

IMPORTANT NOTE: *This version is a translation of the original French version.*

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

N°: SDRCC 17-0328

SIMON LAPOINTE
(CLAIMANT)

AND

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

AND

JOEY FOSTER
HANNAH MEHAIN
(AFFECTED PARTIES)

Tribunal: Patrice Brunet (Sole Arbitrator)

Hearing date: June 22, 2017

Appearances:

Claimant: Simon Lapointe

For the Respondent: Thomas Holland
Richard Lemoine

Affected Party: Joey Foster

DECISION WITH REASONS

I. INTRODUCTION

1. This arbitration essentially deals with the decision of Cross Country Ski de Fond Canada (the “Respondent”) not to award a senior card to Simon Lapointe (the “Claimant”) for the 2017-18 carding cycle.
2. The hearing was held by teleconference on June 22, 2017.
3. I rendered my short decision on June 29, 2017, ruling that the Claimant’s Request was dismissed.
4. The reasons for my decision are set out below.

II. THE PARTIES

5. **Simon Lapointe** is a cross-country skier. He has had a development card for the past three (3) years.
6. **Cross Country Ski de Fond Canada (CCC)** is the national sport organization which governs cross-country skiing in Canada. Among other things, its goal is to coordinate and support the development of the practice of cross-country skiing from entry level to international excellence.
7. **Joey Foster** is a cross-country skier. He currently holds a development card. He decided to participate in this arbitration, as the final decision could affect his carding.
8. **Hannah Mehain** is a cross-country skier. She also has a development card. The final decision could affect her current carding. Although she was designated as an Affected Party, Ms. Mehain decided not to participate in the arbitration.

III. JURISDICTION

9. The Sport Dispute Resolution Centre of Canada (SDRCC) was created by Federal Bill C-12, on March 19, 2003¹.
10. Under this Act, the SDRCC has exclusive jurisdiction to provide to the sport community, among others, a national alternative dispute resolution service for sport disputes.
11. All Parties have agreed to acknowledge the SDRCC's jurisdiction in the present matter.

IV. CONTEXT

12. On April 24, 2017, meetings were held by the Respondent to make recommendations for the selection of athletes to the national teams. The purpose of these meetings of the High Performance Committee was not to make decisions, but to make recommendations.
13. The Respondent announced the composition of the National Cross-Country Team on May 5, 2017. This is when the Claimant learned that he was not selected.
14. Between May 6 and 8, 2017, the Claimant exchanged emails with Stéphane Barrette, the Respondent's Director of Athlete and Coaching Development, to know the reasons for which he was not selected for the National Team.
15. Mr. Barrette told the Claimant that he appeared to be on the development carding list, but that his result in Pyeongchang was not considered sufficient. In providing this information, he described himself as merely a "messenger" of CCC.

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

16. Because of the content of that email, the Claimant decided not to appeal the Respondent's decision not to select him for the National Team. At that time, he believed that he would nevertheless be awarded a card.
17. The Respondent's Director of High Performance, Thomas Holland, advised the Claimant on May 12, 2017, that he was not eligible to receive a senior card.
18. Following this decision, the Claimant filed an arbitration Request to the Sport Dispute Resolution Centre of Canada ("SDRCC") on June 8, 2017.
19. The Respondent filed its Answer form to this arbitration on June 14, 2017.
20. On June 15, 2017, I accepted the appointment as Arbitrator under section 6.8 of the Canadian Sport Dispute Resolution Code (the "Code"). None of the parties raised any objections.
21. An administrative meeting between the SDRCC and the Parties was held by teleconference on June 15, 2017, to explain the procedures.
22. A preliminary meeting between the Arbitrator and the Parties was held by teleconference on June 16, 2017, to plan the next steps of the proceedings.
23. The Parties filed their written submissions on June 21, 2017.
24. The hearing was held by teleconference on June 22, 2017.
25. I rendered my short decision on June 29, 2017, in which I ruled that the Claimant's Request was dismissed.

V. POSITIONS OF THE PARTIES

26. This section provides an overview of the Parties' written and oral submissions. This is not an exhaustive record, but I have carefully reviewed all of the submissions made by each of the Parties.

A) Claimant

27. The Claimant considers that he has greatly improved in recent years. He explained that he is in fact currently one of the best cross-country ski sprinters in the country.

28. According to him, he met the criteria under article 1 (a) of *Cross Country Canada National Ski Teams (NST-PNST) 2017-2018 – Team Selection Criteria* (cited later herein) which should allow him to earn a place on the U25 National Team. In doing so, he would be eligible for a senior card.

29. He explained that he decided to participate in the World Cup competition in Pyeongchang to obtain results within the top 30, thereby securing a place on the U25 National Team. He finished 27th at this event.

30. Following an analysis conducted by the Respondent, which determined that his result in the top 30 in Pyeongchang would not be considered, the Claimant submitted that the selection criteria were unfairly applied.

31. He mentioned that two Canadian skiers were selected for the National Team and received their cards, although they were not among the top 30 in Pyeongchang.

32. According to the Claimant, the top 30 should be considered for selection as a U25 athlete on the basis of the selection criteria. A World Cup competition cannot be excluded from the selection criteria, since none of the criteria mention that the depth of field of an event must be considered in the assessment of the results.

33. He also submitted that his result in Pyeongchang should be considered, because he is better than some athletes who are on the National Team and who hold a senior card.
34. He considers that his result at the World Cup in Pyeongchang was unfairly treated in comparison to other athletes and that this result clearly demonstrates that he is continually progressing to obtain a senior card.
35. According to him, he should alternatively be considered for the U25 National Team because of his results in the last year, which show a progression.
36. He submitted, at the hearing, that it was arbitrary for the Respondent to consider that the points he earned at the Pyeongchang race were due solely to the fact that the best skiers did not offer their best performance. This factor is not specified under any criterion as justification to reject race results.
37. Lastly, he submitted that the Respondent's selection criteria were established in order to consider a top-30 ranking. He therefore met that objective criterion for the U25 National Team during the past year.

B) The Respondent

38. The Respondent submits that the awarding of senior cards to cross-country ski athletes is based on the premise that athletes must, among other things, be selected for national teams.
39. Athletes are selected to the National Team on the basis of the selection policy.
40. At the hearing, the Respondent explained that the High Performance Committee had no obligation to select a member of the U25 team on the basis of a top-30 result at the World Cup. This is merely one criterion to be assessed among others.

41. There was no consensus among the coaches to support a recommendation to select the Claimant to the National Team.
42. The Respondent submitted that the Pyeongchang race did not have the minimum depth of field to be considered as a team selection event. In fact, only nine (9) of the best thirty (30) skiers participated in that event.
43. In addition, the Respondent explained that the Claimant's progress over the last three (3) years during which he had a development card, was insufficient when the selection decision was made to award him a senior card. Progress over a period of three (3) years is a Sport Canada evaluation criterion imposed on the Respondent.
44. The High Performance Committee therefore took the unanimous decision that the World Cup in Pyeongchang did not have a sufficient depth of field to take into consideration the Claimant's 27th position for selection to the U25 National Team.
45. The Respondent also submitted that no one on the High Performance Committee objected to the fact that the results in Pyeongchang would not be considered among the National Team selection criteria.
46. The Respondent submitted that the High Performance Committee had discretion to make selection decisions for national teams.

C) The Affected Party

47. Joey Foster explained that he had been selected for a development card because he had showed progress in recent years.
48. He mentioned that he wanted to succeed at the international level in cross-country skiing and, accordingly, having a card helped considerably in his quest. According to him, his development card should therefore not be affected by this arbitration.

VI. APPLICABLE RULES

A) The Canadian Sport Dispute Resolution Code (the “ Code”)

49. Section 6.7 of the Code establishes the burden of proof in 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.

B) Athlete Assistance Program Carding Criteria 2017-18

5.0 Senior Cards

5.2 National Criteria (SR)

[...]

2) Eligibility: Only athletes on the Senior National Ski Team will be eligible for SR cards. The Senior National Ski Team is comprised of the Senior World Cup Team A & B and the U25 Team.

[...]

C) Ski de fond Canada National Ski Teams (NST-PNST) 2017-18 - Team Selection Criteria²

Section 3: U25 Team (YOB 1993 and after)

7.0 Purpose, Objectives, Criteria Guidelines and Selection Events, NST Support

² Because of the tight timelines, the Parties only submitted the English language version of the selection regulation. Although the French language version is posted on the Respondent's website, I did not consider, or reproduce the French language version of the regulation.

[...]

3. Criteria Guidelines and Selection Events

[...]

b) Subjective selections will be based on quantifiable data and the guidelines in 3.6.b. Within this context, the HPD may recommend athletes to the HPC for selection to this team. [...] Coaches can forward their recommendations to the HPD; these recommendations must be based on the guidelines referenced in 3.6.b and be submitted to the HPD ten days before the HPC meeting.

[...]

8. U25 Team Selection Process and Priorities

1. The U25 Team will be selected based on the following benchmarks and guidelines. All recommendations will be reviewed relative to the purpose, objectives and criteria guidelines (7. 1-3).

a) Athletes achieving a top 30 distance or top 30 sprint result at a 2016-17 World Cup or 2017 World Championship event. An athlete placing in the top 12 distance or the top 12 individual sprint at the 2016 and/or 2017 U23 Championships.

b) Graduating junior athletes placing in top 12 in a distance event or placing in the top 12 in an individual sprint event at the 2017 WJC may be selected based on an assessment and recommendation of the NTDC coaches in collaboration with the HPD to the HPC. This assessment and recommendation will be based on the relative merit of time behind the winner and FIS points.

2. Subjective selections will be based on 7.3.b.

VII. DISCUSSION

50. Pursuant to section 6.7 of the Code, the Respondent must demonstrate that its decision not to select the Claimant to the National Team was made in accordance with its selection criteria.

51. The test I must apply is that of reasonableness of the Respondent's decision. To the extent that this decision appears reasonable to me, it would be risky for me to intervene in a technical decision-making process, which belongs to that sport³.
52. It was, in my opinion, reasonable for the Respondent not to consider the results of the World Cup in Pyeongchang and to therefore exclude this race from the evaluation of the Claimant's qualifying performances in the context of a senior card recommendation. He finished 27th in a competition in which there were few high-caliber skiers.
53. It is normal and even desirable for a National Sport Organization ("NSO") to have a certain discretionary regulatory power when it selects athletes to national teams, which may lead to the award of cards. An NSO is presumed to be an expert and competent to make the best decisions affecting its sport.
54. The High Performance Committee had the required level of discretion to determine which athlete could be selected to the U25 National Team, relying on well-established criteria, more specifically subsections 7 and 8 of section 3 of *Cross Country Canada National Ski Teams (NST-PNST) 2017-18 – Team Selection Criteria*.
55. Accordingly, the Respondent's decision not to include the Claimant on the U25 National Team was reasonable.
56. The Claimant had the benefit of a development card for the last three (3) years. Sport Canada's rule requiring that an athlete demonstrate progress in order to retain a development card beyond 3 years is imposed on the Respondent, thereby limiting its discretionary power. Because the Claimant did not make sufficient progress, the Respondent is bound by the rules of Sport Canada.

³ *Richer v. CCPSA*, SDRCC 15-0265, *Blanchet-Rampling v. Synchro Canada*, SDRCC 15-0266, *Vachon v. Canada Snowboard*, SDRCC 15-0267

57. All of this is, in my opinion, reasonable and is well warranted from a sport standpoint and considering the NSO's obligation towards performance results.

VIII. CONCLUSION

58. By not awarding a senior card to the Claimant and by not selecting him for the U25 National Team, the Respondent did not make an unreasonable decision.

59. It was reasonable for the Respondent not to have considered the World Cup results in Pyeongchang, because an NSO has certain discretionary regulatory power when making decisions about to the selection of athletes, which may then lead to carding allocations.

60. For these reasons, the Claimant's Request is dismissed.

Signed in Montreal, on July 7, 2017

Patrice Brunet, Arbitrator