

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

N°: SDRCC 18-0349

**JULIEN LOCKE
(CLAIMANT)**

AND

**CROSS COUNTRY SKI DE FOND CANADA (CCC)
(RESPONDENT)**

AND

**GRAEME KILLICK
(AFFECTED PARTY)**

Tribunal: Patrice Brunet (Sole Arbitrator)

Date of Hearing: January 25th, 2018

Appearances:

For the Claimant: Leon Pigott

For the Respondent: Thomas Holland

REASONS FOR DECISION

I. INTRODUCTION

1. This arbitration was conducted under extraordinary time constraints since the Canadian Olympic Committee (COC) was meeting late on January 25th, 2018 to confirm the team composition for the upcoming 2018 Winter Olympic Games.
2. On January 24th, 2018, I accepted the appointment to act as Arbitrator in the present proceedings, under article 6.8 of the *Canadian Sport Dispute Resolution Code* (the "Code"). There were no objections raised by any of the parties.
3. On the same day, at 6:00 p.m. (EST), a combined administrative and preliminary conference call was held between the undersigned Arbitrator, the Parties and the SDRCC staff. Considering the extreme urgency of the case, the SDRCC agreed to exceptionally waive the Resolution Facilitation (RF) session requirement.
4. It was determined that the hearing would take place by conference call the very next day at 10:00 a.m. (EST), conditional to any potential Affected Parties wishing to participate in the proceedings.
5. On January 23rd, 2018, the International Olympic Committee (IOC) announced that Sergey Ustiugov, a Russian athlete, was declared ineligible to participate in the 2018 Olympic Winter Games based on its special anti-doping policy regarding the Russian athletes.
6. Since Mr. Ustiugov participated at the FIS World Cup race on December 9th, 2017, in Davos, and finished ahead of the Claimant, the latter is seeking an adjustment in the results of that selection race with the effect that Mr. Ustiugov's results would be removed, for Canadian team selection purposes. This would place the Claimant in 30th position, under *Cross Country Canada's Internal Nomination Procedures – 2018*

- Olympic Winter Games* (“INP 2018”), therefore meeting the selection criteria to achieve three (3) results in the top 30.
7. The Davos results have not been reviewed by the International Ski Federation (FIS). Since the results stand, and since it is still CCC’s position that the current selection order provides Canada with the best podium potential, it is seeking that I do not vary its selection decision.
 8. The hearing was held via conference call, on January 25th, 2018.
 9. On the same day, I rendered my short decision whereby I dismissed the Claimant’s appeal and concluded that the CCC selection criteria remain unaltered in the application of their results, and the achievement of their purpose. I stated that the IOC’s decision to declare Sergey Ustiugov ineligible to the 2018 Winter Olympic Games did not extend to vary the interpretation of the FIS race results, nor did it extend to vary the interpretation of CCC’s INP 2018.
 10. The reasons for my decision are set out below.

II. THE PARTIES

11. **Julien Locke** is a 24-year-old Canadian cross-country skier from Nelson, British Columbia. According to CCC’s website, he has been a member of the Senior Team for two years. At the time of the hearing, Mr. Locke was outside of the country.
12. **Cross Country Ski de Fond Canada (CCC)** is the national sport organization that works with member clubs, divisions, and other partners to coordinate and support the development of cross-country skiing from introductory experience to international excellence through leadership, education, promotion, and training.

13. **Graeme Killick** is a 28-year old Canadian cross-country skier from Fort McMurray, Alberta. According to CCC's website, he has been a member of the Senior Team for nine years. At the date of the hearing, Mr. Killick was ranked 10th on CCC's Olympic Winter Games selection list. If Mr. Locke's appeal is granted, he will replace Mr. Killick as the 10th athlete on the selection list. Therefore, it was determined that Mr. Killick was an Affected Party in this arbitration.

III. JURISDICTION

14. The Sport Dispute Resolution Centre of Canada (SDRCC) was created by Federal Bill C-12, on March 19th, 2003¹.

15. Under this Act, the SDRCC has exclusive jurisdiction to provide to the sports community, among others, a national alternative dispute resolution service for sport disputes.

16. All Parties have agreed to recognize the SDRCC's jurisdiction in the present matter.

IV. BACKGROUND

17. Section 6, paragraph 4, of the INP 2018 states the following:

SECTION 6 – SELECTION PROCESS and CRITERIA

4. Alternate Qualifying Criteria A – (2017 World Championships & 2016-17 and 2017-18 World Cups)

Athletes with the following placing at the 2017 World Championships and 2016-17 &

¹ The *Physical Activity and Sport Act*, S.C. 2003, c.2

2017-18 World Cup events within the qualifying period (refer to Section 3.1) will meet the Alternate Qualifying Criteria A on the condition that all of the World Cup events have reasonable and similar depth of field as per the parameters outlined in Section 5.3.a.

a) Distance. An athlete finishing three times in the top 30 counting only the top four competitors per nation in individual distance races will meet the Alternate Qualifying Criteria A.

b) Sprint. An athlete finishing three times in the top 30, including a minimum of 2 classic sprint results, counting only the top four competitors per nation in the individual sprint will meet the Alternate Qualifying Criteria A.

c) Sprint or Distance. An athlete with a combined total of 3 distance and/or sprint results in the top-30, counting four competitors per nation will meet the Alternate Qualifying Criteria A.

18. The Claimant has two (2) top-30 results in the qualifying period that are not in dispute.

15th Place Dresden World Cup 2018

20th Place Quebec City World Cup final 2017

19. On December 9th, 2017, at the FIS World Cup race in Davos, the Claimant finished 36th. After adjusting the results using the *4 athletes per nation* rule contained in the INP 2018, the Claimant placed 31st.

20. Sergey Ustiugov participated in the Davos race and placed 10th, ahead of the Claimant.

21. However, on January 23rd, 2018, the International Olympic Committee (IOC) announced that Mr. Ustiugov was declared ineligible to participate in the 2018 Winter Olympic Games based on its special anti-doping policy regarding the Russian athletes.

22. It is important to reiterate that, on December 5th, 2017, the IOC Executive Board announced its decision to suspend the Russian Olympic Committee from taking part in the 2018 Olympic Winter Games over multiple doping abuse allegations².
23. This decision followed an investigation into allegations of state-sponsored doping at the 2014 Winter Olympic Games hosted by Russia in Sochi.
24. The World Anti-Doping Agency (WADA) enlisted the services of Richard McLaren to investigate and report on the allegations. McLaren's report concluded that 1,000 athletes across 30 sports benefitted from a national institutionalized doping programme between 2012 and 2015.
25. However, the IOC allowed a process for *clean* athletes from Russia to enter the 2018 Winter Olympic Games under the classification of "Olympic Athlete from Russia" (OAR), a neutral status.
26. A specialist internal panel was appointed by the IOC to decide which athletes could enter the 2018 Winter Olympic Games. The panel applied the following rules while making its decisions:
- Athletes must have qualified according to the qualification standards of their respective sport;
 - Athletes must not have been disqualified or declared ineligible for any violation of anti-doping rules;
 - Athletes must have undergone all the pre-Games targeted tests recommended by the Pre-Games Testing Task Force;
 - Athletes must have undergone any other testing requirements specified by the panel to ensure a level playing field.
27. On January 24th, 2018, the Claimant filed an appeal to the SDRCC to seek an adjustment on the results of the Davos race with the effect that Mr. Ustiugov's results

² The information listed in paragraphs 21 to 25 is a matter of public record and the Parties were not required to introduce it as evidence.

would be removed, for Canadian team selection purposes.

V. POSITIONS OF THE PARTIES

28. This section summarizes the oral and written submissions of the Parties. Although this is not a detailed record, I carefully examined all submissions presented by the Parties.

A) The Claimant

30. The Claimant seeks to obtain a declaration from the Respondent or this tribunal that he has met the Alternate Selection Criteria A of the INP 2018 (section 6, paragraph 4).

31. He submits that Sergey Ustiugov's results should be excluded from any of the qualifying races, for the purpose of the application of the INP 2018, for Canadian athletes.

32. The rationale for his position is the same as the "4 athletes per nation" rule. Had the Davos event been held at the Winter Olympic Games, the results of the Russian athlete would not have been used in the standings.

33. The Claimant submits that Mr. Ustiugov's results at the Davos race should be excluded for qualifying purposes.

34. Adjusting the result of the Davos race as proposed would place the Claimant in 30th position. This would constitute the third (3rd) top-30 result for the Claimant. Consequently, he would meet the Alternate Selection Criteria A of the INP 2018.

B) The Respondent

35. CCC's position is that the Davos results have not been reviewed by FIS, and that there is no indication that it intends to do so, following the IOC's decision.

36. The Respondent states that the other Russian athletes banned from the 2018 Winter Olympic Games still maintain their FIS World Cup results posted for this season and previous seasons back to 2014.
37. The Respondent simply cannot support the Claimant's position that he has three (3) top-30 World Cup results in the Olympic qualifying period. Further, it does not consider that the Claimant has achieved the appropriate performance level to compete at the Winter Olympic Games on the Canadian team.
38. Since the results stand, and since it is CCC's position that the current selection order provides Canada with the best podium potential, the Respondent is seeking that I do not vary its selection decision.

C) The Affected Party

39. The Affected Party was notified of the proceedings as soon as identified by CCC. However, Mr. Killick did not provide submissions nor did he participate in the hearing.

VI. THE APPLICABLE LAW

A) The SDRCC Code

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.

(Emphasis added)

B) The Selection Criteria (INP 2018)

SECTION 1 - INTRODUCTION

2. Strategic Goals.

*a) **Primary goal:** The primary objective of the selection policy and procedures is to select the maximum number of medal potential athletes for the Olympic Team including the relay teams in order to maximize podium performances at the 2018 Olympic Winter Games and meet CCC individual and team benchmarks for this event. Preparation and competition support will be focused on this goal as a first priority and;*

*b) **Secondary goal:** To promote and facilitate the development of athletes with identified potential to achieve future podium or top-12 results at future Olympic Winter Games where it is in the best interest of the team's overall results at this event.*

SECTION 6 – SELECTION PROCESS and CRITERIA

4. Alternate Qualifying Criteria A – (2017 World Championships & 2016-17 and 2017-18 World Cups)

Athletes with the following placing at the 2017 World Championships and 2016-17 & 2017-18 World Cup events within the qualifying period (refer to Section 3.1) will meet the Alternate Qualifying Criteria A on the condition that all of the World Cup events have reasonable and similar depth of field as per the parameters outlined in Section 5.3.a.

a) Distance. An athlete finishing three times in the top 30 counting only the top four competitors per nation in individual distance races will meet the Alternate Qualifying

Criteria A.

b) Sprint. An athlete finishing three times in the top 30, including a minimum of 2 classic sprint results, counting only the top four competitors per nation in the individual sprint will meet the Alternate Qualifying Criteria A.

c) Sprint or Distance. An athlete with a combined total of 3 distance and/or sprint results in the top-30, counting four competitors per nation will meet the Alternate Qualifying Criteria A.

VII. DISCUSSION

40. Under article 6.7 of the Code, the Respondent had the onus to demonstrate that its selection criteria were reasonable and properly established and that the selection decisions were made in accordance with such criteria.

41. It is well established in *lex sportiva* that deference should be granted to the National Sport Organisation (NSO) in the establishment, application and final decisions of its selection criteria. There is a positive presumption that administrators and volunteers in the sport are best placed to achieve sound policy drafting and team selection decision-making. Although this is not always applied in good faith nor in application with basic principles of natural justice, the Canadian sport arbitration system offers a safeguard against abuse.

42. I have reviewed the application of those principles in this particular situation and am satisfied that the selection criteria and team-making selection decisions have been made using best practice principles.

43. I recognize the expertise and experience of the Respondent's Selection Committee. Its members are best placed to decide which eligible athletes will form the team competing at the next Olympic Games and I am satisfied that application of the INP 2018 was done properly.

44. The onus of proof now shifts to the Claimant. He had to demonstrate that he should have been selected on the 2018 Olympic Winter Games team in accordance with the approved criteria.
45. Having considered the evidence provided before me, I find that the Claimant did not meet his onus of proof. His position is certainly creative and has some merit in its applied logic. However, it falls short of meeting an appropriate fairness standard that would comfortably satisfy me that the Claimant should have been allowed to enter the Winter Olympic Games, *in lieu* of the Affected Party. The INP 2018 therefore stands unaltered.
46. The IOC's decision regarding Mr. Ustiugov only concerns his eligibility to enter the 2018 Winter Olympic Winter Games. No more and no less.
47. I agree with the Respondent that Mr. Ustiugov's results have not been reviewed by FIS, and there is no indication that it intends to do so.
48. Consequently, the IOC's decision regarding Mr. Ustiugov's eligibility at the next Olympic Games did not alter the FIS results.
49. Furthermore, it is important to mention that Mr. Ustiugov did not fail a doping test during the Davos race, nor was he disqualified.
50. The Claimant suggests that the Respondent adjust the rankings of the Davos race to remove all the athletes who finished ahead of him and who did not qualify for the 2018 Olympic Winter Games.
51. I find this to be incompatible with the spirit and objectives of the INP 2018.

VIII. CONCLUSION

The CCC selection criteria remain unaltered in applying their results, and achieving their purpose. The IOC's decision to declare Sergey Ustiugov ineligible to the 2018 Winter Olympic

Games does not extend to vary the interpretation of the FIS race results, nor does it extend to vary the interpretation of CCC's INP 2018. It was also relevant to note that the FIS did not alter the results either.

Therefore, the Claimant's appeal is dismissed.

I retain jurisdiction and reserve the right to hear any dispute relating to the interpretation or application of the present decision.

Signed in Montreal, this 9th day of February 2018.



Patrice Brunet, Arbitrator