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

N°: SDRCC DT 12-0182
(DOPING TRIBUNAL)

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)
BOBSLEIGH CANADA SKELETON (BCS)

AND

DEREK PLUG
(ATHLETE)

AND

GOVERNMENT OF CANADA
WORLD ANTI-DOPING AGENCY (WADA)
(OBSERVERS)

Lawyers and Party Representatives:

Jordan Goldblatt, Counsel for the Athlete
Patricia Latimer and *Justin Safayeni*, Counsel for CCES
Don Wilson, Representative of Bobsleigh Canada Skeleton
Kevin Bean, Representative of CCES

Arbitrator

Graeme Mew FCIArb

Heard at Toronto, 19 and 20 December 2012

REASONS FOR DECISION

1. Derek Plug (the "Athlete") is a nationally ranked bobsleigh competitor.

2. On 17 September 2012, in Calgary, the Athlete provided a Sample as part of out of competition testing. The Sample returned an Adverse Analytical Finding for SARM S-22, which is classified as a Prohibited Substance (S-1 Anabolic Agent) on the 2012 WADA Prohibited List.

3. The Athlete agreed to a voluntary Provisional Suspension on 11 October 2012 pending formal issuance by the CCES of Notification of Adverse Analytical Finding on 30 October 2012.

4. On 3 December 2012, the Athlete provided a signed Admission of an Anti-Doping Rule Violation. Specifically, he admitted the presence of SARM S-22 in his Sample. By reason of the Athlete's admission, an Anti-Doping Rule Violation by the Athlete was established. The issue of what the appropriate sanction for this Anti-Doping Rule Violation should be was referred to a hearing which was conducted in Toronto, Ontario on 19 and 20 December 2012.

5. In accordance with Rule 7.88 of the *Canadian Anti-Doping Program* (2009), I issued a summary decision on 27 December 2012 in which I determined that the Athlete shall be subject to a period of Ineligibility of two years commencing on 11 October 2012, with reasons to follow.

6. My reasons for my decision are set out in the balance of this award. I have summarised many of the facts and allegations based on the parties' written and oral submissions and the evidence adduced at the hearing. Additional facts and allegations may be referred to, where relevant, in connection with the analysis and discussion that follows. Although I have considered all of the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, I refer in these reasons only to the submissions and evidence I consider necessary to explain my reasoning.

Overview

7. The presumptive sanction for a first anti-doping rule violation involving the presence of a Prohibited Substance is a period of Ineligibility of two years. In order for an athlete to obtain a lesser sanction he or she must establish "exceptional circumstances."

8. In this case, the Athlete asserted that there were exceptional circumstances because either:

    a. He bore No Fault or Negligence in relation to the Adverse Analytical Finding; or

    b. He bore No Significant Fault or Negligence in relation to the Adverse Analytical Finding.

9. Both of these grounds require the Athlete to establish how the Prohibited Substance entered his system.

10. The Athlete's case is that the source of the SARM S-22 was a bottle of vitamin D3 drops which, unbeknown to the Athlete, had been spiked by an acquaintance of the Athlete's who had added SARM S-22 to three bottles of the Athlete's vitamin D3 drops.

11. The CCES says that the evidence that the Athlete's Adverse Analytical Finding was caused by a spiked vitamin supplement is unreliable and that there is no other credible evidence of how the SARM S-22 got into the Athlete's system. The CCES

adds that even if the source of the SARM S-22 in the Athlete's system can be established, the Athlete cannot meet the burden of showing that there was No Fault or Negligence or No Significant Fault or Negligence on his part.

Hearing Record

12. The parties were able to agree on certain facts which were set out in an agreed statement of facts which was lodged with the SDRCC. A joint document brief was also tendered which contained certain documents agreed upon by the parties. In addition, each party tendered further documents which it wished to enter into evidence.

13. Witness testimony consisted of witness statements provided by Jeremy Luke (Director of the Canadian Anti-Doping Program and Business Operations at CCES), Dr. Daniel Eichner (Executive Director and Laboratory Director of the WADA accredited laboratory in Salt Lake City, Utah (SMRTL)), Derek Plug (the Athlete) and J. S. (an acquaintance of the Athlete's).

14. All of these individuals provided oral testimony at the hearing. The Athlete attended in person. J. S., who was subject of a witness summons issued by me, attended via videoconference. Mr. Luke and Dr. Eichner gave evidence via telephone. All of these witnesses gave evidence under solemn affirmation.

Background

15. The Athlete is 23 years old. He has completed three years of university studies but put his education on hold because of his bobsleigh activities. Until he accepted his Provisional Suspension, he was a beneficiary of funding under the Athlete Assistance Program of the Government of Canada. The Athlete took up bobsleigh in 2007. He has progressed quickly from local to provincial to national levels of the sport. He participates in both the two person and four person events. During the 2011/12 season he was a member of the Canada II team. The previous season he was a member of the Canadian team that won the North America Cup. His goal is to be selected to compete for Canada in the 2014 Winter Olympics.

Athlete's General Awareness of Concerns Related to Supplement Use

16. The Athlete acknowledges awareness of the WADA Code and receipt of doping education. He attended a doping education session as recently as 11 August 2012. He is generally aware of the Prohibited List and knows that it is updated each year. He also acknowledged receipt of the athletes' handbook and awareness of the CCES website.

17. The Athlete has undergone testing on two previous occasions, in November 2008 (in competition) and in August 2011 (out of competition). The results were negative on each occasion.

18. In late April or early May 2012 the Athlete became part of the National Registered Testing Pool administered by the CCES as part of the Canadian Anti-Doping Program.

19. The Athlete acknowledged that he was responsible for making informed decisions about supplement use and taking steps to minimise risks of contamination. He understands the principle of strict liability on the part of an athlete for Prohibited Substances found in his system.

20. The Athlete said that he had reviewed the Prohibited List. He took care to avoid coming into contact with any Prohibited Substances. He accepted that anti-doping was a significant issue for any athlete.

21. The Athlete accepted the propositions that:

    a. Athletes must use utmost caution when taking supplements;

    b. Athletes are responsible for what they consume;

    c. The advice given by CCES is that there are risks associated with supplement use.

Sample Collection and Results

22. The Athlete provided a Sample during out of competition testing on 17 September 2012. He completed a doping control form at the time of sample collection on which he listed 20 prescribed medications, non-prescribed medications and supplements taken by him in the previous ten days:

    1. Creatine
    2. Glutamine
    3. Maca
    4. Gazba
    5. Tribulus Territis
    6. Whey Concentrate
    7. Salbutamol (inhaler)
    8. BCAA
    9. Harmonixx
    10. Refuel
    11. Ignition
    12. Mpower
    13. ZMA
    14. Organic Greens
    15. D-aspartic acid
    16. Multivitamin
    17. Vitamin C
    18. Vitamin B12

19. Vitamin D drops
20. Vitamin D. pills

On the form, the Athlete grouped Harmonixx, Refuel and Ignition together and noted "Possible cross contamination of low dose banned stimulant Dynamis in competition. Out of competition."

23. The Athlete expressed no concerns about the manner of the testing either at the time of testing, or subsequently when, on 11 October 2012, a coach told him that he had tested positive for SARM S-22. The Athlete claims that he had never heard of this substance. However, he had no reason to doubt the accuracy of the analytical report.

24. The Athlete left the squad the same day as he learned of his positive test result. He sought advice from a well known sports lawyer who told him about the option of having his supplements tested. After the passage of some time, the Athlete sent certain bottles of the products listed on his doping control form for testing by the Sports Medicine Research & Testing Laboratory ("SMRTL") in Salt Lake City, Utah.

25. SMRTL concluded that a previously opened bottle of vitamin D3 drops contained SARM S-22. SMRTL concluded that a second bottle of vitamin D3 drops with a seal that "appeared intact" also contained SARM S-22.

26. On 27 November 2012, CCES asked the distributor of the vitamin D3 drops, Pure North S'Energy Foundation ("Pure North") to send six unopened bottles of the vitamin D3 drops (all with the identical lot number as the bottles supplied by the Athlete) directly to SMRTL for further testing. SMRTL randomly chose two of those six bottles and concluded that SARM S-22 could not be detected in either bottle.

27. CCES also asked Pure North to send it four bottles of the vitamin D3 drops, with the same lot number as the Athlete's bottles. CCES then sent one of those bottles to the Laboratoire de Controle du Dopage in Laval, Quebec, for testing. It, too, did not contain SARM S-22.

28. On 6 December 2012, CCES requested that SMRTL compare the concentration of SARM S-22 in the two bottles of vitamin D3 drops supplied by the Athlete (one of which had been previously opened and the other of which, as reported by SMRTL, "appeared intact"). SMRTL concluded that the previously opened bottle had five times the quantity of SARM S-22 in it than the other (apparently intact) bottle.

29. The parties agreed to the following facts with respect to SARM S-22:

    a. SARM S-22 is a drug with presumed anabolic properties. SARM S-22 is not currently licensed or permitted for medical or therapeutic use in Canada;

    b. SARM S-22 can be purchased online in powder, cream or liquid form;

c. SARM S-22 has reputed benefits for an athlete seeking to enhance performance;

d. Adding SARM S-22 in liquid form to liquid vitamin D3 will result in a positive analytical finding consistent with the results reported by SMRTL in connection with the tested vitamin D3 drops; and

e. SARM S-22 is not found in and will not form naturally in vitamin D3 drops or in an athlete's body.

30. The parties also agreed that the Athlete's bottles of vitamin D3 drops were not contaminated during the manufacturing process.

31. The distributor of the vitamin D3 drops, Pure North, works with approximately 96 athletes at the Calgary WinSport Centre, including the Athlete, and provides to them directly, at no cost, various nutritional and supplement products, including the vitamin D3 drops. The parties were in agreement that the Athlete's bottles of vitamin D3 drops were not contaminated during the manufacturing or distribution processes.

32. The parties also agreed that the Athlete did not contact anyone at either the manufacturer or distributor of the vitamin D3 drops prior to the Adverse Analytical Finding.

Sabotage

33. Until the weekend of 8/9 December 2012 the Athlete's position was that he had no knowledge of how SARM S-22 came to be in his vitamin D3 supplement. By this point in time the testing described above had been undertaken by the Salt Lake City laboratory. It had confirmed the presence of SARM S-22 in the two bottles of vitamin D3 drops submitted by the Athlete. But there was no explanation of how the SARM S-22 had got there. The Athlete claims that he never added any substance of any sort to either of the bottles that he submitted for testing.

34. On 8 December 2012, the Athlete was at a Calgary nightclub. There he met J.S., an individual who he had known since childhood. He and J.S. had played soccer together as youngsters and had continued to see each other socially once or twice a year.

35. Prior to the encounter on 8 December 2012, the last time (according to both the Athlete and J.S.) that the two had met was in August 2012 when they had worked out together at a Calgary park. The ostensible purpose for this workout was to work on sprinting techniques. At that time, J.S. was looking to resume playing soccer. He had previously been injured. J.S. says that he telephoned the Athlete and asked him if he could teach him some sprinting and running techniques. The Athlete reportedly agreed. He picked J.S. up from his home and they went to the Rotary Challenger Park to work out.

36. When the Athlete and J.S. met at the nightclub on 8 December the Athlete says that J.S. asked him why he was in Calgary rather than training with the bobsleigh team. The Athlete told J.S. about the Adverse Analytical Finding. He said that he was due to go to Toronto for a hearing on 13 and 14 December.

37. At this point in the narrative it is worth noting that the hearing in this matter was, indeed, originally scheduled to take place on 13 and 14 December 2012.

38. The Athlete alleges that the next day, 9 December, he received a telephone call from J.S., who said he had something he wanted to talk to the Athlete about. The Athlete believes that this call came in between 7:00 p.m. and 8:00 p.m. J.S. told the Athlete that he had been thinking about what he had learned the previous evening. He said that he felt very bad for the Athlete but that the Athlete should not take the blame for what had happened.

39. The Athlete says that J.S. then confessed to having added SARM S-22 to the Athlete's vitamin D3 bottles in August 2012 at the time that the two men had worked out together.

40. The Athlete recalled that on 17 August 2012 he had attended an educational programme that had been organised by True North. He had taken a gym bag with him to the programme. He used this bag to carry his supplements. At the True North session on 17 August he picked up a number of supplements.

41. At around that time, the Athlete was routinely using vitamin D3 drops. He was taking five to ten drops every day.

42. Following the True North programme, the Athlete recalls that after going to pick J.S. up, he and J.S. had gone to a park to work out. The Athlete's car was left in a nearby parking area.

43. The Athlete acknowledged that the vitamin D3 drops were left in his car, along with a number of other supplements for most of the weekend of 19/21 August.

44. The Athlete says that he recalled that after he and J.S. had started their workout together on 17 August, J.S. had wanted to go back to the Athlete's car to get his jacket. The Athlete gave J.S. the keys to the car.

45. During their telephone conversation on 9 December, J.S. told the Athlete that when he had gone to the Athlete's car he had seen the Athlete's supplements in a white bag in the car. J.S. had been using a substance that he described as "Osterine" – another name for SARM S-22. He had some Osterine with him. He was able to open the Athlete's containers of vitamin D3 without breaking the seals. He added the SARM S-22 to the vitamin D3. J.S. told the Athlete that he had added the SARM S-22 to the Athlete's vitamin D3 because he thought it would help him.

46. The Athlete said that he was shocked by J.S.'s revelations. Initially he was very angry. But he then realized that he needed J.S. to co-operate. J.S. said that he

was prepared to testify at the Athlete's forthcoming hearing.

47. The Athlete denies that prior to the weekend of 8/9 December 2012, he had ever discussed the issue of supplements or performance enhancing drugs with J.S. He says that he did not have any reason to believe that J.S. would know that he (the Athlete) was subject to out of competition drug testing.

48. On Monday 10 December the Athlete informed his lawyer about the discussion with J.S. J.S. subsequently spoke to the Athlete's lawyer on 11 December. On 12 December J.S. provided the Athlete's lawyer and, shortly thereafter, the lawyer provided the CCES, with a will say statement setting out J.S.'s account of what had happened in August 2012.

49. Given the emergence of the witness statement from J.S. just the day before the scheduled commencement of the hearing, I acceded to an adjournment request from the CCES. As a result, the hearing was rescheduled to 19 and 20 December 2012.

The Evidence of J.S.

50. J.S. confirmed the Athlete's evidence that he and the Athlete had been friends since they were around ten years old. They had played competitive soccer together. He said they were not close friends. They had never been into each others homes, for example.

51. J.S. is not currently involved in organised sports, although in the past he played soccer to a reasonably proficient level.

52. J.S. has never been involved with drug testing for sport. He acknowledged, however, that he had used performance enhancing drugs as part of his workout regime. He identified Osterine (SARM S-22) and testosterone as substances that he had used.

53. His first experience was with testosterone. He took it approximately a year ago. He used it for improved performance in the gym and for its aesthetic effects. He used it for about six weeks. He did not like the dramatic effect that it had. He noticed, for example, quite marked facial changes.

54. Next he tried Osterine. He obtained it from a friend, whose name he provided during the course of the hearing. This friend works as an emergency medical technician and "knows a lot about this stuff". At one stage J.S. had been working out with this individual on a daily basis. The individual told J.S. that the Osterine would help his game but that its effects were subtle. He told J.S. that it was brand new, not illegal, and not tested for. J.S. did not know where the individual got the substances from. He thought it might be from "a guy" or online.

55. J.S. first obtained Osterine approximately eight months before he testified. He

bought three bottles for $150.00. He no longer has the bottles. He got rid of them about a week before the hearing, shortly after speaking with the Athlete. He did, however, produce a photograph of one of the bottles which he said he had taken before he disposed of it. The photograph shows a white bottle with a logo and the words "UNIQUEMICALS MK-2866 30nl 50 mg/ml."

56. J.S. described the contents of these bottles as clear liquid. The method of application was to take a drop of the liquid under the tongue using a dropper. J.S. did this every couple of days. While he did notice results from his use of the product, these results took a lot longer to emerge than had been the case when he used testosterone. J.S. said that he "wasn't that committed to it" (meaning the Osterine.)

57. J.S. said that he does not think he ever told the Athlete that he was using Osterine or that he had used testosterone.

58. J.S. usually kept his Osterine at home in a safe. It was stored alongside his supply of testosterone and the syringes he used for taking testosterone.

59. J.S. confirmed that he was using Osterine in the summer of 2012.

60. J.S. knew that the Athlete was a member of Bobsleigh Canada. He knew that he wanted to make it to the Olympics. He also knew "that steroids and an Olympic athlete don't go together." However, he never talked to the Athlete about whether the Athlete was being or might be tested for steroids.

61. J.S. had contacted the Athlete during the summer and asked him to teach him some sprinting and running techniques. He contacted him within two weeks of them meeting up to train.

62. J.S. believes that he met the Athlete on 19 August. The Athlete's recollection is that they met on 17 August, a Friday. The Athlete picked J.S. up from his parents' house. They did some catching up as they travelled in the Athlete's car to Rotary Challenger Park. The Athlete told J.S. how hard it was to keep in shape and how hard he would need to work to stay on the team and get to the Olympics.

63. Upon arrival at Rotary Challenger Park, J.S. and the Athlete started warming up. The Athlete's car was parked far enough away that it couldn't be seen from the place that they were training. After around ten minutes J.S. says that he asked the Athlete if he could go back to the car to get his jacket and cell phone. The Athlete gave J.S. the keys to the car.

64. When J.S. got to the car he was moving things around in the back of the car looking for his jacket. He saw the Athlete's white supplement bag. He looked inside the bag. He found a number of supplements including at least three bottles of vitamin D3 drops.

65. J.S. said that he had a bottle of Osterine with him at the time. It was his habit to

take Osterine with him when he went to work out. When he saw the vitamin D3 containers he wondered whether there was some way that he could get Osterine into them. He pulled the tops off the bottles. He says he did not do this very well. He was trying to work the tops off without the seals breaking.

66. J.S. explained that he wanted to be involved in the Athlete's success. He added four to five drops to one of the bottles (the bottle in question appeared to have been opened previously) and one drop to each of the other two bottles of vitamin D3 (these bottles appeared not to have been previously opened). After he had done this he did not really think any more of it. He claimed he did not know that Osterine was a Prohibited Substance. He said he had probably put too much reliance on his friend (the supplier) who had said that the substance was not illegal, was brand new and was undetectable.

67. J.S. says that he did not ask the Athlete, prior to adding some SARM S-22 to the Athlete's vitamin drops, whether he wanted to use SARM S-22. He says he did not ask because he knew that the Athlete would never take that risk.

68. J.S. claims that it took about five minutes for him to put SARM S-22 in the Athlete's vitamin containers. He then put the containers back in the bag that he had found them in and walked away.

69. When, on 8 December 2012, J.S. saw the Athlete at the nightclub and learned that he had tested positive, J.S. did not initially think to tell him what had happened back in August. He did not tell him until the next day.

70. J.S. denies that he was offered anything to testify in support of the Athlete. He says that he has never put steroids into anyone else's supplements. He has stopped using Osterine himself. He only ever used one of the three bottles that he had purchased. He eventually sold two and a half bottles for $100.00. He named the individual to whom he had sold them.

71. In cross-examination, J.S. acknowledged that he was a bit envious of the Athlete but he was also very proud to be associated with him. He said that he wanted to help the Athlete.

72. Until the beginning of 2012 J.S. said that he had not had any contact with steroid use. He became interested when he started working out with the individual who supplied him with the testosterone and Osterine.

73. J.S. says that he believed that SARM S-22 was undetectable. He doubts whether he told the Athlete about SARM S-22. Rather than tell him about using SARM S-22, he spiked the Athlete's supplements. He believed that he had used such a small amount that there could not be any consequences.

74. Despite his assertion that he believed that SARM S-22 was "legal", J.S. acknowledged that it couldn't be bought in a store. He also admitted that even though he believed SARM S-22 wasn't prohibited at the time, that he felt it likely

would be prohibited in due course.

75. When it was put to J.S. that it was a criminal offence to drug someone without their knowledge he reacted defensively. He said that it was not like putting a "roofie" (i.e. benzodiazepines or date-rape drugs) in someone's drink. He reiterated in cross-examination that his motive was to help the Athlete enhance his performance so that he, J.S., would know that he had played some part in the Athlete's Olympic success. He accepted that the Athlete would be subject to some sort of testing. But he did not think that he would be tested for a while. He said that he did not realise that the Athlete was already on the National Team. Nor did he know that he was subject to random testing.

76. It was suggested to J.S. that the small amounts of SARM S-22 that he added to the vitamin bottles could not realistically have made a great deal of difference and, as such, that it was unlikely that he would have wasted his steroids unless he was trying to set up an alibi for the Athlete. J.S. refuted this suggestion.

77. J.S. claimed to have heard very little about drugs and sport. It was only after some prompting that he conceded that he had read about certain high profile doping cases in the media during 2012.

The Risks of Supplement Use

78. At the request of the Athlete, Mr. Luke participated in the hearing for the purpose of answering questions from the Athlete's lawyer (after which counsel for the CCES was permitted to conduct a re-examination).

79. Mr. Luke acknowledged that the supplement testing undertaken by the Salt Lake laboratory was done with the concurrence of the CCES. However he acknowledged that after the three bottles of vitamin D3 had been found to contain SARM S-22, the CCES had asked for further, follow-up testing to determine the relative amounts of SARM S-22 in the two bottles that had been tested. He also acknowledged that the Athlete had not been expressly consulted prior to this request having been made. Mr. Luke saw no problem with this and noted that the results of the further testing had been shared with the Athlete.

80. Mr. Luke emphasised that the CCES does not grade supplement manufacturers. The CCES identifies that one of the ways to reduce the risk of inadvertent doping through the consumption of supplements is to ensure that the supplement manufacturer has gone through a recognised certification program. However one can never be certain that what is on the label is in the product or that supplements will be safe. Furthermore, sabotage is or could be a risk.

81. Leaving medications and supplements unattended can also present risks. It was suggested to the Athlete that leaving his supplements in his car and then giving his car keys to J.S. was evidence of a lack of due diligence. Indeed the Athlete acknowledged that the bag had remained in his car for most of the weekend until he had returned home on 19 August.

82. The Athlete's attention was also drawn to his will say statement, prepared at a time when the theory of his case was somewhat different to that presented at the hearing, in which it was stated:

> Derek will testify that he kept the Bioclinic D3 drops in his gym bag which he took with him to the gym and to training facilities. As such, the Bioclinic D3 drops that Derek sent to the WADA lab to be tested were not at all times within Derek's sole custody and control.

After some equivocation the Athlete confirmed the accuracy of this passage.

83. The Athlete says that he did not really think about the risks associated with supplements until after he became aware of the Adverse Analytical Finding and he consulted a leading sports lawyer with expertise in doping cases. This evidence needs to be considered in the context of the commentary inserted by the Athlete on his doping control form which evidenced an understanding that certain substances, while prohibited for use in competition, are not prohibited for use out of competition.

84. Mr. Luke also commented that in his experience the use by an athlete of upwards of 20 supplements (as per the Athlete's doping control form) would be a high number and would increase the risk of inadvertent doping.

85. This view was confirmed by Dr. Daniel Eichner, whose participation in the hearing was also requested by the Athlete.

86. Dr. Eichner recalled his initial telephone conversation with the Athlete in which the Athlete noted that he had been using approximately 20 supplements. The Athlete and Dr. Eichner discussed the cost of testing each of these supplements. Subsequently, the Athlete called back and said that only eight of the items he had listed needed to be tested. He said that there "have been some new developments." Dr. Eichner noted that some of the supplements listed by the Athlete had been what Dr. Eichner would describe as "high risk" for the possible presence of Prohibited Substances. Products directed primarily for use by athletes carried a higher risk of containing Prohibited Substances than products such as vitamin drops directed to the general public. Dr. Eichner found it noteworthy that the substances which the Athlete asked to have tested were substances that carried a low or medium risk of being non-compliant.

Position of the Athlete

87. The Athlete asserts that he is entitled to the benefit of either Rule 7.44 (elimination of the otherwise applicable sanction where the individual establishes that he bears No Fault or Negligence) or Rule 7.45 (reduction by up to one half of the otherwise applicable period of Ineligibility where the Athlete establishes that he bears No Significant Fault or Negligence).

88. There is credible evidence that the SARM S-22 entered the Athlete's system as a

result of the contamination of his supply vitamin D3 by J.S.

89. The actions of J.S. were not something that could have been anticipated by the Athlete. In the circumstances the Athlete exercised all reasonable care.

90. J.S. gave evidence under oath that he put drops of SARM S-22 in the Athlete's vitamin bottles. J.S. implicated other people (his supplier and the individual to whom he had sold his remaining SRAM S-22). J.S. appeared to be upset as he gave his evidence. The Athlete submitted that he was believable and credible. His explanation about how he removed the tops of the vitamin bottles was consistent with Dr. Eichner's observation that the seal of one of the bottles tested by the Salt Lake laboratory appeared intact.

91. By testifying as he did, J.S. has exposed himself to possible criminal sanctions. He acknowledged that it had been recommended to him to get a lawyer. By testifying as he did he was aware that this may not be the end of the road for him. There may be other consequences of his actions.

92. However, even without the evidence of J.S., the Athlete was taking active steps to clear his name. He called a leading sports lawyer with expertise in anti-doping cases. He contacted the manufacturers of the supplements he had been using. The very fact that he listed in great detail the supplements that he was using on the doping control form evidences general exercise of due care. He was prepared to incur considerable initial expense in having his supplements tested at the very time that he had just lost his financial support from the Government of Canada.

93. The burden of proof on the issue of fault or no fault is the balance of probabilities (Rule 7.81). The Athlete argues that in *WADA v. Jessica Hardy & USADA*, CAS/A/1870, a CAS panel rejected the notion that the more improbable the event, the stronger the evidence required. Is it more likely than not that the Athlete knowingly ingested SARM S-22 then surreptitiously spiked his own supplement? Or is it more likely than not that J.S. spiked the Athlete's supplement. The Athlete submitted that it would be the latter.

94. According to the Athlete, there is sufficient evidence about how the SARM S-22 entered the Athlete's system. The Salt Lake City laboratory tested the supplements provided by the Athlete. No one takes issue with the finding that the two bottles of vitamin D3 tested by the laboratory contained SARM S-22. There is evidence that J.S. put SARM S-22 into the Athlete's supplement. There is evidence that the Athlete took supplements. The alternative is that the Athlete spiked his own supplement and got J.S. to agree to an elaborate hoax. On a balance of probabilities, J.S.'s version of what occurred is more likely than not to have been the case.

95. The Athlete's case stands in contrast to that of *USADA v. Justin Gatlin* (2007) AAA No. 30 190 00170 07. There, an athlete alleged that his positive test was the result of sabotage. He speculated that his physical therapist might have rubbed cream

spiked with testosterone on his legs without his knowledge the night before and the day of drug testing. However there was no substantiation for this assertion. Rather, the trainer involved denied that the product was different from that previously used or that he otherwise switched products on the athlete. By contrast, the Athlete in the instant case has produced direct evidence of sabotage on the part of J.S.

96. Any sabotage case is, by its very nature, "truly exceptional." The fact that this case involves sabotage by an acquaintance rather than another competitor does not rule out the conclusion that the Athlete's Adverse Analytical Finding occurred without fault on his part.

97. For there to be fault or negligence on the Athlete's behalf it would have to have been reasonably foreseeable that, upon giving J.S. the keys to the Athlete's car, J.S. (a) would have had a steroid in his possession; (b) would have seen the supplement bag in the car; (c) would have surreptitiously taken the caps off the vitamin D3 supplement bottles; and (d) put SARM S-22 in the supplement bottles.

98. The Athlete compares the lack of reasonable foreseeability of the conduct of J.S., and its consequences, with the circumstances in the case of *Mariano Puerta v. ITF*, CAS 2006/A/1025. There, an athlete drank from a glass of water which, unknown to him as a result of a momentary absence from a table where he had been sitting where there were glasses of water, the athlete inadvertently drank water from a glass that had been used by his wife who was using (for therapeutic purposes) a medication containing a Prohibited Substance. The athlete thereby ingested the Prohibited Substance. The CAS Panel held (at paragraph 11.5.8) that:

> Although Mr. Puerta acted negligently in not insuring, despite his brief absence, that his previous glass had not been used by another person, the degree of his negligence is so slight that a finding of "No Significant Fault or Negligence" is inevitable and necessary.

If the negligence of Mr. Puerta was "so slight" then it should logically follow that the Athlete was not at fault at all. What J.S. did was so removed from behaviour that could be anticipated that it would make it unfair and manifestly unreasonable for the Athlete to be found at fault at all.

99. This is a unique case. J.S. was using steroids for aesthetic reasons. He spiked his friend's supplements because he wanted to be part of what the Athlete does. What the Athlete does is important and admirable. To take it away from him because of a horrific lack of judgment on the part of J.S. would be unfair. To not recognise the existence of exceptional circumstances warranting a reduction in the otherwise applicable sanction would be to impose upon athletes a standard of perfection.

100. In the event that the Tribunal was not minded to find "No Fault or Negligence", a reduction of the sanction to twelve or thirteen months would give the Athlete at least the possibility of being able to compete in time for the 2014 Winter Olympics.

Position of CCES

101. The applicable sanction should be two years Ineligibility unless exceptional circumstances can be demonstrated.

102. The Athlete must first of all establish how the SARM S-22 got into his system. If he cannot do this, there is no need to proceed to the second stage, which is the evaluation of fault. Unless the Tribunal is satisfied, on a balance of probabilities, that J.S. spiked the Athlete's vitamin D3, the Tribunal has no other evidence of how the SARM S-22 came to be in the vitamin D3 and, hence, in the Athlete's system. This is because without it being satisfied that J.S. sabotaged the supplement, the Tribunal cannot be satisfied with any explanation provided by the Athlete.

103. J.S. did not present as a witness who was being honest or forthright. Nor was he telling a consistent story. The confession itself is suspicious and ought not to be believed and there is no ring of truth to it. The Athlete had given evidence that when J.S. had initially confessed, J.S. had said that he would do whatever he had to do to shoulder the blame for what had occurred. That is exactly what subsequently occurred. J.S. had not considered the possible criminal consequences of his actions but most likely had concluded that there were no sporting sanctions that would be applicable to him because of his lack of involvement in organised sport. J.S. was not convincing in his evidence that he did not believe that the Athlete was subject to testing. It is unlikely that J.S. and the Athlete would not have discussed J.S.'s use of steroids when they worked out together in August. Indeed, J.S. had been somewhat equivocal when questioned as to whether or not he had discussed his use of steroids with the Athlete.

104. Surely J.S. could not have thought that he was helping his friend by spiking his supplements with a performance enhancing drug that he got from a "guy" who had either purchased it on the internet or got it from some other "guy", a supplement he knew that he couldn't buy in a store and that he couldn't have obtained a prescription for himself. Try as he might, CCES submitted that J.S. could not provide a convincing explanation for what he had done.

105. J.S.'s description of what he did also makes little sense. His evidence was that he took some SARM S-22 every day or other day either by placing a drop under his tongue or, on occasion, putting it in a glass of water. Yet on the day that he trained with the Athlete in a public park in Calgary, he had an entire bottle of SARM S-22 with him. It seems a very convenient coincidence that he would have the whole bottle with him but yet at the same time not have any discussion whatsoever with the Athlete about his use of SARM S-22.

106. The evidence of J.S. that, in a period of five minutes, he went to the Athlete's car, rummaged around, found the bag of supplements, removed three vitamin bottles, removed the caps (two of which were unopened), extracted four to five drops of SARM S-22 from the bottle of SARM S-22 he had with him into one of the vitamin bottles and then extracted further single drop of SARM S-22 into each of the other vitamin bottles, put everything back as he had found it and then returned to train with the Athlete beggars belief. The coincidence between the ratio of SARM S-22 detected in one of the vitamin bottles that was tested and the other bottle (approximately 5:1) is consistent with a tailoring of the evidence on tampering to fit with the evidence of the Salt Lake City laboratory's findings.

107. The agreed facts have refuted any chance of establishing an alternative source of contamination. As noted in the case of *CCES v. Scott Lelièvre* (2005) SDRCC DT-4-0014, at paragraph 51, mere speculation as to what may have happened will not satisfy the standard of proof required to establish No Fault or Negligence or No Significant Fault or Negligence for an anti-doping rule violation. There must be evidence of contamination.

108. Even if, contrary to the theory put forward by the CCES, the Tribunal is not persuaded that there has been an attempt to cover the Athlete's use of SARM S-22, the onus is still on the Athlete to prove that J.S. spiked his vitamin D3. If that cannot be proved, then the Tribunal cannot know by whom the vitamin D3 was sabotaged, when or why. Nor would the Athlete have established that he did not intentionally ingest SARM S-22. In the *USADA v. Justice Gatlin* case the majority of the Panel noted, at paragraph 8.10:

> If Mr. Gatlin cannot prove how the testosterone entered his system, and he did not, he cannot provide two significant facts. First, that it was the physical therapist that placed the testosterone in his system transdermally; and second, that he did not intentionally take testosterone.

109. Even if it is concluded that the Athlete has established how the SARM S-22 got into his system, CCES submitted that he still cannot meet the onus of establishing No Fault of Negligence or No Significant Fault or Negligence.

110. The provisions of the World Anti-Doping Code which correspond with Rule 7.44 and Rule 7.45 are Articles 10.51 and 10.52. The commentary to those Articles provides, *inter alia*, as follows:

> Articles 10.5.1 and 10.5.2 are meant to have an impact only in cases where the circumstances are truly exceptional and not in the vast majority of cases.
>
> To illustrate the operation of Article 10.5.1, an example where *No Fault or Negligence* would result in the total elimination of a

sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of *No Fault or Negligence* in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (*Athletes* are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a *Prohibited Substance* by the *Athlete's* personal physician or trainer without disclosure to the *Athlete* (*Athletes* are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any *Prohibited Substance*); and (c) sabotage of the *Athlete's* food or drink by a spouse, coach or other *Person* within the *Athlete's* circle of associates (*Athletes* are responsible for what they ingest and for the conduct of those *Persons* to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on *No Significant Fault or Negligence*, (For example, reduction may well be appropriate in illustration (a) if the *Athlete* clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to *Prohibited Substances* and the *Athlete* exercised care in not taking other nutritional supplements.) For purposes of assessing the *Athlete's* or other *Person's* fault under Articles 10.5.1 and 10.5.2, the evidence considered must be specific and relevant to explain the *Athlete's* or other *Person's* departure from the expected standard of behavior. Thus, for example, the fact that an *Athlete* would lose the opportunity to earn large sums of money during a period of Ineligibility or the fact that the *Athlete* only has a short time left in his or her career or the timing of the sporting calendar would not be relevant factors to be considered in reducing the period of Ineligibility under this Article. While *Minors* are not given special treatment per se in determining the applicable sanction, certainly youth and lack of experience are relevant factors to be assessed in determining the *Athlete's* or other *Person's* fault under Article 10.5.2 as well as Articles 10.3.3, 10.4 and 10.5.1. Article 10.5.2 should not be applied in cases where Articles 10.3.3 or 10.4 apply, as those Articles already take into consideration the *Athlete's* or other *Person's* degree of fault for purposes of establishing the applicable period of *Ineligibility*.

111. The Athlete enabled J.S. to have unsupervised access to the vehicle in which his supplements were temporarily being stored. That is not proceeding with utmost caution on the Athlete's behalf: there is a high onus on elite athletes to be vigilant about what they are ingesting, the manner in which they look after their supplements and who and under what circumstances others have access to their

food, drink or supplements.

112. The commentary to Article 10.5.1 contemplates the possibility of No Fault of Negligence where, despite all due care, there is sabotage by a fellow competitor. There would be fair play reasons for making the distinction between sabotage by a competitor and sabotage by someone else. However, J.S. was not a fellow competitor or even a trusted member of the Athlete's regular circle of associates.

113. Furthermore, in considering the issue of "No Significant Fault or Negligence" a player:

> …must establish that his fault or negligence, in light of the totality of the circumstances and taking into account whether he could have reasonably known or suspected with the exercise of utmost caution, that he had used or been administered a prohibited substance, was not significant in relationship to his Doping Offence (*H v. ATP*, CAS 2004/A/690 at paragraph 35).

By taking such a high number of supplements, the Athlete could not be said to have exercised utmost caution. His extensive supplement use significantly increased the risk of an anti-doping rule violation. To similar effect would be the leaving of those supplements in a bag in the back of a car. Furthermore, some of the supplements being used by the Athlete were what Dr. Eichner would describe as "high risk." Indeed, the Athlete himself had flagged the possibility that three of those supplements might give rise to positive findings if tested for in competition (rather than out of competition).

114. Finally, if the Tribunal were to be persuaded that there was No Significant Fault or Negligence on the part of the Athlete, the commentary to Articles 10.5.1 and 10.5.2 make it clear that the conclusion of the period of Ineligibility should not be dictated to or influenced by the Athlete's competition schedule (e.g. the forthcoming Winter Olympics) but, rather, only by his degree of fault.

Discussion and Analysis

115. The relevant provisions of the Canadian Anti-Doping Program are Rules 7.44 and 7.45, which provide:

> **ELIMINATION OR REDUCTION OF PERIOD OF INDIVIDUAL INELIGIBILITY BASED ON EXCEPTIONAL CIRCUMSTANCES**
>
> **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. In the event this Rule is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Rule 7.51-7.53. [Code Article 10.5.1]

No Significant Fault or Negligence

7.45 With the exception of anti-doping rule violations involving Rule 7.32 (Athlete Availability, Whereabouts Information and Missed Tests) and Rule 7.42-7.43 (Specified Substances), 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]

116. In order for me to consider elimination or a reduction of the presumptive sanction of two years Ineligibility, the Athlete must therefore establish, on a balance of probabilities:

    a. how the Prohibited Substance entered his system; and

    b. either

        i. that he or she bears No Fault or Negligence; or

        ii. that he bears No Significant Fault or Negligence

How Did the Prohibited Substance Enter the Athlete's System?

117. The parties have agreed that there is no basis for concluding that the vitamin D3 used by the Athlete was contaminated as a result of anything that happened at the manufacturing or distribution stages.

118. It is acknowledged that the Athlete was using a large number of supplements, some of which were described as "high risk" for contamination or inclusion of ingredients which are Prohibited Substances. Not all of the supplements allegedly used by the Athlete were sent to the Salt Lake City laboratory for testing. But of those that were, only the vitamin D3 bottles were found to contain SARM S-22.

119. Although there is evidence that the Athlete's supplements were left unattended at

times (for example over the weekend of 17-19 August when the Athlete says he left his supplements in his car or when he went to the gym and to training facilities), there is no evidence, beyond pure speculation, that his supplements were interfered with in any way (other than by J.S.).

120. The evidence of J.S, is, as counsel for the Athlete acknowledged, "crucial." Nevertheless, it was submitted that even if I did not accept J.S.'s account of what happened, I could nonetheless still accept that, because of the results of the testing done by the Salt Lake City laboratory, one of the Athlete's bottles of vitamin D3 was the source of the SARM S-22 found in his system.

121. The evidence of J.S. was, in many respects, baffling.

122. Following a reportedly chance encounter in a Calgary nightclub just five days before the originally scheduled hearing of this case, J.S. came forward and told the Athlete that five months earlier, in an effort to be involved in the Athlete's success, he had clandestinely added SARM S-22 to three bottles of vitamin D3. He did this on the spur of the moment with no intention of revealing to the Athlete what he had done. He did this knowing that the Athlete was an elite athlete who competed internationally and that it was the Athlete's ambition to go to the next Olympics.

123. While he conceded little or no knowledge of doping issues, he did at least acknowledge that he knew "that steroids and an Olympic athlete don't go together."

124. J.S. did not strike me as a stupid person. He gave his evidence in a straightforward manner. Even some of the more inexplicable aspects of his testimony were given in a measured and unemotional way. Nevertheless, much of his evidence lacked a ring of either credibility or reality.

125. I am unable to accept the evidence of J.S. that he benignly assumed that SARM S-22 was "legal" and "undetectable" based on what he had been told by his supplier. Yet he knew that it was not available in stores. He knew that it could not be obtained on prescription. He assumed that his supplier had obtained it from a "guy" or online. He believed that even though SARM S-22 was not yet prohibited that it would be. Despite professing little knowledge of how anti-doping procedures work, he believed that there was no testing for SARM S-22. With some prompting, J.S. ultimately admitted that he was aware of the well-publicised doping issues involving cycling.

126. Against this background, I do not believe that it would not have occurred to J.S. that SARM S-22 might in fact not be "legal." Nor can I accept that J.S. would have had no inkling that spiking the Athlete's vitamin D3 bottles with SARM S-22 would expose the Athlete to significant risk. For these reasons alone I am left with serious doubts about the credibility and reliability of his testimony.

127. J.S says that he kept SARM S-22 in a safe, along with the testosterone he had previously used and the syringes that had delivered the testosterone into his system. Yet he carried a bottle of SARM S-22 with him when he went to the gym

or to workout, even though he only took one drop every second day. That makes little sense and I do not accept his evidence in that regard.

128. According to J.S., he executed his spur-of the-moment decision to spike his friend's supplements in just 5 minutes, during which he found the supplement bag in the Athlete's car, removed three bottles of vitamin D3, removed the lids of all three (two of which were sealed), added drops of SARM S-22, replaced the lids and replaced the bottles in the supplement bag. I find it highly unlikely that even if some or all of these things happened, that the entire series of actions would have been completed in such a short period of time and in such a way as to not bring attention to what he was doing or the time that he was away from the Athlete.

129. Having found the evidence of J.S. to be unreliable, there is no other evidence that can form the basis for a conclusion that the source of the SARM S-22 was a spiked supplement. While it is a fact that two bottles of vitamin D3 supplied to the Salt Lake City laboratory by the Athlete were found to contain SARM S-22, other bottles with the same batch number which were obtained by CCES and tested by the Montréal laboratory contained no prohibited substance. And if the vitamin D3 bottles were not spiked by J.S., there is no other evidence of when they were spiked and by whom. Indeed, with less than half of the supplements declared by the Athlete on the doping control form having been tested, it is possible that one of those supplements could have been the source of the positive test.

130. In short, I am not persuaded on the evidence that the Athlete has established on a balance of probabilities that the source of his adverse analytical finding for the presence in his sample of SARM S-22 was his consumption of a spiked vitamin D3 supplement.

No Fault or Negligence

131. Given my finding that the Athlete has failed to show how SARM S-22 entered his system, it is not strictly necessary for me to determine the issues of No Fault or Negligence or No Significant Fault or Negligence. However, both possibilities were fully addressed in the evidence and the arguments advanced at the hearing. It may therefore be instructive to the parties and of assistance in the event of appellate review of this decision for me to provide my findings on these issues.

132. The commentary to Articles 10.5.1 and 10.5.2 of the *World Anti-Doping Code* underscores the need for truly unique circumstances in order to engage the application of CADP Rule 7.44 (WADC Article 10.5.1). There is a clear qualitative difference between sabotage by a fellow competitor on the one hand, and sabotage by a member of the Athlete's circle of associates. To impose any sanction on an athlete because a competitor engaged in cheating by committing an act of sabotage against the athlete would run contrary to the overarching rationale of the *World Anti-Doping Code* which is the preservation of the spirit of sport (the characteristics of which include ethics, fair play and honesty). By contrast, sabotage by a member of an athlete's own circle of associates would reasonably

engage consideration of the athlete's strict liability for what ends up in his or her system.

133. Having regard not only to the guidance provided by the commentary, but also to the totality of the circumstances, even if I had been persuaded that the Athlete's vitamin D3 was spiked by J.S., I would not accept that there was No Fault or Negligence on the Athlete's part.

No Significant Fault or Negligence

134. The Athlete had sufficient awareness of anti-doping issues and presence of mind that when he was tested, he not only provided a comprehensive list of 20 medications and supplements that he was using, but also entered some narrative on the doping control form about possible contamination occurring in three of them.

135. The Athlete was clearly alert to his personal responsibilities as an Athlete and, in particular, to the concept of strict liability.

136. I would be inclined to the view that any elite athlete who leaves a bag full of supplements in his car over a weekend or unattended at a gym or a training session is courting a risk. In the case of the Athlete, his understanding of his responsibilities and the risks associated with using supplements make it even more surprising that he did not exercise more caution.

137. Furthermore, the number of supplements used by the Athlete, some of them higher risk supplements, multiplies the possibility of contamination, tampering, mis-labelling or other circumstances leading to inadvertent doping.

138. Having regard to "the totality of the circumstances" (to quote *H v ATP*), even if the Athlete had succeeded on the issue of how SARM S-22 had entered his system, he has not established that there was No Significant Fault or Negligence on his part.

Decision

139. The Athlete has voluntarily admitted to an anti-doping rule violation in connection with the presence in a bodily Sample provided by him of SARM-S22, an anabolic agent, which is a Prohibited Substance according to *The 2012 Prohibited List* forming part of the *World Anti-Doping Code*.

140. The presumptive sanction for a first anti-doping rule violation for the Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Sample is a period of Ineligibility of two (2) years.

141. The Athlete has not met the burden of establishing exceptional circumstances pursuant to Rule 7.44 or 7.45 of the Canadian Anti-Doping Program (2009) (or otherwise) which could warrant elimination or reduction of the period of Ineligibility.

142. Accordingly, the Athlete shall be subject to a period of Ineligibility of two years commencing 11 October 2012 (the date upon which he accepted a provisional suspension).

Costs

143. At the hearing counsel reserved their right to address the issue of costs. If counsel are unable to agree on costs, a party seeking costs should, by no later than 18 January at 4:00PM (EST) submit to the tribunal a written request setting out the basis for costs to be awarded and the amount sought. The party responding to the request should do so in writing by no later than 25 January 2012 at 4:00PM (EST).

Appeal

144. The attention of the parties is drawn to the provisions of the *Canadian Anti-Doping Program* concerning appeals and such other provisions in the *Canadian Sport Dispute Resolution Code* and/or International Federation rules as may be applicable.

Toronto, 9 January 2013

Graeme Mew
Arbitrator