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

No: SDRCC 16-0298

Keegan Christ
(Claimant)

and

Speed Skating Canada (SSC)
(Respondent)

and

Steven Dubois
Marc-Olivier Lemay
(Affected Parties)

Appearances:

For the Claimant: Keegan Christ
Emir Crowne
Amanda Fowler
Liam McFarlane

For the Respondent: Ian Moss
Blair Carbert
Jennifer Cottin
Andrew Lahey
Brian Rahill

REASONS FOR DECISION

1. Introduction

1. This case concerns the Claimant's challenge of the discretionary decision of the Respondent's High Performance Committee Short Track (the "HPCST") made in May and/or June 2016, to not name him to the National Development Team. His challenge is based on the allegations that the HPCST did not properly consider the required criteria and that the selection was biased.

2. Procedural Background

2. The Claimant challenged the decision internally and an Appeal Panel was formed and heard his appeal pursuant to the Respondent's Appeals Policy. Such hearing took place on May 23, 2016 and a written decision issued on May 27, 2016, dismissing the appeal. It is this decision which led the parties to the SDRCC.

3. On July 18, 2016 a preliminary conference call was held to deal with process and timing issues. The parties recognized the jurisdiction of the SDRCC to render a final and binding decision of the matter in dispute and confirmed their acceptance of me acting as Arbitrator.

4. In his Request, the Claimant had asked that the Respondent not be permitted to supply any "written explanation" or "minutes" as documentation or evidence to justify its final decision for the discretionary decision. This arose from a finding in *McGuire v. Speed Skating Canada, SDRCC 16-0287 (Soublière)* where the arbitrator expressed concern over the fact that a member of Speed Skating Canada's Selection Committee had improperly amended certain minutes in a deliberate attempt to hinder that claimant's appeal before the SDRCC.

5. As the issues had been raised in the Request, they were addressed in the preliminary conference call. I made it clear that while I had not yet ruled on that part of the Request, I was prepared to hear from the parties on that issue if need be at the hearing on the merits. I also directed that the Respondent should be prepared to produce witnesses to speak to any documents submitted and should not assume that the submission of any document would be proof of the contents in it. This issue was not raised again in the hearing on the merits.

6. Also during the preliminary conference call, the Claimant specifically asked that the Respondent provide minutes from the selection process. The Respondent agreed to do so by August 2, 2016, and later filed minutes from a coaches meeting of April 6, 2016 and a meeting of the HPCST of June 16, 2016.

7. On August 22, 2016, the hearing proceeded on the merits.

8. On August 29, 2016 I issued my short decision without reasons in accordance with the Canadian Sport Dispute Resolution Code (the “Code”). The SDRCC advised the parties of my decision that same day it was issued. In my decision I ordered as follows:

> This is my decision pursuant to the Canadian Sport Dispute Resolution Code (January 1, 2015) (the "Code") arising from the hearing which took place on Monday, August 22, 2016.
>
> The Claimant challenged the discretionary decision of the High Performance Committee Short Track (the "HPCST") made in May and/or June 2016, to not name him to the National Development Team.
>
> After considering all of the evidence and arguments advanced, I have decided that this decision of the HPCST should be set aside. I exercise my power under article 6.17 of the Code and name the Claimant to the National Developmental Team.
>
> Should the impact of my decision be that the Claimant replaces one of the Affected Parties on the National Developmental Team, I leave it to the Respondent to determine as per its required processes who is to be replaced. I note that the Affected Parties had notice of the proceedings but declined to participate.
>
> Complete written reasons for my decision will follow within the timelines prescribed by the Code.

9. The reasons for my decision are set out below.

3. Factual Background

10. The facts set out below are a summary of the evidence relevant to the case. Even though not documented in these Reasons, in coming to my decision I have considered all of the evidence presented.

11. Brian Rahill (the High Performance Director for the Respondent), Andrew Lahey (a member of the HPCST) and Keegan Christ (the Claimant) testified at the hearing.

12. The selection decision in question was made under the Respondent's August 2015 High Performance Bulletin #169, entitled "Team Selection & Carding Criteria for Short Track" ("Bulletin #169"). It states that "the HPCST will select athletes as detailed below". There then are listed the criteria for National Team selection and the criteria for the Development Team selection. There are discretionary criteria set out respecting the final two selections for the Development Team. It is by virtue of these discretionary criteria the Claimant says he should have been selected. The relevant portion of Bulletin #169 reads as follows:

> The final two selections per gender will be made by the High Performance Committee, based on similar discretionary selection criteria that is used for the final individual distance entries at World Short Track Championships (as defined in HP Bulletin 167)
>
> - Long term potential for podium performances
> - Past international performances (if applicable)
> - National performances
> - Training performance
> - Readiness for competition
> - Commitment to their current training program
> - Assessment report from current coach(es)
> - Physiological readiness for increased training

13. The evidence of the Respondent was that the selection decision was a two-step process. Coaches met firstly to consider things and then come to recommendations for the HPCST. The HPCST then made the selection decision, which was later upheld by the Appeal Panel, and is now being challenged in this process.

14. The coaches meeting apparently took place on April 6, 2016. Mr. Rahill later brought forward recommendations to the HPCST on April 9, 2016.

15. It appears that the HPCST made a decision on April 9, 2016 that was not in favour of the Claimant. There was a mistake of some sort made at that stage however relating to the number of spots available, and as a result this led to another HPCST meeting on June 16, 2016, and the same decision being made regarding the Claimant (i.e. he was not selected).

16. The Respondent produced minutes for the June 16, 2016 HPCST meeting, but none for the April 9, 2016 meeting. The Respondent's evidence was somewhat unclear on what exactly was discussed at these meetings and the earlier coaches meeting. Reading the minutes likewise does not provide clarity (though in fairness they were not presented as a

verbatim accounts of what was said). In a general sense, the Respondent suggested that due process was followed, the criteria were properly considered by experts knowledgeable in speed skating, the three athletes being considered were very close and ultimately a difficult decision was made, with two other athletes being selected ahead of the Claimant.

17. The Respondent's evidence was that of the eight criteria in Bulletin #169, the last five were essentially equal and so the decision was based on the first three criteria, specifically:

    - Long term potential for podium performances;
    - Past international performances (if applicable);
    - National performances.

18. The Respondent acknowledged that age was taken into account when assessing long term potential for podium performances, and asserted that this favoured the others over the Claimant as they were younger and had developed quicker.

19. The Respondent's evidence was that it limited its consideration of international competitions to the World Junior Championships, even though it was aware that the Claimant had also participated in other international competitions (and had done well in those). The rationale behind this was the perception that the World Junior Championships were of the highest calibre and more of a true indicator of performance than other international competitions.

20. Nationally, the Claimant was ranked 15th overall, and the other athletes were 17th and 18th. The Respondent explained that it saw all three athletes as relatively comparable in terms of national performance.

21. Evidence was put forth that one of the athletes selected ahead of the Claimant was injured for a part of the season and so the Respondent made the assumption that he had not performed at his peak.

22. The Respondent also gave evidence on the issue of bias. Essentially the historical make-up of speed skating teams had roughly 70% of their athletes from Quebec and this continued here. This arose from the quality of speed skating athletes in Quebec and the support for the sport in that province. This was not as a result of any bias but just a reality. The fact that athletes from Quebec were selected over the Claimant in this instance led to a similar make-up of the Developmental Team here, and in context, this was not surprising and not evidence of bias at all, but simply a reflection of reality as it had been in the past and as it continued to be.

23. The Claimant testified that on or about May 18, 2016 his coach Maggie Qi (who had been present at the coaches meeting in April 2016) told him that the HPCST had used age to determine the selections for the Development Team and that he had not been selected. He said that he had tried to have her attend the hearing to give testimony on his part, but she did not respond to his communications. The Claimant was challenged in cross-examination on what exactly Ms. Qi had told him and was steadfast that indeed she had said that age was the criterion used to select. I note that she was not called by the Respondent to rebut and so I am left with the Claimant's recollection as to what she said.

24. The Claimant indicated that he would have qualified for the Development Team if the last two spots had not been selected on a discretionary basis, as his national standing was higher than the other athletes picked ahead of him for those two discretionary spots.

25. One of the two other athletes was born on May 1, 1997, making him approximately 19 years and 4 months old at the present time. The other athlete was born on June 6, 1998 making him approximately 18 years and 3 months old at the present time. I do not have the exact birthdate of the Claimant, as far as I know, but he was described as being 22 years of age at present.

4. Arguments

26. The following is a summary of the parties' arguments. It is not intended to be a complete recital of everything presented in the written materials or at the hearing itself. While I do not refer specifically to everything offered in argument, in making a decision I have in fact considered very carefully all of the arguments presented by the parties.

27. The Respondent acknowledged that age is not specifically set out in the criteria but said it was implicitly to be considered when looking at the long term podium potential of the athletes. Specifically, the other athletes were seen as being roughly at the same level as the Claimant, but because they were younger, they were seen as having advanced more quickly and so being at a higher stage of development, with greater long term potential.

28. The Respondent argued that age was not considered as a "stand alone" factor in the evaluation of the athletes. It indicated that when evaluating long term potential of an athlete for podium performance, the current stage of the developing athlete had to be considered as compared to the performance level the athlete had obtained by that stage. It suggested that long term potential referred to the number of years in the future during which an athlete might be able to further develop capacities and skills for high level performances. As a result, the age of the athlete was relevant and necessary to the evaluation.

29. In terms of international competitions, the Respondent indicated that the selection was focused on the World Junior Championships and not on other types of international competitions. Those other results were disregarded virtually in their entirety, and to the extent they were considered it was on a very limited basis, if at all. The rationale behind this was the perception that the World Junior Championships were the highest caliber and more of a true measure of performance than other international competitions.

30. Nationally, the Claimant was ranked 15th overall, and the others were 17th and 18th. The Respondent saw all three athletes as relatively comparable in terms of national performance. According to the Respondent, once athletes got below the top dozen or so, the rankings were not as meaningful as they might be otherwise.

31. The Respondent argued that there was no bias. What had occurred in the past in terms of selection of a preponderance of Quebec athletes properly and not surprisingly occurred here. This was not due to bias but just a reflection of reality as it had been in the past and as it continued to be. A tough decision had been made in good faith by experts on speed skating and I ought to respect that.

32. The Claimant argued that the Respondent had not met its initial onus of proving that the criteria were properly applied. Specifically, age was not part of the published criteria and ought not to have been considered. It was also contrary to human rights law to base a decision on age, and so using age to determine selection as was the case here, amounted to illegal discrimination.

33. The Claimant argued that using age as a criterion had not been justified as per Sport Canada's requirements, specifically section 5.3.1 of the Sport Canada Athlete Assistance Program;

> 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.

34. The Claimant argued that it was inappropriate for the HPCST not to consider all international performances. The Claimant had an excellent record in international performances. However, as only the World Junior Championships were considered, ignoring these other performances was to the detriment of the Claimant and so amounted (just like the application of age) to an unfair and discriminatory process.

35. The Claimant also said that national rank had to be taken into account and it was wrong for the Respondent not to do so.

36. The Claimant argued that the bias here was deeply ingrained and being used as a rationalization of the decision to name Quebec athletes ahead of the Claimant. Even if (generally speaking) Quebec athletes were more often better, and so the Claimant's performance could be seen as that of an "outlier", nonetheless his performance was a fact that could not properly be ignored.

37. The Claimant also argued that it would be unfair to send this matter to the HPCST for another decision as there was no reason to believe that it would be done correctly this time. There was nothing preventing the HPCST from coming to the same conclusion it did here, but asserting that it had in fact examined all of the required criteria and nothing else. There was also the overlying issue of systemic bias and the concern that this would again be the determining factor in the decision.

5. The Law on Article 6.7 of the Code

38. Article 6.7 of the Code reads as follows, and clearly places the initial onus on the Respondent:

> 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 probability.

39. The Respondent therefore had the initial and positive onus to prove that the criteria it considered were properly established, and that the decision in question was made as per those criteria.

40. In *Larue v. Bowls Canada Boulingrin, SDRCC 15-0255 (Pound, QC),* an accomplished athlete who in the past had been selected to the national team many times, challenged a decision not to select him again. Arbitrator Pound noted that the decision made by the team selection committee involved a great deal of discretion and so the applicable standard of review was that of reasonableness and not correctness. He referred to *Dunsmuir v. New Brunswick, [2008] 1 SCR 190*, in which the Supreme Court of Canada determined the difference between the terms "correct" and "reasonable", and explained what level of deference should be applied by a reviewing body respecting a decision made by an administrative tribunal.

41. Applying *Dunsmuir* in *Larue*, Arbitrator Pound concluded that there were three considerations that should guide an arbitrator when applying the “reasonableness” test. I paraphrase him as follows:

> 1. absent cogent evidence of error, he/she should be deferential, because a team selection committee composed of experienced experts "knows its business";
>
> 2. the arbitrator cannot rewrite the high performance policy or team selection criteria with a view to "improving" things or substituting a personal view of what they should be, because the organization knows the sport better than any arbitrator could;
>
> 3. the arbitrator’s role simply is to determine if the team selection process was decided in accordance with the selection criteria and whether that outcome fell within a range of possible and reasonable outcomes, defensible in light of the facts and the team selection criteria.

42. In *Richer v. The Canadian Cerebral Palsy Sports Association (including Boccia Canada), SDRCC 15-0265 (Pound, QC)*, Arbitrator Pound made the following comments regarding selection criteria;

> Selection criteria need to contain some reasonable flexibility, but, at the same time, cannot be entirely arbitrary. Certain sports lend themselves to somewhat easier team selection choices, where objective criteria such as times, points scores, weights and distances can be used. Others can be more or less self-selections, such as eligibility based on the results of qualification tournaments. The more difficult choices occur when there may be some element of judgment required regarding performance standards or a need to produce a team that will function most effectively in competition. The default position in such cases, absent reviewable error or proof of bias, is that those responsible for selection decisions are generally the most knowledgeable and experienced persons available, who attempt in good faith to produce the best possible outcomes in the particular circumstances. [at p. 11]

43. These are but examples of the many cases dealing with these types of issues. While of course every case must be decided on its own merits, it seems well established that arbitrators should apply the “reasonableness” test in a case such as this and so ensure procedural fairness was granted. If not, the decision can properly be overturned.

6. Analysis on Selection Decision

44. As noted, the Respondent had the initial and positive onus to prove that the criteria it considered were properly established and that the selection decision in question was made as per those criteria. I find that it did not meet this initial onus.

45. In *Maltais v. Speed Skating Canada,* a February 22, 2015 Internal Appeals Policy decision, the Appeal Panel was required to interpret a different selection policy. There, the policy stated specifically that the issues would be determined "at the absolute discretion of the HPCST", but in that case, the HPCST had effectively limited its own "absolute discretion" to go beyond the listed criteria by explaining that its decision was made "following the evaluation of the criteria above".

46. That of course is not the same wording as is at present in Bulletin #169, where there is no suggestion of absolute discretion in this context. Rather, the criteria are set out and it would seem to me that all must be considered and no others properly can be considered.

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.

50. Not all of the Claimant's international results were considered, yet there is no distinction in the criteria as written between the World Junior Championships and other types of international events. If the criteria had that distinction or suggested some priority to be

given to the World Junior Championships or something of that nature, then the HPCST properly could have discounted or ignored certain international events. The criteria do not allow that however, and instead state "international competitions". It was therefore wrong and procedurally unfair to ignore these other international competitions, to the detriment of the Claimant. By not considering what was required to be considered, the Respondent did not make the selection decision according to the required criteria.

51. National rankings are not absolute as deciding factors because of course the selection is discretionary and based on all the listed criteria. Therefore, the fact that the Claimant was ranked higher than the others, does not end the selection process. He might well have been entitled to be selected if the selection was not discretionary in this way, but it was.

52. While not determinative then, rankings must be taken into account. The evidence is clear that the Claimant had a higher national ranking than the other athletes. The evidence from the Respondent was that the three athletes were all treated as roughly the same under this criterion. While it is true that they were all ranked fairly closely, there were differences and such differences ought to have been taken into account, giving some advantage to the Claimant on that particular criterion. Again, by not considering what was required to be considered, the Respondent did not make the selection decision according to the required criteria.

53. *Island and Adam v. Equine Canada, SDRCC 04-0008 (Sanderson, QC),* was a decision regarding the selection process for the Athens Olympic Games. Four days before the end of a two-year selection process, the NSO issued an addendum for the selection criteria. The NSO argued that the addendum only clarified the criteria and did not change the basis of selection, but Arbitrator Sanderson instead concluded that the criteria were wrongly expanded.

54. The Arbitrator emphasized that he found no intention to create confusion or unfairness, nor even a suggestion of bad faith. However, the result of issuing the addendum at the last moment was to undercut the credibility of the selection process by unfairly expanding the criteria by which athletes would be measured, just days before the selection. Just as bad, other factors not even mentioned in the addendum were being considered. The late introduction of additional criteria was held to be unfair and so the process overturned.

55. *Dufour-Lapointe v. Canadian Freestyle Ski Association, SDRCC 07-0065 (Dumoulin),* was a carding case where it was successfully argued that the NSO unjustifiably failed to select and nominate the athlete. The athlete there argued that the NSO improperly used a handicapping system to finalize its ranking process, where that handicapping system was not referenced in the carding criteria issued by the NSO.

56. In *Dufour-Lapointe,* Arbitrator Dumoulin found that the process was fundamentally flawed. Apart from the question as to whether the handicapping did what it was intended to do, handicapping was not mentioned at all in the NSO's carding criteria and there was no evidence that Sport Canada knew or had approved of the system.

57. *Mayer v. Canadian Fencing Federation, SDRCC 08-0074 (Drymer),* was a selection decision case where the NSO reduced the number of international selection competitions after the selection process was already underway. Arbitrator Drymer specifically found no evidence of bad faith at all, but nonetheless felt that changing selection criteria once the selection process had started was inappropriate. On the facts of the case this deprived

the claimant of certain points he would have had and gave an unfair advantage to another athlete. This amounted to a failure to provide procedural fairness and invalidated the selection decision. Arbitrator Drymer concluded that based on the evidence before him the claimant should have been selected ahead of the other athlete and so ordered that the NSO "should and must select" the athlete for the position (p. 21).

58. Here, limiting the importance of international events and national ranking effectively changed the criteria after the fact. I find that this was improper and a breach of the Claimant's entitlement to procedural fairness.

59. *Miller v. Speed Skating Canada (September 12, 2011)* is an internal appeal decision dealing with selection issues. The Appeal Tribunal upheld the athlete's appeal challenging a selection decision as the committee making the selection did not follow the required procedures. While admittedly dealing with a different decision making process, some comments made in *Miller* seem to me to be appropriate to consider in the present context:

> The Tribunal does not find that there is anything inherently wrong with discretionary selections made by experts, as they give selectors some needed flexibility to accommodate […] special circumstances. There are relatively few sports that base selection on strictly objective measures. While discretionary decisions are by their very nature at least partially subjective, that does not mean that they are to be made in a casual way that lacks rigor, structure or transparency. In the absence of common and weighted criteria (subjective and objective) to apply to discretionary selections, discretionary decisions will have the perception of being made in arbitrary manner. This perception has a negative effect on the motivation of athletes and coaches and can lessen the credibility of the selection process.

60. It is not for me to tell anyone what the selection criteria should be, but I can offer the thought that whatever they are to be, they should be spelled out thoughtfully and carefully, considering the comments in *Miller.* This may minimize the likelihood of future disputes and also enhance the overall credibility of the process.

7. Analysis on Bias

61. In *McGuire,* the claimant raised the issue of possible bias in the team selection process. This argument was dismissed. The arbitrator noted that:

> The difficulty with this submission is that there is simply no evidence before me to support it. Having noted the allegation in the pleadings, I was particularly attentive to the evidence presented by the Respondent and to the possibility that the Claimant might produce some tangible evidence of bias.
>
> As noted in *Richer*, "the seriousness of the accusation of bias is such that the person alleging it must bring forward convincing evidence to support the allegation. The allegation itself is not evidence of bias. Disagreement with an outcome is not evidence of bias. The mere exercise of discretion is not, of and by itself, evidence of bias. " [p. 16]

62. Respectfully, the onus was on the Claimant here to prove the assertion that the selection process was biased in favour of Quebec athletes, and this has not been done. Simply because Quebec athletes were chosen over him does not prove bias. Simply because there are more Quebec athletes on the Development Team and the National Team than athletes from outside of Quebec, consistent with the past, does not suggest bias at this

stage or at any stage in the past. It may well be that quite genuinely there are more athletes from Quebec who excel in speed skating, or it may be that indeed there has been bias for many years. The point is, there is no evidence before me that meets the required standard of proof and I must dismiss the argument on bias.

8. Role of Arbitrator

63. The Code provides guidance on my role in this process;

> 6.17 Scope of Panel's Review
>
> (a) The Panel shall have full power to review the facts and apply the law. In particular, the Panel may substitute its decision for:
>
> i) the decision that gave rise to the dispute; […]
>
> iii) and may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.
>
> 6.21 Awards
>
> (k) Each case must be determined on its facts and the Panel shall not be bound by previous decisions, including those of the SDRCC.

64. I therefore have considerable power to address the inequities arising here, and remedy things as appropriate in this particular context.

65. Still, as Arbitrator Pound noted in *Blais-Dufour v. Speed Skating Canada, SDRCC 11-0145*, I should be very aware of the general reluctance of arbitrators to be seen as imposing their own judgment in matters of team selection. Like Arbitrator Pound, in making my decision in this matter I want to emphasize that I have no personal opinion and express no such opinion as to the merits of the athletes affected or potentially affected by this decision. My decision arises from the evidence and arguments before me.

66. Further, I agree with Arbitrator Mew's comments in *Bastille v. Speed Skating Canada, SDRCC 13-0209*;

> The effect of Rule 6.17 is that no deference to the Appeals Panel below is required beyond the customary caution appropriate where the tribunal below had a particular advantage, such as technical expertise or the opportunity to assess the credibility of witnesses […]
>
> The more cogent and well reasoned (sic) a decision appealed from, the less likely it is that on a review or further appeal, it will be overruled. Conversely, where the reasons of the tribunal below are brief and give limited insight into how the tribunal came to its decision, the likelihood of a more extensive evaluation of the merits of the case increases. [p. 5]
>
> […]
>
> As an outsider to the sport of speed skating, I would not presume to be in a better position than an expert Selection Committee or, indeed, an internal appeal panel of SSC, to say how the results achieved by the athletes in various past competitions or any of the other non-exclusive criteria in the Policy should have

> been weighed and, hence, which athlete should have been selected. Provided that SSC followed its own rules, and did so fairly, an arbitrator at this level of the process should rarely if ever interfere. [p. 9]

67. Respectfully, the reasons or explanations for the decision in the present case are quite brief and offer only limited insight. This invited more of an extensive evaluation of things, which led to the conclusions that the Respondent did not follow its own rules and that I should then "interfere".

68. In *Bastille*, Arbitrator Mew found that the Selection Policy under consideration expressly allowed the Selection Committee to assign different weightings for the factors to be considered. That is not the case here under Bulletin #169 and the criteria to be considered for the discretionary selections to the Development Team, and there is no basis then for potentially assigning greater weight to one factor over any of the others. All three of the relevant criteria should be considered equally.

69. Had all international performances and national ranking properly been considered, this would have led to the selection of the Claimant. These two criteria were misapplied however, leading to a tie. The Respondent ultimately made its selection based on its interpretation of long term podium potential, where it arbitrarily selected the slightly younger athletes. This is consistent with the evidence given by the Claimant based upon what he was told by his coach, who did not testify herself in the process.

70. I find overall that on the evidence before me the Claimant should have been considered as superior on both criteria of international events and national ranking. On long term potential for podium performance, arguably the other athletes had the edge. Had the Respondent followed the criteria as required it should have selected the Claimant for the Development Team. This is inescapable from the evidence before me and there is no reason to send it back to the Respondent to make that decision, as candidly, there could be no other decision made based on the evidence in this case.

9. Conclusions

71. While I have found that the Respondent has not established that the selection decision was made as per the established criteria, I have no basis to conclude that it acted in bad faith.

72. Since my short decision was issued, the Claimant has advised that he wishes to reserve the right to seek costs and make a submission on the issue. If in fact the Claimant does wish to do this, then he should file his submission no later than September 13, 2016 and the Respondent then will have until September 20, 2016 to file a response. The Claimant may file a reply submission, if necessary, by September 27, 2016.

73. I wish to express my sincere appreciation to the parties and all participating in the hearing for their cooperation and professionalism throughout.

Signed in Winnipeg, Manitoba, this 6th day of September, 2016.

Jeffrey J. Palamar, Arbitrator