

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

N°: SDRCC 22-0544/45/46/48/49

**SÉBASTIEN BEAULIEU
KAYLIE BUCK
DARREN GARDNER
JENNIFER HAWKRIGG
JULES LEFEBVRE
(CLAIMANTS)**

AND

**CANADA SNOWBOARD
(RESPONDENT)**

AND

**ARNAUD GAUDET
(AFFECTED PARTY)**

Tribunal:

Patrice Brunet (Sole Arbitrator)

Appearances:

For Sébastien Beaulieu:

Jean Beaulieu

For Kaylie Buck, Darren Gardner,
and Jennifer Hawkrigg:

Dr. Emir Crowne
Amanda Fowler

For Jules Lefebvre:

Louis-Georges Lefebvre

For the Respondent:

Adam Klevinas
Cristy Nurse
Dustin Heise
Tyler Ashbee
Kim Krahulec
Jean-François Rapatel

For the Affected Party:

Patrik Gaudet
Eve Gaudet

DECISION

I. INTRODUCTION

1. This arbitration was conducted under extraordinary time constraints since the Canadian Olympic Committee (COC) was expected to confirm the team composition on Monday, January 24th, 2022, for the upcoming Beijing 2022 Olympic Winter Games.

2. This concerns an application by the Claimants to challenge Canada Snowboard's ("the Respondent") decision not to nominate them to the upcoming 2022 Olympic Winter Games.

3. On January 18th, 2022, I accepted the appointment to act as Arbitrator in the present proceedings, under Section 5.3 of the 2021 *Canadian Sport Dispute Resolution Code* ("SDRCC Code"). There were no objections raised by any of the parties to my nomination as arbitrator in this case.

4. On January 19th, 2022, two administrative and preliminary conference calls were held between the Arbitrator, the Parties, and the *Sport Dispute Resolution Centre of Canada* ("SDRCC") staff. At the Parties' request, the appeals were merged so they could be heard together. Given the urgency and the nature of the matter, the Parties agreed to proceed by way of documentary review.

5. On January 23rd, 2022, I rendered my short decision whereby I found the selection criteria to have been unreasonably applied. Given the strict and limited timelines, I found myself in an exceptional situation which led me to substitute my decision in part to that of the Respondent.

6. The reasons for my decision are set out below.

II. FACTS

7. The facts in this matter are not in dispute.

8. At the Beijing 2022 Olympic Winter Games, the Parallel Giant Slalom (PGS) is an Olympic event while parallel slalom (PSL) is not.

9. According to the *Snowboard Quotas List for the 2022 Olympic Winter Games*, the Respondent was allocated four women’s and three men’s quotas by the *Fédération Internationale de Ski* (“FIS”).

10. As provided by *Canada Snowboard’s Internal Nomination Procedures 2022 Olympic Winter Games Selection Protocol* (“Canada Snowboard’s Selection Protocol”), amended on August 16th, 2021, the qualification period was from July 1st, 2020, to January 16th, 2022, inclusively (“the Qualification Period”)¹.

11. On January 17th and 18th, 2022, the Respondent contacted the Claimants to inform them that they had not been selected to the 2022 Olympic Winter Games team.

12. On January 18th and 19th, 2022, the Claimants solicited the intervention of the SDRCC to challenge the Respondent’s decision not to nominate them.

13. On January 19th, 2022, all parties agreed to merge cases SDRCC 22-0544, 22-0545, 22-0546, 22-0548, and 22-0549.

III. THE PARTIES

The Claimants

14. The Claimants are snowboard athletes competing in PSL and PGS. Their bio excerpts have been obtained from Canada Snowboard’s website.

15. **Jules Lefebvre** (“Mr. Lefebvre”) is a 26-year-old athlete. He represented Canada at the 2016 Junior World Championship in Slovenia. On January 9th, 2021, he finished 22nd at the World Cup PGS, in Scuol, Switzerland.

16. **Sebastien Beaulieu** (“Mr. Beaulieu”) is a 31-year-old athlete. In 2018, he finished 7th at the Bansko World Cup. He is a member of Canada Snowboard’s Athlete Council.

17. **Jennifer Hawkrigg** (“Ms. Hawkrigg”) is a 25-year-old athlete. She has reached the podium at multiple National Championships, and she represented Canada on multiple occasions at the Junior World Championship.

¹ Canada Snowboard - *Internal Nomination Procedures 2022 Olympic Winter Games Selection Protocol*, Sec. 11.1 “Snowboardcross (SBX) And Parallel Giant Slalom (PGS)”

18. **Kaylie Buck** (“Ms. Buck”) is a 21-year-old athlete. She represented Canada at the Junior World Championship in 2020, in Austria, where she finished 3rd.

19. **Darren Gardner** ("Mr. Gardner") is a 31-year-old athlete. He represented Canada at the 2018 Olympic Winter Games, where he finished 28th.

The Respondent

20. **Canada Snowboard** is the National Sport Organization (NSO) that works with members, athletes, coaches and other partners to coordinate and support the development of snowboard from introductory experience to international excellence through leadership, education, promotion and training. The organization’s mission is to develop and lead competitive snowboarding in Canada. Its vision is for Canada to be recognized as a world-leading snowboarding nation.

Affected party

21. **Arnaud Gaudet** is a 21-year-old snowboard athlete. He was nominated to the national team by the Respondent for the upcoming 2022 Olympic Winter Games.

22. Should Mr. Lefebvre, Mr. Beaulieu and Mr. Gardner be nominated to the national team for the 2022 Olympic Winter Games, he may stand to lose his nomination. Therefore, he has an interest in the outcome of this dispute according to subsection 1.1 a) of the SDRCC Code.

IV. JURISDICTION

23. The Sport Dispute Resolution Centre of Canada (SDRCC) was created by Federal Bill C-12, on March 19th, 2003².

24. Under this Act, the SDRCC has exclusive jurisdiction to provide to the sports community, among others, a national alternative dispute resolution service for sport.

25. All Parties have agreed to recognize the SDRCC’s jurisdiction in the present matter.

² *The Physical Activity and Sport Act*, S.C. 2003, c.2.

V. POSITION OF THE PARTIES

26. This section summarizes written submissions from the Parties. Although this is not a detailed record, I carefully examined all submissions and documents presented by the Parties.

Positions of the Claimants

Mr. Lefebvre:

27. Mr. Lefebvre requested that the Respondent nominate him for the 2022 Olympic Winter Games since he is the only male Canadian athlete to have met the result-based criteria described in Priority 5 of Canada Snowboard's Selection Protocol, as acknowledged by the Respondent. Mr. Lefebvre does not wish to replace Mr. Gaudet; instead, he seeks to benefit from one of the unused quotas in the men's category.

28. He claims that he demonstrated medal potential for the 2026 Olympic Winter Games, therefore meeting the criteria laid out in Priority 4 of Section 8.2.1. of Canada Snowboard's Selection Protocol.

29. Mr. Lefebvre states that the Respondent had no legitimate reason to exclude him under Section 14 of Canada Snowboard's Selection Protocol.

30. For reasons out of his control, he believes that he has not been given the opportunity to demonstrate his *Performance Readiness*.

31. He states that he represents Canada's best chance of medal given that he achieved the best result out of all the Canadian male athletes during the Qualification Period.

Mr. Beaulieu:

32. Mr. Beaulieu seeks that the Respondent nominate him to the national team for the 2022 Olympic Winter Games. Mr. Beaulieu is asking to be awarded one of the two remaining men's quotas, following Mr. Gaudet's nomination to the team.

33. He states that he should have been included in the team based on his performance and that he has demonstrated medal potential for the 2026 Olympic Winter Games.

34. Mr. Beaulieu believes that his performance during the seasons affected by the COVID-19 pandemic does not reflect his true medal potential for the 2026 Olympic Winter Games.

35. He argues that the Respondent should fill its quotas for women and men, as it failed to follow its own procedures and to consider relevant information.

Mr. Gardner

36. Mr. Gardner contests his non-selection by the Respondent based on Priority 4 and wishes to be added to the 2022 Olympic Winter Games team.

Ms. Hawkrigg

37. Ms. Hawkrigg contests her non-selection for the Beijing 2022 Olympic Games.

38. She states that she had consistent results in the top 30 on the World Cup circuit and earned three top half results.

39. Ms. Hawkrigg claims that under Priority 4 of Canada Snowboard's Selection Protocol, she demonstrates medal potential for the 2026 Olympic Winter Games, which should have earned her a spot on the Canadian delegation.

Ms. Buck

40. Ms. Buck contests her non-selection to the Canadian Olympic Team. She puts forward the fact that the Respondent did not take her performance curves and Canada Snowboard's Gold Medal Profile into account when assessing her under Priority 4.

The Affected Party

41. On January 18th, 2022, Mr. Gaudet was nominated to the national team for the 2022 Olympic Winter Games. Should the Claimants be nominated to the team by the tribunal, he wishes to defend his nomination.

Position of the Respondent

42. The Respondent considered that Arnaud Gaudet satisfied Priority 4 of Section 8.2.1., as his performance curve, Canada Snowboard's Gold Medal Profile and

Podium Pathway indicated that he demonstrated medal potential for the 2026 Olympic Winter Games.

43. Mr. Gaudet was nominated for the 2022 Olympic Winter Games in accordance with this priority.

44. The Respondent states that all the Claimants, except for Jules Lefebvre, did not satisfy the applicable criteria for nomination to the national team as set out in Section 8, and in particular Section 8.2.1 (Method B) of Canada Snowboard's Selection Protocol.

45. The Respondent claims that it was not mandatory to fill the quotas allocated by the FIS as provided by Section 8 of Canada Snowboard's Selection Protocol.

46. The Respondent states that Jules Lefebvre satisfied the selection criteria listed in Priority 5. However, it considered that Mr. Lefebvre did not satisfy Canada Snowboard's *performance readiness* criteria, as reflected in Section 14. Indeed, the Respondent states that his most recent performance did not suggest that Mr. Lefebvre could perform adequately at the upcoming Olympic Games.

47. In its opinion, it believed that neither Mr. Beaulieu, Mr. Gardner, nor Mr. Lefebvre had demonstrated sufficient medal potential for the 2026 Olympic Winter Games based on their performance curves, Canada Snowboard's Gold Medal Profile, and Podium Pathway.

48. Megan Farrell satisfied Priority 3 of Section 8.2.1. of Canada Snowboard's Selection Protocol, after she achieved two Top 8 final results during the Qualification Period. She was the only female athlete to be nominated for the 2022 Olympic Winter Games.

49. None of the other female alpine athletes satisfied any of the performance-based criteria found in Section 8.2.1.

50. Regarding Ms. Hawkrigg, the Respondent states that "*her rank and FIS points are well outside the average performances of past Olympic medalists in the women's alpine disciplines four years away from their first Olympic performance*".

51. As for Ms. Buck, the Respondent believes she does not have sufficient medal potential for the 2026 Olympic Winter Games. The Respondent confirmed that the only metric used to assess Ms. Buck's eligibility was the Podium Pathway as

provided in Priority 4 of Section 8.2.1. The Respondent stated that the Podium Pathway is sufficient to establish medal potential for the 2026 Olympic Winter Games as all the metrics mentioned in Priority 4 are similar.

VI. APPLICABLE LAW

Physical Activity and Sport Act³

Mission

10 (1) The mission of the Centre is to provide to the sport community

*(a) a national alternative dispute resolution service for sport disputes;
and*

(b) expertise and assistance regarding alternative dispute resolution.

Interpretation

(2) For the purposes of subsection (1), a sport dispute includes disputes among sport organizations and disputes between a sport organization and persons affiliated with it, including its members.

SDRCC Code

6.10 Onus of Proof in Team Selection and Carding Disputes

If an athlete is a Claimant in a team selection or carding dispute, the onus will be on the Respondent to demonstrate that the criteria were appropriately established and that the disputed decision was made in accordance with such criteria. Once that has been established, the onus shall be on the Claimant to demonstrate that the Claimant should have been selected or nominated to carding in accordance with the approved criteria. Each onus shall be determined on a balance of probabilities.

(Emphasis added)

6.11 Scope of Panel's Review

(a) The Panel, once appointed, shall have full power to review the facts and apply the law. In particular, the Panel may substitute its decision for the decision that gave rise to the dispute or may substitute such measures and

³ *Supra*, note 3.

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

(b) The Panel shall have the full power to conduct a hearing de novo. The hearing must be de novo where:

(i) the SO did not conduct its internal appeal process or denied the Claimant a right of appeal without having heard the case on its merits; or

(ii) if the case is deemed urgent, the Panel determines that errors occurred such that the internal appeal policy was not followed or there was a breach of natural justice.

(c) No deference need be given by the Panel to any discretion exercised by the Person whose decision is being appealed, unless the Party seeking such deference can demonstrate that Person's relevant expertise.

Canada Snowboard Internal Nomination Procedures – 2022 Olympic Winter Games Selection Protocol

52. The Respondent has two selection methods as established in its internal nomination procedures at Section 8. *Method A – EARLY NOMINATION* was used to nominate Mr. Gaudet and Ms. Farrell to the national team for the 2022 Olympic Winter Games.

53. Method A is not applicable in the present dispute since none of the Claimants satisfied any priorities laid out in this section.

8.2 METHOD 'B' – RESULTS-BASED NOMINATION FOR ALL DISCIPLINES

The CS Nomination Committee is restricted by the quotas allocated by the IOC/FIS, as outlined in Section 5 above. Once the quota has been met in a discipline, or gender, remaining athletes will no longer be eligible for nomination regardless of their ranking.

8.2.1 METHOD 'B' - SPEED DISCIPLINES (SBX & PGS)

All athletes will be ranked within the priorities based on the results achieved:

Priority 1:

- *One (1) podium at a FIS World Cup or 2021 FIS Snowboard World Championships (SBX or PGS). Athletes with multiple podium finishes will be ranked higher, and athletes with the same number of podium finishes will be ranked by the aggregate total of the final results;*

Priority 2:

- *One (1) Top four (4) final result at a FIS World Cup or 2021 FIS Snowboard World Championships (SBX or PGS): Athletes with multiple Top four (4)'s will be ranked higher.*

Priority 3:

- *Two (2) Top 8 final results at eligible competitions (SBX or PGS) during the selection period*

Priority 4:

- *Demonstrates 2026 medal potential as determined by the athlete performance curves, Canada Snowboard's Gold Medal Profile, and Podium Pathway.*

Priority 5:

- *Best Two (2) final results, which; one (1) of the results must be within the Top Third (1/3) of the field at eligible competitions (SBX or PGS) during the selection period.*

(emphasis added)

54. With respect to the order of priorities, the Respondent could nominate up to 3 men and 4 women to the snowboard national teams as per the quotas awarded by the FIS⁴.

VII. DISCUSSION

Applicable Standard of Review

55. This case is a review of the decision of an administrative body. As set forth by the Supreme Court of Canada in *Canada (Minister of Citizenship and Immigration) v.*

⁴ *Supra*, note 1.

*Vavilov*⁵, “reasonableness” is the default standard of review in Canadian administrative law and is the applicable standard of review herein.

56. In *Vavilov* at paragraph 102, the Supreme Court of Canada enounces that:

[r]easonableness review is not a “line-by-line treasure hunt for error” [...]. However, the reviewing court must be able to trace the decision-maker’s reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that “there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived”.

57. In deciding to uphold reasonableness as the default standard of Canadian administrative law, the Supreme Court granted more, but not unlimited, deference to administrative bodies’ decisions and to the context in which the decision was taken. The Supreme Court emphasizes in *Vavilov* at para. 89 that “*the particular context of a decision constrains what will be reasonable for an administrative decision maker to decide in a given case*”.

58. Considering the applicable standard of review, the Respondent’s decision not to select the Claimants, Mr. Lefebvre, Mr. Beaulieu, Ms. Hawkrigg, and Ms. Buck, is unreasonable. My decision is explained in the following paragraphs.

59. The issues for determination are as follows:

- a) Were Canada Snowboard's selection criteria clear and reasonable?
- b) Did Canada Snowboard use its selection criteria in accordance with their wording and spirit? If so, was their application reasonable?
- c) Is the decision rendered by Canada Snowboard coherent?
- d) Is my intervention as an arbitrator justified?
- e) What is the necessary degree of my intervention?

60. In accordance with Section 6.10 of the Code, the onus is on the Respondent to demonstrate that the selection criteria were clear, coherent, and properly applied.

a) Were Canada Snowboard’s selection criteria clear and reasonable?

61. On February 21st, 2021, the Respondent published Canada Snowboard’s Selection Protocol.

⁵ *Canada (Minister of Citizenship and Immigration) v. Vavilov*, 2019 SCC 65

62. The Podium Pathway metric, mentioned in Priority 4, was developed by Canada Snowboard in collaboration with Own the Podium and the Canadian Tire Sports Analytics Department.

63. The Respondent did not receive any questions nor challenges from its athletes regarding the Selection Protocol. Mr. Beaulieu, as a member of the Canada Snowboard Athlete Council, had the opportunity to give feedback and to request clarification on certain sections of the Selection Protocol and chose not to.

64. Thus, the Respondent has written clear and transparent selection criteria. They are reasonable and I find no reason to alter them.

b) Did Canada Snowboard apply its selection criteria in accordance with their wording and spirit?

65. As provided in Section 6, the following is the method by which quotas are allocated:

The allocation of Canada's quota to each discipline is restricted by the quotas established by the IOC/FIS, as outlined in Section 5 above. Quota will be allocated to the discipline for Quota Allocation 'A', not the individual athlete. Following Quota Allocation 'A' the Athlete Nomination will be made based on the criteria detailed in Section 8 below and Quota Allocation 'B' will be assigned directly to the athletes who have met the nomination criteria based on the Quota Allocation 'B' priorities until there are no longer any available quota or no more athletes who meet the allocation priority.

(Emphasis added)

66. On January 17th, 2022, the Respondent nominated Mr. Gaudet and Ms. Farrell as it considered that no other athletes had satisfied Canada Snowboard's Selection Protocol. This decision was correct and I find no reason to review it.

67. For the Claimants, however, I found that when applying its selection criteria, and by its own admission, the Respondent did not use all the metrics described in Priority 4.

Priority 4:

- *Demonstrates 2026 medal potential as determined by the athlete performance curves, Canada Snowboard's Gold Medal Profile, and Podium Pathway.*

(Emphasis added)

68. In assessing the 2026 medal potential of the Claimants, the only metric used by the Respondent was the Podium Pathway. In an email dated January 18th, 2022, Ms. Buck asked the Respondent to clarify whether the performance curves and the gold medal profile had been considered in the analysis. The response from the Respondent was that *“the GMP and Podium pathway, in essence, are interchangeable to a certain degree [...]”*.

69. The selection criteria described in Priority 4 is clear. However, I find the Respondent's explanation for using only one of the metrics is too vague. The exact criteria should be applied, and if there is a reason why it cannot be applied, then a meaningful explanation is required. If indeed 2 of the 3 criteria are *“interchangeable to a certain degree”*, then why list them in the official selection criteria?

70. I have no doubt that the Respondent acted in good faith in making its initial team selection decision. But good faith is not enough. They should be reminded that not only should they apply the very selection criteria they have enacted, in its entirety, but when these criteria are subjective, they have a duty to explain to the athlete, and then to the arbitrator, how they came to reach this decision. And if they did not/could not apply some of the listed criteria, a convincing and meaningful explanation should be provided. This was unfortunately not done, therefore opening the door to my review.

71. I recognize that the Respondent did not have the obligation to fulfill its allocated quotas. However, I am not satisfied that Priority 4 was applied appropriately, nor that the Respondent recognized that all three criteria should be applied. Under severe time constraints, I was faced with the dilemma of either sending the selection decision back to the Respondent to consider all three factors, or nominating certain athletes directly myself.

72. This is a decision I considered with the full weight of its gravity. I am mindful that, for an arbitrator to substitute its decision to that of an expert NSO, circumstances must be exceptional. In this case, I found that they were because of: the timeliness of the decision to be made, the availability of quotas, and the apparent incomprehension of the Respondent to apply its selection criteria (all 3 factors). Applying the principle

of caution, I found that the balance of inconvenience weighed in favour of the athletes and proceeded to the direct nomination.

c) Was the decision coherent with the Selection criteria?

73. The reviewing court must be able to trace the decision maker's reasoning without encountering any fatal flaws in its overarching logic, and it must be satisfied that *"there is [a] line of analysis within the given reasons that could reasonably lead the tribunal from the evidence before it to the conclusion at which it arrived"*⁶.

74. Perhaps in the Respondent's mind, it is coherent, however to an outside observer (athletes, myself) I was not convinced that the decision was consistent with the application of the Selection Protocol. In the present case, the priority order and the criteria laid out in the Selection Protocol (all 3 factors) were clear and left no discretion to the Respondent whether to use them or not when assessing the Claimants under priority 4.

75. To be clear, had the Respondent applied all 3 factors and summarily explained its decision, the selection decision would have withstood my scrutiny. The NSO is autonomous to draft its selection criteria as it chooses when governing its sport, but it then has a duty to strictly apply those rules, and to communicate its decision clearly.

76. Of course, if the criteria are purely objective (i.e. ranking or time), then no explanation is needed. But if the criteria are subjective, as found in Priority 4, then the selection committee is obligated to explain its decision first to the athlete and then, if challenged, to the reviewing body.

77. The specific nature of the discipline of alpine snowboard also needs to be considered, as all sports and disciplines are not alike. The performance of snowboard athletes is measured mostly through objective criteria: ranking through same day/course racing, combined with varying factors such as depth of quality of field and/or importance of the event. The clock is used to measure individual performance, but only in the context of each specific event. The outcome of the ranking (event-specific and world) then becomes a reliable yardstick for performance, on which an NSO can develop its selection criteria.

78. One must therefore be curious why an NSO would integrate a wide discretion within its selection criteria, and then provide minimal explanations when exercising it. In a discipline such as alpine snowboard, one would expect the selection criteria to

⁶ *Ibid.* para 102.

be mostly objective, as can be found in Priorities 1 to 3. This is not a team sport, the *chemistry of the team* is not an important factor, as can be found in ice hockey or basketball.

79. Still, I find that the built-in subjective criteria, as drafted, was appropriate. But because of the nature of the discipline, the Respondent had a duty to explain how and why it exercised its discretion negatively against the Claimants. By confirming that the criteria had not been applied as drafted, and providing minimal explanations, their selection decision became reviewable.

80. Indeed, the correspondence sent to the athletes did not provide a complete enough understanding of the reasons as to why they were not selected and mentioned that only the Podium Pathway was used in assessing their 2026 medal potential. Canada Snowboard should have taken into consideration all the factors set out in Priority 4.

81. Additionally, for Claimant Jules Lefebvre, the Respondent used its discretionary power provided by the “performance readiness” clause at Section 14 of the *Canada Snowboard’s Internal Nomination Procedures 2022 Olympic Winter Games Selection Protocol*, to dismiss the Selection Protocol under which the claimant had qualified by meeting the criteria of Priority 5.

14. PERFORMANCE READINESS “Competitive Ready” is defined as the ability of the athlete to achieve equal or superior performance(s) onsite at the scheduled event, as compared to the performance(s) the athlete achieved in qualifying. The final decision on competitive readiness will be made by the Head Coach of each disciplines, using all available information at his/her disposal, including performance results and progress during the selection period, the suitability of the training and competition plan, fitness and other competitive readiness indicators, submitted medical documentation, consultations with the athlete’s personal coach, and any other relevant performance related information.

It is implicit that all athletes selected to the 2022 Olympic Winter Games Team prepare in such a way as to be at peak readiness for the 2022 Olympic Winter Games. Canada Snowboard will provide an environment to ensure peak performance for its athletes, but accepts that some athletes may choose to conduct some or all of their preparation outside of the Canada Snowboard program. In such circumstances, Canada Snowboard reserves the right to perform testing on athletes nominated for the 2022 Olympic Winter Games Team in order to assess their performance readiness. Canada Snowboard also reserves the right to remove an athlete from the team in case of injury or

inability to perform at an appropriate level, and to replace that athlete with a nominated reserve (alternate) athlete or to not replace that athlete at all.

(Emphasis added)

82. As explained in Vavilov, “*a decision must comport with any more specific constraints imposed by the governing legislative scheme, such as the statutory definitions, principles or formulas that prescribe the exercise of a discretion*”⁷. This use of discretionary power to dismiss the previously agreed rules for selection to the national snowboard team is not coherent nor reasonable.

83. At this time, I cannot coherently follow the reasoning by which the Respondent decided not to select the Claimants. Given the time constraints and the unreasonable decision initially taken by the Respondent, I am substituting my decision for the Respondent’s initial decision.

d) Is my intervention as an arbitrator justified?

84. In accordance with section 6.10 of the Code, the onus of proof was on the Respondent to demonstrate that its decision was rendered in accordance with Canada Snowboard’s Selection Protocol.

85. I believe that the Respondent did not apply its selection criteria reasonably and its decision not to nominate the Claimants is unreasonable, as the selection rules were not followed or were dismissed arbitrarily.

86. The January 17th, 2022 minutes of the Team Selection committee are mostly telegraphic and fall short of capturing what may have been meaningful discussions within the committee. Those minutes should reflect the rationale behind the decision-makers when exercising their discretion and while they may have been pressed for time, they were duty-bound to be concise, complete and clear.

87. In purely objective sports, such as PSL, where only timed performances count, the discretionary review of NSOs should be kept to a minimum. By excluding two components of Priority 4, the Respondent has not applied its own selection criteria as it was expected to do.

⁷ *Ibid.* para 108

88. Given the foregoing, I do not believe that the Respondent has met its burden of proof, and my intervention as an arbitrator is not only justified but required. As provided for in Subsection 6.11 (a) of the SDRCC Code, the Arbitrator may substitute his decision for the decision in dispute.

e) **What is the necessary degree to my intervention?**

89. Given the time constraints, the importance of the decision to the Claimants, and to avoid further inequity and error, I have decided to substitute my decision for that of the Respondent, in accordance with Subsection 6.11 (a) of the SDRCC Code.

Nomination of the Men's team

90. **Mr. Gaudet** was initially selected for the 2022 Olympic Winter Games. Since no Claimant challenged his nomination to the team, and based on his performances, I confirm his nomination to the national team for the 2022 Olympic Winter Games.

91. **Mr. Lefebvre** met Priority 5's criteria by finishing 22nd at the World Cup PGS event in Scuol on January 9th, 2021. I did not find reasonable nor coherent reasons for the Respondent to dismiss Mr. Lefebvre's qualification through previously established criteria by using its discretionary power under the *performance readiness* criteria.

92. I agree that the Respondent should send the most competitive team to the upcoming Olympic Games, as well as send those who show promise for a podium in 2026. However, this is no justification to arbitrarily set aside the objective criteria. I must also stress that in the context of the COVID-19 pandemic, several competitions were canceled which limited the Claimant's opportunities to replicate his previous performances. This was combined with reduced/altered training opportunities due to various lockdown policies. This reinforces the unreasonableness of the Respondent's reliance on section 14 (the *performance readiness* criteria) to dismiss Mr. Lefebvre's qualification through priority 5.

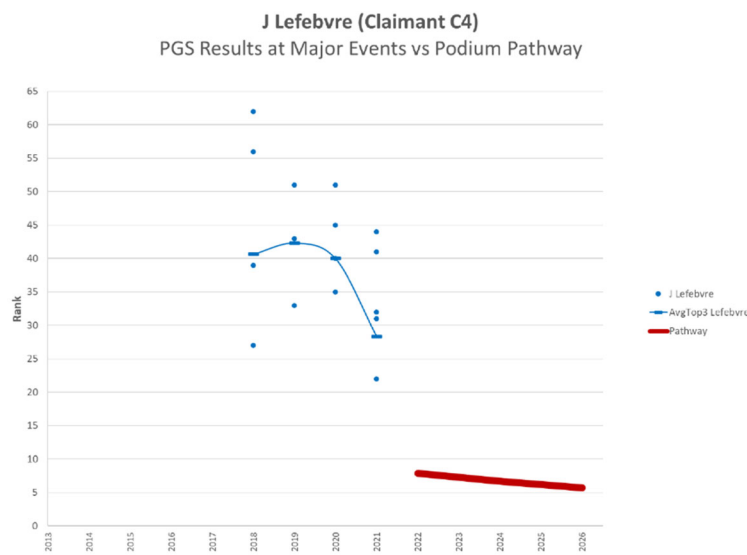
93. To be clear, it is perfectly acceptable for selection criteria to include a *performance readiness* exception, to allow the NSO to exclude the occasional otherwise-qualified athlete to compete, when special circumstances arise. In many cases, this clause has been successfully applied in cases of injury or after experts have produced reports determining that the athlete did not meet specific threshold

standards (i.e. iron deficiencies, unrecovered injuries, limited range of movement, etc.).

94. I have difficulties with the wording of clause 14 as written: it is written in such a way, and I have found that it has, in fact been applied, as a substitute for the team selection objective standard, granting almost unlimited discretion to the NSO to exclude otherwise-qualified athletes.

95. To be clear, I don't believe that the NSO applied the performance readiness criteria against Mr. Lefebvre with ill-intentions or bad faith. But I found that they exercised it without transparency and meaningful explanations. I could not follow their logic in the minutes, and the impression it provided was that they made the decision without sufficient defensible evidence, based on "feeling". The exception found in article 14 is very powerful for the NSO, should only be used in exceptional circumstances, and should always be based on defensible facts (such as outside expert reports on the athlete's physical or mental fitness level).

96. As demonstrated by Mr. Lefebvre's Podium Pathway, his performances are progressing each year. Indeed, the curve downwards is a good sign, showing a climb in ranking over time.



97. Therefore, I believe that Mr. Lefebvre deserves his place on the snowboard national team, by means of qualification through priorities 4 and 5 of the Selection Protocol.

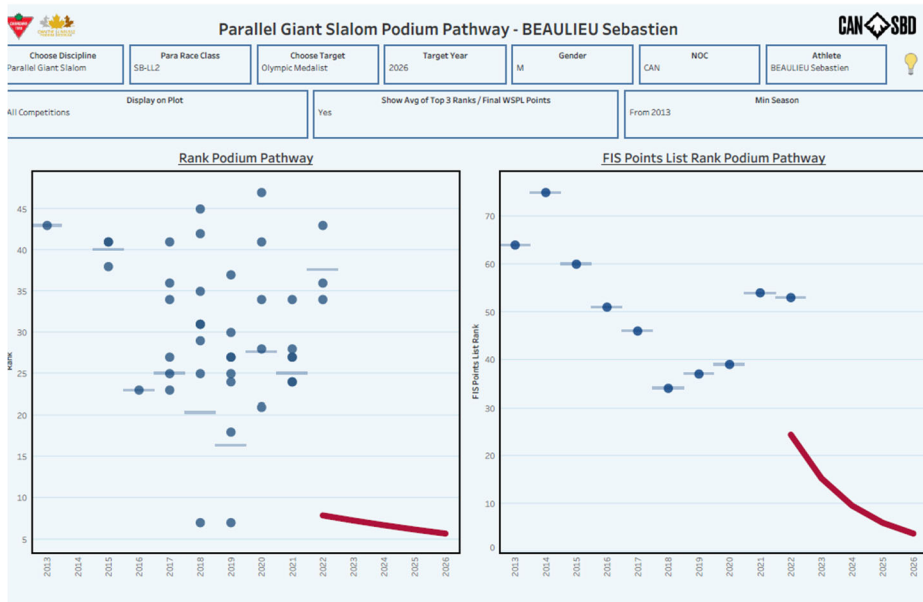
98. Since Mr. Gaudet’s nomination is uncontested and that Mr. Lefebvre qualified for nomination, only one quota remains for the men’s category.

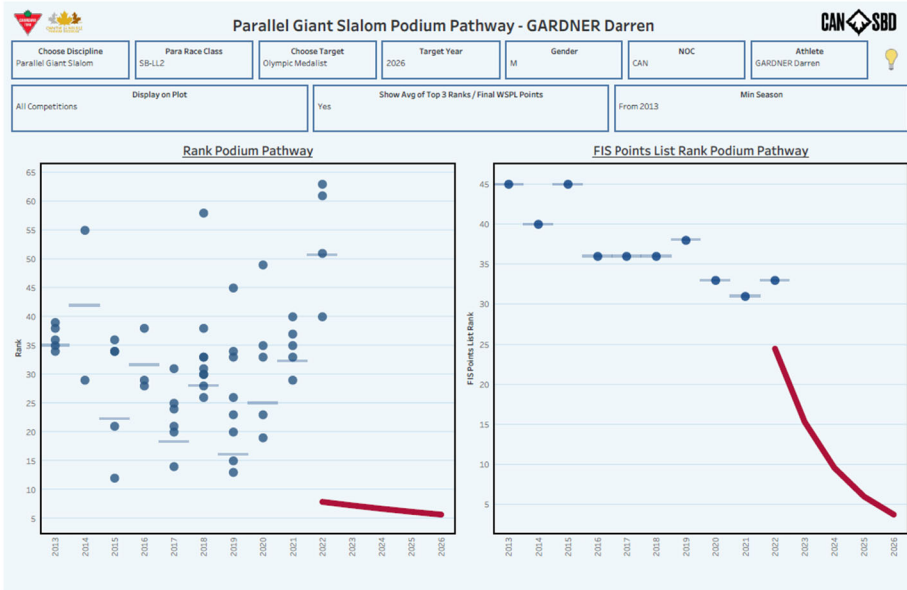
99. It lies between Mr. Beaulieu and Mr. Gardner. Upon careful review of both Claimants’ submissions and performance in accordance with the Selection Protocol, I awarded Mr. Beaulieu the third and final quota.

100. When taking into consideration their Podium Pathways and previous performance, Mr. Beaulieu demonstrates a slightly better medal potential for the 2026 Olympic Winter Games.

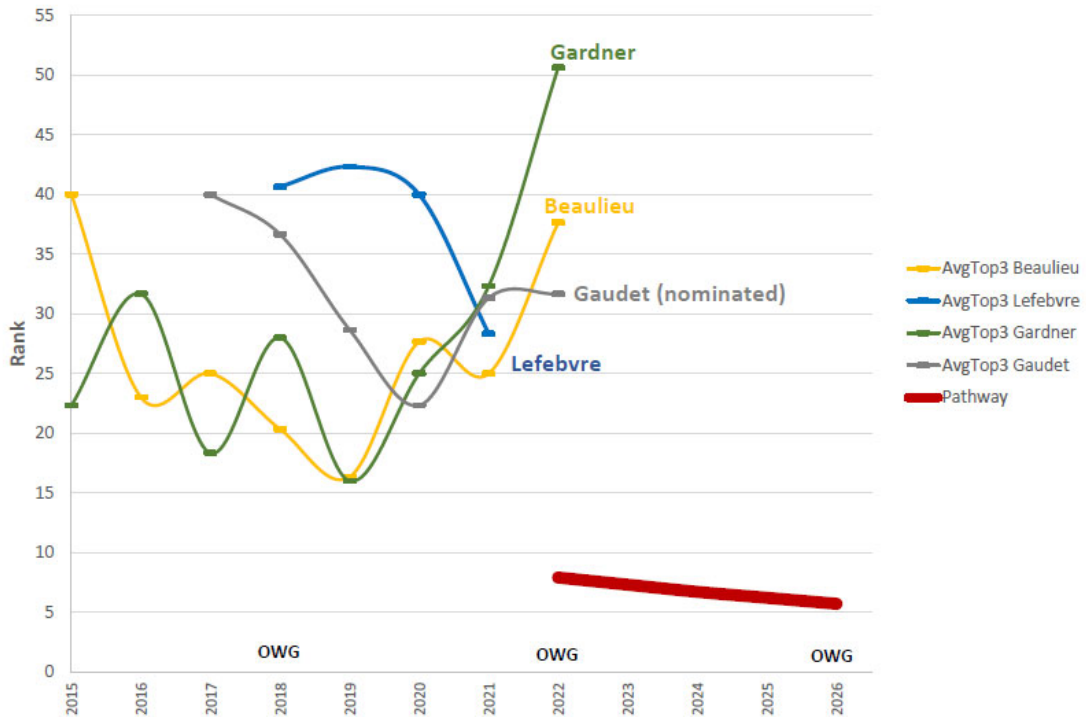
101. When comparing both athletes through the 2018-2022 period, Mr. Beaulieu demonstrates a slightly better performance curve, and his Podium Pathway is more favorable than Mr. Gardner’s.

102. I was faced with the difficult choice of choosing between two very good, promising athletes, and determined Beaulieu deserved the last remaining quota spot.





PGS Results at Major Events vs Podium Pathway



Nomination of the Women's team

103. **Ms. Farrell** was nominated to the national team for the 2022 Olympic Winter Games. She met Priority 3 criteria by finishing twice in the top 8 at eligible events and her nomination is not contested. There is no question that her nomination stands.

104. As for the Claimants **Ms. Buck and Ms. Hawkrigg**, based on their Podium Pathways and their performance curves, I believe that they both have the potential to progress and to perform consistently with the Podium Pathway in the upcoming years.

105. For both athletes, the minutes of the selection committee read as follows:

Kaylie Buck

- Does not show progression towards 2026
- Results are clear
- Does not satisfy priority 4

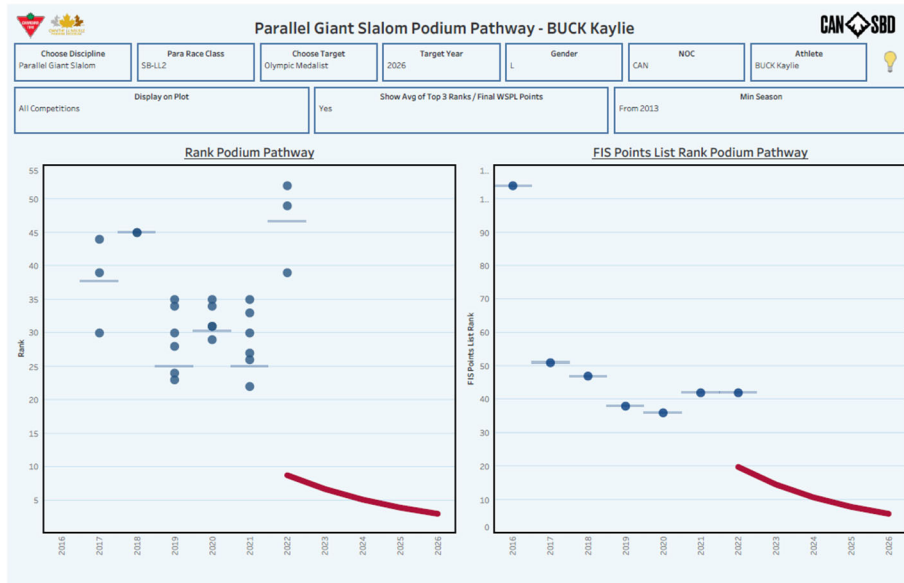
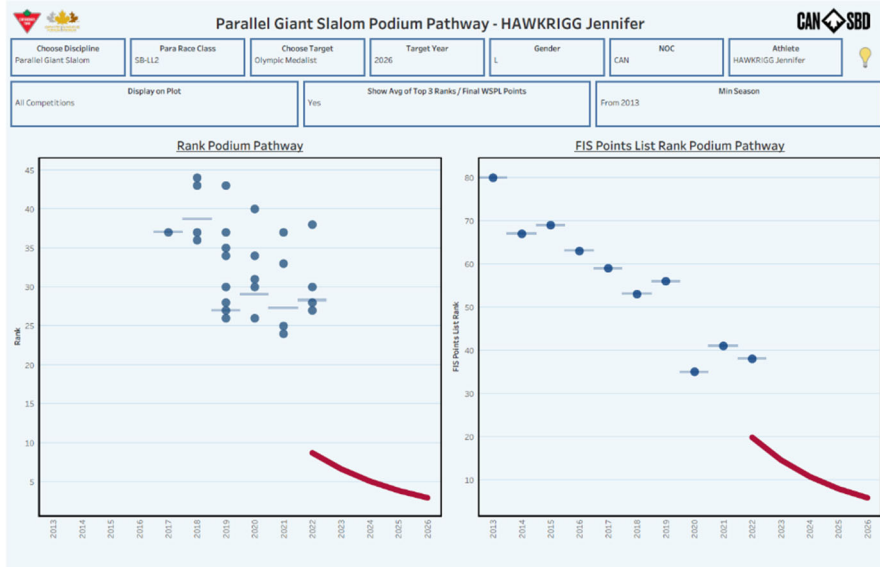
Jennifer Hawkrigg

- Gaps are like Kaylie (relatively the same)
- Does not show enough progression towards 2026
- Does not satisfy priority 4

106. While the committee may have held meaningful and thoughtful discussions in their analysis to exclude the athletes from Priority 4, the minutes reflect the opposite.

107. Without repeating the previous considerations on reasonableness, which apply in this analysis as well, the nomination of Ms. Buck and Ms. Hawkrigg to compete at the 2022 Olympic Winter Games is the reasonable decision to be made as quota spots for Canada are available and they are fit to compete at the event.

108. In accordance with the allocated quotas by the FIS, I confirm both Claimants' nomination to the national snowboard team.



VIII. CONCLUSION

109. I find that the Respondent's selection criteria were not appropriately followed in a predictable manner and reasonably applied.

110. After careful consideration of the evidence, I conclude that the Respondent's decision not to select the Claimants was unreasonable.

111. The Tribunal orders Canada Snowboard to add the following names to its national snowboard team for the 2022 Olympic Winter Games:

MEN

- a. Arnaud Gaudet,
- b. Jules Lefebvre, and
- c. Sébastien Beaulieu

WOMEN

- a. Jennifer Hawkrigg, and
- b. Kaylie Buck

112. Mr. Lefebvre's, Mr. Beaulieu's, Ms. Hawkrigg's, and Ms. Buck's appeals are **granted**.

113. Mr. Gardner's appeal is **dismissed**.

114. I retain jurisdiction and reserve the right to hear any dispute relating to the interpretation or application of the present decision.

Signed in Miches, Dominican Republic, this 7th day of February 2022.



Patrice Brunet, Arbitrator