

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

**NO: SDRCC 16-0304
(ORDINARY TRIBUNAL)**

**ATHLETICS CANADA
(Claimant)**

AND

**JESSICA SMITH
(Respondent)**

Before:

The Hon. L. Yves Fortier, P.C., CC, OQ, QC (Arbitrator)

Appearances and Attendances:

On behalf of the Claimant: Mr. Jared MacLeod, Athletics Canada
Mr. Peter Eriksson, Athletics Canada
Mr. David Spears, legal representative
Mr. Jay Kim, legal representative

On behalf of the Respondent: Ms. Jessica Smith, athlete
Ms. Brit Townsend, coach
Mr. Ryan Shaw, legal representative
Mr. Peter Spencer, legal representative

Assistant to the Arbitrator
Ms Annie Lespérance, LL.M.

AWARD

5 August 2016

I. INTRODUCTION

1. This is an arbitration concerning the decision of Athletics Canada's Commissioner of 16 July 2016 (the "**Commissioner's Decision**") reversing Athletics Canada National Team Committee's ("**NTC**") decision not to submit the name of the Athlete, Ms. Jessica Smith, to the Canadian Olympic Committee for selection to the 2016 Summer Olympic Games in Rio de Janeiro, Brazil.
2. The Claimant, Athletics Canada, is the sport governing body for track and field in Canada.
3. The Respondent, Ms. Jessica Smith, is an 800 meter runner who has competed internationally for several years including the 2012 Olympics in London, England.
4. Athletics Canada seeks a review of the Commissioner's Decision under the Canadian Sport Dispute Resolution Code (January 1, 2015) (the "**Code**") for two reasons which can be summarized as follows:
 - a) Under the Rio 2016 Olympic Games Selection Criteria, only those athletes who have achieved the Athletics Canada Qualifying Standard in 2016 may submit an appeal for nomination to the NTC. The Respondent did not achieve the Athletics Canada Qualifying Standard in 2016 and therefore did not have standing to submit an appeal. As a result, the Commissioner's Office did not have jurisdiction to hear her appeal and his decision to hear the appeal pursuant to the doctrine of estoppel was wrong. The Commissioner's Office was outside of its jurisdiction when it rendered its decision.
 - b) Additionally, and in any event, Athletics Canada exercised its discretion in a fair, proper and reasonable manner when it chose not to nominate the Athlete, and as such its decision should not have been overturned by the Commissioner.
5. The Athlete opposes Athletics Canada's request. She submits, in brief, that:
 - a) The Commissioner's decision to hear her appeal pursuant to the doctrine of estoppel was correct and, in any case, the Commissioner had jurisdiction to hear her appeal pursuant to the Selection Criteria.
 - b) Additionally, the Commissioner's decision to allow the Athlete's appeal was reasonable in light of the facts and the law and should not be overturned.

6. Both Parties agree that the SDRCC has jurisdiction to deal with this dispute pursuant to Section 2.1 (b) (ii) of the Code.

II. PROCEDURAL HISTORY

7. On 17 July 2016, the Claimant filed its Request for Arbitration pursuant to the Code.
8. On 18 July, the SDRCC held an administrative conference call with the Parties. Minutes of the call were circulated thereafter.
9. On 19 July 2016, the Respondent filed her Answer.
10. On the same date, the SDRCC held a second administrative conference call with the Parties. Minutes of the call were circulated thereafter.
11. I was appointed by the SDRCC on 20 July 2016 pursuant to Section 6.8 (b) (i) of the Code.
12. On 20 July 2016, I held a preliminary conference call with the Parties to discuss procedural matters pursuant to Section 6.16 of the Code. I directed that the Claimant would file its brief by 22 July 2016, the Respondent would file her brief by 25 July 2016 and a telephonic hearing would be held on 27 July 2016.
13. On 22 July 2016, the Claimant filed its brief together with relevant factual exhibits, legal authorities and a Will Say Statement of Jared Macleod.
14. On 25 July 2016, the Respondent filed her brief together with relevant factual exhibits and legal authorities.
15. On 26 July 2016, having obtained leave from me, the Claimant filed a reply brief.
16. On 27 July 2016, the Respondent filed a Will Say Statement of Peter Eriksson and the Claimant filed Will Say Statements of Jessica Smith and Brit Townsend.
17. A telephone hearing was held on 27 July 2016 from 2pm to 6pm EDT.

III. FACTUAL BACKGROUND

18. On 27 July 2016, the Parties filed the following Agreed Statement of Facts with underlined and crossed wording:

AGREED STATEMENT OF FACTS

The Appellant, Athletics Canada, and the Respondent, Jessica Smith, agree that:

1. The Respondent has been the number two ranked 800m runner in Canada for the last 5 years, with the exception of 2015 when she was ranked third.
2. The Respondent is the second ranked female 800 meter athlete in Canada in 2016.
3. The Respondent met the qualification standard of 2:01.50 by achieving a performance of 2:01.07 during the qualification period in an event held on June 14, 2015.
- ~~3-4.~~ The Respondent and her personal coach negotiated an initial Competitive Readiness Plan; however, the plan was subsequently re-negotiated twice.
- ~~4.~~ The Respondent met her competitive readiness standard of 2:03.20 three times in 2016.
5. The Respondent received ~~the her most current~~final competitive readiness standard on June 20, 2016, ~~from Peter Erikson, the Head Coach, a standard which he set.~~
- ~~5-6.~~ The Respondent met the final re-negotiated competitive readiness standard of 2:03.20 three times in 2016.
- ~~6-7.~~ The Respondent only ran one race after June 17th before the National Championships, which were held on July 10, 2016.
- ~~7-8.~~ There was only one automatic qualifier in the Women's 800 metre event and she placed 1st at the National Championships.
9. The current National ranking and ranking under the Selection Criteria is different. The current National ranking is based upon an athlete's top performance in 2016, while the ranking under the Selection Criteria is based upon an athlete's top performance during the Olympic qualifying period.
- ~~8-10.~~ The Respondent was the second highest ranked non automatic qualifier who finished in the top eight of the field at the National Championships.
- ~~9-11.~~ The Respondent's time at the National Championships was 2:03.7, which is the fastest she has ever run at a National Championships including the time she ran in 2012 (2:07.7) to qualify for the 2012 Olympics.
- ~~10-12.~~ The highest ranked non-automatic qualifier finished 8th at the National Championships and is ranked 10th in Canada in the 800 metre event in 2016.
- ~~11-13.~~ The Respondent placed 4th at the National Championships, but she was the second place finisher at the National Championships that had met both the qualification standard and her competitive readiness.
- ~~12-14.~~ The second and third place finishers who placed ahead of the Respondent at the National Championships were not selectable as they had not achieved the qualifying standard in the qualifying period.
- ~~13-15.~~ At National Championships or Olympic trials, athletes are generally racing for place more than time.

~~44.16.~~ *Performance Progression Statistics from 2012 to present are not part of the published selection criteria of Athletics Canada.*

~~45.17.~~ *On July 11, 2016, the Respondent was advised by Peter Eriksson, the Head Coach, that the National Team Committee ("NTC") had concluded nomination deliberations and had decided that Athletics Canada would not be submitting her name to the Canadian Olympic Committee for selection to the Olympic Games in Rio.*

~~46.18.~~ *On July 12, 2016, the Respondent filed an appeal to the Office of the Athletics Canada Commissioner.*

~~47.19.~~ *The same day, the Appellant advised the Respondent of the reasons for the NTC's decision.*

19. At the hearing, counsel for the Parties explained that they had filed this Statement with track changes, with underlined words by the Claimant and crossed words by the Respondent. The underlined and crossed words, said counsel, reflect disagreements between the Parties as to the characterization of certain facts.

IV. SCOPE OF REVIEW

20. In her Brief, the Respondent submits that the Tribunal's scope of review should be limited to the evidence which was before the Commissioner.
21. In response, the Claimant submits that the Tribunal's scope of review of the Commissioner's Decision should be on a *de novo* basis pursuant to Section 6.17 (b) (ii) of the Code and should not be limited to the evidence which was before the Commissioner.
22. Section 6.17(b)(ii) of the Code is very clear and it applies in this case as the Claimant argues that the internal appeal policy of the Commissioner was not followed. The Tribunal's scope of review of the Commissioner's decision will be on a "*de novo*" basis, as necessary.

V. THE COMMISSIONER'S JURISDICTION

A. Procedural history of the Athlete's Appeal before the Commissioner

23. On 11 July 2016, the Claimant, Athletics Canada, submitted the names of 65 athletes to the Canadian Olympic Committee for selection to represent Canada in athletics events at the 2016 Summer Olympic Games. The Respondent's name was not included on the list.

24. The Respondent filed an appeal before the Commissioner's Office on 12 July 2016 pursuant to Section 7.0 of the Rio 2016 Olympic Games Selection Criteria (the "**Selection Criteria**").
25. Athletics Canada submitted a response on the same date in accordance with the Commissioner's request and the Athlete then submitted a rebuttal.
26. On 13 July 2016, prior to the hearing, Athletics Canada sent an email to the Commissioner asserting that the Athlete, pursuant to the Selection Criteria, did not have the right to submit an appeal.
27. The Commissioner responded as follows on 13 July 2016:

In order to preserve the integrity of the process and in fairness to all of the athletes who might appeal or be affected by an appeal, I'm of the view that section 7.0 has little flexibility and must be given a strict interpretation. I will have to inform [name redacted out of privacy to athlete] and Jessica that their appeals should not have been received. That being the case it seems appropriate to me that they should have their filing fee refunded if I follow that course. Had they been told at the outset that there was no jurisdiction for me to hear their appeal they obviously wouldn't have paid the fee.

28. On the night of 13 July 2016, the Commissioner then invited the parties to provide written submissions on the issue of the Commissioner's jurisdiction to hear the appeal.
29. Following written submissions from the parties, the Commissioner, on 14 July 2016, issued a pre-hearing ruling in respect of his jurisdiction:

[...]

I am of the view therefore that the doctrine of jurisdiction by estoppel should apply to these circumstances. In other words, there would be an unfairness in limiting the Appellant's right to submit an appeal, when the parties have already proceeded with the appeal in good faith.

For these brief reasons, the ruling of the Commissioner's Office is that with regard to this matter, the Appellant, Jessica Smith is eligible to file an appeal of her non-

selection to the 2016 Olympic Team and the Commissioner's Office has the jurisdiction to hear the Appeal. (my emphasis)

[...]

30. A telephone hearing took place on 15 July 2016.
31. On 16 July 2016, the Commissioner issued his decision granting the Athlete's appeal. He concluded as follows:

20. [...] The Commissioner's Office is overturning the decision made by the National Team Committee on July 10, 2016. As a result, the National Team Committee and Athletics Canada are hereby ordered to submit Jessica Smith's name to the Canadian Olympic Committee as an entrant in the 800 meter event at the 2016 Summer Olympic Games in Rio de Janeiro, Brazil.

B. Claimant's Position

32. The Claimant submits that the Commissioner erred in ruling that he had jurisdiction and in ruling that the Respondent was eligible to file an appeal.
33. Section 7.0 of the Selection Criteria sets out the conditions pursuant to which an athlete may submit an appeal for nomination to the Commissioner's Office. It reads as follows:

Only athletes who are eligible to be considered for nomination (as per Section 1.3) and who have achieved the standard (as per Appendix A) in 2016 may submit an appeal for nomination to the Commissioner's Office. Please refer to Section 3.0 of the National Team – Selection Rules Book for instructions.

Due to the extremely short time frame between Team nomination and final submission to COC (July 17, 2016), Appeals will only be considered if they have been received in writing to the Commissioner's Office within 48 hours of the official announcement of the Team nomination.

34. The Parties agree that, for the women's 800m event, an athlete must achieve performance of 2:01.50 to meet the Qualifying Standard.

35. The Claimant submits that the Athlete's best time of 2016 was 2:01.84 which she achieved on 1 May 2016. She failed to achieve a time of 2:01.50 or better in 2016.
36. The Claimant argues that, as the Respondent did not achieve the Qualifying Standard in 2016, she was not eligible to appeal the National Team Committee's decision under Section 7.0 of the Selection Criteria.
37. The Claimant submits that Section 7.0 of the Selection Criteria is very clear and that it cannot be interpreted as the Respondent proposes.
38. According to the Claimant, the Commissioner also erred in invoking the equitable doctrine of jurisdiction by estoppel to allow the Athlete to file an appeal.
39. The Claimant argues in its Reply Brief that no party's consent, or waiver – or for that matter, an estoppel – can confer jurisdiction on an administrative decision-maker where none existed.
40. In conclusion, the Claimant requests that the Commissioner's Decision be declared a nullity for want of jurisdiction.

C. Respondent's Position

41. The Respondent submits that the Athlete had a right of appeal before the Commissioner pursuant to Section 7.0 of the Selection Criteria.
42. The Respondent avers that there are two possible interpretations of Section 7.0:

The first interpretation is the one suggested by AC, mainly that only those athletes who achieve the Qualifying standard during the 2016 season have a right of appeal to the Commissioner's Office. The second, is that Section 7.0 permits any athlete to bring an appeal to the Commissioner's Office who, in 2016, has met the conditions for eligibility in the Selection Criteria, including having achieved the Qualifying standard.¹
43. The Respondent submits that the second interpretation "should be followed".

¹ Respondent's Brief, para. 58.

44. The Selection Criteria “read as a whole”, says the Respondent, cannot prevent an athlete such as the Respondent who achieved her Qualifying Standard in the qualifying period but not in 2016 from appealing a selection decision of the NTC to the Commissioner’s Office.
45. Section 4 of the Selection Criteria expressly provides that in order to be eligible for selection an athlete must achieve the Qualifying Standard during the qualifying period, which runs from 1 May 2015 to 10 July 2016.
46. The interpretation of Section 7.0 proposed by the Claimant (that the Qualifying Standard must be met in 2016) is different from the qualifying period established by the Selection Criteria during which the Qualifying Standard must be met.
47. The Respondent recalls that she did meet the Qualifying Standard in an event held on 14 June 2015, thus within the qualifying period.
48. As a result, submits the Respondent, she did have a right of appeal to the Commissioner’s Office.
49. The Respondent further submits that, in any event, the Commissioner rightly relied on the doctrine of estoppel.
50. Consequently, the Respondent submits that the Commissioner was right to rely on the equitable doctrine of estoppel in confirming his jurisdiction.

D. Tribunal’s Analysis

51. Initially, I have to interpret Section 7.0 of the Selection Criteria in order to determine whether the Commissioner had jurisdiction to entertain the Respondent’s appeal.
52. As noted above, the Claimant submits that the language of Section 7.0 is very clear and that only those athletes who achieve the Qualifying Standard during the 2016 season have a right of appeal to the Commissioner’s Office.
53. The Respondent, on the other hand, argues that Section 7.0 allows any athlete to bring an appeal to the Commissioner’s Office who, in 2016, has met the conditions for eligibility in the Selection Criteria, including having achieved the Qualifying Standard.

54. It is well settled that the rules or policies of a sport's organization should be interpreted according to the same principles that are used to construe contracts.

55. As Arbitrator Mew stated in *Laberge v Bobsleigh Canada Skeleton*:

The starting point is to ascribe to words their natural and ordinary meaning having regard to the context in which they arise. The intent of the parties is important, but the subjective interpretation of the parties -what they thought the selection criteria meant – is immaterial (see Chitty on Contracts, 30th ed. Vol. 1, para. 12-043).²

56. The right of appeal for Athletics Canada athletes is clearly laid out in the National Team – Selection Rules Book (the “Rules”).

57. Section 3.0 of the Rules states in part:

Appeals of team selection decisions may only be submitted by athletes deemed eligible to submit appeals as specified in the Selection Criteria Document. (my emphasis)

58. Section 7.0 of the Selection Criteria is the section that deals with the athlete's right to appeal a selection decision. As noted earlier but quoted again for ease of reference, it provides very clearly:

Only athletes who are eligible to be considered for nomination (as per Section 1.3) and who have achieved the standard (as per Appendix A) in 2016 may submit an appeal for nomination to the Commissioner's Office. Please refer to Section 3.0 of the National Team – Selection Rules Book for instructions. (my emphasis)

59. I note with interest that the Commissioner himself, after having been notified by Athletics Canada that Ms. Smith did not have the right to submit an appeal under the Selection Criteria, responded and confirmed that he was of the view that Section 7.0 “has little flexibility and must be given a strict interpretation”.

60. Indeed, the words of Section 7.0 viewed in the context of the whole of the Selection Criteria leave no room for flexibility. The only athletes who may submit an appeal for nomination to

² SDRCC 13-0211, at para. 71.

the NTC are those who are eligible for nomination and who have achieved the standard in 2016.

61. The Respondent would have me substitute “during the qualifying period, 1 May 2015 – 10 July 2016” for “in 2016”.
62. Yet, when the drafters of the Selection Criteria wanted to refer to the qualifying period as the relevant period, they did so very clearly, for example in Section 1.2 and Section 4.
63. In Section 7.0, the drafters of the Selection Criteria decided that the relevant period would be 2016. I see no justification for reading out of that Section “2016” and substituting for it “during the qualifying period, 1 May 2015 – 10 July 2016”. If, in future Olympic Games, the drafters of Selection Criteria consider that the relevant period should be as the Respondent argues today, it can do so.
64. I find that the clear language of Section 7.0 simply does not allow for the interpretation proposed by the Respondent.
65. I will now address the decision of the Commissioner of 14 July 2016 when he issued a pre-hearing ruling on the issue of his jurisdiction to hear the appeal.
66. The Commissioner ruled that he would hear Ms. Smith’s appeal pursuant to the doctrine of jurisdiction by estoppel as *“an appeal was filed by the athlete and documents were exchanged by the parties prior to the jurisdictional issue being raised” and “it would be unfair to limit the Respondent’s right to appeal when the parties had already proceeded with the appeal in good faith.”*
67. The Athlete submits that the Commissioner properly relied on the equitable doctrine of estoppel by convention to allow Ms. Smith’s appeal to proceed.
68. The Athlete concludes that “it would have been unjust and unfair to allow Athletics Canada to resile the assumption that the Commissioner had jurisdiction because Ms. Smith would clearly have been prejudiced in the result.”
69. The Respondent also submits that the authority granted to the Commissioner by his “Terms of Reference” does not prohibit the Commissioner from relying on equitable doctrines, such as estoppel, in the course of carrying out his responsibilities.

70. In its Reply Brief, Athletics Canada asserts that this is not a case where estoppel can apply. “This is a case where the very jurisdiction of the Commissioner is at issue”, says the Claimant.
71. The Claimant, relying on the decision of Justice Carnwath in *Gough v Peel Regional Police Service*³, submits that “no party’s consent, or waiver, or for that matter, an estoppel, can confer jurisdiction on an administrative decision-maker where none existed.”
72. As I agree with the Claimant on this important point, I will quote, *verbatim*, the following paragraphs of Athletics Canada’s Reply Brief:

5. [...] *At issue in the case was whether the fact that a police officer plead guilty to misconduct before a Hearing Officer precluded him from later challenging the Hearing Officer’s jurisdiction because certain time limits were not adhered to.*
6. *Justice Carnwath found that the police officer did not waive his right to appeal the jurisdictional issue by acknowledging his misconduct. In particular, Carnwath J. noted that neither waiver nor consent can estop a party from subsequently maintaining that the tribunal acted without jurisdiction. At p. 8 he reviewed and summarized the authorities:*

“Where a nurse’s conduct was in question, her consent to an adjournment of the inquiry did not confer jurisdiction upon the inquiry committee. Counsel’s agreement to the adjournment did not estop the nurse from successfully challenging the jurisdiction of the committee (see: *Newton v. Tataryn*, [1990] M.J. No. 209 (Man Q.B.).

In *Rosenfeld v. College of Physicians & Surgeons (Ontario)* (1969), [1970] 2 O.R. 438 (Ont. H.C.), Fraser J. held that waiver cannot remedy a nullity nor can it give jurisdiction.

The House of Lords, in *Essex County Council*, above, found that no consent can estop the consenting party from subsequently maintaining that such court or tribunal has acted without jurisdiction.

Even if it were possible for a waiver to confer jurisdiction where none exists, the waiver must be explicit. It must be clear, unequivocal, express and informed. There was no such waiver in this case (see: *Earth Vision Productions Inc. v. Saskatchewan Wheat Pool*, [1996] S.J. No. 664 (Sask, Q.B.)). See also: *Goertz v. College of Physicians & Surgeons* (Saskatchewan), [1989] S.J. No. 425 (Sask. C.A.).

I find that Constable Gough did not waive his right to appeal the jurisdictional issue to OCCPS by acknowledging an infraction of the Act.”

³ [2009] OJ No 1155

73. In the present case, Athletic Canada at no time waived its right to challenge the Commissioner's jurisdiction and I find no clear, unequivocal, express and informed waiver in the record.
74. In my view, even if Athletics Canada had consented to the Respondent submitting an appeal, the consent cannot estop it from maintaining before me that the Office of the Commissioner has acted without jurisdiction.
75. Accordingly, I find that the Commissioner did not have jurisdiction to entertain Ms. Smith's appeal. The Commissioner's decision of 16 July 2016 is declared a nullity for want of jurisdiction and the decision of Athletics Canada not to nominate the Respondent to the Canadian Olympic Committee for selection to the 2016 Summer Olympic Games in Rio stands.
76. I have now seen the letter of 3 August 2016 from the Athlete and her coach requesting me "to consider and address the submissions made on our behalf in regard to the substantive issue of whether AC improperly made its decision not to include Ms. Smith on the Team for Rio on the basis of criteria that were not within the parameters of the selection criteria that they were otherwise obliged to follow under their Rules."
77. While I do not share the Athlete's view that, having issued my decision on 29 July 2016 that the Commissioner did not have jurisdiction to entertain Ms. Smith's appeal and that his decision of 16 July 2016 was thus a nullity for want of jurisdiction, it was then necessary for me to consider and address the substantive appeal on its merits, I note that the Athlete requests me to do so in order to obviate the need for her to file "a fresh appeal" to the SDRCC on the question of her non-selection and that Athletics Canada has not objected to the Athlete's request.
78. As I have heard both parties' submissions and arguments in respect of those substantive issues, I have decided to accede to the Athlete's request. I believe it would be fair for me to do so taking into account in particular the potential additional costs to the Athlete if she was obliged to file a new appeal directly to the SDRCC (See Article 3.12 of the Code).
79. Having heard and considered the totality of the evidence as well as the Parties' submissions and arguments, and informed by the reasoning of Arbitrator Pound QC as to

the application of the “reasonableness test”⁴, I see no reason to conclude that the decision of Athletics Canada, taken in the exercise of its unfettered discretion, was unreasonable in the circumstances of this case.

VI. DECISION

80. On 29 July 2016, pursuant to Section 6.21(c) of the Code, I issued the following decision without reasons:

Pursuant to the Rio Olympic Games Selection Criteria (Article 7), only athletes who are eligible to be considered for nomination and who have achieved the Athletics Canada Qualifying Standard in 2016 may submit an appeal for nomination to the Commissioner’s Office.

The Respondent, Jessica Smith, did not achieve the Athletics Canada Qualifying Standard in 2016 and therefore did not have standing to submit an appeal.

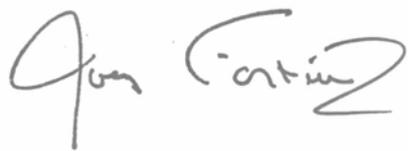
Accordingly, the Commissioner did not have jurisdiction to entertain Ms. Smith’s appeal and his decision of 16 July 2016 is declared a nullity for want of jurisdiction.

81. For all of the preceding reasons, I hereby confirm the above-noted decision.
82. As to the merits of the Respondent’s appeal to the Commissioner, I recall my decision issued today and set out above in paragraph 79 which reads as follows:

“Having heard and considered the totality of the evidence as well as the Parties’ submissions and arguments, and informed by the reasoning of Arbitrator Pound QC as to the application of the “reasonableness test”, I see no reason to conclude that the decision of Athletics Canada, taken in the exercise of its unfettered discretion, was unreasonable in the circumstances of this case”.

⁴ See *Richer v. The Canadian Cerebral Palsy Sports Association*, SDRCC 15-0265 and *Larue v. Bowls Canada Boulingrin*, SDRCC 15-0255.

Signed in Montreal this 5th day of August 2016.

A handwritten signature in black ink, appearing to read "L. Yves Fortier". The signature is written in a cursive style with a large initial "L" and a stylized "Fortier".

The Hon. L. Yves Fortier, P.C., CC, OQ, QC, Arbitrator