SDRCC 16-0317

JOËLLE NUMAINVILLE

(Claimant)

and

CYCLING CANADA

(Respondent)

and

HUGO BARRETTE
ANNIE FORMAN-MACKEY
LEAH KIRCHMANN
RYAN ROTH
PATRICE ST-LOUIS PIVIN

(Potentially Affected Parties)

Richard W. Pound, QC, AdE
(Sole Arbitrator)

JURISDICTIONAL ORDER

Appearances:

For the Claimant: Antoine Michaud-Soret

For the Respondent: Danielle Mathieu
Jacques Landry
Kris Westwood

Introduction

This is a carding case.

The Claimant is a professional road cyclist who applied for carding under the Athlete Assistance Program (**AAP**) funded by Sport Canada, applicable to the year 2017. Carded athletes receive funding, on a scale established by Sport Canada, in consultation with the national federations that govern the various sports participating in the AAP. Nominations for carding in cycling are made by her national federation, the Respondent, Cycling Canada (**CC**), on an annual basis, in respect of a quota established by Sport Canada for the sport of cycling, which includes its various disciplines, such as track, road and BMX.

No issue was raised by any party with respect to the process or mechanics pursuant to which the AAP grants are made in respect of cycling. Some are established on the basis of competitive results obtained. Some are referred to as development cards, awarded to younger athletes identified as having potential for future success at the international level. And some are awarded on a discretionary basis, which involves a combination of competitive results, potential results and a subjective assessment of the applicant. Not having been nominated solely on the basis of her competitive results, the Claimant applied under the discretionary category. The Claimant asserts that she had received a card in respect of the previous five years. She was not nominated to receive carding for 2017. That decision by CC led to the present proceedings.

Preliminary Issues

The matter was not without certain complications, even before entering into an inquiry regarding the substantive merits of the claim.

The Claimant sought provisional measures under section 6.15 of the Canadian Sport Dispute Resolution Code (**Code**), to the effect that no payments be made under the AAP until the current dispute is resolved.

The dispute is a zero-sum situation. If the Claimant is successful, another athlete nominated by CC will lose her or his funding, since cycling is entitled to nominate a maximum of 29 athletes to receive cards for AAP funding in respect of 2017. Any athlete thereby put at risk

becomes a Potential Affected Party for purposes of these proceedings and is permitted to participate in the proceedings.

The Claimant identified the athlete she considered to be the Affected Party. CC did not agree, in part because there was, at the time these proceedings commenced, an ongoing internal appeal against another carding decision, the outcome of which had not been determined at the time of the preliminary conference call in these proceedings, and which outcome might engage other possible Affected Parties. Subsequent to the hearing on jurisdiction (described below), CC identified the athletes who might be affected by the decision in these proceedings, should the Claimant be successful. These athletes were advised of the possibility that their cards might be impacted by the eventual decision and given the opportunity to participate.

There was a further, and potentially determining, complication. CC asserts that the Claimant has not followed the internal appeal process established by CC and that she is now out of time to do so. On the basis that failure to have followed the internal appeal process precludes the Claimant from pursuing any other recourse, CC challenges the jurisdiction of the SDRCC to hear the appeal on the merits.

The essential chronology affecting this aspect of the dispute is set forth below. There is no issue as to earlier timely application for the card by the Claimant (indeed, she was permitted by CC to apply for carding after the published deadline for applications had expired), nor failure on her part to have provided CC with the information required to assess her application.

> November 29, 2016 – The Claimant is advised in writing by CC that she will not be nominated to receive a card for 2017.
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> December 6, 2016 – In a communication addressed to the CC Manager of High Performance, the Claimant requests details and further information regarding the decision.
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> December 9, 2016 – The Claimant receives the requested information and explanations from the CC High Performance Director.
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> December 14, 2016 – The Claimant advises CC that she plans to appeal against the decision not to nominate her to receive a card in respect of 2017.
>
> December 15, 2016 – CC advises the Claimant that the delays to appeal against the decision had expired (pursuant to section 6.3 of the CC's Appeal Policy) and that her appeal could not proceed.

December 29, 2016 – The Claimant files her appeal with the SDRCC.

January 11, 2017 – CC files its Answer with the SDRCC, raising both jurisdiction and the issue of the identification of potentially Affected Parties.

Applicable Rules

Prior to moving forward, it is worth considering the "legislative" background, in the sense of the applicable rules that will frame the discussion.

I. **CC Appeals Policy**.

The current version of this policy was approved on 1 May 2015.

Its stated goal is expressed as: "This policy provides a process for dealing with disputes with Cycling Canada (CC) decisions."

Section 2 is entitled Principles:

> Any individual who is a Participant of CC will have the right to appeal a decision of CC Board, of any Committee of the Board or CC, or of any external organization or individual who has been delegated authority to make decisions on behalf of CC subject to the limits set out in Articles 3.2 [discussed below], 6.1 [contents of a notice of appeal], and 6.4 [procedural grounds for appeal] of this Policy.

The Claimant falls within the definition of "Participant."

Section 3 (Field of Application) contains some confusing language. Section 3.1 states that the Policy will apply to decisions made by CC, *inter alia*, those relating to AAP nominations, whereas section 3.2 states that for further clarity, the Policy will <u>not</u> apply to matters relating to:

> …
> (b) Notwithstanding Item 3.1 above; for any matters related to the Athlete Assistance Program nominations or de-carding, all appeals must follow the Policies and Procedures of Sport Canada's Athlete Assistance Program (AAP).

The policy (at section 5) states that CC is committed to conducting appeals by applying a standard, timely, transparent, affordable, and fair process. Section 6 describes the process, requirements and limitations of an appeal. Appeals to the SDRCC are contemplated, also with limitations as to what "law" may be considered and the statement that the role of the SDRCC is

to "[…] identify [any] error and send the matter back to CC to make the decision free from error, unless this not possible or practical."

II. **The Code**.

The principal provisions of the Code that have application in these proceedings are the following:

> **3.1 Availability of Dispute Resolution Processes**
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> (b) Unless otherwise agreed or set out herein, and if the dispute involves a NSO, where a Person applies to the SDRCC for the resolution of a Sports-Related Dispute, the Person must first have exhausted any internal dispute resolution procedures provided by the rules of the applicable NSO. For the avoidance of doubt, a NSO internal dispute resolution procedure is deemed exhausted when:
>
> (i) The NSO has rejected the right of the Person to an internal appeal;
> (ii) The NSO or its internal appeal panel has rendered its final decision; or
> (iii) The NSO has failed to apply its internal appeal policy within reasonable time limits.

Unfolding of the Proceedings

A preliminary conference call was held on January 20, 2017. Both parties participated and the Claimant was represented by her counsel. The primary purpose of the call was to determine how the proceedings were to be dealt with and to schedule the hearing(s) to follow.

The matter of the request for provisional measures was settled. CC undertook to make no payments in respect of the discretionary card to which the Claimant considers herself entitled until these proceedings have been completed. The Claimant and her counsel expressed themselves as satisfied with that undertaking.

It was appropriate that the matter of jurisdiction be determined first.

The matter was heard, also by conference call, initially, on January 25, 2017, but had to be adjourned until January 30, 2017, due to communications failure attributable to my out-of-office telephone system.

I requested the parties to file points of argument on jurisdiction by January 24, 2017. I find this step to be a useful exercise for purposes of defining the points to be argued and for ensuring that I know what points have been advanced by each party, especially because there may be some differences between the written proceedings and the final positions advanced when the arbitrator is present. In addition, I asked the Claimant to address the matter of why she did not avail herself of the CC Appeal Policy. I asked CC to direct my attention to any other CC documents that dealt with or referred to the Appeal Policy that might suggest that recourse to the Appeal Policy is a condition precedent to any appeal before the SDRCC and to deal with the apparently conflicting language in section 3 of the Appeal Policy (Field of Application).

CC's essential position was that the Claimant had not availed herself of the recourses provided by the CC Appeal Policy and was out of time to have done so. Accordingly, she had no status to lodge an appeal before the SDRCC.

The Claimant argued that she should have had a delay of 15 days to appeal and that there was confusion for the athletes regarding provisions of the Appeal Policy applicable to delays. On the earlier occasion when she had used the Appeal Policy, she had engaged a lawyer and she said she was not personally familiar with all of the applicable rules. Additionally, CC had not drawn her attention to the matter of timelines and she said that, as an athlete, she was not aware of the procedural details of the Appeal Policy, which were not provided to her before the expiration of those timelines.

I am unwilling to make an Order that would effectively relieve the Claimant of responsibility for not being aware of a policy that she had already used in the same calendar year.

It seems to me, however, that the matter of SDRCC jurisdiction is effectively settled by the language of section 3.1(i) of the Code, which deems the CC's refusal of the Claimant's right to proceed pursuant to the CC Appeal Policy to have exhausted the Claimant's recourses under that policy.

I should say that even without such a deeming feature I would have held that the Claimant was not foreclosed from appealing to the SDRCC. There has been nothing drawn to my attention that would compel me to conclude that the route of an internal appeal was compulsory or a condition precedent to any such appeal to the SDRCC.

The terms of the Appeal Policy itself simply provide that it presents an opportunity to have an internal appeal. The goal is expressed as follows: "[t]his policy provides a process for dealing with disputes with Cycling Canada (CC) decisions." [emphasis added] Section 2 (Principles) states that "Any individual who is a Participant of CC will have the right to appeal a decision…" [emphasis added] The appeal process is expressed as "a" process, not as "the" (only) process. Under the policy, Participants are provided with a "right" to appeal, but are not fixed with the obligation to appeal pursuant to the policy.

It would, in my view, require much more specific language to conclude that a Participant must use the internal appeal process as a form of pre-condition to the exercise of any further rights of appeal. It would be completely improper for me, as an arbitrator, to purport to re-write the Appeal Policy to make recourse to the Appeal Policy mandatory, especially in the absence of any compelling evidence that supports the existence of such an intention. I would not merely be filling in a gap in the drafting of the Appeal Policy, but would be adding something that does not flow from the plain meaning of an unambiguous provision.

Clearly, the Appeal Policy was designed to afford individuals affected by CC decisions with an expeditious internal process for challenging such decisions. It was not designed to protect CC as a decision-maker. CC suffers no prejudice if a Participant chooses, for whatever reason, not to avail her/himself of that process.

CC's position that the Claimant is simply out of time to appeal effectively forecloses the ability of the Claimant to bring forward whatever facts and arguments she might have to support her claim. In adversary proceedings, the preferred position is for the relevant facts to be available for consideration by (in this case) the arbitrator, rather than to rely on an alleged procedural deficiency to prevent the merits of the claim from being examined.

I note also that the date on which the Claimant received the explanations she sought regarding her scores was December 9, 2016 and that on December 14, 2016, she advised CC that she planned to appeal, only to be told that the delays had already expired and that she was out of time to appeal. In my view, that triggers the rule in Code Article 3.1(i) that deems her rights under the Appeal Policy to have been exhausted. There is nothing in that rule which restricts its application to decisions on the merits of a claim made pursuant to the provisions of the internal policy. As noted above, it would be improper of me, as an arbitrator, to insert language to limit the application of the Code in such a manner. The rejection of the right of the Claimant to an internal appeal is a rejection, pure and simple, and would, therefore, include a rejection based on alleged time delays. The Code's deeming rule regarding exhaustion of the internal process has the effect of commencing a new delay to appeal, this time to the SDRCC. Under Article 3.5(b) of the Code, that would be 30 days after learning of the reasons for the various scores on which she had sought further information, namely December 9, 2016. The Claimant filed her request for arbitration well within that limit.

I find, therefore, that the matter of jurisdiction is resolved in the Claimant's favour and I so Order.

My decision on jurisdiction was communicated verbally to the Parties at the conclusion of the argument presented on January 30, 2017. I indicated that I preferred to deal with all of the issues in the appeal in a single written decision and would not, therefore, issue a separate Order on jurisdiction, but would include it as a component of the anticipated final Order. No objection was taken by either party to this proposal.

This communication notwithstanding, CC filed a request for clarification of that decision later the same day, in respect of which I requested the SDRCC staff to respond and advise the parties as follows:

> With respect to the Respondent's request for clarification, filed on January 30, 2017, the arbitrator, having reviewed the request for arbitration and having listened to the parties' representations, decided to accept jurisdiction.
>
> This was communicated to the parties at the conclusion of representations regarding jurisdiction. The arbitrator advised the parties that the full reasons for the decision would be included in the final Order disposing of the appeal. No party objected to that proposal.

> The arbitrator made it clear, *inter alia*, that he was not persuaded that the Respondent's internal appeal process was mandatory, or a condition precedent to an appeal by an athlete to the SDRCC.
>
> The Respondent is requested to file its reply on the merits of the request for arbitration by the close of business on February 8, 2017.[1]

A further preliminary meeting was held on February 13, 2017. The appeal was to be heard on March 5, 2017 (and subsequently rescheduled to April 10, 2017 by agreement of the parties) and dates were subsequently set for party filings leading up to that date. In the meantime, the parties proceeded with the mandatory resolution facilitation process prescribed in Article 4.3 of the Code. In due course, I was advised that a settlement had been reached, which involved, *inter alia*, the withdrawal of the Claimant's appeal.

This Order relates solely to the issue of jurisdiction and does not relate to the merits of the claim, which no longer need to be adjudicated.

Because I had made the decision regarding jurisdiction and intended that the reasons for that decision would be included with the anticipated decision on the merits, it is appropriate that this jurisdictional aspect of the proceedings now be published in the form of this Order, which does not, of course, have any impact on the settlement reached by the parties.

I have received no submissions regarding costs and, therefore, award none.

MONTREAL, this 10th day of April 2017

Richard W. Pound, QC, AdE
Arbitrator

[1] CC, having challenged on the basis of jurisdiction, had not pleaded on the merits.