

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

NO: SDRCC 22-0606

BETWEEN:

RANDY BROOKES

(Claimant)

AND

ATHLETICS ONTARIO

(Respondent)

JANICE JOHNSTON
(Jurisdictional Arbitrator)

REPRESENTATIVES:

COUNSEL FOR THE CLAIMANT: Kenneth Wise
Zev Wise

COUNSEL FOR THE RESPONDENT: William Russell
Donald Jackson

AWARD

Background

1. On October 21, 2022, the Claimant, Randy Brookes, filed a Request before the Sport Dispute Resolution Centre of Canada ("the SDRCC"), seeking relief against a resolution of the Board of Directors of Athletics Ontario ("AO"), made on September 14, 2022. In this resolution, the decision was made to terminate the Claimant's membership in AO. This decision was communicated to the Claimant on September 20, 2022.
2. The merits of the decision of the Board of Directors of AO is not before me. The issue before me is a very narrow one. The Respondent has raised a challenge to the jurisdiction of the SDRCC to hear this matter on the basis that the Request filed by Mr. Brookes on October 21, 2022 was filed in an untimely fashion. The Claimant missed the thirty-day appeal period set out in Section 6.2 of the Canadian Sport Dispute Resolution Code ("the Code") and has requested an extension of the time for the filing of an appeal. The Respondent opposed the granting of an extension and has raised a jurisdictional challenge asserting that in the circumstances of this case that it is not appropriate for the SDRCC to waive the time limit and grant an extension. The parties agreed to resolve the jurisdictional dispute by way of arbitration.
3. A preliminary conference call with the parties took place on November 16, 2022. At that time, the parties agreed to proceed by way of written submissions and a schedule for filing the submissions was agreed to. The parties agreed that, should I deem it necessary, or require clarification on the written submissions, a further conference call could be convened. After carefully reviewing the submissions of the parties, I have determined

that a further conference call is not necessary and that I can decide the challenge based on the written submissions.

4. Counsel for the Respondent asserts that the issues for this preliminary jurisdictional challenge are straightforward:
 - a. Was the Request filed after expiration of the time limit(s) for filing a request?
 - b. Are there exceptional circumstances which prevented the Claimant from filing the Request, requiring the Arbitrator to exercise their discretion to extend the prescribed filing time limits?

I agree that the issues as stated are the issues before me.

5. There was no dispute between the parties that pursuant to Section 5.4.(b)(i) of the Code, that I have the authority to address and decide any challenge raised to the jurisdiction of the SDRCC.
6. The relevant portions of Section 6.2 of the SDRCC Code (the "Code") read as follows:
 - 6.2 Time Limits to File a Request
 - (a) Unless set by agreement, statute, regulations or other applicable rules of the relevant SO, the time limit to file a Request shall be thirty (30) days following the later of the date on which:
 - (i) the Claimant becomes aware of the existence of the dispute;
 - (ii) the Claimant becomes aware of the contested decision; and
 - (iii) the last step in attempting to resolve the dispute occurred, as determined by the SDRCC. The SDRCC may, in its discretion, refer this issue to a Panel.
 - (b) Notwithstanding Section 3.5(c), the time limit may be waived with respect to a Request upon agreement of the Parties or under exceptional circumstances. Any issue pertaining to the waiver of the time limit will be referred to a Panel.

7. Section 3.5 of the SDRCC Code is also relevant and states that:

- (a) All days are included in the calculation of time limits, including weekends and holidays.
- (b) Unless otherwise specified by agreement of the Parties or by order of the Panel, a time limit will have expired if information required from a Party is not received by four (4) p.m. Eastern Time on the date of a deadline.
- (c) Subject to the statutes, regulations, CADP or other applicable rules relevant to the Sports-Related Dispute, if all Parties agree or upon application on justified grounds, the SDRCC may extend or reduce the time limits. The SDRCC may, in its discretion, refer this issue to be decided by a Panel.

Submissions of the Respondent

8. The Respondent asserts the following as background facts in this matter:

- i) AO notified the Claimant of the pending action to terminate his membership by the Board on August 23, 2022. The Board requested a response from the Claimant, if any, by September 2, 2022. Counsel for the Claimant requested an extension to make submissions to the Board on August 24, 2022. AO granted this request on August 28, 2022, and extended the deadline for submissions to September 9, 2022.
- ii) On September 9, 2022, counsel for the Claimant provided extensive submissions to AO. At a meeting on September 14, 2022, the Board passed a resolution terminating the Claimant's membership in AO and the Claimant was notified of the Decision on September 20, 2022. AO did not receive any further correspondence regarding the Decision from the Claimant until after the deadline for filing the Request before the SDRCC had passed.
- iii) On October 21, 2022, counsel for the Claimant contacted the SDRCC to inquire about filing an appeal of the Decision. During the exchange of email correspondence with the Claimant, the SDRCC indicated that the Claimant had missed the filing deadline and that the only means of filing the Request was with the consent of AO. On October 25, 2022, the Claimant contacted AO and requested an extension to the filing deadline. This was the first time that the Claimant contacted AO after the Decision

had been issued. AO declined to consent to the Claimant's request to file his Request late.

iv) On November 1, 2022, the SDRCC notified AO that it had received the Request which is the subject of this case from the Claimant on October 21, 2022. AO raised a jurisdictional challenge on November 7, 2022.

9. Counsel for the Respondent pointed out that the Code allows sport organizations to establish their own rules regarding the time limit for filing appeals. The time limit imposed under Section 4 of AO's Appeal Policy is 21 days. Having received notice of the Decision on September 20, 2022, pursuant to the AO policy, the Claimant must have appealed the decision no later than October 11, 2022. The Claimant filed the Request with the SDRCC after 4:00 PM on October 21, 2022, which is well after the deadline to do so under the Appeal Policy.

10. Even if the lengthier 30-day deadline permitted by the Code is applied, that deadline also expired before the Claimant filed his Request. Under both policies, the Claimant simply did not submit his Request in a timely manner.

11. Respondent counsel suggested that the time limit to file a Request to the SDRCC may only be waived if there are exceptional circumstances to do so, as set out in Section 6.2(b) of the Code. Here, the Claimant did not provide any indication that they would be filing a Request late, nor any justification for their failure to meet the required deadline. Accordingly, in counsel's view, it is unnecessary to consider whether there are any *exceptional* circumstances requiring me to exercise my discretion and allow the Request to be filed late, as absolutely no reasons for the late filing have been provided. However, he stated that in anticipation of the Claimant developing a creative explanation for the delay, it would be appropriate to review the applicable law regarding exceptional

circumstances and the extension of the time limit for the filing of a Request.

12. In *Tuckey v. Softball Canada* (SDRCC 08-0071), (“*Tuckey*”) Arbitrator Devlin found that the term “exceptional circumstances” should be given its ordinary meaning. She found that the term denoted circumstances that are “extraordinary or unusual.” In that case, counsel for the Claimant argued that they were unable to meet the filing deadline due to scheduling difficulties relating to other proceedings in which they were involved and that counsel was out of the jurisdiction for nine days.

13. While accepting that the delay was not intentional and recognizing the harshness of the Code, Arbitrator Devlin rejected the notion that scheduling difficulties of counsel could be described as extraordinary or unusual factors that meet the test of “exceptional circumstances.” Arbitrator McDougall in *Canadian Centre for Ethics in Sport v Gerhart* (SDRCC DAT 13-0002) agreed with Arbitrator Devlin in this regard. Therefore, counsel suggested that the interpretation of ‘exceptional circumstances’ in the above SDRCC cases is a reasonable application of the term as used in Section 6.2 of the Code and that there is no reason to depart from this interpretation in the present matter.

14. In *Wachowich v Shooting Federation of Canada* SDRCC 13-0213, (“*Wachowich*”) Arbitrator Pound held that:

Sport-related disputes are generally regarded as requiring relatively quick resolution. The Code and related processes reflect that objective and are specifically designed to provide for speedy resolution of any disputes. Events must proceed, eligibility be determined, sporting outcomes be decided, sanctions be imposed and teams be selected in as close to “real” time as possible. Limitation periods in these circumstances are not mere guidelines. They are sport rules, which govern the rights of the parties involved. Minimal flexibility [such as that contained in Code

Article 3.4(e), now section 6.2(b)] to deal with unusual and unforeseen circumstances is, nevertheless, built into enforcement of such limitation periods, but that flexibility is clearly an exception to the general principle and rule, and must be interpreted accordingly.

15. Counsel also relied upon the comments by Arbitrator Pound about limitation periods and the need for finality in *Wachowich*, supra. At page 15, Arbitrator Pound writes:

Limitation periods are important for purposes of bringing closure to any period during which a matter may be uncertain or unfinished. Such limitation periods require persons, who may have rights to assert, to make those assertions within a period considered to be reasonable in the circumstances by society at large or, as in this case, a particular subset within society, here a national sport system. If the assertions are not made within the prescribed period, no matter how valid the rights may have been, they can no longer be acted upon. Even conduct that might be criminal has limitation periods, beyond which society as a whole acknowledges that a person may no longer be charged. The need for certainty and closure trumps the existence of the rights, be they personal or public.

16. In support of his submissions counsel also relied upon *Borsa v Canadian Centre for Ethics in Sport* SDRCC DAT 19-0014.
17. In conclusion, counsel for the Respondent argued that based on the above cited jurisprudence from the SDRCC, the concept of exceptional circumstances found in Section 6.2 of the Code is meant to apply to situations where an individual is prevented from filing a Request because of unusual, extraordinary or unforeseeable circumstances. In other words, an individual needs to have a valid reason that justifies why they did not file their Request within the otherwise prescribed time limit.
18. AO submits that the exceptional circumstances test is a high bar to be met by the party seeking an extension of the filing deadline. If the Claimant submits grounds within this Request seeking an extension to the time limit

provided in Section 6.2(a) of the Code and Section 4 of the AO Appeal Policy – he must meet the high threshold of exceptional circumstance as interpreted by the SDRCC jurisprudence.

19. In the present matter, it was suggested that AO is in the impossible position of arguing whether the Claimant found himself in a situation where unusual, extraordinary, or unforeseeable circumstances prevented him from filing his Request on time as the Claimant has not provided any reason for the delay, despite having ample opportunity to do so. Should the Claimant contend that he was prevented from filing the Request within the required timeline due to circumstances beyond his control, AO would point out that the Claimant has the benefit of experienced counsel who is familiar with the SDRCC process, having filed at least two previous appeals with the SDRCC on behalf of the Claimant.
20. Further, counsel pointed out that the Claimant has requested and received extensions to deadlines from AO in the past. It should be noted that these requests were filed well before the applicable time limit expired. Absent any explanation from the Claimant, it is AO's position that there is nothing exceptional, unusual, or extraordinary requiring that the Arbitrator exercise their discretion and allow the Request to be heard.
21. Counsel stressed that if the Claimant truly believed that AO's Board had erred by imposing consequences that were unjust in the circumstances and that the termination of his membership was unreasonably harsh and an offence to the principles of procedural fairness, he could have filed his appeal within the prescribed time limits – limits which were known or ought to have been known by both himself and his counsel. Yet, he did not.
22. In conclusion, counsel took the position that AO is in the impossible position of arguing that the unknown reason for why the Claimant missed the filing deadline does not constitute unusual or extraordinary

circumstances that would justify the extension of the otherwise applicable 21-day deadline indicated under Section 4 of the Appeal Policy or the 30-day deadline indicated at Section 6.2 of the Code. A departure from the general rule that rights must be asserted within the prescribed time limits, and/or the general principle that the need for certainty and closure trumps the existence of rights, requires that the Claimant meet a very high threshold. This threshold has not been met in this case.

23. Counsel argued that the SDRCC jurisprudence is clear that the limitation periods and deadlines are in place for a reason. Allowing the Claimant to flout both AO's and the Code's deadlines and treat them as mere guidelines sets a dangerous precedent moving forward. Simply put, the Claimant was represented by counsel, and the Claimant and his counsel knew (or ought to have known) that they had to exercise their rights by the specified deadline.

24. Because there were no exceptional, unusual, or extraordinary circumstances that prevented the Claimant from filing his appeal within the prescribed time limit, AO respectfully requested that I dismiss the Claimant's request to extend the deadline.

Submissions of the Claimant

25. Counsel for the Claimant commenced his submissions by stating that it was appropriate to discuss the history and merits of this matter given that the merits of the Request go to the determination of exceptional circumstances and that one could not determine this timeliness issue in a vacuum. Counsel then went on to review in detail the history leading up to the filing of the Request at the SDRCC. Although I have carefully read all of the submissions, I have not set out all of the history which was suggested relevant, but excerpts from it as it is quite lengthy. Counsel for the Claimant asserted the background was as follows:

- i. On October 9, 2019, the Respondent (the “Respondent” or “AO”) suspended the Claimant (the “Claimant” or “Brookes”) for a 2-year period, with terms, for having a sexual relationship with an adult athlete (the “complainant” or “CB”). At the time, Brookes was 37 and CB was 44 and CB made a complaint after their 4-year relationship was ended by Brookes. That suspension decision concludes with clear directions as to the appropriate method of appeal. The Minor Track Association of Ontario (“MTA”) later on piggybacked on AO’s decision and suspended Brookes for 2 years.
- ii. On October 29, 2019, the Claimant submitted his request for an appeal to the Respondent who was required to respond within 5 days, according to their own policy. On January 3, 2020, about 60 days late, the Respondent denied the Claimants appeal out of hand. AO now asserts lateness to prevent a hearing of this matter on the merits, despite its own disregard for the timelines outlined in their policy.
- iii. On June 3, 2020, Brookes issued a claim in Superior Court against AO and MTA which, with respect to AO, is still an ongoing concern. Brookes and MTA resolved their dispute and Brookes has been fully reinstated. MTA appears to have shared some or all of Brookes’ concerns with respect to AO’s conduct.
- iv. On September 24, 2021, AO initiated a new investigation against Brookes for allegedly violating the terms of the suspension decision. AO, appropriately, retained an outside investigator for this purpose and that investigator advised Brookes that they would provide an investigation report, which could be adjudicated by an impartial third-party advisory panel if there were findings of any violations. This commitment to the use of outside investigators and adjudicators was wholly appropriate given that Brookes and AO are currently engaged in litigation.
- v. Brookes enthusiastically participated in this investigation. However, after Brookes provided his evidence to the investigators, they stopped responding to Brookes’ communications. Despite numerous follow-ups, no investigation report was provided, as promised, and Brookes’ career and livelihood remained on hold, despite numerous follow-up communications to AO and its counsel. With no other option available, Brookes commenced a request to SDRCC bearing number SDRCC 22-0582 to force AO to make a decision on his reinstatement.
- vi. AO took issue with the jurisdiction of any SDRCC Panel over SDRCC matter 22-0582 and promised to make a decision about

Brookes' reinstatement. On August 8, 2022, I (Kenneth Wise) advised Mr. Russell "my client has instructed me to hold his application in abeyance until after the release of AO's decision which will be provided no later than September 9, 2022. This adjournment is without prejudice to my client's rights in the SDRCC matter. Please let me know if this is acceptable and we will advise the tribunal."

- vii. After AO insisted that my client withdraw that complaint without prejudice, I wrote, "I am not sure that there is any real difference in our positions. If an unfavorable decision is released, I would need to amend the current application which would make any jurisdictional concerns moot. If the decision is favourable, the application would be withdrawn." On August 9, 2022, I agreed to withdraw that complaint without prejudice on the clear understanding that Brookes would return to the SDRCC to address any unfavourable decision. It is clear from those communications that Brookes' intention was to appeal to the SDRCC once an unfavourable decision was released.
- viii. On August 23, 2022, AO changed direction, and moved to terminate Brookes' membership pursuant to Article 2.08 of the Athletics Ontario bylaws, without the use of an impartial investigator or adjudicator. It is unknown what happened with the investigation, which AO commenced about a year earlier. It is possible that the 3rd party investigation report exonerated Brookes, which caused AO to seek another way to deal with him. AO's motion to terminate, in part, relied on the fact that Brookes had commenced a civil proceeding as part of its basis to terminate Brookes' membership. In other words, AO, which is embroiled in litigation with Brookes, sought to terminate Brookes' membership because of said litigation.
- ix. On September 9, 2022, Brookes responded to the motion, and raised his very serious concerns with AO's impartiality as a decision maker for his career and reputation while embroiled with Brookes in litigation. AO appears to have expressly engaged in a form of obstruction of justice.
- x. On September 20, 2022, AO provided its termination decision without providing any reasons or analysis. Moreover, AO did not conclude its termination decision with directions with respect to Brookes' appeal rights, as it did in the suspension decision. As per my earlier communications of August 8 and 9, 2022 with Mr. Russell, it was clear to all concerned that Brookes would be making his appeal to SDRCC of any unfavourable decision.
- xi. Brookes was eager to appeal the termination decision as soon as possible. However, to avoid the jurisdictional issues that arose in

the earlier complaint, on September 25, 2022, I consulted with outside counsel to ensure that SDRCC is the appropriate forum. Due to health issues, that lawyer only responded by October 17, 2022. It then took my office until October 21, 2022 to finalize the appeal.

- xii. AO now attempts to insulate its decision from any appeal or review from a specialized sports tribunal under the auspices of the SDRCC on the basis that the timing of the Request is one day late. This extreme position, in circumstances where Brookes' livelihood and reputation are at issue, would be procedurally unfair. The imbalance of prejudice alone demonstrates "exceptional circumstances" that would permit the waiver of any applicable time limit by one day. For the reasons that follow, this case raises multiple surrounding circumstances that fully justify the waiver of any applicable time limit to allow this appeal to proceed.

26. After setting out section 6.2 of the Code, counsel for the Claimant pointed out that there is no statement as to the consequences of a filing after 30 days in these provisions. AO assumes that the only potential consequence of a filing 31 days after receipt of a contested decision is the preclusion of any appeal whatsoever; however, the provisions do not impose that severe sanction.

27. The Respondent has argued that the delay is longer than one day, based on a 21-day time limit contained in the Respondent's Appeal Policy. However, that policy only applies to a "Participant who is directly affected by a decision by a Discipline Panel and the Governance Committee" which was not the case here. The Decision here was made by the Board of Directors which is not the same thing as the "Governance Committee" or "Discipline Panel" which are both defined terms under that policy. If AO wished to offer that internal appeal option to the present circumstances it ought to have included such a direction in its termination decision, as it did in the suspension decision.

28. Counsel argued that furthermore, the Respondent's argument ignores the fact that the within appeal is a statutory appeal, not an appeal pursuant to the Respondent's Appeal Policy. The rule under the internal AO appeal process does not appear to be relevant or applicable. The Respondent has specifically engaged the SDRCC Code and the SDRCC to argue its time bar argument. In other words, if its arguments are unsuccessful, the matter should proceed before the SDRCC under the SDRCC Code. There is no suggestion to the contrary from the Respondent.

29. Counsel next went on to suggest that in this case, that "exceptional circumstances" exist to extend the time-limit in this matter, regardless of whether a 30-day or 21-day time-limit applies to the Claimant's appeal. The SDRCC has stated that the phrase "exceptional circumstances", which appears in section 6.2(b), should be given its ordinary meaning. In particular, 'exceptional circumstances' "refers to circumstances which are extraordinary or unusual." (see the Tuckey case). The Claimant did not take issue with this definition per se.

30. Counsel next suggested that the four SDRCC decisions relied upon by the Respondent were all distinguishable. He stated:

- a. *Tuckey v Softball Canada*: In this matter, the applicant filed their response 41 days after the arbitrator found the internal appeal process had been exhausted. The delay was substantially longer than the present matter.
- b. *Canadian Centre for Ethics in Sport v Gerhart*. In this case, the appeal request was two months late. The delay was substantially longer than the present matter.
- c. *Wachowich v Shooting Federation of Canada*: In this case, the delay was 18 days late, 48 days post-decision. The reasons provided for the delay included training, competition, and the juggling of work, which were normal aspects of life and not "exceptional circumstances". The delay was substantially longer than the present matter, and the explanation for the delay did not involve the compelling circumstances in issue here.

d. *Borsa v Canadian Centre for Ethics in Sport*. This matter involved an appeal of a doping violation, rather than the membership termination in issue here. In addition, there the Claimant admitted to the wrongdoing and sought only to appeal the term of his suspension, after learning of an analogous decision with a lesser suspension that was released two days after the Claimant's time limit for appeal. Therefore, unlike the present matter, there was no intention to appeal during the time-limit and there was only a weak explanation offered for the delay. Notably, it was a purely discretionary matter which was the subject to the appeal, namely, the length of the suspension. Here, the Claimant does not admit fault or the penalty, and in fact, the penalty imposed is significantly greater than in that case.

31. Counsel for the Claimant next went on to argue that the above decisions are not binding on the SDRCC and pointed out that Boards of Arbitration are not bound by the principle of stare decisis. Although it may be preferable for purposes of consistency, they are not bound to follow the decisions of other boards of arbitrations.
32. It was suggested that as a result of counsel's August 8 and 9, 2022 communications with the Respondent, the SDRCC and AO had notice of an intended appeal, which satisfied in advance the notice requirement that a Request is intended to serve. The fact that the complaint was withdrawn "without prejudice" should be construed to refer to the right to re-file an appeal or complaint without strict compliance with the applicable procedure.
33. Counsel for the Claimant submitted that there are a number of *exceptional circumstances* which warrant an extension of the time limit to appeal. While the SDRCC and AO governance documents are silent on the circumstances that could be considered 'exceptional', other arbitration and dispute-resolution bodies have formulated policies on what would constitute 'exceptional circumstances' which warrant the extension of a time limit. In support of this position, counsel for the Claimant referred to: Decision No. 662/06, 2006 ONWSIAT 2430 (CanLII) at para 14; *Galea v*

Southvan Property Management Ltd., 2022 BCSC 398 (CanLII) at para 16; *Herbaut v. British Columbia (Workers' Compensation Appeal Tribunal)*, 2007 BCSC 1656 (CanLII) at para 18; Decision No. 2273/14E, 2015 ONWSIAT 42 (CanLII) at para 5; *Rose v. Bulkowski*, 2000 ABCA 316 (CanLII) at para 14; *Semeniuk v. Semeniuk*, 2005 ABQB 48 (CanLII) at para 14; WCAT-2003-01681-AD (Re), 2003 CanLII 70874 (BC WCAT); and *R. v. Hayes*, 2007 ONCA 816 (CanLII) at para 26.

34. Counsel suggested that in determining if *exceptional circumstances* exist I should consider the following factors. That although the Claimant did not have any “personal circumstance” per se which led to the delay, his legal representative did have personal circumstances which resulted in the delay. This included ill-health. The Claimant relied on his legal representative to advise him of the time limit. However, at no time did the Claimant believe the drastic consequence of being deprived wholly of his right to a hearing on the merits existed. The Claimant and his legal representatives had made it clear to the Respondent that they would appeal to the SDRCC, in respect to any negative decision, thus, there was due notice.

35. The Claimant placed the matter in the hands of his legal representative immediately after the decision was released, with an instruction to promptly pursue the matter. Therefore, his failure to meet the deadline was not “wilful” and he always had the “bona fide” intention to comply with the deadline. While the Claimant was aware of his right to appeal, he did not know of the time limit, but relied on his legal representative to ensure any time limit was met. The Claimant left the matter in the hands of his legal representative after presenting all the facts to him. Therefore, he was not responsible for the delay in any manner. The fact that the appeal was filed one day late is indicative of an attempt to comply. The Claimant had no control over the ill-health of his legal representative.

36. Counsel also pointed to the fact that the Claimant remained in constant contact with his legal representative as indicative of his attempt to comply with the deadline, as was the fact that the appeal was actually filed only one day late. The Claimant did not “cause” or “contribute” to the delay. Indeed, he provided his legal representative with instructions to file the appeal on time. The Claimant’s appeal sets out a case with manifest merit and which deserves a hearing on the merits. This is not a frivolous appeal. The fact that the Code provides a 30-day time-period and the fact that the Claimant was only one-day late, is indicative of the Claimant moving as soon as practical under the circumstances.
37. Counsel for the Claimant argued that the policy of the law is not to punish a party for the inadvertence of their lawyer. He suggested that case law has confirmed that a party's interests should not be irrevocably jeopardized by any inadvertence or inattention of its counsel, nor should a party be penalized for an error which is solely that of counsel, where the party itself has acted with diligence and that a court should not penalize a client for the fault of its solicitor. He suggested that a party is entitled to rely on the assurances of their legal representative as to the manner in which a legal proceeding is moving forward and to act according to such assurances, without suffering prejudice. In support of this position, counsel referred to Decision No. 2273/14E, 2015 ONWSIAT 42 (CanLII) at para 5; *Rose v. Bulkowski*, Supra at para 14; *Semeniuk v. Semeniuk*, Supra at para 14; WCAT-2003-01681-AD (Re), Supra; *R. v. Hayes*, Supra at para 26; *Valente v. Personal Insurance Company*, 2010 ONSC 975 (CanLII) at para 16; *Beals v. Saldanha*, [2003] 3 SCR 416, 2003 SCC 72 (CanLII) at para 261; *Mandal v. 575419 Ontario Ltd.*, 1994 Carswell Ont 484, [1994] O.J. No. 34, 23 C.P.C. (3d) 172, 5 W.D.C.P. (2d) 59 at para 16; and *Guerriero v. Paul (H.C.J.)*, 1990 CanLII 6690 (ON SC).

38. In summary, counsel argued that the extreme imbalance of prejudice in this case further demonstrates exceptional circumstances. Brookes, through counsel, was one day late in submitting his Request to the SDRCC. Brookes promptly sought a waiver of the timeline requirements. AO has not been prejudiced by receiving submissions one day after the deadline; to the contrary, it was fully aware that Brookes intended to appeal the matter by virtue of his prior filing of a Request in SDRCC 22-0582. On the other hand, Brookes is severely prejudiced if the 10-year ban on membership is not subject to an appeal on the merits. Brookes' reputation and livelihood depend on the proper adjudication of this matter.
39. In addition, counsel pointed out that it is worth noting that, although article 6.2(a) refers to a time limit for filing a Request, it is silent on the consequences of a late filing. Without language specifically prohibiting a late filing of a Request, there is an argument that the prejudice of the one day lateness (if any) can be addressed by other remedies, procedural or otherwise. There is no requirement in the SDRCC Code that a failure to meet the time limit should necessarily result in a summary dismissal of the matter.

Reply Submissions by the Respondent

40. Counsel for the Respondent started his reply submissions by asserting that the Claimant sought to distract from the simple question to be addressed by the Arbitrator: was the Claimant prevented by circumstances beyond their control from filing their Request within the required time period? Based on the paucity of evidence before the Arbitrator, the answer is no. Despite the attempt to complicate this simple exercise by providing extraneous historic background, making baseless claims of 'obstruction of justice', and citing dated, irrelevant caselaw, the Claimant was not prevented from filing the Request on time.

41. As the Claimant has failed to submit any explanation for their delay, let alone meet the exceptional circumstance threshold, it was suggested that their Request must be rejected. There is arbitral consensus defining 'exceptional circumstances' under the Code. The Claimant cites significant case law in support of their expansive interpretation of exceptional circumstances. The Claimant relies heavily on three decisions: a 2006 decision from the Workplace Safety and Insurance Appeals Tribunal, a 2007 British Columbia Court of Appeal decision involving a Workers' Compensation matter and a Supreme Court of British Columbia decision involving a residential tenancy dispute.

42. Counsel argued that respectfully, it is not necessary to consider the jurisprudence cited by the Claimant. Each of these decisions involves distinct circumstances wholly unrelated to sport, under different statutory schemes with nothing related or analogous whatsoever to the Code. Further, it should be noted that in each of the decisions cited by the Claimant in support of their novel and expansive interpretation of 'exceptional circumstances', the party seeking to have the deadline for filing an appeal was unsuccessful in their respective bid. The other decisions submitted by the Claimant are likewise inapplicable, involving distinct factual scenarios outside of the sport environment, including criminal matters.

43. Counsel submitted that there is clear guidance from SDRCC arbitrators interpreting the applicable sections of the Code at issue, specifically the definition of 'exceptional circumstances.' Counsel agreed that the Arbitrator is not necessarily bound by the earlier decisions of the SDRCC. However, the importance of arbitral consensus on the issue of exceptional circumstances under the Code should not be wantonly ignored. These decisions must play a role in shaping subsequent awards, including this matter. To deviate from the consensus creates confusion and uncertainty.

This notion of arbitral consistency was acknowledged by Justices Rothstein and Moldaver, in the *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34. Although I set it out earlier in this award, for ease of reference it reads:

[78] Respect for prior arbitral decisions is not simply a nicety to be observed when convenient. On the contrary, where arbitral consensus exists, it raises a presumption — for the parties, labour arbitrators, and the courts — that subsequent arbitral decisions will follow those precedents. Consistent rules and decisions are fundamental to the rule of law. As Professor Weiler, a leading authority in this area, observed in *Re United Steelworkers and Triangle Conduit & Cable Canada (1968) Ltd.* (1970), 1970 CanLII 1688 (ON LA), 21 L.A.C. 332:

This board is not bound by any strict rule of stare decisis to follow a decision of another board in a different bargaining relationship. Yet the demand of predictability, objectivity, and impersonality in arbitration require that rules which are established in earlier cases be followed unless they can be fairly distinguished or unless they appear to be unreasonable.

44. Counsel took the position that the Claimant has attempted to distinguish the prior decisions of the SDRCC on this issue, seemingly on the basis that the delay in this matter was shorter than in the prior decisions. With respect, this is not a position that adequately explains the need to depart from a line of arbitral jurisprudence that is clearly applicable. In the current circumstances, there is no reason to depart from the arbitral consensus regarding the interpretation of exceptional circumstances under the Code. Accepting the reasoning of the Claimant would be an unreasonable distinguishing of this line of decisions, constituting a reviewable error in counsel's opinion.

45. The only reason submitted by the Claimant that explains their failure to file the Request in a timely manner is that the unnamed lawyer consulted by the Claimant's counsel fell ill and they were delayed by three weeks in

responding to the questions of the Claimant's counsel with respect to whether the SDRCC had jurisdiction over this matter. While AO sympathizes with the illness of this lawyer, this is the thinnest of excuses that must not be entertained by the Arbitrator. The strategic decision of the Claimant's legal team to seek outside counsel and the alleged delay of receiving a response from this external advisor is not an *exceptional circumstance*. The supposedly delayed response of this unnamed lawyer – which the Claimant has not provided any evidence to support – did not prevent the Claimant from filing their Request. The Claimant has the benefit of experienced legal counsel who has previously filed two Requests with the SDRCC.

46. Accordingly, the Claimant was in no way prevented from exercising his legal rights in a timely manner. Counsel for the Claimant has not suggested that he was in any way incapacitated or otherwise unable to file the Request within the required period. There is no indication that the Claimant or their counsel was unable to reach out to AO to request an extension, as they did previously in August 2022. The Claimant likewise did not notify AO or request an extension after they received confirmation that the SDRCC was the venue to bring an appeal on September 21, 2022. They did not notify AO when they realized that they were unable to meet the filing deadline under the Code (having already missed the deadline under AO's Appeal Policy). It was only when the SDRCC notified the Claimant that they were out of time that the Claimant sought an extension to file their request.

47. The first time that the illness of the unnamed lawyer consulted by the Claimant's counsel was identified on the record was in the submissions of the Claimant filed on December 14, 2022. At no point before this time did the Claimant or their counsel notify the SDRCC of any reason for their delay. Likewise, when the Claimant requested an extension from AO, they

failed to make any mention of an illness by their external advisor resulting in a delay.

48. The Claimant argues that the Code is silent on what happens if an appeal is filed out of time and therefore there is no requirement in the SDRCC Code that a failure to meet the time limit should necessarily result in a summary dismissal of the matter. Respectfully, this argument must be rejected as it creates an absurdity. It goes without saying that this should be the result. Otherwise, every similar Code and rule of procedure would also have to specify this illogicality. This argument must fail.
49. In conclusion, counsel argued that the prevailing jurisprudence of the SDRCC is clear – for an arbitrator to exercise their discretion to extend the deadline for filing a Request, the facts must clearly show that a claimant was prevented from submitting their Request due to exceptional circumstances. The Claimant has not advanced any compelling rationale to support their position that the Arbitrator depart from the established arbitral consensus on this issue. Counsel asked that the request to extend the deadline to file the Claimant's Request be dismissed.

Decision

50. The issue in this case is a challenge to the jurisdiction of the SDRCC to hear the merits of the Request filed by the Claimant. Although reference was made by the parties to Section 4 of the Respondent's Appeal Policy, the fact that it provided for 21 days to file an appeal and that this time frame had been missed, both Counsel focused their submissions on Section 6.2 of the Code. There was no suggestion that an internal appeal should have been filed or that any challenge was being raised on the basis that the internal appeal processes had not been completed. The Respondent merely took the position that under both policies, the Claimant did not submit his Request in a timely manner.

51. There is no dispute in this case that the Claimant filed his Request to the SDRCC one day after the expiration of the 30-day time limit provided by Section 6.2 of the Code. The Request is therefore untimely and the jurisdiction of the SDRCC to hear this matter is challenged on that basis. There is also no dispute that I have the jurisdiction to waive the time limit, should I determine that “*exceptional circumstances*” prevented the Claimant from filing his Request in a timely manner. In this case, the Claimant bears the burden of proving that there are *exceptional circumstances* justifying the delay in the filing of this Request.

52. As I noted at the outset, the merits of the decision which the Claimant seeks to bring to the SDRCC are not before me. I am dealing with a challenge to the jurisdiction of the SDRCC to hear the Request in this case. Although counsel for the Claimant made lengthy submissions on the background or merits of the dispute, these submissions are not relevant, other than as context, to the jurisdictional challenge before me. The issue I must determine is a narrow one. Namely, has the Claimant established that he missed the time limit set out in the Code due to *exceptional circumstances* such that I should grant relief, waive the time limit and decide that the SDRCC has jurisdiction to determine the merits. Whether or not the Claimant has a good case on the merits and regardless of the seriousness or importance of the issue to be dealt with on the merits, are not relevant to this decision. Any assessment of the merits of the case prior to a determination of the issue of jurisdiction would be premature.

53. In *Joshua Frazer v Boxing Canada* SDRCC 17-0335 Arbitrator Lawless observed, “When faced with a question of jurisdiction as is raised in this case it is not appropriate to make any findings on issues related to the merits of the matter. Rather, the narrow question before the Jurisdictional Arbitrator is whether or not the matter should be permitted to be heard on its merits...”. Additionally, in *Alex Scott v Canoe Kayak Canada (CKC)*

SDRCC 21-0498 Arbitrator Roberts stated, “As a jurisdictional matter was raised, it is neither necessary nor appropriate for me to decide the merits of an appeal at this stage. Nor is it necessary or appropriate to base a decision on the evidence which might be presented by the parties during such an appeal.” I agree with these comments and feel that they are directly applicable in the case before me.

54. Accordingly, I do not accept the argument of counsel for the Claimant that an evaluation of the strength of the merits of a particular matter or the importance of the issue to be dealt with on the merits, as asserted by one party to the dispute, is relevant to the determination as to whether or not *exceptional circumstances* exist under Section 6.2 of the Code and justify the waiving of the time limit. To engage in such an analysis would lose sight of the fact that what has been raised is a challenge going to the jurisdiction of the SDRCC and would result in an assessment of the merits of the case. This is something that should not occur unless and until I determine that the SDRCC does have jurisdiction to hear the merits.

55. Counsel for the Claimant suggested that absent language specifically prohibiting a late filing of a Request, there is an argument that the prejudice of the one day lateness can be addressed by other remedies, procedural or otherwise and that there is no requirement in the SDRCC Code that a failure to meet the time limit should necessarily result in a summary dismissal of the matter. With respect, the issue before me is a jurisdictional issue. The SDRCC either has jurisdiction or it does not. This is not a situation where there is middle ground to craft alternative remedies such as suggested by counsel.

56. In addition, I do not agree with the assertion that there is an absence of “language specifically prohibiting a late filing of a Request”. Section 6.2 states clearly, “the time limit to file a Request **shall be** thirty (30) days ...”. In my view that is clear language that prohibits the late filing of a Request,

except when as later provided, it is determined that *exceptional circumstances* exist justifying the waiver of this time limit.

57. Counsel for the Respondent in his submissions relied upon existing jurisprudence of the SDRCC in support of his argument that exceptional circumstances did not exist in the case before me such that I should waive the time limits. Counsel for the Claimant sought to distinguish these cases on the basis that the delay in filing was longer in them than in the case before me and on the basis that the explanation for the delay in them was not compelling as in the case before me.
58. Counsel for the Claimant attempted to distinguish the prior decisions of the SDRCC on the basis that the delay in this case was shorter – only one day. Section 6.2 of the Code is clear and states that, “the time limit to file a Request **shall be** thirty (30) days.” Whether you miss that deadline by one day or you miss it by more than one day, that time limit may only be waived under *exceptional circumstances*. In my view, the length of the delay is not a determinative consideration. The fact that the delay was only one day in this case does not create an exceptional circumstance within the meaning of the Code.
59. Counsel for the Claimant also suggested that in considering whether or not *exceptional circumstances* existed, I should consider things such as: the Claimant placed the matter in the hands of his legal representative immediately after the decision was released, with an instruction to promptly pursue the matter – his failure to meet the deadline was not “wilful” and he always had the “bona fide” intention to comply with the deadline; while the Claimant was aware of his right to appeal, he did not know of the time-limit, but relied on his legal representative to ensure any time-limit was met; and that the Claimant left the matter in the hands of his legal representative and was not responsible for the delay. Counsel for the Claimant argued that the policy of the law is not to punish a party for the

inadvertence of their lawyer and that a party's interests should not be irrevocably jeopardized by any inadvertence or inattention of its counsel.

60. Counsel for the Respondent argued that the Claimant relied heavily on three decisions in support of this expansive interpretation of *exceptional circumstances* set out above. These were: a 2006 decision from the Workplace Safety and Insurance Appeals Tribunal; a 2007 British Columbia Court of Appeal decision involving a Workers' Compensation matter; and a Supreme Court of British Columbia decision involving a residential tenancy dispute. It was suggested that each of these decisions involved distinct circumstances wholly unrelated to sport, under different statutory schemes with nothing related or analogous whatsoever to the Code. Counsel also pointed out that the other decisions submitted by the Claimant were also distinguishable as they involved distinct factual scenarios outside of the sport environment, including criminal matters.

61. In these circumstances, I agree with Respondent counsel that the jurisprudence relied upon by counsel for the Claimant is of limited assistance. The SDRCC caselaw is much more relevant and helpful to the decision I must make.

62. Counsel for the Claimant also took the position that as Boards of Arbitration are not bound by the principle of stare decisis, that the previous decisions of the SDRCC are not binding upon me. He acknowledged that although it may be preferable for purposes of consistency, he suggested that I am not bound to follow the decisions of other Boards of Arbitrations.

63. In reply, Respondent counsel submitted that there is clear guidance from SDRCC arbitrators interpreting the applicable sections of the Code at issue, specifically the definition of "*exceptional circumstances*." Counsel agreed that I am not necessarily bound by the earlier decisions of the SDRCC but stressed that the importance of arbitral consensus on the

meaning of the term *exceptional circumstances* under the Code should not be forgotten. He pointed out that to deviate from the consensus creates confusion and uncertainty and stressed that the notion of arbitral consistency was acknowledged by Justices Rothstein and Moldaver, in the *Communications, Energy and Paperworkers Union of Canada, Local 30 v. Irving Pulp & Paper, Ltd.*, 2013 SCC 34. Although set out earlier in the award, for ease of reference I will provide it again:

[78] Respect for prior arbitral decisions is not simply a nicety to be observed when convenient. On the contrary, where arbitral consensus exists, it raises a presumption — for the parties, labour arbitrators, and the courts — that subsequent arbitral decisions will follow those precedents. Consistent rules and decisions are fundamental to the rule of law. As Professor Weiler, a leading authority in this area, observed in *Re United Steelworkers and Triangle Conduit & Cable Canada (1968) Ltd.* (1970), 1970 CanLII 1688 (ON LA), 21 L.A.C. 332:

This board is not bound by any strict rule of stare decisis to follow a decision of another board in a different bargaining relationship. Yet the demand of predictability, objectivity, and impersonality in arbitration require that rules which are established in earlier cases be followed unless they can be fairly distinguished or unless they appear to be unreasonable.

64. I agree with this statement of the law and in particular, I agree with the statement that, “predictability, objectivity, and impersonality in arbitration require that rules which are established in earlier cases be followed unless they can be fairly distinguished or unless they appear to be unreasonable.”

65. With that in mind, I would like to turn to the *Tuckey Case*. It is directly on point. In that case, counsel for the Claimant argued that they were unable to meet the filing deadline due to scheduling difficulties relating to other proceedings in which they were involved and that counsel was out of the jurisdiction for nine days. Arbitrator Devlin determined that this type of

circumstance was not unusual or extraordinary and did not amount to the kind of circumstance which could be deemed exceptional.

66. In the case before me, Claimant counsel asserts that he consulted with outside counsel to ensure that the SDRCC was the appropriate forum in which to file an appeal. Counsel suggests that due to health issues, that lawyer did not respond until October 17, 2022. Counsel then stated that it took his office until October 21, 2022 to finalize the appeal. Upon a careful reading of the submissions this appears to be the only specific reason put forward as to why the filing deadline of October 20, 2022 was missed. No reason whatsoever is given for the delay between October 17 and October 20, 2022.

67. If I accept that the health issues facing a lawyer that counsel for the Claimant chose to consult with, as opposed to health issues facing counsel for the Claimant – a very important distinction in my view – is a valid reason for a delay and could possibly constitute *exceptional circumstances*, I must stress again that **no** explanation is provided for the delay between October 17 and October 20, 2022, the deadline for the filing of the appeal. In the *Tuckey Case*, scheduling difficulties were advanced as a reason for missing the filing deadline. In this case, counsel suggests that October 17 to October 20 passed while the Request was being finalized. In both cases the deadline was missed under circumstances ultimately within the control of counsel.

68. In the *Tuckey Case*, Arbitrator Devlin noted, “The time limit for filing a Request is clearly set out in the Code and while I recognize the harsh consequences of this decision for the Claimant, I must give effect to the language of the Code and, in particular, the reference to “exceptional circumstances” in section 3.4(e) [now section 6.2(b)].” I agree. It is unfortunate that the time limits for the filing of this Request were missed and I have some sympathy for the situation that the Claimant is now in.


However, the Code is clear and it is my job to apply it to the facts of the case before me.

69. To summarize, I have carefully reviewed the submissions of the Claimant and I conclude that there have been no reasons offered which meet the standard of *exceptional circumstances* as to why the Claimant did not file his Request within the thirty-day time period set out in the Code. In my view, in this case, no reason has been provided which meets the standard of *exceptional circumstances* as that term has been defined in the SDRCC jurisprudence. The request to extend the time limits for the filing of an appeal is hereby denied.

70. In the circumstances of this case, I am not inclined to make an award of costs. However, if either party wishes to make an application for costs, they must do so no later than 4:00 p.m. (EST) on January 23, 2023. If costs are applied for, the party against whom they are sought, shall have until 4:00 p.m. (EST) on January 30, 2023 to respond.

71. I retain the jurisdiction to deal with any issues arising out of the implementation or interpretation of this award.

Dated in Toronto this 16th day of January, 2023


Janice Johnston
Jurisdictional Arbitrator