

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

N° : SDRCC 21-0492

Between:

Jon McKay
(Claimant)

and

Swimming Natation Canada
(Respondent)

and

Eric Hedlin
(Affected Party)

Attendees at the Hearing:

For the Claimant:

Amanda Fowler
Jordan Goldblatt
Margaret MacKinnon
Jon McKay

For the Respondent:

Benoit Girardin
Ahmed El-Awadi
John Atkinson
Mark Perry

For the Affected Party:

Eric Hedlin

Arbitrator:

James C. Oakley, Q.C.

REASONS FOR DECISION

Background

1 The Claimant, Jon McKay, disputes the decision by Swimming Natation Canada (“SNC”), the Respondent, not to select him for the FINA Olympic (Marathon Swim Qualifier) event for the Tokyo Olympics, and to select Eric Hedlin, the Affected Party. The selection process was affected by the COVID-19 pandemic. Selection events were cancelled. As a result, SNC made the selection based on a different process. The Claimant objects to the process and the result.

2 The Claimant filed a request, dated March 24, 2021, to the SDRCC to resolve a sports-related dispute. The Claimant disputes the decision by SNC dated March 2, 2021 not to select him to compete at the Marathon Swim Qualifier, the final qualifying event in order to compete in the Tokyo Olympics 10k Marathon Open Water swimming event. The Claimant requested that the SNC decision be overturned and that he be selected in the place of Eric Hedlin, the Affected Party. In the alternative, the Claimant requested an opportunity to compete against the Affected Party in a 10k pool trial. In the subsequent written submission of the Claimant to the SDRCC, dated April 12, 2021, the Claimant requested an order that SNC name him as the second male athlete to compete in the 2021 Marathon Swim Qualifier, or in the alternative, that the Claimant was amenable to further direction from the Tribunal.

3 The Claimant filed an internal Notice of Appeal with SNC dated March 15, 2021. The Notice of Appeal requested that the parties waive the requirement to exhaust the SNC internal appeal process, and that the parties agree that the Claimant could apply directly to the SDRCC to resolve the dispute. The parties agreed to proceed directly to the SDRCC.

4 The Respondent filed an Answer dated March 29, 2021. The Respondent stated that, given the exceptional circumstances of the cancellation of selection events, SNC acted diligently and reasonably to exercise its discretion in selecting Eric Hedlin, the Affected Party. The Respondent requested that its decision be upheld.

5 The Affected Party, Eric Hedlin, filed an Intervention with the SDRCC on April 5, 2021, stating that he supported the position of SNC.

6 There was no issue of the jurisdiction of the SDRCC to deal with the dispute.

7 The parties agreed to proceed by way of Arbitration under the 2021 *Canadian Sport Dispute Resolution Code*. The Arbitration hearing was scheduled for April 13, 2021. The parties requested a Short Decision on or before April 15, 2021, due to the deadline for SNC to submit the names of the athletes selected to compete in the Marathon Swim Qualifier. The parties attended a Resolution Facilitation prior to the scheduled arbitration hearing, but the dispute was not resolved at that time. The Claimant and the Respondent filed written submissions, documents and case authorities. The arbitration hearing was held by teleconference. The Claimant and Respondent attended represented by counsel. The Affected Party attended part of the arbitration hearing, advised that he was unable to attend for the remainder of the hearing and agreed that the hearing could continue in his absence. At the hearing, the Respondent called two witnesses, John Atkinson, High Performance Director and Mark Perry, National Distance/Open Water Coach. The Claimant and the Respondent made submissions to the Arbitrator at the hearing.

8 The Short Decision was issued on April 15, 2021, with reasons to follow. These are the Reasons for Decision.

Facts

9 The selection decision concerns the second of two places for male Open Water swimmers for the 10k Marathon Swimming event. There was no issue with respect to the selection of the first male swimmer. The issue concerns selection of the second male swimmer to represent Canada at the FINA Olympic Marathon Swim Qualifier, originally scheduled for May 2021 in Japan, and then rescheduled for June 2021 in Portugal. The purpose of competing in the qualifier event is to qualify for the Tokyo Summer Olympics.

10 The Nomination Criteria for selection is set out in the SNC document “Swimmer and Coach Internal Nomination Criteria Tokyo 2020 Olympic Games - Marathon Swimming”, dated July 6, 2020 (the “Nomination Criteria”). The Nomination Criteria states, for Open Water swimmers, under “Priority 2: Individual Nomination”, as follows:

- B: The highest placed eligible Male and highest place eligible Female Swimmer(s) from the 2021 Canadian Open Water Swimming Championships, who were not selected from A (18th FINA World Championships 2019), shall qualify to compete at the FINA Olympic Marathon Swim Qualifier 2021 event.

11 The 2021 Canadian Open Water Swimming Trials were scheduled to be held in the Cayman Islands in April 2021. As a result of the pandemic and health and safety considerations, the Cayman Islands event was cancelled. The Nomination Criteria also refers to unexpected circumstances as follows:

IX. Amendments and Unforeseen Circumstances

Unexpected Circumstances

1. Should the Swimming Canada Selection Committee determine that unexpected or unusual circumstances have arisen during the process of applying these Criteria, the Selection Committee shall have the full and absolute discretion to resolve the matter as it sees fit, taking into account factors and circumstances that it deems relevant.
2. Any such exercise of discretion shall be subject to the Canadian administrative law principles of fairness.

12 The Swimming Natation Canada Selection Committee (the “Selection Committee”) decided on December 7, 2020 to cancel the event in the Cayman Islands and initially proposed the selection for the Marathon Swim Qualifier at the Canadian pool trials, to be held in April 2021. The Selection Committee decided at its meeting on January 20, 2021, to postpone the pool

trials to May 2021. The Selection Committee also decided not to have pool trials for Open Water due to the deadline to submit names for the Marathon Swim Qualifier. On January 20, 2021, the Selection Committee also decided to invoke the Unexpected Circumstances clause of the Nomination Criteria. The minutes of the January 20, 2021 meeting stated, in part, as follows:

- 3 Review of 2021 Tokyo2020 [sic] Olympic Games Nomination Criteria
[...]
- ii 2020 Tokyo Olympic Games - Open Water

John [Atkinson] provided background on the Tokyo 2020 Olympic Games Marathon Swimming Nomination process. No Canadian Swimmer qualified to be nominated in the qualification system Phase 1.

The highest placed eligible Male (Hau-Li Fan) and highest placed eligible Female (Kate Sanderson) in the 10k event at 18th FINA World Championships 2019, by achieving this position they were selected to complete [sic] for Swimming Canada at Phase 2: the FINA Olympic Marathon Swim Qualifier, Fukuoka, May 29-30, 2021.

FINA has not confirmed that this 2021 Olympic Marathon Swim Qualifier is going to proceed as planned, or circulated or posted any information for this event.

As per the nomination criteria, the second male swimmer and second female swimmer to compete at Phase 2 were to have been selected at the 2021 Canadian Open Water Swimming Trials, which has [sic] been cancelled.

As the Selection Committee has invoked section XI AMENDMENTS AND UNFORESEEN CIRCUMSTANCES, John discussed the various options he and the coaching staff have looked at to select these second swimmers. Each option was evaluated with the health and safety of swimmers and athletes in mind, as well as the reliability of the option, and impact of any international travel restrictions or quarantine rules. John explained the time constraints by when a nomination decision must be made in order to comply with the expected entry and logistics timelines from FINA, for the FINA Olympic Marathon Swim Qualifier 2021 event. Discussion ensued around the possibility of international travel to FINA World Series event in March, the subsequent quarantines upon return or in the case of an illness within the travel group, and the impossibility of hosting a safe open water competition in Canada prior to May 2021. The Committee discussed the various options in terms of safety and reliability.

John and Mark Perry reviewed the previously circulated notes Key Open Water Swimmers addressing historic performances, current commitment, and training situations.

The Committee asked questions specific to key swimmers, and travel options, and provided feedback to John.

Chris tabled the discussion for the next Selection Committee meeting as the time allocated for this meeting drew to a close.

13 John Atkinson testified that he presented the “Key Open Water Swimmer Performances” document to the Selection Committee at the January 20, 2021 meeting. The document set out information on historic performances, current commitments and training situations. He confirmed that information on the criteria listed in the document was presented at that meeting. The document was not submitted in these arbitration proceedings. Mr. Atkinson said the Committee ran out of time to discuss the selection decision on January 20th and the discussion was deferred to the next meeting.

14 Mr. Atkinson testified that the communication to athletes, following the January 20, 2021 Selection Committee meeting, was that there would be a temporary pause in the pool trials. A videoconference meeting was held with athletes and coaches on January 22, 2021, to advise that pool trials were postponed to May and that there would be further detail provided regarding Open Water selection.

15 At the meeting on January 22, 2021, the Selection Committee discussed the Open Water selection and requested additional information from Mr. Atkinson and Mr. Perry. The minutes of the meeting state, in part, as follows:

4 2020 Tokyo Olympic Games - Open Water

The Selection Committee returned to the conversation tabled at the meeting on Wednesday [sic] January 20, 2021.

John reviewed the unpredictable reliability and safety concerns of the options to select the second swimmers to compete at the FINA Olympic Marathon Swim Qualifier, Fukuoka, May 29-30, 2021.

The Selection Committee discussed their role under section XI AMENDMENTS AND UNFORESEEN CIRCUMSTANCES, and each member took time to express their understanding, and which information they would require in order to fulfill this role.

It was requested John and Mark Perry provide additional detailed assessment and analysis to the Key Open Water Swimmers document. It was determined that the analysis would focus on the top two eligible male and top two eligible female athletes. A selection recommendation and rationale would be provided to the Committee. The Selection Committee will use this additional detail to make an informed decision.

Mark and John answered Committee Member's questions throughout the discussion.

Mark will build out the document. It will be circulated on Monday [sic] January 25, 2021, in advance of the next Selection Committee meeting.

16 Mr. Perry and Mr. Atkinson prepared two documents for the next Selection Committee meeting held on January 27, 2021. The document headed "Selecting the Second Swimmers to Represent Canada at the FINA Olympic Marathon Swim Qualifier 2021 (May 29-30, 2021, Fukuoka, Japan)", hereinafter the "Selecting the Second Swimmers" document, included the following statement on page 1:

The following information on the four open water swimmers with the most experience and those that represented Canada in the most recent World Championships has been compiled for discussion, together with the attached graphs and data that have been produced with the assistance of the Canadian Tire analytics team, who have worked extensively with Swimming Canada and Own the Podium in developing athlete identification models in all sports and with swimming both in the pool and now in Open Water.. [sic]

Experience in open water is a factor to be considered and looking at this document to see which athletes have extensive, relevant and more likely repeatable experience.

OW experience is one factor, and along with OW experience 1500m pool speed has been identified as a key metric for assessing the potential of open water swimmers and this is clearly demonstrated by the attached graphs.

17 The "Selecting the Second Swimmers" document included a chart with information for Mr. McKay and Mr. Hedlin under the headings Open Water Podium History, International Open Water Experience, International Pool Experience, 1500 Best Time, Current Training and Other. The document omitted some of the results for Mr. McKay, for reasons that were explained by Mr. Atkinson and Mr. Perry in their testimony. They prepared a second document for the Selection Committee, headed "Open Water Athlete Pool Progression Age Curves". This document contained performance analytics, and included two graphs for Mr. Hedlin and Mr. McKay showing 1500m time in relation to open water results in the categories of medalist, top 10 and participants. The first page of the document stated as follows:

During the spring of 2020, the Canadian Tire Analytics team did some work on tracking open water athlete's [sic] pool performance progressions.

The analysis targeted as all athletes between 2008 and 2019 that had represented their country in the men's and women's 10km event at the Olympics or World Championships, and finished the race within 3 minutes of the gold medalist. This ensured that the group being studied were [sic] very likely the best open water swimmers in the world.

Only the fastest 1500m result for each year per athlete was recorded. All of the results were then plotted by age and a clear progression was observed. The athletes were then broken into three distinct groups. Those athletes that had medaled at any World Championships or Olympics in the 10km event, those that had finished within the top 10 at some point in their careers, and then everyone else that had participated in these events while still finishing within three minutes of the leader. The median performance by age and athlete group were then fit to three constrained quadratic functions, following the work of Allen et al. (Career performance trajectories of Olympic swimmers: Benchmarks for talent development, European Journal of Sport Science, 2014).

Importantly, the medalists group had the fastest median results in the 1500m, followed by those capable of finishing in the top 10, and lastly followed by the remaining participants group. This suggests that there is a strong correlation between an athlete's strength in the 1500m, and their abilities to be competitive in open water.

18 The Selection Committee met on January 27, 2021. The minutes of the meeting state, in part, as follows:

4 Tokyo 2020 Marathon Swimming Nomination criteria - FINA Final OW Qualifier

Prior to the meeting, the following documents were provided to the Committee members:

- i. Key OW Swimmer achievements, 26 JAN
- ii. OW Athlete Pool Progression Age Curves

John began by thanking the members of the Committee for the amount of time they have dedicated to the ongoing updates and revisions of the Selection Criteria during this unusual year; 2020. Each individual's contribution and commitment has been noted and greatly appreciated.

Through the IOC/FINA Olympic Qualification System Phase 1, two swimmers have been selected to attend the FINA Olympic Marathon Swim Qualifier, Fukuoka, May 29-30, 2021. They are Hau-Li Fan and Kate Sanderson.

John recapped the options considered to select the second eligible swimmers to compete. Based off of the level of reliability and safety of each option, and under the Nomination Criteria Section XI: AMENDMENTS AND UNFORESEEN CIRCUMSTANCES the selection of one male swimmer and one female swimmer to go to the FINA Olympic Marathon Swim Qualifier, Fukuoka, May 29-30, 2021 is under the full and absolute

discretion of the Selection Committee.

John touched briefly on keeping in line with the level of high performance as defined in the current Strategic Plan, and the direction from funding partners; OTP and Sport Canada of selecting athletes with the highest chance of success on the international stage. To assist in the selection decision, the selection committee was provided two objective documents. John outlined these documents. The *Key OW Swimmer achievements, 26 Jan* content objectively outlines each swimmer's open water podium history, their international open water and pool experience, their best 1500 freestyle time and their current training. The *OW Athlete Pool Progression Age Curves* Podium Pathways was created through a partnership with the Canadian Tire Analytics team and presents a factual based, analytical review which concludes that there is a strong correlation between an athlete's strength in the 1500m, and their abilities to be competitive in open water.

Mark spoke to the *Key OW Swimmer achievements, 26 Jan* document, reviewing each swimmer. He described the key determining factors of world class open water swimmers, open water race experience and swim speed.

Mark and John answered questions from the Selection Committee regarding specific swimmers international open water competition experience, speed, training situations, level of competitive readiness and the time left to prepare for the final Olympic qualifier.

Iain presented the *OW Athlete Pool Progression Age Curves* document. He further described the process with which the Canadian Tire Analytics team objectively created the document, the data used, the conclusions drawn, as well as how the discussed swimmers perform compared with this data.

John described the process with which Swimming Canada is seeking more information from FINA and the IOC regarding the FINA Olympic Marathon Swim Qualifier, Fukuoka, May 29-30, 2021. As such, the announcement of athlete selection will be held until the end of February 2021 at the latest, while Swimming Canada exhausts all opportunities to received [sic] the necessary information from FINA regarding the Final Qualifier.

In principal the Selection Committee is prepared to exercise their discretion because of the unforeseen circumstances brought on by the COVID-19 Pandemic to select Eric Hedlin and Stephanie Horner for the FINA Olympic Marathon Swim Qualifier, Fukuoka, May 29-30, 2021, as part of the nomination process for the Tokyo 2020 Olympic Games, provided no significant changes are announced by FINA with regards to the Qualifier and will be subject to a resolution to be agreed upon by the Committee.

See Enclosed: Certified Resolutions of Selection Committee

19 The Resolution of the Selection Committee dated January 27, 2021 is attached to the minutes, and states, in part, as follows:

NOW THEREFORE, The Committee has unanimously **RESOLVED THAT**:

1. The Committee reiterates that it has determined that unexpected or unusual circumstances have arisen, resulting from the worldwide Covid-19 [sic] Pandemic, which circumstances effect [sic] the process of applying the Criteria.
2. The Committee has agreed to, and hereby does, exercise its discretion in resolving matters created by the unexpected or unusual circumstances by directing that Paragraph "B" under Priority 2 of the Criteria is no longer of any force or effect, and that, in its place, the following Swimmers be selected to represent Canada at the FINA Olympic Marathon Swim Qualifier 2021 (May 29-30, 2021, Fukuoka, Japan):

Eric Hedlin (m); and
Stephanie Horner (f).

3. The selection of the Swimmers as aforesaid for the FINA Olympic Marathon Swim Qualifier 2021 is subject entirely to any changes made by FINA to its Marathon Swimming "Qualification System - Games of the XXXII Olympiad -Tokyo 2020" and such selection shall be held in abeyance and not be announced by SNC until after March 1st, 2021.
4. Furthermore, the selection of the Swimmers as aforesaid shall be entirely conditional upon the FINA Olympic Marathon Swim Qualifier 2021 proceeding as scheduled in 2021. In the event that the FINA Olympic Marathon Swim Qualifier 2021 does not proceed in 2021 as scheduled, then the selections as aforesaid in paragraph 2 shall be considered null and void.
5. The selection of the Swimmers in paragraph 2 above shall be in addition to the prior selections (to the FINA Olympic Marathon Swim Qualifier 2021) already made pursuant to Paragraph "A" of "Priority 2 of the Criteria", namely Hau Li Fan and Kate Sanderson.

SNC's Evidence

20 Mr. Atkinson testified that he and Mr. Perry presented information to the Selection Committee at its meeting on January 27, 2021. He said there was no option to run a swim competition for the selection prior to the deadline date to submit names, having regard to health and safety considerations. At the time of the January 27th meeting, it was not confirmed that the final Olympic qualifying event would proceed.

21 With respect to the information he submitted to the Selection Committee, Mr. Atkinson testified that Mr. Hedlin was the best choice having regard to performance in international

competition as part of the Canadian team, his 1500m time and analytics showing the relation of 1500m time to success in Open Water swimming. Mr. Atkinson did not agree that head-to-head competition between Mr. McKay and Mr. Hedlin was relevant, when the competition was not held at an international event where the athletes were representing Canada. He testified that the results in head-to-head competitions should be discounted for events where the athlete had entered the event for experience, and had not trained for peak performance. He said the focus of his report was on international competition and not domestic competition. He testified that international events such as the Australian, the LEN, FINA World Series and United States events were at a lower level of importance because the athletes were not competing as part of a team representing their country. Mr. Atkinson did not give complete information about performance history in lower level international events or domestic events to the Committee.

22 Mr. Atkinson testified that the most relevant criteria were the international events where the athlete represented Canada, in particular, World Championships, Olympics, Pan Pacific and FISU events. Mr. McKay did not have any podium results in such events. Mr. Hedlin had two podium results in such events, Silver in 10k at the 2018 Pan Pacifics and Bronze in 5k at the 2019 World Championships. Mr. Atkinson agreed that the more information that the Committee had the better. He said the rationale to select Mr. Hedlin was discussed at the Committee meeting on January 27th. There was a discussion at the meeting of the relevancy of the information in the chart, including podium results, international experience and 1500m speed. Mr. Atkinson testified that the 1500m pool time was relevant for the finishing speed in the 10k Open Water swim.

23 Mark Perry testified that he has been coaching for 37 years. He has coached Open Water swimming since 2006, when it was announced that Open Water swimming would be an Olympic event. He testified that the metrics demonstrated that 1500m speed is a factor for podium success in Open Water swimming. Mr. Perry agreed that the graphs in the document did not include information from 2019. He agreed that their best times in the 1500m put both Mr. McKay and Mr. Hedlin in the medalist category. Mr. Perry testified that performance history older than the most recent four years was relevant for the metrics, and was used in the software to produce the pool progression age curves.

24 Mr. Perry testified that, when comparing performance history, the most important events were Olympics, World Championships and Pan Pacific events. He said that preparatory meets, such as the Cayman Islands trials, the Australian and LEN events were used to gain experience and were less relevant. Also, the athlete may not have optimum preparation depending on training. He testified that Mr. Hedlin's podium result in the 5k Open Water swim was a benefit to him even though it was a different event than the 10k Open Water swim. Mr. Perry agreed with the decision to select Mr. Hedlin, based on his 1500m time, his world level experience, and his podium finish at World Championships.

25 Mr. Perry testified that not all the performance results of Mr. McKay were given to the Selection Committee, in particular the results of head-to-head competitions with Mr. Hedlin. He said this information might not reflect peak performance depending on the stage of the athlete's training at the time of the event. He had not made any inquiries to determine the stage of training of the athletes for particular events, but he was familiar with both athletes. Mr. Perry said that the Selection Committee did not consider the criteria of training situation and commitment. He said

he was not aware that commitment was a possible criteria and had not presented any information to the Selection Committee about commitment. With respect to training situation, Mr. Perry said that he included training information in the chart that was presented to the Selection Committee, but he was not confident that he could verify the accuracy of the information. Mr. Perry understood that the Selection Committee did not consider training situation as a criteria when making its decision.

26 Mr. Atkinson and Mr. Perry were asked at the arbitration hearing about the performance history listed in paragraph 58 of the Claimant's written submission, which included performance history that was not presented to the Selection Committee. They did not dispute the accuracy of the information. The information listed in paragraph 58 of the Claimant's written submission, stated as follows:

Event	Jon McKay	Eric Hedlin
2020 Australia Age Open Water Championships	10K - 5 th	Did not compete
2019 Canadian Cayman Island Trials	10K - Gold	10K - Bronze
2019 Pan-Am Games	10K - 7 th	Did not compete
2019 World Championships	10K - 24 th	10K - Did not compete 5K - Bronze
2019 LEN Open Water Cup in Brive, France	10K - 13 th	10K - 27 th
2019 Australian Age Open Water Championships	10K - 14 th	10K - 16 th
2018 Pan-Pacific Championships		10K - Silver
2017 FISU Games		Did not compete (withdrew from 10K)
2017 World Championships		5K - 14 th

27 Mr. Atkinson and Mr. Perry testified that the performance history information that they did not present to the Selection Committee was either not relevant or had little relevance.

28 Mr. Perry testified with respect to his email exchanges with Mr. McKay in January, 2021. He felt it would have been unfair to tell Mr. McKay at that time what criteria the Selection Committee might use when making the decision, when the criteria had not been decided.

29 Mr. Atkinson testified that, on March 2, 2021, a Zoom call was held with Open Water swimmers and coaches to advise that the Olympic Marathon Swim Qualifier event would take place and there would be an announcement later that day about the selection decision. The selection decision was announced on March 2, 2021 in a news release from SNC that stated, in part, as follows:

After previously invoking the unexpected circumstances clause of its Olympic team nomination criteria, Swimming Canada has selected two swimmers to represent Canada in the FINA Olympic Marathon Swim qualifier.

Stephanie Horner of Swimming Canada’s High Performance Centre – Vancouver, and Victoria’s Eric Hedlin will join previously selected HPC-Van swimmers Kate Sanderson and Hau-Li Fan at the qualifier scheduled for Fukuoka, Japan, on May 29-30.

Sanderson and Fan had earned their spots as Canada’s top finishers in the 10-km open water marathon swim at the Gwangju 2019 FINA World Championships. Due to the cancellation of the Canadian Open Water Swimming Trials due to the COVID-19 pandemic, and the inability to hold a suitable substitute event, Swimming Canada’s Selection Committee chose Horner and Hedlin based on a variety of factors.

“The selection committee have [sic] had to look at performance history over the four-year Olympic quadrennial to determine the two selections best positioned to be successful alongside Hau-Li and Kate at that final marathon swimming qualifier,” explained High Performance Director and National Coach John Atkinson.” [sic]

Hedlin is a two-time medallist in the 5-km distance at the world championships, and also earned silver in the 10-km at the 2018 Pan Pacific Championships.

[...]

“We acknowledge it’s a very challenging situation with the pandemic. It’s not how we would in normal circumstances select athletes, but given the situation we are in, we had to make selections based on an assessment of the athlete’s international performance history,” Atkinson said.

Party Submissions

SNC’s submissions

30 The Respondent, SNC, submitted that its decision to nominate Eric Hedlin, the Affected Party, and not the Claimant, was reasonable, supported by the evidence and made in accordance with the SNC Nomination Criteria. The Nomination Criteria was published on the SNC website, and provided the method and criteria to nominate Open Water swimmers. In the context of the

pandemic, SNC had to adapt when it made the decision. SNC diligently and fairly applied its selection criteria. The Nomination Criteria initially provided for qualification at the Canadian Open Water Swimming Trials to be held in April, 2021. However, the swimming trials were cancelled due to the pandemic. The Selection Committee considered the option of pool trials in April 2021. However, it was later decided that the option of pool trials was not available.

31 At its meeting on January 20, 2021, the Selection Committee decided there were unexpected or unusual circumstances due to the pandemic. Under Section IX of the Nomination Criteria, the Committee has the full and absolute discretion to resolve the matter as it sees fit, in accordance with the Nomination Criteria. The Selection Committee assessed the situation and properly exercised its discretion when it made the decision on January 27, 2021. The Committee took into account what it deemed relevant. The Committee considered objective criteria when comparing the two athletes. The Committee followed the expert opinion of its technical staff, Mr. Atkinson and Mr. Perry, and considered international events and not other events.

32 The Respondent submitted that the athletes were kept informed at various stages of the process. There was no evidence that the Committee made a biased or unfair decision. The technical staff supported the decision. The Committee made its best efforts under the circumstances. The Claimant has not demonstrated that the Committee acted unreasonably to his detriment. The performance history listed in the Claimant's written submissions was not considered to be relevant by SNC, for the reasons stated in witness testimony.

33 The Respondent submitted that the selection decision fell within the range of reasonable, possible outcomes, and should be upheld whether or not the Arbitrator would make a different decision. The Arbitrator should defer to the decision by the experts. The decision was within the boundaries of the selection criteria. In the absence of trials, the Selection Committee had to exercise its discretion to find an alternative method, and decided to nominate the athlete based on performance history and performance related metrics. The Respondent referred to SDRCC jurisprudence in *Weaver v. Nordiq Canada*, SDRCC 20-0481, *Lepage-Farrell v. Speed Skating Canada*, SDRCC 20-0472, *Prediger v. Bobsleigh Canada Skeleton*, SDRCC 15-0284/5, *O'Neill v. Canoe Kayak Canada*, SDRCC 19-0415 and *Palmer v. Athletics Canada*, SDRCC 08-0080. The Respondent requested that the claim be dismissed.

Claimant's submissions

34 The Claimant submitted that the selection decision was made in an unfair and unreasonable manner. The decision making process and the outcome were unreasonable. The tribunal should not give blind deference to SNC and should exercise its discretion to select the Claimant to represent Canada in the Olympic Marathon Swim Qualifier. The process lacked procedural fairness and transparency. The Selection Committee initially decided to consider training situation, commitment and performance results, however, when it made the decision on January 27, 2021 it disregarded training situation and commitment. There was no disclosure to the Claimant of the complete record before the Selection Committee. The minutes of the January 20, 2021 meeting stated that Mr. Atkinson attended with written information but that information was not presented to the tribunal in this arbitration process. There was a disconnect between what the Claimant was told in emails from technical staff and the discussion by the Selection Committee.

35 The Claimant submitted that the decision was not intelligible, fair or transparent. The Selection Committee did not properly exercise its discretion. The Committee did not have all relevant information. The Claimant's written submission listed a complete record of the competitions in which both the Claimant and the Affected Party competed over the last three years. Since 2019, Mr. McKay won every head-to-head competition with Mr. Hedlin. Mr. Atkinson testified that he would put less weight on a particular event depending on the athlete's training status. However, he made no inquiries to the Claimant about training status. The Committee relied on results in 5k Open Water and 1500m pool events, which were different events from 10k Open Water and were not relevant. The SNC news release stated that the performance results considered were based on the last Olympic quadrennial, but the information submitted to the Committee went back to 2008. Mr. Hedlin's result in 2013 in the 1500m was not relevant. Mr. McKay's results demonstrate that he was more successful and consistent since 2018, when he started Open Water swimming. The decision was based on irrelevant information. If weight was to be given to the Open Water Athlete Pool Progression Age Curves, then the best 1500m times of both Mr. McKay and Mr. Hedlin were in the medalist category, according to the chart.

36 The Claimant submitted that consideration of all information leads to the conclusion that the Claimant should have been selected. It would not be appropriate to remit the decision to the Selection Committee or SNC. The information that should have been before the Selection Committee was now before the Arbitrator. The Arbitrator was in a position to make the decision. The Claimant referred to *Li v. Badminton Alberta*, SDRCC 11-0140, *Dutton v. Speed Skating Canada*, SDRCC 18-0344, *Christ v. Speed Skating Canada*, SDRCC 16-0298, *Blais-Dufour v. Speed Skating Canada*, SDRCC 11-0145, and *Beaulieu v. Speed Skating Canada*, SDRCC 13-0199. The Claimant requested that the Arbitrator substitute the proper decision for the Selection Committee's decision and select the Claimant.

Analysis

Issues

37 I have considered the following: (1) was head-to-head performance history a relevant selection criteria, (2) what selection criteria were established and applied by the Selection Committee, (3) did SNC follow principles of procedural fairness, (4) was the selection decision based on criteria that were appropriately established, (5) was the selection decision based on the approved criteria, (6) was the selection decision within the range of possible acceptable outcomes, and (7) in the event the selection decision is set aside, what is the appropriate remedy?

38 In my discussion of the issues, I will consider the 2021 *Canadian Sport Dispute Resolution Code* (the "Code"). The Code states, in part, as follows:

Article 6 Specific Arbitration Rules for the Ordinary Tribunal

6.10 Onus of Proof in Team Selection and Carding Disputes

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.

6.11 Scope of Panel's Review

- (a) The Panel, once appointed, shall have full power to review the facts and apply the law. In particular, the Panel may substitute its decision for the decision that gave rise to the dispute or may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.

Relevance of head-to-head performance history as a selection criteria

39 In the Short Decision issued on April 15, 2021, I decided to set aside and remit the selection decision to SNC for reconsideration. The reasons to set aside the selection decision stated in the Short Decision included my finding that the SNC Selection Committee did not consider relevant factors, in particular, the performance history factor in head-to-head events in which both the Claimant and Affected Party participated. I find that head-to-head performance history is a relevant criteria based on the evidence presented and the submissions by the parties. The Nomination Criteria initially provided that the selection would be based on the results of the 2021 Canadian Open Water Swimming Trials to be held in the Cayman Islands in April 2021. The Cayman Islands Trials were cancelled as a result of the pandemic. Completion of this event would have resulted in selection based on a head-to-head competition. The Selection Committee considered the option of trials held in the pool. This option would also have resulted in selection based on a head-to-head competition. The pool trials were later determined not to be an available option. The preferred method of selection under the Nomination Criteria, and the option of pool trials, would have resulted in selection based on a head-to-head competition. Therefore, the results in prior head-to-head competitions is a relevant factor, when considering performance history as a selection criteria.

40 The results of head-to-head competitions were not presented to the Selection Committee by the SNC technical staff, John Atkinson and Mark Perry, for reasons that they explained in their testimony. However, they conceded that it was better for the Selection Committee to have more information rather than less information. They believed that the results in the head-to-head competitions in domestic or lower level international events, as well as other results in lower level international events, were either not relevant, or had little relevance. They testified that performance depends on training load and whether the athlete has trained to perform at peak level for the event. However, there was no recorded documentation of training load and no inquiry made to the Claimant in that regard. It is significant that the results in head-to-head competitions were not presented to the Selection Committee. The Selection Committee was unable to consider this information, and to decide what weight to place on the results. I find that it is reasonably likely that the Selection Committee would have placed some weight on the results of head-to-head competitions, as a relevant factor, having regard to the preferred selection method in the Nomination Criteria. This finding will be considered in relation to the issues before the Arbitrator.

Selection criteria established and applied by the Selection Committee

41 I find that the Selection Committee did not clearly state the selection criteria and then compare the athletes to the appropriate criteria. Various selection criteria were under discussion at three Selection Committee meetings, according to the meeting minutes. The decision on January 27, 2021 appeared to be based on different criteria, according to the minutes, than the criteria stated in the SNC public announcement. The decision was made on January 27, 2021, but was not communicated to the Claimant until March 2, 2021. There was no communication of selection criteria to the Claimant prior to the announcement of the decision of March 2, 2021.

42 The SNC Nomination Criteria state, under the heading “IX Amendments and Unforeseen Circumstances”, that in the event of unexpected or unusual circumstances, the Selection Committee “shall have the full and absolute discretion to resolve the matter as it sees fit, taking into account factors and circumstances that it deems relevant”. The Nomination Criteria also state “[a]ny such exercise of discretion shall be subject to the Canadian administrative law principles of fairness”. There was no dispute that the circumstances of the pandemic, and the cancellation of the Canadian Open Water Swimming Trials, amounted to unexpected or unusual circumstances, and that part IX of the Nomination Criteria applied. In the exercise of its discretion, and having regard to administrative law principles of fairness, the Selection Committee was required to act reasonably and not arbitrarily, to consider relevant factors and not to consider irrelevant factors. In accordance with principles of fairness, the Selection Committee was required to establish clear criteria for the selection decision, and then to apply the criteria to the athletes. The Selection Committee was also required to follow an open and transparent process, and to provide an opportunity for the athletes to make representations to the extent practical in the circumstances.

43 I have reviewed the evidence concerning the selection criteria that were established and applied by the Selection Committee and announced by SNC. The minutes of the Selection Committee meeting on January 20, 2021 state that Mr. Atkinson and Mr. Perry reviewed the document headed “Key Open Water Swimmer Performances”, and that this document addressed the criteria of historic performances, current commitment and training situation. This document was not submitted in these arbitration proceedings. The discussion was tabled to the next meeting as the time allotted for the meeting drew to a close. The three criteria of historic performances, current commitment and training situation, appear to be the criteria under consideration at the meeting on January 20, 2021. At the meeting on January 22, 2021, the Committee asked Mr. Atkinson and Mr. Perry to provide detailed assessment and analysis in addition to the Key Open Water Swimmer Performances document. The Committee requested a selection recommendation and rationale. The minutes of the January 22, 2021 meeting do not indicate that the Committee decided on the selection criteria, but indicate that the decision on the criteria, and the application of the criteria to the athletes, would occur at the next Committee meeting.

44 Mr. Atkinson and Mr. Perry prepared the “Selecting the Second Swimmers” document for the Selection Committee. The first page of the document stated that experience in Open Water was a factor to consider and that 1500m pool speed was a key metric for assessing potential of Open Water swimmers. Information for Mr. Hedlin and Mr. McKay was listed in a chart under the headings Open Water Podium History, International Open Water Experience, International

Pool Experience, 1500 Best Time and Other. The heading for podium history does not limit the events to international events. There was no heading for domestic Open Water experience or head-to-head performance. The heading “International Open Water Experience” does not state that it is limited to World Championships or International Games in which the athlete represents Canada. The information for the Claimant states that there were other international events, but the results are not listed. The list of historic performance in the chart does not include the 10k event at the 2019 Canadian Cayman Islands Trials in which Mr. McKay won Gold and Mr. Hedlin won Bronze.

45 The second document Mr. Atkinson and Mr. Perry prepared for the Selection Committee was headed “Open Water Athlete Pool Progression Age Curves”. This document included graphs comparing 1500m time and Open Water results. This document shows performance analytics based on 1500m time. I am satisfied, based on the explanation given in the testimony of Mr. Atkinson and Mr. Perry, that this document contains relevant information about historic performances for the Selection Committee to consider. It is not appropriate for the Arbitrator to substitute his decision for the technical experts in the sport with respect to a technical measure of probability of success, see *Prediger v. Bobsleigh Canada Skeleton*, SDRCC 15-0284/5.

46 Mr. Atkinson and Mr. Perry presented the two documents at the Selection Committee meeting on January 27, 2021. The Committee discussed the factors of Open Water podium history, International Open Water experience, pool experience, best 1500m time and current training. The Committee considered a presentation on the analytics comparing the correlation between 1500m time and Open Water competitiveness. The minutes state that Mr. Perry and Mr. Atkinson answered questions regarding the factors of international Open Water competition experience, speed, training situations and level of competitive readiness. The minutes state that Mr. Hedlin was selected, but did not clearly state what criteria were used, or how the criteria were applied to Mr. Hedlin and Mr. McKay.

47 The SNC public announcement on March 2, 2021, stated that the Selection Committee chose Mr. Hedlin “based on a variety of factors”. The announcement quotes Mr. Atkinson stating that the selection was “based on an assessment of the athlete’s international performance history” and that the Selection Committee looked at “performance history over the four-year Olympic quadrennial”. The public announcement did not state that international performance history was limited to World Championships and International Games where athletes represented their country or that performance history did not include domestic events or events in which Mr. Hedlin and Mr. McKay competed head to head.

48 In their testimony at the arbitration hearing, Mr. Atkinson and Mr. Perry stated that they would give greater weight to performance in World Championships and International Games where athletes represented their country compared to other lower level international events. They would not give any consideration to domestic events. For these reasons, they did not present complete historic performance results in all international and domestic events to the Selection Committee.

49 Having regard to the evidence of the Selection Committee minutes, the SNC public announcement on March 2, 2021, the testimony of the witnesses and the submissions, it is not clear

what selection criteria were applied by the Selection Committee when it selected Mr. Hedlin. The minutes state that one criteria was commitment, but no information on commitment was presented to the Committee. If the Selection Committee established commitment as a selection criteria, it is not clear how it could have applied the criteria without any information. The public announcement made no reference to commitment. The minutes state that one criteria was training situation, but Mr. Perry testified that, although training information was presented to the Selection Committee, he was not satisfied with the accuracy of the information submitted to the Selection Committee at the January 27, 2021 meeting. It is not clear how the Selection Committee applied the criteria of training situation. The public announcement did not refer to training situation. It is not clear what criteria were established for performance history. The minutes of January 20, 2021 refer to historic performance, and do not state any limit on the type of event to be included. If the criteria included all historic performance, then it would have included all events, in particular international events at all levels, domestic events and head-to-head events. However, the Selection Committee was unable to apply the criteria of historic performance, including all events, because the information presented to the committee did not include all events. The public announcement stated the selection was based on international performance history. If that was the selection criteria established, it would be inconsistent with historic performance in all events, because it excluded domestic events. If the criteria established was international performance history, it was not properly applied because the information presented did not include all lower level international results. It is therefore unclear from the evidence what criteria were established and applied by the Selection Committee.

Procedural fairness

50 The requirement to follow procedural fairness arises from legal principles and also from the specific directive “Unexpected Circumstances” under Part IX in the Nomination Criteria. The Selection Committee did not clearly decide the appropriate criteria and then apply the criteria to the athletes. The Selection Committee considered the information presented and made the decision based on that information, but it is not clear what criteria were applied to the information. The announcement of the decision sets out selection criteria that are not consistent with the criteria discussed in the Selection Committee minutes. The SNC announcement stated that international experience was considered, however, the information presented to the Selection Committee did not include all the results of Mr. McKay’s international events.

51 The Selection Committee did not provide for any input from Mr. McKay into the appropriate selection criteria. The Selection Committee did not disclose to Mr. McKay what criteria were under consideration. Mr. McKay made inquiries to Mr. Perry about the criteria but was not given the information. Mr. McKay did not have an opportunity to make a submission in support of his selection. There was no disclosure at any time of the document headed “Key Open Water Swimmer Performances”, that was presented to the Selection Committee at its meeting on January 20, 2021. The selection procedure was not open and transparent. I find that SNC did not follow principles of procedural fairness.

Were criteria appropriately established?

52 Was the selection decision based on criteria that were appropriately established? Having

regard to the testimony of witnesses at the hearing, the minutes of meetings and other documents submitted, I find that the criteria were not clearly established at any time prior to the decision at the meeting on January 27, 2021. There was an inconsistency between the criteria discussed at the meeting and the criteria that were set out in the public announcement made by SNC on March 2, 2021. Although the Nomination Criteria provided for the exercise of discretion by the Selection Committee, the Committee was required to establish the selection criteria it would apply in the exercise of its discretion. Criteria were considered by the Committee that were different from the announced criteria. The criteria were not appropriately established because performance results at all international events, performance results in domestic events, and performance results in head-to-head competitions between Mr. McKay and Mr. Hedlin, were not considered. The criteria did not include relevant factors. Therefore, I find that the criteria were not appropriately established.

Was selection based on approved criteria?

53 Was the selection decision made based on the approved criteria? It is not established by the evidence that the decision was based on criteria approved in advance, because the evidence does not clearly demonstrate what criteria were approved. There is an inconsistency in the criteria discussed at the various Committee meetings and the announced criteria. The decision may have been based, in part, on the criteria of training situation, however, Mr. Perry testified that he was not satisfied with the accuracy of the training situation information that was presented to the Selection Committee at the meeting on January 27th. Mr. Perry believed that the training situation information was disregarded by the Selection Committee, however the minutes of meetings indicate that training situation was considered. The announcement stated that the selection was based on the criteria of international performance, however, the testimony of witnesses was that lower level international events were not given consideration and therefore the details of performance results for all international events was not presented to the Selection Committee. The announcement stated that the decision was based on performance history for the prior Olympic quadrennial, however, the information presented to the Selection Committee included performance results for Mr. Hedlin from previous events as far back as 2008. The decision may have been based, in part, on a document that was not produced in these arbitration proceedings. Therefore the evidence does not establish that the decision was based on the approved criteria.

Was the decision within the range of possible acceptable outcomes?

54 I have considered whether the decision was within the range of possible acceptable outcomes. There is established case precedent that an arbitrator will not interfere with a selection decision that falls within the range of possible acceptable outcomes and that is defensible in light of the selection criteria (*O'Neill v. Canoe Kayak Canada*, SDRCC 19-0415, *Weaver v. Nordiq Canada*, SDRCC 20-0481 and *Palmer v. Athletics Canada*, SDRCC 08-0080). In this case, I do not find that the decision was within the range of possible acceptable outcomes, because the decision was not based on criteria appropriately established or based on approved criteria. Also, the Selection Committee did not consider all relevant factors. The relevant factors not considered by the Selection Committee were performance history in head-to-head competition, domestic events, and international events other than international World Championships or Games in which athletes represented their country.

Remedy

55 What is the appropriate remedy? For the reasons discussed I have decided to set aside the decision of SNC. I have considered what remedy to apply, in addition to setting aside the decision, having regard to case precedent and the evidence. Arbitrators are generally reluctant to impose their own judgment in matters of team selection, for the reason that arbitrators are not experts in the sport (*Blais-Dufour v. SSC*, SDRCC 11-0145 and *Prediger v. Bobsleigh Canada Skeleton*, SDRCC 15-0284/5).

56 In *Dutton v. Speed Skating Canada*, SDRCC 18-0344, Arbitrator Bennett set aside the decision in a case where he found there were procedural errors, failure to follow approved policies and failure to consider relevant information. In that case, the Arbitrator remitted the selection decision to Speed Skating Canada for reconsideration, directed what specific criteria to consider in the selection process, and also directed that the respondent issue written reasons. In *Christ v. Speed Skating Canada*, SDRCC 16-0298 (the “*Christ*” case), Arbitrator Palamar issued a decision in which he made the selection decision in place of the original decision. However, the facts of the *Christ* case may be distinguished from the present case. In the *Christ* case, the Arbitrator found that it was inescapable from the evidence that, had the criteria been properly applied, the claimant would have been selected. In this case, it is not certain what decision will be made when all relevant criteria are properly applied to Mr. McKay and Mr. Hedlin.

57 I also note that there was no evidence that SNC or the Selection Committee failed to act in good faith when making the selection decision or that the decision was biased in any way. There is no reason based on fairness not to remit the decision to SNC.

58 For these reasons it was appropriate to remit the selection decision to SNC for reconsideration, with direction to SNC. The Decision gave direction to SNC and stated as follows:

- (1) The selection criteria shall be performance history and pool performance progression analytics. Performance history shall include all Open Water international and domestic events, including all head-to-head events in which both the Claimant and Affected Party participated.
- (2) Swimming Natation Canada, or its representative, shall communicate to the Claimant and the Affected Party, the selection decision, with reasons confirming the selection criteria considered, within 24 hours of the selection decision.

Conclusion

59 For the reasons stated, I find that the decision by SNC to select Eric Hedlin, the Affected Party, and to not select Jon McKay, the Complainant, to compete in the FINA Olympic Marathon Swim Qualifier in 2021 for the Tokyo Olympic Games, was not made in accordance with the principles of procedural fairness, was not based on criteria appropriately established and was not based on the approved criteria. The appropriate remedy is to set aside the decision and remit the decision to SNC for reconsideration based on the directives given with respect to the selection criteria and the application of the criteria. I have not made any order as to costs at this time. In

the event of an application for costs, the application shall be submitted no later than May 14, 2021 and the reply no later than May 21, 2021.

60 I wish to extend my appreciation to the parties and their representatives for their cooperation and participation in the arbitration proceedings.

Dated April 29, 2021.

A handwritten signature in black ink, appearing to read "James C. Oakley". The signature is fluid and cursive, with a long horizontal stroke at the end.

James C. Oakley, Q.C.
Arbitrator