SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)

Nº: SDRCC 17-0319

CANADIAN BLIND SPORTS ASSOCIATION (CBSA)
(CLAIMANT)

AND

SIMON RICHARD
(RESPONDENT)

AND

BRENDAN GAULIN
ARON GHEBREYOHANNES
BRUNO HACHÉ
BLAIR NESBITT
DOUG RIPLEY
JOHN TEE
SIMON TREMBLAY
AHMAD ZEIVIDAVI
(AFFECTED PARTIES)

Tribunal:	Patrice Brunet (Sole Arbitrator)
Date of Hearing:	May 31st, 2017

Appearances:

For the Claimant:	Steve Indig, counsel
For the Respondent:	Connor Allison, Claudia Warner-Romano, representatives Layth Gafoor, counsel
For the Affected Parties:	None

REASONS FOR DECISION

I. INTRODUCTION

1. The crux of this arbitration rests on the decision of the Canadian Blind Sports Association (the "Claimant") not to recommend Simon Richard (the "Respondent") for AAP funding for the 2016-2017 carding cycle and not to name the Respondent to the National Team Pool.

2. On May 31, 2017, the hearing was held via conference call.

3. On June 7, 2017, I rendered my short decision in which I ordered that the decision not to name the Respondent to the National Team Pool be sent back to the CBSA to review the composition of its National Team Pool.

4. The reasons for my decision are set out as below.

II. THE PARTIES

5. **Simon Richard** is a Goalball athlete. He has been a member of the Goalball National Team Pool for the past 4 years. He was selected by CBSA to play internationally at the 2014 IBSA Goalball World Championships, the 2015 Parapan American Games and the 2016 Paralympic Games. However, he was not recommended to receive AAP funding for the 2016-2017 carding cycle.

6. **CBSA** is the national sport organization governing the sport of Goalball in Canada. They provide support to all Canadians who are blind or visually impaired to be involved in a range of sports.

7. The **Affected Parties** are all Goalball athletes. They participated in the proceedings because the outcome of this dispute could affect their carding status.

III. JURISDICTION

8. The Sport Dispute Resolution Centre of Canada (SDRCC) was created by Federal Bill C-12, on March 19th, 2003[1].

9. Under this Act, the SDRCC has exclusive jurisdiction to provide to the sports community, among others, a national alternative dispute resolution service for sport disputes.

10. All Parties have agreed to recognize the SDRCC's jurisdiction in the present matter.

IV. BACKGROUND

11. In May 2016, the Claimant compiled its skills depth chart based on testing and gameplay analysis.

12. Between May and September 2016, the National Team Coaches evaluated the players in order to establish the best combination of centers and wingers from the existing pool of athletes.

13. In September 2016, during the Canada-Algeria game at the Paralympic Games in Rio, the Respondent was given an unsportsmanlike conduct penalty, according to rule 30.8.1 of the IBSA Goalball Rules 2014-2017. As a result of this penalty, imposed because the referee considered the player had tampered with his eye patch, he was ejected from the game, which resulted in the team being forced to play the rest of the game with one less player on the field of play. This rule is similar to the one found in the sport of soccer, when a team member is red carded. It not only affects the player, but the team as a whole.

14. On September 26, 2016, the Respondent was informed by the Claimant that he was not recommended for AAP funding for the 2016-2017 carding cycle. The reason

[1] The *Physical Activity and Sport Act*, S.C. 2003, c.2

provided for the non-recommendation was not based on performance, since the Athlete is considered one of the best, but on risk assessment for possible future similar penalties on the field of play.

15. The Claimant's initial decision was made as a result of the Respondent's eye patch issues over the last few years, in competition. The Claimant considered that the Respondent's inclusion on the team could affect the success of the national team at international competitions, should he be penalized once again.

16. On October 5, 2016, the Respondent filed an appeal of the Claimant's decision, before the CBSA's internal Appeal Tribunal.

17. On January 4, 2017, the Appeal Tribunal granted the Respondent's appeal and concluded that the Respondent's recommendation for eleven (11) months of Sport Canada's Athlete Assistance Program (the "AAP") carding should be reinstated.

18. On February 2, 2017, the Claimant filed an Arbitration Request to the Sport Dispute Resolution Centre of Canada ("SDRCC"). In its Request form, the Claimant appeals the decision rendered by its own internal appeal tribunal.

19. On February 9, 2017, the Respondent filed its Answer Form regarding the present arbitration to the SDRCC.

20. On February 10, 2017, I accepted the appointment to act as Arbitrator in the present proceedings, under 6.8 of the Canadian Sport Dispute Resolution Code (the "Code"). There were no objections raised by any of the parties.

21. On February 10, 2017, an administrative conference call was held between the Parties and the SDRCC staff to clarify the administrative procedures.

22. On February 17, 2017, a first preliminary conference call was held between myself, the Parties and the SDRCC staff. Counsel for both parties disagreed on the interpretation of Section 6.17 (b) of the Canadian Sport Dispute Resolution Code (the "Code"). The Claimant believed that my scope of review should be a *de novo* review of the facts and the law, while the Respondent expressed that my authority should be

limited to a judicial review of the decision of the Appeal Tribunal. Meanwhile, the Parties continued the Resolution Facilitation (RF) process.

23. On May 2, 2017, a second preliminary conference call was held since the Parties were unable to reach an agreement during the RF sessions. I then confirmed to the Parties that I would provide a ruling on the matter of the scope of review.

24. On May 10, 2017, I rendered a Procedural Order in which I determined that this dispute would proceed as a *de novo* hearing. The following is an excerpt of my decision:

> 13. Section 6.17 of the Code reads as follows:
>
> > *(a) The Panel shall have full power to review the facts and apply the law. In particular, the Panel may substitute its decision for:*
> >
> > *(i) the decision that gave rise to the dispute;*
> >
> > […]
>
> 14. However, I recognize that there are various degrees of scope that this sports arbitration tribunal may indeed review, based on the decision itself. In selection or carding matters, the Tribunal may be asked to either review:
>
> > a. The *technical aspect* of the selection or carding decision made by the NSO,
> >
> > b. The *legal foundation* upon which the selection or carding decision made by the NSO rests, or,
> >
> > c. The decision made by the NSO's *internal appeal panel*, either on technical or legal grounds.
>
> 15. When reviewing the *technical aspect* of the selection or carding decision made by the NSO, the vast majority of cases adjudicated by the SDRCC conclude that deference should be granted to the NSO who has the technical knowledge to adopt technically sound selection criteria[2]. An arbitrator will usually defer to the NSO's expertise to

[2] *Rolland* v. *Swimming Canada - Natation Canada*, ADR 02-0011; *Blais* v. *WTF Taekwondo Association of Canada*, ADR 03-0016; *Marchant and DuChene* v. *Athletics Canada*, SDRCC 12-0178; *Mehmedovic and Tritton* v. *Judo Canada*, SDRCC 12-0191/92; *Beaulieu* v. *Speed Skating Canada*, SDRCC 13-0199.

establish its technical criteria, intervening only if the criteria has drafting, interpretation or application issues, or if the decision is not reasonable.

16. The *legal foundation* of the NSO's decision may also be reviewed by the Tribunal, if the decision was biased, adopted by the wrong decision-maker under the rules, or any other reason that would be raised which would be contrary to general principles of administrative law such as the respect of the *audi alteram partem* rule.

17. The decision made by the NSO's *internal appeal panel* may also be subject to the Tribunal's review, both on elements of facts and law, for reasons that follow.

18. In all of the above-referenced three (3) circumstances for review, it is my understanding that Section 6.17 of the Code provides arbitrators with a scope of review that is unrestricted to review the facts and the law, thereby conducting a review *de novo*.

19. In cases where deference should be accorded to the NSO, on technical grounds for instance, and where reasonable, the Panel in its reasons may then conclude that it decided to limit its scope to that of a judicial review. But in order to come to this conclusion, it follows logic that the Tribunal should be provided with a complete presentation on the facts and the law which led to the contested decision, also known as a *de novo* review.

20. Indeed, it would be illogical for the Tribunal to rely strictly on the NSO's internal appeal tribunal's decision, and restrict the scope of review to that of a judicial review, without the benefit of a full knowledge of the facts and law.

21. The reliance on the NSO's internal decision would imply that the decision adhered to a higher standard of administrative law, as defined in *Dunsmuir*[3]. In this 2008 Supreme Court of Canada decision, the highest court held that the principle of deference applied to the appeals of decisions of administrative, specialized tribunals.

22. However, *Dunsmuir* does not apply to SDRCC appeals of NSO decisions *stricto sensu*, for the simple reason that those decisions are not made by public administrative

[3] *Dunsmuir* v. *New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9

tribunals.

23. NSOs are private not-for-profit companies, which are free to adopt internal rules as their members so choose, that they may modify from time to time through simple resolutions. NSOs have no particular legal status under administrative law which would enable them to attribute a quasi-judicial character to their internal review panels' decisions.

24. Public administrative tribunals, which are described in *Dunsmuir*, are creations of legislative authority and answer to a higher degree of administrative law standards which, in turn, allow for appellate tribunals to apply deference when appropriate, towards their decision.

25. The rules of deference towards NSO internal appeal panels, as defined in *Dunsmuir*, do not apply to the SDRCC scopes of review. Those decisions have no quasi-judicial character that would justify for the Tribunal to limit its scope of review to that of a judicial review.

26. This is not to say that the principle of deference towards the NSO, in technical matters, ceases to apply. There must continue to be a positive technical bias towards NSOs, presumed to be experts in the governance and development of their sport. However, the limit of the NSO's expertise stops at the threshold of legal review, as it is better fully exposed before the SDRCC, as it maintains a roster of legal experts for this very purpose.

27. Pursuant to Section 6.17 of the Code, the Arbitrator has jurisdiction to review the facts, apply the law and consider the matter *de novo*.

28. Consequently, this dispute may proceed as a d*e novo* hearing.

25. On May 19, 2017, the Claimant filed its written submissions on the merits with the SDRCC.

26. On May 26, 2017, the Respondent filed its written submissions on the merits with the SDRCC.

27. On May 31, 2017, the hearing was held via conference call.

28. On June 7, 2017, I rendered my short decision in which I ordered that the decision not to name the Respondent to the National Team Pool be sent back to the CBSA to review the composition of its National Team Pool, with instructions not to consider the eye patch issue in its review.

V. POSITIONS OF THE PARTIES

29. This section summarizes the oral and written submissions of the Parties. Although this is not a detailed record, I carefully examined all submissions presented by the Parties.

A) The Claimant

30. In its written submissions, the Claimant indicated that they agree that the Respondent is eligible for the 2016-2017 national team pool and that he ranks competitively considering his individual and team skills.

31. Following the *Goalball National Teams* and *Athlete Assistance Program (AAP) Selection Process (the "Selection Process")*, more precisely section 14.2, the Claimant explained that this document allows the National Team Coaches to use discretion when they build their teams.

32. They submit that the Respondent, even though he is ranked higher on the skills depth chart, is not considered to be one of the best centers or wingers, because of his ongoing eye patching issues.

33. The Claimant considers that the Respondent's eye patching and eyeshade issues could jeopardize the success of the national team at future international competitions. They fear that his ejection from an important game, such as the one that occurred at the Paralympic Games, could affect the success of the team in the future. It could also have an impact on funding and on the ability of the team to succeed internationally.

34. Furthermore, they submit that recommending the Respondent for carding would be unreasonable considering that his eye patching issues could result in other penalties during an international competition which would put the team in a precarious position.

35. According to the Claimant, the Selection Process provides them with a reasonable discretionary power which allows them to refuse recommending athletes for carding when they are not considered to be part of the best combination of centers and wingers by both the National Team Coaches and the selection committee.

36. The Claimant mentions that they have continually worked with the Respondent to help him resolve his eye patching issues.

37. According to them, the Respondent has not followed the rules of Goalball. They do recognize that he may have facial tics which could explain the eyepatch issues. However, they explained that the Respondent never requested a medical exemption to resolve the problem, so they consider that it is incumbent on the Respondent to manage this issue voluntarily.

38. During the hearing, Nathalie Séguin, the head coach of Canada's men's goalball national team, explained that when the Respondent is part of the team at international competitions, there is always a risk that he will be observed during games. It brings negative attention to the entire team.

39. For all these reasons, the Claimant requests that their initial decision not to recommend the Respondent for carding be reinstated.

B) The Respondent

40. The Respondent submits that the Claimant's selection policy for carding has arbitrary components, which lead to procedural unfairness.

41. According to him, the Claimant does not differentiate the athlete assistance program policy of its selection of event specific teams' policy. They are supposed to be distinct.

42. The Respondent considers that he is eligible to play internationally and to be named

to the international teams.

43. Furthermore, he indicates that there are no articles in the Selection Process that clearly demonstrate that the Claimant can decide to include the Respondent or not on the recommendation list for carding based on one single penalty received during one tournament.

44. The Respondent states that the Claimant's decision not to recommend him for carding is unreasonable if we take into consideration his ranking in the depth charts, his ability to play at the international level, and other factors.

45. He believes that the selection criteria for carding is objective and that it is based on the National Team pool and the skills depth chart. Furthermore, he explains that he has been ranked 1st in the depth chart and that he is included in the National Team pool.

46. The Respondent also claims that it is unreasonable for the Claimant to recognize the improvements he made during the past year, only then to refuse to recommend him for carding because they believe that he will not be able to minimize his facial expressions.

47. He mentions that his involuntary facial expressions have no effect on the team's success internationally, especially since he now wears "beaked" eyeshades. As a result, his facial expressions do not present an issue because the "beaked" eyeshades cover his face.

48. The Respondent submits that carding is truly important for his training and competition expenses. Also, he states that it has been emotionally difficult for him this year because of this turn of events.

49. During the hearing, he confirmed that during his entire sports career in Goalball, he has only received one single penalty, at the Paralympic Games in September 2016. There were some warnings, but only one penalty which affected the team. According to him, he believes that he would have been recommended for carding if the penalty had never been given.

50. For these reasons, the Respondent requests that the Appeal Tribunal's

recommendation for eleven (11) months of AAP funding be upheld.

C) The Affected Parties

51. Two affected parties, Mr. Ahmad Zeividavi and Mr. Brendan Gaulin, decided to participate in the proceedings and presented oral arguments during the hearing. The other affected parties submitted no written or oral arguments.

i) Ahmad Zeividavi

52. During the hearing, Mr. Zeividavi mentioned playing the same position ("Center") as the Respondent.

53. He submits that even if the Respondent did receive carding, it would still negatively affect the team's play internationally.

54. According to him, he would receive less money if the Respondent was to be recommended for carding because the Respondent has been ranked first in the depth chart. This would result in him having less money to pay for his personal trainer for example.

ii) Brendan Gaulin

55. During the hearing, Mr. Gaulin submits that it makes no sense to invest thousands of dollars on an athlete who is a liability to the team, referring to the Respondent. He mentions that having the Respondent on the team could cost the national team a game or even a tournament due to his eye patching issues.

56. He also states that it is in the team's best interest that the Respondent is not named to the team due to this numerous eye patching issues which could affect the team during competitions.

57. According to him, if the Respondent cannot play, he should not receive carding. Discretion needs to be given to the Claimant so they can take the best decision for the team and the organization.

VI. THE APPLICABLE LAW

A) The SDRCC Code

58. Section 6.7 of the Code establishes the onus of proof in issues related to team selection and carding disputes:

> **6.7 Onus of Proof in Team Selection and Carding Disputes**
>
> *If an athlete is involved in a proceeding as a Claimant in a team selection or carding dispute, the onus will be placed on the Respondent to demonstrate that the criteria were appropriately established and that the selection or carding decision was made in accordance with such criteria. Once that has been established, the onus of proof shall shift to the Claimant to demonstrate that the Claimant should have been selected or nominated to carding in accordance with the approved criteria. Each onus shall be determined on a balance of probabilities.*

B) The Selection Process

> **14. Recommendations for carding**
>
> *14.1 Athletes are recommended for carding based on the National Team Pool depth charts per position for men and women. The depth charts reflect excellence as a goalball athlete within the player positions on the court (centre or wing).*
>
> *14.2 The National Team Coaches build each team around the best combination of centers and wingers from the pool of available athletes.*

C) The IBSA Goalball Rules 2014-2017

30 Personal Unsportsmanlike Conduct

30.8.1 A player may not interfere with the eye patches under his or her eyeshades in any way. Any player caught manipulating their eye patches will be given an unsportsmanlike conduct penalty and will be immediately removed from the rest of the game and cannot return. The penalized player cannot be substituted. The penalized team will continue with two (2) players and the coach of the team to throw the penalty will choose the defending player from the two (2) players on the court.

VII. PRECEDENTS

Palmer v. Athletics Canada, SDRCC 08-0080

59. In this decision, Arbitrator Pound emphasizes the importance for arbitrators to defer to the national sports organizations when reviewing team selection and carding policies:

> *I should also observe that it is neither the role nor the duty of an arbitrator to pass judgment on the decisions of AC (presumably taken in consultation with Sport Canada) on the overall design of the carding process, nor to comment on policy matters or on some abstract notion regarding the basic "fairness" of the rules.*
>
> *[…]*
>
> *[…] [A]rbitrators are loath to interfere with decisions reached by responsible sports authorities, who are presumed to have the knowledge and experience to make decisions in relation to the sport. They will be willing to do so (and are required to do so) only when it has been shown to their satisfaction that the impugned decision has been so tainted or is so manifestly wrong that it would be unjust to let it stand.*
>
> [Emphasis added]

Richer v. The Canadian Cerebral Palsy Sports Association, SDRCC 15-0265

60. This decision rendered by Arbitrator Pound is enlightening with respect to the selection criteria and team selection choices:

> *Selection criteria need to contain some reasonable flexibility, but, at the same time, cannot be entirely arbitrary. Certain sports lend themselves to somewhat easier team selection choices, where objective criteria such as times, point scores, weights and distances can be used. Others can be more or less self-selections, such as eligibility based on the results of qualification tournaments. The more difficult choices occur when there may be some element of judgment required regarding performance standards or a need to produce a team that will function most effectively in competition.*
>
> [Emphasis added]

VIII. DISCUSSION

61. Under article 6.7 of the Code, the NSO (the Claimant in instance) had the onus to demonstrate that its selection criteria were reasonable and properly established.

62. Reversing a National Sport Organization's decision to select, or not, an athlete to its national team is a delicate matter where deference should be accorded first to the National Sports Organization, as discussed in the *Palmer* decision.

63. However, in this case, I was provided only with evidence of one occasion when the Respondent was ejected during a game over eyepatches and eyeshades issues. Warnings may have been issued previously by referees on the field of play, but they have a limited effect on the conduct of the game.

64. I also find that CBSA's fear of possible reputational damage stemming from the referees' opinion towards the Respondent is unfounded as being too hypothetical to pass the balance of probabilities test. Referees are presumed to be fair and impartial,

ruling on the field of play notwithstanding *reputational* considerations of players. While in some sports, a player's reputation *may* influence the referee, in this case, I was not provided with any evidence that this could happen in this sport.

65. Ejections can occur from time to time in sports. For example, in soccer or in hockey, it is not unusual to see players being ejected from a game. Penalties are part of the game and indeed, a player receiving multiple penalties while resisting discipline would probably be better left off the field of play by his coach.

66. However in this case, the Respondent has received only a single penalty during a competition in his entire career with the national team. While the scope of the competition may have been important (Paralympic Games), it remains a single infraction which I do not consider to be extraordinary or even abnormal.

67. While I do recognize that being ejected during one important game at the Paralympics can have a negative effect on the team during the tournament, I do not believe it justifies, for this sole reason, the exclusion of the Respondent from the national team based on fear of repetitiveness, combined with the measures that the Respondent has undertaken for this situation not to replicate itself.

68. For these reasons, I conclude that the Claimant failed to meet its onus of proof under section 6.7 of the Code. They did not follow their criteria correctly when they decided not to recommend the Respondent for carding. I characterize the decision not to recommend the Respondent to the national team for a single eye patch penalty issue to be patently unfair.

IX. CONCLUSION

69. I do not find that the Claimant appropriately applied section 14.2 of the *Goalball National Teams and Athlete Assistance Program (AAP) Selection Process*.

70. Therefore, the Claimant's appeal is dismissed.

71. I am ordering that the decision not to name the Respondent to the National Team Pool be sent back to the CBSA to review the composition of its National Team Pool.

72. In reviewing its own decision, the CBSA is ordered not to consider "the eyepatch and eyeshade issues", since I have not found that there has been enough evidence to convince me that there is a real and predictable risk that the Respondent will be suspended again in the future for this issue.

Signed in Montreal, this 15th day of June 2017

Patrice Brunet, Arbitrator