

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

NO: SDRCC 21-0482

JOSEPH (RILEY) MONAGHAN  
(CLAIMANT)

AND

BOBSLEIGH CANADA SKELTON  
(RESPONDENT)

AND

KEEFER JOYCE  
CYRUS GRAY  
SHAQUILLE MURRAY-LAWRENCE  
JOSH GILPIN  
ORION EDWARDS  
MIKE EVELYN  
KAYDEN JOHNSON  
ANTHONY COUTURIER-LAGACÉ  
CHRIS PATRICIAN  
WILLIAM AUCLAIR  
JAY DEARBORN  
DANIEL SUNDERLAND  
(AFFECTED PARTIES)

**Appearances:**

Colin Johnston – Counsel for the Claimant  
Julia Flood – Counsel for the Claimant  
Joseph (Riley) Monahan – Claimant

Alexandra Logvin – Counsel for the Respondent  
Chris Le Bihan – High Performance Director BCS

**Arbitrator:** Janice Johnston

## **AWARD**

### **Background**

1. This matter arises from a request for arbitration filed by the Claimant, Mr. Riley Monaghan, on January 7, 2021. I was appointed by the SDRCC to act as Arbitrator based on the agreement of the parties and have filed the requisite Declaration of Independence.
2. Several Preliminary Meetings were held by way of conference call to determine the manner in which this matter would proceed. Ultimately, a hybrid approach consisting of affidavit evidence, cross-examination in an oral hearing conducted via videoconference and written final submissions was the process agreed upon. The hearing was held on April 13, 2021 and the parties agreed upon a time frame for the filing of submissions which concluded on May 27, 2021.
3. I would like to thank the parties and their representatives for the extensive and comprehensive submissions that were filed. They provide a thorough analysis of the respective positions of the parties. The jurisprudence provided by the parties was also helpful to me in coming to the conclusions that follow.
4. The Claimant filed an affidavit and testified briefly, including a brief cross-examination, on April 13. The Respondent filed affidavits for six individuals. However, the only person that counsel for the Claimant chose to cross-examine was Mr. Chris Le Bihan, the High Performance Director (HPD) for Bobsleigh Canada Skeleton (BCS).
5. This case is about the selection of individuals for the Development Bobsleigh Team (DBT) crew positions for the 2020-21 season. Mr. Monaghan was not selected for one of the crew positions and feels that he should have been. He has appealed the decision of the Selection Committee to the SDRCC. The Claimant does not appear to challenge the Selection Criteria itself but asserts

that the Respondent failed in numerous respects to follow and apply its own Selection Criteria and improperly deviated from the Selection Criteria that was presented to the athletes prior to the selection process and upon which athletes reasonably relied.

### The Selection Criteria

6. The National Bobsleigh Program 2020-21 NBP Selection Process and Criteria (the “Selection Process and Criteria”) was published on July 15, 2020. The purpose clause reads as follows:

#### **PURPOSE**

The following outlines the process **Bobsleigh CANADA Skeleton (BCS)** will follow in selecting athletes to the **Senior Bobsleigh Team (SBT)** and **Development Bobsleigh Team (DBT)** as part of the **National Bobsleigh Program (NBP)** as well as for **NextGen Bobsleigh Pilot (NGBP)** designation. This selection Process has been designed in support of BCS’ mission to develop and sustain World and Olympic Champions. Fairness, equal opportunity, the desire to field competitive teams for international competition and the development of NextGen athletes are the guiding principles of this NBP - Selection Process & Criteria.

BCS will utilize a combination of testing camp results, including athletic testing and/or icehouse push testing (as applicable) where athletes earn their **Athletic Performance Evaluation (APE)** score (Appendix A), along with an **Evaluation Race Series (ERS)** for the process of completing team selections.

7. There are two other relevant provisions in the portion of the Selection Process and Criteria with general application that I would like to set out. Section 1 NBP - Selection Process, Subsection C Conduct of the ERS, i) General race format, (4) states, “Each Pilot is responsible for compiling their respective team of eligible Crew and entering the team into the ERS”. Section 3 NBP - Selection Criteria, Subsection H, is titled “Unforeseen [sic] Circumstances & Use of Discretion”. It provides that, “BSC shall consider using discretion in accordance with this NDB Selection Process & Criteria and/or in the event of circumstances such as but not limited to: [...] iii) ‘Acts of God’ - adverse

weather conditions or other external factors resulting in modified or cancelled *BSC testing opportunities* and/or ERS race(s)".

8. The relevant portions of the Selection Process and Criteria specific to the DBT read as follows:

iii) DBT Nominations – Crew:

Upon completion of the ERS, eligible athletes shall be nominated to the Selection Committee as Crew considering all relevant factors, including but not limited to the following:

- (1) Performance Score Rubric (Appendix C); and
- (2) Performance Indicators as per section **3)B)iii)(1)(b)**.

For the avoidance of doubt, the Performance Score Rubric and/or the Performance Indicators shall not be determinative in nominating athletes. Other factors may be taken into consideration, as appropriate in the circumstances, in determining nominations to the Selection Committee.

9. The two sections referenced above, Appendix C and section 3)B)iii)(1)(b) provide:

Appendix C:

<b>PERFORMANCE SCORE RUBRIC</b>
<b>1. QUANTITATIVE SCORE - MAX 12 POINTS (80% Weighting)</b>
<b>A: APE Points / 100</b> <i>Refer to Appendix A</i>
<b>B: Previous Results</b> <i>1 point = 2 or more WC top 3 performances during the most recent Season</i> <i>2 points = top 8 performance at the most recent World Championships</i>

**2. QUALITATIVE SCORE - MAX 8 POINTS (20% Weighting)**

The Athlete's demonstrated:

**A: Commitment to BCS programs**

**B: Ability to take personal responsibility for self and their results**

**C: Ability to work within a team structure**

**D: Understanding and respect for the position on a Canadian National Team**

**E: Willingness to promote BCS in a positive manner**

**F: Contribution towards a positive daily training/competition environment**

**G: Respect towards BCS coaches, staff & volunteers**

**H: Respect towards fellow teammates**

*Scoring:*

*1 = Ideal*

*0 = Needs Improvement*

*-1 = Unacceptable or nonexistent*

$$\text{PERFORMANCE SCORE} = ((1A+1B)*4/3) + ((\text{SUM}(2A:2H))*1/2)$$

Thus Appendix C provides for two categories of factors, quantitative factors which include test scores and previous results and qualitative criteria, such as the ability to work within a team structure or commitment to the BSC program.

3)B)iii)(1)(b)

b. Performance Indicators

The Performance Indicators shall include but are not be limited to the following:

- i. 2020-21 APE Score;
- ii. 2020-21 Push Testing results (Ice House), including individual and team push times, push acceleration profiles and push speed profiles;
- iii. 2019-20 competitive season push performance analysis, including relative push times and relative push speeds;
- iv. Competitive experience; and
- v. Number of Crew required based on the number of Pilots nominated for selection to the SBT.

### The Selection Process

10. In accordance with the Selection Process, athletes seeking selection to the DBT crew positions were invited to attend camps where their performance was assessed by coaches in accordance with the criteria set out above. The testing includes push tests, sprint tests and general fitness tests. Due to the COVID-19 pandemic many of the camps normally scheduled in the off

season had to be cancelled. Therefore, training opportunities were lost and the ability of the athletes to demonstrate their abilities to coaching staff was also restricted. After the crew testing and the final DBT camp was completed, prospective pilots (those seeking a pilot position on the DBT) were asked to select their crews for the ERS races which were taking place in Whistler. The Claimant was not selected by a pilot and therefore did not compete in the ERS races.

11. In this case, the selection process involved two steps. The High Performance Committee (HPC) which consists of the HPD, Mr. Le Bihan, the Head Coach and the High Performance Manager, meets and in accordance with the Selection Criteria determines a list of recommended nominees to the team. Mr. Monaghan was not one of the crew members nominated. This list of nominees is then provided to the Selection Committee for review and final decision. Mr. Le Bihan also sits on the Selection Committee. At the end of the review the members of the Selection Committee voted and ratified the HPC's nominations unanimously.
12. A detailed and lengthy affidavit was filed by Ms. Sarah Storey on behalf of the Respondent, the President of BCS. The HPC met on Sunday, November 8, 2020 following the conclusion of the ERS. Ms. Storey was invited to attend the meeting and did so. She described the process followed at the meeting. I have only set out the portions addressing the selection of DBT crew and have omitted her comments on the selection of Pilots and crew for the Senior Bobsleigh Team:
  48. During the meeting, the members of the HPC reviewed and discussed the APE scores, push testing results, team pushing evaluations and ERS performances and results of all athletes, who participated in the National Team Selection Process. They discussed, among other things, the technical driving skills of the pilots, the technical pushing skills of the pilots and returning and new crew athletes.  
  
[...]
  57. In previous years, the number of crew named would be limited to the number of athletes required to 'fill' the teams based on the number of pilots named to the NBP, being the SBT and DBT.

58. The HPC discussed that the HPC has discretion with respect to the number of athletes to be named to the DBT and I recall referring to section 3)C) of the Selection Policy, which states that “[t]he number of DBT Positions shall be determined at the sole discretion of the NBP-HPC, in consultation with such other BCS staff as may be appropriate, considering such factors as may be deemed appropriate.”
59. Despite the HPC determining that there were no men’s DBT pilots to be nominated, it was anticipated that there would be some NGBP programming, including, if possible, under the pandemic circumstances, training and international competition. As a result, they discussed how many crew athletes would be appropriate to be named in the circumstances and based on the budget, calendar, affects of the pandemic on planned programming and other factors. They also decided, if there were sufficient eligible athletes, to nominate sufficient DBT crew for the remaining positions for the SBT pilots to compete, i.e., two- and four-man crews, plus an alternate and enough crew for two- and four-man crews plus an alternate for the two NGBP pilots.
60. The HPC then reviewed the list of DBT crew athletes who participated in the Selection Process and discussed a variety of sport and technical aspects, including their testing metrics and other data, including APE scores, push testing, team pushing evaluations, and the ERS performances and results.
62. Having considered all the data available for each athlete who participated in the Selection Process and considering no specific metric determinative and having observed the competence of all the athletes in the process, the HPC considered what would be a fair and objectively based way to determine who would be nominated to the DBT.
- [...]
64. The HPC considered:
- a. That, in light of the pandemic, there was limited access to the Ice House for technical push training and that athletes had varying levels of access to training facilities and equipment throughout the off-season.
  - b. Some short-term injuries that may have affected some athletes’ testing metrics but did not prevent the athletes from participating in the Selection Process or the upcoming competitive season.
  - c. Some of the athletes who participated in the Selection Process prior to the ERS were not selected by the participating pilots to travel and participate in the pre-season sliding and ERS.
65. In the end the HPC determined that, considering all metrics and having observed the athletes as much as pandemic protocols allowed, there was no compelling reason to replace athletes who had been selected by the pilots to participate in the pre-season sliding and ERS with athletes who had not been selected to do so.

66. Having reviewed and discussed all relevant factors therefore the HPC agreed to the nominations as communicated to the Selection Committee.

13. Ms. Storey served as the Chair of the NBP Selection Committee for the 2020-21 selection process. Ms. Storey described the meeting of the Selection Committee in her affidavit:

71. On November 8th following the meeting of the HPC to determine the nominations, Mr. Le Bihan sent to the 2020-21 NBP Selection Committee the list of nominees and supporting documentation (comprised of the 2020-21 NBP Selection Metrics [...])
73. One member of the 2020-21 NBP Selection Committee, Dr. Alexis Morris, requested copies of the ERS results which were provided to the Selection Committee ahead of the meeting. [...]
74. The 2020-21 NBP Selection Committee convened at noon PST on November 9<sup>th</sup>, 2020 in person and via Zoom as scheduled.
75. In addition to the named members of the Selection Committee, Mr. Le Bihan invited the other members of the HPC to attend the Selection Committee meeting to answer any questions the Selection Committee may have had. Mr. Todd Hays, NBP Head Coach and Mr. Morgan Alexander, NBP High Performance Manager (“**HPM**”) both attended the November 9<sup>th</sup> Zoom call.
76. As Chair I opened the meeting, welcomed the participants and thanked them for giving of their time to assist with the NBP Selection Process.
77. I confirmed that the Members of the Committee had received and had a chance to review the Selection Policy, the list of the HPC’s nominees, the metrics document(s) and the ERS results and the Selection Committee confirmed that they had and then invited Mr. Le Bihan to present to the Committee.
78. Mr. Le Bihan reviewed with the 2020-21 NBP Selection Committee the changes to the Selection Policy compared to the previous seasons’ criteria and asked if the Selection Committee had any questions regarding the Criteria or the Selection Process.
79. Next, Mr. Le Bihan presented the nominations for the SBT pilots and crew, DBT pilots and crew and NGBP designated athletes for both men’s and women’s teams, referring to the metrics documents attached to his emails of November 8<sup>th</sup> and 9<sup>th</sup> referenced above.
80. The metrics documents contained additional information for the Selection Committee’s reference, including information about pre-selection, eligibility, the athletes’ status (or lack thereof) prior to the completion of the Selection Process (*i.e.*, current NBP athletes have National Team Athletes (“**NTA**”) status until the selection is complete and their status changes depending on whether they are selected to the team. Non-NBP athletes have no BCS status and are referred to as Prospects until being named to a team).

81. The metrics document lists the nominations and other athletes who participated in the Selection Process, but as stated above, the Selection Committee's discussions with respect to selection are not limited to the information listed in the document.
  82. Mr. Le Bihan reviewed the process and reasoning behind the nominations, summarizing the process set out above. The meeting was interactive with the members of the Selection Committee invited to ask questions throughout. I recall that both Messrs. Hays and Alexander both provided comments or answers to questions during the call.
  83. I recall asking Mr. Le Bihan to provide information to the Selection Committee about those athletes who participated in the Selection Process and were not being nominated for ratification (such as the Claimant and some others), which he did to the satisfaction of the Selection Committee. I note that Mr. Monaghan was the only athlete among those who participated in the Selection Process, but not the ERS, who did not have NTA status going into the Selection Process, as he was a Prospect. Nonetheless, all his relevant performances were considered, along with those of all other participants.
  84. As is my practice when I chair Selection Committees for both bobsleigh and skeleton, I asked Mr. Le Bihan to discuss whether and in what way discretion may have been used or not used in the HPC nomination process in order for the Selection Committee to ensure that such discretion was used in accordance with the Selection Policy and appropriately used. Mr. Le Bihan provided information to the Selection Committee about the use of discretion by the HPC, including the number of nominations to the SBT and DBT teams, the considerations for varying skill and experience levels of athletes, the consideration of the ERS performances and results in determining the nominations.
  85. As is my practice, I recall asking the Selection Committee if they were comfortable with the use and non-use of discretion as presented and they confirmed they were.
  86. I asked Messrs. Le Bihan, Alexander and Hays if they had any additional comments and to confirm that they are satisfied with the nominations as presented, which they confirmed in the positive.
  87. I asked each of the members of the Selection Committee individually if they had any additional questions and they had none.
  88. As is my practice when I chair Selection Committees, I asked each individual member of the Selection Committee to vote on whether to ratify the nominations of the NBP Teams, which each confirmed and the nominations were ratified unanimously.
14. Although she was available, Ms. Storey was not cross-examined. Therefore, I accept her evidence as an accurate description of what transpired both at the meeting of the HPC and at the Selection Committee meeting. As noted

earlier in this award, Mr. Le Bihan the HPD for BCS was cross-examined. I will deal with his testimony in the context of addressing the concerns raised by the Claimant, which I will now turn to.

15. The Claimant argues that the results of the selection process were flawed because:
  1. It is improper to delegate the authority to select crew who will be participating in the ERS to the pilots. This decision should be made by the coaching staff;
  2. It is improper to consider the results of the ERS in crew selection as it is not referenced as a selection criteria for crew members;
  3. The test results of the Claimant were superior to those of some of the individuals selected by the pilots to attend the ERS and ultimately nominated and then selected for crew positions. These results were not put before the Selection Committee when BSC's DBT was selected;
  4. The qualitative criteria, which is part of the performance score rubric, were not considered;
  5. Three CFL athletes were given preferential treatment and improperly selected instead of the Claimant.

### **Onus of Proof**

16. This case involves a dispute over team selection. As such, Section 6.10 of the Canadian Sport Dispute Resolution Code, 2021 (the "Code") applies:

#### **6.10 Onus of Proof in Team Selection Disputes 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.

## Standard of Review

17. Section 6.11 of the Code provides:

### **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 grant such remedies or relief that the Panel deems just and equitable in the circumstances  
[...]
- 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.

18. Pursuant to this provision, the parties did not dispute that the SDRCC has a wide discretion. Before I turn to consider the jurisprudence, I should note that the section set out above, Section 6.11, has been modified in the new 2021 Code, to specifically address the concept of deference. Historically, National or Provincial Sport Organizations have successfully argued before the SDRCC that deference to the decision-maker or decision-making process, based on experience and expertise, should as a general rule be granted. It is now made clear that deference is not automatic. It should only be given when the Party seeking deference, whose decision is being questioned, can demonstrate that the person, or persons, who are exercising the discretion and making the decision possess relevant expertise. The onus is on the party asserting that deference should be given to establish the relevant expertise.

19. A review of the jurisprudence and decisions previously rendered by the SDRCC makes it clear that the standard of review to be applied in a selection case is one of reasonableness. In *Beaulieu and Canadian Snowboard Federation and Gardiner* SDRCC 13-0214, Arbitrator Décary articulated the standard as follows:

[23] Arbitrators are guided by two general principles. The first one is that deference is owed to the sporting authority's experience and expertise. It is neither the role nor the duty of an arbitrator to substitute his own appreciation of the appropriate solution unless there are valid grounds to do so. The second one is that the standard to be applied in determining what constitutes a valid ground, is the reasonableness of the decision. This is where it is helpful to compare the process with judicial review and seek guidance in judicial pronouncements that have defined what are the general grounds that entitle a reviewing body to intervene with the original decision and replace it with its own. It is in that context that my comments in *Mehmedovic v. Judo Canada*, SDRCC 12-0191/92 with respect to reasonableness should be read. Simply put, in sport arbitration, where deference to the experience and expertise of sport authorities is a starting point, the test is whether the outcome falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and of the policies at issue.

20. I agree with this statement of the law, subject to my comments above regarding the clarification now provided by the Code on the issue of deference. In terms of the standard of review, it is appropriate for me to adopt a standard of review similar to that which would be applied by an appeal court in an application for judicial review. The appropriate standard of review is not correctness but the less onerous standard of reasonableness.

21. In *Canada (Director of Investigation and Research) v. Southam Inc.* [1997] 1 S.C.R. 748 (SCC) at para 56, the Court articulated the following test for reasonableness:

[...] an unreasonable decision is one that, in the main, is not supported by any reasons that can stand up to a somewhat probing examination. Accordingly, a court reviewing a conclusion on the reasonableness standard must look to see whether any reasons support it.

22. See also in *Maloshicky v. Canada (Canada Customs Revenue Agency)*, 2005 FC 978 at para 10:

[...] A reasonable decision is not necessarily a correct decision. There can be more than one reasonable decision. It does not matter whether or not I would have made the same decision. The reasonableness standard means that the decision should not be interfered with unless clearly wrong in the sense of being based on a wrong principle or a misapprehension of the facts.

23. I will return to this issue later in this award, but I accept that the quotes set out above are reflective of the appropriate general approach in cases of this nature.
24. In his submissions, Counsel for the Claimant made reference to and quoted from *Jaclyn Laberge v. Bobsleigh Canada Skeleton, SDRCC 13-0211 at para. 71*, a decision in which Arbitrator Mew observed:

Although many of the cases which are discussed by courts relate to commercial agreements, those principles can and should be adapted to guide the interpretation of rules, regulations and other agreements which arise in the sport environment. The starting point is to ascribe to words their natural and ordinary meaning having regard to the context in which they arise. The intent of the parties is important but the subjective interpretation of the parties – what they thought the same criteria meant – is immaterial (see Chitty on Contracts, 30<sup>th</sup> ed. Vol. 1, para. 12-043)

Counsel went onto argue that:

As such, the following basic tenets of contractual interpretation are applicable to the language of the Selection Criteria:

- a) The Selection Criteria as a whole must be examined, not just the specific words in dispute;
- b) Words should be given their natural and ordinary meaning;
- c) Individual terms of an agreement are “to be construed in the light of their relationship to other parts of the agreement and the overall objectives of the agreement.

I agree that this approach to the interpretation of the NBC Selection Process and Criteria is an appropriate one and it is one which I will utilize.

25. I will now provide a review of the submissions of the parties and my decision. I have read and considered all of the submissions filed, but as I noted at the outset, they are very thorough and lengthy. In the interest of getting this decision to the parties within the tight time frame that I am working in, I have only summarized and set out the submissions that I consider to be the most pertinent and relevant.

## Decision

26. As noted earlier, a lengthy affidavit with exhibits was filed by the Respondent on behalf of Mr. Chris Le Bihan the HPD for BCS, and he was subjected to an extensive cross-examination. Mr. Le Bihan is a former National and Olympic Team bobsleigh brakeman, Olympic medalist, former Bobsleigh Canada Skeleton Athlete Representative elected by his peers and has been the NBP Push Coach, NBP Head Coach and now since 2014, the HPD of BCS for the sport of bobsleigh and skeleton. Mr. Le Bihan gave his testimony in a professional, straightforward and candid fashion. I am satisfied that the Respondent has discharged its onus and has demonstrated that Mr. Le Bihan possesses personal and professional expertise relevant to the decision-making process in this case, in accordance with section 6.11 (c) of the Code such that in the appropriate circumstances, deference should be granted. In addition, I am satisfied that the Respondent has demonstrated, based on the evidence before me, that the other members of the HPC and Selection Committee also possessed sufficient relevant expertise that deference should be granted.
27. Mr. Le Bihan has been involved in the selection process for the National Bobsleigh Team, World Championships and/or Olympic Games Team almost every year since 2004 either as an athlete, an Athlete Representative, a Technical Coach, a Head Coach or the HPD. In his role as HPD, it is his responsibility to establish and oversee the selection criteria and related processes for the Olympic, National and NDT for both the Olympic sports of bobsleigh and skeleton in Canada. When Mr. Le Bihan became HPD in mid-2014, the selection criteria and processes in place, to use his words, “were not robust.” This was one of the key areas that, in consultation with relevant technical and other staff, he undertook to improve to provide clarity, transparency, fairness and certainty to BCS and aspiring BCS athletes about how selection would be determined.

28. The NBP Selection Process and Criteria is reviewed and revised on an annual basis. The 2020-21 version was published on July 15, 2020 and communicated to athletes. I am satisfied based on the evidence of Mr. Le Bihan that the NBP Selection Process and Criteria was appropriately established in accordance with section 6.10 of the Code. It is not in dispute that once established, the Selection Process and Criteria was communicated to all the athletes.
29. I would now like to address the concerns raised by the Claimant with regard to the selection process in this case. I would note that I am doing so in no particular order in terms of the importance placed upon them by Mr. Monaghan. The first challenge raised was with regard to the fact that the pilots were allowed to select their crew for the ERS. It was suggested that it is improper to delegate the authority to select crew who will be participating in the ERS to the pilots and that this decision should be made by the coaching staff.
30. Mr. Le Bihan was cross-examined at length on this point. He indicated that traditionally pilots chose their crew for the ERS. This is because bobsleigh is a team sport and the members of the team are required to work together under the direction of the pilot. In addition, different members of the team have different strengths, such as having explosive or more sustained speed and a combination of abilities is required. It is in the interests of each pilot to put together the best team possible to achieve the best results at the ERS. If coaches and technical staff selected the crews it might create the perception of favouritism, skew the competition and create a situation in which the pilots questioned the results of the ERS.
31. As set out earlier in this award the NBP Selection Process and Criteria at Section 1 c) i) 4 provides that the pilots are responsible for selecting their crew and entering the team into the ERS. Mr. Monaghan acknowledged in cross-examination that he had read the NBP Selection Process and Criteria and was aware that pilots were responsible for selecting their own crew. He

was aware of this longstanding practice and did not raise any concerns or objections about it prior to his failure to be chosen by a pilot to participate in the ERS.

32. I am satisfied with the explanation provided by Mr. Le Bihan for the reasons behind this practice. The practice of allowing the pilots to select their own crew for the ERS appears to be a fair, pragmatic and reasonable approach. I see no reason to question the decision of BSC to proceed in this fashion.
33. I would next like to address the suggestion that it is improper to consider the results of the ERS in crew selection, as opposed to simply pilot selection. It was argued that the ERS is not referenced as a selection criterion for crew members. With respect I disagree. The purpose clause for the NBP Selection Process and Criteria makes it very clear that BSC will utilize a combination of testing camp results and the ERS for the process of completing team selections.
34. Also, under the heading DBT Nominations - Crew, it starts with "Upon completion of the ERS..." In the affidavit filed by the Respondent on behalf of Ms. Sarah Storey, at paragraph 40, she reasons, "Logically, if the ERS had no bearing on the NBP Crew selection, BSC would be in a position to select crew *prior to* the ERS upon completion of the physical and push testing [...]" Put another way, if the results of the ERS were not relevant to the selection of crew why would they be referenced and why would there be a need to wait for the completion of the ERS?
35. Mr. Le Bihan was cross-examined on this point. He agreed with the suggestions that the ERS was an important event for the pilots and that the Selection Criteria for pilots specifically provided that ERS results were used to rank and select pilots. However, he disagreed with the suggestion that the ERS was only to be used in pilot selection and stressed that the ERS is an important event for all athletes and that the results are also used for crew selection. The ERS is a relevant and important component for team selection and the practice supports this. Based on the affidavits filed by the

Respondent and in particular the evidence given by Mr. Le Bihan, I conclude that it is a well-known and accepted practice. Accordingly, I see no reason to interfere with the decision to use the ERS as a component in the selection process.

36. Before turning to the next concern raised by the Claimant, I would like to generally address the issue of discretion, as contained in the NBP Selection Process and Criteria and the manner in which it was exercised in this case. In the affidavit filed by the Respondent on behalf of Ms. Sarah Storey, she asserted the following:

35. Under the Policy at issue, BCS ultimately retains a high level of discretion to nominate and select athletes.

36. BCS's high level of discretion derives from three key statements within the Selection Policy:

- a. First, the Selection Policy states that "[t]he number of DBT Positions shall be determined *at the sole discretion of the NBP-HPC*, in consultation with such other BCS staff *as may be appropriate*, considering *such factors as may be deemed appropriate*". (*Selection Policy, section 3)C*) [*emphasis added*].)
- b. Second, the Selection Policy states that "[f]or the avoidance of doubt," *neither* the Performance Score Rubric nor the Performance Indicators are "determinative in nominating athletes." (*Selection Policy, section 3)C)iii*)
- c. Third, the Selection Policy entitles BCS to consider *other factors beyond the ones listed* within the Selection Policy. As the Selection Policy states, "[o]ther factors may be taken into consideration, as appropriate in the circumstances, in determining nominations to the Selection Committee." (*Selection Policy, section 3)C)iii*).

Ms. Storey was not cross-examined and a review of the NBP Selection Process and Criteria establishes the accuracy of her statements. Mr. Le Bihan's affidavit also addresses the use of discretion and its important role in the decision-making process. He was cross-examined at length about this issue and how discretion was utilized in the selection process in this case.

37. Counsel for the Claimant argued in great detail that the fact that Mr. Monahan's test results were superior to those of some of the athletes

selected as crew for the DBT, either was not appropriately considered, or was not considered at all in the selection process, was a fatal flaw in the selection process.

38. In the affidavit filed by Mr. Cody Sorensen, the Bobsleigh Athletic Representative Director (which is a position elected by the NBP athletes), he offered the following comments on the value of the individual metrics or test results:

10. I have worked collaboratively with Mr. Le Bihan in recent years to assist in developing more transparent and robust selection processes and criteria in the interest of the athletes who elected me to the position of Bobsleigh Athlete Representative Director, the NBP and BCS as a whole. It is a responsibility that I take very seriously.

11. Bobsleigh is a team sport and as is common with team sports, a selection process for a team sport cannot be solely on the basis of individual metrics. The individual metrics are important to be considered, but must be considered in the context that these are not a measure of the actual sport, but metrics that can indicate an athlete's potential to perform in the sport. Additionally, bobsleigh is unusual because it is possible for athletes who have never even tried the sport prior to participating in the selection process to be named to a National Team at the end of the process.

39. In the affidavit filed by Mr. Le Bihan he also commented on the use and value of the test results in the selection process:

32. I offer [the] following comments regarding Push Testing, APE scores and Experience:

- a. Pushing a bobsleigh is a technical skill. While it is possible for new athletes to push a bobsleigh in the Ice House (indoor iced practice track in Calgary), it is a skill that must be learned and practiced over many years. As a result, those who have had more coaching and training tend to be able to perform better in push testing than those with limited or no experience.
- b. While push testing times are important because of the correlation between push times in the Ice House and push times on the track in competition, it is insufficient as a standalone metric to evaluate and compare athletes, particularly when comparing athletes with varying levels of experience and practice.
- c. The Athletic Performance Evaluation ("APE") score is designed to be a more general measure of athletic ability. However, similar to the push testing metric, it measures metrics that athletes may have varying levels of experience in performing, therefore more experienced bobsleigh athletes or

athletes more experienced in a particular tested event within the APE are more likely to score higher in the APE score. For example, those who have never sprint trained may not be able to demonstrate their full potential compared to those who have developed this technique.

- d. There were several athletes with similar APE scores with a variety of push testing times. This is more common the less experience athletes have with the technical skill of pushing a bobsleigh. And some athletes record better push testing numbers with lower APE scores than athletes with higher APE scores.

33. These metrics and factors set out in the 2020-21 NBP Selection Process & Criteria are used to assist the technical staff in determining which athletes are most likely to be able to reach the highest levels of the sport of bobsleigh. While these correlate to performances in the actual sport, they are not determinative on their own. All testing metrics must be evaluated by technical staff in the context of this purpose and the purpose of the 2020-21 NBP Selection Process & Criteria itself.

40. Mr. Le Bihan was rigorously cross-examined on the tests themselves in terms of what they are intended to measure, the testing process, the importance of these metrics in the selection process and the scores achieved by the Claimant in comparison to other athletes also seeking nomination to a DBT crew position. It was put to Mr. Le Bihan that as the scores achieved by Mr. Monahan were superior that he should have been selected ahead of other athletes. Mr. Le Bihan completely disagreed and was adamant that the metrics were only one small piece of the information considered by the HPC and the Selection Committee in making the decision on crew selection for the DBT.

41. It is apparent that Mr. Monaghan was very discouraged by the fact that his test scores did not result in his selection to the DBT. I can understand that. However, having carefully considered all of the evidence on this point, I accept that the test results or metrics are simply one factor considered in the selection process and am satisfied that this is made clear in the NBP Selection Process and Criteria. Although Mr. Monaghan's results were good, they are only one consideration in the selection criteria.

42. The NBP Selection Process and Criteria at Section 3) H), set out earlier in this award provides for the use of discretion in the event of "Acts of God" which is

defined to include “[...] external factors resulting in modified or cancelled BSC testing opportunities [...]”. COVID-19 was considered by Mr. Le Bihan and other officials in BCS to be an Act of God. In his affidavit, Mr. Le Bihan set out the impact COVID-19 had on the selection process:

40. The COVID-19 pandemic affected the Selection Process in varying ways.

41. I offer the following comments regarding notable pandemic-related changes to the NBP Camp Schedule & Participation:

- a. Normally there are several Recruitment Camps held at various locations across Canada where identified prospects and athletes wishing to do athletic testing participate and then those who meet a minimum athletic benchmark, the NBP Sprint Standard, are invited to participate in a NBP Prospects Camp.
- b. Athletes who participate in the NBP Prospects Camp and who show technical and athletic potential as well as commitment are invited to participate in a following NBP National Team Camp.
- c. This year it was not possible to hold Recruitment Camps because of the pandemic restrictions on gatherings, sport and other activities.
- d. As a result and in part because several had had to travel a significant distance to participate in the sole NBP Prospects Camp, all athletes who attended the NBP Prospects Camp, were invited to participate in the NBP National Team Camp.
- e. Normally all athletes participating in NBP Push Testing do so as one large group, but in light of the pandemic and related restrictions, BCS had robust COVID-19 protocols for all activities, including push testing, requiring separation of the teams into training “nodes” and restricting attendance to only participants and necessary personnel.
- f. As a result, there was limited interaction between athletes and athletes and staff and less opportunity to observe individual and team performances and team dynamics between athletes.

43. As noted earlier in this award, Appendix C provides for two categories of factors, quantitative and qualitative, which are used in selection decisions. Due to the much more limited training opportunities the coaching staff had significantly fewer interactions with the athletes. The decision to not rely on the qualitative criteria and to not calculate qualitative scores for each athlete was therefore made.

44. Mr. Le Bihan's testimony was very clear that this decision was made pursuant to the discretion found in the NBP Selection Process and Criteria in light of the change in circumstance caused by the pandemic. He testified in cross-examination that the policy was applied as fairly as possible to all the athletes. It was felt that due to the limited interactions available this year, it would have been to the advantage of the athletes already known to the coaches and would have worked a significant disadvantage to the newcomers had the qualitative scores been calculated and utilized in the selection process. I am satisfied that this decision was an appropriate use of the discretion found in the policy and an entirely reasonable one in light of the changes caused by COVID-19.

45. Three CFL players tried out for the DBT crew positions. They were available and able to do so due the cancellation of the football season. They were selected for crew positions. Counsel for the Claimant asserts the following:

After the ERS but before the Selection Decision, Mr. Morgan Alexander (BCS's High Performance Manager and a member of the HPC) agreed to conduct an interview with the Toronto Sun. In this interview, he made a number of statements to the Sun's reporter in which he prejudged the issue of team selection. He lauded the performance of three CFL athletes (the "**CFL Players**"), who had come to Selection Camp following the cancellation of their football season. He characterized the CFL Players as being "on our team" and as having bright futures as BCS athletes. BCS has not provided evidence from Mr. Alexander to explain these pre-decision remarks to the Toronto Sun.

46. Again Mr. Le Bihan was cross-examined at length on this issue. It was put to him that the decision to award positions to the CFL athletes was made inappropriately and prior to the meeting of the Selection Committee. Mr. Le Bihan disagreed with this assessment. He did not deny that the interview occurred and that Mr. Alexander spoke highly of the three CFL players. He suggested that as Mr. Alexander "came from football," he would likely have been speaking generally in the interview about the work ethic and attitude of professional football players based on his personal experience.

In the affidavit filed by the Respondent on behalf of Ms. Storey, she comments on the allegation that the decision to award positions to the

CFL athletes was made inappropriately and prior to the meeting of the Selection Committee as follows:<sup>91</sup> I would like to add that at no time did anyone consult with the BCS Media Consultant or discuss any media stories or consider the impact of media interest in any athletes as a factor in the Selection Process, either at the HPC or the Selection Committee, and no such consideration has ever been part of any Selection Process in which I have participated, including the decision at issue in this arbitration.

92. The Claimant's position taken in this arbitration that the events described in his Request at paras. 45-49 in particular referencing the publications about Mr. Shaquille Murray Lawrence and others, is an indication of bias and somehow a plot by BCS against the Claimant and in general, a flawed selection process is unreasonable and utterly without merit for the reasons stated above. Moreover, I did not receive or see the articles and did not know of their content until later in the evening on November 9, 2021, after the Committee made the decision under review in this arbitration.

47. Based on the evidence of Ms. Storey and Mr. Le Bihan I am satisfied that the CFL athletes were not given preferential treatment and that the conduct of Mr. Alexander and the comments he made do not give rise to a reasonable apprehension of bias with regard to the decision of the HPC or the Selection Committee. However, for future reference I would recommend that it is not a good idea for this type of interview to be conducted until well after the Selection Committee has met and picked the team. While I do not feel that it is a "fatal flaw", it is not appropriate and does not demonstrate very good judgement.

48. As I noted earlier, the appropriate standard of review of the decision made by the Selection Committee is reasonableness. As was noted in *Beaulieu and Canadian Snowboard Federation and Gardiner*:

Simply put, in sport arbitration, where deference to the experience and expertise of sport authorities is a starting point, the test is whether the outcome falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and of the policies at issue.

If I feel that the decision made by the Selection Committee was a reasonable one in all of the circumstances, then it is not my role to second-guess the decision and replace it with what I might consider to be a better one.

49. After having given this careful consideration and for all of the reasons articulated in this award, I believe that the decision of the Selection Committee in this case was a reasonable one and should not be interfered with. Accordingly, I am satisfied that the Respondent has met its onus and has demonstrated that the criteria were appropriately established and that the selection decision which is disputed in this case, was made in accordance with such criteria pursuant to Section 6.10 of the Code. The Respondent has met the onus of proof in Team Selection Disputes pursuant to that Rule.

50. In *Bastille and Speed Skating Canada* SDRCC 13-0209, Arbitrator Mew noted:

It is difficult to do justice to the wealth of information and material submitted by both the claimant and the affected party in support of the claim made by each of them to the fifth discretionary position on the team. I was left in no doubt that both of them are highly accomplished and dedicated athletes. As an outsider to the sport of speed skating, I would not presume to be in a better position than an expert Selection Committee or, indeed, an internal appeal panel of SSC, to say how the results achieved by the athletes in various past competitions or any of the other non-exclusive criteria in the Policy should have been weighed and, hence, which athlete should have been selected. Provided that SSC followed its own rules, and did so fairly, an arbitrator at this level of the process should rarely if ever interfere.

51. I agree completely with these observations. As I noted earlier, in sport arbitration, once the relevant expertise of the decision maker(s) has been demonstrated pursuant to Section 6.11(c) of the Code, then deference to the experience and expertise of the sport authorities is appropriate. The test is whether the selection decision at issue falls within a range of possible, acceptable outcomes and is defensible in respect of the facts and of the policies at issue.

52. In my view, the decision of the HPC, which was later confirmed by the Selection Committee, to not include Mr. Monaghan in the athletes selected as DBT crew, was reasonable and the result of the appropriate exercise of discretion. I am not in a position to, nor do I think it is appropriate for me to second-guess this decision.

53. The Claimant in his submissions asks me to order and declare that, pursuant to the Selection Criteria, he was entitled to be selected as a member of the DBT for the 2020-21 season. In other words, to substitute my decision for that of the Selection Committee. It is not appropriate for me to do so. The question that I must ask and answer is whether or not the decision not to select Mr. Monaghan for the DBT was reasonable in all of the circumstances.
54. The Claimant also asks that I direct BCS to reconsider its team selection for the DBT and name DBT members based on the selection criteria. For reasons previously stated I do not feel that it is appropriate to grant this remedy.
55. After having given careful consideration to this matter, I am of the view that the decision reached by the Selection Committee should stand and not be overturned. While I am sympathetic to the position of the Claimant, it is not appropriate for me to grant the relief he requests.
56. Accordingly, his appeal is dismissed.
57. The Claimant has asked that I waive the SDRCC filing fee of \$500.00 in this case based on Mr. Monahan's current financial circumstances. I will reserve on this request pending the outcome of any request for costs.
58. The Respondent has asked that I order costs. No reasons or caselaw were provided in support of this request. Pursuant to Section 6.13 of the Code, I have the authority to award costs. Section 6.13(a) provides:

### **6.13 Costs**

- a) The Panel shall determine whether there is to be any award of costs, including but not limited to legal fees, expert fees and reasonable disbursements and the amount of any such award. In making its determination, the Panel shall consider the outcome of the proceeding, the conduct of the parties and abuse of process, their respective financial resources, settlement offers and each Party's good faith efforts in attempting to resolve the dispute prior to or during Arbitration. Success in an Arbitration does not mean that the Party is entitled to costs.

59. In the circumstances of this case, I am not inclined to make an award of costs. However, if either party wishes to make an application for costs they must do no later than 4:00 p.m. (EDT) on June 28, 2021. If costs are applied for, the party against whom they are sought, shall have until 4:00 p.m. (EDT) on July 2, 2021 to respond.

60. I retain the jurisdiction to deal with any issues arising out of the implementation or interpretation of this award.

Dated in Toronto this 23rd day of June, 2021

  
Janice Johnston  
Arbitrator