

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

**NO: SDRCC 18-0348**

**DEREK PLUG**  
**(CLAIMANT)**

**AND**

**BOBSLEIGH CANADA SKELETON (BCS)**  
**(RESPONDENT)**

**AND**

**JOEY NEMET**  
**SAMUEL GIGUÈRE**  
**BEN COAKWELL**  
**BRYAN BARNETT**  
**(AFFECTED PARTIES)**

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**Attendees at hearing:**

For the Claimant: Derek Plug, Represented by Rebecca Robb and Julia E. Roos

For the Respondent: BCS, Represented by Sarah C. Storey

For the Affected Parties: Ben Coakwell  
Samuel Giguère  
Joey Nemet

## DECISION

### OVERVIEW

1. This case concerns a decision by the Canadian Olympic Bobsleigh Selection Committee (“the Selection Committee”), of Bobsleigh Canada Skeleton (“BCS”), dated January 19, 2018 not to select Derek Plug as part of the Canadian Olympic Bobsleigh Team (“the Olympic Team”) for the 2018 Winter Olympic Games.
2. Derek Plug filed an appeal before the SDRCC on January 22, 2018. As the selection of the Olympic Team had to be finalized by January 28, 2018, the issues were dealt with on an urgent basis.
3. I held a preliminary call with the parties on January 23, 2018 to discuss the arbitration process. The parties agreed on a timeline to file written submissions and statements. It was agreed that BCS would proceed first in the hearing, followed by the Claimant, with a final opportunity for BCS to reply. Subsequently, three affected parties (athletes who had been selected for the Olympic Team, as either competing athletes or as Alternate Athletes) filed Intervention forms and were permitted to participate in the hearing.
4. The parties filed written submissions in accordance with their agreed-upon schedule and participated in a lengthy hearing by conference call on January 27, 2018.
5. On January 28, 2018, I issued a short decision with reasons to follow pursuant to Article 6.21 c) of the Canadian Sport Dispute Resolution Code (“Code”)
6. These are the reasons for my decision.

## **JURISDICTION**

7. BCS Appeals Policy states at sections 19 and 20 that:

*19. All differences or disputes shall first be submitted to appeal pursuant to the appeal process set out in this Policy.*

*20. If any party believes the Appeal Panel has made an error such as those described in paragraph 8 of this Policy, that party may refer any dispute, other than those related to the AAP, to independent arbitration through the Sport Dispute Resolution Centre of Canada (SRDCC) provided the party does so within the prescribed timeline as set out by the SRDCC [...].*

8. After the Claimant filed his appeal to BCS on January 22, 2018, for the sake of expediency both parties agreed to bypass BCS's internal appeal process and refer their dispute directly to the SDRCC.

## **BACKGROUND**

9. The Claimant is a member of the National Bobsleigh Team for BCS, specializing in the four-man bobsleigh event as a brakeman. There is no doubt that he is a brakeman with the drive and competitiveness of a world-class athlete. On January 18, 2018, Head Coach Todd Hays ("Coach Hays") informed the Claimant that he would not be selected for the Olympic Team. Although the evidence differed about the words that were used, there was no dispute about the message: Coach Hays would not be recommending that the Claimant be named to go to the Olympics.

10. I heard evidence about three incidents that led Coach Hays to not nominate the Claimant to the Olympic team. Although the evidence was contested, it is not necessary to draw conclusions on the first

two incidents since those incidents are not being adjudicated before me. The Request form, filed by the Claimant, only made reference to the most recent incident. I will provide a brief description of the first two incidents while acknowledging that there are differing views of what transpired.

11. In the first incident, during an ice house training session in the summer 2017 in Calgary, the Claimant hit a wall with his hand. There was some discussion with the Claimant about the incident. Coach Hays testified that he issued the Claimant a warning for a violent outburst; the Claimant testified that he hit the wall to get excited, that the gesture was not violent and that he was never issued a verbal warning.
12. In the second incident, which took place in early December 2017, the Claimant hit the wall in the hotel hallway with his hand. Although he believed he was alone, it was witnessed by at least one or two other athletes. This led to a meeting with coaches Hays, Alexander, and Richardson to discuss the behaviour. Again, there are factual disputes about what was said in the meeting. BCS maintained at the hearing that the Claimant was issued a verbal warning. The Claimant denied that he was issued a verbal warning, but did acknowledge that he hit the wall at a time when he was concerned about his particular training assignment.
13. The final incident occurred during the week of the World Cup in Koenigssee, Germany (on January 17, 2018). The Claimant was late for a training session. The Claimant explained at the hearing that he assisted his teammates in loading his sled into the truck, then proceeded to the gym for his own training, and then made it on time for the scheduled sliding practice. However, in cross-

examination by one of the affected parties, the Claimant acknowledged that the sled that he assisted with was not the one that he used.

14. BCS's position was that the Claimant was expected to travel with his teammates to the training session and to assist with the preparations and equipment. Coach Hays testified that the scheduled training session was a team event and that it was not an option for athletes to skip the preparation for their own training. Coach Hays testified that by the time the Claimant arrived at the training session, he had already asked another athlete to warm up since he was unsure if the Claimant was going to attend. He told the Claimant that he could participate in the training session, but that there would be a further conversation about the incident.
15. On the following morning (January 18, 2018), the Claimant was informed by Coach Hays that he was being sent back to Canada and would not be nominated for the Olympic Team. Coach Hays testified that the Claimant's behaviour had been disruptive to the team at a time when they were trying to complete the evaluations, select the Olympic team and also compete the final qualifying runs before the Olympics. The Claimant asked if he would be considered as an Alternate Athlete and he was told that he would not be nominated for this role.

## **OLYMPIC TEAM SELECTION PROCESS**

16. The selection process for the Olympic Team is governed by the Bobsleigh Canada Skeleton Olympic Selection Agreement ("the Selection Agreement").

17. Under the Selection Agreement, the Head Coach is responsible for determining which athletes are nominated to the Selection Committee. The Head Coach may also nominate "P Alternate Athletes", also occasionally referred to as "P athletes" or "athletes meeting the P Criteria" ("the Alternate Athletes"), which only become athletes during the Olympic Games if a replacement is required. I will have more to say about Alternate Athletes further in this decision.

18. The Head Coach has discretion under the Selection Agreement. The relevant article reads as follows:

**2.4. BCS DISCRETION**

*The NBP-HC [National Bobsleigh Program Head Coach] and/or BCS shall use discretion in accordance with this Agreement and/or in the event of unforeseen circumstances such as but not limited to:*

*a) Injury or long term sickness resulting in missed competitions within the BCS-QP [Qualification Period];*

*b) In the event of a tie that is not broken by clause **2.2.1** herein;*

*c) "Acts of God" (adverse weather conditions or other external factors resulting in modified or cancelled competitions);*

*d) "IBSF Rulings" (decisions made by the IBSF which impact the nations rankings or athlete results / qualification standards); and/or*

*e) such other circumstances and/or events that in the determination of the Selection Committee warrants the use of discretion, as set out in clause **2.2** or **2.3** herein.*

19. If the Head Coach uses discretion, he must also consider the Performance Score Rubric and Performance Indicators. It is clear that these are not determinative and that the Selection Committee may consider other factors that it deems appropriate in the

circumstances. The relevant article of the Selection Agreement reads as follows:

<b>PERFORMANCE SCORE RUBRIC</b>
<p><b>1. QUANTITATIVE SCORE - MAX 12 POINTS (80% Weighting)</b> <b>A: APE Points / 100</b></p> <p><i>Refer to Appendix B: BCS APE Tables - Bobsleigh</i></p> <p><b>B: Previous Results</b></p> <p><i>1 point = 2 or more WC medals in the 2016/17 or 2017/18 season</i></p> <p><i>2 points = 1 or more WCh medal at the 2017 WChs</i></p>
<p><b>2. QUALITATIVE SCORE - MAX 8 POINTS (20% Weighting)</b></p> <p>The Athlete's demonstrated:</p> <p><b>A: Commitment to BCS programs</b></p> <p><b>B: Ability to take personal responsibility for self and their results</b></p> <p><b>C: Ability to work within a team structure</b></p> <p><b>D: Understanding and respect for their position on a Canadian National Team</b></p> <p><b>E: Willingness to promote BCS in a positive manner</b></p> <p><b>F: Contribution towards a positive daily training/competition environment</b></p> <p><b>G: Respect towards BCS coaches and staff</b></p> <p><b>H: Respect towards their fellow teammates</b></p> <p><i>-1 = Unacceptable or nonexistent</i></p> <p><i>0 = What is expected of a national team athlete</i></p> <p><i>1 = World class, an example to others</i></p> <p><b>PERFORMANCE SCORE = ((1A+1B)*4/3) + ((SUM(2A:2H))*1/2)</b></p> <p><i>Refer to Appendix C: Performance Score Calculation Example - Bobsleigh</i></p>

20. Coach Hays testified that the decision to send the Claimant home was made after he was late for practice. He explained that the teammates were under stress from the Olympic Team selection process and he knew that he would not be nominating the Claimant to the Olympic Team.
21. Coach Hays explained that the coaching staff had been collecting data from various races and training exercises (e.g. the push-off results). The data was tracked in a chart and was used to measure the performance of the athletes. After examining the Quantitative Scores of all candidates, it was apparent to Coach Hays that the Claimant was third from the bottom, in a group of 12 athletes still being considered to fill nine quota spots on the Olympic Team and two Alternate positions.
22. Coaches Hays and Alexander completed the Qualitative Rubric based on the Claimant's ability to work in a team structure. He explained that this was particularly important for the selection of Alternate Athletes since it was difficult to travel to the Olympic Games without being allowed to stay in the Athlete's Village and enjoy the other benefits of being on the Olympic Team.
23. It was apparent to Coach Hays and the coaching staff that the Claimant would only qualify as an Alternate Athlete. In fact, up until being late for practice, the Claimant was in contention for the spot of an Alternate Athlete. Coach Hays candidly acknowledged in his testimony that the Claimant's behavioural issues caused him not to be selected.

24. In accordance with the number of quota places allocated to Canada in the bobsleigh discipline in PyeongChang 2018, Coach Hays nominated nine athletes for the Olympic Team and two Alternate Athletes to the Olympic Selection Committee. These athletes had discipline-free records. A meeting was convened with the Selection Committee on January 19, 2018.
25. Walter Corey, a member of the Selection Committee, who also acted as the independent member since he did not have any other affiliation with the BCS, testified to the details of the meeting. He said that Selection Committee members received the full selection document, the applicable policies, the performance sheets, the rubric, and the performance criteria. The Selection Committee discussed each athlete with Coach Hays, including the Claimant who was not nominated.
26. Each Selection Committee member was asked by the Chair of the Selection Committee (Sarah Storey) if the selection policy had been followed and if the Selection Committee member agreed with the team selections. All Selection Committee members agreed that the selection policy had been followed and ratified the nominations put forward by Coach Hays.
27. The witnesses who testified about the discussions of the Selection Committee acknowledged that the Claimant's past behaviours were discussed and that it was a factor in deciding whether he was a suitable candidate to be an Alternate Athlete. As Mr. Corey explained, it was the decision of the coaches to put together the best team possible and nominate them to the Selection Committee. The same factors were considered for all athletes.

28. Mr. Corey confirmed that the same selection process had been previously used to nominate the Claimant to the National Bobsleigh Team. He also testified that his experience with this Selection Committee was similar to his experiences in the Canadian luge program.

## **DECISION**

29. The thrust of the Claimant's submissions was about the Olympic Team Selection Process. There was very little said by counsel for the Claimant about the sanction imposed on the Claimant for being late to the training session. However, since it was raised by the Claimant in the original request form as a ground for appeal, I will address it.

30. It was undisputed that the Claimant was late for the scheduled sliding session. Although he may have informed a teammate, he did not inform the coach nor did he seek permission to skip the routine preparations. Coach Hays made it clear to the Claimant, at the time, that it was unacceptable, especially at the stage where the team was competing in the last qualifying race before the Olympics. He was also upset that the Claimant decided on his own, without consultation, to engage in his own training, while his team made the necessary preparations for the sliding session.

31. I accept Coach Hays' explanation that his decision to send the Claimant home was based, in part, on the various incidents that had occurred, but also on the fact that the Claimant was not scheduled to compete again in the World Cup. I accept Coach Hays' testimony that the coaches did not want the Claimant around

his teammates because his behaviour was disruptive. He was also concerned about the Claimant's emotional volatility when he would eventually learn that he was not being nominated for the Olympic Team.

32. There were no submissions from the Claimant about what sections of the Dispute Policy were violated by Coach Hays. However, the evidence called by BCS establishes that (a) the Claimant was late for the training session without informing his coach; (b) being late violated the Bobsleigh Canada Skeleton Athletes' Code of Conduct ("ACC"); (c) it was not the first time that the coaches had to address behavioural issues with the Claimant; (d) the incident was, at least, a minor infraction as defined in the Dispute Policy, and arguably a major infraction; (e) the Claimant knew that Coach Hays was unhappy and had an opportunity to explain why he was late; and (f) nothing precluded the Claimant from appealing the decision of Coach Hays.
33. Even if there was a procedural defect in the way that Coach Hays handled the incident, it was not fatal to the Selection Process as will be further discussed in this decision. As Coach Hays explained in his evidence, the decision to send the Claimant home did not preclude him from being selected to the Olympic Team. Moreover, as was made clear in the testimony of Mr. Corey and Ms. Storey, the decision of the Selection Committee was not influenced by the specific disciplinary penalty, but rather the incident itself along with the reports of the other behaviour. I will have more to say about the relevance of this consideration when I discuss the Qualitative Scoring process.

34. As such, I conclude that Coach Hays had a reasonable basis to conclude that the Claimant breached the ACC. Even if there was a procedural defect in following the policy, it does not absolve the Claimant of his responsibility to attend the training session in a timely manner and behave in accordance with the ACC. I also note that the Claimant, in his testimony, did not acknowledge the seriousness of his actions and denied any wrongdoing. He showed no remorse even when being questioned about the incident by the affected parties (who apparently had to assume the responsibility of setting up the bobsled in the Claimant's absence). After considering the circumstances faced by Coach Hays and the explanation from the Claimant, I decline to exercise my discretion to alter Coach Hays' decision or substitute the disciplinary penalty.
35. As this is a case about the selection of the Claimant to the Olympic Team, there was no dispute that the onus was on BCS to demonstrate that the criteria were appropriately established and that the selection decision was made in accordance with such criteria. If BCS is able to satisfy its burden, the onus shifts to the Claimant to demonstrate that the Claimant should have been selected or nominated to the Olympic Team. Article 6.7 of the Canadian Sport Dispute Resolution Code reads as follows:

### **6.7 Onus of Proof in Team Selection and Carding Disputes**

*If an athlete is involved in a proceeding as a Claimant in a team selection or carding dispute, the onus will be placed on the Respondent to demonstrate that the criteria were appropriately established and that the selection or carding decision was made in accordance with such criteria. Once that has been established, the onus of proof shall shift to 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.*

36. There was no assertion by the Claimant that the criteria in the Selection Agreement were not appropriate. The only issue before me was whether the selection decision was made in accordance with the criteria and, if so, whether the Claimant demonstrated that he should have been selected to the Olympic Team.
37. The Claimant argued that, since Coach Hays inappropriately relied upon (and communicated to the Selection Committee) the disciplinary penalties, there should be no deference to his decision or the decision of the Selection Committee. I disagree and find the statement of Arbitrator Pound in *Richer v. The Canadian Cerebral Palsy Sports Association (including Boccia Canada)*, SDRCC 15-0265 (*Richard W. Pound*), at page 11, to be applicable:

*Selection criteria need to contain some reasonable flexibility, but, at the same time, cannot be entirely arbitrary. Certain sports lend themselves to somewhat easier team selection choices, where objective criteria such as times, point scores, weights and distances can be used. Others can be more or less self - selections, such as eligibility based on the results of qualification tournaments. The more difficult choices occur when there may be some element of judgment required regarding performance standards or a need to produce a team that will function most effectively in competition. **The default position in such cases, absent reviewable error or proof of bias, is that those responsible for selection decisions are generally the most knowledgeable and experienced persons available, who attempt in good faith to produce the best possible outcomes in the particular circumstances.***

*[Emphasis added]*

38. Through the analysis of Coach Hays and his staff of the Quantitative Score, compiled over the 2017/2018 season, it was apparent to the Selection Committee that the Claimant was ranked close to the bottom. Coach Hays testified that the Claimant was ranked third from the bottom. This was consistent with Coach Alexander's assessment. There were nine spots for the Olympic Team and two Alternate Positions. Thus, the selection of the Claimant to the Olympic Team or as an Alternate Athlete was far from certain.
39. The Selection Agreement is clear that the Performance Score Rubric and the Performance Indicators are not determinative in selecting athletes for nomination. The Selection Agreement stipulates that the Selection Committee may consider such other factors, as it deems appropriate in the circumstances.
40. The evidence of Coach Hays, and the statements made during the hearing by the Affected Parties, made it clear that the role of the Alternate Athlete is very difficult. The individuals fulfilling this role have limited access to the team that is competing. The Alternate Athlete does not stay at the Athlete's Village and may not have the same access to training facilities. The Alternate Athlete must accept the supporting role of a teammate, with limited hope of actually competing. The Alternate Athlete must also be prepared (both physically and mentally) to compete should the need arise.
41. For these reasons, the Qualitative Score is particularly important in selecting the Alternate Athlete because it measures the quality of the individual as a teammate. It is the type of judgment that is needed to produce a team that will function effectively in competition as referred to by Arbitrator Pound in *Richer, supra*.

42. Coach Hays testified that the Claimant did not score particularly well on the Qualitative Score because of the incidents that had occurred. In Coach Hays' view, the Claimant had violated the ACC on multiple occasions. It was not the specific disciplinary penalties that were weighed. Rather, it was the incidents that cumulatively impacted Coach Hays' nomination.
43. Ms. Storey testified that the Selection Committee considered the Claimant's conduct, not the disciplinary penalties. Although many questions were put to BCS's witnesses about the specific penalties that were imposed on the Claimant and the fact that the most recent disciplinary penalty (being sent home) was being appealed, it was the conduct of the Claimant that was considered by Coach Hays and the Selection Committee. Coach Hays felt that the outbursts of the Claimant and being late for practice were indicators that the Claimant was not suitable for the Alternate Athlete position. This falls within the discretion permitted under the Selection Agreement.
44. The Claimant's evidence was mostly focused on the incidents that gave rise to the discipline. He had an explanation for the various incidents that occurred. But, it was not disputed that the Claimant hit a hotel wall with some emotion and was also not with his team when they were preparing for a practice. Coach Hays considered these incidents relevant to his analysis as to whether to nominate the Claimant as an Alternate Athlete. He candidly explained this analysis to the Selection Committee. The Selection Agreement contemplates that other relevant factors may be considered and that the nominations are at the discretion of the Head Coach.

45. The Claimant's sworn declaration provided details about his own calculations of the quantitative measurements from the National Testing Camps as well as calculations for some of the other athletes. However, these performance scores only tell part of the story. The Selection Agreement stipulates that the Qualitative Score will be considered, that such performance scores are not determinative, that the coach has discretion, and other relevant factors may be considered. In my view, the Claimant's evidence does not establish that he should have been nominated or selected to the Olympic Team.
46. I am unable to find that there was anything inappropriate about Coach Hays' analysis or the contemplations of the Selection Committee. Put another way, the Agreement allows for the Head Coach and the Selection Committee to consider other characteristics in the nomination process, including incidents that might have violated the ACC. Moreover, such behaviours fall squarely within the Qualitative Score and are relevant to determining who should be nominated and selected as an Alternate Athlete.
47. In summary, I am satisfied that Coach Hays and the Selection Committee followed the Selection Agreement appropriately. The Claimant has not persuaded me that he should have been nominated or selected to the Olympic Team or as an Alternate Athlete.
48. For the foregoing reasons, the Request is denied.
49. The matter of costs was not discussed during the hearing. My inclination would be not to award costs, but if a party seeks costs, I

am prepared to maintain jurisdiction should any party file submissions on costs no later than seven days from issuance of these reasons.

Signed this 1<sup>st</sup> day of February, 2018.



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Matthew R. Wilson  
Arbitrator