

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

**SDRCC No: 19-0428**

IN THE MATTER OF AN ARBITRATION HEARING BETWEEN:

**COLLEEN NESBITT  
(CLAIMANT)**

- and -

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

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**DECISION WITH REASONS**

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**ARBITRATOR:** GORDON E. PETERSON

**APPEARING:**

For Claimant: MacLeod Law – Michael Kwiatkowski  
For Respondent: Brazeau Seller LLP – Geoffrey Cullwick and Jay Kim

**WITNESSES:**

For Claimant: Colleen Nesbitt  
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 26<sup>th</sup>, 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 (“Selection Camp”).
02. In the interest of expediency, the Claimant and the Respondent agreed to proceed to arbitration without exhausting the RCA internal appeal process.
03. On October 24, 2019, the SDRCC acknowledged receipt of the Claimant’s Request for Arbitration dated October 23, 2019. The Respondent filed its Answer on October 28, 2019.
04. In making my declaration of independence, I explained that I had been appointed as the arbitrator in a similar case involving the Respondent and that the claimant in that case had refused to merge or combine her case with similar cases. I also reported the request to serve in this case to the claimant in the first case. All parties confirmed that they were comfortable with me proceeding as Arbitrator in this case.
05. After being appointed Arbitrator by agreement of the parties, I held a preliminary call on November 5, 2019, where process was discussed and timelines for the delivery of additional documentation were set.
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 26, 2019. During the hearing, each of the parties availed themselves of the opportunity: (a) to present witnesses and oral arguments; (b) to 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. The number of appeals regarding the RCA's Tokyo 2020 Olympic Team Selection Guidelines (the "**Selection Criteria**") is concerning. 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.
09. It is apparent that allowing additional athletes an opportunity to attend the Selection Camp may be the easier decision. It is clear for athletes not invited to the Selection Camp, their dream to compete at the 2020 Tokyo Olympics for Canada in Rowing has come to an end. Allowing the appeal would defer the selection decision to a later date and perhaps diminish the apparent arbitrariness to the limit of the number of invited athletes. It is not an arbitrator's responsibility, however, to determine what would be the easier choice. The arbitrator's role is to evaluate the process and determine if there is reason to disturb the decision made – in this case, the decision made by the Respondent not to invite the Claimant to the Selection Camp.
10. This case differs slightly from the similar case I heard previously. In the earlier case, SDRCC 19-0425 (*Loutit v. RCA*), counsel for that claimant acknowledged that the Selection Criteria had been properly established, but there were concerns with the application of such criteria to Ms. Loutit; it seemed unusual that she would have better results than two invited athletes in two of the three primary bases for invitation, and yet would not be invited.
11. In the earlier case, after reviewing all the evidence, I could not find the decision made by the Respondent not to invite Ms. Loutit to be unreasonable such that it would permit me to interfere with the decision made by the Respondent.
12. Both parties in the current matter had access to the Loutit decision since the case was submitted by the Respondent in its Book of Authorities. The facts in this matter differ from the earlier case, but the circumstances remain largely unchanged.
13. In this case, however, the establishment of the Selection Criteria, in addition to its application, has been challenged. Another key difference is that on November 15, 2019, two additional athletes were invited to the Selection Camp as a result of severe injuries to two athletes who had originally been invited and would continue to compete for a spot on the Canadian Olympic Team for Rowing.

14. The fact RCA felt the need to invite additional athletes triggers a question as to the reasonableness of the limited number of athletes invited.
15. The original choice was made by the Respondent to include only two athletes above the number of seats qualified for the Women's sweep group. Three boats are qualified for the 2020 Olympic Games in Tokyo, for which 14 rowers and two "spares" were initially invited to the Selection Camp on September 30, 2019.
16. On November 15, 2019, two additional rowers were invited to the Selection Camp. The reason for the late invitations, as the HPD testified, was that three athletes had been injured (broken ribs) which is not uncommon in rowing, but the severity of the injuries in two of the athletes was unusual and resulted in the RCA extending invitations to the next two qualified athletes.
17. Selection decisions are never easy. Appeals generally result because the athletes either don't understand or don't agree with the decisions made. At the same time, organizations generally attempt to select the best athletes to achieve their objectives. In this case, there were contributing factors on both sides: RCA may not have provided sufficient time for the athletes to consider, plan and prepare for the selection events or sufficient guidance as to the basis for consideration; at the same time, the Claimant may not have done all she could to determine what the Selection Criteria were, nor did she ultimately perform up to her perceived capabilities in the selection events. Reasons abound for these factors.
18. 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**").
19. I appreciate the manner and submissions of counsel and witnesses for both parties. They were presented clearly and professionally. Based on the submissions herein, the crux of the issue is whether the delayed publication of Selection Criteria sufficiently prejudiced the Claimant and justifies my interfering with the decisions made by the Respondent not to invite the Claimant to the Selection Camp. As I found in the Loutit case, the application by the Respondent of the Selection Criteria to the Claimant does not appear to be unreasonable, and I adopt much of what I found in that case regarding such application.

## II FACTUAL BACKGROUND

20. The Claimant has been rowing for approximately five years and was invited to the National Training Centre in December 2017. She has progressed rapidly in the sport and has shown great promise in her ergometer scores. She attended the training camp for the 2019 World Championship team, was a member of the Canadian Team at the 2019 World Cups in Poland and the Netherland, competing in the Women's Four. She was hopeful of qualifying for the Canadian Rowing Team to the 2020 Olympic Games.
21. The Respondent is the national federation governing Rowing in Canada. It is recognized by the international federation, *Fédération Internationale des Sociétés d'Aviron* ("FISA"). RCA has the responsibility to recommend to the Canadian Olympic Committee ("COC") members for Rowing on the Canadian Olympic Team in 2020.
22. As part of its responsibilities relating to selecting a team for the Olympic Games, the COC requires each national sport organization's ("NSOs") selection criteria to be approved by the COC to ensure that athletes have been involved in the process and that athletes have a fair opportunity to understand in advance what is required of them in order to be selected to the Olympic team. The COC did review and require changes to the Selection Criteria, with final COC approval granted July 25, 2019.
23. The COC required NSOs to submit selection criteria for Tokyo 2020 by April 30, 2019. This would permit the COC to complete its process in time for Selection Criteria to be published at least 12 months in advance of the Olympic Games in Tokyo. This timing is geared to allow the athletes sufficient time to prepare and plan for their Olympic year.
24. General principles for good selection criteria include:
  - (a) Selection criteria should be established well in advance of relevant events to be contested in order to allow athletes sufficient notice to plan and prepare for such events.
  - (b) Selection criteria should not be established after relevant events have been contested in order to avoid criteria being tailored to benefit certain athletes after the fact.
  - (c) Objective selection criteria are preferred over subjective or discretionary selection criteria to permit everyone to see whether a person has achieved the criteria or not.
  - (d) Even where discretionary selection criteria are included, the clearer the criteria and the more transparent the process, the better for everyone.

25. 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 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).*

*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.”*

26. Development of the Selection Criteria was a lengthy process, starting in the fall of 2018, in which Mr. Brambell, RCA’s High Performance Director (“HPD”), worked with the coaches, RCA Athletes’ Council and the COC prior to finalizing them. The Selection Criteria were published on RCA’s website on August 5, 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.

27. The Claimant submits she was not aware of the Selection Criteria until she received an email from Adam Parfitt, National Team Operations Director, on September 11, 2019.

28. Section 5.1 of the Selection Criteria, in essence, targets choosing athletes to a short list to attend a Selection Camp prior to later selection of the athletes to be recommended to the 2020 Canadian Olympic Team. If an athlete is not invited to the Selection Camp, she is precluded from being selected to the Canadian Olympic Team in Rowing for the 2020 Tokyo Olympic Games.

29. There are six criteria in the Selection Criteria and no required weighting is placed upon any criterion on which invitations to the Selection Camp are to be based, nor do the Selection Criteria limit or specify the number of candidates to be invited.
30. There are limited events that could possibly be used as “data points” for the Selection Criteria in 2019. There were a very limited number of international events – all of which were known by the athletes well in advance – and one national event – the NRCs, also known to athletes well in advance.
31. The first four Selection Criteria are elements an athlete has some direct control over. RCA has agreed the fourth criterion was met by all athletes entering the NRCs.
32. The Selection Criteria contain a significant amount of discretion for RCA with respect to invitations to the Selection Camp, including discretion over the capacity of the NTC as well as interpreting the basis for invitation.
33. There is no objective cut-off. The Selection Criteria do not require a specific number of athletes to be invited to the Selection Camp nor establish a formula to calculate the number of invitees. The Selection Criteria also do not explicitly state what should dictate such number. The Respondent explained that the number of qualified boats was not known at the time the Selection Criteria were being developed. Without knowing the number of qualified boats, it would be hard to determine the number of athletes to be invited or to create a formula for calculating how many should be invited because the number of boats qualified might necessitate a change in strategy.
34. RCA’s expressed strategy to achieve its primary objective of top six is to maximize the time together for the athletes to develop continuity and collaboration to get the most out of each boat. RCA accordingly planned an early start to the Selection Camp and a reduction in the usual number of athletes invited to the Selection Camp.
35. 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.
36. Setting the number of rower invitees at 16 for the three qualified Women’s Sweep boats resulted in a number of athletes who assumed they would be invited to the Selection Camp not receiving an invitation (including the Claimant).

37. In the summer of 2019, the Claimant was on the “short list” to compete at the World Championships. She was surprised when she learned on July 23 that she would not be travelling to the World Championships after competing at two earlier World Cup events in June and July 2019 as part of the World Championship contingent.
38. It did not cross the Claimant’s mind that she would not have the opportunity to compete at the Selection Camp for a spot on the Olympic team, even after she saw the Selection Criteria that outlined the six criteria upon which invitations would be based. Her expectation was she would be invited to the Selection Camp without knowing the limitation on numbers.
39. The difficulty the Claimant has with the Selection Criteria was not the process of development RCA went through, but rather the timing of it and the lack of communication to the athletes as to what they would have to do to qualify for the 2020 Olympic Team. Even if we take the earliest date (August 5, 2019) when the Claimant could have seen the Selection Criteria, it was already after her international results had been achieved and, arguably, insufficient time for her to plan and prepare properly for her only remaining criterion, the NRCs.

### **III SUBMISSIONS AND ANALYSIS**

#### Onus

40. 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.
41. In order to satisfy Section 6.7 of the Code, it is necessary for the Respondent to demonstrate that the Selection Criteria were properly established and the decision not to invite the Claimant to the Selection Camp has been made in accordance with such Selection Criteria.
42. 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 development of the criteria as well as 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.

43. The Selection Criteria 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. Usually, that would be sufficient to discharge the onus of the Respondent in demonstrating the appropriate establishment of the Selection Criteria.
44. Counsel for the Claimant suggests that the Selection Criteria were not properly developed in that the coaching staff and RCA repeatedly failed to follow procedures in respect of dealing with its athletes as set out in the 2019 Athlete Agreement and the RCA Code of Conduct. In particular, the coaches breached their obligation to ensure athletes were made aware of team selection process in accordance with subsection 9(a)(vii) of the RCA Code of Conduct.
45. The evidence was somewhat mixed on the compliance with the agreement obligations (both parties appear to have breached obligations). RCA, however, could have done better in communicating the importance of certain events on a timelier basis.
46. The Claimant suggests that the late publication of Selection Criteria breached the Athlete Agreement requirement for major games' team selection and national team eligibility criteria to be published, where possible at least eight months and three months, respectively, before the selection of a particular national team.
47. The Respondent submits that RCA has complied with the requirements of the Athlete Agreement. The Selection Criteria were provided more than 10 months prior to the selection for the major games. Further, the Respondent suggests that it was not possible to establish the Selection Criteria earlier. Finally, RCA suggests there was no impact on the Claimant because the international events and the NRCs were already considered to be important events and she was already targeting such events.
48. Since a person has to be invited to the Selection Camp as a precursor to selection to the 2020 Canadian Olympic Team, counsel for the Claimant suggests that Selection Criteria should, accordingly, be known well in advance of the identification of athletes attending the Selection Camp, because only athletes attending the Selection Camp have the opportunity to be selected to the 2020 Canadian Olympic Team.

49. There is no evidence that the Claimant performed other than to the best of her abilities at each of the relevant competitions.
50. The Claimant testified that she did not believe advance notice that her performance at the World Cups would be included as a data point for the Selection Camp invitation, would have made any difference to her performances there.
51. The Claimant does question, however, whether she could have performed better at the NRCs if she had had proper notice of its importance and accordingly could have devoted more time to train with her partner and perhaps timed her cross-training differently.
52. The Claimant acknowledges that she did her best within the circumstances after learning that the NRCs would be a data point on September 11, 2019, but she had taken time off in August and likely would have done things differently with earlier notice.
53. The Respondent submits that the athletes returning from the World Championships also took time off, even closer to the NRCs, and yet most of them performed well enough at NRCs to be invited to the Selection Camp.
54. The Respondent provided a schedule of development showing that the Selection Criteria were under development for some time and the Claimant ought to have known about them prior to the email of September 11. Athletes' Council received information in the fall of 2018 and had a further review in May 2019, prior to finalizing their input in July 2019.
55. In his Will-Say, Iain Brambell stated that he provided the Athletes' Council with a "near final draft of the Selection [Criteria] on July 9, 2019." He further stated that the Selection Criteria were reviewed and discussed in detail during an Athletes' Council meeting he attended on July 25, 2019.
56. The Claimant denies ever receiving specific information on the Selection Criteria from the Athletes' Council representative.
57. Selection Criteria were published on the RCA website on August 5 and a newsletter from RCA sent August 30, 2019 included reference to the Selection Criteria and provided a copy by clicking on a link. The Claimant acknowledges that she had an

obligation under the Athlete Agreement to regularly check the RCA website and further acknowledges that she received the RCA newsletter, but must have missed the Selection Criteria link.

58. The Claimant submits that the representative for open weight women on the RCA Athletes' Council did not make the Claimant aware of the Selection Criteria and reiterates she was not aware of the Selection Criteria until September 11, 2019 when Adam Parfitt sent out his email. She acknowledges it may have been discussed in generalities but she was not aware of the critical importance of NRCs.
59. Prior to publication by RCA of the Selection Criteria on August 5, 2019, there were draft versions that may have been reviewed by certain people, including the coaches and members of the Athletes' Council. There was no obligation on those people to communicate widely to any athletes training at the NTC or elsewhere. Many of those athletes might have received the information when perusing the RCA website on or after August 5, approximately two months in advance of the Selection Camp decision, but AFTER most of the datapoints relating to criteria to be considered had been collected (with only World Championships and NRCs remaining).
60. The purpose of the early publication of selection criteria is to ensure athletes have a fair chance to do everything they can to meet the requirements. It is disappointing to learn that no emails were sent specifically directed towards even the national team athletes until September 11, approximately two weeks prior to the last data point to be collected (NRCs).
61. The Claimant submits that the NRCs were consistently communicated by the coaching staff as an insignificant factor in determining future Selection Camp and National Team status. However, no corroborating evidence, other than notes from an unidentified athlete attending the Athletes' Council meeting stating a similar general conclusion, was presented.
62. The Respondent produced evidence that the NRCs were important, including testimony of the HPD, Assistant Women's Coach and Head Women's Coach. The coaches both testified that the NRCs have always been important, and they had never communicated that they were insignificant nor were they aware of anyone

communicating that the NRCs were unimportant. The HPD testified that “anytime you put national in front of anything, it is important.”

63. Counsel for the Respondent submits that Adam Parfitt alerted the Claimant (along with the other athletes) on May 30, 2019 to the fact that the NRCs are an important part of not only the Selection Criteria but also criteria for carding. The Claimant denies having received this email despite her correct email address being included on the email.
64. The Claimant suggests that she did not receive the email to her knowledge, and she believed World Championships were more important. She testified that as a member of the World Championship cohort up until being released on July 23, 2019, the NRCs were not as important to international racers as to club racers. She suggests that NRCs are very important for club teams as they get to race members of national team. She acknowledged that she was aware she had not achieved carding status and the 2019 NRCs would be important to her for that reason.
65. The Claimant submits, however, that it was only as a result of inquiries she made regarding the plan for the next few months did she become “slightly aware of the importance of that NRCs’ results” on September 23<sup>rd</sup> in the week of racing. She did not comprehend that her performance at the event would compromise her position on the National Team.
66. The Respondent testified that the NRCs occur every year and have always been a data point for carding. Athletes, including the Claimant, were very much aware of the important role NRCs played.
67. The Claimant suggests the delivery of information could have been more timely, with more emphasis placed on the critical importance of the NRCs. Some people were told that the HPD announced it to friends and families at the World Championships, but she was not informed.

### Measurement

68. The Respondent testified how each candidate was measured individually against each criterion in order to determine who would 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.

69. 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.
70. Based on the evidence, I find that the Selection Criteria were used and applied against the Claimant by the HPD to determine whether to invite her to the Selection Camp.

#### Capacity

71. There is nothing in the Selection Criteria which expressly limits the number of invitees to the Selection Camp.
72. 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. 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.
73. The Respondent submits the number of athletes 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.
74. Would it have been possible for RCA to have outlined how the number would be established without requiring a specific number? It would still be RCA establishing that number of invitees, but it might have had some advance scrutiny.
75. The Respondent prefers to maintain the limited number. The Claimant suggests that she should be invited because the process was unfair, and she did not have sufficient time to prepare for the NRCs nor did she understand the importance of the NRCs – that failure to perform would eliminate her Olympic dream.
76. 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.

77. Since the agreed standard of review is one of reasonableness, not correctness, it is not necessary for me to agree with the decision by the HPD. 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.

#### **IV CONCLUSION**

78. 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.

79. In general, 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.

80. Arbitrator Drymer in *Li v Badminton Alberta* (SDRCC 11-0140) stated: "*A selection decision may be overturned if the selection criteria are found to be inappropriately established or the selection decision was not made in accordance with the selection criteria. Selection criteria are not appropriately established if not drafted or adopted with the intention of formally establishing selection or procedures, and if never published or in any manner distributed or communicated to members of the sport organization, including athletes, coaches and selectors.*"

81. The Selection Criteria were appropriately drafted. Coaches and athletes were engaged in the process, providing valuable input, and the COC approved the Selection Criteria as being fair and reasonable. The Selection Criteria were drafted for the purposes of identifying athletes who can assist RCA in accomplishing its stated objective. Such criteria were, following approval of the COC, published on the RCA website in accordance with the RCA's obligations set out in the Athletes Agreement.

82. As determined in my earlier decision, I have accepted that RCA measured each of the athlete performances against the Selection Criteria in assessing who should be invited to attend the Selection Camp and I adopt that analysis for this case.
83. For the above reasons, I find that the Respondent has discharged its onus under Section 6.7 of the Code. The Selection Criteria were appropriately established and applied.
84. The question before me is whether the timing and lateness in communicating the Selection Criteria to the Claimant were sufficient errors that require interference in the decision by RCA not to invite the Claimant to the Selection Camp.
85. In *Rachel Cliff v. Athletics Canada* (SDRCC 16-0303), another selection case relating to the Olympic Games, Arbitrator Bennett stated after a review of team selection cases (at p. 14), *“team selection can contain irregularities, even those that might produce some unfairness in the result, but these irregularities must be significant and I should only intervene sparingly.”*
86. Arbitrator Hedley in *Forrester v. Athletics Canada* (SDRCC 10-0117) found (at para. 54): *“In other words, there must be an extremely compelling case made in order that the results of the team selection process can be interfered with, even if an irregularity appears in the process, which may have had some bearing on the ultimate fairness of how the criteria are applied.”* Based on that premise, Arbitrator Hedley declined to rule on whether procedure had been violated, even though he had good reason to believe it had been but not in a manner that *“the result is so badly tainted as to compel me to act on it ... [and] to reconstruct the performance criteria.”*
87. There were some changes to the way RCA previously operated. The Selection Camp was to start earlier, and it would involve a lesser number of athletes than previously. The changes appear to be justified based on the strategy RCA adopted to reach its objective of top six at the Olympic Games. Ideally, RCA should have communicated these changes to its athletes at the earliest possible time to allow them to prepare and plan for making the team. Athletes need to know the requirements for selection. The clearer and more transparent, the better. People should not be surprised by decisions; that is when you tend to get appeals. Even if RCA’s criteria were perfect, the implementation of them are more important (a Grade A implementation of a Grade B plan will win out over the Grade B implementation of a Grade A plan every time!).

88. NRCs represented the only side-by-side racing opportunity and was the last data point (and could very well be the determining point). Its importance should have been stressed to at least those “in the mix.” At a minimum, I would have thought those at the NTC would have had it stressed well before World Championships – simply because those attending World Championships in the past did not have to attend the NRCs in an Olympic year. This time, it was specifically included in the Selection Criteria that they would have to attend and perform at NRCs.
89. Athletes should be aware of the criteria to select them to a team, particularly one that only surfaces every four years. Accordingly, RCA is not without fault.
90. Was the Claimant prejudiced by the fact she did not know the Selection Criteria until it was communicated to her in an email on September 11, 2019? Perhaps, but is it an “extremely compelling case” that warrants intervention? I do not find so for the reasons that follow.
91. The Claimant testified that her knowledge of the World Cup inclusion as a data point for selection would not have made any difference. She prepared for the World Cups and did her best, whether they were a data point in the Olympic Selection Criteria or not. She further testified that she had not been through an Olympic cycle before and thought the Selection Camp would be the same as other, non-Olympic camps. These assumptions were not generated by RCA.
92. She submitted that knowing the importance of the NRCs would likely have caused a change in her behaviour. She acknowledged she knew that NRCs were important both as an event and for carding nominations. Her perception of the relative importance may have been influenced by other factors, but based on the evidence before me, I cannot find that anyone from RCA misled her in any way such that made it unfair to her.
93. RCA has presented evidence that it could not have finalized the Selection Criteria sooner. Although there were suggestions that parts of the Selection Criteria could have been distributed directly to the athletes (and certainly it should have been distributed directly to the national team athletes no later than it was posted on the website), there was ample evidence produced that the Claimant was not without fault in seeking information relating to information on selection for the 2020 Olympic Games.

94. Even if I accept that the Claimant did not receive the May 30 email regarding NRCs, I find the Claimant is also not without fault. NRCs would have been on her radar screen at a minimum because of carding. She testified that no Athletes' Council member had contacted her but acknowledged she did not contact the Athletes' Council representative, despite seeing her at morning meetings, to ask about Selection Criteria. The Claimant testified that she considers herself to be an athlete on the fringe of making the team; yet, she did not fulfil her contractual obligation to check the RCA website nor did she check out the newsletter distributed August 30<sup>th</sup> containing a link to the Selection Criteria. One would reasonably expect that she would be more curious about Olympic selection, particularly after her being "dropped" from the World Championship "short list" on July 23. Whilst RCA could have done a better job, I think also the Claimant had some responsibility as well. That said, I did find the Claimant to be very credible, honest and forthright, and I only raise these concerns to indicate that there were irregularities on both sides.

#### Summary

95. 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.
96. 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.
97. 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.
98. 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. 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.

99. The process for developing the Selection Criteria also appears to be appropriate and the fact that the COC approved the Selection Criteria presumes that it was considered to be fairly developed.
100. In this case, the Claimant believes that it would be unfair not to invite her because she was not aware that the NRCs was a critically important event for selection because she was not informed of the Selection Criteria until it was too late. She was aware, however, of the importance of the NRCs and RCA did not purposefully withhold information or favour any other athlete over the Claimant. All athletes received the information in the same manner and at the same time from RCA. Although RCA could have communicated more effectively and on a more timely basis, it was the same for all athletes. RCA had established processes that were reasonable in the circumstances and believed everyone was aware of the need to perform at NRCs well in advance of the event.
101. 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, even when there may be errors in the process.

102. There is no question in my mind that the Selection Criteria could have been improved. Changes from the previous process should have been stressed to all athletes well in advance of events at which selection data would be collected. Improved criteria and better communication likely would have resulted in fewer appeals. Having heard the evidence, however, my role is not to re-write the Selection Criteria.
103. The Selection Criteria permitted the Respondent to reach its conclusion not to issue the invitation to the Claimant. RCA did not do anything that was manifestly unfair or prejudicial to the Claimant. I have carefully considered the concerns raised by the Claimant and see how the Respondent could have communicated the importance of the NRCs better. However, I conclude that the irregularities that existed did not taint the decisions made by the Respondent. The exercise of its discretion was reasonable in the circumstances and I therefore cannot interfere with the decision.

#### Parties

104. I found the Claimant to be honest, forthright and an excellent example for sporting youth in Canada.
105. I appreciate the clarity with which all witnesses answered questions within their areas of expertise. What was termed as “fogginess” with respect to some of the dates, I note the coaches may have had difficulty in remembering exactly when things in the past occurred. This may be a function of their looking ahead and planning on how to achieve future results. However, when questions were posed regarding reasons for decisions made, I found the coaches to be clear and precise in their recollections.
106. A special thank you to both counsels. The comportment of all parties was excellent, and I appreciated the clear and professional manner in which the submissions were made.

## **V JUDGEMENT**

107. The appeal by the Claimant is dismissed.
108. The decision of the HPD not to invite the Claimant to the Selection Camp is confirmed.

## **VI THE COSTS**

109. 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**

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

DATED: December 3, 2019



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Gordon E. Peterson, Arbitrator