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

No: SDRCC 16-0295

Sébastien Beaulieu
(Claimant)

and

Canada Snowboard
(Respondent)

Appearances:

For the Claimant:	Louise R. Guerrette Sébastien Beaulieu Jean Beaulieu
For the Respondent:	Patrick Jarvis Jean-François Rapatel Tyler Ashbee

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REASONS FOR DECISION

1. Introduction

1. This case concerns the Claimant's challenge of the Respondent's Carding Nomination Criteria & Procedures (the "Criteria"), relevant to the Sport Canada Athlete Assistance Program (the "AAP") for the 2016-2017 Carding Cycle. The Criteria were created October 22, 2015, ratified November 2, 2015 and then had some corrections made on March 11, 2016.

2. Simply put, the Claimant challenged the validity of the Criteria essentially on the basis that they imposed a maximum age of eligibility for a Developmental Funding Card from Sport Canada under the AAP. The Claimant asserted that the age restriction was invalid and discriminatory, and so should not be considered at all. As an alternative position, he asserted that if the Respondent could establish that age should even be considered, then age should simply be one criterion amongst others and not a mandatory condition.

2. Procedural Background

3. On or about March 17, 2016 the Claimant filed an internal appeal with the Respondent challenging the age restriction respecting the Development Funding Cards. He alleged that the Respondent had failed to consider relevant information or took into account irrelevant information in producing the Criteria, or had produced Criteria which were grossly unreasonable. This later led to the Respondent waiving the application of its internal appeal process and policy and instead on or about April 20, 2016 the parties proceeded to the mediation process required under the *Canadian Sport Dispute*

Resolution Code (January 1, 2015) (the "Code"). This was unsuccessful and the parties agreed to proceed with final and binding arbitration on a question of "judicial review" of the Criteria under the Code, prior to any carding decision actually being made by the Respondent's Selection Committee.

4. The parties thereby recognized the jurisdiction of the SDRCC to render a final and binding decision of the matter in dispute and at the hearing on the merits confirmed their acceptance of me acting as Arbitrator.

5. On May 16, 2016 we held a preliminary conference call to deal with process and timing issues and on May 20, 2016 (concluding on May 25, 2016) we proceeded to a hearing on the merits. At the close of the hearing, after each party had presented its case (including documentary evidence, witnesses and arguments) each confirmed having been allowed a fair hearing.

6. On June 1, 2016 I issued my short decision without reasons in accordance with the Code. The SDRCC advised the parties of my decision that same day it was issued. In my decision I ordered as follows:

> This is my decision pursuant to the Canadian Sport Dispute Resolution Code (January 1, 2015) (the "Code") arising from the hearing which took place on May 20, 2016, concluding on May 25, 2016.
>
> The Claimant challenged the Respondent's Carding Nomination Criteria & Procedures (the "Criteria") relevant to the Sport Canada Athlete Assistance Program for the 2016-2017 Carding Cycle. In particular the Claimant alleged that the Criteria were invalid as they imposed an age limit for athletes seeking to be nominated for Developmental Funding Cards, through the Sport Canada Athlete Assistance Program.
>
> After considering all of the evidence and arguments advanced, I have decided to dismiss the Request of the Claimant.
>
> Complete written reasons for my decision will follow within the timelines prescribed by the Code.

7. The reasons for my decision are set out below.

3. Factual Background

8. The facts set out below are a summary of the most salient parts of the evidence. Even though not documented in these Reasons, in coming to my decision I have considered all of the evidence presented.

9. We heard testimony from Sébastien Beaulieu (the "Claimant"), Jean Beaulieu (the father of the Claimant), Patrick Jarvis (the Executive Director for the Respondent), Jean-François Rapatel (the Sport and High Performance Director of the Respondent) and Tyler Ashbee (the High Performance Manager of the Respondent).

10. The Criteria address both Developmental Funding Cards and Senior Cards. The key portion of the Criteria related to Developmental Funding Cards is as follows:

13. Development Cards (D):

'D' cards are intended to support the development needs of younger athletes who clearly demonstrate the potential to achieve the Senior International criteria but are not yet able to meet the Senior criteria.

'D' cards are awarded on the basis of Junior Worlds Championship (JWCH), International Events results and Canadian Ranking Lists points;

To be eligible for a 'D' card, athletes must be younger than 5 years post the FIS junior age category of the 2016-2017 season for the Alpine and SBX disciplines (U25 Under the age of 25) and 4 years post the FIS junior age category of the 2016-2017 season for Halfpipe and Slopestyle (U22 Under the age of 22) as of June 1, 2016. The details of FIS junior age categories can be referenced online in point 2011.6 on page 57 at: http://www.fis-ski.com/mm/Document/documentlibrary/Snowboard/05/56/03/SB_FIS_1CR14Snowboardclean27.08_English.pdf.

Normally, a Development Card cannot be allocated to an athlete previously carded at the Senior Card level (C1, SR, SR1, SR2) for more than two years, except for an athlete carded as a senior card while still competing at the junior international age level.

11. As can be seen, Developmental Funding Cards have age limits.

12. I have not quoted the portion of the Criteria addressing Senior Cards but in contrast, they have no age limits and are based solely on performance standards. If an athlete meets the performance standards he/she may continue to receive such support regardless of how old he/she is.

13. In his testimony, Jean Beaulieu reviewed in some detail an analysis he had undertaken of the performance of various snowboard athletes at various stages and ages in their careers. He had obtained the factual information for the analysis from the Pathway to Podium document provided by the Respondent, and also from other apparently reputable sources. His general theme was that:

    a) successful snowboard athletes in the discipline of alpine are typically older than those in the discipline of snowboard cross;

    b) athletes in snowboard may have success well beyond the age of 25, and generally many are still attaining success at progressively older ages;

    c) athletes develop at different times and speeds, and it is not reasonable to rely solely on chronological age with a hard and fast cut-off at the age of 25 for a Developmental Funding Card;

    d) to the extent there needs to be any limit on Developmental Funding Cards, that should be based on duration (in the sense of how many years one can have such a card) as opposed to chronological age.

14. The Long Term Athletic Development model was introduced into evidence. It supports the fact that not all athletes necessarily advance and mature at the exact same pace

chronologically and that instead there are developmental stages which can provide a more useful way of categorizing and developing successful athletes.

15. In essence, the evidence of Jean Beaulieu can be taken as suggesting that it is unreasonable to have a hard cap with a maximum age for the Developmental Funding Cards as we have at present. Rather, the preference would be a system without any age limit at all but if there had to be any limit, it should be based on duration.

16. The Respondent filed materials dealing with the history of the Criteria relevant to the Developmental Funding Card relating to age restrictions, which I summarize as follows:

    a) prior to the 2012-2013 season, there was no maximum age;

    b) in the 2012-2013 season there was not so much a hard cap as flexible opportunity for ongoing developmental funding for up to 3 years based on the athlete demonstrating continued progress towards senior card status results and being recommended by Canada Snowboard;

    c) in the 2013-2014 season things changed and a hard cap was implemented which effectively provided a maximum age to receive a Development Funding Card. The cap potentially varied as it was set by looking at different criteria during which the funding could continue; and

    d) things changed again for the 2015-2016 season and remain the same for the 2016-2017 season, in the sense that there is a hard cap based on a maximum age.

17. The Criteria were required to be created in accordance with the AAP. The relevant portion of the AAP (detailing the purpose of developmental funding, and the required process) reads as follows:

> 5.3 – Policies for Development Cards
>
> Development Cards are intended to support the developmental needs of younger athletes who clearly demonstrate the potential to achieve the Senior Card international criteria but are not yet able to meet the Senior Card criteria.
>
> The financial support provided through the Development Cards help enhance conditions for younger athletes who have not had the same training, coaching, and competitive experience as older athletes and are not yet able to meet the Senior Card criteria. The allocation of Development Cards is intended to ensure that financial support is provided to athletes with the greatest potential.
>
> As program monies may not always be available to cover the cost of athletes holding Development Cards, athletes should understand that they may be asked to contribute to program costs from their Development Card funding.
>
> Normally, a Development Card cannot be allocated to an athlete previously carded at the Senior Card level (C1, SR, SR1, SR2) for more than two years. An exception may be made, at Sport Canada's sole discretion, for an athlete carded at the Senior Card level for more than two years for exceptional circumstances; for example an athlete carded as a senior card for 2 or more years while still competing at the Junior international level.

5.3.1 – Development Card Criteria

Criteria for Development Cards are established by the NSO and are reviewed each year by Sport Canada for compliance with the AAP.

The criteria must be objective and clearly demonstrate that the athlete has high-performance potential. Normally, the NSO must establish a maximum number of years for which athletes can be carded at the Development Card level before achieving Senior Card status.

NSOs should consider using some or all of the following criteria areas in development of their Development Card criteria:

- International and/or domestic results;
- Elements of the NSO Gold medal profiles;
- Elements of the NSOs Podium pathway profile;
- Full-time commitment to a NSO National Training Centre;
- Elements of the sport specific LTAD model;
- Age may be used as criterion; however the age level must not be established arbitrarily. If an age criterion is included, the purpose of such a criterion should be clearly stated in the criterion. Further, the NSO must be able to demonstrate through statistical evidence and expert opinion that there is a clear link among the reference to age in the criteria, the performance criteria, and the potential to achieve the international criteria for Senior Cards. The NSO must also be able to demonstrate that it has no alternative to the use of age to identify developing athletes.

  (emphasis added)

18. According to the Respondent, the resources used to determine the Criteria were the AAP, statistics determining average ages of athletes achieving podium and top 8 results in the World Cup and World Championships, and the Podium Pathway. The Podium Pathway can be described as a benchmarking tool with data and statistical results, which is used to provide objective information on performance.

19. The Respondent's evidence was that this information was provided to Sport Canada in order to support the proposed Criteria, which were then agreed to by the Respondent and Sport Canada. This type of process was followed as the sport of snowboard evolved, and the Criteria changed from time to time.

20. The Respondent advanced evidence to suggest that many sports use a sport specific Podium Pathway which includes age as a consideration, based on data and scientific evidence, and not merely subjective impression. The Respondent also led evidence to suggest that many other sports also use age to determine eligibility for developmental teams and/or developmental funding nominations, including alpine events, cycling, swimming, athletics, kayak and speed skating.

21. We heard evidence about how the Criteria were developed and introduced and how that compared to the requirements of the AAP.

22. The AAP states that:

> 5.5 – Establishing Carding Criteria
>
> It is the NSO's responsibility to develop the carding criteria for national level Senior Cards and Development Cards, as well as the criteria that apply to injured athletes. (See Section 9). Wherever possible the carding criteria should be based on objective measures.
>
> Opportunities to meet carding requirements should be consistent with a sport's national training or competitive program and should be accessible to the majority of the best Canadian athletes. Carding criteria should normally be linked to National Team selection criteria and the National Team depth chart for team sports.
>
> The NSO may choose its suite of criteria from the following areas:
>
> - Elements of the Podium pathway;
> - Elements of the Gold medal profiles;
> - International and/or domestic results;
> - Full-time commitment to a NSO National Training Centre; and
> - Elements of the sport specific LTAD model.
>
> The development and approval of the NSO's carding criteria must include the following steps:
>
> - The NSO Head Coach, High Performance Director, National Team Committee or appropriate body within the NSO develops the proposed carding criteria;
> - The Athlete Representative and appropriate NSO decision making body review the proposed criteria and make recommendations regarding the criteria;
> - The Board of Directors or appropriate decision making body reviews and approves the criteria for submission to Sport Canada;
> - Sport Canada reviews the criteria to ensure that they comply with the AAP policies; and
> - Under normal circumstances, NSOs distribute these criteria 8 to 10 months before the beginning of the sport's carding cycle. NSO approved AAP compliant carding criteria should be published no later than the beginning of the competition cycle for the upcoming carding period.
>
> (emphasis added)

23. The evidence was clear that there was no Athlete Representative involved in the review or recommendation process respecting the Criteria, although according to testimony from Mr. Jarvis some 60% of the sports are in that same situation.

24. Further, the evidence was clear that the Board of Directors of the Respondent had not directly reviewed or approved the Criteria for submission to Sport Canada. However, Mr. Jarvis testified and produced documents suggesting that such function had been delegated to the Executive Director.

4. Arguments

25. The following is a summary of the parties' arguments. It is not intended to be a complete recital of everything presented in the written materials or at the hearing itself. While I do not refer specifically to everything offered in argument, in making a decision I have in fact considered very carefully all of the arguments presented by the parties.

26. The Claimant argued that the Criteria were not established properly as per sections 5.3.1 and 5.5 of the AAP, and that even if so, they were invalid as being discriminatory.

27. On the alleged improper establishment of the Criteria, the following requirements from the AAP are the most important (with emphasis added);

> Age may be used as criterion; however the age level must not be established arbitrarily. If an age criterion is included, the purpose of such a criterion should be clearly stated in the criterion. Further, the NSO must be able to demonstrate through statistical evidence and expert opinion that there is a clear link among the reference to age in the criteria, the performance criteria, and the potential to achieve the international criteria for Senior Cards. The NSO must also be able to demonstrate that it has no alternative to the use of age to identify developing athletes.
>
> The development and approval of the NSO's carding criteria must include the following steps:
>
> - The NSO Head Coach, High Performance Director, National Team Committee or appropriate body within the NSO develops the proposed carding criteria;
> - The Athlete Representative and appropriate NSO decision making body review the proposed criteria and make recommendations regarding the criteria;
> - The Board of Directors or appropriate decision making body reviews and approves the criteria for submission to Sport Canada.

28. The Claimant said that being a "criterion" is not the same as being an absolute pre-condition, where it alone can be a disqualifying factor as opposed to one of a number of factors to be considered. It also challenged the process as flawed due to the absence of the Athlete Representative and the Board of Directors, suggesting there was no proper delegation to the Executive Director or anyone else. It also argued forcefully that age levels were established arbitrarily, had not been justified by the Respondent and so were illegal as contrary to the Charter of Rights and Freedoms and applicable human rights legislation.

29. The Respondent for its part accepted that in the Criteria age was in fact an absolute pre-condition. It asserted that the age cut-off was a justified and acceptable approach. It also said that overall there had been substantial procedural compliance with the AAP.

30. The Respondent argued that it based the age limit in the Criteria on its own Podium Pathway, which had been shared with Sport Canada. It said that it had analyzed performance of podium and top achieving athletes at Olympic and World Championships, which were predictors of results expected at corresponding benchmark ages. It said that this was a dynamic model and regularly updated based on the acquisition and presentation of new data specific to a sport discipline.

31. The Respondent noted that research had shown that there is a development phase, a peak phase and then a period of decline, and as a result there would be a time when someone should no longer properly be considered a developmental athlete. Accordingly, it made no sense to allocate developmental monies to such a person at such a stage in his/her career. This was not to say that the athlete should then be disqualified from funding. He/she potentially could access funding through Senior Carding which was awarded solely based on performance and without any reference to the age of the athlete.

32. The Respondent argued that age was a relevant factor to be considered and properly taken into account. It noted various other sports which used age to determine eligibility for developmental teams and/or developmental funding nominations, including alpine events, cycling, swimming, athletics, kayak and speed skating.

33. The Respondent accepted that sport is a human right and said that as an organization it fully supported any and all persons' opportunities to participate in the sport of their choice. However, it argued that high performance sport was by definition exclusionary, with participation not a "right" but rather an earned "privilege" based on exacting standards and requirements. Carding was a privilege, not to be expected, nor an entitlement. The Respondent said that it had developed and properly adopted the Criteria, which had been accepted by Sport Canada. It argued that it had taken a reasonable and effective approach in determining eligibility, as was done similarly in many other sports. Based on all relevant information available, age can be and was a proper condition for eligibility in this case.

5. Analysis

34. As noted, the Criteria were challenged both on the basis that they were not established as required by sections 5.3.1 and 5.5 of the AAP, and that even if so, they were invalid as being discriminatory.

35. I start by recognizing that, in its wisdom, Sport Canada has accepted that the Criteria were established consistently with the AAP. In that context, what is my role in determining whether the conditions of the AAP were satisfied?

36. Looking at the authorities, my role as arbitrator in making such a determination is very limited.

37. As noted in *Adams v. Athletics Canada (SDRCC 09-0098);*

Arbitrator Pound went on to emphasize the deference which arbitrators must give to National Sports Organizations in the formulation of carding criteria. At page 4 of his Award he added the following:

> I should also observe that it is neither the role nor the duty of an arbitrator to pass judgment on the decisions of AC (presumably taken in consultation with Sport Canada) on the overall design of the carding process, nor to comment on policy matters or on some abstract notion regarding the basic "fairness" of the rules. These are matters best left to AC, where the relevant experience and expertise are to be found. AC should be presumed (absent evidence to the contrary) to adopt policies and rules which will balance the competing interests and use the scarce financial resources as effectively as possible to produce the best overall results for Canadian athletics. Disagreements at this level are to be dealt with within the internal governance process for arriving at policy decisions.
>
> (p13)
>
> ...

It is extremely important for arbitrators to recognize and respect the exclusive fields of activity of both NSOs and athletes, respectively. It is true that the remedial jurisdiction of SDRCC arbitrators is broadly cast, as it must be, as reflected in the language of article 6.17 of the *Canadian Sport Dispute Resolution Code*. However, the fact that the *Code* grants to the panel the authority to substitute its decision for the decision which gives rise to a dispute should not be misconstrued as a licence to impose on the world of Canadian sport what would be tantamount to a rule of NSO management by arbitrators. The wisdom which counsels against that possible result is well reflected in the following passage of the decision of Arbitrator Pound, found at page 10 of his Award in *Palmer v. Athletics Canada*:

> In such a context, it is important to recall and it has been observed on many occasions that the role of arbitrators in this SDRCC-Code process is not to substitute their personal decisions for those taken by the responsible authorities. The latter are accorded a certain degree of deference based on their expert or specialized knowledge and experience. Carding decisions, as in this case, should not generally be taken by arbitrators who, normally, do not have the specific experience required for the purpose. It is only when the decisions taken by the responsible authorities have been vitiated in some manner that arbitrators may be required to pronounce the decision that should have been taken.

Claimant Adams relies in particular on the comment of Arbitrator Pound which suggests that deference to NSO authorities by arbitrators is not unconditional or without limits. With respect to arbitrators interfering with the decisions of responsible sports authorities Arbitrator Pound commented:

> They will be willing to do so (and are required to do so) only when it has been shown to their satisfaction that the impugned decision has been so tainted or is so manifestly wrong that it would be unjust to let it stand.

This Arbitrator agrees with that comment, a comment which, it should be noted, was expressed in the context of the application of carding criteria, not in a direct challenge to the criteria themselves. That said, it would, in my view, still apply if it could be shown, or substantively alleged, that the decision of an NSO in establishing its carding criteria can be said to be "tainted or...so manifestly wrong

> that it would be unjust to let it stand." If the submission of a claimant athlete asserts facts which, if proved, would establish that a decision taken by an NSO, including a decision in the establishing of carding criteria, is unlawful, arbitrary, discriminatory, in bad faith or patently unreasonable there can be no doubt about the jurisdiction of the SDRCC panel to entertain and remedy such a situation. The standard of review on the basis of reasonableness was, in my view correctly, considered and adopted by Arbitrator Pound in the Award of *Palmer v. Athletics Canada*, based in part on the reasoning of the Supreme Court of Canada in *David Dunsmuir v. Her Majesty the Queen in Right of the Province of New Brunswick* [2008] S.C.C. 9.
>
> In summary, in the view of the Jurisdictional Arbitrator, for an athlete to have access to arbitration to challenge the carding criteria established by an NSO, he or she must allege and be ready to prove that the criteria were the result of a process or decision, or established a standard, that is unlawful, arbitrary, discriminatory, in bad faith or patently unreasonable. The threshold of jurisdiction to question the criteria for carding established by an NSO through the diligent work and considered judgment of its own experts cannot be any less rigorous. That a claimant asserts that he or she will demonstrate that a particular decision of the NSO in establishing carding criteria was unwise or less than optimal is simply insufficient, as it invites the substitution of arbitral opinion for expert opinion which must be within the exclusive preserve of the NSO. (pp18-20)

38. As well, in A*nderson v. Canada Snowboard* (an appeal under the Respondent's internal appeal policy, decided October 7, 2014 by Peter Lawless);

> 36. It was properly pointed out to me during the course of the hearing that an Arbitrator's role is not to weigh in on what he or she thinks the "right" result should be. Rather, as has been far more eloquently stated others, an arbitrator is a "guardian of the process". The role is to ensure procedural fairness and fair treatment of the parties. Arbitrators may or may not have made the same decision as that made by the decision-making bodies entrusted with that authority. However the purpose of an Appeal is not to provide an arbitrator with an opportunity to make what they feel is a "better" decision. The role is to ensure that whatever decision was made was fairly reached in accordance with the rules of procedural fairness and the applicable criteria.
>
> 37. In the matter before me it is conceded that CS decided not to complete the s.24 redistribution as required by the Criteria. It should be noted that I find that there was no ill intent whatsoever by CS in deciding to abbreviate the Criteria. They consulted, and found support from, Sport Canada prior to electing to forgo the s.24 re-distribution. Nevertheless the Criteria were not followed.
>
> ...
>
> 46. I also find that CS's rationale for not finding the Appellant to be a "potential 2018 Olympic athlete" to be wholly without merit. The suggestion that an athlete has no potential to be an Olympian based solely on the fact of, in effect, too many historic attendances at an Olympics cannot be supported. It should, however, also be noted that simply having been an Olympian in the past is equally not a significant factor in determining the potential to again be an Olympian.

39. Accepting my limited role, where does that take us in assessing the AAP requirements? The AAP states that age may be used as a "criterion" and that certain justification must be demonstrated;

> Age may be used as criterion; however the age level must not be established arbitrarily. If an age criterion is included, the purpose of such a criterion should be clearly stated in the criterion. Further, the NSO must be able to demonstrate through statistical evidence and expert opinion that there is a clear link among the reference to age in the criteria, the performance criteria, and the potential to achieve the international criteria for Senior Cards. The NSO must also be able to demonstrate that it has no alternative to the use of age to identify developing athletes.

40. The Claimant said that being a "criterion" was not the same as being an absolute pre-condition, where it alone can be a disqualifying factor as opposed to one of a number of criteria to be considered. The Respondent conceded that age in the Criteria was in fact an absolute pre-condition, but asserted that this was a justified and acceptable approach. I will deal with the specific question of "age" in more detail below in assessing whether the Criteria were discriminatory. In terms of whether the AAP requirements were met however, Sport Canada knew how age was being used in the Criteria. Even if age might be accurately described as an absolute pre-condition, Sport Canada accepted that for the purposes of the AAP, this was a "criterion" as that term was used in the AAP.

41. I note as well that the AAP requires the Respondent to be able to demonstrate through statistical evidence and expert opinion that (amongst other things) there is a clear link between the reference to age in the Criteria and the potential to achieve performance and international criteria, and that there is "no alternative" to the use of age to identify developing athletes. We heard no detailed evidence on that demonstration but heard in a general sense that the Criteria were developed on the basis of objective and scientific data, which was shared with Sport Canada and accepted by Sport Canada.

42. There were of course also arguments that the absence of the Athlete Representative and Board of Directors were fatal procedural problems, which should invalidate the Criteria.

43. Respectfully, whatever I make of the overall process and whether it seems to me to comply with the strict wording within the AAP, is not really the point. The AAP sets forth a variety of things, including specifically what the National Sport Organization must do in order to gain approval from Sport Canada for the Criteria. That is the key as of course it is Sport Canada which provides approval for the Criteria.

44. The National Sport Organization, in this case Canada Snowboard, had to demonstrate to Sport Canada that its Criteria were consistent with the requirements of the AAP. We have evidence from Canada Snowboard that indeed this did take place, and this has not been challenged. I do not then see Canada Snowboard as obliged to prove to me, the Claimant or anyone else that the Criteria are valid as per the AAP. In other words, the evidence before me is that Sport Canada has already accepted that the required processes were followed to develop and approve the Criteria, and that would seem largely to answer any arguments on the point here.

45. Even in the face of Sport Canada's acceptance that the AAP requirements have been met, there are situations where I believe I would have the power to invalidate the Criteria for not being in compliance with the AAP. As an example, proof that the Respondent obtained Sport Canada's approval by means of a fraud could allow such an intervention. I hasten to add that I have heard no evidence at all of any such fraud.

46. As a result, I am not able to conclude that the AAP requirements were not met, and so invalidate the Criteria.

47. However, simply because the AAP requirements were met does not end the inquiry. Arguments were made that the Charter of Rights and Freedoms applies, and that by section 15 of the Charter, generally speaking, one cannot be discriminated against on the basis of age. The same type of argument applies regarding human rights law. As expressed by the Claimant, disqualifying someone from a benefit such as access to the Developmental Funding Cards on the basis of age, which is a prohibited ground of discrimination, is on its face illegal. If this argument holds water, that in my view would override the actions of Sport Canada in accepting the Criteria.

48. I will accept without deciding that the Charter and/or human rights legislation applies such that the Criteria must be consistent with them. Still though, the protections in the Charter or in the human rights legislation are not absolute, but rather there is a balancing process which takes place and there may well be circumstances where someone is on the surface being "discriminated against" based on age but such discrimination is valid constitutionally and as per human rights law. As examples, there are legally accepted age limits on driving automobiles, working and voting, as well as age defined divisions in various sports across the country. Is the age limitation here for the Developmental Funding Card, valid? Firstly though, what is the scope of my jurisdiction in determining that?

49. On jurisdiction, I note *Softball Canada v. Canada Games Council (2008) (Picher)*, a decision under the Canada Games Council Dispute Resolution Policy;

> I consider next the issue of jurisdiction. Can it be said that an Arbitrator seized of a claim under the *CSDR Code* is without jurisdiction to consider or give effect to the possible illegality of a rule, process or decision taken by a party before it, and in particular a violation of general human rights legislation? In approaching this question it is difficult to forget the observation made famously by Lord Denning to the effect that there cannot be one law for the courts and another law for arbitrators. That is particularly so when dealing with matters as fundamental as human rights codes.
>
> As noted above it would appear settled that, insofar as doping cases are concerned, Boards of Arbitration under the *CSDR Code* do have the jurisdiction to consider human rights legislation. It was put in the following terms by Arbitrator McLaren in the *Adams* decision, at paragraph 145:
>
> > Jurisdiction
> >
> > 145. Article 6.18 of the Canadian Sport Code gives the Doping Tribunal jurisdiction over the subject matter of this dispute, the parties and the remedies sought; and, grants full power to review relevant facts and applicable law:
> >
> > 6.18 Scope of Panel's Review
> >
> > The Panel shall have full power to review the facts and the law. In particular, the Panel may substitute its decision for:
> >
> > I. the decision that gave rise to the dispute; or

> II. in case of Doping Disputes, the CCES's assertion that a doping violation has occurred and its recommended sanction flowing therefrom,
>
> and may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.
>
> Therefore, where fair and equitable, the Doping Tribunal may consider the Charter or any other relevant legislation, including human rights legislation in rendering its decision. It is not relevant whether the Doping Tribunal has the authority of the provincial or federal government to apply the law, as this power is being recognized in the context of a private arbitration proceeding by the rules governing its procedures.

Is there any reason to believe that the Arbitrator's jurisdiction is any different where the issue in dispute, also arising under the authority of article 6.18 of the *CSDR Code*, may concern some other issue, such as sport selection, team selection or carding? I think not. It is difficult to conceive of the tribunal empowered to provide relief which is "just and equitable" being precluded from considering standards of general public law, and in particular the antidiscrimination provisions of human rights codes. Is it conceivable that an arbitrator would be limited under the *CSDR Code* to finding that a team selection standard which excluded a particular minority race was properly followed, having regard to the rules and procedures of the NSO, simply because that NSO's rules expressly incorporate racial discrimination? To ask the question is to answer it.

The question was addressed and to some degree answered in different terms by this Arbitrator in a prior decision. In *Canadian Amateur Boxing Association v. Canadian Olympic Committee* (Arbitration Award ADR-Sport RED Ordinary Division, 10 July, 2004) stated the following:

> The role of the [tribunal] is to ensure that the decision has been made in a manner which is not in bad faith, is not arbitrary or discriminatory and which is in keeping with generally accepted standards of fairness, as recognized in Canadian administrative law.

To put it differently, accepting that this arbitration rests on a contractual footing, as a matter of contract interpretation it should not be inferred that the parties intended their rules and procedures to be contrary to public law. For these reasons I am satisfied that it is within the jurisdiction of the Arbitrator to consider whether the processes and/or decision of the Respondent have in some manner violated the anti-discrimination provisions of the *Ontario Human Rights Code*.

(pp14-16)

...

In the result, the Arbitrator is satisfied that no discrimination contrary to the *Ontario Human Rights Code* is demonstrated in the application of the sports selection process for the 2013 Canada Summer Games nor in the result of the decisions taken by the Respondent by the application of its own rules and process....

(p22)

50. By section 6.17 of the Code, I am given the "full power to review the facts and apply the law". Based on that and the logic in *Softball Canada* I will assume then that I have jurisdiction to answer the question on whether the "age" factor is discriminatory and contrary to the Charter or applicable human rights legislation. That accepted, I next must question how much deference I ought to allow the decision by the Respondent, as accepted by Sport Canada, that "age" is to be considered as it has when awarding Developmental Funding Cards, notwithstanding the Charter and applicable human rights legislation.

51. With that question in mind, I note *Mehmedovic and Tritton v. Judo Canada (SDRCC 12-0191/92);*

> 14. In their Requests for Arbitration, the Claimants were essentially arguing that the Carding Criteria are so out-of-touch with the modern reality of the sport of judo that the very fact of applying them to their particular case without looking at the evolution of the sport distorts the assessment of their application and amounts to an improper and unreasonable exercise of Judo Canada's discretion in the nomination for carding process.
>
> 24. With respect to the original ground of attack, the Respondent in its written submissions argue essentially that the Claimants were not alleging that the Carding Criteria were improperly applied to them, but that they should be modified. The attack in reality is not against the interpretation or application of the policy, but it is against the policy itself. Setting a standard of general application in a binding policy is, in essence, a rule-making exercise, only challengeable through the democratic structure of the organization and only reviewable by a court if it falls outside the mandate of the organization as not rationally connected to its mandate or is oppressive....
>
> The Role of Arbitrators and the Standard Review
>
> 27. It is now common ground that arbitration proceedings of this kind under the SDRCC Code are akin to judicial review, as opposed to appeal or trial *de novo*. Arbitrators as a matter of course owe deference to the expertise and experience of the sporting authorities. To use the words of Arbitrator Pound in *Palmer v. Athletics Canada*, SDRCC 08-0080:
>
> > Carding decisions, as in this case, should not generally be taken by arbitrators who, normally, do not have the specific experience require for the purpose. It is only when the decisions taken by the responsible authorities have been vitiated in some manner that arbitrators may be required to pronounce the decision that should have been taken (p.10)
>
> 28. The standard of review to be applied is that of reasonableness. Absent provisions to the contrary, the burden is on the Claimant to demonstrate that the decision is unreasonable. Reasonableness was recently defined as follows by the Supreme Court of Canada in *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339):
>
> > Reasonableness is a single standard that takes its colour from the context. One of the objectives of *Dunsmuir (Dunsmuir v. New Brunswick*, 2008 SCC 9, [2008] 1 S.C.R. 190) was to liberate judicial review courts from

> what came to be seen as undue complexity and formalism. Where the reasonableness standard applies, it requires deference. Reviewing courts cannot substitute their own appreciation of the appropriate solution, but must rather determine if the outcome falls within "a range of possible, acceptable outcomes which are defensible in respect of the facts and law" (*Dunsmuir*, at para. 47) There might be more than one reasonable outcome. However, as long as the process and the outcome fit comfortably with the principles of justification, transparency and intelligibility, it is not open to a reviewing court to substitute its own view of a preferable outcome. (para. 59)

29. As is stated above, "reasonableness...takes its colour from the context". In cases where an athlete…in addition to, or rather than, challenging the application or the interpretation of the carding policy…is in reality challenging the very wisdom or merits of the policy, arbitrators will owe an even higher deference to the policy-maker, for the making and assessment of policy are not within their realm. In *Palmer*, at p. 4, Arbitrator Pound made these comments which are particularly relevant in our case:

> I should also observe that it is neither the role nor the duty of an arbitrator to pass judgment on the decisions of Athletics Canada (presumably taken in consultation with Sport Canada) on the overall design of the carding process, nor to comment on policy matters or on some abstract notion regarding the basic "fairness" of the rules. These are matters best left to AC, where the relevant experience and expertise are found. AC should be presumed (absent evidence to the contrary) to adopt policies and rules which will balance the competing interests and use the scarce financial resources as effectively as possible to produce the best overall results for Canadian athletics. Disagreements at this level are to be dealt with within the internal governance process for arriving at policy decisions (at p.4)

30. I would add that 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 or arbitrary as to be inapplicable with any kind of certainty.

31. As a result, in the present case, I am of the view that there are two types of deference that are owed depending on whether the attack is made against the decision-maker (the Review Committee) or whether it is made, in reality, against the policy-maker (Judo Canada and Sport Canada).

32. When the decision of the Review Committee is attacked on the ground that it misinterpreted or misapplied the policy, the standard of review is that of unreasonableness as developed by the Supreme Court of Canada. This is already a stringent test, as can be seen from *Dunsmuir and Khosa* (above) and more recently from *Smith v. Alliance Pipeline Ltd*, 2001 SCC 7, [2011] 1 SCR 160, *Newfoundland and Labrador Nurses' Union v. Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62, [2011] 3 S.C.R. 708 and *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65.

33. When the decision of the Review Committee is attacked on the ground that it interpreted or applied a policy which is alleged to be obsolete or unwise or imperfect or otherwise invalid in other words where the attack is, although perhaps not phrased that way, against the policy itself and therefore against the policy-

maker (Judo Canada and Sport Canada) - 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. The above description of the standard of review is reinforced by these comments of Arbitrator Picher *in Adams v. Athletics Canada*, SDRCC 09-0098:

> It is extremely important for arbitrators to recognize and respect the exclusive fields of activities of both NSOs and athletes, respectively. It is true that the remedial jurisdiction of SDRCC arbitrators is broadly cast, as it must be, as reflected in the language of article 6.17 of the Canadian Sport Dispute Resolution Code. However, the fact that the Code grants to the panel the authority to substitute its decision for the decision which gives rise to a dispute should not be misconstrued as a license to impose on the world of Canadian sport what would be tantamount to a rule of NSO management by arbitrators. (p. 18)

35. And I am satisfied that my conclusion, while differently worded, is essentially the same as that reached by Arbitrator Picher at p. 19:

> If the submission of a claimant athlete asserts facts which, if proved, would establish that a decision taken by an NSO, including a decision in the establishment of carding criteria, is unlawful, arbitrary, discriminatory, in bad faith or patently unreasonable there can be no doubt about the jurisdiction of the SDRCC panel to entertain and remedy such a situation [of course, the concept of 'patently unreasonable' has since become obsolete]
>
> ...

44. With respect to Carding Criteria, the Program sets out the Policies for Senior Cards in Art. 5.2:

> Sport Canada establishes the performance standards for international criteria used to award Senior Cards. The following are the current standards for international criteria: - Finish in the top 8 counting a maximum of 3 entries per country [....]. A NSO may adjust a criterion or include sport specific requirements to the senior international criteria specific to their sport in order to strengthen the criteria. Any additional requirements imposed by the NSO must be consistent with Sport Canada policies and be approved by Sport Canada.

45. As can be seen, Judo Canada's hands are being tied to a large extent to Sport Canada's requirements. Any assessment of Judo Canada's policy with respect to the establishment of carding criteria has to take this lack of total independence into consideration.

...

49. The Claimants are not alleging any of the exceptional circumstances described above which would entitle an arbitrator to examine the merits of a carding policy. They are asking me, for all practical purposes, to add a new criteria in the carding policy, that of the ranking on the IJF World Ranking List, and to dilute

> another criteria, that of a top-eight finish at the Worlds or Olympics Games within the past 4 years. The World Ranking List, they argue, is a new tool, recently established, that allows for a proper assessment of the merits of an athlete. The top-eight finish, they argue, has become more difficult to attain because of recent changes in the repechage procedure and the number of athletes participating in the World championships. Judo Canada readily agrees that the sport has changed in the way alleged by the Claimants.
>
> 50. It is not for an arbitrator to decide how a carding policy should be adapted to changes in the sport. This is an issue better left to be dealt with through the internal mechanisms already in place within Judo Canada and on which athletes are represented. Suffice it to say that Judo Canada is in some respect questioning the absolute reliability of the World Ranking List, particularly as one moves down the List which may include hundreds of athletes, and that Judo Canada is of the view that tougher criteria, rather than softer ones are required to allow it to compete with the increasing number of demands made to Sport Canada by a larger number of NSOs and with the need for Sport Canada to impose more stringent criteria in order to be satisfied that the best athletes, actual and prospective, are nominated for carding. Moreover, in the case at bar, what is at issue is the fate of those senior athletes who are entering the eighth year and beyond of their carding privileges. According to Judo Canada, there are some international statistics that show that in the sport of judo, athletes generally reach their peak before the age of 28, which is one of the reasons why the carding criteria become so tough after that age. That does not mean, of course, that the Claimants have reached their peak or that they will not continue to perform well on the world stage. It only means that there could be some rationale behind the decision to impose tougher criteria as the years go by. But I would be exceeding my role if I went on to assess that rationale. I am only giving this example to show why it is that these types of issues, facts and arguments do not properly belong to the arbitration process. Who am I to tell Judo Canada what criteria it should favor when attempting to obtain from Sport Canada the few carding privileges available for judo?

52. Again then, my role is extremely limited.

53. It would be unreasonable to look at Developmental Funding Cards in isolation. Rather, such carding is part of an overall system where limited resources are allocated based on factors seen by stakeholders as appropriate, bearing in mind the overriding goal of encouraging and enabling elite performance. The reality is that not everyone who wants funding can receive it, and further, not everyone who may deserve funding (by some measure) can receive it. There is a limit and by that limit the necessary result is that some athletes may potentially go unfunded.

54. Here, the Criteria make it clear that age impacts and limits when a developing athlete is to be funded with a Developmental Funding Card. Athletes who are too old for that card may instead receive a senior card if they meet the performance standards and may continue to receive such support, regardless of how old they are, provided they continue to meet the performance standards.

55. My general impression is that the Claimant was accomplished, skilled and hardworking, and had the possibility of perhaps considerable ongoing success ahead. That said, and in no way meant as criticism, he has apparently not yet obtained the standards required for a senior card and simply due to age would not meet the Criteria set for the Developmental Funding Card.

56. I accept without hesitation as per the Long Term Athletic Development model, that not all athletes necessarily advance and mature at the same pace chronologically and that instead there are developmental stages which perhaps provide a more useful way of categorizing athletes as they mature. Perhaps (and I speculate) it might make sense to have a system where Developmental Funding Cards are not necessarily linked to chronological age but more so to one's level of "maturity" as per the Long Term Athletic Development model. Perhaps (and again I speculate) that has already been taken into account in some fashion by the Respondent and Sport Canada when coming up with the system that we have here.

57. In *Reid v. Squash Ontario, 2015 HRTO 383* an Ontario Human Rights Tribunal addressed an argument that Squash Ontario had discriminated by setting an "under age 22" as a limit for a funding program. The Tribunal noted that its role was not to determine whether Squash Ontario chose the best age as the limit but instead it needed to determine whether the decision amounted to age discrimination. It accepted that age-based distinctions are not inherently discriminatory and recognized that a great many statutes and programs have age limits among criteria to determine eligibility for benefits, including funding. It concluded that as there was a rationale for the limit, setting the "under age 22" limit was not arbitrary and so dismissed the complaint.

58. Age then as a dividing line is not something which is necessarily or automatically offensive or inappropriate. I have heard some evidence (and it seems common sense) that at some stage an athlete stops developing. I do not have full details as to what the statistics or the Podium Pathway would say, in detail, but that is not determinative for me as it appears that such material was available to Sport Canada and the Respondent and as a result Sport Canada approved the Criteria.

59. I must assume that there was a fair basis on which Sport Canada was satisfied as I have no reason to believe that it acted in anything other than good faith and with objectivity in ensuring that the AAP and general law were both complied with by the Respondent. In other words, there was a basis for concluding that the AAP process was met, that an age limitation respecting Developmental Funding Cards (in the context of Senior Cards being not limited at all by age, but tied to performance) was appropriate and that the way age was used here, was justified.

60. Canada Snowboard and Sport Canada are in a much better position than I am to assess if there should be an age cut off for Developmental Funding Cards and if so what the appropriate age should be. Such a decision was made based on some proper rationale and I have no basis to overturn that, whether or not I found persuasive the Claimant's review of the evidence and argument that a different system or age would be better.

61. This is not a situation where age is an absolute bar to all funding or where a blatantly irrelevant criterion was considered. There is a credible basis for suggesting and accepting age as relevant for Developmental Card Funding. If I or anyone believes that it should be considered differently, or not at all, then the proper recourse is to be advocating that with the Respondent and/or Sport Canada at the time the Criteria are next developed and published so as to allow the sport to evolve for the benefit of all.

62. Respectfully, I conclude that age is a valid factor to consider for Developmental Funding Cards. Even if I believed that it should be considered differently than it has been, it is not my role to second guess or substitute my judgment in a situation like this.

63. On the evidence I have heard then, I am not prepared to find that the Criteria are invalid.

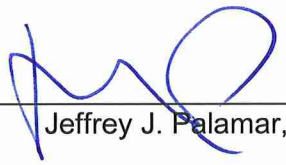
6. Conclusions

64. The Request is therefore dismissed.

65. At the conclusion of the hearing on the merits, I heard some preliminary comments on the issue of costs, particularly as a result of the application for provisional measures which was filed. I advised the parties that I was not prepared to entertain such submissions at that stage, but rather, that if either party felt it appropriate to raise the issue I would hear submissions after issuing a decision on the merits. Accordingly, and while not encouraging either party to seek costs, I must remind the parties of Rule 6.22(b) of the Code that if either wishes to do so, that party should inform the Panel and the other party no more than 7 days after this decision has been rendered.

66. In closing, I wish to express my sincere appreciation to the parties and all participating in the hearing for their cooperation and professionalism throughout.

Signed in Winnipeg, this 6th day of June, 2016.



Jeffrey J. Palamar, Arbitrator