

SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)

N°: SDRCC 13-0199

**RÉMI BEAULIEU
(CLAIMANT)**

AND

**SPEED SKATING CANADA (SSC)
(RESPONDENT)**

AND

**FRANÇOIS HAMELIN
LIAM MCFARLANE
(AFFECTED PARTIES)**

Lawyers and Party Representatives:

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Arbitrator

Graeme Mew FCI Arb

DECISION

1. Rémi Beaulieu (the “Athlete” or the “Claimant”) is an accomplished international level athlete in the sport of speed skating. His career highlights to date include a silver and two bronze career individual medals in world cups and three gold, three silver and three bronze medals in the relay. He has won a gold, silver and three bronze medals at Canadian open championships. He has also been a member of the Men’s National Short Track Team for four years.

2. The Athlete was not selected for the Men's National Short Track Team for the 2013 calendar year.
3. The original decision not to select him was made by the High Performance Short Track Committee ("HPCST") of Speed Skating Canada ("SSC").
4. A subsequent internal appeal under the SSC *Appeal Policy* was unsuccessful. A Case Manager appointed under the Appeal Policy to review the Athlete's appeal concluded that "the Appellant is not eligible to appeal".
5. Had the Case Manager in this case been satisfied that the Athlete's appeal should proceed, she would then have appointed a tribunal to hear it.
6. The Athlete now appeals to the SDRCC.

Jurisdiction of the SDRCC

7. Section 14.2 of the *Appeal Policy* provides:

The decision of the tribunal will be final and binding upon the parties and upon all members of Speed Skating Canada subject to the right of any party to seek a review of the tribunal's decision pursuant to the rules of the Sport Dispute Resolution Centre of Canada (SDRCC), as amended from time to time.

8. Despite the decision being appealed from being that of a Case Manager, rather than a tribunal appointed under the *Appeal Policy*, the Athlete has exhausted his internal remedies within SSC and, hence, the SDRCC would appear to have jurisdiction. Indeed, the Case Manager in her decision wrote, (at paragraph 29):

My decision is final and binding upon the Appellant and Speed Skating Canada, and may not be appealed under the policies of SSC. Should the Appellant wish to pursue this matter further, he may do so under the Rules of the Sport Dispute Resolution Centre of Canada (SDRCC).

The Selection Criteria

9. The applicable selection criteria are set out in *High Performance Bulletin #157 Short Track* (February 2013) (the "Selection Policy"). The bulletin states an intention to carry only eight athletes on each of the women's and men's national teams but goes on to say that:

Additions to this number will only be considered in exceptional situations.

The Selection Policy also provides for the selection of a Development Team and provides the routes by which individuals can qualify for that team.

10. The bulletin provides that the 2013-2014 National Team will be selected on the basis of the following:

- (1) *The five (5)...athletes selected for the 2013 World Short Track Championships.*
- (2) *Replacement athlete(s) sent to the 2013 World Short Track Championships.*
- (3) *The following athlete(s) ranked within the Top 8 from the adjusted 2012-13 final Canadian Rankings following bye requests.*

11. The applicable provisions relating to byes are contained in the 2012/13 Short Track Selection Criteria (High Performance Bulletin #156-Short Track), published in November 2012. The relevant provision is as follows:

An athlete may apply for a Bye to obtain a place on a specific Team or entry to the field of a competition in accordance with Appendix A. A Bye provides the opportunity to be selected to a Team for an athlete who, due to exceptional circumstances and through no fault of his/her own, is unable to qualify for the team through the normal selection competition(s) or selection processes. The basic philosophy for granting a Bye is that the athlete being given the Bye has demonstrated superior performance in previous competitions as described in The Bye point policy.

12. Appendix A repeats this philosophy and then sets out the process for requesting and reviewing a Bye application.

13. Under a subheading "Conditions for Granting a Bye", the following is stated:

When considering whether or not to grant a bye, the HPCST must first evaluate the medical condition of the athlete, the degree to which the athlete has followed the prescribed rehabilitation process, and his/her readiness to compete according to feedback received from the medical team and his/her coaches. If any of the above conditions are not at a satisfactory level to HPCST, the Bye may be refused on this basis alone.

Following this preliminary analysis, the HPCST will assign Bye Points on the basis of competition results from the last 12 months

using the Bye Point System noted below. These points will be assigned to all skaters in the ranking and those requesting the Bye.

...

If the athlete requesting the bye has at least 5 more points than the athlete in the ranking list, that athlete will be inserted above the athlete in the ranking. If not, the athlete requesting the bye will be compared to the next athlete in the list in the same fashion until they are appropriately placed within the adjusted final selection ranking.

When more than one Bye has been requested for a given Team/Competition, the Bye from the athlete with the next highest Bye Points will be considered first.

14. A note at the end of Appendix A indicates that the *Guidelines for the Allocation of Byes* were originally approved by the HPCST on 5 October 2000 and revised in November 2012.

The Decision of the High Performance Short Track Committee.

15. The HPCST met on 13 March 2013 by teleconference to, *inter alia* "confirm the National Development teams for the 2013-14 season...".
16. Ten individuals participated in the HPCST meeting. One of the individuals participating was Yves Hamelin. He is the father of François Hamelin, who was one of the candidates for selection to the men's national team. A conflict of interest on the part of Mr. Hamelin was noted in these terms:

...Yves Hamelin noted that the bye request originating from François Hamelin for team status presented a conflict of interest in the past; however as decisions pertaining to bye requests for Team Status are now made according to objective criteria under the bye points system, his presence during the discussion of the men's team was deemed not relevant.

17. The Athlete had not been selected for the 2013 World Short Track Championships and had not been a replacement sent to the 2013 World Short Track Championships. As such, he did not qualify under the first two criteria set out in the Selection Criteria.
18. After considering bye requests (of which there were two) eight athletes were selected for the Men's National Team. The Athlete, who appears to have been ranked number nine in the short track team listing, was selected for the Development Team.

19. Bye requests were submitted by François Hamelin and Liam McFarlane. The minutes of the HPCST meeting noted that François Hamelin had been unable to compete at the Canadian Open Championships due to injury. He had therefore submitted a bye request. Part of the minute records that:

With feedback from the medical team and national team coaches, the Committee evaluated François' medical condition, the degree in [sic] which he has followed the prescribed rehabilitation plan and his state of readiness to compete. Based on this evaluation, the Committee determined that all factors were satisfactory, allowing the Committee to continue with the evaluation of his bye request.

Applying the point grid set out in the guidelines for the allocation of byes, Mr. Hamelin had accumulated 23 bye points thereby placing him in sixth position in the adjusted final ranking.

20. Liam McFarlane had not been able to compete in all distances at the Canadian Open Championships due to injury and had not been able to participate in the National Selections meetings. After evaluating Mr. McFarlane's medical condition (the minute employs similar language to that used in regard to Mr. Hamelin) it was determined, using the point grid, that Mr. McFarlane had accumulated 18 bye points, which placed him in seventh place in the adjusted final ranking.

21. The claimant had earned six points on the points grid. As another athlete, Vincent Cournoyer (who, like the Claimant, had not applied for a bye) had thirteen bye points, Mr. Cournoyer was therefore selected in eight place and the Athlete was ranked ninth (and hence in the Development Team).

The Case Manager's Decision

22. The Claimant received HPCST's decision on 5 April 2013 (in English) and 8 April 2013 (in French).

23. By a Notice of Appeal dated 14 April 2013, the Claimant purported to exercise his right of appeal to the Appeal Tribunal of SSC pursuant to SSC's *Appeal Policy*. The Claimant asked that the decision to exclude him from SSC's National Short Track Team be overturned on the grounds that:

- (a) exceptional circumstances existed as to permit a ninth member of the Men's National Short Track Team; and/or
- (b) the procedure for the allocation of byes is vague, prone to unreasonable exercises in discretion and/or otherwise procedurally inadequate.

24. The Notice of Appeal also anticipated that there might be an issue as to its timeliness, since the Appeals Policy requires appeals to be received by SSC within 7 days of the decision being appealed from or within 7 days of the appellant becoming aware of that decision. The Notice of Appeal asserted that since it had been lodged with SSC less than 7 business days of the Athlete becoming aware of the HPCST's decision, the appeal had been brought within the time to do so.

25. The basis for the appeal was set out in several numbered paragraphs in the Notice of Appeal and can be summarised by the following points:

- (a) the Claimant outperformed Mr. Hamelin in March 2013, such that there were exceptional circumstances which would warrant adding a ninth member of the Men's National Team;
- (b) the Bye Policy is vague, prone to unreasonable exercises in discretion and/or otherwise procedurally inadequate;
- (c) the HPCST had disregarded Yves Hamelin's conflict of interest and had then selected his son to the Men's National Short Track Team.

26. The appeal was reviewed by a Case Manager, appointed pursuant to section 5.1 of SSC's *Appeal Policy* to oversee the timely management/administration of the athlete's appeal and to determine whether or not leave to appeal should be provided to the athlete.

27. Under section 5 of the *Appeals Policy* the Case Manager has a responsibility to, *inter alia*:

....

- (c) *Determine if appeals lie within the jurisdiction of this Policy;*
- (d) *Determine if appeals are brought in a timely manner;*
- (e) *Determine if appeals are brought on permissible grounds;*

....

- (g) *Appoint the tribunal to hear appeals.*

28. Section 10.1 is to similar effect. It provides that within the appropriate timeline (specified in the *Appeal Policy*) the Case Manager will review the Notice of Appeal and will decide whether:

- (a) *The appeal falls within the jurisdiction of [the Appeal] Policy,*
- (b) *The appeal has been made in a timely manner, and*
- (c) *The appeal has been brought on a permitted ground.*

Section 10.1 continues:

If the Case Manager is not satisfied that the appeal lies within the jurisdiction of this Policy, is timely, or is brought on a permitted

ground, the parties will be notified of this decision in writing, stating reasons, and the appeal will be considered concluded.

29. In a decision dated 18 April 2013, the Case Manager concluded that the Claimant's appeal had not been brought within time. She noted in this regard that under section 6.1 of the *Appeals Policy* the term "days" refers to "total days, irrespective of weekends or holidays" (although the Case Manager has the right to "modify these timelines to accommodate the particular circumstances of any appeal").
30. The Case Manager nevertheless continued to address whether the appeal had been brought on "permissible" grounds in the event that she was not correct in her interpretation of the Appeal Policy's timelines. Her findings were that:
- (a) Appeals are not for re-deciding matters or re-evaluating the merits of a decision already taken, but rather for correcting procedural errors that might have been made in the decision-making;
 - (b) No procedural grounds have been raised to support the appeal;
 - (c) Insufficient evidence has been provided to suggest any procedural errors were made by the HPCST.

Grounds for the Appeal to the SDRCC

31. The Claimant's Request to the SDRCC is dated 1 May 2013. No issue is taken as to either its timeliness or the jurisdiction of the SDRCC.
32. The Claimant's grounds of appeal can be summarised as follows:
- (a) The appeal was commenced within time;
 - (b) The appeal asserted procedural errors on the HPCST's part;
 - (c) The Case Manager ought to have declared a conflict of interest;
 - (d) The Case Manager's decision was procedurally flawed and/or biased;
 - (e) The HPCST's decision should be overturned because:
 - (i) exceptional circumstances exist as to permit a ninth (9th) member of the Men's National Short Track Team; and/or
 - (ii) of the flawed application of the bye policy.
33. A preliminary meeting was convened by way of conference call on 15 May 2013. Deadlines were agreed and set for the delivery of briefs.
34. It was accepted that François Hamelin and Liam McFarlane were properly included as Affected Parties. They were selected in 7th and 8th position respectively. In the case of Mr. Hamelin, the Claimant takes the position that his selection is tainted by the presence of Mr. Hamelin's father at the HPCST selection meeting. In the case of Mr. McFarlane, he could potentially be displaced if the Claimant's appeal were to

succeed. Both of these individuals were given the opportunity to make submissions and otherwise participate in the appeal but elected not to do so.

35. The parties indicated a willingness to have the appeal determined on the papers, i.e. without the need for a hearing. A provisional hearing date of 19 June 2013 was set in the event that, following receipt of the documents and written submissions of the parties, the Tribunal wished to receive oral submissions. In the event, there was no hearing, but the Tribunal did circulate some questions in writing to the parties on 21 June 2013. Answers to those questions were received by the Tribunal on 25 June.
36. The reasons for the Tribunal's decision are set out in the balance of this award. I have summarised many of the facts and allegations based on the documents submitted to me and the parties' written submissions. Although I have considered all of the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, I refer in these reasons only to the submissions and evidence I consider necessary to explain my reasoning.
37. I will deal first with the Case Manager's decision and then go on to consider the merits of the appeal against the HPCST's selection decision.

The Case Manager's Decision

38. I have concluded that the Case Manager was wrong not to allow the Claimant's appeal to proceed to a hearing before an Appeal Tribunal of SSC.
39. The first error made by the Case Manager was her interpretation of the timelines contained in the *Appeal Policy*.
40. In determining when the seven day window for commencing an appeal expired, the Case manager included non-working days. She interpreted the phrase "total days, irrespective of weekends or holidays" as meaning that weekends and holidays should be included when counting the days. The Athlete points to a dictionary definition of "irrespective of" as meaning "without taking account of" to support his submission that the seven days should have excluded weekends and holidays with the result that the deadline to file the appeal should have been 16 April at the earliest, i.e. seven business days from receipt of the English version of the HPCST's decision.
41. The Case Manager's decision provides no insight into whether she considered exercising the right given to her in section 6.1 to modify the timelines to accommodate the particular circumstances of any appeal.
42. In my view the Case Manager misinterpreted section 6.1 of the Appeal Policy. She should not have counted weekends or holidays. This view is reinforced by the French version of the Appeal Policy which states: "

Nota : Par « jours » on entend le nombre total de jours, à l'exclusion des fins de semaine et des jours fériés.

43. Even if the Case Manager was right in counting weekdays and holidays, it would have been appropriate for her to consider exercising her right to abrogate the time for appealing when the Claimant had proceeded on an apparently bona fide interpretation of the Appeal Policy.
44. The second error made by the Case Manager was her finding that the Claimant's appeal should not go forward because of its failure to identify the procedural grounds relied upon to support the appeal.
45. Appreciating that section 8 of the Appeal Policy places limitations on the permissible grounds for appeal, at least one of assertions made in the Claimant's appeal involved an allegation that one of the members of the HPCST had a conflict of interest when selection of the Men's National Short track Team took place. The claimant's notice of appeal to the Appeal Tribunal alleged that the HPCST had "brushed...aside" the conflict of interest declared by Yves Hamelin on the basis that it was irrelevant since requests for team status were made according to objective criteria under the bye point system. The Claimant's notice of appeal, however, had asserted that the fact that objective criteria might apply would not be an adequate basis upon which to dismiss a conflict of interest and, further, that in any event, there was a subjective element to the process because of the need to evaluate the medical information pertaining to athletes who had requested byes.
46. It is not too difficult to see how the points raised by the Claimant in respect of the conflict of interest issue could be seen as engaging several of the grounds set out in section 8 the Appeal Policy, including bias (section 8.1(c)) and/or exercising its discretion for an improper purpose (section 8.1(e)).
47. While it may well be that some of the other grounds articulated by the Claimant would not meet the "procedural grounds" requirements of section 8 of the Appeal Policy, because at least part of the proposed appeal encapsulated a permitted ground, it was the Case Manager's obligation to appoint a tribunal to consider those allegations. It was not the Case Manager's job to assess the merits of the proposed appeal.
48. The third error made by the Case Manager was to reject the Claimant's appeal because of insufficient evidence to suggest any procedural errors.
49. The Case Manager seems to have felt that it was part of her responsibility to consider not only the grounds for appeal raised by the Claimant, but to also evaluate whether there was a sufficient evidentiary basis to support those allegations.
50. If the appeal as entered by the Claimant did not satisfy the requirements of section 8 of the Appeal Policy, i.e. raise procedural grounds, then the Appeal Policy would

appear to give the Case Manager the right to decline to appoint an appeal tribunal. No evaluation of the evidence would be required or appropriate.

51. However, the Case Manager's decision makes reference, on a number of occasions, to no evidence having been provided to support the allegations made by the appellant. For example, in respect of the conflict of interest allegation, the Case Manager concluded that: (a) no evidence had been provided to suggest that the committee failed to follow proper procedures when dealing with a potential conflict (regarding the selection of François Hamelin); (b) no evidence had been provided to suggest that Yves Hamelin had participated in the discussions and/or decision making with respect to the selection of François Hamelin and, therefore (c) there was no evidence to support the position that the committee had disregarded the conflict or failed to act appropriately in managing the conflict.
52. There is no indication that the Case Manager considered whether, on the face of the record alone, there might be a basis for a successful appeal. Had the Case Manager recognised that the allegation of conflict of interest was enough to establish a permissible ground for appeal, it would have been unnecessary for her then to evaluate the evidence (or lack thereof) supporting such ground for appeal.
53. Ultimately the weighing and evaluation of evidence was in the domain of the appeal tribunal (if appointed) and it was therefore an error for the Case Manager to have concerned herself with considerations of the quality or the effect of the evidence.
54. For the foregoing reasons, the Case Manager should have allowed the Claimant's appeal to go forward to an Appeal Tribunal, at least on the conflict of interest ground.

The Case Manager's Alleged Conflict of Interest

55. The Case Manager is a lawyer who is a member of a group called "Sport Law & Strategy Group" ("SLSG"). SLSG apparently has a contract with SSC to write SSC's bulletins and policies. According to the Claimant, this not only raises a conflict of interest but is also contrary to the Appeal Policy itself which provides that the Case Manager shall be "independent".
56. A further criticism of the Case Manager is that she inadvertently released to the claimant a draft version of her decision which was different from the final version of her decision which subsequently replaced the inadvertently sent draft. The claimant suggests that the Case Manager was not acting independently and had at least one other person assisting her with her decision making process.
57. At the organisational meeting, the claimant suggested that SLSG should be added as an affected party in this case. I declined to make such a direction but did indicate that as the role of SLSG had been raised, SSC should make SLSG aware of the Claimant's position and give SLSG the opportunity (through SSC) to respond.

58. SSC tendered, as part of its responding material on the appeal, an affidavit from LeeAnn Cupidio, the Case Manager.
59. The Claimant, in his reply submissions, objects to the admissibility of Ms. Cupidio's affidavit on the basis that it expresses opinions which would be the domain of an expert witness. While I agree that Ms Cupidio cannot provide opinion evidence at this hearing, I accept her affidavit as evidence of her role and that of SLSG.
60. The allegation that there was some sort of impropriety or lack of independence on the part of the Case Manager arising from the fact that an earlier draft of her decision was circulated instead of the final version has no merit. The release of the draft decision was inadvertent. Many arbitrators might say "there but for the grace of God go I". Ms. Cupidio's affidavit confirms that she was the only person involved in making the decision which is now under review. Her draft decision was submitted for peer review by a professional colleague, as a result of which some editorial changes were made. There is, in my view, nothing improper about that at all. If a professional colleague is reviewing primarily for form rather than substantive comment, and provided that applicable principles of confidentiality are respected, having a second set of eyes go over the final draft of a decision before it goes out will rarely give rise to a genuine cause for concern.
61. With respect to the activities of SLSG, Ms. Cupidio's affidavit attests that the group was not involved in the creation of the Appeal Policy or the selection criteria under dispute. More importantly, she indicates that prior to her role as Case Manager in this particular appeal, she had not been involved in any work that had been done previously by any of her colleagues at SLSG. I have no reason not to accept that evidence and, accordingly, do not believe that Ms. Cupidio's independence has been compromised.
62. I would add that SLSG (formerly known as the Centre for Sport and Law) is an organisation well known for its consulting and advisory services to sport organisations and athletes alike. As Ms. Cupidio notes in her affidavit, SLSG provides templates and resources which have been used and adapted by various sports organisations, including SSC. In the absence of more direct involvement in the policies of SSC under review, I do not accept that there is either a real conflict or an appearance of conflict.

Bias

63. The Claimant's position seems to be that the way in which the Case Manager approached her task exhibited bias on her part. In addition to the peer review issue, discussed above, the Claimant points to the fleeting treatment of the timeliness of

the appeal, and her finding that there were no procedural grounds upon which the appeal could proceed, as demonstrative of bias on her part.

64. While, as I have indicated, I am of the view that the Case Manager was in error, I do not accept that there is any indication of bias or insincerity on her part.

Merits of the Appeal

65. The Claimant asks that this tribunal should finally decide all matters (rather than remitting the case or any part of it back to SSC). The Respondent defends the Case Manager's decision but takes no position on whether, in the event I conclude the Claimant's appeal should have been allowed to proceed, I should consider the appeal on its merits or remit the matter to SSC.

66. Article 6.17 of the *Canadian Sport Dispute Resolution Code* deals with the scope of this panel's review and provides:

The Panel shall have full power to review the facts and the law. In particular, the Panel may substitute its decision for:

- (i) the decision that gave rise to the dispute; or*
- (ii) in case of Doping Disputes, the CCES' assertion that a doping violation has occurred and its recommended sanction flowing therefrom,*

and may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.

67. It may have been open to the Case Manager to allow the appeal to go forward on the conflict of interest ground, but not on the basis that the bye policy was flawed or that exceptional circumstances existed. That was not considered. The appeal was turned back in its entirety and now comes to the SDRCC as an appeal on all issues.

68. The root of the Claimant's appeal is the decision of the HPCST dated 13 March 2013. By way of recap, the Claimant's principal complaints appear to be that:

- (a) the Claimant outperformed François Hamelin in March 2013, such that there were exceptional circumstances which would warrant adding a ninth member of the Men's National Team;
- (b) the Bye Policy is vague, prone to unreasonable exercises in discretion and/or otherwise procedurally inadequate;
- (c) the HPCST had disregarded Yves Hamelin's conflict of interest and had then selected his son to the Men's National Short Track Team.

69. I propose to deal with the first point last, as its determination is informed by my consideration of issues (b) and (c).

The Bye Policy

70. The Claimant's attacks on the Bye Policy (excluding the conflict of interest allegation, which I have dealt with separately) are set out as follows in the appeal brief:

- (a) *First, the Bye Policy is not capped. Without placing an upper limit on the number of byes that can be awarded, there is an unreasonable amount of discretion left at the hands of the Committee.*
- (b) *Second, the Bye Policy was only intended to be applied in "exceptional circumstances (e.g. illness, injury, equipment break, etc)". There was no evidence that such exceptional circumstances existed for the Committee to exercise its discretion twice.*
- (c) *Third, the 'basic philosophy' set out in the Bye Policy was not adhered to. The Bye Policy states that the:*

"basic philosophy for selecting an athlete by granting a Bye is that the athlete given the Bye has demonstrated superior performances in previous competitions to one or more athlete or athletes being considered for selection."

In light of the facts raised in PART 7A (concerning the Appellant's outperformance of both athletes granted byes), we submit that the Committee failed to adhere to its own core philosophy in granting byes (which again, are only intended to be exercised sparingly in "exceptional circumstances").

[emphasis in the original]

71. The Claimant may or may not have valid concerns about the Bye Policy. But an appeal to this tribunal is not an appropriate vehicle to address those concerns about the policy itself. Absent a failure by the HPCST to correctly and fairly apply its policy, this tribunal should not interfere with its decision.

72. In the Claimant's reply submission, he argued that the neither Mr. Hamelin or Mr McFarlane should have had the benefit of the Bye Policy since both had suffered in-competition injuries which had limited their opportunities to accumulate full points by competing in every race at a particular event. Because the philosophy of the bye policy is to mitigate the effects of an athlete not having the "opportunity to compete in the nominated selection event/s" because of illness, injury, equipment break etc., the Claimant reasons that this must mean that to be eligible for consideration under the bye policy an individual must have been unable to compete at all.

73. Suffice it to say that in my view the Bye policy was open to be applied to Mr. Hamelin and Mr McFarlane in having regard to their particular circumstances where injury appears to have precluded their ability to compete in all of the races at the events they had entered for. To read the policy in the manner advocated by the Claimant would appear to unduly restrict the remedial nature of the policy.

74. However the Claimant raises another matter in his reply submissions which warrants further consideration of the fairness of the HPCST's decision.

75. In paragraph 15 of his reply brief the Claimant says this:

Furthermore, athletes had been initially advised by the Respondent that the Fall World Cup would not count towards their national ranking, nor their selection to the 2013-2014 National Team.

- a. Curiously, the Respondent only indicated in December of 2012, three (3) months after the Fall selection, that the Fall World Cup would be considered for the selection of the 2013-2014 World Championship Team. At that time, athletes were told that the Fall selection results would be worth twenty percent (20%) of the World Championship Team's selection criteria.
- b. This *ex post facto* decision of the Respondent undermines the sincerity of that decision....
- c. Indeed, *ex post facto* laws and policies are, by their nature, against basic principles of natural justice and fairness....

[emphasis in the original]

76. As a result of the foregoing submission, I asked the parties to comment on whether the Claimant's assertions were correct and, if so, whether there had been an impact on the National Short Track Team Selection.

77. SSC confirmed that the Selection Policy was published after the Fall World Cup but noted that no complaint had been advanced by the Claimant until his reply submission:

The specific details of this set of criteria were slightly different from the previous year's selection criteria, however that is a very different matter. SSC reviews and revises its criteria in advance of every event for which criteria must be produced. Criteria are not "carved in stone" and fixed for all time. They are a reflection, at the relevant time, of the specific needs or objectives specified by SSC for that particular event. These particular criteria were the result of also listening to and addressing various athlete concerns with

respect to weighting of events etc. However the crucial point is that SSC is empowered to create criteria and it did so. It then published these criteria and subsequently utilized them to select its Team. At no point have the criteria themselves been challenged and seeking to do so now in the guise of a selection appeal amounts to a collateral attack by the Applicant and ought to be refused.

78. While the concerns expressed by the Claimant are understandable, they would have far greater force if they had been made contemporaneously and if it was clear that the inclusion of the Fall World Cup results in the Selection Policy had materially affected the outcome of the selection process. While SSC may wish to reflect on whether setting criteria that include events that have already taken place is optimal, I am not satisfied that any manifest unfairness has been visited on the Claimant as a result.
79. The complaint about the HPCST's departure from the "basic philosophy" is directed at the judgment exercised by HPCST. Inevitably one person's views of what circumstances are "exceptional" may differ from another's. However I see nothing on the face of the record that would indicate that the HPCST exercised its judgment improperly.
80. In summary I do not find that HPCST failed to correctly and fairly apply its policy. The Athlete's complaints about the Bye Policy itself relate to matters of policy making rather than the application of policy, and, hence, should be raised in another forum.

Yves Hamelin's Conflict of Interest

81. I can deal with this important point succinctly.
82. One of the candidates for selection to the Men's National Short Track Team was François Hamelin. His father, Yves Hamelin, was a member, albeit a non-voting member, of the HPCST. This placed Yves Hamelin in a conflict of interest when the discussion at the HPCST came around to the selection of the Men's National Short Track Team. According to Section 6.1(c) of SSC's *Conflict of Interest Policy*, athletes, coaches, officials, volunteers, directors, officers and administrators and members of SSC acting on its behalf shall not knowingly place themselves in a position where they could be influenced in a decision by personal, family or other interests.
83. SSC's *Conflict of Interest Policy* is quite clear about the appropriate actions to taken when such a conflict arises. First, the conflict must be disclosed. That occurred. But then, according to section 6.4(b) of the *Conflict of Interest Policy*:

Except where participation in discussion has been properly approved as per Section 6.1, the Board or Committee Member or

Staff Person shall not be present at that portion of a meeting when matters in which they have an interest are considered...

84. While Yves Hamelin, having declared a conflict, did not participate in the discussion of the bye request made by François Hamelin, he did not withdraw from the meeting. The minutes note that his presence was not deemed relevant because "bye requests for Team Status are now made according to objective criteria under the bye point system."
85. The problem with the position taken by the HPCST is that the operation of the Bye Policy does require the exercise of judgment. It is not a purely mechanical exercise. Indeed it is only once a bye request has been determined to be admissible that the bye point system is applied.
86. Accordingly it was wrong for Yves Hamelin to have remained on the call. He should have dropped off the conference call while the selection of the Men's National Short Track Team (and not just his son's selection) was being discussed. Even though he did not have a vote, his presence could potentially have inhibited or otherwise affected the discussion that occurred. While there is no evidence that anything of the sort actually occurred, the presence of Yves Hamelin had the potential to taint the HPCST's decision making. That, in my view, is sufficient for me to conclude that there is merit to this ground of appeal.

There were exceptional circumstances which would warrant adding a ninth member of the Men's National Team

87. It is indeed a fact that the Claimant outperformed François Hamelin at the National Short Track Team selections #2 event at Montreal from 1-3 March.
88. Furthermore, the Selection Policy does not preclude the possibility of additions to the team in exceptional circumstances. This is evident from the fact that the Selection Policy, having stated that it is the intention to carry only eight athletes on each of the women's and men's national teams, qualifies that statement by providing:

Additions to this number will only be considered in exceptional situations.

89. The Claimant points to the fact that in 2012/13 a ninth athlete was added to the National Women's Team pursuant to the exceptional circumstances clause.
90. The Claimant might well have a valid claim to be added as a ninth member of the team based on exceptional circumstances. However, ordinarily that would have to be a matter for the judgment of the HPCST. The Claimant's assertion that he should be granted the ninth place nevertheless has to be viewed in the light of SSC's stated intention to carry only eight athletes on the Men's Senior Team

91. The question now is whether, in light of my finding that one of the participants in the selection meeting had a conflict of interest, the Claimant should, on that basis, be granted a ninth place on the basis of exceptional circumstances. Alternatively, should the matter be remitted to the HPCST to reconsider its selection decision and, in particular, consider whether there are now exceptional circumstance which warrant the Claimant's selection as a ninth member?

92. In the case of *Blais-Dufour v Speed Skating Canada*, SDRCC 11-0145, the arbitrator (Richard Pound QC) made the following comment (at page 15), with which I, too, agree:

I am conscious of, and share, the general reluctance of arbitrators to be seen to impose their personal judgment in matters of team selection. Canadian teams should not, except in the rarest of circumstances, be selected by arbitrators or judges who may not, and probably do not, have the necessary technical experience to make such decisions.

93. On the other hand I am concerned that in the event of a good faith reconsideration by the HPCST which results in the same outcome as before, the Claimant is likely to feel that he has not been treated fairly.

Decision

94. It has never seriously been asserted that any of the athletes already selected by the HPCST should now be de-selected. That being the case, and having regard to the fact that the Claimant placed ninth in the original selection process and was on the Men's Senior Team for the previous four years, it seems to me that if I were to direct that the Claimant should be added to the Men's Senior Team for 2013-14 as a ninth member of that team, it would not represent a nonsensical interference with the SSC's autonomy to make its selection decisions free from interference by less well qualified people such as me. It would be a remedy borne out of regard for the competing interests of fairness to the Athlete and deference to the HPCST as the appropriate decision-maker.

95. Accordingly, and not without some hesitation, but respectfully, I would allow the Claimant's appeal and, exercising the authority provided to me by 6.17 of the *Canadian Sport Dispute Resolution Code*, I would direct that it is just and equitable in all of the circumstances for the Claimant to be granted a place on the Men's Senior Team.

96. I can be spoken to if there are any practical or logistical problems that arise from this decision that cannot be resolved by agreement between SSC and the Claimant.

Costs

97. If the parties wish to make any submissions on costs they should be made in writing on or before 4:00PM on 9 July 2013 and limited to three pages (letter size).

Toronto, 2 July 2013

A handwritten signature in black ink that reads "Graeme Mew". The signature is written in a cursive style with a large initial "G" and a small "Mew" to the right.

Graeme Mew
Arbitrator