

Decision of the Appeal Panel

Saskatchewan Sailing Clubs Association (the Appellant)

v

Sail Canada (the Respondent)

Background on the Appeal under review

1. This Decision follows an Appeal Hearing that was held on May 3, 2017, in response to an appeal filed on March 1, 2017, by the Saskatchewan Sailing Clubs Association (SSCA) regarding the Canada Games Age Exemption for the Paralympic division, 2.4 Meter, granted to the Alberta Sailing Association (on behalf of Wendy Frazier) and Ontario Sailing (on behalf of Peter Eagar) on November 16, 2016, and January 17, 2017, respectively. The process followed is based on the ***Sail Canada Policy: Appeal Process and Dispute Resolution (the Policy)***.

2. The March 1 appeal followed an earlier appeal by the SSCA, filed on January 27, 2017, challenging the decisions by Sail Canada to grant the age exemptions. The SSCA's January 27 appeal was reviewed by the panel constituted by Sail Canada to consider the original requests by Alberta and Ontario, and was denied, following a process that included written submissions – comments on the appeal - from both the Alberta Sailing Association and Ontario Sailing. The ruling by the original panel was filed on February 16, 2017, and was included in the documentation provided to all parties.

3. In response to the second (March 1) appeal by the SSCA, Sail Canada appointed a Case Manager (David Covo) who:

- a. reviewed the appeal and the guidelines in the ***Sail Canada Policy: Appeal Process and Dispute Resolution***, as well as the rulings by the original panel in response both to the original requests for age exemption from AB and ON and to the subsequent first appeal by Saskatchewan on the two earlier decisions;
- b. determined that there exist 'appropriate grounds for the appeal', as set out in **Section 8 Grounds for Appeal (the Policy)**, and recommended that Sail Canada proceed with the establishment of an Appeal Panel according to the procedure described in **Section 7 of the Policy**.
- c. initiated the formation of the **Appeal Panel**, according to the procedure described in the **Policy**, and between March 31 and April 4 confirmed the appointments of Jake Watters (nominated by the Appellant, the SSCA), Gillian Thomson (nominated by the Respondent, Sail Canada), and Michele Cimon, Chair of the Panel (nominated by the other two panelists).

The Preliminary Conference

4. The Chair and the Case Manager convened a Preliminary Conference, per **Article 9 of the Policy**, at 11:00 am, EDT, on Tuesday, April 18, 2017. The participants, consistent with **Article 9.3 of the Policy**, were the three members of the Appeal Panel, representatives of both the Appellant (Mark Lammens) and Sail Canada (Samara Crothers), and the Case Manager. The agenda of the Preliminary Conference was consistent with **Article 9.1 of the Policy**; the Chair of the Panel chaired the Preliminary Conference, and the Case Manager acted as Secretary.

The participants in the Preliminary Conference agreed unanimously that:

- a. the Appeal Hearing would be based on written, as opposed to oral, arguments;
- b. all previous documentation on the Appeal would be made available to all parties via a Dropbox created by Sail Canada; this documentation included the original requests for age-exemption filed by Alberta and Ontario and the rulings by the Sail Canada panel granting the requests, the first appeal by Saskatchewan and the comments on the first appeal by Alberta and Ontario, the February 16 ruling on the first appeal by the Sail Canada panel, and the second (March 1) appeal by Saskatchewan;
- c. Sail Canada (the Respondent), the Alberta Sailing Association and Ontario Sailing would be invited to submit written comments on the second (March 1) Appeal; the deadline for receipt of any new submissions will be **12 pm, Monday, April 24**;
- d. the Saskatchewan Sailing Clubs Association (the Appellant) would be invited to respond in writing to any additional submissions by **12 pm, EDT, Monday, May 1**;
- e. the Appeal Hearing would be held *in camera* (limited to the Panel) and would take place via teleconference at **12 pm, EDT, on Wednesday, May 3** (dial in: 1-866-512-0904, participant code: 6478592);
- f. the procedure for the hearing would be determined by the Appeal Panel in a private teleconference, to be scheduled during the week of April 24, per Article 10 of the ***Sail Canada Policy: Appeal Process and Dispute Resolution***.

5. Pursuant to the decision (4c, above) in the Preliminary Conference, invitations to comment in writing on the March 1 Appeal were sent to Sail Canada (the Respondent), the Alberta Sailing Association and Ontario Sailing on April 18; all three responded in a timely way with written submissions, and all submissions were added to the Dropbox.

6. Pursuant to the decision (4d, above), the Saskatchewan Sailing Clubs Association was invited to comment in writing on the new submissions received; the SSCA responded with a written submission on April 26, 2017, and this document was also added to the Dropbox.

The Appeal Hearing

7. In conformance with the decision made in the Preliminary Conference, the Appeal Hearing took place on May 3, 2017. Participants included the three members of the Panel and, at the request of the Chair, the Case Manager, who acted as Secretary.

8. The Chair started the Hearing with a poll of the Panel. Panelists Thomson and Cimon voted to deny the appeal with respect to the age exemptions granted to both the Alberta Sailing Association and Ontario Sailing. Panelist Watters voted to deny the appeal with respect to the age exemption granted to the Alberta Sailing Association, but voted to allow the appeal with respect to the exemption granted to Ontario Sailing.

9. In the ensuing discussion, panelist Watters expressed concerns with respect to several issues related to this Appeal, specifically, the lack of evidence supporting the need for age exemptions in the original requests by Alberta and Ontario, the lack of opportunity for oral submissions in the Hearing and the lack of opportunity for the Panelists to ask questions of the parties. These concerns were not shared by Panelists Thomson and Cimon, who expressed the view that these issues had been discussed in the Preliminary Conference where they were considered to have been adequately addressed in the written record.

In further discussion, the Panel was unanimous in its expression of concern regarding the **Policy** and the need for further editing to clarify both the procedures and the process of the appeal process.

10. The Hearing concluded with a formal poll of the Panel that confirmed the following:
 - a. with respect to the age exemption granted to the Alberta Sailing Association:
deny - unanimous
 - b. with respect to the age exemption granted to Ontario Sailing:
deny - Thomson and Cimon
allow - Watters

Decision

11. The Appeal, filed on March 1, 2017, by the Saskatchewan Sailing Clubs Association regarding the Canada Games Age Exemption for the Paralympic division, 2.4 Meter, granted to the Alberta Sailing Association (on behalf of Wendy Frazier) and Ontario Sailing (on behalf of Peter Eagar) on November 16, 2016, and January 17, 2017, respectively. by majority vote, is therefore denied.

Arguments and grounds for the decision

12. The majority opinion with respect to the exemptions granted to Both Alberta and Ontario is expressed by **Panelists Gillian Thomson and Michele Cimon**:

- a. Panelist Gillian Thomson:
Both Alberta and Ontario requested and received age exemptions for the 2.4 m class for the 2017 Canada Games. The procedures and timelines were consistent with the Canada Games Sailing Technical Package and the Sail Canada Appeals Policy, and we therefore have no evidence to uphold the Saskatchewan appeal.
- b. Panelist and Chair Michele Cimon:
Both of the age exceptions granted to Alberta and Ontario were done so in accordance with the policies and rules set forth and approved by the Canada Games Council. There is an age exemption policy, for para athletes, defined in Article 3.2 of the Canada Games Sailing Technical Package. Sail Canada's decision to grant the exemptions was entirely consistent with the Canada Games Sailing Technical Package and the Sail Canada Appeals Policy.

That being said, I do sympathize with Saskatchewan's position and feel that all provinces and Sail Canada would be well served to determine, once and for all, if they want to have a para-athlete age exemption to exist at all, and if not, to do away with it as has been done for able-bodied athletes. This determination should be formalized.

Panelists Thomson and Cimon note that the grounds cited by the Appellant in the current (March 1) Appeal do not differ substantially from those cited in the earlier Appeal filed on January 27, 2017. The February 16 ruling by the original panel on the earlier Appeal deals clearly and systematically with the issues raised by the Appellant, and the Respondent and the other parties, AB and ON, addressing each of the major points separately:

- Confirming the definition of eligibility and the opportunity for the consideration of age exemption for para-sailing athletes (Paragraph 3.2, CSG 2017 Sailing Technical Package),
- Finding, on the basis of the evidence provided by Alberta and Ontario, that “neither province had candidate age-compliant para-athletes available to them”,
- Finding that the residency and athletic development standards had been met,
- Noting the lack of any basis to compare real or anticipated performance of age-exempted athletes from one province with age-compliant athletes from another,

- Concluding that the age exemptions were granted in compliance with the CSG rules (the CSG Sailing Technical Package), and
- Denying the Appeal.

Panelists Thomson and Cimon concur with both the findings and the conclusions expressed in the February 16 ruling by the original panel.

Panelists Thomson and Cimon acknowledge the additional submission filed by the appellant on April 26, 2017, noting that the issues raised are consistent with the Appellant's earlier submissions, with the possible exception of Paragraph 1, where the appellant challenges the statement in the April 21 submission by the Ontario Sailing Association that "The Decision by Sail Canada was not made in an Improper Way." The Appellant writes: "It is (the) Saskatchewan Sailing Clubs Association assertion that the decision by the 2017 Canada Games Jury was not improper but incorrect", and refers to the **Grounds for Appeal** cited in Section 8 e) of the **Sail Canada Policy: Appeal Process and Dispute Resolution (the Policy)**: "Making a decision that was grossly unreasonable or unfair."

Panelists Thomson and Cimon find no evidence in any of the documents submitted that the decision by Sail Canada was "grossly unreasonable or unfair".

13. The majority opinion with respect to Alberta and the dissenting opinion with respect to Ontario, are expressed by **Panelist Jake Watters** in a Minority Report, appended here:

- The Appellant challenges two decisions by the Respondent, SAIL CANADA, granting age exemptions to each of the Respondent, ALBERTA SAILING ASSOCIATION, and the Respondent, ONTARIO SAILING, to allow two sailors to compete in the para category at the 2017 Canada Games notwithstanding that the sailors exceed the age limit by 14 years and 26 years, respectively.*
- For the reasons that follow, I agree with the majority of this Panel and would dismiss the appeal as against the exemption granted to ALBERTA SAILING ASSOCIATION; however, I disagree with the majority of this Panel and would allow the appeal as against the exemption granted to ONTARIO SAILING.*

Procedural Matters

- In a conference call held on May 3, 2017 involving only the Panel which was mischaracterized as a "hearing," the majority of this Panel decided against holding an oral hearing. The majority of this Panel also decided against allowing this Panel to make inquiries of the Appellant and the Respondents either in writing or verbally as to questions relevant to this appeal. I disagree with both of those decisions.*
- No oral hearing has been held. An oral hearing would ensure that all parties are granted the full and proper opportunity to make submissions in regard to this appeal.*
- Further, I am of the view that the record before this Panel is deficient in that there is a lack of information and submissions from the parties as to the following:*
 - The particulars of the efforts undertaken by Alberta and Ontario since the last Canada Games to qualify sailors who meet the Canada Games age requirement for the para category;*
 - The particulars of how the efforts of Alberta and Ontario compare to those provinces*

- who have qualified sailors who meet the para category age requirements;
3. Information in regard to how the circumstances of Alberta and Ontario may differ from the provinces who have qualified sailors who meet the para category age requirements;
 4. Would granting an exemption be unfair and/or cause prejudice to the provinces who have qualified sailors who properly meet the para category age requirements?
 5. Information as to the specific circumstances of the sailors to whom the exemptions have been granted, including, but not limited to, whether those sailors fall within the athlete eligibility principles contained in the Measurable Government Expectations for the Canada Games?
 6. Is granting an age exemption consistent with the principles and objectives of the Canada Games as contained in the 1997 Clear Lake Agreement and the Measurable Government Expectations for the Canada Games?
- f. The evidence and submissions filed in this matter are deficient in terms of the particulars of the athletes in question, the basis for the provinces' respective requests for exemptions and the basis for Sail Canada's granting of the age exemptions. Given those deficiencies and given the majority of this Panel's decision not to hold an oral hearing and to not allow the Panel to make further inquiries of the parties, I find it difficult to reach a decision in regard to this appeal. Having said that, rather than refusing to decide this appeal, I have reached my decisions below while noting my reservations as to whether this Panel has discharged its duty to thoroughly examine this appeal in a fair and proper manner.

Canada Games Principles and Approved Expectations

- g. As outlined on the Canada Games website under the Strategic Plan heading:
The Canada Games Council mandate is outlined in the 1997 Clear Lake Agreement. This strategic framework reflects the Canada Games Council 's strategy to deliver its mandated functions.
- h. The opening paragraph of the 1997 Clear Lake Resolution states:
The Canada Games are magnificent ever current expressions of the strength and vitality of the spirit of sport alive in this country. The Federal-Provincial-Territorial Governments, through their respective Ministers Responsible for Sport, have first established the Canada Games to be a recurring festival of sport competition and a movement **which fosters the development and showcasing of sporting excellence amongst Canada's youth and as a means of regional exchange and learning in the celebration of Canadian life.**
[Emphasis Added]
- i. The Measurable Government Expectations for the Canada Games approved on June 10, 2014 states as follows in regard to athlete selection for the Canada Games:
Athletes who comprise the **next generation** of national team athletes, typically in the T2C stage of LTAD, and not the current generation, should be the target for Canada Games participation. **Flexibility would be permitted in exceptional cases, and only subject to the other principles.**
[Emphasis Added]
- j. It seems clear, therefore, that any request to Sail Canada for an age exemption should only be granted in an exceptional case and any such request for an exemption must be considered in light of the above-stated principles and expectations for Canada

Games athletes, namely the goal of fostering youth competition and next generation athletes.

Exemption Granted to Ontario Sailing

- k. *There is a lack of evidence before this Panel as to the efforts by Ontario Sailing to qualify any sailors who meet the age requirements of the para category. Ontario Sailing's submission indicates that Ontario Sailing held trials at a regatta and that the sailor in question won that regatta. That sailor exceeds the age requirement by 26 years.*
- l. *There is a lack of evidence of what steps Ontario Sailing has taken in the years since the last Canada Games to develop and train sailors to meet the age requirements of the para category. There is no information as to the development of any programs, allocation of any resources or any efforts to identify and train athletes to meet the para age requirements.*
- m. *Holding a lone regatta is certainly not an indication of a concerted effort on the part of Ontario Sailing to train and qualify sailors to meet the Canada Games age requirement in the para category.*
- n. *Furthermore, there is a lack of evidence before this Panel as to whether the Ontario sailor is a "next generation" athlete. Again, holding an oral hearing or submitting written questions would have allowed this Panel to properly explore such issues. Nor is there any evidence that Sail Canada gave any consideration as to whether the athlete in question falls within the "next generation" athlete category. Nor is there any evidence that Sail Canada gave consideration to whether granting the exemption to the sailor in question was consistent with the principles and expectations in regard to Canada Games athletes.*
- o. *I note that my quick internet search of World Sailing's website in regard to the Ontario sailor in question reveals that the sailor is a long experienced competitive sailor. The sailor has apparently competed internationally on numerous occasions, including at multiple sailing world championship events. I am at a total loss to understand how granting an exemption to such an experienced sailor who regularly competes at a world championship level is consistent in any way whatsoever with any of the principles and objectives of the Canada Games.*
- p. *There is little information before this Panel as to how Sail Canada's approved Ontario's exemption beyond simply approving the request on the basis that Ontario Sailing advised Sail Canada that the sailor won the trials and was the best candidate. I am left wondering whether Sail Canada would approve Lee Parkhill for the Canada Games laser category if Ontario Sailing informed Sail Canada that Parkhill won Ontario's Canada Games laser trials and was the best candidate.*
- q. *There is nothing in the record to warrant granting an exemption to Ontario taking into account that such an exemption should only be granted in exceptional cases. Rather, granting the subject exemption to a world championship level athlete who exceeds the age limit by 26 years is directly contrary to the principles and objectives of the Canada Games in fostering youth competition and the development of next generation athletes.*

- r. *In these circumstances, Sail Canada erred in granting an exemption to Ontario Sailing. I would allow the appeal against the exemption granted to Ontario Sailing.*

Exemption Granted to Alberta Sailing Association

- s. *There is some indication that Alberta Sailing Association undertook efforts to qualify a sailor to meet the para age requirements. Alberta's submissions provide some detail of their efforts to purchase 2.4 boats and reach out to organizations and schools to find sailors to meet the age requirements as well as their ultimate inability to locate such an athlete.*
- t. *I am, however, concerned that neither Sail Canada nor this Panel thoroughly explored whether Alberta's efforts were consistent with the steps taken by other provinces to qualify sailors who meet the para age requirement. There is little or no information before this Panel as to how Alberta's efforts and circumstances compare to the provinces who qualified sailors meeting that age requirement. Again, an oral hearing and/or written questions may have proved beneficial in allowing the Panel to explore this important issue.*
- u. *Based on the evidentiary record, there is some evidence that the Alberta sailor falls within the definition of next generation athlete notwithstanding that she exceeds the age requirement by 14 years. The sailor appears to be relatively new to sailing in recent years and appears to have dedicated herself to training and participating at a competitive level.*
- v. *I have significant reservations about whether Sail Canada and this Panel have thoroughly examined Alberta's request for an exemption and whether it is warranted as an exceptional case. However, based on the record, deficient as it may be, and taking into account Alberta's stated efforts and that the sailor in question appears to meet the criteria of the next generation athlete category, I would dismiss the appeal in regard to the Alberta exemption.*

Michele Cimon, Chair
Gillian Thomson
Jake Watters

7 May 2017

(minor typographical errors in Section 12, paragraph 7, corrected on May 9, 2017)