

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

NO: SDRCC 19-0407

SÉBASTIEN FORTIER
(Claimant)

AND

NORDIQ CANADA
(Respondent)

Attendees at the Hearing:

For the Claimant: Mr. Sébastien Fortier
Ms. Louise Guerrette, Counsel

For the Respondent: Mr. Adam Klevinas, Counsel
Mr. Shane Pearsall, Representative
Ms. Cindy Chetley, Witness
Ms. Kate Boyd, Witness
Mr. Robin McKeever, Witness

DECISION

SUMMARY

1. The issues in this claim relate to team selection and carding. The Claimant appealed a decision by the Respondent not to nominate him to the Para-Nordic National Ski Team for 2019/20 (the “PNST”). In accordance with Nordiq Canada’s *Dispute Resolution and Appeal Policy* (“*DRAP*”) a three-member internal Appeal Panel heard and denied the Claimant’s appeal in June 2019. Pursuant to the *Canadian Sport Dispute Resolution Code* (the “*Code*”)¹ the Claimant appealed the decision of the Appeal Panel to the SDRCC.
2. Pursuant to Section 6.7 of the *Code* the onus was on the Respondent to demonstrate that its policies, the *Para-Nordic National Ski Team Selection Criteria 2019/20* (the “*Selection Criteria*”) and the *Para-Nordic Athlete Assistance Program Carding Criteria 2019/20* (the “*Carding Criteria*”) were appropriately established and that it selected athletes for the PNST, and nominated athletes for financial assistance in accordance with those policies. I find based on all the evidence even where it is not specifically noted in this decision, that the Respondent appropriately established the above policies and that its team selection and carding decisions were made in accordance with the established criteria.
3. Pursuant to Section 6.7 of the *Code*, the onus subsequently shifted to the Claimant to demonstrate that he should have been selected to the PNST and nominated for carding.

¹ Canadian Sport Dispute Resolution Code, January 1, 2015

While Counsel for Mr. Fortier raised a number of issues related to the conduct and processes of the Respondent, which I address in this decision, I find that Mr. Fortier has not discharged the burden on him to demonstrate that he should have been selected to the PNST and nominated for carding in accordance with the approved criteria.

BACKGROUND

4. Mr. Fortier is an accomplished para-nordic cross-country skier. He was a member of the PNST from 2010/2011 to 2013/2014 at which point, having suffered an injury, he retired. However, in 2017 he returned to competition and participated in the World Championships placing 10th, and based on his results was named to the PNST for 2017/18. Again, based on results he was named to the PNST for 2018/19.
5. Unfortunately, on 21 June 2018 while cycling, Mr. Fortier had to swerve to avoid a tourist who was cycling on the same path. He had a fall and received a blow to his coccyx. Initially, he and his chiropractor thought the injury was minor. However, a few days or a week later the injury became intensely painful and he had to interrupt training. On 9 July 2018 he reported the injury in an email to Robin McKeever, PNST Head Coach. At the time his training was limited to upper body strength exercises and workouts. Following the report of his injury, Kate Boyd, Next-Generation Coach and PNST High Performance Director (“HPD”), checked with him regarding his condition through social media and email. It was evident that Mr. Fortier was dismayed about his inability to train, and that Ms. Boyd was concerned about his condition.
6. In Mid-July 2018, Mr. Fortier began to train again at limited volume. His back pain diminished and he was able to increase his training in the week before a training camp in New Zealand. He participated in the training camp in New Zealand with good volume and minimal pain. At the end of the New Zealand camp Mr. McKeever assigned him a two-week intense training block to complete on his return to Canada. While Mr. Fortier completed the training block, it aggravated his cycling injury and by mid September he was no longer able to train. While Mr. Fortier did not advise Mr. McKeever or Ms. Boyd until 16 October 2018 that his injury had worsened during the training block, he sought medical help and was referred for an MRI after which he was prescribed cortisone shots in his back.
7. In emails Ms. Boyd requested information on Mr. Fortier’s medical treatment, his doctor’s recommendations about training, and how he intended to train in order to ease back into skiing. She reiterated a number of times that Nordiq Canada would like to support his return to full training without any setbacks and that she and Mr. McKeever would be happy to help guide that process. Ms. Boyd emailed Mr. Fortier again on 8 November 2018 stating how important it was for Nordiq Canada to receive information from him and from his physicians to oversee his recuperation and to be able to evaluate his condition in preparation for a return to normal training and competition. She noted that the competitive phase of the season was about to begin and that they needed an assessment by his physician, a treatment plan, and an evaluation and treatment plan by a physiotherapist. She reiterated that they continued to be available to support his recovery so that he could train and compete.
8. Mr. Fortier responded to Ms. Boyd by email on 11 November 2018. He addressed the lack of communication and discussed a number of situations which had been bothering him for a long time. He made it clear that he felt isolated, unappreciated, unsupported

and criticized. He stated that he felt like the black sheep and the least liked athlete on the team. Later in the day he forwarded documentation from his physician, and in a separate email asked if he could have a medical exemption if he did not go to the World Championships in Finland. Ms. Boyd replied a few days later and reiterated that it is Nordiq Canada's responsibility to ensure that athletes are in good health in order to meet the challenges of the sport. She invited him to a training camp in Canmore, Alberta and stated that she would organize a meeting with the team physician and physiotherapist for an assessment. She also stated that they would like to have a conversation face-to-face to discuss next steps for going forward.

9. On 21 November 2018, having been on the road for many hours Mr. Fortier arrived in Canmore and was advised that a meeting with Ms. Boyd and Mr. McKeever would take place right away. Ms. Boyd and Mr. McKeever also invited Maxime Venne from Ski de Fond Québec to participate by telephone in the discussion, as it was apparent from email threads that Mr. Fortier had consulted with him regarding his 11 November 2018 email. Mr. Fortier was not previously told when the meeting would take place and neither was the purpose of the meeting clearly identified. In spite of being tired after many hours of travel he felt compelled to participate. The meeting lasted two hours during which Mr. Fortier was very emotional. At the end of the meeting Ms. Boyd and Mr. McKeever gave him a document to sign and indicated that he could talk with others or a lawyer about it if he wished. However, they were also clear that they wanted him to sign it. The following day he was assessed by the PNST physician and physiotherapist who indicated that he was well enough to train with the team. Mr. Fortier signed the document on 23 November 2018. He returned home on 26 November 2018 at the end of the training camp.
10. On 4 December 2018 Ms. Boyd sent Mr. Fortier an email following up on the Canmore training camp and the two-hour meeting. She inquired about his training and asked him to keep her up to date on how it was going. She indicated that she should have further information on the US Nationals in coming weeks and that she was coordinating travel arrangements for athletes. Mr. Fortier stated that he heard nothing further from her, but Ms. Boyd's evidence was that she sent him a message 24 December as she was advised by an American colleague that Mr. Fortier had not signed up for US Nationals. She asked whether he would be able to compete and about his training and recovery. Mr. Fortier responded, "I will email you for training and everything later but no us [sic] nationals".
11. Ms. Boyd emailed Mr. Fortier on 9 January 2019 stating that she was following up on her email of 2 January 2019 (not in the documentary record), as she had not received any details from him and was concerned. She included Mr. Venne in the email thread. Mr. Venne responded the next day stating that he had spoken with Mr. Fortier who had said he would respond to Ms. Boyd that week. On 14 January 2019 Ms. Boyd emailed Mr. Venne again stating that she had not heard from Mr. Fortier. The following day Mr. Fortier sent Ms. Boyd an email in which he quoted her email of 4 December 2018 regarding the US Nationals and stated that, given the uncertainty about having support for the US Nationals and in order not to aggravate his injury, he decided not to invest hundreds of dollars on it. In the meantime, he indicated that he had participated in a competition at Mont Ste-Anne and provided an update on his physical condition.
12. There were further emails between Ms. Boyd and Mr. Fortier on 18 and 25 January 2019. In her email on 25 January 2019 Ms. Boyd requested an update on his medical care, re-adaptation and progress, and his training plan for the balance of the season. In his Affidavit, Mr. Fortier indicated that he telephoned Ms. Boyd regarding his training and

progress and his interest in participating in the World Cup in Japan in March 2019. Ms. Boyd refused to have him participate in the World Cup but agreed to send him information about the Canadian National Championships. There was no evidence that she followed through on sending him that information and there was no evidence of other communication between them regarding his health or training. An email exchange on 28 March 2019 related solely to Mr. Fortier's payment of an invoice for equipment.

13. As a result of his injury and re-injury Mr. Fortier was unable to train at the required level of intensity and volume, and compete during the 2018/19 season. Consequently, he did not qualify for re-selection to the PNST for the 2019/20 season based on his results in competition. However, the *Selection Criteria* provided him an alternate route for selection to the PNST. It required that he file a *Curtailment of Training and Competition* ("COTC") submission before "March 31, 2019 11:59 AM MST". The *Selection Criteria* also provided that, "Submissions accepted [sic] after this deadline will not be considered". It is evident that "accepted" in the above context was intended to mean, "received".
14. Mr. Fortier did not file a COTC submission and was advised by Ms. Boyd and Mr. McKeever in a phone call on 2 May 2019, that he would not be nominated to the PNST for 2019/20 and that he would not be eligible for funding. A week later, on 9 May 2019, the High Performance Committee (the "HPC") met and confirmed the nominations to the team which were proposed by Mr. McKeever and Ms. Boyd, which nominations did not include Mr. Fortier.
15. On 14 May 2019, pursuant to the Respondent's *DRAP*, Mr. Fortier filed an appeal (the "Appeal Application") of the team selection decision. Two days later, Mr. McKeever and Ms. Boyd sent Mr. Fortier a letter advising that further to their phone call on 2 May 2019, he would not be named to the 2019/20 PNST and would not receive funding. Separately, Nordiq Canada responded to the appeal filed by Mr. Fortier and denied that its team selection decision had been made in error. On 12 June 2019, a three-member Appeal Panel (the "Appeal Panel") denied Mr. Fortier's appeal of the team selection decision.
16. On 18 June 2019 Mr. Fortier filed a Request to the SDRCC for the appointment of a Med/Arb and following the Respondent's Answer the parties proceeded to mediate. They were not successful in mediation and an arbitration took place on 12 September 2019. In my role as Med/Arb, I have based my decision solely on the evidence which was before me at the arbitration including the testimony, Mr. Fortier's Affidavit, and the documents. I have also considered Counsel's submissions.

JURISDICTION OF THE SDRCC

17. Section 6 of the Respondent's *DRAP* provides that after an internal process for dispute resolution has been exhausted, appeals may be referred to the SDRCC with the consent of all parties. By reason of Mr. Fortier's request for Med/Arb and the Respondent's answer agreeing to Med/Arb, I am satisfied that the SDRCC has jurisdiction and that this matter is properly before me.

THE APPEAL PANEL'S DECISION

18. When Mr. Fortier filed the internal Appeal Application, he framed the issue as the non-renewal of financial support pursuant to the *AAP*. He outlined four reasons for appealing: the procedure defined in the Respondent's rules and policies were not followed; the

Respondent's decision was biased and lacked impartiality; the Respondent exercised its discretionary power inappropriately; and, the decision was unreasonable.

19. The Appeal Panel considered the written submissions and oral presentations and reached a unanimous decision, a summary of which follows.
20. The Appeal Panel found the Respondent followed the procedures described in its policies, procedures and criteria for PNST selection and the procedures described by Sport Canada applicable to the AAP. It found there was no evidence the Respondent's decision not to name Mr. Fortier was made with bias, or that a discretionary power was exercised inappropriately, or that the decision was unreasonable.
21. The Appeal Panel held that Section 1, paragraph 3.0.8 of the *Selection Criteria* dealing with *COTC* requests places the onus on PNST athletes to submit a written request with reasons if they have been unable to qualify objectively or subjectively for the PNST because of illness, injury, or an impactful life event. While the *Selection Criteria* requires athletes to state a rationale and provide the listed documentation, the Appeal Panel found Mr. Fortier had not submitted a request and the Respondent was not in a position to nominate him for funding.
22. The Appeal Panel suggested that the Respondent should make an effort to ensure that PNST athletes are aware in advance of a deadline and that it is their responsibility to file a *COTC* request in situations where they have been unable to compete as a result of injury. The Appeal Panel noted that Mr. Fortier was not really aware it was his responsibility to file a *COTC* request and that appeals could be avoided if athletes were made aware. It also found there was a lack of communication between the parties but that there was no evidence the Respondent's decision was biased or inappropriate.
23. The Appeal Panel also noted that it was important for the Respondent to notify carded athletes regarding future carding in advance of formally nominating athletes to Sport Canada, as it would allow them to begin the appeal process in good time. While it noted that the deadline for such notice was imprecise, an early notice would demonstrate the Respondent's respect for athletes and provide them with a better chance to initiate a productive appeal.

PRE-HEARING MATTERS

24. In a Preliminary Conference Call following an unsuccessful mediation session on 18 July 2019, the parties agreed to attempt more settlement discussions on 1 August 2019 and tentatively agreed to an arbitration on 15 August 2019. However, in the weeks before the hearing, it became apparent that the timetable affected the Claimant's ability to review and respond to documents provided by the Respondent. In a preliminary conference call on 7 August 2019, Ms. Guerrette sought to postpone the arbitration hearing date and proposed that the Respondent complete and file its documents and submission by 27 August 2019 and the Claimant would file his documents and submission by 5 September 2019. The Respondent would be entitled to file a reply submission by 10 September 2019 and the arbitration would take place on 12 September 2019. In fairness to Mr. Fortier, I determined that the dates for the parties' documents and submissions should be adjourned pursuant to Ms. Guerrette's proposed schedule and that the arbitration hearing date be rescheduled to 12 September 2019.

25. Ms. Guerrette also submitted a Request for Provisional and Conservatory Measures pursuant to section 6.15 of the Canadian Sport Dispute Resolution Code, which was also addressed during the 7 August 2019 conference call. Having agreed to adjourn the arbitration hearing date to 12 September 2019, and noting that Sport Canada required nominations for carding by 31 August 2019, I ordered that Provisional and Conservatory Measures as proposed by Ms. Guerrette would take effect at 5 p.m. Monday 12 August 2019, in the event the Respondent was unable to arrange for Sport Canada to extend its nomination deadline. On 8 August 2019, Nordiq Canada confirmed that Sport Canada had agreed to extend its nomination deadline until all proceedings in the arbitration were fulfilled and the order for Provisional and Conservatory measures was not required.
26. There were no issues of significance with respect to the delivery of the parties' submissions and documents. However, the Respondent gave notice on 11 September 2019 that it would be represented by Mr. Adam Klevinas, who subsequently advised that the Respondent's witnesses would be Ms. Cindy Chetley and Ms. Boyd. He gave notice that Mr. Shane Pearsall and Mr. McKeever would not be testifying and that they would not be available for cross-examination by Ms. Guerrette, as she had requested on 15 August 2019. After hearing submissions from both parties, I determined that it was important and appropriate that Mr. Pearsall and Mr. McKeever be present to answer questions by Ms. Guerrette and that, pursuant to section 6.24 of the *Code*, the Arbitration Act, 1991, S.O.1991, c.17, of Ontario permitted me to issue subpoenas if required. Mr. Klevinas subsequently advised that Mr. Pearsall and Mr. McKeever would be present to answer questions during the arbitration.
27. The hearing took place on 12 September 2019 and, at my request, was recorded in part by the SDRCC.

THE ISSUES

28. The principal issue is whether the Respondent properly established criteria for team selection and carding and made selections based on the criteria, and whether the Claimant has proven that he should have been selected in accordance with the criteria.
29. The Respondent sought an order upholding the decision of the Appeal Panel which found that its PNST selections and nominations for carding were made following proper procedures and within the scope of its authority and without bias.
30. In contrast, the Claimant argued that the conduct of the Respondent's staff so significantly breached the principles of natural justice and procedural fairness that it would be profoundly unjust to allow the Respondent's decision not to nominate the Claimant to the PNST for 2019/20 to remain in effect. The Claimant sought orders and declarations voiding certain actions and positions taken by the Respondent and argued that I should substitute my decision for that of the Respondent and name him to the PNST.
31. I begin with the evidence and analysis related to whether the Respondent has satisfied the burden on it to show that it established criteria and made a decision with respect to Mr. Fortier based on those criteria. I then discuss the issues raised by Mr. Fortier and end with an assessment of whether he has proven that he should have been selected.

EVIDENCE, ANALYSIS AND FINDINGS

The Respondent's Policies and PNST/Carding Nominations

32. The onus was on the Respondent to demonstrate on a balance of probabilities that it established the *Selection Criteria* appropriately and that the PNST selection was made in accordance with the criteria.
33. The documentary evidence establishes that the Respondent's *Policy and Procedures for National Team Selection, Nomination and Announcement* was last revised in August 2015. The Respondent's High-Performance Coordinator, Ms. Cindy Chetley, under affirmation, described the process by which staff at Nordiq Canada create the *Selection Criteria* for the NST/PNST. She testified that the HPD together with coaching staff create draft criteria which are sent to the HPC for review and comment. Comments and responses continue until members of the HPC are satisfied with the *Selection Criteria*. The draft *Selection Criteria* is returned to the HPD for review and is returned one more time to the HPC for approval. Once the HPC has approved the *Selection Criteria* it is sent for translation following which it is posted on the Respondent's website. Ms. Chetley testified that the English and French versions of the *Selection Criteria* for 2019/20 were published simultaneously on 21 February 2019.
34. Ms. Chetley testified that for the 2019/20 season the Respondent received six *COTC* requests by athletes of which five were approved. The requests were all received from able-bodied athletes and of the six requests, five were pursuant to the *Carding Criteria* and one pursuant to the *Selection Criteria*. She testified that the five *COTC* requests which were accepted were from athletes who had notified Nordiq Canada quickly after injuries were first sustained and provided regular health updates including documents from medical doctors and coaches. In addition, all the athletes submitted an email before the deadline saying that they were requesting a *COTC*, except one athlete who did not submit a request by the deadline and who had also not submitted adequate medical documentation. When asked how much assistance the Respondent gave to athletes claiming a *COTC*, Ms. Chetley responded: "None".
35. In cross-examination Ms. Guerrette challenged Ms. Chetley with respect to whether the French and English versions of the *Selection Criteria* were published simultaneously, noting different dates for the French and English versions on the Respondent's website. Ms. Chetley asserted that they are published simultaneously. I accept her evidence and accept that the *Selection Criteria* were established pursuant to the Respondent's *Policy and Procedures for National Ski Team Selection, Nomination and Announcement*.
36. With respect to the Respondent's *Carding Criteria*, Ms. Chetley testified that it goes to Sport Canada for revisions and examination before it is finalized. Once Sport Canada has inserted its suggestions and comments, the policy is returned to the HPD for approval, following which it goes to translation and is then sent to the community. Part 2 of the *Carding Criteria* provides that only athletes on the PNST will be eligible for carding, and consequently if an athlete is not named to the PNST they are not eligible for funding pursuant to Sport Canada's Athlete Assistance Program. I find on a balance of probabilities that the Respondent's *Carding Criteria* was also properly established.
37. The *Selection Criteria* provides two ways in which an athlete can be named to the PNST. The first is by earning points through approved competitions. An alternate means of being nominated to the PNST, is where an athlete has the misfortune to suffer an injury

which prevents him/her from training and competing. This process is identified at Section 1, paragraph 3.0.8 of the *Selection Criteria* and requires that an athlete file a *COTC* request.

8. Curtailment of Training and Competition - A written request with rationale can be put forward only by existing members of the NST who, due to illness, injury or an impactful life event were unable to achieve the objective or subjective qualification to the NST programs. This rationale must be submitted with:

- documentation confirming the athlete followed proper reporting protocol to the Respondent as per the Athlete Agreement.
- documentation confirming diagnosis by a physician, in the case of illness or injury, or authorized notification from a professional designate relevant to the situation in non-medical circumstances
- a letter from the athlete's coach outlining the impact of the illness, injury or life event
- a return to training, and competition plan for the season
- supporting documentation (physiotherapist or message) of what the athlete's treatment has been and will be going forward.

This provision only applies to situations that effect the athlete for longer than 4-months and must show a consistent, recorded documentation of the situation to the Respondent during the time the athlete was/is unable to compete.

Acceptance for a curtailment of training and competition will be evaluated based on objective data supporting the premise that the athlete would have qualified for the NST if not for the uncontrollable circumstance. Objective data reviewed could include, but not be limited to current and previous season FIS and CPL points, IPBs, race (Tier 1) or training results, etc. Curtailment of Health athletes will be ranked within in the subjective criteria of each Team (WC, SR, JR).

All documentation must be submitted **before March 31, 2019 11:59 AM MST**. Submissions accepted after this deadline will not be considered.

[Emphasis in original]

38. The Respondent submitted that Mr. Fortier, unfortunately, and through no fault of his own, was unable to compete in any accredited competitions in the 2018/19 season and did not meet the criteria for selection to the PNST based on his results in competition. The Respondent also submitted that he did not make the mandatory written request for a *COTC* on or before March 31, 2019 11:59 AM MST stating that he was unable to achieve the objective or subjective criteria for the PNST because of an injury. As the Claimant did not have the necessary points through competition and did not submit the mandatory written request for a *COTC*, the Respondent submitted that Mr. Fortier was ineligible to be considered for nomination to the PNST for 2019/20. It submitted that the decision not to nominate him for the PNST for 2019/20 did not require an exercise of discretion as, absent a *COTC* request on or before the deadline, there was nothing for it to consider. The *Selection Criteria* rules for nomination based on a *COTC* request were not engaged.
39. The Respondent argued that the issue in this appeal is straightforward: did Mr. Fortier submit a *COTC* request as required by the *Selection Criteria*? It submitted that he did not and his appeal should be dismissed.

40. The Claimant argued that the Respondent did not comply with its *Policy and Procedures for National Ski Team Selection, Nomination and Announcement* (Document 2.1.3). In particular, the Claimant alleged breaches of sections 3.0-1) d., 5.0-2, 5.0-3 and 6.0-2 of that document. The Claimant made a number of arguments related to these sections, all of which addressed the processes of the Respondent's HPC on 9 May 2019. The Claimant's arguments touched on principles of openness and transparency related to the HPC's selection processes, the number and representation of those in attendance, the presence of coaches, an absence of real discussion and the fact that the HPC appeared to simply ratify the list of nominees which had been provided by Ms. Boyd and Mr. McKeever. While the Claimant's arguments may have some validity, and the Respondent may wish to examine whether its practices align with the provisions of Document 2.1.3, the validity of the HPC's conduct on 9 May 2019 is not an issue based on the facts of this appeal.
41. In accordance with section 5.0-3 of Document 2.1.3 cited above, Ms. Boyd and Mr. McKeever, coaches for the PNST, drew up a list of nominees for consideration by the HPC. As the Claimant was not eligible for nomination based on his results from competition and as he did not file a *COTC* request by the required date - or at any time - there was no reason for Ms. Boyd and Mr. McKeever to include his name in the list of candidates they forwarded to members of the HPC for consideration at the meeting on 9 May 2019. As Mr. Fortier was not among the nominees for consideration at the HPC meeting on 9 May 2019, the issue of whether the processes of the HPC on that date were compliant with the Respondent's policies and procedures is not an issue properly before me, and I decline to consider it.
42. Section 2.0-3 of the *Carding Criteria* provides that an athlete must be a member of the PNST in order to be eligible for support pursuant to Sport Canada's *Athlete Assistance Program*. As the Claimant was not nominated to the PNST for 2019/20, he is also ineligible for funding from Sport Canada pursuant to the *Carding Criteria*.
43. While not relevant to the decision before me, the Respondent submitted that even if Mr. Fortier had requested a *COTC*, his request would have failed as he had not gathered the documentation needed for a *COTC* request. The Respondent submitted that he did not follow a proper reporting protocol, did not provide documentation confirming his diagnosis by a physician, did not provide a letter from his coach outlining the impact of the injury, and did not provide a return to training and competition plan for the season.
44. The Claimant also asserted that Ms. Boyd and Mr. McKeever breached Nordiq Canada's policies by calling Mr. Fortier on 2 May 2019, to advise that he would not be nominated or selected for the PNST for 2019/20, when the HPC was not meeting to consider the nominees until 9 May 2019. However, Ms. Boyd and Mr. McKeever's evidence was that, as coaches for the PNST, they determined during the pre-selection process that Mr. Fortier did not have the required points through competition and had not made a written request for a *COTC*. As he did not qualify for PNST membership by either way, they did not include him in the list of nominees they were presenting to the HPC for consideration. I note that Document 2.1.3 section 6.2-2 provides: "*Where an athlete has narrowly missed being selected, or where there are known circumstances which indicate that special consideration is warranted, selection results will also be made known to those athletes and their coaches before a general announcement is made.*" I am not persuaded that Ms. Boyd and Mr. McKeever breached Nordiq Canada's policies in calling Mr. Fortier as a courtesy on 2 May 2019.

The Issues and Arguments raised by the Claimant

45. The Claimant challenged the Respondent's decision not to name Mr. Fortier to the PNST and nominate him for carding on several grounds, each of which I will address in this analysis:
- a. The first ground was that the Respondent conducted a surprise hearing on 21 November 2018 in breach of its *Dispute Resolution and Appeal Policy*. The Claimant submitted that there were such serious violations of the principles of natural justice and procedural fairness that it would be profoundly unjust to support or permit any decisions, agreements or acts which took place during and after the hearing on 21 November 2018 to remain in effect, and that they should be declared null and void;
 - b. Second, the Claimant challenged a document presented to Mr. Fortier for signature on 21 November 2018, which document he signed on 23 November 2018;
 - c. Third, the Claimant took issue with the Respondent's refusal to accept the Claimant's medical documentation as adequate;
 - d. Fourth, the Claimant alleged that Ms. Boyd and Mr. McKeever had decided in the fall of 2018 that they would not re-nominate him to the PNST for 2019/20;
 - e. Fifth, the Claimant asserted that the Respondent was in breach of its official languages policy;
 - f. Sixth, that the Respondent was in breach of its contractual obligations to Mr. Fortier; and
 - g. Seventh, the Claimant submitted that it was inappropriate to grant any deference to the Respondent's team selection decisions.
46. Last, I consider whether the Claimant has discharged the burden on him to demonstrate that he should have been nominated for selection and carding.

The Events of 21 November 2018

47. Mr. Fortier submitted that his email of 11 November 2018 addressed a number of grievances regarding decisions made by the Respondent's staff members including violations of the Athlete Agreement and a failure to respond to his questions, all of which he found disrespectful. He argued that his email obligated the Respondent to engage its *DRAP*.
48. The Claimant submitted that instead of proceeding pursuant to the *DRAP*, the Respondent convened a surprise hearing to deal with the problems raised in his email. He noted a number of problems with the manner in which the Respondent structured the alleged hearing, including: a lack of notice, a false pretext, a lack of independence, the presence of the Respondent's staff only with a third person they selected, a failure to provide Mr. Fortier with a copy of the 21 November 2018 document in advance, a failure to give him an opportunity to object to being cross-examined, a failure to allow him to have counsel to prepare for the hearing, and a failure to give him an opportunity to object to the fact that the Respondent's staff participated as parties, judge and jury while already having decided how they would resolve the issues and the outcome.
49. The Claimant submitted that the defects in the alleged hearing were not simple irregularities but serious violations of rules and principles of natural justice and a lack of procedural fairness. In consequence, he argued that it would be profoundly unjust, as was found by the arbitrator in *Palmer v. Athletics Canada* (SDRCC 08-0080), to support

or permit decisions, agreements and acts which took place during and after the hearing on 21 November 2018 to remain in effect, and that they should be declared null and void. Among the decisions, agreements and acts which he argued should be declared null and void were the document dated 21 November 2018; the Respondent's failure to accept the medical evidence regarding his aptitude to train and increase the intensity of his training; the decision of the Appeal Panel; and the Respondent's decision not to name him to the PNST or nominate him for carding.

50. The Respondent submitted that the meeting on 21 November 2018 lacked the hallmarks of a hearing. It submitted that it was an informal meeting intended to address the grievances Mr. Fortier had raised in his email of 11 November 2018 and make him aware that ultimately his success would depend on him taking responsibility for his health and training. The Respondent denied that it had engaged its *DRAP* or that it held a hearing.
51. Having considered the evidence, I find that the Claimant's characterization of the meeting on 21 November 2018 as a hearing is not supported. Six months later, at page 3 of the Appeal Application filed by Mr. Fortier on 14 May 2019, he described what took place on 21 November 2018 as a meeting. He stated that following his heartfelt email of 11 November 2018, he had a meeting with those in charge together with Mr. Venne in order to resolve the problems. While discussing how the meeting on 21 November 2018 concluded, he stated that they agreed to include Mr. Venne in both written and oral exchanges when required as mediator. However, he also stated that the damage had been done with his email of 11 November 2018. Contrary to Mr. Fortier's submission and Affidavit, his Appeal Application clearly indicates that what took place on 21 November 2018 was a problem-solving meeting. It was a discussion rather than a hearing, and in the circumstances was an appropriate first step in clarifying what were viewed as problems by both sides and an attempt to find common ground.
52. While Mr. Fortier appears to suggest in his Affidavit that Ms. Boyd and Mr. McKeever randomly invited Mr. Venne to participate in the meeting, the evidence shows that Mr. Fortier had previously shared his frustrations with Mr. Venne as a confidant and it is apparent that he viewed him at the very least as a neutral party, if not a supporter. His Appeal Application suggests that he welcomed the participation of Mr. Venne and the documentary evidence shows that Mr. Venne was helpful and supportive of Mr. Fortier. I do not doubt that the meeting was emotional as the parties attempted to resolve their different perspectives. Paragraph 25 of Mr. Fortier's Affidavit describes the efforts Mr. Venne made to moderate the positions taken by Ms. Boyd and Mr. McKeever during the meeting and indicates that while Mr. Venne proposed several compromises to resolve the conflict, he was not successful. Mr. Fortier's description of Mr. Venne's mediative role supports a conclusion that this was a discussion and not a hearing.
53. Undoubtedly, Ms. Boyd and Mr. McKeever could have made better decisions in organizing the 21 November 2018 meeting. They could have communicated their intention more clearly and been more open about what they hoped to achieve. They could have been clearer about when the meeting would take place and who would participate, while also allowing Mr. Fortier to choose a support person. If they had been more transparent it may have reduced Mr. Fortier's anxiety, recognizing that there is a power imbalance in the relationship between a national sport organization (NSO) and an athlete. I accept that Mr. Fortier felt compelled to participate in the meeting and was motivated by fear that he would be removed from the PNST. While that fear may have been due in part to his lack of awareness or understanding of his rights as an athlete, it

would have helped to alleviate his fears if Ms. Boyd and Mr. McKeever had taken the above steps.

54. However, it is also apparent that there were serious issues to be discussed which involved Mr. Fortier's hopes and aspirations as an athlete and his relationship to the PNST and the PNST coaches. Consequently, while the measures noted in the previous paragraph may have made the meeting more productive and less fear-inducing for Mr. Fortier, it is unlikely that it would have been easy or straightforward regardless of how open Ms. Boyd and Mr. McKeever had been about the process. For their part, I accept that Ms. Boyd and Mr. McKeever were motivated to try and resolve Mr. Fortier's complaints, the problems in communication, and to ensure that he was aware of his obligation to regularly inform them regarding the status of his injury, his ability to train, and his readiness for competition. While there were missteps, I find that the meeting was an attempt in good faith to clear the air and get back on track.
55. The Respondent's *DRAP* is a policy which benefits both athletes and Nordiq Canada. It is intended to assist parties in resolving problems and disputes should they feel that it is necessary. There is no greater onus on Nordiq Canada to engage the *DRAP* than there is on an athlete to do so. While Mr. Fortier had a number of grievances which he expressed in his 11 November 2018 email, he chose not to engage the *DRAP*. Similarly, neither Ms. Boyd nor Mr. McKeever thought it was necessary to do so.
56. Based on the evidence, I am not persuaded that either party relied on or attempted to engage the *DRAP*. I am also not persuaded that the meeting on 21 November 2018 was a hearing. Instead, I accept that it was an informal meeting to discuss areas of conflict and poor communication between Mr. Fortier on the one hand and Ms. Boyd and Mr. McKeever on the other. The problem-solving meeting was not a hearing and does not attract principles of natural justice and procedural fairness. Consequently, neither have I found that there was a serious violation of such principles and I do not find that the principles discussed in *Palmer v. Athletics Canada* (SDRCC 08-0080) are applicable in this instance.

The Document Dated 21 November 2018

57. The 21 November 2018 document is on Nordiq Canada letterhead, is untitled, does not identify which athlete is being addressed, does not have a preamble, and does not state what its relationship is to the Athlete Agreement or any of the Respondent's policies. The only evidence that it pertains to Mr. Fortier is through his signature at the bottom of the document. Ms. Boyd drafted the document without legal advice regarding its content or structure. It is comprised of five clauses which appear to state what would be readily apparent to an athlete on a national team.
 - a. The 1st clause begins, "La responsabilité de vos actions, commentaires et impacts" and appears to be a reminder that the athlete is responsible for representing the NSO and Canada in a positive light including through the athlete's communications with coaches, team members, funders, supporters and members of the public. If anything, this supports the Athlete Agreement and Code of Conduct.
 - b. The 2nd clause is titled, "La responsabilité de votre succès" and indicates that the athlete is ultimately responsible for his/her preparation. However, it also states that it is expected that the athlete will work with coaches to ensure that his/her

performance is coordinated. It states that Nordiq Canada can contribute to the acquisition and maintenance of equipment but that the athlete is responsible. With respect to the athlete's health, it states that the athlete should do everything within his/her ability to treat injuries as quickly as possible and to inform Nordiq Canada and, if necessary, use its resources to help obtain optimal medical care. This clause reinforces the Athlete Agreement and offers that the Nordiq Canada will give financial assistance for equipment.

- c. The 3rd clause is one line and states, "*Pour la durée de l'entente, adhérer à l'accord des athlètes SFC et au code de conduite.*" This does nothing more than confirm that the athlete is a signatory to such agreements and remind the athlete to abide by them.
 - d. The 4th clause states that the athlete should respond to concerns and questions asked of him quickly, professionally and respectfully.
 - e. The 5th clause indicates that the athlete should respect the general requirements of the Yearly Training Plan which was established and shared at the beginning of the year and to understand what his/her rights are as a PNST athlete and inform himself/herself if the athlete is uncertain.
58. This document does not provide any measures of performance or consequences in the event of non-performance. It is apparent that Ms. Boyd and Mr. McKeever wanted the meeting and the document to serve as a reminder to Mr. Fortier that he was ultimately responsible for himself and his performance as an athlete. The 21 November 2018 document is of questionable enforceability and does not appear to alter or add to Mr. Fortier's existing obligations in any significant manner. The document is analogous to a bulletin or memo which a recipient is asked to sign as confirmation of receipt. I see no compelling reason to declare this document null and void and I decline to do so.
59. The day after the meeting, Mr. Fortier had a full medical examination and physiotherapy assessment and was advised by the team physician that he could train with the PNST in Canmore and possibly participate in the US Nationals at the beginning of January. Having had the medical exam and been told that he could train with the PNST, Mr. Fortier decided to sign the 21 November 2018 document. In spite of having signed it, he felt that he was not given an opportunity to train with the team during the camp which continued until November 25, 2018. Mr. Fortier returned home on 26 November 2018.
60. Ms. Boyd and Mr. McKeever's testimony in contrast to Mr. Fortier's evidence was that he was not involved in the Alberta Cup competition which was taking place concurrently with the training camp in Canmore and that he was therefore on a different training schedule than other members of the team. While Mr. Fortier felt he was being excluded, Ms. Boyd and Mr. McKeever testified that there was no effort or attempt to separate him from other team members.

Mr. Fortier's Medical Documentation

61. With respect to Mr. Fortier's medical documentation, the Claimant has requested that I consider its documents C-06 and C-30 to C-35. In addition, there was the assessment done by Dr. Andrew Reed and physiotherapist Shane Munro on 22 November 2018 included as Exhibit U (R-35) of the Respondent's documents. If the assessments done by Dr. Reed and Mr. Munro are considered the gold standard, it is very clear that the

medical documentation forwarded by Mr. Fortier is of a much lower standard. It is also noteworthy that clause 3.j) of the Athlete Agreement requires that athletes provide Nordiq Canada with a certificate from a “medical doctor” within one week of the diagnosis of an injury.

62. The only medical document contained in C-06 is a note dated 2 November 2018 from Dr. Rémi Ouellette, chiropractor. It is essentially a single paragraph which states that Mr. Fortier was experiencing pain in his lumbar region since the beginning of June which is not entirely consistent with Mr. Fortier’s evidence that he injured his back due to a cycling accident on 21 June 2018. Dr. Ouellette does not refer to Mr. Fortier’s cycling accident in his note which makes it appear that for Dr. Ouellette, it was not a relevant factor. While this discrepancy was not explored by either party at the arbitration, it would have caused Ms. Boyd and Mr. McKeever, if they had noticed, to wonder what was happening with Mr. Fortier and whether his reporting was accurate, or the medical report was accurate. The report by Dr. Ouellette does not indicate the dates on which he saw Mr. Fortier, nor does he chart the course of Mr. Fortier’s back pain or indicate when and to what extent he was able to train. It is evident that the report by Dr. Ouellette was not sufficiently detailed to provide Ms. Boyd and Mr. McKeever with the information they needed to assess the course of Mr. Fortier’s injury, where he was in his recovery, and what kind of training program would be suitable.
63. Document C-30 is an email cover note attaching a medical form completed by Dr. Isabelle Côté. While the cover note is provided at C-30, the medical documents are not, and I am unable to assess the completeness or relevance of the attachments. Document C-31 is a self-report by Mr. Fortier and while it is helpful, it cannot replace a report from his physician. Documents C-32 and C-33 are photographs of a prescription given to Mr. Fortier. The prescription shows that he saw a physician and was prescribed medication, but it does not provide any information in the nature of an evaluation or assessment and, on its own, it is of limited use. While Ms. Boyd followed up and requested the name of the prescribing physician, so that Dr. Reed could speak with him or her, it is apparent that they were unable to connect by phone and there was some suggestion that there was a language barrier. However, Mr. Fortier testified that his physiatrist trained in the United States and speaks English fluently. I accept that evidence and, while I understand that Mr. Fortier was attempting to be helpful to his physiatrist and relieve her of the burden of completing a form, it is sometimes difficult for busy professionals to coordinate, and it would have been more helpful in establishing a documentary record, if he had asked her to complete a written assessment. Even if she and Dr. Reed had managed to discuss Mr. Fortier’s medical condition, one of them would have been required to make a written report for purposes of creating a documentary record, if not also for purposes of liability. Document C-34 is a request for authorization to use a banned substance for therapeutic purposes and is not a physician generated medical form. Document C-35 is a second copy of the note from Dr. Ouellette dated 2 November 2018.
64. I accept that Ms. Boyd and Mr. McKeever found the Claimant’s medical documentation inadequate. The document which most closely approaches an assessment is from Dr. Ouellette. However, I accept that it is insufficiently precise or detailed to give them confidence regarding Mr. Fortier’s state of health, his prognosis, his ability to train at the time of the note, and a suggested path to recovery. In addition, while no doubt skilled, a Doctor of Chiropractic Medicine is not, strictly speaking, a medical doctor.
65. I accept that the detail and precision requested by Ms. Boyd and Mr. McKeever was the kind of medical information which would be required to support a *COTC* request

pursuant to the *Selection Criteria* and *Carding Criteria* in the event Mr. Fortier's injury continued to persist.

66. The Claimant has requested that the Respondent attach the medical documents cited in this part to his file. In the event that the Respondent has not already done so, I order that documents C-06 and C-30 to C-35 be placed in Mr. Fortier's file.

Did Ms. Boyd and Mr. McKeever Decide in Fall 2018 to Remove Mr. Fortier from the PNST?

67. At paragraph 26 of his affidavit, Mr. Fortier states his opinion that Ms. Boyd and Mr. McKeever agreed in advance that he would lose his right to train, be a member of the PNST and compete unless he submitted to a medical evaluation and signed the document which was presented to him at the end of the meeting. Based on the evidence, I do not find that allegation persuasive. Had Ms. Boyd and Mr. McKeever attempted to do so, it is evident that it could have been made the subject of an appeal through the *DRAP*.
68. Mr. Fortier also alleged that the Respondent had decided as of autumn 2018 not to honour its contractual obligation to him and not to nominate him to the PNST for 2019/20 and prevent him from obtaining funding. The Respondent rejected that assertion as untenable. It submitted that the qualification races had not yet occurred and the deadline for a *COTC* was many months away. It argued that its emails show that the Respondent continued to be in communication with Mr. Fortier regarding his health, training and plans for competition. In addition, it is very clear that had Mr. Fortier been able to recover from his injury and compete, he may well have acquired sufficient points to merit being a member of the team through competition. In the autumn of 2018 neither Mr. Fortier nor the Respondent staff knew or were able to foresee whether Mr. Fortier would recover from his injury nor what the competition phase of the season would bring. I agree with the Respondent that this allegation is unfounded.
69. Ms. Boyd testified that she was attempting to assist Mr. Fortier to recover from his injury in a manner which was safe and to ensure in the meantime that he was able to train to the extent possible and prepare for competition. I accept her testimony that she had no intention to drop Mr. Fortier from the PNST as he had shown what he was capable of achieving in the past and the competitive season was just beginning.

The Respondent's Official Languages Policy

70. Mr. Fortier alleged that the Respondent contravened its Official Languages Policy particularly with respect to its obligation under paragraph 15.b to ensure that its staff understands and is capable of communicating effectively with the athlete in his language of choice.
71. The documentary evidence provided by the parties included multiple email threads in which Ms. Boyd, Mr. McKeever and Mr. Fortier initiated communication in both French and English. It is apparent based on the emails that the parties were able to communicate effectively and it is also clear that they had sufficient knowledge of both languages to be able to request clarification when there was a lack of clarity. At the best of times there is a possibility for miscommunication even when parties share a first language and communicate in that language. While Mr. Fortier was frustrated with Ms. Boyd's failure to respond to all of the questions he raised in his emails, I am not persuaded that this is a linguistic issue any more than it is a function of being overworked or distracted.

72. I am satisfied based on the email threads that the Respondent's staff were able to communicate effectively with Mr. Fortier in French. In one particular thread there was an occasion in which Mr. Fortier spontaneously expressed himself in English and when Ms. Boyd was unclear what he had said, she requested that he say it in French. There was also an occasion in which Mr. Fortier requested that Ms. Boyd communicate in French and she did so.
73. In an email (Exhibit Y - Document R-41) Mr. Fortier advised a former staff member, Mike Edwards, who could not express himself in French, that it was okay to communicate with him in English and that Mr. Fortier would ask for clarification if he could not understand. The parties' interactions reflect the kind of give and take required in communication, whether people are of the same linguistic background or different linguistic backgrounds. If something is not understood, it is important to ask for clarification.
74. In testimony, Mr. Fortier indicated that Ms. Boyd understands French better than she speaks or writes it, but that Mr. McKeever is fluently bilingual. He expressed difficulty with certain English acronyms, but also indicated that he was generally able to figure it out. He also agreed that he could have asked for clarification.
75. I am satisfied that Ms. Boyd and Mr. McKeever are competent to communicate with Mr. Fortier in a proactive and effective manner in French, his language of choice, and I am not persuaded that the Respondent has contravened its Official Languages Policy or that an order is required that it comply.

The Respondent's Contractual Obligations

76. Mr. Fortier alleged that the rights and obligations of the parties are identified in the Athlete Agreement and that the Respondent failed to honour its contractual obligations to him and in particular those in paragraphs 2. d), f), j), k), and o). They include: helping the athlete benefit from all the advantages to which he is entitled by reason of the AAP; provide the athlete with the schedule of activities of the PNST and the dates of training camps and competitions; to communicate verbally and in writing in the language of his choice; in the event of a conflict between the athlete and the NSO, offer an appeal procedure reflecting principles of natural justice and equity and providing an independent procedure for the resolution of conflict; assist the athlete to obtain care and advice of quality physicians.
77. In the following paragraphs, I address the Respondent's alleged failures to honour its contractual obligations vis-à-vis Mr. Fortier.
- a. With respect to the AAP, I accept that there was a delay in Mr. Fortier receiving benefits at the beginning of the 2018/19 carding cycle beyond what is typical as a result of Sport Canada's practices. I accept that the additional delay was due to the Respondent misplacing or losing the Athlete Agreement. However, I also note that the Respondent took steps to rectify the problem by ensuring that Sport Canada received Mr. Fortier's signed Athlete Agreement as soon as they became aware that it was an issue. I see this as an innocent mistake and not as a serious breach of the Athlete Agreement.
 - b. Providing athletes with a schedule of training and competitions - I find that through direct communication or through the website Mr. Fortier had access to

schedules showing the PNST's activities, training camps and competitions for 2018/19. While he blamed Ms. Boyd for not following up on her email of 4 December 2018 regarding team travel details to the US Nationals in early January, it is apparent that he was not proactive and did not contact her when the details were not forthcoming.

- c. Nordiq Canada's Official Languages Policy has been previously addressed.
- d. Regarding the availability of an appeal procedure, the Respondent noted in its reply submission there are three references to the appeals process available to athletes in the Athlete Agreement. In addition, Mr. Fortier was clearly able to access the appeal procedure in order to challenge the Respondent's decision not to name him to the PNST for the 2019/20 season. Had he chosen to do so, he could have accessed the *DRAP* in November as a means of resolving his grievances. Instead, he chose a more informal route which was to describe his grievances in an email sent directly to Ms. Boyd and Mr. McKeever. He could also have accessed the *DRAP* as a means of responding to the document of 21 November 2018 if he felt it was necessary to do so.
- e. It is very clear from the email communications that Ms. Boyd was particularly concerned about Mr. Fortier's health (see R-35 referred to in Respondent's reply submission paragraph 7f), the status of his injury, his rehabilitation, and information required by the PNST physician and physiotherapist to assess his condition. Ms. Boyd repeatedly requested that Mr. Fortier provide medical documentation to show that he was healthy enough to participate in training camps and competitions funded by the Respondent, particularly given that it would be irresponsible of the Respondent to allow an injured athlete to compete, and an unwise allocation of its resources.

Regarding Deference Given to the Discretionary Decisions of NSOs

78. The Claimant argued that there should be no deference given to Nordiq Canada with respect to any exercise of discretion required in its decision not to nominate him for the PNST. He noted that Nordiq Canada is not an administrative tribunal as it is conceived in Canadian law and that its designation as an NSO depends on its funding which may be withdrawn at any time and does not confer an exclusive legislative competence in sport law. Mr. Fortier submitted that deference is an exceptional measure in Canadian law and is reserved for decisions by specialized tribunals, and that contractual recognition of Nordiq Canada in matters of cross-country skiing cannot be conflated with an exclusive expertise legislated by Parliament. In contrast, the Respondent submitted that the deferential standard has been applied by innumerable SDRCC tribunals to decisions made by NSOs and their appeal panels and that the Claimant's argument should be rejected. It also submitted that the deferential standard does not apply in this case as the issue is simply whether Mr. Fortier fulfilled or did not fulfil his obligation to file a *COTC* submission. The Respondent submitted that it did not take any steps to assess Mr. Fortier's performances or any subjective or discretionary information pursuant to a *COTC* request.
79. Based on the evidence, I am not persuaded that the Respondent exercised discretion in not nominating Mr. Fortier to the PNST or for carding. I find that with no results from competition and no request for a *COTC*, the team coaches, Ms. Boyd and Mr. McKeever,

did not exercise a power of discretion about whether to include Mr. Fortier in the list of nominees for consideration by the HPC.

The Claimant's Burden of Proof

80. It is apparent that Mr. Fortier was lulled through his superior performances in competition and staff support in previous years, to expect re-nomination to the PNST. However, his 2018/19 season was different.
81. It was the first occasion in many years in which Mr. Fortier was unable to compete. It was also a year in which issues related to communication, reporting, medical documentation and his responsibility as an athlete had been aired and discussed. While Mr. Fortier's grievances were discussed, Ms. Boyd and Mr. McKeever also discussed Nordiq Canada's expectations. While informal, the meeting on 21 November 2018 was nonetheless significant and should have alerted Mr. Fortier to the fact that he needed to be proactive and inform himself regarding his rights and obligations. Just as his email of 11 November 2018 stands as a record of his grievances, Nordiq Canada's document of 21 November 2018 stands as a record of its concerns.
82. Mr. Fortier testified that he was unaware of section 1, paragraph 3.0.8 in the *Selection Criteria*. He acknowledged that he had never visited or browsed Nordiq Canada's website. His testimony was that he had always been verbally advised by Ms. Boyd, Mr. McKeever or other staff members what the criteria were for selection and that he had no need to look at the *Selection Criteria*. His evidence was that he had no idea such a document existed until he received Ms. Boyd and Mr. McKeever's letter dated 16 May 2019. Although Mr. Fortier testified that the meeting in Canmore was very difficult for him, his subsequent behaviour suggests that Ms. Boyd and Mr. McKeever's efforts to make him aware that he was responsible for managing his career was of limited success.
83. Mr. Fortier testified that he thought, with all of the correspondence and medical documentation he had sent Ms. Boyd, the team had everything that would be required to help him obtain a *COTC*, as it had done in 2013. While there was some medical documentation, as previously discussed, there are almost no rigorous assessments and evaluations. In emails, Ms. Boyd specifically requested detailed medical evaluations, treatment plans, and protocols for readapting including ongoing evaluations. She also requested medical certificates showing that he was in good health. It is clear that her requests for the most part went unanswered or would result in Mr. Fortier giving her an update on how he felt he was doing.
84. The Respondent argued that, while Mr. Fortier submitted that Nordiq Canada's staff had helped him with a *COTC* request in 2013 and that its current practice of not proactively assisting athletes was a change, the email evidence (Exhibit W - Document R-39) shows that Nordiq Canada was taken by surprise when its staff member, Mike Edwards, learned that Mr. Fortier had not made a request for a *COTC* on 24 April 2013 and that the documentation required by Sport Canada was not in place. The email reveals that Mike Edwards took steps to help Mr. Fortier but that he was not pleased that he was required to do so.
85. Following experiences such as the one in 2013, it is apparent that the Respondent, with limited manpower and many tasks and obligations, took a firmer approach in requiring that athletes take responsibility for their athletic careers by knowing what is required of

them and satisfying their obligations pursuant to the Athlete Agreement and Nordiq Canada's various policies and procedures. The meeting on 21 November 2018 and the document of that date, represent a serious effort by Ms. Boyd and Mr. McKeever to make it clear to Mr. Fortier that he needed to inform himself regarding his obligations as a PNST athlete.

86. Mr. Fortier would have been acutely aware in March 2019 that he had been unable to achieve any points through competition during 2018/19 and that there were no other opportunities for him to acquire points through competition. That should have prompted him to research how he would deal with not being able to re-qualifying based on points earned through competition. It is apparent that he did not do so. He would also have been aware that the carding cycle was nearing its end and that might also have prompted him to take action.
87. It is very clear that Ms. Boyd and Mr. McKeever took significant measures on behalf of the Respondent, to alert Mr. Fortier regarding his obligation to proactively manage his athletic career. While it is evident that Mr. Fortier did not internalize the message, it was not for lack of effort on the part of Nordiq Canada.
88. Based on the evidence, I find that it was Mr. Fortier's responsibility to familiarize himself with policies which were of importance to him, in particular the *Selection Criteria* and *Carding Criteria*. In spite of a very serious effort to raise his awareness, Ms. Boyd and Mr. McKeever were not successful. Mr. Fortier did not provide much of the documentation, medical certificates and evaluations they requested. He did not research the Nordiq Canada website or inform himself of his rights and responsibilities. At the end of March 2019, he did not file a *COTC* request, and I find that he has not demonstrated that he should have been nominated to the PNST for 2019/20.

CONCLUSION

89. Based on the evidence and my analysis, I find on a balance of probabilities that the Respondent appropriately established *Selection Criteria* for membership on the 2019/20 PNST. In addition, I am satisfied that it acted in accordance with the *Selection Criteria* in making its decision not to name Mr. Fortier to the PNST. The *Selection Criteria* is clear that absent points acquired through competition and objective or subjective criteria, an alternate route for nomination to the PNST was for Mr. Fortier to submit a *COTC* by March 31, 2019 11:59 AM MST. Mr. Fortier did not submit a written request and, as a result, Ms. Boyd and Mr. McKeever who prepared a list of nominees for the HPC did not include his name. Absent a *COTC* request by Mr. Fortier, they did not consider his medical documentation, whether he was able to train and whether his training plan was complete.
90. Based on my findings of fact, I have dismissed Mr. Fortier's amended request for relief, with the exception of an order regarding the medical documents which I trust is aligned with Nordiq Canada's document collection and safeguarding practices.
91. While Mr. Fortier will not have the benefit of being on the PNST and receiving funding, I recognize that he may nonetheless wish to continue training and competing with a view to representing Canada in 2022 as he did at the last Paralympic Games in PyeongChang. Mr. Fortier has proven himself in the past and while it will be significantly more difficult without being a member of the PNST and without carding, there are

mechanisms for him to regain support from Nordiq Canada through competition. Should Mr. Fortier choose that path, or even if he does not, I trust that despite this process, Nordiq Canada will be in a position to offer what assistance it can, particularly related to the incomplete resolution of the defective sled purchased 6 September 2018 from Spokes 'n Motion of Denver, Colorado.

92. I have denied Mr. Fortier's appeal and the decision of the Appeal Panel rendered in June 2019 remains in effect.

Signed 30 September 2019.

A handwritten signature in black ink, appearing to read "Hugh McCall". The signature is written in a cursive, flowing style.

Hugh McCall, Mediator/Arbitrator