

**THE CANADIAN CYCLING ASSOCIATION
- AND -
ROLLAND GREEN**

AWARD

Mr. Roland Green {"the Rider"} is a 30-year-old professional mountain bike cyclist who has a valid licence from the Canadian Cycling Association {"CCA"}. He participated in an international race sponsored by the Union Cycliste Internationale {"UCI"} in Belgium. This arbitration arises out of the analysis of a urine sample given by the Rider at that time.

An ad hoc agreement was entered into by CCA and the Rider requesting that Prof. Richard H. McLaren, Esq. conduct an appeal under the UCI Cycling Regulations {"the Regulations"} in fulfillment of the CCA obligations there under.

A hearing was held on 31 January 2005 by conference telephone call. The Rider represented himself and called at the hearing a single witness his family doctor. Sean O'Donnell the High Performance Program Coordinator represented the CCA and called no witnesses.

BACKGROUND FACTS

1. The Rider is an international level elite professional athlete in the discipline of mountain biking in the sport of cycling. He was a member of the UCI registered Mountain Bike Trade Team (Trek-Volkswagen). He competed at a UCI sponsored event the MTB World Cup in Houffalize, Belgium on the 30th of May last year.
2. The UCI based in Aigle, Switzerland is the international federation responsible for the sport of cycling worldwide. The CCA is the national federation of the sport in Canada and is a national member of the UCI. The UCI establishes the regulations in the sport of cycling for events sponsored by them. These regulations provide for governance and support to its members. Pursuant to this role the UCI has adopted regulations for the conduct of sponsored competitions {the Regulations}.

3. By virtue of the contractual nexus between the Rider and CCA who in turn has a contractual relationship with the UCI the Rider has bound himself to observe the Anti-Doping Regulations. He has had an opportunity to review the Regulations and has agreed to be bound by all the provisions therein and to ride by them.
4. Within the UCI Regulations is Part XIV the Anti-Doping Examination Regulations {"Anti-Doping Regulations"} in force as of 1 July 2001 and described at pages 1 through 34. The Anti-Doping Regulations are designed to maintain the integrity of cycling and protect the health and rights of all athletes. The Program includes (i) doping tests in and out of competition, (ii) the imposition of penalties for Doping Offences, and (iii) support and assistance to riders when applicable. The parties stipulated that the UCI Anti Doping Examination Regulations 2001 version are applicable to this case.
5. The Rider provided a urine sample pursuant to the Anti-Doping Regulations following the UCI sanctioned "UCI MTB World Cup" in Houffalize Belgium on 30 May 2004. The parties have stipulated that the sample was that of the Rider and that it was transported to the Lab without any breach of the chain of custody.
6. The Doping Controle Laboratorium at the Universiteit of Gent {"the Lab"}, located in Belgium, analyzed the Rider's urine sample. The Lab analytical result contained in the Doping Control Report of 10 June 2004 states that the A sample of the Rider indicated the presence of prednisolone a metabolite of Budesonide. Such a glucocorticosteroid is set out in the List of Prohibited Classes of Substances and Prohibited Methods in effect as of 01 January 2004 and referred to in the Anti-Doping Regulations. The B counter-analysis confirmed on 9 July 2004 the existence of the Prohibited Substance.
7. The Rider signed the UCI doping control form completed at the time of giving the urine sample. Line 14 provides space to record *Pharmaceutical drugs taken by rider* and Line 15 provides space to record *Subject to the comments below, I confirm that the sample was taken in accordance with the regulations*. On the instructions of the Rider to the doping control officer a line was drawn through Line 14 and O.K. written in line 15. No other information was provided on the form indicating the use of inhalers. The

Rider testifies that he made a deliberate decision not to disclose his use of the inhaler that morning to the doping control officer.

8. In accordance with the Anti-Doping Regulations the UCI on the 16 June 2004 notified its member federation the CCA that the Rider a Canadian national with a valid license had a positive analytical result and sent along the Lab's analytical package determining that the "A" sample was positive. The parties agree that the Lab analytical process and the quantification of the results are accurate. On 21 June 2004 the CCA notified the Rider of these facts.
9. This Anti-Doping Tribunal {the "Tribunal"} was established pursuant to an agreement to request the Sport Dispute Resolution Centre for Canada {SDRCC} to provide arbitration services to the CCA. The parties confirmed the conferring of jurisdiction on the Arbitrator by a signed Arbitration Agreement {"Agreement"} dated 21/22 January 2005. The parties then proceeded to mutually agree upon the selection of the Arbitrator to hear the alleged Doping Offence in accordance with the Anti-Doping Regulations. The parties confirmed by conference telephone with the Arbitrator on 25 January 2005 and by their signed Agreement that they had no objection to the Tribunal's composition or its jurisdiction to hear, determine and issue a decision in this matter.
10. On 26 January 2005 the Executive Director of the SDRCC issued a written summary of the conference call of the prior day that was accepted by all concerned as a proper reflection of the telephone conference call and the various agreements of the parties. The note detailing the process and procedure the case was to follow and by which it was to be heard is called in these proceedings "the Procedural Order". In accordance with that Order the hearing was held at 12:15 p.m. (Pacific Standard Time) on 31 January 2005 by conference call and concluded at approximately 4:00 p.m.
11. Pursuant to the Procedural Order the Rider provided some exhibits and a statement of what the witness intended to be called would say together with a submission of a written brief. The CCA provided a written submission in accordance with the Procedural Order.
12. The Rider's medical history was filed with the Arbitrator through various exhibits provided in accordance with the Procedural Order. Dr. Attwell the

family physician for the Rider certified by letter dated 4 May of 2003 to the Canadian Centre for Ethics in Sport {"CCES"} that he was the Rider's attending physician and had personally examined him and prescribed two medications: (i) Salbutamol (beta-agonist) and (ii) Symbicort-200 both to be used for exercise induced asthma. No similar procedure had been undertaken by the Doctor with the CCES for the 2004-racing season.

13. Dr. Attwell's letter of 4 May 2003 indicates that the second medication Symbicort-200 is a combination of *Salmeterol 6mcg and Budesonide 200meg per spray*. The prescription is for exercise-induced asthma and the dosage is one puff of the inhaler *30 minutes pre-exertion*. The purpose of the letter was to establish the basis for a medical exemption or waiver for the use of the Prohibited Substance Budesonide to treat the exercised induced asthma.
14. The medical documents filed as exhibits in accordance with the Procedural Order establish that the Rider had a pre-disposed medical condition of exercise-induced asthma. The two letters from Dr. Attwell to the CCES of 4 May 2003 and to the Trek Volkswagen Cycling Team of 31 October 2003 refer to this condition. Various medical specialists physicians examining the Rider to assist in the diagnosis of other medical issues independently confirm the family doctor's diagnosis of this condition. See the correspondence of 6 August 2004 from Dr. Angela M. DiMango to Dr. Gloria Cohen.
15. Dr. Attwell in a letter to the CCES dated 31 October 2004 explained that he had diagnosed the Rider after May of 2004 with having a respiratory infection known as *Chlamydia pneumonia* that the Rider in his testimony indicates he may have had for some time following a trip to Malaysia in the spring of 2003. Dr Attwell prescribed a powerful broad-spectrum antibiotic called Moxifloxacin and inhalers and advised him to rest. The Rider discontinued the season after the race in Calgary on 4 July 2004. He officially withdrew from the remaining competition for the 2004 season by notifying the Interim Director General of CCA on 26 July 2004.
16. The Rider in his submission states that he finished 21st in the race in Belgium despite feeling unwell and was selected for random testing. He admitted that on the race morning he took 2 to 3 puffs of Symbicort-200. He made no declaration to that effect on his anti-doping control form provided

at the time of giving the urine sample. He states that he knew he was not cleared to use the inhaler but did so anyway. He states that *I did this because I hoped that the testing would miss these medications and I would avoid a huge problem. A huge mistake on my part. One which I wish I could undo.*

SUBMISSIONS of the PARTIES

By the Petitioner Rider

17. The Rider submits that in the past he had been cleared to use his Symbicort-200, a glucocorticosteriod inhaler for the treatment of asthma. His submission commences by stating *I would like to admit my own guilt and error in judgement in taking this medication.* It was submitted that due to his own lack of diligence and a hospital policy he did not have his paperwork in order for the 2004 spring racing season.
18. It is submitted that any penalty imposed must be proportionate with the offence committed. In considering the various elements of Article 124 there is good reason to reduce the suspension for a first offence of two years. The paperwork was missing and it was a mistake in judgement to not disclose the use of the inhaler even without the paperwork being in place. Such conduct does not exhibit the behaviour of one intending to dope. The substance is used to treat inflammation in the lungs it does not have anabolic effect. Therefore, there is no performance enhancing effect. The penalty ought to be the minimum under the Anti-Doping Regulations.

By the Respondent CCA

19. The CCA's position was that the Rider had committed a Doping Offense by having a Prohibited Substance in his body during competition in violation of the Anti-Doping Regulations.
20. A violation of Article 64 occurred when the Rider indicated nothing on the doping control form and did not have the proper declaration form filed with the CCES. He had filed the appropriate paperwork in previous years. He was careless in not doing so for this race but he did not do so deliberately or to avert the rules to enhance his performance.
21. For these reasons the CCA submit that the Tribunal should find the Rider

guilty of a Doping Offense and assess the penalties mandated by the Anti-Doping Regulations in consideration of the exceptional circumstances of this case.

22. THE RELEVANT ANTI-DOPING REGULATIONS

Chapter II Principles

Definition of doping

Art.4 Doping is .

1. ...
2. *the presence in the athlete's body of a prohibited substance ... or, ...*

Medical treatment

Art.8 *No substance belonging to a prohibited class or doping method may be used for medical treatment except where specified otherwise in the list: in such a case the burden of proof of medical treatment and use for the needs of such treatment shall lie with the rider. Without prejudice to the provisions of article 64, it must be proved that such medical justification existed and that the use of the substance or method occurred to this end and prior to the test. It must like-wise be established that the documents raised in evidence predate the test, the date mentioned on the documents not constituting proof.*

...

Chapter V Antidoping Test Procedures

Medication

Art. 64 *1. A rider who has used a substance ...on the list of classes of banned substances ... but who is authorised to do so under the conditions there specified must indicate the fact on the*

testing form.

2. A rider failing to do so shall, unless he belongs to a TT/I or TT/II, incur a penalty of between CHF 300 and CHF 8000 for the elite category ...

...

Chapter VIII Disciplinary Measures

A. Principles

Art. 124 *Within the limits set by the present regulations the penalties imposed must be proportionate with the offence committed, taking account of both the specific details of the case in hand and the characteristics of cycle sport and its various disciplines. Therefore, the following elements, inter alia, will be considered:*

- . the circumstance surrounding the offence*
- . the character, age and experience of the transgressor,*
- . the gravity of the consequences of the penalty for his social, sporting and economic position,*
- . the risk to a professional career,*
- . the rider's normal discipline and programme, particularly as regards the length of the season for that discipline and the number and importance of the events.*

Art. 125 *The duration of suspension from all competition may be reduced below the minimum laid down hereafter as long as such a reduction is expressly based on the aspects covered by article 124.*

In no case may the duration of the suspension from all competition be reduced to less than a quarter of the minimum laid down hereafter

The minimum length of the suspension under point 1 article 129 may not be reduced.

Art. 128 *1. Without prejudice to the cases where provision is made for a specific fine, any doping offence may be penalised by a fine in addition to suspension from any sporting activity and where applicable, a ban on taking part in specific competitions.*

2. The fine is obligatory for licence-holders exercising a professional cycling activity and in any event for members of a TT/I, TT/II, TT/III, women's trade team or mountain bike trade team or mountain bike trade team.

4. For licence holders covered by point 2 above, a minimum fine must be imposed of CHF 2000 for elite man, CHF 1000 for elite women and CHF 500 for under 23 riders. These amounts shall be doubled in the event of a subsequent offence, refusal or fraud and in the event of complicity. They may be reduced by two thirds for licence-holders resident outside Europe in line with incomes and the cost of living.

B. OFFENCES

Doping with a <soft> substance

Art. 129 *In cases of doping where the substance detected is ephedrine, phenylpropanolamine, pseudoephedine caffeine, strychnine or related substances, the rider shall be penalised as follows:*

- 1. first offence, other than intentional doping:
-suspension ... between one and six months*

However, if it is demonstrated that the offence was caused by simple inattention, a warning may instead be issued. In this case a subsequent doping offence with a <<soft>> substance, other than intentional doping, will be considered as a first offence for which the suspension must be imposed.

...

Art. 130 *In cases of doping other than those covered by Article 129, the rider shall be penalised as follows:*

- 1. first offence, other than intentional doping:
-suspension for at least two years.*

...

Art. 134 *A rider or a licence-holder who is a former rider who declares or admits to having used doping substances or doping methods shall be considered as having tested positive on the day of the declaration or admission. If the facts admitted or declared can be tied to a specific instance, the penalties in force at the time of the events shall be applied.*

...

Art. 143 *Any case of doping of a rider during competition shall automatically and independently of any penalty imposed, and even where it is not explicitly noted in the decision, lead to that rider's disqualification. A rider who is found to have committed an act covered under Article 131 or under Article 133 while participating in the competition in question shall also be disqualified automatically.*

Art. 150 *As regards international races and UCI out of competition tests, the suspension shall come into effect on the day following the date of the decision. However, at the request of the person suspended, the UCI antidoping commission may allow the suspension to come into effect on the date set by the decision or the regulations of the National Federation, or if it is earlier than the former, the date on which the person was informed of the decision.*

Art. 152 *The normal period of inactivity is determined as follows:*

- ...
- b) *for a rider whose primary activity is road racing from 1 November to 31 January.*
- c) ...

REASONS

23. The agreed upon stipulations indicate that there is no dispute about the manner and method of obtaining the urine sample or the shipment of the sample to the Lab. Therefore, there are no issues in respect of the collection or chain of custody of the sample. It is further agreed that the sample analyzed by the Lab was that of the Rider. The Lab analysis and quantification of its analytical results is undisputed as to the finding that the sample contained a Prohibited Substance, prednisolone. Based upon all of the jointly agreed stipulations the Rider is found to have had a Prohibited Substance within his body. Therefore, the definition of doping found in Article 4 (2) of the Anti-Doping Regulation has been established. It is so found by this Tribunal.
24. The Rider committed a Doping Offence pursuant to an in-competition test. Under Article 143 of the Anti-Doping Regulations and under the principles of strict liability that unquestionably apply, the Rider must be disqualified from the UCI MTB World Cup event of 30 May 2004 being the race where he provided the positive specimen. It is so found by this Tribunal. There

are no subsequent results to the May event which need to be considered because all other events resulted in a did not finish designation. The Rider then withdrew from the season on 26 July 2004.

25. Under Article 128 for a Doping Offence involving a mountain bike trade team licence-holder a fine is obligatory by clause (2). Clause (4) provides that the minimum fine is to be CHF 2000 for elite men. The clause goes on to state that the fine *may be reduced by two thirds for licence-holders resident outside Europe in line with incomes and the cost of living*. The Rider testified that his income in 2003 from mountain bike racing was \$100,000US and for 2004 was \$165,000US. Therefore, it is determined that the fine ought not to be reduced below the minimum CHF 2000.
26. Under Article 8 the burden to establish the medical treatment need for a substance belonging to a prohibited class is placed upon the Rider. Dr Attwell in his testimony has demonstrated that this Rider had a long-standing medical condition involving exercise-induced asthma. Indeed, he had medical certificates for this condition for the years 2003 back to 1997 excluding 1999. The Rider had simply failed to obtain the same waiver for the 2004 season. The method for obtaining such documents has changed over the years and was more extensive for the 2004 season. The Rider had left himself with insufficient time to accomplish all that was required and particularly several tests the Hospital in Victoria, British Columbia would be required to conduct. Nevertheless, there can be no doubt about the need for treatment for this Rider. Therefore, without a doubt the medical justification for use of the substance existed prior to giving the specimen in May of 2004.
27. The Rider admits he failed to indicate that he was using the Symbicort-200 on the doping control form completed at the time of testing. He has a positive duty to do so under Art. 64 when he has authorization to use the substance. Of course, the Rider in this case had no such authorization. That made it even more imperative to have disclosed the use. He admits in his testimony that when he was selected to give a specimen he made a conscious and deliberate decision not to disclose his use. When questioned by the Arbitrator he states that he took a chance and gambled that his use would not be detected by the laboratory analysis. It was, and resulted in these proceedings. Had the Rider disclosed on the form his use, even though it was not authorised, then this case would be more appropriately

characterized as missing paperwork. It cannot be so characterized on the testimony of the Rider. There was a deliberate attempt to conceal use. That was a serious error in judgement on his part. Given the testimony this case is not one of a rider merely failing to disclose an authorised use of a banned substance for treatment of a known prior medical condition. Therefore, the balance of the provisions of Art. 64 have no application to this matter.

28. Dr Attwell in his testimony indicates that if an athlete took two puffs from the Symbicort-200 inhaler prior to competition it would metabolize in the body very quickly and he would expect it to show up in the urine analysis as it has done in this case. Therefore, from this testimony it can be concluded that the method by which the Prohibited Substance was in the Rider's body is established as being the two to three puffs taken by the Rider prior to the commencement of the race on 30 May 2004.
29. Dr. Attwell testifies that the use of the Symbicort-200 inhaler is to reduce inflammation in the lung. In order for it to be effective it requires a regular course of daily use. The Rider testifies that he was not using the puffer in this fashion but only used it when he felt he might have need of it during the race. That is what he had done on May 30th. Therefore, he was not using the inhaler as it was prescribed and the result was of little medical benefit. The testimony of Dr. Attwell is that the active ingredient in the inhaler prednisolone in the quantities being used for inhalation is not anabolic in its effect but rather reduces inflammation of the airways and tiny air sacks of the lungs. It is concluded by the Arbitrator that the Prohibited Substance identified by the Lab did not have performance enhancing effect in the circumstances. However, that conclusion of itself makes no difference to the strict liability principle as is indicated in *Baxter v. IOC (CAS/2002/A/376)*.
30. An issue arose with respect to the category of the offence. Was the situation to be treated as an Art. 129 *Doping with a <<soft>> substance*; or, an Art. 130 *Doping in general* offence? Under the literal interpretation of the Anti-Doping Regulations in force at the time of giving the urine specimen this matter must be treated as a Doping in general offence under Art. 130 because glucocorticosteroids are not specifically mentioned in Art. 129.

31. The World Anti-Doping Code {WADA Code} took effect for the UCI on the eve of the Olympic Games 13 August 2004. Under those Anti-Doping Regulations glucocorticosteroids are a specified substance that list also includes the substances listed in the UCI Art. 129 under consideration in the previous paragraph.
32. The principle of *lex mitior*¹ applies. The new UCI Anti-Doping Regulations {2004} which came into force as a result of the UCI incorporation of the WADA Code into its Regulations contain different sanctions than the Anti-Doping Regulation under consideration herein. Under the principle of *lex mitior*, if new rules come into force between the alleged Doping Offense and the hearing of the allegations; then the sanctions that are more favorable to the athlete must be applied. For a similar application to the rules of FINA who adopted the WADA Code as of 11 September 2003 see *Strahija v. FINA CAS 2003/A/507* at paragraph 7.2.2.
33. The source of the Prohibited Substance prednisolone is not in dispute. It was the Symbicort-200 inhaler used by the Rider the morning of the race. The use that day did not result in any performance enhancing effect. Furthermore, the irregular use of the puffer in the past, contrary to the way it was prescribed by Dr. Attwell, could not have had performance-enhancing effects on prior occasions of use, which were infrequent.
34. Glucocorticosteroids were not within Art. 129 of the Anti-Doping Regulations under consideration herein. However under the Anti-Doping Regulations {2004} currently in force they are specified substances resulting in a sanction in Article 262 of *at a minimum, a warning and reprimand and no period of Ineligibility from future Events, and at a maximum, 1 (one) year's Ineligibility*. The sanction under the applicable Anti-Doping Regulation at the time of the sample is found in Art. 130 and was *a suspension for at least two years* other than intentional doping which the Rider is found not to have committed. Therefore, the principle of *lex mitior* is applied to the sanction of Art. 130 to reduce the sanction range from a minimum of two years to a maximum of one year and possibly only a warning and reprimand.

¹ For a discussion of the principle see Lewis, A. & Taylor, J. *Sport: Law and Practice*: Butterworths (2003). See also *AC v. FINA CAS 1996/A/149*.

35. Turning to the principles of proportionality and the specific elements of Art. 124. The Rider did make an attempt to obtain the required tests while in Victoria, British Columbia his home base before leaving for Europe in the spring of 2004. He left himself without sufficient time to complete all the steps. He elected to go to Europe without the paper work having been completed. In his testimony he indicated his reluctance to use the inhalers except when he really needed them. Indeed he used them only sporadically. Therefore, he could have ridden in Europe and not used the inhalers. He did not do that which he explains in part by his general feeling of unwellness which started the previous year. He also could have continued his efforts to get the paper work completed at a later date which he did not do. His actions were deliberate and for which he must be responsible under Art. 7. The Rider is 30 years old and is an experienced rider. He knows what he should have done. He is a two-time Mountain Bike World Champion and a Commonwealth Games Champion and has been a member in good standing with the CCA since 1992. He is an individual of good character and reputation. Any decision will have an effect on the rider's short-term future and he is currently without a contract for the 2005 season. He is in negotiations with potential employers and any sanction will have an adverse impact on those negotiations. Weighing against the foregoing elements is the level of thought involved by the Rider. It is of some significance and was deliberate in proceeding to compete without the paperwork; then use the inhaler; and then, try to get it past the testing Lab.
36. Having regard to the Principles of Art. 124 and all the circumstances of the case the Rider ought to receive a sanction in the middle of the range of up to a maximum of one year under Art. 130 as modified by the principle of *lex mitior*. It is so found by this Tribunal that a six-month suspension is appropriate in all of the circumstances of the case.
37. In accordance with Art. 150 the suspension should take effect on the day following this decision, which would be in early February of 2005, because the test occurred at a UCI international race. That would mean that the Rider would not be able to compete until some time in July. That is too harsh a penalty in all the circumstances in light of Art. 124 and is not proportionate with the circumstances. Under Art. 150 the UCI antidoping commission may allow the suspension to come into effect on the date set by the decision or the regulations of the National Federation. The following paragraph sets out the reasons why this sanction ought to come into effect

at an earlier date than that provided for by Art. 150.

38. This matter had been delayed in coming to me for arbitration until January of 2005 more than 7 months after the positive notification to the Rider. The Rider did not compete for the balance of the racing season having formally notified his intentions to the CCA on the 26 July 2004. He did not race after the Calgary race on 4 July 2004. His withdrawal from racing was only in part a consequence of the doping infraction but it was a factor. He also admitted the Anti-Doping Regulation infraction before me thereby bringing into play Art. 134 which permits a retroactive sanction. In addition, the references of Art. 150 permit examination of the National Federation rules. In this case those antidoping rules were those of the national doping agency in Canada the CCES. Under those rules section 10 requires the *penalty for a Doping Infraction determined by a Positive Test Result is calculated from the date of sample collection*. Therefore, under the provisions of Art. 150 and Art. 134 I would propose that the sanction which is proportionate in all the circumstances should commence with the Rider's voluntary withdrawal from mountain bike racing from the 5 July 2004. Art. 152 (b) provides for a period of inactivity from 1 November to 31 January that cannot count as part of the suspension. Therefore, the sanction ought to take effect again from 1 February 2005 and continue until 4 April 2005.

ORDERS

The Arbitrator makes the following orders based upon the foregoing grounds and discussion in the above opinion.

1. The Definition of doping in Article 4(2) has been established. A First Doping Offence has occurred under Article 130(1). The Doping Offence involved the use of a Prohibited Substance.
2. Under Article 143 Roland Green is disqualified from the UCI MTB World Cup event held on 30 May 2004 for having committed a Doping Offence during competition.
3. Under Article 128(2) Roland Green being a licence-holder in the mountain bike trade team must pay an obligatory fine. In accordance with Article 128(4) the fine is set at CHF 2000.
4. Under Article 130 as modified by the principle of *lex mitior* and upon a finding of the application of the principles of Article 124 a period of suspension for six months is to be served.
5. Under Article 150 and 134 and having regard to the principles of Article 124 the suspension commenced on 5 July 2004 and will end on 4 April 2005 having taken account of the period of inactivity set out in Article 152(b).

DATED THIS 4th DAY of FEBRUARY 2005



Prof. Richard H. McLaren, C.Arb
Chief Arbitrator SDRCC
Barrister and Solicitor

SIGNED AT: London, Ontario, CANADA