

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

N°: SDRCC 10-0116

**UNIVERSITY OF THE FRASER VALLEY (UFV)
(CLAIMANT)**

AND

**CANADIAN COLLEGES ATHLETIC ASSOCIATION (CCAA)
(RESPONDENT)**

AND

**UNIVERSITY OF BRITISH COLUMBIA OKANAGAN
(UBC-O)
(AFFECTED PARTY)**

AND

**BRITISH COLUMBIA COLLEGES' ATHLETIC ASSOCIATION
(BCCAA)
(INTERVENOR)**

BEFORE: Henri R. PALLARD (Arbitrator)

APPEARANCES: Rick NICKELCHOK (Claimant)
Sandra MURRAY-MACDONELL (Respondent)
Judy SMITH (Respondent)
Rob JOHNSON (Affected Party)
Clayton MUNRO (Intervenor)

HEARING

Place: Telephone conference, Sudbury, Ontario
Decision: 3 March 2010
Reasons for decision: 12 March 2010

DECISION

1. The Claimant, University of the Fraser Valley (UFV), submitted its application to be selected as a wildcard at the national championship three days beyond the announced deadline. The Respondent, Canadian Colleges Athletic Association (CCAA), did not forward its application to the wildcard selection committee. The Complainant alleges that the CCAA erred when it did not forward its application to the wildcard selection committee and that the wildcard selection process should be merit based.

2. The CCAA alleges that the timelines specified for an application for a wildcard position must be respected as there are only two weeks between the deadline for submissions and the date when the teams must leave for the tournament. The CCAA also alleges that it needs to proceed by an application system rather than by an automatic qualification because some highly ranked teams chose, for financial and other reasons, not to send a wildcard team to the national competition. Finally, the CCAA alleges that its wildcard selections are based on merit. The Affected Party, UBC Okanagan (UBC-O), and the Intervenor, British Columbia Colleges' Athletic Association (BCCAA), supported the position taken by the CCAA in this matter.

The issues

3. The issues before me are whether the CCAA was correct in adhering, pursuant to its rules, to its deadline for submissions for wildcard applications and whether the strict application of its rule violates the merit principle.

The decision

4. On 3 March 2010, given the urgent nature of the matter, I gave a written decision, set out below, with reasons to follow.

The Request by the Claimant, University of the Fraser Valley (UFV), to review the decision of the Respondent, Canadian Colleges Athletic Association, not to consider the application of the UFV due to its late submission is denied.

The facts

5. The hearing was conducted by telephone conference on 3 March 2010. None of the parties called any witnesses. The parties agreed on the following facts.

6. The CCAA Operating Code requires teams that wish to be considered for a wildcard selection to apply and they must do so within a certain time. Article 8 states:

7.2.1 Member schools must apply for wildcard consideration (when applicable) six (6) days prior to the final seeding wildcard selection call (Monday immediately following conference championships).

UFV did not apply within the required time frame. The CCAA did not forward the application of UFV to the wildcard selection committee because UFV had not submitted it within the required time lines. Pursuant to its own rules, the BCCAA did not endorse UFV's late application. The wildcard selection committee considered varying wildcards. UFV was not selected for a wildcard position.

Reasons

7. According to the UFV, its late submission of its application for a wildcard was an administrative error and a team should not be penalised for an administrative error. UFV should have been selected for a wildcard position on the basis of merit. UFV referred me to two cases in support of its position, *Clegg et al. and Biathlon Canada and Canadian Olympic Association*, 27 January 2002 (Ratushny) and *UBC-Okanagan and Zaleski against BCCAA*, 5 March 2008.

The wildcard selection process

8. According to the Claimant, the *Clegg* decision supports the proposition that an arbitrator has the authority to reverse a decision in a selection process that is not based on the merit principle. In *Clegg*, three athletes did not meet the performance standard for selection to the Olympics during the time specified by the Canadian Olympic Association (COA). However, the athlete Clegg did do so some 12 days later and within the time period specified by the international body. Arbitrator Ratushny allowed the appeal with regard to one of the three athletes only, Clegg. It is important to note that in *Clegg*, despite the fact that all three athletes had met the international standard, they were all denied their appeal on this ground. Only Clegg was successful on the second ground, that he had met the higher national standard within the time period specified by the international body.

9. Arbitrator Ratushny was quite circumspect with regard to the power of an arbitrator to rewrite agreements governing how athletes and teams are selected to compete.

10. Mr. Carr-Harris emphasized that the COA Team Selection Agreements with the National Sport Federations are the cornerstone of team selection. They would be meaningless if they simply could be ignored to allow athletes who have not qualified to participate in the Olympics. They are the product of discussion, negotiation and approval by the Board of the COA on which the various sports, including biathlon, are represented. Their purpose is to maintain objectivity and to avoid arbitrariness. The COA

specifically addressed the issue of exercising discretion in “special” or “borderline” cases but rejected this approach as a matter of policy to avoid some of the arbitrariness that had occurred in the past in team selection.

11. This argument is compelling. While the frustration expressed by these Athletes may be understandable, the issues they raise must be addressed in the development of appropriate standards in the future. They cannot be applied to over-ride the application of current standards under the existing Agreement. For this reason, the appeal based on these grounds cannot succeed.

Arbitrator Ratushny refused to intervene with regard to the performance standard set by the COA, notwithstanding the fact that the Canadian performance standards were much higher than those established by the international body, whose standards the three athletes had met. The parties had an agreement and, absent any special considerations, the arbitrator must respect that agreement. This led the arbitrator to deny the appeal of all three athletes, Clegg included, on this ground.

10. In this case, the Claimant argues that it is unfair to oblige his team to comply with an artificial deadline when it has met the performance standard for selection. I understand his frustration and that of the athletes at UFV in seeing their chance to participate in a national championship evaporate on account of an administrative error. However, the relevant clause of the CCAA Operating Code is very clear. The parties have accepted to be bound by it and, absent any special considerations, I must respect that agreement. I agree with the rationale set out by Arbitrator Ratushny in *Clegg*. I note that *Clegg* was also accepted in *Shooting Federation of Canada and Canadian Olympic Committee* (ADR 04-0029), 3 May 2004 (Sanderson) and *Canadian Amateur Boxing Association and The Canadian Olympic Committee* (SDRCC 04-003), 8 July 2004 (Picher). If the Claimant wishes to change the criteria used to select wildcard, it must follow the procedures of the BCCAA and the CCAA.

The merit principle

11. According to the argument of the Claimant, the selection of a wildcard team should be based on specific, objective qualifications—the highest ranked team should be selected. A merit based philosophy should govern the selection of wildcard positions for the national championship and administrative considerations should not trump the merit principle. UFV again relies on *Clegg*. In *Clegg*, Arbitrator Ratushny took the merit principle into consideration in deciding that the Appellant Clegg had met the required standard.

20. ... these considerations are administrative rather than performance-related. As a practical matter, they do not preclude a

remedy for the Appellant Clegg in this case. Nor would any other athlete be adversely affected by granting such a remedy.

21. In view of the wording of the Agreement itself, the precedent established in the Skeleton case, the merit-selection principle and the circumstances referred to in the previous paragraph, the appeal will be allowed in relation to the Appellant Clegg.

In the *Clegg* award, it was not the merit principle by itself that moved Arbitrator Ratushny to allow Clegg's appeal. Rather it is a confluence of five factors that led Arbitrator Ratushny to find in favour of Clegg. First, no other athlete would be adversely affected by allowing Clegg to participate in the Olympics (para. 20). Since no athlete had been selected to represent Canada in biathlon, allowing Clegg to compete did not lead to the removal of another athlete from the team's Olympic roster. Secondly, from a reading of the complete agreement between Biathlon Canada and the Canadian Olympic Association, it was not clear how the deadline date was to be applied (para. 12-15). Thirdly, the COA had extended the deadline date with regard to the skeleton team (para. 16). Fourthly, Clegg met the COA standard within the time period established by the international body. The arbitrator said: "In these circumstances, the merit principle appears to be undermined rather than enhanced by denying the athlete the benefit of his results in this competition." (para. 17-18). Fifthly, the considerations were administrative rather than performance related (para. 19-20).

12. It is thus apparent in *Clegg* that the merit principle was one of several factors taken into account. Therefore to properly consider how to apply the merit principle in *Clegg* to the matter before me, I must also consider those other factors. These five factors play out differently in the case before me.

13. First, I must determine whether granting UVF's request will adversely affect the participation of another team at the national championship. Eight teams—the five provincial or conference championship teams, the host team and two wildcard teams—participate in the CCAA Men's National Volleyball Championship. A province may send a maximum of two teams to the national championship (CCRA Operating Code, Article 8, para. 7.1.4). Since the provincial champion earns one spot (para. 6.1.1), only one wildcard may be selected from a province. The wildcard committee selected UBC-O which was nominated by the BCCAA and which had won the bronze medal at its provincial championships. This is different than in the *Clegg* matter. A decision to allow the request by UVF to be one of the two selected wildcards is not without consequence on another participant, in this case UBC-O, the Affected Party. A decision in favour of UVF will lead to the cancellation of the wildcard selection to UBC-O. This is not a determinative of the matter, but it is something that I should consider in arriving at my decision, just as Arbitrator Ratushny did.

14. Secondly, I must determine whether the deadline dates were unclear or ambiguous. The deadline to apply for a wildcard was 23 February 2010. The deadline date, as well as other

important dates and operating procedures, were posted on the CCAA website on 9 August 2009, and everyone had access to the list throughout the year. Reminders were sent to members about the deadlines. On 1 February 2010 a newsletter with the list of deadlines was circulated to all members of the CCAA. This list included the deadline for a wildcard application. On 2 February 2010, a monthly update including the deadline was sent by email to all members. On 11 February 2010, a notice with the deadline date was circulated to all parties. This notice also stated that there would be no extensions to these deadlines. In total, four specific reminders were sent from the CCAA. The application from UFV came in on Friday, 26 February at 6:30 pm. Since it was incomplete, it was resubmitted on Saturday afternoon, 27 February 2010. The deadline dates governing the wildcard selections are made known to the parties early in the season and they are reminded of the dates at various times. There is no ambiguity in this case with regard to the deadline date whereas it was unclear in *Clegg*. Again, this is not a determinative of the matter, but it is something that I should consider in arriving at my decision, just as Arbitrator Ratushny did.

15. Thirdly, I must determine whether the CCAA had extended the deadline date for submissions for wildcard selections in other circumstances. There is no evidence that it had done so. This again distinguishes this case from *Clegg* where the skeleton team was granted an extension. Once more, this is not a determinative of the matter, but it is something that I should consider in arriving at my decision, just as Arbitrator Ratushny did.

A merit based approach

16. Fourthly, I must determine whether the CCAA and the BCCAA used a merit based approach. The wildcard selection committee is composed of three independent members and must take into consideration a variety of factors in selecting the two wildcard teams. The CCAA Operating Code, Article 8, states:

7.3 Selection Criteria/Guidelines

Note: All of the following criteria will be used by the wildcard selection committee.

Performance within own Conference

- current conference standings
- scores/results
- relative strength of opponents

Performance outside Conference:

- results of inter conference tournaments
- results of inter conference exhibition games
- relative strength of opponents

Relative strength of Conference in the sport at the National Level:

- results of tournaments
- results of exhibition games
- results of previous CCAA Championships

The CCAA requires a complete game schedule for the entire year in order to determine the wildcards. One cannot solicit a wildcard position simply on the basis of wins against weak teams. The wildcard committee reviews the records of the teams, their preseason play and their play during the season, and interviews the candidates, in order to select the two most competitive teams while ensuring that no more than two teams from each province are at the national championship. The selection process is not simply a rote exercise. Everything is geared to the selection of the two most meritorious teams within the constraint of two teams per conference. The work of the wildcard selection committee is not simply administrative but performance related. The decision cannot simply be based on the conference championships as upsets occur. The relative performance of teams from various conferences must be weighed in light of the criteria and guidelines set out in paragraph 7.3.

17. According to the BCCAA, typically it would nominate the silver medalist for the wildcard, but that is not necessarily the case. Notwithstanding this, even if BCCAA would have endorsed UFV's selection, it is not guaranteed that the CCAA would have given a wildcard selection to UFV. The berth goes to the school and not to the conference and it is a decision that belongs as of right to the CCAA. The wildcard selection committee must make that decision pursuant to the selection criteria and guidelines set out in paragraph 7.3. It would have needed to take into consideration the following factors. In the final league match of the season between UBC-O and UFV, two weeks before end of season, UBC-O won both matches over two nights, 3-0, 3-0. UBC-O was ranked third and UFV eleventh just prior to the provincial championships. At the provincial championships, UFV and UBC-O were on opposite sides of the draw and they never played each other in the provincial championships. UFV won the silver medal and UBC-O the bronze medal. These are factors that the wildcard selection committee would have had to take into account in coming to a decision as to whether to select UFV or UBC-O.

18. This distinguishes this case from *Clegg* where the decision to include or exclude was purely administrative. The wildcard selections are based on successful performance, that is merit. The task of the wildcard selection committee is to determine which team is stronger; its decision is performance based. Consequently, unlike *Clegg*, I find that the wildcard selection process as administered by the CCAA is merit based. Its basic goal is to ensure that the best teams and athletes are selected on the basis of their overall performance. The argument by UFV that the wildcard selection process is not based on merit is without foundation.

Administrative considerations

19. The fifth and final consideration is whether the deadline in this case is simply an administrative consideration and whether the strict application of the CCAA time line undermines the principle of merit based selection.

20. The deadline date for submission of applications was 23 February 2010. The information about the applications is then circulated to the members of the wildcard selection committee to allow them to prepare for their meeting. The provincial championships were held on 25-27

February 2010. On Monday, 1 March 2010, the wildcard selection committee met by telephone conference and examined the candidacies for the two wildcard spots. During its meeting, it spoke with a representative of each candidate. It announced its decision immediately after concluding its meeting. Teams begin travelling to the CCAA Men's National Volleyball Championship around 8 or 9 March. The national championship runs from 11 to 13 March. There are seven days from the deadline for submission of the application for wildcard selection to the consideration of the applications by the committee. The national competition occurs nine days later.

21. According to UFV, if its application had been submitted on time, it would have been nominated by the BCCAA since it had just won the silver medal at the provincial championships. The BCCAA agreed. Article 9 of its Operations Manual states:

7.1 In order to meet CCAA rules (AII, S6, 1.3) regarding PCAA endorsement of a maximum of one (1) wildcard bids per sport per year from eligible PCAAs, the BCCAA will endorse the highest finishing team at the BCCAA Provincial Championships who:

- a) Did not receive an automatic berth (e.g., gold and possibly silver medalists), and
- b) Who has submitted to the CCAA as per the CCAA guidelines, a wildcard application will automatically receive the endorsement of the BCCAA.
- c) It is up to each individual institution that are applying for a wildcard bid to send all relevant information to the CCAA.

The BCCAA will only endorse a team who has met the above conditions.

UFV was not considered by the BCCAA because it had not submitted its wildcard application in accordance with the time limits set out in the CCAA guidelines. UFV submitted that the BCCAA had in the past ignored time lines, an administrative consideration, when it interfered with the merit based principle. It referred me to *UBC-Okanagan and Zaleski against BCCAA*, 5 March 2008. UBC-O had been disqualified when it was discovered that a player who had played in fewer than 60% of league games had played in the championship semi-final and final. The player only played for a few minutes in each game, did not score any points and only committed one foul. The BCCAA Appeals Committee allowed the appeal from UBC-O. The player had been on the bench for the required number of games but, through an administrative oversight, was not listed on the score sheet, despite the fact that there was place for his name. If he had been listed, he would have met the eligibility requirements. Declaring the player eligible simply recognised that the player had been eligible all along. The Appeals Committee held that this breach did not violate the spirit and intent of the rules and reversed the disqualification. The player was then also eligible to compete in the CCAA national championships.

22. The *Zaleski* case and the case before me are quite different. *Zaleski* is about a disqualification; the case before me is not about a disqualification. *Zaleski* is about the breach of a rule and a subsequent disqualification. The issue in *Zaleski* is how to deal with the problem after its occurrence, how to deal with the fact that *Zaleski* had played despite his ineligibility. Given that the purpose of the 60% rule is to prevent last minute changes to the roster, that *Zaleski* had always been a member of the team, that he had complied with the rule by being present at the required number of games, and that there was a line on the scoresheet where his name could have been entered, it was easy to conclude that the disqualification of the team was “grossly unreasonable” in the words of the Appeal Committee. That is not the issue before me. I must decide whether UFV had qualified for consideration as a wildcard selection given that it had not submitted its application within the required time line. UFV was never disqualified.

23. *Zaleski* and the case before me must be distinguished on their facts. *Zaleski* would be an appropriate case under the following circumstances:

- i. UFV had not submitted an application within the timelines;
- ii. UFV had been nominated by the BCCAA;
- iii. UFV had been selected by the CCAA as a wildcard;
- iv. UFV had participated in the national championship; and
- v. after the fact, it is discovered that UFV has never submitted an application or has submitted a late application.

In such circumstances, the case before me would be more similar to *Zaleski*. Those are not the facts of the case before me. UFV was not selected, UFV did not participate and UFV was not disqualified. Consequently the reasons in *Zaleski* for reversing the disqualification cannot be transposed to the case before me. The case before me is not a case about disqualification but rather a case about not submitting an application on time. Thus *Zaleski* is not helpful in deciding whether the strict application of the wildcard selection time lines undermines the merit principle. I note in passing that the Appeal Committee in *Zaleski* did not refer to the merit principle. Consequently, it is not helpful on that point either.

24. In the case before me, there has not been a breach of the rules. UFV was qualified to apply but did not do so within the required time lines. It never qualified for selection and was never disqualified from the wildcard selection process. In refusing to consider its application, the CCAA and the BCCAA did not breach any rules. In effect, UFV is asking me after the fact to rule that the CCAA and the BCCAA should have breached their rules. If the CCAA and BCCAA had so breached their rules, other teams could have made application seeking to have that decision set aside.

25. The BCCAA Appeal Committee also considered that it was bound to consider the spirit and intent of the bylaws. In the case before me, the spirit and intent appears to be to have teams apply by a certain date.

26. The CCAA recognises that there are costs involved in participating in the National Championship. Some teams which may qualify for a wildcard do not apply on account of

institutional and financial constraints. Some members of the CCAA are small institutions that do not have the financial means to go to the national championship as wildcards. The application process allows the CCAA to determine the pool of potential wildcard teams. Once the wildcard teams are selected, they are seeded for the national championships. The wildcard teams then need to make travel arrangements. The host has a large amount of work to do to move wildcard teams into the national event. Accommodation and local transportation arrangements need to be confirmed and programs published, for example. The ability to uphold duly agreed upon deadlines is essential to allow the CCAA and its provincial conferences to function effectively in all manner of organizational and governance matters.

27. There is a sound administrative reason for requiring teams to apply for consideration as a wildcard selection. The strict application of the CCAA time line does not undermine or frustrate the application of the merit based principle governing wild card selections. The deadlines are instead part of the structure and the process are required for the wildcard selection committee to make its decision and for the national championship to occur in an orderly and efficient manner.

Conclusion

28. At its core, the question that I have been asked to consider is whether a team which has not fulfilled a basic requirement—submit its application in a timely manner—to play in a national championship, should be allowed to overcome that deficiency when the rules are perfectly clear. I conclude that the parties are bound by their agreement setting out the time lines and, absent any special considerations, I must respect the time frame for applying for a wild card position. The CCAA was correct in adhering, pursuant to its rules, to its deadline for submissions for wildcard applications. The five factors set out by Arbitrator Ratushny in *Clegg* play out differently in the case before me.

- i. Allowing the request of UFV will have an adverse effect on another team.
- ii. There is no ambiguity with regard to the dates for submission of the wildcard application.
- iii. The time lines were consistently applied.
- iv. The wildcard selection process is merit based.
- v. The strict application of the time lines does not undermine the merit based selection principle governing wild card selections.

The strict application of the rule with regard to submissions for wildcard applications does not violate the merit principle.

29. In light of the above, the Request by the Claimant, University of the Fraser Valley, to review the decision of the Respondent, Canadian Colleges Athletic Association, not to consider the application of the UFV due to its late submission is denied.

DATED at Sudbury, Ontario, this 12th day of March 2010.

A handwritten signature in black ink, appearing to read "Henri R. Pallard", written in a cursive style.

Henri R. PALLARD
Arbitrator