

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

August 8, 2010

N°: SDRCC 10-0126

IN THE MATTER OF AN ARBITRATION BETWEEN

JILLIAN D'ALESSIO
(CLAIMANT)

AND

CANOE KAYAK CANADA (CKC)
(RESPONDENT)

COUNSEL FOR THE CLAIMANT:

ANNE SMITH

REPRESENTATIVE FOR THE RESPONDENT:

RACHEL CORBETT

ARBITRATOR:

RICHARD H. MCLAREN, C.ARB.

HEARINGS BY WAY OF CONFERENCE CALL TOOK PLACE ON 4 AND 6 AUGUST 2010

AWARD

The Parties:

1. The Claimant, Jillian D'Alessio ("D'Alessio" or "the Athlete") is a Canadian sprint kayaker. She is a carded athlete and a member of the Canadian National Canoe/Kayak team. Ms. D'Alessio participated in the K-4 – 500m event at the Olympics in 2004, and is a two time Pan American Games Champion in 2003 and 2007.
2. Canoe Kayak Canada ("CKC") is the National Sport Organization ("NSO") or governing body for the competitive canoeing and kayaking disciplines in Canada with its head office in Ottawa, Ontario. CKC is responsible for overseeing the flat-water, whitewater, and marathon events.

Background:

3. In January of 2010, following a period to receive comments and criticism from all interested individuals, criteria for the nomination of athletes ("the selection criteria" or "criteria"), including athletes from the Senior World Championships Assessment Pool ("the Pool") to the Senior World Championship Team ("the Team") was accepted and published. The Senior World Championships for Canoe/Kayak will take place in Poznan, Poland on August 19-22, 2010.
4. On July 19, 2010, the Sprint Racing Discipline High Performance Committee of CKC ("the HPC") announced which athletes were named to the Team. Ms. D'Alessio, while being an athlete in the Pool, was not among the named athletes.
5. On July 23, 2010, Ms. D'Alessio appealed this decision. Her appeal was accepted and considered by the Sprint Racing Discipline High Performance Committee Appeal Panel ("HPC Panel"). The HPC Panel, by way of majority decision, upheld the decision of the HPC, and chose not to name Ms. D'Alessio to the Team, stating,

Although feeling strong respect and admiration for the commitment of the appellant, the majority agreed that the selection criteria, as established, were respected by the selectors and that the performance results that were presented did not provide sufficient evidence to show that the appellant had achieved the required standard. It should be noted that the panel agreed that a more clear [sic] explanation, and where possible more objective criteria, is need [sic] to improve the understanding of qualifications for the World Championship team.¹

6. Ms. D'Alessio appealed the decision of the HPC Panel to the SDRCC. It is that appeal which forms the subject of this award.
7. Mr. Paul Lewis, the athlete nominee to the HPC Panel, dissented from the majority opinion, stating, *inter alia*:

¹ R05 – Exhibit #12 in hearing

The Director General of Canoe Kayak Canada, Lorraine LaFrenière, was present during the Panel's deliberations [...] Ms. LaFrenière actively participated in the Panel's deliberations and at times advocated positions taken by Canoe Kayak Canada. [...]

Ms. LaFrenière also participated by steering the Panel towards a specific and, in my opinion, inappropriate voting process.²

Procedure:

8. D'Alessio filed her Request with the SDRCC under section 3.4 of the SDRCC Code ("the Code") on July 29, 2010. D'Alessio claimed that she met the selection criteria stipulated by CKC in the Senior World Championship Handbook ("the Handbook") but nevertheless was not nominated. She further argued that the selection criteria were flawed.
9. On July 30, 2010, CKC filed its Answer under section 3.7 of the Code. Appended to the CKC's Answer were 3 documents, the Handbook (which outlines the criteria for nomination and later became Exhibit #1 in this proceeding); the CKC's Performance Review of Jillian D'Alessio (later became Exhibit #2); and an email from CKC to the SDRCC.
10. A preliminary conference call was scheduled for Sunday, August 1, 2010 at 9:00 a.m. EDT.
11. On Saturday, July 31, 2010, the representative of D'Alessio, Andrea D'Alessio wrote to the SDRCC, requesting an adjournment of the preliminary conference call to enable the Athlete to retain a lawyer to represent her in the matter.
12. It was held that a call should still take place as scheduled in order to allow the parties to consider a schedule for proceeding. The call took place, but it was agreed that no preliminary matters would be dealt with at this time.
13. The preliminary call was thus adjourned to Tuesday, August 3, 2010 at 12:30 p.m. in order to enable the Athlete to retain counsel. It was tentatively agreed that a hearing would take place on either the afternoon of Wednesday, August 4, 2010 or Thursday, August 5, 2010. A few requests for production were made at this time as well, and as a result on Sunday, August 1, 2010, the CKC filed with the SDRCC, a copy of the CKC Appeals Policy.
14. On Sunday, August 1, 2010, a further document, entitled Submission by Claimant was filed by D'Alessio.
15. The parties and the Arbitrator were advised on Monday, August 2, 2010 that D'Alessio would be represented by Ms. Anne Smith. The CKC also filed with the SDRCC, the Decision of the HPC Panel.

² *Ibid.*

16. On Tuesday, August 3, 2010, the Preliminary Hearing took place as scheduled. During the call, the Claimant withdrew her argument that the selection criteria was flawed, and chose to pursue only the claim that the CKC failed to name her to the team, despite having met the criteria outlined in the Handbook.
17. D'Alessio requested production of the following documents:
- The High Performance Director's email to the HPC informing them of the change for woman's K-4;
 - Documentation regarding the subsequent vote taken by the HPC to accept the change to the criteria; and
 - a copy of the amended document for the Senior World Criteria regarding woman's kayak;
 - written or oral communiqué from Scott Oldershaw regarding Jillian's name moving forward and 3 scenario's he presented and how they were received and the time factor involved in making a critical decision affecting Jillian;
 - copies of any handwritten notes made by HPC members during the HPC meeting where the final decision was made to nominate the Team;
18. On Wednesday, August 4, 2010, as a result of requests by the Claimant, CKC filed such further documents as were available with the SDRCC.
19. Hearings in this matter were held from 2:00 p.m. EDT, to approximately 10:30 p.m. on Wednesday, August 4, 2010 and on Friday, August 6, 2010 from 7:30 a.m. to approximately 11:30 a.m.
20. Present for the Claimant was, counsel for Ms. D'Alessio, Ms. Anne Smith; Ms. Jennifer Ross; Ms. Lauren Grant, a student-at-law with Ms. Smith's firm; Ms. Andrea D'Alessio, the Athlete's mother; and Ms. Jillian D'Alessio, the Athlete.
21. Present for the Respondent CKC, was its representative, Ms. Rachel Corbett; Mr. Graham Barton, High Performance Director for CKC; Mr. Scott Oldershaw, women's kayak coach; and Ms. Lorraine LaFrenière, the Director General of CKC.

The Hearing:

22. Ms. Smith called as her only witness, the Claimant, Ms. D'Alessio.
23. Ms. D'Alessio testified *inter alia* that:
- Scott Oldershaw ("Oldershaw") was the High Performance Coach for women's kayak, and he was also her personal coach;
 - She did not receive any subjective feedback from Oldershaw regarding her performance, particularly not in writing;
 - She was aware of the criteria in the Handbook;
 - That Mr. Barton advised her that time standards would play a larger role in selection;

- There was no transparency in the amendments that were made to the performance standard;
 - Oldershaw never communicated to her that she failed to meet the minimum performance standard and in fact Oldershaw advised her that he would put her name forward to the HPC for nomination to the Team;
 - The process for team selection is not transparent;
 - The selection criteria should be applied evenly;
 - The actual decision regarding nominations to the Team was at the sole discretion of the director of the HPC.
24. There was considerable evidence from Ms. D'Alessio about the training camps, how the crews were determined and when they were advised who they would be paired with. Her race results were evaluated with considerable care and attention to the details of the results and her race times.
25. Ms. D'Alessio also stated her concern that if there was an error in the published K-4 criteria, how is one to know that there wasn't a similar error in the K-2 standards.
26. Lastly, in cross-examination D'Alessio stated that her mother, Andrea D'Alessio had a conversation with Paul Lewis, D'Alessio's nominee to the HPC Panel, wherein Mr. Lewis revealed information to Mrs. D'Alessio regarding the HPC Panel's deliberations, prior to the issuance of the written reasons of the internal appeal.
27. CKC called as witnesses: Oldershaw, Mr. Graham Barton ("Barton"); and Ms. Lorraine LaFrenière.
28. Oldershaw testified, *inter alia* that:
- He is the High Performance Coach for CKC women's kayak team. and also personally coaches other athletes, but does not consider himself D'Alessio's personal coach;
 - His role in Team selection was to conduct the assessments of the athletes and apply the criteria that are in place;
 - He did not recommend D'Alessio be nominated to the team based on the handbook guidelines that had been agreed to be applied and the standards that had to be met. i.e. D'Alessio did not meet the standards expected and required;
 - The standard that was required was the athletes position in events and potential to be top 12 at the World Championships
 - He communicates with athletes primarily by way of meetings prior to and after assessments; he also dialogues with the athletes during and after workouts;
 - After the time trials in Montreal, he never told D'Alessio that he would recommend her for nomination.
29. In cross-examination Oldershaw admitted he did not provide athletes with written subjective feedback in accordance with section 10.6 of the Handbook. In Oldershaw's opinion, the requirement of written subjective feedback per section 10.6 was not necessary because he

had provided this feedback verbally, and section 10.6 states that written feedback will be given “as the need arises.”

30. Oldershaw further stated in cross that,

- Subjective criteria for the selection of athletes to the team was more applicable to event and crew selection
- The K-4 time was changed in the handbook because it had been incorrectly calculated or there was a typo. Essentially the time provided in the handbook for the K-4 minimum standard was equivalent to a podium finish, not top 12.
- The minimum time standard was not changed so that CKC could have a K-4 team sent to Worlds; and
- Oldershaw stated that this was made abundantly clear to the athletes, and in fact, it was the athletes themselves who noticed the mistake.

31. Barton testified *inter alia*, that

- He has been the High Performance Director of CKC for the past three (3) years;
- Among his duties are to provide an analysis to establish the minimum standards outlined in the Handbook;
- The standard in the Handbook are not fixed, but shift depending on the quality and performance on the world stage;
- There was a typographical error in the K-4 minimum standard time outlined in the Handbook. It should have been 1:34.8 as opposed to 1:33.8;
- The standards were not lowered in order to allow the K-4 to meet the criteria for nomination to the Team;
- The subjective element of the criteria related to crew selection;
- D’Alessio did not meet the conditions outlined in the criteria by either demonstrating a potential to reach the a projected 2010 Senior World Championship position of finish or a Minimum World Standard Time (“the minimum time standard”);
- Oldershaw’s communication with the Athlete was in compliance with the criteria in the Handbook;
- Two of the athletes nominated to the K-4 team met the minimum time standards outlined. The other two athletes nominations were based on meeting the “modified” minimum time standards for K-4;
- The K-4 standard was modified sometime between June 14 and July 19;
- Kathleen Fraser did not meet the minimum time standard in the event she will be participating in, but was nominated in accordance with the criteria based on having achieved results in an Olympic event;
- He was the author of Exhibit2 to this hearing, Jillian D’Alessio’s Event Performance Report. This report was prepared for the HPC Panel.

32. LaFrenière’s testimony is summarized as follows:

- She has been working in the Canadian sport system since 1981;

- Had been Director General of CKC since April 1, 2010;
- Her role in the appeal before the HPC Panel was as an administrator. Specifically she ensured the internal appeal was conducted in accordance with the CKC Appeals Policy (Exhibit # 17);
- In the internal appeal, she directed the panel members to the relevant parts of the policy to ensure the decision was made in accordance with the criteria;

33. In cross-examination Ms. LaFrenière stated *inter alia*,

- The CKC Appeals Policy does provide for an administrator during the appeal procedure, but the role itself is not outlined in the policy;
- During the internal appeal she took notes of the appeal, wrote down the relevant points, but did not write down anything about the change in the time of the K-4, although it came up;
- There were 3 other appeals in regarding to CKC's nomination of athletes to the Team;
- She was not asked to sit in on D'Alessio's appeal;
- She drafted part of the decision at the request of the Chair, although the Chair ultimately reviewed it and made changes;
- She knew the K-4 minimum time standard was changed, but does not recall the discussions on it. There was no motion before the HPC to change the criteria;

Relevant Provisions:

34. The relevant provisions of the CKC Appeals Policy are as follows:

SCOPE OF APPEAL

1. Any member of CanoeKayak Canada who is directly affected by a decision of the Sprint Racing Council, or of any Committee of the Sprint Racing Council, or of any body or individual who has been delegated or given authority to make decisions on behalf of the Sprint Racing Council, or on behalf of any Committee thereof, or otherwise as part of the operations and activities of the Sprint Racing Discipline of CanoeKayak Canada, shall have the right to appeal that decision, provided there are sufficient grounds for the appeal as set out in Section 5 of this Policy.

GROUND FOR APPEAL

7. A decision cannot be appealed on its merits alone. An appeal may be heard only if the appeal on its face discloses sufficient grounds for the appeal. In order for an appeal to demonstrate sufficient grounds for appeal, it must allege that the respondent did one or more of the following:

- a) made a decision for which it did not have authority or jurisdiction as set out in CanoeKayak Canada's governing documents;*
- b) failed to follow procedures as laid out in the bylaws or approved policies of CanoeKayak Canada;*
- c) failed to follow SRD Rules of Structure or approved policies of the Sprint*

Racing

Discipline;

d) made a decision which was influenced by bias, where bias is defined as a lack of neutrality to such an extent that the decision-maker is unable to consider other views;

e) exercised its discretion for an improper purpose;

f) made a decision for which there is no supporting evidence;

g) failed to make its decision in accordance with criteria and/or principles established and approved by the appropriate body for the purpose of the decision in question

h) made a decision which was unreasonable having regard to the terms of reference or criteria upon which the decision was to be made.

With respect to grounds of appeal d) and g) above, the appellant must establish he or she was prejudiced because of the matter complained of under that ground of appeal, or the matter complained of had, or may reasonably have had, or had it been known by the decision maker may reasonably have had, a material effect on the decision maker whose decision is under appeal.

With respect to ground of appeal h), the appellant must establish that the decision under appeal was not made within the range of possible reasonable decisions on the matter under appeal, and the Appeals Panel shall dismiss the appeal if it is satisfied that the appellant has failed to demonstrate that the decision under appeal was outside of the range of reasonable decisions that may have been made by the decision maker.

APPEALS PANEL

9. The Panel shall be comprised of three individuals who have and have had no significant relationship with the affected parties, have and have had no involvement with the decision being appealed, and are free from any other actual or perceived bias or conflict.

ADMINISTRATION OF APPEAL

13. Appeals shall be administered by the National Office of the Sprint Racing Discipline of the Association under the direction of the Director General of the Association. Administration of the appeal(s) may be contracted by the Chairperson of the Sprint Racing Discipline to an outside source, or agency, and in the event that it is, all of the duties and functions of the Director General or of the National Office as set forth herein will be carried out by such person or agency.

APPEAL DECISION

20. The decision of the Appeals Panel shall be final and binding on all parties and all persons concerned, including the Association, the Sprint Racing Discipline and any and all committees concerned with the decision, and not open to any further appeals or intervention by any court, with the exception of referral by arbitration as provided for in Section 23.

ARBITRATION

23. All differences or disputes shall first be submitted to appeal pursuant to the appeal process set out in this Policy. If any Party is not satisfied with the decision of the Appeals Panel, that party may refer the matter to arbitration provided the party does so within the prescribed timeline as set out in the ADR – SPORT – RED PROGRAM. The matters that can be considered by arbitration and the terms under which the arbitration can be conducted will be determined by the ADR – SPORT – RED PROGRAM.

35. The relevant provisions of the SDRCC Code are as follows:

Article 6 Med/Arb and Arbitration General Rules

6.7 Onus of Proof in Team Selection Disputes

Where an athlete is involved in a proceeding as a Claimant in a team selection dispute, the onus will be placed on the Respondent to demonstrate that the criteria were appropriately established and that the selection decision was made in accordance with such criteria. Once that has been established, the onus of proof shall shift to the Claimant to demonstrate that the Claimant should have been selected in accordance with the approved criteria. Each onus shall be determined on a balance of probabilities.

6.17 Scope of Panel's Review

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, . . .*

36. The relevant provisions of the Handbook are as follows:

National Sprint Team Program for Excellence 2010 Handbook:

SENIOR WORLD CHAMPIONSHIP TEAM

1. Introduction

1.1 Each year, CanoeKayak Canada - Sprint Racing Discipline (CKC-SRD) selects athletes to the Senior World Championship Team according to criteria developed by the High Performance Director (HPD) and approved by the High Performance Committee (HPC).

1.2 The HPD, in consultation with the National Discipline Coach (NDC), will on the basis of the selection criteria contained herein recommend to the HPC those athletes that in their opinion should be nominated to an international team. The approval of all nominations to an international team is the responsibility of the HPC. The HPC shall ensure that such nominations adhere to the procedures and criteria contained within this Handbook. Once nominated to an international team, the final approval of all international competition entries is the responsibility of the HPD.

1.3 The primary objective of the National Team Program is the development of athletes to represent Canada at the highest level at the Olympic Games. Setting the criteria for selection to the Senior World Championships in the three years leading up to each Olympic Games is part of an overall strategy to field the strongest possible Olympic Teams. Athletes who are nominated to the 2010 Senior World Championship Team will be training to win. The performance they demonstrate in training and competition should reflect their progression toward podium results at the Olympic Games. It is not a requirement of the HPD to recommend athletes or crews for every event on the Senior World Championship Program or the HPC to approve such nominations.

3. General Selection Criteria

3.1 All athletes will be evaluated by the NDC at trials, training camps and in competition. (See Section 10, Assessment of "Pool Status" Athletes for details).

5. Senior World Championship Assessment Pool

5.8 Crews will be assessed by their position of finish at National Team Trials and in International competition to determine if the crew demonstrates the potential to achieve a projected 2010 Senior World Championship position of finish or a Minimum World Standard Time (MWST). To assist coaches and athletes in setting appropriate performance goals the following charts have identified Minimum Senior World Championship Performance Standards.

5.8.1 The following Minimum Senior World Championship Performance Standards for projected position of finish at the Senior World Championships have been established for each discipline in order to be considered for a nomination to the 2010 Senior World Championship Team. The potential to reach this minimum performance standard will be determined by a performance assessment of the crew based on results achieved at National Team Trials and World Cup competition.

Event	Projected Position of Finish
WK-1 200	Top 12
WK-1 500	Top 12
WK-2 500	Top 12
WK-4 500	Top 12

5.8.2 Athletes may also be considered for a nomination to the 2010 Senior World Championship Team by achieving a time that indicates the ability to achieve the position of finish identified in section 5.8.1 above. The times in the second column below represent the estimated time required to achieve a medal placing at the 2010 Senior World Championships (WLST) under “flat no-wind conditions”. The third column is intended to provide the estimated Minimum WLST (MWLST) to qualify for a nomination to the 2010 Senior World Championships under “flat no-wind conditions”. These times are based on results achieved in international competition over the past quadrennial.

Women

K-1 200	0:40.5	0:42.3
K-1 500	1:50.5	1:53.0
K-2 500	1:41.0	1:43.5
K-4 500	1:32.0	1:33.8

Official competition times achieved by the athlete will be rounded to the nearest tenth of a second when being compared to the MWLST. (Example A: 1:41.016 would be rounded to 1:41.0, Example B: 1:41.054 would be rounded to 1:41.1) Note that this procedure will only apply to when times are being compared against the MWLST. .

Time standards can be achieved under the supervision of the relevant NDC coach on a course approved by the HPD. The following standards must be in place to conduct such time controls:

- 1) Prior approval by the HPD
- 2) There must be at least two individuals observing the start, one of which must be the NDC Coach.
- 3) There must be a minimum of two individuals with stopwatches to record the finish time. One of these individuals must be the NDC.
- 4) There must be a video of the start and finish of the control
- 5) There must be a record of the wind conditions within 2 minutes of the start of the time control.
- 6) The time recorded will be the average of the two times recorded on the stopwatch. In the case there are more than two stopwatches approved by the NDC recording the race it will be an average of the two fastest times.

9. Senior World Championship Team Nominations

9.3 Women's Kayak

9.3.1 Women's K-1 500m & 200m , Women's K-2 & K-4 500m

Athletes being considered for the Women's K-1 500m & 200m, K-2 and K-4 500m will be determined by the evaluation of athletes in the Senior World Championship Assessment Pool.

Only those athletes who participate in all training camps and competitions as required by the NDC will be eligible.

Athletes selected to the International Tour and the Senior World Championship Assessment Pool will be based on singles results obtained at National Team Trials #1, May, 15, 16 and / or evaluation of athletes in the Senior World Championship Assessment Pool.

9.3.2 Consideration for selection to the Women's Kayak non-Olympic events will be based on Senior World Championship assessment in Olympic events throughout the selection process.

10. Assessment of "Pool Status" Athletes

10.1 All evaluation of athletes is intended to be transparent and will be supported by objective and subjective data collected by the NDC at trials, camps and in competition.

10.2 The NDC has the sole discretion as to the relative importance of each of the assessment criteria. He will communicate to the athletes and their personal coaches prior to each stage of the selection process those measurements that he will specifically use to assess the athlete or crew. All assessment methods and procedures must be approved by the HPD.

10.3 The NDC will structure training and competition activities to provide athletes with opportunities to demonstrate skills and qualities that will contribute to the performance of crews who will compete at the 2010 Senior World Championships.

10.5 Some examples of the objective and subjective measurements the NDC may apply in their assessment of "Pool" athletes are outlined below:

Competition Results:

- *The performance of individuals and crews in National Team Selection Trials and International competitions will be primary indicators in the assessment process.*

Discipline Ranking List

- *The Discipline Ranking List will be compiled on the basis of points awarded for position of finish in singles events in the Senior A or B finals at National Team Trials #1 and #2 according to the following formula:*

Event Position of Finish of Eligible Athletes and Points Awarded

Place: 1st 2nd 3rd 4th 5th 6th 7th 8th 9th 10th 11th 12th

K-1 / C-1 12 11 10 9 8 7 6 5 4 3 2 1

Seat Races – Specific Crew Measurement

- *Individual contribution to crew performance will be evaluated during designated training sessions.*

Training Times – Individual Measurement

- *Athletes may be evaluated in other boats and distances during training and competition.*

Video Assessment - Crew and Individual Observation and Measurement

- *Athletes may be video taped to support any opinions the coach may have regarding the technique, timing or stroke rate of an individual athlete.*

Heart Rate under load and recovery – Individual Measurements

- *Athletes may have their heart rates assessed during training and recovery periods to evaluate athlete heart rates under load and recovery. This assessment is to provide the coach with target and base rates for the individual and is not designed to be a comparative measurement against other pool athletes.*

Stroke Assessment – Crew and Individual Measurement

- *Athletes may have their stroke rate over distance measured (propulsion) and stroke rate against boat speed measured as well as an evaluation of the maintenance of stroke rate targets.*

Attendance

- *Commitment to the crew through attendance at all training sessions is a must. The coach may keep a record of attendance. Any absence must be approved by the National Team Physician or the NDC*

Medical Assessments

- *Athletes may be required to submit to medical tests to assess the health of any athlete involved in the selection process and any impact the assessment may have on the ability to train and ultimately to contribute to the performance of the crew at the Senior World Championships.*

General Physical Tests

- *Athletes may be measured for general strength and endurance.*

Commitment to the Crew / Common Goals / Compatibility

- *Athletes may be assessed on their ability to enhance crew commitment, to provide leadership or be a good follower or other roles as may be required to enhance the performance of the crew. Skills in the area of conflict resolution and appropriate communication may be evaluated.*

Effort in Training / Quality

- *Athletes may be assessed on their ability to enhance the quality of the crews training on a daily basis.*

Technical Compatibility / Seat Skills

- *Athletes may be assessed for technical and physical compatibility with fellow crew members. Skills in the various seat positions will be considered.*

Competition Behavior

- *Athletes will be assessed on their ability to enhance the crew's preparation and results at competitions.*

10.6 The results of all objective measurements will be communicated to athletes electronically either through email in the case of training camp assessment or on the CKC website in the case of National Team Trials results. Subjective observations will be recorded and communicated in writing by email or hard copy to the athlete by the NDC on an individual or group basis as the need arises.

12. Appeals to CKC-SRD internal nomination procedures

12.1 Any appeal with respect to 2010 Senior World Championship Team nominations must utilize the CKC-SRD Appeals Policy. The CKC-SRD Appeals Policy is published annually in the National Team Program for Excellence Handbook.

Issues:

37. The only issue to be decided is whether Ms. D'Alessio should be nominated to the Team. In other words, did Ms. D'Alessio satisfy the criteria outlined in the Handbook?

Arguments:

The Respondent:

38. It was argued on behalf of CKC, that while it is acknowledged that D'Alessio has achieved significant accomplishments in her sport and has made many sacrifices for it, she cannot be nominated on the basis of these accomplishments alone.

39. According to CKC, the selection criteria as provided for in section 5.8 states that crews will be assessed on the basis of two things:

1. Their potential to achieve a position of finish; or
2. Their potential to achieve a minimum time standard

and D'Alessio failed to meet that criteria.

40. As a High Performance athlete, D'Alessio has an obligation to be aware of the criteria she is required to meet in order to qualify. The Respondent also states that CKC's obligation to

communicate with the Athlete goes both ways, and that the Athlete must also ensure she is doing her part to communicate with her coach.

41. The Athlete has failed to prove that the modification to the K-4 minimum time standard was anything but an error and never suggested that the K-2 minimum time standard was wrong.
42. The Respondent also suggests that Mr. Lewis has, by virtue of his discussions with the Athlete's mother, Mrs. Andrea D'Alessio, disqualified himself from the Panel.
43. It was also submitted on behalf of the CKC that if the Arbitrator were to decide that the process for nomination was somehow flawed, and that Ms. D'Alessio's appeal should be upheld, the remedy sought is not within his power. In other words, I should in such a case, send the matter back to the HPC for reconsideration. The Respondent relied on the following cases: *Poss v. Synchro Canada* (Picher); *Palmer v. Athletics Canada SDRCC/CRDSC 08-0080* (Pound); and *Boylen v. Equine Canada SDRCC/CRDSC 04-0017* (Pound).

The Claimant:

44. The Athlete states that the revision to the K-4 standard that was stipulated in the Handbook was never properly changed. There is no discussion that reflects a change in the criteria, nor is there any evidence to show that two of the four athletes who were nominated to the K-4 met the published criteria.
45. It was argued on behalf of the Athlete that in accordance with section 6.17 of the Code, the Arbitrator has full power to review the facts and the law, and may substitute his decision for the one that is in dispute.
46. The decision to change the minimum time standard benefitted two athletes, but resulted in prejudice to Ms. D'Alessio. The only way to right the wrong that was done is to nominate D'Alessio to the team.
47. It was further argued that in team selection, all athletes should be treated with fairness, and as such if Ms. D'Alessio did not meet the published criteria, then neither did the two other K-4 athletes who had been named to the team.
48. Oldershaw applied merely a mechanical approach to his decision to nominate athletes to the Team. He did not include any subjective data as stated in the criteria. He failed to meet the requirement stipulated in the Handbook in 10.2 to communicate his subjective assessment of D'Alessio in writing.
49. With regard to the internal appeal, the Claimant argued that Ms. LaFrenière was under no requirement to sit on the HPC Panel, and that she went outside the scope of an administrative role when she filtered comments and discussion during the appeal in choosing what was and was not relevant. Ms. Smith referred to the authority of *Beaudet v. Federation of Archers Inc. (FCA) SDRCC/CRDSC 08-008* (Brunet); *Palmer v. Athletics Canada SDRCC/CRDSC 08-0080* (Pound); *Zeilstra v. Softball Canada SDRCC/CRDSC 04-00074* (Smith); and an

extract from Administrative Tribunals – A Legal Handbook (Lisa Braverman, 2001) to support her arguments.

Discussion:

50. There were eight (8) women kayakers in the selection pool. Six of them were nominated by the HPC to attend the Senior World Championships in Poznan, Poland on August 19-22 of this year. Among the six selected was the Complainant's crew mate, Kathleen "KC" Fraser in the final rounds of the K-2 500 trials. Ms. Fraser was nominated for the K-1 event. It is apparently, impossible in this particular competition due to scheduling to race in both K-1 and K-2 events.³ The Complainant through this arbitration procedure seeks to be nominated to the Senior World Championships' Team.
51. The Complainant in the past has been competitive in the K-4 event and was hoping this year would see her competing in that event. The assessment period for selection began in November of 2009 and ended in mid July 2010 just before the HPC nomination process took place during the third week in July. Through a process that the Athlete testified was never that clear to her; she realized by mid June that if she was to be selected it would be in the K-2 event and not the K-4 event.
52. The selection criteria are found in the 2010 Handbook filed as Exhibit #1 in this proceeding. Article 5.8 of the Handbook provides that Crews are assessed by one of either their "*position of finish at National Team Trials and in International competition ...*"; or, a "*Minimum World Standard Time ('MWST')*" as set out in the Handbook.
53. Article 5.8.2 indicates that athletes "*may be considered*" for a nomination to the 2010 Senior World Championship Team based on the criteria set out in the Handbook. To be considered for nomination and subsequent selection, an athlete must demonstrate the ability to achieve a "position of finish" set out in 5.8.1 which for the K-2 500 event is Top 12 in the world. To assist in this assessment for nomination purposes, there is a chart set out in Article 5.8.2. That chart sets out an estimated time that assumes ideal racing competition conditions of "flat no-wind conditions". The chart establishes appropriate performance goals for nomination to the 2010 Senior World Championship Team. For women the K-2 500 event the chart sets out an estimated time required to achieve a medal placing at 1:41.0; and, the final column is the MWST of 1:43.5 . The equivalent number for K-4 500 event is set out in the Handbook at 1:33.8.
54. The evidence before me does not establish that the Athlete has the potential to achieve a top 12 in the world finish at the upcoming event in Poland. Furthermore, on the evidence before me, the Athlete cannot point to any results in the nine (9) month assessment period from November of 2009 to July of 2010 that are equal to the MWST of 1:43.5 as set out in K-2 500 in Article 5.8.2. The closest result in this regard is 1:44.561 at the Canoe Sprint World Cup in Duisburg.

³ See Exhibit #2

55. The evidence of Coach Oldershaw is to the effect that the Athlete cannot meet the objective standards described in Article 5.8.2. I found him to be a suitable witness whose testimony in this matter was not shaken through out cross-examination. Therefore, I find that the facts arising out of the evidence do not establish that the objective criteria for nomination have been met.
56. The Code in Article 6.7 provides that CKC has the burden to demonstrate “*the criteria were appropriately established and that the selection decision was made in accordance with such criteria*”. I find that there is no factual or valid challenge to the K-2 criteria. Thus, the burden of the CKC has been satisfied that the criteria are appropriately established.
57. The Athlete’s counsel sought production of notes made by the members of the HPC during the course of their deliberations. Apparently few such notes were made and none remained in existence to be available in this proceeding. All the evidence of the decision making process is in the form of the minutes of the meeting of the HPC. Those minutes are at best brief and uninformative of the debate that may have gone on in respect of the acceptance of a nomination for any athlete. The result of this is that the Athlete in this proceeding has no evidence to call; or, there is no such evidence, to establish that the decision was not made in accordance with the selection criteria. As discussed above I also find that the HPC selection decision based on the nomination put forth by Oldershaw was made in accordance with the established criteria. Therefore, CKC has established its burden under the Code in the sense that there is no evidence that the selection decision was not made in accordance with the criteria. Therefore, I must conclude in the absence of such evidence that the decision was made in accordance with the criteria and CKC has met its burden. For each of the foregoing reasons of this paragraph and the previous one the CKC has met its burden of Article 6.7 of the Code..
58. In view of the foregoing findings the Code in Article 6.7 provides that: “*the onus of proof shall shift to the Claimant to demonstrate that the Claimant should have been selected in accordance with the approved criteria*”. The balance of this Award discusses the Claimant’s burden as set out in the Code.
59. The Athlete asserts through her counsel that she should have been selected because: (i) the process leading to the recommendations to the HPC was not transparent and in accordance with the Handbook in Articles 9.3 and 10.5 & 10.6; (ii) there was a duty under the rules in the Handbook to produce written assessments of objective or subjective data submitted to the Athlete; and (iii) the internal appeal from the HPC decision was procedurally flawed and ought to be quashed and the Athlete nominated to attend the competition.
60. During the course of the hearings in this matter, a great deal of the evidence focused upon the change to K-4 MWLST minimum time standard from 1:33.8 found in the Handbook, to 1:34.8. The fact that there might be some inaccuracy in this time was apparently recognized by the athletes sometime after June 14, 2010. Those involved in the sport recognized that the time published in the Handbook was not the appropriate one. There is no formal record of the change in the standard contained in the CKC’s draft minutes of the HPC meeting. From the evidence before me it does not seem that any formal communication regarding the error

was sent out to the athletes. Nevertheless, I find the athletes were aware of the change because it was they who brought it to the attention of the coach. The time was subsequently adjusted by the HPC in a process which was somewhat casual. This change in the MWLST is permitted under the Handbook rules for in Article 5.8.2 all times are referred to as “estimated” “*based upon results achieved in international competition over the past quadrennial*”. Implicit in an estimated time is that it may need to have some revision particularly as the quality and performance of the athletes evolve over time during the quadrennial . In this case, the K-4 athletes themselves recognized that revision was required as a time of 1:33.8 could not possibly have included all of the top 12 finishes. As testified to by Oldershaw, from the times that athletes were recording at competitions, the MWLST had to be higher if it was to include the top 12 finishes. A top 12 finish was much more akin to a time of 1:34.8. The athletes were, therefore, well aware that change in the published time was required but the process of change by the HPC was unfortunately rather haphazard. Nevertheless, I find that the estimated time could be altered.

61. There was a suggestion in the argument of the Athlete that the time was altered to accommodate the selection of two additional athletes to the K-4 event by the HPC. I found Oldershaw’s and Barton’s explanation for the K-4 time difference to be compelling and convincing. I did not hear, nor could I find, any evidence that there was any undue favouritism or bias exercised in changing the estimated K-4 MWLST. Simply stated, I find it was a less than satisfactory estimate that went unnoticed by many until the time came to seriously consider the nominations of athletes to the Team. Therefore, what the Athlete is left with, is an argument not that the estimate might be changed, but that the process to establish that changed estimate was less formal than might be desired. While I do not disagree with her that the process could indeed have been improved upon, it is not a matter that directly affects her nomination for K-4 as it was not her event. She seeks nomination in the K-2 event.
62. Ms. D’Alessio as a K-2 athlete was at all times, aware of the minimum time standard for K-2 and it was correctly set out in the Handbook. She knew the time that was required in order to be nominated to the Team. She did not meet that standard. Any athlete in a sport in which achievement is measured by time is constantly and unremittingly cognizant of their performance times. Such results are the very essence of their assessment of themselves and by others and they are intimately aware of the time standards and their own performance in relation thereto. There can be no complaint by the Athlete that the process of nomination was lacking in transparency in the K-2 event because of a change in the estimated MWLST in K-4. Furthermore, the Athlete has not established any link between the estimation error in the K-4 minimum time standard, and her own failure to meet the minimum time standard in the K-2 event.
63. For the Athlete to make the Senior World Championship Team and be on the plane to Poland next week, she must meet the K-2 criteria which were correctly set out in the Handbook at 1:43.5. The connection of the K-4 criteria to her nomination is not evident to me and while much of the Athlete’s case focused on that matter and its accompanying time revision, it does nothing to assist her in terms of her own nomination in the K-2 event.

64. Evidence was adduced by Ms. D'Alessio and Mr. Oldershaw about the criteria and how it was applied. We also heard much evidence from D'Alessio about her extensive efforts to meet the criteria as published, the times she had recorded in the events in which she participated, and the conditions she was subjected to during her races. While they may have been relevant to Ms. D'Alessio's performance, I do not find this evidence relevant to her nomination to the Team.
65. After hearing all the evidence and all the arguments of the parties, this matter quite basically boils down to whether or not Ms. D'Alessio met the criteria stipulated in the Handbook for the K-2 event. The objective evidence of results indicates that she did not meet the criteria in the K-2 nomination process.
66. The Athlete's counsel argues that the Handbook requires both written objective assessments and written subjective assessments as indicated in Article 10.6 and that she never received such written assessments. While I agree that the Handbook does indeed require both forms of assessment, for the reasons below, I find that Oldershaw met his obligation under the Handbook.
67. The Athlete claimed that Oldershaw was her personal coach although he did not hold the same view of their relationship. Regardless of that fact, the evidence establishes through the testimony of Oldershaw that there was constant oral feedback with the Athlete. She received more feedback than any other athlete in the testing pool according to the testimony of the coach. The relationship of a coach and an athlete was submitted by the Athlete's counsel to be that similar to an employee/employer one. I respectfully decline to agree in that submission despite the able argument of counsel. The relationship between an athlete and a coach is an intimate and personal one with communication obligations going both ways. It is not comparable to an employer employee relationship. The very different relationship of athlete/coach seems, according to the evidence, to have been working appropriately and smoothly in this case. Ms. D'Alessio was in constant and consistent communications with him and receiving feedback from him. While those communications are limited by the communication skills of the persons involved, they did exist, and no complaint about lack of transparency in the objective criteria and how she was progressing can be established on the facts before me. Therefore, I reject the Athlete's submissions in this aspect of their argument. The Athlete was well aware of her progress against the objective criteria and whether in the words of Article 5.8.2 her times indicated "*the ability to achieve the position of finish*" or the MWLST. If the objective results had indicated "*the potential to achieve a projected 2010 Senior World Championship position of finish or a MWLST*" she would have been proposed by her coach to the HPC. Her results did not indicate that potential. The coach did not nominate her.
68. The subjective element as required in section 10 of the Handbook must remain in the selection process when there is a crew as opposed to a single person competing in an event. A crew involves human dynamics not otherwise present in a single person event. Some of those dynamics must of necessity involve subjective evaluation. Thus, the subjective criteria is there primarily for this purpose and did not come into play in this case as the unwillingness to propose her for nomination was not due to crew related subjective issues,

but rather the failure to meet established objective criteria. I reject the Athlete's argument that Oldershaw was required to give her written subjective feedback, and in failing to do so, he was in contravention of the Handbook. While I have the impression from the evidence that there may indeed have been some communication issues between the two individuals, I find that feedback was given to D'Alessio verbally, and as such, the need, as provided for under 10.6 of the Handbook, didn't arise for written subjective assessment. The Handbook does not make it mandatory to provide such information in written form but only to do so as "*the need arises*". Indeed, as Oldershaw testified, D'Alessio was given more verbal feedback than any of the other athletes with whom he was working.

69. Even if I am wrong in that, I find that Oldershaw's failure to provide subjective assessment in writing did not somehow influence or cause D'Alessio's failure to meet the required minimum time standard. The breach would be at best a technical one and not something which led to the failure to propose her nomination, given that subjective factors did not come into play in her failure to be nominated for selection by the HPC.
70. For all of the foregoing reasons I find that the Athlete has not met the burden of proof required under section 6.7 of the Code. D'Alessio has failed to establish that she "*should have been selected in accordance with the approved criteria*". Therefore I conclude that the Athlete has failed to demonstrate that she should have been proposed to the HPC and selected in accordance with the approved criteria for the K-2 event.
71. With respect to the Athlete's objection regarding Ms. LaFrenière's participation in the HPC Panel deliberations, I find as follows. The internal appeals panel of a sporting organization may indeed require some administrative support particularly, when the panel is comprised of volunteers. That said, there is also a need to maintain the integrity and transparency of the appeals process. Anyone serving in an administrative capacity must be careful of not crossing the line from acting in an administrative support capacity; to actively participating in deliberations or influencing those deliberations directly or indirectly. In this case, Ms. LaFrenière's role may not have been performed as precisely and appropriately as it could have been. I would recommend that the CKC examine its practices in this regard.
72. Whether Ms. LaFrenière crossed the line between administrative support and participation in the decision making process of the internal appeals panel does not give rise to grounds for relief before me. Section 6.17 of the Code, provides that I have the "*full power to review the facts and the law ...*". This is in effect is a "hearing *de novo* power", the effect of which is to cure any procedural flaws that may have occurred at an earlier stage in the process. In writing this decision, I am doing just that.
73. With respect to the Respondent's arguments regarding Mr. Lewis' actions in speaking with Mrs. D'Alessio, prior to the issuance of the decision, I would only caution all parties to ensure that in the future, they are in no way interfering with the appropriate administration of this process. Deliberations are to be kept confidential, and everyone, including parties, panel members, and administrators should be ever mindful of the absolute necessity of maintaining the integrity of an appeal at all times. The independence and impartiality of the members of

the internal appeals process is essential to its effective role within the dispute resolution structure of the federation.

74. Mr. Lewis is not a lawyer, nor is he a judge. He may not have been aware of his obligations to maintain confidentiality. I would suggest that CKC take this as a learning opportunity to, in the future, make certain that all members of any internal appeal panel are aware of the strict confidentiality that is required in proceedings of this nature, and to advise them of their duty to both appear and be impartial at all times. Likewise, parties must be cautioned not to be in contact with Panel members at any time before the issuance of a written decision. Such actions can have a devastating impact on a party if it is later revealed that they were somehow in collusion with a member of a panel.
75. For all of the reasons stated above, the request of the Athlete, Ms. D'Alessio is rejected. The claim is dismissed.

Costs

76. The CKC was successful in this matter but did not request costs. There will be no order as to costs.

Dated at London, Ontario this 8th day of August 2010



Richard H. McLaren, C. Arb.
ARBITRATOR