

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

NOVEMBER 2ND, 2016

N°: SDRCC 16-0309

DAN CARRUTHERS
(CLAIMANT)

AND

SPEED SKATING CANADA (SSC)
(RESPONDENT)

AND

BRADEN CLOUTHIER
(AFFECTED PARTY)

Before: Patrice Brunet (Sole Arbitrator)

Date of Hearing: October 18th, 2016

Appearances:

For the Claimant: Dan Carruthers
Dr. Emir Crowne, counsel

For the Respondent: Ian Moss
Brian Rahill

For the Affected Party: None

REASONS FOR DECISION

I. INTRODUCTION

1. The crux of this arbitration rests on the decision of Speed Skating Canada (“the Respondent”) not to name Dan Carruthers (“the Claimant”) to the 2016-2017 NextGen Program. The Claimant also contests the fact that he was not awarded a Development Card under Sport Canada’s Athlete Assistance Program (the “AAP”).
2. On October 18th, 2016, the hearing was held via conference call.
3. On October 19th, 2016, I rendered my short decision in which I ordered that the Claimant be immediately appointed to the 2016-2017 NextGen Program.
4. The reasons for my decision are set out below.

II. PARTIES

5. Dan Carruthers is a 24-year old long track speed skating athlete. He was part of the 2015-2016 NextGen Program and also received a Development Card under Sport Canada’s AAP for the 2015-2016 carding cycle. However, he was initially not selected by SSC for the 2016-2017 NextGen Program.
6. SSC is the national sport governing body for competitive long track and short track speed skating in Canada. SSC is recognized by Sport Canada, the Canadian Olympic Committee (“COC”), the Canadian Paralympic Committee (“CPC”) and by the International Skating Union (“ISU”). During the proceedings, the organization was represented by Mr. Ian Moss, Chief Executive Officer of SSC and by Mr. Brian Rahill, the High Performance Director of SSC.

7. Braden Clouthier is a 22-year old long track speed skating athlete. He was named on the 2016-2017 NextGen Program by SSC on July 18th, 2016. Even though he was identified as an Affected Party, Mr. Clouthier decided not to participate in the present arbitration.

III. JURISDICTION

8. The Sport Dispute Resolution Centre of Canada (SDRCC) was created by Federal Bill C-12, on March 19th, 2003¹.
9. 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.
10. All Parties have agreed to recognize the SDRCC's jurisdiction in the present matter. They also confirmed their acceptance that I act as Arbitrator in these proceedings, without any objection.

IV. BACKGROUND

11. In November 2015, the Respondent published its *High Performance Bulletin #177*, entitled "2016-2017 Athlete Assistance Program Carding Criteria" (hereinafter the "Carding Criteria").
12. According to the document, "*the fundamental strategic purpose of the High Performance Bulletins (HPB) for the long track program is to establish provisions that are designed to select athletes to teams who will perform at the highest level, and achieve the best possible results for Canada at Olympic Games and World Single Distance Championships*".

¹ The *Physical Activity and Sport Act*, S.C. 2003, c.2

13. The crux of the present arbitration relates to **section 1.8 of the Carding Criteria**, defining the “Development Card Criteria”. This section reads as follows:

1.8. Development Card Criteria

After the application of the Senior International and Senior National card criteria, the remaining card quota in Long Track will be allocated to athletes eligible under the Development Card criteria. Development Cards are intended to support the developmental needs of younger athletes who clearly demonstrate the potential to achieve the Senior International Carding criteria but are not yet able to meet the Senior National Card criteria.

Eligible athletes will be nominated in the following priority order:

Priority 1: *Athletes that placed in the top 8 and top 1/3 at the 2016 World Junior Championships in the overall classification or individual distance events, or medal in Team Pursuit or Mass Start. These athletes will be prioritized based on the overall classification. If there is a tie between 2 or more athletes, the results in the individual distance classifications will be used to break the tie.*

Priority 2: *Athletes that place 21st to 25th in the final ISU Distance ranking for the 2015-2016 competitive season. These athletes will be prioritized based on the actual respective distance ranking;*

Priority 3: *Any remaining card quota will be used to nominate athletes selected to the “NextGen” identified training program (if applicable under the card quota). NextGen athletes are nominated based on their position in the NextGen ranking. The ranking is produced following the assessment of the following criteria/elements in order of priority:*

i. Athlete prospects will be rated and ranked according to performance as a percentage of world record and prorated for age.

ii. Athlete prospects will be rated and ranked according to performance progression (year on year progress for their age) and prorated as improvement progression as a percentage of world record.

iii. Athlete prospects will be rated and ranked according to performance ranking on the Canadian ranking list.

iv. Athlete prospects will be rated and ranked according to the following areas in a Progress Report that will be completed by the coaching staff and evaluated by the SSC Long Track High Performance Management Team:

a) Physiological performance comparison markers to a world class profile

b) Technique skills comparison rating to a world class profile

c) Mental Performance comparison rating to a world class profile

d) Elite Habits comparison rating to a world class profile

e) Health and structural tolerance comparison rating to sustain a world class training program

** Further details on how the rating and ranking will be allocated, will be circulated in an upcoming Bulletin.*

Normally, a Development Card cannot be allocated to an athlete previously carded at the Senior Card level (C1, SR, SR1, SR2) for more than two years, except for an athlete carded as a senior card while still competing at the Junior international age level.

A senior age athlete is expected to be eligible for a Development card for no more than two (2) years at senior age.

(Emphasis added)

14. This section states that eligible athletes will be nominated following three (3) priority orders. The first two priorities (Priority 1 and Priority 2) do not mention “age” as a criterion. However, Priority 3 lists several criteria/elements that will be taken into account while assessing the athletes’ profiles and “age” is one of the considerations listed.

15. No further details regarding the interpretation of “age” as a criterion are included in section 1.8 of the Carding Criteria. “Age” is therefore left undefined as a criterion.

16. Furthermore, the end of section 1.8 of the Carding Criteria (page 8 of 8 of the document) states:

** Further details on how the rating and ranking will be allocated, will be circulated in an upcoming Bulletin.*

17. No evidence was submitted by the Respondent regarding any additional bulletins providing further details on how the *rating* and *ranking* would be allocated for Priority 3.

18. On July 18th, 2016, the Claimant was informed by the Respondent's High Performance Committee – Long Track (hereinafter the "HPCLT") that he had not been selected for the 2016-2017 NextGen Program. Consequently, he was ineligible for AAP support for the 2016-2017 carding cycle.
19. Unsatisfied with this outcome, the Claimant appealed the HPCLT's decision to SSC Appeal Panel. In support of his position, the Claimant contended that:
 - a. the Respondent failed to follow its own Carding Criteria and Sport Canada's AAP Policies and Procedures;
 - b. he believed he had been discriminated against due to his age; and
 - c. the Respondent failed to consider relevant information or took irrelevant information into account.
20. On August 24th, 2016, SSC Appeal Panel dismissed the Claimant's appeal.
21. Following this decision, the Claimant filed an appeal to the SDRCC on September 15th, 2016.
22. In a separate matter, Mr. Nick Goplen filed a Request Form to the SDRCC, also on September 15th, 2016, represented by different counsel, which addressed a common legal issue with Mr. Carruthers' Request: the improper application of the age factor by SSC when considering the NextGen Program criteria.
23. Claimants in both applications applied for a consolidation of the cases. SSC (which is also the Respondent in the *Goplen* arbitration) opposed this request. SSC's view was that, beyond the interpretation of the age factor, each case must be evaluated on its own merit since Messrs. Carruthers and Goplen each have a different athlete profile that may need to be considered separately.
24. On September 20th, 2016, the Respondent filed its Answer Form regarding the present arbitration to the SDRCC.

25. On September 21st, 2016, I accepted the appointment 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.
26. On the same day, an administrative conference call was held between the SDRCC and the Parties to explain the upcoming procedures. It was also decided that I would hear both Parties on the questions of (1) consolidation; and (2) affected parties during the preliminary conference call.
27. On September 22nd, 2016, I accepted the appointment as arbitrator in the case of *Goplen v. Speed Skating Canada* (SDRCC 16-0310).
28. On September 27th, 2016, a preliminary conference call was held between myself and the Parties to address preliminary matters and plan the next steps in the proceedings.
29. Following some discussions regarding potential affected parties, it was determined that no additional affected parties need be considered.
30. Regarding the possibility to consolidate the present case with the *Goplen* matter, each party stated their arguments. The Respondent reiterated its opposition to the consolidation, while the Claimant’s representative submitted once again that the two cases were practically identical and that consolidating them seemed appropriate.
31. It was also identified during the call that there appeared to be a common issue linking both arbitrations, which pertained to the application of the age criteria in the NextGen Program of the Respondent.
32. At the end of the preliminary call, I decided to take the matter under advisement and I informed the Parties that I would render a procedural order shortly after.

33. On September 30th, 2016, I rendered a Procedural Order (see **Appendix I**)² in which I dismissed the Claimants' request for consolidation. However, since there was an important legal issue common to this case and the *Goplen* case, I ordered the following:

- a. *The Claimant in the Carruthers arbitration (SDRCC 16-0309) is invited to seek Intervenor status in the Goplen arbitration (SDRCC 16-0310) under Articles 6.13 and 6.14 of the Code, by September 30th at 4pm (EDT).*
- b. *Assuming Intervenor status is sought, the Tribunal will make a determination on the age criteria in the NextGen Program only in the Goplen arbitration.*
- c. *The Tribunal shall incorporate its conclusions pertaining to the NextGen Program in the Goplen arbitration to this arbitration.*
- d. *The Parties will be ordered to file concurrent written representations by October 5th at 4pm (EDT) in the Goplen arbitration. Those representations shall be restricted to their position on the application of the age criteria in the NextGen Program only. Any other representation to the merits, and more particularly to the athletic abilities of the Claimant, will not be considered by the Tribunal.*
- e. *The Tribunal will issue a partial order in the Goplen arbitration by October 9th, 2016, and retain jurisdiction.*
- f. *Should the Claimant in this arbitration choose not to apply for Intervenor status by September 30th at 4pm (EDT), this procedural order shall have no effect.*
- g. *The hearing on the merits is set for October 18th, 2016 at 11am (EDT), by teleconference.*

34. The Claimant submitted an Intervenor Form with the SDRCC before the

² Procedural Order, dated September 30th, 2016, **Appendix I**.

- aforementioned deadline. By doing so, he was granted Intervenor status in the *Goplen* arbitration.
35. Counsel for the Claimant also sought to add Sport Canada as an Interested Party/Intervenor in both arbitrations.
36. In response, I referred Mr. Carruthers and his counsel to Articles 6.13 and 6.14 of the Code, and more specifically to Article 6.14(a), which is restrictive in its interpretation and requires a Person to file an Intervention as a condition to receive Intervenor status.
37. Since Sport Canada did not file an Intervention Form, I did not consider the request.
38. On October 6th, 2016, I received the Parties' written submissions regarding age as a selection criterion, after having granted them a short extension, upon a request filed by the Respondent.
39. On October 9th, 2016, I rendered a Partial Order in the *Goplen* arbitration with respect to the application of the age factor by SSC when considering the NextGen Program carding criteria.
40. In *Goplen*, I determined that the use of age as a selection criterion was too vague and imprecise to be considered as valid in the application of the NextGen Program. Therefore, those findings are hereby incorporated in the present award and are reproduced in the present decision (**see Appendix II**)³.
41. In accordance with my instructions contained in the Partial Order, the Respondent provided a *Projected Revised List* and explained how the composition of the NextGen Program would vary from the one initially announced on July 18th, 2016, after removing *age* as a criterion.

³ Partial Order rendered in *Goplen v. Speed Skating Canada* (SDRCC 16-0310), dated October 9th, 2016, **Appendix II**.

42. As a result, the Claimant was now listed in 9th position on the *Projected Revised List*.

43. On October 12th, 2016, the Claimant's counsel communicated the following email to the Tribunal:

To the SDRCC and Arbitrator Brunet:

The Respondent's filings in SDRCC 16- 0310 appear to indicate that the Intervenor (and Claimant in SDRCC 16- 0309) has, or will, be nominated for an AAP Development Card (Priority 3).

As those filings apply, mutatis mutandis, to SDRCC 16- 0309 it therefore renders the remainder of this matter moot. (The Affected Party in SDRCC 16- 0309, Mr. Clouthier, having declined to participate in the proceedings, as confirmed during the Preliminary Call on September 27th, 2016).

[...]

Furthermore, the hearing (on the merits) for SDRCC 16- 0309 also appears unnecessary, as does written submissions thereto. But, subject to the arbitrator's guidance, perhaps a Final Order could be issued simply incorporating the Partial Order and confirming the nomination of Mr. Carruthers (the Claimant in SDRCC 16- 0309) for an AAP Development Card (Priority 3).

The Claimant also wishes to reserve his right to seek costs in SDRCC 16- 0309.

All of which is respectfully submitted,

44. On October 13th, 2016, the Claimant's counsel sent the following email to the Tribunal:

To the SDRCC and Arbitrator Brunet,

Further to today's call, the Claimant and Respondent have agreed that the Claimant need not file submissions tomorrow as he will indeed be nominated for an AAP Development Card (Priority 3).

I believe that Mr. Moss will confirm same by day's end.

Thank you kindly,

45. Later that day, Mr. Ian Moss stated by email the following: *“I can confirm that we are of the same mind on this matter.”*

46. Given the content of these exchanges, I communicated with the Parties by email on October 17th, 2016:

Dear Parties,

Further to the agreement between the Parties regarding the appointment of the Claimant to the NextGen program, this matter has now been resolved and there are no further reasons to consider this matter on its merits.

However, I propose to maintain the hearing set for October 18th, 2016, at 11am (EDT), in order to cover the following points:

1. Receive representations whether Parties seek a Consent order from the Tribunal:

- a. either in a joint proposed form for my review, editing and adjudication, or*
- b. leave the content of the order to the discretion of the Tribunal.*

2. Discuss a timeline for filing of representations, should the Claimant seek costs under 6.22 of the Code.

47. Shortly after, the Respondent submitted the following email to the Tribunal:

Dear Tribunal – with respect, SSC did not agree to name the Claimant to the “Next Gen” program per se. Our instructions were as follows:

“This is to inform you that SSC will no longer contest the matter pertaining to SDRCC Case 16- 309 (Carruthers vs SSC). Based upon the “Partial Decision” by Arbitrator Brunet, we feel that Carruthers now meets the AAP criteria standards to be considered under the Development Card Priority #3 as noted in Bulletin #177.

As a result, we will inform Sport Canada of this decision and “nominate” Carruthers to Sport Canada for consideration of AAP support.

I trust that this is the information you require to stop this Case from progressing further, but please inform me of any further requirements from SSC in order to formally close the Case.”

48. The Claimant and his counsel promptly responded to the Tribunal:

[...]

This position came as a genuine surprise to both the Claimant (and his counsel).

Indeed, on October 12th, the Respondent indicated that:

“... SSC will no longer contest the matter pertaining to SDRCC Case 16- 309 (Carruthers vs SSC). Based upon the “Partial Decision” by Arbitrator Brunet, we feel that Carruthers now meets the AAP criteria standards to be considered under the Development Card Priority #3 as noted in Bulletin #177.” (emphasis added)

The Claimant took this to mean that the Respondent would no longer contest the relief sought by the Claimant in his Request. Namely:

“to be named to SSC’s NextGen Identified Training Program and renewed for a Development Card through the AAP.”

Therefore, when the Respondent indicated that it would “no longer contest the matter”, it was the Claimant’s good faith believe that both limbs of the relief would be honoured (i.e. nominated for a Development Card, and named to the NextGen Program).

The Respondent’s email has caused the Claimant considerable concern (and understandably so).

To that end, the Claimant submits that a Final Award (or non- confidential Consent Order) should indeed be rendered by the Panel itself.

49. Given the ongoing dispute, the hearing was maintained on October 18th, 2016.

V. POSITIONS OF THE PARTIES

A) The Claimant

50. The Claimant stated that his comprehension of the Respondent’s communications was that he had been named to the 2016-2017 NextGen Program.

51. He pointed out that the Respondent wrote that “[it] will no longer contest the matter pertaining to SDRCC Case 16-309”.

52. According to him, if the Respondent ceased contesting the matter, it is only logical that the relief sought be accepted in its entirety by the Respondent.
53. He submits that the Respondent's position is confusing and surprising.
54. The Claimant indicated that the relief he initially sought was very clear: Being named to SSC's NextGen Program and renewed for a Development Card through the AAP.
55. According to him, it would be illogical for a carded athlete not to be part of the NextGen Program.
56. During the hearing, the Claimant's counsel also stated that the wording of "Priority 3" is very clear: Anyone who is named for a Development Card (carding) under Priority 3 is automatically part of the NextGen program. The opposite is not necessarily true however.
57. For all these reasons, and considering that the Respondent agreed both verbally and in writing to name the Claimant for carding support to Sport Canada, he requested that the Tribunal name him to the 2016-2017 NextGen Program.

B) The Respondent

58. The Respondent does not deny that it agreed to nominate the Claimant to Sport Canada for consideration of AAP Support.
59. However, the Respondent denies agreeing to name the Claimant on the 2016-2017 NextGen Program.
60. During the hearing, Mr. Ian Moss submitted that carding support and the NextGen Program were two distinct matters. However, no explanation was provided to explain the distinction.

61. The Respondent emphasized that its emails to the Tribunal never confirmed that the Claimant was named on the NextGen Program.

62. When asked by the Tribunal why the Claimant would not qualify for the NextGen Program (considering that the age criterion was removed), the Respondent stated that the *Projected Revised List* they submitted only took into consideration criteria (i) and (ii) of Priority 3.

63. According to the Respondent, if it had also considered criteria (iii) and (iv) of Priority 3, the Claimant would not have been nominated on the 2016-2017 NextGen Program.

C) The Affected Party

64. Braden Clouthier declined to participate in the current proceedings. Therefore, he submitted no written or oral arguments and did not attend the hearing.

VI. APPLICABLE LAW

A) The SDRCC Code

65. Section 6.7 of the Code establishes the onus of proof in issues related to team selection and carding disputes:

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.

(Emphasis added)

B) The 2016-2017 Carding Criteria – Long Track (Bulletin #177)

66. The criterion (section 1.8) has been reproduced in its entirety at paragraph 13 of the present decision.

VII. DISCUSSION

67. In accordance with section 6.7 of the Code, the Respondent has the onus to demonstrate that its decision not to select the Claimant on the NextGen Program was made in accordance with the established criteria.

68. The Respondent's Carding Criteria (*High Performance Bulletin #177*) states the following regarding Priority 3 (page 7 of the document):

Priority 3: Any remaining card quota will be used to nominate athletes selected to the "NextGen" identified training program (if applicable under the card quota). NextGen athletes are nominated based on their position in the NextGen ranking. The ranking is produced following the assessment of the following criteria/elements in order of priority [...]

(Emphasis added)

69. The Respondent confirmed during the hearing that Priority 3 was the only criteria under which an athlete may qualify for the NextGen Program.

70. I find the Respondent's position regarding the Claimant's non-nomination on the NextGen Program quite confusing.

71. The Respondent confirmed, both in writing and orally during the hearing, having nominated the Claimant for a Development Card to Sport Canada. Once nominated, the Respondent confirmed that the Claimant would meet the Sport Canada carding criteria for the 2016-2017 season.
72. Nevertheless, the Respondent maintains that nomination for a Development Card to Sport Canada does not automatically entail nomination to the NextGen Program as they are two separate and distinct matters.
73. While I agree that they are two separate and distinct matters, the first line of Priority 3 makes nomination to the NextGen Program automatic, if carding has been awarded to the athlete, as was the case here. Further, in the Respondent's *Projected Revised List*, the Claimant is listed in 9th position after removal of the age criterion, qualifying him for the NextGen Program.
74. The Claimant's counsel circulated emails prior to the hearing and the Respondent did not object to the content of these emails. The only objection was made the day before the hearing, which is incomprehensibly late.
75. In my view, the wording of Priority 3 leaves no room for interpretation: all athletes who are nominated for a Development Card under Priority 3, must originate from the NextGen Program.
76. Inversely however, an athlete selected on the NextGen program is not automatically nominated for carding. As explained by the Mr. Rahill during the hearing, the number of Development Cards available varies from year to year. There is no pre-determined limit for the number of Development Cards.
77. For the 2016-2017 season, 10 athletes were identified to be on the NextGen Program and 10 Development Cards were available. This is however a coincidence and there may be more athletes named on the NextGen Program than Development cards available. So while a NextGen athlete may not be nominated for carding, as

soon as he is carded, he must be on the NextGen Program. Otherwise, the first line of Priority 3 loses all its meaning.

78. For these reasons, I conclude that the Respondent failed to meet its onus of proof under section 6.7 of the Code. The Respondent did not follow its criteria correctly when it decided not to name the Claimant on the NextGen Program.

VIII. CONCLUSION

79. The Respondent has not established that its decision not to select the Claimant on the NextGen Program was made as per the established criteria.

80. Section 6.17 of the Code grants me authority to address the inequities arising here and to order the necessary remedies in the present arbitration.

81. Therefore, I hereby order that the Claimant be appointed to the 2016-2017 NextGen Program as of October 19th, 2016, the date of my short decision.

82. The Claimant having already been named by the Respondent for AAP Support to Sport Canada, no order is required from the Tribunal regarding carding nomination.

83. Within seven (7) days of the date of this decision, the Claimant may file submissions to the Tribunal regarding costs under section 6.22 of the Code. If he does so, the Respondent will then have seven (7) days to file a reply.

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

Signed in Montreal, November 2nd, 2016



Patrice Brunet, Arbitrator

APPENDIX I

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

N°: SDRCC 16-0309

Between:

DAN CARRUTHERS

Claimant

– and –

SPEED SKATING CANADA (SSC)

Respondent

– and –

BRADEN CLOUTHIER

Affected Party

Tribunal : Mr. Patrice Brunet (Arbitrator)

PROCEDURAL ORDER

1. On September 15th, 2016, the Claimant filed an Arbitration Request to the Sport Dispute Resolution Centre of Canada (“SDRCC”).

2. In his Request Form, the Claimant appeals the decision rendered by the Respondent's Internal Appeal Panel ("SSC Appeal Panel") on August 24th, 2016.
3. In this decision, the SSC Appeal Panel dismissed the Claimant's appeal and maintained the Respondent's decision not to name him to the 2016-17 NextGen Identified Training Program (the "NextGen Program").
4. As a result of this decision, the Claimant was not awarded a Development Card under Sport Canada's Athlete Assistance Program (the "AAP").
5. To support his appeal request, the Claimant submits that:
 - The SSC Appeal Panel erred in finding that it was unable to interfere and appoint him to the NextGen Program and renew his Development Card through the AAP;
 - The SSC Appeal Panel erred in finding that the Respondent properly followed the procedures laid out in Bulletin #177 (the "Carding Criteria") and Sport Canada's AAP Policies and Procedures;
 - The SSC Appeal Panel erred in its analysis pertaining to the **consideration of his age.**
6. For these reasons, the Claimant seeks to be named to the 2016-17 NextGen Program.
7. In a separate matter, Mr. Nick Goplen filed a Request Form to the SDRCC, represented by different counsel, which addresses a common legal issue with Mr. Carruthers' Request: the improper application of the age factor by SSC when considering the NextGen Program criteria.

8. I have also been named as arbitrator in the Goplen arbitration and held a preliminary conference with the Parties and their counsel on September 29th, 2016.
9. I am not breaching any confidentiality provision in the Canadian Sport Dispute Resolution Code (the “Code”) by stating that the interpretation of the age factor, when considering the NextGen Program criteria, is common to both applications, as counsel to both Parties have recognized having discussed this element.
10. While Claimants in both applications are applying for a consolidation of the cases, SSC (which is also the Respondent in the Goplen arbitration) is opposing this request. SSC’s view is that, beyond the interpretation of the age factor, each case must be evaluated on its merits since Messrs. Carruthers and Goplen each have a different athlete profile that may need to be considered separately.
11. The Code does not specifically address the issue of consolidation.
12. Since one of the Parties is objecting to the consolidation, I need to consider other goals of a sports arbitration, in particular confidentiality between Parties, and the specific facts of each case to be analyzed.
13. I also need to be mindful of the legal principles I will consider, which may also be common to another case, and at the same time avoiding conflicting interpretations between the two cases.
14. Consolidations in arbitration matters need to be addressed somewhat differently from those in regular court proceedings, if only for the fundamental principle of confidentiality. While proceedings before common courts are public unless ordered otherwise, sport arbitration disputes are confidential by default.
15. Since the Code is silent on the principle of consolidation, and since the Respondent in both cases has objected to this request, each case shall be heard independently from the other on the merits and the request for consolidation is dismissed.

16. However, since there is an important legal issue common to both cases, which is at the core of each arbitration, I make the following procedural order:

- a. The Claimant in the Carruthers arbitration (SDRCC 16-0309) is invited to seek Intervenor status in the Goplen arbitration (SDRCC 16-0310) under Articles 6.13 and 6.14 of the Code, by **September 30th at 4pm (EDT)**.
- b. Assuming Intervenor status is sought, the Tribunal will make a determination on the age criteria in the NextGen Program only in the Goplen arbitration.
- c. The Tribunal shall incorporate its conclusions pertaining to the NextGen Program in the Goplen arbitration to this arbitration.
- d. The Parties will be ordered to file concurrent written representations by October 5th at 4pm (EDT) in the Goplen arbitration. Those representations shall be restricted to their position on the application of the age criteria in the NextGen Program only. Any other representation to the merits, and more particularly to the athletic abilities of the Claimant, will not be considered by the Tribunal.
- e. The Tribunal will issue a partial order in the Goplen arbitration by October 9th, 2016, and retain jurisdiction.
- f. Should the Claimant in this arbitration choose not to apply for Intervenor status by September 30th at 4pm (EDT), this procedural order shall have no effect.
- g. The hearing on the merits is set for October 18th, 2016 at 11am (EDT), by teleconference.

Signed in Montreal, September 30th, 2016



Patrice Brunet, Arbitrator

APPENDIX II

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

OCTOBER 9TH, 2016

N°: SDRCC 16-0310

NICK GOPLEN
(CLAIMANT)

AND

SPEED SKATING CANADA (SSC)
(RESPONDENT)

AND

BRADEN CLOUTHIER
(AFFECTED PARTY)

AND

DAN CARRUTHERS
(INTERVENOR)

Tribunal: Mr. Patrice Brunet (Arbitrator)

PARTIAL ORDER

I. INTRODUCTION

1. On September 15th, 2016, the Claimant filed an Arbitration Request to the Sport Dispute Resolution Centre of Canada (“SDRCC”).

2. In his Request Form, the Claimant appeals the decision rendered by the Respondent's Internal Appeal Panel ("SSC Appeal Panel") on September 2nd, 2016.
3. In this decision, the SSC Appeal Panel dismissed the Claimant's appeal and maintained the Respondent's decision not to name him on the 2016-17 NextGen Identified Training Program (the "NextGen Program").
4. The Claimant seeks to be named on the 2016-17 NextGen Program.
5. This arbitration bears a common legal argument pertaining to the interpretation of the age criteria in the application of the NextGen Program with another arbitration to which I have also been named as arbitrator, the Carruthers arbitration (SDRCC 16-0309).
6. Claimants in both applications applied for a consolidation of the cases, while SSC (which is also the Respondent in the Carruthers arbitration) opposed this request. SSC's view was that, beyond the interpretation of the age factor, each case must be evaluated on its own merit since Messrs. Carruthers and Goplen each have a different athlete profile that may need to be considered separately.
7. After conducting a preliminary call in both arbitrations, I rendered a Procedural Order on September 30th, 2016, where I dismissed the consolidation request. I also ordered the following procedure to be followed:
 - *The Claimant in the Carruthers arbitration (SDRCC 16-0309) has been invited to seek Intervenor status in the Goplen arbitration (SDRCC 16-0310) under Articles 6.13 and 6.14 of the Code, by September 30th at 4pm (EDT).*
 - *Upon application for Intervenor status to the SDRCC, this order shall serve as confirmation of such status being granted in the present arbitration.*

- *The Tribunal will bifurcate the proceedings in this arbitration to make a determination first on the age criteria in the NextGen program only.*
- *The Parties are ordered to file concurrent written representations by October 5th at 4pm (EDT). Those representations shall be restricted to their position on the application of the age criteria in the NextGen Program only. Any other representation to the merits, and more particularly to the athletic abilities of the Claimant, will not be considered by the Tribunal.*
- *The Tribunal will issue a partial order by October 9th, 2016, and retain jurisdiction.*
- *Should the Claimant in the Carruthers arbitration choose not to apply for Intervenor status by September 30th at 4pm (EDT), this procedural order shall have no effect.*
- *The hearing on the merits is set for October 18th, 2016 at 3pm (EDT), by teleconference.*

8. On the same day, Mr. Carruthers submitted an Intervention Form to the SDRCC. By doing so, he was granted Intervenor status in the present arbitration.
9. Counsel for Mr. Carruthers also sought to add Sport Canada as an Interested Party/Intervenor in both arbitrations.
10. In response, I referred Mr. Carruthers and his counsel to Articles 6.13 and 6.14 of the Code, and more specifically to Article 6.14 (a), which is restrictive in its interpretation and requires a Person to file an Intervention as a condition to receive Intervenor status.
11. Since Sport Canada did not file an Intervention Form, I did not consider the request.

12. On October 6th, 2016, I received the Parties' written submissions, after having granted them a short extension, upon a request filed by the Respondent.

II. PARTIES

13. **Nick Goplen** is a 25-year old long track speed skating athlete. He has competed for Canada at the World Cup level, and more specifically during the past season at World Cup #5 in Stavanger, Norway.

14. **SSC** is the national sport governing body for competitive long track and short track speed skating in Canada. SCC is recognized by Sport Canada, the Canadian Olympic Committee ("COC"), the Canadian Paralympic Committee ("CPC") and by the International Skating Union ("ISU").

15. **Braden Clouthier** is a 22-year old long track speed skating athlete. He was named on the 2016-2017 NextGen Development Team by SSC on July 18th, 2016. Even though he was identified as an Affected Party in both arbitrations, Mr. Clouthier chose not to take part in the current procedures.

16. **Dan Carruthers** is a 24-year old long track speed skating athlete. He was part of the 2015-16 NextGen Program and also received a Development card under Sport Canada's Athlete Assistance Program (the "AAP") for the 2015-16 carding cycle. However, he was not selected for the 2016-2017 NextGen Program. He filed a separate appeal to the SDRCC (16-0309) to contest his non-selection.

III. JURISDICTION

17. The Sport Dispute Resolution Centre of Canada (SDRCC) was created by Federal Bill C-12, on March 19, 2003¹.

¹ The *Physical Activity and Sport Act*, S.C. 2003, c.2

18. 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.
19. All Parties have agreed to recognize the SDRCC's jurisdiction in the present matter. They also confirmed their acceptance that I act as Arbitrator in these proceedings, without any objection.

IV. BACKGROUND

20. In November 2015, the Respondent published its *High Performance Bulletin #177*, entitled "*2016-2017 Athlete Assistance Program Carding Criteria*" (hereinafter the "Carding Criteria").
21. According to the document, "*the fundamental strategic purpose of the High Performance Bulletins (HPB) for the long track program is to establish provisions that are designed to select athletes to teams who will perform at the highest level, and achieve the best possible results for Canada at Olympic Games and World Single Distance Championships*".
22. The crux of the present Partial Order relates to the interpretation of Section 1.8 of the Carding Criteria, defining the "Development Card Criteria". This section reads as follows:

1.8. Development Card Criteria

After the application of the Senior International and Senior National card criteria, the remaining card quota in Long Track will be allocated to athletes eligible under the Development Card criteria. Development Cards are intended to support the developmental needs of younger athletes who clearly demonstrate the potential to achieve the Senior International Carding criteria but are not yet able to meet the Senior National Card criteria.

Eligible athletes will be nominated in the following priority order:

Priority 1: *Athletes that placed in the top 8 and top 1/3 at the 2016 World Junior Championships in the overall classification or individual distance events, or medal in Team Pursuit or Mass Start. These athletes will be prioritized based on the overall classification. If there is a tie between 2 or more athletes, the results in the individual distance classifications will be used to break the tie.*

Priority 2: *Athletes that place 21st to 25th in the final ISU Distance ranking for the 2015-2016 competitive season. These athletes will be prioritized based on the actual respective distance ranking;*

Priority 3: *Any remaining card quota will be used to nominate athletes selected to the "NextGen" identified training program (if applicable under the card quota). NextGen athletes are nominated based on their position in the NextGen ranking. The ranking is produced following the assessment of the following criteria/elements in order of priority:*

i. Athlete prospects will be rated and ranked according to performance as a percentage of world record and prorated for age.

ii. Athlete prospects will be rated and ranked according to performance progression (year on year progress for their age) and prorated as improvement progression as a percentage of world record.

iii. Athlete prospects will be rated and ranked according to performance ranking on the Canadian ranking list.

iv. Athlete prospects will be rated and ranked according to the following areas in a Progress Report that will be completed by the coaching staff and evaluated by the SSC Long Track High Performance Management Team:

a) Physiological performance comparison markers to a world class profile

b) Technique skills comparison rating to a world class profile

c) Mental Performance comparison rating to a world class profile

d) Elite Habits comparison rating to a world class profile

e) Health and structural tolerance comparison rating to sustain a world class training program

** Further details on how the rating and ranking will be allocated, will be circulated in an upcoming Bulletin.*

Normally, a Development Card cannot be allocated to an athlete previously carded at the Senior Card level (C1, SR, SR1, SR2) for more than two years, except for an athlete carded as a senior card while still competing at the Junior international age level.

A senior age athlete is expected to be eligible for a Development card for no more than two (2) years at senior age.

(Emphasis added)

23. This section states that eligible athletes will be nominated following three (3) priority orders. The first two priorities (Priority 1 and Priority 2) do not mention anything about “age” as a criterion. However, Priority 3 lists several criteria/elements that will be taken into account while assessing the athletes’ profiles and the term “age” appears twice.
24. No further details regarding the interpretation of “age” as a criterion are included in Section 1.8 of the Carding Criteria.
25. Furthermore, the following note appears near the end of section 1.8 of the Carding Criteria (page 8 of 8 of the document):

** Further details on how the rating and ranking will be allocated, will be circulated in an upcoming Bulletin.*
26. No evidence was submitted by the Respondent regarding any additional bulletins providing further details on how the *rating* and *ranking* would be allocated for Priority 3.
27. On July 19th, 2016, the Claimant was informed by the Respondent’s High Performance Committee – Long Track (the “HPCLT”) that he had not been selected on the 2016-2017 NextGen Program. Consequently, he was ineligible for the AAP support for the 2016-2017 carding cycle.

28. Unsatisfied with this outcome, the Claimant appealed the HPCLT's decision to the SSC Appeal Panel. In support of his position, the Claimant contended that: The Respondent failed to follow its own Carding Criteria and Sport Canada's AAP Policies and Procedures; that he believed he had been discriminated against due to his age; and that the Respondent failed to consider relevant information or that he took irrelevant information into account.
29. On September 2nd, 2016, the SCC Appeal Panel dismissed the Claimant's appeal.
30. In its decision, the SSC Appeal Panel states that "*[it] does not consider that it is discriminatory to limit selection to the NextGen Development Team or nomination for an AAP Development card to athletes under a certain age, despite the fact that the relevant sections of the Carding Criteria that address selection do not specifically indicate a strict age cut off for selection or nomination to the aforementioned*" (page 10 of the decision).
31. However, the SSC Appeal Panel also added that "*notwithstanding the aforementioned, the Tribunal strongly recommends that the Respondent specify the exact age of eligibility for selection to the NextGen Development Team or for nomination for an AAP Development card in the future versions of its Carding Criteria and that it provide references to the supporting justifications, such as the Pathway document or the Age Analysis (OTP document), or any other document that is relevant for such purposes*" (page 11 of the decision).
32. Following this decision, the Claimant filed an appeal to the SDRCC on September 15th, 2016.

V. POSITION OF THE PARTIES

33. The following section is a summary of the written arguments presented by the Parties. It is not intended to be a complete transcript of what the Parties claimed in their respective written submissions. I can assure the Parties that, in making my

decision, I have carefully considered all the arguments and documents that they presented.

A) Claimant and Intervenor

34. The Claimant and the Intervenor filed joint written submissions regarding age as a selection criterion in the Respondent's Carding Criteria.
35. The Claimant and Intervenor propose that age is a protected ground in Canadian human rights legislation and that any discrimination or uneven treatment of individuals based on age must be justified and proportionate.
36. They also propose that under Rule 6.7 of the SDRCC Code, the onus of proof rests on the Respondent, to demonstrate that the Carding Criteria were appropriately established and that a decision was made in accordance with such criteria.
37. Since the Respondent has failed to discharge its onus and that the use of age as a selection criterion was inappropriate and unjustified in the circumstances, the age criterion should be set aside.
38. Priority 3, set out in section 1.8 of the Carding Criteria, contains four criteria from which the first three prioritized criteria all involve the use of age, but with no justification for its use.
39. The criterion uses the term "prorated" twice, but fails to define what exactly it is being prorated against. There is no such thing as "prorating" in the abstract.
40. The Claimant and the Intervenor raise that this criterion is in violation of Sport Canada's Athlete Assistance Program Policy, a policy that the Respondent is governed by, which indicates at its section 5.3.1:

[...]

Age may be used as a criterion; however the age level must not be established arbitrarily. If an age criterion is included, the purpose of such a criterion should be clearly stated in the criterion. Further, the NSO must be able to demonstrate through statistical evidence and expert opinion that there is a clear link among the reference to age in the criteria, the performance criteria, and the potential to achieve the international criteria for Senior Cards. The NSO must also be able to demonstrate that it has no alternative to the use of age to identify developing athletes.

41. The Claimant and the Intervenor state that the Respondent breached this Policy by failing to develop standards compliant with the use of an age component; by not demonstrating through statistical evidence and expert opinion that there is a clear link between age and the performance criteria; and by not demonstrating that there was no other alternative but to consider age. On all accounts, the Claimants state that the Respondent failed in the definition of the age criterion.
42. They submitted that while each aspect is an independent breach of Sport Canada's Policy, taken together, the breaches are even more serious and make it impossible for the Respondent to demonstrate that its Carding Criteria were appropriately established as required by Rule 6.7 of the SDRCC Code.
43. In addition, the Claimant and the Intervenor argued that the Respondent provided no evidence to discharge its onus to prove that its selection decision (non-selection in this case) was made in accordance with the Carding Criteria (e.g. they did not provide minutes of the HPCLT NextGen Selection Meeting; they failed to circulate further details on how rating and ranking would be allocated in relation to age; they provided no rubric to describe how the criteria would be prorated for age; they provided no rubric indicating how athletes compared to each other).

44. Without any of the above-mentioned evidence, they submitted that there is no causal link between what was considered and how it was applied. In their opinion, nothing demonstrates that the decision not to select them was made in accordance with Sport Canada's policies or in a fair and transparent manner as contemplated by the SDRCC Code.
45. A similar issue was recently addressed by the SDRCC in the case of *Christ v. Speed Skating Canada*, SDRCC 16-0298.
46. In this very recent decision rendered September 6th, 2016, Arbitrator Palamar found that the Respondent had improperly considered age when making its decision not to select Mr. Christ to the Short Track Development Team.
47. He also concluded that the Respondent did not meet its onus under Rule 6.7 of the SDRCC Code.
48. For these reasons, Arbitrator Palamar allowed the appeal and decided that the High Performance Committee Short Track's decision should be set aside. He also exercised his power under Rule 6.17 of the SDRCC Code and named Mr. Christ to the National Development Team.
49. In brief, the Claimant and the Intervenor argued that the Respondent failed to produce any of the required justifications or corroborations for its Carding Criteria or selection decisions and that any selection decision made as a result of such criteria cannot be sustained.

B) Respondent

50. For its part, the Respondent provided documentation and rationale supporting its claim that "age" is a legitimate factor to consider in the assessment of its athletes' long term podium potential.

51. The Respondent considers that the “age” component included in the Carding Criteria has been standardized through its various athlete development documents (such as the *Long Track Athlete Development* document and the *Long Track Elite Athlete Pathway* document) and is also supported through the language found in Sport Canada’s AAP Development Card policy.
52. The Respondent recognized that “age”, in itself, cannot be used in a stand-alone or arbitrary context for selection. However, it stated that it was a credible selection criterion in conjunction with other objective performance indicators with respect to the selection of NextGen athletes.
53. The Respondent explained that it is not using “age” as a “stand-alone” selection criteria, but rather as part of a suite of statistics that have proven reliable in showing athlete progression towards international podium performances in Long Track speed skating. Furthermore, its Carding Criteria for the NextGen Program does not rely on “age” until the very last selection protocol (Priority 3) and even there, it is paired with other objective statistics and surrounded by other objective performance benchmarks.
54. Simply put, the Respondent submits that “age” is only part of the overall assessment of athletes’ performance potential and is not an over-arching factor compared to the other objective statistics used to measure performance.
55. The Respondent also mentioned that its Carding Criteria were established through a rigorous development and approval process with Sport Canada. Year after year, the matter of age within its Carding Criteria has been discussed and approved by Sport Canada.
56. The Respondent added that in respecting consideration for the use of “age” in selection criteria, it automatically implies a categorization of athletes based upon limited age range. For the National Development Team, this “age” range currently falls between 19 and 23 years old (“Neo-Senior” age category). The statistics

show that the peak of long track athletes' performances usually occurs in the mid-to-late 20's age range. Consequently, it is logical that athletes currently in the 19 to 23 year age range are within 5-8 years of a Podium performance and of achieving Senior International AAP standard.

57. For all the above-mentioned reasons, the Respondent maintains that "age" is a reasonable consideration within a suite of other objective performance criteria in the Carding Criteria for the Development card level. Its use of "age" was within a proper and limited framework in conjunction with other statistical analyses that have a proven history.

VI. APPLICABLE LAW

A) The SDRCC Code

58. Section 6.7 of the Code establishes the onus of proof in issues related to team and selection and carding disputes:

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.

(Emphasis added)

B) The 2016-2017 Carding Criteria – Long Track (Bulletin #177)

59. The criteria has been reproduced above.

C) Sport Canada's Athlete Assistance Program Policy

60. In their joint written submissions, the Claimant and the Intervenor referred to section 5.3.1 of Sport Canada's Athlete Assistance Program Policy:

5.3.1 Development Card Criteria

Criteria for Development Cards are established by the NSO and are reviewed each year by Sport Canada for compliance with the AAP.

The criteria must be objective and clearly demonstrate that the athlete has high-performance potential. Normally, the NSO must establish a maximum number of years for which athletes can be carded at the Development Card level before achieving Senior Card status.

NSOs should consider using some or all of the following criteria areas in the development of their Development Card criteria:

- *International and/or domestic results;*
- *Elements of the NSO Gold medal profiles;*
- *Elements of the NSOs Podium pathway profile;*
- *Full-time commitment to a NSO National Training Centre;*
- *Elements of the sport specific LTAD model;*
- *Age may be used as a criterion; however the age level must not be established arbitrarily. If an age criterion is included, the purpose of such a criterion should be clearly stated in the criterion. Further, the NSO must be able to demonstrate through statistical evidence and expert opinion that there is a clear link among the*

reference to age in the criteria, the performance criteria, and the potential to achieve the international criteria for Senior Cards. The NSO must also be able to demonstrate that it has no alternative to the use of age to identify developing athletes.

(Emphasis added)

61. The Respondent referred to section 5.3 of the same Policy:

5.3 Policies for Development Cards

Development Cards are intended to support the developmental needs of younger athletes who clearly demonstrate the potential to achieve the Senior Card international criteria but are not yet able to meet the Senior Card criteria.

The financial support provided through Development Cards helps enhance conditions for younger athletes who have not had the same training, coaching, and competitive experience as older athletes and are not yet able to meet the Senior Card criteria. The allocation of Development Cards is intended to ensure that financial support is provided to the athletes with the greatest potential.

[...]

VII. PAST PRECEDENTS

62. On September 6th 2016, Arbitrator Jeffrey J. Palamar rendered a decision regarding a case similar to the present one (*Christ v. Speed Skating Canada*, SDRCC 16-0298).

63. This case revolved around the decision of the High Performance Committee Short Track (“HPCST”) not to name Mr. Christ to the National Development Team. The “age” component as a selection criterion was also central to the dispute and the same Carding Criteria was relied upon.

64. I find relevant to reproduce certain extracts of Arbitrator Palamar's decision:

47. Age does not expressly appear within the list of criteria and so a strong argument can be made that it ought not to be considered at all. That said, I think that "long term potential for podium performance" can reasonably be interpreted as allowing age to be considered, but only on a limited and proper basis as contemplated by human rights law, Sport Canada Athlete Assistance Program requirements, and beyond that, simple common sense. It cannot in this case reasonably be interpreted in a vacuum as an "absolute". To the extent it can properly apply, it has to be something more subtle than simply a number.

*48. I can understand fully how if, in considering long term potential for podium performances, a 22 year old athlete is selected over one who is 60 years of age. Clearly the 22 year old has a better "long term" potential. **Here though, the age difference amongst the athletes is not at all large, and for all I know, the window of opportunity for podium potential may be something that all of these athletes still have ahead.** No evidence was produced as to the "lifespan" of a speed skater, when they reach their peak, or how long it is. Rather, there was only some suggestion that the Respondent saw the other athletes as having progressed somewhat more quickly than the Claimant because they were viewed by it as roughly equivalent to him in development and were younger. **With due respect, this does not meet the requirements of Sport Canada, human rights law, or even common sense. Something more refined is reasonably required. No analysis was provided to us, and no evidence put forth to suggest that any analysis was used in the selection decision.***

49. I find then that "age" conceptually could be considered as properly implicit in the criteria, but only if it was to be used as a sharpened tool for reasonable comparison, not simply as a blunt instrument. As a result, "age" (as considered by the Respondent here) was not properly established as part of the criteria.

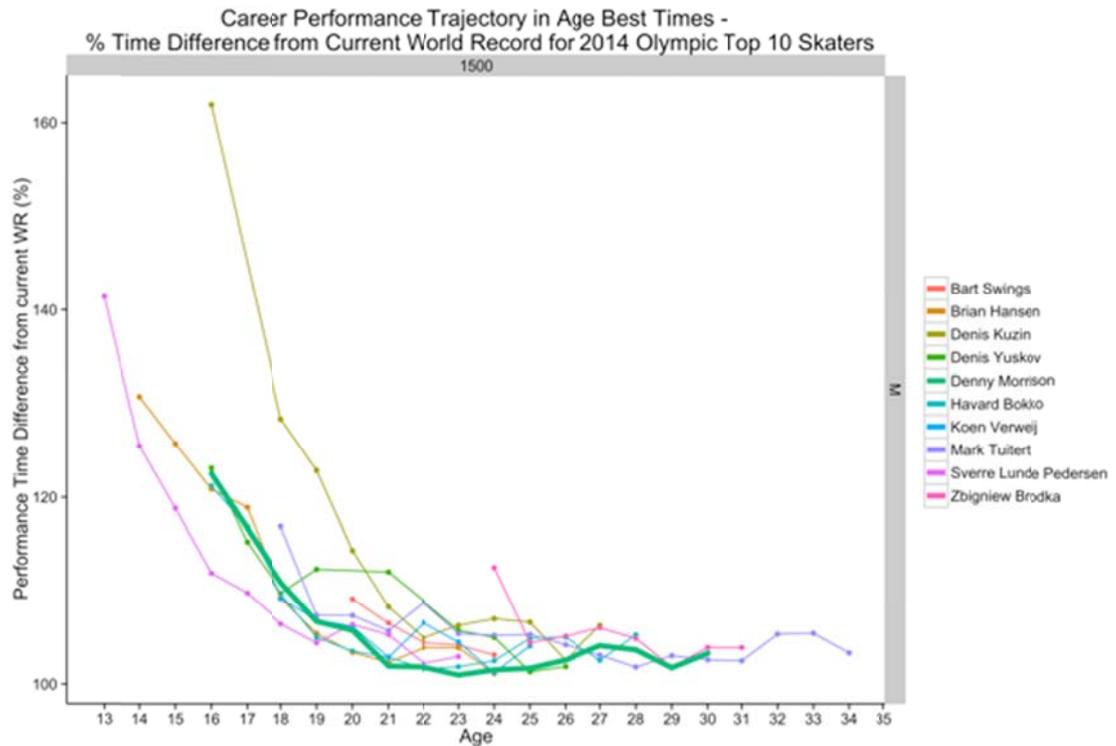
(Emphasis added)

VIII. DISCUSSION

65. I am required first to consider Article 6.7 of the Code. Under this section, the Respondent must demonstrate that "the criteria were properly established".

66. While I am not bound by previous decisions from the SDRCC, this case benefits from the previous interpretation by one of my colleagues, Arbitrator Jeffrey Palamar, on the same subject, which I found to be enlightening.

67. The excerpts from his decision, reproduced at the end of the previous section are applicable to this arbitration, in the appreciation of the age factor in the context of the NextGen program.
68. When they established age as a criteria, the Respondent had a positive obligation to define it clearly, within the framework that is enunciated by Sport Canada's policy.
69. This allows athletes and their coaches to have clarity in their preparation to be selected, and provides clear guidance to the High Performance committee in their team selection choices.
70. Sport Canada's AAP Policy is restrictive when guiding NSOs in their drafting efforts: "...the age level must not be established arbitrarily." Three (3) factors need to be met in order to use age as a criterion, and I agree with the Claimant's and Intervenor's positions as cited above: none of the three (3) criteria seem to have been respected by the Respondent in order to meet the AAP Policy's requirements:
- a. Stating the purpose for using age;
 - b. Demonstrating through statistical evidence and expert opinion that there is a clear link between age and performance criteria; and
 - c. Demonstrating that there was no other alternative but to consider age.
71. The Respondent filed a *Funnel Statistical Analysis by age*, which graphically demonstrates that top athletes peak during ages 22-30. One of the graphics is reproduced below:



72. I cannot disagree with the graphical analysis, however this falls short of meeting the above-referenced Sport Canada AAP Policy “b” criterion. There is no expert opinion in the criterion, and while there seems to be a clear link between age and performance criteria, the NextGen Program fails to clearly associate the statistical results with a specific age cut-off as a criterion.

73. In the previous internal appeal which led to this arbitration, it was revealed that the Respondent defined the cut-off age at 23.6 years old, while the Claimant Goplen was 25.5 years old at the time of selection and Intervenor Carruthers was 24.17 years old. Had this been enunciated in the Carding Criteria, perhaps this decision would have been different.

74. However, and I agree with the Claimant and the Intervenor, age must be justified and was not announced ahead of the selection criteria.

75. While I can understand the obvious reasons why a program called NextGen would be aimed at younger, “up and coming” athletes, age cannot be used as a subjective

factor of analysis, since the very nature of age as a criterion begs for an objective application. Absent an objective definition of age within the context of the criteria, age as a criterion of selection in the NextGen Program cannot survive.

76. This flaw is fatal to the survival of the criterion and, in my view, does not meet the onus test found in Article 6.7 of the Code.

77. The Respondent should not understand these conclusions to completely dismiss age as a selection criterion under the NextGen Program. I believe that it is entirely reasonable to consider age under this program, in the future. However, age must be objectively defined and justified, in order for stakeholders to understand the logical path that led to the committee's decision on this basis.

IX. CONCLUSIONS

78. The use of age as a selection criterion is too vague and imprecise to be considered as valid in the application of the NextGen Program, under the Carding Criteria.

79. The Respondent is ordered to consider bringing the following changes to its Carding Criteria:

a. Under Article 1.8, Priority 3, subsection (i):

- remove “*and prorated for age*” and

b. Under Article 1.8, Priority 3, subsection (ii):

- remove “(*year on year progress for their age*)”.

80. Once these changes to the Carding Criteria have been considered, the Respondent should compose a *Projected Revised List* and explain to the Panel, in its submissions, how the composition of the NextGen team would vary from the one announced on July 18th, 2016. The Panel will then render a final Order further to the hearing.

81. Since I consider that the Respondent has failed to discharge its onus under Article 6.7 of the Code, it is ordered first to file submissions on the merits by October 12th, 2016 at 4pm (EDT), along with a list of witnesses they intend to call.
82. The Claimant is ordered to file his submissions by October 14th, 2016 at 4pm (EDT), along with a list of witnesses he intends to call. The Intervenor status continues in the current proceedings, unless Parties make representations to the contrary. No submissions are expected from the Intervenor, and participation at the hearing is not required.
83. The hearing, as previously ordered, will take place by teleconference on October 18th, 2016 at 3pm (EDT).
84. The findings on *age* found in this Interim Order will be integrated *mutatis mutandis* in the final order of SDRCC 16-0309, and in the interest of efficiency, all Parties are expected to share information seamlessly on the question of age as a criterion.
85. Naturally, I retain jurisdiction for the remainder of this arbitration, as well as regarding the interpretation of this Partial Order.

Signed in Montreal, on October 9th, 2016

A handwritten signature in black ink, appearing to be 'Patrice Brunet', with a horizontal line extending to the right.

Patrice Brunet, Arbitrator