

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

May 9, 2019

No: SDRCC 19-0396

JOSIAH TONG
(Claimant)

AND

BADMINTON ALBERTA
(Respondent)

AND

CARSYN HE
NATHAN MAK
(Affected Parties)

Before: J.J. McIntyre (Sole Arbitrator)

Representative for the Claimant: Emmett Scrimshaw

Representative for the Respondent: Paul D. Reid

REASONS FOR AWARD

1. This is a team selection dispute. The Respondent is a Provincial Sports Organization in the sport of badminton. The Claimant is a 13-year old athlete. He is contesting the decision by Badminton Alberta not to include him in the selection of the Alberta team for the 2019 Western Canadian Team Championships (the "WCTC") being held April 26 - 28 in Richmond, British Columbia. The Affected Parties were identified as athletes whose selection to Team Alberta might be affected by a decision to include the Claimant.
2. Due to the urgency of the need for a decision on the matter and by the agreement of the parties, this matter came on for hearing on documents only. A short decision was rendered by me, as required, on April 25, 2019 finding that the Respondent had followed its published criteria and there was no basis for the Claimant to be added to the Alberta team for the WCTC.
3. As this matter is a fee for service dispute, the parties were given the opportunity to waive the requirement to provide full reasons for the arbitrator's decision and were asked to provide their position on costs. Badminton Alberta has requested a full reasoned decision. Badminton Alberta has also requested full indemnity costs. The Claimant (through his counsel) did not require full reasons and takes the position that each party should bear their own costs.

4. There is no issue that Badminton Alberta published the selection criteria for the WCTC on October 4, 2018 on a webpage on its website. The parties are in agreement that the selection criteria are not discretionary but based on an athlete's performance in certain events. The Claimant's position is that there is an ambiguity in how the Team Selection Criteria were applied. The Respondent's position is that it followed the selection criteria it stated for the WCTC.

The Published Selection Criteria

5. The WCTC format of play was stated to involve team matches versus other competing provinces in three age categories (U15 - born in 2005 or later, U17 - born in 2003 or later and U19 - born in 2001 or later). Each match tie was to consist of 1 Boys singles, 1 Girls singles, 1 Boys doubles, 1 Girls doubles, and 1 Mixed doubles in all age categories. Badminton Alberta was hoping to win gold in all three age categories.
6. Badminton Alberta did have some discretion as to the team make-up for the WCTC. It posted that it would invite a minimum of 4 athletes (2 male/2 female) to a maximum of 6 athletes (3 male/3 female) for each age category. The team size was to be determined by Badminton Alberta and was not necessarily going to be the same for each age category or gender.
7. Qualification was to be based on performance in singles, doubles and mixed doubles, utilizing results from the players' **"best 2 of 3 disciplines in 3 of the following events"**.
 - (1) Derrick Club Junior U11/13/15 (October 12-14, 2018)
 - (2) Royal Glenora Club Junior U17/19 (October 12-14, 2018);
 - (3) Calgary Winter Club Junior U13/15 (December 7-9, 2018)
 - (4) Glencoe Club Junior U11/17/19 (December 7-9, 2018);
 - (5) Gao Badminton - Smashcity Junior U11/13/15/17/19 (January 27-29, 2019); and
 - (6) B-Active Junior U11/13/15/17/19 (February 22 - 24, 2019).
8. Points were awarded based on whether an athlete was the event winner (2000), the runner-up (1700), a semi-finalist (1350) or a quarter-finalist (1000).
9. Importantly, the criteria on the webpage also stated:

Athletes may only qualify in their chronological age group. Should athletes choose to participate in older age groups, in any of the previous named events, THEY WILL NOT RECEIVE ANY QUALIFYING POINTS ACRUED IN THAT AGE CATEGORY

[Spelling of "accrued" is as per the website]

10. The webpage further stated that Badminton Alberta would tabulate the points for the athletes and recommend the team to be approved by the Badminton Alberta Board of Directors by March 28, 2019. Team announcement was to follow by the next day, March 29, 2019.
11. The webpage sets out the appeal procedure regarding athlete selection. Athletes are referred to the Appeal Procedure which is available from either the Badminton Alberta office or by downloading from the website. Appeals were to be received at the Badminton Alberta office by April 4, 2019.

Badminton Alberta Appeal Procedure

12. There is only one Appeal Procedure posted on Badminton Alberta's website, - the Team Selection Appeal Policy (the Policy"). The Policy provides for an internal appeal within Badminton Alberta and references that an external appeal (to the SDRCC) is available once the internal appeal is exhausted. The internal procedure is a step process as follows:
 - (1) An athlete -[...] can make a request to the President of Badminton Alberta to review the decision. The President can weigh the merits and decide.
 - (2) If the request is denied, the athlete -[...] can formally (in writing) appeal the decision to Badminton Alberta. The appeal must be accompanied by a letter of support for the appeal from the Member Club the athlete is affiliated to. The appeal must be sent by registered mail within 14 days of the selection publication.
 - (3) Once the appeal is received the Executive Director is to set up as soon as possible a neutral Appeal Committee consisting of a Badminton Alberta Executive Member, a Board Member, a representative from the Alberta Coaches and Competitions Committee, and in the case of an appeal regarding an official's matter a representative of the Badminton Officials Association
 - (4) The Appeal Committee communicates their decision in writing to Badminton Alberta and the appellant.
13. The Policy specifies that the grounds for an appeal hinge on four elements:
 - (1) That the decision making process did not follow the stated guidelines or procedures outlined by the association.
 - (2) That the individual or group making the decision were not empowered by the association to make such a decision.
 - (3) That the decision making was flawed in that important objective information was not considered by the decision maker and as a result the decision was unreasonable or unfair.
 - (4) That the decision was influenced by bias.

History behind Dispute

14. The Claimant participated in four of the Events listed in paragraph 7 above across multi-disciplines and age groups. He competed at both the U15 and U17

level in the Gao and the Glencoe Junior tournaments scoring first place finishes in U17 Boys singles at both competitions. The Claimant competed in only one U17 discipline and one U15 discipline (mixed doubles) at the Gao tournament. He competed in one U17 discipline and two U15 disciplines (boys doubles and mixed doubles) in the Glencoe tournament. At the Derrick tournament, the Claimant competed in three U15 disciplines (boys singles, doubles and mixed doubles) and at the B-Active tournament one U19 discipline (boys doubles).

15. Sometime after the B-Active Junior tournament, Badminton Alberta did select a team for the WCTC. It did not however announce the team until April 11, 2019.
16. Timothy Tong ("Mr. Tong"), the father of the Claimant, became aware through another parent that Badminton Alberta had extended offers to players for inclusion into Team Alberta for the WCTC. By emails to the President of Badminton Alberta dated April 10 (a day before the public announcement of the team) he requested the inclusion of the Claimant into Team Alberta for the WCTC. This was not the first request made by Mr. Tong. He had requested in an email to the President on March 11, 2019, a month before the team was announced, the inclusion of the Claimant into Team Alberta as a way to resolve issues that had arisen between Mr. Tong/the Tong family and Badminton Alberta. The undersigned is the arbitrator in other disputes between Mr. Tong, his sons, and Badminton Alberta.
17. Mr. Tong is a certified coach. He is a concerned and pro-active parent looking to support his sons in their chosen sport of badminton. In some ways he might be considered to be a manager of their sports careers.
18. Mr. Tong followed up his emails of April 10, 2019 with further emails to the President on April 11, 15 and 17 pushing for a decision on his request so that both the Policy and a possible appeal to the SDRCC could be accommodated before Team Alberta was to fly off for the WCTC.
19. On April 18, 2019 the President of Badminton Alberta, by email, rejected Mr. Tong's request, stating that he was in agreement with the decision reached by Badminton Alberta staff as to Team Selection. On the same date, Mr. Tong, by email and fax to Badminton Alberta, pursuant to the Policy, sought to appeal to an Appeal Committee the decision not to include the Claimant in Team Alberta.
20. In support of the appeal, Mr. Tong provided an email from his son's member club, dated April 10, 2019. This email was written before the announcement of the team and amounts to nothing more than a statement that the Claimant had a couple of wins at the U17 boys single level and wondering if there was a chance for him to be included in the team. It is a stretch to claim this email constitutes a letter of support for the Claimant's internal appeal under the Policy.
21. The grounds of the appeal advanced by Mr. Tong to Badminton Alberta included a belief that the 2 of 3 events referred to in the selection criteria could be

interpreted to mean the events the Claimant participated in and not the combination of disciplines. As the Claimant had won two U17 Boys singles events, he would have 4000 points which would be the best of any U17 athlete and therefore he should be included in Team Alberta for the WCTC in the U17 age category.

22. There were issues regarding method of receipt of the internal appeal by Badminton Alberta. Badminton Alberta appear to have made the process more difficult for themselves and the Claimant than they needed to. Regardless, Badminton Alberta did constitute an Appeal Committee and, on April 23, 2019 they considered the Claimant's internal appeal.
23. The decision of the Badminton Alberta Appeal Committee was communicated by email to Mr. Tong on April 23 following the meeting of the Appeal Committee. In their email dismissing the appeal, Badminton Alberta provided a breakdown of the points accumulated by the Claimant in each of the age categories based on his best 2 of 3 disciplines in those age categories. The Claimant's point totals ranked him at U15 - 7th in that age group; at U17- 17th in that age group and at U19 - 31st in that age group.
24. The Claimant has appealed the decision of the Badminton Alberta Appeal Committee to the SDRCC.

Positions of the Parties

25. At the outset, the Claimant questions whether he was excluded based on issues concerning his membership status. The stated basis for the appeal is that the decision is unreasonable as the selection criteria were misapplied. The Claimant asserts that Badminton Alberta is wrong to only consider the Claimant in the chronological U15 age category. The Claimant has reiterated his belief that his first place finishes at U17 constituted the best 2 of 3 events for that age group, better than the results for the Affected Athletes, and that he should have been selected before them. Further, as he had beaten both of the Affected Athletes at the Glencoe Club Junior Event in December, he should be part of the Alberta team. The Claimant has asserted that his total points across all age groups ought to have been considered and that it was unreasonable for the Appeal Committee not to have done so. There is a suggestion that Badminton Alberta took into consideration factors other than the best two results. Also, the Claimant says any ambiguity in the selection criteria should be interpreted in his favour and as there is a capacity to add another athlete to the Team, no other athlete would be affected. Lastly, there is a suggestion that if Jeff Bell, the Executive Director of Badminton Alberta, was a member of the Appeal Committee, that there is a reasonable apprehension of bias.
26. Badminton Alberta, referring to the criteria set out in paragraph 9 above takes the position that a player can and should only receive selection points in their rightful age category. Age categorization is important from the perspective of

Badminton Alberta, in order to ensure the athlete is not “cherry-picking” encounters in different age categories in order to secure ranking points against less able competitors. Further, Badminton Alberta in its team selection was seeking to put forward athletes that excelled in at least 2 of 3 disciplines (singles, doubles and mixed doubles) and not just a single discipline. Badminton Alberta’s position is that it followed the selection criteria set out for the WCTC and that there is no ambiguity in those criteria. Further, to depart from the selection criteria would promote unfairness in the sport. Badminton Alberta asserts that Mr. Tong in his emails to Badminton Alberta both before and after the announcement of the WCTC team sought to influence the decision making and a departure from the selection criteria. Badminton Alberta has denied any bias in team selection, setting out that it was based solely on the published selection criteria. Further, the position put forward that no other athlete would be affected by inclusion of the Claimant on the WCTC team is disputed. According to Badminton Alberta it has been forced to curtail its budget for the WCTC, and not send as many athletes as it wanted to as a result of having to spend its money on unforeseen expenses including litigation and the threat of litigation (by Mr. Tong). Lastly, if there were resources available for it, athletes other than the Claimant would be entitled to precedence for team selection to the WCTC based on their point totals.

27. Badminton Alberta with their response to this appeal have included the spreadsheet of points for all athletes that participated in the listed events. The spreadsheet confirms the results stated by the Appeal Committee as to the Claimant’s position in each of the age categories.
28. The mother of one of the Affected Parties filed an email response to the Claimant’s appeal. She references the impact of adding another player to the team could have on reduced playing time for the rest of the team. Further she states that the selection criteria (for the WCTC) were understood at the beginning of the season and were published on the Badminton Alberta website. Her position is that a long term impact of adding another player to the team is that it indicates players do not need to read and follow the rules and does not set a good example for younger players.

Findings on Appeal

29. Team selection disputes are not unknown to the SDRCC and in fact make up the majority of the disputes to come before it. The SDRCC has prepared a guide entitled *Selection Criteria for Major Events in Sport* which sets out the principles and best practices that a sporting organization should consider when formulating a selection policy. The guide is primarily directed to national sport organizations, but the principles and best practices would be of benefit to any sport organization fielding a team for competition.

30. The failure of an athlete to meet a criterion for team selection could prevent the athlete from being able to participate in a competition. The athlete has a right to learn and understand each step in a selection process in order to have the greatest chance of participating in an event. It is the responsibility of the sport organization to make the selection criteria public so that its athletes have access to accurate information regarding what is to be expected of them in order to be selected.
31. In *Richer v. The Canadian Cerebral Palsy Sports Association (including Boccia Canada)*, SDRCC 15-0265, Arbitrator Pound made the following comments regarding selection criteria and bias (at page 11):

Selection criteria need to contain some reasonable flexibility, but at the same time, cannot be entirely arbitrary. Certain sports lend themselves to somewhat easier team selection choice, where objective criteria such as times, point scores, weights and distances can be used. Others can be more or less self-selections, such as eligibility based on the results of qualification tournaments. The more difficult choices occur when there may be some element of judgment required regarding performance standards or a need to produce a team that will function most effectively in competition. The default position in such cases, absent reviewable error or proof of bias, is that those responsible for selection decisions are generally the most knowledgeable and experienced persons available, who attempt in good faith to produce the best possible outcomes in the particular circumstances.

-[...] Litigants should be aware that an allegation of bias is a serious accusation. Arbitrators will not lightly conclude that decisions by sport officials have been so tainted by bias as to require that such decisions be reversed or voided. The seriousness of the accusation of bias is such that the person alleging it must bring forward convincing evidence to support the allegation. The allegation itself is not evidence of bias. Disagreement with an outcome is not evidence of bias. The mere exercise of discretion is not, of and by itself, evidence of bias. Evidence of bias may be direct or circumstantial. It may also lead to inferences and a shifting of onus, but the primary onus clearly rests on the accuser.

32. In *Rolland v. Swimming Canada*, ADR 02-0011, Arbitrator Clément made the following comments regarding selection criteria (at pages 3-4):

The Arbitration Tribunal is emphasizing that it cannot substitute its own opinion [...] on what constitutes reasonable or desirable selection criteria to be applied [...]

The Tribunal's role is to determine whether the decision [being reviewed] is unreasonable or otherwise made in bad faith or in an arbitrary or discriminating matter.

33. In *Mehmedovic v. Judo Canada*, SDRCC 12-0191/92, Arbitrator Décarý found that arbitration proceedings under the SDRCC Code were akin to a judicial review, as opposed to an appeal or a trial *de novo*. Arbitrators as a matter of course owe deference to the expertise and experience of the sporting authorities. The standard of review is to be that of reasonableness. Absent provisions to the contrary, the burden is on the Claimant to demonstrate the decision is unreasonable. He stated:

[30] [...] when it comes to assessing policy decisions, arbitrators can only intervene in exceptional circumstances such as where a policy would have been adopted in bad faith or without jurisdiction, would be contrary to law (a discriminatory policy, for example), would have been adopted through a biased process or, at the limit, where it is so vague or so discretionary as to be inapplicable with any kind of certainty.

-[...]

[33] When the decision [...] is attacked [...] against the policy itself [...] the standard of review becomes even more stringent. Policy-makers are recognized a quasi-absolute discretion when it comes to making priorities and choices of methods or criteria and arbitrators are expected to stay away from any second guessing except in such exceptional circumstances as I have described above.

34. Having reviewed the documents and submissions of the parties, I have no hesitation in finding that the selection criteria adopted by Badminton Alberta for the WCTC were made public. The criteria adopted and to be followed were known to the athletes in October 2018. As the mother of one of the Affected Parties stated, the criteria were known to all at the beginning of the season.
35. The Claimant's submission alleging a misapplication of the Badminton Alberta selection criteria for the WCTC is based solely on an alleged ambiguity in those selection criteria which he submits should be resolved in his favour. Such a result would advantage himself at the expense of those athletes that competed in their chronological age groups in multiple disciplines at the specified Events and who thus scored higher than the Claimant in their age groups. Such an interpretation, if adopted by Badminton Alberta, would be unfair to those other athletes who were not misled by any misunderstanding of the selection criteria.
36. Knowing the criteria to be considered for team selection to the WCTC, athletes could choose what disciplines and age groups in which to compete at the specified Events. If the Claimant was confused in any way by the selection criteria for the WCTC, he could have made inquiry to Badminton Alberta before participating outside his chronological age group. He did not do so.

37. I find the selection criteria for the WCTC team were objective and to be based on actual results in multi-disciplines at specified events. Athletes were warned that points accumulated in other age groups would not be considered. These were policy decisions of Badminton Alberta relating to selection criteria that it was entitled to make and that ought to be accorded deference. There is nothing in the evidence filed that would suggest that such decisions were made in bad faith or under any other exceptional circumstances that would justify interference by an arbitral tribunal.
38. Having reviewed the documents and evidence filed, I find the Claimant has failed to establish there was anything unreasonable about the selection criteria or process adopted by Badminton Alberta applying those criteria for the WCTC team. It is clear that Badminton Alberta considered and tabulated the point results of all athletes competing at the specified Events and made their team selections based solely on those results.
39. The Claimant has failed to establish bias on the part of anyone from Badminton Alberta's initial Selection or Appeal Committees or the Executive Director regarding team selection for the WCTC. It is not enough to suspect and then allege bias. There is no evidence to support such a conclusion. Indeed the evidence that the team was essentially self-selected based on the athletes' results, is contrary to any suggestion of bias.
40. In all the circumstances, the Claimant has failed to establish any basis for the Claimant to have been added to Team Alberta for the WCTC. The Claimant's appeal from being left off the Team is dismissed.

Costs

41. In the normal course of SDRCC arbitrations, pursuant to s. 6.22(a) of the Code, subject to s. 6.22(c), costs of the arbitration are typically borne equally by each party. Section 6.22(c) states:

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 the Arbitration. Success in an Arbitration does not mean that the Party is entitled to be awarded costs.

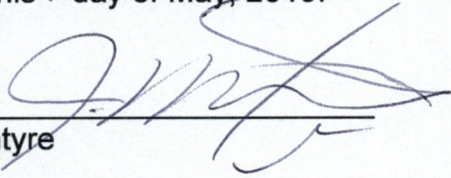
42. In the case of *Canadian Amateur Diving Association v. Miranda*, SDRCC 05-0030 Arbitrator Ratushny held that cost awards should be reserved for exceptional circumstances, such as an exceptional breach of the principles of fairness or natural justice.
43. The outcome of this particular dispute is entirely in favour of Badminton Alberta.

44. By agreement, this was an arbitration based on documents. There was nothing in the conduct of the parties during the arbitration that can be faulted. Following release of the Short Decision, Badminton Alberta sought a fully reasoned decision which has added to the expense of this arbitration, whereas the Claimant did not need or seek a fully reasoned award.
45. The evidence is that Mr. Tong has significant financial resources, far superior to those of Badminton Alberta. He has made reference to that in his own documents and emails filed as exhibits.
46. Badminton Alberta is a non-profit organization set up to advance the sport of badminton in the Province of Alberta. It takes the position that it has had to spend its limited resources on legal expenses to defend its decisions from the attacks made by Mr. Tong in this and other disputes. Consequently, Badminton Alberta is seeking a full indemnity for its counsel costs in this Appeal which it has estimated at \$5,000.
47. A troubling aspect to this dispute is that Mr. Tong, prior to the official announcement of the Team, on behalf of the Claimant, on March 12, 2019 sought to have the Claimant added to the Team under the threat of litigation and as a method of dealing with other issues and disputes that Mr. Tong and the Tong family were having with Badminton Alberta. In other words he was seeking that the Respondent depart from its stated criteria for the selection of Badminton Alberta's WCTC Team in order to favour his son over those athletes that had superior scores and results in the multiple disciplines. He must have known his sons did not meet the stated criteria as he had downloaded those webpages on March 11, 2019.
48. As a parent it is not surprising that Mr. Tong advocates for the best outcomes for his son(s) in their development and participation in the sport. As a certified coach, Mr. Tong ought to consider the best interests of the sport, including all of its athletes, not just the best interests of his son(s) when it comes to his conduct.
49. I find that Mr. Tong's conduct in seeking that the Respondent resolve other issues by including the Claimant in the selection for the WCTC Team and contrary to its published criteria is an aggravating factor and overstepped the bounds of fairness. His conduct under the threat of litigation in essentially trying to bully Badminton Alberta to name his son to the WCTC team, is thus deserving of a cost award in favour of the Respondent.
50. Given that the request for a fully reasoned decision has increased the tribunal costs to be borne by the Claimant, I hereby set the amount of the costs to be paid by Claimant to Badminton Alberta at the sum of \$1,500. Such an award should signal to Mr. Tong and others to be judicious about what disputes need to be redressed and not to use their superior financial resources as a weapon to force sporting organizations to depart from their policies and procedures in order to advantage the athletic aspirations of a small few. Fairness demands that all

athletes in the sport are able to compete under the same rules and criteria.

Dated this ^{9th} day of May, 2019.

JJ McIntyre

A handwritten signature in black ink, appearing to read 'JJ McIntyre', written over a horizontal line. The signature is stylized and cursive.