

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 CHRISTIANO PAES ASSERTED BY
THE CANADIAN CENTRE FOR ETHICS IN SPORT

No. SDRCC DT-06-0055
(Doping Tribunal)

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

And

CHRISTIANO PAES

Athlete

And

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

Observers

Before :

Paule Gauthier (Arbitrator)

Appearances and Attendances :

For the Athlete

Christiano Paes (Athlete)
Sarah Monk Paes (Athlete's wife)

For the Canadian Centre for Ethics in Sport

David W. Lech (Counsel)
Karine Henrie (Results Manager)
Kevin Bean

For Bobsleigh Canada Skeleton

Nich Ward (Managing Director)

For the Government of Canada

Johanne Imbeau (Sport Canada)

AWARD

[1] Christiano Paes (the "Athlete") has been a member of Bobsleigh Canada Skeleton (BCS), the national sport organisation governing the sport of Bobsleigh in Canada up until his retirement in July 2006. Since that time he acts as trainer for individual athletes.

[2] During his career, he participated in several national and international competitions.

[3] He is currently 33 years old and has never been found guilty of any anti-doping rule violation.

[4] On November 25, 2006, the Athlete underwent a doping control. It was a notified, Out-of-Competition sample collection session.

[5] The Athlete provided a urine sample which, following analysis, is alleged to have contained an elevated testosterone-epitestosterone (T/E) ratio greater than four (4) to one (1) in addition to an IRMS result consistent with exogenous origin, the presence of which in an athlete's sample is prohibited under the Canadian Anti-Doping Program ("CADP").

[6] The Athlete admitted to taking a variety of nutritional supplements. Moreover, he inferred that these supplements are the probable cause of the adverse analytical finding.

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

[8] Hearings to determine whether an anti-doping rule violation has been committed and, if so, the consequence(s) are conducted by a single arbitrator, appointed from the roster of arbitrators of the Sport Dispute Resolution Centre of Canada ("SDRCC"), sitting as the Doping tribunal (CADP, Rule 7.59).

Record of Proceedings

[9] The undersigned arbitrator has been appointed by the SDRCC, to decide this matter, on January 19, 2007, on a rotating basis since the parties did not agree on the selection of an arbitrator.

[10] On January 24, 2007, the Doping Tribunal convened a preliminary hearing of all parties by telephone conference to settle procedural matters.

[11] The Athlete did not participate in the preliminary hearing held on January 24, 2007 since he was not aware of this telephone conference.

[12] On February 2nd, 2007, the Doping Tribunal convened a second preliminary hearing of all parties by telephone conference in which the Athlete participated and allowed the Athlete to file his Request on or before February 6, 2007.

[13] On February 6, 2007, the Doping Tribunal received the Athlete's Request.

[14] On February 12, 2007, the Doping Tribunal received the Affidavit of Anne Brown, sworn February 12, 2007 and submitted by the CCES in discharge of the burden of proof set out in Rule 7.55 of the CADP.

[15] The Doping Tribunal received a response to the Affidavit of the CCES from the Athlete as required on February 19, 2007.

[16] On February 23, 2007, the Doping Tribunal received the Written Submissions of the CCES together with a list of authorities.

[17] The Hearing took place by telephone conference on February 28, 2007. The Athlete and his wife, representatives of CCES, Sport Canada and BCS and the counsel for CCES all participated by telephone.

[18] Evidence was given at the hearing by the Athlete and his wife, David W. Lech, counsel for CCES reviewed the written submissions of the CCES and drew the attention of the arbitrator to the List of Authorities that had been submitted by the CCES.

[19] The completion of the Hearing was February 28, 2007.

Events preceding the Hearing

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

[21] On November 25, 2006, the Athlete underwent doping control. It was a notified Out-of-Competition sample collection session. The Athlete's sample code number for this doping control is 1749465.

[22] The Athlete and Ms Barbara Spear, the certified Doping Control Officer, completed the Doping Control Form. In the section of that form relating to prescription, non-prescription medications and nutritional supplements taken during the previous ten days, the Athlete wrote "*Tribulus B-50, Cold Fx, Centrum Protegra, 100% Whey Protein, Mega-men, Glutamine, Amino 1000, Flaxseed Oil, Fish Body Oil, Calcimate Plus, Vertex, Alcohol and Nitric Oxide Reactor*". The Athlete did not indicate any comments on the Doping Control Form.

[23] On December 14, 2006, the Certificate of Analysis from the WADA-accredited laboratory in Montreal relating to the Athlete's sample was sent to the CCES. The Certificate of Analysis indicated the following comments for sample 1749465: an elevated testosterone-epitestosterone (T/E) ratio measured at 15.9; IRMS results consistent with exogenous origin.

[24] Section 3.0 of the CADP incorporates and applies to Canadians subject to the Program the "Prohibited List International Standard" issued by the World Anti-Doping Agency ("*Prohibited List*"). When a T/E ratio is greater than four (4) to one (1) and an IRMS analysis determines that the source is of an exogenous origin, the result is reported as an adverse analytical finding.

[25] Upon receipt of the Athlete's adverse analytical finding, the CCES commenced an "*initial review*" pursuant to Rule 7.45 of the Doping Violations and Consequences Rules of the CADP. The "initial review" required the CCES to determine whether the athlete had a valid Therapeutic Use Exemption (TUE) or whether there was any apparent departure from the Doping Control Rules or the laboratory analysis that undermines the validity of the adverse analytical finding.

[26] After reviewing the relevant documents, the CCES confirmed that there was no apparent departure from the Doping Control Rules or the laboratory analysis that undermined the validity of the adverse analytical finding. Further, the CCES confirmed that it had no record of a TUE for the Athlete for any substance that may produce an adverse analytical finding for a T/E ratio greater than four (4) to one (1).

[27] As part of the “*initial review*” process, the CCES provided the Athlete with an opportunity to submit a written explanation regarding his adverse analytical finding on or before December 29, 2006.

[28] On December 27, 2006, as part of the “*initial review*”, the Athlete provided written information regarding his adverse analytical finding. In his letter dated December 27, 2006 and in summary, the Athlete indicated that he does not know: “*how this could have happened*”. His only explanation was that “*he takes different supplements and always looks for “cheaper” supplements and didn’t look for quality but price*”. He also stated that he “*always checked with the WADA website and did not find anything about these supplements*”. The inference he seeks to draw from this statement is that the adverse analytical finding was caused by his use of nutritional supplements.

[29] Upon receipt of the athlete’s explanation, the CCES requested that the WADA-accredited laboratory in Montreal review the athlete sample code 1749465’s explanation. After careful consideration of the athlete’s explanation, the laboratory indicated the following:

- *“Urine sample 1749465 contained a high T/E ratio (measured at 16) and a concentration of testosterone (measured at 1158ng/mL);*
- *IRMS analysis of urine sample 1749465 conclusively points to an exogenous origin of testosterone and its metabolites;*
- *the list of ingredients of the products mentioned by the athlete does not contain prohibited substances that could have caused the adverse analytical finding;*
- *testosterone (and androstenedione) cannot be legally obtained in Canada and in the USA and;*
- *the steroid profile of urine sample 1749465 was significantly modified – this indicates that the steroid present in the sample must have been present in more than trace amounts.”*

[30] On January 5, 2007, Dr. Christiane Ayotte, the Director of the laboratory commented on the Athlete's written explanation and concluded that the athlete had more than "trace amounts" of a prohibited substance in his urine sample. She also added that although the Athlete declared "alcohol" at the time of the collection, she can rule out any influence on the test results since the IRMS results have clearly indicated an exogenous origin. It was also noted that the WADA website specifically warns regarding the risks associated with supplement use.

[31] The CCES concluded the "*Initial Review*" on January 10, 2007 on the basis that the Athlete did not have a TUE with the CCES for use of any substance that may produce an adverse analytical finding for a T/E ratio greater than four (4) to one (1) and that there was no apparent departure from the Doping Control Rules of the CADP or the laboratory analysis that would undermine the validity of his adverse analytical finding. As a result, on January 10, 2007, the CCES issued a Notice to the Athlete pursuant to Rule 7.46 of the Doping Violations and Consequences Rules of the CADP.

[32] The CCES asserted within its Notice that the Athlete had committed an anti-doping rule violation pursuant to Rules 7.16 to 7.20 (Presence in the Sample) of the Doping Violations and Consequences Rules of the CADP. The CCES based its claim on the certificate of analysis indicating the Athlete's sample contained a T/E ratio of 15.9 and IRMS results consistent with exogenous origin. As this would be a first violation, the CCES proposed a sanction within its Notice pursuant to Rules 7.20 and 7.37 of the Doping Violations and Consequences Rules of the CADP: two years ineligibility and permanent ineligibility for direct financial support from the Government of Canada.

[33] The CCES considered the Athlete's letter of explanation along with the comments provided by Dr. Ayotte but was not satisfied that the Athlete's explanation demonstrated "*exceptional circumstances*" so as to reduce the mandated sanction in Rule 7.20 of the Doping Violations and Consequences Rules of the CADP.

[34] At the Athlete's request, his "B" sample was opened and analysed at the WADA-accredited laboratory in Montreal on January 31, 2007.

[35] On February 2, 2007, the CCES received the Certificate of Analysis from the laboratory relating to the Athlete' "B" sample. The Certificate of Analysis indicated an adverse analytical finding for sample 1749465 at an elevated testosterone-epitestosterone (T/E) ratio measured at 17.8 and an IRMS results consistent with exogenous origin. The findings of the "B" sample analysis then confirmed the findings of the "A" sample analysis.

[36] On February 6, 2007, a copy of the Certificate of Analysis for the "B" sample analysis was forwarded by the CCES to the Athlete.

[37] On February 7, 2007, the CCES forwarded by email directly to the Athlete, a copy of the Certificate of Analysis for the athlete' "B" sample.

[38] In its Written Submissions dated February 23, 2007, the CCES submitted that it has discharged its burden of proof and that the affidavit of Ms. Anne Brown, and its exhibits, is uncontroverted on all relevant matters.

[39] The CCES also submitted that the evidence before the Doping Tribunal is that the sample collection, the chain of custody and the laboratory analysis were all conducted according to the CADP.

Evidence given at the Hearing

[40] During the Hearing, the Athlete confirmed that he retired from the national team of BCS in July 2006 and that he now wants to act as trainer.

[41] He also confirmed that he had no idea where the results came from and declared that he has no explanation to give.

[42] He and his wife affirmed that he was not taking any illegal drugs and that he was checking on the WADA website before taking a nutritional supplement.

[43] Mr. David W. Lech highlighted the most important issues contained in Ms. Anne Brown's Affidavit.

[44] He drew the attention of the arbitrator to the fact that the evidence has not been contested and that even if the Athlete did not intend to "use" testosterone or other substances and did not know he consumed them, he did commit a "presence" anti-doping rule violation. This violation is of "strict liability".

[45] He also added that the Athlete has not established the existence of "no fault or negligence" or "no significant fault or negligence" for the violation and has not proven on a balance of probabilities how the prohibited substance entered his system.

Issues

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

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

- b) If the Athlete is found to have committed an anti-doping rule violation, should the sanction proposed by the CCES within its Notice pursuant to Rules 7.20 and 7.37 of the Doping Violations and Consequences Rules of the CADP be eliminated or reduced based on exceptional circumstances?

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

The CCES shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the CCES has established an anti-doping rule violation to the comfortable satisfaction of the Doping Tribunal bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. When these Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

- a) Has the Athlete committed an Anti-Doping Rule Violation?

[48] The adverse analytical finding was for testosterone-epitestosterone (T/E) ratio measured at 15.9; IRMS results consistent with exogenous origin. The "presence" of an elevated T/E ratio greater than four (4) to one (1) in addition to an IRMS result consistent with exogenous origin in an athlete's bodily sample is an anti-doping rule

violation. Under Rules 7.17 and 7.18 of the CADP, the athlete is responsible for any prohibited substance found to be present in his or her bodily sample. It is not necessary that intent, fault, negligence or knowing "use" by an athlete be demonstrated in order to establish this anti-doping rule violation.

[49] The Athlete admitted that he used a wide variety of nutritional supplements. The CCES emphasises to the fact that the strict liability principle must apply to this case because the violation of a doping rule has occurred.

[50] Dr. Christiane Ayotte, the Director of the laboratory concluded that the high T/E ratio (measured at 16) in a concentration of testosterone (measured at 1158ng/mL) present in the Athlete's urine sample was more than trace amounts. She also ruled out any influence on the test results from the fact that the Athlete declared alcohol at the time of the collection, the IRMS results having clearly indicated an exogenous origin.

[51] Under these circumstances, I do not give the Athlete every benefit of the doubt and do not accept his written and oral explanations inferring that the presence of such an elevated T/E ratio in his body results from his use of a wide variety of nutritional supplements during the past year.

[52] Whether the prohibited substances and the elevated T/E ratio were intended to increase athletic performance, and whether they in fact did so, are not relevant considerations.

[53] I therefore find that the adverse analytical finding for testosterone-epitestosterone (T/E ratio measured at 15,9; IRMS results consistent with exogenous origin) is valid and, as a result, that there has been an anti-doping rule violation by the Athlete.

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

[54] The Athlete declared at the Hearing that he had no idea how the presence of such an elevated T/E ratio might have entered his system.

[55] He could not give an explanation concerning the results of his urine sample test.

[56] The Athlete also submitted that he always looked for "cheaper" supplements and did not look for quality but "price".

[57] Pursuant to Rule 7.20 of the CADP, the sanction proposed by the CCES can be eliminated or reduced if "exceptional circumstances" are established as provided in Rules 7.38 and 7.39 of the CADP and the burden of proof is upon the Athlete to establish them.

[58] The CADP sets out what are "exceptional circumstances". There are two categories: "no fault or negligence," and "no significant fault or negligence." If they can be proven, the consequences of an anti-doping rule violation can be eliminated or reduced.

[59] "No fault or negligence" is defined in the CADP Glossary as follows:

"The Athlete's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method."

[60] "No significant fault or negligence" is defined in the CADP Glossary as follows:

"The Athlete's establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation."

[61] These provisions of the CADP implement Articles 10.5.1 and 10.5.2 of the *World Anti-Doping Code*, virtually verbatim. The CADP provides that the text of the *Code*, including its Commentary, is a source of interpretation of Canada's domestic programme. According to the Commentary to the *Code*, these provisions are meant to be applied "where the circumstances are truly exceptional and not in the vast majority of cases". The Commentary continues :

"To illustrate the operation of Article 10.5, an example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances : (a) a positive test resulting from a mislabelled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a prohibited substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.)"

Article 10.5.2 applies only to the identified anti-doping rule violations because these violations may be based on conduct that is not intentional or purposeful. Violations under Article 2.4 (whereabouts information and missed tests) are not included, even though intentional conduct is not required to establish these violations, because the sufficient discretion to allow consideration of the Athlete's degree of fault."

[62] The Athlete was experienced and knew about the importance of doping controls.

[63] The athlete knew or should have known that using nutritional supplements posed a significant danger.

[64] Nevertheless he took a huge variety of supplements and made the choice to rely generally on the labels of the various products he used.

[65] He mentioned that he checked with the WADA website and did not find anything about these supplements but never took the time to consult or take advice from representatives of the BCS or the CCES involved in the doping control process.

[66] He did not convince me that he did everything possible to find the exact information regarding the composition of the nutritional supplements he was using and that he exercised due care or sensible or reasonable precautions when using these supplements.

[67] His omission to do so constitutes a fault or negligence for which he must be held responsible.

[68] The substances found in many nutritional supplements are not reliably marked and the Athlete declared preferring "cheap" supplements to "quality" products.

[69] This preference was a personal choice and nobody else is to be blamed for such a decision.

[70] This fault or negligence was highly significant in relationship to the anti-doping violation that occurred.

[71] The CCES submitted a number of arbitral cases and decisions which support its position and argument with respect to the strict interpretation of "exceptional circumstances" and the high degree of care demanded of an athlete with respect to prohibited substances.

[72] In the matter of Arbitration between *United States Anti-Doping Agency vs. Faruk Sakin* (American Arbitration Association, Arbitration Tribunal, case No. 30 190 01080 04), the arbitrators stated as follows:

"We cannot allow an athlete's lack of questioning and lack of investigation to become the standard by which athletes circumvent the anti-doping rules. Under the standard advocated by the Respondent in this case, athletes could avoid sanction by ensuring that they do not know what is in the medications given to them by loved ones. Spouses could dope the athletes, and as long as they do it out of spite or anger instead of with intent to cheat, the athlete could avoid sanction by claiming sabotage. This would lead to a standard where it is not the athlete's negligence that matters but rather the spouses intent that would matter. Under the standard proposed by the Respondent, so long as an athlete doesn't ask any questions or conduct any independent investigation they would avoid sanction. The Panel believes that to support a finding of sabotage sufficient to reduce a sanction, the panel would at least have to find that the athlete took all reasonable care to avoid a doping violation." (page 8)

[73] Finally, the Athlete was unable to establish how the prohibited substance entered his system to cause the adverse analytical finding. In failing to do so, the Athlete was unable to prove what was the exact cause of the adverse analytical finding.

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

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

Result

[76] While other factors such as the Athlete's commitment to sport and his desire to continue his career as trainer for individual athletes have been drawn to my attention, I cannot ignore the fact that the Athlete did not exercise extreme caution to avoid coming into contact with a prohibited substance although it is well known and has been made

very clear to Canadian athletes that there are grave dangers associated with consuming nutritional supplements.

[77] The required sanction for a first anti-doping rule violation is a two year period of ineligibility from sports as well as a permanent ineligibility from direct Government of Canada funding and I find this sanction reasonable in these circumstances.

[78] The CADP states that the period of ineligibility shall start on the date of the hearing decision providing for ineligibility.

[79] In the circumstances, the period of ineligibility should start on the date of the hearing decision namely, March 5, 2007.

Costs

[80] Under Rule 7.69 of the CADP, the Doping Tribunal may award costs to any party payable as it directs. Unless applied for, there shall be no award of costs in this matter. Should any party wish to apply for costs, a written request with supporting submissions should be filed with the SDRCC by no later than 5:00 p.m. Eastern time on March 30, 2007. I will then give further directions concerning responding submissions.

QUEBEC CITY, QUEBEC, March 15, 2007



PAULE GAUTHIER
Arbitrator