

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

SDRCC No: 15-0266

IN THE MATTER OF AN ARBITRATION BETWEEN:

**ISABELLE BLANCHET-RAMPLING
(CLAIMANT)**

- and -

**SYNCHRO CANADA (SC)
(RESPONDENT)**

- and -

**STÉPHANIE LECLAIR
(AFFECTED PARTY)**

- and -

**ROBERT PRÉVOST
(AFFECTED PARTY2)**

ARBITRATION AWARD

ARBITRATOR: GORDON E. PETERSON

APPEARING:

For Claimant: Alana Aird of Sport Solution
For Respondent: LeeAnn Cupidio and Jackie Stell-Buckingham
For Affected Party: Nicolas Thibault-Bernier of Lavery avocats

July 20, 2015

I INTRODUCTION

01. This case concerns an appeal of a team selection decision made by Synchro Canada (“SC” or the “Respondent”) on June 8, 2015 regarding the selection of the mixed duet synchronized swimming team to represent Canada at the 2015 FINA World Championships to be held in Kazan, Russia (“Kazan, RUS”).
02. In the interest of expediency, the Claimant and the Respondent agreed to proceed to arbitration without exhausting the SC internal appeal process.
03. On June 26, 2015, the SDRCC acknowledged receipt of the Claimant’s Request for Arbitration dated June 24, 2015. The Respondent filed its Answer on June 29, 2015.
04. I was subsequently appointed as Arbitrator and held a preliminary call on July 1, 2015, at which time the process was discussed and the timelines established for the delivery of any additional necessary documentation.
05. The Affected Party’s representative participated in the preliminary call and indicated that he was uncertain as to the extent of involvement but agreed he would file the declaration of confidentiality and make a decision on whether to file an intervention to permit the Affected Party to make submissions, prior to the Resolution Facilitation which was to occur the following day.
06. Subsequently, the Affected Party filed a statement indicating that she was unable to attend the hearing because of training and that she was focused on performing to the best of her abilities at the 2015 FINA World Championships and she has met all the requirements to represent Canada as a member of the mixed duet. Her counsel attended the hearing and made submissions on her behalf.
07. At the preliminary call, each of the Claimant, Respondent and Affected Party acknowledged acceptance of the jurisdiction of the Sport Dispute Resolution Centre of Canada (“SDRCC”) and confirmed there was no intent to challenge it.
08. During the Resolution Facilitation, the Claimant and the Affected Party agreed that Robert Prévost (“Affected Party2”) was also an affected party in the matter and he was invited to participate in the hearing but did not. Accordingly, the only

affected party participating in the matter was Stéphanie Leclair (in this judgment, the “**Affected Party**”) and in this judgment, “**parties**” means “**parties in attendance**”.

09. The hearing occurred on July 6, 2015. During the arbitration, each of the parties availed themselves of the opportunity to present oral arguments and to respond to arguments made by the other party in addition to addressing questions I raised. Prior to my declaring the hearing closed, each of the parties confirmed that they had no further issues to raise and no further submissions they wished to make and confirmed that they had no objection or reservation regarding the conduct of the proceedings.
10. At the end of the hearing, I reserved judgment. In accordance with Article 6.21(c) of the Canadian Sport Dispute Resolution Code (the “**Code**”), I issued a short decision on July 13 dismissing the appeal and this decision was communicated to the parties within seven days of completion of the hearing.
11. Having considered all of the parties' written submissions, as well as the evidence, arguments and materials presented by them at the hearing, I present the reasons for my decision in this Arbitration Award.

II Factual Background

12. The Claimant is an Olympian, who participated as a member of the Canadian team at the 2008 Olympic Games in Beijing, China. She participated in a trials' event to become a member of the mixed duet team representing Canada at the 2015 FINA World Championships in Kazan, RUS.
13. The Respondent is the national federation in Canada recognized by the international federation, *Fédération Internationale de Natation* (“**FINA**”), governing aquatic sports including synchronized swimming. FINA holds a world championship every two years and the Respondent is responsible for determining any athletes representing Canada in synchronized swimming at such world championships.

14. The Affected Party is also an Olympian, having been a member of the Canadian team at the 2012 Olympic Games in London, UK. She also participated in the trials' event to become a member of the mixed duet team representing Canada at the 2015 FINA World Championships in Kazan, RUS.
15. The mixed duet event is a new event for synchronized swimming, having been approved by FINA at its extraordinary Congress held November 29, 2014. The Respondent did not traditionally include such an event in its national program.
16. Despite an informal search, SC had not identified any mixed duet teams eligible to represent Canada at the 2015 FINA World Championships by May 2015. As a result, SC began a training session at its national training centre in Montreal for two identified males who were initially paired with members of the Respondent's national team. The initial concept was for the female partners to come from the national team and for there to be a trials' event to select the male partner.
17. The Affected Party was initially recruited as an assistant coach at the national training centre to work with the mixed duet teams and to prepare them in advance of a selection trials' event to choose the mixed duet team to represent Canada at the 2015 FINA World Championships. Her coaching included swimming with the athletes and demonstrating the elements to be performed.
18. When another male synchronized swimmer arrived at the national training centre, the Affected Party was paired with him.
19. After the other two male synchronized swimmers self-selected out of contention towards the end of May 2015, the Affected Party asked if she could be considered as a partner in the mixed duet.
20. Since this was a shift away from the original concept of using current national team female athletes, the Respondent determined a trials' event was needed to determine the mixed duet, including to select the female synchronized swimming member of the duet. The criteria were accordingly adapted to permit selection of both the male and female partners.
21. At the time, there was only one male swimmer and one female swimmer.

22. An open invitation to attend a selection trials on June 8, 2015 was posted on the Respondent's website on June 1, 2015, requiring registration to be made prior to 5 pm on June 7, 2015 as follows:

Open Invitation - Mixed Duet Selection Process

On June 8, 2015, Synchro Canada will be holding trials to select the man and woman who will be representing Canada in the brand new Mixed Duet event at FINA's World Aquatic Championships in Kazan, Russia, on July 25-30.

The selection trials will be held at Synchro Canada's Centre of Excellence at Olympic Stadium in Montreal. All expenses to attend the trials will be at the competitors' expense.

Please contact Centre of Excellence Coach Lyne Piché at lynesynchro@gmail.com to obtain the eligibility criteria and more information about the selection process.

Registration must be sent in writing, before June 7 at 5pm, to Lyne Piché at lynesynchro@gmail.com.

23. The Selection Policy and Criteria for the World Aquatics Championships Mixed Duet Entry ("**Selection Criteria**") were available at approximately the same time as the notice of the trials. Although there are objective and subjective criteria required to be met, the objective criteria appear to be thresholds to be met and once they have been met, the criteria leave selection of the team essentially open to the discretion of the selection committee in evaluating the achievement of certain components.

24. The essential Selection Criteria at issue are set out in the components of the trial for women as follows:

- *Perform a one minute solo routine to music*
- *Perform one lap of a duet routine which will be taught to all candidates at the trial (candidates who do not attend the trials with a duet partner will be assigned one on site)*
- *Perform isolated elements at the same time as other candidates.*

25. Each of the Claimant and the Affected Party exceeded the one minute time limit for the solo routine. The Claimant's routine was timed at 1:03 and the Affected Party's routine was timed at 1:21.

26. The Claimant had previously practised a mixed duet routine with the male candidate and they had developed a technical routine that they were targeting to compete.
27. The Claimant had been out of the country during the Respondent's search for possible candidates for the mixed duet team and had not communicated her interest to the Respondent. The Claimant returned shortly before the trials' event as a result of being made aware of the trials by the male candidate.
28. As a result of her position as assistant coach and then as a candidate, the Affected Party had trained for eight sessions with the male candidate during the training sessions in May and had been exposed to the choreography and music selections under consideration.
29. The duet routine was not taught to all candidates at the same time. In fact, the Affected Party taught the duet routine to the Claimant.
30. The Claimant does not believe that any isolated elements were performed at the same time by candidates, as required by her interpretation of one of the components of the trials for women under the Selection Criteria.
31. Following announcement of the trials to be held on June 8, no new male candidates were identified and only two female candidates applied for selection, the Claimant and the Affected Party. As a result, the trials' event was to select the female partner for the male swimmer.

III SUBMISSIONS

32. In accordance with Section 6.7 of the SDRCC Code, the onus is on the Respondent to demonstrate that the criteria were appropriately established and that the selection was made in accordance with such criteria.

Establishment of Selection Criteria

33. The Respondent confirms that once the need for a trials' event was determined, the selection criteria were established by SC and approved by its Board of Directors on June 3, 2015.

34. There are inconsistencies contained within the Selection Criteria. The Selection Criteria provide that the SC Board of Directors has delegated all authority as follows:
- “The Board of Directors of Synchro Canada has delegated the authority for all decision-making under this Policy to a Selection Committee comprised of the Centre of Excellence coaches.”*
- It then proceeds to state:*
- “The Selection Advisory Committee will form one panel of a minimum of two (2) judges and one panel of three (3) coaches who will evaluate the eligible candidates at the trial.”*
- ...
- “Selection of the duet members to represent Synchro Canada will be made by consensus of all judges and coaches involved in the evaluation based on all of the components of the trial and considering all of the eligibility criteria.”*
- ...
- “If a consensus cannot be reached by the Selection Committee on the best possible combination of duet athletes for the 2015 World Aquatic Championships, the National Team Head Coach will have the final decision making authority.”*
35. The Respondent acknowledges that it has prepared numerous selection criteria for events but this one was different because of the novelty of the event and the constantly changing landscape – first choosing only males paired with national team members, then migrating to opening it up and choosing both males and females.
36. The Respondent acknowledges that the lack of time to appropriately prepare for the trials compromised the criteria. The Selection Criteria were developed in May following the two male candidates dropping out of contention. The criteria were approved June 3, 2015 and the trials were held June 8, 2015, with the deadline for submission of team members to FINA on June 15, 2015. The Respondent suggests that the tight timelines may have resulted in errors as a result of the haste; if such errors results in the Selection Criteria not being properly established, they must be addressed.
37. The Respondent confirms that the Selection Criteria were made available to all those who expressed interest following the posting of the notice of the trials’ event - including the Claimant who expressed interest on June 5, at which time a copy of the Selection Criteria was provided by the Respondent.

38. The Respondent submits that although there appears to be some avoidable errors with the criteria, including a reference to older FINA Rules relating to penalties to be enforced on routines, such errors have not impacted the selection process.
39. The Claimant suggests there are better criteria that could have been established for selection and outlined in some detail recommended improvements.
40. The Technical Monitor in her statement submitted by SC states “the objective of the trials was to select the best mixed duet pair.”
41. The Claimant submits that everything in the Selection Criteria was clear but the vagueness permits the Respondent to approve anything.

Bias

42. The Claimant requests that the decision made by the selection committee to choose the Affected Party as a member of the mixed duet synchronized swimming pair at the 2015 FINA World Championships in Kazan, RUS be voided because the decision made was biased and unfair.
43. The Claimant suggests that the Respondent was biased for a number of reasons:
 - (a) The Respondent permitted the Affected Party to swim for a longer period of time than the Claimant took;
 - (b) The CEO for the Respondent was in communication with the Affected Party in advance of the trials in order to arrange a time for the trials that was convenient to the Affected Party, but was not in touch with the Claimant;
 - (c) The Affected Party was permitted to know the routine in advance and in fact had been involved in the development of the routine, even though the Selection Criteria provided that all candidates would learn the routine at the same time; and
 - (d) The Respondent did not require the Affected Party and the Claimant to do side by side elements as required by the Selection Criteria.

44. The Claimant submits that bias is a lack of neutrality and suggests the fact the Respondent engaged in communication with the Affected Party and permitted the alleged non-compliance by the Affected Party with the Selection Criteria evidenced a clear bias in favour of the Affected Party when the Respondent should have been neutral.
45. The Respondent states that the timing of the trials was determined through communication with the Affected Party and the male candidate because they were the only athletes who had expressed interest in attending the trials at the time and the Respondent wanted to ensure they could attend.
46. In response to the allegation of bias, the Respondent submits that all of the candidates were treated equally:
- (a) The criteria were shared with the candidates as soon as they expressed interest;
 - (b) The Technical Monitor took time to read through the criteria with the candidates when they arrived at the trials' event;
 - (c) The athletes were given every opportunity to practice the elements; and
 - (d) The Claimant was given time to learn the routine.
47. In testimony, the Technical Monitor reported that once the components were completed, the judges provided their comments and then the coaches and judges engaged in discussion. She acknowledged that the preliminary decision of the selection committee was not unanimous until the strategy the national team coach was employing was conveyed to all members of the selection committee - at which time the decision became unanimous on which candidate to select.
48. The Claimant suggests that the Respondent was biased because it permitted the Affected Party to practise the routine and did not comply with one component of the Selection Criteria which required all candidates to learn the routine at the trials.
49. The Claimant suggests that it was not in the Affected Party's best interest, as a competitor, to do a good job teaching the routine to the Claimant.
50. The Claimant further suggests that the Affected Party was less than forthcoming in teaching the routine to the Claimant, not providing necessary counts for the

timing, and it was only after the Claimant approached the male swimmer for assistance that the Affected Party provided some necessary information.

51. In response, the Technical Monitor testified that the Respondent tried to make the trials as fair as possible. The Technical Monitor suggests that the routine to be swum as part of the components had only been fully developed that morning and that was one of the reasons the Affected Party could not communicate the “counts” for the music to the Claimant. The Technical Monitor further explains that execution of the routine was not a significant factor in the evaluation of the candidates because neither of them executed particularly well and neither was expected to execute well in view of their limited exposure to the routine.
52. The Technical Monitor submits that the selection committee was also advised to take into consideration some factors communicated by the Claimant, including the fact that she had travelled recently, had not been exposed to the routine and that the Claimant had her legs waxed which might impact her ability to determine where the water was on her legs (her “levels”).
53. In her testimony, the Technical Monitor acknowledged that the components were not followed precisely as written but suggested that the adjustments made were made fairly as were the instructions to the selection committee.
54. In summary, the Respondent denies any bias in the decision, stating that it wants to establish SC as a technical leader in developing the new discipline and wants to choose the “best combination of duet athletes for the 2015 World Aquatic Championships.”

Failure to Follow Selection Criteria

55. These issues relate to the application of the Selection Criteria by the selection committee.
56. With respect to the first component of the trials for women, the Claimant alleges that the Affected Party did not adhere to the time lines and should have been sanctioned in accordance with the Selection Criteria which required the Technical Monitor to ensure that all technical components were performed as required.

57. The Claimant further suggests that the Affected Party was provided with an advantage because she was not limited to the one minute time frame for her solo routine to music whereas the Claimant adhered to the timeframe. Accordingly, the Claimant submits that the Affected Party had opportunity to show more complex and difficult elements.
58. The Respondent contends that the one minute routine was not judged and was therefore not subject to any formal deductions. It was only a fragment of a performance and was used to provide points of reference to the judges and coaches as well as to ensure that the athletes performing the routines possessed a minimum level of fitness. Accordingly, adherence to the exact time was not critical. Further, the Respondent provides that neither of the swimmers adhered to the one minute time frame, although SC acknowledges that the Affected Party performed for 18 seconds longer than the Claimant, based on a video review.
59. The Claimant further contends that neither the second nor the third components of the Selection Criteria were honoured at the trials' event as the duet routine was not taught to "all candidates at the trial" nor was she required to perform isolated elements at the same time as the Affected Party, the only other candidate.
60. The Claimant states that the fact the Affected Party participated in the development of the routine contributed to the choreography being done in the style of the Affected Party.
61. Further, the advance practice with the elements and tailoring of the choreography permitted the Affected Party to focus on her performance whereas the Claimant had to focus on the technical elements which may very well have contributed to the finding by the national coach that the Claimant was "stiff" while the Affected Party was more feminine.
62. In response, the Respondent acknowledges that elements of the routine had been taught to the Affected Party but the actual assembly of the elements into a routine pass was only completed the morning of the trials "so that it could be taught to the trials participants." The implication being that there was no real

advantage experienced by the Affected Party because she did not have significant advanced knowledge of the routine.

63. SC submits that the lack of completeness was evidenced by the difficulty in the Affected Party providing “counts” to the Claimant and that the lack of completeness of the routine pass was the same situation for each of the candidates and had no impact on the assessments provided by the selection committee.
64. The Respondent further contends that the Claimant had an advantage herself in that she had been swimming with the male partner for some time as well as teaching alongside him and consequently having similar styles and approaches to things.
65. The Respondent suggests that although the Claimant had her own advantages in the trials’ event, the trials’ event was conducted in a fair and unbiased manner that permitted the selection committee to make its determination as to who was the best combination of athletes for the mixed duet.
66. Finally, the Claimant alleges that the failure of the candidates to perform isolated elements side by side negatively impacted her selection.
67. The Claimant states “at no time were the female candidates asked to perform anything at the same time for comparison” but were asked to perform other “extremely random and unjustified components” and notes that the additions to the selection process were not mentioned until the very end of the selection process in the water.
68. In response, the Respondent submits that the criteria related to comparisons of mixed duet teams and since there was only one male swimmer, that was not possible.

Remedy Sought

69. The Claimant requested that no team be sent to the 2015 FINA World Championships. In view of the late start taken by the Respondent in preparing for the new event as well as the fact that the event was only approved just over

six months earlier, the Claimant suggested that the resources should not be deployed until proper preparation could be done.

70. The Claimant submitted that “Synchro Canada” is a brand that has considerable value in the world and should not be damaged by entering an unprepared team. The Claimant provided numerous reasons for her belief that the swimmers were not prepared, including that there had been no announcement made of the team, there was no organized coaching staff and no signed athlete agreement. The Claimant contended that the free routine was not ready and SC would be better served by developing a strong technical routine for next year.
71. The Respondent took issue with the suggestion that the team was not prepared and noted that the Affected Party and the male partner had invested time and preparation for the routine and was surprised the Claimant would have knowledge as to the state of development or readiness.
72. The Respondent also noted that prohibiting the sending of the team would result in significant hardship to the Affected Party and the male partner because the Affected Party had cleared her schedule to allow her to prepare for the 2015 FINA World Championships, including stopping work, and each had been training in contemplation of the competition.

V DISCUSSION & FINDINGS

73. Caution should be exercised by arbitrators in substituting their decisions for those of knowledgeable and properly constituted selection committees. It is only when there are errors in procedure or fairness that it becomes appropriate to interfere with the decisions of properly constituted selection committees. Arbitrator Picher in *Poss v. Synchro Canada et. al.* (SDRCC 08-0068) eloquently stated the role of an arbitrator "is to determine whether an NSO has fairly communicated its own rules to athletes vying for team selection, has faithfully adhered to those rules and has administered its selection policy in a manner devoid of arbitrariness, discrimination or bad faith."

74. If the selection process was administered appropriately, there is considerable deference that should be paid to the selection committee, especially one with as much international experience as the one in this instance.

Establishment of Selection Criteria

75. The Selection Criteria establish eligibility requirements and outline the format of the trial to be conducted for selection to the mixed duet team. The criteria clearly contemplate having different criteria for men and for women, presumably to allow the Respondent to combine swimmers with different partners than with whom they may have accompanied to the trials.
76. Based on the submissions and the Selection Criteria, the intention of the selection committee was to choose a team that will produce the best result for the Respondent at the 2015 FINA World Championships in Kazan, RUS for the mixed duet, including selecting partners who were not currently swimming with one another.
77. Despite the errors and inconsistencies, the Respondent has persuaded me that the Selection Criteria were properly established and fairly set out. It is the first time the Respondent has developed criteria for this event and the Respondent provided reasons for taking the approach it did. The Selection Criteria were clearly set out and provided wide discretion to the selection committee. The fact there may have been better criteria does not mean the approach taken by the Respondent was unreasonable.
78. I find that the primary issues for the Claimant relate to the application of the Selection Criteria - alleging that they were not properly applied and in fact one criterion was not employed at all.

Bias

79. The suggestion that there was bias requires evidence that the person making the decision was unable to impartially evaluate the facts that were presented for determination. In this situation, the Selection Criteria evidences that the Board of Directors of the Respondent has delegated all responsibility to choose the mixed duet team to represent Canada at the 2015 FINA World Championships to

the selection committee (and if the selection committee is unable to determine, to the head coach). Provided the Selection Criteria were properly established (as determined above), the selection committee has the sole authority and responsibility to choose the athletes for the mixed duet team.

80. Although the Claimant suggested that the Respondent was biased, the decision was made by the selection committee, not the Respondent. There is no evidence before me that there was any bias with respect to any member of the selection committee.

Application of Selection Criteria

81. The purpose of the Selection Criteria was stated in the Selection Policy – “to describe the procedures and criteria that will be used to select the 2015 World Aquatics Championship Mixed Duet Team from eligible candidates.”
82. The Selection Policy provided that “Selection of the duet members to represent Synchro Canada will be made by consensus of all judges and coaches involved in the evaluation based on all of the components of the trial and considering all eligibility criteria” and then goes on to indicate the intention was to find the best possible combination of duet athletes for the 2015 FINA World Championships.

Eligibility Criteria

83. I have received no evidence that any of the candidates did not meet the eligibility requirements so I am proceeding on the basis that they were met by all of the candidates.

Component 1:

84. All of the female candidates performed the first component of the trials for women – they each performed a one minute solo routine to music. Unlike in the FINA Rules, there was no clarity evident in the selection criteria that the routine had to be one minute or less and that failure to do so would result in a time penalty being assessed.
85. The Selection Criteria does provide that the Technical Monitor “will also assess any penalties incurred during a required element” pursuant to referenced FINA

Rules. The reference to the FINA Rules was not to the current rules (there is no FINA SS 18.3.1, SS 18.3.2 or SS 18.3.3 in the current FINA Rules; they have been replaced in the existing rules by SS 18.2 and the relevant provision would be SS 18.2.2 which cites a one point penalty in accordance with SS 14.1) but the trials' routine is not referred to in SS 14.1 and so no penalty is to be applied.

86. I am cognizant that SC wrote the Selection Criteria and it should not be saved by its failure to accurately reference the rules. Even if the appropriate rules are referenced, however, they can be interpreted reasonably not to apply to the routine time at all while still applying to other elements (such as deliberate use of the bottom of the pool).

87. Since: (i) each of the candidates performed a solo routine of at least one minute; (ii) there was no clarification provided to any of the candidates that there would be a penalty assessed on any routine exceeding one minute; and (iii) each of the candidates exceeded the allotted time period, I do not consider the alleged failure of the Technical Monitor to apply a penalty (of uncertain amount) to mean the Selection Policy was "not followed" by the selection committee. Further, I accept that the selection committee did not formally "judge" the candidates' routines but made notes as points of reference and so the absence of deductions did not impact the result.

Component 2:

88. The second component of the trials for women provided for the candidates to perform one lap of a duet routine to be taught to all candidates at the trials. At the trials, the Claimant was taught the duet routine by the Affected Party. The Respondent suggested in its "Background to Selection" submitted as part of its documentary evidence that the actual assembly of the elements into a routine pass had only really been done on the morning of the trials (June 8th) "so it could be taught to the trials' participants." The Affected Party, even if she learned the routine on the morning of the trials, did not learn the routine **at** the trials.

89. On its face, there appear to be reason for concern in the application of the Selection Criteria as raised by the Claimant. The routine was not taught to "all

candidates at the trials”. The Affected Party knew the routine prior to the trials and the Claimant was, in fact, taught the duet routine by the Affected Party.

90. Further, there are allegations of impropriety in the teaching of the routine made by the Claimant. It is for that reason that the Claimant has alleged bias. Although I do not find any basis for bias, given the autonomy of the decision makers, there is a suggestion that the trials’ event was slanted in favour of the Affected Party.
91. The Claimant has also suggested that assisting in the development of the routine permits some tailoring of the elements to favour the Affected Party’s “style” and could contribute to the impression of better fit with the male partner who was participating in the development of the routine.
92. In her testimony, the Claimant expressed her opinion that there is an advantage to knowing the routine in advance and also being involved in the development of the routine. The Claimant advised that swimmers learning a new routine focus on the mechanics of the elements and cannot focus on the form or fluidity of the routine itself. In other words, knowing the routine in advance allows a swimmer to focus on the performance rather than on the mechanics. As the Claimant only learned the routine at the trials’ event, she suggests that she could not focus on swimming with her partner but rather had to focus on ensuring she was performing the required elements. This focus may have contributed to the appearance that the Claimant was a little “stiff” as referred to in the statements provided by members of the selection committee.
93. The Claimant submits that the Affected Party, however, knew the elements and could focus on making her program look appropriate to what was desired - which could have contributed to the apparent fluidity of the Affected Party.
94. The Technical Monitor did not dispute the suggestion of learning made by the Claimant but noted that the Claimant, in her own testimony, suggested that she was a “quick learner” and was given ample opportunity to learn the routine to the extent desired.
95. The Claimant confirmed that she was a quick learner but was not given the opportunity to “tailor” the routine to her own skillset like the Affected Party was

and suggested that the advantage given to the Affected Party likely contributed to the decision made by the selection committee.

96. The Technical Monitor also suggested that the Affected Party had only learned the routine that morning and was not fully comfortable in the routine, which was one of the reasons why it was difficult to teach the routine to the Claimant.
97. The Respondent has suggested that the “lack of completeness of the routine pass was the same situation for both contestants and had no impact on the assessments provided by the selection committee.”
98. In addition, the Technical Monitor suggested that the Claimant had an advantage over the Affected Party because the Claimant had previously practiced with the male partner for some time and the perception of “fit” would have been impacted by such experience. The familiarity of the Claimant and the male swimmer would appear to provide an advantage to the Claimant.
99. Whilst it may have been preferable for the candidates to have a fresh routine to swim since that was specifically contemplated in one component of the Selection Criteria, the evidence before me was that the routine was comprised of elements that the two candidates were very familiar with and the composition was not judged but was used to determine which of the two female candidates fits the best with the male partner.
100. There was no evidence placed before me regarding the extent any advantage may have played in the decision by the members of the selection committee nor is it for me to decide. The decision I must make is whether the Selection Criteria were unfair, either in their establishment or application.
101. Even accepting the Claimant’s submissions that the Affected Party may have had an advantage in terms of knowledge of the routine (without making any finding on such issue), the evidence before me is the selection committee was advised of the difference in the experience with the routine and advised to take it into consideration in evaluating the fit of the athletes with the male partner.
102. The difficulty with discretion is that it is a subjective determination and may take into consideration many intangible factors that have not been communicated

effectively by the decision makers. It also allows, as the Claimant pointed out, for the vagueness to justify almost any decision taken by the selection committee.

103. Although discretion may permit subjective decisions to be made, it does not mean that they are necessarily arbitrary, unfair or biased. In the artistic world, “beauty is in the eye of the beholder” and synchronized swimming is an art form as well as an athletic endeavour. The selection committee was charged with the responsibility of selecting the best mixed duet team and one component provided for the performance of one lap of a duet routine to see how the mixed duet partners fit together. The newness of the routine does not appear to be an essential element in such selection but did ensure that candidates understood they were not bringing their own routines for evaluation. The fact that the routine was not taught to all candidates at the trials as provided for in the Selection Criteria does not make the criteria arbitrary or unreasonable in and of itself. The basis for the requirement was to allow the selection committee to evaluate the fit of the duet partners using the same routine. The fact that one of the candidates learned it shortly before the other does not make the criteria invalid, any more than the fact that one of the candidates was more familiar with the male partner than the other. The selection committee was fully aware of such differences and was not judging the routine itself but attempting to forecast which of the candidates would provide a higher scoring duet with the existing male partner.

Component 3:

104. I accept the submissions of the Respondent that the third criterion was to permit a comparison of mixed duets. The criterion is included for both men and women and it is reasonable that the selection committee would want the mixed duets to perform side by side and perhaps exchange partners and perform again, in order to determine which athletes match the best. Given that there was only one male, it was not possible to do perform at the same time and I accept that it is reasonable to have requested other skills to be performed that may not have been part of the criteria in order to assist the selection committee in reaching an overall assessment.

VI CONCLUSION

105. Although I do not refer in this Decision to every aspect of the parties' submissions and evidence, in reaching my conclusions and in making my decision I have considered all of the evidence and arguments presented by them in this proceeding.
106. The decision made by the selection committee was in accordance with the Selection Criteria. The determination was made by an expert committee that had considerable discretion to determine the mixed duet team.
107. Two excellent athletes met the Selection Criteria. In the end, it came down to "fit" with the male partner. The selection committee, with its many years of experience, determined the fit the Affected Party had with the male partner to be better than that he had with the Claimant.
108. As has been stated in many previous cases, the role of an arbitrator in a team selection dispute is to determine if the selection has been made in a reasonable manner under the circumstances. It is not open to an arbitrator or any third party to second-guess that decision or the exercise of discretion in which it was made, absent evidence that such decision was made or such discretion exercised arbitrarily, in a discriminatory fashion or in bad faith. Where criteria have been established appropriately and the selection process has been administered in a non-arbitrary fashion and without discrimination or bad faith, arbitrators should give considerable deference to the decisions reached by such expert committees.
109. Having heard the evidence, I see no reason to interfere with the decision reached by the selection committee which had over 130 combined years of experience in the sport.
110. I want to make special mention of the articulate submissions made by each of the Claimant and the Respondent as well as counsel for the Affected Party. The comportment of all parties was excellent and I appreciated the clear and professional manner in which the submissions were made. I was particularly impressed with the clarity and depth of information that the Claimant presented

and the passion for her sport that was evident. I could not help but think that SC might benefit from her expertise in the future.

VII JUDGEMENT

111. The appeal by the Claimant is dismissed.
112. The decision of the selection committee for the selection of the Canadian team for mixed duet to the 2015 FINA World Championships is confirmed.

IX THE COSTS

113. No submissions were made during the hearing regarding costs. The parties and Affected Party are free to make brief written submissions on the subject, should they choose to do so in accordance with Section 6.22 of the Code.

X RESERVATION OF RIGHTS

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

DATED: July 20, 2015



Gordon E. Peterson, Arbitrator