

**THE ATP TOUR ANTI-DOPING TRIBUNAL  
APPEAL OF MELLE VAN GEMERDEN**

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**OPINION**

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An ATP Tour Anti-Doping Tribunal {"Tribunal"} consisting of Prof. Richard H. McLaren, Esq., Chairman, Dr. Arturo Marti, technical expert member with experience in anti-doping and Dr. Gary Wadler MD, medical expert member, was formed by Richard Ings, the **ATP Administrator of Rules**, following an ATP **Review Board** {"RB"} who had determined that Melle Van Gemerden {"Player"} committed a Doping Offense under the Tennis Anti-Doping Program 2004 {"Anti-Doping Rules"}. The Anti-Doping Rules, found on p. 87 – 122 of the ATP 2004 Official Rulebook {"Rules"}, are designed to maintain the integrity of men's professional tennis by protecting the health and rights of all professional tennis players. The Rules include: (i) the procedure for in and out-of-competition doping tests; (ii) the guidelines for the imposition of penalties for Doping Offenses; (iii) information about support and assistance for players when applicable.

Piet-Hein Boekel, Esq. represented the Player.

John MacLennan, Esq. represented the ATP Tour {the "Tour" or the "ATP"}

On 5 May 2005, the Player elected to admit that he had committed a Doping Offense, under Rule K. 1. c. of the Anti-Doping Rules. The effect of that admission, made by his counsel during a conference telephone call on 5 May 2005, was that the Player accedes to the consequences specified in the ATP notice of 6 April 2005, under the Anti-Doping Rules. That notice indicated that, depending on the circumstances surrounding the breach, a possible sanction of up to two years ineligibility from any ATP (or its related organizations) authorized and organized events or activities, and any other sanctions provided for in the Anti-Doping Rules, could be imposed.

The Player's admission at the outset of the proceedings meant that a hearing before the full Tribunal was not required. Procedural Order No. 1 was issued to outline the method to be followed by the Tribunal. After consultation with the other members of the Tribunal, the Chairman now issues the decision herein.

## **BACKGROUND FACTS**

1. The Player is a young professional tennis player from the Netherlands. On 28 February 2004 the Player signed the consent form required by Rule B. 1. for the 2004 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.
2. The ATP 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 tournament organizations and players. Pursuant to this role, the ATP has adopted rules of conduct for its members.
3. The Player provided a urine sample pursuant to the Anti-Doping Rules during an ATP sanctioned challenger tournament in Pheonix, Mauritius on 2 December 2004. The sample was collected in accordance with the International Standard and Rule F. 5. of the ATP Anti-Doping Rules.
4. The urine sample provided was analyzed by a World Anti-Doping Agency {WADA} accredited laboratory, the Laboratoire de Controle du Dopage INRS Institut Armand-Frappier {"the Lab"}, located in Pointe Claire, Quebec, Canada, The Lab analytical result, contained in the Doping Control Report, states that the "A" sample of the Player indicated the presence of cannabis metabolite. This substance is listed in s.3 of the Anti-Doping Rules found in Appendix 3 (*The 2004 Prohibited List*). The "B" sample analysis confirmed the existence of the **Prohibited Substance**.
5. As required by Rule K. 1. a., the **ATP Administrator of Rules** notified the Player that he appeared to have committed a **Doping Offense** on 6 April 2005. He was advised that he could be subject to a maximum two-year period of ineligibility unless a lesser sanction was applied because of the Specified Substances or Exceptional Circumstances provisions. The Player exercised his right under the rules to have a hearing and subsequently the **ATP Administrator of Rules** formed the Tribunal.

6. The appointment of a Tribunal was confirmed by correspondence dated 28 April 2005. By signing the amended Procedural Order No. 1 on 5 May 2005, the Player confirmed the appointment of the Tribunal and agreed that he had no objection to the composition or the jurisdiction of the Tribunal. The ATP likewise confirmed the appointment and composition of the Tribunal by signing Procedural Order No. 1.
7. The Player's statement was to the effect that he had been out with friends at an Amsterdam disco during a period in which he was having *serious personal (family) problems*. He states that he had had a few too many drinks and took *two zips of somebody else's joint*. The use of marijuana is not illegal in the Netherlands. This was an isolated incident that he never intends to repeat and was caused by a momentary loss of his control and self-discipline. He apologizes for his indiscretion and indicates that it has already resulted in the permanent loss of his sponsor. He also states that he had no intention of disobeying the Anti-Doping Rules of tennis and had no idea of the length of time that the substance can remain within the body. He very much regrets the embarrassment this incident has brought upon the ATP and he does not intend to repeat his misconduct.
8. The ATP submits that it has no evidence to refute the evidentiary statement of the Player as to how the prohibited substance entered his system. Further the ATP has no evidence to rebut the player's statement that the substance was not intended to improve his sports performance.
9. It was agreed between the counsels for the parties that the Player had not competed in any ATP Tour (or its related organizations) authorized and organized events or activities since receiving the notification of the commission of a Doping Offense on 7 March 2005. Therefore, at the time of writing the period of voluntary **Ineligibility** amounts to two months and one week.

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

**B. Covered Players and Events**

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2. 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 who has an ATP

ranking (a “**Player**”) shall be bound by and shall comply with all of the provisions of this Program ... 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.*

...

### K. Due Process

1. **Commencing proceedings before the Anti-Doping Tribunal**

...

*c. The **Participant** shall be entitled at any stage to admit that he has committed the Doping Offense(s) specified in the Notice and to accede to the **Consequences** specified in the Notice. In such circumstances, a hearing before the **Anti-Doping Tribunal** shall not be required. Instead, the Chairman of the **Anti-Doping Tribunal** shall promptly issue a decision confirming the commission of the Doping Offense(s) specified in the Notice, and ordering the imposition of such **Consequences** (including, where this Program specifies a range of possible **Consequences**, specifying what the **Consequences** should be in that particular case). Where a range of possible **Consequences** is specified in the Program, written submissions may be made by or on behalf of the **Participant** in mitigation at the time of admission of the Doping Offense, and the Chairman of the **Anti-Doping Tribunal** shall be*

*entitled to take those submissions, as well as any rebuttal submitted by the ATP, into account in determining what **Consequences** should apply.*

...

## **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**

### **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 Methods(s)**) shall be:*

*First Offence: Two (2) years' Ineligibility.*

*Second Offence: Lifetime Ineligibility.*

...

### **3. Lesser Sanction for Specified Substances.**

*The **Prohibited List** may identify specified substances that are particularly susceptible to unintentional anti-doping rules violations because of their general availability in medicinal products or*

*that are less likely to be successfully abused as doping agents (a “**Specified Substance**”). Where a player can establish that the **Use** of such a Specified Substance was not intended to enhance sport performance, the period of **Ineligibility** found in Article M.2 shall be replaced with the following:*

*First offense: At a minimum, a warning and reprimand and no period of **Ineligibility** from future Events, and at a maximum, one (1) year’s **Ineligibility**.*

...

## **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 the **Anti-Doping Tribunal** shall come into force and effect on the date that the decision is issued, save that:

...

*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 participating in Competitions shall be credited against the total period of **Ineligibility** to be served; and*

## APPENDIX THREE

### THE 2004 PROHIBITED LIST

Valid 1<sup>st</sup> January 2004  
(Updated 25 November 2003)

<b>SUBSTANCES AND METHODS PROHIBITED IN-COMPETITION</b>
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#### PROHIBITED SUBSTANCES

##### S.3 CANNABINOIDS

Cannabinoids (e.g. hashish, marijuana) are prohibited

<b>SPECIFIED SUBSTANCES</b>
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“Specified Substances” are listed below:

Stimulants: ephedrine, L-methylamphetamine, methylephedrine.  
Cannabinoids.

...

#### **REASONS**

11. A **Doping Offense** has been established under Anti-Doping Rule C. 1 by virtue of the admission made pursuant to Rule K. 1. c. I so find.
12. The Player committed a **Doping Offense** pursuant to an **In-Competition** test. Under Rule L. 1. there is an automatic **Disqualification** of the

individual result obtained by the Player in that **Competition**, with the resulting consequence of forfeiture of any medals, titles, computer ranking points and prize money obtained in the **Competition**. It is found that the automatic **Disqualification** of the individual results applies in this case.

13. The finding of proof of a first **Doping Offense**, under Rule M. 2, leads to a period of **Ineligibility** up to a maximum of two years. That period may be eliminated or reduced depending upon the application of Rule M. 3, dealing with **Specified Substances**. Cannabinoids are a **Prohibited Substance** that are listed in Appendix 3 (*The 2004 Prohibited List*) at S. 3 in the Anti-Doping Rules and is stipulated as a Specified Substance under the same Appendix. Under Rule M. 3, the sanction for a first offense is at a minimum a warning and reprimand, and at a maximum one (1) year's **Ineligibility**.
14. Rule M.3 institutes a lesser sanction when a player establishes that their use of the substance "*was not intended to enhance sports performance*". There is no evidence of an intention to enhance performance. The circumstances of the isolated use of the substance would suggest, by that fact alone, that there was no intention to enhance performance. Therefore, I find that the use of the cannabis was not intended to enhance performance.
15. The Player accepts the responsibility imposed upon him by Rule C. 1. He has no history of Anti-Doping Rule violations. He admits that his actions were careless, resulting from a momentary lapse of judgement. His misconduct is of a very limited nature and duration, and occurred in a country where the use of cannabis is not against the law. His conduct was of a lesser nature than that of the athlete in the case of *Coutelet v. ATP*, a decision by Chairman Fortier on 10 August 2004. That case involved continuing conduct, albeit in the context of addiction and attempting to withdraw from that addiction.
16. The Player has not attempted to maintain innocence in the face of evidence to the contrary and has not forced the ATP to pursue his case to expensive lengths. In the *Coutelet* case, *supra*, the sanction imposed for the use of cannabis was two months. The circumstances in this case represent a less severe breach of the Anti-Doping Rules.
17. Under Rule M. 8. c. (i), the time that the Player demonstrates he has



voluntarily foregone participation in Competitions is to be credited against any period of **Ineligibility** required to be served. The Tribunal finds that, given the fact that he has not competed since receiving notice of the doping infraction on 7 March 2005, he has *de facto* served more than a two-month voluntary suspension from competition. In the circumstances where there is no intent to commit a rule infraction and with forthright disclosure in a situation that involves a momentary aberration in conduct, the period of foregone voluntary participation in Competitions served to date is all that is required as a period of **Ineligibility**. Therefore, the Tribunal finds that the time voluntarily served is to be the period of **Ineligibility** set by this decision. The period of **Ineligibility** is to cease commencing the day following the issuance of this decision.

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**DECISION**

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

1. The Player, under Rule K. 1. c., admitted a First **Doping Offense** thereby establishing that a **Doping Offense** occurred as defined in Rule C 1. The **Doping Offense** involved the use of the **Specified Substance** cannabinoids, referred to in S. 3 of Appendix Three "*The 2004 Prohibited List*".
2. Rule L. 1. disqualifies the results obtained at the tournament in Pheonix, Mauritius on 2 December 2004. Any medals, titles, computer ranking points and prize money (without reduction for tax) obtained at the **Competition** are forfeited. The commencement of the foregoing Consequences is to be effective in accordance with Rule M. 8.
3. Under Rule M. 3. the period of **Ineligibility** otherwise applicable is determined to be the period of voluntarily foregoing participation in **Competitions**. In accordance with Rule M. 8. c. (i) this **Ineligibility** shall terminate on the day following the date herein.

DATED THIS 16<sup>th</sup> DAY of MAY 2005.

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Prof. Richard H. McLaren, C.Arb  
(Chairman)  
ATP Tour Anti-Doping Tribunal  
Barrister and Solicitor

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