

**IN THE MATTER OF AN ARBITRATION  
IN THE SPORT DISPUTE RESOLUTION  
CENTRE OF CANADA  
(SDRCC)**

BETWEEN

**MEGAN POSS**  
("the Claimant")

AND

**SYNCHRO CANADA**  
("the Respondent")

AND

**JESSIKA DUBUC  
TRACY LITTLE  
ALISON McKENNY  
JENNIFER SONG  
LAURA McCLEMONT  
EVE LAMOUREUX**  
("the Interveners")

**ARBITRATOR  
Michel G. Picher**

**APPEARING FOR THE CLAIMANT:**

Michaël Bardagi – Counsel  
Megan Poss – Claimant

**APPEARING FOR THE RESPONDENT:**

Leanne Standryk – Counsel  
Catherine Gosselin-Després – Chief Operating Officer  
Diane Oigny – Chief Technical Officer  
Julie Sauvé – Consultant

**APPEARING FOR THE INTERVENERS:**

Brian Ward - Counsel

Pre-hearing conference calls were held on January 24 and February 4, 2008, and the hearing was conducted in Montreal on February 7, 2008. Final written submissions were received February 21, 2008.

## **REASONS FOR DECISION**

The following are the reasons for the decision of the Arbitrator, issued February 25, 2008.

This arbitration concerns the claim of synchronized swimming athlete Megan Poss, alleging the improper determination of her position in the selection of the team chosen by the Respondent Synchro Canada to compete at an Olympic qualifying event to be held in Beijing, China in April of 2008, in anticipation of the Beijing Olympic Games. Specifically, she alleges that the second phase of the selection process involved a wrongful departure from the criteria of selection which adversely affected the Claimant's placement in team selection. Although that error was subsequently corrected, resulting in the Claimant being placed back into the ranks of the team to be sent to the Beijing qualifier, a subsequent appeal by another athlete, Ms. Tracy Little, resulted in the Claimant again being displaced from the team selection. The Claimant, who was an intervener in the Tracy Little appeal, also seeks relief from this Board with respect to what she alleges are errors in the decision of the internal Appeal Committee in the Tracy Little appeal.

Unfortunately, during the course of the appeal process both the Claimant and certain representatives of the Respondent engaged in communications which generated more heat than light. In support of her cause, for reasons they best appreciate, the Claimant and her parents issued an extensive series of communications to members of

the synchronized swimming community in Canada. Certain of those communications effectively described the coaches and executive officers of Synchro Canada as involved in “cheating” and “fraud”. For its part, Synchro Canada, for reasons it must best appreciate, directed all of the athletes in its National Team program not to speak with or otherwise communicate with the legal counsel retained by the Claimant, a directive which understandably frustrated the Claimant’s lawyer’s ability to prepare her case for these proceedings. In the result, both parties requested that the Arbitrator issue directions in the nature of provisional measures of relief pending the completion of this hearing. During the initial pre-hearing conference call, having heard the submissions of the parties, the Arbitrator directed, and obtained the undertaking of the Claimant and her counsel, that no further communications with respect to this matter would be made during the course of this hearing, pending a decision. That direction was to ensure general compliance with the confidentiality which governs arbitrations conducted by the SDRCC. The Arbitrator also directed and obtained an undertaking from counsel for Synchro Canada, that a communication would be issued to the athletes and staff of the team explaining that they were free, if they chose, to communicate with the Claimant or her counsel for the purposes the preparation and presentation of her appeal. Those directions and undertakings appear to have been honoured by both parties.

Turning to the merits of the claim, parts of the dispute are put into some perspective by the written response filed on behalf of Synchro Canada. The first nine paragraphs of that response set out the background of the dispute as regards the Phase II Selection Process, and read as follows:

## Background

1. The Canadian National Synchro team has not qualified for the 2008 Olympic Games scheduled to take place in Beijing, China from August 8 to 24, 2008 and, therefore, is required to train for and seek qualification at the Olympic Qualifier competition in China, April 2008.

2. The Respondent developed and published a selection policy and criteria for the Qualification/Olympic team. Attached and marked as D-4 to the Request is a true copy of the Selection Policy and Criteria for the 2008 Olympic Team ratified by the Board of Directors November 11, 2007 (hereinafter referred to as the "Selection Policy").

3. The Selection Policy was structured into three (3) Phases as follows:

- (a) Phase I: Select the best possible Olympic Team Pool of athletes comprised of a "Pool" of fourteen (14) swimmers. To be completed in or about August 2007.
- (b) Phase II: To select a team of nine (9) athletes, including the best possible duet of two (2) athletes plus one (1) alternate (9 + 3 athletes) to swim the Olympic qualifier in Beijing China April 16-21, 2008. Phase II was to be executed between September 2007 to December 2007.
- (c) Phase III: Upon successful qualification, to select the final team of nine (9) athletes to complete the final "Team" to compete at the 2008 Olympic Games.

4. The authority for Selection established by the policy provides as follows:

The final decision-making authority to determine which athletes will be selected to the Team and Duet events at the Olympic Qualifier will be the Chief Technical Officer (CTO). The CTO is responsible for ensuring that the process outlined in this document is properly followed and the Selection process is fair and equitable for all candidates.

5. Any decision made pursuant to the Selection Policy was subject to Synchro Canada Appeals' Policy.

6. The Selection Policy and Criteria for the Olympic Team selection was distributed to athletes in late September 2007 at the beginning of Phase II.

## Selection Process – Phase II

7. Phase II of the Selection Process consisted of three (3) parts outlined as follows:

- (a) Judge based Evaluations (40% of the final score)

- (i) Technical element component (Figure pace 10%, Routine pace 10%)
  - (ii) Individual Routine Set Component (Technical Routine 10%, Free Routine 10%)
  - (b) Coach based Evaluation (30% of the final score)
    - (i) Group Swim Component (Synchronization 15%, Pattern Execution 15%)
  - (c) Expert Based Evaluation: Training Log Evaluation of each athlete (30% of the final score)
    - (i) Subjective analysis of each athlete (30%)
    - (ii) Duet Selection
8. Pursuant to the Selection Policy, the Training Log Evaluation ("Log Book") was intended to be used as follows:

"Phase II c) – Expert Based Evaluation

Subjective Analysis of the Athletes

Athletes will be evaluated on an ongoing basis between September 11 and November 30 by the 2008 Olympic Team coaching staff and each other. Athletes will be evaluated by their peers using a random draw. All information will be collected in an ongoing log. Experts from Synchro Canada Performance Enhancement Team (PET) will also give feedback on their observations and data collection over this time. Based on this information, the CTO and 2008 Olympic Team Coaching Staff will give individual athletes a score out of 30. Together they will come to a consensus on the final score for each athlete. This final score will be worth 30 percent of the Phase II selection process.

9. The Log Book contained assessments of the following attributes of the athlete: effort, concentration, motivation, implication/involvement and attitude. For each of these attributes, the assessment ranges on a 5-point scale: excellent, très bon, bon, moyen and mauvais (excellent, very good, good, fair and poor).

The Phase II selection competition event was held in Montreal on December 7 through 9, 2007. It appears that on the first day the athletes performed before a panel of some seven judges for the purposes of evaluating their technical elements at both slow and fast paces. The second day of evaluation involved individual routine swims,

including both the technical routine and the free routine, which were also judge evaluated. It should be noted that no issue is taken in these proceedings with the legitimacy of the judge evaluated scores, which evaluations comprised some 40% of an athlete's final score.

The third day of the Phase II selection process involved the team swim, with the athletes being divided into two groups. The group or team routine was videotaped from two separate angles for later evaluation by a team of coaches observing the videotape, and assigning points for synchronization and pattern execution, for a total of 30% of the final score. The final element in the selection process was the expert based evaluation. It involved the Chief Technical Officer (CTO) and coaches reviewing training log evaluations made in respect of each athlete, with regard to the attributes of effort, concentration, motivation, involvement and attitude, scored on a five point scale. The log book, in place between September 11 and November 30, involved evaluations made daily by the athletes as well as by the coaches and consulting staff. The evaluations so recorded were compiled and scored for final review by the coaches as part of a subjective analysis of each athlete. The object was to evaluate all of the fourteen original athletes selected to the pool of swimmers in Phase I, to determine a team of nine athletes as outlined in sub-paragraph (b) of paragraph 3 of the Selection Policy reproduced above.

The Respondent's Phase II team selection was announced on December 11, 2007. The Claimant Megan Poss ranked twelfth, being effectively excluded from the

nine person team which would compete for Olympic qualification in Beijing in April 2008. Some athletes questioned the scores appearing in the selection document, and in particular the manner in which certain of the subjective scores were arrived at. In an attempt to clarify the process, CTO Diane Oligny issued an email to all of the swimmers explaining the method by which the final scores were arrived at by the panel of three coaches, Susan Kemper, Denise Sauvé and Nathalie Lagrange, in consultation with the Chief Technical Officer and Consultant Julie Sauvé. The email, dated December 14, 2007, essentially addresses the athletes' concerns with respect to the handling of the log book and the method by which the coaches' subjective scores were ultimately arrived at. Ms. Oligny's explanation reads as follows:

Dear Swimmers

Just a clarification on the scoring for the log book.

The criteria says:

Athletes will be evaluated on an ongoing basis between September 11th and November 30th by the 2008 Olympic Team coaching staff and each other. Athletes will be evaluated by their peers using a random draw. All information will be collected in an ongoing log. Experts from Synchro Canada's Performance Enhancement Team (PET) will also give feedback on their observations and data collection over this time. Based on this information, the CTO and 2008 Olympic Team Coaching Staff will give individual athletes a score out of 30. Together they will come to a consensus on the final score for each athlete. This final score will be worth 30 percent of the Phase II selection process.

Process for Scoring

Log Book

Prior to the meeting, the scores in the log were compiled in this manner. [sic]

# of red dots x 4

# of blue dots x 3

# of yellow dots x 2

# of green dots x 1

Total / 2332 (maximum score) x 30/100

**Discussion (Susan, Denise, Nathalie) and consensus on the subjective scores.**

We all agree and feel that Dominika and Tracy should make the team but the result of the log put them out of the team. We all agree that Dominika and Tracy's subjective scores should be bump [sic] up so they rank 7th and 8th with a written notice on their conduct with the team in exchange of their bonus point. The judging part and the synchronization clearly state that Tracy and Dominika belong on this team.

We all agree that Alison has shown great improvement over the ten weeks and that she should get bonus point for this.

We all agree that the other 11 swimmers will have no altered scores and that it reflects the reality of their effort, concentration, motivation, involvement and attitude.

Susan, Denise, Nathalie

Diane (chair) Julie Sauvé (observer and synchro specialist for the CTO)

If you have any questions or concern you can contact me directly [phone number deleted]

\* Disponible en français sur demande

Diane Oigny  
Chief Technical Officer / Chef de la Direction Techniques  
Synchro Canada

As a result of that clarification the Claimant filed her appeal with Ms. Oigny on December 19, 2007. She effectively charged the coaching staff, the CTO and the consultant with improperly manipulating the selection process in a manner not contemplated by the selection criteria. Her request for relief was relatively extensive, calling for the results of 11 December, 2007 to be declared null and void and demanding the implementation of a new process of athlete evaluation which would effectively exclude the five decision makers involved in the initial team selection. She

requested that the judge based evaluations be allowed to stand, but that a new group of independent reviewers be appointed to examine the methods used by the coaches and determine whether the coach based evaluations and subjective evaluation scores were too flawed or too biased to be used. According to the Claimant's request, should that be the conclusion, the coaches' evaluations should simply be removed and the judge based evaluations substituted as the entire basis of the Phase II scores.

The record reveals that Synchro Canada, which apparently received expressions of concern from other athletes, took the Claimant's appeal seriously. In very little time, it acknowledged the error it made and effectively reversed itself. That is reflected in a letter addressed to the Claimant by Ms. Lisa Schott, President of Synchro Canada dated December 30, 2007. That letter reads, in part, as follows:

In the two weeks since Synchro Canada clarified the results of Phase 2 of the Olympic Selection Process, several athletes have expressed valid concerns. As stated in the Selection Criteria document, it is the responsibility of the CTO to ensure that the selection process is fair and equitable to all athletes, and the process as described in that document is adhered to. However, as the issues presented to us directly implicated the CTO, it was determined that the matter should be dealt with by the President. Under the President's leadership we have conducted a careful review of athlete concerns, and have also obtained independent advice from sport in law, with the result that we have concluded that our selection process was not properly followed.

We have therefore rescinded the CTO's decision of 11 December 2007 and the ranking of athletes published at that time. We have made a new selection decision based upon athlete ranking list that is attached to this letter. Athletes ranked #1 through #9 on this list are hereby selected by Synchro Canada to compete at the Olympic Qualification Tournament, while athletes ranked #10 through #12 are hereby selected as the three alternates who will be invited to continue to train with the team and to seek to qualify for the team representing Canada at the 2008 summer Olympic Games, should we be successful at Olympic qualifications.

In the interests of transparency, please allow us to explain the attached ranking list:

1. The final judges score (over 40 points) is unchanged and is derived from the judged component of the Selection Process, as per the Selection Criteria.
2. The synchronization score (over 15 points) is unchanged and is derived from the assessment by the coaches, as per the Selection Criteria.
3. Also unchanged from the 11 December 2007 decision is that there is no score for pattern execution. Despite our very best efforts we found that it was impossible to fairly assign an individual score for execution of a group pattern. This unforeseen circumstance prevented us from implementing the Selection Criteria exactly as written, which left the CTO and the coaches to resolve the matter using their own discretion, as per the Selection Criteria document. They determined that the pattern execution marks would be dropped from the total score. We also determined that it was appropriate to maintain the same 70 percent – 30 percent ratio between technical elements and subjective elements, as contemplated in the Selection Criteria. In our view, it would be inappropriate and unreasonable to change the proportional weighting of these criteria. Therefore, as the technical elements are now scored over 55 (versus over 70), a pro-rated adjustment to the subjective elements is warranted, as noted in point #4 below.
4. The Subjective Analysis score has changed from the original ranking list. Firstly, it differs from the original decision in that it represents the results from the athlete evaluations without any adjustment by the coaching staff or by the CTO. This score represents the full compilation of peer, PET and coaching staff evaluations of each athlete's subjective attributes (effort, concentration, motivation, involvement and attitude) – attributes which were deemed to be desired qualities in team members when the Selection Criteria were first developed and approved. These scores were compiled as described in the communication of 14 December 2007 and have not been adjusted or manipulated in any way. Secondly, this score differs from the original decision in that it is pro-rated to be expressed over 23.6 points (versus over 30 points), thus maintaining the appropriate 70 percent – 30 percent ratio and weighting mentioned in point #3 above.

We trust that we have clearly conveyed the reasoning behind our new selection decision. While it is unfortunate that one aspect of the technical evaluation could not be implemented as we intended, our policy permits adjustments to be made in such unforeseen circumstances. We feel strongly that the adjustment we have made is not only technically sound, but is also reasonable and fair in the circumstances.

Should you have any questions about any aspect of this letter, please do not hesitate to contact us. We must also mention that this decision may be appealed by any athlete in accordance with Synchro Canada's Appeal Policy, although it is

our hope that all will agree the decision is true to the published Selection Criteria, and has been made without bias or partiality.

With the adjustment described in the letter from Ms. Schott, the Claimant stood in ninth position as of the conclusion of the Phase II evaluation, by reason of the retirement of another swimmer, thereby assuming a position on the team which would be sent to Beijing for the Olympic qualifier in April.

Sadly, that appeared to give the Claimant no satisfaction whatsoever. In an email addressed to Ms. Schott the next day, copied to an extensive list of members of the synchro swimming community in a number of provinces and territories of Canada, Megan Poss served notice that she did not consider that her appeal was dealt with and characterized the remedial steps taken by Synchro Canada as an "... admission of cheating and fraud". In essence she questioned how any of the coaches or executives involved in the first selection decision could have any more involvement with the synchro swimming team and expressed puzzlement that Ms. Rachel Corbett, a respected professional in the field retained by Synchro Canada to handle the appeal process, advised her that there was no basis for the appeal to proceed as the results had been corrected, placing her on the team.

In the Arbitrator's view, the opinion expressed by Ms Corbett was correct, reflecting the most fundamental notions of conflict resolution long acknowledged in the law. Legal process, a costly and time consuming exercise, is generally not fashioned or intended to resolve abstract or academic questions which are of no practical consequence to the party making a complaint. The further examination and pursuit of Ms Poss' claim, and its attendant cost for all concerned, could neither advance nor harm her status once the Respondent's reversal of position, coupled with the retirement, effectively placed her on the National Team selected for the Beijing qualifying competition. There was nothing of material consequence left to appeal. The arbitration process should never be viewed as a form of commission of inquiry to air unresolved grievances or differences of opinion which can ultimately have no effect on the status of

any athlete. Nor, once an error is corrected, is it the appropriate venue to seek the entire destruction of the national team selection processes properly adopted by an NSO, or to seek the removal of its staff and coaches. In matters of national team selection, the purpose of the appeal and arbitration process is to ensure adherence to fair and objective selection criteria and processes, not to vindicate hard feelings or reshape the universe. Ms Corbett was correct in advising the Claimant that there was no valid appeal to be continued, after Ms Schott's letter of December 30, 2000.

But things did not end there. Swimmer Tracy Little, who had stood eighth in the original ranking and was reduced to the thirteenth position and effectively removed from the team, by the revised scoring announced December 30, 2007, filed a separate appeal. Ms Little's appeal did not challenge the judge based or coach based scored components of the selection process. As it was expressed by the Appeal Committee, her appeal challenged "... the validity of the expert-based evaluation scores as they relate to the training log." Ms Little's appeal proceeded to a hearing before an internal Appeal Committee under the Appeal Policy of Synchro Canada. The appeal was heard before a panel of three persons, whose credentials are not challenged, by a telephone conference hearing held on January 11, 2008. Megan Poss intervened in that appeal as an affected athlete and was at all times represented by her legal counsel during the hearing of the appeal. Her intervention and use of counsel are understandable, as the outcome of that appeal could potentially result in her removal from the team.

The decision of the Appeal Committee, which is one of the decisions of Synchro Canada appealed by Ms Poss in this arbitration, was released on January 14, 2008. Given the importance of the Appeal Committee decision to the outcome, it is necessary to make relatively extensive reference to the Appeal Committee's decision. Its decision reads, in part, as follows:

The Appellant in this case is not challenging the scores obtained in the judge-based or coach-based components, but challenges the validity of the expert-based evaluation scores as they relate to the training log.

According to the Selection Policy and Criteria, the Log Book was intended to be used as follows:

“Phase 2 c) – Expert Based Evaluation

Subjective Analysis of the Athletes

Athletes will be evaluated on an ongoing basis between September 11th and November 30th by the 2008 Olympic Team coaching staff and each other. Athletes will be evaluated by their peers using a random draw. All information will be collected in an ongoing log. Experts from Synchro Canada’s Performance Enhancement Team (PET) will also give feedback on their observations and data collections over this time. Based on this information, the CTO and 2008 Olympic Team Coaching Staff will each give individual athletes a score out of 30. Together they will come to a consensus on the final score for each athlete. This final score will be worth 30 percent of the Phase 2 selection process.”

The log referred to above contains assessments of the following attributes of the athletes (in French): *effort, concentration, motivation, implication* (in English, involvement) and *attitude*. For each of these attributes, the assessment ranges on a 5-point scale: *excellent, très bon, bon, moyen* and *mauvais* (or in the English equivalent, excellent, very good, good, fair and poor).

In the December 30th decision, Tracy Little was originally ranked as athlete #13. However, due to the retirement of athlete Tanya Matson who was in the #8 position, the Appellant moved up one spot to rank #12, thus is one of the three alternates training with the Team. If Ms. Little is successful in her appeal that the Log Book scores are not valid, then she moves to rank #9 and is effectively on the Team. The Affected Athlete, Megan Poss, is currently ranked #9 and should Ms. Little’s appeal succeed she would move to rank #12.

...

The Appellant’s December 31st, 2007 notice of appeal is brief and is reproduced verbatim:

“In response to the letter I received December 30, 2007 concerning the removal of myself, Tracy Little, from the National Olympic Team.

I wish to appeal the decision of the scoring criteria. I believe that by including the scores from the log book are invalid [sic]. The entries into the log book are subjective and were not randomly picked or confidential. The intent was to be random but it was not. This procedure was not followed by Synchro Canada. The log book only dealt with discipline scores and had nothing to do with performance of the athlete. No verbal or written notice was ever given to me from the head coach about discipline. The log book was used to manipulate the outcome to improve some athletes position while penalizing others indicating bias of the coach and some athletes. The actual performance of an athlete should be the main criteria of selection.

In conclusion for the good of the team I hope this situation can be quickly resolved as I feel I am an asset to Canada's synchro team."

Marie Pier Boudreau-Gagnon provided evidence to corroborate the claims made in Ms. Little's notice of appeal. The Appeal Committee notes that Ms. Boudreau-Gagnon, while a team-mate of both the Appellant and the Affected Athlete, would not be impacted by any outcome of this appeal as she is the highest ranked athlete overall, regardless of whether this appeal succeeds or not.

Ms. Boudreau-Gagnon explained that as an athlete she understood that the Log Book would compile assessments made by the athlete herself, her team-mates, the coaching staff, and other experts including members of the Performance Enhancement Team, and that this process would be managed in a confidential manner. She also understood, and the selection criteria stated, that athletes would be assigned to evaluate other athletes using a random system. Lastly, she understood and the criteria stated, that the contents of the Log Book would be used to inform the coaches' final assessment of the athletes, but that the contents would not themselves be compiled into a total score to give an exact result.

According to Ms. Boudreau-Gagnon, the process of the Log Book did not go as intended. For the first few days of training, athletes were assigned to evaluate other athletes using a random system but after that it did not happen. Thereafter, each athlete could choose who they would evaluate with the result that friends would pair up and give each other evaluations. Also, the Log Book was not maintained in a secure manner but rather was available in the coaches' room, which was accessible to athletes and others. Athletes who performed evaluations of each other were asked to compile those evaluations onto a sheet of paper that was to be returned on the next day. Completed sheets were dropped off into a folder in the

athletes' locker room, and thus were accessible to other athletes. Ms. Boudreau-Gagnon also noted that the Head Coach was often absent from the Training Centre or sometimes just one coach was present for a training session.

Ms. Boudreau-Gagnon stated that she observed an athlete on one occasion making a change to the evaluation sheet by putting a T before a B (thus changing a grade from bon to très bon). She also observed that because there was no system to assign athletes to serve as evaluators, some athletes were being assessed by one athlete while some were being assessed by two or more athletes, which created a potential problem in that athletes were not scored uniformly but instead would have different numbers of evaluation scores.

Upon questioning by the Appeal Committee and by Mr. Bardagi, Ms. Boudreau-Gagnon also stated that while friends would choose to evaluate friends with favourable marks, it also sometimes occurred that athletes who were not friends would seek each other out to give unfavourable marks. She observed that this was not a good system to use when athletes were competing with each other to earn a position on a team. Upon questioning, she also stated that at no time did she discuss these concerns with the coaching staff. When asked by Mr. Bardagi if she would name the athlete who made a change to her mark, Ms. Boudreau-Gagnon stated she would not. She also believed that the athlete, if confronted, would probably deny that she had changed any score.

In response to questioning about the assessment scale, Ms. Boudreau-Gagnon stated that at no time did the coaching staff provide guidance as to what behaviour would merit a rating of excellent or very good, in other words, each athlete was left to determine for themselves what such a score might mean.

...

Megan Poss, Affected Athlete, spoke briefly to the Appeal Committee. She said that she had never adjusted any of her scores in the Log Book. She agrees that the process for athletes input into the Log Book was not managed properly and was not fairly done, and she agrees that this component of the Log Book was flawed. Ms. Poss was unclear how an athlete who was injured, absent or otherwise unable to train might be scored in the Log Book. She agreed with Ms. Boudreau-Gagnon that for the first two days of the selection period, random evaluations were done but after that the system was abandoned because it was complicated and was taking too much time from training.

However, Ms. Poss questions whether the evaluations of coaches and other experts should also be rejected, as she did not see how it would have been possible for athletes to manipulate or adjust these scores. Athletes do not have keys to the coaches' room. In her view these scores retain validity.

Ms. Poss also claims that athletes should make the team based on their performance, and that her technical scores are superior to Ms. Little's and this should be considered by the Appeal Committee. On certain judged routines, her rank is #4 and #7 as compared with Ms. Little's rank of #9 and #8. Ms. Poss expressed surprise at Ms. Oigny's statement in the December 14th email, and in this hearing, that two athletes should receive bonus marks as they were technically superior to others, as she felt the technical scores did not reflect this. Ms. Poss agrees that the judges' scores (worth 40 marks) were done "by the book" and she accepts them, and while there might be some issues with the synchronization scores (worth 15 percent), they are not part of this appeal.

Ultimately the Appeal Committee decided to entirely remove the log book element from the Selection Process. Its reasons for that conclusion are stated, in part, as follows:

The Appeal Committee notes that there is agreement between both the Appellant and the Respondent about the validity of the Log Book. The Appellant asserts, and the Respondent agrees, that the Log Book was not implemented in the way the Selection Criteria contemplated, and that there was opportunity for manipulation of the Log Book contents. The Affected Athlete also agrees that one component of the Log Book, the athlete evaluation, was not done using a random system as provided for in the Selection Criteria. The Affected Athlete suggests other components of the Log Book remain valid.

The role of this Appeal Committee is to determine whether the Respondent has properly interpreted and followed its Selection Policy and Criteria. Under Section 12 of the Appeal Policy, in making its decision, this Appeal Committee has the authority to void or confirm the decision being appealed; to vary the decision where it is found that an error occurred and such an error cannot be corrected by Synchro Canada for reasons which include, but are not limited to, lack of clear procedure, lack of time or lack of neutrality; or to send the decision back to Synchro Canada to make a new decision. The Appeal Committee also has the authority to award costs of the appeal, but no party has made any submission on costs so the Appeal Committee declines to make any ruling in this area.

The Appeal Committee has decided to uphold Ms. Little's appeal and to vary the decision made by the Respondent on December 30th, 2007. The reason for this decision and the manner in which the Appeal Committee varies the decision are set out below.

All parties to this appeal are in agreement that the athlete evaluation component of Phase 2 c) of the Team selection was not carried out as contemplated in the Selection Criteria. There is some debate about whether the Log book was supposed to be a confidential exercise – the Selection Criteria do not say this, although the Appellant and Respondent both agree that they believed the process was intended to be confidential. The Appeal Committee does not have to decide whether or not the Log Book should have been confidential because it is sufficient, in the Appeal Committee's view, to establish that it was not random. The Selection Criteria clearly states that athletes will evaluate each other using a random system, and the evidence from all parties to the hearing clearly indicates that after only a few days the random system was abandoned. The Appeal Committee decides, therefore, that at least one element of the Log Book, thus one element of the Selection Criteria, was not implemented properly.

The Appeal Committee observes that there were other difficulties with the Log Book exercise in general, apart from the lack of a random system for athlete evaluation. The practice of having team-mates evaluate each other, when they are competing against each other in a team selection process, is unusual. The Appellant claims that this practice puts athletes in an untenable conflict of interest position: The Appeal Committee agrees. Other difficulties with the process were that evaluators (whether athletes, coaches or other experts) were not given clear guidelines about what the ratings meant – that is, what were the parameters for a score of excellent or a score for fair, for example. The lack of confidentiality of the results meant that at any time the evaluators could examine the Log Book to see what other evaluators were doing and what patterns might have been emerging, which creates a potential for scoring to be influenced by extraneous factors. As well, late in the process there was introduced a numerical scheme to tally results, although as explained by Ms. Oligny and the witness Ms. Boudreau-Gagnon, it was not intended that the Log Book would be used in such a manner. There was also the late addition of bonus marks, although these were not documented in the Selection Criteria. Lastly, it appears that the Log Book was used to introduce penalties for discipline, although it was designed as a tool for selection. In other words, all these points suggest that the Log Book system was evolving while underway, which might be akin to “changing the rules of the game while the game is being played”. This is unfair to all concerned.

The Appeal Committee agrees with Ms. Oligny that the coaching staff retains the discretion to assign a score for athletes in Phase 2 c) of the Selection. In other words, it is not improper for coaches to assess candidates for team selection on attributes such as effort, concentration, motivation, involvement and attitude. Subjective considerations have their place in team sports: however, the Appeal Committee considers that such subjective analysis must be carefully guided. Experts may exercise their discretion but must not do so in an unfettered manner.

In this case, had the Log Book been implemented properly, and had the coaching staff taken into consideration the contents of the Log Book evaluations in arriving at their consensus on subjective scores for each athlete, then the Log Book exercise might have proved successful in assisting coaching staff in their

decision-making for Olympic Team Selection. However, the Log Book was not implemented properly.

The Affected Athlete says that parts of the Log Book may be worth keeping as they would not have been susceptible to manipulation. She thus invites the Appeal Committee to reject athlete scores but to keep scores from coaches and other experts. The Appeal Committee rejects this as all the problems described above (lack of guidance and parameters, lack of confidentiality, lack of security, late addition of a numerical scheme, allocation of bonuses, and use of the Log Book for discipline) apply equally to coach and expert evaluations in the Log Book, as well as to athlete evaluations. In conclusion, the Appeal Committee finds that the Log Book exercise, in the absence of careful implementation, strict controls and confidentiality, as well as a clear understanding by the users that it was intended to be a tool for selection, not discipline, is a poor evaluation tool and cannot be relied upon.

The Appeal Committee decides that in light of the above flaws, the appeal of Tracy Little is upheld. The Appeal Committee further decides to vary the decision of the Respondent by eliminating the expert-based evaluation in Phase 2 c) of the Olympic Selection. The Respondent also acknowledges that this is the same approach it would take if called upon to decide this matter again. This results in the following ranking of athletes, based upon scores for judge-based evaluation (2a) and scores for coach-based evaluation (2b):

- # 1 Marie Pier Boudreau-Gagnon
- # 2 Isabelle Rampling
- # 3 Domenika Kopcik
- # 4 Elise Marcotte
- # 5 Marie-Pierre Gagne
- # 6 Jessika Dubuc
- # 7 Jennifer Song
- # 8 Eve Lamoureux
- # 9 Tracy Little
- # 10 Alison McKenny
- # 11 Laura McClemont
- # 12 Megan Poss

Two other factors in the evaluation process were dealt with in evidence by the Claimant, and must be considered to the extent that they form part of her original appeal, as they might affect her status even if she is unsuccessful in her challenge of the decision in the Tracy Little appeal.

Both aspects arise out of the synchronization and pattern team event conducted on the third day of the qualifying competition. Based on their scores in the judged events, the swimmers were placed into two teams, each of which performed a group routine in the pool. That routine was video-taped from two separate angles, with a view to assessing points to the athletes for synchronization and for their ability to maintain pattern. It appears that this was the first year that videotape was utilized by the coaches to assign values for pattern.

The evidence confirms that when the coaches and consultants viewed the video of the group swim of Ms. Poss' team, they found themselves unable to assign any points for pattern. As explained in the evidence of Ms. Oigny, when frames of the swim were subjected to close examination by freeze-frame, virtually all of the swimmers were out of pattern save, of course, the lead swimmer on the team who was to be followed in her movements by the other swimmers. It appears that because virtually all of the team members were badly out of pattern, it was impossible to determine who was responsible for the general error. In that circumstance the coaches and consultants concluded that the best course would be simply to disregard the pattern element altogether. To do otherwise would have resulted in unfairness, as only the lead athlete would have obtained scores for pattern, while the rest of the group would not. It was therefore felt that the fairest approach would be to simply eliminate the pattern score entirely, for all swimmers, which was done.

The second aspect of the group swim which concerns the Claimant is a penalty score of one point which was assessed against her by the coaches. This, it appears, was prompted by the fact that Ms. Poss committed a serious error of synchronization, effectively missing the routine for a duration of eighteen counts, and not finishing. Based on their interpretation of the FINA rule which would apply in a competition, the coaches decided to apply a one point penalty for that error by the Claimant. As her error was characterized by Ms. Oligny, it was sufficiently serious as to have potentially disqualified the team should it have occurred during an international competition. As she relates it, the coaches could have docked Ms. Poss to the level of two points out of ten, but instead decided to penalize her at the rate of one point out of fifteen. Two other swimmers were considered for a point penalty because they came into collision during the routine. After some examination, the coaches concluded that they could not determine which of the two caused the contact. It was therefore decided that it would be unfair to assess a penalty point against them, and none was assigned.

Before turning to the merits, it is necessary to consider certain procedural submissions of the parties. They differ in their positions on the burden of proof.

Article 6.8 of the **Canadian Sport Dispute Resolution Code**, which governs this claim, states:

### **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.

The Respondent's Counsel submits that the instant dispute does not involve the appeal from a team selection decision, but rather from the decision of a domestic tribunal, the internal Appeal Committee of the Respondent. In that regard she relies on the authority of *Michel Larue v. Bowls Canada Boulingrin et al.* SDRCC ordinary Division, July 19, 2004, Arbitrator Paule Gauthier. She submits that the burden should be on the claimant.

Counsel for the Claimant submits that Article 6.8 of the **Code** must apply. He notes that one condition of Sport Canada funding for NSO's is that access to the SDRCC arbitration process must be available to its athletes, after the exhaustion of their internal appeals. How, he asks, can it be that athletes who comply with the necessity to exhaust their internal right of appeal within their own sports federation as a condition to proceeding to the SDRCC then find themselves bearing the burden of proof in the SDRCC arbitration, contrary to Article 6.8 of the **Code**? That would make the benefit of Article 6.8 virtually inaccessible to an athlete who properly follows the process. He submits that the position of the Respondent effectively negates the application of Article 6.8 in a way that was clearly never intended.

The Arbitrator must agree with counsel for the Claimant. A review of the decision in *Michel Larue v. Bowls Canada Boulingrin* reveals no extensive submissions or analysis of the issue of the burden of proof. That suggests that there may well have been no dispute before Arbitrator Gauthier as to that issue. That is likely so because that award was rendered in 2004, well before the introduction of the **Code** which now governs this appeal, a **Code** which is dated May 1, 2007. Under the SDRCC Code of June 1, 2004, no rule was to be found with respect to the burden of proof, except in doping cases, where article AD-8.8 placed the burden of proof on the Canadian Centre for Ethics in Sport (CCES). In light of that history, Arbitrator Gauthier was entirely justified in the approach which she took to the burden of proof in 2004. Her decision is not incorrect, as suggested by counsel for the Claimant, but it is obviously of no precedent value or authority for the purposes of interpreting and applying the current **Code**.

The plain words of Article 6.8 of the present **Code** are inescapable. We are here concerned with a claim in team selection. And that is so notwithstanding that it has been considered at the internal appeal level of Synchro Canada. To accept the position of the Respondent would be tantamount to allowing the NSO to force its athletes out of the benefit of the Code's rule as the burden of proof by requiring them to first exhaust their remedies pursuant to the NSO's internal appeal procedures.

Moreover, from a purposive point of view, the Respondent's position is counter intuitive. Burdens of proof are shifted in law where logic and fairness dictate that they

should. For example, in a wrongful dismissal action the burden is upon the responding employer to first explain the reasons for discharge. That is so for the obvious reason that the employer is in possession of the facts, data and reasons for its decision in a way that the employee simply cannot be. Similarly, in labour arbitration, the burden of proof in any case of discipline or discharge rests on the employer, for the same reasons. In the context of national athletic team selection, where non-selection is tantamount to dismissal, the situation is compellingly analogous. It is therefore not surprising to see that Article 6.8 of the **Code** places upon the NSO the obligation to explain and ultimately justify its decision. Also, there are at least two corollary benefits of that placement of the burden, not to be ignored. The first is the greater efficiency of the arbitration hearing process, which avoids the athlete going first with speculative evidence, much of which may prove irrelevant, in anticipation of the NSO's case. Secondly, the knowledge that it will ultimately bear the burden of proof in a claim before the SDRCC in a team selection dispute will obviously encourage any NSO to establish fair processes and criteria for team selection, insure that they are faithfully observed and, finally, to document with care the decision making process.

For these reasons the Arbitrator sustains the position of the Claimant with respect to the burden of proof in this claim. Moreover, in light of prior decisions and the parties' submissions there would appear to be no reason to depart from the position on the standard of review advanced by the Respondent, being the standard of reasonableness, as reflected in ***Boylan v. Equine Canada***, Arbitration Award, SDRCC Ordinary Division, 11 July 2004, Arbitrator R. Pound.

Turning to the merits of the claim, the Arbitrator deals firstly with the two issues raised in the original appeal, namely the assessment of a one point penalty against the Claimant in synchronization and the decision to eliminate pattern scoring for all swimmers. In approaching these issues I consider it important to express that counsel for the Claimant appears to gravely misconceive the proper role of arbitration under the SDRCC. To deal with both of these issues he sought the production of the videotapes of the team swim, and had them viewed by an experienced synchro swimming judge and coach, Ms Leslie Taylor. She expressed the view, no doubt held in good faith, that the coaches could have followed a different course to deal with the obvious difficulty of the pattern disarray revealed on the tapes. She also questioned their interpretation of the FINA rule which the coaches used as a basis to assess a penalty point for the failure of Megan Poss to finish the routine, missing a full eighteen counts.

The role of an arbitrator hearing an appeal under the **Code** is not to mount the judge's chair and decide between duelling coaches or judges as regards the relative merits of the performance of one or more athletes, or their differing interpretation and application of national or international rules of their sport. Boards of arbitration are neither qualified nor mandated to substitute their judgement for that of expert bodies in matters of technical athletic performance or achievement. The role of an SDRCC arbitrator, who does bring a degree of knowledge in the principles of administrative law and procedural fairness, is to determine whether an NSO has fairly communicated its own rules to athletes vying for team selection, has faithfully adhered to those rules and

has administered its selection process in a manner devoid of arbitrariness, discrimination or bad faith.

To be sure, it may be necessary to examine specifics of the competition and selection procedures to determine whether these basic standards have been violated during the team selection process. But that is the limit of the purpose of examining such evidence, and it is only in that limited context that a board of arbitration can “substitute its judgement” for that of an NSO in the sense contemplated by the comments of Arbitrator Pound in *Bécharde v. Canadian Amateur Boxing Association et al.* Arbitration Award, SDRCC Ordinary Division, Nov. 13. 2006 at p. 15.

How do the foregoing principles apply to the two heads of appeal here under consideration? Firstly, with respect to the decision to assess a penalty point against the Claimant in synchronization, the Arbitrator can see no demonstration of the violation of any standards of fairness. In coming to that conclusion I make no judgement as to the wisdom or correctness of the judgement or opinion of Ms Taylor or of the coaches who made that decision. Even if I should agree with Ms Taylor (a matter on which I make no comment) I must consider the more fundamental question of whether the coaches who dealt with the issue of applying a penalty point did so within their proper authority, applying their mind to the question in good faith, without arbitrariness or discrimination and in a way that was not manifestly unreasonable.

They did. The evidence confirms that the coaches, in the presence of the CTO and the Consultant, viewed the tape of the team swim, each using a clicker to register a missed count by a swimmer. The clickers were held within a towel, under the table, so that they could neither see nor hear each other's clicks, thereby minimizing the chance to be influenced by the others. To their consternation, Megan Poss missed eighteen counts of her routine and failed to finish. In their opinion, which I am satisfied they honestly and reasonably held, such a development could result in the Team's elimination at a qualifying event.

Based on past practice, they referred to the FINA rules of international competition and judged that the error was sufficiently serious as to attract the assessment of penalty points. In their view, as each count could constitute a separate error, the penalty for eighteen errors could have been as high as two points for those missed required elements, in accordance with Rule ss. 18.3.3 of the FINA Synchronized Swimming Manual. They decided to assess a single point against the Claimant.

While Ms Taylor argues a different interpretation of the rule and the way in which international judges would handle the error, I am satisfied that the use of the rule as a guideline to deal with an obviously problematic development was legitimate and appropriate in the circumstances, even if it could be ultimately concluded that Ms Taylor is technically more correct (a point on which I make no finding). The failure to assess any significant consequence for such a serious error would, arguably, have caused grave unfairness to those swimmers who did not commit such an error, and who did

finish the routine. The task of selecting a principle or guideline to deal with the situation presented was within the authority of the coaches, and they exercised their judgement in that regard fairly and objectively. Nor was it discriminatory that they did not assess a penalty point against any other of the swimmers. The evidence confirms that the coaches gave close consideration to two swimmers who came into physical contact during the same routine. Being ultimately unable to determine which of the two was responsible for that error, they opted to assess no penalty against either of them. In my view, albeit there might also have been some consequence for that error in a qualifying competition, in the context of a fair selection process, that was not an unreasonable course of action, nor was it discriminatory as against the Claimant, whose responsibility for her major error was never in doubt.

Nor can Ms Poss succeed in her claim that it was in violation of the selection process and criteria to eliminate the pattern element for scoring purposes. The evidence confirms that this was the first time the Respondent decided to utilize videotape for pattern scoring. To the surprise of the coaches, the whole team was entirely out of pattern. Scoring pattern would have meant points being assigned only to the lead swimmer, with all others losing points, without any precise understanding of which swimmer or swimmers were responsible for the problem.

The selection criteria expressly give to the coaches the latitude to deal with any "unforeseen circumstances" which might arise during team selection. Counsel for the Claimant suggests that that language should be limited to such unforeseen events as

bad weather or flight cancellations, arguing that the use of the “unforeseen circumstance” as applied to a general error of the team is dangerous and beyond the intention of the drafters of the rule. Setting aside that the CTO and coaching staff had some involvement in drafting the rule, the Arbitrator cannot accept the Claimant’s argument. As with the use of the FINA standard reviewed above, the interpretation to be given to the rule resides primarily with the CTO and coaches of the respondent. It is not for this Board to weigh fine points of competing interpretation to overturn the judgement of the experts properly charged with the decision-making responsibility within the NSO, so long as that judgement is exercised honestly and within the principles enunciated above. The fact that on a first attempt to use videotape to assess the pattern element the coaches found themselves with an indecipherable mess does, I think, fall within what can fairly and reasonably be viewed as an unforeseeable development. And while it may be, as suggested by Ms Taylor, that other alternatives beyond abandoning the pattern element for all swimmers might have been available, that decision properly belonged to the coaches and the CTO. Whether it was the “best” decision is not for this tribunal to determine: the decision which they made was within their authority and it should not be interfered with. Nor does the evidence confirm any real prejudice to Ms Poss, who claims that she decided to concentrate on pattern during the competition, at the cost of synchronization. There is nothing in evidence to demonstrate that her pattern was any stronger or weaker than the other team members.

What, then, of the decision of the Appeal Committee rendered in the appeal of swimmer Tracy Little, reproduced at some length above? Counsel for the Claimant

asks this tribunal to partially set aside the decision of the internal Appeal Committee. He submits that the log book entries and scores by coaches and consultants should be allowed to stand, and that only the athlete entries and scores should be viewed as tainted and properly to be removed. That surgical distinction, it is agreed, would restore the Claimant to a position on the National Team.

It is important to appreciate that the Claimant participated fully in the hearing before the Appeal Committee. She did so with the benefit of legal counsel. In essence, the arguments made by her counsel in that proceeding are now made, *de novo*, in this arbitration. Again, principled decision making requires an appreciation that an arbitrator does not have the leisure or luxury of simply substituting his or her subjective opinion for the opinion of the Committee. The question for this Board is whether the Committee accorded the Claimant procedural fairness and natural justice, fairly applied its mind to the issues argued before it and reached a decision that meets the standard of reasonableness and is devoid of arbitrariness, discrimination or bad faith.

With respect to procedure, the Claimant appears to question the role of Ms Corbett in the administration of the appeal. That would seem to be rooted, in part, in the view of Ms Poss that Ms Corbett had somehow frustrated the progressing of her own appeal. The Arbitrator can give no weight to that perception which, for the reasons reviewed above, might be most kindly described as naïve, if not eccentric. Ms Poss or those advising her knew, or reasonably should have known, that once she was placed on the team following the registering of her appeal the time and resources of the appeal

process should no longer be expended on the vindicating of personal claims which had become purely academic. If her standoff with Ms Corbett was problematic, it was a dysfunction of her own making which could not properly be mustered for a self-serving attack on the appeal process generally.

In the Arbitrator's view the decision of the Appeal Committee speaks for itself with regard to the issues raised and fully dealt with, including the concerns of the Claimant in this arbitration. The Committee duly considered the ill-advised concept of athletes in close competition evaluating themselves and each other in a system that would be reduced to a form of mathematical scoring. They examined, in my view reasonably, the frailties of a system that had departed from randomness and was devoid of sufficient safeguards as to security and confidentiality. Contrary to the submission of counsel for the Claimant, they were not bound by strict rules of evidence, and could give such weight as they carefully chose to the report of manipulation made to them, and to rest their decision on the mere possibility of such abuse inherent in the Log Book system. Most importantly from the standpoint of the coaches and expert's entries into the log, they considered the weakness of a system that gave no guidance as to the difference between the five rating values between "excellent" and "poor". Nor is it clear on the evidence before the Arbitrator to what extent the coaches and consultants might themselves have been influenced by the entries made by athletes, in circumstances fraught with the potential for manipulation by strong-willed individuals competing among themselves for a finite number of positions on a National Team. While the Arbitrator appreciates that the Log Book system was set up by the staff of

Synchro Canada with the best of intentions, it is to be hoped that this unfortunate chapter will be read and understood by other NSO bodies for their future guidance in avoiding similar pitfalls.

On what basis can an Arbitrator responsibly overturn the decision of the Appeal Committee, whether in whole or in part? I can see none. Procedurally the Committee scrupulously respected the procedural rights of the Claimant, granting her the fullest right of participation for herself and for her legal counsel. The Committee extensively reviewed the facts presented and grounded their decision entirely on those facts, without regard to any extraneous or improper considerations. Most importantly, their conclusion on the merits is reasonable, whether or not a differently constituted tribunal might have come to a different result, a proposition which in any event seems doubtful. It is certainly not for this Board to overturn the decision of the Appeal Committee simply because it declined the invitation of the Claimant to cherry pick the Log Book to retain those parts that would best serve her interests. The view of the Committee that the taint of unreliability affected the entire Log Book exercise was carefully and reasonably arrived at. The resulting decision was in all aspects consistent with the rules of the Respondent, the authority of the Committee and the overriding principles of fairness that should govern team selection process.

Megan Poss is an outstanding athlete whose technical achievements are not here in question. It is to be hoped that she will continue to contribute to Canada's synchro swimming program and eventually realize her dreams. But for all of the

reasons related in this decision, the Arbitrator cannot sustain her claim, and it must be dismissed.

There remains the issue of costs. That aspect of the Arbitrator's jurisdiction is granted under the terms of Article 6.23 (b) of the **Canadian Sport Dispute Resolution Code**. It provides:

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.

The foregoing provision is unusual as regards the awarding of costs. Unlike what is typically seen in the courts, the awarding of costs for or against a party is not dependent on success on the merits of their position. In other words, under Article 6.23 of the **Code** costs do not necessarily follow the cause. That is not to say that the principle of costs being awarded to successful parties should be entirely disregarded, but the instant provision does introduce the notion that a result exceptional to that rule can be contemplated.

In the Arbitrator's view that is entirely understandable in the special context of appeals by athletes under a national sports dispute system sanctioned by Sport Canada and the NSO bodies who are subject to it. Athletes, particularly amateur athletes, are generally young persons without the financial means to retain legal counsel and pursue their rights through an appeal and arbitration process that that can, in some cases,

become complex and legalistic. Given that reality, the mere possibility of an order for costs against an athlete who is ultimately unsuccessful in his or her appeal could have a substantial chilling effect on the ability and willingness of that athlete to appeal in the first place. The provisions of Article 6.23 (b) of the **Code** must be understood in that context. They also reflect the implicit understanding that in some cases, albeit exceptionally, it may be appropriate to order costs as against an NSO, even though that body may have emerged successful on the merits of the arbitration.

This is manifestly such a case. Although it emerges successful in this arbitration, whether by inadvertence or by design, on at least two occasions the Respondent Synchro Canada introduced steps into its team selection process that effectively drew its athletes into an almost inescapable litigation trap. First there was the implementation and lax administration of the obviously questionable Log Book system, and then the equally regrettable innovation of awarding “bonus points” in the coach’s subjective scores, as reflected in the email issued by the CTO on December 14, 2007. While these things may have been done openly and innocently, they ultimately placed the athletes in an impossible situation where appeals and interventions in those appeals became virtually unavoidable. To that is added the ill-advised, and arguably unlawful, directive of the Respondent to its athletes and staff that they must refuse to discuss with the Claimant Megan Poss or her legal counsel any aspect of her attempt to exercise her right of appeal under the Respondent’s own procedures. However they may have been intended, at a minimum those measures were not calculated to inspire trust and

confidence in the Respondent's coaches and staff among the athletes forced to deal with their consequences.

Fortunately, with the benefit of independent advice, the Respondent corrected the error of the bonus points and restored the integrity of the selection system. It also handled the process of the Appeal committee in an exemplary way, resulting in the setting aside of the impugned Log Book system. While it deserves great credit for those corrections, the fact remains that it was these actions of the NSO which laid the troubled ground on which this difficult arbitration has been contested. Given that reality, why should the athletes forced into defending their interests in these disputes be obliged to bear the cost of the process? In the Arbitrator's view, subject to one exception explained below, they should not.

That exception concerns the conduct of the Claimant, a factor to be considered under Article 6.23 (b) of the **Code**. The language of that article, indeed the entire **Code**, reflects the value that athlete's disputes, which are inevitable, are to be resolved in a way that is civil and orderly. Athletes are entitled to disagree, and to appeal their view forcefully, without being disagreeable. Unfortunately the Claimant, for reasons she and her advisors best appreciate, consciously and repeatedly failed to meet that standard by engaging in a course of widespread communication which was insulting, if not defamatory, towards the Respondent and its staff. She did so notwithstanding the initial correction of the error in relation to the bonus points. Rather than accept the correction, which essentially agreed with her position, she used it as a public avowal of cheating


- 35 -

and fraud to further attack the Respondent. In the Arbitrator's view that conduct on her part was grossly excessive, and must be factored into the analysis with respect to awarding costs. So too must her insistence on pursuing her appeal after she was placed on the team, when the issues she wanted aired had become academic.

In the result, for these reasons, the Arbitrator is satisfied that it is appropriate that the Respondent bear the general burden of costs in these proceedings, with some adjustment as applied to the Claimant, given that they bear some shared responsibility for their respective failure of conduct.

The claim is therefore dismissed. The Arbitrator directs that the Respondent pay the reasonable costs incurred by the Intervener affected athletes to the rate of 100% (one hundred percent) and the reasonable costs incurred by the Claimant to the limit of 66 2/3% (sixty six and two thirds percent). I retain jurisdiction with respect of any issue which may arise concerning the disclosure of particulars in relation to costs or any other question as to quantum.

Dated at Ottawa this 26<sup>th</sup> day of February, 2008



Michel G. Picher

Arbitrator