SDRCC 24-0731

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

Between

LINDSAY TRAISNEL and PATRICIA PEARCE

Claimants

-and-

EQUESTRIAN CANADA

Respondent

-and-

JESSICA PHOENIX, KARL SLEZAK, COLLEEN LOACH

Affected Parties

BEFORE: Peter Lawless, KC (Arbitrator)

REASONED DECISION

APPEARANCES

For the Claimants:	Lindsay Traisnel
	Patricia Pearce
	Alicia Tymec (Counsel)
For the Respondent:	James Hood
	Michelle Kropp (Counsel)
For the Affected Parties:	Jessica Phoenix
	Karl Slezak
	Colleen Loach

PARTIES AND PROCEDURAL BACKGROUND

1. The Claimant Lindsay Traisnel (the "Claimant") appeals Equestrian Canada's decision to select her and her horse Bacyrouge (owned by co-Claimant Patricia Pearce) as the second alternate for the 2024 Olympic Games Eventing Team.

2. The Selection Committee's decision was communicated on June 19, 2024.

3. The Claimants' appeal was filed on June 21, 2024 and Equestrian Canada filed its Response on June 23, 2024.

4. The Canadian Olympic Committee's deadline for nominations from Equestrian Canada was July 3, 2024.

5. Due to the need for a decision by July 3, 2024, the Parties agreed to waive the internal appeal process of Equestrian Canada and have this matter heard on an expedited basis before a Panel of the SDRCC. Similarly, the Parties agreed to submit an application to the SDRCC for a waiver of the usual Resolution Facilitation in favour of a quick arbitral decision.

6. I was appointed to hear this matter with the consent of the Parties and, on June 25, 2024, conducted a Preliminary Meeting to establish a timeline for written submissions and for the hearing.

7. On June 28, 2024, I was advised that one of the members of the Selection Committee had filed an Intervention form with the SDRCC seeking to be heard at the hearing. I refused this application on the basis that the selector was, at most, a witness that could be called by the Parties and that participation as an Intervenor was unnecessary.

8. The hearing proceeded on June 28, 2024, by videoconference. At the conclusion of the hearing the Parties were provided an opportunity to file two-page closing statements by the close of business on June 29, 2024.

9. Pursuant to Section 6.12 of the Canadian Sport Dispute Resolution Code (the "SDRCC Code"), I issued a short decision on July 2, 2024, denying the within appeal and noting that my written reasons would follow in accordance with Section 6.12 of the Code. These are those written reasons.

POSITION OF THE PARTIES

10. The Claimants say the decision to select Lindsay Traisnel as the second alternate cannot stand for two reasons:

    a. They say that one of the members of the Selection Committee was biased against the Claimant; and

    b. They say that the decision was based on the use of a flawed statistical tool, EquiRatings Chart.

11. The Respondent Equestrian Canada ("EC") says that the decision was correctly made and that there was no bias.

12. EC further says that EquiRatings is an appropriate tool to assist the Selection Committee in its decision making and says that it is not flawed as argued by the Claimants.

13. The Affected Parties' participation in this matter was very minimal and as a result I will not refer to their positions other than to note that they would seem to support EC's position and their own selections.

ONUS

14. The SDRCC Code establishes the Onus of Proof as follows:

> *6.10 Onus of Proof in Team Selection and Carding Disputes*
>
> *If an athlete is a Claimant in a team selection or carding dispute, the onus will be on the Respondent to demonstrate that the criteria were appropriately established and that the disputed decision was made in accordance with such criteria. Once that has been established, the onus shall be on the Claimant to demonstrate that the Claimant should have been selected or nominated to carding in accordance with the approved criteria. Each onus shall be determined on a balance of probabilities.*

15. In this matter, it is conceded by the Claimants that the criteria were properly established. Accordingly, the issue before me is the application of those criteria with EC submitting they were properly applied and the Claimants saying they were not.

SDRCC JURISPRUDENCE

16. While prior SDRCC decisions are not binding precedent, they do form a useful guide for the analysis of selection decisions like these.

17. The SDRCC published an annotated version of the 2021 Code which, at least for selection matters, remains very useful as the relevant Code section (Section 6.10) has not changed.

18. While the Parties have both suggested the standard of patent unreasonableness is the appropriate standard for this review, I am unconvinced of that.

19. The annotation for *Bui v. Tennis Canada*, SDRCC 20-0457 provides:

> *SDRCC 20-0457 Bui v Tennis Canada; Carol Roberts, Arbitrator: The Respondent has the initial burden of establishing that the carding criteria were appropriately established and that the carding decision was made in accordance with the criteria. If the burden is satisfied, the onus then shifts to the Claimant to demonstrate on a balance of probabilities, that she should have been nominated in accordance with the criteria. The parties agreed that the standard of review is reasonableness, and that the standard outlined in Tribunal decisions is unchanged following the Supreme Court of Canada's decision in Canada (Minister of Citizenship and Immigration) v. Vavilov, 2019 SCC 65. In Vavilov, the Court held that reasonableness review is a "robust form of review" in which the reasons of the decision maker must demonstrate that he or she has considered the facts and governing scheme relevant to the decision as well as any past practices. An appellant is required to satisfy the Tribunal that there are "serious shortcomings" in the*

decision. Provided that a NSO's decision is intelligible, transparent, and accompanied by reasons, that decision will not be easily overturned.

20. I am of the view that the correct standard of review is that of reasonableness and adopt the guidance set out in *Vavilov* (as described in the annotation to *Bui v. Tennis Canada*, above) that a reasonableness review is a "robust form of review" in which the reasons of the decision maker must demonstrate that he or she has considered the facts and governing scheme relevant to the decision as well as any past practices. An appellant is required to satisfy the Tribunal that there are "serious shortcomings" in the decision. Provided that a NSO's decision is intelligible, transparent, and accompanied by reasons, that decision will not be easily overturned.

21. I am also guided by the three considerations from *Dunsmuir v. New Brunswick*, [2008] 1 SCR 190 (as set out in the annotation to *Larue v. Bowls Canada Boulingrin*, SDRCC 15-0255) that:

    a. *absent cogent evidence of error, the Arbitrator should adopt a deferential assumption that the Team Selection Committee, which is composed of experienced experts, knows its business.*

    b. *the role of the Arbitrator is not to re-write the NSO's high performance policy or its team selection criteria with any view of improving either or substituting its content.*

    c. *the role of the arbitrator is to determine whether the outcome of the team selection process was made in accordance with the selection criteria and whether that outcome falls within a range of possible reasonable outcomes which are defensible in light of the facts and the team selection criteria.*

DISCUSSION

A. Bias

22. The Selection Committee is comprised of three individuals who are charged with reviewing riders and horses in accordance with the nomination criteria.

23. The Claimants do not challenge the qualification of the selectors on the Selection Committee but instead argue that one selector was personally biased again the Claimant and convinced the other two selectors to follow his views.

24. The Claimants assert:

    8.Moreover, the selectors' decision is tainted by the clear bias exhibited by [redacted] *against Lindsay.* [Redacted] *exhibited his bias in multiple inappropriate remarks about Lindsay, personal attacks against her and he assessed her candidacy on invented, irrelevant criteria. The decision was tainted by this bias, which originated with* [redacted] *and formed the basis upon which he persuaded the other two selectors to agree with his view of her.*

25. The test for bias is well known and is set out at paragraph 6 of EC's closing submissions as follows:

    …would a reasonable, well informed and right-minded person look at the matter being adjudicated and conclude that the decision maker, whether consciously or unconsciously, would not make a fair decision in the matter?

26. The Parties rely on lengthy transcripts of the Selection Committee meetings to support their positions.

27. The Claimants points to various sentences and comments made by the impugned selector that they say demonstrate bias. A list of these is provided at paragraph 14 of the Claimants' submissions which I will not reproduce here.

28. EC says that none of these comments rise to a level that a finding of bias can be made. EC further points to other comments by the same selector that are not unfavorable towards the Claimant. Specifically, EC says:

> *EC submits that when the transcript is reviewed in its entirety, it is evident that the impugned selector,* [redacted]*, was fulfilling his duties as selector, which included interpreting and assessing results, and deciding with the other selectors whether athletes do or do not fulfil criteria. It is the selectors' job to point out strengths and weaknesses in each combination's ability to execute in a competitive setting. This work can point to competitive drive, conservative approaches to protect results, their team mentality, pursuit of competitive excellence and personal development, among other things, which* [redacted] *identified in both positive and negative regards for the Claimant. Any reasonable person viewing the transcript in its entirety, and knowing the extent of the [Selection Committee]'s collection of relevant data and observations, would not conclude that* [redacted] *would not make a fair decision on the matter.*

29. I agree with EC.

30. I have considered each of the identified comments individually, as a collection, and in the context of the entirety of the whole meeting.

31. While it may be said that some of the comments are not specifically tied to the various selection criteria and that perhaps, when taken in isolation, a selector might wish to not have made them, when taken in the overall context of the entire selection meeting, they can be seen as the ordinary sort of extraneous commentary that is a common part of any similar lengthy meeting.

32. In my view it is unreasonable to expect that every single utterance by all selectors be solely focused on only the specific criteria. That is a standard that would be near impossible to achieve in any meeting of any length.

33. I further note that one of the reasons for a selection committee as opposed to a single selector is to assist in ensuring that, to as great an extent as possible, individual biases do not overwhelm objective evaluation.

34. To be clear, a single biased individual most certainly can poison an entire selection process, but in the case before me that did not happen.

35. The Claimants' appeal on the basis of bias is dismissed.

B. The Use of EquiRatings

36. With respect to the Selection Committee's use of the EquiRatings tool, the Claimants say:

> *7. The only statistical information (EquiRatings Chart) referenced extensively by the selectors during their meeting supplied analyses that ran contrary [sic] the Nomination Criteria. As a result, the Selection Committee i) failed to correctly apply the Nomination*

Criteria; ii) was not alive to the limitations of the EquiRatings statistics; iii) failed in its obligation to apply a human interpretation to the EquiRatings; iv) disregarded Lindsay and Bacyrougue's objective performance results during the relevant timeframe; and v) placed undue reliance on a [sic] incomplete statistical analysis resulting in a patently unreasonable decision.

37. The Claimants spent the bulk of their submissions and their cross examination of EC's representative at the hearing addressing the issue of their claim that the EquiRatings chart failed to account for cross country penalties.

38. Secondarily, the Claimants submit there is exceptional unfairness as where the EquiRatings chart does allow for the incusing of penalties, it treats all penalties the same despite the fact that they can be objectively different in terms of the actual number of penalty points assessed.

39. EC's response to this is quite straightforward. It says that the Claimants are wrong and that cross country penalties are appropriately accounted for in the EquiRatings chart. More specifically, EC points to the reliability ratings section where they say the cross country penalties are accounted for.

40. EC puts it as follows in its closing submissions:

> *12. To set the record straight, while it is true that ER [EquiRatings] accounts for penalties equally, this does not make it an unreliable metric. The ratings metrics for XC jumping penalties is Reliability Rating. The percentage given to a specific horse/athlete combination represents the statistical chance, based on their cross-country results to date that they will produce a XC round with zero jumping penalties. Therefore, XC jumps are clearly considered and that percentage is the indication of XC jumping faults (R-05, Row 5).*

41. Any objective view of the EquiRatings chart inescapably leads to the conclusion that it clearly does include cross county penalty points as part of the reliability score attributed to each rider.

42. While much was sought to be made by the Claimants of the fact that the reliability score treated all penalties the same, given the role of an Arbitrator as guided by *Larue v. Bowls Canada Boulingrin*, above, I cannot find that the manner in which EquiRatings treats cross country penalties is outside the range of reasonable.

43. Accordingly, deference must be given to the experts who created the selection criteria and who determined that the use of EquiRatings and its treatment of cross country penalties was appropriate and consistent with the objectives of the selection criteria.

DECISION

44. For the reasons set out above, the Claimants' request to overturn the Selection Committee's decision and to vary the Claimant's and Bacyrouge's selection to the 2024 Olympic Eventing Team as the second alternate is denied.

45. Selection disputes are always challenging and when it involves selection to the Olympic or Paralympic Games, the stakes cannot be higher for the parties.

46. In this case, the Claimant is a highly accomplished equestrian athlete who has represented Canada both proudly and successfully. While she has not been successful in this appeal, I am confident she will continue to compete and excel at the highest levels of her chosen sport.

47. Lastly, I wish to thank the Parties for their cooperation and professionalism in this matter. Selection appeals such as this are carried out on incredibly compressed timelines and but for the level of cooperation and professionalism demonstrated by all involved, reaching a decision would have been virtually impossible in the short time available.

48. Signed at Victoria, BC this 15th day of July 2024

Peter R. Lawless, KC
Arbitrator