

SPORT DISPUTE RESOLUTION CENTRE OF CANADA

BETWEEN:

JESSI WILKINSON

Claimant

and

BOWLS CANADA BOULINGRIN

Respondent

and

MIKE MCNORTON, ERIK GALIPEAU,
PATRICK BIRD and AUSTIN CHAMBERS

Affected Parties

BEFORE: Peter Lawless, KC (Arbitrator)

DECISION

APPEARANCES

For the Claimant: Jessi Wilkinson

For the Respondent: Michelle Kropp (Counsel)

Brittany Gordon, CEO

Don Caswell, Manager, High Performance

Ryan Stadnyk, Chair, Selection Committee

For the Affected Parties: Mike McNorton

Erik Galipeau

Austin Chambers

Tyler Mathews (Counsel for Austin Chambers)

Amanda Fowler (Counsel for Austin Chambers)

Anthony Crudo (Assistant for Austin Chambers)

Laura Wade (Assistant for Austin Chambers)

PARTIES AND PROCEDURAL BACKGROUND

1. Bowls Canada Boulingrin (“BCB”) is the national sport organization responsible for the sport of bowls in Canada.
2. BCB selects athletes to form a national team to compete at events such as the World Championships and Commonwealth Games.
3. The Claimant, Jessi Wilkinson, appeals the decision of BCB’s Selection Panel to not select him for the 2023 – 2026 National Senior Squad alleging that the respondent erred in its application of the High Performance Program National Senior Squad Selection Criteria 2023-2026 (the “Selection Criteria”).
4. The Affected Parties are each bowls athletes who were selected to the national team.
5. All parties consented to the appointment of myself as adjudicator for this appeal and a hearing took place on March 8, 2024.
6. In accordance with ss. 6.12(a) of the Code, I issued a short decision on March 15, 2024 denying the Claimant’s appeal. These are my detailed reasons for that decision.

EVIDENCE CONSIDERED

7. The Parties all filed, or had opportunity to file, written materials, supporting evidence and argument in advance of the hearing and at the hearing were able to call evidence, cross examine witnesses and make submissions.
8. In addition to the oral arguments heard at the hearing on March 8, 2024 the following documents were also considered:
 - a. C-01corr to C-15, filed by the Claimant
 - b. R-01 to R-10, filed by the Respondent
 - c. AP1-01; AP2-01; and AP3-01 to AP3-03, filed by the Affected Parties
9. While I have fully reviewed all of the materials and carefully considered all of the submissions, I only refer below to that which is necessary to explain my decision.

APPLICABLE PROVISIONS OF THE SDRCC CODE

10. Section 6.10 of the Code provides:

Onus of Proof in Team Selection and Carding Disputes

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.

11. Accordingly, it falls first to BCB to show how the Selection Criteria were properly established and applied. If they are able to do that, it then falls to the Claimant to show he ought to have been selected following those criteria.
12. The Claimant took no issue with the establishment of the Selection Criteria and did not argue that the criteria were not applied to him or the other evaluated athletes.
13. BCB nevertheless took some time at the hearing to explain the process by which they were established and applied to all athletes who were evaluated.
14. I find that the Selection Criteria were properly established, and that the selection was conducted pursuant to the Selection Criteria.
15. The issue before me therefore is whether the Claimant should have properly been selected in accordance with the Selection Criteria.

SUBMISSIONS OF THE PARTIES

The Claimant

16. The Claimant submits that he was not selected to the National Team as a result of bias.
17. The Claimant notes in his Request:

I seek two things. The first is to bring to light the personal bias of the Bowls Canada high performance committee against myself and their preferences to give opportunities to those they have personal relationships with. Second, I would like to clear my name and repair the damage they have intentionally done to my reputation.

18. He submits that the bias arises because he was “politically opposed” to changes being made to the format of National Championships events going forward. In the Request the Claimant writes:

This year has been a very divisive and challenging year for the Canadian Bowls representatives and decision makers. I served as the chair for the Development Committee. In addition, I was also a voting competition committee member and the Secretary for Bowls Alberta.

I took a stance against the new national format change which has divided our country's PSO's. The Coaches and select current team canada [sic] players created a new format without consulting with the PSO's. They cancelled the seniors division, mixed pairs, singles, pairs and fours. All of these inclusive events were cancelled in favor of a 5 person format that catered to coaches and elite players as that greatly

increased the odds of victory against opposing teams. Meanwhile, those who do not have a team of 5 will not have an opportunity to play. What hit me the hardest was them cancelling the seniors division as I had teammates who were really saddened by the fact they were no longer having their own nationals and their grief over the matter even brought me to tears.

Derek Dillon, also known as the Head Coach, received an email from me on July 11th, 2023. My goal was to express my concern over the drastic changes he had implemented.

“With all due respect, this tournament “5 person” was used as a launchpad which has caused a lot of division within Bowls Canada. And I have been telling everyone that since the beginning before the covert meeting with Bowls Canada and their decision makers and nobody was willing to listen. I cannot support this tournament because it has caused so much damage”.

The email above predates the National Squad Selection decision by around 2 months. The committee was aware of my disagreement with their changes. I feel their decision to not include me was based on this. I feel that they had a conflict of interest. There were other people on the high performance committee who were also a part of the decision to change the national format “IE: Ryan Stadnyk”.

19. The Claimant further particularizes this alleged bias in his oral evidence where he alleges that in addition to the claim of bias created by virtue of Ryan Stadnyk playing a role both with the change to the Nationals format and serving on the Selection Committee. A further bias was created by virtue of another member, Derek Dillon, being a member of the same club as a selected athlete, Rob Law.
20. The Claimant also devoted a significant amount of time and effort to create his own ranking system by modifying the system apparently employed by Curling Canada. The Claimant suggested that his system clearly showed how he was a better bowls athlete than some of the selected athletes.
21. Lastly the Claimant suggests that the selection system itself is flawed and that it should be a “win and get in” system rather than the more nuanced and subjective system that BCB has chosen to use.
22. On this latter point it is important to note that the Claimant did not appeal the Selection Criteria at the time of their publication and indeed does not do so now. Accordingly, even if the Claimant’s view that a “win and get in” system is preferable, it is irrelevant to the matter before me. The only system at issue here is the one properly created by BCB and published as the Selection Criteria.

The Respondent

23. The Respondent, unsurprisingly, says that not only were the Selection Criteria appropriately established (which again is not disputed) but that it was fairly applied to the Claimant.

24. The Respondent particularizes the process it undertook to select its National Team in accordance with the Selection Criteria in its written submissions. I have set out the relevant portions of the Respondent's submissions as follows:

6. Dates for four (4) Evaluation Days were sent to all athletes who submitted signed Expression of Interest. These non-mandatory sessions were designed to provide an additional opportunity for athletes to be seen by selectors. The format for all these sessions were identical at all venues and were facilitated by a Bowls Canada Regional Coach.

7. One or more Selectors attended each session. Athletes were also seen at local, provincial, and national tournaments. Five selectors attended the National championships in Victoria. Three attended the Youth Championships in Regina.

8. Selection meetings were scheduled for October 8, 15, and 22, 2023. Meetings were conducted virtually to accommodate for the geographical spread of selectors. In advance of these meetings, the members of the Selection Panel (SP) were instructed to independently complete the evaluation tools for each athlete.

9. The meetings were chaired by Don Caswell, Manager High Performance (MHP), BCB. His role was to ensure the integrity of the process in that all evaluations were done independently and that the criteria was being followed as published. He also input all the independent evaluation data from the members of the Selection Panel (SP).

12. The completed Consolidated Selection tool with the initial ranking of the athletes was distributed to the SP for review prior to the October 22, 2023 meeting. Per the Selection Criteria the SP was then asked to independently complete the Positional fit tool for the top 18 ranked athletes and to submit the results to the MHP. Once completed the results were shared with the SP.

13. The October 22, 2023 meeting was used to review the initial rankings and the positional fit results. Discussion was held as a group about the top 18 ranked athletes. All SP members agreed that the results reflected their evaluations. The rankings were all very close for the last position, so details of the evaluations were reviewed for three athletes. The top 12 athletes were then reviewed to ensure that from a positional fit perspective all areas were covered properly. The SP found that a good balance was present and confirmed their selections.

25. The Respondent further notes that the format of the national championships and indeed the actual event of the National Championships were irrelevant to the selection process as the Selection Criteria do not consider performance results. As such the Respondent says the Claimant's submissions around this are wholly irrelevant.

26. With respect to the alleged conflict of interest with Mr. Dillon being from the same club as one of the selected athletes the Respondent, through Mr. Caswell, says that BCB has a clear conflict of interest policy and it was followed.
27. BCB says that when they do evaluations, evaluators have to declare if they are a personal coach of a candidate and if so they cannot participate in that evaluation. If however, they serve as a Provincial Team or National Team coach, that is permissible.
28. Mr. Caswell further notes that Mr. Dillon is the National Team head coach and while he is from the same club as one of the selected athletes, he is not that athlete's personal coach and is therefore fully permitted to participate in the selection process.
29. The Respondent asks that the Claimant's appeal be dismissed.

The Affected Parties¹

30. The Affected Parties all support BCB and their own selection.
31. In particular Mr. Chambers submits:
 30. Mr. Chambers further submits that the Tribunal has consistently held that significant deference is owed to sport organizations in the decision-making process due to their sport-specific expertise. In order to prove that the Selection Panel's Decision should not be given deference, the Claimant must prove that there are "serious shortcomings" in the Decision.
 31. In this case, there were no serious shortcomings with the Selection Panel's Decision to warrant arbitral interference. Rather, the evidence shows that the Selection Panel took a holistic view of the various factors specified in the Criteria and applied them in its assessment of the Claimant.
31. The Affected parties ask that the Claimant's appeal be dismissed.

DECISION

32. Arbitrator Picher, in the 2008 case of *Poss v. Synchro Canada*, SDRCC 08-0068 stated that the role of an arbitrator in an appeal such as this is to "*determine whether an NSO has fairly communicated its own rules to athletes vying for team selection, has faithfully adhered to those rules and has administered its selection process in a manner devoid of arbitrariness, discrimination or bad faith*" (page 24). I adopt this view.
33. Other precedential guidance I am provided with comes from *Maxime St-Jules v. Speed Skating Canada*, SDRCC 16-0288 where Arbitrator McDougall noted:

¹ Mr. Bird took no part in this appeal.

38 The Panel cannot substitute its judgement for that of SSC without limitation. In fact, it must assume that the Respondent acted in good faith and its power is limited to determining if the decision at hand is reasonable. A decision is reasonable when it can “stand up to a somewhat probing examination”: in this case, so long as the decision “falls within a range of possible, acceptable outcomes which can be regarded as defensible in respect of the facts and law”, the Panel must be reluctant to interfere. Conversely, an unreasonable decision, made in bad faith, in an arbitrary or discriminatory manner, or otherwise under a vague, arbitrary, partial or unfair policy, does not withstand scrutiny and becomes subject to the Panel’s censure.

34. It is not disputed that the standard of review is that of reasonableness as set out in *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65 (CanLII), [2019] 4 SCR 653 (“*Vavilov*”).

35. Referencing *Vavilov*, Arbitrator Roberts, in *Bui v Tennis Canada*, SDRCC 20-0457, found as follows:

33. In Vavilov, the Court held that reasonableness review is a “robust form of review” in which the reasons of the decision maker must demonstrate that he or she has considered the facts and governing scheme relevant to the decision as well as any past practices.

34. An appellant is required to satisfy the Tribunal that there are “serious shortcomings” in the decision. Provided that a National Sport Organization’s (NSO) decision is intelligible, transparent, and accompanied by reasons, that decision will not be easily overturned.

36. Accordingly, the task before me is, taking the evidence as a whole, to determine if there have been “serious shortcomings.”

37. The bulk of the Claimant’s complaints have nothing to do with the selection process or the application of the Selection Criteria to his play. I find that his allegations as they relate to the changed format for Nationals are not relevant to the matter of selection and that they played no part in his evaluation or ultimate non-selection.

38. Similarly, the Claimant has created his own system of rankings to seek to demonstrate that he is more highly ranked than some other selected athletes. This submission is without merit.

39. The system proposed by the Claimant is not the system that is utilized by BCB and accordingly has no role in determining if the actual Selection Criteria was fairly applied.

40. The only evidence of how the Selection Criteria were applied to the Claimant comes from BCB. I find the evidence of BCB to be cogent and clear. Its evidence was not shaken on cross examination and the Claimant has not provided any evidence of how the Selection Criteria were improperly applied to himself. As such he has failed to meet his burden of proof as required by s. 6.10 of the Code

41. Turning to the allegations of bias I am guided by Arbitrator (now Justice) Mew in *Laberge v Bobsleigh Canada Skeleton*, SDRCC 13-0211:

82. Even considering the broader and ordinary usage of the term “bias” – namely whether a fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the decision maker was biased – context is nevertheless important:

*“...bias is context-specific and the fact that the proceedings at issue are tribunal not judicial proceedings should be taken into account. It follows that the issue of bias (actual or apparent) should be approached with a “measure of realism and good sense”, reflecting that in sport, the relevant community is often a small one with the personalities involved having to interact frequently with and being well known to each other.” (Jack Anderson, *Modern Sports Law* (2010) at. 106).*

42. The fact that Mr. Stadnyk was involved in the changes to the Nationals format and as a member of the Selection Committee cannot absent some other evidence give rise to bias. Both roles are carried out in the ordinary course of his duties and as such are not inherently biased.

43. Similarly, the fact that Mr. Dillon comes from the same club as a selected athlete cannot in and of itself give rise to a finding of bias. There must be some evidence that suggests the decision was not fairly made beyond a mere allegation of a “close connection” given the realities of how small the Bowls community is in Canada.

44. I am comforted in this finding by the fact that the three evaluations conducted of the Claimant were consistent with each other and that at least one of the evaluators is not subject to a challenge of bias by the Claimant.

45. Put another way, if the only evaluation of the Claimant that was put to the Selection Committee was that conducted by the non-impugned evaluator he still would not have been selected.

46. The Claimant feels he is a better bowls athlete than some of the selected athletes however he has not pointed to any actual evidence where the Selection Criteria were misapplied.

Nor has he, after alleging bias been able to demonstrate on a balance of probabilities that the involvement of either Mr. Stadnyk or Mr. Dillon was tainted by bias.

47. On the evidence before me and in particular the evidence of Mr. Caswell as to the structure of the Selection Committee and how it followed its process, I find that that there was no real possibility the decision was tainted by bias.

ORDER

48. On the basis of all of the above, I find that Bowls Canada Boulingrin correctly applied its High Performance Program National Senior Squad Selection Criteria 2023-2026 when it did not to nominate the Claimant to the 2023 – 2026 National Senior Squad.

49. Accordingly, the Claimant's appeal is dismissed

50. My decision is final and binding, subject only to any review that may be permitted under the rules of the Sport Dispute Resolution Centre of Canada.

51. I thank the parties for their submissions and their collaboration in this appeal.

Signed at Victoria, BC this 25th day of March, 2024



Peter R. Lawless, KC

Arbitrator