

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

SDRCC 18-0353

CHARLES PAQUET

Claimant

TRIATHLON CANADA

Respondent

PAVLOS ANTONIADES

Affected Party

Richard W. Pound, Q.C., Ad. E.
Sole Arbitrator

Appearances

Marie-Eve Sullivan for the Claimant

Adam Klevinas for the Respondent

1. This is a “carding” case in the sport of triathlon.
2. I was appointed sole arbitrator at the request of the parties.

Background

3. The following is a brief description of the Athlete Assistance Program funded by Sport Canada, as explained in the Triathlon Canada “Selection Policy - For nominations for the 2018 Athlete Assistance Program carding cycle”.

A. INTRODUCTION

The purpose of this document is to outline the qualification and selection procedures (the “Selection Process”) that will be used by Triathlon Canada to select athletes to be nominated for Sport Canada’s Athlete Assistance Program (AAP).

The Athlete Assistance Program (AAP) is a federal government grant program that provides direct financial assistance to Canadian high-performance athletes and is one of three Sport Canada programs designed to assist in the development of high-performance sport. The AAP contributes toward improved Canadian performances at major international sporting events such as the Olympic/Paralympic Games and World Championships.

Triathlon Canada nominates or re-nominates Eligible Athletes for AAP support at a given level, based on AAP compliant sport-specific carding criteria. AAP then reviews the nominations and approves the athletes eligible for carding.

Eligible Athletes who are approved for funding and are financially supported through the AAP are referred to as carded athletes. AAP support is also known as carding.

4. Carding appeals generally arise when athletes, who believe that they are entitled to a “card” that results in receipt of athlete funding pursuant to the AAP established by Sport Canada, do not receive the appropriate card. Each national sport organization (“NSO”) participating in the AAP, such as Triathlon Canada, is allocated funding based on a certain number of cards per year. Issuance of the cards is primarily performance-driven, with the goal of encouraging, through the AAP funding,

eventual podium performances by Canadian athletes in world championships and multi-sport competitions, such as the Olympic Games, Commonwealth Games and Pan American Games. Extensive consultations and negotiations occur between the NSOs, Sport Canada, the Canadian Olympic Committee and the jointly-funded *Own The Podium* organization regarding the carding criteria, performance indicators, priorities and the appropriate distribution of cards across the spectrum of the sport (senior international athletes, development athletes, injured athletes, etc.) The funding year under consideration in this appeal is calendar year 2018.

5. The Claimant had received a development card under the AAP for 2017. That category contemplates the possibility of a development card being issued for a second year, subject to being nominated (in this case) by Triathlon Canada. Awarding a development card in 2017 does not automatically lead to its renewal for 2018. The Claimant believes he should have received a card for 2018. Hence this appeal.
6. The Claimant is undoubtedly a fine athlete and had a very high finish as a junior athlete in the world championships in 2016. Largely as a result of that achievement, he was awarded a development card for 2017. In 2017, he entered another age category, namely that of U23, in which somewhat different parameters existed. The talent pool is larger and the age differences may significantly affect competition outcomes.

Procedure in Carding Appeals

7. Pursuant to Section 6.7 of the Canadian Sport Dispute Resolution Code, the initial onus of proof in carding appeals rests on the NSO, in this case Triathlon Canada. Triathlon Canada is required to demonstrate, on a balance of probabilities, that the carding criteria were appropriately adopted by Triathlon Canada and that the impugned decision was taken in accordance with those criteria. If that is established, the onus then shifts to the athlete to show, also on a balance of probabilities, that he or she should have received a card in accordance with the criteria. The text of the article is as follows:

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.

The Triathlon Canada Carding Criteria

8. Triathlon Canada, through its High Performance Director, Eugene Liang, described the process by which the carding criteria were established, considered by a range of officials within Triathlon Canada, and adopted. The criteria were eventually submitted to its Board of Directors and approved late January 2017 and were published on the Triathlon Canada website in February 2017. His evidence regarding the establishment and adoption of the criteria was not challenged and was summarized in Triathlon Canada's answer to the appeal filed by the Claimant.
9. The Carding Criteria document was developed over the course of November and December 2016 by Triathlon Canada high performance and technical staff, as well as the Triathlon Canada Athlete Representative. In order to develop the Carding Criteria, Triathlon Canada reviewed historical performance data as well as data from the most recent competition season. It also aligned the Carding Criteria with the most recent high performance review that it underwent in October 2016 with *Own The Podium* as part of establishing its high performance plan.
10. Once the Carding Criteria document was developed, it was sent to Sport Canada for feedback, review and approval. Before approving the Carding Criteria, Sport Canada provided Triathlon Canada with continuous and ongoing feedback and comments until it considered the Carding Criteria to be satisfactory. After Sport Canada approved the Carding Criteria on January 24, 2017, the document was submitted to Triathlon Canada's Board of Directors for review and approval. During this process, the Board of Directors engaged in an in-depth review and discussion

regarding the Carding Criteria, including final editing, before it finally approved the Carding Criteria in late January 2017. The final document was then published on the Triathlon Canada website in February 2017.

11. Regarding the adoption of the carding criteria, therefore, I am satisfied that they were appropriately adopted by Triathlon Canada. Indeed, once the framework of this particular issue was explained to the Claimant, there was no dispute that the selection criteria had been properly adopted.
12. The next element in the two-part analysis is the matter of whether the decision affecting the Claimant was taken in accordance with those carding criteria. Here, a number of factors come into play: what is the role of an arbitrator in such matters; is deference to be accorded to the decision under appeal and, if so, to what extent; and what is the appropriate standard of review to be applied by an arbitrator in the circumstances?
13. Since, before there can be any shift of onus in the direction of the Claimant, I must determine, on the basis of Triathlon Canada's evidence, tested by cross-examination, whether on a balance of probabilities, I am satisfied that the decision taken by Triathlon Canada was taken in accordance with the carding criteria.
14. Dealing with the factors mentioned above, first is the role of an arbitrator in the circumstances. There has been a constant recognition by SDRCC arbitrators¹ that an arbitrator ought not to attempt to bring personal value judgments regarding the substance of the applicable policy in the matters brought before him or her, nor to substitute his or her personal judgment regarding what an impugned decision based

¹ *Inter alia* Graeme Mew in SDRCC 12-0178 Marchant and DuChene v. Athletics Canada; Robert Décary in SDRCC 12-0191/92 Mehmedovic and Tritton v. Judo Canada; Patrice Brunet in SDRCC 16-0299 Plavsic v. Sail Canada; Ross Dumoulin in SDRCC 15-0281 Wodak v. Athletics Canada; and Gordon Peterson in SDRCC 15-0266 Blanchet-Rampling v. Synchro Canada.

on the application of that policy might or “should” have been. An arbitrator is neither a principal, nor (necessarily) an expert, nor a legislator.

15. Next, is there a degree of deference that should be afforded to decisions taken by the appropriate sports authority? This is a way of asking whether it is reasonable to presume or conclude that the sport officials who have taken the impugned decision should be regarded as competent in the circumstances (absent bias, bad faith or a clear error in the interpretation of the applicable rules) to have taken the decision. Clearly, complete deference is inappropriate, since that would effectively deprive an athlete of a meaningful appeal against any such decision. On the other hand, as in the present case, the decision has been taken by the senior management of Triathlon Canada, who are presumed to know their sport, so their expertise, unless vitiated by factors noted above, needs to be given weight.
16. Finally, what standard of review is to be applied in the circumstances? Recent jurisprudence from the Supreme Court of Canada has distilled the standard of review inquiry to one of two factors: correctness or reasonableness. When determining whether a decision has been “correct,” a reviewing tribunal makes its own determination of the facts (as disclosed by the record) and/or the law without the necessity of considering what the initial decision-maker may have thought and without affording any deference to the initial decision. The matter of reasonableness is more nuanced. Here the reviewing tribunal does not reach an independent conclusion based on its own findings, but instead considers whether the impugned decision falls within a spectrum of possible reasonable outcomes that are consistent with the facts and the rationale adopted by the decision-maker.
17. The classic principles of judicial review are somewhat altered in cases of this nature before the Sport Dispute Resolution Centre of Canada. This is due to the fact that, unlike the normal process of judicial review, in which the reviewing court considers only the materials that were before the original decision-maker at the time the decision was taken, there may be additional evidence before the SDRCC arbitrator that was not then present.

18. In the first part of the two-stage consideration, it is apparent that the only evidence before me is that advanced by Triathlon Canada, either in direct examination (including documents) or amplified as a result of cross-examination. It is only if I am satisfied that, on a balance of probabilities, this evidence establishes that the carding criteria, having been appropriately adopted by Triathlon Canada, have also been applied in accordance with the carding criteria themselves, that the onus will shift to the Claimant to lead evidence showing that they were not so applied and that he should be entitled to the card he seeks.
19. As indicated above, I find that the carding criteria were properly adopted by Triathlon Canada as the national federation in Canada. The carding criteria are what they purport to be and can be taken to be definitive for purposes of this appeal. There was no suggestion that the carding criteria were targeted to benefit or prejudice any athlete or group of athletes. Nor, I should say, was there any suggestion of bias on the part of Triathlon Canada.
20. Triathlon Canada described the process it used in determining whether the Claimant should be awarded a card for 2018. The two categories involved were Development Priority #3 and Priority #6, described as follows:

Development Priority #3 - Junior World Championships

Eligible athletes finishing in the Top Three (3) at the Junior ITU Triathlon World Championships.

Prioritization:

- a. If there are fewer cards than athletes meeting the Priority #3 criteria, priority will be given to the athlete(s) with the higher finish in their respective race.
- b. If athletes remain tied (e.g. two silver medallists), then the highest RSD will be ranked higher.

Athletes who meet the Development Card Criteria - Priority # 3 are eligible to be nominated by Triathlon Canada for two consecutive years, at the Developmental carding level. The second year of carding is contingent on the athlete being re-nominated by Triathlon Canada and their training and competitive program approved by Triathlon Canada and Sport Canada being maintained.

[...]

Priority #6 - Selected Athletes

Prioritization:

Eligible athletes under the age of 26 (as per 5.1 & 5.2) will be ranked against each other in three categories to determine their priority for Development Carding. The sum of their rankings in these three areas will determine their priority for Development Carding, with the athlete with the lowest overall rank placing 1st. A committee, composed of High Performance Director, the Triathlon Canada Athlete Representative, and one or more Triathlon Canada Coaches will evaluate the athletes, based on this group's expert assessment and opinion, on the following criteria:

1. Placing at their respective ITU World Triathlon Championships relative to other eligible athletes (e.g. two athletes finishing 11th will receive a ranking of #1 and the next athlete who placed 12th will be ranked #3).
2. A review and comparative ranking of the athlete's 2 (two) best additional in-season races.
3. Ranking of demonstrated swim and run standards relative to the current *Triathlon Canada Gold Medal Profile* document.

If two or more athletes are tied in overall ranking, the tied athletes will be prioritized according to the average of their age-graded swim and run standards, expressed as a percentage, relative to the current Triathlon Canada Gold Medal profile.

21. Having been awarded a card for 2017, mainly on the basis of the second-place finish in the junior world championships in 2016, the Claimant was eligible for a similar card for the following year, if so nominated by Triathlon Canada. Nomination for the second card was not automatic. Triathlon Canada evaluated his U23 performances, both international and domestic, for 2017 and concluded that he had not demonstrated that he was on a trajectory that indicated a potential to achieve the senior international card criteria and podium performances. Demonstrated performance is regarded as the primary indicator to be used in the carding process. Triathlon Canada submitted that this assessment was also undertaken in accordance with Section 5.1 of the Carding Criteria, which indicates that the "focus and guiding principle of the Development Card is to assist the transition towards achieving international excellence of development athletes who clearly demonstrate the potential to achieve the Senior International card criteria."
22. On November 23, 2017, the members of the Triathlon Canada's High Performance staff met in person to assess which eligible athletes should be nominated to Sport

Canada for AAP support for the 2018 carding cycle. The individuals present at this meeting included Eugene Liang (High Performance Director), Alan Carlsson (High Performance Systems Coordinator) and Rachel Macatee (Sport Development Officer). The potential nominees identified by Triathlon Canada's High Performance staff were then provided to Carolyn Murray (Paratriathlon Head Coach) and Sarah Anne Brault (Triathlon Canada Athlete Representative) in December 2017 for a secondary review and approval. The purpose of having these two individuals review the Triathlon Canada's High Performance staff's nominations was two-fold: first, to ensure that the Athlete Representative could verify the nominations against the Carding Criteria to ensure appropriate application and, second, to subject the nominations to an unbiased technical review by Ms. Murray.

23. Based on its assessment of the Claimant's 2017 performances, Triathlon Canada considered that he did not meet any of the primary Key Performance Indicator-based priorities and it was therefore considered that he was not demonstrating a clear and continued trajectory toward Senior International card criteria. For this reason, the Triathlon Canada did not nominate the Claimant for the second year of his previously-earned Priority #3 development card for the 2018 carding cycle.
24. Although Triathlon Canada did not nominate the Claimant for the second year of a two-year development card pursuant to Priority #3 of the Carding Criteria, it nevertheless nominated him to Sport Canada for a development card pursuant to Priority #6 of the Criteria. However, based on the ranking procedure outlined in Priority #6 of the Carding Criteria that is based on objective parameters, the Claimant was the fourth ranked athlete nominated under this level of priority and the remaining available funding for AAP support was exhausted after it was granted to athletes ranked above him. Consequently, the Claimant was not granted AAP support for the 2018 carding cycle pursuant to either Priority #3 or Priority #6 of the Carding Criteria.
25. I conclude, on a balance of probabilities, that the process and the outcomes of that process were "reasonable" in the circumstances.

26. Having so concluded, the onus then shifts to the Claimant. I have some sympathy for the Claimant, who has gone from the heady success of a second-place finish in the 2016 junior world championships to a position of not being considered to be on a demonstrable trajectory toward a senior international carding status. This is perhaps understandable, since he is now part of a much larger talent pool in the U23 category and is at the bottom edge of the age category and it may take some time to adjust to the exigencies of the new challenges. He is clearly a talented athlete and has, among other supporters, a coach who believes strongly in his talent and ability to achieve.
27. The evidence the Claimant and his supporters tendered, orally and through their witness statements, does not, however, result in demonstrating that Triathlon Canada's carding decision was unreasonable. Put at its highest, even if the Claimant can be held to have put forward a reasonable alternative to the decision taken by Triathlon Canada, it merely means that, on the spectrum of reasonableness, both possibilities could be considered reasonable in the circumstances. This does not have the effect of displacing the Triathlon Canada decision as having been unreasonable. The deferential standard of review therefore operates in favour of Triathlon Canada. The search here is not one to determine which of two reasonable possibilities is "more" reasonable. It is only if Triathlon Canada's decision was unreasonable that the Claimant can succeed.
28. In the circumstances, therefore, I am bound to dismiss the Claimant's appeal.
29. The Affected Party took no part in the proceedings, although his mother (since he is a minor) did sit in on the hearing that was held by conference call.

Signed at MONTREAL, this 29th day of March 2018



Richard W. Pound, Q.C., Ad. E.
Sole Arbitrator