SPORT DISPUTE RESOLUTION CENTRE OF CANADA

IN THE MATTER OF AN ARBITRATION
UNDER THE CANADIAN ANTI-DOPING PROGRAM

BETWEEN:

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)
BOBSLEIGH CANADA SKELETON (BCS)
GOVERNMENT OF CANADA

AND:

SERGE DESPRES (Athlete)

AND:

WORLD ANTI-DOPING AGENCY (WADA)
Observers

SDRCC File No. DT 07-0071
(Doping Tribunal)

SOLE ARBITRATOR:	JOHN P. SANDERSON, Q.C.
REPRESENTING THE CCES:	DAVID W. LECH
REPRESENTING THE ATHLETE:	HOWARD L. JACOBS
DATE OF HEARING:	JANUARY 8, 2008
PLACE OF HEARING:	CALGARY, ALBERTA
DATE OF AWARD:	JANUARY 31, 2008

DECISION

INTRODUCTION

This arbitration is pursuant to the application of Section 7 of the Canadian Anti-Doping Program (CADP) concerning Serge Despres, an elite athlete resident in Calgary, who is a member of Bobsleigh Canada Skeleton (BCS). The issue in summary form is whether Mr. Despres has committed an anti-doping rule violation and if so, what are the consequences of that violation.

The Canadian Centre for Ethics in Sport (CCES) is an independent non-profit organization which is responsible for maintaining and carrying out the CADP, including providing anti-doping services to national sports organizations and their members. CCES submits to this tribunal that Mr. Despres has committed an anti-doping rule violation involving a prohibited substance. CCES further submits the appropriate sanction is a two-year period of ineligibility from competition, the mandated period of suspension under the CADP. The position of CCES is that there are no appropriate reasons for eliminating or reducing the required period of suspension.

Mr. Despres does not dispute that an anti-doping rule violation occurred in the circumstances of this case. However, Mr. Despres claims there are "exceptional circumstances" that justify a reduction in the two-year period of suspension. Mr. Despres submits that taking into account the totality of the evidence, the appropriate suspension should be one year, commencing with the date when the anti-doping rule violation was detected.

BACKGROUND FACTS GIVING RISE TO THE ARBITRATION

CCES is a signatory to the World Anti-Doping Code ("Code") and is responsible for ensuring that the Canadian Anti-Doping Program is consistent with international best practices. The general purpose of the CADP code is to protect the rights of athletes and the integrity of sport.

Mr. Despres is a member of BCS, the national sport organization governing the sports of bobsleigh and skeleton in Canada. The CADP applies to all members of BCS, which organization adopted the CADP on October 5, 2004. Consequently, Mr. Despres is subject to the rules of the CADP, as a member of BCS sport.

On August 9, 2007, the CCES conducted out-of-competition doping control in Calgary, Alberta. A sample collection took place which included Mr. Despres. Mr. Despres' sample was delivered by secure chain of custody to the appropriate laboratory in Montreal where it was analyzed. On September 7, 2007 the certificate of analysis with respect to Mr. Despres' sample was received by the CCES. The certificate of analysis indicated an adverse analytical finding. Specifically, the sample contained nandrolone or precursors-norandrosterone concentration measured at 2.8 ng/mL greater than 2 ng/mL.

Section 3.0 of the CADP incorporates the prohibited list international standard issued by the World Anti-Doping Agency. For nandrolone and its precursors, a concentration greater than 2 ng/mL exceeds the stated threshold established in the prohibited list. In Mr. Despres' case, the concentration measured at 2.8 ng/mL. Mr. Despres did not have a therapeutic use exemption from the CCES

for the use of nandrolone and consequently, a notice was issued by the CCES that Mr. Despres has committed an anti-doping rule violation according to rules 7.16 to 7.20 of the CADP. As this was a first violation, the CCES proposed a sanction pursuant to rule 7.20 and 7.37 of two years ineligibility and permanent ineligibility for direct financial support from the Government of Canada. On November 8, 2007, Mr. Despres was provisionally suspended by BCS for a two-year period of ineligibility.

There is no dispute between the parties that Mr. Despres committed an anti-doping rule violation due to the presence of nandrolone or precursors in his sample. The CCES does not dispute that Mr. Despres did not intentionally use or take nandrolone, or a precursor. The CCES also does not dispute that the adverse analytical finding and the resulting anti-doping rule violation was caused by Mr. Despres taking Kaizen HMB.

THE ISSUE FOR DETERMINATION

According to the CADP, an athlete is responsible for any prohibited substances found to be present in his or her body. It is not necessary that intent, fault, negligence, or knowledge be demonstrated to establish a violation. A first "presence" violation requires a period of ineligibility for two years unless there are "exceptional circumstances". The CADP sets out what are exceptional circumstances. There are two categories: "no fault or negligence" and "no significant fault or negligence". If either can be established by evidence in accordance with a standard of proof by balance of probability, the imposed sanction can be reduced or eliminated. Mr. Despres claims "no significant fault

or negligence" and seeks to reduce his sanction as set out above. CADP Rule 7.39 reads as follows:

> "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 o f the minimum period of Ineligibility otherwise Applicable ... When a Prohibited Substance or its Markers or Metabolites 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. [Code Article 10.5.2]."

The CADP Glossary incorporates part of the World Anti-Doping Code, including its Commentary as a source of interpretation of the GADP. The phrases "no fault or negligence" and "no significant fault or negligence" are defined in the Glossary as follows:

> No fault or negligence:
> 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 had *Used* or been administered the *Prohibited Substance* or *Prohibited Method.*
>
> No significant fault or negligence:
> 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 for *No Fault or Negligence,* was not significant in relationship to the anti-doping rule violation.

According to the Commentary, the equivalent of rule 7.38 and 7.39 are meant to be applied "where the circumstances are truly exceptional and not in the vast majority of cases". The Glossary continues as follows:

These provisions of the CADP implement Articles 10.5.1 and 10.5.2 of the World Anti-Doping Code, virtually verbatim. The CADP provides that the text of the Code, including its Commentary, is a source of interpretation of our domestic Program. According to the Commentary to the Code, these provisions are meant to be applied "where the circumstances are truly exceptional and not in the vast majority of cases." The Commentary continues:

> To illustrate the operation of Article 10.5, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a prohibited substances by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the case of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.)

As noted, the CCES does not dispute that Mr. Despres has established that the taking of the Kaizen HMB supplements containing the prohibited substance caused the adverse analytical finding. However, the CCES claims there are "no exceptional circumstances" in this case and that Mr. Despres is significantly at fault or negligent for the violation that occurred.

MR. DESPRES' EVIDENCE

As I have already noted, the facts surrounding the manner in which the prohibited substances became present in the athlete's body are not in dispute.

Rather, the issue is the proper conclusions to be drawn from those facts. As a result, I need only set out the important relevant parts of Mr. Despres' evidence with respect to his claim that exceptional circumstances exist.

Mr. Despres testified that in December 2006, he was competing in Europe on the Europa cup circuit to gain experience on European tracks. Unfortunately, he suffered a severe injury to his hip while pushing the sled during the last race of December 2006 in Italy. Apparently, his hip was partially dislocated which damaged the hip joint and tore muscles around the hip. He was given extensive medical treatment in Europe and in Canada, and also worked with physiotherapists in an attempt to recover. In June 2007 he underwent hip surgery to fix a torn labrum and cartilage in his hip joint. Several days after the surgery Mr. Despres met with John Berardi, who is a sport nutritionist contracted by BCS to give advice to individual athletes on specific diets and nutritional needs.

Mr. Despres met with Mr. Berardi in Calgary on June 22nd. Mr. Despres' purpose in arranging the meeting was confirmed by Mr. Berardi in his testimony as a meeting to discuss special food items and supplements to help reduce inflammation and help with joint tissue repair in Mr. Despres' injured hip. Mr. Berardi recommended several food items and supplements, including HMB. According to Mr. Despres, this was the first time he had heard of that supplement. He said Mr. Berardi told him this was a metabolite of the amino acid Leucine and that there were various studies that HMB would increase collagen deposition, which would be important to Mr. Despres' recovery.

Mr. Despres said he decided he would take Mr. Berardi's advice and purchase HMB. He testified that prior to taking the supplements recommended by Mr. Berardi, he had been taking several other supplements for some time and that he usually purchased such supplements from one of three local stores: GNC, Community Natural Foods, and Popeye's. According to him, Popeye's was more of a discount store and he did not want to purchase from them. GNC caters to muscle building sports as he described it, and that concerned him. As a result, he decided to make his purchase from Community Natural Foods in Calgary. Mr. Despres went to the Community Natural Foods store and took with him his list of recommended supplements given to him by Mr. Berardi, which included the HMB supplement.

He was able to purchase all the recommended products at the store. When it came to the HMB supplement, he was told they carried only one brand, namely from Kaizen. He testified he asked for literature but the store had none. He examined the label which stated that it contained only HMB and certain other ingredients to make the capsule. He asked the sales person about the reputation of Kaizen and emphasized that as an athlete he wanted to make sure the product was free of prohibited substances. He testified he was told that Kaizen was a very good company and that it had strict guidelines to provide clean products. He testified that the sales person stated that Kaizen used raw materials from New Zealand which had a reputation for producing only pure products.

Mr. Despres testified that the Community Natural Foods website contained an assurance that the food found in their stores "meets with our highest standards". He testified that having received the comments of the sales person and from Mr. Berardi, he did not think this was the type of supplement that would be

considered to be suspect for contamination. Consequently, he purchased the product and began taking the recommended dosage.

EVIDENCE OF CCES

The evidence of the CCES consisted largely of the testimony of Ms. Anne Brown, General Manager, CCES. Ms. Brown testified at some length as to the materials prepared by the CCES and distributed to athletes, warning them with respect to the risks associated with taking supplements. According to her, the position of the CCES is to strongly discourage supplement use. Athletes are warned not to take supplements unless they actually need them. They are told that adjusting diet or nutrition is the preferred option and that professionals should be consulted prior to taking supplements, to determine need. She testified that if an athlete decides to use a supplement, CCES recommends that the purchase be from a major multi-national company and the athlete should contact the manufacturer of the supplement to obtain assurances of purity and quality.

Ms. Brown testified that she had looked at the Kaizen nutrition web pages and the links to retailers. According to her, bodybuilding is a marketing focus for Kaizen products and that if Mr. Despres had made the same search she did, that would have raised what she called a "red flag" for him. She testified that the association of any supplement to bodybuilding was the sort of warning sign that the educational materials produced by the CCES and disturbed to athletes, would raise. Specifically, she testified that what she found indicated the Kaizen product was a high risk product as described in the educational materials.

SUBMISSIONS OF THE PARTIES

The submissions of the parties were thoughtful and exceedingly helpful. Both counsel placed most of their emphasis on the case of *Knauss v. FIS* (CAS 2005/A/847). That was a fairly recent arbitration decision where the athlete's sanction was reduced from two years to eighteen months, in circumstances in which he had ingested a supplement that was contaminated. I agree with both counsel that the legal analysis contained in that case is of direct application to the circumstances of this case. The most relevant portions of that decision are as follows:

> 7.3.4 However, the question in the present case remains whether the Appellant's fault or negligence is "*significant*" pursuant to Article 10.5.2 FIS-Rules. The (official) comments on the WADC (p. 30 *et. seq.*) can be viewed as laying down an initial guideline as to how this qualifying element should be interpreted. Although these comments are not binding upon the panel in formulating its decision, they form a body of information which can be taken into account when interpreting the rules and regulations in the WADC. The content of the WADC is, in turn, significant for interpreting the FIS-Rules (which are largely identical in content); pursuant to Article 18.5 FIS-Rules, the latter are to be interpreted in the light of and in compliance with the WADC (see also CAS 2004/A/690 *Hipperdinger v. ATP Tour Inc* [24.3.2005] marg. no. 71). According to the official commentary to the WADC, an adverse analytical finding deriving from a mislabeled or contaminated nutritional supplement can indeed meet the requirements of Article 10.5.2 WADC or the FIS-Rules.
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> 7.3.5 In the Panel's opinion the requirements to be met by the qualifying element "*no significant fault or negligence*" must not be set excessively high (see also CAS 2004/A/624 IAAF v/ *ÖLV & Lichtenegger* [7.7.2004] marg. no. 81 et seq.; by contrast much stricter CAS 2003/A/484 *Vencill v/ USADA* [18.11.2003] marg. no. 61 et seq). This follows from the language of the provision, the systematics of the rule and the doctrine of

> proportionality (see also CAS 2004/A/624 IAAF v/ *ÖLV & Lichtenegger* [7.7.2004] marg. no. 82 et seq.). Once the scope of application of Art. 10.5.2 FIS-Rules has been opened, the period of ineligibility can range between one and two years. In deciding how this wide range is to be applied in a particular case, one must closely examine and evaluate the athlete's level of fault or negligence. The element of fault or negligence is therefore ultimately "doubly relevant". Firstly it is relevant in deciding whether Article 10.5.2 FIS-Rules applies at all and, secondly, whether, in the specific case, the term of the appropriate sanction should be set somewhere between one and two years. However, the higher the threshold is set for applying the rule, the less opportunity remains for differentiating meaningfully and fairly within the (rather wide) range of the sanction. But the low end of the threshold for the element "*no significant fault*" must also not be set too low; for otherwise the period of ineligibility of two years laid down in Article 10.2 FIS-Rules would form the exception rather than the general rule (see also CAS 2003/A/484 *Vencill v/ USADA* [18.11.2003] marg. no. 47). It is this tension between the two limits which is precisely what the WADC wishes to reduce. In this regard the (official) comments on the WADC expressly read as follows:
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> *"Article 10.5 is meant to have an impact only, in cases where the circumstances are truly exceptional and not in the vast majority of cases."*

Quite properly, both counsel have provided me with an analysis of how the facts in this case apply in relation to the facts in the *Knauss* case. Perhaps it is not too surprising that they come to opposite conclusions. Counsel for Mr. Despres submits that his client was more careful and more cautious than Mr. Knauss and that as a result, he should receive the benefit of a reduced sanction, namely the minimum of one year. On the other hand, counsel for CCES submits that Mr. Despres was less careful than Mr. Knauss in guarding against the risk of contamination and that since that arbitration tribunal found Mr. Knauss' conduct was just under the threshold of negligence that was not significant, it follows that

Mr. Despres' negligence was significant and he does not qualify to have his sanction reduced.

I should note that counsel also referred to other cases, including the important decision of *Vencill*, CAS, March 11, 2004. I have carefully reviewed and considered these decisions, all of which have grappled with the difficult task of deciding whether the negligence in question is "significant" in the particular circumstances of that case. I do not believe there is any abstract formulation that can be applied in all cases. The answer depends on a review of the actual facts of each case, an analysis of the totality of the relevant evidence, and the principle of proportionality. In addition, the fundamental principles that underlie the anti-doping program must be maintained. In colloquial terms, those principles can be summed up by observing that an athlete who takes dope commits the ultimate act of selfishness, one that destroys the right of every other athlete to enjoy a fair competition.

DECISION

I have carefully considered all of the evidence and the submissions of the parties. In the circumstances, I have come to the same conclusion reached by the tribunal in the *Knauss* case although here, Mr. Despres conduct was even closer to the bar. To be more precise, for the reasons set out below, I have concluded that Mr. Despres' conduct has met the qualifying standard of "no significant fault or negligence" but has just barely done so.

As I have said, the facts of this case drive the result although some facts are more important than others. The first critical fact is that Mr. Despres did not choose

the supplement for himself, but it was prescribed to him by the team nutritionist, John Berardi. The second important fact is that Mr. Despres was not looking for a supplement to enhance his athletic prowess or to benefit himself as an athlete. If it was not for Mr. Berardi's advice, there is no evidence that the athlete would have selected HMB for himself. The third fact links up with what has been said. Mr. Berardi testified that he recommended HMB to Mr. Despres because it would help in the healing process and assist him in gaining recovery from the surgery that Mr. Despres had undergone several days before. These facts are very different from other cases, including *Knauss*, where the athlete made a deliberate choice to acquire a supplement for himself, rather than having it prescribed to him for the purpose of assisting in a medical recovery.

Does this mean there was no fault or negligence on Mr. Despres' part? No, not at all. The CCES educational materials, the various workshops, and the individual meetings conducted with athletes to warn them of the risk of using supplements regardless of the purpose, were explicit and clear in discouraging the use of supplements and explaining the risk of using them. I agree with the following passage from *Vencill*:

> 62. Indeed, the Panel finds that Appellant's conduct in the circumstances amounts to a total disregard of his positive duty to ensure that no prohibited substance enters his body. Without wishing to attribute any particular motivation to Mr. Vencill in this case, we hold that for an athlete in this day and age to rely—as this athlete claims he did—on the advice of friends and on product labels when deciding to use supplements and vitamins, is tantamount to a type of willful blindness for which he must be held responsible. This "see no evil, hear no evil, speak no evil" attitude in the face of what rightly has been called the scourge of doping in sport—this failure to exercise the slightest caution in the circumstances—is not only unacceptable and to be condemned, it is a far

> cry from the attitude and conduct expected of an athlete seeking the mitigation of his sanction for a doping violation under applicable FINA Rules.

That case was decided four years ago and since then, scarcely a day goes by without the subject of doping being discussed in specific terms in the popular press with regard to virtually every sport.

As an elite athlete, Mr. Despres admits he was negligent. He purchased the HMB supplement from a health food store in Calgary which on the evidence, was probably the most appropriate store of the three. He did make enquiries of the sales person who did give him some assurances, but who after all, was not independent and was there to meet customers' needs. Mr. Despres did not contact the company directly as Mr. Knauss did. He did not seek out any independent information as to the purity of the product. He did not contact Mr. Berardi to ask if he had any views on the matter. He did go to the store website, but his evidence seems somewhat to conflict with Ms. Brown's evidence as to what she discovered on Kaizen's site regarding the use of Kaizen products by bodybuilders.

One difficulty with these cases is that it is easy to become transfixed by one piece of the evidence and to find that swings the result one way or the other. For that reason, arbitrators have been directed to consider the totality of the evidence and to weigh the individual factual components in relation to that principle.

Mr. Despres has been forthright in admitting negligence and quite properly so. As an elite athlete, he knew he was taking a risk when he bought the product. He made some enquiries but they were not enough and they were not made to

the right people or organizations. He did not get any written assurance or guarantee as Mr. Knauss did, whatever the legal status of that guarantee might have been. On the other hand, the evidence is clear and uncontroverted as to his purpose in taking HMB and that it was prescribed for him by a professional nutritionist contracted by his sports team to assist his body to recover from surgery.

In the result, after a careful consideration of all of the evidence, I conclude Mr. Despres is entitled to have his sanction reduced to an extent that is proportionate to his degree of fault and the totality of the circumstances. In view of my finding that Mr. Despres' degree of negligence just barely made the required threshold, I consider that a four month reduction is appropriate in these circumstances.

Mr. Despres submits that the period of ineligibility should commence with the date the test occurred, April 9, 2007. As already noted, Mr. Despres was provisionally suspended on November 8, 2007 by BCS. He submits that "fairness" requires that the suspension commence as at the date of the test. CADP Rule 7.12 reads as follows:

> 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 to be 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.

The bobsleigh competitive season runs essentially from early October through early April. To compete in international events, Mr. Despres must qualify for the Canadian national team during selection races in October. He states that if he is unable to compete in the October selection races, it follows that his suspension is essentially extended for an additional six months.

Counsel further submits that previous anti-doping tribunals have found that a general test of reasonableness may be applied in calculating an appropriate response to the circumstances. According to counsel, this will permit an arbitrator to take into account an athlete's personal circumstances, including factors relating to the athlete's competition schedule in evaluating the harm that may be caused when considering the doctrine of fairness.

With respect, I do not find this argument to be persuasive. The concept of fairness is qualified by the expressed language of rule 7.12. In my view, it does not deal with the personal circumstances or characteristics of the person being sanctioned, except in the limited case where there has been fault or failure by the anti-doping authority either caused directly or inadvertently. In those circumstances, for example where the test was unduly delayed, it may be "unfair" to the athlete not to take that delay into account. In this case, there is no evidence of any unfairness caused to the athlete by the actions or inactions of the CCES, the laboratory, or BCS. Consequently, the situation does not fit within the limited discretionary power available to a tribunal to vary a provisional suspension to a date earlier than the date the suspension was imposed.

On January 11, 2008, in accordance with the SDRCC Rules, I issued the following decision summary to the parties:

The hearing of this matter took place in Calgary, on January 8, 2007.

I have reviewed and carefully considered the evidence together with the helpful and comprehensive submissions of the parties. I will provide full written reasons for my decision in due course. However, in accordance with the Rules, a decision must be made with respect to an anti-doping matter that proceeds to a hearing, as in this case, within five days of such hearing. Accordingly, my decision in summary form is as follows:

1. The evidence, together with the admissions and stated positions of the parties, establishes that an anti-doping violation occurred involving the presence of nandrolone or precursors over the 2 ng/mL threshold set out in CADP Rules 7.16-7.20 and 7.37 in the athlete's collected sample.

2. The evidence, together with the admissions and stated positions of the parties establishes there was fault or negligence by the athlete in ingesting this material. The source was found to be Kaizen HMB supplements, purchased by the athlete.

3. The issue before me is whether the two-year provisional suspension issued November 8, 2007 should be reduced, having regard to the totality of the evidence and the conduct of the athlete. More specifically, the question is whether the athlete bears "no significant fault or negligence" and if so, what is the appropriate reduction, if any, to the two-year period of ineligibility of the athlete from competition.

4. In the unusual and particular circumstances of this case, after a careful review of the evidence, I have determined:

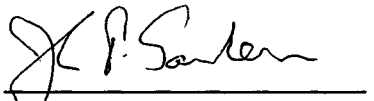
    a. While the athlete bears fault or negligence, his conduct does not quite rise to the level of significant fault or negligence.

    b. While there are grounds established by the evidence for a reduction in the imposed sanction, such reduction must be proportional to the totality of the evidence and the underlying principles of the Rules.

c. Accordingly, the period of ineligibility is hereby reduced to twenty months, to July 8, 2009. The period of ineligibility shall commence November 8, 2007, the date of the provisional suspension, in accordance with CADP Rule 7.12.

In the result, for the reasons expressed above, I hereby confirm the above summary decision. I wish to thank counsel for their able assistance in dealing with this case.

Dated at Vancouver, British Columbia this 31th day of January 2008.



John P. Sanderson, Q.C.
Sole Arbitrator