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

NO: SDRCC 19-0416

BRENDAN COREY
(CLAIMANT)

AND

SPEED SKATING CANADA (SSC)
(RESPONDENT)

AND

MATHIEU BERNIER
SÉBASTIEN GAGNON
KEIL HILLIS
MAXIME LAOUN
ALPHONSE OUIMETTE
JORDAN PIERRE-GILLES
(AFFECTED PARTIES)

COSTS AWARD WITH REASONS

Appearances:

For the Claimant: Emir Crowne
Amanda Fowler
Liam Macfarlane

For the Respondent: Adam Klevinas
Shawn Holman
Jennifer Cottin

For the Affected Parties: N/A

Introduction

1. Following my decision to allow the Claimant's appeal in part, the Claimant submits that he should be entitled to costs pursuant to subsection 6.22(c) of the Canadian Sport Dispute Resolution Code (the "SDRCC Code"). For the reasons that follow, I reject his request for costs in this matter.
2. Costs are only awarded on an exceptional basis so that sport funds may be spent on athletes, coaches and teams, rather than on disputes. The Claimant's request was only partially successful and the parties' conduct did not merit a costs award. Therefore, the exceptional circumstances required for a costs award have not been shown here.

Submissions

Claimant's Submissions

3. The Claimant, Brendan Corey, submits that costs should be awarded on an exceptional basis under subsection 6.22(c) of the SDRCC Code. The Claimant submits that total costs were $16,461.25.
4. The Claimant cites *Hyacinthe v Athletics Canada*, SDRCC 06-0057 ("*Hyacinthe*") for Arbitrator Pound's interpretation of subsection 6.22(c) and to emphasize that the outcome of the proceedings is a primary consideration. As the Claimant's appeal was partially allowed, the Claimant submits that this should weigh in favour of a costs award.
5. Turning to the conduct of the parties, the Claimant submits that, as found in *Kraayeveld v Taekwondo Canada*, SDRCC 15-0253 by Arbitrator Dumoulin, the conduct of the parties is the most important factor to be considered. Under this category, the Claimant

submits that the Respondent's conduct inflated the amount of costs incurred by the other party by: a) challenging the Panel's independence, b) withdrawing the challenge to the Arbitrator's independence, and c) not providing the Claimant with reasons as directed in the award.

6. The Claimant submits that he is a part-time student of limited means, with a reported income of $20,000 in 2018. In contrast, the Claimant submits that the Respondent is a National Sport Organization (NSO) with far greater financial resources.

7. As for intent, the Claimant submits that, as found in *Hyacinthe* it means bad faith, a plot, or conspiracy. In this matter, the Claimant submits that the Respondent has acted in bad faith by adopting the position that it would not fill vacant spots on the National team in a manner that must have been an effort to block the Claimant from being named to a team. Next, the Claimant submits that the re-ranking following the decision implausibly benefitted every athlete except for him. The Claimant also submits that the Respondent delayed the proceedings for approximately a month due to the absence of the Respondent's witness, Jennifer Cottin, who, ultimately, was not called at the hearing. Finally, the Claimant submits that it is an example of bad faith that the Respondent has not provided reasons as directed in my decision. Added together, the above, to the Claimant, represents a concerted effort to avoid naming the Claimant to the Development team.

Respondent's Submissions

8. The Respondent, Speed Skating Canada (SSC), addresses the factors in subsection 6.22(c) point by point to submit that costs should not be awarded in this matter.

9. Beginning with the outcome of the proceeding, the Respondent submits that, as found in *Jacks v Swimming Canada*, SDRCC 17-0324 ("*Jacks*"), costs are only awarded on an exceptional basis so that NSO funds are not diverted from being spent on athletes, coaches, and teams, to settling disputes. The Respondent submits that success on its own does not entitle a party to a costs award. The Respondent submits, furthermore, that in *Christ v Speed Skating Canada*, SDRCC 16-0298 ("*Christ*"), even though the proceeding's outcome is the primary consideration in determining an award for costs, in general, parties should bear their own costs for matters arising under the SDRCC Code. As such, the Respondent submits that the parties should, in general, bear their own costs unless there are other factors aside from the outcome of the proceedings that would justify an award for costs.
10. The Respondent submits that the Claimant was not successful in his appeal, therefore a costs award is not appropriate. The Respondent argues that the only ground for appeal raised by the Claimant was related to the interpretation of the Bye Policy. As found in my decision, the Respondent submits that this ground for appeal was denied. To the Respondent, the Claimant succeeded on the issue of the replacement of skaters, which was not raised before the hearing, only arose during the hearing, and had no impact on the final outcome of this matter. Therefore, the Respondent submits that the Claimant was only partially successful, which makes any request for costs unavailable to the Claimant.
11. Furthermore, the Respondent submits that the outcome of the proceeding on its own does not merit an award for costs, and that no other factors listed in subsection 6.22(c) of the SDRCC Code were present to justify an award for costs.

12. The Respondent declined to elaborate on the challenge to my independence, but submitted instead that this challenge was withdrawn less than 24 hours from when it was presented, and therefore had no material impact on the proceedings' timing.
13. Turning to Jennifer Cottin's absence, the Respondent submits that the reasons for Ms. Cottin's absence were already accepted by the Arbitrator during the preliminary call on August 6th, 2019, and do not need to be reiterated here. The Respondent submits that, in any event, Ms. Cottin's absence was unrelated to her being a witness in this matter. Her expertise and knowledge of the situation were, to the Respondent, critical to the preparation of its submissions, which necessitated the delay during her absence. The Respondent highlights that Ms. Cottin returned to work on August 28, 2019, and that it provided detailed written submissions and extensive evidence within two days of her return.
14. The Respondent also disputes the Claimant's submission that Ms. Cottin was not called as a witness. The Respondent clarified that Ms. Cottin was present and available to give evidence at the hearing, but the Claimant took issue with the fact that no witness statement had been submitted in advance, and therefore refused to cross-examine her even if the Respondent called her as witness. As such, the Respondent submits that they proceeded on the documentary record only because of the Claimant's objections to Ms. Cottin giving evidence at the hearing.
15. Turning to the Claimant's submissions about the Respondent's failure to comply with the decision's order, the Respondent submits that it complied with all parts of the order except the requirement to issue reasons for Keil Hillis' ranking ahead of the Claimant's. The Respondent submits that it declined to issue these reasons based on the

Claimant's participation in the Shanghai Trophy Invitational Competition on September 29, 2019, so that the Claimant could focus on that competition. The Respondent submits that it provided the reasons, as ordered, 5 days after the Claimant returned from Shanghai on October 11, 2019.

16. The Respondent declines to focus only on the Claimant's allegations of poor conduct, and highlights instead its good conduct in disclosing copious evidence to this proceeding, including providing detailed reasons for why the Claimant was not selected to the 2019/2020 Development Team. The Respondent submits that it submitted as much information as possible to help the Arbitrator reach a decision.

17. As for the financial resources of the parties, the Respondent submits that it does not dispute that most athletes' financial means are limited. But the Respondent submits that the evidence provided by the Claimant showed only income from a RESP (Registered Education Savings Plan), and left out that the Claimant received financial support through Sport Canada's Athlete Assistance Program ("AAP"), under which he held a Development Card. The Respondent submits that this program provides the holder of a development card $1,060 per month from Sport Canada, from July 1 – June 30. As such, the Respondent would have received $6,360 through this program. In addition, the Respondent submits that the Claimant also sought permission to receive a $5,000 sponsorship from CGI for the 2018/2019 season. As well, the Respondent argues that the Claimant would also have been eligible for an additional $4,000 in support through the New Brunswick Athlete Assistance Program as a Tier 2 athlete. As shown above, the Respondent submits that although it does not dispute that athletes

have limited financial means, the Claimant has not presented the full picture of his financial circumstances.

18. Even though the Respondent concedes that, as an NSO, it has greater financial means than most athletes, the Respondent submits that it should consider that money spent litigating disputes does not come from a separate budget, but from the same financial resources that it would otherwise spend on programs. Therefore, the Respondent submits that awarding costs against it in this matter when none of the grounds enumerated in subsection 6.22(c) are present, would be contrary to the principle decided in *Jacks*.

19. The Respondent submits that, as I did not find misconduct on its part in the decision, the Claimant cannot now claim that there was a conspiracy against him. The Respondent submits that it explained the reasons for its decision to the Claimant, and that the reason the Claimant was not selected was purely a high performance decision made by those with the authority, expertise, and qualifications to make it.

20. As for the Respondent's re-ranking of the athletes following the decision, the Respondent submits that it had no discretion, and simply re-ranked the athletes based on the adjusted 2018/2019 Canadian rankings. The Respondent submits that no subjectivity was part of this decision, therefore it could not have named the Claimant to the Development team on the basis of the decision.

21. The Respondent disputes the accuracy of the Claimant's representatives' fees. Furthermore, the Respondent cites the Arbitrator's reasoning in the *Christ* costs award to submit that the Claimant's counsel fees are, in general, too high. In *Christ*, Arbitrator Palamar found that claiming a legal bill for two lawyers billing at a combined rate of

$700 an hour for 28 hours was inappropriate in the circumstances. In that decision, Arbitrator Palamar reduced the fees to $250 an hour for a single lawyer for that time period. The Respondent submits that, by way of comparison, the Claimant's representatives have claimed a combined hourly rate of $750 for a total of 36 hours. Given the lack of complexity of this case, the Respondent submits that this matter did not require two lawyers to bill at the combined hourly rate of $750.

Relevant SDRCC Code Sections

22. The relevant sections from the SDRCC Code are as follows:

> **6.22 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.
>
> […]
>
> 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.

Analysis

23. The relevant factors for consideration in awarding costs in this dispute are found in subsection 6.22(c) of the SDRCC Code and include:

> (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.

In the *Jacks* costs award, I applied the SDRCC Code's listed factors and the relevant principles underlying their application. In that decision, I held that the SDRCC Code's costs sections must be interpreted in keeping with the SDRCC's purpose, which *"is to provide an easily accessible means to resolve sport related disputes, many (if not most) of which will involve athletes."* (*Jacks* at para. 11).

24. To determine when costs are appropriate, the factors in subsection 6.22(c) must be present. Costs cannot be awarded unless some combination of the factors in subsection 6.22(c) have been shown. Costs will generally be negligible and should not require costs awards; however, there are some circumstances in which costs might be appropriate (*Jacks* at para. 11). Specifically, costs awards may be appropriate where one party's conduct was without merit and caused financial harm to the opposite party.

25. While I have read the submissions of the parties, I will only refer to their submissions on the outcome of the proceedings, conduct of the parties, and intent. Addressing these submissions is sufficient to resolve this matter.

(i) The Outcome of the Proceedings

26. The Claimant submits that because he was successful in his appeal of this decision, he should be entitled to costs. In fact, the Claimant's main ground of appeal was unsuccessful, although I did partially allow the appeal on the basis of a secondary interpretation question regarding the Respondent's Team Selection policy.

27. The outcome of proceedings is a critical factor, but not a determining one. The drafters of the SDRCC Code made it clear that success on its own is not reason to award costs. This is explicit in subsection 6.22(c): "*Success in an Arbitration does not mean that the Party is entitled to be awarded costs*." In the absence of the other enumerated factors, success alone at Arbitration will rarely fall within an exceptional case giving rise to a costs award. The Claimant argued that the outcome should be a primary consideration in whether to award costs. I agree, but I disagree that the Claimant was successful. The Claimant was not successful on his main ground of appeal, and I will not award costs on this basis.

(ii) Conduct of the Parties

28. The parties' conduct in attempting to reach a timely decision is an important factor in whether to award costs. In cases such as this, where the Claimant was unsuccessful in their main appeal, it will require significant misconduct for a costs award to be made in their favour. I do not find that this threshold has been met. For the parties' conduct to rise to a level justifying a costs award, the conduct must have harmed the Claimant's interests and delayed a decision. I do not find that either party behaved in this manner. The Parties did disagree over some procedural matters. However, they were resolved without significant delay.

29. The Claimant submits that the Respondent's withdrawn challenge to my independence, failure to provide reasons as directed by my award before October 11th, 2019, and for not producing Ms. Cottin as a witness justify a costs award. I disagree. The Respondent's challenge to my independence was quickly withdrawn, and I accept the

Respondent's submissions that Ms. Cottin was made available to provide evidence as quickly as possible. Neither of these issues contributed to extra expense.

30. As for providing reasons to the Claimant as directed in my award, it appears that the Respondent has fulfilled that obligation. The Claimant has not argued that the time in which the Respondent fulfilled this obligation caused any material harm. Therefore, I cannot find that the timeframe in which the Respondent delivered its reasons caused any harm.

(iv) Intent

31. Bad faith is a factor for consideration in determining whether to award costs, as determined in *Hyacinthe* (at page 14). The Claimant submits that there was a concerted effort to keep him from being selected to the team and that the results of the award's implementation benefitted everyone except for him. I do not accept these arguments. The re-selection to the team proceeded as directed by me, and was done in accordance with the Respondent's selection policy.

32. There was a lack of clarity over how Mr. Hillis was ranked ahead of the Claimant, but there was no evidence of bad faith, only insufficient detail which has since been provided to the Claimant. I accept the Respondent's submission that they disclosed voluminous information to help resolve this dispute and worked with Ms. Cottin to produce her as a witness as quickly as possible.

33. Ultimately, alleging a conspiracy by the Respondent that it acted to specifically deprive the Claimant of a spot on the Development Team requires evidence that was not shown. Therefore, I decline to weigh this factor in favour of costs.

Conclusion

34. As I decided in *Jacks*, costs should only be awarded in exceptional circumstances so that the financial resources of NSOs may be properly spent on athletes, teams and coaches, rather than on disputes. The Claimant has not proven that his case is one of these exceptional situations. The Claimant's appeal was only partially successful, and the parties worked productively to resolve issue that arose in the course of proceedings such that no meaningful delays resulted. I do not find that any exceptional circumstances exist to justify the awarding of costs.

35. The request for costs is rejected.

Signed on October 23, 2019, in Budapest, Hungary.

David Bennett, Arbitrator