

IMPORTANT NOTE: *This version is a translation of the original French version.*

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

No.: SDRCC 21-0505

LÉANDRE BOUCHARD (Athlete)

(Claimant)

AND

CYCLING CANADA (CC)

(Respondent)

AND

PETER DISERA

(Affected Party)

Arbitrator:

The Hon. L. Yves Fortier, QC

Appearing:

For the Arbitrator: Laurence Marquis, Arbitrator's Assistant

For the Claimant: Léandre Bouchard, Athlete
Marie-Josée Boily, Counsel

For the Respondent: Kris Westwood, Representative
Dan Proulx, Representative
Jeff Ain, Representative
Benoît Girardin, Counsel

Observers: Roger Bilodeau
Éric Ouellet

I. Introduction

1. The Claimant, Léandre Bouchard, an elite mountain bike athlete, challenges the decision (the "Decision") of Cycling Canada (sometimes referred to as "CC" below) dated June 3, 2021,

informing him that he had been selected as a non-traveling alternate to represent Canada at the Tokyo 2020 Olympic Games (the "Games"). He wishes to be selected in lieu of Peter Disera, an athlete selected by Cycling Canada (the "Affected Party").

2. The Claimant submits that Cycling Canada has improperly and unreasonably applied the modified team selection policy for the XXXII Olympic Games in Tokyo (the "Policy"), that the Decision should be reversed, and that the Claimant should be selected to represent Canada at the Games.
3. Cycling Canada submits that the Decision to select the Affected Party is reasonable and was made in accordance with the intent and wording of its Policy.
4. On June 14, 2021, I was appointed as Mediator-Arbitrator neutral by the SDRCC.
5. On June 18, the Parties having failed to agree on an amicable resolution in mediation, I declared the mediation closed. On June 19, the Claimant confirmed his intention to proceed with the arbitration. The timetable for the Parties' submissions was therefore issued and the hearing took place on June 23rd by videoconference.
6. The written submissions provided to me by the Parties are as follows:
 - APPENDIX A (Léandre Bouchard's Request for Appeal of Cycling Canada's Decision, dated June 3, 2021) (C-02);
 - Submission by Cycling Canada, June 21, 2021 (R-10)
 - Brief by Léandre Bouchard, Claimant, June 22, 2021 (C-14)
 - Summary of Claimant's arguments, June 25, 2021 (C-21)
 - Summary of Cycling Canada's arguments, June 25, 2021 (R-22)

II. Background

7. On June 19, 2020, because of the cancellation of the Games due to the COVID-19 pandemic, Cycling Canada adopted amended selection criteria. The Policy was updated again on January 12, April 9 and May 5, 2021, and the amended provisions are highlighted in red in the text.

The relevant provisions of the Policy are reproduced below.

8. Section 1 "Introduction" of the Policy reads in part as follows:

- *Qualification by nations is not complete for mountain bike, BMX race or BMX Freestyle; according to the amended qualification processes published by UCI:*
 - *MTB qualification will include the Olympic ranking up to March 3, 2020, plus:*
 - *2 World Cups in 2021 (dates and locations TBD)*
 - *Note: Canada's projected quota (2 women, 1 man), is unlikely to change.*

9. The Introduction also provides for the following:

When drafting these amendments, Cycling Canada adopted the following principles:

- *Athletes' health remains the top priority.*
- *Cycling Canada seeks to avoid creating undue incentives for athletes to resume competition in 2020.*
- *As a consequence, other than in men's road, no events taking place between March 3, 2020, and the end of 2020 will be considered for selection.*

10. Section 2 of the Policy, under the heading of Decision Making Authority, states:

The High Performance Director (HDP) is responsible for developing and approving the Internal Nomination Process and procedures for the team that will be nominated to the COC for the Tokyo Games.

Prior to publication, the Cycling Canada INP for the Tokyo Games will be circulated to the Cycling Canada Athletes Council for feedback, published in draft form on the Cycling Canada website, and submitted to the High Performance Committee for ratification.

11. Section 3 of the Policy provides the International Federation Criteria and indicates that the selection period is between May 28, 2018, and May 16, 2021, for mountain bike:

SPORT	Start date	End date	Quota announced	Link to UCI policy
Road	Oct. 22, 2018	Oct. 22, 2019	Nov. 15, 2019	Road Cycling
Mountain Bike*	May 28, 2018	May 16, 2021	May 23, 2021	Mountain Bike
BMX (Race)**	Sept. 1 st , 2018	May 30, 2021	June 6, 2021	BMX Race
BMX Freestyle Park****	Nov. 1 st , 2018	June 8, 2021	June 15, 2021	BMX Freestyle Park
Track	Aug. 30, 2018	March 3, 2020	March 9, 2020	Track Cycling

**Qualification timeline revised due to Games postponement. Does not include World Cups taking place between March 3, 2020, and Dec. 31, 2020; includes the first two World Cups in 2021 (May 8-9 and May 15-16). Quotas will be announced one week after the final qualification event.*

12. Section 5 of the Policy sets out the Selection Criteria for each cycling sport. For mountain bike the criteria are:

5. SELECTION CRITERIA

The Specific Selection Criteria below are the criteria used to select athletes to events in each cycling sport. These criteria also make reference to the Other Factors (Clause 6), Extenuating Circumstances (Clause 7) and Other Selection Matters (Clause 8) found below. [...]

SPECIFIC SELECTION CRITERIA – MOUNTAIN BIKE (XCO)	
<i>Projected team size: Based on Olympic Qualification Ranking on March 3, 2020</i>	<ul style="list-style-type: none"> • Two (2) Women • One (1) man
<i>Period for nations to qualify quota spots for the Games:</i>	May 28, 2018-March 3, 2020, plus two World Cups in 2021 (May 8-9 and May 15-16)
<i>Selection date:</i>	<ul style="list-style-type: none"> • Canada's XCO quota announced May 23, 2021 • Nomination recommendations submitted to the High Performance Committee by June 1, 2021. • All eligible athletes informed by June 4, 2021. • Nominations submitted to the COC by July 1, 2021. • Public announcement of final selection on July 5, 2021.

Objectives:	<p>Women:</p> <ul style="list-style-type: none"> • Medal • Olympic experience for athletes targeted for the 2024 Olympics* <p>Men:</p> <ul style="list-style-type: none"> • Top twelve (12) ranking • Olympic experience for athletes targeted for the 2024 Olympics**Based on Cycling Canada's Pathway to the Podium assessment
IF/IOC eligibility requirements:	To become eligible, athletes must be born on or before Dec. 31, 2002, and have at least 10 UCI points on the UCI ranking on either May 28, 2019, March 3, 2020, or the first ranking published after the last qualification event.
Cycling Canada eligibility requirements:	<p>Athletes must also have achieved one of the following:</p> <ul style="list-style-type: none"> • Be in the top 100 of the UCI ranking on March 3, 2020, or on the first ranking published after the last qualification event; or • Be nominated by the Head Coach based on Other Factors mentioned in Clause 6 of this policy.
Selection considerations:	Selection will be based on maximizing medal potential.
Decision-making authority:	The Mountain Bike Head Coach will submit nomination recommendations to the HPD. These must then be ratified by the High Performance Committee before being submitted to the COC for final approval.
Process for selection:	<p>See Appendix 1 for events that will be considered for selection.</p> <p>Athletes will be selected using the order of priority listed below until the quota for each category has been filled. Results must be achieved between May 17, 2019, and March 3, 2020, and/or at the first two rounds of the 2021 World Cup on May 8-9 and May 15-16 (see Appendix 1 for a list of events).</p> <p>Women:</p> <ul style="list-style-type: none"> • Priority 1: Athlete finishing top 5 in the Elite XCO at the 2019 MTB XCO World Championship. If more than one rider meets this criterion, only the highest-placed rider shall be selected. • Priority 2: Athletes finishing top 12 in an Elite World Cup XCO in Europe or Elite XCO World Championship*. • Priority 3: Athletes finishing top 3 in a U23 World Cup XCO in Europe or U23 XCO World Championship*. • Priority 4: Nomination by the Head Coach based on Other Factors mentioned in Clause 6 of this policy.

	<p>Men:</p> <ul style="list-style-type: none"> • Priority 1: Athlete finishing Top 5 in the Elite XCO at the 2019 MTB XCO World Championship. If more than one rider meets this criterion, only the highest-placed rider shall be selected. • Priority 2: Athletes finishing top 16 in a World Cup XCO in Europe or Elite XCO World Championship*. • Priority 3: Athletes finishing top 3 in a U23 World Cup XCO in Europe or U23 XCO World Championship*. • Priority 4: Nomination by the Head Coach based on Other Factors mentioned in Clause 6 of this policy. <p>* Tie breaker: best single result; if still tied, Head Coach breaks tie based on Other Factors that will be considered in selection mentioned in Clause 6 of this policy.</p>
Alternates	One or more alternates per category may be named using the same process as team selection.

13. Section 6 entitled "Other factors that will be considered in selection" reads as follows:

In addition to the Specific Selection Criteria, selection will take into consideration any one or more of the following additional factors in selecting riders for any Team:

- *Individual performances and/or results in international competition of the rider in the 12-month period prior to the selection to pool or team.*
- *The rider's potential to contribute to Olympic qualifying spots leading into the next Olympic Games.*
- *The rider's potential to compete at the next Olympic Games.*
- *The rider's potential to win a medal at the next Olympic Games.*
- *The rider's potential to compete at future Olympic Games.*
- *The rider's technical ability.*
- *The rider's tactical ability.*
- *The rider's physical ability / fitness.*
- *The rider's suitability for the course / venue / environmental conditions of the Event in consideration.*

- *The rider’s attitude, composure, and behaviour in high-pressure competitive environments.*
- *The results of any of the rider’s sport science tests conducted by CC, including biomechanical and physiological.*
- *The rider’s consistency and reliability in competition.*
- *The ability of the rider to contribute to a team result.*
- *The rider’s attendance, performance, attitude and conduct in training whilst a member of national team program (DTE, training camp or competition).*
- *The rider’s level of communication with CC, including sharing training programs and reports with the relevant National Coach.*

14. Appendix 1 of the Policy specifies the competitions that will be considered for selection of athletes for Mountain Bike. The Policy was amended in June 2020 to add the two 2021 competitions (in red below):

MOUNTAIN BIKE (WOMEN AND MEN)		
Date	Event	Venue
May 17-19, 2019	Mercedes-Benz UCI MTB World Cup	Albstadt (GER)
May 24-26, 2019	Mercedes-Benz UCI MTB World Cup	Nové Město na Moravě (CZE)
July 5-7, 2019	Mercedes-Benz UCI MTB World Cup	Vallnord - Pal Arinsal (AND)
July 12-14, 2019	Mercedes-Benz UCI MTB World Cup	Les Gets (FRA)
Aug. 2-4, 2019	Mercedes-Benz UCI MTB World Cup	Val di Sole (ITA)
Aug. 9-11, 2019	Mercedes-Benz UCI MTB World Cup	Lenzerheide (SUI)
Aug. 28-Sept. 1 st , 2019	UCI MTB World Championships	Mont-Sainte-Anne (CAN)
May 8-9, 2021	Mercedes-Benz UCI MTB World Cup	Albstadt (GER)
May 15-16, 2021	Mercedes-Benz UCI MTB World Cup	Nové Město na Moravě (CZE)

15. On December 9, 2020, Cycling Canada Head Coach Dan Proulx and the Claimant, after a telephone conversation, exchanged the following emails regarding the Policy: ¹

From: Dan Proulx Sent: December 9, 2020, 14:13 To: Léandre Bouchard Cc: Kris Westwood

Subject: Thanks for the phone call. Link to Olympic selection policy.

Hi Dre,

Thanks for the meeting today.

Some great suggestions on Pan Am Champs in Puerto Rico. Thanks for your enthusiasm.

As discussed on our call, here is the updated selection document for Tokyo. Tokyo Olympic Games Selection Policy (draft published April 14, 2019; final version published July 15, 2019; amended draft published July 19, 2020)

As mentioned, after the Rio Olympics the feedback from our athletes and the mountain bike community was that the selection process should be objective rather than subjective. That request led to a results-based selection process for the Tokyo Olympics.

In simple terms, the policy means that in order to earn selection to the Men's team in Tokyo you would have to surpass the 6th place result earned by Peter at the Les Get World Cup in 2019. I'm happy to hear that this is also your understanding and your goal going into next season.

As you will see in the selection document, Covid has allowed us to provide athletes with potentially (based on Covid) two World Cup races in Europe in 2021 where you could earn a better result for this process.

To be clear, World Cup and World Championship results from the 2019 season, as stated in the policy, will be used in the 2021 Olympic selection process as those results were part of the original Olympic selection process that had almost concluded when the Games postponement was announced.

Please remember that as always, if there is any discrepancy between what I've written here or what we discuss, the official selection policy shall always take precedence. It defines the rules and spirit of the selection process that we all agree to honour and follow.

If you have any other questions, please feel free to email Kris or myself.

Dan

¹ R-16: Appendix 6: Léandre Bouchard and Dan Proulx email of December 9, 2020 (my emphasis).

16. On the same day, the Claimant responds as follows:

*Thanks Dan. This is the precisions [sic] I was looking for.*²

17. On December 16, 2020, Dan Proulx contacts the athlete candidates for selection and invites them to a Zoom meeting during which the objectives and the selection policy will be recalled and explained. Two other Zoom meetings are held on January 28 and February 28, 2021.³

18. On December 29, Jude Dufour, the Claimant's personal coach wrote to Dan Proulx and Kris Westwood, Cycling Canada's High Performance Director ("HPD"), expressing his concerns about the selection criteria and events that he felt should be considered "in selecting the best XCO cyclist":⁴

Hello Dan and Mr. Westwood!

It is in my personal capacity as coach of Cyclist Léandre Bouchard, a national XCO athlete, that I am sending you this email!

It is not customary for me as a coach to ask questions about selections. In all modesty, I allow myself to ask some questions and make some comments with reference to the national selection for the Olympic Games of Tokyo 2020.

I am very puzzled and disappointed that Cycling Canada has decided to keep the 2019 results for the Olympic Games in July 2021. An extraordinary Covid-19 situation must legitimize us to change some previous rules. Cycling Canada's interest is not to try to pick the best XCO cycling [sic] a few months before the Olympics?

The two events of the 2021 World Cup (Germany and Republic) could allow to make a more judicious and relevant selection.

I understand that Peter Disera a is now in a very good position for the Olympic choice with his 6th place finish in Gets in July 2019. In the event that Léandre or another National Team rider performs as a 9th or 8th place finisher and Peter does not show interesting competitiveness in the first two world cups in May 2021! How will Cycling Canada be able to explain to the various authorities and fans that the choice has been made in 2019, i.e. 24 months before the Olympics.

I understand that Cycling Canada does not want to have a subjective decision and especially to avoid a repeat of the 2016 Rio Olympics. With two mountain bike

² *Ibid.*

³ R-13, Annexe 3, Dec. 16 Team presentation, R-14, Appendix 4, Jan. 28 Athlete presentation, R-15, Appendix 5, Feb. 28 Athlete Presentation.

⁴ C-15, TR: Subject: Tr: Subject: Re: Léandre's 2020 Olympic Selection XCO Coach, Emails of December 29, 2020, January 19-20, 2021, Jude Dufour to Dan Proulx and Kris Westwood.

events in May of 2021, it seems to me that this is enough to ensure the selection of the Canadian rider with the best result and the best level of competitiveness in 2021.

Thank you for reading and rest assured of my full cooperation with the national authorities.

19. On January 19, 2021, Kris Westwood replied to Jude Dufour:

Hello Jude (cc'ing Dan),

TR: Subject: Tr : Subject: Re: 2020 Olympic Selection by Léandre Bouchard's XCO coach, Jude Dufour

Thanks for the questions, and my apologies for the late reply.

As you know, the report [sic] of the Games leaves us with an incomparable challenge regarding the selection; the selection period was almost over (only one event left) when the IOC announced that the Games would not be held in 2020.

Our dilemma was to decide how to amend the selection criteria to reflect the changes in the schedule in a fair manner. We had to respect the results already achieved, but since the qualification period was not yet over, we also had to give an athlete the opportunity to earn a spot on the team in 2021.

The published amendments took into account the following factors:

- 1. Changes must not be retroactive - a result that was achieved prior to the criteria amendment cannot be removed.*
- 2. Athletes have told us that they want objective criteria.*
- 3. By adding the two mountain bike events in 2021, athletes have two opportunities to earn a spot on the team, instead of just one opportunity in 2020 under the original criteria.*
- 4. We have a way of evaluating the performance level of athletes and we are not obliged to select someone who does not perform - see Clause 9 on page 17 in the French version here: https://www.cyclismecanada.ca/wp-content/uploads/2021/01/2021-01-13-Olympic-selection-criteria-FINAL_FR.pdf*

To validate our decision, we consulted with the Athlete Council, the High Performance Committee and the Canadian Olympic Committee. Dan presented the criteria to the athletes a few weeks ago.

I think we've struck a good balance with these criteria. I know you don't agree with some of the points mentioned, but I hope you understand our rationale.

Don't hesitate to call me if you have any other questions.

20. On January 20, 2021, Jude Dufour replied to Kris Westwood:

Hello Kris!

Thank you for the feedback on my questions, it is greatly appreciated!

I will look at the whole thing carefully and perhaps come back to you on other points of misunderstandings!

Rest assured you shall have our full cooperation, from Léandre and myself.

Moreover, I really appreciate Coach Dan's work!

21. On March 13, 2021, Dan Proulx sent an email to all athletes regarding the selection process. It reads: ⁵

[...]

Olympic selection process at a glance:

At the request of Canada's athletes and the cycling community – the MTB selection process is objective and based on highest placing in World Cup and World Championship competition. The selection process was almost complete when Olympic postponement was announced (Only 1 race remaining in the selection process). MTB is one of CC's last Olympic programs to select its team for Tokyo. All track and most road athletes have already been selected from their 2019 results. 2021 created an opportunity to provide athletes with two more races where they might be able to earn selection. (assuming these events happen) If you want to earn selection, you need to beat the best result already posted by your teammates as described in the selection policy.

Results posted so far in process:

[...]

Elite Men

*Priority 1: Athlete finishing top 5 in the Elite XCO at the 2019 MTB XCO World Championship. If more than one rider meets this criterion, only the highest-placed rider shall be selected.**

No athlete met this standard.

*Priority 2: Athletes finishing top 16 in an Elite World Cup XCO in Europe or Elite XCO World Championship**

Peter Disera – 6th at Les Gets World Cup, 2019

Leandre Bouchard – 14th Lenzerheide World Cup, 2019

⁵ R-17, Appendix 7, Dan Proulx's email to athletes on March 13, 2021 (my highlights).

*Priority 3: Athletes finishing top 3 in a U23 World Cup XCO in Europe or U23 XCO World Championship**

Sean Fincham – 3rd in U23 at the Les Gets World Cup, 2019

Priority 4: Nomination by the Head Coach based on Other Factors mentioned in Clause 6 of this policy.

** Tie breaker: best single result; if still tied, Head Coach breaks tie based on Other Factors mentioned in Clause 6 of this policy.*

22. On May 28, 2021, according to Kris Westwood's testimony, the Claimant had a phone conversation with Dan Proulx in which he says he wanted more weight given to the Section 6 factors and Dan Proulx then explained the selection process again.
23. On June 3, 2021, Cycling Canada sent Léandre Bouchard its Decision informing him of Peter Disera's nomination as an athlete to compete at the Tokyo Games in the mountain bike category, as well as his own nomination as a non-traveling alternate:

Dear Léandre,

On behalf of Cycling Canada, this is to officially nominate you as an alternate for the Men's XCO at the Games of the XXXI [sic] Olympiad in Tokyo, Japan, scheduled for July 27, 2021.

After reviewing the international results and applying the Olympic selection criteria published on the Cycling Canada website against an athlete's Canadian Olympic quota, the nominations for Men's XCO are as follows:

Peter Disera 6th - 2019 UCI XCO World Cup - Les Gets

Non-traveling alternate: Léandre Bouchard 14th - 2019 UCI XCO World Cup - Lenzerheide

The Cycling Canada High Performance Committee has reviewed and approved these nominations. Nonetheless, it remains provisional pending possible appeals and final approval by the Canadian Olympic Committee.

If you wish to appeal this decision, the possible grounds for appeal and the process are outlined in Cycling Canada's Appeals Policy, which can be found on our website.

Cycling Canada and the COC will officially announce our selections on July 6, 2021. In the meantime, please do not make any public statements about the above nominations. Please feel free to contact me if you have any questions.

With best wishes,

Kris Westwood

24. It is from this Decision that the Claimant appeals. It is the subject of this arbitration.

III. Submissions by the Parties

Claimant

25. The Claimant "challenges Cycling Canada's Decision which selected Peter Disera, the Affected Party, as an Olympic participant in the mountain bike category".⁶ He submits that "the Respondent failed to consider all of the selection criteria, resulting in an erroneous and patently unreasonable decision that must be reversed."⁷

26. The Claimant argues that Cycling Canada "has not discharged its burden of demonstrating that the criteria were properly established and that the impugned decision was made in accordance with those criteria. According to him, CC "should have selected him as an athlete for the Olympic Games in the mountain bike discipline".⁸

Policy objectives

27. The Claimant considers that Cycling Canada's Decision and interpretation of the Policy is unreasonable as it is contrary to the goals and objectives of the Policy, as it "does not allow the selection of the athlete with the best potential to win a medal at the Tokyo Olympic Games."⁹

Section 5

28. The Claimant submits that the submissions to CC athletes "demonstrate that the only criterion applied by Cycling Canada officials in making the Decision is the criterion in Article 5 of the Policy. It is clear, according to the Claimant, that the Respondent "did not intend to consider the criteria of Article 6 of the Policy and did not consider them."¹⁰

29. Section 5, the Claimant argues, must in fact be applied in conjunction with Section 6. Cycling Canada, in its June 21 submission, concedes that it was also obliged to apply the Article 6 factors.

⁶ C-14, Claimant's Submissions, p. 2.

⁷ *Ibid.*

⁸ *Ibid.*

⁹ *Ibid.*, p. 6.

¹⁰ *Ibid.*, p. 7.

30. Jude Dufour, the Claimant's coach, on December 29, 2020, sent an email to Dan Proulx (CC's head coach) and Kris Westwood commenting on the selection criteria and telling them, in plain English, that he disagreed with CC's decision "to keep the 2019 results".¹¹

Section 6

31. The Claimant submits that the Policy is clear and that the criteria in Section 6 apply to all selections. For example, the opening paragraphs of Sections 5 and 6 make it abundantly clear that these two articles apply to the selection process. In addition, the "Policy does not state that overriding weight should be given to the application of the criteria in Section 5."¹²

32. The Claimant's counsel, in summarizing her arguments, points out that Kris Westwood, in his testimony, mentioned half-heartedly to having considered the factors in Section 6 of the Policy. She asserts that no other evidence supports Kris Westwood's assertion that he "considered" these "criteria" [sic].¹³

33. According to the Claimant, while Cycling Canada "alleges that the Policy allows it to consider the factors in Section 6 only in the case of a tie (para. 28), [it] then argues to the contrary that it did consider these factors to see if they supported 'the reversal of the Article 5 selection decision' (para. 30)."¹⁴

34. This position is untenable, the Claimant submits. If, on the one hand, Cycling Canada had to consider the "criteria" [sic] of Section 6, it could "only use them to verify whether these criteria allow for the "reversal" of the selection under Section 5, thus limiting their scope to a paltry or insignificant role". This approach would have the effect of "vitiating the entire selection process, since, because of this limited scope of the criteria in Section 6, it must be concluded that the Decision was analyzed through a 'distorting prism'."¹⁵

35. If, on the other hand, the Respondent did not have to consider these "criteria" [sic], "the fact that it did consider them demonstrates that Cycling Canada's decision was not made in

¹¹ C-15, TR: Subject: Tr : Subject: Re: 2020 Olympic selection by Léandre's XCO coach. December 29, 2020 emails, January 19-20, 2021, Jude Dufour to Dan Proulx and Kris Westwood.

¹² C-14, Claimant's Submissions, June 22, 2021, p. 9.

¹³ C-21, Summary of arguments by Claimant Léandre Bouchard, June 25, 2021, p. 1.

¹⁴ C-14, Claimant's Submissions, June 22, 2021, p. 4.

¹⁵ *Ibid.*

accordance with the Policy.”¹⁶

36. The Claimant therefore maintains that Cycling Canada has not discharged its burden of proof and that it has not applied Section 6.

37. The Claimant submits that the "first criterion [sic] of Section 6 of the Policy, the performance of the last twelve months, is a determining factor and probably the one that best ensures that Cycling Canada's objectives are met", as these results are the most contemporary.¹⁷ In "the context where there is a significant gap between 2019 and 2021 performances, the most recent results must be the determining factor.”¹⁸

38. The Claimant considers that he should be selected as the athlete representing mountain bike for the Tokyo Games, as he has had the best results over the last twelve months. He is currently the top performer and "he is the top Canadian in 2020 (March 3rd results) and 2021 (May 18th results).¹⁹ He has placed ahead of Peter Disera in all 9 races prior to selection and has done so consecutively, including the last 5 World Cups in 2020 and 2021:²⁰

<u>Date</u>	<u>Athlete</u>	<u>Position</u>	<u>Event</u>
October 1 st , 2020	Léandre Bouchard Peter Disera	35 th 70 th	Mercedes-Benz UCI MTB World Cup Nové Město na Moravě #1
October 2 nd , 2020	Léandre Bouchard Peter Disera	31 st 64 th	Mercedes-Benz UCI MTB World Cup Nové Město na Moravě #2
October 10, 2020	Léandre Bouchard Peter Disera	26 th 40 th	Mercedes-Benz UCI MTB World Cup Leolang
May 9, 2021	Léandre Bouchard Peter Disera	15 th 42 nd	Mercedes-Benz UCI MTB World Cup Albstadt
May 16, 2021	Léandre Bouchard Peter Disera	19 th 44 th	Mercedes-Benz UCI MTB World Cup Nové Město na Moravě

Table A: Results of the five international races of the last twelve months. In red, the top result for each race.

39. Finally, with two months to go before the Olympics, the Claimant placed 15th, just a few spots away from a top 12 finish, Cycling Canada's specific goal for mountain bike. He reminds us

¹⁶ *Ibid.*

¹⁷ C-14, Claimant's submissions, June 22, 2021, p.9

¹⁸ C-21, Summary of arguments by Claimant Léandre Bouchard, June 25, 2021, p. 2.

¹⁹ *Ibid.*

²⁰ C-02, Appendix A, p. 7. C-05, D -3, Results World Cup Albstadt Germany, May 9, 2021, C-06, Results World Cup Nove Mesto Na Morave Czech Republic, May 16, 2021, C-07, D-3, Results World Cup Nove Mesto Na Morave Czech Republic, October 1, 2020, C-08, D-3, Results World Cup Nove Mesto Na Morave Czech Republic, October 2, 2020, C-09, D-3, Results World Cup Leolang Austria, October 10, 2020.

that his future potential "is excellent, considering his results of the last two years, the age he will have reached for the next Olympic Games, his consistency, the improvement of his performances and his rankings." ²¹

40. In conclusion, the Claimant refers to the jurisprudence regarding the deference owed by arbitrators to sports federations and states that "deference does not extend to allowing the confirmation of an unreasonable or illegal decision." ²²

Cycling Canada

41. Cycling Canada submits that "the decision to select the Affected Party is reasonable and was made in accordance with the intent and wording of its amended Team Selection Policy".²³

42. The Respondent invited me to answer the following question: "Does the evidence demonstrate that CC made a decision that meets its Selection Policy and the reasonableness standard of review [?]" ²⁴

Policy objectives

43. Cycling Canada reminds us that its "Policy was developed in consultation with the Athletes' Council in order to prioritize the objectivity of selection criteria." ²⁵

44. In fact, according to Cycling Canada, its "Policy aims to select men's mountain bike athletes who demonstrate the best potential to finish in the top 12 at the Games and to provide an Olympic experience for those athletes targeted for the 2024 Games." ²⁶

Section 5

45. The criterion in Section 5, the Respondent writes, provides "that athletes will be selected on the basis of their best result during the selection period between May 28, 2018, and March 3, 2020, plus two 2021 World Cup events scheduled for May 8-9 and May 15-16, 2021." ²⁷

²¹ C-21, Summary of arguments by Claimant Léandre Bouchard, June 25, 2021, p. 2.

²² *Ibid.*

²³ R-10, Submissions by Cycling Canada, June 21, 2021, para 3.

²⁴ R-22, Summary of arguments by Cycling Canada, June 25, 2021.

²⁵ *Ibid.*, para 1. R-10, Submissions by Cycling Canada, June 21, 2021, para 4.

²⁶ R-10, Submissions by Cycling Canada, June 21, 2021, para 5.

²⁷ *Ibid.*, para 7.

46. Cycling Canada refers to Kris Westwood 's testimony that, according to his lawyer, "the intent of the Policy was clearly to select athletes on the basis of objective results achieved during the selection period and events and that in addition, or in addition, the other factors of Section 6 are taken into consideration." ²⁸
47. CC's counsel added that Mr. Westwood's testimony on this point was uncontradicted. The criteria in 5 "govern the selection (used to select) and the factors in Article 6 are, in a complementary manner, considered in the final decision." ²⁹
48. The Respondent therefore submits that I should "adopt the logical and liberal interpretation of the Policy that Article 5 prevails (or governs) and that one or more of the 'other' factors in Article 6 are taken into account." ³⁰
49. CC's communications to athletes about its Policy were "numerous and clear." ³¹ Dan Proulx explained the Policy repeatedly, emphasizing the importance of Article 5, while reminding them that the entire Policy applied. ³²
50. Indeed, the Claimant confirmed that he became aware of the Policy upon its release on July 15, 2019, as well as its amendments in 2020 and 2021. He asked Dan Proulx and Kris Westwood questions on several occasions outside of the information sessions. His questions were always answered, and the selection process explained. ³³
51. Cycling Canada also argues that the Claimant has often confirmed that he understood that, to qualify, he had to obtain a better result than the 6th place of the Affected Party at the World Cup in Les Gets in 2019.
52. The Respondent submits that the Claimant has not provided any evidence that Cycling Canada's decision was unreasonable. The Affected Party achieved a 6th place while the Claimant's best result was a 14th place. ³⁴

²⁸ R-22, Summary of arguments by Cycling Canada, June 25, 2021, para 1, a).

²⁹ *Ibid.*

³⁰ *Ibid.*

³¹ *Ibid.*, para 1, d).

³² R-10, Submissions by Cycling Canada, June 21, 2021, para 22.

³³ May 28, 2021 phone conversation per Kris Westwood 's testimony, December 9, 2020 email to Dan Proulx, December 29 email from Jude Dufour to Dan Proulx and Kris Westwood, March 13, 2021 email to athletes.

³⁴ R-22, Summary of arguments by Cycling Canada, June 25, 2021, para 5.

Article 6

53. Cycling Canada submits that the Policy does not allow the HPC to place greater emphasis on more contemporary results. CC must select the top athletes based on results from all World Cup events during the qualification period.
54. Cycling Canada argues that the HPC "exercised its discretion by noting the objective results of the application of Article 5 and considering the Article 6 factors."³⁵
55. According to the Respondent, the evidence shows that its decision was made in accordance with the Policy, by three groups of experts, namely the Head Coach, the HPD and the HPC, and that the Affected Party represents, "in the opinion of these experts, the best candidate to meet the objectives of the Policy, namely, to achieve a top 12 finish at the Games and to gain experience for Paris 2024."³⁶
56. Cycling Canada therefore concludes that the Decision was made in accordance with the Policy, is not manifestly wrong and "exercised its discretion in a reasonable, diligent, fair and structured manner."³⁷

Affected Party

57. Peter Disera, the athlete selected by Cycling Canada to represent Canada at the Games in the mountain bike event, although informed of his Affected Party status, did not participate in the arbitration.
58. Three witnesses appeared at the hearing in the following order: Kris Westwood, Cycling Canada High Performance Director, Jude Dufour, the Athlete's coach and Léandre Bouchard, the Athlete.

Witnesses

59. The three witnesses answered all the questions that were asked of them frankly. I found them all very credible.

³⁵ *Ibid*, para 1, b).

³⁶ *Ibid*, para 5.

³⁷ R-10, Submissions by Cycling Canada, June 21, 2021, para 62.

60. I refer in my decision only to the essential elements of their testimony relating to the issues in dispute.

Kris Westwood

61. Mr. Westwood, in his capacity as High Performance Director, recalled how the Policy was developed. After the 2016 Rio Olympic Games, consultation with the mountain bike community revealed that athletes wanted objective selection criteria. This was the basis for Cycling Canada's thinking and development of the Policy. Once drafted, the Policy was sent to the Athlete Council for input and then submitted to the HPC for ratification.

62. In accordance with the Olympic rules, the final version of the Policy was published one year before the Games, on July 15, 2019. It is only after the cancellation and postponement of the Games that the Policy was amended to allow for the completion of the qualification processes.

63. Mr. Westwood explained that the purpose of the Policy is to allow for the selection of athletes who are capable of winning medals or providing a first Olympic experience. The changes to the Policy made it clear that the year 2020, due to the pandemic, would not be considered as Cycling Canada wanted to protect the health of the athletes.

64. Mr. Westwood has detailed the selection decision-making process for each decision, as provided for in Article 5(8), in this case Dan Proulx making the selection. Kris Westwood, as HPD, then verifies that the selection has been made in accordance with the criteria and submits it to the HPC for approval.

65. Mr. Westwood explained that Article 5 "governs" the selection criteria and therefore applies as an objective criterion first. The four priorities established by the criterion are evaluated in order. Thus, Article 6 is only considered in the situation where (1) a tie must be broken, or (2) an athlete must be assessed under priority 4. Since in this case the Affected Party and the Claimant qualified under priority 2, it was the best result (the 6th place finish of the Affected Party) that led to his nomination.

66. Article 6, which provides for "other" factors, is complementary to Article 5, Mr. Westwood stated.

67. During his testimony, Kris Westwood explained that the "dilemma" he faced after the postponement of the Games, and referred to in his January 19, 2021, email to Jude Dufour, was to provide a "fair" change that would respect the results achieved in 2019 but also add more events in 2021 that would allow athletes to attempt to qualify.
68. Mr. Westwood confirmed that both athletes had been assessed by the HPC under the Article 6 factors and that none of these factors were sufficient to change the Affected Party's qualification under the Article 5 criteria. In his view, the two athletes are "very equal" in many respects and there was no question that the Article 6 factors took precedence over the Article 5 criteria.
69. According to Mr. Westwood, as noted above, on May 28, 2021, in a telephone conversation with the Claimant and Dan Proulx, the Claimant said that he wanted more weight to be given to the Article 6 factors. The selection process was explained again by representatives of Cycling Canada.

Jude Dufour

70. Jude Dufour has been the Claimant's trainer for several years. He testified in great detail about his training over the past 14 years. He commented on the progression of the Athlete to the international level where he competes today.
71. During his testimony, Mr. Dufour explained his December 29, 2020, email to Dan Proulx and Kris Westwood.³⁸
72. In response to a question from counsel for the Respondent, Mr. Dufour confirmed that he and the Athlete fully understood the Article 5 selection criterion that had been explained to the athletes that only a result higher than 6th place for the Affected Party would qualify the Claimant to "walk in through the front door".
73. He explained that in order to "get in the back door," he had encouraged the Claimant to achieve results that would allow him to be selected "under Article 6." As a coach, he responded that he sometimes had to ignore "administrative hassles." His role as a coach was to focus on the competitiveness of the Claimant.

³⁸ *Supra*, para 18.

74. Mr. Dufour testified that he and his athlete knew that a 6th place finish would be difficult to achieve at the 2021 event and that "Léandre was aiming for the best possible result."

75. According to the witness, Claimant's recent performances could allow him "to enter the top 12." Physically and mentally, it was possible for the Claimant to "reach a second peak performance for the Games."

Léandre Bouchard

76. Mr. Bouchard, the Claimant, testified with great candor about his preparation with his coach to qualify for the Games. He explained, among other things, his progress since the beginning of his journey and especially during the last year. His recent results in various international competitions and in the UCI ranking almost always placed him in front of the Affected Party.³⁹

77. His technical abilities, stamina and preparation, his performance in hot and humid conditions, and his knowledge of the Tokyo course, in addition to his contemporary results, confirm that he is "the man for the job".

78. He acknowledged that he attended all of Cycling Canada's presentations about the Games and the selection process.

79. He also confirmed that he had read the Policy when it was first released on July 15, 2019 and understood that he had to "beat the 6th place" of the Affected Party to qualify.

IV. ANALYSIS

80. To resolve this appeal, I must first analyze Cycling Canada's Selection Policy for the XXXII Olympic Games in Tokyo published on July 15, 2019, amended on June 19, 2020, due to the cancellation of the Games postponed by one year because of the COVID-19 pandemic, updated on January 12, 2021, and April 9, 2021, and last updated on May 5, 2021.

81. It is well documented that the pandemic and the postponement of the Games have disrupted the selection policy of athletes for the Tokyo Games for many disciplines in the world of sport including, most notably, in this case, the Selection Policy of Cycling Canada.

³⁹ See C-05 to C-09, and C-16 to C-18.

82. I note first of all that, since the first version, the objectives of the Policy have never been amended. They read as follows:

“The first objective of the selection policy and procedures is to select the maximum number of athletes with the potential to win a medal at the Tokyo Games. The second is to provide an Olympic opportunity for athletes in a position to compete at future Games through Cycling Canada's High Performance Program. Performance goals specific to each cycling sport are also listed below.” (my emphasis)

83. I recall in this regard, among others, the testimony of Kris Westwood, that after the Rio Games in 2016, it was necessary in the future to prioritize the objectivity of the selection criteria, hence the importance of the “performance objectives specific to each cycling sport”.⁴⁰

84. On June 15, 2020, amendments to the Policy were made that are highly relevant to this appeal as the qualification for mountain bike was not complete. Cycling Canada had not, as of that date, selected athletes for the mountain bike events, including one male athlete. I am providing an excerpt of these amendments below:

- *Qualification by nations is not complete for mountain bike, BMX Race or BMX Freestyle; according to the amended qualification processes published by the UCI:*
 - *MTB qualification will include the Olympic ranking up to March 3, 2020, plus:*
 - *2 World Cups in 2021 (dates and locations TBD)*
 - *Note: Canada's projected quota (2 women, 1 man) is unlikely to change.*

85. Cycling Canada stated at that time that these changes had been adopted with regard to certain principles, the most important of which for my analysis are:

- *Athletes' health remains the top priority.*
- *Cycling Canada seeks to avoid creating undue incentives for athletes to resume competition in 2020.*
- *As a consequence, other than in men's road, no events taking place between March 3, 2020, and the end of 2020 will be considered for selection.*
- *In men's road, athletes are subject to their professional team contracts and Cycling Canada's position on Olympic selection will have little to no influence on their decision to resume competition in 2020.*
- *Athletes who have already been selected will remain selected, subject to the Performance Readiness clause of this document (Clause 9).*

⁴⁰ C-04, Selection policy.

- *New athletes may only be selected to events for which selection is complete for the following reasons only:*
 - *To replace athletes who withdraw or are removed from the team; or*
 - *As additional alternates.*
- *For the remaining spots, selection will consider performances at events that have already taken place that were part of the published INP, in addition to events in 2021 that correspond to the type of major international competitions that were part of the original INP (my emphasis).*

86. Under the heading "International Federation Criteria" in Article 3 of the Policy, the following is now provided for the sport of mountain bike:

[...]

Each cycling sport has different qualification timeline and criteria, as follows:

SPORT	Start date	End date	Quota announced	Link to UCI policy
Mountain Bike*	May 28, 2018	May 16, 2021	May 23, 2021	Mountain Bike

**Qualification timeline revised due to Games postponement. Does not include World Cups taking place between March 3, 2020, and Dec. 31, 2020; includes the first two World Cups in 2021 (May 8-9 and May 15-16). Quotas will be announced one week after the final qualification event.*

87. Before turning to Articles 5 and 6, which are at the heart of this dispute, I note, in plain language, that the Policy, as amended following the one-year postponement of the Games, provides that the qualification of mountain bike athletes "in addition to the Olympic ranking until March 3, 2020" now includes "two World Cup events from 2021".

88. Specifically, the Policy states that "selection will take into account performances at events that have already taken place...in addition to the 2021 events".

89. From the two that they were in 2019 just prior to the Games scheduled for July 2020, there are now four "events" or "trials" that will be considered for qualification of the men's mountain bike rider who will compete in the 2021 Tokyo Games.

90. I remember the explanation given by Kris Westwood to the Athlete's coach, Jude Dufour, on January 19, 2021, when he said he was disappointed that Cycling Canada had decided to "keep

the 2019 results for the Olympic Games in July 2021".⁴¹

91. As mentioned earlier, Mr. Westwood, Cycling Canada's High Performance Director, responded to Mr. Dufour as follows:⁴²

As you know, the report [sic] of the Games leaves us with an incomparable challenge regarding the selection; the selection period was almost over (only one event left) when the IOC announced that the Games would not be held in 2020.

Our dilemma was to decide how to modify the selection criteria to reflect the changes in the schedule in a fair manner. We had to respect the results already achieved, but since the qualification period was not yet over, we also had to give an athlete the opportunity to earn a spot on the team in 2021.

The published amendments took into account the following factors:

- 1. Changes must not be retroactive - a result that was achieved prior to the criteria amendment cannot be removed.*
- 2. Athletes have told us that they want objective criteria.*
- 3. By adding the two mountain bike events in 2021, athletes have two opportunities to earn a spot on the team, instead of just one opportunity in 2020 under the original criteria.*
- 4. We have a way of evaluating the performance level of athletes and we are not obliged to select someone who does not perform - see Clause 9 on page 17 in the French version here: https://www.cyclismecanada.ca/wp-content/uploads/2021/01/2021-01-13-Olympic-selection-criteria-FINAL_FR.pdf*

To validate our decision, we consulted with the Athlete Council, the High Performance Committee and the Canadian Olympic Committee. Dan presented the criteria to the athletes a few weeks ago.

92. Before answering the question that counsel for the Respondent invites me to answer, namely "Does the evidence demonstrate that CC has made a decision that meets its Selection Policy and the standard of reasonableness?"⁴³ I felt it was important to review the articles of the Policy that precede Articles 5 and 6 and that must shape my decision.

93. The relevant excerpts from Articles 5 and 6 have been quoted above. At this point, I only want to highlight the French and English versions of the first paragraph, the "*chapeau*", of each of

⁴¹ C-15, TR: Subject: Tr: Subject: Re: Olympic 2020 selection du XCO coach for Léandre, December 29, 2020, January 19-20, 2021, Jude Dufour to Dan Proulx and Kris Westwood.

⁴² *Ibid.* (my emphasis)

⁴³ R-22, Summary of arguments by Cycling Canada, June 25, 2021.

these two Articles:

5. *CRITÈRES DE SÉLECTION*

Les critères de sélection propres à chaque sport cycliste indiqués ci-dessous régissent la sélection des athlètes en vue d'épreuves, en plus de se référer aux articles 6 (Autres facteurs de sélection), 7 (Circonstances exceptionnelles) et 8 (Autres questions relatives à la sélection) expliqués ci-après.

5. *SELECTION CRITERIA*

The Specific Selection Criteria below are the criteria used to select athletes to events in each cycling sport. These criteria also make reference to the Other Factors (Clause 6), Extenuating Circumstances (Clause 7) and Other Selection Matters (Clause 8) found below.

6. *AUTRES FACTEURS PRIS EN CONSIDÉRATION EN VUE DE LA SÉLECTION*

En plus des critères de sélection propres au sport, les personnes responsables de la sélection prendront en considération un ou plusieurs facteurs énoncés ci-dessous pour la sélection des athlètes de n'importe quelle équipe :

6. *OTHER FACTORS THAT WILL BE CONSIDERED IN SELECTION*

In addition to the Specific Selection Criteria, selection will take into consideration any one or more of the following additional factors in selecting riders for any Team:

94. While there is no provision that indicates to me that in the event of difficulties in interpreting the Policy one version should be preferred over another, I have no doubt that in interpreting the Policy I am entitled to use either or both versions.
95. While the French version of the first paragraph of Article 5 has only one sentence, the English version has two and, in my opinion, is much clearer.
96. The first sentence in English reads as follows: "The Specific Selection Criteria below are the criteria used to select athletes". In French, it reads "*les critères de sélection propres à chaque sport cycliste indiqués ci-dessous régissent la sélection des athlètes*". (My emphasis)
97. It is therefore clearly established that under the Policy the selection criteria in Article 5 are used to select the athlete to be nominated for the Mountain Bike event in Tokyo.
98. My second important observation with respect to the two headings of Article 5 is the following; again, the English version is more precise than the French version.

99. The second sentence of the English version states very clearly that "These criteria (i.e., the selection criteria in Article 5) also make reference to the Other Factors (Clause 6)...found below".
100. The French text, although not as clear as the English text, is to the same effect: the Selection Criteria in Article 5 also refer to other selection factors mentioned below, among others, in Article 6
101. And, in fact, for the mountain bike selection criteria, under the headings "Cycling Canada Eligibility Requirements" and "Selection Process", there is specific reference to the Head Coach considering "other factors set out in Article 6" in three specific instances for "nomination" of the athlete. These three instances do not apply in this case.
102. With this in mind, the selection criteria for the male cyclist in Article 5 are very clear.
103. I summarize them as follows. Firstly, during the qualification period any athlete must be ranked in the top one hundred (100) of the March 3, 2020, UCI Rankings and, following the selection process, in this case Priority 2 applies, namely:
- Priority 2: Athletes finishing top 16 in a World Cup XCO in Europe or Elite XCO World Championship*.*
- * Tie breaker: best single result; if still tied, Head Coach breaks tie based on Other Factors mentioned in Clause 6 of this policy.*
104. The evidence shows that both the Affected Party and the Claimant have satisfied this Priority 2. Peter Disera placed 6th at the 2019 UCI XCO World Cup-Les Getz and Léandre Bouchard placed 14th at the 2019 UCI XCO World Cup-Lenzerheide.
105. I now turn to Article 6, the first paragraph of which I quoted above. While Article 5 expressly mentions that the criteria for selection specific to the sport "are the criteria used to select athletes", Article 6, on the other hand, stipulates that the persons responsible for selection "shall take into consideration" one or more of the following factors.
106. I note, first of all, that Article 5 mentions verbatim "*The Specific Selection Criteria below*", while Article 6 uses the words "Other factors that will be considered".
107. The words "selection criteria" and "factors to be considered" clearly have a very different

connotation. The former controls selection, while the latter is an additional element to be considered.

108. In my view, while I accept the argument by the Claimant's counsel that both articles "apply to the selection process", I cannot accept her contention that "no preponderant weight is given to Article 5".

109. On the contrary, it is clear, as counsel for the Respondent submits, that a grammatical and logical interpretation of the first paragraph of Article 5 dictates to me the inescapable conclusion that those with decision-making responsibility for Cycling Canada must make the selection of athletes with reference, first and foremost, to the criteria in Article 5.

110. Now the question remains: if Article 6 applies to the selection process, what is the scope of its application?

111. Again, I wish to emphasize, as I pointed out earlier, that this article does not refer to "selection criteria" but rather to "factors" that will be considered. This distinction is important.

112. I also wish to emphasize that with the exception of the first factor, all other factors mentioned in Article 6 are purely subjective.

113. This first factor reads as follows:

Individual performances and/or results in international competition of the rider in the 12-month period prior to the selection to pool or team;

114. It is this first factor that the athlete's lawyer says must be applied to the selection process and Léandre Bouchard's final results in 2021 "must be the determining factor". For Me Boily, this factor is a criterion.

115. For the above and following reasons, I disagree with Me Boily.

116. I could stick to the distinction I noted above between the wording of Article 5 which deals with selection criteria and the wording of Article 6 which refers to "one or more factors" to be considered. This distinction seems to me to be compelling and convincing.

117. But there is more. Where Article 5 refers to Article 6, in all three places it is explicitly stated that the head coach may in each case make the appointment of an athlete "under the

other factors set out in Article 6" and "based on the factors set out in Article 6 ».

118. In these three cases, as noted earlier, the Article 6 factors are used specifically as selection criteria.

119. However, in all other cases where those responsible for selection are required to consider one or more of the factors set out in Article 6, as in this case, those factors shall not be used as selection criteria. They shall be considered but shall not govern the nomination of an athlete.

120. In other words, as submitted by counsel for Cycling Canada, the selection criteria in Article 5 are paramount and override the factors in Article 6 which must only be considered. This interpretation of the Policy by Cycling Canada, in my view, is appropriate and reasonable.

121. This brings me to another very important question. Were the other factors mentioned in Article 6, especially the first one, actually taken into consideration by Cycling Canada in the exercise of its decision-making authority?

122. Counsel for the Athlete argues that "Cycling Canada has failed to demonstrate, by a preponderance of the evidence, that it has applied the criteria [sic] of Article 6 of the Policy" while counsel for the Respondent submits that the Head Coach, the HPD, as well as the High Performance Committee have considered some of the other factors in Article 6.

123. For the following reasons, I agree with Cycling Canada's counsel.

124. Mr. Westwood, in response to a question from Me Girardin as well as when cross-examined by Ms. Boily, stated that he had considered several of the Article 6 factors.

125. I acknowledge that other than Dan Proulx 's numerous reminders to athletes that the entire Policy applied, there is no other documentary evidence on file that Cycling Canada's decision-making bodies took into consideration the factors mentioned in Article 6.

126. That being said, I have no hesitation in accepting Mr. Westwood's testimony. I consider his testimony entirely credible.

127. I do not accept the contention of Léandre Bouchard's counsel that Kris Westwood has

mentioned only half-heartedly to have considered the Policy's Article 6 criteria [sic]."⁴⁴

128. As Mr. Westwood stated on cross-examination, "We looked at the results of the last twelve months but put them in context".

129. It is therefore established to my satisfaction that Cycling Canada's decision-making bodies took into consideration, among other things, the factor mentioned in the first indent of Article 6.

130. I must now decide whether this factor, namely Léandre Bouchard's results during the last twelve (12) months⁴⁵ prior to his selection as a "non-traveling alternate" which were superior to Peter Disera's "should be a determining factor", as submitted by Ms. Boily.

131. For the following reasons, I answer in the negative to this submission by Ms. Boily.

132. First of all, it seems obvious to me that if Cycling Canada had wanted this factor to be a selection criterion, rather than being in Article 6 under "Other Factors", it would have been inserted in Article 5.

133. In addition, I wish to point out that this factor (in fact, all of Article 6) was in the version of the Policy released on July 15, 2019, in anticipation of the July 2020 Games. At that time, there was some alignment between this factor and the Athlete Selection Process to be selected for the Mountain Bike event at those Games. When the Games were postponed for a year, this factor became less relevant. Perhaps it should have been updated.

134. In any event, given the wording of Articles 5 and 6, I agree with counsel for Cycling Canada that the Policy did not authorize the High Performance Committee to give greater weight to Léandre Bouchard's results in 2021 than to the "Events considered for Olympic selection" as set out in Appendix 1:⁴⁶

⁴⁴ C-21, Summary of arguments by Claimant Léandre Bouchard, June 25, 2021, p. 1.

⁴⁵ See *Supra* para 38. C-02, Annex A, p. 7.

⁴⁶ C-04, Selection Policy, Appendix 1.

MOUNTAIN BIKE (WOMEN AND MEN)		
Date	Event	Venue
May 17-19, 2019	Mercedes-Benz UCI MTB World Cup	Albstadt (GER)
May 24-26, 2019	Mercedes-Benz UCI MTB World Cup	Nové Město na Moravě (CZE)
July 5-7, 2019	Mercedes-Benz UCI MTB World Cup	Vallnord - Pal Arinsal (AND)
July 12-14, 2019	Mercedes-Benz UCI MTB World Cup	Les Gets (FRA)
Aug. 2-4, 2019	Mercedes-Benz UCI MTB World Cup	Val di Sole (ITA)
Aug. 9-11, 2019	Mercedes-Benz UCI MTB World Cup	Lenzerheide (SUI)
Aug. 28-Sept. 1 st , 2019	UCI MTB World Championships	Mont-Sainte-Anne (CAN)
May 8-9, 2021	Mercedes-Benz UCI MTB World Cup	Albstadt (GER)
May 15-16, 2021	Mercedes-Benz UCI MTB World Cup	Nové Město na Moravě (CZE)

135. The evidence shows that the best placing of the Affected Party in these events is a 6th place in the Les Getz race in July 2019.

136. In order to be selected, the Claimant, in one of the two 2021 World Cup events, therefore, had to place among the top six cyclists, and thus surpass (or equal) the Affected Party, which he failed to do.

137. As I have determined above, the selection criteria specifically mentioned in Article 5 are paramount and override, among other things, the factor mentioned in the first indent of Article 6.

138. Affected Party Peter Disera, having ranked higher than the Claimant in the events considered for selection by Cycling Canada was therefore, in accordance with the Policy, to be selected by Cycling Canada to represent Canada as a mountain bike athlete at the Tokyo Games. Any other decision would have been illegal.

139. My interpretation does not mean that the factors mentioned in Article 6 have only a "paltry or insignificant" role as Ms. Boily claims.

140. While the criteria for selecting athletes are found in Article 5, the factors in Article 6 play an important role in the evaluation of athletes as demonstrated by the evidence.

141. Finally, it is not disputed by Claimant that he and his coach, Jude Dufour, were aware of the Policy since its issuance on July 15, 2019, its amendments on June 19, 2020, and in 2021, and that they knew what Léandre Bouchard had to accomplish to be selected for the Games.

142. The evidence to this effect is abundant:

- The emails exchanged between Dan Proulx and the Claimant on December 9, 2020.
- The exchange of emails between Jude Dufour and Kris Westwood on December 29, 2020, January 19 and 20, 2021.
- The email from Dan Proulx to all athletes, including the Claimant, on March 13, 2021.
- Conference call on May 28, 2021, between the Claimant, Dan Proulx and Kris Westwood.
- Zoom meetings chaired by Dan Proulx with all athletes, including the Claimant, on December 16, 2020, January 28 and February 28, 2021.

143. The explanation for the amendments to the selection process for athletes to be nominated for mountain bike is very well summarized by Kris Westwood in his January 19, 2021, email to Jude Dufour:

Our dilemma was to decide how to amend the selection criteria to reflect the changes in the schedule in a fair manner. We had to respect the results already achieved, but since the qualification period was not yet over, we also had to give an athlete the opportunity to earn a spot on the team in 2021.

144. Moreover, it would be, in my opinion, grossly unfair to ignore the results already achieved for the pre-2021 qualifiers. Had the pandemic not occurred, only one qualifying event would have determined the final selection, rather than the two ultimately offered in the amended criteria. In some respects, this provided the claimant with an unexpected opportunity to achieve a better result than the Affected Party's 6th place in order to qualify for the Games.

145. Dan Proulx's message to all athletes on March 13, 2021, is also very clear and precise:

[...]

2021 created an opportunity to provide athletes with two more races where they might be able to earn selection. (assuming these events happen) If you want to earn selection, you need to beat the best result already posted by your teammates as described in the selection policy.

[...]

146. After Dan Proulx clearly explained on December 9, 2020, the objective selection criteria

that would be used to govern the Athlete's selection for the mountain bike event in Tokyo⁴⁷, Léandre Bouchard responded “Thanks Dan. This is the precisions [sic] I was looking for.”⁴⁸

147. I therefore conclude that the Respondent has met its burden of proof pursuant to Section 6.10 of the Canadian Sport Dispute Resolution Code to my complete satisfaction.

148. I am satisfied that Cycling Canada's Decision was made in accordance with the Policy and was reasonable.

149. I understand very well that this decision disappoints the Athlete for whom I have a lot of sympathy, especially considering his brilliant performances of the last few months on the international circuit.

150. I am confident that if the Claimant continues to perform as he did over the last year, he will be a strong candidate for selection to participate in the 2024 Games.

151. Even if I wanted to disregard the Policy and substitute an interpretation different from the one I have applied and deemed reasonable (*quod non*), the arbitrator that I am, according to a constant jurisprudence to which I subscribe, could not substitute his judgment for that of the experts of the Federation to whom I owe deference.

152. The Parties agree on the principle that, in the absence of an unreasonable and unlawful determination, the Arbitrator shall always defer to the decision of the Federation.⁴⁹

153. In closing, I wish to thank the Parties and their counsel for their professionalism and the high quality of their written and oral submissions.

V. DECISION

154. The Claimant's request is denied.

Signed in Montreal, this 12th day of July 2021.

The Hon. L. Yves Fortier, QC, Arbitrator

⁴⁷ R-16 Appendix 6 : December 9, 2020 Léandre Bouchard and Dan Proulx email.

⁴⁸ *Ibid.*

⁴⁹ See, among others, Arbitrator Pound's decision in Palmer v. Athletics Canada (SDRCC 08-0080) (R-19, Appendix 9).