

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

NO: SDRCC DT 10-0117  
(DOPING TRIBUNAL)

CANADIAN CENTRE FOR ETHICS  
IN SPORT (CCES)

AND

JEFFREY ADAMS

AND

GOVERNMENT OF CANADA,  
WORLD ANTI-DOPING AGENCY  
(WADA)  
(OBSERVERS)

**Before:**

Larry Banack (Arbitrator)

**Appearances and Attendances:**

On behalf of the Athlete: Timothy S. B. Danson (counsel)

On behalf of the CCES: Robert C. Morrow (counsel)

The Government of Canada and WADA did not participate in the hearing.

## **DECISION**

Hearing Held October 21, 22, 24 and 25, 2010  
Toronto, Ontario

December 21, 2010

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## **OVERVIEW**

1. This arbitration arises out of an allegation that Jeffrey Adams (the “Athlete”) violated the rules of the Canadian Anti-Doping Program – 2009 (“CADP”). The Canadian Centre for Ethics in Sport (“CCES”) alleges that the Athlete refused or failed without compelling justification to submit to Sample Collection. The CCES seeks a sanction against the Athlete of two years ineligibility.
2. The Athlete was previously the subject of a 2007 Doping Tribunal.<sup>1</sup> That decision became the subject matter of a 2008 Court of Arbitration for Sport (“CAS”) arbitral award<sup>2</sup> (“DT/CAS Determination”). In May, 2009, the Athlete commenced proceedings in respect of the DT/CAS Determination by Statement of Claim in the Ontario Superior Court of Justice and for Judicial Review in the Divisional Court (Exhibit 1, Tabs 7 and 10).
3. On September 30, 2009, the Athlete was selected for doping control by the CCES. However, that session was terminated by the CCES before a sample was given.
4. On November 24, 2009, as a follow up for the terminated session, the Athlete was again selected for doping control to take place on November 28, 2009. This session also did not result in the Athlete providing a sample. The CCES alleges the session ended because the Athlete refused to participate. The Athlete states that the CCES terminated the session and there was no refusal.
5. By letter dated December 17, 2009, Anne Brown of the CCES advised Athletics Canada that the CCES had commenced an “initial review” in respect of a possible refusal to provide a sample by the Athlete, possibly constituting a violation of CADP Rule 7.31. (Exhibit 1, Tab 1)
6. By letter dated January 20, 2010, Mr. Danson, on behalf of the Athlete provided an extensive response to Ms. Brown’s letter. Issues of conflict, bias and denial of natural justice were raised. (Exhibit 1, Tab 2).
7. By letter dated March 22, 2010, Ms. Brown notified Athletics Canada that the CCES asserted that the Athlete had committed an anti-doping violation pursuant to CADP Rule 7.31. (Exhibit 1, Tab 3, Page 3)
8. The CCES determination triggered an arbitration resolution process initiated by the Sport Dispute Resolution Centre of Canada (the “SDRCC”) by letter dated April 1, 2010.

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<sup>1</sup> *The Canadian Centre for Ethics in Sport et al v. Jeffrey Adams* (2007) SDRCC DT-06-0039 (Doping Tribunal)

<sup>2</sup> *Jeffrey Adams v. Canadian Centre for Ethics in Sport* (2008) CAS 2007/A/1312 (Court of Arbitration for Sport)

9. The events of November 28, 2009, cannot be considered in isolation. They must be reviewed in the context of all the circumstances in order to reach conclusions as to conflicting testimony of those in attendance.

### **CONCLUSION**

10. **As set out below, the CCES has not established to the comfortable satisfaction of the Doping Tribunal that any anti-doping rule violation occurred, as alleged on November 28, 2009.**

### **THE PARTIES**

11. **The Canadian Centre for Ethics in Sport:**

- (a) The CCES is a not for profit organization that promotes ethical conduct in all aspects of sport in Canada. To further its objectives, the CCES maintains and carries out the CADP.

12. **Jeffrey Adams:**

- (a) The Athlete has been a celebrated, successful, elite-level, disabled, track and field athlete since the age of 17. He has had numerous medal performances in Paralympic Games, IAAF World Championships, IPC World Championships and the Commonwealth Games. In 2004, he became a member of the Order of Ontario for his community involvement. The Athlete, now age 39, last competed internationally in the Beijing Paralympics in September, 2008. Throughout the Athlete's many years of competition he had been subjected to numerous doping control sessions.

13. **World Anti-Doping Agency:**

- (a) The World Anti-Doping Agency ("WADA") is the international organization responsible for administering the world anti-doping program. WADA was entitled to act as an observer of the arbitration, as of right. It did not, however, participate in any of the proceedings despite having been given notice.

14. **The Government of Canada** did not participate in any of the proceedings despite having been given notice.

### **THE RELATIONSHIP OF THE PARTIES**

15. The Athlete and Athletics Canada have a contractual relationship. Excerpts of the 2008-2009 Athlete Agreement, as executed by the Athlete on June 9, 2009, are found at Exhibit 2, Tab 16 ("the Athlete Agreement").
16. Pursuant to the Athlete Agreement, the Athlete agreed to be bound by "all the rules applicable to AC National Team Members as determined by the International Association

of Athletic Federations, International Paralympic Committee, Canadian Centre for Ethics in Sport, Sport Canada and Athletics Canada, as they apply to doping.”

17. The rules to which the Athlete agreed to be bound, include the CADP Rules.

### **HEARING**

18. The arbitration was conducted in accordance with the:
- (a) Sport Dispute Resolution Centre of Canada, Canadian Sport Dispute Resolution Code, January 1, 2009; and
  - (b) Canadian Centre for Ethics in Sport, Canadian Anti-Doping Program, 2009.
19. An in-person arbitration hearing was conducted. All witnesses testified under oath or having given an affirmation as to the truthfulness of their testimony. On consent of the parties:
- (a) Documents were marked as exhibits without any dispute in respect of origination or authentication;
  - (b) An order was made excluding witnesses, other than the Athlete who remained in attendance throughout the hearing; and
  - (c) A reporter transcribed the testimony of the witnesses.
20. The parties expressly waived the usual deadline for delivery of this Decision.

### **THE ISSUES FOR DETERMINATION**

21. Did the Athlete commit a CADP Rule 7.31 violation of refusing or failing without compelling justification to submit to Sample collection?
22. If the Athlete did commit a CADP Rule 7.31 violation, is he to be sanctioned by two years ineligibility (in accordance with CADP Rules 7.39 and 7.44).
23. To facilitate reading this Decision, the text of the applicable CADP Rules is reproduced in Appendix “A” attached hereto.

### **DT/CAS DETERMINATION**

24. As noted above, the Athlete was the subject of a 2007 Doping Tribunal. The Athlete appealed the findings of the Doping Tribunal to CAS resulting in the 2008 CAS arbitral award, briefly described below.
25. The Athlete alleged that in May, 2006 while attending at a bar in Toronto an unknown woman put cocaine in his mouth without consent. Six days later, the Athlete competed in an athletic event and was selected to give a urine sample.

26. Upon analysis, the sample was found to contain a Prohibited Substance. As a result, the CCES asserted that an anti-doping rule violation had occurred.
27. In defending that allegation, among other matters, the Athlete claimed that the sample contained the Prohibited Substance because he had used a contaminated catheter to give the urine sample.
28. Following a hearing, the Doping Tribunal decided that the Athlete violated CADP Rule 7.16 as a result of the presence of a Prohibited Substance in his urine sample.
29. The Athlete appealed that decision to CAS.
30. In reviewing the evidence adduced before the Doping Tribunal in respect of the Sample collection, CAS recorded the following evidence:

“46. Upon arriving at the Doping Control Station, the Appellant testified that, to his surprise, he had only brought “with him a catheter he had previously used”. The appellant said that the Chaperone watched him use (the previously used catheter) to provide the Sample.

47. At no time did the Appellant, the DCO or the Chaperone discuss the use of the used, unwrapped catheter. A sterile, wrapped catheter was never requested or offered. The DCO and the Appellant jointly completed the doping control form (“DCF”). No comments were recorded in the athlete remarks section of the DCF. The DCO did not describe the use of the catheter by the Appellant or any modifications made to the doping control process as a result of the Appellant’s disability or use of the catheter.

49. Anne Brown, General Manager of the CCES, testified that the CADP Rules do not require the CCES to provide disabled athletes with a sterile catheter. She asserted that sample collection equipment, which must be provided by the CCES, does not include catheters, but only equipment to directly collect or hold an athlete’s sample.

50. Brown also testified that the CCES was not obligated to provide catheters in tamper-proof packaging, despite the recommendations of the WADA Guidelines for Urine Sample Collection, as those guidelines are not incorporated into the CADP Rules. Brown also testified that when athletes bring their own catheters, the CCES never inspects them prior to their use nor are the athletes ever advised to use a clean catheter.”

31. The Athlete submitted to both the Doping Tribunal and CAS that the *Canadian Charter of Rights and Freedoms* applies to the dispute and that the proper interpretation of the

CADP Rules require that they be read in light of the *Charter*. CAS agreed with the Doping Tribunal that the *Charter* did not apply to the dispute.

32. Before both the Doping Tribunal and CAS, the Athlete asserted that the *Human Rights Code* (Ontario) applied to the dispute.
33. CAS accepted that because the law of Ontario governs the dispute, the *Human Rights Code* (Ontario) applies. Section 1 therein prohibits discrimination against individuals in the provision of services on the basis of disability. The CAS award includes the following:

“134. The Appellant contends that this section has been violated as a result of the CCES failing to either provide him with a sterile catheter at the Doping Control Station or to warn him of the dangers of using an unclean one. He maintains that because he is disabled and must use a catheter, the CCES must ensure that his catheter is sterile. Since able-bodied athletes do not share the risk of catheter contamination, the appellant submits that the CCES treats disabled athletes and able-bodied athletes unequally by imposing that risk solely on disabled athletes.

135. We do not find that the *Human Rights Code* (Ontario) placed an affirmative burden on the CCES to provide sterile catheters or to warn athletes about the risks of using contaminated catheters. Based on Ms. Brown’s testimony at the CAS Tribunal Hearing, we find that, at the time, the CCES did not appreciate or fully understand the contamination risks associated with using unclean catheters. Further, we do not find that the CCES was charged with this knowledge as the CCES has done all it reasonably can to educate itself and the athletes on successfully navigating the doping control process. The CCES provides information on its website and through other media to warn athletes of the risks associated with using illegal drugs, supplements, and certain medications. Had the CCES known of the risks of using unclean catheters, we find that it would have similarly warned the athletes. In our view, the CCES has fairly implemented and exhausted a comprehensive program designed to protect athletes (emphasis added).

137. In order for a disabled individual to assert a *prima facie* case under the *Human Rights Code* (Ontario) the individual bears the burden to at least show that, *prima facie*, some form of discrimination occurred. *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at para. 28. We find that, generally, a disabled individual must show that he or she was denied accommodation that was at least reasonably known as a needed accommodation in order to assert a *prima facie* case of

discrimination. If an organization is **not reasonably aware** of a potentially – equalizing accommodation that could be provided to a disabled person, it is not charged with providing that accommodation (emphasis added).

138. We find, therefore, that there was no requirement under the *Human Rights Code* (Ontario) that the CCES offer the Appellant a sterile catheter or warned him of the risks of not using one. (emphasis added)”

34. In respect of the events occurring in the Toronto bar, CAS accepted the Athlete’s uncontroverted testimony that the presence of the Prohibited Substance was the result of the contamination of the used catheter. In addition, CAS concluded the following:

“147. However, we agree with the Doping Tribunal in that the CADP Rules Appellant complains were departed from were not violated. As Ms. Brown testified, these Rules are part of an evolving set of guidelines that slowly adjusts through feedback and experience. The rules, at least at the time of the violation, did not create an affirmative duty to warn athletes of the dangers of using an unclean catheter or to provide a clean one. At that time, neither the CCES nor the athletes really understood the risks of using an unclean catheter. We find that the rules did not clearly express such an obligation, particularly in light of the CCES’s knowledge and experience surrounding self-catheterization **at that time**. Thus, we will not read such an obligation into the Rules. (emphasis added)

157. The circumstances of this case are, in our view, also truly exceptional.

160. We also find that the appellant was not at fault because he could not have reasonably have appreciated the risks of using a used catheter. The Appellant and other athletes testified that they never knew about or considered the risks of catheter contamination. Moreover, if the CCES was unable to appreciate these risks, we cannot expect the Appellant to have known about them either.” (emphasis added).

35. In conclusion, CAS ruled that the Athlete’s appeal against the CCES was partially dismissed, as an anti-doping violation was found to have occurred under CADP Rule 7.16. However, the Athlete’s ineligibility period of two years was eliminated.

### **ARBITRATION HEARING ORAL EVIDENCE**

36. I review below the oral and documentary evidence. Appearing as witnesses for the CCES were Ms. Anne Brown, Mr. John Smyth and Detective Emmanuel Iheme. Witnesses appearing on behalf of the Athlete were Mr. Michaud Garneau, Mr. Christian Bagg and

the Athlete himself. I also received as evidence a letter from Mr. Danson, the Athlete's lawyer, setting out his recollection of events on November 28, 2008. The parties consented to this letter and its content being admitted as evidence.

**MS. ANNE BROWN**

37. Ms. Brown has been an employee of the CCES for approximately 18 years. During the period of time which is the subject matter of the events in question, she was the General Manager of Ethics and Anti-Doping Services.

**DETECTIVE EMMANUEL IHEME**

38. Det. Iheme has been employed by the Durham Police for approximately 19 years and has been a certified Doping Control Officer since 1998. He has conducted approximately 1,000 doping control tests.

**MR. JOHN SMYTH**

39. Mr. Smyth has been a Doping Control Officer for the CCES since approximately 1989 and has conducted in excess of 2,500 doping control tests. He has received re-certification training in respect of the CADP and is aware of the rights and responsibilities of a Doping Control Officer, Chaperone and Athlete.

**MR. MICHAUD GARNEAU**

40. Mr. Garneau was an employee of the Athlete's business for approximately one year, as at November 28<sup>th</sup>, 2009, and was involved in the manufacturing of high-end wheelchairs. He was at the place of business on November 28, 2009. Approximately 7-8 weeks after the events in question, Mr. Garneau prepared a written statement of the events in question (Exhibit 3). He testified that he prepared the statement without assistance from the Athlete or anyone else.

**MR. CHRISTIAN BAGG**

41. Mr. Bagg is a business partner of the Athlete in the building of wheelchairs and testified by telephone conference call. Approximately 7-8 weeks after the events in question Mr. Garneau prepared a written statement of the events in question (which was not marked as an exhibit).

**EVENTS OF SEPTEMBER 30, 2009 ("SEPTEMBER 30<sup>TH</sup> SESSION")**

**September 30<sup>th</sup> Session – Mr. Smith's Evidence**

42. In the role of Doping Control Officer ("DCO"), Mr. Smyth attended at the Athlete's residence at approximately 8:00 p.m. together with Chaperone, Vincent Defosse.
43. Mr. Smyth had known the Athlete for approximately 10 years and previously had conducted approximately half a dozen doping control tests with him.

44. Mr. Smyth presented to the Athlete an Athlete Selection Order (Exhibit 2, Tab 5). It was completed in the ordinary course and Mr. Smyth read to the Athlete, verbatim, the “Athlete Rights and Responsibilities” set out therein.
45. Mr. Smyth had that same day concluded two prior, unrelated, doping control tests. On attending at the Athlete’s residence, he did not have in his possession the standard Chaperone Authorization document. A sample of the correct Chaperone Authorization, apparently completed after the testing session, is found at Exhibit 2, Tab 7.
46. The events of September 30, 2009 were recorded in reports prepared by Mr. Smyth (Exhibit 2, Tabs 2 and 3). Mr. Smyth acknowledged that a legitimate concern of the Athlete arose from the fact that the Chaperone did not have proper identification or a Chaperone Authorization form.
47. Initially, Mr. Smyth had asserted to the Athlete that the Chaperone did not need identification. The Athlete contacted his counsel, following which the Athlete asked to be shown the rule that set out that accreditation was not required by a Chaperone. Mr. Smyth’s Supplementary Report (Exhibit 2, Tab 3) records: “I did not have my binder with me. This will never happen again”.
48. Mr. Smyth conceded that the question raised by the Athlete was fair and not adversarial.
49. Mr. Smyth recognized that the failure to complete a Chaperone Authorization for the session was a problem and when asked by the Athlete to speak to his superior, Mr. Smyth called Ms. Thanh-Tran by telephone at apparently 8:45 p.m.
50. The Athlete also spoke directly with Ms. Thanh-Tran. Hearing only the Athlete’s side of the conversation, Mr. Smyth concluded the Athlete was being polite and not adversarial. It simply appeared that the Athlete was making the CCES properly “cross its t’s and dot its i’s”.
51. Mr. Smyth heard the Athlete say that he was not refusing to do the test, but merely holding the CCES to strict compliance with the rules.
52. Mr. Smyth told Ms. Thanh-Tran that he was not comfortable completing the process and asked for the test to be terminated because the appropriate paperwork was not present. Further, the Chaperone was very agitated and was preparing to leave the site.
53. Mr. Smyth testified that he did not feel threatened by, or unsafe in the presence of, the Athlete. Mr. Smith’s testimony is consistent with the notation of Ms. Thanh-Tran in her note to file (Exhibit 2, Tab 8) where it is stated that, but for one occasion of an elevated tone, the Athlete remained “calm and polite”. In fact, although the discussion was intense, there was nothing the Athlete was doing that was inappropriate.
54. The attendance lasted from 8:00 p.m. to approximately 10:25 p.m. The decision to cancel the test was made by the CCES around 10:00 p.m.

55. Mr. Smyth's Doping Control Officer Report (Exhibit 2, Tab 2) recorded that the sample collection test had been cancelled by the DCO.

**September 30<sup>th</sup> Session – The Athlete's Evidence**

56. The Athlete testified that at approximately 8:00 p.m. on September 30, 2009, he answered his door to find Mr. Smyth and another gentleman present. Mr. Smyth advised that they were in attendance to do a drug test.
57. The Athlete had known Mr. Smyth for over 10 years having been tested by him on numerous occasions. He felt friendly and cordial toward him.
58. The Athlete presented his identification, as did Mr. Smyth. However, the other gentleman, the Chaperone, did not have identification.
59. The Athlete completed the standard Athlete Selection Order (Exhibit 2, Tab 5) which Mr. Smyth reviewed with him verbally and by drawing his attention to specific provisions and wording on the form.
60. A discussion took place between the Athlete and Mr. Smyth as to the obligation for the Chaperone to provide identification and authorization. Mr. Smyth did not have available to him the applicable rules to satisfy the inquiry.
61. Mr. Smyth called the CCES and permitted the Athlete to speak directly with Ms. Thanh-Tran.
62. The Athlete and Ms. Thanh-Tran had an exchange about knowledge of the rules. The conversation became heated and each agreed they should probably calm down. Ms. Thanh-Tran thereafter spoke with Mr. Smyth.
63. Mr. Smyth confirmed that Ms. Thanh-Tran was to forward to his BlackBerry the applicable rules. Shortly thereafter, the applicable rule was sent by a lengthy email that was not easily readable on a BlackBerry.
64. Mr. Smyth again called Ms. Thanh-Tran who quoted to him the rule that the DCO was required to have identification but not the Chaperone. However, the Chaperone was to have a completed Authorization Form.
65. At the direction of Mr. Smyth, the Chaperone went to the vehicle to obtain documentation. The Chaperone documentation was not completed.
66. The Athlete conveyed to Mr. Smyth that the circumstance was unfortunate because it is important for everyone to follow the rules. Rules are not merely a "one-way street" for athletes. The Athlete was unwilling to perform an invasive medical procedure; namely, providing a urine sample with a catheter, in the presence of a person who was unauthorized. He was uncomfortable proceeding on that basis. As such, never having consulted counsel in his previous 22 years as an athlete, the Athlete did so that evening. In his words, there had been a "seismic shift" in his attitude toward drug testing in the

CCES after his earlier DT/CAS Determination. He was distressed that as a person of high character without prior fault or negligence, the CCES had allowed his life to be destroyed in the previous Doping Tribunal in 2007.

67. While on the phone with counsel, the Athlete was instructed to make a statement to Mr. Smyth who had Ms. Thanh-Tran on the phone as well. The message conveyed from counsel was that the Athlete was not refusing to provide a sample but that his rights under the CADP and the Human Rights Code were in peril.
68. Mr. Smyth privately consulted with Ms. Thanh-Tran thereafter.
69. Upon return, the Athlete inquired of Mr. Smyth, "Are we okay? Are we good?" Mr. Smyth indicated supplementary forms would need to be completed and he instructed the Chaperone to leave.
70. The Athlete recorded in his Supplementary Report of September 30, 2009 (Exhibit 2, Tab 4) that he had asked of Ms. Thanh-Tran whether the termination of testing would constitute a "refusal". He was told that Ms. Thanh-Tran "couldn't guarantee that it wouldn't happen". However, the Athlete replied that he "didn't want to refuse", he "just wanted to ensure that [his] legal rights were upheld and that the CADP was being followed".
71. Thereafter Mr. Smyth packed his things and left the premises.
72. The Athlete understood the consequence of signing the Athlete Selection Order and testified that had Mr. Smyth disagreed in respect of the necessity for Chaperone authorization and demanded a sample or indicated an intention to record the session as a refusal, the Athlete testified he would simply have taken the test.
73. The Athlete testified that he wrote in his Supplementary Report that he did not want to refuse, in order to make it unequivocal that he was not refusing the drug test. The CCES did not deem the events of September 30, 2009 to constitute a refusal. Thereafter, the CCES made no assertion of a breach of any rule as a result of the attendance and the terminated session.

**September 30<sup>th</sup> Session – Ms. Brown's Evidence**

74. Notwithstanding her position with the CCES, Ms. Brown testified that before approximately 9:30 p.m. on September 30, 2009, she had not been aware of any testing or pressing issues requiring her attention. She had not been involved with, nor did she direct, the September 30<sup>th</sup> Session of the Athlete. The September 30<sup>th</sup> Session was being managed by her colleague, Ms. Thanh-Tran, Senior Manager, Testing Ethics and Anti-Doping Services.
75. Ms. Brown confirmed that the September 30<sup>th</sup> Session was authorized by the CCES Mission Order No. M-26538715 (Exhibit 2, Tab 1).

76. In respect of the September 30<sup>th</sup> Session, Ms. Brown spoke with Ms. Thanh-Tran by telephone at approximately 9:50 p.m., as recorded in a note to file prepared by Ms. Brown the following day at 6:13 a.m. (Exhibit 2, Tab 9). Ms. Brown recorded in three separate locations, based on information said to be from Ms. Thanh-Tran, that the DCO Mr. Smyth and the Chaperone “were feeling threatened”, “were feeling unsafe/threatened” and “were feeling threatened”. Ms. Brown had understood that an issue had arisen in respect of the Chaperone Authorization Form which was not in the possession of the DCO, Mr. Smyth, for this particular test.
77. In the Note to File, Ms. Brown also recorded her perspective that Ms. Thanh-Tran “was growing more frustrated”, “was exacerbated” and “was clearly indicating strain”.
78. Ms. Thanh-Tran wanted to cancel the test.
79. In reviewing Ms. Brown’s Note to File, she confirmed that she agreed with Ms. Thanh-Tran’s recommendation that the test be cancelled because the CCES personnel were feeling unsafe and threatened. However, Ms. Brown acknowledged that she did not ask Ms. Thanh-Tran what it was that the Athlete had done to make the CCES personnel feel threatened or unsafe. Ms. Brown stated that she trusted Ms. Thanh-Tran and Mr. Smyth in respect of their conclusions.
80. Ms. Brown confirmed that her sole source of information for concluding that the CCES personnel felt “unsafe/threatened” was from Ms. Thanh-Tran.
81. Ms. Brown testified that when she began her telephone conversation with Ms. Thanh-Tran on September 30, 2009, she was focussing on securing a resolution to the problem with the Chaperone Authorization issue. She did not focus on or attempt to probe why the CCES staff were feeling “threatened/unsafe”.
82. In respect of the September 30<sup>th</sup> Session, Mr. Danson questioned why the events described did not result in a charge that the Athlete had refused to provide a sample. The reply was that the CCES had cancelled the test on Ms. Brown’s authority because she could not work through the Chaperone Authorization issues in the short time available to her. She acknowledged that the CCES did not proceed with a refusal assertion because the testing personnel did not have onsite, proper written Authorization for the Chaperone. However, she maintained that the session was cancelled because the DCO and Chaperone were feeling threatened.
83. Ms. Brown was further cross-examined in respect of the Note to File prepared by Ms. Thanh-Tran on September 30, 2009 at 11:27 p.m. (Exhibit 2, Tab 8).
84. The notes of Ms. Thanh-Tran record that during the conversation she asked the Athlete “to calm down as he was elevating his tone”. By footnote to that reference, Ms. Thanh-Tran in her Note to File also recorded that:

“This was the only time in all the evening’s conversation that the Athlete was a little more difficult to deal with. The rest of the time he was very firm in his statements, at times sarcastic but remained calm and polite”

85. Notwithstanding the text of Ms. Thanh-Tran's Note to File, Ms. Brown testified that Ms. Thanh-Tran did not communicate to her that the Athlete "remained calm and polite".
86. When presented with the notes prepared by the DCO, Mr. Smyth, in respect of the September 30<sup>th</sup> Session (Exhibit 2, Tab 3), Ms. Brown acknowledged that she could not find any reference therein to an expression that the DCO or Chaperone felt threatened or unsafe.
87. Ms. Brown candidly testified that:
  - (a) It was legitimate for the Athlete to ask to see the completed Chaperone Authorization Form for September 30, 2009; and
  - (b) The Athlete had every right to ask the DCO carrying out the session for identification and accreditation.

#### **EVENTS OF NOVEMBER 28, 2009 ("NOVEMBER 28<sup>TH</sup> SESSION")**

##### **November 28<sup>th</sup> Session – Detective Iheme Evidence**

88. Det. Iheme acknowledged receipt of the Mission Order No. M-30618224 to conduct an out-of-competition, no notice test, on the Athlete (Exhibit 2, Tab 11). He confirmed that the Mission Order dated November 24, 2009 identified Mr. Smyth as the lead DCO. However, during the period of November 24 to 28, 2009, the roles were reversed and Det. Iheme became the lead DCO and Mr. Smyth become the Chaperone. The Mission Order records under "Status Instruction/Additional Information" that the "Athlete ... requires a catheter".
89. Det. Iheme testified that he was not aware of the events of September 30, 2009, but his understanding was that the September 30<sup>th</sup> Session had to be cancelled. However, on cross-examination, Det. Iheme acknowledged that he and Mr. Smyth had had a conversation concerning the September 30<sup>th</sup> Session. Det. Iheme was aware that the Athlete had consulted counsel during the September 30<sup>th</sup> Session. Det. Iheme denied knowing the details of the circumstances on September 30, 2009, but rather knew that there was some negative feelings from a previous Mission and that the Athlete was harbouring something that made it impossible to complete the September 30, 2009 Mission.
90. Whatever had occurred previously, Det. Iheme had for his Mission made sure that he had all his papers with him to do everything perfectly. In preparation for the attendance upon the Athlete, Det. Iheme confirmed that he had a supply of catheters in tamperproof and sterile packaging material, sufficient for the testing process.
91. Det. Iheme had never previously tested the Athlete. On receiving the Mission Order, Det. Iheme sought to familiarize himself with the Athlete in order to recognize him. Det. Iheme also had previous knowledge of the Athlete because he had assisted his daughter with a school research project concerning the Athlete.

92. At approximately 11:00 a.m. on November 28, 2009, Det. Iheme attended at the Athlete's residence with Mr. Smyth. Det. Iheme identified the Athlete exiting from his building and entering a vehicle parked behind Det. Iheme's vehicle.
93. Det. Iheme approached the Athlete who was then getting into the vehicle with his wheelchair. Det. Iheme identified himself and sought and received confirmation that the Athlete was, in fact, Mr. Adams. Det. Iheme testified that once the Athlete realized who he was, his previously friendly demeanor changed and the Athlete became hostile. The Athlete indicated that he was on his way to his business place and had to pick up a friend promptly because he was running late.
94. The Athlete advised that he was leaving and if Det. Iheme wished, he could follow in his own vehicle. The Athlete was said to have sworn, using profanity.
95. Thereupon, Det. Iheme asked the Athlete to wait while he spoke with the Chaperone, Mr. Smyth, who was in the front car. Following that conversation, Det. Iheme asked the Athlete if he would return to his residence. The Athlete refused. The Athlete indicated that he had errands to run before getting to his place of business. Det. Iheme said that he would follow the Athlete.
96. Det. Iheme testified that he wished to follow the Athlete from his residence to his place of business because the notification of test had been done and he wanted to keep the Athlete in his view.
97. Det. Iheme gave extensive testimony in respect of the ride from the Athlete's residence to his place of business. Det. Iheme concluded that the Athlete was trying to get away or lose Det. Iheme in the following vehicle. Det. Iheme recalled that the Athlete stopped to pick up a passenger. He went through an intersection without a complete stop. The Athlete was said to make quick turns at high rates of speed. During the drive, Det. Iheme told Mr. Smyth to contact the CCES and advise Ms. Brown of what had happened. Det. Iheme had no idea where the business was located. The Athlete made a loop around the area at a high rate of speed returning to the same street. He then made a left turn, where he previously made a right turn, and entered an alley with a garage door at which he stopped. Mr. Smyth was asked to exit Det. Iheme's vehicle and stay with the Athlete to complete the notification process, while Det. Iheme parked the vehicle.
98. Det. Iheme testified that it took approximately 40 minutes to drive around from the Athlete's residence to his place of business. The Detective's Supplementary Report records that the Athlete "drove around in circles before arriving at his office" (Exhibit 2, Tab 11, page 27).
99. The letter contained a map said to represent the route taken by the Athlete from his residence to his place of business. Det. Iheme testified that the map does not include the roundabout looping route taken.
100. Det. Iheme was not aware that the Athlete intended to stop at a pharmacy.

101. Det. Iheme confirmed that he did not know the address of the Athlete's place of business nor could he recall the address. In response to a suggestion that the place of business was at 7 Fraser Avenue, Unit 2, Toronto, Canada, which is an address listed in the Mission Order as a training location, Det. Iheme merely replied that he cannot say for certain what the address was because he did not note it down. Furthermore, Det. Iheme added, where they had attended was not a training facility.
102. When Det. Iheme entered the Athlete's place of business he explained why they were present. At an available table, work tools and equipment were removed for use as a testing station.
103. Det. Iheme denied that Mr. Bagg requested the opportunity to videotape the session; however, Det. Iheme added that if he had been asked, he would not have allowed it.
104. Det. Iheme testified that the Athlete did not raise concerns regarding the prior use of solvents, on the table being used for the testing. In fact, Det. Iheme asserted that the Athlete did not say that and, it was not simply a matter of not recalling.
105. The Athlete was notified of the test by Mr. Smyth while Det. Iheme was setting up the table. The "Athlete Rights and Responsibilities" were read to the Athlete. Det. Iheme testified he "had no doubt he understood what was read to him". Each of the Athlete, Mr. Smyth and Det. Iheme signed the Athlete Selection Order (Exhibit 2, Tab 13).
106. When the testing table was set up and the CCES catheters displayed, the Athlete expressed satisfaction that the CCES was providing catheters.
107. Det. Iheme acknowledged that the issue of the CCES providing catheters free from contamination was important to the Athlete by replying, "it's important for every athlete [that] requires them".
108. Det. Iheme acknowledged that the CCES had the burden to assure that the catheters were free from contamination, but asserted the Athlete has a burden as well, to examine the catheters and seals.
109. Det. Iheme denied that any discussion with the Athlete included the cleanliness of the catheters because they never got that far. Det. Iheme denied that he informed the Athlete that "he was responsible for ensuring that the catheter was free from contamination".
110. After executing the Athlete Selection Order, the Athlete asked a few questions and appeared happy with everything that had been presented to him.
111. However, the Athlete also asked whether his rights would be protected under the *Canadian Charter of Rights and Freedoms* and the *Ontario Human Rights Code*. Det. Iheme testified that he explained to the Athlete that he was a volunteer DCO and was not there under the Human Rights Code. He further stated that he would respect the Athlete's rights, but if the Athlete had legal concerns, they should be raised with the CCES. Det. Iheme reiterated that the Athlete Rights and Responsibilities under the Athlete Selection Order had nothing to do with the *Canadian Charter of Rights and*

*Freedoms* or the *Ontario Human Rights Code*. The Athlete asked Det. Iheme if the Doping Control was subject to the Charter and Human Rights Code to which Det. Iheme replied, “no”. Det. Iheme denied any possibility that he could have misunderstood the conversation about the Charter.

112. At that time, the Athlete backed away from the table and made a telephone call to consult with his lawyer.
113. The Athlete returned with his telephone set to speaker mode to facilitate a discussion with his counsel, Mr. Danson, that everyone could hear (“Speakerphone Call”). The Athlete stated, for all to hear, that Det. Iheme had told him that the testing would respect the Athlete’s rights under the *Canadian Charter of Rights and Freedoms*. However, Det. Iheme testified that he interrupted and corrected the Athlete during the Speakerphone Call. Det. Iheme said he would respect his rights as an Athlete according to the standard operating procedures of the CCES and that he said to the Athlete: “No. What I told you is this does not fall under the Canadian Charter of Rights or Ontario Human Rights Code...We were there to collect a sample under a letter from our authorization from Canadian Centre for Ethics In Sports.”
114. After the Speakerphone Call, the phone was taken by the Athlete so that he could continue a private discussion with Mr. Danson approximately 10 feet away from the CCES personnel.
115. The Athlete returned to the table apparently agreeing to continue the procedure. Det. Iheme proceeded to complete the Doping Control Form, with the Athlete’s input, to record medication being taken (Exhibit 2, Tab 11, Page 25).
116. The Athlete kept asking and trying to bring up his concerns relating to his distrust of the CCES as a result of previous matters, which had resulted in other proceedings. Det. Iheme and Mr. Smyth confirmed they were not part of the previous situation and could not comment on it.
117. Det. Iheme was referred to Mr. Danson’s response letter to the CCES of January 20, 2010 (Exhibit 1, Tab 2). Det. Iheme denied the characterization of the conversations between himself and the Athlete. He expressly denied that the Athlete was being friendly to him.
118. Det. Iheme testified that, at some point, the Athlete said that he was no longer willing to continue with the procedure and that he was surprised.
119. Det. Iheme asked the Athlete, “if he was refusing to go along with the testing” to which the Athlete is said to have responded “yes, he’s retired and he’s not going to continue with the mission”.
120. When questioned further by Det. Iheme as to when the Athlete retired, the Athlete indicated “now”.
121. Det. Iheme asked Mr. Smyth to contact Ms. Brown again.

122. Det. Iheme told the Athlete that even if he was retired, he was still subject to testing for a period of 18 months. Notwithstanding, the Athlete said he was still refusing. Upon inquiry as to why, the Athlete said it was because Det. Iheme could not guarantee the testing is protected under the Charter or the Human Rights Code.
123. Mr. Smyth returned from his call and advised that Ms. Brown had stated that the Athlete was still subject to testing for a period of 18 months from retirement.
124. Det. Iheme provided the Athlete with Supplementary Report forms which he completed (Exhibit 2, Tabs 13 and 14).
125. The Athlete's Supplementary Report (Exhibit 2, Tab 14 or typed version, Exhibit 1, Tab 4, Page 30) was completed by the Athlete, in the presence of Det. Iheme. The Athlete and Det. Iheme were 3 or 4 feet apart. The completed form describes the Athlete as a "retired Athlete".
126. A portion of the text of the Athlete's Supplementary Report was, in cross-examination, read to Det. Iheme who acknowledged that it was written by the Athlete:

"John Smyth called Anne Brown and had a conversation with her – he came back and I made sure that wasn't a 'Refusal' – he assured me that it wasn't saying 'at this point it's certainly not'."
127. Det. Iheme denied that the Athlete was verbalizing what he was writing.
128. Det. Iheme testified that he merely took the Athlete's Supplementary Report, put it in his folder and only read it "way after he wrote it". He confirmed that the session was terminated without his reading the Supplementary Report. He maintained that the Supplementary Report was for the benefit of the Athlete, to write what he wished for the CCES review.
129. Further, Det. Iheme maintained that even if he had read the Supplementary Report before he left, he would not have discussed it with the Athlete who had already made it clear by what he said that he was refusing to proceed.
130. Det. Iheme concluded there would have been no point in discussing the matter with the Athlete because, during the Speakerphone Call, the Athlete had misstated what Det. Iheme had said, the Athlete's staff member had refused to sign the Supplementary Report and accordingly, there was no point in arguing with the Athlete.
131. When questioned about the text of the Supplementary Report, Det. Iheme acknowledged what the Athlete had written; however, the Athlete had already stated that he refused to proceed for the reasons he had given.
132. When questioned by the CCES, following the November 28<sup>th</sup> Session, concerning the Athlete's Supplementary Report, Det. Iheme testified that his response was that the Athlete's report was inaccurate.

133. Det. Iheme asserted that if the Athlete had verbalized a belief that his actions were not a refusal, Det. Iheme would have further explained to him his rights and responsibilities, as Det. Iheme had concluded there had been a refusal. In fact, if the Athlete had verbally spoken to Det. Iheme while writing the Supplementary Report confirming a view that the events did not constitute a refusal, as DCO, he would have clarified the situation with the Athlete due to the fact he had concluded that the Athlete had previously indicated a refusal.
134. However, that was not needed in this case because the Athlete did not orally disclose what was now being suggested.
135. In fact, Det. Iheme testified that if he had been told there was no refusal, the test would simply have been administered.
136. Det. Iheme anticipated that the Athlete would record in the Supplementary Report his explanation to not proceed because he was retired and his Charter Rights were not observed. Det. Iheme stated he did not check the Supplementary Report because he believed the Athlete would be honest.
137. At a later time, Det. Iheme completed a Supplementary Report (Exhibit 2, Tab 11, Pages 1 and 27).
138. Det. Iheme testified that he was prepared to complete the test and, but for the Athlete's refusal, the sample could have been obtained and the session successfully concluded.
139. After the Athlete completed the Supplementary Report, one of his staff was requested to review the report and then sign in agreement with the content. Det. Iheme recalled that the individual said he could not do that because he was not present "when this all transpired."
140. When asked whether Det. Iheme had any doubt that the Athlete refused to be tested, Det. Iheme replied that "[t]here is no doubt in my mind. He clearly stated that he refused the testing". Det. Iheme asserted that they had no conversation that the events would constitute a refusal.
141. Det. Iheme denied that the November 28<sup>th</sup> Session was cancelled.
142. Det. Iheme drew a distinction between an oral assertion by the Athlete that it was not a refusal, which would have led to a further discussion, as compared to the circumstance of the Athlete merely putting his assertion in writing. Det. Iheme testified this latter circumstance did not trigger an obligation because the DCO was not required to read the Athlete's Supplementary Report.
143. Det. Iheme maintains that the Athlete's Supplementary Report recording that the Athlete had not refused is simply not accurate and he had no obligation to discuss or argue the point with the Athlete.

144. Det. Iheme reiterated that although initially the Athlete swore and used profanity, he was polite, calm and joking around with Mr. Smyth. He noted that toward the end, it became very businesslike when the Athlete decided not to proceed. Det. Iheme confirmed that the Athlete was polite and friendly when he and Mr. Smyth left the premises.
145. Det. Iheme recalled that after the Athlete signed the Selection Order, he went into a discussion about whether his rights would be protected. However, he denied that there was a discussion about the Charter of Rights and Freedoms at that time. In response to a suggestion on cross-examination that a Charter discussion occurred following the Athlete's expression of pleasure that the CCES supplied catheters, Det. Iheme reiterated that a Charter discussion did not take place in that sequence of events with the Athlete.
146. Det. Iheme asserted that any discussion about the Charter of Rights and Freedoms and the Human Rights Code occurred after Det. Iheme completed packing up the testing material. He testified that the Athlete was seeking the agreement of Mr. Smyth and Det. Iheme that the testing would fall under the Human Rights Code and Charter, as that was one of the bases of his pending litigation. Det. Iheme asserted that he replied he was only there to collect the sample under the Athlete's Rights and Responsibilities.

**November 28<sup>th</sup> Session – Mr. Smyth Evidence**

147. Mr. Smyth attended as Chaperone on November 28, 2009 along with Det. Iheme in the role of Doping Control Officer. Mr. Smyth's notes of the event are recorded at Exhibit 2, Tab 12.
148. Mr. Smyth testified that they attended at the Athlete's premises. While parked in their vehicle, Det. Iheme noticed the Athlete entering his vehicle. Det. Iheme spoke with the Athlete at his vehicle, with Mr. Smyth overhearing the exchange. The location for the test was then transferred from the Athlete's residence to his place of business approximately 15 minutes away. The Athlete drove to his place of business in his own vehicle, stopping en route to pick up an associate.
149. Mr. Smyth's notes regarding the November 28<sup>th</sup> Session (Exhibit 1, Tab 3, page 21) record that, from his perspective, in respect of the drive to the place of business the Athlete tried "to lose us once while we were following him".
150. Mr. Smyth testified that the testing process followed on November 28, 2009 was similar to the process of September 30, 2009.
151. During the November 28<sup>th</sup> Session, those present at the Athlete's place of business included the Doping Control Officers as well as associates of the Athlete, Messrs. Bagg and Garneau.
152. A request by Mr. Bagg to video the testing session was denied in the context of the rules preventing media attendance at doping control sessions.

153. An Athlete Selection Order (Exhibit 2, Tab 13) was initially completed on November 28, 2009, and signed by all necessary parties. The “Athlete Rights and Responsibilities” were read to the Athlete including, the provision which states:

**“Please be advised that failure or refusal to provide a sample may result in an anti-doping rule violation”.**

154. Mr. Smyth concluded that as the Athlete had signed the Athlete Selection Order he was participating in the sample collection process. Mr. Smyth testified that if required, the CCES representatives had catheters available.
155. As a result of the DT/CAS Determination, the CCES changed its process and brought catheters to sample collection sessions. Mr. Smyth acknowledged an understanding of earlier proceedings involving the Athlete and that it was an important issue for the Athlete and about which he was most vocal.
156. When the CCES-supplied catheters were placed on a table in front of the parties, Mr. Smyth acknowledged that the Athlete contacted his counsel. The conversation continued with counsel on a speaker phone; however, Mr. Smyth, testified that he “tuned it out”.
157. On cross-examination, the question was put to Mr. Smyth as to whether he recalled the Athlete raising a concern that solvents had been used on the table upon which the catheters had been placed. Mr. Smyth testified that he “recall[ed] something to that effect.” When pressed as to whether he felt that it was not a concern, Smyth replied, “That’s not my call”.
158. Mr. Smyth could not recall or testify in any substantive respect concerning the content of the Speakerphone Call or even the conversation between the Athlete and Det. Iheme.
159. During the November 28<sup>th</sup> Session, Mr. Smyth telephoned Ms. Brown on two occasions. The first involved the change of status of the mission, en route from the Athlete’s residence to his place of business and, the second occurred close to the end of the mission.
160. After Mr. Smyth’s second call to Ms. Brown he recounted to the Athlete what he was told by Ms. Brown to say, that even after an athlete retires, they are still subject to doping control.
161. Mr. Smyth confirmed that Det. Iheme had provided the Athlete with a Supplementary Report Form in which the Athlete recorded:
- “John Smyth called Anne Brown and had a conversation with her – he came back and I made sure that this wasn’t a ‘Refusal’ – he assured me that it wasn’t saying ‘At this point it’s certainly not’.” (Exhibit 1, Tab 3, Page 18B)
162. As Chaperone, Mr. Smyth advised that he did not read the Athlete’s Supplementary Report, but, if he had, it would have “raised red flags”.

163. Mr. Smyth testified that he had no discussion with Det. Iheme relating to the content of the Athlete's Supplementary Report. However, Mr. Smyth's notes regarding the November 28<sup>th</sup> Session (Exhibit 1, Tab 3, Page 21) record that Det. Iheme had provided the Supplementary Report to the Athlete "to write down his refusal and any other information he wished to write". Furthermore, Mr. Smyth recorded that he telephoned "Ann Brown to advise her of Jeff refusing to participate". (emphasis added)
164. However Mr. Smyth also testified that he called Ms. Brown when "there was a potential refusal that was going to occur. So that's when I phoned her."
165. Mr. Smyth acknowledged that if he had been the DCO, he would have read the Athlete's Supplementary Report. Further, if he had been aware that the Athlete was saying that he was not refusing at the time, there would have been a discussion for clarification of the issue.
166. Mr. Smyth acknowledged the similarity between the circumstances arising on September 30 and November 28, 2009. In particular, the events included contact with counsel, the assertion that the Athlete was not refusing and that the CCES was being held to the letter of its obligations.
167. Mr. Smyth did not consider the actions of the Athlete to be unreasonable.
168. Mr. Smyth was not able to remember whether he provided Ms. Brown any information in respect of the events of November 28, 2009, as recorded in Ms. Brown's letter of March 22, 2010 (Exhibit 1, Tab 3, Page 3). In fact, the CCES did not raise with Mr. Smyth, nor bring to his attention, the Athlete's Supplementary Report (Exhibit 1, Tab 4, Page 30 (typed version)) wherein the Athlete asserted that he was not refusing to be tested. The Athlete's position was not raised or discussed with Mr. Smyth.

**November 28<sup>th</sup> Session – The Athlete's Evidence**

169. Through an affidavit filed in other proceedings (Exhibit 1, Tabs 8 and 9) and orally in this arbitration, the Athlete described the challenges he faced as a child, an adolescent and as an athlete. In describing the goals he set for himself as a young athlete using a wheelchair, competing in games with rules intended for compliance by able-bodied individuals, he testified that he was obliged to change the rules of every game he played.
170. The Athlete testified that at a young age, he decided that "playing fair was the most important thing. I have never changed my opinion on that, in every decision I've ever made since that day has been to try to make sure the rules are followed as they are agreed upon, that the playing field is level, and the game is fair" (Exhibit 1, Tab 9, Para. 23 & 24).
171. The Athlete's affidavit (Exhibit 1, Tab 8) described his personal background and why it was important to him to have the CADP accommodate him as an athlete. He became a self-appointed advocate for athletes and people with disabilities, fighting every day for equity and contributing to movements advancing the disabled. The 2007/2008 Doping Tribunal and appeal process resulted in the Athlete's marriage failing, sponsors

discontinuing, speaking income being lost and the loss of his business and home notwithstanding that he was eventually “exonerated”. His current economic position is precarious and he has been counselled numerous times to declare personal bankruptcy.

172. The Athlete identified Mr. Danson’s letter of January 20, 2010, to the CCES confirming that it generally recorded what occurred during the November 28<sup>th</sup> Session (Exhibit 1, Tab 2).
173. In testifying concerning the events of November 28, 2009, the Athlete described how he was entering his vehicle at his residence when he was approached by someone waiving at him whom he did not recognize. The Athlete was asked to confirm his identity and he inquired if he knew the approaching gentleman. Det. Iheme then identified himself, advising that he was from the CCES and was there to do a drug test. At that point, Mr. Smyth exited the vehicle ahead of the Athlete’s car and joined the conversation. The Athlete confirmed that it was okay to do the drug test, but he was in an enormous hurry to pick up his business partner and get to work. The rush related to a wheelchair being manufactured for a premier Canadian athlete for use at the forthcoming Olympics. The chair needed to be completed as soon as possible for the athlete’s approval and subsequent modification. The Athlete described his obsession over time which stems from his athletic career where a late arrival at a race does not delay the race, as the race simply starts in any event.
174. On cross-examination, the Athlete was referred to the Supplementary Report of Det. Iheme (Exhibit 2, Tab 11). The Athlete was asked to comment on Det. Iheme’s quote regarding the events which took place in front of the Athlete’s residence. The Athlete denied the words attributed to him and that Det. Iheme was mistaken in what he recorded.
175. The Athlete’s request for the drug test to be done at his place of business was approved by the CCES officials. A discussion ensued as to how they would each travel there, whether it be in the Athlete’s vehicle, the CCES officials following the Athlete’s vehicle or simply meeting at the address.
176. The CCES officials were discussing the options and the Athlete became frustrated, not particularly caring how they travelled to his place of business, but wanting to get on with it. Mr. Danson’s letter reflects that the Athlete used profanity as a matter of speech, but was not directed at the CCES officials personally.
177. The Athlete described the route taken from his residence. He picked up his partner Mr. Bagg, diverted to a pharmacy to secure eye medication, found that the pharmacy was closed and finally ended at the Athlete’s place of business. But for the pharmacy, the route taken was the same route taken on every occasion the Athlete drove from his residence and picked up Mr. Bagg. He testified that the drive to his place of business was uneventful, at regular speed and he obeyed all traffic signs and signals.
178. Having sat in the hearing room during the testimony of Det. Iheme, the Athlete was asked for his response to Det. Iheme’s description of the drive and the erratic and evasive actions said to have been taken by him. The Athlete replied that Det. Iheme’s evidence was untrue and fabricated. The Athlete testified that Detective’s description that “Jeff

attempted to lose us” during the drive from the residence to the place of business was untrue and fabricated.

179. En route to his business premises, the Athlete inquired if Mr. Bagg had a video camera available and requested that the drug session be taped. He testified he made the request so as to avoid the current situation, where it is the Athlete’s word against that of the CCES.
180. The Athlete believed he had reason to distrust the CCES and felt that a video would protect him.
181. On examination of the Mission Order (Exhibit 2, Tab 11), the address listed as a training location, being 7 Fraser Avenue, was also the place of business attended on the day in question. The Athlete testified he did most of his training at the business location when he was not at a local gym.
182. On entering the place of business, Mr. Bagg requested whether the session could be videotaped and he was told by both Mr. Smyth and Det. Itheme that videotaping would not occur under any circumstances.
183. The Athlete testified that at that point he thought it “odd they would be reacting so vehemently to that” and he called his lawyer, Mr. Danson, advising of the situation and to give him a heads up in the event he needed to call again during the process.
184. The Athlete acknowledged signing the Athlete Selection Order because he intended to proceed with the test (Exhibit 1, Tab 3, Page 20).
185. The Athlete maintained that Det. Itheme’s assertion that he read aloud the Athlete Selection Order (Exhibit 4) is incorrect. He denied that his rights and responsibilities as set out in the Athlete Selection Order were read out loud. However, the Athlete acknowledged that he had been informed of his rights and had he not been so informed, he would have raised that in the Speakerphone Call and in the Supplementary Report. The Athlete admitted to being an activist and a person who insists that if people agree on rules, they should follow them.
186. During the process of setting up for the session, the CCES officials took out catheters for the drug test. The Athlete verbalized his pleasure that they were proceeding in that fashion in view of the earlier DT/CAS Determination.
187. However, the Athlete observed that the table being set up for the drug test was used in his daily business with carbon fibres and was cleaned from time-to-time with other solvents, creams and oils. He mentioned that to the CCES officials and Det. Itheme indicated that no change was necessary.
188. The Athlete testified that he and the CCES officials were only three feet apart at that time.

189. The Athlete stated that during the set-up, Mr. Smyth advised the Athlete that it was his responsibility to make sure that the CCES-provided catheter was contamination free.
190. Due to the prior DT/CAS Determination, the Athlete was sensitive to such an issue and advised that he did not believe that was appropriate and it appeared to him to be contrary to the CADP.
191. The Athlete steadfastly asserted that in his discussions with the CCES officials, he maintained that placing the onus on him to ensure that the CCES-supplied catheter was not contaminated was contrary to both the Charter of Rights and Freedoms and the Human Rights Code.
192. As a result, the Athlete telephoned his lawyer, Mr. Danson, to whom he communicated the discussion he had had with the CCES officials. Mr. Danson was said to have disbelieved the position that the CCES had taken and suggested the telephone discussion continue on speakerphone mode so that each person could hear the other.
193. The Athlete returned to the CCES officials with the telephone on speaker mode and proceeded to repeat, in front of Mr. Smyth and Det. Iheme, what he believed he had been told; namely, that it was the Athlete's responsibility to ensure that the catheters being provided by the CCES were contamination free.
194. The Athlete testified that at no point during the Speakerphone Call did Mr. Smyth or Det. Iheme object to the accuracy of what the Athlete described; being, that the Athlete had an onus to ensure the catheters were not contaminated.
195. During the Speakerphone Call, Mr. Danson asked Mr. Smyth to speak with his supervisor to decide what to do about the onus being placed on the Athlete to satisfy himself that the catheter was contamination free.
196. The Athlete described his frustration with Mr. Smyth's evidence that he had "tuned out" during the Speakerphone Call. At the time, he did not believe that Mr. Smyth had "tuned out"; rather, he believed Mr. Smyth did, in fact, hear the telephone discussion.
197. After the Speakerphone Call, Mr. Smyth moved away and made a telephone call. Upon his return, the Athlete asked Mr. Smyth, "Are we okay?" and Mr. Smyth was said to have replied, "Yep, we're going to get you to fill out some supplementary forms and we're out of here".
198. Det. Iheme produced supplementary forms for completion which were written by hand by the Athlete. On his Supplementary Report (Exhibit 1, Tab 3, Page 18B), the Athlete wrote:

"John Smyth called Anne Brown and had a conversation with her – he came back and I made sure this wasn't a 'Refusal' – he assured me that it wasn't saying 'at this point it's certainly not'"

199. When that Supplementary Report was written, Det. Iheme was directly in front of the Athlete and Mr. Smyth was approximately five feet away. The Athlete testified that as he was filling out the form, he was verbally saying “this is not a refusal, I’m writing this down. I’m very clear on that”.
200. The Athlete testified that he put that statement in writing, on the instructions of his counsel to ensure there was documentary evidence establishing that the process was not a refusal and to ensure that no one in the future could attempt to make that argument.
201. The Athlete considered the Supplementary Report to be part of the collection process.
202. The Athlete maintained that CADP Rule 6.61 requires Det. Iheme to sign the Athlete’s Supplementary Report. It was stated by the Athlete to be part of the protocol set out in CADP Rules 6.31 and 6.51 listing all of the things that were required to be done.
203. The Athlete expressly confirmed that he was aware of the consequences of a failure to participate in the process on both September 30, 2009 and November 28, 2009.
204. Further, the Athlete testified that Det. Iheme was incorrect when he asserted in his written Supplementary Report that:

“After a few minutes, Jeff decided that he will not continue with the Doping Control Test. Jeff said he declined the test because he is retired and because we could not assure him that his Charter of Rights and Ontario Human Rights Code will be guaranteed”.(Exhibit 2, Tab 11, Pages 4-5)
205. The Athlete acknowledged as written in the Detective’s Supplementary Report, that Det. Iheme had told him during the session that his rights would be respected.
206. The Athlete testified that at no time before the conclusion of the session did either of the CCES officials, either orally or in writing, maintain that the Athlete’s assertion that this “wasn’t a refusal” was incorrect or that there was any misunderstanding requiring a discussion.
207. The Athlete testified that if the CCES officials in fact disagreed with his conclusion and demanded that he either take the test or consider the session to be a refused test, he absolutely would have taken the test.
208. Det. Iheme took the Supplementary Report, spoke about his daughter’s school project and concluded the session in a very light-hearted manner with all parties shaking hands.
209. From the Athlete’s perspective, the November 28<sup>th</sup> Session ended in a “carbon copy” manner to the September 30<sup>th</sup> Session. The Athlete had concluded the CCES again accepted that the attendance did not constitute a refusal.
210. Upon receipt of the CCES letter of December 17, 2009 (Exhibit 1, Tab 1), the Athlete testified that he was shocked that CCES had come to the conclusion indicated, but not surprised because of his past dealings with the CCES.

211. He noted that by the date of that letter, the Athlete had also already commenced proceedings in respect of the DT/CAS Determination by Statement of Claim in the Ontario Superior Court of Justice and for Judicial Review in the Divisional Court (Exhibit 1, Tabs 7 and 10).
212. The Athlete expressed a belief that there is a “short straight line” connecting his civil proceedings with the CCES subsequent assertion that the events of November 28, 2009, constituted a refusal.
213. Under cross-examination, the Athlete repeated his extensive accomplishments in a competitive career confirming that he had been tested numerous times and expressed as much of an understanding of the rights and responsibilities of the Doping Control Officer and athletes as one can get “without getting a law degree”.
214. The Athlete delivered a required whereabouts form for the period from January 1, 2009 – March 1, 2010 (Exhibit 2, Tab 18), notwithstanding the fact that the Athlete had declared, by at least November, 2009, that he was retired.
215. The Athlete testified that shortly after the Beijing Olympics he confirmed for his coach the fact of his retirement. However, the email exchange in that respect was not produced as an exhibit.
216. The Athlete acknowledged that other than communicating with his coach, there is no other writing evidencing his retirement; however, he was effectively retired after the Beijing Olympics in 2008.
217. In response to a direct question, that the assertion of a retirement was a sham, the Athlete replied that is “absolutely incorrect”.
218. Further, the Athlete advised that the Detective’s evidence was incorrect in asserting that the Athlete had retired on the spot “now”, at the November 28<sup>th</sup> Session.
219. In particular, the Athlete denied that the issue of retirement played any role in the events of September 30, 2009 or November 28, 2009.
220. The Athlete concluded his testimony by asserting that if anyone had ever said that either situation in September, 2009 or November, 2009 would constitute a failure to comply, he would have spent considerably more time filling out the supplemental forms.
221. When he was to be tested in November 2009, he was not receiving any financial assistance and had only been carded for the first half of that year.
222. The Athlete expressly stated that he absolutely did not refuse a drug test on November 28, 2009.
223. The Athlete testified that he has never taken a banned or prohibited substance in his life, other than the circumstance dealt with by the DT/CAS Determination. Accordingly, he had nothing to fear from taking a test in September or November, 2009.

224. He also noted the 2009 CADP introduced changes in Annex 6B, dealing with “Modifications For Athletes With Disabilities”.

**November 28<sup>th</sup> Session – Mr. Bagg’s Evidence**

225. On November 28, 2009, Mr. Bagg was picked up at his girlfriend’s residence by the Athlete as was a regular occurrence. They were in a rush to get to work because they had an important opportunity to manufacture a wheelchair for Canada’s most famous athlete who had wheeled around the world.
226. From the time Mr. Bagg was picked up, it took approximately 5-10 minutes to reach the place of business, following the same route they always did. They had a discussion about the Athlete’s eye condition and were going to stop at a pharmacy; however, en route it was found to be closed. Otherwise, Mr. Bagg described the drive as being the “same old drive, uneventful”.
227. Specifically, Mr. Bagg testified that Det. Itheme was mistaken in asserting that the Athlete took evasive measures and was trying to lose the CCES doping control officers. He was also mistaken in asserting that the Athlete was driving in loops and not taking a direct route.
228. Upon arriving at the office, the CCES officials followed them into the place of business.
229. Once the CCES officials explained to the Athlete what they were doing that day, Mr. Bagg inquired whether he could video the session because he understood the history the Athlete had with the CCES. Mr. Bagg was “harshly” told no, so the issue was not pushed.
230. Mr. Bagg observed one of the CCES officials take out catheters and he knew that had not been done before. He observed they were being put on a table at which point the Athlete advised that solvents were used on the table. The officials advised that was not a problem or reason to not place them there.
231. When the Athlete indicated he was pleased they were giving out catheters, Mr. Bagg testified that one of the officials advised that even though they were supplying them, it was up to the Athlete to make sure they were contamination free. It was described that the Athlete was taken aback and asked the officials to reiterate that the onus was on him to ensure they were contamination free. The officials repeated what they had previously stated.
232. It was Mr. Bagg’s observation that everyone was being “clear and concise and mature”.
233. Additionally, a conversation occurred wherein the CCES officials stated that the Charter applied to the testing process, but that the burden remained on the Athlete in respect of the catheters. The Athlete indicated a desire to call counsel to instruct him.
234. Mr. Bagg overheard a telephone discussion taking place on a speakerphone.

235. Mr. Bagg attributed to Mr. Danson, during the Speakerphone Call, the assertion that the CCES could not place the onus on the Athlete to ensure the catheters were contamination free and accordingly, the CCES should contact their supervisor before the test. Mr. Danson further asserted that if the process was to follow the Charter, the onus could not be on the Athlete. In fact, it is said that Mr. Danson was forceful that if the rules could not be clarified, it would not be a refusal from the Athlete.
236. Mr. Bagg recalled, during the Speakerphone Call, that Det. Iheme said to everyone, to correct the record, that what he was saying was he would protect the Athlete's rights pursuant to the standard operating procedures of the CCES. Further, the Charter of Rights and Freedoms was raised and Det. Iheme said they would respect the Athlete's rights under the Charter.
237. Following the Speakerphone Call, Mr. Bagg overheard the Athlete confirming with the CCES officials that these events would not constitute a refusal. They indicated they would call their office for advice on how to proceed and moved away from the immediate location.
238. Upon return, the Athlete inquired whether it was okay that no test was conducted because "we don't know the rules, but nor is this being counted as a refusal". To which the CCES official indicated that supplemental forms would have to be filled out. In response to the Athlete's further inquiry, "Are we good?", the CCES official was said to respond "Yes".
239. In completing the supplemental form, the Athlete was said to confirm why he was so particular about his rights, how important the Charter of Rights were and how strongly he felt about it. Mr. Bagg remembered the Athlete writing on the sheet that this was not a refusal. Mr. Bagg recalled the CCES officials "read everything" and they said, "Yes, it was okay" and packed up and left.
240. On cross-examination, Mr. Bagg confirmed that at the Athlete's request, he had prepared a statement in January, 2010 (it was not tendered as an Exhibit).
241. When referred to Det. Iheme's Supplementary Report (Exhibit 1, Tab 4, Page 27 (typed version)), Mr. Bagg conceded that he could not remember the intricate details of the conversation and cannot say whether the report is truthful.
242. Mr. Bagg recalled being requested by the Athlete to read the supplementary forms and neither recalls being asked to sign them, nor doing so.
243. On re-examination, Mr. Bagg confirmed that he did not recall the DCO or Chaperone challenging the accuracy of the statements made by the Athlete that the CCES was placing the onus on him that the catheter was free from contamination.

*November 28<sup>th</sup> Session – Mr. Garneau’s Evidence*

244. Mr. Garneau testified that the Athlete advised him of the presence of two gentlemen from the CCES intending to do a drug test. In setting up for the test, the Athlete was overheard suggesting that a different table perhaps be used because, in the course of the business, carbon fibre chemicals are used on the table.
245. The Athlete expressed his pleasure that the CCES was now providing its own catheters. However, he was advised that it was his responsibility to ensure the catheters were contamination free. That statement was attributed by Mr. Garneau, by way of identification (since he did not know the names of the CCES officials) to the “white gentleman” (it being noted that Mr. Smyth is a Caucasian and Det. Itheme is a person of colour).
246. The Athlete said he was not comfortable and wished to speak to his lawyer, stepping away to do so. He returned and placed the phone on speaker mode with Mr. Danson on the line, being heard by those in the room. The Athlete was requested to repeat what had occurred, as indicated above, and then Mr. Smyth reiterated his view that it is the Athlete’s responsibility to ensure the catheter is contamination free.
247. Mr. Garneau testified Mr. Danson expressed his disbelief in that position and advised that the Athlete was not refusing to take the test and that the CCES officials should call their supervisor about responsibility for the catheters. The Athlete then continued his telephone discussion with Mr. Danson in private, away from the others.
248. In response to a direct question of whether, during the Speakerphone Call, the CCES officials challenged what the Athlete was saying about the risk of catheter contamination, Mr. Garneau denied there was any such intervention. Mr. Garneau denied that Det. Itheme interjected during the Speakerphone Call to correct the version of events described by the Athlete.
249. Mr. Garneau testified that during the Speakerphone Call, it was reiterated on several occasions that it was the Athlete’s position that he was not refusing to take the test.
250. After the Athlete’s return from the telephone call, he was provided with some forms which he completed. At the conclusion, everyone shook hands, was smiling and making jokes.
251. During the completion of the forms, Mr. Garneau and Mr. Bagg were “doing our own thing” and were not listening to any conversation between the Athlete and the CCES during the completion of the supplementary forms.
252. On cross-examination, Mr. Garneau confirmed his recollection that a request had been made to videotape the testing session by Mr. Bagg. He was not certain to whom the request was made.

253. Mr. Garneau confirmed the accuracy of the following sentence contained in his own statement (Exhibit 3) with the emphasis placed by Mr. Morrow upon the fact that the reference is to a CCES official and not CCES officials:

“Both CCES official were listening to Jeff as he spoke, and neither made any objection to what was relayed to Tim.”

254. Mr. Garneau’s written statement (Exhibit 3, Page 2, Paragraph 2) notes that the Athlete felt “uncomfortable with the way the CCES was behaving”. When asked what that discomfort was, Mr. Garneau testified that it was because CCES had said it was the Athlete’s responsibility to ensure that the CCES-supplied catheters were contamination free.

255. On cross-examination, Mr. Garneau reiterated that the Athlete had taken the position that it was not fair that he have to prove the CCES-supplied catheters were contamination free. The Athlete did not consider that to be his responsibility.

256. Mr. Garneau was challenged on several occasions that the events he described were incorrect to the extent that Mr. Smyth had simply offered the Athlete the opportunity to inspect the catheters and there was no discussion about the Athlete’s responsibility to ensure they were contamination free. Mr. Garneau testified that assertion is not true.

**November 28<sup>th</sup> Session – Mr. Danson’s Letter**

257. I did not have the benefit of oral testimony from Mr. Danson, I did, on consent of the parties, receive into evidence his letter to the CCES dated January 20, 2010 (Exhibit 1, Tab 2). In that letter Mr. Danson corroborates the evidence of the Athlete to the extent that he had written as follows:

(a) “I personally heard Mr. Adams say, and I said it to myself, that there would be no refusal here, but the law had to be complied with. This burden had to be removed. The CCES had to guarantee, to the best of its knowledge, acting in good-faith and professionally, that the catheter it was providing Mr. Adams was sterile and contamination free.”

(b) “Mr. Adams put me on the telephone speaker with Mr. IHEME, and repeated to me what Mr. IHEME had told Mr. Adams. Mr. IHEME listened to Mr. Adams’ summary of what had been said by him and by Mr. Adams to me, and Mr. IHEME never made any objection. In other words, everyone was alert to the catheter issue and our demand for assurance of contamination free collection session. At no time did Mr. IHEME tell Mr. Adams that he couldn’t comment, and never did he tell Mr. Adams that he should consult the CCES on the point at a later date.”

(c) “Importantly, Mr. IHEME and Mr. Smyth were told by me that we would be vigilant in making sure that they fully complied with their legal obligations, which clearly made them uncomfortable. I also told them that if there was any possibility of any of our requests being deemed a refusal to comply, I needed to know because that was not going to happen. I was clear in stating that if it was a

possibility, I would dictate over the phone precisely what Mr. Adams was to write on the form and I would speak directly to you.”

**November 28<sup>th</sup> Session – Ms. Brown’s Evidence**

258. Ms. Brown testified that following the termination of the September 30<sup>th</sup> Session, a follow-up test authorized by separate Mission Order No. M-30618224 (Exhibit 2, Tab 11) was directed for November 28, 2009.
259. Ms. Brown was on duty on November 28, 2009. In respect of that testing attendance, she recalled speaking with Mr. Smyth, who was acting as the Chaperone that day notwithstanding that he was certified to act as a DCO, as had been the case for the September 30<sup>th</sup> Session.
260. Ms. Brown confirmed that based on the information given to her, she consented to the change of the Mission Order from testing at the Athlete’s residence to his office and consequently, the change in descriptor from a “no notice test” to an “advanced notice test”.
261. Ms. Brown further testified that it was her understanding that on November 28, 2009, the Athlete had refused to provide a sample as required.
262. In respect of the November 28<sup>th</sup> Session, Ms. Brown testified that to the best of her knowledge the CCES did not provide catheters and hence she could not comment on whose responsibility it was to ensure that catheters were contamination free. However, she did concede that as a matter of practice, when the CCES does provide a catheter to an athlete, it is the responsibility of the CCES that it be free from contamination.
263. Ms. Brown referenced the responsibility of the DCO as set out in CADP Rule 6A.4(a), which required the DCO to inform the Athlete that :
- “a *Failure to Comply* could result in an anti-doping rule violation”.
264. By reference to the Athlete Selection Order (Exhibit 1, Tab 3, Page 20) Ms. Brown pointed out that the DCO responsibility is discharged by reading the form to the Athlete which contains the following provision as reproduced below:
- “Please be advised that failure or refusal to provide a sample may result in an anti-doping rule violation”.**
265. Ms. Brown was aware that the Athlete had completed a Supplementary Report on November 28, 2009 recording his understanding that the events of the day would not constitute a “refusal”.
266. However, Ms. Brown repeatedly asserted that the Athlete’s recitation in the Supplementary Report was incorrect.
267. It was acknowledged by Ms. Brown that on November 28, 2009, the DCO and Chaperone are at that point the representatives of the CCES.

268. Ms. Brown had no personal knowledge of any of the events of November 28, 2009 and thus, relied on the information she received from Det. Itheme and Mr. Smyth.
269. The CCES assertion letter of March 22, 2010 (Exhibit 1, Tab 3, Page 3), records an invitation to the Doping Control Officers who conducted the mission to comment upon the reports. Mr. Morrow advised that any comments received were provided orally by the individuals to Ms. Brown and the CCES has no memos recording such conversations.
270. Ms. Brown acknowledged that the Doping Control Officers were not asked about the Athlete's Supplementary Report concerning his understanding that there was no "refusal".
271. When pressed, Ms. Brown could not recollect the particular questions asked of the Doping Control Officers, nor their replies.
272. It was noted that Ms. Brown's assertion letter of March 22, 2010 (Exhibit 1, Tab 3, Page 3) does not record the fact or content of the Athlete's Supplementary Report (Exhibit 2, Tab 14). Ms. Brown offered no explanation for this.
273. On cross-examination, Ms. Brown testified that she could only give evidence to the extent she could remember, that her memory was limited, that she testified to the best of her recollection, that in certain respects, her memory is failing her and on other occasions, she must have been mistaken in respect of certain testimony.

#### **POSITION OF THE CCES**

274. The CCES maintains that the Athlete violated CADP Rule 7.31 by refusing to submit to Sample Collection.
275. The CCES asserts that the resolution of this matter is to be found in the evidence relating to the events taking place on November 28, 2009. The evidence adduced on behalf of the CCES by Det. Itheme is corroborated by Mr. Smyth and Ms. Brown and is simply inconsistent with that proffered by the Athlete and his witnesses. It is said that there is no grey area in this case. One version of the events must be true and one is not.
276. It is argued that the violation asserted by the CCES has been established by the following:
  - (a) The Athlete was given notification of selection for doping control by virtue of the Athlete Selection Order including the Athlete Rights and Responsibilities signed by the Athlete, Mr. Smyth as Chaperone and Det. Itheme as DCO. (Exhibit 2, Tab 13).
  - (b) There was a "clear, unequivocal, unmistakable" refusal by the Athlete to continue participation in the sample collection process. The primary evidence relied upon by the CCES is that of Det. Itheme, a long serving Durham Police officer and DCO said to be impartial, credible and unshaken on his cross-examination. The

events relating to the refusal were recorded by Det. Itheme in a Supplementary Report prepared on the same day, November 28, 2009 (Exhibit 2, Tab 11).

- (c) The evidence of the refusal was corroborated by the testimony of Anne Brown and the Chaperone, Mr. Smyth. Mr. Smyth similarly completed a Supplementary Report on November 28, 2009 (Exhibit 2, Tab 12).
- (d) In respect of the refusal to continue with the sample collection process, Det. Itheme specifically testified as follows:

“I asked him if he was refusing to go along with the testing. He indicated that, yes, that he’s retired and he’s not going to continue with the mission, that it was refused. I said, You’re refusing? You understand the consequence, and I went over the section about -- the section that’s contained in his rights and responsibilities. And, again, he indicated he is not going to continue, because he is retired.

...

At that point, I advised Mr. Adams that the fact that he’s advised me that he’s retired, he’s still subject -- from my understanding of what the rules are, that he’s still subject to testing up to 18 months from the date of his retirement. And he insisted that’s not. He’s refusing to do the test.

I asked him what his reason was for the refusal. He indicated I could not guarantee his -- that the testing falls under or is protected under his Canadian Charter of Rights and Ontario Human Rights.”

- (e) The CCES maintains that the evidence by and on behalf of the Athlete is not trustworthy. In particular, it was argued that the Athlete was evasive, untruthful and only after November 28, 2009, concocted the argument relating to contamination of the catheter which was not raised on the day in question.
- (f) The evidence of Messrs. Garneau and Bagg should be disregarded by reason of their close working relationship with the Athlete. Their notes, memorializing the events in question were prepared six to eight weeks later in January, 2009 and at the request of the Athlete or his counsel.
- (g) The CCES asserts that the evidence of Messrs. Garneau and Bagg should be treated with caution because of their business relationship with the Athlete. That principle is said to be supported by the authority contained in *Annus* in which the Court of Arbitration for Sport concluded that in the circumstances of a witness who was one of the appellant’s “best friends”, the evidence must, due to his close

personal relationship, “be treated with caution. The Panel applies the same caution to the statements made to it by the Appellant himself”.<sup>3</sup>

277. On the basis of the evidence, applied to the jurisprudence and the rules cited below, the CCES asserts that it is appropriate to make a finding that the Athlete committed an anti-doping violation contrary to CADP Rule 7.31, attracting the sanction set out in CADP Rule 7.39.

**Strict Liability Offence**

278. The CCES asserts that as established in the jurisprudence, a violation of CADP Rule 7.31 is a strict liability offence to which the Athlete has not adequately responded. In particular, it is maintained that a violation occurs even in the absence of an athlete’s intention to evade the anti-doping rules.<sup>4</sup>

**Order Sought by the CCES**

279. The CCES seeks an order of:
- (a) A finding that the Athlete committed an anti-doping violation;
  - (b) A suspension of two years from sports eligibility;
  - (c) A suspension effective from the date of the Decision herein;
  - (d) Financial consequence of no carding and no federal financial assistance; and
  - (e) An award that each party bear their own costs of this arbitration.

**POSITION OF THE ATHLETE**

280. The Athlete maintains that the facts do not establish an anti-doping violation as set out in CADP Rule 7.31. Simply put, it is denied that the Athlete refused to submit to Sample Collection on November 28, 2009. The Athlete seeks a declaration that the CCES has failed to establish as against the Athlete an anti-doping violation and asks for an award of costs in relation to this proceeding.
281. The Athlete heavily relies upon the events occurring on November 28, 2009 and in particular, his Supplementary Report authored in the presence of the CCES representatives, Mr. Smyth and Det. Iheme. His report recorded that

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<sup>3</sup> *Adrian Annus v. International Olympic Committee* (2005) CAS 2004/A/718 (Court of Arbitration for Sport) [“Annus”]

<sup>4</sup> *USADA (United States Anti-Doping Agency) v. Kyoko Ina* (2002) AAA No. 30 190 00814 02 (North American Court of Arbitration for Sport Panel) [“USADA v. Ina”]

“John Smyth called Anne Brown and had a conversation with her – he came back and I made sure that this wasn’t a ‘Refusal’ – he assured me that it wasn’t saying ‘At this time it’s certainly not’.” (Exhibit 1, Tab 4, Page 30)

## **CREDIBILITY**

282. In considering the credibility of each witness I have placed weight on a number of factors; such as, the witness’s interest in the outcome of these proceedings, any reason why the witness might provide more favourable evidence to one side than the other, the clarity of the witness’s recollection of the events in question, the manner in which the witness testified, the ability or inability of the witness to provide an answer to direct questions asked on examination, the reasonableness of the witness’s testimony, the likelihood of truthfulness in the witness’s testimony and any inconsistencies within the witness’s own testimony or amongst the other witnesses, as well as, the general conduct and demeanour of the witness.
283. I considered these factors and have found inconsistencies internally within the evidence of Ms. Brown on behalf of the CCES and as between the evidence of Ms. Brown and Mr. Smyth and Det. Iheme. Additionally, there are stark and irreconcilable contradictions between the evidence adduced by the CCES and that on behalf of the Athlete. Accordingly, credibility is of particular importance in weighing the evidence and reaching a conclusion in this matter.

### **(i) Ms. Brown - Credibility**

284. In respect of the evidence of Ms. Brown, she repeatedly testified that she was responding to questions to the best of her knowledge. However, she acknowledged that her memory is not entirely reliable and on one occasion was mistaken in her testimony.
285. Independently of those admissions, doubt is cast on the weight to be attached to Ms. Brown’s evidence in that:
- (i) She is a long-time CCES employee disclosing an interest in casting the organization in the most favourable light possible; and
  - (ii) She testified:
    - (1) In respect of the September 30<sup>th</sup> Session, she did not adequately inquire into the reasons for Ms. Thanh-Tran’s assertion that the CCES personnel felt “unsafe/threatened”;
    - (2) She could offer no explanation for why the Smyth DCO Report of September 30, 2009 makes no reference to the CCES staff feeling “unsafe/threatened”;
    - (3) The CCES posed three questions to the Doping Control Officers following the November 28<sup>th</sup> Session; yet, she could not recall the

specific questions. To the best of Ms. Brown's recollection she could only remember that they were asked generally about Annex 6B;

- (4) There is no record of the responses received from the Doping Control Officers to inquiries about the November 28<sup>th</sup> Session. They are not recorded in the CCES assertion letter of March 22, 2010; and
- (5) The assertion letter she signed makes no reference to the Athlete's Supplementary Report denying that there had been a refusal (although Mr. Danson's letter of response dated January 20, 2010, is referenced but not attached to the letter, as were the CCES documents).

286. Little weight can be attached to the testimony of Ms. Brown in respect of the events on November 28, 2009. She had no first-hand knowledge and for the reason she acknowledged above, cannot be considered reliable for this purpose having regard for the totality of the evidence.

**(ii) Det. Iheme - Credibility**

287. Det. Iheme was forthright and determined in the giving of his testimony. He had a fixed view of the events in question and his answers rejected any alternative or possibility of error. His rigidity led to inconsistencies in his testimony which cannot be explained or easily reconciled, thus diminishing his credibility.

288. Det. Iheme is a police officer and long serving, experienced CCES official. He prepared for the November 28<sup>th</sup> session in order to do "everything perfectly". However, the Mission did not proceed as he planned. I conclude that he was very annoyed by the Athlete's initial and continuing approach. I believe Det. Iheme proceeded as he thought appropriate. His evidence was oppositional and defensive of both the actions he took and of the CCES. He did not reveal himself to be a dispassionate investigator but rather a committed advocate. I do not agree with the CCES submission that Det. Iheme was impartial, credible and unshaken on his cross-examination.

289. The essence of Det. Iheme's testimony was shaken because:

- (a) The sequence of events occurring with the Athlete at his residence was contradicted by Mr. Smyth;
- (b) He was mistaken that the Mission Order (Exhibit 2, Tab 11) did not reflect the Athlete's business address, yet, Det. Iheme attended the very address recorded in the Mission Order. He could not recall the business address despite having attended there. He made no note of the address;
- (c) He denied that Mr. Bagg requested the opportunity to use video equipment at the session which was confirmed by other witnesses, including Mr. Smyth;

- (d) He did not recall that the Athlete raised concerns about the solvents used on the testing table as described by Mr. Bagg, Mr. Garneau and the Athlete;
- (e) His evidence is precise and damning in respect of the Athlete's disrespectful attitude at the residence and in trying to evade the DCO in the drive to the Athlete's place of business. But, otherwise, Det. Iheme was incredibly vague and not believable in that during the drive, he said he did not know his destination or recall to what address he had driven because he indicated it was not noted. However, he was in the vehicle with Mr. Smyth who testified that he knew the location of the place of business. It is not credible that during the car ride Det. Iheme did not receive that information from Mr. Smyth;
- (f) Although Det. Iheme testified that he was surprised the Athlete refused to proceed with the testing he did not consider at the time, the Athlete's Supplementary Report or engage in any clarifying discussion. Surprisingly, Det. Iheme acknowledged that if the Athlete had verbalized that he was not refusing the test, that would have triggered a discussion, yet it is illogical that he did not read the written Supplementary Report; and
- (g) Det. Iheme testified that during the Speakerphone Call he interrupted and corrected the Athlete's recitation of events. However, Mr. Bagg did not recall any interjection or challenge by Det. Iheme during the Speakerphone Call regarding the Athlete's recitation of events. And, Mr. Garneau testified that no one spoke up or challenged the accuracy of what the Athlete said on the Speakerphone Call. Mr. Smyth was of no assistance as he had "tuned out".

**(iii) Mr. Smyth - Credibility**

290. Mr. Smyth testified in a candid and thoughtful manner. He was a fair-minded witness. He conceded where appropriate, suggestions made on cross-examination and properly resisted responses beyond his knowledge or understanding. He deferred to Det. Iheme in circumstances where it appeared that Det. Iheme was either responsible for or had carriage of discussions or decisions taken. The absence of corroborative evidence of Det. Iheme by Mr. Smyth is telling.
291. To the extent that that Mr. Smyth said he overheard the entire exchange of communications between the Athlete and Det. Iheme at the vehicle notwithstanding that Det. Iheme said he started the discussion without the presence of Mr. Smyth, I prefer the evidence of Mr. Smyth. He had known the Athlete for years and had attended the September 30<sup>th</sup> Session so it is more likely that he would not have remained in the car when the initial approach was made to the Athlete. I reject the evidence of Det. Iheme in this respect.
292. However other portions of Mr. Smyth's evidence are less credible; such as:
- (a) He testified that he "tuned out" the Speakerphone Call which is unfortunate but also improbable and incredible based on his years of experience as a DCO and his

personal knowledge and earlier involvement with the Athlete, particularly at the September 30<sup>th</sup> Session;

- (b) It is equally improbable that Mr. Smyth was incapable of recalling the substance of discussions between the Athlete and Det. Itheme; and
  - (c) Mr. Smyth gave no oral evidence to substantiate his written Supplementary Report that the Athlete tried “to lose us once while we were following him”.
293. Mr. Smyth, on two occasions in his notes of November 28, 2009 (Exhibit 1, Tab 3, Page 21) records his understanding that the Athlete was “refusing to participate”.
294. That is difficult to reconcile with Mr. Smyth’s acknowledgement that if he had been the DCO he would have read the Athlete’s Supplementary Report and if the Athlete said there had been no refusal he would have had a discussion for clarification of the issue.
295. On the most critical aspect of whether the Athlete had refused to continue with the test, Mr. Smyth on one occasion testified that he advised Ms. Brown “there was a potential refusal that was going to occur” that is inconsistent with the refusal which was said to have taken place.
296. Mr. Smyth testified he was never asked by the CCES to comment on the Athlete’s Supplementary Report which is contrary to the CCES letter and evidence of Ms. Brown.

**(iv) Messrs. Bagg and Garneau - Credibility**

297. Although pressed by the CCES, I have considered and rejected the proposition that the evidence of Messrs. Garneau and Bagg should be treated with caution based on the principles set out in *Annus*<sup>5</sup>. First, the case before me does not establish that any of the witnesses on behalf of the Athlete were “best friends”, nor is there sufficient evidence to establish a close personal relationship that creates any cause for concern. Further, I am of the opinion that there is no basis in law to commence an analysis of the credibility of testimony of any witness based on a pre-conceived notion that the existence of a prior relationship diminishes their credibility.

**(v) The Athlete - Credibility**

298. Although the Athlete claimed to be retired through communicating with his coach shortly after the Beijing Olympics and yet in November 2009, he remained a member of Athletics Canada, part of the Registered Testing Pool and filed the requisite whereabouts form. This is said by the CCES to reflect negatively on his credibility. I accept that during the November 28<sup>th</sup> Session, he likely said he was retired right then; but, this case

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<sup>5</sup> *Annus*, *supra* note 3 at para. 51.

does not turn on retirement and when or if he was retired is not a matter of consequence to the core issue.

299. Although asserted by the CCES officials that the Athlete was trying to lose them and drove in an improper manner, I reject that evidence which was affected by their misunderstanding of the loop taken to go past the closed pharmacy.
300. The Athlete was a challenging witness, unwilling on occasion to give direct answers or avoid rhetorical assertions. However, his evidence was the most consistent overall and was corroborated by Messrs. Bagg, Garneau and importantly by the correspondence of Mr. Danson. Although the Athlete had the greatest interest in the outcome of this proceeding, his evidence “had a ring of truth” and was delivered in an earnest and sincere manner.
301. Mr. Morrow, on a number of occasions put to the Athlete, on cross-examination, that if he had a different memory or held a different view than that contained in the testimony of Det. Iheme then the proposition was advanced that Det. Iheme must have been lying. I reject that stark alternative. I am of the view that after a significant passage of time, witnesses of the same events can with honestly held beliefs differ in their recollections. This can occur without either one of those witnesses being branded as deceitful.

### **BURDEN OF PROOF**

302. It is acknowledged by both parties that CADP Rule 7.81 governs. Mr. Morrow accepts that the CCES has the burden of establishing that an anti-doping rule violation has occurred.
303. The burden and standard of proof are best understood by recognizing that these proceedings are not criminal or quasi criminal in nature. Doping disputes are sports related matters arising by contract where an athlete agrees not to ingest particular prohibited substances and, for which, all parties concerned have contracted to have their dispute resolved by arbitration through the SDRCC. This matter is arbitrated under a contractual agreement.<sup>6</sup> The parties’ responsibilities are viewed as contracted commitments which are mutually dependent.
304. The standard of proof is described in CADP Rule 7.81 as being greater than a mere balance of probability but less than proof beyond a reasonable doubt. Mr. Danson has argued on behalf of the Athlete, that having regard for the seriousness of the allegations, the consequences of an adverse finding and the prosecutorial nature of the proceeding,

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<sup>6</sup> *The Canadian Centre for Ethics in Sport et al v. Christopher Sheppard* (2005) SDRCC DT-05-0028 (Doping Tribunal) at para. 38. [“*Sheppard*”]

that the standard of proof is far closer to the criminal standard, beyond a reasonable doubt, than it is in the civil standard of proof on a mere balance of probability.

305. In assessing the standard of proof, I am greatly assisted by CADP Rule 7.81 itself which provides:

“The standard of proof shall be whether the CCES has established an anti-doping rule violation to the comfortable satisfaction of the Doping Tribunal bearing in mind the seriousness of the allegation which is made”.

## **FACTUAL FINDINGS**

### **Factual Finding – What Happened on September 30, 2009?**

306. In respect of the September 30<sup>th</sup> Session, the Athlete’s evidence established that the test termination was not a “refusal”. That was not contradicted by the CCES.
307. Based on the evidence before me, I find that:
- (a) Mr. Smyth, as Doping Control Officer, attended at the Athlete’s residence on September 30, 2009 to conduct an out-of-competition doping control test;
  - (b) During the course of the attendance, the Athlete spoke with his lawyer by telephone on two occasions. The CCES officials consulted with their supervisor.
  - (c) For reasons then accepted by the CCES, the test was cancelled by the DCO. The Athlete in an effort to ensure there would be no miscommunication sought to confirm that the termination of the session would not constitute a “refusal”, as recorded in his written Supplementary Report (Exhibit 1, Tab 3, Page 18B).
  - (d) The CCES did not subsequently assert that the events of September 30, 2009 constituted a refusal for the purpose of CADP, Rule 7.31.

### **Factual Finding - What Happened on November 28, 2009?**

308. Based on the evidence before me, I find that:
- (a) Prior to attending November 28, 2009, Det. Ihome had some information about a previous cancelled test. He had done preparatory work to assist in his identification of the Athlete. He wanted to ensure that his test was perfect.
  - (b) As a result of an authorization to conduct out-of-competition doping control on the Athlete, Doping Control Officers attended at his residence on November 28, 2009 as a follow up to the events of September 30, 2009.
  - (c) The Detective, a long-serving member of a police force and an experienced Doping Control Officer, having conducted over 1,000 drug tests, had reason to feel frustrated from the initial contact with the Athlete at his residence at 11:00

a.m. The Athlete rejected the Detective's assertion that they return to the residence and complete the doping control session at that time. He rebuffed the CCES authority to conduct the without notice test immediately at his residence.

- (d) The delay and relocation of the test were not what Det. Iheme wanted to occur. However, for reasons then accepted by the CCES, the location for the sample collection moved on consent of the parties from the residence of the Athlete to his business location.
- (e) From the initial encounter, Det. Iheme appeared offended that the Athlete was rude and used profanity once Det. Iheme identified himself as being a representative of the CCES on the mission of performing a doping control session.
- (f) During the period of transit from the residence to the business location, Mr. Smyth telephoned Ms. Brown, General Manager, Ethics and Anti-Doping Services, CCES.
- (g) Det. Iheme's notes of November 28, 2009 (Exhibit 1, Tab 4) references that he had been told by the Athlete that he "had a few errands to run after he picks up his friend". It appears that the Det. Iheme's notes are consistent with the conduct of the Athlete. Accordingly, it is likely that Det. Iheme and Mr. Smyth misinterpreted the driving route (past the closed pharmacy) as reflecting an improper intention of the Athlete.
- (h) Det. Iheme reached conclusions about the Athlete's intention to evade the process or "lose" the CCES officials en route from the residence to the place of business. This heightened Det. Iheme's frustration level.
- (i) At the Athlete's place of business, the Doping Control Session appeared, to all present, to be cordial and without incident. The Athlete certainly evidenced his willingness to participate by signing the Athlete Selection Order (Exhibit 2, Tab 13). As well, the consensus of the testimony reflected the Athlete's approval that the CCES officials attended with catheters, the supply of which had been the outcome of the DT/CAS Determination. The catheter supply is consistent with the Mission Order disclosing that the "Athlete ... requires a catheter". (Exhibit 2, Tab 11)
- (j) Although denied by Det. Iheme, the weight of the evidence of the witnesses satisfies me that at the outset of the sample collection process, a discussion was initiated by:
  - (i) The Athlete in respect of the use of solvents on the table to be used as a testing station; and
  - (ii) Mr. Bagg in respect of a request to videotape the proceedings, which was denied.

- (k) I conclude that CCES officials did not accept the responsibility that the CCES supplied catheters were clean. Further, the CCES officials sought to shift responsibility to the Athlete and assert a burden rested on him to ensure the CCES supplied catheters were contamination free at least by examination of the catheters and seals.
- (l) As a result of discussions between the Athlete and the CCES officials, the Athlete decided to telephone his lawyer, Mr. Danson. Following a discussion between the Athlete and his lawyer, the lawyer requested that the telephone be placed on speaker mode. A conversation ensued in which all of the witnesses in this proceeding (other than Ms. Brown) either participated in, overheard or had the opportunity to overhear portions of the Speakerphone Call.
- (m) During the Speakerphone Call, the Athlete and Mr. Danson explained there would be no refusal, but that the CCES had to comply with the law. In particular, they expressed the view that the CCES had to ensure that the catheter it was providing the Athlete was contamination free. The Athlete was seeking assurances from the CCES of a contamination free collection session. Mr. Danson also explained that if there was a possibility of these requests being construed as a refusal, he expected the CCES to advise them.
- (n) The Athlete testified that during the set up, Mr. Smyth advised the Athlete that it was his responsibility to make sure that the CCES-provided catheter was contamination free, which I accept because:
  - (i) Mr. Smyth testified that he could not recall and accordingly, could not say whether or not he made such a statement;
  - (ii) Det. Iheme denied any such conversation because “we never got to that point”; however, the Athlete had a burden as well, to examine the catheters and seals (paragraph 108);
  - (iii) I accept the evidence of the Athlete (paragraph 189), Mr. Bagg (paragraph 23) and Mr. Garneau (paragraph 245); and
  - (iv) I accept that responsibility for ensuring that the CCES-supplied catheters was spoken about during the Speakerphone Call.
- (o) Following the Speakerphone Call the Athlete continued to participate by providing information required for completion of the Doping Control Form (Exhibit 1, Tab 3, Page 25).
- (p) As a result of discussions between the Athlete, Mr. Danson and the CCES officials, Mr. Smyth stepped aside and placed a telephone call to Ms. Brown.
- (q) The evidence of Det. Iheme that the Athlete said he is retired and refusing to take the test, is contradicted by the Athlete and others. I am not convinced after

considering all of the evidence that this statement has any effect on the outcome of the matter.

- (r) Although hotly contested by the CCES officials, I accept the evidence of the Athlete that when Mr. Smyth completed his call to Ms. Brown, the Athlete asked him “Are we okay”, to which Mr. Smyth replied in the affirmative and said that they would get the supplementary forms for the Athlete to complete. Det. Iheme provided the Athlete with the supplementary forms. This is consistent with the events of the September 28<sup>th</sup> Session.
- (s) The Supplementary Report form was handwritten by the Athlete in front of the CCES officials. It was taken by the DCO, Det. Iheme, without review by himself or Mr. Smyth, the Chaperone. I accept that the Athlete, while completing the Supplementary Report, verbalized that his actions were not a refusal. It is possible though unlikely that his words were not heard by Det. Iheme or Mr. Smyth.
- (t) The session concluded on a cordial basis with the parties shaking hands in a light-hearted way.
- (u) After the Athlete completed his Supplementary Report, the CCES officials did not confront the Athlete with their view that he was refusing to participate in the test. They only recorded the refusal in their own supplementary reports prepared after the session.

## **JURISPRUDENCE**

- 309. The jurisprudence establishes that a breach of CADP Rule 7.31, is a strict liability offence. There must, however, first be a breach of the rule. A lack of intent to avoid the test or a mistaken belief as to the consequence of an Athlete’s conduct are not defences available to an Athlete.<sup>7</sup>
- 310. However, in at least one prior case, the *Busch* matter, it appears the Doping Control Officer followed a protocol of cautioning the Athlete and confirming that a refusal could lead to disciplinary sanctions as soon as he concluded the Athlete was refusing to participate.<sup>8</sup>
- 311. In other situations, Doping Control Officers made efforts to assert and repeat when appropriate, for an athlete to be aware, that a failure to comply may result in an anti-

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<sup>7</sup> *The Canadian Centre for Ethics in Sports et al v. Yvan Darsigny* (2005) SDRCC/CRDSC DT 05-0020 (Doping Tribunal) at p. 3. [“*Darsigny*”]

<sup>8</sup> *World Anti-Doping Agency v. International Ice Hockey Federation and Florian Busch* (2009) CAS 2008/A/1564ADA v. IIHF & Busch (Court of Arbitration for Sport) at para. 5. [“*Busch*”]

- doping violation.<sup>9</sup> Otherwise, having explained the consequences of not providing a sample, they secured the Athlete’s confirmation in a separate supplementary form as to the understanding of the consequences of not providing a sample.<sup>10</sup>
312. In this case, assuming the CCES officials reached the conclusion that the Athlete was refusing to participate, they did not stop the proceeding and reiterate the caution contained in the Athlete Selection Order or otherwise confirm that a refusal could lead to severe disciplinary sanctions.
313. An athlete is not able to pass on responsibility to abide by the anti-doping rules to anybody else. That conclusion was sufficient to establish a doping violation in the *Gertenbach* case.<sup>11</sup> In the case before me, the Athlete has not sought to pass on his responsibility to abide by the CADP Rules, but rather only sought verification of those rules from CADP itself intending to abide by any determination received.
314. The *Darsigny* case before the Doping Tribunal and the Doping Appeal Tribunal clearly recognized that “for there to be refusal, there must be a clear request”;<sup>12</sup> that is not an issue in the case before me.
315. The question of the Athlete’s refusal in the case before me was hotly contested. This can be contrasted with the other refusal decisions to which I have been referred. In those cases the Athlete’s “refusal” was manifest by their actions (not giving the sample – *Busch*)<sup>13</sup>, not attending (*Zardo*)<sup>14</sup> refusing and acknowledging in writing the consequence of the refusal (*Vedeneeva*)<sup>15</sup>, leaving the scene (*Boyle*)<sup>16</sup>.
316. The United States Anti-doping Agency protocol requires that:
- “A DCO engaged in an out of competition un-announced test must not leave before either obtaining a sample or the Athlete has signed a refusal to give a sample form”<sup>17</sup>

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<sup>9</sup> *The Canadian Centre for Ethics in Sports et al v. Giulio Zardo* (2005) SDRCC DT-05-0023 (Doping Tribunal) at paras. 35-39. [“Zardo”]

<sup>10</sup> *Re Elena Vedeneeva (Rus)* (2010) (FIS Doping Panel) [“Vedeneeva”]

<sup>11</sup> *World Anti-Doping Agency (WADA) v. Jasyn Gertenbach et al* (2009) CAS 2008/A/1558 (Court of Arbitration for Sport) at para. 7.13. [“Gertenbach”]

<sup>12</sup> *Yvan Darsigny v. The Canadian Centre for Ethics in Sport et al* (2005) SDRCC/CRDSC DAT-05-001 (Doping Appeal Tribunal) at para. 52.[“Darsigny Appeal”]

<sup>13</sup> *Busch*, *supra* note 8.

<sup>14</sup> *Zardo*, *supra* note 9 at paras. 35-39.

<sup>15</sup> *Vedeneeva*, *supra* note 10.

<sup>16</sup> *The Canadian Centre for Ethics in Sport et al v. Shari Boyle* (2007) SDRCC DT 07-0058 (Doping Tribunal). [“Boyle”]

<sup>17</sup> *USADA v. Ina*, *supra* note 4 at para. 19.

317. In the *USADA v. Ina*<sup>18</sup> case, the Athlete signed the Athlete Refusal Form having been warned about the potential suspension consequences. CADP does not have such a refusal form.

### **REASONS FOR CONCLUSION**

318. **I have concluded that the Athlete did not commit a CADP Rule 7.31 violation because:**
- (a) **given the contractual nature of the relationship between the parties, the CCES is not entitled, in these circumstances, to enforce the CADP Rules since it did not immediately accept its responsibility to supply contamination free catheters and thus maintain the rights of the Athlete; and in any event,**
  - (b) **the conflicting evidentiary record does not substantiate the CCES allegation.**
319. The events of November 28, 2009 cannot be considered in isolation of the DT/CAS Determination and the events of September 30, 2009. The September 30<sup>th</sup> Session was cancelled by the DCO without adverse consequences or repercussion for the Athlete.
320. The November 28<sup>th</sup> Session did not result in the Athlete providing a sample as contemplated by the Mission Order and the CADP Rules. However, for the reasons that follow, I conclude that the CCES has failed to discharge its burden to show the November 28<sup>th</sup> Session terminated as a result of the Athlete's refusal to provide a sample. The Athlete had sought to hold the CCES accountable both in the application of the CADP Rules and the maintenance of the Athlete's rights under such Rules. The Athlete wanted confirmation from the CCES as to who was responsible for ensuring the CCES-provided catheters were contamination free because the CCES officials created doubt in that respect. The session terminated when the CCES failed to do so.
321. I reject the evidence of the CCES that the session terminated when the Athlete declined the test because he was retired. The CCES's evidence in that respect, is inconsistent with the balance of the testimony, which I have accepted, establishing that the matter of contention was, in fact, the contamination free catheters and not retirement.

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<sup>18</sup> *Ibid.*

## **THE CCES OBLIGATIONS UNDER THE CONTRACT**

322. The obligations of the CCES when performing a doping control session are outlined in the CADP. The objective of the CADP Notification of Athletes is set out in CADP Rule 6.18 as follows:

6.18 To ensure that reasonable attempts are made to locate the *Athlete*, the selected *Athlete* is notified, the rights of the *Athlete* are maintained, there are no opportunities to manipulate the *Sample* to be provided, and the notification is documented. (emphasis added)

323. CADP Rule 6.31(d)(ii) states that the Athlete's rights include "the right to ask for additional information about the *Sample* collection process." Accordingly, during the November 28<sup>th</sup> Session the Athlete was well within his rights, under the contract, to ask the DCO for clarification as to who had the onus of ensuring the CCES-provided catheter was contamination free.

324. In the ordinary course a catheter may be supplied either by the CCES or the Athlete which is governed by the following CADP provisions:

- (a) CCES-supplied catheters: CADP Rule 6B.5 states that "[i]f requested, the DCO shall provide to the *Athlete* a new sterile catheter with which to provide a *Sample*."
- (b) Athlete-supplied catheters: CADP Rule 6B.9 states that "[t]he *DCO* shall inspect all catheters provided by an *Athlete* prior to their use, however the cleanliness of a used or un-sealed catheter is the responsibility of the *Athlete*."

325. Accordingly, it becomes clear by reading CADP Rules 6B.5 and 6B.9 in conjunction that when a new sterile catheter is provided by the DCO, the onus is not on the Athlete to ensure the catheter is contamination free. It is only when the Athlete provides his/her own catheter that the Athlete has the responsibility of ensuring its cleanliness.

326. When the Athlete inquired of Det. Iheme and Mr. Smyth who bore the responsibility of ensuring the CCES-supplied catheter was contamination free, the Athlete's rights should have been respected under the contract. The CCES should have promptly advised the Athlete that the CCES had the onus of ensuring the CCES-provided catheters were sterile and contamination free.

327. The DCO should have been able to provide the Athlete with a prompt response. Pursuant to CADP Rule 6B.3:

"The CCES has responsibility for ensuring, when possible, that the *DCO* has any information and *Sample Collection Equipment* necessary to conduct a *Sample Collection Session* with an *Athlete* with a disability. The *DCO* has responsibility for *Sample* collection."

328. There can be no responsibility on the Athlete to ensure that the CCES-supplied catheter is contamination free.
329. The CCES failed to advise the Athlete during the November 28<sup>th</sup> Session that it bore the onus of ensuring the CCES-provided catheter was contamination free and as such, the Sample Collection Session never reached the stage requiring the Athlete to provide a sample.
330. It is unfortunate that the CCES did not readily acknowledge the responsibility to ensure during the November 28<sup>th</sup> Session that the CCES-supplied catheter was contamination free because that would have changed the outcome of the Session as I have accepted the Athlete's testimony in that respect.
331. The CCES failed to fulfill its obligations to the Athlete under the contract and accordingly, the CCES cannot enforce a contract to which it has not fully complied. The mutually dependent obligations of the parties' contract have not been satisfied. While I recognize that CADP Rule 7.31 has been interpreted as a strict liability offence, I find that in these circumstances, CADP 7.31 is unenforceable because, when the contract is read as a whole, the CCES must adhere to its obligations prior to the Athlete being obliged to fulfil his obligations under CADP 7.31.
332. Having regard for the conclusion reached by other Arbitrators that CADP Rule 7.31 creates a strict liability offence, I note that no athlete could be aware of that conclusion by the DCO reading out loud from the "Athlete's Rights and Responsibilities". The particular provision stressed by the CCES reads:
- "Please be advised that failure or refusal to provide a sample may result in an anti-doping rule violation."** (emphasis added)
333. The quoted provision does not say a failure shall result in a violation. Accordingly, a plain reading would lead one to recognize that not all refusals result in a violation. That was the outcome of the September 28<sup>th</sup> Session.
334. For there to be a "refusal" to which strict liability attaches, there must first be an obligation imposed on the Athlete. In this case, the Athlete's obligation did not arise because the CCES had not met its responsibility to maintain the Athlete's rights by fulfilling its obligation to provide a clean, sterile catheter and assure the Athlete that he had no onus to ensure the catheter is contamination free.

**EVIDENCE**

335. However, in any event of the respective obligations of the parties, the evidence does not establish that the Athlete committed an anti-doping violation on November 28, 2009.
336. There is no doubt that at some point, the November 28<sup>th</sup> Session was interrupted. However, the uncontroverted testimony establishes that interruption occurred only after:
- (a) the Athlete had participated in the initiation of the Doping Control Process through execution of the Athlete Selection Order;
  - (b) the CCES supplied catheters pursuant to the Mission Order disclosing that the “Athlete...requires a catheter” and CADP Annex 6B;
  - (c) there had been discussions between the Athlete and the attending CCES officials;
  - (d) the Athlete twice spoke with his counsel by telephone;
  - (e) the Athlete’s counsel, by Speakerphone Call, addressed the CCES officials who were thus advised of the Athlete’s position;
  - (f) the Athlete continued to cooperate following the Speakerphone Call by participating in the completion of the Doping Control Form;
  - (g) the CCES officials consulted with their supervisor by telephone; and
  - (h) the Athlete completed the Supplementary Report, which patently disclosed his view that there had been no refusal.
337. Having regard for the gravity of the consequences arising from a breach of the CADP Rules, the previous particular experience of the Athlete in respect of the September 28<sup>th</sup> Session, the DT/CAS Determination and the engagement of legal counsel, leads me to accept a critical aspect of the Athlete’s version of the Speakerphone Call. In particular, I accept that during the Speakerphone Call the Athlete and his lawyer made clear their view that:
- (a) no test could continue without clarification of the CCES’s position as to which party bore the burden that the CCES-supplied catheters were contamination free;
  - (b) the Athlete had no intention to refuse to participate in the Doping Control Session; but, merely wished to clarify the CADP Rules; and
  - (c) the CCES officials should consult with their supervisor in order to address the catheter issue.

338. Det. Iheme and Mr. Smyth each testified that:
- (a) they knew from the Athlete's oral statements that "he was retired and not going to continue with the mission, that it was refused"; and
  - (b) had they been aware the Athlete was taking a contrary view to their perspective that a refusal had occurred, then a clarifying discussion would have ensued.
339. However, no clarifying discussion took place and I reject that a refusal occurred because the Athlete claimed he was retired.
340. Mr. Smyth candidly acknowledged that had he been the DCO, he would have read the Athlete's Supplementary Report which patently disclosed the Athlete's view that there had been no refusal which would have triggered the clarifying discussion. Mr. Smyth was not the DCO. Det. Iheme, as the DCO on November 28, 2009, was of the opinion that it was not necessary or appropriate to review the Athlete's Supplementary Report before completion of the Doping Control Session. Additionally, Det. Iheme denied hearing the Athlete verbalize his understanding that the events did not constitute a refusal.
341. The Athlete testified that had he been alerted during the November 28<sup>th</sup> Session, as to there being any dispute with the CCES officials respecting their interpretation that a refusal had taken place, which would have occurred had Mr. Smyth been the DCO, the Athlete would have continued with the process and completed the test.
342. I reject the CCES's assertion that the Athlete "clearly" indicated a refusal. In fact, there is nothing clear about the termination of the November 28<sup>th</sup> Session. On the advice of counsel, the Athlete was simply holding the CCES and himself to strict compliance and interpretation of the CADP Rules.
343. Further, there is no explanation by Mr. Smyth after his discussion with Ms. Brown, of his affirmative advice to the Athlete that we are "okay" which evidence I accept as truthful.
344. Having accepted that the contamination free issue was raised, the CCES officials sought guidance from a supervisor. Unfortunately, based on the evidence before me, that Smyth/Brown telephone discussion did not focus on the issue relating to responsibility for ensuring the CCES-supplied catheters were contamination free. Rather, it appears that that conversation considered a retired athlete's obligation to participate in the Doping Control Session.
345. Thereafter, the parties were like ships passing in the night and were effectively miscommunicating with each other.

346. Mr. Smyth testified that:
- (a) the Athlete “refused to participate based on the fact that he had retired and he had considered there was a Charter right, Charter issue”. At the point the Athlete said he was not participating, is when Mr. Smyth phoned Ms. Brown to advise her of the Athlete refusing to participate (paragraph 163 above); and
  - (b) he called Ms. Brown “when we are close to the end of the mission and the concern was that there was a potential refusal that was going to occur. So that’s when I phoned her” (paragraph 164 above).
347. I note that on the last occasion Mr. Smyth said “potential refusal”. That is contrasted with the other answer given by Mr. Smyth that he telephoned Anne Brown “to advise her of Jeff refusing to participate”.
348. There is an internal inconsistency in the evidence of Mr. Smyth as to whether, when he was calling Anne Brown, there was a “potential refusal” or whether the “refusing” had already been asserted. This inconsistency brings into doubt whether Mr. Smyth perceived only a potential refusal or whether there was an actual refusal by the Athlete.
349. On the basis of the tests to assess credibility set out above, I reject the evidence of Det. Iheme, that the Athlete “clearly stated that he refused the testing” for the following reasons:
- (i) that evidence is not consistent with the testimony of Mr. Smyth (“potential refusal”);
  - (ii) it is inconsistent with Mr. Danson’s January letter to the CCES (Exhibit 1, Tab 2);
  - (iii) it is inconsistent with the evidence of the Athlete and Mr. Bagg that when completing the Supplementary Report Form, the Athlete verbally stated in close proximity to Det. Iheme and Mr. Smyth, “this is not a refusal, I’m writing this down. I’m very clear on that”;
  - (iv) it was not reduced to writing by Det. Iheme until after the session concluded nor was it provided to the Athlete by the DCO;
  - (v) portions of Det. Iheme’s other evidence is overstated (nature of the drive from the Athlete’s residence to his place of business, paragraphs 97 and 98 above), inconsistent with the testimony of others (solvent free testing table, paragraphs 104, 157, 230 and 244) (request to videotape the session, paragraphs 103, 152, 229 and 252 above) and lacking in credibility as an experienced detective (he did not note the address at which the Session took place, paragraph 101 above);

- (vi) Det. Iheme's evidence in chief was modified on cross examination (initially he said he was unaware of the events of September 30, 2009 leading to the cancellation, however on cross examination acknowledged he had a conversation with Mr. Smyth and knew at least that the Athlete had consulted with Counsel) (paragraph 89 above);
- (vii) it is so clearly inconsistent with the text of the Athlete's Supplementary Report that this "wasn't a 'Refusal'";
- (viii) the evidence of Mr. Smyth, in important respects, is not corroborative of Det. Iheme because he could not recall any substantive aspect of the Speakerphone Call (because he "tuned it out") or the conversation between the Athlete and Det. Iheme and he failed to read the Athlete's Supplementary Report (paragraphs 156, 158 and 162 above);
- (ix) I find that it unlikely that as an experienced DCO, Det. Iheme merely took the Supplementary Report without reading it and ascertaining immediately, the issue at hand;
- (x) I find it unlikely that the session would have ended on a friendly tone if the Athlete was considered by the CCES officials to have refused the test (paragraphs 144, 208 and 250 above);
- (xi) I reject Det. Iheme's explanation that a different result would have ensued if the Athlete had verbalized his view of "no refusal" rather than writing it in the Supplementary Report (paragraph 142 above);
- (xii) I prefer the evidence of the Athlete in respect of the drive to his place of business (paragraphs 177 and 178 above) to that of Det. Iheme (paragraphs 97 and 98 above) as being corroborated by Mr. Bagg (paragraphs 225 and 226 above) and because Mr. Smyth did not testify with the same kind of detail as Det. Iheme about the drive (paragraph 148 above); and
- (xiii) I accept the evidence of the Athlete, that following the phone call with Ms. Brown, Mr. Smyth confirmed they are "okay" and only needed supplementary forms to be completed which was similar to the September 30<sup>th</sup> Session (paragraph 197 above).

**IN SUMMARY**

350. I have concluded that the Athlete did not provide a sample at the November 28<sup>th</sup> Session because the CCES failed to clarify who was responsible for ensuring that the CCES-supplied catheter was contamination free. This is an assurance that the CCES could readily have given in respect of other Sample Collection equipment which must be provided by the CCES.
351. That requirement is consistent with the mutuality concept of contract compliance which is the framework for the relationship between the parties. How can one be said to be in default or in breach of a contract when a requirement is questioned without a response being given or the parties have not reached an agreement on a critical term; such as, “Who is responsible to ensure that a CCES-supplied catheter is contamination free?”
352. The Athlete is contractually entitled to the procedural and substantive rights established by the CADP and applicable jurisprudence which includes the DT/CAS Determination.
353. The DT/CAS Determination arose at a point in time when the guidelines applicable to disabled athletes were evolving. This evolution is reflected in Annex 6B to the CADP which establishes the CCES’s obligations to disabled athletes. In the circumstances of the November 28<sup>th</sup> Session, these obligations were not respected.
354. I am unable to conclude on the evidence before me that the Athlete refused to continue with the test because he was retired, as urged by the CCES.
355. The responsibility for the unsatisfactory evidentiary record rests with the CCES, which had refused the request of Mr. Bagg that the session be recorded on videotape. Further, it did not at the time review, challenge or clarify the Athlete’s position that was clearly spelled out in his written Supplementary Report. Had the CCES chosen an alternate approach at the November 28<sup>th</sup> Session, it may have succeeded in meeting its burden of proof by avoiding the existing, contradictory, evidentiary record.
356. In determining the outcome, I am governed by the burden of proof and standard of proof set out in CADP Rule 7.81. I am comfortably satisfied that on the evidence before me, the CCES has failed to discharge its burden that any anti-doping rule violation occurred on November 28, 2009. That is because of its failure to adduce sufficient evidence of a refusal to satisfy even the lower standard of proof in civil cases of a mere balance of probability. I have concluded above that the strict liability nature of CADP Rule offences is not engaged in these circumstances. CCES can thus not succeed in this hearing.
357. I am quite able to reach this conclusion on a “comfortable satisfaction” level bearing in mind the seriousness of the allegation which is made. I am not persuaded that in these circumstances, the Athlete refused to provide a test sample as alleged. This is not a case requiring examination of whether “compelling justification” existed for the Athlete’s refusal as I have concluded that no refusal occurred. However, had I found the Athlete failed to submit to Sample Collection, I would have concluded there was “compelling justification” for the Athlete’s action as the CCES failed to comply with its CADP Rule obligations.

358. **The CCES has not established to the comfortable satisfaction of the Doping Tribunal that an anti-doping rule violation occurred on November 28, 2009.**
359. In the circumstances, I need not consider the sanction applicable in the event the violation had been established.

### **COSTS**

360. The Athlete has sought an order requiring the CCES to pay his costs in respect of this matter.
361. Pursuant to SDRCC Rules 6.22 (b) I have the discretion to award costs. Although I had brief oral submissions of Counsel at the conclusion of the hearing, I have not been provided with a bill of costs or detailed submissions particularizing the legal fees and disbursements claimed. In the unusual circumstances of this case, if any party wishes me to exercise my discretion in its favour, it should make a written request by no later than January 10, 2011. Based upon responses received, if any, I will then provide such directions as may be appropriate concerning submission on costs.

**DECISION**

362.

- (a) The CCES has failed to establish that the Athlete committed a CADP Rule 7.31 violation on November 28, 2009;
- (b) Costs may be addressed in the future if the parties make cost submissions within the deadline set out in the preceding paragraph, otherwise there will be no costs awarded and each party will bear its own costs;
- (c) I retain jurisdiction over this case in the event of any future dispute relating to the interpretation of implementation of this decision among the parties.

Toronto, ON

December 21, 2010



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Larry Banack, Arbitrator

## **APPENDIX “A”**

### **Extracts from the Canadian Anti-Doping Program - 2009**

#### 6.0 DOPING CONTROL RULES

##### INTRODUCTION

- 6.1 These Doping Control Rules are in standard conformance to the mandatory International Standard for Testing (IST), developed as part of the WORLD ANTI-DOPING PROGRAM. [Code Article 5.2]
- 6.2 As part of the CANADIAN ANTI-DOPING PROGRAM, the purpose of the IST and the associated Doping Control Rules is to plan for effective Testing and to maintain the integrity and identity of the Samples collected, from the point the Athlete is notified of the test to the point the Samples are transported to the laboratory for analysis. [IST 1.0]

##### NOTIFICATION OF ATHLETES

##### OBJECTIVE

- 6.18 To ensure that reasonable attempts are made to locate the Athlete, the selected Athlete is notified, the rights of the Athlete are maintained, there are no opportunities to manipulate the Sample to be provided, and the notification is documented. [IST 5.1]

##### GENERAL

- 6.19 Notification of Athletes starts when the CCES initiates the notification of the selected Athlete and ends when the Athlete arrives at the Doping Control Station or when the Athlete's possible Failure to Comply is brought to the attention of the CCES. [IST 5.2]

##### REQUIREMENTS PRIOR TO NOTIFICATION OF ATHLETES

- 6.21 No Advance Notice shall be the notification method for Sample collection whenever possible. [IST 5.3.1]
- 6.23 DCOs/Chaperones shall have official identification that is provided and controlled by the CCES. The minimum identification requirement is an official card/document naming the CCES or the ADO through which they have been authorized.

##### REQUIREMENTS FOR NOTIFICATION OF ATHLETES

- 6.31 When initial contact is made, the CCES or the DCO/Chaperone, as applicable, shall ensure that the Athlete and/or a third party, if required, is informed:
- a. that the Athlete is required to undergo a Sample collection;
  - b. of the authority under which the Sample collection is to be conducted;
  - c. of the type of Sample collection and any conditions that need to be adhered to prior to the Sample

collection;

- d. of the Athlete's rights including the right to:
  - i. have a representative and, if available, an interpreter;
  - ii. ask for additional information about the Sample collection process;
  - iii. request a delay in reporting to the Doping Control Station for a valid reasons; and
  - iv. request modifications as provided for in Annex 6B: Modifications for Athletes with Disabilities;
  
- e. of the Athlete's responsibilities, including the requirement to:
  - i. remain within sight of the DCO/Chaperone at all times from the first moment of in person notification by the DCO/Chaperone until the completion of the Sample collection procedure;
  - ii. produce identification;
  - iii. comply with Sample collection procedures and the possible consequences of Failure to Comply; and

6.32 When in-person contact is made, the DCO/Chaperone shall:

- a. keep the Athlete under observation at all times until the completion of his/her Sample Collection Session;
- b. identify themselves to the Athlete using their official CCES identification card/document; and

6.33 The DCO/Chaperone shall have the Athlete sign an appropriate form to acknowledge and accept the notification. If the Athlete refuses to sign that he/she has been notified or evades the notification, the DCO/Chaperone shall inform the Athlete of the consequences of a Failure to Comply if possible, and the Chaperone (if not the DCO) shall immediately report all relevant facts to the DCO. When possible the DCO shall continue to collect a Sample. The DCO shall document the facts and report the circumstances to the CCES as soon as possible. The CCES and DCO shall follow the steps prescribed in Annex 6A: Investigating a Possible Failure to Comply. [IST 5.4.3]

## CONDUCTING THE SAMPLE COLLECTION SESSION

### REQUIREMENTS PRIOR TO SAMPLE COLLECTION

6.51 The DCO shall ensure that the Athlete is informed of his/her rights and responsibilities as specified in Rule 6.31. [IST 7.3.2]

### REQUIREMENTS FOR SAMPLE COLLECTION

6.59 The DCO shall provide the Athlete with the opportunity to document any concerns he/she

may have about how the Sample Collection Session was conducted. [IST 7.4.4]

- 6.61 At the conclusion of the Sample Collection Session the Athlete and DCO shall sign appropriate documentation to indicate their satisfaction that the documentation accurately reflects the details of the Athlete's Sample Collection Session, including any concerns recorded by the Athlete. The Athlete's representative (if any) and the Athlete shall both sign the documentation if the Athlete is a Minor. Other Persons present who had a formal role during the Athlete's Sample Collection Session may sign the documentation as a witness of the proceedings. [IST 7.4.6]
- 6.62 The DCO shall provide the Athlete with a copy of the records of the Sample Collection Session that have been signed by the Athlete. [IST 7.4.7]

#### ANNEX 6A: INVESTIGATING A POSSIBLE FAILURE TO COMPLY

##### OBJECTIVE

- 6A.1 To ensure that any matters occurring before, during or after a Sample Collection Session that may lead to a determination of a Failure to Comply are assessed, acted upon and documented. [IST A. 1]

##### SCOPE

- 6A.2 Investigating a possible Failure to Comply begins when the CCES or a DCO becomes aware of a possible Failure to Comply and ends when the CCES takes appropriate follow-up action based on the outcome of its investigation into the possible Failure to Comply. [Code Articles 7.4 and 10.5.3 and IST A.2]

##### RESPONSIBILITY

- 6A.3 The CCES is responsible for ensuring that:
- a. any matters with the potential to compromise an Athlete's test are assessed by means of an initial review according to Rule 7.63-7.65 to determine if a possible Failure to Comply has occurred;
  - b. all relevant information and documentation, including information from the immediate surroundings when applicable, is obtained as soon as possible or practical to ensure that all knowledge of the matter can be reported and be presented as possible evidence;
  - c. appropriate documentation is completed to report any possible Failure to Comply;
  - d. the Athlete or other Person is informed of the possible Failure to Comply in writing and has the opportunity to respond; and
  - e. the final determination is made available to other Anti-Doping Organizations in accordance with the Code. [IST A. 3.1]
- 6A.4 The DCO is responsible for:
- a. informing the Athlete or other Person that a Failure to Comply could result in an anti-doping rule violation;
  - b. completing the Athlete's Sample Collection Session where possible; and

- c. providing a detailed written report of any possible Failure to Comply.

6A.5 The other Sample Collection Personnel are responsible for:

- a. informing the Athlete or other Person that a Failure to Comply could result in an anti-doping rule violation; and
- b. reporting to the DCO any possible Failure to Comply.

#### ANNEX 6B: MODIFICATIONS FOR ATHLETES WITH DISABILITIES

##### OBJECTIVE

6B.1 To ensure that the special needs of Athletes with disabilities are considered, where possible, in relation to the provision of a Sample, without compromising the integrity of the Sample Collection Session. [IST B.1]

##### SCOPE

6B.2 Determining whether modifications are necessary starts with identification of situations where Sample collection involves Athletes with disabilities and ends with modifications to Sample collection procedures and equipment where necessary and where possible. [IST B.2]

##### RESPONSIBILITY

6B.3 The CCES has responsibility for ensuring, when possible, that the DCO has any information and Sample Collection Equipment necessary to conduct a Sample Collection Session with an Athlete with a disability. The DCO has responsibility for Sample collection. [IST B.3]

##### REQUIREMENTS

6B.4 All aspects of notification and Sample collection for Athletes with disabilities shall be carried out in accordance with the standard notification and Sample collection procedures unless modifications are necessary due to the Athlete's disability. [IST B.4.1]

6B.5 In planning or arranging Sample collection, the CCES and DCO shall consider whether there will be any Sample collection for Athletes with disabilities that may require modifications to the standard procedures for notification or Sample collection, including Sample Collection Equipment and facilities. If requested, the DCO shall provide to the Athlete a new sterile catheter with which to provide a Sample. [IST B.4.2]

6B.6 The DCO shall have the authority to make modifications as the situation requires when possible and as long as such modifications will not compromise the identity, security or integrity of the Sample. All such modifications must be documented. [IST B.4.3]

6B.7 An Athlete with an intellectual, physical or sensory disability can be assisted by the Athlete's representative or Sample Collection Personnel during the Sample Collection Session where authorized by the Athlete and agreed to by the DCO. [IST B.4.4]

6B.8 The DCO can decide that alternative Sample Collection Equipment or facilities will be used when required to enable the Athlete to provide the Sample as long as the Sample's identity, security and integrity will not be affected. [IST B.4.5]

6B.9 For intermittent catheter use, Athletes may use their own catheter to provide a Sample. Where possible, this catheter should be new, and produced in a tamper evident wrapping. The DCO shall inspect all catheters provided by an Athlete prior to their use, however the cleanliness of a used or un-sealed catheter is the responsibility of the Athlete.

7.0 DOPING VIOLATIONS AND CONSEQUENCES RULES

REFUSING OR EVADING

7.31 Refusing or failing without compelling justification to submit to Sample collection after notification as authorized in applicable anti-doping rules, or otherwise evading Sample collection is an anti-doping rule violation. [Code Article 2.3]

IMPOSITION OF INELIGIBILITY FOR PROHIBITED SUBSTANCES AND PROHIBITED METHODS

The period of Ineligibility for first anti-doping rule violations other than as provided in Rule 7.33 shall be as follows:

7.39 For violations of Rule 7.31 (Refusing and Evading) or Rule 7.33 (Tampering or Attempted Tampering), the Ineligibility period shall be two (2) years unless the conditions provided in Rules 7.44-7.48 (Exceptional Circumstances), or the conditions provided in Rule 7.49 (Aggravating Circumstances) are met. [Code Article 10.3.1]

ELIMINATION OR REDUCTION OF PERIOD OF INDIVIDUAL INELIGIBILITY BASED ON EXCEPTIONAL CIRCUMSTANCES

NO FAULT OR NEGLIGENCE

7.44 If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Rule 7.23-7.27 (Presence) the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Rule is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Rule 7.51-7.53. [Code Article 10.5.1]

BURDENS AND STANDARDS OF PROOF

7.81 The CCES shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the CCES has established an anti-doping rule violation to the comfortable satisfaction of the Doping Tribunal bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. When these Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability, except as provided in Rule 7.42-7.43 and Rule 7.49 where the Athlete or other Person must satisfy a higher burden of proof. [Code Article 3.1]

Sample	All of the sequential activities that directly involve the Athlete
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Collection Session	from notification until the Athlete leaves the Doping Control Station after having provided his/her Sample(s).