

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

NO: SDRCC 22-0539

VINCENT DE HAÏTRE

(CLAIMANT)

AND

SPEED SKATING CANADA

(RESPONDENT)

AND

ALEX BOISVERT-LACROIX
CONNOR HOWE
KAYLIN IRVINE
GILMORE JUNIO
TYSON LANGELAAR
MADDISON PEARMAN
ALEXA SCOTT

(AFFECTED PARTIES)

DECISION

Appearances:

For the Claimant: Michael Smith (counsel)
Yael Kogan (Articling Student)

For the Respondent: Adam Klevinas (counsel)
Susan Auch, CEO
Cathy Tong, Interim High Performance Director, Long Track

Affected Parties: Connor Howe
Tyson Langelaar
Kaylin Irvine

1. On January 11, 2021, I was selected by the parties as a Mediator/Arbitrator under the Canadian Sport Dispute Resolution Code (the “*Code*”) to hear Vincent De Haître’s appeal of Speed Skating Canada’s (“SSC”) decision to select him as a non-travelling alternate to the Canadian 2022 Olympic Winter Games Team (“the Team”).
2. The proceedings were conducted on an expedited basis due to a January 17, 2022 deadline for a public team announcement.
3. The parties agreed to proceed directly to arbitration, which took place on January 13 and 14, 2022 following the filing of written submissions.
4. On January 16, 2022, I issued my decision to deny Mr. De Haître’s appeal, with reasons to follow. These are my reasons.

BACKGROUND

5. Mr. De Haître is a highly accomplished athlete, having represented Canada internationally in both speed skating and track cycling. He competed in the Winter Olympics in both Sochi in 2014 and PyeongChang in 2018 as well as in the Summer Olympics in Tokyo in 2020 [2021]. He is the current holder of the Canadian record in the 1,000-metre long track speed skating event as well as in the one-kilometre track cycling event. Mr. De Haître gave evidence at the hearing, describing his background, his aspirations as an athlete, and his post-athletic goals.
6. SSC is the national governing body for long and short track speed skating in Canada. Testifying for SSC was Dr. Suzanne Leclerc, Chief Medical Officer for Institut National du Sport du Québec (INS), Cathy Tong, Interim High Performance Director, Long Track for SSC and Nicole Espenant, SSC’s Director of Marketing and Engagement.
7. I have no reason to attribute any greater or lesser weight to the evidence of any witness. The evidence is uncontroverted. At issue is a decision taken by SSC on December 20, 2021 to cancel an Olympic Skate-off in light of the facts known at the time and whether the circumstances were unforeseeable.
8. Although I have considered all the evidence, I will refer only to that which is necessary to explain my decision.
9. SSC published its 2022 Olympic Selection Policies and Procedures (Long Track) (the “Policy”) on January 15, 2021. The Policy offered athletes two opportunities to qualify for the 2022 Olympic Team (the “Team”). The first opportunity was the 2021 ISU Fall World Cup events, the last of which was scheduled for December 10-12 at the Olympic Oval in Calgary. To compete at these events, athletes had to first qualify at the Canadian Long Track Championships held in Calgary in October 13 -17. (Phase One)
10. The second opportunity to qualify for the Team was at a Skate-off, which was to be held December 27-31 in Quebec City. (Phase Two) (Policy Section 7.2)

11. The nomination process was subject to “unforeseen circumstances” as outlined in Section 4.2. (Policy Section 7.1)

12. Sections 4.1 and 4.2 provided as follows:

4.1 Changes to this Document

Speed Skating Canada reserves the right to make changes to this 2022 Olympic Selection Policy & Procedures which, in the Chair’s discretion, are necessary to ensure the nomination of the best team possible for the 2022 Olympic Winter Games.

[...]

After the start of the first Selection Event which formed part of Speed Skating Canada’s nomination procedure, this clause shall not be used to justify changes unless such changes relate to (a) an unforeseen circumstance or (b) are necessary due to a typographical error or a lack of clarity in a definition or wording. Such changes must be justifiable in the circumstances [...]

4.2 Unforeseen Circumstances

Speed Skating Canada’s [Policy] is intended to apply as drafted assuming specifically that no athlete(s) shall be prevented from competing due to an unforeseen or unanticipated circumstance. However, situations may arise where unforeseen circumstances or circumstances beyond Speed Skating Canada’s control do not allow competition or nomination to take place in a fair manner or in the best interests of the priorities and general principles for selection as indicated in these criteria, or do not allow the procedure for nomination as described in this document to be applied.

[...]

In the event of unforeseen circumstances beyond the control of Speed Skating Canada that prevent the Chair from implementing Speed Skating Canada’s internal nomination procedures fairly, as written, the Chief Executive Officer of Speed Skating Canada (“CEO”) (or in the absence of a CEO, the interim CEO, or such person the Board of Directors shall appoint), shall have the sole, full and absolute discretion to resolve the matter as he or she sees fit, taking into account factors and circumstances that he or she deems relevant. Where possible, the CEO will consult with the Long Track management team, coaches and/or Olympic Selection Committee to determine if the circumstances justify competition or nomination should take place in an alternative manner. In such circumstances, the CEO shall communicate the alternative selection or nomination process to all impacted individuals as soon as possible.

13. At the time the Policy was drafted, the Quebec City venue was under construction with a planned completion date in mid-2021.

14. After the emergence of the COVID-19 virus, SSC implemented safeguards to ensure that competition venues were able to host events that complied with necessary public health protocols. Additionally, SSC implemented safeguards to ensure athlete safety while travelling and at events, and promoted vaccinations. SSC officials stayed current with COVID protocols, making changes as the virus evolved and as public health measures were implemented. SSC's Competition Guidelines reflected these safeguards and SSC successfully held a number of domestic competitions, including the Canadian Long Track Championships, in October 2021.
15. SSC hosted an ISU World Cup event from December 10-12 followed by a Four Continents event from December 15-17 at the Olympic Oval in Calgary. Because hosting international sporting events had become more complicated and time-consuming due to the COVID-19 virus, SSC engaged an event planner for these two events.
16. Ms. Espenant testified that she and her assistant, as well as the event planning staff, spent "thousands of hours" over three months planning for the competitions. In addition to the usual logistical issues that had to be addressed including facility readiness, the adequacy of human resources (both volunteers and officials), and transportation and accommodation requirements, COVID-19 posed additional challenges, including compliance with national and provincial health guidelines. Ms. Espenant said that for the Calgary events, SSC ensured that all athletes were in a "bubble" for the entirety of the competition, which added further logistical transportation and accommodation issues; as well as ensuring the daily testing of athletes and officials.
17. Based on its experience with the World Cup and other events, SSC was confident of its ability to host the planned events in Quebec City.
18. In late November 2021, the Omicron variant of the COVID-19 virus emerged as a concern to public health authorities. On November 26, the World Health Organization indicated that preliminary evidence suggested that the variant had an increased risk of infection as compared to other variants of concern.
19. The Omicron variant was first detected in Quebec on November 29. SSC officials monitored the guidance from federal and provincial health officials regarding changing protocols in response to the increasing numbers reported in Canada. In the province of Quebec alone, the number of confirmed cases more than doubled in six days, between December 15 and December 21. On December 12, the Omicron variant represented 20.5% of the COVID-19 cases in Quebec, and by December 20, it represented 86.2% of the cases. Hospitals and testing facilities quickly became overwhelmed.
20. On December 16, after the province reported 4,004 new COVID-19 cases, the Quebec government announced new measures to combat the spread of the virus, including the suspension of all sports tournaments and competitions in the province as of December 20.

21. Following the Quebec government's announcement, FPVQ (the provincial speedskating organization) confirmed its ability to host the Olympic Skate-off. The host venue, the Centre de Glaces de Québec, was also scheduled to host the Canadian Junior Championships and Canada Cup 2 at the same time. FPVQ and SSC sought an exemption from the public health measures imposed by the province, although only for the Olympic Skate-off and the Junior Canadian Championships.
22. On December 18, SSC obtained permission from the government of Quebec to allow the Skate-off and Junior Championships to take place but limited the events to 100 individuals. The SSC notified provincial and territorial speed skating organizations of the exemption and further, that necessary health protocols were still being developed.
23. Later that day, SSC learned of a COVID-19 outbreak within the short track Olympic team which had been training at the Centre de Glaces de Québec and the entire team was sent home immediately.
24. On December 20, over 6,000 new COVID-19 cases were reported in Quebec. That afternoon, the government announced new public health measures, calling the situation a "crisis," stating that the situation had "never been seen before."
25. SSC officials met to discuss whether to proceed with plans to hold the Skate-off and consulted with Dr. Leclerc. Dr. Leclerc's advice was that the competition could only be held if SSC implemented a strict bubble format.
26. SSC officials were of the view that they would not be able to replicate the stringent conditions they had created for the World Cup events in Calgary. SSC could not secure a designated, exclusive hotel for the athletes in a short period of time nor was it able to quickly arrange for exclusive transportation operations. Importantly, public testing facilities had become overwhelmed, and SSC had not yet entered into any partnerships with private facilities to provide rapid daily testing, as it had in Calgary. In addition, a number of officials for the event cancelled their trips to Quebec City as a result of the number of Omicron cases.
27. Both Ms. Tong and Ms. Espenant testified that SSC considered the possibility of moving the Skate-off to Calgary, which had successfully hosted the World Cup events earlier that month and where testing facilities were available. Discussions with officials at the Olympic Oval and Alberta Health authorities revealed that while there was a possibility the facility could host the event, it would not be available until January 3-9, 2022, and the health authorities could not provide any assurances of what health measures would be in place at that time. Ms. Tong testified that the Alberta Health authorities suggested that the situation could be worse by that date and could offer no guarantees the event could safely take place. SSC also considered the impact of moving the Skate-off to early January would have on the athletes' training schedules and their preparations for the Olympics.

28. On December 20, after arriving in Quebec City, the members of the long track team were informed of SSC's decision to cancel the event. SSC advised the athletes that its High-Performance team would work towards adjusting the selection criteria and that would be communicated to them as soon as possible.
29. On December 23, the long track National Team and High-Performance Advisory Committee ("HPAC") decided that the results of the ISU World Cups 1- 4 would be used for Phase 2 selection. According to Ms. Tong, HPAC decided to rely on results from the World Cup events because, being international events, they were the best reflection of medal potential, one of SSC's stated selection objectives.
30. SSC grounded its decision to change the selection criteria in Section 4.2 of the Policy, stating that as a result of the cancellation of the Skate-off:

Phase 2 of the nomination and selection process outlined in Sections 7.2, 8.2, 9.2 and 9.3 of the [Policies] cannot take place as foreseen in the [Policy].
31. SSC nominated the 2022 Olympic Team based on Phase 1 (2021 ISU Fall World Cup) results. Mr. De Haître was selected as a non-travelling alternate in the men's 1000-metre and 1500-metre events based on his results at the Fall World Cup events.

ARGUMENT

32. Mr. De Haître did not argue that the Selection Criteria were established improperly. Rather, he contends that SSC failed to follow its own procedures, made a decision that it did not have the authority or jurisdiction to make, and made a decision that was patently unreasonable.
33. Specifically, Mr. De Haître argues that the Omicron outbreak was reasonably foreseeable, that SSC ought to have had a "back-up plan," and that SSC failed to take appropriate steps to ensure that athletes were afforded a second opportunity to qualify for the Team.
34. SSC contends that it was forced to cancel the Olympic Skate-off due to the unexpected and unforeseen rise in COVID-19 cases in Quebec which made holding the event unsafe and, following provincial government directives, impossible. SSC says that its decision to cancel the event was made in consultation with medical professionals, SSC coaches and staff and in compliance with government guidelines. It argues that the decision was reasonable because of unforeseen circumstances which was the unexpected and exponential rise in COVID-19 cases caused by the Omicron variant.
35. SSC contends that the cancellation of the December 27-31 event required it to amend its Olympic Selection Policies and Procedures in order to

provide a mechanism to complete the Phase 2 nominations to the Team. It says that its decision to use results from the ISU World Cup events to complete the Phase 2 nominations was supported by SSC's HPAC, staff and coaches, and that its decision was reasonable in the circumstances, as it was representative of the most recent results achieved at the international level and was aligned with SSC's performance objectives.

ANALYSIS AND DECISION

36. Subsection 6.11 (a) of the *Code* provides that the Panel shall have full power to review the facts and apply the law. Further, the Panel may substitute its decision for the decision that gave rise to the dispute and may “substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.”
37. The standard of review of decisions of national sports organizations is that of reasonableness, not correctness. (see, for example, *Palmer v. Athletics Canada* (SDRCC 08-0080), Arbitrator Pound)
38. The emergence of the virus some two years ago has challenged the ability of all sport organizations to plan events.
39. As Arbitrator Pound noted in *Lepage-Farrell v. Speed Skating Canada* (SDRCC 20-0472) in circumstances similar to those before me, sport organizations are required to make selection decisions in much different ways than they had previously, responding to evolving threats posed by the pandemic:

The fact that some of the criteria were changed [...] does not make the changes thereby unreasonable of and by themselves. The world of sport had been profoundly affected by the pandemic and everyone was scrambling to make equitable adjustments in response to radically different conditions than those anticipated when, in the case of SSC, the former selection criteria had been designed.
40. Sections 4.1 and 4.2 of the Policy enable SSC to make changes to the previously announced selection criteria where “unforeseen circumstances or circumstances beyond Speed Skating Canada’s control do not allow competition to take place [...]”
41. While the fact of the pandemic is no longer a “radically new condition,” it can be reasonably inferred that SSC’s Policy was meant to account for the changing and continuing challenging circumstances posed by the virus and its variants.
42. There is no dispute that this clause was within SSC’s jurisdiction to enact. The Policy granted SSC significant discretion to make changes to its selection procedures, provided that any changes made after the first selection event were a result of unforeseen circumstances.

43. Unforeseen is commonly understood to mean not anticipated or predicted.
44. The COVID-19 virus has had enormous global impact and sports organizations have worked hard to develop protocols to create safe conditions for athletes to train and compete. As our knowledge of the virus evolves, so too do the measures we take to protect ourselves and each other.
45. While variants of the COVID-19 virus can be anticipated, I find that the speed of transmission and the contagiousness of the Omicron variant in Canada, and in Quebec in particular, was not anticipated or predictable. That it was unanticipated is reflected by measures taken by the province in response to what it called a “crisis” that had “never been seen before.” Cases were increasing at exponential rates, leading to Quebec’s December 16 decision to suspend all sporting events.
46. I find that the rapid increase in the Omicron virus was an unforeseen circumstance beyond SSC’s control within the meaning of Section 4.2 of the Policy.
47. SSC continued to believe that it could safely host the Skate-off and decided to seek an exemption from the health measures that Quebec had imposed. Based on SSC’s very recent experience successfully hosting the World Cup events, I do not find this decision unreasonable.
48. On December 20, as the number of cases continued to surge, SSC sought the advice of Dr. Leclerc on whether and how it could safely host the event. Her advice was to implement protocols similar to those that had been in place for the World Cup events. Given the rising cases and the importance of protecting the health and safety of the athletes, I do not find SSC’s acceptance of Dr. Leclerc’s advice to be unreasonable.
49. After further consideration of the measures that would be necessary to safely host the Skate-off, SSC ultimately decided to cancel the event. In making that decision, SSC considered a variety of factors including the availability of testing facilities/resources, the financial, logistical and human resources necessary to create “bubbles” (including volunteers and officials who were able and willing to enter the bubble given the changing circumstances and the holiday season) as well as SSC’s internal resources and the guidance of health officials. I find that the unavailability of rapid testing resources and the lack of human resources, in particular, both of which were a direct result of the Omicron variant, could not have been anticipated.
50. SSC considered the possibility of moving the competition to Calgary but was unable to secure the facility for a timely competition and the health officials in Alberta were unable to provide SSC with any assurances that the event could be held safely. Contrary to Mr. De Haître’s assertions, I find that SSC did have a “back-up plan,” but that it was impossible to execute that plan due to resource issues as well as health considerations, both of which were a direct result of the emergence of the Omicron variant.

51. Finally, SSC also considered the health and safety of the skaters, including those who would have to continue to train with the Olympic Games in mind and any possible quarantine periods in the event of a positive test.
52. In my view, SSC's decisions were well-considered and justifiable in light of the circumstances.
53. Having decided to cancel the Skate-off, coaches and the HPAC decided to use the recent World Cup results as the selection criteria. I am not persuaded that this decision was unreasonable given that the results were very recent and given that the World Cups were international events, best reflected SSC's policy objectives.

CONCLUSION

54. I find that SSC had the jurisdiction to made changes to its selection procedures pursuant to Section 4.2 based on my conclusion that the transmissibility and contagiousness of the Omicron variant was an unforeseen circumstance and that SSC was, for reasons beyond its control, unable to safely hold the Skate-off in light of those circumstances.
55. There is no evidence SSC considered irrelevant factors or exhibited any bias, discrimination or bad faith in making the decision it did. I find that the decision to cancel the Skate-off fell within a range of reasonable outcomes.
56. The appeal is dismissed.
57. Mr. De Haître is a remarkable athlete. It is unfortunate that he has been negatively affected by the pandemic and by SSC's justifiable decision to cancel the event. I have no doubt, however, that he will make positive contributions to the sporting world in years to come.
58. I thank counsel for their conduct and efforts in this appeal.

DATED: January 31, 2022, Vancouver, British Columbia



Carol Roberts, Arbitrator