

FINA Doping Panel 01/16 17 May 2016

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FINA Doping Panel

comprised of

Robert Fox	(SUI)	Chairman
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Raymond Hack	(RSA)	Member

In the proceedings against

the swimmer **William Brothers** ("the Athlete")
affiliated to Swimming Canada

represented by: Mr. Ward Mather,
Legal Counsel

I THE PARTIES

1.1 The FEDERATION INTERNATIONALE de NATATION (FINA) is the International Federation governing disciplines related to swimming. FINA has established and is carrying out, inter alia, a doping control program, both for in-competition as well as out-of-competition testing.

1.2 Swimming Canada is a member of FINA. Swimming Canada is required to recognize and comply with FINA's anti-doping rules, which are set out in the FINA Doping Code ("FINA DC"). The FINA DC is directly applicable to and must be followed by competitors, competitor

support personnel, coaches, physicians, team leaders, and clubs and representatives under the jurisdiction of Swimming Canada.

1.3 Mr. William Brothers is a swimmer and part of the Canadian Swimming team. He began swimming competitively in the 2004/2005 season at the age of 10 in Alberta, Canada. In 2006, he set the Alberta age group records in both the 800 and 1500 meters freestyle. He was awarded the Male Alberta Age Group Swimmer of the year in 2006/2007 season. He was the Canadian Youth Swimmer of the year in 2009 at the age of 15.

Between 2010 and 2012, the Athlete represented Canada on the National junior team. He placed 6th at the World Junior Championships in 2011, and was a silver and bronze medallist at the 2012 Junior Pan-Pacific Championships. Between 2013 and 2014, Mr. Brothers moved to the Canadian senior national team and is the second fastest Canadian in the 1500 meter freestyle of all-time. In the 2013/2014 season, he competed for Canada on the international stage at the World University Games in Kazan, Russia, the FINA World Championships in Barcelona, Spain, the Commonwealth Games in Glasgow, Scotland and the Pan-Pacific Championships in Queensland, Australia.

II NATURE OF THE CASE

2.1 Two Doping Control Officers (DCO) presented themselves at the Athlete's residence on 26 August 2015 in Vancouver Canada at 10 pm. The report which was filed stated: *"initially, the athlete was friendly and cooperative. As the Blood DCF was being completed and we were about to begin the process of choosing a Berek Kit, the athlete took a phone call from his father (as per athlete's girlfriend, [REDACTED]). He*

spoke with his father for a few minutes, under observation, and when he finished the phone call he notified me that he will not be taking the blood test due to health reasons. He said he has health issues and has had to step away from the sport for the last month. He wrote his reason down on the DCF and signed the form. Myself and the BCO could hear parts of the phone conversation between the athlete and his father. We heard his father say: don't say anything else, you don't have to tell them anything, to refuse the test, and that they would deal with the suspension. The athlete was saying: ok, yeah, ok, yeah over and over throughout the conversation and not much else. As soon as he hung up the phone, he said he had health reasons and he wasn't going to take the test. Once he refused the test, he asked what would happen, and I said his sport federation, FINA, would get in touch with him regarding any repercussions. I reiterated that we only had to draw one sample/vial of blood, nothing else, no urine, but he still refused. He was very polite but he looked very nervous, his face was red, and he wouldn't look at me. We then packed up our supplies and left".

III THE PROCEEDINGS

3.1 On 2 September 2015, the Athlete submitted a filled out FINA retirement notification form.

3.2 On 4 September 2015, the FINA Executive Director wrote to the Athlete advising him of the report filed by the DCO on 26 August 2015 and informed him of the possible FINA Doping Control Rule violation consisting of evading, refusing or failing to submit to sampling collection pursuant to FINA DC 2.3.

3.3 On 7 September 2015, Mr. Brothers wrote to FINA, acknowledging his refusal of sample collection but explaining that he

was dealing with a serious medical problem as of 14 August 2015 and finding his situation as a result stressful. He explained he had decided to retire but had not filled out the relevant documentation at the time the DCOs arrived at his home.

3.4 On 25 September 2015, the Athlete was advised by the FINA Executive Director that his matter would be dealt with by the FINA Doping Panel. On the same day, the Athlete responded by email to FINA, expressing his desire to file supportive medical documentation to substantiate his position in the matter and be given a deadline to 10 October 2015 to do so.

3.5 On 28 September 2015 the FINA Doping Panel Chairman wrote to Mr. Brothers and set him a deadline to 10 October 2015 to inform him of whether he wished to have a hearing or use his right to waive a hearing and file a defence brief. Mr. Brothers replied the same day and made inquiries regarding the manner in which the hearing would be carried out, notably if a hearing could be held by videoconference and whether he could have legal representation assist him.

3.6 The FINA Doping Chairman replied to the Athlete on 7 October 2015 and exposed the rule DC 8.1.

3.7 On 8 October 2015 Mr. Ward Mather, attorney, informed the FINA Doping Panel of his mandate to defend the Athlete and requested an extension to 20 November 2015 to file his client's defence and submissions. This deadline was given to him by the FINA Doping Panel Chairman by letter dated 12 October 2015. On 29 October 2015, Mr. Mather sent an executed power of attorney to the FINA Doping Panel Chairman.

3.8 On 13 November 2015, the Athlete's attorney requested a further extension to 1 December 2015 to file the brief and evidence on behalf of his client. The request was accepted by letter dated 16 November 2015.

3.9 On 1 December 2015, the Athlete's attorney filed a brief accompanied by a bundle of 9 exhibits.

3.10 On 4 December 2015, the FINA Doping Panel Chairman set a deadline to 8 December for the Athlete to confirm his wish to have a hearing or not.

3.11 By letter dated 16 December 2015, the Athlete's attorney requested the possibility of holding the hearing by videoconference, due to his client's status as a university student and limited financial means.

3.12 After numerous exchanges relevant to the organization of the hearing and what that entailed, a hearing by videoconference was set for Tuesday 8 March 2016 at 5 pm Swiss time or 8 am Vancouver time.

3.13 On 4 January 2016, Mr. Mather filed a written statement from the Athlete dated 1 December 2015 and requested that this document be entered into the file.

3.14 On 27 January 2016, the Athlete through his attorney raised the concern that none of the members of the Panel was a medical physician and requested that the medical evidence provided by the Athlete be submitted to a FINA medical expert prior to the hearing.

3.15 On 28 January 2016, the FINA Doping Panel Chairman informed the Athlete's attorney that the file and evidence would be submitted to the FINA Doping Control Review Board (FINA DCRB). On

the same day the FINA Doping Panel Chairman submitted the file redacted of the Athlete's identity to the FINA DCRB and requested an answer no later than 8 February 2016.

3.16 The FINA DCRB Chairman, Dr. Andrew Pipe of Canada recused himself from the examination of the file and submitted the file to Dr. Susan White of Australia to examine the evidence and provide FINA with its opinion. Her reply was forwarded to the FINA Doping Panel Chairman on 7 February 2016.

3.17 On 11 February 2016, the FINA Doping Panel wrote to the Athlete's attorney, quoting the reply of the FINA DCRB and set a deadline to 25 February 2016 for the Athlete to respond. On the same date, the Athlete's attorney requested being informed of what information had been provided to FINA DCRB. This was given to him by letter dated 12 February 2016.

3.18 On 24 February 2016, Mr. Brothers' attorney provided additional documentation to the Doping Panel Chairman. On 26 February 2016, he provided more additional information including a letter from the Athlete's father, [REDACTED] who is also a medical physician.

3.19 On 29 February 2016, the Athlete sent additional evidence to the FINA Doping Panel Chairman, by various emails. This documentation was referred to by Dr. Brothers in his correspondence to the FINA Doping Panel Chairman.

3.20 On 1 March 2016, the attorney of the Athlete informed the FINA Doping Panel Chairman that both the Athlete and his father would testify at the hearing.

3.21 By letter dated 3 March 2016, the FINA Doping Panel communicated the letter he sent to the FINA DCRB pursuant to the medical information provided to the FINA Doping Panel. He informed the Athlete's attorney that he would be provided a chance to comment the response received from FINA DCRB. He provided information relevant to the process of the hearing, as well as call in information for the hearing.

3.22 On 8 March 2016, FINA DCRB replied to the FINA Doping Panel Chairman and answered the questions raised. This communication was provided to the Athlete. He was allowed to examine this letter and given a deadline after the hearing to respond. On 15 March 2016, the Athlete's attorney responded that the reply of FINA DCRB was consistent with the information he had previously provided and did not warrant any further response.

3.23 The hearing was held by video conference on 8 March 2016 at the scheduled time in presence of the FINA Doping Panel, Mr. Brothers, Dr. Brothers, Mr. Ward Mather, attorney and a representative of Swimming Canada

IV JURISDICTION AND APPLICABLE RULES

4.1 The jurisdiction of the FINA Doping Panel arises out of the provision of the following provisions of the FINA Rules C 22.8, C 22.9 and FINA DC 8.1.

4.2 The applicable Rules in this case are the FINA Doping Control Rules in effect since 1 January 2015.

V. MOTIONS AND CONTENTIONS

A. The Athlete's motions and contentions

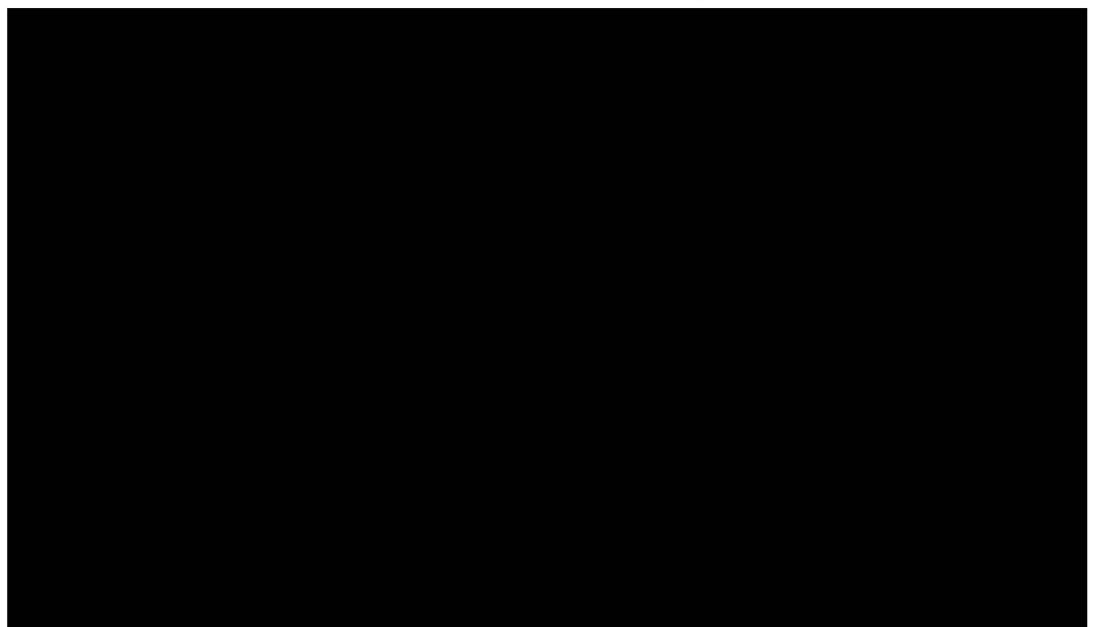
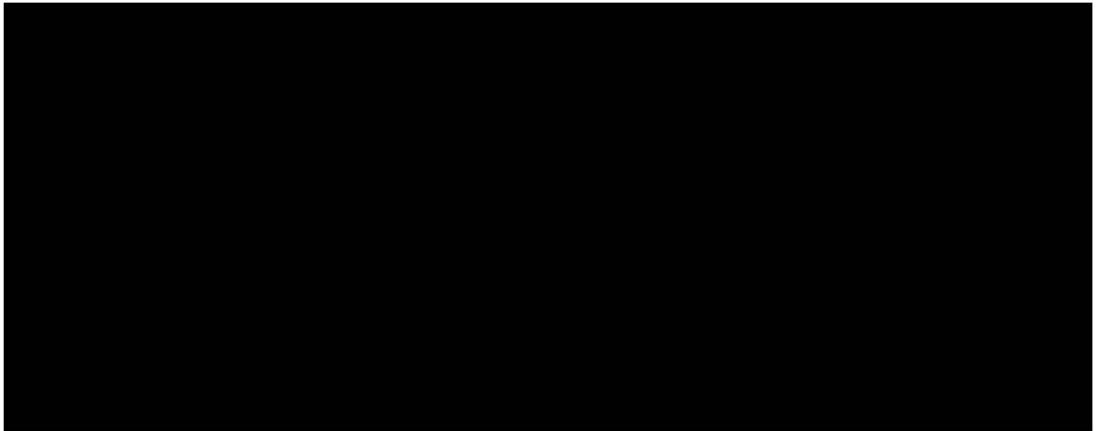
5.1 The FINA Doping Panel listened to the Athlete's testimony of the manner in which the events took place on 26 August 2015. Dr. Brothers was also heard and provided not only testimony relevant to the events, as he was on the telephone with his son on the day the test was to take place, as mentioned in the DCO's report. He also provided the Panel with his medical opinion. The position of the Athlete is summarized here. The FINA Doping Panel however took all the documentation and evidence as provided. The following part of the decision reflects the summary of the Athlete's position and is not a detailed and complete rendition of all his assertions.

5.2 In his submissions the Athlete held that:

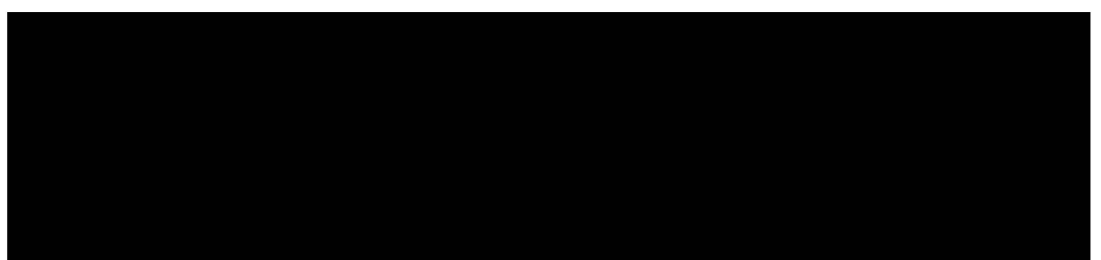
a) Prior to 26 August 2015, he had advised his coaches, family and friends that he intended to take a break from swimming and had voiced his intention to retire from competitions. The decision to take a break from swimming had been made prior to 26 August 2015. The DCOs from IDTM arrived at the Athlete's residence at approximately 10:00 pm on 26 August 2015 which was within the appropriate timing for an out of competition testing mission, but at the time in which he was preparing for bed.

In light of his decision to quit competitive swimming, the Athlete considered that this unexpected visit to be unsettling.





e) In addition to his physical ailments in the 2014/15 season, Mr. Brothers was also dealing with a full-time university course combined with a training schedule of 25 hours per week. Added to this stress was the death of his long-time coach who was diagnosed with cancer in 2014 and who later passed away in April 2015. These factors contributed to his psychological condition and emotional stress.



[REDACTED]

[REDACTED]

[REDACTED] He was incapacitated by these events to the point of being unable to make a clear and rational decision. [REDACTED]

[REDACTED]

h) The Athlete stated that he did not have the requisite intention to evade, refuse or fail to submit to a sample collection as he did not have the mental capacity to make a rational decision in that state. His actions were consistent with involuntary behavior and aligned with his prior medical diagnosis and are compelling justification for refusing or failing to submit to sample collection, hence there was no violation of the anti-doping rules, and no sanction is to be imposed on him.

i) Alternatively, for the Athlete, the Doping Panel could reduce the period of ineligibility based on a finding of no significant fault or negligence pursuant to DC 10.5.2 and arrive at a reduction of sanction based on this finding from the two year period to one year.

Finally, the Athlete contended that a reduction of the period of ineligibility could also be available to the Doping Panel under DC 10.6.3 given Mr. Brothers' prompt admission of an anti-doping rule violation for evading or refusing sample collection. Under this section, a reduction in the period of ineligibility from four years to two years may be granted

"depending on the severity of the violation and the Athlete or other Person's degree of Fault". '

VI LEGAL DISCUSSION

A. THE FACTS

6.1 The FINA Doping Panel based on the evidence of this case concludes that the Athlete refused to submit to doping control pursuant to FINA DC 2.3. Not only does the DCO report confirm that no sample was taken, but the Athlete admits that he refused to give a sample for the purpose of a test. The issue on hand is to determine how this behavior falls under the applicable rules and if there is reason or not to sanction the Athlete.

The FINA Doping Panel listened very carefully to the explanations of the relationship between the medical condition of the Athlete and the possibility of this causing [REDACTED]. However, based on the evidence brought before it, even on the application of a balance of probability threshold, the FINA Doping Panel cannot conclude that Mr. Brothers actually was suffering [REDACTED] at the time the testing was to be carried out. There is no testimony to corroborate that fact and the telephone conversation between the Athlete and his father is not sufficient evidence in the Panel's opinion to conclude that he was actually at the time suffering [REDACTED] [REDACTED] to warrant not taking the sample test.

6.2 The FINA Doping Panel however gives weight to the fact that the ultimate decision to not accept the sample collection resulted from Dr. Brothers instructing his son, the Athlete, and telling him to not

partake in the test and to deal with the consequences after. Hence, on a balance of probability, regardless of whether the circumstances surrounding the telephone conversation and the events which took place were indeed consequences of [REDACTED] the FINA Doping Panel considers that a doping offence occurred and the rules were contravened.

B. THE LAW

6.3 FINA DC 2 defines various Anti-Doping Rule violations. The purpose of FINA DC 2 is to specify the circumstances and conduct which constitute anti-doping rule violations. Athletes or other persons shall be responsible for knowing what constitutes an anti-doping rule violation and the substances and methods which have been included in the prohibited list.

6.4 Pursuant to FINA DC 2.3, *Evading sample collection, or without compelling justification, refusing or failing to submit to Sample collection after notification as authorized in these Anti-Doping Rules or other applicable anti-doping rules.*

6.5 Pursuant to FINA DC 3.1, *FINA and its Member Federations shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether FINA or the Member Federation has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel 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. Where these Anti-Doping 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

6.6 According to FINA DC 10.3, *the period of Ineligibility for anti-doping rule violations other than as provided in DC 10.2 shall be as follows, unless DC 10.5 or 10.6 are applicable: FINA DC 10.3.1 for violations of DC 2.3 or DC 2.5, the ineligibility period shall be four years unless, in the case of failing to submit to Sample collection the Athlete can establish that the commission of the anti-doping rule violation was not intentional (as defined in DC 10.2.3), in which case the period of ineligibility shall be two years.*

6.7 FINA DC 10.2.3 defines the notion of “intentional” as *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.*

6.8 FINA DC 10.5 is relevant to the *reduction of the period of ineligibility based on no significant fault or negligence*. FINA DC 10.5.1 is inapplicable in this matter as it only applies in cases where there is a violation of DC 2.1, 2.2 or 2.6.

6.9 The Panel does not apply FINA DC 10.5.2 here either, as it considers that in this matter, there is no room for considering Mr. Brothers behavior otherwise than intentional.

C. THE DOPING OFFENCE AND SANCTION

6.10 Pursuant to the strict liability principle which governs anti-doping, the Athlete refused to submit to a doping test, as he has

supposed to. The two issues which the FINA Doping Panel must examine are: a) whether there was compelling justification to fail to submit to the test and b) the intentional nature of the behaviour of the Athlete. In other words, does the evidence point to conduct by the Athlete which he 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.

6.11 As observed in the case of WADA v CONI & Ors (CAS 2008/A/1557) at para 80, the use of the word “compelling” in Article 2.3 *“underscores the strictness with which the justification needs to be examined”*. Moreover, in the case of CCES v Boyle (SDRCC, 31 May 2007) at para 53, the tribunal rejected the submission that, if a player was taken violently and horribly ill, this would afford compelling justification for refusing or failing to submit to a test: *“to be compelling her departure would have to have been unavoidable”*.

6.12 The FINA Doping Panel considers that the circumstances argued by the Athlete do not constitute compelling justification for failing to submit to the doping test. The refusal to take the test here was not unavoidable, regardless of the actual circumstances he was under at the time. There is no reason for example why he could not have shared [REDACTED] with the DCOs and evoke alternative solutions. The Panel ultimately feels that the refusal of submitting to the test was avoidable, even in light of the alleged circumstances.

6.13 The behaviour of the Athlete was clearly intentional, as he took the advice of his father and sought no alternative solution to avoid committing a doping offence. His father went as far as to tell him that he would deal with the consequences of the refusal. Hence, the Athlete

was well aware that his decision contravened the Doping Control Rules and constituted an offence. The Panel will not go as far as to state however that the Athlete's behaviour constituted "cheating" or a desire to do so in light of all the circumstances. The medical history of Mr. Brothers points to obvious problems and his judgment was certainly clouded by his circumstances, which in addition to his medical history, included his decision to retire from the sport. Finally, his spur of the moment judgment was also decisively clouded by his father's ill-advised decision to tell him not to submit to the testing. These circumstances however still constitute in the Panel's opinion intentional behaviour and may only be sanctioned as such.

VII SUMMARY OF DECISION

7.1 The Athlete is found to have committed an Anti-Doping Rule Violation under FINA Rules DC 2.1.

7.2 Mr. William Brothers receives a 4 (four) year period of ineligibility commencing on 26 August 2015 and ending at the conclusion of 25 August 2019 for his first anti-doping rule violation in accordance with DC 10.3.1.

7.3 All results obtained by Mr. Brothers on or after 26 August 2015 and through and including the date of this decision are disqualified. Any medals, points and prizes achieved during that period shall be forfeited.

7.4 All costs of this case shall be borne by Swimming Canada in accordance with FINA DC 12.3.

7.5 Any appeal against this decision may be referred to the Court of Arbitration for Sport (CAS), Lausanne, Switzerland not later than twenty one (21) days after receipt of this judgement (FINA Rule C 12.11.4 and DC 13.7).

Robert Fox
Chairman

Farid Benbelkacem
Member

Raymond Hack
Member

Signed on behalf of all three Panel Members

A handwritten signature in black ink, appearing to be 'R. Fox', written over a horizontal line.

Robert Fox