



Introduction

- Claimants:** Annamay Pierse, Gord Veldman & Doug Wake
- Respondent:** Swimming/Natation Canada (SNC)
- Intervenors:** Kurtis MacGillivray, Chad Murray & Karley Stutzel
- Type of Dispute:** Selection to Commonwealth Games
- Arbitrator:** Michel G. Picher
- Dates of Decision:** June 23rd & 26th, 2002



Dispute Summary

Three swimmers (Annamay Pierse, Gord Veldman and Doug Wake) appealed a decision that overturned their selection to the Canadian Team competing at the 2002 Commonwealth Games in Manchester, England.





Background Facts



Six categories were used to select swimmers for the 2002 Games. The criteria ranged from Category “A” (mandatory selection based on performance at the Commonwealth Games Trials) to Category “F” (at the discretion of the SNC Selection Committee and the National Team Coach).

After Category A swimmers were chosen, the Selection Committee retained the discretion not to automatically fill the balance of the team by following the Category B to C to D to E sequence. As Head Coach, Dave Johnson, put it: *“A strong third could be selected over a weak second place finisher.”*



Background Facts (cont'd)

On March 24th, 2002, this process led to the selection of the appellants (Annamay Pierse, Gord Veldman and Doug Wake) over the intervenors (Kurtis MacGillivray, Chad Murray and Karley Stutzel).

The intervenors protested to Swimming Canada's Appeal Panel which ruled on May 13th, 2002 that the Selection Committee did not have any discretion to select swimmers from Category E over those from Category D .

Two days later, the Selection Committee reconfirmed the original selections, arguing that Category F provided the necessary discretion.

On May 21st, the President and the CEO of Swimming/Natation Canada joined in a conference call with the Selection Committee to voice their concerns over the process. As a result, the Selection Committee reversed its decision of May 15th and implemented the internal appeal panel ruling, effectively de-selecting the appellants in favor of the intervenors.



Claimants' Position

The appellants' case was based on the following arguments:

- The formal criteria provided the Selection Committee with enough discretion to support the original decision;
- The internal appeal panel erred when it overturned the Selection Committee's choices; and,
- The athletes originally chosen by the Selection Committee should have been allowed to compete in Manchester.





Respondent's Position



SNC's case was based on the following arguments:

- The Selection Committee did not have the discretion to choose Category E swimmers over those who qualified as Category D; and,
- Consequently, the original Selection Committee decision should be overturned in favor of sending the intervenors to Manchester.



Arbitrator's Analysis

Arbitrator, Michel G. Picher, concluded that all concerned had acted in good faith.

This included members of the Selection Committee who believed they had the discretion to select as they did, with a view to establishing the strongest possible team. According to M. Picher, the selection criteria were reasonably clear and unequivocal.

However, the arbitrator found that the internal appeal panel had erred:

1. By automatically accepting the sequential selection of athletes downwards through the various categories (i.e. without discretion); and,
2. By not fully considering the purpose or intent of the Selection Agreement as a whole. In other words, he disagreed with the panel's conclusion that "... *the Committee was given the jurisdiction to set the criteria as they wished, regardless of policy.*"



Arbitrator's Analysis (cont'd)

The arbitrator concluded: *“In my view, when the paragraph under Category F is read together with the whole document ... the overwhelming thrust ... is to reserve some degree of discretion to the Selection Committee as it proceeds sequentially through the categories in determining the makeup of the National Team.”*





Ruling



The decision by the SNC appeal panel was found to be “*fundamentally flawed and patently unreasonable.*”

The arbitrator directed the reinstatement of the original team selection (i.e. Pierse, Veldman and Wake) made on March 24th, 2002 by the Selection Committee.

[Click here](#) for the full text of this **ADRsportRED** judgment.



Follow-up Application

Shortly after the arbitrator's ruling, SNC asked for clarification.

It noted that M. Picher's ruling, combined with another ADRsportRED decision (Rolland v. SNC) could be interpreted as directing SNC to select a total of 41 athletes, when the quota for the Commonwealth Games Team was only forty.

M. Picher directed the Selection Committee to proceed immediately to complete its selection for the final three places on the Team, consistent with the two ADRsportRED rulings and respecting the Committee's use of discretion.

[Click here](#) for the full text of this **ADRsportRED** judgment.



Lessons Learned

1. An arbitration panel must exercise its jurisdiction with extreme care and deference to the decision making body;
2. An arbitration panel has jurisdiction where the decision of an internal committee appears to be so fundamentally flawed as to be untenable; and,
3. Where two interpretations of a document are advanced, the decision maker must have regard to the purpose or intent of the document as a whole.

