

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

N°: SDRCC 22-0558/0560

**LUIS FREEMAN
MATTHEW HELDMAN
WILLIAM HOWDEN
GABRIEL WOOD
(CLAIMANTS)**

AND

**CANADA SNOWBOARD (CS)
(RESPONDENT)**

DECISION

Parties in attendance at the hearing:

Claimants	Luis Freeman Tom Freeman, representative Matthew Heldman Sandra Heldman, representative William Howden Rick Howden, representative Gabriel Wood McLean Wood, representative Suzanne Wood, representative
For the Respondent:	Tyler Ashbee, representative Jean-François Rapatel, representative Kayla Williams, representative Adam Klevinas, counsel Cristy Nurse, counsel
Assistant to Arbitrator:	Hiam Amar

1. On March 9, 2022, the Claimants filed an appeal of the Respondent's eligibility decision for the 2022 FIS Alpine Snowboard World Junior Championship ("World Juniors") to be held in Chiesa, Valmalenco, Italy from March 29 to April 2, 2022. Four other athletes joined the appeal; however, those athletes resolved their issues at a Resolution Facilitation and were named to the team.
2. A decision was required by March 19, 2022. This matter was heard via telephone conference call on March 18, 2022, and a short decision was issued that day. This is the full decision.
3. I have rejected the Claimants' appeal for the reasons that follow.

The Parties

Claimants

4. The Claimants are four junior alpine snowboarders. All four of the Claimants reside in Ontario. Luis Freeman, William Howden and Gabriel Wood are athletes on the Ontario Alpine Snowboard Team. Matthew Heldman is an athlete on the Ontario Alpine Snowboard Development Team.

Respondent

5. Canada Snowboard is a national sports organization responsible for high performance snowboarding in Canada.

Submissions

Claimants' Submissions

6. The Claimants have brought an appeal of the Respondents' decision not to include the Claimants as eligible athletes for the World Juniors. The Claimants submit that the Respondent applied its FIS Junior World Championships Snowboard 2022 Selection Protocol ("Selection Protocol") strictly on its face without considering the impacts of COVID-19 on the ability of athletes to meet the eligibility criteria.
7. The Claimants submit that the Respondent has decided that only two athletes (Ben Heldman and Aurelie Moisan) are eligible to compete at the World Juniors. This is despite there being availability for six athletes per gender as set out by the Selection Protocol. The Claimants are not disputing the selection of the two eligible athletes, nor the four appointed as part of a settlement at the Resolution Facilitation.
8. The Claimants submit that the Selection Protocol establishes the eligibility criteria. The Claimants note that in order to be eligible, the criteria requires that athletes have a minimum of 50 FIS points in their discipline and must finish in at least the top half of a Europa Cup event or the top 1/3 of a NORAM event.
9. The Claimants submit that the 50 FIS point requirement was an increase from 30 FIS points in the previous year. The Claimants submit that the criteria as set out in the Selection Protocol are unreasonable as athletes were limited to fewer competitions and training activities due to the impacts of the COVID-19 pandemic.
10. The Claimants submit that in sections 28 to 30 of the Selection Protocol, the Respondent has given itself discretion to consider "special ranking considerations" when the eligibility criteria have not been met as a result of unforeseen circumstances. The Claimants take special notice of section 30(c) which states:

Anomalies in competitions arising from factors such as weather or abnormally small field sizes, or the gross inflation of the points value of the event, which are considered by the selection committee to be a factor in the attainment of or failure to attain results.

11. The Claimants submit that this section of the Selection Protocol provides the Respondent with discretion in applying the eligibility criteria instead of requiring strict adherence. Furthermore, the Claimants submit that the anomalies contemplated by this section may impact whether athletes are found to be eligible.
12. The Claimants submit that the Respondent is not bound by the Selection Protocol alone when determining eligibility for the World Juniors, noting that section 7 of the Selection Protocol states that “[a]ny exceptions to the procedures set out in this protocol must be based on the general policies of the Canada Snowboard High Performance Program (HPP).”
13. The Claimants submit that the HPP and the Vision 2020: The Long Term Athlete Development Plan for Snowboarding in Canada (referenced in the HPP) establish a roadmap of stages of expected athlete development activities for high performance snowboard athletes for the purpose of identifying future high performance athletes. Accordingly, these athletes are to be provided with the support necessary to maximize opportunities for success. The Claimants submit that Vision 2020 specifically contemplates that the introduction of any competition standards must be done so “in a manner that recognizes current limitations, and repeats the principals of procedural fairness and natural justice.”
14. The Claimants submit that by applying the competition standards in the Selection Protocol without considering the impact that the COVID-19 epidemic had on athletes such as the Claimants, the Respondent acted in a manner inconsistent with Vision 2020, acted in a manner that was patently unfair to the Claimants and in a manner that was not in accordance with natural justice.
15. The Claimants acknowledge that they have not met the eligibility criteria set out in the Selection Protocol. However, the Claimants submit that the Respondent has failed to consider the significant impact that COVID-19 and the COVID-19 restrictions had upon the ability of the Claimants to meet the competition standards in the Selection Protocol. Accordingly, the Claimants submit that eligibility decision was
 - i) inconsistent with the requirements of those policies governing the Respondent;
 - ii) grossly unreasonable; and
 - iii) inconsistent with the principles of fairness and natural justice.
16. The Claimants further submit that they have not been notified of the reasons that they have been denied eligibility and that the minutes from the Selection Committee’s meetings have not been provided. The Claimants take this to mean that they have not been selected for eligibility on that basis that they did not meet the eligibility criteria set out in the Selection Protocol.
17. The Claimants note that of the six spots permitted per gender for the World Juniors, the Respondent has originally only selected one male and one female athlete. The Claimants submit that they provided expressions of interest which have not been responded to.
18. The Claimants submit that they were close to achieving the 50 FIS point threshold for eligibility. The Claimants note the competition deadline was set out in the Selection Protocol as February 24, 2022. The Claimants submit that if the window were extended by one day to February 25, 2022, two of the Claimants, Mr. Freeman and Mr. Wood, would exceed the point threshold and a third Claimant, Mr. Howden, would have finished with 49.5 points. The

Claimants submit that it was unfair of the Respondent not to consider FIS results up to February 25 as a result of a season in which competitions and training opportunities were impacted by COVID-19. The Claimants note that the Selection Protocol requires that eligibility selections were to be announced on February 24, 2022, however, these were not announced until March 2, 2022. The Claimants question whether it would not have been prudent to consider the results from February 25.

19. The Claimants provided that COVID-19 led to the cancellation of some events, impacted their training opportunities, interfered with cross-border travel for some events and reduced the competitive field. The impact, according to the Claimants, is that FIS points rating for some important races was decreased. Therefore, athletes seeking to improve their FIS point status would be given fewer chances to score the point results necessary for eligibility.
20. The above is based on the Claimants' interpretation of section 19 of the Selection Protocol, which, the Claimants submit, sets out the ranking process for the Respondent to use in deciding which athletes qualify under the Selection Protocol. According to the Claimants, Priority 3 of section 19 holds that athletes which either place in the top 1/3 of the competitive field at a NORAM event or the top 1/2 of the competitive field at a Europa Cup event qualify for selection. The Claimants submit that the Selection Protocol was enacted prior to having the knowledge that competitive fields would be impacted by COVID-19 to the degree they were. The Claimants note that finishing in the top 1/3 of NORAM events was made significantly more difficult as a result of the smaller number of competing athletes.
21. The Claimants submit that the unforeseen circumstances as a result of COVID-19 amounts to a "special ranking circumstance" as set out in section 30(c) of the Selection Protocol. As such, the Claimants argue that the Respondent erred in not considering such circumstances when applying the Selection Protocol.
22. As a part of their submissions, the Claimants submitted letters of support from current and former coaches speaking to the level of commitment and self-directed dedication of the Claimants. The Claimants have submitted these letters as they believe it speaks to their strength, conditioning and physical characteristics, which may be considered as "special ranking considerations" pursuant to sections 30(a) and (f) of the Selection Protocol. They submit that these letters are relevant as training opportunities have been impacted by COVID-19. The result of this, according to the Claimants, is that the Respondent is unable to assess the strength, conditioning and physical characteristics of the Claimants.
23. As a remedy, the Claimants are requesting that they be added to the list of eligible athletes for the World Juniors or, alternatively, an order requiring the Respondent to reconsider the matter of eligibility of the Claimants.

Respondent's Submissions

24. The Respondent submits that it has adequately considered the impacts of COVID-19 in its Selection Protocol.
25. The Respondent submits that the Claimants were not uniquely impacted by any exceptional and unforeseen circumstances that did not also impact the eligible athletes both in the alpine discipline and in the snowboardcross discipline. The Respondent takes the position that the Claimants were not adversely affected by the impacts of COVID-19 to such an extent that the Respondent should have derogated from the criteria set out in the Selection Protocol. The Respondent submits that the Selection Protocol was known to the Claimants

since late-November 2021, when the Respondent circulated and published the Selection Protocol.

26. The Respondent submits that it applied the Selection Protocol in a manner consistent with the objective and that the selection process was fair and transparent. The Respondent asserts that its decision was reasonable and that, absent reviewable error or proof of bias on the part of the Respondent, this panel should defer to the technical expertise of the Respondent's Selection Committee.
27. The Respondent submits that while each snowboarding association recognized by the FIS may enter a maximum of six athletes per gender per event of the World Juniors, it is not required to fill all six spots. The Respondent submits that the purpose of including specific performance criteria is to impose rigorous standards to ensure that only performance ready athletes are selected. For this reason, the Respondent submits that it undertakes an annual pre-season review of its selection criteria for high performance events.
28. The Respondent submits that the Selection Protocol for any given year is guided by the High Performance Program General Policies. The Respondent submits that the current Selection Protocol was therefore established in harmony with these policies and intended to provide a rigorous but fair method of selecting athletes for the World Juniors. Accordingly, the Protocol sets out base-level eligibility requirements which must be met for eligibility. These requirements, set out at section 14 of the Selection Protocol, include that an athlete must have a valid Canada Snowboard membership, a valid and active FIS licence, must have submitted a participation request for their respective discipline online, must be in compliance with the procedure set out at section 10, must be of the required age, and must have *"a minimum of 50 FIS Points in their discipline as indicated on the most recent FIS Points List as of the selection deadline."*
29. The Respondent acknowledges that the threshold eligibility requirement of 50 FIS points is an increase over the previous Selection Protocol's threshold eligibility requirement of 30 FIS points. The Respondent submits that the change was necessary based on the composition and results of previous teams. After a review, the Respondent determined that an increase of the minimum points was needed to ensure competitiveness of the team at the World Juniors and to maintain compliance with the principles articulated in the high performance policies. The evidence of Tyler Ashbee, Canada Snowboard's High Performance Manager, was that the 50 points was consistent with all previous criteria since 2017 except for 2020-21.
30. The Respondent submits that the decision to increase the eligibility threshold was not arbitrarily selected. The Selection Protocol was approved on November 25, 2021, circulated by email to provincial snowboard clubs for distribution to their members on November 29, 2021, and posted on the Respondent's website on November 30, 2021. The Respondent notes that no challenges or objections to the Protocol were received by the Respondent.
31. The Respondent submits that section 6 of the Selection Protocol establishes that eligibility was based athlete performances between August 1, 2021, to February 24, 2022. Based on results during that time period, the Claimants have not met minimum FIS points required for eligibility. Furthermore, the Respondent notes that the Claimants have also not met the Priorities set out at section 19 of the Selection Protocol.
32. The Respondent submits that there are three Priorities listed at section 19. The requirement that one of these three Priorities be met was established as being demonstrative of an

athlete's ability to meet the objectives of the Selection Protocol and the high performance policies as it demonstrates an ability to achieve podium success. None of the Claimants met the Priorities.

33. The Respondent further submitted that the requirement to submit a participation request for the World Juniors before January 31, 2022, was fulfilled by Mr. Freeman, Mr. Wood and Mr. Heldman. However, Mr. Howden did not submit a participation request and was therefore not strictly eligible for further consideration. However, the Respondent indicated that they considered his results. If an athlete met the criteria, the Respondent would have reached out to them to see if they wanted to participate. Therefore, whether Mr. Howden's form was filled out properly is irrelevant to this appeal.
34. The Respondent submits that it adhered with the general principles of procedural fairness when it complied with section 6 of the Selection Protocol which sets out that performances up to February 24, 2022, were to be considered. The Respondent submits that in selecting the team, it did not extend the selection period for any athlete and did not look outside the window of competition results. The Respondent takes the position that it would be unreasonable to extend the selection period by one day. The Respondent believes that doing so would derogate from the Selection Protocol and would incrementally lower the stated known performance standard, which would have the effect of undermining the Respondent's high performance philosophy.
35. The Respondent submits that no further conversation with the Claimants was required as they were determined not to be eligible for selection. It was therefore determined that it was unnecessary to have a more detailed discussion regarding whether any special ranking considerations should apply to the Claimants.
36. The Respondent notes that the Selection Committee considered whether it would be appropriate to extend available quotas beyond those athletes who met the eligibility requirements and who satisfied at least one of the Priorities. The Selection Committee determined not to do so.
37. The Respondent takes the position that its failure to record meeting minutes in accordance with section 29 of the Selection Protocol has no material impact on the Claimants' appeal.
38. The Respondent characterizes the Claimants' position as being that the Respondent failed to exercise its discretion to vary the eligibility criteria by invoking the "special ranking considerations" pursuant to section 30 of the Selection Protocol as a result of the impact of COVID-19. The Respondent submits that while the Selection Protocol reserves the Respondent's discretion to depart from the written criteria and to select athletes in an order other than as indicated by their objective rankings, the Selection Protocol establishes that this discretion is to be exercised in very limited circumstances. The Respondent argues that none of those circumstances apply here. The Respondent cites the following passage from the Selection Protocol's preamble:

Canada Snowboard is carefully following the evolution of the coronavirus on the global and domestic level and how it may impact domestic nomination of athletes to the 2022 FIS Junior World Championships. Unless otherwise required by exceptional and unforeseen circumstances related to the impact of the coronavirus, Canada Snowboard will respect this published Selection Protocol as written.

39. Section 37 of the Selection Protocol reiterates the above and states:

The Selection Protocol is intended to apply as drafted and, specifically, where no athletes are prevented from competing because of an unforeseen injury or other unanticipated or unforeseen circumstances.

40. The Respondent takes the view that section 37 places a constraint on the Respondent's ability to exercise its discretion. The Respondent argues that this constraint is important because it ensures the most objective and transparent selection process. According to the Respondent, deviation from the eligibility criteria is only to occur if the Respondent is satisfied that athletes were prevented from competing on the basis of an unforeseen injury or other unanticipated or unforeseen circumstances.
41. The Respondent submits that the Claimants were not in a uniquely disadvantaged position as compared to other athletes which would have required a deviation from the eligibility requirements set out in the Selection Protocol. The Respondent submits that six athletes competing in the alpine discipline were able to achieve the minimum eligibility requirements set out at section 14 of the Selection Protocol while participating in the same competitive circumstances as the Claimants. Furthermore, according to the Respondent, the Claimants competed at more events than three other athletes who were able to earn the requisite FIS points for eligibility.
42. The Respondent asserts that the Claimants were therefore not impacted by COVID-19 to the extent that the Respondent was obliged to accommodate the athletes by exercising its discretion.
43. The Respondent notes in its submissions that one FIS event was cancelled in January 2022 and could therefore be construed as being unforeseen. However, the Respondent argues that this was not considered exceptional by the Respondent as there were other competition opportunities available. The Respondent also noted that in a season not impacted by COVID-19, it is not unusual for some events to be cancelled by weather related issues. The Respondent notes that the Claimants had the opportunity to participate in 10 FIS events. Furthermore, following the same criteria and with fewer events, 11 snowboardcross athletes were able to meet the 50 FIS point minimum and achieve priority ranking under section 19.
44. The Respondent therefore submits that the Selection Protocol was properly and fairly applied.
45. The Respondent requests that this appeal be dismissed.

Issues

46. The issue in this appeal is whether the Claimants should be selected to participate in the World Juniors.

Decision

47. Submissions were made on the standard of review. However, I find that this is a team selection matter and, as such, section 6.10 of the Canadian Sport Dispute Resolution Code (SDRCC Code) sets out the relevant test to be applied:

6.10 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.

48. In essence, this a two-part test. The first part of this test requires that the Respondent demonstrate the following:
 - i. That the criteria were appropriately established; and,
 - ii. That the decision was made in accordance with the challenged criteria.
49. After this has been done, the onus then shifts to the Claimants to demonstrate that they should have been selected.
50. The Claimants did not challenge whether the criteria were appropriately established or whether the decision was made in accordance with the challenged criteria. As a result, I find that the onus now shifts to the Claimants to demonstrate that they should have been selected.
51. The Claimants' main argument appears to be that while they did not meet the eligibility criteria, the Respondent ought to have taken into consideration the impacts of COVID-19 and exercised its discretion by modifying the selection criteria. In doing so, according to the Claimants, this would have resulted in the Claimants meeting either a modified selection criteria or that they would have met the FIS points threshold.
52. In developing its Selection Protocol, the Respondent gave consideration to the possible impacts of COVID-19 on training and competitions and therefore baked into the Selection Protocol the ability to "modify" the selection criteria as needed. Both parties are in agreement that the ability to modify the Selection Protocol is a discretionary power of the Respondent alone.
53. The Claimants submitted that it was possible for the Respondent to modify the eligibility criteria. During oral arguments, the Claimants cited the example of the four additional Claimants who joined this appeal after it was brought. By way of background, after the Claimants brought this appeal, four additional Claimants joined this appeal. The situations between the four original Claimants and the four additional Claimants were distinct, as the additional Claimants met the FIS points threshold.
54. The four additional Claimants and the Respondent were able to come to an agreement in a successful resolution facilitation. The outcome of this resolution facilitation was that the Respondent acknowledged that there was ambiguity in the wording of its Selection Protocol and, as a result, waived the Priorities requirement. The Respondent acknowledged this ambiguity in its submissions.
55. The four original Claimants relied in their oral arguments on the fact that the Respondent removed the Priorities during resolution facilitation, arguing that dropping the Priorities as a factor in determining eligibility, but maintaining the FIS points threshold demonstrated that

the Respondent could exercise its discretion to modify the eligibility criteria, but was acting unfairly in not doing so.

56. I find that standards for eligibility did not change at resolution facilitation and that agreements made during resolution facilitation cannot be relied on in this matter. Resolution agreements are private and do not capture all of the communications from the parties involved. Furthermore, these agreements are entered into on a non-prejudicial basis and are intended to be done so in order to facilitate a meaningful resolution. I also find that in resolving the matter, the Respondent did not modify its eligibility criteria but was acknowledging the ambiguity contained in this one particular area.
57. The Claimants advanced two further arguments they believe demonstrate they should have been selected: unfairness with the FIS points threshold and unfairness by not extending the time frame for competitions the Respondent would consider.
58. The Claimants argued that the manner in which the Respondent increased the FIS points threshold in its eligibility criteria from 30 FIS points to 50 FIS points for the current season was unreasonable, especially in consideration of the impacts of COVID-19. In their response, the Respondent provided reasonable justifications for the increase. Namely, the Respondent noted that the FIS points threshold in its Selection Protocol since 2017 had been set at 50 FIS points. This number was reduced to 30 FIS points for only one season in 2020-21. The Respondent also submitted that the 50 FIS point threshold was not an impossible criteria, noting that athletes in both the alpine and snowboardcross disciplines had been able to meet that points threshold.
59. Accordingly, I find that the increase in points eligibility criteria is consistent with the eligibility criteria of previous Selection Protocols. Another factor speaking to the reasonableness of this decision is where the Respondent stated that the decision to return to the previous points requirement was determined to be a change which was necessary based on the composition and results of previous teams and to ensure the competitiveness of the team at the World Juniors.
60. The Claimants challenged the eligibility period set out in the Selection Protocol, which took into consideration only those competitions taking place from August 1, 2021, to February 24, 2022. The Claimants point out that if the Respondent had taken into consideration a competition which had taken place on February 25, 2022, two of the Claimants (Claimant Freeman and Claimant Wood) would have met the 50 FIS points threshold. In their submissions, the Claimants took the position that the time frame for eligible competitions could be extended to take into consideration results of the Claimants on February 25. As evidence, the Claimants submitted that the Respondent used the FIS list created on February 26 to determine results from February 24. According to the Claimants, the Respondent should have also included the race of February 25th to determine selection. Accordingly, Claimant Freeman and Claimant Wood would have met the FIS points threshold.
61. I do not agree with the Claimants' submissions as it relates to the competition timeframe. The FIS list created on February 26 was the only accurate list that included the February 24 results. The competitions which would be considered for eligibility are only those which took place during the dates set out in the Selection Protocol. The Selection Protocol was approved on November 25, 2021, sent to the provincial snowboard clubs for distribution to their members by email on November 29, 2021, and was posted on the Respondent's website on November 30, 2021. The Claimants were therefore informed, or were

reasonably expected to be informed, of which competitions they should anticipate contributing towards their eligibility. When the eligibility criteria for a major competition are made available, it is reasonable to expect that athletes would determine their competition and training schedules in accordance with the published eligibility criteria. In addition, it was within the Respondent's discretion whether to extend the time frame. Because the Respondent determined not to exercise its discretion to extend the competition time frame, it is fair that only those points earned up to the selection period of February 24, 2022, were considered. This is as per the published eligibility criteria.

62. I also note that any challenge of the FIS points threshold, the eligible competitions time period and any other challenges to the Selection Protocol are out of time. Pursuant to section 6.2 of the SDRCC Code, a Claimant has 30 days to request a review from the date they become aware of the issue. The Selection Protocol was emailed to the provincial clubs on November 29, 2021, and made publicly available on November 30, 2021. I therefore find that any challenge of the Selection Protocol ought to have taken place within 30 days from either of these dates, unless an agreement between the parties to extend the time limit or exceptional circumstances exist. No arguments for extending the time limit have been submitted. Challenges of the Selection Protocol are therefore out of time.
63. The Claimants advanced another argument. The Claimants submitted evidence showing that Claimant Howden achieved 49.5 FIS points. The Claimants submitted that Claimant Howden with 49.5 FIS points is *"as close to meeting the standard as set out by Canada Snowboard as an athlete can possibly be."* The Claimants submitted that as a result of being so close, Claimant Howden should be made eligible. I find that while he is close to the points threshold, he has not met it. While it is unfortunate, it is not enough to be close to the threshold. The threshold sets a minimum for eligibility which must be met. In the case of Claimant Howden, this minimum threshold has not been met.
64. Finally, the Claimants raised an issue with the minutes. The Claimants argued that the Respondent failed to record meeting minutes in accordance with section 29 of the Selection Protocol. The Respondent responded to this argument by claiming that this error had no material impact on the Claimants' appeal. While I do not condone this type of behaviour and stress the importance of recording all meeting minutes as required by the Selection Protocol, in this case I accept the submissions of the Respondent on this issue. I therefore find that it did not impact the Claimants' appeal.
65. I therefore conclude that the Claimants have not demonstrated that they should have been selected.

Conclusion

66. In my analysis, I came to the following conclusions:
 - i. The eligibility criteria were appropriately established;
 - ii. The decision not to select the Claimants was made in accordance with the criteria; and,
 - iii. The Claimants have not demonstrated that they should have been selected.
67. I have therefore dismissed the Claimants' appeal.
68. While I have dismissed the appeal, the Claimants, although unrepresented by legal counsel, made excellent, sophisticated arguments. I would like to commend the Claimants and Respondent for their collegiality and professionalism throughout this matter. While the

Claimants' appeal has been dismissed, it is always important to be considerate of the fact that the Claimants in this matter are highly skilled, promising young athletes with very bright futures in high performance alpine snowboarding. This fact was attested to in their submissions and in the volume of letters of support speaking to these young athletes' talents. As a result, there is an ongoing relationship between the parties which is at the heart of SDRCC hearings. Demonstrating collegiality through this process is one way to ensure the maintenance of a positive ongoing relationship. I would therefore like to commend the parties for how they have conducted themselves during this process.

Signed in Ottawa, this 31st day of March 2022

A handwritten signature in black ink, appearing to read 'D. Bennett', written in a cursive style.

David Bennett, Arbitrator