

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

N°: SDRCC 16-0300

BENJAMIN TARDIOLI

(CLAIMANT)

AND

CANOE KAYAK CANADA

(RESPONDENT)

AND

MARK OLDERSHAW

(AFFECTED PARTY)

DECISION

Submissions:

Michael-T. Nguyen

On behalf of the Claimant

Steven Indig, Casey Wade

On behalf of the Respondent

Jonathon Barnett

On behalf of the Affected Party

1. On June 29, 2016, I was chosen by the parties as a Med/Arb Neutral under the Canadian Sport Dispute Resolution Code (the *Code*) to hear Benjamin Tardioli's request for arbitration (the "appeal") of Canoe Kayak Canada's ("CKC") decision not to select him to the 2016 Canadian Olympic Games Team.
2. As CKC's Olympic Team selection had to be sent to the Canadian Olympic Committee by July 12, 2016, this appeal was conducted on an urgent basis. The parties agreed to skip CKC's internal appeal process and proceed directly to the SDRCC for a determination. I conducted a mediation on July 6, 2016, and when the parties were unable to resolve the matter, by agreement of all parties, I assumed the role of arbitrator and established dates for written submissions.
3. I issued my decision on July 11, 2016, with reasons to follow. These are my written reasons.

BACKGROUND

4. Mr. Tardioli and Mr. Oldershaw are Canadian canoe athletes. Both have competed internationally for Canada. Mr. Oldershaw captured the Bronze medal at the 2012 London Olympic Games in the C1 1000 metre event.
5. CKC is the national body for competitive paddling in Canada. It is recognized by its partners at the International Canoe Federation ("ICF"), the Canadian Olympic Committee, the Canadian Paralympic Committee and Sport Canada as the designated authority for the sport in Canada.
6. On February 12, 2016, CKC published its 2016 Rio Games Olympic Team Nomination Criteria (the "selection criteria"). CKC's High Performance Director ("HPD") was given responsibility for the implementation of the procedures and criteria (Section 1.3). The selection criteria also sets out Performance Objectives:

The performance objectives of the Canadian National CanoeKayak team is to achieve the best possible medal results as well as achieve as many top 8 performances as possible. Strategic decisions concerning events to be selected and raced will be made according to these performance objectives. (Section 1.5)

7. Appended to the selection criteria is the ICF qualification system. The ICF system prescribes the athlete quota for each country and for each event, and outlines how athlete quotas are allocated.

8. Relevant sections of the ICF qualification system for the purposes of this appeal provide that each continent would be given one athlete quota place for single boats in the C1 events that were won at each Continental Qualification Event, and that each country had an opportunity to obtain quota spots through Continental qualifying events. The ICF document also sets out the process for re-allocations of declined or unconfirmed quota places.
9. The relevant sections of the selection criteria are as follows:

2. General Principles for Selection

A number of general principles will apply to selection for nomination to the Canadian Olympic Team:

2.1 Canadian Olympic Committee may enter one entry per event in which athlete quota places are available at the Rio Olympic Games. The HPC [High Performance Committee] may decide not to nominate athletes to the Canadian Olympic Team in some events even if quota places are available. In this case, CKC may return athlete quota places to the ICF for reallocation;

2.2 Where it is determined by the HPD, and supported by the HPC, that performance in a medal priority event may be compromised by an athlete having to race in two distances or crews, events may not be entered despite having athlete quota places available. If this was to occur, CKC may return athlete quota places to the ICF for reallocation;

2.3 Performance indicator standards will not be applied to crews competing for a nomination to the Americas Continental Qualifier Regatta and similarly, winners at the Continental Qualifier will be deemed A-LP crews;

[...]

2.5 WIN: An overall win for nomination (for the Continental Qualifier or the Rio Olympics) occurs when one athlete or crew has achieved 2 out of 3 wins at the NTT1;

2.6 Where in this document CanoeKayak Canada has not anticipated or accounted for a selection scenario impacted by the constraints of the ICF Olympic Selection Criteria through Continental Qualifier Regattas, the HPD in consultation with NT

coaches will recommend a scenario to the HPC for consideration and approval with the goal of achieving the best possible performances at the Rio Olympics. All entry choices will be final.

[...]

4. Events and Quota Spots

4.1 Qualification: CKC must qualify quota places for Events in accordance with the International Canoe Federation (ICF) Brazil 2016 Qualification System requirements [...] In the event of changes by the ICF to the selection and eligibility criteria, CanoeKayak Canada is bound by these changes and will inform the membership as soon as possible;

4.2 Qualification of a place in any Event by an athlete (or group of athletes) does not guarantee that athlete (or group of athletes) will be nominated or selected to compete in that Event at the 2016 Olympic Games;

4.3 CKC has qualified the following Olympic Quota places from the 2015 World Championships:

4.3.1 MK1 200m

4.3.2 WK1 500m

4.4 CKC has the potential to qualify the following additional quota spots at the 2016 Americas Continental Qualifier

4.4.1. 3 MK

4.4.2.3 WK

4.4.3.2 MC

5. Event Prioritization

CKC and its national team coaches will consider all data from events, however, in the absence of reliable data from events following NTT1, the NTT1 results will stand. IST will gather and compile the data and coaches will submit their recommendations to the HPD at the end of the evaluation process. The HPD will assess the process and data for fairness, reliability and validity and formulate a recommendation to the HPC that best predicts performance at the Rio Olympics.

Following results at the 2015 World Championships and due to the limited Olympic Quota spots, priority events will need to be

identified. It is the intent of CKC to send the athletes and crews to race at the Rio Olympic Games that will be the most competitive and have the potential to record the highest placing in their event.

[...]

The following events may be used to determine the crew with the potential to record the highest placing in their event at the 2016 Rio Olympic Games, and be nominated to the Canadian Olympic Team:

- NTT1: Lake Lanier, Georgia 4 to 8 May 2016
- Americas Continental Qualifiers: Lake Lanier, Georgia, 19 to 20 May 2016
- A third racing opportunity is desirable in order to enhance the body of data available for selection. The following events will be considered for use [...]

Specific Application of Predicted Rank

NTT1: Two (2) Predictive Rank “wins” will be required to determine which crew has the highest international potential at that point in the event prioritization process

(For clarity, there are two 2 out of 3 “win” processes: 1) Two out of three first place finishes – “wins” – in an event are required to earn the entry at the Continental Qualifier; and 2) To be deemed the “priority” event at the Olympics, versus another event, a crew must “win” 2 out of 3 predicted rank calculations).

10. The Continental event for Canada was the 2016 Pan Am Sprint Canoe Championships Continental Qualifier held May 19 – 22, 2016 in Lake Lanier, Georgia.
11. Mr. Oldershaw competed in the C1-1000 metre event, placing first. Mr. Tardoli competed in the C1-200 metre event, placing second behind a Cuban athlete.
12. At the same competition, two Cubans placed first in the C2-1000 metre event, earning two quota spots for Cuba at the Olympics.

13. On May 23, 2016, CKC informed Mr. Tardioli that the HPC had made a decision on the quota assignment:

The review was relative to the ICF criteria, CKC's criteria, the definition of a Qualifier "win" and the selection obligations CKC has regardless of ICF Olympic quota spots. With these factors in mind, the prioritized canoe slot has been awarded to Mark Oldershaw. [...] The decision was based on the fact that Mark was the only canoe athlete to record a "win" at the Qualifier.

ARGUMENTS

Claimant

14. Mr. Tardioli does not challenge the substance or validity of CKC's selection criteria; rather, he argues that its application of the criteria is wrong.
15. Mr. Tardioli argues that there is no definition of "win" for the Continental qualifier in the Olympic Sprint selection criteria. He contends that because ICF removes athletes from races that have already qualified, CKC must treat him as the winner of his event.
16. Mr. Tardioli says that Cuba had already earned two quota spots with a first place finish in the C2-1000 metre event. By winning that event, Cuba had a pair of canoeists for the C2-1000 metre event and was entitled to register either of those athletes for another event. Mr. Tardioli contends that, because Cuba had already qualified two athlete quota spots according to the ICF selection criteria, it had to return the additional places (quota spots) and the Cuban athlete's participation in the C1-200 metre was "of no consequence:"

CKC should have excluded any result obtained by a Cuban C1 athlete at the Continental Qualifier, since CKC knew or must have known, that the Cuban NOC had already qualified for two (2) quota spots by their first place in the C2 event.
17. He argues that CKC must treat him as the winner and evaluate his results along with Mr. Oldershaw's according to Clause 5 of the selection criteria.
18. Finally, Mr. Tardioli contends that Section 1.5 of the criteria allows the HPC to do what is best to achieve CKC's stated performance objectives, which, in this case, is an evaluation of the C1-1000 metre and C1-200 metre events to determine the best possible entry.

Respondent

19. CKC denies that it failed to follow the criteria. It argues that a quota spot must be distinguished from a place finish and that the assignment of a quota spot is separate from achieving a first place finish. It says that the allocation of quota spots does not change the fact that an athlete has won a race.
20. CKC says it cannot change Mr. Tardioli's race placement and award him a win on the basis that the winner's participation was of no consequence. It contends that the selection criteria refer specifically to winners, not recipients of quota spots.
21. CKC also says that while it has a process to bypass higher-ranked athletes due to pre-qualification or quota limitations, there is no precedent for retroactively categorizing athletes who did not finish first as a "winner," nor does the selection criteria require that it do so. It says that the criteria requires event prioritization only where there are multiple winners. In this case, CKC submits, only Mr. Oldershaw won his canoe race at the Qualifier event.
22. CKC argues that it properly applied the selection criteria and that its decision should be upheld.

Affected Party

23. Mr. Oldershaw submits that Mr. Tardioli has misquoted the Olympic selection criteria. He says that CKC does not award "wins" to non-winners at international races unless that is written into the criteria. He also argues that the allocation of a quota spot should not be confused with the definition of a "win."
24. Mr. Oldershaw says that Cuba qualified three separate athletes, and that Cuba later returned the C1 entry quota. He argues that Mr. Tardioli should not be given a "win" because Cuba made a decision to accept the C2 quota spot over the C1 spot. He says that the selection criteria do not award a "win" to the next ranked crew in the event the winner of that event does not accept the quota entry.
25. Mr. Oldershaw contends that the event prioritization clause only takes effect if there are more than one event winners. He says that because he was the only athlete to win a canoe event, there was no need for CKC to resort to this process.

ANALYSIS AND DECISION

26. Section 6.7 of the *Code* requires CKC to demonstrate that the team selection criteria were appropriately established and that the selection decision was made in accordance with such criteria. Once that has been established, the onus of proof shifts to Mr. Tardioli to demonstrate that he should have been selected in accordance with the approved criteria. Each onus is determined on a balance of probabilities.
27. In *Mehmedovic v. Judo Canada* (SDRCC 12-0191/92), Arbitrator Décary relied on *Palmer v. Athletics Canada* in concluding that the standard of review was one of reasonableness and that the Claimant had the burden of demonstrating that the decision was unreasonable.
28. Similarly, in *Sera v. Canadian Amateur Wrestling Association/Wrestling Canada Lutte* (SDRCC 13-0200) Arbitrator Drymer stated that deference is owed to the sporting authority's experience and expertise:

[...] wherever possible, selection decisions are best determined by [...] appropriate and knowledgeable representatives of the NSO (high performance coaches, selection committees), in accordance with valid and applicable rules.
29. The Tribunal will not interfere with the sporting authority's decision provided that it falls within a range of possible acceptable outcomes that are defensible in light of the policies and the facts.
30. In my view, the selection criteria document is poorly drafted and often confusing. However, I am not persuaded that CKC misinterpreted or improperly applied the selection criteria.
31. Mr. Tardioli's argument rests, in part, on the quota allocation procedures outlined in the ICF document. However, that process is distinct from CKC's selection criteria, which are applied after the quota spots are determined.
32. Mr. Tardioli argues that the HPC made its decision based on "the definition of a Qualifier "win"" which is not defined in the selection criteria.
33. While I accept that CKC's selection criteria does not define "win" for the Continental Qualifier, there are nevertheless several references to "wins" in the CKC's selection criteria (section 2.5 and the references to first-place finishes - "wins," in the specific application of predicted rank). In addition, the selection criteria refers to the use of NTT1 event placings to determine the crew with the

potential to record the highest placing in their event at the Olympics. All of these references, in my view, speak to what is commonly accepted as first-place finishes, or “wins.” It defies common sense to suggest that a second place finish constitutes a “win” or that the term “win” should be interpreted to mean anything other than a first-place finish.

34. There is nothing in the selection criteria that obliges CKC to consider Mr. Tardioli a winner of an event that he has in fact not won, simply because the actual winner, who achieved an additional quota spot for Cuba, was not selected by his country to participate in the event (Cuba had qualified more athletes than it had quota spots and did not select him).
35. Section 1.5 states that CKC’s performance objective is to achieve the best possible medal results. This clause, contained in the selection criteria’s introduction, is an “aspirational statement.” It does not set out any principles or guidelines regarding the selection process. Although Mr. Tardioli argues that this clause allows the HPC to do what is best to achieve performance objectives, including re-assessing the Continental Qualifier results, I am not persuaded that the clause compels them to do so in light of the stated criteria.
36. In my view, CKC did not improperly interpret or incorrectly apply its selection criteria. I am also not persuaded that its decision not to select Mr. Tardioli was unreasonable.
37. I decline to overturn or vary CKC’s selection decision.

CONCLUSION

38. The appeal is dismissed.
39. I am not inclined to grant costs in this matter, but if the parties wish to make submissions on this issue, I invite them to do so no later than July 29, 2016.

DATED: July 22, 2016, Vancouver, British Columbia



Carol Roberts, Arbitrator