

**IN THE MATTER OF AN ARBITRATION
OF
ADR-SPORT-RED**

Among

OLIVIER PINEAU
(the “Appellant” or “Olivier Pineau”)

and

WTF TAEKWONDO ASSOCIATION OF CANADA
(the “Respondent”)

and

PIERRE GUENETTE
(the Intervenor, referred to as “Pierre Guenette”)

ARBITRATOR: DALE STYNER

The arbitration was initiated on November 27, 2003. The arbitration was held on an extremely expedited basis in order to accommodate the needs of the parties, particularly in respect of the need for athletes to travel to Paris on November 28, 2003 for the 2003 World Qualification Tournament. Accordingly, the hearing was held on November 28, 2003.

BACKGROUND

The relevant selection criteria and procedure for the selection of Taekwondo athletes to attend the World Qualification Tournament are contained in Schedule “B” of the Canadian Olympic Committee/WTF Taekwondo Association of Canada selection agreement (“Schedule B”).

The Respondent was allowed to select two male athletes to attend the World Qualification Tournament.

The Respondent was required, under Schedule B, to produce a “Ranking List 1” based on the results of certain previous competitions. Each athlete was awarded points based on how high he placed at each designated competition. The Respondent was then required to select the top two

ranked men from Ranking List 1. The Respondent produced a Ranking List 1, with four male athletes tied for the most points.

Schedule B (at section 2.3.3) provides a methodology for breaking such ties. The relevant wording respecting the breaking of ties is as follows:

Step 2 – Dealing with Tied Scores In the event of a tied score on Ranking List 1, between 2 or more athletes being considered for selection to a WTF Qualification Event, a Selection Committee will be established of 3 or more members selected by the WTF Taekwondo Association of Canada Executive Committee, and who do not have a conflict of interest with the athlete under consideration.

The Selection Committee will break the tie based on their evaluation of past performance of athletes in question, by comparing the individual results of the tied athletes where they competed in the same previous events, backing up in time and giving more importance to the more difficult events. The athlete who places higher at the event in question would rank higher than the athlete who achieved a lesser result. The events will be considered in the following sequence – 2003 World Taekwondo Championships, 2003 Pan Am Games, 2003 Olympic Weight Division National Team Selection Event, 2003 Canadian National Taekwondo Championship, 2002 World Cup, 2002 Olympic Division Canadian National Taekwondo Championship and 2002 Canadian National Taekwondo Championship. (emphasis added)

The Respondent established a three-person Selection Committee (the “Selection Committee”) under Schedule B. On November 3, 2003, the Selection Committee rendered its decision. The Selection Committee reviewed the previous results of the four tied male athletes, and Evangelos Ligeros and Pierre Guenette were selected to represent Canada at the World Qualification Tournament. Two of the Selection Committee members – Master Woo Yong Jung and Master Robert White – rated the tied athletes in the following order:

1. Evangelos Ligeros
2. Pierre Guenette
3. Olivier Pineau
4. Jocelyn Addison

The third Selection Committee member – B. Gen. Robert K. Martineau – rated the athletes as follows:

1. Pierre Guenette
2. Olivier Pineau
3. Evangelos Ligeros
4. Jocelyn Addison

As a result, the Selection Committee’s decision was that Evangelos Ligeros and Pierre Guenette had been determined to be the top two male athletes and would represent Canada at the World Qualification Tournament. In its decision (the “Selection Committee Decision”), the Selection

Committee stated that it had broken the ties according to the criteria outlined in Section 2.3.3 of Schedule B.

Olivier Pineau appealed the Selection Committee Decision on the ground that there was an incorrect application of the internal nomination procedures of the Respondent organization. This is the only recognized ground for appeal (under Section 9. of Schedule B). The Respondent established a three-person Appeal Board which heard the appeal. On November 20, 2003, the Appeal Board denied Olivier Pineau's appeal.

On November 27, 2003, Olivier Pineau filed a Request for Arbitration with ADR-Sport-RED. The remedy being sought was somewhat lengthy, but certainly included a determination (either directly or through a referral back to the Selection Committee) that Olivier Pineau be determined to be one of the top two male athletes under Schedule B and that he be named to the team to attend the World Qualification Tournament.

ISSUE

The issue, then, was whether the Selection Committee had incorrectly applied the tie-breaking nomination procedures contained in Schedule B.

HEARING

Procedure

I was appointed arbitrator by Richard McLaren, Co-Chief Arbitrator, pursuant to Section RA-15.2(d) of the ADR-Sport-RED Code of Procedure, on November 27, 2003, who decided this matter was to be dealt with on an expedited basis. The appointment was notified to the parties on November 28, 2003.

The hearing of this matter was held by teleconference on November 28, 2003. Attending the teleconference were Olivier Pineau, the Respondent, Pierre Guenette, Dale Styner, Odette Lagace and Francois St. Pierre. Odette Lagace and Francois St. Pierre are both from the Court Office of ADR-Sport-RED (the "Court Office")

The Court Office made extensive efforts to contact Evangelos Ligeros, as a potential affected party, and, therefore, potential intervenor. However, the Court Office received no response from Evangelos Ligeros and the hearing proceeded without his participation.

The hearing was to be held exclusively in English, since all correspondence and documentation were in English. Complicating an already tight timeline, Pierre Guenette, who speaks primarily French, requested that he be allowed to present his observations in French and that these be translated into English by a translator. Although Section RA-23(a) of the Code provides that each party makes the arrangements and supports the costs of its interpreters, there wasn't enough time for this due to the extremely tight timeframe we were facing. Fortunately, Odette Lagace volunteered to translate between French and English as required, under the agreement that this would be done to facilitate the process in these exceptional circumstances, without any liability. All parties agreed with this solution.

Olivier Pineau's Case

Olivier Pineau presented his arguments as to why the Selection Committee erred in not selecting him as one of the top two male athletes under the Schedule B tie breaking procedure. He focused on the sentence in Schedule B's tie-breaking procedure stating: "The athlete who places higher at the event in question would rank higher than the athlete who achieved a lesser result." The Appellant focused on the 2003 World Taekwondo Championships ("the Worlds"), with some limited discussion of the Pan Am Games (this is consistent with the focus of the Selection Committee and is appropriate given that these two events are major events and Schedule B requires that they be considered first and second, respectively). The Appellant stated that he was one of only two male athletes to achieve a top 32 finish at the Worlds. Accordingly, he argued, he had one of the two highest placings within the meaning of tie breaking procedure, and, therefore, the Selection Committee should have selected him as one of the top two male athletes to represent Canada at the World Qualification Tournament.

In other words, Olivier Pineau argued that Schedule B provides a clear and objective means of breaking ties – as amongst tied athletes, an athlete placing higher at Worlds would have the tie broken in his favour. If this is correct, then the fact that Olivier Pineau was one of only two athletes to place in the top 32 at Worlds would indeed make him one of the top two athletes under the tie breaking system.

Again, all parties focused on the results at Worlds, so there is no real issue as to whether other results should be considered and weighted. There is also no disputing the fact that Olivier Pineau is one of only two male athletes to have made the round of 32 at Worlds. The real issue, then, becomes one of whether there is any room for subjectivity on the part of the Selection Committee under the tie breaking system of Schedule B.

The Respondent's Case

Master White presented the Respondent's case. The Respondent focused on the first sentence of the paragraph of Schedule B setting out the tie breaking procedure. This sentence states: "The Selection Committee will break the tie based on their evaluation of past performance of athletes in question, by comparing the individual results of the tied athletes where they competed in the same previous events..." Master White pointed out that this clearly indicated that there was to be subjectivity in the Selection Committee's decision since the tie break was to be based on "their evaluation of past performance". The Selection Committee had gone to considerable lengths to determine how to properly administer the Schedule B tie breaking system, including whether this was to be a subjective decision (that is, primarily the Selection Committee's evaluation of performances at Worlds and Pan Am Games) or an objective decision (that is, simply assigning a relative placing for athletes based on what ranking (such as top 32) each athlete achieved at the stated events). In addition to internal meetings and debates during three conference calls, the Selection Committee, "in its effort to ensure fair and due process" solicited feedback from the Canadian Olympic Committee (the "COC") respecting how to administer its tie breaking procedure. The COC responded that "...there does not appear to be a simple solution to the multiple-tie situation that you are trying to resolve..."

The Selection Committee determined that the requirement that they evaluate past performance under Schedule B implicitly suggested that there would be a subjective evaluation component to their decision. Otherwise, the alternative of a simple mathematical points based system could have been set out in Schedule B (as it was for Step1) and there would be no need for a Selection Committee.

Accordingly, the Selection Committee reviewed the performances of the tied athletes at the Worlds and Pan Am Games and arrived at its decision that Olivier Pineau's performance at those events was the third best of the four athletes. This decision included an assessment of wins, losses and perceived level of opponents faced. The Selection Committee members then placed the athletes according to their evaluation of the each athlete's performance in order to arrive at a comparative ranking among the athletes.

The Respondent also addressed the possibility that the sentence reading "The athlete who places higher at the event in question would rank higher than the athlete who achieved a lesser result" requires an objective comparison of relative results. The Respondent submitted that, if such an objective comparison is required, then this comparison would be only as between athletes competing in the same weight division. Under this interpretation, the two sentences do not conflict since the Selection Committee would focus on its evaluation of past performance only in cases where athletes did not compete in the same weight division. In the matter under consideration, none of the athletes competed in the same weight division.

Pierre Guenette's Case

Pierre Guenette went through a fairly detailed analysis of historic results of Olivier Pineau, Evangelos Ligeros, and himself. He noted that he and Olivier Pineau were the only two male athletes to achieve a top 32 finish at Worlds.

DECISION

In determining whether the Selection Committee correctly applied the tie breaking procedures contained in Schedule B, one must determine whether there is room for subjectivity as suggested by the Respondent, or, alternatively, is the determination process to be almost purely objective as suggested by Olivier Pineau.

Again, the pertinent two sentences of Schedule B are as follows:

The Selection Committee will break the tie based on their evaluation of past performance of athletes in question, by comparing the individual results of the tied athletes where they competed in the same previous events, backing up in time and giving more importance to the more difficult events. The athlete who places higher at the event in question would rank higher than the athlete who achieved a lesser result.

The Respondent relies primarily on the first sentence as clearly indicating that there is to be a significant subjective evaluation component.

Olivier Pineau relies primarily on the second sentence as clearly indicating that the Respondent must base its decision on where the tied athletes placed at the relevant competitions (primarily Worlds and Pan Am Games).

There appear to be several alternatives in terms of reading the two sentences together and coming to an interpretation of their combined meaning. However, my analysis focused on the two interpretations suggested by the parties to this appeal.

The first potential interpretation, as submitted by Olivier Pineau, is that the second sentence qualifies the first sentence. Under this interpretation, an objective analysis would be required based strictly on what round athletes had achieved at the relevant events. This interpretation has merit, but the problem with this interpretation is that it would mean that the second sentence virtually removes any need for the Selection Committee to evaluate past performance as required under the first sentence.

Alternatively, as submitted by the Respondent, the first sentence suggests an emphasis on the Selection Committee subjectively evaluating past performances and the second sentence then provides for athletes being placed according to this subjective evaluation. This interpretation also has merit, but the problem is to then ascribe some meaning to the words “places higher” in the second sentence. The Respondent concluded that it would be for the Selection Committee members to place athletes based on their evaluation of past performance. In other words, the higher placing contemplated by the second sentence is the placing determined by the members of the Selection Committee. Alternatively, the Respondent submitted that if athletes competed in the same weight division at a competition, then, and only then, would the Selection Committee be required to limit its evaluation to a consideration of the round to which each athlete proceeded in that competition.

This arbitrator has carefully reviewed to two proposed interpretations many times. There is clearly some ambiguity as to the meaning of the two sentences when considered together. I believe that the Selection Committee was aware of this ambiguity and considered at least these two alternative interpretations. The Selection Committee then arrived at a split decision, with two members believing that the Schedule B tie breaking system required a focus on their evaluation of past performance and one member of the Selection Committee believing that the Selection Committee must rank the athletes based on their respective placing (that is the round to which each athlete proceeded), with no consideration of wins, losses, level of competition or other criteria.

In order for the appeal to succeed, the Selection Committee would have to have incorrectly applied the tie breaking procedure of Schedule B. In determining whether the Selection Committee incorrectly applied the tie breaking procedure, I considered whether the Selection Committee’s interpretation was reasonable and concluded that its interpretation was reasonable. The statement that “The Selection Committee **will break the tie based on their evaluation of past performance...**” clearly suggests a strong element of subjective evaluation. The Selection Committee placed emphasis on the quoted phrase and subjectively evaluated past performances. Given the ambiguity of the wording contained in the tie breaking procedure, and further given that the Selection Committee thoroughly considered alternative interpretations of that tie breaking procedure, I have determined that the Selection Committee’s interpretation was reasonable.

Therefore, I conclude that the Selection Committee did not incorrectly apply the tie breaking procedures contained in Schedule B.

In reaching my decision, I have considered the arguments put forward by Olivier Pineau. His arguments were clear and compelling. Nonetheless, there is a significant amount of ambiguity in the Schedule B tie breaking procedure, and this ambiguity has led me to conclude that the Selection Committee's interpretation was reasonable.

The appeal is denied. Accordingly, the Selection Committee Decision is confirmed and the two male athletes named by the Respondent will attend the 2003 World Qualification Tournament.

The arbitrator continues to retain jurisdiction under Rule RA-22 of the ADR-Sport-RED Code.

Dated at Calgary, Alberta this 3rd day of December, 2003.

Dale Styner
Arbitrator