

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

NO: SDRCC 20-0457

BETWEEN:

JADA BUI

(CLAIMANT)

AND

TENNIS CANADA

(RESPONDENT)

DECISION

Appearances:

Macdonald Allen

Counsel for the Claimant

David Outerbridge, Winston Gee

Counsel for the Respondent

Hannah Atkinson

Law Student

Janet Petras

1. On June 23, 2020, I was selected by the parties as a Mediator/Arbitrator and appointed under Article 6 of the *Canadian Sport Dispute Resolution Code* (the “Code”) to hear Jada Bui’s appeal of Tennis Canada’s (“TC”) decision not to nominate her for funding under the Athlete Assistance Program (“AAP”) for the 2020-2021 year. This financial assistance is commonly referred to as “carding” and will be referred to as such in this decision.

2. Although both parties identified an Affected Party who participated in the early stages of this appeal, TC subsequently confirmed that the decision in this proceeding would have no impact on the Affected Party's carding status. Consequently, on June 30, 2020, I issued an order removing the Affected Party from these proceedings.
3. Following an unsuccessful attempt to resolve the dispute by mediation on July 2, 2020, the parties filed their affidavit evidence on July 10, 17 and 21, followed by written submissions on July 22, 2020. Oral submissions were made on July 24, 2020.
4. On July 31, 2020, I issued my decision to deny Ms. Bui's appeal, with reasons to follow. These are my reasons.

BACKGROUND

5. TC, a not-for-profit organization, is the national governing body for the sport of tennis in Canada.
6. Ms. Bui is an accomplished 18-year-old Canadian junior tennis player. She participated in the Canadian Junior Nationals tournaments from 2012 until 2018, earning 10 singles and doubles National titles. She has also competed for Canada at the Junior World Tennis tournament, the 2019 Pan American Games and the 2020 Australian Junior Grand Slam. Ms. Bui was a carded athlete for the 2019-2020 carding cycle.
7. Ms. Bui has delegated all responsibility for communications and registration with TC to her father, Thanh Bui, who has helped manage her competitive career since she was 10 years of age. All references to Ms. Bui's position can be attributed to Mr. Bui.
8. On March 3, 2020, Ms. Bui submitted a Development Card application for the 2020-2021 carding cycle.
9. On April 22, 2020, Debbie Kirkwood, TC's High Performance Director, informed Ms. Bui that she had not been approved for a card because she had neither participated in the 2019 Junior Nationals nor sought an exemption from participation. Ms. Bui appealed that decision on April 27, 2020.
10. On May 11, 2020, TC's President and CEO, Michael Downey, denied Ms. Bui's appeal of that decision.

Code Provisions

11. TC has the initial burden of establishing that the carding criteria were appropriately established and that the carding decision was made in accordance with the criteria. If that burden is satisfied, the onus then shifts to Ms. Bui to demonstrate, on a balance of probabilities, that she should have been nominated in accordance with the criteria. (*Code* Section 6.7)

The Carding Process

12. The AAP is a federal government grant program that provides direct financial assistance to Canadian high-performance athletes in recognition of the commitment athletes make in preparing for, and participating in, international sport. Program funding is subject to the discretion of the Minister of Sport.
13. The AAP Policies and Procedures impose certain obligations on athletes as well as each NSO.
14. In order to be eligible for AAP support, NSO's must, among other things, develop and publish AAP-compliant, sport-specific carding criteria for the purpose of AAP nominations. (Section 2.2)
15. Athletes seeking cards must meet those criteria to be eligible for nomination by their NSO. (Section 2.3)
16. The AAP Policies and Procedures require each NSO to develop and submit carding criteria to Sport Canada for an AAP compliance review. Once reviewed, the criteria used to determine which athletes are eligible for nomination must be both published and communicated to the national team athletes and NSO members in a timely manner. (Section 3.1) Only athletes who meet all requirements of the AAP and the carding criteria are eligible to be nominated.
17. Sport Canada reviews and approves the NSO nominations based on the published carding criteria and AAP policies.
18. The uncontroverted evidence is that TC's carding criteria were developed in consultation with Sport Canada, and that they have remained virtually the same for at least the past eight years with the exception of certain dates, typographical amendments and performance standards.
19. It is also undisputed that Sport Canada approved TC's carding criteria for the 2019-2020 and 2020-2021 carding cycle without identifying any instances of non-compliance with the AAP Policies and Procedures.
20. I find that TC is entitled to rely on Sport Canada's approval in assuming that its carding criteria were AAP-compliant.

The Carding Criteria

21. The relevant portions of TC's AAP Carding Criteria for nominations for both the 2019-2020 and 2020-2021 Carding Cycle are as follows:

Sport Canada Carding Levels

Tennis Canada will nominate players annually (based on the enclosed criteria) for direct funding by Sport Canada. Support comes in the form of a monthly

payment from Sport Canada that goes directly to the players. ... Players are nominated for a twelve-month period under this program. [my emphasis]

Application Deadline

Applications will be sent by Tennis Canada to all likely candidates in late February. To be considered for carding the athlete must apply to Tennis Canada. The Application must be received by the High Performance Director no later than the third week of March.

Sport Canada Carding Criteria

Minimum requirements for athletes to qualify for the AAP are:

- The athlete's NSO must meet the minimum requirements listed in section 2.2 of AAP Policies and Procedures

[...]

In addition to the criteria above, to be considered for carding, players must:

- Be a [sic] "age eligible" junior [...] who meets our D carding criteria
- Junior players must participate in one indoor and one outdoor Junior Nationals (any age category) to be eligible for the Sport Canada carding program (unless they meet the exemption clause – see Appendix #3 for specific details)
- Carded athletes must maintain system eligibility throughout the carding cycle to retain their carding status [my emphasis]

[...]

General Guidelines:

- Players will be nominated by Tennis Canada for carding assistance in April of each year. A player application will be evaluated in relation to the established carding criteria for their respective age/gender. [sic]
- The carding year will be based on a 12-month cycle, starting in May and ending in April of each year. [my emphasis]

[...]

Developmental D Cards

Developmental D cards are intended for age eligible junior players who have the potential to achieve Senior (SR, C1) card status.

D Carding Criteria

- Age eligible juniors (are players under the age of 18 as specified by ITF rules defining U18 players) during the evaluation years in question.

- Juniors are considered for Development (D) card status based on the points accrued based on the D Carding Tables (see Appendix #2 for specific details) for their respective age and gender.
- [...]
- The D Carding Tables will be used in determining the order of priority for Developmental (D) Cards. Priority will be given to players who earn the most number of points over the two year eligibility period.

[...]

22. Appendix #3 is the National Participation and Exemption Policies. The Junior Nationals Exemption Policy provides that, for players who are not seeking a medical exemption, “a written request to be exempted from competing in the Junior Nationals must be submitted and approved in writing.”

TC’s decision

23. In his appeal of Ms. Kirkwood’s decision to Mr. Downey, Mr. Bui said that Ms. Bui had not played in the [Junior] Nationals

[...] due to her high level of competition and did not warranted [sic]her to play at Nationals again in 2019 [...] She is one of the top juniors in the world, therefore playing at the Canadian Nationals does not make any sense for her development as a top player. Jada should be exempt from playing in the Nationals in 2019. Therefore she should qualify for the Canadian Card funding.

24. Mr. Bui also explained that Ms. Bui was in Peru competing at the 2019 Pan Am Games in August just before the outdoor Junior National. He argued that she should be exempt from playing Nationals due to her “high level of accomplishments” and because competing at Nationals so close to competing at the Pan Am Games would have been impossible. He submitted that “making Jada play Nationals at her level is grossly unfair and unreasonable.”

25. Mr. Downey’s reasons for denying the appeal were as follows:

In assessing your appeal submitted earlier this week (April 27, 2020) I have carefully reviewed and considered the following information:

- *The published Athlete Assistance (AAP) Carding Criteria*
- *Tennis Canada’s published Jr. National Exemption Policy*
- *The Grounds for your Appeal along with the Remedy sought*

During my discovery process I also learned that Jada was a carded athlete for the 2019-2020 cycle so I must assume, she was familiar with the published AAP Carding Criteria.

As it relates to the Athletes Assistance Program, under ‘minimum requirements’ for athletes to qualify, it states

- *Junior players must participate in one indoor and one outdoor Junior Nationals (any age category) to be eligible for the Sport Canada carding program (unless they meet the exemption clause)*

As it relates to Tennis Canada’s Jr. National Exemption Policy, key requirements include:

- *A written request from the athlete, to be exempted from competing in the Jr. Nationals must be submitted;*
- *The exemption request will be considered by the V.P. High Performance (for U16 & U18 players) in consultation with High Performance staff ahead of the start of the Nationals (Indoor and Outdoor);*
- *And approval of the exemption, if granted will be given to the athlete in writing.*

Thanh, the problem is that Jada did not submit for an exemption and therefore, did not receive approval in writing. [sic] This did not occur for the 2019 indoor nationals (February/March) and for the 2019 outdoor nationals (July/August). Therefore, she decided to skip the aforementioned nationals without an exemption requested or approved.

It was during these two timeframes in 2019 when our High Performance staff can exercise its discretion when making exemption decisions on behalf of Jada or any other junior player, if requested.

However, High Performance staff do not have the authority to exercise discretion when assessing the applications submitted in April (2020) for carding based on 2019 performance. They must follow the rules as clearly stated in published policy documents.

Thanh, based on the above assessment you and Jada have not established reasonable ‘grounds’ as per points D and G of your appeal. Accordingly, I have no choice but decline the remedy sought.

ARGUMENT AND ANALYSIS

26. TC argues that its decision not to nominate Ms. Bui for carding was reasonable because she was not eligible for carding at the time the decision was made. It seeks to have TC’s decision upheld.
27. Ms. Bui’s arguments evolved throughout the appeal process. In her request to SDRCC, Ms. Bui argued that her participation in the Pan American Games did not permit her to also participate in the Junior Nationals; that the criteria requiring an athlete to participate in Junior Nationals when the athlete was competing in ‘more

significant' international events such as the Pan-American Games was inappropriate; and that she did not receive notice of the requirement to request an exemption from the Nationals prior to either the indoor or outdoor Junior Nationals.

28. In subsequent written appeal submissions, Ms. Bui argued that TC wrongly interpreted the carding criteria, and that it failed to adhere to its obligations under the AAP Policies and Procedures and to the Player Agreement it had with her. Ms. Bui also argued that other athletes had been carded without having met the criteria which, she argued demonstrated that TC was biased against her.

The Code

29. Section 6.17 of the *Code* provides that the Panel shall have full power to review the facts and the law. In particular, the Panel may substitute its decision for:

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.

30. The Tribunal has held that carding nomination appeals are akin to judicial review, as opposed to appeal or *de novo* hearings, and that deference is owed to the expertise and experience of sporting authorities. (*Mehmedovic et al v. Judo Canada* SDRCC 12-0191/92)

31. In *Palmer v. Athletics Canada* (SDRCC 08-0080) Arbitrator Pound determined that the standard of review of decisions of national sports organizations is that of reasonableness, not correctness. In doing so, he concluded that arbitrators will be willing to interfere with a sport organization's decision in relation to that sport

[...] 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.

32. The parties agreed that the standard of review is reasonableness, and that the standard outlined in Tribunal decisions is unchanged following the Supreme Court of Canada decision in *Canada (Minister of Citizenship and Immigration) v Vavilov*. (2019 SCC 65)

33. In *Vavilov*, the Court held that a reasonableness review is a "robust form of review" in which the reasons of the decision maker must demonstrate that he or she has considered the facts and governing scheme relevant to the decision as well as any past practices.

34. An appellant is required to satisfy the Tribunal that there are "serious shortcomings" in the decision. Provided that a National Sport Organization's (NSO) decision is

intelligible, transparent, and accompanied by reasons, that decision will not easily be overturned.

35. I am not persuaded that Ms. Bui has established serious shortcomings in TC's decision not to recommend her for a card on the basis that she had not complied with the carding criteria.

ISSUES ON APPEAL

36. Because athletes and their representatives are rarely legally trained, their reasons for appeal must be read generously, with any uncertainty about the grounds for appeal to be interpreted in favor of the athlete. Such is not the case when the athlete is represented by counsel, as she was in this appeal.
37. Ms. Bui's counsel agreed that this appeal was in the nature of a judicial review. Consequently, this appeal is review of the decision made by TC to ensure that it is fair, reasonable and lawful. Judicial reviews are not opportunities to re-argue a case or, absent unusual circumstances, introduce new evidence.
38. Given that Ms. Bui raised two additional arguments in the request that had not been raised before Mr. Downey, I find it appropriate to address those points since TC had adequate notice of those arguments and was able to respond.
39. However, I decline to address the additional arguments raised only in subsequent written submissions; that is, that TC failed to comply with the AAP, specifically, by failing to ensure that Ms. Bui complied with her NSO-competition plan and by failing to adhere to its responsibilities under the Player Agreement. While I agree that Section 2.2 of the AAP has been expressly included in the carding criteria, not only is there no decision in respect of these issues to review, there is simply no evidentiary basis on which I can make any findings in respect of those arguments.
40. I conclude that the sole issue on review is the reasonableness of TC's decision not to nominate Ms. Bui for a card.

Was TC's decision reasonable?

41. In arriving at his decision, Mr. Downey considered the facts, which were that Ms. Bui had neither competed in either the outdoor or indoor Junior Nationals in 2019 nor had she sought an exemption. Neither of these facts are in dispute.
42. Mr. Downey also considered the fact that Ms. Bui was aware of the carding criteria requiring that she compete in Junior Nationals or seek an exemption from doing so since she had been a carded athlete during the 2019-2020 carding cycle.
43. Mr. Downey then considered Mr. Bui's request for an exemption, and concluded that such an exemption had to be made before the competitions. He determined that TC

had no ability to exercise its discretion to grant an exemption in April 2020 for carding based on 2019 performances.

44. Mr. Downey's reasons demonstrate that he considered the facts and governing scheme relevant to the carding decision as well as past practices. I find, on the basis of those reasons, that the decision was reasonable.
45. I also find no error in Mr. Downey's conclusion that he had no ability to exercise his discretion to grant Ms. Bui an exemption several months after the events were held, and after carding nominations had been made for the 2020-2021 carding cycle. There is nothing in the criteria permitting TC to grant retroactive exemptions and for TC to have done so would have been arbitrary and unfair.
46. Furthermore, even if Mr. Downey had had the jurisdiction to grant a retroactive exemption, Ms. Bui was not entitled to one. Ms. Kirkwood's evidence was that outside of medical issues, a conflicting tournament and other unforeseen circumstances, exemptions are granted only for athletes who meet performance standards that are published in the carding criteria, which Ms. Bui did not meet.

Did TC wrongly interpret the criteria?

47. Ms. Bui argued that TC's decision was unreasonable because, although the criteria included a requirement to participate in the Junior Nationals, they did not specify "which year of the two-year eligibility period" such participation must occur. Ms. Bui took the position that her participation in the 2018 Junior Nationals was sufficient to meet the requirement to compete in Junior Nationals for the 2020-2021 carding cycle.
48. I am unable to agree with this argument.
49. NSO carding criteria must be given their grammatical and ordinary meaning and any interpretation must ultimately conform to the AAP Policies and Procedures.
50. The title of the carding document indicates that it is the criteria for the 2020-2021 carding cycle. The words I have highlighted in the criteria above (paragraph 25) specify that the carding cycle is a one-year period. Players are nominated annually, for a twelve-month period. While it is true that, for Developmental D cards, the criteria indicate that "priority will be given to players who earn the most number of points over the two year eligibility period," that two year period refers to ranking athletes for Development Cards, not the annual carding cycle.
51. I find no ambiguity in the criteria. Carding is an annual process, and the criteria clearly indicate that athletes must qualify for carding each year. By extension and by the wording of the document, athletes must also meet the criteria each year. There is nothing in the criteria establishing a "two-year eligibility period" and to accept such an interpretation would be illogical and incompatible with the plain language of the document.

Did TC communicate the criteria for carding for the 2020-2021 carding cycle to Ms. Bui in a timely fashion?

52. The AAP Policies and Procedures require NSOs to “develop and publish” the carding criteria in a timely manner (Section 2.2). They also require that the NSO “communicate to national team athletes and NSO members in a timely manner, the [...] criteria that will be used to determine which athletes are eligible to be nominated for AAP support.” (Section 3.1)
53. TC’s carding cycle runs from May to April. TC published the 2019-2020 carding criteria on its website on or about June 28, 2018, and the 2020-2021 carding criteria on its website on or about June 5, 2019, approximately 10 months prior to the beginning of the next cycle. I am satisfied that the carding criteria, which have been largely unchanged for the past eight years, were published in a timely manner.
54. TC also emails carding application packages to all candidates who are likely to be eligible for carding in February of each year. The content of the email is virtually identical from year to year, and includes a hyperlink to that year’s carding criteria as well as the National Participation and Exemption Policies, with instructions to “carefully review” them.
55. TC sent carding application emails to Mr. Bui in February 2018, February 2019 and February 2020. I find that in addition to being published on TC’s website, the carding criteria were specifically communicated to Ms. Bui through her father. Furthermore, Mr. Bui sought an exemption from participating in the 2016 Nationals on Ms. Bui’s behalf, a request that was denied.
56. There is nothing in the AAP Policies and Procedures that specify how the criteria are to be communicated to athletes. I am satisfied that the publishing of the criteria on the website, accompanied by the emailing of carding packages prior to the deadline, meet the AAP requirements.
57. Given that Ms. Bui was previously a carded athlete, she was, or ought to have been, aware of the criteria well in advance of the carding cycle. Furthermore, based on the content of Mr. Bui’s appeals to TC, I find that Mr. Bui was well aware of the carding requirements in advance of the Junior National events in 2019. To claim that TC failed to meet its obligations under the AAP to publish and communicate the criteria is simply without foundation.

Were the criteria requiring participation in Junior Nationals appropriately established?

58. Ms. Bui contended that the requirement for her to play at Junior Nationals was, in essence, inappropriate and unfair given her level of development.
59. Ms. Kirkwood’s evidence is that TC’s policy requiring athletes to compete in one outdoor and one indoor Junior Nationals has existed for eight years, and that it is aligned with TC’s strategic priorities. She explained that competition in Junior

Nationals creates an incentive for top players to participate in domestic tournaments to increase the quality of competition and to provide opportunities for participants who may not be eligible for carding to “compete against talented carding prospects and improve their skills accordingly.”

60. TC’s strategic priorities are also identified in its High Performance Handbook, within which the Junior Nationals Participation Policy is contained.
61. Ms. Bui has not demonstrated that the criteria are inconsistent with TC’s national training or competitive program.
62. The fact that TC considered participation at Junior Nationals important for developmental reasons was also communicated to Mr. Bui at the time he sought an exemption for Ms. Bui from participation in the 2016 Junior Nationals.
63. The reasons for the policy requiring that exemptions from playing in Junior Nationals be made in writing have also been carefully considered by TC. According to Ms. Kirkwood, the requirement serves three main purposes: firstly, to ensure that TC is fully aware of the circumstances so that it can make decisions on all of the facts; secondly, to ensure that all exemption decisions are transparent; and thirdly, to have a written record in the event of subsequent disputes regarding the reasons for the exemption or denial.
64. I find that TC’s policy of requiring athletes to compete in Junior Nationals or to request an exemption in writing to be fully considered and rationally connected to its strategic priorities. It is also a long-standing practice of TC.
65. This Tribunal will not second guess the policy decisions of NSO’s in the absence of a good reason for doing so. (see *O’Neill v. Canoe Kayak Canada* 19-0415) Ms. Bui has not demonstrated that the criteria are discriminatory, unfair or otherwise inappropriate.
66. TC acknowledges that athletes who are part of TC’s full time National Training Centre Program or its National Junior Training Regional Programs are sometimes granted exemptions from Junior Nationals without having made a written request. Ms. Kirkwood explained that TC will do so because those athletes are under the direct supervision of TC coaches who are responsible for all aspects of their training and competitive programs and TC has direct knowledge of whether an exemption is warranted. Additionally, those athletes have demanding training and competition schedules that often prevent them from participating in tournaments necessary to qualify them for Junior Nationals.
67. I am unable to agree that these decisions demonstrate that TC’s decision not to recommend Ms. Bui for carding was biased in favor of athletes who are part of TC’s full time training programs.
68. Ms. Bui also contends that there are other athletes who were recommended for carding without having met the criteria. Not only is there no evidence upon which I am able to make any findings on that assertion, the issue before me is not whether other athletes were fairly granted exemptions, but rather, whether TC’s decision not

to recommend her for a card was reasonable. (see also the reasoning of Arbitrator Décary in *Mehmedovic* where the athletes advanced a similar argument)

69. Ultimately, this appeal is about an athlete's disagreement with her NSO's criteria for funding. While an athlete is entitled to disagree with an NSO's criteria, provided the criteria are appropriately established, the athlete must comply with the requirements if they wish to receive public funding.
70. I wish to thank counsel for their thorough submissions in this appeal.

CONCLUSION

71. The appeal is dismissed.

COSTS

72. Under Section 6.22 of the *Code*, an Arbitrator has the power to make an award of costs.
73. I am not inclined to make an award of costs. However, if either party wishes to make such application, they should do so no later than 4:00 p.m. (EDT) August 17, 2020. The submission should address those factors outlined in Section 6.22.
74. If costs are applied for, and the party against whom costs are sought opposes the request, the responding party shall have until 4:00 p.m. (EDT) on August 24, 2020 to file a written response.

DATED: August 10, 2020, Vancouver, British Columbia

A handwritten signature in black ink, appearing to read "Carol Roberts", written in a cursive style.

Carol Roberts, Arbitrator