

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

**N^o : SDRCC DT 06-0040
(DOPING TRIBUNAL)**

**CANADIAN CENTRE FOR ETHICS
IN SPORT (C.C.E.S.)
TRIATHLON CANADA
GOVERNMENT OF CANADA**

AND

**SHARI BOYLE
(Athlete)**

AND

**WORLD ANTI-DOPING AGENCY
(WADA)
INTERNATIONAL TRIATHLON
UNION (ITU)
(Observers)**

Before:

Graeme Mew (Arbitrator)

Appearances and Attendances:

For the Athlete:

Shari Boyle

For the Canadian Centre for Ethics in Sport:

Robert Morrow (Counsel)
Anne Brown
Karine Henri

For Sport Canada:

Johanne Imbeau (Counsel)
Mary Warren

For Triathlon:

Alan Trivett
Michael Emmett

SDRCC:

Benoît Girardin

Hearing Dates:

23 and 28 August 2006 (by telephone conference)

DECISION

1. According to a website from the United States called drugstore.com, a product called Yogi Tea “Breathe Deep” contains Ephedra Twig and Ephedrine Alkaloids¹. The product’s description includes the following:

Breathe Deep® tea is an Ayurvedic blend of herbs and spices formulated to enhance healthy breathing.* Not only does Breathe Deep® promote balanced and easy breaths, but it also aids in countering many of the negative effects that stress, pollution and poor breathing habits have on the respiratory system.* this [*sic*] healing formula utilizes East Asian Ephedra (Ephedra sinica), an herb which, for some five thousand years, has been used to promote bronchial function....

* These statements have not been evaluated by the Food and Drug Administration

2. Shari Boyle (the “Athlete”) is a thirty-three year old athlete who, on 21 May 2006, competed at the Canadian Duathlon Championships in Ancaster, Ontario. After competing she provided a urine sample as part of the doping control procedures conducted at the championships. Her sample tested positive for the presence of Ephedrine at a concentration of 30 ug/mL. The presence of Ephedrine at a concentration of greater than 10 ug/mL constitutes an anti-doping rule violation.

3. The Athlete does not challenge the positive test results. However, she denies knowingly using a Prohibited Substance.² Having ruled out some nutritional supplements that she was using, the Athlete surmises that the source of her positive test must have been her consumption of Yogi Tea. She did not consider the tea to be either a supplement or performance enhancing. She has no other explanation for the positive result.

The Positive Test

4. At the doping control station, the Athlete underwent the standard testing procedures. She completed a Doping Control Form on which she noted that the prescription and non-prescription medications and nutritional supplements used by her in the previous ten days were multi vitamins, Aleve (an over the counter pain reliever) and a nasal decongestant. Her urine sample was divided into “A” and “B” containers. In the comments section on the Doping Control Form, the Athlete wrote “The CCES people were very nice”. She expressed no concerns on the form about the sample collection session.

¹ <http://www.drugstore.com/products/prod.asp?pid=144215&catid=48702&trx=PLST-0-SEARCH&trxp1=48702&trxp2=144215&trxp3=1&trxp4=0&btrx=BUY-PLST-0-SEARCH>

² Capitalised terms not defined in this decision are terms used and defined in *The Canadian Anti-Doping Program – June 2004*.

5. The Athlete's "A" sample was tested at the WADA accredited laboratory in Montreal. On 12 June 2006, the Canadian Centre for Ethics in Sport ("CCES") received the Certificate of Analysis for the Athlete's urine sample, which indicated an adverse analytical finding for sample 1750398 for the presence of Ephedrine measured at 30ug/mL.

Doping Violation and Consequences Rules

6. The presence of Ephedrine (above an allowable threshold of 10ug/mL) is a Prohibited Substance according to the 2006 WADA Prohibited List. Ephedrine is further classified as a 'Specified Substance' on the 2006 WADA Prohibited List. The List states that: "The Prohibited List may identify specified substances which are particularly susceptible to unintentional anti-doping rule violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents."

7. The *Canadian Anti-Doping Program – June 2004* ("CADP") contains Doping Violations and Consequences Rules. The relevant provisions of these Rules include the following:

7.16 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Sample is an anti-doping rule violation. [Code Article 2.1]

7.17 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish this anti-doping violation. [Code Article 2.1.1]

7.18 Excepting those substances for which a quantitative reporting threshold is specifically identified in the Prohibited List, the detected presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation. [Code Article 2.1.2]

7.20 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 as provided in Rules 7.38, 7.39 or 7.40. [Code Article 10.2]

8. As already noted, where the Prohibited Substance is a “Specified Substance”, reduced sanctions may be available:

Specified Substances

7.7 The Prohibited List identifies specified substances which are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or which are less likely to be successfully abused as doping agents. When an Athlete can establish that the Use of such a specified substance was not intended to enhance sport performance, the period of Ineligibility found in Rule 7.20 shall be replaced with the following:

First violation: At a minimum, a warning and reprimand and no period of Ineligibility from future Events, and at a maximum, one (1) year Ineligibility.

Second violation: Two (2) years Ineligibility.

Third 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 (in the case of a second or third violation) this sanction for exceptional circumstances as provided in Rules 7.38, 7.39 and 7.40. [Code Article 10.3]

9. There may also be consequences in terms of Government of Canada funding in the event of an anti-doping rule violation:

7.37 Any *Athlete* or *Athlete Support Personnel* who commits and is sanctioned for an anti-doping rule violation pursuant to Rules 7.16-7.25 and 7.28-7.36, or an *Athlete* who commits a second anti-doping rule violation pursuant to Rule 7.7 (Specified Substances) or to Rules 7.26-7.27 (Athlete Availability and Whereabouts Information), shall be permanently ineligible to receive any direct financial support provided by the Government of Canada. Direct financial support means any direct payment or indirect payment to the individual through a *Sport Organization*, and includes, but is not limited to, monthly financial support through the Athletes Assistance Program, coaching or professional staff salaries, honoraria for the provision of professional services, or coaching internships or apprenticeships. [Code 22.1]

Initial Review by the CCES

10. The CCES reviewed the documentation relating to the collection and analysis of the Athlete’s urine sample and concluded that there was no apparent departure from the Doping Control Rules or the laboratory analysis that undermined the validity of the adverse analytical finding. The CCES also confirmed that it had not granted the Athlete a “Therapeutic Use Exemption” (“TUE”) relating to the use of Ephedrine.

11. As part of the initial review procedure, CCES also provided the Athlete with an opportunity to explain her adverse analytical finding. On 30 June 2006, the Athlete provided written information regarding her adverse analytical finding. In summary, she explained that she had never taken any performance enhancing substances and was unaware of the source of Ephedrine that was found in her sample. She outlined the products and their ingredients she recalled taking in the week leading up to the race. None of these products indicated the presence of Ephedrine and the Athlete stated that her only explanation for how Ephedrine entered her system was if “it [Ephedrine] is hidden in one of the supplements or medicines that I have taken.”

12. Because the Athlete’s positive test involved a Specified Substance and, thus, would result in consequences, depending on whether the Athlete’s use of the substance was intended to enhance sport performance, ranging from a warning and reprimand with no period of ineligibility (Rule 7.7) to two years ineligibility and permanent loss of federal funding (Rule 7.20 and 7.37), the CCES sought further clarification from the Athlete of her use of supplement products. Specifically, the CCES requested the Athlete to outline any steps, precautions or advice that she may have sought prior to consuming her supplement products. The CCES further outlined that Ultimate Orange, one the supplements Ms. Boyle had mentioned consuming, had in the past, contained Ephedrine (according to the www.ultimateorange.com website). Furthermore the CCES asked the Athlete to explain why she had not declared all of the cold medication and supplements she had taken prior to her race on the Doping Control Form.

13. The Athlete responded on 12 July. She said she had answered the questions on the Doping Control Form based on how she had understood them. She said that she had checked the contents of the supplements she had used from what she believed to be updated sources. She had purchased her supplements from Canadian companies and believed the products she had used to be safe. She said that her running coach had concluded that she needed to replenish and increase her nutrient intake and that she used supplements in order to stay healthy. She stated that she did not intend to enhance her sport performance by taking anything illegal.

14. In an affidavit from Anne Brown, the General Manager, Ethics and Anti-Doping Services, for the CCES, it is noted that “[i]n summary, Ms. Boyle did not establish how Ephedrine got into her system and, as a result, has not demonstrated whether or not Ephedrine was consumed to enhance her sport performance.”

Notice of Apparent Violation

15. The “initial review” was concluded and, on 20 July 2006, the CCES issued a Notice to the Athlete pursuant to Rule 7.46 of the Doping Violations and Consequences Rules of the CADP.

16. The CCES asserted within its Notice that the Athlete had committed an anti-doping rule violation according to Rules 7.16 to 7.20 (Presence in the Sample) of the Doping Violations and Consequences Rules of the CADP. The CCES based its assertion on the Certificate of Analysis indicating the Athlete’s sample contained Ephedrine. The

CCES proposed that the sanction for this violation be two years ineligibility (in accordance with Rules 7.7 and 7.20) and permanent ineligibility for direct financial support from the Government of Canada (in accordance with Rule 7.37).

17. In determining whether the CCES ought to propose a sanction consistent with Rule 7.7, Ms. Brown, on behalf of CCES, stated in her affidavit that:

“the CCES considered all the documentation provided during the course of the “initial review” (namely both letters submitted by Ms. Boyle). Ms. Boyle did not identify the source of Ephedrine and as such has not established that the use of Ephedrine was not intended to enhance sport performance. Ms. Boyle identified contamination as a potential explanation for her urine sample containing Ephedrine. Even if the CCES were to accept that the adverse analytical finding for Ephedrine may have been the result of inadvertent doping (which has not been established by Ms. Boyle), it does not appear that she exercised due care in her decision to use supplement products. Therefore, notwithstanding Ephedrine is classified as a specified substance to which Rule 7.7 applies, in the absence of any information suggesting that Ms. Boyle’s use of Ephedrine was not intended to enhance her sport performance, the CCES is required to propose a sanction pursuant to Rule 7.20.

18. The Notice from the CCES also advised the Athlete of her entitlement to request an analysis of her “B” sample and informed her that unless she waived her right to do so, a hearing would be convened to determine whether the anti-doping rule violation asserted by the CCES had, in fact, occurred and, if so, what the appropriate sanction should be.

The Hearing

19. Following receipt of the Notice from the CCES, the Athlete neither requested that her “B” sample be tested nor waived her right to a hearing. Consequently the hearing process provided for by the CADP and the *Canadian Sport Dispute Resolution Code* was initiated. As a member of the panel of arbitrators for the Sports Dispute Resolution Centre of Canada, I was selected and appointed to act as arbitrator for the hearing.

20. Pre-hearing conference calls took place on 14 and 21 August 2006. It was determined in these calls that the parties would be afforded opportunities to place before me additional evidence beyond the record compiled by the CCES and that the parties could also make written and oral submissions. In that regard telephone conference hearings took place on 23 and 28 August. Following the last telephone conference hearing, there were further written exchanges regarding some decisions in other matters that were thought to be of assistance to the determination of this matter.

Anti-Doping Rule Violation Established

21. The Athlete confirmed that she accepted the results of the analysis and, thus, that it had been established that she had committed an anti-doping rule violation, namely, the presence in her urine sample of Ephedrine at a concentration of greater than 10 ug/mL.

22. The balance of the hearing process was, accordingly, directed at determining the appropriate sanction for the Athlete's anti-doping rule violation.

Breathe Deep Yogi Tea

23. During the course of the hearing process, the Athlete introduced the possibility that the cause of her anti-doping rule violation was her consumption of "Breathe Deep Yogi Tea". The Athlete indicated that because the manufacturers of "Ultimate Orange" were now actively affirming that their product was ephedra free, she considered it unlikely that the product could have been the cause of her positive test. She then sought the perspective of a friend who was not involved in sport. That friend pointed out that the Athlete drinks a lot of herbal teas.

24. According to the Athlete, she had been given some herbal teas by a friend as a gift. The Athlete said (in a written statement filed with me):

"I had not previously even considered this, as I group it [herbal teas] with any other beverage that is not in the supplement category. One in particular is called [Breathe Deep], made by the Yogi Tea company. I do not currently have any, and went yesterday to the health food store where I normally purchase this tea. They are out of stock, as I have been told that it is very popular. I had a conversation with staff there, and asked if it could have contained ephedrine, and that I believed I had read his store's product label to have not have *[sic]* any listed. He told me that ephedrine is illegal, and they might not make the Yogi tea that contains the ephedrine (I do not know if they still make it or not), there are still ephedrine products on the shelves of health food stores "flying under the radar" – he said he does not sell Yogi Tea with Ephedrine. This is what prompted me to look the product up on the internet, where I found the same tea from two different sources, one ingredients list containing ephedrine, and one (the latter source being the actual Yogi Tea Company website) listed as not containing ephedrine. I continued to another health food store around the corner to see if they had Breathe [Deep] tea, and they were also sold out. At the same time I looked around I noticed that they had bottles of ephedrine on their shelves, out in plain view. The friend that gave me the Breathe [Deep] Yogi Tea purchased it in the U.S., but cannot recall where. It was given to me with an assortment of other teas, all not in their box. I had no reason to believe that it was any different from the Breathe [Deep] Yogi tea that I had been drinking, purchased from the reputable health food store called Healthy's Nutrition."

25. The Athlete provided links to the websites of both the Yogi Tea Company and drugstore.com. As already noted, the latter site, based in the United States, lists ephedrine alkaloids and ephedra twig as ingredients of Breathe Deep Yogi Tea.

26. In response, the CCES asked the Athlete to provide information as to when and where the tea was purchased and to provide the original packaging of the tea. She was also asked when, in relation to her race on 21 May 2006, she had consumed the tea and in what quantities. She was told that if she provided this additional information, the CCES

would then seek expert advice on the plausibility of the explanation and evidence provided in relation to the adverse analytical finding.

27. The Athlete said that she did not have the packaging and had no specific recollection of when she had consumed the tea in relation to her race. She drinks tea and coffee regularly and has been drinking Yogi Teas, purchased at reputable health food stores in Canada for some time. She assumed that the Yogi Tea she was given by her friend was the same product. She realises that it was an error for her to make that assumption. She acknowledges being fully aware of an Athlete's personal responsibility to ensure that no Prohibited Substances enter her body and believes that she took appropriate and adequate precautions to prevent herself from doing so.

CCES Position

28. CCES, supported by Sport Canada, submits that the Athlete has not discharged the burden of establishing that her use of Ephedrine was not intended to enhance sport performance. At a minimum CCES says that the Athlete should be required to establish the cause of her positive test, the source of the Prohibited Substance and the circumstances of its use. The Athlete has done none of these things.

29. If all an athlete had to do to satisfy the onus on him or her to establish that the use of a Specified Substance was not intended to enhance sport performance was to say that there was no such intention in the absence of any other substantive evidence, there would never be a case in which the modified sanctions provided in Rule 7.7 did not apply.

30. The CCES, while appreciating that the Athlete had not had the benefit of legal advice or representation, notes that she did not provide any corroborating evidence of the circumstances under which she acquired and used the Breathe Deep Yogi Tea that she belatedly asserted to be the cause of her positive test.

31. Because the Athlete had not provided further information requested by the CCES regarding the Breathe Deep Yogi Tea, the CCES did not obtain expert advice on the plausibility or otherwise of the Athlete's explanation.

32. In short, the CCES argued that in the absence of credible evidence upon which I could conclude that there was no intention to enhance sport performance, the minimum sanction for use of a Prohibited Substance – a period of two years ineligibility and permanent ineligibility for direct financial support from the Government of Canada – should be imposed.

Athlete's Position

33. The Athlete states that she did not intend at all to enhance her sport performance. She claims that everything she ingested was to supplement her diet and stay healthy. She feels she did everything she could to prevent taking something illegal.

34. In the face of the requests for CCES for more information and for corroboration, she said that her resources and circumstances precluded her from doing more and asked the tribunal to accept her sincerity and that she had done the best that she could.

Discussion

35. The Athlete was not legally advised. While she clearly understood the process and the nature of the case against her, there was a naïveté that permeated the presentation of her case. Her contention to the contrary notwithstanding, she could have done a lot more to promote her cause. Things she might reasonably have done (or explained properly why she could not do) would have included identifying the friend who provided the Breathe Deep Yogi Tea, providing a statement from that friend, providing a statement from the friend who suggested tea consumption as a possible source of the positive test, and at least attempting to answer CCES's questions about the amount of tea consumed and when it was consumed relative to the event on 21 May.

36. I do not agree with the submission made on behalf of CCES that, as a general proposition, an Athlete should be required to establish the cause of her positive test, the source of the Prohibited Substance and the circumstances of its use. While Rule 7.7 places the onus on the athlete to establish that the use of a Specified Substance was not intended to enhance sport performance, the means by which the athlete does so is not prescribed. The standard of proof is a balance of probability (rule 7.55). This is in contrast to the provisions for elimination or reduction of the period of individual ineligibility based on exceptional circumstances. There, the Athlete must establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced or eliminated (Rules 7.38 and 7.39).

37. CCES referred me to a decision of the FIS Doping Panel in the matter of *Săsa Faric* (28 April 2004). In that case the athlete has tested positive for cannabinoids above the permitted threshold. The athlete's explanation was that she had spent some time in a non-air conditioned bar during a New Year's Eve celebration where cannabis was used. Thereafter, on the date of competition (18 January 2004), the athlete and two friends shared a gondola with closed windows in which two other individuals smoked cannabis. These two friends were not identified and did not provide evidence at the hearing corroborating the athlete's account, although two other witnesses provided statements to confirm the athlete's explanation. Other features of the athlete's account of the gondola ride were contradicted by evidence from the gondola operator. An expert opinion obtained by the FIS concluded that it was very unlikely that the passive inhalation of cannabis asserted by the athlete would have caused the positive result.

38. The FIS Doping Panel made the following statement, which reflects my own view on the approach to be taken in Specified Substance cases:

The listing of Cannabinoids as a Specified Substance allows this panel to take into account factors such as the nature of the sport or discipline, the context of the case and any other factors that may be relevant in arriving at a fair and just sanction

when it is established that the use of the substances is not performance enhancing. Each case must be decided on its own facts and merits.

39. In the result, the panel in the *Sāsa Faric* case did not find the athlete's explanation that she involuntarily inhaled the cannabis smoke of others while in a gondola to be credible. Notwithstanding this, the panel expressed itself to be satisfied that athlete's use of cannabis was not intended to enhance sport performance. A one year sanction was imposed.

40. In the matter of *Kolyshkin Vadym* (25 July 2005), a Judicial Panel of the International Rugby Board did not accept a rugby player's contention that an over-the-counter pain killer he purchased in a pharmacy in Prague was the cause of a positive test for cannabinoids a week later. The panel reasoned that whatever the source of the positive test, it was unlikely that the athlete had intended to enhance sport performance by his consumption of cannabinoids. The player was suspended for six months.

41. In both the *Faric* and the *Vadym* matters, the panels did not accept the athlete's account of how the Specified Substance had been ingested. Nevertheless, both panels were still able to conclude that there had been no intention to enhance sport performance.

42. I find myself in a similar position. Perhaps the culprit was Breathe Deep Yogi Tea. Perhaps it was not. There is no doubt that the Athlete failed to exercise due care and attention in her choice and use of supplements and other substances. If, as she suggests was the case, Yogi Tea was the culprit, it was foolish and careless of her to use a selection of teas, devoid of their full packaging, brought by a friend from the United States.

43. Despite the Athlete's lack of care, I am satisfied in all of the circumstances, including the Athlete's response to questions asked of her during the hearing, that her actions were not intended to enhance sport performance.

44. In determining the appropriate sanction, I am of the view that the Athlete's lack of care and attention should be reflected in the penalty imposed. Although she claims that she carefully checked the supplements she used and purchased them from reputable sources, the Yogi Tea theory is suggestive of conduct that fell well short of her personal duty to ensure that no Prohibited Substance entered her body.

45. I have concluded that the circumstances warrant imposing the high end of the scale of sanctions for use of Specified Substances. The Athlete will therefore be Ineligible³ for a period of one year from 3 September 2006 (being the date upon which I announced my decision (without reasons therefor) and concluding on (and including) 3 September 2007.

³ Rule 7.13 No *Person* who has been declared *Ineligible* may, during the period of *Ineligibility*, participate in any capacity in a *Competition* or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by any *Signatory* or *Signatory's* member organization.

46. If the Athlete wishes me to take into account any period of Provisional Suspension (it being my understanding that no provisional suspension was imposed), a written request to that effect may be made to me (through the SDRCC) within 14 days of the date of release of these reasons.

47. If any party wishes me to consider the exercise of my discretion to award costs (Rule 7.69) it should make a written request to that effect may be made to me (through the SDRCC) within 14 days of the date of release of these reasons. Any party wishing to respond will then have a further 7 days to do so.

48. The Athlete's attention is drawn to the appeal rules set out in Section 8 of the CADP.

8 September 2006.

A handwritten signature in black ink that reads "Graeme Mew". The signature is stylized, with a large, looped 'G' and a distinct 'Mew'.

Graeme Mew
Arbitrator