

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

JULY 7, 2016

Nº: SDRCC 16-0299

ZACHARY PLAVSIC

(CLAIMANT)

AND

SAIL CANADA (SC)

(RESPONDENT)

**Before:** Patrice Brunet (Sole Arbitrator)

**Date of Hearing:** June 22, 2016

Appearances:

For the Claimants: Mr. Zachary Plavsic  
Mr. Tom Ashley (representative)

For the Respondent: Mr. Todd Irving (president of SC)  
Mr. Adam Klevinas (legal counsel)  
Mr. Ken Dool (witness)  
Mr. Philip Gow (witness)

## REASONS FOR DECISION

### I. INTRODUCTION

1. This arbitration was conducted under extraordinary time constraints, as the deadline set by World Sailing (formerly ISAF) to relinquish the additional quota spots for the 2016 Rio Olympic Games was less than 24 hours away when the SDRCC received the Request for Arbitration.
2. On June 21, 2016, the undersigned arbitrator accepted the appointment to act as Arbitrator in the present proceedings, under section 6.8 of the Canadian Sport Dispute Resolution Code (“the Code”). There were no objections raised by any of the Parties.
3. On the same day, at 9:00 p.m. (EDT), an administrative conference call was held between the Parties and the SDRCC staff in order to clarify the administrative procedures.
4. A few minutes later, the undersigned Arbitrator joined the conversation to hold a preliminary conference call with the Parties and the SDRCC staff. Considering the extreme urgency of the case, the SDRCC agreed to exceptionally waive the Resolution Facilitation (RF) session requirement.
5. During the conference call, the Parties and the Arbitrator agreed to the following schedule:

*June 22, 2016 at 11:00 a.m. (EDT):*      *Written submissions by all parties;*

*June 22, 2016 at 1:00 p.m. (EDT):*      *Hearing by conference call;*

*June 22, 2016 at 4:00 p.m. (EDT):*      *Deadline to render short decision*

6. The crux of this arbitration rests on the decision of Sail Canada (“the Respondent”) not to select Mr. Zachary Plavsic (“the Claimant”) on the Canadian Olympic Sail Team for the 2016 Rio Olympic Games.
7. The Claimant submits that he has met the *Internal Nomination Performance Standards* (“the Internal Standards”) outlined in SC’s *Canadian Olympic Trials for Sailing at the 2016 Olympic Games* document (“Olympic Selection Criteria”).
8. Therefore, he claims that he should be nominated on the 2016 Canadian Olympic Team for the RS:X event and submits that the Respondent’s decision should be overturned.
9. The Respondent, on its part, submits that the Claimant has not demonstrated that its Athlete Development Committee (“ADC”) failed to follow the established Internal Standards when it decided not to select him to compete at the 2016 Olympic Games.
10. Consequently, the Respondent asks the undersigned Arbitrator to dismiss the Claimant’s appeal.
11. On June 22, 2016, the hearing was held via conference call.
12. The same day, I rendered my short decision in which I dismissed the Claimant’s appeal and concluded that the exercise of SC’s discretion was appropriate and did not justify my intervention. Therefore, I deferred to the expertise of SC, which decided not to select Mr. Plavsic on the 2016 Olympic Team.
13. The reasons for my decision are set out below.

## **II. THE PARTIES**

14. **Zachary Plavsic** is a 33-year-old Canadian windsurfer athlete. He started windsurfing when he was 16 years old. He has competed at two Olympic Games: Beijing 2008 and London 2012, where he finished in 8<sup>th</sup> place (Canada's best-ever result in the event).
15. **Sail Canada (SC)** is the designated National Sport Organization representing the sport of sailing in Canada. A Registered Amateur Athletic Association with charitable status, SC represents all participants including recreational sailors and high performance athletes at the club, provincial, national and international level. SC is recognized by Sport Canada, the Canadian Olympic Committee ("COC"), the Canadian Paralympic Committee ("CPC") and by World Sailing.

## **III. JURISDICTION**

16. The Sport Dispute Resolution Centre of Canada (SDRCC) was created by Federal Bill C-12, on March 19, 2003<sup>1</sup>.
17. Under this Act, the SDRCC has exclusive jurisdiction to provide to the sports community, among others, a national alternative dispute resolution service for sport disputes.
18. All Parties have agreed to recognize the SDRCC's jurisdiction in the present matter.

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<sup>1</sup> The *Physical Activity and Sport Act*, S.C. 2003, c.2

#### IV. **BACKGROUND**

19. On or around April 13, 2015, the Respondent distributed to all its athletes the Olympic Selection Criteria for the 2016 Rio Olympic Games.
20. These Selection Criteria were developed by the Respondent's ADC in early 2015.
21. On or around April 21, 2015, the Respondent published on its website the final version of the Olympic Selection Criteria.
22. This document describes the conditions that an athlete is required to meet in order to be considered and to be eligible for selection to the 2016 Rio Olympic Games.
23. Page 2 of the Olympic Selection Criteria states the following:

***Internal Nomination Performance Standards:***

*Nomination to the 2016 Olympic Sailing Team will be based on athlete assessment against the following performance criteria:*

- 1) *Demonstrated Podium Potential at nomination events.*
- 2) *Consistent Medal Race Performance at nomination events.*
- 3) *Consistent Top 16 overall (or top 50% for fleets of less than 32 boats or boards) performance in final standings at nomination events.*
- 4) *Consistent Top 25% of overall fleet performance in final standings at nomination events or Top 50% at World Cup Events (if fleet is restricted to 40 boats or less).*
- 5) *Rising Star Criteria*

*Athletes with performances achieved at or below the "Criteria 4" standard set out above may be nominated to the Olympic Sailing Team at the discretion of the ADC in consultation with HPD and HP Coaches, but athletes eligible under the Rising Star category may be considered for nomination ahead of these athletes. Such decisions will weigh factors such as commitment to a long-term program*

*and evaluation against an age group cohort along with results achieved. (See “Rising Star Criteria”, below).*

[Underline added]

24. On June 21, 2016, the Respondent informed the Claimant that he had not been appointed to the 2016 Canadian Olympic Team. This decision was made by the Respondent’s ADC.

25. In fact, no RS:X athlete was nominated by the Respondent to compete at the 2016 Rio Olympic Games.

26. On June 21, 2016, the Claimant filed an appeal to the SDRCC.

## **V. POSITIONS OF THE PARTIES**

### **A) The Claimant**

27. The hearing was called the day after the filing of the Request for Arbitration, and Parties were invited to file their related documents, call witnesses and provide submissions. Given the extremely limited time constraints, I nevertheless felt I had all the necessary information from all Parties to develop a good understanding of the core issues.

28. The Claimant submitted that he:

- a) Satisfied criterion number 3 of the Internal Standards related to “Consistent Top 16 Performance”;

- b) Satisfied criterion number 1 of the Internal Standards related to “Podium Potential at nomination events”;
- c) Can satisfy criterion number 5 of the Internal Standards related to “Rising Star” capacity;
- d) Can be nominated under Sail Canada’s discretion provided by the Internal Standards.

29. First of all, the Claimant stated that he achieved Top 16/Top 50% performances at least twice in nomination events during the season: once at the 2016 Weymouth & Portland World Cup Regatta and the other at the 2016 Holland Regatta.

30. He finished 8<sup>th</sup> out of the 18 participants that competed at the 2016 Weymouth & Portland World Cup Regatta, which is within the top 50% of the participating fleet. This event is listed as a nomination event in the Internal Standards (see page 2).

31. Regarding the 2016 Holland Regatta, the Claimant submitted that he would have finished 16<sup>th</sup> or better if he had raced the last race.

32. He explained that he was in 16<sup>th</sup> position before the last race of the competition, but that he decided on his own not to compete in the final race to avoid further injury and to allow his body to recover before the next competition, which was the 2016 Weymouth & Portland World Cup Regatta.

33. To justify his decision not to compete in the final race of this competition, the Claimant stated that Mr. Ken Dool, the Sailing Team Head Coach and High Performance Director of Sail Canada, told him that he would have to finish in the Top 10 to be nominated by the ADC on the 2016 Olympic Team.

34. He stated that based on this communication, his expectation and understanding was that he needed to finish in the Top 10 at either the 2016 Weymouth & Portland World Cup Regatta or the 2016 Holland Regatta.
35. Considering that he was sitting in 16<sup>th</sup> place before the final race, the Claimant thought that it would be better to rest for the next event rather than put his body under further stress and suffer injury. In his mind, this decision would put him in a better position for the 2016 Weymouth & Portland World Cup Regatta and to obtain a Top 10 result.
36. By not participating in the final race of the Holland Regatta, the Claimant fell from the 16<sup>th</sup> position to the 19<sup>th</sup> in the final standings. He stated that relying on Mr. Dool's representation has been to his detriment in the end.
37. In his opinion, with an average score in the final race, he would have remained in the Top 16 or would even have improved his standing. The race that he missed was in windy conditions, which is his favoured conditions. According to him, this provides further support to his view that he would have recorded a better than average score if he would have participated in the final race of the day.
38. Furthermore, the Claimant stated that he achieved "consistent" performance in regards of the Top 16/Top 50% criterion. According to him, the fact that he achieved Top 16/Top 50% results twice in two consecutive regattas within an Olympic year (where the standard is very high) supports his "consistence".
39. When discussing criterion #1 of the Internal Standards, the Claimant stated that he met it by being 3<sup>rd</sup> place overall at the Holland Regatta after the conclusion of the first day of racing (after four races were completed).
40. He added that during these races, he beat the Rio 2015 Pre-Olympic champion in three races and also beat many other competitors who will be competing at the 2016 Rio Olympic Games later this summer.

41. His submission is that this represents a clear demonstration of “podium potential” in regards to Criterion #1 of the Internal Standards.
42. According to him, if the regatta had ended after the first day, he would have actually finished on the podium.
43. It is important to note, however, that the Holland Regatta did not end after the first day of the competition and that the Claimant ultimately finished in 19<sup>th</sup> position in the final rankings.
44. In his written submissions, the Claimant also stated that he believed that he qualified as a “Rising Star” in accordance with criterion #5 of the Internal Standards.
45. He explained that he had committed to the 2020 programming and that he never announced his intention to retire after the 2016 Olympic Games.
46. Furthermore, he stated that his career results have only improved throughout the years, with the exception of the two years following the 2012 London Olympic Games. However, since 2015 he has continued to improve again and there has been no sign of a plateau in his athletic career.
47. He mentioned that he finished in 8<sup>th</sup> place in the 2012 Olympic Games, which is Canada’s best result in sailing at the Olympic Games.
48. In brief, the Claimant submitted that if he did not meet the other criteria of the Olympic Selection Criteria (which he denies), then he should be nominated under the “Rising Star” criteria.
49. Finally, the Claimant stated that the Respondent and its ADC should use their discretion to nominate him on the Olympic Team in accordance with the Internal Standards (see page 2 of the document).

50. To support this claim, he stated that the following circumstances/factors should be taken into account:

- After the 2012 London Olympic Games, it was always his intention to take a break from windsurfing before coming back to the sport full time.
- The funding offered by the Respondent to its athletes had significantly dropped after the 2012 London Olympic Games.
- He worked full time during his break to run a family business.
- During the summer 2014, his father was diagnosed with grade 3 colon, liver and lung cancer. He took care of his father until he passed away in late October 2014.
- When he came back from his break in 2015, he over trained for the 2015 RS:X World Championships in Oman and he consequently developed a very bad case of tendonitis.
- His doctor advised him to take six (6) months off training on the board to allow for a full recovery.
- In 2016, he competed at the Miami Olympic Classes Regatta. Even though he had little to no on-the-water training since October 2015 and that he was still injured at the time, he still made a respectable performance by finishing 19<sup>th</sup> out of 52 competitors.
- He has been sailing in the bay of Rio since 2001. In total, he sailed more than 40 days there. Another 20 days on the water of Rio is scheduled in July-August 2016. Therefore, this would make him one of the most experienced Canadian athletes on the bay of Rio for the Olympic Games.
- The Canadian athletes who are going to Rio for the Olympic Games support him.
- He is not a needy athlete. He does not require a coach or many resources. He has already tested and selected his equipment.

- His current training partners are the defending Gold medallist from the 2012 London Olympic Games and the 2015 Pre-Olympic champion.
- His injuries are behind him and he is currently in good health and top fitness level to compete with the best in the world.
- Not sending him to Rio after the performances he achieved at the last Olympic Games would not send a good message to youth in windsurfing in Canada.

51. For all the above-mentioned reasons, the Claimant states that he should be nominated on the 2016 Canadian Olympic Team by the Respondent.

## **B) The Respondent**

52. The Respondent, represented by Mr. Klevinas for its submissions, is of the opinion that the Panel should dismiss the Claimant's appeal.

53. According to them, the Claimant has not demonstrated, on a balance of probabilities, that the ADC failed to follow the Olympic Selection Criteria and the Internal Standards when it decided not to select him to compete at the 2016 Rio Olympic Games.

54. The Respondent first submitted that the Panel of the SDRCC owes deference to the ADC's experience, expertise and technical knowledge and that its decision not to select the Claimant falls within a range of possible outcomes that are defensible in light of the Olympic Selection Criteria and the facts of the present appeal.

55. Furthermore, it claimed that the ADC's decision was reasonable, justified, transparent and intelligible.

56. For these reasons, the Panel should not interfere with the ADC's decision according to the Respondent.

57. The Respondent started its submissions by detailing how its Olympic Selection Criteria were established.
58. It explained that the Criteria were developed by the ADC in early 2015. Following a series of discussions, a draft document was sent to the Board of Directors for review and approval.
59. The Respondent specified that this step included receiving extensive feedback from the athlete representative to the Board, which led to a Questions & Answers clarification document being distributed to the athletes of the National Team.
60. Afterwards, certain modifications were made to the Olympic Selection Criteria. These modifications are reflected in the final version of the document that was published on the Respondent's website on April 21, 2015.
61. Considering the input of its Board of Directors, as well as the extensive feedback of athlete representatives, the Respondent submits that the Olympic Selection Criteria and Internal Standards were appropriately established by the ADC.
62. When discussing the decision not to select the Claimant on the Olympic Team, the Respondent began by stating that its ADC is composed of individuals with extensive experience in the sport of sailing who have competed at past Olympic Games. The Respondent considered that these individuals have the relevant technical knowledge, expertise and experience to assess the athletes' eligibility in accordance with the Olympic Selection Criteria.
63. The Respondent explained that on May 30, 2016, the ADC held a Skype meeting to assess each athlete who was being considered for selection to compete at the 2016 Olympic Games in Rio.

64. In making its decision, the ADC assessed the Claimant's profile and his results at the following nomination events:

<b>Competition</b>	<b>Result</b>	<b>Percentage (%)</b>
2015 World Championships	64 <sup>th</sup> out of 82	78%
2015 European Championships	53 <sup>rd</sup> out of 100	53%
2015 Rio Test Event	21 <sup>st</sup> out of 28	75%
2016 Miami World Cup	20 <sup>th</sup> out of 52	35%
2016 World Championships	51 <sup>st</sup> out of 81	63%
2016 Holland World Cup	19 <sup>th</sup> out of 39	49%

65. Based on these results, the ADC concluded that the Claimant did not demonstrate podium potential, and therefore, that he did not satisfy the first criterion of the Internal Standards.

66. Regarding the statement of the Athlete that he was in 3<sup>rd</sup> position after the first day of competition at the Holland Regatta, the Respondent emphasized the fact that the Athlete ultimately finished the competition in 19<sup>th</sup> position out of 39 competitors. In its opinion, the important result to consider is the final position of the Claimant, which does not indicate podium potential.

67. The Respondent also explained that the ADC, on the basis of the results listed in the above paragraph 64, concluded that the Claimant had not obtained consistent medal race performances at nomination events and that, consequently, he did not satisfy the second criteria listed at page 2 of the Internal Standards.

68. Furthermore, the ADC concluded that the Claimant did not either obtain consistent top 16 overall (or top 50% when fleets were less than 32 boats or boards) performances in final standings at nomination events.

69. The Respondent agreed that the Claimant's 8<sup>th</sup> place finish at the 2016 Weymouth & Portland World Cup constitutes a top 50% finish. However, the Respondent submitted that this was the Claimant's only top 50%/Top 16 result in a

nomination event and that a single result cannot be considered “consistent results” in accordance with the third criterion of the Internal Standards.

70. Therefore, the Respondent explained that its ADC concluded that the Claimant had not satisfied the third selection criterion. In its opinion, this conclusion was reasonable and supported by objective data.
71. Furthermore, considering that there was only one nomination event remaining at that point, the ADC concluded that it was not possible for the Claimant to show consistent performance.
72. In its submissions, the Respondent stated that it received an email from the Claimant on May 31, 2016. This email asserted that the Claimant had been told that the selection decision would be made after the 2016 Weymouth & Portland World Cup.
73. Following this email, Mr. Philip Gow, Chair of the ADC, agreed to have a conversation with the Claimant, considering that the ADC had followed the same process with most athletes in order to debrief them regarding the trials process. Mr. John Curtis, another member of the ADC, was also on the call.
74. The Respondent stated that, during the phone conversation, Mr. Gow and Mr. Curtis ascertained that Mr. Ken Dool had in fact had a conversation with the Claimant from which he might have understood that his results from the Weymouth & Portland World Cup would be considered with respect to his selection to the 2016 Olympic Team.
75. However, Mr. Dool clearly stated during his testimony at the hearing that he never told the Claimant not to race the final day at the 2016 Holland Regatta, nor that he suggested that a single performance would assure the selection of the Claimant on the Olympic Team.

76. Mr. Dool explained that he recalled saying something like: “At minimum, [the Claimant] needed to demonstrate performance that met the selection standards and that a top 10 in both events would make any discussion easy, further that he needed to demonstrate competitiveness relative to Olympic fleet competitors”.
77. On June 1, 2016, Mr. Gow informed the Claimant that the ADC would consider his results at the 2016 Weymouth & Portland World Cup within the context of the published selection criteria.
78. The Respondent explained that when the ADC polled its members by email regarding the Claimant’s potential nomination, two (2) members supported his nomination, and three (3) held their position that he had not satisfied the Olympic Selection Criteria and the Internal Standards.
79. Regarding the Claimant’s arguments related to his injuries and extenuating factors, the Respondent submitted that it was not possible nor fair to any other athlete who was considered for selection on the 2016 Olympic Team to speculate with respect to what the Claimant’s results may have been, had he not been dealing with an injury or with the recovery from an injury.
80. Finally, the Respondent claimed that it properly exercised its discretion not to nominate the Claimant or any other RS:X athlete to compete at the 2016 Olympic Games.
81. In its opinion, it was not obligated to exercise its discretion to select an athlete for the RS:X event at the Rio Olympic Games in the event that any athlete’s performances were above or below the “Criteria 4 standard” as indicated in the Olympic Selection Criteria.

## VI. THE APPLICABLE LAW

### A) The SDRCC Code

82. Section 6.7 of the Code establishes the onus of proof in issues related to team selection:

#### ***6.7 Onus of Proof in Team Selection and Carding Disputes***

*If an athlete is involved in a proceeding as a Claimant in a team selection or carding dispute, the onus will be placed on the Respondent to demonstrate that the criteria were appropriately established and that the selection or carding decision was made in accordance with such criteria. Once that has been established, the onus of proof shall shift to the Claimant to demonstrate that the Claimant should have been selected or nominated to carding in accordance with the approved criteria. Each onus shall be determined on a balance of probabilities.*

[Underline added]

### B) Canadian Olympic Trials for Sailing at the 2016 Olympic Games

83. This document was published in April 2015 and describes the general and specific conditions that an athlete is required to meet in order to be considered and to be eligible for selection on the 2016 Olympic Team.

84. Page 2 of the document states the following regarding the selection criteria:

#### ***2016 Canadian Olympic Sailing Team Nomination Criteria***

*Classes must meet ISAF country qualification requirements before individual athletes sailing those classes can be considered for nomination to the 2016 Olympic Team. Classes that have met the international criteria for nomination*

*but where no athlete has met the internal criteria may not be nominated to the Olympic team.*

***Internal Nomination Performance Standards:***

*Nomination to the 2016 Olympic Sailing Team will be based on athlete assessment against the following performance criteria:*

- 6) *Demonstrated Podium Potential at nomination events.*
- 7) *Consistent Medal Race Performance at nomination events.*
- 8) *Consistent Top 16 overall (or top 50% for fleets of less than 32 boats or boards) performance in final standings at nomination events.*
- 9) *Consistent Top 25% of overall fleet performance in final standings at nomination events or Top 50% at World Cup Events (if fleet is restricted to 40 boats or less).*
- 10) *Rising Star Criteria*

*Athletes with performances achieved at or below the “Criteria 4” standard set out above may be nominated to the Olympic Sailing Team at the discretion of the ADC in consultation with HPD and HP Coaches, but athletes eligible under the Rising Star category may be considered for nomination ahead of these athletes. Such decisions will weigh factors such as commitment to a long-term program and evaluation against an age group cohort along with results achieved. (See “Rising Star Criteria”, below).*

[Underline added]

85. This page of the document also lists the Nomination Events for the 2015-2016 season:

***Nomination Events:***

*Athlete performances will be evaluated utilizing scores achieved at the events listed below. It is not the expectation or desire that athletes attend all of the designated events but rather that they follow a coach approved program targeted to achieve personal performance potential.*

*2015 Olympic Class World Championships*

*2015 Olympic Class European Championships*

*2015 Olympic Class World Cup Events – Hyeres, Weymouth & Portland*

*2015 Test Event*

*2016 Olympic Class World Championships*

*2016 Olympic Class World Cup Events – Miami, Hyeres, Weymouth & Portland*

*2016 Olympic Class European Championships*

*2016 Princess Sofia (Palma) Regatta and Holland Regatta*

*A nomination event must be completed prior to June 20<sup>th</sup>, 2016, for consideration in a selection decision.*

[Underline added]

86. Further details are provided at page 3 of the document regarding the “Rising Star” criteria:

***Rising Star Criteria:***

*Teams having formally committed to 2020 programming (see Appendix A) and having demonstrated international performance that illustrated the ability to perform at the 2016 Games but which do not meet the first four Internal Nomination Performance Standards may be nominated under the Rising Star criteria. Performance criteria may include, but are not limited to, performances at the events listed above under “Nominations Events” and such additional events as: Eurosaf Events, Youth World Championships, North American Championships, age group world championships or performance in an Olympic Class in which the athlete has not been nominated at the Olympic representative. When considering the additional events, performance across all Olympic Classes or Youth World Championships classes, where appropriate, will be included.*

[Underline added]

## VII. PAST PRECEDENTS

87. The Parties did not submit jurisprudence with their submissions, but I still find it relevant to reproduce passages of a few important decisions from the SDRCC.

### Mehmedovic and Judo Canada, SDRCC 12-0191/92

88. This decision rendered by Arbitrator Décary is very enlightening with respect to the role of the arbitrators and the applicable standard of review in carding and team selection issues:

*[27] It is now common ground that arbitration proceedings of this kind under the SDRCC Code are akin to a 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 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 (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. [...]*

*[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 is not within their realm. [...]*

*[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.*

([Underline added])

Beaulieu and Gardner and Canadian Snowboard Federation, SDRCC 13-0214

89. Once again, Arbitrator Décary had to rule on an issue regarding selection protocol. At paragraph 23 of his decision, Arbitrator Décary states the following:

*[23] Arbitrators are guided by two general principles. The first one is that deference is owed to the sporting authority's experience and expertise. It is neither the role nor the duty of an arbitrator to substitute his own appreciation of the appropriate solution unless there are valid grounds to do so. The second one is that the standard to be applied in determining what constitutes a valid ground, is the reasonableness of the decision*  
*[...]*

*Simply put, in sport arbitration, where deference to the experience and expertise of sport authorities is a starting point, the test is whether the outcome falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and of the policies at issue.*

[Underline added]

The Canadian Amateur Boxing Association (CABA) et al. and the Canadian Olympic Committee (COC), SDRCC 04-003

90. Arbitrator Picher sums up the principles in regards with the applicable standard of review related to team selection criteria problematics:

*The benchmark principle must be a recognition that those with the greatest knowledge of the sport and the administration of Olympic competition have come together and have applied their expertise to fashioning the most appropriate standard, a standard upon which they have reached agreement sometimes after a complex and extensive negotiation. If the values of certainty, predictability and objectivity are to be preserved and the mischief of subjectivity, unpredictability and arbitrariness are to be avoided, such agreements should not lightly be interfered with. In some extraordinary cases the failure of the decision maker to properly turn its mind to facts which are placed before it, or where it has adopted a clearly unfair procedure, there might be*

*cause to conclude that a decision is tainted by arbitrariness or is manifestly unfair. However, the onus which lies on an appellant to establish such arbitrariness or manifest unfairness can only be discharged on the basis of the most clear and compelling evidence.*

[Page 21 of the decision; Underline added]

## **VIII. DISCUSSION**

91. At the beginning of the hearing, the Parties and the undersigned Arbitrator agreed to narrow down the issues around the following sections of the Olympic Selection Criteria:

- Criterion #1: Demonstrated Podium Potential at nomination events;
- Criterion #3: Consistent Top 16 overall or Top 50% performance in the final standings at nomination events;
- Paragraph immediately following Criterion #5: Discretion of the Respondent.

92. The Respondent established its selection criteria quite clearly. It combined a number of factors, which resulted in providing a clear pathway to eligible athletes who wished to rely on objective criteria to meet the standard, in addition to the consideration of subjective factors providing the Respondent with decision-making flexibility adapted to sailing, necessary in a sport with highly varying in-competition conditions.

93. I was satisfied with the ADC's thorough analysis of the Claimant's potential nomination, applying the Olympic selection criteria. This analysis was data-based, anchored in the 2015-2016 season results.

94. As the Respondent's internal highly expert and technical body, great deference must be attributed to the ADC, and an arbitrator should interfere only if its decision deviates from the application of its own rules, or if it is demonstrated by the Claimant, as the onus of proof rests with him, that its decision was unreasonable.
95. On Criterion 1, I trust the ADC has come to the right conclusion. Podium potential at nomination events must be reflected not only hypothetically, but realistically with results. No podium was achieved during the current season. Placing 3<sup>rd</sup> after the first day cannot be considered, as only the final result counts.
96. On Criterion 3, the Claimant was required to place consistently in the top 16/top 50% of the results. Although he placed once in the top 50%, this was an isolated result, and does not meet my definition of *consistency*. I cannot advance how many similar results would have met the definition of *consistency*, and I do not need to define it. However I am most comfortable to conclude that a single placing would not meet any definition of *consistency*.
97. The fact that he was 16<sup>th</sup> before the last race, and that he chose not to race was a choice he made and that he owns. While I understand that the discussions held with Mr. Dool may have been open for interpretation, I can only recognize that there was a divergence of understanding based on this conversation. Absent a written confirmation to the contrary, I am not willing to allow a single conversation to be considered as a commitment from the Respondent to support the view of the Claimant.
98. One cannot extrapolate a possible result *had he raced*, or if so, this would have been entirely within the discretion of the ADC, which they chose not to exercise. I will not review the ADC's judgment on this issue, which is presumed to be correct.

99. Lastly, I cannot intervene under the paragraph immediately following Criterion 5.

This criterion is entirely subjective and allows the ADC, in consultation with the HPD and the HP coaches, to nevertheless nominate athletes to the team, should they fail to meet all other criteria. Again, I defer to the expertise of the ADC, and as they chose not to exercise it, it is not for me to substitute my own decision for theirs, without being convinced that their decision was unreasonable, which I did not find it to be.

## **IX. CONCLUSION**

100. I conclude that the Respondent exercised its discretion appropriately and I do not see any reason that would justify my intervention. I defer to the expertise of the Respondent's ADC with its decision not to select Mr. Plavsic on the 2016 Olympic Team.

101. Therefore, the appeal of the Claimant is dismissed.

102. I retain jurisdiction and reserve the right to hear any dispute relating to the interpretation or application of the present decision.

Signed in Montreal, this 7<sup>th</sup> day of July 2016.



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Patrice Brunet, Arbitrator