

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

N°: SDRCC 17-0321

CROSS COUNTRY SKI DE FOND CANADA (CCC)
(CLAIMANT)

AND

DOMINIQUE MONCION-GROULX
(RESPONDENT)

AND

JULIEN LOCKE
(AFFECTED PARTY)

Tribunal: Patrice Brunet (Sole Arbitrator)

Date of Hearing: March 13th, 2017

Appearances:

For the Claimant: Thomas Holland

For the Respondent: Dominique Moncion-Groulx

For the Affected Party: Leon Pigott, counsel for Julien Locke

REASONS FOR DECISION

I. INTRODUCTION

1. This arbitration was conducted under extraordinary time constraints since the FIS Cross-Country World Cup Finals 2017 (the "World Cup Finals") were taking place in Quebec City from March 17th to 19th, 2017.
2. On March 11th, 2017, I accepted the appointment to act as Arbitrator in the present proceedings, under article 6.8 of the Canadian Sport Dispute Resolution Code (the "Code"). There were no objections raised by any of the parties.
3. On March 12th, 2017, at 11:00 a.m. (EDT), an administrative conference call was held between the Parties and SDRCC staff to clarify the administrative procedures.
4. On the same day, at 2:00 p.m. (EDT), a preliminary conference call was held between the undersigned Arbitrator, the Parties and SDRCC staff. Considering the extreme urgency of the case, the SDRCC agreed to exceptionally waive the Resolution Facilitation session requirement.
5. During this preliminary conference call, it was determined that the hearing would take place by conference call on Monday, March 13th, 2017, at 11:00 a.m. (EDT).
6. Cross Country Canada (the "Claimant") seeks to overrule the decision rendered by its own internal appeal panel (the "Hearing Panel") on March 10th, 2017. The Hearing Panel allowed the appeal of Mr. Dominique Moncion-Groulx (the "Respondent"). The Claimant asserts that the Hearing Panel fettered the discretion of the selection committee in its application of the selection criteria when it ordered that the Western Canadian Championships (the "Westerns") be included among the qualifying races. Consequently, the Respondent was added to the team, in order to compete at the World Cup Finals in Quebec City.

7. The hearing was held via conference call, on March 13th, 2017.
8. On the same day, I rendered my short decision in which I allowed the Claimant's appeal and concluded that the exercise of its discretion when applying the selection criteria was appropriate given the circumstances, and that the selection criteria were reasonable. Therefore, I quashed the Hearing Panel's decision and ordered that the team composition for the World Cup Finals be determined by the Claimant in application of its original criteria.
9. The reasons for my decision are set out below.

II. THE PARTIES

10. **Cross Country Canada (CCC)** is the national sport organization that works with member clubs, divisions, and other partners to coordinate and support the development of cross-country skiing from introductory experience to international excellence through leadership, education, promotion, and training. The organization's vision is to inspire a nation to international excellence and podium success, health, and participation.
11. **Dominique Moncion-Groulx** is a Canadian cross-country skier competing at the international level.
12. **Julien Locke** is a 23-year old Canadian cross-country skier from Nelson, British Columbia. According to CCC's website, he has been a member of the Senior Team for one (1) year.

III. JURISDICTION

13. The Sport Dispute Resolution Centre of Canada (SDRCC) was created by Federal Bill C-12, on March 19th, 2003¹.
14. 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.
15. All Parties have agreed to recognize the SDRCC's jurisdiction in the present matter.

IV. BACKGROUND

16. The 2017 World Cup Finals were initially set to be staged in Tyumen, Russia.
17. However, further to reasons which are extraneous to this arbitration, the FIS withdrew the hosting rights of this competition from Russia.
18. On January 15th, 2017, it was announced that Canada (Quebec City) accepted an invitation by the FIS to host the World Cup Finals, from March 17th, to 19th, 2017.
19. As a result, as host nation, Canada, through the Claimant, was suddenly allotted spots to enter additional athletes. Initially, a maximum of three (3) male athletes and three (3) female athletes could compete at the World Cup Finals for Canada, in Russia. With the change of venue, the Claimant now had the possibility to enter up to fifteen (15) male athletes and fifteen (15) female athletes in total.

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

20. Consequently, the Claimant amended its selection criteria within a very short timeframe. The *2016-17 Selection Criteria for Competitions, Amendment #2 – 23 January 2017* (the "Selection Criteria") were published on January 23rd, 2017.
21. The Canadian team for the World Cup Finals was announced on March 8th, 2017 by the Claimant.
22. The Respondent was not initially selected by the Claimant to participate at the World Cup Finals for Canada. Therefore, he decided to file an appeal before the Respondent's Hearing Panel on March 9th, 2017.
23. This hearing took place by conference call on March 10th, 2017.
24. The Hearing Panel concluded that the points from the Westerns races should have been included in the selection criteria. Consequently, the Hearing Panel granted the Respondent's appeal.
25. On March 11th, 2017, the Claimant filed an appeal to the SDRCC to challenge the decision rendered by its Hearing Panel.
26. On the same day, another member of Cross-Country Canada filed an appeal to the SDRCC, on the grounds that he was unfairly removed from the same World Cup Finals team, after Cross-Country Canada presumably corrected a calculation error. It was agreed by parties in both cases that, given the interdependence of their disputes and the time constraints, both appeals would be heard jointly by me. However, during the preliminary conference call, that athlete withdrew his appeal and therefore I will only address the merits of the case between Cross-Country Canada and Mr. Moncion-Groulx in this award.

V. POSITIONS OF THE PARTIES

27. This section summarizes the oral and written submissions of the Parties. Although this is not a detailed record, I carefully examined all submissions presented by the Parties.

A) The Claimant

28. The Claimant asks the Tribunal to set aside the decision rendered by its Hearing Panel on March 10th, 2017. They also seek to confirm the validity of the selection criteria they established for the World Cup Finals.

29. The Claimant submits that the races chosen by its selection committee to form the basis of selection for the World Cup Finals were reasonable and appropriate given the circumstances.

30. The Claimant states that its amended selection criteria were fair and reasonable in this instance.

31. The Claimant further explains that they had to modify their selection criteria on short notice after learning that they could send up to 30 Canadian athletes (15 men and 15 women) to the World Cup Finals. Prior to the announcement that Quebec City would host this competition, the Claimant could only nominate a maximum of 6 athletes (3 men and 3 women).

32. The Claimant also mentions that its High Performance Director (the "HPD") formulated recommendations and approved the selection criteria. The drafting of these selection criteria was done with care and diligence.

33. Finally, it also explains that its selection criteria provide an appropriate and reasonable discretion to the HPD during the selection process.

B) The Respondent

34. The Respondent submits that the Claimant used arbitrary and inconsistent selection of races to determine which athletes would compete at the World Cup Finals.
35. With a reference to Section 7.5 of the selection criteria, the Respondent mentions that the selection period does not include the Westerns *skate sprint*. In his position, if this sprint result had been included in the selection period, it would have provided him with two Canadian Points List ("CPL") races scoring 189.31, thus allowing him to participate at the World Cup Finals in Quebec City.
36. He also claims that it was unjustified that one of the highest-level races in Canada, the Westerns, was not included in the selection period.
37. The Respondent states that races with a similar format to the World Cup Finals should be prioritized in the selection period. For example, the Westerns should have been included, considering that the date of the competition is closer to the World Cup Finals and that there is a high-level field of athletes.
38. He claims that the Soldier Hollow race (Utah, USA) should not have been included if the Westerns are not included as well. This could be regarded as favoring one or more athletes.
39. Moreover, the Respondent submits that the NorAm leaders selected to the World Cup Finals were partially selected based on their results from the Westerns.
40. Referring to the SDRCC document entitled "Selection Criteria for Major Events in Sport: Guidelines and Tips", he states that the Claimant failed to follow best practices regarding fair and transparent selection process, such as: precisely defining the qualifying period for the team selection, communicating the criteria to domestic

athletes before the selection is made, and preparing a quick reference document containing competitions that will be considered during the selection process.

41. The Respondent wants the Claimant to include all races from the beginning until the end of the selection period (from January 12th, 2017, to March 5th, 2017), which includes the sprint race at Soldier Hollow and the Westerns races. If it is not possible, he wants the Claimant to consider only the races from January 28th, 2017, to March 5th, 2017, excluding Soldier Hollow and the Westerns races.

C) The Affected Party

42. The Affected Party, represented by Mr. Leon Pigott, wishes to maintain the selection criteria with no modification, and for this Panel to uphold the selection committee's decision. He stands to lose his position to the World Cup Finals if the Hearing Panel's decision is confirmed.
43. In his opinion, and in order to allow the Hearing Panel's decision to stand, the Tribunal would have to find that the selection criteria were unreasonable or biased.
44. He submits that, in this instance, they are not unreasonable and biased, and that the choice of races for qualification were reasonable and fair.
45. According to him, the Hearing Panel has exceeded its authority because its own rules state that the HPD has discretion in the selection criteria and its ability to overturn the HPD's discretion would be limited to a case where the HPD made a selection outside of its own stated criteria. To this effect, he refers to section 11 (c) of Annex A of the *CCC Dispute Resolution and Appeal Policy* ("CCC Appeal Policy").
46. The Affected Party also mentions that the Hearing Panel included a member with a conflict of interest, since Mr. Peter Lloyd is a friend of the Respondent's family and is a member of the same ski club for which the Respondent competes (Nakkertok

Nordic). To this effect, the Affected Party refers to section 8 (a) of Annex C of CCC Appeal Policy.

47. Finally, he states that if the selection criteria are changed to grant inclusion of the Respondent's races at the Westerns, nothing will prevent other athletes to ask for additional races to be considered in the selection process. For instance, he mentions that he would personally benefit from the inclusion of the Korea National Championship.
48. He submits that changing the criteria based on athlete requests could open the door for other appeals, which undermines the ability of the Claimant's HPD to perform his function and his duties.

VI. THE APPLICABLE LAW

A) The SDRCC Code

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.

[...]

B) The Selection Criteria

7.5 Athlete Ranking

Athletes will be ranked in the following order up to the maximum of Canada's WC quota:

[...]

(f) *The HPD can make recommendations to the World Cup coaching team and the selection committee to select additional skiers based on:*

i. international results and domestic results; CPL data may be used as part of the reasoning where quantitative analysis is applicable;

ii. subjective selection guidelines listed under Section 3.3.b of the Selection Criteria for Competitions.

(g) *Additional athletes from the ranking list in 7.4.e in the following order:*

i. Top U23 woman and man if not already selected (this includes juniors);

ii. The next athletes on the ranking list.

VII. PAST PRECEDENTS

Mehmedovic et al. v. Judo Canada, SDRCC 12-0191/92

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

*[27] It is now common ground that arbitration proceedings of this kind under the SDRCC Code are akin to a judicial review, as opposed to appeal or trial de novo. Arbitrators as a matter of course owe deference to the expertise and experience of the sporting authorities. To use the words of Arbitrator Pound in *Palmer v. Athletics Canada, SDRCC 08-0080*:*

Carding decisions, as in this case, should not generally be taken by arbitrators who, normally, do not have the specific experience required for the purpose. It is only when the decisions taken by the responsible authorities have been vitiated in some manner that arbitrators may be required to pronounce the decision that should have been taken (p.10)

[28] The standard of review to be applied is that of reasonableness. Absent provisions to the contrary, the burden is on the Claimant to demonstrate that the decision is unreasonable. [...]

[29] As is stated above, "reasonableness...takes its colour from the context". In cases where an athlete -- in addition to, or rather than, challenging the application or the interpretation of the carding policy--, is in reality challenging the very wisdom or merits of the policy, arbitrators will owe an even higher deference to the policy-maker, for the making and assessment of policy is not within their realm. [...]

[30] I would add that when it comes to assessing policy decisions, arbitrators can only intervene in exceptional circumstances, such as where a policy would have been adopted in bad faith or without jurisdiction, would be contrary to law (a discriminatory policy, for example), would have been adopted through a biased process or, at the limit, where it is so vague or so discretionary or arbitrary as to be inapplicable with any kind of certainty.

(Emphasis added)

Beaulieu v. Gardner, SDRCC 13-0214

50. This decision, also rendered by Arbitrator Décary, emphasizes the importance for an Arbitrator to apply the proper standard of review when reviewing the sporting authority's policies:

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

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

51. According to Arbitrator Décary, when an arbitrator is reviewing a National Sport Organization ("NSO")'s policies, he has the duty to use deference, to apply the proper standard of review of reasonableness, and to follow the rules of procedural equity and fairness.

VIII. DISCUSSION

52. Under article 6.7 of the Code, the NSO (the Claimant in instance) had the onus to demonstrate that its selection criteria were reasonable and properly established.
53. It is well established in *lex sportiva* that deference should be granted to the NSO in the establishment, application and final decisions of its selection criteria. There is a positive presumption that administrators and volunteers in the sport are best placed to achieve sound policy drafting and team selection decision-making. Although this is not always applied in good faith nor in application with basic principles of natural justice, the Canadian sport arbitration system offers a safeguard against that.
54. I have reviewed the application of those principles in this particular situation and am satisfied that the selection criteria and team-making selection decisions have been made under best practices, considering the last-minute opportunity for Canada to host the World Cup Finals.
55. As stated in *Mehmedovic* and *Beaulieu*, an arbitrator will only intervene in exceptional circumstances, and the circumstances do not meet the definition of *exceptional*.
56. I did not specifically review the internal appeal decision since I considered this appeal under article 6.17 (b) (ii) of the Code on an urgent basis, and since the Claimant advanced that the Hearing Panel had breached principles of natural justice by fettering the discretion of the selection committee. My review was therefore one of an appeal *de novo*. As such, I did not need to review the Affected Party's allegations of partiality towards a member of the Hearing Panel.
57. In conclusion, I did not subscribe to the Respondent's position that the Claimant's selection criteria were unfair, unreasonable, discriminatory or arbitrary in their application.

IX. CONCLUSION

58. I conclude that the exercise of the Claimant's discretion when applying the selection criteria was appropriate given the circumstances. I find that the selection criteria were reasonable, and properly applied.
59. Therefore, the Claimant's appeal is allowed, the Hearing Panel's decision is quashed and the team composition for the World Cup Finals shall be determined by the Claimant in application of its original selection criteria.
60. I retain jurisdiction and reserve the right to hear any dispute relating to the interpretation or application of the present decision.

Signed in Montreal, this 28th day of March 2017.



Patrice Brunet, Arbitrator