

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

NO: SDRCC 19-0404/05

**CENDRINE BROWNE (Athlete)
(Claimant)**

AND

**NORDIQ CANADA
(Respondent)**

Before:

The Hon. L. Yves Fortier, QC (Arbitrator)

Appearances and Attendances:

On behalf of Nordiq Canada: Mr. Shane Pearsall
Ms. Cindy Chetley

On behalf of the Athlete: Ms. Cendrine Browne, athlete
Ms. Margaret MacKinnon, Sport Solution
Mr. Tyler O'Henly, Sport Solution

REASONED DECISION

26 August 2019

I. INTRODUCTION

a. Procedure

2. On 14 June 2019, I was appointed as med-arb neutral by the Parties.
3. After two mediation sessions, the Parties reported to me that they were unable to reach a settlement of their dispute.
4. In accordance with Section 5.9 (b) of the 2015 Canadian Sport Dispute Resolution Code (the “Code”), I put an end to the mediation on 21 June 2019.
5. With specific approval of both Parties, the arbitration commenced on 21 June 2019 with the undersigned as the Sole Arbitrator.
6. After consultation with the Parties, I then ordered the following calendar for the submission of the Parties’ written pleadings:
 - 2 July 2019: Submissions and List of witnesses by Respondent
 - 12 July 2019: Submissions and List of witnesses by Claimant
 - 22 July 2019: Reply Submissions by Respondent
 - 30 July 2019: Reply Submissions by Claimant
7. It was also agreed by the Parties that a hearing would be held by telephone at 11 a.m. (EDT) on Wednesday 7 August 2019.
8. The hearing was held as scheduled and the Parties, subsequently, submitted their oral closing statements in writing on 8 August 2019.
9. I declared the proceedings closed on 12 August 2019.

b. The Parties

10. The Claimant, Ms. Cendrine Browne (the “Athlete”) is an elite cross-country skier who lives in St-Ferréol-les-Neiges near Quebec City. She is a French speaking Canadian who, although she speaks and understands English, much prefers to speak in French. At her request, the SDRCC made arrangements to provide an interpreter during the telephonic mediation and arbitration sessions.
11. The Athlete was assisted throughout the proceedings by Ms. Margaret MacKinnon and Mr. Tyler O’Henly, two law students from London, Ontario, who are employed by the Sport Solution clinic of the Western University Law Faculty.
12. Nordiq Canada (“Nordiq”) is the governing federation for cross-country skiing in Canada. Its head office is in Canmore, Alberta and its chief executive officer is Mr. Shane Pearsall who was the spokesperson for Nordiq throughout the proceedings.

II. THE PROCEEDINGS

13. On 6 June 2019, the Athlete filed a first Appeal from a decision of Nordiq’s Board chair to refuse her internal appeal in which she sought her reintegration to the National Senior Team (the “NST”) for the 2019-2020 season.
14. In brief, she claims firstly in that appeal that the selection criteria for the national team were published too late and left her with an unreasonably short period of time to comply with the criteria. This, says the Athlete, caused her irreparable prejudice.
15. Secondly, and separately from her first ground of appeal, the Athlete claims that the notice provided to her to submit a curtailment of training and competition request for health-related reasons was unreasonably short and burdensome and caused her serious prejudice. In this connection, she invokes the significant and material differences between the French version of the criteria, which guided her, and the English version.
16. In her second Appeal, filed on June 6 2019, the Athlete requests her selection for AAP (Athlete Assistance Program) carding, whether or not I were to decide that she should be reintegrated to the national ski team.

III. THE APPLICABLE LAW

17. With respect to team selection and carding disputes, Section 6.7 of the Code applies. It provides 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.

18. I have been referred by the Parties to a long list of decisions which now establish, as part of “lex sportiva”, the following principles in respect of appeals by athletes of team selection decisions made by national sport organizations (“NSO”).¹ I have read all these decisions. These principles are paramount and I summarize them as follows:

- 1) Generally, arbitrators should defer to the decisions of the NSOs who are comprised of men and women experienced in the sport in question, highly qualified to exercise good judgment and very knowledgeable about the athletes competing for selection.
- 2) Only in exceptional situations where bias is proven or the selection process is

¹ See *inter alia*, *Island v. Equine Canada*, SDRCC 04-0008, C-26; *Forrester v. Athletics Canada*, SDRCC 10-0117, C-32; *Richer v. Canadian Cerebral Palsy Sports Association*, SDRCC15-0265, R-22; *Palmer v. Athletics Canada*, SDRCC 08-0080, R-23.

conducted unfairly or the decision is made in an arbitrary or discriminatory way or in bad faith, should an arbitrator set aside the decision of the NSO.

19. Informed and guided by those principles, I will now proceed with my analysis to determine whether this is one of those extremely compelling cases where the Athlete has proven to me, on a balance of probabilities, that I should interfere with the selection of the NST made by Nordic's High Performance Committee (the "HPC") at its meeting of 2 May 2019 and confirmed on 3 May 2019 by Mr. Pearsall, its High Performance Director (the "HPD").

20. I will deal in turn with the Athlete's two grounds of appeal in respect of her first Appeal.

IV. ANALYSIS

A) First Appeal – Late Publication of Criteria

21. According to the Athlete's contract with Nordiq (the "Athlete Agreement", R-15), the selection criteria for all national ski teams must be published three months at least prior to the selection (Art. 2 b)).

22. The selection of the NST was scheduled to take place on 2 May 2019 at the meeting of the HPC.

23. The evidence is clear: the selection criteria were first published on 12 March 2019 and revised and published on Nordiq's website on 27 March 2019.

24. Accordingly, the Athlete (and indeed all other competitors), instead of having her contractually set period of three months to satisfy members of the HPC that she fulfilled the subjective selection criteria, only benefitted from a period of six to seven weeks.

25. I refer solely to the subjective criteria as it is common ground between the Parties that the Athlete did not meet the objective criteria.

26. It is of interest to note, in connection with the subjective criteria, that according to Article 1.3.7 of the Cross Country Ski de Fond Canada National Ski Team (NST-PNST) Selection Criteria 2019-20 (C-03) (the "Selection Criteria Policy"), they "may be based on a variety of factors, including but not limited to the following [...]" [my emphasis].

27. This wording, on its face, leaves members of the HPC with a great deal of discretion.

28. The evidence also demonstrates that Ms. Chetley, on behalf of Nordiq, forwarded on 12 April 2019 the agenda of the HPC 2 May 2019 meeting to the HPC members and asked that coaches and athletes make their submissions for the application of the subjective criteria to the HPC by 22 April 2019 (R-07).

29. The Athlete testified that her coach, Mr. Louis Bouchard, advised her against submitting such a letter. Unfortunately, the Athlete, contrary to what she represented to me during the

meeting of 21 June 2019, did not file a witness statement from Mr. Bouchard or indeed from any witness.

30. The Athlete's representation appears to be contradicted by the fact that Mr. Bouchard, at the meeting of the HPC on 2 May 2019, did not register any dissent when all HPC members approved the selection of the NST teams. The vote was unanimous.
31. I note however that Mr. Bouchard did submit a letter to Ms. Chetley and Mr. Pearsall on the Athlete's behalf on 29 April 2019 (R-04) which, *inter alia*, listed, in very summary form, the Athlete's recent physical and mental health issues. The letter reads, in relevant parts, as follows:

Submission for Cendrine Browne for the national ski team 2019-20

Why I want to be on the team

- Good team mate
- Want to be back on the international curve and be to 20 and 15 next winter
- I know with my coach the way to be back on track
- really good relationship with the coaches and the staff
- Following the plan in training camp and help teammate tp [sic] be faster
- Also good person to help the next gen
- been 3 year close to my IPB, but want to be over the line ASAP.

Reason why I had a bad year.

- Some injury in the summer
- Strength issue form [sic] my injury
- mentally got tired from the last Olympic game

32. Mr. Pearsall confirmed at the hearing that Mr. Bouchard's letter, although submitted late, was presented to members of the HPC and considered by them at the team selection meeting of 2 May 2019.
33. At this meeting, as noted above, members of the HPC agreed unanimously on the composition of the NST. Mr. Pearsall, at the hearing, confirmed that there was no disagreement amongst members of the HPC with respect to any one of the athletes selected to the national teams. Accordingly, he adopted the HPC's recommendation in his capacity as HPD.
34. The following extracts from the minutes of the HPC meeting of 2 May 2019 are particularly pertinent:

9.0 NST Team Selection Recommendations

Erik Braten and Louis Bouchard presented the NST Coaches recommendation for the NST Team comprised of 7 men and 7 women. Discussion ensued around the composition of the women's team with the HPC presenting an alternate recommendation of 3 SR women and 4 JR women. [...]

Shane Pearsall called for confirmation by HPC members of agreement to accept the HPCs recommendation of 3 SR and 4 JR women to the NST and that they agreed that this Team was in the best interest of Canada. No objections were raised by HPC members. Agreement was made to accept the HPCs women's team recommendation.

35. Nordiq has demonstrated to me, on a balance of probabilities, that the criteria were appropriately established and that the selection decision was made in accordance with such criteria, pursuant to the Policy for Procedures for National Ski Team selection, nomination and announcement (R-09).
36. According to Section 6.7 of the Code, the onus of proof now shifts to the Athlete to demonstrate that she should have been selected in accordance with the approved criteria.
37. Although the selection criteria were not published in accordance with her contract with Nordiq, the Athlete has not persuaded me, on a balance of probabilities, that, had the three-month period been respected, she would have been selected to the NST.
38. There is no evidence of bias. The selection process was conducted fairly and I have seen no evidence that the unanimous decision of the HPC was made in an arbitrary or discriminatory way.
39. Accordingly, I defer to the decision of Nordiq regarding the selection of its NST and the Athlete's request on this ground is dismissed.

B) First Appeal - Notice for the Curtailment Request of Training and Competition for Health Reasons

40. The key facts with respect to the second facet of the Athlete's First Appeal are the following.
41. As noted above, the selection criteria were published on 12 March 2019.
42. The Athlete's evidence is that she then became aware of the requirements to submit a request for the curtailment of training and competition for health-related and other reasons and that she had until 31 March to do so, 19 days later.
43. The Athlete Agreement provides that the Athlete must notify the NST leader and her coach of any health-related problem or legitimate reason which prevents her from training or fulfilling her obligations under the Agreement [R-15, art. 3 j)].
44. In addition, Article 3 j) obliges the Athlete, in the event of an injury, to provide Nordiq with a certificate from a doctor describing the nature of the injury within one week of the diagnosis.

45. Nordiq affirms that the Athlete never submitted any such notification. Additionally, Nordiq claims that, by competing prior to selection, the Athlete in effect confirmed that she was fit and healthy to compete.
46. The evidence is clear that the Athlete was competing during those two and a half weeks (C-25), during which period of time she had to submit a curtailment of health request.
47. In this connection, the Athlete told me that, as usual, she read and was guided by the French version of the Selection Criteria Policy.
48. I note with grave concern that the French version of Article 8, in Section 1, Sub-Section 3.0, of the Selection Criteria Policy is significantly different from the English version:

- In French, it provides as follows:

8. Diminution de l'entraînement et de la compétition - Une demande écrite avec justification ne peut être présentée que par les membres actuels de l'ÉNS qui, en raison d'une maladie, d'une blessure ou d'un événement important de la vie, n'ont se qualifier [sic] de façon objective ou subjective pour les programmes de l'ÉNS. Cette justification doit être soumise avec:

- La documentation confirmant que l'athlète a suivi le protocole de rapport approprié à Nordiq Canada, conformément à l'entente de l'athlète.
- Les documents confirmant le diagnostic posé par un médecin, dans le cas d'une maladie ou d'une blessure, ou un avis autorisé d'un professionnel désigné pertinent à la situation dans des circonstances non médicales
- Une lettre de l'entraîneur de l'athlète décrivant les implications de la maladie, de la blessure ou de l'événement important.
- Un plan de retour à l'entraînement et à la compétition pour la saison
- La documentation à l'appui (physiothérapeute ou massage) du traitement suivi et à venir.

Cette disposition ne s'applique qu'aux situations qui affectent l'athlète pendant plus de 4 mois et une documentation cohérente et notée de la situation durant laquelle l'athlète était/est incapable de concourir fournie à Nordiq Canada.

L'acceptation d'une diminution de l'entraînement et de la compétition sera évaluée en fonction de données objectives à l'appui de la supposition que l'athlète se serait qualifié pour l'ÉNS si ce n'était de circonstances incontrôlables. Les données objectives examinées pourraient inclure, sans s'y limiter, les points FIS et LPC de la saison en cours et de la saison précédente, les CPI, les résultats de course (niveau 1) ou d'entraînement, etc. Les athlètes visés par la diminution pour des raisons de santé seront classés selon les critères subjectifs de chaque équipe (CM, SR, JR).

Tous les documents doivent être soumis **avant le 31 mars 2019 à 11 h 59 HNR**. Les soumissions acceptées après cette date limite ne seront pas considérées. [Emphasis in citation]

- In English, the same article provides as follows:

8. Curtailment of Training and Competition for Health-related and other reasons

– A written request and rationale can be put forward for not having competed in or completed selection races. This rationale must be submitted with relevant data including physician and/or other relevant documentation **before March 31 11:59 AM MST**. Submissions accepted after this deadline will not be considered. Consideration for exemption may include but not be limited to:

a) An unexpected event beyond the reasonable control of the athlete that crucially affects an athlete’s ability to compete (e.g. illness, injury, transportation breakdown)

b) Inadequate recovery time from a health-related issue or injury by the time of the selection competition or competition selected to. [Emphasis in citation]

49. I am appalled to see such a material and fundamental discrepancy between the French and English versions of such an important clause in the Selection Criteria Policy of Nordiq. It is unacceptable in Canada, where we have had two official languages for 50 years, for a NSO financed by the Government of Canada to treat its French speaking members in such a way.²
50. Nordiq submitted at the hearing that this was not a material error and apologized for what Mr. Pearsall called “a translation error”. I disagree. This error is material and not a mere translation error. The burden on French-speaking athletes to submit a request for curtailment of training and competition for health-related reasons is substantially different than for English-speaking athletes.
51. I have read carefully the detailed letters from her doctor, physiotherapist, coach, physiologist and sports psychologist filed by the Athlete at the beginning of June with her med-arb Request to the SDRCC.
52. I have formed the view that it would have been difficult for the Athlete, while she was training and competing during the period from 12 to 24 March 2019, to have approached these five professionals in Quebec City and obtain these or similar letters.
53. But, on the other hand, she could have done so during the month of April, prior to the 2 May meeting of the HPC, and I am convinced that the NST leader and Mr. Pearsall would have accepted them as they did with Mr. Bouchard’s letter of 29 April 2019.
54. The Athlete never informed Nordiq of her mental and physical health issues (save for Mr. Louis Bouchard’s short communication of 29 April 2019). She could have asked for an extension of the time to file a request for the curtailment of training and competition for health-related reasons or attempted by any other formal or informal means to communicate her intent to file such a request, in light of her health-related issues. She never did so.

² Indeed, I am appalled and troubled by the so-called French translation of the whole Selection Criteria Policy. The French version reads as if it had been translated using the Google Translate tool, which in itself is an insult to the French language.

55. After having considered carefully the totality of the evidence, I have reached the conclusion that the Athlete is the author of her own misfortune. She neglected to notify Nordiq of the health issues she was suffering from and which prevented her from training or fulfilling her obligations under the Agreement. She could have gathered the required material prior to 2 May 2019 and the decision of the HPC might then have been different, but she failed to do so.
56. I reiterate that I regret that her coach Mr. Louis Bouchard was not called to testify on her behalf. If he had appeared before me and confirmed some of the important comments that she attributed to him, my decision may well have been different.
57. On a balance of probabilities, I find that the Athlete has not discharged her burden of proving that she should have been selected to the NST but for the material discrepancy between the French and English versions of the Selection Criteria Policy and I therefore dismiss her request on that ground.

C) Carding

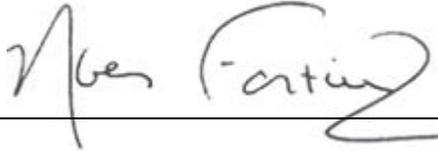
58. Having dismissed the Athlete's request to be reintegrated to the NST, I fail to see how I can direct Nordiq to grant her AAP carding. I find no justification for such a decision.
59. The parties agree that AAP carding is automatically granted to athletes selected to the national team, pursuant to the Athlete Assistance Program Carding Criteria 2018-2019 (R-14, art. 2).
60. The Athlete has requested that she be selected for AAP carding, even if I were to decide not to order her reintegration to the NST. She has not submitted any supporting evidence as to whether, and how, I can take such a decision.
61. Nordiq has alleged that this would be a decision that they would not be able to implement, as the Athlete has failed to submit a request for curtailment of health.
62. The Sport Canada Athlete Assistance Program, Article 9.1.3, provides that an athlete who has not achieved the standard required for carding renewal at the end of the season may be reconsidered for carding if, amongst other things, the NSO provides evidence that the athlete's failure is due to injury or illness.
63. Nordiq alleges that, as the Athlete failed to follow the mandated procedure and submit a curtailment request for health-related issues for carding, it would not be able to implement an order from me awarding such carding.
64. I am therefore not convinced that, on the balance of probabilities, it is possible to award AAP carding to an athlete who has not been selected to a national team.
65. As the Athlete did not submit a request for a curtailment of training and competition for health-related reasons for carding, I therefore dismiss her request on this ground.

Decision

8. Accordingly, I dismiss the Athlete's requests to:

- reintegrate the National Senior Team; and
- be selected for AAP carding.

Signed in Montreal this 26th day of August 2019.

A handwritten signature in black ink, appearing to read "L. Yves Fortier", written over a horizontal line.

The Hon. L. Yves Fortier, QC, Sole Arbitrator