

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

NO: SDRCC 24-0711

BETWEEN:

TREVOR JONES

(CLAIMANT)

AND

ROWING CANADA AVIRON
("RCA")

(RESPONDENT)

DECISION

Appearances:

On behalf of the Claimant:

Sarah Klinger, Counsel

On behalf of the Respondent:

Adam Klevinas, Counsel
Cristy Nurse, Counsel

1. On March 22, 2024, I was selected under section 5.3 (b) of the *Canadian Sport Dispute Resolution Code* (the "Code") to hear Trevor Jones' (the "Athlete") appeal of the decision of Rowing Canada Aviron ("RCA") not to select him to compete for an Olympic qualification spot of the Men's Single Sculls ("M1x") at the Final Olympic Qualification Regatta (the "Olympic Qualifier") in Lucerne, Switzerland. The effect of that decision means that the Athlete's funding through the Athlete Assistance Program will be discontinued July 1, 2024, as will his membership in RCA's National Training Centre ("NTC").

2. During the administrative meeting, the parties agreed to proceed by way of the mediation/arbitration process.
3. Following an unsuccessful mediation on March 27, 2024, the parties made written submissions with a view to having a short decision by April 9, 2024.
4. On April 9, 2024, I issued my decision to deny the Athlete's appeal, with reasons to follow. These are my reasons.

BACKGROUND

5. RCA is the national governing body for the sport of rowing in Canada and is responsible for nominating rowing athletes to compete at the Olympics.
6. The Athlete is 26 years of age and has been a member of RCA's National Team ("Team") since 2018. He is an accomplished rower, placing 9th at the 2021 Tokyo Olympics and was the U23 men's single sculls World Champion in 2017 and 2018.
7. The Athlete was one of two athletes seeking to secure RCA's sole Men's Single Scull ("M1x") position to qualify for and compete at the 2024 Olympics. On March 12, 2024, RCA informed the Athlete that he had not been selected to compete at the Olympic Qualifier.
8. The Athlete challenged this decision, asserting that RCA did not appropriately establish the selection criteria, and that the selection process was influenced by bias, and was grossly unreasonable or unfair.
9. The parties agreed to proceed directly to SDRCC, bypassing RCA's internal appeal process. The appeal was based on written submissions only. I thank counsel for their submissions, which were both thorough and helpful. I have attempted to summarize the essence of those submissions without doing injustice to the parties' positions.

Office of the Sport Integrity Commissioner ("OSIC") Complaints

10. The Athlete says that in January 2023, his boat overturned during a training session, and he spent several minutes in cold water before being rescued. (the "near-drowning incident") A rowing alumnus filed a complaint with the OSIC regarding RCA's lack of a cold-water safety policy, a complaint that the Athlete did not initiate, file, or take part in ("the First Complaint"). The Athlete says that, during a public meeting, RCA's President "blamed" the coach and athletes for the incident. Following the meeting, the Athlete wrote to the President seeking an apology. The Athlete contends that he was told by RCA's Chief Executive Officer, through his coach, that he was wrong to ask for such an apology. RCA says that on March 28, 2024, it was informed that the complaint was outside OSIC's jurisdiction and that OSIC would take no further action.

11. The Athlete contends

[REDACTED]

(the "Second Complaint").

12. In November 2023, OSIC's Director of Sanctions and Outcomes imposed provisional measures consisting of a prohibition on the other athlete from being in contact with Mr. Jones. The prohibition was subject to the following exception: "when [Mr. Jones] and the Respondent are in training or competition at the same time and venue, the Respondent is required to maintain the maximum possible distance from [Mr. Jones] and/or to create distance between himself and [Mr. Jones] as necessary."

The Code

13. RCA has the initial burden of establishing, on a balance of probabilities, that the selection criteria were appropriately established, and that the selection decision was made in accordance with the criteria. If that burden is satisfied, the onus then shifts to the Athlete to demonstrate, on a balance of probabilities, that he should have been nominated in accordance with the criteria. (*Code* Section 6.10)

14. Section 6.11 of the *Code* provides that the Panel has the power to conduct a hearing *de novo*, and that the hearing must be *de novo* where the sport organization did not conduct its internal appeal process.

Argument

15. In his submissions, the Athlete advanced allegations of discriminatory, unfair, retaliatory, and bad faith decisions made by RCA staff, suggesting that, but for those decisions, he would have met the established criteria. For example, he asserted that after the filing of the First Complaint, he experienced retaliation, which consisted of comments which he interpreted as inferring he was being held to a different standard than other athletes, and a denial of a medical "bye" despite suffering from a respiratory illness although a female athlete was excused for medical reasons. He further alleged that after the filing of the Second Complaint, RCA engaged in additional retaliatory actions, including insisting that the Athlete train at the NTC with his harasser rather than another location

and refused to enforce OSIC's interim measure that his harasser maintain maximum possible distance from the Athlete.

16. Additionally, the Athlete contended that RCA demonstrated bad faith by insisting that he take a swimming test on the anniversary of his near drowning incident. RCA submitted, and the Athlete did not dispute, that it offered him multiple opportunities to complete the swimming test, but he did not want to participate on the dates offered.
17. Allegations of bad faith, bias and discrimination are serious as they impugn the integrity of decision makers. They should not be made speculatively and must be supported by credible evidence. Given that this decision is based on the written submissions of the parties in the context of a selection decision (which is made within a very tight time frame) there is an inadequate evidentiary record on which to analyze the complaints. RCA denied many of the allegations, some of which are more properly dealt with by the OSIC.
18. I further note that much of the conduct or decisions the Athlete suggests constitute bad faith, discrimination or bias, were made well before the selection decision and, had the Athlete believed them to be discriminatory, he ought to have challenged them in a more timely manner. I am not persuaded that the Athlete has made out a *prima facie* case of discrimination based on the undisputed evidence.
19. This dispute is about whether or not RCA's decision not to select the Athlete to compete at the Olympic Qualifier was reasonable, not whether RCA has discriminated against him.
20. I will first address the issue of whether RCA appropriately established the selection criteria, followed by the Athlete's argument that RCA's "changing selection criteria" were made in retaliation for his involvement in complaints made to the OSIC. I will then address the Athlete's arguments that he should have been selected in accordance with those criteria.

The Selection Criteria

21. RCA's selection criteria consist of the Paris 2024 Olympic Team Internal Nomination Procedure ("Nomination Procedure"), the 2024 Senior Nomination Camp General Information document ("Nomination Camp Information") as well as additional metrics applicable to the M1x boat classification. (collectively, the "Criteria") These criteria apply to selection for the Olympic Qualifier.
22. The Nomination Procedure, which was drafted by RCA and approved by its Athlete Council, was published on the RCA website in July 2023. Schedule "A" to the Nomination Procedure is the IOC/World Rowing Qualification System for

Paris 2024 /IOC Olympic events and sets out available quota spots by gender, event, and National Olympic Committee; and prescribes athlete eligibility requirements and qualification pathways, among other things.

23. Schedule "B" to the Nomination Procedure establishes the Olympic team's general objectives and the steps to support the nomination of athletes/crews to the Canadian Olympic Committee.
24. The Nomination Procedure sets out RCA's objective, which is to nominate crews (including the M1x) that have the potential to achieve a top six at the Olympics "with the ultimate aim of winning medals." (Section 1 of Schedule "B").
25. The Nomination Procedure provides that, to be eligible to be considered for selection, athletes had to be part of the National Training Centre ("NTC"). Section 11 grants RCA the discretion as to which athletes to invite to the NTC to be considered for selection.
26. Sections 11 and 12 of the Nomination Procedure address "Boat class strategy." Together, the sections identify which boat classes the RCA intended to compete in during the 2024 season, a strategy which was contingent upon the results at the 2023 World Championships and the Olympic qualification spots earned. The sections identified RCA's strategy for pursuing additional Olympic qualification spots through the Olympic Qualifier in May 2024.
27. RCA did not secure any Olympic qualification spots in the open men's categories at the 2023 World Championships. Therefore, for any open men to compete at the Olympics, they were required to secure a qualification spot through the Olympic Qualifier. For the M1x category, only 2 qualification places were available.
28. The Nomination Procedure also established training and selection periods, those being a "Training and Assessment Period" from October 16 to December 21, 2023, a "Crew Development Period" from January 3, 2024 until the start of the Nomination Camp, and the "Nomination Camp" from March 4 to 16, 2024. (sections 13-15). The Nomination Procedure prescribed the activities that would be considered to assess the performances and progress of the athletes. Some of those criteria were specific (section 15) and included time trial results and side-by-side racing, and others were discretionary ("the selection panel may consider the following other factors"). The Nomination Procedure also provided as follows:

At a minimum of two weeks prior to the nomination camp, coaches shall have consulted with relevant athletes on their camp strategy and produce a written framework of the intended activities, including key points that

would influence next steps throughout the camp. It is understood that activities need to respond and react to athlete performances and other relevant circumstances (e.g. weather conditions) and coaches have the ability to adjust any activity, without notification prior to the scheduled activity taking place.

29. On September 27, 2023, RCA's High-Performance Director ("HPD"), Adam Parfitt, notified all NTC members about the approach RCA would take for boats that had failed to secure Olympic nomination during the 2023 World Championships:

...

For the men's athlete who have indicated at [sic] desire to pursue sculling, a trial will be held in December to determine the fastest M1x. The successful athlete out of that process will be invited to continue into the March selection period. The details of that trial will be released upon reopening of the centre mid October.

30. The Nomination Camp information was provided to all athletes on February 19, 2024, at least two weeks before the nomination camp. The document indicated that it was intended to create fair and robust processes "based on each specific boat's requirements and objectives."

31. For the M1x selection, section 10 provided that:

... a series of open racing will occur between invited athletes over 2000m. From this outcome, the winner will be determined based on a "best of three" process. The winner will need to show suitable speed relative to other testing boats on any given day along with successfully winning two of the three races listed below.

32. The Athlete was one of the two athletes invited to attempt to secure an Olympic qualification spot at the M1x.

Has RCA met its burden of demonstrating that the selection criteria were appropriately established?

33. The Athlete contends that the selection criteria for the M1x class was unfair. Specifically, he argues that the selection criterion of finishing a 2000m race in 6:55 or less was communicated to him for the first time on or about February 12, 2024, and that no other crew had a time criterion. The Athlete also contends that on March 7, 2024, after having won two of the three races, (the only other athlete who was vying for the spot dropped out after the second race), RCA changed the criteria by telling him he would have to meet a time of 6:55 or beat the

Lightweight Women's double scull ("LW2x") by five seconds. He argues, in essence, that the revised criteria were unfair, as 6:55 was an "extremely difficult standard" to meet and the LW2x is the fastest crew on the team.

34. The Athlete submits that the General Information document stated that athletes would need to "show suitable speed relative to other testing boats on any given day," a standard that is extremely vague and does not appear to have been applied to any other boats.
35. The Athlete further argues that the Nomination Camp Information, whilst indicating that it is intended to "create the fairest and most robust processes," treats crews differently. The Athlete submits that although the document states that for the M8+, W8+, W4x and LW2x crew, upon completion of the camp, the boats will be named to represent Canada, there is no similar wording for the single scull. The Athlete contends that this language "suggests that RCA had no intention of pursuing an Olympic qualification for the M1x" through the Olympic Qualifier.

Findings

36. I find that RCA has met its burden of demonstrating that the selection criteria were appropriately established.
37. As Arbitrator Decary noted in *Mehmedovic v. Judo Canada* (SDRCC 12-0191/92), decisions of sport organizations are subject to two types of deference depending on whether the challenge is made against a selection decision or selection policy:

... when it comes to assessing policy decisions, arbitrators can only intervene in exceptional circumstances, such as where a policy would have been adopted in bad faith or without jurisdiction, would be contrary to law (a discriminatory policy for example), would have been adopted through a biased process, or at the limit, where it is so vague or discretionary or arbitrary as to be inapplicable with any kind of certainty. (para. 30)

...

Policy-makers are recognized a quasi-absolute discretion when it comes to making priorities and choices of methods and criteria and arbitrators are expected to stay away from any second-guessing except in such exceptional circumstances as I have described above (para. 33)

38. In arriving at this conclusion, Arbitrator Decary relied upon the earlier decision of Arbitrator Picher in *Adams v. Athletics Canada* (SDRCC 08-0098) who put it this way:

... However, the fact that the Code grants to the panel the authority to substitute its decision for the decision which gives rise to a dispute should not be misconstrued as a license to impose on the world of Canadian sport what would be tantamount to a rule of NSO management by arbitrators. (p. 18)

39. RCA's Nomination Procedure (which can be characterized as a 'policy-related decision'), was approved by the Athletes' Council and published in July 2023, almost seven months before the Nomination Camp. That document outlined RCA's overall objective, which was to nominate crews that had the potential to achieve at least a top six placement at the Olympics.
40. The Nomination Procedure established training and selection periods as well as criteria against which athletes would be considered. Section 15 of the Nomination Procedure provided that nominations would be based on an athlete's "performance and achievement" with respect to specific criteria, including time trial results relative to RCA's Gold Medal Standards ("GMS"), side-by-side racing, as well as small and/or large boat seat racing matrices.
41. The Athlete was aware of the nomination process, including that the RCA would 'produce a written framework of the intended activities' and that those activities 'need to respond and react to athlete performances and other relevant circumstances.' (section 15)
42. The Athlete does not dispute that in December 2023, HPD Parfitt varied M1x selection activities on the recommendation of the Athlete's coach, Jeremy Ivey, who was of the view that the athlete could benefit from additional training. The Athlete did not object to RCA's decision to delay the initial round of selection.
43. On February 17, 2024, RCA informed the Athlete that it was implementing a specific performance requirement for selection to the Olympic Qualifier, which was a standard time of 6:55, which could be achieved during any of the 2000m races completed within the selection window. Although RCA acknowledges the 6:55 time standard was not reduced to writing, it was communicated to the Athlete two weeks before he was expected to meet it. The Athlete was informed of the alternate standard, which was to beat the Lightweight Women's Double Sculls ("LW2x"), which has already qualified for the 2024 Olympics, by five seconds in side-by-side racing.
44. The 6:55 time was selected based on the projected Gold Medal Standard ("GMS") for the M1x event and gave the Athlete both an objective target and a clear understanding of how he would be assessed.

45. While the Nomination Camp information provided that invited athletes would need to show “suitable speed relative to other testing boats on any given day,” I accept that there are a number of factors that RCA would need to take into consideration, including weather conditions and water temperatures, so that the evaluation process is as fair to athletes as possible.
46. I am not persuaded that establishing different requirements for different classes is unfair. The reasons for RCA’s differing approaches to boat qualification is multi-factorial, including the necessity of swapping a number of athletes in and out of the larger boats (such as the W8+ and M8+) to evaluate various combinations to ensure, as far as possible, direct comparisons between them.
47. RCA established performance indicators which it believed best reflected the readiness of M1x boats to compete for and earn an Olympic qualification, including the 6:55 prognostic time. It says that the LW2x are considered an appropriate comparator for an M1x due to similarity of their prognostic speeds. Additionally, RCA says that it considers that a M1x capable of a top six finish at the Olympic Games should be able to achieve one of the two metrics (either 6:55 or finishing five seconds ahead of the LW2x).
48. Having failed to meet the criteria, the Athlete now contends that the 6:55 standard was not fair, is ‘largely unachievable’ and does not demonstrate “flexibility” on the part of RCA. As the Tribunal noted in *Boulangier v. Canada Snowboard* (SDRCC 20-0462), National Sport Organizations are entitled to establish standards that must be met by athletes seeking positions on teams. Athletes have input into the establishment of selection criteria through various avenues and the Athlete does not dispute that the criteria were approved, in this case, by the athlete’s council.
49. RCA submitted that neither of the athletes competing for the M1x position objected to the criteria and indicated to Coach Ivey that they considered the 6:55 prognostic standard to be reasonable. While the Athlete now contends that he felt he could not ‘push back’ against this standard in February because of a ‘power imbalance,’ he does not dispute RCA’s assertion in this respect.
50. It is not for arbitrators to substitute their views of what is ‘fair’ or appropriate. Provided the criteria are, as far as possible, objective and transparent, arbitrators will not interfere with the decision of the experts, who are presumed to have the knowledge and experience to make decisions in relation to the sport. (see *Larue v. Bowls Canada*, SDRCC 15-0255, *Palmer v. Athletics Canada*, SDRCC 08-0080). In the absence of any evidence from the Athlete about what the appropriate standards should be, I have no basis to find that the selection criteria were not appropriately established.

Were the selection criteria established in retaliation for the Athlete's OSIC complaints?

51. I am also not persuaded that the selection criteria were established in retaliation against the Athlete because of the OSIC complaints.
52. In *Canadian Amateur Softball Association* (SDRCC 08-0076), Arbitrator Picher determined that SDRCC arbitrators have the jurisdiction to consider whether sport selection, team selection and carding rules, processes and decisions violate human rights legislation.
53. Most human rights legislation in Canada, including the *Canadian Human Rights Act* and the *Ontario Human Rights Code*, provide that a person cannot be retaliated against because they have filed a complaint. A person alleging retaliation has the burden of demonstrating that the conduct complained of was directly related or connected to the complaint. (see, for example, *Tabor v. Millbrook First Nation*, 2015 CHRT 18).
54. The Athlete has presented no evidence the Nomination Procedure was established in retaliation for the Athlete's involvement in the First Complaint or the Second Complaint, which was filed on his behalf, and I am not able to reasonably conclude that the selection criteria were "changed" or established in retaliation for his complaints. The Procedures were applicable to all athletes seeking nomination to the Olympic team and set out dates, standards and how athletes could meet those standards.
55. Furthermore, RCA asserts, and the Athlete did not dispute, that following the 2022 World Championships, the Athlete was informed that a M1x athlete "would be expected to produce repeatable performance and have the ability to go 6:50 multiple times over 2000m in training and 6:40 in competition," and that a single "should be aiming for podium performances" rather than just trying to make a team. Given this information was communicated to him well before either of the Complaints were made and the fact that the criteria were equally applicable to the other M1x athlete who has not filed any complaints, I am not persuaded that the standards were established in retaliation for the Athlete's involvement in the OSIC complaints.
56. The Second Complaint was filed in October 2023, several months after the Selection Criteria were published. RCA contends that it was informed of issues between the two athletes just prior to the 2023 World Championships and directed the alleged harasser to avoid interaction with the Athlete as much as possible in addition to making medical staff available to him on a priority basis during the World Championships. RCA also says that it provided the Athlete with an early return ticket (which he did not ultimately use) when he withdrew

from the second race and ensured that he had medical support upon his return home.

57. While the Athlete does not dispute that RCA has complied with OSIC's processes, he claims that it has insisted that he train at the NTC in retaliation for filing the OSIC complaint. I find no basis for this argument.
58. The Nomination Procedure, published in June 2023, required all athletes seeking nomination to an Olympic crew to train at the NTC as of October 2023. This criterion was established before the Second Complaint was filed. The Interim Measures order does not restrict the alleged harasser from training at the NTC. Although the Athlete has elected to train elsewhere, neither his coach nor the LW2x are based at the second location. There is no evidence RCA has restricted the Athlete's access to training or other services, although it will not provide coaching staff at the other location. There is no evidence that the decision not to select the Athlete was taken in retaliation against the Athlete for his choice of training at a location other than the NTC.
59. The Provisional Measures order does not restrict the alleged harasser from training at the NTC. Although the Athlete has elected to train elsewhere, neither his coach nor the LW2x are based at the second location. There is no evidence RCA has required the Athlete to train at the NTC, although it will not provide coaching staff at the second location. There is no evidence that the decision not to select the Athlete was taken in retaliation against the Athlete for his choice of training at a location other than the NTC.

Did RCA fairly and appropriately apply the selection criteria in not selecting the Athlete?

60. RCA says that although HPD Parfitt and Coach Ivey communicated their concerns about the Athlete's performances following the 2022 World Rowing Championships, the Athlete continued to struggle leading into the 2023 season. After Coach Ivey advocated for the Athlete to have a second chance at World Cup selection, HPC Parfitt agreed that the Athlete could undertake an additional team selection activity alongside the LW2x and earn selection by meeting certain specified times.
61. In 2023, the Athlete finished last in his quarterfinal at the 2023 World Cup 2 and did not complete in the D final due to a medical withdrawal; at the 2023 World Cup 3, he placed 12th in the B final; did not compete in the 2023 RCA National Rowing Championships; and finished 4th in the quarterfinal at the 2023 World Rowing Championships and did not compete in the D final due to a medical withdrawal.

62. Prior to the 2023 World Rowing Championships, the Athlete was involved in selection activities with candidates for the Men's Quadruple Sculls ("M4x") over 2000m. He finished 6th out of six scullers and was therefore not selected as the M1x for the event. However, he was granted the opportunity to be the racing alternate for the M4x based on improvements and times shown in training.
63. Notwithstanding the Athlete's performance at the 2023 World Championships, RCA invited him to participate in all phases of training and selection for the 2024 Olympic Games.
64. Between January and March 2024, the Athlete participated in a regular series of timed training sessions alongside the LW2x as well as other crews. The Athlete was consistently slower than these crews.
65. The first of the three side-by-side 2000m races was completed on March 5, 2024. The Athlete finished faster than the only other athlete invited to attempt to secure the Olympic nomination with a time that was 91.64% of the GMS. The following day the second M1x athlete indicated he would no longer seek nomination. A second race held that day with the Athlete racing against the LW2x resulted in a time that was 90.37% of the GMS.
66. Although there was no third side-by-side race since the second athlete had withdrawn, RCA offered the Athlete an additional opportunity to demonstrate competitive readiness by achieving a time of 6:55 or better during the 2000m March 12, 2024, race or by finishing 5 seconds ahead of the LW2x. The Athlete finished with a time of 7:06.44 and a GMS result of 92.76% while the LW2x finished in a time of 7:02.80 and a GMS of 95.82%.
67. At no time during the selection period did the Athlete either achieve a finish time of 6:55 or beat the LW2x by 5 seconds. Nor did he produce relative speed faster than any boat seeking nomination for the Olympic Qualifier or the 2024 World Cup series.
68. The Athlete advanced a number of reasons for his failure to 'produce consistent results' at specific events or to meet the selection standards, including an injured rib, COVID-19, compartment syndrome as well as mental health issues arising from the harassment which was the subject of the second OSIC complaint.
69. The Tribunal has held that carding and nomination appeals are akin to judicial review, as opposed to appeal or *de novo* hearings. The standard of review to be applied to these appeals is that of reasonableness, not correctness. Reasonableness is a deferential standard. Experts of a National Sport Organization are best placed to assess athletes pursuant to the NSO's selection

criteria and, provided the NSO followed its own rules, arbitrators should rarely, if ever, interfere. (*Bastille v. Speed Skating Canada* 13-0209)

70. In my view, the standards must be read through the prism of RCA's overall objective – that is, to have rowers achieve a top six finish at the Olympics. The fact is that by any objective measure, the Athlete did not meet RCA's selection criteria, which I have found to be properly established.
71. While there may be valid reasons for the Athlete's inability to meet the selection criteria, I am unable to conclude, on a balance of probabilities, that the criteria were wrongly or unfairly applied.
72. Although it may be that RCA staff ought to have addressed some of the Athlete's concerns differently, I am unable to find, on a balance of probabilities, that the selection decision was wrong.
73. After the selection decision was made, the Athlete sought the opportunity to 'self-fund' a trip to the Olympic Qualifier. RCA denied that request, which the Athlete seems to suggest was yet another example of bias.
74. RCA denied the Athlete's request for a number of reasons, including issues of resources (the ability to provide staff and equipment support to athletes who did not meet the selection criteria) as well as fairness to other athletes, who may or may not have the ability to self-fund, and the absence of any criteria that might guide such a decision. I am unable to find that these reasons demonstrate a bias on the part of RCA.

CONCLUSION

75. The appeal is denied.

DATED: April 23, 2024, Vancouver, British Columbia



Carol Roberts, Arbitrator