BEFORE THE SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)

IN THE MATTER OF AN ARBITRATION

B E T W E E N :

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)
JUDO CANADA

Nº: SDRCC DT 15-0225 **AND**

YOUSSEF YOUSSEF
(ATHLETE)

ARBITRATOR: **MICHEL G. PICHER**

APPEARANCES FOR THE CCES:

Luisa Ritacca	**- Counsel**
Justin Safayeni	**- Counsel**
Kevin Bean	**- Manager, Compliance and Procedures (CCES)**

APPEARANCES FOR THE ATHLETE:

Travis Walker	**- Counsel**
Youssef Youssef	**- Athlete**

A hearing in this matter was held in Toronto, Ontario on December 15 and 16, 2015.

DECISION

The Athlete, Youssef Youssef, a competitor in Judo, brings this case in respect of the four-year suspension that he faces for the alleged use of a prohibited substance. It is not disputed that in his case a urine sample, taken on March 31, 2015, was found to be positive for the prohibited substance testosterone. The unchallenged evidence of expert witness Professor Christiane Ayotte is that the level of testosterone detected in the Athlete's sample was "abnormally high" and that its concentration was "very high". Under Rule 10 of the *Canadian Anti-Doping Program* Rules, in such a circumstance if the use of the prohibited substance is intentional the sanction is a suspension of four years. In the case of a non-intentional violation the sanction of ineligibility is for two years. The above is reflected in the provisions of Article 10.2 of Rule 10 of the *Canadian Anti-Doping Program* which provides as follows:

> **10.2 *Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method***
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> The period of *Ineligibility* for a violation of Rules 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Rules 10.4, 10.5 or 10.6:
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> 10.2.1 The period of *Ineligibility* shall be four years where:
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> 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.
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> 10.2.2 If Rule 10.2.1 does not apply, the period of *Ineligibility* shall be two years.
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> 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.

The Athlete does not dispute the positive test result. He maintains, however, that in his case the anti-doping rule violation was not intentional. On that basis he seeks a ruling of ineligibility for two years rather than the period of four years which was proposed by the CCES.

Background and Evidence:

A substantial part of the facts surrounding this case is not in dispute. There is no dispute about the Athlete's standing and accomplishments within his sport. He entered the Ontario Team of the Judo Canada High Performance Program in the 2012-2013 period. In the period between 2008 and 2014 he placed in the top three or better at nine Canadian national championship events. He distinguished himself as the Canadian national champion in his weight class on four separate occasions, most recently at the national championships held in May of 2014. He is said to be ranked 106th in the world in his weight class, which is under 60 kilograms. At the time of the events here under examination he was arguably on track to qualify for the 2016 Olympic Games in Rio de Janerio.

There is no substantial dispute before the Arbitrator concerning the factual context leading up to and surrounding the positive test recorded by the Athlete. The Athlete's written submission to the Arbitrator contains a relatively extensive account of his eating habits and his consumption of nutritional supplements, as reflected in the following excerpts, which also make reference to his competitive activities in South America, as well as at a competition in Montreal, Quebec.

> *Supplementation*
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> 23. As part of his dedication to his craft, Mr. Youssef is an extremely health conscious individual. He monitors his diet strictly, and does not drink alcohol or smoke.
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> 24. However, due to the rigors of his training regime, Mr. Youssef, like many competitive athletes of his caliber,

supplements his healthy lifestyle with a basic set of nutritional supplements comprised of: whey protein powder, branch chain amino acids ("**BCAAs**"), a multivitamin, and a carbohydrate energy drink. Mr. Youssef has been taking the same basic supplements for several years. He does not experiment with products he does not know.

25. During an average training day, Mr. Youssef will typically consume between two (2) to three (3) servings of protein powder, two (2) to three (3) servings of BCAAs, one (1) to two (2) servings of carbohydrate energy powder, and a daily multivitamin. Mr. Youssef would take a serving of BCAAs and protein powder prior to each workout and a serving of the carbohydrate powder during his workout. If he trained a second time, he would follow the same pattern, and would occasionally have an additional protein shake before bed if he was hungry.

26. As Mr. Youssef lives at home with his family and is not gainfully employed, he relies on his father and/or older brother(s) to purchase his supplements. When Mr. Youssef was running low on one of his supplements, he would notify one of these family members who would then purchase more. His supplements were purchased almost exclusively at GNC, a reputable health and nutrition store with locations across Ontario and the country.

27. Mr. Youssef and/or his family members would consistently inquire with GNC staff members as to the ingredients and certification status of any supplements they were purchasing. They would also check the ingredients against the WADA Prohibited List, and would occasionally contact the manufacturer if there were ingredients which were unknown to them. As all of the men in the Youssef family have or continue to compete in Judo, they are extremely prudent in ensuring that all supplements acquired adhere to the highest standard and are safe for consumption both in and out-of-competition.

28. In December of 2014, Mr. Youssef's father took a personal trip to Egypt. While there, he purchased a number of nutritional supplements from a gymnasium owned by a close family friend. Among these items was a container of KAIZEN brand whey protein and an ISAGENIX brand electrolyte mix. Mr. Youssef's father would occasionally purchase supplements when abroad as they were

considerably more affordable than products sold at GNC in Ontario. However, he always ensured that he purchased brand names that were reputable and that he was familiar with.

29. Mr. Youssef's father had purchased nutritional supplements from the same gymnasium in Egypt before and they had been used by Mr. Youssef's older siblings. No issue with any of these products had been identified previously. Mr. Youssef had never personally used supplements purchased from Egypt before but, as his father had been his coach and mentor since he was five (5) years old, he trusted him unequivocally to provide him with safe, certified products.

30. When Mr. Youssef depleted his supply of protein powder and carbohydrate mix, sometime prior to March 31, 2015, he began taking the supplements obtained by his father in Egypt.

…

33. Prior to March 31, 2015, Mr. Youssef had undergone anti-doping control testing only twice before. The first such test was an in-competition urine sample provided after Mr. Youssef won the Canadian national championship for the under 20, under 55 kilogram division. There was no adverse analytical finding.

34. The second occasion was on September 20, 2014 when Mr. Youssef secured first place at the European Cup in Tampere, Finland. No adverse analytic finding arose from this sample either.

35. It is Mr. Youssef's understanding that every Athlete who finishes on the podium of a national or international event should expect, before receiving their medal, to be subjected to anti-doping control testing, particularly if they had won the event. As such, Mr. Youssef was aware that testing could and often did take place at various events.

Lead-Up to Sample Collection

36. Between March 10, 2015 and March 22, 2015, Mr. Youssef was in South America competing in the Pan American Open tournaments in Montevideo, Uruguay and Buenos Aires, Argentina. While abroad, Mr. Youssef carried

his regular mix of basic supplements detailed above. He also followed the same intake schedule discussed previously.

37. Following the Pan American Open tournaments, Mr. Youssef returned to Toronto, on March 22, 2015, for a short time only. Thereafter, he departed for Montréal with the Ontario High Performance Team to participate in a sparring camp with the Mexican national team. The camp was scheduled to last one week and was being used as a training grounds for the upcoming Pan American Championship in Edmonton, Alberta on April 24-26, 2015.

38. While in Montréal, Mr. Youssef stayed in a room with three of his High Performance teammates. Once again, Mr. Youssef brought his ordinary supplements and consumed them on his regular schedule. For the most part, he kept his supplements in his personal bag in the room and mixed shakes to bring with him to the training facility during the day. However, the athletes occasionally left their supplements on the counter in the shared room as they were all taking similar supplements and they considered it to be a safe environment given that only those staying in the room would have access to it.

39. On March 31, 2015, while sparring with an opponent at the camp, Mr. Youssef was notified that he had been selected to provide an anti-doping control sample. He had consumed his usual dose of protein and BCAAs prior to the training session and would have been in the process of consuming his electrolyte mix at the time.

40. Mr. Youssef was not asked to provide identification and does not recall being given any instruction with respect to providing his urine sample. He did complete a Doping Control Form, provided his sample, and went back to complete his training session.

41. Mr. Youssef never suspected that there would be any issue with his anti-doping control sample as he had never been notified of any issues previously and he had not changed his diet or added any new supplements to his routine.

Adverse Analytical Finding and Proposed Period of Ineligibility

42. On April 23, 2015, the CCES issued an Initial Review of Adverse Analytical Finding to Mr. Adrien Landry, Executive

> Director of Judo Canada, regarding the sample provided by Mr. Youssef on March 31, 2015. CCES invited Mr. Youssef's written comments regarding the finding.
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> 43. Shortly thereafter, Mr. Youssef replied to the CCES by letter, indicating that he was unaware of the cause of the adverse analytical finding and included a list of all food items he recalled consuming while in South America and details of his nutritional supplements, including photographs of the brand and ingredient lists of the same.
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> 44. Mr. Youssef entered into a Voluntary Provisional Suspension on April 29, 2015 and certifies that he has not participated in any competitions or events subject to anti-doping regulation or otherwise since that time. He also waived his right to have his B-sample tested.
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> 45. On May 12, 2015, following completion of an "initial review", the CCES issued a Notification of Adverse Analytical Finding to Mr. Landry, asserting that Mr. Youssef had committed an anti-doping rule violation. As a first violation, CCES proposed a sanction of four (4) years.
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> 46. After consulting with legal counsel, Mr. Youssef executed a Timely Admission form on July 23, 2015, thereby admitting the fact of the anti-doping rule violation asserted against him by the CCES.

A number of witnesses were called in these proceedings. The Arbitrator does not deem it necessary to review their testimony in detail, noting that issues of credibility are not raised as being critical to the outcome in these proceedings. The Athlete's father, Mr. Amr Youssef, gave evidence with respect to his own role in his son's involvement in competitive judo. He explained that it is normal for him to buy supplements for the Athlete, including things such as protein powder, energy drinks and multivitamins, something which he says he does on a monthly basis. He relates that in December of 2014 he made a visit to his home country of Egypt, as he does annually to visit his mother and sister. When he was there he visited with a friend who operates a gymnasium and, according to

his account, purchased a number of products, including an energy supplement called “Isagenix”, as well as a whey protein product called “Kaizen Naturals Whey Protein”. Mr. Amr Youssef testified that he was familiar with the products he obtained and purchased them because they were available more cheaply in Egypt. He further elaborated that following the Athlete’s positive test on or about March 31, 2015, he proceeded to have the Isagenix as well as another product, Aminocore, tested but could not obtain testing in relation to the Kaizen Naturals Whey Protein powder he obtained in Egypt, as it was then fully consumed.

During the course of his evidence, although he related that he feels guilty, the Athlete’s father commented that he is still not sure that the products he obtained necessarily caused the problem in relation to the Athlete’s eventual positive testosterone reading. When asked whether he considered sending the Kaizen Naturals Whey Protein powder container to be tested he responded that he did not, because it was empty, conceding that he did not inquire as to whether it could be tested for possible residue.

There is a notable contradiction between the evidence given by the Athlete’s father and the content of the Athlete’s written submissions. The written brief presented to the Arbitrator speaks to Mr. Youssef’s father making personal trips to Egypt stating, in part: “Mr. Youssef’s father would occasionally purchase supplements when abroad as they were considerably more affordable …” During his testimony in person Mr. Amr Youssef gave a different account, stating that he had never purchased supplements in Egypt before December of 2014. In fairness to this part of his evidence, a certain degree of

ambiguity may flow from whether he had previously purchased supplements in Egypt for the Athlete's older siblings, but not for the Athlete himself. Mr. Amr Youssef's best recollection is that one of the Athlete's older siblings ultimately gave the Athlete the supplements obtained in Egypt and that the Athlete had taken them with him to competitions in Argentina and Uruguay in March of 2015.

According to the Athlete's explanation, the supplements which he was regularly taking in March of 2015 included multivitamins, branch chain amino acids (BCAAs), a protein shake and Isagenix prior to workouts. The Athlete further stressed that he was mindful of steering clear of doping problems, noting that he successfully completed the "True Sport Clean 101" course of the Canadian Centre for Ethics in Sport in December of 2014.

Adverting to the facts of the instant case, the Athlete related that he recalls that he did not have Isagenix or multivitamins with him when he went to Montreal, although he took supplements the day before he went there. He further recalls that he took a protein shake the night before his positive test, and also took BCAA Aminocore on the morning of the day of his positive test.

The Athlete gave some account of events immediately prior to the positive urine test which was registered in Montreal on March 31, 2015. He related that the athletes stayed in a hotel near the Olympic Stadium and that he was assigned a Brazilian athlete as his roommate. According to his recollection he was in Montreal for two or three days

before the taking of his positive urine sample. During that time he kept his supplements on a counter in his hotel room where, according to his recollection, his roommate Nicolas Santos received and entertained a number of other people. He recalls that on more than three occasions he found other people in his room, although he qualified that that was not uncommon among judo athletes.

Filed in evidence is the Doping Control Form in relation to the taking of the urine sample from the Athlete during the sparring camp in Montreal at 12:21 p.m. on March 31, 2015. While the declaration and consent section of that form asks the Athlete to list medications and supplements taken over the previous seven days, in fact the Athlete listed only BCAA because, he says, he was told by the Doping Control Officer that he should list only supplements he had taken that same day. The Arbitrator confesses to some difficulty with that part of the evidence, given that the form itself plainly states that the medications and supplements listed are those "taken in the last seven (7) days …"

Several weeks later, while the Athlete was at a competition in Edmonton, Alberta on April 23, 2015, he was advised by his national coach and the coach's assistant that he had in fact tested positive for testosterone, based on the sample taken in Montreal on March 31, 2015. No challenge is made with respect to the validity of that positive test result.

It may be noted that there is a certain inconsistency additionally reflected in the record of the Athlete's communications. In an undated letter which the Athlete sent to Mr. Kevin Bean, of the Canadian Centre for Ethics in Sport, he states, in part, the following:

> During my training / training camps for recovery in Canada and abroad I made every effort and used all my knowledge to make sure that there are zero prohibited substances included in my food or nutrition intake. On top of that every time I bought a product I have been very cautious and asked the nutrition substance stores , whither [sic] the products I am buying are approved by an unbiased third party laboratory or not. All that, to make sure that the bought supplement is not a risk of violating the Anti-doping rule.

Contrary to the suggestion reflected in the above passage, the principal evidence adduced on behalf of the Athlete before the Arbitrator is that in fact he did not himself buy nutrition supplements, and that those were in fact obtained almost always by his father. In the Arbitrator's view it would not have been difficult for him to make that distinction in his letter to Kevin Bean. Whatever the intention, it is difficult to reconcile the suggestion in the Athlete's letter to Mr. Bean that he was a cautious purchaser of nutritional supplements, while his father's evidence in these proceedings is that it was the father who had the principal responsibility for obtaining them.

The Athlete relates that after he learned on or about April 23, 2015 of his positive urine test, he made efforts to determine how it could have happened. He states that he sent the BCAA product, Aminocore, and Isagenix for testing. He relates that ultimately he "settled" on two best guesses for the source of the testosterone: either the supplement bottle which his father brought back from Egypt or alternatively, the possibility that one of

his bottles was sabotaged by someone in Montreal. Under cross-examination he conceded that he did not seek to obtain the lot and batch numbers of the product in question and never pursued whether the empty Kaizen Naturals Whey Protein container could in fact be analysed for residues of the questioned product. The Athlete admitted that no other athlete stood to benefit significantly from his removal and that in fact no one would have any motive to sabotage him by contaminating his supplements.

On behalf of the Athlete, evidence was called through judo instructor Ken Fukushima, the head judo instructor at the Japanese Canadian Cultural Centre in Toronto. He relates that he coached the Athlete from the age of 12 and that the Athlete has shown himself to be a dedicated student of judo who has become more passionate and focused on competition in the last few years. The Athlete's coach spoke positively of his "good maturation" and of the family support which he enjoys, by reason of the involvement of his father and brothers in judo. Noting that he instructs as many as 70 students of all ages and sizes, Coach Fukushima rates the Athlete as among the best athletes he works with. As to the Athlete's good character, Coach Fukushima notes that the Athlete volunteers as an instructor at the Japanese Canada Cultural Centre and contributes voluntarily to his summer day camp, as a result of which the Athlete won an award for his volunteer service. The Athlete's coach describes him as a positive role model for students, who both look up to him and bond with him. Stressing the importance of the mental dimension of the sport of judo, Coach Fukushima relates the Athlete's ambition to win a gold medal at the 2020 Olympics in Tokyo.

Coach Fukushima explained that with respect to the issue of maximal strength, athletes can be either in an “improve” mode or a “maintain” mode. According to his view, on or about March 31, 2015, a few weeks before the Pan American Games, the Athlete would have been in a “maintain” phase, during which his coach would not have advised that he concentrate on increasing strength, which could add muscle mass and stiffness, but rather that he seek simply to maintain flexibility.

Coach Fukushima relates that in Edmonton, shortly before the Pan American competition, the Athlete told him of his positive urine test from the sample taken in Montreal. He relates that the Athlete then told him that he did not know what could have caused the positive result and wondered whether it might have been food or supplements, adding that the Athlete seemed perplexed at the high testosterone reading. Coach Fukushima elaborated on the efforts made to instruct athletes in the dangers of doping and steroid use, including their possible side effects. In that regard Coach Fukushima noted that the Athlete never displayed the side effects, such as mood swings, back acne, shrunken testicles or developing breasts, associated with steroid abuse. He relates that he has no knowledge of the Athlete having used steroids, nor has he ever suspected that he did.

Evidence on behalf of the CCES was tendered, in part, through the testimony of Professor Christiane Ayotte, Director of the Doping Control Laboratory at INRS-Institut Armand-Frappier, which is a laboratory accredited by the International Olympic Committee and by the World Anti-Doping Agency. She is an unchallenged expert in the

field of doping and the related science. The Arbitrator considers Professor Ayotte's evidence to be sufficiently critical to the outcome in the instant case that it merits reproduction, almost in whole, within this Decision. The substance of Professor Ayotte's opinion reads as follows:

> ***Basis for opinion***
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> 4. Based on my review of the Athlete's submissions, I understand the Athlete to be claiming that he did not take testosterone intentionally, and that he believes the adverse analytical finding was due to his consumption of a protein supplement (Kaizen Natural Whey) that was either:
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> a. Contaminated with testosterone; or
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> b. Sabotaged by teammates.
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> 5. A photograph of the Kaizen Natural Whey product in question, which I understand was provided by the Athlete, is attached as Exhibit "**C**" to this affidavit.
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> 6. In providing the information and opinions set out in this affidavit, I reviewed the Athlete's submissions; the sample test results at the source of the adverse analytical finding presented in the documentation package dated June 3rd, 2015 (a true copy of which is attached as Exhibit "**D**" to this affidavit); the Certificate of Analysis (a true copy of which is attached hereto at Exhibit "**E**" to this affidavit); other adverse analytical findings reported by my laboratory in the past five years; the content, size and commercial sources of the Kaizen Natural Whey product (a picture of which is attached at Exhibit "**C**" to this affidavit); and various research papers referenced below.
>
> 7. I will begin by presenting some background information on testosterone and the Athlete's test results, and then I will deal with the subject of the opinion.

Background information

8. Testosterone is present normally in the human body and fluids, including urine. The initial and confirmation analyses performed on the Athlete's urine sample 2951389 (the "Sample") revealed the presence of an abnormally high testosterone to epitestosterone (T/E value) of 31:1, and a very high concentration of testosterone measured at 230 ng/mL (see documentation package, exhibit [sic]). Both the T/E value and the concentration of testosterone clearly exceed the ranges of values normally found in humans.

9. The GC-C-IRMS (CIR) analysis conclusively established the exogenous (*i.e.* synthetic) origin of testosterone and its metabolites present in the Sample (see documentation package at Exhibit "**D**" to this affidavit).

10. Testosterone is a banned anabolic androgenic steroid, found in section S1.b) endogenous anabolic androgenic steroid (EAAS) of the World Anti-Doping Agency's Prohibited List of substances and methods.

11. Testosterone is a restricted substance in Canada, the USA and many countries in the world, meaning that it can only be legitimately obtained from a pharmacy with a physician prescription when medically justified. However, testosterone is, although illegally, available from the black market and from the internet.

12. Whether testosterone is contained in legitimate medications or in counterfeit products from the black market, it can be administered intra-muscularly (injections), orally (tablets, capsules, lozenges) or topically (through gels, or transdermal patches). Pure testosterone in powder form cannot be purchased without a licence from Health Canada (restricted to research laboratories principally). When taken orally, testosterone is rapidly excreted in urine; consequently, the level of testosterone and the T/E value are elevated for a short period of time, making the detection possible for less than 24 hours. The Athlete's explanations implying the contamination or sabotage of a powder taken orally, testosterone would have been administered orally as well.

13. Kaizen Natural Whey is a source of whey protein that is offered to athletes as an extra-source of protein and as a meal substitute to the general population. The product as shown on the picture provided (Exhibit "**C**") is sold in general stores and online in Canada (e.g. Best Buy, Amazon, Walmart, Costco). Whey and whey protein isolates do not contain testosterone (let alone synthetic testosterone), nor do they contain compounds that can transform or lead to testosterone.

It is extremely unlikely that contaminated Kaizen Natural Whey product caused the adverse analytical finding

14. In my opinion, it is extremely unlikely that the adverse analytical finding in this case could have been caused by the consumption by the Athlete of a contaminated package of Kaizen Natural Whey product. I reach this conclusion for several reasons.

15. First, as mentioned previously, Kaizen Natural Whey is sold in superstores, pharmacy and online. As such, it cannot contain testosterone. If it did, it would be an illegal product. It contains whey and whey protein isolates that do not contain testosterone, let alone synthetic testosterone (testosterone is not present in plants, herbs etc.)

16. Second, contamination with testosterone during the manufacturing process is extremely unlikely. Kaizen does not manufacture or distribute testosterone containing products. Therefore, there are no grounds for suspecting Kaizen Natural Whey product to be contaminated with testosterone during the manufacturing process, even with very low amounts.

17. Third, even if I were to consider that a trace of testosterone could be present in Kaizen Natural Whey product, such a contamination would not produce results such as those observed in the Athlete's Sample. Trace amounts of testosterone, even if ingested orally every day, will introduce trace amounts in the Athlete's body, but not enough to impact the normal urinary values. Testosterone when taken orally, as it is proposed here, disappears rapidly from the body, it does not accumulate. Moreover, the

Athlete's Sample did not contain trace amounts, but rather a very high amount of testosterone – much higher than normally measured in males. In fact, having reviewed the data of 80 other testosterone AAFs reported by our laboratory in the past 5 years, I observed that 78% of these "positive" samples contained less testosterone than was measured in the Athlete's Sample (230 ng/mL vs. the average positive samples concentration at 170 ng/mL). In other words, the testosterone levels in the Athlete's Sample are similar to – and, in fact, greater than – those found in most other athletes who tested positive for testosterone (from all possible modes of administration).

18. Furthermore, as shown by the GC-C-IRMS analysis, almost all the testosterone present in the Athlete's sample was synthetic, which means that there was nearly no testosterone coming from the Athlete's own production (negative feed-back mechanism). Furthermore, the urinary level of luteinizing hormone ("LH") in the Sample was below the limit of quantification (LOQ), which is consistent with the suppression of LH secretion associated with the regular use of high levels of oral testosterone, daily topical application of testosterone gels or injectable testosterone. According to the literature, orally taken testosterone being excreted rapidly – even when taken every day – is often not sufficient to inhibit the secretion of LH. According to another study, LH was suppressed after 2 weeks of daily administration of 800 mg of oral testosterone (a dose of 400 mg twice a day was insufficient to suppress LH).

19. Based on the high level of synthetic testosterone found in the Athlete's sample and the suppression of LH, I conclude that the athlete consumed testosterone in a pharmacological dose (*e.g.* a dose contained in a testosterone medication), sufficiently to shut down his own body production.

20. Therefore, I conclude that it is extremely unlikely that the adverse analytical finding was caused by contamination of the Kaizen Natural Whey product.

It is extremely unlikely that the results were caused by the sabotage of the Kaizen Natural Whey product

21. The only way to determine with any certainty whether the protein powder could have been sabotaged with enough testosterone to explain the finding would be to test its content. However, in my opinion, it is extremely unlikely that the Athlete's Sample test results can be explained by the sabotage of his Kaizen Natural Whey product.

22. The efficient "sabotage" of the Kaizen Natural Whey product requires introducing a sufficiently high amount of testosterone to cause the detection of a high T/E value and very high and synthetic testosterone urinary level as well as the apparent suppression of LH (as discussed above). This would be extremely difficult to do (and unlikely to occur) furthermore unnoticed, given the amount of testosterone (an illegal product not available without a physician prescription) required and the fact that they would be contained in capsules or oils and have to be introduced into the powder.

23. With respect to the amount of testosterone required, as the level of testosterone in the Athlete's Sample was equivalent if not higher than other testosterone "positives" tested in our laboratory, the quantity ingested had to be at least the same as a typical oral preparation of testosterone which contains 40 mg to 120 mg per gel capsule. At the very least, there had to be the equivalent of 1 capsule per 31 g serving of Kaizen Natural Whey product, or 74 testosterone capsules in the entire jar (25 pills if one third of the whey supplement was left).

24. When I consider the apparently suppressed LH value and the literature cited above, it is my view that an even higher amount of testosterone had to be ingested orally. In order to consume 800 mg daily, each serving had to contain between 270 and 400 mg of testosterone, therefore 29,000 mg or 29 g of testosterone in the entire jar (1 g = 1000 mg) e.g. 242 capsules of 120 mg of testosterone (80 pills if one third of the whey protein product was left).

25. Even assuming the minimum amount required that would account for the adverse analytical finding, it would not be simple to sabotage the Kaizen Natural Whey powder. In particular, it would be extremely difficult to introduce the quantity of testosterone required (contained in dozens of capsules, or in solution in oil in bottles for injection) unnoticed into a jar of powder. Capsules cannot be simply dropped in the Kaizen Natural Whey jar of powder. Instead, a certain level of preparation would be required to surreptitiously introduce the content of so many testosterone gel capsules (which contain testosterone in a liquid/oil form) into the Kaizen Whey powder.

26. Spiking with more concentrated, injectable preparations of testosterone is equally as difficult, since testosterone is diluted in oil (e.g. 250 mg in one mL of oil), and oil added into a powder would not remain unnoticed.

27. For the sake of completeness, I note the possibility that the perpetrator of the sabotage was a steroid producer/importer/dealer, who had acquired steroid powder illegally in bulk (importation from China) to produce counterfeit testosterone products. In that case, he/she needed to have possession of enough testosterone to introduce for example, 29 g of pure testosterone powder *e.g.* 2 tablespoon in the jar possibly unnoticed. I consider such a scenario to be extravagant and remote in the extreme since the perpetrator would not carry testosterone powder for his / her personal use because testosterone is not ingested directly in the powder form.

Testosterone's use in judo

28. Anabolic androgenic steroids (such as testosterone) are taken for several "performance-enhancing" purposes, from accelerating healing and boosting recovery to building muscular mass, strength and power. There is no sport-specific prohibition of anabolic steroids.

29. The presence of testosterone in judo athletes' samples is not an isolated phenomenon. Based on the statistics for 2014 testing published by WADA, there were 48

> adverse analytical findings reported by accredited laboratories from tests done on judo athletes. Of these, 20 were for anabolic androgenic steroids.

It should be noted that the evidence of Professor Ayotte is the only expert testimony placed before the Arbitrator in these proceedings. It is, to that extent, largely unchallenged, save by the explanations and suppositions put forward by the Athlete.

Argument for the Athlete:

Counsel for the Athlete draws to the Arbitrator's attention certain provisions of Rule 10 of the *Canadian Anti-Doping Program*, and in particular Rule 10.2 which is reproduced above. Adding that the reproduced provisions are part of the new *Code* adopted on January 1, 2015, counsel notes that the definition section of the *Canadian Anti-Doping Program* contained in Appendix 1 provides a number of definitions, however there is no definition of the words "intent" or "intentional" save for the clarification which appears in the text of Rule 10.2.3. In Rule 10.2.3 "intentional" is defined as follows: "… the term 'intentional' is meant to identify those *Athletes* who cheat."

By way of context, counsel draws to the Arbitrator's attention the changes implemented in respect of the 2015 *World Anti-Doping Code*. In particular, he points to the following excerpt from a page entitled, "Summary of Major Changes", appearing on the CCES website with respect to the 2015 *World Anti-Doping Code*.

Article 6 of that excerpt reads as follows:

> Various parts of Article 10, Sanctions on Individuals, have been revised to reflect the strong consensus of stakeholders that the real cheats should be ineligible for four years, while cases involving mistakes should be subject to more flexible sanctions. A chart setting forth the new periods of ineligibility, as provided in 2015 Code draft v2.0, is now attached to the Code. Under this new approach, the concept of "aggravating circumstances," which was almost never used, is replaced with a four year period of ineligibility for prohibited methods, anabolics, hormones, and masking agents, unless the athlete can establish that the anti-doping rule violation was neither reckless nor intentional. For other substances, the burden to obtain a four year ban shifts to the Anti-Doping Organization.

Counsel for the Athlete submits that the position of CCES effectively reads something additional into Rule 10.2, namely that as a prerequisite of proving a lack of intention the Athlete must show how a substance entered his or her body. That approach, he submits, breaches accepted tenets of statutory interpretation. With respect to this aspect of statutory interpretation counsel refers the Arbitrator to a decision of the Supreme Court of Canada: *Jake Friesen v Her Majesty the Queen*, [1995] 3 S.C.R. 103. Counsel for the Athlete submits that the *Friesen* decision stands for the proposition that "reading in" with respect to the interpretation of a statute should not be engaged in if it is not necessary to do so. He makes specific reference to a passage from the *Friesen* decision of the Supreme Court of Canada at p. 121:

> It is a basic principle of statutory interpretation that the court should not accept an interpretation which requires the insertion of extra wording where there is another acceptable interpretation which does not require any additional wording.

Counsel for the Athlete stresses that nothing in the language of Rule 10.2.3 expressly states that an athlete must prove how a prohibited substance entered his or her body.

Counsel for the Athlete concedes that Mr. Youssef does bear a high degree of fault and that he could very well have done things better. For example, he suggests, he could have performed a closer check on the content of the supplements which he was taking or, alternatively, he could have refrained from taking any supplements.

Counsel submits that while the Athlete is responsible for a high degree of fault and is deserving of some penalty, he questions the position of CCES which argues that he must be presumed to have acted intentionally because he is unable to explain how the prohibited substance got into him. In counsel's submission, the Athlete is liable to a severe penalty as contemplated in Rule 10.2.2, which would result in a sanction of two years. He submits, however, that the doping infraction in which Mr. Youssef was involved was not intentional and that as a result a two year sanction is the appropriate outcome as contemplated within Rule 10.2.2 of the *Canadian Anti-Doping Program*. Overall, he submits, the evidence simply does not show that the Athlete had an intent to ingest testosterone or that the Athlete was aware that he was at a significant risk of doing so and disregarded that risk.

Counsel for the Athlete also questions what possible motivation Mr. Youssef might have had to deliberately ingest a substance whose effect would arguably be to increase his bulk. To do so, he suggests, could have caused the Athlete to no longer be eligible

to compete in the 60 kilogram judo division, forcing the Athlete into the 66 kilogram weight division where he would not do as well. Counsel further notes that at the time of the positive urine test Mr. Youssef was in a “maintain” part of his training program, working on flexibility, mental focus and technique and not on adding weight or strength. Counsel stresses that in fact normally expected effects of steroids would not have been beneficial to the Athlete.

The Athlete’s counsel takes issue with the submission made on behalf of CCES which cites cases from the United Kingdom which it submits support the proposition that it is incumbent upon an athlete to prove the source of a substance found within his or her body to rebut the element of intent on their part. Counsel specifically questions the reliance of CCES on three precedent cases from the United Kingdom: *UK Anti-Doping Limited v Songhurst*, SR/00001120248; *UK Anti-Doping Limited v Graham*, SR/0000120259; *UK Anti-Doping Limited v Hastings*, SR/0000120256.

Counsel stresses that in the instant case the disputed evidence is that the Athlete relied substantially on his father, and to some extent on his older brother, with respect to the quality of supplements they provided him. Counsel notes that the Athlete relied on four sources of supplements: protein powder; branch chain amino acids; multivitamins and an electrolyte energy drink. Significantly, he submits, when the Athlete was notified on April 23, 2015 of the adverse finding against him, he had finished consuming all of his protein powder.

Counsel also questions the timing of the notice to the Athlete of his alleged offence, which he received on April 23, 2015. He notes that although the contract between WADA and CCES contemplates a 10 day period to release a lab report, in the instant case the lab results were reported after 11 days. Additionally, counsel notes that it took 23 days in total to get a sample result, a point at which the Athlete's multivitamin and protein powder were fully depleted. In the result, there was no opportunity for him to test samples of the products he used to see if in fact they were contaminated. In that regard counsel notes that under the provisions of Rule 10.5.1.2 if he could show that the prohibited substance in his system came from a contaminated product his sanction might be reduced to a reprimand. Rule 10.5.1.2 reads as follows:

> 10.5.1.2 *Contaminated Products*
>
> In cases where the *Athlete* or other *Person* can establish *No Significant Fault or Negligence* and that the detected *Prohibited Substance* came from a *Contaminated Product*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years *Ineligibility*, depending on the *Athlete's* or other *Person's* degree of *Fault*.

On the facts of the instant case, counsel stresses the undisputed fact that a mistake which occurred in the laboratory resulted in the Athlete's test being reported one day late. As noted above, because it took some 23 days in total for the Athlete to be notified of the results of his doping test, counsel submits, the Athlete's multivitamins and Kaizen Naturals Whey Protein powder were in fact depleted, thereby depriving him of the opportunity to have his own products tested to see whether they were contaminated.

In summary, counsel submits that the Athlete should be found responsible for a high degree of fault, but that the evidence does not support a finding that there was an intentional doping violation deliberately committed by Mr. Youssef. The Athlete does not, counsel submits, fall within the concept of "*Athletes* who cheat" as contemplated within Rule 10.2.3 of the *Canadian Anti-Doping Program*, reproduced above. On that basis, counsel submits that the four year sanction imposed upon the Athlete is excessive and that, in fact, in all of the circumstances a two year sanction should be the appropriate result in the instant case.

Argument for CCES:

Counsel for CCES agrees with the Athlete's counsel that the Athlete's intention is at the core of the instant case and that ultimately the question is whether the Athlete has discharged his onus to prove that he had no intent to commit an anti-doping rule violation. Counsel for CCES stresses that it is for the Athlete to prove a lack of intent on his part for the doping violation which in fact occurred, acknowledging that if the Athlete can demonstrate that he had no intent to violate the rule his sanction would be a two-year suspension, rather than the four-year suspension which was assessed against him. The position argued by CCES is that on the evidence before the Arbitrator the Athlete has not proved that his anti-doping rule violation was not intentional.

In support of its case, CCES advances a twofold argument. Firstly, it asserts that without establishing how testosterone got into his system, the Athlete cannot prove that

his doping violation was not intended. Secondly, and alternatively, even if it should be that proof of the actual source of his testosterone violation is a strict prerequisite, he has nevertheless not proved that his anti-doping rule violation was not intentional. Significantly, under Rule 10.2.1 four years of ineligibility is the presumptive sanction unless it is established that the rule violation was not intentional. In that case, the period of ineligibility is reduced to two years by the operation of Rule 10.2.2.

Counsel for CCES draws to the Arbitrator's attention the distinction between the rules of the new *Canadian Anti-Doping Program* and the rules of the old *Canadian Anti-Doping Program*, noting that under the old rules the presumptive sanction for a rule violation was a two-year suspension of eligibility, subject only to a greater period of sanction in the case of aggravating circumstances. By contrast, under the 2015 *Canadian Anti-Doping Program* the presumptive sanction is four years unless the Athlete can demonstrate a lack of intention. In other words, violations involving a prohibited substance start with a four-year sanction subject to the burden which is placed upon the athlete to demonstrate that the anti-doping rule violation was not intentional. That is substantially different from the old rule which posited a normative two-year sanction unless aggravating circumstances justified an increase in the sanction.

DECISION:

It does not appear disputed that this is the first case in which a Canadian Tribunal is called upon to interpret and apply the rules here under consideration.

Rules 10.2.1 of the *Canadian Anti-Doping Program* provides the following with respect to the situation regarding the application of a four year period of ineligibility:

> 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.

Rule 4.2.2 defines “Specified Substances”, and provides as follows:

> 4.2.2 *Specified Substances*
>
> For purposes of the application of Rule 10, all *Prohibited Substances* shall be *Specified Substances* except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the *Prohibited List.* The category of *Specified Substances* shall not include *Prohibited Methods.*

Professor Ayotte stated the following regarding testosterone at paragraph 10 of the Opinion she rendered following a review of the Athlete’s situation:

> 10. Testosterone is a banned anabolic androgenic steroid, found in section S1.b) endogenous anabolic androgenic steroid (EAAS) of the World Anti-Doping Agency’s Prohibited List of substances and methods.

The parties agree that testosterone is a prohibited substance. While, given Professor Ayotte's description of Testosterone, it appears that this situation would fall under Rule 10.2.1.1, no submissions were offered by the parties regarding whether the testosterone involved in the Athlete's anti-doping violation involved a Specified Substance or not, i.e. whether it falls under Rule 10.2.1.1, where the burden is clearly on the Athlete to establish that the anti-doping violation was not intentional, or whether it falls under Rule 10.2.1.2, where the initial obligation is on CCES to demonstrate that the violation was intentional.

In the current circumstances, the Arbitrator is satisfied that it is unnecessary to make a determination regarding whether it is either Rule 10.2.1.1 or Rule 10.2.1.2 that governs because, in either case, the ultimate obligation rests with the Athlete to demonstrate that the violation was not intentional. His burden to do so is either expressly stated on the face of Rule 10.2.1.1 or the burden to do so has shifted to him under Rule 10.2.1.2. In the event that CCES carried an initial burden under Rule 10.2.1.2, the Arbitrator would be satisfied that by bringing forth undisputed evidence that the Athlete's Sample contained high levels of the prohibited substance, testosterone, CCES would have met its obligation of establishing the requisite intention and the obligation would have shifted to the Athlete to demonstrate that the violation was not intentional.

Rule 10.2.3 defines "intentional" as used in Rule 10.2 and stipulates what is required of the Athlete, as follows:

> 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.

Rule 10.2.3, therefore, informs that, "… the term 'intentional' is meant to identify those Athletes who cheat." It then further describes the conduct engaged in by "the Athlete or other person" that would be considered "intentional." It stipulates that "intentional" 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.

Substantial evidence was submitted regarding the protein supplement, Kaizen Naturals Whey Protein. The evidence reveals that the Athlete was provided with the protein supplement that had been purchased by his father from a friend who operates a gymnasium in Egypt. By the Athlete's account, sometime prior to March 31, 2015, when his urine sample was taken, he started taking the Kaizen Naturals Whey Protein when he had depleted the protein he had been taking. The Athlete's father testified that after CCES issued an Initial Review of Adverse Analytical Finding, he had other supplements that the Athlete was taking tested, specifically Isagenix and Aminocore. Both of these supplements were found to have been clean and free of testosterone. The Kaizen

Naturals Whey Protein powder was not sent for testing because it had been fully consumed by the point that the Athlete received the Adverse Analytical Finding.

The Athlete asserted that he does not know how he could have tested positive for testosterone. Among possibilities, the Athlete suggested that the source of the testosterone might have been the Kaizen Naturals Whey Protein powder that his father brought back from Egypt or that one of his supplement bottles had been sabotaged by someone in Montreal, which was the location of the sparring camp where he was when he was tested. In paragraph 4 of her Opinion, Professor Ayotte set out the following regarding her understanding of the Athlete's claim:

> 4. Based on my review of the Athlete's submissions, I understand the Athlete to be claiming that he did not take testosterone intentionally, and that he believes the adverse analytical finding was due to his consumption of a protein supplement (Kaizen Natural Whey) that was either:
>
> a. Contaminated with testosterone; or
>
> b. Sabotaged by teammates.

The written submission made to the Arbitrator on behalf of the Athlete, quoted above, indicates in paragraph 26 that, in the normal course, the supplements the Athlete took were regularly and almost exclusively purchased at GNC, which was described therein as a reputable health and nutrition store with multiple locations across Ontario and Canada. Paragraph 27 sets out the care that the Athlete and his family members regularly took when purchasing supplements, as follows:

> 27. Mr. Youssef and/or his family members would consistently inquire with GNC staff members as to the ingredients and certification status of any supplements they were purchasing. They would also check the ingredients against the WADA Prohibited List, and would occasionally contact the manufacturer if there were ingredients which were unknown to them. As all of the men in the Youssef family have or continue to compete in Judo, they are extremely prudent in ensuring that all supplements acquired adhere to the highest standard and are safe for consumption both in and out-of-competition.

The evidence does not reveal that similar precautions were taken upon the purchase of the Kaizen Naturals Whey Protein powder from the gymnasium in Egypt. A primary motivation for purchasing the protein powder at the gymnasium rather than at a location such as GNC was that it was more affordable. The Athlete's father had purchased products from his friend's gymnasium before. Paragraph 28 of the Athlete's submission states that in so doing his father "always ensured that he purchased brand names that were reputable and that he was familiar with." The evidence reveals that no further or additional precautions were taken with the Kaizen Naturals Whey Protein powder that the Athlete's father brought back from his friend's gymnasium.

The Arbitrator is satisfied that for the Athlete to have consumed the Kaizen Naturals Whey Protein powder purchased by his father from the gymnasium of his friend in Egypt without independently verifying the security of its contents, given that it did not come from a reputable health and nutrition store or a like location, constitutes conduct in respect of which the Athlete either knew, or ought to have known, that "there was a

significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk."

Accordingly, to the extent that the assertion is that the testosterone that was found in the Athlete's urine might have come from the Kaizen Naturals Whey Protein powder, the Arbitrator finds that the Athlete's conduct of consuming the Kaizen Naturals Whey Protein powder under the circumstances in which he did meets the definition of "intentional" under Rule 10.2. Pursuant to Rule 10.2.3, the Athlete either knew or ought to have known that there was a significant risk that consuming the Kaizen Naturals Whey Protein powder might result in an anti-doping rule violation given the lack of security precautions that were taken respecting the contents of that particular container of Kaizen Naturals Whey Protein powder. Because the undertaking of that risk, in the manner in which it occurred, meets the definition of "intentional" under Rule 10.2.3, that circumstance, as standing on its own establishes the period of ineligibility as four years pursuant to article 10.2.1 because instead of establishing that the anti-doping rule violation was not intentional, it demonstrates the opposite.

Based on her review of the Athlete's submissions, though, Professor Ayotte was satisfied that the Kaizen Naturals Whey Protein powder was in all likelihood not the source of the testosterone. She concluded both that "[i]t [was] extremely unlikely that contaminated Kaizen Natural Whey product caused the adverse analytical finding" and that "[i]t [was] extremely unlikely that the results were caused by the sabotage of the Kaizen Natural Whey product". Her rationale in both instances included an emphasis on

the fact that the Athlete's Sample did not contain trace amounts but rather a very high amount of testosterone. She noted that he consumed a level of testosterone sufficient to shut down his own body's production. In paragraph 8 of her Opinion she stated that the Athlete's urine sample "revealed the presence of an abnormally high testosterone to epitestosterone (T/E value) of 31:1, and a very high concentration of testosterone …". She stated in paragraph 17 that "… even if I were to consider that a trace of testosterone could be present in Kaizen Natural Whey product, such a contamination would not produce results such as those observed in the Athlete's Sample." Regarding sabotage, she stated in paragraph 25, among other reasons, that "it would be extremely difficult to introduce the quantity of testosterone required (contained in dozens of capsules, or in solution in oil in bottles for injection) unnoticed into a jar of powder."

The Athlete stated that he does not know where the testosterone came from. Professor Ayotte concluded that in all likelihood it did not come from the Kaizen Naturals Whey Protein. No evidence was presented by the Athlete to provide any explanation for the presence of testosterone in his urine apart from the Kaizen Naturals Whey Protein powder or sabotage. Even the Athlete acknowledged that sabotage was not likely. Do these circumstances establish that the period of ineligibility should be four years? When the burden rests with the Athlete to demonstrate a lack of intention, as it does, how should the Arbitrator treat a situation in which no explanation as to the source of the testosterone has been provided?

As noted by counsel for CCES, three prior decisions in the United Kingdom have in fact dealt with this issue. They are: *UK Anti-Doping Limited v Songhurst*, SR/00001120248; *UK Anti-Doping Limited v Graham*, SR/0000120259, and; *UK Anti-Doping Limited v Hastings*, SR/0000120256.

In the case involving athlete Paul Songhurst, decided by the United Kingdom's National Anti-Doping Panel in a decision dated July 8, 2015, consideration was given to the question of intentional use of a prohibited substance in violation of Article 2.1 of the Anti-Doping Rules. In that case a urine test disclosed the presence of drostanolone in the urine of the athlete, a prohibited substance under class S1 of the World Anti-Doping Agency *2015 Prohibited List (Exogenous Anabolic Androgenic Steroids)*. In the *Songhurst* decision by a Panel chaired by Charles Hollander Q.C. the following comments appear in relation to the question of intentional use at pp 7-8 of the Panel's decision dated July 8, 2015:

> **Intentional use**
>
> 25. Article 10.2 provides for a mandatory four year ban unless the athlete is able to show that the ADRV was not intentional. The burden of proof is on the athlete, which Article 8.3.2 provides must be satisfied on a balance of probabilities. We have set out Article 10.2.3 above, which defines "intentional".
>
> 26. In evidence, Mr Songhurst fairly accepted that in the light of UKAD's evidence, it was apparent that the "Monster Mix" could not have given rise to the ADRV. He said that he simply did not know what had given rise to the positive finding and he was unable to point to any likely cause.

27. UKAD not surprisingly submitted that in such circumstances, Mr Songhurst had failed to satisfy the burden of proof which was on him.

28. In response, it was submitted for Mr Songhurst that the tribunal were entitled to assess his credibility in the round, and in the light of his oral evidence, and decide whether they believed his firm denial that he had taken the prohibited substance deliberately, and, if they did, to hold that he had satisfied the burden of proof. Otherwise the rule would have the draconian effect of ruining the career of someone who was innocent of intentional wrongdoing but did not know how the prohibited substance came to be found in his body. The practical effect of Art 10.2 is that the athlete has to prove a negative.

29. The problem with this submission is that in the normal course it is not to be expected that prohibited steroids are found in the body of an athlete. In any normal case knowledge concerning how the substance came to be in the body is uniquely within the knowledge of the athlete and UKAD can only go on the scientific evidence of what was found in the body. The scientific evidence of a prohibited substance in the body is itself powerful evidence, and requires explanation. It is easy for an athlete to deny knowledge and impossible for UKAD to counter that other than with reference to scientific evidence. Hence the structure of the rule.

30. We note that drostanolone is a steroid that is potentially of use to sportsmen and that it normally enters the body by intra-muscular injections, that it is not normally digested orally, and that if it was so ingested, it would rapidly be de-activated by the liver and would then cease to appear in a urine sample.

31. Mr Songhurst has failed to provide any real explanation as to how this prohibited substance came to be found in his body. In such circumstances, we find that he has failed to discharge his burden of proof under Art 10.2.

The same theme is touched upon in the decision of the UK Anti-Doping Tribunal in the case of Lewis Graham, a decision dated August 27, 2015. In that case, in

considering the athlete's submission with respect to the issue of intent under rules which are equivalent to the rules before this Arbitrator, the Panel commented at paragraph 38 of its decision:

> 38. In any event, the fundamental difficulty with this submission is that where the ADRV arises under Article 2.1 without establishing the likely method of ingestion of the Prohibited Substance it is difficult to see how this Tribunal could properly and fairly consider the question of intent in relation to the conduct which led to that ingestion.

What these decisions reflect is that, very clearly, the United Kingdom National Anti-Doping Panel has ruled that it is incumbent upon the athlete to show how the substance got into his or her body as a prerequisite element to assessing the question of intent. To put it differently, the cases from the United Kingdom stand for the proposition that an athlete must prove the means of ingestion in order for him or her to prove a lack of intent. It appears that that issue has not yet been addressed in Canada and counsel for CCES submits that the United Kingdom approach, reflected in such cases as *Songhurst, Graham* and *Hastings*, should be adopted in Canada. The argument of CCES is that it is always necessary to know how a substance entered an athlete's body to deal properly and responsibly with the issue of intention. In respect of that issue further reference is made to the decision of the Court of Arbitration for Sport in the case involving *Lauris and Janis Daiders and the Federation Internationale de Motocyclisme*, CAS 2014/A/3615, a decision dated January 30, 2015. At paragraph 61 of that arbitral award the following comment appears:

> As already highlighted in this award and by other CAS panels in previous cases, in order to be in a position to assess whether there has been no fault or negligence on the part of the athlete, or no significant fault or negligence, having regard to Articles 10.5.1 or 10.5.2 of the FIM AD Code, it is necessary that the source of the prohibited substance in the athlete's system is identified and proven to the requisite standard.

How do the above principles, which the Arbitrator considers appropriate, apply to the facts of the case at hand? Firstly, the Arbitrator considers the evidence of Professor Ayotte to be significant in the instant case. For instance, the Athlete argued that he was effectively prejudiced by the fact that his protein supplement was entirely depleted by the time he was advised of his positive urine test, although it does appear that he still had the container in his possession. With respect to the issue of any possible prejudice to the Athlete, the Arbitrator considers it significant to note the unchallenged testimony of Professor Ayotte who stated that the empty protein supplement container would in all likelihood have contained residual traces of the original protein substance which could have been tested to what she describes it as the miniscule level of a picogram which, it appears, is one trillionth of a gram.

Having reviewed the evidence and the extensive submissions presented in the instant case, the Arbitrator is compelled to the unfortunate conclusion that the doping violation alleged against the Athlete is established on the balance of probabilities. In many respects the instant case is similar to the *Songhurst* decision of the National Anti-Doping Panel of the United Kingdom, referred to above. In that case the Panel concluded: "Mr Songhurst has failed to provide any real explanation as to how this prohibited

substance came to be found in his body. In such circumstances, we find that he has failed to discharge his burden of proof under Art 10.2."

In the instant case, what compelling explanation has been provided by the Athlete as to how the prohibited substance came to be found in his body? At best, he offers a speculative theory to suggest that a protein powder substance obtained by his father in Egypt must, somehow, have been the source of the testosterone which was found in his body and constituted the rule violation in this case. Neither the substance nor the container which the Athlete's theory suggests was the source of the testosterone found in his system was available to be verified or tested. He further posited the possibility of sabotage of either the Kaizen Naturals Whey Protein powder or his other supplements but acknowledged that that was unlikely. The written Opinion of Professor Ayotte, as described above, was that it was "extremely unlikely" that either contamination of the Kaizen Naturals Whey Protein powder or sabotage of the container could account for such high levels of testosterone as were found in his Sample.

Beyond suggestions of contamination of the Kaizen Naturals Whey Protein powder or sabotage, neither the Athlete nor any other person was able to provide an explanation for how such undisputedly high levels of testosterone were found in his Sample. In these circumstances, from the standpoint of rigorous evidence, the Arbitrator is compelled to conclude that the Athlete has not provided a real or verifiable explanation as to how testosterone found its way into his body. Significantly, in the Arbitrator's view, the

evidence presented by the Athlete simply does not demonstrate, for the purposes of Rule 10.2.1 of the *Canadian Anti-Doping Program*, that his rule violation was not intentional.

In coming to this conclusion, the Arbitrator accepts the submission of counsel for CCES that the jurisprudence reviewed above, emanating from the United Kingdom, properly establishes that in a doping case of this kind the burden is upon the athlete to prove the means of ingestion of the prohibited substance so as to prove a lack of intent on the athlete's part. The Arbitrator is satisfied that the approach adopted in the United Kingdom decisions reviewed above is the appropriate approach to be adopted in the Canadian context, where the issues and rules are substantially similar. The Arbitrator accepts as correct the approach taken in the United Kingdom cases of *Songhurst, Graham* and *Hastings* touched upon above. The Arbitrator further accepts as correct the proposition which emerges from those decisions, which is that it is incumbent upon the athlete to prove the means of ingestion of a prohibited substance to prove the athlete's lack of intent.

How do those principles apply here? The Athlete has not proved, on the balance of probabilities, the precise source of the high level of testosterone which was found within his system in violation of the rules. With respect, his suggestion that the source must have been a protein powder from Egypt is speculative, at best, if not gratuitous. At the end of the day, in the case at hand, there is no meaningful, verifiable or compelling evidence to establish how significant levels of testosterone came to be in the Athlete's system, in violation of the provisions of the *Canadian Anti-Doping Program*.

The evidence before the Arbitrator does disclose that the Athlete consumed a substance imported by his father from Egypt in circumstances of questionable origin and quality control outside the regulatory protections which would apply in Canada. The Arbitrator is satisfied that in these circumstances, when considering the issue of intention, for the purpose of Rule 10.2.3 of the *Canadian Anti-Doping Program* the actions of the Athlete in this case were intentional in the sense that the Athlete knew, or reasonably should have known, 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."

On the basis of all of the foregoing the Arbitrator is compelled to the unfortunate conclusion that the doping infraction alleged against the Athlete is proved and that he engaged in intentional conduct within the definition of Rule 10.2.3 of the *Canadian Anti-Doping Program*. In these circumstances, regrettably, the Athlete's request for a reduced sanction must be dismissed.

Dated at Ottawa, Ontario this 31st day of December, 2015.

"Michel G. Picher"

Michel G. Picher
Arbitrator
s.c.