SPORT DISPUTE RESOLUTION CENTRE OF CANADA

IN THE MATTER OF THE CANADIAN ANTI-DOPING PROGRAM

and

IN THE MATTER OF AN ANTI-DOPING RULE VIOLATION BY CHRISTOPHER SHEPPARD ASSERTED BY THE CANADIAN CENTRE FOR ETHICS IN SPORT

N° : SDRCC DT-05-0028
(Doping Tribunal
Ordinary Division)

CANADIAN CENTRE FOR ETHICS IN SPORT {CCES}

CANADIAN CYCLING ASSOCIATION {CCA}

GOVERNMENT OF CANADA {GC}

and

CHRISTOPHER SHEPPARD {Athlete}

and

WORLD ANTI-DOPING AGENCY{WADA}
UNION CYCLISTE INTERNATIONALE {UCI}

Before:

Professor Richard H. McLaren (Co-Chief Arbitrator)

Appearances and Attendances:

For the Athlete:	Robert W. Cameron, Esq.
For the Canadian Centre for Ethics in Sport:	David W. Lech, Esq. Jeremy Luke Karine Henrie
For the Government of Canada:	Mary Warren, Esq.
For the Canadian Cycling Association:	Kris Westwood
World Anti-Doping Agency:	No Appearance

Background Facts

1. Christopher Sheppard {Athlete} is an athlete in the sport of cycling and a member of the Canadian Cycling Association {CCA}. As a member he agreed by signing a contract that he would abide by the rules of the CCA.

2. The CCA is the national sport organization governing the sport of Cycling in Canada. They adopted the Canadian Anti-Doping Program {CADP} on 31 May 2004. The purpose of CADP is to protect athletes' rights to fair competition.

3. The Canadian Centre for Ethics in Sport {CCES} is an independent not-for-profit organization incorporated under Part II of the *Canada Corporations Act* who, amongst other things, promotes ethical conduct in all aspects of sport in Canada and to further that objective administers CADP.

4. This arbitration is conducted under the CADP and the Sport Dispute Resolution Centre for Canada {SDRCC} Arbitration Rules and Procedures including those for Doping Disputes known as the ADR-Sport-RED Code.

5. Mr. Sheppard was an athlete selected for a no advance notice, out-of-competition doping control in Kamloops, British Columbia. Pursuant to the rules of CADP the Athlete provided a urine sample for testing on 29 May 2005.

6. The World Anti-Doping Agency {WADA} accredited laboratory in Montreal {Lab} reported on 15 June 2005 to the CCES, an adverse analytical finding for the presence of recombinant erythropoietin {rEPO} in Sample "A". On 4 July 2005, the Lab reported a confirmation adverse analytical finding for the presence of rEPO in Sample "B". Section 3.0 of the CADP incorporates the Prohibited List International Standard issued by WADA. Section S2.1 of the Prohibited List, applicable at the time of obtaining the sample, sets out that exogenous erythropoietin {EPO} is a Prohibited Substance

7. Following the receipt of the Lab Certificate of Analysis an "initial review" was conducted by the CCES pursuant to Rule 7.45 of the CADP. As part of that review, a representative of the CCES requested, through the CCA, that the Athlete provide a written explanation of the adverse analytical findings by an extended deadline of 28 June 2005. No letter of explanation from the Athlete regarding the adverse analytical findings was ever forthcoming.

8. On 5 July 2005 a Notice about Mr. Sheppard was issued to the CCA by the CCES pursuant to Rule 7.46 of the CADP. The Notice asserted that a doping infraction occurred and proposed a sanction of two years ineligibility and permanent ineligibility for direct financial support from the Government of Canada pursuant to Rules 7.20 and 7.37.

9. Rule 7.53 of CADP provides that a Doping Tribunal must hold a hearing to determine an anti-doping rule violation and impose consequences provided for under the CADP unless the athlete waives the right to a hearing pursuant to Rule 7.54. There was no waiver of the right to a hearing.

10. The Co-Chief Arbitrator Yves Fortier, C.C., Q.C. appointed me to be the Arbitrator on 7 July 2005. The parties were advised of the appointment by letter from the SDRCC on the same date. The letter advised the parties that a pre-hearing conference call would take place on 12 July 2005. At the time of the call there was no objection to my appointment as arbitrator, nor as to the arbitrability of the matter.

Record of Proceedings

11. The Athlete's counsel participated in the pre-hearing call of 12 July 2005. Mr. Benoit Girardin, the Executive Director of the SDRCC, forwarded minutes of that call to counsel for the parties. Those minutes constitute the Procedural Order in this matter.

12. Pursuant to the Procedural Order on 19 July 2005 the CCES filed a document entitled *Affidavit of Jeremy Luke, General Manager, Doping Control Team*. This document provided the information

and business records of the CCES in respect of the alleged Sheppard anti-doping rule violation and forms part of the evidence of the CCES in this matter.

13. At the request of the Athlete's counsel a one-week extension of the time for filing of their brief was granted. Pursuant to the Procedural Order and the extension granted by the Arbitrator the Athlete filed on 19 August 2005 its brief together with an Affidavit of Dr. Brian Berry dated 11 August 2005 and an exhibit being the First Edition Cycling News bulletin dated 10 August 2005.

14. A further pre-hearing by way of conference call was held on 25 August 2005 where the proceedings in this matter were further and better defined. The minutes of that call constitute the Second Procedural Order in this matter.

15. Pursuant to the Second Procedural Order the CCES filed its answering brief on 26 August 2005. That brief contained further submissions in answer to those of the Athlete. It also contained a supplementary Affidavit of Jeremy Luke together with an expert report with three annexes from the Lab Director Dr. Christiane Ayotte.

16. Pursuant to the Second Procedural Order, on the filing of a request for adjournment by the Athlete's counsel, a further pre-hearing conference call was held on 1 September 2005. Following oral submissions by counsel the request for an adjournment of the hearing date was denied for the oral reasons delivered at the time. At the hearing in Victoria on 6 September 2005 counsel for the Athlete went on the record in the course of making his submissions to state that the refusal to grant an adjournment was a denial of natural justice.

Affidavit Evidence

17. In the first affidavit of Jeremy Luke filed with the submission of the CCES he attests that the athlete, Mr. Sheppard, underwent doping control 29 May 2005. There were no concerns regarding the urine sample collection and no irregularities in the chain of custody. He asserts the "initial review", pursuant to Rule 7.45 of

the CADP, revealed no apparent departure from Doping Control Rules or laboratory analysis that undermined the validity of the adverse analytical finding for rEPO. The "B" sample confirmed the adverse analytical finding. The affidavit confirms notice was provided 5 July 2005 to Mr. Sheppard asserting his commission of an anti-doping rule violation according to Rules 7.16 to 7.20 (Presence in the Sample) of the CADP and a two-year sanction was proposed.

18. Dr. Brian Berry is a medical doctor with a specialist certificate in Hematological Pathology (1992) and Anatomical Pathology (1991) and is currently the Director of Hematopathology, Vancouver Island Health Authority in Victoria, British Columbia. He attests that he reviewed the Lab report and found that the *Documentation of procedure steps, reagents, test results and technologist identification where appropriate appear to be* [sic] *demonstrate a high standard of laboratory practise.* He went on to discuss the results of the analyses reported and the various methodologies used to determine that there had been an adverse analytical finding. He commented upon the densitometry methodology and noted that the evidence of reliability is not provided. He made reference to the *Beke* case in Belgium by referral to a cycling news bulletin, which stated that the triathlete had been cleared of an EPO adverse finding on the basis that the lab result was a false positive. The affidavit then concludes with the following expression of opinion: *One must assume that the methodologies used in these cases are identical given the international protocols. As well, one must assume that there will be or has been some re-evaluation of this methodology to ensure its reliability and remove any doubt of its validity in the sporting and scientific community.*

19. Dr. Christiane Ayotte is the Director of the WADA accredited laboratory in Montreal {Lab}. In her expert report she advises that she has not received any information from the scientists who developed the test for rEPO or from WADA supporting the assertion by counsel for the Athlete that the current method for detecting rEPO is not reliable. She contends that WADA has restated that the test for rEPO is valid and reliable, that it has been scientifically validated and refined over time and that the test can clearly differentiate natural and exogenous EPO when the test

results are properly interpreted according to the appropriate criteria. She attests that since 2003, her Lab has accordingly implemented the methods for conducting and interpreting the EPO test as described in WADA Technical Document TD2004EPO. Dr. Ayotte further acknowledges that the Lab is collaborating in research commissioned by WADA concerning deviant or abnormal profiles of EPO that are not due to the administration of exogenous EPO. The Lab has recognized these deviant or abnormal profiles in appropriate circumstances. Dr. Ayotte confirmed that the results of the testing carried out on Mr. Sheppard's samples are valid and clearly demonstrate the presence of rEPO isoforms. She also states that the Lab's testing results were sent to, and confirmed by, Ms. Françoise Lasne at the WADA accredited laboratory in Paris.

Evidence at Hearing

20. Neither the Athlete nor Dr. Berry were present at the hearing. The only witness to be examined and cross-examined at the hearing was Dr. Ayotte. Her evidence-in-chief included an explanation of the history of the test for rEPO. She also explained the test procedure used by the Lab and how it conformed to the WADA standard. In response to questioning by the Arbitrator she went through the Lab documentation and data to explain further the compliance with the WADA standard. In her testimony she confirmed that the Athlete's sample was unquestionably not one that was borderline and that the sample did not produce any "active" or "effort" urine patterns. She concluded that it was a clear and unequivocal case of an adverse analytical finding for rEPO.

21. Dr Ayotte was cross-examined extensively by counsel for the Athlete. The questions centered upon the development of the test for rEPO and the literature that supports it. Further questions addressed the fact that the test has been refined since the recognition of "active" and "effort" urine patterns beginning in mid-June of 2003. Dr. Ayotte stated that the refinements in the test did not reflect a lack of reliability, but merely the on-going advancement of science and the improvement and refinement of the test technique as a result. In regards to the state of affairs of the Rutger Beke case she testified that the reasons for the decision are

not currently available and that the only allegation that the rEPO test is flawed is by way of a newspaper report.

22. In his submissions at the hearing on 6 September 2005 in Victoria, British Columbia, counsel for the Athlete submitted that the failure of the CCES to provide the WADA report on the EPO test[1] during the discovery process was not a fair and full disclosure and that it affected preparation for the case by counsel.

Submission of the CCES

23. The CCES has met its burden of proof to establish an anti-doping rule violation. The Athlete is responsible under CADP Rules 7.16 and 7.17 for any prohibited substance or its metabolites found to be present in his sample. Mr. Sheppard has committed an anti-doping rule violation by having the Prohibited Substance rEPO in his body contrary to the CADP. The Athlete is therefore subject to the mandatory two-year period of ineligibility and permanent ineligibility for direct financial support from the Government of Canada. No "exceptional circumstances" warrant a reduction or elimination of the required period of suspension and none have been asserted.

24. The CCES submits that the evidentiary burden on the Athlete rebutting the presumption of procedural reliability and regularity accorded to WADA-accredited laboratories, pursuant to CADP Rule 7.56(b), has not been met. Suggesting or raising a possibility that the Lab lacks relevant testing experience and that the test is unreliable is not evidence that a departure from the laboratory rules in fact occurred. The Athlete has not demonstrated that any departure from the laboratory rules has occurred and provides no support for his contention that the rEPO urine test is unreliable. In the alternative, if a departure from laboratory rules is proven to have occurred, CCES may prove any such departure did not cause the adverse analytical finding.

25. The CCES further submits that the affidavit of Dr. Christiane Ayotte confirms that not only is the approved test to detect rEPO

[1] This is a report dated 11 March 2003 entitled "Evaluation Report on the Urine EPO Test" authored by Dr. G. Peltre and Dr. W. Thormann.

in urine valid and reliable, but in addition the Lab has the necessary expertise and experience to accurately perform the test procedure.

26. For these reasons CCES submits that the Tribunal should find the Athlete to have committed an anti-doping violation and should assess the penalties mandated by the CADP Rules 7.20 and 7.37.

Submission of the Athlete

27. The Athlete's written submissions challenge the reliability of the urine test used by the Lab to establish an adverse analytical finding for the presence of rEPO. In particular, it is submitted that there is no evidence that the pattern of distribution or profile of the migration of the isoforms on the gel reliably confirms the presence of rEPO. It is further submitted that the suspect distributions can occur naturally even when the athlete has not ingested rEPO.

28. Additionally, it was submitted that a new more reliable urine test is being developed. Such a development is confirmation that the test used by CCES is obsolete. Therefore, the CCES has not met the burden of proof imposed by CADP Rule 7.55 and no doping violation can be confirmed in this proceeding.

29. In the alternative, it was submitted that the analytical result requires corroboration by at least some other evidence having regard to the most current research from Belgium. In the absence of such corroborating evidence the burden of proof has not been met. In the further alternative, it was submitted that the hearing couldn't proceed until the research is obtained from Belgium.

30. At the hearing counsel relied on the foregoing written submissions. In the submissions at the hearing two procedural objections were raised. It was submitted that the refusal to grant the requested hearing adjournment is a denial of natural justice. It was further submitted that a document referred to by Dr. Ayotte, but requested by counsel for the Athlete the morning before the hearing, meant that there had not been fair and full disclosure. In this connection reference was made to *R.* v. *Stinchcombe* [1991] 3 S.C.R. 326 and the application of that case in *Familamiri* v. *Assn. of Prof.*

Engineers & Geoscientists of B.C. 2004 BCSC 660 (Vancouver Registry No. L030184).

31. In further support of the Athlete's case it was submitted at the hearing that there is no presumption in the CADP that the scientific test procedure used by the Lab is reliable and does not produce false positives. It was submitted that if it was determined that there were such a presumption then it would be inconsistent with CADP Rule 7.55, at which point reference ought to be made to the common law as held in *Dr. Q* v. *College of Physicians & Surgeons of B.C.* [2003] 1 S.C.R. 226 and referenced therein *Jory* v. *College of Physicians & Surgeons of B.C.* [1985] B.C.J. No. 320 (QL). The burden is then upon the CCES to prove that the test is reliable and valid. It was submitted that this has not been done here and therefore no doping offence has been made out.

32. Finally, it was submitted that all that is required under the common law is to raise doubts or concerns about the test and this has been done through the filed material and the cross-examination of Dr. Ayotte. Once that has occurred, it is the burden of the CCES to establish that the test is reliable and valid. The burden that shifts in this case is the evidentiary burden rather than the legal burden.

Submission of the Government of Canada

33. The *Canadian Policy Against Doping in Sport (2004)* was endorsed by Federal-provincial/Territorial Ministers Responsible for Sport, Fitness and Recreation in April 2004, and came into effect on 1 June 2004 in conjunction with the Canadian Anti-Doping Program. The policy designates and recognizes the CCES as having he appropriate authority to execute the CADP. Therefore, the Government of Canada subscribes to the CCES submission as filed and requests that their proposed actions be upheld.

DECISION

Procedural Issues

34. I turn first to the procedural objections of counsel for the Athlete on an adjournment. Counsel for the Athlete asserts the Lab test is not reliable. Dr. Ayotte's affidavit and evidence is to the contrary and stands unaffected by cross-examination. The only other evidence is from Dr. Berry who did not present himself for cross-examination and whose testimony is speculative and suggestive while admittedly not being an expert in the field. I find that awaiting further scientific developments that may or may not occur, and awaiting a particular foreign arbitration award, are not grounds to grant a request to adjourn this scheduled hearing. Natural justice does not require that the matter be delayed until the scientific community has progressed with developments that might, or might not, permit a different or a stronger defense for the Athlete. Scientific testing is a continuously evolving field. It will always be possible that a delay might provide further information about the reliability of a scientific test. However, there has to be reason for delay beyond speculation and assertion that the test is unreliable. Time constraints, and preservation of the effectiveness of anti-doping rules, requires the reliability of a particular scientific test be assessed using the scientific evidence available at the time of the hearing. There is a very rigid set of time limits in the rules of CADP and the ADR-Sport-RED Code for good reason.

35. Mr. Sheppard has not been provisionally suspended which has left him free to compete until the final adjudication is completed. Where an arbitrator finds that an offense has been committed, an athlete who was free to continue competing throughout the procedure leading up to the hearing, has had the advantage of competing when he should not have been. Therefore, the procedural process should not allow adjournments where this state of affairs will continue unless there is a significant reason to do so. Awaiting potential scientific developments does not qualify as a significant reason to allow for adjournment and delaying this matter is ultimately unfair to those who are clean competitors. For all of these reasons I reject the submission that the refusal to grant an adjournment of the hearing was a denial of natural justice.

36. Counsel's second procedural objection at the hearing alleged that the CCES had committed a lack of full and fair disclosure by failing to make a particular report available and thereby made it difficult to prepare the Athlete's defense. Counsel for the athlete made the request for the document the morning prior to the hearing, which was a national statutory holiday and coincided with the travel departure of the CCES counsel in order to be present at the hearing in Victoria, British Columbia the following day. I find that the request was made too late.

37. The requested document was a report produced for WADA in early 2003, before the current International Standard used by the Lab was developed. The report evaluated the rEPO test used at the time and not the one used today. It had been published on the WADA web site but was no longer set out there. Therefore, it was a public document. It is not part of the discovery process to require the disclosure of a public document that is readily available from a body other than the CCES and forms no part of the current International Standard for testing.

38. First, I find that full and complete disclosure has been made by the CCES. Second, the particular request was untimely and made too late in the proceedings. Third, it was a public document not produced by the CCES or the Lab and not relevant to the current testing procedure used in the Lab. Therefore, there is no basis for the objection made by counsel for the Athlete. The cases submitted in support of the assertion are distinguishable and have no application to the case herein. The cases relate to a criminal and a disciplinary hearing considered to be quasi-criminal, where the other party in the proceeding has evidence within its control that ought to be disclosed in the discovery process. Specifically, the cases set out principles for criminal and disciplinary proceedings considered quasi-criminal in nature and not for matters being arbitrated under a contractual agreement. These proceedings are not criminal or quasi-criminal in nature,[2] but rather arise as a result

[2] It is with great respect that I disagree with Arbitrator Gauthier in her decision in *CCES et al v. Zardo* SDRCC DT 05-023 (6 September 2005) wherein she makes reference to penal law at pages 29 and subsequent. Doping disputes are sports related matters arising by contract where an athlete agrees not to

of a contract. The Athlete agrees by contract that he will abide by CCA's anti-doping rules, which in turn are those of CADP. The parties then agree to proceed by way of arbitration to have the matter adjudicated. A further basis for distinguishing the cases is because the document requested is not evidence in this arbitration proceeding and was publicly available. I reject the procedural submission as being ill founded and in any event the request was untimely.

Merits of the Decision

39. The proper selection of the Athlete for testing, the integrity of the sample collection and the chain of custody of the urine sample are all established on the record. The Lab has reported an adverse analytical finding and there is no indication that the chemical analytical process used by the Lab was in any way flawed. Indeed, the expert for the Athlete, Dr. Berry, states in his affidavit that: *Documentation of procedure steps, reagents, test results and technologist identification where appropriate appear to be* [sic] *demonstrate a high standard of laboratory practice* (Underlining that of the Arbitrator). Therefore, the presumptions of CADP Rule 7.56 are not required in this case. The challenge by the Athlete relates to the reliability of the test given the new developments in 2005 in connection with the testing for the substance rEPO and alleged discovery of false positives. The challenges are not with respect to the presumption of sample analysis or chain of custody as provided in CADP Rule 7.56.

40. The human body does not normally produce rEPO, and its presence in the body of an athlete is therefore indicative of the intentional administration of an external substance.[3]

41. This is the first Canadian doping case to deal with the Prohibited Substance rEPO. The laboratory procedures for carrying out the analysis were first introduced in 2000 just prior to the Summer

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ingest particular prohibited substances and, for which, all parties concerned have contracted to have their dispute resolved by arbitration through the SDRCC.

[3] See Françoise Lasne, et al., *Detection of Isoelectric Profiles of Erythropoietin in Urine: Differentiation of Natural and Administered Recombinant Hormones*, Analytical Biochemistry 311, 2002, at 119 at 120 stating that ... *endogenous EPO is synthesized in the human kidney, whereas recombinant EPO is synthesized in Chinese hamster ovary cells.*

Olympic Games in Sydney, Australia. The test procedures have gone through a number of refinements since that time. The first cases adjudicated around the world did not arise until 2001. This case appears to be the very first case in which a review of the refinement of the procedures must be undertaken by examining the WADA Technical Document TD2004EPO, which took effect in January of 2005.

1. The Prohibited Substance

42. The naturally occurring protein hormone EPO is produced by the kidney and stimulates the production of new red blood cells (erythropoiesis).[4] The naturally produced version of this hormone is sometimes referred to as endogenous EPO or urinary erythropoietin (u-EPO).

43. In both its natural and synthetic forms, EPO stimulates the production of red blood corpuscles, thereby increasing oxygen transport and aerobic power.[5] The synthetic forms of rEPO exist in several forms including emerging new forms. Athletes use rEPO to artificially enhance the number of red blood cells carrying oxygen to the muscles to boost the delivery of oxygen to the tissues thereby enhancing an athlete's performance in endurance sports.

2. The Lab test procedure

44. CADP Rule 6.1 prescribes that the Doping Control Rules are based upon the mandatory International Standard for Testing developed as part of the WADA Program.

45. In 2004 WADA issued Technical Document TD2004EPO[6] for use by their accredited labs in connection with testing for rEPO. That document: *Harmonization of the method for the identification of epoetin alfa and beta (EPO) and Darbepoetin alfa (NESP) by IEF-Double blotting and chemiluminescent detection"* is the one that

[4] F. Lasne et al., *Recombinant erythropoietin in urine* Nature\Vol. 405\635\8 June 2000.
[5] Françoise Lasne, et al. supra note 3.
[6] This document as well as the International Standard for Laboratories is on the web cite of WADA www.wada-ama.org. It is effective as of 15 January 2005.

was followed by the Lab during the testing of Mr. Sheppard's sample.[7]

46. In response to questioning by the Arbitrator Dr. Ayotte went through the Lab *Documentation Package*[8] for the urine sample of the Athlete and demonstrated the strict and complete compliance with the WADA technical document TD2004EPO. There was no challenge to that testimony and it is undisputed that there has been complete compliance by the Lab with the test procedure as prescribed by that technical document. It is the assertion of counsel for the Athlete that the test result is not reliable because it may generate false positives. An argument was also made as to who had the burden of proof with respect to the reliability of the test and if it had been met.

3. International jurisprudential acceptance of rEPO Test

47. The jurisprudential basis for the acceptance of rEPO testing began with the Court of Arbitration for Sport {CAS} decision in *Meier* v. *Swiss Cycling* CAS 2001/A/345 {*Meier*}. That case arose in the era when each international sports federation made its own rules about doping in contrast to the harmonized rules of WADA establishing International Standards for testing. In that case the Panel accepted that the *direct urine test*, as it was then referred to, was reliable and might be applied to determine an adverse analytical result.[9]

48. Following the *Meier* decision the next case, *UCI* v. *Hamburger* CAS 2001/A/343 {*Hamburger*}, challenged not the general reliability of the test but if there was a laboratory standard of 80% basic area percentage {BAP} overlap, a visual and quantification test to interpret the electropherogram.[10] The Panel in *Hamburger*

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[7] The WADA report sought by discovery and dealt with at paragraph 35 and subsequent was published in March of 2003 and contributed to the rewritten document TD2004EPO.

[8] Exhibit #12 to the first Luke affidavit.

[9] The words of the Panel were: *This "direct method" combines an isoelectrical focussing with a double immunal blotting. The method is based on the finding that artificially produced rEPO behaves differently in an electrical field than human nEPO and can therefore be distinguished from one another. A second basic assumption of the test method is that, as is the case with many steroids, the production of natural hormones is reduced when an artificial hormone is introduced*

[10] The basic area percentage {"BAP"} method of interpreting the EPO test was described as follows in *IAAF v/ MAR and Boulami* CAS 2003/A/383: *[O]ne of the 100% r-EPO control samples is used to*

found that the international federation did not have to follow the IOC practice of requiring an 80% BAP in its own anti-doping rule. However, the evidence was that the laboratory doing the testing followed the practice in any event. The Panel held that in so doing it must apply the 80% method of interpretation to both the "A" and "B" sample and it had not done so. Therefore, no doping infraction had occurred because the "B" sample did not confirm the "A" sample.

49. Both *Meier* and *Hamburger* were released just prior to the Salt Lake City Winter Olympic Games in February of 2002. The famous trilogy of cross-country skiing cases arose dramatically on the last day of the Salt Lake City Games dealing with the artificial substance aranesp, a wholly synthetic version of rEPO.[11] That synthetic version of rEPO was developed by the manufacturer to show up in the acidic band of the electropherogram. The result is very readily observed and creates no issues of interpretation similar to those of other rEPO forms. The result is a very clear and distinctive visual test that requires nothing more to declare the adverse analytical result.[12]

50. The next step in acceptance of the rEPO testing methodology came in the *USADA* v. *Sbeih NACAS* AAA No. 30 190 001100 03 {*Sbeih*} dated 25 March 2004 and *Boulami* (*supra note 10)* cases. In *Boulami*, the athlete challenged the validity of the 80% BAP threshold for detecting EPO. Evidence was presented that there was only a 1 in 3,161 possibility of a false positive at 80% BAP. In *Sbeih*, further scientific studies were available indicating that at

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establish a horizontal dividing line ... drawn at the bottom of the most acidic rung of the 100% r-EPO sample. ... The EPO ladder of the athlete urine sample in question is then examined relative to the horizontal baseline. ... [A] machine then measures what percentage of the surface area of these rungs appears above the horizontal baseline in the basic area of the gel. This percentage figure is the BAP. It is one of several methods of interpreting the isoelctropherograms although in the early testing days it was the predominate method.

[11] *Lazutina* v/ *IOC*: CAS 2002/A/370; *Danilova* v/ *IOC*: CAS 2002/A/371; *Lazutina* v/ *FIS*: CAS 2002/A/397; and *Danilova* v/ *FIS*: CAS 2002/A/398; Lazutina *and Danilova v/ IOC*, 4P. 267/2002 (27 May 2003) (Swiss Federal Tribunal); *Muehlegg v/ IOC*: CAS 2002/A/374 {"*Muehlegg*"}.

[12] The CAS Panel in Muehlegg made the following findings regarding the detection of Aranesp (or darbepoietin): *The Panel must conclude on all of the evidence before it that Aranesp has its own unique fingerprint which shows 4 bands clearly ... in the acidic range.* And in another section of the decision: *[T]he Panel concludes that the direct urine test employed to detect r-EPO can also be applied to detect Aranesp. The notable difference between the two applications is that Aranesp does not require a threshold safety margin to protect against false positives because of overlap, as does r-EPO.*

80% BAP, the risk of false positive is actually 1 in 500,000. Also, evidence was presented that other criteria could be used to determine the presence of rEPO instead of 80% BAP such as the two-band ratio analysis {TBR} or the location of the most intense ban analysis {LOC} criteria. Evidence was also presented that technology had advanced such that a threshold below 80% BAP might be used without risking the possibility of a false positive.

51. The use of criteria other than 80% BAP to determine a positive result for rEPO first came about in *USADA v. Bergman*, CAS 2004/O/679 {*Bergman*}. Bergman was an American cyclist who was found to have tested positive for rEPO. His "A" and "B" samples had BAP's of 79.5% and 79.4% respectively. Bergman argued that 80% BAP was a standard threshold, and that BAP values below this level could not be proof of a doping offence. The CAS Panel rejected Bergman's argument, and accepted the use of the TBR and LOC criteria as proof of the presence of rEPO in Bergman's sample. They also found that the presence of rEPO could be proven even with BAP values less than 80%, if the BAP value is high enough to rule out false positives as it was in Bergman's case. The Panel also considered the new WADA criterion for EPO testing described in Technical Document TD2004EPO, even though this criterion was not yet in force but which has now come into force and was used for this case.

4. WADA Technical Document – TD2004EPO

52. Bergman's test was positive according to the new WADA criterion, and this evidence supported the Panel's decision that Bergman had committed a doping offence. The novel development before me is the mandatory application of the revised Technical Document TD2004EPO.

53. As of 1 January 2005, the new WADA criterion for determining the presence of rEPO described in the technical document TD2004EPO is in force. Therefore, this new criterion is the relevant standard for interpreting the electropherogram generated during Mr. Sheppard's EPO analytical result.

54. That document sets out three identification criteria for rEPO. It also states that: *Further research and experience has indicated than the identification criteria below are more discriminating than the "80% basic bands" rule....*[13] The document goes on to state that in interpreting analytical findings the following identification criteria *define the requisites that the image has to fulfill to consider that an adverse analytical finding corresponding to the presence of rEPO ... has occurred.*

1. *–in the basic area there must be at least 3 acceptable, consecutive bands assigned as 1,2,3 or 4 in the corresponding reference preparation.*
2. *–the 2 most intense bands either measured by densitometry or assessed visually in the basic area must be consecutive and the most intense band must be 1, 2 or 3.*
3. *–the two most intense bands in the basic area must be more intense than any other band in the endogenous area either measured by densitometry or assessed visually. ...*

55. On the questioning of the Arbitrator, the testimony of Dr. Ayotte clearly explained how the information in the Lab *Documentation Package* had been examined against the foregoing criteria and applied in Mr. Sheppard's analytical result. She concluded her testimony by stating that the results on applying the TD2004EPO document to the Lab results left her in absolutely no doubt that: *... this is a clear case not on the borderline ...there is no deviant profile that might suggest one of either active*[14] *or effort urine.* There was no doubt in her mind that the proper interpretation had been arrived at and the image results do not show a strange or deviant profile. However, in case of any doubt a practise has developed of sending the results to another WADA accredited laboratory for their interpretation. In this case the results were sent to the Paris accredited laboratory that developed the original test and many of its refinements. Dr. Ayotte in her affidavit states that: *Ms. Françoise Lasne ... confirmed the results demonstrated the presence of rEPO.* She reiterated this point in her cross-examination.

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[13] The document states that the 80% BAP threshold should no longer be used as a method of identifying an adverse analytical finding by an accredited laboratory.

[14] A phenomenon first drawn to the attention of WADA laboratories in June of 2004.

56. Based upon all of the foregoing I conclude that on the facts of the case as established by this award there is a reliable result from the Lab in conformity with the International Standards and demonstrating that rEPO is present in the Athlete's urine sample.

5. False Positive Result

57. The international jurisprudence quoted above has analyzed the test procedure up to the issuing of the technical document TD2004EPO as having a reliable result, which has an acceptable level of risk of a false positive. The submissions of counsel for the Athlete challenge the reliability of the test result of the Lab.

58. The only basis for submitting that the Lab test result was unreliable centered upon the Rutger Beke matter and the loud and vociferous recent denials of accusations by Lance Armstrong of the United States in connection with allegations of testing of stored versions of the "B" sample from the 1999 Tour de France. The Lance Armstrong matter has nothing whatsoever to do with this case and I make no further reference to it.

59. The Athlete's lawyer provided a copy of First Edition Cycling News of 10 August 2005 edited by a John Stevenson. It cites a Belgian news report that a Flemish government disciplinary commission has cleared Belgian triathlete Rutger Beke of taking EPO. It allegedly did so on the basis that Beke naturally excreted proteins that would yield a positive test that would be false.

60. Dr. Ayotte addressed the assertions in her cross-examination. She testified there is always a possibility that there has been an error in the interpretation of the identification criteria. It takes a very experienced person to do that part of the test procedure and even someone as experienced as Dr. Ayotte sends the results out for a second opinion as she did in this case. She also indicates that if it is a borderline case it is not declared positive in order to remove the possibility of a false positive. She also indicates that no one has seen the decision and the Flemish authorities refuse to release it or the grounds for the exoneration. She refused to accept that this matter could arise from contamination in the pre-analytical stage, or that the profile was similar to "active" or "effort" induced

urine. She would have to examine the analytical results in the Beke case referred to in the article in order to establish such conclusions and satisfy herself that the analytical result was due to one of these situations. Of course, in the absence of public disclosure of the test result the data and the reasons she is unable to form her own opinion that might support the magazine assertion.

61. The assertions by the Athlete's counsel and the filing of a news article are not evidence that the analytical result in Mr. Sheppard's case is a false positive. Furthermore, in a circumstance where a decision making body will not release its reasons and its evaluation of the evidence in regards to its own decision, there is no reason to either delay these proceedings, as was argued here, or to have regard to what a news article says is the reasoning. There must be direct evidence not mere assertions, speculations and news reports to establish the proposition that a false positive has occurred. Mere speculative assertion by counsel is unresponsive to the need for evidence. All athletes should realize that they must be able to prove assertions such as the ones made herein. There is absolutely no evidence to support the representations of counsel.

62. Aside from the absence of evidence in support of the argument, the very document said to raise an inference of unreliability in the test indicates that: *Beke was found to naturally excrete proteins that would yield a positive test.* Therefore, even the newspaper article suggested that the case might be very much related to the unusual make-up of the individual. That information also raises the possibility of the finding being upon the basis of "active" or "effort" based urine. In this case Dr. Ayotte has unequivocally rejected such a proposition given Mr. Sheppard's electropherogram produced at her Lab. She confirms that the Athlete's sample did not involve either "active" or "effort" urine patterns.

63. I find that there is no evidence to establish that the test procedure results are unreliable and that a false positive has occurred. The speculation and allegations are categorically rejected.

6. Proof of Doping Offense

64. CADP Rule 7.55 places the burden of establishing an anti-doping rule violation upon the CCES. The standard of proof is that of the *comfortable satisfaction* of this Doping Tribunal.

65. CADP Rule 7.17 and 7.18 make an athlete responsible for any prohibited substance found in a urine sample analysis. As was held in the decision of Arbitrator Mew in *CCES & GC* v. *Scott Lelièvre*[15] *... it is not necessary that intent, fault or knowing 'use' by an athlete be demonstrated to establish this anti-doping rule violation.*

66. The CCES receives the benefit of the presumptions set out in CADP Rule 7.56 in respect of sample analysis and chain of custody procedures being in accordance with the provision of the laboratory rules for laboratory analysis. These matters were not placed in dispute in this proceeding as discussed at paragraph 39. Therefore, it is unnecessary to invoke the presumptions in this case.

67. CADP Rule 7.56 does not provide a presumption that the scientific test is reliable. That is a matter of evidence in any individual case. The Athlete in this proceeding has alleged that the test procedure in its overall operation is not reliable and raises a risk of a false positive. The Athlete has a burden of proof regarding his allegations and in so doing the burden is by CADP Rule 7.55 to provide evidence on the balance of probabilities.

68. In this decision I have found no evidence from the Athlete that establishes his allegations. I want to make it clear to all athletes and their counsel, as did Arbitrator Mew in his decision,[16] that mere assertions, propositions or hypothesis that are unsupported by fact are of no weight whatsoever in meeting an athlete's burden of proof as provided by CADP. The Athlete's counsel submitted a lengthy and technical argument about burdens of proof. However, before an analysis of that topic is required there must be some

[15] SDRCC DT –4-0014 dated 7 February 2005.
[16] Supra note 15 at paragraph 51.

evidence that is relevant and reliable. I have found herein there was no such evidence.

69. There is no possibility in this particular case that the threshold has been crossed of a shifting of the burden to require answering evidence upon reliability of the test procedure from the CCES. The evidence of Dr. Ayotte is clear and unequivocal on the reliability of the test given the profiles generated by the analysis. The test for this Athlete is reliable. Therefore, I do not need to address the submissions of reversion to the common law on burdens of proof submitted by the Athlete's counsel.

70. I am comfortably satisfied that, on a review of all of the evidence before me, an anti-doping rule violation has occurred. I find that the CCES has met its burden or proof and proven its case.

7. Sanctions

71. Based on all of the foregoing I find that it has been established that a Prohibited Substance was present in Mr. Sheppard's urine sample. Therefore, an anti-doping rule violation has occurred under the CADP Rule 7.16. The Athlete raised no issue of no fault or negligence, or, any significant fault or negligence. Therefore, I am not required to examine the elimination or reduction of the sanction. In the circumstances, I have no other choice than to impose the sanction for a first anti-doping rule violation of a two-year period of ineligibility as provided for by Rule 7.20.

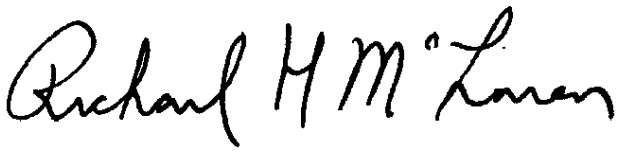
72. I further find that CADP Rule 7.37 applies. Mr. Sheppard is from the date of this award permanently ineligible for direct financial support provided by the Government of Canada.

73. The foregoing period of ineligibility in respect of the sanction and the financial support starts on the date of this decision in accordance with the CADP.

Costs

74. No submission was made on costs. Unless applied for, I make no order in respect of the same.

DATED at LONDON, ONTARIO this 12th Day of SEPTEMBER 2005



Prof. Richard H. McLaren, C.Arb
Co-Chief Arbitrator SDRCC