SDRCC 19-0434C

ALBERTA CRICKET COUNCIL ("ACC")

CLAIMANT

v.

CRICKET CANADA

RESPONDENT

And

ALBERTA CRICKET ASSOCIATION ("ACA")

AFFECTED PARTY

DECISION OF THE PANEL ON THE PETITION TO REMOVE ARBITRATOR

PROCEDURAL BACKGROUND

1. The underlying matter commenced with the SDRCCC on November 22, 2019 and was, at the outset, the subject of a jurisdictional challenge. The appointed arbitrator found that the SDRCC did have jurisdiction to hear the matter; a decision upheld on judicial review.

2. After the conclusion of the judicial review on April 22, 2020, the Arbitrator directed the Respondent to retain an independent investigator to investigate the matters raised in the complaint.

3. The Affected Party then retained counsel and that counsel wrote to the Arbitrator:

> *11. After retaining counsel, ACA sent a letter to the Arbitrator dated 13 July 2020 raising the following objections to the investigative process ordered by the Interim Awards:*
>
> *i) The basis for the Arbitrator receiving and reviewing the Investigation Report before the parties is unclear and unfair (and was not addressed in the parties' prior submissions).*
>
> *ii) The Code does not provide for the Arbitrator to assume an investigative role and the Arbitrator's impartial adjudicative function should not be eroded by the Arbitrator coming into possession of information that is not within the knowledge of the parties to the proceeding.*

iii) Not providing the parties with the final investigation report would be against the principles of natural justice.

4. On June 23, 2020, the Arbitrator issued a decision clarifying the scope of that investigation noting, in part:

> *Therefore, as I have indicated several times, I would like to have a neutral individual meet with the parties and try to discover what has and is happening with regard to organized cricket in Alberta. That is the reason why I determined in the first place that it was appropriate to appoint an Investigator rather than engage in what would have been a very lengthy arbitration process. All of the parties involved in this case will have an opportunity to meet with the Investigator and provide input. The appointment of the Investigator was delayed by the judicial review of my interim award. As my interim award was upheld, it is important that the Investigation commence immediately. Accordingly, the Respondent is directed to retain an independent Investigator and get the process started without further delay. The Investigator is to be provided with a copy of this decision and my earlier award as well...the Investigator shall prepare a report which will be provided to me. This report will not be provided to the parties until I have had an opportunity to review it. I will utilize the report to determine the next steps in this case. As I indicated previously I am not bound by the factual conclusions reached by the Investigator but may chose to ultimately rely on all or part of them.*

5. The investigation was conducted, and a report dated November 3, 2020, was submitted to the Arbitrator.

6. On November 9, 2020, the Arbitrator sent the following correspondence to the Parties:

> *I have received and reviewed the report of the Investigator. In my opinion, the Investigator has conducted a thorough investigation and has written a thoughtful and articulate report.*
>
> *Based on this report, it is my sincere hope that the parties can come to some mutually agreeable resolution in this case. Should the parties chose [sic] to do so they may avail themselves of the services of Mr. Jon Fidler the Resolution Facilitator who initially worked with them. In the alternative, the parties can agree to appoint me as a Med/Arb Neutral, so I can conduct a mediation to avoid, if possible, the need for arbitration.*
>
> *In the final alternative, if the parties are unable to agree on either of the above noted options, any party may request my involvement as Arbitrator and make submissions as to:*
>
> *1) the next steps to be taken in this matter; and*
>
> *2) the use of the report in any future proceedings.*

7. On November 13, 2020, the Affected Party challenged the continued involvement of the Arbitrator in light of the November 9th email, setting out (in part):

> *The Alberta Cricket Association ("ACA") hereby challenges the continued involvement of the Arbitrator in this matter pursuant to section 6.11 of the SDRCC Code. Regrettably, the Communication not only raises a reasonable apprehension of bias on the part of the Arbitrator, but actually establishes bias relating to the matters that are to be determined within this Arbitration.*

8. On December 28, 2020, the Arbitrator dismissed the challenge. The relevant portion of that decision is as follows.

> *On November 13, 2020 Mr. James Bunting, on behalf of the Intervener, wrote to the SDRCC challenging my continued involvement in this matter pursuant to Section 6.11 of the SDRCC Code. The letter states that my communication not only raises a reasonable apprehension of bias but establishes actual bias relating to the matters to be determined within the arbitration.*
>
> *With respect, I disagree. Numerous reasons are given for this assertion of bias, including the fact that I reviewed the report first before providing it to the parties. This is something I indicated I was going to do, (without objection at the time) last June before the Investigator was even appointed.*
>
> *The fact that I observed that, "In my opinion, the Investigator has conducted a thorough investigation and has written a thoughtful and articulate report" is also suggested to be indicative of bias. To be very clear, if it is not patently obvious already, I was hoping this comment might guide the parties towards settlement.*
>
> *In addition, many objections are raised with regard to the report itself. However, I have not at this point determined what, if any use, will be made of the report. In fact, I have invited the parties to make submissions on this very point. One option may be to simply put the report on a shelf and make no further use of it.*
>
> *Accordingly, I am not prepared to step down as Arbitrator in this case.*
>
> [the "December Bias Challenge Response"]

9. Despite the reasons provided by the Arbitrator, the Affected Party maintains its position that the Arbitrator has evidenced bias. Having been unsuccessful in its challenge, the Affected Party now applies to the SDRCC to have the Arbitrator removed.

APPOINTMENT OF THE PANEL

10. The relevant provisions of the 2015 Canadian Sport Dispute Resolution Code ("SDRCC Code") are found in Article 6.11:

> *6.11 Challenge, Removal and Replacement of an Arbitrator*
>
> *(a) The appointment of an Arbitrator may be challenged if there is doubt regarding the Arbitrator's independence or a perception of conflict of interest. The challenge shall be brought immediately after the grounds for the challenge become known and in accordance with Subsection 6.11(c) hereof.*
>
> *(b) Decisions with respect to challenges are in the exclusive domain of the SDRCC and shall be determined in accordance with this Code and applicable laws.*
>
> *(c) A challenge shall be brought by a Party by way of a written petition to the SDRCC, which sets forth the facts giving rise to the challenge. The Arbitrator shall be informed of the challenge and given the opportunity to resign. If the Arbitrator chooses not to resign, the challenging Party may apply for three (3) other Arbitrators to be appointed by the SDRCC, on a rotational basis, to conduct a hearing and receive written submissions from all Persons with an interest in the proceedings who desire to make written submissions. This Panel shall rule on the challenge.*
>
> *(d) The SDRCC may remove an Arbitrator if that Arbitrator refuses to, or is prevented from, carrying out its duties or if a decision to excuse the Arbitrator has been made pursuant to Subsection 6.11(c) hereof.*

11. Upon receipt of the Affected Party's application to remove the Arbitrator, the SDRCC appointed three arbitrators from its rotational list to conduct a hearing and make a determination on the challenge.

12. The Panel directed that the challenge be heard by way of documentary review and set out a calendar for submissions to be made by the Parties.

13. The Panel further directed that they would only review the challenge submitted by the Affected Party and the Arbitrator's response, rather than the entire case file.

14. The Panel subsequently received submissions from the Parties and carefully reviewed all submissions as well as both the initial challenge and the Arbitrator's response.

15. Having reviewed the facts and arguments carefully and having discussed the matter at length among themselves, this Panel dismisses the application to have the Arbitrator removed for the reasons that follow.

DECISION

16. In its written submissions to this Panel the Affected Party summarizes its challenge as follows:

> *4. ACA respectfully submits that the Arbitrator's conduct demonstrates a reasonable apprehension of bias (if not actual bias) in both of the following ways. First, the Arbitrator has, by written comments to the parties, prejudged an issue in this Arbitration in a manner that favours the Claimant, Alberta Cricket Council ("ACC"), over ACA, before permitting the parties to make submissions on that issue.*
>
> *5. Second, in trying to justify the comments that give rise to the concern of bias, the Arbitrator has demonstrated that she either failed to understand or failed to adhere to her obligations as an impartial arbitrator. In particular, the Arbitrator has now suggested that her comments were not a form of prejudgment but instead were made to try to guide the parties toward settlement. The Arbitrator was not appointed as a Mediator, Resolution Facilitator, or even Med/Arb Neutral. The role of the Arbitrator is to fairly and impartially adjudicate the dispute before her. It is not to assert positions or make findings with a view to driving the parties to settle. The Arbitrator's comments demonstrate that she is more concerned with pushing the parties towards settlement than impartially adjudicating this dispute, which amounts to a breach of section 35 of Ontario's Arbitration Act, 1991.*

17. The Affected Party further specifies its position in paragraphs 23 and 24 of its written submissions as follows:

> *23. For the reasons set out below, ACA respectfully submits that there are two bases upon which the Arbitrator has demonstrated a reasonable apprehension of bias:*
>
> *i) The Arbitrator prejudged the adequacy and propriety of the Investigative Report in a manner favouring ACC over ACA, without hearing from the parties; and*
>
> *ii) The Arbitrator has through her own words acknowledged that she is acting outside of her role as an impartial arbitrator tasked with deciding fairly the dispute before her. Indeed, the Arbitrator appears to have improperly transformed this Arbitration into a conciliation process without ACA's consent, in violation of section 35 of the Arbitration Act, 1991 (the "Act")*
>
> *24. Either one of these two bases, considered independently, demonstrates a reasonable apprehension of bias sufficient to justify the removal of the Arbitrator. Their cumulative effect erodes entirely any reasonable perception that the Arbitrator is able to maintain an impartial adjudicative role in this proceeding.*

18. The Panel agrees with the Affected Party that the test for determining a reasonable apprehension of bias is the two-pronged test articulated by the Supreme Court of Canada in *Wewaykum Indian Band v. Canada*, 2002 SCC 79:

    i) The perspective of a reasonable person, unrelated to the case at hand, and

    ii) The apprehension of bias must be reasonable, given the circumstances of the conduct of the judge.

19. The Affected Party also provides the following excerpt from *Wewaykum*:

    > *[…] The essence of impartiality lies in the requirement of the judge to approach the case to be adjudicated with an open mind. Conversely, bias or prejudice has been defined as a leaning, inclination, bent or predisposition towards one side or another or a particular result. In its application to legal proceedings, it represents a predisposition to decide an issue or cause in a certain way which does not leave the judicial mind perfectly open to conviction. Bias is a condition or state of mind which sways judgment and renders a judicial officer unable to exercise his or her functions impartially in a particular case.*

20. The Affected Party's view of the November 9th email from the Arbitrator is that the Arbitrator demonstrated her bias in three ways:

    a. First the email "[…] prejudges the adequacy and propriety of the Investigation Report in a manner that favours the position of ACC" [emphasis added].

    b. Second, they suggest that email from the Arbitrator "improperly affirm[s] the Investigative Report" (as it was sent prior to the parties having an opportunity to make submissions).

    c. Lastly they submit that the November 9th email was a "… a unilateral pronouncement on the investigation as "thorough" and the report as "thoughtful and articulate" and that by writing that email "[…] the Arbitrator has improperly prejudged and validated the report, including its many 'findings' in favour of ACC."

21. It is this Panel's finding that no reasonable person reviewing the November 9th email would feel that the Arbitrator was favouring any party's position. All parties were treated equally. The Parties received the report at the same time, and all were provided the identical November 9th email.

22. The Arbitrator informed the Parties that she would review the report before providing it to the Parties and no objection was raised at that time. The Arbitrator did not make any form of ruling or decision absent the Parties' submissions. Further, the Arbitrator made no determination as to the use of the report in the arbitration. In this matter, the Arbitrator received the report and reviewed it and passed it along and no reasonable person would view that as favoring one party or position over another.

23. Similarly, the fact that the Arbitrator described the report as being 'thorough', 'thoughtful', and 'articulate' does not raise a reasonable apprehension of bias. In fact, there is no evidence that the Arbitrator will rely in full or in part on the report when making her decision. Further, the Arbitrator provided her description of the report in the context merely to remind the Parties that they could resolve the matter themselves.

24. The Arbitrator invited the Parties, in the event, they could not resolve the matter between themselves in light of the report to:

> *"[…] make submissions as to:*
>
> *1) the next steps to be taken in this matter; and*
>
> *2) the use of the report in any future proceedings."*

25. It is this Panel's view that the Arbitrator, like many decision makers in our legal system, informed the Parties that they could resolve the matter themselves. The Arbitrator wrote:

> *Based on this report, it is my sincere hope that the parties can come to some mutually agreeable resolution in this case. Should the parties chose [sic] to do so they may avail themselves of the services of Mr. Jon Fidler the Resolution Facilitator who initially worked with them. In the alternative, the parties can agree to appoint me as a Med/Arb Neutral, so I can conduct a mediation to avoid, if possible, the need for arbitration.*

26. The Arbitrator made no direction as to the way the Parties should conduct themselves and clearly did not favour any position over another. At most the Arbitrator could be said to have encouraged the Parties to resolve the matter themselves – an outcome entirely consistent with the SDRCC's purpose of resolving a sports dispute in a just, speedy, and cost-effective manner. This is not something that a reasonable person would consider as demonstrating bias against or in favor of a Party or outcome.

27. This Panel finds that the Arbitrator did not at any time, either in the November 9th email or in the December Bias Challenge Response, compromise or appear to compromise the Tribunal's ability to decide this dispute impartially. This Panel finds that the Arbitrator's conduct does not run afoul of s. 35 of the Arbitration Act, 1991, S.O. 1991, c. 17 as alleged by the Affected party.

28. The Arbitrator clearly did not conduct any part of the arbitration as a mediation or conciliation process. The Arbitrator offered the parties the opportunity to engage in their own mediation, but did not convert the arbitration into either a mediation or conciliation process.

29. The Affected Party also asserts that the Arbitrator's written ruling on refusing to withdraw from this matter is itself evidence of bias. This Panel strongly disagrees.

30. The Affected Party in making this argument is in effect saying that the Arbitrator's reasons for refusing to withdraw, as they are not consistent with the Affected Party's position, are therefore evidence of bias. This is an untenable argument.

31. In providing the December Bias Challenge Response the Arbitrator did exactly what was asked by the Affected Party – rule on the challenge, and did so in a way that this Panel finds no fault with.

ORDER

32. Accordingly, having fully reviewed the submissions and carefully considered this matter and the arguments made, this Panel dismisses the challenge to the Arbitrator and remits the matter back to the Arbitrator for determination pursuant to the SDRCC Code.

Peter Lawless
Chair
Victoria, BC

Charmaine Panko, QC
Member
Saskatoon, SK

Aaron Ogletree
Member
New York, NY (USA)

February 23, 2021