INTERNATIONAL TENNIS FEDERATION

INDEPENDENT ANTI-DOPING TRIBUNAL

DECISION IN THE CASE OF MR ANTONY DUPUIS

Tim Kerr QC, Chairman (sitting alone)

Introduction

1. This is the decision of the independent Anti-Doping Tribunal ("the Tribunal") appointed by the Anti-Doping Administrator of the International Tennis Federation ("the ITF") under Article K.1.1 of the ITF Tennis Anti-Doping Programme 2006 ("the Programme") to determine a charge brought against Mr Antony Dupuis ("the player") following a positive drug test result in respect of a urine sample no. 396429 provided by the player on 2 May 2006 at the Tunis Challenger Event in Tunis, Tunisia.

2. By a letter dated 11 August 2006 the player effectively admitted the doping offence but contended that he bore no fault or negligence. He did not dispute the presence in his body of a prohibited substance, salbutamol, but asserted that it is a Specified Substance within the meaning of the Programme, and that he took it by inhalation as a treatment for asthma and did not intend to enhance his sport performance. He sought minimal sanctions, namely a warning and reprimand, no period of ineligibility and no disqualification or results or forfeiture of prize money and ranking points.

3. In the same letter, the player asked for the matter to be determined by the chairman sitting alone, on the basis of written submissions, without an oral hearing. The ITF supported this proposal, to which I agreed by email dated 15

August 2006. Accordingly there was no oral hearing. The parties have provided me with helpful written submissions for which I am grateful.

<u>The Facts</u>

4. The player was born in France on 24 February 1973 and is therefore now aged 33. He is an experienced French professional tennis player who has been involved in professional tennis since the early 1990s, when he joined the ATP Tour while still a teenager. Since childhood he has suffered from asthma and allergic symptoms. He has asthma attacks in May and June when pollen levels tend to be high. The attacks are now less severe and less frequent than they were during his infancy. He uses an inhaler to take prescription medication including ventoline which contains salbutamol, a prohibited substance.

5. He does not have a therapeutic use exemption ("TUE") in respect of his use of salbutamol. By paragraph 8.4 a. of Appendix Three to the Programme, an application for an ATUE in respect of a substance such as salbutamol is effective to permit use of the substance in question immediately on receipt by the Anti-Doping Programme Administator ("APA") of "a complete notification". The APA has at all material times been Mr Staffan Sahlström of International Doping Tests and Management ("IDTM'), based at Lindigö, Sweden. There is no evidence that the player sought to apply to IDTM for an ATUE in respect of salbutamol until 5 September 2006.

6. It appears that on 6 May 2005 the player's doctor, Dr Nedelec, signed a certificate stating that the player's state of health required him to use a ventoline inhaler in the event of an asthma attack. The player has submitted that the date of this certificate is 6 May 2006, not 2005. However the date of the certificate is clearly 6 May 2005, in what appears to be Dr Nedelec's handwriting.

7. It is possible that Dr Nedelec made an error as to the year, but that is unlikely more than four months after the start of the year. I think it is more likely that the player obtained the certificate in 2005, probably when obtaining a prescription. If the correct date is 6 May 2006, that was four days after the player provided a urine sample (see further below) and would suggest that the player may have been concerned to obtain whatever protection the certificate might give in the event that the test result were positive. If the correct date is 6 May 2005, the player, again, appears to have been concerned to have it in order to obtain whatever protection it might give in the event of a positive test result.

8. The player states that he did not know that he needed a TUE in respect of salbutamol. He has been tested before in the months of May or June at a time when he had been inhaling ventoline, but with negative result. The player obviously did not inform himself accurately about the need for a TUE. The player was not advised by his doctor or by his coach that he needed a TUE. I infer that either a certificate of the type signed by Dr Nedelec was, wrongly, considered sufficient protection in the event of a doping test revealing the presence of salbutamol; or that the player thought that the risk of a positive test result was negligible; or both.

9. The player was under the misapprehension that there is a "threshold" for salbutamol. This is clear from his initial letter of 11 August 2006 and from his answering brief. If he thought there was a threshold, he must have known that salbutamol is a prohibited substance if present in a concentration above what he thought was the "threshold". There is no formal threshold under the Programme. The two certificates of analysis in this case refer to a "threshold" of 100 ng/ml but this is not, apparently, derived from the Programme and appears to be in the nature of a limit of detection or an informal threshold operated by the WADA accredited laboratory in Montreal or generally.

10. On 1 January 2006 the current version of the Programme entered into force (see Article A.5). On 6 January 2006 the player signed a form agreeing to be bound by it. Article B.4 of the Programme, like its predecessors, made it plain that it is the sole responsibility of players to acquaint themselves with all the provisions of the Programme.

11. Also at some stage, it is not clear exactly when but probably in or about early 2006, the player received a wallet card which had been printed on 20 December 2005, informing tennis players about anti-doping rules and in particular the need to obtain a TUE before using any banned substance. The card gave details of how to obtain further information, including a "hotline" telephone number, and included a copy of the Prohibited List which included the information that inhalation of salbutamol requires an ATUE.

12. In mid-April 2006 the player took part in a competition in Bermuda, where he achieved good results. On his return to France he was experiencing asthma symptoms and on 26 April he visited Dr Nedelec, who signed a certificate in the same form as the one already mentioned, and issued a written prescription for anti-asthma drugs including ventoline. The player inhaled ventoline during the seven days prior to 2 May 2006, as he openly declared on his doping control form. I do not know exactly when he inhaled ventoline.

13. He then took part in the Tunis Challenger Event which began on 1 May 2006. The next day he was selected for a doping control and provided a urine sample, declaring on the doping control form that he had used ventoline and claritine during the previous seven days. He earned one ranking point and US £1,300 from his participation in that competition. The player then continued competing in singles and doubles events through May, June and July 2006 in Italy, France, Spain and Newport (presumably either Wales or Rhode Island, USA).

14. Meanwhile, the player's A sample was analysed at the WADA accredited laboratory in Montreal, Canada, and found to contain salbutamol in a concentration of 220 ng/ml. In accordance with the Programme, Mr Sahlström of IDTM convened a review board to determine whether there was a case to answer. By 11 July 2006 all three members of the review board had concluded that there was a case to answer. Accordingly Mr Sahlström notified the player, by letter of that date, that the A sample analysis had revealed the presence of salbutamol and that the B sample would (unless the player waived his right to analysis of the B sample) be analysed at the same laboratory on 25 July 2006.

15. In his initial letter dated 11 August 2006, the player asserts that on 13 July 2006 a Dr Delabareyre of the Institut National du Sport, confirmed the need for therapeutic use of ventoline. It is not disputed that the player has a therapeutic need for such anti-asthma medication, but I have no evidence that Dr Delabareyre gave such confirmation in writing. However, the involvement of the Institut National du Sport on 13 July 2006 suggests that the player had by that date received Mr Sahlström's letter dated two days earlier.

16. The player continued competing, taking part in singles and doubles competitions in Manchester and Nottingham during the second half of July 2006. On 25 July 2006 the player's B sample was analysed at the same WADA accredited laboratory in Montreal, and also found to contain salbutamol, in a concentration of 207 ng/ml. The certificate of analysis was dated 26 July 2006. The player was accordingly charged with a doping offence by letter dated 1 August 2006. He set out his initial response to the charge by letter dated 11 August 2006.

17. He then took part in the US Open Qualifying Event during the week commencing 21 August 2006, where he lost in the first round. The last day of the Qualifying Event was 26 August. I accept the player's submission that he voluntarily abstained from competition from 27 August 2006 onwards, even

though the US Open tournament did not end until 10 September and even though he would, I believe, have taken part in the US Open final rounds had he had the good fortune to qualify. I accept the player's argument that the finals of the US Open can be differentiated from the qualifying rounds; the ITF has not disputed that those who fail to qualify can take part in a separate challenger event during the week commencing 28 August, and that the player did not do so.

18. On 5 September 2006 the player completed an application form seeking an ATUE in respect of salbutamol, supported by a declaration from Dr Nedelec. However as at 14 September 2006 IDTM had not, according to IDTM, received that application. Consequently the ITF does not accept that the player now has a valid TUE in respect of salbutamol. It is obviously important for the player to ensure that he has a valid TUE in respect of salbutamol before using his inhaler.

The Proceedings

19. By its letter dated 1 August 2006 the ITF formally charged the player with a doping offence under Article C.1 of the Programme. On 11 August 2006 the player wrote to the ITF's Anti-Doping Administrator, Mr Jonathan Harris, stating his explanation for the offence and asking for the matter to be dealt with on the basis of written submissions by the chairman sitting alone. I agreed with that course. The ITF, through its solicitors in London, Hammonds, set out the ITF's prima facie case in a letter dated 23 August 2006, noting that the player had not then applied for an ATUE in respect of salbutamol, and accepting that salbutamol is, when inhaled, a Specified Substance

20. The player set out his case in more detail, through his lawyers, Messrs Didier Poulmaire and Guillaume David, in his answering brief sent to me on 7 September 2006. In that document the player asserted again that he "could not imagine that such inhalation of 'Ventoline' would cause the overtaking of Salbutamol threshold". However, as already noted, there is no formal threshold

in the case of salbutamol. There is a threshold where a TUE is obtained: a doping offence may be committed despite the existence of a TUE where the concentration exceeds 1,000 ng/ml. That threshold is not relevant here unless it confused the player. It is possible that the player is referring to his perception that there is an informal threshold of the type referred to in the two certificates of analysis.

21. The player urges me in his answering brief not to impose any period of ineligibility, only a warning and reprimand, nor any disqualification of results or forfeiture of ranking points and prize money in respect of competitions in which the player has taken part since 2 May 2006. He asserts that he bore "No Fault or Negligence" for the offence within the meaning of Article M.5.1 of the Programme. In addition he relies on Article M.3 of the Programme and asserts that he inhaled ventoline to treat his asthma and not in order to enhance his sporting performance.

22. The player accepted that he had received the anti-doping wallet card, but stated that he has been taking ventoline for years and has in the past been tested during May or June with negative result. He went on to assert that neither his coach nor his doctor advised him of any risk of committing a doping offence by inhaling ventoline. He asserted that on 5 September 2006 he had claimed an exemption by completing an ATUE application form. He submitted that disqualification and forfeiture in respect of results subsequent to those obtained in the Tunis Challenger Event would be "disproportionate and inequitable".

23. The ITF, through its solicitors in London, Hammonds, responded in its reply brief dated 14 September 2006. The ITF strongly disputed the proposition that the player was without fault but did not assert that the player intended to enhance his sporting performance. The ITF submitted that in view of the player's fault it would be a "dangerous precedent" if no period of ineligibility were imposed.

24. On the question as to how I should exercise my discretion under Articles M.3 and M.7 of the Programme, the ITF's solicitors helpfully sent me a file containing various case law precedents forming part of the rapidly growing body of jurisprudence that now exists, dealing with doping cases governed by the rules of national and international federations, including the ITF, which have adopted the World Anti-Doping Code and incorporated its provisions into their anti-doping programmes. I shall refer to some of those cases below.

25. The parties helpfully made some late further submissions by email concerning the date with effect from which the player had voluntarily abstained from competing, for the purposes of the application of Article M.8.3(a) of the Programme. These were directed to the point that the player had in fact continued competing after receiving notification of the positive test in respect of his B sample.

<u>The Tribunal's Conclusions, With Reasons</u>

26. The player has admitted the commission of a doping offence under Article C.1 of the Programme. Accordingly pursuant to Article K.1.3 of the Programme, the Tribunal is required to confirm the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 1 August 2006: namely that a prohibited substance, salbutamol, has been found to be present in the urine specimen that the player provided at the Tunis Challenger Event on 2 May 2006.

27. It follows that irrespective of whether or not the player intended to enhance his sport performance or did enhance it, the Tribunal is obliged by Article K.1.3 to apply the mandatory consequences provided for in Article L.1 of the Programme. Accordingly the player's results in the Tunis Challenger Event must be disqualified and the one ranking point and US$1,300 earned from that event, must be forfeited.

28. The player asserts that he bears "No Fault or Negligence" for the offence within the meaning of Article M.5.1 of the Programme. Article M.5.1 provides, so far as material, that the otherwise applicable period of ineligibility shall be eliminated if the player establishes (on the balance of probabilities, see Article K.3.2), that he bears "No Fault or Negligence" for the offence. Where, as in the present case, the offence is committed under Article C.1 (presence of a prohibited substance in the body), the player has to establish also how the prohibited substance entered his system.

29. In order to establish "No Fault or Negligence" for the purpose of eliminating the otherwise applicable period of ineligibility, the player must establish (according to the definition in Appendix One to the Programme) that he did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he had used or been administered with the prohibited substance. The case law of the CAS and of sports tribunals whose decisions can be appealed to the CAS makes it clear that the standard is a high one and that cases where the defence succeeds are likely to be rare and the circumstances truly exceptional.

30. In the present case, I have no hesitation in rejecting the submission that the player bore "No Fault or Negligence" for the offence. I accept the submission of the ITF that the player was at fault in that he did not make any enquiry about the content of ventoline before using his inhaler; he did not ask Dr Nedelec whether it contained any substances that may have been prohibited; he did not show Dr Nedelec his wallet card although it states that a copy should be given to the player's physician; he did not contact the hotline telephone number on the wallet card; and he did not take any step to apply for an ATUE or trouble to inform himself about the need to do so. It follows that the player fails in his contention that the case falls within Article M.5.1.

31. I turn next to consider what sanctions are appropriate under Articles M.7 and M.3 of the Programme. Subject to one matter to which I shall return in a moment, I approach the matter in a similar manner to the approach in cases such as *Koubek* (decision of the Anti-Doping Tribunal dated 18 January 2005, upheld on appeal to the CAS sole arbitrator (CAS 2005/A/828, April 2005) and *Bogomolov* (decision of the Anti-Doping Tribunal dated 26 September 2005, see at paragraph 101ff), namely on the basis that the sanctions imposed under each head should be such that together they meet the justice of the case overall.

32. The player seeks to invoke Article M.3 of the Programme. This provides that in the case of a "Specified Substance", identified as such in the list of prohibited substances, where a player can establish on the balance of probabilities that the use of the substance "was not intended to enhance sport performance", the period of ineligibility for a first offence shall be, instead of a mandatory period of two years, at a minimum a warning and reprimand and no period of ineligibility, and at a maximum one year. The issue is therefore whether the player can establish that his use of salbutamol was not intended to enhance his sporting performance.

33. There is no reason not to accept the player's assertion, supported by the medical evidence, that use of his asthma inhaler is for medical purposes only and that he did not intend to enhance his sporting performance. The ITF does not dispute that assertion, and accepts that salbutamol is, when inhaled, a Specified Substance. I have no difficulty in accepting the player's case and I find that he has discharged the onus on him of showing on the balance of probabilities that his use of salbutamol was not intended to enhance his sporting performance. As this is the player's first offence, I therefore have discretion under Article M.3 to impose, at a minimum, a warning and reprimand and no period of ineligibility, and at a maximum, one year's ineligibility.

34. I propose in the present case to consider first the question of disqualification of results and forfeiture of ranking points and prize money in respect of competitions subsequent to the Tunis Challenger, and then to consider whether I should impose any period of ineligibility and if so when it should start and what should be its duration. Under Article M.7 of the Programme, I am required to impose disqualification of results and forfeiture of ranking points and prize money in respect of all competitions in which the player took part subsequent to the Tunis Challenger Event unless I determine that "fairness requires otherwise".

35. Disqualification and forfeiture in respect of subsequent competitions should be the norm and not the exception, as this Tribunal has previously accepted. If it were otherwise, Article M.7 would have been drafted the other way round, so as to provide that there shall be no such disqualification or forfeiture unless the Tribunal considers that fairness requires it.

36. As from 1 January 2006, there is now added to the Programme a new Article M.7.1 which provides that the lack of any evidence that the player's performance was illegitimately enhanced during subsequent competitions shall not of itself be sufficient to trigger the Tribunal's discretion under Article M.7, i.e. the discretion not to impose disqualification and forfeiture in respect of competitions subsequent to that which produced the positive test result. I must therefore approach the present case with that new rule firmly in mind and must be cautious about case law precedents which predate the amendment to the Programme.

37. By reason of the addition of the new Article M.7.1, it is no longer open to me to conclude that fairness requires no disqualification and forfeiture in the case of subsequent competitions merely because there is no evidence that the player's sport performance was illegitimately enhanced in such competitions. That does not mean that lack of enhancement of sporting performance is a wholly

irrelevant consideration, but it does mean that it cannot be the sole consideration informing the Tribunal's decision under Article M.7. This requires some adjustment to the approach adopted in cases such as *Bogomolov* (cit. sup.); *Fridman* (decision of the Anti-Doping Tribunal dated 2 March 2006); and *Koubek* (cit. sup.; not appealed to the CAS on this point).

38. There was an obiter discussion (on the basis of rules which did not include any equivalent of what is now Article M.7.1 of the Programme) of the issue of fairness in relation to disqualification of subsequent results in *Hipperdinger v. ATP Tour Inc.* (CAS 2004/A/690) at paragraphs 93-101. At paragraph 97 the CAS Panel expressed concern that the rules could operate unfairly in relation to a player, given that a player should not be penalised for exercising, without any abuse of rights, the right to continue competing where the rules do not provide for provisional suspension.

39. The CAS Panel considered that it was not free to depart from the rules embodied in the World Anti-Doping Code, but that where there is no obvious abuse of defence rights, "the application of the fairness exception must not be weakened by the application of a very stringent standard of proof" (paragraph 97). Otherwise there is a risk of a period of ineligibility which is de facto longer than the maximum provided for under the relevant rules.

40. However the risk of unfairness identified in *Hipperdinger* does not, in my view, arise in the present case because in *Hipperdinger* the substance present in the tennis player's body was not a Specified Substance, with the consequence that (subject to possible defences under the ATP equivalent of Article M.5) a mandatory two year period of ineligibility for a first offence had to be imposed.

41. Where, however, the substance ingested is a Specified Substance and the player succeeds in his defence under Article M.3, the Tribunal has discretion to impose a period of ineligibility of up to one year or none at all. In such cases,

including the present case, the question of disqualification and forfeiture with respect to subsequent competitions can be considered as part of the Tribunal's duty to reach a decision which, in the round, meets the justice of the case overall.

42. With those considerations in mind, I turn to consider the application of Article M.7 and M.7.1 to the facts of this case. I have already stated my reasons for deciding that the player was at fault. In my judgment the fault was quite serious. The player is an experienced professional who has lived with asthma for many years and has had ample time to acquaint himself with the relevant anti-doping rules and procedures. The fault is more serious than in *Bogomolov*, where the unamended Article M.7 was applied to a younger player who had failed to secure renewal of his expired TUE. I also note that in the present case there has been no unusual delay in analysis of the A and B samples or notification to the player of test results.

43. I accept that there is no evidence of any enhancement to the player's performance in competitions subsequent to the Tunis Challenger Event. I also accept that he has not sought to contest the charge, that he has not sought an oral hearing or a three person tribunal, that in consequence time and expense have been saved. The player has helpfully co-operated in the Tribunal process, although he has not gone into much detail in his written submissions. I am conscious that he has stands to lose some US $29,240 from singles and doubles events since 2 May 2006 as well as some 94 singles ranking points and 17 doubles ranking points.

44. I have come to the conclusion, however, that these factors are not enough to persuade me that fairness requires me to leave undisturbed the player's results, ranking points and prize money in competitions subsequent to the Tunis Challenger Event. I reach this conclusion after careful consideration of all the circumstances, including the question of a period of ineligibility discussed

below, and having regard most importantly to the degree of the player's fault, on which I have commented above. I therefore decide that the player's results in respect of competitions in which he took part subsequent to the Tunis Challenger Event shall be disqualified, and the prize money and ranking points obtained in those competitions shall be forfeited.

45. It remains to consider the question of a period of ineligibility. In approaching that question, I take into account my reasoning above in relation to the degree of fault of the player and also my decision not to leave his results, earnings and ranking points undisturbed in respect of subsequent competitions. I cannot accept the player's submission that there should be a warning and reprimand only in this case. I find that the fault of the player is too serious for that, indeed more serious than in *Bogomolov*, in which the player was banned for 1½ months, albeit in circumstances that he lost less money than this player will lose.

46. Taking all the factors I have mentioned into account, I have concluded that the appropriate period of ineligibility is 2½ months. As the player has voluntarily abstained from competition since 26 August 2006, it follows from Article M.8.3(a) of the Programme that the period of ineligibility should start on 27 August and accordingly it will expire at midnight London time on 10 November 2006.

<u>The Tribunal's Ruling</u>

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

(1) confirms the commission of the doping offence specified in the notice of charge set out in the ITF's letter to the player dated 1 August 2006: namely that a prohibited substance, salbutamol, has been found to be present in the urine specimen that the player provided on 2 May 2006 at the Tunis Challenger Event in Tunis, Tunisia;

(2) orders that the player's individual result must be disqualified in respect of the Tunis Challenger Event, and in consequence rules that the one ranking point and the prize money of US $1,300 obtained by the player through his participation in that competition, must be forfeited;

(3) orders, further, that the player's individual results in competitions subsequent to the Tunis Challenger Event shall be disqualified and all prize money and ranking points in respect of those competitions forfeited;

(4) finds that the player has succeeded in establishing on the balance of probabilities that his use of salbutamol leading to the positive test result was not intended to enhance sport performance;

(5) declares the player ineligible for a period of 2½ months, running from 27 August 2006 until midnight London time on 10 November 2006, from participating in any capacity in any event or activity (other than authorised anti-doping education or rehabilitation programmes) authorised by the ITF or any national or regional entity which is a member of or is recognised by the ITF as the entity governing the sport of tennis in that nation or region.

Tim Kerr QC, Chairman of the Anti-Doping Tribunal
29 September 2006