

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

NO: SDRCC 11-0153

**LEE BARICH
DREW GILDNER
(CLAIMANTS)**

AND

**CANOE-KAYAK CANADA (CKC)
(RESPONDENT)**

Attendances and Appearances

Lee Barich:	Claimant
Drew Gildner:	Claimant
Dean Oldershaw:	Kayak Coach, Mississauga Canoe Club (representing the Claimants)
Barney Wainwright:	High Performance Director, Canoe-Kayak Canada
Lorraine Lafrenière:	Director General, Canoe-Kayak Canada
Marie-Claude Asselin:	SDRCC Secretariat
Francine Black:	SDRCC Secretariat
Paul Godin:	SDRCC Observer

Heard: 19 July 2011 By way of telephone conference

REASONS FOR DECISION

1. The claimants are both athletes competing in the sport of canoe-kayak. They have recently participated in various trials and events during with the objective of being selected to represent Canada at the 2011 Junior World Championships.
2. Canoe-Kayak Canada ("CKC") is the national sport organisation in Canada for the sport of Canoe Kayak. CKC is the body responsible for selecting athletes to represent Canada in its sport.
3. The High Performance Committee ("HPC") undertakes selection responsibilities for CKC. The HPC concluded that the claimants had not met the requisite criteria for

selection to participate in the C2 1000m event at the 2011 Junior World Championships which were due to be held on 29 – 31 July 2011 in Brandenburg, Germany.

4. The claimants have appealed from that decision. They say, in essence, that the HPC failed to consider relevant information and, further, considered irrelevant information in making its selection decision. The claimants also assert that the standards applied by the HPC, and the formula used by the HPC to adjust for factors of wind and time, is unfair and led to an assessment of the claimants that did not accurately or properly reflect their level of achievement and, hence, their suitability to compete at the Junior World Championships.
5. CKC says that its selection criteria were well known and understood by the claimants. These criteria are reviewed annually and represent the considered conclusions of the canoe-kayak community as to the appropriate selection criteria.
6. The claimants' request for arbitration was filed on 15 July 2011 and was heard by me, sitting as a sole arbitrator, on 19 July 2011 by way of telephone conference.
7. On 20 July 2011, I released my decision, in which I dismissed the appeal and, hence, the relief sought by the claimants that they should be selected to represent Canada at the Junior World Championships in the C2 1000m event. I indicated that my reasons would follow. These are my reasons.
8. The starting point for my analysis is the internal *Appeals Policy* of CKC. This provides that decisions, such as that made by the HPC, may only be appealed on procedural grounds which are limited to the respondent:
 - Making a decision for which it did not have authority or jurisdiction as set out in governing documents;
 - Failing to follow procedures laid out in its approved policies;
 - Making a decision which was influenced by bias;
 - Failing to consider relevant information or taking into account irrelevant information in making the decision; or
 - Making a decision that was grossly unreasonable.

9. In addition to these criteria, I have also considered whether either the procedures of CKC or their implementation were unfair.
10. The selection criteria applicable to the claimants are set out in a document entitled "*National Teams Selection Criteria – 2011*". These criteria are, according to CKC, the process of extensive consultation. Some of the criteria were changed in 2011 following input from senior athletes and other members of the canoe-kayak community. The criteria were well known and well publicised. No one had taken serious issue with them.
11. According to Mr. Wainwright, who represented CKC at the hearing, in establishing the criteria CKC tried to set performance standards which would make CKC confident that Canadian crews would perform well on the world stage.
12. There is relatively little discretion built into the criteria. The HPC will take into account "Performance Indicators" in coming to its selection decisions. These Performance Indicators, which form part of the selection criteria, provide as follows:

"An athlete can achieve the Performance Indicator by *recording the prescribed race time in good conditions, in the official event in question*. In the absence of good conditions, the Performance Indicator can be achieved by alternate means, namely:

 - By recording a race time measured as a percentage of a different athlete or crews [*sic*] race time, in other events within the discipline or across other disciplines, that the HPC deems is evidence of achievement of the Performance Indicator, or
 - By recording a race time in a different official regatta that was recorded within one month of the selection event. Race times from different regattas may be considered at the discretion of the HPC. "
13. For the mens C2 1000m event, the junior performance indicator was a time of 3 minutes 48 seconds.
14. According to CKC, it wants its athletes to achieve success. On occasions, where appropriate, CKC will give athletes who do not strictly meet selection criteria the benefit of the doubt.

15. As I listened to the submissions that were made with respect to the performance criteria, read the criteria, and obtained a better understanding of how these criteria are considered and applied, there was nothing that occurred to me as being inherently unfair or unreasonable about the criteria themselves or the process by which they were applied.
16. The HPC considered the performance of the claimants at “Junior Trials 2, Montreal” and at the Lake Placid International Regatta. According to the HPC:

“The information used in these two events was to be used as evidence that the Performance Indicator standard, as described in the CKC selection Criteria, had been achieved. Namely:

 - Race time in good conditions (good conditions exist when the average wind speed recorded over the course of one minute does not exceed 1.5m/s in any direction, as described in the CKC selection criteria).
 - Recording a race time measured as a % of a different athlete or crews [*sic*] race time, in other events within the discipline or across disciplines, that the HPC deems is evidence of achievement of the Performance Indicator”
17. Apparently the conditions at the Lake Placid Regatta, with winds varying in strength and direction during a single race, and limited access to actually measure the wind, were such that the HPC, in its allowable discretion, decided not to use the race times from that regatta. Due to the changing conditions and a lack of senior crews present at the Lake Placid Regatta it was also not possible to use times as a percentage of another crew’s times.
18. At the Junior Trials 2, according to the HPC, wind conditions exceeded the criteria for “good conditions” which meant that the race time, as a percentage of another crew’s time would need to be used. The race immediately prior to a race in which the claimants participated was the Senior race of the same distance and class – C2 1000m. The following data were recorded:

Crew Name	Race Time (m:ss.000)	Conditions	Performance Indicator Time (m.ss.0)	Time from Performance Indicator (ss.000)	Time from Senior Crew (m.ss.000)	% from Senior Crew (%)	Standard % difference between Senior and Junior Crews (%)
Russell / Beauchesne-Sevigny	3:56.995	4.0m/s Headwind	N/A	N/A	N/A	N/A	N/A
Gildner / Barich	4:34:171	4.0m/s Headwind	3:48.0	46.171	0:37.176	15.7	3.4

19. The claimants won their race. However, there was a 37.2 second time difference between the senior and junior crews, a difference of 15.7%. According to the HPC, the average time difference between a junior world championship gold medallist and a senior world championship gold medallist is 3.4% for this event.
20. Even if the Lake Placid results were taken into account, according to the HPC submissions, it would not have helped the claimants.
21. The selection decision of the HPC was taken on 11 July 2011. The draft minutes of the meeting at which the claimants' performance was discussed for selection purposes said this in respect of them:

“Junior Men C-2

4.0 tailwind. 3.48 is the PI and they did a 4.34 (46 seconds off the PI). The junior time was 37 seconds off the senior time (i.e. 15% off the senior time). Coach's feedback that was present to the MR (coach's rep) prior to the meeting was shared. He felt they had beat the top crews that had been training with the National Team but the staff felt that of our C2s have never demonstrated a good enough time to race the C2 and therefore focused on C4 in training camp. The HPC emphasized that the criteria focus on Trials 2 and Lake Placid performance, and that the available data for Trials 2, and particularly the difference between the junior and senior C-2 results, do not support a conclusion that the C-2 has demonstrated the required level of performance.”

22. In an appeal such as this, the test is not whether, if I was putting myself in the position of the HPC, I would have reached a different conclusion. What I have to consider is whether the HPC failed to follow its own policies, committed any of the other errors that are identified in the appeals policy as forming the basis for an appeal or otherwise acted unfairly or contrary to principles of natural justice.

23. In my judgment there is no compelling evidence to support the claimants' appeal. Although they point to what they perceive to be defects in the selection criteria (and presented evidence in support of that view from an eminent athlete in the sport) they have not persuaded me that the HPC failed to follow its own procedures.
24. The claimants' position seems to overlook the reality that no set of criteria are going to perfectly accommodate all athletes in all situations. As submitted by CKC, the current selection criteria represent the culmination of an extensive process of consultation within the sport. Furthermore, these criteria are re-evaluated annually. There is ample opportunity for the sort of views that the claimants expressed during the course of the hearing to be submitted to those who are responsible for drawing up the criteria.
25. It is easy to understand the disappointment of the athletes who, having won their race in Montreal, thought that they had done enough to justify selection. During the course of the hearing it was made clear that CKC values these athletes and regards their future prospects in the sport as excellent.
26. It may well be that some of the factors cited by the claimants in support of their appeal are matters which CKC will want to take into account as further refinements to the selection criteria are considered.
27. For the reasons set out above, however, I feel compelled to dismiss the appeals. In the absence of any established procedural defect or unfairness, the decision which the HPC arrived at was one which it was entitled to make having regard to the results achieved by the claimants and the proper application of the selection criteria.

28. Pursuant to section 6.22 of the *Canadian Sport Dispute Resolution Code* I have discretion to award costs. My provisional inclination would be to make no award of costs in this case. However, should any party wish to assert an entitlement to costs, it may do so in writing within five working days of receipt of these reasons. The party or parties against whom costs are sought will then have five working days to respond.

3 August 2011

A handwritten signature in black ink, appearing to read "Graeme Mew". The signature is stylized with a large, looped initial "G" and a horizontal line underlining the name.

Graeme Mew – Arbitrator