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

N°: SDRCC 24-0728

TUGRUL OZER
(CLAIMANT)

AND

SHOOTING FEDERATION OF CANADA
(RESPONDENT}

AND

MICHELE ESERCITATO
(AFFECTED PARTY)

Representatives:

For the Claimant:	Mr. Tyler Matthews, counsel
For the Respondent:	Mr. Will Russell counsel Ms. Jasmine Northcott
For the Affected Party:	On his own behalf

DECISION WITH REASONS

1. The Claimant is an accomplished athlete and member of the Shooting Federation of Canada. He is a member of the Canadian national team and having won gold at the 2023 Pan-American games in the 10m air pistol he is responsible for securing Canada's sole quota spot for the 2024 Summer Olympic Games in Paris in the men's 10m air pistol discipline.
2. In May of 2024 the Respondent held the Olympic team selection trial for the sole quota spot in 10m air pistol. The Claimant competed in the team selection trial but did not win the quota spot. Rather, the Affected Party defeated the Claimant in the competition and was therefore named to the Olympic team.
3. The Claimant initiated an internal appeal. That appeal was dismissed with written reasons issued on June 14, 2024 by adjudicator Ann Peel. The Claimant now appeals to this tribunal.

4. On June 24, I issued a short decision dismissing the appeal of the Claimant. This decision reflects my reasons for dismissing the appeal.

ISSUES

5. The Claimant advances three issues;
    a. Firstly, he submits that despite the fact that he initiated and participated in an internal appeal pursuant to the Respondent's appeal policy, the appeal to this tribunal should proceed as a hearing de novo and not a judicial review.
    b. Secondly, the Claimant submits that Respondent unilaterally amended the published nomination procedures for the Olympic trial and that the amended procedures were procedurally unfair and, as a result, the amended nomination procedure was not appropriately established by the Respondent contrary to Section 6.10 of the Canadian Sport Dispute Resolution Code of October 1, 2023 (the "Code").
    c. Thirdly, the Claimant submits that if this appeal is to proceed as a judicial review of arbitrator Peel's internal appeal decision, that such decision was unreasonable.

THE NOMINATION CRITERIA

6. The nomination criteria, Shooting Federation of Canada Athlete Selection Criteria for Major Competitions / Major Games 2021-2024, established by the Respondent was first published by the Respondent on December 20, 2021 (the "Criteria"). The nomination procedures specific to the 2024 Olympic Games, Shooting Federation of Canada Internal Team Nomination Procedures 2024 Paris Olympic Games, were published by the Respondent on October 12, 2022 and appended as Appendix "C" to the Criteria. (the "Olympic Criteria")
7. The portion of the Olympic Criteria that is relevant to this appeal reads as follows starting on page 19;

> **Trials**
> Stage 1: **Date TBD (post PanAm Championships)** Trials will be conducted as per the standard Olympic course of fire – twice over the course of fire, excluding finals - and are open to all National and Development Team Athletes. Ties will be broken in accordance with ISSF rules and regulations. The top three (3) athletes determined by the results of Stage 1 will be invited to compete in Stage 2 of the Olympic Trials.
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> Stage 2: **Date TBD (post PanAm Championships)**: The top three athletes from the Stage 1 Trials will be invited to compete. All athletes begin the Stage 2 Trials at zero; no scores are brought forward from Stage 1. Trials will be conducted as per the standard Olympic course of fire - once over the course of fire, excluding finals. The athlete achieving the highest score, excluding finals in the first competition of the event, will determine the winner of the quota spot and the athlete who will be nominated to represent Canada at the 2024 Olympic Games. The athlete placing second in the event for which a quota has been awarded to Canada, will be named as the alternate.

If an athlete, who has won the quota declines participation the alternate athlete will be awarded the quota and the 3rd place athlete designated as the alternate.

Team membership is subject to confirmation of the SFC High Performance Committee and Canadian Olympic Committee.

8. The Criteria provides that changes can be made to the document where there are typographical errors or lack of clarity. It further provides that any such changes must be reasonably justified and in accordance with the principles of fundamental justice and procedural fairness.
9. The Olympic Criteria provides that changes to the nomination procedure for the Olympics can be made in the event of unforeseen circumstances. The relevant portion of the Olympic Criteria reads;

Unforeseen Circumstances
This INP is intended to apply as drafted and, specifically, where no athletes are prevented from competing because of an unforeseen injury or other unanticipated or unforeseen circumstances. Situations may arise where unforeseen circumstances or circumstances beyond the Shooting Federation of Canada's control do not allow competition or nomination to take place in a fair manner or in the best interests of the priorities and general principles for selection as indicated in these criteria, or do not allow the procedure for nomination as described in this document to be applied.

In the event of such unforeseen circumstances the Vice President, High Performance will, where possible, consult with the High Performance Committee to determine if the circumstances justify competition or nomination should take place in an alternative manner. In such circumstances, the High Performance Committee shall communicate the alternative selection or nomination process to all impacted individuals as soon as possible.

Any changes due to unforeseen circumstances shall be posted to the SFC website and communicated directly to all members of the 2024 High Performance Program either electronically or by mail.

10. As it happened, only two athletes met the applicable qualifying standards and were therefore eligible to compete for the one Olympic nomination in the 10m air pistol event. Those two athletes were the Claimant and the Affected Party. As there were only two athletes eligible to compete for the one spot on the Olympic team, the Respondent elected to amend the Olympic Criteria (the “Amended Criteria”).
11. The Amended Criteria reflected two substantive changes to the Olympic Criteria. Firstly, the Olympic Criteria were amended to provide for only one Olympic trial event on May 25 and 26, 2024 rather than the two events prescribed by the Olympic Criteria. Secondly, the sole Olympic Trial event scheduled for May 25 and 26, 2024 was changed to provide that athletes would be required to complete two separate relays of the course rather than one relay of the course as proscribed in the Olympic Criteria.
12. The reason the Respondent adopted the Amended Criteria was because there were only two athletes able to participate in the competition and there was therefore no need for Stage 1 one of the competition as described in the Olympic Criteria. Stage 1 of the Olympic Criteria was designed to narrow the field to a maximum of three competitors who would then be eligible to compete in Stage 2 of the competition.
13. The Respondent’s decision to adopt the Amended Criteria was communicated to the

Claimant on April 25, 2024. That same day the Claimant confirmed his participation in the competition pursuant to the Amended Criteria.

14. The Claimant qualified for and competed in the Olympic trial on May 25 and 26, 2024 and he was defeated by the Affected Party in a very close competition. Consequently, the Affected Party has been named to the Canadian Olympic team in the men's 10m air pistol event for the Paris Olympics.

SUBMISSIONS AND EVIDENCE OF THE CLAIMANT

Hearing De Novo

15. The Claimant submits that this appeal should be heard de novo. He notes that the internal appeal decision was rendered by Ms. Peel, who is not an expert in the sport of shooting. He therefore submits that no deference is owed to her decision. He submits that I have the authority under Section 6.11 of the Code to proceed with this appeal de novo and that in fairness to the Claimant, I should focus on the substance of the appeal rather on the reasonableness of Ms. Peel's decision. The fairness submission is based on the fact that the Claimant was not represented by counsel in the hearing before Ms. Peel and that English is his second language. The Claimant submits that the only procedurally fair way to proceed is to hear this appeal de novo and consider the issues raised by the Claimant afresh.

The Amended Criteria were not appropriately established

16. The Claimant directs me to Section 6.10 of the Code which provides that the Respondent has the burden to prove that the Amended Criteria were appropriately established.
17. The Claimant submits that the Respondent has not and cannot meet its burden to show that the Amended Criteria were appropriately established because the decision to adopt the Amended Criteria lacked procedural fairness.
18. The Claimant referred me to a number of prior cases decided by this tribunal finding that changes to competition criteria are not appropriately established when changed mid-stream. For example, the Claimant notes the comments of Arbitrator Stitt who made the following comment in respect of an appeal in the sport of wrestling.[1]

> On the one hand, we want the best athletes to represent Canada in international competitions. We want the competitions for spots on the National Team to be open to those athletes who may be the best in the country. On the other hand, the path that athletes must follow in order to be named to a national team must be clear. Just like in sport, if rules are set and changed in mid-stream, it creates unfairness for athletes who rely on the rules.

[1] Asselstine v. Wrestling Canada SDRCC 14-0225 at page 5

19. The Claimant also cites several prior decisions of this tribunal that make the point that athletes make their decisions about training based on established criteria and that changing the criteria mid-stream can therefore be procedurally unfair. The Claimant notes that the procedural unfairness of changing the criteria mid-stream is not remedied by the good intentions of the sporting federation, the fact that the right to make changes had been reserved by the sporting federation or that the athlete did not object to the changes at the time.[2]
20. The Claimant notes that the Athlete Agreement signed by the Claimant and the Respondent provides that the Respondent would publish selection criteria at least 8 months before selection to major games teams. The Claimant submits that he reasonably relied on this term of the Athlete Agreement. He further submits that the decision to adopt the Amended Criteria so close to the Olympic games was fundamentally unfair.
21. The Claimant further submits that the Amended Criteria were not appropriately established because there were no typographical errors or lack of clarity as required by the Criteria. Further, the Claimant submits that there were no unforeseen circumstances beyond the Respondent's control that would have prevented the competition from taking place in accordance with the Olympic Criteria. (see para. 9 of this decision)
22. With respect to foreseeability, the Claimant submits that there was nothing to prevent the Respondent from conducting the Olympic qualifying competition in accordance with the Olympic Criteria and that it knew or ought to have known as early as October of 2023 that there were likely to have been three or less athletes qualified to compete for an Olympic Games spot in 10m air pistol. This submission is based on the fact that the Criteria provides that the only athletes possibly eligible to compete in a major games competition are those that are members of the National or Development Team as of September 30, 2023. The Claimant submits that only he and the Affected Party were so qualified and that it therefore cannot be argued by the Respondent that the low number of eligible athletes was an unforeseen event.
23. Finally, the Claimant submits that the Amended Criteria were not appropriately established because the Amended Criteria were not approved by the Canadian Olympic Committee.

The decision to adopt the Amended Criteria was unreasonable

24. The Claimant submits in the alternative, if I determine that this appeal is to proceed as a judicial review in respect of the internal appeal decision rendered by Arbitrator Peel, that her decision was unreasonable and should be reversed. As I have determined that this appeal will proceed as a hearing de novo, I do not consider it necessary to detail the Claimant's submissions with respect to unreasonableness.
25. The Claimant seeks an order that the appeal be allowed and that I direct the Respondent to conduct a second Olympic trial event between the Claimant and the Affected Party on an expedited basis.

SUBMISSIONS AND EVIDENCE OF THE RESPONDENT

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[2] Island and Dax v. Equine Canada SDRCC 04-0008 and Mayer v. Canadian Fencing Federation SDRCC 08-0074

26. The Respondent notes that the Olympic Criteria provide that changes can be made to the Olympic selection criteria in unforeseen circumstances including situations that did not allow the procedure for nomination as described in the Olympic Criteria to be applied.[3] The Respondent notes that the Olympic Criteria were established to, firstly, hold a Stage 1 competition to winnow the field of competitors to a maximum of 3 athletes and then, secondly, to hold a Stage 2 competition between the top three athletes to nominate an athlete or athletes to the Olympic team. The Respondent emphasizes that athletes successful in the Stage 1 competition would begin the Stage 2 competition equally, ie there would be no carry over of points from the Stage 1 competition. In other words, the Respondent says, all athletes competing in the Stage 2 competition would begin that competition on an equal footing.
27. The Respondent notes that the decision to adopt the Amended Criteria was made by the High-Performance committee (the “HPC”) of the Respondent. The HPC is comprised of acknowledged experts in the shooting disciplines. The Respondent acknowledges that the HPC was aware in early 2024 that there was a probability that three or fewer athletes would be eligible to compete for a spot on the Olympic team in 10m air pistol. The HPC made the decision to consult with the Canadian Olympic Committee with respect to the option of eliminating Stage 1 of the Olympic trials as mandated by the Olympic Criteria. The HPC advised the Canadian Olympic Committee that reducing the trials to a one stage competition would reduce time commitments, travel, stress and cost for the athletes involved. The Canadian Olympic Committee did not prohibit or object to the HPC adopting the Amended Criteria.
28. Following this, the HPC then made the decision to adopt the Amended Criteria subject to a determination of how many spots would be allocated to Canada at the Paris Olympics in 10m air pistol. The Respondent notes that had Canada qualified for two spots in 10m air pistol, the Olympic trial would have been cancelled entirely and the Claimant and Affected Party would both have been appointed to the Olympic team as they were the only athletes qualified to compete.
29. The final Olympic qualifying event for 10m air pistol was held in Brazil from April 11 to 19, 2024. Following that event, it was clear that Canada would only receive one Olympic spot in 10m air pistol. Immediately following the event in Brazil, the Respondent notified the Claimant (email April 25, 2024) that the Amended Criteria would be adopted. The Claimant then confirmed his participation and the Olympic qualifying competition occurred as required by the Olympic Criteria, no earlier than May 16, 2024.
30. With respect to the Stage 2 competition to occur on May 24-26 2024, the Respondent advised the Claimant that the Stage 2 competition would proceed with two courses of fire rather than the one course of fire detailed in the Olympic Criteria. The reason for this change was to ensure that the two competitors were given the best chance to succeed and was the fairest option. Holding a competition with two courses of fire would give both athletes the same level of fatigue and reduce the chance of an athlete experiencing a bad or lucky day.
31. With respect to the Claimant’s assertion that he was suffering from a bad back prior to day two of the Stage 2 competition, the Respondent notes that it advised the Claimant to obtain a doctor’s note explaining that he could not shoot and then to make a request to the Respondent that the Olympic Trial be rescheduled. No such note or request was

[3] Olympic Criteria page 20

received from the Claimant. Rather, the Claimant advised the Respondent that he intended to compete in any case.

32. Following these events, the competition proceeded and the Affected Party won the competition and the appointment to the Canadian Olympic team.

No hearing de novo required

33. The Respondent notes that the Code does not require a hearing de novo in this matter. It submits further that the decision of Arbitrator Peel was well reasoned and complete. On that basis, the Respondent says there is no need for a hearing de novo. Rather, the Respondent submits that this appeal is more akin to a judicial review and there is no need to re-examine the evidence and make any fresh determination on the issues raised in the appeal. The Respondent submits that this appeal should proceed as a reasonableness review of the decision of Arbitrator Peel and that on its face, the decision of Arbitrator Peel was manifestly reasonable.

The Amended Criteria were appropriately established

34. The Respondent emphasizes that it had the authority to adjust the Olympic Criteria when circumstances do not allow for "competition or nomination to take place in a fair manner or in the best interests of the priorities and general principles for selection as indicated in these criteria, or do not allow the procedure for nomination as described in this document to be applied."[4]

35. The Respondent submits that unless the decision to adopt the Amended Criteria was tainted by bias, bad faith or a clear error by the HPC then the appeal should be dismissed. The Respondent emphasizes that the HPC is comprised of experts in the field of shooting and it should therefore be given weight by me in evaluating this appeal.

36. The Respondent says that this is particularly important in this appeal because the Claimant cannot establish that he suffered any prejudice whatsoever. Had the competition proceeded in accordance with the Olympic Criteria, the Claimant would have qualified in any case. Further, the Respondent says, the fact that the Stage 2 competition was changed from one course of fire to two courses of fire had no impact on the Claimant.

ANALYSIS AND DISCUSSION

Hearing de novo?

37. In the circumstances of this appeal, Section 6.11 of the Code provides I have "full power" to conduct a hearing de novo. However, a hearing de novo is not mandatory in this appeal as the Claimant initiated an internal appeal which was decided against him on the merits.

38. The Parties have made competing submissions about whether I should hear the matter de novo or rather as an appeal of the decision of Arbitrator Peel. If I proceed in the latter fashion, I would be obliged to determine whether the decision of Arbitrator Peel was

[4] Olympic Criteria page 3

reasonable, as that term is used in the case authorities.

39. I do not consider it necessary to consider in depth the arguments of the Parties on this point. I have determined that the appeal must be dismissed on the substantive merits of the case advanced by the Claimant and that it is therefore the case that the decision of Arbitrator Peel was reasonable. I exercise my discretion to hear this appeal de novo.

Were the Amended Criteria appropriately established?

40. Section 6.10 of the Code requires the Respondent to establish that the Amended Criteria were appropriately established and that the disputed decision was made in accordance with the Amended Criteria. It is only the first of these requirements that is in issue in this appeal. The issue in this appeal is whether the Amended Criteria were appropriately established. There is no issue that the Olympic Criteria were appropriately established in accordance with the Criteria.
41. There is also no dispute that the competition proceeded in accordance with the Amended Criteria and that the Affected Party fairly won the competition. The question is whether the Amended Criteria were appropriately established.
42. The analysis of this question must begin with an examination of whether the Olympic Criteria provided the Respondent the ability to adopt the Amended Criteria. If the answer to that is "no" then no further analysis is required, and the Claimant would be successful in the appeal. If the Olympic Criteria provide a mechanism allowing the Respondent to adopt the Amended Criteria, then an analysis of whether, in the circumstances, the Respondent acted within the scope of the Olympic Criteria and whether the Claimant was prejudiced in any way by the adoption of the Amended Criteria must be addressed.
43. I have set out the key provision of the Olympic Criteria in paragraph 9 of this decision. In my opinion the "Unforeseen Circumstances" clause of the Olympic Criteria provides the Respondent two disjunctive circumstances within which the Respondent could adopt the Amended Criteria.
44. The first circumstance permitting the Respondent to establish the Amended Criteria is if "unforeseen circumstances… do not allow competition or nomination to take place in a fair manner or in the best interests of the priorities and general principles for selection as indicated in these criteria…" The second circumstance permitting the Respondent to establish the Amended Criteria is if situations arise "beyond the Shooting Federation of Canada's control do not allow competition or nomination to take place in a fair manner or in the best interests of the priorities as general principles for selection as indicated in these criteria…"
45. In my opinion, the Respondent has established that circumstances that were both unforeseen and beyond the control of the Respondent have occurred that "do not allow competition to take place in a fair manner or in the best interests of the priorities and general principles for selection as indicated in these criteria…" The circumstance that was both unforeseen and beyond the control of the Respondent is that there were only two competitors qualified to compete for the one spot available on the Olympic team. To be clear, the HPC knew earlier that there were only two competitors who would be qualified for nomination to the Olympic Team but it did not know and could not foresee how many spots would be allocated to Canada.
46. As the first stage of the competition detailed in the Olympic Criteria was designed to winnow the field down to three or less competitors, a two-stage competition became completely unnecessary, particularly as all competitors eligible for the round two

competition would begin on an equal footing, ie their scores from the round one competition would not be carried over. If Canada had qualified for two Olympic spots at the final Olympic qualifying competition in Brazil, then there would have been no need for an Olympic nomination competition at all; both the Claimant and the Affected Party would have been nominated to the Olympic Team. The competition in Brazil occurred on April 11-19, 2024. As I have stated, the result of that competition was a circumstance beyond the control of the Respondent.

47. The HPC of the Respondent made this decision because in its considered judgment adoption of the Amended Criteria would "reduce undue time commitments, travel, and cost for the athletes involved."[5] In other words, the HPC made the determination that the adoption of the Amended Criterial would allow the nomination competition to proceed in a manner fair to the athletes.

48. The HPC also determined that changing the competition from one course of fire to two courses of fire would give the athletes the same level of fatigue for the second course of fire and would reduce the risk of an athlete having a bad or lucky day.[6]

49. As I have determined that on the face of the Olympic Criteria, the Respondent was authorized to adopt the Amended Criteria, I must now determine whether I can or should examine the stated reasons of the HPC quoted above for their determination that adoption of the Amended Criteria was fair to the athletes (and, in particular, the Claimant).

50. I agree with the Respondent that absent bad faith or other circumstances not present here, I should not substitute my judgment for that of the HPC about the fairness to the athletes and to the competition resulting from the adoption of the Amended Criteria. The HPC consists of experts in the sport of shooting and it is not for me to question the opinion of the HPC that adoption of the Amended Criteria was, in general, fair to the athletes.[7]

51. That said, I am obliged to consider whether the adoption of the Amended Criteria created prejudice unique to the Claimant such as to render the decision to adopt the Amended Criteria as unfair. Although not clearly stated by the Claimant, the only facts alleging prejudice appear to relate to the back injury suffered by the Claimant prior to the second course of shooting during the Olympic nominating competition. This, of course, does not speak to whether there was prejudice to the Claimant at the time the Amended Criteria were established in April of 2024. The Claimant states that the email delivered on April 25, 2024 advising that the competition (as amended) would occur on May 24-26, 2024 gave him insufficient time to prepare for the Olympic nomination competition.[8] I observe that the Olympic Criteria state that the Olympic nomination competition will occur no earlier than May 16, 2024 and that team selection would occur no later than June 17, 2024. The Olympic nomination competition occurred within those dates. The scheduling of the date of the competition was mandated by the Olympic Criteria, not the Amended Criteria and cannot be considered with respect to whether the Amended Criteria were appropriately established.

52. I do not see any facts that could justify a finding that the Claimant was prejudiced by the decision to adopt the Amended Criteria. The Claimant was invited to compete, his travel was eliminated (the competition was held in Calgary, the Claimant's hometown) and the two courses of fire mandated by the Amended Criteria were well within the ordinary. In

[5] Borgerson witness statement para 8
[6] Borgerson witness statement para 11
[7] Maxime St-Jules v. Speed Skating Canada SDRCC 16-0288
[8] Ozer witness statement page 1

any event, even if the nomination competition was limited to one course of fire as set out in the Olympic Criteria, the Claimant would not have qualified as he was defeated by the Affected Party on the first course of fire. If anything, the second course of fire gave the Claimant an additional opportunity to win the competition.

53. The fact of the back injury was communicated by the Claimant to the Respondent before the second day of the nomination competition and the Respondent advised him that he could seek a medical opinion and he could seek a delay in the competition. The Claimant declined this opportunity to seek a medical opinion and to seek a delay in the competition. While unfortunate, that was a decision the Claimant was entitled to make and if it played any part in the Claimant's failure to defeat the Affected Party in the nomination competition, that failure cannot be visited upon the Respondent. Ultimately, I see no prejudice to the Claimant whatever from the adoption of the Amended Criteria.

54. I observe that in all the cases cited by the Claimant in his submissions that resulted in a finding that nomination criteria had not been appropriately established, the claimants were able to demonstrate to the tribunal that they had suffered some form of prejudice from the purported adoption or change of nomination criteria. That prejudice was demonstrated by showing the athlete preparation for an event was negatively impacted or prior a competitor was given an unfair advantage because of the amendment of the nomination procedures. In other words, all of the cases cited by the Claimant consisted of circumstances rendering the competition unfair to the claimant. None of those circumstances are present in this appeal.

55. In summary, I conclude that;

    a. The adoption of the Amended Criteria was authorized by the Olympic Criteria and
    b. The reasons given by the HPC for adopting the Amended Criteria were reasonable and fair and
    c. As there is no evidence of bad faith or other circumstances calling into question the judgment of the HPC, I would not interfere with their determination that adoption of the Amended Criteria was fair to all the competing athletes and
    d. There was no prejudice to the Claimant from the adoption of the Amended Criteria and
    e. Therefore, the Amended Criteria were appropriately established and
    f. The Affected Party fairly won the nomination competition.

AWARD

56. The Amended Criteria were appropriately established and

57. The Appeal is dismissed with thanks to counsel for their able submissions.

Signed in Vancouver, this 9th day of July 2024.

Robert Wickett, K.C., Arbitrator