

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

No: SDRCC – 23-0662

SOPHIE BUKOVEC  
(Claimant)

and

VOLLEYBALL CANADA  
(Respondent)

and

MOLLY McBAIN  
SARAH PAVAN  
(Affected Parties)

**Arbitrator**

Jeffrey J. Palamar

**Appearances:**

Amanda Fowler and Andy Smith as legal counsel and Anthony Crudo as law student for Ms. Bukovec

Justin Safayeni as legal counsel for Volleyball Canada

Ed Drakich and Kerry MacDonald as representatives for Volleyball Canada

Sarah Pavan on her own behalf

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**REASONS FOR DECISION**

**Introduction**

1. Sophie Bukovec, Molly McBain and Sarah Pavan are athletes who compete in beach volleyball.
2. This is an appeal by Ms. Bukovec of a decision by Volleyball Canada not to select her for the 2023 FIVB World Championships.
3. Ms. Bukovec initially appealed this internally with Volleyball Canada, but in light of the need to have a final decision made by August 11, 2023 she and Volleyball Canada agreed to bypass that internal appeal process.

4. Accordingly, on August 4, 2023 Ms. Bukovec filed a Request with the SDRCC under the Canadian Sport Dispute Resolution Code, January 1, 2021 (amended June 20, 2022) (the "Code"), appealing the decision.
5. On August 8, 2023 Volleyball Canada filed its Answer with the SDRCC, asserting the Request was untimely, and also opposing it on the merits.
6. On August 9, 2023 Ms. Pavan filed her Intervention with the SDRCC, opposing the Request on the merits.
7. The parties accepted the jurisdiction of the SDRCC. and my own jurisdiction. Our hearing proceeded on August 10, 2023.
8. Due to a pending deadline to register participants in the World Championships, the parties asked me to issue a decision before 10:00 am EDT on August 11, 2023.
9. On the evening of August 10, 2023 I issued a Short Decision with Reasons to Follow, dismissing Ms. Bukovec's Request. These are the reasons for my decision.
10. While in these reasons I do not refer specifically to everything presented, in making my decision I have in fact carefully considered everything.

### **The Core Facts**

11. On April 6, 2023 Volleyball Canada's Beach Operations Manager issued the following email to various athletes (including Ms. Bukovec):

Dear Athlete,

You're receiving this communication because you as an individual are eligible or close to eligible to participate in the NORCECA World Championship Qualification tournament being held in Punta Cana, Dominican Republic (May 29 - June 1).

Volleyball Canada will hold a trials to participate in the NORCECA World Championship Qualification tournament on May 4-5, 2023 at the Beach High-Performance Centre (HPC) in Downsview Park.

To be eligible to compete in the 2023 FIVB World Championships being held in Tlaxcala, Mexico (October 6-15) athletes must appear as an individual in the FIVB Athlete Entry Ranking within the first 250 places (approximately 400 points at the present time) as of 21st August 2023 as per the attached FIVB and NORCECA Qualification system documents.

Volleyball Canada will nominate the winner of our trials for the NORCECA trials in Punta Cana.

If you qualify through your performance in the NORCECA trials Volleyball Canada will register your team for the World Championships unless you qualify in the top 25 teams (including 2 teams from Mexico) per gender through the FIVB Entry Ranking. Since one team cannot earn two berths for a country, should this happen the nomination would go to the next team on the NORCECA trials.

If you aren't in the top 250 ranked players on August 21, Volleyball Canada will register another team.

The fee to register will be \$75 per athlete, and a link to register will be sent to you next week. This is a closed trials so there won't be any access to register from the VC Program Info page.

12. Leading up to the Canadian trials in May 2023, Ms. Bukovec had made it known that she wanted to compete with another athlete, HB. HB was then employed by Volleyball Canada and so not eligible to compete. At the time HB had no points and was not listed in the FIVB Athlete Entry Rankings within the first 250 places, or even close to that.
13. Instead then, in May 2023 Ms. Bukovec participated in the Canadian trials with another athlete (SM). She and SM won the Canadian trials.
14. Volleyball Canada says that on May 5, 2023 Ms. Bukovec and other athletes attended a technical meeting at the Canadian trials, at which Volleyball Canada's Beach High Performance Director:
  - a. confirmed the winner of the trials tournament would represent Canada in the 2023 NORCECA Tournament;
  - b. reiterated the explanation of the continental qualification pathway in the April 6, 2023 email (the top four teams from each gender at the NORCECA Tournament would earn spots to the 2023 World Championships provided the athletes on those teams met the top 250 requirement);
  - c. advised the athletes of how Volleyball Canada would "register another team" as per the April 6, 2023 email (if a team placed in the top four spots at the 2023 NORCECA Tournament, but one or both athletes failed to meet the top 250 requirement, making them ineligible for the 2023 World Championships) the team with one/both ineligible athletes would be replaced by the eligible team with the most total FIVB entry points (i.e. sum of points between the team members) as of August 11, 2023.
15. Volleyball Canada asserted this process would lead to the strongest eligible team taking Volleyball Canada's spot through the continental qualification pathway and said this was consistent with past practice at the highest levels of the sport.
16. Ms. Bukovec disputed this explanation was provided on May 5, 2023 as alleged.
17. On June 8, 2023 Ms. Bukovec and SM placed 3rd in the NORCECA World Championships Qualifier in Punta Cana and earned Canada a berth at the Tlaxcala 2023 World Championships.
18. On June 9, 2023 HB resigned from her employment with Volleyball Canada and began competing on a team with Ms. Bukovec, who stopped competing on a team with SM.
19. On June 9, 2023 Volleyball Canada's Beach High-Performance Director issued the following email to Ms. Bukovec and SM:

Congratulations on earning a berth to the Tlaxcala 2023 World Championships (October 6-15, 2023) at the NORCECA World Championship Qualifier in Punta Cana, DOM June 7-8, 2023.

Please note that each player being nominated for the Tlaxcala 2023 World Championships must be ranked in the top 250 on the FIVB Individual Entry Ranking on August 21, 2023 (Section 3.d. in the attached document). This is why players far below this top 250 Individual Entry Ranking line (Approximately 400 FIVB points per player) were not allowed to compete in the 2023 VC NORCECA World Championship Qualifier Trials (May 5, 2023).

Also, please remember that as I explained at the Technical Meeting before this VC NORCECA WCH Qualifier Trials that on or before August 11th VC will only nominate teams where BOTH athletes are eligible to compete in the World Championships and that if one player was not eligible from a team that earned a World Championship berth for Volleyball Canada in Punta Cana (June 7-8, 2023) that team would not be nominated and the highest ranked Canadian Team using the sum of the Individual FIVB Ranking Points (Not certain to earn a berth to the World Championships via the Top 23 FIVB teams) on Monday August 7, 2023 where both players are eligible will be nominated to represent Volleyball Canada at the Tlaxcala 2023 World Championships.

I'm reminding you of this policy because at present SM is not presently in the top 250 places of the Individual Entry Ranking. By my calculations SM will have 360 points (128 + 160 + 72) on June 12, 2023 after including the results from Punta Cana (128 points). This means that SM is about 40 FIVB points short of being eligible (SM needs to earn 112+ points (72 + 40) at one event between now and August 7th).

Good luck.  
Best regards,

20. As it later turned out, Ms. Bukovec, HB, Ms. McBain and Ms. Pavan each wound up with enough points as of the relevant time to be within the top 250. SM did not.
21. On July 24, 2023 Ms. Bukovec emailed Volleyball Canada's Beach High-Performance Director as follows:

Looking forward to another great Canadian Beach Volleyball World event here in Montréal this weekend.

I wanted to discuss the World Championship Volleyball Canada NORCECA nomination as the deadline is soon approaching.

As of this Wednesday, July 26, 2023 HB and myself will BOTH be individually eligible to compete at the 2023 World Championships in Tlaxcala, Mexico. Our top 10 result in the Challenge event in Edmonton and our entry into the Elite 16 event in Montreal this weekend guarantees HB and myself the 400 points needed to be individually eligible to compete at the World Championships.

The initial email sent out from Volleyball Canada sent out on April 6, 2023 informing eligible (& almost eligible) athletes about the Canadian trials states *"if you aren't in the top 250 ranked players (roughly 400 points), Volleyball Canada will register another team"*. With the new development of my team's points, I am hoping to confirm my team (HB/Bukovec) based on the points below.

- Volleyball Canada is a trials based organization. Trials are organized to avoid appeals, bias and nominations and to reward those who can perform on demand to secure their position in special events. This is the Volleyball Canada Model.

The Player Handbook speaks to the importance of the trial selection process as a key part of our program.

### **Section 9**

#### ***Trials Selection Process for Competitions***

- *The top performers on the sand get selected to attend special events*
- *Reward those who can perform on demand*
- *Create a high performance culture with internal competition*

- The Canadian NORCECA trials for World Championships were held, specifically on a date where there were NO conflicting international events. This ensured a fair opportunity for ALL Canadian athletes who were interested in competing at the World Championships to attend and compete for their position.

- My original partner consideration for this event was HB. It was VC's policy & recommendation to participate alongside an athlete who has close to 400 points as VC believed there was NO opportunity for HB to become eligible. There were explicit conversations with VC about my intentions to play with HB. She and I would have formed a team to compete in the Canadian trials, should VC have allowed her participation.

- I chose to play with SM who was almost eligible to compete at the World Championships. Should she have accumulated the necessary 400 points, I would have happily attended the World Championships with her as she and I BOTH qualified via the Canadian Trials & NORCECA event.

- SM and I won the Canadian trials that were open to ALL eligible Canadian athletes

- SM and I came 3rd at the Punta Cana NORCECA event - qualifying us via NORCECA

Volleyball Canada has historically used the trials system as a fair and equal way to have teams compete for their position in tournaments. I have competed in multiple trials (local & international) and have successfully earned the right to compete at this year's World Championships. I have spent time, money & resources abiding by Volleyball Canada's necessary steps and protocols, and have been successful in each of these steps, to earn a berth for myself at the World Championships. As last year's World Championship silver medalist. I hope to have these points considered.

I will be focused on the Elite 16 Montreal competition over the next few days, but will make sure to be available early next week to discuss any of the points listed above (via email), as I know the deadline to submit the team considerations is Aug 11. 2023.

Thank you

22. On July 24, 2023 Volleyball Canada's Beach High-Performance Director responded as follows:

Hello Sophie,

Please see the email below that you were sent on June 9, 2023. It indicates that Volleyball Canada will nominate the highest team via FIVB Entry Points as of August 7, 2023 to fill the NORCECA berth that you and SM earned. Volleyball Canada will not nominate a team for the 2023 World Championships that has not played in at least one FIVB (Beach Pro Tour) event in 2023.

Since you and SM paid to earn this berth in Punta Cana for Volleyball Canada and since you and SM are not eligible to compete in the 2023 World Championships, Volleyball Canada will reimburse both you and SM \$1,500 CAD each either through flight credit or direct reimbursement with receipts.

Good luck in Montreal.

Best regards,

23. On July 24, 2023 Ms. Bukovec responded as follows:

Hello [XX],

I am a bit confused by this email.

I do not remember you sharing that policy during the technical meeting. I have asked other participating athletes about this and they too have no recollection of you speaking about "the next highest ranked FIVB team" being considered as the alternative nominated team should a team become ineligible. You spoke about acquiring 400 points individually/being in the top 250 individual ranking but nothing further. The first time I have been sent written information about this policy was via your June 9 email, after both trial events had been completed.

The requirement to participate in a 2023 Beach Tour Event has also not been expressed as a policy to the athletes prior to the Canadian Trials.

Can you please inform me as to where these policies have been written and shared with the athletes, prior to the Canadian Trials?

The criteria for nomination was:

1. Participate and win the Canadian Trials- I planned to participate with HB. VC denied her participation. Competed and won with SM
2. Place top 4 at the Punta Cana NORCECA World Championship qualifier - Placed top 3
3. Have 400 points individually - Our top 10 result in Edmonton and entry into Montreal guarantees us at least 400 points each.

All of which I have done.

I am confused as to why I am being penalised for following and succeeding at all of the necessary steps set forth by Volleyball Canada. HB and I had originally wanted to compete in the Canadian trials knowing it was going to be difficult to gain 400 points. But we knew that if given the opportunity our team could obtain the necessary results. And we have. Volleyball Canada did not have the same faith. And so, I was forced to play with another athlete who was "close to 400 points."

It is unfortunate that SM did not meet the requirements, but I do not see how it is fair for Volleyball Canada to completely disregard my part in the qualification process and in earning a berth for Canada. I have competed & succeeded in all of the necessary events to qualify myself. Now that my original intended partner HB has acquired 400 points, I hope you reconsider.

Thank you

Sophie

24. On July 25, 2023 Volleyball Canada's Beach High-Performance Director responded as follows:

Hello Sophie,

I sent the email on June 9th (One day after you and SM earned Volleyball Canada a women's NORCECA berth to the Tlaxcala 2023 World Championships at the event in Punta Cana, DOM June 7-8, 2023) as a written reminder of what I stated during the Technical Meeting immediately before the VC NORCECA World Championships (WCH) Trials on May 5, 2023. Below are the main points I stated during the VC Trials Technical Meeting on May 5, 2023:

- That players must be ranked in the top 250 on the FIVB Individual Entry Ranking when Volleyball Canada submits the NORCECA berth nominations by August 11, 2023.
- As of the week of May 5, 2023, the 250<sup>th</sup> ranked player had 400 Individual FIVB Entry Points and because of this each player competing in the VC WCH Trials had to be in the "vicinity" of 400 points at the time of the VC Trials to be allowed to participate in the Trials. Any player with less than 200 individual Entry Points was not allowed to register for the VC Trials on May 5, 2023. In fact, the lowest ranked female players allowed to compete in the VC NORCECA WCH Trials on May 5<sup>th</sup> were EF and GH with 226 points each.
- The team that wins the VC Trials on May 5<sup>th</sup> will earn the right to represent Canada at the NORCECA Beach World Championship Qualifier (which was held June 7-8, 2023 in Punta Cana) and if that team earns a World Championship berth for Volleyball Canada, that team will be nominated by Volleyball Canada to compete in the 2023 World Championships PROVIDED that both players on this team are eligible to participate in the World Championships. I also stated that if either of the players were not eligible the week of August 11 (Rankings will be dated August 7, 2023) then Volleyball Canada will NOT nominate that team because they would be declared ineligible to get the NORCECA Berth by the FIVB and the next NORCECA National Federation from the NORCECA WCH Qualifier in Punta Cana (June 7-8, 2023) would get the berth (In this case CUB women would get the berth since they came in 5<sup>th</sup> place at the NORCECA WCH Qualifier). I also stated that if the team that earned the berth is not eligible then Volleyball Canada will decide the team to nominate and that Volleyball Canada will send the highest ranked team with both players eligible that would not qualify directly through the FIVB process (Top 23 teams qualify directly for the Tlaxcala World Championships).
- The final item I stated during the Technical Meeting on May 5, 2023 was that a team that earned the NORCECA World Championship berth was expected to play in at least one additional event together before the Tlaxcala 2023 World Championships. The commonsense policy that I highlighted in my email below – that new team that has



never played together in 2023 will not be nominated by Volleyball Canada to compete in the World Championships – is consistent with this point.

Good luck in Montreal.

Best regards,

25. On July 27, 2023 Ms. Bukovec emailed Volleyball Canada's President and Chief Executive Officer as follows to launch her internal appeal:

I wish to appeal Volleyball Canada's decision not to nominate me for the 2023 World Championships. Please find my formal notice of appeal document attached, my email exchange with [Volleyball Canada's Beach High-Performance Director] as well as the original email sent by [Volleyball Canada's Beach Operations Manager].

May I ask how to pay the filing fee?

I look forward to hearing from you regarding next steps.

Thank you

### **Argument for Ms. Bukovec**

#### **The Merits**

26. Ms. Bukovec is a top-ranked Volleyball Canada Women's Beach Senior National Team athlete with much success in her athletic career. Fundamentally volleyball is a team sport but athletes get awarded points individually and the reality is that teams change.
27. Traditionally, Volleyball Canada has nominated the winner of the Canadian Trials to represent the National Team at the World Championship Qualifiers and World Championships in accordance with FIVB's policies.
28. Ms. Bukovec along with her previous teammate SM won the Canadian Trials and then earned Canada a World Championships berth with their Top 3 performance at the World Qualifiers.
29. Ms. Bukovec is the most qualified candidate for selection to the World Championships. She is the highest individually ranked Canadian Volleyball Beach National Team member eligible for nomination, being 52nd on the FIVB Athlete Entry Ranking, with 830 points. Both Ms. Pavan and her teammate Ms. McBain are ranked lower than Ms. Bukovec, and neither earned the berth.
30. The highest ranked team based on Individual FIVB Ranking Points would be Ms. Bukovec and Ms. Pavan, currently being ranked 38th with 1540 points. Team Pavan/McBain is ranked 44th with 1420 points.
31. Ms. Pavan has stated she does not wish to play on a team with Ms. Bukovec and is being allowed her wish to play instead with the athlete of her choosing (Ms. McBain).



Ms. Bukovec is not allowed to play with the athlete of her choosing (HB). This is procedurally unfair and cannot stand.

32. The onus of proof is on Volleyball Canada to prove the selection criteria were appropriately established, and the disputed decision was made in accordance with the criteria. If Volleyball Canada meets this onus, then, Ms. Bukovec must prove she should have been selected in accordance with the criteria.
33. Volleyball Canada did not properly establish its selection criteria. It was required to publish (not simply email) formal team selection criteria for the 2023 World Championships but failed to do so.
34. Per section 6 of its own Beach National Team Handbook, Volleyball Canada was required to publish "Internal Nominating Procedures (INP) at least eight months in advance of Major Games". It again failed to do so.
35. FIVB required Volleyball Canada to submit its selection criteria for the World Championships by January 31, 2023. Again, Volleyball Canada failed to do so.
36. SDRCC jurisprudence has consistently stressed the importance of properly published selection criteria, which must be widely available, transparent and justified using reasonable rationales (see, for example, *Jon McKay v. Swimming Canada* SDRCC 21-0492 at paras. 50–51, 59; *William Dutton v. Speed Skating Canada* SDRCC 18-0344 at para. 48, *Sébastien Beaulieu, Kaylie Buck, et al v. Canada Snowboard* SDRCC 20-0544/45/46/48/49 at paras. 69–71.)
37. The failure to properly publish selection criteria for the 2023 World Championships amounts to a violation of the procedural fairness owed to Ms. Bukovec.
38. All athletes have the right to know the criteria they are being measured against in a team selection. Athletes also have the right, at the least, to have the criteria brought to their attention in writing, in a timely manner, and not simply in a late email. This, too, is another breach of procedural fairness by Volleyball Canada.
39. The right of athletes to have access to selection criteria was confirmed in *Keegan Christ v. Speed Skating Canada* SDRCC 16-0298 at para. 60:

It is not for me to tell anyone what the selection criteria should be, but I can offer the thought that whatever they are to be, they should be spelled out thoughtfully and carefully, considering the comments in *Miller*. This may minimize the likelihood of future disputes and also enhance the overall credibility of the process.

40. Volleyball Canada does not have the discretion to unilaterally change the criteria with impunity. As the Supreme Court of Canada held in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 this is unreasonable (i.e. not only must an outcome be examined as to its reasonableness, but the decision-making process itself also must be reasonable);

85. Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, **a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker.** The reasonableness standard requires that a reviewing court defer to such a decision.

86. Attention to the decision maker's reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with "the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes": para. 47. Reasonableness, according to *Dunsmuir*, "is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process", as well as "with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law": *ibid.* In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported by intelligible and rational reasoning, **an otherwise reasonable outcome also cannot stand if it was reached on an improper basis.**

87. This Court's jurisprudence since *Dunsmuir* should not be understood as having shifted the focus of reasonableness review away from a concern with the reasoning process and toward a nearly exclusive focus on the *outcome* of the administrative decision under review. Indeed, that a court conducting a reasonableness review properly considers both the outcome of the decision and the reasoning process that led to that outcome was recently reaffirmed in *Delta Air Lines Inc. v. Lukács*, 2018 SCC 2, [2018] 1 S.C.R. 6, at para. 12. In that case, although the outcome of the decision at issue may not have been unreasonable in the circumstances, the decision was set aside because the outcome had been arrived at on the basis of an unreasonable chain of analysis. **This approach is consistent with the direction in *Dunsmuir* that judicial review is concerned with both outcome and process.** To accept otherwise would undermine, rather than demonstrate respect toward, the institutional role of the administrative decision maker." [italics in original; emphasis added]

41. In a post-Vavilov (*supra*) world, there is less deference owed to an administrative body's expert decision. Rather, one must continue to scrutinize the outcome, but also the process followed in arriving there. If either is unreasonable, the decision should be overturned.
42. On this basis alone, the Request should be granted. Volleyball Canada's decision was not made in accordance with the selection criteria.
43. Volleyball Canada claims to have notified Ms. Bukovec of the selection criteria, but its methodology in doing so falls short of what was required. Volleyball Canada sent three private emails to Ms. Bukovec well after the required eight month notice.
44. Apart from Volleyball Canada failing to properly establish its selection criteria, there are fatal flaws involving the interpretation and application of the selection criteria as set out in these emails.

45. According to Volleyball Canada a team would be selected for the 2023 World Championships in one of two ways provided the two athletes on the team placed within the top 250, having had some 400 points in the FIVB Entry Ranking on August 21, 2023:
  - a. Qualifying through performance by earning Canada a berth at the NORCECA Trials/World Championship Qualifier in Punta Cana; or
  - b. Qualifying as one of the Top 25 teams through the FIVB Entry Ranking.
46. Ms. Bukovec had the required top 250/400 points. On June 8, 2023 she placed 3rd in the NORCECA World Championship Qualifier and earned Canada a berth at the Tlaxcala 2023 World Championships. On this basis, she earned a nomination to the World Championships.
47. Unfortunately, Ms. Bukovec's partner in the NORCECA World Championship Qualifier (SM) did not have the required top 250/400 points for individual eligibility to the 2023 World Championships.
48. Ms. Bukovec formed a team with HB in June 2023. Both Ms. Bukovec and HB satisfy the requirements of being ranked in the top 250 and having at least 400 points. Ms. Bukovec is entitled to have this new team selected for the 2023 World Championships.
49. Team Pavan/McBain does not meet the criteria for nomination. Neither earned the berth at the NORCECA Trials/World Championship Qualifier and their team is not within the top 25.
50. Ms. Bukovec asked Volleyball Canada to compete with HB in the Canadian trials. Volleyball Canada denied the request because at the time it thought HB would not eventually meet the 400 point benchmark. Volleyball Canada forced Ms. Bukovec to play with SM because SM was "close" to 400 points. As it turned out SM did not earn 400 points, but HB did.
51. Ms. Bukovec and Ms. Pavan had been a team in the past, but Ms. Pavan broke up that team and so forced Ms. Bukovec to form a new team with HB, to the knowledge of Volleyball Canada. Ms. Bukovec should not be penalized for Ms. Pavan breaking up their team. Ms. Bukovec and HB are the rightful team nomination for the 2023 World Championships. We would not be sending the best team without the best athlete (Ms. Bukovec) on it.
52. Switching partners is common in volleyball. Volleyball Canada could have contemplated and addressed this possibility with explicit criteria in the April 6, 2023 email, but it did not. We should look solely at the April 6, 2023 email and apply the selection criteria as they appear there to address the facts at hand and not consider other selection criteria added in after-the-fact by subsequent emails. This changing of criteria was in effect an attempt to circumvent a fair process and reverse-engineer a team for selection.

53. The June 9, 2023 email improperly added new criteria for qualifying for the World Championships, a day after the event had occurred and it was known Ms. Bukovec had won. This addition appears to be targeted directly at Ms. Bukovec.
54. Specifically, this email added new criteria such that if one of the players who won the Qualifier berth were ineligible, the team would not be nominated for the World Championships. It also added the criteria for how the replacement team would be nominated, that being the highest ranked Canadian Team using the sum of the Individual FIVB Ranking Points.
55. Ms. Bukovec is the highest ranked individual eligible athlete with 830 FIVB Ranking Points. Any team satisfying these new criteria should include her. The next highest ranked team eligible for nomination is the team of Ms. Bukovec and Ms. Pavan (ranking 38th on the FIVB Entry Rank). In contrast, the team of Ms. Pavan and Ms. McBain only rank 44th.
56. On July 24, 2023 Ms. Bukovec emailed to try and confirm her team with HB would be nominated for the World Championships in accordance with the April 6, 2023 email. That same day she emailed challenging Volleyball Canada on its selection policy. She asked where the policies were written and shared with athletes prior to the trials, and cited the criteria for nomination (as per the April 6, 2023 email).
57. On July 25, 2023 Volleyball Canada advised Ms. Bukovec of even more new criteria; the team eligible for nomination must have played together in 2023 in addition to being the highest ranked team outside the Top 23.
58. On August 8, 2023, Volleyball Canada added still more criteria, by asserting teams must now be “registered” in order to be considered.
59. Ms. Bukovec disputes the application of any of these after-the-fact selection criteria, including what is alleged to have been explained on May 5, 2023. Team selection criteria must be published in advance and in writing as a matter of procedural fairness.
60. Even if this Tribunal accepts the constant changing of team selection criteria, the top-ranked team remains that of Ms. Bukovec and Ms. Pavan, who also played together in 2023.
61. To interpret otherwise penalizes the athlete (Ms. Bukovec) who earned the berth at the World Championships Qualifier. Surely, Volleyball Canada could not have intended to punish athletes who earn berths for Canada?
62. It should be Ms. Pavan who suffers the consequences of refusing to play with Ms. Bukovec, and not Ms. Bukovec. If there can be no team of Ms. Bukovec and Ms. Pavan, the next eligible team who meets the nomination requirements would be the team of Ms. Bukovec and HB.
63. Arbitrator Poulin in *Alex Boisvert-Lacroix and Jacob Graham v. Speed Skating Canada* SDRCC 21-0523/24 determined that where the interpretation of a selection policy is at

issue, the role of an arbitrator is "...not to determine who most deserves to take part in the [competition]; rather, it is to determine the criteria applicable to the selection and ensure that the Respondent has applied them rigorously." (at para. 97)

64. Volleyball Canada has an obligation to select its 2023 World Championships teams in accordance with the selection criteria outlined in its April 6, 2023 email. World Championships nominations were to be awarded to teams whose players individually qualified and earned a berth at the NORCECA World Championships Qualifier.
65. Volleyball Canada erred in selecting Ms. Pavan and Ms. McBain, who did not meet the required conditions. Volleyball Canada sought to justify this by stating they are the next highest ranked, registered team. Volleyball Canada unilaterally determined it had the power to nominate a replacement team outside of the criteria. More to the point, the selection criteria do not grant Volleyball Canada permission to alter the stated selection criteria, nor do they give Volleyball Canada ultimate discretionary power. Volleyball Canada's decision is prima facie unreasonable and cannot stand.
66. As per Vavilov (supra) "reasonableness" is the standard of review in Canadian administrative law. "Reasonableness" is the applicable standard of review in a sport dispute, which is a review of a decision from an administrative body (Sébastien Beaulieu (supra) at para. 56).
67. As per the Supreme Court of Canada in Vavilov (supra),

**The administrative decision maker's task is to interpret the contested provision in a manner consistent with the text, context and purpose**, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior – albeit plausible – merely because the interpretation in question appears to be available and is expedient. The decision maker's responsibility is to discern meaning and legislative intent, **not to "reverse-engineer" a desired outcome.** (para. 121, emphasis added)

68. In Sébastien Beaulieu (supra) Arbitrator Brunet relied on Vavilov (supra) and held Canada Snowboard had acted unreasonably by dismissing the selection criteria and replacing them with its own discretionary interpretation:

82. As explained in Vavilov, "*a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion*". **This use of discretionary power to dismiss the previously agreed rules for selection to the national snowboard team is not coherent nor reasonable.**

83. At this time, I cannot coherently follow the reasoning by which [Volleyball Canada] decided not to select the Claimants. Given the time constraints and the unreasonable decision initially taken by [Volleyball Canada], I am substituting my decision for [Volleyball Canada's] initial decision. (italics in original; bolding added)

### **Timeliness**

69. In terms of the deadline to file, the 30 days would start at earliest on July 24, 2023. Only at that stage was it clear Ms. Bukovec was not being selected and so only at that stage could the time to file start running.
70. Ms. Bukovec wrote that day of how she was "confused". This confirms matters were not yet clear to her, and they certainly were not as of June 9, 2023. Only when matters later became clear did she become aware of the actual fact of the dispute. Only at that stage could the time to file logically start running.
71. This confusion also reinforces just how lacking the entire process was. Being charitable, the whole thing was very messy at absolute best.

### **Conclusion and Relief Sought**

72. The emails set out Volleyball Canada's 2023 World Championships selection criteria. They lack the requisite clarity and cohesiveness one would expect for such an important selection decision (arguably, Volleyball Canada's most important tournament selection decision for the year). As Volleyball Canada authored these far from clear emails they should be interpreted against its position.
73. Volleyball Canada failed to establish and intentionally failed to follow its own selection criteria, invented a new, unilateral, unannounced "registration requirement" and used a perceived discretionary power, that it did not have, to select the team it wanted for the 2023 World Championships.
74. Despite their deficiencies, the emails reveal certain selection criteria and Volleyball Canada failing to properly apply its criteria.
75. Volleyball Canada also gave Ms. Pavan special treatment not offered to Ms. Bukovec by allowing her to select her teammate.
76. On its face this all runs contrary to the basic fairness and consistency that all athletes expect, especially in such an important selection process. Procedurally, it is unreasonable, contrary to the requirements declared by the Supreme Court of Canada in Vavilov (supra) and Dunsmuir v. New Brunswick, 2008 SCC 9.
77. Section 6.11(a) of the Code grants the Tribunal authority to select Ms. Bukovec and/or her team to the 2023 World Championships, and there is case law arising from similar situations supporting such a selection here.
78. In Keegan Christ v. Speed Skating Canada SDRCC 16-0298 at para. 70 the arbitrator named the athlete to the team, determining there was no need to remit the matter to Speed Skating Canada for reconsideration as "there could be no other decision made based on the evidence in this case."



79. Likewise here, there is no other decision that could reasonably or fairly be rendered if the selection criteria were followed.
80. Arbitrator Mew (now Justice Mew) in *Rémi Beaulieu v. Speed Skating Canada* SDRCC 13-0199 at para. 93 selected an athlete for the Men's Senior Team when the athlete's faith in the NSO's decision-making process was tainted:

I am concerned that in the event of a good faith reconsideration by the HPCST which results in the same outcome as before, the Claimant is likely to feel that he has not been treated fairly.

81. Arbitrator Brunet in *Sébastien Beaulieu* (supra) at para. 89 determined it was appropriate to appoint four athletes to the 2022 Olympic Team in similar circumstances to those at hand;

Given the time constraints, the importance of the decision to the Claimants, and to avoid further inequity and error, I have decided to substitute my decision for that of the Respondent, in accordance with Subsection 6.11(a) of the SDRCC Code.

82. Our case too has serious time constraints, is an important decision and one that has been plagued with inequity and error. It would be appropriate for the Tribunal to exercise its discretion in like fashion.
83. Accordingly, Ms. Bukovec respectfully requests her appeal be granted and she be selected for the 2023 World Championships. In the alternative, she asks that she and HB be selected. In the further alternative, she asks that she and Ms. Pavan be selected. In still a further alternative, she offers she is amenable to "further direction" from the Tribunal.

## **Arguments for Volleyball Canada**

### **Merits**

84. Volleyball Canada accepts the initial onus on it pursuant to section 6.10 of the Code, but in context the Tribunal must show significant deference to what Volleyball Canada has done. *Vavilov* (supra) has not lessened the required deference.
85. SDRCC jurisprudence has consistently held to the effect that:

...selection decisions are best determined by experts, that is; the high-performance committees of national sports organizations, and provided [these experts] followed [their] own rules, arbitrators should rarely if ever interfere.

In practice, the deferential standard of review means that an arbitrator "will not substitute [their] own decision for that of a sport organization provided the decision falls within a range of possible, acceptable outcomes.

(see *Gavin Hay and Canadian Fencing Federation* (SDRCC 22-0565) at paras 48 and 49.)



86. Selection standards (as opposed to the administration and application of the selection system) are reviewable only if they are patently unfair, arbitrary or discriminatory (see Bennett-Awad et al v. Equestrian Canada SDRCC-21-0508).
87. None of the cases cited by Ms. Bukovec supports the proposition that selection criteria always must be posted online. There is nothing anywhere requiring a general publication of selection criteria on a website or otherwise. Instead, selection criteria simply must be fairly communicated, and we should not focus on the form of that communication.
88. In Scott v. Canoe Kayak Canada SDRCC-21-0498 (for example) it was held that what matters in a selection case is that the information was in fact communicated. The form of that communication is not important. There, an informal WhatsApp group message, rather than a more formal email or letter, was held to be an acceptable means of communication.
89. As stated in Carroll v. Taekwondo Canada SDRCC-13-0195 a tribunal should be "loath to overturn selection standards...when the objection taken...is more technical than real" (on page 8). As stated on page 9:

Additionally, given the earlier discussions and consultations which had gone on within the NSO, I find it difficult to conclude that any athlete did not know, or reasonably should not have known, that the US Open would be among the competitions selected for qualification purposes leading to the Nanjing YOG.
90. As held in Abdul-Rashid v. Athletics Canada SDRCC-19-0400, a tribunal's role is limited to determining whether:
  - a. there has been a fair communication of the rules of the selection process;
  - b. the selectors have reasonably adhered to those rules and have administered the process in a manner which is not arbitrary, disconsolate or in bad faith.
91. Initially Ms. Bukovec only challenged the team replacement criteria but now has broadened that to attack the entire process.
92. The Volleyball Canada Beach National Team Handbook provides for an eight month advance publication in the case of "Major Games", which would be multisport events such as the Olympics or Commonwealth Games. That is not the same as the FIVB World Championships. The eight month advance publication requirement does not apply.
93. The January 31, 2023 deadline applies to "Confederations", not National Federations. An example of a Confederation would be NORCECA. This deadline has no application either.
94. According to Monaghan v. Bobsleigh Canada SDRCC-21-0482, selection criteria have to be interpreted in a way that gives the words their natural and ordinary meaning, but also has regard to the broader context in which they arise and the objectives those criteria are meant to achieve. The subjective interpretation of a claimant is irrelevant.

95. The focus here must be on the reality that athletes compete on teams, not as individuals. The natural and ordinary meaning of the words of the April 6, 2023 email must be read in that context.

Dear Athlete,

You're receiving this communication because you as an individual are eligible or close to eligible to participate in the NORCECA World Championship Qualification tournament being held in Punta Cana, Dominican Republic (May 29 - June 1).

Volleyball Canada will hold a trials to participate in the NORCECA World Championship Qualification tournament on May 4-5, 2023 at the Beach High-Performance Centre (HPC) in Downsview Park.

To be eligible to compete in the 2023 FIVB World Championships being held in Tlaxcala, Mexico (October 6-15) athletes must appear as an individual in the FIVB Athlete Entry Ranking within the first 250 places (approximately 400 points at the present time) as of 21st August 2023 as per the attached FIVB and NORCECA Qualification system documents.

Volleyball Canada will nominate the winner of our trials for the NORCECA trials in Punta Cana. If you qualify through your performance in the NORCECA trials Volleyball Canada will register your team for the World Championships unless you qualify in the top 25 teams (including 2 teams from Mexico) per gender through the FIVB Entry Ranking. Since one team cannot earn two berths for a country, should this happen the nomination would go to the next team on the NORCECA trials.

If you aren't in the top 250 ranked players on August 21, Volleyball Canada will register another team.

The fee to register will be \$75 per athlete, and a link to register will be sent to you next week. This is a closed trials so there won't be any access to register from the VC Program Info page.

96. The phrase "Volleyball Canada will nominate the winner of our trials" must refer to a team, as only a team could be the winner. That team can only be the same team which competed in and won the trials, as any other team could not be the winner of the trials.
97. The phrase "If you qualify through your performance in the NORCECA trials Volleyball Canada will register your team" clearly uses "you" and "your" in the plural sense, to signify the two athletes on the team. The reference to "your team" cannot be some team of your choosing, but can only be the team that competed in and won the trials.
98. The "you" in the phrase "If you aren't in the top 250 ranked players on August 21, Volleyball Canada will register another team" clearly is used in the plural sense, to signify the two athletes on the team.
99. If this had been intended to allow an athlete the power to create another team after the fact in the face of having an ineligible partner, that power would be clearly expressed. It is not and in fact clearly means the exact opposite by stating "Volleyball Canada will register another team."

100. If we don't look beyond the April 6, 2023 email as Ms. Bukovec seems to suggest by objecting to all the alleged additional criteria it simply would be up to Volleyball Canada to determine how to replace that ineligible team ("Volleyball Canada will register another team"). In that scenario, Ms. Bukovec would have no possible claim to that selection. It is only because of what was advised at the May 5, 2023 technical meeting and the subsequent emails, that she has any basis to pursue this appeal here.
101. Based on the evidence it is clear this selection of the other "replacement" team was done by experts to whom deference should be paid, and based on valid and objective criteria. There is no basis for interfering with that.
102. Ms. Bukovec seeks to have this Tribunal ignore Volleyball Canada's established process for replacing ineligible teams, and instead provide Ms. Bukovec with her own individualized right to compete in the 2023 World Championships. No other Volleyball Canada athlete has received such treatment.
103. From the outset Volleyball Canada clearly communicated to all athletes that eligibility was always to be considered on a team basis — and that if any team were ineligible, then "Volleyball Canada [would] register another team."
104. A key requirement for eligibility is that both team members must rank in the top 250 places according to FIVB rankings.
105. Ms. Bukovec and her then-teammate SM would have been selected if they were both eligible, given their performance at the 2023 NORCECA World Championship Qualification Tournament.
106. There is no dispute that SM did not finish in the top 250. This left SM and her teammate Ms. Bukovec ineligible to compete as a team in the 2023 World Championships.
107. Volleyball Canada advised all athletes multiple times, orally and in writing, that the ineligible team would be replaced by the eligible team with the most FIVB points (i.e. the sum of points between the team members). There is no dispute that Ms. Bukovec is not registered as part of any team that satisfies this requirement.
108. Ms. Bukovec's situation is a consequence of her own decision-making. Following the 2023 NORCECA World Championship Qualification Tournament Ms. Bukovec could have continued to compete with SM. Had she done so, SM would have earned the requisite number of points to meet the top 250 requirement, meaning their team would be eligible for the 2023 WCH and would have been selected by Volleyball Canada.
109. Rather than continuing to play on a team with SM, Ms. Bukovec unilaterally chose to switch teammates and begin competing with someone else. Due to Ms. Bukovec's choice, SM did not accumulate the requisite number of points to be eligible.
110. Ms. Bukovec now seeks to have this Tribunal rewrite the process for replacing ineligible teams at the 11th hour by granting her an individualized right to compete in World

Championships on a team of her choosing. Such an approach appropriates a berth allocated to Volleyball Canada, to Ms. Bukovec personally.

111. There is no basis for this approach anywhere in Volleyball Canada's rules or policies. Indeed, such an approach is totally at odds with the approaches taken by Volleyball Canada, NORCECA and the FIVB, which are rooted in determining what eligible team has the most number of points — and not giving rights to any individual athlete to compete.
112. This would undermine Volleyball Canada's team selection process, and also deprive other Volleyball Canada athletes of their rightful position representing Canada at the World Championships.
113. There are three ways for a team of female beach volleyball players to earn one of 48 available team spots at the 2023 World Championships;
  - a. as one of three FIVB wild card spots;
  - b. as one of the top 25 teams based on FIVB 2023 WCH rankings (i.e. based on the best six FIVB results between February 1 and August 21, 2023); and
  - c. as one of 20 teams from continental confederations (the "continental qualification pathway").
114. These requirements are clearly set out in the 2023 World Championships Qualification Requirements.
115. This appeal involves the continental qualification pathway. There are five continental confederations and each confederation may send four teams of each gender to the 2023 World Championships.
116. Canada is part of NORCECA, a continental confederation comprised of North America, Central America and the Caribbean.
117. The 2023 World Championships Qualification Requirements are clear that in order to participate through the continental qualification pathway, both female athletes on a given team "must appear as an individual in the FIVB Athlete Entry Ranking within the first 250 places as of 21st August 2023".
118. The FIVB Athlete Entry Rankings are done on an individual basis and depend on the number of "points" an athlete has, as compared to other athletes. While the point value cutoff to satisfy the top 250 requirement varies from time to time for most of the relevant period Volleyball Canada believed that around 400 points would be required. The actual number of points required ended up being approximately 380 points.
119. The 2023 NORCECA World Championship Qualification Tournament was held on June 7-8, 2023 in Punta Cana, Dominican Republic. The federations with the top four teams

from each gender at this event would earn spots to the 2023 World Championships through the continental qualification pathway.

120. The spots or “quotas” allocated at the 2023 NORCECA Tournament were allocated to the national volleyball federations in each country (i.e. spots earned by Canadian teams are allocated to Volleyball Canada as Canada’s national federation, and not to any particular team or individual athlete). This makes good sense as if an athlete (and so their team) is ineligible or unable to compete, the national federation has the full authority to nominate a different team to compete instead.
121. Volleyball Canada’s intention at all times was that if a team earned Volleyball Canada a spot at the 2023 World Championships through the 2023 NORCECA Tournament, then that team would be selected to fill that spot, provided the athletes on that team also met the other applicable 2023 World Championships, including the top 250 requirement.
122. To determine what teams would represent Canada in the 2023 NORCECA Tournament, Volleyball Canada organized a trials tournament in May, 2023.
123. Since the trials tournament was more than three months before the August 11, 2023 deadline for nominating teams through the continental qualification pathway, Volleyball Canada allowed teams to register for the trials tournament even if at the time one or both athletes did not meet the top 250 requirement (i.e. then-estimated at 400 points or higher).
124. However, only teams where both athletes had more than 200 points were allowed to participate in the trials tournament. This threshold was based on the view that during the three months between the trials tournament and the submissions deadline of August 11, 2023, athletes with at least 200 points could potentially bring themselves and their team into compliance with the top 250 requirement.
125. On April 6, 2023, weeks before the trials tournament took place, Volleyball Canada’s Operations Manager sent an email to all female beach volleyball athletes with more than 200 points, which included Ms. Bukovec. The email advised these athletes of their ability to participate in the trials tournament and of the top 250 requirement. The email also explained that if an athlete failed to meet the top 250 requirement “Volleyball Canada will register another team”.
126. Ms. Bukovec misinterprets this email as meaning “athletes must first qualify individually, and the top qualified individual will then have their team registered.” That is not what the email says. The email is clear that:
  - a. both athletes on a team must meet the top 250 requirement; and
  - b. if an athlete does not meet the top 250 requirement, then “Volleyball Canada will register another team”.
127. Ms. Bukovec fundamentally mischaracterized registration as a selection criterion. It is not, but rather simply an administrative step athletes must take in order to participate.

An athlete asks Volleyball Canada to register them, and it does, as part of a single team. Suggesting Volleyball Canada has a duty to register every possible permutation of teams, failing which it is acting in bad faith, makes no sense.

128. The April 6, 2023 email never stated that an individual athlete will somehow be given a spot in the 2023 World Championships even if their team does not qualify. On the contrary, the email is clear that if a team becomes ineligible because one of the athletes is ineligible, then Volleyball Canada will pick another team to be registered. There is no obligation at all to select a member of the ineligible team.
129. Ms. Bukovec's interpretation is at odds with the basic principle in beach volleyball that eligibility (the ability of a team to compete in a spot owned by Volleyball Canada) is always assessed on a team basis. If a team has an athlete who is ineligible, injured or otherwise unable to attend, then that team cannot compete.
130. The issue of having to replace a potentially ineligible team has never happened before in Volleyball Canada's beach trials history. Normally only those players guaranteed to be eligible for the World Championships are allowed to participate in any World Championships trials tournament. However, because of the unusual three-month gap between the trials tournament and the 2023 World Championships nomination deadline, Volleyball Canada opened its trials tournament to athletes who did not yet meet the top 250 requirement but could potentially do so by the relevant time.
131. Volleyball Canada wanted to make sure all athletes understood the need to meet the top 250 requirement for the 2023 WCH, which is why it made clear to all athletes in the April 6, 2023 email that "[i]f you aren't in the top 250 ranked players on August 21, Volleyball Canada will register another team."
132. On May 5, 2023 and just before the start of the trials tournament, a technical meeting was held at the Volleyball Canada Beach High Performance Boardroom. Ms. Bukovec was in attendance as were other athletes competing in the trials tournament. Such meetings are routine before the beginning of competitions such as the trials tournament, to review the applicable rules and regulations regarding the trials.
133. Volleyball Canada asserts that at the technical meeting its Beach High Performance Director confirmed the winner of the trials tournament would represent Canada in the 2023 NORCECA Tournament. He also reiterated the explanation of the continental qualification pathway from the April 6, 2023 email: the top four teams from each gender at the NORCECA Tournament would earn spots to the 2023 World Championships provided the athletes on those teams met the top 250 requirement. He also advised athletes of how Volleyball Canada would "register another team" if one or both athletes failed to meet the top 250 requirement, making them ineligible. In such a scenario, the team with one/both ineligible athletes would be replaced by the eligible team with the most total FIVB entry points (i.e. sum of points between the team members) as of August 11, 2023.



134. This replacement process was a fair, transparent and objective means of selecting the strongest eligible team to take Volleyball Canada's spot through the continental qualification pathway. It also was consistent with past practice at the highest levels of the sport. For example, team selection for the NORCECA berths at the Olympics has always been decided on the basis of the eligible team with the most points. FIVB also uses that same approach when determining what teams can enter FIVB Beach Pro Tour Events and how those teams will be seeded.
135. Ms. Bukovec originally wanted to partner with HB for the trials tournament, who was not permitted to compete for two reasons. First, HB was a Volleyball Canada staff member and staff members are not allowed to compete as athletes. Second, HB had zero points at the time, putting her well below the 200-point cutoff for participation in the trials tournament.
136. Instead, Ms. Bukovec chose SM as her partner. They won the trials tournament and then finished in third place at the 2023 NORCECA Tournament, held on June 7-8, 2023.
137. Volleyball Canada was willing to nominate Ms. Bukovec and SM for a spot at the 2023 World Championships via the continental qualification pathway provided they both met the top 250 requirement. After winning the 2023 NORCECA Tournament, Ms. Bukovec was well above the 400-point threshold, but SM was still short of the mark.
138. On June 9, 2023, the day after the 2023 NORCECA Tournament, Ms. Bukovec advised SM she had decided to team with HB in an attempt to qualify for the Paris 2024 Olympic Games. HB submitted her letter of resignation as a Volleyball Canada staff member to pursue this opportunity as an athlete.
139. Volleyball Canada quickly recognized the implications of Ms. Bukovec's choices. Ms. Bukovec's team had won a spot for Volleyball Canada at the 2023 NORCECA Tournament subject to each athlete meeting the top 250 requirement, but the team was currently ineligible and at risk of staying so unless SM gained enough points to meet the requirement. Rather than continuing to compete with SM and helping her achieve those points, Ms. Bukovec changed partners and was instead competing with HB.
140. The same day Ms. Bukovec and HB announced they were competing as a team, Volleyball Canada emailed both Ms. Bukovec and SM. That email reiterated the need for both athletes to meet the top 250 requirement and confirmed that, if necessary, Volleyball Canada would choose a replacement team in accordance with the process outlined at the May 5, 2023 technical meeting.
141. On May 5 (orally) and June 9, 2023 Volleyball Canada advised Ms. Bukovec that it would replace an ineligible team with the highest ranked eligible team using the sum of the athletes' individual FIVB ranking points.
142. The replacement process was determined by Volleyball Canada's High Performance Director in consultation with Volleyball Canada's Beach High Performance Manager. The High Performance Director had the full authority and obligations as part of his job description to establish operational policies such as the replacement process (i.e.



....provides direction and has authority in the formulation of policy, programs, budget and other decisions regarding the Beach Volleyball High Performance area including the High Performance Centre.)

143. In doing this he considered the following:

- a. The risk of team ineligibility was known to all. From the outset in the April 6, 2023 email it was made clear to all athletes that because of the novel inclusion of ineligible athletes in the trials tournament, there was a risk a team could win Canada a spot at the 2023 World Championships via the continental qualification pathway, yet be ineligible to actually attend due to a team member having insufficient points to meet the top 250 requirement.
- b. Athlete choice. Athletes were free to choose their own partners provided their choice does not violate other Volleyball Canada policies. Here, all athletes, including Ms. Bukovec, made choices knowing full well the risk that their partner and thus their team could ultimately be ineligible for the 2023 World Championships. Similarly, Volleyball Canada respected an athlete's choice for who they elect to partner with and did not force two athletes to play together on a team. Team chemistry is essential to a competitive team and forcing two players to play together, when they do not wish to do so, can be detrimental to the team's performance.
- c. Beach volleyball is fundamentally a team sport. Volleyball Canada always considered a "team" to be the key unit for competitions and events. Players can only register for competitions as part of a single team. Spots in competitions or tournaments are awarded to teams. Eligibility, or lack of eligibility is always assessed on a team basis. If a team member is unable to make a particular event due to injury or for any other reason, then that team is not able to compete in the event.
- d. Fairness to all Volleyball Canada athletes. By replacing an ineligible team with the highest-ranking eligible team, Volleyball Canada has set out a transparent, objective and fair process for all athletes. It gives all eligible teams an opportunity to compete for the spot, without any kind of favouritism, and awards the spot to the eligible team with the most collective points.
- e. Sending the strongest team to the World Championships. The use of FIVB Team Entry Points (i.e. the sum of team members' individual points) to determine the replacement team is a fair and tested indicator of team strength.
- f. Team selection should be "decided on the court", consistent with past practice at the highest competitive levels. Since 2012, team selection for the NORCECA berths at the Olympics has always been decided based on the eligible team with the highest number of FIVB Team Entry Points. The same approach is used by the FIVB when determining what teams can enter their Beach Pro Tour Events and how those teams will be seeded.

144. Ms. Bukovec did not reply to this email. She did however choose to continue on with HB as her teammate, not SM.
145. This choice to compete with HB rather than SM was entirely Ms. Bukovec's to make (subject to HB's agreement). Ms. Bukovec could have participated in competitive events with SM who was ready, able and willing to do so. In fact, had Ms. Bukovec done so, SM likely would have earned the points needed for both members of their team to meet the top 250 requirement, and so that team would have been selected.
146. Instead, SM was forced to compete for points with a different teammate, while Ms. Bukovec went ahead with HB. As of July 24, 2023 SM had 360 points — still 20 points shy of what the top 250 requirement cutoff would turn out to be on August 7, 2023.
147. As of July 25, 2023 Volleyball Canada had not made any decisions about what team would be nominated to take the continental qualification pathway spot. As of then it was still possible for Ms. Bukovec and HB to become the top ranked Canadian women's team based on their performance at a pending tournament. Had they done so, Volleyball Canada would have nominated them for the continental qualification pathway spot in the 2023 World Championships (replacing the ineligible team of Ms. Bukovec and SM). As it turned out, their performance was not enough to place them as the top ranked Canadian's women team by combined points.
148. As of August 7, 2023, which is when the latest round of rankings were released prior to the August 11, 2023 nomination deadline, the top ranked Canadian women's beach volleyball teams who have registered for the 2023 World Championships are as follows:
  - a. AB/CD (Points = 3,000; Ranking = 2)
  - b. Pavan/McBain (Points = 1,420; Ranking = 44)
  - c. Bukovec/HB (Points = 1,230; Ranking = 71)
149. AB/CD have qualified for the 2023 World Championships by being one of the top 25 teams based on FIVB 2023 rankings, meaning they are ineligible to get another spot via the continental qualification pathway.
150. That left the team of Ms. Pavan and Ms. McBain as the team that was rightfully positioned to replace the ineligible team of Ms. Bukovec and SM, pursuant to the process and requirements explained by Volleyball Canada since the email of April 6, 2023.
151. Ms. Bukovec has proposed various pairings of athletes (such as Ms. Bukovec and Ms. Pavan) and compared total points of such combinations, claiming whatever "team" she would be on would have the most points.
152. In doing this she has ignored the fact she and Ms. Pavan may have been together on a team in the past but are no longer together on a team. A team is not formed simply by picking a pair of athletes with high scores and conscripting them to play together.

153. Ms. Bukovec's request to be selected to compete at the 2023 World Championships necessarily means that one or both of Ms. Pavan and Ms. McBain would be deprived of that opportunity. This would be a deeply unfair result for Ms. Pavan and Ms. McBain, hardworking athletes who adhered to and relied on the rules and requirements Volleyball Canada set out for when and how an ineligible team would be replaced.
154. Ms. Bukovec's alternative request that she and Ms. Pavan be selected as a team is both unprincipled and unworkable. Volleyball Canada does not dictate whether athletes must register as a team with other athletes for any particular competition: that is a decision that players must make and agree to for themselves. To require Ms. Pavan to compete with Ms. Bukovec is an affront to this basic principle.
155. Ms. Pavan and Ms. Bukovec used to be on a team together, but had an acrimonious split several months ago. Since then Ms. Pavan has competed with Ms. McBain and together they accumulated the points that have landed them in the position of attending the 2023 World Championships via the continental qualification pathway. To the best of Volleyball Canada's knowledge, Ms. Pavan is committed to being on a team with Ms. McBain and to this point has not even been asked by Ms. Bukovec to register as a team with her.
156. Ms. Bukovec's requested relief would see Ms. Pavan forced to leave her chosen team partner, and instead be conscripted into registering as a team with Ms. Bukovec, despite having intentionally stopped being teammates with Ms. Bukovec months ago.

### **Timeliness**

157. Ms. Bukovec's appeal is out of time and ought to be dismissed on that basis alone.
158. The Code requires a Request to be filed within 30 days of the date the person becomes aware of the existence of the dispute.
159. The June 9, 2023 email is crystal clear on the possibilities facing Ms. Bukovec;

Also, please remember that as I explained at the Technical Meeting before this VC NORCECA WCH Qualifier Trials that **on or before August 11th VC will only nominate teams where BOTH athletes are eligible to compete in the World Championships and that if one player was not eligible from a team that earned a World Championship berth for Volleyball Canada in Punta Cana (June 7-8, 2023) that team would not be nominated and the highest ranked Canadian Team using the sum of the Individual FIVB Ranking Points (Not certain to earn a berth to the World Championships via the Top 23 FIVB teams) on Monday August 7, 2023 where both players are eligible will be nominated to represent Volleyball Canada at the Tlaxcala 2023 World Championships.**

I'm reminding you of this policy because at present SM is not presently in the top 250 places of the Individual Entry Ranking. By my calculations SM will have 360 points (128 + 160 + 72) on June 12, 2023 after including the results from Punta Cana (128 points). This means that SM is about 40 FIVB points short of being eligible (SM needs to earn 112+ points (72 + 40) at one event between now and August 7th).

(emphasis added)

160. At that stage SM did not have the necessary points to guarantee the team of Ms. Bukovec and SM would be eligible. In this email Volleyball Canada was directly warning Ms. Bukovec of their precarious situation. However, rather than help herself (and SM) by remaining on a team with SM, helping her gain more points and have them qualify, Ms. Bukovec chose a different teammate.
161. It is indisputable that as of June 9, 2023 Ms. Bukovec was given clear and full notice of the replacement process, and so should have been aware of the very distinct possibility of being replaced. If she objected to that possibility or the process which could lead to that, for whatever reason, that was the time to have raised the issue and filed her Request, and the 30 day deadline to do so runs from then.
162. While Ms. Bukovec may argue that she met the applicable time periods vis-à-vis the July 24, 2023 emails, those emails merely reiterated the process and requirements previously communicated to Ms. Bukovec in writing on June 9, 2023 (and, as Volleyball Canada asserts, as explained to athletes including Ms. Bukovec at the May 5, 2023 technical meeting).

### **Conclusion and Relief Sought**

163. Ms. Bukovec's untimely complaint is that Volleyball Canada purportedly "changed" the criteria after the April 6, 2023 email and "failed to publish its new selection criteria in advance of the qualifying events."
164. She takes issue with Volleyball Canada's process for replacing an ineligible team for the 2023 World Championships via the continental qualification pathway. Rather than Volleyball Canada selecting a new team based on highest total team score, Ms. Bukovec believes she has some kind of individual right to compete based on a team of her choosing.
165. Previous SDRCC decisions have stressed how the review of a sport organization's selection process is entitled to deference;
166. In our case, the criteria for eligibility to the 2023 World Championships including the top 250 requirement, are not being challenged.
167. Instead, the sole challenge is to Volleyball Canada's process for replacing an ineligible team. From April 6, 2023 onward, it was made clear to all athletes that teams with players that did not meet the top 250 requirement would be ineligible, and that Volleyball Canada would have full authority to replace an ineligible team with a new team.
168. In the words of SDRCC Code section 6.10, the replacement process was "appropriately established." It took into account a number of appropriate factors and was communicated to Ms. Bukovec both orally and in writing.
169. Ms. Bukovec is not entitled to a spot at the 2023 World Championships under the replacement process and the Request should be dismissed.

### **Arguments for Ms. Pavan**

170. Ms. Pavan and Ms. Bukovec had been on a team together earlier in 2023 but Ms. Pavan had determined they were not a good fit for high performance goals and so she left the team.
171. Ms. Pavan took exception to the position advanced by Ms. Bukovec's representatives in suggesting Ms. Bukovec was the best athlete and so based on that deserved to be selected here.
172. Some 600 of the current 830 points Ms. Bukovec had were earned with Ms. Pavan as her teammate. Ms. Pavan provided details as to her own athletic career, and contrasted it with that of Ms. Bukovec. She asserted there was no real comparison between the two and in fact she was more decorated and the better athlete. Ms. Bukovec did not have some entitlement to a priority based on being the best athlete.
173. The selection criteria should be applied and on that basis Ms. Pavan and Ms. McBain should be selected ahead of Ms. Bukovec.
174. Berths are won by teams, not individuals.
175. Berths don't belong to a team or the individuals on that team, but the country for which the team competes.
176. Berths are always distributed to teams, not individuals.
177. A team is not created merely by matching up two individuals and having them play together. There needs to be chemistry, compatibility and numerous other qualities to make two athletes into a team, never mind a competitive one.
178. At the NORCECA trials for the 2023 World Championships, Ms. Bukovec and SM had won a berth for Canada, and it was up to Canada to determine which team was selected for that berth. Ms. Bukovec has no priority claim to it.

### **Analysis and Decision**

179. Despite the objection the Request was filed too late, I am not prepared to dismiss it on that basis.
180. The Code requires a Request to be filed within 30 days of the date the person becomes aware of the existence of the dispute (emphasis added)
181. Due to the extreme urgency of this case, I was not in a position to hear testimony about what occurred at the technical meeting of May 5, 2023 and so assess Ms. Bukovec's understanding of things as of that date. As a result, I cannot decide if things had crystalized such as to have the 30 days run from then, and so will not base my decision on timeliness on the events of May 5, 2023.

182. As to the email of June 9, 2023, at the time SM did not have the necessary points to guarantee the team of Ms. Bukovec and SM would be eligible to be selected, and I accept Volleyball Canada was directly warning Ms. Bukovec of their precarious situation.

183. However, I do not accept it as "indisputable" that as of then Ms. Bukovec was given clear and full notice of the replacement process, and so should have been aware of the very distinct possibility of being replaced as an individual.

184. The email stated (in part):

**...if one player was not eligible from a team that earned a World Championship berth for Volleyball Canada in Punta Cana (June 7-8, 2023) that team would not be nominated and the highest ranked Canadian Team using the sum of the Individual FIVB Ranking Points (Not certain to earn a berth to the World Championships via the Top 23 FIVB teams) on Monday August 7, 2023 where both players are eligible will be nominated to represent Volleyball Canada at the Tlaxcala 2023 World Championships.**

(emphasis added)

185. That Team Bukovec/SM had the real possibility of being replaced certainly must have been clear but based on what Ms. Bukovec apparently believed to be her individual rights (an inference I draw from the submissions made on her behalf in this process) what actual rights she had in the replacement process were perhaps not necessarily quite as clear, at least to her.

186. In other words, I am not satisfied on the balance of probabilities she was aware as of June 9, 2023 of the existence of the dispute.

187. I therefore conclude it is appropriate to address matters on the merits and not dismiss the Request for being untimely.

188. Section 6.10 of the Code states:

If an athlete is a Claimant in a team selection or carding dispute, the onus will be on the Respondent to demonstrate that the criteria were appropriately established and that the disputed decision was made in accordance with such criteria. Once that has been established, the onus shall be on 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.

189. This section places the initial onus of proof on Volleyball Canada, to demonstrate the criteria were appropriately established and the selection decision made in accordance with such criteria.

190. Once that has been established, the onus of proof shifts to Ms. Bukovec to demonstrate she should have been selected or nominated in accordance with the approved criteria. Each onus is to be determined on the balance of probabilities.



191. My role is intentionally quite limited when assessing selection criteria and processes. As noted in the case law cited earlier (both before and after Vavilov (supra)), considerable deference should be shown to the experts in the area.

192. As to the specific effect and application of Vavilov (supra) I accept that both the ultimate conclusion and the path taking one there are relevant considerations and subject to review on the basis of reasonableness. I also embrace the words of Arbitrator Brunet in the Sébastien Beaulieu case (supra);

55. This case is a review of the decision of an administrative body. As set forth by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, “reasonableness” is the default standard of review in Canadian administrative law and is the applicable standard of review herein.

56. In Vavilov at paragraph 102, the Supreme Court of Canada enounces that:

*[r]easonableness review is not a “line-by-line treasure hunt for error” [...]. However, the reviewing court must be able to trace the decision-maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that “there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived”.*

57. In deciding to uphold reasonableness as the default standard of Canadian administrative law, the Supreme Court granted more, but not unlimited, deference to administrative bodies’ decisions and to the context in which the decision was taken. The Supreme Court emphasizes in Vavilov at para. 89 that “*the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case.*”

193. There seems to be no merit to the suggestion that Volleyball Canada was required by the Volleyball Canada Beach National Team Handbook to publish anything eight months in advance, as these were not "Major Games." Further, there seems to be no merit to the suggestion Volleyball Canada was required to submit its selection criteria with FIVB by January 31, 2023, as Volleyball Canada is not a "Confederation."

194. I accept as reasonable the statement in Bennett-Awad (supra) that selection standards are reviewable only if they are patently unfair, arbitrary or discriminatory. There is nothing in the selection criteria as set forth in the April 6, 2023 email (i.e. both athletes are within the top 250 rankings at the relevant date, win the Canadian trials and qualify through the NORCECA Tournament) to suggest those criteria were patently unfair, arbitrary or discriminatory. I heard no evidence or submissions to suggest these were. I accept them as appropriately established.

195. I accept that absolute perfection in drafting anything is an extraordinarily high and normally unattainable standard. I accept Volleyball Canada's interpretation of the April 6, 2023 email. This interpretation makes sense and embraces the appropriate interpretive lens everyone should apply when reading a document such as this, as set out in Monaghan (supra).



196. As held in Monaghan (supra) selection criteria have to be interpreted in a way that gives the words their natural and ordinary meaning. We also must consider the context in which they arise and the objectives those criteria are meant to achieve. The subjective interpretation of an individual is irrelevant. The reality in this sport is that athletes compete on teams, not as individuals. The natural and ordinary meaning of the words of the April 6, 2023 email must be read in that context.
197. Ms. Bukovec as an individual did not win the berth for herself. She has no right to create a new team after the fact or have one created for her, so as to maintain some type of individual right to participate in the 2023 World Championships.
198. As to the replacement process, I accept that if one looks solely at the April 6, 2023 email, then Volleyball Canada would have had considerable discretion on how exactly to exercise that discretion. I accept the evidence offered in terms of how that discretion was to be exercised and cannot find that to be inappropriate. Ms. Bukovec has not demonstrated she would have been selected, and indeed, it is clear she would not have been selected.
199. While it is true in an ideal world how exactly this discretion was to be exercised would all have been set out clearly and in plain language well in advance on a website easily accessible to all concerned, we do not live in an ideal world. For what it's worth however, and in considering the challenging reality of the limited resources facing most sports (that preferably would be spent on the development of the sport as opposed to dispute resolution in the sport), I again encourage all involved to strive for as broad and early publication of well-drafted and reasonable selection criteria as is possible in the circumstances. The less likely a problem is to arise, the better for all concerned.
200. In any event, the fact is that by the relevant time and when it became clear the original team of Ms. Bukovec and SM were ineligible, the criteria by which the replacement team would be selected (which were reasonable) had been appropriately established and published. I also find them to have been appropriately applied in this context.
201. I emphasize there was no absolute and predictable need to have pre-existing criteria for the selection of a replacement team, in this context. These criteria only could become applicable and relevant if the team which won the Canadian trials and successfully competed at NORCECA, proved to be ineligible.
202. Ms. Bukovec and SM formed that team. The evidence before me was clear they would have qualified for the selection by attaining the necessary ranking points for SM. Doing so would have led to the certainty they would have been selected.
203. Ms. Bukovec chose not to pursue that road to certainty but instead took a chance on a different team which by definition meant the replacement team selection process would need to be finalized and used.
204. This occurred by latest as of June 9, 2023. I do not accept there were substantive additional (and inappropriate) criteria added after the fact. I also find nothing about the situation to suggest any re-engineering or inappropriate actions by Volleyball Canada.

Volleyball Canada was responding to a challenging situation caused by Ms. Bukovec's own choices, in the overall context of a novel situation where the Canadian trials were taking place some months before the date by which the representative team for the World Championships was to be selected.

205. On July 25, 2023 Volleyball Canada's Beach High-Performance Director sent an email stating (in part):

I sent the email on June 9<sup>th</sup> (One day after you and SM earned Volleyball Canada a women's NORCECA berth to the Tlaxcala 2023 World Championships at the event in Punta Cana, DOM June 7-8, 2023) as a written reminder of what I stated during the Technical Meeting immediately before the VC NORCECA World Championships (WCH) Trials on May 5, 2023. Below are the main points I stated during the VC Trials Technical Meeting on May 5, 2023:

- That players must be ranked in the top 250 on the FIVB Individual Entry Ranking when Volleyball Canada submits the NORCECA berth nominations by August 11, 2023.
- As of the week of May 5, 2023, the 250<sup>th</sup> ranked player had 400 Individual FIVB Entry Points and because of this each player competing in the VC WCH Trials had to be in the "vicinity" of 400 points at the time of the VC Trials to be allowed to participate in the Trials. Any player with less than 200 individual Entry Points was not allowed to register for the VC Trials on May 5, 2023. In fact, the lowest ranked female players allowed to compete in the VC NORCECA WCH Trials on May 5<sup>th</sup> were EF and GH with 226 points each.
- The team that wins the VC Trials on May 5<sup>th</sup> will earn the right to represent Canada at the NORCECA Beach World Championship Qualifier (which was held June 7-8, 2023 in Punta Cana) and if that team earns a World Championship berth for Volleyball Canada, that team will be nominated by Volleyball Canada to compete in the 2023 World Championships PROVIDED that both players on this team are eligible to participate in the World Championships. I also stated that if either of the players were not eligible the week of August 11 (Rankings will be dated August 7, 2023) then Volleyball Canada will NOT nominate that team because they would be declared ineligible to get the NORCECA Berth by the FIVB and the next NORCECA National Federation from the NORCECA WCH Qualifier in Punta Cana (June 7-8, 2023) would get the berth (In this case CUB women would get the berth since they came in 5<sup>th</sup> place at the NORCECA WCH Qualifier). I also stated that if the team that earned the berth is not eligible then Volleyball Canada will decide the team to nominate and that Volleyball Canada will send the highest ranked team with both players eligible that would not qualify directly through the FIVB process (Top 23 teams qualify directly for the Tlaxcala World Championships).
- The final item I stated during the Technical Meeting on May 5, 2023 was that a team that earned the NORCECA World Championship berth was expected to play in at least one additional event together before the Tlaxcala 2023 World Championships. The commonsense policy that I highlighted in my email below – that new team that has never played together in 2023 will not be nominated by Volleyball Canada to compete in the World Championships – is consistent with this point.

206. Volleyball Canada was represented by legal counsel who has certain ethical obligations and of course ethically he could not have presented evidence which he knew to be untrue or misleading. I accept without question he would have made appropriate

inquiries and presented all evidence (including this email of July 25, 2023) believing it to be the truth. Accordingly, the evidence from Volleyball Canada is that in considerable detail starting on May 5, 2023 the details of how this selection process for a replacement team would work, were communicated to Ms. Bukovec and others.

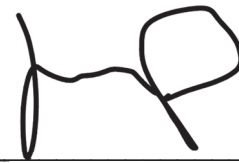
207. On the other side, Ms. Bukovec also was represented by legal counsel with the same ethical obligations. I likewise accept without question they would have made appropriate inquiries and presented all evidence believing it to be the truth. In the documents I have seen Ms. Bukovec asserted she did not remember these issues being discussed at the technical meeting of May 5, 2023.

208. Based on this, I am not prepared to draw the conclusion Volleyball Canada's Beach High-Performance Director and legal counsel for Volleyball Canada presented evidence they knew to be false. I conclude then there was explanation on these issues at the May 5, 2023 technical meeting and written communications on this continued afterwards. The selection criteria were appropriately established and Ms. Bukovec's subject interpretation is not relevant.

209. As a result, I dismiss the Request.

210. I thank all concerned for the professional and efficient manner in which the case was presented.

Signed in Winnipeg, Manitoba, this 18<sup>th</sup> day of August, 2023

A handwritten signature in black ink, appearing to read 'JP', is written above a horizontal line.

Jeffrey J. Palamar, Arbitrator