

I

OVERVIEW

[1] The Claimants each appealed the Respondent's 18 October 2021 decision under Article 6 of the *Canadian Sport Dispute Resolution Code* (hereinafter "the **Code**").

[2] At the parties' request, the appeals were merged so they could be heard together. However, given the urgency, the nature of the matter and the documentation filed, the parties agreed to proceed by way of documentary review.

[3] This decision pertains to the selection of athletes for World Cups 1 to 4 based on the criteria contained in *High Performance Bulletin 197, 2021-22 World Cups and World Championships Team Nomination*, published 17 September 2021 and revised 6 October 2021 (hereinafter "the **Bulletin**").

[4] The Claimants acknowledge that the Respondent has appropriately established the selection criteria set out in the Bulletin. However, they submit that the Respondent did not correctly apply the selection criteria for World Cup 1 to 4 nominations. They further submit that the decision rendered by the Respondent is unreasonable.

[5] The Respondent submits that its decision was made in accordance with the criteria set out in the Bulletin and that it is reasonable, since it falls within the possible outcomes.

[6] Following an analysis of the evidence, the Respondent's decision is set aside on the basis that the Respondent did not correctly apply the selection criteria in the Bulletin, with the result that its decision is not reasonable.

II

SUMMARY OF FACTS AND ISSUES

[7] The Claimant Alex Boisvert-Lacroix (hereinafter "**Alex**") has been a member of the Canadian team for 15 years, and the Claimant Jacob Graham (hereinafter "**Jacob**") has been a member for 7 years.

[8] In accordance with International Skating Union (hereinafter "**ISU**") Communication 2425 for the ISU World Cup Speed Skating 2021/22, section 3.1.3, the Respondent may enter up to four (4) athletes in the Men's 500 m category (hereinafter "the **Quota**") for World Cups 1 to 3, but is not under an obligation to fill all the Quotas. As for World Cup 4, a Quota of 5 athletes is granted because Canada will be hosting the event.

[9] On 18 October 2021, the Respondent published its decision on the selection of athletes for World Cups 1 to 4, including the Men's 500 m category. The World Cups are qualifying events for the 2022 Winter Olympics, which will be held in Beijing (hereinafter "the **2022 Olympics**").

[10] The Respondent issued its decision following the Canadian Long Track Championships, which were held from 13 to 17 October 2021 (hereinafter "the **CLT Championships**").

[11] Under the contested decision, Laurent Dubreuil and Gilmore Junio filled the first two (2) Quotas out of an available total of four (4). This meant that two (2) Quotas remained available; and the Respondent chose to fill them with Cédric Brunet and Christopher Fiola.

[12] At the CLT Championships, Alex placed 5th and Jacob placed 13th.

[13] The athletes selected to take part in World Cups 1 to 4 were the ones who placed in the top four (4) positions at the CLT Championships. They are Laurent Dubreuil (1st place), Gilmore Junio (2nd place), Cédrick Brunet (3rd place) and Christopher Fiola (4th place).

[14] For World Cup 4, Claimant Alex obtained the fifth Quota, having placed 5th in the CLT Championships.

[15] In addition, during the qualifying period, specifically, from 1 July 2019 up to and including the CLT Championships held from 13 to 17 October 2021 (hereinafter “the **Qualifying Period**”), the Claimants, as well as Laurent Dubreuil and Gilmore Junio, achieved the various qualifying times contemplated in the Bulletin, namely the Canadian Long Track Senior Time Standard for the Men’s 500 m (hereinafter “the **2021 CLT Senior Time Standard**”) as well as the qualifying time set out in Appendix A of the Bulletin at an ISU sanctioned event (hereinafter “the **ISU Time Standard**”).

[16] However, at no time during the Qualifying Period did Cédrick Brunet or Christopher Fiola achieve the ISU Time Standard.

[17] Claimant Alex contests the decision with respect to World Cups 1 and 2, while Claimant Jacob contests the decision with respect to the four (4) World Cups. It should be specified that, since Canada is granted a 5th Quota for World Cup 4, Alex succeeded in qualifying, because he came in 5th at the CLT Championships.

Issues

[18] The Claimants contend that, as prerequisites for being eligible for nomination under the 5th criterion of section 4.4.2, it is necessary to achieve both the 2021 CLT Senior Time Standard and the ISU Time Standard. The Claimants submit that, unlike the Affected Parties, they both achieved the said Time Standards during the Qualifying Period, and should have been nominated.

[19] The Respondent argues that the 5th criterion in section 4.4.2 cannot be read as an independent criterion under which an athlete can be eligible for nomination and be nominated for World Cups 1 and 2 solely on the basis of his results under the 2021 CLT Senior Time Standard and the ISU Time Standard.

[20] Rather, the Respondent submits that placing among the first four (4) positions at the CLT Championships (Men’s 500 m category) was required in order for skaters to be added to the matrix with a view to nomination for World Cups 1 and 2.

[21] Since no athlete fully met the conditions of the 5th criterion of section 4.4.2, the Respondent submits that it was justified in nominating the Affected Parties on the basis of section 3.4 of the Bulletin in order to fill the remaining Quotas.

[22] In contrast, the Claimants are of the view that the requirement to place among the first four (4) skaters at the CLT Championships (Men’s 500 m category) constitutes an addition to the criteria in the Bulletin, meaning that the Respondent did not follow its own procedure.

[23] Furthermore, they say that the Respondent could not nominate the Affected Parties on the basis of section 3.4, since nominations were still possible under

section 4.4.2. The Respondent, they claim, was not entitled to draw on its residual discretion.

[24] The issues to be determined are therefore as follows:

- A. Did the Respondent correctly apply its procedure, and, more specifically, does the requirement in relation to placement in the CLT Championships constitute an addition to the established selection criteria for athletes?
- B. If so, did the Respondent correctly exercise its discretion under section 3.4 of the Bulletin?

III

THE APPLICABLE LAW

The main applicable provisions

[25] The Code states as follows with respect to the burden of proof:

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. [emphasis added]

[26] In the present case, it is alleged that the Respondent did not correctly apply the Bulletin's criteria for selecting team members; therefore, I feel it necessary to reproduce several provisions of the Bulletin despite their length:

2.1 International Skating Union Qualification

The applicable ISU Qualifying Times and conditions for approval of achieved Qualifying Times will be announced in ISU Communications. For convenience, ISU Qualifying Times are also included in Appendix A of this HP Bulletin.

APPENDIX A: ISU QUALIFYING TIMES

As per ISU Communications, in order for a result to be a valid Qualifying Time, it must have been achieved in an ISU sanctioned event in the period between July 1, 2019 (World Cups) or July 1, 2020 (Championships) and the entry deadline for the ISU World Cup or World Championship Event concerned. For the Mass Start and Team Events, any of the listed Qualifying Times will apply.

The ISU Speed Skating Technical Committee has determined Qualifying times required for participation in ISU Speed Skating Championships. For all ISU Championships, except for the ISU World Junior Speed Skating Championships, two alternative sets of Qualifying times have been defined. The slower Qualifying time, listed in (brackets), applies for results achieved outside the high altitude ice rinks in Calgary (Olympic Oval), Salt Lake City (Utah Olympic Oval) and Ürümqi (Xinjiang Ice Sports Center). The following Qualifying time limits apply for ISU Speed Skating Championships:

ISU World Cup Qualifying Times

ISU World Cup

To be entered, a skater must have achieved the following Qualifying Time.

	Women	Men
500m	39.50 (40.00)	<u>35.70</u> (36.20)
1000m	1.19.00 (1.20.00)	1.11.00 (1.12.00)
1500m	2.00.50 (2.02.00)	1.49.00 (1.50.50)
3000m	4.19.00 (4.22.00)	---
5000m	7.23.00 or 4.11.00 (7.33.00 or 4.14.00)	6.40.00 (6.45.00)
10000m	---	13.30.00 or 6.28.00 (13.40.00 or 6.33.00)

[emphasis added]

2.2 Athlete Eligibility

All athletes must meet the relevant ISU eligibility requirements in order to be considered for Nomination to an Event. In order to be eligible for Nomination to the Team, the athletes must also meet all of the following eligibility conditions:

[...]

[emphasis added]

3. PROCESS

The Chair will Nominate athletes for each specific Event in accordance with the following general procedures. Athletes will be nominated, in order of priority, to a Team by one of three methods:

- Pre-selection
- Performance/results at designated Selection Event(s) as detailed in this Bulletin. Nomination is subject to any Bye request application being granted (See Appendix C)
- Additional athletes may be added for Nomination to the Team at the sole, full and absolute discretion of the Chair considering performance potential in the Team Pursuit and Mass Start.

[emphasis added]

3.1 Pre-Selection

Pre-selection decisions will be based on specific and objective results obtained by the athlete during the past or present skating season, in Individual Distances, and are not subject to any decisions made with regard to Bye request application. [...]

- Pre-selection shall be determined before any such Selection Event, and therefore all athletes participating in the competition will be notified of the number of positions available for selection through performance results. Except in the case of Mass start, a minimum of one quota spot per Individual Distance will be reserved to be filled based on the results at the 2021 Canadian Long Track (CLT) Championships.
- Subject to the requirement described above that a minimum of one 2021 Fall World Cup quota spot per Individual Distance (other than Mass Start) must be reserved to be filled based on results at the 2021 CLT Championships, athletes who placed in the top 5 in an Individual Distance at the 2020 World Single Distance Championships will be pre-selected to the 2021 Fall World Cups in such Individual Distance on the

basis of their finish position in such Individual Distance at the 2020 World Single Distance Championships. Should there be remaining quota positions after filling the pre-selections from the 2020 World Single Distance Championships and subject to the requirement described above that a minimum of one 2021 Fall World Cup spot per Individual Distance must be reserved to be filled based on results at the 2021 CLT Championships, athletes who placed in the top 5 in an Individual Distance at the 2021 World Speed Skating Championships will be eligible to be pre-selected to the 2021 Fall World Cups on the basis of their finish position in an Individual Distance at the 2021 World Speed Skating Championships.

- For the avoidance of doubt and by way of example only, if Canada earns three quota spots to the 2021 Fall World Cups in a particular Individual Distance, then only two positions may be pre-selected based on the following priorities: first, the results at the 2020 World Single Distance Championships and second, the results at the 2021 World Speed Skating Championships. The remaining quota spot will be selected at the 2021 CLT Championships, except in the case of Mass Start.

[...]

[emphasis added]

3.4 Filling Entry Quota

If the processes herein result in less than the maximum Team quota being selected for either gender, the Chair has the sole, full and absolute discretion to Nominate, or not to Nominate, any remaining Team positions. For greater certainty, the Chair may determine in his or her sole, full and absolute discretion not to fill the maximum Team entry quota. [emphasis added]

4. ISU WORLD CUP TEAM NOMINATION

4.3 Qualifying Time / Time Standard

Unless otherwise pre-selected in accordance with Section 4.4.1. below, in order to be nominated for ISU World Cup 1 and ISU World Cup 2, an athlete must have achieved the ISU World Cup Qualifying Time as listed in Appendix A in accordance with ISU Communication 2425, 3.1.2 Qualifying Times at an ISU sanctioned competition between the time period of July 1, 2019 up to and including the 2021 CLT Championships (the “Qualifying Period”).

An athlete must have also achieved the following 2021 Canadian Long Track (CLT) Senior Time Standards (formerly the 2019 CLT Senior Time Standards) set forth in an Individual Distance at least once in a sanctioned competition between July 1, 2019 up to and including the CLT Championships (defined below (4.4.2)).

Table 2. 2021 Senior CLT Time Standards

	Women	Men
500m	38.43	<u>34.90</u>
1000m	1.16,19	1.09,16
1500m	1.57,32	1.45,70
3000m	4.08,18	---
5000m	7.06,60	6.22,08
10000m	---	13.15,71

[emphasis added]

4.4 ISU World Cup 1 and ISU World Cup 2 – Nomination

4.4.1 Pre-Selection

Athletes will be pre-selected in order of their finish position in an Individual Distance as per Section 3.1 in the following priority:

- Athlete(s) who placed in the top 5 in an Individual Distance at the 2020 World Single Distance Championships;
- Athlete(s) who placed in the top 5 in an Individual Distance at the 2021 World Speed Skating Championships;

The following athletes have been pre-selected for ISU World Cup 1 and ISU World Cup 2:

- 500m: Laurent Dubreuil

[...]

[emphasis added]

4.4.2 Performance Results

Selection Events: Canadian Long Track Championships (“CLT Championships”), October 13-17, 2021

Athletes who have achieved the Time Standard in one or more Individual Distance during the Qualifying Period may be nominated to the Team in order of priority as follows up to the maximum entry quota allocated (Section 4.2):

1. Athletes already selected pursuant to Section 4.4.1;
2. Subject to Byes, athletes who have achieved one or more 2021 Senior CLT Time Standards listed in Section 4.3 in an Individual Distance at the 2021 CLT Championships will be ranked by their final placing in such Individual Distances according to the matrix below;
3. For World Cup 2, athletes who have placed in the top three (3) positions at CLT Championships in the 5000m (women) and 10000m (men) and have satisfied the 2021 CLT Time Standard (at the CLT Championships pursuant to Section 4.3) in those respective distances;
4. 4. At the sole, full and absolute discretion of the Chair, skaters may be added to the Team, from the Team Pursuit Pool (as per Section 3.3.1) in order to field a competitive Team Pursuit Team;
5. Athletes who have achieved one or more 2021 Senior CLT Time Standards in an Individual Distance at an ISU sanctioned event since July 1, 2019 pursuant to Section 4.3 may be added to the matrix and ranked by their final placing in such Individual Distances according to the matrix below;
6. The Chair may, at his or her sole, full and absolute discretion, nominate additional athlete(s) to the Team or choose to exclude athletes from the Team in order to field the most competitive team.

[emphasis added]

The standard of review

[27] The standard of review for an SDRCC arbitrator is the reasonableness standard, as Arbitrator Pound stated in *Larue*,¹ citing the leading case of *Dunsmuir v. New Brunswick*.²

[28] More recently, in 2019, the Supreme Court clarified the approach to judicial review in *Vavilov*,³ where it considers, among other things, the applicable standard of review and the concept of *reasonableness* in relation to decision-making.

[29] The Court held that the reasonableness standard applies in most cases, including situations where a decision-maker is interpreting its own enabling statute.⁴ The Court noted that, despite the goal of intervening minimally and only where truly necessary to “safeguard the legality, rationality and fairness of the administrative process”, the reasonableness standard remains a robust standard of review.⁵

[30] In the following terms, the Supreme Court emphasizes that it is important that administrative decisions have justification:

[15] In conducting a reasonableness review, a court must consider the outcome of the administrative decision in light of its underlying rationale in order to ensure that the decision as a whole is transparent, intelligible and justified. [...]⁶

[31] On the basis of the reasonableness standard, the Court specifies:

[85] Developing an understanding of the reasoning that led to the administrative decision enables a reviewing court to assess whether the decision as a whole is reasonable. As we will explain in greater detail below, a reasonable decision is one that is based on an internally coherent and rational chain of analysis and that is justified in relation to the facts and law that constrain the decision maker. The reasonableness standard requires that a reviewing court defer to such a decision.

[86] Attention to the decision maker’s reasons is part of how courts demonstrate respect for the decision-making process: see *Dunsmuir*, at paras. 47-49. In *Dunsmuir*, this Court explicitly stated that the court conducting a reasonableness review is concerned with “the qualities that make a decision reasonable, referring both to the process of articulating the reasons and to outcomes”: para. 47. Reasonableness, according to *Dunsmuir*, “is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process”, as well as “with whether the decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law”: *ibid*. In short, it is not enough for the outcome of a decision to be *justifiable*. Where reasons for a decision are required, the decision must also be *justified*, by way of those reasons, by the decision maker to those to whom the decision applies. While some outcomes may be so at odds with the legal and factual context that they could never be supported

¹ *Larue v. Bowls Canada Bowlingrin*, SDRCC 15-0255.

² *Dunsmuir v. New Brunswick*, [2008] 1 S.C.R. 190; to the same effect, see the decision of Arbitrator Roberts in *Ferguson v. Equestrian Canada*, SDRCC 20-0455.

³ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65.

⁴ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, *supra* note 3, at para. 7.

⁵ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, *supra* note 3, at para. 13.

⁶ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, *supra* note 3.

by intelligible and rational reasoning, an otherwise reasonable outcome also cannot stand if it was reached on an improper basis. [emphasis added]

[32] The Court continues by specifying the appropriate method for analysing a provision:

[117] A court interpreting a statutory provision does so by applying the “modern principle” of statutory interpretation, that is, that the words of a statute must be read “in their entire context and in their grammatical and ordinary sense harmoniously with the scheme of the Act, the object of the Act, and the intention of Parliament”: [...]Parliament and the provincial legislatures have also provided guidance by way of statutory rules that explicitly govern the interpretation of statutes and regulations: see, e.g., *Interpretation Act*, R.S.C. 1985, c. I-21.

[118] This Court has adopted the “modern principle” as the proper approach to statutory interpretation, because legislative intent can be understood only by reading the language chosen by the legislature in light of the purpose of the provision and the entire relevant context: Sullivan, at pp. 7-8. Those who draft and enact statutes expect that questions about their meaning will be resolved by an analysis that has regard to the text, context and purpose, regardless of whether the entity tasked with interpreting the law is a court or an administrative decision maker. An approach to reasonableness review that respects legislative intent must therefore assume that those who interpret the law — whether courts or administrative decision makers — will do so in a manner consistent with this principle of interpretation.

[...]

[120] But whatever form the interpretive exercise takes, the merits of an administrative decision maker’s interpretation of a statutory provision must be consistent with the text, context and purpose of the provision. In this sense, the usual principles of statutory interpretation apply equally when an administrative decision maker interprets a provision. Where, for example, the words used are “precise and unequivocal”, their ordinary meaning will usually play a more significant role in the interpretive exercise: *Canada Trustco Mortgage Co. v. Canada*, 2005 SCC 54, [2005] 2 S.C.R. 601, at para. 10. Where the meaning of a statutory provision is disputed in administrative proceedings, the decision maker must demonstrate in its reasons that it was alive to these essential elements.

[121] The administrative decision maker’s task is to interpret the contested provision in a manner consistent with the text, context and purpose, applying its particular insight into the statutory scheme at issue. It cannot adopt an interpretation it knows to be inferior — albeit plausible — merely because the interpretation in question appears to be available and is expedient. The decision maker’s responsibility is to discern meaning and legislative intent, not to “reverse-engineer” a desired outcome.

[122] It can happen that an administrative decision maker, in interpreting a statutory provision, fails entirely to consider a pertinent aspect of its text, context or purpose. Where such an omission is a minor aspect of the interpretive context, it is not likely to undermine the decision as a whole. It is well established that decision makers are not required “to explicitly address all possible shades of meaning” of a given provision: *Construction Labour Relations v. Driver Iron Inc.*, 2012 SCC 65, [2012] 3 S.C.R. 405, at para. 3. Just like judges, administrative decision makers may find it unnecessary to dwell on each and every signal of statutory intent in their reasons. In many cases, it may be necessary to touch upon only the most salient aspects of the text, context or purpose. If, however, it is clear that the administrative decision

maker may well, had it considered a key element of a statutory provision's text, context or purpose, have arrived at a different result, its failure to consider that element would be indefensible, and unreasonable in the circumstances. Like other aspects of reasonableness review, omissions are not stand-alone grounds for judicial intervention: the key question is whether the omitted aspect of the analysis causes the reviewing court to lose confidence in the outcome reached by the decision maker. [emphasis added]

[33] In principle, if a selection decision is justified, then in accordance with the teachings of our country's highest court,⁷ an arbitrator should rarely interfere with such a decision, provided the Respondent followed its own rules, as Arbitrator Mew states in *Bastille v. Speed Skating Canada*.⁸

IV

ANALYSIS AND DECISION

[34] It is not disputed that the Respondent's decision was appealed within the allotted time and that the reasons for contesting the decision are admissible, in accordance with the Respondent's Appeal Policy.

[35] Since the appeal was brought by athletes, the initial onus of proof falls on the Respondent, as stated in Section 6.10 of the Code.

[36] The Claimants acknowledge that the Respondent appropriately established the selection criteria set out in the Bulletin. The Respondent must therefore show that the decision it made complies with the criteria in the Bulletin; if so, the onus of proof shifts as provided in Section 6.10 of the Code.

[37] We should specify at the outset—and this is not contested—that, for World Cups 3 and 4, the Bulletin gives a priority to athletes who have qualified for World Cups 1 and 2, which explains why few arguments were made in this regard. Accordingly, in my decision, I will primarily address World Cups 1 and 2, knowing that the nomination of the Claimants for World Cups 1 and 2 results in their also being nominated for World Cups 3 and 4. Since Alex initially obtained the 5th Quota for World Cup 4, it will be up to the Respondent to reassign this Quota to another athlete, since Alex now holds the 3rd Quota, and Jacob now holds the 4th.

[38] The Respondent submits that its decision was made in accordance with the criteria set out in the Bulletin. Specifically, the Respondent submits that the Claimants did not meet the 5th criterion in section 4.4.2 of the Bulletin, and that, consequently, it was justified in exercising its discretion as set out in section 3.4 of the Bulletin and to select the Affected Parties for World Cups 1 and 2.

[39] The Respondent asks that I find that its decision falls within the range of possible outcomes having regard to the selection criteria in the Bulletin, and that I conclude that the decision is reasonable.

[40] The Claimants vigorously contest this position and assert that, in the present case, the procedure in section 4.4.2 allowed them to be nominated without recourse to the

⁷ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, *supra* note 3.

⁸ *Bastille v. Speed Skating Canada*, SDRCC 13-0209.

discretion in section 3.4. They argue that this makes the Respondent's decision unreasonable, since it is inconsistent with the criteria in the Bulletin.

A. Did the Respondent correctly apply its procedure, and, more specifically, does the requirement in relation to placement in the CLT Championships constitute an addition to the established selection criteria for athletes?

[41] Before proceeding any further, it is important to specify the role of arbitrators called upon to consider an appeal from a selection decision. In this regard, I cite with approval what Arbitrator Pound stated in *Larue*.⁹

In the present case, there are three considerations that should guide me. The first is that, absent cogent evidence of error, I should adopt a deferential assumption that the Team Selection Committee, composed, as it was, of experienced experts in bowls, knows its business. Second, my role as Arbitrator is not to re-write BCB's High Performance policy or its team selection criteria with any view of "improving" either, or to substitute my personal view of what they could or ought to contain. The operating consideration is that BCB knows the sport of bowls better than any arbitrator. Third, my role is simply to determine whether the outcome of the team selection process was made in accordance with the selection criteria and whether that outcome falls within a range of possible, reasonable, outcomes defensible in light of the facts and the team selection criteria (i.e., the applicable "law" in this matter). [emphasis added]

[42] Therefore, in the present case, I must identify the Bulletin's selection criteria and, as needed, interpret the Bulletin to determine what they are. It is not my role to rewrite them, improve upon them or make them clearer. Nor is it my role to substitute my opinion in order to determine what the criteria should have been.

[43] The Respondent acknowledges that, in order to be nominated for World Cups 1 and 2, a skater needs to have achieved both the ISU Time Standard and the 2021 CLT Senior Time Standard, which are, respectively, 35.70 and 34.90, based on the criteria set forth in section 4.4.2 of the Bulletin.

[44] However, the Respondent submits that the selection was not based solely on the aforementioned time standards, but rather, was also intimately tied to the aforementioned times as well as the ranking and the matrix.

[45] The Claimants submit that nothing in the Bulletin would support such an interpretation, and that the addition of such a criterion introduces a form of bias by favouring one selection event at the expense of the others, which are just as important. In their view, this is tantamount to a *reverse engineering* of the established criteria in order to achieve the desired result.

[46] It is not disputed that the Affected Parties did not, at any time during the Selection Period, achieve the ISU Time Standard, nor is it disputed that the Claimants both achieved the two (2) time standards during that period.

[47] It is not disputed—indeed, it is beyond dispute—that the Affected Parties placed 3rd and 4th in the CLT Championships and that the Claimants placed 5th (Alex) and 13th (Jacob).

⁹ *Larue v. Bowls Canada Bowlingrin*, SDRCC 15-0255.

[48] In support of its assertions, the Respondent submits that the matrix used can be found directly below priority number 6 in section 4.4.2:

Rank	Distance	Gender	Position	Name
1	5000m	M	1	Ted-Jan Bloemen (PS)
2	1000m	M	1	Laurent Dubreuil (PS)
3	5000m	M	2	Graeme Fish (PS)
4	3000m	W	1	Isabelle Weidemann (PS)
5	500m	M	1	Laurent Dubreuil (PS)
6	3000m	W	2	
7	1500m	M	1	
8	1500m	M	2	
9	5000m	M	3	Jordan Belchos (PS)
10	1000m	M	2	
11	500m	M	2	
12	500m	W	1	
13	3000m	W	3	
14	1500m	W	1	
15	500m	W	2	
16	500m	M	3	
17	1000m	W	1	
18	1500m	W	2	
19	1000m	M	3	
20	1500m	M	3	
21	500m	W	3	
22	1500m	W	3	
23	1000m	W	2	
24	1000m	W	3	

[49] To demonstrate how the matrix works, the Respondent produced the table below, which shows how the athletes are placed in the matrix:

Athlete	Placing at CLT Championships in men's 500m	Time Standard	Priority	Nominated to World Cup Team	Position on Matrix
Laurent Dubreuil	1 st	Yes – 34.12 (CLT Championships)	Section 4.4.1 and 4.4.2 (Priority 1)	Yes	1
Gilmore Junio	2 nd	Yes – 34.59 (CLT Championships)	Section 4.4.2, Priority 2	Yes	2
Cédric Brunet	3 rd	<u>No</u>	N/A	Yes – Section 3.4	N/A
Christopher Fiola	4 th	<u>No</u>	N/A	Yes – Section 3.4	N/A
Alex Boisvert-Lacroix	5 th	<u>Yes</u>	N/A	No	N/A
[...]	6 th	No	N/A	No	N/A
[...]	7 th	No	N/A	No	N/A
[...]	8 th	No	N/A	No	N/A
[...]	9 th (tied)	No	N/A	No	N/A
[...]	9 th (tied)	No	N/A	No	N/A
[...]	11 th	No	N/A	No	N/A

[...]	12 th	No	N/A	No	N/A
Jacob Graham	13 th	<u>Yes</u>	N/A	No	N/A

[emphasis added]

[50] The Respondent submits that Laurent Dubreuil was preselected, and that he accordingly obtained the 1st available Quota (section 4.4.1 and section 4.4.2, para. 2(1)). This nomination is not being contested.

[51] As for Gilmore Junio, he obtained the 2nd Quota because he achieved the 2021 CLT Senior Time Standard at the CLT Championships, which corresponds to the 2nd criterion in section 4.4.2. This nomination is not being contested.

[52] It is also worth noting that criteria 3 and 4 of section 4.4.2 pertain to events that the Claimants did not take part in, and do not apply to this case—a fact that is not in dispute.

[53] As for priority number 6 of section 4.4.2, the Respondent contends that this provision applies only for the purpose of filling a Quota when a selected athlete refuses to take part in World Cups 1 and 2 or when the athlete cannot take part because of an injury even though the athlete qualified and obtained a Quota. For the purposes of this case, suffice it to say that none of the Claimants have stated that they should have or could have been nominated pursuant to this 6th criterion; therefore, I will not be addressing it further in this decision.

[54] Accordingly, what remains to be examined is priority number 5.

[55] On the basis of the evidence tendered, the Respondent submits that it is clear that placement in the CLT Championships had to be considered for the purposes of fulfilling the conditions in section 4.4.2, priority number 5:

28. According to Priority 5 of Section 4.4.2 of HP Bulletin 197, SSC may nominate a skater to ISU World Cup 1 and ISU World Cup 2 if they have achieved one or more CLT Time Standard in an Individual Distance at an ISU sanctioned event during the Qualifying Period by adding them to the Matrix and ranking them by their final placing in an Individual Distance [at the CLT Championships] provided that they achieved a top 4 placing in the men's 500m event.

29. For the avoidance of doubt, in order to be nominated pursuant to Priority 5 on the Matrix, a skater must have achieved one or more CLT Time Standard(s) in an Individual Distance at an ISU sanctioned event during the Qualifying Period and have achieved a ranking at the CLT Championships that would allow them to be placed on the Matrix. This means that, for the men's 500m event, to be nominated to ISU World Cups 1 and 2 pursuant to Priority 5, an athlete would have had to have achieved one or more CLT Time Standard(s) in an Individual Distance at an ISU sanctioned event during the Qualifying Period and have finished in the top 4 at the CLT Championships since there are only four quotas for this event at the World Cups.¹⁰ [emphasis added]

[56] The Respondent adds that consideration of rankings from the CLT Championships does not constitute an addition to the criteria set out in section 4.4.2. Specifically, it submits that the criteria set out in section 4.4.2 were discussed by the High Performance Advisory Council – Long Track (hereinafter “the **HPAC**”) at the meeting of 17 October

¹⁰ Excerpt from the Respondent's final submissions.

2021, where it was assisted by Cathy Tong, who took part in developing the criteria set out in the Bulletin. In light of the opinion she gave concerning the interpretation of section 4.4.2, it was determined that only the best skaters can qualify for a Quota, those skaters being the ones who [translation] “perform on demand.”

[57] The Respondent rejects the Claimants’ argument that achieving both the ISU Time Standard and the 2021 CLT Senior Time Standard during the Qualifying Period is sufficient to guarantee a place for the Claimants under the present circumstances, and argues that nothing in the Bulletin supports a conclusion that prior achievement of those time standards could take precedence over better ranking in the CLT Championships.

[58] In the Respondent’s opinion, the Claimants’ interpretation of section 4.4.2 disregards the requirements of section 3, which prioritizes performances in selection events; that this interpretation is erroneous; and that it would allow them to disqualify the Affected Parties, who performed better than they did at the CLT Championships.

[59] Lastly, the Respondent asserts that this interpretation of the criteria of section 4.4.2 has been applied uniformly to all speed skating selections, for all distances and for the two (2) genders.

[60] Consequently, the Respondent asks that I conclude that it was justified in exercising its discretion under section 3.4, and that its decision is reasonable.

[61] With respect, I cannot agree with the Respondent’s arguments.

[62] Firstly, if the criteria in the Bulletin were improperly applied, albeit uniformly to all categories (i.e. all distances and both genders), this in no way means the Respondent followed its own procedure. On the contrary, and for the following reasons, I am of the opinion that it did not follow its own procedure, and that it did this uniformly for all categories.¹¹ This “equal mistreatment” cannot make the decision reasonable.

[63] Section 3 of the Bulletin establishes the general framework for the procedure, from which the other sections and provisions of the Bulletin concerning nominations for each competition contemplated in the Bulletin flow. In the present case, World Cup nominations are the subject of section 4.

[64] Section 3 specifies the order in which the selection criteria must be established for each competition contemplated by the Bulletin. According to that order, one must establish the preselection-based nominations, followed by those based on performances and results in the designated selection events (subject to requests for exemption), followed, lastly, by nominations made at the discretion of the Chair (mass start and team pursuit). Sections 3.1, 3.2 and 3.3 specify how each of these priorities works and how people are classified in case of a tie.

[65] Section 3.1 pertains to the priority applicable to preselections.

[66] Section 3.2 pertains to performance results at selection events and specifies that designated selection events will be named.

[67] Section 3.3 deals with mass start and team pursuit, which are of no importance in the present case.

¹¹ To the same effect, see *Larue v. Bowls Canada Boulingrin*, *supra* note 9.

[68] Section 4 is devoted to World Cups 1 and 2, and section 4.4.1 is about preselections in the order established by section 3 and detailed more fully in section 3.1.

[69] Priority number 1 in section 4.4.2 corresponds to the preselection criterion, which constitutes the first priority under section 3 (and is detailed more fully in section 4.4.1 in relation to World Cups).

[70] Priorities numbers 2 and 3 in section 4.4.2 are related to the second priority set out in section 3, namely, the priority associated with selection based on performance results at selection events. In accordance with section 3.2, the “CLT Championships” is the designated selection event (section 4.4.2, para. 1) for nominations to World Cups 1 and 2.

[71] Priority number 4, for its part, refers to the Chair’s discretion in the case of team pursuit and mass start, something that does not concern us here.

[72] As for priority number 5, it refers to qualifying times achieved during the Qualifying Period, specifically, the 2021 CLT Senior Time Standard, pursuant to section 4.3.

[73] As the Supreme Court has instructed us, one must ascribe to words their natural and ordinary meaning having regard to the context in which they arise, and taking into account, notably, the purpose of the law—in this instance, the Bulletin.¹² Also, when the words of a provision are clear and unequivocal, those words, in their ordinary meaning, will generally take precedence over the context.¹³

[74] In the present case, one cannot disregard the clear and imperative terms of section 4.3, which impose a double requirement—namely, achieving both the 2021 CLT Senior Time Standard and the ISU Time Standard—in order to be eligible for nomination for World Cups 1 and 2. The word also means that these conditions are cumulative and not alternative, and there is no basis to derogate from the clear meaning.¹⁴ *A contrario*, failure to achieve either (or both) of the time standards makes an athlete ineligible for a nomination for World Cups 1 and 2.

[75] It would be internally inconsistent to claim that the Bulletin provides that an athlete who is not eligible for a nomination under section 4.3, and who therefore cannot even be considered for such a nomination, can be nominated by virtue of the 5th priority of section 4.4.2, which expressly refers to section 4.3. In fact, this is not what the Respondent is arguing, and I must find that the requirement set out in the 5th priority is nothing more and nothing less than the achievement, during the Qualifying Period, of the double requirement set out in section 4.3.

¹² *Canada (Minister of Citizenship and Immigration) v. Vavilov*, *supra* note 3, at para. 117.

¹³ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, *supra* note 3, at para. 120.

¹⁴ 4.3 : [...] in order to be nominated for ISU World Cup 1 and ISU World Cup 2, an athlete must have achieved the ISU World Cup Qualifying Time as listed in Appendix A [...] between the time period of July 1, 2019 up to and including the 2021 CLT Championships[...].

An athlete must have also achieved the following 2021 Canadian Long Track (CLT) Senior Time Standards (formerly the 2019 CLT Senior Time Standards) set forth in an Individual Distance at least once in a sanctioned competition between July 1, 2019 up to and including the CLT Championships (defined below (4.4.2)).¹⁵ 4.4.2 (2): Subject to Byes, athletes who have achieved one or more 2021 Senior CLT Time Standards listed in Section 4.3 in an Individual Distance at the 2021 CLT Championships will be ranked by their final placing in such Individual Distances according to the matrix below;

[76] But that is not the crux of the issue. What lies at the heart of this dispute is the Respondent's interpretation which holds that nobody among the Claimants or the Affected Parties met the requirements of priority number 5 by reason of the double requirement related to the time standards, a requirement not met by the Affected Parties, and the requirement related to placement at the CLT Championships, a requirement not met by the Claimants, hence the Respondent's exercise of discretion as contemplated in section 3.4.

[77] Based on my reading of the Bulletin, when requirements related to rankings at a given event exist, they can be found in express wording. By way of illustration, I cite section 3.1, para. 1, (2) and (4), section 4.4.1 (1) and (2), section 4.4.2, para. 2, (3), section 4.5.1 (1) and (2), and section 4.5.2, para. 2, (1).

[78] In the present case, the requirement related to ranking at the 2021 CLT Championships is found only in priority number 2 of section 4.4.2.¹⁵

[79] For its part, priority number 5, which reads as follows,

5. Athletes who have achieved one or more 2021 Senior CLT Time Standards in an Individual Distance at an ISU sanctioned event since July 1, 2019 pursuant to Section 4.3 may be added to the matrix and ranked by their final placing in such Individual Distances according to the matrix below;

articulates no requirements as to rankings.

[80] To find otherwise would mean disregarding the wording of section 4.4.2 and of the Bulletin as a whole. Consequently, consideration of rankings at the CLT Championships under the terms of priority number 5 constitutes an addition to the selection criteria.

[81] Under section 1.9.1 of the Bulletin, the Respondent is entitled, unilaterally and at its sole discretion, to modify or clarify the Bulletin to ensure the nomination of the best teams possible. However, any change must be made before a selection event and the changes must be communicated to HPAC-LT and to the high performance program athletes.

[82] This requirement has several justifications, notably *lex sportiva*, which recognizes that [translation] "selection criteria must offer reasonable foreseeability to athletes and their coaches", a principle that has been repeated many times.¹⁶

[83] Although Arbitrator Pound acknowledges that some flexibility, and therefore, some unpredictability, in the application of selection criteria may be necessary because of the nature of certain sports to which objective criteria such as time standards are difficult to apply,¹⁷ that is not the case with speed skating.

[84] In the present case, the selection criteria were clear and objective. Cathy Tong's interpretation of section 4.4.2, which she communicated to the HPAC, is of little importance given the need to give the words their ordinary meaning. As Arbitrator Mew

¹⁵ 4.4.2 (2): Subject to Byes, athletes who have achieved one or more 2021 Senior CLT Time Standards listed in Section 4.3 in an Individual Distance at the 2021 CLT Championships will be ranked by their final placing in such Individual Distances according to the matrix below;

¹⁶ *Adhihetty v. Cricket Canada*, SDRCC 19-0411; *Beaulieu v. Gardner*, SDRCC 13-0214.

¹⁷ *Richer v. Canadian Cerebral Palsy Sports Association*, SDRCC 15-0265.

has stated, “[t]he intent of the parties is important, but the subjective interpretation of the parties – what they thought the selection criteria meant – is immaterial.”¹⁸

[85] Based on this, the Respondent did not follow its own procedure. It had to nominate the Claimants to World Cups 1 and 2 and was not entitled to exercise its residual discretion under section 3.4.

[86] Consequently, the Respondent’s decision is unreasonable, as it is not in any way supported by the applicable rules, which the Respondent itself developed. Had it applied the Bulletin’s objective and precise criteria, it could not have come to the same decision. I would add that, though the Respondent provided explanations for its decision in the course of this arbitration, its decision as communicated to the athletes is not in any way substantiated, in that it presents the results of the selection, and nothing more.

[87] In light of the foregoing, it is unnecessary to answer Question 2, since it has become academic.

[88] For these reasons, the Respondent’s decision is set aside and the Claimants’ appeal is allowed.

[89] That said, the parties submitted a plethora of arguments in support of their respective positions, several of which have not been addressed because they are not necessary to dispose of this appeal. I believe it would nonetheless be appropriate to respond to some of them, even though they have no effect on the outcome of the dispute.

[90] Claimant Jacob argued that the Respondent’s interpretation of section 4.4.2 constitutes, to some degree, bias in favour of one selection event at the expense of the others. In his view, the Respondent *reverse engineered* the established criteria to achieve the desired result.

[91] With respect, the evidence does not support such an interpretation. In my opinion, the fact that the criteria, as interpreted by the Respondent, were applied uniformly to all categories, distances and genders, instead shows that the Respondent misinterpreted its own rules.

[92] The Respondent argued that, as a consequence of the Claimants’ interpretation of the Bulletin, mere participation in the CLT Championships, without regard to performance, would be sufficient to be nominated and to take part in World Cups 1 to 4 provided the athlete has achieved the double time standard during the Qualifying Period.

[93] The Respondent stated that this interpretation could lead to absurd results. In this regard, it provides the hypothetical example of a young athlete who was a junior or neo-senior at the beginning of the Qualifying Period and who might not have had as many opportunities as the more experienced athletes to take part in selection events. Another example would be a young athlete who, because of his development, has greatly improved between the beginning of the Qualifying Period and the last selection event, causing the gap between the athlete and the veterans to narrow. The Claimants’ interpretation would then deprive young athletes, with major medal potential, of the possibility of being selected.

¹⁸ *Laberge v. Bobsleigh Canada Skeleton*, SDRCC 13-0211, at para. 71.

[94] The Respondent therefore submits that past results according to the time standards are just part of the data to consider, and that maintaining otherwise amounts to making the need for selection events obsolete. The Respondent adds that an athlete who claims to have the potential to win medals at the 2022 Olympics should be able to rank among the top four in a local event.

[95] I understand the Respondent's arguments. That said, with respect, for the reasons given above, I cannot agree with the Respondent's logic, and, accordingly, its interpretation of the Bulletin. In addition, I would note that the Bulletin was adopted on 17 September 2021 and revised on 6 October 2021, which was less than two (2) weeks before the end of the Qualifying Period and the selection decision. On those dates, the past results of the young athletes and veterans alike were known. It was up to the Respondent to draft or revise the established criteria accordingly, by applying the rules from its own procedure.

[96] Lastly, the Affected Parties argue that they had few opportunities to take part in competitions due to the COVID-19 pandemic, which has been ongoing since March 2020. They also argue that, because of certain unfortunate events, in 2019, they were unable to perform to the best of their abilities at the 2019 World Cup selection. In contrast, they state that the Claimants had more opportunities than they did to compete during the Qualifying Period.

[97] I am sensitive to the situations of both the Affected Parties and the Claimants. However, my role is not to determine who most deserves to take part in the World Cups; rather, it is to determine the criteria applicable to the selection and ensure that the Respondent applied them rigorously.

FOR THESE REASONS, THE TRIBUNAL:

ALLOWS the Claimants' appeal;

SETS ASIDE Speed Skating Canada's 18 October 2021 selection decision;

NOMINATES the Claimants Alex Boisvert-Lacroix and Jacob Graham to the Canadian speed skating team for World Cups 1 and 2, it being understood that this nomination results in nomination for World Cups 3 and 4; and

RETAINS jurisdiction to decide on costs, if called upon to do so.

Kirkland, this 11th day of November, 2021.

Karine Poulin, Arbitrator