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. Jason Beitchman and Ms. Brynn Leger, Rayman Beitchman LLP, counsel
On behalf of the Respondent:	Mr. David Bedford Ms. Leanne Standryk, Lancaster, Brooks & Welch LLP, counsel

COST AWARD

April 3, 2020

1. On December 6, 2019, I issued a decision allowing the Claimant's appeal and remitting the matter back to Athletics Canada (AC). Mr. McInnis submits that he is entitled to costs pursuant to section 6.22(c) of the *Canadian Sport Dispute Resolution Code* (the "SDRCC Code"). For the following reasons, I am awarding costs of $43,174.97 to Mr. McInnis.
2. The basic rule of the SDRCC is that costs are not awarded. This is so that time and sport funds are spent on athletes, coaches and teams, rather than disputes. This is reflected in the Rules of the SDRCC. However, I find that awarding legal costs is appropriate in this instance.

Procedure

3. This matter proceeded by written submissions. Parties made written submissions on the following dates: January 9, January 30, February 12 and February 24. A short hearing was convened by the panel, to clarify some issues via telephone on March 5, 2020. After this phone call, Mr. McInnis submitted further dockets on March 19, 2020. AC submitted a further written reply on March 25, 2020.

Submissions

McInnis's Submissions

4. Mr. McInnis submits that costs should be awarded pursuant to subsection 6.22(c) of the SDRCC Code. The Claimant is seeking full indemnification of his legal fees totalling $105,993.88.
5. Mr. McInnis submits that this was an exceptional case, for the record created before Commissioner Fowlie and before the SDRCC, and because the appeal before the SDRCC raised a number of complex legal issues of jurisdiction, procedural fairness, bias and evidence. He also submits that this case was exceptional for the broader context and that, given the Safe Sport Initiative, AC treated this case as an opportunity to implement the Safe Sport Initiative publicly.
6. Mr. McInnis argues that section 6.22 of the SDRCC Code allows parties to seek costs following an arbitration. Further to this, Mr. McInnis relies on the cases of *Phoenix v Equine Canada*, SDRCC 16-0301, para 25 [*Phoenix*], *Hyacinthe v Athletics Canada* [*Hyacinthe*], SDRCC 06-0047, and *Canadian Centre for Ethics in Sport v Godinez*, SDRCC DT 18-0290 [*Godinez*], for the proposition that costs have been awarded by the SDRCC in cases where there has been a finding of an unfair process, evidence of financial harm, or where a case is unique. Mr. McInnis argues that all three of these circumstances in which costs have been awarded are present.
7. Mr. McInnis submitted that the relevant criteria for costs before the SDRCC is outlined in section 6.22 of the SDRCC code. Mr. McInnis relies on *Pyke v Taekwondo Canada*, SDRCC 15-0273 [*Pyke*], *Hyacinthe*, *Bazin et al v Taekwondo Canada Board of Directors*, SDRCC 14-0243 [*Bazin*], and *Canadian Centre for Ethics in Sport v Adams*, SDRCC DT 10-0117 [*Adams*] for their authority on how they speak to the section 6.22 criteria.

8. Mr. McInnis submits that his case was an exceptional case and that it raised a number of complex legal issues of jurisdiction, procedural fairness, bias and evidence, and that it was exceptional due to its relationship to the broader context of the Safe Sport Initiative. Mr. McInnis takes the position that AC used Mr. McInnis as a "guinea pig", so that AC could test case the Safe Sport Initiative.

9. Speaking directly to the subsection 6.22(c) criteria, Mr. McInnis takes the position that he was successful on his appeal before the SDRCC which resulted in the quashing of the AC decision terminating Mr. McInnis's membership in AC and removing Mr. McInnis from the AC Hall of Fame. Mr. McInnis argues that in order to achieve this result, he was required to retain counsel in order to respond to the investigation, the Commissioner and to pursue his appeal of the Commissioner's decision.

10. Under the second part of the criteria, Mr. McInnis submits that he was subjected to bias on the part of AC. In addition, he argues that he was denied procedural fairness by having an inadequate opportunity to respond to the case against him, and that he was subjected to inflammatory and prejudicial language by AC that resulted in negative media attention in local and national media. Mr. McInnis states that AC did not make any reasonable efforts at mediation and that AC took an aggressive position.

11. Under the third part of the criteria, Mr. McInnis argues that the costs throughout this process have been substantial and that AC's publication of Commissioner Fowlie's decision caused damage to Mr. McInnis's reputation and career. In addition, Mr. McInnis has been suspended without pay since May 6, 2019, severely impacting his livelihood. He argues that there is no question as to which of the parties is in the better financial position between himself and AC, as AC is a federally-funded national sport organization.

12. Under the intent criterion, Mr. McInnis argues that AC acted in a manner demonstrating bad faith. He reiterates his arguments about AC's use of the Safe Sport Initiative to treat Mr. McInnis as a test case and argues that AC continues to distort and mischaracterize information relating to this matter. Specifically, Mr. McInnis gives as evidence: a) the December 18, 2019 announcement AC made to the public regarding the SDRCC appeal decision; b) a January 6, 2020 press release; and c) that AC has not apologized to Mr. McInnis, nor has it reinstated him to the AC Hall of Fame.

13. Mr. McInnis addresses parts five and six together and submits that Mr. McInnis, under previous legal counsel, proposed a retirement from coaching and suggested that further punishment was unnecessary in light of this. Following this, AC made no effort to engage in discussion or pursue the option of letting Mr. McInnis retire. Mr. McInnis acknowledges that the parties engaged in mediation before the SDRCC− however, AC continued to act unreasonably and would not consider acknowledging any wrongdoing. Mr. McInnis describes this as AC's failure to engage in reasonable resolution efforts.

14. Mr. McInnis also includes in his submissions arguments that the investigation carried out by Andre Marin was done in bad faith and makes arguments supporting that position.

15. Mr. McInnis submits that for the reasons above, he is entitled to full indemnification for his costs plus HST.

Athletics Canada's Submissions

16. AC takes the position that costs are not appropriate in this case. AC states that subsection 6.22(a) of the SDRCC Code sets out the presumption that each party shall be responsible for its own expenses. AC also acknowledges that subsection 6.22(c) gives the Panel discretion to award costs and to determine the quantum of such awards, and accepts the criteria identified by Mr. McInnis. However, it relies on *Meisner v. Equine Canada et al*, SDRCC 08-0070, for the proposition that "if counsel complicate, extend and add confusion to the proceedings, there may be a price to be paid in terms of costs."

17. AC stresses that the overall goal of the SDRCC is to provide a process of sport dispute resolution that is convenient and as inexpensive as possible.

18. AC responds to Mr. McInnis's claims by asserting that AC has incurred significant expense throughout this process as well, and will continue to do so as a result of the matter being remitted to the Commissioner's Office. In addition, AC takes the position that the only costs to be considered under section 6.22 are those involved with the arbitration hearing before the SDRCC. As such, AC argues that costs incurred during the internal investigation and when the matter was before the Commissioner are not to be taken into account or form an award by the SDRCC.

19. Going through the criteria identified above, AC takes the position that the appeal did not raise complex legal issues that were unique or exceptional in matters of arbitration before the SDRCC. AC argues that the issues in Mr. McInnis's appeal are routinely considered by the SDRCC. In addition, AC disputes Mr. McInnis's claim that he was used as a "guinea pig" or "test case" and that AC was acting in accordance with its commitment to the Safe Sport Initiative.

20. Regarding the outcome of the proceeding, AC argues that Mr. McInnis did not achieve an absolute success in his appeal. In particular, AC takes the position that the preliminary issues were by-and-large determined in a manner that was consistent with the positions advanced by AC, and that the substantive issues of jurisdiction, participatory rights of natural justice and procedural fairness during the investigation, and whether the complaint meets the definition of "harassment", were all decided in favour of AC.

21. AC takes the position that when it comes to the conduct of the parties criterion, Mr. McInnis is comingling the behaviour of AC and Investigator Marin and is attributing behaviour to AC that should not be attributed to it. AC disputes the claim that it made no reasonable efforts at mediation and cites the examples of the June 25, 2019 Resolution Facilitation; the July 10, 2019 preliminary conference; the August 20, 2019 preliminary conference call; the October 8, 2019 preliminary conference call, and the November 15, 2019 preliminary conference call. AC argues that during these conference calls and Resolution Facilitation, it was Mr. McInnis and his counsel who were either unprepared to discuss a resolution or who intentionally tried

to delay this matter going to hearing, so that he could wait for the decision in another case involving AC.

22. AC argues that it has conducted itself in a manner that should not amount to a cost award against it as it did not delay or overly complicate the matter before the SDRCC. In addition, AC argues that conduct prior and subsequent to the proceedings is irrelevant.

23. AC argues that, regarding the financial resources criterion, it is a Not-For-Profit Corporation with charitable status and points out that it does not have significant funds available for discretionary matters. It argues, citing the decision in *Jacks v Swimming Canada*, SDRCC 16-0324 [*Jacks*], that costs should only be awarded in exceptional circumstances given the limited funds that are available for the development of sport. In addition, AC submits that Mr. McInnis's claims that he is a man of limited means is unsupported and untested by any evidence provided by the Claimant. AC argues that Mr. McInnis has over 40-years' experience coaching for universities and internationally. As a result, Mr. McInnis should not be given the same treatment as athletes, as he is a man who has spent his lifetime enjoying a professional income.

24. AC's position on intent is that, despite the Panel making a finding that the investigation was biased and the bias flowed to the Commissioner, and even though the Panel referred to the Commissioner as being "overzealous", there was no finding of bad faith or evidence to support that finding. AC argues that the Commissioner provided a reasonable explanation for his refusal to consider the Tremayne Report and that the Commissioner's conduct does not satisfy a definition of bad faith, withholding of information or mischaracterization of the facts.

25. In addition, AC argues that the examples of the December 18, 2019 announcement and the January 6, 2020 statement are not conduct that is to be considered by this panel in an award of costs. AC states that any post-December 17, 2019 conduct is irrelevant for consideration in a cost award.

26. Regarding the settlement offers and attempts at resolution, AC states that there were no formal offers to settle by either party. In addition, AC takes the position that it fully engaged in Resolution Facilitation and that the failure to resolve the matter is not indicative of a failure by AC to have engaged in a meaningful attempt at resolution.

27. AC also argues that Mr. McInnis is not entitled to full indemnity costs and argues that the overall principle in determining quantum is whether they are "fair and reasonable" in the circumstances. AC argues that Mr. McInnis was represented by three law firms and four separate counsel. The changes in counsel necessitated familiarization with the case, that AC argues it should not forced to bear as this is a duplication of costs. In addition, AC argues that some of the legal counsel retained by Mr. McInnis has never argued before the SDRCC. AC submits that it should also not bear the costs associated with the time Mr. McInnis's legal counsel has spent familiarizing himself with the SDRCC processes and rules. AC also submits that it should not be forced to bear the costs associated with Mr. McInnis's preliminary arguments for a trial *de novo*.

Athletics Canada's Reply Submissions to Mr. McInnis's Dockets

28. AC submits that section 6.22 of the SDRCC Code limits costs to be considered only those costs involved in the arbitration process.

29. AC also submits that, in his counsel's partially redacted dockets, Mr. McInnis has withheld the names and identities of witnesses, whom Mr. McInnis is claiming may be material at the remitted hearing before AC. AC argues that there is no property in witnesses. It cites rules governing procedure before tribunals and courts and submits that their ability to provide fulsome submissions are inhibited by the production of partially redacted dockets. AC asks that I take this into consideration in determining quantum, if any.

30. AC made submissions on particular elements of the cost submissions that will not be particularized in this decision, but which I have considered.

31. In its submissions, AC asked that I pay special consideration to the burden placed on it by global events beyond AC's control, in particular, COVID-19. AC submits that the postponement of the Tokyo Olympics and all major revenue driving events has impacted its discretionary funds. It has also lost revenue streams as it projects a drop in sales of its merchandise and the loss of membership fees. As such, the amount sought by Mr. McInnis would place an undue burden on AC.

Relevant Sections of the SDRCC Code

32. The relevant section from the SDRCC Code is 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

33. This matter was a unique and exceptional case. Given the broader social factors at play and the Safe Sport Initiative, this matter was exceptional for its timeliness and for its position in the current political climate in sport and broader society. I find it disingenuous for AC to make arguments during the appeal that this matter was exceptional, and to now suggest that this matter is anything but. In addition, I find that the exceptional nature of this case is exactly what motivated AC to pursue a zealous and dogged defence of the decision by Commissioner Fowlie to punish an alleged abuser. I found that AC pursued this matter publicly and aggressively in order to show to the broader public that it is enforcing the terms

of the Safe Sport Initiative, even going so far as to rely on the Marin report of what was an obviously biased investigation.

The Relevant Factors for Consideration in Awarding Costs

34. Both parties agree that the relevant factors for consideration in awarding costs are outlined in subsection 6.22(c) of the SDRCC Code. As I have previously outlined in *Pyke*, these factors include the following:

    (i) The outcome of the proceedings;
    (ii) The conduct of the parties;
    (iii) Financial resources;
    (iv) Intent;
    (v) Settlement offers; and,
    (vi) Willingness in attempting to resolve the dispute prior to arbitration.[1]

35. In *Jacks*, I wrote the following with regard to the application of these factors:

> Costs will generally be negligible and should not require costs awards; however, there are some circumstances in which costs might be appropriate. Specifically, costs awards may be appropriate where one party's conduct was without merit and caused financial harm to the opposite party. To determine when costs are appropriate, the factors in 6.22(c) must be present.[2]

36. As this passage makes clear, the SDRCC is generally reluctant to award costs. Arbitrators will only consider doing so where most of the factors in subsection 6.22(c) are present and where there are appropriate circumstances for awarding costs.

37. My analysis of the factors is set out below.

(i) The Outcome of the Proceedings

38. The outcome of the proceedings was in Mr. McInnis's favour.

39. In their submissions, AC claimed a partial victory. I do not agree with their position as it relates to what is understood by "outcome of the proceedings" Specifically, as stated in *Pyke*:

> Whether or not the party seeking costs was fully vindicated by his or her claim is a consideration in determining whether or not to make such an award. A claimant whose appeal has been denied cannot expect to receive a costs award. A claimant who has been fully vindicated by an SDRCC decision, incurred costs in doing so, and could not have obtained their result other than by appealing to the SDRCC may be justified in receiving costs. However it would still be the exception and

[1] SDRCC 15-0273 [*Pyke*] at para 8.
[2] SDRCC 17-0324 [*Jacks*] at para 11.

only if the other factors, set out below, were also present. The drafters of the Code made it clear that success on its own is not reason to award costs.[3]

40. Winning on some preliminary matters and on some arguments of law is not what I had in mind when I wrote about "vindication" in *Pyke*. In nearly every legal matter there are preliminary matters that will arise requiring decisions or questions of law that will be decided. Ultimately, what is of most relevance to the outcome of the proceedings is in whose favour the ultimate decision goes. In this case, the final order allowed Mr. McInnis's appeal and remitted the matter back to AC. This was an unequivocal decision in Mr. McInnis's favour. In addition, Mr. McInnis incurred costs obtaining this decision and he could not have obtained this result in any other way than by appealing to the SDRCC.

(ii) The Conduct of the Parties

41. What is of relevance when considering the "conduct of the parties" is stated simply in *Pyke* as: "The conduct must deny the claimant such that it harms their interests and delays their vindication."[4]

42. In some regards, AC is correct in pointing out that Mr. McInnis is comingling its behaviour with that of Investigator Marin. The conduct of Investigator Marin is not a factor in this matter. What is under scrutiny are the actions of Mr. McInnis and AC after Commissioner Fowlie rendered his decision. The question to be asked is: was a *bona fide* effort to resolve this matter ever undertaken and, if not, why? The second question to be asked is: who is at fault?

43. Mr. McInnis claimed in his submissions that AC did not make any reasonable efforts at mediation. In response, AC cited attempts at mediation failed on: June 25, 2019 at the Resolution Facilitation; the July 10, 2019 preliminary conference; the August 20, 2019 preliminary conference call; the October 8, 2019 preliminary conference call; and, the November 15, 2019 preliminary conference call. AC argues that during these conference calls and Resolution Facilitation, it was Mr. McInnis and his counsel who were either unprepared to discuss a resolution or who intentionally tried to delay the matter from going to hearing. AC argues that they did so in order to wait for the decision in another case involving AC.

44. With respect to AC, I find that their claim that Mr. McInnis was waiting for a decision in another case involving AC is speculation as it is unsupported by anything put before me in the evidentiary record beyond assertion.

45. Where AC had submitted that it has conducted itself in a manner that should not amount to a cost award against it, as it did not delay or overly complicate the matter before the SDRCC, I disagree. I find that AC undertook no *bona fide* efforts to mediate or settle this matter. All of the dates cited by AC as contributing to delay are part of the preliminary processes before the SDRCC. I have been presented with no evidence that AC at any time sought to mediate a

[3] *Pyke* at para 11.
[4] *Pyke* at para 13.

settlement on the decision by Commissioner Fowlie, which was informed by a biased investigation. This bias was apparent. I will summarize my finding from the *McInnis* decision: Mr. McInnis was owed procedural fairness. When no hearing was given and the results of the obviously biased Marin investigation were relied on wholesale by Commissioner Fowlie, that bias flowed through to Commissioner Fowlie's decision. The decision was not about Mr. McInnis's guilt or innocence, but about AC's failure to provide Mr. McInnis with a fair process.

46. Because AC undertook no *bona fide* efforts to resolve this matter informally, Mr. McInnis had no other option than to bring this matter before the SDRCC. As a result, I find that AC conducted itself in a manner that harmed Mr. McInnis's interests and delayed his "vindication".

(iii) Financial Resources of the Parties

47. In *Pyke*, I wrote: "Where these is a disparity in resources between the parties that may affect one party's ability to defend their interests, it will be considered in awarding costs."[5]

48. Under the third part of the criteria, Mr. McInnis argues that the costs throughout this process have been substantial and that AC's publication of Commissioner Fowlie's decision caused damage to Mr. McInnis's reputation and career. In addition, Mr. McInnis has been suspended without pay since May 6, 2019, severely impacting his livelihood. He argues that there is no question as to which of the parties is in the better financial position between himself and AC, as AC is a federally-funded national sport organization and therefore is in the better financial position.

49. It is important to note that Mr. McInnis is not an athlete. I nonetheless agree with the Claimant that there is a disparity in resources.

(iv) Intent

50. According to *Hyacinthe*, the issue to be considered under this factor is whether either side operated in bad faith.[6] I find that AC treated Mr. McInnis with acrimony and that it sought to make an example of him.

(v) Settlement Offers

51. I am unaware of any formal offers to settle that were made by either party in this matter.

(vi) Willingness in Attempting to Resolve the Dispute Prior to Arbitration

52. I find that at all times AC demonstrated an attitude that showed that it was unwilling to resolve the dispute prior to arbitration. While I am critical of AC for their unwillingness to resolve the dispute, their position was understandable. This was a very high-profile case which AC publicized heavily. They had a new Safe Sport policy to demonstrate that the days

[5] *Ibid* at para 15.
[6] *Hyacinthe* at page 14.

of harassment and abuse in sport were a thing of the past. Once Commissioner Fowlie's decision and Investigator Marin's report were so public, how could AC publicly back down and make an agreement that wouldn't seem like they were tolerating abuse? Though their position is understandable, it was a position of their own creation. In such situations, there can be a price to pay for taking such a hardline position.

Quantum

53. Mr. McInnis provided the following breakdown of costs:

- The cost of Rayman Beitchman LLP preparing for and conducting the SDRCC hearing: $25,000 (Cost A)
- The cost of Rayman Beitchman LLP preparing for the cost submissions: $5,678.25 (Cost B)
- The cost of SKS Law initiating the appeal, conducting pre-hearing matters, developing arguments, researching case law and providing analyses, and preparing written submissions: $41,280.03 (Cost C)
- The Cost of Bayne, Sellar, Ertel, Carter conducting the investigation and proceedings before Commissioner Fowlie: $34,035.60 (Cost D)

54. Mr. McInnis seeks a total of $105,993.88.

55. The costs that arose under Cost D are costs that arose during the AC investigation. I accept AC's arguments that costs that arose before this appeal are costs that cannot be awarded by the SDRCC. I find that the costs associated with Cost D are the normal costs for defending one's self from an internal investigation. As such, I will not award the costs associated with Cost D.

56. I find that costs associated with Cost C are legitimate costs and were necessarily incurred by Mr. McInnis to defend himself at the SDRCC and for him to be successful.

57. Costs A & B are also legitimate costs incurred by Mr. McInnis. During the appeal process, Mr. McInnis was required to change counsel as a result of circumstances that were beyond his control. These costs were reduced for Mr. McInnis by his new counsel in order to keep costs as low as possible. These costs were reduced from $49,561.80 to a flat fee of $25,000. While AC raised concerns that there may be duplication in the costs, I find that this reduction of costs prior to billing accounts for any duplication of work or costs associated with counsel making itself familiar with process.

58. With the elimination of Cost D, the amount of costs is reduced to $71,958.28. I have considered and agreed with the argument raised by AC that Mr. McInnis was unprepared for some of the resolution facilitation and preliminary calls of June 25, July 10, August 20, October 8, and November 15, 2019. As a result, I am awarding a standard partial indemnity calculation of 60% of costs.

59. I am ordering a total cost award of $43,174.97.

60. With regard to AC's request for special consideration in light of the current COVID-19 pandemic, I will grant no such special consideration. I find that if AC was serious about the

burden it believes COVID-19 will place on its discretionary budget, AC should have filed evidence and made real substantive submissions on this matter. By failing to do so, it is impossible to properly consider this matter.

Conclusion

61. I am awarding costs in this matter in the amount of $43,174.97.
62. While I am awarding these costs, it is important to note that the general rule before the SDRCC is of reluctance to award costs. This decision should not be considered a departure from this general rule, nor the well-established case law supporting it. It should not be considered to be an opening of the floodgates to cost awards. These were exceptional circumstances in an exceptional case that made granting costs the only fair decision to make.
63. In addition, it is important to note that neither this cost decision, nor the original decision on the merits of the appeal, in any way condones the conduct that Mr. McInnis has been accused of. This decision seeks to assert the balance between the rights of procedural fairness owed to respondents, and the need for sport organizations to police the conduct of its coaches, staff and others in positions of fiduciary responsibility. Sport organizations must act in a manner that is fair according to the rules they have set out, fair according to what is owed according to the SDRCC, and fair according to what is owed under the principles of the common law. A failure to do so could give rise to an award of costs, as occurred in this case.

Signed at Ottawa on April 3, 2020

David Bennett, Arbitrator