

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

**SDRCC 21-0508
Ordinary Division**

**Hawley Bennett-Awad
Lisa Marie Fergusson
Holly Jacks-Smith
Karl Slezak
Mike Winter**

Claimants

v.

Equestrian Canada

Respondent

and

**Colleen Loach
Jessica Phoenix**

Affected Parties

Before

Robert Néron, LL.B., LL.M, C.Arb.

Arbitrator

REASONS FOR DECISION

This is an appeal regarding the selection for the 2020 Tokyo Summer Olympics to be held from July 23 to August 8, 2021, filed by five athletes who are appealing the selection decision of Equestrian Canada (EC).

I have been appointed as Arbitrator in these proceedings by the SDRCC.

The dispute that is the center to this appeal is whether the selection policy has been properly applied in the selection of the Affected Parties. In other words, the Claimants allege that HPC failed to comply with the correct procedures outlined in the Nomination Criteria, which resulted in a patently unreasonable decision based on the said criteria.

Therefore, the decision made that is being appealed is the Rider and Horse Eventing combinations selected for the 2021 Tokyo Olympics: According to the Claimants, Jessica Phoenix on Pavarotti and Colleen Loach on Qorry Blue D'Argouges are not the most competitive combinations and have not posted the best results to be selected, which goes against the published criteria.

EC, the Respondent in these proceedings, is the national federation in Canada recognized by the international federation, la Fédération Equestre internationale (FEI), governing the equestrian sports.

The remedy sought by the Claimants is to have the decision to select the Affected Parties set aside and sent back to the HPG in order to have the selection criteria properly applied and to have those selections based on the specific criteria in accordance with the 2020 Olympic Games Equestrian Canada Nomination Criteria & Procedures Event, Appendix 1.

Submissions

Claimants

Based on the documentation received from the Respondent, the Claimants submit that the Respondent has not met the onus that the selection was made in accordance with the selection criteria.

The Bromont Event

The Claimants mentioned that COVID-19 hit the eventing community hard. Most events all over Canada, the United States, and Great Britain had been cancelled, and the 2020 Tokyo Olympic Games postponed. Multiple riders intended to participate at the 2020 MARS Bromont Event.

The Bromont Event could not obtain approval to offer a CCI4*, so Bromont decided to run an Advanced Horse Trials in its place. Ms. Phoenix lobbied EC to have the results from this non-FEI event calculated together with her actual official FEI final scores and be used for her consideration to be selected to the Olympics.

No other declared riders, outside of possibly Colleen Loach, were aware of these proceedings; ultimately, EC approved her request. However, no other declared rider was given the opportunity to enter this competition.

According to the Claimants, after the decision regarding the Bromont Event, Mr. Hood was tasked with letting the declared riders know. Those riders did not learn about this special consideration event until, via email, the day before the event.

Therefore, making special exceptions for one rider is not fair, is not transparent, and has the appearance of preferential treatment.

Selecting the Most Competitive Pair

According to the Selector, Dr. Penny Rowland, Ms. Phoenix, and Ms. Loach are the highest-ranked Canadian FEI riders. However, the individual rankings of the horse/rider combinations are:

Karl Slezak/Fernhill Wishes #302
Colleen Loach/Qorry Blue #308
Lisa Fergusson/Honor Me #315
Jessica Phoenix/Pavarotti #392

Therefore, the Claimants submit that, under FEI rankings, Jessica Phoenix is the fourth-placed Canadian rider. This breaches the objective of “select the most competitive athlete/horse combinations to represent Canada.”

Other Factors Mandating Consideration

With respect to cross-country time, Pavarotti at 19 years is at an advanced age at this level. He is slow, and his average FEI cross-country penalties for the years 2019–2021 is 19.3. In his two championship entries 2014 WEG, he finished on an adjusted score of 83; most recently, at the 2018 World Equestrian Games, they were eliminated with a fall on cross-country. However, three other declared riders competed and successfully completed at those games as well.

In short, the selection of Pavarotti does not follow the criteria regarding time penalties (cross-country time) in Section 5.2.2. This selection indicates that the Selection Panel will consider the current fitness, soundness, and ability of the combination to represent Canada at the standard of the 2020 Olympic Games Eventing Competition, e.g. distance, size, and complexity of obstacles and the required speed to minimize time penalties.

According to the Claimants, EC stated:

Colleen Loach/Qorry Blue

2. Kentucky report/observations General Notation made by the group – For a championship – especially selecting combinations for an individual competition (like OG 2020) it’s not about finishing, it’s about achieving the lowest possible score.

However, the Claimants question as to how you can have a low score, if you did not finish. The Claimants also submit that comments like this have been injected to justify a position and narrative, and this is manipulative and wrong.

If you want to talk about mental toughness, focus, and the ability to be competitive, then you have to find a way to stay on your horse and complete the competition.

[...]

Colleen and Qorry have contested three long format competitions since 2019. Of those she has fallen twice and both times have been ignored as nothing but unfortunate. EC has offered that it should not happen again. Except, it did happen again.

In summary, the Claimants submit that statistics can be manipulated to support a personal agenda. Cherry-picking statistics is subjective, manipulative, and results in inequity as well as does not produce the two pairs most likely to finish the Olympics on behalf of Equestrian Canada.

Affected Party: Jessica Phoenix

In her submissions, Ms. Phoenix stated that she, together with her horse Pavarotti, satisfied all objective criteria set out in the 2020 Olympic Games Equestrian Nomination Criteria & Procedures for Eventing (the Nomination Criteria). In addition to satisfying these objective criteria, the Selection Panel was also required to “use their discretion” to assess performances in order to determine the most competitive athlete/horse combinations to represent Canada and achieve as many personal best performances as possible.

The disruption of the Olympics and access to competitions caused by COVID-19 made this an unusual if not unique quadrennial. On top of that, Ms. Phoenix added that the composition of selectors has changed over time for reasons that are not entirely clear to her.

Ms. Phoenix reminded that the panel was thus comprised of Mr. James Wofford and Dr. Rowland, with Mr. Waylon Roberts to be available as a tiebreaker. Ms. Phoenix mentioned that Mr. Wofford is a “legendary American Eventing champion” and “world-famous” coach, and his assessment of the horse/rider combinations most likely to get the job done on the day is entitled to a huge amount of deference.

According to Ms. Phoenix, that is even more so the case here, where Section 5.2 of the Nomination Criteria provides for a “patently unreasonable” standard of review. Moreover, even if everything the Claimants have asserted were true, it still would not meet this standard of review.

As a preliminary point, Ms. Phoenix said that the Claimants’ own submissions indicate that they were aware of the facts which they now rely on in support of their bias allegations in April 2021. Rather than act on those facts in a timely fashion, the Claimants agreed to continue with the process, only raising the issue now, after they were disappointed with the result.

Ms. Phoenix also reminded the panel that the Selection Letter also explained that she was selected because her performance results “demonstrate a level of competitiveness in all phases on a consistent basis to indicate readiness to achieve a competitive and personal best performance,” which is directly in line with the primary goal of the Nomination Criteria.

Finally, regarding the allegations of bias made by the Claimants against Dr. Rowland, Ms. Phoenix submits that, while Dr. Knabe has worked on her horses in the past, she has also worked for horses belonging to Hawley Bennett-Awad, Lisa Marie Fergusson, Karl Slezak, Colleen Loach, and Holly Jacks-Smith.

Moreover, Ms. Phoenix confirmed that she is not in any joint business relationship with either Dr. Rowland and Dr. Knabe, nor are they financially dependent on each other in any way, nor do either of them have an ownership interest in Ms. Phoenix’s horses, including Pavarotti.

Therefore, the allegations of bias against Dr. Rowland can and should be rejected outright as improper and untimely.

Finally, with respect of Mr. Wofford, Ms. Phoenix mentioned that he does not have ties to either of the horse/rider combinations that were chosen. Even if the Claimants’ unfortunate allegations about Dr. Rowland, as previously discussed, were tenable, it does not change the fact that, arguably, the most qualified and experienced individual in the world on this issue, namely Mr. Wofford, was part of the Selection Decision.

Respondent

In essence, the Respondent submits that this application should be set aside because Section 5.1 of the Nomination Criteria provides for a right of appeal only on the grounds that the HPC has failed to comply with the correct procedures outlines in the Nomination Criteria or have made a patently unreasonable decision based on the Nomination Criteria.

The Respondent also submits that the starting point for review in the sporting context is deference to the sports organization’s expertise and experience. Therefore, the tribunal should not substitute its decision for that of the Selection Panel unless the Respondent has satisfied the high threshold of “patently unreasonable.”

In this case, the Respondent submits that the clear set of Nomination Criteria was strictly adhered to, the decision was carefully explained and reasoned and there is no evidence of untoward or inappropriate conduct by the Selection Panel.

While the Claimants make an allegation of bias, according to the Respondent the allegation is vague, unparticularized and unsubstantiated by any written document. Therefore, the

Respondent said that these proceedings are without merit and should be dismissed in accordance with section 6.13 of the *Canadian Sport Dispute Resolution Code*.

Witnesses

James Hood

Mr. Hood is the Director of High Performance and the International Federation for Equestrian Sports (FEI) Relations at Equestrian Canada (EC).

Mr. Hood confirmed that EC was responsible for establishing the 2020 Olympic Games Equestrian Canada Nomination Criteria & Procedures – Eventing (the Nomination Criteria) and for appointing the Selection Panel that chose the athlete/horse combinations on the Canadian Eventing Team for the Tokyo Olympics.

Mr. Hood stated that the Nomination Criteria for the Canadian Eventing Team for the Tokyo Olympics (EC Olympic Team) were initially developed over a period spanning from January 2019 to July 2019 and approved by the Canadian Olympic Committee on October 21, 2019.

The Tokyo Olympics was postponed from the summer of 2020 to the summer of 2021. Accordingly, the Nomination Criteria were updated in June 2020 and approved by the Canadian Olympic Committee on July 23, 2020.

Mr. Hood mentioned that, on May 25, 2021, Jessica Phoenix requested consideration for the use of scores from the Bromont Advanced Horse Trials in support of selection. According to him, this request was based on her decision, motivated by family considerations, to remain in Canada during the COVID-19 pandemic.

Initially, the Public Health Agency of Canada declined the request from the Province of Quebec for EC and Bromont to operate and to allow for the entry to Canada without quarantine for officials and athletes to participate in Bromont CCI4*L and 4*S. However, Bromont requested the ability to operate as Advanced Horse Trials. This was granted from the Government of Quebec on June 3, 2021.

The selection panel considered the request of Ms. Phoenix and agreed to consider the Advanced Horse Trials scores. With the borders closed to travel and no waiving of restrictions, only two athletes were in Canada at the time to be able to participate: Ms. Loach and Ms. Phoenix.

Notification was sent to all declared riders on June 10, 2021, notifying them of the use of the Advanced Horse Trials results for consideration but not for qualification for a certificate of capability. Ms. Loach only participated in Phase 1 (Dressage) and Phase 2 (Jumping) and withdrew prior to cross country. Ms. Loach's scores for Bromont were not considered.

With respect to conflict of interest, Mr. Hood mentioned that Section 3 of the Nomination Criteria Appendix requires Selection Panel members who find themselves in a conflict-of-interest position declare their conflict in advance and recuse themselves from the Selection Panel as follows:

In selecting the combinations, it is understood that the individual Selection Panel members may be in a real or perceived conflict of interest position. Members with a conflict of interest shall declare their conflict of interest (real or perceived) in advance. Any member of the Selection Panel who has declared a conflict of interest will remove themselves from all discussions and will abstain from voting in connection with such conflict, including consideration of any family member (direct relatives) or any other conflicted situation or conflicted relationship that may arise.

Mr. Hood confirmed that the three-person Selection Panel for determining the nominees for the EC Olympic Team was originally comprised of Dr. Penny Rowland, James Atkinson, and Dr. Rob Stevenson, who were appointed in 2018.

In April 2021, the Selection Panel was updated to be comprised of Dr. Penny Rowland, James Atkinson, and James Wofford, with the resignation of Dr. Robert Stevenson. However, on June 10, 2021, James Atkinson recused himself for personal reasons.

The Selection Panel was then updated again to be comprised of Dr. Penny Rowland, James Wofford, and Waylon Roberts. Mr. Roberts was suggested by the Athlete Representative, Shandiss Wewiora-McDonald, to participate in the Selection Panel meeting of June 16, 2021, in the event of a tie-breaker. Dr. Anne Baskett was selected as the selector veterinarian.

Due to COVID-19 restrictions, observing at the designated competition by the Selection Panel in accordance with Section 3 of the Nomination Criteria Appendix was limited. Nevertheless, the Selection Panel had significant exposure to the leading athlete/horse combinations prior to making their selections. Mr. Hood provided a chart with the designated competition, the attendees, and their role.

Moreover, in accordance with Section 8.1 of the Nomination Criteria Appendix, Veterinary Assessments of the horses were conducted. Mr. Hood provided the relevant details of the veterinary assessment with their location, their dates, the names of the veterinarian, and their role.

Mr. Hood confirmed that eight meetings of the Selection Panel occurred. He also provided the purpose of the selection panel meeting, their dates, the attendees, and their role.

Finally, having observed all eight of the Selection Panel meetings, Mr. Hood confirmed that the Nomination Criteria Appendix was strictly adhered to by all members of the Selection Panel. It is to be noted that the minutes of the Selection Panel meeting were provided as exhibits.

Mr. Hood added that, given the COVID-19 restrictions and the inherently high-risk nature of eventing, it was of utmost importance for the Selection Panel to nominate the athlete/horse combinations that were the most experienced, consistent, reliable, and best equipped to handle travel to the Tokyo Olympics and COVID-19 restrictions, which will be in place.

At the hearing, Mr. Hood confirmed that, with the impact of COVID-19 and the postponement of the 2020 Tokyo Olympics Games, EC had to postpone some of the redesign and restructuring of programs. With respect to the meetings of the Selection Panel, Mr. Hood attended all the meetings. He was there as *ex officio*. He was allowed to ask questions and to seek clarifications.

Mr. Hood confirmed that the selection panel considered all the performances of each of the eligible riders, and they walked through those performances and those discussions. Mr. Hood also confirmed that he was amazed about the interrelationships that go on between the athletes and the people involved in the sport of equestrian.

Mr. Hood said that most of the committee members and the experts in their field are also interrelated, whether having provided people with horses to ride in the past or offering working placements for athletes on people's farms, or even being hired to break horses or to train horses.

Finally, regarding the event in Bromont, Mr. Hood acknowledged that he did not inform the athletes sooner, but he said that EC did not have confirmation until last minute that this event would be able to run.

Dr. Penny Rowland

Dr. Rowland is a small-animal veterinarian, farm owner, and former competitive equestrian rider. Dr. Rowland was shortlisted for the 2000 Summer Olympics in Sydney, Australia. From 1999 to 2017, she was a member of many Canadian equestrian teams.

Dr. Rowland stated that the Canadian equestrian community is close-knit. She is also familiar with all the Claimants in various manners. To her knowledge, none of the Claimants raised concerns with her appointment until after the athlete/horse combinations for nominations for the EC Olympic Team were finalized.

Dr. Rowland confirmed that, as one of the three members of the Selection Panel, she was bound by the Nomination Criteria Appendix and familiarized herself with it to ensure that she performed her duties properly. She said that she took her duties as a member of the Selection Panel seriously

and strictly adhered to the Nomination Criteria Appendix in making her recommendations with respect to which athlete/horse combinations should be nominated to the EC Olympic Team.

She added that, in making her nomination recommendations, she relied upon Section 5 of the Nomination Criteria Appendix in considering the specified objective and subjective factors.

Dr. Rowland also confirmed that, in carrying out her duties as a member of the Selection Panel, she attended the following designated competitions: Red Hills, USA, Carolina International, USA and Bromont, Canada.

In addition to attending the above designated competitions, she spoke to the following Official Competition Observers who attended these competitions on behalf of the Selection Panel: Rachel Hunter who attended Burnham Market, UK, and Matthew Brown who attended Jersey Fresh, USA.

Dr. Rowland also spoke to the Selector Veterinarian, Dr. Anne Baskett, about her observations from the veterinary assessments she conducted on the horses and during the designated competitions. She also watched the videos sent by each athlete being considered of their horses in bridle being jogged straight on a hard surface.

Dr. Rowland confirmed that the athlete/horse combinations of Jessica Phoenix/Pavarotti and Colleen Loach/Qorry Blue D'Argouges were chosen for nomination for the Olympic Team because of their experience, competitiveness, consistency, and results of veterinary assessments, which are particularly important for the sport of equestrian eventing.

She mentioned that Ms. Phoenix and Ms. Loach have the highest FEI rankings of all of the athletes considered, being 93rd and 90th, respectively.

With respect to the allegations of bias by the Claimants, Dr. Rowland said that, at no point in acting as a member of the Selection Panel, did she feel like she should declare herself in a conflict-of-interest position and recuse herself from voting.

Dr. Rowland understands that the Claimants are alleging that she nominated the athlete/horse combination of Jessica Phoenix/Pavarotti for the Olympic Team because Dr. Knabe, her business partner in Cranmore Farms, also treats Pavarotti. She also adds that there is no benefit for her, personally or financially, for nominating the athlete/horse combination of Jessica Phoenix/Pavarotti.

As a selector, Dr. Rowland said that she attended as many competitions as possible. For those she could not attend, she had either the other selectors or competition observers in the UK and in the United States. Dr. Rowland also spoke with veterinarians about the horses and had spoken to all competitors at some point during this season and last season. Finally, Dr. Rowland

confirmed that, toward the end, the selectors were also looking at videos on horses that were sent in to determine that they were still sound in their trotting.

Dr. Rowland is adamant. Her nomination of the athlete/horse combination of Jessica Phoenix/Pavarotti to the EC Olympic Team was not influenced by her relationship with Dr. Knabe, who, to her knowledge, treats or has treated several horses involved in EC, including the horses of the Claimants, Ms. Fergusson and Ms. Jacks-Smith.

Bromont Event

Dr. Rowland said that, due to COVID-19 restrictions, the athlete/horse combination of Jessica Phoenix/Pavarotti was only able to compete in one (1) of the available competitions outside of Canada, being Kentucky, USA. Because of this, Ms. Phoenix requested consideration by the Selection Panel of her performance riding Pavarotti at the Bromont, Canada, Advanced Horse Trials.

Dr. Rowland added that, out of fairness, the Selection Panel agreed to consider the performance of the athlete/horse combination of Jessica Phoenix/Pavarotti at the Bromont Event. This decision was communicated to all of the other athletes being considered by the Selection Panel for the EC Olympic Team. Moreover, to her knowledge, none of the other athletes raised any concerns about the Selection Panel's decision to consider the performance of the athlete/horse combination of Jessica Phoenix/Pavarotti at the Bromont, Canada, Advance Horse Trials.

With respect to the overall selection of the two athletes, Dr. Rowland said that she had gone over all of the results, the criteria, their competitiveness, their consistency, speaking with the veterinarians, and using a certain amount of experience.

Mike Winter

Mr. Winter has long experience with EC. Mr. Winter has consistently been long listed for the Canadian Eventing Team since 1995. For instance, Mr. Winter has represented Canada at various major events, notably in 2003 at the Pan American Championship, in 2007 at the Pan Am Games and at the Olympics of 2004 and 2008.

Mr. Winter has also been part of the EC selection group for about 25 years. He is the current rider representative. He did not go through the nomination process for the Olympics in 2012, 2016, and 2020 because he did not have a horse then.

Mr. Winter's Criticism of EC

1. The rules and criteria of the reliability rating are unfair

He has been critical of High-Performance Equestrian Canada, its process of selection, lack of program, and its inability to produce a consistent selection panel and provide coaching or technical advisors. He had asked for James Atkinson to be removed because of past behaviour. He brought up conflicts of interest regarding Holly Jacks-Smith and Jessica Phoenix. He thought that one of the candidates picked by the selection group (Colleen Loach) failed miserably on the reliability rating. Pavarotti and others have an equal reliability rating of 100%.

2. The criteria of the reliability rating are unfairly applied

Mr. Winter had been in the four-star long format and he could run 100 metres under 10 seconds; yet, he was not considered as an alternate. This speaks to the system of selection being broken. He has trouble with the selection criteria being applied. He received 20 penalties on a cross-country, which affected his reliability rating the same way as those who were eliminated or pulled out even when he completed the events.

Mr. Winter believed that his rating should consider his ability to complete events. The system of selection that gives equal weight to penalties in completed events to elimination and pull-outs only show how subjective the selection process is.

Mr. Winter's complaint about Dr. Rowland.

Mr. Winter was familiar with the updated criteria dated May 3, 2021. When he saw that Dr. Rowland was part of the EC selectors, Mr. Winter raised the issue of Dr. Rowland's conflict of interest. He had raised the issue with Mr. Hood, and Mr. Hood had promised Mr. Winter that any conflict of interest on Dr. Rowland's part would be investigated.

Yet, on Dr. Rowland's witness statement, she claimed that no one asked her about potential conflict of interest. This is another issue raised by Mr. Winter as proof that the selection process did not include investigating conflicts of interest. Nicholas Austin, the chair of the EC Eventing Committee, promised Mr. Winter that he would clean house and restructure after the Tokyo Olympics.

Mr. Winter did not raise any issue about Dr. Rowland after May 3, 2021. He did not initiate the process until after the athlete/horse combinations had been selected. Mr. Winter agreed that the community of EC was small and tight-knit. Dr. Rowland and Dr. Boucher had treated horses of those selected and horses of the Claimants. Mr. Wofford is a world-famous athlete and coach. Mr. Winter did not believe Mr. Wofford was biased.

Mr. Winter's Horse was Considered

The actual selection was made on June 16, 2021, and Mr. Winter claimed that his horse El Mundo did not get consideration. However, on page 6 of the actual selection decision, the group laid out its opinions of El Mundo.

Unethical Behaviour is Rampant in EC

Mr. Winter feels that a culture of backchanneling and unethical or illegal behaviour has been rampant in the High-Performance Equestrian Canada for a long time. This is one of the reasons why there had been many appeals and problems. Administrative staff backdated the declaration of Katherine Robinson in 2014 just for Ms. Robinson to get nominated.

According to Mr. Winter, some of the people who committed those unethical acts were fired; some resigned, but others simply recused themselves. However, they are still around influencing the future of the athletes. That is what disturbs Mr. Winter. He seeks a close and sharply focused scrutiny of the process to initiate a change.

James Wofford

Mr. Wofford is a member of the Selection Panel. He did not give *viva voce* evidence at the hearing. His evidence was entered by way of witness statements. He was not cross-examined on it.

Mr. Wofford is a retired competitive equestrian rider and is still a coach. Mr. Wofford was a silver medallist in the 1968 Olympics in Mexico City and the 1972 Olympics in Munich, Germany. Mr. Wofford won the silver medal at the 1980 Alternate Olympics in Fontainebleau, France.

Mr. Wofford was a bronze medallist at the 1970 and 1978 Equestrian World Championships at Punchestown, Ireland. Finally, he was a gold medallist at the 1967 Pan American Games. He also won five USA National Championships.

In April 2021, Mr. Wofford was appointed as a member of the Selection Panel tasked with nominating the Equestrian Eventing athlete/horse combination nominees for the 2020 Olympics held in Tokyo in 2021. Mr. Wofford confirmed that the Selection Panel met on eight occasions, five of which Mr. Wofford attended.

According to him, the deliberations with respect to why the athlete/horse combinations of Jessica Phoenix/Pavarotti and Colleen Loach/Qorry Blue D'Argouges were chosen are detailed in the minutes from the meetings of the Selection Panel.

Mr. Wofford stated that, in making his nomination recommendations, he relied solely upon Section 5 of the Nomination Criteria Appendix and that the Selection Panel members conducted themselves in a manner that was appropriate, honest, professional, neutral, and impartial.

According to him, at no time did he believe that any of the Selection Panel members were motivated by bias, malice, or self-interest.

Analysis

What an arbitrator ultimately decides after all the facts have been put into evidence, including new facts, and after all the arguments have been pleaded, is whether it was reasonable for a selection committee to nominate or not nominate, as the case may be, a given athlete. In practical terms, therefore, the focus on the arbitration will generally be the original decision made by the sporting authority.

Arbitrators are guided by two general principles. The first one is that deference is owed to the sporting authority's experience and expertise. It is neither nor the duty of an arbitrator to substitute his own appreciation of the appropriate solution unless there are valid grounds to do so.

The second one is that the standard to be applied in determining what constitutes valid ground is the reasonableness of the decision. This is where it is helpful to compare the process with judicial review and seek guidance and judicial decisions, which have defined the general grounds that entitle a reviewing body to intervene with the original decision and replace it with his own.

Simply put, in sports arbitration, where deference to the experience and expertise of sports authorities is a starting point, the test is whether the outcome falls within a range of possible acceptable outcomes, which are defensible in respect to the facts and the policies at issue.

Arbitrators are at liberty to use whatever methods necessary in a given case to reach their decision, subject only to their duty to be deferential to sporting authorities, to apply the proper standard of review, and, of course, to follow the relevant rules of procedural equity and fairness.

With respect to the standard of review, the Canadian Sport Dispute Resolution Code stipulates that the scope of the panel's review is:

6.11

(a) The Panel, once appointed, shall have full power to review the facts and apply the law. In particular, the Panel may substitute its decision for the decision that gave rise to the dispute or may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.

(b) The Panel shall have the full power to conduct a hearing de novo. The hearing must be de novo where:

(i) The SO did not conduct its internal appeal process or denied the Claimant a right of appeal without having heard the case on its merits; or

(ii) if the case is deemed urgent, the Panel determines that errors occurred such that the internal appeal policy was not followed or there was a breach of natural justice.

(c) No deference need be given by the Panel to any discretion exercised by the Person whose decision is being appealed, unless the Party seeking such deference can demonstrate that Person's relevant expertise.

However, it is to be noted that exceptionally, according to EC 2020 Olympic Games Equestrian Canada Nomination Criteria & Procedures, we find with respect to appeals the following:

5.0 Appeals

5.1 Athletes participating in the nomination process for the 2020 OG have the right to appeal against a nomination decision but only on the grounds that the HPC has failed to comply with the correct procedures outlined in the Nomination Criteria or have made a patently unreasonable decision based on the Nomination Criteria.

While the Canadian Sport Dispute Resolution Code (Code) stipulates that the standard of review is reasonableness, the EC criteria talk about "patently" unreasonableness. Because I am bound by the selection policy of EC in interpreting its selection decision, I must therefore apply the standard of review of patently unreasonable as stated in its policy.

Finally, because I find that the selectors had relevant and great expertise in the field of equestrian, I must give deference to their decision.

Conflict of interest

The Claimants alleged that Dr. Rowland was in conflict in interest because of her business relationship with Dr. Knabe with whom she co-owns and operates Cranmore Farm and that Dr. Knabe provides therapy at many of Ms. Phoenix's events.

I must say that, as mentioned by Dr. Rowland and Mr. Hood, the equestrian community is a small group of people and are often interrelated. Moreover, I do not see that Dr. Rowland's relationship with Dr. Knabe constitutes a conflict of interest that demonstrates she will be biased.

Everyone knew of the business relationship between Dr. Rowland and Dr. Knabe, and at no time in her tenure as a selector was this issue raised. Dr. Rowland also had past relationship with

several of the athletes, which did not prohibit her to effectively and diligently do her job as a selector.

In essence, I have insufficient evidence to conclude that Dr. Rowland was in conflict of interest, which would invalidate her decision as a selector. In addition, Dr. Rowland is not the only selector. There was also Mr. Wofford who concurred with her decision to select the Affected Parties and their horses. I have no allegation of apprehension of bias and of conflict of interest in this case on the part of Mr. Wofford.

I have no doubt that Dr. Rowland and Mr. Wofford made their decision based on their experience and the overall assessment of the athletes and horses. Therefore, the alleged conflict of interest of Dr. Rowland is not sufficient to invalidate her decision in this case; further, the evidence does support that she was biased in any way, shape, or form in favour of Jessica Phoenix and Pavarotti.

Bromont Event

I must say that the way the Bromont Event was organized was not optimal. It would have been better to have an event with advance notice, wherein all the athletes would have had the opportunity to participate. We have to understand, as mentioned by Mr. Hood, that the COVID-19 situation did not help, i.e. it prohibited participation of athletes from outside Canada.

That been said, it is my understanding that not all athletes compete at the same events. It appears from the testimony of Mr. Hood and Dr. Rowland that athletes select events that they will be participating in. These events are also considered in the overall assessment.

I conclude that the Bromont Event and the fact that Ms. Phoenix was the only one among the other athletes who participated in this event is not fatal to the selectors' assessment of her performance.

As mentioned, it would have been better if all the athletes had received advance notice of the event; however, in taking into consideration as to how the event was authorized late by the public health authorities, it does not void Ms. Phoenix's performance at the said event, i.e. it is not unreasonable for the selectors to have considered her performance at this event.

Selection Criteria

With respect to the selection criteria, we find the following in Appendix 1: Nomination Criteria & Procedures for the Olympic Games Eventing:

1. OBJECTIVE

(a) Primary objective: To achieve as many personal best performances as possible.

[...]

1.2 To achieve the objective of the criteria, EC will select the most competitive athlete/horse combinations to represent Canada. Competitiveness, rather than participation at the Games will be stressed, hence, all quota spots may not be filled. Meeting the conditions of these criteria does not guarantee selection.

[...]

5. EC SELECTION CRITERIA

5.1 The Selection Panel will consider the factors below and use their discretion in the nomination process in order to attain the objectives as outlined in Appendix 1, Section 1.1. The Selection Panel will at all times, use discretion, honestly, in good faith and with integrity.

In the present case, it is clear that EC adopted criteria that give latitude to the selectors who are conducting their evaluation of the athletes/horses based on their expertise. We have the minutes of the selection meetings in evidence of that.

I agree with the Claimants that the minutes do not include a detailed rationale for their decisions; however, we have in my view all the necessary elements that the selectors considered in making their final decision.

I understand that Mr. Winter disagrees with their decision and with the selection criteria. Mr. Winter also mentioned that the selection system at EC is broken. This is his opinion; moreover, this appeal is not to review the criteria developed by EC to select athletes/horses, but rather whether the selection decision of the selectors was unreasonable.

Based on the overall evidence before me, I find that the selectors have completed the necessary analysis within their reasons for selection of both athletes/horses, which reasonably led to their conclusion. The factors considered by the selectors with respect to the events completed and the mental toughness to complete them was, as mentioned by the Respondent, within the range of reasonable outcomes.

I should mention that the selection criteria adopted by EC were clear, and, as testified by Dr. Rowland, the selectors took them into consideration in their overall assessment. The criteria were also communicated to all athletes, which is not denied by the Claimants. In other words, the Claimants knew what they were being assessed for, including the identity of the selectors. All were informed in advance of the criteria.

I agree with the Respondent that minutes of the selection meetings reveal objective factors such as scores and performance metrics of the athletes/horses that were considered. There was also a subjective factor regarding competitiveness.

I agree with the Claimants that this factor is disputable; at the end, however, this is a factor that was established and that had to be considered by the selectors. Based on their vast expertise of equestrian sport, I defer to the opinion of the selectors when assessing this subjective factor, which was an important factor in selecting the two athletes/horses.

I also agree with the Respondent, in that my role is not to assess the correctness of the decision of the selectors but rather to ensure the team selection process has been conducted in a manner that is fair and devoid of bad faith, arbitrariness, or discrimination.

Conclusion

In *Prediger v. Bobsleigh Canada Skeleton*, SDRCC 15-0284/5, arbitrator Brunet stated that selection standards are reviewable only if they are patently unfair, arbitrary, or discriminatory. Thus, there is nothing patently unfair, arbitrary or discriminatory about the criteria nor about the process followed by the selectors in this case.

On the contrary, I find that the criteria adopted by EC were sufficient to assist the selectors in fulfilling their duties and making a decision. In addition, based on all the evidence before me, I cannot conclude that the Respondent did not meet his onus and that the Claimants have proven that the selectors' decisions were patently unreasonable, arbitrary, or discriminatory. Finally, the Claimants failed to establish on the balance of probabilities that the decision was biased from the part of Dr. Rowland.

I conclude, for all of the above reasons, that EC's decision to select Jessica Phoenix on Pavarotti and Colleen Loach on Qorry Blue D'Argouges is not patently unreasonable.

In closing, I would like to thank the parties for their professionalism and for complying with the short tribunal deadline due to the urgency of this case, the quality of their arguments, and their conduct during this appeal. I also thank the SDRCC staff for its work in coordinating all the administrative aspects of this arbitration.

ORDER

This appeal is dismissed.

Dated in Ottawa, this 5th day of July 2021.



Robert Neron, Arbitrator