

**THE ATP TOUR ANTI-DOPING TRIBUNAL  
APPEAL OF GUILLERMO CAÑAS**

---

**OPINION**

---

This appeal by Guillermo Cañas {"Player"} was heard on 20 & 21 July 2005 in New York before an ATP Tour Anti-Doping Tribunal {"Tribunal"} consisting of Professor Richard H. McLaren, Esq., Chair, Dr. Arturo Marti, technical member and Dr. Peter van Beek, MD medical member, formed by Richard Ings the ATP Administrator of Rules following a Review Board {"RB"} determination that Guillermo Cañas had a case to answer under the Tennis Anti-Doping Program 2005 {"Anti-Doping Rules"}. Those rules are contained within the ATP 2005 Official Rulebook found at pgs. 143 through 173. The Anti-Doping Rules are designed to maintain the integrity of men's professional tennis and protect the health and rights of all tennis players. The Program includes (i) doping tests in and out of competition, (ii) the imposition of penalties for Doping Offenses and (iii) support and assistance to players when applicable.

Eduardo Ipiens Castillo, Esq., Ifligo Perez, Esq. and Alvaro Garcia Alaman de la Calle, Esq. represented the Player and were present at the hearing.

The ATP Tour {hereafter the "Tour" or the "ATP"} was represented by Stephen D. Busey, Esq., John MacLennan, Esq. and Mark V. Young, Esq., ATP General Counsel and Executive Vice-President. Also present was Richard Ings, ATP Executive Vice-President Rules and Competition.

**BACKGROUND FACTS**

1. The Player is a tennis professional from Argentina. He has been a member of the ATP since 1995 and a member of the Player Council since 2004.
2. The ATP Tour is a not-for-profit membership organization composed of male professional tennis players and tournament organizations. The ATP

sanctions tennis tournaments and provides league governance and support to its member tournaments and players. Pursuant to this role the ATP has adopted rules for the conduct of tournaments and players. The parties have stipulated that the ATP Tour 2005 Official Rulebook {the "Rules"} is applicable to this case.

3. In February 2005 the Player signed the standard consent form required by Rule B. 1. for the 2005 season. By that form he acknowledged that he had received a copy of the Rules. He further acknowledged that he had an opportunity to review the Rules and agreed to be bound by all the provisions therein and to play by the Rules.
4. The Player provided a urine specimen pursuant to the Anti-Doping Rules during the ATP sanctioned tournament the "Abierto Mexicano de Tenis" in Acapulco, Mexico on 21 February 2005. The International Doping Tests & Management {"IDTM"} is the Anti-Doping Program Administrator {"APA"} pursuant to a contract between the IDTM and the ATP. The APA obtained the urine specimen.
5. The specimen sample was shipped from Mexico to the Laboratoire de Controle du Dopage INRS-Institut Armand-Frappier, Montreal, Canada, a World Anti-Doping Agency {"WADA"} accredited laboratory {"the Lab"}.
6. The Lab Doping Control Report sent to Mr. Sahlstrom of IDTM stated the analytical result of the A sample of the Player. It was reported that the analysis on 9 March 2005 indicated the presence of hydrochlorothiazide {"HCT"} with a concentration level estimated at 4,900ng/ml. (4.9 micrograms). That substance is identified in the Anti-Doping Rules under S5. Diuretics and Other Masking Agents (Appendix 3, 2005 Prohibited List).
7. In accordance with the Anti-Doping Rules the APA obtained the Lab's analytical package and provided it to the RB members who were not informed of the Player's identity. Following their confidential review, the RB advised the APA that there was a case to answer. The APA in turn advised the ATP Administrator of Rules and informed him of the identity of the Player. The ATP Administrator of Rules notified the Player that there was a case to answer pursuant to the Anti-Doping Rules by a letter

dated 13 May 2005.

8. The B analysis conducted by the Lab on 10 May 2005 confirmed the existence of the Prohibited Substance to the satisfaction of the APA in accordance with Rule J. 2. h. The matter then is required to proceed to a hearing in accordance with the provisions of Rule K.
9. By a letter dated 13 May 2005 the ATP Administrator of Rules advised the Player that his urine specimen had produced an analytical result that was positive for the prohibited substance "Hydrochlorothiazide" {"HCT"}. He was advised of the potential sanctions that could arise under the Anti-Doping Rules and of his elections under those rules. The Player elected to dispute the allegation of a Doping Offense and requested a hearing before an ATP Anti-Doping Tribunal thereby activating the process leading to this decision.
10. This Anti-Doping Tribunal {the "Tribunal"} was established pursuant to Rule K. 1. a. On 13 June 2005 the Chairman of the Tribunal issued Procedural Order No. 1 detailing the process and procedure the case was to follow and by which it was to be heard. That Order was subsequently amended. Pursuant to the amended Procedural Order No. 1 hearings were held commencing at 9:30 a.m. on the 20<sup>th</sup> of July continuing on the 21<sup>st</sup> in facilities located in New York City. By signing Procedural Order No. 1, as amended, Counsel for both parties confirmed that they had no objection to the Tribunal's composition or its jurisdiction to hear, determine and issue a decision on this case.
11. Pursuant to the Procedural Order, counsels for the Player filed sworn affidavits from each witness to be called. The Player provided written statements from himself; his coach Hernan Gumy; his personal doctor, Dr. Walter Mira; his personal trainer Fernando Cao; his manager Michael Dukote; and his kinesiologist Diego Rivas. Also filed were expert reports from Dr. Vivian James, Emeritus Professor of Chemical Pathology at St. Mary's Hospital Medical School, Imperial College, London and Spanish Pharmaceutical Professor Rafael Argüelles Solis. A testimonial was provided from Martin Jaite a former professional tennis player and the present manager of the ATP Tournament in Buenos Aires since 2001. The ATP accepted without cross-examination the statements of Dr. Mira, Professor Solis and Messrs. Ducote, Rivas and Jaite. At the hearing the

ATP determined that it no longer desired to cross-examine Messrs. Gumy or Cao and as a result their statements were accepted. The Player gave evidence on his own behalf and was cross-examined by the ATP counsel and questioned by the Tribunal. There were no other witnesses for the Player that were cross-examined by counsel or questioned by the Tribunal.

12. The Tour provided a sworn affidavit from Professor Christiane Ayotte, Director of the Lab; Richard Ings of the ATP; Julian Cavazos a Doping Control Officer with IDTM and his assistant Shane Woten; and two licensed physicians practising in Mexico who were the tournament physicians Dr. Mercader and Dr. Chinchila. The Player's counsel accepted, without cross-examination, the statements of Dr. Mercader and Mr. Woten. At the hearing the Player's counsel took the position that the ATP in connection with Professor Ayotte's report had not satisfied certain demands for production of information and as a consequence they did not cross-examine her.<sup>1</sup> They also elected at the hearing not to cross-examine Julian Cavazos. Richard Ings and Dr. Chinchila were cross-examined and questioned by members of the Tribunal.
13. Shane Woten in his sworn statement described the beaker selection and collection of the sample and the Player's action in dividing the specimen into the "A" and "B" bottles. The agreed stipulations make this evidence uncontested. He further provided that he had no recollection of the Player telling Mr. Julian Cavazos about any medication prescribed by a tournament physician, nor of Cavazos telling the Player not to disclose this information on the doping control form.
14. In his sworn statement, Julian Cavazos, an International Doping Control Officer for IDTM, stated that he accompanied the Player throughout the sample-taking process. He stated that the Player did not express dissatisfaction with the collection procedure and that he listed Voltaren 75 as the only supplement or medication that he had taken. Cavazos declared in his statement that *I have no recollection of Mr. Cañas advising me that he had received a prescription from a tournament*

---

<sup>1</sup> The counsel for the ATP indicated that everything the Player's counsel requested that was in their or Dr. Ayotte's possession had been produced. At the hearing the counsel for the Player indicated that Joint-Exhibit #7 "Rapport de quantification" goes from page 1 of 5 directly to page 5 of 5 with apparently pages 2 through 4 missing. They submitted that the absence of this information had precluded their expert Dr. James from being able to modify his report if it was required.

*physician. I believe that I would recall such a statement if it had been made because it would have been out of the ordinary. I am certain I did not advise Mr. Cañas not to disclose anything on his doping control form. My advise to players in this situation is always to disclose everything.*

15. The sworn statement of Dr. Mercader attests to the fact that he and Dr. Chinchila were present at their designated location *at all times* during the Acapulco tournament. He stated that he did not remember treating the Player at the tournament and *had he appeared for treatment I would have recognized him at once*. He also attested to the fact that detailed records were kept of all treatment given to players at the tournament and no record exists of any treatment having been given to the Player. Dr. Mercader added that he had prescription medication on stock for sore throats and therefore would not have needed to write a prescription to be filled at a pharmacy. Finally, Dr. Mercader noted that supplements containing HCT are not used to treat sore throats and that prescribing HCT would not be advisable in the Acapulco heat as it could lead to dehydration of the athlete.
16. The Lab conducted the “in-competition” analysis of the eighteen urine samples collected at the Acapulco tournament. Professor Christianne Ayotte, Director of the Lab, provided in her sworn statement a detailed account of the testing of the Player’s urine sample and concluded that both the A-sample and the B-sample contained HCT. She stated that as the drug is not a threshold substance, its presence in the athlete’s urine sample was reported as an adverse analytical finding. Furthermore she stated that the presence of HCT in a urine sample is *proof of past administration* but that she could not conclude from the test result when or how much HCT had been taken.
17. Professor Ayotte also provided the following comments on the possibility that the presence of HCT could have arisen by the contamination of a supplement.
  - 25) *Firstly, the presence of hydrochlorothiazide in a urine sample is proof of past administration. One cannot infer from the roughly or precisely estimated amount contained in a single urine sample the dose, the frequency of use or the time of administration, let alone the purpose of the administration.*

- 26) *Diuretics are prohibited in sport as masking agents, and are known to be used for that purpose along with other methods such as high water intake, adulteration of specimen, urine exchange etc. I have no knowledge of an established relationship between the dose administered or the urinary level of hydrochlorothiazide and the efficiency of attempted masking.*
- 27) *Hydrochlorothiazide is a medication (tablets for oral use) employed for example to control hypertension, generally requiring a prescription from a physician. It is not a natural product and it cannot be found in herbal preparations unless it is added. The pharmaceutical preparations are available in 25 to 100 mg tablets for example, also in combination with other diuretics or antihypertensive agents.*
- 28) *Several health professional organizations expressed their concern with regards to the high prevalence of contamination and adulteration of Asian/Chinese medicines and incorrect labelling. A Chinese herbal medicine (Zhen Ju Jiang Ya Pian) very frequently used in that community for the treatment of hypertension, contains hydrochlorothiazide at 5 mg per tablet (medicine can be correctly labelled).*
18. Furthermore she stated that the presence of HCT in a urine sample is *proof of past administration* but that she could not conclude from the test result when or how much HCT had been taken.
- 29) *Hydrochlorothiazide is incompletely absorbed after oral administration and 65% of an oral dose is excreted unchanged in the first 24 h (Clarke's analysis of drugs and poisons, 3<sup>rd</sup> ed, 2004).*
- 30) *In the scientific literature, the determination of hydrochlorothiazide in urine samples serves the purpose of determining the excretion rate, i.e. the amount excreted per min or hour. Consequently, there are very few publications describing levels (ng/mL) actually measured; it is not useful in the context of doping control either for the reasons cited earlier (paragraphs 9, 10 and 25).*
- 31) *One publication published in 1998 estimated at 3,300 ng/mL the level of hydrochlorothiazide present in the urine samples collected and pooled 24 to 30 hours following the administration of one 25 mg pharmaceutical tablet (Farthing et al., 1998). Another*

*publication dating from 1983 presents excretion curves from two volunteers following the administration of one 100 mg oral dose: the concentrations are higher than 10,000 ng/mL in the first 18 hours (Yamazaki et al., 1983).*

- 32) *In conclusion, I cannot deduce from the test result why, when or how much hydrochlorothiazide has been taken.*
19. Professor Vivian James, the expert scientist for the Player, reviewed the Documentation Package provided by the Lab to the Player. He concluded at p. 3 of his report that in respect of the A sample: *the close similarity of the retention times and the mass spectra are consistent with and strong evidence for the presence of hydrochlorothiazide in the sample.* After his review of the B sample, he concluded that: *I can find no reason to question the confirmation of the presence of hydrochlorothiazide in sample B384347.* He also concluded from the information available to him that: *I am unable to deduce from this information either the dose of diuretic ingested or the time of administration.*
20. In uncontested written statements, four witnesses testified about the Player's character based on their longstanding relationships with him: Dr. Walter Mira, Cañas's personal doctor, stated that the Player always carried around his ATP doping wallet card and that he would never voluntarily ingest a performance enhancing drug.<sup>2</sup> Mr. Michael Dukote, the Player's commercial manager and friend of ten years, highlighted Cañas's diligence when taking supplements and commented on the experienced and qualified team that the Player worked with. His kinesiologist, Diego Rivas, called him a *highly qualified professional and an excellent human being* and considered that he did not need supplements to be in his best physical condition. Finally, Martin Jaite, the manager of the ATP tournament in Buenos Aires and former teammate of the Player, commented on his humbleness and sense of professionalism. Jaite also concluded that Cañas worked with *the best professional team that a tennis player could ever have* therefore testifying to the reliability

---

<sup>2</sup> A fax of 18 July 2005 was admitted by consent of counsel with the translation being #18B. He indicated that in his capacity as a physician at a tournament in Buenos Aires he had *medicated various players, prior to a diagnostic, and they have acquired the medication on their own.* He also stated that he had a practise, which in his view was required by the ATP Rules, of recording in the log the *diagnostic, the drug used, the number of tablets and the lot number of manufacture.*

of the team in preventing accidental doping infractions.

21. In his sworn statement, the Player's coach, Herman Gumy, asserted that his team discussed the ATP anti-doping procedures *from time to time* and that he checked the ATP website for information regarding banned substances. He confirmed that he had hand-delivered the prescription that the Player alleged was from the tournament doctor to a tournament hostess. Additionally, he attested to Cañas's good character and mentioned that he had passed his previous doping tests *without any problem*.
22. The player's trainer, Fernando Cao, confirmed that the Player received medicine from the tournament hostess in Acapulco. Cao stated he was *surprised and very annoyed* when he heard about the alleged doping violation and he indicated that the Player never planned on using prohibited substances and *due to his strength he would have never needed them*.
23. In attempting to establish that the presence of HCT was a technical positive and as such would not mask a prohibited substance, the Player's counsel submitted the undisputed statement of Professor Rafael Agruelles Solis. The pharmaceutical professor stated that the action of HCT leads to greater elimination of water and electrolytes but does not lead to greater elimination of doping agents. Therefore, he concluded that the *urine would be more diluted, but this WOULD NOT MASK the presence of a prohibited substance*. On the same subject Professor James in his report referred to the case of *Oliver v. ATP* (an ATP Anti-Doping Tribunal decision dated 28 January 2004) and stated: *... the specific gravity of the urine was 1.017, which indicates that it was not abnormally dilute. The laboratory report does not show the presence of any anabolic steroids. If the definition of a technical violation is that quoted above, [referring to paragraph 38 of Oliver] then the same conclusion might reasonably be reached with regard to the sample 384347*. He concluded: *The urine sample was not abnormally dilute, which is not consistent with an attempt to conceal a prohibited substance*.
24. The parties as requested by the Procedural Order filed the following agreed upon stipulations with the Tribunal.
  - a. *The collection of the sample from the Player at the Acapulco*



- tournament was done properly.*
- b. The sample provided by the Player was given the number 384347.*
  - c. The sample provided by the Player was properly transported to the Montreal WADA accredited laboratory.*
  - d. The A sample provided by the Player had the prohibited substance hydrochlorothiazide in it.*
  - e. The B sample of the Player also had hydrochlorothiazide in it.*
  - f. The Player is very aware of the ATP's anti-doping program.*
  - g. The Player knows of the dangers of contaminated nutritional supplements.*
  - h. The Player carries with him the wallet card provided to him by the ATP that contains the list of prohibited substances.*

During the course of the hearing counsel agreed to the following additional stipulation.

- i. At the ATP tournament in Buenos Aires the Player underwent a doping control sample on 7 February 2005 and a further one during the French Open at Roland Garros in early June 2005. On both occasions the sample was tested and produced a negative result.*

### Evidence at the Hearing

25. Mr. Ings in his sworn statement indicated that the Player was one of many male tennis professional players who in 2002/2003 experienced nandrolone readings<sup>3</sup> which were not reported as analytical positives but were very close to being so. Mr. Ings personally discussed with the Player his own situation and advised him to stop taking any supplements that might be the cause of the analytical results. During this discussion the Player voluntarily handed over to Mr. Ings a list of supplements he stated he was taking and indicated that he would no longer take such supplements. Mr. Ings in his statement noted that the doping control form referenced only Voltaren 75 yet the player's brief to the Tribunal listed 7 other supplements and his doctor's statement listed some of those and an additional 2 supplements not referenced in the brief. Mr. Ings indicated

---

<sup>3</sup> At the time it was thought these readings were caused by ATP trainers who had been distributing certain electrolyte replacement tablets to ATP tennis players without the knowledge of the ATP. It now appears such readings may have been caused by a condition described as "active urine" by WADA in May of 2005. See the following sources: WADA letter of 13 May 2005 to Lab Directors and Explanatory Technical Note of the same date.

that as a result of the experiences in 2002/2003 he instituted medical logs be kept at all ATP tournaments. Tournament physicians or trainers use the medical log to record treatments at the tournaments. This log includes both prescription and non-prescription medications prescribed by the tournament physicians. ATP trainers are not permitted to provide any medications or supplements to ATP tennis players.

26. Mr. Ings was cross-examined on the foregoing testimony by the Player's counsel. He clarified that the physicians at ATP tournaments do not work for the ATP but for the tournament organizers. He was questioned on the practises of the physicians at tournaments in using the logs at the tournaments and conceded that the procedure for filling out the logs as required by the ATP and the actual practise in dispensing and recording medicine in the log does not necessarily coincide. He was also cross-examined on the specific log details in Acapulco and the existence of any practise of recording manufacturer's lot numbers. {See evidence at footnote #2}. Mr. Ings confirmed that there was no record in the log of treatment by Dr. Chinchila of either the Player or of another ATP Player at the event, Mr. Juan Monaco.<sup>4</sup>
  
27. Dr. Chinchila in his sworn statement indicated that he was an ATP tournament physician working with the other tournament physician Dr. Mercader. At their workstation at the tournament they stored medications, including prescription medications, for common medical problems. A detailed list including the lot number of the medications was kept. The stock included medications for colds, flu and sore throats. He testified that he did not treat the Player at the tournament. If the player had approached Dr. Chinchila complaining of a sore throat or a cold or flu there were medications, including prescription medications, to treat the condition on site. Therefore, there would have been no need to write a medical prescription to be filled at an off site pharmacy. He also stated that substances containing diuretics such as HCT are not used in treating sore throats, cold or influenza. Additionally he stated that as the tournament in Acapulco involves very hot weather it would be medically inadvisable and indeed dangerous to a player's health to prescribe a

---

<sup>4</sup> Discussion of this evidence and other matters had delayed the commencement of the hearing from its original 9:30 a.m. start until 1 p.m. It was agreed by the ATP that his e-mail could be entered as hearing Exhibit # 17A & B. The e-mail advised that Monaco had a nasal condition similar to that of the Player, was treated by the medical staff with medication they bought at a pharmacy and he reimbursed the cost.

diuretic under any circumstances.

28. Dr. Chinchila was cross-examined at length by several of the Player's counsel. Before doing so they registered a complaint with the Tribunal that his cross-examination had been made more difficult by the fact that he was not personally present despite their request that he be present. The ATP counsel responded that he was unable to obtain the required visa in time to enter the United States from Mexico.<sup>5</sup> It also became apparent during the course of the cross-examination that Dr. Chinchila was looking at a computer record. That record turned out to be that involving Mr. Juan Monaco. On a ruling by the Tribunal, the computer record was filed the following day as Hearing Exhibit # 19. It confirmed the e-mail note of Mr. Juan Monaco (referred to in footnote #4) and indicated that he was treated with a nasal spray. The Tribunal also learned during the course of the cross-examination that Dr. Mercader was present in the room with the witness and discussions were going on between the two of them while Dr. Chinchila was giving his testimony. It is for these sorts of reasons that the Tribunal requires that witnesses be present in person rather than by telephone attendance which should only be the rare exception with respect to controversial evidence. Nevertheless, the counsel and the Tribunal proceeded to hear the cross-examination of Dr. Chinchila.
29. The cross-examination on the telephone began with questioning regarding the treatment of the Player. Dr. Chinchila checked his log and confirmed the Player was not treated. He also testified that he knew of the Player and would recognise him if he had come to the clinic so he would not have needed to refer to the log to know that he had not treated the Player. He indicated it would have been an honour to treat the Player and regardless of what is stated in the log there is no possible way he would not have remembered treating him. Dr. Chinchila also stated that he would not have treated the Player with a substance containing HCT. There was extensive questioning of the list of treatments that were given on the Saturday and Sunday and recorded in the log filed as Joint Exhibit

---

<sup>5</sup> The Tribunal notes that Procedural Order No. #1 requires in paragraph 11 that all witnesses listed on the witness list are to plan to be personally present at the hearing until advised to the contrary. The witness lists were exchanged on 23 June 2005. It was not until the pre-hearing conference call originally scheduled for 12 July and, at the request of the parties, rescheduled to 15 July 2005 that persons required to be at the hearing for purposes of cross-examination were identified. It was only then that the ATP counsel took steps to have Dr. Chinchila present. By then it was only three working days prior to the hearing. It was impossible for him to obtain the necessary visa. The Tribunal wants counsel to note that such violations of the Procedural Order of the Tribunal are not to occur again in connection with these cases.

#15.

30. Dr. Chinchila was cross-examined about the writing of prescriptions at a tournament generally and at the Acapulco tournament in particular. When a prescription is issued it would be given to the person and sometimes they would give it to a driver to obtain. He further testified that in Mexico HCT could be obtained without a prescription. Responding to questions from the Tribunal, Dr. Chinchila indicated that pharmacies do not have to keep prescriptions unless it involves a controlled substance. HCT can easily be obtained without a prescription in Mexico. If a prescription were written it would be possible to trace it to a pharmacy for a controlled substance.
31. The Player in his sworn statement indicated he has always been very cautious about the products he consumes being well aware of the risks of taking supplements from the ATP circuit, the University of the ATP and his role on the Players Council. He is very cognisant of the problems over the past few years with vitamin supplements and contaminated substances. He is also aware of the warnings given by the ATP regarding the use of the substances. He surrounds himself with a professional team upon which he relies to ensure that he meets all the Anti-Doping Rule requirements.
32. The Player, in his statement, indicated that he arrived for the tournament on Friday 18 February 2005. He had a sore throat and symptoms of influenza. On the Sunday, he attended the offices of the ATP physicians but was unable to locate the doctors in the morning and returned later in the day. He testified that he was seen by a Doctor and given a prescription for the purchase of certain products to treat his sore throat and influenza symptoms. He stated that he gave the prescription to coach Gumy and that he saw him personally deliver the prescription to a hostess at the tournament reception desk. He gave her the money and the prescription so that she could purchase the medicine. He stated that two hours later he was handed the medicine in a bag from the drug store along with the change. The Player did not remember if the medication was in pill or fluid form. He testified that he did not read the label. He took the medicine following the instructions given to him by the doctor. He did so for four days commencing on the evening of 20 February.

33. Following his evening match that lasted about one hour, the Player gave his sample at 22.15 p.m. on 21 February. This was the day after he started taking the prescription medication. He testified that he indicated to the doping control officer that he was taking *Voltaren and two other things whose name I did not remember. The person who was there said that if to [sic] those two products were prescribed to my [sic] by the tournament doctor that I should not worry that it was ok and I left normally.*
34. The Player was cross-examined about his use of supplements. He was questioned about the differences between the lists of supplements provided by the Player's lawyers in their brief and the Player's personal physician in his witness statement. He was also questioned on the fact that the doping control form only revealed one substance. He explained that he does not take all these various listed products throughout the year so he only recorded the supplements that he took irregularly on the doping control form.
35. The Player on his cross-examination was certain that the doctor he saw was not Dr. Mercader but another person inside his office. He was given a prescription but did not know what it was because he could not read the handwriting.
36. The Tribunal was advised on its questions that the match took less than an hour because the opponent withdrew. The evening was very hot and humid. The Player showered and stretched in the dressing room before giving the sample. Two people were there a black guy and a blond guy. He drank a lot in trying to urinate and believed he was there for less than an hour.

### **The SUBMISSIONS of the PARTIES**

#### **Submissions on behalf of the Player**

37. It was submitted that the Player is a renowned professional with an extraordinary record of fair play, cleanness and diligence. He was tested 15 days before the sample was taken in Acapulco and the result was negative. He bears no fault or negligence for the offense. Therefore, the Player's counsel submits that there should be no suspension or forfeiture

of Race/Entry System points and prize money.

38. It was submitted that prescriptions given to him by the tournament doctor for a sore throat and symptoms of congestion must have caused the positive test result. The alternative would be that the products purchased by an ATP receptionist at a nearby pharmacy and given to the Player were not the ones prescribed by the doctor and caused the result. Therefore, the ATP would be the origin of the positive test result and the principles of equitable estoppel as established in the ATP and CAS jurisprudence ought to be applied. In pursuit of this and other arguments the reputation, professional integrity and credentials as to the testimony of Dr. Chinchila was placed in issue.
39. It was further submitted that the scientific experts confirmed the lab data as indicating that there had been an ingestion of small amounts of the prohibited substance just a few hours before the sample was taken. Therefore, there was no intention to eliminate any other doping substance that may have been present in the player's body. Furthermore, the urine was insufficiently diluted to have eliminated traces of other substances. Therefore, in accordance with ATP jurisprudence this case is one of a technical violation of the Anti- Doping Rules.
40. It is submitted that there has been no infraction of the ATP Anti-Doping Rules and therefore, no sanction under the Rules is required or ought to be imposed. In the alternative it was submitted that the rulebook was not applied precisely in the *ATP v. Coria*<sup>6</sup> and the *ATP v. Chella* cases and it should not be done here both on the basis of the ATP cases and for reasons of proportionality. The Player is a careful and responsible tennis professional whose livelihood and tennis career will be destroyed by a two-year sanction. The suspension, if any, ought to be considerably less in all of the circumstances of this case.

#### Submissions by the Respondent ATP

41. The Tour's position was that the Player had committed a Doping Offense by having the Prohibited Substance HCT in his body during competition in violation of the ATP Anti-Doping Rules.

---

<sup>6</sup> *Coria v. ATP* a decision of an Anti-Doping Tribunal 20 December 2001 and *Chella v. ATP* a decision of an Anti-Doping Tribunal 30 March 2001.

42. It was submitted that the ATP is not equitably estopped from pursuing the application of the Anti-Doping rules against the Player. The necessary evidence to make such a defence is not available in this case. The alternative submission that a mistake at the pharmacy was made cannot be established because there was no prescription provided by a tournament physician. Even if there had been a prescription provided, the ATP is not responsible for the offsite pharmacy. The burden of proof never shifted to the ATP to disprove that a pharmacy provided the wrong prescription.
43. The Tour submitted that the Player has not satisfied the requirements of the Exceptional Circumstances in the Rules as the Player cannot establish how the Prohibited Substance entered his body. In the alternative if Exceptional Circumstances has been established the problem of supplement contamination is no justification for the reduction of the sanction. The analytical result is not a technical positive as HCT is not a threshold substance.
44. For these reasons the Tour submits that the Tribunal should find the Player to have committed a Doping Offense and assess the penalties mandated by the Program.

45. **THE RELEVANT ANTI-DOPING RULES**

**B. Covered Players and Events**

1. *Any player who enters or participates in a Competition, Event or activity organized, sanctioned or recognized by the ATP, or who is an ATP member or has an ATP ranking (a "Player") shall be bound by and comply with all of the provisions of this Program including making himself available for Testing both In-Competition and Out-of-Competition. Further, for each calendar year all such Players shall, as a condition of entering or participating in any event organized or sanctioned by the ATP, deliver to the ATP a signed consent in the form set out in Appendix 2.*

...

**C. Doping Offenses**

**Doping is defined as the occurrence of one or more of the following (each, a “Doping Offense”):**

1. *The presence of a Prohibited Substance or its Metabolites or Markers in a Player's Specimen, unless the Player establishes that the presence is pursuant to a therapeutic use exemption granted in accordance with Article E.*

a) *It is each Player's personal duty to ensure that no Prohibited Substance enters his body. A Player is responsible for any Prohibited Substance or its Metabolites or Markers found to be present in his Specimen. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Player's part be demonstrated in order to establish a Doping Offense under Article C.1; nor is the Player's lack of intent, fault, negligence or knowledge a defense to a charge that a Doping Offense has been committed under Article C.1.*

b) *Excepting those substances for which a quantitative reporting threshold is specifically identified in the Prohibited List, the detected presence of any quantity of a Prohibited Substance or its Metabolites or Markers in a Player's Specimen shall constitute a Doping Offense under Article C.1, unless the Player establishes that such presence is pursuant to a therapeutic use exemption granted in accordance with Article E.*

...

#### **L. Automatic Disqualification of Individual Results**

1. *A Doping Offense committed by a Player in connection with or arising out of an In-Competition test automatically leads to Disqualification of the individual result obtained by the Player involved in that Competition with all resulting consequences, including forfeiture of any medals, titles, computer ranking points and prize money (without deduction for tax) obtained in that Competition.*

...

#### **M. Sanctions on individuals**



1. *Disqualification of Results in Event During which a Doping Offense Occurs.*

...

- b) *If the Player establishes that he bears No Fault or Negligence for the Doping Offense, the Player's individual results obtained in the Competition(s) other than the Competition in relation to which the Doping Offense occurred shall not be Disqualified unless the ATP establishes that the Player's results in the other Competition(s) were likely to have been affected by the Player's Doping Offense.*

2. *Imposition of Ineligibility for Prohibited Substances and Prohibited Methods.*

*Except where the substance at issue is one of the specified substances identified in Article M.3, the period of ineligibility imposed for a violation of Article C.1 (presence of Prohibited Substance or its Metabolites or Markers), Article C.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article C.6 (Possession of Prohibited Substances and/or Prohibited Method(s)) shall be:*

*First offense: Two (2) years' Ineligibility*  
*Second offense: Lifetime Ineligibility*

*However, the Participant shall have the opportunity in each case, before a period of ineligibility is imposed, to establish the basis for eliminating or reducing this sanction as provided in Article M.5.*

...

5) *Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances.*

- a) *If the Player establishes in an individual case involving a Doping Offense under Article C.1 (presence of Prohibited Substance or its Metabolites or Markers) or Article C.2 (Use of a Prohibited Substance or Prohibited Method) that he bears No Fault or Negligence for the offense, the otherwise applicable period of ineligibility shall be eliminated. When the case involves a Doping Offense under Article C.1*

*(presence of a Prohibited Substance or its Metabolites or Markers), the Player must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event that this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the Doping Offense shall not be considered a Doping Offense for the limited purpose of determining the period of Ineligibility for multiple Doping Offenses under Articles M.2, M.3 and M.6.*

- b) *This Article M.5.b applies only to Doping Offenses involving Article C.1 (presence of Prohibited Substance or its Metabolites or Markers), Article C.2 (Use of a Prohibited Substance or Prohibited Method), Article C.3 (failing to submit to Sample collection), Article C.8 (administration of a Prohibited Substance or Prohibited Method) or Article C.9 (refusing or failing to abide by any other provision of this Program). If a Player establishes in an individual case involving such offenses that he bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, but the reduced period of Ineligibility may not be less than one-half of the minimum period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this section may be no less than eight years. When the Doping Offense involves Article C.1 (presence of Prohibited Substance or its Markers or Metabolites), the Player must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.*

...

7. *Disqualification of Results in Competitions Subsequent to Sample Collection.*

*In addition to the automatic Disqualification, pursuant to Article L. of the results in the Competition that produced the positive Sample, all other competitive results obtained from the date a positive Sample was collected (whether In-*

*Competition or Out-of-Competition) or other Doping Offense occurred through to the date of commencement of any Ineligibility period shall, unless fairness requires otherwise, be Disqualified with all of the resulting consequences, including forfeiture of any medals, titles, computer ranking points and prize money (without deduction for tax).*

8. *Commencement of Consequences.*

*Any Consequences set out in the decision of an Anti-Doping Tribunal shall come into force and effect on the date that the decision is issued, save that:*

- a) *For purposes of forfeiture of computer ranking points, the decision shall come into effect at midnight on the Sunday nearest to the date that the decision is issued.*
- b) *The Anti-Doping Tribunal shall have discretion, where fairness requires, to establish an instalment plan for repayment of any prize money forfeited pursuant to Articles L and /or M of this Program. For the avoidance of doubt, the schedule of payments pursuant to such plan may extend beyond any period of Ineligibility imposed upon the Player.*
- c) *The period of Ineligibility shall start on the date that the decision is issued, provided that:*
  - i) *any period during which the Player demonstrates he has voluntarily foregone participation in Competitions shall be credited against the total period of Ineligibility to be served, and*
  - ii) *where required by fairness, such as in the case of delays in the hearing process or other aspects of Doping Control not attributable to the Player, the Anti-Doping Tribunal may start the period of Ineligibility at an earlier date commencing as early as the date of Sample collection.*

...

## **APPENDIX ONE**

### **DEFINITIONS**

**No Fault or Negligence.** The Player establishing 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 the Prohibited Substance or Prohibited Method.

**No Significant Fault or Negligence.** The Player 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 Doping Offense.

## **APPENDIX THREE**

### **THE 2005 PROHIBITED LIST**

**Valid 1 January 2005**

**The use of any drug should be limited to medically justified indications.**

#### **SUBSTANCES AND METHODS PROHIBITED AT ALL TIMES (IN- AND OUT-OF-COMPETITION)**

##### **PROHIBITED SUBSTANCES**

##### **S5 DIURETICS AND OTHER MASKING AGENTS**

Diuretics and other masking agents are prohibited.

Masking agents include but are not limited to:

Diuretics\*, epitestosterone, probenecid, alpha-reductase inhibitors (e.g. finasteride, dutasteride), plasma expanders (e.g. albumin, dextran, hydroxyethyl starch).

Diuretics include:

Acetazolamide, amiloride, bumetanide, canrenone, chlortalidone, etacrynic acid, furosemide, indapamide, metolazone, spironolactone, thiazides (e.g.

bendroflumethiazide, chlorothiazide, hydrochlorothiazide), triamterene, and other substances with a similar chemical structure or similar biological effect(s).

\* A therapeutic Use Exemption is not valid if an Athlete's urine contains a diuretic in association with threshold or sub-threshold levels of a Prohibited Substance(s). . . .

## REASONS

### Application of Equitable Estoppel to the facts of this case

46. The first submission by the Player was that the principle of equitable estoppel as applied in the second decision in *Ulihrach v. ATP* dated 7 July 2003 should be applied. The principles of estoppel were first set out in the Court of Arbitration for Sport {"CAS"} jurisprudence in *IAAF v. USATF* (CAS 2002/O/401), a decision of the Ordinary Division of the CAS dated 10 January 2003.
47. Equitable estoppel is to be applied as a matter of fairness and good conscience to estoppe the person whose conduct has brought the situation about from asserting their legal rights against another party who may have been misled or affected by that conduct. In order for the estoppel principle to arise, the Player must establish that the source of the prohibited substance in his urine sample was a prescription provided to him by a tournament physician.
48. The Player testified that he was treated at the Acapulco tournament for a sore throat and symptoms of a cold or influenza. He testified that he received a prescription from a tournament physician as part of his treatment. The thrust of this testimony is to implicate the ATP in the analytical result obtained by the Lab in a fashion similar to that of the *Ulihrach* case.<sup>7</sup> In that case it was held that a player's analytical results for low levels of nandrolone were caused by a contaminated supplement supplied by ATP trainers and therefore the ATP was equitably estopped from pursuing implications against the player and having the benefit of the

---

<sup>7</sup> There were two decisions the first ATP Anti-Doping Tribunal Decision was issued on 1 May of 2003. It was reopened in July of 2003 based upon new evidence involving the ATP trainers and the use of contaminated supplements. It is the decision of the re-opening hearing dated 8 July 2003 that is referred to here.

principle of strict liability in the application of its Anti-Doping Rules. The finding of such a similarity between the two cases would make it possible to apply equitable estoppel and prevent the ATP from having the benefit of the strict liability principle otherwise applicable in the application of the Anti-Doping Rules. If the ATP could not prove its case otherwise than with the benefit of strict liability then the Player would have to be exonerated.

49. The Player testified that he was treated by a tournament physician and given a prescription. There were only two such persons at the tournament. Both Dr. Mercader and Dr. Chinchila have stated that they did not treat the Player nor did they prescribe any medication for the Player. There is a direct conflict in the evidence between the witnesses. The conflict raises a credibility issue between the Player and the doctors that this Tribunal must resolve. One version of the facts must be incorrect.
50. The log of the tournament physicians<sup>8</sup> reveals the treatment of one player on Friday 18 February for *faringitis*. A further four players were treated on the 19 February for similar symptoms and a fifth player was treated for *sx gripal*, which is presumably like the *faringitis*. The log on 20 February, the day the Player testified he was treated, shows three separate treatments for *faringitis* and one treatment for *sx gripal*. It is undisputed that none of the existing entries in the log for the 20 February are related to the Player at arbitration. The log does establish that players at the tournament in Mexico were encountering sore throats and influenza-like symptoms. Thus, the Player can be taken to be credible when he says he had a sore throat and influenza like symptoms following his arrival on 18 February. The Player has also established through Ex. #17 & 19 that the log was incomplete with respect to the treatment of Jaun Monaco. The difficult evidentiary problem is the direct conflict in the testimony of the Player and of the two doctors.
51. The Player testified at the hearing that he knows Dr. Mercader and says he did not treat him. The witness statement of the doctor is in agreement with that testimony in that the Player said Dr. Mercader did not treat him. It is known that only Dr. Chinchila was present at the tournament medical facility on the Sunday afternoon when the Player alleges a tournament

---

<sup>8</sup> Part of Exhibit #15. The log had to be compiled removing the names of those who were treated for privacy and personal medical information reasons and was done on the direction of the Chairman of the Tribunal. Therefore, the actual log has not been filed as an exhibit but a redacted compilation of it.

physician saw him. Dr. Mercader has known the Player since 1997. If the Player had been at the tournament medical facility; then Dr. Mercader would have remembered his being there. In his statement the doctor says *had he appeared for treatment at the Acapulco tournament, I would have recognised him at once*. Therefore, the evidence unequivocally establishes that Dr. Mercader was not present when the alleged treatment was given. Therefore, the conflict in testimony becomes one of credibility in the statement of Dr. Chinchila and the Player.

52. Dr. Chinchila in his statement denied treating the Player at the tournament. In his telephone evidence he stated that *the Player is familiar to me and I do not need to consult the medical log to testify that I did not treat him*. When asked in cross-examination if he perhaps treated him but the entry is not in the log he replied: *it would be an honour to treat him*. The implication is that had there been treatment of the Player, Dr. Chinchila would have remembered it because of the personal regard in which he held the Player. The conclusion that must be drawn from Dr. Chinchila's testimony by the Tribunal is that the log is correct at least to the extent that it makes no reference to the treatment of the Player and the Doctor's memory is accurate. There was no treatment of the Player by either of the two tournament physicians.

53. Analysis of other facts can be made to see if other evidence supports the foregoing conclusion. The Player testified that he received a prescription from a tournament physician. In contradiction to that proposition and his testimony are the following points:

- a. The medical facility at the tournament keeps on hand certain medications to be used for common player health problems that would include medications for colds, flu and sore throats. Therefore, it would be unnecessary for a tournament doctor to write a prescription for a player suffering from a common health problem.
- b. The medical log reveals that from the 18 February to 20 February 2005 8 players were treated for *faringitis* and 2 for *sx gripal* and none of them received a prescription. They were treated with antibiotics, vitamin C and aspirins.
- c. Dr. Chinchila stated that diuretics such as HCT are not used in the treatment of sore throats, colds, and influenza. Indeed, the evidence before the Tribunal is that such a prescription would be very

dangerous to the health of a player because of the hot and humid conditions in Acapulco. The natural dehydration that results from such a climate would be intensified greatly by a product containing HCT.

- d.* The prescription itself has not been produced. In Mexico a prescription is not required for a substance containing HCT and even if one were written for HCT or a product that contained HCT, the dispensing pharmacy would not necessarily have to keep a record. Therefore the prescription would likely have been left with the person buying the medicine. One would imagine that the prescription would have been handed to the person with the drugs and the change. The other alternative would be that the prescription was left at the pharmacy and could be retrieved. However the pharmacy at which the alleged prescription was filled is unknown.
- e.* The person alleged to have gone and made the purchase for the medicine has not been produced. Therefore this aspect of the Player and the coach's evidence cannot be corroborated.
- f.* Furthermore, if the Player is as careful as he claims he would have kept the boxes the pills came in to show to his own personal trainer and coach. In addition, he would have found out from the tournament physician what he was taking and perhaps even checked with his own personal physician before taking the pills. He also stated that he always carried the ATP wallet card on doping substances and made no effort to check it.
- g.* Additionally, the medication obtained at the Mexican pharmacy would likely have contained information in the Player's own language. If the Player is as careful as he claims, he would have read the outside of the box.
- h.* The doping control officer Julian Cavoza and his assistant Shane Woten both deny that the Player told them at the time of the sample collection that a tournament physician had prescribed medication for him. Of course, at the time he spoke to the control officers he would have had no need to refer to the tournament physician in any discussions with them because he did not know of the events which would follow.
- i.* Aside from having no recollection of point *h.*, the doping control officers would not tell any person completing the doping control form that they do not have to include something on the form. That is contrary to their training, which is to tell athletes to disclose



everything even when the player is uncertain of the identity of medication. It is also possible for a player to state that a tournament physician prescribed medication without specifically mentioning the name of the medicine.

54. The Tribunal finds that there is considerable supporting evidence to corroborate the statement of Dr. Chinchila that he did not treat the Player on 20 February. The Player also agrees that Dr. Mercader did not treat him. The evidence of Dr. Chinchila is preferred over that of the Player because of all of the supporting corroborative evidence. While the Player's reputation as a professional tennis player is at stake if his testimony is found to be false, the doctors and doping control officers have comparatively little to gain from lying about the events that occurred in Mexico thereby lending further support to the accuracy of Dr. Chinchila's testimony. Therefore, for all of the foregoing reasons the Tribunal finds that none of the tournament physicians attended to the Player. On that finding of fact there could be no possibility that a prescription was issued by either of the tournament physicians. The factual basis is then non-existent for a connection of the ATP to some substance ingested by the Player that may have caused the analytical result.

55. Even if one were to accept the Player's entire version of the events any versions of the possibility facts supporting equitable estoppel do not arise. First, the tournament physicians are not employees or agents of the ATP. Even if they were, a prescription filled offsite by a pharmacy does not implicate the ATP in causing the positive analytical result. The ATP is not responsible for an offsite pharmacy and what it supplies to the Player. That proposition is unchanged even where a tournament hostess acts as the courier to deliver the prescription and carry back the medication. Therefore, even on the Player's own testimony the circumstances giving rise to the positive analytical reading do not mean that the ATP has contributed to the violation of its own rules as was established, at the time, to be the case in the *Uhlirach*, decision.

56. On the foregoing findings of facts there is no factual foundation upon which to construct the legal theory of equitable estoppel. Therefore, we conclude that the first defense of the Player to the allegations of the ATP is without foundation in fact and therefore in law.

Existence of a Doping Offense

57. The Tribunal based on the facts it has found must conclude that as a matter of law there can be no application of the principle of estoppel to this case. Therefore, the ordinary application of the Anti-Doping Rules applies as does the principle of strict liability. The agreed upon stipulations indicate that there is no dispute about the manner and method of taking the urine sample and the shipment of the sample to the Lab. Therefore, there are no issues in respect of the collection or chain of custody of the sample. It is further agreed that the sample analyzed by the Lab was that of the Player. The Lab analysis and quantification of its analytical results is by Dr. Ayotte's sworn statement, accepted without cross-examination, undisputed as to the finding that the sample contained the Prohibited Substance HCT. Based upon all of the jointly agreed stipulations and Professor's James expert report, the Player is found to have had a Prohibited Substance within his body. Therefore, a Doping Offense has been established and occurred under Anti-Doping Rule C. 1. It is so found by this Tribunal.

58. The Doping Offense that is found to have been committed occurred pursuant to an In-Competition test. By Anti-Doping Rule L. 1. there must be an automatic Disqualification of the individual result obtained by the Player at the "Abierto Mexicano de Tenis" tournament. The Player must forfeit any medals, titles, computer ranking points and prize money (without deduction for tax) obtained at that tournament.

Elimination or Reduction of Sanction by way of Exceptional Circumstances

59. The second defense of the Player centred upon the application of Anti-Doping Rules M. 5. a. and b. Rule M. 5. a. is the no fault or negligence provision that permits the otherwise applicable period of ineligibility to be eliminated. Rule M. 5. b. is the no significant fault or negligence provision which permits the reduction of the period of ineligibility to be not less than one half of what it would otherwise have been, which in this case would be one year.

60. Rule M. 5. a. requires before its application may be utilised that: *the Player must also establish how the Prohibited Substance entered his or her system*

*in order to have the period of Ineligibility eliminated.* Rule M. 5. b. requires before its application may be utilised that: *When the Doping Offense involved Article C. 1. ( ... ), the Player must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.* The Tribunal has no evidence indicating how the prohibited substance entered the Player's system. There is a letter from Dr. Andrew Kioman, Head of Research and Development at the Drug Control Centre of King's College London to Professor James listing six items that the Player was using which were tested for the presence of HCT. The 1 July 2005 letter reports that the listed products were tested using gas chromatography-mass spectrometry and no HCT was detected in the products supplied.

61. It is the submission of the Player's counsel that the adverse analytical positive result must have been caused by the medicine obtained through a pharmacy with a prescription provided by a tournament physician. The Tribunal has found that none of these facts have been proven. However, even if they had been proven the type of product or substance used is totally unknown. Thus, there is no way of evaluating if the medication alleged to have been used was the method by which the prohibited substance entered the Player's system. Therefore, the threshold for use of either of the exceptional circumstances provisions in the Anti-Doping Rules in M. 5. a. or b. has not been established. In this case the source of the substance and how it entered the Player's system is purely one of speculation, conjecture and possible fantasy. The necessary condition precedent for the application of these exceptional circumstances provision is completely absent in this case.
62. Regardless of the previous paragraphs in which it was concluded that the necessary threshold condition precedent has not been established the Tribunal may also dismiss the use of the exceptional circumstances rules on the facts in this case. The Player is at fault even on his own version of the events that transpired.
63. When asked in cross-examination if he received pills or a liquid in bottles or boxes he answered hesitantly and only after much explanation not relevant to the question asked and then finally replied that there were two boxes of pills. He did not ask the alleged attending physician what he had been prescribed and stated he could not read the handwriting on the

prescription. At the time the alleged courier hostess of the tournament handed him the bag with the medicines in it he took the contents opened them and consumed them. He testified that he did not read the label despite the fact that it most likely would have contained information in his own language. He never compared the contents description on the boxes or containers to his wallet card from the ATP that he states he always carried on his person as did his team members. He never asked his personal physician to verify the contents of the medicine. He did not retain the boxes or the pill containers and their enclosed leaflets. He consumed the product on the Sunday and then again on the Monday. He had time to reflect and have his team examine what he was taking. He did not ask them to check out the medicine.

64. Finally, the sample provided is reported by the Lab as having a normal density and is the same for the B confirmation test. Such results would be absolutely in contradiction with the use of HCT on the same day as the sample and the day before. The Player's expert, Professor Solis, came to this conclusion in his expert report. Such a medical conclusion raises the possibility that he did not take any HCT on the day of the match or the day before otherwise he would have had a diluted urine sample, which he did not have. Therefore, the scientific evidence when used in conjunction with medical science raises the question when was the administration and that it could not have been the alleged prescription medicine.

65. All of the foregoing circumstances lead to the conclusion that the facts are not within the definition of No Fault or Negligence nor No Significant Fault or Negligence. The definitions require the *exercise of utmost caution*. On the Player's own version of the events he did not demonstrate caution; let alone utmost caution, at the time of first ingestion or the subsequent day. Therefore, even on his own testimony the Player has not satisfied the necessary precondition for the use of the exceptional circumstances found in Rules M. 5. a. or b.

#### Proportionality and Technical breach of the Rules

66. The alternative argument of the Player is that the sanction if not reduced for any other reason ought to be so because of the principle of proportionality. The case of *Hipperdinger v. ATP* (CAS 2004/A/ 690) deals directly with

the point and is also an appeal of a decision of an ATP Anti-Doping Tribunal decision of 23 July 2004 to the CAS by the player. In the *Hipperdinger* case the Appeal Panel dealt with the subject of proportionality in an exhaustive fashion at paragraphs 82 to 90. The CAS decision concludes that with the implementation of the WADA Code the former multiplicity of anti-doping legal regimes has been altered by the harmonization brought about by WADA of both the legal framework and particularly the sanctions. The only possibility for modification of the sanction is through the exceptional circumstance provisions involving no fault or negligence and no significant fault or negligence. No other sanctions other than those in the WADA Code apply. The ATP has adopted the WADA Code. The Tribunal has already determined that the Player cannot claim to be without significant fault or negligence in this case. Therefore, there is no basis to apply the former doctrine of proportionality to this case.

67. The Panel in *Hipperdinger* goes on to indicate additional support for the abandonment of proportionality in the following terms. First, the Swiss Federal Supreme Court,<sup>9</sup> being the national court with jurisdiction over the CAS, ruled that the application of an ineligibility period of two years, without examining the proportionality of the sanction in an individual case, does not violate general principles of Swiss law, which includes proportionality. Second, the fixed sanction regime of the WADA Code serves the legitimate aim of harmonisation of doping penalties and complies with human rights and general legal principles even though proportionality is not examined in the individual case.

68. Based on the foregoing analysis of the *Hipperdinger* case, the Tribunal concludes that the doctrine of proportionality is no longer available in applying the ATP Anti-Doping Rules. Therefore, it declines to do so. The Tribunal having declined to examine exceptional circumstances, has no other choice but to apply the sanction as set out in the Anti-Doping Rules. That is the essence of the case of *Torri Edwards v. IAAF & USATF* (CAS 2004/OG/003).

69. A further aspect of the alternative argument of the Player in reducing the sanction cantered upon two ATP Anti-Doping Tribunal decisions in *Chella*, supra and *Coria*, supra where it was argued that the rulebook was not

---

<sup>9</sup> Decision dated 31 March 1999 in Re: *N. et al v. FINA* reported in the digest of CAS Awards, vol II 2002 at p. 775.

strictly applied and therefore it does not have to be strictly applied in this case. Those cases can no longer be a guide to the approach to sanctions because they preceded the adoption of the WADA Code. They are also distinguishable on the facts they were clear evidence of the causes of the analytical positive results. We do not have such evidence in this case.

70. The final alternative argument is based on the ATP Tribunal decision in *Oliver v. ATP*<sup>10</sup> and the submission that there was merely a technical breach of the rules. While such a statement was made in the *Oliver* decision, the decision was made prior to the WADA Code being implemented as the backbone of the ATP Anti-Doping Rules. That is one very important distinction between the *Oliver* case and this one because the WADA Code provides that the only way for reducing the two-year fixed sanction is by establishing exceptional circumstances of no fault or negligence or no significant fault or negligence.
71. Furthermore, in the *Oliver* decision the exact source of the HCT was known and proven as required when establishing technical breaches. In that context the quantity ingested could be established and some approximation of its effect on sporting performance could be made. The possibility that HCT was used to mask other drugs by cleansing the body through excessive urination was eliminated based on the evidence in *Oliver*. A similar statement cannot be made in the case for the Player here. It was on that base that the *Oliver* Anti-Doping Tribunal felt it could describe the breach as merely a technical one, which was inadvertent. (The WADA notions of fault had not yet come into the Anti-Doping Rules.) This case is very distinguishable from *Oliver* in that the source of the HCT is unknown. The story of explanation by the Player has not been found to be truthful and the possibility of use as a masking agent is a real one. We note in passing that Professor James, one of the Player's experts, ventured into the area of attesting as to the present case being one similar to *Oliver* at paragraph 26 of his statement. Our only comment on that aspect of the evidence is to note that in so doing the very learned and distinguished professor is venturing outside his area of expertise in rendering such a legal opinion.
72. The expert opinion of Professor Solis provides some scientific basis for attempting to assess the impact of the prohibited substance and its effect. However, in the absence of precise knowledge of the substance ingested

---

<sup>10</sup> An ATP Anti-Doping Tribunal decision dated 30 January 2004,

and knowledge as to the quantity of dosage, timing of the investigation and much other information, we conclude it is not possible to make the judgement of a technical breach in this case. Reference is made to the statement of Dr. Ayotte referred to in paragraph 17 of these reasons to arrive at this conclusion. The Tribunal finds that nothing can be deduced in these circumstances that would make it possible to say this case is in any way similar to that of *Oliver*. However, we do not have to make this conclusion as has already been noted because the legal regime under which *Oliver* was decided is very different than the regime under which this case is being decided.

73. For all of the foregoing reasons the submissions of the Player's counsel on the basis of proportionality or other technical reasons are rejected. There cannot be any such adjustment of the sanction for the reasons given above.

### The Appropriate Consequences

74. Rule M. 8. prescribes the consequences that flow from the Tribunal decision. The period of Ineligibility comes into effect normally on the date of the decision. In this case the Player has established under Rule M. 8. c. i. that he had voluntarily foregone participation in tennis from the 11 June 2005. Therefore, the period of Ineligibility is to commence on that date.

75. Rule M. 7. provides that in addition to the automatic disqualification of results at the competition where the sample was provided pursuant to Article L there will be disqualification of results in competitions subsequent to the sample collection competition.

76. The following table of those competition results subsequent to the sample collection competition was provided to the Tribunal at the hearing.

#### 2005 Singles Tournament Review

Guillermo Canas

Tournament	Tournament Date	Highest Round	Entry Points	Race Points	Qual. Points	GP Points	Prize Money
Acapulco	Mar. 7, 2005	Q	60	12			\$ 17,250
ATP Masters Series Indian Wells	Mar. 21, 2005	S	225	45			\$114,000
ATP Masters Series Miami	Apr. 11, 2005	R64	5	1			\$ 10,350

ATP Masters Series Monte Carlo	Apr. 18, 2005	R32	35	7	\$ 15,000
Barcelona	May 2, 2005	R16	25	5	\$ 11,750
ATP Masters Series Rome	May 9, 2005	R16	75	15	\$ 27,000
ATP Masters Series Hamburg	May 16, 2005	R32	35	7	\$ 15,000
World Team Championship	May 23, 2005	R5	0	0	\$ 55,645
Roland Garros	Jun. 6, 2005	Q	250	50	\$145,748
Halle	---	S	100	20	*\$ 39,050
Total for 2005			810	162	\$450,793
					* Already Collected
Total Not Collected					\$411,743

## 2005 Doubles Tournament Review

Guillermo Canas

Tournament	Tournament Date	Highest Round	Entry Points	GP Points	Qual. Points	Prize Money
ARG v. CZE WG 1st RD DC	Mar. 4, 2005	R3				
ATP Masters Series Indian Wells	Mar. 7, 2005	R32	5			\$ 1,750
ATP Masters Series Miami	Mar. 21, 2005	R16	75			\$ 5,450
ATP Masters Series Monte Carlo	Apr. 11, 2005	R32	5			\$ 1,750
Barcelona	Apr. 18, 2005	R32	5			\$ 1,125
World Team Championship	May 16, 2005	F	0			
Halle	Jun. 6, 2005	Q	5			*\$ 1,000
Total for 2005			95			\$ 11,075
						* Already Collected
Total Not Collected						\$ 10,075
TOTAL OUTSTANDING						\$421,818

77. Rule M. 7. provides that unless fairness requires otherwise all the foregoing results be disqualified with all the resulting consequences, including forfeiture of any medals, titles, computer ranking points and prize money (without deduction for tax).

78. The Player provided a urine specimen at Roland Garros. It is now known that the analytical result was negative. Therefore, the Tribunal has determined that fairness ought to dictate that the results at Roland Garros should not be disqualified. It so orders pursuant to its power to do so under Rule M.7. That leaves the Player with prize money less the amount already collected to be repaid from Singles Tournaments in the amount of \$265,995



and Entry Points lost of 560. For the Doubles Tournaments the data is unchanged from that set out in the table.

79. Less monies already collected and the monies ordered to be repaid within 7 days of the date herein, under Rule L. 1. the Player has to repay a total of \$276,070 under Rule M. 7. The Tribunal has the discretion under Rule M. 8. b. to establish an instalment plan for repayment of prize money forfeited pursuant to Rule M. We have determined that a fair and appropriate repayment plan ought to commence three months from the date of this award and to be repaid monthly continuously for 24 months thereby requiring a monthly payment of \$ 11,503. Therefore, the period of repayment will extend beyond the period of Ineligibility for five months. Such extension beyond the period of Ineligibility is permitted under Rule. M. 8. b.

80. Should the Player fail to make any payment in a timely fashion under this instalment plan for repayment then interest will be applicable from the date of the missed payment forward at 5% on the then outstanding balance. Interest will be added to each and every future payment thereafter. Reinstatement under Rule M. 10. and paragraph *d* in particular can only take place upon fulfillment of all outstanding payments to the date of the expiry of the period of ineligibility.

---

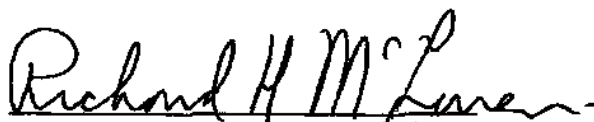
**DECISION**

---

The Tribunal makes the following orders based upon the foregoing grounds and discussion in the above opinion.

1. A Doping Offense occurred under Rule C. 1. as a result of an In-Competition test.
2. Rule L.1. requires the Disqualification of the individual results obtained at the "Abierto Mexicano de Tenis" tournament in Acapulco, Mexico. The consequence of that order requires the forfeiture of any medals, titles, computer ranking points and prize money obtained in that tournament. The tournament prize money is to be returned to the ATP without deduction for tax payable within 7 days of the date herein under Rule M. 8. b.
3. Rule M. 2. requires a two-year period of Ineligibility for a first offense violation of Article C. 1. The two-year period of Ineligibility is to take effect from 11 June 2005 under Rule M. 8. c. i.
4. By Rule M. 7 the Competition Results as set out in the table herein in the competitions since the sample competition are all Disqualified except because of fairness the results obtained at Roland Garros.
5. By Rule M. 8. b. the Tribunal orders the repayment of monies to commence three months from the date herein and to continue in equal instalments for a period of 24 months Reinstatement under Rule M.10 to take place only upon payment of all instalments up to the expiry of the period of Ineligibility by Order #3 above.

DATED THIS <sup>4</sup>7 DAY of AUGUST 2005 SIGNED in COUNTERPARTS.

  
Prof. Richard H. McLaren, C.Arb  
(Chairman)  
Barrister and Solicitor

**SIGNED AT:  
London, Ontario, CANADA**

---

Dr. Arturo Martí  
Rio Piedras, PUERTO RICO

---

Dr. Peter van Beek  
Elst, the NETHERLANDS

---

**DECISION**

---

The Tribunal makes the following orders based upon the foregoing grounds and discussion in the above opinion.

1. A Doping Offense occurred under Rule C. 1. as a result of an In-Competition test.
2. Rule L.1. requires the Disqualification of the individual results obtained at the "Abierto Mexicano de Tenis" tournament in Acapulco, Mexico. The consequence of that order requires the forfeiture of any medals, titles, computer ranking points and prize money obtained in that tournament. The tournament prize money is to be returned to the ATP without deduction for tax and is payable within 7 days of the date herein under Rule M. 8. b.
3. Rule M. 2. requires a two-year period of Ineligibility for a first offense violation of Article C. 1. The two-year period of Ineligibility is to take effect from 11 June 2005 under Rule M. 8. c. i.
4. By Rule M. 7 the Competition Results as set out in the table herein in the competitions since the sample competition are all Disqualified except because of fairness the results obtained at Roland Garros.
5. By Rule M. 8. b. the Tribunal orders the repayment of monies to commence three months from the date herein and to continue in equal instalments for a period of 24 months. Reinstatement under Rule M.10 to take place only upon payment of all instalments up to the expiry of the period of Ineligibility by Order #3 above.

DATED THIS 7<sup>th</sup> DAY of AUGUST 2005 SIGNED in COUNTERPARTS.

---

Prof. Richard H. McLaren, C.Arb  
(Chairman)  
Barrister and Solicitor  
London, Ontario, CANADA



---

Dr. Arturo Martí  
SIGNED AT: Rio Piedras, PUERTO RICO

---

Dr. Peter van Beek  
Elst, the NETHERLANDS

---

**DECISION**

---

The Tribunal makes the following orders based upon the foregoing grounds and discussion in the above opinion.

1. A Doping Offense occurred under Rule C. 1. as a result of an In-Competition test.
2. Rule L.1. requires the Disqualification of the individual results obtained at the "Abierto Mexicano de Tenis" tournament in Acapulco, Mexico. The consequence of that order requires the forfeiture of any medals, titles, computer ranking points and prize money obtained in that tournament. The tournament prize money is to be returned to the ATP without deduction for tax and is payable within 7 days of the date herein under Rule M. 8. b.
3. Rule M. 2. requires a two-year period of Ineligibility for a first offense violation of Article C. 1. The two-year period of Ineligibility is to take effect from 11 June 2005 under Rule M. 8. c. i.
4. By Rule M. 7 the Competition Results as set out in the table herein in the competitions since the sample competition are all Disqualified except because of fairness the results obtained at Roland Garros.
5. By Rule M. 8. b. the Tribunal orders the repayment of monies to commence three months from the date herein and to continue in equal instalments for a period of 24 months. Reinstatement under Rule M.10 to take place only upon payment of all instalments up to the expiry of the period of Ineligibility by Order #3 above.

DATED THIS 7<sup>th</sup> DAY of AUGUST 2005. SIGNED in COUNTERPARTS.

---

Prof. Richard H. McLaren, C.Arb  
(Chairman)  
Barrister and Solicitor  
London, Ontario, CANADA



---

Dr. Peter van Beek  
SIGNED at ELST, NETHERLANDS

---

Dr. Arturo Martí  
SIGNED AT 'Rio Piedras, PUERTO RICO