

DECISION

INTRODUCTION

On July 21, 2023, I issued a Short Decision denying the Claimant's request to suspend a penalty imposed by Hockey Canada. The decision was issued in an urgent manner as the Claimant sought to participate in a hockey tournament the following week and needed a bottom-line answer on whether his suspension would be temporarily lifted. I considered the materials filed by the parties as well as the submissions made at the hearing. The parties agreed that the reasons for my decision may be issued at a later date in accordance with the Canadian Sport Dispute Resolution Code ("the Code"). These are my reasons.

BACKGROUND

As the issue involves minors, the identity of the Claimant and the complainant hockey player (hereinafter referred to as "the Complainant") will be anonymized.

Hockey Canada is the national governing body for amateur hockey in Canada. Hockey Canada oversees the management and structure of programs in Canada from entry-level to high performance teams and competitions.

The Claimant is a 15-year-old hockey player from British Columbia. The Claimant attends a hockey academy, which is an elite hockey academy in British Columbia. He was drafted to a major junior hockey team in the Western Hockey League ("WHL").

On or about March 19, 2023, a complaint was filed against the Claimant, and others on the hockey team, by a teammate's father. In general, it was alleged that the Claimant, and others on the hockey team, engaged in a pattern of bullying during the 2022-2023 hockey season, culminating in an incident on March 1, 2023 when the teammate was held down while the Claimant lowered his bare buttocks onto his face.

HOCKEY CANADA'S COMPLAINT AND INVESTIGATION PROCESS

At the outset of the 2022-23 season, Hockey Canada initiated an independent complaint management system (hereinafter referred to as the "ITP"). The ITP is external from Hockey Canada and is staffed by people who have no other association with the organization. The operation of the ITP is described in Hockey Canada's Maltreatment Complaint Management Policy (hereinafter referred to as the "Complaint Policy").

As a result, all complaints which occur in Hockey Canada-sanctioned programming are sent to the ITP for assessment. If the complaint arose in the context of Member-run programming (i.e., all grassroots hockey, whether recreational or competitive), the

matter will be returned to the relevant Member organization for handling pursuant to its own protocols if the ITP determines that an allegation does not meet its threshold of severe maltreatment. However, if it does determine that the allegations are severe, the ITP retains the matter and handles it according to the Complaint Policy.

The ITP assigned Julien S. Matte of Certitude Group (the “Investigator”) to investigate the incident.

The Investigator found that the Claimant pulled his pants and underwear partly down while crouched over the Complainant’s face, slowly lowered his exposed buttocks and anus over the Complainant’s face until it touched before standing back up. The Investigator made further findings of fact regarding the bullying that the Complainant had experienced throughout the season by the Claimant and others.

After the Investigator delivered his report, the ITP constituted an adjudicative panel as it is required to do pursuant to the Complaint Policy. The ITP engaged the Honorable Anne M. Mullins, a retired judge formerly of the Ontario Superior Court of Justice to constitute the Panel. Adjudicator Mullins’ role under the Complaint Policy was to determine whether an infraction, breach, or violation of a code of conduct or policy against maltreatment, bullying or harassment had occurred, and, if so, what if any sanctions would be appropriate.

After conducting an oral hearing, Adjudicator Mullins concluded that the Claimant engaged in maltreatment when he lowered his bare buttocks onto the Complainant’s head while he was being held down by one of the other Respondents. Adjudicator Mullins determined that the appropriate sanction was a suspension of six months with immediate effect, to be followed by a period of probation of six months during which the Claimant shall not serve as captain or assistant captain of any team. The Claimant was also required to complete the BC Play Safe Tool for Sport before he could return to play. These penalties were also imposed on one other Respondent who was found to have held down the teammate.

The Claimant filed an appeal of Adjudicator Mullins’ decision to the SDRCC on July 15, 2023.

In the instant matter, the Claimant seeks an interim order lifting the suspension to allow him to participate in a tournament for possible selection to the British Columbia team scheduled during the week of July 24, 2023. The selection camp will be used to determine who will represent the province at the 2023 WHL Cup, a tournament set to take place on October 17-22, 2023. The Claimant further states that the OHL will not hold his spot in the program because the suspension would cause him to miss too many games. Finally, he is unable to attend the camp for the WHL team scheduled for late August. These are the harms that the Claimant has identified and the basis for which he seeks interim relief.

ANALYSIS

Both parties rely on the principles established by the Supreme Court of Canada in *RJR Macdonald v. Canada (Attorney General)*, [1994] 1 S.C.R. 311. In that case, the Court identified three elements to be considered for interim relief. Briefly, these are as follows:

- (a) The existence of a serious issue to be tried;
- (b) The likelihood of irreparable harm to the moving party; and
- (c) The balance of convenience must favour the granting of the relief sought.

I will address each criterion separately.

As will become clear, this application fails on the third criterion.

The existence of a serious issue to be tried

The determination of whether there is a serious issue to be tried is generally a low standard to meet. Unless the application is frivolous or vexatious, an applicant seeking interim relief will usually meet this standard.

The Claimant's appeal is against Adjudicator Mullins' decision. The Claimant challenges the findings of fact, the penalty and also raises issues about procedural fairness. While the SDRCC jurisprudence has shown deference to these types of decisions, it remains to be determined the level of deference afforded in this particular case.

There is clearly a serious issue to be decided and the first criterion is satisfied.

The likelihood of irreparable harm to the moving party

This criterion examines the harm that may be suffered by the Claimant.

The Claimant has identified three distinct harms that he will suffer if the suspension is not lifted.

First, he states that he will be unable to participate in a British Columbia Hockey tournament for selection to the British Columbia provincial team. This selection process takes part during the week of July 24, 2023. The Claimant states that if he is selected, it could be an important step in his hockey career. The effect of the suspension is that he is unable to participate in the tournament.

Second, the Claimant asserts that he will be unable to attend school with the hockey academy as he is not permitted to join the roster until January 2024. The Claimant

advises that he has been told that the hockey academy will not hold a spot on the team for him for the duration of the suspension. Thus, the Claimant states that he will need to change high schools to a school in another city. At the hearing, the Claimant's representatives stated that this would also impact the Claimant's younger brother who is enrolled at the hockey academy as it was not feasible for the family to have two of their children attending schools in different cities.

Third, the Claimant advises that the main camp for the WHL team commences on August 30, 2023. He anticipated playing in pre-season games and possibly remaining with the team in early September. The effect of the suspension is that he is not permitted to attend the main camp. The Claimant states that this jeopardizes his contract with the team, which includes three years of paid university tuition.

Each of the harms identified by the Claimant are distinct and warrant individual analysis. However, it is important to recognize that this criterion is intended to examine the actual harm that will occur to the Claimant. It is not a time to speculate on what might happen if the suspension remains in place pending the appeal. Moreover, it is quite possible for the appeal to be heard and decided before some of the harm identified by the Claimant occurs.

As the Court made clear in *RJR MacDonald*, the harm itself is not to be evaluated or measured. Rather, the analysis is whether there is irreparable harm. The Court held as follows:

The harm which might be suffered by the respondent, should the relief sought be granted, has been considered by some courts at this stage. We are of the opinion that this is more appropriately dealt with in the third part of the analysis. Any alleged harm to the public interest should also be considered at that stage.

At this stage the only issue to be decided is whether a refusal to grant relief could so adversely affect the applicants' own interests that the harm could not be remedied if the eventual decision on the merits does not accord with the result of the interlocutory application.

The inability to participate in the British Columbia Hockey tournament means the Claimant loses the opportunity to be selected for the British Columbia provincial team. That is a harm to the Claimant as he is losing an opportunity because of the suspension.

I am not persuaded that the harm identified by the Claimant with respect to the hockey academy and attendance at the WHL camp are relevant at this stage. The appeal can be decided before those harms materialize. However, the harm identified with respect to the British Columbia Hockey tournament is sufficient to satisfy this criterion.

The balance of convenience must favour the granting of the relief sought

Under this criterion, I am to assess which of the parties will suffer the greater harm from granting or refusing to grant the interim relief. It is appropriate for me to consider the harm that may be caused to the Complainant and the constituents of Hockey Canada.

Hockey Canada submits that I ought to hear from the Complainant to properly assess the harm that he may face if the suspension were lifted on an interim basis. I do not accept Hockey Canada's argument. In my view, the need to hear from witnesses, and in particular from the Complainant, will only arise in the most exceptional of cases. These motions are intended to be dealt with expeditiously. The involvement of witnesses would inevitably protract the proceedings. Moreover, the risk of re-traumatization to the Complainant must be handled with care and suitable caution.

The harm suffered by the Claimant is primarily with respect to his eligibility to play in a tournament for selection to a provincial hockey team. While there is obviously some harm to not playing in the tournament and not being eligible for selection, it is not the serious harm that would usually attract interim relief of a suspension. It may be a significant tournament for the Claimant, but it was not asserted that ineligibility would negate his playing career aspirations or his eligibility for higher level play.

The Claimant presented me with a letter from a Registered Clinical Counsellor that identified the Claimant as his client. The letter, dated July 20, 2023, does not address any harm suffered by the Claimant. Rather, it speaks to his remorse and understanding of the consequences of his actions. With no real description of the harm suffered, the letter offers very little for me to consider using the test of *RJR MacDonald*.

If the suspension were varied on an interim basis, there would be harm to both the Complainant and the broader community that Hockey Canada is charged with protecting. By the Claimant's own admission, there was serious wrongdoing against the Complainant. The Complainant is registered to play in the tournament that the Claimant seeks to participate in. I accept Hockey Canada's submission that it would be a shock to the Complainant to learn that the Claimant is now permitted to play in the tournament a few weeks after the suspension was imposed. It is obvious that such a result would undermine the Complainant's confidence in the system designed to protect him, as a young hockey player. Moreover, it is very likely to cause the Complainant some degree of re-traumatization.

I am also persuaded that Hockey Canada's objective of maintaining a safe sport environment would be harmed if the suspension were lifted in these circumstances. Hockey Canada has utilized an investigation process and an adjudicative process to render the suspension. It would undermine its protective efforts if the suspension were lifted so quickly without a compelling reason.

I conclude that the harm caused to Hockey Canada and the Complainant by granting interim relief significantly outweighs the harm caused to the Claimant. This criterion heavily weighs against granting the interim relief sought in this motion.

For these reasons, the request to grant interim relief against the suspension is denied.

Signed in Whitby, this 31st day of July 2023.



Matthew Wilson, Arbitrator