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)

COSTS AWARD

THE HONOURABLE ROBERT P. ARMSTRONG, Q.C.

Counsel for Claimants:	PETER F.C. HOWARD AND AARON L. KREADEN
Counsel for Respondent:	BENOIT GIRARDIN

I. INTRODUCTION

1. On July 6, 2016, I acted as arbitrator concerning a decision made by the Selection Panel of Equine Canada (EC) in respect of the selection of 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*"). The issue in the case was whether Jessica Phoenix in combination with one of her two horses, Pavarotti or A Little Romance, should have been selected for the Canadian Team. I held that Ms. Phoenix in combination with A Little Romance should replace Kathryn Robinson and her horse Let It Bee.

2. I have now been asked by the Claimants to make an award of costs in their favour.

3. It is unnecessary to set out the facts in any detail because they are fully recited in my original Award. Suffice it to say, I found that the selection process was flawed for a number of reasons, not the least of which was when the team coach, Clayton Fredericks, told Ms. Phoenix that her refusal to run two of her horses at an event in Bromont would ruin her chances to make the Olympic team. Mr. Fredericks made a similar statement to Mr. Good, the owner of one of the horses in issue.

4. I accepted the evidence of Ms. Phoenix and Mr. Good. I rejected the denial of Mr. Fredericks that he made any such threat. I found as a fact that Mr. Fredericks was a very important member of the Selection Panel who had suggested how the panel would proceed at the outset of the selection meeting, which was followed by the other panel members. I concluded that, "a Selection Panel in which one of its principal members prejudges the outcome cannot be said to be a panel, which acts fairly and creates an appearance of fairness."

5. The Claimants have filed a Bill of Costs in which they seek a total of $50,029.33 including HST.

II. THE *CODE* PROVISIONS IN RESPECT OF COSTS

6. Section 6.22 of the *Code* governs the award of costs. The relevant provisions are as follows:

> (a) Except for the costs outlined in Subsection 3.9(e) and Section 3.10 hereof and subject to Subsection 6.22(c) hereof, each Party shall be responsible for its own expenses and that of its witnesses.
>
> …
>
> (c) 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 or during Arbitration.

> Success in an Arbitration does not mean that the Party is entitled to be awarded costs.

7. Over the years, arbitrators have often declined to award costs in sport disputes - particularly against athletes. However, there have been exceptions to this practice.

8. In *Hyacinthe v. Athletics Canada, SDRCC 06-0047*, 27 March 2007, the arbitrator, Richard Pound, Q.C., said the following:

> I think the Article [in the *Code*] has to be read in its entirety and in the context of its purpose, which is to provide an easily accessible means to resolve sport related disputes, many (if not most) of which will involve athletes. The overwhelming number of cases will likely involve matters of fact and sport judgment, most of which can be readily resolved by sport related individuals in the presence of an independent arbitrator. In such cases, the costs should not be significant and there has been a tendency on the part of arbitrators under the *Code* and its predecessor not to award costs, particularly when athletes are the losing parties. I think that is generally a reasonable approach and it is certainly one that I have favoured in the great majority of cases in which I have acted as arbitrator.
>
> But there are cases in which sports organizations have acted in ways that have financially prejudiced athletes and in which it is appropriate that they assume some of the financial responsibility for those actions.

9. In another case, *Boylen v. Equine Canada, SDRCC 04-0017*, 20 July 2004, Mr. Pound, as arbitrator, said that egregious conduct on the part of a sport organization may attract costs on an increased scale:

> Conduct of the parties is normally taken into account when that conduct is egregious and may lead to increased costs being awarded and, in severe cases, to

costs on what is known as a solicitor-client basis, in which the party against whom the costs are awarded will be responsible for all of the costs incurred by the other party. This is generally only in extreme cases.

III. THE POSITION OF THE CLAIMANTS

10. The Claimants rely on the above principles articulated by Mr. Pound in *Hyacinthe, Boylen* and other similar cases.[1]

11. Counsel for the Claimants reviewed the criteria referred to in section 6.22(c) of the *Code* in relation to the facts of this case as follows:

(i) The outcome of the proceedings – the Claimants were fully successful.

(ii) The conduct of the parties – the conduct of EC and particularly the conduct of Mr. Fredericks was highly inappropriate. The minutes of the meeting of the Selection Panel reveal a failure to mention Pavarotti, Canada's leading eventing horse for the last several years. The minutes of the meeting refer to "soundness concerns" for A Little Romance when the evidence of two veterinarians was to the contrary.

(iii) Financial resources - given the fact that the Claimants included the owners of Pavarotti and A Little Romance, the usual gap in financial resources between the athlete and the sport organization is not likely to exist but there is still a gap nonetheless and in any event the Claimants were completely successful.

(iv) Intent - counsel for the Claimants argues that the conduct of Mr. Fredericks did not constitute merely an error in judgment. His improper threat was in fact put into effect, which constitutes "intent" for the purpose of section 6.22(c) of the *Code*.

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[1] See also *Meisner et al. v. Equine Canada, SDRCC 08-0070*, 5 June 2008, and *Strasser v. Equine Canada, SDRCC 08-0085*, 20 October 2008.

(v) Settlement Offers - there were none except counsel for the Claimants argues that if EC had carried out a proper investigation, it would have discovered that the selection process was seriously flawed and would have taken appropriate steps to resolve the matter in a manner that was fair to all of the athletes concerned.

IV. THE QUANTUM OF COSTS

12. The Claimants submit that the facts of this case and the result obtained dictate that they should receive an award of costs at the highest level. They argue that this is precisely the type of exceptional case where the conduct of Equine Canada has been "unprofessional", "objectionable", and "in bad faith" such that the Claimants ought to be awarded their legal costs in full.

13. Counsel for the Claimants advises that when they were retained they agreed that a portion of the case would be on a *pro bono* basis. Mr. Howard's time would be *pro bono* and only Mr. Kreaden's time would be billed to the Claimants, in the absence of a costs order. Counsel further submits that the Court of Appeal for Ontario has held that costs awards may be available to successful *pro bono* litigants. See *1465778 Ontario Inc. v. 1122077 Ontario Limited,* 2006 CarswellOnt 6582 (OCA) at paragraph 48. The Claimants are asking that the total bill including Mr. Howard's time be included in the costs award.

V. THE POSITION OF EQUINE CANADA

14. EC has argued that no costs be awarded in this matter. Counsel for EC submits that under section 6.22 an award of costs is the exception. While an award of costs may be appropriate in some cases, this is not such a case.

15. Counsel for EC conceded at the outset that costs submissions are not to be used as an opportunity to re-litigate the case. That said, counsel proceeded to do just that and argued that the case had been wrongly decided. For example, he said that there was no evidence to support the finding in paragraph 85 of the Award that the Claimants discharged their onus to establish that Ms. Phoenix should have been selected in accordance with the approved criteria. This is the central issue in the case, which counsel now argues was decided in error.

16. Counsel for the Respondent's submissions are replete with arguments that were not made and evidence that was not led at the arbitration hearing. Counsel made much of the fact that EC was not represented by counsel. Counsel for EC made the following statement at paragraph 74 of his submissions:

> Further, the number of hours from two experienced counsels for preparation appear excessive. There was no sophisticated evidence presented and it appears clear to be a case of counsel taking advantage of opposing party not having counsel.

17. The above statement, in my view, constitutes a serious allegation. At a minimum it suggests that counsel behaved inappropriately. Counsel who act in a matter in which the opposing party is unrepresented have a special duty to ensure that no such advantage is taken. The allegation made by counsel for EC is not supported by reference to anything in the record. I reject it out of hand.

18. I now turn to the submissions that counsel for EC made in respect of the Claimants' Bill of Costs.

19. The Respondent argues that an award of costs in a sports dispute is the exception rather than the rule. Counsel relies on section 6.22(a) of the *Code* and comments made by Arbitrator Dumoulin in *Kraayeveld v. Taekwondo Canada*, SDRCC 15-0253:

> This is the starting point, the general principle. For matters arising under the *Code*, the parties are to bear their own costs. In my view, based upon this introductory language, only exceptional circumstances would justify a deviation from this principle.

20. Counsel submits that this is not an exceptional case. He further submits that, "the SDRCC was established to provide a rapid and expert resolution of sporting disputes and the awarding of costs will provide a disincentive to the parties to pursue such matters if they know their limited funds would be on the line each time. For that reason, we suggest the principle stated in section 6.22(a) of the *Code* and the approaches employed in the vast majority of cases, should be followed."

21. Counsel for the Respondent advanced other arguments in respect of the decision of the Selection Panel and that Mr. Fredericks' conduct did not affect the decision the panel made.

22. Counsel for the Respondent further argues that national sports organizations like EC have limited financial resources. An award of costs only ensures that there is less money for others who were not involved in the case at hand.

23. On the issue of intent, counsel for the Respondent argues that there is no evidence supporting bad faith on the part of EC. While counsel concedes that Mr. Fredericks' conduct was not appropriate, his reason for such conduct was for Ms. Phoenix's benefit and he wanted her on the team.

24. In respect of settlement offers and willingness to resolve the dispute, counsel pointed out that the parties did participate in a mediation session, which unfortunately did not succeed.

VI. CONCLUSION

25. I do not accept the submissions made by counsel for EC that there should be no costs award. In my view, the evidence in this case clearly establishes that this is an exceptional case. Ms. Phoenix and the Claimants were subject to a process, which could not withstand scrutiny. Persons in the position of Ms. Phoenix and the other Claimants must be subject to a process that has the objective appearance of fairness. This case manifestly did not have the appearance of fairness. Indeed events turned

out exactly as they were predicted by the coach. Minutes of the meeting of the Selection Panel are deficient in respect of the failure to mention Pavarotti and simply wrong in respect of A Little Romance. I conclude that there should be an award of costs in favour of the Claimants.

26. As to quantum, I am not inclined to make an award on the basis of full indemnity as requested. An award of $50,000 would be fully justified in a commercial case involving senior experienced counsel and a junior counsel. In my view, the reasonable expectation of parties in a case such as this would not contemplate a bill of costs in the $50,000 range. I therefore conclude that there should be an appropriate deduction to take into account the nature of this case. In my view, a proper award of costs is $35,000 inclusive of HST.

Dated at Toronto, this 6th day of October, 2016.

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