COURT FILE NO.: 06-CV-36365
DATE: 2007/06/07

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:	)	
	)	
CANADIAN CENTRE FOR ETHICS IN SPORT, SWIMMING NATATION CANADA and COACHES OF CANADA	)	Robert C. Morrow, for the Applicant Canadian Centre for Ethics in Sport and Swimming Natation Canada
	)	
Applicants	)	David Lech, for the Co-Applicant, Swimming Natation Canada
	)	
	)	Peter R. Lawless, for the Applicant, Coaches of Canada
	)	
	)	
	)	
- and -	)	
	)	
	)	
CECIL THOMAS GEORGE RUSSELL	)	Gary G. Boyd, for the Respondent
	)	
	)	
	)	
Respondent	)	
	)	
	)	
	)	**HEARD:** April 10, 2007

REASONS FOR DECISION

R. Smith J.

Overview

[1] The Canadian Centre for Ethics in Sport ("CCES"), Swimming Natation Canada ("Swimming Canada") and Coaches of Canada ("Coaches") have applied to set aside the

decision of the adjudicator Graeme Mew, dated October 29, 2005, reinstating the Respondent Cecil Thomas George Russell ("Russell") as a national level swimming coach on the basis of fraud.

[2] In October 1997 Russell was banned for life from participating in sports funded or recognized by the Government of Canada, because he was found to have committed a doping-related infraction by reason of his criminal conviction for possession and conspiracy to traffic in anabolic steroids in 1996.

[3] On June 24, 2005 Russell applied for reinstatement for the second time and after a hearing was held in September of 2005, Arbitrator Mew ordered that Russell be reinstated as a swimming coach in Canada.

[4] After the arbitration hearing was held the CCES learned from reading newspaper articles in the Globe and Mail and the Toronto Star, that Russell had pleaded and been found guilty of conspiracy to possess with intent to distribute MDMA (ecstasy) in Arizona and was sentenced to a term of four years imprisonment in March of 2004. At his reinstatement hearing before Arbitrator Mew in September of 2005, that Russell did not disclose his conviction for conspiracy to traffic in ecstasy in Arizona in 2004, to Arbitrator Mew.

[5] Russell also provided a letter to Arbitrator Mew from his attorney in Arizona stating that the importation and possession charges on Cecil Russell, due to his extradition from Spain to the United States of America, were dismissed by the Crown Attorney's Office in March of 2004.

His letter did not disclose Russell's conviction on the charge of conspiracy to possess with intent to distribute ecstasy.

[6] In addition, in Russell's application for reinstatement, submitted by way of a letter from his counsel the following false statements were made (it is acknowledged that Mr. Russell did not advise his counsel of the criminal conviction in Arizona):

a) "His charges in Spain were thrown out. He was extradited in Arizona to the United States. There the charges were summarily dismissed.; and

b) Mr. Russell states emphatically that he has not had any contact with drugs since 1995.

[7] In response to the CCES' application Russell raises the following arguments:

i) that Russell's failure to disclose his conviction for a drug-related offence in Arizona in 2004 did not amount to fraud, as Russell did not make a false representation when giving his evidence at the reinstatement hearing;

ii) that a finding of fraud cannot be made on an application, where there is conflicting affidavit evidence, and a trial of an issue should therefore be directed, as Russell denies making a false representation when he gave his evidence at the arbitration hearing;

iii) that the false representations contained in Russell's written application for reinstatement are not evidence at the hearing and are analogous to pleadings in a civil action, and therefore, the false representations contained therein do not amount to fraud;

iv) that the new evidence of the conviction in Arizona should not be considered by the Court, as CCES failed to act diligently to discover the conviction, failed to ask Russell at the hearing if he had been convicted of any other drug offences in Arizona, and there has been unreasonable delay by CCES in bringing this application;

v) that Russell's evidence at the hearing did not amount to perjury; and

vi) that the CCES has failed to appeal the arbitrator's decision within the required time and therefore it is too late to correct any error the Arbitrator may have made in finding that Mr. Russell was "ultimately absolved of these charges (drug related charges) in both countries".

[8] In addition Russell has brought a motion seeking:

a) an order that the Superior Court does not have jurisdiction in this matter and that the Federal Court has exclusive jurisdiction;

b) an order removing Robert Morrow and Burke-Robertson as counsel for the CCES; and

c) an order striking out all evidence in affidavits filed in support of the CCES' application:

i) that relate to evidence given by Russell before the arbitrator at the hearing, as there was no transcript of the proceeding; and

ii) that relate to newspaper articles referring to Russell's testimony that he helped dispose of a murder victim's butchered body, at a murder trial of an associate, as this evidence is irrelevant and inflammatory.

[9] In this application and motion the Court must decide the following issues:

1. Did Russell's failure to disclose the material fact of his criminal conviction for a drug-related offence in Arizona in 2004 or the making of false representations in his application for reinstatement, constitute fraud?

2. Does the Superior Court have jurisdiction to hear this application?

3. Should Commission Counsel and his firm be removed from the record?

4. Should the Court strike out the portions of the affidavits which set out the false evidence that is alleged to have been given by Russell at the arbitration hearing, where there was no transcript; and the portions which relate to newspaper articles describing Russell's admission to assisting an associate to dispose of a murder victim's body?

Background Facts

[10] The CCES is a non-profit corporation, established as a result of the recommendations flowing from the DUBIN Report, which has as its mandate the responsibility of overseeing Canada's anti-doping program.

[11] The CCES is the successor agency to the Canadian Centre for Drug-Free Sport ("CCDS") which was the independent body responsible for coordinating the development and implementation of programs and policies for anti-doping, including testing, research, education, appeals and arbitration in 1993.

[12] The applicable policy in place when Russell applied for reinstatement, was the 1993 Canadian Policy on Penalties for Doping in Sport ("the Policy"). The Policy defines doping infractions and doping-related infractions that applied to both athletes and coaches. The 1993 Policy set out penalties, which included, subject to the provisions for reinstatement, a lifetime ineligibility for direct federal sport funding, and a sport ineligibility for a minimum of four years. The 1993 Policy permitted a person who committed an infraction to apply for a Category II reinstatement under limited and exceptional circumstances. Russell applied for reinstatement under this section of the 1993 Policy.

[13] The CCDS (now the CCES) established Doping Control Standard Operating Procedures (S.O.P.) to determine whether doping or doping-related infractions had occurred. The S.O.P. provides that a coach's application for reinstatement was to be submitted to the CCDS for submission to arbitration, which was the procedure followed in Russell's case. The CCDS was

responsible for both the management and coordination of the arbitration and conducted the hearing as commission counsel to the arbitrator.

[14] Mr. Robert Morrow was counsel to the CCDS (now CCES) and acted as Commission Counsel at the arbitration hearing before Graeme Mew, the adjudicator appointed to hear Mr. Russell's reinstatement application in September of 2005.

[15] Section at 11.2.3(ii), A, of the S.O.P. sets out following factors for the arbitrator to consider to determine whether exceptional circumstances justifying the reinstatement exist:

a) age;
b) remorse;
c) circumstances of the offence;
d) experience;
e) rehabilitation;
f) prior and post offence conduct;
g) contribution to sport;
h) Cooperation with investigation;
i) length of suspension; and
j) others factors.

[16] In 1997 Russell was found to have committed a doping-related infraction, as a result of his conviction for possession of anabolic steroids in 1995 and his conviction in 1996 for conspiracy to import steroids. The arbitrator imposed a lifetime ban on Mr. Russell as a penalty because Mr. Russell was one of the main architects and main beneficiaries of a large, very

sophisticated conspiracy which involved the importation of steroids from countries set out on the indictment to Canada, through his place of business and his home in Oshawa. The drugs were then disseminated to various other areas, namely throughout Quebec, parts of the United States and to regions in Western Canada. Mr. Russell spent 201 days in pre-trial custody and received a suspended sentence and three years probation on the criminal charges.

[17] Mr. Russell applied for reinstatement in February of 2000 and his request was denied by Arbitrator Doumoulin. Russell applied for reinstatement again in 2005 and was reinstated by Arbitrator Mew in his decision dated October 29, 2005.

Incorrect Findings by Arbitrator Mew

[18] In his decision at paragraph 19, Arbitrator Mew found that Russell was accused of being involved in a conspiracy to traffic ecstasy into the United States, that charges were laid against him in both Spain and the United States and he was ultimately absolved of these charges in both countries. This finding was not correct as Russell was convicted of conspiracy to traffic in ecstasy in Arizona in 2004.

[19] Mew also found that Russell provided candid and comprehensive information concerning these further charges, including “the ultimate disposition of these charges in his favour.” This finding is also not correct. At paragraph 52 Mew found that Russell was completely exonerated. This is also not correct given the subsequently discovered evidence of his criminal conviction in Arizona.

[20] Upon reading newspaper articles in the Globe and Mail and the Toronto Star disclosing that Russell had been convicted of conspiracy to traffic in ecstasy in Arizona in 2004, the CCES sought leave on January 31, 2006 and again on September 26, 2006 from Arbitrator Mew to reopen the hearing based on the newly discovered information. Arbitrator Mew refused to reopen the hearing on the ground that he was *functus officio*.

Issue #1 – Did Russell's failure to disclose the material fact of his criminal conviction for a drug-related offence in Arizona in 2004 or his false representations in his application for reinstatement, constitute fraud?

[21] In his affidavit, Russell swears that he answered all of the questions posed to him at the hearing before Arbitrator Mew carefully and truthfully. He swears that he testified that all of the drug charges in Arizona related to importation and possession of ecstasy were dismissed by the Crown Attorney's Office. Russell denies that he testified that the charge of conspiracy to import ecstasy with the intent to distribute was dismissed.

[22] Russell's evidence in his affidavit is contradicted by the affidavit evidence of Ken Radford, Mary Warren and Ian Bird. Mr. Radford was present at the hearing and stated that Russell testified that a judge had dismissed all charges against him (in Arizona) and that he was fully exonerated. Ms. Warren swears that she has an independent recollection of the testimony given under oath by Mr. Russell at the reinstatement hearing on September 8, 2005 and also took careful notes of the questions asked and answers given. She swears that Russell testified that the charges in Arizona were dismissed and that he had no criminal record in the United States.

[23] I agree with counsel for Mr. Russell that the Court cannot make a finding of fraud or perjury based on the conflicting affidavit evidence filed in this application, without obtaining the

notes of the arbitrator and without directing a trial of an issue and assessing the credibility of the witnesses involved. However, I will proceed to consider whether the Applicants have been able to prove that Russell committed a fraud based on the following uncontested evidence contained in the application, namely:

> a) Russell's admission in his affidavit that he did not disclose his conviction for conspiracy to traffic in ecstasy in Arizona in 2004 at the arbitration hearing or to his counsel; and
>
> b) the uncontested evidence that in his application for reinstatement, submitted by Russell's counsel, that
>
> i) he falsely represented that in the United States "the charges were summarily dismissed; and
>
> ii) that Mr. Russell stated emphatically that he has not had any contact with drugs since 1995.

Analysis

[24] Section 46(1)(9) of the *Arbitration Act of Ontario* S.O. 1991 c. 17 provides that on a party's application, the Court may set aside an award on a number of grounds including where the award was obtained by fraud. This is the provision relied on by the applicant.

[25] The standard of proof to establish civil fraud is proof on a balance of probabilities. However, the Court will consider the seriousness of the accusation and the gravity of the consequence of a particular finding in weighing the evidence. In *Bater v. Bater*, [1950] 2 All E.R. 458 (Eng. C.A.) at 459, the Court stated:

> A civil court, when considering a charge of fraud, will naturally require a higher degree of probability than that which it would require if considering whether negligence were established. It does not adopt so high a degree as a criminal

> court, even when it is considering a charge of a criminal nature but it does require a degree of probability which is commensurate with the occasion.

[26] Similar tests were applied in *Continental Insurance Co. v. Dalton Cartage Ltd. et al.*, [1982] 1 S.C.R. 164 and by Rutherford J. in *Sayeau v. Prudential of America General Insurance Co.* (Canada), [2000] O.J. No. 4479.

[27] A definition of civil fraud was set out in the case of *Gregory v. Jolley*, [2001] O.J. No. 2313 (Ont. C.A.) leave to appeal to the S.C.C. refused, S.C.C. File No. 28814. In the above case at paragraph 15, Sharp J.A. stated as follows:

> It is common ground between the parties that the test for civil fraud to be applied here is that stated by Lord Herschell in *Derry v. Peek* (1989), 14 A.C. 337 at p. 374…
>
> > fraud is proved when it is shown that a false representation has been made (1) knowingly, or (2) without belief in its truth, or (3) recklessly, carelessly whether it be true or false.
> >
> > …
> >
> > Thirdly, if fraud be proved, the motive of the person guilty of it is immaterial. It matters not that there was no intention to cheat or injure the person to whom the statement was made.

[28] Russell relies on the above test for civil fraud to support his position that there can be no fraud without a false representation and he argues that an omission to disclose a material fact cannot amount to fraud. A number of other cases have held that the deliberate non-disclosure of material facts may amount to fraud in certain circumstances. An examination of the facts involved in the *Derry* decision and the exact issues with which that House of Lords was concerned, indicates that *Derry* does not preclude this possibility.

[29] In *Derry Supra*, the defendants were directors of a tramway company incorporated under a special act providing that carriages might be moved by animal power and, with the consent of the Board of Directors, by steam power. The directors issued a prospectus containing a statement that by their special act, they had the right to use steam power, instead of horses. The plaintiff purchased shares in the company on the truth of this statement. The Board afterwards refused their consent regarding steam and the company was wound up. The plaintiff sued the defendants on the ground of deceit.

[30] The Court of Appeal overturned the trial judge and held that to prove deceit, it was necessary to prove fraud. The Court of Appeal held that fraud was proven because, though the directors believed the statement was true, they had no reasonable grounds to believe it was true. The House of Lords overturned the Court of Appeal and set out the above test for fraud. The focus of Lord Herschell's decision was largely on whether the Court of Appeal was correct in including the "lack of reasonable grounds" test in their assessment of fraud. The House of Lords held that the defendants would avoid liability for fraud if they honestly believed the false statement to be true. The issue of whether the omission to disclose material facts or the deliberate non-disclosure of material facts could amount to fraud did not arise in the *Derry* case and was not addressed by the House of Lords.

[31] In *Perdue v. Myers*, [2005] O.J. No 3637 (Ont S.C.J.), G. P. DiTomaso J. set out a general analysis of fraud in a case involving a failure a failure to disclose a latent defect in a real estate transaction, and at paragraph 31 stated:

> Silence can be taken as fraudulent misrepresentation. The circumstances must establish dishonest conduct on the part of the defendant, who must have intended (i) to deceive the plaintiff by his/her failure to disclose relevant information, and (ii) to commit a fraudulent act by such non-disclosure equivalent to that which would prevail had s/he made a false statement knowing it to be false. See 411397 B.C. *Limited v. Granmour Holdings Limited*, [1996] B.C. J. No. 1210 (B.C.S.C.).

[32] In the Granmour Holdings case *Supra,* a similar view of the law of fraud was taken by the British Columbia Court of Appeal, which quoted from Rainbow Indust. Caterers Ltd. v. C.N.R. (1988), 30 B.C.L.R. 273 at 313 (B.C.C.A.) as follows:

> At the very least the circumstances must establish dishonest conduct on the part of the defendant. He must be found to have intended to deceive the plaintiff by his failure to disclose to the plaintiff the relevant information and, as a result, have intended to commit a fraudulent act by such non-disclosure equivalent to that which would prevail had he made a false statement knowing it to be false.

[33] I find that Russell's failure to disclose his Arizona conviction was calculated to deceive the arbitrator at the reinstatement hearing based on the fact that Russell was fully aware that his criminal conviction for conspiracy to traffic in Ecstasy in Arizona in 2004 was highly relevant, he had a letter prepared by his Arizona attorney stating that the importation and possession charges on Cecil Russell were dismissed by the Crown Attorney's office, and false representations were made in Russell's application for reinstatement stating that all the criminal charges in Arizona had been dismissed against Russell.

[34] A reasonably informed person would conclude that Russell's actions in not disclosing his conviction in the circumstances were calculated to deceive. In *International Corona Resources Ltd. v. LAC Minerals Ltd.* (1988), 66 O.R. (2d) 610, Osborne J. (as he then was) laid out the following test for setting aside a judgment on the basis of fraud:

> 1) The fraud must be proved on a reasonable balance of probability. The more serious the fraud alleged, the more cogent the evidence going to establish it will have to be to meet the civil onus of proof.
>
> 2) The proved fraud must be material, that is, it must go to the foundation of the case.
>
> 3) The evidence of fraud must not be known at the time of the trial to the party seeking to rely on it to set aside the trial judgment.
>
> 4) The unsuccessful trial party is exposed to the test of due diligence.
>
> 5) If the fraud is that of a non-party, and the successful party at trial is not connected to the fraud alleged, the tests must be more stringent than for a fraud of a party.
>
> 6) The test imposed upon the unsuccessful party to obtain relevant evidence with due diligence is objective.
>
> 7) Delay will defeat a motion to set aside a trial judgment for fraud.
>
> 8) Relief is discretionary. The conduct of the moving party is relevant.

[35] In *100 Main Street East Ltd. v. Sakas* (1975), 8 O.R. (2d) 385 (C.A.) Estey J.A. set out the test to be applied when an unsuccessful litigant seeks to set aside a trial judgment on the basis of fraud, which included non-disclosure of a material fact. In the *100 Main Street East* case, the Defendants Sakas and Leaukus deliberately withheld the information that Sakas had made a deal with Leaukus to sell the land in question to Leaukus for more than Sakas had agreed to sell it to the Plaintiff. Estey J.A. noted that to be successful on a motion to set aside a judgment on the basis of fraud, it was necessary to show that the evidence withheld related to a material fact going to the issue in dispute. He further stated that it must be shown that the failure to disclose was improper and deliberate and not the result of mere inadvertence.

[36] In *100 Main Street East* Estey J.A. elaborated on the requirement that undisclosed fact be "material" when at p. 389-390 he stated:

> The authorities make it clear that the new evidence of fraud must relate to the "foundation" of the decision or be "material" to the claim or defence but need not necessarily amount to a "determining factor in the result."

[37] Black's Dictionary 7th ed., 1999 defines fraud as follows: "a knowing misrepresentation of the truth or concealment of a material fact to induce another to act to his or her detriment … a misrepresentation made recklessly without belief in its truth to induce another person to act; a tort arising from a knowing misrepresentation, concealment of a material fact, or reckless misrepresentation made to induce another to act to his detriment."

[38] In this case Russell was fully aware that he had pleaded guilty to conspiracy to traffic in ecstasy in Arizona in 2004 and was initially sentenced to four years in jail, which appears to have been varied based on a plea bargain, and therefore his failure to disclose the conviction was not mere inadvertence. Russell was also aware of the 10 factors which would be considered for his reinstatement set out in the S.O.P., as he had previously unsuccessfully applied for reinstatement in 2000. Russell also withheld the evidence of his conviction from his own counsel, with the result that his counsel made false representations to the arbitrator to the effect that (all) the charges in Arizona were summarily dismissed in the application for reinstatement. In addition Russell obtained a letter from his defence attorney in Arizona stating that the importation and possession charges on Russell had been dismissed. While the facts in the Arizona attorney's statement were true, Russell and Mr. Carr, Russell's Arizona defence attorney, were both fully

aware that Russell had been convicted on the conspiracy to traffic in ecstasy charge, which was omitted from the letter, which causes the letter to reflect only part of the truth.

[39] I therefore find that Russell's failure to disclose his conviction in Arizona, which occurred approximately one year before the reinstatement hearing, was both deliberate and improper. I also find that the evidence of his conviction for a drug related infraction was a very material fact going to the issue in dispute. The drug-related conviction was directly related to several of the ten factors to be considered by the arbitrator, including the applicant's remorse, prospect for rehabilitation and post-infraction conduct.

Criminal Definition of Fraud

[40] In *R. v. Théroux*, [1993] 2 S.C.R. 5 the Supreme Court of Canada considered the meaning of fraud at page 15 and 16 in a criminal context. Section 380(1) of the *Criminal Code of Canada* sets out the criminal offence of fraud and reads in part as follows:

> (1) Everyone who, by deceit, falsehood or other fraudulent means …

[41] The Court considered what was included in "other fraudulent means" and relied on the case of *R. v. Olan*, [1978] 2 S.C.R. 1175 and held that the commission of fraud "by other fraudulent means" is determined objectively, by reference to what a reasonable person would consider to be a dishonest act, and that economic loss was not essential to the offence.

[42] At page 16 of the *Théroux* case, the Supreme Court of Canada stated that the Courts have defined the sort of conduct which may fall under the category of "by other fraudulent means" to

include the use of corporate funds for personal purposes, non-disclosure of important facts, exploiting the weakness of another, unauthorized diversion of funds, and unauthorized arrogation of funds or property.

[43] If non-disclosure of important facts falls within the definition of "by other fraudulent means" when proving fraud in a criminal context, which requires a higher standard of proof than in a civil proceeding, then I find it is logical to conclude that fraud may be committed in a civil matter by the deliberate non-disclosure of important facts. This is also consistent with the definition of fraud found in Black's Dictionary referred to previously and the finding by Estey J.A. in *100 Main Street East Supra.*

[44] Russell submits he did not disclose his drug conviction in Arizona, because his criminal file in Arizona was ordered to be sealed at his request. He states that his plea agreement prevented him from disclosing his cooperation with the U.S. Attorney's Office unless he had their consent. The reason given for sealing the file was to prevent individuals identified by Russell, who were involved in organized crime, from retaliating against Russell's family because he had supplied documentation in his possession to the authorities. In his affidavit, he does not state that there was any restriction on the disclosure of the fact that he had been convicted of conspiracy to traffic in ecstasy. The criminal conviction was a matter of public record, even if the contents of his criminal file were sealed.

[45] Russell's affidavit states that he believed that he was not able to discuss the arrangement to assist the authorities, or to provide details related to the charge or its disposition. The only purpose served by sealing the file was to protect Russell and his family from possible retaliation

if he disclosed that he had cooperated with the authorities and received a lenient sentence. There is no reason for failing to disclose the conviction which is a matter of public record.

[46] In addition, Russell did not advise Mr. Boyd, the attorney acting for him on his reinstatement application, if he could disclose his criminal conviction nor did he ask Mr. Boyd whether he was prevented from disclosing his conviction in Arizona as a result of the criminal file being sealed. There was no restriction preventing Russell from revealing the fact that he had been convicted in Arizona, which could have been done without revealing details of his cooperation with the State Attorneys. I therefore find that Russell's alleged reason for failing to disclose his criminal conviction in Arizona to the arbitrator at the hearing is not believable nor does it provide him with a reasonable excuse for failing to disclose his criminal conviction in the circumstances of this case.

[47] I find that civil fraud may be committed by failing to disclose a material or very important fact within the knowledge of the individual, in a context where the failure to disclose the known material fact would be improper and would mislead the Court or arbitrator on a material part of his or her inquiry. Russell admits that he did not disclose his conviction for conspiracy to traffic to the arbitrator or to his lawyer and therefore I reject his explanation for the reasons given above.

[48] I am also satisfied that the CCES has acted with due diligence given the dates that it became aware of the contents of the newspaper articles, the fact that the criminal file was sealed at Russell's request, and in view of the two attempts to have the arbitrator consider the newly

discovered evidence, and the delay involved in obtaining a date to hear an application in this Court.

[49] Russell argues that the CCES should have conducted its own inquiry about Russell's criminal record in Arizona before the arbitration hearing and presented the evidence at the reinstatement hearing. I am not persuaded that it was unreasonable for the CCES to rely on the statements made by counsel for Russell in his letter applying for reinstatement stating that all charges had been dismissed, together with the letter provided from Russell 's Arizona attorney stating that the possession and trafficking charges against Russell in Arizona had been dismissed.

False Statements Made in Russell's Application for Reinstatement

[50] The false statements in Russell's application for reinstatement were made by counsel for Russell and not by Russell personally. However I find that counsel can bind his or her client in these circumstances and it would not be reasonable to allow counsel to make false representations in an application for reinstatement, in circumstances where it was reasonably foreseeable that the arbitrator would place some reliance on the content of the application, and then argue that the false representation was not that of his or her client.

[51] I accept Russell's argument that the false statements contained in the application would not amount to perjury, but they are misleading on a material fact, namely the statement that all of the drug-related charges in Arizona were dismissed. I find that the false statements contained in the application for reinstatement would also constitute fraud for the purpose of setting aside an

arbitrator's decision in the context of the type of application that was being made, and because Russell knew such an application for reinstatement would only be granted in exceptional circumstances.

[52] I am satisfied that Russell deliberately withheld the very important material fact that he was convicted of conspiracy to traffic in ecstasy in Arizona in March of 2004. The fact of his conviction was known to Russell. The fact was not known to the CCES or the arbitrator as evidenced by the arbitrator's findings and Russell's own affidavit evidence. The conviction for conspiracy to traffic in ecstasy was highly material as he had been banned for life in 1997 based on a charge of conspiracy to import steroids and possession of steroids. The conviction was also highly relevant to the factors of remorse, rehabilitation and his post (1996) offence conduct. I find that the standard of proof for civil fraud has been met by Russell's own admission that he had failed to disclose the material fact of his conviction for conspiracy to traffic in Ecstasy to the Arbitrator and his lawyer in Canada, based on the false statements in his application for reinstatement and based on the misleading letter produced from his Arizona attorney.

Issue #2 – Does the Superior Court have jurisdiction to hear this application?

[53] Russell has brought a motion for a declaration that the Superior Court does not have jurisdiction to hear the application to set aside the arbitrator's decision based on fraud, and that the Federal Court of Canada has exclusive jurisdiction over the matter. CCES, Swimming Canada and Coaches of Canada submit that the Superior Court does have jurisdiction as Graeme Mew was acting as an arbitrator under the *Arbitration Act of Ontario* and the Court referred to in section 46(1)(9)of the *Arbitration Act* is the Superior Court in Ontario. The Federal Court is a

court created by statute and the statutes involved, the *Ontario Arbitration Act* and the *Canada Corporations Act* do not confer exclusive jurisdiction on the Federal Court of Canada in this case.

[54] The Federal Court of Canada has exclusive original jurisdiction to hear applications and grant relief with respect to a federal board, commission or other tribunal: *Federal Courts Act* R.S.C. 1985 c. F-7 as amended.

[55] A "federal board, commission or other tribunal" is defined in s. 2(1) of the *Federal Courts Act* as follows:

> means any body, person or persons having, exercising or purporting to exercise jurisdiction or powers conferred by or under an Act of Parliament or by or under an order made pursuant to a perspective of the Crown, other than the Tax Court of Canada or any of its judges, any such body constituted or established by or under the law of a province or any such person or persons appointed under or in accordance with a law or a province or under section 96 of the *Constitution Act 1867*."

Not a Federal Tribunal under 2003 Act.

[56] In 2003 the Federal government passed the *Physical Activity and Sport Act*, 2003, c.2, which established a non-profit corporation called the Sport Dispute Resolution Centre of Canada. The purpose of the Sport Dispute Resolution Centre is to provide an alternate dispute resolution service for Sports Disputes and as part of that mandate to provide qualified, independent arbitrators and mediators to provide dispute resolution services.

[57] Section 9(4) of the 2003 *Physical Activity and Sport Act*, specifically states that an arbitrator providing dispute resolution services is not a federal board, commission or other tribunal and stated as follows:

> For the purposes of the *Federal Courts Act*, the Centre, or an arbitrator or a mediator who provides services under the auspices of the Centre, is not a federal board, commission or other tribunal within the meaning of that Act.

[58] Russell argues that because the *Physical Activity and Sport Act* specifically states that the arbitrators and mediators providing dispute resolution services through the Centre, after 2003, are not a federal board, commission or other tribunal under the *Federal Courts Act*, that an arbitrator such as Mr. Mew conducting an arbitration hearing in 2005 pursuant to the 1993 Policy on Doping in Sports and the 1994 Standard Operating Procedures, must therefore have been a federal board, commission or other tribunal.

[59] I find that at best the 2003 amendments to the *Physical Activity and Sports Act* are neutral as it could equally be argued that the 2003 amendments clarified the pre-existing situation, namely that arbitrators conducting hearings concerning sports disputes, were not acting as a federal board, commission or tribunal. This position is further supported by the fact that there has been no change to the organization, or structure relating to resolving sports disputes from 1993 to the present and there has always been an independent, not-for-profit corporation to appoint arbitrators and to conduct the adjudications, starting initially with the CCDS, then the CCES (the Applicant) and since 2003 ADR Sport RED. The facts are more consistent with the Coaches of Canada's argument that the 2003 amendments to specify that the arbitrators were not acting as a

federal board, commission or tribunal, did not amount to a change of the jurisdiction from the Federal Court to the Superior Court.

Arbitrator's decision that *Arbitration Act* governed proceeding

[60] Arbitrator Mew specifically ruled that he was conducting his adjudication under the *(Ontario) Arbitration Act*, 1991 both in his decision on the preliminary question and in his decision to refuse to reopen the arbitration based on the newly discovered evidence of the Arizona drug conviction. I find that it is appropriate to accord deference to the findings of arbitrators when they are interpreting their home statute which is the situation in the case before me.

[61] Arbitrator Mew has acquired special expertise in the interpretations of the various anti-doping policies as well as the Standard Operating Procedures have been in effect to implement the anti-doping policies as well as interpreting the statutory basis for his jurisdiction. Because of the special expertise of the arbitrator in this area, I find that his decision that he was operating under the provisions of the 1991 *Arbitration Act of Ontario,* is entitled to deference and his finding is not patently unreasonable or incorrect.

[62] The provisions of the 1993 Policy concerning reinstatement specifically state in Section 11.2 ii) that "Applications (for reinstatement) shall be forwarded by the NSGB to the CCDS for submission to arbitration." Section 11.2 iii) provides that the CCDS is responsible for the management and coordination of the arbitration. As a result of these sections, I find that

Arbitrator Mew was correct when he concluded that he was conducting as arbitration hearing in Ontario and that the Ontario *Arbitration Act* applied.

[63] Russell's motion is not an application for judicial review of the arbitrator's decision but rather an attempt to reargue the issue in a new forum as the arbitrator had previously ruled that "this tribunal is not a Federal Board, commission or other tribunal" with regards to the issue of whether a notice of constitutional questions should have been served on the Federal Government by Russell.

Bylaws were passed by federally incorporated non-profit corporation

[64] The Co-Applicant, Coaches of Canada, argue that the CCES is a private not-for-profit corporation, incorporated under the *Canada Corporations Act* with the objects of promoting education and ethics in sport. The Coaches argue that the Anti-Doping Policy was a joint exercise of policy which involved many parties in addition to the Federal Government of Canada.

[65] The Federal Government approved of the 1993 Policy and the 1994 S.O.P. and provided funding to CCES, provided it adopted regulations and by-laws which were consistent with the agreed upon Anti-Doping Policy.

[66] Under the *Canada Corporations Act* a "court" in Ontario is defined to be the Supreme Court (now the "Superior Court" in Ontario).

[67] To decide whether a board is a federal board or tribunal a two-step process must be followed, namely the character of the Board and the character of the act in question must be considered: *Cairns v. Farm Credit Corp.*, [1991] F.C.J. No. 1143. In the case of *DRL v. Halifax Port Authority* (F.C.) (2006), 3 F.C.R. 516, the Court held that the character of the act is most relevant and not the characterization of the body.

[68] The Courts have consistently held that even though the CCES was incorporated under a federal statute and receives federal funding on the condition that it enacted by-laws consistent with the Anti-Doping Policy, clear and unambiguous language would be required to remove a matter from the Superior Court's jurisdiction. No such clear and unambiguous language exists in the case before me.

[69] I find that this argument is determinative as the Federal Court is created by statute and does not have jurisdiction unless jurisdiction is specifically assigned to it, whereas the Superior Court has jurisdiction, under the *Canada Corporation Act* and under the *Arbitration Act*, unless a matter otherwise within its jurisdiction, is clearly and unambiguously transferred to the Federal Court: *Sabados v. Canadian Slovak League* (1982), 35 O.R. (2d) 718 and *Bedard v. Isaac et al.*, [1972] O.R. 391 (reversed on other grounds 38 D.L.R. (3d) 481).

[70] I agree with the Coaches' submission that the Anti-Doping Policy which involves consultation between the federal government and CCES cannot be construed as representing an Act of Parliament. While the fedral government has played a collaborative role in the development of anti-doping policy, this is not required by any federal act and is within the context of federal funding matters.

[71] The following factors, which indicate a federal body, were outlined in *Derek Inc. v. Chairman of the Board of Directors of Canada Post* (1985), 1 F.C. 122 include:

> a) reference in the enabling statute to the role of the organization being that of a governmental institution (not the case for CCES);
>
> b) requirement of government that approval of by-laws (CCES was a non-profit organization and would receive funding provided that bylaws existed that were consistent with the anti-doping policy);
>
> c) authority to make regulations subject to government approval (in this case funding was conditional on the agreed policy being implemented);
>
> d) the role of government in both the development standard and policies of procedure and in the operations of the corporation. (In this case the government was involved in developing the policies but not in the operation of the corporation);

[72] Other factors were identified in *Sabattis v. Oromocto Indian Band,* [1986] N.B.J. No. 141 (N.B.C.A.) and in *Toronto Independent Dance Enterprise v. Canada Council* (1989), 38 Admin. L.R. 231, including:

> e) whether the body receives government funding (CCES does receive governmental funding);
>
> f) whether the corporate body has a reciprocal role in the exercise of authority by the government (not the case for CCES);
>
> g) the extent which the body may be an agent of government (CCES is not an agent of government but does provide a mechanism to resolve disputes involving doping in sports, which is in the public interest.)

[73] The CCES does have many traits of a federal board, tribunal or commission. However that is not determinative of the matter. In *Cairns v. Farm Credit Corp.* [1991] FCJ NO. 1143, the federal court noted that even if a body appears to fall within the definition, they should not presume jurisdictions without first examining the particular circumstances of the case. *DRL*

Vacations Ltd. V. Halifax Port Authority, (2006) 3 F.C.R. 516 recently affirmed the principle that the character of the action is most relevant not the characterization of the body.

[74] The act which requires characterization in this case, is the decision made by Arbitrator Mew reinstating Mr. Russell. In *Kass v. Canada (Attorney General*), [1998] F.C.J. NO. 1448, the federal court noted at paragraph 19 "more than incorporation pursuant to a federal statute even when coupled with ministerial approval of its bylaws and the possible inspection of its activities by a minister, is required to make a decision by the corporate body a decision of a federal board, commission or other tribunal. The powers that the board of directors were exercising were not required responsibilities under the relevant federal statute." This indicated that the act to be characterized will not be considered an act of a federal body, if the act is not a required responsibility under the federal statute governing the body.

[75] In the case at bar, the authority for CCES to make that decision is dependent on its by-laws and regulations and the authority of the arbitrator to review and consider Russell's reinstatement application is found in the corporate regulations of CCES as passed by resolution of its Board of Directors. The provision of this decision making process in the bylaws is not mandated by the Canada Corporations Act and is not an exercise of public responsibility. While the passing of the by-laws and its regulations as determined by the CCES organization involves the public interest, I find that it is not equated with the assumption of public responsibilities.

[76] I agree with the Coaches' submissions that the power exercised by CCES in reinstating Russell was incidental to its objects as a corporation, namely "to foster ethical sport through research, promotion and education relevant to ethics in sport, including fair play and drug-free

sport". Reinstatement is an act of controlling the membership of a professional organization and is not required by the federal statute governing the CCES. Control over the grants and revocation of membership in a professional organization relate to the objects of the corporation and are not actions of a federal board or tribunal.

[77] I find that the fact that the CCES was incorporated under a federal act (the *Canada Corporations Act*), receives funding from the federal government, the federal government was involved in developing the anti-doping policy, which was incorporated in the by-laws and regulations passed by the directors of CCES, is not sufficient to establish that the decision of Arbitrator Mew was that of a federal board, commission or tribunal, I therefore conclude that the application brought by CCES, the Coaches of Canada and Swimming Canada is not one that is exclusively within the jurisdiction of the Federal Court of Canada and is within the jurisdiction of the Superior Court.

Issue #3 - Should Commission Counsel and his Firm be removed from the record?

[78] Russell has made a motion to remove Burke-Robertson and Robert Morrow as counsel on this application and to remove CCES as a party to the application on the ground that it is inappropriate for Commission Counsel and CCES to appear as counsel against one of the parties to the arbitration. Russell argues that by participating as counsel and bringing the application to set aside Arbitrator Mew's decision on the basis of fraud, Morrow is breaching his duty of fairness and even handedness to all parties to the arbitration. He also argues that absent instructions from the arbitrator Commission Counsel should not take a position contrary to a party to the arbitration.

[79] The coaches and CCES argue that the CCES has two different roles set out in the 1994 S.O.P. and that its role is not limited to just acting as Commission Counsel. CCES has a second more broadly defined role as being "responsible for the management and coordination of the arbitration" in addition to acting as commission counsel.

[80] The twofold authority of the CCES is set out in s. 11.2.1(iii) of the 1994 Standard Operation Procedure which states as follows:

> The CCDS (now CCES) shall be responsible for the management and coordination of the arbitration, and shall have conduct of the hearing as Commission Counsel to the Arbitrator.

[81] I am satisfied that because CCES is responsible for the overall management and coordination of the arbitration that it is appropriate for CCES to be a party and to bring the newly discovered fact of Mr. Russell's conviction for conspiracy to traffic in ecstasy in Arizona, before the Court for a determination of whether a fraud has occurred or for any other remedy.

[82] I also find that it is not inappropriate or unfair in the circumstances to allow, the firm of Burke-Robertson who act as counsel to CCES to continue to act on behalf of CCES. CCES and their counsel initially brought the newly discovered evidence of Mr. Russell's Arizona drug-related conviction back to Arbitrator Mew, who ruled that he was *functus* and that any further remedy required the consent of the parties or a court order. The next logical step was to make an application for a court order, which CCES has done.

[83] I also find that when the CCES and former Commission Counsel brought this application, they were not acting in their role as commission counsel but exercising their responsibility to

manage and coordinate the arbitration in order to ensure the integrity of the arbitration process. By analogy, on judicial review of a decision of an administrative tribunal, s. 9(2) of the *Judicial Review Procedure Act* R.S.O. 1990 c. J. 1 provides standing that can be limited by the Court, if legislation does not otherwise articulate the scope of the tribunal's role: *Ontario (Children's Lawyer) v. Ontario (Information and Privacy Commission)* 2005, 253 D.L.R. (4th) 489.

[84] The overarching framework is to limit the scope of the tribunal to that which is "needed" having regard to the nature of the process, the special knowledge or expertise of the tribunal, the nature of the issue and the role of the tribunal: *Alberta Liquore Store Assn. v. Alberta (Gaming and Liquor Commission)*, [2006] A.J. No. 1597; *British Columbia Teachers' Federation v. British Columbia (Information and Privacy Commissioner)*, [2005] B.C.J. No. 2394.

[85] I am satisfied that given the unique circumstances of the case of discovering an undisclosed criminal conviction for a drug-related offence, which occurred shortly before the application for reinstatement was made, and the special knowledge and expertise of the CCES and their counsel concerning of the various Anti-Doping Policies, and Standard Operating Procedures and how the arbitration hearing was conducted as well as the changes which have occurred during the past 14 years, that the participation of CCES and their counsel was "needed" and reasonable in the circumstances. Their role should be and was limited to ensuring the integrity of the arbitration proceedings was not compromised and they were not acting in their capacity as Commission Counsel.

Issue #4 – Should the affidavit evidence relating to the Globe and Mail and the Toronto Star articles be struck?

[86] Russell argues that the reference to the Globe and Mail and Toronto Star newspaper articles stating that when Russell testified at a murder trial of an associate, he testified that he had assisted his associate in disposing of the body of the murder victim, is hearsay and is unduly prejudicial and should be struck.

[87] I agree with counsel for Russell that the newspaper articles constitute hearsay and any reference to Russell's assisting the accused to dispose of the murder victim's body should be struck from the affidavit on the ground that it constitutes hearsay. The balance of the two newspaper articles are admitted for the limited purpose of evidenc of when the articles came to the attention of CCES and alerted CCES to the fact that Russell had not disclose a drug-related criminal conviction in Arizona in 2004.

[88] I am not ruling that the evidence of Russell's testimony, that he assisted an accused to dispose of the murder victim's body, is not relevant to Russell's application for reinstatement provided this evidence is properly introduced. A transcript of the proceedings would be much more reliable than a newspaper article. If Russell's conduct amounted to being an accessory after the fact to murder, but charges were not laid in return for his testimony, his conduct may well be relevant to his application for reinstatement as a swimming coach. This is a matter which I leave to the Arbitrator to determine.

Disposition

[89] a) Russell's motion to quash the application on the ground that the Ontario Superior Court of Justice does not have jurisdiction is dismissed.

b) Russell's motion to remove the CCES as a party and Burke-Robertson and Robert Morrow as counsel for CCES and Swimming Canada is dismissed.

c) Russell's motion to strike reference in the newspaper articles to his alleged testimony that he assisted the accused with the disposal of a murder victim's body is granted for purposes of this application on the grounds that it is hearsay.

d) It is not necessary to deal with the motion to strike the affidavit evidence tendered by the Applicants with regards to Russell's evidence at the reinstatement hearing, as I have made my findings on Russell's own admissions as well as other documentary evidence before the arbitrator, without considering their evidence of Russell's testimony at the hearing.

e) The CCES, Coaches and Swimming Canada application to set aside Arbitrator Mew's decision on the basis of fraud pursuant to s. 46.(1).9 of the *Arbitrations Act of Ontario* is granted and the matter is referred back to Arbitrator Mew for reconsideration based on the additional evidence.

Costs

[90] The Applicants shall have 15 days to make any additional submissions on costs. The Respondent shall have 15 days to respond and the Applicants shall have 7 days to reply.

R. Smith J.

Released: 2007/06/07

COURT FILE NO.: 06-CV-36365
DATE: 2007/06/07

ONTARIO

SUPERIOR COURT OF JUSTICE

B E T W E E N:

CANADIAN CENTRE FOR ETHICS IN SPORT, SWIMMING NATATION CANADA and COACHES OF CANADA

Applicants

- and –

CECIL THOMAS GEORGE RUSSELL

Respondent

REASONS FOR DECISION

R. Smith J.

Released: 2007/06/07