



Tribunal Arbitral du Sport  
Court of Arbitration for Sport

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**TAS 98/189**

**ARBITRAL AWARD**

rendered by

**THE COURT OF ARBITRATION FOR SPORT**

in the case of

**Michael Dlonne  
and  
US Bobsled & Skeleton Federation (USBSF)**

**Appellants**

represented by David Kurtz, Esq. Hotel Ikemon, Room 610, 1362 Suchiro-Cho  
Nagano

vs.

**Fédération Internationale de Bobsleigh et de Tobogganing (FIBT)**

**Respondent**

represented by Mr. Robert Storey, President, Hotel Kokusai 21, 576 Agata-Machi, Nagano

**Composition of the Panel:**

**Sole Arbitrator:** Mr. Jan Paulsson, attorney, Paris

**Hearing:** 9 February 1998

## BACKGROUND AND PROCEDURE

1. Mr. Dionne tested positive twice for ephedrine\* in connection with an America's Cup bobsleigh competition in Calgary in November 1997. He contends that his ingestion of the prohibited substance was innocent, and invokes in support of this contention a number of circumstances inconsistent with an intent to violate anti-doping rules or to procure an illicit competitive advantage. In essence, he admits to taking vitamin supplements and cold medication in the days preceding the tests and moreover concedes that they contain ephedrine, but states that he did so only to stave off a cold, and that he purchased them over the counter without any reason to believe that they contained a prohibited substance. He also states that he has come recently to the sport and had very little awareness of the risks of taking over the counter products.
2. In light of these circumstances, Mr. Dionne believes that FIBT has sanctioned him too harshly. The sequence of salient events is as follows.
3. On 18 December 1997, FIBT informed USBSF, and through it Mr. Dionne, of the positive tests and invited both USBSF and Mr. Dionne to confirm a convenient date for the counter-control of Mr. Dionne's B samples, which was to take place in Montreal.
4. On 23 January 1998, Mr. Dionne wrote a letter to FIBT explaining the circumstances referred to in paragraph 1.
5. On the same day, his legal counsel wrote an 8-page single spaced letter taking the position that a three-month suspension would violate :
  - the IOC Medical Code
  - the FIBT's own rules, and
  - principles of fairness and proportionality reflected in previous decisions of CAS.
6. Due to extraordinary snowstorms that severely disrupted the testing in Montreal, the B sample analysis could not be carried out until January 26. It confirmed the two positive results.
7. On 28 January 1998, Mr. Dionne's legal counsel forwarded to the FIBT a brief report from Dr. David Black to the effect that the test results were consistent with Mr. Dionne's explanation of the circumstances.

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\* In the interest of simplicity, the expression "ephedrine" is used herein to refer without distinction to a number of related compounds.

8. On 29 January 1998, the FIBT Executive Committee decided to suspend Mr. Dionne for three months starting from 22 November 1997 (the date of his first positive test). This would make Mr. Dionne ineligible for participation in the Nagano Games now under way. By coincidence, the Games end precisely on 22 February 1998.
9. On 6 February 1998, an application was filed before the ad hoc Division of CAS on behalf of both Mr. Dionne and USBSF ("the Application").
10. The Deputy President of the Appeals Arbitration Division of CAS immediately ruled that the Application did not fall within the jurisdiction of the ad hoc Division, on the grounds that the dispute has not arisen during the Olympic Games. At the same time, he appointed me to deal with the application in the framework of the ordinary CAS Rules for Appeal Arbitration, without prejudice to my authority to rule on my own jurisdiction.
11. The Deputy President also ordered a 96-hour stay of Mr. Dionne's suspension so as not to prejudice his possible participation in the Games in the event that his appeal were to succeed.
12. At 17:00 hours on 9 February 1998, the following persons appeared before me in the course of a two-hour hearing :
  - Mr. Michael A. Dionne, for himself
  - Mr. David Kurtz, for Mr. Dionne and for USBSF
  - Mr. Robert Storey, FIBT President
  - Mr. Ermanno Gardella, FIBT Secretary-General
  - Mr. Paul Prozynski, FIBT Vice-President.

### **JURISDICTION**

13. FIBT challenges the jurisdiction of CAS. As stated in paragraph 10, I consider that no issue arises as to the jurisdiction of the CAS ad hoc Division (which has been ruled out), but it remains for me to decide whether I have jurisdiction under the ordinary CAS Rules for Appeal Arbitration.
14. FIBT maintains that Mr. Dionne's appeal must fail because he has not exhausted internal remedies within the FIBT Rules.
15. It is true that CAS R47 provides as follows :

*"A party may appeal from the decision of a disciplinary tribunal or similar body of a federation, association or sports body, insofar as the statutes or regulations of the said body so provide or as the parties have concluded a specific arbitration agreement and insofar as the appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of the said sports body." (Emphasis added.)*

16. Article I 14.6 of the FIBT Rules provides as follows :

*"The FIBT recognises the competence of the Appellate Arbitral Division of CAS as the court of last instance after all internal remedies, including the FIBT Internal Court of Arbitration, have been exhausted."*

17. FIBT declares that it is able and willing to organise an immediate appeal to its Internal Court of Arbitration.
18. FIBT notes that the Appellants have not sought to use this avenue, and concludes that therefore they may not now come before CAS.
19. But the provision of the FIBT Articles of Association that deals with the Internal Court of Arbitration (Article I 14.1) states that :

*"The competence of this Internal Court of Arbitration is any issue exclusive of decisions by..... the Executive Committee..."*

20. The decision challenged by the present appeal was expressly stated (by letter from the Secretary General dated 29 January 1998) to have been rendered by the Executive Committee. Mr. Storey explained that this reference was made inadvertently and in haste, and that actual practice consisted of allowing recourse to the Internal Court of Arbitration.
21. As has been affirmed in previous CAS decisions, imperfectly worded rules or rulings may confuse and prejudice athletes, whose procedural rights are not to be circumscribed by the vagaries of unwritten "practice." In this case, not only did Mr. Dionne have no reason to believe that he should seize the Internal Court of Arbitration, but he was faced with an explicit text which precluded him from doing so.
22. Mr. Storey accepts with commendable candour that the FIBT rules may merit a further review to ensure their coherence. (In this connection, I would note *obiter dictum* that Article I 14.1 of the FIBT Articles of Association may be read as requiring appeals from the Executive Committee to the Congress, which would imply that the Congress's decision on appeal could then be taken onward to CAS. Given the wording of Article 9 of the FIBT Doping Control Regulation as well as

the FIBT's stated intention of operating in harmony with the IOC Medical Code, it may be useful for the FIBT to reexamine and clarify its procedure in this regard.) In the meanwhile, the Appellants' failure to exhaust internal remedies can be no bar to coming before CAS.

### THE MERITS

23. Appellants do not challenge the conclusion that Mr. Dionne committed an infraction. Contrary to the arguments put forward in the Application, they stated at the hearing that they do not criticize the procedure that led to the suspension inasmuch as the representations made by Mr. Dionne and his legal counsel to FIBT were not only considered, but indeed accepted. FIBT does not believe that Mr. Dionne is a cheater; indeed Mr. Storey declares that Mr. Dionne is a fine young man of the kind the Federation is pleased to have participating in the sport.
24. The only issue before me is therefore whether I should reconsider the penalty.
25. It is beyond cavil that I have the authority under CAS R57 to reassess the merits of FIBT's decision. I would however do so only with considerable reluctance. It is in the general interest of athletes that the rules and procedures implemented by their federations be considered as authoritative and legitimate in the absence of a clear showing of injustice. Otherwise the impression could be created that every appeal is likely to bring about a modification of sanctions. This could contribute to a climate of contentiousness and disruption. A federation is likely to understand its sport better than an arbitrator, and thus have a better feeling for the appropriate implementation of its rules; and is likely to know the athletes better than an arbitrator who forms fleeting impressions in the course of a hearing, and thus have a better appreciation of attenuating or aggravating circumstances.
26. It is with this attitude that I now examine the relevant legal rules.
27. Both the IOC Medical Code and the FIBT Doping Control Regulations have been modified to treat cases involving ephedrine with greater leniency, given the prevalence of infractions recognized to be innocent and accidental.
28. Thus, Article III of Chapter IX of the IOC Medical Code provides that for a first offense relating to ephedrine, the athlete is suspended for a maximum of three months, while Article 9.1. of the FIBT Doping Control Regulations imposes "ineligibility ... for three months in the case of a first-time contravention."
29. On behalf of Mr. Dionne, Mr. Kurtz urged me to conclude (i) that the IOC Medical Code had been accepted as binding by the FIBT, (ii) that the concept of a maximum

suspension of three months implied flexibility in light of attenuating circumstances, and (iii) that FIBT's inflexible imposition of a three-month suspension demonstrated that the Federation had not given effect to the attenuating circumstances pleaded by Mr. Dionne and not presently contested by the FIBT.

30. Aply presented though they were, I cannot accept Mr. Kurtz's submissions in this regard. First, it is not clear to me that the FIBT's imposition of a three-month suspension in all cases of first-time offenses relating to ephedrine is inconsistent with the IOC Medical Code. Secondly, it seems in any event that the FIBT showed leniency in imposing the suspension retroactively to run from 22 November 1997 whereas the combined effects of Chapter VI, Article III and Chapter IX, Article III of the IOC Medical Code might have led to a suspension in Mr. Dionne's case running from 26 January 1997.
31. Indeed, Mr. Kurtz graciously conceded that the FIBT's retrodating of the suspension was a goodwill gesture in Mr. Dionne's favor. Equally graciously, Mr. Storey confirmed that such had been his Federation's intent.
32. In the circumstances I am unwilling to disturb the FIBT's decision.
33. But my examination of this matter cannot end there, because this case is singularly affected by the objective circumstance that Mr. Dionne is presently an accredited U.S. Olympic Team member in the on-going Games. I cannot fail to consider the obvious human element that it would be personally demeaning for him to be deprived of his status and credentials, and for his Olympic experience to be interrupted in such an abrupt and distasteful fashion.
34. This problem would not have existed if Mr. Dionne had not presented himself in Nagano. But I do not see how he can possibly be blamed for being here, given the facts that :
  - he had made the Olympic team
  - the decision to suspend him was taken one week before the opening of the Games
  - an appeal from this decision was open to him
  - he diligently pursued this remedy, and
  - the appeal would have lost most of its meaning if he had not put himself in a position to benefit from its possible success.

In other words, I do not imagine that anyone else would have acted otherwise than he did.

35. My decision to uphold the FIBT's decision respects the legitimate authority of the Federation. It also directly protects the interests of other athletes; the FIBT rules are being applied and Mr. Dionne will not be able to compete against them in Nagano.
36. But that in my view is sufficient punishment. Mr. Dionne is not accused of cheating, but of carelessness. The rules in case of a first-time offense call for a limited suspension. The FIBT accepted that there were attenuating circumstances, and applied the three-month suspension retroactively, so that its practical effect was to run less than one month from the date of the FIBT decision. For Mr. Dionne now to be required to leave the Games would be a distasteful additional punishment which was not intended by the FIBT. Mr. Storey has stated that this is not FIBT's wish, and, taking him at his word, I consider that the FIBT should do what it can to ensure that Mr. Dionne is able to enjoy his experience of the Games. There is in this respect no reason to treat Mr. Dionne differently than one would treat any other athlete who has been selected for his or her team but is unable to compete due to happenstance, such as injury or failure to survive preliminary qualifying events.

### **DECISION**

37. The FIBT decision regarding Mr. Dionne dated 29 January 1998 is upheld.
38. In the circumstances, the sanction thus confirmed is not considered per se to affect Mr. Dionne's status as a duly accredited member of the U.S. Olympic Team.
39. The application has not occasioned significant costs. There is no award in that regard.
40. Pursuant to CAS R59, this award shall immediately be made public.

Done in Nagano at 18:00 hours on 10 February, 1998.



Jan Paulsson  
Sole Arbitrator