

ATP TOUR ANTI-DOPING TRIBUNAL APPEAL OF TODD PERRY

O P I N I O N

An ATP Tour Anti-Doping Tribunal {"Tribunal"} composed of Prof. Richard H. McLaren, Esq., Chair, Dr. Arturo Marti, laboratory expert, and Dr. Gary Wadler MD, medical expert, was formed by Gayle David Bradshaw the ATP Administrator of Rules following a Review Board {"RB"} determination that Todd Perry {"Player"} had a case to answer under the Tennis Anti-Doping Program 2005 {"Anti-Doping Rules"} found at p. 143 through 173. Those rules are contained within the ATP 2005 Official Rulebook {"Rules"}. 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 Offences, and (iii) support and assistance to players when applicable.

Simon Rofe, Esq. and Adam Firth, Esq. represented the Player.
John McLennan, Esq. represented the ATP Tour {hereafter the "Tour" or "ATP"}.

Procedural Order No.1 was issued on 12 October 2005 to prescribe the procedure to be followed in this proceeding. Procedural Order No.2 was issued on 31 October 2005 to supplement and where applicable, supplant Procedural Order No. 1. By that Order the parties filed agreed facts and entered into this truncated procedure not fully prescribed by the Anti-Doping Rules but closely approximating the process contemplated by Rule K. 1. c. without the benefit of the admission of a Doping Offense as provided for by that Rule.

BACKGROUND FACTS

1. The Player is a professional tennis player from Australia. He is an ATP member who competed in an ATP sanctioned competition. In accordance with Rule B. 1, he is bound by and shall comply with all of

the provisions of the Tennis Anti-Doping Program 2005. In effect he has agreed to be bound by all the provisions therein and to play by the Rules.

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. The ATP has adopted rules for the conduct of such tournaments and players. The ATP Tour 2005 Official Rulebook is applicable to this case.
3. The Player provided a urine sample pursuant to the Anti-Doping Rules during an In-Competition test at an ATP tournament in Casablanca, Morocco on 7 April 2005. The sample was collected in accordance with the International Standard and Rule F. 5 of the Anti-Doping Rules.
4. The urine sample was analyzed by the World-Anti Doping Agency {"WADA"} accredited Laboratoire de Controle du Dopage INRS Institut Armand-Frappier {"the Lab"}, in Pointe Claire, Quebec, Canada.. The Lab provided its Doping Control Report to Mr. Sahlstrom of the International Doping Tests & Management {"IDTM"}, the Anti-Doping Program Administrator {"APA"} under the Anti-Doping Rules. The Report advised that the "A" sample of the Player indicated the presence of "Salbutamol," a BETA-2 Agonist listed under Appendix 3 of the Anti-Doping Rules in Section S.3 as a Prohibited Substance. The subsequent testing of the "B" sample was conducted on 13 September 2005 and confirmed a positive test for Salbutamol.
5. Following the notification of the Adverse Analytical Finding, Mr. Sahlstrom, representing the APA, informed the ATP of its obligation under Rule J. 2. h. to proceed, in accordance with Rule K, to appoint an Anti-Doping Tribunal and send a written notice of the infraction to the player. The Review Board advised the APA that there was a case to answer. The APA in turn advised the ATP Administrator of Rules Mr. Gayle David Bradshaw.
6. Acting on the notice from the APA, Mr. Bradshaw, pursuant to Rule K. 1. a. of the Anti-Doping Rules, notified the Player on 26 September 2005 that his "A" sample had produced an analytical positive result for the prohibited substance "Salbutamol". The Player was advised of his

right to have a hearing before the Anti-Doping Tribunal on written notification to Mr. Bradshaw within 10 days from receipt of the aforementioned letter.

7. In a letter dated 4 October 2005, the ATP notified the Tribunal and counsel via e-mail that the Player was requesting a hearing to dispute that he had a case to answer to under Article C.1 (Doping Offences) of the Anti-Doping Rules. The appointment of the Tribunal was confirmed in this correspondence. Both the ATP and the Player have accepted the composition of the Tribunal by signing Procedural Order No.1.
8. A conference call between the parties was held on the 31st of October during which the parties agreed to stipulate the facts and to submit their submissions simultaneously on 8 November 2005 in accordance with Procedural Order No. 2.
9. The Chairman modified the procedure following receipt of the parties' submissions of the 8th of November 2005 by requesting a further conference call with counsel. That call took place on 18 November 2005 during which counsel answered questions of the Chairman and made further submissions. Written responses were also received. The admissions of the Player and the ATP were completed on 23 November 2005.

Agreed Stipulations of Fact:

10. *The Player has suffered from asthma since early childhood and has been on medication for his asthma since his condition was first diagnosed. The Player's usual bronchodilator medication is Terbutaline administered by inhaler.*
11. *On three occasions the Player applied for and was granted Abbreviated Therapeutic Use Exemption {"ATUE"} for the substance Terbutaline administered by inhaler. Each application was completed with an ATP tournament doctor. The applications were completed on 14 June 2004, 26 July 2004, and 10 June 2005.*
12. *The combined effect of those ATUEs is that the Player held a valid ATUE for Terbutaline at all times since 14 June 2004. The Player is currently subject to an ATUE for Terbutaline that is valid until 31*

December 2005.

13. *Dr. Lawrence Stack was a tournament doctor at the ATP tournament in Memphis in February 2005 (“the Memphis Open”).*
14. *The ATP provides instructions to the tournament doctors relating to the Anti-Doping Program and the manner in which doctors are to conduct themselves in their capacity as an ATP tournament doctor with players.*
15. *Dr. Stack understood the ATP guidelines issued to tournament doctors as requiring him to carry Salbutamol inhalers to give to all players requiring bronchodilator medication at tournaments.*
16. *The Player met with Dr. Stack to obtain a Terbutaline inhaler at the Memphis Open shortly prior to a tournament match he was participating in on 19 February 2005 {“the Memphis meeting”}. The Player attended the Memphis meeting with ATP tournament trainer, Mr. Bill Norris. Mr Norris told Dr. Stack that the Player required a refill of his asthma medication.*
17. *At the outset of the Memphis meeting the Player showed Dr. Stack his existing Terbutaline inhaler and asked the doctor for a refill of that specific medication, which Dr. Stack recognised as a Terbutaline inhaler.*
18. *Notwithstanding this specific request and his recognition of the inhaler, Dr. Stack gave the Player an inhaler containing Salbutamol in order to accord with his understanding of ATP guidelines.*
19. *Dr. Stack says with a certainty of approximately 80% that he did not tell the Player that he had given him a Salbutamol inhaler. Further, Dr. Stack says that even if he had told the Player that he had been given a Salbutamol inhaler, Dr. Stack does not recall explaining that the medication was different to Terbutaline.*
20. *Dr. Stack did not discuss the issue of a therapeutic use exemption at all with the Player or Mr. Norris. Specifically a therapeutic use exemption was not discussed in respect to bronco dilator medication.*
21. *Dr. Stack says he assumed the Player had all relevant medical*

clearances and permission from the ATP to use all bronchodilator medications, including Salbutamol.

22. *Dr. Stack believes it is likely the Player left the Memphis meeting under the belief he had been given a Terbutaline inhaler as requested and that belief was reasonable in the circumstances.*
23. *The Player says he left the Memphis meeting believing, and at all material times believed, that Dr. Stack gave him a Terbutaline inhaler in accordance with his specific request for that medication.*
24. *Mr. Norris has a file record stating that the Player was given medication at the Memphis meeting for which the Player had a valid ATUE.*
25. *The Player used the inhaler provided by Dr. Stack at the Memphis meeting up to and throughout the Casablanca Open held in April 2005. The Player did not use any other inhaler during that period.*
26. *On 7 April 2005, during the Casablanca Open, the Player provided a urine sample that tested positive for the presence of salbutamol in a manner consistent with that drug having been consumed by inhaler.*
27. *On his Doping Control Form dated 7 April 2005, the Player declared his use of Bricanyl- or Terbutaline sulphate- consistent with his belief that Dr. Stack had prescribed him a Terbutaline inhaler.*
28. **The relevant Rules of the ATP Anti-Doping Program read as follows:**

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 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.* ...

E. Therapeutic Use Exemptions

1. *The International Standard for Therapeutic Use Exemptions issued by WADA sets out the circumstances in which Players may claim an exemption to Use one or more Prohibited Substances or Prohibited Methods to treat documented medical conditions. In order to rely upon such an exemption to excuse the Use, the presence in a Sample or the Possession of a Prohibited Substance or Prohibited Method that would otherwise amount to a Doping Offense under this Program, a Player must obtain a therapeutic use exemption (“TUE”) prior to such Use, presence or Possession.*
2. *As soon as there is a medical*

recommendation for a Player to use a Prohibited Substance or a Prohibited Method, the Player's physician should submit a request for a TUE to the TUE Committee, c/o the APA. The request must be accompanied by all of the information specified in the International Standard for Therapeutic Use Exemptions, and the TUE Committee may require that further information be provided as necessary.

...

4. *The TUE Committee shall notify the APA of the approval or denial of the TUE request, and the APA shall notify the Player and his physician, as well as WADA. If the request is approved, the TUE will become effective as of the date of receipt of the request by the APA.*

K. Due Process

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

...

- a. *When the Review Board determines, pursuant to Article J.2.d. or Article J.3.d., that the Participant in question has a case to answer under Article C the ATP Administrator of the Rules shall appoint an Anti-Doping Tribunal to hear the matter and shall send a written notice to the Participant ("the Notice"), with a copy to the person designated as chairman of the Anti-Doping Tribunal, setting out the following:*

- i) *the Doping Offense(s) alleged to have been committed, including the specific Article(s) of this Program alleged to have been infringed, and the facts upon which such allegations are based;*
- ii) *the Consequences prescribed under the Program if it is found that such Doping Offense has been committed; and*
- iii) *the Participant's entitlement, if he so elects, to have the matter determined by the Anti-Doping Tribunal, at a hearing conducted in accordance with this article K.*

...

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 Offence 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.

...

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.

Second offense: Two (2) years’ Ineligibility.

Third 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 (in the case of a second or third offense) 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 . . .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 Prohibited Substance or it s 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 Article M.2, M.3 and M.6.

...

APPENDIX ONE

DEFINITIONS

International Standard. *A standard adopted by WADA in support of the*

Code, as revised from time to time. Compliance with an International Standard (as opposed to another alternative standard, practice or procedure) shall be sufficient to conclude that the procedures addressed by the International Standard were performed properly. The International Standards are set out on WADA's website. WADA's Executive Committee may approve revisions to an International Standard at any time, and such revisions shall become effective in relation to this Program on the date specified therein, without the need for further action by the ATP.

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.*

Use. *The application, ingestion, injection or consumption by any means whatsoever of any Prohibited Substance or Prohibited Method.*

TUE Committee. *A panel designated by the ATP and composed of at least one physician with experience in the care and treatment of Players and a sound knowledge of clinical and exercise medicine. In all cases involved a Player with a disability, one of the physicians must have*

*experience with the care and treatment
of Players with disabilities.*

...

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

S3. BETA -2 AGONISTS

All beta-2 agonists including their D- and L-isomers are prohibited. Their use requires a Therapeutic Use Exemption.

As an exception, formoterol, salbutamol, salmeterol and terbutaline, when administered by inhalation to prevent and/or treat asthma and exercise-induced asthma/broncho-constriction require an abbreviated Therapeutic Use Exemption.

Despite the granting of a Therapeutic Use Exemption, when the Laboratory has reported a concentration of salbutamol (free plus glucuronide) greater than 1000 ng/ml, this will be considered as an Adverse Analytical Finding unless the athlete proves that the abnormal result was the consequence of the therapeutic use of

inhaled salbutamol.

SPECIFIED SUBSTANCES*

“Specified Substances”* are listed below:

•••
All inhaled Beta-2 Agonists, except clenbuterol;
•••

WRITTEN SUBMISSIONS FOR THE PLAYER

29. Counsel for the Player submits that the laws of the state of Delaware govern this proceeding and that the doctrine of estoppel applies precluding the ATP from enforcing its Anti-Doping Rules against the Player.
30. The Player saw Dr. Stack in his capacity as the tournament medical director and is entitled to believe that he would exercise all due caution to ensure that a player does not breach the Anti-Doping Rules.
31. The Player requested a refill for a Terbutaline inhaler, in accordance with his ATUE. The Player was given a Salbutamol inhaler in accordance with Dr. Stack’s understanding of ATP guidelines. No one at the tournament, including Dr. Stack, told the Player that he was receiving any medication other than Terbutaline. The Player believed at all times he was following his ATUE.
32. The conduct of Dr. Stack in the circumstances gives rise to the estoppel in that the Player relied on the doctor’s conduct in fulfilment of his request for a Terbutaline inhaler. Dr. Stack acted upon the request in accordance with his understanding of his obligations as an ATP tournament medical director. However, he failed to notify the Player he was not receiving Terbutaline because he believed it was his duty to supply Salbutamol. It is submitted this conduct by the doctor gives rise to an estoppel against the ATP in alleging that a Doping Offense has occurred.
33. According to the application of estoppel, set out in the precedent of

IAAF v USATF,¹ the Player was entitled to believe he was receiving Terbutaline unless told otherwise by Dr. Stack. The ATP should be estopped from enforcing its rules against the Player and the Tribunal should hold that the Player has not committed a doping offence.

34. In the alternative, it is submitted that the Player is not required to second guess the advice of a Doctor when obtaining a inhaler the request for which was covered by an ATUE. The Prohibited Substance is a Specified Substance. The parameters of Rule M. 3 and M. 5. a. apply and have been satisfied thereby justifying the elimination of the Ineligibility sanction.
35. The doctrine of proportionality ought to be used as it is discussed in *G. Squizzato v FINA*² to eliminate the public warning provision because there was no wrong doing on the part of the Player. Given the Player's compliance with an ATUE for Terbutaline there is no reason to believe he would have taken Salbutomal if told by Dr Stack that he was giving him Salbutomal. The Player would have also made an application for an ATUE for the new substance.

WRITTEN SUBMISSIONS OF THE ATP

36. Based upon factual stipulations agreed by the Player and the ATP and the fact that the Player had an exemption for use of a Terbutaline inhaler through December 31, 2005, the ATP submits that the Player should not be found to have committed a Doping Offense.
37. In February 2005 at an ATP tournament in Memphis Tennessee the Player received a replacement inhaler from Dr. Lawrence Stack. Although the Player requested a Terbutaline inhaler, Dr. Stack's understanding of tournament guidelines was that the ATP required the doctor to use Salbutamol inhalers for treatment of asthma. Accordingly, Dr. Stack gave the Player a Salbutamol inhaler.
38. The Player is certain that he was not told that the inhaler contained a different medication than Terbutaline. Dr. Stack does not seem to believe otherwise. Under these circumstances it was reasonable that

¹ CAS 2002/O/401

² CAS/2005/A/830

the Player believed he was receiving Terbutaline and that he believed his ATUE covered his use of the inhaler.

39. Because the Player had no reason to believe he was receiving medication other than Terbutaline and because he had a valid ATUE for his previous inhaler, the ATP submits the Player should not be found to have committed a Doping Offense.

R E A S O N S

40. At the Memphis tournament the Player made what he believed to be a request for a refill of his Terbutaline inhaler in accordance with the Anti-Doping Rules. He held an ATUE for the use of Terbutaline valid until 31 December 2005. Dr. Stack responded to that request by providing a Salbutamol inhaler in accordance with what he believed were his obligations as a tournament medical director. The Player was not aware that he had received a Salbutamol inhaler instead of the requested Terbutaline inhaler.
41. If the Player's request had been fulfilled as made, no Doping Offense would have occurred because of the exception found in Rule C. 1. for the presence of a Prohibited Substance pursuant to a therapeutic use exemption. However, this case has proceeded because the tournament doctor supplied a different inhaler in the mistaken assumption that this was his duty as a medical tournament director.
42. Counsel for the Player argues that the legal principle of estoppel ought to be applied to determine that there is no Doping Offense. There is both a substantive legal difficulty and one of legal principle with those submissions.
43. The doctrine of estoppel requires that one party to a contract must have made a representation by conduct or words to alter the existing legal arrangements between them. The other party must have relied upon that representation to their detriment.
44. The difficulty on the facts of this case is that Dr. Stack has neither actual authority nor any ostensible or apparent authority to alter the

Anti-Doping Rules of the ATP Tour. Dr. Stack is not a party to the contract nor does he have authority to alter the contract (the Rules of the ATP including its Anti-Doping Rules) between the ATP and the Player. He is a tournament doctor and not employed by the ATP. On that legal basis, his conduct or verbal representations cannot give rise to the possibility of an estoppel. The difference in the *ATP v. Ulihrach*³ case where the doctrine was applied is that the trainers dispensing the tablets thought to contain the Prohibited Substance were employees of the ATP at the time and acting in the course of their employment under the Rules thereby making the ATP responsible for their conduct. Therefore, the ATP itself was making the representation by conduct that the tablets were acceptable for use under the Anti-Doping Rules through the actions of its employees. The principle of estoppel was used to shift the burden onto the ATP to show that the Doping Offense was not the result of the contaminated electrolyte supplement provided by it. The estoppel had this effect because the ATP through its trainers was the likely source of the contaminated substance at issue. The ATP was required to prove, without the benefit of strict liability, why a violation of the Rules had occurred. The ATP without the benefit of strict liability was unable to present any proof of a Doping Offense. Therefore, the Player was found to have answered the ATP allegations of a Doping Offense and was exonerated on the basis that the case was not proven against him that a Doping Offense had occurred.

45. The legal distinction in the case before me and that of *Ulihrach* is that Dr. Stack is a tournament medical director present because the ATP Rules require that such a person be at an ATP sanctioned tournament. However, Dr. Stack does not represent the ATP and is not an employee of the ATP. The tournament organizers arrange his employment. Therefore, he is not a person with actual or apparent or ostensible authority to set up an estoppel against the ATP in its contractual relations with the Player in connection with the Anti-Doping Rules. This is the substantive legal reason why the doctrine of estoppel cannot be applied in this case. I turn next to the principled reason for not applying the doctrine of estoppel.

³ *ATP v. Ulihrach* a decision of an ATP Anti-Doing Tribunal dated 1 May 2003 subsequently reopened and reversed in a further decision of the Tribunal dated 7 July 2003. See the ATP web site at http://www.atptennis.com/en/antidoping/info_warnings_archive.asp. See also *Cañas v. ATP* a decision of another ATP Anti-Doping Tribunal dated 7 August 2005 at paragraphs 46 through 56. (The case is on appeal to CAS.)

46. The argument of counsel on the estoppel principle while perhaps arguably having some foundation in law and certainly applied in other tennis and sports cases does not need to be resorted to in this case. The development of principles such as estoppel in sports cases ought to be restricted to the most extreme and egregious circumstances as they were known at the time as was very explicitly stated in *ATP v. Ulihrach, supra*. This caution was noted as well in *USATF v. IAAF, supra*.
47. In *Ulihrach*⁴ there was an unequivocal statement at paragraph 30 that:
1. *This Tribunal decision should not be read as a qualification on the concept of strict liability as that notion has become understood under the CAS lex sportif. This situation is, in the experience of this Tribunal, and we suspect in the experience of the world of sport, a unique set of circumstances. These reasons should not be read as placing any sort of qualification on the strict liability principle because of an assertion by an athlete that the analytical results being challenged may have arisen because of a supplement made available to the athlete by competition sponsors or its sports federation. There has been an extensive investigation by the ATP in this matter for which it should be commended for the integrity with which it conducted itself. To the ATP's credit and with considerable courage it voluntarily undertook in the face of a very perplexing set of facts to investigate and ultimately implicate itself in the problem in which they and the players found themselves. The principles applied in this case are not to be read as a qualification or refinement of the principles of strict liability.*
 48. The caution in the use of the estoppel principle was noted and reinforced in *USATF v. IAAF* at paragraphs 132 and 133. The Panel, while accepting that fairness lies at the heart of the concept of estoppel, found the doctrine of estoppel not to be the sole basis on which the case was to be decided. They held that support for the USATF's position could be found in CAS case precedent, particularly the *AEK Athens*⁵ case that established *where the conduct of one party has led to legitimate expectations on the part of the second party, the first party is estopped from changing its course of action to the detriment of the*

⁴ Decision of 1 May 2003.

⁵ *AEK Athens and SK Slavia Prague v. Union of European Football Associations*, 98/2000, para.60

second party. The panel found that the heart of the matter was the athlete's legitimate expectations, which have been recognised in several CAS cases including *USA Shooting*⁶, *Watt*⁷ and *Prusis*⁸. Particularly applicable is the case of *US Swimming v. FINA*⁹ in which the Panel *resiled from penalizing unsuspecting athletes for the consequences of conduct beyond their control and for which they were blameless.*

49. In this case before me, there are Anti-Doping Rules of the ATP Tour including the principle of strict liability that can and were intended to have effect and application to the facts at hand. The principle of estoppel ought not to be brought into consideration merely to frustrate the application of a comprehensive Code of harmonized doping rules that the WADA Code¹⁰ represents and which are the parent derivative rules. Within that Code are rules and remedies dealing with the situation at hand that are the appropriate rules within which to work out a resolution of this dispute. The very nature and essence of a Code is to make it comprehensive and to preserve its integrity by not referring to extraneous principles that upset the intricate balancing of interests reflected in the achievement of an international agreement to harmonize sport-doping rules in the Code. Therefore, for all of the foregoing reasons the application of the doctrine of estoppel is rejected as a matter of principle as well as the facts not being in compliance with the requirements of the principle.

Application of the ATP Anti-Doping Rules

50. Both Terbutaline and Salbutamol are Beta 2 Agonists within the listing of S. 3 of the 2005 Prohibited List in Appendix 3 of the Anti-Doping Rules. They are also Specified Substances under the same Appendix.
51. Rule C. 1. provides that the presence of a Prohibited Substance is a Doping Offense unless that presence is subject to a TUE granted in accordance with Article E. The Player had an ATUE for Terbutaline but unfortunately not for Salbutamol the substance identified by the

⁶ *USA Shooting & Q v. International Shooting Union*, CAS 1994/A/129

⁷ *Watt v. Australian Cycling Federation*, CAS1996/A/153.

⁸ *Prusis v. International Olympic Committee*, CAS 2002/A/001.

⁹ CAS1996/A//001

¹⁰ Reference is made here to the WADA Code and not the ATP Anti-Doping Rules for it is the foundation anti-doping rules that the ATP agreed to adopt, as did virtually every other international sport federation.

Lab. Therefore, a Doping Offense occurred by Rule C. 1.

52. Rule L. 1. provides that on a finding of a Doping Offense from an In-Competition test there is a Disqualification of the individual result obtained by the Player in that Competition. I find, as was found by the Tribunal in the case of *ITF v. Bogomolov*,¹¹ that a Tribunal is obliged to apply the mandatory sanctions provided for in Rule L. 1. This is the essence of strict liability to which estoppel should not be applied in this case.

Lesser Sanction for Specified Substances

53. In dealing with the sanctions to be imposed for a Doping Offense Rule M. 2 provides for a two year period of Ineligibility for a first offense. The Prohibited List identifies Trebutaline as a Specified Substance. Where such a substance is involved, Rule M. 3. can be applied to modify the sanction for a first offense to: *at a minimum, a warning and reprimand and no period of Ineligibility for future Events, and at a maximum , one(1) year's Ineligibility*. In order for the foregoing to be the appropriate sanction in this case the Player must establish that the use of such a Specified Substance *was not intended to enhance sport performance*. There is absolutely no evidence that the Player had any intention of enhancing his performance by the use of his inhaler. In fact he believed he was using it entirely in accordance with the Anti-Doping Rules and precisely in accordance with the purpose for which it was prescribed. Therefore, a period of a lesser sanction may be applied in this case under Rule M. 3. To establish the basis for the elimination or reduction in the sanction reference is made to Rule M. 5.

Elimination or Reduction of Sanction by way of Exceptional Circumstances

54. Rule M. 5. a. provides that if the Player can establish No Fault or Negligence for the offense, the *otherwise applicable period of Ineligibility shall be eliminated*. To do so the Player must establish how the Prohibited Substance entered his system. I shall return to this parameter later in these reasons.

¹¹ A decision of Tim Kerr QC sitting alone as Tribunal chair under the ATP Anti-Doping Rules dated 26 September 2005. See paragraph 58.

55. No Fault or Negligence is defined as 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 ...* The facts agreed by the counsel and the only ones before me indicate that the Player made a request to Dr. Stack for a Terbutaline inhaler by showing the inhaler he was currently using to Dr. Stack. The doctor recognized it as a Terbutaline inhaler. The doctor dispensed a Salbutamol inhaler in accordance with what he perceived his medical duty and responsibilities to be for the tournament. Dr. Stack did not advise the Player that he was dispensing a different type of inhaler than the one the Player had shown him. Therefore, the Player was unaware that this switch of inhalers had occurred (the precise process of handing over of the inhaler is unexplained on the agreed facts). The Player believed he had been given the correct inhaler in accordance with his request. He also disclosed on his Doping Control Form at the time of giving his specimen that he used a Terbutaline inhaler and thus confirmed his belief that he was taking this substance. There is also the corroborating fact of Bill Norris, an ATP trainer, who had made a file record notation at the Memphis tournament that the Player had a valid ATUE. Therefore, the Player did not know or suspect he had a different type of inhaler that was not covered by an ATUE.
56. In the *Squizzato/FINA* case the CAS Panel found a swimming athlete to have *a duty of diligence* in the use of a skin cream to counteract an infection. Unlike the *Squizzato/FINA* case the Player here was not selecting a medical treatment without advice of a medical professional. He had specifically requested a Terbutaline inhaler for which he held an ATUE. He had been given what he could reasonably believe to be an inhaler in accordance with his request. He does not have to cross-examine the medical doctor as to what he had really or actually been given. If the doctor had dispensed something different it is reasonable and cautious conduct for the Player to assume the doctor would advise him about the change in medication. Furthermore, given that the doctor was working at a sports tournament, it was reasonable and cautious for the Player to make the assumption that the medical practitioner would have indicated to the Player that he needed a different ATUE for the different type of inhaler being given to him. The Player exercised utmost caution by showing the doctor the inhaler he was using and implicitly and expressly requesting he receive a like replacement

inhaler. The doctor correctly identified the inhaler as being a Terbutaline one. However, he dispensed a different type and did not inform the Player he was doing so because he assumed the Player also held a valid ATUE for Salbutamol, which in fact the Player did not have. In these circumstances and agreed facts, there is little doubt that the Player conducted himself without Fault or Negligence. In arriving at the foregoing conclusion this case is distinguished from *ITF v. Koubek*¹² where it was held that a player would be at fault for his entourage including medical personnel. In the case before me the doctor did not observe the request of the Player and did not inform him that he was not following the request. Furthermore, the tournament doctor is not a part of the Player's entourage but someone standing apart from the Player, but in whom the Player can have confidence of competency. To impose a level of caution or duty of diligence on the part of the Player in such circumstances is to go beyond what was intended by Rule M. 5. a. I find this case to be an illustration of the No Fault or Negligence definition within the Anti-Doing Rules.

57. The Player must establish that he not only acted with No Fault or Negligence, but also must additionally establish the source of the prohibited substance. The agreed stipulations of fact indicate that Dr. Stack dispensed, and the Player used, a Salbutamol inhaler from the time of supply in February in Memphis, Tennessee until the time of the Casablanca competition. Throughout this period of use the Player held a reasonable belief the inhaler was for Terbutaline for which he had an ATUE for its use. The Tribunal finds that the Salbutamol detected in the specimen obtained in Casablanca entered the Player's body by inhalation through the use of the inhaler provided by Dr. Stack. Therefore, the Player has identified with specific detail how the Prohibited Substance without the ATUE came to be within his bodily system. The fact that the incorrect inhaler with a Prohibited Substance for which no ATUE had been applied for was supplied was not the fault of the Player. The Player could not have known, reasonably known or suspected that he had used or been administered a Prohibited Substances for which he held no ATUE. Therefore, the Player satisfies all of the requirements under Rule M. 5. a. for the elimination of the period of Ineligibility that might otherwise arise from a finding of a Doping Offense under Rule C. 1. It is ordered that no period of

¹² A decision of an ITF Anti-Doping Tribunal by its chair Tim Kerr QC dated 18 January 2005 and upheld by a CAS sole arbitrator in CAS/A/828 (see paragraphs 53 to 61).

Ineligibility in accordance with Rules M. 3 and M. 5. a. be imposed in this matter.

Application of Proportionality

58. In making the foregoing order it is noted that in accordance with Rule M. 5. a. 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.* It is ordered that this provision be applied in the future should another doping allegation ever arise in the Player's professional tennis career.
59. It is the further submission of counsel for the Player that the sanction remaining to be applied, namely *a warning and reprimand* under Rule M. 3. be eliminated by the doctrine of proportionality. It is further submitted that should this occur the automatic disqualification of individual results provided for in L. 1. should also be eliminated. In the *Squizzato/FINA, supra* the Panel was of the view that the principle of proportionality could apply where an award were to constitute an attack on personal rights which were serious and totally disproportionate to the behaviour penalized, despite the fact that the rules specify the sanction to be applied. I also note that the Panel in *Squizzato/FINA* did not actually apply the doctrine of proportionality to the facts of the case. The CAS in the ATP Tour case of *Hipperdinger v ATP*¹³ has expressed a contrary opinion. In that case the CAS suggested that the doctrine of proportionality had no application to the WADA Code the derivative rules from which the ATP Anti-Doping Rules are obtained.
60. The matter before the Tribunal involves a Player who belongs to the ATP Tour and is not a FINA swimmer. Therefore, the better view of the doctrine of proportionality at least for the application to this ATP Tour case and their Anti-Doping Rules is to follow the approach outlined in the *dicta* of the *Hipperdinger* CAS case. For that reason, I have declined to accept the submissions on proportionality. Therefore, I order that Rule L. 1. and M. 3. be applied in this matter.
61. In support of the foregoing order, I note that the rationale behind the automatic disqualification of individual results is as much a part of the

¹³ CAS 2005/A/690

protection of other competitors as it is a sanction against an individual competitor. If there were any benefits from the use of the Prohibited Substance the benefit is eliminated from the competition by the disqualification of the results. The warning and reprimand to the Player is part of the balancing structure of the Anti-Doping Rules. Part of the purpose is to ensure that other competitors know about the matter so as to be sure they obtain the benefits of the disqualification of individual results. The matter ought to be examined in the overall context of doping control and not the individual context of a particular case in order that a proper balancing of interests can be achieved. This approach is endorsed and indeed suggested in the closing paragraphs of the *Hipperdinger* decision. Therefore Rule L. 1. is appropriate and I order it to be applied to disqualify the individual result of this competition and the forfeiture of any medals, titles, computer ranking points and prize money.

DECISION

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

1. A Doping Offense has occurred under Rule C. 1 because of the presence of a Prohibited Substance for which no therapeutic use exemption had been granted in accordance with Article E.
2. ATP is ordered under Rule L. 1. to Disqualify the individual result at the Casablanca Competition Under the same Rule it is further ordered that there be a forfeiture of any medals, titles, computer ranking points and prize money (without the deduction for tax) obtained at the Competition. The disqualification of the results and other consequences will have effect from the time provided for in Rule M. 8.
3. The Player is found to have committed No Fault or Negligence in respect of the use of the Specified Substance and under Rule M. 5. a. the period of Ineligibility is eliminated. Furthermore, the findings of the Tribunal with respect to a Doping Offense are specifically limited in their effect as prescribed by Rule M. 5. a. as not being considered a Doping Offense for purposes of calculating any future infractions of the Anti-Doping Rules should that occur.
4. As a consequence of the finding of No Fault or Negligence for the Doping Offense it is ordered under Rule M. 1. b. that no other disqualification of results other than as referred to in paragraph 2 shall arise in this case.
5. By Rule M. 3 the ATP is ordered to issue a warning and reprimand to the Player because of this decision.

DATED THIS 30th DAY of NOVEMBER 2005.



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

SIGNED AT: London, Ontario, CANADA