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

NO: SDRCC 23-0682

AN ATHLETE
(CLAIMANT)

AND

DIRECTOR OF SANCTIONS AND OUTCOMES (DSO)
(RESPONDENT)

AND

OFFICE OF THE SPORT INTEGRITY COMMISSIONER (OSIC)
(INTERVENOR)

DECISION

On November 8, 2023, the Claimant brought a request before the Ordinary Tribunal pursuant to section 6.1 of the SDRCC *Code* ("*Code*") seeking to stay an ongoing investigation being conducted by the Office of the Sport Integrity Commissioner (OSIC). The Claimant requests the stay of proceedings on the basis of delay.

The Respondent challenged the Claimant's request on the basis that the Ordinary Tribunal does not have jurisdiction to consider the matter. I was appointed as Jurisdictional Arbitrator by consent of the Parties pursuant to section 5.4 of the *Code*. The Parties gave their consent that I would act as arbitrator for the substantive issue if it was determined that the Ordinary Tribunal has jurisdiction to consider the matter, pursuant to subsection 5.4(d) of the *Code*.

On December 6, 2023, OSIC brought a request for Intervenor status pursuant to section 6.6 of the *Code*. A brief hearing was conducted on December 7, 2023, and OSIC was granted Intervenor status by consent of the Parties.

The hearing was convened on December 19, 2023, and my short decision was issued on December 22, 2023. The short decision read as follows:

> *[…] I have determined that the Ordinary Tribunal does not have jurisdiction to consider the substantive issues. […] Conservatory Measures issued on December 7, 2023, are hereby revoked.*

The Claimant had requested anonymity and I granted it. I rejected the same request made by the Respondent and Intervenor.

The Parties

Claimant

The Claimant is a high performance athlete who trains in one of Canada's high performance centres operated under the auspices of a National Sport Organization (NSO).

Respondent

The Director of Sanctions and Outcomes (DSO) is the function of Abuse-Free Sport that is responsible for making decisions regarding Provisional Measures and violations of the *Universal Code of Conduct to Prevent and Address Maltreatment in Sport* ("UCCMS"), imposing sanctions where relevant, appearing before the Safeguarding Tribunal or the Appeal Tribunal when decisions are challenged, and reviewing and approving mediated outcomes to ensure that they align with the objectives of the Abuse-Free Sport program. It reports to the Maltreatment in Sport Sanctions Council and includes the Deputy Director of Sanctions and Outcomes and their delegates. The DSO took on the role of *amicus curiae* for this hearing.

Intervenor

OSIC was established in 2022 as an independent division of the SDRCC which is responsible for administering the *UCCMS* for the purpose of the Abuse-Free Sport program. The UCCMS establishes principles regarding respectful sport culture, defines behaviours that constitute abuse and maltreatment in sport and establishes a framework for determining appropriate sanctions against such prohibited behaviour.

Submissions

Claimant's Submissions

The Claimant submitted a request to the Jurisdictional Arbitrator pursuant to section 5.4 of the *Code* seeking an order that:

1) OSIC lost jurisdiction of its investigation due to delay; and,
2) OSIC's ongoing investigation of the Claimant should be stayed as an abuse of process arising from OSIC's egregious and unexplained delay.

According to the Claimant[1], on April 12, 2023, OSIC received a third-party complaint alleging that the Claimant had engaged in conduct which contravened the UCCMS. On the same date and because of the complaint, the Claimant's registration and membership from their NSO were suspended and the Claimant was prohibited from attending, participating, competing, training or otherwise engaging in any activity directly or indirectly related to the NSO.

When the Claimant communicated with the NSO to address their suspension and its cause, the NSO advised the Claimant that the matter was before OSIC and that the Claimant would need to wait for the outcome of the OSIC investigation.

The Claimant reported that they did not receive any communication from OSIC for approximately three and a half months when, on July 21, 2023, the Claimant received the Notice of the Allegations. During this time, the Claimant remained suspended by their NSO.

On August 23, 2023, the Claimant received a Report on Provisional Measures signed by the DSO. The Claimant submitted that the Report on Provisional Measures, in essence, set out conditions which maintained the NSO's suspension.

[1] The Claimant filed an affidavit setting out the events. The facts set out by the Claimant were uncontested and therefore I have used them to set out the background.

On August 29, 2023, the Claimant sent a letter to OSIC requesting an expedited investigation. After receiving no response from OSIC, the Claimant submitted a second request for an expedited investigation on September 1. According to the Claimant, they did not receive a "substantive" response to their request until September 12, 2023. In this communication, OSIC advised the Claimant that an independent investigator had been potentially identified and that the name of the investigator would be provided to the Claimant once they had been confirmed as an investigator. The Claimant was informed that they could expect to receive this information within "the next week or so" from the September 12 communication. The Claimant did not receive notice or communication that an investigator had been identified until some time after filing this claim on November 8, 2023.

The Claimant appealed the Provisional Measures before an SDRCC arbitrator of the Safeguarding Tribunal. On October 6, 2023, Arbitrator Carol Roberts issued her decision which granted the Claimant's appeal ("Roberts Decision"). Despite the Claimant's success before Arbitrator Roberts and the Safeguarding Tribunal, OSIC did not expedite its investigation, did not identify an investigator and did not provide any reasons or excuses for the delay.

The Claimant submitted that OSIC's unexplained delay in carrying out this investigation constitutes an abuse of process for being inordinate and for compromising the fairness of the hearing. According to the Claimant, the result is that OSIC has acted in a manner which has caused prejudice to the Claimant's ability to mount a fair answer and defence and that OSIC has lost jurisdiction over the matter.

The Claimant submitted that the SDRCC has jurisdiction to hear this matter as an Ordinary Tribunal under article 6 of the *Code* and that the Ordinary Tribunal can provide the requested relief. The Claimant submitted that the NSO in this matter adopted the UCCMS by a contractual service agreement with the SDRCC, which came into effect on January 12, 2023. According to the Claimant, this service agreement assigned responsibility for investigations into maltreatment in sport to OSIC. This service agreement does not provide for an appeal mechanism of investigations relating to UCCMS issues of which the Claimant might avail themselves.

According to the Claimant, the service agreement between the NSO and OSIC sets out that the SDRCC will provide arbitration and mediation services in accordance with the *Code*. The Claimant submitted that there is nothing in the service agreement which expressly prohibits the jurisdictional arbitrator from taking jurisdiction over the matter and that the SDRCC has some express jurisdiction under article 8 of the *Code*, which relates to the operation of the Safeguarding Tribunal.

The Claimant submitted that the SDRCC's jurisdiction comes from this matter being a "sports-related dispute", as defined by the *Code*. Furthermore, that the Safeguarding Tribunal is not the appropriate panel to consider this matter as the jurisdiction of the Safeguarding Tribunal is limited only to challenges of the Provisional Measures, challenges of consequences and findings on a violation. The Claimant submitted that this matter can only be considered by the jurisdictional arbitrator pursuant to section 5.4 of the *Code* as it addresses a challenge to jurisdiction before a finding is made under the UCCMS and that section 5.4 applies to all of the panels at the SDRCC.

The Claimant has taken the position that this matter should be considered under the previous version of the *Code*, which came into effect on January 1, 2021, and was amended on June 20, 2022.

The Claimant submitted a request that this matter be anonymized to remove the Claimant's name and any information which might identify the Claimant. The Claimant also requested that the final decision in this matter be provided to Claimant's counsel prior to publication so that Claimant's counsel may review this decision and make submissions on appropriate redactions.

Respondent's Submissions

The Respondent participated in this matter on an *amicus curiae* basis. The Respondent took this position on the basis that they are not responsible for the investigation which is the subject of this matter.

The Respondent submitted that there were two complaints filed with OSIC on April 12 and 13, 2023, alleging that the Claimant engaged in conduct consistent with Prohibited Behaviours and/or Maltreatment, specifically, Psychological Maltreatment and Sexual Maltreatment as identified in Sections 5.2 and 5.5 of the UCCMS. OSIC determined that the complaints against the Claimant were properly filed and fell within OSIC's jurisdiction to investigate.

OSIC provided the Claimant with a Statement of Allegations on July 21, 2023, and recommended to the Respondent certain Provisional Measures pending the final determination of the complaints. On August 21, 2023, the Respondent imposed provisional measures on the Claimant. These Provisional Measures permitted the Claimant to train and compete subject to certain conditions. The Claimant challenged the Provisional Measures before the Safeguarding Tribunal, which resulted in the Roberts Decision.

The Respondent took the position that the SDRCC does not have jurisdiction to hear this matter as an Ordinary Tribunal. According to the Respondent, section 5.4 of the *Code* does not relate to the jurisdiction of Abuse-Free Sport and that OSIC is not a tribunal or administrative decision-maker in a way contemplated by section 5.4.

The Respondent submitted that its role is as a decision-making arm of Abuse-Free Sport and that a challenge of the DSO's decisions is specifically contemplated by article 8 of the *Code*. Accordingly, challenges of DSO decisions can only be heard before the Safeguarding Tribunal. The Respondent submitted that OSIC's Guidelines Regarding Investigations of Complaints sets out that where a party objects to an investigation step or procedure, their only recourse is to bring a challenge before the Safeguarding Tribunal.

The Respondent did not make substantive submissions in relation to the issue of OSIC's delay, submitting that they could not speak to OSIC's processes, the steps of its complaint management processes or timelines or any of the reasons for the delay. However, the Respondent noted that there is no specific timeframe for OSIC investigations to be conducted. The Respondent also noted that the initial full suspension of the Claimant was imposed at the discretion of the NSO. This was done in accordance with the NSO's policies prior to the final resolution of an alleged violation and that neither itself nor the Intervenor were involved in the interim suspension given by the NSO.

The Respondent submitted that it is settled law that a tribunal may lose jurisdiction where the delay causes prejudice to such a measure and degree that the prejudiced party cannot mount a fair answer and defence. However, the Claimant failed to demonstrate how this delay resulted in the loss of evidence or witnesses.

The Respondent also submitted that the delay in this matter is not inordinate and cited the case law which had significantly longer delays of 71-months and 24-months.[2] According to the Respondent these delays were not found to have amounted to inordinate delay.

The Respondent submitted that if it is determined that OSIC's delay has constituted an abuse of process, a stay of proceedings is inappropriate as it does not meet the threshold of "shocking abuse."[3] Furthermore, granting such a remedy would be to deprive the complainants, the impacted persons and the NSO of any formal remedy in the ongoing OSIC investigation.

The Respondent did not oppose the Claimant's request for anonymization. The Respondent requested that this matter be anonymized for all parties and that this decision be placed under a publication ban. The Respondent submitted that this matter has the potential to be highly prejudicial and to pose a potential negative impact to Abuse-Free Sport.

Intervenor's Submissions

The Intervenor argued that the Ordinary Tribunal does not have inherent jurisdiction over matters pertaining to Abuse-Free Sport.

The Intervenor submitted that the Complaint Management Process is the contractual framework agreed to by the Sport Organization for the application of the UCCMS. As a result, the contractual framework of the Service Agreement between OSIC and the NSO is applicable in this matter. Under this Service Agreement, any Sports-Related Dispute arising out of the UCCMS is to be dealt with by the Safeguarding Tribunal, even where the issue is one of an alleged failure to observe principles of natural justice and procedural fairness. According to the Intervenor, issues of natural justice and procedural fairness can only be considered after a decision by the DSO is rendered.

The Intervenor submitted that the *Code* will only apply where the SDRCC has jurisdiction to settle a Sports-Related Dispute involving a Sport Organization and only where the SDRCC has jurisdiction to hear a matter pursuant to subsection 2.1(b) of the *Code*. According to the Intervenor this matter is not a Sports-Related Dispute, OSIC is not a Sport Organization and there is no agreement or contractual framework giving the Ordinary Tribunal jurisdiction pursuant to subsection 2.1(b) of the *Code*. The Intervenor submitted that in the absence of such an agreement or contractual framework, the SDRCC does not have inherent jurisdiction over this matter. The Intervenor argued that this is sufficient to dismiss the Claimant's request.

The Intervenor submitted that if it is determined that the *Code* applies, both the *Code* and the framework of the Complaint Management Process preclude an arbitrator of the Ordinary Tribunal taking jurisdiction over the Claimant's request. By this, the Intervenor means that the Jurisdictional Arbitrator's only powers are to replace a Panel before it is named and that a Panel cannot be formed until the DSO has rendered a decision. According to the Intervenor, after the DSO's decision, the only appropriate panel is the Safeguarding Tribunal. The Intervenor submitted that if it is determined that the Ordinary Tribunal has jurisdiction to hear this matter, it would be *ultra vires*.

OSIC made submissions in relation to the Claimant's allegations of abuse of process, but refused to provide any reasons or justification for the delay which is at the heart of the

[2] *Law Society of Saskatchewan v. Abrametz*, 2022 SCC 29, and *Blencoe v. British Columbia (Human Rights Commission)*, 2000 SCC 44 ("*Blencoe*").
[3] *Blencoe*, *supra*.

substantive issues brought by the Claimant. Instead, the Intervenor argued that the level of procedural fairness of an administrative body is variable and ranges depending on whether it is an investigation or an administrative hearing and that, in this case, the Claimant is owed a level of procedural fairness in the low- to mid-range level.

The Intervenor submitted that the remedy sought by the Claimant of a stay of proceedings, is an extreme remedy which would have extreme consequences for the Complaint Management Process administered by OSIC and the UCCMS. The Intervenor argued that allowing for a stay of proceedings at this stage in the process would provide a way to short-circuit an investigation before it is completed and that it would open the floodgates to interlocutory motions seeking to bypass the Complaint Management Process. According to the Intervenor, this would be to undermine the public interest in ensuring that complaints of maltreatment in sport are thoroughly investigated and that outcomes are decided on their merits. It would also be to deprive the Interested Parties, such as complainants and impacted persons, of their interests before the SDRCC.

Factual Background

The facts in this matter are not in dispute. However, the background to this matter is complex and so has been set out.

On or about April 2, 2023, the Claimant attended an NSO competition. After the competition, the Claimant and other athletes consumed alcohol. The complaints before OSIC occurred on this night.

On April 12 and 13, 2023, complaints about the Claimant's conduct were filed to OSIC. On April 12, the Claimant received a Notice of Interim suspension from their NSO. In the Notice, the Claimant is informed that they are being suspended in response to "serious pending allegations" made to OSIC alleging a breach of the UCCMS. According to the conditions of the suspension, the Claimant was prohibited from attending, participating or otherwise engaging in any competitions sanctioned by the NSO, any member provinces, the NSO's Special Interest Groups, Partners or registrants in any capacity. The Claimant's suspension was Canada-wide and was "pending the outcome of OSIC process."

Following the interim suspension, the Claimant emailed the NSO requesting details of the allegations brought against them and asked for an estimated timeline of the investigation. In this email, the Claimant acknowledged some fault and took accountability for their actions and also articulated that they had been told they would no longer be permitted to see their sports psychologist. The Claimant wrote about the mental toll these allegations and the interim suspension were taking on them and expressed suicidal ideation.

On April 17, the Claimant received a response to their email from the NSO. The NSO advised the Claimant that they would be given funding to continue to see their sports psychologist. The NSO informed the Claimant that due to the nature of the complaints, they were obligated to provide them to OSIC. The NSO acknowledged that they had shared the complaints with OSIC on April 12 and that OSIC acknowledged receipt of the complaints on April 15. The Claimant was advised to wait for the outcome of the OSIC investigation.

On June 4, the Claimant contacted the NSO advising that they had not received any contact from OSIC or information relating to the complaints brought against them. The Claimant expressed some concern that rumours were being spread about them in the High Performance Training Centre and that information about the complaints was being leaked by the NSO. The

Claimant then raised concerns that they were being punished without being told what the allegations against them were, that there had been no investigation to date and that they had not been provided a timeline for the investigation.

The Claimant received a response from their NSO on June 5. The NSO reiterated that the complaints had been sent to OSIC and that OSIC is responsible for managing the investigation process. The NSO promised to contact OSIC and that they would ask OSIC to follow up with the Claimant.

On July 21, the Claimant was provided with a Statement of Allegations and a case file number by OSIC. There were allegations of maltreatment brought in relation to two separate complaints.

The first complaint set out that on or prior to April 2, 2023, the Claimant and another athlete engaged in "bullying type behaviour" toward the impacted person after a competition. This was found to amount to an allegation of Psychological Maltreatment pursuant to s. 5.2 of the UCCMS. A second allegation of maltreatment as part of the same complaint alleged that the Claimant and the impacted person attended a party after the same competition. It was alleged that drinking was involved and that the Claimant recorded a video of the impacted person laying naked, curled up in the shower and that the Claimant sent the video to a team group chat. It was found that this amounted to an allegation of Sexual Maltreatment pursuant to s. 5.5 of the UCCMS. This complaint was received by OSIC on April 12, 2023.

The second complaint set out that on April 2, 2023, the Claimant was dancing next to the impacted person and that the Claimant "became touchy". The impacted person attempted to walk away but the Claimant "pulled them right back". The Claimant then began to kiss the neck of the impacted person without consent. The impacted person then went to sit down but the Claimant allegedly followed the impacted person and pulled the impacted person to the bar, "all while being touchy". OSIC determined that this amounted to three allegations of Sexual Maltreatment pursuant to s. 5.5 of the UCCMS.

On August 23, the Claimant was provided with a Report on Provisional Measures from the DSO. In this report, the DSO noted that the allegations against the Claimant "may be considered medium forms of Psychological and Sexual Maltreatment." The DSO felt that because there were two separate complaints against the Claimant, that this demonstrated a "pattern of Prohibited Behaviour." It also noted that complaints were not reported by the impacted persons and that the complaints had not yet been verified by the impacted persons and that the Claimant had been suspended by their NSO pending the outcome of OSIC's investigation.

The DSO imposed the following conditions on the Complainant in the Report on Provisional Measures:

1. Restriction on activities outside of training-related and field of play activities.
   [The Claimant] is provisionally prohibited from attending and participating in any NSO activities that are outside of [their] direct needs and responsibilities during training or competition (e.g. social events, both formal and informal), unless it is strictly required and respects the other Imposed Provisional Measures. Should such attendance be strictly required, it is to be documented.
2. Restriction on contact outside of training-related and field of play activities.
   [The Claimant] is provisionally prohibited from being in contact, directly or indirectly, with any person under the age of 25 in the context of NSO activities outside of [their] direct needs and responsibilities during training or competition, unless it is strictly required. If

such contact is required, it must respect Provisional Measure #3 and must be documented or preserved.

3. **Restriction on contact with Impacted Persons.**
   [The Claimant] is provisionally prohibited from being in contact with the Impacted Persons.

The Claimant was informed of their right to appeal the Provisional Measures before the Safeguarding Tribunal of the SDRCC.

On August 29, the Claimant received a letter from their NSO advising them that the interim suspension issued by the NSO on April 12 would be lifted as of September 1. This letter informed the Claimant that, while the NSO's interim suspension was being lifted, the Claimant was still subject to all provisional measures imposed by the DSO in the Report on Provisional Measures. The letter also indicated that, despite the interim suspension being lifted, the Claimant was not invited back to train at the High Performance Centre. The NSO advised that, "This decision is based, in part, on its incompatibility with the provisional measures, and especially provisional measure #3." The Claimant was informed that they could return to training and competing by registering with an affiliated club. The Claimant was advised that they could follow-up with OSIC if they had any questions related to the provisional measures.

On August 29, the Claimant emailed OSIC advising that they had been under "severe sanctions" since April 12 and raising issues with the delay in which their case had been treated. The Claimant raised issues that the names of the complainants had been withheld from the Claimant and that there were no particulars as it related to the allegation of bullying. The Claimant identified concerns that the complaints had been filed by third parties and that they had not even been verified by the impacted persons. The Claimant told OSIC that they may wish to submit a response to the allegations against them but that they were unable at that time based on the information they had been provided to date. The Claimant raised issues with procedural fairness and informed OSIC of the impacts the delay had caused on their mental health and their career.

On August 30, the Claimant requested that this matter proceed on an expedited basis due to the "extreme" impacts this situation had on the Claimant.

On September 1, the Claimant contacted OSIC again for a response to their August 29 email as they had received none.

On September 12, OSIC responded to the Claimant's communications requesting an expedited investigation. OSIC advised the Claimant that an independent investigator had been potentially identified and that the name of the investigator would be provided to the Claimant once they had been confirmed as an investigator. The Claimant was informed that they could expect to receive this information within "the next week or so".

The Claimant appealed the August 23 provisional measures to the Safeguarding Tribunal. This appeal before the Safeguarding Tribunal resulted in the Roberts Decision dated October 6, which maintained provisional measure 1 by consent of the parties, lifted provisional measure 2 and varied provisional measure 3. The two remaining provisional measures were with respect to:

1. The restriction on activities outside of training-related and field of play activities; and
2. The restriction on contact.

In relation to the first provisional measure, Arbitrator Roberts took the opportunity to clarify that the Claimant was not prohibited from attending/watching competitions of other athletes and that if the Claimant was required to be at an NSO-organized team outing, this was to be documented by a coach or NSO staff member.

Arbitrator Roberts varied the second remaining provisional measure to include an exception which permitted to Claimant to return to training and competition facilities. Arbitrator Roberts included that the Claimant was to remain 10 metres from the impacted persons and/or that the Claimant was to remove themselves if approached by an impacted person.

On November 8, the Claimant submitted their request to the SDRCC that the matter of the delay be heard by way of an Ordinary Tribunal.

On November 10, OSIC emailed the Claimant and informed them that an independent investigator had been appointed to investigate the complaints. The Claimant was provided with the investigator's name for the purposes of checking for any perceived conflict of interest. OSIC informed the Claimant that the investigator would be in touch with them shortly.

On November 27, the investigator emailed the Claimant, advising that they were looking to schedule an interview and providing information for how the investigation and interview would proceed.

This matter was initially set down to heard on December 7. However, on December 5, OSIC made submissions requesting Intervenor status. OSIC had been made aware of this dispute at some point in November after the Claimant had filed it with the SDRCC. Instead, a short hearing was convened to determine the issue of whether OSIC would be granted Intervenor status.

On December 10, I issued the following Order with respect to OSIC's request:

1. On consent of the parties, OSIC is to be granted Intervenor status pursuant to section 6.6 of the Code;
2. I order the following conservatory measure pursuant to section 6.7 of the Code:
    a. All steps related to the investigation or determination of the merits of the complaint are stayed until the Claimant's request has been heard and the final written reasons for this decision are released;
3. Upon request and consent of the parties, the final date for issuing written reasons pursuant to 6.12(a) are extended until January 8, 2024.

The hearing to determine jurisdiction and all other matters brought by the Parties was convened on December 18.

Issues

This issues before me are the following:

1. Which version of the *Code* applies?
2. Does the SDRCC have jurisdiction to hear this matter as an Ordinary Tribunal?
3. If so, whether OSIC has lost jurisdiction over the matter on account of delay?
4. If so, what is the appropriate remedy?
5. Regardless of the preceding issues, whether the Parties should be given anonymity?

Decision

1. Which version of the *Code* applies?

I find that that the current version of the *Code* applies to this matter; specifically, the version of the *Code* which came into effect on October 1, 2023.

I find this to be the case on the basis that while the Claimant's challenge is linked to issues which had their start before the coming into effect of the current version of the *Code* on October 1, 2023, the Claimant's challenge in this matter is with the ongoing delay caused by OSIC. It is not a challenge of OSIC's investigation or their initial jurisdiction to conduct such an investigation, but with whether the delay has resulted in a loss of that jurisdiction.

I therefore find that the current version of the *Code* applies. Regardless, it would make no difference to my determination of jurisdiction for reasons which will become apparent below.

2. Does the SDRCC have jurisdiction to hear this matter as an Ordinary Tribunal?

I find that the SDRCC does not have jurisdiction to hear this matter as an Ordinary Tribunal.

It is settled law that arbitral bodies like the SDRCC do not have inherent jurisdiction[4]. Instead, jurisdiction must be found by demonstrating the following three-part test:

(i) One of the parties to the claim is a "Sport Organization";
(ii) That the dispute is a "Sports-Related Dispute"; and,
(iii) That the SDRCC has jurisdiction pursuant to subsection 2.1(b) of the *Code*.

While not binding, Arbitrator Robert Décary's decision in SDRCC 15-0272 is instructive for setting out the relevant test and for giving some guidance[5]. In this decision, Arbitrator Décary clearly articulates where the SDRCC derives its jurisdiction and how it does so. According to Arbitrator Décary:

> 13. Let it be clear from the outset: the fact that a sport organization is involved in a dispute does not in and of itself make that dispute a sports-related dispute for purposes of arbitration by a sport arbitration tribunal. On the other hand, it is common ground that in Canada national sports organizations are asked and expected to adopt appeal policies that favour mediation and arbitration by the Sport Dispute Resolution Centre of Canada (SDRCC) over court proceedings.
>
> 14. It is well established that the SDRCC has no inherent jurisdiction, i.e. no jurisdiction other than that which is attributed to it by the Code. The Code defines the meaning of "Sports-Related Dispute" and identifies those "Sports-Related Dispute" with respect to which the SDRCC has jurisdiction.
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> 15. The words "Sports-Related Dispute" are given a wide meaning in the definition found in subsection 1.1(mm)(iii), where they are said to mean "any dispute affecting participation of a Person in a sport program or a sport organization […]".

[4] *Nova Scotia (Workers' Compensation Board) v. Martin; Nova Scotia (Workers' Compensation Board) v. Laseur*, 2003 SCC 54, and *Matamy (Downsview) Limited v KSV Restructuring Inc. (Urbancorp)*, 2023 ONSC 3013.
[5] *Provincial Taekwondo Society of Nova Scotia (PTSNS) and Provincial Taekwondo Society of Newfoundland & Labrador (PTSNL) and Taekwondo Canada (TC) Board of Directors*, SDRCC 15-0272.

[…]

20. However, it is not enough for a dispute to be sports-related within the definition of the Code to be brought before the SDRCC. Only those sports-related disputes which are contemplated by section 2.1 of the Code may be adjudicated upon by the SDRCC. The SDRCC has jurisdiction to resolve the dispute only (i) where an agreement exists between the Parties to bring the dispute to the SDRCC, (ii) where the Parties are required to resolve the dispute through the SDRCC or (iii) where the Parties and the SDRCC agree to have the dispute resolved using this Code.

Under the first prong of this analysis, I find that OSIC and the DSO are very clearly sport organizations. section 1.1 of the *Code*, sets out the following as the definition of a "Sport Organization":

> (xx) "Sport Organization" or "SO" « Organisme de sport » or « OS » includes any sport organization in Canada that is:
>
> > (i) the governing body for a specific sport or discipline at the national level or in any provincial, territorial or regional jurisdiction in Canada, as recognized from time to time by the SDRCC;
> > (ii) a multisport service organization at the national level or in any provincial, territorial or regional jurisdiction in Canada, as recognized from time to time by the SDRCC; or
> > (iii) a Canadian Sport Institute or Centre receiving funding from Sport Canada;

I find that OSIC and the DSO are properly considered multisport service organizations under subsection (ii). For this finding, I have taken judicial notice of Sport Canada's definition of a "Multisport Service Organization"[6]:

> Multisport Service Organizations (MSOs) lead or coordinate the delivery of specific services to the national sport community. These services may include:
>
> - coach education and certification;
> - development of sport programming at post-secondary institutions;
> - support for Indigenous peoples in sport and national coordination for the North American Indigenous Games (NAIG);
> - strengthening the active involvement of women and girls in sport;
> - sport dispute resolution services including education, mediation and arbitration;
> - franchise holder for major national and international sport events.
> - promoting sport participation

I note that this list is non-exhaustive, as indicated by the use of "may" and should be interpreted broadly.

To determine whether an organization meets the definition of a Sport Organization, it is important to consider what the organization does instead of what they say they do.

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[6] *National Multisport Service Organizations* (September 2023), online: Government of Canada <https://www.canada.ca/en/canadian-heritage/services/sport-organizations/national-multisport-service.html>.

In the case of the Intervenor, OSIC is responsible for administering the UCCMS for the purpose of Abuse-Free Sport. The UCCMS establishes principles regarding respectful sport culture, defines behaviours that constitute abuse and maltreatment in sport and establishes a framework for determining appropriate sanctions against such prohibited behaviour. OSIC operates as an independent division of the SDRCC, which is identified by Sport Canada as a multiservice sport organization. Part of OSIC's responsibilities is to take complaints which allege violations of the UCCMS and to send them for investigation. They do this through a series of Service Agreements with NSOs which have adopted the UCCMS. In Section 1 of the UCCMS, the following is identified as the purpose of the UCCMS:

> 1.1 The Canadian sport sector is committed to advancing a respectful sport culture that delivers quality, inclusive, accessible, welcoming and safe sport experiences.
>
> 1.2 Individuals should have the reasonable expectation when they participate in sport in Canada that it will be in an environment that is free from all forms of Maltreatment and that treats every individual with dignity and respect. Maltreatment in all its forms is a serious issue that undermines the health, well-being, performance and security of individuals, communities, and society.

As the body responsible for administering the UCCMS for the purpose of Abuse-Free Sport and investigating claims of maltreatment in sport, OSIC is the organization responsible for providing specific services which aim to ensure that a respectful sport culture is fostered and that athletes are protected from maltreatment. OSIC is a multisport service organization as defined by Sport Canada. As a result, I find that OSIC meets the definition of a sport organization as defined by the *Code*.

I find the same is true of the Respondent. Like OSIC, the DSO leads or coordinates the delivery of specific services to the national sport community. Specifically, the DSO makes decisions regarding Provisional Measures and violations of the UCCMS, it imposes sanctions where relevant, appears before the Safeguarding Tribunal or the Appeal Tribunal when decisions are challenged, and reviews and approves mediated outcomes to ensure that they align with the objectives of the Abuse-Free Sport program. DSO Provisional Measures are implemented only after OSIC determines that a complaint is admissible for investigation and imposes sanctions after an OSIC investigation substantiates a finding of maltreatment. In this way, the DSO and OSIC operate in sync with one another. Their goals are aligned and they provide complimentary services.

I therefore find that both organizations are properly defined as Sport Organizations under the *Code*.

Under the second prong to determine jurisdiction, I must now consider whether the dispute at hand meets the threshold of a "Sports-Related Dispute". As per Arbitrator Décary, because the dispute involves a Sport Organization it may not meet the threshold of a Sports-Related Dispute. According to Arbitrator Décary, we must look to the *Code* to make this determination. Specifically, the definition of a "Sports-Related Dispute" contained in section 1.1:

> (yy) "Sports-Related Dispute" « Différend sportif » means a dispute affecting participation of a Person in a sport program or a Sport Organization arising from, but not limited to:
>
> (i) the selection of members to a team;
>
> (ii) the Athlete Assistance Program of the Government of Canada;

(iii) a decision of an SO board of directors, a committee or an individual delegated to make a decision on behalf of an SO or its board of directors, which affects any Member of the SO;
(iv) the application of the CADP; or
(v) the application of the UCCMS under the authority of a SO having an effective Abuse-Free Sport program service agreement with the SDRCC;

Based on this definition, I find there is little doubt that this matter is a Sports-Related Dispute. The dispute at hand has impacted the Claimant's participation in their sport. Furthermore, the dispute has arisen from the application of the UCCMS under the authority of a Sport Organization.

I must now turn to the third prong of the test to determine jurisdiction: whether the SDRCC has jurisdiction under subsection 2.1(b) of the *Code*. I find that the SDRCC does not have jurisdiction to consider the Claimant's claim as a result of subsection 2.1(b).

According to Arbitrator Décary, only those sports-related disputes which are contemplated by subsection 2.1(b) of the *Code* may be adjudicated upon by the SDRCC. Subsection 2.1(b) of the *Code* establishes the following as a means for determining jurisdiction:

2.1 Administration

(b) This Code applies to a Sports-Related Dispute where the SDRCC has jurisdiction to resolve the dispute. This Code will therefore apply to any Sports-Related Dispute:
(i) in relation to which an agreement exists between the Parties to bring the dispute to the SDRCC, whether by virtue of a policy, contract clause or other form of agreement binding the Parties;
(ii) that the Parties are required to resolve through the SDRCC; or
(iii) that the Parties and the SDRCC agree to have resolved using this Code.

Because the SDRCC does not have inherent jurisdiction to hear a Sports-Related Dispute, jurisdiction must be found in one of the three enumerated ways:

a) An Agreement must exist between the Parties to bring their disputes before the SDRCC;
b) The Parties are required to bring their disputes before the SDRCC to be resolved; or
c) That the Parties have agreed with the SDRCC to resolve their dispute through the *Code*.

In the absence of an agreement to bring their dispute before the SDRCC or a requirement to do so, jurisdiction cannot be found.

In reviewing the submissions of the Parties, I find that there is no such agreement which allows the SDRCC to take jurisdiction of this matter as an Ordinary Tribunal. In the course of this matter, I was provided with a Service Agreement between the Intervenor and the Claimant's NSO, with the UCCMS and with Guidelines created by the Intervenor. In these documents, some reference is made to the SDRCC, however, the SDRCC's function is limited to its function as convening a Safeguarding Tribunal. This permits the SDRCC to hear challenges of either: (i) a DSO decision on a violation or a sanction pursuant to section 8.6 of the *Code*; or, (ii) a challenge of a DSO decision on Provisional Measures pursuant to section 8.5 of the *Code*. These materials do not set out an agreement between the parties to bring their disputes before the Ordinary Tribunal.

The Parties are not required to bring their disputes before the SDRCC. No legislation, statute or document I have been presented establishes this requirement, except in the case of the Safeguarding Tribunal.

Finally, the Parties have not agreed with the SDRCC to resolve their dispute through the *Code*. Given that the Respondent has challenged the jurisdiction of the SDRCC to hear this matter as an Ordinary Tribunal, it is beyond question that the Parties have not agreed to have their dispute resolved through the *Code*.

As a result of the above, I find that the SDRCC does not have jurisdiction to hear this matter under article 6 of the *Code* as an Ordinary Tribunal.

I understand how disappointing this decision is for the Claimant. I would like to take the time to acknowledge that the manner in which the Claimant has been treated is unfair.

The facts, as presented by the Claimant, are uncontested in this matter. The Claimant received an interim suspension from their NSO pending the outcome of OSIC's investigation on April 12, 2023. The interim suspension was revoked after the Respondent released its Provisional Measures on August 23. The revocation of this interim suspension should not be understood as an end to the suspension but rather formalization of the suspension the Claimant was already serving. The NSO was clear in its communications with the Claimant that they would not be invited back to the High Performance Centre as a result of the Provisional Measures.

The Provisional Measures were varied on October 6, 2023, by Arbitrator Roberts. However, despite this, the Claimant was still not permitted to return to the High Performance Centre for training. According to the Claimant, they were informed by their NSO that they could not return because one of the impacted persons trained with their University team at the same facility and that, due to the Claimant's lack of high level training during the interim suspension and suspension meted out by the DSO in the Provisional Measures, the Claimant could no longer perform at the level required by the NSO.

The Claimant in this matter has been, in effect, held out of their sport for nine months, as of the time of this decision. It is unequivocal from the communications submitted before this tribunal that OSIC's investigation is the sole reason that the Claimant has been held out of their sport. The NSO made it clear to the athlete that their interim suspension was pending the outcome of OSIC's investigation. When the Provisional Measures were released, the NSO made it clear to the athlete that, while the interim suspension was revoked, these Provisional Measures would keep the Claimant from returning to the High Performance Centre. The NSO specified that the third Provisional Measure made it impossible for the Claimant to return to the High Performance Centre, as it restricted the Claimant's ability to train or be in the presence of an impacted person. At all time, the NSO directed the Claimant to OSIC and told the Claimant to remain patient while OSIC investigated the complaints. This investigation never started.

The Claimant did not receive any details about the allegations against them until July 21, when the Claimant received the Statement of Allegations. This document contained summaries of the allegations brought in relation to two separate incidents which occurred on the same evening of April 2, 2023. The allegation of bullying contained no details and the other allegations did not contain enough detail that the Claimant could be said to understand the case they would be expected to meet or speak to. The Statement of Allegations is so lacking in details that the Claimant did not even become aware that they had been made by third parties or that the allegations had not even been verified by the impacted persons. The Claimant did not learn

these very basic facts until they received the Provisional Measures over a month later, on August 23. These facts were known to OSIC as early as April 12.

While the Claimant was permitted to join a club, the impacts of the suspension were still felt and still ongoing. The clubs the Claimant could join were far below the Claimant's skills and abilities. Because of OSIC's delay in conducting this investigation, the Claimant has been denied funding, high performance level coaching and training, they have missed out on competitions. It is disingenuous to suggest that the Claimant's suspension ended when the interim suspension was withdrawn on September 1 or when Arbitrator Roberts varied the Provisional Measures on October 6.

The Intervenor has suggested the Claimant is in some way responsible because they did not admit to the conduct that is alleged against them. I disagree with the Intervenor on this point. The Statement of Allegations given to the Claimant is a wholly inadequate document for the purposes the Intervenor is seeking to use it. In reading this document, there is no possible way that the Claimant could understand what is being specifically alleged against them or what conduct they are being accused of. It is this very fact that the Claimant raised to the Intervenor in an email dated August 29.

On that same date, August 29, the Claimant requested an expedited hearing. The Claimant cited the fact that they had already served a four and a half month suspension up to this point and pleaded the toll this had taken on their mental health and career as an athlete. However, the Claimant received no meaningful response until September 12, when OSIC informed the Claimant that a potential investigator had been identified and that the name of the investigator would be provided within a week or so. No investigator was named until nearly two months later, when, on November 10, OSIC informed the Claimant of the name of the investigator. This was two days after the Claimant filed their request before the SDRCC for this hearing.

The appointment of an investigator took nearly seven months to the day since OSIC received the two complaints from the Claimant's NSO. This was one month since Arbitrator Roberts heard the matter and had already expressed criticism of the Intervenor for the unexplained and inordinate delay in carrying out this investigation. The following paragraphs of that decision demonstrate Arbitrator Roberts's feelings on the matter:

> 57. Although the DSO suggests that the investigation is underway, correspondence from [the Claimant]'s counsel indicates that, as of the date of the reply submissions (October 2, 2023), no investigator had been assigned to investigate the complaints. There has been no explanation for the delay, which in the context of the purpose of Abuse-Free Sport, is simply untenable. Requiring parties to wait six months before an investigator is even assigned, in my view brings the process into disrepute. It is unfair to all the parties, including [the Claimant], the alleged victim(s) as well as to [the NSO].
>
> 58. Not only is the OSIC obliged to initiate a complaint investigation without delay, but [the Claimant] also has an interest in having the allegations addressed expeditiously. Unexplained delays, at best hampering [the Claimant]'s ability to pursue [their] sport, at worst causing [them] irreparable harm, are deeply unfair to [them].

To date, and despite this criticism from Arbitrator Roberts, the Intervenor has not bothered to offer an explanation to the Claimant or to this panel for the delay. Such conduct is contrary to the principles of fairness, transparency and accountability that bodies like OSIC are supposed to represent. It is also demonstrative of the arrogance I have observed throughout this matter.

Furthermore, the Intervenor and Respondent made a number of submissions which Arbitrator Roberts had already ruled on. They argued that the delay was not inordinate to bring the process into disrepute. Arbitrator Roberts, as can be seen in quote above, has contradicted this. In their arguments, both parties made submissions that the conduct of the Claimant, as has been alleged, is on the high end in terms of seriousness. Arbitrator Roberts found that the Claimant's alleged breach is on the medium end, which aligns with the Respondent's own finding in the Report on Provisional Measures. I find that they are probably on the lower end, based on the allegations I have seen. However one feels about the level of seriousness of these allegations, it is evident that the Claimant would not have received a suspension in excess of six-months from the SDRCC for the conduct they are accused of.

OSIC exists in a novel space which has been completely removed from any meaningful accountability or oversight. Through a series of complex Service Agreements and Guidelines, OSIC has substituted the SDRCC, which offers athletes the ability to have their disputes heard by an arbitrator expert in sport law in a simple, cost-effective and expeditious manner, for an arcane, time-consuming, Kafkaesque and potentially costly process. This entire process is a step back in time for sport law in Canada. The Intervenor and the Respondent submitted that the avenues available to the persons in the position of the Claimant are to challenge the Provisional Measures before the Safeguarding Tribunal, which the Claimant has done. Otherwise, the Claimant must retain legal counsel and bring a challenge before a court in Ontario, regardless as to whether they live in Ontario. Based on the submissions of the Parties, I find this to be the case.

It is entirely foreseeable that at some point an athlete will abuse this process to derail the career of a competitor. The only protections in place, as the Intervenor and Respondent pointed out, is a prohibition for filing a false report. With all due respect, this prohibition is entirely inadequate. In order to offer this protection, it requires a finding that the person reporting the false complaint did so *knowingly*. This is a high threshold to meet and one that I would hazard is rarely met. I foresee that this will inevitably present a public policy problem. Furthermore, a finding that a false report was filed could potentially occur after a major competition had already occurred.

Abuse-Free Sport is important to sport in Canada and is a commendable goal for its ambitions of making sport more open and accessible for everyone. However, the way we ensure that sport in Canada is indeed Abuse-Free is not to run roughshod over the rights of the accused. It is not to let these types of investigations sit and languish for months at a time and to open the investigations to charges of unfairness or to have a decision overturned on judicial review for failing to adhere to principles of procedural fairness[7]. It is OSIC's responsibility to ensure that

[7] In SDRCC 19-0401 at para 159, I wrote the following to remind Sport Organizations that while the goals of Safe Sport are commendable, there is still a legal obligation to ensure that investigations are fair, unbiased and free from prejudice. The same applies to Abuse-Free Sport:

> Athletics Canada has submitted that the social reality is one of increasing concern for issues around harassment and abuse in sport. This, they argued, should be a consideration when determining bias. I find the social reality is completely irrelevant in the consideration of bias. While it is important that Athletics Canada has set about implementing and enforcing its Safe Sport Initiative, the social reality does not permit an unfair process. The issue of safe sport and athletes being able to fulfill their full potential free of harassment is an important value. The Canadian Government and Athletics Canada should be commended for their leadership in these areas. However, in the rush to protect athletes it is essential that everyone's rights are respected, whether it be the complainant, witnesses or the person complained about. A fair process will equal fair results. Just like in sport there are rules of fair play, there must be fair play in investigations and discipline decisions.

investigations are carried out expeditiously, fairly and transparently. They have not done so in this case. Let my comments on this matter motivate OSIC to do better.

3. Has OSIC has lost jurisdiction over the matter on account of delay?

Given my findings above, I have not addressed this issue.

4. What is the appropriate remedy?

Given my findings above, I have not addressed this issue.

5. Should the Parties should be given anonymity?

In their submissions, the Claimant requested anonymity due to the serious nature of the allegations currently before OSIC, which have, as of yet, not been investigated. The Claimant believes that it is necessary to be granted anonymity as publishing their name is likely to stigmatize the Claimant, lead to prejudice and traumatize or retraumatize the Claimant.

The Claimant submitted that they should not punished in the court of public opinion or anywhere for asserting their rights before the SDRCC. The allegations currently under OSIC investigation are still unproven and have not been investigated. According to the Claimant, it would therefore be unfair to publicly associate the Claimant with these still unproven allegations. The Claimant also submitted that, in order to make out their case, they have had to submit sensitive medical information for consideration, including the toll the suspension took on their mental health. The Claimant believes that there is no compelling reason to publish their name and any information which might identify them and associate them publicly with this sensitive medical information. The Claimant also argued that publishing their name will have a chilling effect for future Claimants who may be in the Claimant's position.

According to the Claimant, anonymization of this decision is permissible under the *Code*. The SDRCC is a not-for-profit corporation which derives its jurisdiction from section 2.1 of the *Code*. The SDRCC is therefore not bound by the same principles of open court proceedings which characterize other bodies. Furthermore, the Claimant argued that section 5.9 of the *Code* establishes that arbitrations under the *Code* are confidential and that hearings are not open to the public, except where provided by the *Code*. The Claimant also cited subsection 6.12(d) of the *Code*, which sets out that awards of the Ordinary Tribunal are not to be made public unless the panel determines otherwise. In essence, this gives the Ordinary Tribunal the power to determine not to make an award public.

The Claimant's request for anonymity in this matter has not been opposed by the Respondent or the Intervenor. I accept the reasoning of the Claimant and I have therefore granted their request for anonymity on the basis of their submissions.

I did not accept the Claimant's argument that they should be able to review this decision and suggest redactions. That would result in compromising my independence.

I do not grant the Respondent's request for anonymity. No compelling reasons have been given by the Respondent in relation to this request other than an assertion that this matter has the potential to be highly prejudicial and to pose a potential negative impact to Abuse-Free Sport. I find that the Respondent has not acted in a manner which is contrary to Abuse-Free Sport and that their conduct has in all other ways been what I would expect of such a body. There is no reason to provide anonymity.

I have also not granted anonymity to the Intervenor. While they have not requested it, bodies such as the Intervenor should not be given the opportunity to shield themselves from scrutiny. A sport organization not wanting to have a critical decision published about them or a decision which potentially shows them in a negative light is insufficient to justify granting anonymity.

Conclusion

Based on the above, I have come to the following conclusions:

i. The current version of the *Code* applies to this hearing.
ii. The Ordinary Tribunal does not have jurisdiction to consider the substantive issues as a result of section 2.1 of the Code.
iii. The Claimant's request that their name and any identifying information be anonymized is granted. I order that any potentially identifying information be redacted by the SDRCC prior to publication of any decision or communication in relation to this matter.
iv. The Respondent and Intervenor have made a similar request that their identifying information also be anonymized. Their requests are denied.
v. The Conservatory Measures issued on December 7, 2023, are hereby revoked.

I would like to thank the parties in this matter for their assistance with these submissions. This was a novel case before the SDRCC involving a complex set of circumstances.

Signed in Ottawa, this 7th day of January 2024

David Bennett, Arbitrator