

Case number: NST-E22-73721

Case Title: Georgina Collin v Paddle Australia

## Determination

### National Sports Tribunal General Division

sitting in the following composition:

Panel Member/s

Adam Casselden, SC

Eugénie Buckley

Dr Peter Fricker OAM

in the arbitration between

**Georgina Collin**

**(Applicant)**

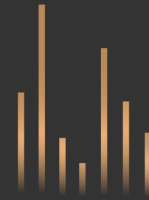
Represented by Jeremy Masters (Counsel), instructed by Paul Horvath (Solicitor) of Sports Lawyer

And

**Paddle Australia (“PA”)**

**(Respondent)**

Represented by Ian Fullagar (Solicitor) of Lex Sportiva



## PARTIES

1. The Applicant athlete is a 25-year-old competitor in the sport discipline of canoe slalom seeking to represent Australia in the 2022 Canoe Slalom World Cup and World Championships in the Women's K1 event ("**the Event**").
2. The Respondent sporting body is the governing body in Australia for the sport of Paddle/Canoeing, which includes the discipline of canoe slalom, and is responsible for setting the relevant Selection Procedure Policy ("**the Policy**") and Selection Criteria Supplement for Canoe Slalom ("**the Supplement**"), and for implementing that Policy and those Criteria.

## INTRODUCTION

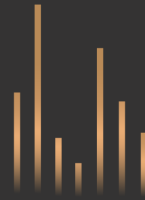
3. The Applicant nominated for selection in the 2022 World Cup and World Championships and took part in various selection competitions as required by the Policy and the Supplement. She was not selected for the World Cup or World Championships, and by this appeal against her non-selection, she sought in particular, selection as the Women's K1 reserve for the World Championships and World Cup ("**Reserve**"), and to be selected as the third Australian representative in the World Cup 3 ("**3<sup>rd</sup> Quota**") under specific provisions set out in the Supplement.

## NST JURISDICTION

4. It was agreed by the parties that the jurisdiction of the National Sports Tribunal was as provided by section 23 (1) (a), (b) (i) and (c) (i) of the *National Sports Tribunal Act 2019* ("**the NST Act**") and clause 9 of the Policy.

## PROCEEDINGS BEFORE THE NST

5. The Applicant filed her Application Form on 17 March 2022. She sought expedition of the Application.
6. The NST Registry held a Preliminary Conference on 21 March 2022. Directions were made for the filing of submissions and evidence as well as the provision of documents by the Respondent as requested by the Applicant. Those documents were provided by the Respondent.
7. The Applicant filed her submissions and evidence on 26 March 2022, the Respondent on 29 March 2022 and the Applicant filed submissions in reply and further evidence on 29 March 2022.
8. The parties identified Sophie Wilson as a person permitted to participate in the hearing under section 23 (c) (i) of the NST Act, but Ms Wilson did not indicate that she wished to be a party to the arbitration under section 23 (c) (ii) of the NST Act.
9. The parties signed an Arbitration Agreement on 31 March 2022 whereby a number of procedural and jurisdictional matters were agreed. Under that Agreement it was agreed that the



determination by the NST would represent full, final and binding settlement of all issues raised in the arbitration by the Applicant, and that there would be no right of appeal from the determination of the NST in the General Division.

10. The hearing was conducted by videoconference on 4 April 2022, and the Panel reserved its decision.
11. No objection was made at the outset of the hearing to the composition of the Panel and at its conclusion the parties confirmed that their procedural rights had been fully respected.

## APPLICABLE RULES

12. The relevant provisions of the Policy are as follows:

1. *Introduction*

*PA's Objective when selecting Teams include but are not necessarily limited to:*

- a) *identifying and including the best performing Athletes to represent Australia, maximising the likelihood of success at the international competitions attended and/or*
    - b) *providing appropriate international competition opportunities for high performing, developing Athletes*

2. *Definitions*

*"CEO" means the Chief Executive Officer of PA*

*"NPD" means the National Performance Director of PA*

*"Team" means the Athletes Selected to attend an ICF or other International Competition*

- 4.8 *Subject to this Policy, including the Selection Criteria Supplement, the Selection Panel has absolute discretion to determine whether an Athlete is selected in a Team.*

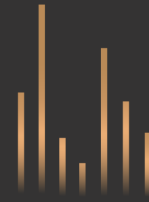
6. *Eligibility*

- 6.1 *To be eligible for consideration for selection under this Policy, the CEO must be satisfied that, at the time of selection to a Team(s), the athlete:*

.....

*6.1.6 completes any specific eligibility requirements outlined within the relevant Selection Criteria Supplement*

.....



*The CEO or NPD may at their sole discretion confirm an Athlete's eligibility, depending on the circumstances as considered on a case-by-case basis*

## **7. Nomination and Selection**

- 7.1 Athletes wishing to nominate for selection to a Team must comply with the procedure set out in the Selection Criteria Supplement, including meeting all relevant dates and requirements.*
- 7.2 The Selection Panel shall apply the Selection Criteria Supplement when determining the Athletes for selection to any Team.*
- 7.3 All other matters concerning selection are governed by this Policy, including the composition of the Selection Panel, eligibility of Athletes, notification of selected Athletes, appeals and withdrawal and replacement of selected Athletes.*

## **9. Appealing Decisions**

- 9.3.5 The decision of the NST will be final and binding on the parties.*

13. The relevant provisions of the Supplement are as follows:

### **1. Definitions**

*"Minimum Performance Standards (MPS)" means the minimum performance standard required by PA for selection to a national team in addition to any other criteria as set out in clause 5 of this (sic) Criteria*

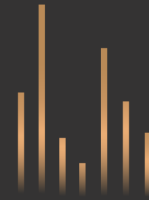
*"Team" means the 2022 Paddle Australia Canoe Slalom Team to compete at the 2022 ICF Canoe Slalom World Cups and World Championship Events.*

*Words not defined in these Criteria have the meaning ascribed to them in the Constitution of PA or the Policy unless a contrary meaning appears from the context*

### **2. Selection Aims**

*To give context to the following policy and processes, the aims of the PA High Performance Program for the 2022 season are as follows:*

- a) identify the top 3 senior athletes within each Event to contest the ICF Canoe Slalom World Cup and World Championship Events in 2022.*



*b) provide potential Paris 2024 athletes, who reach the necessary age-related minimum performance standards, an opportunity to compete in ICF International competitions (if maximum number of ICF quota positions are not filled).*

### 3.2 Eligibility

*3.2.1 To be eligible for consideration for selection to the Team, athletes must comply with the Policy*

*3.2.5 Athletes must have nominated for the Team under clause 3.3 of this (sic) Criteria*

### 3.3 Team Nomination

*3.3.1 The competitions for which the Team will be selected for in 2022 are:*

- a) 2022 ICF Canoe Slalom World Cups;*
- b) 2022 ICF Canoe Slalom World Championships;*
- c) other ICF competitions as may be determined by PA.*

*3.3.2 Athletes will be required to nominate for selection to the Team. The process of nomination will form part of the entry process for the selection competitions listed in clause 3.4 of this (sic) Criteria.*

*3.3.4. By nominating for selection to the Team, athletes agree to comply with:*

- (i) this (sic) Criteria: and*
- (ii) the Policy.*

## 4. Selection Criteria and Process

*Athletes may be selected to the Team in each respective Event, up to the maximum number of quota places (3) awarded to Australia by the ICF for each individual Event, as follows:*

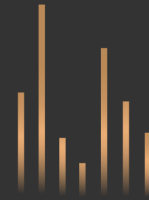
### 4.1 Selection Process – International Early Pre-Selection and Domestic Ranking System

.....

### 4.2 Selection Criteria

*Selection to world cup and world championship competitions up to the maximum ICF quota positions for Australia (3) will be allocated by:*

*INTERNATIONAL (EARLY) PRE-SELECTION*



4.2.1 To be selected to the Team under this clause, an athlete must have achieved a podium (top 3) result at the Tokyo 2020 Olympic Games

AUTOMATIC SELECTION

The following criteria (4.2.2 and 4.2.3) applies (sic) for World Cups 1,2,4,5, and World Championships

.....

AUTOMATIC SELECTION

The following criteria (4.2.4) applies (sic) for World Cup 3:

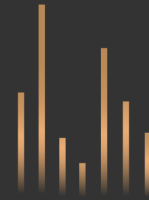
4.2.4 After the application of 4.2.1, automatic selection up to a maximum of two (2) positions will be made in the order of the highest ranked eligible Male and highest ranked eligible Female athletes, based on the ranking system outlined in clause 4.1, AND, having achieved at least 1 x Senior MPS (or U25 MPS for eligible Athletes aged 25 years or younger), in any of the selection events outlined in clause 4.1.2, will be automatically selected in the Event or Events they achieve the ranking results.

4.2.5 To be clear:

- a) to be AUTOMATICALLY selected, a maximum of two (2) positions will be selected after the application of clauses 4.2.1 and 4.2.4.
- b) an athletes must be ranked in either the Top 1 or in the Top 1 or 2 places as outlined in clause 4.1, after application of clause 4.2.1, AND
- c) to be AUTOMATICALLY selected, an athlete must have achieved at least 1 x Senior MPS (or U25 MPS for eligible Athletes aged 25 years or younger).
- d) an athlete who is ranked in the Top 1 or 2, who has not achieved 1 x Senior MPS (or U25 MPS), will not be AUTOMATICALLY selected, but may be selected by discretion according to Clause 4.2.7 (ie. The position does not automatically roll down to the next ranked athlete who has achieved MPS).

4.2.6 The remaining allocations up to the maximum quota positions available for Australia will be subject to fulfilling the following criteria in order:

- 4.2.6.1 The highest ranked U21 athlete who has not already been selected for World Cups 1, 2, 4, 5, or World Championships and has achieved at least 1 x U25 MPS
- 4.2.6.2 The highest ranked U18 athlete who has not already been selected for World Cups 1, 2, 4, 5, or World Championships and has achieved at least 1 x U23 MPS



4.2.6.3 *The highest ranked U23 athlete who has not already been selected for World Cups 1, 2, 4, 5, or World Championships and has achieved at least 1 x SNR MPS*

4.2.6.4 *The highest ranked athlete who has not already been selected for World Cups 1, 2, 4, 5, or world Championships and has achieved at least 1 x SNR MPS*

#### DISCRETIONARY SELECTION

*The Canoe Slalom community has experienced challenges due to the impact of Covid 19, in light of this the selection panel will consider where teams are not filled to the maximum allocated spots, applying their absolute discretion to select athletes who performances are suitable for international representation.*

4.2.7 *The Selection Panel, at their absolute discretion, may select additional athletes in Events up to the maximum number of quota places awarded to Australia by the ICF. In doing so, they will consider the following:*

4.2.7.1 *ranking of each athlete according to clause 4.1.5 of this (sic) Criteria*

4.2.7.2 *application of Senior MPS according to clause 5 of this (sic) Criteria*

4.2.7.3 *performances in relation to the Senior MPS, or in relation to the U25 and U23 MPS for those eligible U25 and U23 aged athletes, respectively.*

.....

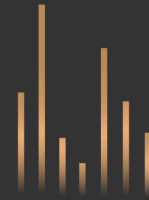
4.2.8 *In the application of Discretionary Selection, the Selection Panel, at their absolute discretion, may select athlete(s) for one, or more than one, ICF World Cup competitions (including World Championships). In doing so, it may select additional athletes under the Reserve Criteria (Clause 4.3), to fill any available quota places awarded to Australia by the ICF*

#### 4.3 Reserves

*The Selection Panel may, but is not obliged to, name Reserves for each Event according to Clause 4.2.6. If a selected Athlete chooses not to, or, is unable to compete in any of the selected competitions, then the Reserve athlete will replace the selected Athlete in that competition.*

#### ALLEGED ERRORS MADE BY PA

14. Essentially, the Applicant alleges two errors were made by PA:



- a. PA incorrectly deemed another athlete, Sophie Wilson, was eligible to be selected for the Senior WKI team because Wilson did not nominate for the senior team. The consequence of this error was that Wilson was selected to the 3rd Quota position instead of Collin; and
- b. PA incorrectly applied the selection criteria under the Supplement.

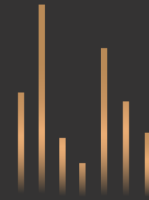
## REMEDY SOUGHT BY THE APPLICANT

15. The Applicant submitted that the Tribunal should stand in the shoes of PA and select Collin as 3rd Quota position and Reserve in the Senior WK1 team.

## MAIN SUBMISSIONS OF THE PARTIES

16. While the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties, it refers in its Determination only to the submissions and evidence it considers necessary to explain its reasoning.
17. The purpose of the Policy is to provide certainty and clarity to athletes seeking to be selected to PA Teams and to establish transparent and consistent procedures and criteria (Section 1 Introduction). The Policy must be read in conjunction with the Selection Criteria Supplement applicable to each PA Team.
18. Clause 6 of the Policy covers eligibility for selection with seven sub-paragraphs, including “completes any specific eligibility requirements outlined within the relevant Selection Criteria Supplement” (clause 6.1.6).
19. Under the Supplement, to be eligible for consideration for selection to the Team, “Athletes must have nominated for the Team under clause 3.3 of this Criteria” (clause 3.2.5). Clause 3.3.2 states that “Athletes will be required to nominate for the Team.”
20. It is not in dispute by the parties that Collin nominated for the senior team and that Wilson did not nominate for the senior team.
21. Collin contends that by not nominating for the senior team, Wilson was not eligible for selection by PA to the 3rd Quota position.
22. PA contends that the under clause 6.1 of the Policy (last sentence) the CEO has a discretion to deem an athlete eligible and that this was validly exercised by the PA CEO, Phil Jones. In an email dated 2 March 2022 from Sara Latham, PA Performance Operations Manager to Phil Jones, PA CEO and Kim Crane, PA National Performance Director (NPD), Ms Latham states that the Selection Panel came across an issue regarding the 3rd Quota position. That email requested the PA CEO apply a discretion under clause 6.1 (last sentence) of the Policy to allow Wilson to be eligible for senior team selection.
23. Collin argues that the PA CEO incorrectly deemed Wilson was eligible to be selected for the Senior WKI team because she did not nominate for the senior team. Clause 6.1 of the Policy



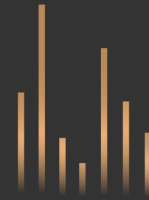


sets out the seven criteria that the CEO must be satisfied of in order to make an athlete eligible for selection. At the end of clause 6.1, the following sentence states “The CEO or NPD may at their sole discretion confirm an Athlete’s eligibility, depending on the circumstances as considered on a case-by-case basis.”

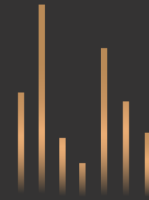
24. The resolution of this appeal turns on the proper construction of the Policy and the Supplement.
25. Collin submits that the use of the word “confirm” in the last sentence of clause 6.1 of the Policy does not permit the CEO (or NPD) to deem an athlete eligible when that athlete did not meet the eligibility requirements. The discretion to confirm, she submits, relates to where there is factual doubt. Collin contends the purpose of the discretion was to make it clear that the CEO or NPD had sole discretion to determine any factual question or doubt as to whether requirements are met. It is for confirmation or verification purposes only. Any alternative construction, it is said, would make a “nonsense” of the provision. It would mean the clause requires the CEO to be satisfied and then provide the CEO with a discretion to deem eligible if not so satisfied. Collin argues there was no factual question or doubt as Wilson did not nominate for the senior team.
26. On the other hand, PA contends that the CEO has an absolute discretion and he was satisfied that Wilson had nominated for the senior team, because if an athlete nominates for a team, they are eligible for any team. It was submitted that the different age groups under the Policy and Supplement reflect this and are “inter-changeable”.
27. PA submits the definitions of Teams under the Policy and Supplement are unambiguous. It was submitted that the definition of “Team” in the Policy overrides the definition of “Team” in the Supplement. PA argued that under clause 6.1 of the Policy, it relates to “a Team(s)” as it needs to be sufficiently broad to cover all teams selected by PA for different age groups and for different disciplines. PA submitted that the definition of Team under clause 3.3.2 of the Supplement is specific and relates only to the senior team that is covered by the Supplement.

## MERITS

28. The Tribunal prefers the construction advanced by Collin and finds that the CEO did not have a discretion to deem Wilson eligible for selection to the senior team when Wilson did not meet the eligibility requirements of the Supplement. In our opinion clause 6.1.6 of the Policy was not satisfied by Wilson as she did not nominate for selection in the senior team as required under clauses 3.2.5 and 3.3.2 of the Supplement. Wilson was, therefore, in breach of the Policy (see cl. 3.2.1 of the Supplement) and also the Supplement by reason of the operation of clauses 3.2.5 and 3.3.2 of the Supplement. The purported exercise of the discretion by the CEO in 6.1 (last sentence) of the Policy could not, in our opinion, permissibly operate to overcome these breaches by “confirming” the Athlete’s eligibility.
29. The selection aims of the senior team are prescribed in clause 2 of the Supplement as:
  - a) *Identify the top three senior athletes within each Event.*
  - b) *Provide potential Paris 2024 athletes, who reach the necessary age-related minimum performance standards (MPS), an opportunity to compete in ICF competitions (if the maximum number of ICF quota positions are not filled).*

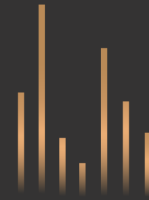


30. Further, under clause 1.1 of the Policy, PA's objectives when selecting Teams include, relevantly:
- a) *Identifying and including the best performing Athletes to represent Australia, maximising the likelihood of success at the international competition attended.*
  - b) *Providing appropriate international competition opportunities for high performing, developing Athletes.*
31. The parties agree that automatic selection criteria are not relevant to this matter (clauses 4.2.4 to 4.2.6).
32. The discretionary selection criteria in clause 4.2.7 of the Supplement allow the Selection Panel, at their absolute discretion, to select additional athletes in Events up to the maximum number of quota places awarded to Australia. In doing so, the Panel will consider the following five elements:
- i. Ranking of each athlete (from the selection events of Olympics, Oceania Championships and Australian Open) – see cl. 4.2.7.1
  - ii. Application of Senior MPS – see cl. 4.2.7.2
  - iii. Performances in relation to the Senior MPS, or in relation to the U25 and U23 MPS for those U25 and U23 aged athletes – see cl. 4.2.7.3
  - iv. Circumstances under clause 7.5 relating to cancellation of events that are not relevant to this matter – see cl. 4.2.7.4
  - v. Approved extenuating circumstances – see cl. 4.2.7.5
33. Collin advances the proposition that the Selection Panel did not take into account relevant criteria and did take into account irrelevant criteria. This proposition is based on the record of the Selection Panel's reasoning as found in the documentation, being the 2 March 2022 email, Statement of Sue Natoli (especially paragraph 5) and Annotated Version Based on Selection Panel Discussions of the Supplement.
34. Based on the discretionary criteria above:
- i. Collin was ranked 4<sup>th</sup> and the next highest in ranking. This fact is not in dispute.
  - ii. Neither Collin nor Wilson achieved the Senior MPS, but Collin was much closer to this achievement at 3.49% off compared to Wilson at 10.13% off.
  - iii. Collin achieved her age related U25 MPS. The criteria require consideration only of U25 and of U23 MPS. Wilson should have been compared against U23 and not U21 MPS. There is no reference in the criteria to U21 MPS and so this is an irrelevant consideration.
  - iv. Not applicable.
  - v. Extenuating circumstances. Medical evidence was provided that Collin was suffering from post-Covid fatigue and this was not referenced in the documentation.
35. Collin relied on expert witness statements from:



- a) Dr David Abraham dated 18 February 2022 stating she had post-COVID fatigue which led to a decrease in performance levels. His expert witness statement dated 25 March 2022 requested consideration of this with regards to her appeal against non-selection;
  - b) Warwick Draper dated 27 March 2022 and especially paragraphs 7, 10 and 11;
  - c) Zlatan Ibrahimovic dated 25 March 2022 that Collin's performance was "significantly impacted due to Covid19" and that she would otherwise have made Senior MPS; and
  - d) Didier Baylacq dated 25 March 2022 as her current coach.
36. PA argued that the Selection Panel did take into account all the circumstances and this is made clear in the statement of Sue Natoli, one of the Selection Panel members. The obligation on PA is only to consider the criteria and it has an absolute discretion. In fact, it was submitted that the Selection Panel does not need to select anyone. PA submitted that the evidence of the expert witnesses provided by Collin is irrelevant. Clause 4.2.7 is not an exhaustive list and the Selection Panel has the right to consider other aspects, including U21 performance.
37. The Tribunal notes that the Selection Panel does have an absolute discretion, but it needs to take into account the purpose of the Supplement around the 3rd Quota position, especially in providing potential Paris 2024 athletes that meet age-related MPS with an opportunity. Collin will be 27 years old, had met the U25 MPS and is the next ranked athlete.
38. The arguments advanced by Collin under clause 4.2.7 apply equally to the Reserve under clause 4.3.
39. Collin argues that WK1 was the only one of the four events where a reserve was not nominated. The reference in clause 4.3 to clause 4.2.6 is likely to mean 4.2.7, given the former is about automatic selection rather than discretionary selection. An absolute discretion should be consistently applied to the automatic selection. It was submitted that the Selection Panel did not properly apply the discretion to the Reserve under clause 4.3.
40. Again, the Tribunal notes the discretion of the Selection Panel but finds Collin best met the discretionary criteria under clause 4.3 of the Supplement.
41. Finally, PA submits that Collin does not have any grounds of appeal that strictly fall within clause 9 of the Policy. The sole grounds of appeal to the NST include that "the applicable Selection Criteria Supplement has not been properly followed and/or implemented" (clause 9.2.1). It was argued by PA that the alleged error of PA around athlete eligibility under clause 6.1 related to the Policy and not the Supplement and therefore Collin's appeal was incompetent.
42. The Tribunal rejects this submission. The non-selection dispute before the Tribunal related to the Supplement not being followed or implemented, because PA misconstrued "eligibility" under clause 6.1 of the Policy by reason of it misconstruing clause 3.2 "Eligibility" and clause 3.3 "Team Nomination" of the Supplement. Accordingly, Collin does have grounds to appeal to the Tribunal.

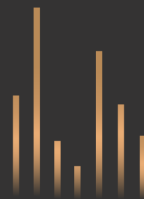
## THE POWER OF THE NST TO MAKE THE SELECTION DECISION



43. Collin submitted that the Tribunal should stand in the shoes of the Selection Panel and make the decision to select Collin as the 3rd Quota position and Reserve. The rationale being:
- a) Urgency of the selection decision makes it preferable and more efficient for the Tribunal to make the decision and to not simply remit it back to Selection Panel.
  - b) The Selection Panel made a number of errors relating to Collin. This together with three other selection appeals show a lack of trust in the decisions of the Selection Panel.
  - c) It is questioned whether the Panel can be impartial.
  - d) The Tribunal is required under clause 9.3.5 of the Policy to make a decision that is final and binding. This implicitly gives the Tribunal the power to make a decision on who should be selected.
  - e) The Tribunal is a sporting tribunal and thus has the necessary expertise.
44. The Tribunal declines to accede to this submission for the reasons articulated by PA, namely, that the Selection Panel is an expert panel better placed to make selection decisions and tribunals, such as this Tribunal, should be reluctant to make their own selection decisions but should, however, be prepared to comment on whether selection requirements and processes have been followed.
45. The Tribunal notes that Wilson was notified of the Collin appeal as an affected party but did not provide to the Tribunal any written or oral submissions.

**THE TRIBUNAL THEREFORE DETERMINES:**

- a) Wilson was not eligible for selection to the 3<sup>rd</sup> Quota position.
- b) The Tribunal remits the 3<sup>rd</sup> Quota position back to the PA Selection Panel to select in accordance with clause 4.2.7, noting the purpose of the 3<sup>rd</sup> Quota position and that Collin was the next highest ranked paddler at 4<sup>th</sup>, was 3.49% off the Senior MPS, with expert evidence provided that she would have achieved this if not for post-Covid fatigue, and she met her age-related U25 MPS.
- c) The Tribunal remits the matter of the Reserve back to the PA Selection Panel to reconsider in accordance with clauses 4.3 and 4.2.7 of the Supplement.
- d) PA Selection Panel needs to reconvene and determine this matter urgently and within seven days from the date of this Determination.



Date: 03 May 2022



Mr Adam Casselden SC



Ms Eugenie Buckley



Dr Peter Fricker