

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA  
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA**

No. DT-06-0043

**IN THE ARBITRATION**

Between:

**THE CANADIAN CENTRE FOR ETHICS IN SPORT**

and

**CANADIAN INTERUNIVERSITY SPORT**

and

**THE GOVERNMENT OF CANADA**

**Claimants**

- and -

**JAMES KELLEHER**

**Respondent**

- and -

**THE WORLD ANTI-DOPING AGENCY**

**Observer**

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**DECISION**

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Stephen L Drymer  
*Arbitrator*

13 November 2006

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## 1. THE PARTIES

### a) The Canadian Centre for Ethics in Sport

1. The Canadian Centre for Ethics in Sport (the “CCES”) is a not-for-profit organization incorporated under part II of the *Canada Corporations Act*. According to the *Canadian Policy Against Doping in Sport (2004)* for the Federal, Provincial and Territorial Governments, the CCES is an independent, non-profit organization that promotes ethical conduct in all aspects of sport in Canada. The CCES also maintains and carries out the Canadian Anti-Doping Program and its Rules (the “CADP” and the “CADP Rules”), including providing anti-doping services to national sport organizations and their members.

2. The CCES was represented in the arbitration by Ms. Karine Henry, Ms. Anne Brown, Mr. Joseph de Pencier and Mr. David Lech.

### b) Canadian Interuniversity Sport

3. Canadian Interuniversity Sport (“CIS”) is the national governing body of University sport in Canada. It is a federally incorporated body, with its head office in Ottawa. CIS is a voluntary association formed to further the objectives set out in its by-laws, including the encouragement of the highest standards of excellence in sport in an educational context. Its powers include, among other matters, establishing eligibility criteria for all CIS members and competitions.

4. The involvement of CIS in the arbitration consisted essentially in its expression of support for the positions taken by the CCES; it did not present any evidence or submissions of its own.

5. CIS was represented in the arbitration by its Director, Operations and Development, Mr. Tom Huisman.

### c) The Government of Canada

6. The Government of Canada participated in the arbitration through the intervention of Sport Canada, a division of the International and Intergovernmental Affairs section of the Department of Canadian Heritage (“Sport Canada”). As with CIS, Sport Canada’s participation in the arbitration consisted essentially in its expression of support for the positions taken by the CCES; it did not present evidence or submissions separate from those presented by CCES.

7. Sport Canada was represented in the arbitration by Maître Johanne Imbeau and Ms. Mary Warren.

**d) James Kelleher**

8. Respondent James Kelleher (the “Athlete”) is a student-athlete at Bishop’s University, participating in the sport of football.

9. Bishop’s University is a member of Canadian Interuniversity Sport. According to CADP Rules 1.7 and 1.8, the CADP applies to all members of, and all participants in the activities of, sport organizations adopting it. CIS adopted the CADP on 12 June 2004. As a participant in CIS sport, Mr. Kelleher is subject to the Rules of the CADP.

10. The “Student Athlete Acknowledgement Form” which Mr. Keller signed on 21 August 2006 also provides: “By signing this form, I acknowledge that I have read, understand and will abide by Canadian Interuniversity Sport Eligibility and Doping Control Regulations.”

11. As discussed below, Mr. Kelleher chose not to participate in the arbitration.

**e) The World Anti-Doping Agency**

12. The World Anti-Doping Agency (“WADA”), whose head office is in Montréal, is the international organization responsible for administering the World Anti-Doping Program, one of whose principal elements is the World Anti-Doping Code. WADA was an observer of the arbitration, as of right. It did not, however, participate in any of the proceedings.

**2. FACTUAL AND PROCEDURAL BACKGROUND**

**a) The Doping Control Session**

13. On 4 September 2006, Mr. Jean-Paul Ricard, a CCES certified doping control officer, was authorized to conduct out-of-competition doping control on the Bishop’s University football team, in accordance with the CADP.

14. Mr. Kelleher, a Bishop’s University football player, was randomly selected for out-of-competition doping control.

15. Mr. Ricard presented the Athlete Selection Order form to Mr. Kelleher to inform him of his selection. Mr. Kelleher signed the Athlete Selection Order form acknowledging that he had received and read the Order, and reported to the doping control station at 11:40.

16. As per the CADP Doping Control Rules Mr. Ricard began to complete the top portion of the Doping Control Form with Mr. Kelleher. While together, Mr. Kelleher had a number of questions for Mr. Ricard and, as explained below, ultimately informed Mr. Ricard that he would not submit to doping control.

**b) The Athlete's Refusal to Submit to Sample Collection**

17. According to the Supplementary Report annexed to Mr. Ricard's 4 September 2006 Doping Control Officer Report, while in the doping control station Mr. Kelleher seemed very nervous and in fact told Mr. Ricard that he was nervous. Mr. Ricard tried to comfort the Athlete and inquired as to the reasons why he was nervous. After some time, Mr. Kelleher asked "what would happen if he refused to be tested," to which Mr. Ricard replied that "the consequences could be the same as a positive test". The Athlete asked whether the media would be informed, how long it would take for the results of his doping control to become public if he tested positive, and whether his sample would be tested by the same laboratory that tests Olympic athletes. Mr. Ricard notes in his Supplementary Report that when he told the Athlete that indeed it was the same laboratory that tests Olympic athletes that would test his sample, the Athlete stated: "They will find out. I have no chance to get away with it".

18. According to Mr. Ricard, the Athlete then stated that he would prefer to refuse the test. Mr. Ricard advised him to "take the time to think about it before taking a decision". Mr. Ricard encouraged Mr. Kelleher to discuss his decision with someone. The Athlete indicated that he would like to meet with coach Leroy Blugh. Mr. Kelleher and Mr. Blugh met privately for approximately 10 minutes, after which, according to Mr. Ricard, "James told me he still wants to refuse the test, knowing what the consequences could be."

19. Mr. Ricard requested that Mr. Kelleher complete and sign the Doping Control Form, which he did. In the section of the Doping Control Form entitled "Athlete's Remarks" Mr. Kelleher wrote: "I refuse to take test." Mr. Kelleher accordingly never submitted to sample collection.

**c) Initial Review**

20. As mandated by the of the results management procedure set out in the CADP Rules 7.45 *et seq.*, an initial review and investigation were initiated by the CCES (the “**initial review**”).

21. The purpose of the initial review was, firstly, to determine whether the events of 4 September 2006 constituted an anti-doping rule violation, and secondly, to determine the full circumstances of the possible anti-doping rule violation occasioned by Mr. Kelleher’s refusal to submit to doping control.

22. As part of the review process, on 11 September 2006 the CCES, through CIS, notified Mr. Kelleher of the anti-doping rule violation which appeared to have been violated in the circumstances, and the consequences should this prove to be the case. As stated in the 11 September letter: “The possible consequences for an anti-doping rule violation involving a Refusal are outlined below:” following which the text of CADP Rules 7.24 and 7.25 were reproduced. The CCES requested that the Athlete provide his written submissions on the matter on or before 20 September 2006.

23. On 14 September 2006, the CCES received an email from Mr. Huisman of CIS stating that Mr. Kelleher had received the CCES’ letter of 11 September 2006 but that the Athlete did not wish to provide any information in regard to the 4 September 2006 doping control session. Attached to Mr. Huisman’s email was an email dated 13 September 2006 from Mr. Kelleher himself which read: “*I have received the messages, and I will not be furthering my appeal. Thanks again.*”

24. The CCES nevertheless provided Mr. Kelleher until September 20, 2006 to furnish any information regarding the matter, in the event that he re-considered his decision. In the end, Mr. Kelleher did not provide any information or submissions regarding his conduct or the reasons for his apparent refusal to submit to doping control.

25. In the face of the Athlete’s outright refusal to provide any information or explanation regarding the matter, the CCES concluded its initial review on the basis of the information contained in Athlete Selection Order, the Doping Control Form, the Doping Control Officer Report and Supplementary Report.

**d) Notice of Apparent Violation**

26. On 22 September 2006, the CCES issued a Notice to Mr. Kelleher, pursuant to Rule 7.46 of CADP Rule 7.46 (the “**Notice**”).

27. In the Notice, the CCES asserted that Mr. Kelleher had committed an anti-doping rule violation according to CADP Rule 7.24, and proposed that the sanction for this violation be two years ineligibility from sport and permanent ineligibility for direct financial support from the Government of Canada, in accordance with CADP Rules 7.25 and 7.37.

28. On September 25, 2006, the CCES received an email from Mr. Huisman stating that Mr. Kelleher had received a copy of the CCES’s 22 September 2006 Notice and did not wish to participate in the results management process or provide the CCES with any information. Again, attached to Mr. Huisman’s email was, among other things, an email from the Athlete dated 22 September 2006 in which Mr. Kelleher declared: “*[I] feel that this matter should be over for me. I signed the form saying i would not test and that’s as much as i am doing ...*”

**e) Administrative and Pre-Hearing Conference Calls**

29. On 26 September 2006, the Sport Dispute Resolution Centre of Canada (the “**SDRCC**”) sent a letter to Mr. Kelleher requesting that he inform them by 2 October 2006 of his decision either to waive his right to a hearing or to proceed to a hearing. Mr. Kelleher did not reply to the SDRCC’s communication.

30. On 4 October 4 2006 the SDRCC convened an administrative conference call with all parties involved in this matter. Mr. Kelleher received notice of the call but chose not to participate.

31. On 5 October 2006, the SDRCC sent another letter to Mr. Kelleher reminding him of the importance of his participation in these proceedings. The letter also informed the Athlete that if he did not participate in the pre-hearing conference call with the arbitrator (i.e., with myself) scheduled for 13 October 2006, the matter could proceed without him.

32. Once again, CIS sought to verify that Mr. Kelleher had received the SDRCC letter and the important information it contained. In its own email addressed to Mr. Kelleher dated 5 October 2006, CIS reiterated the substance of the information set out in the SDRCC’s letter and asked the Athlete to confirm his receipt of the SDRCC’s 5 October letter. Once again, Mr. Kelleher

confirmed his receipt of this correspondence; in an email dated 10 October 2006 he wrote simply: “*Yes, I got it.*”

33. On 13 October 2006, the pre-hearing conference call took place. The CCES, CIS and the Government of Canada were all represented on that call. Mr. Kelleher did not participate.

34. As subsequently confirmed in a letter to the parties on the same date, after hearing submissions from the parties’ representatives during the conference call I determined that, in accordance with the CADP and the Canadian Sport Dispute Resolution Code (the “**Code**”), the arbitration proceedings would continue and a hearing would be held notwithstanding the absence of the Athlete. I also determined during the conference call that, as submitted by the participating parties, there was no need in the circumstances to require the participating parties to attend an in-person or telephone hearing, and that a documentary hearing was appropriate.

35. A timetable for the submission by the parties of their evidence and written submissions was accordingly agreed and communicated to all parties. This included a deadline for the filing of any evidence and/or submissions by Mr. Kelleher, should he have a last-minute change of heart as regards his participation in the arbitration.

#### **f) Evidence and Submissions**

36. In accordance with the timetable communicated to the parties, the CCES submitted its evidence in the arbitration, consisting of a detailed affidavit from Ms. Brown with exhibits, on 25 October 2006. This was followed, on 27 October 2006, by the filing of CCES’ submissions.

37. In its submissions, the CCES seeks a finding that, by his refusal to submit to sample collection, Mr. Kelleher has committed the anti-doping rule violation set out in CADP Rule 7.24. By way of consequences for this, the Athlete’s first anti-doping rule violation, the CCES seeks the imposition of a two-year period of ineligibility as well as permanent ineligibility to receive direct financial support from the Government of Canada

38. As they had advised me during the 13 October 2006 pre-hearing conference call, CIS and the Government of Canada did not file any evidence or submissions of their own, relying instead on the evidence and submissions presented by the CCES.



39. In accordance with the timetable communicated to the parties, Mr. Kelleher was provided until 1 November 2006 to file his evidence and submissions in the arbitration. In the event, the Athlete chose not to do so, consistent with his intention as stated on several occasions, as described above.

### 3. THE SPECIFIC ANTI-DOPING RULE VIOLATION AND SANCTION AT ISSUE

40. The provisions of the CADP primarily at issue are Rules 7.21, 7.25 and 7.37, all of which are contained in the section of the CADP entitled "Specific Anti-Doping Rule Violations and Sanctions on Individuals":

#### **Refusals**

**7.24** 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.

**7.25** The period of *Ineligibility* imposed for this 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 reducing the sanction for exceptional circumstances as provided in Rules 7.39 or 7.40.

[...]

#### **Government of Canada Funding Sanctions**

**7.37** Any *Athlete* or *Athlete Support Personnel* who commits and is sanctioned for an anti-doping rule violation pursuant to Rules 7.16-7.25 ... shall be permanently ineligible to receive any direct financial support provided by the Government of Canada ...

### 4. DISCUSSION AND FINDINGS

41. The evidence is clear, and it is entirely uncontested. Indeed, the facts speak for themselves.

42. As explained above, Mr. Kelleher is subject to the Rules of the CADP. This includes CADP Rule 7.24.

43. On 4 September 2006 Mr Kelleher refused, without compelling justification (in fact, without any justification), to submit to sample collection after having received due and proper notification that he had been selected for doping control.

44. Mr. Kelleher's refusal to submit to sample collection constitutes an anti-doping rule violation under CADP Rule 7.24.

45. Under CADP Rule 7.25, the sanction for a first violation of CADP Rule 7.24 is a two-year period of ineligibility.

46. The Athlete has failed to establish any basis for reducing the sanction provided for in CADP Rule 7.25, whether for exceptional circumstances or otherwise.

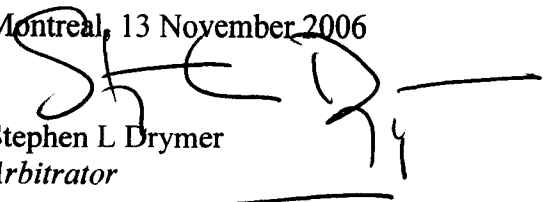
47. Under CADP Rule 7.37, an athlete who commits and is sanctioned for certain anti-doping rule violations, including the violation set out in CADP Rule 7.24, shall also be permanently ineligible to receive any direct financial support provided by the Government of Canada.

## 5. DECISION

For all of the foregoing reasons, I decide and order as follows<sup>1</sup>:

- (1) Mr. Kelleher has committed the anti-doping rule violation set out in CADP Rule 7.24, namely, refusing to submit to sample collection;
- (2) The period of ineligibility imposed for this violation, Mr. Kelleher's first anti-doping rule violation, shall be two years, as required by CADP Rule 7.25;
- (3) Mr. Kelleher shall, in addition, be permanently ineligible to receive any direct financial support provided by the Government of Canada, in accordance with CADP Rule 7.37.

Montreal, 13 November 2006

  
Stephen L Drymer  
Arbitrator

<sup>1</sup> This Decision, without reasons, was communicated to the parties on 6 November 2006, in accordance with CADP Rule 7.60(c) and Art. 6.22(b) of the Canadian Sport Dispute Resolution Code.