

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

NO: SDRCC 18-0344

WILLIAM DUTTON
(CLAIMANT)

AND

SPEED SKATING CANADA (SSC)
(RESPONDENT)

AND

JORDAN BELCHOS
BENJAMIN DONNELLY
LAURENT DUBREUIL
(AFFECTED PARTIES)

Attendees at hearing:

For the Claimant: William Dutton, represented by Dr. Emir Crowne, Amanda Fowler and Liam McFarlane

For the Respondent: Susan Auch, Dominique Gravel, Shawn Holman and Scott Maw, represented by Steven Indig

For the Affected Parties: Jordan Belchos, represented by Michael Belchos
Benjamin Donnelly
Laurent Dubreuil, represented by Robert Dubreuil and
Michaël Bardagi

Overview

1. The Claimant, Mr. William Dutton, narrowly missed qualification to compete in the 2018 Winter Olympic Games in Pyeongchang. The Respondent, Speed Skating Canada, adopted a qualification system that refers to the International Skating Union (“ISU”) rankings, and requires competitors to rank in the top 16 for Olympic consideration. Those rankings included the results of three Russian competitors who finished ahead of the Claimant. On December 5, 2017, the International Olympic Committee banned the Russian Olympic Committee from participating in the 2018 Winter Olympic Games for maintaining a state-wide doping scheme. That announcement specified the conditions in which Russian competitors who had been found to violate anti-doping rules would be banned from participation.
2. Following this announcement, the Claimant noticed that the ISU standards included ranking Russian athletes who would be banned based on the IOC announcement. His coach raised it with the Respondent on December 22nd, 2017, which took no action. The Claimant failed to qualify for selection when he finished outside the top 16 of ISU ranked athletes in the 500m speed skating event, finishing 18th instead. Three Russian athletes, of which two are banned following the IOC announcement ranked ahead of him. The Claimant raised the problem with the standard to the Respondent following his failure to qualify on January 8th, 2018, but the Respondent still found no problems with the ranking system.
3. The Claimant challenges the standard the Respondent failed to modify when it became clear that the standard ranked Russian athletes implicated in doping violations against clean athletes. The Claimant seeks to have the Respondent recalculate its rankings without the Russians, which would place the Claimant in the top 16 and qualify him for selection.
4. For the reasons that follow, I order that the matter be sent back to the Respondent with directions.

The Parties

William Dutton

5. Mr. Dutton, the Claimant, is a senior member of the Canadian National Speed Skating Team. He participated in the 2014 Olympics, proudly representing Canada. He is an accomplished and experienced speed skater.
6. In this year's Olympic Time Trials, which took place on January 5th, 2018, he finished second in the 500m event.

Speed Skating Canada

7. The Respondent, Speed Skating Canada, is Canada's National Sport Organization for speed skating. In that role, Speed Skating Canada organizes and coordinates the sport of speed skating in Canada for the betterment of the sport and its members.

Jordan Belchos

8. Mr. Belchos is a member of the Canadian National Speed Skating team. He has been selected to represent Canada at the 2018 Winter Olympic Games representing Canada in speed skating.

Laurent Dubreuil

9. Mr. Dubreuil is also a member of the Canadian National Speed Skating team that has been selected to represent Canada at the 2018 Winter Olympic Games in speed skating.

Benjamin Donnelly

10. Mr. Donnelly is also a member of the Canadian National Speed Skating team that has been selected to represent Canada at the 2018 Winter Olympic Games in speed skating. He attended the hearing but chose not to file an intervention form.

Procedure

11. The hearing proceeded by conference call on January 19th, 2018. I issued a short decision on January 21. This is the reasoning behind that decision.

Applicable Policies

12. At issue in this dispute are sections of the Respondent's qualifying criteria and fair play policy.

13. The selection criteria are contained in the "2018 Olympic Selection Policies & Procedures – Long Track Program". The relevant sections are as follows:

6.2 Olympic Performance Standards

Other than Team Pursuit, in order to be eligible for Nomination to the 2018 Olympic Team, the athlete must meet all of the following Olympic Performance Standards as follows;

- a) Athletes must achieve minimum ISU Olympic Qualifying Standards for each event in which they compete;
- b) Athletes must achieve one of the below qualifying standards ("**Qualifying Standards**"), in each event in which they compete, during the period from January 1, 2017 to January 9, 2018:
 - i. Achieve a time equal to or better than the 16th best time on the Special Olympic Qualification Classification ("**SOQC**") [sic], published by the International Skating Union, after the 2017 Fall World Cups season ("**2017 Fall World Cups**") for the 500m, 1000m, 1500m, 3000m women, 5000m or 10000m men (sorting by time, adjusting to maximum country quota allocation);
 - ii. Achieve a top 12 in points placing on the SOQC from the 2017 Fall World Cups in the 500m, 1000m, or 1500m;
 - iii. Achieve a top 12 in points from the 2017 Fall World Cups in the 3000m or 5000m, each ranked separately, for women, and the 5000m or 10000m, each ranked separately, for men. (This separate ranking for each of the 3000m and 5000m for women, and each of the 5000m and 10000m for men, will be compiled by Speed Skating Canada for each of these individual distances, separately from the SOQC); or
 - iv. Achieve a top 16 in points placing on the SOQC from the 2017 Fall World Cups in Mass Start.

For greater certainty, and as per section 9.1.2, athletes nominated to the 2018 Olympic Team in Team Pursuit may not have to meet the Qualifying Standards as outlined above.

14. In addition to the Olympic Selection Policies & Procedures, the Respondent's Fairplay Policy was also at issue. The relevant sections are as follows:

1. OBJECTIVE

1.1 To identify and integrate procedures and guidelines based on the principles of fair play into Speed Skating Canada (SSC) programs to protect those who commit themselves to the sport of speed skating.

4. PRINCIPLES

4.1 SSC believes in fair play among athletes.

4.3. SSC believes that the rights of athletes should be protected if the principles of fair play are violated.

4.4 SSC believes that an effective doping control program assists in achieving a fair play environment.

5. POLICY STATEMENT

5.1 SSC will protect those who commit themselves to a sport based on fair play in a healthy and safe environment.

6. PROVISIONS

6.2. This means that at all times during competitions, training and preparation activities, participants, coaches, officials, support people and volunteers shall ensure that the conditions for everyone are equal and that no person shall have an artificial advantage over any other resulting from the use of banned substances or methods, or by collusion, action or biased decisions.

6.4. Major infractions under the fair play policy include but are not limited to:

6.4.1. The use of banned substances and methods

6.4.5. Collusion with the objective to disadvantage a competitor (this is different than discussing strategies aimed at winning a race).

6.7. SSC supports all efforts and will cooperate with the activities of the World Anti Doping Agency (WADA) to prevent the use of banned substances, methods and procedures by our athletes.

6.10. SSC will develop and maintain operational procedures aimed at supporting the fair play policy.

6.11. SSC will develop and maintain an operational strategy to deal with the impact fair play infractions have on the organization.

Issues

15. The Claimant raised the following issues:

- a. the Respondents made procedural errors in failing to follow procedures as laid out in its approved policies;
- b. the Respondents made procedural errors in failing to consider relevant information and in taking into account relevant information;
- c. the Respondents exercised their discretion for an improper purpose;
and
- d. the Decisions made were grossly unreasonable in the circumstances.

Position of the Parties

Claimant's Position

16. The Claimant submits that the Respondent had the discretion to modify its standard following the exposure of Russia's state-sponsored doping program, and failed to exercise it in the circumstances. To the Claimant, the three Russians who placed ahead of him should be removed from the rankings, thus qualifying him for selection.

17. The Claimant argues that the Qualifying Time Standard published by the ISU was fatally flawed, as it did not provide for any contingency if athletes whose scores formed that standard were later banned from the 2018 Olympic Winter Games. The Claimant points out that three Russians were included in the rankings, pushing him to 18th, when he was required to place no worse than 16th to qualify. He submits that two of those skaters, Mr. Artyom Kuznetsov and Mr. Pavel Kulizhnikov are ineligible for the Winter Games based on the IOC's statement and their bans by the ISU, while also noting that the Schmid Report found that there was "a failure to respect the

WADA Code within the various entities under the responsibility of the Russian Ministry of Sport.”¹

18. The Claimant argues that though SSC does not have the ability to change the ISU rankings, it does have the ability to decide on how to apply them and that it can decide for its selection process that SSC should not include the Russian times or rankings.
19. Despite these findings by the Schmid Report, the McLaren Report, and the IOC, the Claimant submits that he was unfairly excluded from qualifying when the Respondent failed to act on these announcements concerning state sanctioned doping. The Claimant submits that the ISU standard used by the Respondent is unacceptable, and he should be appointed to the team based on his second place finish in the 500m Olympic Time Trials. It is his position that it is unfair for him to be compared with athletes who are known to have violated anti-doping rules.
20. The Claimant submits that this flaw could have been addressed under section 4.2(a) of the 2018 Selection Policy, which the Claimant argues requires the Olympic Selection Committee and Speed Skating Canada to ensure fairness in the Olympic Team’s selection process. In particular, the Claimant submits that Russia’s doping scheme was an “institutional conspiracy”, such that the qualifying rules should have been modified following the new evidence that came to light. ²
21. Turning to the Respondent’s actions following the IOC announcements, the Claimant submitted that he again raised the issue to its Executive Members on January 8, 2018, before the team selection had been made. The team selections were announced, and no explanation was provided to the Claimant as to why the standards had not been modified or whether it had even considered modification.
22. The Claimant points to the Respondent’s Mission statement and Fairplay policy as requiring the Respondent to act to modify their standard in this situation. The Claimant submits that the Respondent’s failure to exercise its discretion in these circumstances violates procedural fairness. Next, the Claimant submits that the Respondent failed to consider the information that Russian athletes had engaged in

¹ Claimant’s Factum at para 8.

² Claimant’s Factum, at para 35.

widespread cheating. In addition, the Respondent exercised its discretion for an improper purpose when it failed to act. Finally, the Claimant submits that the decision was grossly unreasonable, as it prevented him from competing on a level playing field for qualification purposes.

23. The Claimant cited case law to support the proposition that I can appoint him to the team, as occurred in *Beaulieu v Speed Skating Canada SDRCC 13-0199* and in *Ammar v Cross Country Canada SDRCC 14-0217*.

Respondent's Position:

24. The Respondent denies that it had either the requirement or the authority to modify the qualifying standard.³

25. As for the Claimant's qualification, the Respondent submitted that pursuant to the Olympic Selection Process & Procedure guide at section 6.2, the Claimant failed to meet either of the two Olympic Performance Standards, either in meeting the minimum ISU Olympic Qualifying Standards or the alternative criteria set out in section 6.2(i) and 6.2(ii).

26. The Respondent submitted that it properly adopted the selection criteria, which delegated ranking responsibility to the ISU. Accordingly, the Respondent argues that it had "no control over the content of the SOQC." Having adopted the standard, the Respondent could not change it based on which athletes it perceived should be eligible.

27. The Respondent argued that the two ineligible Russian athletes are not conclusively ineligible, as one case has been appealed, and the IOC has not yet released its list of athletes invited to the Games.

28. To the Respondent, it is the IOC that has final discretion on selecting participants. The Respondent rejects that historical evidence about doping in Russia gives the Respondent discretionary authority to modify the standard.⁴

29. The Respondent submits that its criteria were fairly adopted and not challenged within 30 days of their adoption in April, 2017.⁵ It submitted that the appeal was filed too

³ Respondent's Factum, at paras 11-12.

⁴ *Ibid*, at para 13.

⁵ *Ibid*, at para 17.

late and is time barred as the appropriate moment to have appealed would have been following the standard's adoption in April 2017.⁶ Simply, there was no lack of clarity of what was expected of the athletes. Even if there were, the Claimant's complaint would be time-barred given the appeal's lateness.

30. The Respondent argues that it considered the information about Russia's history of state sponsored doping, but determined that there was no certainty about whether Russian Athletes would be banned from the Games. Having established that the IOC would make the determination, the Respondent chose not to act on the qualifying standards and had the sole authority to do so.⁷

31. The Respondent contemplated that If the two Russian athletes who are ineligible were not invited, it may need to reconsider a decision to modify its qualifying standard based on its policies.⁸

32. The Respondent cited *Adams v Athletics Canada (SDRCC 09-0098)* to support that an SDRCC Arbitrator's jurisdiction was limited, in that the SDRCC Code's provisions are not to be read so broadly as to replace management of National Sport Organizations by arbitrators. Additionally, the Respondent raised *Palmer v Athletics Canada (SDRCC 08-0080)* to argue that arbitrators should only interfere with a decision in situations where the decision has been so tainted that it is manifestly wrong or unjust. Finally, the Respondent cited *Richer v The Canadian Cerebral Palsy Sports Association (SDRCC15-0265)* to submit that selection committees have the most knowledge with respect to suitability for selection, and, unless bad faith is present, should be deferred to.

Affected Parties

33. Mr. Laurent Dubreuil was one of the three speed skaters named to the team who would be affected if the Claimant succeeds in his appeal. Mr. Dubreuil has been selected to compete in the 500 and 1000metre events. If the Claimant is successful

⁶ *Ibid* at para 22.

⁷ *Ibid*, at para 26-27.

⁸ Respondent's Factum at para 31.

he would lose his spot in the 500m event. He submitted that there is no jurisdiction for an SDRCC arbitrator to modify the ISU or the SCC standards. He also argued that even if the Claimant succeeds, he did not meet the minimum qualifications to make the team.

34. Mr. Jordan Belchos was another speed skater named to the team who could be dropped from competition if the Claimant is successful. Mr. Belchos supported the position of the Respondent and of Laurent Dubreuil.

Claimant's Reply

35. In reply, the Claimant submitted that the complaint was not time-barred, given the circumstances of the IOC's announcement on December 5th, 2017 and that the time started running after the January 10, 2018 announcement of the team.

36. Further, the Claimant raised that there was a reasonable apprehension of bias of the Respondent's executive, Ms. Kristina Groves, based on an article she wrote for the CBC on January 17th, 2018, shortly after this appeal was submitted. In that article, she described her experience speed skating and her success despite learning that others had cheated. The Claimant submits that this is an indication of bias, as Ms. Groves sits on the selection committee for the Respondent.

37. Finally, the Claimant argued that there was no evidence that the Respondent had contemplated its selection standard following the IOC Announcement on December 5, 2017, despite the Claimant's repeated attempts to raise the matter.

Standard of Review

38. This is a selection dispute. The SDRCC's arbitral jurisprudence shows that arbitrators will interfere with a team's selection in rare circumstances where the team's selection was "so tainted or so manifestly wrong that would be unjust to let it stand"⁹. While I have the remedial jurisdiction to substitute my decision for the

⁹ *Forrestor v Athletics Canada* (SDRCC 10-0117).

Respondent's, it is not a "licence to impose on the world of Canadian sport what would be tantamount to a rule of NSO management by arbitrators"¹⁰.

39. Some circumstances in which I should intervene were set out by Arbitrator Décary and are as follows:

- a policy has been adopted in bad faith or without jurisdiction;
- Would be contrary to law
- Would have been adopted through a biased process; or
- Where it is so vague or so discretionary or arbitrary as to be inapplicable with any kind of certainty¹¹.

Therefore, the Respondent's decision is entitled to deference where it falls within a range of reasonable possibilities within its expertise as a national sporting organisation.

Analysis

Selection Criteria Dispute

40. The main issue in this case regards the Respondent's policy-imposed duty to ensure a clean playing field for its athletes and whether it must modify the selection criteria following the IOC's decision to ban Russia from the 2018 Winter Olympic Games.

This is a selection dispute, therefore I must determine

- a. whether the selection criteria were reasonably adopted;
- b. whether it was reasonably applied, and
- c. whether the athlete should have been selected based on the selection criteria.

41. The parties agreed that at the time the selection criteria was adopted in April 2017, it had been reasonably adopted. The main issue concerns the application of the selection criteria alongside the Respondent's other policies once the findings about

¹⁰ *Jeffrey Adams v Athletics Canada* (SDRCC 09-0098).

¹¹ *Mehmedovic and Tritton v Judo Canada* (SDRCC 12-0191/92 at para 30).

Russia's state-sponsored program and the IOC's ban of Russian athletes who had violated doping rules was announced.

42. The Respondent argued that this appeal is time barred, as the correct time for the Claimant to challenge the standard was back in April 2017. I do not agree. Given the circumstances, I find that it was open to the Claimant to raise the issue of modifying the standard following the team selection on January 10, 2018. Only after the IOC's Announcement on December 5, 2017 did the unusual situation arise where the IOC had banned athletes that would have been competing in qualification trials up to that point. The Claimant raised this on at least two occasions with the Respondent, both informally through his coach and formally through counsel. The Claimant's communications were not answered by the Respondent. It was only after the announcement of the team selection on January 10, 2018 that there was an actual decision that indicated that the Respondent had not modified its selection criteria. I find that time started running on January 10, 2018, and the claim is not time barred.

43. Turning to the question of modifying the standard, the Claimant and Respondent disputed whether the Fairplay Policy required the Respondent to modify their criteria, and while it is beyond my jurisdiction to force the Respondent to modify its criteria, the Respondent failed to provide procedural fairness to the Claimant once he raised the matter.

44. The Respondent's Fairplay Policy required it to "ensure that the conditions for everyone are equal and that no person shall have an artificial advantage", but the Olympic Selection Criteria grant full discretion to the Olympic Selection Committee to resolve any unexpected circumstances in applying the ISU standards (Olympic Selection Criteria, 4.2 and 5.1.). This conflict raises the thorny issues of jurisdiction, as I cannot substitute my opinion for the Respondent's in a matter within its expertise as a national sporting organization. Despite that, it appears as though the Claimant was ranked against athletes who are banned for violating anti-doping rules, and harming his chances of selections, which would trigger the Fairplay Policy's requirements.

45. I do not have the jurisdiction to change the ISU rankings. These are International rankings over which a Canadian arbitrator has no control. However, I do find that the Respondent owed the Claimant more procedural fairness than he received. The IOC announcement on December 5th, 2017 was largely unprecedented as a nation's Olympic Committee was banned for wide-spread cheating. The Respondent cannot be at fault for having standards in place at the time of the announcement that could not reasonably have anticipated this situation. The Respondent should have, at minimum, contemplated this new information in light of its Fairplay Policy. To not consider the IOC's announcement and their qualification standards at this time would be to render the Fairplay Policy a toothless document.
46. I agree that the Respondent cannot change the ISU rankings. This is something that only the ISU, the IOC or the Court of Arbitration for Sport can do. It does, however, have the ability to adjust its own selection criteria and determine whether including ineligible Russians, or any Russians is inappropriate. The Respondent has the expertise to determine how to deal with doping and fair play in its sports. The Respondent chose to trust in the international standard it had adopted in its Olympic Selection Criteria, despite the appearance of two athletes who are currently banned from participating in the Olympics. I do find that it owed the Claimant an explanation, and to demonstrate that it had turned its mind to the situation in which some athletes could be compared against athletes who were banned for anti-doping violations.
47. When the Claimant brought this matter to the Respondent's attention, no explanation was forthcoming. At the hearing, the Respondent provided minutes that stated only that it had considered modifying the standard and rejected that idea without further elaboration. The Respondent referenced e-mails that circulated between selection committee members on this issue, but declined to provide them at the hearing. While I do not draw an adverse inference based on this refusal, I am left with an insufficient record of how the Respondent considered the problems that the Claimant raised.
48. Accordingly, I find that the Respondent violated the procedural fairness owed to the Claimant by failing to disclose its rationale for maintaining the selection criteria. While the Respondent argued at the hearing that changing the standard was not desirable and enumerated several reasons, this is not the same as showing that at the time the

IOC's announcement was made or during qualifying that it had sufficiently contemplated and explained its decision. Given the unprecedented announcement that a nation was banned from competition because of systemic cheating, and the appearance of athletes on qualification rankings that had participated in that scheme, I find that the Respondent had to show that it had deliberated the matter and rationalized its decision to use rankings that include athletes now banned for doping.

49. As for the final step of the analysis, I decline to determine if the Claimant meets the criteria given that it remains to be seen if the current criteria will stand. It is only worth mentioning that, as it stands, the Claimant does not meet the criteria as he is 18th and needs to rank at least 16th. He would meet the criteria if the ineligible Russian athletes were not included.

Reasonable Apprehension of Bias

50. The Claimant also argued that there was a reasonable apprehension of bias by one of the Respondent's decision-makers, Ms. Kristina Groves, owing to an article she published for CBC. In that article, Ms. Groves discussed her personal experiences as a medal-winning Olympian and how the revelations that many people in her sport have been found to be cheating. Ms. Groves wrote that her belief in the sport was shaken, but that ultimately she does not regret her years as an Olympian.

51. The standard for proving a reasonable apprehension of bias is high. The article raised by the Claimant does not disclose that Ms. Groves is apathetic or takes a tolerant attitude towards cheating. In fact, Ms. Groves wrote disapprovingly of cheating, and the article's main thrust regarded her reflections looking back on the sport in light of the revelations of cheating. I do not see how this can reasonably rise to the standard required to prove a reasonable apprehension of bias, given that the article was unspecific, unrelated to her role as an executive with the Respondent, and disapproving of cheating in sport.

Decision

52. Regarding the four issues, I decide as follows:

- a. The Claimant showed that the Respondent made procedural errors in failing to follow its own approved policies.

- b. The Claimant showed that the Respondent made procedural errors in failing to consider relevant information and in taking into account relevant information.
- c. The Claimant failed to show that the Respondent exercised its discretion for an improper purpose.
- d. The Claimant failed to show that the Decision made was grossly unreasonable in the circumstances.

Order

53. I send this back to the Respondent for reconsideration by January 23rd, 2018. The Respondent must consider the following in the selection process:

- SSC Fair Play Policy, in particular sections 1.1, 4.3, and 5.1;
- The IOC Announcement dated December 5, 2017;
- The McLaren Report;
- The Schmid Report;
- That Russian Skater, Mr. Pavel Kulizhnikov appears to be ineligible for the Games by failing to meet the testing requirements as set out in the IOC Announcement;
- That Russian Skater Mr. Artyom Kuznetsov was banned on December 22, 2017, by the ISU, for doping violations and is currently ineligible for participation, and his appeal to the CAS will only be determined after Canada finalizes its team selections; and
- All other Russian skaters' results in the qualification period in light of the above reports.

The Respondent must issue reasons in writing demonstrating the above.

Signed in Ottawa, Ontario this 26th day of January 2018.



David Bennett
Arbitrator