

Sport Dispute Resolution Centre of Canada (SDRCC)
Centre de Règlement des Différends Sportifs du Canada (CRDSC)

No: SDRCC 16-0305/6
(Ordinary Tribunal)

Alexander Scott
Étienne Morneau
(Claimants)

and

Canoe Kayak Canada (CKC)
(Respondent)

and

Hugues Fournel
(Affected Party)

Before: Robert Décary, arbitrator

Attendees at hearing:

For Claimant Scott: Alexander Scott
Emir Crowne (counsel)

For Claimant Morneau: Étienne Morneau
Jérôme Cantin (counsel)
Maxime-Arnaud Keable (counsel)

For the Respondent: Casey Wade
Christopher Helyar
LeeAnn Cupidio (counsel)
Frédéric Jobin

For the Affected Party: Hugues Fournel
Adam Klevinas (counsel)

REASONS FOR THE AWARD

Date: 6 August 2016

1. These are the reasons for the award I made on Friday, August 5, 2016.
2. These appeals result from the late allocation to Canada of two additional quota spots for the Men's K2 200m kayak event at the Rio Olympics due to Russian athletes being disqualified because of doping. The spots were first offered to Sweden, the next ranked nation, but Sweden having declined, they were informally offered to Canada. Canada accepted the offer and on Sunday July 31st, 2016, Canoe Kayak Canada (CKC) picked a crew formed of Ryan Cochrane and Hugues Fournel. The two Claimants separately challenge the selection of Hughes Fournel and want this Tribunal to quash it. Their appeals have been joined upon consent by all parties. In their view, they (or, rather, one of them), should have been selected instead of Mr. Fournel. The selection of Mr. Cochrane is not questioned.
3. Both claims were filed on Wednesday, August 3, 2016. I was appointed Arbitrator on the same day. In view of the urgency of the matter, the Parties agreed to waive the requirement of a Resolution Facilitation session at this stage.
4. At the administrative conference calls held at 11:30 a.m. (EDT) and 2:30 p.m. (EDT) on August 3, 2016, and at the preliminary conference held later in the evening, the parties agreed that the Tribunal had jurisdiction to hear the claims, but recognized that in the event the Arbitrator ordered that one of the Claimants be named to the team by CKC instead of Fournel, the Rio Organizing Committee and/or the International Canoe Federation could still refuse to change the nomination. If this were to occur, the only appeal mechanism available would be to the *ad hoc* division of the Court of Arbitration for Sport in Rio. (A discussion of the jurisdiction of the CAS *ad hoc* division in similar matters may be found in *Birkner v. Comité Olimpico Argentino et al*, OG Sochi 14/003, Feb. 13, 2014).
5. I first was involved through a Preliminary Conference Call held at 7:00 p.m. (EDT) the evening of August 3. It was then agreed that the parties

would file written submissions by 10:00 a.m. (EDT) Thursday morning, August 4, 2016, that the hearing would be held starting at noon on Thursday, August 4, 2016 and that I would render my decision on Friday, August 5, 2016, in the morning, with reasons to follow shortly. These are the reasons.

THE FACTS

6. On Wednesday July 27, 2016, CKC was unofficially informed that Canada would be receiving two additional quota spots for the Men's K2 200m, an event scheduled for August 17, 2016. (ex. R-04) It was told "that the deadline for the entry by name for the reallocated places [...] will be 48 hours prior to the technical meeting, which is scheduled for August 13, 18:00." (ex. R-04) An official confirmation came on Thursday night, July 28, 2016 (ex. R-10). A Press Release was issued by CKC on Friday, July 29, 2016. (ex. C-09)
7. CKC's High Performance Committee (HPC) met at 1:00 p.m. via teleconference on Friday, July 29, 2016 and confirmed that it recommended that Canada should accept the quota spot. This decision was then communicated to the Canadian Olympic Committee (COC) and the International Canoe Federation (ICF) by CKC and was based on the understanding that CKC had until 2 days prior to the Technical meeting (August 11th) to name the athletes.
8. At the July 29th meeting, the HPC agreed that they believed that the exceptional circumstances clause (Section 2.6) of the 2016 Rio Games Olympic Team Nomination Criteria (ex. R-03) had been triggered by this unique and unforeseen opportunity. The HPC deferred the actual decision making process to the High Performance Director (HPD) Scott Logan and the Head Sprint Kayak Coach, Frédéric Jobin, asking them to develop a selection scenario under Section 2.6 of the Criteria.

9. On Saturday July 30, 2016, the Rio Organizing Committee (ROC) confirmed by email the new allocation quota to Canada in canoe sprint for two athletes "and that the absolute deadline for submitting entry by name is on the 7th of August (one additional day from what I confirmed verbally)". The ROC also suggested "that you also confirm the above date with ICF [...]" (ex. R-05). A call was then held with CKC's Chief Executive Officer (CEO) Casey Wade, Scott Logan, Frédéric Jobin, Ian Mortimer and Chris Helyar to discuss the evaluation process to be used to select the K2 200m crew, with the understanding that the deadline to name the crew had been shortened to August 7, 2016. The call ended with a request for Mr. Logan and Mr. Jobin to work together to develop the scenario for selection.
10. Later that evening, the CKC received a message by email from the Secretary General of the ICF that the deadline to provide names had been shortened by a week, to the end of day Sunday July 31, 2016: "Sorry but entry by name needs to be immediate [...] If we don't put the athletes in now the places will be lost [...] Please ensure the athletes are entered by Sunday evening Rio time or else we will scratch the boat [...]" (ex. R-06)
11. Given the long week-end --Monday, August 1st, 2016 was a holiday-- it was not possible for the HPC to arrange a quorum on Sunday July 31, as 2 of its 4 members were not accessible. CKC was therefore forced to make a decision whereby the CEO applied the veto authority he, along with the Chair of the HPC Mr. Helyar and HPD Mr. Logan, felt was granted to him under the Terms of Reference of CKC's Sprint Racing Council (SRC) (ex. R-14). He therefore assigned full responsibility for the final decision to the CKC National Sprint Kayak Coach, Mr. Jobin.
12. Given the limited timeline Mr. Jobin had to work with, it was virtually impossible to conduct any sort of objective assessment. There was simply no time to access race readiness or outline a formal process to compare athletes and crews. There was certainly insufficient time to

arrange a "race off" as earlier contemplated when the deadline had been said to be much longer. According to Mr. Jobin's written statement (ex. R-21) and his testimony, he was forced to rely on his knowledge of the athletes and their abilities in order to determine which combination of athletes would be able to provide the best results for Canada with only two and a half weeks of focused preparations. His assessment took into account historical data as to who has and would likely continue to work best as a crew. His considerations were less about who was race ready (he did not factor training records in his decision), and focused more on which crew could provide the best results after 2-3 weeks of focused training.

13. Mr. Jobin consulted with his team and it became evident to him that the only crew who had consistently performed well together, and who had the international and Olympic experience necessary to meet the challenge of competing at Rio with very little preparation, was the crew of Ryan Cochrane and Hugues Fournel. That crew had competed in the 2015 World Championships in Milan where their high placing had led to Canada being offered the quota spot.
14. A call was convened between the same individuals noted above at 1:00 p.m. on Sunday, July 31, wherein Mr. Jobin indicated that he had consulted with the CKC sport science staff and that they had agreed with his selection. The CEO, again exercising his veto authority over the HPC, approved Mr. Jobin's recommendation and proceeded to communicate it internally to the CKC Board and Committees and to the National Team Athletes at 5:28 p.m. (ex. R-16). The CKC submission of names was provided to the ICF and COC also at 5:28 p.m. on July 31, 2016, a few hours before the expiry of the deadline. (ex. R-17)
15. Both Claimants, on Sunday, July 31, 2016, informed CKC that they would file a notice of appeal with respect to that decision or seek legal guidance. (ex. C2-3 and C-06). That led CKC to immediately examine its process of appeals in order to deal with the appeals as expeditiously as

possible. On Monday, August 1, at 12:56 p.m., Natalie Brett, the National Team Manager, informed Casey Wade that Canada "would have until 1 hour prior to the K2 200 heats to submit a change in names which would have to be approved by the ICF" but that "we would need this process [the appeal] complete well before that deadline as we would need the athlete in Rio and fully accredited in order to compete. Their flights are booked for August 12th so I would suggest we use that date as the deadline (or earlier) for a decision since we would need to get the ticket reissued." At 7:11 p.m., Casey Wade sent a copy of Brett's email to ICF, to "verify if we're accurate here." (ex. R-07)

16. At 5:25 p.m., ICF answered back. "This is not a normal situation, [...] Stick with the athletes you choose or lose the boat! The situation is really delicate [...] It's not a normal procedure and that is what you need to consider in your appeals. If you have problems I have no issue in cancelling the boat for CAN [...]. So there is no time anyway." (ex. R-07).

ONUS OF PROOF

17. In matters of team selection disputes, article 6.7 of the Canadian Sport Dispute Resolution Code (Jan. 2015) provides that "the onus will be placed on the Respondent to demonstrate that the criteria were appropriately established and that the selection [...] decision was made in accordance with such criteria." The article goes on to state that "Once that has been established, the onus of proof shall shift to the Claimant to demonstrate that the Claimant should have been selected [...] in accordance with the approved criteria. Each onus shall be determined on a balance of probabilities."

STANDARD OF REVIEW

18. All Counsel agree that the relevant standard of review is reasonableness. Reference is made to *Mehmedovic and Tritton v. Judo Canada*, SDRCC 12-0191/92, *Palmer v. Athletics Canada*, SDRCC 08-0080, *Larue v. Bowls Canada*, SDRCC 15-0255, *Poss v. Synchro Canada*, SDRCC 08-0068 and to *Canada (Citizenship and Immigration) v. Khosa*, 2009 SCC 12, [2009] 1 S.C.R. 339. Counsel for Scott relies expressly, in his submissions, on the following quote from *Khosa*, at para.59:

"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."

THE SELECTION CRITERIA

19. It is common ground that CKC's 2016 Rio Games Olympic Team Nomination Criteria (ex. R-03) do not contain any specific provision dealing with the present situation. Sections 2.6 and 9 of the Criteria are the closest possibly relevant provisions referred to by the parties:

section 2.6 "Where in this document Canoe Kayak 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."

section 9 "After 12 July 2016 any decisions regarding changes to the composition of crew boats and races to be raced by individuals and crews, as well as any other decisions required to be made with the aims of meeting the performance objectives identified in Section 1, will be under the sole authority of the HPD. The HPD may consult other members of the Olympic Games staff or the HPC to come to his decision. The ability to make decisions quickly and decisively in the interests of team results must not be compromised. Any decisions that affect individual athletes may be communicated verbally by the HPD or another staff member who has been given the authority to communicate information on his behalf."

20. Reference was also made to the Terms of Reference of CKC's Sprint Racing Council (ex. R-14):

CEO Veto: Notwithstanding the authority of the Council to oversee all technical matters of the discipline, the CEO, on behalf of the Board of Directors, will retain a veto over such technical matters if, in the opinion of the CEO, i) they present unacceptable safety risks, ii) they threaten the image and reputation of CKC or the sport, or iii) they impose financial costs that have not been accommodated in Board-approved general approved budgets. Any dispute between the CEO and the Council in relation to the exercise of this veto power will be resolved by the Board. It is anticipated that this veto power will be exercised in rare circumstances and only in a reasonable fashion.

CLAIMANTS' SUBMISSIONS

21. Counsel for Alexander Scott essentially argues that it is unclear what selection criteria were followed, if any, and that section 2.6 cannot apply

as it applies to constraints through Continental Qualifier Regattas; that three days were ample time to develop and publish criteria; that the selection process was unreasonable as it was not justified, transparent nor intelligibly made against established criteria; that no intelligible reasons were provided for the selection decision; and that whatever criteria were applied, it was unreasonable to have a decision pertaining to Olympic selection made by only one person. Counsel is asking this Tribunal to either name Mr. Scott to the available quota spot in lieu of Mr. Fournel or to remit the matter back to the High Performance Committee for reconsideration.

22. Counsel for Étienne Morneau argues that the decision must be overturned because it did not consider relevant data pertaining to year 2016 during which Mr. Morneau and Mr. Cochrane formed a crew; because it was rendered without considering any criteria and solely on a subjective basis; because Mr. Jobin did not have the power nor the authority to make such a decision by himself, the proper authority being the High Performance Director (HPD), Mr. Logan; and because Mr. Jobin had no authority to overturn the decision of the HPD to organize a race off. Counsel is asking this Tribunal to either name Mr. Morneau to the available spot in lieu of Mr. Fournel or to order a race between Mr. Morneau and Mr. Fournel.

RESPONDENT'S SUBMISSIONS

Counsel for the Respondent basically argues that nothing in the selection policy adequately outlined how CKC was to handle such an exceptional circumstance, particularly given the extraordinary timelines provided and that as a result it had no choice but to apply Section 2.6 and exercise the CEO's veto authority under the Terms of Reference of CKC's Sprint Racing Council in order to arrive at a reasonable and expedited decision; that the process used and the ultimate decision rendered were not purely subjective as they were also based on the consideration of historical objective data;

and that its selection of Mr. Cochrane and Mr. Fournel was not made arbitrarily but was reasonable and fair given the extreme circumstances. With respect, more particularly, to the applicability of Section 2.6, counsel argues that when the issue was first put before the HPC, it considered Section 2.6 to be the only viable option, but that it now realizes that perhaps Section 2.6 is more limited in scope than it had initially thought; perhaps, the argument goes, an error was made, but if there was such error, the question remains as to whether or not it was substantial enough to render the final selection so unfair or unreasonable that it should be overturned. Counsel also argues that no evidence was provided to suggest that Mr. Jobin's decision was tainted by bias, conflict of interest or discrimination, or made in bad faith.

AFFECTED PARTY'S SUBMISSIONS

23. Counsel for Mr. Fournel acknowledges that reliance on Section 2.6 might have been an error, but that reliance could have been put instead on Section 9; in any event, he says, there were no other sections that could address the unique and unforeseeable circumstances of this case and yet, CKC was forced into a position where it had to make a decision, on very short notice and the process it chose, i.e. to task Mr. Jobin, a highly experienced, knowledgeable and internationally respected coach, with making the selection decision was a reasonable one. There was, in counsel's view, sufficient objective data to reach the conclusion that the selected crew was in the best position to be ready to perform on short notice at the highest possible level in the Men's K2 200m event.

ANALYSIS

24. I have recited the facts with much detail as to days and times of the day to illustrate how exceptional and unprecedented this case is. Sport arbitrations do not take place in a vacuum. There is a reality out there

such that some circumstances can render useless, inoperative and hopelessly unrealistic and unworkable any blind recourse to principles established in prior decisions. This case cries out for flexibility.

25. CKC had no idea, prior to July 27th, 2016, that it would have a crew competing in the Men's K2 200m which was scheduled for August 17, 2016. When CKC found out, on that day, that it could have a crew in that event, it was told that it had until August 11, 2016 for the formal entry by name of its crew. On Saturday, July 30, 2016, CKC was informed by the Rio Olympic Committee that the deadline had been moved to August 7, 2016. Later that evening, it was informed that the deadline had been moved to the end of the following day, i.e. Sunday, July 31st, 2016. On Monday, August 1st, 2016, it was informed, for all practical purposes, that it had to abandon any process of internal appeals because there would be no possibility to change the names entered. In other words, in the space of three days the deadline went from August 11, 2016 to Sunday night, July 31st, 2016. Meetings and conference calls were accordingly made, first with the date of August 11, 2016 in mind, then, with the date of August 7, 2016 in mind, and finally, with the date of Sunday night, July 31st, 2016 in mind.
26. In addition, the weekend of July 30th, 2016 was a long weekend in most of Canada, with many officials being unreachable. To make matters worse, and it is common ground among the parties, that kind of situation had not been formally contemplated by the Olympic Team Nomination Criteria.
27. In other words, CKC was faced with a formidable dilemma. It wanted, with good reason, to avail itself of this totally unexpected opportunity to send a crew to the Rio Games, yet there was no formal mechanism set out to select the crew and there was no time to make any fully objective assessment of the athletes. CKC had no other practical course, if it wanted to send a crew to Rio, but to seek a novel way to select the crew that was as fair as possible to the athletes concerned.

28. We are talking here of a selection process which had to take place within a moving deadline which, in three days, was reduced from eleven days to one day. CKC did its best to develop a selection process which was as close as possible to that set out in the Nomination Criteria and as permissible as possible under the CKC structure.
29. In these circumstances, whether CKC was wrong or not in interpreting section 2.6 as it did, whether or not section 9 could be relied upon, whether or not the veto authority granted to the CEO under the Terms of Reference of the Sprint Racing Council could be invoked, the fact is that CKC found a novel way which in the end was quite compatible with the very spirit of the Selection Criteria and of the Terms of Reference. When reading these Criteria and Terms in the context of the position in which CKC found itself, one cannot escape the conclusion that whenever an unanticipated scenario occurred, it was contemplated and accepted that a decision be made by a sole authority, be it the HPD, the HPC or the CEO, after consultation whenever possible. In the case at bar, as a result of numerous discussions amongst various officers of CKC, it was agreed that the CEO would be the sole authority. The CEO, exercising his sole authority, then appointed the Head Coach to make the recommendation with respect to the crew to be selected. All of this, I repeat, occurring within a time frame of a few hours.
30. I therefore reach the conclusion that CKC has satisfied, in the exceptional circumstances of this case and on a balance of probabilities, the onus of proving that the selection process was a proper one. To use the words of section 9 of the Nomination Criteria (whether or not that section applies), the process chosen was dictated by "The ability to make decisions quickly and decisively in the interests of team results"; and to use the words of Section 2.6 (whether or not that section applies), the scenario was adopted "with the goal of achieving the best possible performances at the Rio Olympics"; and to use the words of the Terms of Reference, "It is anticipated that this veto power will be exercised in rare circumstances and only in reasonable fashion".

31. As prescribed by article 6.7 of our Code, the onus then shifts to the Claimants. In context and in light of the applicable standard of review, i.e. reasonableness, I am prepared in this case to describe that onus as simply to demonstrate on a balance of probabilities that the decision to select Mr. Fournel rather than themselves was not reasonable.
32. With respect, the arguments raised by counsel for the Claimants fail that test. Most of their arguments are impliedly dealt with in the paragraphs above. While the reasons given by Mr. Jobin are not exhaustive - the context obviously did not require any lengthy reasons - anyone who reads the various emails will understand that the selection was based on historical data as well as on Mr. Jobin's conviction, based on his own experience, and on that of the two selected athletes, that the selected crew had the best chances of success at the Olympic Games.
33. I am prepared to recognize that there were at least three possible outcomes: the selection of Mr. Scott, the selection of Mr. Morneau and the selection of Mr. Fournel. The three athletes testified in this arbitration. I was impressed with their respective careers, with their fortitude and maturity, and with their utmost respect for each other. They each claim, of course and in all honesty, that they would form the best crew with Mr. Cochrane. But my role is not to determine nor to attempt to determine which of the three possible crews would be the best. My role is to determine, to use the words of the Supreme Court in Khosa, "if the outcome falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law."
34. A crew composed of Mr. Cochrane and of Mr. Fournel is an acceptable and defensible outcome. It was very much open to Mr. Jobin to conclude, on the basis of historical data and on the basis of his own experience as a respected international coach, that there would be a better chemistry between Mr. Cochrane and Mr. Fournel. Mr. Jobin was particularly concerned, and rightly so, that he was selecting, not two individuals, but a crew. He had been trying over the past years to find

the best crew and had made various experiences in that regard. I was impressed with his testimony: he was frank, direct, to the point. He had reached his conclusion after discussion with his staff. He was respectful of the other athletes.

35. I therefore reach the conclusion that the impugned decision was a reasonable one in the circumstances of this case. For all practical purposes, CKC was given at the same time a last minute and unexpected opportunity to send a crew to the Olympic Games and an ultimatum to select the crew within the next few hours. CKC had to improvise a novel process of selection. It established one which was as close as possible to the existing but not applicable one and which respected the spirit of the existing one. That novel process led to the selection of a crew comprised of Ryan Cochrane and Hugues Fournel. That selection was a possible, acceptable outcome.

ORDER

36. The appeals are dismissed.

37. The matter of costs was not discussed during the hearing. My inclination would be not to award costs, but if costs are sought by a party, I am prepared to keep jurisdiction should specific representations on the point be made in writing no later than 7 days from the issuance of these reasons.



Robert Décary,
Arbitrator

Gatineau, August 6, 2016