

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

Between:

JACOB LEGAULT

(CLAIMANT)

AND

CANADA SNOWBOARD

(RESPONDENT)

AND

LUCAS BRIGGS

(AFFECTED PARTY)

Attendees at hearing:

For the Claimant:

Jacob Legault

Justine Legault

Dr. Emir Crowne (Counsel)

Amanda Fowler (Counsel)

Dylan Romero-Marshall (Law Student for Claimant's Counsel)

For the Respondent:

Tyler Ashbee

Lucinda Jagger

Adam Klevinas (Counsel)

REASONS FOR AWARD

I. Introduction

1. The Claimant, Jacob Legault, appeals the decision of Canada Snowboard not to select him as a member of either the 2023-2024 Men's Slopestyle National Team or NextGen Team. He alleges, among other things, that Canada Snowboard failed to follow the criteria it established for team selection in making its decision.

2. On August 1, 2023, I issued an award allowing the appeal and instating the Claimant as a member of the 2023-34 NextGen Program with reasons to follow. These are those reasons.

II. The Code, Applicable Law, Standard of Review and Parties' Positions

3. The Parties agree that this appeal is governed by the Canadian Sport Dispute Resolution Code (January 2021, as amended June 2022) (the "Code"). The Code provides that the law of the Province of Ontario is the law applicable to the appeal (section 5.1).

4. In relation to team selection disputes like this one, the Code sets out the following test at section 6.10:

If an athlete is a Claimant in a team selection or carding dispute, the onus will be on the Respondent to demonstrate that the criteria were appropriately established and that the disputed decision was made in accordance with such criteria. Once that has been established, the onus shall be on 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.

5. The Parties agree that a team selection decision should be reviewed on appeal only to determine whether it was reasonable, consistent with *Canada (Minister of Citizenship and Immigration) v Vavilov* 2019 SCC 65. It is not to be reviewed for correctness.

6. I adopt the following statement of Arbitrator Roberts in *Fergusson v Equestrian Canada*, SDRCC No. 20-0455 as to what constitutes "reasonableness" in the context of a team selection decision:

While deference is owed to the experience and expertise of sporting authorities, a National Sport Organization must nevertheless follow its own rules making

carding and team selection decisions. Where a sport organization has made a decision that is not accordance with its own rules, that decision cannot be found to be reasonable or to “fall within a range of possible outcomes” and the Tribunal has the power to correct such errors [citations omitted].

7. In this case, the Claimant does not dispute that the team selection criteria used by Canada Snowboard were properly established. Instead, the Claimant argues that Canada Snowboard failed to follow its own team selection procedures in making its decision. The Claimant further alleges that Canada Snowboard’s decision was influenced by bias. He argues that, as a result, Canada Snowboard made an unreasonable and unfair decision when it denied the Claimant’s selection to the NextGen Team and to the National Team.

8. Canada Snowboard denies the Claimant’s allegations arguing that it properly applied the selection criteria and that the team selection decision was both fair and reasonable and not influenced by bias.

III. Procedural Background

9. On April 28, 2023, the Claimant was informed by his coaches that he was not selected to the Slopestyle National Team or NextGen Team for the 2023-24 season.

10. Canada Snowboard has an appeal policy dated effective December 31, 2022 (“**Appeal Policy**”) that applies to team selection and eligibility decisions.

11. On June 21, 2023, pursuant to the Appeal Policy, the Claimant filed an Internal Notice of Appeal.

12. Pursuant to section 21 of the Appeal Policy, an Appeal Manager was appointed to determine whether: (a) the appeal fell under the scope of the Appeal Policy; (b) if the appeal was submitted in a timely manner; and (c) whether there were sufficient grounds for appeal.

13. On June 26, 2023, the Appeal Manager issued a decision accepting the appeal as he found that it fell within the scope of this Policy, there were sufficient grounds for appeal and the appeal was submitted in a timely manner. Pursuant to section 18 of the Policy, the Parties agreed to have the appeal heard by the SDRCC.

14. On July 4, 2023, the Claimant filed a Request for an Ordinary Tribunal with the SDRCC pursuant to section 6.1 of the Code. On July 10, 2023, Canada Snowboard filed an Answer pursuant to section 6.4 of the Code. As part of its Answer, Canada Snowboard identified Lucas Briggs and Ryan Vo as Affected Parties, as defined under section 1.1(a) of the Code, stating that they would lose funding or partial funding if the appeal was allowed. By email dated July 11, 2023, Canada Snowboard confirmed that only Lucas Briggs was an Affected Party.

15. On July 18, 2023, I was appointed by the SDRCC to act as the sole arbitrator of the appeal. On July 19, 2023, a preliminary conference was held by telephone conference with the Parties and their counsel. Lucas Briggs did not attend. The SDRCC confirmed that Lucas Briggs, as an identified Affected Party, was provided notice of the meeting. Counsel for the Parties then confirmed my appointment as arbitrator and that they were unaware of any basis to challenge my independence and impartiality. The Parties agreed to have a hearing by video conference on July 31, 2023 and agreed to a schedule for the exchange of documents and written submissions including written witness statements in advance of the hearing.

16. At the hearing on July 31, 2023, the Affected Party, Lucas Briggs, did not attend and the SDRCC confirmed he had been provided notice of the hearing. The sole witness to give evidence at the hearing was Tyler Ashbee who gave evidence on behalf of Canada Snowboard. He is Canada Snowboard's High Performance Park & Pipe Senior Manager. He gave evidence under affirmation and was questioned by counsel for both Parties. At the close of the evidence, counsel for both Parties made closing oral arguments. I reserved my decision, but confirmed, as requested by the Claimant, that I would issue an award before the close of business the following day on August 1, 2023. I also confirmed that reasons for the award would be provided to the Parties within 15 days from the close of the hearing as required by the Code.

IV. Facts

17. The Claimant is a 19-year-old snowboarder who competes in Big Air and Slopestyle events.

18. Canada Snowboard first selected the Claimant as member of a team that was part of its High Performance Program for the 2019-2020 season when he was named to the NextGen

Slopestyle “Prospect” team. The following season COVID disrupted competition and Canada Snowboard stopped selecting a Prospect team. For the 2021-22 season, Canada Snowboard selected the Claimant as a member of the Men’s Slopestyle NextGen Team but he suffered an ankle injury which prevented him from competing for most of the season.

19. For the 2022-23 season, Canada Snowboard again selected the Claimant as a member of the Men’s Slopestyle NextGen Team.

(A) The Addendum, the Protocol and 2022-23 Season

20. For the 2022-23 season, the Claimant was required to sign an addendum to his athlete agreement (“**Addendum**”). The Addendum states:

Based on your gap analysis and as discussed with you, the following items have been identified as requirements for your continued participation towards your Olympic goals and future sustainability in elite snowboarding:

Area	Goal	Deadline
Winter Objective-skill based	<ul style="list-style-type: none">• Land all four 1260’s on 50ft + jumps (any axis) and holding grab until the last 180 at 60% consistency• Land back to back 1440s in a line in two different locations, sessions or environments	May 31, 2023

21. The Addendum also states: “failure to achieve the above requirements will mean that you must meet the team selection requirements through the ranking process and if unable to meet the requirements, then this would result in removal from the National Team program for the 2023-24 season.”

22. On November 30, 2022, the High Performance Program Selection Protocol Slopestyle National Team & NextGen Program 2023-2024 (the “**Protocol**”) was approved by Canada Snowboard and circulated to High Performance Program athletes and posted online. The Protocol, among other things, sets out the eligibility criteria, selection criteria and selection

process Canada Snowboard would use to identify eligible athletes and to select the 2023-24 Slopestyle National Team and NextGen Team.

23. The Claimant suffered an injury on January 30, 2023 to the same ankle that he had injured the season before. The injury was diagnosed as a second-degree sprain. The Claimant did not compete from that point in the season until March 16, 2023. As a result, he only competed in six events.

24. It appears the Claimant and his coaches disagreed as to whether he could have returned to competition earlier than he did. The Claimant took issue with the reliability of some evidence concerning this point, in particular, a note that a physiotherapist added to his medical file at the end of May 2023 that would support the view that he had medical clearance to return to competition earlier. The note was backdated to the middle of February and described a conversation between the physiotherapist and the Claimant which the Claimant asserted did not occur. Whether the conversation occurred or not, it was not demonstrated that the Selection Committee was aware of the note or its contents when it made its selection decision and I have given it no weight.

25. The Selection Committee met on April 18, 2023 to make its team selections for the 2023-24 season. At the time of the meeting the Claimant had not met the goals set out in the Addendum. While he had landed all four 1260's and he had landed 1440's on various occasions, he had not landed the back-to-back 1440's as was specified in the Addendum. The Claimant had five team-arranged opportunities to land back-to-back 1440's during the 2022-23 season. It appears from the evidence that the last opportunity occurred around March 25, 2023 at a FIS World Cup in Silvaplana, Switzerland.

26. On April 28, 2023, the Claimant was advised by his coaches that he was not selected to the NextGen or National Teams for the 2023-24 season.

27. Although the Claimant remained a member of the 2022-23 NextGen Team until May 31, 2023, he was not invited to attend a spring camp at Whistler, B.C. being held at the beginning of May.

28. In response to an inquiry on behalf of the Claimant as to why he was not invited to the camp, Tyler Ashbee responded:

The May camp is a beginning of the season session, and not an end of season camp. It falls within our programming and planning for our 23/24 season plan/fiscal year and is funded and paid for by our funding partners to support the 23/24 National team. Although Jacob's agreement does say May 31st as an end date, that for the 2022/23 National Team and he did not satisfy the requirements to be named to the 2023/24 National team which meant he is not invited to participate in the upcoming spring training session.

29. As to whether there could have been an opportunity for the Claimant to complete his outstanding Addendum goal at the Whistler camp, the evidence of Tyler Ashbee was that the area where the 2023-24 National Team athletes were training was not set up to accommodate back-to-back 1440's. However, there was at least one other location at Whistler, this one open to the public, where back-to-back 1440's could be attempted.

(B) Protocol: Eligibility, Selection Criteria and Process

(I) Eligibility

30. As stated, the Protocol contains the eligibility requirement for an athlete to be considered as part of the selection process for the National and NextGen Teams. The Claimant met the eligibility requirements to be considered for the National Team. However, because the Claimant did not meet the age requirement to be eligible for selection to the NextGen Team (under the Protocol the maximum age for a Male NextGen Team athlete was 18 as of December 31, 2023), the Claimant would have to fall within one of two specified exceptions.

31. One exception is set out at section 13 of the Protocol. It states:

An athlete may remain on the NextGen team beyond these ages on a case-by-case basis provided they show a significant progress towards achieving national team standards as determined by the athlete's performance curve compared to the Podium Pathway data available. [Emphasis in original]

32. Another exception is where an athlete meets the conditions set out in section 19 and 20 concerning extraordinary circumstances.

33. Section 20 is relevant here and it provides:

It may occur that an athlete may, by reason of a health related curtailment of activities or extraordinary circumstances, be unable to participate in a minimum of three national or international level events in the program year just ended. In such circumstances, the athlete's eligibility for selection shall be reviewed on the basis of his or her projected medical rehabilitation as well as such other information (results, video, coaches' assessments, etc.) as may be available to the National Team & NextGen Program Coaches.

(II) Selection Process and Criteria

34. The selection process for eligible athletes is set out in sections 15 and 16 of the Protocol.

35. Athletes are ranked based on a "Gap Score."

36. For National Team eligible athletes, the Gap Score is calculated on the following basis:

- A. Slopestyle Rank (35) and Big Air Rank (15)
- B. Skill Based Assessment (25)
- C. Seasonal Progression (15)
- D. Elite Performance Characteristics (10)

37. For NextGen Team eligible athletes, the Gap Score is calculated on the basis of:

- A. Slopestyle Rank (30)
- B. Skill Based Assessment (40), consisting of Foundational Skills (20/40) and Competition Skills (20/40)
- C. Seasonal Progression (30)

38. The Protocol states that the Slopestyle Rank and Big Air Rank that are used to generate an athletes Gap Score will be based on their active World Snowboarding Points List Results as of May 1, 2023. The Protocol also provides that the Selection Committee will meet on or before May 30, 2023 to identify and recommend athletes for team selection for the 2023-24 season.

(C) Selection Committee Meeting

39. Because the Selection Committee meeting was held on April 18, 2023, the May 1, 2023 World Snowboarding Points List was not available. The Selection Committee instead relied on a list taken from the World Snowboarding Points List website on April 17, 2023.

40. Minutes were taken of the Selection Committee meeting on April 18, 2023 and a follow up call on April 24, 2023 (“**Minutes**”). In addition to Tyler Ashbee, in attendance at the meeting were the Lead Freestyle Coach, the Slopestyle National Team Coaches, the Slopestyle Off Snow Coaches and the High Performance Program Coordinator.

41. The Claimant disputed the accuracy of the Minutes. It was demonstrated during the cross examination of Tyler Ashbee that the document’s metadata showed that it had been changed in July 2023. Tyler Ashbee explained that he had redacted the Minutes only to remove confidential information relating to other athletes before the Minutes were produced in this proceeding. It can be seen on the document where the redactions were made. I found Tyler Ashbee to be a credible and forthright witness and I accept this explanation and that the Minutes were otherwise unchanged from the original.

42. The Minutes show that the Selection Committee discussed the athletes’ skills and progression scores and elite performance characteristics focussing on those categories that had not yet been scored. Once the scoring discussion was completed, the rankings based on the April 17, 2023 list, were reorganized incorporating the additional scores.

43. The Selection Committee next considered eligible athletes for the National Team in the order of their ranking. The Claimant ranked seventh of eight eligible athletes. The six athletes that ranked higher than the Claimant were selected to the National Team. After discussion, the Selection Committee concluded that the Claimant’s results did not meet the requirements to be named to the National Team.

44. The Selection Committee then considered the ranked athletes for the NextGen Team. The Claimant was ranked third out of seven eligible athletes. Ultimately, only the top-ranked athlete was named to the NextGen Team. There was a lengthy discussion about the Claimant and another athlete. At the end of the meeting the Selection Committee decided to take a few days before deciding whether to select the Claimant and the other athlete to the NextGen Team. On April 24, 2023, the Selection Committee reconvened by telephone and decided that neither athlete would be selected to the NextGen Team.

V. Analysis

45. Based on section 6.10 of the Code, the first issue to be determined is whether Canada Snowboard made its decision in accordance with the selection criteria set out in the Addendum.

46. As a current NextGen Team member, the Claimant could remain on the NextGen Team for the 2023-24 season without having to go through the eligibility and selection process set out in the Protocol if the Claimant met the Addendum goals.

47. The Selection Committee met on April 18, 2023 and as part of its deliberations noted that the Claimant had not met all of the goals in the Addendum. It ultimately concluded it would not select the Claimant to the 2023-24 NextGen Team and, on April 28, 2023, the Claimant's coaches informed him of that decision. This all occurred more than a month before the deadline for the Claimant to complete the goals provided for in the Addendum.

48. The Claimant argues that the decision was premature and that it denied him the opportunity to satisfy his outstanding goal. He asserts that Canada Snowboard failed to consider his injury in relation to his ability to achieve the goals as provided for by the Protocol. He also points out that he was not invited to participate in a Whistler training camp, and so was also denied an opportunity to meet the Addendum goals.

49. In response, Canada Snowboard argues that, despite the deadline set in the Addendum, the Protocol gave the Selection Committee the discretion to "set the precise timing" because the Protocol states that it could meet to make team selections at any time up until May 30, 2023.

50. In my view, Canada Snowboard's argument conflates the Addendum and the Protocol selection process.

51. The selection process under the Protocol operates separately from the Addendum. This conclusion is based on the wording of the Addendum quoted above ("failure to achieve the above requirements will mean that you must meet the team selection requirements through the ranking process") and section 11(a) of the Protocol. Section 11(a) provides that current team members may be given "benchmarks" with their athlete agreements. If the athlete meets all of the benchmarks over the course of the season, he or she will be named to the 2023-24 National team regardless of competition results. It states if "an athlete is unsuccessful in meeting the

benchmarks, they will still be eligible for team selection based on the eligibility and selection criteria in sections #12 through #16.”¹ Consistent with this, Tyler Ashbee confirmed with his evidence at the hearing that if the Claimant had satisfied all the goals in his Addendum, he would have been named to the NextGen Team.

52. The discretion provided to the Selection Committee under the Protocol is for the stated purpose of scheduling a meeting to identify and to recommend athletes for selection to the National and NextGen Teams for 2023-24. Because the Addendum is separate from the Protocol selection process, a discretion granted for the purpose of the selection process cannot be used to supersede a deadline set in the Addendum.²

53. Canada Snowboard argues that it acted reasonably, in any event, because: it had already given adequate opportunities to the Claimant to meet the outstanding goal of landing back-to-back 1440s; the Claimant never informed it of any plans to meet the outstanding goal between April 18, 2023 and May 31, 2023; and the Selection Committee did not believe it was likely that the Claimant would have achieved the outstanding goal in the near future. It argues: “it is paradoxical for the Claimant to claim that his performances during the latter half of the 2022-23 season were adversely affected by an injury, but also claim that he would have demonstrated a skill not seen over several previous seasons with the benefit of one additional month.”

54. These arguments are all premised on the assertion that it was unnecessary for the Selection Committee to adhere to the deadline because it had formed the opinion that the Claimant would not satisfy the outstanding goal in any event. However, the opinion of the Selection Committee, expert though it may be, was not the basis set out in the Addendum for determining whether the Claimant could remain on the NextGen Team for the 2023-24 season. Rather, what was stipulated, and what the Claimant agreed to, was that he would have to meet certain goals and he would have the opportunity to meet those goals until May 31, 2023. The

¹ Although section 11(a) refers only to the National Team, I am satisfied that it also applies to NextGen Team athletes given the reference to section 13 which is relevant only to NextGen athletes.

² Similarly, a discretion provided to the Selection Committee under the Protocol concerning the consideration of injuries as part of the selection process does not apply to the Addendum. Under the Addendum, whether the Claimant is named to the 2023-24 NextGen Team is simply a question of whether the Claimant met the goals within the deadline or not.

Selection Committee ignored that deadline and it did so without notice or discussion with the Claimant. That was not reasonable.

55. I find that Canada Snowboard has not discharged its burden to demonstrate that its selection decision was made in accordance with the selection criteria it established in the Addendum.

56. Given this finding and the decision as to the appropriate remedy below, it is unnecessary for me to consider the alternative grounds argued by the Claimant.

VI. Remedy

57. I have found that Canada Snowboard has failed to apply its selection criteria set out in the Addendum in determining whether the Claimant could remain as a member of the Men's Slopestyle NextGen Team for the 2023-24 season. As a remedy, the Claimant seeks to be named to the NextGen Team.

58. Section 6.11(a) of the Code provides me with broad powers. It states that I may substitute my decision for that of Canada Snowboard or I may substitute such measures and grant such remedies or relief as I deem just and equitable in the circumstances.

59. Despite these broad powers, a cautious approach is warranted. I share the view expressed by Arbitrator Pound in *Blais-Dufour v. Speed Skating Canada*, SDRCC 11-0145:

I am conscious of, and share, the general reluctance of arbitrators to be seen to impose their personal judgment in matters of team selection. Canadian teams should not, except in the rarest of circumstances, be selected by arbitrators or judges who may not, and probably do not, have the necessary technical experience to make such decisions...

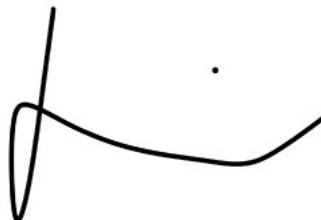
60. However, this is not a selection decision that can now be sent back to the Selection Committee for reconsideration. There is also no ability to turn back the clock and allow the Addendum deadline to run its course and see what would have happened. Training for the 2023-24 season has already begun. That means the only practical remedy available, at this point, is to name the Claimant to the NextGen Team.

61. I acknowledge that the Selection Committee believed that the Claimant would not have met the outstanding goal and I accept that it is much better situated than me to make such a determination. On the other hand, I have found that the Selection Committee failed to apply its selection criteria as set out in the Addendum and that its decision was unreasonable. At the end of the day, I am not prepared to let an unreasonable decision stand unremedied. As a result, I have ordered that the Claimant be re-instated as a member of the 2023-24 Men's Slopestyle NextGen Team.

VII. Costs

62. Section 6.13 of the Code provides an arbitrator with the jurisdiction to award costs. The Parties have made no submissions on the issue, and I am not inclined to award costs absent a Party requesting them. If a Party wishes to apply for costs, it may do so in writing within 7 days of the date of these Reasons. Any response to the application must be in writing and filed within seven days from when the application was made.

DATED August 14, 2023, and signed at the City of Calgary in the Province of Alberta,

A handwritten signature in black ink, consisting of a large, stylized 'J' followed by a horizontal line and a small upward curve.

Julie G. Hopkins, Arbitrator