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 KANE WASELENCHUK ASSERTED BY THE CANADIAN CENTRE FOR ETHICS IN SPORTS

No.: SDRCC DT-06-0038
(Doping Tribunal)

Canadian Centre for Ethics in Sport

Racquetball Canada

Government of Canada

-and-

Kane Waselenchuk
Athlete

-and-

World Anti-Doping Agency
International Racquetball Federation
Observers

BEFORE:

Ross C. Dumoulin
Arbitrator

APPEARANCES:

For the Athlete: Howard L. Jacobs (Counsel)

For the Canadian Centre for Ethics in Sport: David W. Lech (Counsel)
Karine Henrie
Kevin Bean

For Racquetball Canada: Lyle M. Smordin (Counsel)
Ron Brown

DECISION

On January 19, 2007, I was appointed as arbitrator by the Sports Dispute Resolution Centre of Canada (SDRCC) pursuant to sub-paragraph 6.9 (b) (i) of the *Canadian Sport Dispute Resolution Code (April 1, 2006)* to sit as Doping Tribunal in the present matter. This is a decision with reasons issued pursuant to paragraph 7.60 c) of the *Canadian Anti-Doping Program (June 2004).*

FACTUAL AND PROCEDURAL BACKGROUND

June 16, 2006: The date of the Canadian Centre for Ethics in Sport's (CCES) report on the result of a doping control conducted on May 27, 2006 following the Canadian Racquetball National Championships held in Edmonton, Alberta which was sent to Racquetball Canada. The report states that there was an adverse analytical finding for Cannabis above the allowable threshold and for Cocaine metabolite which are both classified as prohibited substances on the 2006 World Anti-Doping Agency (WAD A) List of Prohibited Substances. The said report points out that the adverse analytical finding does not mean that the athlete has committed an anti-doping rule violation. Once the CCES has completed its initial review, it may issue a Notification asserting that the athlete has in fact committed an anti-doping rule violation. The report requests that Racquetball Canada advise the athlete of its finding. The athlete in question is Mr. Kane Waselenchuk, the athlete in this matter. On June 19, 2006, the CCES e-mailed a copy of the report to Mr. Waselenchuk.

June 22, 2006: Mr. Waselenchuk e-mailed a letter of explanation to the CCES and to Racquetball Canada. The letter expresses Mr. Waselenchuk's astonishment at the positive test for cocaine. It also states, "As for the cannabis detected in the sample, that is correct. I realize that this is a prohibited substance, unfortunately for me, I made a mistake ... a bit of celebration prior to the commencement of the competition in which I did partake in this foolish act with cannabis only."

June 26, 2006: The date of CCES's Notification to Racquetball Canada asserting that Kane Waselenchuk committed an anti-doping rule violation and proposing that the sanction for the violation be two (2) years of ineligibility from sport and permanent ineligibility of direct financial support from the Government of Canada. The Notification states that the sample giving rise to the adverse analytical findings was collected on May 27, 2006 and that the adverse analytical findings were received by the CCES from the WADA-accredited laboratory on June 14, 2006. A copy of the certificate of analysis was enclosed indicating the presence of Cannabis above the allowable threshold and of Cocaine metabolite. The Notification points out that it does not mean that Mr. Waselenchuk has been finally determined to have committed an anti-doping rule violation and further states that this can only be determined by a hearing before a Doping Tribunal, unless the athlete acknowledges the anti-doping rule violation, accepts the sanctions proposed by the CCES

and waives his right to a hearing. The Notification goes on to state that the athlete has three options: proceed to a hearing, waive his right to a hearing, or provide further information to the CCES. It concludes by advising that if Mr. Waselenchuk has any questions, he may contact Ms. Karine Henrie, Results Manager, Anti-Doping Program, CCES and it provides the necessary contact information.

July 6, 2006: Mr. Waselenchuk signed the Waiver of Hearing Form which reads in part as follows: "I, Kane Waselenchuk, acknowledge the anti-doping rule violation set out in the CCES notice of June 26, 2006. I accept the sanction for this violation be two years ineligibility from sport and permanent ineligibility of direct financial support from the Government of Canada by the CCES and waive my right to a hearing."

January 11, 2007: Arbitrator Bernard A. Roy issued a Preliminary Ruling pertaining to the present matter. Mr. Roy was appointed on November 17, 2006 by the SDRCC as Jurisdictional Arbitrator pursuant to rule 6.11 of the *Canadian Sport Dispute Resolution Code (April 1, 2006)* to deal with an issue of jurisdiction arising from a request filed by Mr. Waselenchuk who submitted that he had a right to challenge the purported waiver he had signed which he claimed was not a true and informed waiver. He took the position that the SDRCC had the authority to set up a Doping Tribunal, while the CCES was of the view that the SDRCC had no jurisdiction to appoint a Doping Tribunal to interpret the validity of a signed waiver.

Arbitrator Roy stated in his decision, at paragraph 25, that his perview as arbitrator was limited to the question of determining the authority of the SDRCC to decide whether the waiver effectively deprived Mr. Waselenchuk of the right to request that a dispute be submitted to a Doping Tribunal.

At paragraph 37 of his decision, arbitrator Roy held as follows:

> I am not prepared, at this juncture, to subscribe to the position advanced by the CCES that the signing of a Waiver effectively estops the Applicant from seeking to have a Doping Tribunal rule whether or not his Waiver was properly given.

And at paragraph 38:

> It will be incumbent on the Applicant to successfully argue before a Doping Tribunal to be set up by the SDRCC that his Waiver was not properly given because of alleged failures and omissions which were in breach of principles of natural justice and procedural fairness. A Doping Tribunal should first deal with the purported breaches before even hearing any technical evidence on the merits of the Dispute.

Arbitrator Roy concluded as follows at paragraph 41 of his Preliminary Ruling:

> As the appointed jurisdictional arbitrator, seized of the issue of the SDRCC jurisdiction, I have come to the conclusion that the SDRCC has jurisdiction to appoint a Doping Tribunal to interpret the validity of the Waiver signed by the Applicant and that said Waiver does not constitute an absolute bar to the SDRCC jurisdiction.

January 19, 2007: As a result of the above-noted determination made by arbitrator Roy in his Preliminary Ruling, I was appointed as arbitrator by the SDRCC pursuant to sub-paragraph 6.9 (b) (i) of the *Canadian Sport Dispute Resolution Code (April 1, 2006)* to sit as Doping Tribunal in the present matter.

January 24, 2007: A preliminary meeting of the parties by teleconference was held pursuant to section 7.66 of the *Canadian Anti-Doping Program (June 2004).* It was agreed that Mr. Waselenchuk's legal counsel, who represented him at the meeting, would file affidavit evidence and submissions pertaining to the issue of the validity of the waiver on or before February 7, 2007 and that the CCES,'s legal counsel, Mr. David Lech, would file affidavit evidence and submissions on the waiver issue on or before February 16, 2007. The parties also agreed to a tentative hearing date of March 2, 2007.

Mr. Waselenchuk was not available for a hearing in early March 2007. The CCES consented to delay the hearing until mid-March. A conference call was then set for March 7, 2007 to deal with the subject of a new hearing date and location, as well as any other procedural matters. Mr. Waselenchuk, then retained a new legal counsel, Mr. Howard Jacobs. Mr. Jacobs indicated that he would attend the conference call set for March 7th and that he saw no problem with March 19, 2007 for a hearing, a date which had been informally agreed to between Mr. Waselenchuk's former legal counsel and Mr. David Lech, counsel for the CCES.

March 7, 2007: A second preliminary meeting of the parties by teleconference was held. Mr. Jacobs, on behalf of Mr. Waselenchuk, raised an issue concerning the jurisdiction of the CCES to handle the results management of this case. It was agreed by the parties that Mr. Jacobs would file written submissions by March 12, 2007, that the CCES would file its reply by March 15, 2007 and that this Tribunal would render a decision on the jurisdiction of the CCES on March 16, 2007.

March 16, 2007: This Tribunal rendered a preliminary decision denying the athlete's objection to the jurisdiction of the CCES and confirming that the arbitration hearing with respect to the waiver issue would, therefore, take place as agreed by the parties in Ottawa on Monday, March 19, 2007.

ADDITIONAL FACTS SUBMITTED ON THE JURISDICTION OF THE CCES

Mr. Waselenchuk has been a member of USA Racquetball since at least October of 2004. He is a Canadian citizen, but resides in the United States and plays primarily on the International Racquetball Tour (IRT) which requires him to be a member of USA Racquetball. From 2004 to 2007, Mr. Waselenchuk has not received any funding from Racquetball Canada, nor from the Canadian Olympic Association.

On April 22, 2006, Mr. Waselenchuk indicated in an e-mail to Mr. Ron Brown, Executive Director of Racquetball Canada, that he would like to enter the Canadian Racquetball National Championships to be held in Edmonton, Alberta. Subsequently, Mr. Brown submitted a cheque to Racquetball Canada in the amount of $325.00 which covered Mr. Waselenchuk's entry fees, as well as, apparently, a $25.00 membership fee to Racquetball Canada. This membership is a requirement for competing in the Canadian Racquetball National Championships. They are conducted and sanctioned solely by Racquetball Canada. Mr. Waselenchuk did, in fact, compete in the said Championships which were held in Edmonton, Alberta in May of 2006.

THE POSITIONS OF THE PARTIES ON THE JURISDICTION OF THE CCES

The Athlete:

Mr. Jacobs submitted on behalf of Mr. Waselenchuk that in the case of an international-level athlete such as Mr. Waselenchuk, the *Canadian Anti-Doping Program* (CADP) specifies under rule 7.2 that the determination of an alleged doping infraction and the consequences are governed by the rules of the international sports organization which, in this case, is the International Racquetball Federation (IRF). Reliance is placed upon IRF Anti-Doping Rule 7.3 which states in part that apparent anti-doping rule violations by athletes who are members of another National Federation "shall be referred to the Athlete's National Federation for hearing".

It was argued that the anti-doping rules make it clear that results management shall be undertaken by the athlete's national federation, which in this case is USA Racquetball, regardless of the location of the positive drug test. Even if it were found that Mr. Waselenchuk agreed to join Racquetball Canada in order to play in the 2006 Canadian Racquetball National Championships, despite the fact that there is no evidence of any such agreement, the proper course would still be to refer results management to USA Racquetball.

Mr. Jacobs submitted that the fact that Mr. Waselenchuk is a Canadian citizen does not impose CCES results management upon him where he elects to participate as a racquetball player as a member of the US Federation instead of the Canadian Federation. He cited the example of Canadian cyclist Geneviève Jeanson who elected to race as a member of the US Federation instead of the Canadian Federation and whose positive tests were adjudicated by the US Anti-Doping Agency and not by the CCES.

The position of the athlete was that the CCES lacks jurisdiction and is required to refer this matter to USA Racquetball.

The CCES:

It was submitted by Mr. David Lech on behalf of the CCES that the CADP and World Anti-Doping Code (WADC) rules confirm that the CCES has proper jurisdiction to conduct results management in the present case. According to rule 7.2 of the CADP, international-level athletes "may" be subject to the results management of an international sports organization. This may occur, but only in certain situations that are not applicable here. For an international federation, such as the IRF, to have results management authority from a test made by the CCES, in Canada, that international federation must be conducting and sanctioning the athletic event in Canada at which the testing occurred and must have initiated and directed the sample collection.

Counsel argued that Ms. Jensen competed at the ICU World Championships held in Canada in 2003 and at ICU sanctioned races in Belgium in 2004 which were conducted and sanctioned by ICU, the international Federation. Accordingly, the ICU had results management authority at these events. In the present case, it was Racquetball Canada, not the IRF, who initiated and directed sample collection and testing at the Canadian Championships. The IRF rules are not applicable. Mr. Waselenchuk was tested by the CCES at the Canadian Championships which were conducted and sanctioned solely by Racquetball Canada. At this event, anti-doping rule violations and consequences are to be determined according to the CADP.

It was the position of the CCES that Mr. Waselenchuk joined Racquetball Canada to enable him to participate in the Canadian Championships and this would, pursuant to IRF Rule 7.3, grant to the CCES results management authority. It was submitted that, in any event, pursuant to CADP Rule 1.3, sports organizations such as Racquetball Canada who are subject to the CADP and their members and participants agree to be bound by the Canadian Policy against Doping in Sport which applies to all individuals who participate in any capacity in any activity held by sports organizations. The CADP is governed by the said Policy and the authority of the CCES flows from the Policy and the CADP.

It was further argued that Rule 6.23 of the CADP allows the CCES to conduct sample collection and testing of athletes who are subject to the Policy and the CADP by reason of their participation in sport but who may not otherwise be in a testing pool. Non-members of a sport organization who participate in sport in Canada at the national level at an event sanctioned by an organization such as Racquetball Canada that has adopted the CADP are subject to the Policy and the CADP and fall under the authority of the CCES. According to CADP Rules 1.7 and 1.8, the CADP applies to all the members of, and all participants in the activities of, sports organizations adopting it such as Racquetball Canada. Mr. Waselenchuk, by reason of his participation alone at the Canadian Championships, comes under the authority of the CCES and the CADP.

Mr. Lech submitted that the *World Anti-Doping Code* provides in section 15.3 that results management shall be governed by the anti-doping organization that initiated and directed sample collection which, in this case, is the CCES. Mr. Waselenchuk is a citizen of Canada and thus, the exclusion in section 15.3 .1 does not apply to him.

DECISION ON THE JURISDICTION OF THE CCES

The scope of the jurisdiction of the CCES is dealt with in the *Canadian Anti-Doping Program (June 2004).* Rule 7.2 of the CADP reads as follows:

> 7.2 These Rules apply when results management is the responsibility of the *CCES* and anti-doping rule violations and consequences are to be determined according to the CANADIAN ANTI-DOPING PROGRAM. *International-Level Athletes*, or national-level *Athletes* who are tested at an *International Event*, may be subject to the results management of an international *sport organization* or other *Anti-Doping Organization.* If so, the determination of anti-doping rule violation and consequences shall be governed by the rules of the international *sport organization* or other *Anti-Doping Organization.* Results management and the conduct of hearings for anti-doping rule violations arising from a test or discovery by the *CCES* involving an *Athlete* who is not a citizen or resident of Canada shall be governed by the rules of the *Athlete's* international federation. [Code Articles 15.3 and 15.3.1]

Rule 7.2 of the CADP states in part that international-level athletes who "are tested at an *International Event*, may be subject to the results management of an international *sport organization...*" This part of Rule 7.2 does not apply to the present case because Mr. Waselenchuk was tested at the Canadian Racquetball National Championships, which is not an "international event", defined in part in the Glossary of the CADP as an event where an "international *Sport Organization* is the ruling body for the *Event.*" Racquetball Canada was the ruling body for the Canadian Championships and is a national (not an international) sport organization.

In any case, even if the Canadian championships were an international event,

Rule 7.2 states that international level athletes who are tested at an international event "may" be subject to the results management of an international sport organization and that "If so, the determination of anti-doping rule violation and consequences shall be governed by the rules of the international *sport organization*..." The next sentence of the Rule then specifies the circumstances under which results management would be governed by the rules of the athlete's international federation: a test by the CCES involving an athlete "who is not a citizen or resident of Canada". Mr. Waselenchuk would have to be neither a citizen nor a resident of Canada for the results management to be governed by the rules of his international federation. Since he is a citizen of Canada, the present case is not one where the results management would be governed by the rules of Mr. Waselenchuk's international federation under Rule 7.2.

Moreover, article 15.3 of the *World Anti-Doping Code* (WADC) states in part that "Except as provided in Article 15.3.1 below, results management and hearing shall be the responsibility of and shall be governed by the procedural rules of the *Anti-Doping Organization* that initiated and directed *Sample* collection..." In the present case, the CCES is the anti-doping organization that initiated and directed Mr. Waselenchuk's sample collection, therefore, pursuant to the WADC, the results management is the responsibility of the CCES. Article 15.3.1 of the WADC is of the same effect as Rule 7.2 of the CADP where it specifies that it is when an athlete who is "not a citizen or resident of that country" of the national anti-doping organization which conducted the test that results management would come under the applicable international federation. Since Mr. Waselenchuk is a citizen of Canada, he does not come under the article 15.3 .1 exception.

The *Canadian Policy against Doping in Sport* (Policy) applies to "all individuals who participate in any capacity in any activity organized, held, convened or sanctioned by" sports organizations who have adopted the Policy "regardless of where they [participants] reside..." Racquetball Canada has adopted the Policy, therefore it applies to Mr. Waselenchuk as a participant in the Canadian Racquetball National Championships. Paragraph 1.3 of the CADP states in part that it is governed by the Policy and that "*Sports*

Organizations and their members and participants who are subject to the CANADIAN ANTI-DOPING PROGRAM agree to be bound by the provisions and the spirit of the CANADIAN POLICY AGAINST DOPING IN SPORT".

Mr. Waselenchuk comes within the definition of "*Athlete*" found in the Glossary of the CADP which states in part: "For purposes of *Doping Control*, any *Person* who participates in sport at the international level (as defined by each international federation) or national level (as defined by each *National Anti-Doping Organization*)..." Paragraph 1.8 of the CADP provides in part: "If any such individual [includes *Athletes* mentioned in paragraph 1.7] is found to have committed an anti-doping rule violation, the *Consequences of Anti-Doping Rule Violations* shall apply." Therefore, the sanctions under the CADP apply to Mr. Waselenchuk. He comes within the definition of an athlete under the CADP and the CCES is the national anti-doping organization which the CADP mandates to conduct results management pursuant to Rules 7.45 to 7.48 of the CADP.

For all of the above reasons, it is the decision of this Tribunal that the relevant provisions of the *Canadian Anti-Doping Program (June 2004)* and of the *World Anti-Doping Code* make it clear that the CCES has jurisdiction to conduct results management in the present case.

ADDITIONAL FACTS SUBMITTED ON THE WAIVER ISSUE

The evidence given by Mr. Waselenchuk in a sworn affidavit as well as by teleconference at the hearing in Ottawa on March 19, 2007 may be summarized as follows. Mr. Waselenchuk is a racquetball player who participates on the international professional racquetball tour (IRT). He travels in the US to approximately a dozen IRT tournaments per year. His last tournament in Canada was in 2001 or 2002. He has been a member of USA Racquetball since 2001.

Prior to submitting to the test conducted by the CCES on May 27, 2006 at the

Canadian National Racquetball Championships held in Edmonton, Alberta which returned adverse analytical findings for Cannabis and for Cocaine metabolite, Mr. Waselenchuk told Mr. Ron Brown, Executive Director of Racquetball Canada, that he would likely test positive for Cannabis. A telephone call was then made to the CCES to ask about potential sanctions for those who had tested positive for Cannabis. Mr. Brown advised the athlete that 21 people had tested positive for Cannabis in the past and all of them were given warnings.

Nothing in the June 26, 2006 notification from the CCES indicated that Mr. Waselenchuk had the right to retain and instruct legal counsel, nor did it suggest that the proposed sanction would affect his ability to play as a professional outside of Canada.

Mr. Waselenchuk telephoned Ms. Karine Henrie, Results Manager, Ethics and Anti-Doping Services for the CCES, and asked her what the international effect of the sanction would be. Ms. Henrie didn't know about the IRT and told him that he should call the IRT Commissioner. Ms. Henrie did not advise Mr. Waselenchuk that the proposed sanction could affect his eligibility to play racquetball outside of Canada.

Mr. Benoit Girardin, Executive Director of the SDRCC, provided the athlete with a phone number for a girl at the University of Western Ontario in case he had any questions. When Mr. Waselenchuk contacted her, she stated immediately that she could not provide legal advice, but that she could clarify any questions he may have about the SDRCC process. He was never advised that he could retain counsel to act on his behalf.

Two days before he signed the Waiver, Mr. Waselenchuk contacted Mr. Dave Negrete, the IRT Commissioner, and asked him whether the sanction would affect his status on the professional racquetball tour and he was told that nothing would affect his pro status. He received the same advice from Mr. Ron Brown of Racquetball Canada. Three days after he had signed the waiver, he discovered that there was an issue. Mr. Negrete called him and told him that he, Mr. Negrete, had made a mistake and the "booklet" says

that one must be a USA Racquetball member to be on the pro tour. Mr. Negrete then made the offer that the IRT would get its own insurance. It took over two months to get a quote however, one of the IRT sponsors indicated it would pull its sponsorship if there was new insurance in place. Mr. Waselenchuk then sought to have the Waiver set aside.

Mr. Waselenchuk maintains that he was never advised that he had the right to contact a lawyer of his choice before deciding to sign a Waiver. Nothing printed on the Waiver indicated that he had the right to contact a lawyer and obtain advice on the potential consequences of signing the Waiver. When Mr. Waselenchuk signed and faxed the Waiver on July 6, 2006, he did not know he could obtain legal advice before signing it.

Under cross-examination, Mr. Waselenchuk testified that he did not ask the International Racquetball Federation about the scope of the sanction. He did go to the World Anti-Doping Agency (WADA) web site to see if the IRT was a member, but he did not look up the World Anti-Doping Code (WADC). Ms. Henrie did advise him to go on the Internet for resources. He visited the CCES web site and "went through" the "I Tested Positive?" information but didn't read it. He did not visit the SDRCC's web site. Ms. Henrie suggested that he call the Sports Solution, which he did. When he called the University of Western Ontario, he was aware that he was calling its Law School. His question related to the hearing and not to any international consequences of the sanction. The person he spoke to went onto the CCES's web site with respect to other positive tests for Cocaine and told him that it was impossible to have the sanction removed if he didn't know where the Cocaine had come from.

The evidence given by Ms. Karine Henrie, Results Manager, Ethics and Anti-Doping Services for the CCES, in a sworn affidavit as well as by testimony at the hearing in Ottawa on March 19, 2007 may be summarized as follows. On June 19, 2006, Mr. Waselenchuk contacted her by telephone and informed her that he had been contacted by Racquetball Canada concerning a positive test. He told her that he was expecting the Cannabis finding, but was extremely surprised by the Cocaine finding. Ms. Henrie

explained to him that the CCES had issued its initial review letter in part to provide him with an opportunity to explain how his sample contained the substances outlined on the Certificate of Analysis. She explained that the CCES had not yet made any determination of an anti-doping a rule violation. Mr. Waselenchuk reiterated that he was very surprised by the Cocaine finding and was not sure if he would be able to explain it. Ms. Henrie encouraged the athlete to take some time to think about it to see if he could explain how Cocaine might have entered his system. She further explained that the CCES would review any explanation and would determine if the matter should be closed or continue to a Notification under Rule 7.46 of the CADP. She invited Mr. Waselenchuk to contact her if he had any further questions which she reiterated in an e-mail to him on that day, June 19, 2006.

On June 22, 2006 Mr. Waselenchuk sent an e-mail to Ms. Henrie indicating his astonishment at the Cocaine finding and admitting his usage of Cannabis prior to the commencement of the competition.

During the week of June 26, 2006, Mr. Waselenchuk contacted Ms. Henrie on numerous occasions by telephone to discuss the content of the CCES Notification and how it would impact him as an athlete. Ms. Henrie reviewed with the athlete the assertion of the CCES and the consequences it was proposing. She advised him that his options were to proceed to a hearing, to waive his right to a hearing, or to provide further information to the CCES. She encouraged him to carefully read the Notification and to contact her or Mr. Girardin at the SDRCC if he had any additional questions. During that same week, Mr. Waselenchuk often called Ms. Henrie to discuss whether or not he should sign the Waiver or proceed to a hearing. She informed him that he should be aware that under the WADC, decisions rendered pursuant to the CADP would be recognized by other anti-doping organizations or sports organizations such as the United States Anti-Doping Agency or the International Racquetball Federation. She clearly explained to him that the two-year suspension from sport proposed by the CCES did not apply only in Canada and that the IRF would recognize the suspension and he would not be allowed to compete in any

international events sanctioned by the IRF. He replied that his pro tour was different from the IRF. Ms. Henrie told him that she was not familiar with the rules of his pro tour and whether or not his professional career could be affected, but she stated that he should clarify that fact either by contacting his pro tour directly and/or by contacting the IRF.

Ms. Henrie told Mr. Waselenchuk that advice and guidance was available to him in the "I Tested Positive?" guide available on the CCES web site and encouraged him to read the material. On page 3 of the said guide, which was created independently of the CCES, athletes are advised to "retain an experienced lawyer" if they wish to contest a claim by the CCES that an anti-doping rule violation has taken place.

Also during the week of June 26, 2006, Ms. Henrie advised Mr. Waselenchuk to consult the SDRCC web site, that the SDRCC maintains a list of lawyers who could assist him and that Mr. Girardin could direct him to that information. She provided him with the telephone number and e-mail address of Mr. Girardin. The materials available on the SDRCC web site include a "list of legal representatives" which provides athletes with "the names and contact information of legal advisors working in the field of sport law in Canada" who have "special expertise in amateur sport law in Canada". The site goes on to say that these legal advisors "will be able to assist you in the event you have any questions regarding your rights and obligations as a member of the Canadian sport community". It also indicates that the advisors have no connection with the SDRCC. The site then lists 14 legal advisors located in various cities across Canada along with a link to the résumés of each one. The SDRCC web site also has a link to a booklet entitled "Legal Tips for athletes" which speaks about The Sport Solution, a not-for-profit program at the University of Western Ontario that helps Canadian high-performance athletes resolve legal conflicts. The booklet states that The Sport Solution offers Canadian amateur athletes access to advice on sports-related issues which "*may* require legal counsel". It goes on to state that should the athlete require legal advice, The Sport Solution "may refer you to a lawyer at Osler, Hoskin & Harcourt, a national law firm which has been providing legal advice to athletes since 1996."

Ms. Henrie also provided Mr. Waselenchuk with contact information for The Sport Solution and encouraged him to contact this organization which is a joint initiative of Athletes CAN (Canada's national Organization for athletes) and the Dispute Resolution Centre at the Faculty of Law of the University of Western Ontario. The Sport Solution law student representatives are required to inform the athletes who contact it that they can retain legal counsel to receive further legal advice if this is desired. The Sport Solution web site also states that if an athlete's issue requires legal assistance, they may be referred to the above-noted law firm.

Racquetball Canada, represented at the March 19, 2007 hearing in Ottawa by Mr. Lyle Smordin, its legal counsel, and by Mr. Ron Brown, its Executive Director, elected not to call any evidence.

THE POSITIONS OF THE PARTIES ON THE WAIVER ISSUE

The Athlete:

The brief submitted by Mr. Waselenchuk's former legal counsel on February 7, 2007 may be summarized as follows. The issues are: firstly, must an athlete be informed of his or her right to retain and instruct counsel before a Waiver can be deemed valid? Secondly, must the athlete be informed that the consequences of signing the Waiver may affect his or her ability to compete outside of Canada?

It was submitted that in order for a Waiver to be valid under the CADP, an athlete must be informed of his or her right to retain and instruct counsel. Section 10 of the *Canadian Charter of Rights and Freedoms* elevated that right to constitutional status. It can also be found in various provincial bills of right and statutes like the *Canadian Bill of Rights*. Article 8 of the WADC states that a hearing process provided for by an anti-doping organization such as the CCES shall respect the principle of the right to be represented by

counsel. The CCES has the responsibility of clearly communicating that right before an athlete decides whether to waive his or her right to a hearing. The common law duty of procedural fairness dictates this requirement.

In Baker v. Canada (Ministry of Citizenship and Immigration), [1999] 2 S.R.C. 817, L'Hereux-Dubé J. outlined five factors to consider when determining the content of the duty of procedural fairness. The first factor is the nature of the decision and the process following it. Here, the nature of the process is no longer investigatory at the time the CCES proffers a Waiver to an athlete. This is analogous to when an accused person in a criminal proceeding must decide whether to plead guilty. The second factor is the nature of the statutory scheme. Here, it suggests a high degree of procedural fairness at this juncture. The CADP does not state what constitutes a valid Waiver, which creates uncertainty. Therefore, a higher degree of procedural fairness must be accorded when the CCES attempts to rely on a Waiver. The third factor is the importance of the decision to the individual affected. This factor "bleeds" procedural fairness. By signing a Waiver, an athlete may be hammered with a lifetime ban from sport. The potential consequences flowing from an anti-doping violation can adversely affect an athlete's reputation, ability to earn a living, and capacity to participate in competitive sport. The fourth factor is any legitimate expectations of the person challenging the decision. Mr. Waselenchuk was not advised that the sanction would affect his ability to play in the United States. He had a legitimate expectation as to the end result of the process given the representations he received. After he received misinformation, Mr. Waselenchuk could have clarified his situation had he sought advice from a lawyer. The fifth factor is the choices of procedure made by the agency. In this case, the CCES chose not to inform the athlete of his right to counsel however, it cannot say that this was a procedural decision made within the scope of its administrative expertise

Therefore, it was argued that the Baker factors militate towards a duty to afford high procedural protections when an athlete must contemplate whether to waive his or her right to a hearing and those protections must include the CCES's obligation to inform the

athlete of his right to counsel.

It was submitted that the effect of signing a Waiver is tantamount to a guilty plea in a criminal proceeding. In the sphere of criminal law, the state bears the onus of informing an accused person that he or she has the right to retain and instruct counsel. The CCES holds an advantageous position over the athlete with the power to bar him from sport. It would be unreasonable if the CCES could obtain a Waiver of the hearing from an athlete, and thereby prohibit that person from his or her livelihood for two years, without at least mentioning the words "right to counsel".

It was argued that in order for a Waiver be valid under the CADP, an athlete must be informed that the consequences may affect his or her ability to compete outside of Canada. Mr. Waselenchuk relied on representations by agents of Racquetball Canada and the CCES who suggested that his professional status would not be affected if he accepted the sanctions proposed by the CCES. The provisions of the CADP and of the WADC do not relieve the CCES from a duty to inform an athlete of the potential consequences of an adverse analytical finding. Rule 7.46 of the CADP requires the CCES to inform the athlete of "the consequences of the asserted anti-doping rule violation." This requires the CCES to notify the athlete that there may be consequences arising from international bodies who are signatories to the WADC. The purpose of this notification requirement cannot be simply to reproduce the consequences in the CADP; its purpose is to inform the athlete, notwithstanding that he or she could find this information by reading the CADP. The drafters of the CADP must have intended to inject fairness in the process by notifying an athlete, who is subject to a difficult and unfamiliar proceeding, with information that is crucial, yet readily available. It was not unreasonable for Mr. Waselenchuk to trust the representations made by the agents of the CCES and Racquetball Canada. He was not in a position to make an informed decision when he signed the Waiver.

Mr. Howard Jacobs, legal counsel retained by the athlete in early March 2007,

made the following submissions in writing on March 12th and at the hearing on March 19th. Mr. Waselenchuk mistakenly believed, either through misrepresentations made by Racquetball Canada or otherwise, that his agreement to a suspension would not affect his IRT eligibility and the CCES was of no help on this issue. He signed the Waiver based on this mistaken belief.

It is an apt analogy to compare the acceptance of a doping sanction without a hearing to a guilty plea in a criminal case. The decisions in R. v. Moser (163 C.C.C. (3d) 286) and in R. v. Rollinmud (2005 ABPC 206) were cited in support. The factors in those cases which weigh in favour of setting aside Mr. Waselenchuk's acceptance of the sanctions are that he was not represented by counsel at that time, he did not understand the full consequences of his acceptance and he has consistently denied that he used Cocaine.

Arbitrator Roy in his Preliminary Ruling raised the issue of equity. Will fairness and justice be best served by allowing Mr. Waselenchuk to have a hearing? A consideration is how the CCES would be harmed by this relief and the answer is not at all. The CCES suggested he call the IRT and he did so. He should not be faulted because the IRT gave him false information and because he reasonably relied on Mr. Negrete when it was the CCES who told him to contact the IRT in the first place. Once he found out the information was wrong and discussions on insurance didn't go anywhere, he took steps to have the Waiver set aside. The CCES should agree to this if it is mainly concerned with fairness to the athlete. Equity and fairness dictate that the Waiver be set aside and that a hearing be granted.

The CCES:

Mr. Lech submitted on behalf of the CCES that the Waiver was properly executed and is a valid document evidencing the athlete's acceptance of the anti-doping violation asserted by the CCES and of the sanctions proposed by the CCES.

It was argued that there is no obligation on the part of the CCES to inform an athlete of a right to counsel prior to signing a Waiver. No such obligation exists in the CADP, nor in the WADC. The reason for this is that the right of an athlete to retain counsel is contained in anti-doping rules in force around the world and every athlete is deemed to know the substantive content of these rules. An athlete participating in Canada must know and accept the mandatory rules contained in the CADP as a condition of participating in sport. CADP Rule 7.65 states that a person participating in a proceeding before the Doping Tribunal "has the right to counsel".

It is clear from the words in the CADP and in the conduct of the CCES that obtaining legal assistance for an athlete is permitted and encouraged. This was made abundantly clear to Mr. Waselenchuk. He was advised by Ms. Henrie to contact the SDRCC to access their online resources and that the SDRCC maintains on its web site a list of lawyers, expert in anti-doping matters, who could assist him. The SDRCC web site states that legal advice was available and that retaining counsel was possible and encouraged. There is a list of legal representatives. The CCES published the "I Tested Positive?" guide which advises that athletes retain counsel if they wish to contest the assertion that they have breached an anti-doping rule. If the athlete did not make use of these extensive online resources to which he was directed, he should have. Mr. Waselenchuk was advised by Ms. Henrie to contact The Sport Solution directly, which he did, and the CCES was advised that he was provided with a consultation and with legal advice. It is made clear on The Sport Solution's web site that if an athlete has an issue that requires legal assistance, he or she may be referred to a law firm. It can be reasonably inferred that Mr. Waselenchuk was directed to the possibility of retaining the lawyers at that firm for further advice.

Counsel submitted that, based on the above-noted evidence, it is not believable that Mr. Waselenchuk was unaware that he could obtain legal advice before signing the Waiver and that he did not know that he could retain a lawyer to act on his behalf at a hearing before a Doping Tribunal.

It was argued that the athlete was correctly advised by the CCES regarding the potential consequences of the sanction that he accepted by signing the Waiver. Ms. Henrie spoke on the phone to the athlete repeatedly concerning the issue of international recognition of the sanction. It was made clear to him by the CCES that the IRF would recognize a sanction imposed in Canada. He was treated fairly. The following decisions make it clear that athletes must take personal responsibility for their actions and decisions: M. Puerta v. ITF, CAS 2006/A/1025; S. Karatancheva v. ITF, CAS 2006/A/1032; G. Canas v. ATP Tour, CAS 2005/A/951; S. Lelièvе v. CCES, DT-4-0014. These four cases show the level of care, caution and diligence an athlete must exercise in doping matters.

Racquetball Canada:

Mr. Smordin submitted that there was never any misrepresentation made by Racquetball Canada. Mr. Waselenchuk was aware of his membership with the organization and was a member by consent. Racquetball Canada acted properly in this matter.

Reply of the Athlete:

Mr. Jacobs submitted in reply that what must be considered is what the athlete did, or should have done. One can always do more. What else could Mr. Waselenchuk have done after he followed the CCES's instructions? He trusted the information he received – who better would know the consequences than Mr. Negrete? The athlete did what was reasonable.

DECISION ON THE WAIVER ISSUE

The issue is whether or not the Waiver which Mr. Waselenchuk signed is a true and valid one. If it isn't, then this matter may proceed to a hearing. If it is, then the athlete

must be considered to have acknowledged the anti-doping rule violation, accepted the proposed sanctions and relinquished his right to a hearing. And that would be an end to the matter.

The two grounds raised by the athlete in support of the invalidity of the Waiver are as follows: firstly, Mr. Waselenchuk was not informed of his right to retain and instruct a lawyer before he signed the Waiver; secondly, he signed the Waiver based upon misinformation he had received regarding an element of the international consequences of the proposed sanctions.

In his Preliminary Ruling issued on January 11, 2007, arbitrator Bernard A. Roy held, at paragraph 38, that it would be incumbent upon the athlete to successfully argue before a Doping Tribunal that his Waiver was not properly given "because of alleged failures and omissions which were in breach of principles of natural justice and procedural fairness."

I am in agreement with Mr. Waselenchuk's former legal counsel where he argues that factors enumerated by the Supreme Court of Canada in the Baker decision, *supra*, militate towards a duty to afford high procedural protections when an athlete must contemplate whether to waive his or her right to a hearing.

More specifically, at the point when an athlete is considering whether or not to sign a Waiver, the CCES has already asserted an anti-doping rule violation and proposed a sanction. Although the CCES has not decided anything at this point, it has certainly taken the position that the athlete has committed a rule violation. When one "asserts" something, they are affirming that thing to be true. Essentially, at this stage, the CCES is accusing the athlete of a rule violation, however, no final determination has been made because he still has a right to a hearing. This is why, in my view, there should be a very high level of procedural fairness at the point where the accused athlete is contemplating whether or not to waive this right, an act which also entails, according to the wording of the Waiver form,

an admission of the asserted rule violation and an acceptance of the proposed sanction. Another factor cited in the Baker decision is the importance of the decision to the individual affected. In the matter at hand, by signing the Waiver, Mr. Waselenchuk became subject to the extremely serious sanctions of two years of ineligibility from sport and permanent ineligibility of direct financial support from the Government of Canada. These sanctions have a very serious effect upon the athlete's reputation, his capacity to participate in competitive sports and even upon his ability to earn a living. In view of this, procedural fairness is paramount.

It is for these reasons that, in this Tribunal's judgment, an athlete who is at the stage where he or she must decide whether or not to sign a Waiver should be informed, as a matter of procedural fairness, of his or her right to retain and instruct a lawyer. In arguing that there is no obligation on the part of the CCES to inform an athlete of a right to counsel prior to signing a Waiver, Mr. Lech cited CADP Rule 7.65 which states that "A *Person* participating in a proceeding before the Doping Tribunal has the right to counsel..." However, this Rule does not state that an athlete contemplating whether or not to sign a Waiver has the same right. The hearing before the Doping Tribunal is an entirely separate portion of the procedure and quite different in nature from the signing of a Waiver. To my knowledge, there is nothing in the CADP Rules, nor in the WADC articles, nor in the Canadian Policy Against Doping in Sport, nor in the standard correspondence from the CCES to the athlete in its conduct of the results management, which informs an athlete of his or her right to retain and instruct a lawyer before he or she decides to sign a Waiver. This could be easily remedied by stipulating this right in the text of the Waiver form. As an added precaution, the CCES could, in its Notification under Rule 7.46, inform the athlete of this right in the paragraph dealing with the second option of signing a Waiver. The evidence that was presented in the present matter must be examined in order to determine if this right was breached in Mr. Waselenchuk's case.

Has Mr. Waselenchuk established any breaches of the principles of natural justice and procedural fairness that would render the Waiver invalid? We are dealing with

procedural fairness. What must be considered is, firstly, the procedure that was in place, i.e., the anti-doping rules and regulations contained in the CADP and the WADC and, secondly, the manner in which the body which had jurisdiction to conduct the results management of this matter, i.e., the CCES (as determined earlier in this decision), applied this procedure.

Therefore, the question is whether or not the procedure in place and its application were unfair to the athlete or in breach of natural justice. The point is that, even if it were true that the circumstances in their totality played out unfairly for Mr. Waselenchuk, that is a separate issue from whether or not there was *procedural* unfairness. To illustrate, if an athlete is misinformed as to the venue of a competition by his sport organization and, as a result, he misses the event, this may be unfair to him, but there is no *procedural* unfairness such that the competition should be re-done. On the other hand, if an athlete were forced by the officials at a track meet to start a raise 10 feet behind all the other runners, that would be an instance of *procedural* unfairness which should result in the re-doing of the race.

In the case of the signing of a Waiver of one's rights, additional requirements for its validity beyond procedural fairness would be that the person signing it understand what it says and that the act of signing is done freely and voluntarily. This was the case here in light of the clear wording on the Waiver form and the absence of any evidence that would suggest the signing of the Waiver was not done freely and voluntarily. I say that these conditions are beyond procedural fairness because, to use an extreme example, if some stranger were to force an athlete at gunpoint sign a Waiver, this might not constitute procedural unfairness, but it would still render the Waiver invalid.

With respect to the issue of any duty on the part of Mr. Waselenchuk to inform himself of the relevant rules and regulations, I start by observing that he is a competitive athlete who is subject to the *Canadian Anti-Doping Program*, the *Canadian Policy Against Doping in Sport*, as well as the *World Anti-Doping Code*. The legal system in this country,

and in many other parts of the world, is such that people have a responsibility to be aware of the rules and laws which govern them. It is no excuse to say, "I didn't know about that section of the Highway Traffic Act." Similarly, an athlete also has a responsibility to be aware of the rules and regulations which govern him or her. Mr. Waselenchuk has a particular interest in been very familiar with the relevant rules because he is a world-class athlete competing at the very highest level of his sport and his participation in sport is his livelihood. This responsibility of awareness of the rules means that when an athlete undertakes to inform himself of the nature of these rules or any consequences of their violation, he or she has the duty to ensure that the information received is accurate.

In the case at hand, Mr. Waselenchuk was unfortunately misinformed by an official of the IRT that the proposed sanctions would not affect his status on the professional tour. However, for the reasons outlined above, this was not, in my view, an instance of procedural unfairness, nor was it a breach of natural justice by the CCES, the body conducting the results management of this matter. As stated earlier, the athlete had the responsibility to obtain accurate information on this particular aspect of the consequences of the sanctions proposed by the CCES. It should not be incumbent upon the CCES to conduct an investigation for an athlete and report back to him on what specific national or international sport organizations, both amateur and professional, will or will not recognize and respect the sanctions it is proposing. It follows that the Waiver should not be considered invalid by reason of the misinformation received by the athlete.

Support for the above conclusion and guidance on the second issue of communication of the right to retain a lawyer may be found in an analysis of the procedure that was, in fact, followed in the case of Mr. Waselenchuk.

The evidence established to this Tribunal's satisfaction that the procedure followed by the CCES in the present matter, with all its built-in safeguards and, crucially in this case, including the assistance provided to the athlete by Ms. Karine Henrie in the form of guidance, advice, cautions and warnings, was fair and just to the athlete.

More particularly, the June 16, 2006 report by the CCES clearly indicated to the athlete the timing, circumstances and nature of the adverse analytical findings, the fact that there had been no determination that he had committed an anti-doping rule violation and the next steps to be taken by the CCES and by the athlete. Mr. Waselenchuk was requested to provide a written explanation regarding the findings and given full opportunity to do so.

On June 19, 2006, Mr. Waselenchuk contacted Ms. Karine Henrie, Results Manager for the CCES. She explained to him the various elements of the initial review letter of June 16th and encouraged him to take some time to think about the explanation he would furnish with respect to the Cocaine finding. Ms. Henrie also reiterated to the athlete the next steps to be taken and invited him to contact her if he had any further questions.

On June 22, 2006, Mr. Waselenchuk provided his written explanation by e-mail.

The June 26, 2006 Notification from the CCES clearly outlined the anti-doping rule violation it was asserting and the resulting sanctions it was proposing. It also provided particulars concerning the adverse analytical findings, including a copy of the certificate of analysis. It further clarified that there was no determination at that point that he had committed an anti-doping rule violation and that this could only be determined by a hearing. The Notification then outlined the three options available to the athlete and advised him that if he had any questions, he could contact Ms. Henrie.

I accept Ms. Henrie's evidence that during the week of June 26, 2006, Mr. Waselenchuk contacted her on numerous occasions by telephone to discuss the content of the CCES Notification and how it would impact him as an athlete. She reviewed with him the asserted violation and the proposed sanctions, she advised him again of his three options and she encouraged him to carefully read the Notification and to contact her or Mr. Girardin of the SDRCC if he had any additional questions. During that week, the athlete often called Ms. Henrie to discuss whether or not he should sign the Waiver or proceed to

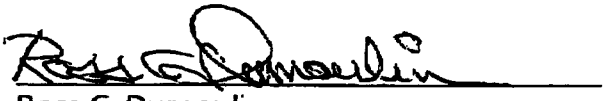
a hearing. She informed him that decisions rendered pursuant to the CADP would be recognized by other anti-doping organizations or sports organizations such as the US Anti-Doping Agency or the IRF, she explained that the sanction applied not only in Canada, that the IRF would recognize the suspension and that he would not be allowed to compete in any international events sanctioned by the IRF. Ms. Henrie told the athlete that she was not familiar with the rules of his pro tour, but stated that he should clarify this by either contacting his pro tour directly and/or by contacting the IRF. In my estimation, by her complete availability, guidance, advice, warnings, patience, willingness to answer, or attempt to answer, all of the athlete's questions and her reiteration of many of the elements which had already been outlined to him in the CCES's correspondence, Ms. Henrie treated the athlete with the utmost fairness and clearly alerted him to possible US-based consequences. This certainly met any CCES obligation of procedural fairness and it was up to the athlete to find out the information he required with respect to his pro tour. Hence, the Waiver cannot be set aside on the basis of the misinformation Mr. Waselenchuk received.

The following evidence also leads this Tribunal to conclude that Mr. Waselenchuk was, in fact, advised of his right to retain and instruct a lawyer before he signed the Waiver. Again, during the week of June 26, 2006, Ms. Henrie advised him to consult the SDRCC web site, that the SDRCC maintains a list of lawyers who could assist him and that Mr. Girardin could direct him to that information. She provided him with the contact information for Mr. Girardin. Moreover, the materials available on the SDRCC web site include a list of 14 legal representatives who work in the field of sport law in Canada with the necessary contact information for each one. The site also states that these legal advisors would be able to assist the athlete if he or she has any questions regarding his or her "rights and obligations as a member of the Canadian sport community". As well, the site also contains information about The Sport Solution which states that this organization offers athletes access to advice

on sports-related issues which may require legal counsel and that if this is the case, it may refer the athlete to a lawyer at a named law firm. All this information, especially Ms. Henrie's statement to the athlete that the SDRCC maintains a list of lawyers who could assist him and the advice to consult the SDRCC web site with its list of 14 lawyers, fulfills the procedural fairness obligation to advise the athlete of his right to retain and instruct a lawyer before signing a Waiver. All Mr. Waselenchuk had to do was follow the advice of Ms. Henrie and visit the SDRCC web site to exercise this right.

In the result, for all of the above reasons, it is this Tribunal's decision that, in the particular circumstances of this case, the Waiver signed by Mr. Waselenchuk was a true and valid one. Its effect is that there will be no further hearing of this matter before a Doping Tribunal.

Dated at Ottawa this 23rd day of March, 2007.



Ross C. Dumoulin
Arbitrator