

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

October 28, 2020

No: SDRCC 20-0469

BADMINTON CANADA
(Claimant)

AND

BADMINTON ALBERTA
(Claimant)

AND

TIMOTHY TONG
(Respondent)

Before: J.J. McIntyre (Sole Arbitrator)

Representative for the Claimants: Michelle Kropp

Representative for the Respondent: Michael Kwiatkowski

DECISION

1. This is a dispute over the impact of a prior Decision (SDRCC 19-0395) rendered by the Arbitrator in a dispute involving Badminton Alberta and the Respondent's children, Josiah and Solomon (the "Athletes"), concerning their membership status and eligibility to compete in pending Alberta Provincial Championships and is a request for clarification of that decision. The reason for the request is that the Respondent continues to be involved in disputes with Badminton Alberta which have now been brought to Badminton Canada and has taken the position that the Claimants are prohibited from adopting, changing, or modifying their respective policies if it negatively impacts his children.
2. Badminton Alberta is the Provincial Sport Organization ("PSO") responsible for managing the sport of badminton in Alberta. Badminton Alberta is also a member of Badminton Canada, the National Sport Organization ("NSO"). Timothy Tong is a nationally certified coach.
3. All parties requested and agreed with me issuing this clarification.

4. In the preliminary meeting that followed the administrative conference call held on September 18, 2020, the parties agreed that this clarification was to be on documents only and that there was no necessity to file my previous decisions involving Badminton Alberta and the Respondent in SDRCC 19-0395 and SDRCC 19-0396 as they were matters of public record. An issue was taken by the Claimants as to the appropriateness of the filing made by the Respondent in this matter of the Confidential Preliminary Review of Complaint made by a Safety Sport Officer dated November 5, 2019 (the "Preliminary Review") acting pursuant to the NSO's Safety Sport program.
5. The parties agreed in the preliminary meeting on a timetable for the filing of submissions by the Claimants, by the Respondent, any Reply by the Claimants and any Sur-Reply by the Respondent. That timetable has now passed and the parties have filed their respective Submissions, a Reply and Sur-Reply. I have reviewed and considered their respective positions.
6. It was my decision on April 10, 2019 in SDRCC 19-0395, acting under strict time constraints pursuant to the January 1, 2015 Canadian Sport Dispute Resolution Code (the "SDRCC Code") that the Athletes had never lost their national memberships through Badminton Alberta and that the Athletes were thus able to participate in the upcoming Alberta Provincial Championships. Fulsome reasons for the decision were delivered on July 5, 2019.
7. In the fulsome reasons for SDRCC 19-0395, I referred to the evidence that was filed in the arbitration as well as the evidence of the witnesses, including that of Mr. Bell. Briefly, the Athletes had obtained and paid for national memberships through Badminton Alberta in September 2018 through to August 2019. Based on erroneous information as to membership rights and eligibility for tournaments published on the Badminton Alberta website and a perceived lack of support by Badminton Alberta for his sons' athletic careers, Mr. Tong requested of Mr. Bell in February 2019 that he downgrade the membership status of the Athletes in Alberta to provincial memberships and then took out further national memberships for the Athletes through Badminton Ontario. The unintended (from Mr. Tong's perspective) consequence of that change was to render the Athletes ineligible to compete in the upcoming Alberta Provincial Championships as they no longer had national memberships through Badminton Alberta. On discovering this consequence, Mr. Tong requested Badminton Alberta reverse the change in the Athletes' membership status. Badminton Alberta refused.
8. There was no evidence adduced either in writing or through witnesses in SDRCC 19-0395 that Mr. Bell had any power to make changes in the membership status of the Athletes, once granted. Consequently, I ruled that the 2018-2019 national memberships obtained by the Athletes through Badminton Alberta had never been lost. The effect of the ruling was that the Athletes were thus eligible to compete in the Alberta Provincial Championship.

9. There have been a multiplicity of disputes between Badminton Alberta and the Respondent. There were three requests for arbitration filed in 2019, two of which were consolidated in SDRCC 19-0395. The remaining arbitrated dispute, SDRCC 19-0396, was a team selection dispute. That case was a challenge made on behalf of Josiah Tong to the failure by Badminton Alberta to include him in the selection of the team chosen to represent Alberta in the 2019 Western Canadian Team Championships ("WCTC"). My decision in that matter was that Badminton Alberta had made no errors in ranking the athletes in their age categories and in choosing which athletes (based on its published selection policy as set out at the beginning of the membership year) would represent Badminton Alberta in the WCTC.
10. The Preliminary Review involves complaints made by the Respondent against Badminton Alberta and its Executive Director Mr. Bell alleging further acts of unfair and ill-treatment of the Tong family subsequent to the decisions made in SDRCC 19-0395 and SDRCC 19-0396. The Preliminary Review simply determined there was a basis for these new complaints to go forward to the SDRCC dispute resolution procedures without deciding whether there existed any validity to the complaints. A mediation involving the parties appears to be stalled pending my clarification
11. As is evident from the Preliminary Review, the toxic relationship between Badminton Alberta and Mr. Tong has now spilled over and threatens to engulf the NSO in further complaints. In the current joint Request for clarification of my decision in SDRCC 19-0395, Badminton Canada states that it is looking to avoid spending additional resources and time dealing with future complaints by the Respondent.
12. In their Request, the Claimants stated that the Respondent has asserted (in other proceedings involving the Claimants and Respondent) that the decision in SDRCC 19-0395 prohibits Badminton Canada and Badminton Alberta from modifying or creating policies that may negatively affect the Respondent and his children. The Claimants wish to be able to share any clarification of my decision with Mr. Tong, and any Case Manager, Mediator or Panel that might be appointed to deal with any future complaint by the Respondent. In that regard the Claimants ask me to clarify:
 - a. Does the Decision in SDRCC 19-0395 in any way limit the ability of Badminton Canada or Badminton Alberta to make operational policies or procedures?;
 - b. Does the Decision in SDRCC 19-0395 in any way limit the ability of Badminton Canada or Badminton Alberta to make operational policies or procedures for the betterment of their sport that may or may not affect the Respondent or his children?; and
 - c. Are any rights granted to the Respondent or his children by the SDRCC 19-0395 decision?

13. The Claimants filed with their request a letter to the SDRCC dated September 10, 2020 which relates that the Respondent has stated he will pursue 'Safe Sport' complaints in the event either Badminton Canada or Badminton Alberta create or modify operational policies or procedures that negatively affect the Respondent or his children,.
14. The Respondent in his formal Answer to the Request took no issue with the framing of the request before me. The Respondent filed only the one document in support of his position, the Preliminary Review from November 2019.
15. There is no dispute that Badminton Canada was not a party to any of the previous arbitrations between Badminton Alberta and the Respondent and the members of his family. Hence, it could not be bound by the decisions in those matters. Badminton Canada is free to adopt whatever policies and procedures it sees fit without regard for the decision in SDRCC 19-0395.
16. Decisions in arbitrations are based on the state of the evidence at the time the dispute is submitted for resolution to the arbitrator. The facts found in support of a decision are based on those facts that the parties have adduced to that time. As the arbitrator can only base his/her decision on the evidence that is produced by the parties in the dispute, it is possible for relevant evidence to be omitted and a decision based on an incomplete record. For example, in SDRCC 19-0395 it was possible that Mr. Bell was in fact authorized by Badminton Alberta to make changes to athlete's memberships after memberships were granted. However, the failure to adduce any evidence that he was so acting within the scope of his authority led to the findings and decision made.
17. Following the making of the decision in SDRCC 19-0395, there was nothing to prevent Badminton Alberta adopting policies and procedures that would allow for the Executive Director in the future to change athlete's memberships during the course of a year. One might still expect any such policy or procedure would allow for the athlete to contest the change if it was not a change sought by them.
18. It is expected that every sport organization whether local, a PSO or NSO would have as a goal the betterment of the sport for the benefit of its participants. As times change, policies may need to change and adapt in order to develop the sport, protect the athletes and advance their sporting careers, including such decisions as to who gets to be a coach, a provincial, national or international team member and based upon what selection criteria. As issues arise that may not have been encountered before, sport organizations may need to change how they deal with such issues and adopt policies to deal appropriately with them.
19. Every sport organization needs to follow its by-laws and procedures for making decisions or in adopting changes to its operations. Some changes in decision making or in operations might be required to be voted on by members at an Annual General Meeting, some might require only voting by a Board of Directors, some might be delegated to executive officers. Every sport organization is expected to know what decisions can be made by whom, and is expected to

know and adhere to all applicable laws, bylaws and previously adopted policies for its decision-making.

20. The Preliminary Review includes allegations by Mr. Tong that Badminton Alberta changed its policies to negatively affect the Tong family. The truth of those allegations is not before me. It may come before an SDRCC arbitrator in the near future. I am limited to deciding only the clarifications sought of me regarding my decision in SDRCC 19-0395.

21. Having considered the parties' filings, I would answer the questions posed of me as follows:

- a. Does the Decision in SDRCC 19-0395 in any way limit the ability of Badminton Canada or Badminton Alberta to make operational policies or procedures?

No.

- b. Does the Decision in SDRCC 19-0395 in any way limit the ability of Badminton Canada or Badminton Alberta to make operational policies or procedures for the betterment of their sport that may or may not affect the Respondent or his children?

No.

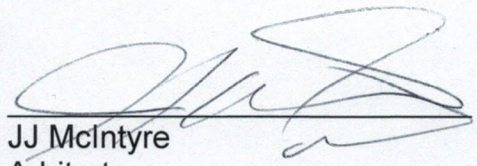
- c. Are any rights granted to the Respondent or his children by the SDRCC 19-0395 decision?

The declaration of ongoing national membership status for the Athletes obtained through Badminton Alberta for the 2018-2019 year simply gave the Athletes the benefits of such a membership for that year.

22. Whether this clarification assists Badminton Canada from expending further time or resources in dealing with ongoing or future complaints that might be advanced by Mr. Tong or other members of his family is questionable. I am fully aware that sport organizations largely function with a heavy reliance on volunteers and have limited resources, both in time and money to expend on what might prove to be nuisance complaints. While there is a temptation to consider the circumstances and findings of fact in other arbitral decisions involving Badminton Alberta and the Respondent as determinative of the issues, those findings may not be relevant to any current or future complaints by Mr. Tong or his family. Just because he may have been in the wrong in the past about some issues does not automatically mean his complaints or those of his family are or will be invalid in the future. Each complaint must be decided on its own merits. However, a history of making unfounded complaints might very well be relevant on the issue of costs, including the awarding of costs on a full indemnity basis.

23. If there is an abuse of process by a complainant, including access to the Safe Sport policy, then perhaps Badminton Canada should be looking at amending its policies and procedures (in accordance with its own bylaws and applicable laws) to allow for the ability to assess costs against a party or to require the posting of security for costs in circumstances where there is found to be no justification for a complaint. (I have not reviewed Badminton Canada's bylaws to determine whether there is any existing power to assess costs against a party in such circumstances.)
24. The general principle relating to costs in SDRCC disputes is set out in s. 6.22(a) of the SDRCC Code that "... each Party shall be responsible for its own expenses and that of its witnesses." Subsection (c) provides as follows:
- (c) The Panel shall determine whether there is to be any award of costs and the extent of any such award. When making its determination, the Panel shall take into account the outcome of the proceedings, the conduct of the Parties and their respective financial resources, intent, settlement offers and each Party's willingness in attempting to resolve the dispute prior to or during Arbitration. Success in an arbitration does not mean that the Party is entitled to be awarded costs*
25. In the circumstances of this dispute, based on the factors set out in s.6.22(c), I have concluded there is no reason to depart from the general principle. Each party shall bear its own costs in this request for clarification of a decision.
26. There is one other matter that I wish to deal with. Under the guise of their Sur-Reply the Respondent has appended a number of emails not previously produced in evidence. It is inappropriate to introduce such documents as part of a party's final submissions. This is not a case of a lay person not knowing any better, as all parties in the present matter were represented by counsel. If the Respondent considered such documents to be relevant, they needed to be filed before any submissions were made. It is highly prejudicial to a party to introduce documents after that party has already made its submissions based on the state of the record and the evidence at the time of its submissions. Especially so, where, as in this case, the Claimants have not only made their submissions but also their Reply submissions. Accordingly, the inclusion of these emails in the Respondent's Sur-Reply has had no impact on my decision.

Dated this ^{28th} day of October 2020.


JJ McIntyre
Arbitrator