

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

**NO: SDRCC 19-0416**

**BRENDAN COREY  
(CLAIMANT)**

**AND**

**SPEED SKATING CANADA (SSC)  
(RESPONDENT)**

**AND**

**MATHIEU BERNIER  
SÉBASTIEN GAGNON  
KEIL HILLIS  
MAXIME LAOUN  
ALPHONSE OUIMETTE  
JORDAN PIERRE-GILLES  
(AFFECTED PARTIES)**

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**DECISION**

**Attendees at hearing:**

For the Claimant: Emir Crowne  
Amanda Fowler  
Liam Macfarlane

For the Respondent: Adam Klevinas  
Shawn Holman  
Jennifer Cottin

For the Affected Parties: N/A

## **Summary**

Speed Skating Canada (SSC) named skaters to its National and Development Teams in March 2019. As part of that process, skaters who had been injured could apply through a Bye to be named to the team despite lacking some results. One skater, the Claimant, was denied his Bye request to be named to the Development Team. The Claimant appealed the decision to reject his Bye, arguing that the Respondent had named other skaters to the team improperly. At issue is the Respondent's interpretation of its Bye Policy. In previous years, the Respondent would not name a skater to a team through a Bye if the skater had never been previously named to the team. This year, the Respondent named two skaters to the National Team who had not skated for the National Team before. The Respondent elected to do so based on those skaters' rankings, rather than past membership of a team. The Claimant disputes this, and requests that Team Selection be done in accordance with past practice.

For the reasons that follow, I accept his appeal in part.

## **Procedure**

1. The Claimant appealed the Respondent's decision to reject the Claimant's bye request on March 30, 2019. The internal appeal was filed on April 6, 2019 and heard on June 12, 2019. The appeal panel dismissed the Claimant's request and upheld the Respondent's decision with reasons on June 27, 2019.
2. Subsequently, the Claimant appealed the internal appeal panel's decision as a team selection dispute pursuant to section 6.7 of the

Canadian Sport Dispute Resolution Code (SDRCC Code). Facilitated discussions for settlement were unsuccessful.

## **Issues**

3. There are two issues in this dispute:
  - a. Did SSC apply their bye policy in an unreasonable manner by allowing skaters Maxime Laoun and Mathieu Bernier through byes when they had never been named to the National Team before?; and
  - b. Which section of SSC's team selection policy applies for naming and replacing athletes named to the National Team until appeals of byes have been resolved?

## **Relevant Provisions**

4. SSC has two high performance bulletins that are in dispute in this case: Bulletin #181 – Team Selection & Carding (“Selection Policy”) and Bulletin #182 – Bye Request Policy (“Bye Policy”).
5. The relevant provisions from the Selection Policy are as follows:

### **1.1 Introduction:**

The High Performance Committee – Short Track (HPCST) will confirm the athletes who qualify for the 2019/20 National Team and Development Team respectively within 1 week of the HPCST's Annual Review meeting scheduled for April 2019.

The HPCST will select athletes as detailed below. The intention for the 2019-20 season is to carry a total of 14 athletes on the National and

Development teams. Additions to this number will only be considered under exceptional situations evaluated by the HPCST.

PLEASE NOTE: Selection to the National Team or Development Team is provisional until any and all bye requests have been resolved.

### **1.2 National Team Selection**

The National Team will be composed of 8 athletes per gender, notwithstanding eventual withdrawals or replacements.

The 2019/20 National Team will be selected on the basis of the following [...]

### **1.3 Development Team Selection**

The Development team will be composed of 6 athletes per gender, notwithstanding eventual withdrawals or replacements.

The 2019/20 Development Team will be selected on the basis of the following prioritization until the team quota has been filled [...]

[...]

### **1.5 Replacement of Skaters**

Following confirmation to the 2019/20 National Team, if an athlete subsequently withdraws from the National Team prior to the Canadian Short Track Championships Competition of the 2019/20 season, and the withdrawal causes the National team number to be reduced below 8 members, the available spot **may** be replaced as follows, in order to keep a total of 14 athletes on the national and development team:

- The first athlete on the development team **may** be elevated to National Team Status

AND/OR

- The next ranked athlete from the 2018/19 final adjusted Canadian Ranking **may** be granted a spot in the Development Team [...]

[Emphasis in original]

6. The relevant provisions from the Bye Policy are as follows:

### **Principles of the Bye**

An athlete may apply for a Bye to obtain a place on a Team or entry to the field of a competition in accordance with the following guidelines. A Bye provides the opportunity to be selected to a Team for an athlete who, due to exceptional circumstances and through no fault of his/her own, is unable to qualify for the team through the normal selection competition(s) or selection process. The basic philosophy for granting a Bye is that the athlete being given the Bye has demonstrated superior performance in previous competitions.

#### **1. Purpose**

To provide guidelines for the High Performance Committee in the granting of Byes.

#### **2. Philosophy for allocation of byes**

Due to exceptional circumstances (e.g. illness, injury, equipment break, etc) and through no fault of their own, a skater sometimes does not have the opportunity to fully compete in the nominated selection event/s. In this situation the athlete may be eligible to apply for a Bye selection to the relevant team.

The basic philosophy for selecting an athlete by granting a Bye is that, all things being equal, the skater given the Bye has clearly demonstrated superior performances and/or qualities to other athletes being considered for selection.

Byes are not to be considered as a standard route for selection, and an athlete will not be accorded something through a bye that s/he has not previously shown the ability to earn through the normal means. In the evaluation of an athlete should not elevate them to a level that is deemed beyond their previous performances.

#### **3. Rules for requesting a bye**

a) For selection to a team: Only athletes who have placed in the top 10 of one of the following competitions in the current or previous season will be eligible to request a bye:

[...]

#### **4. Types of bye requests and deadlines**

[...]

##### **ii. Bye Request to a specific Team or a Competition for the season following the selection event/s**

[...]

The Bye must be requested **within 48 hours** following the final selection event. The Bye application **must state clearly** what the skater is requesting, and provide appropriate documentation (medical, etc).

[Emphasis in original]

### **The Hearing**

7. The hearing proceeded by way of conference call on September 14<sup>th</sup>, 2019. The parties agreed to rely on evidence in the documentary record and not to call witnesses for oral evidence. Submissions, therefore, were made based on the documentary record provided by the parties.

### **The Parties**

8. The Claimant, Brendan Corey, is an accomplished speed skater with aspirations of racing at the 2022 Olympics in Beijing.
9. The Respondent, Speed Skating Canada, is Canada's National Sport Organization for speed skating with a mission to achieve excellence on the international stage by investing in a world class and sustainable high-performance system while building excitement and awareness about the sport and fostering connections and partnerships. SSC oversees competition for short and long track speed skating.
10. The Affected Parties, Mathieu Bernier, Sébastien Gagnon, Keil Hillis, Maxime Laoun, Alphonse Ouimette, and Jordan Pierre-Gilles are speed skating athletes who have been named to the National Team, the

Development Team, or, in Mr. Hillis' case, are on the cusp of being ranked highly enough for the Development team. The Affected Parties were aware of these proceedings but chose not to participate in this hearing.

## **Positions of the Parties**

### ***The Claimant***

11. Mr. Corey submits that SSC interpreted and applied its Bye Policy in an unreasonable manner and that it has erred in applying its Selection Policy for replacing athletes on either team while Bye appeals are still pending.
12. The Claimant submits that the standard of review in this situation is reasonableness.
13. The Claimant submits that skaters Maxime Laoun and Mathieu Bernier were improperly appointed to the National Team through bye requests as they had never been members of the National Team before. The Claimant submits that this was contrary to SSC's Bulletin 182, which states that "an athlete will not be accorded something through a bye that s/he has not previously shown the ability to earn through the normal means. In the evaluation of an athlete should not elevate them to a level that is deemed beyond their previous performances." Mr. Corey submits that the proper interpretation of this section, when viewed through the SSC's meeting minutes and previous practice, means that if an athlete has not been named to the National Team before, they cannot request to be named to the National Team regardless of their current ranking. In support of this, Mr. Corey points to the Respondent's submissions at the internal appeal, that the policy

does not clearly state that rank is sufficient, and that in *Lee v Speed Skating Canada*, SDRCC 18-0361 (August 31, 2018), one of the Respondent's employees testified that bye requests were not intended to permit athletes to be named to teams they had not been named to previously.

14. The Claimant submits further that Mr. Laoun and Mr. Bernier should be removed from the National Team. Additionally, because Mr. Laoun and Mr. Bernier did not request to be named to the Development team in their Bye requests, they have no claim to be named to that team because of the Bye policy's requirement that athlete's "state clearly what they are requesting."
15. Once Mr. Laoun and Mr. Bernier are removed, the Claimant submits that SSC would be forced to follow the Selection Policy sections 1.1, 1.2 and 1.3, and name Mr. Corey to the team. Mr. Corey submits that Section 1.5 is not available until the team selections are finalized. Section 1.1 reads that "Selection to the National Team or Development Team is provisional until any and all bye requests have been resolved." Therefore, Mr. Corey submits that the bye requests have not yet been resolved as they are still under appeal, meaning that sections 1.2 and 1.3 apply instead.
16. Mr. Corey submits that he should be named to the Development Team based on removing Mr. Laoun and Mr. Bernier from consideration because of their faulty bye request, taking into account retirements, and naming athletes to the team based on a re-ranking taking into account the above.

17. The Claimant cites numerous SDRCC decisions to support the submission that an arbitrator can name athletes directly to a team where circumstances show evidence of bias, breaches of natural justice, illegality, unreasonableness and/or urgency with respect to the selection decision in question, and that I should do so in this case. Or, barring that, in a situation where redetermination is the remedy, the Claimant submits that such an award should be provisional and the arbitrator should retain jurisdiction for the implementation of the award. The Claimant submits that past SDRCC decisions against the Respondent demonstrate that were the matter sent back for redetermination, the Claimant would not get "a fair shake." As a result, the appropriate remedy should be for the Arbitrator to appoint the Claimant directly to the team. Mr. Corey's counsel submits that the following decisions are relevant: *Beaulieu v Speed Skating Canada*, SDRCC 13-0199 (*Beaulieu*), *Carruthers v Speed Skating Canada*, SDRCC 16-0309 (*Carruthers*), *Christ v Speed Skating Canada*, SDRCC 16-0298 (*Christ*), *Maltais v Speed Skating Canada*, Appeal Panel Decision Dated Feb 22, 2015 (*Maltais*), *Dutton v Speed Skating Canada* SDRCC 18-0344 (*Dutton*), *Goplen v Speed Skating Canada* SDRCC 16-0310, and *McGuire v Speed Skating Canada*, SDRCC 16-0287.

### ***The Respondent***

18. Speed Skating Canada responds that the Selection Policy was properly applied and that the Bye policy was correctly interpreted in the National and Development Team selections.
19. The Respondent submits that I should defer to their technical expertise in interpreting the Bye Policy, as found in *Bastille v Speed Skating*

*Canada* (SDRCC 13-0209). In that case, Arbitrator Mew held that SSC's experts were best placed to assess athletes pursuant to their Selection Criteria, and that as long as SSC had correctly followed its own rules, arbitrators should rarely, if ever interfere.

20. In that vein, SSC submits that the decisions made for team selection were made in good faith and for a proper purpose, as required by SDRCC caselaw. For example, the Respondent referred to Arbitrator Roberts' decision in *Pyke v Taekwondo Canada* (SDRCC 16-0296).
21. SSC submits that the standard of proof is reasonableness, based on the following cases: *Larue v Bowls Canada* (SDRCC 15-0255), *Palmer v Athletics Canada* (SDRCC 08-0080), and *Christ v Speed Skating Canada* (SDRCC 16-0298).
22. Regarding the Claimant, SSC submits that he was not ranked as highly as other athletes who submitted byes, and therefore was correctly left off the National and Development Teams.
23. The Respondent submits that it properly established its Selection Criteria and detailed SSC's efforts in creating the criteria beginning in June 2018, and finalizing the relevant bulletins in September 2018. SSC submits that no challenge was made against the establishment of these bulletins.
24. Turning to the Bye Policy (Bulletin 182), SSC submits that while it would not normally have named athletes to a team through a bye request if they had not been named to that team previously, there were new circumstances related to team composition for the 2019

program that were different from previous years. In past years, 6 athletes would be named to the National Team and 8 athletes would be named to the Development team. For 2019/20, the National Team would now have 8 athletes and the Development Team would have 6 athletes. Given the changed circumstances, the Respondent submits that it could interpret the Bye policy to name athletes to a team based on their ranking, rather than whether they had been named to a team before. The Respondent submits that discussion about this interpretation were discussed and recorded in the minutes.

25. Regarding Mr. Laoun and Mr. Bernier, the Respondent submits that, had the National and Development teams been the same sizes in previous years as they are this year, Mr. Laoun and Mr. Bernier's ranking would have been sufficient for them to be named to the National Team. To the Respondent, naming both athletes to the team through the Bye request, therefore, complies with the Bye Policy as they have earned their rankings and are not being ranked more highly through the Bye Policy than otherwise would be the case.
26. The Respondent made numerous submissions detailing the process for assessing Bye requests, such as that they are done on a personalized basis, and that athletes submitting byes are graded on the following criteria: Future podium potential; International performances and experiences; National Performances; Recent training and testing performances; Readiness for competition; and Commitment to the training program. The Respondent submits that the Claimant was ranked behind Mr. Laoun and Mr. Bernier based on points under these criteria. Based on the same criteria, the Claimant was ranked ahead of Keil Hillis, however, after a meeting on March 27, 2019, the

Respondent submits that it properly re-ranked Mr. Hillis ahead of the Claimant despite the points-based ranking, as Mr. Hillis had outperformed the Claimant.

27. Further, the Respondent submits that the Claimant cannot be selected to the team because even if successful, it would not be sufficient to elevate the Claimant to the team, as there are still other athletes ranked between the Claimant and the Development team. The Respondent restated how ranking had been done, and submitted that the Claimant's requested relief could not succeed based on multiple scenarios involving ranking or re-ranking the athletes in question.
28. The Respondent submits that the Claimant failed to satisfy the onus of proof pursuant to Section 6.7 of the SDRCC Code, as the Respondent has shown that the policy was properly enacted. The Respondent submits that as the Claimant has not made any arguments nor shown any evidence to show that the policy was enacted improperly, that the Bulletins were properly enacted and applied.
29. The Respondent also contests the Claimant's argument that past SDRCC caselaw decisions decided against SSC can be used to show that the Respondent is also wrong in this case. The Respondent submits that past decisions against SSC in other matters are not relevant to this one and that I should focus my analysis on the evidence and circumstances present in this matter only.
30. Finally, regarding the team's status as provisional or confirmed, the Respondent submits that the team's status was confirmed on April 1<sup>st</sup> when it was announced. Therefore, if new skaters need to be added to

the team, it will be through the Selection Policy Section 1.5. The Respondent submitted that the phrase “until all Bye requests are resolved” does not include appeals, but only the initial decision to accept or reject the Bye request.

## **Analysis**

31. I have reviewed the Parties’ submissions and evidence and taken them into account, even if not specifically referred to below. The matters to determine are as follows: the standard of review, the application of the Bye Policy, and the application of the Selection Policy. I will also comment on the evidence related to how athletes were ranked and arguments about other SDRCC decisions against the Respondent.

### *Standard of Review*

32. The standard of review in this case is reasonableness. Counsel for the parties agreed, and helpfully cited several SDRCC cases that applied directly to team selection disputes. As this is a selection dispute, Section 6.7 of the SDRCC Code applies. In these situations, the Respondent has the onus of showing that policy was appropriately applied, then the onus shifts to the Claimant to demonstrate that she should have been selected in accordance with the approved criteria.

33. The Claimant did not argue that the policy was adopted inappropriately. Therefore, to succeed, the Claimant must show that the Respondent arrived at a decision that was unreasonable based on the policy in place.

### *Application of the Bye Policy*

34. Counsel disputed whether the Bye policy could be applied in the manner done by SSC. In this case, the Claimant submitted that accepting the bye applications of two skaters, Mr. Laoun and Mr. Bernier, to be named to the National Team- when they had never been named to that team before- was against the Bye Policy established by the Respondent. I find that the Bye policy was properly applied in this case for the reasons that follow.
35. The Selection policy, as shown in great detail by the Respondent, was put together over several months and contained a key difference from previous years: there would be additional athletes named to the National Team and fewer athletes named to the Development Team. The Bye policy, however, did not change its wording.
36. The dispute is about possible interpretations of the Bye Policy. The Claimant argued that if an athlete has not been named to a team before, it cannot be placed on that team through the Bye Policy, while the Respondent countered that the Bye Policy allowed athletes to be named to a team if their ranking was high enough that, barring injury, they would have been named to the team on merit.
37. The Bye Policy's past application had been that athletes seeking a bye would not be able to seek appointment to a team that they had not previously been named to. But, the change in Selection Policy resulted in changes to the Bye Policy's application that was supported by the Bye Policy's wording. The key sections from the Bye Policy are as follows (my emphasis in bold):

The basic philosophy for granting a Bye is that the athlete being given the Bye has demonstrated **superior performance** in previous competitions. (Bulletin 182, Page 3)

Byes are not considered as a standard route for selection, and an athlete will not be accorded something through a bye that s/he has not previously **shown the ability** to earn through the normal means. The evaluation of an athlete should not elevate them to a level that is **deemed beyond their previous performances**. (Bulletin 182, Page 4)

The Bulletin's words emphasize ability or performance, rather than membership in a team. I interpret this to mean that an athlete cannot request a Bye that would rank them higher than any rank that they had shown the ability to reach in previous performances. This does not necessarily prevent an athlete from being named to a team they had not previously been named to, as the Bulletin does not say that a Bye cannot be requested for appointment to a team if an athlete has never been on that team before. The wording, while potentially unclear given the phrase "will not be accorded something", does not refer to previous team membership being a necessary qualification for requesting a bye.

38. Applied in this case, the Respondent named Mr. Laoun and Mr. Bernier to the National team based on their ranking. In fact, Mr. Laoun and Mr. Bernier did not request a Bye to the National Team in a way that required them to be ranked more highly than they were. Had Mr. Laoun and Mr. Bernier been suddenly ranked higher through the Bye policy than any ranking they had ever attained before, I would agree with the Claimant that the Bye Policy had been incorrectly applied. This was not, however, the situation before me.

39. The Claimant raised numerous arguments that the past practice with respect to the Bye Policy is what should govern, but I decline to accept this argument. It is true that in previous years, the Bye Policy was interpreted differently, but as shown by the Respondent, these Policies were implemented in 2018 after much deliberation and with important changes to the Selection Policy, which opened up additional spots on the National Team. The Respondent argued that Mr. Laoun and Mr. Bernier would have been on the team in past years if team sizes were the same then, as they are now. Accordingly, the Respondent's application of the Bye Policy was reasonable because it simply named people to two new spots on the team through the Bye Policy based on their rankings.
40. I can understand the Claimant's disappointment in how SSC interpreted Bulletin 182. The bulletin is open to two interpretations; the one advanced by the Claimant, and the one put forward by SSC. Either interpretation is reasonable. However, it is within SSC's prerogative to give the interpretation it wanted to achieve the ends that they did. These were new circumstances as the number of athletes to be named to the team had increased, and it was not unreasonable to interpret the Bulletin to base selection on ranking, rather than previous participation on the team. This was a new situation that had never been addressed before. I would recommend that SSC amend Bulletin 182 so that this is crystal clear, and no misunderstandings occur on this point in the future.
41. As a final note, as Mr. Bernier and Mr. Laoun were properly appointed to the National Team, I decline to make a ruling on whether they

would have been excluded from the Development Team because they did not ask for that in the alternative in their Bye request.

*Selection Policy and Replacing Athletes on the Team*

42. The Parties disputed how replacements to the National and Development Team should proceed, either based on the Selection Policy's sections for initial team selection (1.2 and 1.3), or the later section 1.5, for replacing athletes on the National and Development Teams after the teams have been finalized. The difference is an important one, as the rules for team selection are different under the Replacement of Skaters section than they are under the National Team Selection and Development Team Selection sections. I accept the Claimant's submission that the teams have not been finalized until this appeal is completed. Therefore, team selection is still governed by Selection Policy Sections 1.2 and 1.3.
43. The Selection Policy Introduction includes the following, critical phrases, which determines how team selection proceeds while Bye requests have yet to be resolved (my emphasis):

PLEASE NOTE: Selection to the National Team or Development Team is **provisional** until any and **all bye requests have been resolved**. (Bulletin 181, Section 1.1 at page 3).

**Following confirmation** to the 2019/20 National Team, if an athlete subsequently retires from the National Team prior to the Canadian Short Track Championship [...] (Bulletin 181 Section 1.5 at page 5)

The Respondent submitted that the team was confirmed and was no longer provisional as of April 1, 2019, when selections were announced, but I cannot accept this argument. To accept the Respondent's argument would render appeals meaningless. The

wording above is clear. Section 1.1 says that team selections are provisional until all the Bye requests have been resolved. There is no qualification or restriction on the word "resolved", meaning that I cannot interpret it as "resolved, not including appeals" or some other interpretation. As this Bye request is still under appeal, it has not been resolved, therefore selections are still provisional. Section 1.5 for Replacement of players emphasizes that it only becomes available "[f]ollowing confirmation." No confirmation has occurred as the Byes have been under appeal. Therefore, Section 1.5 for Replacement of Skaters is not available yet, and the Team must be selected based on Sections 1.2 and 1.3, taking into account subsequent withdrawals or retirements from competition.

#### *Hillis' Ranking*

44. I was not asked to re-rank the athletes, but some attention was paid to the fact that the Claimant was ranked, based on points, ahead of Mr. Keil Hillis, but then re-ranked below Mr. Hillis, a skater who had been injured for the period in question, based on potential and head-to-head competition against the Claimant. In some scenarios, this potential re-ranking could have had significant consequences for the Claimant, as he would have been edged out of selection to the Development Team by Mr. Hillis' ranking. While I do not want to interfere with the expert assessments of professional speed skating coaches, it was notable that the reasoning behind this re-ranking was unclear. It is also of note that this was the only re-ranking of athletes that was not based on their point score.
  
45. The Minutes of the March 27, 2019 meeting are difficult to understand. On page 2 at bullet iv, notes about the Claimant read "reranked after

Keil Hillis (no clear superiority in the past)". Notes about Mr. Hillis just beneath that read "Since he did not compete all year and was 10<sup>th</sup> last year, it is hard to hold his injury against him. Since the composition of the team changed this season, it's the worst season for him to be injured. He did not get the opportunity to improve this season as opposed to other skaters." Below these notes, under the Bye request section, the following comment was made about Mr. Hillis: "Keil was out for the whole season. He was ranked 10<sup>th</sup> last year, which would technically get him onto the team with this year's criteria." In that same section, it was noted for Mr. Corey that "no clear superiority with Jordan Pierre-Gilles (who is last on the team), but he has been clearly superior to Alphonse Ouimette. We need to evaluate the head-to-head with the last skater on the list and the one that would be bumped out, this is how we have been evaluating bye requests in the past." Contemplating Hillis and Corey, the notes read "Keil and Brendan's situations are not enough for "exceptional situation", they are too much on the edge on that 10<sup>th</sup> spot for the DT [Development Team] to make an exception and add them to the team. Keil has no results, Brendan does. They were very close in head to head last season."

46. Taken together, these minutes paint a contradictory picture. On the one hand, Mr. Corey has better head-to-head results against one person on the Development Team (Alphonse Ouimette), and "no clear superiority" with another, (Jordan Pierre-Gilles). Because Mr. Pierre-Gilles was the last skater and ranked 10<sup>th</sup>, the minutes indicate that it was only head-to-head results with Mr. Pierre-Gilles that could be considered, despite the Claimant having "clearly superior" head-to-head results against the 9<sup>th</sup> ranked skater, Mr. Ouimette. Despite this, Mr. Corey was re-ranked below Mr. Hillis, as it was determined to be

unfair to hold Mr. Hillis' injury against him such that he could retain his previous ranking of 10<sup>th</sup>.

47. While I decline to order a re-ranking, I note here that, in the circumstances where an athlete is being ranked in a team when they have little statistical evidence to base evaluation on, the Selection Committee should include additional detail to clarify the athlete's ranking. Reading the minutes, it is very hard to tell how the Respondent arrived at the ranking it did with respect to Mr. Corey and Mr. Hillis, when Mr. Corey compares favourably to some athletes that are ranked higher to Mr. Hillis, while Mr. Hillis' evaluation- at least based on the minutes- comes down to that he had once been ranked 10<sup>th</sup>, with little analysis of how his injury may have affected his ranking or how other skaters' performances were more recent than his. In such scenarios, it is in the Respondent's benefit to provide more detail so that such decisions are intelligible, lest the determination be challenged by an athlete.

#### *SSC's Past Conduct*

48. As a final note, the Claimant argued that I should appoint him directly to the team or that I make the award provisional so that I could supervise SSC's implementation of my Order. This latter request was based on the prior misconduct of the Respondent in previous matters before the SDRCC. I decline to do so. I can only determine the matter before me based on the evidence presented on this matter. As Arbitrator McCall held in *Lee v Speed Skating Canada*:

I would like to point out that while Claimant's Counsel encouraged me to consider a pattern of behaviour reflected in a number of decisions by other arbitrators who have found that SSC acted improperly or unethically, I have resisted doing so. Instead, recognizing that it is

possible for organizations to learn from mistakes and improve their policies and procedures, I have based my decision solely on the evidence put before me by the parties and going to the merits of the claim." (*Lee v Speed Skating Canada* SDRCC 18-0361 at para 80).

## Decision

49. For the reasons above, the appeal is allowed in part.
50. Submissions for costs were not made at the hearing, and costs will be dealt with by request of the parties in accordance with the SDRCC Code.
51. The Claimant's request that Mr. Laoun and Mr. Bernier be removed from the National Team is denied.
52. I order that Team Selection proceed under Sections 1.2 and 1.3 of Bulletin 181 in light of retirements and withdrawals, and that following selection, any replacements be governed by Section 1.5 of Bulletin 181.
53. I order that, when the Respondent names athletes to the National and Development Teams following this decision, the Respondent provide written reasons to Mr. Corey. The written reasons should explain the Claimant's ranking behind Mr. Hillis despite having more points than him in their evaluation system, as he was the only athlete whose ranking changed during deliberations.

Signed on September 24<sup>rd</sup>, 2019, in Ottawa, Ontario.



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David Bennett, Arbitrator