

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

N°: SDRCC 23-0681

Between:

Olivia McMurray
(Claimant)

and

Rowing Canada Aviron
(Respondent)

Arbitrator

Robert V. Wickett, K.C.

Hearing:

Appearances:

For the Claimant:	Olivia McMurray Jake Cabott (counsel) Les Honywill (counsel)
For the Respondent:	Adam Parfitt Terry Dillon Cristy Nurse

DECISION WITH REASONS

These are the reasons for my short form of decision issued on November 16, 2023 wherein I allowed the appeal of the claimant.

Introduction:

1. The claimant is an accomplished rower who hopes to row for Canada at the upcoming Paris 2024 Olympics.
2. The respondent is the National Sports Organization for the sport of rowing and is responsible for the selection of athletes to represent Canada at the Olympics.
3. The only path to selection to the Canadian rowing team at the Paris 2024 Olympics is to gain admission to the National Training Centre (the “NTC”) for rowing, located in Duncan, British Columbia.
4. The respondent established a deadline of October 2, 2023 as the date by which invitations to attend the NTC would be delivered to aspiring athletes deemed qualified to compete for a position on the Canadian Olympic team for the Paris 2024 Olympics in rowing.
5. The respondent did not extend an invitation to attend the NTC to the claimant (the “Decision”). She appeals the Decision and asks that this tribunal direct the respondent to admit her to the NTC so that she can be evaluated for inclusion on the Canadian Olympic rowing team.

Issues:

6. The claimant advances two submissions:
 - Firstly, she says that the respondent did not comply with the criteria it had established for admission to the NTC.

- Secondly, she says that the respondent's decision not to extend an invitation to the claimant to attend the NTC was unreasonable.

The Claimant

7. The claimant, now aged 27, is an accomplished sweep rower. She has been racing competitively since 2011 and has won a number of medals at the Canada Games, the Commonwealth Games and numerous regattas.
8. In 2019, she finished 10th at the senior women's pair at the National Rowing Championships (the "NRCs"), finishing ahead of two teams that were then members of the NTC.
9. Having achieved this result in 2019 the claimant set her sights on gaining admission to the NTC so that she could be considered for selection to the Canadian Olympic team for the 2024 Olympics in Paris.
10. Since 2019 the claimant has earned a number of achievements in pursuit of admission to the NTC in advance of the 2024 Olympics. In particular:
 - a. She is one of the only three women's sweep athletes to compete in the "A" Final (top 6) at every NRC in this Olympic Cycle, which began immediately after the 2021 Tokyo Olympics concluded;
 - b. She won a silver medal in the 2021 NRC, 6th place at the 2022 NRC and 4th place at the 2023 NRC;
 - c. She placed 7th in the Time Trial for the 2022 Rowing Canada Speed Orders;

d. On April 17, 2023, she won gold in the Women's Pair at the 2023 Pan American Games Qualification Regatta and finished fourth in the Women's Fours; and

e. On October 23, 2023, she won gold in the Women's Eight and silver in the Women's Pair at the Santiago 2023 Pan American Games.

(Claimant witness statement No 1, para 13)

11. Following the 2022 NRC, the claimant spoke to Carol Love, the women's program head coach for the respondent. The claimant asked Ms. Love "what she needed to do to earn a spot at the NTC". Ms. Love told the claimant that she would have to come in the "middle of the pack, not at the bottom" (para 16 claimant witness statement No. 1, para 16). I take this statement to refer to the claimant's performances in the 2023 NTC qualifying events.

12. In addition to finishing "in the middle of the pack, not at the bottom", Ms. Love told the claimant that she would need to improve her ERG score. ERG is a measurement tool derived from performance on a dry land rowing machine.

13. It is without doubt that the claimant is well qualified to compete with other rowers for admission to the NTC and thereby be in a position to compete for a spot on the 2024 Olympic team.

14. In June of 2023, the respondent held a ranking camp. This ranking camp was held to create a short list of athletes who would be eligible to compete for the 2023 World Championships.

15. The 2023 ranking camp was also designated by the respondent as an intake event for admission to the NTC for 2023. Intake events are events at which new athletes are or may be admitted to the NTC and at which existing NTC athletes can be released from the NTC.
16. The claimant qualified for and received an invite to participate in the 2023 ranking camp. Unfortunately, two days before the ranking camp was to begin the claimant came down with cold symptoms. She was required to report these symptoms to the respondent, and she did so. Consequently, the claimant was not permitted to participate in the ranking camp because of the risk of infection of other athletes. As a result, the claimant lost an opportunity to compete for admission to the NTC and to be selected for the Canadian team for the 2023 World Championships.
17. Following the ranking camp, the respondent told the claimant that there would be no further NTC intake opportunities until the 2023 NRC held in the fall of 2023.
18. The claimant competed in the 2023 NRC. The claimant and her partner Abby Dent finished 4th in Women's Pairs. Of note, the claimant and Ms. Dent defeated 7 athletes currently in the NTC.
19. In addition to finishing 4th at the 2023 NTC, the claimant had reduced her ERG score by 9 seconds over the preceding year.
20. Having finished well within "the middle of the pack" at the 2023 NRC and having significantly improved her ERG score, the claimant believed that she was qualified for admission to the NTC.

21. In September of 2023, the respondent published the Paris 2024 Olympic Nomination Policy (the "Policy"). The respondent also published an expression of interest form to be completed by athletes seeking to be considered for the 2024 Olympic team. The claimant completed and submitted the expression of interest form as required by the Policy.
22. The Policy provides that athletes selected for admission to the NTC will be notified by October 2, 2023. The claimant did not receive notification by that date. She followed up with the respondent on a number of occasions and on October 24, 2023 Adam Parfitt, the respondent's High Performance Director, sent the claimant an email advising her of the Decision.
23. Mr. Parfitt advised the claimant that she was not invited to join the NTC because "given the results at the worlds, we needed to revisit the perspective of how we use the NRC and ergometer performance for invites into the NTC..." (para 54, claimant witness statement No 1).
24. As it turned out, Canada had performed below expectations at the 2023 World Championships and had only qualified one women's boat (Women's 8) for the 2024 Olympics.
25. Although the claimant knew that she would be evaluated based upon her on water rowing results and/or her ERG score, she was not told what the achievement standard for ERG score would be, nor was she told how her ERG score ranked in relation to other athletes in the NTC.

The Respondent

26. The respondent proffered Mr. Parfitt as a witness in this appeal. As High Performance Director for the respondent, Mr. Parfitt was directly involved in the creation of the Policy and the selection of athletes to the NTC. He will also be involved in the selection of athletes for the Canadian rowing team at the 2024 Olympics.
27. The purpose of the Policy is to establish the process for selecting athletes for the 2024 World Cup Races and for the 2024 Olympics.
28. Mr. Parfitt testified at paragraph 6 of his witness statement that the primary purpose of the Policy:

...is to establish the process for selecting athletes/crews for 2024 World Cup races and ultimately nominating athletes/crews to the COC for the Olympics. The Criteria therefore establishes general eligibility requirements to be considered for nomination. **It also contemplates a process for identifying new athletes who will be invited into the existing pool of NTC athletes to be considered for and/or participate in selection activities.** (emphasis added)

29. In this regard Mr. Parfitt testified that the NTC consists of athletes who have demonstrated their readiness to compete for spots at the Olympics. Mr. Parfitt further testified that the respondent's objectives at the Olympics are to achieve a top 6 finish in each rowing event at the Olympics. This is explicitly set out in the Policy.
30. Mr. Parfitt stated that the Policy provides that invitations to the NTC can be based on different pathways. In the circumstances of the claimant, those

pathways are the 2023 World Championships, the 2023 NRC and/or her September 2023, 2km ERG score.

31. Mr. Parfitt testified (and the Policy states) that performance at the NRC's and ERG assessments are only required for those athletes who did not compete at the 2023 World Championships.
32. Mr. Parfitt testified that the claimant was tested on September 4, 2023 on the ERG machine. The purpose of this test was to determine which athletes would be available for selection to the Pan Am Games. Of the 11 athletes tested, the fastest tested at 6 minutes, 48.3 seconds and the slowest at 7 minutes 14.5 seconds. The claimant's test result came in at 7 minutes, 7.9 seconds.
33. There was no evidence before me of the claimant's ERG score relative to all of the other 18 athletes currently in the NTC. Mr. Parfitt volunteered in his oral testimony that the respondent has just completed ERG testing on the existing NTC athletes and that the claimant's ERG time of 7 minutes 7.9 seconds recorded in September of 2023 would have placed her 13th within the existing group of 18 NTC athletes.
34. As the claimant had missed the June 2023 ranking camp because of illness, the only event that she could rely upon for evaluation for entry into the NTC was the NRC held in late September, 2023. Mr. Parfitt noted that the claimant and her partner Abby Dent finished fourth in the women's Pairs at the NRC.
35. Mr. Parfitt testified as follows at paragraph 22 of his witness statement:

The HP Leadership Team met on September 25, 2023, prior to the start of NRCs, to review the World Championship outcomes, the feedback received through athlete debriefs, and to set a course forward. In this meeting, which I attended, it was confirmed that because we had only qualified eight open women's seats for the Olympics and there were already 18 open women's sweep athletes in the NTC, additional invitations into the NTC, if any were to be made, would require exceptional performances. The goal for the W8+ is to improve the crew's 5th place finish in 2023 to a podium performance at the Olympics. It was agreed that the emphasis needs to be on a structured and transparent process to reduce the number of the athletes in the NTC between opening in October and December. We considered this consistent with Section 11 and Section 13 of Schedule 'B' to the Criteria, which identifies the October to December period as a training and assessment period during which athletes may exit the NTC.

36. With respect to the claimant, Mr. Parfitt testified as follows at paragraph 27 of his witness statement:

Regarding Olivia, it was agreed that her NRC performance was positive, but not significantly better than the performances of the present pool of NTC athletes and did not compensate for the significant gap between her erg score and the scores of the core NTC group. **Simply put, RCA was only looking to invite new athletes into the NTC if it is clear that they are capable of consistently competing with – and beating – the existing pool of NTC athletes in various performance metrics and will be immediately competitive for selection/nomination. We do not believe Olivia would enhance the present options for one of the eight qualified seats.** (emphasis added)

The Policy

37. As I have previously noted, the Policy was specifically created for the 2024 Olympic Cycle.

38. As stated, the objective of the Policy is as follows;

“The objective of the Nomination Criteria is to nominate crews that have potential to accomplish RCA's National Team goal of achieving an 'A' Final position (top 6) at the 2024 Paris Olympic Games, with the ultimate aim of winning medals. In this policy, the terms 'crew' and 'crews' include single scullers.” (Article 1 of the Policy)

39. The Policy deals with all aspects of nominating athletes to the 2024 Olympics and it includes the provisions imposed by the International Olympic Committee (IOC) in its World Rowing/IOC qualification system for the Paris 2024 Olympics.

40. In addition to covering all aspects of the nominating procedure for athletes for the 2024 Olympics, the Policy has an express provision dealing with entry of athletes into the NTC. That portion of the Policy, relevant to this appeal provides as follows:

11. NTC INVITE PROCESS

In accordance with the requirements more fully detailed below, athletes may be invited to the NTC, beginning on October 16, 2023. Subject to the exemptions set out in these Nomination Criteria, athletes are invited through their results at the 2023 World Championships, 2023 Under 23 World Championships, 2023 National Rowing Championships, and/or their September 2023 2km erg score. Invites will be determined upon review of Olympic qualifications achieved, boat class strategy for 2024 (below) and performance assessment of the qualified crews and pool of NTC athletes. Invitations will be reviewed by the HP Leadership Team and extended by the HPD to athletes who RCA judges, in its sole discretion, could enhance the performance options for the RCA program. Invitations will be extended October 2, 2023.

12. BOAT CLASS DETERMINATION

Prior to invitations to the NTC being extended October 2nd, RCA performance staff and coaches will meet to review results from 2023 World Championships and Olympic qualification spots earned. A boat strategy for the 2024 season will be determined at the end of that review, including intention to pursue any boats through the Final Olympic Qualification Regatta process. Final review of the boat strategy will be completed with the Selection Panel and CEO and published September 26th, 2023.

41. Also relevant to this appeal, the Policy provides a wide discretion to the respondent if it wishes to remove an athlete from the NTC. Article 17 of the Policy provides as follows;

17. REMOVALS FROM NTC, NOMINATION ACTIVITY AND/OR IDENTIFIED GROUP

Removals from the NTC or any identified crew/team will be informed by:

- Inability to maintain high training standards.
- Inability to meet performance expectations in training or competition,
- If the athlete has not fulfilled his/her responsibilities as identified in the RCA Athlete Agreement.

It is understood that the objective of these Nomination Criteria is to identify athletes and crews with the potential to contribute to RCA's performance goals, as described herein. Subject only to the RCA Athlete Agreement or another applicable policy of RCA, RCA reserves the right to remove any athlete from the NTC or any identified crew/team at any time for any reason or reasons as outlined above. Removals shall be at the sole discretion of the relevant members of the HP Leadership Team and, except where a serious breach of the Athlete Agreement or other RCA policy is involved, should include an initial warning, verbal or otherwise, clarifying where expectations have not been met and the required action.

Discussion and Analysis

42. As I have stated earlier in this decision, the claimant advances two grounds of appeal. The first ground is that the respondent did not comply with the Policy in refusing the claimant admission to the NTC. The second ground is that the decision to refuse to admit the claimant to the NTC was unreasonable.

43. Section 6.10 of the Canadian Sport Dispute Resolution Code (the "Code") provides the following in respect of carding and selection disputes;

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 approximately 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 approval criteria. Each onus shall be determined on a balance of probabilities.

44. In this appeal it was conceded by the claimant that the respondent has demonstrated that the criteria for admission to the NTC were appropriately established. The criteria established for admission to the NTC are set out in Articles 11 and 12 of the Policy, quoted above at paragraph 40.

Issue 1

45. The first issue raised by the claimant poses the question of whether the respondent has established that the Decision was made in accordance with the criteria established in the Policy.

46. The respondent submits that it has proven that the Decision was made in compliance with Sections 11 and 12 of the Policy. The claimant demurs.

47. The burden remains upon the respondent to demonstrate that the Decision was made in accordance with the Policy. If the respondent meets this burden then the onus shifts to the claimant to demonstrate that she should have been selected for admission to the NTC in accordance with the Policy.

48. In the particular circumstances of the claimant, the selection criteria as established by the Policy require the respondent to assess the claimant

through her results at the 2023 NRC. The Policy provides that an assessment can be made at the 2023 ranking camp, the 2023 World Championships or the Under 23 World Championships. The claimant was not eligible for the Under 23 World Championships because of her age (age 27) and she was unable to perform at the 2023 ranking camp (because of sickness) which could have qualified her for selection to the 2023 World Championship Team. The 2023 NRC provided the claimant with her only opportunity to qualify for admission to the NTC.

49. In addition to performance at one of the events described above, the Policy permits the respondent to base its assessment of the claimant for admission to the NTC upon her September 2023 ERG score.
50. The Policy further provides that “invites will be determined upon review of Olympic qualifications achieved, boat class strategy for 2024 (discussed below) and performance assessment of the qualified crews and pool of NTC athletes.” The Policy further provides the judges making the determination about whether the claimant (and others) would be admitted to the NTC is based on their determination that the claimant “could enhance the performance options for the RCA program”.
51. Although the Policy grants the respondent wide latitude to exercise its expertise in choosing athletes for admission to the NTC, it is obliged to comply with the Policy and to demonstrate that it has done so. This is essential in the team selection process to ensure transparency and fairness. Athletes are

entitled to know what the selection criteria are and, if not selected for the NTC, the reasons they did not meet the standard.

52. To establish that the Decision was made in accordance with the Policy the respondent is required to establish that it fairly assessed the claimant's performance at the 2023 NRC and/or her 2023 ERG score relative to other NTC athletes and applicants.
53. I consider it important that Mr. Parfitt testified that the respondent would only consider athletes for admission to the NTC if they are capable of consistently competing with and beating the existing pool of NTC athletes and being immediately competitive for selection or nomination (to the Olympic team). He further testified that the respondent does not believe that the claimant would "enhance the present options" for one of the 8 Olympic spots. (para 27, Adam Parfitt witness statement).
54. I observe that although there will only be 8 women ultimately selected for the Olympic team, there are 18 athletes currently in the NTC and it is admission to the NTC that is at issue in this appeal.
55. I consider this approach to be an error and contrary to the provisions of the Policy. The Policy does not state that admission to the NTC will be granted only to those who can demonstrate that they are "immediately competitive for selection/nomination" to one of the 8 positions available on the Olympic team. Application of that standard is certainly correct in the process of selecting the team to compete at the 2024 Olympics (see article 1 of the Policy) but that is not the objective at this stage. Rather, the Policy provides that athletes will be

selected to the NTC who “could enhance the performance options for the RCA program” (article 11 of the Policy). In my opinion, the Policy requires the respondent to evaluate the claimant against all of the athletes in the NTC, not just those at the highest level.

56. The claimant had a strong performance at the 2023 NRC’s, finishing fourth with her partner Abby Dent. As noted above, the claimant finished ahead of several other athletes currently in the NTC.
57. Mr. Parfitt fairly conceded in his evidence that the claimant had a strong performance at the 2023 NRC relative to the other athletes within the NTC and that the reason for the Decision was the claimant’s poor ERG score as recorded in September of 2023. The Policy provides that the September 2023 ERG score is the second metric of evaluation that the respondent would utilize to evaluate athletes competing for admission to the NTC.
58. With respect to the claimant’s ERG score, the evidence before me was unsatisfying. The claimant was told that she had to “improve” her ERG scores to be considered for admission to the NTC. Upon receipt of that advice the claimant made effort to reduce her ERG score, reducing it by nine seconds. The claimant was tested in September 2023 as required by the Policy but there was no evidence tendered in this appeal as to the ERG scores of the other athletes in the NTC, nor was there any evidence tendered as to the claimant’s ERG score relative to other NTC athletes as of September of 2023. As I have noted above, the only evidence on this point came from Mr. Parfitt who testified that recent testing of NTC athletes had recently completed and if the claimants

September 2023 ERG score is compared to those recent results, she would have placed 13th out of 18 athletes.

59. Mr. Parfitt explained there was no specific ERG target established for admission to the NTC because the respondent did not know how many boats would qualify for the Olympics. I accept that no specific ERG standard could be established prior to release of the Policy.
60. That said, once the spots qualified for the Olympics were known, the respondent was obliged to assess the ERG score of the claimant relative to the other NTC athletes so that it could make a fair determination about whether the claimant could “enhance the performance options for the RCA program”.
61. I am unable to determine on the evidence whether the respondent evaluated the claimant's September 2023 ERG score against the ERG scores of existing NTC athletes and, if it did, how that evaluation related to her on water performance at the NRC.
62. At para 33 of his witness statement Mr. Parfitt stated as follows:

On October 30, 2023, Tom and I spoke with Olivia personally and further explained the decision not to invite her into the NTC. The primary message I attempted to convey is that, with a Nomination Camp beginning in March 2024, there is not sufficient time to bridge performance gaps. Given that we have only qualified eight seats, any new athletes invited into the NTC at this stage need to be “complete” athletes, with competitive performances both on the water and on the erg, capable of immediately contesting spots in an Olympic boat. The assessment of the HP staff is that Olivia is not in this position.

63. I have no doubt that the assessment of the HP staff was made in good faith but, with all due respect, that is not enough. As stated by the arbitrator in *Sébastien Beaulieu, Kaylie Buck, Darren Gardner, Jenifer Hawkrigg and Jules*

Lefebvre v Canada Snowboard (SDRCC 22-0544/45/46/48/49), a decision of this tribunal in a team selection dispute in the sport of snowboarding:

I have no doubt that the Respondent acted in good faith in making its initial team selection decision. But good faith is not enough. They should be reminded that not only should they apply the very selection criteria they have enacted, in its entirety, but when these criteria are subjective, they have a duty to explain to the athlete, and then to the arbitrator, how they came to reach this decision. And if they did not/could not apply some of the listed criteria, a convincing and meaningful explanation should be provided. This was unfortunately not done, therefore opening the door to my review.

64. I agree with these comments and repeat that in my opinion, the respondent appears to have imposed a performance standard (capable of immediately contesting spots in an Olympic boat) that does not appear in the Policy.
65. There is one other matter to mention in relation to adherence with the Policy. Although not substantively relevant to the evaluation of the claimant, the respondent did not publish a 2024 boat strategy by September 26, 2023 as required by the Policy. Although a boat strategy was created by the respondent and released privately to the existing NTC athletes, it was not released publicly. Publication of the boat strategy requires release to all athletes, not just those already admitted to the NTC.
66. The respondent has not met the burden imposed upon it to demonstrate that it applied the criteria set out in the Policy in making the Decision. I therefore conclude that the claimant must succeed in her first ground of appeal.

Issue No. 2

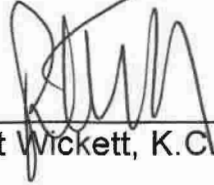
67. In light of my conclusion with respect to Issue No. 1, I will not address the reasonableness of the Decision.

Conclusion and remedy

68. In a perfect world, the remedy on this appeal would be a direction to the respondent to reconsider the claimant for admission to the NTC based on these reasons. That remedy is not practical because the evaluation and training period for existing NTC athletes for the Olympics has already commenced. Time is of the essence.

69. The respondent advises that there are no formal limits on the number of athletes admitted to the NTC. The respondent noted that there will be a dilution of the coaching time available for each individual athlete if the claimant is admitted to the NTC but there will be no other prejudice to existing NTC athletes. I therefore direct the respondent to admit the claimant to the NTC for the purpose of training and evaluation for selection to the 2024 Olympic team.

Signed in Vancouver, this 29th day of November, 2023.



Robert Wickett, K.C., Arbitrator