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

Nº: SDRCC DT 15-0239
(Doping Tribunal)

Between:

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)
CANADIAN INTERUNIVERSITY SPORT (CIS)

– and –

JUSTIN MAHEU

Athlete

– and –

GOVERNMENT OF CANADA
WORLD ANTI-DOPING AGENCY (WADA)

Observers

Tribunal : Patrice Brunet (sole arbitrator)

Dates of Hearing: April 7th and 12th, 2016

Appearing:

For CCES: Annie Bourgeois & Yann Bernard (legal counsel), Kevin Bean, Jason Francis

For CIS: Tara Hahto (observer)

For the Athlete: Carlos Sayao (legal counsel)

Observer: Robert Maheu (father of the Athlete)

REASONS FOR DECISION

I. INTRODUCTION

1. On October 25, 2015, Justin Maheu (the "Athlete"), a 24-year-old interuniversity soccer player, participated in a match opposing Cape Breton University ("CBU") and Dalhousie University. This match took place in Halifax, Nova Scotia.

2. On December 11, 2015, the Athlete was notified of an Adverse Analytical Finding ("AAF") under Rule 7.3.1 of the 2015 Canadian Anti-Doping Program (the "CADP"). The notice stated that he had committed an anti-doping violation based on the sample provided during the game on October 25, 2015.

3. The Canadian Centre for Ethics in Sport ("CCES") certifies that the analysis of the sample provided by the Athlete revealed ephedrine concentrations of 20.2 μg/mL.

4. Ephedrine is a Specified Substance only when found in concentrations exceeding the threshold of 10 μg/mL.

5. The Athlete does not dispute that his sample analysis revealed ephedrine concentrations exceeding the threshold and he recognized the violation on December 11, 2015. Prior to this admission, the Athlete had accepted a provisional suspension on November 17, 2015.

6. However, he is challenging the 2-year sanction proposed by the CCES and pleads that this sanction is unjust and disproportionate to his degree of fault.

7. Consequently, he is requesting a significant reduction of the ineligibility period he is facing.

II. THE PARTIES

8. The CCES is an independent, not-for-profit organization that promotes ethical conduct in all aspects of sport in Canada. The CCES also maintains and carries out the CADP, including the provision of anti-doping services to national sports organizations and their members. As Canada's national anti-doping organization, the CCES is in compliance with the World Anti-Doping Code ("the WADA Code") and its mandatory International Standards. The CCES has implemented the WADA Code and its mandatory International Standards through the CADP, the domestic rules that govern this proceeding. The purpose of the WADA Code and of the CADP is to provide protection for the rights of athletes to fair competition.

9. CIS is the national governing body of university sport in Canada, comprising the majority of degree-granting universities in the country.

10. Mr. Justin Maheu is a 24-year-old interuniversity soccer player. He began playing at the age of four and soccer has been the focus of his life since. Mr. Maheu is a student-athlete at Cape Breton University. In 2015, he was named CIS Male Athlete of the Year at the BLG Awards and CBU Male Athlete of the Year.

11. Based in Montreal, the World Anti-Doping Agency ("WADA") is the international organization responsible for managing the World Anti-Doping Program which includes the WADA Code. WADA did not take part in the hearing,

12. The Government of Canada did not attend the hearing either.

III. FACTUAL BACKGROUND

13. The Athlete stated that, during the summer of 2015, he was finding it increasingly difficult to breathe while he was training and playing soccer, especially when it was humid or cold.

14. While he was playing in Korea at an international soccer tournament in June 2015, the Athlete consulted a doctor and informed him about his breathing problems. According to him, the doctor advised him that it could be asthma and that he should see his doctor.

15. However, the Athlete confirmed that he did not find the time to consult his doctor when he went back home to Canada, mainly because he was both working and studying full-time.

16. Instead, the Athlete purchased Sudafed (pseudoephedrine) at the pharmacy. According to its manufacturer, Sudafed is a product that helps relieve sinus pressure, pain and congestion related to the common cold, allergies and other sinus problems.

17. The Athlete stated that he consumed this product for a week or two and that he followed the indications on the package. It helped him feel better, but he was still having problems breathing throughout the summer.

18. During the fall season at CBU, the Athlete's condition worsened.

19. It is in this context that, while he was at a GNC store[1] in Sydney, Nova Scotia, the Athlete bought Ephedrine.

20. He stated that he asked the clerk for something to help him breathe better. The clerk gave him a package of "Kaizen ephedrine hcl" supplement pills, which he purchased for 5$.

21. The package of this product stated that it is to be "used as a decongestant/to relieve nasal congestion". It also indicated the following: *"Dose(s): Adults and adolescents 12 and over: Take 1-4 tablets per day, not to exceed 1 tablet per single*

[1] **General Nutrition Center**. These stores focus on the retail sale of health and nutrition-related products (vitamins, sports nutrition, supplements, energy products, etc.)

dose". The package contained 50 tablets. Each tablet contained 8 mg of Ephedrine.

22. During his testimony, the Athlete specified that he actually purchased this product on two separate occasions. The first time on September 1, 2015, and the second time on October 7, 2015.

23. However, he did not begin to consume ephedrine before October 20, 2015.

24. Questioned about the relevance to purchase a second package of fifty (50) tablets, considering that he had not even opened the first one, the Athlete stated that he bought the second pack in order not to run out of the product and that it was inexpensive.

25. The Athlete also specified that he conducted some online research regarding ephedrine before using the product. In particular, he consulted the Global DRO website, referred in the CCES e-online courses, which states the following information:

> *In Competition: Conditional (orange)*
>
> *Out of Competition: Not prohibited (green)*
>
> *Additional information: Ephedrine is prohibited when the urinary concentration exceeds 10 micrograms/mL. This threshold is not valid in the presence of diuretics. If you are using a diuretic, you must have a Therapeutic Use Exemption to use both the diuretic and ephedrine.*

26. The Athlete explained that he concluded that it "was probably okay to take the supplements," as long as he followed the instructions on the package on competition days, since the substance was conditionally prohibited in competition only.

27. The Athlete also stated that he "Google-searched for information on

substances prohibited above a certain threshold." He found an academic article called "Drugs in Sport," dated from 2004. The article discussed ephedrine, but did not specify anything about a threshold or about ephedrine being conditionally prohibited. The article also mentioned caffeine and gave general guidelines regarding the correlation between the quantity of caffeine consumed and the threshold.

28. The Athlete testified that "ephedrine and caffeine both being stimulants, I figured that the guideline referenced above for caffeine roughly applied to ephedrine." Consequently, he compared the two thresholds and roughly estimated the maximum daily dosage of ephedrine he could take without exceeding the threshold established at 10 μg/mL.

29. Regarding his consumption of ephedrine, the Athlete stated that he took ephedrine supplements for approximately five (5) days before his anti-doping test on October 25, 2015. This was the first time he used this product and he took it until the end of his soccer season at CBU, on November 14, 2015.

30. He stated that he started consuming the supplements because his asthma and sinus conditions were very bad that week, due to the cold and damp weather, which worsened his respiratory problems.

31. The Athlete testified that he "generally" followed the instructions on the package of the product, which stated, "up to four tablets per day, never exceeding one pill at a time."

32. However, he recalled a few times in the five-day period before his anti-doping test when he took two or three tablets at a time and one day in particular when he took six pills in a single day. On this last occasion, he was feeling "jittery" and promised himself not to repeat the dosage.

33. He stated that he was not concerned with slightly exceeding the therapeutic instructions because the dosage was well below the one he thought would keep

him under the threshold limit, based on his internet research.

34. To be conservative, the Athlete explained that he followed the posology instructions precisely the day of and the day before any soccer games. On October 25, 2015, he stated, "I did not recall 100% but I think that I took two pills, one right when I woke up in the morning and another before the game."

35. After the game of October 25, 2015, the Athlete was asked to undergo an anti-doping test.

36. During the test, he was also asked to fill out a Doping Control Form. Instead of writing that he was using ephedrine, the Athlete wrote down "caffeine pills." He was not taking caffeine pills at the time, nor had he ever previously. He stated that he did not recall the name of the ephedrine tablets and that is why he wrote caffeine pills on the form.

37. On November 17, 2015, the Athlete received an email from Mr. John Ryan, CBU Athletic Director, informing him that his urine sample of October 25, 2015, had tested positive to ephedrine.

38. The certificate of analysis of the Athlete's A sample indicated:

> *Ephedrine measured at 20.2 µg/mL, U= 0.9 µg/mL (k = 2) at threshold of 10 µg/mL. Decision limit: 11 µg/mL.*

39. In the World Anti-Doping Agency's Prohibited List, the excerpt pertaining to this substance states the following:

> *S6. STIMULANTS*
>
> *All stimulants, including all optical isomers, e.g. d- and l- where relevant, are prohibited.*
>
> *Stimulants include:*
>
> *[…]*

b: ***Specified Stimulants****. Including, but not limited to: Benzfetamine; cathine**; cathinone and its analogues, e.g. mephedrone, methedrone, and α-pyrrolidinovalerophenone; dimethylamphetamine;* ***ephedrine***;*** *epinephrine**** (adrenaline); […]*

[…]

***** ***Ephedrine*** *and methylephedrine:* ***Prohibited when the concentration of either in urine is greater than 10 micrograms per milliliter.***

[Emphasis added]

40. On November 17, 2015, the Athlete accepted a provisional suspension.

41. He also consulted Dr. Reggie Sebastian from the CBU Health Centre to address his breathing problems and chronic sinus congestion.

42. On November 19, 2015, the Athlete visited the Glace Bay Healthcare Facility to undergo a Pulmonary Function Test and a Methacholine Challenge Test.

43. On November 23, 2015, he received the results of these tests. The results showed a "moderate obstructive lung defect", which is a form of asthma. It is to be noted that the Athlete's father has a long history of allergies and asthma, as evidenced in the record.

44. The same day, Dr. Sebastian prescribed the Athlete a Ventolin inhaler to treat his asthma. The doctor also filled out the application form for a Therapeutic Use Exemption ("TUE").

45. According to the Athlete, the Ventolin inhaler has allowed him to breathe much better.

46. On November 30, 2015, the Athlete received an email from Mr. Kevin Bean, Manager, Compliance and Procedures of the CCES. Mr. Bean asked him to give certain precisions. In particular, the Athlete was asked the following questions:

Can you confirm when the product that [sic] was used (and how much). For

example: did you consume the product on the day of the event (the day you were tested) or was it day(s) prior to the actual game?

47. The Athlete responded by email to this question on December 1, 2015. He stated the following:

The product was used for approximately 5 days prior to the testing. I took up to 4 pills per day (never exceeding 1 pill at a time according to the instructions) depending on how bad my breathing was. On the day of the game, I do not recall 100% but I think I took 2 pills as my asthma and sinuses were very bad that day and week due to the cold and damp weather which worsened my respiratory problems. These pills were used as a decongestant.

48. However, this response was not fully accurate and the Athlete corrected it in a written statement, dated January 27, 2016. Indeed, although he generally tried to follow the instructions on the package of the product, the Athlete admitted that he slightly exceeded the recommended dosage a few times. He mentioned that at the time of his response, "he was still very stressed and scared about his positive test and he did not fully understand how the disciplinary process worked. He had not retained counsel."

49. On December 11, 2015, the Athlete was notified of the AAF under Rule 7.3.1 of the CADP.

50. The same day, the Athlete voluntarily admitted to an anti-doping rule violation resulting from the presence of an ephedrine concentration exceeding the threshold.

IV. PROCEDURAL BACKGROUND

A. Preliminary Stages

51. On December 11, 2015, the CCES issued a notification of anti-doping violation in

compliance with CADP Rule 7.3.1. At paragraphs 1 and 2 of the notice, the CCES stated the following facts:

> *The Canadian Centre for Ethics in Sport (CCES) asserts that Mr. Justin Maheu, an athlete affiliated with Canadian Interuniversity Sport (CIS), has committed an anti-doping rule violation.*
> *The sample giving rise to the adverse analytical finding was collected in-competition on October 25, 2015, in Halifax, NS, in accordance with the CADP. The adverse analytical finding was received by the CCES from the World Anti-Doping Agency (WADA) accredited laboratory on November 10, 2015. A copy of the Certificate of Analysis is enclosed, indicating the presence of Ephedrine, classified as a prohibited substance (Stimulants) on the 2015 World Anti-Doping Agency (WADA) Prohibited List. Further, this substance is classified as a "specified substance" pursuant to CADP Part C Rule 4.2.2.*

52. On December 23, 2015, I was appointed as Arbitrator in the present case.

53. On January 13, 2016, a preliminary conference call was held between the Parties, the SDRCC and the undersigned Arbitrator, to explain preliminary matters and plan the next steps in the proceedings.

54. In accordance with the directions issued by the Tribunal, the Parties were informed of the following timetable:

- February 1, 2016, at 4:00 p.m. (EST): Submissions by the Athlete;

- March 4, 2016, at 4:00 p.m. (EST): Submissions by the CCES;

- March 11, 2016, at 4 p.m. (EST): Reply submissions, if any, by the Athlete;

- April 7, 2016, all day: Hearing in-person in Ottawa, subject to

availability of expert witnesses, if any. Start time and location to be confirmed by the SDRCC at a later date.

55. On February 1, 2016, the Athlete and his legal counsel filed their written submissions. The submissions included in particular the report of an expert, Dr. David M. Schwope ("Dr. Schwope") and a witness statement of the Athlete signed on January 27, 2016.

56. On March 11, 2016, the CCES filed its written submissions after I granted a one-week extension.

57. On March 17, 2016, the Athlete's counsel requested an extension to file his Reply Submissions until March 29, 2016. Considering that the counsel's reply was not expected to be voluminous and that it would be limited to dealing with legal arguments, I granted this request. I also reserved the right of the CCES to request the postponement of the hearing if they deemed it necessary.

58. On March 29, 2016, the Athlete filed his Reply Submissions.

B. <u>The Hearing</u>

59. As agreed between the Parties and confirmed by the undersigned Arbitrator, the hearing took place in Ottawa on April 7, 2016.

60. The following individuals attended the meeting in-person:
    - Mr. Justin Maheu (the Athlete)
    - Mr. Robert Maheu (the Athlete's father – observer)
    - Mr. Carlos Sayao (the Athlete's legal counsel)
    - Dr. David Schwope (the Athlete's expert witness – attended via conference call)
    - Ms. Annie Bourgeois (CCES' counsel)

- Mr. Yann Bernard (CCES' counsel)
- Mr. Kevin Bean (Manager, Compliance and Procedures of the CCES)
- Mr. Jason Francis (Intelligence Coordinator, CCES)
- Pr. Christiane Ayotte (CCES's expert witness – attended via conference call)
- Ms. Tara Hahto (for the CIS – observational capacity)

61. It is important to note that, at one point during his testimony, the Athlete was cross-examined in detail by the CCES' counsel as to the quantity of coffee that he had taken in the morning of the doping control.

62. An objection was raised by the Athlete's counsel regarding the pursuit of this line of questioning, since the scientific analysis of caffeine in the Athlete's urine was not at issue at the hearing.

63. After a brief recess, both counsels agreed not to further explore that avenue. I have not inferred any opinion regarding the Athlete's credibility as a witness based on this limited exchange.

64. At the end of the day, I adjourned the hearing to April 12, 2016, to hear closing arguments.

65. On April 12, 2016, the hearing resumed via conference call. Each Party had the opportunity to fully present their closing arguments.

C. <u>Short Decision</u>

66. On April 18, 2016, I issued a short decision in writing, concluding in particular the following:

> *There are many aggravating factors that I have considered which establish the degree of fault of Justin Maheu as significant*.

However, while the CADP and the WADA Code establish a positive responsibility on anti-doping agencies to provide anti-doping education, I find that there is no basic education provided to athletes for them to understand any suggested posology to take ephedrine without going over the threshold.

[…]

For this reason, Justin Maheu's degree of fault, while significant, falls short of the maximum of 24 months, but still remains within the 16-24 months range, as outlined in the Cilic decision.

THEREFORE, Justin Maheu is declared ineligible for a period of eighteen (18) months, effective retroactively from October 25, 2015, until midnight on April 24, 2017.

V. JURISDICTION

67. The Sport Dispute Resolution Centre of Canada (SDRCC) was created by Federal Bill C-12, on March 19, 2003[2].

68. Under this Act, the SDRCC has exclusive jurisdiction to provide to the sports community, among others, a national alternative dispute resolution service for sport disputes.

69. In 2004, the SDRCC assumed responsibility for all doping disputes in Canada.

70. All Parties have agreed to recognize the SDRCC's jurisdiction in the present matter.

[2] The *Physical Activity and Sport Act*, S.C. 2003, c.2

VI. SUBMISSIONS

71. This section summarizes the oral and written submissions of the Parties, including expert testimonies. Although this is not a detailed record, I carefully examined all submissions presented by the Parties.

A. The Athlete

Submissions of the Athlete

72. The Athlete submits that the two-year sanction proposed by the CCES is disproportionate and unjust in the circumstances. He seeks a substantially reduced suspension that is fair and proportionate so he can get back on the field. According to him, an appropriate sanction in instance would be a suspension of two (2) to three (3) months.

73. He also submits that the start of any suspension should be backdated to his sample collection, which is October 25, 2015.

74. According to him, he established that he had no intention to enhance his performance by taking ephedrine. In fact, he consumed ephedrine tablets to assist with his congestion and his breathing difficulties. Since then, he has been diagnosed with asthma. Therefore, his consumption of ephedrine was for therapeutic purposes only.

75. Furthermore, the Athlete underscores the fact that ephedrine is a Specified Substance that is only prohibited in-competition, and even then only above a threshold of 10 μg/mL. Therefore, ephedrine cannot be compared to "hard-core" doping agents such as anabolic steroids and other more egregious substances

(Prohibited Substances).

76. He also states that he established, on a balance of probabilities, how the substance entered his body by detailing the history of the consumption in his witness statement, dated January 27, 2016. He always collaborated fully with the CCES.

77. According to him, this evidence was corroborated by the two expert witnesses, Dr. Schwope and Pr. Ayotte, who both agreed on the key scientific issues in instance.

78. The Athlete's counsel raised the fact that the present matter was the first case, to his knowledge, which has considered the interaction of the well-recognized principle of proportionality to the Specified Substance regime under the newly enacted WADA Code.

79. According to him, the CADP and WADA Code do not, *prima facie*, provide any flexibility in setting a sanction for the ingestion of Specified Substances unless an athlete can meet the onerous standard of showing *No Fault* or *No Significant Fault*.

80. He stated that, in comparison, the 2009 Canadian Anti-Doping Code "expressly provided for Tribunals to set sanctions in cases like Justin's involving a non-intentional violation for the consumption of a Specified Substance based on each athlete's particular degree of fault."

81. In his opinion, the CADP's purpose includes the recognition that some athletes may have an AAF in circumstances in which they did not intend to cheat, which is the case of the Athlete. Furthermore, he states that the Tribunal should be vigilant to ensure that the principle of proportionality long enshrined in the *lex sportiva* protects against innocent casualties. He also states that this principle of proportionality can be invoked under the CADP to reduce the Athlete's sanction.

82. To support his claim, the Athlete's counsel listed several Specified Substance cases decided under the 2009 Anti-Doping Code where athletes were found to be at "considerable" or "significant" fault, but ultimately received a properly

proportionate sanction of well under two years (see for instance, *Kendrick* v. *ITF*, CAS 2011/A/2518; *Fauconnet* v. *ISU*, CAS 2011/A/2615; *WADA* v. *FIVB & Gregory Berrios*, CAS 2010/A/2229).

83. According to the Athlete, these precedents demonstrate that a two-year sanction is not proportionate in instance.

84. He submits that his sanction should in fact be reduced to three (3) months or less. According to him, the facts of the case analyzed in light of the relevant jurisprudence demonstrate that his degree of fault falls on the lower end of the spectrum (references past ephedrine cases, such as: *H* v. *FIM,* CAS 2000/A/281; *Sebastián Berti* v. *International Rugby Board*, Board Judicial Committee, 2006; *Jacques Bouchard* v. *CCES*, SDRCC DT 07-0066).

85. Furthermore, the Athlete claims that, if the Tribunal concludes that it is not appropriate to rely on the principle of proportionality to reduce his sanction, he bears No Significant Fault and is entitled to a reduced sanction pursuant to Rule 10.5.1.1 of the 2015 CADP.

86. According to his counsel, we are not in front of a case of an athlete blindly consuming a substance with flagrant disregard to whether it poses a risk of an anti-doping violation. Rather, this is a case of an athlete taking steps to inform himself of the risk of consuming ephedrine, which is a substance only conditionally prohibited in competition.

87. The Athlete's counsel reminds the Tribunal that the Athlete conducted internet research into ephedrine to determine i) that it is a conditional substance prohibited in-competition and ii) that by following the therapeutic directions on the package of the product he would remain well below the applicable threshold concentration limit.

88. According to him, the fact that the Athlete ultimately arrived at a wrong conclusion regarding the dosage and the respect of the threshold should not mean that his

assessment was unreasonable or reckless. Indeed, he submits that athletes do not have to pursue every conceivable measure in order to meet the standard of No Significant Fault and to be entitled to a reduced sanction (see *Despres* v. *CCES & BCS*, CAS 2008/A/1489).

89. Moreover, the Athlete states that the Tribunal should take particular care in ensuring that the standard of No Significant Fault is not set too high in Specified Substance cases, keeping in mind the principle of proportionality so fundamental to the *lex sportiva*. According to him, the CCES' interpretation places the bar (i.e., the burden of proof) way too high.

90. Based on these facts, the Athlete submits that he has met the standard so as to be eligible for a reduced sanction and that his fault in all circumstances was not significant in relation to his offence. To support his position, the Athlete brings the *Kutrovsky* v. *ITF*, CAS 2012/A/2804 case to the attention of the Tribunal.

91. As mentioned earlier, the Athlete and his legal counsel also submitted Reply Submissions after taking into account the CCES' own written submissions. In particular, the Athlete and his counsel stated that:

- The CCES is trying to apply the 2015 WADA Code and the CADP in a manner that imposes a significant additional threshold requirement that did not exist under the 2009 WADA Code or the CADP in order for an athlete who has tested positive for a Specified Substance to have his or her sanction reduced;

- The CCES' position marks a substantial deviation from how athletes were treated under the 2009 WADA Code and slams the proverbial door firmly shut, such that even though the Athlete had no intention to cheat his sanction cannot be reduced;
- Strict-liability sanctions of the anti-doping regime must in all cases be proportionate to the conduct of the athlete in question, evaluated in totality of the circumstances;

- The CCES' Assessment of Case Law is selective, inconsistent and illogical.

- The CCES' suggestion that "one cannot validly claim to be taking Ephedrine for therapeutic reasons", must be firmly rejected. Therapeutic use of a substance has nothing to do with whether it is sold in a pharmacy or approved by the government according to the Athlete. Furthermore, he stated that he provided ample evidence that he was suffering from sinus congestion and asthma and that he was using ephedrine to contribute to curing these health problems.

- The CCES' position that "it is inconceivable that an athlete who "self-medicates" should be eligible to have his or her sanction reduced below two years" sets the bar too high and could infringe on the proportionality of sanctions, especially in cases involving conditionally prohibited substances such as ephedrine. To illustrate his position, he refers to the *Robert Lea* v. *USADA* case that he considers very relevant in instance.

- The amount by which his sample exceeded the threshold established at 10 μg/mL is not relevant whatsoever to the analysis of his fault.

- His failure to declare ephedrine on his Doping Control Form should be relativized. Various jurisprudence cases involve athletes who failed to declare, but nonetheless received substantially reduced sanctions.

- The ephedrine case law he initially submitted is critical to the assessment of the proportionate sanction. Therefore, and contrary to the CCES' opinion, the Tribunal should not disregard these cases based on the fact that they are supposedly "significantly different" and "of little assistance.".

- The CCES' argument that pursuant to section 10.11.2 of the CADP "at least 50% of the sanction must be served after the date of the decision" is, with respect, incorrect. According to the Athlete's counsel, the interpretation of this

rule was carefully considered and definitively determined in the case of *CCES* v. *Kraayeveld* and *Taekwondo Canada*, SDRCC DT 12-0179*,* in which Justice Fraser held instead that the 50 percent clock can start counting down on the day the athlete accepts a provisional suspension or admits the anti-doping rule violation.

92. The Athlete also stated that his degree of anti-doping education and experience is not at a level of international competition and that has never been part of the CCES Registered Testing Pool. He was only part of the CIS Testing Pool.

93. His former anti-doping education was limited to three (3) annual online CCES courses. Moreover, the conditions in which the courses were given were far from optimal and it was difficult to focus. The athletes were gathered in a computer room at the university, without coach supervision, and the seriousness of the atmosphere was shallow.

94. During the final oral submissions, the Athlete's counsel underscored the fact that it is impossible to find material to calculate the effect of ephedrine on the threshold in the documents emanating from WADA and from the CCES. In other words, there is no guidance on how to interpret the threshold established at 10 µg/mL.

95. To this point, the transcript of the CCES' courses followed by the Athlete contains no references whatsoever to ephedrine.

96. Since the system is one of strict liability, the obligations are mutual. It is therefore not an onerous obligation for the CCES and WADA to provide sufficient guidance on how to interpret the threshold.

97. Consequently, the Athlete made use of the resources he was introduced to and that were at his disposal, such as the Global DRO website.

98. Finally, the Athlete and his counsel reiterated the fact that his credibility was not tarnished during the hearing. For instance, he stated that it is normal that he did

not remember certain details that happened months ago, given that memory fades over time. Also, he was very honest during the proceedings, in particular when he corrected the record in his witness statement regarding the partly inaccurate email he sent to Mr. Bean on December 1, 2015.

99. For all the above reasons, the Athlete submits that the appropriate sanction should be limited to a suspension of two to three months.

Testimony of the Athlete's Expert, Dr. David M. Schwope

100. Dr. David Schwope is a Research Scientist Manager at Aegis Sciences Corporation, located in Nashville, Tennessee.

101. Aegis is a toxicology laboratory specializing in forensic and healthcare services that provides science-driven testing and consulting for clients. It is the largest independent anti-doping laboratory in the U.S. operating out of the Wilma Rudolph Sports Testing Laboratory. Aegis' clients include the National Football League Players Association, the National Hockey League Players Association and NASCAR.

102. Dr. Schwope holds a doctoral degree in Toxicology from the University of Maryland (2011). He also obtained a Master's degree in Forensic Science from the University of Illinois in 2005. In 2003, he obtained a Bachelor's degree in Chemistry (ACS Certified) from Miami University.

103. For the past three (3) years, he has been developing urine steroid isotope ratio mass spectrometry ("IRMS") capabilities at Aegis, in addition to other research activities. He has approximately ten years of experience in the field of toxicology of which six have been focused on sports doping testing in human and equine casework.

104. During his testimony, Dr. Schwope confirmed that he was familiar with the WADA Prohibited List and the Global DRO website.

105. He also stated that most of the scientific literature that he wrote was in relation to the effects of cannabis. He published an article on anti-doping on horses, but none on humans. He wrote two presentations on human anti-doping, one in October 2014 and the other in February 2016.

106. Dr. Schwope confirmed that he was independent, having no relationship whatsoever with the Athlete and having received no financial compensation for his opinion and for the preparation of his report.

107. During his testimony at the hearing, Dr. Schwope reiterated the content of his expert report, dated February 1, 2016.

108. In his opinion, the Athlete's AAF is consistent with his history of ingestion.

109. According to him, the urine concentration of 20.2 µg/mL measured on October 25, 2015, falls within the concentration range that can be expected based on the history of ingestion described by the Athlete, "particularly so considering the demonstrated inter-individual variation in ephedrine excretion profiles following controlled single-dose oral administration studies and the fact that multiple doses were consumed as described in Mr. Maheu's witness statement."

110. Furthermore, he added that the "specific gravity (determined by the laboratory at 1.009) and pH (6.1) are both within normal limits and do not adversely impact the interpretation of the urine ephedrine concentration."

111. For all these reasons, Dr. Schwope concludes that the Athlete's AAF "is consistent with the range of concentrations that would be expected following ingestion of ephedrine HCL tablets in the manner described in his witness statement."

B. The CCES

Submissions of the CCES

112. The CCES submits that the Athlete is at "significant fault or negligence" and thus the two (2)-year suspension of section 10.2.2 of the 2015 CADP must be imposed.

113. Alternatively, if the Tribunal comes to the conclusion that the Athlete is not at "significant fault or negligence," the CCES claims that the appropriate sanction should fall in the range between 16 and 24 months of ineligibility given that the Athlete's fault should be deemed "considerable."

114. Furthermore, the CCES submits that the Athlete's sanction should start on October 25, 2015, date on which the Athlete's sample was collected.

115. Finally, the CCES states that, whatever the length of the sanction ultimately imposed is, 50% of this sanction must be served after the date of the decision, in accordance with section 10.11.2 of the CADP.

116. To support these claims, the CCES states that under the CADP, the two-part test established in section 10.5.1.1 of the CADP provides sufficient flexibility to the present Tribunal to award a fair and proportionate sanction to the Athlete and that there is no lacuna or "gap" in the CADP as the Athlete pretends.

117. The CCES also submits that the present case must be decided under the 2015 CADP and not the 2009 Canadian Anti-Doping Program. Therefore, most of the jurisprudence mentioned by the Athlete is of no direct use to the Tribunal, because it was rendered under the 2009 Canadian Anti-Doping Program, or the 2009 World Anti-Doping Code.

118. Regarding the Athlete's degree of fault, the CCES submits that the Athlete did

not conduct himself with the utmost caution and that he has to prove, on the balance of probabilities, the following:

a. How a concentration of Ephedrine over the threshold limit was present in his urine sample dated October 25, 2015; and
b. Establish that his fault (as defined in Appendix I of the CADP) was not significant in light of the anti-doping rule violation committed.

119. Regarding how the ephedrine entered the Athlete's body at a higher concentration than the threshold, the CCES states that it cannot confirm, in light of Pr. Ayotte's expert report, that the concentration of ephedrine of 20.2 µg/mL is the result of the history of ingestion that the Athlete describes.

120. Regarding the second part of the test of section 10.5.1.1, the CCES submits that the Athlete's fault was significant in light of the anti-doping rule violation committed and as a result he did not prove that he bears "no significant fault or negligence." To support this claim, the CCES underscores the following elements that show that the Athlete departed from the expected standard of care and that his fault is considerable:

- He knowingly took ephedrine pills, which is a banned substance in-competition, on the day of a competition.

- He relied on the advice of a clerk from a GNC (General Nutrition Center) store, which is a well-known retailer of supplement products, rather than in a pharmacy or clinic where one can be expected to go for a legitimate health/medical problem such as sinus, nose and lung congestion. The GNC clerk was not competent to inform him correctly regarding the use of ephedrine.

- The Athlete could have consulted a doctor, a pharmacist or even a coach. If he had the time to go to the GNC store twice, he had time to go see a doctor.

- The Athlete's attempt to self-manage the reporting threshold (without direction or guidance) regarding his ephedrine use in-competition by comparing it with caffeine when there was no logical basis to do so.

- The Athlete did not take ephedrine for valid therapeutic reasons, because (a) ephedrine is not an approved medication in Canada; (b) a TUE for ephedrine cannot be granted, and (c) he admitted not having followed the directions on the ephedrine product label.

121. To further prove that the Athlete's degree of fault is high and that his sanction should be in the range of 16 to 24 months, the CCES submits the following facts:

- At 24 years-old, the Athlete is an experienced athlete who has been playing soccer for over twenty (20) years. He has played at the national and international level during the past nine (9) years. Therefore, the expected standard of care of a mature and elite level athlete like Justin Maheu is high.

- Throughout his athletic career, the Athlete received sufficient anti-doping education and had plenty of general anti-doping awareness to know about the risks related to taking a banned specified substance and all the recommended steps to minimize the risks and dangers associated with the use of an in-competition banned specified substance over a certain threshold.

- For instance, the Athlete has taken three (3) e-learning courses offered by the CCES during the past three years. The most recent one was the "True Sport Clean 101" course, taken on September 4, 2015.

- It is unfortunate that the Athlete did not take these classes seriously, but he only has himself to blame for that.

- There was and there still is a large amount of information made available by the CCES and CIS on banned substances so that the Athlete knows or ought to have known that he was assuming an elevated risk in taking a banned specified substance such as ephedrine on a game day.

- Indeed, the CCES and CIS spend a great deal of time and energy warning athletes about the risks associated with medication and supplement use in general.

- Since the summer of 2015, the Athlete had issues with his breathing. He was told at that time that it could be asthma and that he should see a doctor. However, the Athlete never consulted a doctor until after he was informed of his AAF.

- The Athlete's failure to consult a health professional between June 2015 and November 2015 proves that he did not act diligently and his conduct does not correspond to the expected standard of behaviour of athletes in similar situations.

- The Athlete's research and verifications prior to taking ephedrine were insufficient/inadequate and do not correspond in the least to the expected standard of behaviour of an athlete in his position.

- The Tribunal should not accept as reasonable and sufficient the internet verification done by the Athlete. A vague internet research, skimming through articles to then rely on an article on caffeine, as an equivalent to ephedrine use, is far from the expected standard of behaviour.

- The easiest and most logical verification would have been to "Google" the brand product and the manufacturer of the product.

- A general internet verification would have led the Athlete to see that there are many warnings for the use of Kaizen Ephedrine. The product is often mentioned on body builders' websites and is considered as a powerful stimulant.

- The fact that the Athlete forgot the name "ephedrine" on the day he was tested shows and supports the fact that he was not mindful of his duties as an athlete even though this was not his first anti-doping test.

- Furthermore, the Athlete knew he had not taken caffeine, but coincidentally replaced the name of the banned product he was taking by the name of a product that was not banned (i.e. caffeine). It was illogical to write "caffeine pill" on his Anti-Doping Control Form. That shows that he was not taking anti-doping seriously. This is a crucial aspect of the case that demonstrates a higher degree of fault.

- Finally, the fact that the Athlete's AAF was significantly over the threshold is another element to consider and proves that the Athlete's degree of fault is far higher.

122. During the hearing, the CCES' counsel questioned the Athlete's credibility. They claim there were inconsistencies in the Athlete's testimony. In particular, they questioned the relevance to take ephedrine for preventive reasons, when there was no real medical urgency to use it. They stated that the Athlete took ephedrine to avoid any kind of symptoms. Considering that soccer is his whole life, this was a considerable gamble to take and there was no reason to use ephedrine, which is a specified substance.

123. Furthermore, they stated that it was strange that the Athlete decided to purchase a second package of ephedrine, when he had not begun using the first one. The Athlete also stated that he did not follow the instructions on the package on a

number of occasions. For all these reasons, the CCES submits that the Athlete's credibility is affected.

124. In regards to the Athlete's argument that nothing on the courses' transcripts or on the website addresses ephedrine, the CCES submits that, following this reasoning, it would have to address every possibility regarding every doping substance, which is simply illogical.

125. Finally, the CCES submits that the ephedrine precedents referenced by the Athlete are different from the current case and that Tribunals have awarded in the past lengthy suspension periods in cases involving Specified Substances (see *Flavia Oliveira* v. *United States Anti-Doping Agency (USADA)*, CAS 2010/A/2107; *Fauconnet* v. *International Skating Union (ISU)*, CAS 2011/A/2615; *CCES* v. *Chan,* SDRCC DT 15-0217).

Testimony of the CCES Expert, Pr. Christiane Ayotte

126. Pr. Ayotte earned her Ph.D. in organic chemistry from Université de Montréal in 1983. She also completed post-doctoral studies in mass spectrometry.

127. She is currently employed by INRS – Institut Armand-Frappier in the capacity of Professor and Director of the Doping Control Laboratory.

128. The INRS Doping Control Laboratory is accredited by the World Anti-Doping Agency (WADA).

129. INRS – Institut Armand-Frappier analyzes some 25,000 samples annually for the presence of hundreds of prohibited substances and methods.

130. Pr. Ayotte is also a member of several committees and scientific groups, including the International Olympic Committee (IOC) and WADA. For example,

Prof. Ayotte is or has been a member of the following WADA groups: Health, Medical and Research Committee Laboratory Expert Group and Prohibited List Expert Group which is responsible for providing expert advice, recommendations and guidance to the Health, Medical and Research Committee on the overall publication, management and maintenance of its annual International Standard of the Prohibited List (the List of Prohibited Substances and Methods).

131. During her career, Pr. Ayotte also served as witness before several courts, including the Court of Arbitration for Sport ("CAS") as well as local tribunals.

132. Although the CCES is a client of INRS, Pr. Ayotte confirmed that she is an independent witness and employee of the Ministère de l'Éducation du Québec (Quebec Education Ministry).

133. Pr. Ayotte also occasionally defends athletes (for example, she defended Australian swimmer Ian Thorpe because she considered the findings scientifically to be untenable).

134. During her career, she also published several dozen scientific studies on doping, although none related to ephedrine.

135. In my opinion, Pr. Ayotte has considerable experience and a vast expertise in matters of doping, most certainly among the foremost in the world. There is no reason to dispute her opinion as an expert.

136. Pr. Ayotte produced an expert report on March 11, 2016. Her testimony at the hearing captured the broad lines of this report.

137. Pr. Ayotte explained that ephedrine is one of the oldest stimulants prohibited to athletes and that it is extracted from a plant called ephedra.

138. Ephedrine increases blood pressure and has a vessel dilating effect. When an

individual consumes it, he/she is stimulated and feels less fatigue. Ephedrine is also known to remove nasal congestion. Moreover, it is used for asthma control, but it has since been replaced by Ventolin and Salbutamol because of less important side effects.

139. Pr. Ayotte explained that ephedrine has always been banned in sports. In 1983, it was banned when combined with caffeine. In 2004, the Food and Drug Administration (FDA) banned this product because it created hypertension and increased blood pressure, which could lead to strokes, heart attacks and death. However, ephedrine is allowed as a nasal decongestant in Canada, as long as it is not combined with caffeine.

140. She also stated that the threshold for doping purposes was previously established at 5 µg/mL. It was increased to 10 µg/mL at the end of the 1990s. According to her, since the threshold was increased, there are much less positive tests.

141. When questioned on the reasons why the threshold was established at 10 µg/mL, she explained that it was to avoid false positive tests. Indeed, in China and Europe, some preparations and medications contain ephedrine, without any relation to sports doping.

142. Pr. Ayotte explained that ephedrine is not sold in pharmacies in Canada, contrary to Europe and Asia where this product can be found in these businesses.

143. Ephedrine is rapidly absorbed and excreted within 36 hours.

144. According to her, the presence of 20.2 µg/mL of ephedrine in the Athlete's sample is a sign of recent administration. Furthermore, when the result is corrected for specific gravity at 1.020, it provides a urinary level of 44 µg/mL.

145. In her opinion, this is not an abnormal result and it is consistent with other comparable results with ephedrine. There is nothing unusual about this finding

accordingly.

146. Finally, she stated that she could not draw conclusions on the purpose of the Athlete's ingestion of ephedrine (whether it was for doping/increasing performance or to treat asthma) and that considering as well the high inter-individual variability in the excretion of ephedrine, she could not confirm nor rule out that the urinary level of ephedrine measured in the athlete's sample is the result of the alleged ephedrine ingestion by the Athlete.

VII. APPLICABLE RULES

Canadian Anti-Doping Program (CADP)

147. The CADP is largely based on the WADA Code.

148. Under Article 1.3 of the CADP, Athletes and other Persons accept the CADP as a condition of participating in sport and shall be bound by the rules contained in the WADA Code and the CADP.

149. An athlete is defined in the CADP definitions (Appendix 1) as someone who competes in sport at the international level or at the national level. Mr. Maheu is an individual who fits this description, therefore he is bound by the CADP and there were no objections to this effect.

150. The following provisions of the CADP's anti-doping rules are particularly relevant to the present proceedings. It should be noted that these provisions are repeated, almost word for word, in the WADA Code:

> *2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample*

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Rule 2.1.

[…]

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2. The anti-doping rule violation involves a Specified Substance and CCES can establish that the anti-doping rule violation was intentional.

10.2.2 If Rule 10.2.1 does not apply, <u>the period of Ineligibility shall be two years</u>.

[underline added]

[…]

10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Rule 2.1, 2.2 or 2.6.

<u>10.5.1.1 Specified Substances</u>

<u>Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of</u>

Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

[Underline added]

[…]

APPENDIX 1 DEFINITIONS

Fault: *Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Rule 10.5.1 or 10.5.2.*

No Fault or Negligence: *The Athlete or other Person's establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Rule 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.*

No Significant Fault or Negligence: *The Athlete or other Person's establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship*

to the anti-doping rule violation. Except in the case of a Minor, for any violation of Rule 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.

[underline added]

10.11.2 Timely Admission

Where the Athlete or other Person promptly (which, in all events, for an Athlete means before the Athlete competes again) admits the anti-doping rule violation after being confronted with the anti-doping rule violation by CCES, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Rule is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed. This Rule shall not apply where the period of Ineligibility already has been reduced under Rule 10.6.3.

[underline added]

The principle of "Education" in the CADP

151. Section 2 of the CADP lists its general principles, which includes "education":

Section 2.0 General Principles

Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as "the spirit of sport". It is the essence of Olympism; the pursuit of human excellence through the dedicated perfection of each person's natural talents. It is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is reflected in values we find in and through sport, including:

• *Ethics, fair play and honesty*
• *Health*
• *Excellence in performance*
• *Character and education*
• *Fun and joy*
• *Teamwork*
• *Dedication and commitment*
• *Respect for rules and laws*
• *Respect for self and other Participants*
• *Courage*
• *Community and solidarity*

152. This "education principle" is reiterated throughout the rest of the CADP. The following articles are largely based on articles 18 and 20.5 of the WADA Code:

> *3.4 Each Sport Organization adopting the CADP will benefit from the identical "value proposition" associated with the adoption of the CADP. The value proposition is as follows:*
>
> *Every adopting Sport Organization shall have in place a Code-compliant anti-doping program that is meaningful and effective. The anti-doping program shall be administered by the CCES and shall be specifically designed to protect designated Athletes within that sport from the risk of doping. The anti-doping program shall include the delivery of appropriate anti-doping education.*

[…]

> *5.3 The Adoption Contract will address, at a minimum, the following issues:*
>
> *[…]*
>
> *d) A requirement for the annual completion of an appropriate anti-doping education prevention program. Specifically, the Sport Organization must ensure*

that,

(i) appropriate anti-doping e-learning is completed by all NAP Athletes,

(ii) appropriate anti-doping e-learning is completed by designated Athlete Support Personnel,

(iii) every Athlete and other Person participating in the sport who is subject to the CADP knows they are subject to the CADP and is appropriately informed.

e) A requirement that the Sport Organization demonstrate that it is aware of, has agreed to use and shall make available to its membership and all Participants in the sport the full menu of CCES' anti-doping educational resources.

[…]

7.2 Sport Organizations

7.2.1 Sport Organizations shall, in cooperation with the CCES, deliver comprehensive and ethical anti-doping education programs to their Athletes, Athlete Support Personnel and other Participants. […]

7.3 The Canadian Centre for Ethics in Sport

[…]

7.3.8 The CCES shall plan, implement and monitor anti-doping information, education and prevention programs;

[…]

RULE 19 EDUCATION

CCES and the Sport Organization shall plan, implement, evaluate and monitor information, education and prevention programs for doping-free sport on at least the issues listed at Article 18.2 of the Code, and shall support active participation by Athletes and Athlete Support Personnel in such programs.

19.1 Education Programs

These education programs, detailed in the Adoption Contract between CCES and the Sport Organization, shall provide Athletes and other Persons with updated and accurate information on at least the following issues:

a) substances and methods on the Prohibited List;
b) anti-doping rule violations and Consequences;
c) health and social Consequences of doping;
d) Sample collection procedures;
e) Athletes' rights and responsibilities;
f) Athlete Support Personnel rights and responsibilities;
g) TUEs;
h) managing the risks of nutritional supplements;
i) the harm of doping to the spirit of sport; and
j) applicable whereabouts requirements.

19.2 Spirit of Sport

Educational programs will promote the spirit of sport in order to establish an environment that is strongly conducive to doping-free sport in an effort to have a positive and long-term influence on the choices made by Athletes and other Persons. These programs will be directed at young people, appropriate to their stage of development in their schools and sports clubs, and to parents, adult Athletes, sport officials, coaches, medical personnel and the media.

WADA Code

153. Articles 2.1, 10.2, 10.5, 10.11.2 as well as Appendix 1 of the CADP are largely based on articles 2.1, 10.2, 10.5 and 10.11.2 Appendix 1 of the WADA Code.

154. The WADA Code is also complemented by the International Standards, which include WADA's Prohibited List.

155. WADA's 2015 Prohibited List includes the following provision regarding ephedrine:

> *S6. STIMULANTS*
>
> *All stimulants, including all optical isomers, e.g. d- and l- where relevant, are prohibited.*
>
> *Stimulants include:*
>
> *[…]*
>
> *b:* ***Specified Stimulants****. Including, but not limited to: Benzfetamine; cathine**; cathinone and its analogues, e.g. mephedrone, methedrone, and α-pyrrolidinovalerophenone; dimethylamphetamine;* ***ephedrine***;*** *epinephrine**** (adrenaline); […]*
>
> *[…]*
>
> ***** ***Ephedrine*** *and methylephedrine:* ***Prohibited when the concentration of either in urine is greater than 10 micrograms per milliliter.***

VIII. RELEVANT JURISPRUDENCE

156. Both parties submitted several authorities to support their arguments. For the sake of brevity, I will focus on existing jurisprudence that is most relevant to this case.

Cilic v. *International Tennis Federation*, CAS 2013/A/3327

157. Even though it was rendered before the adoption of the 2015 WADA Code, this case is probably the most relevant in the instance because it sets the principles applicable to the length of the period of ineligibility for Specified Substances under certain circumstances.

158. In this case, Mr. Cilic, a professional tennis player, tested positive to N-ethylnicotinamide, a metabolite of nikethamide, which is prohibited in competition. The Anti-Doping Tribunal of the ITF imposed a period of ineligibility of nine (9) months. Mr. Cilic appealed this decision to the Court of Arbitration for Sport.

159. In its analysis, the Panel establishes three degrees of fault:

a. *Significant degree of or considerable fault;*

b. *Normal degree of fault;*

c. *Light degree of fault.*

160. Applying these three degrees of fault to the possible sanction range of 0 to 24 months, the Panel arrives at the following sanction ranges:

a. *Significant degree of or considerable fault: 16-24 months, with a "standard" significant fault leading to a suspension of 20 months;*

b. *Normal degree of fault: 8-16 months, with a "standard" normal degree of fault leading to a suspension of 12 months;*

c. *Light degree of fault: 0-8 months, with a "standard" light degree of fault*

leading to a suspension of 4 months.

161. The following paragraphs of the decision are particularly relevant in the instance:

71. In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities.

72. The Panel suggests that the objective element should be foremost in determining into which of the three relevant categories a particular case falls.

73. The subjective element can then be used to move a particular athlete up or down within that category.

74. Of course, in exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether. That would be the exception to the rule, however.

aa) The objective element of the level of fault

At the outset, it is important to recognize that, in theory, almost all anti-doping rule violations relating to the taking of a product containing a prohibited substance could be prevented. The athlete could always (i) read the label of the product used (or otherwise ascertain the ingredients), (ii) cross-check all the ingredients on the label with the list of prohibited substances, (iii) make an internet search of the product, (iv) ensure the product is reliably sourced and (v) consult appropriate experts in these matters and instruct them diligently before consuming the product.

75. However, an athlete cannot be reasonably expected to follow all of the above steps in every and all circumstances. Instead, these steps can only be regarded as reasonable in certain circumstances: […]

162. In the end, the Panel found that it was a "standard" case of light degree of fault and determined that the appropriate amount of time was in the middle of the applicable range of 0-8 months, i.e. four (4) months. Therefore, Mr. Cilic was suspended for a period of four (4) months.

163. The *Despres* case unfolded in 2008, but still remains an important precedent in doping cases *(WADA v. Despres, CCES & Bobsleigh Canada, CAS 2008/A/1489).*

164. In this case, Mr. Despres tested positive to a nandrolone concentration exceeding the 2.0 ng/mL threshold. The SDRCC initially found that Mr. Despres had met the standard of "no significant fault or negligence" and shortened his term of ineligibility to twenty months (instead of 24 months). Still unsatisfied with this sanction, Mr. Despres soon after appealed this decision to the CAS.

165. While discussing the notion of "No Significant Fault or Negligence", the Panel stated the following:

7.8 The Panel is not suggesting that an athlete must exhaust every conceivable step to determine the safety of nutritional supplements before qualifying for a "no significant fault or negligence" reduction. To that end, the Panel recognizes Mr. Despres' argument that taking reasonable steps should be sufficient since "one can always do more". The Panel in Knauss followed this logic when it determined that even though Mr. Knauss could have had the nutritional supplement tested for content, or simply decided not to take it altogether, "these failures give rise to ordinary fault or negligence at most, but do not fit the category of "significant" fault or negligence". Similarly, the Panel distinguished between reasonable steps Mr. Despres should have taken and all the conceivable steps that he could have taken. In light of the risks involved, the Panel finds that Mr. Despres did not show a good faith effort to leave no reasonable stone unturned before he ingested Kaizen HMB.

7.9 In addition to his failure to contact the manufacturer directly, the Panel finds that he failed to take the following reasonable steps before taking Kaizen HMB, and that these failures bar a finding that the Appellant exercised a standard of care meriting a "no significant fault or negligence" reduction to the mandated two-year period of ineligibility.

(a) Mr. Despres did not check with his doctor, the team doctor, or Mr. Berardi about whether Kaizen was a trustworthy brand of HMB supplements. […]

(b) Mr. Despres should have done more thorough research. […]

(c) Even that limited research should have provoked caution. However, Mr. Despres failed to ask for more information and took Kaizen HMB despite coming across information the internet that should have triggered greater vigilance. […]

[Underline added]

166. The Panel ultimately set aside the SDRCC decision and imposed a twenty-four (24)-month period of ineligibility to Mr. Despres.

CCES v. *Chan,* SDRCC DT 15-0217

167. In this case, Mr. Chan's sample analysis revealed the presence of Fentanyl and Oxycodone, which are both Specified Substances. The sole issue before the Tribunal was Mr. Chan's degree of fault and the appropriate sanction in light of his fault.

168. The Tribunal applied the factors listed in the *Cilic* decision and ultimately concluded that Mr. Chan's degree of fault was at the highest level. Consequently, the Tribunal imposed a sanction of 16 months.

169. In particular, the Tribunal stated the following:

> *62. The Panel further distinguished between substances prohibited in-competition from those prohibited out-of-competition, and medication designed for therapeutic purpose. In the latter case, the Panel noted that a higher duty of care was called for because medicines are known to have prohibited substances in them.*
>
> *63. The Panel noted that, while each case will turn on its own facts, the following examples of matters can be taken into account in determining the level of subjective fault: the athlete's age and experience, language or environmental problems, the extent of the athlete's anti-doping education and any other "personal impairments", including an athlete who may be experiencing a high degree of stress, or whose level of awareness has been reduced by a careless or understandable mistake.*
>
> *64. Applying those factors, and considering Kendrick and Fauconnet decisions, I conclude that Mr. Chan has demonstrated a high degree of fault. In my view, a higher standard of care could and should be expected from a reasonable person in Mr. Chan's situation […]*
>
> [Underline added]

Flavia Oliveira v. *United States Anti-Doping Agency (USADA)*, CAS 2010/A/2107

170. In this case, the athlete tested positive to oxilofrine. After being imposed a two-year sanction by the American Arbitration Association (AAA), the athlete sought a reduction of her sanction by filing an appeal to CAS.

171. While assessing the Athlete's degree of fault, the Panel stated that:

> *39. Because the risks of mislabeling and/or contamination now are generally known or at least foreseeable, all athletes must exercise reasonable care to ensure a nutrition supplement does not contain a banned substance whether the WADA Code classifies it as a prohibited or specified substance. […]*

[…]

42. […] In determining Oliveira's period of ineligibility, the Panel must impose an appropriate sanction that furthers the WADC's objective of proportionate and consistent sanctions for doping offences based on an athlete's level of fault under the totality of circumstances […]

[…]

43. […] However, the appropriate inquiry, in the Panel's view, is Ms. Oliveira's "degree of fault" under the circumstances, not simply whether her failure to take certain steps to ensure Hyperdrive 3.0+ did not contain a banned substance was reasonable (which it was not). To resolve this issue, the Panel must determine whether the nature and degree of her unreasonable conduct under the circumstances was so high that a two-year period of ineligibility is proportionate and consistent with other similar cases.

[Underline added]

172. In the end, the Panel set aside the two-year period of ineligibility by the AAA Arbitrator and replaced it with a period of ineligibility of eighteen (18) months.

H. v. *Fédération Internationale de Motocyclisme (FIM)*, CAS 2000/A/281

173. The athlete, one of the leading Superbike riders in the world at that time, tested positive to ephedrine in April 2000. The concentration of ephedrine in his urine sample was 12.4 µg/mL, which was over the threshold of 10 µg/mL.

174. In its analysis, the Tribunal states, among other things, the following:

Finally, the Panel again rejects the claim that the Appellant cannot be found to have committed a doping offence since he was not aware that he was using a forbidden substance. In a case of strict liability it is irrelevant whether the athlete was aware that he was using a substance appearing on the doping list. The Panel notes that it is

not public knowledge that MaHuang contains ephedrine. On the other hand, the Panel is of the opinion that products and homeopathic substances that do not give the chemical name of the substances but the names of herbal substances need to be examined with great care by the athlete. It is clearly not sufficient for the Appellant to ask his fitness trainer about the substances contained in "Thermogen". A fitness trainer will normally not be sufficiently qualified to give advice in pharmacological matters.

[Underline added]

175. In the end, the Tribunal annulled the initial decision rendered by the FIM International Tribunal of Appeal and suspended the athlete for a period of three (3) weeks.

176. It is to be noted that this decision was rendered in 2000, well before the *Cilic* decision and the adoption of subsequent and updated WADA Codes.

Sebastián Berti v. *International Rugby Board*, Board Judicial Committee, 2006

177. In this case, Mr. Berti committed an anti-doping rule violation because his urine sample revealed the presence of ephedrine at a concentration greater than 10 µg/mL (result of the sample = 13 µg/mL).

178. The Committee determined that the athlete's use of ephedrine was not intended to enhance sport performance, but also concluded that the presence of ephedrine in his sample was nevertheless a result of his failure to discharge his personal responsibility to ensure that no Prohibited Substance is found to be present in his body.

179. In particular, the Committee stated that:

59. Even if, which is by no means certain, the Player was given a decongestant

containing ephedrine by a team physiotherapist, the evidence of the Player's supplement use cannot be ignored. All players – be they amateurs playing club rugby or professionals playing internationally – are responsible for ensuring that no Prohibited Substances are found in their bodies. The standard is one of strict responsibility. The Player's actions fell well short of his personal responsibility.

60. […] While the concentration of ephedrine in the Player's urine only modestly exceeded the reporting threshold and was taken into account by us in concluding that he had not intended to enhance sport performance, we are nevertheless of the view that had he exercised appropriate care and attention in his supplement use, a positive test may well have not occurred.

61. Regardless of the degree of the Player's exposure to anti-doping education, he, and all players should know that the use of supplements is risky, hence warnings of the sort set out in the first paragraph of these reasons. […]

[Underline added]

180. In the end, the Committee imposed a six-week period of ineligibility to the athlete. However, I note that the Committee considered the impact that a lengthier period of suspension would have had, not only on the athlete's livelihood, but also, on his family and the community he served. This consideration is specifically addressed in the notes not to be a matter of consideration under the 2015 Code.

CCES and *Jacques Bouchard*, SDRCC DT 07-0066

181. This is another case regarding ephedrine. In instance, Mr. Bouchard, an Athletics Canada athlete, tested positive to ephedrine at a concentration of 14 µg/mL, which was above the threshold of 10 µg/mL.

182. The Tribunal's decision includes the following extracts:

In the view of this Tribunal, Mr. Bouchard could have reasonably known or suspected,

with the exercise of utmost caution, that he was using a prohibited substance […] [page 14 of the decision]

[…] It follows that he could have reasonably suspected, even with the exercise of merely ordinary caution (reading the label), let alone utmost caution, that he was using a prohibited substance. […] [page 14 of the decision]

[…] Other factors raised by the athlete do not fall within the scope of exceptional circumstances outlined in the CADP and, in any event, do not serve to exculpate him or even reduce the seriousness of the anti-doping rule violation [page 14 and 15 of the decision] […]

183. The Tribunal ultimately ordered that the sanction of six-month ineligibility proposed by the CCES be imposed upon Mr. Bouchard.

Fauconnet v. *International Skating Union (ISU)*, CAS 2011/A/2615

184. Mr. Fauconnet, an international level short-track skater, tested positive to Tuaminoheptane, which was listed as a Specified Substance under the 2010 WADA List of Prohibited Substances and Methods.

185. The ISU Disciplinary Commission sanctioned Mr. Fauconnet with a reduced sanction of eighteen months. Unsatisfied with this decision, the athlete filed an appeal to CAS shortly after.

186. The Panel, in particular, concluded the following:

112. Having found that Fauconnet's degree of negligence is significant for the above reasons and in light of the above-mentioned cases, the Panel considers it was not disproportionate to reduce that period of ineligibility by one quarter of the maximum sanction of two years, as stipulated in Article 10.4 of the ISU Rules.

113. In conclusion, the Panel wishes to underline that it believes that Fauconnet did not intend to cheat or enhance his sporting performance. It is therefore unfortunate that he made this mistake that is inconsistent with his otherwise clean anti-doping record. To be in keeping with the applicable rules and to meet the need of promoting equality of athletes worldwide, the Panel must nevertheless apply a sanction that is proportionate to the quite significant lack of diligence Fauconnet demonstrated in ingesting the Product. Thus, for the reasons indicated above, Fauconnet is declared ineligible to compete in all sporting competitions for a period of eighteen months.

[Underline added]

187. Consequently, Mr. Fauconnet was declared ineligible for a period of eighteen (18) months.

Robert Lea v. *USADA,* CAS

188. The Athlete's counsel stated that this recent decision rendered by CAS is crucial with respect to the issue of "self-medication".

189. On the other hand, the CCES submits that the definition of "Significant Fault" in this case is not the same as in the 2015 CADP. According to them, the fault committed by Lea was not significant, but important enough to fall in the higher portion of the 0 to 24-month sanction.

190. In this case, the athlete self-medicated without consulting a doctor or taking any steps to determine whether the product contained a prohibited substance. CAS ultimately reduced his sanction of 16 months to a six-month suspension.

191. However, as this decision is very recent, the fully reasoned decision is not currently available to the public. Only the operative portion of the award was rendered. The Athlete's counsel tried to obtain the full decision by contacting CAS, but to no avail.

192. Considering that I do not have access to the full decision and the rationale of the CAS, I cannot consider the *Lea* case in the present instance.

IX. DISCUSSION

A. The applicable law and the principle of proportionality

193. Since the sample was provided on October 25, 2015, it is the 2015 Code that applies.

194. Although the jurisprudence under the 2009 Code is useful, it cannot be applied completely to this matter, since the concepts have evolved with the 2015 Code.

195. Under the previous Code, an arbitrator was required to apply the principle of proportionality of the suspension period, considering a range of subjective factors.

196. Under the 2015 Code, the principle of proportionality has been eliminated, to be replaced by a binary analysis of the "significance" of the fault or negligence with respect to Specified Substances, to be evaluated by the Tribunal.

197. The Tribunal is now required to determine whether the Athlete bears No Significant Fault or Negligence. If so, only then can an analysis of the degree of Fault be entertained, leading to a reduction of the suspension period.

198. The concept of "No Significant Fault or Negligence" implies fault or negligence, but to a lesser degree than a "significant fault or negligence". As each case turns on its facts, I have analyzed this one through the glasses of the 2015 Code, combined with the intention of the drafters. In my opinion, the drafters intended to be severe towards dopers, while providing a limited flexibility to the Tribunal when considering reductions of suspension periods for Specified

Substances. In other words, only special, but not exceptional, circumstances would permit a reduction of the suspension period.

199. Now therefore, the 2-step test under article 10.5 of the 2015 Code requires that I consider:

a. Whether the Athlete established how the Prohibited Substance entered his or her system, and
b. Whether the Athlete has established that he bears No Significant Fault or Negligence.

B. Sanction reduction under 10.5.1.1 of the CADP

200. In order to be eligible for a reduction of his sanction in accordance with section 10.5.1.1 of the CADP, the Athlete was required to meet the following two (2) criteria:

(1) Establish how ephedrine entered his system at a concentration superior to the 10 µg/mL threshold.

(2) Establish his absence of "significant fault or negligence".

201. The burden of proof related to these two criteria is the "balance of probabilities".

202. The expected standard of behaviour of the Athlete is also an important element that I considered in this analysis.

203. Justin Maheu is a young soccer player. I found him to have a certain level of immaturity towards his doping obligations and the way he handled his research, although I did not find this level of immaturity to be particularly lower than the

average athlete in his situation.

204. In my experience after having seen many high-level athletes testify before me, most of them are nurtured by parents, coaches and their entourage throughout their athletic careers. It is not surprising that, even at the age of 24, elite athletes do not have the same level of world savviness and snappy, error-free decision-making as other 24-year-old university graduates, having recently embarked on a career.

205. Therefore, although the behaviour of the Athlete must be commensurate with the discharge of his obligations towards a drug-free sport as an elite athlete, the applicable standard that I have considered is one of the behaviour of a normal elite athlete, and not the standard of a graduate student who would have deeply reflected on all the scientific analysis available to him, in order to determine the quantity of ephedrine he could have consumed, without exceeding the threshold. The Athlete had limited tools at his disposal, and he tried to make use of them, in the doping education he was provided with.

206. This standard is central to the analysis of the concept of "Significant Fault or Negligence".

Criteria No. 1: How ephedrine entered the system of the Athlete in a concentration superior to 10 µg/mL

207. In order to argue the absence of "*Significant Fault or Negligence*", Appendix I of the CADP requires that "[…] the Athlete must also establish how the Prohibited Substance entered his or her system".

208. Ephedrine is a conditional substance and is only prohibited in competition when the urinary concentration exceeds 10 µg/mL. Consequently, the meaning of Appendix 1 of the CADP requires that the Athlete not only admit the presence of the substance in his system, but also that he explains how the substance exceeded the threshold.

209. In my opinion, the Athlete satisfied this first criterion. He was very candid and transparent in his explanations on how he consumed the ephedrine pills, and in what quantities. He established, on a balance of probabilities, how the ephedrine entered his system in a concentration superior to 10 μg/mL. Moreover, the testimony of the two expert witnesses agreed on the key scientific issues to the effect that the Athlete's version was/could be consistent with the finding (20.2 μg/mL of ephedrine).

Criteria No. 2: The absence of "Significant Fault or Negligence"

210. The analysis of the second criteria is set out in section 10.5.1.1 of the CADP.

Appendix I of the CADP defines the term "Fault" as follows:

> ***Fault:*** *Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk.* […]
>
> [Emphasis added]

211. I carefully examined the factors listed in this definition while assessing the Athlete's absence of Significant Fault or Negligence:

a. The evidence shows that the Athlete received basic knowledge and education regarding the anti-doping program. However, his experience with respect to the anti-doping program cannot be qualified as "considerable";

b. The Athlete is not a minor;
c. There was no evidence of Athlete impairment;
d. In my opinion, the Athlete's perception of the degree of risk related to ephedrine consumption was "high". He was aware that ephedrine was a banned substance in competition beyond a certain threshold, and conducted some research online to learn more about ephedrine, the allowed quantities he could ingest, and its effects;
e. In my opinion, the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk was limited and deficient. In order to alleviate his breathing difficulties, he certainly had other, safer alternatives than to take a threshold-specified substance; he could have consulted with a doctor, contacted the CCES directly and he should have been transparent in his Doping Control Form. Those are all aggravating factors that increase the Athlete's degree of fault.

212. However, I found no evidence that neither the CCES nor a doctor could have provided him meaningful advice on dosage. Of course there is always the alternative of consumption abstinence, and this needs to be set against the fact that the substance is permitted under a set threshold.

213. If the CCES and WADA tolerate athletes to ingest substances up to a certain threshold, they need to provide minimum guidance to athletes who choose to consume those products, particularly for a product that is available without a prescription.

214. By analogy and example, when the government established the maximum limit of 0.08% of blood alcohol content as the upper limit of motor vehicle driving impairment, they also informed the population as to the approximate corresponding quantity that they can consume to stay below this limit (no more than one drink per hour). While this is a general guidance which has limited legal effects, it does provide meaningful education and guidance to the population without which most would

remain clueless as to the benchmark quantity of consumption.

215. In the case of ephedrine, the threshold of 10 µg/mL is foreign in comprehension to the Athlete, and frankly, also to myself in a context of limited consumption. Outside of expecting the Athlete not to consume at all, which would make it a specified substance without threshold, I find there is a gap in the education expectation found in the WADA Code and the CADP rules. Even after hearing experts throughout the hearing, I still do not understand what would be the permitted dose of ephedrine an athlete could consume without testing over the threshold. This is unfair for the Athlete, who has, although naively, found a simple and inexpensive method to regulate his breathing problems.

216. The information on ephedrine contained in the Prohibited List and the website Global DRO (which is supported by the CCES) leaves potential athletes with an incomplete picture in order to meet the CCES education obligation found in sections 2, 7.3 and 19 of the 2015 CADP.

217. The CCES' duty to provide anti-doping education to athletes, in the case of threshold substances, is not limited to the publication of the substance and its threshold, and the obligation of following an annual recurrent anti-doping education through a self-guided course on the internet. In this case, I find that the CCES fell short of providing minimal guidance with respect to acceptable levels of consumption for ephedrine as a threshold substance.

218. Without proper basic guidance, it is impossible for an athlete who is not educated in analytical chemistry, to correlate 10 µg/mL with an 8 mg dose contained in a pill.

219. There was no evidence presented to explain, in simple terms, what a typical dose, per day, would be allowable to stay within the allowable threshold. I am of the opinion that a typical dose recommendation is part of the education obligation of an anti-doping agency such as the CCES, and they have failed to provide it as a matter of information. As the substance is allowed under the CADP, under a certain threshold,

it leaves athletes without any guidance if they want to steer away from an adverse analytical finding, while treating a breathing condition.

220. As ephedrine is available without a doctor prescription, the Athlete could not use reliable posology information, as one could find with another threshold Specified Substance such as salbutamol.

221. Nevertheless, the Athlete had an obligation to investigate thoroughly and there were alternatives that he chose not to explore. He was therefore at fault, but not significantly. As such, he should not be suspended at the far end of the spectrum corresponding to the maximal sanction (24 months).

222. For all these reasons, I find that the Athlete's *Fault* is not significant, although the *degree* of the Fault is, itself, significant. Therefore, the Athlete must serve a period of suspension that is commensurate with the degree of Fault.

223. I agree with the general sanctioning guidelines found in *Cilic*, where a sanction of 16-24 months was appropriate when there was a significant degree of fault under the 2009 Code. *Cilic* sets that the "standard" degree of fault is 20 months. Because I found the Athlete to be candid and collaborative with the CCES from the start, I am prepared to provide a 2-month credit of his suspension from the standard for the Athlete's collaboration.

X. DECISION

CONSIDERING the submitted documentary evidence and the testimonies heard during the hearing:

Justin Maheu violated anti-doping rules under Rule 2.1 of the Canadian Anti-Doping Program.

His degree of fault, while significant, falls short of the maximum of 24 months, but still remains within the 16-24 months range, as outlined in the *Cilic* decision.

CONSEQUENTLY, Justin Maheu is declared ineligible for a period of eighteen (18) months, effective retroactively from October 25, 2015, until midnight on April 24, 2017.

I retain jurisdiction with respect of any issue which may arise concerning the interpretation or implementation of this decision.

Signed in Cancun, on May 2, 2016.

Patrice Brunet, arbitrator