

**DECISION of the FEI TRIBUNAL**

**dated 28 March 2013**

**Human Anti-Doping Case No.:** 2011/02

**Athlete / NF:** Jonathon Millar/CAN

**FEI ID:** 10001794

**Event:** CSI4\*-W, Calgary, Spruce Meadows AB (CAN);

**Sampling Date:** In-competition, 30 June 2011

**Prohibited Substance:** Prasterone (Dehydroepiandrosterone, DHEA)

**I. COMPOSITION OF PANEL**

Prof. Dr. Jens Adolphsen, Chair

Dr. Armand Leone, Member

Mr. Pierre Ketterer, Member

Ms. Erika Riedl, FEI Tribunal Clerk

**II. SUMMARY OF THE FACTS**

**1. Memorandum of case:** By Legal Department.

**2. Summary information provided by the Athlete:**

The FEI Tribunal duly took into consideration all evidence, submissions and documents presented in the Case File and at the oral hearing, as also made available by and to the Athlete.

**3. Oral hearing:** London (UK) - 12 February 2013.

Present:

The FEI Tribunal Panel

Ms. Erika Riedl, FEI Tribunal Clerk

For the Athlete:

Mr. Jonathon Millar, Athlete

Mr. Timothy Danson, Counsel for the Athlete

Ms. Marjan Delavar, Counsel for the Athlete

Mr. Ian Millar, Witness

For the FEI:

Mr. Jonathon Taylor, External Legal Counsel FEI

Ms. Lisa F. Lazarus, General Counsel FEI

Ms. Carolin Fischer, FEI Legal Counsel  
Ms. Catherine Bollon, Coordinator Athlete Legal  
Services and Human Anti-Doping

### **III. DESCRIPTION OF THE CASE FROM THE LEGAL VIEWPOINT**

#### **1. Articles of the Statutes/Regulations which are applicable or have been infringed:**

Statutes 23<sup>rd</sup> edition, effective 6 May 2011 ("Statutes"), Arts. 1.3, 34, 36, 37 and 40.

General Regulations, 23<sup>rd</sup> edition, 1 January 2009, updates effective 1 January 2011, Arts. 143.1, 168.4 and 169 ("GRs").

Internal Regulations of the FEI Tribunal 2<sup>nd</sup> edition, 1 January 2012 ("IRs").

FEI Anti-Doping Rules for Human Athletes, based upon the 2009 revised Code, effective 1 January 2011 ("ADRHA").

World Anti-Doping Code 2009 ("WADA Code")

2011 Prohibited List of the World Anti-Doping Agency (« the List »).

#### **2. The Athlete:** Mr. Jonathon Millar

#### **3. Justification for sanction:**

GR Art. 143.1: "Medication Control and Anti-Doping provisions are stated in the Anti-Doping Rules for Human Athletes (ADRHA), in conjunction with The World Anti-Doping Code, and in the Equine Anti-Doping and Controlled Medication Regulations (EADCM Regulations)."

Art. 2.1.1 ADRHA: "It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enters his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary that intent, fault, negligence or knowing *Use* on the *Athlete's* part be demonstrated in order to establish an anti-doping violation under Article 2.1."

Art. 4.1 ADRHA: "These Anti-Doping Rules incorporate the *Prohibited List* which is published and revised by *WADA* as described in Article 4.1 of the Code. The *FEI* will make the current *Prohibited List* available to each *National Federation* by means of

publication on the [www.fei.org](http://www.fei.org) website, and each *National Federation* shall ensure that the current *Prohibited List* is available to its members and constituents.”

#### **IV. DECISION**

Below is a summary of the relevant facts and allegations based on the Parties’ written submissions, pleadings and evidence adduced prior to and at the Hearing. Additional facts and allegations found in the Parties’ written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. Although the Tribunal has considered all the facts, allegations, legal arguments and evidence in the present proceedings, in its Decision it only refers to the submissions and evidence it considers necessary to explain its reasoning.

##### **1. Factual Background**

- 1.1 In 2007, Mr. Jonathon Millar (“the Athlete”) felt fatigued and his energy level was significantly reduced. Following a number of medical examinations in May 2008 and blood tests performed in October 2008, the Athlete was diagnosed with a “DHEA deficiency syndrome” by his family doctor, Dr. Randy Knipping, BSc, MD, CCFP. Dr. Knipping advised the Athlete to start taking DHEA to boost his natural levels to a mid-normal range. As a result of the medical examinations it was determined that the Athlete’s health problems had likely been caused by the fact that he had learned in 2007 that his mother had been diagnosed with stage 4 cancer and had passed away at the beginning of March 2008.
- 1.2 On 8 September 2008, the Athlete informed his National Anti-Doping Agency, the Canadian Centre of Ethics in Sport (“CCES”) that his doctor had concluded that his DHEA level was very low and that he had suggested taking DHEA, at a dose of 25 mg per day.
- 1.3 On 9 September 2008, Ms. Megan Cumming, CCES Athlete Services Coordinator, informed the Athlete that DHEA was a Prohibited Substance on the 2008 Prohibited List of the World Anti-Doping Agency and that he was required to obtain a Standard Therapeutic Use Exemption (“TUE”), for which he had to submit a Standard TUE form as well as relevant documents that confirmed his diagnosis. Ms. Cumming explained further that the TUE application was to be reviewed by a panel of physicians and that the final decision would be conveyed to the Athlete by the CCES. Lastly, Ms. Cumming advised the Athlete that if he was selected for doping control, he should declare any prescription and non-prescription medications and nutritional supplements he had taken in the last 10 days.

- 1.4 On 29 October 2008, the Athlete submitted a Standard TUE application to the CCES and enclosed two pages of blood test results from LifeLabs dated 9 October 2008. The form contained a note by Dr. Knipping stating that the Athlete had "DHEA deficiency syndrome" and was requesting permission to take 25 mg of DHEA daily in form of oral drops, in order to boost his DHEA levels to midrange.
- 1.5 On 14 November 2008, Ms. Julie Vallon, CCES Athlete Services Manager, informed the Athlete that his TUE application had been reviewed by the CCES Therapeutic Use Exemption Committee ("TUEC"), but that further documentation, specifically documentation from a specialist in endocrinology, were needed in order to move his TUE application forward.
- 1.6 On 11 December 2008, Dr. Amish Parikh, MD, MEd, FRCPC, Endocrinologist, sent a letter to Dr. Knipping, copying Ms. Vallon and stating that the Athlete was a 34-year-old male with DHEA deficiency, but otherwise healthy. Dr. Parikh further explained that the Athlete had been started on DHEA 25 mg daily in form of oral drops in order to get his DHEA level in the mid normal range, and that he agreed with that treatment.
- 1.7 On 21 May 2009, Ms. Vallon advised the Athlete that his TUE application had been denied, outlining in detail the areas for which evidence to support the Athlete's application was lacking.
- 1.8 By fax of 12 June 2009, Dr. Knipping advised the Athlete to stop taking DHEA until he had met the provisions set by the CCES.
- 1.9 On 4 December 2009, Ms. Sandra de Graaff of the Athlete's National Federation, Equine Canada ("CAN-NF") forwarded the Athlete's 2008 CCES TUE application to Ms. Danièle Gutowski, FEI WADA-ADAMS Assistant – Legal Department, and enclosed (i) the CCES letter dated 14 November 2008, (ii) the letter by Dr. Parikh, dated 11 December 2008 (iii) the two pages of blood test results from LifeLabs, dated 9 October 2008, (iv) the CCES TUE denial letter of 21 May 2009, and (v) Dr. Knipping's fax of 12 June 2009.
- 1.10 On 16 February 2010, Ms. Gutowski informed Ms. de Graaff that a new TUE form needed to be submitted and that furthermore clear medical support was required for the TUE application to be considered.
- 1.11 On 19 February 2010, Ms. Gutowski further informed Ms. de Graaff that if the FEI Medical Committee confirmed the CCES TUE denial and if the Athlete was tested while taking the DHEA, he risked a positive test and being subject to sanctions.
- 1.12 From 30 June to 3 July 2011, the Athlete participated at the CSI4\*-W in Spruce Meadows AB in Calgary, Canada (the "Event"), in the discipline of Jumping.

- 1.13 On 30 June 2011, the Athlete was selected for in-competition testing. Analysis of urine sample no. 1895863 taken from the Athlete at the Event was performed at the WADA-approved laboratory, Institut Armand Frappier ("INRS"), in Montreal, Canada. The analysis of the urine sample revealed the presence of Prasterone (DHEA). DHEA is a Prohibited Substance according to the List, in force at the time of Sample collection (Analysis Result Record dated 3 August 2011 and Amended Certificate of Analysis dated 3 August 2011).
- 1.14 DHEA is in the class of anabolic androgenic steroids (AAS), listed in the category S1.a of Prohibited Substances as set forth in the List. DHEA is not a "Specified Substance" under the List, and is prohibited in and out-of-competition. DHEA is capable of being produced by the body naturally at certain levels but is prohibited when administered exogenously. Following the positive finding, an Isotope-ratio mass spectrometry test ("IRMS") was performed on the positive Sample. The IRMS results for DHEA, testosterone and their metabolites were consistent with an exogenous origin of DHEA.
- 1.15 On 12 October 2011, the Athlete requested an indefinite extension of the deadline to respond to the charge, as he was waiting on a number of expert reports.
- 1.16 On 17 October 2011, the FEI granted the extension request based on the rationale that the Athlete should be given every opportunity to defend his position. The FEI further reminded the Athlete that his Provisional Suspension would be maintained unless it was lifted following a Preliminary Hearing or by the Final Tribunal decision.

## **2. The Legal Proceedings**

- 2.1 The presence of the Prohibited Substance following the laboratory analysis, the possible rule violation and the consequences implicated, were officially notified to the Athlete by the FEI Legal Department on 24 August 2011, through the CAN-NF. The Notification Letter included notice that the Athlete was provisionally suspended in accordance with Article 7.6 of the ADRHA and granted him the opportunity for a Provisional Hearing in accordance with Article 7.6.3 of the ADRHA.
- 2.2 The Athlete did not request a Preliminary Hearing, and no Preliminary Hearing was ever held in this case.

## **3. The B-Sample Analysis**

- 3.1 The Athlete was also informed in the Notification Letter of 24 August 2011 that he was entitled: (i) to the performance of the B-Sample

analysis on the positive sample; and (ii) to attend or to be represented at the B-Sample analysis.

- 3.2 On 26 August 2011, the Athlete requested for the B-Sample analysis to be performed.
- 3.3 The B-Sample analysis confirmed the presence of DHEA. The IRMS performed on the B-Sample for DHEA, testosterone and their metabolites confirmed the exogenous origin of the DHEA (Certificate of Analysis dated 14 September 2011). Upon request, the Athlete also received the Laboratory Documentation Packages (A-Sample and B-Sample) for the positive sample.
- 3.4 On 30 October 2011, Dr. Edward M. Sellers, MD, PhD, FRCPC, FACP, Professor Emeritus, Pharmacology, Medicine and Psychiatry at the University of Toronto, hired as an expert witness by the Athlete, raised various queries related to the analytical results relied upon by the FEI in support of the charge, in particular taking into account that the case at hand concerned an individual with a deficiency of natural DHEA. Dr Sellers requested "a full report including conclusions and interpretations that account for both Samples A and B".
- 3.5 On 7 February 2012, Dr. Christiane Ayotte, Ph.D., Professor and Director of INRS provided a detailed response to Dr. Sellers' queries, and further provided details of two previous tests conducted on the Athlete by the CCES. Dr. Ayotte further clarified that the DHEA found in the Athlete's sample had been established by IRMS analysis to be exogenous.
- 3.6 In the following, the Parties exchanged several written submissions, details of which will be referred to below only insofar as they are relevant to this Decision.

#### **4. The Athlete's written and oral submissions**

- 4.1 Together with his explanations, the Athlete submitted an email of 15 January 2013, in which Dr. Parikh confirmed that the Athlete had requested him to send his letter of 11 December 2008 to the CCES, because he wanted the CCES to know that he had started taking DHEA.
- 4.2 The Athlete further submitted a letter dated 2 November 2012 by Dr. Shereen Ezzat, MD, FRCPC, FACP, Professor of Medicine & Oncology. Dr. Ezzat explained that he had reviewed the Athlete's medical condition, and that he had come to the conclusion that the clinical and biomechanical assessment had shown no sign of complete adrenal or gonadal dysfunction, but that evidence of adrenocortical deficiency had been found, which required further medical attention. The Athlete also

submitted a letter dated 5 February 2013 by Dr. Chi-Ming Chow, MDCM, MSc, FRCPC, FACC, FASE, DBIM, Director of Echocardiography and Vascular Ultrasound Laboratories. Dr. Chow confirmed that there was a relationship between DHEA levels and cardiovascular diseases, but that there was no current medical indication for the Athlete to use DHEA for treating cardiovascular conditions.

- 4.3 In addition the Athlete submitted statements by Dr. Ross McLean, dated 11 January 2013, and by Dr. Dane M. Hershberg, B.A. B.Sc. (Med) M.D. F.R.C.P.(C), psychiatrist, dated 21 January 2013. Dr. McLean explained that the Athlete suffered from a reactive depression caused by the death of his mother. Further that the Athlete's ability to concentrate and his decision-making had been significantly compromised during his illness. Dr. Hershberg admitted that he had not himself assessed the Athlete, but that the symptoms the Athlete had described to him were consistent with clinical depression. Dr. Hershberg contended that the cognitive component of the Athlete's depressive illness had caused him to be remiss in attending to the CCES TUE denial letter of 21 May 2009 or subsequent communications.
- 4.4 The Athlete also provided affidavits from his father, Mr. Ian Millar, member of the Canadian Equestrian Team for the past 41 years, and his sister, Ms. Amy Millar. Both described how the Athlete had suffered from severe depression, and that he had been exhausted and fatigued. Both witnesses also confirmed that it had been discussed within the family that full disclosure of the Athlete's DHEA treatment had to be made to Anti-Doping Organizations.
- 4.5 Lastly, the Athlete provided witness statements by Mr. Terrance Millar, Ms. Jill Henselwood and Mr. Eric Lamaze, all of them members of the Canadian Equestrian Team. All witnesses attested to the Athlete's character and agreed that if the Athlete had not been suspended, he would have been selected to compete in the 2011 PanAmerican Games and in the 2012 Olympic Games.
- 4.6 In essence the Athlete submitted:

- a) That he was not contesting the rule violation, but that a reduction of the two-year period of suspension to one year had to be applied, in accordance with either Article 10.5.4 of the ADRHA - voluntary admission - or Article 10.5.2 of the ADRHA - No Significant Fault or Negligence. He also submitted that his sanction had to be reduced to one year according to Article 40 of the FEI Statutes - Reprieve. Later on, and in light of an FEI response explaining that Article 40 of the Statutes was only applicable once a final sanction had been imposed, the Athlete conceded that only Articles 10.5.4 and 10.5.2 of the ADRHA were applicable in the case at hand. That finally, as he had already been provisionally suspended

for eighteen (18) months, and for reasons of practicality, he was only requesting a reduction of six (6) months.

b) Regarding his allegation of a voluntary admission, the Athlete contended that the fact that he had sent the letter by Dr. Parikh, stating that he "had been started on DHEA 2.5 mg daily in form of oral drops" to the CCES on 11 December 2008, and to the FEI (through CAN-NF) on 4 December 2009, had to be interpreted as voluntary admissions to two Anti-Doping Organizations for the purposes of Article 10.5.4 of the ADRHA.

c) That he had also informed the CAN-NF on further occasions, i.e. at the Spruce Meadows Event, that he was taking DHEA.

d) Regarding Fault or Negligence for the rule violation, the Athlete contended that he had met the criteria of Article 10.5.2 of the ADRHA on the basis that he had taken DHEA upon medical advice, purely for therapeutic reasons, i.e. in order to bring his DHEA levels in a normal range, and not for performance-enhancing purposes. That his health had begun to deteriorate both mentally and physically after he had learned about his mother's cancer in 2007, and her passing away in March 2008. That he had taken DHEA in good faith upon the advice of a medical doctor since he promised his family that maintaining his health would be his number one priority and that he would seek treatment. He also emphasized that he had never been told by either the CCES or the FEI to stop the DHEA use. That it was irrelevant in this context that later on the specialists decided that DHEA was not the appropriate medication for his condition.

e) That disclosure of his DHEA ingestion to Anti-Doping Organizations had been discussed within his family and that such disclosure had been important to him, which demonstrated his outstanding ethics and character.

f) That in the United States, where his family had a second base, DHEA was available without prescription, and that he had therefore bought DHEA in the United States in form of supplements. That he had also listed those supplements on the Doping Control Form, when tested, as "multivitamin".

g) That in addition he had been away from home for long periods competing and that it was possible that the family's secretary had filed the CCES TUE denial letter and Dr. Knipping's fax of 12 June 2009, and that he had therefore most probably not seen these communications. That, in addition, he had never received the email by the FEI, sent to



the CAN-NF, informing him that he was subject to sanctions if tested while taking the medication without a TUE. The Athlete argued that the CAN-NF might have forwarded that email to an email address different than the one he had provided on the TUE Application Form, one he was no longer using. The Athlete further argued that given the importance of the information contained in the FEI email, the CCES and the FEI should have communicated directly with him, and not through CAN-NF.

h) That furthermore, even if he had taken note of the above communications, he had been "dangerously and clinically depressed" during the relevant time and "in no condition to appreciate its significance". That, because of his clinical depression, his ability to act with utmost care had been severely impacted. He argued that the tragic circumstances which caused his depression in which he had been functioning during his mother's battle with cancer and her subsequent death were unique, exceptional and extraordinary.

i) The Athlete finally submitted that, even if the Tribunal found that he was negligent, any higher sanction than the period already served was disproportionate, and that his honesty and integrity also deserved recognition in the consideration of the sanctions to be imposed.

## **5. The FEI's written and oral submissions**

5.1 Together with its submissions, the FEI provided a record of the Athlete's competition results.

5.2 In essence the FEI submitted:

a) That the Athlete had not disputed that exogenous DHEA was present in the sample collected from him at the Event and that it had therefore discharged its burden of establishing that the Athlete had violated Article 2.1 of the ADRHA.

b) That according to Article 10.2 of the ADRHA a standard sanction of two (2) years was applicable, unless the Athlete could establish that grounds for mitigating that sanction, in accordance with Articles 10.4 and 10.5 of the ADRHA, existed.

c) That in a first step, the Athlete had to show how the Prohibited Substance had entered his system. That the Athlete had adduced evidence - in particular the letters by Dr. Parikh and Dr. Knipping - that was likely to prove, by a

balance of probability, that the Prohibited Substance in the Athlete's system resulted from ingesting DHEA.

d) Regarding the applicability of Article 10.5.4 of the ADRHA the FEI argued that it was aimed at Athletes who had succumbed to temptation and breached the rules, and that it was intended to incentivise and reward them for repenting for their wrongdoing and coming clean. That in addition, Athletes had not only to come forward and confess their violations, but that they also had to stop the violation in question. That in the case at hand, no voluntary admission had been made by the Athlete, since he had simply applied for permission to use DHEA, and had not admitted to an Anti-Doping Rule violation. That the Athlete did not repent for his violation, but instead went ahead and started using the DHEA in advance of any response from the CCES, and that he had not stopped competing. Lastly, that the Athlete had not mentioned the alleged voluntary admission in his first submissions, but had only raised that argument for the first time in his revised response of 6 December 2012. Further, that the Athlete had not disclosed his DHEA use on the Doping Control Form when he was tested.

e) That as a result, reducing the Athlete's sanction under Article 10.5.4 of the ADRHA was inconsistent with the wording of that rule, and was further inconsistent with the overriding objective of the Code and the rules, which was to ensure clean competition.

f) Regarding Fault or Negligence the FEI argued that the comment to Articles 10.5.1 and 10.5.2 of the ADRHA made it clear that these Articles were meant to have an impact only in cases where the circumstances are truly exceptional, and not in the vast majority of cases. That moreover, according to the jurisdiction of the Court of Arbitration for Sport ("CAS") (i.e. WADA v. Turrini and CISM CAS 2008/A/1565, Award dated 4 November 2008), a hearing panel assessing an Article 10.5.2 plea had to determine to what extent the Athlete departed from the standard of care that the Code imposes on him in order to avoid ingesting any Prohibited Substances. That in the case at hand, the Athlete's departure from the rigorous standard of care expected of him was significant, as he was aware that he could not use the DHEA without a TUE. That the Athlete had further chosen to not complete the process with CCES by providing a full endocrinological work-up, detailing the cause of his low DHEA levels and determining whether DHEA supplementation was an appropriate treatment, but had instead chosen to approach the FEI for a TUE. That further, even after the FEI had told him through CAN-NF that the medical information he

had submitted did not justify granting a TUE, and after the FEI had warned him that he would be sanctioned in case he tested positive for DHEA without a TUE, he still continued competing.<sup>1</sup> That the Athlete had been aware that two separate Anti-Doping Organizations (CCES and FEI) had decided that his use of DHEA was not justified based on his medical circumstances, but that he still continued using the Prohibited Substance. That it had been the Athlete's duty, following an application for a TUE, to await approval of the TUE, before taking the Prohibited Substance or continuing to compete respectively, as silence by an Anti-Doping-Organization following a TUE request was not equal to an approval of that request.

g) That in the case at hand it was not possible to apply for retroactive permission of the DHEA use.

h) That in addition, while the Athlete had disclosed eight substances on the Doping Control Form, he had failed to disclose his daily consumption of DHEA.

i) Regarding the Athlete's allegation that his ability to act with utmost care had been impacted, the FEI acknowledged that the WADA anti-doping regime did not ignore personal disabilities, under the condition however that it was shown that there were valid reasons as to why an athlete departed from the expected standards of care. That furthermore, CAS had accepted that depression can potentially interfere with cognitive function, and could therefore explain a departure from the expected standards of care. That, however, according to CAS jurisprudence, a claim of such impairment had to be backed up by a "proven medical diagnosis". That moreover, the Athlete had to provide proof that the alleged impairment had indeed had an impact on his ability to meet the expected standard of care (i.e. Vlasov v. ATP, CAS 2005/A/873, Award dated 23 August 2005). That in this case no medical diagnosis of depression had been provided. The FEI argued in this context that Dr. McLean's statement did not include details of any consultation he had had with the Athlete, nor of any treatment provided to the Athlete. Further that Dr. Hershberg had not examined the Athlete himself but had simply based his review on the affidavits and medical reports provided to him. The FEI further highlighted that none

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<sup>1</sup> On 24 January 2013, Mr. Craig Andreas, Chief Operating Officer of CAN-NF confirmed that Ms. Gutowski's email of 19 February 2009 to Ms. de Graaff had been forwarded to the Athlete on 21 February 2009, by Ms. Karen Hendry-Ouellette, CAN-NF Manager of Sport – Jumping Department.

of the medical reports provided by the Athlete suggested that the alleged depression and impairment had lasted until February 2010, i.e. the time of the FEI's email warning to the Athlete about the consequences of testing positive for DHEA without having received a TUE for that substance. That to the contrary, the contemporaneous assessments of the doctors who had actually examined the Athlete – Dr. Ezzet, Dr. Knipping and Dr. Parikh – only supported the finding of a “significant reduction in energy level and increased fatigue” and DHEA deficiency, but not of clinical depression.

j) That moreover, the Athlete's objective conduct during the relevant period – at least between October 2008 and February 2010 – had been inconsistent with the suggestion that his cognitive abilities were impaired to an extent that he had not been able to function. The FEI argued in this context that the Athlete had functioned well enough to apply for a TUE with the CCES in October 2008, that he had further understood the significance of the CCES's request for further information in November 2008, since he had arranged for that further information, which had been provided by Dr. Parikh. That he had also clearly understood the implications of the CCES's rejection of his TUE application in May 2009, as he had taken decisions and acted accordingly. That he had requested his family secretary to forward the CCES TUE application and its documents to the CAN-NF in December 2009, in order for it to apply to the FEI for a TUE on his behalf. That it followed from the Athlete's competition and results history that throughout the period from 19 September 2008 to 17 August 2011 the Athlete had functioned well enough to be able to enter elite international-level Jumping competitions, including the World Equestrian Games in Kentucky in September 2010, and to guide his horse over very challenging jumps, without injuring himself or others. In conclusion the FEI argued that the Athlete had not established any grounds for mitigation of the otherwise applicable sanction under Article 10.5.2 of the ADRHA.

k) Lastly the FEI also requested that, in accordance with Article 10.1 of the ADRHA, the results obtained in other competitions in the Calgary Spruce Meadows event from 8 June to 6 July 2011 be disqualified, and all related medals, points and prizes forfeited.

## **6. Jurisdiction**

- 6.1 The Tribunal has jurisdiction over this matter pursuant to the Statutes, GRs and the ADRHA.

## **7. The Decision**

- 7.1 To start with, the Tribunal takes note that the final, and only hearing in this case took place roughly eighteen (18) months after the Athlete had been provisionally suspended by the FEI. The Tribunal finds however that the record reflects that the possibility of a Preliminary Hearing was brought to the attention of the Athlete's counsel at numerous occasions, but that neither the Athlete himself nor his counsel had requested a Preliminary Hearing. The Tribunal further acknowledges that the procedural delays prior to the Final Hearing were caused by the Athlete himself as he made numerous requests, through his counsel, for extensions of deadlines.
- 7.2 As set forth in Article 2.1.2 of the ADRHA, sufficient proof of an Anti-Doping Rule violation under Article 2.1 of the ADRHA is established by the presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A-Sample where the Athlete waives his right to the analysis of the B-Sample and the B-Sample is not analysed, or the B-Sample confirms the A-Sample. The Tribunal is satisfied that the laboratory reports relating to the A-Sample and the B-Sample reflect that the analytical tests were performed in an acceptable manner and that the findings of the INRS are accurate. The Tribunal is further satisfied that the test results evidence the presence of exogenous DHEA in the Sample taken from the Athlete at the Event. DHEA of exogenous origin is listed as a Prohibited Substance on the List. The Athlete did not contest the accuracy of the test results or the positive findings.
- 7.3 The Tribunal takes note of the TUE application process initiated by the Athlete prior to the Event, both with the CCES and the FEI. However, no valid TUE had been provided to the Athlete for the use of the Prohibited Substance detected at the time of the Sample collection at the Event.
- 7.4 The FEI has thus established an Adverse Analytical Finding, and has thereby sufficiently proven the objective elements of an offence in accordance with Article 3 of the ADRHA. This is undisputed between the Parties.
- 7.5 Pursuant to Article 10.2 of the ADRHA, the mandatory period for a first breach of the ADRHA is a period of two (2) years Ineligibility. However, depending on the circumstances of the specific case, a reduction or even elimination of this period of Ineligibility is possible under Articles 10.4 and 10.5 of the ADRHA.

- 7.6 To start with, the Tribunal finds that Article 10.4 of the ADRHA is not applicable to the positive finding for DHEA, since DHEA is classified as a non Specified Substance.
- 7.7 The Tribunal takes note of the arguments brought forward by the Parties regarding Article 10.5.4 of the ADRHA. In particular, the Tribunal takes note of the Athlete's assertions – as affirmed by his father, his sister and Dr. Parikh - that he wanted the Anti-Doping Organizations to know that he was taking DHEA following his doctor's advice. The Tribunal further notes the Athlete's claim that the fact that he had sent the letter by Dr. Parikh of 11 December 2008 to the CCES in December 2008, and to the FEI in December 2009, had to be interpreted as voluntary admissions to two Anti-Doping Organizations.
- 7.8 Article 10.5.4 of the ADRHA provides for a reduction of the period of Ineligibility of up to one half, where an Athlete voluntarily admits the commission of an Anti-Doping Rule violation before having received notice of a Sample collection which could establish an Anti-Doping Rule violation, and where that admission is the only reliable evidence of a violation at the time of the admission. In line with a previous Decision by the Anti-Doping Tribunal of the International Baseball Federation (IBAF; IBAF v. Ponson, IBAF Anti-Doping Tribunal decision dated 8 June 2009), the Tribunal considers that "admission" according to Article 10.5.4 of the ADHRA means an admission in terms of liability for the commission of an Anti-Doping Rule violation. The Tribunal however finds that submitting Dr. Parikh's letter to the CCES and the FEI merely formed part of the TUE application procedure in both cases, and that therefore, no voluntary admission had been made. The Tribunal is further of the opinion that informing an Anti-Doping Organization about the use of a Prohibited Substance is not sufficient for the purpose of an admission. In addition, the Tribunal finds that there was no causal connection between the rule violation and the alleged admission – i.e. - forwarding Dr. Parikh's letter of 11 December 2008 to the CCES and to the FEI – because the "admission" had taken place almost three years prior to the Athlete participating at the Event and testing positive for DHEA. As a result, the Tribunal holds that an "admission" by the Athlete in 2008 or 2009 could not possibly be effective for an Anti-Doping Rule violation that did not take place until 2011. The Tribunal further finds that the fact that the Athlete had disclosed in total eight substances on the Doping Control Form but did not name DHEA is contradictory to his claim of an admission. In this context, the Tribunal is not convinced by the Athlete's argument that the "multivitamin" listed by him on the Doping Control Form had to be interpreted as meaning DHEA, as DHEA clearly is not a multivitamin. Further, there was no obvious reason for the Athlete not to list DHEA by name especially when he knew it was a substance for which he required a TUE.
- 7.9 Turning to a potential elimination or reduction under Article 10.5.2 of the ADRHA, the Tribunal holds that the Athlete has the burden of proof

that he bore “No Significant Fault or Neglligence,” for the positive findings, as set forth in Article 10.5.2 of the ADRHA. However, in order to benefit from any elimination or reduction of the applicable sanction under Article 10.5.2 of the ADRHA, the Athlete must first establish how the Prohibited Substance entered his system. This element is a “pre-requisite” to the application of Article 10.5.2 of the ADRHA.

- 7.10 The Tribunal, in considering the Athlete’s explanations and supporting evidence – in particular Dr. Parikh’s letter and Dr. Knipping’s fax – finds that the Athlete has established “by a balance of probability”, as required under Article 3.1 of the ADRHA, that the ingestion of DHEA caused the positive test result. The Tribunal is therefore satisfied that the Athlete has established how the Prohibited Substance had entered his system.
- 7.11 The Tribunal therefore needs to examine the question of “No Fault or Negligence” or “No Significant Fault or Negligence” for the rule violation. The Tribunal holds, that it is the Athlete’s basic duty to act with utmost caution to not ingest any Prohibited Substances. The Tribunal however finds that the Athlete did not fulfil this basic duty, as he ingested the DHEA while well-aware that it is a Prohibited Substance as demonstrated by his own application for a TUE.
- 7.12 The Tribunal takes note of the Parties’ submissions, in particular the Athlete’s assertion that the oppressive and tragic circumstances in which he was functioning during his mother’s battle with cancer and her subsequent death were unique, exceptional and extraordinary, and that the Athlete had been in a debilitating and desperate state and that his ability to act had been severely impacted. The Tribunal also takes note of the affidavits by the Athlete’s father and sister, confirming that he had suffered particularly heavily during this time. In addition, the Tribunal acknowledges the witness statements by the three members of the Canadian Equestrian Team, affirming the Athlete’s otherwise outstanding character. The Tribunal credits that evidence and recognises that this was a difficult and sad time for the Athlete.
- 7.13 The Tribunal nonetheless finds that the Athlete had been highly negligent in taking the Prohibited Substance DHEA without a respective TUE, even more so after his TUE application had been denied, and after he had been advised by his doctor to stop taking the medication until such TUE was granted. In this context the Tribunal takes note of the Athlete’s allegation that he had not received either the CCES TUE denial letter, or Dr. Knipping’s fax, or the FEI email, allegedly due to the use of an inactive email account or due to those documents being filed by the family’s secretary without first advising him of their content. However, the Athlete did not present any evidence regarding his allegation that the CAN-NF had sent the relevant letter to a former, unused email address. He furthermore did not provide any proof that the family’s secretary had indeed filed the

documents in question prior to him learning their contents. The Tribunal therefore finds that the Athlete has not established that he never learned of either of the three communications listed above, and that he was therefore unaware, that his TUE request had been rejected. Given that lack of evidence, the Tribunal must conclude that he knew or should have known that the TUE had not been granted.

7.14 The Tribunal further acknowledges the specific circumstances alleged by the Athlete – his physical and medical conditions. Regarding the alleged physical and medical conditions of the Athlete, the Tribunal in particular considered the statements from Dr. McLean and the letter by Dr. Hershberg, suggesting that the Athlete had been clinically depressed, and that this depression might have affected his cognitive function. The Tribunal however finds that those statements do not sufficiently establish the alleged depression of the Athlete, since none of the doctors had actually diagnosed the Athlete himself, and none of them had provided any details regarding treatment of the alleged clinical depression. The Tribunal therefore finds that the Athlete has not established that he suffered from depression during the period of time when the relevant communications took place. Moreover, the Tribunal holds that even if it concluded that the Athlete had provided proof of clinical depression, he still had to show in a further step that this clinical depression had led to the impairment of his cognitive ability. No respective evidence has however been provided by the Athlete. To the contrary, the fact that the Athlete had competed at the highest level throughout more or less the entire period of time in question would suggest that he was not suffering from severe depression.

7.15 The Tribunal further holds that even if the Athlete had established that he had not received the above communications or had not been in a position to duly consider them due to his depression, the Tribunal would still find that he was negligent. The Tribunal comes to this conclusion in light of the clear wording of Article 4.4.1 of the ADRHA, according to which the Athlete had to “first” obtain a TUE, prior to using any prescribed medication that is prohibited in and out of competition. It was therefore the Athlete’s duty, prior to competing on the medication, to follow up with the Anti-Doping Organizations to find out whether his TUE request had been granted or not. The Tribunal is further of the opinion that in the absence of an affirmative answer by the Anti-Doping Organizations regarding his TUE application, there was no basis for the Athlete to believe that he was allowed to use the Prohibited Substance. The Tribunal comes to this conclusion in light of the fact that for certain Prohibited Substances, a “Declaration of Use” form used to exist, as provided for in the International Standard for Therapeutic Use Exemption (“ISTUE”) of the World Anti-Doping Agency (“WADA”), which was clearly distinguishable from the request for a TUE insofar as the respective substances could be used following the declaration only.



7.16 The Tribunal concludes that the circumstances of the case at hand are not truly exceptional, that the Athlete acted highly negligently in taking DHEA without a TUE and that therefore no reduction or elimination of the otherwise applicable period of Ineligibility of two years may be applied, under Article 10.5.2 of the ADRHA. Regarding the Athlete's claim that even if the Tribunal found that he was negligent, he should be given some credit for acting in good faith by being honest and fully disclosing to the Anti-Doping Organizations that he was taking the Prohibited Substance DHEA. The Tribunal, in line with CAS jurisprudence<sup>1</sup> finds that as it has rejected the presence of any exceptional circumstances in this case under the WADA Code and the ADRHA, it is left with no other choice than to apply the sanction provided in Article 10.2 of the ADRHA.

## **8. Disqualification**

8.1 For the reasons set forth above, the Tribunal is disqualifying the Athlete from the Competition and all medals, points and prize money won at the Competition must be forfeited, in accordance with Article 9 of the ADRHA. The Tribunal is further disqualifying all other results obtained by the Athlete in the Event, in accordance with Article 10.1 of the ADRHA.

## **9. Sanctions**

9.1 As a consequence of the foregoing, the Tribunal is imposing the following sanctions on the Athlete, in accordance with Article 169 of the GRs and Article 10 of the ADRHA:

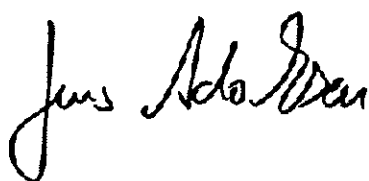
- 1) The Athlete shall be suspended for a period of **two (2) years** to be effective immediately and without further notice from the date of the notification. The Period of Provisional Suspension, effective from 24 August 2011, i.e. the date of Provisional Suspension, shall be credited against the Period of Ineligibility imposed in this decision. Therefore, the PR shall be ineligible **through 23 August 2013**.
- 2) The Athlete is fined **CHF 2,000**.
- 3) The Athlete shall contribute **CHF 4,000** towards the legal costs of the judicial procedure, as well as the costs of the B-Sample analysis.

- 9.2 No Athlete who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) that is authorized or organized by the FEI or any National Federation or be present at an Event (other than as a spectator) that is authorized or organized by the FEI or any National Federation, or participate in any capacity in Competitions authorized or organized by any international or national-level Event organization (Article 10.10.1 of the ADRHA). Under Article 10.10.2 of the ADRHA, specific consequences are foreseen for a violation of the period of Ineligibility.
- 9.3 According to Article 168.4 of the GRs, the present Decision is effective from the day of written notification to the persons and bodies concerned.
- 9.4 In accordance with Article 12 of the ADRHA, the Athlete and the FEI may appeal against this decision by lodging an appeal with the Court of Arbitration for Sport within 30 days of receipt hereof.

**V. DECISION TO BE FORWARDED TO:**

1. **The person sanctioned:** Yes
2. **The President of the NF of the person sanctioned:** Yes
3. **The President of the Organising Committee of the Event through his NF:** Yes
4. **Any other:** WADA

**FOR THE PANEL**



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**THE CHAIRMAN, Prof. Dr. Jens Adolphsen**

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<sup>1</sup> See CAS 2004/A/690 Hipperdinger v. ATP, Final Award dated 24 March 2005.