SPORT DISPUTE RESOLUTION CENTRE OF CANADA

IN THE MATTER OF THE CANADIAN ANTI-DOPING PROGRAM

AND IN THE MATTER OF AN ALLEGED ANTI-DOPING RULE VIOLATION BY JEFFREY ADAMS ASSERTED BY THE CANADIAN CENTRE FOR ETHICS IN SPORT

No: SDRCC DT-06-0039
(Doping Tribunal)
Ordinary Division

CANADIAN CENTRE FOR ETHICS IN SPORT

ATHLETICS CANADA

GOVERNMENT OF CANADA

- and -

JEFFREY ADAMS
Athlete

- and -

WORLD ANTI-DOPING AGENCY

INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS
Observers

Before:

Richard H. McLaren (Arbitrator)

Appearances and Attendances at Hearings on 17 & 18 August 2006:

Richard H. McLaren (Arbitrator)
Benoit Girardin (SDRCC)
Jeffrey Adams (Athlete)
Timothy Danson (Legal Representative for the Athlete)
Robert Morrow (Legal Representative for the CCES)
Anne Brown & Karine Henri (CCES)
Paul Kane & Heather Box (Legal Representatives for Athletics Canada)
Joanne Mortimore & Scott Ogilvie (Athletics Canada)
Johanne Imbeau (Legal Representative for Sport Canada)
Mary Warren (Sport Canada)

Witnesses:

Anne Brown (CCES)

Appearances and Attendances at Continued Hearings on 7 & 8 September 2006:

Richard H. McLaren (Arbitrator)
Benoit Girardin (SDRCC)
Jeffrey Adams (Athlete)
Timothy Danson & Steve Reich (7th only) (Legal Representatives for the Athlete)
Robert Morrow (Legal Representative for the CCES)
Joseph de Pencier & Anne Brown (CCES)
Paul Kane (Legal Representative for Athletics Canada)
Jacqueline Dais-Visca & Anne Burke (7th only) (Legal Representatives for the Attorney General of Canada and Sport Canada)
Attorney General of Ontario notified of the *Notice of Constitutional Question* but no appearances.

Witnesses:

Lane MacAdam (Witness for the Attorney General of Canada)
Jeffrey Adams (Athlete)
Harpreet Karir (Witness for the Athlete)
Clint McLean (Witness for the Athlete) by telephone conference

Appearances and Attendances at Continued Hearings on 11 & 12 October 2006:

Richard H. McLaren (Arbitrator)
Benoit Girardin (SDRCC)
Jeffrey Adams (Athlete)
Timothy Danson & Steve Reich (Legal Representatives for the Athlete)
Robert Morrow (Legal Representative for the CCES)
Joseph de Pencier (CCES)
Paul Kane & Heather Box (as to certain witnesses) (Legal Representative for Athletics Canada)
Heather Cooper (Athletics Canada) by telephone conference
Jacqueline Dais-Visca (11th only) (Legal Representative for the Attorney General of Canada and Sport Canada)

Witnesses:

Athlete "A" (Witness for the Athlete) by telephone conference
Christian Bagg (Witness for the Athlete)
Joseph de Pencier (CCES)
Nathalie Lapierre (Expert Witness for the CCES)

Dr. Ayotte (Expert Witness for the CCES)
Dr. Kadar (Expert Witness for the Athlete) listening on telephone to cross-examination of Dr. Ayotte (Expert Witness for the CCES)

Appearances and Attendances at Continued Hearings on 19, 21 & 22 December 2006:

Richard H. McLaren (Arbitrator)
Benoit Girardin (19th only) (SDRCC) by telephone conference
Jeffrey Adams (Athlete)
Timothy Danson (Legal Representative for the Athlete)
Robert Morrow (Legal Representative for the CCES)
Joseph de Pencier (CCES)
Paul Kane (21st & 22nd only) (Legal Representative Athletics Canada)
Heather Copper (19th only) (Athletics Canada)
Joanne Mortimore (19th only) (Athletics Canada)
Jacqueline Dais-Visca & Andrea Bourke (21st only) (Legal Representatives for the Attorney General of Canada and Sport Canada)

Witnesses – 19 December 2006:

Dr. Ayotte (Expert Witness for the CCES)
Dr. Kadar (Expert Witness for the Athlete)
Dr. Sellers (Expert Witness for the Athlete)

Oral Submissions – 21 & 22 December 2006:

Jacqueline Dais-Visca (21st only) (Legal Representative for Sport Canada)
Robert Morrow (Legal Representative for the CCES)
Timothy Danson (Legal Representative for the Athlete)
Paul Kane (Legal Representative Athletics Canada)

Hearings in relation to this matter were held in Toronto, Ontario on 17 & 18 August; 7 & 8 of September; 11 & 12 October; and 19, 21 & 22 December 2006. Written argument filed by Athletics Canada 28 January 2007; CCES February 1, 2007; the Athlete 19 March 2007; the Attorney General of Canada and Sport Canada 2 April 2007 and, the reply submissions to those of the Athlete by the CCES and Athletics Canada were received on the same date; the final rebuttal of the Athlete was filed on 16 April 2007 thereby completing the written submissions of the parties.

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AWARD

The Parties:

1. The Canadian Centre for Ethics in Sport (the "CCES") is an independent, not-for-profit organization incorporated under Part II of the *Canada Corporations Act,* R.S.C. 1970, c. C-32.[1] The CCES promotes ethical conduct in all aspects of sport in Canada. As part of that work it maintains and carries out the Canadian Anti-Doping Program (the "CADP") by providing anti-doping services to national sport organizations and their members.

2. Jeffrey Adams (the "Athlete") is an international level disabled track and field athlete and a member of that sport's governing body, Athletics Canada. In 1992 and 1993, he was the Province of Ontario Disabled Athlete of the Year. In 2000, he was a Canadian Athlete of the Year finalist. In 2001, he was the Province of Ontario, Athlete of the Year. In 2004, he was made a member of the Order of Ontario. He is also a member of the Terry Fox Hall of Fame and the Brampton Sports Hall of Fame. To become a member of Athletics Canada and to receive federal government funding through Sport Canada he has agreed to be subject to doping control.

3. Athletics Canada is the national sport organization ("NSO") governing the sports of track and field, cross-country running, road racing and race walking in Canada. It is a member of the International Association of Athletics Federations (the "IAAF"). Athletics Canada has a contractual relationship with both the Athlete and Sport Canada that requires the Athlete to submit to doping control procedures.

4. Sport Canada is a branch of the International and Intergovernmental Affairs and Sport Sector within the government of Canada's Department of Canadian Heritage. It provides funding to Canadian NSOs, including Athletics Canada. Through the Sport Canada funded Athlete Assistance Program (the "AAP"), athletes selected by their respective NSOs are granted financial assistance to help promote sport in Canada. Sport Canada has provided funding to the CCES in the amount of $ 3,825,000 for fiscal 2003-2004.

5. The IAAF is the international federation governing the sports of track and field, cross-country running, road racing and race walking throughout the world. Athletics Canada is a member of the IAAF. The IAAF was entitled to attend the hearings but did not.

6. The World Anti-Doping Agency ("WADA") is the international organization that promotes, co-ordinates and monitors a worldwide effort against doping in sport. WADA was entitled to attend the hearings but did not.

[1] The citations to legislation and other authorities found in this award are listed in Appendices I through V.

Creating the Doping Tribunal:

7. On 28 May 2006, in accordance with the Doping Control Rules of the Canadian Anti-Doping Program (the "CADP Rules" or the "CADP Rule"), the Athlete submitted to an in-competition doping control test administered by the CCES.

8. On 14 June 2006, the CCES was notified by a WADA accredited laboratory that the presence of cocaine metabolites caused an adverse analytical finding (the "AAF") in the Athlete's "A" sample. Cocaine is a prohibited substance in-competition as provided for by the 2006 WADA List of Prohibited Substances. This list is incorporated by reference by CADP Rule 3.

9. The CCES reviewed the AAF in accordance with the CADP Rules. Following the initial review and pursuant to CADP Rule 7.46, the Athlete was notified of the AAF on 16 June 2006 by a letter notice to Athletics Canada who in turn advised him.

10. On 16 June 2006, the Athlete spoke to the CCES contact person, Karine Henrie, by telephone and advised her of his explanation for the AAF.

11. On 30 June 2006, counsel for the Athlete provided a written response to the AAF. That response included an allegation that errors were made in the doping control procedure by the CCES and that the Athlete had used a contaminated catheter to provide the urine sample.

12. On 6 July 2006, according to CADP Rule 7.46, counsel for the Athlete was notified of the CCES determination that pursuant to CADP Rules 7.16 to 7.20 an anti-doping rule violation had occurred. The CCES proposed a sanction for this violation of two years ineligibility from competition, in accordance with CADP Rule 7.20, and permanent ineligibility for direct financial support from the Canadian government, in accordance with CADP Rule 7.37.

13. On 7 July 2006, counsel for the Athlete filed a formal notice to appeal and requested that the Athlete's "B" sample be tested. In the Athlete's circumstances, CADP Rule 7.53 stipulates that only a doping tribunal may determine the occurrence of an anti-doping rule violation and sanction an athlete.

14. In accordance with Article 6.9(b) of the Canadian Sport Dispute Resolution Code (the "Canadian Sport Code") established by the Sport Dispute Resolution Centre of Canada (the "SDRCC"), a doping tribunal was established to hear the Athlete's appeal. Richard H. McLaren was appointed by agreement of the parties as the arbitrator (the "Arbitrator"). An initial hearing was held on 17 and 18 August 2006 in Toronto, Ontario. Subsequent hearings dates in Toronto, Ontario were 7 and 8 September 2006; 11 and 12 October 2006; and 19, 21 and 22 December 2006. Written argument followed and was completed on 16 April 2007.

Record of Proceedings:

15. On 25 July 2006, a pre-hearing conference call was conducted by the Arbitrator to determine a procedural order for submissions and to select dates for an oral hearing. Present on the call:

Benoit Girardin (SDRCC)
Richard H. McLaren (Arbitrator)
Timothy Danson (Legal Representative for the Athlete)
Robert Morrow (Legal Representative for the CCES)
Karine Henrie (CCES)
Paul Kane and Heather Box (Legal Representative for Athletics Canada)
Johanne Imbeau (Legal Representative for Sport Canada)
Mary Warren (Sport Canada)
Joanne Mortimore and Scott Ogilvie (Athletics Canada)
Jennifer Cottin (SDRCC assistant)

At the time of this call, counsel for the Athlete informed all concerned of his intention to raise both a constitutional issue in respect of the *Charter of Rights and Freedoms* (the "*Charter*") and the issue of discrimination under the human rights legislation of Ontario and Canada.

16. On 1 August 2006, the CCES submitted the affidavit of Anne Brown, General Manager, Ethics and Anti-Doping Services for the CCES. The following exhibits were attached to the affidavit of Anne Brown:
    a. Resume of Anne Brown
    b. Canadian Policy Against Doping in Sport
    c. Doping Control Officer Agreement between the CCES and Joan Decarie signed 20 November 2005
    d. Athlete Selection Order pertaining to the Athlete dated 28 May 2006
    e. Doping Control Form of the Athlete dated 28 May 2006
    f. Chain of Custody Form
    g. Sample Receipt Acknowledgement dated 28 May 2006
    h. Doping Control Officer Report of Joan Decarie dated 28 May 2006
    i. Certificate of Analysis Laboratoire INRS-Institut Armand-Frappier dated 14 June 2006
    j. CCES Initial Review Letter dated 16 June 2006
    k. Note to File of Karine Henrie, following her telephone conversation with the Athlete dated 16 June 2006
    l. Email from Timothy Danson to Karine Henrie dated 22 June 2006
    m. Email from Karine Henrie to Timothy Danson dated 27 June 2006
    n. Email from Timothy Danson to Karine Henrie dated 27 June 2006
    o. Supplementary Report Form of Joan Decarie dated 6 July 2006
    p. Letter from Anne Brown to Timothy Danson dated 6 July 2006

q. Laboratory Documentation Package Urine Sample 1747045A dated 27 June 2006
r. Email from Timothy Danson to Karine Henrie dated 7 July 2006
s. Email from Karine Henrie to Timothy Danson dated 12 July 2006
t. Certificate of Analysis Laboratoire INRS-Institut Armand-Frappier dated 19 July 2006
u. Email from Karine Henrie to Timothy Danson dated 20 July 2006
v. Email from Karine Henrie to Timothy Danson dated 21 July 2006
w. Documentation Package Urine Sample 1747045B dated 20 July 2006

17. On 4 August 2006, an additional pre-hearing conference call was conducted by the Arbitrator to discuss the hearing procedures. Everyone listed in Paragraph 15 above was present on the call, except for Johanne Imbeau, Joanne Mortimore and Jennifer Cottin. In addition to those persons listed, Anne Brown of the CCES joined the call.

18. On 10 August 2006, counsel for the Athlete filed a factum. In addition, by letter, the counsel for the Athlete raised issues related to the speed of the proceedings. At the request of the parties, an expedited process had been established so that a decision could be made by 26 August 2006. The condensed process was intended to allow the Athlete, if exonerated, to compete at an important upcoming world event in The Netherlands.

19. On 14 August 2006, to address the procedural issues raised by counsel for the Athlete, the Arbitrator convened a conference call. In addition to the other parties in this matter, Alain Préfontaine also took part.

20. On 15 August 2006, the Arbitrator ruled that the proceedings were to take place as prescribed in the minutes of the 25 July 2006 conference call, as amended by the minutes of the 4 August 2006 call.

21. On 16 August 2006, Athletics Canada filed its factum in the proceeding and Sport Canada filed its representations (the "Representations").

22. On 17 August 2006, the CCES read into the record the affidavit of Anne Brown and made her available for cross-examination.

23. On 17 August 2006, counsel for the Athlete presented oral arguments in response to the “factum” of Athletics Canada and the “Representations” of Sport Canada. Those arguments included a constitutional challenge. In response to the constitutional challenge, counsel to Sport Canada, submitted to the Doping Tribunal, by faxed letter, that the failure of the Athlete to serve a *Notice of Constitutional Question* with the Attorney Generals of Canada and Ontario, as required by s. 109 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43, deprived the Arbitrator of jurisdiction to grant a constitutional remedy.

24. On 18 August 2006, to allow time to give effect to the *Notice of Constitutional Question* to the Attorney Generals of Canada and Ontario, the Athlete filed a signed undertaking to, "*voluntarily withdraw from any and all competition until the adjudication of the herein matter has resulted in a final decision of the arbitrator.*" The hearing on the substantive issues was adjourned until 7 September 2006. A target date for completing the proceedings of no later than 9 September 2006 was set.

25. On 19 August 2006, a letter was received from the office of the Attorney General of Canada responding to the *Notice of Constitutional Question*. That letter stated that the Attorney General of Canada did not intend to intervene at the current stage of the proceedings.

26. On 22 August 2006, the office of the Attorney General of Ontario replied to the *Notice of Constitutional Question*. It stated that the Attorney General of Ontario did not intend to intervene at the current stage of the proceedings.

27. On 24 August 2006, the office of the Attorney General of Canada made a further reply to the *Notice of Constitutional Question* advising that it was reversing its position and intended to respond to the constitutional issues before the Arbitrator and to be present at the continuation of the proceedings in September 2006.

28. On 1 September 2006, counsel for the Athlete filed with the Arbitrator the affidavits of the Athlete, as well as the Athlete's witnesses, Harpreet Karir ("Karir") and Clint McLean ("McLean").

29. On 1 September 2006, on the instructions of Jacqueline Dais-Visca counsel for the Attorney General of Canada and Sport Canada, Lane MacAdam, Executive Director of the Sport Excellence Division of the Sport Canada branch of the federal government's Department of Canadian Heritage, filed an affidavit in response to the *Notice of Constitutional Question*. Lane MacAdam is the person at Sport Canada responsible for monitoring anti-doping efforts in Canadian athletics. That affidavit is attached to this award as Attachment "A".

30. On 5 September 2006, a conference call was held by the Arbitrator. The Arbitrator ordered the remainder of the proceedings to be held with a court reporter. It was further ordered that there was to be production by noon on 6 September 2006 of any scientific papers, studies or literature supporting the supplementary report of Dr. Ayotte's, which was filed on 5 September 2006.

31. Present on the 5 September 2006 conference call were: Jacqueline Dais-Visca and Andrea Bourke for the government of Canada and Sport Canada; Tom Barber and Karine Henrie for the CCES; Timothy Danson for the Athlete; Paul Kane for Athletics Canada; and Benoit Girardin and Julie Audette for the SDRCC.

32. On 7 September 2006, the office of the Attorney General of Canada read into the record the affidavit of Lane MacAdam, of Sport Canada, and made him available for cross-examination by the Athlete, Athletics Canada and the CCES.

33. On 8 September 2006, the affidavit of the Athlete was read into the record along with the affidavits of two of his witnesses, Karir and McLean. Each of them was made available for cross-examination by the CCES and Athletics Canada.

34. On 22 September 2006, the Arbitrator received a written request from counsel for the Athlete seeking permission to call an additional expert witness, Dr. Sellers. The request was subsequently granted.

35. On 26 September 2006, the Arbitrator convened a telephone conference call of counsel to all parties to discuss the proceedings and the need for further hearing days. A follow up call was held on 28 September 2006. As a result, there was an agreement amongst the parties to hold additional hearings on 11 and 12 October and 21 and 22 December 2006.

36. On 6 October 2006, counsel for the Athlete filed the affidavits of Athlete "A"[2] and Christian Bagg, both paraplegic athletes who must self-catheterize. Counsel for the CCES filed the affidavit of Nathalie Lapierre, a registered nurse qualified as an expert witness.

37. On 11 October 2006, the report of Dr. Sellers was filed. The affidavits of Athlete "A" and Christian Bagg, for the Athlete, and Joseph de Pencier and Nathalie Lapierre, for the CCES, were read into the record and each was made available for cross-examination.

38. On 12 October 2006, the cross-examination of Dr. Ayotte was commenced. Based on the expected length of her testimony, the Arbitrator scheduled 19 December 2006 as an additional date of hearing.

39. On 19 December 2006, because of the previous suggestion of the Arbitrator, an expert witness conference was undertaken with all of the expert witnesses participating. Testimony, including cross-examination of Dr. Ayotte, expert witness for the CCES, was completed on that date, as was the testimony of the Athlete's expert witnesses, Dr. Kadar and Dr. Sellers.

40. On 21 and 22 December 2006, counsel for the parties made oral submissions. It was agreed that written submissions would be made by counsel to all parties. Deadlines for written submissions were established, with the final reply to be made by the Athlete's counsel on 16 April 2007, at which time the hearing process would be complete.

[2] For reasons consented to by all counsel and the Arbitrator, the athlete was permitted to testify without reference to his/her identity. The athlete's identity was disclosed to the Arbitrator.

41. On 22 December 2006 counsel agreed to waive the deadline for a decision by the Arbitrator, as provided for in CADP Rule 7.60 (b) and (c). The Arbitrator was instructed to take time, as reasonably required following the completion of written argument, to issue his decision and reasons.

Facts

42. The Athlete is a member of Athletics Canada. Through that organization he receives federal government funding under the AAP of Sport Canada.

43. At the age of 9, the Athlete was diagnosed with *transverse myelitis*, which has left him a paraplegic. Since becoming a paraplegic, he has had to self-catheterize. He has been instructed to use a sterile technique to self-catheterize; however, he asserts the sterile technique to be prohibitively expensive and inconvenient.

44. The Athlete testified that he has always used his own catheter when providing urine samples for doping control tests, including the sample under scrutiny in this matter. Until the AAF, the Athlete has never raised any issues concerning the use of his own catheter when participating in doping control tests.

Vatikan Bar Incident

45. On 21 May 2006, the Athlete and Karir visited the Vatikan bar at Queen St. West in Toronto. Around eleven o'clock in the evening, the Athlete alleges that an unknown woman inserted cocaine into his mouth with her fingers while seated beside him on a sofa in the bar. He claims this was done against his consent.

46. The witness Karir testifies that following the alleged assault she verbally confronted the woman, whom she believed was on drugs. Karir states she observed that the woman was carrying a plastic pouch, which the woman confirmed to her contained cocaine.

47. The Athlete testifies that he washed out his mouth immediately after the woman put her fingers into it and that his mouth and throat went numb. McLean, another friend of the Athlete's, apparently observed the commotion from across the room and approached the Athlete to offer assistance. Neither McLean nor Karir witnessed the unknown woman putting her fingers into the Athlete's mouth.

48. The Athlete returned home from the Vatikan bar around midnight. Within thirty minutes of arriving at home, it was necessary for him to urinate. He did so using a clean, new catheter. The Athlete then put the freshly-used catheter (the "Vatikan Catheter") into the emergency pocket of his wheelchair, for additional use, if necessary. The Athlete next employed the Vatikan Catheter to provide a sample of urine on 28 May 2006 following the ING Ottawa Marathon Wheelchair Competition (the "Competition").

Doping Control Test

49. Following the incident at the Vatikan bar, the Athlete became concerned about the possibility of testing positive for cocaine. Before leaving Toronto to attend the Competition, he personally researched the clearance time of cocaine. In addition to reviewing information available on the Internet, the Athlete spoke to the head of a U.S. laboratory with expertise in the field about the possibility of testing positive on 28 May 2006 at the Competition.

50. Based on his research of the clearance time of cocaine, including his discussion with the head of a U.S. laboratory, and a review of the 2006 Prohibited List of Substances, the Monitoring List and the WADA Code, the Athlete decided that it would be safe for him to participate in the Competition.

51. On 23 May 2006, the Athlete drove to Ottawa from Toronto for the Competition. He brought his wheelchair, which had the Vatikan Catheter in the emergency pocket. He had another catheter with him in the car and several in his luggage for a total of between seven and nine catheters.

52. On 28 May 2006, following his participation in the Competition, the Athlete was selected to provide a sample of urine as part of the doping control program operated pursuant to the CADP Rules by the CCES. The Athlete arrived at the doping control station without any catheters other than the Vatikan Catheter. He states that he was surprised to realize that he had brought only one catheter.

53. The chaperone watched the Athlete take the unsealed and unwrapped Vatikan Catheter from the emergency pocket of the wheelchair and use it to provide a sample of urine.

54. In no respect did the Doping Control Officer (the "DCO"), the Athlete or the Athlete's chaperone discuss the use of a catheter by the Athlete. The DCO and the Athlete jointly completed the Doping Control Form (the "DCF"). No comments were recorded in the athlete remarks section of the DCF. The DCO did not describe the use of a catheter by the Athlete or any modifications made to the doping control process as a result of the disability of the Athlete.

55. The DCO filed a Supplementary Report Form dated 6 July 2006, which states:

> *I did not ask Mr. Alpin* [the chaperone] *if there were any modifications necessary for Mr. Adams' passing of the sample (catheter, etc.) and the chaperone did not advise me of same. Mr. Adams and I then went forward with the doping control procedure*.

56. By the conclusion of these proceedings, there was no dispute amongst the parties about compliance with CADP Rules in respect of sample security; sample

transportation; and the Lab analytical sample findings. The only disagreement is whether the catheter used by the Athlete was contaminated, and which party is responsible for any contamination.

57. The Athlete alleges that he used the Vatikan Catheter to provide a sample of urine because it was the only catheter he had brought to the Competition. The Athlete acknowledges that he was nearly certain he would medal at the Competition and be compelled to provide a sample of urine for a doping control test. The Athlete did not request the provision of a sterile catheter or raise concerns regarding the use of the Vatikan Catheter.

The Athlete's Use of a Catheter

58. The Athlete must self-catheterize on every occasion of passing urine. In his affidavit he states that:

> *The catheter is an indispensable piece of equipment for me, and I do not have a choice in this matter. I have no option but to use a catheter. This is the unpleasant reality of my physical disability. The indispensable nature of the catheter for me is solely and exclusively because of my disability.*

59. The Athlete asserts that the CCES has never inquired about the nature of his disability or his need for a catheter. He contends that the CCES was aware that he had to self-catheterize because of the multiple drug tests he has undergone.

60. He further alleges that he has not been informed by the CCES or any DCO about his responsibilities with respect to self-catheterization. The Athlete had always used his own catheter to pass urine for doping control tests up to and including the sample he provided on 28 May 2006 (the "Sample"). He further testifies that the CCES had never inspected a catheter prior to his use of it.

61. The particular brand of catheter used by the Athlete was introduced into evidence. The packaging states that the catheter is "for single use only" and also states that it is sterile unless opened.

62. The Athlete's practice is to reuse single-use catheters. He does so a number of times before discarding them. The Athlete engages in reuse of catheters as a matter of practicality in both cost and the number of catheters he carries with him, particularly while traveling. Other athletes testified that it is common practice to reuse single-use catheters for the same reasons suggested by the Athlete.

63. Although the practice of reusing catheters is not supported by the manufacturers of catheters, Nathalie Lapierre, an expert witness called by the CCES, advises that it might be acceptable to reuse a single-use catheter if it is properly cleaned. She

suggested an acceptable best practice is to wash the catheter with soap and water for a few seconds, shake off the excess water, dry the outside and then to store the catheter in a clean, dry place. She further testified that the practice of reuse is not supported by the manufacturers because of the risks of urinary tract or bladder infection.

64. While agreeing it to be prudent, the Athlete does not clean his single-use catheters before reusing them. It is his practice not to wash or dry his single-use catheters. He stated that his approach to using single-use catheters was haphazard.

Scientific Experts Witness Conference

65. Dr. Ayotte is a professor as well as the director of the WADA accredited laboratory at Montréal (the "Lab"). She holds a PhD in Organic Chemistry from the Université de Montréal. Through her work she has gained considerable knowledge in excretion, metabolism, and detection periods of drugs of abuse and other substances prohibited in sports.

66. The Lab produced the Documentation Package Urine 1747045A on 27 June 2006 and 1747045B on 20 July 2006. These are exhibits in this proceeding and they triggered this case by the CCES. In addition to that documentation she has produced two Letter Opinion Reports dated 1 August and 5 September 2006, both being responses to questions put to her through counsel.

67. Dr. Kadar filed Expert Opinion Reports made exhibits in these proceedings dated 17 August and 8 October 2006. Dr. Kadar is a professor emeritus at the Faculty of Medicine of The University of Toronto. He holds a PhD in pharmacology from the University of Toronto and is a specialist in toxicology.

68. Dr. Sellers filed an Expert Opinion Report made an exhibit in these proceedings dated 10 October 2006. Dr. Sellers is a professor of pharmacology, medicine and psychiatry at the Faculty of Medicine of the University of Toronto, as well as President and CEO of Ventana Clinical Research Corporation. He holds a PhD in pharmacology from the Harvard Medical School. He is a licensed medical doctor and a Fellow of the Royal College of Physicians and Surgeons of Canada.

69. At the outset of these proceedings, there was some dispute by Dr. Kadar about the accuracy and credibility of the collection and testing procedure applied to the Athlete's Sample. However, by the completion of all expert testimony there was no dispute about the procedures of the Lab and there was a consensus amongst the experts that that Sample contained the cocaine metabolite benzoylecgonine ("BE"); which is an AAF under the CADP Rules (see Glossary).

70. The Lab normally tests for the presence of cocaine or BE and not the quantity. Nevertheless, the Lab did a quantification calculation and this is what initially gave rise to concerns about the Lab's procedures. Based on an agreement that the

corrected concentration calculation in both the "A" and "B" urine samples was approximately 3ng/ml of BE, all of the experts found the Lab's analytical procedures to be acceptable.

71. There being no longer any dispute about the Lab's procedures, the testimony and examination of each expert proceeded without challenge to the identity, custody and security of the Sample or the Lab's analytical results. The difference of scientific opinion centered upon the question of whether the Vatikan Catheter was contaminated and could have produced the AAF found by the Lab.

72. The expert witness conference and the examinations of the experts established the following propositions:
    a. The use of a catheter contaminated with urine containing BE from a prior use could cause an AAF.
    b. After oral cocaine ingestion, about 8% is excreted as metabolites in the urine in the first hour. Approximately 40% of this excretion is the metabolite BE.
    c. The type of catheter used by the Athlete when full would contain 2.3 to 2.5 ml of urine.
    d. After use and drainage, the type of catheter used by the Athlete could retain some urine.
    e. The amount of residue of BE contaminated urine that was in the Vatikan Catheter cannot definitively be established and its determination requires the use of best judgment.
    f. Degradation of the contaminated urine could have occurred during the week the Vatikan Catheter was coiled up and stored.

Notice of Constitutional Question

73. The evidence of Lane MacAdam and Joseph de Pencier indicates that the CCES was created to operate independently of the government of Canada, in accordance with recommendations made in the *Dubin Report*.

74. Joseph de Pencier, as the Director of the CCES, reports to a Board of Directors that is independent of the government of Canada or Sport Canada and is established in accordance with the rules of the *Canada Corporations Act,* R.S.C. 1970, c. C-32. That Board of Directors manages the CCES and has authority over its employees. Sport Canada has no functions in respect of the management of the CCES or its employees. In addition, there is no government power to extinguish the corporate charter of the CCES other than those powers found in its incorporating statute and applicable to all corporations incorporated under the *Canada Corporations Act*.

75. The role of Sport Canada is a financial one. The CCES applies for annual contribution agreements in respect of funding from the Canadian government. The application used by the CCES to obtain funding contemplates allocations to

various categories of spending but Sport Canada does not direct how and when the money allocated to the CCES is spent. The power of Sport Canada is limited to enforcement of the contractual rights in the contribution agreements.

76. The anti-doping program administered by the CCES arises from collaboration between the sporting community, sports organizations and games organizers (e.g. the International Olympic Committee), at the national and international levels and various levels of government in Canada. The anti-doping program of the CCES is compliant with the WADA Code. The WADA Code is a consensus document created by international sports federations and their members to combat the use of prohibited substances by athletes and is intended to harmonize worldwide the doping rules used by international federations and their NSO members.

77. The *Charter* provides in s. 32 for the application of that legislation to the Parliament and government of Canada. What is at issue in this matter is whether the CCES is included within the concept of the government of Canada.

78. If the CCES is a private organization engaged in private activity then the *Charter* will not apply. The case law indicates that reference to government does not include just the Crown or its servants and agents. The matter to be determined here is whether the CCES is a public body subject to the *Charter*, although it is not a servant or agent of the Crown.

79. Regardless of whether the *Charter* applies, other provincial or federal human rights legislation may apply to this case.

Arguments

80. There were both oral submissions at the close of the hearings and written submissions filed by all counsel after the hearings. The Arbitrator has received full and exhaustive briefs with complete citation of authority. In the interest of brevity and in recognition of the fact that there are written submissions and a stenographic record of the oral arguments, it is unnecessary to summarize the parties' extensive oral and written submissions. The discussion of the various parties' arguments herein is in summary form there being the aforementioned other written records.

81. The appendices to this award list the cases and statutes cited by the parties in their written and oral material. Any cases or statutes cited by the parties and used in this award will have reference to only the name of the case or statute. The reader is requested to refer to the appendices for the proper citation. Where cases or statutes used by the Arbitrator are not listed by the parties' counsel and set out in the appendices, citation will accompany the name of that case or statute within the body of this decision.

The Athlete

82. It is submitted that the Athlete's constitutional rights guaranteed and protected under ss. 8 and 15 of the *Charter* were violated. Such a violation can not be justified under s. 1 of the *Charter*. The only remedy can be a rectification of the constitutional violation by finding that the Athlete is not guilty of a doping infraction.

83. In the alternative, the Lab finding in this case is invalid and must be expunged from the record and can not serve as evidence of a violation because:

    (i) the Athlete's rights under ss. 8 and 15 of the *Charter* were violated, and he is entitled to the exclusion of this evidence under s. 24 of the *Charter* or pursuant to the doctrine of fairness;

    (ii) fairness and natural justice require that the Athlete be free from discrimination under the *Human Rights Code* (Ontario) and that derogations from general *Charter* and natural justice principles be remedied with an exclusion of the Lab's findings; and

    (iii) there were: (a) clear departures from the CADP Rules, *per se* when viewed through the lens of natural justice, and by contradictions to the *Human Rights Code* (Ontario) and *Charter* principles; and, (b) the CCES has failed to prove that the departures were not a cause of the AAF.

84. It is submitted by the Athlete that without the Lab's result, the CCES has not met its burden under the CADP Rules. Therefore, there can be no anti-doping rule violation. It was the obligation of the CCES to ensure that a clean catheter was used by the Athlete because the CCES is required by Canadian law to accommodate athletes with disabilities. The obligation of the CCES to ensure the use of a clean catheter could be considered to arise because there is a constitutional requirement to read it into the definition of "Sample Collection Equipment" as prescribed by the CADP Rules.

85. In the further alternative, even with the Lab's result in evidence, the law of Ontario affords the Athlete, at a minimum, the defence of due diligence to the assertion of an anti-doping rule violation. The Athlete has met his burden in demonstrating due diligence in the circumstances, and further, in demonstrating that any failure of his to report or make inquires to the CCES or Athletics Canada about the reuse of a contaminated catheter could not have had any affect on the Lab's result. In view of the Athlete's due diligence, the CCES has not met its burden in proving an anti-doping rule violation.

86. In the further alternative, if the CCES has met its burden in proving an anti-doping rule violation, the law of Ontario must be read into CADP Rules 7.38 and

7.39 with the effect that the lack of legal fault (intent, willful blindness or recklessness) or negligence (unreasonable standard of care that causes the result) entitles an athlete to the elimination of his or her sanction. In this case, the Athlete has demonstrated no fault and an absence of negligence, as those terms are understood at law. He ought, therefore, to have his sanction eliminated.

87. In the final alternative, if the stringent standards of fault, negligence, significant fault and significant negligence apply despite the law of Ontario, the Athlete has met his burden under the CADP Rules 7.38 and 7.39. He ought, therefore, to have his sanction eliminated or reduced.

88. The legislative and other authorities relied upon by the Athlete are set out in Appendix I to this award.

The CCES

89. It was submitted that the Athlete's explanation is not consistent with the AAF and therefore an anti-doping rule violation has been proven. There was no departure from the CADP's Rules concerning the Athlete's catheter and even if there was it did not cause the AAF. Moreover, this is not a case of no fault or negligence or even no significant fault or negligence. Therefore, the anti-doping rule violation must result in a period of ineligibility. It is submitted by the CCES that a two-year period of ineligibility ought to be imposed.

90. In the alternative, if the Doping Tribunal accepts the Athlete's description of involuntary ingestion of cocaine, it must be sympathetic to the position of an athlete subject to a criminal assault. For a reduction of the period of ineligibility by up to one half, the standard "no <u>significant</u> fault or negligence" requires some substantial degree of care or caution to be exercised, short of the absolute degree necessary to establish a complete absence of fault or negligence. The Doping Tribunal must be satisfied, given that it received no evidence but the Athlete's about the actual assault, and given that he failed to take appropriate steps in response to the involuntary ingestion, that he has satisfied his burden of proof to establish the exercise of a substantial or <u>significant</u> degree of care or caution. In that case, the Athlete should be ineligible to participate in sporting competitions for at least one year. The CCES submits that the Athlete has not met the burden of proof that the CADP Rules require.

91. The legislative and other authorities relied upon by the CCES are set out in Appendix II to this award.

Athletics Canada

92. In regard to the evidence presented by the CCES and the Athlete, Athletics Canada accepts the Athlete's evidence as to the occurrence of an assault and that the AAF was caused by residue left in the Vatikan Catheter. Athletics Canada

made no submissions as to the scientific and medical evidence. They also made no submissions in regard to the *Charter* issues.

93. Athletics Canada submitted that the Athlete failed to meet his responsibility to provide an uncontaminated urine sample. The Athlete was responsible for the absence of a clean, uncontaminated catheter. He failed to demonstrate that positive discrimination or adverse effect discrimination occurred under ss. 1 and 6 of the *Human Rights Code* (Ontario). In the alternative, it was submitted that the Athlete failed to show under s. 11 of the *Human Rights Code* (Ontario) the existence of a factor that results in the exclusion or preference of disabled athletes or that if such factor exists, that the same is not reasonable and *bona fide*. Therefore, the Athlete bears some responsibility for the presence of cocaine metabolites in his urine sample. It was further submitted that the *Canadian Human Rights Act* is not applicable to the present case.

94. The legislative and other authorities relied upon by Athletics Canada can be found at Appendix III of this award.

Sport Canada (representing the government of Canada)

95. The sole issue addressed by Sport Canada is the legal one of discrimination leveled against the CCES. It is submitted that only the *Human Rights Code* (Ontario) applies to the CCES and not the *Charter* or the *Canadian Human Rights Act*.

96. Sport Canada submitted that the role of the federal government in this particular instance is purely contractual, and was entered into with a view to promoting physical activity. Accordingly, the government merely provides financial assistance to NSOs and to athletes through "contribution agreements."

97. Sport Canada further submitted that although they share a common objective with NSOs (that being the elimination of doping from sport), this does not equate to the regulation of the activities or the control of the private institutions involved.

98. Sport Canada submitted that CCES does not form part of the government, it is not subject to governmental control nor is it "merely a vehicle" through which the government is delivering a program. The submissions of Sport Canada were that the CCES is the agent of NSOs and NSOs are non-governmental organizations.

99. Sport Canada then asserted that the *Canadian Human Rights Act* does not apply as this matter is subject to labour relations. The Code governing the arbitration in this matter makes Ontario law applicable.

100. Finally, Sport Canada submitted that courts and tribunals should not deal with constitutional issues when the case can be disposed of on non-constitutional grounds. It was their position that this case would be more appropriately dealt

with under the *Human Rights Code* and accordingly there is no reason to turn to the *Charter*.

101. The legislative and other authorities relied upon by Sport Canada can be found at Appendix IV to this award.

Attorney General for Canada (regarding the *Notice of Constitutional Question* – representing Sport Canada)

102. Following the *Amended Notice of Constitutional Question* the amendment is not discussed in the record of proceedings at the beginning of the document the Attorney General of Canada (the "AG of Canada") took up intervener status in these proceedings. The issue addressed by the AG of Canada related to the status of the *Charter* and its applicability to the procedures of doping control administered by the CCES.

103. The Arbitrator needs to deal with the Athlete's *Charter* argument only if there is a finding that the CCES is a government actor and the Arbitrator is a "court of competent jurisdiction". If the evidence of the Athlete about how the cocaine metabolite BE came to be in his Sample is rejected and departures from the doping control rules did not cause an AAF; then the *Charter* issue might be considered as arising, but "judicial restraint" ought to preclude any such determination when the appropriate remedy is available under the *Human Rights Code* (Ontario). In essence, no resort to the *Charter* is required to determine the threshold evidentiary issues or to adequately and properly dispose of the case.

104. The legislative and other authorities relied upon by the AG for Canada can be found at Appendix V to this award.

DECISION

Anti-Doping Rule Violation

105. There is no dispute that the Athlete's Sample contained the cocaine metabolite BE. Furthermore, the Athlete has admitted ingesting cocaine through his description of the events at the Vatikan bar. Such admissions are contemplated by CADP Rule 7.56.

106. CADP Rule 3 incorporates by reference the 2006 WADA List of Prohibited Substances, which includes cocaine and BE. The presence of cocaine and BE in an athlete's bodily sample, in any amount, is evidence of an anti-doping rule violation (CADP Rules 7.16 and 7.18).

107. CADP Rule 7.17 makes it unnecessary for the CCES to prove intent, fault negligence or knowing use on the part of the Athlete in order to establish an anti-doping rule violation. The principle of strict liability is well established in doping

cases. (see e.g. O. Pobyedonodstev *v/* International Ice Hockey Federation; ATP *v/* D. Vlasov, ATP Anti-Doping Tribunal, 24 March 2005, aff'g CAS 2005/A/873, Dimitry Vlasov *v/* ATP, 23 Aug 2005) Furthermore, absolute liability fault requirements are common in Canada for provincial and federal regulatory offences**.** They are unconstitutional only in circumstances where they are punishable by imprisonment (see *Re: s. 94(2) Motor Vehicles Act,* [1985] 2 S.C.R. 486). The international community has also accepted the concept of strict liability doping offences as being, in and of themselves, "*consistent with internationally recognized human rights and general principles of law*." (See *Legal Opinion on the Conformity of Certain Provisions of the Draft World Anti-Doping Code with Commonly Accepted Principles of International Law* at para. 98.)

108. The CCES has the burden of establishing that an anti-doping rule violation occurred as is provided for in CADP Rule 7.55. It did so through the presentation of the unchallenged finding by the Lab of an adverse analytical finding ("AAF"). When that finding is coupled with the Athlete's admission, I find there can be no doubt that the burden is satisfied and an anti-doping rule violation has occurred.

109. The mandatory consequence that arises from the foregoing finding because of the concept of strict liability is that at a minimum the results of the competition are nullified in accordance with CADP Rule 7.4 and there is a forfeiture of any medals, points and prizes. One of the other consequences that may flow from the foregoing finding is the possibility of a sanction of two years ineligibility to compete in accordance with CADP Rule 7.20 However, the burden on this aspect of the matter shifts to the Athlete upon the finding of the anti-doping rule violation. The otherwise mandatory sanction may be reduced if the Athlete provides credible evidence establishing a basis for eliminating or reducing the mandatory sanction for exceptional circumstances within CADP Rules 7.38, 7.39 or 7.40.

Potential Mitigating Factors

Out-of-Competition Use

110. The Athlete submits that there is no use or attempted use of a Prohibited Substance (as defined by the WADA Code) because cocaine and its metabolites are only prohibited in-competition. He maintains that the ingestion of cocaine is only an anti-doping rule violation when it is done to enhance performance at a competition.

111. The Athlete argues that his involuntary ingestion of cocaine occurred well before the Competition and could not have enhanced his performance at the Competition. Reference is then made to the editorial comments related to 2.2.1 of the WADA Code wherein it is stated:

An Athlete's Out-of-Competition Use of a Prohibited Substance that is not prohibited Out-of-Competition would not constitute an anti-doping rule violation.

112. The Arbitrator finds that counsel's submission is a misreading of the WADA Code and the CADP. There can be a violation through the presence,[3] use or attempted use[4] of a Prohibited Substance. Each is an alternative method of finding an anti-doping rule violation. To say that one violation does not arise says nothing about the possibility that another violation has occurred (i.e. presence). Furthermore, there does not need to be performance enhancement before there can be a violation.[5]

113. I find that the CADP Rules do not, nor does the WADA Code, provide that the results of "in-competition" doping control can be discounted or ignored if the Prohibited Substance detected could not have enhanced performance (because of the passage of time between its out-of-competition ingestion and the competition).

114. The foregoing proposition would require a provision such as CADP Rule 7.7 (and WADA Code Article 10.3) that permits the reduction of disciplinary consequences for positive test results involving enumerated "specified substances" on the basis that they have not been used to enhance performance at a competition. Cocaine and BE are not "specified substances" (see CADP Rule 7.7 and WADA Code Article 10.3); accordingly, no reduction of sanction can be made on this basis.

115. Based upon all of the forgoing I find that the Athlete has *prima facie* committed an anti-doping rule violation and the factors discussed above can not and do not mitigate that finding.

Vatikan Bar Battery

116. The cross-examination of the Athlete does not reveal any obvious reasons to conclude that the Athlete's version of the facts lacks credibility. The supporting witnesses Karir and McLean did not actually see the assault by the unknown woman. Therefore, they are not corroborating witnesses whose testimony may be taken to support the version of the facts attested to by the Athlete in respect of the assault. They are, of course, corroborative of the events following the alleged assault. I must conclude that the credibility as to what is said by the Athlete remains unshaken through cross-examination. However, in acknowledging his version I also note that there are no supportive surrounding documents suggesting

[3] See CADP Rule 7.16.
[4] See CADP Rule 7.21.
[5] On the subject of cocaine not enhancing performance after a 96 hour time lapse between the "out-of-competition" ingestion and the "in-competition" test see the unanimous decision in Sailor *v/* Australian Rugby Union Judicial Committee para. 54 to 66 in administering the Australian Rugby Union's Anti-Doping By-Law

that the Athlete was at the bar on the particular night by way of a taxi cab receipt or credit card voucher paying the bill incurred or some other similar documentation. There is merely his testimony and nothing more by way of evidence. Furthermore, the Athlete could have reported the matter to the police but choose not to do so despite the fact he is married to a police officer and his accompanying companion that evening is well familiar with matters involving illegal substances given her position with the Attorney General for Ontario.

117. There are also a substantial number of unknowns in the Athlete's version of events. No one knows who the alleged assailant was or the substance administered by that person or even if it was administered by that person. As an Arbitrator conducting a hearing under the *Arbitration Act* of Ontario I am empowered to admit hearsay and place whatever weight on such evidence as I may determine. I note that the Athlete and his companion were at a bar consuming alcohol and the assailant, if her response to Ms. Karir is to be accepted implies that she may well have been using illegal drugs This entire case pivots on the hearsay evidence that the substance placed in the Athlete's mouth was cocaine. I am comfortably satisfied the hearsay evidence of Karir suggests the possibility that the substance administered might have been cocaine. What will always be unknown is the amount of cocaine ingested at that time which affects the evaluation and weighing of the scientific expert evidence. When I look at the entire circumstances beyond the mere testimony of the Athlete I find that the overall version of the events strains my credulity in respect of what occurred.

118. The attack took place on 21 May 2006 and the urine sample was produced on the 28 May 2006 more than 7 days or 168 hours later. The scientific evidence is unequivocal that cocaine ingested more than six days before the sample was taken could not have remained in the Athlete's system to be present in the urine sample.[6] Therefore, the AAF must either be as a result of the use of the Vatikan Catheter or an ingestion of cocaine later than 21 May 2006.

119. The Athlete's explanation when coupled with all of the other surrounding circumstances could mean that the AAF finding is the result of contamination from the Vatikan Catheter. The Athlete's evidence if accepted would mean that the Prohibited Substance was not present in his bodily fluids during the Competition only in the residue within the Vatikan Catheter. Therefore, the analytical result would be explained by the presence of BE in the Vatikan Catheter.

[6] The expert testimony is that it would be totally out of the system within 72 hours. This testimony is based upon the scientific literature that indicates, that although clearance rates for drugs depend on how long the person has been taking the drug, the amount of drug ingested, as well as the individual's metabolism, the metabolites will only continue to be excreted in the individual's urine between the 1st hour of ingestion, up to a maximum of 72 hours following ingestion.

The Vatikan Catheter

120. The Athlete submits in his factum of 19 March 2007 at paragraph 187 that:

> [Prior to these proceedings] ***no self-catheterizing athletes had any idea or even suspicion that a non-sterile catheter could be a source of contamination***.

121. However, on 8 September 2006, the Athlete testified in re-examination that sterilizing a catheter in certain solutions could lead to an AAF:

> [H]*ad I cleaned my catheter with vinegar and my sample had been found to contain vinegar* [I could have been disciplined for an AAF]*, there's a couple of swimmers that have been disciplined for things like that.*

122. Regardless of when the Athlete became aware of the risks associated with using vinegar to clean a catheter, and his protestations to the contrary, the preponderance of the evidence suggests that he is likely to have known or ought to have known that a used catheter could be contaminated from prior use.

123. The Athlete was also acutely aware of bacterial and bladder infection problems associated with the use, including prior use of his catheter. The Athlete testified on 8 September 2006 in cross-examination that the purpose of keeping his catheter clean was to prevent infection:

> *Q. The purpose for keeping* [a catheter] *clean is to prevent infection is it not?*
> *A. Yes.*
> *Q. Bladder infection correct?*
> *A. Yes.*
> *Q. Urinary tract infection as well?*
> *A. I think it's the same thing.*
> *Q. Perhaps. Both those things are pretty critical, are they not?*
> *A. Yes.*
> *Q. That's the kind of thing you would want to avoid, correct?*
> *A. Absolutely.*
> *Q. Absolutely? In every case. Every time you do it, correct?*
> *A. Yes.*

124. The Athlete is aware of the risks of infection and the need for hygiene and sterile technique in using a catheter. He may also be taken to be aware of the risk of

infection from a contaminated catheter even when following appropriate hygiene practice and technique. In addition, he appeared gravely concerned about testing positive for cocaine in advance of going to Ottawa for the Competition, which he demonstrated by extensively investigating the clearance time of cocaine. Despite this, the Athlete chose to use the Vatikan Catheter and acknowledges that he did not clean it, even by rinsing, or otherwise use a sterile technique between the use on 21 May 2006 and the reuse on 28 May 2006. Therefore, the Athlete's use of the Vatikan Catheter at the Competition was vulnerable to contamination because of his own actions.

125. Athletes are permitted to use their own catheters. The CADP Rules do not oblige athletes to use sterile catheters when supplying urine samples for doping control tests and the WADA Guideline is to the same effect. However, it should be self evident that for their own benefit, athletes should use sterile catheters. The WADA Guideline for Urine Sample Collection in s. 6.7.1 states:

> *Athletes may use their own catheter to provide a sample (this catheter <u>should</u> be produced in tamper-evident wrapping), or use one provided at the Doping Control Station, if available* [emphasis added].

This particular provision of the WADA Guideline is not required to be in the CADP Rules and is not found therein.

126. Therefore, I conclude that it is the Athlete's responsibility when choosing to use his own catheter to ensure that a clean catheter is used and that proper hygiene practice is followed. The affidavit of Joseph de Pencier contains excerpts from the *U.S. Anti-Doping Agency Protocol* and from the *U.K. Sport Doping Control Officers Handbook*, which show that in addition to the CCES, doping control organizations in both the U.S. and the U.K. permit athletes to use their own catheters.

127. The Athlete argues that the Sample results should be invalidated because the CCES failed to offer a sterile catheter to him and failed to advise him of the importance of using a clean catheter. The difficulty with that argument is that the Athlete must advise the DCO of his decision to use his own catheter or request one from the DCO. He did neither. The Athlete acknowledges that he did not have a sterile catheter at the time the Sample was collected and that he did not clean the one he used. Furthermore, he made no request of the DCO for the provision of a catheter. Rather he chose to use his own catheter, which under the Rules he is free to do. However, in doing so he must take on responsibilities that would have become those of the DCO had he made a request for a catheter or advised of his choice to use his own.

128. CADP Rule 6.68(a) requires the DCO to collect the urine sample in accordance with Annex 6C of the CADP Rules, *Collection of Urine Samples*. In the

circumstances of this case, Annex 6B of the CADP Rules, *Modifications for Athletes with Disabilities,* also applies. Annex 6C.5 to the CADP Rules reads:

> *The DCO shall ensure that the Athlete is offered a choice of appropriate equipment for collecting the Sample. If the nature of an Athlete's disability requires that he/she must use additional or other equipment as provided for in Annex 6B: Modifications for Athletes with Disabilities, the DCO shall inspect that equipment to ensure that it will not affect the identity or integrity of the Sample.*

129. It is the responsibility of the DCO to ensure that an Athlete is offered a choice of appropriate equipment (being a catheter) to be used for collecting a sample of urine. That responsibility can only arise if there is a request made by the Athlete for the provision of a catheter. For an athlete that must use "*additional or other equipment*", the responsibility of the DCO is further expanded and requires an inspection by the DCO of the equipment. The purpose of the inspection is to ensure that the equipment will not affect the integrity of the Sample. Such inspection would not reveal that the catheter might be contaminated with BE. After inspection, the DCO would only arrive at that conclusion if he or she were informed of the history of the Vatikan Catheter. Consequently, that expanded obligation can only arise upon being advised by the Athlete of the necessity to use a catheter and the history of prior use. Therefore, I find no departure from the requirements of CADP Rule 6C.5.

130. The evidence is that catheters are personal individual equipment used by those who need to do so in order to void the bladder and pass urine. The Athlete must use a catheter in every situation where he wishes to void the bladder, including when he gives a doping control sample.

131. The Athlete, and two athletes on his behalf, testified that athletes expect to use their own catheters to pass urine for doping control tests. Therefore, they bring their own catheters with them. If they sought a catheter from a DCO it would be because they failed to bring one with them. In the past, at least to the point of 28 May 2006, the three athletes who must self-catheterize and testified in this proceeding used their own catheters without objection. The Athlete did not record on any doping control form that a failure to provide a catheter is objectionable until after he learned of the positive analytical result leading to these proceedings.

132. I find that the supply of the catheter is at the option of an athlete who may use his or her own personal and individual catheter or request that the DCO obtain one for his or her use. Within Annex 6C.5 to the CADP Rules the supply of a catheter is not the initial responsibility of the DCO. It becomes the responsibility of the DCO only if the Athlete places that responsibility on the DCO by a request.

133. The DCO is not required to offer or compel the Athlete to use a sterile catheter. The Athlete asserts that the DCO was negligent in failing to adequately inspect the catheter prior to allowing its use and consequently, has failed to ensure the integrity of the doping control test.

134. The DCO is required to inspect equipment to ensure that it will not affect, "*the* […] *integrity of the Sample*." Any assessment arising out of inspection must be informed of unusual circumstances surrounding prior use of the catheter, information which the Athlete never gave to the DCO. Thus, Annex 6C.5 of the CADP Rules makes the proper use of a catheter the shared responsibility of the Athlete and the DCO. It is unknown if such an inspection might have alerted the DCO to any problem with the catheter. However, the Athlete ought also to have been cognizant of the problem of contamination from prior urination use. After all he was aware that he had placed the Vatikan Catheter in his emergency pouch and did not follow his usual placement routine. Upon reaching into the emergency pouch one would expect all of the events of the Vatikan bar incident and the inquiries thereafter about the elimination times to have come rushing back into his consciousness before using the catheter. Instead he chose to say nothing about any of this information.

135. Of relevance to the DCO's degree of fault, the Athlete has submitted that the urine existing in the Vatikan Catheter was likely dry by the time of the doping control test. This proposition is advanced in support of his contention that the BE was stable enough and present in sufficient amount to contaminate the Sample. Such circumstances, where the urine was dry, would make an inspection of the Vatikan Catheter unlikely to have raised concerns for even the most attentive of doping control officers. The purpose of the inspection can not be fully carried out without information provided by the Athlete in these circumstances.

136. The responsibility to ensure that the integrity of sample collection does not affect the integrity of the sample and therefore, the analytical results, is not exclusively the DCO's but is shared with the Athlete. The CADP Annex Rule 6B.10 underscores that proposition when it states :

> *Athletes who are using urine collection or drainage systems are required to eliminate existing urine from such systems before providing a urine Sample for analysis.*

137. In summary, the Athlete did not request a sterile catheter from the DCO, nor did he advise the DCO of his use of the same. Furthermore, the Athlete failed to eliminate existing urine from the Vatikan Catheter, nor did he provide any information concerning the circumstances surrounding its prior use. Moreover, the Athlete did not express any dissatisfaction with using the Vatikan Catheter. Both the DCO and the Athlete completed the DCF without reference to the use of the Athlete's own catheter and there was no verbal discussion of the matter. The chaperone should have observed the use of the Vatikan Catheter but did not report

it to the DCO. However, in light of the above, I find it was the Athlete who potentially compromised the integrity of the doping control test.

138. I find that when athletes choose to use their own catheters, they are responsible for ensuring that proper hygiene practices are followed, meaning in particular that the catheter is not contaminated. An athlete must accept the risks associated with choosing to reuse a single-use catheter and ignoring standard hygiene practices.

139. The expert witnesses unanimously agree that there exists an AAF in the Athlete's urine sample for BE. The corrected concentration calculation in both of the Athlete's "A" and "B" samples is approximately 3ng/ml of BE.

140. The critical question to answer in respect of the scientific experts' opinion is: Could residual urine contaminated with BE in the catheter result in the AAF?

141. The experts have determined that the use of a catheter contaminated with urine containing BE from a prior use could cause an AAF. The experts differ in their opinions as to the likelihood of such an occurrence. The absence of knowledge as to the amount ingested means that assumptions have to be made in order to provide scientific opinions.

142. Dr. Sellers' and Dr. Kadar's opinions are that, based on the Athlete's testimony, residual contaminated urine is a likely cause of the AAF. Dr. Ayotte's opinion is that the amount of contaminated urine retained in the catheter does not fully explain the concentration of BE in the Sample.

143. Three factors are significant in determining the likelihood that residual urine in the Vatikan Catheter could have caused the AAF: (i) the amount of cocaine ingested by the Athlete; (ii) the actual volume of urine left in the catheter and whether it was wet or dry; and (iii) the stability of BE (both wet and dry) left in a catheter for a week in a pouch of a wheel chair at room temperature. None of these essential three factors is known and require assumptions to opine on the likelihood of contamination.

144. On the whole, the scientific evidence presented at the hearing is inconclusive about whether traces of BE remaining in the Vatikan Catheter could have caused the concentration of BE found in the Sample. There are so many unknown input factors that it is impossible to come to scientific conclusions without significant assumptions about the input circumstances. Therefore, I conclude on the balance of probabilities that the evidence fails to demonstrate that contamination of the Vatikan Catheter led to the AAF.

Charter and Human Rights Issues

Jurisdiction

145. Article 6.18 of the Canadian Sport Code gives the Doping Tribunal jurisdiction over the subject matter of this dispute, the parties and the remedies sought; and, grants full power to review relevant facts and applicable law:

> *6.18 Scope of Panel's Review*
>
> *The Panel shall have full power to review the facts and the law. In particular, the Panel may substitute its decision for:*
>
> *I. the decision that gave rise to the dispute; or*
>
> *II. in case of Doping Disputes, the CCES's assertion that a doping violation has occurred and its recommended sanction flowing therefrom,*
>
> *and may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.*

Therefore, where fair and equitable, the Doping Tribunal may consider the *Charter* or any other relevant legislation, including human rights legislation in rendering its decision. It is not relevant whether the Doping Tribunal has the authority of the provincial or federal government to apply the law, as this power is being recognized in the context of a private arbitration proceeding by the rules governing its procedures.

146. With respect to human rights legislation, the jurisdiction of the Federal Commission on Human Rights and its Ontario counterpart are distinct. The two commissions do not have equal and simultaneous jurisdiction to determine and dispose of the same alleged acts of discrimination.

147. The *Canadian Human Rights Act* applies to federal government departments and agencies, Crown corporations and federally regulated businesses (e.g. banking, transportation and broadcasting). See *CHRC v. Haynes* cited with approval in *Bell Canada v. Quebec (CSST)*, at p. 808-809.

148. The activities of the CCES are not within federal legislative jurisdiction because those activities do not form an integral part of primary federal jurisdiction over a federal government function. Nor are the activities of the CCES one of the enumerated areas of federal jurisdiction under s. 91 of the *Constitution Act*. Lastly, the CCES is not operated under the Peace, Order and Good Government clause. Furthermore, the Canadian Sport Code at Article 6.25 provides that the applicable law is that of the Province of Ontario (although federal law is a part of

Ontario law where there is no overlap of jurisdictional function as there is with human rights legislation).

149. Therefore, analysis of the allegation of discrimination in violation of human rights legislation raised by the Athlete must be made pursuant to the *Human Rights Code* (Ontario).

Applicability of the *Charter*

150. Section 24(1) of the *Charter* states that anyone whose rights or freedoms, as guaranteed by the *Charter*, have been infringed or denied may apply to a court of competent jurisdiction to obtain such remedy as the court considers appropriate and just in the circumstances. Section 24(2) of the *Charter* provides that where, under subsection (1), a court concludes that evidence was obtained in a manner that infringed or denied any rights or freedoms guaranteed by the *Charter*, the evidence shall be excluded if having regard to all the circumstances its admission in the proceedings would bring the administration of justice into disrepute.

151. I find that the *Charter* applies strictly to government action, or actions taken on behalf of the government in furtherance of a specific government policy or program. Section 32 of the *Charter* states:

> *This Charter applies to:*
>
> > *a. to the Parliament and government of Canada in respect of all matters within the authority of Parliament,* […]*; and*
> >
> > *b. to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.*

152. Since the government cannot breach the *Charter*, neither can it authorize a breach of the *Charter* by others. Consequently, the *Charter* is applicable to the exercise of statutory authority regardless of whether the actor is part of or controlled by the government. *Charter* limitations apply to all actions based on statutory authority. As a result, private non-governmental entities exercising powers greater than a natural person based on statutory authority are bound by the *Charter* (see e.g. *Kwantlen Faculty Association v. Douglas College* and *Lavigne v. O.P.S.E.U.*, where community colleges were held to be subject to the *Charter*).

153. Although all private corporations, such as the CCES, are created by statute, they are empowered to exercise only the same proprietary and contractual powers that are available to a natural person. It is the power of compulsion that subjects an action to scrutiny under the *Charter*. To illustrate, the Supreme Court of Canada has held that the mandatory retirement policies of a university and a hospital are

not reviewable under the *Charter*. In those cases, the university and the hospital were established and empowered by statute but they did not possess powers greater than those of a private non-governmental entity, nor were the agreements or policies in question demonstrative of dictates of the government. (see the decisions in *McKinney v. University of Guelph (McKinney).* and *Stoffman v. Vancouver General Hospital (Stoffman),* respectively).

154. In *McKinney*, the Supreme Court of Canada established a method for determining whether action is "government action" pursuant to s. 32 of the *Charter*. The Court found that entities, like the CCES, that are legally autonomous, have their own governing bodies and control their own daily operations are not considered delegated statutory authorities so as to be within the purview of government for the purposes of s. 32 of the *Charter*. This reasoning in *McKinney* was subsequently reiterated and reapplied in *Harrison v. University of British Columbia* and *Stoffman* and is well-established.

155. The CCES does not wield coercive powers pursuant to statutory authority to which the *Charter* applies. Furthermore, the CCES is not a statutory body or agency of the government of Canada. It is the CCES, a private non-governmental entity, and not any government body, administering doping control rules, which are conducted primarily to ensure the fairness of privately-held sporting competitions. The following evidence was submitted on behalf of the Attorney General of Canada at para. 34 of the "Written Reply Submissions" with respect to the independence of the CCES and is accepted:

> *1) the CCES is created as a not-for-profit corporation, not by the Physical Activity and Sport Act and does not act pursuant to <u>any</u> statutory authority;*
> *2) the CCES completely controls its governing body, including the appointment of all directors;*
> *3) the Government of Canada does not direct or otherwise control employees or the daily operation of the CCES;*
> *4) The Government of Canada's relationship with the CCES is governed solely by contribution agreements.*

156. The *Charter* regulates the relations between government and private persons, but it does not regulate the relations between private persons such as athletes and private persons in the form of the sport organization of which the athlete is a member. Private action is excluded from the *Charter*. The rule that the *Charter* does not apply to private non-governmental entities is consistent with the underlying purpose of s. 32, which was designed to limit the impact of the *Charter* to the relationship between the state and the individual.

157. This dispute arises from the contractual arrangements between private non-governmental entities. Both the Athlete, by virtue of his agreement with Athletics Canada, and the CCES have agreed to be bound by the CADP Rules. Agreement

to interlocking contractual arrangements to be bound by the CADP Rules is an obligation of the parties pursuant to a private regulatory framework regarding voluntary participation in international sport organizations and competitive events. The rules of an organization that are binding on its members by virtue of their consent are not subject to *Charter* scrutiny (*Tomen v. FWTAO* (1989), 70 O.R. (2d) 48 (C.A.)).

158. The Athlete has entered into a contractual agreement with Athletics Canada to be bound by the CADP Rules as part of the rules of competing in his sport and also in order to receive AAP. The authority of the CCES is derived from this agreement and there is no law of Canada being applied to the Athlete or under review in these proceedings. The government of Canada has not exerted any control over the Athlete or over the administration of the CADP Rules by the CCES: the CCES is not exercising compulsory powers conferred by statute (*Slaight Communications v. Davidson*, [1989] 1 S.C.R. 1038) and the terms of the CADP Rules are not stipulated by statute (see *Miron v. Trundel*).

159. The CADP Rules are necessarily compliant with international sporting standards and agreements to which NSOs, the CCES and the government of Canada subscribe. They are introduced by contract and made effective by an internationally collaborative process having at its root contractual arrangements.[7] Thus, the decisions made by the CCES pursuant to the CADP Rules which also may affect AAP funding eligibility are not those of the government of Canada and should not be subjected to *Charter* scrutiny.

160. To subject an action to *Charter* review, the courts have occasionally deviated from requiring the existence of compulsory power pursuant to statutory authority. For example, in *Eldridge*, the *Charter* was found to be applicable in the absence of any power of compulsion, and in two other cases (*Re Bhindi* and *Lavigne v. O.P.S.E.U.*) the *Charter* was found inapplicable despite existence of a power of compulsion.

161. *Eldridge* makes it possible to argue that where there is a comprehensive government program under the overall control of the government, decisions as to what specific services are to be provided pursuant to that program are subject to *Charter* review even when such decisions are made by a private non-governmental entity. The conclusion in *Eldridge* is based on the fact that the delivery of medically necessary services is part of a comprehensive program that is generally defined and controlled by the government. The government statutorily obligated itself to provide medical services and contracted the fulfillment of its obligation out to a private non-governmental entity.

[7] For a discussion of the interlocking nature of the contractual process between national federations and international sport organizations see the decision of the Court of Appeal of New South Wales in *Raguz v. Sullivan* (2000), 50 N.S.W.L.R. 236 (N.S.W.C.A.).

162. In contrast to the facts in *Eldridge*, the CADP Rules are not part of a comprehensive government program under the overall control of the government and the government has not obligated itself to provide services relating to the administration of sport-related doping control rules. The government did not create nor does it control the CADP and the actions of the CCES pursuant to the CADP Rules are not those of the government of Canada. The CADP Rules are the result of international collaboration amongst largely private non-governmental entities and they must be complied with in order to uphold contractual obligations relating to voluntary participation in privately-sanctioned sporting events.

163. The CCES gains its influence by contract with NSOs who in turn contract with individual member athletes. NSOs contract with the CCES to administer and prosecute their anti-doping rules, which are dictated by their International Federations ("IF"), as part of the NSO's contractual commitments to the IF of their sport. The IFs require the NSOs to follow WADA doping control rules. As a result, a contract to observe and be bound by WADA doping control rules is formed between athletes and the relevant sport organization, which the CCES oversees. The CCES is not acting by government authority. Therefore, even on the basis of *Eldridge*, the specific services provided to the Athlete by the CCES in accordance with the CADP Rules (or in the present case, the alleged lack thereof) should not be subjected to *Charter* review.

164. For all of the foregoing reasons, I find that the *Charter* does not apply to the doping control rules and procedures established by the CADP Rules and implemented by the CCES. The CCES is not a "government actor" within the meaning of section 32 of the *Charter* and accordingly, the *Charter* does not apply to its actions. Furthermore, arbitrators appointed under the SDRCC are not "courts of competent jurisdiction" and as such, I have no jurisdiction to grant the s. 24 remedy being sought by the Athlete. Finally, should I be wrong in either of the foregoing conclusions, it is appropriate in the circumstances to use "judicial restraint" and refrain from determining whether or not the *Charter* applies in light of the fact that the Athlete admits that an appropriate remedy is available under the Ontario *Human Rights Code*.

Ontario Human Rights Legislation

165. In the relevant part, the *Human Rights Code* (Ontario) prohibits discrimination against individuals in the provision of services on the basis of disability.

166. The objective of Annex 6B to the CADP Rules is to provide as much accommodation as possible to athletes with disabilities. Annex 6B of the CADP Rules is intended to ensure that disabled athletes have no greater burden for securing the integrity of doping control test results than other athletes and is consistent with the human rights legislation of Ontario. Athletes who use a catheter have the choice to use their own or request one from the DCO. In choosing to use their own catheter they take on responsibilities that those who

choose to rely upon the DCO do not. It is the athlete's choice that dictates the different consequences arising from the exercise of that choice. The choice does not make the circumstances discriminatory or impose a greater burden on disabled athletes.

167. CADP Rule 6B.3 requires the CCES to make certain, when possible, that the DCO has the information and equipment necessary to properly conduct a doping control test with a disabled athlete. To comply with CADP Rule 6B.3, the DCO should be notified by the CCES in advance of a doping control test where a catheter is known to be required in order to ensure that one can be made available upon request.

168. If the DCO knew or should have known that the Athlete might require a catheter to provide a sample and failed to provide one upon request, a valid basis for asserting a violation of the CADP Rules or perhaps discrimination would have been established. I have interpreted the CADP Rules to permit an athlete to request the provision of a catheter. Therefore, the assertion of discrimination would have also required that the Athlete request the use of a sterile catheter, which the Athlete did not request.

169. Although CADP Rule 6C.3 states that the DCO has a responsibility to monitor all aspects of the doping control procedures, including those modifications that may be necessary for athletes with disabilities, to ensure the integrity of the doping control test; the reason for the DCO to scrutinize modifications, including self-catheterization, is to prevent the manipulation of samples by athletes. This includes the intentional contamination of samples to make doping control results uncertain. Athletes are allowed to use their own catheters or may request a catheter from the CCES at the time of a doping control test.

170. Where athletes decide to use their own catheters, CADP Rule 6B.10 provides that existing urine must be eliminated from catheters before use and s. 6.7.1 of the WADA Code Guideline advises athletes that they should use sterile catheters when submitting to a doping control test. The Athlete acknowledges that he has failed to eliminate existing urine in contravention of the CADP Rules and has voluntarily acted contradictory to the advice provided by the WADA Code Guidelines.

171. The Athlete used the Vatikan Catheter without objection and without mentioning at any point in the doping control process, including to DCO or on the DCF, his concerns about testing positive for cocaine based on the alleged assault occurring at the Vatikan bar or his reuse of a single-use catheter. He also failed to eliminate existing urine before reusing it. Based on the concerns he expressed at the hearing about testing positive for a doping control infraction in advance of providing the Sample and that he demonstrated by his investigation into the clearance time of cocaine, his actions are inexplicable.

172. A complainant must establish a *prima facie* case of discrimination on the balance of probabilities (*Ontario (Human Rights Commission) v. Simpsons-Sears Ltd.* (1985), 7 C.H.R.R. D/3102). As a general matter, it is reasonably incumbent on a disabled individual to request necessary accommodation under human rights legislation and not so for the service provider to insist on providing it. The Athlete made no such request.

173. In *De Souza v. Ontario (Liquor Control Board)* (1993), 23 C.H.R.R. D/401 (Ont. Bd. Of Inquiry), where the respondents mistakenly refused to serve a complainant suffering from a disability on the grounds that he appeared to be intoxicated, no direct discrimination under s. 1 of the *Human Rights Code* (Ontario) was found because the complainant made no attempt to correct the employees' impression. Nevertheless, constructive discrimination was found to occur. In contrast to those facts, no request was made by the Athlete to be supplied a sterile catheter. Furthermore, there is no indication that if such a request was made, it would have been denied. Consequently, there can be no finding of constructive discrimination.

174. There is no contractual authority according to any of the applicable rules or affirmative duty imposed by the *Human Rights Code* (Ontario) to compel an athlete to use a sterile catheter or to require an explicit warning be made to an athlete of the risks of reusing a catheter. Moreover, attempting to coerce a self-catheterizing athlete to use a sterile catheter supplied by the DCO could be construed as a directly discriminatory practice, particularly in view of the Athlete's description of his health concerns regarding the use of sterile catheters (shared by other similarly situated athletes).

175. The CADP Rules administered by the CCES make all reasonable efforts to accommodate disabled athletes. The Athlete is responsible for his failure to use a sterile catheter, eliminate existing urine from his catheter, object to the Vatikan Catheter or request a sterile catheter (as was reasonably incumbent on him). The Athlete has not established a *prima facie* case of discrimination on the balance of probabilities pursuant to the *Human Rights Code* (Ontario).

Elimination or Reduction of Period of Individual Ineligibility Based on Exceptional Circumstances

176. A finding of an anti-doping rule violation results under CADP Rule 7.20 in a two year period of Ineligibility. CADP Rule 7.39 permits this period to be reduced in prescribed circumstances. The Athlete is unable to establish how the Prohibited Substance entered his system nor did he take the appropriate steps by choosing to use a different catheter. It is the Athlete who must have no significant fault for the anti-doping rule violation in Rule 7.39. I am not able to take account of the actions of individuals other than the Athlete in assessing the application of Rule 7.39.

177. The combined interplay of the definitions of “no fault” and “no significant fault” require that the Athlete has used the utmost caution to avoid the ingestion of the Prohibited Substance. I can make no such finding here, when the actions of the Athlete failed to meet the standards of hygiene and use of a catheter and when he chose to use his own catheter rather than use one supplied following a request by the Athlete which he did not make in this case. I am therefore, unable to use Rule 7.39 to reduce the period of Ineligibility.

Government of Canada Funding

178. CADP Rule 7.37 provides that an Athlete who commits and is sanctioned for an anti-doping rule violation under Rule 7.16 shall be permanently ineligible to receive any direct financial support provided by the Government of Canada. I must apply this rule in this case, there being no discretion vested in me to act otherwise.

179. I would like to thank the counsel involved in this case. They worked hard and did an exceptional job. Their skill enabled me to perform my task more easily. Thank you all for your assistance, which was excellent and of a high professional standard.

ORDERS

The Doping Tribunal of the Sport Dispute Resolution Centre of Canada therefore rules:

1. An Anti-Doping Rule Violation is found to have occurred under CADP Rule 7.16. This being a first violation the period of Ineligibility prescribed by CADP Rule 7.20 is two years.

2. The period of Ineligibility prescribed by this Award is to commence on 18 August 2006 in accordance with CADP Rule 7.12 being the date on which the Athlete voluntarily elected not to compete and filed a letter to that effect with the Arbitrator. In accordance with this award and the CADP Rules the period of Ineligibility will terminate on 17 August 2008.

3. The competition result achieved by the Athlete at the ING Ottawa Marathon held at Ottawa, Ontario on 28 May 2006 is disqualified by virtue of CADP Rule 7.4 and he is to forfeit any medals, points or prizes in accordance with the CADP.

4. In accordance with CADP Rule 7.37 the Athlete is permanently ineligible to receive any direct financial support provided by the Government of Canada.

5. Under Rule 7.69 of the CADP, the Doping Tribunal may award costs to any party payable at its discretion. Unless applied for, there shall be no award of costs in this matter. Any application for costs is to be in written form addressed to the SDRCC and received not later than 10 days following the receipt of this Award.

Signed at LONDON, Ontario this 11th Day of June 2007

Richard H. McLaren, C. Arb.
Arbitrator
SDRCC Anti-Doping Tribunal

ATTACHMENT "A"

File No.: DT-06-0039

In the matter of the Canadian Anti-Doping Program;

And in the matter of an anti-doping rule violation by Jeffrey Adams asserted by the Canadian Centre for Ethics in Sport;

And in the matter of a hearing before the Doping Tribunal

Affidavit of Lane MacAdam

I, Lane MacAdam, of the City of Gatineau, Province of Quebec, make oath and say:

1. I am the Executive Director of the Sport Excellence Division with the Sport Canada Branch of the federal government Department of Canadian Heritage, and as such I have responsibility for the domestic anti-doping in sport file since June 2003. I have been employed since January 2002 with Canadian Heritage.

2. The following is an outline of the history of the Government of Canada's policy and program evolution in anti-doping in sport. You will note that the early initiatives in this area included efforts by governments and sport organizations in separate but complementary roles. This twin track approach continues today and is the basis for world-wide advances in doping control efforts.

3. Prior to 1983, some sport organizations in Canada did drug testing on their athletes according to the rules of their international sport federations.

4. The Government of Canada's original involvement with anti-doping in sport came in response to the strong public reaction to several Canadian athletes testing positive at the 1983 Pan American Games in Venezuela. Canada released its first anti-doping policy: *Drug Use and Doping Control in Sport, - A Sport Canada Policy* (the "Canada Policy") in 1983.

5. This policy required National Sport Organizations (the "NSOs") to develop anti-doping policies and programs for their respective sports complete with infractions and sanctions for athletes and athlete support personnel.

6. It was also in 1983 that the federal government supported the Sport Medicine Council of Canada (SMCC) in establishing an advisory committee on anti-doping in amateur sport.

7. In parallel, the SMCC advisory committee developed standard operating procedures for doping control (testing). This marked the beginnings of the sporting community and Canada's anti-doping programs in 1984.

8. By mid summer, NSOs were focused on the development of their policies and the testing of their athletes prior to the 1984 Summer Olympics in Los Angeles. The INRS Santé, a private laboratory affiliated with the University of Québec accredited by the International Olympic Committee (the "IOC") for the 1976 Montreal Olympics, entered into a contract with Sport Canada to conduct the analysis of samples collected as part of Canada's anti-doping "program".

9. The Policy continued to evolve and in 1985 extended the sanctions for a first-time proven steroid use from one year to lifetime ineligibility from federal government funding. This change was motivated by the ever increasing number of Canadian doping positives and was seen as a greater deterrent.

10. The SMCC published its Doping Control Standard Operating Procedures (the "SOPs") in 1985. The SOPs were designed to assist NSOs and other sport event organizers in conducting doping controls in Canada.

11. In 1986 NSOs expanded their own doping plans, policies and programs to include arbitration procedures providing athletes with a right to appeal/challenge the doping penalties the NSOs imposed. In 1988, the SMCC introduced a training program for Doping Control Officers.

12. In 1988 Canada became the second non-European country to sign the Council of Europe Anti-Doping Convention.

13. It was also in 1988 that a total of five Canadians tested positive for steroids, the most famous case being that of Ben Johnson at the 1988 Seoul Olympics. These latest positive tests prompted the Government of Canada to launch the Commission of Inquiry into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance (the "Dubin Inquiry").

14. In 1989, the SMCC revised the Doping Control SOPs and developed protocols for unannounced doping controls in keeping with international trends and evidence provided about the fallacy of in-competition testing during the Dubin Inquiry.

15. In 1990, Canadian NSOs approved their own anti-doping policies that conformed with the SMCC's protocols for unannounced testing with athletes in 25 sports participating in such controls.

16. The Dubin report, containing 70 recommendations, was released in June 1990. The Government of Canada responded in January 1991 by declaring its commitment to provide financial support for a comprehensive, consistent and coordinated Canadian Anti-Doping campaign. The government agreed to the establishment of the Canadian Anti-Doping Organization (the "CADO") as an independent, arms' length, not-for-profit organization incorporated under part II of the *Canada Corporations Act*. CADO was responsible for coordinating the development and implementation of policies and programs in the areas of athlete testing, research, coordination of appeals, investigation into alleged drug use, education, coordinating the involvement of Federal-Provincial/Territorial governments, sport bodies, educators and medical personnel. CADO acted independently of day to day influence by any single constituency including the federal government and NSOs. CADO agreed to be accountable for how it spent funds received from the federal government in accordance with a multi-year funding agreement.

17. The development of this comprehensive, consistent and coordinated Canadian anti-doping campaign recognized, as had Justice Dubin, that the problems of doping abuse in sport cannot be solved by sport organizations alone: Government and non-government organizations, sport and non-sport bodies must be involved in a coordinated fashion.

18. Justice Dubin also pointed out that decisions on eligibility for competition remain a function of the sport-governing bodies themselves. While the federal government can and should reserve the right to determine what individuals and bodies receive government funding, Justice Dubin opined that it was not appropriate for the government of Canada to determine who is eligible to compete in either domestic or international competition.

19. On November 7, 1991, the first joint policy approved by Federal-Provincial/Territorial (the "FPT") Ministers responsible for Sport and Recreation identifying roles and responsibilities for all players was introduced. Federal, provincial and territorial governments, CADO, NSOs, Games Organizations, the Commission for Fair Play and other organizations assisted in the development of this first, joint policy (the "1991 FPT Policy"). In December 1991, NSOs endorsed the 1991 FPT Policy in principle, adopting sections on definitions, interpretations and penalties.

20. CADO was fully operational by February 1992, and essentially took over the testing responsibilities, under agreement with 52 amateur sports. CADO changed its name to the Canadian Centre for Drug-free Sport (the "CCDS") in 1992 at which time it developed and published the revised 1992 Doping Control SOPs.

21. During the spring of 1993, a CCDS policy working group involving the sport community and the government updated the 1991 Policy incorporating feedback from the

Canadian sport community. The CCDS distributed a policy titled *Canadian Policy on Penalties for Doping in Sport* to NSOs (the "1993 CCDS Policy") and the federal government for implementation by October 1993. The 1993 CCDS Policy was endorsed by the NSOs, the Government of Canada, the Canadian Olympic Association, the Commonwealth Games Association of Canada, the Federal, Provincial and Territorial Sport Ministers, and Athletes CAN.

22. In addition to the finalization of the 1993 Policy, the CCDS revised the 1992 SOPs to refine appeal mechanisms and create a reinstatement procedure resulting in the 1994 SOPs.

23. In 1995 CCDS merged with Fair Play Canada and was renamed the Canadian Centre for Ethics in Sport (CCES). Fair Play Canada was a national non-profit organization whose mandate was to promote fairness and respect in sport and recreation.

24. In 1996 the CCES contracted the services of the Centre for Sport and Law, a private consulting firm, to coordinate appeals, reinstatements and case reviews under the 1993 CCDS Policy using independent adjudicators.

25. In 1997, International Anti-Doping Arrangement (IADA), a five nation collective developed a Quality Assurance Manual which set out international standards for Doping Control. Also in 1997, Sport Canada agreed to have the CCES undertake a review of the current 1993 CCDS Policy in light of international developments pertaining to doping and sanctions.

26. In 1999, after intensive consultation with the Canadian sport community, a new *Canadian Policy on Doping in Sport* (the " 2000 Canadian Policy") was approved, along with the improved *Canadian Doping Control Regulations* (the "2000 Regulations"). The 2000 Canadian Policy and 2000 Regulations replaced the 1993 CCDS Policy and the 1994 SOPs, and became effective January 1, 2000. In the preamble, of the 2000 Canadian Policy, it states that it reflects the common interest and consensus of Athletes, coaches, NSOs, and governments in Canada. The creation of the 2000 Canadian Policy was led by the CCES, in accordance with its mandate.

27. The 1998 Tour de France, involving several anti-doping violations and the seizure of prohibited substances, prompted the IOC to convene a World Conference on Doping in Sport in Lausanne, Switzerland in February 1999. The Conference resulted in the Lausanne Declaration on Doping in Sport and provided for the creation of the World Anti-Doping Agency ("WADA"), an independent international anti-doping organization that was to be fully operational by the beginning of the 2000 Summer Olympic Games in Sydney, Australia.

28. WADA was established by the IOC on November 10, 1999, in Lausanne with the mandate to promote and coordinate the fight against doping in sport internationally. WADA is a partnership between the Olympic Movement (sport organizations) and governments world-wide to fight doping in sport. This partnership was seen as essential – as recommended by Justice Dubin in his 1990 report - to ensuring a coordinated approach to combating doping in sport.

29. Immediately after the creation of WADA in 1999, WADA began to develop a set of rules and regulations for sport organizations and governments to adopt in order to harmonize the approach to anti-doping in sport around the world.

30. On January 1, 2002, the CCES issued updated regulations entitled *Canadian Doping Control Regulations*, which replaced the 2000 Regulations.

31. Several years of drafting, revisions, reviews and extensive collaboration of stakeholders around the world committed to the eradication of doping in sport, culminated in the tabling of the World Anti-Doping Code (the "WADA Code") during the March 2003 World Conference on Doping in Sport in Copenhagen, Denmark.

32. The CCES, which was recognized as the Canadian national anti-doping organization by WADA, adopted the WADA Code during the Conference. The WADA Code required that International Sport Federations (the "IFs") adopt it prior to the 2004 Olympic Games.

33. Governments world-wide signaled their support for the WADA Code by signing the Copenhagen Declaration that committed them to the development of an international, intergovernmental mechanism to adopt the Code and harmonize the approach to anti-doping procedures and penalties world-wide.

34. To that end, the Government of Canada, the CCES, the Canadian sport community, and the provinces and territories worked towards the development of a new Federal-Provincial/Territorial Canadian Policy against doping in sport and a Canadian Anti-Doping Program which was to be aligned with the WADA Code.

35. The CCES reasoned that the requirement for IFs to implement a code-compliant program prior to the Athens Games necessarily required Canadian NSOs, as members of these international federations, to also have a code-compliant program in place by the same deadline.

36. In advance of WADA tabling the WADA Code for adoption by the IFs, national anti-doping organizations, national Olympic and Paralympic committees and major

games organizations. Sport Canada and the CCES began a review of the documents governing anti-doping in sport in Canada.

37. The CCES worked closely with the Canadian sport community and the federal government throughout 2002 and 2003 to develop and finalize its Canadian Anti-Doping Program to give operational effect to the WADA Code in Canada. Significant changes included a reduction of the traditional Canadian four-year sport ineligibility penalty to one of two-years for a first infraction; the right to a hearing prior to the imposition of a sanction; removal of the reinstatement options, and the requirement of athletes to submit whereabouts information to facilitate out-of-competition testing. These measures led to the adoption of the CCES Canadian Anti-Doping Program.

38. Simultaneously the federal government, with input from the CCES launched a review, beginning in 2002, of the 1991 FPT Policy. The redrafting of the 1991 FPT Policy was processed through the Federal-Provincial/Territorial Sport Committee, a committee of all Federal Provincial/Territorial government sport departments.

39. The current Canadian Policy Against Doping in Sport (2004) (the "CPADS") was adopted by FPT Ministers at their conference in Quebec City in April 2004, and came into full force and effect on June 1, 2004. This is a high level document containing the broad principles for doping-free sport in Canada. CPADS outlines roles and responsibilities for sport organizations, provincial/territorial governments, participants in sport, and the CCES in support of anti-doping procedures and practices.

40. The Government of Canada also provides funding directly to athletes through its Athlete Assistance Program. Athletes who have committed and are sanctioned for a doping violation are ineligible to receive this support. When the CCES asserts an anti-doping rule violation to the NSO, they copy Sport Canada on the notice. That notice triggers an in-house verification at Sport Canada to determine if the athlete is receiving federal funding. If so, the athlete is advised by way of letter that pursuant to section 12 of the Athlete Assistance Program Policy (AAP), funding is interrupted until the B sample is analyzed. If the B sample does not confirm the A sample, then AAP support will be reinstated retroactively to the date withheld. If the B sample confirms the A sample, then the athletes AAP benefits are withheld pending the final disposition of the matter. If the decision is that no anti-doping rule violation occurred, then the AAP support is reinstated retroactively to the date of withdrawal.

41. In the lead-up to the 2003 World Conference on Doping in Sport, the federal government worked with other leading anti-doping nations to develop the previously referenced Copenhagen Declaration, which committed signatory governments to the development of an international intergovernmental convention against doping in sport.

42. Following the tabling of the Code, the UNESCO Executive Board meeting confirmed UNESCO's commitment to the development of an International Anti-Doping Convention. Acting on those recommendations, the Director General of UNESCO convened three meetings of experts in 2003-2004 to develop a primary draft of such a convention for the negotiation of all member states (countries) between 2004 and 2005. During the 33rd General Conference of UNESCO in the fall of 2005, the final text of the Convention was adopted.

43. Canada deposited its instrument of signature in November 2005, and was the second country, behind Sweden, to do so. In order for the Convention to come into force thirty countries must sign/accept/ratify the Convention, to date 17 countries have done so (August 30, 2006).

44. The purpose of the Convention is to harmonize anti-doping efforts world-wide and to provide an internationally recognized legal framework for governmental anti-doping measures, including recognition and support for WADA and the principles of the WADA Code and the International Standards. The Convention also affirms the current practice of equal funding of WADA by national governments and the Olympic movement.

45. The Government of Canada's involvement in sport is financial. Through contribution agreements concluded with NSOs or athletes it provides financial assistance to help promote sport in Canada. As a condition of federal funding, all NSOs and Multi-Sport Organizations must endorse the CPADS and, as applicable, they must also adopt CCES 2004 Anti-Doping Program.

46. I affirm this affidavit in response to the applicant's Notice of Constitutional Question, and for no improper purpose or delay.

Affirmed before me)
this 1st day of September , 2006)
at Gatineau, , Canada)
)
)
)
)

LANE MacADAM

Monique Soucy, Commissioner of Oaths
160764

MONIQUE SOUCY

APPENDIX I

ATHLETE AUTHORITIES

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