IMPORTANT NOTE: *This version is a translation of the original French version.*

SPORT DISPUTE RESOLUTION CENTRE OF CANADA

IN THE MATTER OF THE CANADIAN ANTI-DOPING PROGRAM

AND IN THE MATTER OF AN ANTI-DOPING RULE VIOLATION BY BENJAMIN MARTEL ASSERTED BY THE CANADIAN CENTRE FOR ETHICS IN SPORT

No.: SDRCC DT 11-0161
(Doping Tribunal)

Canadian Centre for Ethics in Sport (CCES)

Canadian Cycling Association (CCA)

-and-

Benjamin Martel (Athlete)

-and-

Government of Canada

World Anti-Doping Agency (WADA)
(Observers)

BEFORE: Ross C. Dumoulin

APPEARANCES:

For the Athlete: Benjamin Martel

For the Canadian Centre for Ethics in Sport: Yann Bernard

DECISION

January 20, 2012

[1] I was selected by the parties pursuant to subsection 6.8(b)(i) of the *Canadian Sport Dispute Resolution Code* (2011) (*Code*) and appointed as arbitrator to sit as Doping Tribunal by the Sport Dispute Resolution Centre of Canada (SDRCC) to hear and determine the present matter. My appointment was confirmed by the SDRCC pursuant to subsection 6.9(a) of the *Code*.

[2] On December 5, 2011 a preliminary meeting with the parties was held by teleconference pursuant to subsection 7.7 of the *Code* and Rule 7.94 of the *Canadian Anti-Doping Program* (CADP).

[3] On January 10, 2012, an arbitration hearing was held in the presence of the parties in Montreal pursuant to subsection 7.9(b) of the *Code*.

[4] This decision is a reasoned decision rendered pursuant to subsection 6.21(d) of the *Code* and Rule 7.88(c) of the CADP.

THE FACTS

[5] The Athlete, Mr. Benjamin Martel, is a 37-year old amateur cycling racer who works full time. He cycles for his personal enjoyment since 2004 and succeeded in reaching the "Elite" level which is the highest level without being a professional. He was part of a provincial elite team and was taking part in competitions against other Quebec teams. His spouse, Ms. Julie Pagé, testified to the fact that cycling was his "whole life", and that he was training six to seven days per week and that to take it away

from him would be like amputating both his legs. Mr. Martel testified that he does not rely on his results as much as on giving his best performance.

[6] In June 2011, he started to suffer from injuries to his inner thighs which he tried to heal during the summer by applying Vaseline and Zincofax, but with no success. Ms. Pagé confirmed his very painful condition. His injuries were open wounds. In order to procure him with some relief, his lesions had to be punctured. He experienced difficulty sitting down. It was intolerable. Ms. Pagé wanted him to go to the hospital. In August, Mr. Martel tried all kinds of creams and household remedies, such as: Cortrate, Lamisil, Fucidin, hydrocortisone acetate USP 0.5%, Anti-Itch cream and two jars of essential oils prepared by his sister, but nothing was working.

[7] According to his own saying, Mr. Martel also tried a few "American cream[s] for which I don't have the name" who were given to him by one of his customers who is a trucker in order to reduce his cysts and fungus flare ups. Mr. Martel talked about his condition with the trucker who gave him a jar of cream, telling him to try it and that his manager had given it to him and that it would help him. Both men acted in good faith according to the Athlete. He applied the cream during the course of the two first weeks of August. His condition was keeping him from sleeping and slowed him down at work to a point where he had to decline contracts. He had no other choice than to heal himself so he could earn a living and he was in a hurry.

[8] On August 28, 2011, during the Quebec Road Championships held in St. Agathe, Québec, during a doping control, the Athlete provided a urine sample which resulted in an adverse analytical finding. The

certificate of analysis indicated the presence of testosterone, a prohibited substance according to the 2011 Prohibited List of the World Anti-Doping Agency (WADA).

[9] According to a letter from Mr. Martel dated October 4, 2011 addressed to the CCES, he sought information from a doctor and his pharmacist, but their knowledge of sport doping was limited. He did not mention this during his testimony. He testified that he was not able to see a doctor before August 30; therefore his search for information took place after he had applied the trucker's cream. He did not know the CCES. He would have had to pay to get the trucker's cream analyzed but his financial problems forbade him from doing so. In the end, his condition gradually disappeared by itself during the month of September.

[10] The CCES first received the adverse analytical finding from the WADA accredited laboratory on September 20, 2011.

[11] The CCES sent a notification dated October 20, 2011 to the Canadian Cycling Association and part of it reads as follows:

> This letter is a Notification under Rule 7.66 of the Doping Violations and Consequences Rules of the Canadian Anti-Doping Program (CADP). The Canadian Centre for Ethics in Sport (CCES) asserts that Mr. Benjamin Martel, an athlete affiliated with the Canadian Cycling Association, has committed an anti-doping rule violation.
>
> . . .
>
> Therefore, the CCES asserts that Mr. Martel has committed an anti-doping rule violation pursuant to Rules 7.23 to 7.26 of the Doping Violations and Consequences Rules (Presence in Sample). This would be a first violation and the CCES proposes

> that the sanction be two (2) years of ineligibility (in accordance with Rule 7.38 of the CADP).

[12] On November 9, 2011 Mr. Martel signed an admission pursuant to Rule 7.13 of the CADP in which he declares "having committed the violation assessed against me by the CCES and as stated in the notification [dated as of October 20, 2011, part of which is reproduced above]".

[13] Doctor Christiane Ayotte, professor and director of the Doping Control Laboratory of the INRS-Institut Armand-Frappier in Montréal, offered her expert opinion on the products mentioned previously by Mr. Martel, other than the trucker's cream, "they are nothing but ointments or inoffensive medications, sold over the counter or prescribed, that cannot contain testosterone". The Doctor concludes that none of the aforementioned products can "explain the sample result". She testified that testosterone can be either administered through injections, pills, gels or patches. Testosterone cream is not prescribed to treat skin infections. In that form, it would be traceable during a maximum of five or six days. This substance is used in cycling in the form of gels or patches to help recover from a competition to allow competition to resume the next day.

[14] Mr. Martel asserted that he would have never thought the application of creams and ointments could result in "such an issue" and that he was not using anything else therefore he did not consult with any specialists. He testified that there could have been testosterone in the cream given by the trucker, since Dr. Ayotte's report concludes that testosterone was not present in any of the other products he used. He did

not voluntarily use a prohibited substance and he was not interested by them. He used the substance in question to heal himself.

THE POSITIONS OF THE PARTIES

The Athlete:

[15] Mr. Martel acknowledges Dr. Ayotte's evidence that testosterone can be found in the form of a gel; his conclusion is that the cream given to him by the trucker did contain testosterone. He did not have the money to pay for the analysis of the cream.

[16] The Athlete points out that the CCES presumes that he used testosterone to enhance his performance, but this is not his case. It's speculation.

[17] Mr. Martel insists that for him it is important that the truth be told and the truth is that he did not use testosterone voluntarily. The only thing is that he should have been more thorough in his verification.

[18] According to the Athlete, he is being punished for his negligence and he will pay for this for the rest of his life. Because of the sanction, he can't partake in races. He can live with that. He is cycling "at home".

[19] Mr. Martel asks the Doping Tribunal to adjudicate with humanity and common sense. A two-year suspension – as if he was doping – is unfair. In his hearing request pursuant to subsection 3.4 of the *Code*, Mr. Martel declares that he seeks a sanction reduction from the two-year suspension and that these are exceptional circumstances.

The CCES:

[20] Mr. Bernard submits on behalf of the CCES that because of the violation of the anti-doping rules (presence of testosterone in a sample), Mr. Martel has to be suspended for a period of two years pursuant to Rule 7.38 of the CADP.

[21] On November 3, 2011, Mr. Martel admits having violated Rule 7.23 of the CADP according to which the presence of a prohibited substance in an Athlete's bodily sample is an anti-doping rule violation.

[22] The CCES pleads that Mr. Martel did not relieve himself from the onus of proof stipulated in Rules 7.44 and 7.45 of the CADP in order to get a sanction elimination or reduction. He had to demonstrate how the testosterone had entered his body according to the balance of probabilities. There was no supporting evidence. It is speculative to say that there was testosterone in the trucker's cream that was intended to relieve skin problems. Mr. Martel applied the cream during the first two weeks of August, there would not be any trace of testosterone after five or six days according to Doctor Ayotte, but the test on August 28 identified testosterone positively in his system. If the cream was the source of this substance, there would have been no trace when tested which cannot explain this result. Mr. Martel did not provide any satisfying evidence to explain how the testosterone entered his body. It is unsatisfactory that Mr. Martel put forward a hypothesis that has not been verified. This position was sustained in the case of *CCES vs. S. Lelièvre*, SDRCC DT 04-0014.

[23] In order to meet the onus of proof as required by Rules 7.44 and 7.45 of the CAPD to obtain a reduction or elimination of the sanction, Mr. Martel also had to prove that there was "No Fault or Negligence" or "No Significant Fault or Negligence"; such terms are defined in the CADP and the definitions are based on Articles 10.5.1 and 10.5.2 of the *World Anti-Doping Code* (WADA Code). The content of the WADA Code serves as a basis of interpretation for the CADP. The comments found with Articles 10.5.1 and 10.5.2 of the WADA Code specify that these Articles are enforceable only in cases where the circumstances are truly exceptional and not in the vast majority of cases.

[24] According to the CCES counsel, Mr. Martel did not offer proof that there was "No Fault or Negligence" or "No Significant Fault or Negligence". Counsel indicates that Mr. Martel admitted to his own negligence. Furthermore, his actions indicate clearly that he did not adopt a behaviour beyond any fault or negligence as stipulated in Rule 7.44 of the CADP since he accepted to use the creams recommended by a trucker or other products without conducting any verification at all. He could have gone to the hospital where he would have seen a doctor, obtained a prescription thus avoiding a positive test. Mr. Bernard quotes the case of the *CCES vs. V. Zolotarova*, SDRCC DT 08-0087, to support his position.

[25] Mr. Bernard also points out that Mr. Martel did not adopt a behaviour devoid of significant fault or negligence which would provide him with an opportunity to get a sanction reduction as stipulated in Rule 7.45 of the CADP. He states the matter of *WADA vs. Despres, CCES and Bobsleigh Canada Skeleton*, CAS 2008/A/1510, to support his statement.

The only measure taken by Mr. Martel (to contact a doctor and a pharmacist that were unable to provide him with the information he needed) is far from satisfying the expectations set out in the *Despres* decision. He made a serious mistake and was negligent by taking creams recommended by a trucker without conducting proper investigation before using them. Mr. Martel is experienced and old enough to be aware of his obligations with regards to the CADP and no one can blame it on his own turpitude.

[26] The CCES maintains that the two-year sanction is appropriate and should be upheld.

ANALYSIS AND DECISION

[27] Rule 7.23 of the *Canadian Anti-Doping Program* (CADP) stipulates that the presence of a prohibited substance "in an *Athlete*'s bodily *Sample* is an anti-doping rule violation". On August 28, 2011, at the Quebec Road Championships held in St. Agathe, Québec, during a doping control, Mr. Martel, the Athlete, provided a urine sample that resulted in an adverse analytical finding. The certificate of analysis indicated the presence of testosterone, a prohibited substance according to the 2011 Prohibited List of the World Anti-Doping Agency (WADA). Furthermore, on November 9, 2011, Mr. Martel signed an admission in accordance with Rule 7.13 of the CADP in which he declares "having committed the violation assessed against me by the CCES and as stated in the notification [dated as of October 20, 2011, part of which is reproduced above]". The CCES notification asserts that Mr. Martel has "committed an anti-doping rule violation pursuant to Rules 7.23 to 7.26 of the Doping Violations and Consequences Rules (Presence in Sample)".

[28] Rule 7.38 of the CADP stipulates that the sanction imposed for a first violation of the anti-doping rule (Presence) as admitted by Mr. Martel:

> **7.38** The period of Ineligibility imposed for a first violation of Rules 7.23-7.27 (*Presence*),... shall be two (2) years *Ineligibility*, unless the conditions for eliminating or reducing the period of *Ineligibility*, as provided in Rules... 7.44-7.48 (*Exceptional Circumstances*),... are met.

[29] Therefore, the only question to be addressed by this Doping Tribunal is whether Mr. Martel has satisfied the conditions to get a reduction or elimination of the period of ineligibility in accordance with Rules 7.44 to 7.48 (Exceptional Circumstances).

[30] The two CADP rules that could impact the period of ineligibility are as follows:

> **No Fault or Negligence**
> **7.44** If an *Athlete* establishes in an individual case that he or she bears *No Fault or Negligence*, the otherwise applicable period of *Ineligibility* shall be eliminated. When a *Prohibited Substance* or its *Markers* or *Metabolites* is detected in an *Athlete's Sample* in violation of Rule 7.23-7.27 (Presence) the *Athlete* must also establish how the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* eliminated. [Code Article 10.5.1]
>
> **No Significant Fault or Negligence**
> **7.45** ... if an *Athlete* or other *Person* establishes in an individual case that he or she bears *No Significant Fault or Negligence*, then the period of *Ineligibility* may be reduced, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this section may be no less than eight (8) years. When a *Prohibited Substance* or its *Markers* or *Metabolites* is detected in an *Athlete's Sample* in violation of Rule 7.23-7.27 (Presence) the *Athlete* must also establish how

> the *Prohibited Substance* entered his or her system in order to have the period of *Ineligibility* reduced. [Code Article 10.5.2]

[31] In order to get a reduction or elimination of his period of ineligibility in accordance with Rules 7.44 and 7.45 of the CAPD, Mr. Martel had to prove that he committed "No Fault or Negligence" or "No significant Fault or Negligence"; such terms are defined in the Glossary of the CADP. The sentence "No Fault or Negligence" is defined as follows:

> The *Athlete*'s establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the *Prohibited Substance* or *Prohibited Method*.

[32] I believe there is an error in the French translation of the definition of this phrase in the CADP and even in the one found in the French version of the *World Anti-Doping Code* (WADA Code). Both definitions use the word « ou » [or] before « n'aurait pu raisonnablement savoir... » [could not reasonably have known...], as if it was sufficient that the Athlete establishes that he was unaware that he had used, which is a non-sense because if such was the case, the sentence « n'aurait pu raisonnablement savoir... » [could not reasonably have known...] would be excessive and totally useless. The English version of the CADP and WADA Code both use the word "and" between "he or she did not suspect" and "could not reasonably have known or suspected". This version makes more sense because it adds the condition that the Athlete "could not reasonably have known..." to the fact that he or she ignored that he was using. Rule 1.34 of the CADP declares that "The English and the French versions of the CANADIAN ANTI-DOPING PROGRAM are equally authoritative", but Article 24.1 of the WADA Code declares that "In the event of any conflict between the English and French versions, the English version shall prevail". For these reasons, I rely on the English version.

[33] Therefore, Mr. Martel had to demonstrate that he could not have reasonably known or presumed, even with the utmost caution, that he had used testosterone in order to have benefited from the elimination of the period of ineligibility in accordance with Rule 7.44 of the CADP. The definition of "No Significant Fault of Negligence" in the Glossary of the CADP includes the criteria found in the definition of the phrase "No Fault or Negligence" and adds a precision with "was not significant in relationship to the anti-doping rule violation".

[34] For the following reasons and, if in fact, the testosterone in his system came from the trucker's cream, I conclude that Mr. Martel did not prove that the anti-doping rule violation that he committed is due to any fault or negligence on his part (Rule 7.44 of the CADP), nor has he established that there was no significant fault or negligence on his part (Rule 7.45).

[35] In my opinion, Mr. Martel could have reasonably known or suspected, with the utmost caution, and even with regular caution, that he was using testosterone. Firstly, he could have and should have asked the trucker if he knew what ingredients were in the cream or at least what was the manufacturing company. The answers to the questions could have given him an indication that the cream could possibly contain a prohibited substance, or he could have consulted a doctor familiar with medication for athletes. Secondly, if the trucker did not have the information sought by Mr. Martel, he could have had the cream analysed before using it. Thirdly, if the cost of an analysis was unaffordable for him, reasonable caution would have guided him to avoid using a product of such doubtful origins. Fourthly, he always had the option of using more

traditional therapeutics: he could have gone to the hospital emergency where he could have seen a doctor, gotten a prescription and avoided a positive test. I understand that Mr. Martel was going through a very disturbing time but it was unnecessary for him to try all products that were offered and especially one that was unknown. An Athlete must observe the utmost caution under those circumstances, especially an elite Athlete who stands to lose a lot if the substance is in fact prohibited.

[36] With no verification, Mr. Martel used a remedy without a name that was found in an ordinary jar made of unknown ingredients, of questionable origin that was given to him by a well-intentioned person but who was not qualified to offer said remedy. By acting this way, and by not seeking the reasonable options described in the paragraph above, I conclude that Mr. Martel did not prove that he had no significant fault or negligence. This conclusion is supported by the words of Rule 7.24 of the CADP: "It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her Body". In order to accomplish that Mr. Martel had two reasonable choices: determine the ingredients in said cream or avoid using it. By applying the cream, he did not make sure that no prohibited substance entered his body. He did not take the necessary precautions. Nevertheless, Mr. Martel is experienced and old enough to be aware of his obligations under the CADP. He is a 37-year old cyclist racer that has been cycling for his personal enjoyment since 2004 and succeeded in reaching the "elite" level which is the highest level without being a professional. He was part of an elite provincial team and was taking part in competitions against other Quebec teams.

[37] In the matter of *WADA vs. Despres, CCES and Bobsleigh Canada Skeleton*, CAS 2008/A/1510, the Athlete got an opinion and investigated

the substance he ingested but the panel judged nonetheless that he had not established that there was no significant fault or negligence:

> 2.8 Mr. Despres decided to take HMB supplements on the advice of John Berardi, a sports nutritionist contracted by BCS to give advice to individual athletes on specific diets and nutritional needs. He sought Mr. Berardi's advice following his surgery... Mr. Despres bought Kaizen HMB supplements at a local health food store after conducting some research but did not further consult with Mr. Berardi.
>
> . . .
>
> 7.6 ...In the present case, Mr. Despres did not make any attempt to contact the distributor or manufacturer of Kaizen HMB to obtain more information about the product. Had he done so, he would have demonstrated the higher level of care necessary to establishing "no significant fault or negligence".
>
> . . .
>
> 7.9 In addition to his failure to contact the manufacturer directly, the Panel finds that he failed to take the following reasonable steps before taking Kaizen HMB, and that these failures bar a finding that the Appellant exercised a standard of care meriting a "no significant fault or negligence" reduction to the mandated two year period of ineligibility.
>
> (a) Mr. Despres did not check with his doctor, the team doctor, or Mr. Berardi about whether Kaizen was a trustworthy brand of HMB supplements...
>
> (b) Mr. Despres should have done more thorough research. Although the Appellant testified to having done research over the internet for "one hour"...
>
> (c) Even that limited research should have provoked caution. However, Mr. Despres failed to ask for more information and took Kaizen HMB despite coming across information on the internet that should have triggered greater vigilance... it is not the attitude of someone who sincerely wishes to make sure that what he is ingesting is free of contamination. Rather, his behavior shows that he took into account a certain margin of risk.

[38] Despite the fact that the Athlete in this case had sought his nutritionist's opinion and that he had researched the product, the panel decided that he should have consulted with the manufacturer and his doctor and further his research in order to show no significant fault or negligence. Mr. Martel did much less, therefore I have to reach the same conclusion.

[39] In the matter of *CCES vs. V. Zolotarova*, SDRCC DT 08-0087, the Athlete did not ask any questions to her doctor who prescribed the medication and told her that it was allowed. The panel decided on page 13 that the Athlete "did not act with sufficient care regarding what she ingested", that the criterion includes "what the Athlete should reasonably have suspected and should have questioned" and that the Athlete "did not act with sufficient care". Equally, Mr. Martel should have suspected the cream of a trucker, which leads me to conclude, as did the panel in the matter of Ms. Zolotarova, that he failed to establish no significant fault or negligence.

[40] Rule 7.24 of the CADP also points out that "Athletes are responsible for any Prohibited Substance found to be present in their Samples". The Rule adds that "Accordingly, it is not necessary that intent,... or knowing Use on the Athlete's part be demonstrated in order to establish this anti-doping violation". These principles illustrate the fact that Mr. Martel is not accused of voluntarily doping. Rule 7.23 simply states that the presence of a prohibited substance in an Athlete's sample is sufficient to be considered a violation. And Rule 7.38 stipulates a period of ineligibility of two years. It is a severe sanction for an Athlete who is not knowingly using a prohibited substance, but the goal is to promote utmost caution

regarding the products he or she uses. The Athlete that has a prohibited substance in his or her system, whether it be wanted or not, could have an unfair advantage over another Athlete.

[41] If the testosterone in Mr. Martel's body did not come from the trucker's cream, therefore he did not satisfy the second condition set out in Rules 7.44 and 7.45 of the CADP as to establish how the prohibited substance entered his body. No other evidence was submitted to that fact.

[42] Articles 10.5.1 and 10.5.2 of the *World Anti-Doping Code* (WADA Code) are almost identical to Rules 7.44 and 7.45 of the CADP. The comments of the WADA Code relating to these articles indicate that they are applicable only in the cases where the circumstances are "truly exceptional". Based on the analysis above, I find that such circumstances have not been established in the present matter.

[43] For the reasons described above, I conclude that Mr. Martel did not establish exceptional circumstances and did not satisfy the criteria described in Rules 7.44 and 7.45 of the CADP in order to get a reduction or elimination of the two-year ineligibility period provided for in Rule 7.38.

[44] On November 9, 2011, Mr. Martel signed an admission in compliance with Rule 7.13 of the CADP in which he declares having committed the violation assessed against him by the CCES.

[45] Rule 7.13 indicates, in part, as follows:

> 7.13 Where the Athlete or other Person promptly (which, in all events, for an Athlete means before the Athlete competes

> again) unequivocally admits the anti-doping rule violation in writing... the period of Ineligibility may start as early as the date of Sample collection...

[46] The sample of Mr. Martel was collected on August 28, 2011.

[47] On January 12, 2012, this Doping Tribunal rendered the following decision in accordance with subsection 6.21(d) of the *Code* and Rule 7.88(b) of the CADP:

> It is ordered that the recommended sanction by the CCES of two-year (2) ineligibility period be upheld. The suspension will be in effect from August 28, 2011 to August 28, 2013.

[48] I therefore confirm this order.

Ottawa, January 20, 2012.

Ross C. Dumoulin
Arbitrator