

SDRCC/CRDSC 11-0145
Ordinary Division

GUILLAUME BLAIS-DUFOUR

Claimant

v.

SPEED SKATING CANADA

Respondent

and

MICHAEL GILDAY
FRANÇOIS-LOUIS TREMBLAY

Affected Parties

Before

Richard W. Pound, Q.C., Ad.E.
(sole arbitrator)

ARBITRAL ORDER

This is a team selection appeal by the Claimant. It relates to the selection of the Canadian team in short track speed skating for the 2011 World Championships in Sheffield, England. The appeal was heard on an urgent basis due to the imminence of the World Championships and as a result of the time taken for the Respondent's internal appeal process. The request for arbitration was filed on 2 March 2011 and a decision was requested not later than the morning of 4 March 2011, which was duly rendered, with the understanding that written reasons would be delivered as soon as possible.

As part of that process, the parties waived the resolution facilitation process contemplated in the Code. I am grateful to the participants and their counsel, as well as the staff of the Sport Dispute Resolution Centre of Canada (SDRCC), for their cooperation in helping to move the matter forward expeditiously.

The Claimant was present and assisted by his mother and Me Michael Bardagi. The Respondent was present and represented by Mark Mathies and Brian Ward, counsel. Michael Gilday (Affected Party) was present and assisted by his father. François-Louis Tremblay (Affected Party) was present and was not represented by counsel. Each of the athletes involved is of the age of majority. Despite a request by the Claimant to have an in-person hearing, due to the fact that the Respondent would have been unable to be in Montreal in time for the hearing, I ruled that the matter would proceed by telephone conference.

A conference call was held during the morning of 3 March 2011 to determine the scope of the arbitration. The Claimant put in issue both the failure by the Respondent to follow its own procedures as well as unjust and

unreasonable exercise of discretion by the Respondent in selecting the team. The Respondent argued that the scope of the arbitration should be limited to whether or not the decision of the internal Appeal Panel was reasonable in the circumstances and that the issue of the Respondent's failure to follow the selection procedures had not been raised during the internal appeal process and could not, therefore, be raised for the first time in these proceedings. It is clear, however, that this issue had been raised in the internal appeal process, although it had not been dealt with by the internal Appeal Panel, which dismissed the Claimant's appeal. Having heard the parties and the Affected Parties, I ruled that it was open to me to consider both the reasonableness of the internal appeal decision and the issue of whether the Respondent had followed its own procedures in selecting the team.

The parties and the Affected Parties acknowledged and agreed that the outcome of the arbitration would be final and binding. No translator/interpreter was requested. Each person agreed to speak in the language of his or her choice and, were there to be any difficulties, the staff of the SDRCC would provide any necessary clarifications in French or in English, as appropriate. I am satisfied that all concerned properly understood the proceedings.

The hearing on the substantive issues was held on the afternoon of 3 March 2011.

Because this is a matter of team selection, the onus falls on the Respondent to justify its decision and the Respondent had no objection to proceeding first, to be followed by the Claimant and the Affected Parties. Argument proceeded in the same order, with the Respondent having the right to a brief reply. There was a certain fluidity in the course of both sessions due to the fact that the normal

process of exchanging written witness statements and points of argument had not been possible as a result of the time constraints.

Team Selection – 2011 World Speed Skating Championships

Immediately following the Canadian Open Championships a High Performance Committee (HPC) meeting was held on 23 January 2011. The HPC for this purpose consisted of three elected members (one of whom was travelling and did not participate), five national coaches, the Short Track Program Director, the interim Director of Sport and a Board Athletes Director. The latter two were advisory only. Athlete representatives (one of whom is the Claimant) do not participate in team selection meetings and were not present at this meeting. Discussions regarding team selection occur in the presence of all of those identified above, following which the national coaches withdraw (due to potential or actual conflicts of interest) and the team selection decisions are made solely by the elected members and the Short Track Program Director, in this case by three individuals.

The Claimant had finished fourth overall in the Canadian Open Championships, the relevant qualification competition for purposes of selection of the 2011 World Short Track Championships Team. The Team announced by the HPC did not include the Claimant. An athlete (one of the Affected Parties) who was granted a medical Bye was ranked fourth by the committee, ahead of the Claimant. The HPC then exercised further discretion to name another athlete (the other Affected Party in this matter) ahead of the Claimant. The maximum team size for the World Championships is five. In the result, therefore, the Claimant, despite his fourth place overall position at the Canadian Open Championships, has not been named to the Team.

Respondent's Team Selection Policy

The parties agree that the applicable governing policy for selection to the 2011 World Speed Skating Championships Team is contained in a document entitled "Speed Skating Canada High Performance Bulletin #147 – Short Track" (the "Bulletin") dated August 2010. The front page of the Bulletin contains the following notation:

The High Performance Committee – Short Track (HPCST) will issue bulletins periodically throughout the season informing skaters, coaches and associations of any update and/or changes to selection criteria, competitions, etc.

The HPCST reserves the right to modify or change the enclosed policies in the event that exceptional circumstances arise and that any such changes are clearly in the best interest of the high performance program. In these situations all athletes and coaches will be advised of any changes as soon as they are confirmed by the HPCST.

No subsequent changes to the Bulletin have been drawn to my attention.

The first portion of the Bulletin is headed "2010/11 Short Track Selection Criteria." General information is then provided, followed by specific criteria for various teams and competitions. Under the heading "Selection Procedures," this portion of the Bulletin provides:

All skaters must qualify through the specific standards as set by the ISU¹ to be eligible to compete in each specific event. Speed Skating Canada will then select athletes for each specific event in accordance with the following general procedures.

...

¹ International Skating Union, the international federation governing the sport of skating, in which short track speed skating is a particular discipline.

For World Cup races 5 and 6 and World Championships the team will be selected on the basis of results from the Canadian Open Championships and HPCST discretion.

Specific details for selection of skaters for each of the respective World Cup competitions are provided later in this HPC Bulletin.

As the Bulletin pertains to the 2011 World Short Track Championships, it reads as follows:

Eligibility: ISU Rule 281 determines the eligibility of Canada to submit entries for this Championship.²

Quota: The 2011 World Short Track Championships Team will be composed of 5 women and 5 men.

Selection Procedures: The Team selection will be based upon results from the Canadian Open Championships. The top 4 athletes based on cumulative overall rankings of the Canadian Open Championships plus 1 discretionary selection by the HPC will form the team. The HPC will again consider recent performances, including quality and commitment to the training program and Olympic potential to confirm the discretionary selections. [*emphasis added*]

The top 2 ranked of these 5 skaters will be automatically entered for the individual competition.

The remaining entry for the individual competition will be determined at the absolute discretion of the HPCST from amongst the remaining 3 team members. Criteria to be considered may include but is (*sic*) not limited to results of the Fall World Cup Selections, the Canadian Open Championships, other competition results including World Cup performances, recent training performances, ranking, and current commitment to the program.

Normally, the HPCST will make this discretionary selection in the week immediately following World Cup 6, 2 weeks before the World Championships. All 5 members will be eligible for selection for the relay competition, however the National Team coach at the World Championships will determine the composition of the relay team for each round of competition.

NOTE: The only exception will be if the HPCST makes such a decision as to give a skater a bye onto the team due to illness or injury as per the policy on granting byes. If an athlete's training performances are clearly below their performances that earned them (*sic*) selection to the World Short Track Championships Team, the HPCST may make a decision to replace this skater either for entry to an individual distance and/or the relay team.

² Nothing in this appeal turns on this Rule.

Because one of the Affected Parties obtained his place as the result of a Bye, it is appropriate to consider certain of the provisions of the Bulletin, contained in Appendix A to the Bulletin, entitled “Operational Guidelines to the High Performance Committees for the Allocation of Byes.” The stated purpose of this Appendix is to “provide guidelines to the High Performance Committees in the granting of Byes.”

...

2. Philosophy of Team Selection

The philosophy for team selection is to select the athletes that will achieve the best possible result for Canada at different competitions (Olympic Games, World or Continental Championships, World Cups, etc.).

The Long Track (HPCLT) and Short Track (HPCST) High Performance Committees are committed to make the selection to these teams as objective as possible. To ensure this occurs the HPCLT and HPCST will use, wherever possible, objective criteria such as time, placing at a specific competition/s, and ranking etc. as the foremost criteria in selecting athletes. *[emphasis added]*

These criteria will be used at specified selection event/s or a series of specified events.

...

In all cases it is the intent of the HPCs that selection is earned through current performances in the specified selection events. *[emphasis added]*

However, in exceptional circumstances an athlete may not be able to compete in the relevant selection events. In this instance the athlete is eligible to apply for selection under the Bye Clause as detailed below.

3. Bye Policy Clause Selection Policy

(The Bye Policy Clause will only apply to selection for specific competitions/events. The Bye Clause will not apply for nominations by SSC to Sport Canada's, Athlete Assistance Program. In the case of a major injury, the AAP Injury Card procedures will be implemented to handle this situation.)

Due to exceptional circumstances (e.g. illness, injury, equipment break, etc) and through no fault of their (*sic*) own, a skater sometimes does not have the opportunity to compete in the nominated selection event/s. In this situation the athlete may be eligible to apply for a Bye selection to the relevant team.

The basic philosophy for selecting an athlete by granting a Bye is that, all things being equal, the skater given the Bye has clearly demonstrated superior performances in previous competition to other athletes being considered for selection. [*emphasis in original*]

A Bye request is considered as the last means by which an athlete can gain selection and is intended to provide for exceptional circumstances outside the normal selection criteria rather than being a part of the normal means by which an athlete can gain selection.

There follow several procedural provisions. There was no dispute that the Bye granted to one of the Affected Parties was granted in accordance with the applicable procedure and was within the discretionary authority of the HPC to grant. Where the parties diverge in this matter is over the subsequent actions of the HPC.

7. Conditions for Granting a Bye

The basic question the HPC must answer is whether the skater requesting the Bye had a recent history of performances or other factors as listed below that demonstrate clear superiority of the skater requesting the Bye to those other athletes in consideration for selection. [*emphasis in original*]

The HPC must also be certain that the athlete requesting the Bye would be able to compete at a similar level in the event or team for which they (*sic*) seek selection. The HPC may award a "Conditional Bye" to skaters recovering from injury or illness. In this situation the skater may have certain conditions imposed. This could include, but is not limited to such things as a certain time frame, performance requirement etc.

In order to make these decisions, the HPC will evaluate a number of elements including, but not limited to the following.

- a) Head-to-head competition results of the athletes being considered for selection,
- b) Past performances of the skater requesting the Bye,
- c) Results of the selection competition (by skaters in contention for the team),
- d) Recent training and testing performances.

In evaluating past performance, the HPC will assign priority to those performances from the 12 month period prior to the selection event.

However this is occasionally not possible because of injuries, or the lack of opportunity for the skaters to compete. In such instances, performances beyond this 12 month period will be considered but will assume a lower value in assessing the Bye request.

...

ii. Short Track

In short track, the general guideline is that the HPCST judges that the athlete being granted a Bye would have finished clearly ahead of the last skater selected.

In making this judgment the HPCST will evaluate a number of elements including, but not limited to the following.

- a) Head-to-head competition results of the athletes being considered for selection,
 - b) Past performances of the skater requesting the Bye,
 - c) Results of the selection competition (by skaters in contention for the team),
 - d) Recent training and testing performances
 - e) Current world rankings of the athletes.
- [emphasis added]*

8. Appeals

Following the announcement of the “Team” the athlete/s affected by the Bye request decision has/have the opportunity to appeal this decision in accordance with the Speed Skating Canada Appeal Policy.³ (refer to SSC Appeals Policy RES 100)

Internal Appeal

The Complainant availed himself of the Speed Skating Canada internal appeal procedure. It is not clear from the material in my possession exactly when his appeal was filed, but no issue was taken with the timing or admissibility of the appeal. Given the tight timelines involved, however, the pace with which it proceeded can only be described as leisurely. Indeed, action on the internal appeal seemed only to occur when it became apparent that the Claimant was considering recourse to proceedings before the SDRCC.

In his internal appeal, the Claimant clearly put in issue the failure of the Respondent to follow the procedures contained in its policy document, specifically, the Bulletin. He referred, in particular, to the published selection

³ This is the process which gave rise to the Claimant’s internal appeal.

criteria, including the statement that the teams, *inter alia*, for the 2011 World Championships would be selected on the basis of the Canadian Open Championships and that the first four athletes would be on the team, to be completed by a discretionary choice by the HPC. He claimed that the decision to exclude him from the team was, in the circumstances, unjust and unreasonable.

Bye requests had been received by the Respondent for both the men's and women's teams. François-Louis Tremblay, one of the Affected Parties, had applied for a Bye, which was conditionally approved and granted, and he was given a rank of position #4. The HPC determined that there was convincing evidence that Tremblay was clearly better than the Claimant.⁴ The Bye was conditional: Tremblay was required to be certified by medical and coaching personnel as being able to train at 100% by 21 February 2011, two weeks before the team was to leave for the World Championships. If Tremblay were not to meet this condition, the Claimant was to be granted the position at the World Championships. This decision had the effect of invalidating the outcome the Claimant had earned as a result of competing in the Canadian Open Championships, where he had finished fourth overall. It had the effect of bumping him to fifth in the listing for the Team.

This was, however, not the end of the Claimant's misfortune. Now that the Claimant was sitting in fifth position, the HPC decided that it would exercise yet another discretionary choice, this time involving the other Affected Party,

⁴ Tremblay had finished 4th overall in the Fall World Cup Selections; the Claimant had finished 12th overall. Tremblay had 5 superior finishes to 1 for the Claimant in individual distances at the Fall World Cup Selections. Tremblay was an Olympic Team member in 2010 and won 2 medals; the Claimant was not on the team. Tremblay won a gold medal in the 500 m. on the Fall World Cup circuit; the Claimant did not qualify for any World Cups. Recent training indicated Tremblay was in excellent physical condition and continuing to improve in technical and tactical aspects of the sport. [These are taken from the decisions of the HPC.] The Respondent adduced no evidence as to the hierarchy or levels of competition in each of the various events taken into consideration in this evaluation.

Michael Gilday, who was thereupon awarded the “discretionary selection” as the fifth member for the World Championships Team.⁵

The internal appeal was finally heard at 8:00 p.m. EST on 1 March 2011. A decision was rendered the same evening, rejecting the Claimant’s appeal. While the role of the president of the Respondent in framing the appeal is not clear, it appears, on the face of the decision, that the president (not a member of the Appeal Panel) had been involved in some manner. In the event, the Appeal Panel did not consider the principal ground of appeal raised by the Claimant, namely a failure on the part of the HPC to follow the established procedure for team selection, and restricted its consideration to whether the discretion exercised by the HPC had been properly exercised. The Appeal Panel simply stated that, even if there were subjective factors in the selection criteria, the HPC had taken them into account, in a reasonable manner, to select the athlete who would achieve the best results possible for Canada at the World Championships. The HPC’s decision was maintained, in particular, with respect to the discretionary position awarded to Gilday.

The reasoning in the Appeal Panel’s decision was spare, to the point of emaciation. The decision failed to address the principal submission of the Claimant in the internal appeal.

⁵ The Claimant finished 4th overall at the Canadian Championships; Gilday finished 5th overall. Gilday had superior finishes in 2 individual distances; the Claimant had superior finishes in 2 individual distances at the Canadian Championships. Gilday finished 2nd overall at the Fall World Cup Selections; the Claimant was 12th overall. Gilday had 6 superior finishes in individual distances; the Claimant had 0 superior finishes at the Fall World Cup Selections. Gilday was a multiple medalist on the Fall World Cup circuit; the Claimant did not qualify for the fall World Cup teams. Neither athlete had been at a World Championships competition. Gilday had had very consistent international performances in the current year and in previous international racing opportunities. He had proven to be a key component of the relay team, having the speed and strength for top level racing. [These are taken from the decisions of the HPC.] As was the case for the previously noted comparison, the Respondent adduced no evidence as to the hierarchy or levels of competition in each of the events taken into consideration.

Jurisprudence in the Court of Arbitration for Sport (CAS), and the Swiss Federal Tribunal sitting in judicial review of CAS, has held that such a failure may amount to denial of a fair hearing with respect to the losing party.⁶ I raise this point simply to underline the importance of dealing with all substantive issues raised in any appeal by the party against whom a decision is pronounced. This is not to suggest that frivolous or vexatious issues and arguments need exhaustive consideration, but that a Panel should acknowledge the points which were raised and considered in the course of arriving at a decision which rejects the position of the losing party. The same stricture does not necessarily apply with respect to all matters or arguments raised by the winning party. Once a Panel has settled on the basis to allow the claim, it is not necessary to consider all of the other arguments raised in support of the winning party's position, which then can be ranked no higher than *obiter dicta*.⁷ In the appeal before me, this aspect of the internal appeal decision is relevant only for purposes of rebutting the suggestion initially advanced by the Respondent that the issue of any failure to follow the selection procedures should not be raised for the first time in this proceeding.

Given the inherent time problem of reaching a decision not later than early on 4 March 2011, it would have served no useful purpose for me to have referred the matter back to the internal Appeal Panel for consideration of the issue of the failure to follow the selection procedure.

⁶ See: *Cañas v. ATP Tour*, CAS/2005/A/951 and judgment of the Swiss Federal Tribunal dated 22 March 2007, 4P.172/2006.

⁷ In this appeal, for example, the Claimant's counsel advanced an argument that the Respondent had treated the exercise of discretion differently in the selection of the men's, as opposed to selection of the women's teams. Without pronouncing on the cogency or persuasiveness of that argument, given the grounds on which the matter has been decided, it is not necessary for me to decide whether that position was correct or not.

Decision

Because this is a team selection appeal, the onus is on the Respondent to justify its particular choice. Its position on the appeal is that, to discharge that onus, it has merely to demonstrate that the published selection process was followed and that its exercise of discretion in the course of applying that process was not unreasonable. No issue has been raised with respect to the substance of the selection criteria, nor as to whether the criteria were reasonable. The question is merely whether the criteria were applied as set forth in the Bulletin. The Respondent asserts that they were; the Claimant that they were not.

I mentioned during the hearing that I was having some difficulty with the Respondent's assertion that it had discharged its burden of demonstrating that it had followed the selection process, with particular reference to the provision that the team for the World Championships would consist of the first four overall at the Canadian Open Championships and a fifth discretionary choice. There is no doubt that the Claimant finished fourth overall in that competition. Granting a Bye does not entitle the Respondent to re-write the results of that competition. Granting a Bye does not change the position actually achieved by the Claimant in the Canadian Open Championships.

It may well be (although I do not know) that a conclusion that Tremblay is a better skater than the Claimant is not unreasonable. It may well be reasonable for the Respondent to have awarded a Bye to Tremblay, and no issue was taken with such issuance. Tremblay could have been added to the team for the World Championships without displacing the Claimant. The difference between being named to the team as the fourth or fifth member is neither significant nor prejudicial: both may be considered for the individual distances and both may be

considered for the relay; neither is automatically entered in the individual events.

It may well be (although I express no opinion) that the Respondent was technically justified in regarding Tremblay as the “real” #4, in terms of ability. But this cannot have the effect of erasing or changing the results actually achieved by the Claimant on the ice at the designated qualification competition, namely the Canadian Open Championships. Nor can it change the plain and unambiguous meaning of the language in the Bulletin. Discretion was to be applied in selecting the fifth member of the team, not to re-order the results of the qualification competition. I am comforted in reaching this conclusion by the insistence in the Bulletin of emphasising that, as much as possible, selections were to be based on objective criteria.

I note also that the Bye granted to Tremblay was conditional and that the Claimant would take his place were Tremblay not to meet the conditions imposed. It would not have been Gilday, whom the HPC (and explicitly confirmed by the internal Appeal Panel) had ranked higher than the Claimant.⁸

The HPC should have concluded that the Claimant qualified for the World Championships on the basis of his performance at the Canadian Open Championships, in accordance with the published selection criteria.⁹ Having

⁸ **Conditional Approval:** François-Louis (Tremblay) must be certified by medical and coaching personnel as being able to train at 100% by February 21/11, two weeks before the team leaves for the World Championships. If François-Louis does not meet this condition, Guillaume Blais-Dufour (the Claimant) will be granted the position at the World Championships. [Men’s Teams document produced by the Respondent]

⁹ I repeat the undisputed Selection Procedures: “The Team Selection will be based upon the results from the Canadian Open Championships. The top 4 athletes based on cumulative overall rankings of the Canadian Open Championships plus 1 discretionary selection by the HPC will form the team. The HPC will again consider recent performances, including quality and

failed to do so, its decision should have been reversed by the internal Appeal Panel. The internal Appeal Panel having failed to do so, it now falls to me to render the decision which ought to have been rendered.

I am conscious of, and share, the general reluctance of arbitrators to be seen to impose their personal judgment in matters of team selection. Canadian teams should not, except in the rarest of circumstances, be selected by arbitrators or judges who may not, and probably do not, have the necessary technical experience to make such decisions. In rendering judgment in this matter, I want to make it clear that I express no opinion as to the relative technical merits of the three athletes affected or potentially affected by this decision. My award, as arbitrator, is based on the failure of the Respondent to adhere to clearly expressed selection criteria, with which the Claimant complied, and compliance with which entitled him to a position on the 2011 World Championships Team.

I restrict the Order in this matter to the Claimant. This Order may, however, have the practical effect of forcing the Respondent to consider the relative positions of Tremblay and Gilday with respect to the remaining position on the Team. There is insufficient information before me to permit any attempt to make a reliable decision on that point and it would be inappropriate for me to make what would be an essentially arbitrary Order in the circumstances. The Respondent was fully aware of the possibility that the Claimant might be successful in this proceeding and that, if so, it would be necessary to get the HPC together on short notice to make a decision. This potentiality was discussed during the hearing and I suggested that such an action be considered by the Respondent as a contingency plan, in case it might prove necessary.

commitment to the training program and Olympic potential to confirm the discretionary selections." [emphasis added]

No submissions were made during the hearing regarding costs. The parties and Affected Parties are free to make brief written submissions on the subject, should they choose to do so, on the following schedule: Claimant – by 21 March 2011; Affected Parties – by 28 March 2011; Respondent – by 4 April 2011.

Order¹⁰

The Respondent is hereby ORDERED to name the Claimant to the Canadian Team for the 2011 World Championships.

Reservation of Rights

I reserve the right to deal with any matter arising from this decision and its interpretation.

MONTREAL, 7 March, 2011



Richard W. Pound, Q.C., Ad. E.
Arbitrator

¹⁰ The operational text of this Order was transmitted electronically to the SDRCC on 4 March 2011 at 1:04 a.m. EST, with instructions to transmit the award to the parties and Affected Parties. Reasons for the Order were to follow as soon as possible.