

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

SDRCC 20-0472

ALEX LEPAGE-FARRELL

Claimant

and

SPEED SKATING CANADA

Respondent

and

WREN ACORN  
ANN-SOPHIE BACHAND  
FLORENCE BRUNELLE  
VICTORIA GAREAU  
FELIX ROUSSEL

Affected Parties

Richard W. Pound, Q.C., Ad.E.  
Sole Arbitrator

Appearances:

For the Claimant: Marc-Olivier Brouillette

For the Respondent: Jeffrey Scholten, Shawn Holman, Adam Klevinas

For Wren Acorn: Kerry Egan (mother)

For Ann-Sophie Bachand: Marie-Josée Bouchard (mother)

For Florence Brunelle: Jean-François Brunelle (father)

For Victoria Gareau: Dominic Gareau (father)

Félix Roussel: self-represented

## Introductory Remarks

1. This appeal involves elements of team selection (but not only team selection), establishment of selection criteria, carding under the Sport Canada Athlete Assistance Program (as a consequential outcome, but not directly raised in the pleadings) and the impact of the world COVID-19 pandemic.
2. The sport is short track speed skating, governed in Canada by Speed Skating Canada (SSC).
3. The context is the havoc caused by the pandemic to athletes and to the sport itself. Schedules of both domestic and international competitions have been cancelled, rescheduled and cancelled again, beginning in March 2020 and concluding with the cancellation of the entire season in September 2020. In the process, athletes have lost opportunities to compete, in some cases even to train, in preparation for, in particular, the forthcoming Olympic Winter Games in Beijing, scheduled to be held in February 2022.
4. I was appointed sole arbitrator in these proceedings by the consent of the parties.
5. A preliminary hearing was held by conference call on 22 October 2020 with the parties and the Affected Parties (one of which was only identified during the call and who intervened thereafter and participated in the proceedings). A hearing was fixed for 25 October 2020, also by conference call, and held as scheduled, during which evidence was presented and oral argument advanced by both parties.
6. SSC provided written notes of argument prior to the hearing to assist the Claimant and the Affected Parties. Some of the Affected Parties were minors and were assisted during the proceedings by their parents. While the proceedings were conducted mainly in French, some of the Affected Parties requested translation and the SDRCC provided the excellent services of an experienced interpreter, Sandra Traynor, for their assistance.
7. To ensure that the parties and the Affected Parties had full opportunity to participate in the proceedings, they were invited, at the outset of the proceedings, to make any opening statements they wished. Both parties did so. No Affected Party offered an opening statement. With respect to evidence, the two witnesses presented on behalf of SSC were examined in chief, cross-examined by the Claimant and briefly re-examined by SSC. Affected Parties were invited to address any questions to each witness. None had any questions. Upon the closing of the evidence, argument was advanced on behalf of both the Claimant and SSC, supplemented by written argument previously supplied by SSC and, in the case of the Claimant and any Affected Party, by written argument to be submitted by midnight on 25 October 2020.
8. Since the proceedings, in their widest sense, were characterized as a team selection issue, SSC assumed the initial burden of establishing that the selection criteria were reasonable and reasonably applied.

9. For the reasons indicated below, there was some urgency in rendering a decision. I undertook to render a short decision by the end of the day on 26 October 2020, with a reasoned decision to follow. This constitutes my reasoned decision.

## **Background**

10. The Claimant in these proceedings is Alex Lepage-Farrell who, in addition to being a talented short track speed skater, is a Medical Doctor pursuing her practice as a pediatric Resident at Ste-Justine Children's Hospital in Montreal. She had arranged for permission to defer her residency for a year and hopes to extend that deferral until after the Beijing Games if she can qualify for those Games. If she does not qualify (or at least achieve sufficient status within the SSC to be in a position to qualify), it appears unlikely that the Université de Montréal and hospital authorities will agree to extend her deferral, especially in the medical context of the current pandemic.
11. As a result of the pandemic, SSC cancelled, effective 12 March 2020, the remaining domestic events of the 2019-2020 season. This included the Short Track Canada Cup Final, which would otherwise have been used for purposes of selecting the 2020-2021 National and Development teams. The truncated season created a conundrum for SSC, since its carefully considered process for selecting such teams could no longer be applied, given the absence of the competition data that would otherwise be available.
12. Verbal evidence was given by Jeffrey Scholten, SSC's NextGen Pathway Coach and Shawn Holman, SSC's Chief Sport Officer. Both have competitive experience as athletes, coaching expertise and familiarity with the SSC performance objectives. I accept their explanations regarding the process of developing the new selection criteria, their concerns about trying to limit any prejudice suffered in the circumstances and the ongoing concern of SSC to develop criteria that would maximize the podium performances of Canadian athletes at the 2022 Beijing Olympics. No evidence pointed toward any bias or discrimination directed at particular athletes.
13. Faced with this new pandemic-created reality, the SSC coaches and the High Performance Committee met several times by video conference in an effort to develop a process responding to the current circumstances, knowing that it would not be perfect, but concerned that it should nevertheless lead to having in place national and development teams that would best lead to medal performances at the 2022 Beijing Games. The process was anonymized so that no personalities were identified. Past performances were considered to be more reliable future performance indicators than expected (or hoped-for) possible future results. Efforts were made to stick as closely as possible to the pre-pandemic performance objectives and measurements, while recognizing the challenges posed by the lack of data from the cancelled events and season.
14. It is easy to take effective judicial notice of the huge disruptions caused by the pandemic, across the entire spectrum of life in Canada and throughout the world. There has been nothing like it in current memory. Sport has not been immune from it. Its features of

spectator crowds, national and international travel and close contact between athletes, coaches and support personnel present all-too-convenient opportunities for the rapid transmission of a particularly virulent virus. If not controlled and an effective vaccine found and widely administered, the threat posed by the pandemic may well be existential. No element of society has been spared. Responses to the threat have not been uniform and many have been *ad hoc* or poorly executed.

15. The flavour of the impact on SSC and its athletes can be garnered in part from the language contained in SSC's 16 October 2020 publication entitled "Additional criteria updates related to competition cancellations and end of season decisions."

#### Preamble

This document has been created to provide an additional and final update for the determination of the 2019-20 season rankings in short track speed skating as well as the method for the 2020-21 National and Development Team selection and carding, subsequent to the cascade of cancellations arising from COVID-19.

This document supersedes the High Performance Bulletin #186 for the purpose of carding and team status and HP Bulletin #184 for the purpose of determining a 2019-20 season ranking.

As announced on March 12, 2020 the Canada Cup Final and Canada Cup Junior Final were both cancelled due to COVID-19. Shortly thereafter Speed Skating Canada announced that a modified Canadian Championships would be held in September that would serve to qualify the 2020-21 National and Developments (sic) teams and also to select athletes for the Racing Pool. Carding support for all athletes carded in 2019-20 and continuing in the sport was extended until the end of October 2020 to allow for this selection event to take place.

Unfortunately, this competition was subsequently delayed until the end of October, and finally as of September 22, removed from the calendar altogether. Due to this change of events, SSC has put in place the following order to close the issue of team status and ranking from last season to be able to start anew in 2021.

#### Acknowledgements

SSC acknowledges that no system put in place after the fact will be considered without flaw by those who are impacted by the result.

Given the manner in which competitions are planned during a typical season, no competition already contested can serve as a perfect substitute for a cancelled ranking event. There may be athletes who were not present due to participation in other events and/or pre-selection to the ranking event itself, and the emphasis in training and preparation is not the same for any other competition. SSC is mindful of these things and wherever possible has attempted to favour elements that resemble the spirit and objective of the original criteria.

That being said, at this point in the Olympic quadrennial, it is imperative that SSC conclude the rankings and selections from the previous season in order to support the preparation of athletes who show the most promise to be part of the team in Beijing 2022.

## Objectives, Priorities and Adjustments

The objective of the high performance program, and in particular, of selecting athletes to receive carding support, is to provide assistance to athletes in the preparation of world-class performance at the highest levels. Speed Skating Canada receives a set allocation of funding for support each year and is tasked to establish criteria to determine which athletes show the most merit for this funding.

In evaluating the procedure to be taken for adjusting the 2020-21 criteria, one of the chief priorities was to ensure that no athlete who was unable to requalify for carding support due to changes to the competition calendar was disadvantaged by the new criteria. Secondly, to the extent possible within the rules and regulations of Sport Canada allocations, SSC's goal was to establish criteria that would allow for the fairest distribution of new cards to athletes who demonstrated through their performance during the season that they were the most promising choices. In reviewing these priorities, SSC determined that the usual order of procedures for determining the recipients of carding would need to be modified.

Normally short track carding is determined by team status which is in turn decided by the season ranking, be it either the senior, junior or NextGen ranking.

Since the ranking competitions for both junior and senior levels were both cancelled in March of 2020, SSC was unable to make any selections, outside of those who were selected to the World championships team, on this basis. Therefore with the first priority being to ensure that no athletes lose funding due to the exceptional situation, SSC has chosen to operate in near reverse order this season for all athletes who were not named to the World Championships team.<sup>1</sup>

It is clear that this was a whole new paradigm, made necessary in response to the obvious fact that the previous system could no longer be applied. These were the new and final rules for the season and the upcoming Olympic season.

16. Central to the Claimant's request for a different outcome was her performance at what is known as Canada Cup 2, effectively the last domestic event able to be completed prior to closure of the season in March 2020. The difficulty with her reliance on those performances is that SSC does not consider that event as a sufficiently high-level team selection event because many of the top athletes (whose performances had exceeded those of the Claimant) were not present and were involved in other, and higher level, competitions. In fact, neither Canada Cup 1 nor 2 had ever been used by SSC for team selection purposes. All of the national coaches agreed with that decision, in addition to not wishing to lose athletes who had already qualified on the basis of demonstrated performances at the international level, which included World Junior events, considered by SSC to be of a higher standard than Canada Cup 1 and 2. These conclusions were coherent with the

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<sup>1</sup> The procedure was to: (1) rename athletes to the National Team or Development Team; (2) establish a method to rank those renamed to the teams; (3) determining criteria for new admissions to the teams according to maximum team size; (4) allocate cards to team members; (5) establish the Canadian rankings.

“normal” or pre-COVID evidence-based priorities that focussed on international competition.

17. The SSC decision to carry over the national and development teams from 2019-2020 to the 2020-2021 National Team was based on that principle and was regarded as just and equitable, given the priority assigned to international competition. No drastic changes resulted from that decision, since the same, already internationally qualified, athletes were involved. That left two additional skaters to be added to complete the eight-athlete national team. The Claimant was not ranked high enough to form part of the national or development team. She had not qualified for the Racing Pool, which would have placed her in the top eight athletes and might well have resulted in her selection for the national team, but her performance at the 2019 Canadian Championships did not reach the required level.

## Analysis

18. While I appreciate the tenaciousness with which the Claimant has pursued her appeal, the principal difficulty is that in order to succeed in this proceeding, she must demonstrate, on a balance of probabilities, that SSC has acted unreasonably and to her detriment, in developing and implementing its new COVID-related selection policy. In addition to that, she must show that she, at the expense of an Affected Party, was entitled to have been selected.
19. As mentioned, I have found no evidence of bias or discrimination exercised by SSC to her particular detriment.
20. Nor have I found any significant deviation from the objectives and priorities that existed under the “normal” pre-COVID policies. The SSC focus has remained on maximizing Canadian podium performances at the 2022 Beijing Olympic Winter Games and for that purpose to put the best possible team in the field. I have found, after reviewing all of the documentary and verbal evidence, that SSC demonstrated a genuine interest in doing the best thing and minimizing collateral damage in the process, even though some might be inevitable.
21. I have, of course, paid close attention to the Claimant’s submissions, but have not found them persuasive and many of them, with respect, were somewhat beside the point or were rendered moot as a result of the new selection paradigm that supplanted and replaced the previous High Performance Bulletins. The submissions were not determinative of the central issue of the new selection criteria, namely her own performances and her SSC-determined rankings in relation to other athletes.
22. First, she only focussed on those performances which were discounted by SSC due to the low level of competitions in comparison with international standards, but failed to explain how other relevant performance measures, in which other athletes had fared better,

should have been ignored by SSC. SSC is entitled to and is capable of making such performance-related judgments, which, as noted, were dispassionate in nature.

23. The fact that some of the criteria were changed, after the commencement of the 2019-20 season and after the season had to be cancelled, does not make the changes thereby unreasonable of and by themselves. The world of sport had been profoundly affected by the pandemic and everyone was scrambling to make equitable adjustments in response to radically different conditions than those anticipated when, in the case of SSC, the former selection criteria had been designed.
24. The new criteria were stand-alone criteria and attempted to reflect to the extent possible or feasible, the underlying principles (but not necessarily the specific elements) of the former criteria. The idea was not to ride one horse for the first part of the season and then to switch to a different horse to apply the new criteria for the remainder of the season. The outcome was a new selection process, not a hybrid of the old and the new. It is not for litigants to propose that an arbitrator should mandate an entirely new selection process that runs contrary to that adopted by SSC.
25. The senior-junior distinctions she raised no longer applied under the new selection criteria. The Claimant had also raised the issue of nominations to the Development team, in respect of which she had argued that there was still one spot available for her as a senior athlete. The criteria were, however, quite clear that there was no minimum number of senior athletes who could be named to the Development team – only a maximum. Accordingly, SSC had no obligation to name two senior athletes to the Development team.
26. The matter of byes on which she made submissions was no longer relevant, since SSC had determined that no selections would be made on the basis of byes. Nor had she relied on a bye in support of her selection.
27. With respect to the Shanghai Cup results, there is no evidence that SSC had failed to consider the outcomes of that event when applying the new selection criteria.
28. Finally, on the matter of evaluating World Junior Championships participation as superior to Canada Cup 2 performances, that can be noted in High Performance Bulletin #184, as a long-standing judgment on the part of SSC.
29. Put at its highest, even if the Claimant's submission that it would have been reasonable to have given greater consideration of her Canada Cup 2 performance and Shanghai Cup results, that does not mean that SSC's conclusion is therefore unreasonable. On the spectrum of reasonableness, there can be many possible "reasonable" positions and there is no "either/or" involved. If it cannot be demonstrated that the SSC decision was unreasonable, the Claimant cannot succeed.
30. In the end, the experience, expertise and even-handed conduct of SSC in the difficult circumstances created as a result of the pandemic are such that it acted in a manner which, at least in its view as the organization responsible for speed skating in Canada, will likely

produce the best outcomes in Beijing. I find that SSC has discharged its burden of establishing that its selection criteria were reasonable in the particular unprecedented circumstances and that they were properly applied. I also conclude that the Claimant has not discharged her own burden to overturn that finding.

31. I cannot finish without commenting on the conduct of all who were involved in this proceeding. The parties themselves were well prepared and entirely civil in their conduct throughout the process. The Affected Parties participated with admirable restraint, as did their parents, who limited their interventions to those provided in their documents or submitted separately and did not fall into the trap of trying to hijack the proceedings or to pursue tangents unrelated to the central point at issue. And finally, the SDRCC case managers adroitly managed to keep the many moving parts well coordinated, enabling the proceedings to be concluded in good time and in good order. I extend my thanks to all concerned.

#### FINAL ORDER

The Claimant's appeal is dismissed.

MONTREAL, 6 November 2020



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Richard W. Pound, Q.C., Ad.E.