

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA
CENTRE DE REGLEMENT DES DIFFERENDS SPORTIFS DU CANADA**

BETWEEN:

EVAN WHITE, BRYCE KWIECIEN-DELANEY, CONNOR WILKINS, MATTHEW MAC
and MACKENZIE HAMILL

Claimants

-and-

SWIMMING NATATION CANADA (SNC)

Respondent

AWARD
(Hearing May 20, 2014 by Conference Call)

The Arbitrator
Larry Banack

Sean Baker
Head Coach, Oakville Aquatics
P.O. Box 86044
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Oakville, Ontario L6H 5V6

Authorized Representative of the
Claimants

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Counsel for the Respondent

I. Introduction

1. This arbitration concerns the ratification of National Age Group Records claimed by five Canadian Swimmers in five events at the Thunderbolt Junior International Short Course Championships (the “Meet”) held in Oregon, USA on December 13-15, 2013.
2. The Claimants, Evan White, Bryce Kwiecien-Delaney, Connor Wilkins, Matthew Mac, and Mackenzie Hamill, were represented by Sean Baker, a swimming coach from the Oakville Aquatic Club. It was Mr. Baker who, on behalf of the Claimants, requested the ratification of the National Age Group Records in question.
3. The Respondent, Swimming Natation Canada (“SNC”), is the national governing body of swimming in Canada.
4. The dispute concerns the length of the pool used in the Meet. The parties agree that the required length is 25 meters. The Respondent disputes that the pool measured the required 25 meters.

II. The Impugned Decisions

5. The decision that commenced the current dispute was sent on January 30, 2014, from Ken Radford for the SNC Officials Competition and Rules Committee (the “Committee”). It denied Mr. Baker’s request for ratification of five National Age Group Records, and provided that:

...the results from the December 13-15, 2013 Thunderbolt Junior International Short Course Championships will be ratified for the purposes of entries and rankings only. Given the course was not certified in accordance with US Swimming rules and was stated as such in the meet information, no National Records will be recognized from the results of this competition.
6. Therefore, the reason given for the initial denial was that “the course was not certified in accordance with US Swimming rules...”

7. On February 19, 2014, Mr. Baker appealed the decision pursuant to sections 4(a)(ii) and (vi) of the SNC Appeal Procedure on the basis that the decision was not consistent with the established procedures of the SNC, and that it was grossly unreasonable.
8. By letter dated February 24, 2014, the Appeal Panel denied the appeal on the following basis:
 - a. The SNC Appeals Policy and Procedure do not apply to matters relating to:
 - i. The rules of swimming, or
 - ii. The technical (field of play) rules of swimming;
 - b. The SNC Rulebook, and specifically Appendix B of the Canadian Rulebook, CFR 1.3.1, requires certification of the pool;
 - c. The SNC could not address previous records that had been ratified;
 - d. The USA Swimming website considered the Meet “not certified” ;
 - e. The SNC requires Age Group National Records to be certified even though USA Swimming may not; and
 - f. The pool dimensions submitted for the Meet were not provided by a certified surveyor or other official certified for this position.
9. As a result, on March 20, 2014, Mr. Baker commenced the current arbitration.

III. Procedural History

10. The current arbitration was initiated pursuant to section 13 of the SNC Appeal Procedure by filing a Request Form under section 3.4 of the Canadian Sport Dispute Resolution Code (the “Code”) in respect of the decision of the Appeal Panel dated February 24, 2014.
11. On March 27, 2014, parental consent was provided to have Mr. Baker act as the authorized representative for the Claimants.

12. On March 30, 2014 SNC delivered its Answer to a Request Form under section 3.7 of the Code.
13. In advance of the hearing and with the consent of Mr. Baker, I granted permission for SNC to file a witness statement from Mr. Bill Hogan, Chair of the Committee, who would be unavailable to attend the hearing.
14. Mr. Baker responded to the witness statement in writing on May 12, 2014.
15. Mr. Baker also submitted written submissions dated April 14, 2014. SNC then filed its submissions to which Mr. Baker replied on May 12, 2014.
16. The hearing of this matter took place by Conference Call on May 20, 2014. Mr. Ken Radford testified for SNC, and both parties made oral submissions.
17. Both parties agreed that there were no interested parties that needed to be included in this matter or provided the opportunity to make submissions.
18. None of the swimmers were present during the arbitration hearing, and for that reason, I refer to Mr. Baker's submissions, where necessary, to articulate the Claimants' position.

IV. Jurisdiction

19. There has been no challenge to my jurisdiction in this matter.
20. Section 13 of the SNC Appeals Procedure provides that:

If a Party believes the Appeal Panel has made an error such as those described in paragraph 4(a) of this Procedure, that Party may seek resort to independent arbitration through the SRDCC, provided the Party does so within the prescribed timeline as set out by the SRDCC. The matters can be considered by arbitration and the terms under which the arbitration can be conducted will be determined by the SRDCC.

21. Mr. Baker continues to rely on the grounds set out in sections 4(a)(ii) and (vi) of the SNC Appeal Procedure.

V. Background

22. The Meet in question was held under sanction of USA Swimming Inc. Article 202.4 and under sanction of Oregon Swimming Inc.

23. The organizer, Linck Bergen, is a local swimming coach.

24. The promotional material circulated before the Meet advised that “the competition course has not been certified in accordance with 104.2.2c(4)” of the USA Swimming Rulebook.

25. Article 104.2.2c(4) of the USA Swimming Rulebook sets out the pool measurements required to be met with respect to American and United States Open Records.

26. There is no similar rule requiring pool measurements for National Age Group Records under the USA Swimming Rulebook.

27. The pool in question was set up using a temporary bulkhead.

28. On each day of the Meet, Mr. Bergen took the individual lane measurements with a laser device and recorded the information. The lane measurements, as recorded on the survey signed by Mr. Bergen, were at least 25 meters.

29. In Canada, Appendix B of the Swimming Rules of SNC, and specifically CFR 1.3.1 provides that:

A certificate by a surveyor or other qualified official current within six months of the date of competition shall be filed with the responsible PS [Provincial Section] prior to the meet in order to confirm official times and to apply for records.

30. Nowhere are there criteria set out to define what is meant by “other qualified official”.
31. Canadian swimmers have been competing at the Meet, which has been held in the same pool, for approximately 14 years. In the past, National Age Group Records have been set, and accepted by SNC.
32. In 2013, the following five swimmers from the Oakville Aquatic Club, claimed National Age Group Records for Boys aged 15-17, in the following events:

Swimmer		Events
1.	Evan White	100M & 200M Butterfly; 200M Breaststroke; 4x100M Free Relay; 4x100M Medley Relay
2.	Bryce Kwiecien-Delaney	4x100M Free Relay; 4x100M Medley Relay
3.	Connor Wilkins	4x100M Medley Relay
4.	Mackenzie Hamill	4x100M Free Relay
5.	Matthew Mac	4x100M Free Relay; 4x100M Medley Relay

33. There is no dispute as to the times achieved at the Meet, which are posted on SNC’s power rankings as well as recorded as the individual swimmers’ official times. Further, these times have also been used by SNC for ranking and entry of these swimmers at SNC competitions.
34. After receiving the National Age Group Record Applications, which included the survey signed by Mr. Bergen, the Committee contacted the Meet’s host swim club, and Oregon Swimming Inc. seeking an official survey, which was not provided.
35. After the Committee’s initial decision on January 30, 2014, Mr. Baker received email confirmation from Mr. Daniel McAllen, the Chair of the Rules and Regulations Committee of USA Swimming Inc., that in the United States there are “no specific requirements to become a qualified official for measuring the pool” and that Mr. Bergen, as someone who has been measuring the pool since 2000 “...is ready for the measuring device Hall of Fame.”

VI. Issues

36. The only issue submitted was:

- a. Whether SNC acted reasonably in determining that the National Age Group Records could not be ratified.

37. However, before answering this, it must first be determined whether CFR 1.3.1 of the Swimming Rules of SNC apply to the Meet.

VII. Position of the Parties

a. Sean Baker

38. Mr. Baker seeks the ratification of the Canadian National Age Group Records in question, and an order requesting SNC to clarify the rules applicable to National Age Group Records.

39. Mr. Baker argues that the National Age Group Records should be ratified because:

- a. The CFR 1.3.1 does not apply to a meet in the USA;
- b. There is nothing in the Swimming Rules of SNC that mention pool measurement certification with respect to National Age Group Records;
- c. The SNC has not required a certified survey from a surveyor for official times and Canadian records set at this same meet in the past;
- d. SNC has not consistently or strictly adhered to the requirement for a survey in respect of other Canadian and international meets;
 - i. Specifically, the SNC has accepted official times and Canadian records set at competitions that did not provide a survey within the six month time frame provided by the rule;
- e. The pool in question was measured every day by the organizer, Mr. Bergen, who recorded the measurements and confirms that the pool measured between 25.04 and 25.08 meters every day of the Meet;
- f. There is no criteria in the Swimming Rules of SNC for what constitutes a “qualified official”; and

- g. The Chair of the Rules and Regulations Committee for USA Swimming Inc. confirmed in an email that Mr. Bergen was a “qualified official: for the purposes of USA Swimming Inc.

40. Mr. Baker contends that as a result of the inconsistent approach taken to the requirement of a survey under CFR 1.3.1, it would be unfair to the five swimmers whose times are at issue to now require a certified survey. He argues that this would be contrary to the policy objective of the Swimming Rules, which states:

Swimming/Natation Canada's (SNC) goal is to conduct well organized, uniform, and consistently operated swim meets for the benefit of all swimmers. The objective of all meets is fair and fast swimming. When swimmers arrive at the meet site, they have had months and years of preparation with specific goals in mind and must be allowed to achieve the highest level of performance.

41. For the above reasons, Mr. Baker argues that SNC acted unreasonably in refusing to ratify the records in question without issuing an advance written guidance signalling a change in conduct.

b. Swimming/ Natation Canada

42. SNC provides that the decision to refuse to ratify the records in question should stand because:

- a. CFR 1.3.1 applies to the Meet in question;
- b. The Committee is not bound by its past conduct, rather, it is required to make a decision on the basis of the facts currently before it;
- c. The Committee reasonably applied the rule provided in CFR 1.3.1 on the facts before it;
- d. The survey provided in respect of the Meet was not a proper survey, because:
 - i. It did not contain details about the technical elements of pool, such as the pool depth or the location of touchpads, and
 - ii. It was not certified by a surveyor or other qualified official, rather, it was signed by the coach of the local swim team who organized the meet;

- e. The promotional material circulated for the swim meet provided that the pool was not certified;
 - f. SNC is not bound by foreign rules, and specifically it is of no effect that USA Swimming Inc.:
 - i. does not require an official survey for National Age Group Record applications, and
 - ii. deems Mr. Bergen to be a “qualified official” for the purpose of measuring the pool; and
 - g. It is the role of the Committee to determine what an “other qualified official” is, which the Committee reasonably interprets as an engineer.
43. In addition to the foregoing, SNC relies on the decision in *Palmer v Athletics Canada*, SDRCC/CRDSC 08-0800 to argue that in making this determination, just like a judge conducting a judicial review, I should have a certain degree of deference for the decision of the Committee based on their expert or specialized knowledge and experience.

VIII. Analysis

a. Standard of Review

44. According to section 6.17 of the Code, arbitrators shall have full power to:

...review the facts and the law. In particular, the Panel may substitute its decision for:

(i) the decision that gave rise to the dispute...

....

and may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.

45. I have considered SNC’s legal position, and though Mr. Baker did not provide any contrary case law, I note that there are competing interpretations of the applicable standard of review (see *Laberge v Bobsleigh Canada Skeleton (BCS)*, SDRCC/ CRDSC 13-0211 at paragraphs 36 and 37). However, in light of my findings in this matter, outlined below, it is not necessary to determine the level of deference, if any, owed to the Appeal Panel. For the reasons below, the decision of the Appeal Panel was incorrect, and

therefore it was grossly unreasonable and inconsistent with the procedures as laid out in the bylaws or approved policies of the SNC.

46. With that in mind, I turn to the issue in dispute.

b. Certified Survey Requirement

47. First and foremost, it must be determined, what, if any, pool measurement certification is required in the circumstances of this Meet.

48. SNC clearly stated its position that the governing rule in this matter is CFR 1.3.1. It did not cite any other rule which would require a certified survey to be submitted before the National Age Group Records could be accepted. In fact, there was no rule cited that was explicitly applicable to National Age Group Records and that would require an official certificate in respect of the pool length.

49. SNC's reliance on CFR 1.3.1 during the hearing is an additional position from that taken by the Committee in its decision of January 30, 2014 wherein it provided that: "[g]iven the course was not certified in accordance with US Swimming rules ..." CFR 1.3.1 was raised for the first time by the Appeal Panel in its decision on February 24, 2014.

50. Mr. Radford admitted at the hearing that the USA Swimming Rule requiring certified pool measurements does not apply in respect of National Age Group Records. Further, any reliance on a USA Swimming Rule requiring such certification is inconsistent with the SNC's argument that it is not bound by foreign rules.

51. Therefore, it is irrelevant that USA Swimming did not consider the Meet as "certified". The Committee was incorrect when it denied ratifying the National Age Group Records because "the course was not certified in accordance with US Swimming rules..."

52. In respect of the argument that the requirement for a certified survey is in fact found in the Swimming Rules of SNC, I note that CFR 1.3.1 is part of Appendix B to those Rules, entitled FINA Facilities Rules. FINA (or Federation Internationale de Natation – the

International Swimming Federation) is the world governing body for five aquatic disciplines, including swimming. Appendix B is broken into two types of rules, FR, presumably Facilities Rules, and CFR, Canadian Facilities Rules.

53. The FR rules are essentially the FINA facilities rules, while the CFR qualifies the FR rules with respect to their specific application in Canada. For example, FR 2.3 deals with minimum pool depth, while CFR 2.3.1 qualifies this rule and provides that in Canada the FINA proscribed minimum pool depths only apply to “new pools beginning construction after December 31, 2002”. For pools already built at that time, CFR 2.3.1 sets a shallower minimum depth.
54. This interpretation is consistent with the preamble which provides that the CFR are “intended to apply specifically to national and provincial sanctioned swimming competitions...” (my emphasis).
55. Without any additional indication in the text of the rule to the contrary, the CFR do not apply to non-Canadian competitions.
56. For ease of reference, CFR 1.3.1. provides that:
- A certificate by a surveyor or other qualified official current within six months of the date of competition shall be filed with the responsible PS [Provincial Section] prior to the meet in order to confirm official times and to apply for records.
57. There is nothing in this provision that expands the application of the rule beyond the “national and provincial sanctioned swimming competitions” specified in the preamble.
58. Therefore, SNC’s argument that the CFR 1.3.1 precludes ratification of the National Age Group Records is incorrect. That rule has no application to this Meet.

59. Although not determinative, this conclusion is consistent with SNC's conduct:
- a. To ratify the official times and Canadian records achieved at the Meet in question in previous years without the need for a certificate of a surveyor or other qualified official;
 - b. In respect of other competition, to not always require copies of certified surveys in respect of Applications for National Age Group Records; and
 - c. To accept these swimmers' times for other purposes.
60. Since the times have been accepted for the swimmers' personal records, and for the purpose of entry and ranking in SNC competitions, it only seems logical that they would also be accepted for the purpose of National Age Group Records. SNC cannot say that there is no "proper survey" and rely on CFR 1.3.1 when it accepted the measurements of the pool for the purposes of personal records and ranking. If SNC felt the measured pool was unreliable it certainly would not have accepted the competition results from the Meet for any purpose.
61. Given the conclusion that CFR 1.3.1 does not apply to the Meet in question, I do not need to determine whether the Appeal Panel further erred in rejecting the applications. Similarly, I do not need to address Mr. Baker's request for clarification of the rules that apply to National Age Group Records.
62. I would like to note however, that on the record before me it was abundantly clear that the Committee and the Appeal Panel conducted themselves in a reasonable and honest manner, even if based on an erroneous understanding of the applicable rules. They made a number of inquiries in an effort to obtain the necessary surveys, and interpreted the remainder of the rule in light of their special expertise and knowledge. For example, though not determinative of the current arbitration, I could not find fault with SNC's interpretation of "other qualified official". The Committee clearly has the special knowledge and expertise to determine what constitutes a "qualified" official, and it would not have been for me to disturb that on the record before me.

63. I agree that the Committee is not bound by its past conduct, and must make a decision on the basis of the facts before it. However in this case the past conduct is consistent with my conclusion that CFR 1.3.1 is not applicable.

IX. Conclusion

64. The Committee erred on January 30, 2014 by concluding that the "...course was not certified in accordance with US Swimming rules..." In fact, the statement in the promotional material referred to the certification necessary only for American and United States Open Records. No USA Swimming Inc. Rule disqualified the course for the purposes of National Age Group Records.

65. The Appeal Panel then erred on February 24, 2014 by concluding that CFR 1.3.1 applied to the Meet. That rule only applies in Canada.

66. SNC having been satisfied that the pool was 25 meters and sufficient for certain record purposes it is inconsistent and illogical to then say the Meet outcomes should not be recognized for National Age Group Record purposes.

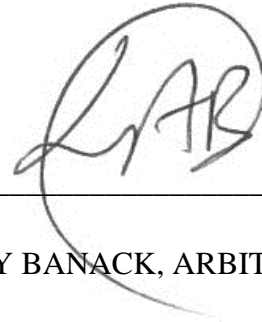
67. As a result, the balance of the arguments asserted on behalf of the SNC, including among other things the course of its past conduct and the quality of the survey are without merit in these circumstances.

68. In the absence of an applicable Canadian Rule, and without the benefit of an applicable USA Swimming Rule, the Appeal Panel's decision to refuse the National Age Group Record applications was grossly unreasonable and inconsistent with the procedures as laid out in the bylaws or approved policies of the SNC.

69. For the foregoing reasons, I find that CFR 1.3.1 of the Swimming Rules of SNC does not apply to the applications for National Age Group Records achieved at the Meet, and therefore the National Age Group Records at issue are to be accepted.

70. Section 6.22 of the Code entitles the parties to make submissions as to costs. If Mr. Baker seeks his costs in this matter, short submissions shall be filed no later than June 9, 2014. Submissions shall address the conduct of the parties and their respective financial resources, intent, and each Party's willingness in attempting to resolve the dispute prior to or during Arbitration. If SNC opposes Mr. Baker's cost request it will file brief responding submissions no later than June 23, 2014.

Dated at Toronto this 27th day of May, 2014.

A handwritten signature in dark ink, appearing to read 'LARB', is written over a horizontal line. The signature is stylized and cursive.

LARRY BANACK, ARBITRATOR