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December 8, 2014

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Re: **Wambach et. al. v. Canadian Soccer Association**
HRTO File Number: 2014-18923-I

Please find enclosed an interim decision of the Tribunal in this matter,
dated December 8, 2014.

16 pages including this cover sheet.

Child and Family Services Review Board
Custody Review Board
Human Rights Tribunal of Ontario
Landlord and Tenant Board Ontario
Special Education (*English*) Tribunal Ontario
Special Education (*French*) Tribunal Ontario
Social Benefits Tribunal

Commission de révision des services à l'enfance et à la famille
Commission de révision des placements sous garde
Tribunal des droits de la personne de l'Ontario
Commission de la location immobilière
Tribunal de l'enfance en difficulté de l'Ontario (*anglais*)
Tribunal de l'enfance en difficulté de l'Ontario (*français*)
Tribunal de l'aide sociale



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

**Abby Wambach and Players on National Teams Participating in the FIFA
Women's World Cup Canada 2015 Listed on Schedule "A"**

Applicants

-and-

**Canadian Soccer Association and
Fédération Internationale de Football Association**

Respondents

INTERIM DECISION

Adjudicator: Jo-Anne Pickel
Date: December 8, 2014
File Number: 2014-18923-I
Citation: 2014 HRTO 1760
Indexed as: **Wambach v. Canadian Soccer Association**

WRITTEN SUBMISSIONS

Abby Wambach and Players on National)
Teams Participating in the FIFA Women's)
World Cup Canada 2015 Listed on) Catherine Gleason-Mercier,
Schedule "A", Applicants) Counsel
)

Fédération Internationale de Football)
Association, Respondent) Jérôme Valcke, Representative
)

[1] This Interim Decision addresses the issue of whether the respondent, Fédération Internationale de Football Association ("FIFA"), has received effective legal notice of this Application. In particular, the Interim Decision addresses whether it is necessary to serve the Application materials in accordance with the procedures set out in the Convention on the Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters ("Hague Service Convention" or "Convention").

BACKGROUND TO THE APPLICATION

[2] By Application filed on October 1, 2014, the applicants alleged that FIFA and the Canadian Soccer Association ("CSA") discriminated against them because of sex contrary to the *Human Rights Code*, R.S.O. 1990, c. H. 19, as amended (the "*Code*"). In particular, the applicants allege that FIFA and the CSA have taken, and continue to take, actions that will force women players to play games on artificial turf during the FIFA Women's World Cup Canada 2015. The applicants claim that artificial turf is dangerous to athletes and considered sub-standard for international play. The applicants allege that the respondents' actions discriminate against them based on sex because, according to the applicants, neither FIFA nor the CSA requires men's soccer players to play World Cup games on artificial turf. The applicants seek remedial orders that will require the FIFA Women's World Cup Canada 2015 to be played on natural grass fields.

[3] The applicants sent a copy of the Application and an accompanying Request to Expedite Proceedings to each respondent. In particular, the applicants sent copies of the Application and Request by facsimile to Joseph Blatter, the President of FIFA, at FIFA's office in Switzerland.

[4] The following day, in accordance with the Tribunal's usual practice, the Tribunal sent a Notice of Application and Request to Expedite Application ("Notice") as well as a copy of the Application and the Request to Expedite Proceedings to both respondents. The Tribunal sent the Notice and enclosed documents to FIFA by mail and facsimile and to the CSA by courier and facsimile.

[5] By letter dated October 3, 2014, Jérôme Valcke, FIFA's Secretary General, acknowledged receipt of the above materials by facsimile. However, he advised the Tribunal that FIFA was refusing acceptance of the Notice and enclosed documents on the basis that the procedure for delivery provided for by relevant international treaties had not been complied with in the present case.

[6] By letters dated October 5 and 7, 2014, one of the applicants' counsel advised that it was the applicants' position that international service treaties do not apply in the present case. She also asked FIFA to identify and provide contact information for an agent for service in Ontario under the *Extra-Provincial Corporations Act*, R.S.O. 1990, c. E.27. Finally, she advised that, as a courtesy, the applicants would effect delivery of the Application materials addressed to FIFA on the CSA, which appears to be a FIFA affiliate, as well as on the "National Organising Committee for FIFA Women's World Cup Canada 2015" which FIFA and the CSA have established as a joint committee operating in Canada.

[7] On October 6, 2014, one of the Tribunal's legal counsel e-mailed Switzerland's Central Authority for purposes of the Hague Service Convention to request service of the Application in accordance with the Convention. The Swiss authority advised the Tribunal's counsel that the Canton of Zurich does not accept applications by e-mail. The authority stated that the Tribunal's request would have to be submitted by mail. The Tribunal's counsel took no further action pending a determination by a Tribunal adjudicator as to whether service under the Hague Service Convention was required in this case.

[8] By Case Assessment Direction ("CAD") dated October 23, 2014, I directed the parties to file written submissions on the issue of whether FIFA had received effective legal notice of the Application.

[9] FIFA filed submissions on November 3, 2014, and the applicants filed submissions on November 6, 2014. FIFA also filed a Response to the Application on November 6, 2014. FIFA stated that it was filing its Response and its reply to the

Tribunal's CAD under protest due to its position that it has yet to be properly served with the Application materials. FIFA made clear its position that, in filing its Response and making submissions in response to the CAD, it was not attorning to (i.e. accepting or recognizing) the jurisdiction of the Tribunal in this matter.

PARTIES' SUBMISSIONS

FIFA's Submissions

[10] FIFA submits that compliance with the Hague Service Convention is mandatory under Canadian law for three reasons. First, it argues that there is a strong presumption that Canadian legislation complies with Canadian international obligations. Therefore, according to FIFA, the Tribunal's Rules cannot oust compliance with the Convention. FIFA submits that, in the absence of a provision expressly excluding the application of the Convention, the Convention must apply. Second, FIFA submits that the existence of the Convention and the Tribunal's conduct to date gave rise to a legitimate expectation on the part of FIFA that the Tribunal would comply with the Convention. Third, according to FIFA, the principles of international comity require compliance with the Convention as, in its view, Swiss courts would not recognize the Tribunal's jurisdiction absent compliance with the Convention.

Applicants' submissions

[11] The applicants submit that there is no requirement to comply with the Hague Service Convention in this case. The applicants believe that FIFA's true motivation in raising its objection is to evade a hearing on the merits. According to the applicants, this motivation is evidenced by FIFA's refusal to appoint an agent of service in Ontario under the *Extra-Provincial Corporations Act*. The applicants note that service in accordance with the Hague Service Convention may take months to complete; thus, in their view, "eviscerating any meaningful remedy to the current discrimination faced by the applicants".

[12] The applicants submit that treaty provisions cannot affect domestic law unless and/or until they have been implemented by the legislature. The applicants note that the Hague Service Convention has been implemented into the Ontario *Rules of Civil Procedure* (applicable to civil court proceedings in Ontario). However, the Convention has not been implemented either into the *Code* or into the Tribunal's Rules of Procedure ("Rules"). Therefore, according to the applicants, the Convention does not apply to these proceedings.

[13] According to the applicants, a finding that the Hague Service Convention does not apply to Tribunal proceedings would be consistent with provisions of the *Code* and the Tribunal's Rules which speak to the Tribunal's mandate to promote fair, just and expeditious proceedings.

[14] Finally, the applicants submit that FIFA's natural justice rights have not been infringed in this case since the organization has itself acknowledged receipt of the Application materials. The applicants argue that it is their natural justice rights, and not FIFA's, that would be prejudiced if the Tribunal were to find that service must be effected in accordance with the Hague Service Convention as this would significantly delay the hearing of the Application.

RELEVANT LAW

Relevant Provisions of the *Code* and Rules

[15] Section 43(1) of the *Code* states that "the Tribunal may make rules governing the practice and procedure before it." Under Rule 6.6 of the Tribunal's Rules, an Application accepted by the Tribunal for processing will be sent by the Tribunal to the respondent(s) at the address provided in the application. Neither the *Code* nor the Rules require that the Hague Service Convention must be complied with in Tribunal proceedings. In fact, neither the *Code* nor the Rules refer to any "service" requirements at all. Instead of referring to the service of documents, the Rules require parties to deliver materials using one of the methods for delivery listed in Rule 1.21 of the Tribunal's Rules.

Likewise, the Rules do not refer to the "service" of any documents by the Tribunal. Instead, the Rules require the Tribunal to send materials to a party using the contact information provided for that party.

[16] As a final point, the *Statutory Powers Procedure Act*, R.S.O. 1990, c. S.22 ("SPPA"), also does not explicitly require tribunals which are governed by the SPPA, such as this Tribunal, to comply with the Hague Service Convention. The SPPA only requires tribunals to give parties to a proceeding reasonable notice of hearings: s. 6 of the SPPA. The SPPA does not set out any requirements relating to the provision of notice of proceedings. It also does not address what constitutes effective notice of a hearing.

The Hague Service Convention

[17] Both Canada and Switzerland are signatories to the Hague Service Convention. The preamble to the Convention makes clear that one of the Convention's purposes is to ensure simplicity and expedition. According to the preamble, the Convention's purposes are:

- to create appropriate means to ensure that judicial and extrajudicial documents served abroad will be brought to an addressee in sufficient time; and
- to improve the organisation of mutual judicial assistance for that purpose by simplifying and expediting the procedure.

[18] Article 1 of the Convention sets out the Convention's scope of application. It states in its relevant part:

The present Convention shall apply in all cases, in civil or commercial matters, where there is occasion to transmit a judicial or extra judicial document for service abroad. [emphasis added]

[19] The Convention does not define the terms “judicial documents” or “extra judicial documents”. It also does not define the term “service” used in the title of the Convention and also throughout the Convention.

[20] The Ontario legislature has included within the *Rules of Civil Procedure* a provision which requires compliance with the Hague Service Convention. For proceedings governed by the *Rules of Civil Procedure*, the Convention is made specifically applicable where service is to be made outside Canada within a contracting state: see Rule 17.05 of the *Rules of Civil Procedure*. The Tribunal is not governed by the *Rules of Civil Procedure*. As noted above, the Ontario legislature has not enacted any statutory or regulatory provision requiring compliance with the Convention in Tribunal proceedings nor, it appears, in proceedings before any administrative tribunal in Ontario.

ANALYSIS AND CONCLUSIONS

[21] The issue of whether the Tribunal must comply with the procedures for service contained in the Hague Service Convention is one of first impression. The issue has not been raised before this Tribunal to date. Moreover, I have not been provided with any case law on this issue by human rights tribunals in other Canadian jurisdictions or by any other administrative tribunal, whether based in Canada or any other country.

[22] It is a principle of natural justice that a party is entitled to notice of a legal proceeding that is brought against it. However, the form of effective legal notice may vary depending on the legal forum in which the case is brought. In this case, I must determine what method of service is required by the applicable statutes, rules and legal principles.

Whether Hague Service Convention must be read into Code or Rules

[23] In essence, FIFA submits that the Hague Service Convention must be read into the Code or the Tribunal’s Rules. I cannot accept this submission for the reasons that follow.

[24] In order for international conventions/treaties to have the force of law in Canada, they must be implemented into Canadian law through the enactment of legislation by the appropriate legislative body. It is well-established that courts and tribunals will interpret statutes so as to conform as far as possible with Canada's treaty obligations or international customary law. In other words, Parliament and the provincial legislatures are presumed not to intend to legislate in breach of Canada's international law obligations: see *Thibodeau v. Air Canada*, 2014 SCC 67 at para. 113, and *Zingre v. The Queen et al.*, [1981] 2 SCR 392. However, this presumption is not absolute; it is rebuttable.

[25] The Ontario legislature has required compliance with the Hague Service Convention in court proceedings governed by the *Rules of Civil Procedure*. However, it has not required such compliance in Tribunal proceedings. In my view, the legislature's failure to implement, or decision not to implement, the Convention in relation to proceedings before this Tribunal and other administrative tribunals must be given effect.

[26] I find that it is not appropriate to read into the *Code* a requirement that Tribunal materials must be served in accordance with the procedures set out in the Convention. Although a legislature must be presumed to legislate in compliance with international law, this presumption can be rebutted when it is clear that the legislature has made certain legislative choices about the proper scope of application of international treaties. I do not agree with FIFA's submission that, in the absence of a provision expressly excluding the application of the Convention, the Convention must apply. I find that the Ontario legislature has made a clear legislative choice not to require compliance with the Hague Service Convention in Tribunal cases or, it appears, in cases before any administrative tribunal in Ontario. This choice is consistent with the Tribunal's mandate to provide accessible and less formal means for the enforcement of rights under the *Code*.

[27] I note that the legislature's decision not to require service in accordance with the Convention is not necessarily inconsistent with the general interpretation given to the Convention. Section 1 of the Convention states that the Convention applies, "where

there is occasion to transmit a judicial or extrajudicial document for service abroad". The scope of application of the Convention is discussed by C. Bernasconi and L. Thébault, *Practical Handbook on the Operation of the Hague Service Convention*, 2006 (3d ed.) ("*Handbook*"). The *Handbook's* authors distinguish between two distinct questions:

- a. first, which law determines whether or not a document has to be transmitted abroad for service; and
- b. second, if a document does have to be transmitted abroad for service, whether the channels of transmission set out in the Convention necessarily have to be applied.

[28] Based on case law interpreting the Convention, the authors conclude that it is for the domestic law of the forum where the legal proceeding is taking place (*lex fori*) to determine if a document needs to be served. As the authors note, this approach has been confirmed by two Special Commissions on the practical operation of the Convention. See *Handbook* at paras. 24-48. It is only if service abroad is required under the domestic law of the forum that the procedures set out in the Convention must be followed.

[29] As the authors of the *Handbook* note, the Convention does not set out any requirements as to which documents must be served and which documents do not need to be served. Instead, the Convention requires that its procedures be followed for documents that must be served abroad. According to the *Handbook*, it is for contracting states to determine which documents must be served abroad and which documents do not have to be served abroad. Based on the *Handbook*, the Ontario legislature's decision not to require service abroad of materials in Tribunal proceedings appears not to be inconsistent with the Convention.

[30] Whether the legislature's choices are consistent with the Convention or not, they must be given effect. For the reasons set out above, I find that there is no requirement that materials in proceedings before the Tribunal be served using the procedures set out in the Hague Service Convention. In my view, it is appropriate for the Tribunal and parties to send materials to a foreign-based party using one of the methods of

transmission listed in the Tribunal's Rules. If it becomes clear that a party has not received the materials that were transmitted, it is open to the Tribunal or a party to use the procedures contained in the Convention or, for that matter, any other method to ensure effective notice. However, for the reasons set out above, I find that Ontario law does not require use of the Convention's service procedures in Tribunal proceedings.

[31] In this case, it is clear from FIFA's acknowledgment of receipt on October 3, 2014, that it has received the Application materials. As such, I find that FIFA has effective legal notice of these proceedings under the Tribunal's Rules. In the alternative, I find that the applicants' service of materials on the "National Organising Committee for FIFA Women's World Cup Canada 2015" is sufficient to provide FIFA with effective legal notice of these proceedings under the Tribunal's Rules.

Doctrine of Legitimate Expectations

[32] As noted above, FIFA submitted that natural justice requires service in accordance with the Hague Service Convention because it has a legitimate expectation that the procedures set out in the Convention will be followed. According to FIFA, this legitimate expectation arises from the existence of the Convention's detailed provisions and the Tribunal's conduct in this proceeding. I cannot accept this submission for the following reasons.

[33] First, I find that the mere existence of the Convention cannot give rise to a legitimate expectation that Tribunal materials will be transmitted using the procedures set out in the Convention regardless of Ontario law on the issue. In my view, to accept FIFA's argument on this point would completely override well-established law that treaties do not have the force of law in Canada unless implemented by the appropriate legislative institution.

[34] Second, I find that the actions of the Tribunal's counsel in this case cannot reasonably be seen to give rise to a legitimate expectation that the Tribunal would serve materials to FIFA using the procedures set out in the Convention.

[35] The Supreme Court of Canada has described the circumstances in which a public authority's actions will give rise to legitimate expectations as follows:

If a public authority has made representations about the procedure it will follow in making a particular decision, or if it has consistently adhered to certain procedural practices in the past in making such a decision, the scope of the duty of procedural fairness owed to the affected person will be broader than it otherwise would have been.

Agraira v. Canada (Public Safety and Emergency Preparedness), [2013] 2 SCR 559 at para. 94 [*"Agraira"*]

[36] It is well accepted in the case law that such a representation by a public authority must be clear, unambiguous and unqualified: see *Agraira* at para. 95.

[37] Neither the Tribunal nor its counsel made any clear, unambiguous and unqualified representations about compliance with the Convention in this case. As noted above, the Tribunal's counsel contacted the Swiss Central Authority to request service of the Application in accordance with the Convention. However, he ended up taking no further action pending a determination by a Tribunal adjudicator as to whether service under the Hague Service Convention was required in this case. If anything, his actions gave rise to a legitimate expectation that the Tribunal would not serve any materials using the procedures set out in the Convention unless and/or until a Tribunal adjudicator found that compliance with the Convention was required in this case.

[38] For all these reasons, I find that the rules of natural justice relating to the doctrine of legitimate expectations do not require compliance with the Hague Service Convention in this case.

International Comity

[39] Finally, FIFA argues that principles of international comity require compliance with the Hague Service Convention in this case. I cannot accept this submission for the reasons that follow.

[40] FIFA asserts that a Swiss court would not assume jurisdiction over this case if the roles were reversed and FIFA were based in Canada. FIFA seeks to rely upon provisions of the *Swiss Civil Procedure Code* (Code de procédure civile) which appears to be the equivalent to the *Rules of Civil Procedure* in Ontario. The *Swiss Civil Procedure Code* preserves the application of international treaties. In my view, rather than seeking international comity, FIFA is in effect arguing in favour of international uniformity. As with FIFA's submissions on the issue of legitimate expectations, its arguments, if accepted, would permit the principle of international comity to override well-established law that treaties do not have the force of law in Canada unless implemented by the appropriate legislative institution.

[41] FIFA also argues that a Swiss court would not enforce a Tribunal decision in the absence of compliance with the Hague Service Convention. I have not been provided with any case law that would support this proposition. In any event, it is not appropriate for me at this stage to prejudge what type of remedy a Tribunal adjudicator might award if the applicants are successful and whether enforcement abroad would be required. For this reason, I find that FIFA's arguments relating to the enforceability of any judgment in the future are speculative. In my view, they do not establish that compliance with the Hague Service Convention is required due to principles of international comity.

ORDER AND NEXT STEPS

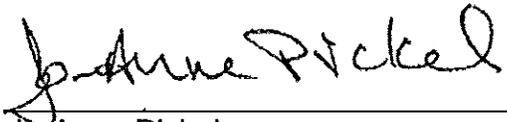
[42] For all the reasons set out above, I find that Ontario law does not require compliance with the Hague Service Convention in Tribunal proceedings. In the circumstances of this case, I find that FIFA has received effective legal notice of this proceeding. I also find that all documents so far delivered in this case have been properly delivered in accordance with the Tribunal's Rules and all applicable law.

[43] When asked to indicate its preferred method of communication in its Response, FIFA indicated that it does not consent to service of documents by e-mail, mail or facsimile. It indicated that it requires service in accordance with the Hague Service Convention. In light of my conclusion that service in accordance with the Convention is

not required by Ontario law, I find it appropriate for the Registrar to deliver documents to FIFA by facsimile and e-mail.

[44] Since not all parties have agreed to mediation, the Tribunal will continue to process this Application. The next step in this proceeding is for the Tribunal to issue an Interim Decision addressing two Requests filed by the applicants: a Request for Interim Remedy and a Request to amend the Application. An Interim Decision on these requests will be provided in the coming days.

Dated at Toronto, this 8th day of December, 2014.



Jo-Anne Pickel
Vice-chair

Schedule A

Jackie Acevedo

Katherine Alvarado

Nadine Angerer

Verónica Boquete

Fabiana Da Silva Simões

Abby Erceg

Caitlin Foord

So-Yun Ji

Samantha Kerr

Alexandra Morgan

Yuki Ogimi

Heather O'Reilly

Diana Saenz

Abby Wambach

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December 8, 2014

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Re: **Wambach et. al. v. Canadian Soccer Association**
HRTO File Number: 2014-18923-I

Please find enclosed a reconsideration decision of the Tribunal in this matter, dated December 8, 2014.

5 pages including this cover sheet.

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Tribunal de l'enfance en difficulté de l'Ontario (*français*)
Tribunal de l'aide sociale



HUMAN RIGHTS TRIBUNAL OF ONTARIO

BETWEEN:

**Abby Wambach and Players on National Teams Participating in the FIFA
Women's World Cup Canada 2015 Listed on Schedule "A"**

Applicants

-and-

**Canadian Soccer Association and
Fédération Internationale de Football Association**

Respondents

RECONSIDERATION DECISION

Adjudicator: Jo-Anne Pickel
Date: December 8, 2014
File Number: 2014-18923-I
Citation: 2014 HRTO 1761
Indexed as: **Wambach v. Canadian Soccer Association**

[1] This Reconsideration Decision addresses the applicants' Request that the Tribunal reconsider its Interim Decision 2014 HRTO 1635, in which it denied the applicants' Request to Expedite Proceedings.

[2] Under Rule 26.1 of the Tribunal's Rules of Procedure, reconsideration is only available from a final decision. A final decision is "one that disposes of some or all of the central issues in the complaint as between the parties": *Sigrist and Carson v. London District Catholic School Board et al.*, 2008 HRTO 34 at para. 41. The decision on whether a proceeding will be expedited is a procedural decision. It relates to when deadlines will be set and when the hearing will be scheduled. As determined by the Tribunal in many cases, a refusal to expedite proceedings is not a final decision within the meaning of Rule 26.1 and as such is not subject to reconsideration. See for example *Weerawardane v. 2152458 Ontario Ltd.*, 2008 HRTO 66 at para. 4; *Quintieri v. Dufferin-Peel Catholic District School Board*, 2009 HRTO 1313 at para. 2; and *Fish v. National Steel Car Ltd.*, 2012 HRTO 358 at paras. 6 and 10.

[3] For these reasons, the applicants' Request for Reconsideration is denied. Moreover, in my view, the new information and arguments provided by the applicants do not support a different conclusion than the one reached in the Interim Decision. In particular, the respondents' alleged actions surrounding the 2013 survey of players does not affect my view that the applicants failed to proceed expeditiously in filing this Application. In addition, the issue of whether the respondents were amenable to mediation was not a factor relied upon in refusing the applicants' Request to Expedite.

ORDER

[4] The applicants' Request for Reconsideration is denied.

Dated at Toronto, this 8th day of December, 2014.



Jo-Anne Pickel
Vice-chair

Schedule A

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