

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)**

NO: SDRCC DT 10-0117
(DOPING TRIBUNAL)

CANADIAN CENTRE FOR ETHICS
IN SPORT (CCES)

AND

JEFFREY ADAMS

AND

GOVERNMENT OF CANADA,
WORLD ANTI-DOPING AGENCY
(WADA)
(OBSERVERS)

Before:

Larry Banack (Arbitrator)

Appearances and Attendances:

On behalf of the Athlete: Timothy S. B. Danson (counsel)

On behalf of the CCES: Robert C. Morrow (counsel)

The Government of Canada and WADA did not participate in the hearing.

COSTS AWARD

Hearing Held October 21, 22, 24 and 25, 2010
Toronto, Ontario

February 15, 2011

INTRODUCTION

1. The Canadian Centre for Ethics in Sport (“CCES”) alleged that Jeffrey Adams (the “Athlete”) committed an anti-doping violation pursuant to Rule 7.31 of the Canadian Anti-Doping Program – 2009 (“CADP”).
2. That allegation was the subject matter of an arbitration conducted in October, 2010, determined by Decision dated December 21, 2010.
3. I concluded that the CCES had failed to establish that the Athlete committed a CADP Rule 7.31 violation.
4. Costs were reserved in order to permit the parties to make submissions.
5. Written submissions were received from the parties in attendance at the arbitration hearing; namely, the CCES and the Athlete.

POSITION OF THE ATHLETE

6. The Athlete submits he is entitled to costs as described in a bill of costs, claiming fees of \$81,872.79 (including applicable taxes) plus \$365.08 on account of disbursements (including applicable taxes), resulting in a total claim for fees and disbursements in the amount of \$82,237.87.
7. The Athlete seeks his full indemnity for costs on the basis that:

“Through the exercise of minimal competence and fairness by the CCES initially in its review, Adams would never have been prosecuted. Taken at its highest for the CCES, it exhibited a high level of indifference and tunnel vision and abdicated a responsibility in a manner that was entirely inconsistent with its publicly funded mandate to be the guardian of Canada’s Anti-Doping program”

CCES POSITION

8. The CCES submits that the Sport Dispute Resolution Centre of Canada (“SDRCC”) Code Article 7.1 and CADP Rules 7.93 and 7.97 are the applicable rules in respect of an award of costs in a domestic doping arbitration. It is asserted that, read in conjunction, they preclude the awarding of legal fees to the Athlete. It is submitted that no such costs have been awarded to any party in a doping arbitration in Canada since the adoption of the CADP in 2004.
9. The CCES does however recognize that some expenses (other than legal fees) contemplated by SDRCC Code Article 6.22(b) might be compensable, provided the claimant properly documents the costs sought. In this case however, the CCES submits that the factors in SDRCC Code Article 6.22(b) do not warrant a costs award in favour of the Athlete or any award on account of legal fees.

JURISDICTION

10. The parties have referred me to the provisions contained in the SDRCC Code, the CADP Rules and the *Ontario Arbitration Act*.
11. It is clear to me that the CADP Rules contemplate that a doping tribunal may award costs in its sole discretion. Upon request of a party, a doping tribunal has the discretion to award costs for a reasonably appropriate amount having regard for all of the circumstances of the proceeding. Costs are not awarded as of right and in the absence of the tribunal's exercise of discretion, a party bears his or her own costs.
12. CADP Rule 7.93 merely establishes the right of a person "to counsel at his/her own expense". Accordingly, it is not directed to, nor affects, the discretion afforded to an arbitrator pursuant to CADP Rule 7.97.
13. Furthermore, it is noted that Arbitrator Richard McLaren concluded, in an earlier matter concerning the Athlete,¹ that he had jurisdiction to award costs under Rule 7.69 of the CADP (now CADP Rule 7.97) and SDRCC Code Article 6.23.
14. I conclude that my jurisdiction to award costs in this matter derives from CADP Rule 7.97, which provides that the "Doping Tribunal may award costs to any party payable as it directs", subject to CADP Rule 7.93. As noted above, CADP Rule 7.93 is not applicable in this circumstance.
15. CADP Rule 7.97 is specifically applicable to this proceeding. It thus prevails and accordingly, it is not necessary or appropriate for me to further consider the SDRCC Code or the *Ontario Arbitrations Act*.

BURDEN OF PROOF

16. The onus of proof regarding entitlement to and quantification of the Athlete's claim for costs rests with the Athlete.

ISSUE FOR DETERMINATION

17. What principles apply to the exercise of an arbitrator's discretion in determining whether or not to award costs to the Athlete, as a result of an arbitration which concluded that the CCES' allegations were unfounded, and if so, in what amount?

¹ *The Canadian Centre for Ethics in Sport et al v. Jeffrey Adams* (2007) SDRCC DT-06/0039 (Doping Tribunal) at para. 9.

BACKGROUND

18. I will not repeat my Decision dated December 21, 2010 herein; but, I will briefly refer to the following paragraphs which inform my determination of costs in this matter:

- [308(k)] I conclude that CCES officials did not accept the responsibility that the CCES supplied catheters were clean. Further, the CCES officials sought to shift responsibility to the Athlete and assert a burden rested on him to ensure the CCES supplied catheters were contamination free at least by examination of the catheters and seals.
- [308(s)] The Supplementary Report form was handwritten by the Athlete in front of the CCES officials. It was taken by the DCO, Det. Iheme, without review by himself or Mr. Smyth, the Chaperone. The Athlete, while completing the Supplementary Report, verbalized that his actions were not a refusal. It is possible though unlikely that his words were not heard by Det. Iheme or Mr. Smyth.
- [308(u)] After the Athlete completed his Supplementary Report, the CCES officials did not confront the Athlete with their view that he was refusing to participate in the test...
- [337] ...during the Speakerphone Call the Athlete and his lawyer made clear their view that:
- (b) the Athlete had no intention to refuse to participate in the Doping Control Session; but, merely wished to clarify the CADP Rules
- [340] Mr. Smyth candidly acknowledged that had he been the DCO, he would have read the Athlete's Supplementary Report which patently disclosed the Athlete's view that there had been no refusal which would have triggered the clarifying discussion. Mr. Smyth was not the DCO...
- [342] I reject the CCES's assertion that the Athlete "clearly" indicated a refusal. In fact, there is nothing clear about the termination of the November 28th Session. On the advice of counsel, the Athlete was simply holding the CCES and himself to strict compliance and interpretation of the CADP Rules.
- [353] The [prior] DT/CAS Determination arose at a point in time when the guidelines applicable to disabled athletes were evolving. This evolution is reflected in Annex 6B to the CADP which establishes the CCES's obligations to disabled athletes. In the circumstances of the November 28th Session, these obligations were not respected.
- [355] The responsibility for the unsatisfactory evidentiary record rests with the CCES, which had refused the request of Mr. Bagg that the session be recorded on videotape. Further, it did not at the time review, challenge or clarify the Athlete's position that was clearly spelled out in his written Supplementary Report. Had the CCES chosen an alternate approach at the November 28th Session, it may have succeeded in meeting its burden of proof by avoiding the existing, contradictory, evidentiary record.

CONCLUSION

19. **For the reasons described below I have concluded that the Athlete is entitled to recover costs on account of fees, disbursements and applicable taxes in the all inclusive amount of \$40,000.00.**
20. The general rule that costs follow the event applies to a Doping Tribunal subject to the discretion afforded by CADP Rule 7.97 which I find “ought to be exercised judicially and in the interest of justice between the parties”² The assessment of costs is governed by an overriding principle of reasonableness.
21. I reject the CCES’s narrow interpretation of the CADP and SDRCC Rules. The CCES’ approach renders meaningless CADP Rule 7.97.
22. I am mindful of the CCES’s obligation to vigilantly pursue its important public mandate concerning anti-doping issues. In doing so, the CCES must carefully manage its resources. The CCES does so through prudent operations and is accountable for day-to-day decisions, including those which may give rise to litigious proceedings.
23. I comment below on specific considerations as well as some general principals (A-F), which I consider to be applicable in reaching a conclusion on the issue of costs.

A) OUTCOME

24. The outcome of the proceedings is a primary consideration in making a decision as to costs. The Athlete was, following a contested hearing, successful in defeating the allegations made by the CCES. As the successful party, the Athlete is *prima facie* entitled to receive a contribution toward his costs unless that entitlement is affected by the factors noted below.

B) CONDUCT OF THE PARTIES

25. There is nothing in the Athlete’s conduct during the Arbitration that would warrant a reduction of any costs which may otherwise be payable to him. Similarly, there is nothing in the conduct of the CCES throughout the Arbitration which would warrant an increase in the costs payable.
26. Counsel and the parties acted reasonably and responsibly in conducting the hearing in a timely and effective manner.
27. However, the Athlete asserts that all stages from the point of the testing held on November 28, 2009 through the formal review process and prosecution of the allegations of an anti-doping violation, the CCES proceeded notwithstanding “a serious conflict of

² *Marinov v. Australian Sports Anti-Doping Authority* (2007) CAS 2007/A/1311 (Court of Arbitration for Sport) at para. 31.

interest, bias, even *animus*". In addition, the Athlete asserts that the prosecution of the allegations including testimony received during the hearing that "was completely self-serving and mean spirited". The CCES is said to be accountable for the investigation, review and untrustworthy evidence adduced on its behalf during the Arbitration.

28. Further, the Athlete has asserted that given all the damage caused by the process, he should not have to be put further into debt by having to pay any of his legal fees. The CCES cannot act with impunity and there must be accountability. The CCES is the guardian of Canada's Anti-Doping Program, and it must be held to the highest standard. The CCES' mission statement states as follows:

"the mission of the CCES is to foster ethical sport for all Canadians. While ensuring ethical conduct in sport is ultimately everyone's responsibility, it remains important and valuable that one's national organization can help provide leadership and support in the ethical stewardship of Canadian sport."

29. Furthermore, under "stewardship" the CCES states that it is committed to:

"The efficient, effective and wise use of resources to best ensure that sustainability of the organization."

30. The Athlete asserts that the notion that there can be an acceptable level of collateral damage, or indifference to this damage, because the battle against drugs in sport is a noble cause, is both unacceptable and morally reprehensible. In sport, the CCES is given enormous invasive power that imposes a duty of utmost fairness and impartiality on the CCES. It cannot act with impunity.
31. The CCES defends the integrity of the testing process and the course of its investigation, including the conduct of the Arbitration. It argues the steps it took were all made necessary because the Athlete did not provide a required sample on November 28, 2009.
32. The CCES asserts that the Arbitration was conducted in an effective manner and that no negative outcome ought to arise because of the testimony of its witnesses.

33. I concur with the views of Arbitrator Pound in *Hyacinthe v. Athletics Canada*, expressed as follows:

“The purpose of the Code and the entire system established for mediation and arbitration in relation to sports disputes is to provide athletes, in particular, with a means to obtain simple and timely resolution of such disputes by experienced mediators and arbitrators without incurring significant costs. All parties to the disputes, especially those in a position of authority, are expected to act in a manner best designed to achieve such objectives.³”

34. Additionally I believe that a doping tribunal must have all of the necessary tools to control the orderly disposition of arbitrations ensuring that the objectives described by Mr. Pound are achieved and justice is done between the parties. Accordingly, cost consequences must be visited upon litigants in appropriate circumstances.
35. The conduct of the CCES in respect of the events from the test of November 28, 2008 to completion of its investigation, as revealed by the evidence reviewed above is a factor in favour of the Athlete and to which I afford weight in the award of costs in the matter.
36. However, I find that the reasonable conduct of the parties throughout the Arbitration process itself is neutral factor in considering my award of costs.

C) FINANCIAL RESOURCES THE PARTIES

37. The Athlete asserts that the actions of the CCES have had enormous, deleterious effects on him, although I was not provided with any specific information relating to the Athlete’s financial situation. It appears self-evident that the CCES, although a not-for-profit organization, is funded by public funds. In that context, I conclude there is a significant economic disparity between the Athlete and the CCES. This financial disparity is a factor in favour of the Athlete to which I afford weight in the award of costs in this matter.

D) INTENT

38. The Athlete asserts that by reason of the bad faith, improper use of authority and power in pursuit of unproven allegations, the CCES must be held fully accountable for the Athlete’s entire financial cost of the proceeding as a punitive measure.
39. In assessing the conduct of the CCES, in the test and investigation phases, the expectation of CCES’s perfection by the Athlete is inappropriate. Although unfortunate decisions were taken by the CCES on November 28th and thereafter, I have no cause to attribute bad faith or the improper use of authority or power to the CCES or its representatives. I

³ *Hyacinthe v. Athletics Canada* (2007) SDRCC/CRDSC 0-0047 at p. 13.

conclude that its conduct was not so egregious to attract a punitive sanction justifying an award to the Athlete on a full indemnity basis as claimed.

E) COST EXPECTATIONS

40. The amount of costs that an unsuccessful party could reasonably expected to pay for the arbitration hearing is a factor for consideration in assessing whether and in what amount costs should be awarded. Historically the CCES has not sought awards of costs against unsuccessful athletes, which is understandable and appropriate in most cases. The CCES has submitted that previously there has never been any award of costs in a doping arbitration in Canada since the adoption of the CADP in 2004. Accordingly the CCES may have proceeded with the prosecution of this alleged anti-doping violation with a reasonable expectation that no award of costs would be made against it.
41. That expectation disregards the discretion afforded a doping tribunal by CADP Rule 7.97. However, because I recognise that any such expectation of the CCES may have been founded in the prior jurisprudence, I moderate, in this first instance, the quantum of costs to be awarded the Athlete. It will be open to future doping tribunals to determine the reasonableness of unsuccessful parties' expectations in respect of the obligation to pay costs.

F) PROPORTIONALITY

42. The quantum of costs awarded must be proportionate to and reflect the nature and importance of the matter in issue and the complexity of the proceeding. There should also be proportionality between costs payable on a full indemnity scale from a partial indemnity scale.
43. In most cases, an anti-doping prosecution will be of general importance to all parties and of the greatest importance to the Athlete. In this instance the proceeding itself was not complex. The costs awarded must only reward an appropriate level of effort warranted in all of the circumstances.

DISPOSITION

44. In reaching my conclusion, I have not been swayed by, nor have I taken into account the rhetoric of either counsel as set out in the written costs' submissions.
45. In assessing costs, the paramount objective is to fix an amount that is fair and reasonable for the unsuccessful party to pay in all of the circumstances without slavish regard for the actual costs which may have been incurred by the successful party.
46. I have carefully considered the six principles described above (A-F) and conclude that it is appropriate to exercise the discretion afforded me by CDAP Rule 7.97 and apply the general rule that costs follow the event. The Athlete was successful in the Arbitration and is entitled to receive a contribution toward his legal costs from the CCES.

47. The CCES has not taken issue with the hourly rate or the time devoted to the matter by the Athlete's counsel. I have reviewed Mr. Danson's itemized account of time and cannot fault the amount of time attributed to the services provided or the hourly rate charged to the Athlete on a full indemnity basis. However, determining an award of costs is far more than the arithmetic exercise of multiplying a rate by the number of hours claimed.
48. The principles (A-F above) inform my view of the appropriate quantification of costs. Despite the strong submissions on behalf of the Athlete, I do not accept on the evidence before me, that the CCES or its representatives acted in bad faith or had the intent of particularly harming the Athlete.
49. Having concluded that the Athlete is entitled to the recovery of costs, I am unable to accede to his submission that such costs be fixed at a full indemnification level based on the bill of costs filed. There is nothing in the circumstances that would warrant an award of the level of costs sought by the Athlete. I was not provided with a bill of costs calculated on a partial indemnity basis.
50. Having regard for the principle of proportionality, I conclude that the time and effort devoted to the Athlete's defence appear to be appropriate having regard for the nature and importance of the matter in issue. The arbitration involved a number of factual disputes requiring careful examination and preparation to address the testimony of numerous witnesses and documents.
51. I note that the Athlete's bill of costs did not include a claim for the required written costs submissions and I take that into account fixing the amount of costs payable.
52. Having regard for the steps undertaken by the Athlete's counsel, a four day hearing, post hearing activities; including, submissions as to costs, I conclude, having regard for the above-noted paragraphs (A-F) that it is fair and reasonable to award the Athlete \$40,000.00 payable by the CCES inclusive of all the Athlete's claim for fees (including cost submissions and applicable taxes) on a partial indemnity basis.
53. I remain seized with the implementation of this Costs Award if necessary.

