

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

NO: SDRCC 21-0488

ROBERT THOMPSON
(CLAIMANT)

AND

NORDIQ CANADA
(RESPONDENT)

AND

RÉMI DROLET
(AFFECTED PARTY)

Attendees at the hearing:

For the Claimant: Robert Thompson, Represented by Kate Scallion,
Elliot Saccucci

For the Respondent: Nordiq Canada, Represented by Stéphane Barrette,
Kate Boyd, Adam Klevinas

For the Affected Party: David Wood on behalf of Rémi Drolet

DECISION

OVERVIEW

1. This case concerns a decision by Nordiq Canada not to select Robert Thompson (“the Claimant”) to represent Canada at the 2021 Senior World Ski Championships team.
2. The Claimant filed an appeal before the SDRCC on February 20, 2021. As the selection of the team had to be finalized by February 22, 2021, the issues were dealt with on an urgent basis.
3. I held a preliminary call with the parties in the early afternoon of February 21, 2021 to discuss the arbitration process. The parties agreed on a timeline to file supporting documents, as well as an order for proceeding. At the time of the preliminary call the status of the affected athlete was unknown. However, at the commencement of the hearing at 4:00 p.m. on February 21, 2021, a representative of the athlete was in attendance. There was no dispute about the participation rights of the affected athlete. The hearing proceeded in an orderly manner with the active participation of the affected athlete’s representative, David Wood.
4. There was no dispute that I had jurisdiction in this matter.
5. The parties had jointly requested that I issue a short decision with reasons to follow. At approximately 8:30 p.m. on February 21, 2021, I issued a short decision denying the appeal with reasons to follow.
6. These are the reasons for my decision.

THE EVIDENCE

7. This case arises in the context of the global COVID-19 pandemic. As a result of the pandemic, Nordiq Canada was unable to hold competitions in Canada in 2020. All qualifying events in Canada were cancelled. The Claimant is a competitor in Nordiq Skiing and has competed for Canada at national and international events in previous years. He sought to be selected to represent Canada at the 2021 Senior World Ski Championships.
8. On February 19, 2021, Nordiq Canada announced the selection of its team. The Claimant was not included on this list. It is this decision that is under appeal.

9. The only witness that testified was Kate Boyd, the High Performance Director for Nordiq Canada. The parties also placed a number of documents before me.
10. Ms. Boyd testified to the selection process used by Nordiq Canada. It requires some background detail.
11. Nordiq Canada planned to attend the three different periods of competition in Europe. As a result of the pandemic, the first period of competition to be held in Norway was cancelled. The second period was Tour de Ski. Nordiq Canada sent a team to the third period ("P3") of competition in Sweden and Finland. The team was comprised of 5 women and 6 men who departed Canada in January to travel to the competition. The Claimant was not selected to the team.
12. The consequence of the cancelled domestic events and the restricted international competitions was that the opportunities to be selected to represent Canada at the 2021 Senior World Ski Championships were significantly reduced.
13. The criteria used for the selection of the team to represent Canada at the World Championships is made available to the public in a document referred to as the Competition Trip Criteria. The first page of the document includes a message that due to COVID the selection criteria may change. The disclaimer reads as follows:

DISCLAIMER

Due to the changing and unpredictable events surrounding COVID-19, the terms, selection criteria, and competitions outlined in this document are subject to change at any time.

*Nordiq Canada's top priority is health of athletes and staffs. As such, it will follow best practices and recommendations from government health officials (domestic and international) in determining whether or not to proceed with any competition trip in this document. **Nordiq Canada reserves the right to cancel or amend any competition trip deemed unsafe.***

14. The Competition Trip Criteria stipulates three criterion to be used for the selection of the 2021 Senior World Ski Championships. The first criterion (s. 5.2(a)) identifies athletes who achieved a Top 30 World Cup individual final finish race result in 2020-21. There is no dispute that the claimant did not qualify under this criterion. The second criterion

(s. 5.2(b)) identifies athletes who had a Top 12 U23 Championships individual finish in 2021. There is no dispute that the Claimant did not qualify under this criterion.

15. It is the third criterion (s. 5.2(c)) where the dispute lies. The original version of the Competition Trip Criteria stipulated that the remaining team spots, to a maximum team size of 5, would be selected from the highest ranked World Cup finishes in an individual finish.
16. On December 16, 2020, Nordiq Canada posted the Competition Trip Criteria. After an inquiry by the Claimant, the criteria was amended to include an end date for evaluation, which was February 9, 2021. As will become apparent, the criterion did not identify a date for which competitions would start to be considered for evaluation. Ms. Boyd testified that the missing date was an oversight.
17. Ms. Boyd testified that the team was limited to 6 men and 5 women in order to keep the team safe in the pandemic and reduce non-essential travel. Ms. Boyd said that they wanted to keep their bubble small to mitigate their risks.
18. Ms. Boyd explained that they were always looking at the current season results to select the team. Her uncontradicted evidence was that it was very difficult to compare athletes when using previous years' events and that when evaluating athletes, it was necessary to see them in their current year. Ms. Boyd testified that Nordiq Canada hoped to use the trial races and domestic competitions for evaluations but they were cancelled due to the pandemic.
19. There were two male athletes selected under the first criterion based on their current results, no athletes qualified in the current season under the second criterion, and the team was filled with three additional men under the third criterion, again using the current results from the World Cup competitions up until the last race (e.g. P3 competitions).
20. Ms. Boyd testified that since the claimant had not qualified to attend the P3 competitions, he could not participate in the World Cup events and thus was unable to meet the selection criteria.
21. The issue raised in this case is the absence of a date in s. 5.2(c) of the Competition Trip Criteria. Ms. Boyd testified that the absence of a date was an omission on the part of Nordiq Canada. It was her understanding and intention that only the race achievements in the current year would be considered. Ms. Boyd explained that the changes to the competitions and restrictions resulting from the pandemic

resulted in multiple revisions to the criteria. However, it was always her intention, and that of Nordiq Canada, to use the current year of competitions as the criteria for selection.

22. Although not officially announced, the team selection was communicated to the High Performance Committee in an email dated February 13, 2021. A copy of this email was filed with the SDRCC. In response to this communication, there was an email discussion among the Committee members about the criteria in s. 5.2(c). Specifically, one committee member of the High Performance Committee recognized that there was an end date on the period of evaluation but not a start date. It was pointed out that s. 1.6(c) of the Competition Trip Criteria permitted Nordiq Canada to "...amend this document prior to the selection date under the following circumstances... to correct, clarify or amend any inconsistencies, errors or omissions in the criteria". Ms. Boyd testified that as a result of this discussion, it was determined that the criteria needed to be clarified to reflect Nordiq Canada's intention to only use the current season for evaluation.
23. Ms. Boyd testified that since the issue was raised on a Saturday of a long weekend in Alberta, there was some delay in clarifying the criteria. The delay was also partly caused by further discussion about a junior member and also the time needed to prepare a press release. The amendment to s. 5.2(c) was announced on February 17, 2021 and reads as follows:

5.2 Selection Criteria

- c. Remaining team spots, to the maximum team size of 5, will be selected from the highest ranked World Cup ⁴finishes in an individual finish up to February 9th, 2021.

FOOTNOTE 4: To add clarification, the World Cup finishes referred to in point 5.2.c. are from the 2020-21 season. The intention of this selection criteria is to provide priority ranking for athletes with WC finishes from the 2020-21 season.

24. Ms. Boyd testified that the clarification was made to be transparent about the selection criteria, so that athletes understood why the selections were made. There was never an intention to utilize a criteria other than the current season.

25. Ms. Boyd was asked about the impact on the evaluation process if s. 5.2(c) was applied without any parameters. She testified that there would be many more athletes that would need to be evaluated if prior years were considered. This was a point also made by Mr. Wood on behalf of the affected athlete. Ms. Boyd explained that it was too difficult to evaluate the competitiveness of athletes when looking back 12 to 16 months.
26. Ms. Boyd explained that since the Claimant was unable to participate in the World Cup events in the current season, he could not qualify for the team to represent Canada at the 2021 Senior World Ski Championships. She explained that Nordiq Canada did not use any race readiness assessments or other subjective factors in selecting the team. Rather, it was based on solely on objective criteria, that being the ranking lists from the current year competitions.

POSITIONS OF THE PARTIES

27. The parties presented strong arguments with reference to several SDRCC decisions. I have only referred to the decisions necessary to explain the reasons for my decision.
28. The Claimant makes two arguments in support of being placed on the team to represent Canada at the 2021 Senior World Ski Championships. First, he argues that the criteria for selection was not properly established and thus cannot be used to exclude him from the team. He asserts that the criteria was changed after the team selections were made and thus cannot be a valid amendment to the criteria that could be used for the team selection. Since there was no qualifying start date, the Claimant's results from the 2019-20 season should have been used for evaluation, which would have secured him a spot on the team.
29. Second, the Claimant argues that the amended criteria leads to an inference that the selection decision was affected by a reasonable apprehension of bias. It points to the amendment to the criteria as retroactively narrowing the pool of potential athletes to the six individuals who were selected to the World Cups in December 2020 and thus excluding the applicant. The consequence, according to the submissions of the Claimant, is that the Claimant could not demonstrate his race readiness nor could he overcome the favouritism shown towards the athletes competing at the World Cups.

30. Nordiq Canada denies making a change to the criteria to exclude the Claimant. Rather, it asserts that it clarified the criteria to reflect its original intention (published in December 2020) that only competitions in the 2020/2021 competitive season would be used to select the team to represent Canada at the 2021 Senior World Ski Championships. It argues that it never intended to consider competitions from the 2019/2020 season or earlier since that would not allow for an accurate assessment of the athletes.
31. Nordiq Canada further argues that the clarification was made after the team had been selected as evidenced in the February 13, 2021 email to the High Performance Committee. It relies on the evidence of Ms. Boyd to argue that the absence of a qualifying start date in s. 5(2)(c) was an oversight caused by the constant readjustments to its operations arising from the pandemic. On this basis, Nordiq Canada denies any allegation of bias towards the Claimant.

ANALYSIS

32. The analysis must start with recognizing that the onus is on Nordiq Canada to demonstrate that the criteria were appropriately established and that the selection decision was made in accordance with such criteria. If Nordiq Canada is able to satisfy its burden, the onus shifts to the Claimant to demonstrate that the Claimant should have been selected to the team representing Canada at the 2021 Senior World Ski Championships. Section 6.10 of the Canadian Sport Dispute Resolution Code ("the Code") reads as follows:

If an athlete is a Claimant in a team selection or carding dispute, the onus will be on the Respondent to demonstrate that the criteria were appropriately established and that the disputed decision was made in accordance with such criteria. Once that has been established, the onus shall be on the Claimant to demonstrate that the Claimant should have been selected or nominated to carding in accordance with the approved criteria. Each onus shall be determined on a balance of probabilities.

33. This case arises in an unfortunate set of circumstances. I have considerable sympathy for the Claimant's position. His record demonstrates that he is a high level competitive athlete determined to compete on the world stage. The impact of the global pandemic has stymied his opportunity to pursue his dreams. I believe he brings this appeal in a good faith effort to be selected to represent Canada at the

2021 Senior World Ski Championships. On its face, it looks like the Claimant was excluded because of the changes that were made to the criteria. However, after hearing the evidence and reviewing the documentation filed with the SDRCC, I am convinced that the changes made to s. 5.2(c) had no impact on Nordiq Canada's selection of the team. My reasons are as follows.

34. I must decide this case based on the evidence before me. I found Ms. Boyd's evidence to be credible. She candidly acknowledged the shortcomings of Nordiq Canada in drafting the criteria and offered an explanation, supported by documentation, of the team selection process.
35. I accept Ms. Boyd's evidence that Nordiq Canada had always intended to use the current season to evaluate the athletes for the selection of the team to represent Canada at the 2021 Senior World Ski Championships. Her explanation that the best way to objectively measure the competitiveness of the athletes is to consider their race results in the current season was not rebutted. I am unable to conclude that the criteria changed or that it was enacted after the selection period had ended. Rather, it was, as argued by Nordiq Canada, clarified so that it was clear that the current season of competitions was used.
36. The evidence also reveals that the selection of the team had been made before the criteria was clarified with the qualifying start date. I was provided with an email sent by Ms. Boyd to the High Performance Committee on February 13, 2021 announcing the team selection. The email explains the basis for the selection of the athletes with reference to s. 5 of the Competition Trip Criteria. Following an email discussion, the decision was made to clarify that it was the current season used for the evaluation and selection of the team. Thus, this is not a case of Nordiq Canada changing the criteria to fit its decision.
37. The crux of the Claimant's argument is that s. 5(2)(c) does not contain a qualifying start and therefore Nordiq Canada was precluded from restricting its evaluation to the current season. In other words, it argues that the absence of a qualifying start date meant that Nordiq Canada had to consider the race results of the previous season. The problem with this analysis is that it would mean that Nordiq Canada would need to consider race results beyond just the previous season. It would have to look back at race results in prior seasons, perhaps going back years. Moreover, such an interpretation would expand the list of eligible athletes and make it impossible to conduct an objective analysis and comparison.

38. I am also not persuaded that the Claimant's interpretation of s. 5.2(c) is the only interpretation available. The absence of a qualifying start date does not necessarily mean that Nordiq Canada was required to consider the previous year results as argued by the Claimant. A plain and ordinary reading of s. 5.2(c), in particular the language "will be selected from the highest ranked World Cup finishes", could be interpreted as the current season of World Cup events. This is particularly persuasive when considering the evidence about the effectiveness of utilizing current season results for team selection and Nordiq Canada's past practice of doing so. The inclusion of the dates in s. 5.2(a) and (b) are necessary because those provisions use broader descriptions of the events without reference to World Cup finishes. Section 5.2(a) references "individual final finish race result" and s. 5.2(b) references "Top 12 U23 Championships individual finish". It simply may be the case that these descriptions, on their face, require a more precise temporal period.
39. The interpretation put forward by the Claimant also ignores the clear wording of the disclaimer of the Competition Trip Criteria and s. 1.6 of the Criteria that specifically contemplates the need to make clarifications. This was a point raised in the email discussion among the High Performance Committee members when the suggestion was made to clarify s. 5.2(c).
40. There are obvious concerns with the timing of Nordiq Canada's decision to clarify the criteria. It creates the appearance of shifting the evaluation criteria to fit its decision. I agree with Arbitrator Décary's statement in *Beaulieu v. Canadian Snowboard Federation* SDRCC 13-0214 that athletes should be able to rely on the selection criteria that has been set out in the sport organization's policies. This was a point emphasized by the Claimant and supported in other awards referred to me (See for example *Lehmann v. Table Tennis Canada* SDRCC 18-0355 (Brunet); and *Li v. Badminton Alberta* SDRCC 11-0140 (Drymer)).
41. Without the credible explanation put forward by Ms. Boyd, the timing of the clarification to the criteria might reasonably raise questions of fairness. As Ms. Boyd candidly acknowledged in her evidence, Nordiq Canada made an unfortunate oversight when it amended the criteria in January 2021 and omitted a qualifying start date.
42. The decision in *Beaulieu v. Canadian Snowboard Federation* SDRCC 13-0214 (Décary) is a helpful example of where an arbitrator considered the unique circumstances when a sport organization failed to post the criteria for selection. The Canadian Snowboard Federation did not update its Selection Protocol to take into account a newly announced

event. When the Appellant was not selected, he alleged that the Federation had unfairly changed the rules without notifying the athletes. The internal appeal was granted on the basis that the Federation changed the rules after the event. Arbitrator Décary saw it differently. He rejected the argument that the Protocol was to be read strictly without regard to what was intended by the Federation. Instead, he found that the Selection Committee had made the “most reasonable and logical [decision] in the circumstances”. The arbitrator further recognized the unique circumstances of the case as he explained at paragraph 27:

[27] I do not want this decision to be seen as a diversion from previous decisions of this Tribunal which have rightly insisted on the need to have selection criteria clearly set out in official policies on which athletes can safely rely. The uniqueness of this case comes from the fact that no selection criteria had been, or could have been, set out for the Carezza PSL event. The Federation, notwithstanding that it was perhaps busier in this pre-Olympic year, could and should have updated its Selection Protocol. But the lack of an updating, as desirable as it might have been, should not be seen in the circumstances of this case as improper or unfair. It was, in my view, implicit in the Protocol that selection criteria for any new event would be based on the same grounds as those set out with respect to scheduled events.

43. I have already found that the criteria was not changed in order to support the team selection. Rather, Nordiq Canada clarified the temporal period for competitions that would be considered for evaluation. It was facing unique circumstances in updating the criteria when competitions were being derailed by the pandemic. Its explanation, supported both in the testimony of Ms. Boyd and in the documentation, is reasonable in the circumstances and resolves any issue of unfairness. Although the inclusion of the qualifying start date would have been desirable, the clarification should not be seen as either unfair or improper.
44. Thus, I am satisfied that Nordiq Canada had established the criteria and applied that criteria fairly. It had always intended, and this appears to be a fairly obvious intention, to consider current season results in the selection process in a manner consistent with its past practice. It has satisfied its onus stipulated in s. 6.10 of the Code. There was no evidence, and no assertion, that if the criteria was properly established that the Claimant could displace the 5th selected athlete on the team based on current season results.

45. Given my factual findings, in particular that Nordiq Canada always intended to use the current season for evaluation, I reject the assertion that there was a reasonable apprehension of bias. Bias is defined in the Dispute Resolution and Appeal Policy as "...a lack of neutrality to such an extent that the decision-maker appears not to have considered other views".
46. The evidence was that Nordiq Canada had to make difficult decisions caused by the global COVID-19 pandemic as the ability to hold domestic competitions and participate in international competitions was significantly curtailed. It was not a circumstance where Nordiq Canada could reschedule competitions to create a broader base for evaluation. Ms. Boyd testified that Nordiq Canada lost all qualification races because of the pandemic. She consulted with the High Performance Committee to determine the best and fairest way to select athletes. This called for difficult decisions while still making an effort to select a competitive team. This is not a case of bias nor an example of not being able to consider other views.
47. To be clear, I am not deferring to Ms. Boyd's opinion about the validity of the criteria that was applied. Nor am I deferring to her view that the best way to evaluate athletes is to use the current season of competitions. Rather, I am guided by the evidence put before me. Ms. Boyd's evidence that the preferred basis for evaluation is the current season of competitions and that this has been the practice of Nordiq Canada was not challenged. There was no evidence to the contrary.
48. As described by Arbitrator Mew in *Laberge v. Bobsleigh Canada Skeleton* SDRCC 13-0211, context is important. An analysis of bias is contextual in nature and requires a realistic analysis of the circumstances. The evidence before me is that Ms. Boyd's recommendation for team selection was based on the application of objective criteria (e.g. World Cup finishes in the current season) and that current season results is the best way to measure the athlete's success. This cannot reasonably be considered as bias.
49. There was also no evidence of bias against the Claimant. While I appreciate that the Claimant feels a sense of unfairness with the decision, there is simply no evidence that he was precluded from selection in an unfair way. He was unsuccessful in being named to the P3 competitions and that precluded his opportunity to be selected to represent Canada at the 2021 Senior World Ski Championships. It was an unfortunate result of the significant restrictions in domestic and international competition caused by the global pandemic.

50. For the foregoing reasons, I conclude that Nordiq Canada appropriately established the criteria set out in Competition the Trip Criteria and applied that criteria in a fair manner. Therefore, the appeal is denied.
51. The matter of costs was not discussed during the hearing. My inclination would be not to award costs, but if a party seeks costs, I am prepared to maintain jurisdiction should any party file submissions on costs no later than seven days from issuance of these reasons.
52. I express my gratitude to the representatives in this matter who presented their arguments in an efficient and professional manner.

Signed in Whitby this 8th day of March, 2021.



Matthew R. Wilson
Arbitrator