent

JURISDICTIONAL ARBITRATOR:	Professor Richard H. McLaren, O.C.

COUNSELS/REPRESENTATIVES

For the Claimant:	Mark Bourrie (Counsel) André Marin (Counsel)
For the Respondent:	Tamara Medwidsky Jordan Goldblatt (Counsel)

JURISDICTIONAL ARBITRATOR'S DECISION

Introduction

1. The Claimant is Frank Fowlie ("Fowlie"). He was the WCL Appeals and Complaints Officer ("ACO") from September 2020 to October 2021. The ACO's job was to screen complaints brought to WCL under its Policy. That function was moved in October of 2021 to a new position known as the ITP in accordance with the Policy. Fowlie no longer performed the screening role after that date. His employment with WCL was terminated after one year of a three-year contract. It was following that action that his complaints were launched.

2. The Respondent is Wrestling Canada Lutte ("WCL"), the National Sport Organization ("NSO") for the sport of wrestling in Canada. It is the body who promulgated the Discipline and Complaints Policy (the "Policy") and subsequently amended it to extend immunity to a person appointed as the Independent Third Party ("ITP").

Complaints by and against Fowlie

(i) By Fowlie

3. Between 30 July 2022 and 5 September 2022, Fowlie launched five separate complaints under the Policy against various persons. On 13 September 2022, he also brought a complaint under the Policy against the ITP alleging improper delay in screening his previous five complaints.

4. On 18 October 2022, the Permanent ITP dismissed the five complaints determining they were outside of the jurisdiction of WCL. An Acting ITP was appointed by WCL to screen the complaint against the Permanent ITP.

5. The Acting ITP rendered her decision on 22 December 2022 screening the complaint. In the ruling it was held that the Policy included contractors and

should be broadly applied. The direction of the Acting ITP was to the effect that the complaint should advance past the initial screening phase.

(ii) Against Fowlie

6. There was also a complaint brought against Fowlie by one individual ("Spinney") alleging that Fowlie had taken confidential information communicated to him in his role as the ACO and breached confidentiality of the Policy by placing it in the Statement of Claim in an Ontario Superior Court of Justice (the "OSCJ") action.

7. The complaint against Fowlie was heard on 28 October 2022 by a Discipline Panel of WCL. It was determined that there had been a breach of the confidentiality provisions under the Policy by Fowlie. It was reasoned that he was no longer under contract with WCL, nor the ACO, by the time of filing of the Spinney complaint. Therefore, the Policy no longer applied to Fowlie. The complaint was dismissed by the Discipline Panel.

Policy Amendment

8. On 13 January 2023, WCL amended its Policy to clarify that an ITP was not subject to discipline under the Policy. The amendment was stipulated to have retroactive application and stayed any proceedings against an ITP that had not been determined on their merits. The complaint against Fowlie was merely screened to proceed to the discipline process and be dealt with on its merits.

9. As a consequence of the Policy Amendment, the Acting ITP applied the amended Policy on 16 January 2023 and permanently stayed the ITP complaint.

Application to the SDRCC

10. On 30 January 2023, Fowlie brought an application to the SDRCC requesting that the SDRCC:

- "Strike down" the WCL Policy Amendment and conduct a *de novo* hearing into the ITP complaint; and
- Conduct a *de novo* hearing of Fowlie's original five complaints under the unamended Policy.

11. Based upon the relief requested above, WCL brought a challenge to the Request before the SDRCC seeking a ruling that there was an absence of jurisdiction.

12. The SDRCC appointed Professor Richard H. McLaren, O.C. as a Jurisdictional Arbitrator under its rules to hear and rule upon the jurisdictional aspect of the application to the SDRCC.

SUBMISSIONS

(i) WCL

a. SDRCC Jurisdiction to Strike Down

13. WCL submitted that whether the source of the SDRCC jurisdiction is derived from the Canadian Sport Dispute Resolution Code (the "Code") or the *Physical Activity and Sport Act,* SC 2003, c.2 (the "Act") the result is the same. There is no jurisdiction to consider the Fowlie Request.

14. It was submitted that the Code applies to Sports Related Disputes. A Sports Related Dispute is defined in the Code as "a dispute affecting participation of a Person in a sport program or Sport Organization." The creation and imposition of the Policy was not a Sports Related Dispute.

15. WCL claims there is a distinction between the application and creation of a policy. While the former may constitute a Sports Related Dispute as set out in s. 1.1(yy) of the Code, the latter does not. Fowlie's requested relief

concerns the extinction of the Policy rather than its application and therefore this dispute is not in the SDRCC's jurisdiction.

16. WCL argued that the scope of the SDRCC's jurisdiction is limited to increasing levels of physical activity and participation in sports organizations. Since Fowlie has no current relationship with WCL and his previous relationship was purely contractual, WCL submits that he is not a "participant" in WCL. The Policy does not affect his participation in a sports program or organization.

17. It submitted that SDRCC Arbitrators cannot direct the creation, enactment, drafting or re-writing of a "NSO's" policies. An Arbitrator's opinion of a policy does not grant them jurisdiction to decide whether a policy should exist. This is left for members to decide.

18. WCL further submitted that SDRCC Arbitrators are precluded from reviewing the merits of a policy under s. 6.11 of the Code, which states that Arbitrators are to review decisions, not policies. Since this is a policy matter, there is no jurisdiction.

19. WCL submits that policy changes with retroactive effect are common and such changes do not confer jurisdiction to the SDRCC even if there is ongoing litigation. WCL submits that the parties' rights are to be decided by the Policy that existed at the start of the action including the retroactive effect. WCL asserts that there is no room for interpretation here, let alone room to strike down the Policy.

b. Review of the Complaints

20. WCL asserts in the alternative if it is found that the amendment can be struck down, then the SDRCC's ability to review the five previous complaints brought by Fowlie is time-barred. This is based on a 30-day window starting on 18 October 2022 when the claims were dismissed. Since Fowlie's claim was brought on 30 January 2023, it was too late and there was no explanation for the delay.

21. Accordingly, WCL seeks that Fowlie's Request be dismissed.

(ii) Fowlie

a. *SDRCC Jurisdiction to Strike Down*

22. Fowlie disputes WCL's characterization of the situation. He submits that the Policy was not "properly enacted" but was done to deprive him of a route of complaint regarding his successor. He claims this was part of a broader vendetta against him perpetuated by WCL.

23. Fowlie submits that the SDRCC has jurisdiction to resolve this dispute irrespective of whether it derives its jurisdiction from the Code or the Act. The Claimant agrees with WCL that jurisdiction under the Code exists with respect to Sports Related Disputes but disagrees with WCL's assertion that this is not a Sports Related Dispute.

24. Fowlie seeks to review this decision under s. 6.11 of the Code. Fowlie asserts that he challenges not only the Policy's creation but also its application, which was specifically for the purpose of barring his complaints against the ITP.

25. The Claimant submits that this Policy has unintended, but far-reaching consequences and goes against the principles of good governance. Unlike a law enacted by Parliament which reigns supreme save for the Constitution, a policy enacted by WCL is still subject to the SDRCC's oversight.

26. Fowlie submits that WCL has mischaracterized the role of the ITP by first depicting them as a "judicial or quasi-judicial officer" in the initial pleading but lowering them to a "complaints screener", like a "traffic cop", in their subsequent submissions. The Claimant submits that neither characterization captures the true role of the ITP and that both are merely attempts to twist the facts to fit WCL's narrative. Fowlie claims this is an attempt to separate the policy change from Fowlie, but that WCL's actions are inherently linked to his complaints.

b. Review of the Complaints

27. The Claimant disagrees that the claim is time-barred. The ITP's dismissal of the complaints on 18 October 2022 either amounted to disregard for due process or was a calculated attempt to time-bar Fowlie's ability to appeal the decision. Accordingly, it is unfair to start the 30-day limitation period on 18 October 2022 when the Acting ITP's investigation into the ITP's handling of those complaints was ongoing and a thorough review of the facts and merits of the complaint had not been completed. Fowlie claims that he did not appeal at the time because he was following WCL's process.

28. Fowlie asserts that the 30-day limitation period began on 13 January 2023 when the top WCL executive sent an email to the Claimant reiterating that his complaints had been dismissed on 18 October 2022 by the ITP and that WCL considered the complaints process completed. Since the Claimant launched his appeal on 30 January 2023, he submits that he was well within the 30-day limitation period.

29. Accordingly, Fowlie seeks to have his request accepted with costs against WCL.

RULING

30. There are two different views on the source of the jurisdiction to conduct an arbitration by the SDRCC. The long-held theory provides that jurisdiction to conduct an arbitration stems from the Code. Recent jurisprudence[1] has disagreed and held that jurisdiction to conduct an arbitration is not derived from the Code, but from the Act. It does not matter which theory is relied upon because on either theory the SDRCC has the source jurisdiction to deal with the dispute by way of arbitration. The issue is not the source of the SDRCC jurisdiction but whether the dispute is within the arbitration provisions of the Code. Either theory as to the source of the powers of the

[1] *Cricket Canada* v. *Alberta Cricket Council*, 2020 ONSC 3776.

SDRCC to conduct an arbitration requires the same determination: whether an arbitrator should be hearing the dispute.

31. This proceeding is an arbitration under the *Arbitration Act, 1991,* S.O. 1991, c. 17 as stipulated in the Code at section 5.1.

32. The issue in this Jurisdictional Decision is whether an Arbitrator has the jurisdiction to nullify the amendment to the Policy. That is very different from the question of whether the source jurisdiction of the SDRCC over arbitration is present. There is a potential further issue that may arise following any ruling that the Arbitrator has jurisdiction over the dispute. If jurisdiction is found to exist, is there jurisdiction to conduct a *de novo* hearing of the five complaints administratively dismissed by the NSO months before the complaint and request was submitted to the SDRCC?

33. The issue in this dispute is not about the interpretation of the Amended Policy. The relief requested concerns declaring the amendment to the Policy as null and void. Therefore, the issue relates solely to the creation and existence of the Policy. The Claimant's Request seeks relief against what he considers an unfair policy rather than an unfair application of that policy.

34. The authority to create a provision such as the Policy stems from the constitution of the NSO. WCL, being a not-for-profit corporation, prescribes the powers of the various official bodies of the entity and the general conduct of the affairs of WCL through By-Laws. These By-Laws of the corporation are in effect the constituting documents of the corporation.

35. The By-Law defines what persons or organizations may be recognized as the members of the corporation. The members will constitute the sports organization. The members hold elections to the prescribed positions on the Board of Directors. The By-Law provides that the power to enact further by-laws and policies are granted to the Board of Directors of the organization and in some cases with the final approval by the members. Therefore, the Board of Directors has the authority and power to prescribe and promulgate

policies such as the Policy in this matter. As stated in *Syed*[2], policies are developed by members (or in WCL the members and the Board) and cannot be changed or amended according to the unilateral decision of an Arbitrator. There is no jurisdiction to override the constitutional provisions of a sport and alter by-laws or policy proclaimed in accordance with proper application of the constituting documents of the organization. Members and Boards of Directors determine policy, not adjudicators.

36. What arises on the facts here is an amendment to the Policy which is also stipulated to have retroactive effect. There is no reason why amendments to a policy ought to receive different consideration than discussed above. When properly adopted by the governance rules of a given organization, they form part of the revised Policy. Therefore, members and Boards determine the content of policy amendments, not adjudicators. Amendments to policies have the same constitutional protection as does the original policy.

37. For the purposes of this Jurisdictional Decision, it is unnecessary to determine if the present disagreement between the parties constitutes a Sports Related Dispute. It can be assumed that it is for purposes of this analysis. Arbitrators when dealing with a Sports Related Dispute as prescribed in the Code interpret policies but do not alter them, create them, or nullify them.

38. In this case WCL's members determined that the amendment was to have retroactive effect. That is also within the authority of the members and the Board as was the promulgation of the original policy and its later amendments. The general principle of statutory interpretation is to the effect that a new piece of legislation has only prospective effect. However, it is within the powers of a decision-making body such as the Board of Directors to declare that a particular provision or amendment or the policy itself has

[2] *Cricket Canada v. Bilal Syed*, 2017 ONSC 3301 at paras 37 and 51 [*Syed*].

retrospective effect if so expressed in a clear fashion. In such a case, the statute is effective according to its terms.[3]

39. The request for relief in the application of the Claimant on the merits seeks not only to interpret the Amended Policy but also to strike it down and render it null and of no effect. The retroactive application of law may extinguish or simplify legal rights and is neither improper nor without constitutional authority.

40. It follows from the foregoing analysis that the decision of the ITP to decline to investigate the five complaints cannot be adjudicated because of the Amended Policy. That revised Policy extended immunity from arbitral review to the ITP. There can be no power or authority in the SDRCC Arbitrator to strike down the Policy as properly amended.

41. Dismissal of the matter on the first issue means that it is unnecessary to rule on the second issue because the first issue did not find a power to strike down the Amended Policy.

42. For all the foregoing reasons there is an absence of jurisdiction for an Arbitrator appointed by the SDRCC to examine and declare the Amended Policy to be a nullity without effect. The Amended Policy cannot be "struck down" as per the request for relief by the Claimant on this challenge.

43. In accordance with the powers extended to me as the Jurisdictional Arbitrator in the Code and for the reasons set out, the Jurisdictional Arbitrator dismisses the Request of the Claimant.

44. The Claimant on this challenge in its submissions made a request for costs. WCL made no submission as to costs.

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[3] See *British Columbia v. Imperial Tobacco Canada Ltd.,* 2005 SCC 49 at para 69.

DATED AT LONDON, ONTARIO CANADA THIS 3 OF APRIL 2023.

Professor Richard H. McLaren, O.C., C.Arb.

Jurisdictional Arbitrator