SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)

IN THE MATTER OF THE CANADIAN ANTI-DOPING PROGRAM

AND IN THE MATTER OF AN ANTI-DOPING RULE VIOLATION BY AUSTIN DENMAN

No: SDRCC DT 13-0203
(Doping Tribunal)

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)

CANOE KAYAK CANADA (CKC)

– and –

AUSTIN DENMAN
(ATHLETE)

- and –

GOVERNMENT OF CANADA
WORLD ANTI-DOPING AGENCY (WADA)
(OBSERVERS)

REPRESENTATIVES FOR CCES:	JUSTIN SAFAYENI DAVID LECH LUISA RITACCA
REPRESENTATIVE FOR CKC:	CHRISTINE BAIN SCOTT LOGAN
REPRESENTATIVE FOR THE ATHLETE:	ANDREW CARLSON JEFF HOUSER
ARBITRATOR:	RICHARD H. McLAREN, C.ARB

AWARD

Introduction:

1. This is an expedited doping tribunal hearing pursuant to sections 7.23-7.26 of the Doping Violations and Consequences Rules of the Canadian Anti-Doping Program 2009 (the "CADP").[1]

2. The instant matter concerns whether and to what extent, if required, the Athlete should be sanctioned with a first anti-doping rule violation ("ADRV"). The Athlete returned an Adverse Analytical Finding ("AAF") out-of-competition for terbutaline, but has since obtained a Therapeutic Use Exemption ("TUE") for that particular Prohibited Substance.

The Parties:

3. The CCES is the body responsible for administering the CADP.

4. The CKC is the national governing body for the sport of kayaking in Canada. The representatives of CKC made no submissions in this matter, but did attend the hearing.

5. The Athlete is a 22 year old member of the CKC who competes in the sport of sprint kayaking. He was at all times subject to the CADP.

Background:

6. On July 19, 2013, the Athlete was selected for an out-of-competition doping control sample of both blood and urine at Lac-Beauport, Quebec. According to the WADA-Accredited Laboratory Certificate of Analysis, his sample gave rise to an AAF for the presence of terbutaline, a *Prohibited Substance* according to the 2013 WADA Prohibited List incorporated under the CADP.

7. On December 10, 2013, the Athlete was notified of the AAF. In that notification, CCES proposed a two-year sanction on the Athlete for the ADRV. The Athlete was subsequently able to obtain a valid TUE for the use of terbutaline.

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[1] All capitalized and italicized words or acronyms take their defined meaning from the CADP 2009; or, if not found there, then from the text herein.

8. The Athlete accepted a voluntary provisional suspension effective from December 16, 2013.

9. On March 5, 2014, CCES sent an amended notification to the Athlete, and based on evidence received, including the fact that the Athlete received a TUE for terbutaline, proposed a two month sanction.

Procedure:

10. On December 16, 2013, an administrative call took place to further detail and outline the Doping Tribunal process. Present on the call, in addition to SDRCC staff, were Jeff Houser (a representative for the Athlete), the Athlete and Kevin Bean of the CCES.

11. On April 3, 2014, the parties were advised of the confirmation of their jointly agreed upon appointment of Richard H. McLaren as Arbitrator.

12. On April 4, 2014, the parties were notified that a preliminary meeting had been scheduled for April 10, 2014.

13. The preliminary meeting took place as scheduled. In addition to members of the SDRCC staff, present on the call were: the Arbitrator, Erin McDermid, associate lawyer with the Arbitrator, Andrew Carlson for the Athlete, Kevin Bean from CCES and its counsellor, Justin Safayeni, Scott Logan of CKC and George Taylor, an Observer. During the call, the parties agreed to a timetable for submissions, and for a date for hearing on May 9, 2014.

14. Subsequent to the preliminary meeting, on April 11, 2014 at approximately 3:30 p.m. EDT, Andrew Carlson, on behalf of the Athlete, sent a letter to the parties and the Arbitrator requesting an expedited hearing schedule. The reason for the proposed amendment was that the Athlete had been given an invitation to participate in team trials on April 25, 2014, and if possible, he would like a Decision that would enable him to participate.

15. Following exchanges of correspondence between the parties and the Arbitrator, it was agreed to have the hearing on April 22, 2014, with an oral decision rendered by April 23, 2014 with these written reasons to follow.

Jurisdiction:

16. The CKC is a Sport Organization that is subject to the CADP which is mandated by the World Anti-Doping Code (the "WADC") and as such is bound by the provisions of the CADP.

17. The Athlete is subject to and bound by the provisions of the CADP by virtue of his membership in and athlete's agreement with, the CKC.

18. The CADP provides that hearings to determine whether an anti-doping rule violation has been committed shall be conducted by a single arbitrator sitting as the Doping Tribunal. The Doping Tribunal is constituted and administered by the SDRCC, pursuant to section 7.87 of the CADP.

The Evidence:

19. The Athlete testified on his own behalf. His evidence is summarized as follows:

    - He began competitive kayaking in 2008, when he was 16 years' old;
    - His first international event was the 2012 World Cup Tour, where he placed third in the K2 200 B-Final;
    - He is hoping to make CKC's World Cup team this year;
    - He has suffered from asthma since the age of 10 or so;
    - He believes the sport should be fair and ethical and agrees that as an athlete he has certain responsibilities regarding anti-doping (included in that responsibility is the duty to check what he is taking);
    - He has never intentionally cheated and never intended to enhance his performance (or mask the use of a performance enhancing substance) by taking steroids, drugs, or other banned substances;

- He understands the active ingredient in Bricanyl (his asthma medication) is terbutaline, and that terbutaline is a banned substance;

- He further understands that because terbutaline is a banned substance, he needs a TUE to use it;

- He has at all times tried to be fully up front and honest with CKC and CCES regarding his asthma medication. He has never tried to hide the fact that he is taking Bricanyl;

- As of April 25, 2013; he was aware of the requirement to obtain a TUE for his use of Bricanyl. Prior to that, he had never checked to see if Bricanyl contained Prohibited Substances;

- He had a busy training schedule after that time and because of that, he did not turn his mind to complete the TUE application, nor did he take any steps to arrange for an appointment with his family doctor;

- His focus prior to the AAF was on his training and his busy competition schedule. He was not trying to cheat or get away with cheating. During his brief period of time at home, he simply forgot to deal with the matter of the TUE;

- When he applied for his TUE, he did not expressly request a retroactive TUE, but he believed that was what he was applying for. The intent all along when he sought the TUE was to resolve the AAF;

- The TUE process was long and frustrating and confirmed to him that even if he had applied for a TUE in advance of the AAF, he never would have had the TUE in place in time.

20. The CCES called the evidence of its Manager of Compliance and Procedures, Kevin Bean. Mr. Bean testified that:

    - CCES has a TUE Committee (the "TUEC");

- The TUEC is responsible for reviewing and considering applications for TUEs in accordance with the criteria set out in Article 4.1 of the WADA Code's International Standard on TUEs;

- The TUEC is not responsible for setting the "effective date" of the TUE certificates. As such, they do not evaluate whether a TUE ought to have retroactive effect;

- The TUEC solely reviews the medical evidence to determine whether it accords with the requirements of the International Standard. Once that review is performed, it is the duty of CCES to make a determination as to whether any TUE should be of retroactive effect, and this evaluation is performed by the CCES Results Management Group;

- It is not the practice of the CCES to ask the TUE applicant whether he or she intends to apply for a TUE with retroactive effect. CCES will invite such evidence if the circumstances of a particular case appear to engage the requirements for retroactivity as set out in the International Standard;

- CCES did not understand the Athlete's application for TUE to be an application for a TUE with retroactive effect, nor did CCES consider this a case that met the requirements of the International Standard in that respect;

- CCES nevertheless waited a significant period of time before asserting an ADRV against the Athlete because it believed that acquisition of a TUE would go a long way to reducing the Athlete's degree of fault under the CADP;

- When the CCES Results Management Group became aware that the Athlete was seeking a TUE with retroactive effect, they considered whether he met the requirements for retroactivity and determined that he did not;

- When the CCES approved the TUE, he inadvertently instructed staff to insert an effective date of July 19, 2013. As soon as he realized his mistake, he immediately took steps to correct it by issuing an Amended Certificate.

The Submissions:

21. The submissions that follow are a summary of the parties' submissions. While the Arbitrator has considered all of the submissions of the parties, reproduced below, are only those submissions the Arbitrator deems necessary to support his reasoning.

a. Athlete Submissions:

22. The Athlete submits that he did not commit an ADRV on the basis that he was granted a valid and applicable TUE on July 19, 2013, or in the alternative, that he should have been granted a *Retroactive TUE*. In the further alternative, even if the Athlete is found to have committed an ADRV, he submits that: given the presence of terbutaline in his system was not intended to enhance his sport performance, or mask the *Use* of a performance enhancing substance; and he has since been granted a TUE, he is entitled to a complete elimination of the period of *Ineligibility* as provided for in Rule 7.42 and should be sanctioned by reprimand only.

23. The Athlete states that the CADP is on the face of it, internally inconsistent and that while it provides for application by an Athlete for TUEs, unlike the WADA Code (the "Code") which provides that a TUE is a full answer and defence to commission of an ADRV for *Presence* of a particular Prohibited Substance, the CADP does not.

24. The Athlete submits that the CADP only provides for the application of TUEs to AAFs at the results management phase where upon receipt of an AAF, the CCES does not and in fact, cannot assert an ADRV against an athlete who either: (A) was granted an applicable TUE prior to his or her AAF, or (B) was not granted an applicable TUE prior to the AAF, but who the CCES considers will be granted a TUE. [2] In particular, the CADP provides, in relevant part, that upon receipt of an "A" Sample AAF, the CCES shall conduct an initial review to determine whether:

[2] See Rules 7.63 and 7.66 CADP.

an applicable TUE has been granted or will be granted as provided in the International Standard for Therapeutic Use Exemptions or whether a medical review will be granted. If an applicable TUE has been granted, ***or will be granted****, or if a medical review will be granted* ***no further action will be taken****, provided the A Sample Adverse Analytical Finding is consistent with the TUE and the medical review. [Emphasis Athlete]*

25. Unlike the WADA Code, the CADP does not provide for a defence to an ADRV where the Athlete obtains a valid TUE. The effect of this is in essence, a procedural loophole in the CADP where an Athlete who is granted a TUE after CCES had already determined that the Athlete would not be granted one, is then prevented from asserting a valid defence to the ADRV on the basis of obtaining a TUE.

26. Furthermore, the Athlete states that Rule 7.63 cannot be contemplating a *Retroactive TUE* in accordance with the Rules, because if that were the case, it could simply have used the term Retroactive TUE, but it did not. Instead, the CADP purposely uses the phrase "*or will be granted*" which must mean some other form of TUE.

27. According to the Athlete, because the language of the rules is ambiguous, the provisions of the CADP must be interpreted in favour of the Athlete and this should be borne in mind when deciding the issues at play in this case.

28. The Athlete submits that following his AAF, he made an application for and was granted a valid TUE by the TUE Committee effective July 19, 2013 (the date of his *Sample* collection). This should be a complete answer to the assertion of the ADRV.

29. Contrary to the CCES' position, the Athlete states that the CCES cannot overrule the TUE Committee and simply assert the date outlined in the TUE was a mere typo and void the TUE. At all times, throughout the TUE application process, the Athlete considered that he was applying for a Retroactive TUE. At no time was he advised there was a difference between an application for a regular, going-forward TUE and an application for a *Retroactive TUE*. Indeed, CCES admits there is no difference in the form to be submitted by an Athlete seeking to obtain a *Retroactive TUE*.

30. As further proof that the TUE Committee did indeed provide him with a TUE with an effective date of July 19, 2013, the Athlete notes the expiration date labelled on the original Certificate is July 18, 2017. While one typo may be possible, two typos on the same form make it clear that the TUE Committee had indeed intended to give the Athlete a *Retroactive TUE.*

31. In the alternative, the Athlete submits that he should have been granted a TUE with an effective date of July 19, 2013.

32. Part 4.3(b) of the *International Standard for TUEs* provides:

> *An application for a TUE will not be considered for retroactive approval except in cases where:*
>
> *b. Due to exceptional circumstances, there was insufficient time or opportunity for an applicant to submit, or a TUEC to consider, an application prior to Doping Control.*

33. The Athlete states that he had insufficient time or opportunity to apply for a TUE prior to his *Doping Control* on July 19, 2013.

34. By April 25, 2013, the Athlete knew he required at TUE for his use of terbutaline, but between then and his *Sample* collection on July 19, 2013, he had a very busy training and competition schedule and his focus was elsewhere.

35. Regardless of the above, even if the Athlete had applied for a TUE prior to his Doping Control, given the length of time it actually took him to obtain a valid TUE, it is clear he would not have obtained a TUE in advance of his July 19, 2013 *Sample*.

36. Lastly, in accordance with Rules 7.42 and 7.43 of the CADP, if the Athlete is found to have committed an ADRV, he should be sanctioned by reprimand only.

37. Rule 7.42 provides that where an Athlete can establish how a *Specified Substance* had entered his body and that it was not intended to enhance sport performance or mask the use of a performance enhancing substance, the Athlete is entitled to an elimination or reduction of the standard two year period of *Ineligibility*. The Athlete has met both of these criteria, and therefore the only determination is his degree of fault.

38. In this case, the Athlete's only "fault" is his purported failure to apply for a TUE promptly. In assessing his degree of fault, the Arbitrator should look to various other situations which call for a reduction or elimination of a sanction under the CADP.

39. There are no hard and fast rules or deadlines in the *International Standard* for TUEs; the rules simply provide that they are "encouraged" to apply no less than 30 days before an *Event*. This obviously does not apply to the present case where it was no advance notice out-of-competition testing.

40. In light of the above, the Athlete submits that his degree of fault is on the absolute lowest of the fault spectrum and does not warrant a two month sanction. Accordingly, the Athlete requests that if the Arbitrator finds he committed an ADRV, he be sanctioned with a reprimand only.

b. <u>CCES Submissions</u>:

41. The CCES submits that in the circumstances of this case, the appropriate sanction is a two (2) month period of *Ineligibility* under Rules 7.42 and 7.43.

42. According to the CCES, only *Retroactive TUEs* can have retroactive effect. Pursuant to the CADP, the Code, the International Standard for TUEs, and the WADA Therapeutic Use Exemption Guidelines, the assertion of an ADRV by CCES is not affected by a TUE that an Athlete acquires after an AAF, unless that TUE is a *Retroactive TUE*. Furthermore, a Retroactive TUE can nevertheless be relevant to the issue of sanction in an AAF.

43. No fair reading of the CADP can logically support the Athlete's interpretation of the TUE provisions. The provisions relied upon by the Athlete clearly contemplate TUEs with retroactive effect. However, what they do not provide is that every TUE acquired after an AAF will serve to retroactively insulate an athlete from a previously asserted ADRV. There is a clear distinction between regular, going-forward TUEs granted in the ordinary course, and *Retroactive TUEs*. A *Retroactive TUE* is defined as a "*[TUE] approved by a [TUEC] based on a documented medical file <u>after</u> a laboratory has reported an [AAF].*" [Emphasis CCES], while a TUE is clearly defined as one obtained before an AAF. Accordingly, the only logical conclusion is that where the provisions of the CADP require

that the CCES take no action where TUEs "*will be granted*" is that they are referencing *Retroactive TUEs*. There is no third category of TUEs as suggested by the Athlete and the CCES knows of no decision that would support the Athlete's interpretation.

44. The CCES states that no *Retroactive TUE* was granted in this case and none was ever contemplated. According to practice of the CCES, the TUE Committee does not consider the retroactivity of a TUE and in fact does not date the Certificate. Rather, this is the function of the CCES Results Management Group. The Original Certificate that bore the date of July 19, 2013 was issued in error. To hold otherwise would be to accept the proposition that CCES cannot fix an inadvertent slip made with respect to the effective date on a TUE certificate within 48 hours of that error being made. Furthermore, in this particular situation, the Athlete did not even request the relief that was purportedly granted by error.

45. At no point did the CCES intend to issue a TUE with retroactive effect, nor did the CCES consider that the Athlete had applied for a *Retroactive TUE*. To disallow the CCES to fix an inadvertent mistake in these circumstances would provide the Athlete with a windfall at the integrity of the anti-doping regime.

46. The CCES further submits that the requirements for a *Retroactive TUE* are not met. The Athlete accepts that he does not meet the requirements for a *Retroactive TUE* under 4.3(a) of the International Standard; however the requirements under 4.3(b) are also quite high and will only be met in exceptional circumstances. The Commentary in the *International Standard* provides among other things that circumstances requiring expedited consideration of an application for a TUE due to imminent competition are infrequent. The Guidelines likewise state that circumstances are exceptional when, for example, a TUE cannot be granted in time through no fault of the Athlete. The Guidelines go on to state that the case of a normally healthy Athlete suddenly affected by a significant medical condition some days prior to an *Event*, and unable to request a TUE, may be considered exceptional.

47. It is clear, given the language of these documents, that *Retroactive TUEs* are granted in exceptional circumstances only; circumstances where it would have been impossible or

beyond all reasonable expectation for the Athlete to submit a full application for a TUE prior to *Doping Control*. This is not such a case.

48. The Athlete has been a carded Athlete since October 2012. Since February 2013, he was training for and competing in *Events*. While it is agreed that he was away on a frequent basis for competitions and events, he spent at least 35 days in his hometown. The Athlete made no attempt to apply for a TUE until notification of his AAF. Circumstances of this nature are not unusual or exceptional for athletes at this level. The Athlete was not experiencing a significant medical condition, nor was he subjected to a sudden or unexpected event.

49. Athletes have strict personal duties to ensure that no *Prohibited Substance* enters their system. This is a bedrock principle of the anti-doping regime. As part of this duty, athletes must also ensure that they check for *Prohibited Substances* before ingesting anything.

50. The Athlete has failed to establish that it would have been impossible or beyond all reasonable expectations for him to submit a full application for a TUE prior to *Doping Control*.

51. In particular, this Tribunal ought to have regard to the fact that:

- The Athlete ought to have been aware of the requirement to obtain a TUE for years given that he competed in the Canoe/Kayak National Championships in 2010, 2011 and 2012 (in addition to other International Events over the course of 2012 and 2013);

- The Athlete had actual knowledge of the requirement to obtain a TUE for terbutaline since at the very latest, April 25, 2013;

- The Athlete had 86 days between the latest date on which he gained actual knowledge of the TUE requirement and his doping control test on July 19, 2013;

- The Athlete had 117 days between the latest date on which he gained actual knowledge of the TUE requirement and his notification of the AAF;

- He spent at least 35 days at home in Dartmouth, Nova Scotia.

52. As to the matter of sanction, CCES admits the Athlete has a reduced degree of fault and it is for this reason that it submits that a fair and proportionate sanction is a two-month period of *Ineligibility*.

53. The CCES submits that in assessing the degree of fault, the relevant inquiry is the Athlete's departure from the "expected standard of behaviour." It is a rare case where the period of *Ineligibility* would be eliminated entirely. The Athlete has a personal duty to ensure that no *Prohibited Substance* enters his system.

54. The Tribunal in assessing the appropriate degree of fault in this case should have regard to the following factors:

- The Athlete was not faced with an unexpected or sudden medical condition. Rather, he has suffered and been treated for asthma since childhood;
- The Athlete has been an elite, national team athlete since October 2012;
- The Athlete has competed in numerous National Championships and *International Events* since 2010;
- The Athlete knew of the need to obtain a TUE since April 25, 2013 or so;
- The Athlete failed to declare his use on his *Doping Control Form*;
- The Athlete did not take any steps to apply for a TUE until his notification of an AAF on August 19, 2013;
- The Athlete spent over 35 days at home (near his doctor) between April 25, 2013 and the notification of the AAF.

55. The CCES states that it is aware of no other factually similar cases where the Athlete has received only a reprimand and relies on the following cases in support of its position:

Re: Dos Santos, decision by Fédération International de Gymnastique Presidential Commission, 27 January 2010
Re: Bramley, decision of the Sports Tribunal of New Zealand 20 June 2011
Re: Billing, decision of FEI Tribunal, 5 May 2011
Re: Boswell, uncited

56. In light of the above considerations, the CCES submits that a fair and proportionate sanction is 2 months' *Ineligibility* commencing on December 16, 2013.

c. <u>Reply of the Athlete:</u>

57. In reply, the Athlete submits that having reviewed the CCES submissions, it is apparent that the TUE Committee that decided the Athlete's TUE was not effectively constituted and was contrary to the applicable *International Standard.* Consequently, the Athlete's TUE application was never properly considered for retroactive approval. In particular, the TUE Committee was not free from conflicts of interest or political responsibility within CCES.

58. The Athlete submits that Mr. Bean's Affidavit makes it abundantly clear that the TUE Committee was not independent, and rather consisted of the CCES Results Management Group, which included CCES' Manager of Compliance and Procedures, CCES' General Counsel, and the Director of CADP. These are also of course, the individuals pursuing the case against the Athlete in this instance.

59. According to the Athlete, the CCES' flawed practices and procedures regarding *Retroactive TUEs* raise a reasonable apprehension of bias. The International Standard says nothing to suggest that the consideration or determination of a Retroactive TUE is to be determined by anyone other than the properly constituted, independent TUE Committee appointed under Part 6.0. The Athlete states that the practices and procedures of the CCES raise a reasonable apprehension of bias in that:

- Contrary to *the International Standard*, the *Retroactive TUE* was not decided by a properly constituted TUE Committee;

- The determination as to whether a *Retroactive TUE* ought to be granted was made by the CCES Results Management Group;

- It appears that the CCES Results Management Group only considered the Athlete's request for a *Retroactive TUE* after the CCES had asserted the ADRV and proposed sanction against him;

- The determination of the retroactivity of the TUE was made by the same individuals who are now prosecuting the Athlete;

- In making the decision that the Athlete's TUE is not retroactive, the CCES effectively has determined that the Athlete committed an ADRV.

Relevant Provisions:

60. The relevant provisions of the CADP 2009 are as follows:

> ***5.0 Therapeutic Use Exemption and Medical Review Rules***
>
> *These Rules describe two distinct processes. Each process is designed for a specific group of Athletes. Athletes may obtain permission to use otherwise prohibited substances and/or prohibited methods for therapeutic purposes by means of a Therapeutic Use Exemption or by means of a medical review. Elite Athletes defined in Rule 5.2 must strictly comply with WADA's International Standard for Therapeutic Use Exemptions. All other Canadian Athletes may obtain a medical review to validate their therapeutic use of prescription medications.*
>
> *All Athletes are advised to declare all of their medications or the substances they are consuming on the Coping Control Form at the time of testing.*
>
> *5.1 This Rule recognizes, adopts and applies to the CANADIAN ANTI-DOPING PROGRAM WADA's International Standard for Therapeutic Use Exemptions (TUEs) as it may exist from time to time. [Code Article 4.4]*
>
> *The current version of this document can be downloaded at:*
> - *WADA International Standard for TUEs: www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organziations/International-Standards/International-Standard-for-Therapeutic-Use-Exemptions/*

7.0 Doping Violations and Consequences Rules

Commencement of Ineligibility Period

7.11 Except as provided below, the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility or, if the hearing is waived, on the date Ineligibility is accepted or otherwise imposed. [Code Article 10.9]

7.12 Where there have been substantial delays in the hearing process or other aspects of Doping Control not attributable to the Athlete or other Person, the body imposing the sanction may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. [Code Article 10.9.1]

7.13 Where the Athlete or other Person promptly (which, in all events, for an Athlete means before the Athlete competes again) unequivocally admits the anti-doping rule violation in writing after being confronted with the anti-doping rule violation that is being asserted by the CCES, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Rule is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed. [Code Article 10.9.2]

Presence in Sample

7.23 The presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Sample is an anti-doping rule violation. [Code Article 2.1]

SANCTIONS ON INDIVIDUALS

Imposition of Ineligibility for Prohibited Substances and Prohibited Methods

7.38 The period of Ineligibility imposed for a first violation of Rules 7.23-7.27 (Presence), Rules 7.28-7.30 (Use or Attempted Use) and Rules 7.34-7.35 (Possession) shall be two (2) years Ineligibility, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Rules 7.42-7.43 (Specified Substances) and Rules 7.44-7.48 (Exceptional Circumstances), or the conditions for increasing the period of

Ineligibility, as provided in Rules 7.49 (Aggravating Circumstances) are met. [Code Article 10.2]

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

7.42 Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Rule 7.38 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years' Ineligibility.

7.43 To justify any elimination or reduction under Rule 7.42, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the Doping Tribunal the absence of an intent to enhance sport performance or mask the Use of a performance enhancing substance. The Athlete or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility. The Athlete or other Person shall have the onus of establishing that his or her degree of fault justifies a reduced sanction. [Code Article 10.4]

RESULTS MANAGEMENT

Initial Review Regarding Adverse Analytical Findings

7.63 Upon receipt of an A Sample Adverse Analytical Finding, the CCES shall conduct a review to determine whether:

a) an applicable TUE has been granted or will be granted as provided in the International Standard for Therapeutic Use Exemptions or whether a medical review will be granted. If an applicable TUE has been granted, or will be granted, or if a medical review will be granted no further action will be taken, provided the A Sample Adverse Analytical Finding is consistent with the TUE and the medical review;

b) there is any apparent departure from the Doping Control Rules or the laboratory analysis that caused the Adverse Analytical Finding; or [Code Article 7.1]

c) *there is any other possible anti-doping rule violation associated with the Adverse Analytical Finding. [Code Article 7]*

If necessary, and with notice to the Athlete, the CCES may have the B Sample analyzed as if requested by the Athlete in accordance with Rule 7.66.

Notification After Initial Review Regarding Adverse Analytical Findings

7.66 If the initial review under Rule 7.63 does not reveal an applicable TUE or a possible TUE or a departure that caused the Adverse Analytical Finding, the CCES shall promptly issue a notice to the Athlete, the Doping Tribunal, the relevant Sport Organization(s), WADA and the Government of Canada of:

a) *the Adverse Analytical Finding and whether the CCES will assert an anti-doping rule violation;*
b) *the anti-doping rule the CCES asserts was violated;*
c) *the consequences(s) of the asserted anti-doping rule violation;*
d) *the Athlete's right to promptly request the analysis of the B Sample so that the B Sample may be analysed within the period specified in the International Standard for Laboratories or, failing such request, that the B Sample analysis may be deemed waived;*
e) *the right of the Athlete and/or the Athlete's representative to attend the B Sample opening and analysis if such analysis is requested;*
f) *the Athlete's right to request copies of the A and B Sample laboratory documentation package which includes information as required by the International Standard for Laboratories;*
g) *the hearing procedure to determine whether an anti-doping rule violation has occurred and the consequences of the violation; and*
h) *the Athlete's right to waive the hearing procedure, acknowledge an anti-doping rule violation and accept the consequence(s) of the violation. [Code Article 7.2]*

61. The relevant provisions of the International Standard of Therapeutic Use Exemptions are:

4.3 An application for TUE will not be considered for retroactive approval except in cases where:

a. *Emergency treatment or treatment of an acute medical condition was necessary, or*

b. Due to exceptional circumstances, there was insufficient time or opportunity for an applicant to submit, or a TUEC to consider, an application prior to Doping Control.

[Comment: Medical emergencies or acute medical situations requiring administration of an otherwise Prohibited Substance or Prohibited Method before an application for a TUE can be made, are uncommon. Similarly, circumstances requiring expedited consideration of an application for a TUE due to imminent competition are infrequent. Anti-Doping Organizations granting TUEs should have internal procedures that permit such situations to be addressed.]

62. The relevant provisions of the World Anti-Doping Code are:

4.4 Therapeutic Use

WADA has adopted an International Standard for the process of granting therapeutic use exemptions.

Each International Federation shall ensure, for International-Level Athletes or any other Athlete who is entered in an International Event, that a process is in place whereby Athletes with documented medical conditions requiring the Use of a Prohibited Substance or a Prohibited Method may request a therapeutic use exemption. Athletes who have been identified as included in their International Federation's Registered Testing Pool may only obtain therapeutic use exemptions in accordance with the rules of their International Federation. Each International Federation shall publish a list of those International Events for which a therapeutic use exemption from the International Federation is required. Each National Anti-Doping Organization shall ensure, for all Athletes within its jurisdiction that have not been included in an International Federation Testing Pool, that a process is in place whereby Athletes with documented medical conditions requiring the Use of a Prohibited Substance or a Prohibited Method may request a therapeutic use exemption. Such requests shall be evaluated in accordance with the International Standard for Therapeutic Use Exemptions. International Federations and National Anti-Doping Organizations shall promptly report to WADA through ADAMS the granting of any therapeutic use exemption except as regards national-level Athletes who are not included in the National Anti-Doping Organization's Registered Testing Pool.

WADA, on its own initiative, may review at any time the granting of a therapeutic use exemption to any International-Level Athlete or

national-level Athlete who is included in his or her National Anti-Doping Organization's Registered Testing Pool. Further, upon the request of any such Athlete who has been denied a therapeutic use exemption, WADA may review such denial. If WADA determines that such granting or denial of a therapeutic use exemption did not comply with the International Standard for Therapeutic Use Exemptions, WADA may reverse the decision.

If, contrary to the requirement of this Article, an International Federation does not have a process in place where Athletes may request therapeutic use exemptions, an International-Level Athlete may request WADA to review the application as if it had been denied.

Presence of a Prohibited Substance or its Metabolites or Markers [Article 2.1], Use or Attempted Use of a Prohibited Substance or a Prohibited Method [Article 2.2], Possession of Prohibited Substances and Prohibited Methods [Article 2.6] or Administration or Attempted Administration of a Prohibited Substance or Prohibited Method [Article 2.8] consistent with the provisions of an applicable therapeutic use exemption issued pursuant to the International Standard for Therapeutic Use Exemptions shall not be considered an anti-doping rule violation.

63. The relevant provisions of the SDRCC Code are as follows:

6.17 Scope of Panel's Review

The Panel shall have full power to review the facts and the law. In particular, the Panel may substitute its decision for:

(i) the decision that gave rise to the dispute; or

(ii) in case of Doping Disputes, the CCES' assertion that a doping violation has occurred and its recommended sanction flowing therefrom,

and may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.

7.1 Application of Article 7

In connection with all Doping Disputes and Doping Appeals, the specific procedures and rules set forth in this Article 7 shall apply in addition to the rules specified in the Anti-Doping Program. To the extent that a procedure or rule is not specifically addressed in this Article 7 or in the Anti-Doping Program, the other provisions of this Code shall apply, as applicable.

Findings of Fact:

64. The Parties filed an Agreed Statement of Facts prior to the Hearing. The salient facts have been set out already in this Award. In making my Award, I rely on the following particular facts:

- The Athlete is an elite carded Athlete who has competed in World and International Championships;
- The Athlete knew, as of April 25, 2013 of the requirements to obtain a TUE;
- The Athlete was home for a total of 35 days between the date he knew he was required to obtain a TUE and the date of his positive finding. He made no attempts during those times to commence an application for TUE. He did not even endeavor to make an appointment with his family physician;
- At the time that he was subject to doping control, the Athlete failed to declare his use of Bricanyl on the Doping Control Form;
- It was not until the Athlete's AAF that he took the steps to obtain his TUE;
- When the CCES issued the Athlete his TUE, it erroneously marked the date July 19, 2013, the date of his Sample Collection;
- The moment CCES became aware of its error, it immediately took steps to rectify it and issue an amended TUE Certificate;
- At no time did the Athlete intend to cheat or gain a competitive advantage through his use of Bricanyl.

Issues:

65. The issues before the Arbitrator are:

(a) whether the Athlete was granted a valid and applicable TUE (with an effective date of July 19, 2013 or otherwise) and therefore did not commit an ADRV;

(b) whether the Athlete ought to be granted a retroactive TUE, with an effective date of July 19, 2013; and/or

(c) if the Athlete is entitled to an elimination of the period of *Ineligibility* as provided for in Rule 7.42 should the sanction be by reprimand only.

DECISION

66. By the time of the hearing, the Athlete had been granted a valid TUE for use of terbutaline. Accordingly, I need not determine whether the Athlete has met the applicable criteria for a TUE. What I must decide is, first, whether a valid TUE was effective as at the date of the AAF; or, alternatively whether a retroactive TUE ought to be considered. If these questions are answered in the negative, I must then determine the applicable sanction.

a. Did the Athlete have a valid TUE effective on July 19, 2013?

67. The Athlete argues that he was granted an applicable TUE on July 19, 2013. His argument is based almost entirely on the fact that the Original Certificate of TUE bore this date. He further relies on an alleged inconsistency in the CADP to argue that a TUE can be back dated in a way other than through the ordinary application for a *Retroactive TUE.*

68. The testimony of Kevin Bean is that at the time the Original Certificate was issued, he was travelling. In instructing his staff to complete the TUE Certificate for the Athlete, he erroneously advised the date should be July 19, 2013. I have found that Mr. Bean got muddled up at the time, and confused the circumstances as between the TUE issue and the medical review process. At no time, according to Mr. Bean, was the CCES contemplating providing a retroactive TUE to the Athlete. Indeed, they did not even consider that he met the required criteria for a retroactive TUE.

69. It is unfortunate that there was an error in issuing the initial certificate. But I do not find that it was an error that caused any prejudice to the Athlete in correcting it. Particularly when the error was corrected so quickly.

70. Furthermore, an organization must be permitted to make corrections to documents that were incorrectly issued. To allow an Athlete to obfuscate his duties under the CADP on the basis of a clerical error that was quickly corrected runs afoul of the spirit and intent of the entire anti-doping regime. While admittedly, anti-doping organizations must also be vigilant in their duties and CCES fell short of perfection here, this is not an error that in my mind, attacks the credibility of the anti-doping program.

71. On the basis of the foregoing, I do not accept that the Athlete had a valid TUE effective on July 19, 2013. In making this finding, I rely on the evidence of Mr. Bean that at no time had the CCES considered this was a *Retroactive TUE* and that the date on the certificate is a mere administrative error and mix up. There is no documentation before me to demonstrate that retroactivity was the intention. The case might be different if it appeared as though CCES had in fact changed its mind. For example, if it were the case that CCES had originally considered approving a retroactive TUE, and then suddenly and without reason decided not to consider it as a retroactive TUE, my view might have been different. The effective date of the TUE is therefore, the date it was approved, that being February 28, 2014.

b. Should the Athlete have been granted a TUE with an effective date of July 19, 2013?

72. In the case of a retroactive TUE, it is generally considered that it is only in rare or exceptional cases that an athlete may receive approval retroactively for use of a *Prohibited Substance*.

73. In particular, the International Standard for Therapeutic Use Exemptions states at section 4.7 that:

> *"An application for a TUE will not be considered for retroactive approval except in cases where:*
>
> *a. Emergency treatment or treatment of an acute medical condition was necessary, or*

b. due to exceptional circumstances, there was insufficient time or opportunity for an applicant to submit, or a TUEC to consider, an application prior to Doping Control, or

c. the conditions set forth under 7.13 apply.

74. The Athlete submits that he meets the conditions in 4.3(b) in that he had insufficient time to apply for a TUE. Regrettably, I cannot agree with this position. To accept the Athlete's position, I must look at all the circumstances and ask myself, does the Athlete's situation amount to exceptional circumstances?

75. As an elite Athlete, Mr. Denman has an obligation to comply with the provisions of the CADP. It is accepted that at the time in question, he had a busy training schedule, but all athletes do. A busy training and competition schedule, in the context of an Athlete of Mr. Denman's class is not tantamount to exceptional circumstances. In fact, to the contrary, it is the norm. To allow Mr. Denman to avoid these obligations by finding that he did not have time to apply when there were periods of time when he was home and could begin the process, would be directly contrary to the spirit and intent of the CADP.

76. Athletes are admittedly held to a high standard. However, they agree to such high standards in signing their Athlete Agreements and when they choose to participate in sport at the highest level. Indeed, even in Mr. Denman's own testimony he acknowledged his responsibility to abide by the CADP and stated that he simply "forgot" to make the application for TUE when he was home. This "forgetfulness" falls well short of the standard imposed on elite level Athletes to ensure they are competing cleanly and abiding by the rules of the sport.

77. I also take note that Section 7.13 of the applicable International Standard provides that failure to declare use of the *Prohibited Substance* on the Doping Control Form at the time of *Testing* will be taken into account in the result management process in the case of application for a *Retroactive TUE.*

78. In this case, the Athlete failed to declare use of his inhaler on the Doping Control Form, despite having recently gone through the CCES standard anti-doping education program; and, despite admitting that as of April 25, 2013, he was aware of his need to apply for a

TUE. Indeed, even the Doping Control Form itself lists and draws attention to the fact that asthma medication would be an appropriate medication for which to declare use.

79. Given the Athlete's failure to declare and his failure to demonstrate he took any active steps to obtain a valid TUE until after being made aware of the AAF, I cannot find that a *Retroactive TUE* ought to be granted in this case.

c. What is the applicable sanction?

80. Given my determinations above, it follows that the Athlete committed an ADRV. It then falls to me to determine the appropriate sanction, keeping in mind the facts of this case.

81. The Athlete clearly suffers from asthma. Terbutaline, the active ingredient in Bricanyl is a *Specified Substance*. Section 7.42 of the CADP provides that where an Athlete can establish how a *Specified Substance* entered his body and that it was not intended to enhance the Athlete's performance or mask the *Use* of a performance-enhancing substance, the period of *Ineligibility* can be, for a first violation, anywhere from a reprimand and no period of *Ineligibility* to a maximum of 2 years' *Ineligibility*.

82. I am satisfied given the Agreed Statement of Facts and the Athlete's testimony that the substance entered his body through the legitimate use of his asthma inhaler and that such use was not intended to enhance his performance. Accordingly, the Athlete can avail himself of the provisions of 7.42.

83. Under section 7.43 of the CADP, in assessing an appropriate sanction and determining whether a reduction in sanction is warranted, I must look to the Athlete's degree of fault. The fact that Mr. Denman was granted this TUE goes a long way to reducing his degree of fault in this matter. This does not end the assessment however.

84. Mr. Denman is an international level athlete. He participated in standard anti-doping education and training in the spring of 2013. He accepts that he has a responsibility to comply with the CADP and that he knew of his responsibility to obtain a TUE at least as of April 25, 2013. He admits that his failure to apply or commence an application for a TUE while he was home was the result of forgetfulness.

85. In addition to his forgetfulness in applying for the TUE, the Athlete also failed to declare his use of the inhaler on his Doping Control Form when he underwent his first doping control. It is important to note that the Doping Control Form reminds the Athlete to declare his use of Bricanyl. In particular the form states: "*I declare the use of the following: i) All prescribed medication taken (e.g. asthma medication and glucocorticosteroids) [...]*" Even in the face of a reminder or warning on the form itself. The Athlete therefore, fell well short of his duties while at the doping control station.

86. Further, the Athlete states in his own evidence that the reason he applied for a TUE when he did was to deal with the ADRV. Therefore, even then, faced with the AAF, the Athlete's sole motivation in applying for the TUE was to avoid the consequences of an ADRV, and not to comply with his responsibility as an athlete.

87. On the basis of all of the foregoing facts and circumstances aforementioned, I simply cannot find that the Athlete is free from fault in this situation. For this reason, I accept the two-month period of *Ineligibility* as proposed by CCES as being fair and proportionate in the circumstances. To find that he is not at fault at all could in my mind, have a detrimental impact on the fight against doping in sport. Athletes must be held to the strictest standard when applying the CADP.

88. The start date of the period of *Ineligibility* shall be December 16, 2013, the date the Athlete voluntarily accepted a provisional suspension. Therefore, this award is declaratory in nature, the period of *Ineligibility* having already expired.

d. Procedural Matter raised in Reply

89. I turn very briefly to the procedural argument the Athlete raised in his Reply. I am persuaded by the arguments of the CCES that this argument is not a matter to be dealt with here. In any event, if there were any procedural errors, or irregularities regarding the CCES's consideration of the retroactivity of the TUE, this being a proceeding *de novo* under the Rules and such procedural errors, if any, are cured by my hearing of the matter and dealing with all the issues.

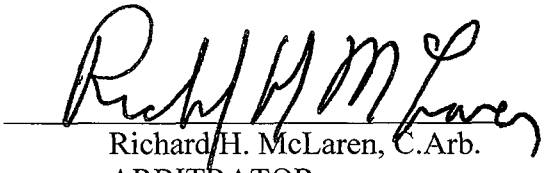
90. Neither party made a request for costs in this matter. Therefore, none will be ordered.

DISPOSITIVE

FOR ALL OF THE FOREGOING REASONS, I DECIDE AND ORDER AS FOLLOWS:

1) The Athlete has committed an Anti-Doping Rule Violation for the Presence of a Specified Substance in his bodily specimen;
2) The Athlete shall be sanctioned with a 2 month period of Ineligibility;
3) Because the Athlete has been serving a provisional suspension since December 16, 2013, I order that the provisional suspension be terminated effective immediately. The Athlete is free to compete.
4) CADP Rule 7.97 provides that the Doping Tribunal may award costs to any party payable as it directs. Neither party has made a request for costs. Accordingly, no such order will be made.

Dated at London, Ontario this 7th day of May, 2014.



Richard H. McLaren, C.Arb.
ARBITRATOR