

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA**

BETWEEN:

KATE NOSWORTHY

Claimant

-and-

TAEKWONDO CANADA (TC)

Respondent

AWARD WITH REASONS
(Hearing held March 13, 2017 by Conference Call)

Larry Banack
The Arbitrator

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A. Introduction

1. This arbitration concerns the selection protocol (the “Protocol”) implemented by Taekwondo Canada (“TC”) in respect of its team for the 2017 Universiade competition in Taipei (“Universiade”), scheduled to take place on August 19-30, 2017.

2. The Claimant, Kate Nosworthy, is a nationally-accredited Taekwondo coach and is involved with the drafting and consideration of TC selection policies. Ms. Nosworthy, on her own behalf and as the authorized representative for two of her student athletes, initiated these proceedings with a Request for Arbitration under section 3.4 of the Canadian Sport Dispute Resolution Code (“Code”), seeking a ruling that TC’s selection of the Kyorugi (sparring) team for Universiade was unfair, and that a new protocol setting out a different selection process should be put in place.

3. Fifteen Affected Parties submitted Intervention forms as required under section 6.13 of the Code. Eight of these Affected Parties participated during the hearing of this matter on March 13, 2017.

4. Although it had been agreed that I would release a short decision today followed by a final Award with Reasons in a week, I do not consider that necessary. This document is sufficient for both purposes.

B. Jurisdiction

5. The parties have expressly agreed that I have jurisdiction over this dispute pursuant to section 2.1(b) of the Code. In light of the urgency of the matter the parties agreed to bypass TC's internal appeal and submit the dispute for resolution to the SDRCC.

C. The Protocol and Relevant Background

6. On February 9, 2017, prior to the release of the Protocol, TC published a notice on its website alerting athletes that the deadline for submitting a letter of interest for selection to the Universiade team would be on February 24, 2017.

7. The Protocol was released by TC on February 15, 2017. Its stated objective "is to identify the best Canadian athletes to be named to the Universiade team".

8. The Protocol does not provide any specific eligibility criteria relating to the Universiade competition, but rather states that athletes must satisfy the "eligibility requirements of the World Taekwondo Federation (WTF), Fédération Internationale du Sport Universitaire (FISU) and Taekwondo Canada".

9. The Kyorugi selection process is set out in the Protocol as follows:

- a. Interested athletes must submit a letter of interest to TC by February 24, 2017;
 - b. Selection will be based on the results of the 2017 Canadian National Championships in Montreal (“Montreal Nationals”), scheduled to take place on March 4-5, 2017.
 - c. Of those athletes that have submitted a letter of interest, those finishing highest at the Montreal Nationals in a particular weight division will be named to the Universiade team for that same weight division.
 - d. In case not all team spots are filled at the Montreal Nationals, interested athletes who participated, or have a valid medical exemption, may submit expressions of interest to fill the available spots to TC by March 10, 2017. Those athletes that submitted an initial letter of interest by the February 24, 2017 deadline will be given higher priority.
10. Selection for the Poomsae team sets out a similar process, however the selection competition is the Canadian National Championships in Calgary (“Calgary Nationals”, taking place in May, 2017), rather than the Montreal Nationals. The Protocol as it relates to the Poomsae team selection has not been challenged and is therefore not addressed in this award.
11. The Protocol provides that “final decisions on the selection of athletes to participate on the Universiade Team shall be made by the [TC] Executive Director”.
12. Ms. Nosworthy’s Request for Arbitration challenging the Protocol was filed with the SDRCC on February 24, 2017.

13. On February 26, 2017, TC consented to a Provisional and Conservatory Measure sought by Ms. Nosworthy and posted a notice on its website on February 27, 2017 that “the Universiade selection criteria are currently under appeal. If the appeal is successful it is possible the Universiade team selection may be amended”.

14. The Montreal Nationals took place as scheduled on March 4-5, 2017 and selections based on the Protocol were made for the Universiade Kyorugi team. The selections to the Universiade team have not been publicly posted pending the resolution of this arbitration.

D. Positions of the Parties

i. Claimant and Affected Parties supporting Claimant

15. Ms. Nosworthy submits that the Protocol is deficient and unfair in the following principal respects.

- a. Short notice: Ms. Nosworthy submits that the 2-week period between the Protocol’s publication and the Montreal Nationals provided interested athletes with insufficient notice and inadequate time to prepare and peak for the competition.
- b. Reasonable expectations of athletes: Ms. Nosworthy submits that athletes interested in competing at Universiade, until the Protocol’s publication on February 15, 2017, would have had no reasonable expectation that the Montreal Nationals would serve as the sole selection event. Specifically, by the time that expressions of interest in Universiade were sought by TC on February 9, 2017, Ms. Nosworthy submits that no athlete could have expected that the Montreal Nationals would be used as the sole selection event on less than one month’s notice. Ms. Nosworthy also submits that it was widely known that the Montreal Nationals had been scheduled in March (as

opposed to May, the typical time for Nationals) expressly for the purpose of serving as the selection event with sufficient lead-time for the World Championships, which are scheduled for August. Given that TC historically has not used Nationals as a sole selection event for more than one international competition, Ms. Nosworthy submits that athletes could not have reasonably anticipated the selection process set out in the Protocol.

- c. Lack of communication and transparency with eligibility criteria: Ms. Nosworthy submits that TC failed in its duty to advise its athletes who may or may not be eligible for selection to the Universiade team. In particular, she refers to the FISU eligibility criteria that are referenced in the Protocol, which provide that eligible athletes must be “presently enrolled and studying at a university [...] or they must have acquired a diploma from the [university] within a year before the event”. Ms. Nosworthy submits that this criteria, without any clarification from TC in the Protocol, led to significant confusion on the part of some athletes who may have been interested in competing at Universiade: specifically, athletes currently in their last year of high school who would be attending (or planned on attending, subject to receiving still outstanding acceptance letters) university in the fall. Ms. Nosworthy submits that TC provided no broadly published clarification of these criteria, and instead offered sometimes conflicting advice directly to athletes in response to specific inquiries.
- d. General unfairness and failure of Protocol to select the best possible athletes: Ms. Nosworthy highlights two additional issues that arise from the Protocol. First, the Protocol may fail in its objective of selecting the best possible athletes for Universiade, because an eligible athlete who loses at the Montreal Nationals to an

ineligible (i.e. non-university) athlete may have otherwise been among the best possible **eligible** athletes to compete at Universiade. Second, Ms. Nosworthy submits that the Medical Injury clause, which is triggered only in cases where there are remaining available spots on the team following the Montreal Nationals, may unfairly deprive athletes who are battling injuries at the time of the Montreal Nationals from competing at the Universiade, again raising the risk that the best possible athletes may not be selected for the team.

16. In her responding submissions, Ms. Nosworthy argues that the Protocol also violates TC's Athletes' Bill of Rights Policy, which provides for "the right to an equal opportunity to strive for success free from inequitable barriers", and "the right to advance the widest array of athletic goals of all participants [...] free from barriers based on personal circumstances". The above rights are expressly noted to include the right to "receive equitable treatment, benefits, and objective assessment involving [...] team selection".

17. Ms. Nosworthy does not propose any specific selection process to replace the Protocol. She submits that an alternate method should be "fair and equitable for all, and transparently communicated", and could include an "application procedure, additional event, or something else [TC] may come up with". She highlights that despite TC's claims to the contrary, there was no particular urgency to select the Universiade Kyorugi team, because selection for the Poomsae team is not to take place until the Calgary Nationals in May.

18. Four Affected Parties submitted Intervention forms in support of Ms. Nosworthy's position: Evelyn Gonda, Fung Cheung, Tyler Wiebe, and Rachel Zanyk.

19. Mr. Cheung and Ms. Wiebe are coached by Ms. Nosworthy. In their respective cases, Ms. Nosworthy (as their authorized representative) submits that due to the short notice and lack of transparency and communication surrounding the Protocol, both athletes for different reasons were deprived of the opportunity to even compete for a place on the Universiade team.

20. Similarly, Ms. Zanyk (through her authorized representative) explained that had she known earlier that the Montreal Nationals would serve as the selection competition for Universiade, she would have registered under a different weight category and had sufficient time to make that weight. For her part, Ms. Gonda (through her authorized representative) emphasized that learning of a selection Protocol on such short notice ahead of a competition is highly stressful for athletes, and that it sets a dangerous and “negative” precedent for TC going forward.

ii. Respondent and Affected Parties supporting Respondent

21. Ms. MacDonald, the Executive Director of TC, acknowledges that the short period of time between the publication of the Protocol and the Montreal Nationals was far from ideal. Ms. MacDonald noted in her submissions, in fact, that TC’s best practices for team selection would provide for a 6-week period between the publication of a selection protocol and the relevant selection competition at a minimum, and ideally this period would be even longer (2 to 3 months).

22. That said, TC denies that the Protocol gave rise to any unfairness for its athletes, or that it failed to achieve its stated objective of selecting the best possible team for Universiade.

23. TC’s main response is that even before the Protocol’s publication, any athlete capable of competing at a sufficiently high level to consider attending Universiade would have already considered the Montreal Nationals as a “must-attend” event on their calendar, for two reasons. First, as it was known that the Montreal Nationals would serve as the selection event for the World

Championships, all of Canada's highest performance athletes would have already planned on attending. Second, even for those athletes not interested in the World Championships, the Canadian Nationals have always (for at least the past 5 years) been included as an important (though not sole) factor in the Universiade team selection.

24. Essentially, TC asserts that the Protocol's use of the Montreal Nationals as the sole selection event for Universiade should not have come as a surprise, and that the (admittedly short) 2-week notice period therefore did not cause any unfairness or undue hardship to athletes that wanted to be selected for that team.

25. TC also denies that there was any lack of transparency or communication surrounding the Protocol's eligibility criteria for Universiade. According to TC, when athletes were asked to submit letters of interest on February 9, 2017, the governing international bodies (namely FISU) had still not finalized the Universiade eligibility criteria, so there was nothing meaningful to communicate at that time. For that reason, athletes were merely asked to express their interest, and it was open to all athletes (whether current high-school students or otherwise) to do so. Any athlete that self-selected by not expressing interest based on assumptions as to the Universiade eligibility criteria, did so on their own initiative, and not as a result of any failure on the part of TC or the Protocol itself.

26. Eleven Affected Parties submitted Intervention forms in this arbitration in support of TC and the Protocol. For the most part, these Affected Parties are athletes who participated at the Montreal Nationals, and were successful in securing a spot on the Universiade team. They contend that any change to the Protocol at this time would lead to significant financial and athletic hardships, particularly if a new selection protocol required them to compete at some additional

event(s) between now and the Universiade (the likeliest candidate being the Calgary Nationals). In several cases, athletes that have tentatively secured spots on the Universiade team by their success in Montreal would – if the Protocol were replaced with some other selection process – necessarily lose their spot because scholastic or financial constraints make it impossible to attend another meet if conducted in May, 2017.

E. Reasons

i. Applicable legal principles

27. First, I note that the onus lies on Ms. Nosworthy to establish on a balance of probabilities that the Protocol should be vacated.

28. Though I am not bound to do so, I consider the following passage from Arbitrator Hedley’s decision in *Forrester v. Athletics Canada* (SDRCC 10-0117, Hedley, March 18 2010) to be a useful statement of the threshold for any arbitral intervention in this type of dispute:

53. As Arbitrator Richard Pound, Q.C. pointed out in the decision *Palmer v. Athletics Canada* (SDRCC 08-0080, Pound, July 2 2008), arbitrators “will be willing to do so (and are required to do) only when it has been shown to their satisfaction that the impugned decision has been so tainted or is so manifestly wrong that it would be unjust to let it stand”

54. In other words, there must be an extremely compelling case made in order that the results of the team selection process can be interfered with, even if an irregularity appears in the process, which may have had some bearing on the ultimate fairness of how the criteria are applied.

29. Arbitrator Hedley found that while he believed a “good case has been made” that Athletics Canada had violated procedure, he chose to not rule on that question, concluding that in any event the “result is not so badly tainted as to compel me to act on it in the manner preferred [by the Claimant].”

30. I am also guided by TC's Athletes Bill of Rights, as put to me by Ms. Nosworthy. With this in mind, I turn to the facts of this case.

ii. Events leading to the Protocol's late publication

31. Both Ms. Nosworthy and TC agree that having only 2 weeks between the release of the Protocol and the Montreal Nationals was far from ideal. That said, there is some ambiguity in the evidence as to why exactly the Protocol was released on such short notice ahead of the Montreal Nationals.

32. Ms. Nosworthy, who is herself closely affiliated with TC and a member of TC's staff, noted that she was in talks with TC's High Performance Director as early as October, 2016 with regard to the Universiade team selection protocol. Ms. Nosworthy asserts however that it was never her responsibility to develop the selection protocol, and that by December, 2016 she and the High Performance Director were still waiting on information from FISU as to the Universiade eligibility criteria. In January 2017, the minutes of a TC staff meeting (which Ms. Nosworthy did not attend), indicate that the TC Coaching Committee would work on the Universiade team selection criteria. Ms. Nosworthy submits that she also inquired directly with Ms. MacDonald in or around this time as to the status of the Universiade selection protocol, and was advised that it was being considered by the TC Board of Directors prior to its final publication.

33. There is insufficient evidence for me to reach any conclusion as to the reason for TC's late release of the Protocol. Without assigning blame to any particular individual or group, I am merely left to conclude that TC found itself in a position in February 2017 whereby it felt compelled – rightly or wrongly – to release a team selection protocol for Universiade on unusually short notice.

34. Whereas in past years Universiade teams would have been selected based on an application process factoring in results from multiple competitions, TC came to the conclusion this year that its best (and perhaps only) option was to have the Montreal Nationals serve “double-duty” as the selection event for both World Championships and the Universiade.

iii. No grounds to justify vacating the Protocol

35. I share the parties’ common view that the 2-week period between the Protocol’s release and the Montreal Nationals was too short. That said, I am not persuaded that the Protocol should be vacated and a new selection process put in place for the Universiade team.

36. I come to this conclusion for two principal reasons.

37. **First**, I do not find that any of TC’s conduct surrounding the Protocol – while certainly less-than-ideal and an “irregularity” within the meaning described by Arbitrator Hedley – rises to the level of conduct that “so badly tainted” the Universiade team selection as to justify any kind of arbitral intervention.

38. I accept that TC acted in good faith and with the goal of selecting the best possible athletes for Canada’s Universiade team. Although the late publication of the Protocol and use of the Montreal Nationals as the sole selection event took at least some athletes by surprise, there is no evidence that these athletes received any inequitable **treatment** from TC (which would for example violate the TC Athletes Bill of Rights and could justify arbitral intervention), but only

that they suffered adverse **consequences** due to their pre-existing circumstances¹ and prior decisions.²

39. **Second**, based on the submissions of all Affected Parties, I find that any decision requiring a change to the Protocol at this time would cause as much (if not more) hardship on athletes as it might prevent or rectify.

40. I accept the submissions of the four Affected Parties who support Ms. Nosworthy's claim: had the Protocol been published earlier, and had TC done more to clarify the Universiade eligibility criteria (as they were known at the time) for its athletes, these athletes would likely have made different decisions and at least had a chance to compete for a spot on the Universiade team. However, I must also accept submissions of the eleven Affected Parties who support TC and the *status quo* of the current Protocol. Most of these athletes competed at Montreal Nationals, and despite the late publication of the Protocol and any other "irregularities" in TC's conduct, by the time they stepped onto the mat in Montreal they knew they were competing for a spot on the Universiade team. To vacate the Protocol and intervene in the team selection process would deprive these athletes of a hard-fought and well-earned spot at an important international competition.

41. In considering the relief sought in this arbitration, I am left to weigh the hypothetical "lost chance" suffered by those Affected Parties supporting Ms. Nosworthy against the more tangible adverse consequences that would befall the Affected Parties supporting TC if the Protocol were vacated.

¹ For example, Ms. Wiebe's injury.

² For example, Mr. Cheung's decision to compete at the US Open rather than the Montreal Nationals.

42. This arbitration raises the difficult scenario in which none of the affected athletes or coaches on both sides of the dispute have committed any wrongdoing whatsoever. As noted above, TC's conduct, while irregular and leaving room for improvement in the future, also does not rise to the level of wrongdoing.

43. In the absence of any wrongdoing by any athletes, coaches, or TC itself that demands some correction, I am unwilling to intervene in the Universiade team selection, as doing so would only make the overall situation worse.

F. Conclusion

44. In conclusion, I commend Ms. Nosworthy for taking what was undoubtedly the difficult decision of initiating these proceedings in order to protect the interests of her athletes and the integrity of TC's team selection process.

45. For the foregoing reasons however, I dismiss the Claimant's Request. The Protocol is to remain in place for the 2017 Universiade team selection, including selections based on the results from the Montreal Nationals.

Dated at Toronto, this 15th day of March, 2017

A handwritten signature in black ink, appearing to read 'L.B.', enclosed within a large, hand-drawn oval.

**LARRY BANACK
ARBITRATOR**

Appendix A
SDRCC 17-0320
Affected Parties

Hayk Amirbekyan
Ashlyn Arnold
AJ Assadian
Zakaria Benaouda
Emmanuelle Boudreau
Dave Bouffard
Shane Britton
Éthienne Brunet
Erika Caldwell
Jackson Carroll
Hunter Carroll
Kai Cayenne
Crystal Chan
Jaden Chong
Justin Choy
Fung Cheung
Samuel Coutu
Rachel Cuma
Andrew Cunnane
Maria Alvie Dela Cruz
Daniya Dhillon
Miguel Diaz
Anya Ettinger
Richard Gao
Sebastian Goh
Evelyn Gonda
Khalid Hassan
Cathy Ho
Raha Hojjati
C J Huard Berro
Chanelle Hunter
Ethan Jenkins
Thomas Jeongho Song
Andrea Jerom
Alissa Juman

Hanson Koh
Chloe Lee
Dagyeong (Kara) Lee
Mina Lee
Brandon Ly
Camille Marulanda
Seddik Mégraoui
Kim Migneault
Cameron Mitchell
Dylan Nadler
Romandeep Padda
Éloi Paradis-Deschênes
Skylar Park
Maria Inez Philip
Kelvyn Pincherli-Castellanos
Chloé Plante
Ruxandra Rodgers
William Rodgers
Gabrielle Rousseau
Keven Saint-Jean
James Saleh
Raphael Salvail
Dalton Samson
Anas Sghir
Angela Sinilaite
Jordan Stewart
Adam Tomlinson
Viviane Tranquille
Matthew West
Tyler Wiebe
Kaitlyn Wiens
Taye Williams
Rachel Zanyk