

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

February 6th, 2019

**N°: SDRCC DAT 18-0013
(DOPING APPEAL TRIBUNAL)**

**CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)
(CLAIMANT)**

AND

**KARLA GODINEZ
(RESPONDENT)**

AND

**WORLD ANTI-DOPING AGENCY (WADA)
U SPORTS
(OBSERVERS)**

BEFORE:

PATRICE BRUNET

APPEARANCES:

FOR THE CANADIAN CENTRE FOR ETHICS IN SPORT:

**LUISA RITACCA, COUNSEL
STEPHEN AYLWARD, COUNSEL**

FOR KARLA GODINEZ:

**DR. EMIR CROWNE, COUNSEL
AMANDA FOWLER, COUNSEL**

DECISION

I. INTRODUCTION

1. This is an appeal by the CCES against the costs award of Arbitrator Bennett in SDRCC No DT 18-0290 released on October 24th, 2018 (the “Cost Decision”).
2. The Cost Decision related to Arbitrator Bennett’s earlier decision to impose a sanction on the Respondent for a positive test of a banned substance. In the Cost

Decision, Arbitrator Bennett rejected the Respondent's request for legal fees, but awarded the Respondent the cost of hiring an expert to attend the hearing to support the Athlete's attempt to obtain a reduced sanction. The cost had been set at \$1,000.

3. On December 3rd, 2018, an administrative conference call was held by the Sport Dispute Resolution Centre of Canada (SDRCC) between the Parties in order to clarify the administrative procedure of the appeal. During this call, and knowingly departing from the Sport Dispute Resolution Centre of Canada Code (the "SDRCC Code"), the Parties discussed the value of having this appeal heard by a sole arbitrator, owing to the narrow issue of the appeal on costs. All parties agreed that this appeal arbitration would be conducted by the undersigned as sole arbitrator.
4. On December 5th, 2018, I was therefore nominated under article 6.8 of the SDRCC Code as an arbitrator to hear and determine the present matter.
5. On December 10th, 2018, during the preliminary conference call, both the Athlete's and the CCES' counsel confirmed their consent to my nomination as a sole arbitrator. It was also determined that none of the Parties would present witnesses. All Parties had the opportunity to present full and complete submissions, and no hearing was deemed necessary.

II. FACTS

6. On August 22nd, 2018, Arbitrator Bennett imposed a 12-month period of ineligibility on the Respondent for a doping violation.
7. Following this decision, the Respondent sought \$27,120 in legal fees and \$1,000 to cover the witness fee in accordance with article 6.22 of the SDRCC Code.

8. On October 24th, 2018, Arbitrator Bennett rendered his Cost Decision. He rejected the request for legal fees but awarded the Respondent the witness fee.
9. On November 25th, 2018, the Respondent confirmed that she would not receive the \$1,000 since she is being reimbursed by her university. This was communicated to the Claimant on November 26th, 2018.

III. THE PARTIES

The Claimant

10. The CCES is an independent, not-for-profit organization that promotes ethical conduct in all aspects of sport in Canada. The CCES also maintains and carries out the Canadian Anti-Doping Program (CADP), including the provision of anti-doping services to national sports organizations and their members. As Canada's national anti-doping organization, the CCES is in compliance with the World Anti-Doping Code ("the WADA Code") and its mandatory International Standards. The CCES has implemented the WADA Code and its mandatory International Standards through the CADP, the domestic rules that govern this proceeding. The purpose of the WADA Code and of the CADP is to provide protection for the rights of athletes to fair competition.

The Respondent

11. Karla Godinez is a wrestler in the varsity wrestling program at the University of Fraser Valley, where she also studies.

Observers

12. The World Anti-Doping Agency (“WADA”) is the international organization responsible for managing the World Anti-Doping Program which includes the WADA Code.
13. U Sports is an organization that leads and governs university sports in Canada.

IV. THE APPLICABLE LAW

The SDRCC Code

14. Subsections 6.21(h) and (k) of the SDRCC Code state the following:

Awards

(h) Notwithstanding Subsection 6.21(g) hereof, a Party shall have the right to appeal an award in a Doping Dispute pursuant to Section 7.4 hereof. In addition, WADA and the applicable international federation shall have the right to appeal any award of the Doping Panel or of the Doping Appeal Panel to the CAS.

[...]

(k) Each case must be determined on its facts and the Panel shall not be bound by previous decisions, including those of the SDRCC.

15. Section 6.22 of the SDRCC Code states the following:

Costs

(a) Except for the costs outlined in Subsection 3.9(e) and Section 3.10 hereof and subject to Subsection 6.22(c) hereof, each Party shall be responsible for its own expenses and that of its witnesses.

(b) Parties wishing to seek costs in an Arbitration shall inform the Panel and the other Parties no more than seven (7) days after the award being rendered.

(c) The Panel shall determine whether there is to be any award of costs and the extent of any such award. When making its determination, the Panel shall take into account the outcome of the proceedings, the conduct of the Parties and their respective financial resources, intent, settlement offers and each Party's willingness in attempting to resolve the dispute prior to or during Arbitration. Success in an Arbitration does not mean that the Party is entitled to be awarded costs.

[...]

The 2015 Canadian Anti-Doping Program (the "2015 CADP")

16. Rule 8.2.4(h) of the 2015 CADP states the following:

The Doping Tribunal shall act in a fair and impartial manner towards all parties at all times. More specifically,

[...]

h) Subject to Rule 8.2.4b (excluding legal counsel fees), the Doping Tribunal may award costs to any party, payable as it directs.

17. Rule 13.1 of the 2015 CADP states the following:

Decisions Subject to Appeal

Decisions made under the Rules may be appealed as set forth below in Rules 13.2 through 13.7 or as otherwise provided in the Rules, the Code or the International Standards. Such decisions shall remain in effect while under appeal unless the appellate body orders otherwise. Before an appeal is commenced, any post-decision review provided in the Anti-Doping Organization's rules must be exhausted, provided

that such review respects the principles set forth in Article 13.2.2 of the Code (except as provided in Rule 13.1.3).

18. Rule 13.2 of the 2015 CADP states the following:

Appeals from Decisions Regarding Anti-Doping Rule Violations, Consequences, Provisional Suspensions, Recognition of Decisions and Jurisdiction

A decision that an anti-doping rule violation was committed, a decision imposing Consequences or not imposing Consequences for an anti-doping rule violation, or a decision that no anti-doping rule violation was committed; a decision that an anti-doping rule violation proceeding cannot go forward for procedural reasons (including, for example, prescription); a decision by WADA not to grant an exception to the six months' notice requirement for a retired Athlete to return to Competition under Rule 5.7.1; a decision by WADA assigning results management under Article 7.1 of the Code; a decision by the CCES not to bring forward an Adverse Analytical Finding or an Atypical Finding as an anti-doping rule violation, or a decision not to go forward with an anti-doping rule violation after an investigation under Rule 7.7; a decision to impose a Provisional Suspension as a result of a Provisional Hearing; the CCES' failure to comply with Rule 7.9; a decision that the CCES lacks jurisdiction to rule on an alleged anti-doping rule violation or its Consequences; a decision to suspend, or not suspend, a period of Ineligibility or to reinstate, or not reinstate, a suspended period of Ineligibility under Rule 10.6.1; a decision under Rule 10.12.3; and a decision by the CCES not to recognize another Anti-Doping Organization's decision under Rule 15, may be appealed exclusively as provided in Rules 13.2 – 13.7.

V. POSITIONS OF THE PARTIES

Position of the Claimant

19. The Claimant submits that the CCES has the right to appeal the decision in accordance with rules 13.1 and 13.2 of the 2015 CADP and section 6.21 of the

SDRCC Code and that the Doping Appeal Tribunal has jurisdiction to hear this appeal under rule 8.2.4(h) of the 2015 CADP.

20. The Claimant submits that costs ordered in favour of an athlete are costs associated with an ADRV and thereby are consequences of an ADRV.
21. The Claimant also submits that the appeal is not moot even if the Respondent has informed the CCES that she had no intention to receive the witness fee of \$1,000. The Claimant refers to *Alberta v. Vader* in which the Alberta Court of Appeal explains that “self-inflicted mootness” should not be considered and treated as mootness and thereby cannot prevent the appeal¹.
22. In the alternative, the Claimant submits that this case does not meet the second step of the two-step analysis, developed in *Borowski v. Canada*, which defines the criteria under which to determine that an appeal is moot². The Claimant argues that the Cost Decision, if left undisturbed, will set a precedential value against future cases, guiding arbitrators in a direction which is contrary to the SDRCC Code. For this reason, it is the Claimant’s position that I should hear the appeal, to correct Arbitrator Bennett’s erroneous interpretation.
23. Indeed, the Claimant submits that Arbitrator Bennett erred in awarding costs to the Respondent, when he determined that the Respondent was entitled to recover non-legal fees. According to the Claimant, the Respondent should be responsible for her own expenses and that of her witnesses, since the conditions found in subsection 6.22(c) of the SDRCC Code were not met.

¹ *Alberta v. Vader*, 2017 ABCA 158

² *Borowski v. Canada (Attorney General)*, [1989] 1 SCR 342 at p. 353

24. The Claimant also submits that the disparity of resources between the Parties is not a valid argument since there will always be a disparity of resources between the CCES and the athletes.
25. The Claimant requests that the appeal be allowed and that the Cost Decision be set aside.

Position of the Respondent

26. The Respondent submits that the Claimant has no right to appeal the Cost Decision based on the definitions of the 2015 CADP. Since only athletes or other persons can suffer from financial consequences related to an ADRV, an Anti-Doping entity, such as the CCES, cannot appeal under rule 13.2 of the 2015 CADP.
27. The Respondent strengthens her argument by explaining that the 2015 CADP was written by the Claimant. If the organization had wanted to include themselves, they would have expressed it clearly when drafting the rules.
28. Therefore, this omission and/or ambiguity should be interpreted in favour of the Respondent and the appeal dismissed for lack of jurisdiction.
29. The Respondent also submits that the appeal is moot since she has promptly informed the Claimant that she does not intend to collect the money ordered in the Cost Decision. As a result, the issue regarding the Cost Decision is hypothetical and no controversy remains. The Respondent supports her

argumentation with the two-step analysis developed in *Borowski v. Canada*³ regarding mootness.

30. The Respondent also submits that this issue represents no exceptional situations that would allow the Arbitrator to use his discretion.
31. Finally, the Respondent also claims that the Cost Decision does not contain any reversible error. Arbitrator Bennett applied the factors of subsection 6.22(c) of the SDRCC Code and concluded, among other factors, that the disparity of resources between the parties justified awarding the reimbursement of the witness costs.
32. In conclusion, the Respondent submits that the appeal should be dismissed.

VI. DECISION

33. In their submissions, the parties raised three primary arguments to support their positions:
 - a. The jurisdiction of the Doping Appeal Tribunal;
 - b. The mootness of the appeal; and
 - c. That Arbitrator Bennett committed an error in his Cost Decision.
34. I agree with the Claimant that I have jurisdiction to hear this appeal and that the SDRCC Code does not prevent the Claimant to appeal the Costs Decision. While it does not specifically refer to the appealable nature of the *costs portion* of an award, it is only logical to me that the principle of *accessorium sequitur principale*

³ *Supra* note 2.

would apply in this case. The Cost Decision, as accessory to the main arbitration decision, is appealable under the SDRCC Code.

35. However, this appeal is moot.

36. In *Borowski v. Canada*, Justice Sopinka explained that “at the time when the court is called upon to reach a decision”, a case is considered moot if “no present live controversy exists”, even if the event that makes the case moot happens subsequently to the initiation of the action⁴.

37. I have considered the Claimant’s position, citing the *Vader*⁵ decision. However, I found that the facts of this case discuss the issue of mootness in a different light. In *Vader*, the Attorney-General chose not to attempt to recover or to propose to recover any funds which had been advanced in furtherance of the Order. Nevertheless, the Attorney-General insisted to argue the legal questions before the Court, in order to bring clarity for future decision-makers in similar future situations. Justice Watson recognized the notion of *self-inflicted mootness*, but nevertheless allowed the application for leave. The opportunity of determining a legal question in sport arbitration, absent a “live controversy”, is further discussed below.

38. As explained in *Jane Doe v. Canada*⁶, the Claimant has the onus to convince me that I “should make an exception to the application of the general rule in this case”. I did not find anything particularly exceptional in this case, aside from raising a misinterpretation of the SDRCC Code, which has no future binding effect.

⁴ *Supra* note 2.

⁵ *Supra* note 1.

⁶ *Jane Doe v. Canada (Attorney General)*, 2005 CanLII 18839 (ON CA)

39. Since the Respondent has forfeited her right to collect the awarded costs, there is no more controversy between the parties.
40. Still, the Claimant insists that I review Arbitrator Bennett's Cost Decision, otherwise it would set a dangerous precedent whereby "*any athlete would be entitled to be reimbursed for costs incurred in meeting their own burden to prove they were entitled to a sanction reduction [...]*".
41. Sports arbitration case law has been building over the last 30 years, in Canada and elsewhere. Principles of sport law have developed, and the legal community, counsels and arbitrators alike, have relied on those principles to mount their strategy and/or decisions. Those principles are important and they should continue to develop and flourish.
42. At the same time, I remain mindful, as should all lawyers, of the language contained in Subsection 6.21(k) of the SDRCC Code: "Each case must be determined on its facts and the Panel shall not be bound by previous decisions, including those of the SDRCC".
43. SDRCC arbitrators are not judges sitting in public courts, and the principle of *stare decisis* does not apply to arbitration matters. I can understand why the Attorney-General, in *Vader*, despite abandoning its monetary claim, insisted to have a legal question determined by the Court. In its opinion, the public interest required it, and the outcome may very well set a legal precedent, by which other tribunals and the public administration would be bound. Jurisprudential precedent does not bear the same weight in arbitration.

44. In our case, there is no “live controversy” anymore since the Respondent forfeited her right to claim the awarded costs. Justice Sopinka, in *Borowski*, considers a case moot, if it fails to meet this test.
45. The learned Supreme Court Justice wrote that I can nevertheless elect to address a moot issue if the circumstances warrant, but what is the purpose, if my, or Arbitrator Bennett’s, decision has no binding effect on future arbitrators? I don’t believe that it was the intention of Justice Sopinka to envision that an arbitration matter, with no potential to create a binding precedent, be pursued for the purpose of setting, or correcting, a decision outside of the judicial system. In my view, the scarce resources found in sport law, coupled with the weak legal value of the outcome, does not justify this matter to be pursued.
46. Since this appeal is moot, it is not necessary that I address the third argument raised by the Claimant as to whether Arbitrator Bennett erred in awarding costs to the Respondent.

VII. CONCLUSION

47. Having carefully considered the arguments of the parties, the law and the jurisprudence, the appeal is dismissed.
48. I retain jurisdiction and reserve the right to hear any dispute relating to the interpretation or application of the present decision.

Signed in Montreal, this 6th day of February 2019



Patrice Brunet, Arbitrator