

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

No.: SDRCC DT 15-0229
(DOPING TRIBUNAL)

CANADIAN CENTRE FOR ETHICS IN SPORT
(CCES)
SOFTBALL CANADA

And

BRIAN BANNER
(ATHLETE)

And

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

BEFORE:

Jane H. Devlin

Arbitrator

APPEARANCES:

For the CCES

Alexandre Maltas
Kevin Bean

For Softball Canada

Hugh Mitchener

For the Athlete

Emir Crowne
Melissa Knox

The Athlete, Brian Banner, is 33 years of age and has been playing softball competitively since the age of 18. In April 2015, he attended a training camp in Mississauga for the Senior Men's National Team. On Sunday, April 26th, he was subject to doping control. Analysis of the urine sample provided by Mr. Banner revealed the presence of four separate anabolic agents, namely, oxandrolone, methandienone, drostanolone and dehydrochloromethyltestosterone ("DHCMT"). Each of these agents is classified as a prohibited substance on the WADA Prohibited List and their use is prohibited at all times, both in and out of competition.

Upon being advised of the adverse analytical finding, Mr. Banner agreed to a provisional suspension which took effect on May 27th. He also admitted the anti-doping rule violation and requested a hearing to contest the sanction proposed by the CCES involving a four year period of ineligibility under Rule 10.2.1 of the Canadian Anti-Doping Program ("CADP"). Rule 10.2 sets out the sanction for a violation of Rule 2.1 which deals with the presence of a prohibited substance or its metabolites or markers in an Athlete's sample. In this regard, the relevant provisions of the Rule are as follows:

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

The period of *Ineligibility* for a violation of Rules 2.1, 2.2 or 2.6 shall be as follows, subject to the potential reduction or suspension pursuant to Rules 10.4, 10.5 or 10.6:

10.2.1 The period of *Ineligibility* shall be four years where:

- 10.2.1.1 The anti-doping rule violation does not involve a *Specified Substance*, unless the *Athlete* or other *Person* can establish that the anti-doping rule violation was not intentional.
- 10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and CCES can establish that the anti-doping rule violation was intentional.
- 10.2.2 If Rule 10.2.1 does not apply, the period of *Ineligibility* shall be two years.
- 10.2.3 As used in Rules 10.2 and 10.3, the term “intentional” is meant to identify those *Athletes* who cheat. The term, therefore, requires that the *Athlete* or other *Person* engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall be rebuttably presumed to be not “intentional” if the substance is a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance was Used Out-Of-Competition*. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall not be considered “intentional” if the substance is not a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance was Used Out-of-Competition* in a context unrelated to sport performance.

Rule 3.1 provides that where the Rules place the burden of proof upon the Athlete alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.

The hearing in this case took place by teleconference on Thursday, September 17, 2015. The evidence on behalf of the Athlete consisted of a witness statement of Mr. Banner on which he was cross-examined by Mr. Maltas, on behalf of the CCES, and re-examined by his counsel, Dr. Crowne. In support of its case, the CCES tendered an affidavit of Dr. Christiane Ayotte, a Professor and the Director of the Doping Control Laboratory at INRS-Institut Armand-Frappier, which is accredited by the International Olympic Committee and by WADA. Dr. Crowne waived the right to cross-examine Dr. Ayotte on her affidavit.

Dealing firstly with the evidence of the Athlete, in Mr. Banner's statement, he indicated that during the winter, which is the off-season for softball, he plays recreational ice hockey. He also indicated that this past winter, he was suffering from a shoulder injury which had been bothering him since the fall of 2014. Mr. Banner believed that the injury was the result of wear and tear or overuse of his neck and shoulders from playing sports. As a result, he sought treatment at Sooke Evergreen Physiotherapy for his neck and shoulders on three or four occasions.

Mr. Banner also indicated that in mid-March of this year, he was on the bench during a hockey game with one of his teammates, whom he described as a friend, and they were discussing treatment for injuries. According to Mr. Banner, he mentioned his shoulder was still not feeling 100% and his friend recommended a product that he had used. Mr. Banner testified that his friend gave him an unsealed bottle of capsules and the

packaging on the bottle indicated that the product was Tribulus Terrestris ("TT"). Mr. Banner also testified that his friend indicated that the product contained "all natural" herbs, which Mr. Banner took to mean that it did not contain any substances which would damage his health and that it would assist in rebuilding the strength in his shoulder. Mr. Banner testified that he took one TT capsule twice a day for approximately three weeks, beginning in mid-March. He also indicated that he discontinued using the product because he did not notice any improvement in the condition of his shoulder.

During the course of his evidence, Mr. Banner acknowledged that he was aware that as a member of the Senior Men's National Softball Team pool, he was subject to doping control. He was also aware that as an Athlete, he was responsible for what he ingested. Mr. Banner testified that when he took the TT capsules, he believed that he was taking an "all natural" product and that it was only after he tested positive that he realized that TT must have been the cause of the adverse analytical finding. Mr. Banner also testified that at the time he took TT, he was not taking any other supplements and that in terms of medication, he only took Advil or Aleve.

Mr. Banner testified, as well, that both before taking TT and after testing positive, he did some research on the product on the internet. At one point, he suggested that he was more concerned by the research that he did after he tested positive than by the research he did before. In any event, in his statement, Mr. Banner indicated that some websites describe TT as a widespread weed and a natural source of a dietary supplement

which is said to raise natural testosterone levels. However, the websites indicate that there have been no studies showing a direct correlation between the use of TT and an increase in natural testosterone. Mr. Banner also agreed that a Wikipedia article on TT appended to his statement refers to the anabolic effect of TT but does not indicate that TT contains steroids. Moreover, although Mr. Banner indicated in his statement that it was not clear from various websites whether TT contains anabolic steroids, he agreed that he did not find any websites linking TT to the four anabolic agents that were detected in his urine sample.

Mr. Banner also acknowledged that prior to testing positive, he did not consult a coach, a physician, the manufacturer of TT or the CCES. He acknowledged, as well, that although he continues to have access to the product, he did not have it tested, nor did he ask that it be tested by the CCES. He also took no steps to contact the friend who gave him the TT.

As noted previously, in support of its case, the CCES tendered an affidavit from Dr. Ayotte on which Dr. Crowne waived the right of cross-examination. In her affidavit, Dr. Ayotte indicated that the analysis of Mr. Banner's urine sample revealed the presence of the four anabolic agents referred to earlier and she noted that the results were not due to low amounts or traces. Dr. Ayotte also indicated that the substances in question are purely synthetic and that because their chemical structures are different, all four would have to be ingested for their presence to be detected in an Athlete's urine

sample. She indicated, as well, that the distribution of such substances is illegal in Canada although they can be acquired on the black market. Dr. Ayotte also advised that while oxandrolone, methandienone and DHCMT are found in capsules or tablets for oral administration, drostanolone preparations (in oil) must be injected intra-muscularly.

Dr. Ayotte indicated, as well, that although supplements containing or claiming to contain extracts of TT have been promoted as a means of naturally enhancing testosterone secretion, several scientific studies did not report any elevation in urinary testosterone following the ingestion of TT supplements. In conclusion, Dr. Ayotte expressed the opinion that it was not possible that all four anabolic agents detected in Mr. Banner's urine sample were contained in the TT product that he claimed to have ingested or were formed by his body following ingestion.

Submissions

It was the submission of Dr. Crowne that Mr. Banner was candid and forthright in giving his evidence and that his version of events was consistent throughout. Dr. Crowne further submitted that although Mr. Banner took pain medication in the spring of 2015, he was not taking any supplements, apart from TT. Accordingly, it was contended that the elements necessary to establish that TT was the source of the prohibited substances detected in Mr. Banner's sample had been made out. Mr. Crowne also

submitted that although Mr. Banner did some measure of research, he admitted to a level of carelessness in taking TT.

Based on the totality of the evidence, Mr. Crowne contended that there was no intent on Mr. Banner's part to cheat so as to warrant a four year period of ineligibility under Rule 10.2.1.1 of the CADP. It was submitted that in Mr. Banner's case, such a sanction would amount to a "life sentence". Moreover, while Dr. Crowne advised that a claim was not being pursued under the provisions of the CADP dealing with contaminated products, he submitted that in view of Mr. Banner's lack of intent and the level of carelessness involved, a two year period of ineligibility was appropriate. Given Mr. Banner's prompt admission of the violation, Dr. Crowne proposed that the period of ineligibility run from the date of sample collection on April 26, 2015.

It was the submission of Mr. Maltas that the anti-doping rules must be interpreted in a manner consistent with the general principles set out in the CADP. He contended that these principles make it clear that doping-free sport is a matter of great public interest and that anti-doping efforts require transparency, openness to scrutiny and public accountability in order to achieve public confidence. Mr. Maltas further submitted that under Rule 10.2.1.1, the burden is on the Athlete to demonstrate that the anti-doping rule violation was not intentional.

Mr. Maltas contended that in this case, Mr. Banner has not met that burden as he offered nothing more than his belief that TT was the cause of the adverse analytical finding. In this regard, Mr. Maltas noted that there was no testing of the product, no information from the manufacturer, no studies or research to link TT to the anabolic agents detected in Mr. Banner's sample and no evidence from Mr. Banner's friend who gave him the supplements. It was submitted, therefore, that Mr. Banner failed to establish that TT was the cause of the adverse analytical finding and, accordingly, he did not discharge the burden of proving a lack of intention. In these circumstances, it was submitted that Rule 10.2.1.1 of the CADP mandates a four year period of ineligibility.

In the course of his submissions, Mr. Maltas also referred to various portions of the affidavit of Dr. Ayotte and noted, among other matters, that not merely trace amounts of the four anabolic agents were detected in Mr. Banner's sample. Mr. Maltas also noted that Dr. Ayotte indicated that the substances are purely synthetic and that their distribution is illegal in Canada although they may be obtained on the black market. He noted, as well, that Dr. Ayotte indicated that one of the substances must be injected intramuscularly and that this statement was unchallenged. Moreover, Mr. Maltas noted that like the Wikipedia article appended to Mr. Banner's statement, Dr. Ayotte indicated that studies have not reported any elevation in urinary testosterone following the ingestion of TT supplements. She also expressed the opinion that it was not possible that the four anabolic agents detected in the Athlete's sample were contained in the TT supplements that he claimed to have ingested.

Mr. Maltas further submitted that even if I were to find that there was a link between the TT that Mr. Banner testified that he took and the adverse analytical finding, Mr. Banner ingested TT capsules from an unsealed bottle on the advice of a friend. It was contended that he exercised no real diligence to determine the safety of the product and that, in these circumstances, Mr. Banner knew that there was a significant risk that his conduct might constitute or result in an anti-doping rule violation and he manifestly disregarded that risk.

Mr. Maltas also noted that the Athlete was not pursuing a claim for a reduction in the period of ineligibility based on Rule 10.5.1.2 of the CADP which deals with contaminated products. As to Rule 10.5.2, which provides for a reduction where there is no significant fault or negligence on the part of the Athlete in other cases, Mr. Maltas contended that the Rule applies only if the Athlete can prove that the anti-doping rule violation was not intentional. Moreover, Mr. Maltas submitted that under the Rule, Mr. Banner would have to establish how the four anabolic agents entered his system and that he failed to do so. Mr. Maltas submitted, as well, that a very high standard is expected of Athletes to make diligent and detailed inquiries before ingesting supplements and that Mr. Banner did not take any real steps to determine whether TT was safe. Accordingly, Mr. Maltas contended that there is no basis for reducing the four year period of ineligibility mandated by Rule 10.2.1.1 of the CADP. In view of Mr. Banner's admission of the

violation, Mr. Maltas proposed that the period of ineligibility run from the date of sample collection.

Decision

As noted at the outset, on April 26, 2015, Mr. Banner was subject to doping control and the analysis of his urine sample revealed the presence of four anabolic agents, namely oxandrolone, methandienone, drostanolone and DHCMT. Each of these agents is a prohibited substance on the WADA prohibited list and the use of these substances is prohibited both in and out of competition.

Mr. Banner admitted the anti-doping rule violation and, accordingly, the issue relates to the sanction for the violation in question. In this regard, Rule 10.2.1.1 of the CADP provides that the period of ineligibility shall be four years where the anti-doping rule violation does not involve a specified substance unless the Athlete can establish that the violation was not intentional. Rule 10.2.2 provides that if Rule 10.2.1 does not apply, the period of ineligibility shall be two years. Rule 10.2.3 provides that the term "intentional" in Rules 10.2 and 10.3 is meant to identify Athletes who cheat. The Rule further provides that the term requires that the Athlete engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk.

In considering whether Mr. Banner has satisfied the burden of proof under Rule 10.2.1.1, I note that he testified that he obtained an unsealed bottle of TT from a friend who indicated that the product contained all natural herbs and Mr. Banner understood that it would promote healing in his shoulder. Mr. Banner acknowledged that his friend was not a physician and that after doing some internet research, he took the product twice daily for approximately three weeks. Upon being advised of the adverse analytical finding, Mr. Banner concluded that TT must have been the cause of the finding.

As the CCES noted, Mr. Banner offered nothing more than his belief that the TT, which he testified he took, was the source of the anabolic agents that were detected in his sample. Although Mr. Banner acknowledged that he continues to have access to the product, he did not take any steps to have the product tested, nor did he contact the manufacturer of the product and although facing a significant period of ineligibility, he did not contact the friend from whom he obtained the product. Mr. Banner also acknowledged that none of the internet research he conducted indicated a link between TT and the anabolic agents found in his sample.

In assessing the veracity of Mr. Banner's account, it is also necessary to consider a number of statements contained in Dr. Ayotte's affidavit. Firstly, Dr. Ayotte indicated that Mr. Banner's sample did not contain trace amounts of the four anabolic agents and, instead, she described the signals as "intense". She also indicated that the

substances in question are purely synthetic and that they have different chemical structures so that all four would have to be ingested for their presence to be detected in an Athlete's urine sample. Dr. Ayotte indicated, as well, that distribution of the substances is illegal in Canada although they can be obtained on the black market. In my view, these factors substantially reduce the likelihood that the adverse analytical finding, which involved four separate anabolic agents, was attributable to the ingestion of TT supplements.

Moreover, Dr. Ayotte indicated that one of the substances, namely, drostanolone, must be injected intra-muscularly and I find that this statement on the part of Dr. Ayotte calls into question the explanation offered by the Athlete. Although Mr. Banner testified that he ingested TT only in capsule form, the unchallenged evidence of Dr. Ayotte indicates that one of the anabolic agents detected in his urine sample requires intra-muscular injection. In my view, this evidence bears directly on the veracity of Mr. Banner's account and in light of the evidence, it cannot reasonably be concluded that the ingestion of TT was responsible for the presence of four separate anabolic agents in Mr. Banner's sample. Accordingly, I am compelled to conclude that Mr. Banner has failed to satisfy the burden of establishing that the anti-doping violation was not intentional.


During the course of the hearing, Dr. Crowne acknowledged that the Athlete was no longer advancing a claim under Rule 10.5.1.2 of the CADP, which deals with contaminated products. However, reference was also made to Rule 10.5.2 which provides

for a reduction in the period of ineligibility where an Athlete can demonstrate that he or she bears no significant fault or negligence in cases other than those to which Rule 10.5.1 applies. The commentary to Rule 10.5.2 indicates that the Rule may be applied to an anti-doping rule violation except those Rules where intent is an element of the violation (e.g. Rule 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (e.g. Rule 10.2.1). In this case, Rule 10.2.1 applies and for the reasons set out, I have found that Mr. Banner failed to satisfy the burden of establishing that the anti-doping rule violation was not intentional. Accordingly, there can be no further reduction in sanction based on Rule 10.5.2.

In the result, Rule 10.2.1.1 of the CADP prescribes a four year period of ineligibility and while I recognize the effect of such a sanction on Mr. Banner, who is 33 years of age, the provisions of the Rule are clear where lack of intention has not been established. Given Mr. Banner's timely admission of the violation, there was no dispute that the period of ineligibility should run from the date of sample collection on April 26, 2015.

Unless a written request is made to the SDRCC by 5:00 p.m. (EDT) on October 1, 2015, there will be no order as to costs.

DATED AT TORONTO, this 25th day of September, 2015.



Arbitrator