

SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)

No. 08-0074

NICOLAS MAYER

Represented by Mr. Michaël Bardagi,
Bardagi Sénéchal, Attorneys

Claimant

v.

CANADIAN FENCING FEDERATION (CFF)

Represented by Ms. Gabriela Mayer
Representative for the CFF Board of Directors

Respondent

- and -

PHILIPPE BEAUDRY

Represented by Mr. François Beaudry, and by
Mr. Hugo R. Martin and Mr. Jean M. Alarie, *Boucher Harper, Attorneys*

Affected Party/Intervener

AWARD

April 24, 2008

Mr. Stephen L. Drymer,
Arbitrator

I, the undersigned arbitrator, having been duly designated and having duly heard the evidence and submissions of the Parties, conclude and decide the following:

I. FACTUAL AND PROCEDURAL CONTEXT

1. The Claimant, Mr. Nicolas Mayer, is an amateur fencer (sabre fencer) and member of the Canadian Fencing Federation (“**CFF**”).
2. The Respondent, the CFF, is a national sporting federation devoted to the development of Canadian fencing under the sponsorship of the international fencing federation (“**FIE**”).
3. The Intervener, Philippe Beaudry, is also an amateur fencer (sabre fencer) and member of the CFF.
4. On March 26, 2008, the CFF Selection Committee rendered a decision to choose one male sabre fencer to attend the 2008 Pan-Am Zone Olympic Qualifier, a tournament, the winner of which receives nominative FIE qualification for the 2008 Olympic Games (“**Decision**”). The tournament in question, to be held from April 26 to April 28, 2008 in Santiago de Queretaro, Mexico, is the final opportunity for a Canadian male sabre fencer to qualify for the 2008 Olympic Games.
5. On April 2, 2008, Mr. Mayer lodges an appeal to the CFF appeal board (“**appeal board**”) with respect to the choice of Mr. Beaudry for the qualifier in question.
6. On April 9, 2008, the appeal board concludes that “the Selection Committee made the selection in accordance with the statements found in the *2007-2008 HP Program Selection Policies*, as it was supposed to do” [unofficial translation], and rejected the appeal lodged by Mr. Mayer.

7. On the same day, April 9, 2008, Mr. Mayer submits a Request to the Sport Dispute Resolution Centre of Canada (“**SDRCC**”) pursuant to Section 3.4 of the *Canadian Sport Dispute Resolution Code* (“**Code**”), in which he appeals the appeal board’s decision (“**Request**”).
8. On April 10, 2008, the CFF submits its Answer to the Request pursuant to Section 3.7 of the Code (“**Answer**”).
9. Having been duly advised of Mr. Mayer’s Request on April 9, 2008, Mr. Beaudry submits an Intervention pursuant to Section 6.14 of the Code on April 10, 2008 (“**Intervention**”).
10. April 10, 2008 is indeed a busy day. At 10:30 a.m., an administrative call is held by teleconference, presided over by Ms. Marie-Claude Asselin, Executive Director of the SDRCC, with the participation of the Parties and their representatives.¹ The purpose of the call is to clarify the administrative procedures surrounding the arbitration process initiated by Mr. Mayer’s Request. Minutes from the call are sent to the Parties by Ms. Asselin.
11. That same evening, at 5:30 p.m., a preliminary hearing is held via teleconference, presided over by the undersigned. The Parties and their representatives² participate, as does Ms. Nathalie C. Labelle, Executive Assistant for the SDRCC. The purpose of the preliminary hearing is to determine the schedule and proceedings of the hearing. Minutes from the preliminary hearing are transmitted to the Parties by the SDRCC.
12. The hearing is held on the day following the pre-hearing, April 11, 2008 specifically, and in accordance with what was agreed upon in the preliminary hearing, a hearing is held at the SDRCC offices from 10:30 a.m. to 4:45 p.m. The Parties present their evidence and submissions and respond to questions asked by

¹ In this call, Mr. Beaudry is represented by Mr. François Beaudry.

² In this call as in the hearing held April 11, 2008, Mr. Beaudry is represented by Mtres Martin and Alarie.

other Parties during the cross-examinations. They also answer questions addressed to them by the undersigned. Mr. Mayer testifies for his own cause, Ms. Gabriela Mayer (no relation to the Claimant) testifies for the CFF, and Mr. Danek Nowosielski, High Performance Director of the CFF testifies for Mr. Beaudry. Mr. Beaudry himself is not called to testify.

13. Given the CFF's requirement to inform the FIE of their male sabre fencer selection for the Olympic qualifier at the latest on Saturday, April 12, 2008 at the end of the day (in Europe), and as agreed upon with the Parties, I rendered my decision on April 12, 2008, in the morning, the reasons for which are to follow. This decision was transmitted to the Parties by the SDRCC shortly thereafter.
14. According to my decision of April 12, 2008:
 - (i) The appeal is granted;
 - (ii) The decision rendered on April 9, 2008 by the CFF Selection appeal board is overturned.
 - (iii) The selection policies stated in the *Canadian Fencing Federation – 2006 - 2008 HP Program - Selection Policies* should have been and must be respected and applied with respect to selection for the 2008 Pan-Am Zone Olympic Qualifier;
 - (iv) Mr. Mayer must be ranked in the selection ranking of the CFF High Performance Program according to the policies mentioned above in order to be able to participate in the 2008 Pan-Am Zone Olympic Qualifier for men's sabre fencing;
 - (v) The parties will be able to submit their observations concerning the award and extent of the fees by virtue of Section 6.23 of the *Canadian*

Sport Dispute Resolution Code, of a maximum length of two (2) pages within a period of three (3) days.

15. On April 14, 2008, the CFF submits an application for interpretation of my decision to the SDRCC pursuant to Section 6.24 of the Code, stating that it has some difficulty interpreting my decision and asking that I confirm its understanding “that the CFF select Mr. Mayer for the Pan-Am Zone Olympic Qualifier (see (iv) in the email)” [unofficial translation].
16. In response to this application for interpretation, Mr. Mayer submits that my decision, rendered April 12, 2008, ordering the CFF to select him for the tournament in question is clear and no interpretation is warranted. Mr. Beaudry, for his part, pleads the supposed “illegality” of the CFF’s application given the clarity of my decision which, according to him, means that the CFF selects him for the tournament in question.
17. On April 15, 2008, I called a hearing to discuss the application for interpretation, as requested by Mr. Beaudry. This hearing was held via teleconference between 9:00 p.m. and 10:00 p.m. After having heard the arguments of all Parties, I rendered a decision pursuant to Section 6.24 in which I concluded that there were indeed reasons requiring interpretation, as was shown by the Parties’ diametrically-opposed interpretations. As for the interpretation, I clarified that my decision was “that the CFF select Mr. Mayer for the Pan-Am Zone Olympic Qualifier” [unofficial translation], therefore exactly how the CFF and Mr. Mayer understood it. In response to my question, the representatives from each Party confirmed that this clarification renders my decision of April 12, 2008 clear and unmistakable to them all.
18. As indicated, given the urgent atmosphere in which the arbitration occurred as well as the need for a decision to be rendered the day following the hearing (before the end of the day in Europe), my decision of April 12, 2008 was rendered with no further explanation.

19. The present award consists in my reasoned decision.

II. THE PARTIES' POSITIONS

20. The Parties' positions are described in their written submissions, and they were further expressed and elaborated during the hearing. The summaries below must not be considered as comprehensive accounts of the Parties' evidence, submissions, or arguments. On the contrary, they are outlines of the main points of their positions; points that I consider most important in deciding the issue raised by Mr. Mayer's Request: should the decision rendered on April 9, 2008 by the appeal board be maintained, in which case the decision to select Mr. Beaudry for the Olympic qualifier also be maintained, or should this decision be reversed on the grounds that the CFF should have selected and should select Mr. Mayer?
21. If I do not cite each allegation, argument, or claim made by the Parties, this does not mean that I did not hear them.
22. In short, Mr. Mayer claims that it was unjust and wrong of the CFF to modify, in November 2007, in the *2007-2008 HP Program, Selection Policies* ("**2007-2008 Selection Policies**"), the number of international pre-assigned tournaments in 2006 for the purposes of ranking high-performing male sabre fencers to be selected for the 2008 Pan-Am Zone Olympic Qualifier. He maintains that these selection policies or criteria were modified "along the way" since in December 2006, the CFF issued its selection criteria in a document entitled *2006-2008 HP Program, Selection Policies* ("**2006-2008 Selection Policies**").
23. Among other changes brought to the 2006-2008 Selection Policies, it has been noted that in the 2007-2008 document, the number of international competitions identified for selection purposes was reduced from six (6) to five (5). One of the outcomes of this change is that the Madrid Grand Prix/World Cup competition, an international selection competition listed in the 2006-2008 Policies, no longer figured among the international selection competitions in the 2007-2008 Policies.

24. Such being the case, and with Mr. Mayer having won 50 points at the 2007 Madrid Grand Prix (in relation to the 0 points gained by Mr. Beaudry at the same tournament), he maintains that the changes brought to the Selection Policies in the 2007-2008 booklet had the effect of giving an unfair and discriminatory advantage to Mr. Beaudry in the two sabre fencers' race for Olympic selection.
25. More generally, Mr. Mayer claimed that it was illegal to make these changes "along the way" given the public statements made by the Canadian Olympic Committee ("COC") in 2005 and by the CFF in 2006 concerning their desire to develop, before the end of 2006, selection policies that span two years, 2006-2008 for example, for selecting the Canadian Olympic Team for the 2008 Olympic Games.
26. Furthermore, Mr. Mayer maintains that two (2) of the three (3) appeal board members were in conflict of interest concerning the decision. He also insists that his rights were violated since he did not have the chance to hear the arguments made by the other Parties to the appeal board; he had to appear before the board without his lawyer; the board did not consider all the evidence he presented; and the reasons behind the decision were incomplete.
27. For its part, the CFF states that the HP Committee's policy is to revise the Selection Policies each year, particularly as they relate to the choice of international tournaments held for selection purposes, and that the 2007-2008 Selection Policies were developed and published using this usual process. The federation denied any discrimination or unjust effects relating to the 2007-2008 Policies, and affirmed that no official objection or submission was made by Mr. Mayer before all the competitions that influence the ranking leading to the contested selection were completed and the ranking resulting therefrom was established in February 2008. In short, the CFF claimed that by selecting Mr. Beaudry for the 2008 Pan-Am Zone Olympic Qualifier, it was duly respecting the policies currently in effect, published, and well known to all concerned. Athlete

ranking and selection for the tournaments in question are, according to the CFF, purely a matter of “mathematics” resulting from applying the stated criteria.

28. Concerning Mr. Mayer’s claims about the conflicts of interest and other procedural errors affecting the appeal board’s decision, the CFF denied them entirely.
29. Mr. Beaudry, on his part, maintains that his selection and the CFF appeal board’s decision are neither undesirable nor contrary to the natural principles of justice. He mentions that the 2006-2008 Policies should merely be considered as a “guideline” and that they were subject to modification particularly in relation to international selection competitions. He argues that the appeal board’s decision cannot be reversed unless there was an error applying the Selection Policies at hand, which is not the case here, given that the appeal board applied the 2007-2008 Policies correctly.
30. In addition, Mr. Beaudry believes that even though a decision doesn’t mention any document or argument brought up by the Parties, this does not vitiate said decision in any way. He maintains that there was no conflict of interest affecting the appeal board’s decision and that Mr. Mayer knew all the members of the board and never brought up this issue before having filed his Request to the SDRCC. Regarding Mr. Mayer not having the chance to hear the other arguments or testimonies before the appeal board, Mr. Beaudry also denies that this vitiates the decision, as the Claimant states.

III. DISCUSSION

31. It is appropriate to recall certain basic principles stated in the Code, according to which this Arbitration took place and the current award was issued.
32. With respect to the onus of proof, Section 6.8 of the Code reads as follows:

6.8 Claimant in Team Selection

Where an athlete is involved in a proceeding as a Claimant in a team selection dispute, the onus of proof will be placed on the Respondent.

33. I would like to note that this Section was brought to the attention of the Parties, namely to the CFF, during the April 10, 2008 preliminary hearing. I would also like to note that throughout the Arbitration, at no time did any of the parties' representatives object or plead contrary thereto.
34. Sections 6.17 and 6.18 state the following with regard to the Arbitration procedure and the Arbitrator's scope of review:

6.17 Procedure of the Panel

(a) Subject to the specific provisions set out in Article 6, the Panel shall have the power to establish its own procedures so long as the Parties are treated equally and fairly and given a reasonable opportunity to present their case or respond to the case of another Party as provided for by this Code and applicable law. The Panel may take such steps and conduct the proceedings as considered necessary or desirable by the Panel to avoid delay and to achieve a just, speedy and cost-effective resolution of the dispute.

(b) The Arbitrator may require witnesses to testify under oath or affirm the evidence that they are about to give.

6.18 Scope of Panel's Review

The Panel shall have full power to review the facts and the law. In particular, the Panel may substitute its decision for:

- (i) the decision that gave rise to the dispute; or
- (ii) in case of Doping Disputes, the CCES's assertion that a doping violation has occurred and its recommended sanction flowing therefrom, and may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.

35. Section 6.22 of the Code, namely subparagraphs (a), (d), and (h), concerns arbitral awards:

6.22 Awards

(a) All awards shall be in writing, dated and signed by the Panel. For a Panel of three (3) Arbitrators, the award shall be made by a majority decision or if all three (3) Arbitrators have different decisions, by the President alone. Subject to Subsections 6.22(b) and 6.22(c), Arbitration decisions shall be communicated to the Parties within seven (7) days of completion of the hearing. In the absence of an agreement between the Parties to the contrary, the Panel shall also provide written reasons for the award. Such written reasons, if any, shall be provided to the Parties within fifteen (15) days of the completion of the hearing.

(d) Subject to Subsection 6.22(e), the award shall be final and binding upon the Parties. There is no right of appeal on questions of law, fact or mixed questions of fact and law. Proceedings before a Panel may not be restrained by injunction, prohibition or other process or proceeding in a court and are not removable by certiorari or otherwise by a court.

(h) Each case must be determined on its facts and the Panel shall not be bound by previous decisions, including those of the SDRCC.

36. The matter of costs and the Arbitrator's obligation concerning cost determination and distribution among the Parties is covered by Section 6.23 of the Code:

6.23 Costs

(a) Subject to Subsection 6.23(b) below, each Party shall be responsible for his or her own costs and that of his or her witnesses. A party is entitled to French/English interpreter for Arbitration. Any interpreter requested for Arbitration shall be selected and paid by the SDRCC.

(b) The Panel shall determine whether there is to be any award of costs and the extent of any such award. When making its determination, the Panel shall take into account the outcome of the proceedings, the conduct of the Parties and their respective financial resources, intent, settlement offers and each Party's willingness in attempting to resolve the dispute prior to Arbitration.

(c) The filing fee retained by the SDRCC can be taken into account by a Panel if any costs are awarded.

37. Section 6.24 of the Code deals with interpretation:

6.24 Interpretation of an Award

(a) If a Party believes the award is unclear, incomplete, or ambiguous or its components are contradictory or contrary to the reasons, or it contains clerical mistakes or a miscalculation of figures, such Party may request the assistance of the RF in understanding the award. While the explanation of the RF is not binding, access to the RF is intended to assist Parties to understand decisions of the Panel.

(b) After consulting with the RF, the Party may apply to the Panel for the interpretation of an award.

(c) When an application for interpretation is filed, the Panel shall review whether there are grounds for interpretation. The Panel shall rule on the application within one (1) week following the submission of the application to the Panel.

38. Finally, Section 6.25 of the Code stipulates the following with respect to the law on Arbitrations:

6.25 Applicable Law for Arbitrations

The applicable law for Arbitrations shall be the law of the Province of Ontario and the Arbitration legislation in place in Ontario shall be the law of SDRCC Arbitrations.

39. I find it necessary and important to note that even though Mr. Mayer questions the fairness and reasonableness of the CFF appeal board's decision, he does not question the good faith of the Federation, its staff, or its various committees. For that matter, I myself had the opportunity to witness the good faith, candor, and integrity – in other words, the credibility – of the CFF representatives and staff that appeared before me or participated in any of the conference calls held for Arbitration purposes.
40. I would like to add that I was equally impressed by the good faith shown by Mr. Mayer in his testimony. He is in no way a “poor loser” as was claimed by Mr. Beaudry's representative during the hearing.
41. As pleaded and argued by the Parties, Mr. Mayer's Request brings up two issues surrounding the April 9, 2008 decision rendered by the CFF appeal board. The first concerns the decision's fairness (“correctness”); the other is more a question

of natural justice, such as a supposed conflict of interest and supposed violation of Mr. Mayer's right to be heard. Given my conclusions regarding the first issue, conclusions reflected in my decision rendered on April 12, 2008 and explained below, it is not necessary that I decide on the second issue.

42. Despite their efforts, neither the CFF nor Mr. Beaudry succeeded in proving the correctness of the appeal board's decision and of the way the Selection Policies were applied in this case.
43. The Respondent and Intervener argue that the appeal board did not commit any errors since the 2007-2008 Selection Policies were applied correctly – that is to say, the terms thereof were respected – to “mathematically” select the male sabre fencer with the right to participate in the 2008 Pan-Am Zone Olympic Qualifier. Nevertheless, the error rests precisely in the application of these policies, in this way.
44. Evidence submitted by the Parties leads to the conclusion that it was unfair to reduce, in 2007, pursuant to the 2007-2008 Selection Policies, the pre-established number of international tournaments for High Performance athletes for the purposes of selecting a male sabre fencer to compete in the 2008 Pan-Am Zone Olympic Qualifier. Given the rotating yearly ranking system used by the CFF, Mr. Mayer requests that the Madrid Grand Prix/World Cup competition be added for ranking purposes to the list of international selection competitions designated in the 2007-2008 Policies, in accordance with the 2006-2008 Selection Policies. He is right. To deprive Mr. Mayer, in November 2007, of the points he gained in this tournament held earlier in 2007 is unjust and inequitable, and gives an unfair advantage to Mr. Beaudry.
45. As the Claimant maintains, the 2006-2008 Selection Policies were published with the express intent of establishing selection criteria that would remain in effect for two years, that is to say until the 2008 Olympic Games. In fact, by issuing two-year selection policies, the CFF acted within the context and according to the

Team Selection Policy – Beijing, CHN 2008 timeframe approved by the COC in October and November 2005.

46. In November 2006, when the 2006-2008 Selection Policies were released, only the 2006-2007 tournament dates were known. On this issue, the evidence is clear and there is no debate between Parties. This is why the competition calendar, as stated in the 2006-2008 Selection Policies, only identified international selection competitions occurring in 2007.

47. However, these same policies also stipulate that the 2008 international selection competitions “will be published once the FIE 2008 international calendar is confirmed” [unofficial translation]. Modifying these selection policies, namely with respect to international selection competitions, in order to add competitions in 2008 would have been one thing, and it would have been acceptable. It was something else entirely when in November 2007, the CFF issued selection policies reducing the number of international selection competitions from six (6) to five (5) and the number of best results counting for international selection from five (5) to four (4). As indicated, the non-disproved evidence is such that these changes in policy resulted in depriving Mr. Mayer of points that he had earned in the 2007 Madrid Grand Prix/World Cup tournament for selection purposes in the 2008 Pan-Am Zone Olympic Qualifier. These points should have counted for these purposes according to the 2006-2008 Selection Policies.

48. The fairness of Mr. Mayer’s claim that in 2007 the CFF “changed the rules” and did so “along the way” is apparent in the first sentence of the first paragraph of the first page of the 2006-2008 Selection Policies, which reads as follows:

This document contains the selection policies, which will be used to select athletes for the Canadian Fencing Federation’s (CFF) High Performance Program (HPP) and projects within the CFF HPP *during the 2007 and 2008 seasons.*

[our emphasis]

49. It is true that on the same page, these policies declare that “this document should only be considered as a guideline” and that “the CFF reserves the right to make any necessary changes to this document” [unofficial translation]. But reading these passages in their context clearly reveals that they are referring to necessary modifications with the purpose of updating the international selection competition calendar. This is also how I interpret the testimonies of Ms. Mayer and Mr. Nowosielski. I would like to further note that Ms. Mayer has admitted quite candidly that it is unjust and inequitable to change selection criteria once a selection process is already underway.
50. I would also like to state, and I find it pertinent that in the 2007-2008 Selection Policies, under the heading “*Changes to this Document*”, we find the following principles:

This clause shall not be used to justify changes after a competition or trials which formed part of the internal nomination procedure unless it is related to an unforeseen circumstance.

The purpose of this section is to allow for changes to this document that may become necessary due to a typographical error or a lack of clarity in a definition or wording before it has an impact on athletes. The purpose of such changes must be in order to avoid disputes over the meaning of the provisions of this document rather than to allow changes to be made to justify selection of different athletes than would have otherwise been selected.

Such changes must be reasonably justifiable in accordance with fundamental principles of natural justice and procedural fairness.

51. While these principles, which in fact rationalize the idea that it is unjust and inequitable to change selection criteria once a selection process is already underway, do not appear among the explicit clauses of the 2006-2008 Selection

Policies, it is undeniable that they form an implicit part of these policies. This is indeed what Ms. Mayer stated, as indicated, when she admitted that it would be incorrect to change selection criteria once a selection process is already underway.

52. Regardless of the CFF's intentions – and as indicated above, no one contests its good faith – it did not have the right to reduce the number of international selection competitions once the selection process fixed in the 2006-2008 Selection Policies was underway. It did not have the right to cancel the Madrid Grand Prix/World Cup tournament, a tournament that appears in the list of designated international selection competitions in the 2006-2008 Selection Policies. I repeat; depriving Mr. Mayer of the points earned during that competition was unjust and gave an unfair advantage to Mr. Beaudry in the selection race for the 2008 Pan-Am Zone Olympic Qualifier.

53. Just like in the case of *Judith Island and Dax Adam vs. Equine Canada et al.* (SDRCC/CRDSC 04-008 and 04-018), I conclude that there was a lack of procedural fairness in the present case. Although the 2007-2008 Selection Policies were issued with good intentions, the reduction in the number of international selection competitions took away Mr. Mayer's right to be ranked in the context of a just and equitable selection process.

54. Among the evidence submitted to me, there is a document entitled *Canadian Fencing Federation - HPP Athlete Agreement*, a formal agreement between the CFF and its High Performance Program athletes. In the preamble to this agreement, we find, among other things, the following principles:

WHEREAS the Athlete wishes to be an active competitor in CFF sanctioned events with his or her rights and obligations clearly defined;

(...)

WHEREAS the CFF recognizes the need to clarify the relationship between the CFF and the Athlete by establishing their respective rights and obligations.

55. Under the heading *CFF Obligations*, the following CFF obligation, among other things, can be found:

(c) conduct selection of members to all national teams in a manner that is in conformity with the published selection criteria and generally accepted principles of natural justice and procedural fairness.

56. I find that in respect thereof, the CFF did not fulfill its duty regarding its agreement with Mr. Mayer. Just as the Court concluded in the case of *Patrick Kelly vs. Canadian Amateur Speed Skating Association* (Unreported decision, Ontario Court (General Division), (Ottawa), File No. 89101/95 (1995)), with all due respect to the Federation in question's right to formulate its own selection policies, I do not believe that the CFF could, in 2007, modify the selection criteria, notably the number of international selection competitions that had been previously stated in the 2006-2008 Selection Policies. Such an attempt violates the agreement between the CFF and Mr. Mayer.

57. In the arbitration award issued in the case of *Karine Sergerie vs. WTF Taekwondo Association of Canada et al.* (ADR-03-0027), the arbitrator expressed himself as follows:

This case is an illustration of the importance for a national federation's selection committee to clearly understand their own internal selection criteria in its fine details.

58. This observation also applies in the present case. As stated by the arbitrator in the *Sergerie* case:

30. One cannot set aside the reasonable expectation these [selection] criteria create for the ... athletes, their entourage, and the sporting community at large.

59. Mr. Beaudry argues that the principle to retain from the *Sergerie* case is that an arbitrator cannot reverse a selection made by a sport federation unless there had been an error in the application of the rules in question. In this respect, the CFF made such an error.
60. I also refer to the Quebec Court of Appeal decision in *Deschênes vs. Canadian Olympic Association* ([1988] A.Q. No. 1646), in which the Court of Appeal reminded the Canadian Olympic Association and the CFF of its obligation to respect the published selection criteria as they risked failing to be impartial and loyal towards the athletes. In this case, the Court of Appeal concluded that the courts of law cannot refuse to help a fencer when the Federation violates, at the expense of the athlete, “the rules and regulations that it had itself pre-established” [unofficial translation]. In the present case, we are faced with similar circumstances.
61. When selecting a male sabre fencer for the 2008 Pan-Am Zone Olympic Qualifier, the CFF should have included the Madrid Grand Prix/World Cup tournament in the international selection competitions used for this purpose, with the result, according to the non-disproved evidence, *that Mr. Mayer rather than Mr. Beaudry would have therefore been first in the selection ranking* and would have been chosen for the qualifier in question.
62. This obviously doesn’t mean that the selection should have been made exclusively in accordance with the competitions mentioned in the 2006-2008 Selection Policies or that the 2007-2008 Selection Policies are invalidated. As indicated, the 2006-2008 Selection Policies only mention the 2006-2007 season competitions; they explicitly allow for the subsequent identification of selection competitions for the 2007-2008 season, once the 2007-2008 FIE international calendar is

confirmed. That being said, neither of the Parties has asked that the selection in question be made exclusively according to the international competitions listed in the 2006-2008 Selection Policies, nor that the 2007-2008 Selection Policies be invalidated.

63. It must also be made clear that the present adjudication only targets the ranking used in selection for the qualifier in question (men's sabre) and not the high performance selection rankings in general. In other words, the present award only applies to the present case and only targets Mr. Mayer and the only athlete identified as potentially affected by his claim, Mr. Beaudry.
64. Finally, I reject the arguments made by the CFF and Mr. Beaudry regarding the supposed lateness of Mr. Mayer's claim. Although the evidence raised by the Parties does not clearly indicate at what exact moments or how many times Mr. Mayer would have approached CFF personnel to discuss his concerns about the changes to the selection criteria, it is nonetheless clear that Mr. Mayer did in fact respect the CFF Policy and Procedure for the Appeals of Selections, which maintains that any athlete "who is not selected" has the right to appeal a selection in the case where "the selection was not made in accordance with the published policies, procedures, rules and criteria," that is, after the selection in question has been made.

IV. CONCLUSIONS

65. It is rare that an arbitrator intervenes in a selection process. I entirely respect the right and responsibility of a federation and its selection committee to formulate selection criteria and proceed to the selection of athletes according to these criteria. An arbitrator only cancels a selection if the selection process was applied in an unjust manner, for example when a federation does not follow its own regulations or changes its regulations along the way, which is the present case.

66. In the case of *Judith Island and Dax Adam vs. Equine Canada et al.*, the arbitrator wrote:

14. Designing a selection process that is fair and seen to be fair can be a difficult task. The selection of one athlete over another means someone has gained a place on a team but another athlete has lost out. These are decisions that go to the very essence of being an athlete. The process in which the athletes are competing against selection must have integrity; it must be built on procedural fairness as the foundation.

67. I am entirely of the same opinion. In the present case, the change to the number of international selection competitions stated in the 2006-2008 Selection Policies and the exclusion of the results obtained by Mr. Mayer at the Madrid Grand Prix/World Cup had a negative impact on the integrity of the ranking and selection process. Just like the arbitrator in the *Island and Dax* case, I am of the opinion that this reversed Mr. Mayer's right to be ranked and selected using a just and equitable selection process, such as the current arbitrary intervention.

68. It was unfair and inequitable for the CFF, once its 2006-2008 Selection Policies were issued, to change the selection criteria stated in the policies with respect to the number of international selection competitions designated for the purposes of ranking high performance men's sabre fencer athletes for selection for the 2008 Pan-Am Zone Olympic Qualifier.

69. For the purposes of said selection, the CFF should have and must add the Madrid Grand Prix/World Cup tournament, as stated in the 2006-2008 Selection Policies, to the international selection competitions for the 2007-2008 Selection Policies, for selection of men's sabre fencers for the 2008 Pan-Am Zone Olympic Qualifier.

70. By doing so, the evidence submitted by the Parties is to the effect that Mr. Mayer and not Mr. Beaudry should have been and would be first in the selection ranking.

71. The CFF should and must select Mr. Mayer for the qualifier in question.

V. FEES

72. On April 14 and 16, 2008, the Parties submitted their observations and claims with respect to fees.

73. The discretion granted to arbitrators by Section 6.23(b) of the Code to determine “whether there is to be any award of costs and the extent of any such award” is wide. That being said, it is subject to certain constraints, namely the obligation of taking into account the factors stated in the Section itself, in other words the result of the proceedings, the behaviour of the Parties, the Parties’ respective financial resources, their intentions, and their willingness to settle the dispute prior to beginning arbitration.

74. Concerning the interpretation and application of this section, Mr. Mayer and the CFF refer to the decision in the case of *Kimberley Hyacinthe vs. Athletics Canada et al.* (CRDSC/SDRCC 06-0047).

75. Just like the arbitrator in *Hyacinthe*, I am of the opinion that the result of the proceeding is essential. In respect thereof, Mr. Mayer won his case, a complete success in his appeal of the April 9, 2008 decision pronounced by the CFF appeal board.

76. Although the result is that the CFF selects Mr. Mayer rather than Mr. Beaudry for the qualifier in question, it is nonetheless true that Mr. Beaudry “was in fact only a passenger” in the proceeding, as he claims. I consider him rather to be the second victim of the errors committed by the CFF.

77. I don’t see anything in the behaviour of the Parties that allows me to add importance to it in the cost allocation.

78. Concerning the behaviour of the CFF in particular, the Respondent claims the following:

During the drafting of the policies for the 2007-2008 year, none of the individuals consulted noticed the impact the contested change would have on the Claimant or on other athletes. These individuals include the national coaches and a representative of the athletes [unofficial translation].

79. No one has claimed otherwise. The CFF also claims that:

The present case is very different from the Court of Appeal decision in *Deschênes vs. Canadian Olympic Association and Canadian Fencing Federation* [1988] R.J.Q. 2389 (C.A.). In this case, it was not a question of modifying criteria along the way, but of making a selection based on criteria that did not exist in the federation's documents, at the end of the proceeding.

80. In these remarks, I recognize a laudable desire on part of the CFF to accept responsibility for the "impact" caused by the contested modification and the conclusion that this modification occurred "along the way".
81. Concerning the financial resources of the respective Parties, I'm taking into account the fact that both implicated athletes are students whose personal resources are limited, while the Respondent is a national federation with a budget of a certain size. I cannot avoid lending importance to this obvious gap in financial resources for the allocation of costs.
82. Where the Parties' intentions are concerned, as previously indicated and admitted several times by Mr. Mayer, the good faith of the federation is not in question. Certainly, I conclude that the CFF did not follow its own regulations and that it changed them along the way. However, I see no injurious intentions and nothing

that allows me to lend weight to this factor in the allocation of expenses in this case.

83. Concerning settlement proposals and the Parties' desire to settle the dispute, I can't help but note that the lack of time kept the Parties from referring to the services of a dispute Resolution Facilitator pursuant to Article 4 of the Code, and this, despite their common volition.
84. The costs of the athletes' claims consist of "lawyer-client" claim costs, that is, fees for professional services provided by their lawyers. This type of expense is not always awarded; but it is more often seen in arbitration than before of a court of law. This does not mean that the losing Party usually indemnifies the winning Party for all expenses incurred during the dispute. But in a case like this, where the Federation's error truly requires the Claimant and Respondent to appeal to arbitration in order to have their rights recognized, and that the financial resources of the Federation are largely disproportionate to those of the athletes, I consider it appropriate that the Federation reimburse the athletes with at least a portion of the fees that they claim.
85. Section 6.23(c) of the Code allows me to take into account the filing fee retained by the SDRCC if costs are granted. It is quite obvious that this filing fee, in the amount of \$250.00, constitutes an expense incurred during the arbitration process.
86. Taking into account and having weighed the factors listed above, as well as the observations submitted by the Parties, I deem that Mr. Mayer has the right to be reimbursed by the CFF for half the fees of \$4,704.85 that he claimed, thus an amount of \$2,352.43.
87. In the case of Mr. Beaudry, while he was merely a passenger, he was nonetheless endowed with excess baggage in the form of two lawyers for whom he claims the fees. I therefore disregard half of the \$5,468.51 fee claimed by him, thus reducing

the amount claimed to \$2,734.26. I deem that Mr. Beaudry has the right to be reimbursed by the CFF for half this amount, thus an amount of \$1,367.13.

88. I therefore order the CFF to reimburse Mr. Mayer in the fifteen days following the date of this award, the amount of \$2,352.43, plus the \$250.00 filing fee, for a total of \$2,602.43. I also order the CFF to reimburse Mr. Beaudry in the fifteen days following the date of this award the amount of \$1,367.13.

FOR ALL THESE REASONS, I DECIDE AND ORDER THE FOLLOWING:

According to my judgement pronounced on April 12, 2008,

- (i) The appeal is granted;
- (ii) The decision rendered on April 9, 2008 by the CFF Selection appeal board is overturned;
- (iii) The selection policies stated in the *Canadian Fencing Federation – 2006-2008 HP Program – Selection Policies* should have been and must be respected and applied with respect to selection for the 2008 Pan-Am Zone Olympic Qualifier;
- (iv) Mr. Mayer must be ranked in the selection ranking of the CFF High Performance Program according to the policies mentioned above in order to be able to participate in 2008 Pan-Am Zone Olympic Qualifier for men's sabre fencing;

Concerning the fees

- (v) The CFF must reimburse Mr. Mayer the amount of \$2,602.43; it must also reimburse Mr. Beaudry the amount of \$1,367.13; all in the fifteen days following the date of the present award.

April 24, 2008

Stephen L. Drymer,
Arbitrator