



Arbitration CAS ad hoc Division (O.G. Nagano) 98/002 R. / International Olympic Committee (IOC), award of 12 February 1998

Panel: Mr. Richard Young (USA), President; Mr. Jan Paulsson (France); Mrs. Maria Zuchowicz (Poland)

*Disqualification of an athlete for use of marijuana
Lack of legal basis to sanction the athlete*

- 1. The sole basis to sanction the use of marijuana at the Olympic Games is Chapter II, article III, paragraph B of the IOC Medical Code, which treats the use of marijuana as doping only if there is an agreement between the IOC and the relevant international federation to that effect. Absence of any such agreement in this case.**
- 2. The CAS recognizes that from an ethical and medical perspective, cannabinoids consumption is a matter of serious social concern. The CAS is not, however, a criminal court and can neither promulgate nor apply penal laws. The CAS must decide within the context of the law of sports, and cannot invent prohibitions or sanctions where none appear.**

On 8 February 1998, R. was awarded the Olympic gold medal in the snowboard giant slalom competition. On 11 February 1998, the IOC Executive Board, upon the recommendation of the IOC Medical Commission, notified R. that it had decided to rescind the award of the medal based on the finding of a metabolite of marijuana in the doping control which followed the competition. R. now appeals the decision of the IOC Executive Board.

LAW

1. These proceedings are governed by the Rules for the Resolution of Disputes Arising During the XVIII Olympic Winter Games in Nagano (the “ad hoc Rules”) of CAS enacted by the International Council of Arbitration for Sport (ICAS) on 9 April 1997. They are further governed by Chapter 12 of the Swiss Private International Law Act of 18 December 1987 (“PIL Act”). The PIL Act applies to this arbitration because the seat of the ad hoc Division and of its panels of Arbitrators is established at Lausanne, Switzerland, pursuant to Art. 7 of the ad hoc Rules.

2. Under Article 17 of the ad hoc Rules, the Panel must decide this dispute “*pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate*”.
3. The jurisdiction of the ad hoc Division arises out of Article 74 of the Olympic Charter and out of the arbitration agreement embodied in the entry form for the Games. At the outset of the hearing, the parties confirmed their acceptance of the jurisdiction of the ad hoc Division and that they had no objection against the composition of the Panel.
4. According to Article 16 of the ad hoc Rules, the Panel has “*full power to review the facts on which the application is based*”.
5. The Panel wishes to make clear that it shows no particular leniency toward R. on account of the fact that he was announced as the winner of the event; nor does it treat him with greater severity on this account. This panel considers that all athletes, great or small, are equal before the law, and examines R.’s appeal accordingly.
6. R. does not contest the urine sample collection process or the laboratory analysis which found traces of marijuana metabolites (17-25 ng/ml) in his urine.
7. R. alleges that he has not actively used marijuana since April 1997. He further states that he attended parties on 20 and 31 January 1998 at which other people smoked marijuana. Therefore, he argues that the presence of marijuana metabolites in his urine must have come from exposure to second hand marijuana smoke on these occasions, prior to his departure for Nagano on 2 February 1998.
8. In support of his allegations, R. offered to call Dr. P., Chairman of the Canadian Center for Ethics in Sport, to testify that the test results reported in Nagano are not inconsistent with R.’s version of events and that marijuana metabolites present in the system take a long time to purge themselves from urine (thus, metabolites could still be present on 8 February 1998 without any further exposure to marijuana after 31 January).
9. The representatives of the IOC do not challenge R.’s statement of facts. They also acknowledge that metabolites of marijuana may be present in an athlete’s urine for a substantial period of time after exposure.
10. The IOC rather takes the position that its sanction was justified even if the facts alleged by R. are correct. It was therefore unnecessary to hear Dr. P.
11. The decision of the IOC Executive Committee was expressly based on Chapter II, article III, paragraph B of the IOC Medical Code, which provides:
“Marijuana
In agreement with the International Sports Federations and the responsible authorities, tests may be conducted for cannabinoids (e.g. Marijuana, Hashish). The results may lead to sanctions?”.

12. The issue before the Panel is therefore whether the detection of marijuana metabolites in R.'s urine in and of itself proves an offense under the text invoked by the Executive Committee, which we will refer to below as "paragraph B".
13. In order to appreciate the significance of paragraph B, it is useful to examine it in relation to other parts of the Code. Chapter II, article I identifies five classes of "prohibited substances", none of which includes marijuana. The IOC also publishes a list of prohibited substances. Marijuana is not on that list. Chapter II, article II proscribes the use of certain "prohibited methods", among which does not appear the use of marijuana. Finally Chapter II, article III identifies "Classes of drugs subject to certain restrictions"; this is where paragraph B appears.
14. Prince de Mérode and Doctor Schamasch of the IOC Medical Commission testified that marijuana is not a prohibited substance under the Code. Explaining the phrase in paragraph B "*in agreement with the International Sports Federations*", they stated that the use of marijuana is not banned unless the IOC and a particular international federation have agreed to enforce a ban on marijuana as adopted by that federation.

Specifically Prince De Mérode concluded his explanation as follows: "*I repeat: in fact, marijuana, it's not written like doping inside this Medical Code. It's only a product submitted to some restriction. That was a long discussion before and in the past, and I believe it's clear*".

15. Prince de Mérode and Doctor Schamasch also explained that the IOC has tested all samples collected during Olympic Games for marijuana since the Seoul Olympics in 1988. The purpose of this effort was not to impose sanctions on athletes who were found to have marijuana or its metabolites in their urine, but rather to obtain a base of data from which a determination could be made by the IOC whether marijuana use is a sports related problem which would justify adding marijuana to the banned substances list. Neither the athletes who tested positive for marijuana in prior Games nor their federations were notified of the positive test results. Prince de Mérode stated, in his own words, that testing for marijuana in this sense is an: "*educative measure, not more. It is not doping*".
16. In summary, the IOC Medical Code standing alone does not provide a basis for treating marijuana as a banned substance justifying the finding of a doping offense and resulting sanctions.
17. Since the effect of paragraph B is to require a joint approach by the IOC and FIS to create sanctions for the use of marijuana, the testimony of Mr. Hodler, FIS President, was of the first importance.
18. Mr. Hodler told the Panel emphatically and repeatedly that with regard to doping offenses, FIS has adopted the IOC Medical Code in its entirety, with no special rules of its own. He then went on to say that FIS has adopted "measures" with regard to testing which "*have nothing to do with doping controls*". He gave as an example tests for hemoglobin, which are "pure security tests" put in place at the request of many cross-country skiers and carried out only in

connection with their events (as well as the biathlon), given the extraordinary efforts required by their disciplines. FIS's purpose here is to test before an event to prevent an athlete from competing if his blood count suggests that his health would otherwise be at risk.

19. According to Mr. Hodler, marijuana has also been given special consideration by FIS, but for other reasons. There are two events, namely the downhill and ski jumping, which are particularly risk-filled. As Mr. Hodler stated: *"there, marijuana can be a help to overcome a natural resistance against excessive risk"*.
20. Thus, Mr. Hodler explained, FIS's concern regarding marijuana use in these events is to protect the health of athletes who might have accidents, if they were affected by marijuana to the point of recklessness.
21. Mr. Hodler then turned to the situation with respect to the giant slalom event, with respect to which he stated that no agreement to test, as required under paragraph B, had ever been entered with FIS. Since his testimony in this respect was crucial, it merits verbatim quotation:
"We have never been asked for approval. We would never give approval for a giant slalom ... There is absolutely no risk. We have safety measures. Even if he goes too fast and misses lots of gates, nothing much happens. I believe some very basic conditions are missing, in this particular case".
22. The representatives of the IOC also acknowledged that there had been no agreement between the IOC and FIS to treat marijuana as a banned substance. This is crystal clear from the following verbatim exchange:
Question of the Panel: "If FIS is telling us that marijuana is not doping in their sport – they have health concerns, they have educative concerns, but it's not doping – and you're saying it's not doping in the IOC's eyes, and you'll only enforce it if the international federation and the NOC make it their priority, why are we here?"
Prince de Mérode: "That's the reason for me – I will perhaps give a conclusion quicker – but it's no case here on this table ... that's my opinion. I'm sure that if the Medical Commission had heard the explanation given by Mr. Hodler, the vote certainly was different, I'm sure".
23. The cumulative testimony of Mr. Hodler and that of the representatives of the IOC resolves the issue in this case. The sole basis for the present sanction is paragraph B, which treats the use of marijuana as doping only if there is an agreement between the IOC and the relevant international federation to that effect. There is no such agreement in this case. Hence, the decision of the IOC Executive Board sanctioning R. for the presence of marijuana metabolites in his urine lacks any basis. In this respect, the Panel entirely subscribes to the conclusion reached by Mr. Hodler at the end of the following exchanges:
Question of the Panel: "Given all of the things you have said, and given the recognized role of your federation under ... the Medical Code, what is your view as to what should be done to this athlete in these circumstances?"
Hodler: "For us it is not doping, because as long as it is not doping for the IOC, it cannot be for us, because we have said in all matters of doping we follow exactly the IOC. That is our basic principle. I understand that

my representative last night has stressed that fact. We are only considering as doping any action of taking of products which is considered doping by the IOC”.

Question of the Panel: “You do not favor this sanction?”

Hodler: “No”.

24. By way of significant confirmation of our reasoning we refer to the Drug Formulary Guide for the XVIII Olympic Winter Games which was issued by the Nagano Olympic Organizing Committee and widely distributed prior to the Games. The Guide states that it is intended “*for the members of the NOCs and the Olympic Family*” (page 3) and that one of its “primary objectives” is to inform “team physicians” about the “status” of drugs “*such as substances the IOC Medical Commissions prohibits or restricts*” (page 5). The Guide then goes on to explain that marijuana is not listed as a prohibited substance, but describes it in the discussion of restricted substances as one that “*should be used cautiously*” (page 12). Without entering into an analysis of the division of authority in policy-making with respect to drugs, and without considering whether the IOC may consistently with good faith act in contradiction with such a clear statement by the Nagano Olympic Organizing Committee, the Panel takes the view that the Drug Formulary Guide reflects a correct interpretation of the IOC Medical Code under which the sanctions imposed on R. cannot stand.
25. Although it is not necessary to our decision, we note that the IOC representatives confirmed that Chapter II, article IV of the Code, which generally makes doping a strict liability offense, does not apply to positive tests for marijuana and other substances described in Chapter II, article III. Thus, if contrary to the express declaration of Hodler, there had been an IOC/FIS agreement to test for marijuana in R.’s event, a substantial question would still exist whether passive inhalation of second hand marijuana smoke could constitute “*the administration of substances belonging to prohibited classes of pharmacological agents*” pursuant to the Code’s definition of doping in Chapter II, paragraph I.
26. In reaching our result, we do not suggest for a moment that the use of marijuana should be condoned, nor do we suggest that sports authorities are not entitled to exclude athletes found to use cannabis. But if sports authorities wish to add their own sanctions to those that are edicted by public authorities, they must do so in an explicit fashion. That has not been done here. Indeed, Mr. Hodler expressly affirmed that FIS does not consider cannabis consumption as a doping offense and that although FIS discourages both alcohol and cannabis consumption it has never positively enacted specific prohibitions with respect to either. The Panel recognizes that from an ethical and medical perspective, cannabis consumption is a matter of serious social concern. CAS is not, however, a criminal court and can neither promulgate nor apply penal laws. We must decide within the context of the law of sports, and cannot invent prohibitions or sanctions where none appear.
27. We have been told that the decision to sanction R. was reached after difficult deliberations at the level of the IOC Executive Board as well as at that of its Medical Commission. Our own decision is not difficult. Although we have taken pains to explain our reasoning in some detail, and although we understand that the ethical aspects of the question have given pause as to appropriate sanctioning policies – and may result in further reflection in this regard – the

existing applicable texts leave us no alternative whatsoever. It is clear that the sanctions against R. lack requisite legal foundation.

28. Finally, the Panel is concerned that R. should not suffer from any needless embarrassment on account of misunderstandings or distortions of the factual circumstances of this matter. His performance should not be tarnished by any suggestion that he deserved his punishment but is being saved by a technicality. R. has affirmed that he has not ingested cannabis since April 1997, and that any exposure he has had to it since then was second hand. The Panel emphasizes that these facts have not been challenged by either the FIS or the IOC. R. has not been accused of being a current cannabis user, but of having residual traces in his urine. For the reasons given above, this is not a punishable offense under the applicable rules.

The CAS ad hoc Division rules:

1. The IOC Executive Board's decision of 11 February 1998 is reversed.
2. No costs are awarded.
3. The decision shall be subject to immediate publication.