SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)

October 24, 2012

N^O: SDRCC DT 12-0177

IN THE MATTER OF AN ARBITRATION BETWEEN

CECIL RUSSELL
(CLAIMANT)

AND

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)
SWIMMING NATATION CANADA (SNC)
(RESPONDENTS)

COUNSEL FOR THE CLAIMANT: GARY G. BOYD

REPRESENTATIVE FOR THE RESPONDENT CCES: DAVID W. LECH

REPRESENTATIVE FOR THE RESPONDENT SNC: BENOIT GIRARDIN

ARBITRATOR: RICHARD H. MCLAREN, C.ARB.

AWARD

Introduction:

1. Mr. Cecil Russell ("Russell") made an application for a reduction in his lifetime sanction for a doping infraction (the "Application"). The various participants in this proceeding, the prior procedural history, and the procedure to be followed in this arbitration were set out in the Initial Ruling of 19 May 2012 and are not repeated herein. For the background of this arbitration, reference should be made to that Initial Ruling.

2. The matter is proceeding under the rules of the Canadian Sport Dispute Resolution Code (the "Code") and under Section 1.26 of the 2009 Canadian Anti-Doping Program ("CADP 2009"). In furtherance of establishing the process to hear evidence and to rule on Russell's application for a sanction reduction, a Second Ruling was issued on 29 May 2012. Reference should be made to that Second Ruling and in particular paragraphs 6 through 11 for further background regarding the related prior arbitration and judicial proceedings. It is stated in the Second Ruling at paragraph 46 that:

   > *"... the facts as found in the various arbitration and judicial proceedings to date can be taken by me and the parties in this procedure to be established as facts in this proceeding without my hearing and determining evidence on such matters."*

3. Hearings to receive the evidence in this matter were held in Toronto, Ontario on 10 through 13 September 2012. Closing submissions were heard in Ottawa, Ontario on 19 September 2012.

The Parties:

4. The various participants in this proceeding and the procedures followed to date were set out in the previous Rulings of 19 and 29 May 2012 and need not be repeated herein. The same acronyms are used.

Background:

5. Pursuant to the procedure to be used in this matter as established by the Second Ruling, the parties filed on 13 August 2012, a document titled "*Joint Counsel Submissions on Record Background and Facts*" (the "Joint Submission."). The Joint Submission contains: (i) the historical record; (ii) a summary of the background facts and procedural history; and (iii) agreed upon facts. The relevant parts are set out below:

> 1. *These joint submissions are filed as directed by Arbitrator McLaren in his procedural Order of May 29, 2012 and flowing from the preliminary conference call conducted on June 7, 2012.*
>
> 2. *Comments and findings of fact contained in the earlier arbitral or judicial decisions that form part of the Record and that have not been specifically agreed to herein may be filed separately by the parties. Such comments and findings of fact concern issues that a party may wish to highlight for Arbitrator McLaren and/or may wish to rely on without further proof thereof.*
>
> ***The Record***
>
> 3. *All parties agree that the following arbitral and judicial decisions form the historical Record in this proceeding. All parties intend that these decisions be filed, on consent, with Arbitrator McLaren.*
>
>   - *The initial Case Review decision (1997)*
>   - *The appeal of the Case Review decision (Mew, 1998)*
>   - *Reinstatement decision #1 (Dumoulin, 2000)*
>   - *Reinstatement decision #2 (Mew, 2005)*
>   - *Ontario Superior Court decision (J. Smith, 2007)*
>   - *Reinstatement decision #3 (Mew, 2009)*

Summary of relevant background facts and procedural history

4. *The parties are mindful of the directions given by Arbitrator McLaren in his procedural Order dated May 29, 2012 dealing with the scope of review and what evidence would and would not be considered in this arbitration. Accordingly, all parties agree that portions of the existing Record (see above) accurately and succinctly set out the relevant background facts and procedural history, at least until June 15, 2009. Rather than repeat this material the parties believe that reference to the earlier decisions and the specific paragraphs therein will suffice.*

5. *The parties believe that the following material from the Record sets out the relevant background facts and a brief procedural history:*

    - *Reinstatement decision #2 (Mew, 2005): paragraphs 1-18.*
    - *Reinstatement decision #3 (Mew, 2009): paragraphs 15-19; 122-123.*
    - *In March 2012 Mr. Russell submitted an application to CCES seeking a reduction in his lifetime ineligibility sanction. The application was made to CCES pursuant to the 2009 CADP and specifically relied upon CADP Rule 1.26. Mr. Russell requested a doping penalty reduction hearing before the Doping Tribunal under CADP Rule 7.84. Mr. Russell requested a reduction in his period of ineligibility from lifetime to a period of between 4 and 8 years in accordance with CADP Rule 7.40.*
    - *On the consent of CCES and Mr. Russell the request for a sanction reduction was referred to the SDRCC to be adjudicated. The SDRCC accepted that Mr. Russell's request for a reduction in his sanction was a doping dispute and accordingly opened a case file.*
    - *Arbitrator McLaren was jointly nominated by CCES and Mr. Russell as the arbitrator to sit as the Doping Tribunal.*

- *The national sport governing body for swimming in Canada, Swimming Natation Canada, was added as a proper party to the arbitration.*

- *Various preliminary procedural motions were argued and decided by Arbitrator McLaren including issues related to outstanding cost awards, who was a proper party to the arbitration, the scope of review for the arbitration, which doping rules apply (the current 2009 CADP) as well as dates, timing, disclosure and evidentiary matters.*

- *The arbitration is scheduled to proceed on September 10, 2012 in Toronto, Ontario at an in-person hearing.*

Agreed facts

6. *The parties agree on the following facts:*

- *The CCES and the Board conducting the Case Review Hearing had proper jurisdiction over Mr. Russell at all relevant times.*

- *The investigation, case review and Case Review Hearing were all conducted fairly.*

- *The Board's decision at the Case Review Hearing to determine a doping related violation against Mr. Russell was correct.*

- *The life sanction imposed as a result of the doping related violation was properly imposed.*

- *In March 2004, Mr. Russell pleaded guilty in Arizona to one criminal count as follows: Conspiracy to Possess with Intent to Distribute MDMA. The sentence was a prison term of forty-eight (48) months with supervised release thereafter for three (3) years. In 2009, Mr. Russell testified at the hearing before Arbitrator Mew that the plea was entered into circumstances where Mr. Russell was advised that without the plea he would remain incarcerated for a further 18 months to trial and that his legal expenses would be a further $30,000 to $40,000 U.S. The plea saw Mr. Russell released based on pre-trial time in custody.*

- *Pursuant to the 2009 CADP and relevant jurisprudence, for a first doping violation for Trafficking a lifetime ban is*

excessive as a sanction having regard to the following facts: (i) a criminal conviction for trafficking steroids led to the determination of the doping violation, and (ii) there was no evidence that the steroids that were sold went to athletes in organized sport.

- *Mr. Russell received a Canadian pardon on September 25, 2008.*

6. The matter before me is a reduction of sanction hearing pursuant to Section 1.26 of the CADP.

7. Russell is currently serving a ban that was imposed under a predecessor Canadian anti-doping regime. The actual sanction imposed was a "*lifetime penalty in respect of ...sport eligibility*" under C. 3 of the "*Canadian Policy on Penalties for Doping in Sport*" which is contained in Appendix 5 to the Doping Control Standard Operating Procedures 1994 ("SOP 1994" or the "old rules"). The sanction was imposed as Mr. Russell committed a doping related infraction by importing banned substances.

8. Under the "old rules", Russell had twice applied for reinstatement. Both times he was ultimately unsuccessful. He now applies under the CADP 2009, which states in the relevant section, that where a final decision finding an anti-doping rule violation was rendered prior to January 1, 2009, and the individual is still serving the period of *Ineligibility* as of January 1, 2009, one may apply to the CCES to consider a reduction in the period of *Ineligibility* "in light" of the CADP.

Procedure:

9. On 13 August 2012, Russell filed his will-say statement; and the expert report of Dr. Julian A. C. Gojer, Forensic Psychiatrist, together with Dr. Gojer's CV. Neither the CCES nor SNC sought to examine Dr. Gojer. His report was filed as that of a duly qualified expert.

10. On 20 August 2012, the CCES filed the following documents: a submission regarding the findings of facts in the record on which it intends to rely; the sworn affidavit of Douglas MacQuarrie, Chief Operating Officer of the CCES; and a position summary. SNC likewise

filed its submission on the facts upon which it intended to rely; as well as will-say statements of 7 witnesses.

11. On 28 August 2012, a pre-hearing conference call took place to deal with various matters that had arisen following the parties' filings. A further call took place on 4 September 2012, during which the parties dealt with certain pre-hearing issues, including the admissibility of evidence. The Rulings made by the Arbitrator at the time of those calls were turned into minutes of the calls by the SDRCC and released on 8 September 2012 to the parties following review by the Arbitrator.

12. In accordance with the Rulings and conference calls, on 5 September 2012, the parties filed the documentary evidence referred to in the will-say statements and on which they intended to rely at the hearing. The exchanges of documents continued until 7 September 2012, when the Arbitrator issued a direction to the parties to cease filing further documentation.

Jurisdiction:

13. The effect of the Initial and Second Rulings in May, the Joint Submission, and the various minuted conference telephone calls over the course of the summer of 2012, is that the parties are agreed that I am properly appointed as the Arbitrator to hear this dispute. The parties agree that I have jurisdiction to determine the matter; and lastly that there are no preliminary objections as to jurisdiction or arbitrability of this matter.

14. The Joint Submission establishes that the parties are agreed that the original Case Review decision was within the jurisdiction of the first instance hearing body and that there was jurisdiction to impose a life sanction as a result of the doping related violation. Accordingly, there are no jurisdictional disagreements as to the foundations upon which this application has been made.

15. Given that the Code provides the jurisdiction to hear the matter *de novo*, the Arbitrator has the authority to issue a full, final and binding arbitration award arising out of this proceeding.

Issue:

16. The issue before the Arbitrator is whether there ought to be, as referred to in the CADP 2009, a *"reduction in the period of Ineligibility"* in Russell's lifetime sanction. Should it be determined that Russell should have a reduction in his sanction, it follows that the Arbitrator must also decide what the appropriate reduction ought to be.

The Submissions:

a. <u>Submissions of the Claimant:</u>

17. Russell submits that the penalty he is currently serving is excessive and that accordingly, it would be appropriate to reduce the length of the sanction to between 4 and 8 years from the time of the imposition of the sanction. The effect of such a decision would be the immediate cessation of the ban.

18. Russell's counsel further submits that relevant factors to look at in determining whether or not it would be appropriate to reduce his sanction include the fact that: Russell never supplied drugs to an athlete; Russell has abided by the terms of the ban; Russell's children are swimmers and he would like to be able to coach them; and also the ban has been in place for a sufficient time period.

19. In particular, Russell submits that this Tribunal should take into consideration the following:

- He has never supplied drugs to an athlete, and any athletes under his tutelage (to the best of his knowledge) are drug-free;
- He does not condone the use of drugs;
- He makes his living as a private trainer and consultant in the fields of nutrition and dry land training for conditioning and swimming;
- His training is not conducted within the umbrella of any member group of SNC or Swim Ontario ("SO");
- His training has been provided under private contract to individuals in facilities either owned or rented by him or his numbered company;

- His athletes/clients participate in a variety of sport disciplines and swim in a number of different swimming organizations;
- He has always attempted to live within the terms of the sanction imposed in 1997; and
- He was a registered swim coach in Spain, which was possible because FINA did not recognize the sanction that had been imposed on him.

20. Further, Russell has undergone professional counseling to assist him in coming to understand the problems generated by his "brushes with the law," as described by him and his counsel, and to fully appreciate the implications of his past behaviour. In that regard, Russell submitted the report of his treating psychiatrist, Dr. Gojer.

21. The Arbitrator also ought to consider the fact that the appropriate ban under the current CADP for Russell's offence would have been four (4) years.

22. As such, the appropriate remedy in the circumstances of this case is a reduction in the ban from life to 4 years, starting from the date of the original ban. If, however, the Arbitrator feels that Russell has strayed over the edge of the ban with some of his actions, and decides as a result, to double or even triple the ban, the effect would nevertheless be to cause an immediate lifting and termination of the ban.

23. Russell also submits that the scope of the ban, as articulated by the CCES and SNC, is an impermissible restraint of trade.

24. The cases and authorities submitted on behalf of the Claimant were:

- *Stephens v. Gulf Oil Canada Ltd. et al.*, [1975] O.J. No. 2552, 11 O.R. (2d) 129, 65 D.L.R. (3d) 193, 25 C.P.R. (2d) 64 (Ont. C.A.)
- *Jakub Wawrzyniak v. Hellenic Football Federation (HFF)*, Arbitration CAS 2009/A/1918, dated January 21, 2010
- *E. & A. v. International Biathlon Union (IBU)*, Arbitration CAS 2009/A/1931, dated November 12, 2009
- *Johnson v. Athletics Canada*, 1997 CarswellOnt 3340, 41 O.T.C. 95, [1997] O.J. 3201 (Ont. Gen. Div.)

- *Martin v. ConCreate USL Limited Partnership and Steel Design & Fabricators (SDF) Ltd.*, 2012 ONSC 1840
- *Tank Lining Corp. v. Dunline Ltd.*, [1981] O.J. No. 986
- *Shafron v. KRG Insurance Brokers (Western) Inc.*, 2009 SCC 6, [2009] 1 S.C.R. 157
- *Canadian Centre for Ethics in Sport and Canadian Lacrosse Association v. Isaac Haack* , before Carol Roberts, dated May 22, 2012 (SDRCC)
- *Canadian Centre for Ethics in Sport v. Jimmy Gariépy*, before François Tremblay, dated January 19, 2012 (SDRCC)
- *Canadian Centre for Ethics in Sport v. Valerio Moscariello*, before Barbara Cornish, dated December 14, 2009 (Doping Tribunal)
- *André Aubut v. The Canadian Centre for Ethics in Sport v. The Canadian Cycling Association*, before Michel G. Picher, dated March 2, 2009
- *United States Anti-Doping Agency v. Raymond Stewart*, before Judge James Murphy, (ret), dated June 2, 2012 (Arbitration Tribunal)
- *United States Anti-Doping Agency v. Mark Block*, before The American Arbitration Association, AAA No. 77 190 00154 10, dated March 17, 2011

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

25. Russell's lifetime ban was properly imposed in 1997.

26. Russell breached the ineligibility sanction prior to 2009, although no formal determination of this fact was ever asserted, pursued or proven by the CCES.

27. The CCES submits that while Russell purports that he has been acting as a personal trainer, he has in fact been engaged in coaching and other activities that are a blatant contravention of 2009 CADP Rule 7.18.

28. The 2009 CADP Rules are pivotal in making a determination as to whether there ought to be a reduction in the sanction. It is further submitted that because the CADP 2009 applies to this proceeding, Rule 7.20 requires that a sanction must start over again following a

proven breach of ineligibility. Furthermore, Rule 7.40 provides that a lifetime sanction for trafficking is within the range of acceptable sanctions.

29. The CCES also submits that intervening facts subsequent to the last reinstatement application and reinstatement decision #3 by Arbitrator Mew are highly relevant for the Arbitrator to consider. In particular, it is important to consider the fact that Russell breached his ineligibility sanction on numerous occasions. Incidents of these violations include:

- Signing up members of the Oakville Dolphins for the Mare Nostrum event in 2012;
- Coaching at the Mare Nostrum in 2012;
- Coaching his children and members of the Oakville Dolphins at swim practices;
- Coaching his children and members of the Oakville Dolphins during SNC and SO sanctioned swim meets, including a meet in Sudbury and a meet in Nepean;
- Holding a training camp in the Barbados for members of the Oakville Dolphins;

30. Prior to January 1, 2009, CADP Rule 7.20 provided that if a person breached a prohibition against participation during a period of Ineligibility, the sanction period initially imposed could be re-started. Practically speaking, as attested to in the affidavit and *viva voce* evidence of Mr. MacQuarrie, there was no available remedy for the CCES because Russell was already serving a lifetime ban. A reset of the ban does nothing to change the end result that there is a lifetime ban in place.

31. CADP 2009 Rule 7.18 provides that no person who has been declared Ineligible may participate "*in any capacity in a Competition or activity [...] authorized or organized by a Stakeholder or any Signatory, Signatory's member organization or a club [...]*". This Rule is binding on Russell and for this reason, any participation he has engaged in involving members of SNC or a provincial body or any international body of swimming or any other sport that is a signatory is strictly prohibited.

32. While CADP Rule 7.18 is expressed somewhat differently than the rule on which Russell's current ban is based, both have the same fundamental underlying principle, which is that an

individual may have "*no participation in any role and in any activity linked to or sanctioned by organized sport entities.*"

33. In determining the appropriate sanction, the CCES states that the Arbitrator should take a two-pronged approach:

    1. Look back in time through the 2009 CADP lens to determine the appropriate sanction;

    2. Determine whether the conduct during the sanction was consistent with the expected standard of behaviour.

34. The cases and authorities submitted in support of the submissions of the CCES were:

    - *UK Anti-Doping v. Carl Fletcher*
    - *ASADA v. Francis Bourke*, 30 May 2012
    - *CCES v. Haack* SDRC DT 12-0171
    - *CCES v. Gariépy* SDRC DT 11- 0162
    - *USADA v. Block* AAA No. 77 190 00514 10
    - *"Lifetime ineligibility according to the WADA Code"* Despina Mavromati CAS Counsel

c. <u>Submissions of SNC</u>:

35. SNC adopts and relies on the submissions of the CCES as well as making its own independent submissions.

36. SNC submits that there is ample evidence demonstrating that Russell breached or violated the ban, all of which is relevant to determining the reduction of his sanction and justifying no reduction.

37. Alleged incidents of violation include:

    - Russell was engaged in "coaching activities" with Canadian swimmers who are affiliates of SO and were registered in swimming events during the Barcelona,

Spain; Canet, France; swim meets in June of 2012; and the international swimming meet of the Fédération Monegasque de Natation in Monaco on 9 & 10 June 2012; and

- Russell has been engaged in coaching activities with Oakville Dolphins during DSC sanctioned swimming practices.

38. SNC states that if the sanction violates the restraint of trade principle, it is reasonably justified to protect the interest of sport as against the detriment likely to be suffered by the athletes.

39. SNC states that in light of the aforementioned breaches, there ought to be no modification to the ban. As a coach, Russell ought to be held to a higher standard of conduct. In the alternative, if the Arbitrator is inclined to reduce the sanction; it should still be closer to life than the minimum of four (4) years. Any ban that the Arbitrator places on Russell ought to be prospective rather than retroactive.

40. In support of its submissions the following authorities and cases were submitted for consideration:

- *Gasser v. Stinson* (Unreported, 15 June 1988, Australian High Court of Justice) *Canas v. ATP Tour Inc.* CAS 2005/A/951
- Validity of doping sanctions – Collection of Sport Law

Relevant Provisions:

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

1.25 ...

1.26 *With respect to cases where a final decision finding an anti-doping rule violation has been rendered prior to January 1, 2009, but the Athlete or other Person is still serving the period of Ineligibility as of January 1, 2009, the Athlete or other Person may apply to the CCES to consider a reduction in the period of Ineligibility in light of the CANADIAN ANTI-DOPING PROGRAM. Such application must be made before the period of Ineligibility has expired. The*

decision rendered by the CCES in such an instance may be appealed pursuant to the <u>Appeal Rules</u>. The CANADIAN ANTI-DOPING PROGRAM shall not apply to any anti-doping rule violation case where a final decision has been rendered and the period of Ineligibility has expired prior to January 1, 2009. [WADA Code Article 25.3]

7.0 Doping Violations and Consequences Rules

Status During Ineligibility

7.18 No Athlete or other Person who has been declared Ineligible may, during the period of Ineligibility, participate as an Athlete or an Athlete Support Personnel in any capacity in a Competition or activity (other than authorized anti-doping education or rehabilitation programs) authorized or organized by a Stakeholder or any Signatory, Signatory's member organization, or a club or other member organization of a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international or national level Event organization. An Athlete or other Person subject to a period of Ineligibility shall remain subject to Testing. [Code Article 10.10.1]

a) The 'activity' referred to in 7.18 authorized or organized by a Stakeholder or any Signatory, Signatory's member organization, or a club or other member organization of a Signatory's member organization specifically includes coaching, training, working with, treating or assisting Persons, Athletes or Athlete Support Personnel to participate in or prepare for sports Competition.

> *This is the underlying work of all such organizations and their members. Accordingly, no Athlete or other Person who has been declared Ineligible may, during the period of Ineligibility, have any collaboration or association with any Person, Athlete or Athlete Support Personnel who is subject to the CANADIAN ANTI-DOPING PROGRAM if such collaboration or association involves coaching, training, working with, treating or assisting such Person, Athlete or Athlete Support Personnel to participate in or prepare for sports Competition.*

42. The relevant provisions of the WADA Code are as follows:

> *23.2.2 The following Articles (and corresponding Comments) as applicable to the scope of the anti-doping activity which the Anti-Doping Organization performs must be implemented by Signatories without substantive change (allowing for any non-substantive changes to the language in order to refer to the organization's name, sport, section numbers, etc.):*
>
> - *Article 1 (Definition of Doping)*
> - *Article 2 (Anti-Doping Rule Violations)*
> - *Article 3 (Proof of Doping)*
> - *Article 4.2.2 (Specified Substances)*
> - *Article 4.3.3 (WADA's Determination of the Prohibited List)*
> - *Article 7.6 (Retirement from Sport)*
> - *Article 9 (Automatic Disqualification of Individual Results)*
> - *Article 10 (Sanctions on Individuals)*
> - *Article 11 (Consequences to Teams)*

- *Article 13 (Appeals) with the exception of 13.2.2 and 13.5*
- *Article 15.4 (Mutual Recognition)*
- *Article 17 (Statute of Limitations)*
- *Article 24 (Interpretation of the Code)*
- *Appendix 1 - Definitions*

No additional provision may be added to a Signatory's rules which changes the effect of the Articles enumerated in this Article.

43. 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.

Application for Reduction in Sanction:

44. A hearing was held at JPR Arbitration Centre in Toronto, Ontario on September 10-13, 2012. The following witnesses were heard:

- Cecil Russell, the applicant;
- Douglas MacQuarrie, COO of CCES;
- Susan Eadie, manager of the Centennial Pool in the Town of Oakville;
- Cathy Pardy, certified swimming coach, head age group coach with Oakville Aquatic Club;
- Tom Johnson, national coach for SNC, (via teleconference);
- Ken McKinnon, national junior coach for SNC, (via teleconference);
- Morgan Chambers, a 14 year old young lady who previously swam for the Oakville Dolphins;
- Melanie Chambers, Morgan's mother, both her children swam for the Oakville Dolphins;
- Karen Hillis Stinson, certified swimming coach, meet manager for Clarington Swim Club;
- Meagan MacDonald, a 14 year old young lady who swims for the Oakville Dolphins;
- Erin Russell, wife of Russell and coach of Oakville Dolphins;
- Nota Klentou, board member of the Oakville Dolphins, her children swim for the club; and
- Jeff Dixon, board member of the Oakville Dolphins, his children swim for the club.

45. From the witness testimony, the Arbitrator makes the following findings of fact:

- Russell, when he was reinstated during the period of 2005 to 2006, was head coach of the Oakville Dolphins;
- The Oakville Dolphins is an affiliate of SO who in turn is a member of SNC;

- In 2008, Russell incorporated a numbered company, 1759717 Ontario Ltd., through which he carries on his business as a private trainer and consultant in the fields of nutrition and dry land training for conditioning and swimming. Russell is the sole director and shareholder of the company;

- 1759717 Ontario Ltd.'s registered business name is Dolphin Swim Club of Ontario;

- There is also a separate swim club operating out of Oakville known as Dolphin Swim Club (referred to in these proceedings as the Oakville Dolphins). Erin Russell is the head coach of the Oakville Dolphins as was Russell in 2005 & 2006 (during his reinstatement);

- Erin Russell has worked for Russell's company as a coach/trainer at times;

- The names of Russell's numbered company and the swim club in Oakville are sufficiently similar to give rise to confusion in the minds of people who interact with Russell or his spouse;

- Russell's daughters Shannon and Sinead, and his sons Connor and Colin, all swim or swam for the Oakville Dolphins;

- Sinead and Colin were members of the Canadian Olympic Team for swimming at the London 2012 Olympic Games;

- The draft contracts for Russell's personal training services show a progression from a personal contract for undefined and unspecified services with him in his individual capacity in 2007; to involvement in designated sports and specified roles that he would provide in 2009 through his incorporated company; and, by 2010, the designated sports have been removed and the roles that Russell would engage in are expanded;

- Some, if not a majority of Russell's personal training clients are or were members of the Oakville Dolphins at one time or another;

- It is at times, difficult to determine whether members of the Oakville Dolphins, when participating in training and/or activities related to competitions, were doing so as members of the Oakville Dolphins or as athletes working with Russell under his personal services contract. Indeed, some of the parents who testified at the hearing advised that they were not necessarily differentiating between activities their children were doing for the Oakville Dolphins and activities they were doing under Russell's personal service contracts;

- Russell and Erin Russell sometimes shared an email address – coachrussell84@yahoo.com, with both of them sending emails from this address. One could not differentiate from the emails which individual was sending them. They also shared, despite being estranged from each other, a cell phone, that number appears on the web site of the Oakville Dolphins; ;

- Oakville Dolphins' swim practices were sometimes taking place at the same time as Russell was engaging in personal training services in adjacent lanes of the same pool;

- Russell was actively participating in the training of his daughter Sinead by writing her training routine out prior to practices with the Oakville Dolphins. The training routines were written in the time period just prior to practice on a white board that was located on the pool deck. All athletes and coaches who were on deck during those practices would have been able to see and refer to the training routine;

- Members of the Oakville Dolphins were registered in and participated in certain events at the Mare Nostrum (a series of 3 swim meets taking place in Monaco, Canet, and Barcelona) in 2012. Some of those swimmers were registered in the event as Oakville Dolphins;

- Erin Russell and Russell both prepared the necessary documentation to ensure the swimmers were registered in the meet;

- Erin Russell attended only the Barcelona meet, the last of the three meets for the Mare Nostrum in 2012;

- Russell was present at the Mare Nostrum in 2012. While it is clear that he had discussions with Oakville Dolphins swimmers during that time (from the stands and in the corridors of the venue), it is uncertain whether he was "coaching" them in the fullest sense of the term, i.e. he was not present on the deck during competitions. However, Russell certainly participated in the training of athletes, including Oakville Dolphins, during the Mare Nostrum;

- Russell assisted and trained members of the Oakville Dolphins at the Mare Nostrum before and after races and during practice sessions;

- Russell took splits of members of the Oakville Dolphins during SO sanctioned swim meets while sitting in the public gallery for the purpose of providing feedback to improve their performance;

- Russell sat in the stands during the meets, and was not present on the pool deck during competitions. On the pool deck during the competitions was Ingrid Fleck, Diego Pesce, or Erin Russell;

- A training camp took place in Barbados in 2010. Athletes who participated in this camp were members of the Oakville Dolphins. Not all members of the Oakville Dolphins participated in this camp. Russell was the primary coach/trainer at this camp;

- It is unclear how athletes were invoiced by Russell for the training camp, or his personal services contract. It is further unclear if Russell was in fact remunerated by clients. The contract simply states that "*Russell agrees to provide his services to the Client on a non-exclusive basis for a period of years [...] at agreed rate between the parties.*" Russell did not submit any actual or executed contracts between the parties, nor did he submit any documentation that would support his

contention that he invoiced clients separately for these services. In reply the contract with one of the swimmers was introduced;

- The personal services contract further provides in the relevant part as follows:
  - *The parties acknowledge that Russell is currently the subject of a prohibition under the Canadian Policy on Penalties for Doping in Sport for competitive swimming and that, in particular, he is ineligible to participate in any role and in any competition or activity organized, convened, held in sanctioned events "by Swimming Canada Natation or any of its affiliates". Pursuant to the Canadian Policy on Doping in Sports this means that Russell may not participate in organized sport in any other area that is governed by a National Sport Governing Body which is a Signatory to the Canadian Policy on Doping in Sport.*
  - *The parties acknowledge that Russell will not be the Coach of Record in competitions in Canada, and will not participate with Client in any activity that would be a breach of the prohibition set out above.*
- There exists some deep seated resentment between some members of the swimming community and Russell, while there are others who have respect for him and his talents;
- SNC carved out an exception to Russell's prohibition to enable him to train his children – although SNC maintained that such coaching and training could not be conducted under the auspices of, or forming part of, the activities of a member club of SO or SNC;
- SNC also clarified that Russell could engage clients as a private trainer, so long as such training was not conducted as part of the activities of a member club or affiliate of SO or SNC. This "modification" to the ban is not entirely clear on its face. Contrary to its intention, the clarification between the parties regarding the

extent of the ban makes the dividing line between what is and what is not permissible somewhat more convoluted.

D E C I S I O N

46. The Case Review Hearing Board (the "Board") appointed by the Centre for Sport and Law Inc., that administered the hearings for the CCES, found that Russell had committed a doping related infraction. On 27 October 1997 the Board found:

- *"Mr. Russell conspired to import and through his home and place of business supplied, possessed and sold banned substances, namely anabolic steroids;**

- *Mr. Russell's actions were performed with the intention of violating the anti-doping rules;**

- *The SOP* [Standard Operating Procedure April 1994] *applied to the Case Review ...;*

- *... "* (1998 Award of Mew at p. 4);

- * Appears to be the "doping related infraction found at A.3(f) of Appendix 5 to the Doping Control SOP April 1994.

47. The foregoing findings were based upon certificates of conviction which read:

    i. *On 26 March 1996 at Whitby, two charges against Mr. Russell that he did traffic in a controlled drug on or about 22 October 1993 and two further charges that, on or about the 22 October 1993, he did possess a controlled drug contrary to the Food and Drug Act were stayed.*

ii. *On 26 March 1996 at Whitby, Mr. Russell was convicted on a charge that between 1 February 1993 and 6 September 1995, he did conspire to traffic in a controlled drug contrary to section 39(1) of the Food and Drugs Act and therefore did commit an offence contrary to section 465(1)(c) of the Criminal Code of Canada. He was given a suspended sentence and placed on probation (201 days of pre-trial custody taken into account).* (1998 Award of Mew at p. 2).

48. The second certificate reveals that a criminal offence occurred over a two and one half year period ending in 1995. Russell was given a suspended sentence for time served and placed on probation. The Joint Submission indicates that Russell received a Canadian pardon for both of these convictions on 25 September 2008.

49. The Parole Board of Canada has the exclusive jurisdiction to grant a pardon and applies the *Criminal Records Act* in so doing. The effect of a pardon is described as: "*The government of Canada has forgiven you of your past charges. They no longer want the conviction to reflect adversely on your character, and wish to remove any disqualification to which you are subjected. It is treated as though it never happened. If an RCMP search is done your FPS# will not show up.*"[1]

50. The system of sanctions at the time of the offense was described in C. 3 of Appendix 5 to the SOP 1994 under the heading "**C. Penalties-Doping Related Infractions**" in paragraph 3: "*shall be subject to a lifetime penalty in respect of direct federal sport funding and sport eligibility*". The expression of what is prohibited by that sanction for a "doping related infraction"[2] is a period of ineligibility found in Appendix 5 at A. 8 of the SOP 1994 and reads as follows:

> *"Ineligible to participate in any role, and in any* ***competition or activity organized, convened, held or sanctioned by*** *a Canadian*

[1] Pardons Canada, http://pardons.org/pardons_faqs.html retrieved on 16 October 2012.

[2] The world international federation in the sport of swimming, FINA, did not have a similar provision of a *"doping related offence"* in its doping rules at the time. Therefore, the result was Russell was not considered to have committed a doping offence under FINA's rules. This meant that the suspension in Canada did not carry into other countries such as Spain where he coached Olympic caliber athletes. See also discussion of point in Mew decision 2009.

NSGB, PSGB, or affiliate for the duration of the period of ineligibility". (Emphasis that of the Arbitrator)

51. This sanction at C. 3 could be terminated by application for "reinstatement" under various Categories for Reinstatement pursuant to the SOP 1994. As described in the Second Ruling at paragraph 39, the sanction "*was in effect a ban until altered by the reinstatement process.*" The ban has been in effect from 1997, except for a period in 2005 and 2006 where Russell was successful in a reinstatement hearing. That reinstatement was ultimately set aside by court proceedings and by Reinstatement decision #3 (Mew, 2009), the lifetime ban was confirmed and continued from the time of the judicial re-imposition. The ban has remained in effect to the date of this award. In October of 2012, the ban will have been in effect for more than 12 years.

52. In the period up to Reinstatement decision #2 (Mew, 2005), I must consider that the ban was observed. At paragraph 23 of that decision it is stated: *"Although questions have been asked, it has not been asserted by SNC or any other party that Mr. Russell has broken the terms of his ban"*. However, it is noted that he remained actively involved in the sport of swimming and that led Arbitrator Mew to state at paragraph 51, that *"Mr. Russell has, ... skirted around the edges of his ban."* For purposes of my decision, I must conclude that in essence, the ban was not breached in the 8 years from imposition until reinstatement in 2005. The ban was then re-imposed as a result of the order of Justice R. J. Smith effective on 6 June 2007.

53. The 1997 ban was carried forward under the CADP of 2004 and again under the CADP of 2009 by operation of the transition provisions previously mentioned. This is the ban to which Mr. Russell is currently subject and for which he seeks before me, a reduction in the period of Ineligibility through s. 1.26 of the CADP 2009.

54. The criteria set out in the SOP 1994 and repeated in Annex 5 for a Category II Reinstatement, have no direct application in this procedure because those "old rules" have been jettisoned as discussed in the Second Ruling at Para. 40. The reinstatement process no

longer exists under the applicable rules of the CADP 2009.[3] Accordingly, this is a case of first impressions under the CADP 2009 for a reduction in the period of ineligibility.

55. There are no guidelines in this proceeding. Pursuant to the procedure established for this arbitration, the parties have jointly agreed at the third bullet point of paragraph 6 "Agreed facts" that the Board determination of a "*doping related violation against Mr. Russell was correct*" and the "*case review and Case Review Hearing were all conducted fairly*". It is further agreed that the *"life sanction issued as a result of the doping related violation was properly imposed"*.

56. The application that triggered this arbitration procedure was made under the transition provision found at Section 1.26 of CADP 2009. That section permits an application to the CCES to consider *"a reduction in the period of* Ineligibility ***in light of*** *the CANADIAN ANTI-DOPING PROGRAM"* (emphasis that of the Arbitrator). The phrase "in light of the CADP" means that I must make the decision within principles enunciated in the CADP – i.e. proportionality, fairness and due process.

57. Therefore, the framework I propose to use to determine this application is to determine: 1. What conduct is prohibited by the 1997 ban imposed on Russell? 2. Is there conduct violating the modified ban? 3. Consideration of the reduction of the duration of the modified ban. 4. Conclusion.

1. What conduct is prohibited by the 1997 ban imposed on Russell?

58. Under A. 8 of Appendix 5 to the SOP 1994, a person sanctioned by the policy is ineligible to participate in any role whatsoever in any:

   a.) Competition; OR

   b.) Activity;

when either a.) or b.) has been organised, convened, held or sanctioned by a Canadian NSGB, PSGB or affiliate (the "Referenced Organizations"). Each of the words of the ban carries their ordinary English language meaning of what is to be prohibited by the SOP

[3] Arbitrator Mew in Decision #3 purports to have preserved the reinstatement process.

1994 ban. The word "activity" now carries a definition in 7.18 a) of the CADP 2009.[4] I will not have regard to that provision in clause a) for reasons that I will elaborate upon later in this decision.

59. As a matter of strict interpretation, I find that someone subject to this expression of what is prohibited in the ban is barred **from participation in any role whatsoever** in relation to either **a competition** or **an activity** of the Referenced Organizations. There are essentially therefore two separate prohibitions here.

60. The first prohibition relates to participation in competition. Competition is the act of competing under the aegis of the Referenced Organizations. Therefore, any role in reference to the act of competing, which in the context of sport and swimming must include preparation in direct connection with and just prior to the days of the competition, is part of the expression of what is prohibited by the ban.

61. The second prohibition relates to participating in any role in an activity. Activity is defined in the Concise Oxford English Dictionary in various ways. The most applicable definition therein is "spheres of action" which on the facts of this case would mean a specified pursuit in which a person engages with respect to the Referenced Organisations. As such, any role of participation in the spheres of action under the aegis of the Referenced Organizations is another part of the expression of what is prohibited by the ban. These roles can occur disjunctively at either a competition or an activity; or, they can occur conjunctively, so that activity may occur at a competition while not being part of the act of competing as described above.

(i) *Was the ban otherwise modified by the parties?*

62. Shortly after the re-imposition of the ban and following an explanatory letter from the CEO of SNC to Russell, Mr. Boyd, on behalf of Russell, wrote to SNC to clarify the scope of the prohibited activities. In correspondence of 20 June 2007, it is suggested by Mr. Boyd that the ban does not remove any rights Russell has as a parent. The letter states: *"It is perfectly*

---

[4] The WADA Code 2009 does not define the word activity. The CCES submits that this addition is within the permitted local variations as set out in Article 23.2.2 of the Code. I make no finding on that submission because it is not necessary to my decision herein.

permissible for Russell, as a parent, to participate in the training of his own children and to be present to observe their training - even if that happens to be within the training program of the Dolphins Swim Club Inc." The correspondence goes on to reference personal training, suggesting that Russell is free to contract his services as such, with the proviso that *"...the training is not part of any 'activity organized, convened, held or sanctioned' by Swim Ontario or any of its affiliates"*.

63. Mr. Boyd's correspondence is followed up the next day by correspondence from the CEO of SNC clarifying that Russell is free, as a parent and a member of the public, to observe the training activities of his children while they are being trained at the Dolphins Swim Club (the Oakville Dolphins). The letter states in the relevant part that: *"It is perfectly permissible for Mr. Russell to participate in the coaching or training of his children-so long as such ... is not conducted under the auspices of or forming part of, the activities of a member club of Swim Ontario or Swimming Canada.*" On the question of personal training, the letter states *"We agree with your comments regarding Mr. Russell engaging clients as a private trainer.*" A similar proviso as with his own children is added stating: *"so long as such training is not conducted as part of the activities of a member club or affiliate of Swim Ontario or Swimming Canada"*.

64. At the heart of this matter is the foregoing exchange of correspondence in 2007. Today, SNC views this correspondence as very narrow and completely confirmatory to ban as articulated in the SOP 1994, whereas Russell views the correspondence as supporting the view that the activities in which he has engaged are permitted under the SOP 1994. Thus, to some degree, the conduct of Russell of which SNC complains, was brought about by SNC's own less than adequate response to legitimate inquiries of Russell as to what he may or may not do under the ban.

65. The principle of fairness requires that any confusion generated by this correspondence be taken account of in the final analysis of any reduction in sanction. Furthermore, the complete absence of any formal attempts by SNC to make it obvious that Russell was in violation of the ban, even by way of warning letters, must also be taken account of. SNC in its correspondence states it "... *will continue to monitor your personal involvement with*

swimmers in Canada..." It was also stated at that time that any breaches "*may result in further disciplinary actions taken against the parties involved*". There has been a long period of inaction by SNC against Russell. There was some evidence, that at some point in time action was taken against the Oakville Dolphins but it was the result of a confidential settlement and was never brought into the evidence of this proceeding. In any event, it is not action against Russell, although he may have been the *causa causan* of it. This failure on the part of SNC to follow up as indicated in its correspondence also must be weighed in any determination of the reduction in sanction.

66. The SOP 1994 expression of what conduct is prohibited under the ban has either been interpreted by the parties through their correspondence; or, the contract has been modified to encompass their correspondence as assisting in the expression of what is prohibited. Either way, I conclude that there has been some carving out from the original meaning and intention of what conduct is precluded under the ban as expressed in the SOP 1994 and interpreted in this award. That carving out is that Russell was allowed to do some training of his children, and to act in some capacities as a private trainer. However, there were limits placed on both of those activities. The limits were that they were not to occur or be conducted when the athlete was under the aegis of the Referenced Organizations.

(ii) *Is the ban contained in the CADP 2009 a restatement of its earlier enunciation?*

67. The CCES submits that the CADP 2009 has completely incorporated, using different wording, the prohibitions that were expressed in Appendix 5 of the SOP 1994, such that when the CADP 2009 came into effect, Russell's ban did not change. I cannot find this to be the case.

68. Article 7.18 a) of the CADP provides for a far more encompassing definition of the term "activity" than is contemplated by the undefined use of that word in the SOP 1994. "Activity" is defined in the CADP 2009 to include "*...coaching, training, working with, treating or assisting [...] Athletes [...] to participate in or prepare for sports Competitions.*" It goes on to provide that no person during his or her period of Ineligibility may have "*any collaboration or association with any [...], Athlete or [...] who is subject to the [CADP] if such collaboration or association involves coaching, training, working with,*

treating or assisting such [...], Athlete or [...] *<u>to participate in or prepare for sports Competition".</u>* I find this to be a change in both the expression of what is prohibited under the initial ban to which Russell was subjected; and, the modification to the ban as expressed in the correspondence exchanged between Russell and SNC.

69. SNC was able to impose the ban following the Board decision in 1997 because of the contractual nexus between SNC and Russell. The ban is established by contract between those parties. The administrative machinery under which Russell's ban is now regulated is very different because of the CADP 2009, but the contractual basis of the ban cannot change.[5]

70. The regulatory administrative regime by which Russell is currently bound moving forward is the CADP 2009. However, the only ban that he is subjected to, and the only activities he is banned from participating in, are as I have described them above in paragraphs 58-66. It is a well-known principle of law that a contract cannot be changed without the consent of both parties. I do not find that Russell consented to any modification by the definition in clause a) or alteration to the terms of the expression of his ban. For this reason, I reject the submission of the CCES on the application of clause a) of 7.18 to the circumstances of this case.

71. The transition rule in Article 1.26 states that I am to consider a *"reduction in eligibility* ***<u>in light of</u>*** *the CADP"*. The key words are "in light of." The WADA Code is not adopted for purposes of redefining the historical contractual ban or in the expression of what is prohibited. It is merely to be used to assist in the administration of the ban in the very different sports world of today. Therefore, I do not accept the CCES submissions that the CADP has incorporated the prohibitions expressed in 1997. The prohibitions in 1997 imposed by contract stand on their own and are brought forward by the CADP but are not altered by it. It is important to recognize that my jurisdiction as agreed to by the parties in

[5] The adoption of the first version of the WADA Code in 2004 made the Canadian NSGBs become subject to the international regime of WADA because their counterpart international federation, FINA, became a signatory to that Code and required their Canadian member's compliance. At the same time, the Government of Canada became an independent signatory to the Code through its mechanism for governmental participation. Therefore, since the adoption of the 2004 and subsequently the 2009 WADA Codes the regulatory system for the administration has changed but the ban is a contractual one established under the SOP 1994; not under the present or predecessor provisions of the WADA Codes.

the Joint Submission does not extend to looking behind that ban but, rather I must accept it as having been properly imposed with full original jurisdiction to do so.

2. Is there conduct violating the modified ban?

72. Mr. Justice Smith re-imposed Russell's ban in June 2007. By January of 2008, Russell had incorporated a numbered company whose trade name, Dolphin Swim Club of Ontario, was very close to that of the Dolphins Swim Club (referred to in these proceedings as the Oakville Dolphins). The corporate legal entity he incorporated is the vehicle through which Russell booked swimming pools and other facilities. He testified that this was done simply for tax purposes. I find that it also had the convenient effect of driving a wedge between his personal activity and the activity of his wholly owned corporate vehicle. Russell used this separate legal existence to justify actions by the corporate entity as not being his own and thus not contrary to the ban.

73. An examination of the unexecuted sample contracts provided by Russell reveals a substantial progression in the scope of the activities covered by the agreement. In 2007, the agreement was between the client and Russell in his personal capacity. Through the vehicle of the contract, Russell would provide undefined and unspecified services. In 2009, the contract stipulated Russell would assist the client in designated sports and would do so in specified roles; and, finally by 2010, the contract no longer contains a provision outlining the specific sports he will train in, but goes on to expand the roles Russell will have in the individual's training regimen. The 2010 contract also contains a stipulation that the client *"does not engage Russell as a coach or trainer in any particular sport."*

74. Each contract references the ban in increasing detail, the 2010 contract states that pursuant to his ban, Russell *"may not participate in organized sport in any other area that is governed by a National Sport Governing Body which is a Signatory to the Canadian Policy on Doping in Sport."* It appears that these contracts were designed by Russell to create a role for himself that he perceived was not prohibited by the ban. He was attempting to ensure he could make a living as a personal trainer in sports.

75. In his testimony, Russell stated that he has a gymnasium where he provides land training to athletes who have executed the contracts referred to in the previous paragraphs. He further testified that he emphasized to the athletes with whom he worked that he was not their coach of record, adding that he was permitted to advise them in other ways including nutrition, fitness, diet, and motivation.

76. It was Russell's view, that as a result of correspondence with SNC in June of 2007, he was permitted to act as a personal trainer and coach of his own children at any time other than when they were in the programs of SNC or SO. Russell took a very strict, literal view of when his children were in the programs of the Referenced Organizations. Therefore, he decided that he could write the workout for his daughter on a white board poolside, before the Oakville Dolphins' official practice time began.

77. Russell testified that coaching meant that he could not function as a "professional coach". Therefore, he could not be on the pool deck during Oakville Dolphins practices and meets. In contrast however, he believed that any activity he engaged in with any swimmer including his children up to the point where the athlete was in the starting blocks was personal training or other services that were permissible.

78. I return to the wording of what is prohibited by the expression of the ban as set out in Appendix 5 in the SOP 1994 and as interpreted in this Award. The ban prevents participation in any role involving competitions or activities organized convened, held or sanctioned by the Referenced Organizations. The crucial wording is "any role." Clearly the ban was not intended to forbid only coaching or restricted to activities on the pool deck. There is no dividing line in this ban between coaching, consulting, advising, training, conditioning, or motivating an athlete at a competition or activity sanctioned by the Referenced Organizations.

79. Of the other conduct engaged in by Russell during the years after the re-imposition of his ban, and including the "modification" to the ban as agreed to between the parties, I find the following actions were breaches of the ban:

- Writing out training routines and warm-up routines on the white board prior to Oakville Dolphins' practices. Whether or not they were Sinead's practices is irrelevant. The fact is, that the warm-up was part of the activities of the Oakville Dolphins. While the action of writing the warm-up and other routines may have taken place prior to the official start time of the practice, the effect of the action took place during Oakville Dolphins swim time. More specifically, putting it in the terms of the ban as I have found it to be, Russell was engaged in the "role" of preparing and writing training routines that were then used as part of a practice (or an organized activity) of an SO affiliate, namely, the Oakville Dolphins.

- Advising and meeting with members of the Oakville Dolphins about their performances at swimming meets through conversations in the public viewing areas of the pool; or other adjacent locations such as stairwells and lobbies of venues; prior to, during and after competitions that were organized, convened, held or sanctioned by the Referenced Organizations. Expressed in the terms of the ban, Russell's behaviour in talking to athletes about how to improve their performance constituted an activity or role during those competitions and such competitions were organized or sanctioned by the Referenced Organizations. This conduct was prohibited by the ban because competition and activity in the ban are to be read conjunctively.

- Russell incorporated a company and used this vehicle to contract with pool owners and other individuals, such as his wife, where it suited his mode of operation. He developed private contracts with swimmers who were also registered as swimmers with the Oakville Dolphins as well as with athletes of other Referenced Organizations. Expressed in terms of the ban, under those private contracts, Russell, through his corporation, and in his own words, performed many activities and roles of a coach/trainer for members of the Oakville Dolphins. He only drew the

line at being on the pool deck during sanctioned practices and events and acting as "coach of record" for those same activities

- Assisting athletes in Canet, Barcelona, and Monaco in their training and preparation for the Mare Nostrum. While it is conceded that the Mare Nostrum is not a competition "run" or sanctioned, in the official sense, by a Referenced Organization, Erin Russell organized the attendance on behalf of the Oakville Dolphins and in my view, attendance of the Oakville Dolphins (as Oakville Dolphins) at a meet is in and of itself, an activity as contemplated by the ban. It follows that I do not read the ban to be limited to participation in events that are run only by Referenced Organizations. It is clear that the ban is intended to preclude Russell from being involved in any manner with Referenced Organizations, including the Oakville Dolphins.

80. What I do not find Russell to be precluded from doing, are the following activities:

- Holding training camps for swimmers so long as such training camps are not organized, held or convened by the Oakville Dolphins (or any other Referenced Organisation), which was the case with the Barbados camp. However, I feel it is important to note, that if the Oakville Dolphins as an organization encouraged their swimmers to attend the camp or advertised the camp to parents, such event would become "organized" or even "sanctioned" by the Oakville Dolphins and thus, within the scope of the ban.

- Land training athletes and individuals at Russell's own facility (whether rented or owned by him), so long as the athletes' engagement in that activity was not arranged or organized by the Referenced Organizations.

- Other forms of personal training for athletes who are not affiliated with the Referenced Organizations.

81. For the purposes of my decision about sanction reduction, I do not have to determine the quantum of breaches. The foregoing are merely examples of where the ban has been breached and where it has not been breached. It is sufficient for me to find that Russell has put a scheme in place to breach the ban, while trying to rationalize his activity and conduct as not precluded by the ban.

82. I further find that Russell has also engaged in a number of other activities that Arbitrator Mew described in his 2009 Reinstatement decision as "*skirt[ing] around the edges of the ban.*" While some of these activities may not be clear breaches on their face, the manner in which Russell's activities have been carried out since 2009 with the subterfuge of joint email and cell phones, directives to swimmers intended to draw a distinction between coaching and training such as saying: speak to your coach and statements that "I am not your coach", all these actions demonstrate a propensity by Russell, to engage in activities that obfuscate the force and effect of the ban. These activities since 2009 are engaged in to push the limits of and circumvent the ban. Contrary to his submission, I do not find they were attempts to comply with the ban.

83. In making the assessment to consider a reduction in the ban I find that the following activities are aggravating factors that weigh in favour of maintaining the ban:

- Renting adjacent lanes to those of the Oakville Dolphins at pools during Oakville Dolphins' sanctioned swim practices;

- The joint e mail address and the joint telephone numbers, the fact that the joint number was also the Oakville Dolphins web site telephone number, are all devices which blur the dividing line between Russell's activities conducted under the auspices of his contracts for personal service, and activities that are within the Oakville Dolphins sphere of activity.

3. <u>Consideration of the reduction of the duration of the modified ban</u>

84. Article 6 of the Code is entitled *"Med/Arb and Arbitration General Rules"*. Article 6.17 of those rules in the Code permits me to consider the recommended sanction flowing from a doping violation. The Code provides me with the discretion and power to: *"substitute*

such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances". It is pursuant to those powers that I enter into the following consideration of a possible reduction in the duration of the modified lifetime ban.

85. As far as I have been made aware, there were no particular breaches of the ban during the period from its institution in 1997 until 2006 when Russell was reinstated by Arbitrator Mew. At the very least, none form part of the record in this proceeding. Russell was out of the country coaching and training athletes in Spain and thereafter in the United States and at some points incarcerated and unable to coach or train. Therefore, Russell was effectively subject to the full force and effect of the ban in the 9 year period before reinstatement.

86. Another consideration in weighing the factors for a reduction in the ban is the *modus operandi* under which Russell conducted his activities from the re-imposition of the ban until the hearing in this matter. The object of his method was to obscure the dividing line between the Oakville Dolphins and his operation as Dolphin Swim Club of Ontario and thereby disguise his conduct that violated the ban. There was considerable subterfuge between his operation and that of the Oakville Dolphins; so much so that at least one witness called by Russell was candid enough to say he really did not know when his child was swimming under the auspices of the Oakville Dolphins and otherwise under the auspices of Russell

87. The *modus operandi* suited Russell and his desire to remain involved in swimming, while disregarding the consequences of his activities on others be they individual swimmers or the Oakville Dolphins

88. I have found that the correspondence between Russell and SNC in 2007 (see paragraphs 62-66 above) modified the contractual ban. To the extent, there is confusion as to what was or was not permitted SNC had a role to play in that confusion. In so far as the evidence is before me the SNC never sought to discipline Russell as they did apparently do to the Oakville Dolphins with the suspension of 2012 of which there is very little in evidence but does seem to relate to conduct of the club revolving around Russell. SNC could have sought a court injunction if it felt Russell was acting contrary to the ban; or, at

the very least it could have written letters to warn him. Instead, Russell was permitted to continue on in his subterfuge with the unrealistic belief that he was observing the ban. This contribution to the confusion and the lack of enforcement action or fobbing that off on the CCES are factors for me to take account of in considering a reduction in the ban.

89. The original ban was based upon Russell's two *Criminal Code* violations in the 1990s, for which Russell received a pardon in 2008. Thus, the very foundation and essence of the ban has crumbled away, at least to a degree, at this point. The criminal conduct that gave rise to the lifetime ban still occurred as does the offense but the record is kept separate from his "public record" of criminal conduct. The force of the conviction is spent at this point from a Criminal Code perspective. I must take account of the fact that a determination has been made that going forward, past conduct should no longer be a matter of public record. In evaluating any reduction in the ban, the pardon is drawing a curtain across past conduct. I think that drawing of the current should also occur in respect of this doping violation. At some point both because of fairness and proportionality, the lifetime ban of the SOP 1994 ought to become a time limited ban and no longer a lifetime ban just as the criminal record is no longer in the public domain.

90. In making a determination that Russell's lifetime ban ought to become a time limited ban, I note also that lifetime imprisonment under the Criminal Code for the most serious offenses, such as murder, never last a lifetime. Instead they often result in release and parole. An anti-doping rule violation giving rise to a sporting ban ought not to have an existence that continues a life time when other more serious conduct is time limited after which a renewal and fresh start is available. Proportionality is a necessary factor to be taken account of in evaluating any reduction in the sanction.

91. Russell's conduct was trafficking of banned substances. However, as acknowledge by all the parties, this trafficking was not to athletes. Russell testified that he has never supplied drugs to an athlete, and that as far as he knows, those under his tutelage were not users of performance enhancing drugs. To that end, neither the CCES nor SNC state otherwise. Given the CCES's and SNC's tacit agreement that he was not involved in supplying drugs to athletes, and the lack of anything suggesting the contrary, I am inclined to accept

Russell's evidence in this regard. Therefore, the degree of seriousness of the offence Russell committed is less than that found in the case of *USADA* v. *Raymond Stewart, supra.* In that case, a lifetime ban was imposed on an athletics coach who secured prohibited performance enhancing drugs for athletes that he coached. Stewart was found to have trafficked in prohibited substances and to have administered and attempted to administer prohibited substances. He also counseled the cover up of such activities. Under the WADA Code 2009, the range for such offences is four years to a lifetime ban. The lifetime ban was selected by the adjudicator in that case. The degree of seriousness of the conduct in the Stewart case was in my mind, much graver than in the case before me, because it affected athletes and the sport of athletics and involved them in violating their obligations and then being counseled to lie about their actions. Russell's conduct was not directed at athletes.

92. I note that if the infraction were to occur under the current CADP 2009, the period of Ineligibility is now a range of between 4 years and a lifetime ban (rather than the old rules absolute lifetime ban.) The parties in their Joint Submission are agreed that under today's rules and the relevant jurisprudence, if Russell were to have committed the same offence, a lifetime ban would be excessive. However, this case must be viewed through the prism of the SOP 1997 not that of the CADP 2009. On that basis, it was submitted by CCES that a further period of ineligibility of 5 to 8 years was appropriate; while SNC suggested a continuing lifetime ban would be most appropriate. Mr. Boyd produced a summary table of trafficking cases in Canada which I have reproduced as Appendix 1 to this award. This table shows a trend that the range of sanctions for trafficking offenses has been on the whole, less than a lifetime ban.

93. According to the record in front of me, Russell has served a period of ban without incident up to 2006, approximately nine (9) years. Following the re-imposition of his ban, he has from time to time, breached the ban as I have already found. I find that such conduct does not justify a reduction that would amount to an immediate lifting of the ban. There must be a period of unequivocal compliance with the ban in which it is completely observed before there can be a reduction in the sanction. The intervening conduct between 2007 and now also suggests that Russell has taken considerable liberty with his interpretations of the

modified ban. However, SNC has not pursued this conduct with any form of action, suggesting instead that it is up to the CCES. The fact remains that SNC is the party who makes a ban operational and applies to FINA, the world governing body, to make the ban effective with all other national members of FINA. SNC said in its original correspondence in 2007 that it would "*continue to monitor your personal involvement with swimmers in Canada*" so as to ensure compliance with the ban. SNC seems to have failed in this regard. Had it been more vigilant, there might well have been a curtailment of what Russell believed he was entitled to consider as permitted by the modified ban. Furthermore, he might well have complied with or been forced to comply with the ban by way of a judicial injunction.

94. In the past reinstatement hearings there has been concern expressed that Russell is neither contrite nor regretful of his behaviour. Whatever the state of affairs may have been in the past Russell has been and is now taking steps to deal with the psychological and emotional issues associated with his past behviour. There is an expert report by Dr. Julian A.C. Gojer of the "Manasa Clinic", uncontested by either Respondent, which states that: *"he has significantly better understanding of what he did wrong, that he associated with the wrong people, that he used selfishness to further his objectives and that the decisions he made were founded on distorted thoughts." The report* concludes: *"His remorse at this time appears to be genuine".* I have concluded that he is in the process of rehabilitating himself and that ought to be taken account of in considering a reduction in the lifetime ban

95. Finally, there is the doctrine of restraint of trade to deal with. In 1997, in *Johnson v. Athletics Canada*, the Ontario Court of Justice held that a lifetime ban imposed on an athlete was not an illegal restraint of trade. The Honorable Judge in *Johnson* determined that the usual presumption of invalidity that goes along with a clause in restraint of trade was rebutted in that case upon balancing the health interests of the athlete; the rights of other competitors to a clean competition with clean competitors; and, the public interest in the protection of the integrity of sport . Therefore, the lifetime ban was reasonable and not an illegal restraint of trade. I do not find that it is necessary to resort to the restraint of trade doctrine given my power under the Code to deem what is just and equitable in the circumstances. However, if I did have to refer to the doctrine I would find, as did Justice

Caswell in the *Johnson* decision, that the presumption of invalidity is rebutted and the life time ban on a coach for trafficking is reasonable and not an illegal restraint of trade.

96. Russell has been the subject of a ban intermittently since 1997. Most recently, since 2008, he has attempted to define a role for himself doing what he does best – which is coaching in the fullest and broadest sense of that word. I have found him in breach of his ban because of certain activities described herein. On the other hand, I observe that he has attempted in his own mind, to have made concessions and an effort to comply with the ban. The evidence makes it clear that he has suffered considerable family effects from all of the turmoil and is now estranged from his wife and has difficult relations with his children. He is entitled to be free of this justifiable restraint in the reasonably near future. The agony has gone on for long enough.

97. In an effort to balance all of the foregoing contributing factors and considerations, I find that due to Russell's breaches of the ban, there is no justification for its immediate lifting. The ban ought to continue for some limited time period provided that during that time the ban is completely and totally observed by Russell. If that occurs then the ban should not continue.

98. Therefore, given all of the foregoing and the submissions of the parties, I find that Russell should serve a further 3 years of ineligibility to account for his behavior since 2008 and to give effect to the original modified ban. When that conclusion is weighed against SNC's failures to monitor the ban, the lack of clarity in the wording of the modifications and the fact that there has been 9 years of compliance with the ban, I direct that one half of the three years of ineligibility be suspended on conditions outlined below. For all of the foregoing reasons, I am exercising my jurisdiction to reduce the lifetime ban to a further 3 years from the time of the commencement of the hearings in this matter, namely 10 September 2012 and terminating on 9 September 2015. The last one and a half years of that three year time frame will be suspended if there is absolute full and complete compliance with the ban as described and applied in this award. If the ban is breached during the first one and a half years then the full three year period will have to be served. This award will also serve to put Russell on notice that after a return to the full 3 year-ban,

the procedure outlined in Article 7.20 of the CADP 2009, will apply to him in respect of any further breaches committed by him.

99. The parties are advised that the Arbitrator is prepared to remain seized of the remedy in this award for the duration of the ban in order to determine if there are any alleged unjustified violations. If the parties want the Arbitrator to remain seized of the matter, they are requested to file a joint statement to that effect. If all parties do this within 30 days of the date of this Award, I will remain seized of this matter for the duration of the ban for the purposes of interpreting and applying the remedy.

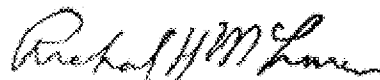
4. Conclusion:

100. The lifetime ban imposed upon Russell by the SOP 1994 and the banned activities arising therefrom as modified by the parties is reduced to a ban for three more years beginning on 10 September 2012 for a total of 15 plus years from its outset in 1997.

101. The last one and a half years of the said 3 more years of the ban will be suspended in the event that for the first year and half of the continuance of the ban imposed by this Award Russell abides by both the absolute letter of the ban and the spirit of what the ban stands for and intends to accomplish. If he is free of breaches of any kind then the ban will cease one and one half years from the date of the hearings in this proceeding and would be terminated on 9 March 2014.

102. If any party wishes to make submissions on costs, they may do so by way of written submission to me and copied to all parties, within fifteen (15) days of the date of this Award.

Dated at London, Ontario this 24th day of October, 2012.



Richard H. McLaren, C.Arb.
ARBITRATOR

Jurisdiction	Name	Year	Sport	Role	Details	Penalty
Canada	Haack	2012	Lacrosse	athlete	elite level B.C. lacrosse player, criminal charges of possession for the purpose of trafficking, anabolic steroids, no response from athlete, no "exceptional circumstances", possession and trafficking demonstrated, range 4 years to life	4 years
Canada	Gariepy	2012	taekwondo	athlete support personnel	provided prohibited diuretics to a **minor athlete** for whom he was a trainer for the Canadian Championships, athlete suspended for 2 years	5 years
Canada	Moscariello	2009	boxing	athlete support personnel	**injected athlete** with deca-durabolin **without her knowledge**, did not participate in heariing, wrote on behalf of athlete acknowledging fault, **athlete 19 years old**, not told until 1 month later, Moscariello **kept store of steroids for his own use** in same location as coached athlete	12 years
Canada	Aubut	2009	cycling	athlete support personnel	**administered EPO** to athlete Jeanson while he was her **coach**, she was a **minor**	life
U.S.A.	Stewart	2010	athletics	coach	obtained prohibited drugs (numerous types) from a known drug dealer in Mexico over a **period of 10 years for use by athletes he was training, administered** and attempted to administer prohibited substances, **aided and abetted anti-doping rule violtions, counseled cover up of activities**	life
Canada	Russell	1997	swimming	person	criminal conviction for conspiracy to import anabolic steroids, 201 days in jail, no evidence that drugs went to athletes in organized sport, no involvement in organized sport at the time of the offence or conviction	life