Important note: *The name of the athlete has been redacted from this decision.*

SPORT DISPUTE RESOLUTION CENTRE OF CANADA

IN THE MATTER OF THE CANADIAN ANTI-DOPING PROGRAM

AND IN THE MATTER OF AN ANTI-DOPING RULE VIOLATION BY [redacted] ASSERTED BY THE CANADIAN CENTRE FOR ETHICS IN SPORT

N° : SDRCC DT -4-0014
(Doping Tribunal)
Ordinary Division

CANADIAN CENTRE FOR ETHICS IN SPORT

CANADIAN INTERUNIVERSITY SPORT

GOVERNMENT OF CANADA

and

[redacted]
Athlete

and

WORLD ANTI-DOPING AGENCY
Observer

Before:

Graeme Mew (Arbitrator)

Appearances and Attendances:

For the Athlete:	[redacted] (Athlete) Jennifer [redacted]
For the Canadian Centre for Ethics in Sport	Joseph de Pencier (Counsel)
For Canadian Interuniversity Sport	Marg McGregor (CEO)
For the Government of Canada	Mary Warren (Sport Canada)

DECISION

1. [redacted] (the "Athlete") is a member of the Brandon Bobcats basketball team which represents Brandon University and, as such, is a member of Canadian

Interuniversity Sport ("CIS"), the national sport organisation governing university basketball in Canada.

2. On 25 November 2004, while playing for his team against the University of Winnipeg in Winnipeg, Manitoba, the Athlete was one of four athletes randomly selected for doping control administered by Canada's national anti-doping agency, the Canadian Centre for Ethics in Sport ("CCES") following completion of the basketball game.

3. The Athlete provided a urine sample which, following analysis, is alleged to have contained two substances, the presence of which in an athlete's sample are prohibited under the Canadian Anti-Doping Program ("CADP"), namely cannabis at a concentration of 731 ng/ml and a cocaine metabolite.

4. The Athlete acknowledges that he used cannabis for medicinal purposes and admits the adverse analytical finding against him in this regard. However, the Athlete denies having used cocaine and challenges the adverse analytical finding in respect of the presence of cocaine metabolite.

5. The Athlete submits, in respect of the adverse analytical findings for cannabis and, if established, cocaine metabolite, that "exceptional circumstances" exist which would permit a Doping Tribunal to eliminate or reduce the sanction that would otherwise be applicable.

6. Under Rule 7.53 under the CADP, unless a person waives the right to a hearing, an anti-doping rule violation by a person and the appropriate consequence may not be determined and imposed without a hearing by a Doping Tribunal.

7. Hearings to determine whether an anti-doping rule violation has been committed and, if so, the consequence(s), are conducted by a single arbitrator, appointed from the roster of arbitrators of the Sport Dispute Resolution Centre of Canada, sitting as the Doping Tribunal (CADP, Rule 7.59). I was so appointed in this matter by order of the Co-Chief Arbitrator of the Doping Tribunal, L. Yves Fortier, CC, QC dated 14 January 2005.

Record of Proceedings

8. The hearing commenced on Monday 24 January in Brandon, Manitoba. The Athlete attended in person as did counsel for the CCES. Representatives of Sport Canada and the CIS participated by telephone conference. The Athlete was assisted by Jennifer [redacted], who also participated by telephone.

9. There were further brief telephone conferences on 26 and 28 January. The hearing proper continued on 31 January by telephone conference, following which written submissions were received from the parties on 1 and 2 February 2005.

10. Evidence was given at the hearing by the Athlete and by Christiane Ayotte (Director, Doping Control Laboratory, INRS-Institut Armand-Frappier, Montreal). The Athlete asserted the protection of the *Canada Evidence Act*, R.S.C. 1985, c. E-5 and the *Evidence Act*, R.S.O. 1990, c. E.23. The CCES also tendered evidence in the form of an affidavit of Jeremy Luke (Senior Manager, Doping Control Program, Canadian Centre for Ethics in Sport, Ottawa).

11. The documents provided to the arbitrator were as follows:

    a. Athlete Answer to Rule 7.46 Notification from CCES dated 12 January 2005

    b. Affidavit of Jeremy Luke, affirmed on 19 January 2005 together with the following exhibits:

        1. Curriculum vitae of Jeremy Luke

        2. The Canadian Policy Against Doping in Sport

        3. World Anti-Doping Agency 2004 Prohibited List

        4. Doping Control Officer Agreement between CCES and Joe Landreville dated 25 October 2003

        5. Athlete Selection Order regarding [redacted] dated 25 November 2004

        6. Doping Control Form ([redacted]) dated 25 November 2004

        7. Chain of Custody Form

        8. Doping Control Officer Report of Joe Landreville dated 25 November 2004

        9. Amended certificate of analysis, INRS-Institut Armand-Frappier dated 13 December 2004

        10. CCES (Jeremy Luke) letter to CIS (Marg McGregor) dated 13 December 2004 regarding Initial Review of Adverse Analytical Finding – In Competition Testing

        11. Email message from [redacted] to CCES (Jeremy Like) dated 20 December 2004

        12. Email message from INRS-Institut Armand-Frappier (Christiane Ayotte) to CCES (Karine Henrie) dated 23 December 2004 regarding Marijuana and Cocaine metabolites in urine sample 671274

13. CCES (Jeremy Luke) letter to CIS (Marg McGregor) dated 4 January 2005 regarding Assertion of an Anti-Doping Rule Violation

14. CCES (Jeremy Luke) letter to CIS (Marg McGregor) dated 4 January 2005 regarding Provisional Suspensions

15. Email message from Brandon University (Rick Nickelchok) to CIS (Marg McGregor) concerning provisional suspensions (text of press release following)

16. Email string ([redacted] to Jeremy Luke – 7 January 2005, Rick Nickelshok to Jeremy Luke – 11 January 2005, [redacted] to Jeremy Luke – 10 January 2005, Jennifer [redacted] – 9 January 2005 (attaching letter from Rick Nickelchok to Jerry Hemmings said to have been posted on 26 October 2004 in internet chat room "Canadian Hoops Talk"

17. Email CCES (Jeremy Luke) to [redacted] dated 11 January 2005 regarding Letter of Appeal

18. Email CCES (Jeremy Luke) to [redacted] dated 14 January 2005 regarding "B" Sample Opening

19. Email [redacted] to CCES (Jeremy Luke) dated 17 January 2005

20. Email Joe Landreville to CCES (Stuart Kemp) dated 18 January 2005 regarding Statement Required

c. Article - Technical Briefs – "False-Positive Ethanol in Clinical and Postmotem Sera by Encymatic Assay: Elimination of Interference by Measuring Alcohol in Protein-Free Ultrafiltrate", William C. Thompson et al, (1994) 40 Clinical Chemistry No. 8. 144

d. Extracts from "Emergency Care for patients with Hemophilia", Canadian Hemophilia Society

e. Medical Marijuana Briefing Paper downloaded from www.mpp.org/medicine.html

f. Email Jennifer [redacted] to SDRCC (Benoit Girardin) dated 25 January 2005

g. Article – "False Positive Postmortem EMIT Drugs-of-Abuse Assay due to Lactate Dehydrogenase and Lactate in Urine" (1995), 19 Journal of Analytical Toxicology 554

h. Extract, Holtorf, Urine Trouble: the truth about drug tests, (1st Ed.) 88-89

i. Extracts from website www.stopcocaineaddiciton.com/what-is-crack.htm

j. Letter, Marie-Andrée Covey RN to Dispute Resolution Secretariat dated 24 January 2005

k. Treating Physician Form, Dr. Luc Rochon, 18 September 2000

l. Information complied by Jennifer [redacted] dated 18 January 2005 with references to www.swedish.org/17150.cfm, www.xlar.com/false-positive-drug-test.html and www.doctorspiller.com

Events Preceding the Hearing

12. Based on the evidentiary record, I find that the following events occurred prior to the Hearing.

13. On the day he was tested, the Athlete was informed of the doping control process by Joe Landreville, the certified Doping Control Officer. Under Mr. Landreville's supervision, and with the observation of a chaperone, the Athlete provided, divided and sealed his sample into "A" and "B" bottles. The sample number code on his sample collection kit was 671274.

14. The Athlete and Mr. Landreville completed the Doping Control Form. In the section of that form relating to prescription, non-prescription medications and nutritional supplements taken during the previous ten days, the Athlete wrote "Koeagenate FS (Factor 8), Extra Strength Tylenol, Aerius ginseng, second hand marijuana smoke". The Athlete did not indicate any concerns on the Doping Control Form. In particular, the Athlete did not indicate his sample (while unsecured) had been left unattended for any period of time.

15. The Athlete's urine sample (sample code 671274) was sealed in a CCES transport bag by Mr. Landreville and delivered by secure chain of custody to the World Anti-Doping Agency accredited IRNS laboratory in Montreal pursuant to Rules 6.75 to 6.90 of the Doping Control Rules under the CADP. A representative for the INRS laboratory received the Athlete's urine sample on 29 November 2004.

16. On 13 December 2004, the Certificate of Analysis from the WADA-accredited laboratory in Montreal relating to the Athlete's sample was sent to the CCES. The Certificate of Analysis indicated two adverse analytical findings for sample 671274: cannabis at a concentration of 731 ng/ml and a cocaine metabolite.

17. Section 3.0 of the CADP incorporates and applies to Canadians subject to the programme the "Prohibited List International Standard" issued by the World Anti-Doping Agency ("Prohibited List"). Cannabis (at a concentration greater than 15 ng/mL) and cocaine metabolites are prohibited substances according to the Prohibited List. Cannabis is a threshold substance. Threshold substances are

defined in the International Standard for Laboratories as "A substance listed in the Prohibited List for which the detection of an amount in excess of a stated threshold is considered an Adverse Analytical Finding." The threshold level for cannabis is greater than 15 ng/ml. Cocaine is not a threshold substance. Therefore, the presence of cocaine or its metabolites, at any level, is prohibited.

18. Upon receipt of the Athlete's adverse analytical findings, the CCES commenced an "initial review" pursuant to Rule 7.45 of the Doping Violations and Consequences Rules. The "initial review" requires the CCES to determine whether the athlete had a valid Therapeutic Use Exemption (TUE) or whether there was any apparent departure from the Doping Control Rules or the laboratory analysis that undermines the validity of the adverse analytical finding.

19. After reviewing the relevant documents, the CCES confirmed that there was no apparent departure from the Doping Control Rules or the laboratory analysis that undermined the validity of the two adverse analytical findings. Further, the CCES confirmed that it had no record of a TUE for the Athlete relating to use of cannabis or cocaine.

20. As part of the "initial review" process, CCES provided the Athlete with an opportunity to submit a written explanation regarding his adverse analytical finding. In summary, the Athlete's explanation of 20 December 2004, for the presence of cannabis within his sample was that he previously used the substance for medicinal purposes. With respect to presence of Cocaine metabolite in his sample, the Athlete suggested he had been falsely accused.

21. The CCES requested the Director of the WADA-accredited laboratory in Montreal comment on the Athlete's letter of explanation during the "initial review" process. On 23 December 2004, Dr. Christiane Ayotte, the Director of the Laboratory commented on the Athlete's written explanation. She did not identify any departures from the laboratory analysis that would undermine the validity of the Athlete's adverse analytical findings which might suggest he had been falsely accused.

22. The CCES considered the Athlete's letter of explanation along with the comments provided by Dr. Ayotte. The CCES concluded the "initial review" on 4 January 2005 on the basis that the Athlete did not have a TUE with the CCES for use of cannabis or cocaine and that there was no apparent departure from the Doping Control Rules or the laboratory analysis that would undermine the validity of his adverse analytical findings. As a result, on 4 January 2005, the CCES issued a Notice to the Athlete pursuant to Rule 7.46 of the Doping Violations and Consequences Rules of the CADP.

23. The CCES asserted within its Notice that the Athlete had committed an anti-doping rule violation according to Rules 7.16 to 7.20 (Presence in the Sample) of the Doping Violations and Consequences Rules of the CADP. CCES based its claim on the certificate of analysis indicating the Athlete's sample contained

cannabis (at a concentration greater than 15ng/ml) and cocaine metabolite. As this would be a first violation, the CCES proposed a sanction within its Notice pursuant to Rules 7.9, 7.20 and 7.37 of the Doping Violations and Consequences Rules of the CADP: two years ineligibility and permanent ineligibility for direct financial support from the Government of Canada.

24. The Athlete requested the opening and analysis of his "B" and that was done. By a certificate of analysis for the "B" sample number 671274 dated 19 January 2005, the INRS Laboratory confirmed the positive results for cannabis and a cocaine metabolite.

25. In his email correspondence with the CCES and his Athlete Answer to Rule 7.46 Notification From CCES, the Athlete asserted that during the urine sample collection, he was not with his unsealed urine sample for approximately 2-3 minutes. He claims that he sat in a waiting area while another athlete was doing paperwork. He also questions whether his selection for doping control was truly random.

26. The Athlete admitted smoking marijuana to help him with muscle pains he gets as a result of a documented bleeding disorder (haemophilia) and because of the limited medical alternatives, as a result of his haemophilia, to obtaining pain relief (he acknowledged that his declaration on the Doping Control Form of "second hand marijuana smoke" was inaccurate). However, he also vigorously denies willing or knowing use of cocaine and raises the following issues concerning the positive finding for the presence of that substance:

    a. Tampering with his urine sample during the collection process

    b. Contamination of his marijuana supply

    c. False positive result due to his documented medical condition

Issues

27. The issues which arise as a result of the operation of the CADP and the positions taken by the parties are as follows:

    a. Has CCES established that the Athlete has committed an anti-doping rule violation?

    b. If the Athlete is found to have committed an anti-doping rule violation, should the sanction otherwise applicable be reduced or eliminated based on "exceptional circumstances"?

28. Rule 7.55 of the CADP addresses the burdens and standards of proof applicable in hearings to determine anti-doping rule violations and consequences:

> The CCES shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the CCES has established an anti-doping rule violation to the comfortable satisfaction of the Doping Tribunal bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. When these Rules place the burden of proof upon the Athlete or other Person 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.

Did an Anti-Doping Violation Occur?

29. The adverse analytical finding was for cannabis at a concentration of 731 ng/ml and a cocaine metabolite. The "presence" of a prohibited substance or its metabolites in an athlete's sample is an anti-doping rule violation. Under Rules 7.17 and 7.18 of the CAPD, the athlete is responsible for any prohibited substance or its metabolites found to be present in his or her sample. It is not necessary that intent, fault, negligence or knowing "use" by an athlete be demonstrated to establish this anti-doping rule violation.

30. At the hearing and in his submissions, the Athlete did not pursue the issue of whether his selection for drug testing was not random. There was, in any event, nothing in the record placed before me from which I could reasonably infer a departure from appropriate doping selection procedures.

Cannabis

31. The Athlete admitted that he had taken marijuana prior to being tested. The CCES accepts his evidence that he took marijuana to deal with the pain caused by certain of his medical conditions. It also accepts his evidence, and I so find, that marijuana was not taken for performance enhancement. But the Athlete also admitted that he did not seek a therapeutic use exemption (TUE) or consult with his doctors about taking marijuana. Nor has he made a TUE application for marijuana since being informed of his adverse analytical finding.

Cocaine Metabolite

32. As already noted, the Athlete raised as an issue whether his unsealed sample was left unattended. He first did so in an email on 10 January 2005, some six weeks after the event. In giving evidence he asserted that for a period of 1½ minutes (in contrast to the 2-3 minute period asserted in his Answer) his sample was left unattended on a table in one room while he was in an adjacent waiting room. He acknowledges being told by the Doping Control Officer not to leave his sample unattended, but claims he was not told this until after he had left the sample unattended for the 1½ minute period. He also acknowledges that he did not observe the sample having been moved while it was unattended. He says that

nothing occurred in the doping room which caused him to feel at the time that he should record any comment on the doping control form. The Doping Control Officer, Mr. Landreville, filed a report on the testing which was undertaken on 25 November, in which, despite commenting in some detail on other matters concerning the sample collection process, there was no reference to the possibility that the Athlete's sample was left unattended.

33. Rule 7.57 of the CAPD provides:

> Departures from the Doping Control Rules which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such results. If the Athlete establishes that departures from the Doping Control Rules occurred during Testing then the CCES shall have the burden to establish that such departures did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation.

34. I am not satisfied that the Athlete's sample was, in fact, left unattended as he claims. Even if it was, however, the Athlete has offered no evidence that could lead me to conclude that his sample was tampered with or that there was a departure from the Doping Control Rules which caused the adverse analytical finding for cocaine metabolite. No evidence was presented by the Athlete that someone could have used such an opportunity, let alone actually took the opportunity, to tamper with his sample. There was no evidence of any unauthorised persons in the doping control station itself where the sample was said to have been unattended. Moreover, the fact that it was a metabolite of cocaine found in his sample, as opposed to the substance itself, indicates tampering could not have involved cocaine.

35. The Athlete, assisted by his mother, Jennifer [redacted], who is a pharmacist by profession, asserted that his medical condition might have caused a "false positive" for cocaine. I was referred by them to a number of articles discussing this issue. These articles address the possibility of false positive results in certain drug screening processes.

36. The CCES called Dr. Christiane Ayotte to give evidence. She is an expert in analytical chemistry and techniques for analysis and testing of doping substances. She pointed out that the articles I had been referred to were typical of literature that was prevalent around ten years ago. They address the incidence of false positives in certain testing techniques commonly employed at that time for workplace drug testing. By contrast, the process used to analyse the Athlete's sample employed a far more sophisticated testing protocol involving gas chromatography and mass spectrometry. Dr. Ayotte was unequivocal in her opinion that a false positive for cocaine metabolite was not a possibility in this case.

37. While the Athlete produced a letter from a medical clinic confirming his medical condition, he produced no expert medical evidence from his doctors to support his

theory that there was a false positive finding in his case. Materials found on the internet, without any real application to the facts of this case, are not adequate proof. That, coupled with Dr. Ayotte's evidence, persuades me that it was not possible, let alone probable, that there was a false positive finding in this case.

38. I therefore find that the adverse analytical finding for cocaine metabolite is valid and, as a result, that there has been an anti-doping rule violation by the Athlete.

Consequences

Cannabis

39. As a prohibited cannabinoid, marijuana is a "specified substance" according to the World Anti-Doping Agency 2004 Prohibited List. According to Rule 7.7 of the CAPD and on a first anti-doping rule violation, when an athlete can, as in the present case, establish that taking a "specified substance" was not intended to enhance performance, the period of ineligibility for a "presence" violation may be reduced or even eliminated. Unless there are "exceptional circumstances," at a minimum a warning and reprimand is required in such cases. But there would be no permanent ineligibility for direct Government of Canada financial support.

40. The Athlete submitted that his medical condition requires the medicinal use of marijuana and that this is an exceptional circumstance.

41. Rules 7.38 and 7.39 of the CADP set out what are "exceptional circumstances." There are two categories: "no fault or negligence," and "no significant fault or negligence." If they can be proven, the consequences of an anti-doping rule violation can be reduced or eliminated.

42. "No fault or negligence" is defined in the CADP Glossary:

> The *Athlete's* establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *Used* or been administered the *Prohibited Substance* or *Prohibited Method.*

"No significant fault or negligence" is defined in the CADP Glossary:

> The *Athlete's* establishing that his or her fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence,* was not significant in relationship to the anti-doping rule violation.

These provisions of the CADP implement Articles 10.5.1 and 10.5.2 of the *World Anti-Doping Code*, virtually verbatim. The CADP provides that the text of the *Code*, including its Commentary, is a source of interpretation of Canada's domestic programme. According to the Commentary to the *Code*, these provisions are meant to be applied "where the circumstances are truly exceptional and not in the vast majority of cases". The Commentary continues:

> To illustrate the operation of Article 10.5, an example where No Fault or Negligence

> would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. Conversely, a sanction could not be completely eliminated on the basis of No Fault or Negligence in the following circumstances: (a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Article 2.1.1) and have been warned against the possibility of supplement contamination); (b) the administration of a prohibited substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any prohibited substance); and (c) sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those persons to whom they entrust access to their food and drink). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.)
>
> Article 10.5.2 applies only to the identified anti-doping rule violations because these violations may be based on conduct that is not intentional or purposeful. Violations under Article 2.4 (whereabouts information and missed tests) are not included, even though intentional conduct is not required to establish these violations, because the sanction for violations of Article 2.4 (from three months to two years) already builds in sufficient discretion to allow consideration of the Athlete's degree of fault.

43. In evidence and in his submissions, it was made clear that the Athlete took marijuana knowing the risks of an anti-doping rule violation. He did not seek medical advice before taking marijuana (despite the seriousness of his underlying medical conditions). He did not seek a TUE. His conduct was knowing and intentional. This excludes the consideration of "exceptional circumstances" in this case with respect to the adverse analytical finding for marijuana.

44. CCES submitted that if this had been a case of marijuana alone, the Doping Tribunal would have to determine that Mr. [redacted] had committed an anti-doping rule violation under the CADP for a specified substance, but that if his use of marijuana was found to not to have been intended to enhance sport performance, he could receive a warning and a reprimand.

45. In view of the fact that the Athlete took a calculated risk of committing an anti-doping rule violation, I might have, the submission of CCES notwithstanding, imposed a short period of suspension, rather than a mere warning and reprimand, as a result of the Athlete's adverse analytical finding for cannabis. However, by virtue of Rule 7.9, when an athlete, based on the same Doping Control, is found to have committed an anti-doping rule violation involving both a specified substance under Rule 7.7 and another Prohibited Substance or Prohibited Method, he or she shall be considered to have committed a single anti-doping rule violation, but the sanction imposed shall be based on the Prohibited Substance or Prohibited Method that carries the most severe sanction.

Cocaine

46. Cocaine, as already noted, is not a "specified substance." Therefore, according to the CADP, the first "presence" violation must lead to a period of ineligibility for two years, unless there are "exceptional circumstances."

47. The requirements for "exceptional circumstances" have already been discussed. In this case, the Athlete has suggested two possibilities: that his unsealed sample was left unattended in the doping control station for a period of time and that this may have given someone an opportunity to tamper with it; or that his supply of marijuana contained cocaine without his knowing it. If either could be proven on a balance of probabilities, it might arguably qualify as an "exceptional circumstance" meeting the requirements for "no fault or negligence." The result could be an elimination of the period of ineligibility.

48. I have already concluded that I am not satisfied that the Athlete's unsealed sample was, in fact, left unattended.

49. In addition to the comments I have already made on this issue, I would observe that if the Athlete did leave his sample unattended as claimed, this would have been a breach of Rule 6C.9 of CADP's Doping Control Rules which provides that "[t]he Athlete shall retain control of the collection vessel and any Sample provided until the Sample is sealed, …" Under the CAPD rules, any action or inaction with the potential to compromise the test must be reported by the doping control officer and treated as a "possible failure to comply." This in turn would lead to the CCES asserting a "refusal" or "tampering" anti-doping rule violation. In other words, the Athlete's own failure to follow the rules does not prevent the prescribed consequences.

50. While the CCES in its submissions indicated that it is inclined to accept the Athlete's stout denial that he ever used cocaine, it rejects the Athlete's argument -- containing perhaps the more likely explanation for the cocaine positive -- that "exceptional circumstances" exist if the Athlete's marijuana was contaminated with cocaine.

51. Bearing in mind that the Athlete has the burden of establishing on a balance of probabilities that he bears no fault or negligence, or no significant fault or negligence for the anti-doping violation, there must be <u>evidence</u> of contamination of the marijuana used by the Athlete if I am to be persuaded that exceptional circumstances that would result in elimination or reduction of the normal penalty exist. While recognising that obtaining such evidence might be difficult if not impossible, mere speculation as to what may have happened will not satisfy the standard of proof required.

52. Furthermore, to argue that contamination of one prohibited substance excuses the "presence" of another, flies in the face of the spirit and letter of anti-doping rules.

Such circumstances should not be viewed as "exceptional" although, if proven, they certainly would be troubling.

53. Even then, as the Commentary from *Code* set out above indicates, cases of contamination will only give rise to exceptional circumstances when the athlete can demonstrate "all due care" concerning the product said to be the source of the prohibited substance. In this case, the Athlete did not even consult medical or other expertise in the decision to use marijuana, and by his own admission did not have a safe or secure source of supply of that prohibited substance.

54. In the *Kelly Guest* case[1] in 2003 involving a Canadian athlete and arguments by him that his positive test result could have been due to contaminated supplements, it was found that the athlete's use of supplements was irresponsible because of his failure to take proper measures to ensure his products were clean. Although that case was decided under different rules, similar principles apply in this case. Athletes are strictly liable for the substances that are found in their systems and exceptional circumstances mitigating against the consequences of that strict responsibility will not be found to exist where the athlete has failed to exercise appropriate diligence and care.

55. For the foregoing reasons, I am unable to find that there are "exceptional circumstances" in this case that would warrant elimination or reduction of the consequences otherwise applicable for a first anti-doping rule violation of this nature.

Result

56. While other mitigating factors have been drawn to my attention – the Athlete's commitment to his sport and to his team, his disappointment in letting his team down, his athletic and sporting achievements in the face of considerable medical challenges, his application to his studies, the support of his family and the importance of sport in his life – none of them have a bearing on the evaluation of exceptional circumstances and, in the absence of exceptional circumstances, I have no discretion to modify the prescribed sanction because of such factors.

57. The required sanction for a first anti-doping rule violation for cocaine, which I am obliged in the circumstance to impose, is a two year period of ineligibility from sport as well as permanent ineligibility from direct Government of Canada funding.

58. The Athlete was provisionally suspended on 5 January 2005. The CADP states that the period of ineligibility shall start on the date of the hearing decision. Any

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[1] *In the matter of the Canadian Policy on Doping in Sport and an Application by Kelly Guest for Category II Reinstatement*, June 20, 2003, paragraphs 83 to 89

period of provisional suspension shall, however, be credited against the total period of suspension.

Costs

59. Under Rule 7.69 of the CADP, the Doping Tribunal may award costs to any party payable as it directs. Unless applied for, there shall be no award of costs in this matter. Should any party wish to apply for costs, a written request with supporting submissions should be filed with the SDRCC by no later than 5:00pm EST on 14 February 2005. I will then give further directions concerning responding submissions.

Toronto, Ontario: 7 February 2005

Graeme Mew

(Arbitrator)