CANADIAN CENTRE FOR ETHICS IN SPORT

IN THE MATTER OF AN APPLICATION BY ERIC LAMAZE FOR A CATEGORY II REINSTATEMENT PURSUANT TO THE CANADIAN POLICY ON DOPING IN SPORT AND THE DOPING CONTROL REGULATIONS

DECISION

ED RATUSHNY, Q.C.
ADJUDICATOR

OTTAWA, ONTARIO SEPTEMBER 19, 2000

APPEARANCES

MR. TIMOTHY DANSON	Counsel for the Applicant
MS. DAVID LECH	Counsel for the Canadian Equestrian Federation
MR. ROBERT MORROW	Counsel for the Canada Centre for Ethics in Sport
Mr. JOSEPH de PENCIER and MR. ADRIAN JOSEPH	Counsel for Sport Canada (Canadian Heritage)
MR. MICHEL FRANCOEUR	General Counsel, Canadian Heritage
MR. MICHAEL CHAMBERS	Representing the Canadian Olympic Association

ALSO PARTICIPATING

MR. ERIC LAMAZE	Applicant
MR. VICTOR LACHANCE	Canadian Centre for Ethics in Sport

ALSO ATTENDING

MR. DON ADAMS and MS. GILLIAN PERKINS	Canadian Equestrian Federation
MS. GISELA VOGEL	Canadian Olympic Association
MS. RACHEL CORBETT	Centre for Sport and Law

1. BACKGROUND:

Mr. Eric Lamaze had been a member of the Canadian Equestrian Team since 1993 and had qualified to represent Canada at the Atlanta Olympic Games. On June 24, 1996, he was advised that he had tested positive for a banned substance and was suspended for the minimum period of four years pursuant to the **Canadian Policy on Penalties for Doping in Sport** in effect at that time. By my decision of January 31, 1997, he was reinstated under the **Standard Operating Procedures** related to that Policy on the basis of criteria similar to those applicable to the current Category III reinstatement provisions.

The decision reinstating Mr. Lamaze at that time contained detailed reasons and also imposed conditions requiring him to act as an advocate to promote drug-free sport and lifestyle for a period of three years ending on June 24, 2000. All of the parties to the current Application concur that he had fully satisfied these conditions. He had also been tested on from 8 to 10 occasions during this period and as recently as July 22, 2000, without any trace of cocaine in his system. By that time, he had rebuilt his business, known as Torrey Pines Stables, and competed frequently and successfully, earning a position on the Canadian Olympic Equestrian Team to compete in Sydney, Australia. He also became engaged to be married in April 2001.

However, the testing on July 22, 2000, revealed that Mr. Lamaze's sample contained ephedrine and pseudoephedrine. By letter dated August 8, the Chair of the Canadian Centre for Ethics in Sport (CCES), Dr. Andrew Pipe, advised the Executive Director of the Canadian Equestrian Federation (CEF), Mr. Don Adams, that this athlete was required to provide a written explanation within five working days (by August 14). The Chair of the Human Medications Committee of the CEF, Dr. Adam Steacie, immediately wrote to Mr. Lamaze, urging him to provide the required letter of explanation within the specified time. Dr. Steacie pointed out that pseudoephedrine is found in many over-the-counter cold preparations such as "Advil Cold and Sinus". He also indicated that ephedrine is found in many nutrition and herbal preparations. Dr. Steacie offered to assist in drafting the letter of explanation.

The Doping Control Regulations recognize that athletes may inadvertently ingest stimulants of this nature, even when care is taken. Section 7.3.5 provides:

> Where the certificate of analysis indicates a Positive Test Result for a Banned Substance in the stimulant class, and where:

> a) The Athlete provides a written declaration from a physician that the Substance was administered for medical purposes; or
> b) The Athlete provides a written declaration that the Substance was ingested as part of a nutritional product; and
> c) The Substance is found at a concentration, determined by CCES, not to be performance-enhancing;
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> the Athlete shall be given a letter of warning. Letters of warning shall be issued for the first and second such occurrences. The third such occurrence shall give rise to a Doping Infraction.

The letter from Dr. Steacie to Mr. Lamaze was reassuring in pointing this out. It stated:

> In cases of positive tests for medications such as these, the Doping Control Review Board of the CCES usually delivers a letter of warning to the athlete ... I believe that this will be an administrative exercise to establish that you took over-the-counter medications and/or herbal preparations without knowledge of the drugs contained in the preparations ... A letter of warning is not a "doping infraction" and should in no way effect [sic] your standings in the CEF Olympic Team trials.

In fact, Dr. Steacie was correct in anticipating that Mr. Lamaze would be found to have taken over-the-counter products without knowledge that they contained banned substances.

He had taken Advil Cold and Sinus in completely innocent circumstances. He also had been taking a nutritional diet supplement known as "Ultra Diet Pep" for approximately five years. It did not contain ephedrine and this substance had never appeared in Mr. Lamaze's samples. However, the manufacturer subsequently began to distribute the same product with the addition of ephedrine. The name, print size, style of the product name and colour of the label are identical for both categories of the product. Again the ingestion of ephedrine was completely innocent.

However, before this seemingly straightforward determination was made, a rather bizarre and tragic sequence of events occurred.

2. EVENTS SURROUNDING THE INFRACTION:

By letter dated August 10, Mr. Tim Danson, the lawyer representing Mr. Lamaze requested an extension of the August 14 deadline for providing an explanation. He had just returned from a holiday and was faced with other pressing matters. However, the CCES faced a

number of timing issues, including the transportation of the horses from Canada to Australia on August 19, requiring a decision prior to that date. Mr. Danson was given an extension of one day to Tuesday, August 15 at 4:00 p.m. to provide the letter of explanation. By letter dated August 15, to Dr. Pipe, Mr. Danson provided a detailed explanation of the Advil Cold and Sinus use. He also reported that he had made inquiries about the Ultra-Diet Pep product and:

> My information is that the new "improved" Pep contains "ephedra" described as "standardized plant body extract yielding 18 mg ephedrine". I have not independently confirmed this.

He stressed that ephedrine could not be performance-enhancing for equestrian show-jumping and offered to provide expert evidence to this effect. He also explained that Mr. Lamaze had been using the same product for approximately five years, without any adverse test results.

In light of Mr. Lamaze's completely innocent behaviour, the reassuring letter from Dr. Steacie and the explanations discovered by Mr. Danson, it came as a complete shock to Mr. Lamaze that by letter dated August 18, Dr. Pipe advised the Canadian Equestrian Federation that it determined the circumstances to be a doping infraction. The letter added:

> Therefore, in accordance with CEF anti-doping policy, the athlete is banned form competing in Canadian amateur sport for life commencing July 22, 2000.

By letter dated August 22, 2000, Mr. Robert Morrow, counsel for the CCES, informed Mr. Danson that the CCES was satisfied there were extenuating circumstances which warranted a "Reconsideration" by the Doping Control Review Board. There is no provision for such a Reconsideration under the Regulations.

Additional material was filed by Mr. Danson but it appears that the only significant addition was a letter from the general counsel of the manufacturer of Ultra Diet Pep to Mr. Danson confirming the sale of a second variety of the product containing ephedrine. As a result of the Reconsideration hearing on August 20, the Board, in effect, reversed its earlier decision. This time it concluded that there was no doping infraction. The criteria of section 7.3.5 were met and a letter of warning was issued.

No explanation was provided for the initial decision of the Doping Control Review Board although counsel for the CCES suggested that the initial documentation provided on behalf of Mr. Lamaze was inadequate. The explanations in the initial documentation provided by Mr.

Danson were ultimately accepted by the Board although reinforced at the Redetermination hearing by the letter on behalf of the manufacturer. There has been no suggestion of any bad faith or misconduct on the part of the Doping Control Review Board or the CCES. However, the consequence of these event was that on August 18, as he was preparing to depart for the Olympics, after admirably re-constructing his life and career, he was told that he was banned from competition for life. He received this notice knowing that he was innocent of any doping infraction.

The facts which follow were undisputed by any of the parties to these proceedings and, therefore, must be accepted at face value.

On August 18, Mr. Lamaze was competing at the Collingwood Horse Show when he received a call on his cellular telephone from Mr. Danson advising him of the lifetime ban referred to in Dr. Pipe's letter. He was devastated. He made it back to his hotel but could not eat or sleep and was awake the entire night. On August 19, he was exhausted and in a state of panic. He could not speak coherently and his communication came out as "gibberish". His fiancée persuaded him to attend the party for the participants in the Horse Show in the hope that it would provide a diversion from his depression which had reached the point where he was considering suicide.

At the party, he drank heavily and became intoxicated. His fiancée persuaded him to return to the hotel but he said he had to go the washroom and would leave with her when he returned. Portable toilets had been set up behind the main tents where the party was taking place. On his way to the toilets, he met some people whom he knew, who were also intoxicated. He stopped to talk and when cocaine in cigarette form was passed around to him, he shared the cigarette. He then went to the toilet, returned to the party and was immediately taken back to the hotel room by his fiancée.

Expert evidence was filed before me in the form of letters of opinion from two experts. The first is Dr. Adrian Harnick, a psychiatrist with specialized expertise in psychosomatic medicine including practical experience in dealing with post-traumatic reaction. The second is Dr. Howard Cappell, a clinical psychologist with specialized expertise in pharmacology. **The professional qualifications of these experts were not disputed by any of the parties. The experts were not asked to be made available for questioning on their opinions and no contrary expert evidence was presented.** As a result, I must accept their evidence as to the consequences for Mr. Lamaze of receiving the news of his lifetime ban.

The following are the relevant excerpts from the evidence of Dr. Harnick and Dr. Cappell:

> It is evident that, had Mr. Lamaze not suffered this earlier "ban for life" from equestrian competition, he would not have come to be in his present equally distressing circumstances. It is evident that, at the time of his cocaine ingestion, Mr. Lamaze had been in a total state of lost self-control and had been totally without his previous good judgment.
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> It should not be understood that Mr. Lamaze had simply suffered an upsetting event and a consequent depression. Rather, it is evident that he had suffered a catastrophic event and an immediate and severe and overwhelming depression and state of emotional shock. Indeed, it is evident that his degree of anxiety and depression had been so immediately severe that he had lost judgment, in total.
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> However, it is also evident that Mr. Lamaze had come to drink so heavily because of an equally severe and impairing psychological psychiatric reaction to his banishment from equestrian riding. Given Mr. Lamaze's severe reaction, he had reacted in a near psychotic fashion, having lost all perspective and all judgment and having been totally influenced, beyond his control, by his despair.
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> His adult defences against relapse were strong but not impregnable to the catastrophe that was enveloping him. He was out of control.

Thus, the expert evidence is **unequivocal and uncontradicted**. The news of his lifetime ban in Dr. Pipe's letter at a time when he had overcome his previous demons, when he was preparing to leave for the Olympics and when he was innocent of any doping infraction, left him out of control.

3. NATURE OF THE PROCEEDINGS:

I was appointed as Adjudicator on September 13, 2000. A conference telephone call was conducted on September 15. The oral hearing was held in Ottawa on September 16. A summary decision was issued on September 18 and this Decision is issued on September 19.

During the conference telephone call, two parties sought intervener status. The participation of the Canadian Olympic Association was granted but that of Spruce Meadows was denied. The denial was based on the conclusion any relevant and useful submissions which Spruce Meadows might make could be adequately addressed by the CEF and the CCES who are parties to the proceedings. The representative of the Canadian Olympic Committee did not make

representations on the merits of the application during the conference call or at the hearing but advised the adjudicator and the parties that the Athletes Agreement between the Committee and Mr. Lamaze left the final determination of his participation in Sydney with that body.

Counsel for the Applicant requested that the hearing be recorded and this was granted at the Applicant's expense. In addition to the submissions of counsel, Mr. Lamaze and Mr. Victor Lachance, on behalf of the CCES, provided information at the oral hearing. Mr. Danson was also permitted to provide factual information without objection by the parties.

4. CATEGORY II REINSTATEMENT:

The central provisions related to application for reinstatement under Category II of the Canadian Doping Control Regulations are as follows:

> 10.3.8 The Applicant in a Category II reinstatement bears the onus of proving, on a balance of probabilities, that there existed exception circumstances surrounding the Infraction.
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> 10.3.9. For the purposes of a Category II reinstatement application, the words "circumstances surrounding the Infraction" mean only those external factors that are specifically identified and that directly gave rise to the Infraction and that were not within the applicant's knowledge or control. Examples of such external causal factors might include, but are not limited to:
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> a) The applicant relying upon information that was inaccurate and that the applicant could not reasonably have verified.
> b) The applicant being unduly influenced or coerced by a person in a position of authority over the applicant.
> c) Actions of identified third parties that the applicant could not reasonably have prevented.

Counsel for Mr. Lamaze argued that the onus of proof should be reduced to reflect the serious consequences of a lifetime ban which, in this case, would seriously affect the applicant's ability to earn a living. The suggestion was that some "leniency" should be granted in assessing the application. Authority was cited in relation to penal and other matters where the consequences for the individual affected are serious. It was also argued that the Regulations should be given a large, liberal and "purposive" interpretation.

These propositions cannot be accepted. The Regulations clearly adopt the ordinary civil standard of proof. Moreover, section 10.1.2 states:

> Circumstances may exist which justify reinstatement from these uniform penalties; however, the test for such circumstances is intended to be restrictive in both interpretation and scope.

I read this provision as reminding adjudicators to avoid the very kind of interpretation which has been suggested. It does not require that adjudicators interpret the Regulations unfairly against applicants. But it does require adjudicators to restrict themselves to the requirements in the Regulations.

The task of the adjudicator is to interpret the words of the Regulations according to their plain meaning. There is no room in an adjudication of this nature for any large and purposive approach of the kind appropriate for Charter interpretation. Proof on a balance of probabilities means, then, simply that I must be more satisfied than not, that the standard in section 10.3.8, as explained by the requirements of section 10.3.9, has been met. If the applicant does not meet that threshold of satisfaction, the reinstatement application must be dismissed.

The plain meaning of the phrase “exceptional circumstances surrounding the Infraction” surely has been met. Notification by Dr. Pipe of an erroneous determination of a drug infraction, resulting in a lifetime ban, following a “storybook” comeback, leading to a chance encounter combined with an extraordinary mental condition are not ordinary circumstances. They are “exceptional” in the plain meaning of that word and they certainly surrounded the infraction in question.

The issue then is to determine whether the restrictions imposed by section 10.3.9 remove the circumstances of this case from the general criterion established by section 10.3.8. These further restrictions may be broken down as follows:

- external factors;
- specifically identified;
- directly gave rise to the infraction;
- not within his knowledge or control.

I am satisfied that the notification by Dr. Pipe of a drug infraction, when none had occurred, together with a consequent lifetime ban meet the first two restrictions. The notification is a specifically identified external factor.

Did this notification “directly” give rise to the infraction? It could be argued that the notification only gave rise to the infraction “indirectly” since the notification directly caused only “a total state of lost self-control”. This reasoning would argue that the infraction was directly caused by the loss of self-control and only indirectly caused by the notification. However, such reasoning would be mere sophistry and would place a strained, even tortured, meaning on the word “directly”. Surely, both the notification and the loss of control as described by the undisputed medical evidence are factors external to the infraction. Moreover, the choice of the phrase “gave rise to” rather than “caused” suggests a broader scope to the word “directly”. The plain and ordinary meaning of the words “directly gave rise” leads to the conclusion that Dr. Pipe’s erroneous notification of a doping infraction and related lifetime ban directly gave rise to the infraction in question.

The remaining restriction turns on whether the external factors were within the applicant’s “knowledge or control”. Counsel for Sport Canada provided helpful submissions in relation to the interpretation of this phrase. In the circumstances of this case, to succeed, the applicant must satisfy me that the external factors were not within his “control”. Certainly Mr. Lamaze had no control over the notification and lifetime ban even though he knew that no doping infraction had been committed at the time. Nor did he have control of his drinking or smoking of the cigarette that evening.

I wish to emphasize that the factual determination that Mr. Lamaze was not in control when the infraction occurred is not an inference which I am making from the evidence of Mr. Lamaze or from the circumstances of this case. Rather, it is based on the unequivocal opinions of two medical experts which were not challenged by any of the parties in any way.

Mr. Lachance, on behalf of the CCES expressed concern about the notification of a lifetime ban constituting an external factor under section 10.3.9. Does this mean that every time an athlete receives notice of a lifetime ban or other serious penalty, there will be grounds for a Category II reinstatement? The answer is clearly not. The notification, in itself, was only the triggering factor. Apart from being erroneous, the exceptional circumstances here rest on the total lack of control established by the medical evidence. This will be extremely difficult to establish in future cases and will almost inevitably be irrelevant. That is because in most cases a notification is the **result** rather than the **cause** of an infraction. Moreover, most cases would involve performance-enhancing drugs, which there would be no incentive to take following a

ban. In contrast, this case involves an infraction as the unique consequence of an initially erroneous determination, a drug which is not performance-enhancing for the sport in question and extraordinary medical evidence.

Mr. Lachance, together with counsel for the CCES and the CEF also submitted that Category II reinstatements were never intended to deal with subjective elements such as the athlete's mental state since these are addressed under Category III. This is likely to be true in the vast majority of situations. However, in Category II, the mental state may be introduced through the restrictive criterion of absence of "control". Under this criterion, however, consideration of the mental element can only occur where there is a complete loss of control. Any continuum of intent or reduced willpower short of total absence of control cannot apply although they might be mitigating factors under a Category III reinstatement.

Support for this view is found in the example contained in section 10.3.9(b) which recognizes a subjective element through undue influence or coercion by a person in authority. Indeed, this example could be interpreted as detracting from the requirement of total loss or control under the opening sentence of section 10.3.9. At the very least it recognizes that a subjective loss of control is sufficient to meet the requirements of section 10.3.9. Whether that loss of control is due to the actions of a coach or the notification of an erroneous ban for life should not be a relevant distinction, provided loss of control can be established by the evidence.

Mr. Lachance stated at the hearing that it was not difficult for the CCES to change the Regulations. If there is any concern about this Decision creating a precedent which could adversely affect doping enforcement, the simple answer is for the CCES to change the Regulations.

5. CONDITIONS:

Both the CCES and the CEF made submissions which reflected concern about the imposition of a lifetime ban on Mr. Lamaze. There are strong compassionate and humanitarian considerations which exist but which are totally irrelevant to this Category II reinstatement. Mr. Lamaze has never attempted to cheat by using performance-enhancing drugs. His survival of a severely disadvantaged youth was remarkable. His triumph over the previous doping infraction was inspiring. His notification by Dr. Pipe of a lifetime ban for a doping infraction he did not commit was a cruel twist of fate. Moreover, equestrian athletes do not merely complete for a

short period of time and move on to other things. In the case of Mr. Lamaze, his competition is integrated with his other commercial activities such as operating his stables, teaching and coaching. The lifetime ban could have disastrous economic consequences for him. **Compassionate factors are irrelevant to this application.**

Nevertheless, counsel for the CEF, Mr. David Lech, submitted that although the applicant had not met the onus of satisfying section 10.3.8 in conjunction with 10.3.9, a result short of a lifetime ban was possible. Section 10.3.7 provides:

> If sport eligibility or eligibility for Federal Sport Funding or both, are reinstated, the adjudicator may prescribe terms and conditions of the reinstatement.

The CEF took the position that it would favour reinstatement after a ban of approximately four years subject to conditions being met over that period such as continued testing and medical evaluation.

While this result might provide an opportunity for some balancing between individual fairness and broader considerations of denunciation and general deterrence, it is not authorized by the provisions for a Category II reinstatement. Moreover, section 10.3.6 provides:

> Applications for Category II reinstatement are limited to requests for reinstatement of sport eligibility and eligibility for Federal Sports Funding in any role, in any sport. **The original penalties for Infractions are not open to review.** [Emphasis added]

It simply is not open to an adjudicator to change a ban for life to a four-year ban through the imposition of conditions. Penalties are not open to review.

Counsel for the CCES took another approach towards the same purpose. Mr. Morrow suggested that the application could be dismissed with the condition that Mr. Lamaze be entitled to re-apply in 48 months. The difficulty here is that section 10.3.7, which authorizes conditions, only does so where there is a reinstatement, not a dismissal. Another difficulty is that section 10.3.4 provides that an application may be made only once per infraction. Moreover, the passage of time cannot assist in a future Category II application. The criteria for reinstatement are frozen in the “circumstances surrounding the Infraction”. In this respect, they are completely different from a Category III application which is also foreclosed to Mr. Lamaze in future because of his previous successful application analogous to the current Category III.

Counsel for Sport Canada, Mr. de Pencier, expressed grave doubts about the authority of an adjudicator to proceed along either of the avenues suggested by the CCES and the CEF respectively. I agree. While these submissions reflect a laudatory attempt to balance individual fairness with enforcement objectives, they cannot be supported by the language of the Regulations. The current Category II avenue is an "all or nothing" proposition and any modifications are properly introduced through amendments to the Regulations rather than creative adjudicative interpretation.

6. ORDER AND CONCLUSION:

Pursuant to my Summary of Decision issued on Monday, September 18, the application of Mr. Eric Lamaze is granted effective that date. Mr. Lamaze will bear the costs of the oral hearing facilities but no other costs are ordered. As pointed out in the Summary of Decision, this order does not resolve the Applicant's eligibility to participate in the Sydney Olympics which falls within the authority of the Canadian Olympic Association to determine.

As a final observation, the evidence before me did not disclose in any way that Mr. Lamaze is a drug addict or that his positive test was an attempt to cheat. The evidence did disclose that his personal history has left him vulnerable in some respects. While he has shown incredible strength in many ways over the past four years and takes personal responsibility for his actions, it appears he would benefit from ongoing professional support. In particular, a professional support mechanism should be put in place in the event another catastrophic event, in the words of Dr. Harnick, should present itself. I considered imposing conditions along these lines but concluded it would be better to trust him to work out such arrangements with personal and professional assistance.

Dated at Ottawa this nineteenth day of September, 2000.

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Ed Ratushny, Q.C., Adjudicator