SPORT DISPUTE RESOLUTION CENTRE OF CANADA
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA

No. SDRCC / CRDSC DAT-05-0001 (Ref. DT-05-0020)

DOPING APPEAL TRIBUNAL

On Appel From a Decision of the Doping Tribunal in the
Matter of the Canadian Anti-Doping Program

Between :

YVAN DARSIGNY

Appellant

– and –

1. **THE CANADIAN CENTRE FOR ETHICS IN SPORT,**
2. **THE CANADIAN WEIGHTLIFTING FEDERATION,**
3. **THE INTERNATIONAL WEIGHTLIFTING FEDERATION,**
4. **THE GOVERNMENT OF CANADA,** and
5. **THE WORLD ANTI-DOPING AGENCY**

Respondents

DECISION

The Panel: 8 July 2005

The Honourable Benjamin J. Greenberg, Q.C. (*Arbitrator*)
Ross C. Dumoulin (*Arbitrator*)
Stephen L. Drymer (*President*)

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1. INTRODUCTION

1. On 17 April 2005, Patrice M. Brunet (the "Arbitrator"), constituted as the Doping Tribunal, rendered a decision (the "Decision") in which he found that the Appellant, Mr. Yvan Darsigny (the "Athlete"), had committed a violation of Rule 7.24 of the Canadian Anti-Doping Program (the "CADP") by evading sample collection. The Arbitrator ordered the ineligibility of the Athlete for a period of two years, in conformity with Rule 7.25 of the CADP.

2. The Decision is appealed by the Athlete under Rules 8.0 *et seq*. ("Appeal Rules") of the CADP and Articles AD-9 *et seq*. ("Appeals of Doping Tribunal Decisions") of the ADR-Sport-RED Code (the "Code").

3. As discussed below, the Athlete requests that the Doping Appeal Tribunal (the "Appeal Tribunal") overturn the Decision of 17 April 2005 and either acquit him of all charges or reduce the period of ineligibility ordered by the Doping Tribunal.

2. THE PARTIES

4. Rule 8.15(a) of CADP provides that: "The parties before the Doping Appeal Tribunal are: the parties before the Doping Tribunal, the relevant international federation and *WADA*." Moreover, Rule 7.63 of the CADP reads as follows: "The parties before the Doping Tribunal are the *Person* the *CCES* asserts to have committed an anti-doping rule violation, the *CCES*, the relevant national *Sport Organization* and the Government of Canada.

A. The Appellant

5. **Yvan Darsigny** is a Canadian athlete who has been involved in the sport of weightlifting since the age of 14. He has participated in several national and intentional competitions, in particular the Los Angeles Olympic Games in 1984 and the Barcelona Olympic Games in 1992. He is currently 38 years old and continues to train and to compete. Mr. Darsigny lives in St-Hyacinthe and has been a member of the Club La Machine Rouge de Saint-Hyacinthe since the beginning of his weightlifting career. During that career, he has made a name for himself in Canadian and international sport, and he enjoys an enviable

reputation in the world of weightlifting, among other things, as a mentor to young Canadian weightlifters.

6. During his athletic career, M. Darsigny has undergone no less than 57 doping controls. All of these have produced negative results and Mr. Darsigny has never committed an anti-doping rule violation.

7. The Athlete was represented in the appeal by Maître François Montfils of the law firm *Therrien Couture avocats S.E.N.C.*, in Montréal.

B. The Respondents

8. **The Canadian Centre for Ethics in Sport** (the "CCES"), whose head office is situated in Ottawa, is the national anti-doping organization whose principal responsibility is the adoption and enforcement of anti-doping rules and regulations in Canada, as well the collection of samples and the management of doping control results on a national level.

9. The CCES administers the CADP. In accordance with its responsibilities, and as provided for by the CADP, the CCES bears the burden of establishing the grounds of any alleged anti-doping rule violation.

10. The CCES was represented in the appeal by Mr. Joseph de Pencier, Director of Sport Services and General Counsel of the CCES, and by Ms. Anne Brown, Manager of Quality Control under the CCES Doping Control Program.

11. **The Canadian Weightlifting Federation** (the "CWF"), with an office in Whitehorse, is the national sport organization that administers the sport of weightlifting in Canada and that is affiliated with the International Weightlifting Federation. Mr. Darsigny is a member of the CWF.

12. The CWF was represented in the appeal by its Secretary General, Ms. Moira Lassen.

13. **The International Weightlifting Federation** (the "IWF") is the international federation that administers the sport of weightlifting at the international level. Based in Budapest, Hungary, the IWF is composed of the various national sport federations that administer the sport of weightlifting in their respective countries, such as the CWF. As is the

case with all other international sport federations, the IWF has the responsibility and the duty to regulate the sport of weightlifting around the world, while ensuring its promotion and development, to oversee the functioning and organization of competitions and to promote respect of the rules of "fair play".

14. In accordance with Rule 7.64 of the CADP, the IWF had the right to observe the proceedings before the Doping Tribunal, and the CCES kept the IWF fully abreast of the proceedings in first instance. At the stage of the appeal, despite numerous requests from the Sport Dispute Resolution Centre of Canada (the "SRDCC", or the "Centre"), the IWF failed to appear in the case, and this notwithstanding its status as a party. It neither responded to any of the Centre's communications nor answered any of the Appeal Tribunal's requests for information concerning IWF Rules applicable to the Athlete. The Appeal Tribunal cannot ignore this unfortunate attitude, in particular because the information that the IWF was asked to provide could have clarified an important issue concerning the status of the Athlete and his right of appeal in the circumstances (these questions are discussed further, below).

15. **The Government of Canada** participated in the appeal through the intervention of Sport Canada, a division of the International and Intergovernmental Affairs section of the Department of Canadian Heritage ("Sport Canada"). Apart from responding to questions and to requests for information from the Appeal Tribunal, the participation of Sport Canada consisted essentially in its expression of support for the position taken by the CCES and the arguments advanced by it both in writing and orally.

16. Sport Canada was represented in the appeal by Maître Johanne Imbeau and Ms. Mary Warren.

17. **The World Anti-Doping Agency** ("WADA"), whose head office is in Montréal, is the international organization responsible for administering the World Anti-Doping Program, one of whose principal elements is the World Anti-Doping Code. As with the IWH, WADA had the right to observe the proceedings before the Doping Tribunal, and the CCES ensured that it remained abreast of the status of those proceedings.

18. By email dated 30 May 2005 addressed to the Executive Director of the SDRCC, WADA advised the Centre and the Appeal Tribunal that it did not intend to participate in the

preliminary meeting scheduled for that date, or to make any written or oral submissions in the appeal, while leaving open the possibility of attending the hearing as an observer. In the event, WADA did not attend the hearing.

3. PROCEDURAL BACKGROUND

A. Preliminary Stages

19. In conformity with Rule 8.10 of the CADP and Article AD-9.4(a) of the Code, the appeal was initiated by means of a Notice of Appeal duly filed by the Athlete on 17 May 2005. At paragraph 6 of that Notice, the Athlete states the following grounds of appeal: "The Doping Tribunal erred in its interpretation of the Program, in particular Articles 7.24 and 7.25. The Doping Tribunal also ignored the arguments submitted to it with respect to Article 6.33, without providing any reasons in this regard."

20. The Panel constituting the Appeal Tribunal having been duly designated and constituted in accordance with Rule 8.11 of the CADP and Article AD-9.5 of the Code, the President convened a preliminary meeting with the parties, by telephone, on 30 May 2005, in order to resolve outstanding procedural matters and set a procedural timetable for the appeal. By letter dated 1 June 2005, Maître Julie Duranceau, the Case Manager for the Appeal at the Centre, confirmed in writing the items addressed and the procedural directions issued during the preliminary meeting of 30 May.

21. As described in the 1 June letter, a question arose during the preliminary meeting concerning the status of Mr. Darsigny as a "national-level" or "international-level" athlete. More precisely, the question concerned the application of Rule 8.22 of the CADP, which reads: "In cases arising from *Competition* in an *International Event* or in cases involving *International-Level-Athletes*, the decisions of the Doping Tribunal may be appealed exclusively to the Court of Arbitration for Sport in accordance with its rules and procedures." (Emphasis added)

22. In respect of this issue, the President had addressed a letter to the parties on 31 May, the day following the preliminary meeting, to request that they provide more detailed information concerning the status of the Appellant as a national- or international-level athlete.

The information subsequently furnished by the parties demonstrated clearly the existence of a dispute in this regard, and, thus, regarding the Athlete's right to appeal the Decision to the Appeal Tribunal – in other words, a dispute concerning the jurisdiction of the Appeal Tribunal. Following discussions between the members of the Appeal Tribunal, the President issued supplemental procedural directions for the production of written submissions on the question of the status of the Athlete and the jurisdiction of the Appeal Tribunal.

23. In accordance with the directions issued by the President, the following written submissions were filed the parties:

As regards the merits of the appeal

- On 6 June 2005, the Athlete submitted his Appeal Brief;

- On 13 June 2005, the CCES and Sport Canada submitted their answers to Mr. Darsigny's Appeal Brief;

- On 17 June2005, the Appellant filed his Reply to the arguments submitted by the CCES and Sport Canada.

As regards the question of the jurisdiction of the Appeal Tribunal

- On 7 June 2005, the CCES and Sport Canada filed challenges to the jurisdiction of the Appeal Tribunal; and

- On 17 June 2005, Mr. Darsigny submitted his answer to the challenges to the jurisdiction of the Appeal Tribunal.

B. The Hearing

24. As agreed during the preliminary meeting of 30 May and indicated in the subsquent correspondence and procedural directions, the hearing of the appeal took place in Montréal, at the offices of the President, on 20 June 2005. No witnesses were called to testify during the hearing, and the Appeal Tribunal was addressed solely by the parties' representatives. As agreed, the first question heard by the Appeal Tribunal concerned the issue of its jurisdiction.

Once that question was resolved (see below) the Appeal Tribunal heard the parties' oral submissions on the merits of the appeal. The hearing took place between 9h30 and 16h30, with several pauses throughout the day. At the end of the hearing, the President declared the proceedings closed.

4. JURISDICTION OF THE APPEAL TRIBUNAL

25. At the end of the day, the issue of the Athlete's status and the jurisdiction of the Appeal Tribunal effectively resolved itself, during the hearing.[1]

26. In brief, whether Mr. Darsigny is considered a national-level athlete (with the right to bring his appeal before the Appeal Tribunal) or an international-level athlete (with the right to appeal the Decision solely before the Court of Arbitration for Sport (the "CAS", in Lausanne) is a matter that flows directly from the Rules of the IWF and its Canadian affiliated federation, the CWH. Under the Rules of those bodies, the IWF designates as international-level athlete those individuals who are identified as such by their respective national federations, such as the CWF. All depends, therefore, on the names of the athletes furnished to the IWF by the various national federations.

27. Unfortunately, in the case of Mr. Darsigny, vague and even contradictory information concerning his status was provided to the Appeal Tribunal by the Respondents in their correspondence and written submissions before the hearing; and, as mentioned above, the IWF ignored all requests for information. The Athlete, on the other hand, consistently argued that he would be astonished to discover that he is still considered an international-level athlete given that his last international-level competition took place in 1994, and that he continues to train and to participate in local competitions "purely for pleasure and to share his experience with younger athletes."

28. It was only during the hearing, in response to specific questions posed by the members of the Appeal Tribunal, that the CWF declared: that it had *never provided the IWF with a list of Canadian athletes who were to be designated international-level athletes*; that it certainly

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[1] In the opinion of the Appeal Tribunal, the issue could have been resolved in the same manner well *before* the hearing, without the need or inconvenience of written and oral submissions.

had *not indicated to the IWF that Mr. Darsigny should be designated an international-level athlete in recent years*; and that it possesses *no information whatsoever to the effect that Mr. Darsigny is actually designated an international-level athlete by the IWF*.

29. Further to these declarations, the CCES and Sport Canada withdrew their challenges to the jurisdiction of the Appeal Tribunal, which then declared itself competent to receive, hear and decide the appeal.

5. THE DECISION APPEALED FROM

30. As explained above, the Doping Tribunal held that the Appellant had evaded sample collection and had thereby violated Rule 7.24 of the CADP, which entails his ineligibility for a period of two years in accordance with Rule 7.25 of the CADP.

31. In view of the nature and strict limits of an appeal before the Doping Appeal Tribunal under the CADP, the Appeal Tribunal considers it important to set out certain of the factual conclusions drawn by the Arbitrator further to this study of the evidence presented by the parties. These conclusions are beyond the scope of appeal and constitute the factual context within which the Athlete's appeal must be decided:

- On January 23, 2005, at 8:20 a.m., two Doping Control Officers ("DCOs") accredited by the CCES arrived at Mr. Darsigny's residence in order to conduct an unannounced (also known as a "no advance notice") doping control.

- DCO Ms. Germaine Lyte remained in the car, while the other DCO, Ms. Joan Decarie, knocked at the door of the residence at 8:20 a.m. and attempted to see whether there was someone inside. Mr. Darsigny was sleeping on the sofa in his underwear, and rose to answer the door. The door used being the secondary entrance to the house, an exchange of gestures and words took place through the windowed door, and Ms. Decarie waved her CCES ID card in the window. Ms. Decarie testified that Mr. Darsigny saw and understood her ID.

- Ms. Decarie explained that she had come to conduct a doping control, and Mr. Darsigny replied "I do not believe you." Mr. Darsigny gestured to DCO Decarie to knock at the other door, located on the same side of the house.

- Mr. Darsigny opened the door and immediately shouted at DCO Decarie.

- Mr. Darsigny totally monopolized the conversation and allowed Ms. Decarie little or no chance to speak.

- Mr. Darsigny's tone of voice was very agressive.

- Ms. Decarie had not shown documents to Mr. Darsigny, apart from her ID card.

- Mr. Darsigny yelled during the exchange at the second door, criticizing Ms. Decarie for not having called before, adding that her presence constituted harassment and that she should "get out of here."

- The exchange lasted 45-60 seconds on the front steps of the house.

- Mr. Darsigny turned around, and Ms. Decarie left.

- Mr. Darsigny explains his reaction as follows:

    - His three children had been sick all night, obliging Mr. Darsigny and his wife to stay awake. Mr. Darsigny was only able to fall asleep on the living room sofa at around 4:00 a.m.

    - Having had only a few hours of sleep during the night, and initially believing that he had to deal with door-to-door solicitors on a Sunday morning, he reacted agressively.

    - Even when he understood that this was a representative of the CCES, Mr. Darsigny did not believe she had the right to intrude on his privacy,

particularly at his home. He believed she had to provide advance notice, and since he was not informed, he thought he had a legitimate right to refuse to abide by the procedure.

- This refusal was also explained by the fact that during his some 20 years as an athlete, Mr. Darsigny had never been subjected to no advance notice testing. They were all conducted either with advance notice or during competition.[2]

- Over recent years, the technique of no advance notice testing has become the international standard for the fight against doping in sports.

- The World Anti-Doping Code (Article 5.1.2) requires that the CCES make no advance notice testing a priority.

- The CCES, in its CADP (Rule 1.1), specifies that the "Canadian Anti-Doping Program implements the mandatory and other portions of the World Anti-Doping Program, including the World Anti-Doping *Code* …"

- The CADP reflects the will of the international sports community in its subsection 6.29: "*No Advance Notice* shall be the notification method for *Out-of-Competition Sample* collection whenever possible."[3]

- DCO Decarie testified that no advance notice controls represent approximately 99% of the tests she conducts every year. This is thus the standard for sample collection.

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[2] At the hearing, the Appellant clarified that he had been subject to "one or two" no advance notice doping controls in the 1980s.

[3] No advance notice is defined in the CADP Glossary as being "a *Doping Control* which takes place with no advance warning to the *Athlete* and where the *Athlete* is continuously chaperoned from the moment of notification through *Sample* provision."

- Moreover, sample collection conducted at an athlete's residence is the current standard, as stated by the CCES in a memorandum to this effect addressed to the Canadian sports community on 22 August 2002.

- The circumstances were such that the athlete alone triggered the events of 23 January 2005, and did so voluntarily.

- On February 22, 2005, Mr. Darsigny adressed a letter to the CCES, in which he wrote: "On the morning of January 23, 2005, I informed the representative of the CCES that the moment was not a good one for a control because of the circumstances already explained …" It thus seems reasonable to conclude that Mr. Darsigny understood the nature of Ms. Decarie's visit on that morning, and that he was thus duly notified.

- In the present circumstances, Mr. Darsigny knew that the officer knocking at his door on 23 January 2005 at 8:15 a.m. was not a salesperson, Cub Scout or Church member.

- He knew that this was a CCES representative. He was responsible for knowing the nature of the visit and the consequences of refusing to collaborate. These consequences clearly appear not only in the CCES documentation, but it is reasonable to believe that Ms. Decarie could also have explained this to him *viva voce*, had she had an opportunity to say a few words.

- Mr. Darsigny ordered Ms. Decarie to leave his domicile while recognizing her identity.

32. On the basis of the foregoing facts, the arbitrator concluded (pages 4-5 of the English Translation of the Decision):

> My understanding of the evidence created some hesitation in my mind before concluding that there had indeed been a definitive refusal by Mr. Darsigny to [evade] the sample collection, because the testimonies are

> contradictory with respect to the stated (or not) reason for the visit of Ms. Decarie, notwithstanding the letter of February 22, 2005.
>
> Ms. Decarie affirms that she clearly said, through the first door, that she had come to conduct a doping control, while showing her ID card. Mr. Darsigny states that even if he was able to identify Ms. Decarie as a representative of the CCES, he never really understood the reason for her visit.
>
> To constitute a refusal, there must be a clear request. If one believes the testimony of Mr. Darsigny (corroborated by his spouse who heard the conversation), Ms. Decarie had not clearly established that the purpose of her visit was in relation with doping control.
>
> I could perhaps have considered this argument to allow Mr. Darsigny's appeal, were it not for the second section of paragraph 7.24 of the CADP.
>
> Indeed, it is not only the refusal, but also the fact that [*evading*] *a sample collection constitutes a violation of the anti-doping rules*.
>
> (…)
>
> [N]otwithstanding the difficult circumstances of his night, he was responsible for knowing the nature of the visit and the consequences of refusing to collaborate …
>
> Since Mr. Darsigny knew this was a CCES representative and that furthermore it is reasonble to conclude that Mr. Darsigny knew that the visit was for the sole purpose of collecting samples, I am of the opinion that the violation provided for in subsection 7.24 of the CADP was committed and that Mr. Darsigny [*evaded*] *the sample collection*.

33. As required by the provisions of the CADP, the Doping Tribunal proceeded to an analysis of the existence (or not) of any "exceptional circumstances" that might justify the elimination or reduction of the applicable sanction, in accordance with Rules 7.25 and 7.39 of the CADP. It found as follows (at pages 5-6 of the English translation of the Decision):

I have not found any evidence allowing me to attest to the exceptional nature of the circumstances.

The circumstances were indeed special, unusual, demanding, difficult, trying, unpleasant, even surprising for an experienced athlete. They were not exceptional.

(…)

These circumstances not being exceptional, I find it impossible to reduce or eliminate the sanction provided for in subsection 7.25 of the CADP. It must be applied as is.

(…)

Mr. Darsigny committed a fault, coupled with the negligence of voluntarily refusing to collaborate with the DCO.

The fact that Mr. Darsigny is an experienced athlete and Olympian with many awards who has been already submitted to more than fifty (50) doping tests, gives this fault a significant character.

In these circumstances, the exception excuse is ill-chosen. I cannot conclude that Mr. Darsigny has not committed any fault or significant negligence, because he had all of the elements available to comply with what was requested from him on the morning of January 23, 2005. He chose, and this was his choice, not to cooperate.

6. THE KEY CADP RULES

34. In the context of the present appeal, the relevant CADP anti-doping rules are the following:

SPECIFIC ANTI-DOPING RULE VIOLATIONS AND SANCTIONS ON INDIVIDUALS

(…)

Refusals

7.24 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.

7.25 Except for the specified substances identified in Rule 7.7, the period of *Ineligibility* imposed for this anti-doping rule violation shall be:

First violation: Two (2) years *Ineligibility*.

Second violation: Lifetime *Ineligibility*.

However, the *Athlete* or other *Person* shall have the opportunity in each case, before a period of *Ineligibility* is imposed, to establish the basis for eliminating or reducing this sanction for exceptional circumstances.

(…)

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

No Fault or Negligence

7.38 If the *Athlete* establishes in an individual case involving an anti-doping violation under Rules 7.21-7.23 (Use), that he or she bears *No Fault or Negligence* for the violation, the otherwise applicable period of *Ineligibility* shall be eliminated. When a *Prohibited* S*ubstance* or its *Markers* or *Metabolites* is detected in an *Athlete's Sampl*e in violation of Rules 7.16-7.20 (Presence), the *Athlete* must also establish how the *Prohibited* S*ubstance* 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 violation under Rules 7.16-7.20 (Presence), 7.21-7.23 (Use) and 7.30-7.32 (Possession).

No Significant Fault or Negligence

7.39 This Rule applies only to anti-doping violations involving Rules 7.16-7.20 (Presence), Rules 7.21-7.23 (Use) or Rules 7.24-7.25 (Refusals) and Rules 7.35-7.36 (Administration). If an *Athlete* establishes in an individual case involving such violations that he or she bears *No Significant Fault or Negligence*, then the period of *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may not be less than one-half of the minimum period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this Rule may be no less than eight (8) years. When a *Prohibited Substance* or its *Markers* or *Metabolite*s is detected in an *Athlete's Sample* in violation of Rules 7.16-7.20 (Presence), the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* reduced.

(…)

APPEAL RULES

(…)

Appeals Involving National-Level Athletes and Other Persons

8.8 An appeal shall be limited to questions of procedural error or unfairness by the Doping Tribunal or *TUEC*, or failure to properly interpret and apply the CANADIAN ANTI-DOPING PROGRAM. An appeal is not a trial *de novo* with complete reconsideration of whether there was an anti-doping rule violation and, if so, whether the Doping Tribunal imposed the appropriate *Consequences of Anti-Doping Rule Violations*, or of whether the *TUE* ought to have been granted. A decision of the Doping Tribunal or *TUEC* shall only be reversed if it is unreasonable.

8.9 The Doping Appeal Tribunal has the authority to make the determination that should have been made by the Doping Tribunal or *TUEC* without error.

35. The Athlete also invoked Rules 6.29 *et seq*. of the CADP concerning "Requirements Prior to Notification of Athlete" and 6.42 *et seq*. dealing with "Requirements for Notification of Athletes."

7. ANALYSIS

36. As set out by the Appellant in his Appeal Brief, the issues in dispute are three-fold:

(1) What is the standard of review applicable by the Appeal Tribunal in its review of the Decision?

(2) Did the Arbitrator err in his interpretation of Rules 6.26 *et seq*. and 7.24 *et seq*. of the CADP in respect of the violation in question?

(3) Did the Arbitrator err in his interpretation and application of Rules 7.25 *et seq*. with respect to the sanction and the possibility of its reduction?

37. The Appeal Tribunal addresses each of these questions in turn, below

A. The Standard of Review

38. The Appellant submits that there exists a "clear contradiction" on the face of Article AD-9.1 of the Code (which reproduces, almost word-for-word, Rule 8.8 of the CADP). On the one hand, he claims, Article AD-9.1 provides that the simple failure to interpret and apply the CADP "properly" opens the door to an appeal; while, on the other hand, Article AD-9.1 provides that a decision of the Doping Tribunal will only be reversed "if it is unreasonable." According to the Athlete, on the face of Article AD-9.1 it is thus "difficult to understand the scope of the Appeal Tribunal's power to intervene." Having thus opened the door, the Appellant proceeds to assess the standard of review that he submits is applicable in the present case. He does so by means of the so-called "pragmatic and functional" analysis elaborated by the Supreme Court of Canada in several administrative law decisions, in particular *Bibeault*[4] and *Pushpanathan*[5].

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4 *U.E.S., Local 298* v. *Bibeault*, [1988] 2 S.C.R. 1048.

5 *Pushpanathan* v. *Canada (Minister of Citizenship and Immigration)*, [1988] 1 S.C.R. 982.

39. It is unnecessary for the Appeal Tribunal to summarize here the arguments of the Athlete with respect to this complex and multi-faceted question. It suffices to note that the Appellant contends that only a low degree of deference is owed to the Doping Tribunal by the Appeal Tribunal, that the applicable standard of review is one of *correctness*, and that the Doping Appeal Tribunal can and must intervene to correct a simple error of law on the part of the Doping Tribunal.

40. For its part, the CCES denies the existence of any contradiction or ambiguity with respect to Article AD-9.1 of the Code and Rule 8.8 of the CADP.[6] That said, the CCES submits that a "pragmatic and functional" analysis, even if unnecessary, leads nonetheless to the conclusion that the applicable standard of review is one of *unreasonableness.* The CCES adds that this conclusion is all the more logical given that the issues in dispute before the Arbitrator concern essentially questions of fact rather than of law. According to the CCES: "*This case was largely fact-driven*." It further adds that the Appeal Tribunal is not in a position either to appreciate or to weigh the facts that underlie the Decision, and is thus not in a position to determine whether or not the Decision is correct, in the light of the complete lack of evidence of these facts before the Appeal Tribunal.

41. The Appeal Tribunal finds itself entirely in agreement with the arguments of the CCES. In particular, and perhaps despite what might be called a certain "softness" in the drafting of the Rule in question, the Appeal Tribunal is of the opinion that the intention of Rule 8.8 is clear. As argued by the CCES, the first sentence of Rule 8.8 describes the restricted nature of the questions susceptible of appeal, namely, questions of "procedural error or unfairness by the Doping Tribunal … or failure to properly interpret and apply the [CADP]." The second sentence emphasizes the important principle that an appeal "is not a trial *de novo"* and is not intended to reconsider "whether there was an anti-doping rule violation." The third and last sentence of Rule 8.8 declares the applicable standard of review, stating expressly and unambiguously that a decision "shall only be reversed if it is unreasonable".

42. Bearing in mind the various elements of the pragmatic and functional analysis, one could add to the foregoing the fact that Rule 7.70 of the CADP provides that decisions of the

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[6] Because the CWF and Sport Canada chose to make almost no submissions whatsoever during the hearing and to declare instead their support for the written and oral submissions of the CCES, all reference in the present Decision to the position taken by the Respondents will necessarily be a reference to the written and oral arguments of the CCES.

Doping Tribunal are "final and binding" except in the restricted cases of appeals permitted by the CADP, what the CCES calls "a kind of privative clause that is intended to require considerable deference [toward] decisions of the Doping Tribunal."

43. In the same sense, the Appeal Tribunal is of the opinion that the CADP confers a limited and specialized jurisdiction on the Doping Tribunal, and that the nature of the specialized issues that come before it require a high degree of expertise on its part.

44. Still in the same vein, the objective of the CADP is to fight against doping in sport. The means chosen to do so involve an arbitration process conducted in the first instance by a Doping Tribunal capable of analyzing circumstances that are specific to the world of sport and to the problem of doping within that world, to apply specialized rules, and to balance criteria and considerations unique to the world of sport.

45. For all of these reasons, the Appeal Tribunal is of the opinion that the standard of review in the present case is that of unreasonableness, as stated explicitly in Rule 8.8 of the CADP, which provides that a decision of the Doping Tribunal "shall only be reversed if it is unreasonable. "

B. The Anti-Doping Rule Violation

46. In view of the foregoing, the finding by the Doping Tribunal that Mr. Darsigny committed the violation set out in Rule 7.24 of the CADP by evading sample collection could only be reversed if the Athlete were able to demonstrate that that finding is unreasonable. In the opinion of the Appeal Tribunal, the Athlete has failed to do so.

47. This conclusion flows almost inevitably from the numerous and detailed findings of fact expressed by the Arbitrator that are set out, in part, above. Despite his efforts and notwithstanding his clear good faith, Mr. Darsigny has simply not been able to convince the members of the Appeal Tribunal that the Decision is unreasonable. On the contrary (and even though the standard of review does not require that the Decision be correct), the Appeal Tribunal would hesitate a long time before concluding that the Decision is not in fact correct, that is, that it suffers from any failure to interpret or apply the CADP properly.

48. A key point is that Mr. Darsigny knew that the reason for the presence at his home of Ms. Decarie, the representative of the CCES, was to collect a sample (in his letter of 22 February 2005 adressed to the CCES, Mr. Darsigny describes the reason for the visit as being to conduct a "control"). As found by the Arbitrator, notwithstanding the difficult circumstances of the preceding night, as an experienced Athlete Mr. Darsigny possessed all of the information required to conform to what was asked of him on the morning of 23 January 2005. In the words of the Doping Tribunal: "He chose, and this was his choice, not to cooperate."

49. In his Appeal Brief as well as at the hearing, the Appellant advanced a detailed argument the objective of which was to demonstrate the lack of adequate notice to him in the form prescribed by Rules 6.29 *et seq.* and 6.42 *et seq.* of the CADP, and thus the impossibility for him to have evaded sample collection *after notification*. He declares: "The Arbitrator erred in finding that there was adequate notification and the Appeal Tribunal must intervene … in the absence of proper notification the Athlete must be acquitted." The position of the Athlete in this respect rests on a misunderstanding of the anti-doping rule in question.

50. It is true that the CADP contains precise rules concerning notification of athletes, the principal objective of which is to ensure that an athlete chosen for doping control is properly notified and that his rights are respected throughout the doping control process. It is also true that these rules stipulate certain requirements concerning the conduct of the CCES *prior to the* notification of the athlete (Rules 6.29 *et seq.*) as well as *during* the notification process itself (Rules 6.42 *et seq.*). (It is noted that under the heading "Requirements Prior to Notification of Athletes" the CADP also lists a number of responsibilities incumbent on *the athlete*.) That being said, it seems evident that rules related, for example, to the list of information to be exchanged at the moment of initial contact between a doping control agent and an athlete, which rules form part of the requirements of a formal notification, simply cannot apply to a situation in which an athlete *evades* doping control.

51. This understanding of the anti-doping rule in question is derived not only from a "common sense" interpretation of Rule 7.24 but also from a reading of the rule itself. Rule 7.24 deals with two categories of violation: the refusal or the failure to submit to sample collection without a valid justification, after notification; and evading sample collection. In the

second case, Rule 7.24 in no way requires a formal notification as a pre-condition to a violation of the rule.

52. The Arbitrator understood this distinction and expressed it well in his Decision. He wrote: "For there to be refusal, there must be a clear request." He then notes the contradictory testimony concerning the conversation that took place between Ms. Decarie and the Athlete on the day in question, and observes that according to Mr Darsigny and his wife, the doping control agent did not clearly establish that the reason for her visit was to conduct a doping control. The Arbitrator goes on to explain as follows: "I could perhaps have considered this argument to allow Mr. Darsigny's appeal, were it not for the second section of paragraph 7.24 of the CADP. Indeed, it is not only the refusal, but also the fact that [*evading*] *a sample collection constitutes a violation of the anti-doping rules*."

53. The Arbitrator concluded:

> Since Mr. Darsigny knew this was a CCES representative and that furthermore it is reasonable to conclude that Mr. Darsigny knew that the visit was for the sole purpose of collecting samples, I am of the opinion that the violation provided for in subsection 7.24 of the CADP was committed and that Mr. Darsigny [*evaded*] *the sample collection.*

54. The Appeal Tribunal finds nothing whatsoever unreasonable in this conclusion. In the factual context that the Arbitrator was able to appreciate as a result of his consideration of the evidence submitted to him, his reasoning leading to the conclusion that Mr. Darsigny committed a violation of Rule 7.24 of the CADP is completely reasonable, if not (though we do not decide the point) correct.

55. As stated by the Arbitrator in a manner that the Appeal Tribunal finds wholly reasonable:

> Thus, from the moment Mr. Darsigny recognized the identification of the CCES, and under the circumstances specific to this visit, I conclude that the notification was completed to my satisfaction, as provided for in subsection 7.24 of the CADP.

> Reaching a conclusion to the contrary would amount to playing with words in an unreal manner and allow abusers of the system to run and hide, plug their cars, or shout continuously as soon as a CCES officer would come knocking at their door.

C. The Sanction

56. Rule 7.25 of the CADP provides for a mandatory two-year period of ineligibility for a first violation of the anti-doping rules, except in cases of "exceptional circumstances." The Arbitrator having found that there existed neither any exceptional circumstance nor the "absence of significant fault or negligence" within the meaning of Rule 7.39 of the CADP, imposed the two-year sanction provided for by Rule 7.25.

57. The Athlete requests that the Appeal Tribunal overturn this aspect of the Decision, for several reasons. He claims, firstly, that the Doping Tribunal should have proceeded to hear the case in two phases, that is, that the Arbitrator should have bifurcated the questions of culpability and sanction so as to hold a first hearing on culpability followed, if necessary, by a further hearing on the question of the applicable sanction. In the words of the Appellant: "The Arbitrator's failure to do so constituted a lack of procedural fairness and a breach of the rules of natural justice, justifying intervention by the Appeal Tribunal."

58. The Appeal Tribunal rejects this claim. Not only does Rule 7.53 of the CADP declare explicitly that the hearing before the Doping Tribunal is to determine "an anti-doping rule violation and the appropriate consequence" (emphasis added), but the near universal practice of such tribunals in Canada and internationally is to hear the parties' representations on the questions of culpability and sanction at the same time. Of course, there are exceptions. As Mr. Darsigny writes in his response to the arguments submitted by the CCES: "This ‘mechanism’ [a hearing on culpability followed by a hearing on sanction], even though it is not written in black and white, may still be applied by the Doping Tribunal in order to avoid placing athletes in a difficult position." An Anti-Doping Tribunal *may* hold a separate hearing on the question of the applicable sanction, after having decided that a violation of the anti-doping rules has been committed. But this in no way suggests that hearing the parties on the questions of culpability and sanction during the same hearing in any way infringes the rules of natural justice or procedural fairness, as alleged by the Athlete.

59. Mr. Darsigny had the fullest possible opportunity to present evidence and arguments on the question of the appropriate sanction, including the existence of exceptional circumstances justifying a reduction of that sanction, during the hearing before the Doping Tribunal.

60. As regards the sanction actually imposed by the Doping Tribunal, the Athlete submits that the Arbitrator erred in his interpretation and application to the facts of the term "exceptional circumstances" within the meaning Rule 7.25 of the CADP. He sets out a list of what he calls the exceptional circumstances relating to the overall situation of the Athlete at the moment of the Arbitrator's pronouncement of the sanction, which militate, according to the Athlete, in favour of a greatly reduced if not completely eliminated period of ineligibility.

61. Once again, the Appeal Tribunal must reject the Appellant's arguments. As submitted by the CCES, the reasoning of the Doping Tribunal as expressed in its Decision clearly shows that the Arbitrator analyzed the issue of the existence of exceptional circumstances in a wholly reasonable manner. He studied the evidence before him in order to determine whether he could find one or more exceptional circumstances, but was ultimately unable to find "elements of proof that would enable me to conclude that the circumstances were exceptional."

62. There is nothing unreasonable in this aspect of Arbitrator's Decision, and absolutely nothing to convince the Appeal Tribunal that it should substitute its own reasoning or conclusions for those of the Arbitrator.

63. The Appeal Tribunal wishes to add certain observations related to a further illustration of what it has called the "softness" in the drafting of the CADP. The term "exceptional circumstances" is not defined in the CADP.[7] One must look under the heading "Elimination or Reduction of the Individual Period of Suspension Based on Exceptional Circumstances" in order to understand this term in the context in which it is used in the CADP. Under that heading, one finds two distinct rules, one applicable to circumstances of "*absence of fault or negligence"* (Rule 7.38) and the other applicable to circumstances of "*absence of significant*

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[7] The term is not defined in the World Anti-Doping Code, either. However, the World Anti-Doping Code is organized and drafted in such a way as to avoid the "softness" of the CADP and to make it clear that the sort of exceptional circumstances that might give rise to the reduction or elimination of the period of ineligibility are specifically those circumstances of "absence of fault or negligence" or "absence of significant fault or negligence."

fault or de negligence" (Rule 7.39).[8] These are the only two categories of circumstances that are considered "exceptional" under the CADP for purposes of eliminating or reducing a period of ineligibility.

64. An analysis of the issue of the existence or not of exceptional circumstances that might give rise to the elimination or reduction of the period of ineligibility provided for in Article 7.25 must therefore take place in the light of Rules 7.38 and 7.39, the aim of which is to weigh the degree of the athlete's fault in the commission of the violation in question. Only the exceptional circumstance of a violation of the anti-doping rules that is due to *no fault or negligence* on the part of an athlete can justify the elimination of the period of ineligibility, in accordance with Rule 7.38. If, on the other hand an athlete is able to establish that with respect to a particular violation of the anti-doping rules he or she committed *no significant fault or negligence*, the period of ineligibility may be reduced in accordance with Rule 7.39, by up to one-half the period normally applicable.

65. Not only do Rules 7.38 and 7.39 apply to distinct circumstances (no fault or negligence; no significant fault or negligence), they apply only to specific anti-doping rule violations. The possibility of eliminating a sanction under Rule 7.38 exists only with respect to the violations set out in Rules 7.16-7.20 (Presence in a Sample of a Prohibited Substance) or Rules 7.21-7.23 (Use or Attempt to Use of a Prohibited Substance or a Prohibited Method) of the CADP. As regards a violation of Rules 7.24 and 7.25 (Refusal of or Evading Sample Collection) Rule 7.38 does not apply, and an athlete may only request the *reduction* of his period of ineligibility in accordance with Rule 7.39 of the CADP.

66. In the light of the foregoing, it is clear that the Appeal Tribunal does not even have the power to eliminate the two-year period of ineligibility set out in Rule 7.25. It is only the possibility of a reduction of that sanction, by application of Rule 7.39 of the CADP, that is available to the Athlete.

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[8] The terms "absence of fault or negligence" and "absence of significant fault or negligence" are themselves defined by the CADP. The first comprises: "The *Athlete's* establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she has *Used* or been administered the *Prohibited Substance* or *Prohibited Method*." The second is understood as: "The *Athlete's* establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria of *No Fault or Negligence*, was not significant in relationship to the anti-doping rule violation."

67. Neither the Appellant nor the Respondents deal with the question of Rule 7.39 in their written submissions. In the view of the Appeal Tribunal, neither did the Arbitrator deal particularly clearly with either the rule itself or the relationship between the term "exceptional circumstances" and the two specific categories of such circumstances identified in Rules 7.38 and 7.39. However, this changes nothing as regards the well-foundedness of the Decision. As stated above, there exists no ground on which to overturn the conclusions of the Doping Tribunal as regards the period of ineligibility imposed in the circumstances.

D. The Commencement of the Period of Ineligibility

68. The only question that remains to be determined concerns the date of commencement of the period of ineligibility. This question appears not to have been discussed before the Doping Tribunal, and the Decision is silent in this regard. Turning to Rule 7.12 of the CADP, one reads as follows:

> **Commencement of Ineligibility Period**
>
> 7.12 The period of *Ineligibility* shall start on the date of the hearing decision providing for *Ineligibility* or, if the hearing is waived, on the date *Ineligibility* is accepted or otherwise imposed. Any period of *Provisional Suspension* (whether imposed or voluntarily accepted) shall be credited against the total period of *Ineligibility* served. Where required by fairness, such as delays in the hearing process or other aspects of *Doping Control* not attributable to the *Person*, the body imposing the sanction may start the period of *Ineligibility* at an earlier date commencing as early as the date of *Sample* collection. An *Athlete* with an *Adverse Analytical Finding* is eligible to participate unless or until anti-doping rule violation is determined, subject to Rule 7.11 (Disqualification of Results in Competitions Subsequent to Sample Collection).
>
> (Emphasis added)

69. Mr. Darsigny claims the benefit of a period of ineligibility commencing on 23 January 2005, the date of the events leading to the finding that he committed a violation of the anti-doping rules. According to the Athlete, this is required by fairness.

70. Although in its written submissions the CCES seeks the complete dismissal of the Athlete's appeal, at the hearing it accepted that fairness could require that the period of the Athlete's ineligibility commence at the date of his evasion of sample collection, that is, on 23 January 2005. According to the CCES, the unfairness to which the Athlete would otherwise be subjected arises from the fact that, as explained by the Appellant, the "real and concrete effect" of a period of ineligibility commencing only as of the date of the Decision, 17 April 2005, would be to prevent him from competing in the Canadian Championships in 2005, 2006 and 2007, that is, for *three* years, because the deadline to qualify for the Championships is in mid-March of each year.

71. The CWF, for its part, suggested at the hearing that a period of ineligibility of three to six months, commencing on 23 January 2005, would be appropriate. It referred to the fact that Mr. Darsigny is a seasoned athlete of exceptional character who serves as an inspirational role model and teacher to many young athletes. Although, for the reasons already explained, under Rule 7.39 the minimum potential period of ineligibility in this case is one year (one-half the two-year period provided for in Rule 7.25), the Appeal Tribunal acknowledges the views of the national sport federation of which the Appellant is a member and to which nobody doubts that he has devoted a large part of his life.

72. As mentioned, the Doping Tribunal does not address the question of the commencement of the period of ineligibility in its Decision. One does not know, therefore, if the Doping Tribunal considered the question, or not. One does not know whether its intention was that the period commence "on the date of the hearing decision," as provided for in the first sentence of Rule 7.12, or at "an earlier date". One does not know whether or not the Doping Tribunal considered the question of fairness in this context. It is impossible even to know whether the intention was that the sanction commence on the date of the Athlete's evasion of sample collection, as requested by him.

73. The Appeal Tribunal is of the opinion that the failure to address clearly the question of the commencement of the period of ineligibility is unreasonable, as a result of which the Appeal Tribunal must consider the question itself. The fact that the question was perhaps not even raised by the parties themselves before the Doping Tribunal changes nothing in this respect. Under Rule 8.9 of the CADP, it falls to the Appeal Tribunal to "make the determination that should have been made by the Doping Tribunal."

74. Rule 7.12 is far from clear as regards the circumstances related to the notion of "fairness" that would permit a tribunal to modify the date of commencement of the period of ineligibility. The Appeal Tribunal is nonetheless of the view that it cannot close its ears to the position of the CCES, which was the first "body imposing the sanction" in this case (the second being the Doping Tribunal). The CCES declares its agreement with the Athlete's proposition that fairness in this case requires that the period of ineligibility commence on the date of evasion, and it asks for nothing more; while for its part the Doping Tribunal is silent on the subject. The Appeal Tribunal recognizes, and, for the reasons set out above, declares itself ready and willing to give effect to this declaration by the CCES.[9] By ordering that the period commence on 23 January 2005 rather than 17 April 2005, the intention of the Appeal Tribunal is to avoid a sanction the "real and concrete" effect of which – and thus the unfair effect of which – would be to render the Athlete ineligible to compete for three years as opposed to two.

75. In sum, the Appeal Tribunal decides that, in the circumstances, the period of ineligibility should commence as at the date of the Athlete's evasion of sample collection, namely, 23 January 2005.

E. Conclusion

76. As provided for by the provisions of the CADP, notably Rule 8.8, a decision of the Doping Tribunal may only be reversed if it is unreasonable. Apart from the question of the commencement of the period of ineligibility, there is nothing in the Decision of 17 April 2005 that is unreasonable. This conclusion applies equally to the treatment by the Doping Tribunal of the question of the violation of the anti-doping rules as well as its treatment of the duration of the sanction to which the Athlete is subject in the circumstances. Under the CADP, there exists no ground on which to overturn either of these aspects of the Decision.

77. However, in view of the fact that the question appears not to have been addressed in the Decision, and given that the CCES is in agreement with the Athlete on this point, the Appeal

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[9] The Appeal Tribunal notes that Rule 7.12 of the CADP speaks of the period of ineligibility commencing "at an earlier date … as early as the date of *Sample* collection." In the present case, there was obviously no sample collection, but rather an *evasion* of sample collection. This distinction is of no practical importance for purposes of applying Rule 7.12. By stipulating that the beginning of the period of suspension may commence as at the date of sample collection, Rule 7.12 establishes a limit in time, but does purport to limit its application exclusively to cases of sample collection. It applies, rather, to all cases of violations of anti-doping rules – or at least, to the violation in question here.

Tribunal determines that the period of ineligibility in question commences as at the date of the Athlete's evasion of sample collection, namely 23 January 2005, rather than as at the date of the Decision.

78. The members of Appeal Tribunal have the greatest sympathy for the Athlete. Not only do they recognize the particular circumstances surrounding the events of 23 January 2005, they also acknowledge that the Athlete bitterly regrets his conduct that day, that he acted in an emotional manner as a result of an accumulation of personal circumstances, that he did not intend to hide anything and that he expressed himself, and even excused himself, most sincerely before the Doping Tribunal. However, the rules to which to which the Athlete has voluntarily subjected himself for many years are strict. They are strict to the point of imposing a severe sanction even in the case of a momentary defect in behaviour. This is the case of Yvan Darsigny. It is an extremely sad case, not only for the Athlete, but for all those around him and all those who have benefited and could still benefit from his continuing participation in Canadian weightlifting. But it is nonetheless the case that this is the result of a reasonable and fair application of the anti-doping rules in question.

8. COSTS

79. Rule 8.20 of the CADP gives the Appeal Tribunal the power "to award costs to any party payable as it directs."[10] The Appellant has made no submission to the Appeal Tribunal with respect to the costs of the appeal. The CCES, for its part, has explicitly renounced to any claim for costs. In the circumstances, the Appeal Tribunal considers that it is fair and reasonable that each party should bear all of its own costs and expenses incurred in relation to the appeal.

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[10] In fact, the French version of Rule 8.20 reads as follows: «Le Tribunal antidopage peut accorder des frais payables à toute partie, selon ce qu'il ordonne.» This reference to the Doping Tribunal rather than to the Doping *Appeal* Tribunal is a typographical omission of no significance. It is clear from the context in which Rule 8.20 is found that it is intended to refer to the Doping Appeal Tribunal, and as noted above the English text of the rule makes this manifest: "The Doping Appeal Tribunal may award costs to any party payable as it directs."

9. DECISION

80. **FOR ALL OF THESE REASONS**, the Doping Appeal Tribunal decides as follows:

(1) The appeal is rejected, in part;

(2) The Decision rendered on 7 April 2005 by the Doping Tribunal is maintained;

(3) The Athlete committed the anti-doping rule violation set out in Rule 7.24 of the CADP, specifically, evading sample collection;

(4) The Athlete is ineligible for a period of two years commencing on 23 January 2005;

(5) Each party shall bear its own costs and expenses incurred in the appeal.

8 July 2005

THE DOPING APPEALTRIBUNAL

The Honourable Benjamin J. Greenberg, Q.C.
Arbitrator

Ross C. Dumoulin
Arbitrator

Stephen L. Drymer
President