

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

NO: SDRCC 17-0324

Ron Jacks
(Claimant)

AND

Swimming Natation Canada
(Respondent)

AND

Dominique Longtin
(Affected Party)

DECISIONS WITH REASONS

APPEARING FOR THE APPELLANT:

Ron Jacks (Coach)
Jordan Goldblatt (Counsel)
Jeff Hernaez (Counsel)
Peter Vizsolyi (Representative)

APPEARING FOR THE RESPONDENT:

John Atkinson (High Performance Director, Swimming Natation Canada)
Mark Perry (National Coach, Swimming Natation Canada)
Ahmed El-Awadi (CEO Swimming Natation Canada)
Brian Edey
Benoit Girardin (Counsel)

APPEARING FOR THE AFFECTED PARTY:

Dominique Longtin (Coach)
Patrick Goudreau (Counsel)
Véronique Leroux (Counsel)

Hearing by way of teleconference on June 21, 2017

Overview

1. The Complainant disputes the Respondent's decision to not select him as a coach for the 2017 FINA Championships in the Open Water Competition. Following the announcement that the Complainant, an experienced and successful coach, would not be selected, he received reasons suggesting that the decision may have been made by someone other than the appropriate decision-maker, that the person who helped make the decision was in a conflict of interest, that the decision was therefore tainted with bias and that irrelevant criteria may have been included in the decision against selecting him.
2. The Complainant asks that the Respondent's decision be overturned and that he be appointed as a coach. On June 22nd, 2017, I issued a short form decision allowing the Complainant's appeal. These are the accompanying reasons of that decision.

The Parties

2. The Claimant ("Mr. Jacks"), is a highly accomplished swimming coach with decades of experience and success. He has participated or coached swimmers in the Olympics or Paralympic Games every four years from 1964 to 2016. This participation has produced finalists or semi-finalists at each of these events between 1976 and 2012, including medalists. Specific to Open Water Swimming events, Mr. Jacks has produced a World Champion, an Olympic bronze medalist and a World Series female champion. Two other athletes coached by Mr. Jacks won Pan Am Games gold medals and three of his other swimmers finished in the top eight at the World Championships. He has been named Canada's Open Water coach of the year more than ten times. Currently, he coaches three of the highest ranked swimmers set to compete at this year's FINA Championships.
3. Swimming Natation Canada, ("the Respondent"), is the national governing body for swimming. This organization oversees Canadian swimming programs across the country, guiding and promoting swimmers and coaches. Swimming Natation Canada prepares its athletes and coaches for participation in national and international swimming competitions. It is based in Ottawa, Ontario.
4. John Atkinson ("Mr. Atkinson") has been Swimming Natation Canada's High Performance Director since 2013. His successful career in swimming spans more than 30 years in the UK, Australia, and Canada. His leadership of the 2016 Rio Olympic team yielded excellent results for Canada in Olympic Swimming ever. While the Team Leader for the British Swimming at the 2012

Paralympic Games, his team won 39 medals and returned more medalists than any other nation.

5. Mark Perry ("Mr. Perry") has coached swimmers to Olympic medals and World Championships in multiple competitions throughout his career as a coach and team leader for over 20 years. While leading the British Swimming Open Water Team, his athletes won three Olympic medals at the Beijing Olympics. His swimmers also won five World Championships (including two gold medals) and nine European Junior Open Water medals (including 4 gold medals).
6. Ahmed El-Awadi is the CEO of Swimming Natation Canada.
7. Dominique Longtin ("Ms. Longtin") has been a swimming coach for over a decade. She has coached athletes of all age groups, including senior swimmers in FINA competitions in which her athletes have consistently finished in the top ten, including second and third place finishes. She is trilingual and speaks and writes in English, French, and Spanish.

Background

8. Mr. Jacks communicated to Swimming Natation Canada that he wanted to be appointed as 10km Open Water Coach for the 2017 FINA World Championships.
9. Pursuant to the selection policy, the Respondent was scheduled to make the announcement regarding coaching selections at the conclusion of the 2017 Canadian Swimming Trials on April 9th, along with many other positions for that year's competitions.
10. The announcements regarding selections were made for all swimmers and coaches aside from the two positions for head coach for 10km Open Water for the 2017 World FINA Championships. Mr. Jacks confronted Mr. Perry about the omission of the 10km Open Water coaches from the announcement, and Mr. Atkinson intervened.
11. Following this, Mr. Jacks wrote an e-mail to Mr. Perry and Mr. Atkinson on April 17, 2017, summarizing his qualifications for the coaching role and his interest in working with Mr. Perry.
12. On April 20, 2017, Mr. Perry responded by e-mail to Mr. Jacks and informed him that Mr. Atkinson, in consultation with Mr. Perry, had decided against appointing Mr. Jacks to one of the two positions for Open Water coaches. Mr.

Perry informed him that there would be future opportunities to work with him in the future. Mr. Atkinson was copied on this e-mail, part of which read:

I note that you are interested in being part of the staff team for this year's World Championships. However, for this year, the High Performance Director in consultation with me has made the coaching appointments and unfortunately you will not be part of the staff on this occasion.

[Underline added]

13. That same day, Mr. Jacks responded to Mr. Perry and Mr. Atkinson and expressed concern that he had not been selected and asked for clarification about the reasoning behind his omission from selection.
14. Mr. Perry wrote an e-mail to Mr. Jacks, which was also copied to Mr. Atkinson and Mr. El-Awadi, on April 22, 2017 and explained that the criteria that Mr. Atkinson and he had based the decision on were: the ability to work within the team environment; work in a positive manner and accept decisions from the team leader and head coach; and to work exclusively with Team Canada and no other country or its athletes. An excerpt of this e-mail reads:

Along with High Performance Director John Atkinson we both considered all aspects to the selection of coaches for the summer to the Swimming Canada World Championships Open Water team and the following aspects are very important to our sections process. [...] The coaching staff have been appointed and the decision made and confirmed for the Open Water team in 2017 that we will not be changing selections or adding to the team.

[Underline added]

15. Mr. Jacks responded by e-mail to Mark Perry, copying Mr. Atkinson and Mr. El-Awadi on April 23, 2017. He disputed the manner in which the criteria had been formed as a basis for selection and how some of the facts alleged by Mr. Perry were inaccurate.
16. Mr. Atkinson responded to Mr. Jacks' April 23, 2017 e-mail in an e-mail dated April 24, 2017. Mr. Atkinson confirmed to Mr. Jacks that the decision had been made, and that they would be "happy to work to improve the relationship" between Mr. Jacks and Swimming Natation Canada for the future. Mr. Atkinson's e-mail included the following passages in which he explains his and Mr. Perry's sentiments regarding the situation:

As the High Performance Director for Swimming Canada the overall team environment is very important in this whole process and both Mark and I discussed this at length. [...] We are happy to work to improve the relationship between yourself and Swimming Canada, and also ourselves as National staff for the future, and build trust which is another very important

part in this decision, as things stand we do feel in our professional opinion that the team staff we have appointed will provide the best supportive positive environment for this team [...] We are therefore not moving from our decision and the coaching/staffing appointments stand that have been made.

[Underline added]

17. On April 26, 2017, Mr. Jacks responded to Mr. Atkinson to tell him that he felt "unease" at how a casual meeting with Mr. Perry had been factored into the decision against selecting him. Mr. Jacks reiterated in this e-mail his concern that the selection process had not been made in a fair manner and that the result may prejudice some of his athletes' preparation.
18. Mr. Atkinson responded that day to Mr. Jacks, and commented on each of his points, assuring him that the decision had been made fairly. He expressed that he did not think further e-mail exchanges would be "productive" but that in the future, the focus should shift to how Mr. Jacks works with Mr. Perry.
19. There was no further correspondence between the parties following Mr. Atkinson's e-mail to Mr. Jacks on April 26, 2017.

Procedure

20. The parties agreed that this would be an appeal under Swimming Natation Canada's rules and governed by the SDRCC's procedure.
21. Mr. Jacks submitted that he was not selected to be an Open Water Coach for Swimming Natation Canada at the 2017 FINA Championships owing to an arbitrary decision-making process that did not take into account his objective qualifications for the position and was made in contravention of SNC's rules for selection. Mr. Jacks submitted several exhibits including e-mail exchanges with SNC staff, SNC's selection criteria ("the Criteria"), and a CV showing his qualifications as a swimming coach.
22. Swimming Natation Canada responded that they had wide discretion to select not necessarily the most qualified coach, but the best "team of coaches". This discretion extended to determining not just a coach's objective qualifications, but subjective factors such as commitment to SNC and capacity to work well with other SNC staff. In support of these arguments, they submitted CVs of the applicants for the Open Water coach positions.
23. The matter needed to be determined urgently, as the team was scheduled to arrive in Hungary, for the FINA 2017 World Championships, on July 4th, 2017.

The Hearing

24. The hearing proceeded by way of conference call. Mr. Atkinson, Mr. Perry, Mr. El-Awadi and Mr. Jacks gave oral evidence and were cross-examined. Before giving evidence, each witness affirmed that their testimony was truthful and accurate to the best of their knowledge. As Mr. Atkinson and Mr. Perry were in the same room, they alternated leaving the room so that they could not hear each other's evidence.
25. Mr. Atkinson testified to how the decision was made, his relationship to Mr. Perry, and his knowledge of Mr. Jacks. Mr. Atkinson's evidence was that:
 - There is a difference between an appointment and a selection in the Swimming Natation Canada's criteria for selection; selection requires a competitor to attain specific goals or criteria, while appointment confers broad discretion on the decision-maker to select those with the base qualifications.
 - The factors he considered in appointing the 10km Open Water coaches were: the best "complement" of coaches to give the athletes the best chance to succeed; that Mr. Perry had been successful with other countries' teams and fostered a holistic team environment with all competitors and support staff; that Ms. Longtin had proven her ability to support the team and brought diversity to coaching selections as she is female and speaks French.
 - Mr. Jacks was not appointed owing to concerns about his ability to work in a supportive team environment based on comments he made about support staff, a matter that will be referred to as the "other issue", and information he had received from Mr. Perry in his role as Swimming Natation Canada's head coach.
 - Regarding the incident on April 9, 2017 at the Canadian Swimming Trials, after the parade of athletes selected to competitive teams, he observed Mr. Jacks and Mr. Perry talking at the other end of the pool in plain view of guests and competitors. He saw that it was an animated discussion and felt that he should intervene, which he did.
 - He "was 100% confident that he made the right selections" to foster the team environment he desired and feels that the decision against appointing Mr. Jacks was in the best interest of Team Canada, but that he would provide other opportunities to Mr. Jacks.

- Mr. Perry provided information to him that he took into consideration in making his decision.
- Mr. Jacks was the coach of three of the six Open Water athletes according to the list on Swimming Natation Canada's website, rather than two, as was mentioned in the Respondent's written submissions.
- He had sole discretion to appoint coaches and made the decision himself.
- The tie-breaking policy for selecting swimmers involves a Selection Committee and the High Performance Director, but that the decision for selecting coaches does not include a selection committee.
- Mr. Perry was not an automatic selection as one of the two Open Water coaches, but had to be chosen after consideration like anyone else.
- He disputed that it was unfair that Mr. Perry was involved in selection for a position he needed to be selected for. Mr. Atkinson says that Mr. Perry provided information from January to March 2016 in his role as National Coach.
- He made the decision, but delegated the announcement to Mr. Perry.
- He approached the decision with an open mind and only considered relevant information.
- Mr. Perry notified him there was an "other matter"¹ that was still ongoing. After being notified of this, Mr. Atkinson did not discuss it with Mr. El-Awadi, nor did he follow-up with Mr. Jacks about it.
- He stood behind his decision "100%".

26. Mr. Perry testified about his role in Swimming Natation Canada, his knowledge of Mr. Jacks, and his knowledge of selection process for 10km Open Water Coaches:

- Mr. Perry's role is that of Assistant and Open Water Coach, in which he oversees swimming clubs across Canada, working with coaches, and athletes to implement Swimming Natation Canada strategies for competitions.

¹ There was an allegation made by Swimming Natation Canada that would have been highly prejudicial to Mr. Jacks' and Swimming Natation Canada's reputation if disclosed publicly. The parties agreed that it would simply be referred to as the "other matter".

- Mr. Perry testified that since starting at Swimming Natation Canada in January 2017, he met Mr. Jacks in January and again in April. He observed Mr. Jacks during a training session at his pool in January, and they met for coffee afterward so that Mr. Perry could determine of Mr. Jacks' thoughts on Open Water competition. Mr. Perry's impression of the meeting was that Mr. Jacks disagreed with substantially everything about Mr. Perry's plans for the program. Additionally, Mr. Perry noted Mr. Jacks' comments that team managers were unnecessary.
- At some point before the trials in April, Mr. Perry remembers a phone call from Mr. Jacks that lasted about an hour. He recalls that it was less of a conversation than Mr. Jacks "talking at" him about how to do his job.
- Regarding the incident at the trials on April 9, Mr. Perry remembers Mr. Jacks approaching him in an aggressive manner following the presentation of the selected athletes. He says that Mr. Jacks wanted to know why the Open Water coaches had not been announced, and that he was so agitated there was "spittle coming from his mouth." Mr. Perry remembers telling Mr. Jacks something to the effect that it would be difficult to work with Mr. Jacks. He recalls Mr. Atkinson intervening.
- Mr. Perry stated that he has regular meetings with Mr. Atkinson, whom he reports to by phone at least once a week. Mr. Perry says that he routinely updates Mr. Atkinson about all parts of his job.
- Regarding coaching selections, Mr. Perry states that it was Mr. Atkinson's decision, but that he would ask Mr. Perry for information about the candidates if he encountered them in his regular visits to Canadian swimming programs.
- Mr. Perry does not think that people apply for the coaching positions. As for how Mr. Atkinson made his appointments, Mr. Perry believes he was appointed and then Ms. Longtin was appointed.
- He understood that he was as qualified as Mr. Jacks or Ms. Longtin for the position, and that it was possible that Mr. Atkinson would not appoint him. He denies that he told Mr. Atkinson who to appoint.
- As for his impressions of Mr. Jacks, Mr. Perry said that he does not have a negative opinion of him as a person, but was concerned about his professionalism as a coach based on their meetings. Mr. Perry was very uncomfortable about the incident on April 9 at the Canadian Swimming Trials, but was not concerned for his safety.

- Mr. Perry stated that in the April 20, 2017 letter to Mr. Jacks in which he informed him that he was not selected that the wording "We both consider all aspects" meant that he advised Mr. Atkinson, and Mr. Atkinson made the decision. Regarding the meaning of "our selection process", Mr. Perry said it referred to "Swimming Canada." He denied that he meant that he and Mr. Atkinson made the decision jointly.
 - Mr. Perry confirmed that he could develop a good working relationship with Mr. Jacks and that transparency is important to developing relationships. Still, he felt that the "other matter", which he had told Mr. Atkinson about, cast doubt on Mr. Jacks' suitability for selection.
27. Mr. El-Awadi testified largely about the "other matter", which will not be reproduced here by agreement of the parties, but instead summarized alongside Mr. El-Awadi's other evidence:
- Regarding the "other matter", Mr. El-Awadi testified that he had discussed it in September 2016 with Mr. Jacks and considered the matter closed. He had not heard anything about that matter from anyone since that time and considered it a settled matter.
 - Mr. El-Awadi stated that if the decision concerning the appointment of Open Water coaches were remitted for reconsideration because the initial decision were tainted by bias, the current policy did not contemplate such a situation and that it would be "very difficult to go down that path."
28. The parties agreed that Mr. Jacks' submission to the tribunal would be affirmed and that he would be cross-examined on its contents.
29. Mr. Jacks testified about his relationship to Mr. Perry and his history as a swimming coach:
- About the meeting in January 2017 with Mr. Perry, Mr. Jacks said that he expressed concern to Mr. Perry that there was no program for Open Water athletes at that time. To Mr. Jacks, it was frustrating that there was no program from Swimming Natation Canada while Mr. Perry was taking over.
 - Mr. Jacks disputed that he had disagreed with all of Mr. Perry's ideas for the program. Mr. Jacks felt that Mr. Perry wanted to know what Mr. Jacks' philosophy was, and that maybe that happened to be different than Mr. Perry's. Mr. Jacks said that following this meeting, he was excited to work with Mr. Perry and that he offered to run clinics with him.

- Mr. Jacks said that he was unhappy in January at the lack of direction from Swimming National Canada for Open Water athletes, as it took some preparation to participate in the high quality competitions. Mr. Jacks said that he did make negative comments about Swimming Natation Canada for the lack of direction at that time.
- As for problems with his communication style that might have influenced Mr. Atkinson's decision, Mr. Jacks commented that throughout his decades long career, he has never had any complaints registered against him. He said that he does not try to supersede whoever is in charge, but that he will give his opinion. As he said "Every coach has an opinion. I don't think you can find two coaches in Canada with the same opinion on everything."
- In response to suggestion that Mr. Jacks told his athletes to disregard Swimming Natation Canada programming, he denies ever telling his athletes to disregard Swimming Natation Canada directions.

Relevant Provisions

30. The grounds for appeal under the Swimming Natation Canada Appeal Policy are as follows:
- a. A decision cannot be appealed on facts alone. An Appeal may be heard only in respect of the following grounds:
 - i. the Respondent made a decision for which it did not have authority or jurisdiction as set out in Swimming Canada's governing documents, rules and policies;
 - ii. the Respondent failed to follow procedures as laid out in bylaws or approved policies of Swimming Canada;
 - iii. the Respondent made a decision that was influenced by bias, defined as a lack of neutrality, to such an extent that the decision-maker is unable to consider other views;
 - iv. the Respondent exercised its discretion for an improper purpose;
 - v. the Respondent made a decision for which there is no supporting evidence; or
 - vi. the Respondent made a decision that was grossly unreasonable.
31. The relevant SNC team selection criteria are set out below:

VII. General Information – Coaches

1. To be eligible for selections a Coach must:
 - i. Have been resident in Canada and duly employed as a swimming coach by a Swimming Canada affiliated organization since February 1, 2017.
 - ii. Be registered with the CSCTA and Swimming Canada as of February 1, 2017.

- iii. Be in good standing with the Professional Coaching Department of the Coaching Association of Canada as of February 1, 2017 either as a Chartered Professional Coach or as a Registered Coach.
 - iv. Be a minimum NCCP Level 3 In-training or be a Chartered Professional Coach with the Professional Coaching Department of the Coaching Association of Canada as of February 1, 2017.
2. All coaches identified by these criteria will be required to declare their availability by signing the Swimming Canada Staff Code of Conduct and providing a signed copy of the same to Swimming Canada on or before June 1, 2017. Failure to do so will render the Coach as having officially declined Selection.
 3. All Coaches must demonstrate a ***complete commitment in support of the Swimming Canada National Team Protocols to be eligible for nomination.*** Coaches are required to provide a signed copy of the National Team Protocols on or before June 1, 2017. (National Team protocols are available for review [here.](#))
 4. Coach selections will be announced following the conclusion of the 2017 Canadian Swimming Trials (April 6-9, 2017).

VIII. SELECTION – Coaches

The Swimming Canada National High Performance Director shall appoint up to two Open Water 10km event coaches for the FINA 2017 World Championships.

IX. AMENDMENTS AND UNFORESEEN CIRCUMSTANCES

Unexpected Circumstances

1. Should the Swimming Canada Selection Committee determine that unexpected or unusual circumstances have arisen during the process of applying these Criteria, the Selection Committee shall have the full and absolute discretion to resolve the matter as it sees fit, taking into account factors and circumstances that it deems relevant.
2. ***Any such exercise of discretion shall be subject to the Canadian administrative law principles of fairness.***

[My emphasis]

Issue

32. One issue was raised for determination by the Complainant:

Should Swimming Natation Canada's decision to not select Mr. Jacks be set aside for:

- i) being made beyond the decision-maker's authority as set out in the Selection Policy;
- ii) the decision-maker's failure to exercise his discretion;
- iii) being tainted with bias; and/or
- iv) being grossly unreasonable?

Submissions

The Appellant

33. Mr. Jacks argued that the Respondent's decision was made beyond its jurisdiction or authority as set out in its governing documents, that the decision-maker did not properly exercise his authority, that the decision was tainted by bias, and that the decision was grossly unreasonable.
34. First, Mr. Jacks submitted that the Respondent was bound by its governing documents, which refer to administrative law principles of fairness and its appeals policy which states that Swimming Natation Canada's actions are taken in a "proper, fair and informed manner."
35. As such, Mr. Jacks was entitled to certain legitimate expectations based on Swimming Natation Canada's governing documents. Mr. Jacks points to the policy which states that the High Performance Director, Mr. Atkinson, is to appoint up to two coaches for the 10km Open Water FINA Championships.
36. He submits that he was entitled to expect that Mr. Atkinson alone would make the decision, but that Mr. Atkinson improperly delegated his authority in selecting the coaches to Mr. Perry. Mr. Jacks submits that Mr. Perry played a role in determining who the coaches would be, but that the Selection Policy does not indicate that the High Performance Director will make the decision in consultation with others.
37. Mr. Jacks points to correspondence from Mr. Perry that refers to the decision being made jointly between Mr. Perry and Mr. Atkinson.
38. Secondly, Mr. Jacks submits that Mr. Atkinson failed to properly exercise his discretion by neglecting to provide any reasoning for how that discretion was exercised. Although Mr. Atkinson had broad discretion to appoint coaches based on the Selection Policy's criteria, this did not mean that Mr. Atkinson could appoint absolutely anyone who met the baseline criteria for the position. Instead, he had an obligation to appoint coaches based on the Selection Policy's scheme; meaning the coaches most likely to lead the team to victory.
39. Mr. Jacks argues that Mr. Atkinson failed to do so, and points to the April 20, 2017, e-mail from Mr. Perry which disclosed no reasoning behind the decision against selecting Mr. Jacks. Mr. Jacks submits that the clarifications following this e-mail did not explain the reasoning in a manner consistent with the Selection Policy, as these e-mails only referenced "vague, unsupported and unsubstantiated" factors about Mr. Jacks' suitability. Mr. Jacks insists that objective qualifications, such as past history of success and current coaching

work with swimmers, should have been considered rather than vague references to "fit". Additionally, Mr. Jacks argues that significant weight was also placed on the "other matter", even though this matter had been investigated and settled by Mr. El-Awadi, who concluded nothing improper occurred. Mr. Jacks submits that resting the decision on fit, which is not set out in the Selection Policy, and the "other matter", are irrelevant considerations.

40. Next, Mr. Jacks submits that the decision not to select him was tainted with bias. Mr. Jacks argues that the standard for whether bias has tainted a decision is what an informed person, viewing the matter realistically and practically- and having thought the matter through- would conclude. Mr. Jacks points to the e-mails from Mr. Perry which indicate that Mr. Jacks was viewed as difficult to work with by the Mr. Perry and Mr. Atkinson, and that in the future they need to work on their relationship. Mr. Jacks submits that he is unaware of the "past issues" referred to in the e-mails, and that if either Mr. Perry or Mr. Atkinson had a personal dislike for him, they should have recused themselves, or, at least, given Mr. Jacks the opportunity to address those concerns.
41. Further, Mr. Jacks refers to the submissions about Mr. Perry's involvement in the decision, and argues that his involvement constitutes a conflict of interest which is compounded by his apparent dislike for Mr. Jacks.
42. Finally, Mr. Jacks submits that the decision is grossly unreasonable. The standard is whether a decision falls within a range of possible, acceptable outcomes which are defensible in respect of the facts and law. Mr. Jacks argues that there are three reasons the decision is unreasonable;
 - i) Mr. Atkinson failed to exercise the discretion granted to him in the policy, which is *prima facie* unreasonable for rendering a decision that he did not turn his mind to;
 - ii) Mr. Atkinson did not provide reasons supporting the decision such that someone reviewing it can understand how he arrived at his decision and if it is within a range of reasonable outcomes; and
 - iii) Mr. Jacks' qualifications as a coach are evident, and that there is no realistic reason to explain why he was not named as a coach. Therefore, the decision not to select him falls outside the reasonable range options.
43. The Complainant submitted that he is prejudiced by the Respondent's decision because he will be barred from supporting athletes he has coached

during the FINA World Championships, which could potentially harm their performances.

44. As far as remedy, Mr. Jacks submitted that he should be appointed as a coach for the 10km Open Water Event at the 2017 FINA World Championships.
45. In support his arguments, Mr. Jacks' council cited the following cases: *Perron v Guelph General Hospital*, 2014 ONSC 1032; *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817; *Jackson v Vaughan (City)*, [2010] OJ No 588 (CA); *Morton v Canada (Minister of Fisheries and Oceans)*, 2015 FC 575; *Roncarelli v Duplessis*, [1959] SCJ No 1; *CUPE v Ontario (Minister of Labour)*, [2003] SCJ No 28; *Prince George (City) v Payne*, [1977] SCJ No 53; *Dunsmuir v New Brunswick*, [2008] 1 SCR 190; *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299; *Jackson v Ontario (Minister of Natural Resources)*, 2009 ONCA 846; and *Newfoundland and Labrador Nurses' Union v Newfoundland and Labrador (Treasury Board)*, 2011 SCC 62.

The Respondent

46. Swimming Natation Canada disputed each of the Complainant's submissions. The Respondent submits that its decision to select Mr. Perry and Ms. Longtin was properly arrived at by Mr. Atkinson and was reasonable towards attaining the goal of appointing the best team of coaches.
47. The Respondent submits that Mr. Jacks was unwilling to work with its employees and his behaviour would have been detrimental to team success. The Respondent also raised the "other matter" as a rationale for how he was not an appropriate fit for selection.
48. First, the Respondent submits that there is a distinction between an appointment and a selection. Although Mr. Atkinson's appointment must be made in full compliance with Swimming Natation Canada's policies and best management practices, it is a discretionary decision reflecting his expertise as a swimming expert. Therefore, as this decision falls within his expertise, it is the type of decision that the SDRCC should not overturn and SDRCC arbitrators should be able to substitute decisions made in an expert capacity only in exceptional circumstances.
49. Second, the Respondent submits that the decision-making process involved considerations of how many swimmers each coaching candidate guided to the FINA Championships, their professionalism, team staff unity and

cohesion, and whether coaches follow Swimming Canada team protocols as developed by Mr. Perry. Pursuant to those criteria, Mr. Atkinson considered Mr. Perry, Ms. Longtin, Mr. Jacks, and Ryan Purdy ("Mr. Purdy"). Mr. Purdy was then eliminated because he is based in the United States and coaches an athlete who will compete for the United States.

50. Mr. Perry and Ms. Longtin were selected for these reasons; first, Mr. Perry was a "logical choice" given that he was recently appointed the National Coach for Open Water and already works with all national coaches and athletes in that capacity. In addition, Mr. Perry is a well-known international expert and an experienced coach.
51. As for Ms. Longtin, Mr. Atkinson considered that she coached two of the four athletes in the Olympic 10km event at the World Championships and that he believed she would bring a positive disposition to the team and was prepared to cooperate with all Swimming Natation Canada and staff. In addition, Mr. Atkinson valued that Ms. Longtin would bring "female balance and French language" skills to the team.
52. Mr. Atkinson respects Mr. Jacks' career and accomplishments, but declined to appoint him based on his lack of collaboration and willingness to work with Swimming Natation Canada's team. Based on information that Mr. Perry told him, Mr. Atkinson pointed to Mr. Jacks' refusal to work with Swimming Natation Canada's integrated support team or to align with Mr. Perry's Open Water strategy. Further, Mr. Atkinson refers to the incident on April 9, 2017 in which Mr. Perry was aggressively approached by Mr. Jacks following the Canadian Swimming Trials. Mr. Atkinson was also told that Mr. Jacks had criticized the Open Water program to third parties.
53. In response to the Complainant's submissions, Swimming Natation Canada argues that Mr. Jacks is not necessarily more qualified than the coaches who were selected and that he has only two swimmers competing in the 10km race at the World Championships.
54. The Respondent disputes that Mr. Atkinson delegated his authority to Mr. Perry. Instead, Mr. Atkinson consulted with his staff, which included Mr. Perry, in arriving at his decision. Swimming Natation Canada argues that Mr. Atkinson arrived at this decision based on his expertise that the team would perform better with Mr. Perry and Ms. Longtin as coaches.
55. The Respondent also states that Mr. Jacks was considered for selection like any other candidate without any preferred right or privilege.

56. Further, the Respondent disputes that Mr. Atkinson failed to give reasons to Mr. Jacks regarding the failed appointment. The Respondent points to the criteria sent to Mr. Jacks indicating that team cohesion was considered and how Mr. Jacks had not met that criteria.
57. The decision, the Respondent submits, was not unreasonable as the two coaches who were selected have excellent credentials. Therefore, the selections fall within a reasonable range of outcomes based on the selection policy.
58. In support of its arguments, the Respondent cited the following cases: *SDRCC 16-0303 Rachel Cliff v Athletics Canada*, *SDRCC 06-0044 Béchard v Canadian Amateur Boxing Association*, and *SDRCC 12-0178 Marchant and Duchene v Athletics Canada*.

The Affected Party

59. The Affected Party's submissions largely supported the Respondent's, though the Affected Party's counsel added some supplementary arguments.
60. The Affected Party submitted that the just because the Complainant is very qualified, does not mean that he has to be selected. Otherwise, the Complainant's qualifications would operate as a guarantee on selection.
61. The Affected Party's counsel also submitted that there was a clear lack of trust between the parties, meaning that the Complainant should not be appointed to the team.

Analysis

62. The Complainant has asked me to overturn the Respondent's decision and to appoint him as an Open Water coach to the 2017 FINA World Championship team. For the reasons that follow, I allow the Complainant's appeal.
63. The Complainant argued that the decision should be set aside for having been made beyond the decision-maker's authority, for the decision-maker having failed to exercise his authority, for being tainted with bias, and for being grossly unreasonable. I will address each of these arguments in turn.

Did the Decision-maker Exceed His Authority as Set out in the Selection Policy?

64. The decision against selecting Mr. Jacks was not made pursuant to the Selection Policy by the defendant. The Respondent has failed the doctrine of legitimate expectations², or the principle that decision-makers will behave according to promises or policies they make available about a process.

The Selection Policy set out how the decision would be made for coaching selections for the Open Water team at the 2017 FINA Championships. The Respondent's duty of fairness in this situation is based on its creation of certain expectations in the selection process. Accordingly, the key features of the Selection Policy in dispute before me are:

- 1) That the High Performance Director had sole responsibility of making the selections; and
- 2) That the decision was made in accordance with administrative law principles of fairness and the Respondent's commitment to making decisions "in a proper, fair and informed manner."³

In addition, the corresponding article for selecting swimmers is different and specifically refers to a selection committee.⁴ The Respondent was bound by these requirements, but failed to make the selections pursuant to this policy.

65. Mr. Atkinson had to make the decision to appoint the two coaches pursuant to this selection policy, and I find that he did not. Based on the correspondence I read and oral testimony I heard, it became clear that Mr. Perry's involvement in this selection process was sufficient that the decision was made at least jointly between Mr. Atkinson and him. The critical portions of the e-mails from Mr. Perry and Mr. Atkinson to Mr. Jacks are reproduced as follows (my emphasis):

"I note that you are interested in being part of the staff team for this year's World Championships. However, for this year, the High Performance Director in consultation with me has made the coaching appointments and unfortunately you will not be part of the staff on this occasion."⁵

"Along with High Performance Director John Atkinson we both considered all aspects to the selection of coaches for the summer to the Swimming Canada World Championships Open Water team and

² *Perron v Guelph General Hospital*, 2014 ONSC 1032 (CanLII) at para 17, citing *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 1999 CanLII 699 at para 26.

³ Swimming Natation Canada "Swimmer and Coach Selection Criteria FINA 2017 World Championships – Open Water Swimming" Articles 7-10.

⁴ *Ibid*, Article IV.

⁵ E-mail from Mark Perry to Ron Jacks, April 20, 2017.

the following aspects are very important to our sections process. [...] The coaching staff have been appointed and the decision made and confirmed for the Open Water team in 2017 that we will not be changing selections or adding to the team.”⁶

“As the High Performance Director for Swimming Canada the overall team environment is very important in this whole process and both Mark and I discussed this at length. [...] We are happy to work to improve the relationship between yourself and Swimming Canada, and also ourselves as National staff for the future, and build trust which is another very important part in this decision, as things stand we do feel in our professional opinion that the team staff we have appointed will provide the best supportive positive environment for this team [...] We are therefore not moving from our decision and the coaching/staffing appointments stand that have been made.”⁷

Mr. Atkinson claimed that he was the only person that made the decision and that Mr. Perry advised him on a regular basis, but was not involved in any deliberations. I find that the e-mails above and their testimony indicate otherwise. Firstly, Mr. Atkinson delegated the announcement of the selections to Mr. Perry. Secondly, both Mr. Atkinson and Mr. Perry refer to the decision as having been made jointly. Thirdly, each of them discuss not only what they jointly considered in the selection process, but how they might change their minds going forward.

66. While it would be placing too high a standard on Mr. Atkinson to expect him not to discuss critical information with his employee, it appears that he went further than this and made the decision jointly with Mr. Perry. This is not provided for in the Selection Policy. Mr. Perry was also under consideration for the coaching position, which raises a conflict of interest which I will discuss further below. For the matter at hand, Mr. Atkinson was authorized to make the decision by himself, pursuant to administrative law principles of fairness in a proper, fair and informed manner.
67. To that end, Mr. Atkinson had to consider evidence relevant to selecting coaches who met the Selection Criteria’s basic qualifications and could contribute to a successful FINA 2017 World Championships team. Therefore, it was inappropriate that the decision would be conveyed to Mr. Jacks by Mr. Perry, who was a successful candidate, particularly so when the announcement was made without reference to any reasons as to why Mr. Jacks was not selected.

⁶ E-mail from Mark Perry to Ron Jacks, April 22, 2017

⁷ E-mail from John Atkinson to Ron Jacks, April 24, 2017

68. When Mr. Jacks did receive clarification from Mr. Perry, Mr. Perry referred not to any objective criteria, but to the subjective ability to “work within a team environment” and “in a way that is positive toward Swimming Canada”, and an erroneous statement that Mr. Jacks was working with an American athlete (the athlete was a dual citizen, as it turned).⁸
69. Further, Mr. Perry questioned Mr. Jacks’ commitment to Swimming Natation Canada, to himself, and to Mr. Atkinson following their meeting in January when he wrote that:

“As you know Ron, I came to Victoria to meet you, watch your swimming training session and have discussions, I am open to working with you, however both the High Performance Director and I believe there needs to be an improvement in the relationship before you would be added onto the national team.”⁹

The implication was that Mr. Perry developed a dislike for Mr. Jacks’ professionalism after meeting him in person, which was confirmed by Mr. Perry’s testimony, and this meant he could not work well in a team environment. The Respondent also submitted that in support of its selection of Ms. Longtin, that she brought gender balance and French language skills to the team. While these criteria may be laudable, they are not set out as criteria in the selection policy and should otherwise be clearly stated. In addition, the aforementioned “other issue” was raised by Mr. Perry. Although it will not be discussed at length here, it is sufficient that the other issue was an irrelevant consideration to the decision being made, and should not have been taken into consideration at all. The effect is that few objective qualifications were referred to in explaining the reasoning to Mr. Jacks, while subjective qualifications were predominantly pointed to as the reasoning behind the decision.

70. The broad authority conferred on Mr. Atkinson did not enable him to appoint anyone who merely met the baseline qualifications set out in the policy. The relevant administrative law principle is that the decision still needs to reflect the purpose and scheme of the relevant Act or Policy. Complainant’s counsel referred me to *CUPE v Ontario (Minister of Labour)* decision as comparable to the facts before me. In that case, the Minister appointed several judges to sit as chairs to labour arbitration boards, against the previous practice of appointing arbitrators based on a list that was created in consultation with affected unions. The unions disputed the appointment of judges who, though qualified to sit in arbitrations, lacked expertise specific to labour arbitrations. The majority ruling held that the Act in question, the *Hospital Disputes*

⁸ E-mail from Ron Jacks to Mark Perry, April 23, 2017.

⁹ E-mail from Mark Perry to Ron Jacks, April 22, 2017.

Arbitration Act, required more than just a baseline capacity to act in arbitrations, but also expertise, experience, and independence and impartiality in labour matters.¹⁰

71. As mentioned, the reasons given to Mr. Jacks do not specify which objective qualifications were considered by Mr. Atkinson, who had to select coaches pursuant to Selection Policy's scheme to foster a winning team. Mr. Atkinson referred to some aspects that might foster such an environment, but the lack of objective measures fails to produce an understandable decision.
72. It appears that all three candidates under consideration were suitable, but a comparable situation arose in *CUPE*. In that case, it turned out that some of the judges who were appointed could have been qualified, but the process by which they were appointed was so flawed that they their candidacy had to be re-evaluated on a case-by-case basis. Similarly, the process by which the three candidates were evaluated is sufficiently flawed that it cannot be said that Mr. Atkinson properly exercised his discretion.
73. Taken together, Swimming Natation Canadian failed its duty of fairness to satisfy Mr. Jacks' legitimate expectations about the selection process. Mr. Atkinson did not make the decision alone, delegated it to a subordinate against Swimming Natation Canada policy, and considered factors that were irrelevant without clearly referring to objective qualifications.

Was There a Reasonable Apprehension of Bias in the Selection Process?

74. Mr. Atkinson's decision raised a reasonable apprehension of bias owing to Mr. Perry's involvement in the selection process. The test for a reasonable apprehension is:
"what would an informed person, viewing the matter realistically and practically- and having though the matter through – conclude. Would he think that it is more likely than not that [the decision-maker], whether consciously or unconsciously, would not decide fairly."¹¹

I find that Mr. Perry's involvement in the decision tainted it with bias for multiple reasons.

75. Mr. Perry, who was under consideration for one of the two coaching positions, and whose appointment was not a *fait accompli*, provided input into Mr. Atkinson's decision. Not only was Mr. Perry helping Mr. Atkinson make his decision, but his e-mails indicate that he was more involved and that the decision was made jointly. On a basic level, it is generally considered improper for people who are under consideration for a position to also have

¹⁰ *CUPE v Ontario (Minister of Labour)*, [2003] 1 SCR 539, 2003 SCC 29 (CanLII).

¹¹ *Supra*, note 2, *Baker* at para 46.

input into how that consideration will be exercised. Despite this, it appears that Mr. Atkinson did not take any measures to establish that Mr. Perry's role in the decision was anything more than providing routine information from his work as a National Coach.

76. Mr. Perry had developed a dislike for Mr. Jacks' professionalism in coaching situations from his January meeting, and communicated this to Mr. Atkinson. Mr. Perry also raised the "other matter", which Mr. El-Awadi had already determined was not an issue. Mr. Jacks, who did not understand that his January meeting with Mr. Perry was anything but informal, was not given an opportunity to address Mr. Perry's concerns. So far as can be determined from the evidence, Mr. Atkinson did not attempt to verify Mr. Perry's concerns on his own, despite being aware of Mr. El-Awadi's earlier decision on the "other matter". The effects on Mr. Jacks' selection were considerable, as Mr. Atkinson and Mr. Perry referred mainly to Mr. Jacks' capacity to communicate and behave professionally, and based that decision on Mr. Perry's uncorroborated statements. Nor did he verify the "other matter" with Mr. El-Awadi, who had already done his own investigation and settled the matter.
77. Additionally, Mr. Jacks was determined to have been insufficiently committed to Swimming Natation Canada to be selected as a coach, and was never offered any chance to explain himself. In oral testimony, Mr. Jacks conceded that he had been general critical of the Respondent during the transition before Mr. Perry began as a coach for the lack of a national plan, but no specific complaint against Mr. Perry. Aside from evidence coming from Mr. Perry, whose involvement raises a reasonable apprehension of bias, the subjective qualities Mr. Jacks was judged on appear not to have been corroborated by any other investigation by Mr. Atkinson. While I am not saying that Mr. Perry lacks credibility, the reasonable apprehension of bias his participation in the selection process raises means that there should have been some other source of information about Mr. Jacks.
78. Accordingly, I find that Mr. Jacks has proven a reasonable apprehension of bias.

Was the Selection Process Unreasonable?

79. The process by which the decision was arrived was marred by legal errors, rendering the result unreasonable. For a decision to be unreasonable, it must fall outside "a range of possible, acceptable outcomes which are defensible in respect of the facts and law."¹²

¹² *Dunsmuir v New Brunswick*, [2008] 1 SCR 190 at para 47.

80. The Complainant submitted that the decision was *prima facie* unreasonable because the Respondent fettered their discretion by considering some relevant factors but not objective ones, while including the irrelevant “other matter” in its consideration. According to *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 (CanLII), decisions that are supposed to be based in law, cannot draw upon something other than the law, for example a decision based solely upon an informal policy statement without regard or cognisance of the law, cannot fall within the range of what is acceptable and defensible and, thus, be reasonable as that is defined in *Dunsmuir*.¹³ Therefore, where a decision is made by something other than through its legal authority, it is unreasonable.
81. In this case, Mr. Atkinson shared authority in making his decision, which was not set out in the Selection Policy. Additionally, the reasons given for how the decision was made revealed both that objective qualifications related to swimming expertise were not factored into the decision, and also that Mr. Atkinson did not attempt to corroborate for himself subjective factors that proved critical to the decision on its own.
82. As the reasoning that was offered for the decision was obtained through Mr. Perry, and Mr. Perry was involved in making the decision, the decision is unreasonable. This is not to diminish the qualifications or suitability of Mr. Perry or Ms. Longtin. Although I trust that they meet the Respondent’s basic qualifications, and have impressive resumes, the issue here is that process by which they were appointed was unreasonable.
83. Accordingly, I find that the selection was made based on factors that did not flow from the Selection Policy, and is therefore unreasonable.

Did the Complainant Suffer Prejudice from this Decision?

84. The parties argued that there must be some prejudice shown before I could intervene, and based on what I have heard I find that there was indeed prejudice to the Complainant.
85. Although the Complainant submitted that he suffered prejudice owing to being unable to coach his athletes directly and the Respondent countered that Mr. Jacks did not suffer any prejudice that other non-selected coaches suffered, I find that Mr. Jacks arose from a different source. Mr. Jacks was prejudiced by this decision owing to the manner in which it was made. Mr. Jacks’ professionalism and cooperativeness were called into question by the manner in which the evaluation proceeded, which, for the reasons mentioned

¹³ *Stemijon Investments Ltd v Canada (Attorney General)*, 2011 FCA 299 (CanLII) at para 24.

above, was unreasonable. In particular, the Respondent's invocation of the "other matter" may have been particularly harmful to Mr. Jacks's reputation.

86. The Respondent submitted that any coach who is not selected would suffer a prejudice but that Mr. Atkinson's task was to appoint the best team of coaches. While I agree that the best team of coaches may not necessarily have included Mr. Jacks, I disagree that this means he did not suffer any prejudice.
87. The Respondent's failure to provide reasons and implications that Mr. Jacks' candidacy suffered owing to the subjective characteristics mentioned above may have the effect of forming negative perceptions about him in the future. As both Mr. Atkinson and Mr. Perry told Mr. Jacks, he must work to improve his relationship with Swimming Natation Canada based on his behaviour since the selection process began.

Remedy

88. The Complainant asks that I appoint Mr. Jacks as a coach for the 10km Open Water event at the 2017 FINA Championships. The Respondent cited multiple arbitral authorities to me to the effect that I should only substitute my opinion for that of an expert in exceptional circumstances, including my own decision in *Cliff v Athletics Canada*. At paragraph 46 of that decision I held the following:

[...] my expertise is in law and not in track and field. Even if I would have voted in favour of Ms. Cliff, it is not my place to overturn decisions by experts such as Coach Eriksson and the NTC, unless exceptional circumstances exist.

I find that exceptional circumstances exist here.

89. I emphasize that I am compelled to overturn the Respondent's decision because of the process by which the Respondent arrived at its decision. I make this decision based in my expertise in law and procedure rather than an attempt to displace Mr. Atkinson's expertise in swimming.
90. The evidence shows that Mr. Perry and Mr. Atkinson made the decision jointly, which was in contravention of the Selection Policy. Far from being a minor procedural flaw, this procedural error was aggravated by Mr. Perry also being in consideration for the coaching position. When the Respondent offered its reasoning behind how the decision was made, the e-mails to Mr. Jacks showed that subjective criteria had been taken into account, and that

Mr. Atkinson trusted Mr. Perry's judgment on these criteria even though this was his decision to make. In this situation, it would be unjust to allow this decision to stand.

91. I accept the Affected Party's argument that Mr. Jacks is not an automatic selection based purely on his past accomplishments. But even if the Respondent was not bound to decide on taking Mr. Jacks, they were required to arrive at a fair, and reasoned decision.
92. I would have preferred to send this back to Swimming Natation Canada for redetermination. Circumstances prevented this from being a viable option. Mr. El-Awadi stated that Swimming Natation Canada would find it difficult to process such a result. In addition, Mr. Atkinson's "100%" support for the selections means that even if the decision were sent back to him for re-determination, he would be in an untenable situation.
93. Quite simply, the Respondent must follow its own Selection Policy, and give understandable reasons for how it did so. If a situation arises where there may be a conflict of interest, the Respondent should take to steps to address it or change its selection policy to indicate that National Coach is an automatic selection for these coaching positions.

Decision

94. For the reasons above, the appeal is allowed.
95. Submissions for costs were not made at the hearing, and costs will be dealt with by request of the parties pursuant to the relevant provisions of the Canadian Sport Dispute Resolution Code.
96. The Complaint shall be appointed as an Open Water coach to the 2017 FINA Championships team.

Signed on July 7th, 2017, in Ottawa, Ontario.

A handwritten signature in black ink, appearing to read 'David Bennett', with a stylized flourish at the end.

David Bennett, Arbitrator