

No.: SDRCC 18-0376

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)  
CENTRE DE REGLEMENT DES DIFFERENDS SPORTIFS DU CANADA (CRDSC)**

ADHAM SHARARA

Appellant

-and-

TABLE TENNIS CANADA (TTCAN)

Respondent

**REASONS FOR AWARD**

(Hearing by Conference Call January 24, 2019)

**Arbitrator:** Larry Banack

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## I. OVERVIEW

1. The Appellant, Mr. Adham Sharara (hereafter Mr. Sharara), appeals the decision of the Respondent, Table Tennis Canada, and specifically its Board of Directors (“**TTCAN Board**”) finding him ineligible to run for President of TTCAN as a result of a conflict of interest (the “**impugned decision**”).
2. Mr. Sharara was informed of the impugned decision on September 20, 2018.
3. On September 27, 2018, Mr. Sharara appealed the impugned decision pursuant to the TTCAN Appeals Policy. Mr. Sharara raised five grounds of appeal.
4. An independent TTCAN Tribunal was constituted to review Mr. Sharara’s grounds for appeal (“**TTCAN Appeals Tribunal**”). The TTCAN Appeals Tribunal concluded that only one ground of appeal, whether the Board’s decision was influenced by bias, should proceed to a hearing before this Tribunal.
5. There is a dispute between the parties as to the proper grounds of appeal before me. For the reasons below, I do not need to resolve this dispute as I grant Mr. Sharara’s appeal on the basis that there was a reasonable apprehension of bias in the TTCAN Board’s decision that Mr. Sharara is ineligible to run for President of TTCAN due to a conflict of interest. Moreover, I find no basis to conclude that Mr. Sharara is in a conflict of interest, or otherwise fails to meet the eligibility criteria for nomination to the Board of Directors, as set out in the TTCAN Bylaws.
6. I grant the appeal, reinstate Mr. Sharara’s nomination for President, and direct the Respondent to call an election for the President of TTCAN at its earliest opportunity.

## II. THE STANDARD OF REVIEW

7. Mr. Sharara argues that I ought to consider this appeal *de novo*. He relies on Article 6.17 of the Canadian Sport Dispute Resolution Code (the “**Code**”) and a decision by Arbitrator Mew, in *Bastille v Speed Skating Canada* (SDRCC 13-0209).
8. TTCAN relies on the same Article 6.17 for its position that I am not entitled to conduct a *de novo* appeal, given that Mr. Sharara triggered a TTCAN Appeals Tribunal, which properly considered his appeal.

9. The relevant parts of Article 6.17 provide:

**Scope of Panel's Review**

(a) The Panel shall have full power to review the facts and apply the law. In particular, the Panel may substitute its decision for:

(i) the decision that gave rise to the dispute; or

...

(b) For the avoidance of doubt, the Panel shall have the full power to conduct a procedure de novo where:

(i) the N[ational] S[port] O[rganization] did not conduct its internal appeal process or denied the Person a right of appeal without having heard the case on its merits; or

(ii) if the case is deemed urgent, the Panel determines that errors in the NSO internal appeal process occurred such that the internal appeal policy was not followed or there was a breach of natural justice.

10. While I am not bound by any precedent, I am guided by the decisions of other Arbitrators. I agree with Arbitrator Mew that Rule 6.17 effectively provides that I am not required to give any deference to the decision maker below. An appropriate exception to this would be where the decision maker has a particular advantage, like specialized knowledge or expertise relevant to the determination in question.

11. The impugned decision only relates to the existence of a conflict of interest, and I do not believe that the TTCAN Board possesses any particular advantage in making this determination which would support deference. Even if I am wrong, however, it would not change the result as I find there to be no reasonable basis upon which the TTCAN Board could have found Mr. Sharara to be ineligible to run President by reason of a conflict of interest.

### **III. BACKGROUND**

#### **A. MR. SHARARA**

12. Mr. Sharara delivered a will-say statement along with his submissions in support of this appeal. At the outset of the hearing, counsel for TTCAN confirmed that it did not dispute the content of Mr. Sharara's will-say statement and would not be cross-examining him thereon. I therefore accept Mr. Sharara's will-say statement as uncontroverted evidence.
13. Mr. Sharara is a former competitive table tennis player and coach. He has also participated at various levels in the administration of the sport. He is a former member of the TTCAN Board, and held increasingly senior roles with the International Table Tennis Federation ("**ITTF**") between 1995 and 2017.
14. Mr. Sharara also served as a volunteer member of the Board of Directors of Table Tennis Marketing Services International Inc. ("**TMS**"), a Canadian not-for-profit founded in 2001 that provided marketing services to table tennis clients, including ITTF, around the world. Mr. Sharara's association with TMS seems to be the main source of concern for the TTCAN Board members.
15. Mr. Sharara was a volunteer director with TMS and received no compensation for his services.
16. Moreover, beginning in 2017, TMS began the dissolution process. It ceased doing active, revenue generating business on or about January 1, 2017 and in accordance with Canadian corporate law, distributed its outstanding assets to other charitable/not-for-profit entities.
17. Mr. Sharara resigned from his volunteer directorship position with TMS on August 30, 2018. TMS was then dissolved effective November 19, 2018.
18. Unrelated to his role with TMS, in the summer of 2018 Mr. Sharara began a discussion with the Quebec Table Tennis Federation ("**QTTF**") about how Mr. Sharara could contribute to the organization. According to Mr. Sharara, he began his competitive table tennis career in Quebec and was looking to give back.

19. These discussions culminated in the signing of a cooperation agreement between Mr. Sharara and the QTTF on September 9, 2018, in which Mr. Sharara pledged to assist the QTTF with, among other things, the recruitment of a French-speaking technical director. It seems that most of the assistance Mr. Sharara pledged to provide to the QTTF had already been completed at the time the cooperation agreement was signed in September 2018. According to Mr. Sharara, the actual written agreement was effectively a promotional document, symbolic of the cooperation between him and the QTTF.
20. TMS is not a party to the cooperation agreement between Mr. Sharara and the QTTF.

B. NOMINATION FOR PRESIDENT OF TTCAN

21. Just prior to the execution of the cooperation agreement, Mr. Sharara was nominated for President of TTCAN by QTTF on or around August 30, 2018. His nomination was supported by letters of support from Table Tennis North, as well as the Manitoba Table Tennis Association.
22. In accordance with Article 4.19 of the TTCAN Bylaws, the election for President was to take place at the annual meeting of the General Assembly, which was to be held on or around September 23, 2018.
23. Between August 30-September 19, 2018, Mr. Sharara says that it was brought to his attention that his connection to TMS was a concern for certain members of TTCAN. Mr. Sharara does not say how he came to understand this, but it is clear that there was no official communication on behalf of the TTCAN Board.
24. On September 20, 2018, Mr. Sharara sent an e-mail to the members of the TTCAN Board that were handling nominations. His e-mail explained that he is a volunteer director for several not-for-profit organizations, but that he no longer holds a position with TMS, which was in the process of winding down its activities. Mr. Sharara then lists the organizations he assists, and attaches a sworn affidavit acknowledging the TTCAN Code of Conduct /Conflict of Interest for Board Directors policy, agreeing to abide by it, declaring that he was not currently in a conflict of interest, but offering to resign from any volunteer directorships upon his election as TTCAN President, if requested to do so.

25. On that same day, Mr. Sharara received an e-mail from the TTCAN Board that it had found him to be ineligible to stand for election as TTCAN President by reason of a conflict of interest given his role with TMS and the cooperation agreement with the QTTF. No other reasons were provided. I understand that from the minutes of the TTCAN Board's meeting on September 19, 2018, that the current President, and only other nominee for President, recused himself from the TTCAN Board's decision.
26. Conflicts of Interest are dealt with by the TTCAN Code of Conduct /Conflict of Interest for Board Directors policy ("**Conflict Policy**"), which provides that:

#### **CONFLICT OF INTEREST**

A Conflict of Interest arises where a director has a direct or indirect interest, financial or otherwise, or has a duty that is in conflict with the performance of the director's duties owed to TTCAN or is sufficient to influence or appear to influence that performance. An indirect interest may arise, for example, through a relative or friend.

For that reason a director may not hold, nor an immediate family member hold, a financial interest, directly or indirectly, or hold a management position in an organization in a relationship with TTCAN whereby that director could in any way benefit the other organization by influencing the purchasing, sponsorship arrangements or other decisions of TTCAN.

Exception: A director may hold a volunteer position in a provincial/territorial member association. This is not regarded as a Conflict of Interest.

A Conflict of Interest can be real or perceived. Perceived Conflicts of Interest are more frequent than real Conflicts of Interest. Both are harmful to the public trust in TTCAN and are therefore prohibited.

...

27. Following the decision, in the late evening of September 20, 2018, Mr. Sharara followed up with the TTCAN Board by clarifying again that he was no longer a volunteer director of TMS, which was in the process of being dissolved. He further stated that his cooperation agreement with QTTF did not create a conflict of interest with TTCAN and he raised his own concerns about bias among the TTCAN Board in respect of the handling of his nomination.
28. The following day, Mr. Sharara's personal lawyer wrote to the Chair of the Members' Council of TTCAN reiterating many of the same points. The Members Council is made up of delegates of each member association. In accordance with Article 5.4.1 of the TTCAN Bylaws, the Members Council is responsible for appointing members to the Nominating Committee and the election of the Board of Directors, among other things.
29. I note that Article 4.14 of the TTCAN Bylaws also provides that the Board will appoint the Nominating Committee, an ambiguity that Mr. Sharara has raised since the impugned decision. While it is not for me to resolve this ambiguity as nothing in this appeal turns on this, it would provide clarity to future nominees and the organization as a whole for the TTCAN Board to resolve this as soon as possible.
30. At a meeting of the Members' Council on September 22, 2018, the Members' Council voted to reinstate Mr. Sharara's nomination and to invite him to address the Annual General Assembly on September 23, in advance of the election.
31. When Mr. Sharara attended the General Assembly meeting, Mr. David Jackson, the incumbent TTCAN President and only other candidate for President in the election, advised Mr. Sharara and the General Assembly that Mr. Sharara was not eligible to be a candidate and not permitted to address the Assembly.
32. An election vote did not proceed. Rather, Mr. Sharara was provided the opportunity to appeal, which he did by Notice of Appeal dated September 27, 2018.

### C. THE APPEAL

33. Mr. Sharara delivered detailed grounds for appeal on September 27, 2018, which were then updated on October 22, 2018. In all, he raised five grounds of appeal.
34. In accordance with the TTCAN Appeals Policy, the TTCAN Appeals Tribunal was constituted to review the notice of appeal and reasons for appeal to “decide whether or not there are sufficient grounds for an appeal.”
35. As noted above, in the present case, by e-mail dated October 30, 2018, the TTCAN Appeals Tribunal dismissed four out of the five grounds of appeal raised, but determined that it “was unable to rule, without doubt, that the persons appointed to the Nominating Committee were without conflict of interest or bias in coming to its decision regarding [Mr. Sharara’s] nomination to the Board of Directors.”
36. In accordance with section 7 of the TTCAN Appeals Policy, the TTCAN Appeals Tribunal referred the matter to the SDRCC.
37. The parties agree that the issue of bias in respect of the TTCAN Board’s decision is properly before me. Given my conclusion on this ground, I do not need to determine whether I have jurisdiction to consider the other grounds raised by Mr. Sharara.

### IV. **THE IMPUGNED DECISION**

38. In its decision dated September 20, 2018, the TTCAN Board stated as follows:

Dear Adham,

Following your nomination to the position of President the TTCAN Board of Directors, in consultation with the Sports Law and Strategic Group have unanimously found that Mr. Sharara does not meet the criteria for eligibility by virtue of conflict of interest.

As per the Table Tennis Canada Code of Conduct Conflict of Interest Policy: “No candidate shall stand for election for the position of director of TTCAN if he/she is in a position of Conflict of Interest, real or perceived.”

....



As per the attached advertisement on the QTTF Facebook page, Mr. Sharara through his company TMS has entered into an arrangement putting him in clear conflict of TTCAN Conflict of Interest. For your information we have also attached TMS Federal Corporation Information as of September 7, 2018 from Government of Canada.

Should the nominee wish to appeal he may do so by filing with the President of Table Tennis Canada. Should the President of Table Tennis Canada find himself in conflict, an independent Director will be nominated to conduct the investigation. Should this appeal take place after the AGM and be successful a re-election will take place to include their nomination.

(My emphasis.)

39. The basis of the TTCAN Board's decision is clearly that Mr. Sharara, *through his company*, holds an agreement with QTTF that puts in him a clear conflict of interest with TTCAN pursuant to its Conflict Policy.
40. The QTTF Facebook post announcing its cooperation agreement with Mr. Sharara as well as the Federal Corporation Information for TMS as of September 7, 2018, were the only documents provided by the TTCAN Board in support of its decision.
41. In addition to the documents attached to the TTCAN Board's decision on September 20, 2018, counsel for the Respondent notes in his submissions that the TTCAN Board considered a letter from Steve Dainton, the current CEO of ITTF, dated September 15, 2018. Neither this letter, nor its contents, were referenced in the TTCAN Board's decision. Most importantly, it was never provided to Mr. Sharara. The TTCAN Board cannot now rely on this letter to change or bolster the basis of its decision in respect of Mr. Sharara's nomination.

**V. THE TTCAN BOARD DISPLAYED A REASONABLE APPREHENSION OF BIAS**

42. The parties agree that Justice de Grandpre's dissent in *Committee for Justice and Liberty v Canada (National Energy Board)*, [1978] 1 SCR 369 at page 394, sets out the appropriate test in determining a reasonable apprehension of bias. According to Justice de Grandpre:

... the apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information. In the words of the Court of Appeal, that test is "what would an informed person, viewing the matter realistically and practically — and having thought the matter through — conclude.

43. The Respondent rightly points out that both the person considering the alleged bias must be reasonable, as well as the apprehension itself. In addition, the party alleging the bias bears the onus of proof, and the threshold for finding a real or perceived bias is high. See *R v S (RD)*, [1997] 3 SCR 484 at paragraphs 111-114.
44. Mr. Sharara argues that because the members of the TTCAN Board who decided that Mr. Sharara was ineligible for nomination currently work with Mr. Jackson, the only other nominee for President who stood to gain if Mr. Sharara was prevented from running, the deciding Board members were in a conflict of interest between their allegiance to their current colleague and their duties as Board members.
45. In addition, Mr. Sharara argues that the TTCAN Board members who determined Mr. Sharara's ineligibility never afforded him an opportunity to make representations in the face of their concerns. They went so far as to solicit submissions from the ITTF, but did not contact Mr. Sharara. They also disregarded the representations Mr. Sharara made on September 20, prior to receiving the Board's decision and again on September 21 and 22, in response to the Board's decision.
46. Lastly, when Mr. Sharara's personal counsel contacted the Chair of the Members' Council, the latter agreed to allow Mr. Sharara's nomination, which was then again blocked by Mr. Jackson and the Board at the General Assembly.
47. According to Mr. Sharara, in light of the information provided, and specifically the concrete evidence that he was no longer a director of TMS at the time of his nomination, there was no basis upon which to find a conflict of interest. The Board's conduct, and specifically the fact that the TTCAN Board refused to consider this information, is in and of itself an indication of its bias.

48. The Respondent relies on the high threshold for finding real or perceived bias. It argues that Mr. Sharara cannot satisfy the heavy onus. Given that Mr. Jackson, the Board member with a real conflict of interest, recused himself from the TTCAN Board's decision, the Respondent states that it is insufficient for Mr. Sharara to point to the position of current Board members as colleagues of a conflicted Board member as the basis for their bias against him. If that were enough, every time a board member declared a conflict of interest and recused him/herself, the rest of the board would be in a conflict of interest. According to the Respondent, at the time the TTCAN Board made its decision, it had ample information on which to base it.
49. With respect, I disagree with the Respondent. While a conflict of interest, real or perceived, does not automatically follow from the fact that the TTCAN Board members currently serve with the only other person running for President, this fact, considered in light of the TTCAN Board's conduct and decisions surrounding Mr. Sharara's nomination gives rise to a reasonable apprehension of bias.
50. In advance of the TTCAN Board's decision on September 20, 2018, Mr. Sharara sent an e-mail to those Board members handling the nominations advising that it had been brought to his attention that there were concerns about him being in a conflict of interest as defined by the TTCAN Conflict Policy. It is clear that Mr. Sharara was not aware of the specific concerns had by the Board members, because his e-mail proceeds to comprehensively set out his involvement with all other organizations and attaches a sworn affidavit acknowledging the TTCAN Conflict Policy and his agreement to abide by it. This e-mail also notes that he was not currently a director of TMS, which was in the process of winding down its activities.
51. The TTCAN Board did not reply to this e-mail, nor did it ever formally advise Mr. Sharara of any concerns it had about his nomination.
52. Moreover, once the impugned decision was made, and the TTCAN Board found Mr. Sharara ineligible on the basis of his relationship with TMS and QTTF, Mr. Sharara submitted the requisite corporate documentation to prove his prior statement that he was no longer a director of TMS, and had not been at the time of his nomination. In addition, he confirmed that TMS was not his company, rather, he was a volunteer director, and

given that TMS was a not-for-profit organization, even if he continued to be a volunteer director, it was not doing business with TTCAN, nor had it been for some time, and he had never received any financial benefit for his services.

53. In the face of these submissions, and particularly the conclusive evidence that Mr. Sharara was no longer a director of TMS, the TTCAN Board did nothing. More alarmingly, even when the Members' Council was provided with the same information and agreed to reinstate Mr. Sharara's nomination and have him address the General Assembly, Mr. Jackson, the President and Chair of the Board intervened. Counsel for the Respondent argued that once the decision was made by the TTCAN Board, there was nothing they could do except allow Mr. Sharara his appeal rights under the TTCAN Appeals Policy. With respect, I disagree. The election had not yet taken place, and I see no reason why the TTCAN Board could not have, in the face of information that it was incorrect in its determination, make a new determination.
54. I have no hesitation in concluding that Mr. Sharara is not in a conflict of interest for the reasons suggested by the TTCAN Board in its e-mail dated September 20, 2018.
55. The TTCAN Conflict Policy provides that a director (or his/her immediate family) may not hold "a financial interest ... or ... a management position in an organization in a relationship with TTCAN whereby that director could in any way benefit the other organization by influencing the purchasing, sponsorship arrangements or other decisions of TTCAN."
56. The TTCAN Board's concerns relate exclusively to Mr. Sharara's relationship with TMS, which was not *his* company, as suggested. Moreover, Mr. Sharara had resigned from his position as volunteer director at the end of August 2018, prior to, or at the same time as his nomination for President. Lastly, given that TMS was a not-for-profit corporation from which Mr. Sharara derived no financial benefit, it is unclear whether his role as volunteer director was even sufficient to create a conflict of interest. Given that he was not a director at the time of his nomination, and certainly was not a director at the date of the anticipated election, I do not need to resolve this issue.

57. Moreover, the TTCAN Board also raises a concern that Mr. Sharara's agreement with the QTTF creates a conflict of interest pursuant to the TTCAN Conflict Policy. While the impugned decision suggests that Mr. Sharara signed this agreement through his company, TMS, I have already found this to be a factual error. Assuming the TTCAN Board would have a similar issue with Mr. Sharara signing a cooperation agreement in his personal capacity, in my view it is determinative that the TTCAN Policy contains an exception to its definition of a conflict of interest for directors who hold volunteer positions in "a provincial/territorial member association" which undoubtedly includes the QTTF. According to Mr. Sharara's uncontroverted evidence, the cooperation agreement is of a volunteer advisory position, not a management role, and for which he derives no financial benefit.

58. It is my view that a reasonable person would conclude that the TTCAN Board's decision that Mr. Sharara was ineligible to run for President of TTCAN on the basis of a conflict of interest was biased, having consideration for the following circumstances:

- a. the current TTCAN Board was charged with determining Mr. Sharara's eligibility to run for President;
- b. Mr. Sharara was the only nominee for President of TTCAN other than the incumbent;
- c. Mr. Sharara provided a sworn statement that he was not in a conflict of interest with TTCAN in advance of the impugned decision;
- d. The TTCAN Board never raised concerns with Mr. Sharara in advance of the impugned decision;
- e. The Members' Council re-instated the nomination;
- f. The TTCAN Board relied on incorrect information that it knew to be incorrect prior to the anticipated date for the election; and
- g. Notwithstanding the knowledge that it had relied on erroneous facts the TTCAN Board refused to reconsider its decision.

59. Given my review of the documents concerning Mr. Sharara relationship to TMS and the QTTF, I find that insofar as his relationship with these two organizations is concerned, Mr. Sharara is not in a conflict of interest as defined in the TTCAN Conflict Policy. I therefore grant Mr. Sharara's appeal and given that there were no other objections to his eligibility for nomination as President of TTCAN, I restore his nomination for TTCAN President and direct the Respondent to hold an election at its earliest opportunity.

Dated at Toronto this 31st day of January, 2019.



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LARRY BANACK