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

SDRCC NO. 23-0625

IN THE MATTER OF AN ARBITRATION

BETWEEN:

FRANK FOWLIE
(Claimant)

-and-

WRESTLING CANADA LUTTE (WCL)
(Respondent)

-and-

DAVID SPINNEY
(Affected Party)

RE: JURISDICTION

JURISDICTIONAL ARBITRATOR: Sylvia P. Skratek

FOR THE CLAIMANT:
Mark Bourrie - Counsel
André Marin - Counsel

FOR THE RESPONDENT:
Jordan Goldblatt - Counsel
Tamara Medwidsky – WCL's Representative

FOR THE AFFECTED PARTY:
Michael Smith - Counsel
Tamika Edward - Assistant for the Counsel
Jane North - Assistant for the Counsel
Eva Kamel - Assistant for the Counsel

BACKGROUND

On February 14, 2023, Dr. Frank Fowlie filed a Request with the Ordinary Tribunal of the Sport Dispute Resolution Centre of Canada ("SDRCC") appealing the costs decision made by David Kellerman on January 30, 2023. The Kellerman decision was issued in the matter of a discipline policy complaint filed with Wrestling Canada Lutte ("WCL"). On February 24, 2023, I was appointed by the SDRCC to act as the Jurisdictional Arbitrator.

A preliminary conference call was convened with the parties on March 3, 2023. During that call I discussed with the parties how the proceedings would be conducted. All parties agreed that the format for the proceedings would be documentary review. The parties also agreed to the following statement of the issue to be decided:

> Does the Sport Dispute Resolution Centre of Canada (SDRCC) have jurisdiction to hear the complaint filed by Dr. Frank Fowlie in which he contends that the costs decision issued by David Kellerman is flawed for the reasons set forth in his request for an Ordinary Tribunal dated February 14, 2023?

The timetable for the parties' submissions was set as follows:

> March 17, 2023 at 4:00 p.m. EDT: Submissions on jurisdiction by the Respondent and the Affected Party;
>
> March 31, 2023 at 4:00 p.m. EDT: Submissions on jurisdiction by the Claimant;
>
> April 14, 2023 at 4:00 p.m. EDT: Reply submissions on jurisdiction by the Respondent and the Affected Party.

All submissions were received in a timely manner.

On February 15, 2023 the Claimant had filed an Application for Conservatory Measures requesting that "...all records pertaining to the WCL Complaint and Arbitration process" be preserved. During the March 3rd conference call all parties agreed that there was no need for conservatory measures in this matter.

STATEMENT OF THE FACTS

Between September 2020 and October 2021, Dr. Frank Fowlie was the Appeals and Complaints Officer, an independent third party ("ITP"), for Wrestling Canada Lutte. In that role he was responsible for screening complaints brought to WCL under its Discipline and Complaints Policy (the "Policy").

Following the end of his time with WCL, Dr. Fowlie commenced a civil claim against Mr. David Spinney, Wrestling Coach at the University of Western Ontario.

On March 30, 2022, Mr. Spinney brought a complaint under the Policy against Dr. Fowlie, alleging that Dr. Fowlie's civil claim pled information that was known only to Dr. Fowlie by virtue of his position with WCL, and therefore contravened a confidentiality obligation imposed under the Policy.

On October 28, 2022, David Kellerman, sitting as the Discipline Panel in the confidentiality complaint filed by Mr. Spinney, found that Dr. Fowlie had breached confidentiality provisions under the Policy but that the Policy no longer applied to Dr. Fowlie. Mr. Kellerman reasoned that the obligations placed on Dr. Fowlie following the end of his relationship with WCL were prescribed by the contract he had entered into with WCL, not under the Policy.

Following the release of Mr. Kellerman's decision, Dr. Fowlie sought costs of the proceeding. On January 30, 2023, Mr. Kellerman declined to award costs, finding that the complaint filed by Mr. Spinney was not frivolous and vexatious.

On February 14, 2023, Dr. Fowlie appealed Mr. Kellerman's Decision regarding costs to the SDRCC. He seeks to have WCL, Mr. Spinney and the individual who replaced him as the ITP pay him the costs that he incurred as a result of the confidentiality complaint.

ANALYSIS

Applicable Provisions of the Canadian Sport Dispute Resolution Code ("the Code")

2.1 Administration

(a) The SDRCC administers this Code, which may be amended from time to time by its Board of Directors, to resolve Sports-Related Disputes.

(b) This Code applies to a Sports-Related Dispute where the SDRCC has jurisdiction to resolve the dispute. This Code will therefore apply to any Sports-Related Dispute:

(i) in relation to which an agreement exists between the Parties to bring the dispute to the SDRCC, whether by virtue of a policy, contract clause or other form of agreement binding the Parties;
(ii) that the Parties are required to resolve through the SDRCC; or
(iii) that the Parties and the SDRCC agree to have resolved using this Code.

(c) This Code shall not apply to any dispute where a Panel or a Jurisdictional Arbitrator has determined that the SDRCC does not have jurisdiction to deal with the dispute.

5.4 Jurisdictional Arbitrator

(a) Where a Panel has not yet been appointed and a jurisdictional or procedural issue arises between the Parties which they cannot resolve, the SDRCC may appoint a Jurisdictional Arbitrator from the Rotating List.

(b) The Jurisdictional Arbitrator shall have all the necessary powers to decide:

(i) any challenge raised to the jurisdiction of the SDRCC; [...]

POSITIONS OF THE PARTIES

All parties to this dispute have submitted lengthy and well-written arguments of whether or not costs should be awarded in this matter to the Claimant, Dr. Frank Fowlie. Their submissions will be reviewed below; however, it is important to emphasize that as the Jurisdictional Arbitrator my only role is to determine whether or not the SDRCC has jurisdiction to hear the complaint filed by Dr. Frank Fowlie in which he contends that the costs decision issued by Mr. Kellerman is flawed. If I determine that the SDRCC has jurisdiction then the question of costs will be determined through a subsequent proceeding under the provisions of the SDRCC Code.

The Respondent

SDRCC proceedings are arbitrations governed by the *Arbitration Act, 1991*. As set forth at Section 5.1 of the Code "The applicable law for Arbitrations shall be the law of the Province of

Ontario."[1] There are two different views in respect of the source of SDRCC jurisdiction: jurisdiction is from the SDRCC Code however more recent court jurisprudence has disagreed and held that jurisdiction is not derived from the Code, but from the *Physical Activity and Sport Act*, SC 2003, c 2 (the "Act"). Either source of jurisdiction leads to the same result: there is no jurisdiction to consider Dr. Fowlie's Request.

The Code sets out the procedure to be applied in its proceedings. Jurisdictional arbitrators appointed through the SDRCC almost invariably rely on and cite the Code. The Code applies to a "Sports-Related Dispute where the SDRCC has jurisdiction to resolve the dispute." A "Sports-Related Dispute" is defined under the Code to mean "a dispute affecting participation of a Person in a sport program or Sport Organization". The Code further clarifies that a "Sports Related Dispute" may include the "application of a [Sport Organization's] Applicable Conduct Rules."

The Respondent cites *Cricket Canada v. Alberta Cricket Council*[2], in which the Honourable Justice Koehnen explicitly rejected that the Code granted jurisdiction to SDRCC arbitrators. He held instead that SDRCC proceedings take their authority from the Act. He held:

> The Centre and its jurisdiction are not established by the Code. Rather, they are established by the *Physical Activity and Sport Act*, SC 2003, c 2, section 10 of which provides:
>
> 10 (1) The mission of the Centre is to provide to the sport community
> a) a national alternative dispute resolution service for sport disputes; and
> b) expertise and assistance regarding alternative dispute resolution.
>
> (2) For the purposes of subsection (1), a sport dispute includes disputes among sport organizations and disputes between a sport organization and persons affiliated with it, including its members.
>
> Applying either the Code or the Act in this dispute yields the same result: no jurisdiction.

In this matter, Dr. Fowlie asserts that he is entitled to costs of the failed Spinney Confidentiality Complaint. WCL however has made a policy decision that a successful respondent in a discipline

[1] See *Cricket Canada V Bilal Syed*. 2017 ONSC 3301.
[2] 2020 ONSC 3776 at para.20

proceeding is not entitled to costs. WCL's Policy does not explicitly provide for the payment of legal costs to any party. It does provide that the sanction for a found infraction under the Policy may include "costs", although these are defined as "event related costs". It is open for debate as to whether a "sanction" under the Policy could include the payment of legal costs. However, it is perfectly clear that *legal* costs are not recoverable by a successful respondent. In *Ryan v. Calder*, this provision was considered at length by Arbitrator Sayao, who held that the Policy did not grant him jurisdiction to award costs against a respondent. Arbitrator Sayao accepted as true a legal proposition that there is no "inherent jurisdiction" for an administrative tribunal to award costs, and that the Policy did not grant him such jurisdiction.

If there is no jurisdiction for a WCL Panel to award costs in favour of a respondent in a proceeding, then the SDRCC equally does not have jurisdiction to do so. The SDRCC does not have jurisdiction to rewrite and then re-apply an NSOs policy. In effect, Dr. Fowlie seeks to have the SDRCC re-write the Policy and permit the award of costs where none is permitted. In *Beaulieu v. Speed Skating Canada*, Arbitrator Mew dismissed a complaint, concluding that it "relate[s] to matters of policy making rather than application of policy".[3] Similarly, in *Taekwondo Manitoba v. Taekwondo Canada*, Jurisdictional Arbitrator Roberts held that the SDRCC did not have jurisdiction to "re-write" or "redraft" a policy passed by an NSO.

An SDRCC arbitrator can only apply a policy. They cannot re-write it. In *Larue v. Bowls Canada Boulingrin*, Arbitrator Pound held that in applying a team selection policy, the role of the SDRCC is not to "re-write" a policy with a view of improving it, or, to substitute a personal view. Instead, the role of the arbitrator is to ensure that the policy was properly applied.[4]

Even if Dr. Fowlie's Request is not akin to requiring a revision of WCL's Policy, it is not a sports-related dispute. Both the Code and the Act require the existence of a "sports-related dispute" in order for the SDRCC to take jurisdiction. The dispute Dr. Fowlie has brought to the SDRCC has nothing to do with sport. It concerns the allocation of legal fees following a dispute. There is nothing Dr. Fowlie proposes to advance before this Tribunal that engages its specialized

[3] SDRCC 13-0199 at Paras. 78-80
[4] SDRCC 15-0255

expertise in sport matters. The Kellerman Decision does not affect Dr. Fowlie's participation in a sport program or sport organization. It does not concern team selection. It has nothing to do with sport, whatsoever. Dr. Fowlie's request is not a sports-related dispute and is therefore outside SDRCC's jurisdiction. The Respondent further submits that as set forth in *Strasser v. Equine Canada*[5] the Code only permits the awarding of costs related to an SDRCC proceeding.

The Claimant's argument that costs are a sanction and that there is jurisdiction to hear an appeal concerning a sanction fails to consider that a sanction can only be applied where there is an infraction. In this matter there was no infraction and without one there can be no sanction.

For all of the above, the Respondent requests that the Claimant's appeal be dismissed.

The Affected Party

Mr. Spinney has provided submissions in furtherance to the written submissions of the Respondent, WCL, filed on March 17, 2023.

WCL has determined that this matter was appropriately designated Process #1: the lowest level of offence per section 25 of the Policy. Process #1 is an internal process that does not contemplate the calling of witnesses or viva voce evidence. It consists solely of written submissions before a single Arbitrator.

The Claimant was employed by WCL as a Complaints and Appeals Officer for over a year. He is well-versed in the organization's policies and procedures, and has ample knowledge of administrative law. Nonetheless, the Claimant retained two separate lawyers for whom he now seeks to recover costs. Presumably, the Claimant has the skills and experience necessary to pursue this matter independently, or with nominal legal assistance. Moreover, the process is designed to be user-friendly for self-represented coaches and athletes. It is unreasonable for Mr. Spinney to incur costs as a result of the Claimant's decision to retain two legal counsel to navigate a process with which he is abundantly familiar. To the contrary, if costs are contemplated, they should be awarded against the Claimant for his vexatious, abusive, and

[5] SDRCC 07-0056

frivolous actions throughout this process.

The Affected Party contends that the SDRCC has no jurisdiction to award costs where the Policy does not permit. Nothing in WCL's Policy indicates that a successful party is entitled to costs or that obliges a cost award in favour of a successful party. In fact, section 3 of WCL's Appeal Policy sets out the types of decisions for which the Appeal Policy will apply. Costs are not an eligible ground. Additionally section 8 of WCL's Appeal Policy clearly states: "The Appellant must demonstrate, on a balance of probabilities, that the Respondent has made a procedural error as described in the 'Grounds for Appeal' section of this Policy and that this error had, or may reasonably have had, a material effect on the decision or decision-maker." No procedural error has been made with regards to the decision to decline to award costs in the Claimant's favour. The Panel's decision to decline to award costs in the Claimant's favour is discretionary and cannot be appealed. Such an appeal would effectively usurp WCL's jurisdiction to exercise its discretion in awarding costs.

WCL Panel considered whether to award costs and concluded not to award costs. In civil litigation, courts have the jurisdiction to award costs to the winning party however, the winning party is not entitled to costs due to a decision made in their favour. The Claimant cites Rule 57.01 as evidence that costs should be awarded however, they fail to acknowledge that the rule at Section 131 emphasizes that discretion remains with the court to award costs.

Mr. Spinney does not deny that costs are a method of sanction just that they should not apply in this case. Mr. Spinney further does not deny that an arbitral tribunal may award the costs of arbitration however, it is not appropriate to appeal a decision on the basis that costs were not awarded. Therefore, it follows that the since the Claimant was not awarded costs, it is not an error of the process but has been explicitly accounted for as an option available to the tribunal.

The Claimant referenced the SDRCC's provision in the Code as a reason that this tribunal has the jurisdiction to hear this appeal. It is Mr. Spinney's position however that the Panel is expected to determine whether costs should be awarded at the conclusion of a proceeding of a sport's related dispute, which is outlined in 6.13 of the Code and as quoted by the Claimant.

Again, the Claimant has outlined that the Panel has the jurisdiction to make a decision, but has yet to bring forth an argument that an appeal based on the decision of costs is appropriate. Mr. Spinney takes the position that the Claimant is abusing the SDRCC process in order to appeal the Kellerman decision on the basis of costs. WCL and the SDRCC both have established systems in place for individuals to bring forward complaints. The Claimant has done so, and decisions have been made.

Mr. Spinney asks for this complaint to be dismissed with costs against the Claimant because of the excessive and unnecessary costs incurred.

The Claimant

The Claimant puts forward several provisions that discuss the awarding of costs usually given to the prevailing party. Rule 57.01 of the Ontario Rules of Civil Procedure lists the *Factors in Discretion* for the awarding of costs of proceedings. Under the *Arbitration Act, 1991*, S.O. 1991, C.17 provisions for costs are set out as:

> **Costs**
> **Power to award costs**
> **54** (1) An arbitral tribunal may award the costs of an arbitration. 1991, c. 17, s.
>
> **What constitutes costs**
> (2) The costs of an arbitration consist of the parties' legal expenses, the fees and expenses of the arbitral tribunal and any other expenses related to the arbitration. 1991, c. 17, s. 54 (2).
>
> **Request for award dealing with costs**
> (3) If the arbitral tribunal does not deal with costs in an award, a party may, within thirty days of receiving the award, request that it make a further award dealing with costs. 1991, c. 17, s. 54 (3).

A similar provision exists in the Code at Section 6.13:

> (a) The Panel shall determine whether there is to be any award of costs, including but not limited to legal fees, expert fees and reasonable disbursements, and the amount of any such award. In making its determination, the Panel shall consider the outcome of the proceeding, the conduct of the Parties and abuse of process, their respective financial resources, settlement offers and each Party's good faith efforts in attempting to resolve the dispute prior to or during Arbitration. Success in an Arbitration does not mean that the Party is entitled to costs.

(b) A Party may raise with the Panel any alleged breach of this Code by any other Party. The Panel may take such allegation into account in respect of any cost award.

(c) Any filing fee charged by the SDRCC can be taken into account by a Panel if any costs are awarded.

In awarding costs of over $27,000, the Panel in SDRCC 21-0516 (2) *Valois* v. *Judo Canada* 2022, the following criteria were applied:

1. The outcome of the proceedings;
2. The conduct of the Parties and abuse of process;
3. Their respective financial resources;
4. Their settlement proposals and the efforts made in good faith shown by each Party in attempting to resolve the dispute prior to or during the arbitration.

Similarly, in *Lucas O'Cellachan et al.* v. *Spinney,* Wrestling Canada Lutte 2022, Arbitrator Dan Ratushny awarded the two claimants a total of $10,000 in costs as part of the defendant's punishment for his harassing behaviour of them. At para. 55 and 56, Arbitrator Ratushny wrote that legal costs would be awarded for the defendant's harassment against the claimants. Arbitrator Ratushny's total sanctions are in para. 122 of his decision:

> In addition to the suspended Two-Year Ban, the Respondent shall within 60 days of the date of this Decision, pay by way of costs $5,000 (CAD) to the First Complainant and $5,000 (CAD) to the Second Complainant as contributions towards their legal fees and expenses.

The Claimant further emphasizes that on its website the SDRCC under question 1 of its FAQ lists "disciplinary sanctions" as disputes that can be heard:

> 1. What types of disputes can be heard by the Dispute Resolution Secretariat?
>
> The Dispute Resolution Secretariat can hear cases that concern a **sports-related** dispute. Although it can take different forms, a sports-related dispute is usually one that affects "participation" in a sport organization. If someone's participation in a sport organization as an athlete, a coach, an official, or a volunteer board or committee member is affected by a decision made by the sport organization, or by a person or committee acting on behalf of that sport organization, this could be a sports-related dispute. For example, the SDRCC often deals with issues such as:
>
> - Athlete selection to the national team program or for an international competition

- Athlete Assistance Program funding
- *Disciplinary sanctions*
- Doping
- Eligibility
- Harassment or discrimination
- Interpretation of an agreement
- Field of play decisions tainted by partiality or bias
- Other decisions handed down by a sport organization that affects one of its members. (Emphasis added}.

It follows that if costs are part of the element of sanctions, as per the *Arbitration Act,* other legislation and SDRCC and WCL caselaw, the SDRCC has jurisdiction to hear an appeal that costs should have been ordered when they have not been.

The Claimant concludes that in light of all of the above, the Jurisdictional Arbitrator should allow this case to proceed to arbitration.

Discussion

After careful consideration of all of the documents submitted and the arguments of the parties, it is apparent that WCL has adopted and implemented internal procedures and a policy to address any and all disputes that may arise. Dr. Fowlie as the former Appeals and Complaints Officer for WCL would have been fully aware and informed of these procedures as well as the Policy. In fact, as WCL Complaints and Appeals Officer Dr. Fowlie appointed a Discipline Panel in April of 2021 to review a Discipline Policy Complaint between WCL and Marty Calder. When a Discipline Policy Complaint was filed against Dr. Fowlie by Mr. Spinney, WCL Complaints and Appeals Officer Ilan Yampolsky properly referred the matter to the dispute resolution procedure contained within WCL Discipline Policy. Dr. Fowlie prevailed in part under the Policy. Mr. Kellerman determined at paragraph 19 of his decision that:

> While the information revealed in his statement of claim is confidential, Dr. Fowlie cannot be found by the Panel to have been in violation of section 48 [of the Discipline and Complaints Policy]

Mr. Kellerman further states at paragraph 28 of his decision that:

> At the time the Notice of Complaint was filed, Dr. Fowlie was no longer CAO, and therefore no longer under contract with WCL. The CAO is a Participant under the terms of the Safe Sport Policy Manual, but when the CAO's contract is terminated, he can no

longer be considered a Participant...

In essence, Mr. Kellerman had determined that Dr. Fowlie had revealed confidential information but further determined that Dr. Fowlie was no longer bound by Section 48.

Dr. Fowlie appealed to Mr. Kellerman seeking reimbursement of the costs that he had incurred in his defense of the complaint filed by Mr. Spinney. Mr. Kellerman declined to award costs stating in part at paragraph 32 of his Modified Complaint Review Decision that:

> "...Mr. Spinney's complaint is not vexatious nor frivolous in nature. Respondent claims that the present complaint should not have been accepted by WCL's safe sport officer...Mr. Spinney is not responsible for the safe sport officer's decision...and therefore should not bear the responsibility of costs incurred by Dr. Fowlie in relation to this arbitration."

The decision by Mr. Kellerman represents a complete and thorough review and determination of both the substance of the Discipline Policy Complaint and the determination of costs. It was issued under the Discipline Policy of WCL. Mr. Kellerman exercised his discretion to deny the costs on the basis that the complaint was not vexatious nor frivolous. It is worth noting that Mr. Kellerman did not deny the costs based upon prior decisions that focused on WCL Policy having no provisions that provide for the payment of legal costs. He denied the costs based on the record that was presented to him. What the Claimant is attempting to do in this matter is to have the sections within Mr. Kellerman's decision, at paragraphs 32 and 35, regarding the awarding of costs, that was rendered under WCL Discipline Policy, reviewed and presumably modified through a different adjudicative body. That is simply not how it works. The complaint filed against Dr. Fowlie was adjudicated under WCL Policy. When Dr. Fowlie prevailed in part he sought reimbursement of the costs that he incurred and was denied. The complaint and the determinations on both the substance and the costs remain under WCL Policy. It does not move forward to another adjudicative body to strike two paragraphs regarding costs from the Kellerman decision. To allow that to happen would in effect be rewriting WCL Policy. That is not something that can or should be done. The Code provides at Section 2.1, subsection (b) items i-iii the matters over which the SDRCC has jurisdiction:

> (i) in relation to which an agreement exists between the Parties to bring the dispute to the SDRCC, whether by virtue of a policy, contract clause or other form of agreement binding the Parties;

(ii) that the Parties are required to resolve through the SDRCC; or

(iii) that the Parties and the SDRCC agree to have resolved using this Code.

There is no "...policy, contract clause or other form of agreement..."; there is no requirement "...to resolve through the SDRCC..."; and there is nothing to conclude that "...the Parties and the SDRCC agree to have resolved using this Code."

Furthermore, as stated by the Affected Party, WCL and the SDRCC both have established systems in place for individuals to bring forward complaints. The Discipline Policy Complaint was filed under WCL established system. Under that system, decisions have been made not only on the merits of the complaint but also on the awarding of costs to Dr. Fowlie. It is well established that a determination of whether costs should be awarded occur at the conclusion of a proceeding of a sports-related dispute. That is exactly what occurred in the matter before Mr. Kellerman. Dr. Fowlie requested costs and his request was denied. The SDRCC has no jurisdiction to interfere in the properly established and administered WCL Discipline Policy. For it to do so would in effect be a modification of that Policy which as previously discussed herein is unwarranted.

CONCLUSION

Based on all of the foregoing and for the reasons set forth above the SDRCC does not have jurisdiction to hear the complaint filed by Dr. Frank Fowlie in which he contends that the costs decision issued by Mr. David Kellerman is flawed for the reasons set forth in his request for an Ordinary Tribunal dated February 14, 2023. Dr. Fowlie's complaint is hereby dismissed.

April 24, 2023 at Tsawwassen, British Columbia by

Sylvia P. Skratek