A typo in the date of signature of this decision was corrected after issuance.

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

NO: SDRCC 23-0690
(ORDINARY TRIBUNAL)

FRANK FOWLIE
(Claimant)

AND

WRESTLING CANADA LUTTE
(Respondent)

AND

DAVID SPINNEY
AHMED SHAMIYA
MARA SCHIAVULLI
(Affected Parties)

Before:

Roger Bilodeau, K.C. (Jurisdictional Arbitrator)

Representatives:

On behalf of the Claimant:	André Marin (counsel), Adam P. Strömbergsson-DeNora (counsel) and Deanna Marie Lynch
On behalf of the Respondent:	Ilan Yampolsky, Tamara Medwidsky, Jordan Goldblatt (counsel) and Morgan McKenna (counsel)
On behalf of the Affected Party David Spinney:	Michael Smith (counsel), Malik Bouhamdani, Kiran Virk and Jessica Sawyer
On behalf of the Affected Party Ahmed Shamiya:	Cory Coles
On behalf of the Affected Party Mara Schiavulli:	Eamonn Dorgan

Decision

A. INTRODUCTION

1. On 5 December 2023, the Affected Party David Spinney ("Mr. Spinney") filed a challenge with the Sport Dispute Resolution Centre of Canada ("SDRCC") in case number SDRCC 22-0609, seeking the removal of the arbitrator appointed to hear that matter ("Appointed Arbitrator") on the grounds of a reasonable apprehension of bias. On 6 December 2023, Mr. Spinney filed a separate challenge on the grounds of a reasonable apprehension of bias. In that document he also seeks to supplement his earlier challenge filed on the previous day. I will address below the interplay between those two challenges and the manner in which I have dealt with both for the purposes of this proceeding (the "Spinney challenge").

2. On 7 December 2023, I was appointed as Jurisdictional Arbitrator to render a decision on the Spinney challenge, in accordance with Sections 5.4 and 5.5 of the Canadian Sport Dispute Resolution Code (the "Code").

3. On 13 December 2023, the Affected Party Ahmed Shamiya ("Mr. Shamiya") also filed a challenge with the SDRCC in case number SDRCC 22-0609 seeking the removal of the Appointed Arbitrator appointed to hear that matter on the grounds of an apprehension of bias (the "Shamiya challenge").

4. Given that the parties could not agree on whether or not the Spinney and Shamiya challenges should be heard and decided jointly, I requested their submissions on that point and by way of a Procedural Order dated 11 January 2024, I determined that I would hear and decide the Spinney and Shamiya challenges jointly in this case number SDRCC 23-0690.

5. On 15 February 2024 and prior to receiving all submissions in regard to the merits of the Spinney and Shamiya challenges, the Affected Party Mara Schiavulli ("Ms. Schiavulli") also filed a challenge with the SDRCC in case number SDRCC 22-0609 seeking the removal of the Appointed Arbitrator on the grounds of a conflict of interest and of a reasonable apprehension of bias (the "Schiavulli challenge").

6. Since the parties could not agree on whether or not all three (3) challenges should be heard and decided jointly, I requested their submissions on that point and by way of a Procedural Order dated 26 February 2024, I determined that I would hear and decide the Spinney, Shamiya and Schiavulli challenges jointly in this case number SDRCC 23-0690.

7. The Respondent, Wrestling Canada Lutte ("WCL"), took no position on either of the challenges.

8. This case proceeded without a hearing and was decided on the basis of the written submissions and evidence put forward by the parties. I have reviewed the entire evidence and submissions but I only refer to the facts, evidence and arguments that I considered necessary to explain my reasoning in this decision. I dismiss the challenges and remit the matter back to the Appointed Arbitrator to pursue the hearing of case number SDRCC 22-0609 on the merits.

B. BACKGROUND AND PRELIMINARY MATTERS

9. All three challenges in this case number 23-0690 relate to case number SDRCC 22-0609 in which the Claimant, Dr. Frank Fowlie ("Dr. Fowlie"), submitted his request to appeal a decision of the WCL's Safe Sport Officer, as well as a final decision of the WCL Discipline Panel dated 1 September 2022, among other grounds. For

purposes of this case number SDRCC 23-0690, it is useful to firstly provide a brief summary of the procedural history of case number SDRCC 22-0609.

Summary of case number SDRCC 22-0609

10. Case number SDRCC 22-0609 was set in motion in November 2022 and emanated from case number SDRCC 21-0534. Based on the information provided to me, case number SDRCC 22-0609 was essentially a continuation of case number SDRCC 21-0534 in the form of a hearing *de novo.* Both cases involved the same parties and the same Appointed Arbitrator was designated by the parties to hear both cases.

11. In January 2023, Mr. Spinney and Mr. Shamiya filed separate challenges seeking the removal of the Appointed Arbitrator on the grounds of a reasonable apprehension of bias. These two (2) challenges were dismissed by Jurisdictional Arbitrator Thauli in her decision dated 3 April 2023 in case number SDRCC 22-0609 ("Thauli decision").

12. In June 2023, the hearing in that case was finally scheduled for 11, 12 and 15 September 2023. On 11 September 2023, the hearing was adjourned on request by Mr. Shamiya following an injury suffered by him. By way of a Procedural Order dated 11 September 2023, the Appointed Arbitrator set new hearing dates for 4-5-6 and 8 December 2023 (the "hearing").

13. On 1st December 2023 and in response to correspondence received on 30 November 2023 from Mr. Spinney's counsel asking to be excused from Day 1 of the hearing for personal reasons, the Appointed Arbitrator issued a Procedural Order that the hearing would go ahead as planned on 4 December 2023. At all relevant times, all parties received the regular SDRCC notifications inviting them to join the hearing, which was held on 4-5-6 December 2023 and adjourned on 6 December 2023.

14. As will be explained below, Mr. Shamiya did not join the hearing, except for a very brief appearance on 6 December 2023. His representative joined the hearing in the afternoon of 6 December 2023. Mr. Spinney joined various parts of the hearing on all three days. Mr. Spinney's counsel also joined the hearing at various times on 5 December 2023 and during part of the morning session of the hearing on 6 December 2023. Ms. Schiavulli did not join the hearing at any time, nor did she make any request for an adjournment or otherwise.

15. By the end of the morning session of the hearing on 6 December 2023 and as will also be further explained below, the Appointed Arbitrator had heard the evidence of Dr. Fowlie without the participation of the Affected Parties. In the presence of all parties except Mr. Shamiya (who had not yet joined the hearing) and Ms. Schiavulli (who did not join at any time), the Appointed Arbitrator also indicated that if there was no further evidence and no cross-examination by any other party, he would proceed to "close the hearing" and hear submissions. He then proceeded on that basis and heard the submissions of Dr. Fowlie and WCL.

16. Most of the afternoon session of the hearing on 6 December 2023 was spent hearing Mr. Coles, who joined the hearing at that point for the first time as Mr. Shamiya's representative. Before ending that afternoon session of the hearing on 6 December 2023, the Appointed Arbitrator indicated that the SDRCC Case Manager was in the process of checking with counsel for Mr. Spinney to determine if he was planning to make submissions, either that day or on the next hearing day scheduled

for 8 December 2023. The Appointed Arbitrator also left open the possibility that Mr. Shamiya, or his representative, could do the same. In any event, the hearing was adjourned on that note at approximately 3:30 p.m. (ET) on 6 December 2023.

17. By way of an email message sent by the SDRCC to all parties on 7 December 2023 at 5:01 p.m. (ET), the SDRCC advised that all proceedings in case number 22-0609 were suspended, pending a ruling on the Spinney challenge by a Jurisdictional Arbitrator. The message also advised that the hearing was adjourned, until further notice.

The current case number SDRCC 23-0690

18. In regard to this case number SDRCC 23-0690, a preliminary meeting (the "Meeting") was convened on 11 December 2023, at which time I heard from the following parties, with a view to setting a schedule for submissions in relation to the Spinney challenge:
    - Cory Coles, representative for Mr. Shamiya;
    - Tamara Medwidsky, representative for WCL;
    - Morgan McKenna, counsel for WCL;
    - André Marin and Mark Bourrie, counsel for Dr. Fowlie;
    - Michael Smith, counsel for Mr. Spinney; and
    - Malik Bouhamdani, articling student with Mr. Spinney.

19. Early on in the Meeting, a question arose as to whether it would be appropriate for the Appointed Arbitrator to file evidence or to make submissions in regard to the Spinney challenge. Given that there was no agreement between the parties on that point and given the fact the Appointed Arbitrator had been allowed to make such submissions in regard to the earlier challenges which were addressed in the Thauli decision, I requested submissions from the parties on that point.

Filing of the challenges and notice to the Appointed Arbitrator

20. As mentioned above, Mr. Spinney submitted his challenge on 5 December 2023, just before the start of Day 2 of the hearing in case number SDRCC 22-0609. That challenge was brought to the attention of the Appointed Arbitrator, in accordance with section 5.5 of the Code. At that time, the Appointed Arbitrator could have chosen to resign, but did not do so, which is also in accordance with section 5.5 of the Code.

21. In the late afternoon of 6 December 2023, after Day 3 of the hearing was adjourned, Mr. Spinney filed a separate challenge on the grounds of a reasonable apprehension of bias. In that document, he also sought to supplement his earlier challenge filed on 5 December 2023.

22. Before proceeding further, I must also note the fact that counsel for Mr. Spinney made a specific request to the SDRCC Case Manager that a new case number should be assigned to that second challenge filed on 6 December 2023, distinct from the case number SDRCC 22-0609. This was done by the SDRCC and this case number SDRCC 23-0690 was created for the purposes of the Spinney challenges filed on 5 and 6 December 2023. The above procedure is different from what was done in regard to the two challenges which were dealt with in the Thauli decision, both of which were filed and dealt with under case number SDRCC 22-0609. The Spinney challenge of 5 December 2023 was initially filed in case number SDRCC 22-0609 and was later copied into this case number case number 23-0690.

23. I must also point out that the Spinney challenge filed on 5 December 2023 refers to correspondence and events which transpired during the period of 23 November 2023 to 4 December 2023, including a Procedural Order by the Appointed Arbitrator on 1st December 2023. On the other hand, the Spinney challenge filed on 6 December 2023 refers to correspondence and Procedural Orders which transpired during the period of 23 November 2023 to 5 December 2023 inclusively, as well as to correspondence, followed by a Procedural Order by the Appointed Arbitrator, which transpired during the period of 8 to 11 September 2023, all in regard to case number SDRCC 22-0609.

24. In addition, the Spinney challenge filed on 6 December 2023 sets out three different headings under which Mr. Spinney claims a reasonable apprehension of bias. These headings were not shown in the initial Spinney challenge filed on 5 December 2023. These headings are summarized as follows:

    - the Appointed Arbitrator's decision to order the hearing to proceed go ahead despite the requests to postpone by two of the Affected Parties;
    - the Appointed Arbitrator's failure to admonish or otherwise reprimand Mr. Marin, one of Dr. Fowlie's co-counsel, for his inappropriate behavior; and
    - the Appointed Arbitrator's violation of the Code by rendering a decision that was outside of his jurisdiction without giving the parties an opportunity to make submissions.

25. The Spinney challenge filed on 6 December 2023 was not brought to the attention of the Appointed Arbitrator because, as confirmed by staff of the SDRCC, he only has access to case number SDRCC 22-0609 and cannot view documents filed in case number SDRCC 23-0690. In that regard, Dr. Fowlie argues that the Spinney challenge filed on 6 December 2023 should be rejected because its contents were not brought to the attention of the Appointed Arbitrator, which is unfair to him.

26. In my view and based on my understanding of the Code, there are two key aspects of section 5.5 of the Code which are non-negotiable in all cases: (a) any challenge must be brought to the attention of the Appointed Arbitrator; and (b) all challenges must be filed 'without undue delay after the grounds for the challenge become known'. In addition to those requirements, it should be highly exceptional for there to be two challenges under section 5.5 of the Code in regard to the same subject matter. On that topic, I also note that the Code does not explicitly prohibit nor allow for a different case number to be assigned to a jurisdictional challenge such as this one. Finally, I have taken note of subsection 5.7(h) of the Code which allows a Panel to cure any irregularity which comes to its attention and that a Panel is fully authorized to 'give such directions as it thinks just to cure or waive the irregularity', before arriving at a decision.

27. Based on the above and in the circumstances of this particular case, I will therefore consider the Spinney challenge of 5 December 2023 because it was brought to the attention of the Appointed Arbitrator in accordance with the Code. In addition, I will only consider the segments of the Spinney challenge of 6 December 2023 which are in fact supplementary to the challenge of 5 December 2023.

28. On the other hand, I will not consider the second heading of the Spinney challenge of 6 December 2023 because its subject matter was not brought to the attention of the Appointed Arbitrator in the Spinney challenge of 5 December 2023 but I will consider the third heading because its subject matter flows directly from the first heading, which is at the core of the Spinney challenge of 5 December 2023. In addition, I will not consider the segments of the Spinney challenge of 6 December 2023 which refer to events and documents which were raised more than two months after their occurrence, i.e. in September 2023.

29. In sum, I will therefore consider the Spinney challenges of 5 and 6 December 2023 together as one challenge, with the exceptions noted above and only in regard to the documents or events that transpired during the period of 23 November to 6 December 2023 inclusively.

30. On a different note, and by way of a letter dated 1st March 2024, counsel for Mr. Spinney questioned whether the Appointed Arbitrator had been made aware of and had been given an opportunity to respond to the Shamiya and Schiavulli challenges, respectively filed on 13 December 2023 and 15 February 2024, after the hearing. It should be noted that the Shamiya and Schiavulli challenges were both filed in case number SDRCC 22-0609 and later copied to this case number SDRCC 23-0690, upon my Procedural Order that they should be heard and decided jointly with the Spinney challenge. Dr. Fowlie's co-counsel also sent correspondence on this topic, advising that the Appointed Arbitrator had not offered to resign in regard to the Spinney challenge and that the above query by Mr. Spinney's counsel could only be seen as an attempt to delay the proceedings in this case.

31. Upon verification, I was informed by the staff of the SDRCC that the Appointed Arbitrator has always continued to have access to case number SDRCC 22-0609, in his capacity as the Appointed Arbitrator. I was also advised that he is fully aware of all challenges which have been filed in that case, except for the Spinney challenge of 6 December 2023. I was also further advised that, as provided for in section 5.5 of the Code, he has had the opportunity to resign as the Appointed Arbitrator and has not done so.

Access to the recordings and transcripts of the hearing

32. In their respective challenges, Mr. Spinney and Mr. Shamiya both refer to the recordings and transcripts of the hearing. In view of Dr. Fowlie's objection in that regard, I therefore requested submissions from the parties. Mr. Spinney argued that since the submissions in support of his challenge contained references to the transcripts and recordings of the hearing, it would be illogical to have the submissions refer to that evidence without my ability to review and assess it.

33. WCL took no position on this issue.

34. Given that Mr. Spinney, Mr. Shamiya and Ms. Schiavulli are all claiming that the Appointed Arbitrator should be removed from case number SDRCC 22-0609 on account of a reasonable apprehension of bias by the Appointed Arbitrator in relation to the management or conduct of the hearing, I do not see how I can assess their arguments and submissions without referring to various portions of the recordings and transcripts of the hearing, as required.

35. In a Procedural Order dated 20 February 2024, I therefore *"determined that I must have access to the recording and transcript, as needed, for the sole purpose of assessing and deciding the petitions which I must rule upon in case number SDRCC 23-0690."* Moreover, I made this ruling on the basis that I will only be considering the manner in which the Appointed Arbitrator conducted and managed the process and procedure in case number SDRCC 22-0609, during the period of 23 November to 6 December 2023. It goes without saying that I will consider the recordings and transcripts based on their relevance and will attribute only the appropriate weight to each reference. I will not be accessing the recordings or transcripts of the hearing for any purpose related to the merits of case number SDRCC 22-0609.

36. Having addressed the above preliminary matters, I now turn to the substance of the three (3) challenges which are the subject matter of this proceeding.

C. THE ISSUES

37. I will now address the following issues:
    (i) Hearing and deciding the three (3) challenges jointly;
    (ii) Whether the Appointed Arbitrator should be given an opportunity to make written submissions in regard to the three (3) challenges;
    (iii) Whether the Appointed Arbitrator's management of the hearing in case number SDRCC 22-0609 during the period 1st to 6 December 2023, as described in the three (3) challenges, created a reasonable apprehension of bias; and
    (iv) In regard to the Schiavulli challenge, whether the Appointed Arbitrator is in a position of conflict of interest in regard to case number SDRCC 22-0609

Brief description of the challenges

38. For the purposes of considering the issues to be decided, it is useful to briefly describe the three challenges which are the subject matter of this proceeding.

39. The Spinney challenge claims a reasonable apprehension of bias in that the Appointed Arbitrator:
    a) ordered the hearing to proceed despite requests to postpone by two of the Affected Parties; and
    b) blatantly violated the Code by rendering a decision during the hearing that was outside of his jurisdiction without giving the parties an opportunity to make submissions.

40. The Shamiya challenge alleges a reasonable apprehension of bias in that the Appointed Arbitrator:
    a) proceeded with the hearing despite the absence of Mr. Shamiya due to a head injury; and
    b) did not allow Mr. Shamiya to testify or question Dr. Fowlie during the hearing.

41. The Schiavulli challenge raises two claims, namely that:
    a) the Appointed Arbitrator is in a conflict of interest in case number SDRCC 22-0609, due to his role as a director of the Canadian Olympic Committee ("COC"); and
    b) the Appointed Arbitrator's continuing role as arbitrator in case number SDRCC 22-0609 creates a reasonable apprehension of bias because he has "shown a concerning fixation on addressing Dr. Fowlie's complaints against WCL".

Issue (i): Hearing and deciding the challenges jointly

Issue (i)(a): Joining the Shamiya challenge

42. As noted above, the Shamiya challenge was filed on 13 December 2023 in case number SDRCC 22-0609, after the preliminary meeting held on 8 December 2023 in

regard to this case number SDRCC 23-0690. Since the parties could not agree on whether or not the Spinney and Shamiya challenges should be heard and decided jointly, I invited submissions from the parties on that point.

43. WCL did not take a position in regard to that point. Mr. Shamiya expressed the same view but indicated a preference for the fairest approach, keeping in mind the time and expense for all concerned parties.

44. For his part, Dr. Fowlie strongly supported having both challenges being heard jointly, for the following reasons:

    a) avoiding the scenario of diverging decisions if the challenges were to be decided separately, i.e. by different arbitrators;
    b) economies of time and resources for the Tribunal and for all concerned; and
    c) in spite of each having a different basis, the similar nature of the challenges, i.e. determining if the Appointed Arbitrator should be removed for a reasonable apprehension of bias.

45. On the other hand, Mr. Spinney objected to the challenges being heard jointly, on the following grounds:

    a) the challenges were raised separately and refer to distinctive issues;
    b) to avoid any confusion as to the basis of each challenge and the positions of each party; and
    c) to allow for a greater focus on each challenge's specific issues.

    In addition, Mr. Spinney also argued that section 5.5 of the Code provides that each challenge will be heard and decided separately.

46. After having considered all submissions, I cannot agree that section 5.5 of the Code requires that each challenge must be dealt with separately and by a different arbitrator. This is not to say that such a scenario could never happen and, in my view, section 5.5 allows for both scenarios. In the circumstances of this case, I am also persuaded by the argument put forward by Dr. Fowlie that to have the challenges heard separately could result in a scenario where the Appointed Arbitrator could be confirmed if one challenge is rejected, and removed, if a separate challenge is allowed in the case of different jurisdictional arbitrators. I am also mindful of the fact that the Code provides a specific framework to guide the resolution of sports-related disputes, as set out in its subsection 5.7 (f):

> The Panel shall conduct the proceedings to avoid delay and to achieve a just, speedy and cost-effective resolution of the dispute, and may impose limitations on the duration of the hearing or the length of submissions.

47. Furthermore, I have no doubt that a jurisdictional arbitrator is fully able to focus on the issues raised by each challenge, even if they are heard and decided jointly. As a result, I issued a Procedural Order on 11 January 2024 that the Spinney and Shamiya challenges would be heard and decided jointly in this case number SDRCC 23-0690.

Issue (i)(b): Joining the Schiavulli challenge

48. As noted above, the Schiavulli challenge was filed on 15 February 2024 in case number SDRCC 22-0609. Since the parties could not agree on whether or not the Spinney and Shamiya challenges should be heard and decided jointly with the Schiavulli challenge, I invited submissions from the parties on that point.

49. WCL took no position on the matter. Mr. Shamiya expressed the same view but indicated a preference for the fairest approach, again keeping in mind the time and expense for all concerned parties.

50. Mr. Spinney raised the following grounds in support of the merger of the Schiavulli challenge:

    a) Ms. Schiavulli is an Affected Party in this case number SDRCC 23-0690 and it would be counterintuitive to address her petition separately;
    b) the subject matter of Ms. Schiavulli's challenge is similar to the two other challenges; and
    c) this Panel already has carriage of the other two challenges and is well informed on the relevant facts and issues.

51. For his part, Dr. Fowlie expressed a strong objection to joining all three challenges and to the additional delay which the Schiavulli challenge would bring about. In sum, Dr Fowlie's position was that the Schiavulli challenge should be dismissed summarily in its entirety.

Analysis

52. As a starting point, I was not referred to any provision of the Code which allows me to summarily dismiss a challenge such as this one which is filed under section 5.5 of the Code. This Tribunal must therefore receive the challenge and deal with it as expeditiously as possible under that section of the Code. Having said that, I appreciate Dr. Fowlie's concerns about additional delay but in the circumstances, this matter can only be addressed on the basis of the existing provisions found in the Code.

53. Furthermore, and given that the Schiavulli challenge has to be addressed by this Tribunal, pursuant to section 5.5 of the Code, there would still be an 'additional time factor' or delay even if the challenge were to be heard by a separate jurisdictional arbitrator. I also agree with Mr. Spinney's position that there are similarities between all three (3) challenges. As a final point and in keeping with my above analysis in regard to joining the Shamiya challenge to this case, I find that joining the Schiavulli challenge to this matter is consistent with the letter and spirit of subsection 5.7 (f) of the Code.

54. I therefore issued a Procedural Order on 26 February 2024 that the three (3) challenges would be heard and decided jointly in this case number SDRCC 23-0690.

Issue (ii): Whether the Appointed Arbitrator should be allowed an opportunity to make written submissions in regard to the three (3) challenges

55. As mentioned above, this question arose during the preliminary meeting in regard to the Spinney challenge, at which time I requested submissions from the parties. I also allowed further submissions on that point in regard to the Shamiya and Schiavulli challenges.

Issue (ii)(a): Having regard to the Spinney and Shamiya challenges

56. Dr. Fowlie submits that the Appointed Arbitrator should be allowed to make submissions in regard to those challenges. In his view, the Code does not explicitly set any limitation on who can respond to a challenge under section 5.5. He then refers to the Thauli decision in support of his position, in particular on the point that an arbitrator should be allowed to make submissions "where the matter in issue involves

factors or considerations peculiarly within the arbitrator's knowledge or expertise, or where explanations are not going to be put forth by any of the parties". (Thauli decision in case number SDRCC 22-0609 at paragraph 60)

57. Mr. Shamiya did not take a position on this issue but simply requested that whatever approach is followed should allow for procedural fairness and that if the Appointed Arbitrator is allowed to make a submission, that he should be allowed to question or test that submission.

58. For his part, Mr. Spinney submits that the Code is clear in that an arbitrator is not a party to the Petition and that only the parties are to make submissions under section 5.5 of the Code. In other words, he submits that the Code does not contemplate any mechanism which allows an arbitrator to make submissions.

59. Mr. Spinney then refers to the decisions of this tribunal in Valois v. Judo Canada SDRCC 21-0516 ("the Valois decision") and Alberta Cricket Council v. Cricket Canada SDRCC 19-0434 ("the Alberta Cricket decision"), as well as to the Thauli decision, in support of his position.

60. Mr. Spinney goes on to state that to allow an arbitrator to make submissions for any reason other than to present explanations or relevant information that only he or she can provide would be contrary to the provisions of the Code. In his view, it would only risk further exacerbating the apprehension of bias or create actual bias.

61. Mr. Spinney then adds that the legal test for a reasonable apprehension of bias is objective and must take into account all facts in the matter. If the relevant facts in connection with a challenge can be obtained without the participation of the arbitrator, he or she should not be permitted to make submissions.

Issue (ii)(b): Having regard to the Schiavulli challenge

62. Dr. Fowlie, Mr. Shamiya, Ms. Schiavulli and WCL took no position on this point in regard to the Schiavulli challenge.

63. For his part, Mr. Spinney reiterated the position which he put forward on this matter in regard to the Spinney and Shamiya challenges. He also opposes any submission by the Appointed Arbitrator on the grounds that:

    a) the Appointed Arbitrator has not requested or otherwise asked to make submissions in this matter;
    b) the Appointed Arbitrator could only provide information which is readily available to this Panel and to the parties; and
    c) to allow the Appointed Arbitrator to make submissions at this stage would muddy the waters.

Analysis

64. In my view, the logical starting point for this analysis is the Thauli decision. As mentioned in that decision, the Code is silent on whether an arbitrator can make submissions in relation to a challenge filed under section 5.5 of the Code. In addition, there are only a few other SDRCC decisions that have addressed this question, namely the Valois and Alberta Cricket decisions referred to above by Mr. Spinney.

65. In her decision, Arbitrator Thauli has ably canvassed those two decisions in her reasons, as well as a few other non-SDRCC decisions. There is no need to review those decisions for the purposes of this matter. I agree with Arbitrator Thauli that for

the purposes of addressing this issue, the focus of the analysis must be on the approach adopted by the jurisdictional panels in those cases as opposed to the outcomes of each decision.

66. I therefore find myself in full agreement with Arbitrator Thauli that the Valois and Alberta Cricket cases serve to illustrate "that where the matter in issue involves factors or considerations peculiarly within the arbitrator's knowledge or expertise, or where explanations are not going to be put forth by any of the parties, there should clearly be room for the arbitrator to make submissions on a challenge to his jurisdiction." (see paragraph 60 of the Thauli decision)

67. I would also add that another way to frame this question is by asking whether the conduct or matter being complained about under section 5.5 of the Code is 'internal' or 'external' to the case in which the alleged conduct or action is alleged to have occurred. In other words, it is useful to determine if the alleged conduct or action is connected to the procedure in the case itself or during a hearing, as opposed to being connected to an external factor, such as for example where the Appointed Arbitrator has been involved with one of the parties in the case in an activity which is outside the case itself.

68. If the conduct or action being complained about is in fact external to the case, that would be an appropriate circumstance where the Jurisdictional Arbitrator could exercise his or her discretion to ask for submissions in that regard by the Appointed Arbitrator. In the case of conduct or an action which is internal to the case, my view is that the general rule should be that the Appointed Arbitrator would not be allowed make any submissions in that regard.

69. On a different point, it is not relevant whether the Appointed Arbitrator asks or not to make such a submission. What matters, in referring back to paragraph 60 of the Thauli decision, is that it makes full sense for such a submission to be allowed "where the matter in issue involves factors or considerations peculiarly within the arbitrator's knowledge or expertise, or where explanations are not going to be put forth by any of the parties", that only he or she can provide. In the end, this is a question which should be determined on a case-by-case basis by the Jurisdictional Arbitrator, in accordance with the parameters described above and in the Thauli decision.

70. In addition, it is also important to remind all parties that the Appointed Arbitrator is not a party to this case number SDRCC 23-0690 and in my view, he or she is not in an adversarial position vis-à-vis any other party in this case. Secondly, it is my view that the case law on this point does not allow the other parties to respond to the Appointed Arbitrator's submission, if any, in the same way that they might respond to another party's submissions. Finally, the sole purpose of the Appointed Arbitrator's submission is to assist the Jurisdictional Arbitrator, along with the submissions of all other parties, in his or her determination of whether or not the claims of a reasonable apprehension of bias or conflict of interest should be upheld, or not.

71. In light of the above and in the circumstances of this particular case, I have concluded that no submissions by the Appointed Arbitrator should be allowed in regard to the Spinney and Shamiya challenges, as well as in regard to the portion of the Schiavulli challenge which raises an allegation of a reasonable apprehension of bias. This is because those challenges are in relation to the conduct or action(s) of the Appointed Arbitrator during the hearing or in connection to the hearing process in case number SDRCC 22-0609.

72. On the other hand, I have concluded that the Appointed Arbitrator can file a submission solely in relation to that part of the Schiavulli challenge which is based on

an allegation of a conflict of interest in case number SDRCC 22-0609, due to his role as a director of the COC. My decision is based on a determination that the alleged conflict of interest is external to case number SDRCC 22-0609 and that the Appointed Arbitrator is in the best position to provide information or an explanation which could be useful to the Jurisdictional Arbitrator in that regard.

D. THE RELEVANT TESTS TO ASSESS A REASONABLE APPREHENSION OF BIAS OR A CONFLICT OF INTEREST

73. Subsection 5.5(a) of the Code sets out how a party may challenge an arbitrator's jurisdiction, as follows:

> "An Arbitrator may be challenged solely on the grounds of conflict of interest or a reasonable apprehension of bias. The challenge shall be brought without undue delay after the grounds for the challenge become known."

74. All three (3) challenges in this case allege that the Appointed Arbitrator should be removed on the grounds of a reasonable apprehension of bias. In addition, the Schiavulli challenge also alleges that the Appointed Arbitrator is in a conflict of interest.

The Test for a Reasonable Apprehension of Bias

75. The test for such a claim is well-established and has been canvassed on several occasions in the case law submitted by the parties, as well as in the Thauli decision[1].

76. From the above-mentioned case law, it can be said that one of the main questions to ask is the following: would a reasonable and informed person, with knowledge of all relevant circumstances, viewing the matter realistically and practically, think that it is more likely than not that the decision-maker, whether consciously or not, would not decide the matter fairly?

77. When asking that question, the following factors are also relevant to consider:

a) the onus of demonstrating a reasonable apprehension of bias rests with the party alleging it. Actual bias need not be established. However, the person making this allegation has a high burden to discharge because decision-makers are presumed to be impartial[2]. The test therefore requires a real likelihood or probability of bias; and
b) the inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias is inherently based on an objective test.

78. The test establishes a high threshold because decision-makers are presumed to be impartial. In Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General) (2015 SCC 25), the Supreme Court of Canada therefore framed the analysis in the following terms:

> *[25] Because there is a strong presumption of judicial impartiality that is not easily displaced (Cojocaru v. British Columbia Women's Hospital and Health Centre, [2013] 2 S.C.R. 357, at para. 22), the test for a reasonable apprehension of bias requires a "real likelihood or probability of bias" and that*

[1] Davidson v. Canada (Attorney General), 2021 FCA 226 at para. 15.
[2] McMurter v. McMurter, 2020 ONCA 772 at para. 26.

a judge's individual comments during a trial not be seen in isolation: see Arsenault-Cameron v. Prince Edward Island, [1999] 3 S.C.R. 851, at para. 2; S. (R.D.), at para. 134, per Cory J.

[26] The inquiry into whether a decision-maker's conduct creates a reasonable apprehension of bias, as a result, is inherently contextual and fact-specific, and there is a correspondingly high burden of proving the claim on the party alleging bias: see Wewaykum, at para. 77; S. (R.D.), at para. 114, per Cory J. As Cory J. observed in S. (R.D.):

> *. . . allegations of perceived judicial bias will generally not succeed unless the impugned conduct, taken in context, truly demonstrates a sound basis for perceiving that a particular determination has been made on the basis of prejudice or generalizations. One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding. [Emphasis added; para. 141.] (emphasis appears in the original citation)*

The Test for a Conflict of Interest

79. Given the well-known test for a reasonable apprehension of bias, as described above, I asked for submissions from the parties to determine what, if any, additional factors should be considered in assessing a claim of conflict of interest.

80. Ms. Schiavulli referred to case law on the topic of judicial impartiality, as well as in regard to institutional impartiality[3]. She also relies on the same case law in regard to her claim of a reasonable apprehension of bias.

81. In further regard to the matter of a conflict of interest, she also refers to the Canadian Judicial Council's publication titled Ethical Principles for Judges (pages 28 and 30 to 32), as well as the document titled Principles of Judicial Office found on the website of Ontario Courts, more specifically section 3.2, which reads as follows:

> "Judges must avoid any conflict of interest, or the appearance of any conflict of interest, in the performance of their judicial duties."

82. For his part, Mr. Spinney submits that Canadian courts have developed common law principles that govern conflict of interest matters in various contexts, such as fiduciary duties, corporate governance, and professional ethics. In the present case, he submits that one must determine whether the Appointed Arbitrator's relationship with the COC creates a conflict of interest in the context of case number SDRCC 22-0609. To do so, he further submits that this Panel must apply the objective reasonable person test, as confirmed by the Supreme Court of Canada in *Committee for Justice and Liberty et al. v. National Energy Board et al., 1976 CanLII 2 (SCC), [1978] 1 SCR 369*, at page 394:

> "The proper test to be applied in a matter of this type was correctly expressed by the Court of Appeal. As already seen by the quotation above, the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically—and having thought the matter through—conclude. Would he think that it is more

[3] R c Lippé [1991] 2 SCR 114

likely than not that Mr. Crowe, whether consciously or unconsciously, would not decide fairly."

83. Mr. Spinney then refers to another leading case on the topic of impartiality in the case of Valente v The Queen[4] He then goes on to propose an adapted version of the test outlined at para. 13 of the Valente decision, as follows:

> "The question that now has to be determined is whether a reasonable person, who was informed of the relevant statutory provisions, their historical background and the traditions surrounding them, after viewing the matter realistically and practically would conclude that the (Appointed Arbitrator) could make an independent and impartial adjudication."

84. Mr. Spinney also submits that the application of that test does not require the party alleging a conflict of interest to demonstrate actual conflict, His position is that the reasonable objective person test turns on whether a decision-maker can maintain an appearance of impartiality, as well as the public's confidence, when all the facts and information are considered.

85. For his part, Dr. Fowlie submits that the test to determine whether a conflict of interest exists, or not, is case specific and depends on the circumstances of each case. He then refers to the *Law Society Act* of Ontario (R.S.O. 1990, c. L.8) and its definition of a conflict of interest. In reference to that legislation, Dr. Fowlie further submits that a conflict of interest "need not be certain or even likely, but it must be more than a mere possibility."

86. Dr. Fowlie then goes on to refer to the *Conflict of Interest Policy* of the SDRCC, which also applies to its arbitrators and mediators. In that policy, a conflict of interest is defined as follows in section 2 of that document:

> "Conflict of Interest means a situation in which an Interested Person has financial, private or professional interests that could improperly influence the performance of his or her official duties and responsibilities with the SDRCC or in which the Interested Person uses SDRCC for personal gain. A real Conflict of Interest is one that exists at the present time, an apparent Conflict of Interest could be perceived by a reasonable observer to exist, whether or not it is the case, and a potential Conflict of Interest could reasonably be foreseen to exist in the future".

87. In her reply submission, Ms. Schiavulli also notes that the above definition must be considered in conjunction with the definition of a "Conflict of Duties", also found in section 2 of that same document, as follows:

> "Conflict of Duties means a conflict that arises, not because of an Interested Person interest, but as a result of one or more concurrent or competing official responsibilities. For example, these roles could include their role, duties and/or responsibilities with the SDRCC and their responsibilities in an outside role that forms part of their official duties, such as an appointment to a board of directors, employment, contracted services or other outside function. For the sake of clarity, any official duty held by an Interested Person currently or in the past two years shall be subject to due consideration as a potential Conflict of Duties."

88. Dr. Fowlie goes on to add that a reasonable apprehension of bias occurs when – for whatever reason - there is a justifiable belief that an adjudicator will be biased against

[4] Valente v. The Queen [1985] 2 SCR 673

a given party because of who the party is. He then references a decision of the Supreme Court of Canada which held that the "test is whether a reasonably informed bystander could reasonably perceive bias on the part of an adjudicator." (Newfoundland Telephone Co. v. Newfoundland (Board of Commissions of Public Utiilities) [1992 1 SCR 623])). In addition, Dr. Fowlie states that issues pertaining to a conflict of interest do not usually arise as a result of a party's identity, but rather because the circumstances of the case give rise to incentives for the adjudicator to favor other interests. He concludes by stating that by their very nature, conflicts of interest lead to an apprehension of bias.

89. Based on the above, it may well be that the test against which can be assessed a claim of conflict of interest may not be as clearly formulated as is the case for a reasonable apprehension of bias. There is nevertheless a need in both cases to determine the impartiality of an arbitrator's impugned conduct or actions. It is against that backdrop that I will therefore proceed to assess the various claims which allege a reasonable apprehension of basis, as well as determining whether the Appointed Arbitrator can maintain an appearance of impartiality and independence as a result of his involvement with the COC.

E. THE SPINNEY CHALLENGE

Background

90. Mr. Spinney's counsel, Mr. Michael Smith ("Mr. Smith"), states that he wrote to the Appointed Arbitrator on 23 November 2023 to advise of an unforeseen scheduling conflict in regard to Day 1 of the hearing, on account of personal reasons. After indicating that his client Mr. Spinney is in agreement, he goes on to write as follows:

> "Please note that I am sharing this personal information with the Panel for the sole purpose of excusing myself for the first day of the hearing. I have not shared the specific information with my colleagues and do not intend to. I am requesting, however, a message from this Panel informing the parties that I will not be able to attend on day 1 of the hearing for personal reasons."

91. Later that same day, Mr. Smith received an email from the SDRCC Case Manager, noting that the Appointed Arbitrator had accepted the fact that Mr. Smith would not be present at the hearing on 4 December 2023. The message then continues as follows:

> "We wish to remind you that the hearing will be recorded and we endeavor to make the recording available to all parties as soon as possible so you can listen to it before the second hearing day, should you wish to do so.
>
> Finally, can you please inform us whether someone else will represent Mr. Spinney during your absence, or whether Mr. Spinney agrees to be unrepresented during this period?"

92. On 27 November 2023, Mr. Smith responded to the above-mentioned email from the SDRCC Case Manager by stating that the Appointed Arbitrator's conclusion was a misinterpretation of his original email sent on 23 November 2023. He then continued as follows:

> "I will not be able to participate on day 1. There is no other person to stand in my place. Mr. Spinney would not be examining witnesses on his own. Mr. Spinney and I would not be able to participate in day 1. I hope that helps clarify the situation."

93. Mr. Smith submits that he did not indicate in his messages to the Appointed Arbitrator that Mr. Spinney would be comfortable with the matter proceeding without his counsel. In his view, it is unclear how the Appointed Arbitrator came to the conclusion that he reached without enquiring about Mr. Spinney's position, or otherwise seeking clarification from him.

94. On 30 November 2023, Mr. Smith sent an email to the SDRCC for the benefit of all concerned parties in case number SDRCC 22-0609, to inform them that due to personal reasons, he would be unable to appear as scheduled on day 1 of the hearing. He wrote as follows:

> "…I will not be able to participate in the hearing on Monday. I provided the Panel with the necessary information reflecting my circumstances. I will not go into them as the matter is of a personal nature. I was asked to send this message to the Tribunal for the purpose of having it posted in the portal. I have made Mr. Spinney aware of my situation and apologized to him given that my absence means that (t)his (sic) matter will not be able to proceed as scheduled. I would extend my regrets to you all as well and thank you for understanding as I deal with the personal matter."

95. On 1st December 2023, Dr. Fowlie's counsel sent a lengthy letter to oppose Mr. Smith's request to reschedule the hearing.

96. On 1st December 2023, the Appointed Arbitrator released a Procedural Order ("ruling 1") that the matter would go ahead as scheduled on 4 December 2023. The Appointed Arbitrator wrote as follows:

> "It has been brought to my attention that Mr. Michael Smith, counsel for the Affected Party David Spinney, states that he is unable to attend the first day of the hearing on December 4, 2023 for personal reasons.
>
> In light of what was discussed and agreed upon by all parties on September 11, 2023, I remind Mr. Smith of his professional commitment to represent Mr. Spinney for the hearing. It should also be noted that another counsel, Ms. Kiran Virk, is listed as Mr. Spinney's legal representative.
>
> In view of the foregoing, the fact that the personal reasons invoked by Mr. Smith do not involve an inability affecting him personally or a close family member, and because the unfolding of the hearing does not depend on an agreement between Mr. Smith and his client, I hereby order that the matter proceed as scheduled.
>
> Consequently, the hearing will take place on December 4, 2023, starting at 11:00 a.m. (EST)."

97. At the start of the hearing on 4 December 2023, Mr. Spinney alleges that the Appointed Arbitrator did not inquire in regard to the presence of the other affected parties. Mr. Spinney appeared virtually at the hearing and voiced his concerns that it would be inadequate to proceed without his counsel being present. Mr. Spinney then announced that he would not be participating in the hearing any further without counsel being present and he then disconnected from the hearing.

98. Mr. Spinney goes on to state that the Appointed Arbitrator simply proceeded with the hearing without any regard for the affected parties' availability or the facts in support of an adjournment.

99. Just before the start of the second day of the hearing on 5 December 2023, Mr.

Spinney's counsel filed a challenge to remove the Appointed Arbitrator from this case on the grounds of a reasonable apprehension of bias. When the Parties appeared at the hearing at 9:00 a.m., the Appointed Arbitrator stated that in his view, the challenge was groundless and that the hearing would proceed despite Mr. Spinney's concerns. Shortly thereafter, the Appointed Arbitrator announced that following a short adjournment, the hearing would resume later the same day at 1:00 p.m., to allow Mr. Spinney and his counsel a chance to review the recording of the hearing from Day 1.

100. Just before the adjournment, Mr. Spinney's counsel states that he interjected to remind the Appointed Arbitrator of the due process requirement under section 5.5 of the Code. According to him, the Appointed Arbitrator indicated that he would not recuse himself and that the challenge was a delaying tactic.

101. At or about 1:00 p.m. (ET) on 5 December 2023, the Appointed Arbitrator reconvened the hearing and read out a Procedural Order ("ruling 2") stating that the challenge was an abuse of process that he would not entertain. He wrote as follows:

> "This is my procedural order following the petition filed by the Affected Party David Spinney to have me removed as Arbitrator in case number SDRCC 22-0609 on the grounds of apprehension of bias. This is the second time in this matter that an apprehension of bias has been raised as grounds for my removal as Arbitrator.
>
> **Background**
>
> 1. This matter has been outstanding for some time.
> 2. It involves a serious issue, namely claims of workplace harassment made by an appointed official of a National Sport Organization.
> 3. After several delays, including the time required for the appointment of a Jurisdictional Arbitrator to dispose of a complaint filed by the Affected Parties regarding apprehended bias, a schedule was established for the preparation and hearing.
> 4. That schedule could not be adhered to because of last-minute reasons affecting two of the Affected Parties.
> 5. A new schedule was established for a hearing commencing on December 4, 2023.
> 6. A procedural order to that effect was issued, and the parties were advised that the schedule was final.
> 7. Notwithstanding this, two of the Affected Parties nevertheless made last-minute requests for adjournment.
> 8. Neither request was granted, and the procedural order remained in force.
> 9. Parties were duly notified of the hearing to be held on December 4, 2023 and today and were provided with the necessary links to join.
> 10. Despite the procedural order and the reminder of the hearing, Affected Parties Mara Schiavulli and Ahmed Shamiya did not participate. Nor did Affected Party David Spinney's counsel, although Mr. Spinney appeared briefly, but withdrew shortly thereafter.
> 11. Evidence was provided by and on behalf of the Claimant.
> 12. Arrangements had been made by the SDRCC to record the hearing and a copy of the recording was distributed to all parties at 5:39 p.m. (EST) on December 4, 2023.
> 13. The parties were also advised that they would have the opportunity to cross-examine the witnesses who testified.
> 14. Mr. Spinney was advised of both the recording and the opportunity for cross-examination prior to his withdrawal from the hearing.

15. The absent parties can hear exactly what was said and are under no disadvantage. Any further witnesses will be heard by all parties.

Order

Under Section 5.5 of the Canadian Sport Dispute Resolution Code ("the Code"), the sole grounds for removal of an Arbitrator are conflict of interest or a reasonable apprehension of bias.

No conflict of interest has been alleged. None exists. The matter of reasonable apprehension of bias has already been decided. There are no changes in any relevant circumstances that justify wasting time and SDRCC resources on a re-determination of that issue.

Section 5.7 of the Code provides as follows:

(d) The Panel shall have the power to expedite or adjourn, postpone or suspend its proceedings, or to extend or reduce any time limit provided by this Code, upon such terms as it shall determine, where fairness so requires.

(e) Where a matter arises that is not otherwise set out in this Code, the Panel shall have the power to establish its own procedures provided each Party is treated equally and fairly.

(f) The Panel shall conduct the proceedings to avoid delay and to achieve a just, speedy and cost-effective resolution of the dispute, and may impose limitations on the duration of the hearing or the length of submissions.

The petition is, in my considered view of all the circumstances, an abuse of process, produced with the sole intention of delaying the hearing of this matter.

I declare the petition to be non-receivable and of no effect. The hearing will continue as scheduled."

102. At 1:55 p.m. (ET) on 6 December 2023, the SDRCC Case Manager sent the following message to all parties, along with a copy of ruling 2, as directed by the Appointed Arbitrator:

> "As discussed and agreed by the parties present at the hearing this morning, December 6, 2023, the hearing will resume at 2:30 p.m. (EST) this afternoon so that the Panel can hear representations from all Affected Parties."

103. Mr. Smith states that he then reminded the Appointed Arbitrator that he did not have the jurisdiction to make such an order and that he only had two options, either to resign or not to resign. Mr. Smith also reminded the Appointed Arbitrator that if he chose not to resign, the matter would have to go to a Jurisdictional Arbitrator, in accordance with the Code.

104. Although Mr. Spinney and his counsel joined the hearing for a few minutes during the morning session of the hearing on 6 December 2023, they did not join the afternoon session because in their view, the hearing was or should have been suspended due to the Spinney (and the other) challenges and the need to have them decided by a Jurisdictional Arbitrator.

Submissions

105. Mr. Spinney submits that he has lost confidence in due process being properly

applied in this matter as a result of the Appointed Arbitrator's actions, or lack thereof. He does not believe that the Appointed Arbitrator will be capable of rendering an impartial, objective, and reasoned decision.

Issue: whether the Appointed Arbitrator's decision to order the hearing (i.e. ruling 1) to proceed on 4 December 2023 despite the requests to postpone by two of the Affected Parties gives rise to a reasonable apprehension of bias

106. According to Mr. Spinney, the Appointed Arbitrator released an arbitrary procedural order that neglected or failed to appropriately consider the material changes that occurred as a result of his counsel's personal reasons.

107. Mr. Spinney submits that Mr. Smith took the appropriate steps to inform the Appointed Arbitrator of his unfortunate scheduling conflict and that he properly requested a one-day adjournment.

108. Mr. Spinney argues that the Appointed Arbitrator's actions in this matter, or lack thereof, demonstrate his failure to give weight to the following factors:

a) the personal reasons put forward by his counsel;
b) the short time-frame that was available to his counsel to respond to his personal situation;
c) the fact that his counsel was only requesting a one-day adjournment;
d) the fact that his counsel has been acting for Mr. Spinney throughout this matter.

109. Mr. Spinney adds that the Appointed Arbitrator, when informed of Mr. Smith's unavailability, ordered that Mr. Spinney should proceed with the assistance of a lawyer from Mr. Smith's firm who, according to Mr. Spinney, does not have appropriate knowledge of this highly adversarial and complex litigation.

110. He also submits that the Appointed Arbitrator did not enquire about the viability of another lawyer representing him in this matter. In his view, proceeding with another lawyer would deprive him of adequate representation and a fair hearing.

Issue: whether the Appointed Arbitrator blatantly violated the Code by rendering a decision (i.e. ruling 2) during the hearing that was outside of his jurisdiction without giving the parties an opportunity to make submissions, thus giving rise to a reasonable apprehension of bias

111. Upon taking notice of his challenge on the grounds of a reasonable apprehension of bias filed on 5 December 2023, Mr. Spinney argues that the Appointed Arbitrator did not have knowledge of the established procedure and the steps that he ought to have taken in accordance with the Code.

112. Mr. Spinney submits that the Appointed Arbitrator made a decision in regard to his challenge without knowledge of the relevant section of the Code and that he insisted on the case going ahead despite the Code clearly indicating otherwise.

113. Mr. Spinney adds that the Appointed Arbitrator did not seek guidance from counsel on the applicable due process and that he rushed to proceed with the hearing despite there being several days still available in the schedule, keeping in mind that Dr. Fowlie had completed the presentation of his case.

114. In Mr. Spinney's submission, the Appointed Arbitrator issued a procedural order that was favorable to Dr. Fowlie without the required knowledge of the facts and the rules. In his view, that conduct demonstrates actual bias in this particular case or at the very

least, establishes an apprehension of bias.

115. The other affected parties support Mr. Spinney in regard to his allegations.

116. For his part, Dr. Fowlie submits that Mr. Spinney conveniently appears to equate losing an argument as evidence of bias. He also adds that the allegations of a reasonable apprehension of bias are unsupported by any facts.

Analysis

117. As a starting point, it is important to note the suggested approach in this type of case, as set out by the Supreme Court of Canada in the Yukon case[5], at paragraph 26:

> *…One overriding principle that arises from these cases is that the impugned comments or other conduct must not be looked at in isolation. Rather it must be considered in the context of the circumstances, and in light of the whole proceeding.*

118. Based on the above and after review of the evidence and submissions, as well as of the entire recording of the hearing, I find that the Spinney challenge does not support any claim of a reasonable apprehension of bias.

119. At its core, this challenge is based on the Appointed Arbitrator's refusal to postpone the hearing at the request of Mr. Spinney's counsel. In light of the history of case number SDRCC 22-0609, including its predecessor case number SDRCC 21-0534 as well as delays caused by a previous adjournment and challenges in case number SDRCC 22-0609, I find that the Appointed Arbitrator's ruling 1 to proceed with the hearing as scheduled does not equate to bias on his part. In my view, it is rather a case of the Appointed Arbitrator having made a ruling which is entirely in keeping with the letter and spirit of section 5.7(f) of the Code.

120. In addition, one must consider the wording of the messages of 23 and 27 November 2023 from Mr. Smith to the Appointed Arbitrator. It is striking that neither of those messages contains the words 'adjournment' or 'postponement' but rather a statement excusing himself and that he and Mr. Spinney will not be able to participate on Day 1 of the hearing. His choice of words clearly could leave one to conclude that he will be available on the other three days set aside for the hearing.

121. Also noteworthy is that one is left with the distinct impression that Mr. Smith considers his message to be a *fait accompli* of sorts, without having specifically asked for an adjournment or postponement. This is supported by the fact that it is only in his message of 30 November 2023, which is addressed to all parties, that he refers for the first time to the concept of a postponement by writing "my absence means that his (sic) matter will not be able to proceed as scheduled'. In my view, words count. If Mr. Smith was seeking an adjournment or a postponement of the hearing, he could have expressed himself more clearly in his messages of 23 and 27 November 2023.

122. In addition, the wording of ruling 1 is clear and in my view, has nothing to do with bias, especially the segment where the Appointed Arbitrator reminds 'Mr. Smith of his professional commitment to represent Mr. Spinney for the hearing' and that 'another counsel, Ms. Kiran Virk, is listed as Mr. Spinney's legal representative'. Having a replacement counsel in a given case is not unheard of. Fairness to all parties and the proper administration of justice require this. In this case, it is also noteworthy that Mr.

[5] Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General) (2015 SCC 25)

Smith could have had at least one full week to brief his colleague, had he chosen to do so.

123. In sum, a request to reschedule or to postpone must be balanced with the imperatives of the proper management and conduct of a case, as provided for by section 5.7 of the Code and taking into account the history and context of a given case. In my view, the Appointed Arbitrator did that, no more and no less, with valid reasons as set out in ruling 1.

124. As previously mentioned, ruling 1 and ruling 2 are interconnected and in my view, there would not have been any need for ruling 2 had the hearing unfolded as planned, with or without Mr. Smith. To be sure, section 5.5 of the Code does set out a process when a party brings forth a challenge under that provision. Although no doubt rare, there may well be circumstances, such as this one, where an Appointed Arbitrator decides to proceed otherwise on the basis of an abuse of process. After all, it is possible to conceive of a case involving multiple parties, such as this one, where various parties might raise multiple challenges or grounds for delay at each and every hearing. If that were to happen, one could be left to wonder if and when a case would be heard on its merits. Such a scenario would surely not be in keeping with the spirit and letter of the Code.

125. Although there is no rule or reference in the Code in regard to the concept of an abuse of process, it can surely be invoked as part of an Arbitrator's discretionary powers, albeit on rare occurrences. After all, each case is different and an Arbitrator must retain a degree of flexibility on how to conduct and manage a case within the parameters of the Code, especially section 5.7 thereof.

126. I hasten to add that even if there was a procedural error by the Appointed Arbitrator in regard to his application of section 5.5 of the Code, such an error does not support a claim for a reasonable apprehension of bias, at least not in the circumstances of this case. In addition, I am also of the view that the Appointed Arbitrator in this case can invoke subsections 5.7 (g) (h) of the Code to waive any irregularity before reaching a decision on the merits, as required. In sum, a procedural error, if any, does not in itself equate to bias.

127. I have also considered the decisions of this Tribunal in the Valois and Alberta Cricket cases. These cases do offer very useful guidance on the topic of a reasonable apprehension of bias but, in the end, each case is different, including its context and history, such that claims of a reasonable apprehension of bias must be assessed on a case-by-case basis.

128. In addition, one must consider the extensive reasons and measures set out by the Appointed Arbitrator in ruling 2. In my view, the Appointed Arbitrator took appropriate steps to alleviate Mr. Smith's inability to attend Day 1 of the hearing and in addition to what is provided for in ruling 2, he clearly stated on more than one occasion during the hearing that a transcript of the hearing would be made available to all parties.

129. Based on all the above and my reading of ruling 2, as well as having reviewed the entire recording of the hearing, I detect no evidence of bias and in my view, the Appointed Arbitrator was justified in ruling the Spinney challenge as an abuse of process and to take steps to hear this matter, especially given the history and context of case number SDRCC 22-0609 as a whole.

F. THE SHAMIYA CHALLENGE

Background

130. In the late afternoon of 3 December 2023, on the eve of the hearing, Mr. Shamiya's partner sent an email on behalf of Mr. Shamiya to the SDRCC, Dr. Fowlie, Mr. Spinney and Ms. Schiavulli, seeking to find out 'when this hearing can be rescheduled', with a doctor's note dated 2 December 2023 attached to the email. In the circumstances, it is useful to quote the bulk of his email message:

> On September 15, 2023, Ahmed suffered a head injury that has caused him to be unable to work and wrestle.
>
> The timing of this injury was particularly unfortunate given that it took place less than 3 months before Ahmed competes at the Canadian Olympic trials taking place just a few weeks from now.
>
> Because of the ongoing impact of Ahmed's injury, he was forced to miss his October and early November tune up competitions leading up to the Olympic trials as he chose to not risk jeopardizing his recovery. Ahmed decided to only compete in New York City a couple of weeks ago because it was the last UWW tournament in North America before the Olympic trials.
>
> Unfortunately, Ahmed suffered a serious setback of his head injury in the tournament and was forced to forfeit in the middle of the match. Please see attached documents demonstrating Ahmed's injury and forfeit. Forfeiting in the middle of a match is an extremely rare occurrence for Ahmed as it has happened only once before in his entire wrestling career.
> Ahmed has been praying that he will recover in time for the Olympic trials in December. His participation in the Trials is increasingly doubtful given the fact that the time spent trying to read in preparation for the SDRCC hearing, he has been experiencing blurred vision and severe head pain. Ahmed had hoped that he would recover enough to participate in the hearing, however Friday and Saturday's efforts to review hearing materials demonstrated that he is not recovered enough to participate.
>
> He has been told by the doctor to take time off work for the next 2 weeks as a last ditch effort to hopefully be well enough to compete at the Olympic trials. I am attaching a medical note.
>
> This is now the second time that Ahmed has been unable to participate in the hearing for medical reasons, and he realizes that it inconveniences the other parties to have adjournments and so Ahmed commits that after the Olympic trials he will rest and recover with no attempts made to return to competition until his head is well enough to participate in the SDRCC hearing.
> As further evidence of Ahmed's commitment to participating in this SDRCC hearing, Ahmed also commits to the SDRCC that he will retain representation for the SDRCC hearing in order to help make the hearing more manageable for Ahmed."

131. As can be seen, that email refers to Mr. Shamiya's most recent head injury which occurred while competing in New York City on or about 18 November 2023.

132. On the following day, Mr. Shamiya states that he asked his mother to check his email throughout the day, with instructions to wake him as soon as a message came in from the SDRCC or from the Appointed Arbitrator. He adds that at the time, he was

on heavy painkillers that kept him groggy and mostly sleeping.

133. On 4 December 2023 at 5:44 p.m., the SDRCC Case Manager sent an email to Mr. Shamiya in response to his email of 3 December 2023 which was sent by his partner on his behalf. Neither Mr. Shamiya nor anyone else acting on his behalf saw the email from the SDRCC that evening.

134. Early the next morning, on 5 December 2023, Mr. Shamiya states that he checked his email and was shocked to discover a message sent on the previous evening by the SDRCC Case Manager, which read as follows:

> At the request of Arbitrator Pound, I am writing to inform you that the hearing of the above-mentioned case took place today and will continue on the days scheduled this week, as indicated in last Friday's Procedural Order (document O-11 on the Case Management Portal) and in several calendar reminders you have received over the past few days.
>
> Please note that the parties will be provided with a recording of the hearing.

135. Mr. Shamiya then states that he spent the entire day of 5 December 2023 calling law firms in order to try and secure immediate legal representation, to no avail, adding that he was not able to represent himself because of his medical condition and that he was desperate for someone to represent him at the hearing.

136. On 6 December 2023, Mr. Shamiya sent an email to the SDRCC at 12:17 p.m. (ET) requesting an adjournment of the hearing, with suggested options for him or his representative to join the hearing on 8 December 2023, or preferably the following week or in two weeks.

137. On the same day at approximately 2:40 p.m. (ET), Mr. Coles joined the hearing on behalf of Mr. Shamiya and repeatedly asked the Appointed Arbitrator to enter evidence or at the very least, to be allowed to cross-examine Dr. Fowlie. The Appointed Arbitrator declined that request, stating that the “proof” had ended.

138. The recording of the hearing shows that Mr. Coles then attempted to clarify with the Appointed Arbitrator that a request for an adjournment had in fact been submitted by Mr. Shamiya, namely by email on 3 December 2023 and again on 6 December 2023 at 12:17 p.m. (ET). According to Mr. Shamiya, the Appointed Arbitrator still refused to accept his evidence or to allow his agent to question Dr. Fowlie.

139. Mr. Shamiya joined the hearing very briefly at 3:55 p.m. (ET), simply to confirm that Mr. Coles was his designated representative.

Submissions

140. Mr. Shamiya submits that the Appointed Arbitrator’s conduct, in proceeding with the hearing in his absence on account of a head injury, violated section 6.2 of the Code as well as section 19 and subsection 46(1)6 of the Arbitration Act, 1991 ("Arbitration Act") of Ontario, both of which require the equal and fair treatment of parties in an arbitration. Mr. Shamiya further submits that the Appointed Arbitrator’s ruling to proceed in his absence, along with his ruling to not allow him to testify or question Dr. Fowlie despite there being time in the hearing schedule, creates a reasonable apprehension of bias.

141. Mr. Spinney and Ms. Schiavulli support Mr. Shamiya’s claim. For his part, Dr. Fowlie submits that Mr. Shamiya, as in the case of Mr. Spinney, conveniently appears to

equate losing an argument as evidence of bias. He also adds that the allegations of a reasonable apprehension of bias are unsupported by any facts.

Analysis

142. Although the circumstances and reasons for the Spinney and Shamiya challenges are different, the analysis offered above in regard to the Spinney challenge is also applicable to the Shamiya challenge. In essence, I find that the Appointed Arbitrator was rightfully concerned in moving this matter along, after delays caused by a previous adjournment and challenges in case number SDRCC 22-0609.

143. As a starting point, Mr. Shamiya's request to reschedule was very untimely, coming in late afternoon on a Sunday, on the eve of the hearing, especially knowing the long history of case number SDRCC 22-0609 and that the hearing dates had been finalized since 11 September 2023, following a previous injury incurred by him.

144. It is fully understandable that Mr. Shamiya's injury was aggravated by the November 2023 incident. However, it is difficult to understand why Mr. Shamiya did not act sooner to seek a medical note immediately after the injury in New York City on 18 November 2023 or to file a request to have the matter rescheduled. One can only assume that he waited until the last minute in the hope that he would be able to join the hearing.

145. As mentioned above in my analysis of the Spinney challenge, the Appointed Arbitrator must be guided by the Code, especially section 5.7 thereof, and by the requirement to balance the interests of all parties in a given case. As also indicated in the Spinney analysis, a claim of reasonable apprehension of bias 'must be considered in the context of the circumstances, and in light of the whole proceeding.' In my view, an Arbitrator's refusal to grant a request to reschedule does not automatically equate to bias.

146. In the present case, it is noteworthy that Mr. Shamiya's request to reschedule starts with a long recitation of what he has gone through in recent months, followed by his reference to a medical note stating that he must take time off work to be ready for the Olympic trials later in that same month as the hearing, concluding by his commitment to focus on getting ready for the hearing after the Olympic trials and another commitment to seek legal representation for the purposes of the hearing at a later date in case number SDRCC 22-0609.

147. I am also struck by the fact that Mr. Shamiya spent Day 2 of the hearing trying to find legal representation and that during the afternoon of Day 3, he was finally able to secure an agent to join the hearing on his behalf. In addition, the agent who appeared for him ended his appearance by stating that he was unsure if he or a lawyer would continue to appear for Mr. Shamiya during the remainder of the hearing, but that one of the two would be there on his behalf.

148. All this to say that by waiting to the very last minute to file his request to reschedule, as well as trying to find legal representation, Mr. Shamiya created a very difficult situation for the Appointed Arbitrator and for himself. After his re-injury on 18 November 2023, being fully aware of the history of case number SDRCC 22-0609 and in light of the commitment in his request filed on 3 December 2023 to secure legal representation, one is left to wonder why he did not take steps well before 4 December 2023 to secure such representation or at very minimum, to file his request to reschedule. He did not do so and in my view, he contributed to weakening his position and claims. One can appreciate the importance of Olympic trials and related events in any given sport. On the other hand, being designated as a party in a

SDRCC proceeding, as is the case with any legal proceeding, comes with duties and responsibilities that cannot be ignored or delayed to suit one's schedule or priorities.

149. As a further note, ruling 2 issued by the Appointed Arbitrator in the Spinney challenge also refers and applies to Mr. Shamiya. As mentioned in my analysis of the Spinney challenge, that ruling provided extensive reasons and measures to support my assessment that the Appointed Arbitrator sought to manage and conduct the hearing as provided for by the Code, especially section 5.7 thereof. In my view, that ruling contained sufficient measures to meet the requirements of section 19 of the Arbitration Act.

150. Mr. Shamiya has also referred to section 6.2 of the Code but I do not see how that provision applies to the matter at hand. In regard to subsection 46(1) 6 of the Arbitration Act, my understanding is that it can only be invoked once the Appointed Arbitrator has issued a decision on the merits.

151. Finally, Mr. Shamiya submits that the Appointed Arbitrator did not allow his representative, Mr. Coles, to present evidence or to question Dr. Fowlie during the hearing, thereby creating a reasonable apprehension of bias.

152. I firstly wish to point out that there was confusion and uncertainty when Mr. Coles joined the hearing. By all indications, his appearance was unforeseen and unannounced. He was unknown to the Panel. There was discussion and debate about his capacity to act as Mr. Shamiya's representative, as well as about his identity. His status was only confirmed once Mr. Shamiya very briefly joined the hearing to confirm that fact. Finally, there were misunderstandings between Mr. Coles and the Panel on several topics, as well as poor communications on several occasions.

153. I have reviewed the entire recording of the hearing and of the exchanges between the Appointed Arbitrator and Mr. Shamiya's representative. There is no doubt that Mr. Coles' appearance came 'very late in the game' and in my assessment, the Appointed Arbitrator was focused on the conduct of the hearing and on ensuring that there would be no further delays, given the long and tortuous history of case number SDRCC 22-0609. In the worst-case scenario, he may have been overzealous in reaching that goal and there may have been procedural missteps, especially in terms of what Mr. Shamiya's representative could have been allowed to do during the hearing. If there were such missteps, I believe that they were due in very large part to miscommunications or misunderstandings, which I will discuss further below but, in my view, the Appointed Arbitrator's conduct and management of the hearing do not equate to bias.

154. Based on all the above, as well as having reviewed the entire recording of the hearing, I dismiss Mr. Shamiya's challenge.

G. THE SCHIAVULLI CHALLENGE

Background

155. In her challenge filed on 15 February 2024, Ms. Schiavulli states that on 4 October 2023, her daughter Madison Parks ("Ms. Parks"), sent correspondence to the COC, addressed specifically to its directors, in which Ms. Parks threatened legal action against the COC and possibly against its directors personally.

156. Ms. Schiavulli then adds that the Appointed Arbitrator is a director of the COC, which was the case at the time of and since that correspondence.

157. The email message which sets out her challenge is based on a separate email message which she received from Ms. Cora Gillis earlier that day. Based on the message from Ms. Gillis, Ms. Parks is a wrestler and Mr. Spinney was her coach on or about 4 October 2023. Furthermore, Ms. Gillis and Ms. Schiavulli have never met and do not know each other. Ms. Gillis states in her message that she is “not a lawyer” and not providing Ms. Parks or anyone else legal advice but that she is “a support person who lends Madison a hand whenever possible.”

158. It is also noteworthy that in her message to Ms. Schiavulli, Ms. Gillis states that the correspondence of 4 October 2023 which was sent by Ms. Parks to the COC and its directors also refers to her coach, Mr. Spinney.

159. Ms. Schiavulli then goes on to add that Dr. Fowlie has argued before the Appointed Arbitrator that certain emails, i.e. “the complained of emails”, which she wrote about him to various officials in Canadian sport, as well as to the Government of Canada, should result in her never again being able to attend a wrestling event to watch her daughter Ms. Parks or her grandchildren.

160. She then states that she was acting in the capacity of Power of Attorney for her daughter Ms. Parks during the entire timeframe when "the complained of emails” were sent by Dr. Fowlie.

161. She goes on to state that Ms. Parks filed her lawsuit against the COC in the first half of February 2024 and that the lawsuit involves all the Affected Parties in case number SDRCC 22-0609, as well as dealing with many of the same facts which have been put forward in that case. It Is not clear from the challenge or the message sent by Ms. Gillis if the lawsuit names the COC directors, or not.

Allegation of a Conflict of Interest

162. According to Ms. Schiavulli, the Appointed Arbitrator is in a conflict of interest as the Appointed Arbitrator in case number SDRCC 22-0609 because of his other role as a director of the COC, especially in light of the fact that during all material times in her dealings with Dr. Fowlie, she was acting as Ms. Parks’ Power of Attorney.

163. She further submits that the overlapping facts between case number SDRCC 22-0609 and her daughter’s lawsuit against the COC support her allegations of a conflict of interest and of a reasonable apprehension of bias, as well as a lack of impartiality on the part of the Appointed Arbitrator.

Submission by the Appointed Arbitrator

164. The Appointed Arbitrator states that he was coopted as a member of the International Olympic Committee (IOC) in 1978. At that time, he was the elected President of the Canadian Olympic Association, now the Canadian Olympic Committee (COC).

165. He then adds that it is now more than forty years since he has had an active role as an executive of the COC.

166. In the context of the proceedings in case number SDRCC 22-0609 he states that the COC is neither a party nor an affected party. He goes on to add that the COC had no role in his appointment as an arbitrator and has no standing whatsoever in the present matter.

167. Finally, he states that he does not represent the COC nor the IOC in proceedings of the SDRCC. He concludes by stating that his duty as an arbitrator is to ensure that parties and affected parties can present their relevant evidence and submissions before a neutral arbitrator.

Analysis

168. As a starting point on this issue, Ms. Parks sent her notice to the COC and its directors on 4 October 2023. In light of the information described above in regard to Ms. Schiavulli's challenge, it strains credulity that Ms. Schiavulli would not have been aware of her daughter's notice to or contemplated actions directed at the COC until 15 February 2024. As a result, Ms. Schiavulli's claim of a conflict of interest must be rejected for having been submitted with undue delay, contrary to subsection 5.5(a) of the Code.

169. It is also worth noting that since Mr. Spinney was mentioned in the message of 4 October 2023 addressed to the COC in his capacity as Ms. Parks' coach, one could assume that he would have been aware of her message to the COC. If anybody could have raised a claim of conflict of interest as against the Appointed Arbitrator, it would surely have been him. That was not done.

170. Even if I am in error in regard to the above finding, my view is that the lawsuit initiated by Ms. Parks is her own business and not that of Ms. Schiavulli. In addition, Ms. Parks is not involved with or connected to case number SDRCC 22-0609 and to the extent it could be relevant, there is no evidence in this challenge as to the exact nature or parameters of Ms. Schiavulli's Power of Attorney vis-à-vis Ms. Parks. Even if Ms. Schiavulli could be a potential witness in that lawsuit, the fact remains that the party opposed to the COC in the lawsuit is Ms. Parks, not Ms. Schiavulli.

171. I have also considered the Appointed Arbitrator's submission and in my view, it is clear that he has no involvement in the day-to-day affairs of the COC, including lawsuits or potential lawsuits, and that he takes his role as a neutral arbitrator very seriously.

172. Based on the above and on the information contained in Ms. Schiavulli's challenge, I therefore find that there is no conflict of interest between the Appointed Arbitrator's concurrent roles as an SDRCC Arbitrator and as a Director of the COC.

Allegation of a Reasonable Apprehension of Bias

173. Ms. Schiavulli submits that during the entire course of case number SDRCC 22-0609, the Appointed Arbitrator has shown a 'concerning fixation' on addressing Dr. Fowlie's complaints that the WCL allowed 'workplace harassment' and that he has repeatedly stated that he wants the WCL to provide a witness, which the WCL has consistently refused to do. In her view, the above has created a reasonable apprehension of bias vis-à-vis the Appointed Arbitrator.

Analysis

174. I start by noting that as far as I can determine, the record shows that Ms. Schiavulli did not participate in the hearing. Although she continues to have access to the portal and all documents filed by the parties, as well as to the recording of the hearing in case number SDRCC 22-0609, she is not well placed to raise such an allegation. In addition, whatever role she may have played in case number SDRCC 22-0609 before the hearing is beyond the scope of my review. Finally, one would assume that WCL

would be in the best position to raise such an allegation.

175. In addition to the above and subject only to considerations which are brought forward under section 5.5 of the Code, it is not my role to review how the Appointed Arbitrator manages the evidence or witnesses in the hearing. I therefore conclude that this allegation is unsupported by any cogent evidence and that it must fail.

Final Observations in regard to all three challenges

176. In sum, my review of the materials filed in all challenges, as well as the recording of the hearing, do not support the respective claims of a reasonable apprehension of bias or of a conflict of interest. Under section 5.5 of the Code, that is the extent of my role as Jurisdictional Arbitrator in regard to any challenge under that provision of the Code. On the other hand, I did observe other issues in regard to the conduct of the hearing and in the interests of wishing to ensure the best possible resolution of case number SDRCC 22-0609, I offer supplementary observations and considerations, as set out below.

H. SUPPLEMENTARY OBSERVATIONS

Miscommunications, Misunderstandings and Decorum during the Hearing

177. In the course of reviewing the recording of the hearing, as well as the correspondence between the parties and the SDRCC, I have observed the following:
    - bad sound connections on several occasions between various parties and the Appointed Arbitrator, such that the Appointed Arbitrator often had difficulty hearing the parties and had to repeatedly ask some parties to speak more loudly, or vice-versa;
    - at various times and especially on Days 2 and 3 of the hearing, Mr. Spinney and Mr. Shamiya and\or their respective counsel or representative would be in the hearing and in the next moment, they would leave the hearing. In those cases, the Appointed Arbitrator and the other parties either did not hear when one of them said that they were leaving the hearing or simply did not realize that they had done so;
    - especially poor communications between Mr. Shamiya's representative and the other parties in the hearing, especially with the Appointed Arbitrator. More noticeably, there was no video image for Mr. Shamiya's representative at any time and at one point, he was called away from the hearing on a separate phone call, left the hearing and rejoined again, without the Appointed Arbitrator being aware;
    - on several occasions, there were interruptions by Dr. Fowlie's counsel, Mr. Marin, while other representatives were addressing the Panel, as well as on some occasions by Mr. Shamiya's representative, Mr. Coles. In any hearing, I can understand if this might happen on a few occasions but in my view, there were many such instances during the course of this hearing;
    - on one occasion, the Appointed Arbitrator's computer or internet connection was jammed and he had to leave and reconnect to the hearing. In addition, Dr. Fowlie's other counsel, Mr. Bourrie, had a very bad connection during the entire hearing and would fade in and fade out when talking;
    - on various occasions, the Appointed Arbitrator used the expression 'the proof is closed' or 'finished' when indicating to the representatives of the parties that the time for entering evidence had passed. Unfortunately, that expression appears to have been unclear because Mr. Coles, in particular, asked on more than one occasion what it meant;

- in regard to the message sent by the SDRCC Case Manager to Mr. Shamiya on 4 December at 5:44 pm (ET) in response to Mr. Shamiya's message sent the previous day in late afternoon, as well as in regard to the message of 6 December 2023 sent by Mr. Shamiya to the SDRCC, it is my clear impression that these messages were being dealt with while the hearing was in progress and because of that, the Appointed Arbitrator and the SDRCC Case Manager could likely not attend to these messages as quickly or as thoroughly as they might have normally done, given that they were both managing the hearing and its platform, as well as simultaneously having to respond to emails from other parties and to manage the case portal; and
- finally, the fact that the hearing was adjourned at the end of Day 3 in an 'open-ended' manner in regard to Mr. Shamiya and Mr, Spinney. When the hearing was adjourned, the Appointed Arbitrator was clearly waiting to see if Mr. Spinney wished to make a submission and in regard to Mr. Shamiya, that also remained a possibility. In other words, the hearing was adjourned on an uncertain note.

178. As we know, virtual hearings are commonplace for tribunals such as the SDRCC and will no doubt remain such. In light of that fact and for the benefit of all concerned, the SDRCC may wish to consider adopting the following parameters for all future hearings, including the remainder of the hearing in case number SDRCC 22-0609:
    - if this is not yet the case, a requirement that before the start of any hearing session, all participants would take time to test their connection, as well as audio and video quality, with the SDRCC Case Manager who is managing the hearing platform;
    - all participants should consider using headphones or earphones with a built-in microphone to ensure better audio quality for all concerned;
    - unless the Panel invites one party or representative to address the Panel, any participant wishing to intervene or address the Panel must firstly 'raise its hand' by way of the tools on the hearing platform, such that the Panel can control who is talking at any given time;
    - if any party or representative joins a hearing which is already underway or if a party or representative wishes to leave a hearing for any reason, such a party or representative must clearly advise the Panel and the SDRCC Case Manager of its intentions and the record should clearly reflect any such event during the hearing;
    - there should be no interruptions by outside phone calls or the like during a hearing, except for emergency situations;
    - if any party wishes to join a hearing at any time as a representative or agent, his or her status must be arranged and confirmed by the SDRCC Case Manager and the Panel before making any intervention in the hearing; and
    - any other measure or tool, as may be the case, which would help ensure the quality of audio and video connections for the Panel, the SDRCC Case Manager and all parties at all times during the course of a hearing.

<u>Observations in regard to the recording and transcripts of the hearing</u>

179. At several points during the hearing or in their submissions related to their respective challenges, Mr. Spinney's counsel and Mr. Shamiya both sought to confirm that there would be a recording and transcript of the hearing. This was confirmed by the Appointed Arbitrator more than once during the hearing. In addition, Mr. Shamiya reminded us in his submissions that as far back as 1st June 2023, the Appointed Arbitrator made a ruling that he would "arrange for a court stenographer to prepare a verbatim record of the hearing proceedings."

180. Mr. Shamiya then goes on to state that the transcripts which were uploaded to the portal after the hearing appear to have been made by using some kind of "voice-to-text" software. In his view, these transcripts were not prepared by a court stenographer, especially since they do not mention who is speaking in any given phrase or segment of the transcript. In addition, they contain several spelling mistakes. He adds that when listening to the audio recordings while simultaneously reading the transcripts, it is often still not clear to him who is speaking at any given time.

181. I have reviewed the transcripts and can confirm that Mr. Shamiya's observations are correct. After checking this matter with the SDRCC Case Manager, it was confirmed that the transcripts were generated by an artificial intelligence tool from the audio recordings of the hearing. It was also confirmed that the transcripts of Days 1 and 2 of the hearing were provided to all parties on 7 December 2023 and that the transcript of Day 3 was provided on 8 December 2023.

182. It may well be that when the matter of transcripts was discussed or taken up by the parties, well before the hearing, that the Appointed Arbitrator and the parties in case number SDRCC 22-0609 omitted to consider section 5.10 of the Code, which provides as follows:

> (a) Any Party requiring a transcript of the hearing, in full or in part, shall make arrangements directly with the service provider and shall notify the other Parties of such arrangements at least three (3) days before the start of the hearing or as required by the Panel.
>
> (b) Audio recording during conference call or videoconference hearings may be arranged by the SDRCC upon request made by a Panel or a Party at least three (3) days before the start of the hearing or as required by the Panel.
>
> (c) The requesting Party shall pay the cost of the services requested. If more than one Party wants a copy of a transcript or recording, the costs shall be shared equally.

183. Be that as it may and in light of the above, the Appointed Arbitrator may wish to consider how to address this matter on a go forward basis, including by taking into account the relevant provisions of sections 5.7 and 5.10 of the Code.

A Final Observation and Consideration

184. Based on my review of the entire recording of the hearing, it is my impression that after ruling 2 was issued by the Appointed Arbitrator at approximately 1:00 p.m. on Day 2 of the hearing, the hearing did not proceed in a 'straight line' from that point on. This was due at least in part to Mr. Spinney's position that the Appointed Arbitrator could not proceed with the hearing because of his challenge, on one hand, and the late intervention of Mr. Shamiya's representative on the other, with various miscommunications and misunderstandings between himself and the Appointed Arbitrator.

185. I also note that ruling 2 of 5 December 2023 provided the opportunity for the parties to cross-examine any witnesses, amongst other measures in that ruling. The Appointed Arbitrator also alluded to that possibility during the morning session of the hearing on 6 December 2023 and in the email message of 5 December 2023 to all parties with a copy of the ruling 2, there is also mention of the Affected Parties being able to enter evidence and/or cross-examine witnesses.

186. In light of the above and of how the hearing unfolded after ruling 2, the Appointed Arbitrator may wish to consider, within the parameters of section 5.7 of the Code, resuming the hearing by allowing the Affected Parties to present evidence, if so desired, followed by cross-examination and supplementary submissions by the Claimant and WCL, as required. This would of course be followed by reply submissions by the Affected Parties, as may be the case. I fully realize that this would be an unusual step but in the circumstances of case number SDRCC 22-0609 and pursuant to section 5.7 of the Code, it may well be justified. After all, the Appointed Arbitrator himself observed during the afternoon session on Day 2 of the hearing that "I can't imagine there's been a case quite like this before."

I. CONCLUSION

187. This case raised several issues, with many steps along the way. I wish to thank all parties and their counsel for their helpful submissions.

188. I also wish to thank the helpful SDRCC Case Manager and staff of the SDRCC for their invaluable support and assistance in managing this case, which included more than 100 documents or exhibits filed by the parties.

J. ORDER

189. I dismiss the challenges and remit case number SDRCC 22-0609 back to the Appointed Arbitrator to pursue the hearing on the merits.

Dated 18 April 2024 at the City of Ottawa in the Province of Ontario.

Roger Bilodeau, K.C. (Jurisdictional Arbitrator)