

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

NO: SDRCC 24-0745

JAMES PICCOLI

(Claimant)

AND

CYCLING CANADA

(Respondent)

Before

Aaron Ogletree
(Arbitrator)

PROCEDURAL HISTORY

1. On August 23, 2024, the SDRCC appointed me from its rotating list of med-arb neutrals to facilitate and/or make a determination on the Claimant's appeal of Cycling Canada's (hereinafter the 'Respondent') decision that Mr. James Piccoli (hereinafter the 'Claimant') needed to provide evidence of performance readiness to participate in the Grands Prix Cyclistes de Québec et Montréal (hereinafter the 'GPCQM') beyond his performance in 2023 Tour of Hainan.
2. The appeal classified as urgent because the GPCQM was set to be held on September 13-15, 2024.
3. On August 26, 2024, a preliminary meeting was held in which the Claimant requested that Mr. Adam Klevinas (hereinafter the 'Respondent's Counsel') be removed as the Respondent's Counsel, alleging a conflict of interest because he retained him in his previous appeal against the Respondent in 2021, and because he acted as an arbitrator in another appeal with the Respondent.
4. The Respondent's Counsel took the position that there is no conflict of interest. He acknowledged that he acted as an arbitrator in appeal between the Claimant and Respondent in 2016 and he argued that the Claimant did not retain him, but he provided the Claimant with limited advice and he referred the Claimant to counsel Cristy Nurse which were invoiced through Sportlex Group Inc.
5. The parties agreed to a timetable for submissions for the Claimant's Application to remove the Respondent's Counsel.
6. On August 26 and 27, 2024, the Claimant filed his submissions on the Claimant's Application to remove the Respondent's Counsel.
7. On August 27, 2024, the Respondent filed its submissions on the Claimant's Application to remove the Respondent's Counsel.

BACKGROUND

8. The Respondent's Counsel served as an independent third party arbitrator in 2016 in an internal appeal in which the parties were Claimant and Respondent.
9. The Respondent's Counsel provided the Claimant with advice and reviewed the Claimant's submissions in 2021 in relation to his appeal against the Respondent's decision not to select him to the 2021 Olympic Team as an alternate.
10. The Respondent's Counsel referred the Claimant to counsel who was never employed as an associate with him or Sportlex Group Inc.

11. The Respondent's Counsel's reviewed the Claimant's appeal submissions and provided email responses regarding the Claimant's chances of success and referring him to other cases on May 19 and 20, 2024.
12. The Respondent's Counsel's and Cristy Nurse's legal services were invoiced through Sportlex Group Inc.
13. The Respondent's Counsel is representing the Respondent in this case against the Claimant.

ARGUMENTS

Claimant's Position:

14. The Claimant consulted with and retained the Respondent's Counsel and his associate, Ms. Christy Nurse, in his 2021 appeal against the Respondent before the SDRCC which included representation during the appeal by Ms. Nurse and the drafting of the Memorandum of Understanding to settle the appeal.
15. It seems like there may be a risk of a breach in this case based on the Respondent's Counsel's duty to previous clients, duty of confidentiality, and duty to avoid conflicting interests.
16. The Claimant cited the Canadian Supreme Court in the *Canadian National Railway v. McKercher* decision noting that there is a two-part test is applied to determine whether the new matter will place the lawyer in a conflict of interest: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of that client? If the lawyer's new retainer is "sufficiently related" to the matters on which he or she worked for the former client, a rebuttable presumption arises that the lawyer possesses confidential information that raises a risk of prejudice.
17. The Respondent's Counsel's new retainer for representing the Respondent seems to be sufficiently related in this case.
18. The Respondent's Counsel also acted as an independent third party arbitrator in 2016 in an internal appeal that the Claimant had with the Respondent, and as a result the Respondent's Counsel is privy to the decision in that case which pursuant to Section 6.10.3. of the Respondent's Appeals Policy is confidential information not available to the public, which may or may not be used in these proceedings. The Respondent's Counsel would thus be in possession of material non-public information in this case as well, which is one of the two tests proposed for a potential breach of confidentiality.

19. Every lawyer has a duty of confidentiality to his client. This duty extends beyond the duration of the legal relationship. Any lawyer who has obtained confidential information from a client can never act against that client.
20. A lawyer may act against a former client where a reasonable member of the public who is in possession of the facts would conclude that no unauthorized disclosure of confidential information has occurred or would occur.
21. This does not seem to be the case here in either circumstance.
22. Further, the Respondent by retaining Respondent's Counsel would also seem to be in violation of their own confidentiality policy.

Respondent's Counsel's Position:

23. Respondent's Counsel acknowledges providing the Claimant with limited advice in 2021 in relation to his appeal against the Respondent's decision not to select him to the 2021 Olympic Team as an alternate, that he referred the Claimant to counsel, Ms. Cristy Nurse, who was not employed as an associate with the Respondent's Counsel or Sportlex Group Inc. in 2021 or at any time thereafter, and that the Respondent's Counsel's limited services, and those of Cristy Nurse, were invoiced through Sportlex Group Inc.
24. Claimant's allegation fails to satisfy the first part of the test that he cites from the Supreme Court of Canada's decision in *Canadian National Railway v. McKercher* because the Claimant did not provide the Respondent's Counsel with any confidential information in the context of his 2021 Olympic selection appeal within the context of a solicitor-client relationship. In fact, the Claimant does not state what confidential information that Respondent's Counsel may have become privy to during the limited consultation in 2021. The Claimant merely makes this allegation without any support and appears to confuse the distinction between being provided confidential information in a solicitor-client relationship which did not occur and being involved in a confidential process such as an appeal which did occur.
25. After the Respondent's Counsel reviewed the Claimant's appeal submissions and exchanged emails with him, the Claimant's file was transferred to Ms. Nurse. Once the Claimant's case was transferred to Ms. Nurse, the Respondent's Counsel was not involved in the case, either through conversations with Ms. Nurse, nor before the SDRCC as a representative for the Claimant or otherwise.
26. The Respondent's Counsel was also not privy to any of the proceedings before the SDRCC or any of the documents filed by the Claimant or the Respondent with the SDRCC, or the terms of the Memorandum of Understanding entered into between the Claimant and the Respondent in relation to the 2021 Olympic selection appeal. The

Respondent's Counsel was only informed of the outcome of his 2021 Olympic selection appeal once the Memorandum of Understanding was signed by the parties.

27. The Claimant asked the Respondent's Counsel to review his appeal submissions in the 2021 Olympic selection appeal but this document did not include any confidential information. It also did not contain any information that is related to or could be used by the Respondent against the Claimant in the present appeal, which is strictly related to whether the Respondent had the authority under Section 6 of the Respondent's General Selection Policy (the "Policy") to impose a performance readiness condition on the Claimant to determine whether he should be allowed participate in the 2024 GPCQM after his selection and, if such a condition was imposed, whether the condition complied with the Policy and was reasonable in the circumstances.
28. Claimant's 2021 Olympic selection appeal addressed the following matters: 1) his grounds for appeal; 2) his requested remedies; 3) the selection process used by the Respondent in relation to the 2021 Olympic Games; 4) the objective and subjective aspects of the relevant selection criteria; 5) how the criteria was designed; 6) alleged conflicts of interest; 7) notes on the Tokyo Olympic road course; and 8) summaries of testimony.
29. The Claimant referred to the selection criteria which is a publicly available document, the UCI ranking points of the athletes in contention for selection which are also publicly available, publicly available jurisprudence from the SDRCC, and the Claimant's arguments which could have been publicly disclosed in any SDRCC decision and would have, in any event, been disclosed to the Respondent and the arbitrator appointed by the SDRCC.
30. The Claimant's appeal submission in relation to his 2021 Olympic selection appeal, as well as the correspondence between the Claimant and the Respondent's Counsel within Claimant's submission contained no confidential information. Indeed, none of the information exchanged between the Claimant and the Respondent's Counsel in the context of his 2021 Olympic selection appeal was marked as confidential, marked as covered under attorney-client privilege, nor did the Claimant indicate at any time that any of the information that he provided the Respondent's Counsel was to be maintained confidential. As such, the first limb of the test in *McKercher* is not satisfied.
31. There is no nexus between the Claimant's 2021 Olympic selection appeal and his present appeal that gives rise to a conflict of interest situation, or a duty to previous clients or a duty of confidentiality in favour of the Claimant that would prevent the Respondent's Counsel from acting for the Respondent in the present matter. Further, none of the information provided by the Claimant to the Respondent's Counsel in the context of his 2021 Olympic appeal relates to the issues in the within appeal. Therefore, the second limb of the test in *McKercher* is not satisfied since there is no risk that the information from the Claimant's 2021 Olympic appeal which was not confidential

could be used in the present appeal.

32. With respect to the Claimant's 2016 selection appeal, it is noted that the Respondent's Counsel acted as the arbitrator in that matter, and that there was no solicitor-client relationship between the Respondent's Counsel and the Claimant or between the Respondent's Counsel and Respondent. Further, as with the Claimant's 2021 Olympic selection appeal, his 2016 appeal is entirely unrelated to the within appeal. This means that, even if the Respondent's Counsel was in possession of confidential information related to the 2016 appeal, which is not the case, no rebuttable presumption arises that the Respondent's Counsel possesses confidential information that raises a risk of prejudice to the Claimant. Consequently, none of the considerations from *McKercher* arise in relation to the Claimant's 2016 appeal, and the fact that the Respondent's Counsel acted as an arbitrator in a matter that involved the same parties as the within matter does not give rise to a conflict of interest situation, or a duty to previous clients or a duty of confidentiality in favour of the Claimant that would prevent the Respondent's Counsel from acting for the Respondent in the present matter. In addition, the Respondent's Counsel notes that the Claimant saw no issue with seeking legal services from the Respondent's Counsel for his 2021 Olympic appeal after he acted as an arbitrator in the Claimant's 2016 selection appeal.
33. The Respondent notes that the Supreme Court of Canada recognizes a parties' right to select counsel of their choosing. The Supreme Court of Canada in *Celanese Canada Inc v Murray Demolition Corp*, 2006 SCC 36, [2006] 2 SCR 189, stated the "right of a plaintiff to continue to be represented by counsel of its choice is an important element of our adversarial system of litigation".
34. The Respondent's Counsel did not receive any confidential information from the Claimant in his 2016 selection appeal or his 2021 selection appeal. Therefore, the Claimant did not satisfy his onus to remove the Respondent's Counsel as counsel in the present matter, and the Respondent's right to counsel of its choosing must be preserved.

ISSUE

35. The issue is whether the Respondent's Counsel should be removed as counsel for the Respondent based on the Claimant's allegations that "[i]t seems like there may be a risk of a breach in this case [based on the Respondent's Counsel's duty to previous clients, duty of confidentiality, and duty to avoid conflicting interests]."

RELEVANT CASE LAW

36. Both parties agree that the standard for determining whether the Respondent's Counsel should be removed due to a lawyer having a conflict of interest is defined as follows the Canadian Supreme Court decision in *Canadian National Railway v. McKercher*, 2013 SCC 39, [2013] 2 S.C.R. 649 quoting *MacDonald Estate v. Martin*, [1990] 3 S.C.R. 1235:

A two-part test is applied to determine whether the new matter will place the lawyer in a conflict of interest: (1) Did the lawyer receive confidential information attributable to a solicitor and client relationship relevant to the matter at hand? (2) Is there a risk that it will be used to the prejudice of that client?: *Martin*, at p. 1260. If the lawyer's new retainer is "sufficiently related" to the matters on which he or she worked for the former client, a rebuttable presumption arises that the lawyer possesses confidential information that raises a risk of prejudice: p. 1260.

RELEVANT PROVISIONS

37. Section 6.9.2. of the Respondent's Appeals Policy governs its Hearing Confidentiality. It states that:

The appeal process is confidential involving only the Parties, the Independent Case Manager and the Tribunal. Once initiated and until a written decision is released, none of the Parties or the Tribunal will disclose confidential information relating to the appeal to any person not involved in the proceedings. Any failure to respect the aforementioned confidentiality requirement may result in disciplinary action being taken against the Individual(s) in accordance with CC's relevant and applicable policies.

38. Section 6.10.2 of the Respondent's Appeal Policy governs the Release of Decision on the Respondent's website. It states that:

Subject to Section 6.10.3 below, unless the matter involves a Vulnerable Participant, once the deadline to appeal to the SDRCC (where applicable), as indicated in the Canadian Sport Dispute Resolution Code, has expired, CC shall publish the outcome of the appeal on its website. Publication shall be limited to, where applicable, the provision(s) of any relevant policies that have been violated, the name(s) of the Individual(s) involved, the sanction(s) or order imposed, if any. Identifying information regarding Minors or Vulnerable Participants will never be published by CC.

39. Section 6.10.3. of the Respondent's Appeal Policy governs the Release of Decision when the appeal panel dismisses the appeal. It states that:

If the appeal panel dismisses the appeal, the decision may only be published, as provided for in Section 6.10.2, with the Respondent's consent. If the Respondent does not provide such consent, the decision will be kept confidential by the Parties, the Independent Case Manager and CC and shall be retained and discarded in accordance with the relevant and applicable privacy legislation. Failure to respect this provision may result in disciplinary action being taken pursuant to this Policy.

ANALYSIS

40. It is undisputed that: a) 3 years ago that the Respondent's Counsel provided the Claimant with advice regarding his appeal of the Respondent's decision not to select the Claimant as an alternate for the 2021 Tokyo Olympic Games; b) Respondent's Counsel served as an arbitrator in an internal appeal of a dispute between the Claimant and Respondent; and c) Respondent's Counsel is now representing the Respondent in a dispute against the Claimant regarding the Respondent's decision to impose a performance readiness condition on the Claimant to determine whether he should be allowed participate in the 2024 GPCQM after his selection to the team.

Solicitor-Client Relationship

41. The Claimant argues that the Respondent's Counsel legal services in his 2021 appeal has caused what "[i]t seems like there may be a risk of a breach in this case based on the Respondent's Counsel's "[d]uty to [p]revious clients, [d]uty of [c]onfidentiality, and [d]uty to avoid conflicting interests". He added that "[t]he new retainer seems to be "sufficiently related".
42. However, the Claimant states no connection between this case and his appeal 3 years ago except for stating that the parties are the same and the Respondent's Counsel is delivering legal services to one of the parties. He merely makes a conclusory statement that "[t]he new retainer seems to be "sufficiently related" in this case, but he fails to provide any analysis of how this is the case. Further, the Claimant does not affirmatively state that there is any breach of duty owed by the Respondent's Counsel to him instead he uses qualifiers in each allegation such as there "it seems like there may be a risk of", "seems to be", or "potential". The Claimant never even states what confidential information that the Respondent's Counsel received from him which is relevant to this case.
43. The Claimant did not allege or provide evidence that even if the Respondent's Counsel has confidential information related to him or concerning him that the Claimant has been or will be prejudiced in this case.

Arbitrator in Internal Appeal

44. The Claimant argues that the Respondent's Counsel served as an arbitrator in the Claimant's internal appeal against the Respondent in 2016, so the Respondent's Counsel is in possession of material non-public information which is a potential breach of confidentiality.
45. Here the Claimant makes no nexus between this case and his internal appeal 8 years ago where Respondent's Counsel served as an arbitrator except that both involved the Claimant and Respondent. There is no solicitor and client relationship formed from Respondent's Counsel serving as an arbitrator in that internal appeal. Moreover, 5 years later the Claimant himself obtained legal services from the Respondent's Counsel in an appeal involving the same parties as in this case. Again, the Claimant has not alleged that the Respondent's Counsel has confidential information that will prejudice him in this case.
46. The Claimant also argues that the Respondent is in violation of its own confidentiality policy due to having Respondent's Counsel as its representative in this case and he cites 6.10.3 of the Respondent's Appeal Policy.
47. There is nothing in Section 6.10.3 of the Respondent's Appeal Policy that prohibits it from later utilizing legal services from a solicitor that previously served as an arbitrator. In fact, that Section focuses on the Release of a Decision when the appeal panel dismisses the appeal and the decision will be confidential between the parties and Independent Case Manager. As a result, there is no breach of confidentiality pursuant to 6.10.3 of the Respondent Appeal Policy due to the Respondent having been a Party to the internal appeal, so it already knew the appeal decision.

CONCLUSION

48. The Claimant's request for Respondent's counsel to be removed in this matter is denied.

Signed in Detroit, this 24th of September, 2024.



Aaron Ogletree, Arbitrator