

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

Nº: SDRCC 24-0727

July 15, 2024

ZACH ZONA
(CLAIMANT)

AND

SWIMMING CANADA
(RESPONDENT)

AND

NICOLAS GUY TURBIDE
(AFFECTED PARTY)

Attendees at the hearing:

For the Claimant: Zach Zona (Claimant)
Steve Funk (Counsel)

For the Respondent: Suzanne Paulins
Will Russel (Counsel)
Marj Walton (Witness)

For the Affected Party: Nicolas Guy Turbide

Decision with reasons

Overview

1. The Claimant has brought an appeal of a team selection matter before the Ordinary Tribunal pursuant to Section 6.1 of the Canadian Sport Dispute Resolution Code (“Code”). The Claimant submitted that the Respondent erred in its application of the nomination criteria. The Claimant requested that, as a result of this error, this Tribunal order the Respondent to give the Claimant a ranking against the Paris Qualification Rankings (“PQR”) and that the Respondent nominate the Claimant to the Canadian Paralympic Committee (“CPC”) for selection to the Paris 2024 Paralympic Games (“Paris 2024”) team.
2. A short decision was issued on June 29, 2024. The Claimant’s appeal was denied with written reasons to follow. These are my reasons.

3. This matter was heard as an appeal as the Parties agreed to bypass the Respondent's internal appeal process.

Facts

4. The facts in this matter are not in dispute.
5. The specific requirements under consideration in this matter are set out in Section IV of the Swimmer and Coach Nomination Criteria ("Criteria"). The Criteria were established by Swimming Canada and published in June 2023. The Criteria were subsequently updated on several occasions, with the latest amended copy coming out on March 19, 2024.
6. The Respondent received a maximum quota of seven male spots for the Paris 2024 team. There are 14 sport classes in swimming to address a range of disabilities. Classes 1-10 are allocated to swimmers with a physical disability, classes 11-13 are allocated to swimmers with visual impairments and class 14 is allocated to swimmers with an intellectual disability. To be eligible for nomination, athletes are required to meet the Minimum Qualifying Standard (MQS) for their class and event. However, to be ranked against the PQR, athletes must also meet the required PQR for their class and event. The MQS and PQR vary based on the class and competition. The position an athlete ranks against the PQR to qualify will also vary between classes.
7. To be considered for nomination and eligible for Paris 2024, Canadian athletes had to meet the MQS. This minimum threshold is set out by class and stroke in *Appendix A* of the Criteria. The PQR can be considered a second time factor. The PQR cannot be slower than the MQS.
8. The PQR was developed from swims that have met the MQS for Paris 2024. To create the PQR, swims between June 1, 2023, to January 31, 2024, were identified and indexed with a maximum of three swims per country, per Sport Class per event. All Canadian times were removed to calculate the PQR so that athletes are judged against the rest of the world. This standard is meant to be a variable one, based on the strength of the international field for each class within the different strokes.
9. The PQR is then used to determine rankings to nominate athletes for Paris 2024. The Criteria sets out five Priorities for nomination to the CPC and includes a tie-breaker mechanism. The Criteria for nomination are as follows:

PRIORITY	CRITERION
Priority 1	At the conclusion of the Nomination Event swimmers will be ranked, based on the highest PQR, in each eligible individual event provided they swim a time that equals or betters the 'Canada A' qualifying time, to a maximum of three swimmers, per sport class, per individual event.
Priority 2	After identification of swimmers using Priority 1 is complete, swimmers will be ranked, based on PQR, in each eligible event provided they swim a time that equals or betters the 'Canada B' qualifying time, to a maximum of three swimmers, per sport class, per individual event.
For male and female swimmers, the initial nomination of swimmers will be completed using the method described in Section IV b) up to and equal to the number of quota places provided to Canada <i>less</i> 2. Two positions, one for female and one for male swimmers will be held in reserve for Clause VI Extenuating Circumstances.	
Priority 3 – Extenuating Circumstances	<p>All requests for consideration of performance received under Section III will be considered, up to a maximum of one swimmer per gender for non-relay events. Rankings for Priority 3 shall be applied as per Section IV a)</p> <p>Priority 3 shall not be used to unseat any swimmer previously achieving the Performance Requirements through Priority 1 or 2.</p> <p>Should there be no Extenuating Circumstances (as defined below), the final nominations (for both male and female swimmers) would be filled following the Priority 1, 2, and 4 Criteria.</p> <p>If a position is declined during the Trials, nomination shall go to the next ranked (in accordance with the above selection criteria) eligible swimmer from the Trials or the next eligible Extenuating Circumstance swimmer who has otherwise met the Performance Standard.</p>
Priority 4 – Named Athlete/Event nomination (Bipartite nomination)	<p>In the event that a named athlete is identified in a named event by WPS and/or IPC through the Bipartite Commission, or other extraordinary means, the ADHP may nominate that athlete; subject to restrictions of quota as applicable.</p> <p>Priority 4 shall not be used to unseat any swimmer previously achieving the Performance Requirements through Priority 1, 2 or 3.</p>
Priority 5 – Discretionary Selection	<p>Following the Nomination Event, the ADHP, at his sole discretion, may nominate additional eligible swimmers.</p> <p>Priority 5 shall not be used to unseat any swimmer previously achieving the Requirements through Priority 1, 2, 3 or 4. (refer to section VI iv).</p>

10. There are two classes of qualifying times which distinguish athletes selected under Priority 1 and Priority 2: Canada A qualifying times and Canada B qualifying times.

Canada A Time is equal to the 5th Fastest Time (with all Canadians removed) in the Paris Qualification Rankings (PQR) for the period June 1, 2023 to January 31, 2024, where the Depth of Field is at least 6.

Canada B Time is equal to the 10th Fastest Time (with all Canadians removed) in the Paris Qualification Rankings (PQR) for the period June 1, 2023 to January 31, 2024, where the Depth of Field is at least 12.

Should there be insufficient Depth of Field to establish a B standard, or if the identified performance is slower than the MQS, the B Standard will be set equal to the A Standard.

11. The Criteria state:

Please note that in the event that the Minimum Qualification Standard (MQS) is faster than the ranking time - or the Depth of Field was insufficient - the MQS has been used.

12. Section IV sets out the tiebreaker provisions as follows:

In the event of a tie for the final position on the team based on PQR, the following process, in this order, will be applied until the tie is resolved:

- i. The swimmer whose preliminary swim has the highest ranking, using PQR, will be used to separate the tied swimmers;*
- ii. If the tie is not broken by application of (i) above, then the World Para Swimming Point Score of the final swim will be used to separate the tied swimmers;*
- iii. If the tie is not broken by application of (i) and (ii) above, then World Para Swimming Point Score of the preliminary swim, will be used to separate the tied swimmers;*
- iv. If the tie is not broken by application of (i), (ii) and (iii) above, then the ADHP will have the authority to select, at his sole discretion, the final swimmer to the team. Any such determination will be based on factors that include, but are not necessarily limited to, a swimmer's previous competitive history, their potential eligibility and availability for relay events and any other relevant performance matters.*

13. The World Para Swimming Point Score ("WPS") is a scoring system designed by World Para Swimming which assigns a score to each performance in a Para Swimming event. The event that was evaluated to nominate the Team was the 2024 Canadian Olympic & Paralympic Swimming Trials, which were held from May 13-19, 2024 in Toronto, Ontario.

14. At the conclusion of the Trials, four Canadian male swimmers had achieved selection under Priority 1 of the Criteria. This meant that they had swum a time faster than the Canada A standard in their respective class for a given stroke, posting better times than the 5th fastest time on the PQR.

15. Two Canadian male swimmers had achieved selection under Priority 2 of the Criteria, one of whom was the Affected Party. This meant that they had swum a time faster than the Canada B standard in their respective class for a given stroke. As above, this meant that they had a time better than the 10th fastest time on the PQR or, if this time was identified performance is slower than the MQS, the Canada B standard was set equal to the Canada A Standard.
16. The Affected Party competed in the Class 13 50m Freestyle. The lowest rank an athlete could achieve in this class of competition to qualify for nomination was 8th. The time to beat to qualify was 0:24:49. The Affected Party's time for this competition was 0:24.46 and he was assigned a PQR of 8th.
17. Another athlete, Ms. Nikita Ens, was assigned a ranking of 8th in the Class 3 Women's 50m Backstroke. In order to be eligible for a PQR in this class of competition, the athlete was supposed to have finished ahead of 7th.
18. The Para Swimming Selection Committee ("Committee") then needed to decide the final remaining position for the Team. Only two swimmers - Mr. Philippe Vachon and the Claimant - were eligible as they had recorded a time faster than the MQS but had not met the PQR for their class and stroke during the period to obtain a PQR.
19. Both Mr. Vachon and the Claimant competed in the Class 8 400m Freestyle. The lowest rank an athlete could achieve against the PQR and qualify was 6th for this class. The time to beat to qualify was 4:40.41. Mr. Vachon's time was 4:40.88. The Claimant's time was 4:43.53. Because both times were behind 6th, the Respondent did not rank either swimmer's times against the PQR standard.
20. On May 19, 2024, the Committee held two meetings to deliberate on the selection of the final athlete. The Committee is composed of members appointed for their expertise, education and skill for the purpose of applying the Criteria to select the team for Paris 2024. The Committee is comprised of the following members:
 - Committee Chair - Marj Walton, Executive Director, Swim Saskatchewan
 - Adam Purdy - Three-time Paralympian and two-time Paralympic gold medallist Paralympian (swimming)
 - Jocelyne McLean - World Para Swimming Technical Official; Swimming Canada Level 5 Master Official
 - Mitchell Smith- Lawyer with Borden Ladner Gervais LLP
 - Peter Carpenter - Head Coach McGill; Level 3 NCCP certified coach; Board Member of the Canadian Swimming Coaches Association
 - Cory Beatt - Technical Director, Swim BC, Paralympic and Olympic Coach

- Swimming Canada Staff Present: Mike Edey, J-P Lavoie and Wayne Lomas
21. During the first session, the Committee noted that it had eight athletes who had qualified under Priority 1 and Priority 2 of the Criteria, however, there were only seven spots allocated to the men. The Committee members recognized that there appeared to be a tie and determined that the tie would need to be resolved via the tiebreaker provision and the athletes' WPS. The Committee also looked at other ways they could resolve the issue that would not result in an athlete being left out. The Committee considered whether they could return one female allocation for an additional male, recognizing that the Claimant and Mr. Vachon had achieved the MQS and were eligible for qualification under Priority 2 even if they had not met the minimum PQR in their class. This option was explored as there were fewer eligible female athletes to fill the spots allocated to the women's team. This option could not be fully explored until June 28 when the International Paralympic Committee ("IPC") would be able to advise whether there were any unused allocations, however, the Respondent continued to explore this option after the hearing. Ultimately, this arrangement could not be made and the Claimant was informed that he would not be selected.
22. The Claimant and his coach approached representatives of Swimming Canada to raise the arguments which form the basis of this appeal. The Committee then convened a second meeting to consider the Claimant's argument of why he should be named to the team. During the second meeting, the Committee considered how it might resolve the matter. The Committee recognized that with seven spots allocated and eight athletes eligible, one athlete would be left out. The Committee recognized that putting either of the Claimant or Mr. Vachon would mean excluding the Affected Party, who had ranked 8th against the PQR. They again considered whether the Claimant and Mr. Vachon could receive an equal PQR rank of 7th as they finished outside the required time range to be ranked against the PQR. Ultimately, the Committee decided that neither swimmer should receive a ranked swim against the PQR as they had not met the minimum rank of 6th for their class. The Committee determined that it was appropriate to use the tiebreaker provisions contained in the Criteria. The tiebreaker provisions set out that the WPS of the final swim would be used to separate the swimmers. Mr. Vachon, with 857 WPS Points, was selected above the Claimant, who had 834 WPS Points.
23. Once the decision was made, the Para Swimming Selection Committee notified the Athletes by email.

Claimant's Submissions

24. The Claimant submits that the Respondent erred in its application of the Criteria in two ways:

- i. How the Respondent applied the Criteria and treated the Claimant's swim as different from other athlete's swims; and,
 - ii. The manner in which the Respondent assigned the PQR rankings in the event of a tie.
25. With respect to the first, the Claimant submits that Respondent erred in its application of the Criteria by not following it or by applying it inconsistently. The Claimant submits that he was not provided with a PQR ranking and that, as per the Criteria, every eligible athlete must be provided a PQR. For this position, the Claimant relies on the wording set out under section IV a) of the Criteria:
- If the number of swimmers of either gender who meet the performance requirements for Priority 1, 2 or 3 as outlined in Section IV b) exceeds available quota positions, **swimmers will be ranked from highest to lowest within each priority against the PQR.** The swimmers shall be selected in rank order until the available quota complement is met. [emphasis added]*
26. Despite this, he and Mr. Vachon were not ranked against the PQR. As evidence of differential treatment, the Claimant pointed to the manner in which PQR was assigned to Ms. Ens. The Claimant submits that even though her swim was not fast enough to rank against the PQR, the Respondent still provided her with a PQR.
27. The Claimant asserts that there is no wording in the Criteria stating that times must be faster than another time on the PQR document to be ranked, only that they meet or exceed the MQS and Canada A or B times, which Claimant's swim did. The Claimant asserts there is no wording in the nomination criteria that states the PQR is a separate time standard.
28. On this basis, the Claimant believes his Class 8 400m freestyle (and Mr. Vachon's) should have been assigned a rank based on having met the MQS and Canada B times as stated under Priority 2 of the Nomination Criteria.
29. With respect to Claimant's second area of dispute, the Claimant disputed the manner in which the Committee determined not to assign the same PQR for swims in the same event and class. The Claimant points out that there already exists a tie-breaker mechanism within the Criteria, which the Committee used in the process to nominate Mr. Vachon ahead of him. Instead, the Committee should have assigned rankings to both performances as they had done for another athlete in this same time scenario.
30. As evidence, the Claimant submits that in the Class 7 Women's 50m Butterfly event two swimmers finished this race with times that would give them the same ranking against the PQR (1st), but when the team selection rankings document was provided, Ms. Tess Routliffe's time in that event was not there. By email, it was clarified this was due to a cut/paste error after her 100m breaststroke (ranked 1st) was finished as it "had a higher WPS score." It is not stated by the

Committee Chair in this email that her ranking against the PQR was higher, only her points.

Respondent's Submissions

31. The Respondent submits that it correctly applied the Criteria and that the decision not to nominate the Claimant was reasonable.
32. The Respondent made submissions that this matter is an appeal and not a hearing *de novo*. Accordingly, the appropriate standard of review in this matter is reasonableness. The Respondent submitted the cases of *Christ v. Speed Skating Canada*¹, *Bui v. Tennis Canada*², *Canada (Minister of Citizenship and Immigration) v. Vavilov*³ and *Forrester v. Athletics Canada*⁴ for the position that the arbitrator's role in an appeal before the SDRCC is to determine whether the team selection decision fell within a range of possible and reasonable outcomes. When considering the reasonableness of a team selection decision, arbitrators are expected to engage in a robust review of the decision maker's reasons which must show that the decision maker has considered the facts and the governing scheme relevant to the decision. There must also be an "extremely compelling case" to interfere with the team selection.
33. The Respondent submits that technical expert committees are owed deference in their decision-making and cited *Plavsic v. Sail Canada*⁵ to support this position.
34. The Respondent submits that the Claimant must point to some serious shortcoming or defect, such as bias, bad faith or a clear error in the application of the Criteria. The Respondent submits this is not the case and that its decision is intelligible, transparent and supported by reasons. The Respondent submits that its Criteria have not been challenged by the Claimant and so there is no inherent defect with the Criteria. The Claimant has also not challenged the Committee or its members, indicating that there is no issue before this Tribunal with the Committee.
35. The Respondent submits that the Priorities contemplate swimmers being named to the Team who have not met the PQR result but have met the MQS standard.
36. After the 2024 Canadian Olympic & Paralympic Swimming Trials were held from May 13-19, 2024, in Toronto, four athletes had been nominated under Priority 1. Two other athletes had been nominated under Priority 2. The second athlete nominated under Priority 2, the Affected Party, was assigned a PQR of 8th as he had finished with a time between the 7th and 8th ranked swims on the PQR.

¹ SDRCC 16-0298

² SDRCC 20-0457

³ 2019 SCC 65 [*Vavilov*]

⁴ SDRCC 10-0117

⁵ SDRCC 16-0299

37. The Committee then needed to decide which athlete would be nominated to the final position on the team. The Respondent submits that the choice was between the Claimant and Mr. Vachon. Both athletes had competed in the same event but neither had met the PQR during the applicable period or obtained a time within the PQR range for the competition and so could not be ranked against the PQR. As a result, the Respondent relied on the tiebreaker provisions contained in the Criteria and nominated Mr. Vachon based on his higher WPS.
38. The Respondent submits that the provisions of Criteria must be given their grammatical⁶ and ordinary meaning and disputes the Claimant's argument that the Criteria require the Claimant to provide him a PQR. The Respondent disputes that it must provide the Claimant and all athletes with a rank against the PQR under Article IV. The Respondent submits that Priority 2 states the following:
- ...swimmers **will be ranked, based on PQR**, in each eligible event provided they swim a time that equals or betters the 'Canada B' qualifying time, to a maximum of three swimmers, per sport class, per individual event. [emphasis added]*
39. Given its grammatical and ordinary meaning, the Respondent asserts that the ranking under Priority 2 was based on the PQR. This means that this standard was the basis for establishing a hierarchical list of swim results. As a result, both the Claimant and Mr. Vachon cannot both be given a rank of 7th against the PQR as it would contradict the Criteria, the goal of which is to create a sequential list of swims based on results from the Nomination Event. The Respondent submits this provision cannot be read any other way.
40. The Respondent submits that providing the Claimant and Mr. Vachon with a PQR ranking when they fell outside of the PQR time would unfairly diminish the results of the Affected Party, who met the threshold of the PQR for his class and stroke.
41. The Respondent submits that Ms. Ens was provided a PQR, despite not achieving a time that could be ranked against a PQR, because there were more female spots allocated to the team than qualifying athletes. As a result, the same level of scrutiny was not needed for the female selections and this ranking was assigned in error.
42. The Respondent submits that it has discharged its onus under Section 6.10 of the Code to demonstrate that the Criteria were properly established and that the disputed decision was made in accordance with the Criteria. The Respondent submits that the Claimant has the onus to demonstrate that he should have been nominated in accordance with the Criteria. The Respondent submits that the Claimant has not done this.

⁶ The Respondent relies on the following decisions: *Consolidated-Bathurst v. Mutual Boiler*, [1980] 1 S.C.R. 888 at 901, and *Laberge v. Bobsleigh Canada Skeleton*, SDRCC 13-0211

43. The Respondent submits that its decision was reasonable and requests that the Panel dismiss the Claimant's appeal.

Affected Party's Position

44. The Affected Party submits that the Respondent's decision should be upheld and the Claimant's appeal dismissed.

45. The Affected Party submits that while the Claimant and Mr. Vachon met the MQS, their times were slower than the PQR. As the athletes competed in the same competition, they could not be given the same PQR. If the performances of the Claimant and Mr. Vachon were ranked as equal and given the same ranking, then it would unfairly benefit the slower swimmer; in this case, the Claimant.

46. The Affected Party submits that the Respondent's nomination recommendation should be upheld.

Issues

47. The issues before me in this matter are:

- i. Has the Respondent erred in its application of the Criteria;
- ii. If yes, should the Claimant be nominated by the Respondent to the CPC for selection to Paris 2024?

Standard of Review

48. The correct standard of review is reasonableness.

49. I accept the Respondent's submissions on this issue. However, I note that as a consequence of the Supreme Court of Canada's decision in *Vavilov*, there is a rebuttable presumption that reasonableness is the applicable standard in appeals such as these.⁷

Analysis

Issue 1: Has the Respondent erred in its application of the Criteria

50. I find that the Respondent has not erred in its application of the Criteria.

⁷ *Vavilov* at paras 16 and 17.

51. As this is a team selection matter, article 6.10 of the Code sets out the following three-part test:
- i. The Respondent must demonstrate that the Criteria were appropriately established;
 - ii. The Respondent must then demonstrate that the disputed decision was made in accordance with the Criteria; and,
 - iii. The onus then turns to the Claimant to demonstrate that he should have been selected or nominated in accordance with the Criteria.
52. Under the first prong of this test, I find that the Respondent has demonstrated that the Criteria were appropriately established. The Claimant has not disputed the Criteria. In addition, I accept the Respondent's submissions as they relate to the Committee. Upon review of the Claimant's submissions, I am satisfied that the Committee is comprised of members who have the relevant expertise and knowledge to apply the Criteria for the purpose of nominating athletes to Paris 2024. As with the Criteria, the Claimant has raised no objection to the Committee.
53. Under the second part of the test, I find that the Respondent has demonstrated that the disputed decision was made in accordance with the Criteria. As part of their submissions, the Respondent provided detailed minutes from two meetings of the Committee. These meetings were held to determine how to apply the Criteria to this team selection matter. They demonstrate the manner in which the Committee grappled with the fact that one athlete would be left off the team, despite having met the MQS. These minutes also demonstrate the considerations that went into finding a way to obtain an eighth spot for all eight athletes.
54. The Committee selected athletes under Priority 1 and Priority 2 based on their PQR rankings. As the Claimant and Mr. Vachon had not finished in a position to obtain a PQR, they were ranked in positions seven and eight. With both athletes finishing above the MQS but below the PQR, they were ranked the same. However, because of limited space on the team for Paris 2024, the Committee was unable to take all eight otherwise eligible athletes and instead relied on the tiebreaker provision to settle the matter. Because the tiebreaker provision settles the matter by WPS, Mr. Vachon, who had a higher WPS, received the final spot on the team.
55. I am satisfied the Respondent's onus to demonstrate that the decision not to nominate the Claimant was made in accordance with the Criteria.
56. Under the third part of the test, the onus now turns to the Claimant to show that he should have been selected. I find that the Claimant has not discharged this onus.
57. The Claimant has argued that the Respondent should have selected the Claimant for the team however, the Respondent applied the Criteria incorrectly by not

assigning him a PQR, that the Respondent treated the Claimant's swim as different from other athlete's swims and that the manner in which the Respondent assigned the PQR rankings in the event of a tie is a departure from their previous practices.

58. To demonstrate that the Respondent applied the Criteria incorrectly, the Claimant relied on the wording contained in Section IV of the Criteria where it says, "swimmers will be ranked from highest to lowest within each priority against the PQR" (emphasis added). The Claimant believes that this language is clear and that the Respondent must provide him with a PQR. In essence, the Claimant has interpreted "will" as "shall" with the consequence being that he *shall* receive a numbered ranking against PQR.
59. I do not agree with this interpretation. The passage relied on by the Claimant, from Section IV a) v. of the Criteria, establishes that where there are more athletes competing than there are quota positions, the swimmers will be ranked *from highest to lowest* against the PQR. This means that the athletes' PQRs will be compared and that they will be ranked based on where their times are on the PQR results. In essence, the PQRs will have already been assigned and then the athletes are ranked.
60. The section relied on by the Claimant must be read in concert with the similar passages in Priority 1 and Priority 2. Both of these passages indicate that "swimmers will be ranked, based on highest PQR", and "swimmers will be ranked, based on PQR". In both instances, they are ranked based on a PQR they have already been assigned based on their performance in an eligible event. The PQR helps determine the ranking for nominating athletes to Paris 2024, but is not the ranking in and of itself. In order to achieve a PQR, the athlete must finish with a time greater than the PQR minimum time.
61. While the Claimant achieved a greater time than the MQS, he did not achieve a time greater than the PQR minimum time. As a result, he has not been assigned a ranking against the PQR. The same is true of Mr. Vachon. On the other hand, the Affected Person was assigned a PQR of 8th as a result of his having achieved a result greater than the 8th place PQR time, which was the PQR minimum time for his class and event. If the Claimant were to be given a PQR ranking, it would be 7th. However, doing so would create a patent unfairness to the Affected Party as he would lose his position on the team to an athlete who, while surpassing the MQS, had not met the PQR minimum time.
62. I find that the Respondent fulfilled its obligation to rank the athletes from highest to lowest as per the Criteria. It ranked the athletes who met the PQR minimums accordingly and they were allocated the first six spots on the team out of a total of seven. While the Claimant and Mr. Vachon were not provided with a numbered ranking against the PQR, they were ranked and placed in the final two spots as they had met the MQS. It is this ranking, along with the application of the tiebreaker provision, which led to Mr. Vachon's nomination based on his WPS. The Claimant has not disputed Mr. Vachon's place on the team.

63. As evidence of differential treatment, the Claimant has pointed to Ms. Ens receiving a PQR. I accept the evidence of Marj Walton, who acts as the Committee Chair. Ms. Walton provided evidence at the hearing that the PQR provided to Ms. Ens was in error. I found Ms. Walton to be very credible and reliable in her presentation of her evidence and I accept her evidence in its entirety. Ms. Walton stated that since the number of female athletes who were eligible did not exceed the quota allocation, the level of scrutiny paid to the women's nomination events were less than the men's. While I can appreciate this may feel unfair to the Claimant or may cause some consternation, it is simply a technical error which has no bearing on the outcome of the matter before me.
64. The Claimant argued that both he and Mr. Vachon should have been provided the same PQR of 7th despite competing in the same class and event and that both should have been nominated to the team. As evidence that this could be done, the Claimant cited another example of female athletes to support his position. However, upon review, the example appears to have been a misunderstanding and that one of the athletes whose results the Claimant cited was discarded. This example turned out to be a moot point.
65. Instead, I accept the Respondent's arguments as it relates to the application of its tiebreaker provision. The Respondent had seven spots with which to nominate eight eligible male athletes for Paris 2024. The athletes had competed in the same event, the Class 8 400m Freestyle. However, Mr. Vachon finished ahead of the Claimant and had a higher WPS score and was therefore nominated in accordance with the tiebreaker provision. As there are a finite number of spots allocated for Paris 2024, the Respondent does not have the luxury to nominate an 8th athlete. While it is unfortunate the Claimant finds himself as the 8th athlete, I find that the Respondent has not erred in its application of the Criteria.
66. The decision not to nominate the Claimant was reasonable.

Issue 2: Should the Claimant be nominated by the Respondent to the CPC for selection to Paris 2024?

67. Given my finding above, I have not addressed this issue.

Conclusion

68. I have come to the following conclusions:
- 1) The Respondent has not erred in their application of the Criteria and their decision not to nominate the Claimant is reasonable; and,
 - 2) The Claimant's appeal is dismissed.
69. I would like to commend all of the parties for their collegiality and professionalism at all times throughout this matter. In reviewing the submissions and during the

hearing, it was evident that the parties involved held each other in the highest regard.

70. Decisions to exclude an otherwise eligible athlete are not made lightly. From the Committee meeting minutes to determine the composition of the Paris 2024 team, I am able to see that the Committee did not make this difficult decision with any amount of ease. They understood how important their decision was to the Claimant, the Affected Party and all of the other athletes impacted by their decision and I am aware of repeated efforts made by the Respondent to find a solution that would permit the Claimant to join the team in Paris. This included a request to World Para Swimming and the IPC for a bi-partite allocation of an additional spot for the Claimant.
71. While I recognize the disappointment that accompanies being left off the Paris 2024 team, despite having met the MQS, it is still very impressive that the Claimant made the MQS. This should not be forgotten.
72. I wish to thank the parties for their excellent submissions and I wish both athletes who appeared before me, Mr. Zona and Mr. Turbide, great success on their careers and in all future athletic endeavours.

Signed in Ottawa this 15th day of July, 2024.



David Bennett, Arbitrator