

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

No: SDRCC 17-0331

Between:

Olivia Mew
(Claimant)

and

Sail Canada
(Respondent)

and

**Justin Barnes
Gabriel Verrier-Paquette
Coralie Vittecoq
Arie Moffat
Georgia Lewin-LaFrance
Pat Wilson
Alex Heinzemann
Andrew Wood
Ryan Wood**
(Affected Parties)

Arbitrator: John H. Welbourn

Hearing: Conference call, Saturday, October 28, 2017

Party Representatives:

For the Appellant: Lucy Wu
Gordon Chan
Layth Gafoor

For the Respondent: Don Adams
Ken Dool
Todd Irving

For Coralie Vittecoq: Cyrille Vittecoq

For Justin Barnes No appearance
For Gabriel Verrier-Paquette No appearance
For Arie Moffat No appearance
For Georgia Lewin-LaFrance No appearance

For Pat Wilson	No appearance
For Alex Heinzemann	No appearance
For Andrew Wood	No appearance
For Ryan Wood	No appearance

Witnesses:

For the Claimant:	Olivia Mew Kathleen Tocke Farrah Hall
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For the Respondent:	Don Adams Ken Dool Todd Irving
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SDRCC Observers:	Marie-Claude Asselin Thomas Heintzman
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Reasons for Decision

These Reasons follow the Decision of November 5, 2017 and are delivered as required by Article 6.21(c) of the *Canadian Sport Dispute Resolution Code* (the "Code").

Hearing:

1. The hearing was conducted by conference call on October 28, 2017 at 11:00 a.m. (EDT).

Issue:

2. This appeal is from Sail Canada's internal appeal decision issued June 27, 2017, dismissing Olivia Mew's appeal from the decision of Sail Canada not to nominate her to Sport Canada for carding under the Athlete Assistance Program ("AAP") for the 2017 - 2018 carding year.
3. The grounds of appeal are:
 - a. Sail Canada failed to follow its published policy, Sail Canada: Appeal Process and Dispute Resolution (the "ADR Policy") in the appointment of the internal appeal panel;
 - b. Sail Canada failed to correctly apply the 2017-2018 Canadian Sailing Team Sport Canada Carding Criteria (the "Criteria") in not nominating her to Sport Canada for carding;

- c. Sail Canada failed to correctly apply the Criteria in nominating the Affected Parties to Sport Canada for carding.

Preliminary Matters:

4. I was appointed arbitrator on August 10, 2017. A preliminary meeting was held on August 18, 2017 to determine procedural and administrative matters.
5. During the meeting, an issue was raised regarding potential additional affected parties. At that point the named affected parties were Justin Barnes, Gabriel Verrier-Paquette and Coralie Vittecoq. After written submissions were received, my Decision issued September 12, 2017 directed that Pat Wilson, Arie Moffat, Georgia Lewin-LaFrance, Ryan Wood, Andrew Wood and Alex Heinzemann be added as affected parties.
6. SDRCC notified the additional Affected Parties as required. Moffat, Lewin-LaFrance, and Wilson filed Interventions as prescribed by s. 6.13 of the Code.
7. At the beginning of the hearing, the Parties confirmed that:
 - a. The conference call format of the hearing was satisfactory;
 - b. The arbitrator had jurisdiction to consider the issues and his decision would be final and binding;
 - c. The oral testimony of all witnesses would be given under oath or affirmation and would not be formally recorded.

Facts:

8. Ms. Mew is a member of Sail Canada and competes in RSX-W, the women's windsurfing classification. She has been a member of the Sail Canada National Team since 2015. Sail Canada previously nominated her to Sport Canada for carding for the 2015 - 2016 and 2016 - 2017 carding cycles and she received AAP assistance for those periods.
9. In 2016, Ms. Mew finished 4th overall in the Weymouth & Portland World Cup regatta. There were 8 competitors, including Ms. Mew, in the RSX-W Class which involved 9 races over several days. Of the 8 competitors, 3 sailed in the 9 races, and 5 sailed in 8 races. All competitors sailed in 7 of the 9 races.
10. By letter dated May 3, 2017, Sail Canada advised Ms. Mew that her carding status had not been renewed for the 2017 - 2018 AAP carding cycle (the "Decision"). Ms. Mew appealed the Decision.

11. Paragraph 7.1 of the ADR Policy states:

Within ten days of having received the Appeal Document, the Case Manager will initiate the establishment of a Panel as follows:

- a) The Panel will be comprised of three individuals;
- b) The panel will consist of one person named by the Appellant(s), one person named by the Respondent(s) and the third person, who shall act as chairperson of the Panel, nominated by the Appellant(s)' and Respondent(s)' nominees to the Panel, or failing agreement by such nominees, appointed by the Case Manager.

12. Paragraph 3.2(a) of the ADR Policy states:

This appeal policy will not apply to decisions relating to the Athlete Assistance Program (AAP) policies and procedures established by Sport Canada.

13. Sail Canada advised Ms. Mew that her appeal would be governed by the Appeal Procedure contained in the Athlete Agreement. The Athlete Agreement is not in evidence but it is not disputed that the Appeal Procedure in that document states in part:

Any decision made by Sail Canada or its Committees may be appealed by the Athlete to the Sail Canada Board of Directors for a further review. The Board of Directors may appoint a separate Panel of no less than 3 people to review the decision.

14. Ms. Mew did not name a member of the Appeal Panel as contemplated by the ADR Policy. The Appeal Panel consisted of 6 members of the Sail Canada Board of Directors.

15. Ms. Mew's appeal was heard, considered and denied by the Panel. Ms. Mew was advised of the outcome by Sail Canada letter dated June 27, 2017. The Panel's 20 page decision with reasons is also dated June 27, 2017 but apparently was not provided to Ms. Mew until August 8, 2017.

16. Page 7 of the Criteria states that the qualification system for carding is divided into a 6 Tier system for Senior Cards and a 3 Tier system for Development Cards.

17. The Tier 4 Senior Card Criteria specifies the performance an athlete must achieve to qualify for a Senior Card includes:

Top 30% of overall fleet performance in final standings at nomination events or
Top 50% at World Cup Events (if the fleet is restricted to 40 boats or less)/Olympic Games

Nomination Events:

2017 World Cup Events - Miami (Jan 2017)

2016 Olympic Games - Rio (August 2016)

18. Page 13 of the Criteria sets out additional criteria ("Additional Criteria") applicable to all Tiers that an athlete must also satisfy to qualify for carding. The first of the Additional Criteria states:

An Athlete must be able to demonstrate progression in their performance, as shown by performance indicators such as, in comparison to performances in previous years, performance on fitness assessments, and maintenance of appropriate body composition for the class in question.

19. Page 11 of the Criteria states the availability of Tier 3 Development Cards to be:

If any Development Cards remain available after application of Development Card Tier 1 and 2 then eligible teams may be considered for nomination under Development Card Tier 3 criteria.

20. The standard for a Tier 3 Development Card is not performance based. Rather, athletes are to be nominated based on a depth chart ("Depth Chart") created by the High Performance Director and High Performance coaching staff. The Depth Chart ranking is based on 9 prescribed factors, with international potential being most important.

Argument:

21. Ms. Mew submits that Sail Canada did not adhere to the ADR Policy in the appointment of the internal appeal panel.
22. Sail Canada responds that Ms. Mew's appeal was from a decision relating to AAP policies and procedures established by Sport Canada. Therefore the ADR Policy did not apply as provided by paragraph 3.2 of the document. The applicable Appeal Procedure was that stated in the Athlete Agreement.
23. Ms. Mew states that she achieved the Tier 4 Senior Card standard with her 4th place finish at the Weymouth & Portland regatta in 2016. She acknowledges that she did not finish in the top 30% at the 2017 Miami regatta. She did not compete at the 2016 Rio Olympics. However, the Tier 4 Senior Card criteria is stated in the alternative. That is, if top 30% at nomination events is not attained then top 50% at a World Cup event meets the Criteria requirement.
24. Sail Canada submits that the Weymouth & Portland regatta was not considered a nomination event for the 2017 - 2018 Criteria. Further, Ms. Mew did not finish in

the top 50% in any of the 9 individual races of the regatta. She finished 4th of the 6 competitors who sailed in all races. Therefore she did not achieve the performance standard for the Tier 4 Senior Card.

25. Further, Sail Canada states that Ms. Mew did not demonstrate progression in her performance as required by the Additional Criteria. She finished 31 out of 36 in the 2016 Miami regatta, 31 out of 34 in the 2017 Miami event, 7 of 11 in the 2017 North American regatta, 4 of 9 in the 2016 CORK event, and 30 of 31 in the 2016 Holland regatta. Ms. Mew was the only competitor in the 2016 Nationals.
26. Alternatively, Ms. Mew submitted in her pre-hearing brief that Gabriel Verrier-Paquette and Justin Barnes were nominated for Tier 6 Senior Cards but were ineligible. This is based on the age of each athlete and the number of years each has received carding.
27. Sail Canada contends that both athletes were eligible for nomination for Tier 6 Senior Cards.
28. Ms. Mew argues that the Tier 1 and 2 Development Card performance criteria require qualification in an Olympic Class or allow an exemption for a non-Olympic Class. Tier 3 does not mention Olympic Class or any exemption. Therefore Tier 3 should be interpreted as applying to Olympic Class only. None of the Affected Parties, Heinzmann, Lewin-LaFrance, Moffat, Wilson, Andrew and Ryan Wood sailed Olympic Class. Each received Tier 3 Cards but were ineligible for such.
29. Sail Canada disagrees with Ms. Mew's interpretation of the Development Card criteria.
30. Ms. Mew submits that her ranking on the Depth Chart is wrong based on the method of evaluation and assessment, and in comparison to the Affected Athletes who received Tier 3 Development Cards.
31. Sail Canada asserts that the Depth Chart was developed by its High Performance Director and approved by the Board of Directors. Those Affected Parties were correctly nominated for Tier 3 Development Cards.

Findings:

32. I do not agree that the Appeal Procedure contained in the Athlete Agreement governed Ms. Mew's internal appeal. First, paragraph 3.1 of the ADR Policy states:

Any Registered Participant of Sail Canada who is affected by a decision of the Board of Directors, of any Committee of the Board of Directors, or of any body or individual who has been delegated authority to make decisions on behalf of

Sail Canada or its Board of Directors, will have the right to appeal that decision, provided there are sufficient grounds for the appeal, as set out in Section 8.

Ms. Mew falls within that scope.

33. Second, the Decision was made on the Criteria established by Sail Canada and the application of those Criteria by Sail Canada. Based on the Criteria, Sail Canada decided not to nominate Ms. Mew to Sport Canada for carding. Sport Canada did not participate in the Decision. The Decision has not been demonstrated to relate to AAP policies and procedures established by Sport Canada. Therefore the exclusion expressed by paragraph 3.2(a) of the ADR Policy (paragraph 13 above) does not apply.
34. Third, Ms. Mew's Athlete Agreement for the 2016 - 2017 carding cycle is not in evidence. However, it is not disputed that it contains an Appeal Procedure. Don Adams is the CEO of Sail Canada. He agreed that an athlete must sign an athlete agreement as a prerequisite to receiving AAP funding and benefits for each carding cycle. The carding cycle ends April 30 each year as does the term of the athlete agreement. Unless specifically contemplated in the document, the Appeal Procedure in Ms. Mew's expired Athlete Agreement could not govern Ms. Mew's internal appeal of the Decision. The Decision was made after expiry of the 2016 - 2017 Athlete Agreement.
35. The ADR Policy establishes the appointment process and composition of a 3 member internal appeal panel. That appointment process was not followed, the result of which was a denial of natural justice. The result should be to allow Ms. Mew's appeal, set aside the internal appeal panel's decision and direct a new internal appeal. However, both parties, particularly Ms. Mew, expressed the desire for the appeal be determined on the application of the Criteria and not any procedural error.
36. Article 6.7 of the Code states:

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.
37. From the outset, Ms. Mew has stipulated that the Criteria were appropriately established.
38. Sail Canada does not dispute that the Weymouth & Portland regatta was a World

Cup event. However, Sail Canada asserts that the regatta was not a nomination event stipulated in the Tier 4 Senior Card Criteria. Plain reading of that Criteria is that the performance standard to be achieved is either top 30% finish in final standings at "nomination events" or top 50% finish in final standings at World Cup Events/Olympic Games. The Tier 4 Criteria lists 2 specific regattas as "Nomination Events". No World Cup events are listed.

39. I agree with Ms. Mew that it is clear that the Tier 4 Criteria provide 2 alternative methods through which to achieve the performance standard - either the 2 nomination events, or World Cup events.
40. Sail Canada contends that the Weymouth & Portland regatta was not considered an adequate test to assess athlete performance levels. Further, all of Ms. Mew's individual race results were in the bottom 50% of the athletes competing.
41. The Tier 4 Criteria does not exclude any World Cup event as an eligible competition for performance assessment. Neither does the Criteria indicate that individual race finish in a multi-race regatta will be a performance standard. The Tier 4 Criteria is clear - "final standings" is the measure.
42. Any absence of detail, confusion or ambiguity in the Criteria is the responsibility of Sail Canada and must be construed against Sail Canada. Ms. Mew finished 4 of 8 competitors in the 2016 Weymouth & Portland regatta. She finished in the top 50% at a World Cup event. Ms. Mew met the performance standard for a Tier 4 Senior Card.
43. Sail Canada submits that Ms. Mew has not shown progress in her performance in competition as required by the Additional Criteria. The preamble of the Additional Criteria states:

Meeting the outlined performance criteria alone does not guarantee a nomination for AAP support. In line with the performance targets and objectives of Sail Canada for World Championships and Olympic/Paralympic Games, and to optimise the development of athletes along the Performance Pathway, the additional criteria must also be met for any athlete to be nominated for carding.
44. In addition to demonstrating performance progression, the Additional Criteria require an athlete to complete an annual training plan in consultation with High Performance or National Team officials, adhere to that plan under regular coaching supervision, attend National Team training camps, testing and assessments.
45. Sail Canada relies on Ms. Mew's competition results described in paragraph 25 above as confirmation that she has not demonstrated adequate or any progression in competition performance. Those results reflect that, apart from the

Weymouth & Portland regatta, Ms. Mew has consistently finished toward the bottom of the field. I accept that Ms. Mew's competition results do not reflect progress in her performance.

46. I find that Sail Canada's decision not to nominate Ms. Mew for a Tier 4 Senior Card was made in accordance with the Criteria and in particular the Additional Criteria. I also find that Ms. Mew has not demonstrated that she should have been nominated to a Tier 4 Senior Card in accordance with the Criteria.
47. In her brief filed in advance of the hearing, Ms. Mew contended that Gabriel Verrier-Paquette and Justin Barnes were nominated for Tier 6 Senior Cards but were ineligible. At hearing, she and her witnesses did not provide any evidence on the allegation. The evidence of Mr. Adams confirms that Verrier-Paquette and Barnes were nominated for carding in accordance with the Criteria.
48. Ms. Mew asserts that she qualified for nomination for a Tier 3 Development Card by 2 methods. First, she was not properly assessed on the Criteria for nomination for that Card. Second, other athletes were nominated improperly. If those athletes are removed then her ranking will rise so that she would then qualify for nomination.
49. The Tier 3 Card criteria specifies that athletes will be nominated based on their position on the Depth Chart. The Depth Chart was created by evaluating each athlete on a score of 1 to 10 on each of 9 factors, then multiplying each score by an assigned weighting factor. The total of each of the adjusted scores determines the athlete's position on the Depth Chart.
50. The evaluation factors are international potential, technique, tactics and skill, physical testing, stress management, progressive improvement, commitment, goals and objectives, and coachable.
51. Ms. Mew ranked 12 of 20 athletes on the Depth Chart. The top 6 athletes were nominated for Tier 3 Development Cards.
52. Ms. Mew contends that the Tier 1 and 2 Development Card Criteria require qualification in an Olympic Class but allow for an exemption for a non-Olympic Class. Tier 3 does not mention Olympic Class or any exemption. Therefore Tier 3 must apply to Olympic Class only. None of Moffat, Lewin-LaFrance, Wilson, Heinzmann, Andrew or Ryan Wood sailed Olympic Class. Each was ineligible but received Tier Cards.
53. This argument cannot succeed. First, neither the Tier 1 or 2 Development Card criteria provide for any express exemption. Second, not specifying a Class is to be construed as restricted to Olympic Class is counter-intuitive. The absence of any Class reference should be considered expansive and not restrictive.

54. Ms. Mew submits that the Depth Chart is subjective and her scores on 2 evaluation factors are suspect. Those are international potential and physical testing. She also disputes the method of observation.
55. In consultation with her coach, Ms. Mew provided Sail Canada self-evaluation scores for each factor. Sail Canada adjusted those scores for the Depth Chart calculations. I accept Sail Canada's rationale that accepting self evaluation values without allowing for independent review and adjustment is prone to abuse
56. Ms. Mew asserts that she has significant international competition experience while the Affected Parties named in paragraph 49 above have little or no similar experience in Olympic Classes. Sail Canada emphasizes that it is potential not experience that is key.
57. Ms. Mew submits that the physical demands of the RSX Class are significantly greater than those of the other Olympic and non-Olympic Class craft. She has asked to participate in fitness testing events with other athletes but never given the opportunity.
58. Ms. Mew submits that Sail Canada assessed her scores based on on-line tracking and technology. She contends that the other athletes were assessed in person by the High Performance Director.
59. Kathleen Tocke has competed internationally for the USA for many years in many classes, including RSX, achieving podium finishes in many of those events. She is also a coach and has competed against Ms. Mew. She spoke to the technical aspects and physical demands of RSX Class sailing at the international level. Those include the athlete's physicality, fitness, agility, tactical knowledge and attitude. As a coach, Ms. Tocke has never assessed an athlete online and asserts that race finish position is a measure of speed only.
60. Farrah Hall has coached Ms. Mew and competed against her. She is an international RSX athlete and coach who competed at the 2012 London Olympics and has medalled at other international games and regattas. Ms. Hall assesses Ms. Mew as an athlete to be focused, determined, intelligent and a quick learner, organized, a good problem solver, who enjoys the sport and has a good attitude. She believes Ms. Mew has the potential to be a top 16 finisher who needs team support and time to develop. Ms. Hall stated that online assessments cannot be used for tactics. She has never seen the Sail Canada High Performance Director assess Ms. Mew in person.
61. Ken Dool is Sail Canada's High Performance Director and only full time High Performance coach. He compiled the Depth Chart. In doing so he used the sources available. Those included personal observation, online information, and input from other athletes and coaches. Mr. Dool agrees that online

assessments are not perfect but they are a tool not to be disregarded. He stated that in assessing athletes for carding nomination, the task is not to identify the best Canadian but the best Canadian with international potential. He noted that while Ms. Mew had made significant gains physically, her history of competition results is not indicative of a world class athlete.

62. On balance, there isn't sufficient evidence to find any significant error in the Depth Chart assessment of Ms. Mew, or the manner in which information was gathered for the assessment. Sail Canada has demonstrated that the Tier 3 Development Card decisions were made in accordance with the Criteria.

Decision:

63. Ms. Mew's appeal is dismissed.

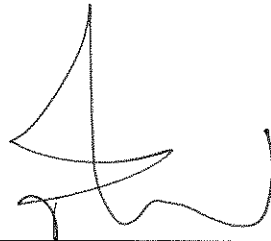
Costs:

64. The Parties appearing at the hearing seek costs. Those Parties can provide a written submission on costs within 7 days of the date these Reasons for Decision are posted in the SDRCC Case Management Portal.

Conclusion:

65. I declare that I do not have any conflict of interest with any Party, counsel, agent or any witness in this matter.

Signed at Calgary, Alberta, on November 13, 2017.



John H. Welbourn, Arbitrator