

**BEFORE THE SPORTS TRIBUNAL  
OF NEW ZEALAND**

**ST 02/11**

**BETWEEN**                      **SAMANTHA MICHAEL**

Appellant

**AND**                              **NEW ZEALAND FEDERATION OF ROLLER  
SPORTS**

Respondent

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**DECISION OF THE SPORTS TRIBUNAL**

**Dated        19 JULY 2011**

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**Tribunal:**                      Nicholas Davidson QC (Deputy Chairperson)  
Dr Lynne Coleman  
Adrienne Greenwood

**Hearing:**                      In Wellington on Wednesday 22 June 2011

**Present:**                      Samantha Michael, Appellant  
Daniel Kalderimis and Julian Brown, Counsel for  
Appellant  
John and Gloria Michael in support of Appellant  
Nick Elsmore, Counsel for Roller Sports  
Graeme Campbell, Chairman of Selectors for Speed  
Skating Committee, Roller Sports

**Registrar:**                      Brent Ellis

## **A INTRODUCTION**

1. This Appeal is against the decision of the New Zealand Federation of Roller Sports ("Roller Sports") not to select Samantha Michael ("the Appellant") for the 2011 World Championships ("the 2011 Worlds") to be held in South Korea in August and September 2011.
2. The Appellant contends that she should have been selected as a Junior woman.
3. The New Zealand team includes six Senior men and three Junior men. The sole woman selected is New Zealand and World Champion Nicole Begg, in the Senior women's category.
4. The Appellant asks that this Tribunal "select" her, or refer the matter back to Roller Sports for further consideration on the basis that the selection process was flawed.

## **B THE NATURE OF THIS APPEAL AND THE APPLICABLE RULES OF THIS TRIBUNAL AND OF ROLLER SPORTS**

5. The Rules of this Tribunal provide grounds for an Appeal, limited as follows.

*"42. The grounds for an appeal shall be those set out in the constitution, rules or regulations of the NSO or the NZOC (if the appeal is brought under section 38(c) of the Act) or as set out in the agreement between the parties (if the appeal is brought under the provisions of section 38(b) of the Act). In the absence of such grounds, the grounds shall only be one or more of the following grounds:*

*(a) natural justice was denied;*

*(b) the decision-maker or decision-making body acted outside of its powers and/or jurisdiction (i.e. acted ultra vires);*

*(c) substantial new evidence became available after the decision, which is being appealed, was made;*

*(d) in the case of a decision relating to misconduct, the penalty was either excessive or inappropriate;*

*(e) in respect of a decision relating to the Selection or Non-Selection of the appellant as a New Zealand representative in a sport or to a New Zealand representative team or squad, the following additional grounds apply:*

*(i) the applicable Selection Criteria have not been properly followed and/or implemented;*

*(ii) the person seeking selection was not afforded a reasonable opportunity by the NSO to satisfy the applicable Selection Criteria;*  
*(iii) the selection decision was affected by actual bias;*  
*(iv) there was no material on which the selection decision could reasonably be based."*

6. The Criteria adopted by Roller Sports set out the grounds for a selection appeal and closely mirror the Rules of this Tribunal.
7. The Appellant submits that there was a "violation" of Roller Sports' Selection Policy and Criteria. These are contained in "Criteria for 2011 World Team Selection – July 2010", and Rule 108(d) of the Speed Skating Rules.
8. The Selection Criteria provide as follows:

*"Selection process and documentation*

*No later than two weeks after the finish of the 2011 Banked Track National competition the Selectors will provide the Speed Sport Committee with the nominees for a team, with a written report on the basis of the selection, or non-selection of each nominee and any additional information to assist the Speed Sport Committee. This report will include for each skater, why it is the view of the selectors that the skater is either competitive or shows potential to be competitive at a future world championships, or in the case of non-selection, why it is the opinion of the selectors that the skater does not meet the criteria.*

*The selections must be put to the Board of the NZFRS for ratification before any announcement is made."*

9. Rule 108(d) provides as follows:

*"(d) Selectors will avail themselves of available information concerning skaters who put themselves forward for consideration."*
10. A skater who is not selected should speak first with the Speed Sports Committee and the Convener of Selectors before considering an appeal to the Sports Tribunal. This is advisory and does not influence this Tribunal.

## **C THE HEARING**

11. The hearing in Wellington on Wednesday 22 June developed each ground of appeal with reference to the evidence, which was uncontested. No witness was called. This Tribunal has the power to inquire into matters before it, but no further evidential inquiry was needed.
12. The evidence for the Appellant was provided through witness statements by the Appellant, her coach Mr William (Bill) Begg, and her father Mr John Michael. For Roller Sports a witness statement was given by Mr Graeme Campbell.

## **D THE GROUNDS OF APPEAL**

13. The appeal was based on the following points taken from the Synopsis of Submissions provided by counsel for the Appellant Mr Kalderimis, supported by Mr Brown.

“9.1 The Challenged Decision did not properly follow or implement the Criteria as it:

- (a) Was not impartial, but involved the inconsistent application of the Criteria as between male and female skaters; and
- (b) Specifically misapplied the Criteria to the Appellant;

9.2 The Respondent misunderstood and/or failed to properly avail itself about the condition, training regimen and fitness of the Appellant, and did not afford the Appellant any reasonable opportunity to satisfy the Criteria; and

9.3 Overall, there was no material on which the Challenged Decision could reasonably be based.”

14. All these grounds were contested by Mr Elsmore as counsel for Roller Sports. He prefaced his submissions with this statement:

*"Samantha Michael has not been selected as a member of the 2011 New Zealand team to the Junior World Championships on the basis of her performance in the qualifying events. She did not meet the stated Criteria. This despite the fact that she is the best Junior*

*female speed skater in the country but it is felt that she is not internationally competitive, a requirement of selection."*

15. We say at the outset, as indicated during the hearing, that this is not an appeal which could carry to a "selection" by this Tribunal. Any further consideration of selection must be for the sport, unless there is evidence of a process so flawed that there could be no confidence in its rectification, or in extraordinary circumstances associated with the timing of the event for which selection is in issue. There may be other exceptional cases. This appeal falls outside these categories.

### **First ground of appeal – that the Challenged Decision did not meet the Criteria**

16. Three points were advanced which (paraphrased) are that:
  - The Decision was *"not adequately reasoned or recorded in any written report"*;
  - *"Impermissibly applied the Criteria differently between men and women"*; and
  - *"Specifically misapplied the Criteria to the Appellant"*.

17. We discuss each in turn.

### **Failure to provide a written report**

18. The Appellant alleged there was no reasoned decision contained in a written report, apart from an explanation in an email to the Appellant of 27 April 2011 which recorded that the team had been ratified and a *"copy and paste"* of the selectors' comments regarding her non-selection was as follows:

*"Sam, also been three times. Has not realised her potential to date and, in our opinion, has a fitness problem."*

19. Roller Sports said that these shortly stated reasons should be set against the fact that the selection Criteria are published, and that the selectors had to reach a judgment whether the Appellant was

capable of finishing in the top ten at the Junior World Championships.

20. While the written report was acknowledged as brief, it was submitted this should not be taken as indicative of inadequate consultation, consideration or reasoning, and that "*selection is not a science*". Further because there is no prescription as to the extent of a written report, and there is no requirement for selection notes to be kept, the submission for Roller Sports is that there was no inadequacy to constitute an impugnable element of process.
21. The Tribunal agrees. The reasons are brief and could be better expressed, but they are clear. We return to this point as an aid to all sports.

**Impermissibly applied the Criteria differently between men and women – also described as "*improper and inconsistent application of the Criteria generally*"**

22. The decision is alleged not to be "*impartial*" but this is not an allegation of actual bias in favour of another person selected, or against the Appellant. There was no evidence to that effect. The ground is more accurately described as a differential application of the Criteria between men and women. The Appellant refers to the evidence of her father, and the composition of the New Zealand team being six Senior male skaters, three Junior men skaters, with one Senior woman skater, and no Junior women.
23. There must be no gender bias in selection, which of itself could constitute "*actual bias*". The Appellant contends that there is a strong indication of gender discrimination given the differential composition of the New Zealand team.
24. This team composition cannot stand as a bare allegation, but the contention is that the three Junior men selected cannot objectively be seen to have a better chance of success in the

2011 World Championships than the Appellant, as a Junior woman, and this demonstrates a gender bias.

25. Mr Michael acknowledges his own partiality, but says that he has knowledge sufficient to assert that it is "*not credible*" that each of the nine men is superior to every woman skater in New Zealand in terms of their prospects at the World Championships, other than Nicole Begg. The evidential considerations here overlap with those under the next head "*specific misapplication of criteria to the Appellant*".
26. One Junior male, about the same age as Samantha, has been three times to the World Championships but has not achieved a top ten placing, unlike Samantha who was placed 9<sup>th</sup> in 2007. Like Samantha that skater competed in the 2011 National Championships in the Senior grade, because the age rule has changed.
27. Mr Michael says that this Junior's results were "*adequate but not outstanding*" and puts that against Samantha's results in Senior and Junior ranks being "*second only to those of Nicole Begg*".
28. His second statement of evidence, referred to the 2010 Oceania Championships in Hastings where the Appellant finished second in the 1000m track event, close to the 2010 World Championships winning time, and defeating the then 2009 Senior 1000m World Champion from the Chinese-Taipei team. This is said to be even "*more impressive*" when the slower New Zealand track was brought to account. This was compared with the Junior male selected who won an event in a time much slower than the 2010 World Championship winning time.
29. In essence Mr Michael says this Tribunal should accept that some Junior men could not be recognised as a better prospect for a top 10 placing than Samantha, in the World Championships and this shows the selection was discriminatory when she was not selected.

30. Mr Campbell for Roller Sports, referred to 2011 results. He noted she was 4<sup>th</sup> in a 200m time trial which he said would put her 29<sup>th</sup> out of 31 in the 2010 Junior Worlds. Samantha is not a sprinter. But Mr Campbell added, relevant to the reasons for her non-selection this passage:

*"She failed to impress us and convince us that she had the necessary fitness and speed to be competitive at the expanded junior worlds."*

31. Both Mr Begg and Mr Michael said New Zealand tracks are not comparable to World tracks.
32. Mr Campbell stated that in the 2011 banked track championships the Appellant finished 3<sup>rd</sup> in the 300m time trial, and that *"her time would have placed her 28<sup>th</sup> out of 28 at last year's Junior Worlds"*.
33. The evidence and submissions for the Appellant and Roller Sports placed some weight on the 10km event when the Appellant finished 2<sup>nd</sup>. Mr Campbell stated that the selectors considered that she *"skated a lazy race sitting behind Nicole Begg and was 'towed' around the course. At no time did she show any aggression in her skating. The selectors unanimously felt that she was unfit and under prepared for the event."*
34. The Appellant laid some emphasis on the World In-Line Cup, where her placing in Valencia was four minutes behind the first three place getters. Mr Campbell said the balance of the field were local Spanish skaters and it was not considered by the selectors to be a world class field. The point is discussed further below.
35. Roller Sports through Mr Elsmore made the submission that there was no gender imbalance in the selection process, but was in part the result of participation levels. He submits that Roller Sports considers that the three Junior male competitors selected have a better chance of success at the 2011 World Championships than the Appellant in the selectors' estimation. This of course is not a test as such.

36. Such evidential analysis and that which follows is nearly impossible for this Tribunal to rationalize to a conclusion as sought by the Appellant, especially in a sport where times are not necessarily a true indicator of performance. The Tribunal simply does not have the skills and would need far more assistance to conclude that the gender imbalance is the result of some form of unfair preference for male skaters.

### **Specific misapplication of Criteria to the Appellant**

37. The key reference in the Criteria is:

*"Selected skaters should, in the opinion of the selectors, be capable of attaining a top 10 Junior World placing in 2011, or alternatively be a developer capable of reaching a top 10 Junior World placing in 2012."*

38. The Appellant contends both legs of the Criteria (read as a whole) were met in her case, and her development potential was not brought to account.
39. As to development potential the Tribunal considers the Criteria cannot be read in a restrictive way so that no-one in the last year of Junior ranks should be precluded from consideration under "*development*" potential in Senior ranks, given the quite specific reference to such potential for Senior selection. This potential seems to have been expressly excluded in the selectors' thinking.
40. Otherwise objective consideration of her prospects was said to include her being "*an experienced speed skater of a high standard*" and a "*multiple medal winner*" (in the Senior grades) on Banked Track and Road at the 2011 New Zealand National competition, and a multiple medal winner at previous New Zealand national competitions.
41. While the selectors must be satisfied that an athlete is "*capable of attaining a top 10 Junior World placing in 2011*", this is submitted not to extend to the selectors' "*whims*", to overwhelm objective evidence.

42. The Appellant referred to her No. 4 ranking in the World In-Line Cup, and her performance in the last week of April 2011 where she finished in the top 10 in two European Senior Ladies Speed Skating events in Spain and Holland.
43. In February 2011 the Appellant competed in the South Canterbury Open Speed Skating Championships and finished 3<sup>rd</sup> overall behind Nicole Begg and a male competitor, and won a local long distance cycling race. There is reference to her performance in the 2011 Banked Track Championship, and her second place in the 10,000m points elimination race behind Nicole Begg, referred to above, and her achieving two top 20 finishes at the 2009 World Championships then sitting out the 2010 World Championships to "*restore her fitness levels*".
44. There was much reference to her first World Championships appearance where in 2007 she achieved a top 10 finish, the only such result by a New Zealand Junior skater in the last five years (male or female).
45. The Appellant is clearly the second best female skater in New Zealand but is held by the selectors not to be a "*world class skater*". The non-selection is challenged head-on based on her background track record and "*pedigree*" and that she is "*truly world class*". Emphasis was laid on times achieved in Europe between April and June 2011 as being "*obviously world class*" and includes Mr Begg's evidence (see below).
46. If the contention regarding her "*world class*" status is not upheld by this Tribunal, then the failure to bring account her development potential is submitted relevant, and in particular that her results in the European Open Speed Skating Circuit make it plain she has significant development potential as a Senior skater.
47. The evidence for Roller Sports is that the World In-Line Cup gave the Appellant a chance to qualify outside the published Criteria, and she was told that if she finished 5<sup>th</sup> or better at Dijon, she

would be selected. She finished 15<sup>th</sup>. The In-Line Cup is a points competition, and only three women including the Appellant have competed in all four In-Line Cup meets. Points are collected for each race. She finished 9<sup>th</sup> out of 23 in Valencia and 9<sup>th</sup> out of 13 in Rennes, and in Incheon she finished 17<sup>th</sup> out of 30. In-Line Cup competitors are awarded points based in part on their being in the competition, and she finished 17<sup>th</sup> but collected points as if she had finished 4<sup>th</sup>. In Dijon she finished 15<sup>th</sup> out of 27. Roller Sports says that the Appellant is not "*truly world class*", that she failed to perform at the last World Championships and did not seek selection in 2010.

48. The Tribunal was struck by the submission for Roller Sports that "*All sports people know that you are only as good as your last performance and the Appellant's last performance at World Championships was not truly world class*". Her times are described as "*interesting*" but "*still well behind the top finishing group*". Time is not necessarily the determinant. Roller Sports acknowledges her very credible placing in 2007 but says that she "*has failed to follow through on her potential*".
49. Ameliorating the seemingly clear recognition that potential was not brought into account, was the evidence that the selectors did not believe she was showing potential to be a Senior skater competitive at World Championships in the next three years. But they do acknowledge her embarking on a professional skating career may see that change in the near future, but they consider that she is not "*evidencing that potential*" at present.

**Second ground of Appeal – respondent misunderstood and/or failed to properly avail itself of information concerning the Appellant, and did not afford the Appellant any reasonable opportunity to satisfy the Criteria**

50. Speed Skating Rule 108(d), requires the selectors to utilise "*available information*" and to provide the athlete a "*reasonable opportunity to satisfy the applicable selection Criteria*".

51. The Appellant says there was a failure to "*approach the Appellant at competitions*", and a failure to "*advise the Appellant of any perceived shortcomings or areas where it is considered additional work might be required*". At heart this is a contention that Roller Sports was "*totally unaware*" of "*the actual work the Appellant was doing*".
52. This turned on the circumstance that in January 2011 the Appellant moved from Palmerston North to Timaru to be coached by Mr Begg as an international standard coach, training with Nicole Begg and working on her "*deep fitness*" by "*gruelling road cycling and marathon skating sessions*".
53. The Appellant says that because the Respondent was not "fully informed" about all this, and her "*exceptional*" fitness, its decision must be vitiated.
54. Roller Sports says there was no obligation to communicate with the Appellant, but acknowledges that the selectors must be aware of available information "*whatever that term may mean*".
55. While the selectors were aware of the shift to Timaru, and Mr Begg's qualifications as international coach are undisputed, Roller Sports says the Appellant's training and fitness regime is irrelevant. While the selectors felt and said that her fitness was questionable a "*major issue*" in selection is her failure to impress the selectors "*with a performance that would be of an international standard*".
56. The selectors attended all four qualifying events and watched her performance at each event but her training hard and "*making an effort*" does not qualify her for the Junior World Championships in their eyes.
57. More broadly the Respondent says the selectors must assess skaters during the year, and not focus entirely on the Speed Skating Rules.
58. We return to this second ground further in this Decision.

### **Third ground of appeal – no material on which the selection could reasonably be based**

59. This ground of appeal has a high threshold to meet because it is in effect a contention that the decision not to select was without substance, and "*wholly unsupportable*" on the available evidence. It is an assertion that selection is so clearly warranted that that cannot be gainsaid.
60. The factual case is stated broadly, that the Appellant is the second best female speed skater in New Zealand and the New Zealand team has only one woman (Ms Begg).
61. The submission relies heavily on the top 10 finish in the World Championships in 2007, then moves to the same proposition as the second ground of appeal with regard to the selectors not being aware of her fitness which is put by Mr Begg as "*exceptional*".
62. There is a further assertion that because this is the final year in which the Appellant may race in the junior grade, and is otherwise racing successfully in Senior and open grade competitions in New Zealand and Europe, it is open to this Tribunal to conclude that the Appellant has the potential to be the leading Senior skater for New Zealand. This is predicated in part on a submission that the Appellant did not compete in the 2010 World Championships in order to recover from a serious injury suffered in the 2009 Worlds, and that she would be irreparably damaged in her career if she cannot go to the 2011 World Championships. It is submitted that the challenged decision does not do justice to her "*tenacity and commitment*".
63. For Roller Sports the submission is made that the selection decision is based on the athlete's performance, not her place nationally, and while she is second in New Zealand to Nicole Begg this does not mean she is of international "*ranking of significance*".

64. Her efforts are acknowledged, and her potential improvement is also recognised "*but cannot be considered at this stage*".

## **E DISCUSSION**

65. The Tribunal has brought to account the evidence put before it, in considerable detail. It reminds itself that it is not here to "*reselect*".

66. We begin by dismissing the **third** ground of appeal, that there is "*no material on which the selection decision could reasonably be based*". The material which was brought to account by the selectors could not of itself be said by this Tribunal to vitiate the decision as allowing no other conclusion but selection. The question rather is whether information considered relevant, but not brought to account or wrongly assessed may have produced a different result. This is a matter essentially of process, of fulfilling the requirements under the Criteria, with the relevant facts to hand. That brings the Tribunal back to the first two grounds of appeal.

67. It seems clear to the Tribunal that in two respects the selection **process** may reasonably be challenged.

68. First, it is of course not sufficient for a selection to be justified simply on the basis of communicated reasoning, if the basis for that reasoning is deficient, on its face or on further inquiry by email.

69. The decision communicated comprehends two reasons, that ("Sam") "*has not realised her potential to date and, in our opinion, has a fitness problem*".

70. The communication of her non-selection came on Saturday 12 March 2011.

71. The reasons given were communicated on 2<sup>nd</sup> April 2011 and followed inquiry of Tuesday 15 March 2011.

72. We are not influenced by the contention that participation in the 2011 Worlds is crucial to the athlete's development as a world class speed skater, nor by the commitment to the sport demonstrated from the Appellant at the age of five. These are personal career considerations, not part of a national selection process. The development potential must be assessed.
73. It is clear to us that consideration of her 2007 performance must bring to account her fall in 2008 in Gijon, Spain, where she broke her wrist and collarbone, which took her out of the sport until she returned in 2009, where she achieved two top 20 placings after 7 months training. In her own words she had not fully regained her confidence and fitness and decided not to participate in 2010 to allow full recovery, to return her fitness and confidence to 2007 levels.
74. In January 2011 she moved to live with Bill and Nicole Begg and has engaged in intensive long distance training both road and cycle. Nicole Begg is regarded as one of the fittest world skaters.
75. Mr Begg described the move to Timaru in January in 2011. Apart from the endorsement of the Appellant as having "*always displayed the qualities required of a champion speed skater*" Mr Begg described her performance at the 2009 World Championships where she achieved two top 20 rankings with only 7 months training as a "*fantastic achievement*".
76. After she moved to Timaru in January 2011 she has become "*extremely fit*" and Mr Begg says "*I have been closely monitoring her fitness levels, and can say they are exceptional*". He refers to a strict regime of cycle training and long distance skating and describes his being struck with her "*grit and determination*" and "*good composure under stress*".
77. His view is that she has the required skill and fitness to attain a top 10 placing at the 2011 Junior World Speed Skating Championships. The Tribunal reminds itself that Mr Begg must not become a de facto substitute for the selection process.

78. At a more generic level he does not consider a New Zealand team should have only one female, where individual performance is executed by teamwork. He refers to the development of leading Junior speed skaters for future development prospects. The Tribunal does not consider that such a policy consideration is relevant to selection on this appeal.
79. We accept Mr Campbell's evidence, and the submissions made by Mr Elsmore, that this is not a case where on the facts there is any validity in the suggestion that there has been a favouritism of "*men over women*".
80. Ultimately the issue of selection turns on the prospect of her finishing in the Top 10 and whether all relevant information has been **properly** and adequately brought to account in that regard, and otherwise whether her potential has been considered under the Criteria.
81. Under the **first** ground of appeal, that the decision did not properly implement the Criteria, we dismiss the sub-ground relating to the failure to produce a written report. There is no such obligation. There is sufficient to indicate the basis on which the decision is made. We think Roller Sports could have done better, but the essence of the reasoning of the selectors is set out. It would be folly for any template for communication to be laid down by this decision, other than to indicate the need for a short and better articulated set of reasons than contained in the short email in this instance.
82. Next we dismiss that element of the **first** ground of appeal with regard to "*improper and inconsistent application of the Criteria generally*". We do not have sufficient before us nor the knowledge to conclude there has been a loaded basis of selection of men rather than women. We detect no "*imbalanced selection policy*". An imbalanced team of itself does not dictate the result of this appeal.

83. With regard to the "*specific misapplication of the Criteria to the Appellant*" we consider there is a clear error, in that the athlete's potential has been overlooked, as a consideration. It cannot be the case that the last year of competition in Junior ranks obviates the need for consideration of potential, when selection for the Senior ranks requires consideration of potential. A strict reading of the Criteria may lead to this view but the sport recognises potential in either rank as a basis for selection.
84. We also have real reservations as to whether the selectors have fairly brought to account the explanation given for a performance which was world class in 2007, which was not truly tested in 2008 through accident, nor 2009, and not tested at that level in 2010. The reasons given show that the selectors have looked back to a prior time and expected an equivalent performance when all the circumstances of her not reaching that standard have not adequately been brought to account. At least it is not apparent to this Tribunal that this has been assessed.
85. The Tribunal is not influenced by the extensive reference to comparative results. There is no evidence the selectors are not aware of such nor were incapable of evaluating those. But evaluation of her performance 2007-2011 is clearly relevant to the Criteria, as is the knowledge of the selectors regarding her fitness, and steps taken to achieve the high levels of fitness required.
86. The loose expression employed with regard to the athlete having a "*fitness problem*" troubled the Tribunal. The evidence is of a determined and successful adoption of a tough fitness regime, the measure of which is well stated by Mr Begg. He is well qualified to make this assessment. As at the date of selection it may be that the fitness programme was still a work in progress, but it was in progress, and the significance to the selectors of a perceived "*fitness problem*", has to be measured against that training regime and the results of that. The two do not reconcile. It is idle now to ignore the success of that programme as

described to us, and to wind the point of determination back to the date of selection.

## **F DECISION**

87. This Tribunal is reluctant to intervene in selection decisions, as they are very much for the sport.

88. There is little to distinguish this appeal as to a matter of principle from the appeal before the Tribunal in 2004 of **Murdoch and others v Yachting New Zealand** (SDT 01, 02, 03/04). Although the Tribunal's decision was ultimately overturned on appeal by the Court of Arbitration for Sport, on other grounds, we consider that the following passage in the Tribunal's decision at para 33 is still valid:

*"It was common ground between all parties that it was not the role of the Tribunal to substitute its views for those of the Nomination Panel on the merits of the decision as to whether the nominees will or will not achieve a top 10 placing in their class at the Olympics. The limited grounds of appeal set out in the NZOC Nomination Criteria and Selection Criteria are constructed in such a way as to direct the Tribunal's attention to matters of process and procedure."*

89. For that reason much of what the Appellant has put to us has no influence on our Decision. We will not substitute our evaluation, nor second guess the selection which requires judgment. Our concern in most cases will be with the process adopted, including the way the reasons for selection or non-selection are expressed. They will usually, as here, throw light on the validity of that process.

90. We conclude that the selectors have erred in failure to bring to account Samantha's potential in her last year in Junior ranks, thus as she moves to Senior rank, and have not accurately assessed her fitness. We do not extend this to a criticism of the selectors. It is simply the case. Further, we consider the selectors have looked back and seen the lack of international success 2008 to 2010 as telling against her, where on the

evidence there are explanations which must be carefully evaluated.

91. First, too much weight was put on a principle which was put as "*last performance*", rather than there being any evidence that future performance was to be assessed against the success of the Appellant's competition in 2007, and the unfortunate event which have succeeded that. There is evident in the reasons submitted to this Tribunal a line of thinking which is that she has somehow "*failed*" in failing to achieve the same standards. That should not be seen as a "*failure*", but this Tribunal recognises that "*past glories*" sustain future selection considerations. It is this point, coupled with what appears to be some preconception as to fitness which together leaves this Tribunal in real doubt whether a fair process under the selection Criteria has been followed.
92. We do not express any opinion on whether reconsideration of her fitness as described by Mr Begg, coupled with a re-evaluation of the circumstances in which she has not replicated the success of 2007, should dictate the Appellant's selection. But it cannot be gainsaid that her fitness at the level described by Mr Begg, if sustained as of today, puts the selection reasoning in doubt. This is not a criticism of the selectors given a decision made in March after her moving to Timaru in January and when the full fruits of her training come to bear as described by this Tribunal.
93. It will fall to the selectors for Roller Sports to bring that level of fitness to account when considering the Appellant's selection again, and then to approach with an open mind the circumstances in which she has not achieved the results of 2007.
94. We should say we are not influenced by the In-Line performance as such nor the analysis of times and results, because that is very much for the selectors. Allied with the two significant reasons set out above, we think some reconsideration needs to be made of the circumstances in which she was held to run a "*lazy*" race when finishing second to Nicole Begg and when both had lapped the field.

95. The Tribunal considers that to take that one performance as a demonstration of a lack of aggression or determination, in the absence of either a conveyed expectation of such, or an inquiry as to why she did not pursue Nicole Begg harder than she did is to place too much store on her finishing second to a true world champion.
96. This decision is not a direction as to selection, but it is a direction that Roller Sports must reconsider the non-selection in light of the two issues described in this part of the decision and developed more fully in our reasoning.
97. The Sports Tribunal Rule 42(e) applies, in that the selection criteria have not been properly followed and/or implemented in relation to the determination of the prospect of a top ten finish and the selectors have not properly brought to account the potential of the athlete at international level at senior rank.
98. On the facts replicated, too great a focus has been placed on results achieved in 2007 and without making sufficient allowance for the effect of injury and the recovery process. Further, the athlete's fitness at the time of the selection or the prospect of gaining fitness as described by Mr Begg should have been brought to account.
99. Rule 42(c) has application because there is ongoing evidence of the fitness programme, and its successful implementation which constitutes "*substantial new evidence*".

## **G FORMAL DISPOSITION AND DIRECTION**

100. The Tribunal finds that on the evidence before it that the non-selection of the Appellant Samantha Michael involved error in the respects identified above, and **directs reconsideration** involving:
  - (i) Accurate up to date assessment of her fitness relevant to World Championship prospects;

- (ii) The selectors not placing excessive weight on the 10,000m points race in which the Appellant finished second;
- (iii) Consideration of the Appellant's potential in Senior ranks and relevance of the World Championships to that;
- (iv) Consideration of her accident in 2008 and recovery from that in assessing whether her failure to repeat her 2007 results is attributable in whole or part to these circumstances.

101. This Decision is **not** a direction to select and is based on the need for a process which complies with proper assessment of the Selection Criteria.

Dated this 19<sup>th</sup> day of July 2011



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**Nicholas Davidson QC**  
**Deputy Chair**