

IN THE MATTER OF A DOPING APPEAL UNDER
THE CANADIAN SPORT DISPUTE RESOLUTION CODE OF
THE SPORT DISPUTE RESOLUTION CENTRE OF CANADA

CASE NO. SDRCC DAT 13-0002
(DOPING APPEAL PANEL)

AMONG:

AMANDA GERHART

Claimant

-and-

CANADIAN CENTRE FOR ETHICS IN SPORT
CANADIAN AMATEUR WRESTLING ASSOCIATION

Respondents

-and-

WORLD ANTI-DOPING AGENCY
INTERNATIONAL FEDERATION OF ASSOCIATED WRESTLING STYLES

Parties

AWARD ON JURISDICTION

Andrew de Lotbinière McDougall
Jurisdictional Arbitrator

TABLE OF CONTENTS

	<u>Page</u>
I. PARTIES	2
A. Claimant.....	2
B. Respondents.....	2
C. Additional Parties	3
II. JURISDICTIONAL ARBITRATOR	3
III. BACKGROUND TO THE DOPING APPEAL.....	4
IV. JURISDICTIONAL ARBITRATOR PROCEEDING.....	5
V. ISSUE	6
VI. PARTIES' CONTENTIONS.....	6
A. Summary of Claimant's Position.....	6
B. Summary of CCES' Position.....	8
VII. ANALYSIS.....	10
A. CADP.....	10
B. SDRCC Code – Articles 2 and 7	11
C. Request Form – Notice of Appeal	13
D. SDRCC Code – Article 3.4.....	14
E. SDRCC Code – Article 6.5.....	16
F. Ontario Law.....	16
G. Exceptional Circumstances.....	17
VIII. COSTS	19
IX. AWARD	20

This Award on Jurisdiction is rendered in connection with a dispute among an athlete Ms. Amanda Gerhart (the “**Claimant**”); the Canadian Centre for Ethics in Sport (the “**CCES**”) and the Canadian Amateur Wrestling Association (“**Wrestling Canada**”) (together the “**Respondents**”); and the World Anti-Doping Agency (“**WADA**”) and the International Federation of Associated Wrestling Styles (“**FILA**”) (together the “**Additional Parties**”) (the Claimant, the CCES, Wrestling Canada, WADA, and FILA all together the “**Parties**”), resolved under the Canadian Sport Dispute Resolution Code (the “**SDRCC Code**”) administered by the Sport Dispute Resolution Centre of Canada (the “**SDRCC**”), specifically regarding a jurisdictional issue in a doping appeal brought by the Claimant.

I. PARTIES

A. CLAIMANT

1. The Claimant (a defined term in Article 1.1(h) of the SDRCC Code) is a 28-year-old athlete and accomplished wrestler affiliated with Wrestling Canada. She is represented in this arbitration by Dr. Emir Crowne.
2. The Claimant seeks to appeal the Decision dated 18 April 2013 of a Doping Dispute Panel (“**Doping Dispute Panel**” is defined in Article 1.1(n) of the SDRCC Code) despite being approximately two months beyond the 30-day time limit for bringing such an appeal. Her appeal is a “**Doping Appeal**” as defined in Article 1.1(j) of the SDRCC Code.

B. RESPONDENTS

3. The Respondents (“Respondent” is a defined term in Article 1.1(kk) of the SDRCC Code) are:
 - (a) The CCES, an independent non-profit organization responsible for maintaining and carrying out the Canadian Anti-Doping Program (the “**CADP**”), including providing anti-doping services to national sports organizations and their members. The CCES is represented in this arbitration by its General Counsel, Mr. David W. Lech.

(b) Wrestling Canada, the national sport governing body for Olympic style wrestling in Canada, operating, among others, the men's and women's national team programs, which teams represent Canada at major competitions (including the Olympics), and overseeing the operation of the National Championships. Wrestling Canada is represented in this arbitration by its Executive Director, Ms. Tamara Medwidsky.

4. The CCES participated actively in the proceeding, opposing the Claimant's request to have her Doping Appeal heard, on the basis that it was brought out of time.
5. Wrestling Canada did not participate actively in the proceeding other than to attend one conference call on 1 August 2013 and to submit in writing that it supported the Claimant's request to have her Doping Appeal heard despite being brought late.

C. ADDITIONAL PARTIES

6. WADA and FILA are also Parties to this proceeding by virtue of Article 7.6(b) of the SDRCC Code.
7. FILA did not participate actively in the proceeding other than to attend the initial Administrative Conference Call with the SDRCC.
8. WADA did not participate actively in this proceeding at all.

II. JURISDICTIONAL ARBITRATOR

9. In application of Article 6.10(a) of the SDRCC Code,¹ the SDRCC appointed Mr. Andrew de Lotbinière McDougall to serve as the Jurisdictional Arbitrator in this proceeding.

¹ Article 6.10(a) of the SDRCC Code provides that “[w]here no Panel has yet been appointed to deal with a Sports-Related Dispute, and an issue arises between the Parties which they cannot resolve, the SDRCC may appoint a Jurisdictional Arbitrator from the rotating list of Arbitrators...”

10. Article 6.10(b) of the SDRCC Code provides the Jurisdictional Arbitrator with “*all necessary powers to decide any issue in dispute between the Parties which would have otherwise been argued before the Panel had it been constituted.*”

III. BACKGROUND TO THE DOPING APPEAL

11. The Claimant’s Doping Appeal concerns the Decision of the Doping Dispute Panel dated 18 April 2013 that her failure to submit a urine sample in a mandatory out-of-competition doping test was an anti-doping rule violation requiring a sanction of two-years of ineligibility from competition. The facts which form the background of the case are set out in the Decision of the Doping Dispute Panel.
12. In summary, CADP, Rule 1.10 provides that athletes “*shall be available for Sample collection*”, which takes place for the purposes of doping control. Rule 7.31 of the CADP provides that “[r]efusing or failing without compelling justification to submit to Sample collection after notification ... is an anti-doping rule violation.” The sanction for such violation is, pursuant to Rule 7.39 of the CADP, ineligibility from competition for a period of two years, unless there are aggravating or exceptional circumstances surrounding the situation.
13. The CCES sought to collect a sample from the Claimant at the gym where she was training on 30 January 2013, after giving the Claimant advance notification. The Claimant refused to submit to the sample collection, explaining that she had to report to work and could therefore not stay for the sample collection. She left the premises without giving the required sample.
14. On 13 March 2013, Wrestling Canada imposed a provisional suspension on the Claimant.
15. On 10 April 2013, the Doping Dispute Panel issued a decision summary, holding that the Claimant had failed to submit to an out-of-competition doping control sample collection without compelling justification, finding an anti-doping rule violation, and finding that the appropriate sanction was a two-year period of ineligibility from competition, the ineligibility period running from 13 March 2013 until midnight on 12

March 2015. On 18 April 2013, the Doping Dispute Panel issued its Decision confirming the decision summary.

16. On 14 July 2013, the Claimant filed a Notice of Appeal with the SDRCC seeking to bring a Doping Appeal from the Decision of the Doping Dispute Panel dated 18 April 2013 (the “**Notice of Appeal**”). The Notice of Appeal named the CCES and Wrestling Canada as Respondents, and the Government of Canada and WADA as Observers. This was later corrected by the SDRCC to remove the Government of Canada and add FILA. Pursuant to Article 7.6(b) of the SDRCC Code, WADA and FILA are Parties (as opposed to Observers) to this proceeding, and the Government of Canada is not.

IV. JURISDICTIONAL ARBITRATOR PROCEEDING

17. On 18 July 2013, the SDRCC held an Administrative Conference Call with the Claimant (in person and represented by her counsel Dr. Crowne); the CCES (represented by its counsel Mr. Lech); and FILA (represented by Mr. Carlos Roy). During the call, the SDRCC proposed and the Parties agreed to the appointment of a Jurisdictional Arbitrator from the SDRCC’s rotating list of arbitrators pursuant to Article 6.10 of the SDRCC Code to address the preliminary issue of the late filing of the Claimant’s Notice of Appeal.
18. The Jurisdictional Arbitrator was appointed and received the file in this matter on 18 July 2013.
19. A Preliminary Jurisdictional Meeting took place via conference call on 19 July 2013 among the Jurisdictional Arbitrator; the Claimant (in person and represented by her counsel Dr. Crowne); the CCES (represented by its counsel Mr. Lech); and the SDRCC. During the conference call, the Parties confirmed the Claimant’s wish set out in its Notice of Appeal to follow a written procedure, and a procedural timetable was established, with agreement for a further conference call with the Jurisdictional Arbitrator thereafter if needed.
20. In accordance with the agreed procedural timetable:

- (a) the CCES made written submissions on 26 July 2013; and
- (b) the Claimant submitted a reply brief on 28 July 2013 (made available on the SDRCC electronic case management portal (“CMP”) on 29 July 2013).

- 21. In addition, on 26 July 2013, Wrestling Canada submitted in writing that it “*would support the appeal being heard, notwithstanding the late notice of appeal.*”
- 22. On 30 July 2013, the Jurisdictional Arbitrator wrote to the Parties inviting them to consider a list of four issues and to attend a further conference call.
- 23. On 1 August 2013, a further conference call took place. Just prior to the conference call, written submissions from the Claimant dated 31 July 2013 were made available to the Parties on the CMP. The Jurisdictional Arbitrator; the Claimant (in person and represented by her counsel Dr. Crowne); the CCES (represented by its counsel Mr. Lech); Wrestling Canada (represented by its Executive Director Ms. Medwidsky); and the SDRCC attended. During the conference call, the Claimant and the CCES made oral submissions; the Claimant, the CCES, and Wrestling Canada confirmed that they had nothing further to raise and had no complaints about the proceeding; and the Jurisdictional Arbitrator brought the proceeding to a close.

V. ISSUE

- 24. It is undisputed that the Claimant’s Notice of Appeal was filed out of time, approximately two months after the expiry of the 30-day time period for bringing a Doping Appeal under Article 7.4(a) of the SDRCC Code.
- 25. What is in issue before the Jurisdictional Arbitrator is whether the SDRCC nevertheless has jurisdiction to allow the Claimant’s Doping Appeal to proceed.

VI. PARTIES’ CONTENTIONS

A. SUMMARY OF CLAIMANT’S POSITION

- 26. The Claimant’s position is that despite the late filing of her Notice of Appeal the Doping Appeal should be heard for the following reasons:

- (a) Article 3.4(e) of the SDRCC Code grants the SDRCC the power “[u]nder exceptional circumstances or if all Parties agree” to “accept a Request that is not filed within the time limit”;
- (b) Article 3.4(e) applies to the Claimant’s Notice of Appeal;
- (c) “*Exceptional circumstances*” should be construed as “notable” or “special” as opposed to “extraordinary” or “unusual”;
- (d) Such “*exceptional circumstances*” are present in this case, as:
- the Claimant is 28 years old and “*a two (2) year ban ends her viable career as an athlete*”;
 - the Claimant was “*mentally defeated by her two (2) year ban*”, and “*simply could not file [the] appeal in a timely manner*”; and
 - Wrestling Canada agrees to the Doping Appeal being heard despite the late filing of the Notice of Appeal;
- (e) The power to extend time limits can also be derived from Chapter 17 of Ontario’s *Arbitration Act, 1991* (“**Arbitration Act**”), and more precisely from its Sections 20.1 and 27.4, as well as from Ontario’s *Statutory Powers Procedure Act* (“**SPPA**”);
- (f) The time period within which an appeal has to be filed in the sporting context is merely a time limit and not a limitation period;
- (g) The Parties have varied the terms of the Arbitration Act regarding the time limits by adopting the CADP and the SDRCC Code and, thus, the 30-day time limit for filing an appeal, which in the Arbitration Act may be absolute, does not apply here; and
- (h) Considerations of fairness require that the appeal be admitted, as:
- no one is prejudiced if the appeal proceeds;

- the two-year ban ends the Claimant’s viable career as an athlete; and
- the Claimant’s failure to file a timely notice results partly from the Claimant’s prior counsel being “*largely unavailable and under a misapprehension as to the appropriate appellate standard.*”

B. SUMMARY OF CCES’ POSITION

27. The CCES opposes the Claimant’s position and submits that the SDRCC has no jurisdiction to proceed with the Claimant’s Doping Appeal.
28. The CCES submits that the 30-day time limit for filing a Doping Appeal in the SDRCC Code is a limitation period, which cannot be varied from. The CCES submits that there are no curative provisions in the applicable rules that would allow the filing of a Doping Appeal outside the applicable 30-time limit.
29. Further, the CCES submits that neither Ontario law nor common law doctrines allow for correcting such delay.
30. The CCES relies on the following arguments in support of its position:
 - (a) In a doping case, only Article 7 of the SDRCC Code applies to time limits, and Article 3.4(e) of the SDRCC Code regarding “*exceptional circumstances*” has no relevance with respect to doping cases;
 - (b) The CADP has priority over the SDRCC Code, and, thus, the 30-day time limit for filing a Doping Appeal in the CADP cannot be cured by any provision of the SDRCC Code;
 - (c) In any event, Article 3.4(e) of the SDRCC Code is limited in that it deals with a request to commence arbitration proceedings, *i.e.*, at the beginning of the process, and not with appeals in already ongoing proceedings;
 - (d) Even if Article 3.4(e) of the SDRCC were applicable, the circumstances in this case are not exceptional and thus do not justify an extension of the time limit for filing an appeal. The CCES submits that the term “*exceptional*

circumstances” should be given its ordinary meaning and should thus be interpreted as meaning circumstances that are “*extraordinary or unusual*”.

- (e) The SPPA is inapplicable to SDRCC doping cases;
- (f) The Arbitration Act is not of help to the Claimant, as:
 - Section 20(1) deals with an arbitrator’s power to determine the procedures to be followed in the conduct of arbitration proceedings and does not provide anything with respect to “*missing a limitation period*” established in the applicable arbitration rules;
 - Section 27(4) deals with a party’s failure to prosecute an arbitration that the party itself commenced not with “*missing a limitation period*” established in the applicable arbitration rules; and
 - Section 52(1) provides that Ontario law “*with respect to limitation periods applies to an arbitration as if the arbitration were an action and a claim made in the arbitration was a cause of action.*” This law in turn is construed strictly by the courts of Ontario, which consider that the common law doctrine of “special circumstances” does not apply “*in the vast majority of cases*”.
- (g) It would not be a violation of the common law doctrine of fairness to dismiss the appeal, as:
 - the Claimant received the standard sanction for a first doping violation;
 - the effect of the sanction on the Claimant or on her career does not render the decision unfair; and
 - the Claimant was aware that she could appeal the decision, as well as of the timelines that apply to appeals, and decided not to appeal while still within the time limits to file an appeal; and

- (h) There is a need for certainty in doping tribunal adjudications that the 30-day limitation to file an appeal cannot be extended, and allowing this appeal to proceed would constitute a persuasive precedent, creating a “*climate of uncertainty*”.

VII. ANALYSIS

A. CADP

31. It is undisputed that the CADP applies to this dispute.
32. Rule 1.0 of the CADP sets out the following “*General Principle*” about how the anti-doping effort in Canada is structured:

“In Canada our national effort to eliminate doping from sport is not directed by specific legislation. Rather, all parties and organizations committed to the Canadian anti-doping effort have collectively agreed to abide by a common set of rules, procedures, duties and responsibilities which are expressed in the CANADIAN ANTI-DOPING PROGRAM.”

33. Rule 1.3 of the CADP sets out the CADP’s jurisdiction and includes the following introductory paragraph:

“The CANADIAN ANTI-DOPING PROGRAM is based on and informed by the Code [defined in the CADP as the World Anti-Doping Code]. Pursuant to the Code, Athletes and other Persons accept the CANADIAN ANTI-DOPING PROGRAM as a condition of participating in sport and shall be bound by the rules contained in the Code and the CANADIAN ANTI-DOPING PROGRAM. The CCES is a Signatory to the Code and the CCES is recognized by WADA as Canada’s national Anti-Doping Organization. Further, the CCES has been designated by the Canadian sport community the independent organization with responsibility to administer the CANADIAN ANTI-DOPING PROGRAM.”

34. Rule 8.0 of the CADP sets out its “*Appeal Rules*”. Rule 8.4 provides that “[i]n cases involving national-level Athletes and other Persons who do not have a right to appeal under Rules 8.20-8.22 to CAS [defined in the CADP as The Court of Arbitration for Sport], decisions of the CCES or the Doping Tribunal may be appealed to the Doping Appeal Tribunal.”

35. Rule 8.8(a) of the CADP provides that “[a]n appeal from the Doping Tribunal shall be initiated by a notice of appeal in writing to all parties before the Doping Tribunal within thirty (30) days of the Doping Tribunal’s decision.”
36. Rule 8.9(b) provides that “[t]he Doping Appeal Tribunal shall be constituted and administered by the Sport Dispute Resolution Centre of Canada [the SDRCC] and the arbitrators shall be members of its roster of arbitrators.”
37. Rule 8.9(c) provides that “[t]he procedural rules of the Sport Dispute Resolution Centre of Canada [the SDRCC] shall apply to the proceedings of the Doping Appeal Tribunal except as matters are addressed in these Rules.”
38. Therefore, pursuant to the CADP, where there is an appeal arising out of Rule 8.4 of the CADP (as is the case here), it is necessary to turn to the SDRCC Code.

B. SDRCC CODE – ARTICLES 2 AND 7

39. Article 2.1(a) of the SDRCC Code explains that “[t]he SDRCC administers [the SDRCC Code] to help resolve Sports-Related Disputes.” “**Sports-Related Dispute**” is a term defined in Article 1.1(mm) of the SDRCC Code as “a sport dispute to which [the SDRCC Code] applies as set out in Section 2.1” of the SDRCC Code. It includes “any dispute arising out of the application of the Anti-Doping Program,” i.e., the CADP (see Article 1.1(mm)(iv) of the SDRCC Code).
40. Article 2.1(b) of the SDRCC Code in turn explains how the SDRCC Code “applies to a Sports-Related Dispute where the SDRCC has jurisdiction to resolve the dispute.”
41. Article 7 of the SDRCC Code is entitled “Specific Arbitration Procedural Rules for Doping Disputes and Doping Appeals”, and Article 7.1 provides as follows:

“In connection with all Doping Disputes and Doping Appeals, the specific procedures and rules set forth in this Article 7 shall apply in addition to the rules specified in the Anti-Doping Program [which is the CADP as defined in Article 1.1(d) of the SDRCC]. To the extent that a procedure or rule is not specifically addressed in this Article 7 or in the Anti-Doping Program [i.e., the CADP], the other provisions of this Code [i.e., the SDRCC Code] shall apply, as applicable.” (Emphasis added)

42. Article 7.4(a) of the SDRCC Code (which mirrors Rule 8.8(a) of the CADP) provides that the initiation of a Doping Appeal is subject to a 30-day time limit:

“With respect to a Doping Appeal, a Person shall initiate the process by delivering a notice of appeal in writing to all Parties who were before the Doping Dispute Panel within thirty (30) days of the Doping Dispute Panel’s decision pursuant to Rule 8.8 of the Anti-Doping Program.”
(Emphasis added)

43. Article 7.2 of the SDRCC Code is headed “*Time Limits*” and states:

“The time limits fixed under this Article 7 shall begin from the day after the day on which either:

- (i) the notification of an anti-doping rule violation pursuant to Rules 7.66-7.69 of the Anti-Doping Program was issued; or*
- (ii) the notice of appeal is received by the SDRCC or the Panel, as applicable.*

The time limits will have expired if the communications by the Parties are not received before four (4) p.m., Eastern Time, on the date when such time limit expires.”

44. The CCES submits that the CADP and Article 7 of the SDRCC alone govern the issue at hand.² According to the CCES, as “*the CADP has expressly and clearly set out timelines for filing a proper Appeal, no other section in the SDRCC Code is applicable.*”³
45. The CCES argues further that the 30-day period for initiating a Doping Appeal under Article 7 of the SDRCC is akin to a limitation period because there are no curative provisions in the SDRCC, the CADP, or Ontario law that would allow for this time limit to be extended in any circumstances.
46. The Jurisdictional Arbitrator does not agree with the CCES’ arguments in this regard. Neither the CADP nor Article 7 of the SDRCC Code specifically address the

² See e.g., CCES written submissions, para. 5.

³ *Ibid.*

procedure by which a notice of appeal in a Doping Appeal is to be filed. This is distinct from the time limit within which a notice of appeal in a Doping Appeal is to be filed. Rule 8.8(a) of the CADP and Article 7.4(a) of the SDRCC Code provide for the time limit within which a notice of appeal in a Doping Appeal must be filed, which is 30 days. Article 7.2 of the SDRCC Code provides for how to calculate when this time limit begins and expires. However, these provisions do not set out the procedure by which a notice of appeal in a Doping Appeal is to be filed.

47. Accordingly, Rule 8.9(c) of the CADP and Article 7.1 of the SDRCC Code apply and one must look to the other provisions in the SDRCC Code to determine how a notice of appeal in a Doping Appeal is to be filed. As stated in Article 7.1 of the SDRCC Code, where “*a procedure...is not specifically addressed in this Article 7 or in the [CADP]*” (as is the case here where the procedure by which a notice of appeal in a Doping Appeal is to be filed is not specifically addressed in the CADP or Article 7 of the SDRCC Code), “*the other provisions of the SDRCC Code shall apply, as applicable.*”
48. The question then becomes whether there are “*other provisions of the SDRCC Code*” that set out the procedure for filing a notice of appeal in a Doping Appeal. The answer is yes.

C. REQUEST FORM – NOTICE OF APPEAL

49. Before turning to the relevant “*other provisions of the SDRCC Code*” it is informative to consider the SDRCC’s publicly available website at www.crdsc-sdrcc.ca and the standard form available there that was used by the Claimant in this proceeding to file her Notice of Appeal in this Doping Appeal.
50. The Dispute Resolution Secretariat menu on the English language homepage of the SDRCC website contains a link to a page called “*Forms*”.⁴ On the “*Forms*” page of the SDRCC website is a section headed: “***Request Form: It needs to be completed by***

⁴ See www.crdsc-sdrcc.ca/eng/home.jsp.

the claimant in order to initiate any proceedings” (emphasis original).⁵ One of the “Request Forms” listed is “*Notice of Antidoping Appeal*.”⁶ When one clicks on “*Notice of Antidoping Appeal*”, a standard form entitled “*Notice of Appeal – Doping*” is available to be downloaded.

51. It is this standard “*Notice of Appeal – Doping*” Request Form that the Claimant filled out and submitted as the Notice of Appeal in this proceeding. The Notice of Appeal states in the standard language in its introductory sentence: “*This form is used to file before the SDRCC a notice of Doping Appeal as defined in Subsection 1.1(j) of the Canadian Sport Dispute Resolution Code (“Code”).*” It goes on to state in its standard language in the third paragraph at the top of the first page: “*The intent of this form is to engage the hearing process with the SDRCC.*”

D. SDRCC CODE ~ ARTICLE 3.4

52. A “*Request*” is defined in Article 1.1(hh) of the SDRCC Code as a “*request to the SDRCC for Mediation, Arbitration or Med/Arb, as more fully described in Section 3.4 hereof.*”
53. Article 3.4(a) of the SDRCC Code states that “[w]hen a Sports-Related Dispute is brought to the SDRCC, the Claimant shall complete a Request and file such Request with the SDRCC.” As noted above, the term Sports-Related Dispute includes “*any dispute arising out of the application of the Anti-Doping Program,*” i.e., the CADP (see Article 1.1(mm)(iv) of the SDRCC Code). Article 3.4(a)(viii) of the SDRCC Code goes on to state that “*where a Sports-Related Dispute is submitted to the SDRCC on appeal from a prior decision, the Claimant shall submit, if applicable, a copy of the decision being appealed.*” Again, this includes any dispute arising out of the application of the CADP.

⁵ See www.crdsd-sdrcc.ca/eng/dispute-resolution-forms.jsp.

⁶ See www.crdsd-sdrcc.ca/eng/dispute-resolution-forms.jsp.

54. In other words, Article 3.4 explains the procedure for filing a Sports-Related Dispute, which includes a notice of appeal in a Doping Appeal brought to the SDRCC. There is no other provision in the CADP or the SDRCC Code that addresses this procedure.
55. Necessarily, the rest of Article 3.4 of the SDRCC Code applies to the “Request”, *i.e.*, the Notice of Appeal, used to file and commence this proceeding. This includes Article 3.4(e), which provides that “[u]nder exceptional circumstances or if all Parties agree, the SDRCC may accept a Request [e.g., a notice of appeal in a Doping Appeal] that is not filed within the time limit or that is not completed pursuant to Sections 3.4 or 3.5 hereof.”
56. The CCES submits that “*SDRCC Code sub-section 3.4(e) deals with filing a Request to commence an SDRCC hearing and does not address the timeliness for filing an Appeal from a decision issued in an existing SDRCC doping case*”⁷ (emphasis original). However, the Jurisdictional Arbitrator disagrees for the reasons stated above. The only provision in the CADP and the SDRCC Code that can conceivably deal with the procedure for filing a notice of appeal in a Doping Appeal is Article 3.4 of the SDRCC Code. There is no other provision in the CADP or the SDRCC Code that tells a party that wishes to commence a Doping Appeal what form it is supposed to submit with what information in order to commence the appeal process. All the CADP and Article 7 of the SDRCC Code tell such a party is that it has 30 days to initiate such an appeal by filing a notice of appeal and how to calculate when that time period begins and expires, nothing more and nothing less in this regard.
57. Under the SDRCC Code, a Doping Appeal is commenced by submitting a Request to the SDRCC as set out in Article 3.4 of the SDRCC Code. This necessarily includes Article 3.4(e) and the provision regarding the SDRCC’s power to accept a Request that is not filed within the time limit under exceptional circumstances or if all parties agree, as Article 3.4(e) is in no way excluded from applying to Doping Appeals.

⁷ CCES written submissions, para. 8.

58. Had the drafters of the SDRCC Code wished to exclude this possibility when drafting Article 7 of the SDRCC Code, they could have; however, they did not.

E. SDRCC CODE – ARTICLE 6.5

59. During the proceeding, reference was made to Article 6 of the SDRCC Code (“*Med/Arb and Arbitration General Rules*”) and specifically Article 6.5(c), which provides that the SDRCC or a Panel may “*extend or reduce time limits*”, “*upon application on justified grounds*.” The Claimant submitted that the “*justified grounds*” language in Article 6.5(c) is broader and more flexible than the “*exceptional circumstances*” language in Article 3.4(e) of the SDRCC Code.

60. The Jurisdictional Arbitrator finds that Article 6.5 of the SDRCC Code is not relevant here as it is a more general provision, while Article 3.4(e) is a more specific provision dealing specifically with Requests, which includes a notice of appeal to commence a Doping Appeal.

61. This is logical, as arbitrators, parties, and the SDRCC are afforded the procedural flexibility that Article 6.5 of the SDRCC Code allows with respect to time limits when conducting an arbitration (such as to reschedule conference calls, extend or reduce filing dates as necessary, re-organize the procedural calendar of the arbitration, etc.), while Article 3.4(e) provides for a more stringent test in allowing late Requests to be filed in commencing a procedure, such as a Doping Appeal here, where all parties do not agree to the late filing.

62. Only “*justified grounds*” are needed to extend or reduce time limits generally in an SDRCC arbitration proceeding, while “*exceptional circumstances*” are needed to file a Request (including a notice of appeal in a Doping Appeal) late when all parties do not agree to the late filing.

F. ONTARIO LAW

63. Article 6.24 of the SDRCC Code provides that “[t]he applicable law for [SDRCC] Arbitrations shall be the law of the Province of Ontario and the arbitration legislation in place in Ontario shall be the law of SDRCC Arbitrations.”

64. The Claimant and the CCES have both made arguments regarding the applicability and effect of the Arbitration Act, Ontario case law, and the SPPA.
65. The SPPA does not apply to this dispute, as it does not apply to proceedings before an arbitrator to which the Arbitration Act applies,⁸ such as this one.
66. Reference has been made to various provisions of the Arbitration Act and related case law. However, as set out in Section 3 of the Arbitration Act, “[t]he parties to an arbitration agreement may agree, expressly or by implication, to vary or exclude any provision of this Act except the following” after which follows a list of provisions of the Arbitration Act that the parties cannot vary or exclude. None of the provisions of the Arbitration Act referred to by the Claimant and the CCES in support of their arguments are among those that cannot be varied or excluded, and for the reasons stated above the SDRCC Code sets out the procedure for commencing a Doping Appeal with the SDRCC, which includes being able to file such an appeal out of time under exceptional circumstances or if all parties agree. Accordingly, there is no need to turn to the Arbitration Act or the related case law referred to by the Claimant and the CCES for assistance.

G. EXCEPTIONAL CIRCUMSTANCES

67. The next question that must be addressed is whether there are “*exceptional circumstances*” within the meaning of Article 3.4(e) of the SDRCC Code allowing this Doping Appeal to proceed despite being commenced late. This is necessary to consider, as all Parties have not agreed to this Doping Appeal proceeding.
68. In this regard, the Jurisdictional Arbitrator notes that Article 3.4(e) of the SDRCC Code uses the permissive “*may*” rather than the mandatory “*shall*”. In other words, it is arguable that even if exceptional circumstances exist or if all Parties agree, the SDRCC has the discretion to (but is not obliged to) accept a Request that is not filed within the time limit or that is not properly completed. Indeed, the words “shall” and

⁸ SPPA, Section 3.2(d).

“may” are used in different places in Article 3.4 of the SDRCC Code, which is arguably for a reason.

69. This question was not addressed by the Parties in their submissions. However, it is not necessary for the Jurisdictional Arbitrator to address here given the Jurisdictional Arbitrator’s findings below.
70. Having considered all of the Parties’ submissions, and while the Jurisdictional Arbitrator has sympathy with the Claimant’s situation and the consequences of the sanction that she has received, the Jurisdictional Arbitrator agrees with the CCES’ submissions on this issue and considers that there are no exceptional circumstances in this case allowing the late filing of the Claimant’s Notice of Appeal.
71. The jurisdictional arbitrator in the SDRCC dispute *D. Jill Tuckey v. Softball Canada*,⁹ cited by the CCES had to decide whether exceptional circumstances existed under Article 3.4(e) of the SDRCC Code to accept a Request, which was not filed within the time limit.¹⁰ I agree with that jurisdictional arbitrator, who held that “exceptional circumstances” should be “*given its ordinary meaning*” and interpreted as “*extraordinary or unusual*”.¹¹
72. There is nothing extraordinary or unusual in the circumstances here. The Claimant was given the standard sanction in the CADP for her anti-doping rule violation of refusing to submit to an out-of-competition sample collection. The Claimant’s age does not change anything in this regard and is not an exceptional circumstance.
73. It is also unsurprising that the Claimant would be emotionally affected by receiving this sanction, as indeed most any athlete would likely be. This is also not an exceptional circumstance.

⁹ *D. Jill Tuckey v. Softball Canada*, 2008 SDRCC 08-0071.

¹⁰ *Ibid.*, paras. 21 *et al.*

¹¹ *Ibid.*, para. 23.

74. Rule 1.9 of the CADP states clearly that: “*Athletes shall have knowledge of and comply with all applicable anti-doping policies and rules adopted pursuant to the Code.*” These rules include the CADP and the SDRCC Code and the 30-day time limit for filing an appeal, which is contained in both the CADP and the SDRCC Code.
75. In the present case, it was apparent that the Claimant was aware of the 30-day time limit for filing an appeal and decided together with her counsel at the time not to appeal. Again, this is not an exceptional circumstance, nor is the fact that the Claimant’s previous counsel was apparently unavailable during part of the relevant time period.
76. Moreover, the Jurisdictional Arbitrator has sympathy with the CCES’ argument that there has to be finality in doping disputes.¹² Indeed, the reasons set forth by the Claimant could justify any length of delay in filing a notice of appeal in a Doping Appeal, not just a delay of two months. If there is no finality to doping disputes, any party can come back at any time and invoke these kinds of circumstances in order to re-open the dispute. This is certainly not the purpose of Article 3.4(e) of the SDRCC Code. Therefore, “*exceptional circumstances*” should be truly extraordinary or unusual, justifying the party’s failure to file in time.
77. Accordingly, the Jurisdictional Arbitrator finds that there are no exceptional circumstances justifying the Claimant’s filing of its Notice of Appeal out of time, and this Doping Appeal shall not proceed.

VIII. COSTS

78. The Parties were invited to address the issue of costs in advance of the conference call held on 1 August 2013. The Claimant and the CCES agreed in their submissions during the conference call on 1 August 2013 that each Party should bear its own costs in this proceeding.

¹² CCES written submissions, paras. 41-42.

79. Accordingly, the Jurisdictional Arbitrator makes such a finding, namely that each Party shall bear its own costs of this proceeding.

IX. AWARD

80. For the foregoing reasons, the Jurisdictional Arbitrator decides as follows:

- (1) The Claimant's Notice of Appeal to commence her Doping Appeal was filed approximately two months late;
- (2) Article 3.4 of the SDRCC Code applies to Doping Appeals under the SDRCC Code and thus Article 3.4(e) of the SDRCC Code applies to notices of appeal to commence Doping Appeals that are filed late;
- (3) In the present case there are no exceptional circumstances and there is no agreement of all of the Parties within the meaning of Article 3.4(e) of the SDRCC Code that would allow the late filing of the Claimant's Notice of Appeal.
- (4) Accordingly, the SDRCC does not have jurisdiction to proceed with the Claimant's Doping Appeal, and the Claimant's Doping Appeal is dismissed.
- (5) Each Party shall bear its own costs of this proceeding.

All other requests for relief by the Parties are hereby dismissed.



Andrew de Lotbinière McDougall
Jurisdictional Arbitrator

5 August 2013