

SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE REGLEMENT DES DIFFERENDS SPORTIFS DU CANADA (CRDSC)

SDRCC No: 19-0425

IN THE MATTER OF AN ARBITRATION HEARING BETWEEN:

JESSIE LOUITIT
(CLAIMANT)

- and -

ROWING CANADA AVIRON (RCA)
Represented by Terry Dillon, CEO, and Iain Brambell, HPD
(RESPONDENT)

DECISION WITH REASONS

ARBITRATOR: GORDON E. PETERSON

APPEARING:

For Claimant: Gowlings WLG LLP - James H. Smellie
For Respondent: Brazeau Seller LLP – Geoffrey Cullwick and Jay Kim

WITNESSES:

For Claimant: Jessie Loutit
For Respondent: Iain Brambell, High Performance Director
 Dave Thompson, Women’s Head Coach
 Phil Marshall, Women’s Assistant Coach

Hearing by way of teleconference on November 7th, 2019

I INTRODUCTION

01. This case concerns an appeal of a team selection decision made by Rowing Canada Aviron (“**RCA**” or the “**Respondent**”) on September 30, 2019 regarding the invitation of athletes to attend the 2020 Olympic Selection Camp to be held at the National Training Centre (“**NTC**”) from October 7, 2019 to March 28, 2020.
02. Only athletes attending the 2020 Olympic Selection Camp (“**Selection Camp**”) may be selected to the 2020 Canadian Olympic Team for Rowing. Accordingly, the decision on athletes selected for invitation to attend is a selection decision.
03. In the interest of expediency, the Claimant and the Respondent agreed to proceed to arbitration without exhausting the RCA internal appeal process.
04. On October 15, 2019, the SDRCC received the Claimant’s Request for Arbitration dated October 14, 2019. The Respondent filed its Answer on October 16, 2019.
05. After being appointed Arbitrator, I held a preliminary call on October 18, 2019, where process was discussed, and timelines set for the delivery of additional documentation.
06. At the preliminary call, each of the Claimant and the Respondent accepted the jurisdiction of the Sport Dispute Resolution Centre of Canada (“**SDRCC**”).
07. After exchange of documents and some communications, the hearing occurred on November 7, 2019. During the hearing, each of the parties availed themselves of the opportunity to (a) present witnesses and oral arguments, (b) cross examine and respond to arguments made by the other party, in addition (c) to addressing questions I posed. Prior to my declaring the hearing closed, each of the parties confirmed that they had no further issues to raise and no further submissions they wished to make, and confirmed they had no objection or reservation regarding the conduct of the proceedings.
08. At the end of the hearing, I reserved judgment but confirmed I would be issuing my decision as soon as possible and in accordance with Subsection 6.21(c) of the Canadian Sport Dispute Resolution Code (the “**Code**”).
09. Selection decisions are never easy, and emotions frequently run high. I particularly have appreciated Counsel for both parties and the witnesses in this matter. Each has

been very professional and helpful in presenting the materials and providing the necessary information to be considered and all have performed clearly and admirably.

10. The Canadian Olympic Committee (“**COC**”) requires selection criteria to be approved by the COC to ensure that athletes have been involved in the process and have a fair opportunity to understand in advance what each needs to do in order to be selected to the Olympic team. Evidence was produced and agreed upon regarding the establishment of RCA’s selection criteria and there appears to have been efforts made to advise athletes of the importance of certain criteria (such as attendance and performance at the National Rowing Championships or “**NRC**”).
11. Nevertheless, there is no question that the number of appeals alone regarding such selection criteria should give pause for thought. If the purpose of selection criteria is to permit athletes to know what they must do in order to be selected, it appears evident, based on the number of appeals, that there was a lack of clarity over what was required to be achieved in order to be invited to the Selection Camp.
12. It is evident the Claimant has felt “wronged” and honestly believes that she should be invited to the Selection Camp – that she should be allowed to continue to contest a seat in the boats racing for Canada at the Olympic Games in Tokyo.
13. At the same time, it is also evident that the Respondent honestly believes it is doing its best within its selection criteria to ensure that Canada will have the best results in qualified boats at such Olympic Games.
14. It is clear for athletes not invited to the Selection Camp, that their dream to compete at the 2020 Tokyo Olympics for Canada in Rowing has come to an end. That is never easy to accept, but especially when you believe it was not fair.
15. It is trite to say that the High Performance Director (“**HPD**”) has no reason not to select the athletes he believes will provide the best opportunity to achieve RCA’s objective of top 6 for the Women’s sweep boats. His decision was based on recommendations by both coaches involved in the Women’s sweep program. Coaches’ reputations and careers ebb and flow based on the results they achieve - and coaches do not usually choose to select teams to lose.

II FACTUAL BACKGROUND

16. The Claimant was a member of the Canadian Team at the 2019 Pan American Games in Lima and earned a silver medal in Rowing at such Games. She was hopeful of qualifying for the Canadian Team to the 2020 Olympic Games in Tokyo, Japan.
17. The Respondent is the national federation governing Rowing in Canada. It is recognized by the international federation, *Fédération Internationale des Sociétés d'Aviron* (“FISA”).
18. RCA’s Tokyo 2020 Olympic Team Selection Guidelines were drafted and prepared by RCA staff, reviewed by RCA’s Athlete Council and approved by the COC prior to becoming effective and being posted on the RCA website (“**Selection Criteria**”). It was a lengthy process in which Mr. Brambell, the HPD, worked with the coaches, RCA Athletes’ Council and the COC prior to finalizing them. The Selection Criteria were published in August 2019 and state that the objective of such criteria is to select crews that have potential to achieve the top 6 at the 2020 Olympic Games in Tokyo, Japan.
19. In order to select such crews, candidates were to be identified and invited to the Selection Camp where the final team would be selected. Only athletes invited to the Selection Camp were permitted to attend. Only those athletes attending the Selection Camp could be selected to the 2020 Canadian Olympic Team for Rowing. Essentially, the candidates invited to the Selection Camp form a short list of athletes who may be selected to the 2020 Canadian Olympic Team for Rowing.
20. Section 5.1 of the Selection Criteria requires the list of athletes to be invited to the Selection Camp to be posted on the RCA website by September 30, 2019 and outlines the basis for such invitation. The word “discretion” is not used in the Selection Criteria.
21. For the Women’s sweep group in which three boats are qualified for the 2020 Olympic Games in Tokyo, 14 rowers and two spares were invited to the Selection Camp.
22. The Selection Criteria for Selection Camp invitees are set out in Section 5.1 as follows:

“The list of invited athletes to the selection camp will be posted on the RCA website by September 30, 2019. RCA Head Coaches are to nominate their invitation list to the High Performance Director for approval.

Invitations to athletes will be extended by the High Performance Director based on:

- *2019 International Racing Results including World Rowing Championships, Under 23 Rowing Championships, Pan American Games and U21 Trans Tasman Regatta;*
- *Attendance at and performance in the 2019 National Rowing Championships, September 27th to 29th in Burnaby, BC;*
- *2019 RCA Athlete Monitoring Program Results (RADAR);*
- *Meeting eligibility requirements as outlined in 4.1 General Eligibility Requirements above;*
- *The capacity of the overall NTC environment; &*
- *Number of 2020 Olympic Qualification places available per category (Open/Lightweight).*

Athletes who competed and qualified boats through the FISA Olympic and qualification criteria at the 2019 World Rowing Championships, must comply with the 2020 Olympic Selection Camp invitation process for entry into the Olympic Selection Camp. RCA's High Performance Director will consult with the Head Coaches to determine if it is within RCA's performance objectives (top 6) to consider and pursue an entry(ies) into the Final Olympic Qualification Regatta. The final decision rests with the High Performance Director."

23. The Selection Criteria do not place required weighting upon any criterion on which invitations to the Selection Camp are to be based, nor do they limit or specify the number of candidates to be invited. Accordingly, it is not surprising for the Claimant to question how she, as a silver medallist at one of the identified international competitions and with better results in her ergometer monitoring program ("**RADAR**"), fails to be invited while other athletes, who raced together in a boat finishing ahead of the Claimant's boat at the NRC but have no international results and slower RADAR results, are invited. Is it appropriate one criterion outweighs the other two criteria?

III SUBMISSIONS AND ANALYSIS

24. In its submission, Counsel for the Claimant correctly suggested that "RCA is obligated to conduct its selection of those athletes in conformity with published selection criteria and generally accepted principles of natural justice and procedural fairness."
25. Counsel for the Claimant submits that "jurisprudence outlines the following principles for selection criteria decisions:
- (a) Selections must be made in accordance with the natural and ordinary meaning of the criteria;
 - (b) Any subjective intentions of discretion must be properly conveyed in the wording of the criteria;

- (c) Where criteria provide for or mandate the exercise of discretion, it must be exercised reasonably and not arbitrarily.”
26. Claimant’s Counsel further suggests that the right to employ discretion is not sufficiently displayed in Section 5.1 of the Selection Criteria in the manner that it is contained in Section 5.2 or in earlier selection criteria - such as the selection criteria for the Pan American Games.
27. Invitations must be extended to athletes based on six specified criteria. Claimant’s Counsel suggests unbridled discretion is not supported by jurisprudence and the Respondent does not have the right to massage and interpret the Selection Criteria as it sees fit.
28. Counsel for the Respondent submits that there does not need to be discretion explicitly provided for in Section 5.1 because it is inherent in the Selection Criteria. He further argues that the Respondent applied such discretion as directed to achieve the explicit objective of the Selection Criteria – to achieve an ‘A’ Final position for each of its boats, with the ultimate aim of winning Gold medals.
29. The ordinary meaning of “*Invitations to athletes will be extended by the High Performance Director based on ...*” (emphasis added) requires a mandatory extension of invitations by the HPD but a discretionary interpretation of how the performance results are to be interpreted. As submitted by the Claimant and consistent with past jurisprudence, it cannot be an arbitrary or unreasonable interpretation, but I find there is discretion inherent in such Selection Criteria.
30. The Respondent suggests that each candidate must be measured individually against each criterion in order to determine who will be “short-listed” and permitted to attend the Selection Camp, where rowers will later be recommended to the COC for selection to the 2020 Olympic Team.
31. There is no objective cut-off. The Selection Criteria do not require a specific number of athletes to be invited to the Selection Camp. The Selection Criteria also do not explicitly state what should dictate such number. The short-list contains the number of people determined by the HPD as the number permitting RCA to best train and prepare at the Selection Camp in order to achieve the objective of top-6 boats at the 2020 Olympic Games.

32. The Respondent suggests the number invited will be influenced by the perceived capacity to permit testing different combination of rowers, as well as permitting appropriate seat races and development of trust between the rowers. The Claimant acknowledges that Section 5.2 contains discretionary criteria but only once athletes are at the Selection Camp.
33. Counsel for the Respondent submits that the HPD not only has the discretion to invite the number of athletes he determines will best accomplish the objective of selecting crews that have potential to achieve an 'A' Final position (top 6) at the 2020 Tokyo Olympic Games, but he is in fact required to do so under the Selection Criteria.

Onus

34. In accordance with Section 6.7 of the Code, the onus is on the Respondent to demonstrate that the Selection Criteria were appropriately established, and that the selection of athletes was made in accordance with such criteria.
35. It has been acknowledged by the Claimant that the Selection Criteria were properly established and therefore that element is not in issue.
36. In order to satisfy Section 6.7 of the Code, it is necessary for the Respondent to demonstrate that the decision not to invite the Claimant to the Selection Camp has been made in accordance with the Selection Criteria. The reason for this reverse onus is because the Respondent made the decision and may have the only information regarding how the decision was made. Placing the onus on the Respondent ensures that the Claimant has information about the process applied to the selection decision (or non-selection in this case) in order to permit the Claimant to demonstrate why she believes the selection decision was incorrect.
37. The Respondent reviewed the Selection Criteria and provided evidence of how the Selection Criteria were applied by the HPD. As set out in Section 5.1, there are six criteria relating to selection for the Selection Camp set out in the Selection Criteria:
 - (a) One criterion is the "capacity of the overall NTC environment." The number of 2020 Olympic Qualification places available in the Women's sweep group (another criterion) impacts the NTC capacity. Three boats have been qualified in Women's sweep. Respondent decided that the number of Women's sweep rowers invited should accordingly be limited to 16 (14 rowers required for the three boats qualified and two spares). The Claimant

argued that the subsequent addition of two coaches permits an increase in the number of rowers at the Selection Camp.

- (b) It is agreed by the parties that entering the NRC essentially ensures the eligibility requirement of the Selection Criteria is met.
- (c) The application of the remaining three criteria were in dispute and were the focus of the hearing - whether the three performance results' requirements had been properly applied: (a) international rowing results; (b) RADAR results; and (c) NRC results.

38. Each of Dave Thompson, the Women's Head Coach, Phil Marshall, the Women's Assistant Coach, and Iain Brambell, the HPD, testified and provided evidence as to the application of Selection Criteria - how the invited athletes were nominated and what led to the non-invitation of the Claimant.
39. Based on the evidence, it appears that the Selection Criteria were used and applied against each of the candidates by the HPD to determine who to invite to the Selection Camp. Therefore, the onus set out in Section 6.7 of the Code is satisfied. It does not mean necessarily, however, that they were correctly applied; it is therefore incumbent upon the Claimant to demonstrate that the correct application of the Selection Criteria should lead to a different result. Did the HPD give an inappropriate and disproportionate weight to the NRC results? If not, how were athletes with no international experience and comparatively poorer RADAR results selected ahead of the Claimant? At a minimum, should the Claimant not also be invited?

Capacity

40. There is nothing in the Selection Criteria which limits the number of invitees to the Selection Camp. Is it reasonable for the Respondent to impose a limit? At the time the Selection Criteria were established, the number of qualified boats was unknown. Accordingly, it was reasonable not to establish a fixed number of invitations to be issued. It may have been possible, however, to establish a formula but that calculated number would still have to have the same basis for establishment – that which would allow the boats to demonstrate potential to achieve a top-6 finish.
41. It would still be RCA establishing that number of invitees, but it might have had some advance scrutiny from those involved in the establishment of the Selection Criteria.

42. It would not be reasonable simply to invite anyone who met only one criterion of the Selection Criteria without some analysis of how that one justifies RCA meeting its primary objective of top 6. Similarly, it would not be reasonable to require a minimum number of the criteria to be met without explicitly stating that, in order for athletes to understand what they would have to accomplish.
43. The Respondent suggests that the reason for the limitation on numbers is to ensure there are adequate opportunities to develop cohesion and continuity between rowers, to allow for different combinations to be tested and to allow the coaches to focus their attention. If I understand correctly, the contention is that having lower numbers allows for more personal attention and more thorough testing of the combinations to ascertain the best combination to achieve a top-6 finish at the 2020 Olympic Games.
44. The Respondent would prefer to maintain the limited number. The Claimant has suggested that she should be added to the invitation list because, if she has performed better than others invited in more of the Selection Criteria upon which invitations were to be based, she must have achieved the Selection Criteria.
45. The Claimant also submits that the recent addition of two assistant coaches for Women increases the capacity at the Selection Camp.
46. The Respondent states that the coaches were added following a gap analysis of what was required to accomplish RCA's stated objective of top 6 for each of their boats. Accordingly, increasing the number of rowers at the Selection Camp would merely create another gap and therefore not be in accordance with the Selection Criteria.
47. On the one hand, the lack of a limit to the number of invitees appears to mean additional rowers may be added without issue under the Selection Criteria. Additional rowers might permit a greater chance of discovering the optimal combination. On the other hand, it may result in less focus on each athlete and less opportunity to determine the optimal boat composition due to a shorter trial for each combination.
48. Since the agreed standard of review is one of reasonableness, not correctness, it is not necessary for me to decide which interpretation may be correct. It is sufficient that I find the restricted number appears to be a reasonable interpretation of capacity by the Respondent and is consistent with the Selection Criteria.

Performance Results

49. The Claimant submits that it is incongruous to have two of the three performance results favour the Claimant and yet two other rowers, with only one result favouring each of them, both being invited to the Selection Camp while the Claimant is not. The suggestion is that the Selection Criteria could not possibly have been applied correctly.
50. In the absence of weighting being specified, a reasonable approach might be to weight each criterion equally or to require that each candidate must at least have achieved results in each of the criteria.
51. The Respondent suggests, alternatively, that it merely has to measure each of the candidates against each criterion and determine a ranking based on such criteria.
52. The Respondent submits that the Head Coach and Assistant Coach for Women met to discuss potential invitees to the Selection Camp on September 28, immediately following the conclusion of the NRC. With input from Phil Marshall (the Assistant Coach for Women), Dave Thompson, the Head Coach for Women, prepared a list of athletes. The list included those athletes recommended for invitation and those athletes considered who were not recommended for invitation (including the Claimant).
53. There are 47 athletes listed on Mr. Thompson's list. It does not include one sculling athlete, Carling Zeeman, who was coached by Dick Tonks, the men's coach.
54. Also on September 28, Mr. Brambell met with Adam Parfitt to review the Selection Criteria and to discuss the results of the NRC.
55. At 9 am on September 29, 2019, Messrs. Thompson and Marshall met with Mr. Brambell, at which time they discussed each athlete on Mr. Thompson's list. Recommendations were made to Mr. Brambell by the coaches as to the athletes to be invited to the Selection Camp. Each of the attendees at that meeting testified that the athletes on the list recommended for invitation were measured against each of the Selection Criteria in a meeting lasting between 2 and 2 1/2 hours.
56. With respect to consideration of the Claimant's results, the Respondent's witnesses confirmed that they discussed her results in some detail. They testified and were cross-examined on their conclusions from which the following information was adduced:

- (a) International results in which athletes are measured directly against boats in the top 6 in the world are the best indicator, as that is the objective for which the Selection Criteria were established. The Claimant's silver medal at the Pan American Games was a good result but the crew that defeated the Claimant and her rowing partner, went on to the World Championships where they finished outside the top 11 and did not qualify for the Olympic Games.
- (b) Counsel for the Claimant took issue with the suggestion that therefore the Claimant is outside the top 11 and does not demonstrate potential to finish in the top 6. Nevertheless, a better extrapolation was not provided. Are international results that do not demonstrate a potential for top 6 still more valuable than no international results? The Claimant noted that the Claimant had to defeat those without international results in order to compete internationally. Counsel for the Respondent correctly noted, however, that those results are not part of the Selection Criteria.
- (c) RADAR is an ergometer testing and monitoring program that is a simulation, an indicator of strength and power, in which they look for improvement. Mr. Brambell confirmed that RCA has seen improvement from the Claimant since she has been at the NTC. He reported that prior to the Claimant's arrival, she performed at 7:10 and is currently at 6:56. Mr. Brambell also testified that it is not a direct measure as it is not "on water." Results are extrapolated to what it means for top 6 performance - a standard has been established and the Claimant has not achieved that standard (and not surprising, nor have most of the Canadian rowers).
- (d) The NRC is the only "side-by-side" comparison of the considered athletes that is contained in the Selection Criteria. Both Mr. Brambell and Mr. Thompson appeared to place significant weight on the fact that athletes at the NTC have an advantage in that they have multiple opportunities to use the ergometers and other training resources. The expectation is that they will progress forward at a greater rate with the resources of RCA supporting them and should not be losing to athletes without an international background. This expectation was not part of the Selection Criteria.
- (e) The witnesses explained that it was a negative having the Claimant's boat finished 5th (11th overall) and 12.23 seconds behind the winner of the B final at the NRC, especially since the Claimant was beaten by a number of athletes who were not training at the NTC and did not have the same international experience or support available to them.

57. In its brief, the Respondent submits: "Athletes who had the opportunity to represent Rowing Canada on the international stage in 2019 had an inherent advantage heading into the NRCs as they had enhanced competitive experiences, best positioning them to compete with and beat other athletes with less international experience at the NRCs." In response to questions during the hearing, Mr. Brambell confirmed that the intention is for athletes to perform on demand and the expectation was that someone who had

been training at the NTC, such as the Claimant, should finish in the A final or at the top of the B final at the NRC. He then reviewed the Claimant's results at NRC and concluded that, taken together with her international results and her RADAR results, they were insufficient to warrant her being invited to the Selection Camp.

58. The Claimant submits that the non-invitation of the Claimant places too much emphasis on a single race and that it is not in keeping with the multiple criteria contained within the Selection Criteria, which requires at least three performance results to be taken into consideration.
59. The HPD reiterated that, in determining the people best able to achieve the primary objective of top 6, the preferred comparison is on the water. Any other comparison is extrapolation. The optimal measure was racing against crews that would be at the Olympic Games. Demonstrated potential of achieving the objective of top 6 was reached at the World Championships by a few candidates - two medals resulted and yet those athletes in such boats were still specifically required to attend and perform at the NRC. Accordingly, it would appear that more emphasis was placed on the NRC because that was an "on-water, side-by-side" race between candidates, which does not require the same extrapolation as RADAR or international results where direct comparisons to top-6 boats were not available. No other races were included in the Selection Criteria.
60. This analysis does raise legitimate questions about why the Selection Criteria did not specifically give more weight to the on-water racing, which perhaps could have caused the Claimant to focus more attention on it. The Claimant took time off from training after the Pan American Games and might have prepared better if she had known there would be more weight to the NRC.
61. The Claimant submits that she had been informed by the Head Coach for Women that the NRC were not really important. In his testimony, Mr. Thompson specifically denied stating that. I accept, however, that there was evidence that he had said international results were more important than NRC (but he says to show top 6).
62. The Respondent provided evidence that everyone knew of the traditional importance of the NRC. It was also important for carding in addition to it being part of the Selection Criteria. There was no reason NOT to place emphasis on it. Rowers who attended the

World Championships (held later than the Pan American Games) also took time off following the championships in accordance with the instructions from the Head Coach, but they still placed the appropriate emphasis on the NRC. In other words, the Respondent maintains that the importance of the NRC was always clear.

63. Although there was a great deal of evidence presented about the meaning of different performance results, I accept as reasonable that more weight should be given to side-by-side comparisons and to results achieved in the finals of events.

Bias

64. The Claimant raised the spectre of bias on the part of the Head Coach for Women based on the treatment the Claimant received over time. Bias may be characterized as a lack of neutrality and the Claimant suggests a number of examples of where the Head Coach did not appear to be neutral.

65. Bias requires evidence that the person making the decision was unable to impartially evaluate the facts that were presented for determination. In this situation, the Selection Criteria evidences that the HPD has all responsibility to invite candidates to the Selection Camp.

66. Accordingly, despite the suggestion that the Head Coach might have had some bias towards the Claimant, it is not necessary for me to determine that because the decision was made by the HPD, not the Head Coach. There is no evidence before me that there was any bias with respect to the HPD.

IV CONCLUSION

67. Although I do not refer in this Decision to every aspect of the parties' submissions and evidence, in reaching my conclusions and in making my decision I have considered all of the evidence and arguments presented by them in this proceeding.

68. What this boils down to is interpretation of the Selection Criteria. Is it reasonable using the Selection Criteria for RCA to invite two rowers who have no international results and comparatively poorer RADAR results than an athlete not invited? RCA has done so based on its extrapolation of the performance results against potential for top 6 in Tokyo.

69. Caution should be exercised by arbitrators in substituting their decisions for those of knowledgeable and properly constituted experts. It is only when there are errors in procedure or fairness that it becomes appropriate to interfere with the decisions of the experts identified in the Selection Criteria. Arbitrator Picher in *Poss v. Synchro Canada et. al.* (SDRCC 08-0068) eloquently stated the role of an arbitrator "is to determine whether an NSO has fairly communicated its own rules to athletes vying for team selection, has faithfully adhered to those rules and has administered its selection policy in a manner devoid of arbitrariness, discrimination or bad faith."
70. The Selection Criteria establish eligibility requirements and outline the basis for invitation to the Selection Camp. The criteria clearly contemplate reducing the number of athletes to be considered for eventual selection to the 2020 Canadian Olympic Team for Rowing.
71. Based on the Selection Criteria, the intention was to invite athletes from which crews could be selected who would have the potential to achieve an 'A' Final position (top 6) at the 2020 Olympic Games. The Respondent was clear that focusing on fewer athletes at the Selection Camp improves such potential.
72. The Selection Criteria were clearly set out and provided inherent discretion to the HPD. The fact there may have been better or more objective criteria does not mean the approach taken by the Respondent was arbitrary or unreasonable.
73. The decision made by the HPD on who to invite to the Selection Camp was made in accordance with the Selection Criteria. There is no weighting of each criteria required by the Selection Criteria, merely that it be based on the identified Selection Criteria. Each of the Head Coach and the Assistant Coach testified that they had applied the Selection Criteria in making their recommendations to the HPD. The HPD also confirmed that he considered each of the Selection Criteria in determining who to invite to the Selection Camp. The results for each criterion were measured by the HPD, by way of extrapolation, against the primary objective of the Selection Criteria. Whilst there may have been more data points for the Claimant, the HPD testified that the performance results taken together did not result in an invitation being extended to the Claimant. This does not appear to be an arbitrary or unreasonable approach and appears consistent with the overall objective of the Selection Criteria, which was reviewed by the Athletes' Council and the COC prior to being published.

74. As has been stated in many previous cases, the role of an arbitrator in a team selection dispute is to determine if the selection has been made in a reasonable manner under the circumstances. It is not open to an arbitrator or any third party to second-guess that decision or the exercise of discretion in which it was made, absent evidence that such decision was made, or such discretion was exercised, arbitrarily, in a discriminatory fashion or in bad faith. Where criteria have been established appropriately and the selection process has been administered reasonably in a non-arbitrary fashion and without discrimination or bad faith, arbitrators should give considerable deference to such decisions.
75. There is no question in my mind that the Selection Criteria could have been improved. Improved criteria would have resulted in fewer appeals. Having heard the evidence, however, my role is not to re-write the Selection Criteria that the parties have agreed were properly established by RCA. The evidence adduced supports the fact that the Respondent applied the Selection Criteria in not inviting the Claimant to the Selection Camp and falls within a range of possible, reasonable outcomes.
76. The Selection Criteria permitted the Respondent to reach its conclusions and not to issue the invitation to the Claimant. I have carefully considered the concerns raised by the Claimant. However, I conclude that the irregularities that existed did not taint the decisions made by the Respondent to limit the number of athletes invited and not to invite the Claimant. The exercise of its discretion was reasonable in the circumstances and I therefore defer to the decision of the HPD.
77. I want to make special mention of the articulate submissions made by counsel for each of the Claimant and the Respondent as well as by each of the witnesses. The comportment of all parties was excellent, and I appreciated the clear and professional manner in which the submissions were made.

V JUDGEMENT

- 78. The appeal by the Claimant is dismissed.
- 79. The decision of the HPD not to invite the Claimant to the Selection Camp is confirmed.

VI THE COSTS

- 80. No submissions were made during the hearing regarding costs. The parties and Affected Party are free to make brief written submissions on the subject, should they choose to do so in accordance with Section 6.22 of the Code.

VII RESERVATION OF RIGHTS

- 81. I reserve the right to deal with any matter arising from this decision and its interpretation.

DATED: November 13, 2019



Gordon E. Peterson, Arbitrator