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

SDRCC No: 23-0680

IN THE MATTER OF AN ARBITRATION HEARING BETWEEN:

KRYSTOFER BARCH ("BARCH")
(CLAIMANT)

- and -

HOCKEY CANADA ("HC")
(RESPONDENT)

DECISION WITH REASONS

ARBITRATOR: GORDON E. PETERSON

APPEARING:

For the Claimant:	Krystofer Barch Stephen McCotter (counsel)
For the Respondent:	Nathan Kindrachuk Adam Klevinas (counsel)

Hearing by way of Zoom conference on December 19, 2023.

I INTRODUCTION

Appeal

01. This case concerns an appeal to the Sport Dispute Resolution Centre of Canada ("**SDRCC**") of a disciplinary decision made September 28, 2023 ("**Decision**") by an adjudicator appointed August 10, 2023 ("**Adjudicator**") by the Independent Third Party ("**ITP**") for Hockey Canada ("**HC**" or the "**Respondent**").

02. The Decision was communicated to the Claimant on September 30, 2023, and was rendered in respect of an anonymous complaint ("**Complaint**") made shortly after a youth (U-14AAA) hockey game on December 29, 2022 – a quarter final match in the Toronto Marlboros' 28th Annual Holiday Classic Tournament held in Etobicoke between Huron Perth Lakers and the Ottawa Myers Automotive (the "**Game**").

03. The appeal was referred to the SDRCC for resolution in accordance with the Med/Arb provisions of the Canadian Sport Dispute Resolution Code ("**Code**") by means of a Request filed by the Claimant on October 28, 2023.

04. I issued a short decision on December 27, 2023, in accordance with s. 6.12(a) of the Code but because of holiday commitments was unable to deliver my reasons simultaneously. These are my detailed reasons.

Background

05. A written complaint was filed with the ITP on December 29, 2022, in accordance with s. 2, Article 10 of HC's Discipline and Complaints Policy ("**Policy**") and was supplemented with additional information filed December 30, 2022.

06. The Complaint alleged misconduct by the Respondent relating to verbally abusive conduct and threats of physical violence made to the opposing coach during the Game where the young players could hear. The Complaint further alleged the Respondent directed comments towards the opposing players.

07. The ITP accepted jurisdiction over the Complaint in a procedural order dated January 15, 2023. The ITP concluded that the Complaint met the requirements for "serious misconduct" enumerated in s. 4, Article 38(a) of the Policy and directed that the Complaint proceed to the investigation stage in accordance with Process #2.

08. The ITP procedural order required the respondent in the matter (Krystofer Barch, the Claimant in this appeal) to make any submissions on interim sanctions within three days of receipt of the written procedural order and any decision by the ITP to be rendered within two days of receiving the Claimant's submissions. An investigation was directed to commence immediately following delivery of the procedural order to the parties to the Complaint.

09. On April 8, 2023, the ITP issued the following interim suspension under the Policy:

> *In accordance with Article 22 of Hockey Canada's Discipline and Complaints Policy, please be advised that Krys Barch, a coach of the Huron Perth Lakers U14 AAA team, is hereby placed under restrictions as to their coaching activities with Hockey Canada pending completion of the Adjudicative Process. Effective immediately, Krys Barch may not coach in any game played against the Ottawa Myers Automotive U14 AAA team, attend in or outside the locker rooms before or after any such games or attend any such games as a spectator. Krys Barch is also prohibited from approaching the coaching staff or players of the Ottawa Meyers team in any Hockey Canada sanctioned venue, such restriction to be continued until the completion of the Adjudicative Process herein.*

10. In its brief submitted on appeal, the Claimant advised that he was "not even made aware of the Complaint until April 11, 2023."

11. On April 10, 2023, the Claimant filed a related complaint against Andy Bryan regarding his conduct at the Game and alleging that Mr. Bryan used the HC complaints process for his personal advantage (the "**Related Complaint**").

12. In the Decision of the Adjudicator on the Related Complaint, the Adjudicator indicated at paragraph 5:

> *This* [*Related Complaint*] *was submitted to the ITP after Barch was personally impacted by the [Complaint]. It was submitted on April 10, 2023.*

13. Based on the dates before me, it appears that there is some disagreement over whether the Related Complaint was filed before or after the Complaint was communicated to the Claimant. I was not provided with any additional specificity regarding the dates of submission of the Related Complaint or the date the Complaint was communicated to the Claimant.

14. An investigator (the "**Investigator**") was contracted to investigate the anonymous complaint on May 16, 2023. The delay in the process appears to have been that the

Claimant was not contacted until April to be made aware that there was a complaint against him.

15. The Investigator issued her report on July 9, 2023 ("**Report**") and a summary of the Report on August 9, 2023 (the "**Summary Report**").

16. The Adjudicator was appointed by the ITP on August 10, 2023, for both the Complaint and the Related Complaint. On August 22, 2023, the Adjudicator issued a procedural order advising that the Policy creates a presumption that the Report is determinative of the facts related to the Complaint but that such presumption may be rebutted where a flaw in the process can be demonstrated or if it can be established that the Report contains conclusions which are inconsistent with the facts as found by the Investigator.

17. The Adjudicator invited written submissions to be made on four questions with a limit of eight pages, double-spaced:

    (a) Was there a significant flaw in the process followed by the Investigator?

    (b) Does the Report contain conclusions which are not consistent with the facts found by the Investigator?

    (c) Has an infraction, breach or violation of a governing policy or code occurred?

    (d) *In the event that an infraction, breach, or violation is found by the Adjudicator, what are the appropriate sanctions to be imposed?*

Process

18. The Respondent is a federal non-profit corporation governed by the *Canada Not-for-Profit Corporations Act*, S.C. 2009, c. 23. HC is recognized as the official national governing body for the sport of hockey in Canada.

19. The Claimant is a coach of a youth team governed by the rules of HC.

20. Both parties agreed to submit the matter to Med/Arb with the SDRCC and I was appointed as neutral by agreement of the parties. We held a preliminary conference call on November 10th to discuss the process and to ensure there were no jurisdictional or preliminary issues to be resolved. The Med/Arb commenced by mediation on November 21 at 10:30 am.

21. At the start of the mediation, I raised the question as to whether HC had authority to agree to a resolution that alters the Decision rendered by the Adjudicator appointed

by the ITP. HC was prepared to proceed with the mediation to determine if the Claimant identified some significant errors that HC would be comfortable rectifying to ensure justice was appropriately served.

22. During the mediation phase of the proceedings, it became evident that, despite the good faith efforts of the parties, it would not be possible for the parties to reach agreement on a resolution of the dispute, and I declared an end to the mediation. The parties agreed to dates for submission of additional information as well as the hearing dates of December 19 and 20 (if necessary), 2023.

II SCOPE OF REVIEW AND BURDEN OF PROOF

23. The Code provides in s. 6.11 that I may conduct a hearing *de novo*, that I shall have full power to review the facts and apply the law, and that I may substitute my decision for the Decision that gave rise to the dispute.

24. Section 6.11 of the Code also provides that I must conduct a hearing *de novo* in certain circumstances – none of which are present in this matter.

25. The Respondent submitted that the matter should proceed by way of judicial review and the standard of review should be reasonableness. The Respondent suggested that there was no serious shortcoming in the Decision that would warrant intervention.

26. I accept the submissions of the Respondent on the standard of review. There does not appear to be any reason to consider each and every finding of the Investigator on a *de novo* basis.

27. The standard of reasonableness does not mean that I must agree with the Decision made by the Adjudicator but whether the reasons outlined by the Adjudicator are justifiable in the circumstances – that the Decision is within a range of reasonable outcomes. There is a proviso that an otherwise reasonable outcome cannot stand if it was reached on an improper basis.

28. The Claimant did not dispute the standard of review but submitted the Decision rendered by the Adjudicator was unreasonable and should be overturned based on the four grounds outlined by the Claimant. I will examine the grounds in more detail below.

29. Under a reasonableness review, the onus of whether a decision is unreasonable lies with the person challenging the decision, in this case, the Claimant. The challenging party must show that any shortcomings or flaws are "sufficiently central or significant to render the decision unreasonable." [1]

30. Having read the materials and listened intently to the submissions, the investigation appears to have been conducted professionally and a Report was delivered outlining the scope, evidence and findings. The Adjudicator asked for submissions from the parties on the Investigator's Report prior to making the Decision and outlined in some detail his determination on the issues raised. The Adjudicator, based on the information in front of him, at first blush appears to have come to reasonable conclusions. That would suggest to me that I should not disturb the sanctions imposed.

31. However, the reasonableness standard of review requires a "robust review" and it is not enough for the outcome of a decision to be reasonable. Both the outcome and the reasons that justify the outcome must be reasonable. Accordingly, there appear to be some factors that require consideration.

32. A few preliminary concerns surfaced in my initial review of the evidence before me. I have outlined them below.

III PRELIMINARY CONCERNS

Redaction

33. I have access only to the materials submitted by the parties, which includes a redacted version of each of the Investigator's Report and the Summary Report. It appears that the Adjudicator had access to an unredacted copy of the Investigator's Report in making the Decision, as did the Investigator in preparing the Report.

34. I inquired at the hearing as to who made the redactions. Neither of the parties could answer with any certainty. In reviewing the materials more closely for my decision, it appears that the redactions may have been made by the ITP.

35. Although the redactions appear to have been made to protect the identity of the complainant, I am not aware of any oversight on the scope of the redactions. In

[1] *Canada (Minister of Citizenship and Immigration) v. Vavilov* (2019) SCC 65, para. 100.

addition, it appears that the original intention is now moot as all parties appear to have knowledge of the identity of the complainant and Mr. Bryan appears to have acknowledged that he made the Complaint in the quote provided in paragraph 26 of the decision for the Related Complaint. This raises the question as to the necessity for the redacted Report and Summary Report, particularly on appeal.

36. It is possible that some of the conclusions reached by the Investigator or the Adjudicator may draw upon unredacted information. In the Decision, the Adjudicator accepted the Investigator's Report and asked the parties to make submissions on whether there were any significant flaws in the process followed by the Investigator, or any conclusions reached that were not consistent with the facts found by the Investigator. It may be that I will miss some of the subtleties that may have resulted in some of the conclusions drawn by the Adjudicator as well as potentially exculpatory evidence, because of the redactions. As a result, if I find some conclusions not reasonable in the circumstances, it may be because I did not have access to the same information the Adjudicator or Investigator had.

37. The complainant's interview is heavily redacted and arguably prevents what may be exculpatory evidence from being in the record. The interview with the Claimant and other witnesses are not as heavily redacted and the Claimant suggests that there is inclusion in the witness interviews that portray the Claimant in poor light, much of which is hearsay. The Claimant also submits concerns over things that were not redacted, suggesting that some of the information in the Investigator's Report was unnecessarily prejudicial to the Claimant and should have been redacted. For those reasons, the redaction should have been transparent and there should be some oversight to ensure that inadvertent bias does not impact the outcome of the matter.

38. The Claimant suggested that he did not have an opportunity to challenge the accuracy of the redacted information and it could have resulted in unconscious bias. Whilst I understand the concern expressed by the Claimant, I note that the Claimant was provided an opportunity by the Adjudicator to address any flaws that the Claimant saw in the process and did so. The Adjudicator did not acknowledge they were flaws and noted that the Investigator did not include any reference in her findings to such allegedly prejudicial statements. This appears to have been a reasonable approach.

Clarification

39. On the eve of the hearing, a clarification ("**Clarification**") was received as follows:

> *A suspension under the Policy is "from participation, in any capacity," and that includes spectating at all events including practices, games and tournaments sponsored by, organized by, or under the auspices of Hockey Canada. The factors considered in my decision support a complete suspension, including spectating, until the Respondent has satisfied the education requirements and has spent a sufficient time away from hockey.*

40. Given that the Clarification was received more than two months after the Decision was rendered and was communicated to the parties just a day prior to the hearing being held, it raised some concerns surrounding its appropriateness.

41. It was satisfactorily explained, however, that the Clarification resulted from an incident that may form part of another complaint and the timing was merely coincidental.

42. I would not mention it except for the fact that the Clarification relates to the sanctions in this case. In his Decision, the Adjudicator specified that the sanctions applied to the Claimant's participation in hockey governed by Hockey Canada. The Adjudicator appeared to be very conscious of the scope of his sanctions and it is clear that the sanctions do not apply to the Claimant's involvement in unsanctioned activities.

43. In reviewing the Clarification, it purports to limit the Claimant's involvement as a spectator at HC events and clarifies that the intention is for the Claimant to spend "*a sufficient time away from hockey.*" Given that the Claimant still has other, unsanctioned activities involving hockey, that may be somewhat contradictory to the prior acknowledgement of scope.

44. Further, I inquired if the Respondent rents or owns the facilities at which the majority of activities would be conducted and was informed that most of the facilities are public facilities and are not under the auspices of HC. It raises a legitimate question as to whether HC can limit the Claimant's attendance at a public facility, any more than it can regulate his involvement in unsanctioned activities.

45. HC's response to my inquiry was that this is a common restriction in doping offences. I would suggest that there must be some basis for application and a cursory review of the Policy indicates it does not appear to have any application to spectators as "participating" in HC activities, but I did not hear argument on that point.

Self-Represented Party

46. The Claimant submitted that he did not really understand what was going on when he received the Complaint, nor did he appreciate the seriousness of the process. No one told him that he should obtain counsel and he did not perceive the matter to be very serious because he did not even hear about a concern until more than three months after the Game. He expressed a belief that the truth would come out and the matter would end. He suggests that had he known about the risk he was facing for his involvement in coaching and the damage to his reputation, he would have sought legal aid much earlier and it may have prevented some of the conclusions from being drawn.

47. The Respondent suggests that many of the submissions made by the Claimant should have been made when the Adjudicator invited submissions on the Report and sanctions. HC suggests that the Claimant should not have a second attempt to revise the submissions to address flaws in his initial attempt.

48. The Claimant suggests that it was because he was unrepresented that he did not know how to effectively present the facts and the Adjudicator's Decision evidences how ineffective he was at communicating the facts.

49. I note that the Adjudicator was very clear in his Procedural Order and his requests for what information should be submitted. That would argue against any impact of a self-represented party. On the other hand, there was complexity in that there were two complaints being addressed, not just one, and the suggestion that the two complaints "*are nearly identical and the facts as found in the Report will be used in the [Related Complaint]*" certainly could have benefited from counsel advice. At the same time, only written submissions were to be made so there was limited assistance that could be given to the unrepresented party to help formulate responses to issues raised by the complainant, as set out in the Report.

IV HEARING

50. The hearing was held on December 19, 2023. Documents were submitted by each of the Claimant and the Respondent prior to and following the hearing.

51. The Claimant submitted four grounds of appeal to the Decision of the Adjudicator: (i) there were significant flaws in the process followed by the Investigator; (ii) the

Investigator erred in finding that the alleged behaviours occurred on a "balance of probabilities"; (iii) the Claimant was significantly prejudiced by the delay between the date of the alleged incident and the date the Claimant was notified of the Complaint; and (iv) the severity and length of the sanction imposed was unreasonable.

52. At the end of the hearing, I reserved judgment but confirmed I would be issuing my decision as soon as possible and in accordance with Subsection 6.12(a) of the Code.

V GROUNDS OF APPEAL

Ground 1. Flawed Process

53. The Claimant suggested, as his first ground for appeal, that the finding by the Investigator resulted from a flawed process. He originally proposed six alleged flaws in the submission to the Adjudicator and the Adjudicator addressed each and every one in his Decision.

54. Evidence of the errors in process submitted on appeal included: (i) an appearance of bias against the Claimant based on the attack on personal characteristics of the Claimant by the Investigator in her report; (ii) alleged collusion by witnesses affiliated with the person making the claim based on the similarities of the evidence provided to the Investigator; (iii) despite the referees recalling hearing some back and forth from the coaches and warning that a bench minor would be forthcoming if it didn't stop, only the team with the person making the Complaint received such penalty during the game; (iv) none of the referees recalled what was said by Barch which suggests the words were not as significant as alleged in the Complaint; (v) the Investigator was not thorough as no effort was made to corroborate the Complaint by evidence of independent people, even though Witness 1 stated that "*everyone heard BARCH, he was loud [a]nd it was constant*"; (vi) the Investigator also did not investigate the actions of the person who filed the Complaint, despite a credible witness affiliated with the person making the Complaint suggesting the matter may have been initiated by the bench of the person making the Complaint. I examine each of the alleged errors below.

(i) Bias

55. The Claimant submitted that the Investigator had a personal dislike for the Claimant's personality and made findings on his credibilty as a result, despite that not being one of the 12 enumerated factors to assess credibility.

56. Bias requires evidence that the person making the decision was unable to impartially evaluate the facts that were presented for determination.

57. There was no expression of personal dislike by the Investigator. The Investigator assessed credibility against the 12 enumerated factors and her reporting on what the Claimant said or did and her interpretation of those actions to justify her credibility findings appear reasonable. The Investigator comments on the personal characteristics of the Claimant were not indicative of bias but were observations made in the course of determining a conclusion on credibility.

58. The Adjudicator found that conclusions by the Investigator applied to assess credibility did not appear to impact her ability to conduct the investigation and she supported her conclusions based on her exchanges with the Claimant.

59. I agree that Arbitrator Bennett, in *McInnis v. Athletics Canada* (SDRCC 19-0401), para. 133, correctly outlined that the test for determining bias is a reasonable apprehension of bias and the threshold for finding bias is high. In this case, there was no evidence presented that supported any bias on the part of the Investigator that prevented her from impartially evaluating relevant information. The fact that the Claimant did not come across well to the Investigator and she reported her observations of his behaviour and apparent motivations does not constitute bias.

(ii) Collusion

60. Similarly, there was insufficient evidence of collusion provided by the Claimant to find that the parties colluded prior to being interviewed by the Investigator. The Investigator examined such things in her Report and concluded the witnesses were credible and I find the rationale to be reasonable in the circumstances.

61. After reviewing some of the facts, the Adjudicator stated at para. 50 in his Decision: "*There is no error in process in failing to identify collusion between Bryan, Tangalin, and Bullen because it is unlikely that any exists*." I also do not believe there was intentional

collusion. However, the Adjudicator found that it is likely there was specific recall of the parties affiliated with the complainant because:

> [i]*t is reasonable to believe that those that are subject to verbal abuse will have a clearer recollection of what was said than unaffected bystanders. The evidence provided by Tangalin and Bullen is consistent with that given by Bryan, but it is not identical. Their evidence is detailed and provides ample support for the conclusion reached by the Investigator*.

62. Were the <u>other</u> Ottawa coaches' targets of abuse? Should they have reason for the clearer recollection, as the Adjudicator found was reasonable?

63. There could legitimately be another reason for the specific recall. We are aware of the impact discussion can have on witness recall. The Game occurred at 1 pm on December 29, 2022. The Complaint was filed on December 29, 2022 (and supplemented the next day). It is unlikely that a complaint would have been filed without discussion amongst the coaches. Were the words used in their respective interviews their own words or their interpretation of words that had arisen in their discussions with others?

64. Further, Witnesses 10 & 11 state on p. 29 of the Report, "*He [the complainant] articulated this and he was visibly upset. He apologized that the kids had to be subject to something like that. He's a good communicator so he wanted to communicate that to us.*" Clearly there was some discussion regarding the behaviours prior to the interviews by the Investigator.

65. Further support for discussions between the complainant and a witness is in the Summary Report on page 2, where it states:

> *[redacted] was present for the December 29 games. [redacted] met with the complainant <u>shortly after the game that evening</u>. [redacted] witnessed how visibly upset the complainant was about what allegedly had occurred on the bench with BARCH. [redacted] stated the complainant could barely get his words out when they were talking. [emphasis added]*

66. There is also mention of an apparent meeting held with Ottawa Myers' parents on January 3 but no submissions were made to me in respect of the content of that meeting or whether it in fact related to the allegations of what occurred at the Game. That meeting may be what Witnesses 10 & 11 were referring to regarding the communication by the complainant. There was also no evidence presented regarding the discussions between members of the Ottawa Myers that occurred shortly after the Game or leading up to the making of the Complaint against the Claimant, let alone any

discussions that may reasonably have occurred in advance of any alleged meeting with the parents of the players who may have witnessed some of the alleged behaviours at the Game. There is no evidence as to whether witnesses were asked questions by the Investigator regarding any discussions regarding the situation with anyone prior to the interview. The Investigator may have done so in assessing credibility.

67. The conclusion on collusion made by the Arbitrator does not take into account the likelihood that the witnesses had reason to discuss the evidence while it was fresh in their minds and on numerous occasions prior to the interviews but the other witnesses had none.

68. I note that there is little evidence before me with respect to those occasions, including immediately after the game, the next day or in preparation for a suggested meeting with the players' parents on January 3, 2023, and mere speculation is insufficient to overturn a reasonable conclusion by the Adjudicator.

(iii) One sided or Back and Forth

69. The witnesses were divided as to the alleged abuse. The two witnesses from Ottawa Myers' bench (Witnesses 1 and 3) and the complainant were unequivocal – it was one-sided and lengthy. They include specific threats and swear words.

70. The three bench coaches for Huron Perth Lakers (Barch, Witnesses 7 and 8) were equally unanimous that it was back and forth. They acknowledge there was swearing but none referenced threats.

71. The referee (Witness 6) indicated that the exchanges were back and forth, and a player's parent (Witness 9) suggested provocation. The other referee and linesperson (Witnesses 4 & 5) were more equivocal – one indicating that he was "*trying to calm the game down*" (which implies it was not one-sided) and the other stating that Barch was being "*verbally aggressive*" (without reference to the whether more than one person participated in the exchange). The remaining witnesses (2, 10 & 11) did not have relevant evidence in this regard.

72. The Agreed Statement of Facts set out in the Report states at para. 4.10:

> *At some point the Referee came over to the team benches and told them to settle down. No penalties were assessed [at that time].*

73. The referee had warned the benches if they did not stop the back and forth, he would penalize them. The Claimant suggested that the bench minor against Ottawa was because Ottawa would not stop (see p. 31 of the Report). The Adjudicator stated at paragraph 18 of his Decision that the bench minor was for arguing a line change call. The only evidence in the Report that could be the reference for the Adjudicator's conclusion appears to be redacted on p. 15. The Agreed Statement of Facts fails to cite a reason in para. 4.11 of the Report:

74. "*A bench minor was called in the 3rd period against the Ottawa Myers. The game sheet does not reflect what the bench minor was for.*"

75. Accordingly, in the absence of evidence supporting the Adjudicator's finding, it perhaps raises a question of whether exculpatory information was ignored in the finding of fault and not taken into consideration in the determination of sanctions.

(iv) Referee Recollection

76. In her report, the Investigator stated:

> *The game officials [redacted] confirmed that there was some "back and forth" on the bench during the game. It was confirmed that there was some swearing, but they did not hear or recall specifically what was being said. [Emphasis added.]*

77. In her findings, the Investigator suggests that time was the culprit because the investigation was more than six months after the event and their recall was cloudy. There is no suggestion, however, that the officials were not doing their job. Had the game officials heard some of the more egregious utterances alleged, there is no question that an unsportsmanlike penalty would have been called. Thus, it is not the referee's recollection that is impacted, and time should not be responsible for the failure of the referees to recall the more egregious alleged behaviours.

78. The Claimant has suggested that the fact the referees did not hear the more significant abuse means it did not occur. I do not subscribe to that theory as it is possible that the referees simply did not hear it because they were not near the benches at the time it occurred. There is evidence that the officials were frequently away from the benches, as evidenced on video, and may not have heard everything.

79. Alternatively, the Claimant has suggested that the fact the referees do not recall the abuse or threats is because it was not particularly significant. Had it been significant,

the referees or linesperson would have heard at least some of it (it was "*constant*" according to the complainant and Witness #1). There is no evidence that Barch, who has been characterized as intense, was timing his verbal assault while the referee or linesperson was away from the post near the bench. It raises a legitimate question as to the nature and extent of the alleged abuse.

80. Further, if it was as bad as alleged (and harmful to the children), why did the opposing coach not draw it to the attention of the referee – particularly when the referee approached to asked them to cease the back and forth and threatened bench minors if they did not stop? The Claimant suggests that it is reasonable to conclude that the fact that no action was taken by the game officials was because it was not as offensive as alleged.

81. There are suggestions by certain witnesses that it was merely "*chirping*" and not threatening. This may account for no action by the referees and lack of specific recollection. It does not explain the apparent impact on the complainant, nor does it address the evidence of the players on the Ottawa bench moving further away from the Lakers' bench. This movement could be caused by any number of reasons, including the players being impacted by what was being said and voluntarily moving away, or the result of coaches asking the players to move down the bench to move away from swearing, or for a reason unrelated to the behaviours complained of. There is no evidence in that regard before me.

(v) Thoroughness of Investigation

82. The Claimant submits that the fact the Investigator did not interview the supervisors of the referees at the Game is a flaw in the process. This was also submitted to the Adjudicator, and he determined it was not an error of process. The Adjudicator found in paragraph 35 of the Decision that:

> *It is up to an investigator who they interview, and an investigator must also determine when sufficient evidence has been gathered to make factual determinations. There will almost always be more people that could have been interviewed and that is the case here with the referee supervisors. But I do not see it as an error of process to limit the witness list to the thirteen people interviewed by the Investigator. It was not an error to not interview the supervisors of the on-ice officials.*

83. The Investigator must determine who is relevant to be interviewed. The Adjudicator did not find it to be a process error but there is a legitimate question because of the conflicting evidence from the respective benches. Was it not appropriate to interview at least one independent person to get some objective perspective on the activities that occurred at the Game? Since most people attending the Game would have had reason not to be objective, the advantage of the supervisors of the referees is that they are trained to look for things such as inappropriate behaviours and they were likely the only independent people at the Game.

84. Furthermore, Witness #1 stated that "*[e]veryone heard BARCH, he was loud. And it was constant.*" It does not seem the best approach to self-censor and conclude how someone might respond without asking them.

85. That said, it is entirely possible that the supervisors may have seen nothing or recalled nothing six months after the Game was over. However, if something were not recalled, that would suggest they were not able to hear or see things or it was not sufficiently concerning to be remembered. This would be <u>their</u> evidence and not mere speculation on whether they have something relevant to provide, by either the Investigator making a bald conclusion that they have nothing to say, the Adjudicator justifying it by concluding it was a reasonable decision by the Investigator or me questioning the non-inclusion of at least one objective person as a witness.

86. The Investigator made the determination not to interview the supervisors because, in her opinion, "*they would not be able to provide relevant evidence due to their physical positions in the arena.*" This may be entirely accurate but is it appropriate to choose not to seek out the only people who are not connected to one of the teams when matters of credibility exist? Should they not be the ones to say whether they have relevant evidence? If they did not have any evidence, that would have been easily ascertained and not taken much time. Even interviewing one supervisor of officials would have been sufficient if that person said they had no knowledge about what occurred. Is the justification by the Adjudicator appropriate, given the potential for the importance of the evidence?

(vi) Investigation Scope

87. I accept the fact the Investigator did not investigate the actions of the person who filed the Complaint. The Investigator set out her scope in the beginning of her report and it did not include investigating the person who filed the Complaint.

88. Thus, of the six points submitted as reasons for a flawed process, I find that three of them were not of concern. The other three points submitted regarding a flawed process, related to errors on conclusions of what was used as evidence of the breaches and the resultant severity of the sanction.

Ground 2 - Error Regarding Finding of Behaviours

89. The Claimant alleges some of the more serious threats or harassments did not occur. The Claimant suggests that he used profanity but never uttered any death or actual threats of physical harm.

90. The findings of the Investigator are redacted and prevent a complete understanding of her conclusions regarding the specific language alleged.

91. Barch admitted to behaviours that breach the codes of conduct, including swearing and threatening language ("*don't start something you can't finish*"). The Claimant submitted that of the 13 witnesses interviewed by the Investigator, the only witnesses providing evidence on the more serious breaches were the members of the opposing bench. It is reasonable to assume the Investigator would have asked if threats had been made by Barch. There were no other witnesses, however, who confirmed such wording. There were witnesses, including those found to be credible from the Claimant's bench and a person standing between the benches, who did not state such language occurred.

92. Witness #7, was considered credible, and provided the following evidence on the exchanges:

> *It got heated and there was arguing and confrontations back and forth between coaches. I don't know the words that were said. They were both doing the talking. I know there was probably swearing. I am sure there was. I think it was at a break, and Krys thought they [redacted].*

93. Witness #8 was not considered to be credible because of possible collusion but the rationale is redacted. Witness #9, who was between the benches was found to be credible and provided the following evidence:

> *BARCH said something like: Do you know what I did for a living? You shouldn't start something you can't finish. … BARCH might have said something like "you're an idiot." … <u>It was just chirping</u>.* [*Emphasis Added.*]

94. The Claimant raised his concerns prior to the Adjudicator making his determination and the Adjudicator did not accept them and found that the Investigator was suitably thorough and appropriately concluded that the breaches of conduct had occurred, as alleged. The Adjudicator found the conclusions of the Investigator to be reasonable and not to be re-litigated.

95. The Investigator found on the balance of probabilities that *the* "*alleged behaviours did occur. BARCH did utter threats, harass, and bully [redacted] December 29, 2022*" (Section 9.3, Page 38 of the Report).

96. The Adjudicator found that "*It was reasonable for the Investigator to draw the conclusion, based on the evidence as a whole, that the allegations in the Complaint likely took place*" because the evidence of Deboer and Henderson provided "*some support for the allegations made by the anonymous complainant.*" The Adjudicator acknowledged that there was no similar evidence for such abusive and threatening behaviours but found in paragraph 53 of his Decision that the evidence provided by two of the Lakers' coaches "*provided some support for the allegations made by the anonymous complainant*." He noted that the Investigator had erroneously used the word "*similar*" but that a reasonable reader would know that the comments were not the same. I note that the reference to "*similar*" must be redacted, as it was not in the copy of the Report I reviewed.

97. With respect, this conclusion does not appear to take into consideration that the evidence as a whole about the most concerning language resulted in the severe sanction but consisted only of the evidence provided by those affiliated with Ottawa Myers team. The evidence that constituted "*some support*" related to some back and forth and the conclusion was not that it was evidence that Bryan had made the same sort of abusive comments (because the Investigator's scope did not include uncovering what Bryan might have said).

98. The conclusion of the Adjudicator requires some analysis. A person may open a door – can that be used as providing "*some support for the allegations*" that the person ripped the door off the hinges and damaged personal property because the property damage occurred? What if there was no property damage? Does it still provide some support? Does the fact that the Claimant admits to a transgression provide some support that he was responsible for any other transgressions alleged?

99. The Adjudicator found that the more egregious behaviours included some very specific and excessive threats in addition to swearing (as set out in the facts for the Related Complaint) that caused the complainant to be very emotional in his evidence (see p. 16 of the Report and particularly page 3 of the Summary Report – which states:

> *Testimony from the complainant was emotional and intense, and his upset was still evident five months after the occurrence. The complainant was deeply affected by his interactions with BARCH's conduct, at the game on December 29, 2022.*

as well as the evidence of other affiliated Ottawa coaches as witnesses (e.g. see Witness #1, page 19 of the Report).

100. Although it is exceedingly difficult to prove a negative, there are some concerning factors present that I find difficult to reconcile with the conclusions reached by the Investigator and the Adjudicator. I note that I am asked to be prescient because I do not have all the evidence at hand. Even the evidence I have been provided has important parts redacted. Despite those constraints, I am being asked to determine if the sanctions made by the Adjudicator were reasonable in the circumstances.

101. The Decision failed to consider whether there was some concerning language originating from the Ottawa bench because that was not part of the Investigator's scope. Similarly, there was no examination as to whether provocation played any role.

102. As indicated above, there was discussion regarding the allegations by the complainant with some witnesses that was evident in the Investigator's Report. There is also mention in the Report that the parties shook hands at the end of the Game (as evidenced by Witness #3 at p. 21 of the Report):

> *At the end of the game, it was like BARCH flipped a switch and it was over (his behavior). They had won and we shook hands.*

103. The only testing that was done was by the Investigator, with a limited scope, and she concluded that breaches occurred as alleged, based solely on the evidence of one side.

104. There is a legitimate question why something that caused such an emotional reaction was not immediately reported to the on-ice officials, especially given the Complaint was made the same day and there is evidence of the complainant's emotional reaction provided by someone who met with the complainant on the night of the Game either shortly before or after the time of the filing of the Complaint.

105. The complainant did not express any concern to the on-ice officials and shook hands at the end of the Game but felt obligated to apologize to the parents, immediately filed a complaint with the ITP, and was emotionally distraught for an extended period of time. Some things appear to be difficult to reconcile with the conclusions reached - but were not addressed.

106. I do not have any trouble accepting that the Claimant crossed the line and was intense and inappropriate towards the complainant. Games can get emotional, and it sounds like there was a lot of emotion in this one. The referees were struggling to control things and there were other inappropriate things alleged that did not target the Claimant (such as the jeering or chirping when a player was injured in the third period.) This is not appropriate behaviour in a game and appears to be some of the very culture that HC is striving to eradicate. Further, the Claimant admitted to behaviour that breaches applicable conduct codes. The issue is to what extent and whether the behaviour should constitute an aggravating factor in the sanction.

107. For those reasons, the conclusion of the Adjudicator to adopt the Investigator's conclusion is a potential concern. There is reason for cross-examination in legal matters - if we only hear from one side of a dispute, we do not get the full picture. The scope of the Investigator's review was limited to considering what was said by the Claimant. There were clearly differences in the evidence provided by the parties and to take only one side's evidence and not to seek independent evidence appears to be a potential problem.

Ground 3 - Delay

108. The Claimant submitted that the delay in the Claimant becoming aware of the Complaint is a significant concern. Delay was not the fault of the parties but occurred, nonetheless. Whilst the complainant and the witnesses from that team had the opportunity to discuss what occurred over some time, and while it was fresh in their

minds, all other participants had no reason to recall the incidents until four to six months later. Perception of even egregious behaviour may lessen in such time (time heals all wounds).

109. There is good reason for communicating on a timely basis any complaint made. Evidence dissipates over time, particularly if there is no reason to recall the incidents that may have occurred. The fact that the Claimant did not know that there was any concern about his behaviour is not only unfair to him but also potentially to the children he was coaching – the very people we are belatedly acting now to ensure their safety and well-being. Acting promptly ensures that the players would not be subjected further to ongoing inappropriate behaviours, because of the delay in communicating the concerns to the Claimant.

110. In fact, as the Claimant testified, the delay also caused him to minimize the importance of the Complaint. Some of the very evidence relied upon by the Investigator may have had a different slant if the concern about behaviour had been promptly raised following the game and communicated that a complaint had been filed and was proceeding to investigation. At a minimum, it would have caused the Claimant to examine the codes of conduct and may have resulted in him taking it more seriously than he appears to have taken the Complaint when it was first communicated to him months' later when things were not fresh, and his behaviours may have been diminished in his mind.

Ground 4 – Severity of Sanction

111. In his decision, the Adjudicator referenced only "aggravating factors" and did not mention any "mitigating factors." The Adjudicator notes at paragraph 103 that the parties have not submitted "*any other mitigating or aggravating factors here*." Given that the independent evidence indicated that there was a back and forth (the referees – Witnesses 4 and 6 on pp. 22, 23 of the Report) and that the exchanges were initiated by the Ottawa bench commenting on the Lakers' players (Witness 1 stating that the initiating comment came from "*our bench, directed to the play*" – p. 20 of the Report - and that "*the refs at one point came over and said I hear there is some back and forth*" – p. 21 of the Report), it stands to reason that there might be some mitigating factors such as provocation or retaliation that the Adjudicator might have surfaced in the same manner as he referenced the Related Complaint as an aggravating factor.

112. The aggravating factors cited by the Adjudicator include the following: (i) the nature of the outburst ("*meant to intimidate, and* even show dominance over, Bryan"), (ii) Barch's prior history (citing four instances in the duration of Barch's coaching career which the Adjudicator found were "*consistent with the Complaint here*"), (iii) the risk of other outbursts if no mitigating steps are taken (the history indicates "*an outburst like this in response to a relatively small stimulus, raises concerns that similar situations will arise in the future*"), (iv) the fact that Barch had "*not admitted to the outburst at the Game*" and "*continues to state that it was a 'back and forth' when the Report found otherwise*," (v) the impact his conduct has on others, including Bryan, (vi) the retaliatory conduct in filing the Related Complaint (was a "*form of retaliation [by Barch] against who he believes is the anonymous complainant*").

(i) Aggravating Factor – Nature of the Outburst(s)

113. I have discussed this factor in a prior section dealing with the flawed process. It appears to me that the evidence supports a back and forth, but the Investigator's scope was limited. The findings of the Adjudicator that the outburst(s) by Barch warrants a more severe sanction in accordance with the Policy requires some consideration.

114. Verbal abuse is no less concerning than physical abuse. In this situation, some have referred to it as "chirping," suggesting that it may be more acceptable in sport. This does not appear to be a desirable thing, particularly where HC is attempting to change its culture. Sometimes the pendulum has to swing too far in order to end up where desired.

115. There is a question on the balance of probabilities as to what was actually said. I do not believe that it is essential for an independent party to have witnessed the outburst(s) but there is some legitimate question as to what was said, even if one takes the position of accepting the stated harm caused to Bryan without any independent corroborating evidence.

116. I have to weigh the conclusions reached by the independent Investigator who heard the evidence from the parties and does not appear to have any reason to favour one party over the other. At the same time, there are some questions raised that were not addressed in the evidence considered by the Investigator, such as why the complainant (or a bench coach) did not raise concerns with the referees for the entire game if the

matter continued unabated for most of two or more periods? Why did the referees not hear or recall any of the alleged abuse? Is there objective evidence to support the allegations?

117. The Claimant raised the question as to why is there no evidence of the complainant seeking some form of counselling, given the alleged severity of the impact as evidenced by communications by the complainant or the complainant's wife to others? I do not want to put too much emphasis on this point but when someone is suggesting that a person should be permanently banned, there should be something more than a suggestion that the actions were significantly damaging, and some corroborating evidence from unimpeachable sources would also be prudent. Should this have not been a mitigating factor or at least addressed in the Decision?

(ii) Aggravating Factor – Prior History

118. The Adjudicator cited four complaints against Barch that were used as aggregating factors. After inquiring to the ITP, the Adjudicator received the "previous complaints that had been lodged against Barch." The complaints were as follows:

(a) From a complaint made April 2, 2022, the Claimant was alleged to have used bad language with 12 year olds – "*loud vulgar screaming*" to pump them up. The Chief Referee thought it sounded like he was berating kids and investigated. The Claimant subsequently apologized for his loud voice and the Chief Referee informed him that he was not concerned with the loud voice but "*it was the vulgar language that he was using addressing his 12 year-olds.*" The Chief Referee indicated that Mr. Barch obviously "*did not pay attention in his coaching clinic as he was facing his entire team using foul language that [the Chief Referee] believe a 12 year old should be subject to.*" He went on to say he strongly believed that "*this coach crossed the line with this type of coaching and language at this level.*" There is no evidence before me of any outcome to that complaint. This did not evident any attempt at domination over or intimidation of the young players or bear any resemblance to the actions referenced in the Complaint.

(b) A second complaint referenced a game between Huron Perth Lakers and Windsor Jr. Spitfires in October 2022. The Adjudicator continually refers to "Barch" but the actual complaint, as I read it, and the Alliance Hockey sanction, refers to the

"*coaching staff*" or "*coach*" and the findings of Alliance Hockey is that" *[t]he actions of [a player] are the responsibility of the Head Coach*" and that the "*Head Coach had a responsibility to defuse the situation.*" As indicated in the Adjudicator's award, the report found that "*the actions of the Huron Perth U14AAA team instead escalated emotions and potentially placed players in vulnerable positions.*" It did not say the Head Coach caused or did anything to escalate the situation, but rather that he "*had a responsibility to defuse the situation and did not.*" The Discipline included "[*t]he actions of the Head Coach are paramount to player safety and any failure to recognize player safety in the future will result in an investigation and potential suspension.*" It does not appear that there was any investigation relating to player safety in in this Complaint because it was directed towards the issue of abuse of an opposing coach.

(c) I do not have the referee's report referenced in the Adjudicator's Decision regarding a January 15, 2023, game between Huron Perth and Brantford. The linesperson's report indicates that the "*behaviour of the coaching staff from the Huron Perth Lakers was disgraceful. The coaches from Huron Perth Lakers were verbally abusing all on-ice officials for most of the game.*" I did not see any specific reference to the Claimant regarding such abuse. There are some comments attributed to the Claimant in the Adjudicator's Decision, but they do not appear to be abusive or vulgar in any way, although they may not be appropriate. The issue I have with the reference by the Adjudicator is that the game occurred <u>after</u> the incident in the Complaint. Can it be considered to be evidence of "*prior history and any pattern of inappropriate behaviour*" when it occurs **<u>after</u>** the incident being investigated?

(d) The Adjudicator erroneously reports as another instance (a fourth incident), a game between Huron Perth and Brantford on January 16, 2023, because the email was sent January 16, 2023, but it actually appears to reference the game played on January 15, 2023, that is mentioned above. The incident described in the Adjudicator's Decision referenced maltreatment by an assistant coach, not the Claimant and cannot be considered evidence of prior history.

119. The Adjudicator finds at paragraph 95:

> *That prior conduct is consistent with the Complaint here. It paints a picture of a coach that uses vulgar language with children, is disrespectful, and demeaning. This factor indicates that a more severe sanction is appropriate.*

120. With the greatest of respect to the Adjudicator, who I believe did an exceptional analysis for the most part, this conclusion does not appear to be warranted, based on the following:

(a) In the first of the prior history, the Claimant did use vulgar language with children and it should not be condoned. However, it was not used for anything that resembles what formed the Complaint. It might be appropriate to have addressed it at the time by reminding the coach what the "coaching clinic" says about such language with children but there does not appear to have been any sanction imposed despite the complaint by a chief referee (at least nothing is before me). It does not appear appropriate to lump it into this matter as an aggravating factor since it is different inappropriate behaviour and no sanction was imposed, raising the question as to whether the Claimant was even made aware of the concern.

(b) The discipline that was imposed on the Claimant, as Head Coach, in the Windsor Game related to his responsibility for player safety but that does not appear to be part of the Complaint.

(c) The third (and fourth) "*prior*" complaint is not prior at all and should not be considered (and would not have been if the Compaint had been addressed on a timely basis). Further, it is not specific to Barch but the Adjudicator refers to it as if it were.

121. Although the prior complaints do not, in my opinion, paint the picture the Adjudicator described, they do suggest that there are some potential behavioural concerns with respect to the Claimant. Accordingly, the conclusions by the Adjudicator that they are aggragating factors may be reasonable in isolation but the weighting would be adjusted, if solely because there were fewer complaints than considered.

122. I recognize that there is an issue of children overhearing the abuse of the coach in this matter. The fact that it appears not to have been specifically addressed in the redacted Report does not diminish potential harm and may go to some aggravating factor.

However, the Claimant submits that he has coached over 500 games without incident and there is no mention in the Decision and whether that should be a mitigating factor.

(iii) Aggravating Factor – Risk of Further Outbreaks

123. The ongoing risk was not part of the Investigator's scope and is appropriately left to the Adjudicator. The Adjudicator found that "*an outburst like this, in response to a relatively small stimulus, raises concerns that similar situations will arise in the future*." There is no mention of the number of games in which no similar outbursts have occurred or even analysis on the stimulus that caused the outburst. It goes on to reference the previous complaint history – which is flawed – in determining that it justifies a more severe sanction. I have no additional information before me. Although I disagree with the conclusion reached, the decision made by the Adjudicator in isolation may be within a reasonable range, although with a faulty base.

(iv) Aggravating Factor – Admission

124. The submission by the Claimant is that he could not admit to something he did not do. He has continued to suggest that the exchange was a back and forth and that it was initiated by the opposing bench directing comments at his players. The Claimant has admitted profanity and some derogatory language towards the person making the Complaint. These behaviours constitute a breach under the applicable codes of conduct. The Investigator's finding regarding the Claimant's credibility: "*to be called out on his bad behaviour could cause him to skew his perspective of the occurrence*." The Claimant has admitted to behaviour that breaches the codes of conduct. What he has consistently done is refused to admit to certain, more egregious behaviours that have only been alleged by the members of the opposing coaching staff.

125. Should the fact that a responding party refuses to admit action that he disputes occurred, be taken as an aggravating factor?

(v) Aggravating Factor – Impact on Others

126. The Adjudicator states at paragraph 99:

> *The impact of such an aggressive outburst, including threats and vulgar language, is significant. The Report described the intense impact it had on Bryan, stating on page 37 that Bryan "was deeply affected by his interaction with BARCH at the game on December 29, 2022." I also find that the players on both teams at the Game would have been negatively impacted by the outburst. Finally, as noted above, I find*

that outbursts like this bring the sport of hockey into disrepute. I find that this factor indicates that a more severe factor may be appropriate.

127. The redacted version of the Report does not include such wording. I also do not have the basis for the finding but I have submissions being made by the Claimant that there is no evidence to support that conclusion – Mr. Bryan has never missed any work and it has not caused him to seek any assistance. The Investigator did find Mr. Bryan to be emotional in relaying the occurrence and I have no reason to doubt her findings.

128. Mr. Bryan was not cross-examined on the impact and his emotion appears to have a significant aggravating impact on the sanction. The Claimant also did not have an opportunity to challenge the specific wording because it was redacted. It is a fine line that must be drawn between protecting the victim and testing the basis for such emotion. A finding of maltreatment could have a significant impact on a coach's reputation and that must be balanced with the negative impact of a complainant being questioned.

129. This situation involved one coach alleging that aggressive wording from another coach has had a significant negative impact on the receiving coach. The receiving coach has the ability, if being verbally assaulted and finding it hurtful, to seek assistance from the referee – one of whom was not that far from the bench most of the time. At a minimum, there should be some corroborating evidence supporting the impact. Allegations should not just be accepted at face value. It could be as simple as asking the complainant whether there has been any treatment sought or why he did not address it during the Game. I only have questions but no evidence to reach conclusions.

(vi) Aggravating Factor - Reprisal

130. The Report is well laid out that the scope of the investigation was to determine if there was sufficient evidence to support or refute the allegations that the Claimant engaged in behaviours that could violate specified codes of conduct and meet the definition of "Maltreatment" according to HC's Policy.

131. The Report was then used in the Related Complaint brought by the Claimant against the complainant, because the facts as found by the Investigator would be the same. It was not part of the Investigator's scope to consider whether the complainant uttered anything that might violate the specified codes of conduct or meet the definition of

"Maltreatment" according to HC's Policy. Additionally, some of the redacted wording may have provided valuable information to determine whether the motivation was retribution or simply to demonstrate that the Complaint was not being made by clean hands ("if you want to play that way, you are also not clean"), as suggested by the Claimant. Because any such wording was redacted, the Claimant had no opportunity to make such an argument for the Adjudicator to consider.

132. It is not for me to consider the substantive factors of the Related Complaint brought by the Claimant, but I do have an obligation to examine any evidence regarding reprisal since it was an aggravating factor in the Decision of the Adjudicator. My concern is the conflicting evidence on dates and the fact that the evidence relied upon by the Adjudicator was that the Related Complaint was filed by the Claimant in response to the Complaint. There is conflicting evidence before me as to when the Claimant received details of the Complaint, but the Related Complaint appears to have been filed on April 10, 2023. The ITP issued a limited interim suspension against the Claimant on April 8, 2023. I have no evidence before me specific to when it was received other than the Claimant submitted that he had learned of the initial Complaint on April 11, 2023.

133. Depending on the actual dates, the filing of the Related Complaint may very well have been a reprisal. The Claimant suggested that he filed the Related Complaint only after he read the Policy and realized that the initiating comments directed at his players justified a sanction under the Policy. It looks bad when there is a complaint filed and a related complaint is filed after learning of the first complaint. It is important to ensure that it is not retaliation. However, my only role is to determine whether the sanctions imposed by the Adjudicator were reasonable in the circumstances.

134. The fact that the Adjudicator did not expand the scope of the investigation but chose to use the same facts appears to be flawed, even though the Adjudicator did permit the parties to address any errors in such facts. There was no evidence sought on what Bryan had said to the Huron Perth Lakers. How could a determination be made as to the validity of the Related Complaint without at least examining if something were said that breached the codes of conduct? The Adjudicator correctly relied upon the Investigator's Report for the facts in the Complaint, in accordance with the Policy. It would be reasonable that additional investigation would be carried out for the Related Complaint, given the limited scope of the Investigator's role in the Complaint.

135. The Adjudicator considered the fact that a Related Complaint had been filed and found that it was in response to the Complaint. He supported that finding as retaliatory because there had been calls made and stated that "*Barch has gone out of his way to make this complaint process difficult for those involved, both by lodging this retaliatory complaint and by only admitting any responsibility after sanctions were imposed.*"

136. The Related Complaint (issued October 18, 2023) had not been determined at the time of the decision in the Complaint and there was no expansion of the Investigator's scope. The mere fact that the Related Complaint was filed may create a presumption that it was not filed in good faith, but the allegations need to be investigated. That did not appear to have been done prior to it being found to be an aggravating factor.

137. Once the Related Complaint was accepted by the ITP, the process should consider both complaints, not only one side. It does not appear that there was any further investigation made on the Related Complaint.

138. The Related Complaint was found to be an aggravating factor. The conclusion reached by the Adjudicator in paragraph 104 of the Decision was that the Related Complaint was:

> *clearly aimed at diverting attention away form [sic] Barch's own conduct, and a form of retaliation against who he believes is the anonymous complainant for filing this Complaint. Section 11 of Appendix A of the Policy states that complainants "shall not be subject to reprisal or retaliation" and I find that Barch's filing of the Related Complaint was retaliation and is an aggravating factor in determining the appropriate sanction here.*

139. The scope of the Investigator's Report was limited to whether Barch had engaged in behaviours that could violate the applicable codes of conduct and meet the definition of maltreatment in accordance with the Policy. The Related Complaint filed against Bryan for his breaches of the codes was therefore separate from the scope of the Investigator's Report.

140. Yet, the Adjudicator stated at paragraph 103:

> *However, I find that the Related Complaint is an aggravating factor. The Report found that this complaint was substantiated by the evidence the Investigator gathered. But Barch decided to file a complaint against Bryan for his alleged conduct during the same game in the Related Complaint.*

141. The conclusion of the Adjudicator raises questions of fairness to the Claimant.

142. The Complaint was anonymous, and the Related Complaint was filed almost immediately after, if not before, the time of the Claimant's receipt of the Complaint and well before the Investigation had commenced. The determination by the Adjudicator was made without considering whether there was any merit in the Related Complaint against Bryan – there can be a perception of retaliation but if there is merit in the Related Complaint, it should not be a race to file first or considered retaliation if both parties were engaged in policy breaches.

VI ANALYSIS

143. In today's climate, justified concerns raised about the safety of children under the care of coaches in sport appear to warrant significant sanctions. Based on recent media reports, one might consider that undesirable behaviour appears to be rife in sport and largely unchecked. With the numerous cases that have been highlighted in the press, including matters relating to junior hockey and the culture that appears to have been developed within elite hockey, a significant message that the era has ended appears warranted.

144. The Claimant expresses concern that he may be a sacrificial lamb, being punished for the transgressions of others. That may be an unfortunate side effect but there have been many other victims who have not been protected because the culture was protective of the coaches instead of the athletes. The Claimant has admitted to some behaviour that has perpetuated an undesirable culture within elite hockey and that has occurred because there was nothing to deter such activity. The Claimant has suggested that he has learned from this process and will be changing some of his approaches. Whilst I understand the concerns of Mr. Barch that the timing of his actions may have resulted in a harsher sanction because people are sensitized to correcting the situation, I cannot help but believe that the greater good outweighs any unfairness to someone

who may have been practising some undesirable behaviour for most of his coaching career without any corrective action being taken.

145. The concerns that need to be considered include the following:

(a) Evidence was provided that the exchanges may have been two-way and not overwhelmingly one way. The fact that the Ottawa team was penalized as a bench minor may support that the exchanges were not quite as one-sided as the witnesses affiliated with the Ottawa team portrayed to the Investigator. However, that was not within the Investigator's scope as set out in the Report.

(b) Was the investigation conducted by the Investigator appropriately thorough? I do not perceive my role to be to closely examine the investigation Report and question the professionalism of the Investigator. Certainly, in reading such report, the Investigator appears to have approached things in a very professional manner and to have drawn appropriate conclusions for the most part. It is not relevant whether I would have asked different questions or approached things differently or even drawn different conclusions. What is relevant, however, is whether the Investigator had reason to call additional or other witnesses prior to concluding that the incidents or behaviours, as reported, occurred.

(c) It concerns me that there was no independent evidence surfaced by the Investigator regarding the language or exchanges. It was stated by one of the members of the Ottawa Myers team (Witness No. 1) on page 19 of the Investigator's Report: "*Everyone heard BARCH, he was loud. And it was constant [sic].*" If everyone heard Barch, why was there no other evidence, other than from the people on the opposing team, about the more egregious abuse and threats?

(d) Why were no independent witnesses interviewed prior to concluding that the allegations of incidents, or behaviours, as reported, had occurred, as part of the Investigator's two-pronged test? The Claimant has legitimately questioned why people who were there to evaluate the officials were not interviewed. They were likely the only independent people in the arena at the time. For the Investigator to eliminate them as witnesses without good reason appears to me not to be reasonable – when the only evidence supporting the conclusions reached come from people affiliated with the opposing team. At a minimum, a question should

have been asked of at least one of the three OHL/NHL supervisors. It may be that the officials could have seen the action across the rink and could have provided a more objective view of what occurred. It may also be that they could not because they did not hear or see any relevant evidence because of their physical positions or that they did not recall anything specific – which brings me to another concern.

146. The delay in communicating the Complaint to the Claimant appears to have significantly impacted the Claimant. He testified that it caused him to diminish the apparent importance of the Complaint and resulted in not seeking counsel prior to responding to it. The delay also impacted the recollection of any witnesses that could have provided exculpatory or explanatory evidence for the Claimant. Although the delay was accidental and not the fault of the parties, it still negatively impacted the Claimant and does not appear to have been acknowledged in the Decision, nor was there any apparent accommodation made to alleviate its impact.

147. Finally, the incidents occurred during a game. The only penalty called relating to the interactions between the benches was a bench minor against the Ottawa team. It is understandable to me why the Investigator did not canvas information surrounding that penalty because it did not relate to the scope of her investigation. However, I question why the Adjudicator would not see the relevance of that matter and when faced with a related case, not require additional questions to be asked rather than relying upon the limited Report to address both issues. There is no evidence before me of any reports made following the game relating to the incidents. Although not determinative, it at least begs the question as to whether the alleged behaviours were as severe as was found by the Adjudicator. There was no physical contact, evidence legitimately supports that there were mutual exchanges and any damage to the players could have come from either party. I am not satisfied that the treatment of the Claimant in the totality of the circumstances was fair or reasonable.

148. It is not any one of the concerns on their own that causes me pause but the fact that none of them were addressed in either the Investigator's Report or by the Adjudicator in assigning weight to the evidence. It is difficult to be critical of either the Investigator or the Adjudicator, as they each, for the most part, did their jobs admirably. The Investigator focused on the scope provided and it is difficult to fault her for not examining independent evidence when so many people who were witnesses did not

recall the event clearly, but the people affiliated with the Ottawa Meyers recalled it in great detail and had taken actions that indicated that they were concerned with the well-being of the players who may have overheard the exchanges.

149. The Adjudicator adopted the Investigator's Report, consistent with Article 33.c of the Policy. He appropriately did not conduct his own investigation but also examined the conclusions drawn and accepted them after giving an opportunity for the parties to provide additional evidence and considering the evidence in total. Usually, that would be sufficient to warrant a denial of the appeal and not intervene in the Decision reached.

150. The Adjudicator provided the Claimant with an opportunity to challenge any facts from the Investigator's Report. Unfortunately, the Claimant was self-represented at that time and claims that he did not perceive the seriousness of the Complaint because of the delay in it being raised to him.

151. None of the concerns raised by the Claimant in and on their own would be sufficient to warrant any interference with the Decision reached by the Adjudicator. It is only when one looks at all the factors and considers them as a whole that there is a concern that the process may have resulted in a sanction that is unfair in the circumstances.

152. Hockey Canada made very cogent arguments that the Adjudicator's Decision was reasonable and proportionate in the circumstances, taking into account the facts of the incident. The Respondent suggests that there are "*insufficient reasons to disrupt the sanctions that were imposed through a thorough, independent investigation and disciplinary process that was conducted by experienced individuals*."

153. I concur with the Respondent with respect to the professionalism of the investigation and conduct of the disciplinary process for the most part. I can only hope that other situations receive the similar level of professionalism as the Investigator and Adjudicator exhibited in this situation. The concerns I have expressed do not lessen my appreciation nor admiration of either's approach or conclusions. My biggest concern was not of their doing – the delay in the Claimant becoming aware of the Complaint and the implication borne of the HC culture that it was therefore not that important.

154. Were the concerns identified discussed by the Adjudicator and dismissed, I would have found that I had conducted a robust review and found the Decision to be reasonable

in the circumstances and would therefore have no reason to intervene. That is not my finding.

VII FINDINGS

155. Although I do not refer in this Decision to every aspect of the parties' submissions and evidence, in reaching my conclusions and in making my decision I have considered all the evidence and arguments presented by them in this proceeding.

156. Based on the foregoing extensive review, I find that the sanction imposed was unreasonably onerous in the circumstances.

157. I find that the delay impacted many aspects of the process, including the seriousness with which the Claimant approached the matter as well as the evidence presented for consideration. Delay was not considered by either the Investigator or the Adjudicator and was not taken into consideration as a mitigating factor in the Decision.

158. For the foregoing reasons, I do not view the submissions made by the now-represented Claimant to be a second chance to challenge the evidence. The other minor concerns, which individually would likely not be sufficient to disrupt the sanctions imposed, cumulatively result in a concern of the reasonableness of the sanctions.

159. I have no reason to disturb the conclusion of the Adjudicator that the breaches of the applicable codes occurred. The admissions by the Claimant are conclusive evidence of such breaches and a sanction is therefore appropriate.

VIII DETERMINATION OF SANCTIONS

160. With respect to the sanctions that were imposed by the Adjudicator, they appear to be discretionary. My primary concern, and that of the submissions made by the Claimant, is that the length of the suspension was excessive when mitigating factors are applied and the aggravating factors are adjusted in accordance with the foregoing analysis.

161. There appears to be no standard basis for suspension, be it a number of games or reference to a portion of a season or even a calendar time period. The Adjudicator chose the balance of the season underway at the time and this determination was not based on submissions made by the parties. The complainant had suggested a permanent ban from hockey programming and the Adjudicator appropriately found

that not to be proportionate. However, there were no submissions made to the Arbitrator, or to me, as to what was a proportionate suspension based on principles.

162. The Claimant submits that a less severe set of sanctions would be appropriate and proposed a three-month suspension, ending December 31, 2023, which would amount to a 25-game suspension. This would be in conjunction with the anger management training determined by the Adjudicator as well as a period of probation for another year, being the entire 2024 calendar year. The Claimant suggests these sanctions are reasonable and proportionate for a first offence, and that they will serve as a punishment and have a deterrent effect.

163. Hockey Canada submitted that I had no reason to intervene in the sanction imposed by the Adjudicator and any reduction is unjustified in the circumstances because there was no evidence of any flaws in the investigation or adjudication process to support a significant reduction. The sanction resulted from an independent process made by people with no ties to Hockey Canada and it was "*reasonable and proportionate in the circumstances, taking into account the facts of the incident, which the Claimant had been unable to refute.*"

164. The Respondent further submits that the proposed end date of the sanction proposed by the Claimant is "*entirely self-serving and will not serve to correct the Claimant's future behavior.*"

165. I have no basis for calculating an appropriate sanction for a first offence which is likely what the Adjudicator experienced in arriving at a sanction. Any sanction I may impose is arbitrary in the sense that neither of the parties presented a principled basis for determining the length of suspension. One party proposed an arbitrary reduction, based on the perceived seriousness of the transgressions and the other party requested the suspension remain unchanged.

166. The Respondent has also suggested that the proposal for reduction and the submissions made by the Claimant "*is consistent with his past behaviour to try to avoid accountability for his actions*."

167. The lack of recognition of any mitigating factors in weighing the appropriate length of suspension necessitates a reduction in the sanction. I do not perceive that the duration makes a significant difference in the impact on future behaviour – it appears to me that

the point has already been made to the Claimant that such is not appropriate behaviour and will be dealt with harshly. That said, if I am incorrect, any sanction for a second offense may take that into account with a more onerous sanction.

168. I am faced with three alternatives on the length of suspension: (i) the proposal by the Claimant, (ii) the proposal by the Respondent, or (iii) some other arbitrary length of suspension. I elect to choose the proposal of the Claimant with a couple of slight modifications, to address some of the concerns raised by the Respondent.

169. The Adjudicator saw no merit in an apology by the Claimant to the complainant:

> *I do not see an apology as appropriate here. I do not believe that a forced apology will be meaningful and find that education and a lengthy suspension are appropriate sanctions.*

170. Although I agree with the Adjudicator's rationale regarding forced apologies, I do not share that belief in the matter at hand. It is true that a forced apology is often not meaningful nor sincere, and that it may also not be welcomed. However, in this case, the complainant requested an apology (see para. 106 of the Decision) and I perceive that an apology can be justified for something that appears to have had a significant impact on the complainant and was inappropriate to subject young players to such language and immature behaviour of the people charged with teaching them appropriate behaviour. In my opinion, because it is welcome by the complainant, a forced apology is warranted here if for no other reason than for the Claimant to acknowledge, in writing, that his behaviour was not appropriate and to express remorse for subjecting those affected individuals to such behaviour. Whether it was merely "chirping" as has been suggested by some, or more egregious, as alleged by the complainant and others, it has no place in hockey or society and should be so acknowledged by the Claimant.

171. Accordingly, based on the foregoing, I substitute the following sanctions in place and stead of the sanctions awarded by the Adjudicator:

(a) The length of suspension is reduced to the end of the calendar year, being December 31, 2023, from any program, activity, event, or competition sponsored by, organized by, or under the auspices of Hockey Canada;

(b) The Claimant is placed on probation for the remainder of the 2023-24 season and for the 2024-25 season – the current season and one full season after the end of

the current season (not for the balance of the 2024 calendar year as proposed by the Claimant). Any incident resulting in a sanction on the Claimant during the probationary season shall consider the status of the Claimant (on probation) and take that into consideration as an aggravating factor in establishing any sanction.

(c) A letter of apology addressed to the complainant and copied to the Ottawa Myers Automotive U14AAA team is to be provided in a form acceptable to the ITP and delivered to the ITP for communication to the addressees. The letter shall express remorse for any harm caused as a result of the outbursts that occurred at the Game and shall specifically state that it will not happen again in the future.

(d) Reinstatement of Barch remains conditional upon proving to the ITP that he has completed an assigned anger management course, and he may not begin coaching or participating in any program, activity, event, or competition sponsored by, organized by, or under the auspices of Hockey Canada until the ITP confirms this sanction has been satisfied.

172. In closing, I want to make special mention of the articulate submissions made by counsel for each of the Claimant and the Respondent. The comportment of all parties was excellent, and I appreciated the clear and professional submissions.

IX JUDGEMENT

173. The appeal by the Claimant is allowed in part. Sanctions are amended as follows:

(a) Claimant is suspended to the end of the calendar year, being December 31, 2023, from any program, activity, event, or competition sponsored by, organized by, or under the auspices of Hockey Canada;

(b) Claimant is placed on probation for the remainder of the 2023-24 season and for the entire 2024-25 season;

(c) Claimant to write a letter of apology addressed to the complainant and copied to the Ottawa Myers Automotive U14AAA team in form acceptable to the ITP;

(d) Reinstatement of Barch is conditional upon proving to the ITP that he has completed an assigned anger management course.

X THE COSTS

174. No submissions were made during the hearing regarding costs, and I do not see any reason to make one in this case. Nevertheless, the parties are free to make brief written submissions on the subject, should they choose to do so in accordance with Sections 5.14 and 6.13 of the Code.

XI RESERVATION OF RIGHTS

175. I reserve the right to deal with any matter arising from this decision and its interpretation.

DATED: December 28, 2023

Gordon E. Peterson, Arbitrator