

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)**

No: SDRCC 20-0464

Hubert Marcotte
(Claimant)

And

Speed Skating Canada (SSC)
(Respondent)

PRESIDING:

The Honourable Yves Fortier, QC

APPEARING:

For the Claimant:

Mr. Mathieu Laplante-Goulet
Mr. Hubert Marcotte
Mr. Carmin Marcotte
Mr. Muncef Ouardi

For the Respondent:

Mr. Adam Klevinas
Mr. Shawn Holman
Ms. Cathy Tong

DECISION WITH REASONS

October 16, 2020

I. INTRODUCTION

1. This decision with reasons (the "Decision") is issued pursuant to Section 6.21(c) of the *Canadian Sport Dispute Resolution Code* (2015) (the "Code") and with the agreement of the Parties.
2. On April 17, 2020, Speed Skating Canada's High Performance Long Track Committee informed Mr. Hubert Marcotte (the "Athlete") that he had not been selected to be part of Speed Skating Canada's ("SSC") NextGen Team for the 2020/21 season.
3. The Athlete challenged this decision on April 23, 2020. On July 23, 2020, arbitrator Mr. Yann Bernard dismissed the appeal filed by the Athlete (the "Decision").
4. The Athlete, in his notice of appeal dated April 23, 2020, requests that the Decision be reversed, that he be found to have qualified in accordance with High Performance Bulletin 192 ("HP Bulletin 192") criteria 3.3.2.2 and that he be granted NextGen status on the National Long Track Speed Skating Team for the 2020/21 season, confirming his 20th place position.
5. The Athlete further submits that he should not have been assessed under the Podium Pathway, and that, in the alternative, [translation] "[he] also qualifies under 3.3.3".¹
6. The Respondent submits that the Athlete has not been selected to the NextGen 2020/21 team because he does not meet the criteria set out in Sections 3.3.2.2 and 3.3.3 of HP Bulletin 192.
7. On September 10, 2020, at the request of the Parties, I rendered a preliminary decision determining that Cooper Emin, Paul Coderre and Gibson Himbeault, the three skaters

¹ Athlete's Brief of October 6, 2020, p. 8.

ranked ahead of the Athlete, were Affected Parties. I note, however, that none of the Affected Parties chose to participate in the proceedings.

8. A telephone hearing was held on September 23, 2020 and the parties, having each made initial written submissions on September 15, 2020, simultaneously filed final written submissions on October 6, 2020.
9. The Parties agree on the application of Section 6.7 of the Code in disputes relating to team selection. The section provides as follows:

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. [My emphasis]

10. The Respondent's HP Bulletin 192 sets out the criteria for selection of athletes to the NextGen 2020/21 Team.

II. JURISDICTION

11. The Athlete, in his request for arbitration, confirms the jurisdiction of the SDRCC to hear the [translation] "appeal of a final decision rendered by Mr. Yann Bernard rendering a final decision made by the Appeal Committee of the [National Sport Organization] as prescribed by 3.1 b) ii) of the Code".
12. The Respondent confirms in its response of August 21, 2020 that it does not challenge the jurisdiction of the SDRCC.

13. The parties having raised no objections in this regard, I therefore confirm my jurisdiction as Arbitrator in this case.

III. ANALYSIS

1) Section 3.3.2.2 of HP Bulletin 192

14. Section 3.3.2.2 reads as follows:

3.3.2.2 Junior athletes that have placed in the top 8 and top 1/3 of the field at the 2020 Junior World Championships in the overall classification or individual distance events, or medal in Team Pursuit or Mass Start. These athletes will be prioritized based on the overall classification. If there is a tie between 2 or more athletes, the results in the individual distance classifications will be used to break the tie.

15. The Athlete alleges that the Respondent should have given him priority as per Section 3.3.2.2, due to his result at the 2020 World Junior Championships in Poland where he placed 5th out of a field of 15 skaters, placing him in the top 1/3 of the field.²

16. The Respondent rather considers that the Athlete is not part of the first 1/3 of the field, despite his 5th place, the field being of 12 athletes.

17. The relevant facts are as follows. Although 16 skaters were entered in all four distances of the all-round competition in Poland, only 12 skaters, including the Athlete, completed all distances of the competition. Indeed, as the Athlete indicates, 4 of these skaters did not receive final ranking points: one athlete [translation] "did not show up to start the race; despite belonging to the field, he did not start the 5000m", another athlete "was disqualified for a technical fault in the 5000m" and two "other athletes did not finish the race as they fell during the 500m".³

² Athlete's Brief, September 15, 2020, paragraph 9, Exhibit P-1. Athlete's Brief, paragraph 36.

³ Athlete's Brief, September 15, 2020, paragraph 11.

18. The Respondent submits that the Athlete's fifth place finish can only be compared to the performances of the 12 athletes who successfully completed all four distances [translation] "because it is the only representative and accurate comparison of where the Athlete stands in comparison to the rest of the world".⁴
19. The Athlete, on the other hand, submits that [translation] "it is unreasonable and incorrect to think that the term 'field' in English means only those skaters who have completed the race". According to the Athlete, the term [translation] "'field', which in this case translates the French word *peloton*, means a group and [...] that group is the group at the start and not the group at the finish".⁵
20. Especially in light of the testimonies of Cathy Tong and Rick Hunt, and even if I fully agree with Mr. Yann Bernard that the terminology in Section 3.3.2.2 of HP Bulletin 192 is imprecise and confusing, I agree with the position of the Respondent.
21. I note in this regard that the Respondent, both at the hearing and in its submissions, acknowledged that HP Bulletin 192 is worthy of clarification. I therefore invite the Respondent, as Mr. Bernard did, to clarify this rule in HP Bulletin 192 without further delay.
22. It is obvious to me that if an athlete does not obtain a valid result for a race and does not obtain any points for the final classification of the all-distance competition, he or she cannot logically be considered part of the field in that event.

⁴ Respondent's Arguments, October 6, 2020, paragraph 27.

⁵ Athlete's Brief, October 6, 2020, p. 8.

23. Accordingly, I can only defer to the jurisdiction and decision of the Respondent with respect to the number of athletes in the field as the number of athletes who completed the race, in order for their results to be valid and accounted for. Thus, the field being comprised of 12 athletes as alleged by the Respondent, the Athlete's 5th position did not place him in the first 1/3 of the field.

24. Having considered all of the evidence submitted and heard at the hearing, I therefore conclude that the Respondent correctly applied the selection criteria in Section 3.3.2.2 of HP Bulletin 192.

2) Section 3.3.3 of HP Bulletin 192

25. Section 3.3.3 reads as follows:

3.3.3 Athletes will be reviewed and evaluated on their year on year performance progression using the tools provided by Canadian Tire (i.e., Podium Pathway, Real Time and Normalized Time graphs) by the High Performance Management Team (consisting of but not limited to the Chief Sport Officer, High Performance Manager, Technical Coach Advisor and IST Lead).

26. In his October 6, 2020 submissions, the Athlete, after stating that he should not have been assessed according to the Podium Pathway, submits in the alternative that [translation] "[he] also qualifies under 3.3.3".⁶

27. As Shawn Holman made clear in his testimony, the concept of the Podium Pathway was adopted across the Canadian sport system in 2014 and the Respondent was required to incorporate the use of the pathway in its HP Bulletin 192.

⁶ Athlete's Brief of October 6, 2020, p. 8.

28. The evidence shows that the Athlete and his coach, Muncef Ouardi, were notified by the Respondent in August 2019, two months before the HP Bulletin 192 was published, that the Podium Pathway would be used for the selection of the NextGen team.
29. Cathy Tong testified that the Athlete could have, at that time as well as after the Bulletin was published in October 2019, requested clarification or even appealed the content of the Bulletin. Indeed, according to the Respondent, no athlete has raised any objection to the Bulletin.⁷
30. The Respondent, in particular through the testimony of Cathy Tong, confirms that although the Athlete only qualified for Priority 4, because he had met the time criterion in the 1000m, his ranking was reviewed on all priorities (1, 2, 3 and 4) corresponding to the selection criteria for NextGen status.
31. The Respondent, following the testimony of Shawn Holman and Cathy Tong, submits that even if the Athlete had met the criteria in Section 3.3.2.2, his performance would not have qualified him under Section 3.3.3 for the NextGen 2020/21 Team⁸. The Athlete's path to the podium did not indicate that his performance in any of the four distances would lead to a podium finish in 2022 or 2026.⁹
32. At the hearing on September 23, 2020, the way in which the Podium Pathway works was discussed at length. Through its brief submitted on October 6, the Respondent, at my express request, explained the functioning of the mathematical tool and the source of the data for the Podium Pathway.

⁷ Respondent's Brief of October 6, 2020, paragraphs 114-115.

⁸ Respondent's Brief of October 6, paragraphs 76-79.

⁹ *Id.* at paragraph 88.

33. It is very clear to me that this pathway evaluates each skater's progress and calculates the probability that an athlete will win an Olympic medal or individual world championships within a set number of years.
34. I am satisfied with the Respondent's explanation that the Podium Pathway model and probability calculations are objective.
35. This is a mathematical model (i.e. an algorithm) based on performance data provided by the Respondent's high performance management team.
36. This is not a delegation of power as claimed by the Athlete.
37. The Respondent's assessment of the Athlete's performance is within the competency of SSC, to which I cannot substitute myself.
38. Having considered all of the evidence, I consider that the Respondent has met its burden of proof, and I therefore deny the Athlete's request.
39. I understand that the Athlete is disappointed by this decision. I note, however, that following a recent mediation, the Respondent and the Athlete have reached an agreement that will allow the Athlete to continue his efforts to [translation] "improve his future performance and get back onto the Podium Pathway", as stated by the Respondent.¹⁰

3) Is HP Bulletin 192 a contract of adhesion?

40. The Athlete submits that HP Bulletin 192 is a contract of adhesion under Quebec civil law.

¹⁰ Respondent's Brief of October 6, 2020, para 132.

41. The Respondent outlined in its submissions, as well as at the hearing through the testimony of Cathy Tong, the process of drafting HP Bulletin 192. As noted above, the terms of the Bulletin were not imposed or dictated to the athletes by the Respondent.¹¹

42. I am satisfied that the Athlete and his coach were given multiple opportunities to comment on the Bulletin, both before and after its adoption.

43. Accordingly, I conclude that HP Bulletin 192 is not a contract of adhesion under Quebec law.

4) Costs

44. Finally, the Athlete requests that he be awarded costs. The Respondent recalls the jurisprudence of the SDRCC to the effect that costs can only be awarded in exceptional circumstances, and on the basis of unprofessional or reprehensible behaviour by one of the parties.

45. I can only find that these exceptional circumstances do not exist in the present case and that in this matter, therefore, I cannot award costs to the Athlete.

III. DECISION

46. For these reasons:

- The Athlete's request is denied;

¹¹ See *supra*, paragraphs 27-28.

- The Athlete's request for costs is denied and I confirm that costs are to be borne by the parties.

Montreal, October 16, 2020,

The Honourable L. Yves Fortier, QC
Arbitrator