

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

**No.:** SDRCC 19-0426

IN THE MATTER OF AN ARBITRATION HEARING BETWEEN

**KAREN LEFSRUD**

(CLAIMANT)

AND

**ROWING CANADA AVIRON**

(RESPONDENT)

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**DECISION WITH REASONS**

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**ARBITRATOR:** Robert Néron, LL.B., LL.M., CArb.

**APPEARING:**

For Claimant: Borden Ladner Gervais LLP – Jake Cabott and Christie Campbell

For Respondent: Brazeau Seller LLP – Geoffrey Cullwick and Jay Kim

**WITNESSES:**

For Claimant: Karen Lefsrud

For Respondent: Iain Brambell, High Performance Director  
Dave Thompson, Women's Head Coach  
Phil Marshall, Women's Assistant Coach

The hearing was held by way of videoconference on December 4, 2019

[1] This Request for Arbitration (the “appeal”) has been made pursuant to the Canadian Sport Dispute Resolution Code (the “Code”) against the decision of the Respondent, Rowing Canada Aviron (“RCA”) not to select Karen Lefsrud for the 2020 Olympic and Paralympic Rowing Team Selection Camp (“Selection Camp”).

[2] The parties agreed to waive RCA’s internal appeal process to go directly to SDRCC arbitration. However, the parties agreed that sections 9 and 18 of RCA’s internal appeal policy would apply to this arbitration in addition to the Code.

[3] I was appointed arbitrator by the SDRCC on October 24, 2019, pursuant to Subsection 6.8(b)(i) of the Code and I have filed the requisite Declaration of Independence.

[4] A preliminary conference call was held on November 14, 2019. My jurisdiction was not challenged. The hearing took place via videoconference on December 4, 2019. On December 11, 2019, I issued my decision in this appeal, and these are the reasons for my decision.

### **Facts and Issues**

[5] On September 30, 2019, RCA announced the list of athletes who had received an invitation to the Selection Camp. The Claimant did not receive such invitation.

[6] Sixteen women rowers received an invitation to the Selection Camp, and, according to the Respondent, the invitations were sent in accordance with RCA’s Tokyo 2020 Olympic Team Selection Guidelines.

[7] In light of RCA’s decision, the Claimant raised the following issues in this appeal:

- a) RCA failed to follow the approved Code of Conduct policy. In particular, it failed to follow:
  - (i) s. 9(a)(vii), which requires coaches to ensure that athletes are made aware of the details of the team selection process as well as to abide by the Selection Policy and Selection;
  - (ii) s. 9(d)(i), which requires staff to act in the best interest of RCA and the team of athletes it supports;
- b) RCA failed to follow the National Rowing Championships (NRC) Technical Package and Rules of Racing in its operation of the National Rowing Championships held September 26-29, 2019;
- c) RCA made a decision that was grossly unreasonable and unfair.

[8] In support of her appeal, the Claimant filed various documentary exhibits:

- (i) Email dated May 30, 2019, from Adam Parfitt to RCA athletes;
- (ii) RCA’s list of erg (RADAR) scores;
- (iii) RCA Team Nominations for the 2019 World Rowing Cup;

- (iv) A briefing note dated May 8, 2019 from Dr. Pdraig McCluskey;
- (v) Email from Adam Parfitt dated Sept. 11, 2019, regarding Olympic and Paralympic selection and carding documents;
- (vi) RCA's Tokyo 2020 Olympic Team Selection Guidelines;
- (vii) Email dated September 30 from Adam Parfitt with the list of athletes invited to participate in the 2020 Olympic and Paralympic Selection Camp;
- (viii) RCA Athlete Council meeting minutes dated October 19, 2019;
- (ix) RCA Contribution Campaign;
- (x) The RCA Code of Conduct;
- (xi) 2019 NRC Technical Package;
- (xii) The excerpted RCA Rules of Racing approved on January 28, 2018.

[9] The Respondent filed the following documentary exhibits:

- (i) RCA 2020 Olympic Team Selection Guidelines;
- (ii) Email dated May 30, 2019, from Adam Parfitt to RCA athletes;
- (iii) Emails from Iain Brambell dated July 8, 25 and 28, 2019, to Athletes Council members regarding Selection Guidelines;
- (iv) RCA August 2019 Newsletter;
- (v) Email dated September 11, 2019, from Adam Parfitt to RCA athletes regarding the Final version of the Selection Guidelines;
- (vi) 2019 RCA Athlete Agreement;
- (vii) RCA Appeal Policy and Procedure;
- (viii) Copy of Dave Thompson's list of recommended athletes;
- (ix) 2019 World Rowing Cup II Results;
- (x) 2019 World Rowing Cup III Results;
- (xi) 2019 National Rowing Championships Results;
- (xii) 2019 RADAR Results.

### **Role of the Arbitrator**

[10] Arbitrators are guided by two general principles. The first is that deference is owed to the sporting authority's experience and expertise.<sup>1</sup> It is neither the role nor the duty of an arbitrator to substitute his own appreciation of the appropriate solution unless there are valid grounds to do so.

[11] The second principle is that the standard to be applied in determining what constitutes a valid ground is the reasonableness of the decision. In sports arbitration, where deference to the experience and expertise of sport authorities is a starting point, the test is whether the outcome falls within a range of possible and acceptable outcomes, which are defensible with respect to the facts and the policies at issue.

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<sup>1</sup> *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190

## **Onus of Proof**

[12] This case involves a dispute over team selection. Therefore, Section 6.7 of the Code applies:

### *“6.7 Onus of Proof in Team Selection Disputes*

*Where an athlete is involved in a proceeding as a Claimant in a team selection dispute, the onus will be placed on the Respondent to demonstrate that the criteria were appropriately established and that the selection decision was made in accordance with such criteria. Once that has been established, the onus of proof shall shift to the Claimant to demonstrate that the Claimant should have been selected in accordance with approved criteria. Each onus shall be determined on a balance of probabilities.”*

## **Standard of Review**

[13] Section 6.17 of the Canadian Sport Dispute Resolution Code provides:

*“The Panel shall have full power to review the facts and the law. In particular, the Panel may substitute its decision for:*

*(i) the decision that gave rise to the dispute; [...]*

*and may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.”*

[14] In this appeal, the Claimant alleges, among other things, that there was a violation of natural justice in not having been informed by RCA of the selection criteria. If I were to agree, such inadequacy can be cured by substituting the RCA decision for my decision.

## **Claimant’s Position**

[15] The Claimant submits that RCA violated the principles of fairness and natural justice because RCA failed to inform the Claimant of the criteria for the athletes to be invited to the Selection Camp. This failure to inform the Claimant is unfair and amounts to a breach of natural justice.

[16] Also, RCA’s decision to invite only 16 athletes to the Selection Camp is unreasonable because it fails to consider that the National Training Center has the capacity to house and train more than 16 athletes, and RCA purposely employed a strategy to limit the number of invited athletes. Therefore, RCA’s decision was unreasonable because it failed to comply with the obligation set out in the Code of Conduct policy.

## **Respondent’s Position**

[17] RCA’s decision to invite only a limited number of athletes was difficult to make, because it often does not select for invitation athletes who have devoted their entire lives to rowing.

[18] Moreover, RCA's decision aligns with the stated goal of finishing in the top six at the 2020 Tokyo Olympics, a goal which is explicitly stated in the Selection Guidelines. Moreover, three Rowing Canada coaches made the selections as a team and invited those athletes whom they believed would achieve the best results.

[19] RCA ultimately decided against inviting the Claimant because the Claimant was not likely to achieve the goal of landing in the top six at the 2020 Tokyo Olympics. Also, Rowing Canada's decision not to invite the Claimant is within the range of reasonable acceptable outcomes and is in line with the Selection Guidelines that have been established, published, and disseminated.

[20] The Selection Guidelines were reasonably and fairly applied in making the decision not to invite the Claimant. In the alternative, even if there were evidence to prove minor irregularities in the manner by which the guidelines were disseminated and published, such irregularities would not be sufficient to put Rowing Canada's decision into question.

[21] The Respondent also submits that the guidelines contain no requirement for RCA to invite a set number of athletes. The number of invited athletes is discretionary on the part of RCA and is based on its subjective assessment as to who can best achieve the goal of finishing in the top six in the Olympics.

### **Testimony**

[22] Four witnesses were called to testify in these proceedings: the Claimant herself and three witnesses for the Respondent, i.e., Dave Thompson, Phil Marshall, and Iain Brambell. It is not necessary for me to repeat verbatim everything they have said. However, their respective testimony could be summarized as follows:

#### Karen Lefsrud

[23] Ms. Lefsrud joined the Canadian National Rowing Team in 2016. She became a member of the Canadian Senior National Rowing Team in 2017, and she moved to the National Training Centre in Victoria around Christmas of 2017. She has been a carded rowing athlete for five years.

[24] Ms. Lefsrud sustained two injuries in 2019. She was selected for the women's eight for the World Cup 2 in June 2019, but she fractured her rib. For the 2019 World Championships (World Championships), Ms. Lefsrud was selected to be in the spare pair. However, she dislocated her shoulder and was told she could not compete in Europe. She was directed to rehabilitate the injury properly to prevent re-injury, at which point she went home to Calgary and trained there.

[25] Ms. Lefsrud claims that choices made for her by RCA, including decisions relating to the management of her rehabilitation and return from two injuries, prejudiced her ability to achieve better results in the NRC.

[26] According to Ms. Lefsrud, RCA prioritized her long-term rehabilitation and development. Had she been informed that her not competing in the World Championships would curtail her chances of being invited to the Selection Camp, Ms. Lefsrud would have insisted on competing.

[27] Further, Ms. Lefsrud did not speak with her athlete representative nor any of the coaching staff to appeal the decision to de-select her from the World Championships or the decision not to return her to the women's eight, for which she had qualified prior to fracturing her rib.

[28] Moreover, Ms. Lefsrud believes she performed poorly in the NRC because she did not match up well with the person she rowed with, although she did admit that Mr. Thompson had given her the right to decide whom to row with.

[29] Ms. Lefsrud further adds that she had not received training and support from RCA to prepare her to get the best results in the NRC.

[30] Ms. Lefsrud has participated in four or five NRC. Her understanding of the NRC was that athletes are to be allowed outside the National Training Centre to get an opportunity to show that they belong in the Centre, although she understood that even Centre athletes needed to race in the NRC. She insists that she was led to believe that the NRC was merely a formality.

[31] Ms. Lefsrud did not know about the NRC or the World Championships being factors in whether or not she would be invited to the Selection Camp. Therefore, Ms. Lefsrud relied on the incorrect representations from RCA coaches and staff regarding the selection process. However, she admits that she had not fulfilled her obligation under her contract to read the Rowing Canada website, where the guidelines had been posted since August 5, 2019.

#### Dave Thompson

[32] Mr. Thompson was a New Zealand national team senior coach for 10 years. He became the head coach of women's rowing and of Ms. Lefsrud beginning in January 2017. He confirms that Ms. Lefsrud had been training full-time at the National Training Centre for two years and was being considered for inclusion in the Olympic team selection process.

[33] He also confirms that RCA held internal seat races for the World Championships and that Ms. Lefsrud competed in 17 seat races. Ms. Lefsrud competed against 2016 Olympian Jen Martins, whom she beat, an accomplishment Mr. Thompson congratulated her for. Shortly thereafter, Ms. Lefsrud suffered a rib injury.

[34] When Ms. Lefsrud recovered, Mr. Thompson did not put Ms. Lefsrud back into the eight-seat spot she had won, but into the four with another athlete who was also injured. He said that RCA maintains the discretion and authority to change crews before a regatta.

[35] Mr. Thompson adds that Ms. Lefsrud was selected as a spare in the World Championships. He confirms that, during training and 10 days before leaving for the World Championships, Ms. Lefsrud dislocated her left shoulder.

[36] Seven days before leaving, Mr. Thompson told Ms. Lefsrud that she needed to row for paces and demonstrate that she could complete a training row. According to Mr. Thompson, it was dangerous to send her to do thousand-metre paces as hard as she could go after her shoulder had been dislocated.

[37] Ms. Lefsrud also told Mr. Thompson that she had dislocated her shoulder many times, and they spoke of shoulder reconstruction. Later the same day, a case management meeting attended by the doctor, the physiotherapist, the nutritionist, the psychologist, Phil Marshall and Mr. Thompson took place. They decided that it was in Ms. Lefsrud's best interest not to compete in the World Championships.

[38] Mr. Thompson did not feel that Ms. Lefsrud's performance could assist the team at World Championships. To send her to the World Championships in her condition would have been wrong because it would have hurt her chances at the upcoming National Rowing Championship.

[39] Ms. Lefsrud took the news emotionally, but Mr. Thompson's 28 years' experience told him that her injury would get worse if she competed. Her shoulder would not have withstood the intensity of the training. Even when the physiotherapist cleared Ms. Lefsrud to row, it was still up to the coach, the medical director, and the performance director to say that Ms. Lefsrud could row in team sessions.

[40] Mr. Thompson confirms that another athlete was also injured but rowed in the World Championships because she received a medical clearance from the chief medical director. However, Mr. Thompson did not receive any similar clearance for Ms. Lefsrud.

[41] Mr. Thompson adds that he and Ms. Lefsrud discussed rehab for her shoulder. Mr. Thompson did not talk to her about the Olympic preparation camp or tell her that not going to the World Championships would affect her selection to the Selection Camp.

[42] They did not discuss that the NRC results would be part of the selection criteria for the Selection Camp. He did not tell her that there were a limited number of athletes who would be selected or invited to the camp. They discussed her health and well-being, which were the most important matters.

[43] Mr. Thompson informed Ms. Lefsrud that when she came back, she would be rowing single. Ms. Lefsrud had rowed single for the first three years of her career, and she was

competent. Mr. Thompson thought it the best way for her to return from her injury. Ms. Lefsrud messaged Mr. Thompson when he was still in Europe that she intended to row with a specific athlete (“Athlete A”).

[44] Mr. Thompson told her to do what was best for her. He inquired about her health and believed that she was recovered, ready to go, and ready to race at the NRC to the full extent of her ability. Mr. Thompson would not have taken it against Ms. Lefsrud if she had raced with another athlete (“Athlete B”).

[45] According to Mr. Thompson, between World Championships and NRC, coaches gave the athletes a training plan, but Ms. Lefsrud did not ask for a training plan. Mr. Thompson understood that Ms. Lefsrud was happy training in Calgary. She had organized with another coach and rowed with Athlete B.

[46] Mr. Thompson says that he never told Ms. Lefsrud that the NRC was unimportant or inconsequential to the selection criteria. He did not discuss the selection criteria with the athletes. He also did not tell Ms. Lefsrud that her 2020 carding was guaranteed or that, because she made the World Championships team, her carding was not in jeopardy.

[47] With respect to the athletes to be invited to the Selection Camp, Mr. Thompson and an assistant coach listed names of athletes they wanted to recommend for an invitation to the Selection Camp. They recommended only 16 names because they wanted to zoom in only on those athletes.

[48] According to Mr. Thompson, 16 would work well with the athlete/coach ratio; further, it would give the athletes more rowing time together. Mr. Thompson met with Iain Brambell, Phil Marshall, and Adam Parfitt (RCA’s Director of National Team Operations) on September 29, 2019. They went through 47 candidates and checked them against the selection criteria.

[49] Three days prior to the Selection Camp, only 18 women were listed for the Selection Camp. Mr. Thompson did not cut down the list. He provided this list of names to the high-performance director (HPD), Mr. Brambell, who collaborated on the decision to select only 16 rowers.

[50] According to Mr. Thompson, to qualify for the Selection Camp, an athlete must have combined good results at all the races. There were athletes from the National Training Center who were not invited to the Selection Camp. There were also athletes from outside the National Training Centre who were invited to the Selection Camp. During the Selection Camp, two athletes sustained serious injuries so around mid-November, Mr. Brambell, Mr. Marshall and Mr. Thompson invited the next two athletes on the list.

[51] Finally, Mr. Thompson says that Ms. Lefsrud did not meet the selection criteria and that she had not demonstrated that she could achieve a top-six result at the 2020 Tokyo Olympics.



### Phil Marshall

[52] Mr. Marshall is the Senior Women Program's assistant coach. He was involved in the selection processes for the World Championships, World Cup II and III. He was also involved in the formation of the list and in the decision not to invite Ms. Lefsrud to the Selection Camp, as there was no evidence to support that she was capable of being in the top-six performers.

[53] Mr. Marshall says that he was involved in the decision not to send Ms. Lefsrud into the World Championships. In addition, he says that he has never told athletes that the NRC was not important or a relevant consideration for being invited to the Selection Camp.

[54] Also, Mr. Marshall did not tell Ms. Lefsrud that invitations were based purely on World Championship results, or what she needed to do to make the Selection Camp. He never told her that she needed to do well in the NRC to make the Selection Camp nor did he tell her that RCA's strategy was to invite only a few athletes to the Selection Camp.

[55] Mr. Marshall confirms that he met with Mr. Thompson and that they went over every athlete's name on the list, looked at the performance against the selection criteria, and discussed the NRC as well as the international and RADAR results.

### Iain Brambell

[56] Mr. Brambell confirms that he and others developed the Selection Guidelines during the autumn of 2018 after consulting and working with stakeholders and seeking outsider perspectives and input. They also consulted the Athletes' Council and obtained the approval of the Canadian Olympic Committee (COC) in July 2019. The Selection Guidelines were posted on the RCA website on August 6, 2019, in English and French, sent to the athletes by email and published in the monthly newsletter, which was sent to all registered members of RCA.

[57] According to Mr. Brambell, the selection criteria's goal was to assemble a team to represent Canada in the Olympics and Paralympic games and place in the final top six. He adds that holding a Selection Camp before making the actual selection decisions builds cohesion and allows to test crew combinations. A camp was in the best interest of advancing to the top six.

[58] Mr. Brambell confirms that the criteria consisted of the 2019 international results, National Rowing Championship results, the RADAR monitoring program results, the capacity of the NTC, and the available places per category. (*Capacity* means the physical, financial and technical resources that can be allocated.) He adds that inviting only 16 athletes allowed RCA to divert all important mechanisms and technical expertise to give the athletes the best possible environment in which to achieve their performance goals.

[59] Mr. Brambell also mentions that athletes take both the international and national championships seriously, even if they are not forced to attend. The nonattendance in the NRC would make them ineligible both for carding and for the Selection Camp. He says that athletes know the importance of these events.

[60] He confirms that the performance enhancement team decided not to allow Ms. Lefsrud to compete in the World Championships, as it was unsure she could race both the four and the eight. He adds that another athlete, who was also injured, was allowed to compete because the chief medical officer gave her clearance to race.

[61] RCA did not withdraw support for Ms. Lefsrud even if she would not compete in the World Championships. RCA also never told Ms. Lefsrud that her carding for 2020 was already confirmed. RCA nominates athletes, but the confirmation comes from Sport Canada.

[62] On September 29, 2019, RCA checked every eligible athlete against the selection criteria. Mr. Thompson gave Mr. Brambell a list of recommended athletes, which they checked against the list of eligible athletes, and they selected the athletes that best meet the selection criteria.

[63] Finally, there was no automatic qualification for the invitation to the Selection Camp. The decision process was difficult because all the athletes were talented, but they decided based on who met the objective. Ms. Lefsrud was not invited despite her exciting RADAR scores because she was unable to transition those results onto the water and finished 13th in the nationals.

### **Discussion**

[64] At the outset, I should mention that I am impressed by the achievements of the Claimant in rowing. She has participated in numerous national and international competitions, where she achieved high results. This is to her credit.

[65] I also understand that she is disappointed not to have been invited to the RCA Selection Camp, and that it may end her Olympic dreams to participate to the 2020 Tokyo Summer Olympics.

[66] However, the fact that I am, on a personal level, sensitive to the Claimant's experience in this matter has no bearing on my decision. It is not one of the factors that I must consider. Rather, as mentioned, it is my task to look only at the reasonableness of RCA's decision not to invite the Claimant based on the criteria used to reach that decision.

### **Credibility**

[67] For all I have heard from the several witnesses in this matter, including the Claimant, I find them all to be credible and reliable. Without a doubt, they all testified in good faith

and to the best of their knowledge. I give, therefore, weight to all of their respective testimony.

#### Issue # 1: Number of Athletes Invited

[68] The Claimant takes issue with the fact that RCA only invited a limited number of female athletes to the Selection Camp in comparison with the number of male athletes who were invited, and despite the RCA's capacity to invite more athletes.

[69] On that issue, Mr. Dave Thompson testified that the number of 16 athletes plus two coaches was based on the number of boats at the World Championships, and Mr. Iain Brambell's and his own belief that 16 athletes should suffice to fulfill RCA's needs for the Olympic Games.

[70] Mr. Thompson added that they invited 16 athletes because the athlete/coach ratio would be balanced; therefore, the coaches would be able to make a difference. In short, Mr. Dave Thompson and Mr. Iain Brambell decided initially to invite 16 athletes because that number would be sufficient, in their view, to achieve their goal: selecting the athletes who had the best potential to finish top-six at the 2020 Tokyo Olympic Games.

[71] Moreover, Mr. Thompson is of the view that having a smaller number of rowers at the Selection Camp allows him and the other coaches to give more personal attention to the invited athletes and to conduct more thorough testing of rower combinations to end up with the best combinations of athletes.

[72] I have also reviewed Sections 5.1 and 5.2 of the Selection Criteria governing RCA's selection of athletes, which stipulate as follows:

##### *"5.1 SELECTION CAMP INVITE*

*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 World Rowing Championships, PanAmerican Games, and U21 Trans Tasman Regatta;*
- *Attendance at and performance in the 2019 National Rowing Championship, September 27<sup>th</sup> to 29<sup>th</sup> 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). [...]*

## 5.2 SELECTION CAMP CREW NOMINATIONS

*The 2020 Olympic Selection Camp will be held at the National Training Centre in Victoria, BC. The Selection Camp begins on October 7, 2019, and continues through to March 28, 2020. Only athletes invited to this camp may attend.*

*Qualification of a boat through the 2019 World Rowing Championships process does not pre-qualify athletes within that crew for 2020 Olympic team nomination.*

*Athletes will be evaluated for crew and team selection using the process outlined in Appendix 1 in accordance with an individual athlete's performance and achievement with respect to the following criteria ("Selection Criteria"):*

- *Performance results in 2019 and 2020 including but not limited to:*
  - *Time trials of various distances, including but not limited to 2000M*
  - *Small and/or large boat seat racing matrices (i.e., seat racing all athletes against each other) and/or targeted seat racing (i.e., select head to head races with direct swaps of relevant athletes)*
  - *Designated ergometer assessments*
  - *Racing results, including but not limited to, results achieved at national and international rowing regattas*
- *Ongoing ergometer testing as per 2019 & 2020 RCA Athlete Monitoring Program including RADAR.*

*In addition, RCA may consider the following additional factors during the team selection processes ("Other Criteria"):*

- *Ongoing technique and ability to adjust to technical feedback;*
- *Factors relevant to crew combination, namely, crew compatibility (i.e., how individuals perform as a team), coachability, and technical compatibility;*
- *Commitment to the program;*
- *Assessment of competitive readiness (i.e., fitness relative to previous assessments and to peers);*
- *Ability to meet and maintain bodyweight targets (for lightweights and coxswains only);*
- *Additional factors relevant to achieving RCA team objectives including but not limited to potential development of the athlete or coach for subsequent National Teams and ultimately Senior Team selection. [...]*

## 7. SELECTION AUTHORITY

*The final authority for Team selection rests with the RCA High Performance Director. This authority is based upon the nominations made by individuals noted in the chart below and all other criteria within this document. [...]*

[73] Based on the above, I note that the Selection Guidelines refer to a number of criteria—not to the number of places available at the Training Centre. Also, as argued by Respondent’s counsel, there is no requirement in the Selection Guidelines that a certain number of athletes be selected, and, as testified to by Mr. Brambell, the selection was based on six criteria and involved a difficult decision-making process in selecting from a talented group of women.

[74] RCA’s ultimate goal is to select the athletes most likely to achieve top-six results at the next Olympic Games; unfortunately, as mentioned by Mr. Brambell and also as confirmed by Mr. Thompson, the Claimant was not considered one of them.

[75] In Mr. Brambell’s assessment, the Claimant’s past results, such as at the World Cup or at the National Championships held in September 2019, fell short of RCA’s top-six selection criteria.

[76] In the end, after having consulted the coaches, Mr. Brambell was only interested in selecting athletes that met the criteria and had the potential to finish in the top six at the 2020 Tokyo Olympics; moreover, in their view, the Claimant was not one of them.

[77] For her part, the Claimant testifies that she expected 22 athletes to be invited to the Selection Camp, which is the average number of women in that category who are in the National Training Centre at any given time.

[78] The Claimant had the above expectation because she said that, in a competitive environment, it is essential to have people with whom you are racing against every day. The Claimant adds that she thinks it is also necessary for competitive drive and for making each other better. Also, the Claimant is of the view that, in fighting for a seat, it is important to have those people around to push one other to perform.

[79] The Claimant confirms that she did not know that there would be a limited number of women invited to the Selection Camp, and when she was informed as much on September 30, 2019, she was surprised and confused.

[80] The Claimant also testifies that being able to compete for a spot in the 2020 Tokyo Olympic Team meant everything to her. For as long as she can remember, she has always wanted to be an Olympian; it has always been her dream to compete in rowing at the Olympic Games.

[81] The Claimant also submits in her Notice of Appeal that there was no reason for RCA to have artificially limited the number of women initially invited to the Selection Camp to 16.

## Conclusion

[82] Based on the above and the entirety of the evidence before me, with respect to the fact that only a limited number of athletes were invited despite the capacity to invite a larger number, I find on the balance of probabilities the rationale provided by Mr. Thompson for coming to that number to be reasonable.

[83] In my view, there is insufficient evidence to establish that RCA did not have the right to invite only 16 women at the Selection Camp. As mentioned, based on the criteria stipulated in the Selection Guidelines and the power conferred upon the HPD, and in consultation with the coaches, RCA had authority to make the final selection.

[84] I have also reviewed the decision of Arbitrator Peterson.<sup>2</sup> I agree with him. Arbitrator Peterson wrote the following in a similar case with respect to the limited number of athletes invited to RCA 2020 Olympics:

*“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-six boats at the 2020 Olympic Games.”<sup>3</sup>*

[85] Based on the evidence before me, I also conclude that it was reasonable for RCA to limit the number of invitees to the Selection Camp. I cannot find anything in the Selection Criteria that leads me to conclude otherwise.

[86] For all these reasons, I find that RCA’s decision to invite only a limited number of athletes was reasonable, and there was no obligation to invite 22 athletes, as suggested by the Claimant.

## Issue # 2: Breach of Fairness and Natural Justice

[87] Another issue raised in this appeal is the fact that RCA has not made its selection criteria clear to the Claimant. In other words, the Claimant and other athletes did not have an accurate understanding of the expectations for athletes to be invited to the Selection Camp.

[88] According to the Claimant, she did not know of NRC’s importance for invitations to the Selection Camp. The Claimant confirms that she was selected to the women’s eight for World Cup II, but that she ended racing in the women’s four.

[89] The Claimant ended in the four because, after being selected for the eight, she suffered a stress-fractured rib, and Mr. Thompson decided for the purposes of having the crews training together leading up to the regatta to remove her from the eight. When she was ready to be able to row again, she went into the four. They finished 12<sup>th</sup> or 13<sup>th</sup> at the

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<sup>2</sup> *Loutit v. RCA*, SDRCC 19-0425

<sup>3</sup> *Supra* at pg. 6.

World Cup II held in June 2019. The Claimant says that, of the athletes that raced with her in the four, two were invited to the Selection Camp.

[90] The Claimant ended up racing the four at the World Cup III, and their boat came in 12<sup>th</sup>. Of the athletes that the Claimant raced within the four at World Cup III, two athletes were also invited to the Selection Camp. For the World Championships, the Claimant was selected to be in the spare pair, and 14 athletes were selected to attend World Championships including the spare pair.

[91] Sometime after the selection for the World Championships Team, the Claimant was stretching and dislocated her shoulder. One week before flying for the World Championship, the Claimant was told she would not be on that flight; further, Mr. Thompson told her that she would not be attending, so that she could stay home and rehabilitate properly.

[92] The Claimant testified that Mr. Thompson never talked about the Selection Camp during this conversation. She added that the NRC was only brought up because Mr. Thompson told her she would probably be sculling at the NRC in a single. At no time did Mr. Thompson tell her the relationship between the NRC and Selection Camp.

[93] After being told to rehabilitate her shoulder, the Claimant stayed in Victoria with the team for the last week it was in Canada, and she continued training at the Centre. When the team left for Europe, the Claimant returned to Calgary, as instructed, and she did her rehabilitation at home.

[94] The Claimant confirms that, at that time, she did not realize there was a relationship between the NRC and the Selection Camp. Also, according to the Claimant, she did not receive any program for training or rehabilitation. She was left on her own.

[95] Based on her conversation with Mr. Thompson, the Claimant's understanding was that her goal for that time should be to rehabilitate her injury properly to ensure that that injury would not be a recurring problem in the future.

[96] The Claimant is adamant on this point: If she had known about the importance of the NRC, she would have done a lot more high-intensity training to be at peak performance for racing; she also would have chosen a different partner to pair with.

[97] According to the Claimant, the matching up of partners is critical. She added that she would have made a better choice for a partner who matched up with her, and she would not have worried about who she thought Mr. Thompson wanted her to partner with.

[98] With respect to her choice of a pair partner, the Claimant commented on two text messages<sup>4</sup> that she had sent to Mr. Thompson prior the NRC. She mentioned that, in the first text messages to Mr. Thompson during her rehabilitation in Calgary, she was inquiring as to whether she would be able to row with Athlete A at the NRC when she started rowing again. Mr. Thompson replied that she should do what she thought would

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<sup>4</sup> Exhibits R-14 and R-15.

be best to position her at the NRC. Later the same day, Mr. Thompson asked her if she had made her decision, and she told him that she would row with Athlete A.

[99] According to the Claimant, she did not have any knowledge at that time that the NRC would be essentially the deciding factor for an invitation to the Selection Camp. If she had known that the NRC was the most important factor, she would have chosen to row with Athlete B, an athlete from Calgary, because there were a lot more resources available there and because Athlete B and the Claimant matched up better and rowed better together than the Claimant did with Athlete A.

[100] The Claimant confirms receipt of three emails from Mr. Adam Parfitt. In the first, dated May 31, 2019, Mr. Parfitt reminded the athletes of the NRC to be held in Burnaby from September 26 to 29 and confirmed that it would be the last data point for the Selection Camp. In the second email, dated September 11, 2019, Mr. Parfitt provided the links on RCA's website to several documents, including the Olympic Selection Guidelines. Finally, the third email from Mr. Parfitt contained the list of athletes invited to the Selection Camp.

[101] The Claimant also says that if RCA had not prioritized her long-term rehabilitation, she assumes she still would have been with the team and would have had physiotherapy access every day. In retrospect, she thinks it was the wrong decision to prioritize her long-term development when RCA knew how important it was that she performs in the short term.

[102] In cross-examination, the Claimant confirmed that, at any time in the summer of 2019 and leading up to the NRC, she did not have any discussion with any other athletes about the Selection Guidelines. She also adds that she never asked any RCA coaches or representatives about the Selection Guidelines or criteria.

[103] With respect to World Cup II, the Claimant acknowledged that RCA has the discretion to change the configuration of crews. She also confirmed that Mr. Thompson did not want her to go to the World Championships because he did not want her to be in a position where she would have a higher probability of reinjury.

[104] The Claimant acknowledges that Mr. Iain Brambell, as the high-performance director, is the final decision maker with respect to selection, not Mr. Thompson. She also acknowledges that she never asked any athletes on the Athletes' Council about the Selection Guidelines and that she did not check the website where the Selection Guidelines were posted, despite knowing that about the obligation contained in her Athlete's Agreement to regularly check the RCA website.

[105] For his part, Mr. Thompson confirms that RCA maintains the discretion and authority to change crews around before regattas. He also said that the Claimant was not brought to the World Championships because it was best for her for long-term rehabilitation, a determination based on consultation with health professionals. Mr. Thompson added that the Claimant told him that she had dislocated her shoulder too



many times, so sending her to the World Championships would have been inappropriate because her continuing to train and race would have hurt her performance at the NRC.

[106] In addition, Mr. Thompson confirms that he never told the Claimant that the NRC was not an important factor for consideration in inviting athletes to the Selection Camp—nor did he tell her that the NRC was inconsequential and that only the World Championships mattered.

[107] Mr. Thompson also confirms that he never had discussions with the Claimant or other athletes about the NRC and the selection criteria. In cross-examination, Mr. Thompson confirmed that, at the time of the World Championships, the Claimant had to look to her health and her well-being.

[108] Mr. Thompson also acknowledges that he told the Claimant that not going to the World Championships was best for her, but he did not tell her that not going to World Championships would affect her selection to the Selection Camp.

[109] For his part, Mr. Marshall testifies that neither he nor anyone else at RCA has ever told any athletes that the NRC was unimportant or of lesser importance for consideration in electing athletes for the Selection Camp. He also confirms that, when they considered whether or not to invite the Claimant, he and Mr. Thompson looked at her performance in relation to the selection criteria, including international results and RADAR scores.

[110] Finally, Mr. Brambell testifies that the Selection Guidelines were started in the fall of 2018 and drafted throughout 2019. He added that the proposed guidelines had to be approved by the COC, which approval occurred in July 2019. Prior to sending the proposal to the COC, Mr. Brambell says that a draft copy was sent to the Athletes' Council. The approved Selection Guidelines were posted on the RCA website on August 6, 2019.

[111] Mr. Brambell mentioned that, after the posting of the Selection Guidelines, he spoke about them in a public forum where athletes were present. Mr. Brambell added that the August 2019 RCA Newsletter included reference to the published guidelines by indicating that the Olympic and Paralympic selection documents had become available on the RCA website.<sup>5</sup>

[112] In cross-examination, Mr. Brambell acknowledged that he has the ultimate authority to make all decisions relating to the nominations of athletes to the Olympic Team. Regarding the Selection Guidelines, he said that the draft copy was not circulated to the athletes because it had to be first approved by the COC. Only the coaches and the members of the Athletes' Council were consulted.

## **Conclusion**

[113] After having heard from the witnesses and having reviewed all the evidence entered in exhibit, I must now determine whether there was a breach in fairness and natural

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<sup>5</sup> Exhibit R-4.

justice that constitutes a flaw in the selection process, which would render the decision of not inviting the Claimant unreasonable.

[114] I have carefully reviewed the evidence before me, and I note that Section 9(a)(vii) of the RCA Code of Conduct is unequivocal. Coaches must ensure that athletes are made aware of the details of the team selection process and abide by the Selection Policy and Selection Criteria.

[115] In this case, I accept the testimony of the Claimant when she said that she was only made aware of the Selection Policy and Selection Criteria on September 11, 2019, when she received an email from Adam Parfitt with the final version of the Selection Guidelines.

[116] In addition, the Claimant mentioned that, if she had known of the importance of the World Championships and NRC in the selection of athletes for the Selection Camp, she would have done things differently. But she said that she did not know; further, she assumed that 22 athletes would be invited and did not foresee the initial invitation of only 16.

[117] For its defense, I have heard from the witnesses of RCA that the Selection Guidelines were prepared over a period of time and the Athletes' Council members were consulted along with coaches during the draft stage. Upon receiving the approval of the COC, the guidelines were posted on August 6, 2019, on the RCA website.

[118] As admitted by the Claimant, she had the obligation to consult the RCA website from time to time as per her athlete contract, which she had not done. In addition, the Selection Guidelines were also referred to in the August RCA newsletter.

[119] In my view, the issue remains that, when the Claimant was injured, Mr. Thompson did not tell the Claimant that her not going to the World Championships would have a negative impact on her chance of competing in the 2020 Olympics, nor did he tell her about the importance of the NRC. Without knowing the potential consequences of these sporting events, the Claimant made choices that were detrimental to her.

[120] As argued by the Claimant's counsel, the Claimant was deprived of the ability to organize her training and competition schedule in such a way that she would have been able to maximize her peak at a critical time. She was not informed of critical information by coach Thompson when he would have had the opportunity to remind her of the possible consequences of not participating in the World Championships and the importance of the NRC.

[121] The evidence establishes that the Claimant could have been aware of the selection criteria by the beginning of August, but not in May, when critical decisions had to be made that would affect her possible selection to the Selection Camp.

[122] Even though I have no doubt that Mr. Thompson intended to act in the best interest of the Claimant and that all employees of RCA acted in good faith in this matter, the fact remains that the Claimant was not told of the consequences of not going to the World Championships nor of the manner of her preparation for the NRC. Therefore, the Claimant

was not given the opportunity to make an informed decision when she agreed not to attend and when she made her choice of a pair partner.

[123] I also understand that long-term rehabilitation was the preferred approach of Mr. Thompson with respect to the Claimant's injury, but the final say on how to care for her body belonged to the Claimant, who had to determine the best for herself if she wanted to prioritize being invited to the Selection Camp.

[124] In my view, this involuntary breach by RCA toward the Claimant has resulted in unreasonable consequences for her. I agree with Claimant's counsel that, given her specific circumstances, it is unfair that nobody told her that her Olympic dreams were on the line, dependent on her result at the NRC.

[125] I acknowledge that the Claimant was injured, but the evidence shows that RCA also brought another injured athlete to World Championships and selected her to the Selection Camp on the basis of her international results. Unlike that other athlete, however, the Claimant was not given the opportunity to prove she was healthy enough to compete at the peak of her ability.

[126] Further, as stipulated in the RCA Code of Conduct, coaches must ensure that athletes are made aware of the details of the team selection process. This was clearly not done in the Claimant's case.

[127] The Respondent relied on case law precedents, one of which is a recent decision of Arbitrator Peterson related to the non-selection of other RCA athletes to the Selection Camp.<sup>6</sup>

[128] As previously mentioned, that case pertained to the capacity of the Training Centre to accommodate athletes and the nonexistence of any limit imposed on RCA regarding the number of athletes to invite. It also raised the issue of the athlete's performance results. In my view, that case had nothing to do with the breach of fairness and natural justice in light of Section 9(a)(vii) of the RCA Code of Conduct and, therefore, is of limited assistance to me.

[129] In contrast, the Claimant presented one case,<sup>7</sup> wherein Arbitrator Picher overturned a decision on the basis that the athlete was not clearly informed in advance of the criteria that would apply to the possible renewal of his carding.

[130] In another case<sup>8</sup>, Arbitrator Picher found the Olympic team's selection process to be fundamentally flawed and manifestly unfair. In his decision, Arbitrator Picher found that the only appropriate remedy was to give the appellants the benefit of the Olympic qualifying standard, which they were knowingly led to believe would apply to them.

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<sup>6</sup> *Loutit v. RCA*, SDRCC 19-0425.

<sup>7</sup> *Mourad v. The Canadian Taekwondo Association WTF*, dated July 31, 2002.

<sup>8</sup> *CABA v. Gaudet et al.*, SDRCC 04-003.

[131] For all the above reasons and based on the entirety of the evidence filed and heard, I find that the fact of not having informed the Claimant in due course of the criteria that would apply to her invitation or non-invitation to the Selection Camp, and the importance of World Championships and NRC among those criteria, constituted a breach of fairness and natural justice under Section 9(a)(vii) of the RCA Code of Conduct.

[132] In my view, this breach is such that it renders the decision not to invite the Claimant to the Selection Camp unreasonable and constitutes a breach of fairness and natural justice.

**Order**

[133] The Request of the Claimant is granted. It is hereby ordered that Karen Lefsrud be invited by Rowing Canada Aviron to the 2020 Olympic & Paralympic Selection Camp.

Dated in Ottawa this 16<sup>th</sup> day of December, 2019.



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Robert Neron, LL.B., LL.M., C.Arb.  
Arbitrator