

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

N°: SDRCC 17-0319

Between:

CANADIAN BLIND SPORTS ASSOCIATION (CBSA)

Claimant

– and –

SIMON RICHARD

Respondent

– and –

**BRENDAN GAULIN
BRUNO HACHÉ
BLAIR NESBITT
AHMAD ZEIVIDAVI
DOUG RIPLEY
SIMON TREMBLAY
JOHN TEE
ARON GHEBREYOHANNES**

Affected Parties

Tribunal : Mr. Patrice Brunet (Arbitrator)

PROCEDURAL ORDER AND RULING ON SCOPE OF REVIEW

1. On February 2nd, 2017, the Claimant filed an Arbitration Request to the Sport Dispute Resolution Centre of Canada (“SDRCC”).
2. In its Request Form, the Claimant appeals the decision rendered by its internal Appeal Tribunal on January 4th, 2017.
3. In this decision, 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.
4. On February 10th, 2017, the undersigned was appointed as Arbitrator.
5. On February 17th, 2017, a preliminary conference call was held between the Arbitrator and the Parties to address preliminary matters and plan the next steps in the proceedings.
6. During this preliminary meeting, 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.
7. I confirmed to the Parties that I would provide a ruling on this issue following the Resolution Facilitation (the “RF”) session, if it was deemed unsuccessful.
8. On February 21st, 2017, the Claimant filed submissions regarding the interpretation of Section 6.17 (b).
9. On May 2nd, 2017, a second preliminary conference call was held since the Parties were unable to reach an agreement during the RF sessions.

10. On May 5th, 2017, the Respondent filed his written submissions on the preliminary issue in reply to the previously filed submissions of the Claimant.
11. After carefully reviewing the submissions filed by the Parties regarding the preliminary issues, I cannot subscribe to the position of the Respondent that my scope of review be limited to a judicial review for the reasons that follow.
12. The Code is worded in such a way to provide the Tribunal with full authority to review the facts and the law.
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 criteria¹. An arbitrator will usually defer to the NSO's

¹ *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.

expertise to 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*². 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.

² *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190, 2008 SCC 9

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 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 *de novo* hearing.

29. In instance, Section 6.7 of the Code applies with respect to the onus of proof. In this case, it lies with the Claimant (the NSO) to first establish that the selection or carding decision was made in accordance with such criteria. Once, and if, this is established, the rest of the Section applies *mutatis mutandis*.
30. The procedural calendar as previously ordered during the second preliminary meeting remains unchanged and the order of submissions shall be as follows:

May 19, 2017 at 4:00 p.m. (EDT): Submissions by Claimant;

May 26, 2017 at 4:00 p.m. (EDT): Submissions by Respondent and Affected Parties;

May 31, 2017 at 1:30 p.m. (EDT): Hearing by conference call.

Signed in Montreal, on May 10th, 2017

A handwritten signature in black ink, appearing to be 'Patrice Brunet', with a horizontal line extending to the right.

Patrice Brunet, arbitrator