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 GIULIO ZARDO ASSERTED BY THE CANADIAN CENTRE FOR ETHICS IN SPORT

No. SDRCC DT-05-0023
(Doping Tribunal)

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

And

GIULIO ZARDO
Athlete

And

WORLD ANTI-DOPING AGENCY (WADA)
INTERNATIONAL BOBSLEIGH AND SKELETON FEDERATION

Observers

Before :

Paule Gauthier (Arbitrator)

Appearances and Attendances :

For the Athlete	Michael Bardagi (Counsel) Giulio Zardo (Athlete)
For the Canadian Centre for Ethics in Sport	Rima Kayssi (Counsel) Anne Brown (Senior Manager)
For Bobsleigh Canada Skeleton	Patrick Stopa (Counsel) Shane Pearsall (Managing Director) Benoit Morin
For the Government of Canada	Mary Warren (Sport Canada)

AWARD

[1] Giulio Zardo (the "*Athlete*") had been a member of Bobsleigh Canada Skeleton (BCS), the national sport organisation governing the sport of Bobsleigh in Canada approximately for four years up until his retirement on April 6, 2005.

[2] During his career, he participated in several national and international competitions, won a World Championship and various other honors and upon his retirement was considered one of the best "*brakeman*" in the world.

[3] He is currently 25 years old and has never been found guilty of any anti-doping rule violation.

[4] On March 26, 2005, the Athlete underwent a doping control. It was a no-notice, Out-of-Competition sample collection session.

[5] On April 19, 2005, Mr. Jeremy Luke, then the Senior Manager of the Doping Control Program (DCP) and now the General Manager, DCP initiated a target test for the Athlete based on concerns reported by the World Anti-doping Agency (WADA) accredited laboratory in Montreal based on the analysis of the sample collected from the Athlete on March 26, 2005.

[6] On April 21 and 22, 2005, the CCES attempted to conduct no-notice, Out-of-Competition doping control on the Athlete but despite several attempts on these two days, the Doping Control Officer (DCO) was unable to locate the Athlete for the purpose of sample collection.

[7] On April 22, 2005, the CCES re-scheduled the Athlete's no-notice test to an advance notice test.

[8] The CCES asserts that the Athlete refused to submit to sample collection on April 23, 2005 after being informed of his selection for doping control and that he has not demonstrated "*compelling justification"* for his refusal.

[9] The Athlete indicates that had a Therapeutic Use Exemption (TUE) been granted for the substance known as "*Propecia*", he would not have been targeted for testing in April 2005.

[10] The Athlete questions the decision of the CCES to conduct testing on April 23, 2005 after having been tested on March 26, 2005.

[11] The Athlete acknowledges that he knew he was notified for doping control but asserts that he never refused to provide a sample on April 23, 2005, since at that time he did not understand why he had to be tested.

[12] The Athlete submits in respect with the assertion that he refused to submit to sample collection, that he had *"compelling justification"* for doing so.

[13] The Athlete submits in respect with the assertion that an anti-doping rule violation has been committed, that "exceptional circumstances" exist which would permit a Doping Tribunal to eliminate or reduce the sanction that would otherwise be applicable.

[14] In his letter dated April 25, 2005 to the CCES, the Athlete's lawyer wrote to the CCES to inform it that the Athlete definitely retired from BCS on April 6, 2005 and therefore did no longer remain subject to any doping control by the CCES or any other sport organization.

[15] Under Rule 7.53 under the Canadian Anti-Doping Program (CADP), unless a person waives the right to a hearing, an anti-doping rule violation by a person and the appropriate consequence may not be determined and imposed without a hearing by a Doping Tribunal.

[16] Hearings to determine whether an anti-doping rule violation has been committed and, if so, the consequence(s) are conducted by a single arbitrator, appointed from the roster of arbitrators of the Sport Dispute Resolution Centre of Canada, sitting as the Doping tribunal (CADP, Rule 7.59). I was so appointed in this matter by order of the Co-Chief Arbitrator of the Doping Tribunal, L. Yves Fortier, CC, QC dated 23 June 2005.

Record of Proceedings

[17] On July 4, 2005, the Doping Tribunal convened a preliminary meeting of all Parties by teleconference to settle procedural matters.

[18] On July 8, 2005, the Doping Tribunal received the Affidavit of Anne Brown, sworn July 7, 2005 and submitted by the CCES in discharge of the burden of proof set out in Rule 7.55 of the CADP.

[19] On August 4, 2005, the Doping Tribunal received the Defence of the Athlete together with the following exhibits:

1. ADRsportRed (Me Julie Duranceau) letters dated January 25 and 26, 2005
2. Ogilvy Renault (Me Stephen L. Drymer) letter dated February 10, 2005 together with signed settlement agreement
3. E-mail from Pat Stopa to Michael Bardagi dated February 18, 2005 including a draft Press Release.
4. DVD on televised interview with Shane Pearsall

5. Press clipping of The Gazette, Montreal, dated February 22, 2005 written by Mr. Pat Hickey

6. Notice of default dated February 24, 2005 signed by Michael Bardagi

7. E-mail from Michael Bardagi to Pat Stopa dated March 3, 2005 concerning a Press Release

8. Letter of apology from Giulio Zardo dated February 16, 2005

9. Internet information published by Radio Canada and TSN dated May 4, 2005

10. Bobsleigh Canada Skeleton (Shane Pearsall) letter to Giulio Zardo dated May 4, 2005

[20] On August 4, 2005, the Doping Tribunal received the Written Submission of the Government of Canada.

[21] On August 16, 2005, the Doping Tribunal received the Reply Submission of the CCES to the Defence of the Athlete together with the following documents :

1. List of Authorities

2. The 2005 Prohibited List (International Standard)

3. Press Release from the CCES info line

[22] The hearing commenced on August 25, 2005 in Montreal, Quebec. The Athlete attended in person as did his counsel. Representatives of CCES and of Sport Canada attended in person as did the counsel for CCES. Counsel and representatives of the BCS participated by telephone conference.

[23] The hearing continued on August 26, 2005, during which oral submissions were presented by the parties.

[24] Evidence was given at the hearing by the Athlete, the Athlete's father, Joseph Zardo, and by Anne Brown (Senior manager, Doping Control Program, Canadian Centre for Ethics in Sport, Ottawa). The CCES also tendered evidence in the form of an affidavit of Anne Brown.

[25] The documents provided to the arbitrator were as follows:

a. Athlete Answer to Rule 7.46 Notification from CCES dated May 20, 2005;

b. Affidavit of Anne Brown affirmed on July 7, 2005 together with the following exhibits:

1. Curriculum vitae of Anne Brown

2. The Canadian Policy Against Doping in Sport

3. Doping Control Form (Giulio Zardo) dated 26 March 2005

4. Laboratoire de contrôle du dopage INRS-Institut Armand-Frappier (Christiane Ayotte, Ph.D.) letter to CCES (Jeremy Luke) dated 19 April 2005 regarding Certificate for the analysis of one urine sample

5. Athlete Location Form April 1 – June 30, 2005

6. Doping Control Officer Agreement between CCES and Michel Bourgault dated October 24, 2003

7. CCES (Michel Bourgault) "*Rapport de l'agent de contrôle de dopage*" dated 21 April 2005

8. CCES (Michel Bourgault) *"Rapport de l'agent de contrôle de dopage*" and letter dated 22 April 2005

9. CDO Report (Michel Bourgault) to Stuart Kemp, Operations Manager, DCP dated 25 April 2005

10. CCES (Stuart Kemp, OM, DCP) advance notice notification letter to Giulio Zardo dated 22 April 2005 regarding the authorization for sample collection

11. CCES (Jeremy Luke, Senior Manager, DCP) letter to Bobsleigh Canada Skeleton (Shane Pearsall) dated 22 April 2005

12. CCES (Stuart Kemp) notes to file containing the communications between the CCES and Mr Zardo's residence

13. Bardagi Senéchal (Giulio Zardo's lawyers letter to CCES (Stuart Kemp) dated 25 April 2005

14. CCES (Jeremy Luke) letter to Bardagi Senéchal (Giulio Zardo's lawyers) dated 26 April 2005

15. CCES (Jeremy Luke) letter to BCS (Shane Pearsall) dated 26 April 2005 concerning investigation notice regarding Giulio Zardo

16. Bardagi Sénéchal (Giulio Zardo's lawyers) letter to CCES dated 4 May 2005

17. CCES (Jeremy Luke) letter to Bardagi Sénéchal (Giulio Zardo's lawyers) dated 5 May 2005

18. Bardagi Sénéchal (Giulio Zardo's lawyers) letter to CCES dated 6 May 2005

19. CCES (Jeremy Luke) response letter to Bardagi Sénéchal (Giulio Zardo's lawyers) dated 11 May 2005 regarding an extension for the athlete's written explanation

20. Bardagi Sénéchal (Giulio Zardo's lawyers) letter to CCES dated 10 May 2005

21. CCES (Jeremy Luke) response letter to Bardagi Sénéchal (Giulio Zardo's lawyers) dated 20 May 2005

22. Bardagi Sénéchal (Giulio Zardo's lawyers) letter to CCES dated 20 May 2005 regarding his written explanation concerning his refusal to submit to doping control

23. CCES (Jeremy Luke) letter to BCS (Shane Pearsall) dated 10 June 2005 regarding Assertion of an Anti-Doping Rule Violation

24. Copies of Doping Control Forms which act as records of the Athlete's previous domestic tests

25. Authorization from the Athlete to use his photograph on various CCES publications and electronic tools

26. The Athlete's TUE file

c. Athlete's Agreement with BCS signed by the Athlete on November 18, 2004 and by BCS on February 1, 2005.

d. Copy of a resolution of the Executive Committee of BCS adopted October 5, 2004 concerning the 2004 CADP.

[26] The completion of the hearing was August 26, 2005.

Events preceding the Hearing

[27] Based on the evidentiary record, I find that the following events occurred prior to the Hearing.

[28] On March 26, 2005, the Athlete underwent doping control. It was a no-notice Out-of-Competition sample collection session. The Athlete's sample code number for this doping control is 668746.

[29] The Athlete and Ms Joan Decarie, the certified Doping Control Officer, completed the Doping Control Form. In the section of that form relating to prescription, non-prescription medications and nutritional supplements taken during the previous ten days, the Athlete wrote "*Whey Protein, Glutamine, Ala, Digestive Enzymes, Finasteride"*. The Athlete did not indicate any concerns on the Doping Control Form except for the word *"Fine!"*.

[30] On April 19, 2005, the Certificate of Analysis from the WADA-accredited laboratory in Montreal relating to the Athlete's sample was sent to the CCES. The Certificate of Analysis indicated the following comments for sample 668746: List of substances tested: Procedures 3, 4 and 6: - Anabolic agents – Hormones and related substances – Beta-2 agonists – Agents with anti-oestrogenic activity – Diuretics and other masking agents.

[31] Section 6.22 of the CADP indicates that the CCES will consider Target Testing Athletes based on several criteria including 6.26 j) reliable information from a third party.

[32] After having verified the sample code number on the Certificate of Analysis with the doping control form and having conducted a review in order to determine whether an applicable TUE had been granted to the Athlete for the substance outlined in the WADA-accredited laboratory report for the substance known as "*Finasteride*" and since the doping control form was the Athlete's and that as of April 19, 2005, no valid TUE existed for the Athlete, the CCES initiated a target test on the Athlete.

[33] On April 21 and 22, 2005, the CCES attempted to conduct no-notice, Out-of Competition doping control, in accordance with the CADP, on the Athlete according to the information submitted on the athlete whereabouts form.

[34] Despite several attempts to locate the Athlete on April 21 and 22, 2005, Mr. Michel Bourgault, the CCES Doping Control Officer responsible for conducting the doping control, contacted Mr. Stuart Kemp, the Operations Manager of the DCP at the CCES office to inform CCES that he was unable to locate the Athlete for the purpose of sample collection. During Mr. Bourgault's visit on April 22, 2005, Mrs. Zardo informed him that the Athlete was no longer a member of BCS and Mr. Bourgault then explained to her that even then within a period of eighteen (18) months after the Athlete ceased to meet the criteria set out in Rule 6.10 of the CADP regardless of retirement.

[35] On April 22, 2005, Mr. Kemp instructed Mr Bourgault to deliver an advance notice authorization form to the Athlete's home and upon receipt of this advance notice authorization form, Mrs Zardo, the Athlete's mother, provided written verification of the notification which included dating and signing the notification. During that visit, Mr. Bourgault explained the consequences if the Athlete did not comply with the request.

[36] The advance notice authorization form stated that "*Failure to comply with this request may be considered an anti-doping rule violation*".

[37] On April 23, 2005, as the Athlete had not contacted Mr. Kemp as per the requirements stated on the advance notice authorization form, Mr. Kemp called the Athlete to arrange the advance notice test. Mr. Kemp spoke with Mrs Zardo who indicated that the Athlete was not home and confirmed that the Athlete had received the notification. Mr. Kemp was advised by Mrs Zardo that the Athlete's lawyer would be contacting him.

[38] On April 23, 2005, Mr. Kemp first explained during a telephone conversation with Mrs. Zardo that at that point no letter from the Athlete's lawyer had been received and repeated that the Athlete should be made aware that failure to comply may result in an anti-doping rule violation.

[39] At 16:40 on that same day, Mr. Kemp spoke with the Athlete's father who advised him that the CCES should contact the Athlete's lawyer with any further communication and that a fax from his lawyer was imminent and that the Athlete was now "*unavailable*" for testing. During that conversation, Mr. Kemp re-asserted that failure to comply with doping control may result in an anti-doping rule violation and asked that the Athlete be informed of the potential consequence.

[40] On April 23, 2005, the Athlete's father called Mr. Kemp another time to ask why the CCES was trying to test the Athlete "*after having just been tested weeks earlier*" and he also explained that the Athlete had just retired and therefore a test did not seem appropriate. During that telephone conversation, the Athlete's father was told by Mr. Kemp that "*he could not speak to the exact reason for the test, but that he was still*

subject to the rules for an 18 months after retirement in the event he chose to return to the sport and that it was in the Athlete's best interests to comply with the request regardless." During that telephone conversation, the Athlete's father also speculated that "*issues with BCS were the reason and that the CCES was attempting to smear the Athlete*". At the end of the conversation, Mr. Kemp asked to speak to the Athlete directly without success and was then told by his father to expect a fax from his lawyer imminently.

[41] Despite Mr. Kemp's numerous attempts to arrange to speak with the Athlete directly and/or arrange for advance notice doping control, Mr. Kemp was unable to execute doping control on the Athlete.

[42] Upon reviewing the relevant documentation relating to the Athlete's refusal to submit to control doping, the CCES commenced an *"initial review"* pursuant to Rule 7.45 of the Doping Violations and Consequences Rules. As part of the *"initial review"*, Mr. Jeremy Luke, then Senior Manager of the DCP, initiated an *"investigation"* pursuant to Rule 7.48 (Review of Anti-Doping Rule Violations other than of Adverse Analytical Finding Where Required by the Prohibited List Rules) and Annex 6A (Investigating a Possible Failure to Comply) of the Doping Violations and Consequences Rules of the CADP to determine whether the CCES believes the Athlete has committed an anti-doping rule violation.

[43] The purpose of the investigation was to identify whether the Athlete had refused to submit to sample collection pursuant to Rule 7.24. And, if he did refuse to sample collection, did he have *"compelling justification"* for doing so.

[44] The Athlete was selected for doping control by the CCES as a *"target test"* and the CCES *"targeted"* the Athlete for doping control based on concerns reported by the WADA-accredited laboratory in Montreal based on the analysis of the sample collected from the Athlete on March 26, 2005.

[45] As part of the investigation, on April 26, 2005, Mr. Luke requested, through BCS, that the Athlete provides the CCES with a written explanation for his apparent refusal to submit to doping control. Mr Luke granted the Athlete an extension until May 9, 2005 to submit his written explanation.

[46] On May 4, 2005, the Athlete's lawyer requested from the CCES precisions related to the concerns reported by WADA with the laboratory documents produced by the laboratory in Montreal based on the analysis of the sample collected from the Athlete on March 26, 2005, including the Certificate of Analysis with a letter from Dr. Christine Ayotte addressed to Mr. Jeremy Luke's attention.

[47] On May 5, 2005, the CCES informed the Athlete's lawyer that the CCES commenced an *"initial review"* and gave him the procedure to be followed in such a case.

[48] On May 6, 2005, the CCES received written communication from the Athlete's lawyer and Mr. Luke responded, including granting an extension for the Athlete's submission to May 11, 2005.

[49] On May 6, 2005, in response to a request from CCES received on April 22, 2005, for assistance from BCS in contacting the Athlete concerning his selection for testing, Shane Pearsall sent a letter to the Athlete asking him to communicate with CCES to make arrangement to submit to doping control.

[50] The CCES received written communication from the Athlete's lawyer on May 10, 2005 and Mr Luke responded, including granting an extension for the Athlete's submission to May 20, 2005.

[51] On May 20, 2005, the CCES received a response from the Athlete's lawyer regarding the Out-of-Competition doping control that the CCES attempted to conduct on the Athlete on April 22 or 23, 2005.

[52] In his written submission dated May 20, 2005, the Athlete provided explanations regarding the attempts by the CCES to conduct an Out-of-Competition doping control: a Therapeutic Use Exemption application for the substance known as *"Finasteride"* still pending with the CCES – the difficulty for the Athlete to understand why the CCES wanted him to submit to another doping control on April 23, 2005 since he felt that he had been unfairly and inequitably treated by BCS – there was no refusal by the Athlete to submit to doping control.

[53] The CCES considered the Athlete's letter of explanation along with documents provided by Mr. Bourgault and Mr. Kemp. The CCES concluded the *"initial review"* on June 10, 2005 and asserted that the Athlete refused to sample collection and that he has not demonstrated *"compelling justification"* for doing so.

[54] As a result, on June 10, 2005, the CCES issued a Notice to the Athlete pursuant to Rules 7.46 and 7.48 of the Doping Violations and Consequences Rules of the CADP.

[55] The CCES asserted within its Notice that the Athlete had committed an anti-doping violation according to Rules 7.24 and 7.25 (Refusals) of the Doping Violations and Consequences Rules of the CADP. CCES based its claim on the Athlete's refusal

to submit to sample collection and his failure to demonstrate *"compelling justification"* for his refusal.

[56] As this would be a first violation, the CCES proposed a sanction within its Notice pursuant to Rules 7.25 and 7.37 of the Doping Violations and Consequences Rules of the CADP: two years ineligibility and permanent ineligibility of direct financial support from the Government of Canada.

[57] The Athlete had been tested by the CCES approximately nine times previously, and is therefore knowledgeable of the doping control process and associated requirements.

[58] The Althete has submitted TUE applications on more than one occasion, his first TUE application was for *"Nolvadex"* in 2001. His second TUE application was a retroactive TUE for the prohibited substance *"Prednisone*" prior to the 2002 Salt Lake Olympics. In addition, a third TUE application by the Athlete, for the substance known as "*Finasteride*" was denied by the CCES Therapeutic Use Exemption Committee on June 13, 2005.

[59] In his Defence, the Athlete submitted that should the Doping Tribunal come to the conclusion that he refused to submit to doping control, he had good reasons.

[60] In his Defence, the Athlete also submitted that the denial by the CCES Therapeutic Use Exemption Committee on June 13, 2005 was not well founded and was discriminatory and the Athlete would have been obliged to appeal this decision had he not decided to retire.

[61] Moreover, in his Defence, the Athlete reviewed his four year career with BCS and the difficulties encountered in February and March 2005 with regard to the release of confidential information by BCS concerning the Athlete despite the settlement agreement between him and BCS and the publication of a press release.

[62] In his Defence, the Athlete submitted that in April 2005, when the CCES asked him to submit to doping control, himself and his parents were frustrated and fed up with BCS or any other related sport organization.

[63] In his Defence, the Athlete blamed his difficult relationship with BCS and the intention of the CCES to *"smear"* him to explain his attitude with regard to doping control test.

[64] In his Defence, the Athlete referred to his lawyer's letter dated April 25, 2005 to Mr. Stuart Kemp of CCES indicating that the Athlete had retired since April 6, 2005 and therefore was not obliged to submit to any sample collection.

[65] In his Defence, the Athlete submitted that the substance known as *"Finasteride"* was noticed only because the Athlete declared the presence of such a substance, that the doping control was requested due to the presence of such substance notwithstanding the fact that the Athlete had an open application for TUE.

[66] In his Defence, the Athlete submitted that the CCES made an error in not giving him a TUE and if such a TUE had been granted to him there would not have been a second test requested on April 21st, 22nd and 23rd, 2005.

[67] In his Defence, the Athlete submitted that he never refused to submit to doping control.

[68] Finally, in his Defence, the Athlete submitted that if the Doping Tribunal comes to the conclusion that the Athlete did refuse to submit to doping control, he had good reasons not to submit and if the Doping Tribunal comes to the conclusion that the Athlete refused and did not have good reasons for doing so, the sanction should be reduced or eliminated based on exceptional circumstances.

[69] In its Written Submission dated August 3rd, 2005 and in its Oral Submission given at the hearing on August 26, 2005, the Government of Canada fully subscribes to the Written and Oral Submissions of the CCES as filed for these proceedings on July 8, 2005 and presented at the hearing on August 26, 2005 and requests that the assertion presented by the CCES be upheld.

[70] In its Reply Submission dated August 15, 2005, the CCES indicated that the Athlete was tested for the substance known as *"Finasteride"* as per letter attached to the Certificate of Analysis of the WADA - accreditated laboratory dated April 19, 2005 which reads as follows :

> *"The steroid profile of urine sample 668746 was found to be abnormal, the Salpha-reduced metabolites being excreted in a lower level than the 5 beta. This is consistent with the use of Finasteride a medication prohibited as a masking agent; the athlete has declared its use. We have detected the presence of the main urinary metabolite but our method has not been fully validated yet.*
>
> *Finasteride is a efficient masking agent; by inhibiting the formation of 5 alpha-metabolites, many being the main urinary metabolites of anabolic steroids, the detection of steroids can be efficiently masked."*

[71] In its Reply Submission, the CCES also submitted that the Athlete's un-availability when the Doping Officer tried to reach him for doping control on April 22nd and 23rd, 2005, and the fact that, after these attempts, he did not offer at the appropriate

time (as amended at the beginning of the hearing on August 25, 2005) to submit to doping control constitute in a non equivoquial manner, a refusal to doping control.

[72] In its Reply Submission, the CCES also indicated that the Athlete never gave the evidence that he had good reasons or that exceptional circumstances existed not to submit to doping control and moreover that the Athlete was familiar with the doping control process.

[73] In its Reply Submission, the CCES submitted that all the facts related to the reasons why the Athlete used the substance known as *"Finasteride"* are not relevant in the present case.

[74] The substance known as *"Finasteride"* is on the Prohibited List as masking agent since January 1st, 2005.

[75] In its Reply Submission, the CCES submitted that the Athlete's state of mind vis-à-vis BCS due to their previous relationship should in no way be considered as an exceptional circumstance for refusal to submit to doping control.

[76] In its Reply Submission, the CCES submitted that CCES and BCS are two different bodies completely independent from one another.

[77] In its Reply Submission, the CCES submitted that the Athlete made his own decision to continue to use the substance known as *"Finasteride"* knowing that it had been added to the Prohibited List since January 1st, 2005.

[78] In its Reply Submission, the CCES submitted that the Athlete has experience and is very knowledgeable about the CADP Program and the risks attached to the use of prohibited substances without proper authorization.

[79] Also, in its Reply Submission, the CCES submitted that the Athlete refused to submit to doping control and despite many opportunities did not submit himself at the appropriate time to doping control.

[80] Finally, in its Reply Submission, the CCES submitted that the Athlete never had compelling justification for his refusal to submit to doping control and no exceptional circumstances exist to reduce or eliminate the sanction.

Evidence given at the Hearing

[81] In cross-examination, Anne Brown confirmed that the Athlete had been properly notified through his parents in accordance with Rule 6.41 of the CADP for the advance notice test and that CCES was aware that the Athlete received the notice.

[82] She then explained that pursuant to Rule 6.42 e) (iv) the Athlete had twenty-four hours of receipt of notification to submit to the test and that the window of opportunity had been expanded up until Monday April 25, 2005.

[83] She also explained that there were no obligation for the CCES to wait for the Athlete's lawyer or to talk to him and to give the Athlete's lawyer or parents the reasons why the Athlete had been selected for doping control since it is a privacy issue.

[84] During his testimony, the Athlete tried to explain his state of mind at the time that he was requested to submit to doping control on April 21, 22 and 23, 2005.

[85] His relationship with BCS had deteriorated to the point that he decided to leave the sport because he was too upset and frustrated.

[86] His frustration also existed in relation with his application for a TUE concerning the substance known as "*Finesteride*" since he felt he had sent all the required documents and the decision had still not been made in April 2005.

[87] He mentioned that he did not talk to his parents on April 21 and 22, 2005 and learned about the notification for advance notice sample collection only on Saturday, April 23, 2005.

[88] He first learned about it during a phone conversation with his father who told him that "*BCS was giving them a bad time again*".

[89] He came back home at around 9 h 30 p.m. on April 23, 2005 and saw the notification.

[90] He could not understand why there was another request for a test since he had been tested in March 26, 2005 and had won a championship.

[91] He mentioned that he was not fully aware at that time of the obligation to submit to doping control during a period of 18 months after he ceased to meet the criteria set out in Rule 6.10 of the CADP regardless of his retirement.

[92] He mentioned that had he known that the test was required because of concerns related to the substance known as "*Finesteride*" he would have taken the test again.

[93] He also mentioned that he put all his trust in his lawyer and that he would have taken the test if he had told him so.

[94] He declared that he never refused to submit to doping control since all his previous tests had been fine and that he would take the test today or tomorrow, anytime since he has nothing to hide.

[95] On April 23, 2005, his father had told him that the request came from BCS and he did not know that it were from CCES.

[96] He also declared that it was his understanding that they had agreed to wait for his lawyer's letter the following Monday, April 25, 2005.

[97] Finally, he mentioned that he does not have the intention to come back to sport and that he will continue to take the substance known as "*Propecia*".

[98] In cross-examination, he declared that he offered to take the test through his lawyer but confirmed that he never took it on April 21, 22, 23 and 24, 2005.

[99] In his testimony, the Athlete's father, Joseph Zardo, explained how the difficulties encountered by his son in his athletic career affected himself and his wife mentally, financially and medically.

[100] He gave a thorough description of the attempts of the CCES Doping Officer to locate the Athlete on April 21, 22 and 23, 2005 and of the numerous telephone conversations with representatives of the CCES, his son and his son's lawyer on April 22 and 23, 2005.

[101] He mentioned that he could not understand why BCS was still interested in testing his son.

[102] He declared that he talked with his son at 15 h 30 on April 23, 2005 and explained to him that BCS still wanted to cause him problems and that he was in contact with his lawyer regarding this matter.

[103] He described the numerous telephone conversations between himself and Mr. Kemp and between himself and his son's lawyer.

[104] He explained that Mr. Kemp refused to contact his son's lawyer even though he asked him to do so.

[105] He declared that Mr. Kemp explained the consequences if his son does not comply with the request to submit to doping control.

[106] He explained that an agreement was made with Mr. Kemp to wait until Monday, April 25, 2005 in order to give his son's lawyer time to send a letter to Mr. Kemp.

[107] He declared that his son was informed about this agreement upon his return home on April 23, 2005.

[108] In cross-examination, the Athlete's father explained that he did not read the whole notice received on April 22, 2005 but read the bottom line only and saw the name Bobsleigh Canada and never the name CCES.

[109] At the conclusion of the hearing, the Athlete's lawyer tried to explain to the arbitrator that he had a conversation with Mr. Jeremy Luke around April 26, 2005 about the possibility for the Athlete to offer to submit to doping control and that Mr. Luke mentioned that it was not possible to do so. The Athlete's lawyer recognized that the Athlete did not offer to do so at that time.

[110] The Athlete's lawyer also mentioned that he discussed this same possibility with Mr. Joseph de Pencier, General Counsel for CCES, around June 25, 2005 during negotiations held to settle the present case but recognized that the offer never materialized.

Oral Submissions presented at the Hearing

Oral Submissions of the CCES's Counsel

[111] The CCES's counsel submitted that all criteria required pursuant to Rule 7.24 of the CADP have been met in the present case to establish that a violation exists.

[112] She also submitted that the burden of proof is upon the Athlete to demonstrate that "*exceptional circumstances*" exist.

[113] She submitted that it was impossible to locate the Athlete on April 21 and 22, 2005 for doping control and that Mr. Kemp informed the Athlete's mother for the first time that even though her son had retired, "*he still has to do the test when required within a period of six month after*". The mother was then informed of the consequence of the failure to comply when she received the notification form on April 22, 2005. This information was re-asserted twice on April 23, 2005 to the Athlete's parents. The Athlete was informed about that notification on April 23, 2005 and recognized it.

[114] She then submitted that the Athlete had 24 hours of receipt of notification to submit to doping control and did not do so.

[115] She recognized that the period of 24 hours is short but explained that the objective of the doping control is to proceed with Sample collection within a short period

of time so that the results of the doping control test not be modified and therefore no delay is allowed to wait for a lawyer to help with Sample collection.

[116] She referred to the Athlete's lawyer letter dated April 25, 2005 in which he asserts that the Athlete is not obliged to submit to doping control since he retired.

[117] She concluded that the Athlete refused or failed without compelling justification to submit to doping control since he did not do so within 24 hours of receipt of advance notice notification.

[118] Referring to relevant Rules of the CADP, she made the following comments:

- "*The Athlete must know all the Policies and Rules of the CADP pursuant to Rule 1.7 of the CADP.*
- *There was no obligation on the part of CCES to inform why a doping control test was required pursuant to Rule 6.21 of the CADP.*
- *Pursuant to Rule 6.22 h) and j) of the CADP, the CCES will consider Target Testing Athletes based on details of past Doping Controls and reliable information from a third party.*
- *The Athlete must comply when requested to do so and offers made days or weeks later are not acceptable since the Athlete does not have the choice to submit to Sample collection when he decides.*
- *The Athlete was obliged to submit to doping control even though he retired pursuant to Rule 6.10 of the CADP.*"

[119] She submitted that the Athlete did not have compelling justification for failing to comply to submit to doping control since the Athlete was familiar with the doping control process and knew the difference between BCS and CCES. She also added that his state of mind and that of his parents vis-à-vis BCS was irrelevant in the case of a world champion and contrary to the whole spirit of the sport.

[120] She submitted that no exceptional circumstances exist to establish a basis for eliminating or reducing the sanctions for the same reasons as the Athlete did not demonstrate compelling justification not to submit to Sample collection.

[121] She finally commented on the cases referred to in her List of Authorities.

Oral Submissions of the Athlete's Counsel

[122] The Athlete's counsel denied the allegation of the CCES's counsel that a refusal to submit to doping control is an anti-doping rule violation of strict liability.

[123] To the contrary, he submitted that the burden of proof is upon the CCES to demonstrate that not only did the refusal occur but that the Athlete had the intention to refuse to submit to Sample collection.

[124] He recognized that the Athlete was aware of the notification on April 23, 2005 when he came back home at the end of the day but submitted that his state of mind and frustration due to his difficult relationship with BCS at that time were very relevant factors that must be considered to assess the Athlete's attitude on April 23, 2005.

[125] He also submitted that Mr. Kemp chose not to contact the Athlete's lawyer even though the Athlete's father asked him to do so but recognized that Mr. Kemp agreed to wait until Monday, April 25, 2005 to receive the letter of the Athlete's lawyer.

[126] He then asked questions as to why Mr. Kemp refused to contact him and to give the Athlete's parents the CCES' reasons for selecting the Athlete for doping control.

[127] He also recognized that neither he or the Athlete knew about the obligation for the Athlete to submit to doping control during a period of 18 months after he ceased to meet the criteria set out in Rule 6.10 of the CADP regardless of retirement.

[128] He mentioned that he came to the conclusion that the testing was required because the Athlete declared having used the substance known as "*Finesteride*".

[129] He recognized that the Athlete is obliged to submit to Sample collection within 24 hours of receipt of notification but mentioned that in the present case the process had been expanded by Mr. Kemp up until Monday April 25, 2005.

[130] He submitted that the CCES denied the Athlete the right to have a representative to ask for additional information about the Sample collection process and to request a delay in reporting to the Doping Control Station for valid reasons contrary to rule 6.42 of the CADP.

[131] He submitted that there is an obligation upon the CCES to demonstrate the intention of the Athlete not to submit to doping control and referred to Commentary to Articles 2.3 and 10.5 of the *World Anti-Doping Code* (the *"Code"*) to support his opinion.

[132] After commenting the cases included in the List of Authorities submitted by the CCES' counsel, he concluded that the Athlete never refused to submit to doping control, did not know about his obligation to submit to doping control during a period of 18 months after retirement and was frustrated because of the long delay to obtain a decision concerning his open application for a TUE.

[133] He concluded by drawing the attention of the arbitrator to the fact that the Athlete and his parents went through a very difficult time, are very sad and concerned about the

damage to the Athlete's reputation and the negative consequences of the present case on his future career.

Issues

[134] At the outset, the Doping Tribunal finds necessary to establish that only the World Anti-Doping Agency Therapeutic Use Exemption Committee (WADA TUEC) is able to reverse a decision on a TUE granted by the CCES.

[135] Therefore the Doping Tribunal has no jurisdiction whatsoever to review the decision on the TUE granted by the CCES on June 13, 2005 concerning the substance known as *"Finasteride"*.

[136] The issues which arise as a result of the operation of the CADP and the positions taken by the parties are as follows:

a. Has CCES established that the Athlete has committed an anti-doping rule violation ?

   i) Did the Athlete refuse to submit to sample collection ?

   ii) If he did refuse, did he have compelling justification for doing so ?

b. If the Athlete is found to have committed an anti-doping rule violation, should the sanction proposed by the CCES within his Notice pursuant to Rule 7.24, 7.25 and 7.37 of the Doping Violations and Consequences Rules of the CADP be reduced or eliminated based on *"exceptional circumstances"* ?

[137] Rule 7.55 of the CADP addresses the burdens and standards of proof applicable in hearings to determine anti-doping rule violations and consequences :

> The CCES shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the CCES has established an anti-doping rule violation to the comfortable satisfaction of the Doping Tribunal bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less then proof beyond a reasonable doubt. When these Rules place the burden of proof

> upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

a. Has CCES established that the Athlete has committed an anti-doping rule violation ?

i) Did the Athlete refuse to submit to sample collection ?

[138] The Athlete was a member of BCS, the national organization governing the sport of Bobsleigh in Canada up until April 6, 2005.

[139] As such he was an athlete who was part of a national team in an Olympic sport and therefore was included in the Registered Testing Pool.

[140] Pursuant to Rule 6.6 of the CADP, which reads as follows:

> *"6.6 The CCES will define and document the criteria for Athletes to be included in a Registered Testing Pool. At a minimum, International-level Athletes, and Athletes who are part of national teams in Olympic and Paralympic sports and recognized federations must be included in the Registered Testing Pool. The Registered Testing Pool may also include the following:*
>
> *a) Carded Athletes;*
>
> *b) Athletes receiving direct or indirect financial assistance from National Sport Organizations or who are benefiting from any form of federal government subsidy;*
>
> *c) Athletes who are members of any Canadian team participating in an international multi-sport event; and*
>
> *d) Athletes currently under suspension.*
>
> *Individuals shall continue to be subject to Doping Control as long as they meet the criteria set out in Rule 6.6 and for a period of 18 months thereafter regardless of retirement.*

it is clear that individuals continue to be subject to Doping Control as long as they meet the criteria set out in that rule and for a period of 18 months after they ceased to meet the criteria set out in Rule 6.10 of the CADP regardless of retirement.

[141] Though the Athlete effectively retired from the sport of Bobsleigh on April 6, 2005, pursuant to Rule 6.10 of the CADP, he remains subject to Out-of-Competition doping control (including target testing) by the CCES for a period of 18 months after he ceased to meet the criteria set out in Rule 6.10 of the CADP regardless of retirement. He is also required to submit accurate and up-to-date whereabouts information for the same period of time.

[142] Pursuant to Rule 6.22 of the CADP, which reads as follows :

> *As a minimum, the CCES will consider Target Testing Athletes based on the following information :*
>
> *a) injury;*
>
> *b) withdrawal or absence form expected Competition;*
>
> *c) going into or coming out of retirement;*
>
> *d) behaviour indicating doping;*
>
> *e) sudden major improvements in performance;*
>
> *f) changes in Athlete whereabouts information that can indicate a potential increase in the risk of doping, including moving to a remote location;*
>
> *g) Athlete sport performance history;*
>
> *h) details of past Doping Controls;*
>
> *i) Athlete reinstatement after a period of Ineligibility;*
>
> *j) reliable information from a third party; and*
>
> *k) possible anti-doping rule violations by (an)other team member(s) in a Team Sport.*

it is clear that details of past Doping Controls and reliable information from a third party constitute information upon which the CCES may consider Target Testing Athletes.

[143] Since the CCES targeted the Athlete for doping control based on concerns reported by the WADA – accredited laboratory in Montreal, i.e. details of past Doping Controls and reliable information from a third party, pursuant to Rule 6.22 of the CADP, the requirements for selection of athletes were followed by the CCES in the present case.

[144] Pursuant to Rule 6.42 e) (iv), the Athlete had 24 hours of receipt of notification to submit to doping control i.e. up until August 23, 2005 but that delay had been expanded by the CCES up until Monday 25, 2005.

[145] Pursuant to Rule 7.24 of the CADP *"Refusing, or failing without compelling justification, to submit to Sample collection after notification as authorized in applicable anti-doping rules or otherwise evading Sample collection is an anti-doping rule violation".*

[146] At this point, it is important for the arbitrator to make comments on the category of liability involved in the present case and on the burden of proof placed upon the CCES and the Athlete.

[147] By analogy, it is appropriate to refer to penal law which recognizes three categories of offences well described in the case of *The Queen* v.*Sault Ste.Marie* [1978] 2 S.C.R., 1299 as follows:

> *"I conclude, for the reasons which I have sought to express, that there are compelling grounds for the recognition of three categories of offences rather than the traditional two:*
>
> *1. Offences in which mens rea, consisting of some positive state of mind such as intent, knowledge, or recklessness, must be proved by the prosecution either as an inference from the nature of the act committed, or by additional evidence.*
>
> *2. Offences in which there is no necessity for the prosecution to prove the existence of mens rea; the doing of the prohibited act prima facie imports the*

> *offence, leaving it open to the accused to avoid liability by proving that he took all reasonable care. This involves consideration of what a reasonable man would have done in the circumstances. The defence will be available if the accused reasonably believed in a mistaken set of facts which, if true, would render the act or omission innocent, or if he took all reasonable steps to avoid the particular event. These offences may properly be called offences of strict liability. Mr. Justice Estey so referred to them in Hickey's case.* (Emphasis is added)
>
> *3. Offences of absolute liability where it is not open to the accused to exculpate himself by showing that he was free of fault".*(pages 1325 and 1326)

[148] It is clear from the reading of this extract that offences of strict liability have two characteristics: there is no necessity for the prosecution to prove the existence of mens rea and the accused can avoid liability by proving that he or she took all reasonable care.

[149] These principals are very well summarized in an article published in a book entitled *"Droit pénal canadien"*[1] which read as follows:

> *"En quoi consiste donc cette défense de diligence raisonnable ? Nous pouvons tout d'abord saisir cette responsabilité pour négligence en la comparant avec la mens rea. Dans le cas d'une infraction de mens rea, la poursuite a le fardeau de prouver hors de tout doute raisonnable l'état d'esprit de l'accusé, qu'il s'agisse de connaissance, d'intention ou d'insouciance. Nous avons aussi vu qu'il existe ce qui est appelé une présomption de mens rea en vertu de laquelle le juge ou le jury peut inférer des faits en litige l'état d'esprit de l'accusé. Le fardeau de preuve pour la responsabilité pénale demeure toujours sur la poursuite sauf lorsque le législateur prévoit expressément une présomption à l'effet que le fardeau de preuve est renversé : il s'agit alors de cas exceptionnels où les termes explicitent la volonté du législateur. De plus, dans les cas limités de renversement de preuve, il s'applique généralement sur un élément de l'infraction et le principe à l'effet que la poursuite doive prouver la culpabilité hors de tout doute raisonnable demeure. Enfin,dans le cas des infractions requérant la mens rea, la défense d'erreur de fait pourra être soulevée tant dans la preuve du poursuivant que du défendeur; elle devra être de bonne foi et il suffit qu'un doute raisonnable soit suscité pour que l'accusé soit acquitté.*
>
> *Dans le cas d'une infraction de responsabilité stricte, la poursuite n'a pas à faire la preuve de l'état d'esprit de l'accusé; elle n'aura qu'à faire la preuve de l'élément matériel de l'acte d'où découlera ce que le juge Dickson a appelé « une présomption d'infraction ». L'accusé pourra alors soulever une défense d'erreur*

[1] Côté-Harper G., Manganas A.D. and J. Turgeon, *« Droit pénal canadien »*, 3d ed, Cowansvile, Éditions Yvon Blais, 1989, 785 p.

> *de fait raisonnable ou de diligence raisonnable à l'effet qu'il « […] croyait pour des motifs raisonnables à un état de faits inexistants qui, s'il avait existé, aurait rendu l'acte ou l'omission innocent, ou […que] l'accusé a pris toutes les précautions raisonnables pour éviter l'événement en question ».*
>
> *Le prévenu pourra donc se disculper s'il démontre par prépondérance de preuve qu'il s'agissait d'une erreur de fait raisonnable ou qu'il a fait preuve de diligence raisonnable. Quant à l'erreur de fait, celle-ci ne doit pas seulement être honnête mais en plus, elle doit être raisonnable; on applique alors le test objectif, c'est-à-dire l'état d'esprit de l'homme raisonnable. Quant à la défense de diligence raisonnable « […] l'auteur matériel peut se disculper en démontrant que l'infraction a été commise malgré toute la prudence apportée dans l'exercice de l'activité ».* (pages 356 and 357) (Emphasis is added)

[150] The provisions of Rule 7.24 of the CADP implement Article 2.3 of the *World Anti-Doping Code* (the "*Code*"), virtually verbatim. The CADP provides that the text of the *Code*, including its Commentary, is a source of interpretation of Canada's domestic programme. According to the commentary of the *Code*, a violation to this rule of "*refusing or failing to submit to Sample collection may be based on either intentional or negligent conduct of the Athlete while "evading" Sample collection contemplates intentional conduct by the Athlete".*

[151] Violation of refusal or failing without compelling justification falls in the second category of offences as described earlier. The Provisions of Rule 7.24 of the CADP as well as those of the Code, commentary to the Code, authorities and cases that I have reviewed all lead me to that conclusion.

[152] Therefore once the facts and elements constituting refusal or failing without compelling are established by the CCES, a defence is then available to the Athlete.

[153] The Athlete must prove that he took all reasonable care to avoid liability. He must prove that he took all the reasonable steps to submit to Doping control, that his conduct

was not negligent or intentional. Otherwise, he will be held liable for an anti-doping rule violation for refusal.

[154] Although Article 10.5 of the Code relates to *"Elimination or Reduction of Period of Ineligibility based on Exceptional Circumstances"*, it is interesting to read in the Commentary that:

> *"Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance and Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink".*

[155] Since this Article relates to sanction, it is also mentioned that:

> *"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".*

[156] Nevertheless, this Commentary demonstrates that the duty of care of the Athletes is very broad.

[157] Despite several attempts to locate the Athlete on April 21 and 22, 2005, it was impossible to reach him for the purpose of a no-notice, Out-of-Competition sample collection session.

[158] An advance notice authorization form was delivered on April 22, 2005 and Mrs Zardo, the Athlete's mother, confirmed that the Athlete received the notification.

[159] Nevertheless, despite numerous attempts to arrange to speak with the Athlete directly and/or arrange for an advance notice doping control, it was impossible to execute doping control on the Athlete.

[160] The Athlete admitted that he received the notification on April 23, 2005 and submitted that he did not know about his obligation to submit to doping control during a period of 18 months after he ceased to meet the criteria set out in Rule 6.10 of the CADP regardless of retirement.

[161] He also declared that had he been told to submit to doping control, he would have done so.

[162] At the request of the Athlete's parents, the CCES accepted to expand the delay to submit to doping control and wait until April 25, 2005 to obtain the letter of the Athlete's lawyer as requested by them.

[163] However, the Athlete's lawyer indicated clearly in his letter to CCES dated April 25, 2005, that the Athlete was not obliged to submit to doping control since he was retired and moreover ordered CCES to stop trying to communicate with the Athlete or taking any measure concerning the Athlete.

[164] The Athlete had many opportunities to submit to doping control requested by the CCES between April 21st, 2005 and June 10, 2005, the date the CCES concluded its "*initial review*" but at no time on April 21, 22 and 23, 2005, did the Athlete submit to doping control as requested by the CCES.

[165] In the present case, at the hearing and in his submissions, the Athlete made it clear that even though he was aware of the notification to submit to doping control, his state of mind and that of his parents and his lawyer's advice lead him to decide not to do so.

[166] It is simply not acceptable for an Athlete to hide a fault or a negligent conduct behind a lawyer's legal opinion particularly when the provisions of the Rules of the CADP are clear and the advice and information from the representatives of the CCES have both been given on numerous occasions to the Athlete's parents.

[167] I therefore find that the Athlete did not submit to doping control during the appropriate time on April 21, 22, 23, 2005 and though he never personally directly refused to do so, his negligent conduct was equivalent to a refusal.

ii) If he did refuse, did he have compelling justification for doing so ?

[168] The Athlete submitted that he had compelling justification for not submitting to doping control on April 21, 22 and 23, 2005.

[169] First, the Athlete submitted that since he had retired on April 6, 2005, he had no obligation to submit to doping control.

[170] As previously mentioned, Rule 6.10 of the CADP indicates clearly that an individual continues to be subject to doping control for a period of 18 months after he ceased to meet the criteria set out in Rule 6.10 of the CADP regardless of retirement.

[171] The Athlete also submitted that a TUE application for the substance known as "*Finesteride*" was still pending with the CCES in April 2005 due to the fact that neither he nor his father understood the many requests for details from the CCES and that if the requests for details had been clearer, they could have responded more quickly to obtain this exemption.

[172] The Athlete further submitted that if the TUE had been granted, as it already should have been, his anti-doping test of March 26, 2005 would not have raised any doubt or questions and he would not have been targeted for a new test in April 2005.

[173] The TUE application by the Athlete for the substance known as "*Finesteride*" was denied by the CCES Therapeutic Use Exemption Committee on June 13, 2005.

[174] The Athlete knew or should have known the consequences of using the substance known as "*Finesteride*" without a TUE and the possibility of being selected for testing particularly after having received the Certificate of Analysis and the attached letter dated April 19, 2005 from the WADA – accredited laboratory in Montreal indicating that the substance known as "*Finesteride*" is an efficient masking agent and therefore the detection of steroids can be efficiently masked.

[175] The Athlete's TUE application was a completely different process than the doping control test requested by the CCES and the Athlete knew about the obligation to submit to doping control and about the difference between these two processes.

[176] Finally, the Athlete submitted that he had been unfairly treated by BCS and that he did not understand why CCES wanted to submit him to doping control otherwise than to continue to "*smear*" his reputation.

[177] The representatives of the CADP informed the Athlete's parents about the impact of his failure to comply with the request to submit to doping control and about his obligation to submit to doping control during a period of 18 months after he ceased to meet the criteria set out in Rule 6.10 of the CADP regardless of retirement during their visits to their home on April 21, 22 and 23 as well as during numerous telephone conversations during that period of time.

[178] I am not satisfied with the Athlete's explanations and do not consider them relevant to the fact that the Athlete was requested to submit to doping control and was obliged to do so.

[179] I therefore find that the Athlete refused to submit to doping control and did not have compelling justification for doing so and, as a result, that there has been an anti-doping rule violation by the Athlete.

b. Should the sanction proposed by the CCES be reduced or eliminated based on exceptional circumstances ?

[180] The Athlete submitted that his state of mind due to his difficult relationship with BCS, also the delay of obtaining his TUE for the substance known as "*Finasteride*" and finally the fact that he did not understand why the CCES had selected him for doping control only a few weeks after his previous testing are exceptional circumstances.

[181] The Athlete also mentioned that had he been told to take the test, he would have done so.

[182] The Athlete also mentioned that he did not know that he was obliged to submit to doping control during a period of 18 months after he ceased to meet criteria set out in Rule 6.10 of the CADP regardless of retirement.

[183] Pursuant to Rule 7.25 of the CADP which reads as follows:

> *"Except for the specified substance identified in Rule 7.7, the period of Ineligibility imposed for the anti-doping rule violation shall be :*
>
> *First violation : Two (2) years Ineligibility.*
>
> *Second violation : Lifetime Ineligibility.*
>
> *However, the Athlete or other Person shall have the opportunity in each case, before a period of Ineligibility is imposed, to establish the basis for eliminating or reducing this sanction for exceptional circumstances. »*

the sanction proposed by the CCES can be eliminated or reduced if *“exceptional circumstances”* are established as provided in Rules 7.38 and 7.39 of the CADP and the burden of proof is upon the Athlete to establish them.

[184] In the present case, there is a violation of refusal and therefore Rule 7.38 does not apply.

[185] Pursuant to Rule 7.39 of the CADP, which reads as follows :

> *"This Rule applies only to anti-doping rule violations involving Rule 7.16-7.20 (Presence), 7.21-7.23 (Use), 7.24-7.25 (Refusals) and 7.35-7.36 (Administration). If an Athlete establishes in an individual case involving such violations 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 minimum period of Ineligibility otherwise applicable. Of the otherwise applicable period of Ineligibility is a lifetime, the reduced period under the Rule 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 Rules 7.16-7.20 (Presence), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced"*

only the possibility of a reduction of the sanction as set out in Rule 7.25 is available to the Athlete.

[186] Rule 7.39 of the CADP sets out what "*exceptional circumstances*" are in the case of a violation of refusal pursuant to Rules 7.24 and 7.25 of the CADP. If *"no Significant Fault or Negligence"* can be proven, the consequences of an anti-doping rule violation can be reduced and the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable.

[187] "No Significant Fault or Negligence" is defined in the CADP Glossary as follows:

> *"The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or*

> *Negligence, was not significant in relationship to the anti-doping rule violation.* (Emphasis is added)

[188] Rule 7.39 of the CADP implements Article 10.5.2 of the *World Anti-Doping Code*, virtually verbatim. As already stated, the CADP provides that the text of the *Code*, including its Commentary, is a source of interpretation of Canada's domestic programme. According to the Commentary to the *Code*, this article is meant to be applied "where the circumstances are truly exceptional and not in the vast majority of cases". The Commentary continues :

> *"To illustrate the operation of Article 10.5, 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 form a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what the 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 form a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.)*
>
> *Article 10.5.2 applies only to the identified anti-doping rule violations because these violations may be based on conduct that is not intentional or purposeful. Violations under Article 2.4 (whereabouts information and missed tests) are not included, even though intentional conduct is not required to establish these violations, because the sufficient discretion to allow consideration of the Athlete's degree of fault.*

[189] 10.5.2. Comment:

> *The trend in doping cases has been to recognize that there must be some opportunity in the course of the hearing process to consider the unique facts and*

> *circumstances of each particular case in imposing sanctions. This principle was accepted at the World Conference on Doping in Sport 1999 and was incorporated into the OMADC which provides that sanctions can be reduced in "exceptional circumstances." The Code also provides for the possible reduction or elimination of the period of Ineligibility in the unique circumstance where the Athlete can establish that he or she had No Fault or Negligence, or No Significant Fault or Negligence, in connection with the violation. This approach is consistent with basic principles of human rights and provides a balance between those Anti-Doping Organizations that argue for a much narrower exception, or none at all, and those that would reduce a two year suspension based on a range of other factors even when the Athlete was admittedly at fault. These Articles apply only to the imposition of sanctions: they are not applicable to the determination of whether an anti-doping rule violation has occurred.*

[190] As already mentioned, the duty of care on the part of the Athlete is very broad.

[191] I already concluded that the Athlete committed an anti-doping rule violation of refusal based on a negligent conduct.

[192] The arbitrator must now decide if the Athlete's negligence or fault was significant or not in order to justify the reduction of the period of Ineligibility based on exceptional circumstances.

[193] The Athlete was experienced and knew about the importance of doping controls and the difference between CCES and BCS.

[194] He made the choice to rely on his parents' comments and on his lawyer's advice.

[195] He never mentioned that he took the time to review the relevant rules of the CADP or to try to talk to the representatives of CCES involved in the process.

[196] He did not convince me that he did everything possible to submit to doping control. On the contrary, he convinced me that he did everything possible to avoid it.

[197] The Athlete's general behaviour, his fault or negligence conduct by not talking with the Control Doping Officer, his ignorance of the numerous advice given to his

parents by the representatives of CCES as to his obligation to submit to doping control and the importance of the consequences should he decide not to submit to doping control require the sanction to be two (2) years Ineligibility.

[198] For the foregoing reasons, I am unable to find that there are *"exceptional circumstances"* in this case that would warrant reduction of the consequences otherwise applicable for a first anti-doping rule violation of this nature.

[199] Therefore, the sanction proposed by CCES in its Written and Oral Submissions is accepted.

Result

[200] While other mitigating factors have been drawn to my attention – the Athlete's commitment to his sport and to his team, his disappointment in retiring from his team, his athletic and sporting achievements in the face of considerable pressure and the importance of his possible participation in the Olympic games – none of them have a bearing on the evaluation of exceptional circumstances and, in the absence of exceptional circumstances, I have no reason to modify the prescribed sanction because of such factors.

[201] The required sanction for a first anti-doping rule violation for refusal to submit to doping control, which I am obliged in the circumstances to impose, is a two year period of ineligibility from sport as well as permanent ineligibility from direct Government of Canada funding.

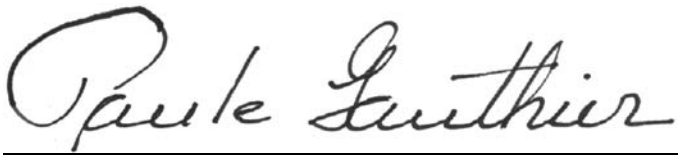
[202] The CADP states that the period of ineligibility shall start on the date of the hearing decision providing for Ineligibility. Any period of Provisional Suspension shall, however, if any, be credited against the total period of Ineligibility to be served.

[203] In the circumstances, the period of Ineligibility should start on the date of the hearing decision, namely August 31, 2005.

Costs

[204] Under Rule 7.69 of the CADP, the Doping Tribunal may award costs to any party payable as it directs. Unless applied for, there shall be no award of costs in this matter. Should any party wish to apply for costs, a written request with supporting submissions should be filed with the SDRCC by no later than 5:00 p.m. Est on September 21, 2005. I will then give further directions concerning responding submissions.

QUEBEC CITY, QUEBEC, September 6, 2005



PAULE GAUTHIER
Arbitrator