

IN THE NEUTRAL ZONE

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Recent Trends and Issues in Doping: Assessing Athlete Intention and Fault

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The authors are lawyers practicing in sports law. They act for the CCES in relation to anti-doping proceedings, but views expressed in this article are solely their own and do not reflect those of the CCES nor those of the SDRCC.

The principle that athletes are responsible for what they consume is a cornerstone of the global anti-doping system, and is reflected in the fact that most anti-doping rule violations ("ADRV") are akin to absolute liability offences. When it comes to determining an appropriate sanction for an ADRV, however, an athlete's intent and degree of fault can make a significant difference.

To obtain a reduced sanction, athletes must establish how a prohibited substance entered their system and that they exercised care to avoid ingesting that substance. This article reviews some of the latest jurisprudence from SDRCC Doping Tribunals and the Court of Appeal for Sport ("CAS") on these issues, with a view to highlighting some practical, legal and scientific challenges that may arise.

Identifying the Method of Ingestion

Consistent with the terms of the 2015 WADA Code, the 2015 Canadian Anti-Doping Program's Anti-Doping Rules ("Rules") require an athlete to demonstrate how they ingested a prohibited substance on a balance of probabilities before they can establish that an ADRV was a result of *No Fault or Negligence* or *No Significant Fault or Negligence*, or (in most cases) that an ADRV was not "intentional" (Rule 10.2.1.1). In other words, an athlete must prove how a substance entered their body if they want a reduction from the pre-

sumptive sanction that applies under the Rules. This is often called the "threshold test".

Recent decisions demonstrate a variety of ways athletes fall short of meeting the threshold test and offer guidance in considering how to approach the issue. Three key points stand out.

First, given the critical role credibility often plays in these cases, athletes who fail to offer a fulsome and consistent explanation as to what they ingested will likely find themselves unable to meet the threshold test. In *CCES v. Pierre* (SDRCC DT 17-0256), the athlete initially tried to explain the D- and L-amphetamine in his system by telling anti-doping authorities he was taking a "C4 pre-workout powder", but later contradicted himself and admitted that he was taking a "study pill" to complete a school assignment. This change in his story proved fatal to his attempt to receive a lower sanction. The Tribunal explained, "When trust is breached... [t]here is no common denominator anymore to assess credibility and point in the direction of truth... I am not able, on a balance of probabilities, to conclude positively as to the method of ingestion."

Second, the threshold test may invite difficult questions of expert evidence. Where one side proffers such evidence, it will generally not be enough for the other to rely solely on credibility, or lack thereof.

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In *CCES v. Findlay* (SDRCC DT 16-0242), the athlete faced detailed scientific evidence casting considerable doubt on her claim that she consumed the prohibited substance Clenbuterol through contaminated horse meat. While she filed a report from a toxicologist, pharmacologist and veterinarian who opined that it was “plausible” for her to have eaten contaminated horse meat in Canada, that evidence was not supported by the significant responding evidence of the CCES. Ultimately, the athlete relied primarily on her own credibility, without putting forward credible responding scientific evidence. Although she made “a good impression” in her testimony, the Tribunal concluded that “apart from her own words, [she] has not provided me with any concrete evidence”. The presumptive four year sanction applied.

Tribunals have been particularly inclined to reject an athlete’s explanation as to the mode of ingestion where they readily *could* have offered scientific evidence in support - for example, by having the purported source of the substance tested - but failed to do so.

Finally, the threshold test is most likely to be satisfied where only a single route of ingestion is advanced, and other routes of ingestion eliminated. Put differently, athletes risk being unable to meet the threshold test if it is established that many different routes of ingestion are possible. This consideration played an important role in *CCES v. Brown* (SDRCC DAT 15-0006). At first instance, the Tribunal found at least five “possible reasonable sources” that could explain how the athlete ingested the specified substance - yet still concluded that she bore *No Fault or Negligence*. The Doping Appeal Tribunal overturned that decision, noting that the existence of multiple “possible” sources falls below the required threshold of proof of a balance of probabilities.

Exercising Proper Care to Avoid an ADRV

When assessing the impact of the measures an athlete took to avoid ingesting a prohibited substance, the cases fall on a spectrum.

On the far end are cases where athletes have been so reckless that their conduct actually rises to the level of

being “intentional” under the Rules (Rule 10.2.1.1). In *CCES v. Farrier* (SDRCC DT 15-0233), the Tribunal confirmed that intentionality is a two-part test: the athlete must have known there was a significant risk that his/her conduct would result in an anti-doping violation, and he/she must have manifestly disregarded that risk.

This inquiry is a contextual one, making the circumstances surrounding the acquisition and investigation of the substance potentially critical. Recent case law confirms that the first part of the test may be satisfied where an athlete receives a product of questionable origin, or in suspicious circumstances - such as from a source he/she does not know well, or in a strange bottle or packaging. The second part of the test may be satisfied where an athlete fails to adequately investigate the product, such as by asking questions of his/her coach, doctor or anti-doping authorities.

At the other end of the spectrum are the (very rare) cases where athletes can establish that they acted with utmost caution, justifying a finding of *No Fault or Negligence*.

Most cases fall in the middle of the spectrum: an athlete who is neither reckless, nor completely diligent, and thus bears some degree of fault. One novel issue recently considered by CAS is the extent to which an athlete can reduce their degree of fault by delegating anti-doping responsibilities to other trusted advisors. In *Sharapova v. ITF* (CAS 2016/A/4643), the athlete delegated the “performance of all anti-doping related matters” - including checking medications and supplements against the WADA prohibited substance list - to her “expert sports agent”, despite the fact that he had no scientific or medical qualifications.

The International Tennis Federation Tribunal did not accept the athlete’s delegation of her anti-doping responsibilities to her sports agent as proof that she exercised “any degree of diligence”. On the contrary, the Tribunal found that her concealment (of her use of Milndronate) from the anti-doping authorities and her team was “a very serious breach of her duty to comply with the rules”. The Tribunal concluded that she was the “sole author of her misfortune”.

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SDRCC Roster Member Profile: Learning More About our Arbitrators and Mediators

They come from every region of Canada and have extensive experience in alternate dispute resolution and sports-related issues, but how much do we really know about them? The SDRCC has an impressive list of 58 mediators and arbitrators and we will be introducing them through regular installments of "SDRCC Roster Member Profiles". In this edition, we feature **Gordon E. Peterson**, an **Arbitrator and Mediator** from London, Ontario.



What led you to a career in ADR?

As a national team athlete, I saw first-hand that fairness was not always a given. As a coach, official and later administrator, I realized the need for a third party decision maker outside the system to assist in ensuring inherent fairness.

As a lawyer, I have participated in many administrative processes, including for sport, and was invited to serve as a member of the original working group to determine whether ADR was appropriate for sport in Canada. I subsequently chaired the Implementation Committee to formulate much of the work that evolved into the SDRCC and was a founding member of the SDRCC Board. Once the SDRCC was established and my terms on the Board complete, I joined the panel as an arbitrator and mediator.

Specialization/Area of Expertise:

My legal practice focuses on corporate law, including governance, and I understand the importance of drafting clear policies, rules and regulations from my work as a sport administrator. I have a thorough knowledge of the high performance Canadian sport system and know what it is like to migrate through that "system" as an athlete, coach and official.

As an arbitrator with the SDRCC, I...

...strive to be fair, unbiased and fully cognizant of the impact my decision will have on the parties. As a mediator, I take care to be respectful and listen carefully to the parties to assist them in finding solutions. I understand the imbalances that occasionally exist in the sport system as well as the reasons for apparent inequalities. I take my role of ensuring appropriate balance of interests seriously, to ensure not only "things are done right" but that the "right things are done."

Favorite Sports:

Having been a diver, a diving coach and currently a diving official, my favourite sport is Diving. However, I am truly a lover of most sports and sincerely believe in the value of sport.

Dispute Prevention Tip for Athletes and Federations:

Don't be afraid to ask questions. It is better to ensure you understand the implications of policies/rules than to realize subsequently their impact is a problem for you. Questions do not need to be confrontational; it is always best to be respectful of others. Finally, avoid blaming others - it is always best to ask "what can I do?" - to solve the problems that inevitably crop up, regardless of the best of intentions. ■

In our next edition, look for the profile
of an SDRCC arbitrator.

Recent Trends and Issues in Doping: Assessing Athlete Intention and Fault (continued)

CAS overturned this finding and held that delegating anti-doping compliance matters to her agent was not unreasonable *per se*. The CAS fault analysis was more nuanced: the athlete was not necessarily at fault for delegating to an expert agent, but did bear considerable blame for failing to give proper instructions and all information necessary to perform the anti-doping compliance function. As a result, the ineligibility sanction was reduced from two years to fifteen months.

Conclusions

The cases discussed above highlight potential challenges of athletes attempting to demonstrate *No Fault or*

Negligence, No Significant Fault or Negligence and/or that their conduct was not intentional. With respect to the threshold test, issues of credibility, scientific evidence and presenting a single, compelling 'route of ingestion' are critical considerations. In determining whether an athlete's conduct in the ingestion of a prohibited substance was "intentional", circumstantial evidence is key, both in terms of how the athlete obtained the substance and what precautions (if any) were taken thereafter. Finally, the *Sharapova* decision suggests that athletes may delegate their anti-doping responsibilities under certain circumstances and still benefit from a reduced degree of fault. ■



Closing the Loop – A Proposal for a Sport Ombuds in Canada

On April 21, 2017, the report “Closing the Loop – A Proposal for a Sport Ombuds in Canada” was published online by the SDRCC. Fruit of the work of an *ad hoc* committee and the result of a far-reaching stakeholders consultation, the report recommends a progressive hybrid approach, combining elements of traditional ombuds functions while adding other features designed to meet the unique needs of the Canadian sport system. Housed within the Centre and reporting to an independent advisory committee, the main functions of the ombuds would be to informally resolve conflicts and other issues, investigate complaints and make recommendations, provide advice and referrals, monitor trends and emerging issues, and manage the ombuds office. The SDRCC is currently looking to identify possible funding sources. It also wishes to highlight the exceptional contribution of the *ad hoc* committee members and to thank them wholeheartedly. ■

The SDRCC welcomes Ms. Linda Cuthbert as Board member, as of March 22, 2017.

New SDRCC Staff Members



Philippe N'Djoré-Acka joined the SDRCC team on February 20th as Partnerships and Promotion Coordinator. He is responsible for the coordination of domestic partnerships and promotion initiatives, including attending the Centre's kiosk and holding awareness activities at targeted sports-related events. Philippe holds a graduate degree in Sports Management and played Canadian university football. He has since started boxing recreationally.



Stéphane Grégoire will join the SDRCC in July as Education and Communication Coordinator. He will be in charge of developing new educational content and delivering workshops on dispute prevention and resolution. Avid cyclist and swimmer, Stéphane brings a strong experience in management and is currently pursuing graduate studies in dispute prevention and resolution at the Faculty of Law of University of Sherbrooke. ■

Tool for unrepresented parties:

What are submissions and what do I need to file?

The SDRCC's new resources on submissions is available to parties online. Its purpose is to guide parties in the preparation of documents to file before the tribunal in an arbitration proceeding. It also explains the format in which to present these documents in a coherent fashion in order to facilitate their review by the arbitrator and by other parties. ■



SDRCC at the Canada Games

The SDRCC will be onsite at the Canada Games in Winnipeg from July 28 to August 13, 2017 to provide free dispute resolution services. Athletes, coaches and mission staff are invited to stop by the kiosk to pick up publications and souvenirs, and for any information or assistance. ■

SDRCC Welcomes New Roster Members

On May 5 and 6, 2017, at the SDRCC's annual conference, 19 new roster members were added to the roster, bringing the current total to 58 mediators and arbitrators. ■

Notable Dates

- June 6: Kiosk at the USports AGM (Mississauga, ON);
- June 7: Kiosk at the Canadian Colleges Athletic Association AGM (Abbotsford, BC);
- June 8: Workshop for the Advanced Coaching Diploma, Institut national du sport - Québec (Montreal, QC);
- July 8: Workshop at the Table Tennis Canada AGM (Markham, ON);
- September 16: Workshop at the Synchro Alberta AGM (Edmonton, AB);
- September 22 - 24: Kiosk and presentation at the AthletesCAN Forum (Kanata, ON). ■

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