

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE REGLEMENT DES DIFFERENDS SPORTIFS DU CANADA
(CRDSC)**

No: SDRCC 16-0301:

JESSICA PHOENIX
DON LESCHIED
ANITA LESCHIED
DON GOOD
(Claimants)

AND

EQUINE CANADA (EC)
(Respondent)

AND

Kathryn Robinson
(Affected Party)

AWARD

THE HONOURABLE ROBERT P. ARMSTRONG, Q.C.

Counsel for Claimants:

PETER F.C. HOWARD AND
AARON KREADEN

Representative for EC:

OWZIE SAWICKI

I. INTRODUCTION

1. This is an arbitration concerning a decision made by the Selection Panel of Equine Canada (EC) on June 24, 2016 selecting the members of the Canadian Eventing Team for the 2016 Olympic Games in Rio de Janeiro. The Request for Arbitration was filed by the Claimants pursuant to the Canadian Sport Dispute Resolution Code (the “Code”). Pursuant to s.2.1(b)(iii) of the Code the parties have agreed that the SDRCC has jurisdiction to deal with this dispute. In addition, the parties have agreed to waive an internal appeal process contemplated by EC and proceed directly to Arbitration. See *Rowland v. Equine Canada* No: SDRCC 07-0059.
2. Eventing is an equestrian competition where a single rider/horse combination competes in the three phases of dressage, cross country and show jumping.
3. The arbitration was held in Toronto on July 6, 2016. The evidence was comprised of documents filed by the parties, live witnesses, witness statements and cross-examination on witness statements either by telephone or in person.
4. I released my decision on July 11, 2016 and what follows are my reasons for that decision.

II. THE PARTIES

5. The Claimant, Jessica Phoenix, is a person who resides in Cannington, Ontario and is a professional equestrian who participates in eventing competitions. Throughout the time period relevant to this Arbitration, she has competed with four different horses: Abbey GS, A Little Romance, Bentley's Best and Pavarotti.
6. The Claimant, Don Good, is a person who resides in New Hamburg, Ontario and is the owner of the horses, Pavarotti and Bentley's Best.
7. The Claimants Anita and Don Leschied, are husband and wife who reside in Ontario and are the owners of the horse, A Little Romance.
8. As owners, Don Good, Anita Leschied and Don Leschied (collectively, the "Owners") were required by EC to execute Owners Agreements, which provide that they would each be "deemed to be an athlete" for the purpose of any appeal of a selection decision or for any recourse to the EC Dispute Resolution Policies. The Owners therefore have standing to be Claimants in this proceeding.
9. The Respondent, EC, is the national governing body for equestrian sport and recreation in Canada. It was responsible for, among other things, establishing the Nomination Criteria for the Olympic Games in Rio, appointing the Selection Panel and ultimately rendering the decision in issue here.

III. FACTUAL BACKGROUND

10. The Selection Panel made its decision on June 24, 2016 and selected the following rider/horse combinations for the team:

- (i) Rebecca Howard - Riddlemaster
- (ii) Colleen Loach – Qorry Blue D’Argouges
- (iii) Selena O’Hanlon – Foxwood High
- (iv) Kathryn Robinson – Let It Bee

11. The Panel also appointed the following horse-rider combinations as alternates to the team:

- (i) Jessica Phoenix – A Little Romance
- (ii) Jessica Phoenix – Bentley’s Best
- (iii) Waylon Roberts – Kelecyn Cognac

The Nomination Criteria

- 12. The nomination criteria for selection to the EC Olympic Team for Rio were established in late 2015. This was a collaborative effort with input from athletes, coaches and owners.
- 13. Section 6 of the nomination criteria establishes the process of selecting rider/horse combinations.
- 14. Section 8.1 of the nomination criteria states that:

The selection panel has the responsibility for selecting the rider/horse combinations to be nominated by EC to the COC that will achieve the best possible result at the 2016 Olympic Games. The selection panel will consider the following in relation to any combination under consideration for nomination to COC.

Section 8.1 then lists a number of Considerations and General Factors that the selection panel should take into account as follows:

- (i) Competition considerations
- (ii) Objective considerations
- (iii) Discretionary considerations
- (iv) General factors

Section 8.1 is attached as Appendix 1.

15. EC also recommended five targeted competitions for prospective team members during 2016 prior to the selection process. Results for those competitions would be taken into account in the selection process but no particular competition was mandatory.

The Minutes of the Selection Panel Meeting, June 22, 2016

16. The meeting took place by conference call. According to the minutes the meeting commenced at 7:00 pm and concluded at 7:50 pm. At the outset of

the meeting Mr. Fredericks asked each panel member to name the four team members and their alternates in ranked order. They agreed to proceed on this basis. Each panel member provided his/her list. The minutes record under the heading “Overall Considerations when Selecting Combinations (all reflected in 2016 Elite and National Squad Criteria):

- Consistency of performance results (overall and specific to each of the three phases)
- Strength of field at which results were achieved
- Ability of athlete to achieve elite or national squad targets
- Soundness of the horse (Vet reporting via Team Vet/Selector Vet)
- Ability to finish competition in all three phases.

The goal is to finish a team – all members.”

17. The Minutes have attached to them Appendix A-1, entitled “Matrix of Selection (Ranking and Rationale) for Rio Olympic Games”. The Matrix compares the average scores for each potential horse/rider combination. There is also a Comments column on the Matrix. The Matrix was apparently prepared by Mr. Ozzi Sawicki on the day following the Selection Panel meeting, June 23, 2016. Mr. Sawicki is the Eventing High Performance Advisor for EC.

18. Ms. Phoenix appears on the Matrix with two of her four horses, Bentley's Best and A Little Romance. In respect of A Little Romance there is a reference in the comments column to "soundness concerns". This is contrary to the evidence of Dr. Copenhagen and Dr. Baskett. The comments in respect of Ms. Kathryn Robinson and Let It Bee are all favourable.
19. There is no mention of Pavarotti in the minutes of the Selector Panel or the Matrix.

The Position of the Parties in this Arbitration

20. The Claimants submit that Ms. Phoenix is and has been Canada's leading Eventing competitor for the last ten years with significant international achievements and "on any metric – whether objective, discretionary or otherwise – Phoenix satisfied all Nomination Criteria to be appointed to the 2016 Olympic Team." In the result, they submit that the Selection Panel failed to properly apply the Nomination Criteria and should have selected Ms. Phoenix in combination with one of two horses, Pavarotti or A Little Romance. They further submit that Kathryn Robinson, who was selected to the team with her horse, Let it Bee, simply does not measure up to Ms. Phoenix. Should Ms. Phoenix succeed in this Arbitration she would replace Ms. Robinson on the EC team so Ms. Robinson is an "Affected Person". Ms. Robinson has received notice of these proceedings. An Intervention Form was filed on behalf of Ms. Robinson. She also forwarded an e-mail stating her position. However, Mr. Sawicki indicated that Ms. Robinson was not prepared to be cross-examined on her e-mail. Mr. Sawicki also indicated

that she did not wish to participate in the Arbitration. In the circumstances I am not able to take into account her e-mail.

21. The position of EC is that the Nomination Criteria were properly applied by the Selection Panel and that the selection made by the Selection Panel should stand.

Onus of Proof in Team Selection Disputes

22. Section 6.7 of the Code provides:

If an athlete is involved in a proceeding as a Claimant in a team selection or carding dispute, the onus will be placed on the Respondent to demonstrate that the criteria were appropriately established and that the selection or carding decision was made in accordance with such criteria. Once that has been established, the onus of proof shall shift to 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.

23. The Claimants do not take issue with the criteria but they challenge their application. As the onus rests with EC to establish that the selection decision in issue was made in accordance with the Nominating Criteria, EC presented its case first.

The Evidence of EC

24. EC filed a document titled, “Selector Statement” which was prepared by Ms. Jenn Holling, a member of the Selection Panel. EC also provided a witness statement of Clayton Fredericks, the coach of the Eventing Team and a member of the Selection Panel. He was also called as a witness for cross-examination in person. Finally, EC filed witness statements from two veterinarians – Dr. Jill Copenhagen and Dr. Anne Baskett. Dr. Copenhagen was made available for cross-examination over the telephone.

The Selector Statement

25. Ms. Holling prepared the Selector Statement as a result of consulting with the other members of the Panel. Counsel for the Claimants objected to the admissibility of this document on the ground that it was the product of several persons and most of them other than Ms. Holling were not being called as witnesses. However, I allowed the document to be filed on the basis of the more relaxed evidentiary rules, which apply to these kinds of arbitrations.
26. The Selector Statement indicates that it contains a collective “recollection of our meetings and discussions on the horses in question.” The Statement contains the following caveat: “These are supporting notes and do not replace the minuted decision, as presented in the Selection Minutes June 22, 2016.” I will consider the statement but I intend to rely mainly on the Minutes of the June 22nd meeting and the appended Matrix.

Clayton Fredericks

27. Mr. Fredericks is a former Olympian who competed in eventing competitions for Australia. He was hired initially as the International Technical Advisor by Equine Canada and then was appointed the coach of the Team in about September, 2015. In his witness statement of July 4, 2016 he says:

The withdrawals from competition of Jessica Phoenix and Pavarotti at Carolina International CIC3***, Rolex Kentucky CC14*** and Bromont CIC3*** and Jessica Phoenix and Bentley's Best at Bromont CIC3*** were not part of a team decision and went against the advice of myself as team coach. In each instance the withdrawals were communicated to me by Jessica Phoenix on the day of Cross Country close to competition time. This pattern of withdrawals has raised concerns regarding Jessica's level of competitiveness as an athlete and her readiness to be competitive at the Olympic Games.

As Eventing Team Coach I have had concerns this year regarding the fitness program of Jessica Phoenix and her declared horses which was discussed in March with Jessica, myself and the team vet, Jill Copenhagen. I still have concerns regarding the fitness levels of Jessica's horses, in particular Pavarotti and their level of fitness while competing has not demonstrated the level required to compete successfully at the Olympics. Similar fitness concerns were raised by the selectors who had opportunity to observe Jessica over the course of the targeted competitions leading to Bromont.

28. Mr. Fredericks was cross-examined by Mr. Howard. Although Mr. Fredericks had expressed concern about the level of fitness of Ms. Phoenix's horses he had not reviewed a copy of any of the veterinarian reports with respect to Pavarotti or A Little Romance in the period between May 15, 2016 (competition at Jersey Fresh) and the meeting of the Selection Panel on June 22, 2016.
29. Mr. Fredericks acknowledged that it was his view that Ms. Phoenix should have run Pavarotti and Bentley's Best at the competition in Bromont. He acknowledged that he expressed this view to Ms. Phoenix. However, he denied that he threatened Ms. Phoenix that her failure to run the horses in Bromont would keep her off the Olympic Team.
30. Mr. Fredericks denied that he told Mr. Good at Bromont that he thought Mr. Good and Ms. Phoenix were hiding something from him concerning the soundness of Pavarotti. Mr. Fredericks acknowledged that in a conversation with Mr. Good he told him that from a coach's perspective when a competitor does not want to run his or her horse it could be seen as a competitor trying to hide something. He said he was trying to help Mr. Good and that he was keen for the horses to run and that it was in Jessica's best interest to run as Ms. Phoenix needed another good strong performance to give her the strongest chance of being selected for the Olympic Team. Mr. Fredericks also denied that he told Mr. Good that if Jessica did not run both horses at Bromont, they would not be considered for the Olympics.

Dr. Jill Copenhagen

31. Dr. Copenhagen is presently the veterinarian for the Canadian Eventing Team. She filed a Witness Statement in which she stated:

To summarize my findings on Pavarotti, he has a chronic active tendonitis affecting the right front SDF. It has been closely monitored since October 2015. There are two areas of concern. An older area of inflammation at mid level of the tendon has been non-reactive and static on ultrasound since the spring. A newer area of fibre disruption and inflammation presented itself in April 2016. This region is below the previous injury. It is this area that has been intermittently reactive to palpation and carried heat or fill. On ultrasound it is unchanged since prior to running Jersey CCI.

My clinical impression is that the horse has had low grade tendonitis throughout the spring season. He has been carefully managed which has allowed him to get to this point. There is a strong possibility that the fibers will tear more fully at some point during his athletic career. That may be this year or 2 years down the road. Historically, he has been able to remain sound when he has entered competitions whilst having tendonitis present on either the left or right front.

In my opinion, the nature of the injury increases the risk to the horses' soundness for the Rio games. As I explained to Jessie, he is a higher soundness risk than either blue or benny. I cannot predict the outcome, but I do have reservations about his soundness following an Olympic effort at speed.

32. In respect of Pavarotti, she told Mr. Howard in cross-examination on the telephone that Pavarotti has competed successfully for Canada. She says he has issues that have flared up which are part of the maintenance of a high performance athlete. She agreed that a lot of horses experience injuries that are managed throughout their careers.
33. She also said in cross-examination that the horse does not have a tear. He has chronic active tendonitis, which is unchanged from before the Jersey Fresh meeting in April [May]. She also testified that she is not predicting that he will break down at Rio.
34. In respect of A Little Romance she agrees with the opinion of Dr. Baskett and is comfortable with her chances of coming through Rio with an acceptable level of soundness at the second inspection.

Dr. Anne Baskett

35. Dr. Anne Baskett, a veterinarian, provided the following statement in respect of Pavarotti and A Little Romance:

I agree completely with Dr. Copenhagen's assessment of Pavarotti. Due to the careful management of the horse resulting in limited cross country runs this season, I do not feel that we have enough information to realistically try to predict his chances of getting through Rio with the chronic active tendonitis. While I wholeheartedly feel that both Jessie and Pavarotti's owner have acted in the

best interest of the horse and his ability to compete in the future, this does leave us with questions as to whether he can perform and stay sound at a demanding level of competition at this time.

With respect to A Little Romance, although she was not completely sound after Bromont, it was my feeling that her LF irregularity and positive flexion tests on both front distal limbs were consistent with previous exams after competition. Both Dr. Copenhagen and myself felt that her issues have been managed successfully in the past and are therefore comfortable with her chances of coming through Rio with an acceptable level of soundness at the second inspection.

The Evidence of the Claimants

36. The Claimants provided evidence from Jessica Phoenix, Don Good, Graeme Thom, Kyle Carter and Dr. Usha Knabe.

Jessica Phoenix

37. Ms. Phoenix is 32 years old. She is married with two sons, aged 6 years and one year. She and her husband live on a farm near Cannington, Ontario. Her husband is a farmer. Ms. Phoenix, as a young girl, started riding ponies in Uxbridge, Ontario where she grew up. She subsequently took up the sport of eventing in Port Perry, Ontario. In addition to her involvement in eventing she also trains horses and trains students in horsemanship.

38. For the last ten years Ms. Phoenix has been the leading Canadian eventing competitor. Her many achievements include:
- (i) 2007 - selected to Canadian team for PanAm Games
 - (ii) 2010 - selected to Canadian team for the World Equestrian Games
 - (iii) 2011 - Pan American Games – Individual Gold and Team Silver in Guadalajar, Mexico
 - (iv) 2012 - selected to the Canadian Olympic Team for the London Games
 - (v) 2014 - selected for the World Equestrian Games in France where she achieved the best Canadian performance
 - (vi) 2015 – Pan American Games, Individual Silver and Team Bronze
 - (vii) Currently ranked 44th in the world as an eventing rider. The next closest ranked Canadian is ranked 80th.
39. In February of 2016 she sat down with Mr. Fredericks to discuss her plan for preparation for the Olympic Games in Rio. She discussed which of the targeted competitions she would enter with her various horses.
40. It was clearly understood by all riders that none of the targeted competitions were mandatory. This evidence was confirmed before me by other witnesses.

41. Ms. Phoenix competed with Pavarotti in two of the targeted competitions at the Fork in North Carolina and Jersey Fresh in Allentown, Pennsylvania.
42. There was a plan to compete with Pavarotti in two other targeted competitions out of a possible three: Pine Top in Georgia, Rolex in Kentucky in April and Jersey Fresh in May.
43. At Pine Top she did not run Pavarotti because of a sore back and a couple of other relatively minor injuries unrelated to his tendons.
44. In respect of Rolex in Kentucky in April, 2016 the intention was always to compete in either Rolex or Jersey Fresh and to make a decision at the time of the scheduled competitions.
45. It was her plan, as discussed with Mr. Good, the owner of Pavarotti, that they would assess whether to compete at Bromont after Jersey Fresh. They were concerned that the time between Jersey Fresh and Bromont was a little over three weeks and it would provide too short a recovery period after Jersey Fresh. The decision was made prior to the cross-country run that the best interest of the horse was not to run him.
46. Ms. Phoenix typically spends each day with her horses and rides them six days a week for an hour to one and a half hours. The relationship between a horse and rider is extremely close and a rider develops what is known in the horse fraternity as “feel”. She gets to know when her horses are up or down and feeling well or otherwise. She loves her horses – they are family. She would never run a horse that she knew was injured.

47. In respect of the withdrawal of Pavarotti and Bentley's Best from Bromont and her discussion with Mr. Fredericks she testified that he arrived at the barn in Bromont. He was very agitated. He told her, "you were in the driver's seat for this selection and now you have completely ruined your chances not just on Bentley's Best and Pavarotti but on the other two mares as well." Ms. Phoenix testified that, Mr. Fredericks said "he could no longer help but was going to spend his time preparing the people who wanted to do this."

Don Good

48. Mr. Good is the owner of Pavarotti and Bentley's Best. He and Ms. Phoenix decided that after competing both horses at Jersey Fresh that Bromont would be an unnecessary risk to the horses' health to run them cross-country at Bromont.
49. Mr. Good was approached by Mr. Fredericks in Bromont before the commencement of the competition. During this discussion Mr. Fredericks tried to persuade him to insist that Ms. Phoenix would run both Pavarotti and Bentley's Best in the cross-country phase at Bromont. Mr. Good said he would talk with Ms. Phoenix. However, he told Mr. Fredericks that he did not think it was in the best interests of the horses to compete at Bromont. Mr. Good said they had just recently competed at Jersey Fresh, which was a higher level of difficulty than Bromont and they had nothing to prove.

50. In response, Mr. Fredericks accused Ms. Phoenix and Mr. Good of hiding something from Mr. Fredericks regarding Pavarotti's soundness. As this discussion continued Mr. Good said that Mr. Fredericks threatened him by stating that if Jessica did not run both horses at Bromont, they would not be considered for the Olympics.

Graeme Thom

51. Mr. Thom gave a Witness Statement and was also available on the telephone to answer questions of Mr. Kreaden, counsel for the Claimants and Mr. Sawicki.
52. Mr. Thom's statement provided evidence concerning his involvement with the Canadian Eventing Team and his role as a witness in this matter as follows:

My involvement with the Canadian Eventing Team (“CET”) and its related High Performance Committee began in 2004/5 and ended in June of this 2014. At the time of my resignation, I held the positions of Chef D’Equipe for the CET and Chair of the Eventing High Performance Committee. Although I carried out these positions on a volunteer basis, in the years of Major Games, I devoted approximately 1000 hours/year. As Chef D’Equipe of the Team and Chair of High Performance, I had numerous responsibilities ranging from philosophy development, program initiation/implementation, Own The Podium

(“OTP”) presentations, logistics and basic day to day chores. I also attended every training session and CCI 3*/4 in North America, as well as many in Europe.

Through my involvement with CET, I was the Chef D’Equipe for, among other things: the Pan American Games 2007 (Rio, Brazil); 2008 Olympics (Hong Kong); 2010 World Equestrian Games (Lexington, USA); 2011 Pan American Games (Guadalajara, Mexico); and the 2012 Olympic Games (London). During this time period, our Team was fortunate to record the greatest number of medals in any similar period in its history, highlighted by Team Silver at WEG 2010 and individual Gold at PAG 2011. It also twice had athletes honoured with the award for Canadian Equestrian of Year.

As Chef D’Equipe and Chair of the Eventing High Performance Committee, I was involved in many discussion with selectors surrounding team selection. In addition, the coach at the time (David O’Connor) and I were constantly evaluating rider performance in anticipation of Major Games. I was complimented by Own the Podium on my analysis of national and international teams and riders. As a result of this background, I have been asked by the Claimants to provide this witness statement to provide a general overview on the sport of eventing, and also to provide my views on the proper application of the Nomination Criteria that is attached as Exhibit B1 to the Complaints’ Request, based on the Results that are attached at B4 of the Complainants’ Request.

53. Mr. Thom made it clear that he knows and respects both Ms. Phoenix and Ms. Robinson. In paragraph 14 of his statement he says:

All of this is to say that my statements and analysis below is based solely on my analysis of each rider's objective results, as well as the subjective considerations that ought to be taken into account by a member of any selection committee. I am in no way motivated to see one rider succeed over the other; I simply believe that the best choice under the circumstances ought to be made.

54. At the outset of his analysis he states in paragraph 15 that the Nomination Criteria applicable to this case appear to be relatively the same as the criteria in place when he was involved with the Canadian Equine Team.
55. Mr. Thom's analysis of the Nomination Criteria and related matters as they applied to Ms. Phoenix and Ms. Robinson and their horses – Pavarotti, A Little Romance and Let It Bee – are found at paragraphs 20 to 27 of his statement:

Results and Subjectivity

20. I understand that some analysis of the score data has already been completed by the two sides. I would right off the bat say that any reliance on averages is not something that I would gravitate towards. My work with Own the Podium enforced my own feeling that the risk of averages is that they can be skewed by outliers; good and bad. I prefer to concentrate on median scores and then work [it]out but in the case of these two riders there is not so much data that results can simply be looked at individually.

21. Another critical piece is the difference between CCI and CIC scores. The biggest difference, and most influential, is that the distance and time of the cross country phase. Per the FEI rules a CCI 4* is between 11 and 12 minutes, a CCI 3* between 10 and 11 minutes and a CIC 3* is between 6 and 7 minutes. CCI 4 star fences are larger than 3 star fences. The extra time required of a horse at the CCI level is impactful. It makes things more difficult, not just for the cross country phase but also for the final phase of show jumping; if the horse has carry over fatigue and possibly some soreness. My point is that if you were to evaluate a group of marathon runners then you would lend more weight to their marathon results as opposed to shorter prep races.
22. Looking only objectively at the CCI results, Jessica bests Kathryn's scores on all of her horses. That Kathryn completed Badminton is very impressive and normally this type of an outing would trump any 3 star result. However, Kathryn's time penalties were so numerous (53.2) that her 4 star result is not impressive enough to stand on its own. To put this into perspective, these time penalties represent the equivalent of two stops, (and then some) on cross country, and do not meet the criteria to be counted as a qualifying result within the FEI rules. The prescribed speed by the officials is 570 metres per minute. Kathryn finished over 2 minutes above the optimum time, putting her speed at approximately 480-485 metres per minute.
23. I actually disagree with the Selectors' choice of Bentley's Best but agree with their omission of Abbey GS. While both very talented horses and likely ones for the Team in the future, neither of these horses has shown consistency over their few outings. I am quite surprised that Pavarotti has been overlooked given his record. Thus I would concentrate on A Little Romance and Pavarotti as the two choices for Jessica.
24. In the first phase of competition (Dressage), I see some very consistent results over the period by both riders. Kathryn's scores have less deviation, but Pavarotti shows he

can put in a slightly better test than Let it Bee if he has a good day. A Little Romance loses in this phase as she is consistently 10 points worse than Let it Bee.

25. The cross country phase is the most influential of all the phases because it carries the highest amount of penalties per error. This is extremely important. In the cross country phase, I would discount Jessica's out of character fall from Pavarotti, and also note that it was not a fall of the horse. Pavarotti has never had a cross country jump penalty with Jessica riding him. Let it Bee has had a better 2016 than last year in the CCI world. That said, it was done at some pretty cautious paces so I would suggest that Pavarotti wins out in that phase. A Little Romance (despite a rider fall at Rolex CCI 4 star last year) has an impressive clear jumping record in cross country over the period. In addition, this horse has proven the quickest of the three so therefore passes Let it Bee.

26. The show jumping phase, from an objective basis, is fairly clear cut. The scores really do speak for themselves and I would rank the horses as: A Little Romance, Let it Bee and Pavarotti.

Summary

27. The Olympics rewards medals in Eventing for both Individuals and the overall team. Neither of the three horses I have discussed is going to win an individual medal at the Olympics. The next question then becomes, which combination will contribute the most to our Team's overall placing. Yes, I would rank Jessica's CCI results ahead of Kathryn's, primarily due to the highly valuable cross country phase, and in respect of A Little Romance, the show jumping phase as well.

56. Under cross-examination by Mr. Sawicki, Mr. Thom acknowledged that he has not acted as a selector in eventing competitions for Canada or any other

country. He also acknowledged that as Chef D'Equipe he did not have a vote in team selection. He did not attend any of the five targeted competitions, although he watched the competition at Rolex (presumably on television).

Dr. Usha Knabe

57. Dr. Knabe is a veterinarian physician who has spent 25 years in private equine veterinary practice with an emphasis on the integrative veterinarian management and care of elite level 3-day event and dressage horses, both in training and during championship competitions. She has treated Pavarotti for several years and examined him two days before the commencement of the hearing.
58. Dr. Knabe provided a Witness Statement and was made available for cross-examination over the telephone.
59. Dr. Knabe has attended to Pavarotti during the 2016 winter season and up to the present time both in Ms. Phoenix's base in Ocala, Florida, and during competitions elsewhere. On each occasion that she has treated Pavarotti, she has found the horse to be clinically sound and fit for competition.
60. On returning to Canada in the spring, Dr. Knabe performed routine clinical examinations of the horse's distal limbs including digital ultrasound examinations, the results of which were communicated to Dr. Copenhagen, the veterinarian for the Canadian team.

61. Dr. Knabe's witness statement at paragraphs 6 and 7 contain the following information:

6. Ultrasound exams and clinical palpations were performed both pre and post competitions and after gallops and jumping sessions and comparisons were made. The tendons have continued to palpate within normal limits and ultrasound results have shown no deterioration in the tendon structure or size. On the contrary, I performed both a clinical and ultrasound examination as recently as July 4th, 2016 after Pavarotti had successfully completed a jumping competition on July 1st, 2016. His tendons palpated normally as has been the case all season and the ultrasound examination showed a more homogeneous echogenicity with less fiber disruption and an overall reduction in cross-sectional size consistent with a tendon returning back to normal functionality post stress of competition.

7. Based on my experience and this horse's clinical and competition history, I am not aware of any reason that would make Pavarotti unfit for competing at the highest level of professional eventing.

62. Dr. Knabe further testified when called as a witness at the hearing that she has no reason to assume that Pavarotti's performance and results of those performances would be any different than over the last six months.

IV. ANALYSIS

Has Equine Canada discharged its onus?

63. The position of the Respondent is that it applied the appropriate Nomination Criteria by an experienced Selection Panel.
64. I am fully aware, that all things being equal, an arbitrator should be reluctant to interfere in a case such as this. Ordinarily considerable deference is owed to an expert tribunal or panel if the decision passes a reasonableness test. The fact that the arbitrator would have made a different selection is not enough to set aside the selection made by the Selection Panel.
65. Unfortunately this is not an ordinary case. The intervention of Mr. Fredericks in respect of the decision by Ms. Phoenix and Mr. Good not to run Pavarotti and Bentley's Best at Bromont takes this case out of the ordinary.
66. In respect of the conversations between Mr. Fredericks and Mr. Good, I prefer Mr. Good's evidence. Similarly, in respect of Mr. Frederick's conversation with Ms. Phoenix, I prefer her evidence.
67. I accept that Mr. Fredericks earnestly believed that both horses needed another run at cross-country before the Selection Panel would meet. However, he became a man with a mission on this issue and my assessment, unfortunately, is that he lost it. He told both Mr. Good and Ms. Phoenix that Ms. Phoenix's four horses would not be considered for the Rio Games for failure to run in Bromont – an event that was clearly not mandatory.
68. Mr. Fredericks was not only the Coach of the Team but he was a Member of the Selection Panel. He was obviously a very important member of the

Panel. It was he who suggested how they would proceed at the outset, which was accepted by the other Panel Members.

69. It is essential that a Selection Panel proceeds impartially and applies the Nomination Criteria in a way that ensures fairness and also the appearance of fairness. The approach taken by Mr. Fredericks with Mr. Good and Ms. Phoenix fails that test. A Selection Panel in which one of its principal members pre-judges the outcome cannot be said to be a panel, which acts fairly and creates an appearance of fairness. I cannot conclude on this evidence that the Respondent has demonstrated that the selection decision to exclude Ms. Phoenix and her horses was made in accordance with the Nomination Criteria.
70. The meeting of the Selection Panel lasted less than an hour. In a sense, the Minutes are significant for what they do not contain. For example, there is no mention of Pavarotti at all – Canada’s leading eventing horse for the last several years.
71. There is little mention in the Minutes of any medical or veterinary information. As mentioned above in respect of the Comments column for A Little Romance there is a note: “soundness concerns”. The evidence of Dr. Copenhagen and Dr. Baskett filed in this hearing is to the contrary.
72. Mr. Fredericks testified that he did not look at any veterinary reports between the Jersey Fresh Competition in mid-May and the meeting of the Selection Panel on June 22, 2016.

73. The meat of the decision is in the Panel's application of the Objective Considerations in Section 8.1 of the Nomination Criteria. I adopt the submission of the Claimants in paragraphs 14 and 15 of their "Further Submissions" as follows:

14. As set out in paragraph 13 of the Claimants' Request, section 8.1 of the Nomination Criteria required the Selection Panel to consider the following "objective considerations" in selecting the Team: i) the final score across all three phases of the competition; ii) the scores achieved in each individual phase; and iii) the final placing of the combination. It is never the case that all horse/rider combinations will compete in exactly the same events over the course of a season. The document included as Appendix 1 to the Respondent's Answer (identified as "Matrix of Selection (Ranking and Rationale) for Rio Olympic Games") reveals that the Selection Panel dealt with this issue by comparing the average scores for each potential horse/rider combination. Leaving aside the appropriateness of this approach, the following table sets out the applicable averages and demonstrates that Phoenix's results were better than Robinson's:

Table A: Average Scores Compared

Table A: Average Scores Compared						
Horse/Rider	Dressage	Cross Country		Stadium Jumping		Total
		Jump	Time	Jump	Time	
Abbey GS / Phoenix	51.4	21	15	1	0.3	68.5
A Little Romance / Phoenix	55.9	8.1	7.9	1.1	0	64.4

<i>Bentley's Best / Phoenix</i>	47.1	13	13.8	2	1.4	71.6
<i>Pavarotti / Phoenix</i>	45.1	16.3	15.1	4	1.2	63.7
<i>Let it Bee / Robinson</i>	47.2	10	21	2	1.3	84.5

15. For the purpose of this appeal, it is not necessary to go into the intricacies of Eventing scoring, except to note that, like in golf, the higher the number, the worse the score. The table above not only demonstrates that each of Phoenix's four horses had a better "total" score than Robinson's, but Phoenix's horses generally performed better on a category by category basis.

74. Table A, in my view, provides evidence that the Respondent apparently failed to carry out a thorough analysis of the available data, which would have favoured Ms. Phoenix's selection to the team with one or more of her horses. Equine Canada did not challenge the evidence related to Table A. However, even without this further evidence, the decision of the Selection Panel, in my view, could not stand once the chance of a fair hearing had been removed.
75. I therefore conclude that the Respondent has failed to discharge its onus.

The Onus on the Claimants

76. Having determined that the Respondent failed to discharge the onus placed upon it under section 6.7 of the Code, I turn to whether the Claimants have established that the rider/horse combinations of Jessica Phoenix/Pavarotti or

Jessica Phoenix/A Little Romance should have been selected in accordance with the approved criteria.

77. I start with Ms. Phoenix. All of the evidence before me establishes that she has been Canada's leading international rider in eventing competitions for the last decade. No one has suggested that there has been any change to her pre-eminent position. She is in a class by herself.
78. That said, I have to consider Ms. Phoenix in combination with the horses she proposes to ride. In this regard I have to decide whether she and one of her two horses (Pavarotti or A Little Romance) come out ahead of Ms. Robinson and Let it Bee. I am satisfied that Ms. Phoenix, with either Pavarotti or A Little Romance, does come out ahead of Ms. Robinson and Let it Bee.
79. Table A which compares the average scores of the three horses supports this conclusion. Also, the evidence of Mr. Thom, which I have cited at length, supports the conclusion that both Pavarotti and A Little Romance come out ahead of Let it Bee. The Table A evidence was not challenged. Mr. Thom's evidence was not seriously challenged other than Mr. Sawicki having raised the issue of Mr. Thom's never having acted as a selector or never having had a selector vote. I am satisfied that the background and experience of Mr. Thom in his various positions with Equine Canada up to 2014 qualifies him to provide the opinions he gave and I have no hesitation in accepting his evidence. He is familiar with the relevant Nomination Criteria which he employed in his opinion. He is familiar with the horses involved and the two riders involved. The choice then for me is between Pavarotti and A

Little Romance. Pavarotti is the more experienced horse with a more impressive competitive record in the past. Looking at their scores in competition over the last year on an average basis, they are very close – less than a point separates them.

80. Mr. Thom has analyzed the relative strengths and weaknesses of the two horses, which I need not repeat. As between A Little Romance and Pavarotti, it appears to be a close call. However, I cannot choose them both.
81. In my view the evidence of the veterinarians gives the nod to A Little Romance. According to Dr. Knabe, who knows Pavarotti well, and saw him as recently as two days before the hearing, he is presently fit to compete at the highest level of professional eventing.
82. On the other hand, Dr. Copenhagen, the Canadian team veterinarian who has known Pavarotti for some time and has received the ultrasound reports and other information from Dr. Knabe, raises a cautionary note. I repeat her concern here:

To summarize my findings on Pavarotti, he has a chronic active tendonitis affecting the right front SDF. It has been closely monitored since October 2015. There are two areas of concern. An older area of inflammation at mid level of the tendon has been non-reactive and static on ultrasound since the spring. A newer area of Fiber disruption and inflammation presented itself in April 2016. This region is below the previous injury. It is this area that has been intermittently reactive to palpation and carried heat or fill. On ultrasound it is unchanged since prior to running Jersey cci.

My clinical impression is that the horse has had low grade tendonitis throughout the spring season. He has been carefully managed which has allowed him to get to this point. There is a strong possibility that the fibers will tear more fully at some point during his athletic career. That may be this year or 2 years down the road. Historically, he has been able to remain sound when he has entered competitions whilst having tendonitis present on either the left or right front.

In my opinion, the nature of the injury increases the risk to the horses soundness for the Rio games. As I explained to Jessie, he is a higher soundness risk than either blue or benny. I cannot predict the outcome, but I do have reservations about his soundness following an Olympic effort at speed.

Dr. Baskett agreed with Dr. Copenhagen.

83. I have heard much evidence that Pavarotti's chronic low grade tendonitis has been successfully managed over his competitive life. Both Dr. Copenhagen and Dr. Baskett accept that to be the case, yet they have reservations and questions about Pavarotti's soundness to compete at the Games in Rio. I accept the opinions of Dr. Copenhagen and Dr. Baskett that they have a basis for their concerns and I prefer their evidence to the evidence of Dr. Knabe on this issue.
84. There is also no doubt that A Little Romance appears to have had a heavier schedule of competition than Pavarotti over the last year. It is also clear that A Little Romance does not appear to have any issues in respect of her soundness at this time.

85. I am satisfied that the Claimants have discharged their onus to establish that Jessica Phoenix/A Little Romance should have been selected in accordance with the approved criteria for the Canadian Eventing Team for Rio 2016.

V. CONCLUSION

86. The request of the Claimants is granted and Jessica Phoenix/A Little Romance shall replace Kathryn Robinson/Let It Bee on the Canadian Olympic Team (Eventing) for the Games in Rio 2016.

Dated at Toronto, this 16th day of July, 2016.


The Honourable Robert P. Armstrong, Q.C.
Arbitrator

APPENDIX “1”

8. SELECTION CONSIDERATIONS

- 8.1** The Selection Panel has the responsibility for selecting the rider/horse combinations to be nominated by EC to the COC that will achieve the best possible result at the 2016 Olympic Games. The Selection Panel will consider the following in relation to any combination under consideration for nomination to COC.

A. Competition considerations

1. The Selection Panel will consider competition results achieved at CCI 4*, CCI 3*, CIC 3*s during 2015 and 2016.

B. Objective considerations

In assessing the performances of combinations, the Selection Panel will consider the following objective performance measures:

1. The final score (across all three phases of the competition)
2. The scores achieved in each individual phase; and
3. The final placing of the combination (the Selection Panel note that the score and placing of each combination will be considered, but do not automatically position one combination above another for nomination purposes, as discretionary consideration can be applied).

C. Discretionary Considerations

In assessing the performances of combinations, the Selection Panel will consider the following based factors: These factors include but are not restricted to:

- i. The performances of each combination in relation to the quality and number of competitors
- ii. The consistency of the performances of each combination during the qualificaton period and in preparation for the Olympic Games.
- iii. The technical features of the competition, in particular (but not limited to):
 - a) The dressage judging (including the breakdown of scores across multiple judges)
 - b) The cross country fences and terrain
 - c) The relative difficulty of the show jumping
 - d) The quality of riding by the rider; and
 - e) The general conditions under which the performance is achieved, such as weather, surface and footing

D. General Factors

In assessing the performance of combinations, the Selection Panel will give consideration to general factors. These general factors include but are not limited to:

- i. The suitability of the combination for the expected conditions of the 2016 Olympic Games (taking into account the objective of team and individual competition)
- ii. The overall balance of the combinations that have been selected
- iii. The ability and experience of the combination to compete successfully at high level international competition. Consideration will be given to:
 - a) Demonstrated experience and/or success at championship level
 - b) The ability or potential ability of a horse and/or rider to perform under the stress and pressure of an Olympic Games
 - c) The ability of the rider to prepare their horse to peak condition for a major campaign and a commitment to maintain a fitness and training programme as agreed with the ETC and Team Veterinarian
 - d) The ability of the rider to contribute towards an effective team environment
 - e) Rider's demonstrated understanding and respect for obligations that accompany being a member of a Canadian team including respect for team members
 - f) Consistency of performance and the likelihood of a suitable performance to contribute towards a team outcome may be considered

- g) Exceptional ability of a combination (and the potential to achieve an individual medal) may be a consideration and may, in the Selection Panel's sole discretion, place a combination with less experience or consistency ahead of another combination
- iv. The Selection Panel has the discretion to place a greater emphasis on one or more of the nomination considerations in considering combinations for nomination.