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

NO: SDRCC 19-0401

ANDY MCINNIS
(CLAIMANT)

AND

ATHLETICS CANADA
(RESPONDENT)

AND

OTTAWA LIONS TRACK AND FIELD CLUB
(AFFECTED PARTY)

Before:

David Bennett (Arbitrator)

Appearances:

On behalf of the Claimant:	Mr. Andy McInnis
	Mr. James Katz, counsel
On behalf of Athletics Canada:	Mr. David Bedford
	Ms. Leanne Standryk, counsel

PRELIMINARY DECISION

28 August 2019

Overview

1. The Claimant has appealed the May 5, 2019 decision of Dr. Frank Fowlie ("Fowlie Decision"), Commissioner for Athletics Canada, to the SDRCC under r. 140.10 of Athletics Canada's *Rules and Bylaws*. The Claimant has raised the preliminary issue of whether it be permitted to conduct his appeal of the Fowlie Decision by way of a hearing *de novo*.

2. The hearing was conducted by written submissions from the Parties. After reviewing the written submissions, I have determined that this matter should be heard by way of judicial review.

3. This decision is a preliminary decision and was given orally on August 20, 2019.

The Parties

4. The Claimant, Andy McInnis, is the former Executive Director and former Head Coach of the Ottawa Lions Track and Field Club ("Lions"), a track and field club and member of Athletics Canada.

5. The Respondent, Athletics Canada, is the national governing body for track and field. It is a not-for-profit corporation that has jurisdiction to hear complaints and carry out investigations over member and associate clubs.

Background

6. On December 14, 2018, Commissioner Fowlie, acting on behalf of the Respondent, received a written complaint alleging that the Claimant had engaged in behaviour constituting harassment and sexual harassment in contravention of the Respondent's *Code of Conduct* and *Harassment Policy.*

7. On January 30, 2019, the Respondent claimed jurisdiction over the investigation and André Marin ("Mr. Marin") was appointed to conduct the investigation pursuant to r. 130.04 of the Respondent's *Rules and Bylaws*.

8. On March 21, 2019, Commissioner Fowlie placed the Claimant on suspension pending the release of Commissioner Fowlie's decision or no later than June 29, 2019.

9. On May 5, 2019, Commissioner Fowlie received the final version of Mr. Marin's report and released his decision on the matter that same day. Mr. Marin concluded that the Claimant violated the *Code of Conduct* and *Harassment Policy* and recommended that the Claimant receive a lifetime expulsion from Athletics Canada. Commissioner Fowlie accepted Mr. Marin's findings and recommendations in their entirety without conducting a hearing.

10. Pursuant to r. 140.08.14(a-i) of the Respondent's *Rules and Bylaws*, the Claimant was found by Commissioner Fowlie to have committed major infractions of the

Athletics Canada *Code of Conduct and Ethics* by repeated minor violations, by behaviour that constitutes sexual harassment and sexual misconduct, repeated violations of the *Code of Conduct and Ethics*, and acted in a manner that damaged the Respondent's image, credibility or reputation. As a result, Commissioner Fowlie ordered the Claimant expelled from Athletics Canada and its member branches and clubs and expelled from the Athletics Canada Hall of Fame.

11. The Claimant appealed the decision on the basis that he was denied procedural fairness and natural justice.

12. The Claimant has asked that this matter be heard *de novo*.

Procedure

13. The appeal was brought before the SDRCC pursuant to r. 140.10 of Athletics Canada's *Rules and Bylaws*.

The Hearing

14. The Hearing proceeded by way of written arguments with the decision given orally by telephone on August 20, 2019.

Issue

15. The following issue has been raised in the present case as a preliminary matter: should this matter proceed by hearing *de novo* or judicial review?

Submissions

The Claimant

16. The Claimant argues that, pursuant to s. 6.17 of the *Canadian Sport Dispute Resolution Code* ("SDRCC Code"), this matter should be heard *de novo*. The Claimant has submitted that he was denied principles of natural justice and procedural fairness. In particular, the Claimant submits that he was only interviewed for 30 minutes by Mr. Marin and that he was never provided with copies of the complaints, violating his rights under r. 140.08 of the *Rules and Bylaws*, and that he was neither given a hearing (whether in-person or via telephone) nor given the opportunity to cross-examine witnesses.

17. Citing para. 33 of Commissioner Fowlie's decision, the Claimant submits that Commissioner Fowlie based his decision on Mr. Marin's report. The Claimant argues that when Mr. Marin provided the Claimant with a draft copy of his report, the five days he was given to respond to the findings and conclusions were inadequate, given that the report was over 220 pages and the seriousness of the sanctions being recommended by Mr. Marin.

18. The Claimant argues that s. 6.17(b) of the SDRCC *Code* enables this matter to proceed *de novo* where either a National Sport Organization ("NSO") does not conduct its internal appeal process or denies a claimant a right of appeal without due consideration via a hearing on the appeal's merits. The Claimant further argues that the language of this section means that proceeding *de novo* is mandatory, given the use of the term "shall have".

19. The Claimant points to the fact that the Athletics Canada's *Rules and Bylaws* do not provide for an internal appeal of a Commissioner's decision and that the SDRCC is set out as the only avenue of appeal by r. 140.16, thus denying the Claimant's right to an internal appeal, making it the first and only avenue of appeal.

20. In support of his arguments, the Claimant cited the following cases: *Marchant and Duchene v. Athletics Canada*, SDRCC 12-0178; *Khan v. University of Ottawa*, [1997] O.J. No. 2650 (C.A.); *Gordon v. Canadian Amateur Boxing Association*, ADR 02-0013; *Dolphins Swim Club Oakville v. Swimming Canada*, SDRCC 14-0226; *Canada Blind Sports Association (CABA) v. Simon Richard*, SDRCC 17-0319; *Paterson v. Skate Canada*, 2004 ABQB CarswellAlta 1797; *McGarrigle v. Canada Interuniversity Sport*, [2003] O.J. No. 1842 (S.C.J.); *Kane v. Board of Governors of U.B.C.*, [1980] 1 S.C.R. 1105; *Sych v. Shooting Federation of Canada*, SDRCC 10-0112.

The Respondent

21. The Respondent submits that the appeal should proceed by way of judicial review. In support of the position, the Respondent argues its appeal policy limits the jurisdiction of the arbitrator to a review of Commissioner Fowlie's decision. In support of this position, the Respondent relies upon the wording contained in r. 140.16 of Athletics Canada's *Rules and Bylaws*.

22. While the Respondent acknowledges that s. 6.17 of the SDRCC *Code* empowers SDRCC arbitrators to hear matters *de novo*, the Respondent argues that the wording contained in s. 6.17(b) gives the arbitrator a discretionary right to grant a trial *de novo*, specifically the wording, "shall have the power".

23. Further, the Respondent acknowledges that it did not conduct an internal appeal, but that this appeal before the SDRCC is more accurately characterized as an appeal of first instance. The Respondent's position is that r. 140 of Athletics Canada's *Rules and Bylaws* gives the Claimant the right to either an internal appeal of the Commissioner's decision or an appeal before the SDRCC. In this case, according to the Respondent, the Claimant has exercised his right and option to appeal directly to the SDRCC as the place of first appeal. The result of this choice, according to the Respondent, is that r. 140.16 specifically proscribes limits on the scope of any appeal conducted by the SDRCC, namely, that the scope of this appeal is by way of judicial review.

24. The Respondent refutes the position of the Claimant that the Claimant was denied procedural fairness when he was given no hearing and no cross examination. The Respondent submits that the Commissioner has sole discretion to determine if an in-person hearing or conference call hearing is necessary to address a complaint and has the sole discretion to determine the format of any hearing. According to this discretion and the factors to be considered set out in r. 140.08.12 of the Athletics Canada *Rules and Bylaws*, the Respondent argues, the Claimant was afforded procedural fairness.

25. In support of its arguments, the Respondent cited the following cases: *Lee v Showmen's Guild of Great Britain*, [1952] 1 All ER 1175; *Gordon v Canadian Amateur Boxing Association*, ADR 02-0013; *Baker v Canada*, [1992] 2 SCR 817; *Stachiw v Saskatoon Softball Umpires Assn*, [1985] 5 WWR 651 (Sask QB); *Khan v University of Ottawa*, [1997] OJ No 2650 (CA); *Paterson v Skate Canada*, 2004 Carswell Alta 1797; *Sych v Shooting Federation of Canada*, SDRCC 10-0112; *Mayer v Canadian Fencing Federation et al*, Arbitration Award, ADR-Sport-RED Ordinary Division, Arbitrator Richard W Pound, QC April 25, 2008.

Relevant Provisions

26. From the SDRCC *Code*:

> **6.16 Procedures of the Panel**
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> (b) Subject to the specific provisions set out in this Article, the Panel shall have the power to establish its own procedures so long as the Parties are treated equally and fairly and given a reasonable opportunity to present their case or respond to the case of another Party as provided for by this Code and applicable law. The Panel may take such steps and conduct the proceedings as considered necessary or desirable by the Panel to avoid delay and to achieve a just, speedy and cost-effective resolution of the dispute.
>
> **6.17 Scope of Panel's Review**
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> (a) The Panel shall have full power to review the facts and apply the law. In particular, the Panel may substitute its decision for:
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> (i) the decision that gave rise to the dispute; or
>
> (ii) in case of Doping Disputes, the CCES assertion that a doping violation has occurred and its recommended sanction flowing therefrom,
>
> and may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.
>
> (b) For the avoidance of doubt, the Panel shall have the full power to conduct a procedure *de novo* where:
>
> (i) the NSO did not conduct its internal appeal process or denied the Person a right of appeal without having heard the case on its merits; or

(ii) if the case is deemed urgent, the Panel determines that errors in the NSO internal appeal process occurred such that the internal appeal policy was not followed or there was a breach of natural justice.

27. From Athletics Canada's *Rules and Bylaws*

140.16 Final and Binding Decision

The decision of the Commissioner's Office will be final and binding upon the parties and upon all members of Athletics Canada, subject to the right of any party to seek a review of the decision pursuant to the rules of the Sport Dispute Resolution Centre of Canada (SDRCC) as amended from time to time, and subject to these limitations:

a. The 'law' to be considered by the SDRCC tribunal is the internal rules, policies and selection criteria of Athletes Canada;

b. The 'facts' to be considered by the SDRCC tribunal are the facts relevant to the case under appeal;

c. If the SDRCC tribunal determines that Athletics Canada has made a decision in error, the role of the SDRCC tribunal is to identify that error and send the matter back to Athletics Canada to make the decision free from error, unless this is not possible or practical;

d. The parties will execute an arbitration agreement that will confirm the jurisdiction of the SDRCC tribunal to decide the matter, specify the precise decision under appeal, specify the issues in dispute and specify other matters the parties agree will be binding on themselves and the SDRCC tribunal.

Analysis

28. For the following reasons, this matter will proceed by way of judicial review. In his written submissions, the Claimant has argued that under s. 6.17 of the SDRCC *Code*, I am required to call a hearing a *de novo*. In the Claimant's interpretation of s. 6.17, the phrase "shall have" imposes a hearing *de novo*, where the NSO either does not conduct its internal appeal process or denies a claimant a right of appeal without due consideration via a hearing on the appeal's merits, and when appearing before an SDRCC arbitrator is therefore the first appeal of an NSO's decision. In the estimation of the Claimant, the emphasis on the wording of s. 6.17 is properly placed on the term "shall have".

29. While the Respondent does not dispute that s. 6.17 permits a hearing *de novo* before an SDRCC arbitrator or panel, the Respondent submits two arguments on this point: first, it argues that, with regard to the power to hear a matter *de novo* under s. 6.17, this power is discretionary, emphasizing "shall have the power", a fuller reading of the wording contained in s. 6.17 than that of the Claimant. The second argument the Respondent advances is that r. 140 of the Athletics Canada

Rules and Bylaws prohibits this matter from proceeding by *de novo* and forces arbitrators and tribunals to proceed only by judicial review.

30. I find the reading of s. 6.17 of the SDRCC *Code* advanced by the Respondent is the preferred reading of this section. It is insufficient to isolate the words “shall have” and to suggest that these words alone impose a *de novo* hearing where the conditions set out in s. 6.17(b) are met.

31. If I were to agree with the Claimant’s reading of s. 6.17, in many cases, imposing a *de novo* hearing would defeat the object and intention of an SDRCC appeal, which is, as s. 6.16 makes clear: “to avoid delay and to achieve a just, speedy and cost-effective resolution of the dispute.” In the words of Arbitrator Pound, “The objective of the SDRCC proceedings and, indeed, the very purpose for the existence of the SDRCC itself, is to provide independent, expert, timely and inexpensive resolution of sport-related disputes arising within the Canadian sport context” (*Mayer v Canadian Fencing Federation et al*, Arbitration Award, ADR-sport-RED Ordinary division, Arbitrator Richard W Pound, QC April 25, 2008 p. 2).

32. When s. 6.17 is read in the context of following s. 6.16, it supports the position that s. 6.17 is setting out discretionary powers. Section 6.16 specifically sets out that arbitrators have broad discretionary powers in order to achieve the goal of a just, speedy and cost-effective resolution. According to s. 6.16, in order to do this: “the Panel shall have the power to establish its own procedures so long as the Parties are treated equally and fairly and given a reasonable opportunity to present their case or respond to the case of another Party as provided for by this Code and applicable law.” When these two sections are read together, it shows that arbitrators and panels have a number of discretionary powers, hearings *de novo* being but one.

33. Further, had it been intended that s. 6.17 were to be read as imposing an obligation to hear matters *de novo* whenever one of the criteria contained in s. 6.17(b) was met, s. 6.17 would say so in no uncertain terms. However, in this absence and the reasons already stated, it must be understood that this power is discretionary.

34. Additionally, the Claimant has submitted that in the matter of *Sych v Shooting Federation of Canada*, it was determined by Arbitrator Mew that “it seems to me just and appropriate that I consider this matter *de novo*.” The wording here also implies that hearing the matter *de novo* is discretionary.

35. The question now turns to whether I will exercise this discretionary power. In the matter before me, I will not. Instead, this matter will be heard as a judicial review.

36. Even where a Claimant is able to make out those conditions enumerated in s. 6.17(b) to support a hearing *de novo*, it is ultimately the arbitrator or panel’s discretion to hear the matter *de novo*. By way of examples, in *Sych*, a *de novo* hearing was granted as both parties agreed to do so (see para. 30). In the case of

Cliff v Athletics Canada, SDRCC 16-0303, *de novo* was granted because of the urgency and time constraints placed upon the matter. In the present matter, there is neither agreement between the parties on the manner in which this appeal should be carried out nor similar time constraints.

37. This is not to suggest that, in the future, matters will be heard *de novo* where circumstances such as those in *Sych* or *Cliff* are present. This power remains discretionary and there may be instances where arbitrators may find a more suitable manner to achieve the objectives of the SDRCC. In this current matter, I believe that proceeding by way of *de novo* would likely add unnecessary expense in legal fees and would add unnecessary days-worth of hearings.

38. With respect to the second argument advanced by the Respondent, that I am bound by r. 140.16 to order a judicial review, I disagree. A sports body cannot limit the ability of the SDRCC to conduct hearings and reviews in a manner that would allow it to achieve those objectives and purposes outlined in s. 6.16. This would set a dangerous precedent that would allow each and every sports body to create its own set of rules to play by before the SDRCC. This would, in effect, defeat the very purpose of this body. Under this understanding, while r. 140.16 may act as another factor for me to consider, I do not consider myself bound by this rule.

Decision

39. For the above reasons, this matter shall proceed by judicial review.

Signed in Ottawa, this 28th day of August, 2019.

David Bennett, Arbitrator