INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF TRAVIS MOFFAT

Tim Kerr QC, Chairman
Dr Barry O'Driscoll
Dr Nick Webborn

Introduction

1. This is the unanimous decision of the independent Anti-Doping Tribunal ("the Tribunal") appointed by the Executive Consultant, Medical of the International Tennis Federation ("the ITF") under Article K.1.1 of the ITF Tennis Anti-Doping Programme 2004 ("the Anti-Doping Programme") to determine a charge brought against Mr Travis Moffat ("the player") following a positive drug test result in respect of a urine sample provided by the player on 4 February 2004 at the Sydney International wheelchair tennis event in Sydney, Australia.

2. In a fax dated 19 May 2004, the player admitted the doping offence, with which he was charged by letter dated 21 April 2004 from Mr Jonathan Harris, the ITF's Administrator Anti-Doping. Accordingly by Article K.1.3 of the Anti-Doping Programme a hearing before the Tribunal was not required. The Tribunal considered written representations submitted by and on behalf of the player, and on behalf of the ITF by Hammonds, the ITF's solicitors in London. Before reaching its decision, the Tribunal satisfied itself that neither the player nor the ITF wished to make any further written representations.

The Facts

3. The player fractured his back in 1994 in a car accident. He is confined to a wheelchair and competes in wheelchair tennis events recognised by the ITF. After his accident he was treated for his symptoms with various pain relieving tablets. More recently he has ceased to take these tablets and instead has taken cannabis, or "THC", the active ingredient in cannabis, on a daily basis to relieve his symptoms.

4. By Article A.5 of the Anti-Doping Programme, it entered into force on 1 January 2004. By Article B.1 it applies to events organised, sanctioned or recognised by the ITF. By Article B.2 events recognised by the ITF include wheelchair events. Article B.1 obliges players to "comply with all the provisions of this Programme", including submitting to in-competition and out-of-competition testing as part of the doping control process.

5. By Article S3 of Appendix Two to the Anti-Doping Programme effective from 1 January 2004, cannabinoids became a prohibited substance for the first time. Cannabis and cannabinoids were not prohibited under the predecessors to the Anti-Programme for 2004. The Anti-Doping Programme for 2004 became available to players on the ITF's Wheelchair Tennis website, www.itfwheelchairtennis.com, towards the end of 2003.

6. Under section E of the Anti-Doping Programme (and within it Articles E.1-E.6), a player may apply for a Therapeutic Use Exemption ("TUE") enabling the player, in advance of a particular competition and in advance of using the prohibited substance in question, to apply for an exemption to use of one or more prohibited substances to treat documented medical conditions.

7. The key elements of the procedure when applying for a TUE are set out at Part I of Appendix Three to the Anti-Doping Programme. There is a right of appeal to the World Anti-Doping Agency ("WADA") against refusal of such an

exemption by the ITF's TUE Committee. The player in the present case did not apply for a TUE in respect of his use of cannabis.

8. On 20 December 2003 the player signed an entry form in respect of the international wheelchair event due to be held in Sydney in early February 2004, organised by Tennis New South Wales. His signature appeared beneath a declaration confirming that he was aware of and agreed to abide by the relevant ITF and local rules and that he was aware he may be required to undergo drug testing as a result of other binding regulations imposed upon the event by authorities outside the organiser's control.

9. On 3 February 2004 the player travelled by air from New Zealand to Sydney, arriving in Sydney at or about 7.55am. The player states, and we accept, that he did not take cannabis (or THC) after leaving New Zealand, before competing in the event. On 4 February the player was notified that he was required to undergo a doping test by providing a urine sample. He declared "nutra fibre diet" on the doping control form under the heading "Drugs declared to have been recently used." He did not declare recent use of cannabis or THC. He provided a sample as required. The player then competed in the Sydney International event. He lost in the first round and received 59 Australian dollars in prize money, and one ranking point.

10. The A sample was analysed at the Laboratoire de Contrôle du Dopage INRS-Institut Armand-Frappier, the WADA accredited laboratory in Quebec, Canada, and found to contain cannabis metabolite with an average concentration of 97.13 ng/ml. According to a WADA technical document setting minimum required performance limits for laboratories, a urinary concentration of cannabis metabolite greater than 15 ng/ml constitutes a doping violation. On or about 8 March 2004 the laboratory reported the adverse finding to the International Doping Tests & Management organisation in Lidingö, Sweden.

11. Pursuant to Article J.2.1 of the Anti-Doping Programme, the ITF's Anti-Doping Programme Administrator ("the APA") then identified a Review Board consisting of three members and sent the entire A sample laboratory documentation package to them. The Review Board reviewed the documentation and the APA's report containing information about the collection of the sample and the chain of custody. The Review Board determined and notified the APA pursuant to Article J.2.4 that there was a case to answer.

12. By letter dated 15 March 2004 the player was sent a copy of the laboratory report and informed of his rights under the Anti-Doping Programme, including the right to request the analysis of the B sample. The player did not request analysis of the B sample and accordingly was deemed by Article J.2.5 of the Anti-Doping Programme to have waived his right to have the B sample analysed, and to have accepted the analytical results in respect of the A sample.

13. By letter dated 21 April 2004 the ABA, on behalf of the ITF, charged the player with a doping offence under Article C.1 of the Anti-Doping Programme in that a prohibited substance, namely cannabis metabolite, had been found to be present in the player's urine sample provided at the Sydney International event on 4 February 2004. The letter went on to set out the effect of the relevant provisions of the Anti-Doping Programme and to inform the player of the appointment of the Chairman of the independent Anti-Doping Tribunal which would determine the matter under section K of the Anti-Doping Programme.

14. The player replied by fax dated 19 May 2004 admitting the doping offence and asking that his case be considered in the light of Articles M.3 and M.5 of the Anti-Doping Programme. He stated in the letter that he had suffered severe spasm and pain since his car accident, and that over the years he had replaced all his previous medication with THC "for control of all spasm and pain and in

the process removed a myriad of side effects and instituted an efficacious treatment for my problems."

15. In the same fax the player went on to state that he last had THC before leaving New Zealand and competing in Sydney and that he does not take THC for performance enhancing reasons. He added that the matter had "resulted in serious reflection on the manner in which I train and compete, and many changes will result from this so that I can compete in the future."

16. On 25 May 2004 Dr John Hellemans, a Sports Medicine Practitioner, sent a fax to the ITF in support of the player's "appeal for a lenient sentence". Dr Hellemans added that the player had been using a "mild dose" of cannabis "on a daily basis" since replacing his previous medication with it, and expressed his view that the player qualifies for a dispensation for therapeutic use. He asserted, finally, that the player was not aware that cannabis had been added to the list of prohibited substances, noting that this had occurred only recently.

17. On 2 July 2004 the ITF, through its solicitors, submitted a letter in response to those points made by and on behalf of the player. The ITF noted that this was the player's first doping offence; that the mandatory sanctions concerning forfeiture of prize money and computer ranking points must be applied; that the player had since 4 February 2004 taken part in the Australian Open, losing in the first round and receiving 95 Australian dollars and one computer ranking point; that a mandatory two year period of ineligibility must be applied unless the player could bring his case within Article M.3 or M.5 of the Anti-Doping Programme; and that Article M.5 could not apply since the player had voluntarily ingested cannabis.

18. As to the applicability of Article M.3, the ITF stated in its solicitors' letter that it deferred to the expertise of the Tribunal on the question whether the player's ingestion of cannabis was not for performance enhancing reasons. However it

commented on the contentions advanced on the player's behalf, stating that no precise details of the amount of cannabis ingested had been given; that the concentration in the player's sample was 97ng/ml; that cannabis had become a prohibited substance for the first time in the 2004 Anti-Doping Programme; that the prohibition was notified to players through availability of the text of the 2004 Anti-Doping Programme on the ITF's website; that its understanding is that it is illegal in New Zealand to prescribe cannabis for therapeutic use; that the player had not applied for a TUE in respect of his use of cannabis; and that he has not since applied for a TUE by retroactive approval (under paragraph 4.7 of the WADA International Standard document, extracted in Appendix Three to the Anti-Doping Programme).

19. The Tribunal then took steps, with assistance from the ITF and its solicitors, to ensure that the player did not wish to make any further comment or written representations, and having received confirmation that he did not wish to do so, made arrangements to confer privately to consider its decision. Due to the diary commitments of the members of the Tribunal, we were not able to do this until 28 July 2004.

The Tribunal's Conclusions, With Reasons

20. The player has admitted the commission of a doping offence under Article C.1 of the Anti-Doping Programme. Accordingly pursuant to Article K.1.3 of the anti-Doping Programme, we are required to confirm the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 21 April 2004: namely that a prohibited substance, cannabis metabolite 11-nor-delta-9-THC.COOH, has been found to be present in the urine specimen that the player provided at the Sydney International event on 4 February 2004.

21. Irrespective of questions of fault or negligence under Article M.5 of the Anti-Doping Programme, and irrespective of the player's intention or otherwise to

enhance performance for the purpose of determining the applicability of Article M.3 of the Programme, the Tribunal is obliged by Article K.1.3 to apply the mandatory sanctions provided sanctions provided for in Articles L.1 and M.7 of the Anti-Doping Programme.

22. It follows that pursuant to Article L.1, the player's individual result must be disqualified in respect of the Sydney International event, and in consequence the computer ranking point and the prize money of 59 Australian dollars obtained by him by taking part in that event, must be forfeited.

23. It follows, further, that pursuant to Article M.7 of the Anti-Doping Programme, unless the Tribunal considers that fairness requires otherwise, the player's individual result must be disqualified in respect of the Australian Open, and in consequence the computer ranking point and the prize money of 95 Australian dollars obtained by him by taking part in the Australian Open, must be forfeited. We do not consider that fairness requires otherwise in respect of the Australian Open, and indeed the player did not so contend in his submissions to the Tribunal.

24. We turn next to the question whether Article M.5 of the Anti-Doping Programme can be successfully invoked by the player. Articles M.5.1 and M.5.2 provide, so far as material, that the otherwise applicable period of ineligibility shall be eliminated (Article M.5.1) or reduced by up to half the otherwise applicable minimum (Article M.5.2), if the player establishes (on the balance of probabilities, see Article K.3.2), that he bears "No Fault or Negligence" (Article M.5.1) or "No Significant Fault or Negligence" (Article M.5.2) for the offence. Where, as in the present case, the offence is committed under Article C.1 (presence of a prohibited substance in the body), the player has to establish also how the prohibited substance entered his system.

25. In order to establish "No Fault or Negligence" for the purpose of eliminating the otherwise applicable period of ineligibility, the player must establish (according to the definitions in Appendix One to the Anti-Doping Programme) that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered with the prohibited substance. In order to establish "No Significant Fault or Negligence" for the purpose of achieving a reduction of up to half of the otherwise applicable minimum period of ineligibility, the player must establish that his 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 relation to the offence.

26. We have come to the clear conclusion that the player cannot succeed in invoking either of Articles M.5.1 or M.5.2 of the Anti-Doping Programme. He voluntarily ingested cannabis (or THC) before leaving New Zealand to compete in the Sydney International event. He did so in sufficient quantity to produce an average concentration of 97.13 ng/ml in his urine at Sydney in the afternoon of 4 February 2004. The player himself does not assert ignorance of the newly introduced ban on cannabis for ITF recognised events, though Dr Hellemans asserts that the player was ignorant of it.

27. If he was ignorant of the ban, he could easily have discovered its existence from the ITF's wheelchair tennis website, or by other means such as enquiring of the ITF or the organisers of the Sydney International event. His medical condition and treatment of it with cannabis (or THC) was such that he could be expected to concern himself with the question whether that treatment was consistent with anti-doping rules applicable in the sport in which he competes. He either knew of the ban or did not trouble to find out about it. In either case he was significantly at fault within the meaning of the provisions of the Anti-Doping Programme mentioned above.

28. We turn, next, to consider whether the player can successfully invoke Article M.3 of the Anti-Doping Programme. This provides that in the case of a "Specified Substance", identified as such in the list of prohibited substances, where a player can establish - again on the balance of probabilities, see Article K.3.2 - that the use of the substance "was not intended to enhance sport performance", the period of ineligibility for a first offence shall be, instead of a mandatory period of two years, at a minimum a warning and reprimand and no period of ineligibility, and at a maximum one year. The issue is therefore whether the player can establish that his use of cannabis or THC was not intended to enhance sport performance.

29. The Tribunal notes that the focus is on the motivation of the player in deciding to take the prohibited substance. It does not matter whether the prohibited substance actually enhanced the player's performance or not, nor whether it was by its nature apt or likely to do so. The issue relates to the player's state of mind when he ingested the prohibited substance.

30. Thus, a player who takes cannabis with intent to enhance his sporting performance cannot rely on Article M.3 even if the effect of the cannabis is detrimental to his sporting performance. Conversely, a player who takes cannabis without intent to enhance his sporting performance, for example for purely recreational purposes, can rely on Article M.3 even if his sporting performance is actually enhanced by taking the drug.

31. The question for the Tribunal under Article M.3 is not one of scientific or other expert opinion, but of fact. However, expert opinion may inform the Tribunal's finding of fact. For example, the degree of concentration of the drug in a player's urine, the timing of its administration in relation to the competition in question, and the rate at which it is eliminated from the body, may in principle be relevant to the Tribunal's finding on the issue of the player's intent.

32. The ITF accepts that cannabis is a "Specified Substance" under the Anti-Doping Programme, in respect of which the defence against a two year mandatory ban may be available under Article M.3, depending on the facts. Indeed cannabis is identified as such in Appendix Two to the Programme (at page 47).

33. In the present case, the Tribunal considers that no clear deductions about the player's intentions may be made from an examination of the evidence concerning the timing of the player's ingestion of the drug and the degree of concentration found in the player's urine in the A sample. It is not possible on the evidence to know what dose was taken, nor exactly when it was taken. The rate of elimination of cannabis from the body varies from one person to another. In the absence of other evidence, it is reasonable to infer from Dr Hellemans' reference to use of cannabis on a "daily basis", that the player last took cannabis either early in the morning of 3 February 2004, before his flight left New Zealand, or on 2 February 2004, the previous day. The daily dose is described by Dr Hellemans as "mild", but beyond that there is no evidence of the quantity taken each day.

34. Even if it were possible to know exactly how much cannabis was taken by the player and exactly when it was taken, knowledge of those facts would not be conclusive as to the player's motivation in circumstances where he relies on a clear motive other than enhancement of sporting performance – namely, relief of pain and spasm – for taking the drug.

35. The evidence of intention given to the Tribunal by the player and Dr Hellemans is contained in the two faxes of 19 May and 25 May 2004 respectively. The player asserts, simply, that he "do[es] not take THC for performance enhancing reasons". The ITF in its letter of 2 July 2004 does not invite the Tribunal to disbelieve that assertion, but adopts a neutral stance on the point.

36. Given the supporting evidence from Dr Hellemans of therapeutic motivation, and given the word of the player which is not directly contradicted by the ITF in its submissions or by any circumstantial or other evidence tending to show intent to enhance sporting performance, the Tribunal accepts the player's assertion that he had no such intent when he took the cannabis which resulted in the positive test result.

37. We should add that we have considered the possibility of "dual motivation", i.e. that the player may have intended when taking the drug to relieve the pain in his back *and at the same time* to enhance his sporting performance, and/or that he may have intended *thereby* to enhance his sporting performance. In such a case it might be necessary, on the proper construction of Article M.3, to examine which of the player's intentions was the predominant one. The evidence is sparse and neither party has suggested that the player intended to enhance his sporting performance by use of cannabis also intended to relieve pain, nor that he intended to do so through the medium of relieving pain. Accordingly we think it right to put any such suggestion to one side, and we do so.

38. For those reasons, we have reached the conclusion that the player has succeeded in establishing on the balance of probabilities that his use of cannabis or THC leading to the positive test result in respect of the A sample taken on 4 February 2004 was "not intended to enhance sport performance". As this is the player's first offence, the Tribunal therefore has discretion under Article M.3 to impose, at a minimum, a warning and reprimand and no period of ineligibility, and at a maximum, one year's ineligibility.

39. We turn to consider how the Tribunal should exercise that discretion in the present case. In mitigation, we bear in mind, first, that the player was confronted with a problem starting in 2004 when his chosen method of relieving the pain and spasm from which he suffers, became prohibited under

the rules of the sport in which he competes. We bear in mind that the player has admitted the doping offence and that he did not request analysis of the B sample.

40. On the other hand, we are not persuaded that the player was ignorant of the ban on cannabis and THC when he took the drug before leaving New Zealand, and when he completed the doping control form. The player himself does not assert such ignorance, though Dr Hellemans says the player was unaware of the ban. Dr Hellemans may simply have been making an assumption. If the player did not know cannabis was prohibited, he would have had no good reason to refrain from declaring use of cannabis on the doping control form.

41. Even if the player was ignorant in late 2003 of the forthcoming ban on cannabis in the case of ITF recognised tennis events, it was his responsibility to discover its existence and he could easily have done so. He signed a declaration in December 2003 stating that he was aware he could be subject to doping control and agreeing to abide by relevant rules, which necessarily included anti-doping rules. It is universally accepted in sport that an athlete is responsible for ascertaining what substances he may lawfully ingest and for ensuring that he does everything possible to avoid ingesting prohibited substances.

42. We are also mindful that the player has not been very forthcoming in informing the Tribunal of the exact circumstances surrounding his use of cannabis: thus he has not given us any evidence of the dose ingested, nor the precise timing, nor the method of administration.

43. Taking all the above factors into account, the Tribunal considers that it is appropriate to impose a period of ineligibility of six months, which should run from the date of this decision. We have considered carefully whether pursuant to Article M.8.3(b) the starting date of the period of ineligibility should be a date earlier than the date of this decision. We have come to the conclusion that

the period of ineligibility should not start on a date earlier than the date of this decision.

44. There has been some delay in the process leading to the issuing of this decision, but the delays have not been unusually or inordinately long bearing in mind the procedures provided for under the Anti-Doping Programme, involving as they do busy professionals with full diaries. Some of the delay has been attributable to difficulties in communicating with the player and, in particular, obtaining from him confirmation that he was in receipt of all the documents which it was necessary for him to receive in order to achieve the fair disposal of this case.

The Tribunal's Ruling

45. Accordingly, for the reasons given above, the Tribunal:

(1) confirms the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 21 April 2004: namely that a prohibited substance, cannabis metabolite 11-nor-delta-9-THC.COOH, has been found to be present in the urine specimen that the player provided at the Sydney International event on 4 February 2004;

(2) orders that the player's individual result must be disqualified in respect of the Sydney International event held in February 2004, and in consequence rules that the computer ranking point and the prize money of 59 Australian dollars obtained by the player through his participation in that event, must be forfeited;

(3) orders, further, that the player's individual result must be disqualified in respect of the 2004 Australian Open wheelchair tennis event, and in consequence rules that the computer ranking point and the prize money of 95 Australian dollars obtained by him through his participation in the 2004 Australian Open, must be forfeited;

(4) finds that the player has succeeded in establishing on the balance of probabilities that his use of cannabis or THC leading to the positive test result in respect of the A sample taken on 4 February 2004 was not intended to enhance sport performance;

(5) declares that the player shall be ineligible for a period of six months starting from the date of this decision from participating in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised by the ITF or any national or regional entity which is a member of or is recognised by the ITF as the entity governing the sport of tennis in that nation or region.

Tim Kerr QC, Chairman of the Anti-Doping Tribunal

8 August 2004