This is only a translation.

The original signed decision of the Arbitrator is rendered in French.

SPORT DISPUTE RESOLUTION CENTRE OF CANADA

In the matter of the Canadian Anti-Doping Program and in the matter of an alleged violation of an anti-doping rule by Mr. Yvan Darsigny

No: SDRCC/CRDSC DT 05-0020

BETWEEN

THE CANADIAN CENTRE FOR ETHICS IN SPORTS (CCES)

THE CANADIAN WEIGHTLIFTING FEDERATION (CWF)

THE GOVERNMENT OF CANADA

AND

YVAN DARSIGNY, Athlete

AND

THE WORLD ANTI-DOPING AGENCY (WADA), Observer

ARBITRATOR: PATRICE M. BRUNET

Appearances:

On behalf of the **CCES**: Joseph de Pencier

On behalf of the **CFWL**: Moira Lassen

On behalf of the **Government of Canada**: Mary Warren

On behalf of **Yvan Darsigny**: François Montfils, Therrien Couture, Lawyers, S.E.N.C.

AWARD

In conformity with the provisions of article 7.46 of the Canadian Anti-Doping Program (CADP), the CCES requested that a hearing take place in order to determine whether athlete Yvan Darsigny committed a violation by refusing or avoiding the sample collection, as outlined in subsection 7.24 of the CADP.

In conformity with the provisions of subsection 7.59 of the CADP, the Sport Dispute Resolution Centre of Canada (SDRCC) constitutes the arbitral tribunal, fixes the rules of procedure and manages the hearing.

An initial preparatory conference took place via a conference call on March 16, 2005. The hearing was divided into two parts, taking place on April 4 and 7, 2005. Certain additional documents having been requested, I declared the hearing closed on April 12, 2005.

FACTS

On January 23, 2005, at 8:20 a.m., two (2) Doping Control Officers (DCO) accredited by the CCES arrived at Mr. Darsigny's residence in order to conduct an unexpected anti-doping control.

DCO Germaine Lyte remained in the car, while the other DCO, 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 waived 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 an anti-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. There is no contradiction in either the written report of Ms. Decarie or in her testimony and the testimony of Mr. Darsigny on the following points:

• Mr. Darsigny totally monopolized the conversation and allowed Ms. Decarie little or no chance to speak;
• Mr. Darsigny's tone of voice was very aggressive;
• 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 (3) 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 aggressively.
• Even when he understood that this was a representative of the CCES, Mr. Darsigny did not believe they had the right to intrude on his privacy, particularly at his home. He believed they 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 competitions.

Yvan Darsigny has been weightlifting since he was 14 years old. Now 38, he is still active and participates in many competitions. Having participated in numerous competitions on an international level, including two (2) Olympic Games (1984 and 1992), Mr. Darsigny is a Canadian athlete who has made his mark on the sports communities of both Quebec and Canada.

ANALYSIS

The violation alleged to have been committed by Mr. Darsigny is not one of reputation or of standards of good manners: this is not a violation of behaviour, but a strict liability violation. The CCES having succeeded in proving the elements contained in subsection 7.24 of the CADP, it is thus the responsibility of Mr. Darsigny to argue subsection 7.25 *in fine* of the CADP in order to eliminate or reduce the application of the sanction.

Did Mr. Darsigny have prohibited substances in his body on that Sunday, January 23, 2005, at 8:20 a.m.? This is not the issue. In conformity with the terms of the Canadian Anti-Doping Program, the CCES has the right to appear anywhere, anytime, in order to conduct sample collections. This is the gist of the CADP.

No advance notice tests are fundamental to ensure sound management of the CADP. Indeed, notice of only a few minutes may allow an athlete to consume concealing and non-detectable products or to inject a dose of exogen urine directly into one's bladder. This explains the definition contained in the CADP Glossary that provides for the DCO to chaperone the athlete without interruption from the moment of notification until the completion of the sample collection.

According to his testimony, the technique of no advance notice testing was unknown to Mr. Darsigny. Be that as it may, I cannot accept such an answer as an explanation. Using the same logic, the fact of not knowing that the police uses roadblocks to control drunk drivers does not constitute a valid defence for refusing to provide a sample.

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

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

• The CCES, in its CADP, 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…" (art. 1.1 of the CADP).
• 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."[1]

DCO Decarie testified that these unexpected controls represent approximately 99% of the tests she conducts every year. This is thus the standard for sample collection. Moreover, the sample collection conducted at the 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 August 22, 2002.

• In addition to the legal relationship linking the various anti-doping codes, it is fundamental that the CADP match the world anti-doping policy. This allows national sports organizations (NSOs) to maintain their positions in their respective international federations (IFs). Obviously, our NSOs' membership with their respective IF is fundamental to the participation of our Canadian athletes in the Olympic Games, Paralympic Games and other international major events.

• It is with this international view that the analysis of the circumstances specific to this matter must be made, while considering the exceptions provided for in subsection 7.25.

THE VIOLATION

The violation alleged to have been committed by Mr. Darsigny can be found at subsection 7.24 of the CADP. Thus, the CCES has the burden of proving the existence of a violation of the rules:

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 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.

[1] 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."

THE NOTIFICATION

In conformity with the provisions of subsection 7.24 of the CADP, I shall first establish whether there was notification to the athlete.

Mr. Darsigny contends that, because Ms. Decarie did not have the opportunity to verbally express the reason for her visit, there was a default in the notification.

I can not accept this explanation, because the circumstances were such that the athlete alone triggered these events, and did so voluntarily. 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 ears, or shout continuously as soon as a CCES officer would come knocking at their door.

I must consider the evidence in light of the wording of the rules, the goals identified by the legislator, and the anti-doping program in a general sense.

Furthermore, the basis for the argument of an absence of notification and Mr. Darsigny's testimony are overshadowed by the terms of his letter to the CCES, dated February 22, 2005, in which he writes: "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 then 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.

THE REFUSAL

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 avoid 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 of 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.

THE FAILURE TO SUBMIT

Indeed, it is not only the refusal, but also the fact that *avoiding a sample collection constitutes a violation of the anti-doping rules*.

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

He knew this was a CCES representative, and notwithstanding the difficult circumstances of his night, 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.

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 *avoided the sample collection*.

THE APPLICATION OF EXCEPTIONAL CIRCUMSTANCES

The remaining issue relates to whether this violation can justify the elimination or the reduction of the sanction on the basis of exceptional circumstances (art. 7.25 of the CADP).

One has to consider whether exceptional circumstances existed that would provide justification for the failure to submit to the sample collection.

The *Grand Larousse de la Langue Française* provides that allowing an exception for someone, means to accept, to tolerate that a person avoids the obligations valid for others, and that something shall not be submitted to the general rule.

I have weighed the evidence in order to identify whether I can justify one or more exceptional circumstances that would allow the rule of general application to be avoided.

While I am naturally inclined to understand one's need to sleep during the weekend and the irritable mood associated with a hasty awakening provoked by an intrusive action, 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.

If the legislator had wished to respect one's private life or the athlete's comfort at any cost, I suspect that those would be terms he would have used to justify the failure to comply for a sample collection.

The legislator used the word "exceptional," which is reserved for a much more limited and restricted use. Without spending time on examples of exceptions that might have justified a refusal or a failure to comply, the circumstances in this matter were not tantamount to 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.

THE ABSENCE OF FAULT OR OF SIGNIFICANT NEGLIGENCE

The analysis of subsection 7.39 of the CADP is worth an analysis: "…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."

The *Grand Larousse de la Langue Française* enlightens us again, this time on the definition of the word *significant*: "That which has is very clear, does not allow any doubt, expresses its true meaning."

Did Mr. Darsigny commit a fault or negligence by refusing to collaborate with the DCO? And if so, was this fault or negligence significant?

By ordering to the DCO to leave his domicile while recognizing her identity, 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.

CONCLUSIONS

The Tribunal confirms the decision of the CCES to apply the sanction stipulated in subsection 7.25 of the CADP.