No. SDRCC 23-0628

IN THE MATTER OF WRESTLING CANADA LUTTE'S DISCIPLINE POLICY

BETWEEN:

DAVID SPINNEY

(Claimant)

-and-

WRESTLING CANADA LUTTE

(Respondent)

-and-

LÚCÁS Ó'CEALLACHÁIN and ED ZINGER

(Affected Parties)

BEFORE:

Peter Lawless, KC (Arbitrator)

APPEARANCES:

On behalf of the Claimant:	Michael Smith (Counsel)
On behalf of the Respondent:	Morgan McKenna (Counsel)
On behalf of the Affected Parties:	André Marin (Counsel)

DECISION

Procedural Matters

1. This matter comes before me as an appeal of an arbitrator's decision denying an appeal from a discipline panel's decision wherein the Claimant was found to have violated the Respondent's Discipline Policy and ordered a sanction against the Claimant.

2. A preliminary issue was argued before me as to the format for this appeal. In a decision dated August 12, 2023, I found that as this matter is an appeal from the decision of an appeal arbitrator below, this procedure be conducted in a form akin to judicial review.

3. At a preliminary meeting a schedule was set for the parties to file their respective submissions as follows:
    a. August 21, 2023, at 4:00 p.m. (EDT): Claimant's Appeal Submissions;
    b. August 28, 2023, at 4:00 p.m. (EDT): Affected Parties and Respondent's Response Submissions.

4. Two days were set aside for the hearing, but the parties completed their submissions in one day, on August 30, 2023.

5. For the reasons that follow, I deny the Claimant's appeal.

The Applicable Law

6. In denying this appeal, I am first guided by the decision of the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov* [2019] 4 S.C.R. 653 where the Court prescribes a test of reasonableness to be applied to reviews of administrative decisions.

7. Second, the Claimant relies on *MDG Computers Canada Inc. v. MDG Kingston Inc.*, 2013 ONSC 5436 for the test reasonable apprehension of bias. The Affected Parties reference *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25.

8. Both of these authorities, and indeed a great many others, establish the test to be whether a reasonable and informed person, viewing the matter realistically and practically, in light of the particular context, and with knowledge of the relevant facts and circumstances, find it more likely than not that the decision maker arrived at their concision through use of generalizations or prejudice. As noted in these authorities, this is a high threshold.

Grounds of Appeal

9. The Claimant frames this appeal as follows:
    a. This Appeal is before the SDRCC to address the many procedural errors which have compromised Mr. Spinney's right to procedural fairness.

10. In addition to his written submissions and oral arguments, the Claimant further refers to a list of documents previously filed on the Case Management Portal of the SDRCC, all of which I have reviewed.

11. At paragraph 16 of his written submissions, the Claimant sets out his grounds for this appeal as follows:

Generally, the grounds for the appeal include lack of procedural fairness on the part of the Panel. This occurs in several areas:

a. *The Panel's application of the information outlined in the investigation report published by Ms. Durant.*
b. *The Panel's error in not permitting the WCL to fully participate in the matter given its proprietary role in these complaints.*
c. *The issues relating to Dr. Fowlie's involvement leading to a reasonable apprehension of bias.*
d. *The Panel's award of financial costs to the Complainants without any formal legal basis or applications in that regard.*

12. I will deal with each of these in turn.

Ground #1 - Treatment of the Investigator's Report

13. As part of the WCL complaints process, an investigator was retained by the Complaints and Appeals Officer (in this matter, Dr. Fowlie) who is charged with investigating the complaint and providing a report with any recommendations. The Complaints and Appeals Officer is then empowered to dismiss the complaint or, as was done here, convene a Panel to hear the complaint.

14. The Claimant argues at paragraph 26 of his submissions:

> *The WCL disciplinary process is such that, whenever there is a complaint, it goes to an investigator who shall draft an independent report with their findings. Dr. Fowlie, who was at the time the Complaints and Appeals Officer (hereinafter "CAO") ignored the findings, which is problematic in itself.* ***The Panel then exacerbated the problems by not considering the findings of the investigation, even though it was required to do so****. The Panel excluded key information which should have held considerable weight in its decision process.* [emphasis mine]

15. Later, at paragraph 65 of his submissions the Claimant submits:

> Throughout the proceedings, the Panel committed several procedural errors that had direct consequence on its outcome:
>
> a. *The Panel Failed to consider the findings of the Investigation published by Ms. Durant. He did not grant any weight to the investigation.* ***There is no indication in his decision that he considered, analyzed or even looked at the investigation*** *which concluded that the Claimant's actions did not constitute a breach of the WCL's Code of Conduct.* [emphasis mine]

16. The Claimant's submissions with respect to the Panels' treatment of Ms. Durant's investigative report are patently false.

17. The Panel specifically makes reference to the investigative report on several occasions and in fact quotes from it in the impugned decision.

18. Additionally, the submissions that the investigation concluded that "the Claimant's actions did not constitute a breach of the WCL's Code of Conduct.", is equally false.

19. Ms. Durant specifically did not make a finding as to a breach. She stated in her report that "It may well be open to a Panel to find that the communications are objectionable and that is open for the Panel to decide – not me."

20. I find it extremely troubling that in his submissions the Claimant strays so far from the truth. It is further notable that this is not an isolated incident of "getting a fact wrong" but rather the extremely "loose" application of truth is pervasive throughout his submissions.

21. I reject this ground for appeal.

Ground #2 - Status of WCL

22. The Claimant next raises the fact that the Panel below determined, after hearing from the parties, that WCL would not have the status of a party but rather could participate as an Intervenor.

23. The Claimant submits at paragraph 29 of his written submissions:

> *As a result of the Panel's decision, the WCL found itself as a mere intervenor with a limited scope and limited ability to participate in a process that is inherently its own. The WCL should have been granted the role of party in this matter. To bar the WCL from doing so constitutes a procedural mistake.* ***By doing so, the panel limited the Claimant's opportunity to have another personal advocate present on his behalf.*** [emphasis mine]

24. Regardless of any status granted to WCL (or not), there is no additional personal advocate available to the Claimant.

25. Further, during oral arguments, the Claimant agreed that he had a full opportunity to make any and all arguments he chose to make and that there was nothing "additional" that could have been added by WCL were it a party. At most, WCL could have said "we agree with the submissions of the Claimant". However, that would not add any weight to those submissions.

26. Additionally, WCL, in its submissions at paragraph 5 says: "*WCL denies that it must exercise participatory rights in every discipline proceeding*." Further, at paragraph 6 it says:

> *Moreover, its request to intervene in this proceeding was appropriately accepted on a limited basis, and WCL sought no greater role in the proceeding after its intervention request was granted on a purposefully limited basis. Had WCL intended to participate in the hearing as a whole it could have sought leave to exercise participatory rights. It did not.*

27. I reject this second ground of appeal.

Ground #3 - The Ongoing Participation of Dr. Fowlie

28. The Claimant's next alleged ground is that the continued involvement of the Complaints and Appeals Officer, Dr. Fowlie, in the proceeding before the Panel gives rise to a reasonable apprehension of bias **by the Panel.**

29. The Claimant sets out a version of events involving Dr. Fowlie and the history of the investigative process during and after his time as the Complaints and Appeals Officer.

30. It is clear that Dr. Fowlie took steps while engaged as the Complainants and Appeals Officer that go beyond what is typically seen on these types of proceedings. However, it is fair to say that this proceeding is equally unusual with numerous procedural attacks and allegations of bias raised by the Complainant at multiple points.

31. Furthermore, it is significant to note that the question to be addressed here is not of any possible bias of Dr. Fowlie. The issue is any reasonable apprehension of bias by the Panel.

32. Despite numerous paragraphs of his written submissions, and oral argument devoted to complaints around Dr. Fowlie, the only articulable claim to seat the allegation of bias by the Panel comes by inferring that as the Complainants and Appeals Officer selects the Panel a biased Complaints and Appeals officer would select a Panel favourable or supportive of the biased Complaints and Appeals Officer.

33. At paragraph 57 and 58 of his written submissions, the Claimant puts it as follows:

> *57. It is worth noting that Dr. Fowlie had ability [sic] to select any Panel and there were numerous arbitrators available to him. **Presumably**, he selected a Panel that he believed would favour his desired outcome, given his direct interest in the outcome of this case.* [emphasis mine]
>
> *58. The Panel then permitted Dr. Fowlie to appear at the hearing as a witness and permitted numerous individuals who had no standing in the matter to be involved. For example, he permitted Dr. Fowlie's legal counsel, Mr. Marin, to make submissions regarding Mr. [sic] Fowlie's own complaints, and to improperly deliver closing arguments to the Panel.*

34. For a party to allege bias they must bring forward cogent and logical claims which, while not necessary to be accepted by a Panel, cannot be manufactured out of thin air without any factual underpinning. Dr. Fowlie, as the Complaints and Appeals Officer, was duty bound to select the Panel. The allegation made by the Claimant would therefore be laid at the feet of any arbitrator selected for the Panel and absent even a shred of supporting evidence this type of allegation must be forcefully rejected.

35. Given the high threshold for bias as set out in *Yukon Francophone School Board, Education Area #23 v. Yukon (Attorney General)*, 2015 SCC 25, the attempt by the Claimant to raise this

significant allegation without any supporting evidence particularly when tied to the legal presumption of judicial impartiality and judicial fairness can only be found to be outrageous.

36. I reject this ground of appeal.

37. It is also worthy of censure that, in the context of the many paragraphs devoted to the alleged bias of Dr. Fowlie, the Claimant once again demonstrates a casual indifference to the truth.

38. The Affected Parties devote several pages of their written submissions to "Spinney's False and Misleading Pleadings". I will confine myself to referencing one particularly egregious example.

39. As supporting "evidence" of Dr. Fowlie's bias (again, significantly not as evidence of the Panel's bias) at paragraph 33 E of his written submissions, the Claimant pleads as fact that:

> *On October 21, 2022, Mr. Fowlie's appeals was denied. On November 22, 2022, Mr. Fowlie escalated the appeal to the SDRCC outside the prescribed time limit.*

40. The Affected Parties respond to this pleading as follows:

> This is categorically false and counsel as an Officer of the Court needs to be more cautious with the truth. … Arbitrator Richard Pound issued an oral decision on January 25, 2023, confirmed in writing May 25, 2023, in which he made the following ruling:
>
> > For clarity**, <u>I reiterate my decision made at the Motion Hearing of January 25, 2023, and its reasons duly recorded in the meeting notes on file, that the Claimant's (Dr. Fowlie) appeal was filed within the applicable deadline</u>**… […
> > [emphasis mine]

41. When pressed by me as to how this clear decision by Arbitrator Pound could be reconciled with his pleading that the appeal was filed outside the time limit, the Claimant could only say that he did not accept that was the final decision and made reference to it being a live issue in another, ongoing proceeding.

42. This is entirely unacceptable. The Claimant pled as fact something which he plainly knew to be untrue. A proper pleading would have indicated that there was a finding that the filing was within the prescribed time limit but that finding was under appeal. It is improper to allege as fact the outcomes one wishes to have.

Ground #4 - Costs Below

43. The final ground for appeal argued by the Claimant is a claim that the costs orders made by the Panel below were improperly imposed.

44. The Claimant says that costs should not have been ordered noting that in his view costs are the exception and not the rule in sports arbitrations and also suggesting that the Panel below failed to properly received evidence and submissions.

45. In the decision of the Panel below wherein the costs were ordered, I note the Panel found the following:

> *116. In the Panel's view, based on the evidence before it, the Respondent's descriptions and characterizations about the behaviour of the First Complainant and the Second Complainant are without merit. The Respondent's case is largely based on witness testimony that when challenged on cross-examination was revealed to be inconsistent and unreliable, on an audio recording that was repeatedly referred to but was never produced, and on situations or events that were misrepresented, sometimes grossly, in the Respondent's portrayal of them in his harassing communications. In sum, the Panel finds that the Respondent's descriptions and characterizations of the First Complainant's behaviour and the Second Complainant's behaviour are not supported by credible evidence.*
>
> *117. Based on the evidence before it in this proceeding, the Panel is satisfied that the Respondent has not established any justification for his code of conduct violations. Those violations amount to attacks that scorn the dispute resolution processes available in WCL's codes and have caused significant stress, mental anguish, and psychological and reputational harm to the First Complainant and the Second Complainant, on both a professional and personal level.*
>
> *…*
>
> *122. 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.*

46. In the proceedings below, the Panel found specific and significant harms caused by the Claimant and notes that the costs award is a "contribution" towards legal fees and expenses.

47. As correctly pointed out by the Claimant, the Code of Conduct allows for costs to be ordered against direct losses.

48. In all of the circumstances, and again bearing in mind that the test I am to apply is that of reasonableness, I cannot say that the order made by the Panel below was unreasonable.

49. Were I the Panel below, I might not have ordered those costs payable but equally I might not have imposed a <u>suspended</u> two-year ban particularly in circumstances where the Claimant clearly refuses to acknowledge, even today the serious nature of his breaches of the Code of Conduct and instead characterizes his behaviours as merely sending "strong worded emails" attempting to cloak them in a stated intention to "protect the athletes under his care".

50. So, while I might have imposed a much more impactful sanction against the Claimant, it is not for me to re-decide what was before the Panel. It is my role, sitting in review of the Panel's decision, to determine if, in all the circumstances, the award of costs was reasonable. I find that it was.

51. I reject this ground of appeal.

Costs of the Current Proceedings

52. Having disposed of the four grounds of appeal alleged by the Claimant, I now turn to the question of costs for the proceedings before me.

53. In their written submissions, the Affected Parties seek costs in the amount of $10,000 to each of the two Affected Parties in addition to the costs awarded below. The rationale put forward for this is deterrence.

54. The Canadian Sport Dispute Resolution Code allows for costs to be awarded as set out in s. 5.14 of that Code:

> *5.14 Costs*
>
> *(a) Except for the costs outlined in Section 3.8 and Subsection 3.7(e), and unless expressly stated otherwise in this Code, each Party shall be responsible for its own expenses and those of its witnesses.*
>
> *(b) Where applicable, Parties seeking costs in an Arbitration shall inform the Panel and the other Parties no more than seven (7) days after the final award or decision on merits being rendered.*
>
> *(c) A reasoned decision on costs shall be communicated to the Parties within ten (10) days of the closing of cost submissions.*
>
> *(d) The Panel does not have jurisdiction to award damages, compensatory, punitive or otherwise, to any Party.*

55. The Canadian Sport Dispute Resolution Code also notes:

> *6.13 Costs*
>
> *(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.*

56. Despite the submissions of the Affected Parties, I am not prepared to directly award costs absent proper submissions from the Parties. I do however accept their submissions as a request for costs as contemplated by s. 5.14 (b).

57. Accordingly, I direct that, given the request for costs by the Affected Parties, their submissions on costs be submitted in writing, restricted to a maximum of four pages, by 4:00 p.m. (EDT) on Wednesday, September 13, 2023. The Claimant may respond to the submissions, again limited to a maximum of four pages, by 4:00 p.m. (EDT) on Monday, September 18, 2023, after which I will issue a reasoned decision as prescribed above.

58. I urge any party seeking costs to consider what guidance they may find in the provisions of s. 6.13(a) of the Canadian Sport Dispute Resolution Code set out above as they frame their request.

Signed at Ottawa, Ontario this 6th day of September 2023.

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Peter Lawless, KC
Arbitrator