

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)**

**IN THE MATTER OF THE UNION CYCLISTE INTERNATIONALE ANTI-DOPING PROGRAM**

**AND IN THE MATTER OF AN ANTI-DOPING RULE VIOLATION BY JACK BURKE**

No: **SDRCC 13-0206**

Ordinary Division

**JACK BURKE  
(CLAIMANT / ATHLETE)**

– and –

**CYCLING CANADA CYCLISME (CCC)  
(RESPONDENT)**

- and –

**UNION CYCLISTE INTERNATIONALE (UCI)  
(OBSERVER)**

REPRESENTATIVE FOR CLAIMANT:

JAMES BUNTING  
CHANTELLE SPAGNOLA

REPRESENTATIVE FOR CCC:

BRETT STEWART

REPRESENTATIVE FOR THE OBSERVER:

DOMINIQUE LEROUX

ARBITRATOR:

RICHARD H. McLAREN, C.ARB

AD HOC CLERK OF THE ARBITRATOR:

TORI CRAWFORD

## **AWARD**

### **I. The Parties:**

1. Mr. Jack Burke (“the Athlete”) is a member of the Cycling Canada Cyclisme (“CCC”).
2. CCC is the national governing body for the sport of cycling in Canada.
3. Union Cycliste Internationale (“UCI”) is the international federation responsible for the sport of cycling worldwide. CCC is a national member of the UCI.

### **II. Background:**

4. The Athlete is 18 years of age and graduated from high school in Spring of this year. He has competed in cycling since 2007 and has been a member of Team Ontario, Team Canada and various private teams. He will attend university in British Columbia at the end of September and has scholarship financing.
5. The UCI has established regulations governing the sport of cycling and sponsored events, including the Anti-Doping Rules (“ADR”). The aim of the ADR is to protect both the integrity of the sport and athletes’ health.
6. Due to the contractual nexus between the Athlete and CCC, which in turn has a contractual relationship with the UCI, the Athlete is required to observe UCI regulations, including the ADR. The Parties have agreed that the 2012 version of the ADR is applicable to this case.
7. The Athlete competed as a member of Team Canada in the UCI-sanctioned Tour de l’Abitibi Desjardins in Rouyn-Noranda, Quebec from July 15 to 21, 2013. The Athlete provided a urine sample during a stage of the competition held in Malartic, Quebec on 18 July 2013.

8. The urine sample provided was analyzed by the World Anti-Doping Agency (“WADA”) accredited laboratory in Montreal, Quebec. The analysis of the Athlete’s A sample revealed the presence of hydrochlorothiazide (“HCTZ”), a prohibited substance according to the 2013 WADA Prohibited List. HCTZ is a therapeutic diuretic that stimulates the kidneys and increases the amount of urine the body excretes. Diuretics such as HCTZ are prohibited by WADA due to their potential to be used for weight management or as masking agents to cover up the use of other performance enhancing substances. HCTZ is a synthetic compound and is only available with a physician’s prescription. It is most commonly available in pill form containing 5-50 mg of HCTZ.
9. The Athlete was informed of the adverse analytical finding via letter from the UCI dated 16 August 2013. An analysis of the B sample requested by the Athlete confirmed the existence of the prohibited substance in a concentration of between 0.8 and 1.0 ng/ml. According to Dr. Christiane Ayotte, head of the Montreal laboratory and the expert called by CCC, this concentration is close to the detection limits of the most up to date equipment the Montreal laboratory can use to run the screen for HCTZ. The sample had a specific gravity of 1.021.
10. The Parties agreed that there was no breach in the chain of custody in transporting the sample to the laboratory. It was further agreed that the laboratory’s analytical process and the quantification of results are accurate and not disputed.
11. Neither CCC nor the UCI issued a provisional suspension against the Athlete, and he did not accept a voluntary provisional suspension.

### **III. Procedure:**

12. UCI informed CCC on 11 September 2013 that the Athlete had committed an anti-doping rule violation under Articles 21.1 and 21.2 of the ADR, and requested that CCC commence disciplinary proceedings in accordance with ADR Articles 249 to 348.
13. The Parties concluded an agreement on 12 September 2013 providing that the dispute would be resolved by arbitration under the rules of the SDRCC pursuant to the Canadian Sport Dispute Resolution Code with the application of the UCI's ADR.
14. All Parties confirmed my appointment as Arbitrator on 13 September 2013. During the pre-hearing conference calls that day the procedure leading to the arbitration was determined. The Parties agreed that the matter had to be heard on an expedited basis, with a decision to be rendered by 18 September 2013. The reason for the expedited proceeding was the Athlete's interest in being present and permitted to compete in the 2013 UCI Road World Championships. The World Championships were to be held in Italy. The Athlete had a flight scheduled for the day the reasons in the expedited procedure were rendered. UCI also requested to have a representative present as an observer at the arbitration hearing in order to allow it to make an informed decision as to whether to appeal the Arbitrator's disposition of the case or refer the case to its own internal doping panel.
15. The hearing took place via video and teleconference on 17 September 2013, and lasted approximately six and a half hours. During the hearing, the following people gave evidence under solemn affirmation: Jack Burke, Dion Burke (the Athlete's father), Dr. Christiane Ayotte (head of the WADA-accredited laboratory in Montreal), Dr. Timothy Robert (Chief Science Officer of Aegis Science Corporation), and Anisah Hassan (a student at law with the firm of the Athlete's counsel).

16. Also present at the hearing were SDRCC staff, James Bunting (Athlete's counsel), Chantelle Spagnola (Athlete's counsel), Brett Stewart (representative of CCC), Dominique Leroux (observer from the UCI), and Tori Crawford (Ad Hoc Clerk to the Arbitrator).
17. On 18 September 2013 the Arbitrator released brief reasons and his orders in the expedited arbitration proceeding. The purpose of this Award is to provide a fully reasoned decision. That interim award is hereby incorporated into and forms part of this Award.

#### **IV. Relevant Provisions:**

18. The relevant provisions of the UCI ADR are as follows:

##### **Chapter II: Doping**

##### **Anti-Doping Rule Violations**

##### *21. The following constitute anti-doping rule violations:*

- 1. The presence of a Prohibited Substance or its Metabolites or Markers in a Rider's bodily Specimen.*

*1.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his body. Riders are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their bodily Specimens. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping violation under article 21.1.*

*1.2 Sufficient proof of an anti-doping rule violation under article 21.1 is established by either of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Rider's A Sample where the Rider waives analysis of the B Sample and the B Sample is not analyzed; or, where the Rider's B Sample is analyzed and the analysis of the Rider's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Rider's A Sample.*

...

2. *Use or Attempted Use by a Rider of a Prohibited Substance or a Prohibited Method.*

*2.1 It is each Rider's personal duty to ensure that no Prohibited Substance enters his or her body and that he does not Use any Prohibited Method. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Rider's part be demonstrated in order to establish an anti-doping rule violation for Use of a Prohibited Substance or a Prohibited Method.*

*2.2 The success or failure of the Use of a Prohibited Substance or Prohibited Method is not material. It is sufficient that the Prohibited Substance or Prohibited Method was Used or Attempted to be Used for an anti-doping rule violation to be committed.*

## **Chapter X: Sanctions and Consequences**

### **Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method**

*293. The period of Ineligibility imposed for a first anti-doping rule violation under article 21.1 (Presence of a Prohibited Substance or its Metabolites or Markers), article 21.2 (Use or Attempted Use of a Prohibited Substance or Prohibited Method) or article 21.6 (Possession of a Prohibited Substance or Prohibited Method) shall be*

*2 (two) years' Ineligibility*

*unless the conditions for eliminating or reducing the period of Ineligibility as provided in articles 295 to 304 or the conditions for increasing the period of Ineligibility as provided in article 305 are met.*

### **Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances**

*295. Where a Rider or Rider Support Personnel can establish how a Specified Substance entered his body or came into his possession and that such Specified Substance was not intended to enhance the Rider's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility for a first violation found in article 293 shall be replaced with the following:*

*at a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility.*

*To justify any elimination or reduction, the License-Holder must produce corroborating evidence in addition to his word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance-enhancing substance. The License-*

*Holder's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.*

## **V. Submissions of the Parties:**

### **Submissions of the Athlete**

19. The Athlete did not contest the presence of HCTZ in the sample, however he submits that Specific Circumstances pursuant ADR Article 295 are present in this case. It is submitted that the trace amount of HCTZ detected in the Athlete's samples entered his body through contaminated water obtained from a tap sourced by a well in Malartic, Quebec. The Athlete relies on expert testimony from Dr. Robert that HCTZ can be present in raw water, surface water, sludge, and treated drinking water to argue that on a balance of probabilities, contaminated water is the probable cause of the Athlete's adverse analytical finding.
20. Since the Athlete did not intend to ingest HCTZ, and the specific gravity of his urine sample indicates the concentration of HCTZ was not consistent with an effort to dilute the urine and was insufficient to have any masking effect, the Athlete submits that his degree of fault falls at the lowest end of the spectrum. Further, the Athlete did not receive any formal education through UCI, CCC, or any of his teams regarding doping control. Given this lack of education and his young age, the Athlete submits he has a low level of sophistication regarding doping in cycling. The Athlete therefore argues that the appropriate sanction is a reprimand. The Athlete relied on three cases in his submissions: *Canadian Centre for Ethics in Sport v. Ashley Kraaveveld* (SDRCC DT 12-0179), *Union Cycliste Internationale v. Alexander Kolobnev & Russian Cycling Federation* (CAS 2011/A/2645), and *Association of Tennis Professionals Tour v. Graydon Oliver* (ATP Anti-Doping Tribunal, February 2004).

### Submissions of the CCC

21. CCC submits that the Athlete has not satisfied the requirements to justify a reduction in the mandated two-year period of Ineligibility pursuant to ADR Article 295. It is submitted that the testimony provided by Dr. Robert and Dr. Ayotte is insufficient to establish on a balance of probabilities that the Athlete's adverse analytical finding was caused by contaminated drinking water. The more likely explanation is that one of the supplements the Athlete was taking (as listed on his doping control form) was contaminated with HCTZ. Further, the burden of proof to establish that the supplements were not contaminated rests with the Athlete. Since he has not discharged this burden, a two-year period of Ineligibility is the appropriate sanction.

### Submissions of the UCI

22. UCI submits that it is unlikely the presence of HCTZ in the Athlete's urine was caused by contaminated drinking water. It submits that the adverse analytical result was likely the result of the Athlete ingesting contaminated supplements. UCI noted that WADA has been warning athletes for years about the possibility of contaminated supplements, and that high profile doping cases such as that of Alberto Contador have also highlighted this risk. The Athlete therefore failed to exercise the degree of care required to justify a reduction in the period of Ineligibility pursuant to ADR Article 295.

### **VI. Findings of Fact:**

23. The following findings are in addition to those already determined and set out in the brief reasoned decision. The findings herein are in addition to those already found and are supplementary to those findings.

24. In the afternoon of 18 July 2013, the day the Athlete's sample was collected, he was scheduled to compete in a circuit race in Malartic, Quebec. Since the Tour de l'Abitibi



Desjardins was headquartered in Rouyn-Noranda, approximately 80 kilometres from Malartic, the athletes were bussed to the location of that stage of the race. While most of the competing cyclists filled their water bottles in Rouyn-Noranda, the Athlete was delayed in arriving to the bus and was unable to fill his water bottles prior to departure. He testified that the line-up of athletes waiting to fill their water bottles in Rouyn-Noranda was extremely long.

25. Upon arriving in Malartic, the Athlete had difficulty locating a source to fill his water bottles. The event organizers were unable to direct him towards a water fountain or other source. Eventually he obtained the assistance of an individual who appeared to work in a facility where the stage began. She filled the Athlete's five 750-ml water bottles using a tap located in a closed bar behind a locked gate. To the Athlete's knowledge he was the only cyclist competing that day who obtained water from this source. The evidence suggests that he was likely the only rider competing in Malartic who obtained drinking water in Malartic, the rest having filled their bottles back in Rouyn-Noranda. The drinking water in Malartic is sourced from a well.

26. The Athlete consumed three of his water bottles during warm-up, and the remaining two bottles during the race. At the end of the race the Athlete was selected to undergo a doping control procedure.

27. Dr. Robert testified that concentrations of HCTZ can be present in raw water, surface water, sludge, and even treated drinking water. Scientific research indicates that HCTZ is one of the substances that is not always completely eliminated through drinking water treatment. Further, the sludge left over after residual water is treated is also commonly used to make fertilizer pellets and can contain concentrations of HCTZ. The town of Malartic is on the perimeter of open-pit gold mining operations, and the town also has a

golf course. Golf courses often use residual water and fertilizers made from sludge to maintain their premises. There is also a water treatment sludge processing facility headquartered in Malartic.

28. Sludge is described in the scientific literature as containing residual amounts of HCTZ. When sludge is incorporated into fertilizers, HCTZ may leach from this source and percolate into the water table and well water as a result. Therefore, the possibility of HCTZ being a contaminant in the drinking water from the well has been established to the comfortable satisfaction of the Arbitrator.
29. The Parties' experts agree that a trace analytical reading of HCTZ, such as the sample analyzed in this case, could possibly be the result of drinking water contaminated by the prohibited substance.

## **VII. Legal Analysis:**

30. There is no dispute regarding the manner and method of obtaining the urine sample or the chain of custody in delivering the sample to the laboratory. Further, none of the parties have contested the quantification and analysis that revealed the presence of HCTZ in the Athlete's sample. Since the Athlete was found to have a prohibited substance in his body, the principles of strict liability require that I conclude that an anti-doping rule violation has occurred pursuant to Article 21 of the ADR.
31. The ADR provide that in the case of a first anti-doping violation pursuant to Article 21, the sanction shall be an Ineligibility period of two years. However, Article 295 permits for the elimination or reduction of a period of Ineligibility under certain circumstances. Pursuant to Article 32 of the ADR, HCTZ is a "Specified Substance" enabling the Athlete to plead that Article 295 should be applied.

32. In order to be granted a reduction or elimination of the period of Ineligibility pursuant to Article 295, the Athlete must adduce corroborating evidence beyond his own word that demonstrates:
- a. How the specified substance entered his body; and
  - b. That the specified substance was not intended to enhance his sport performance or mask the use of a performance enhancing substance.
33. The applicable standard of proof is the comfortable satisfaction of the Tribunal. If these two elements are established, the Athlete's degree of fault must then be considered in determining the appropriate reduction to the two-year period of Ineligibility.

Source of the Prohibited Substance

34. The Athlete, who I found to be a very credible witness, stated that he does not use any prohibited substances, including HCTZ. Neither the CCC nor the UCI contested this position. I accept that the Athlete did not purposely ingest HCTZ.
35. In assessing the evidence regarding the source of the HCTZ in the Athlete's body, it is important to take into account the expedited nature of the proceedings. No laboratory analysis of the water supply in Malartic could be completed in the requisite time frame for disposition of this case. Even if an analysis could have been completed, this would not necessarily have led to a definite result, since an analysis of water collected today would not reflect the same concentration of substances as the water the Athlete ingested in July. The Parties were therefore limited in the type of evidence available.
36. Based on the Athlete's testimony regarding the source of the water he consumed on the day he provided his urine sample, as well as the scientific studies provided by the Athlete and the expert evidence of Dr. Robert and Dr. Ayotte, it is established to the comfortable satisfaction of the Arbitrator that the HCTZ entered the Athlete's body via drinking water

from the town of Malartic. Specifically, the presence of the golf course and the sludge-based fertilizer company in Malartic combined with the fact that the town is serviced by well water suggest the water the Athlete used to fill his bottles was contaminated by HCTZ.

37. CCC and UCI argued that it is more likely that the source of the HCTZ was a contaminated nutritional supplement the Athlete consumed. Although the expedient nature of this case did not permit an analysis of the supplements the Athlete listed on his doping control form, it is worth noting that Dr. Robert testified that HCTZ was not listed as an ingredient in any of the Athlete's supplements that were included in the Aegis database. Further, neither the UCI nor the CCC pointed to a specific supplement listed on the Athlete's doping control form that may have been contaminated by HCTZ. The Athlete focused the majority of his submissions and all of his evidence on contaminated drinking water, and the Parties' experts both agreed that contaminated drinking water could not be eliminated as the possible cause of the adverse analytical finding on the facts of this case. I conclude that on the evidence it is more likely the contaminated source was drinking water obtained in Malartic and not any nutritional supplement.

38. Further, CCC argued that the fact that none of the other members of Team Canada tested positive for HCTZ indicates that drinking water could not have been the contaminant. Dr. Ayotte added that a total of twenty-two urine samples were collected during the Tour de l'Abitibi Desjardins, but the Athlete's sample was the only one in which HCTZ was detected and confirmed. However, based on the evidence the Athlete was likely the only individual who consumed drinking water from the town of Malartic. Further, Dr. Robert testified that even if other athletes had consumed water from the same source, whether or not they would ultimately test positive for HCTZ would depend on a number of factors,

including the quantity of water they ingested and their bodies' ability to absorb and excrete the substance.

39. Based on the considerations above, it is established to the comfortable satisfaction of the Arbitrator that the HCTZ entered the Athlete's body through contaminated drinking water obtained from the town of Malartic.

Intent to Mask a Performance Enhancing Substance

40. In addition to the source of the specified substance, in order to avail himself of Article 295 the Athlete must establish that the HCTZ was not intended to enhance his performance or mask a prohibited substance.

41. HCTZ is prohibited for two reasons:

- i. As a weight reducing agent;
- ii. As a masking agent to hide the use of other prohibited performance enhancing substances.

In sports such as rowing and wrestling, athletes compete in specific weight categories. Diuretics can artificially manipulate weight for a short period of time thus enabling an athlete to compete in a lower weight class. They are therefore considered to violate the ethics of sport and are prohibited.

42. Since there are no weight classes in cycling, the issue in this case is whether the HCTZ was used to mask the presence of another performance enhancing substance. The athlete ingested the HCTZ inadvertently through contaminated drinking water. He therefore could not have had the intent to use the diuretic as a means of masking the presence of another prohibited performance enhancing substance.

43. This lack of intent is corroborated by the specific concentration of HCTZ detected in the Athlete's urine as well as the specific gravity of the sample. Dr. Ayotte and Dr. Robert

agreed that the analysis of the Athlete's sample reflects a trace amount of HCTZ. The specific gravity of the sample was 1.021, which makes it a scientific fact that the sample was not diluted. This specific gravity is not consistent with an attempt to produce diluted urine in which another performance enhancing substance would be less susceptible to detection. A diuretic must be consumed in sufficient quantities to have any actual diuretic or dilution effect. Although the presence of HCTZ in any concentration is sufficient to establish a doping infraction under the ADR, the level of HCTZ detected in the Athlete's sample can assist in establishing whether or not he intended to use the substance to enhance his performance or mask a prohibited substance. Given the concentration detected and the specific gravity of the Athlete's urine, the Arbitrator concludes that not only did the Athlete lack the intention to use HCTZ as a masking agent; there could not be any actual masking effect because the sample was not diluted.

#### The Appropriate Sanction

44. Since the Athlete has established to the comfortable satisfaction of the Arbitrator how the HCTZ entered his body, and that he had no intent to use the specific substance to mask the presence of another prohibited substance, the final issue to consider in applying Article 295 is the appropriate reduction to the mandated two-year period of Ineligibility required by ADR Article 293. Pursuant to Article 295, the Athlete's degree of fault is the key criterion in determining the reduction to the period of Ineligibility.
45. Given the absence of intent noted in the preceding section, the Athlete has committed what can be described as essentially a technical violation of the ADR. The Athlete did not purposely ingest HCTZ and the level of HCTZ detected in his urine could not have achieved any masking effect. Therefore, the purpose of prohibiting the substance is not

fulfilled – the Athlete may have violated the letter of the ADR but he did not violate its spirit.

46. In exercising my discretion, I take into account the Athlete's level of sophistication in doping matters. He is relatively young and only recently finished high school. He has never received any anti-doping training from UCI, CCC, or any of his teams. Although he recently began training with a coach, he does not receive any counseling regarding nutrition or supplements. The Athlete testified that prior to his adverse analytical finding, he had no information about HCTZ and was unaware of how diuretics could impact sport performance. The doping control procedure that revealed the adverse analytical finding at issue in this case was his first ever doping test.
47. Despite this lack of information regarding cycling's doping rules, the Athlete made a proactive effort to ensure he did not violate any anti-doping rules. Specifically, he cross-referenced the ingredients of any supplement or vitamin he planned to ingest with the WADA Prohibited List available online. He also asked vendors whether the supplements he was purchasing contained any prohibited substances, and checked company websites for whether they contained product warnings regarding prohibited performance-enhancing substances. I therefore conclude that the Athlete made reasonable efforts to comply with the ADR, even though his sport's governing bodies provided him with no information as to what these regulations actually entailed.
48. However, no amount of training or individual research would have assisted the Athlete in the circumstances. The Athlete ingested a prohibited substance through contaminated drinking water. It would be unreasonable to require all athletes to arrange for all the water they consume to be tested to ensure that it is not contaminated by prohibited substances.

There is nothing further the Athlete could have done or should have done to ensure the drinking water he consumed was free from contaminants.

49. Furthermore, in considering the use of my discretion I note that the Athlete gave his testimony in a candid, forthright, and very credible fashion. I find him to be a highly credible witness. I make a similar finding with respect to the testimony of his father. I have also taken account of the severe consequences that a lengthy period of ineligibility would impose on this young man. He has made significant sacrifices and worked very hard throughout his adolescence in order to become a successful cyclist. A two-year period of ineligibility when he is near the peak of his junior career would have a devastating impact on his future in the sport. He testified that if he were to be suspended he would likely never race competitively again.

50. Based on the foregoing considerations, I conclude that the Athlete's degree of fault falls at the lowest end of the spectrum. This case represents only a technical violation of the ADR. A two-year period of Ineligibility would be vastly disproportionate to the Athlete's degree of culpability. I therefore exercise my discretion in favour of the Athlete when his sport has done absolutely nothing to educate him about any aspect of anti-doping and no degree of utmost care other than not using tap water from a well would have prevented the circumstances. Therefore, I find there is no fault and that the appropriate sanction is a reprimand, which will still represent a first doping infraction. I do not impose any period of Ineligibility.



**ORDER**

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

1. A first doping offence has occurred under Article 21 of the ADR. The doping offence involved the ingestion of HCTZ, a prohibited substance.
2. Under Article 295 and upon a finding of a Specified Substance being found in Specific Circumstances no period of Ineligibility is imposed. The appropriate sanction is a public reprimand.

DATED AT LONDON, ONTARIO THIS 2<sup>ND</sup> DAY of OCTOBER 2013

A handwritten signature in black ink, appearing to read 'Rich H McLaren', written over a horizontal line.

**Richard H. McLaren, C.Arb.**

**Arbitrator**