IN THE MATTER OF AN ARBITRATION under the *ADRsportRED PROGRAM*

BETWEEN:

SARA LINDMAN-PORTER

("Appellant")

AND:

CANADIAN CYCLING ASSOCIATION (CCA)

("Respondent")

(ADRsportRED FILE NO. SDRCC 05-0027)

SOLE ARBITRATOR:	JOHN P. SANDERSON, Q.C.
REPRESENTING THE CLAIMANT:	MARC A. KAZIMIRSKI
REPRESENTING THE RESPONDENT:	SEAN O'DONNELL
DATE OF HEARING:	APRIL 5, 2005
PLACE OF HEARING:	VANCOUVER, BRITISH COLUMBIA
DATE OF AWARD:	APRIL 14, 2005

AWARD

INTRODUCTION

Sara Lindman-Porter, the appellant, is an elite women's downhill mountain bike rider. She participated in the World Masters Mountain Bike Championships held in Mont. Ste Anne, Quebec, on September 5, 2004. There she won a gold medal in the elite women's thirty to thirty-four category. This arbitration arises out of the analysis of a urine sample given by the appellant at the completion of the race.

A hearing was held in Vancouver on April 5, 2005. The appellant was represented by counsel. Her husband gave evidence at the hearing as did a training companion and the appellant herself. Sean O'Donnell, the High Performance Program Coordinator represented the CCA and called no witnesses.

BACKGROUND FACTS

The appellant is an elite level athlete in the discipline of downhill mountain biking in the sport of cycling. The UCI, based in Aigle, Switzerland, is the International Federation responsible for the sport of cycling world-wide. The CCA is the National Federation for the sport in Canada and is also a national member of the UCI.

A contractual arrangement between the appellant and CCA provides that the rider is bound to observe the Anti-Doping Regulations established by UCI. The contract specifies that she has had the opportunity to view the regulations and has agreed to be bound by all the provisions set out therein.

The CCA has a contractual relationship with the UCI. The effect of that relationship is that the CCA is obliged to enforce the UCI regulations. Within the UCI regulations is Part 14, entitled "The Anti-Doping Examination Regulations".

These regulations first came into force on July 1, 2001 and were subsequently amended on August 13, 2004. Their purpose is to protect the health and safety of all athletes and to maintain the integrity of the sport of cycling. The regulations cover anti-doping tests in and out of competition, the imposition of penalties for doping offences and the provision of support and assistance to cycling athletes when required. The parties agree that the UCI Anti-Doping Examination Regulations 2004 are applicable to this case.

The appellant provided a urine sample pursuant to the anti-doping regulations, following the World Masters Mountain Bike Championships on September 5, 2004. The parties agree that the sample was that of the appellant and that it was transported to the lab without any breach of the chain of custody.

The appellant's urine sample was analyzed by the laboratory as required by the regulations. The analytical result was a positive test for cannabis of 22.6 ng/mL. The appellant was notified of these results on September 26, 2004. She accepts the positive test result and does not allege a departure from the laboratory rules for the testing of samples. She did not request an analysis of her B sample.

This anti-doping tribunal was established pursuant to an agreement to request the Sport Dispute Resolution Centre for Canada to provide arbitration services to the CCA. The parties confirmed the conferring of jurisdiction on the arbitrator by a signed arbitration agreement. The parties then proceeded to mutually agree upon the selection of the arbitrator to hear the alleged doping offence in accordance with the anti-doping regulations. The parties have confirmed that they have no objection to the tribunal's composition or its jurisdiction to hear, determine and issue a decision in this matter.

SUMMARY OF RELEVANT EVIDENCE

Trevor Porter, the appellant's husband, is an experienced and accomplished cyclist. He has been a member of the Canadian national team six times since 1995. He also competed at the World Masters Mountain Bike Championships on

September 5, 2004. Like his wife, he won the gold medal in his category. He too was selected for testing, but his sample was not designated as a positive test.

Mr. Porter and the appellant were married in April 2000. He encouraged his wife to take up the sport of downhill mountain bike racing in a serious way and she rather quickly established herself in the elite category. However, she suffered injuries to her shoulders and by early 2004, she was recovering from surgery to both shoulders. She was unable to train and was not sure if she was going to be able to ride again. According to his evidence, she was in considerable pain and discomfort and was depressed.

At this point in the narrative I pause to record that the evidence of all the witnesses given in this proceeding is subject to the protection of the Canada Evidence Act.

Mr. Porter testified that he occasionally smoked marijuana, but never when he was training or racing. He stated that he considered it unsafe to use marijuana when cycling as it would dull his reaction time and create a risk to himself. He also was aware that marijuana was a prohibited substance under the anti-doping rules and he respected those rules.

In regard to his wife, he testified that she smoked marijuana on occasion during the early period of 2004 when she was recovering from surgery, as a means of dealing with the discomfort she was in and her concern for her future in the sport. By April of 2004, she began to recover her strength and mobility and decided she would attempt to get back to serious competition. He said that he and his wife talked about the fact she would have to stop smoking marijuana if she was going to resume her racing career. He stated that she agreed with his view that using marijuana was extremely dangerous for a downhill racer, who would be unable to react quickly and would be in serious danger. He stated that the did not observe her smoking marijuana after April and if she had, he would have noticed the effect.

When he and his wife decided to enter the World Masters Mountain Bike Championships, they registered through a web-site that posted the rules for competitors. He testified that the reference to marijuana on the web-site with respect to this competition contained the old measurement of 40 ng/mL as a violation, rather than the 15 ng/mL, which was the actual rule in force at that time. When they took part in the competition, there was no notice given on the web-site or otherwise that the rule had been changed.

The Porter's arrived in Mont. Ste Anne the day before the competition began. They stayed at a bed and breakfast near the mountain. Mr. Porter stated that smoking marijuana is very much part of the culture of biking, especially in relation to cross-country and endurance athletes. Consequently, a majority of their friends and colleagues smoke marijuana and at social occasions, particularly at parties and other events during or immediately prior to actual competition, he testified it is almost impossible to get away from the smoke of marijuana. Other athletes stayed at the bed and breakfast they were using and he observed a number of them smoking marijuana, which was freely used in all of the rooms.

Following the competition and having learned that the appellant had tested positive, they were shocked by the results. He said they simply could not understand how there could be a positive test. He stated that the appellant was devastated by what had occurred and that she was diagnosed by her family doctor as being clinically depressed. She began seeing a psychologist and receiving treatment. In his words, they had thought her victory would carry her forward, "but it had all turned sour".

Corey Cooper is a close friend and training partner of the appellant. Ms. Cooper is a long-time mountain biker who competes, but not at the elite level. She has been a major force in encouraging the appellant to progress from a virtual novice to an elite biker in only a few short years. She brought the appellant in to her circle of biking enthusiasts, all of whom formed a tight-knit group who trained regularly on the North Shore of Vancouver.

Ms. Cooper owns a large van she used for shuttling riders, including the appellant, to the head of the trail where the training run began. The appellant would take part in this training regimen, at least two or three days a week during the racing season from approximately 5:00 p.m. to 9:00 p.m. In September that had risen to five or six days per week. During the drive up the mountain, there would be as many as six bikers and according to Ms. Cooper, there was always at least one of them smoking marijuana, with the exception of the appellant. Ms. Cooper testified she did not see the appellant smoke marijuana on any of the training runs. She also testified that because the appellant was an elite biker and the others were not, she would do her training run on her own and would meet the others at the bottom of the hill.

In May 2004, Ms. Cooper testified that the appellant resumed her training and using the shuttle system. She observed the appellant progress in her training to the point that she was fully recovered from the surgery. She said that in the entire time they were training together, from May until the competition in Mont. Ste Anne, she did not see the appellant smoke marijuana, although all around her others, including Ms. Cooper, were smoking. According to her, none of them considered there would be any risk of being affected by second-hand smoke. She said she feels very badly for what has happened. In particular, she was thrilled when appellant returned with her medal, but when the positive test results were announced, the appellant went right back down again into the same depressed state as she in was following the surgery.

The appellant immigrated to Canada from Sweden in 1998. She became interested in the sport of mountain bike riding through her husband, particularly when they came to Vancouver some time in 2000. By 2003, she was determined to reach the elite level in her sport; however, in the same year, she underwent surgery to both shoulders which left her in considerable pain and wondering if she would ever race again. In addition to her prescribed medication, she testified that on occasion she would use marijuana during this period of her convalescence.

In April 2004, she decided she would attempt to resume training. She stopped using marijuana after a discussion with her husband and said that she pushed herself through her pain threshold. She and her husband did not train together, but she rejoined the shuttle training system arranged by Ms. Cooper and her circle of friends.

By the summer of 2004, the appellant was able to race again. By this time she was training five to six times per week, usually with Ms. Cooper and her group. After talking it over with her husband, they decided to both enter the race in Mont. Ste Anne. She was excited to be back racing and she invited her father to come from Sweden to watch the event. She testified that at no point did she use marijuana, that she knew the rules and that there was no way she would smoke if she was racing. She said she knew it would impair her skills on a bike and that she could lose concentration and injure herself.

The appellant testified that there was almost always someone smoking marijuana in Ms. Cooper's van during the shuttle training runs. She said she did not believe it would be possible to be affected by second-hand smoke. At no time did she feel any physical or mental effect on her. She said that she now realizes she used bad judgement in not asking them not to smoke, or not going off to train with others who were not using marijuana. She does not blame her friends, but she said that if she had known what could happen, she would have found someone else to ride with. She also testified that she now knows one must be careful at parties and social occasions to avoid inhaling second-hand smoke.

In addition to the *viva voce* evidence, the appellant through her counsel, filed an affidavit from a medical practitioner who is also an elite biker giving his medical opinion with respect to the effect of second-hand marijuana smoke in circumstances such as are present here, together with supporting articles from medical journals. Mr. O'Donnell, on behalf of the CCA, made reference to the medical views of a doctor associated with the laboratory where the testing took place. Perhaps thankfully, I conclude it is not necessary to enter this medical

debate as it is not contested that the appellant was exposed to second-hand marijuana smoke and this would explain the positive test, since there is no other credible evidence.

SUBMISSIONS OF THE PARTIES

The submissions of both parties were admirably clear and succinct. It is conceded that a violation of the anti-doping regulations has been established by the facts of this case. More specifically, the appellant does not dispute that a prohibited substances, as defined by article 15 of the Anti-Doping Examination Regulations was present in her bodily specimen. Article 15 reads in part as follows:

> 15. The following constitute anti-doping rule violations:
>
> .1 The presence of a *Prohibited Substance* or *Markers* in a *Rider's* bodily *Specimen.*
>
> .1.1 It is each *Rider's* personal duty to ensure that no *Prohibited Substance* enters his body. *Riders* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their bodily *Specimens*. Accordingly, it is not necessary that intent, fault, negligence or knowing *Use* on the *Rider's* part be demonstrated in order to establish an anti-doping violation under article 15.1.

The parties also agree that the positive test result occurred in connection with an in-competition test as set out in article 256. The effect of that article is automatic disqualification of the individual result, in this case the appellant winning a gold medal. Article 256 reads as follows:

> A violation of these Anti-Doping Rules in connection with an *In-Competition* test automatically leads to *Disqualification* of the individual result obtained in that *Competition.*

The appellant accepts that the decision of the CCA to disqualify the appellant's individual result was proper and appropriate in the circumstances.

In making their submissions, the parties further agree that cannabis is a specified substance listed in the amended prohibited list which came into effect on August 13, 2004. Further, the parties agree that cannabis is a specified substance "not intended to enhance sport performance". The significance of that agreement is evident from a close reading of article 262, which reads as follows:

> Where a *Rider* can establish that the Use of a *Specified Substance* was not intended to enhance sport performance, the period of *Ineligibility* found in article 261 shall be replaced with the following:
>
> > First violation: At a minimum, a warning and reprimand and no period of *Ineligibility* from future *Events*, and at a maximum, 1 (one) years' *Ineligibility*.
> >
> > Second violation: 2 (two) years' eligibility
> >
> > Third violation: Lifetime *Ineligibility*
> >
> > However, the *License-Holder* shall have the opportunity in each case, before a period of *Ineligibility* is imposed, to establish the basis for eliminating or reducing (in the case of a second or third violation) this sanction as provided in articles 264 and 265.

Thus, the issue I must determine is whether the appellant has established a proper basis for eliminating or reducing the period of ineligibility from future events, recognizing that the above-quoted article specifies the period of ineligibility can not exceed one year for a first violation, which is the case here.

Counsel for the appellant submits that no period of ineligibility from future events should be imposed. Counsel urges that the following factors support that submission:

1. This is the first anti-doping violation committed by the appellant

2. The test result of 22.6ng/mL would not constitute a positive test result under the earlier prohibited substance list, which prohibited marijuana in downhill mountain bike competition where the

sample exceeded 40ng/mL, according to the race web-site that was the standard for the event.

3. The evidence is that the appellant did not use marijuana during the race season and her positive resulted from inhalation of second-hand smoke.

4. It is not disputed that marijuana does not enhance performance in a downhill mountain bike competition.

Mr. O'Donnell, on behalf of the CCA agrees that I have the arbitral discretion to find there should be no period of ineligibility for future events in the circumstances of this case.

DECISION

I have carefully reviewed the evidence, the relevant anti-doping regulations and rules and the able submissions of the parties. I find that an anti-doping violation as defined by article 15 occurred. I further find that the substance found in the appellant's bodily sample is a specified substance listed in the amended prohibited list in effect at the time of the race. The question now to be determined is the appropriate sanctions in accordance with the application of article 262 to the facts of this case.

The evidence of all of the witnesses, particularly the appellant, was clear, cogent and credible. I see no reason to doubt their account of the various events and their reasons for the actions that were taken. In the circumstances, I accept the evidence of the appellant that the substances was not self-administered and that she did not smoke marijuana after May of 2004. On the evidence, I am satisfied that the prohibited substance was present because the appellant inhaled high levels of second-hand smoke while training for the competition, and to a lesser degree, in the bed and breakfast in Mont. Ste Anne. While there may be a debate among medical experts as to the exact correlation between inhaling amounts of

second-hand smoke and the passage of a number of days before testing, that issue is not relevant in these particular circumstances.

Turning now to the issue of the appropriate sanctions, I agree with the parties as to the basis and extent of my discretionary authority. This is the appellant's first violation of the anti-doping regulations. The medal she won has been returned and the race result disqualified because the violation took place during a competition. As required by article 262, as a minimum, I must provide a sanction that includes a warning and a reprimand. Thus, the only issue that remains is whether the sanction should also include a period of ineligibility from future events, which period can not exceed one year. In the somewhat unusual circumstances of this case, I have concluded no period of ineligibility from future events should be applied.

I have reached this conclusion for the following reasons:

1. The appellant did not bring the substance in to her body by smoking marijuana herself; she ingested the substance by inhaling second-hand smoke.
2. She has been honest, forthright and cooperative during the investigation and these proceedings.

3. The prohibited substance in question does not enhance performance. In fact, it diminishes the skills and capacity to perform that a rider in competition requires.

4. The appellant has accepted full responsibility for what occurred. She admits she used poor judgement in continuing to ride in the training van when others were smoking marijuana. She states that she was not affected by the smoke and thus she did not realize it was being absorbed in to her blood stream. In giving evidence at the hearing, she assured the tribunal and the CCA that in the future

she will not allow herself to be put in the same position by friends and training companions.

5. She has suffered the loss of her medal and endured the notoriety that has resulted from her actions and poor judgement. Her mental health has been affected and she has had to seek medical treatment for depression following the positive result. I am satisfied that she is contrite and that she has learned from this experience. If I am wrong, she must understand that will be an important factor in any future case.

In sum, I am persuaded, she has suffered enough and there is no reason to punish her further by imposing a period of ineligibility from future events in addition to a warning and reprimand. As can be seen from the language of article 262, the notion of proportionality is to be applied in the proper circumstances. I am satisfied she had an honest but mistaken belief that the prohibited substance would not enter her blood stream through inhaling second-hand smoke — in contrast to a situation where a rider makes a conscious decision to smoke marijuana.

In the result, for the reasons expressed above, I am prepared to exercise my discretion in favour of the appellant by finding that the appropriate sanction in this case is a warning and a reprimand for permitting a prohibited substance to enter her body and that effective as of the date of this decision, the appellant is eligible to engage in future events.

It is so ordered.

Dated at Vancouver, British Columbia this 14th day of April, 2005.

John P. Sanderson, Q.C.
Sole Arbitrator