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

IN THE MATTER OF A DOPING APPEAL UNDER THE CANADIAN SPORT DISPUTE RESOLUTION CODE

No. SDRCC / CRDSC DAT-15-0006

Doping Appeal Tribunal

Between :

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)

Appellant / Cross-Respondent

– and –

ALICIA BROWN

Respondent / Cross-Appellant

– and –

ATHLETICS CANADA (AC)
INTERNATIONAL ASSOCIATION OF ATHLETICS FEDERATIONS (IAAF)
WORLD ANTI-DOPING AGENCY (WADA)

Parties

REASONED DECISION

Panel: The Hon. L. Yves Fortier, CC, OQ, QC (President)
Mr. Patrice Brunet (Arbitrator)
The Hon. Robert P. Armstrong, QC (Arbitrator)

20 April 2015

I. INTRODUCTION

1. On 5 January 2015, Allan J. Stitt (the "Arbitrator"), constituted as the Doping Tribunal, rendered a decision (the "Decision") in which he found that the Respondent, Ms. Alicia Brown (the "Athlete"), who had admitted to violating Rule 7.23 of the 2009 Canadian Anti-Doping Program ("CADP"), had established that she had no significant fault or negligence. As a sanction, the Arbitrator issued a reprimand.

2. The Decision is appealed by both the Canadian Centre for Ethics in Sport (the "CCES") (the "Appeal") and the Athlete (the "Cross-Appeal") under Rule 8 of the 2009 CADP and Article 7 of the 2011 Canadian Sport Dispute Resolution Code ("CSDR Code").

3. As discussed below, the CCES, in its Appeal, requests that the Doping Appeal Tribunal (the "Tribunal") overturn the Decision of 5 January 2015 and impose a period of Ineligibility of two years on the Athlete, effective 26 November 2013, i.e. the date of the Sample collection.

4. The Athlete, in her Cross-Appeal, submits that the Arbitrator should have found, on a balance of probabilities, that HCTZ entered her body through contaminated Ingersoll water and, on that basis, requests that the sanction imposed by the Arbitrator be maintained.

5. On 2 April 2015, pursuant to Rule 8.10 (b) of the 2009 CADP, the Tribunal issued a written decision with reasons to follow (i) allowing the Appeal, (ii) denying the Cross-Appeal and (iii) imposing a period of Ineligibility of two years on the Athlete beginning on 26 November 2013.

6. Pursuant to Rule 8.10 (c) of the 2009 CADP, the Tribunal hereby issues the reasons for its decision.

II. THE PARTIES

7. Rule 8.13(a) of CADP provides, in relevant part, that: "*The parties before the Doping Appeal Tribunal are: the parties before the Doping Tribunal, the relevant International Federation, any other Anti-Doping Organization under whose rules a consequence could have been imposed and WADA.*" Rule 7.91 of the CADP reads as follows: "*The parties before the Doping Tribunal are the Athlete or other Person the CCES asserts to have committed an anti-doping rule violation, the CCES and the relevant national Sport Organization.*"

A. The Appellant / Cross-Respondent

8. **The Canadian Centre for Ethics in Sport** ("CCES"), whose head office is situated in Ottawa, is the national anti-doping organization whose principal responsibility is the adoption and enforcement of anti-doping rules and regulations in Canada, as well as the collection of samples and the management of doping control results on a national level. In this respect, CCES administers the CADP.

9. CCES is represented by Messrs. David Lech, Jeremy Luke, Kevin Bean and Ms. Erika Pouliot of CCES as well as Ms. Luisa Ritacca and Messrs. Justin Safayeni and Stephen Aylward of Stockwoods LLP.

B. The Respondent / Cross-Appellant

10. **Alicia Brown** (the "Athlete") is a Canadian elite, carded, track and field athlete. She was part of the CCES Registered Testing Pool during the relevant period, and therefore subject to out-of competition testing. At the time of the hearing before the Doping Tribunal, she was 24 years old. In 2013, she was the 400M National Champion. She has won numerous athletic and academic awards, and

received numerous athletic scholarships. Ms. Brown graduated from the University of Toronto in 2013 with Honours and a GPA of 3.74.

11. The Athlete is represented by Messrs. Jordan Goldblatt and Louis Century of Sack Goldblatt Mitchell LLP.

C. Other Parties

12. **Athletics Canada** ("AC"), with a national office in Ottawa, is the national sport organization that administers the sport of athletics in Canada and that is affiliated with the International Association of Athletics Federations (the "IAAF"). Ms. Brown is a member of AC.

13. AC is represented in these proceedings by Messrs. Corey Dempsey and Scott MacDonald of AC. On 17 February 2015, Mr. Dempsey, on behalf of AC, informed the Tribunal that it did not intend to make submissions or participate in the hearing. On 17 March 2015, the Tribunal granted the AC's request that an audio-recording of the hearing be made.

14. **The IAAF** is the international federation that administers the sport of athletics at the international level. Based in Monaco, the IAAF is composed of the various national sport federations that administer the sport of athletics in their respective countries, such as AC. As with all other international sport federations, the IAAF has the responsibility and the duty to regulate the sport of athletics around the world, while ensuring its promotion and development, to oversee the functioning and organization of competitions and to promote respect of the rules of "fair play".

15. In accordance with Rule 7.92 of the CADP, the IAAF had the right to observe the proceedings before the Doping Tribunal but did not do so. The IAAF did not participate in the proceedings before the Tribunal.

16. **The World Anti-Doping Agency** ("WADA"), whose head office is in Montréal, is the international organization responsible for administering the World

Anti-Doping Program which includes the World Anti-Doping Code. As with the IAAF, WADA had the right to observe the proceedings before the Doping Tribunal. WADA did not participate in the proceedings before the Tribunal.

III. FACTUAL BACKGROUND

17. The factual background of the present case is not in dispute between the parties. The relevant facts are as follows.

18. During the week of 15 November 2013, the Athlete was in Florida for training. She stayed in a condominium with six other female athletes. The condominium belonged to the grandmother of one of her teammates, and had only two bathrooms. At one point during the trip, the Athlete drank Gatorade that had been mixed in a team jug from water and powder.

19. From 23-24 November 2013, the Athlete attended her coach's wedding in Ingersoll, Ontario where she drank tap water on many occasions. She left for Ingersoll at around noon on 23 November and returned to Toronto at some point on the morning of 24 November.

20. Before she went to bed on 25 November, she put on a cream that she uses for her eczema.

21. On 26 November 2013, at approximately 6:30 am, the Athlete was visited [at her home] in Toronto by a representative of CCES who asked her to take a random Out-of-Competition urine test. This was the first time the Athlete had been asked to take a urine test for anti-doping purposes. After the test, the Athlete texted her parents and coach, proudly believing that her results were significant enough that she was being tested for performance enhancing substances.

22. The testing of the Samples resulted in an Adverse Analytical Finding for the presence of HCTZ, with concentrations of approximately 1.8 ng/mL (or 1800 ng/L) in Sample "A" and 1.0 ng/mL (or 1000 ng/L) in Sample "B".

23. HCTZ is a Prohibited Substance and a Specified Substance under the CADP Rules. HCTZ is a synthetic chemical used to treat conditions such as high blood pressure, heart congestion or excessive fluid in the body. It is a diuretic. It is sometimes used by athletes who want to lose a lot of weight in a short period of time (for example, athletes in a weight class), and it can be used to mask the ingestion of performance enhancing drugs because HCTZ causes the body to excrete fluids at a faster than normal rate.

24. On January 30, 2014, CCES notified the Athlete that it would be asserting an anti-doping rule violation based on the Adverse Analytical Finding for the presence of HCTZ in her system, contrary to CADP rules 7.23 to 7.26.

25. The Athlete then went through a long process to attempt to explain how she ingested HCTZ. The Tribunal recalls the findings of the Arbitrator with respect to that process which are not contested by CCES:

> *28. […] she made efforts to determine whether she might have accidentally taken medication intended for one of her roommates or of people she stayed with in Florida; whether she may have accidentally ingested HCTZ belonging to the owner of the condominium in Florida where she stayed; whether she may have accidentally ingested HCTZ belonging to one of the people she roomed with in Ingersoll or people she sat with at the wedding; or whether there might have been contamination of the cream she used for her eczema. She did not learn anything from her investigation that suggested the source of the HCTZ.*
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> *29. She also considered whether her supplements may have been contaminated and concluded that that was very unlikely as most of the supplements were either World Anti-Doping Agency ("WADA") pre-tested, certified clean for sport, third party tested in WADA accredited laboratories, or recommended by those who produced supplements that were tested by WADA accredited laboratories.*
>
> *30. She did not have her supplements tested because she could not afford the cost of the testing. She asked the CCES if it would test her supplements and CCES refused to test the supplements, saying that it was the athlete's burden to prove how the Specific Substance entered her system, not for CCES to disprove.*
>
> *31. She spoke to a sport medicine doctor at the University of Toronto about the possibility of cross-contamination of her supplements and he*

said he would be "very surprised" if it occurred and considered it "very unlikely".

32. In March, the Athlete had the water from Ingersoll and from Florida tested for HCTZ. No HCTZ was found in the water.

26. On 11 March 2014, the Athlete voluntarily admitted that she committed an anti-doping rule violation.

IV. DECISION APPEALED FROM

A. Factual Findings

27. The Athlete's central submission before the Arbitrator was that "the only realistic explanation for the positive test for HCTZ was that it resulted from her consumption of drinking water in Ingersoll."

28. As noted above, the Arbitrator held that the Athlete, who had admitted to violating Rule 7.23 of the 2009 CADP, had established that the HCTZ had entered her body through no significant fault or negligence. The Arbitrator reduced her sanction from a two year period of Ineligibility to a reprimand.

29. Before reaching his decision, and after having rejected the possibility that the Athlete had consumed HCTZ intentionally, the Arbitrator made the following findings which will inform the Tribunal's conclusions:

(i) After having considered the parties' respective expert evidence, the Arbitrator rejected the Athlete's theory that the positive test resulted from the Athlete drinking contaminated water in Ingersoll. He concluded that it was "extremely unlikely" that this was the case although it was not "impossible".

(ii) The Arbitrator then found that there were a number of other "possible reasonable sources of ingestion in this case", including "accidentally taking

someone else's medication, contamination of the eczema cream used at the pharmacy, accidental contamination of supplements, sabotage or possible inadvertent consumption through the Gatorade that the Athlete drank in Florida".

(iii) In the end, the Arbitrator said that he was unable to reach any conclusion as to how the HCTZ entered the Athlete's system and he concluded as follows:

> *"76. Therefore all of the possible reasonable sources of ingestion in this case lead to a conclusion of inadvertent ingestion of a small amount of HCTZ, with no significant fault or negligence on the part of the Athlete."*

B. Legal Reasoning

30. Before making these factual findings, the Arbitrator had determined that the 2015 CADP Rules which had come into force as of 1 January 2015 had significantly altered the 2009 CADP Rules under which the case had been initiated and that, by applying the principle of "lex mitior", the Athlete was entitled to have any new more favorable provision applied to her.

31. The Tribunal considers it important to quote in full the following paragraphs of the Arbitrator's Decision in that connection:

> *43. A preliminary issue that I must determine is, to the extent that the 2015 CADP Rules provide a test that is less stringent for the Athlete to meet than the 2009 CADP Rules, whether I am to apply the CADP Rules that were in force at the time of the anti-doping violation and at the time of the hearing, or the CADP Rules in force at the time the decision is released.*
>
> *44. Rule 20.4.2 of the 2015 CADP states that, with respect to any anti-doping rule violation case which is pending as of January 1, 2015, the arbitrator may determine that "the principle of "lex mitior" appropriately applies under the circumstances of the case".*
>
> *45. The principle of lex mitior provides that where there is a difference between the law in force at the time of an alleged offence and the law as it exists at the time of final judgment, the person accused of wrongdoing is entitled to have the more favourable provision applied to him or her. […]*

> *49. A significant difference between the 2009 CADP and the 2015 CADP is that the 2015 CADP does not require the Athlete to prove how the Specified Substance entered his/her system in order to obtain a reduced sanction. The Athlete must only establish no significant fault or negligence to be entitled to a reduced sanction.* (The Tribunal's emphasis)
>
> *[…]*
>
> *54. […] While she is not required to prove the specific way that the HCTZ entered her body, she must convince me, on the balance of probabilities, that it entered her body other than through her significant fault or negligence.*
>
> *[…]*
>
> *77. The 2015 CADP is drafted differently from the 2009 CADP so that, where the arbitrator is persuaded on the balance of probabilities that any of the ways that the Specified Substance could reasonably have entered the Athlete's system were a result of no significant fault or negligence on the part of the Athlete, but where the Athlete has not succeeded in showing on a balance of probabilities the one specific way the Specified Substance entered her system and where there was no intent to enhance sport performance or mask, that I should reduce the sanction.*

32. Accordingly, based on his interpretation of the 2015 CADP Rules, the Arbitrator concluded that the Athlete bore No Significant Fault or Negligence, despite the fact that she had not established how the HCTZ had entered her system. In reaching his conclusion, he relied on "five important facts which [he said] influenced [him]":

(i) HCTZ was not a drug that would logically benefit a track athlete;

(ii) There were no other prohibited substances in her system suggesting that HCTZ was being used as masking agent;

(iii) The amount of HCTZ in the Athlete's system was below the amount that could have been detected by some WADA approved laboratories;

(iv) The Athlete did not know and, despite strenuous efforts, could not determine how the HCTZ entered her system; and

(v) None of the theories put to the Athlete about how the substance may have entered her system involved significant fault or negligence on her part.

33. As to the sanction, the Arbitrator concluded as follows:

> *81. Various sport tribunals have accepted that proportionality should be applied to determine the appropriate sanction for an athlete. […]*
>
> *82. Six athletes have tested positive for HCTZ without a TUE and without traces of other Prohibited Substances in their systems. Of five (other than the Athlete), four have been identified, and all four have received a suspension of significantly less than two years (two received a reprimand, one received a two-month suspension and once received a six-month suspension). There has been no suggestion that there are circumstances that should cause this Athlete to be treated differently from all of the others who tested positive for HCTZ (with no TUE and no other Prohibited Substances found). I therefore find that the concept of proportionality requires me to reduce the sanction for this Athlete.*

34. Since the Athlete quickly admitted the anti-doping rule violation and had not participated in a sanctioned race for over a year, the Arbitrator decided to reduce the sanction to a reprimand.

V. PROCEDURAL BACKGROUND

A. Preliminary Stages

35. In conformity with Rule 8.8 of the CADP and Article 7.4 (a) of the CSDR Code, the appeal was lodged by means of a Notice of Appeal filed by the CCES on 22 January 2015. At paragraph 3 of that Notice, the CCES sets out the following grounds of appeal: "*Arbitrator Stitt erred in concluding that there was no requirement in the 2015 Canadian Anti-Doping Program (2015 CADP) for an Athlete to prove how a Prohibited Substance entered his or her system to be eligible for a sanction reduction. […] In addition, Arbitrator Still [sic] erred by failing to consider Ms. Brown's 'degree of Fault' when he calculated her sanction reduction.*"

36. The Cross-Appeal was initiated by means of a Notice of Cross-Appeal filed by the Athlete on 5 February 2015. At paragraphs 1 and 2 of that Notice, the Athlete sets out the following grounds of appeal: "*[…] Arbitrator Stitt unreasonably applied the balance of probabilities standard to her case. […] [T]he Arbitrator unfairly and unreasonably raised the burden of proof that [the Athlete] was required to meet in the circumstances of the case […]*."

37. On 13 February 2015, during an administrative conference call held by the SDRCC, the parties agreed that the appeal would proceed under the 2009 CADP Rules as recorded in the Notes of the Administrative Conference Call.

38. The Panel constituting the Appeal Tribunal having been duly designated and constituted in accordance with Rule 8.9 of the CADP, convened a preliminary meeting with the parties, by telephone, on 17 February 2015, in order to resolve outstanding procedural matters and set a procedural timetable for the Appeal and Cross-Appeal. The President was not able to participate in the meeting due to a scheduling conflict, however another member of the Panel was able to preside the meeting. By letter dated 19 February 2015, the SDRCC confirmed in writing the items addressed and the procedural directions issued during the preliminary meeting of 17 February.

39. In accordance with the directions issued by the Appeal Tribunal, the following written submissions were filed by the parties:

- On 20 February 2015, CCES and the Athlete filed an Agreed Statement of Facts;
- On 12 March 2015, CCES filed its Factum along with a Compendium;
- On 16 March 2015, the Athlete filed her Factum along with a Compendium; and
- On 18 March 2015, CCES filed its Reply Factum and a Reply Compendium.

B. The Hearing

40. As agreed during the preliminary meeting of 17 February and indicated in the subsequent correspondence and procedural directions, the hearing of the appeal took place in Toronto, at the Fairmont Royal York, New Brunswick Room, on 19 March 2015. No witnesses were called and the Tribunal heard the parties' oral submissions on the merits of the appeal and the cross-appeal. The hearing took place from 9:30 a.m. to 4:15 p.m. At the end of the hearing, the President declared the proceedings closed.

C. Decision (with reasons to follow)

41. On 2 April 2015, pursuant to Rule 8.10 (b) of the 2009 CADP, the Tribunal issued a written decision with reasons to follow (i) allowing the Appeal, (ii) denying the Cross-Appeal, and (iii) imposing a period of Ineligibility of two years on the Athlete beginning on 26 November 2013.

VI. THE KEY CADP RULES

42. The following provisions of the 2009 CADP anti-doping rules are particularly relevant to the present proceedings:

> ***SPECIFIC ANTI-DOPING RULE VIOLATIONS***
>
> *[…]*
>
> ***Presence in Sample***
>
> *7.23 The presence of a Prohibited Substance […] in an Athlete's bodily Sample is an anti-doping rule violation. [Code Article 2.1]*
>
> *7.24 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance […] found to be present in their Samples. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish this*

anti-doping violation.

SANCTION ON INDIVIDUALS

Imposition of Ineligibility for Prohibited Substances and Prohibited Methods

7.38 The period of Ineligibility imposed for a first violation of Rules 7.23-7.27 […] shall be two (2) years Ineligibility, unless the conditions for eliminating or reducing the period of Ineligibility […] are met.

Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

7.42 Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Rule 7.38 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years' Ineligibility.

7.43 To justify any elimination or reduction under Rule 7.42, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the Doping Tribunal the absence of an intent to enhance sport performance or mask the Use of a performance enhancing substance. The Athlete or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility. The Athlete or other Person shall have the onus in establishing that his or her degree of fault justifies a reduced sanction.

APPEAL RULES

(…)

Appeals Involving National-Level Athletes and Other Persons

8.6 An appeal shall be limited to questions of procedural error or unfairness by the CCES, the Doping Tribunal or TUEC, or failure to properly interpret and apply the

CANADIAN ANTI-DOPING PROGRAM. An appeal is not a trial de novo with complete reconsideration of whether there was an anti-doping rule violation and, if so, whether the Doping Tribunal imposed the appropriate Consequences of Anti-Doping Rule Violations, or of whether the TUE or medical review ought to have been granted. A decision of the CCES, Doping Tribunal or TUEC shall only be reversed if it is unreasonable. (Emphasis added)

8.7 The Doping Appeal Tribunal has the authority to make the determination that should have been made by the CCES, Doping Tribunal or TUEC without error.

VII. PARTIES' WRITTEN AND ORAL SUBMISSIONS

A. CCES

43. CCES requests that the appeal be allowed, that the cross-appeal be dismissed, and that a two year period of Ineligibility be imposed on the Athlete, effective 26 November 2013, i.e. the date of the Sample collection.

44. CCES raises two issues in its Appeal:

(i) CCES argues that the Arbitrator erred in interpreting and applying the 2015 CADP Rules so as to remove the requirement that an Athlete establish how a Specified Substance entered her system before being entitled to a reduction in sanction; and

(ii) CCES argues that the Arbitrator erred in interpreting and applying the principle of proportionality to impose a sanction.

1) Standard of Review

45. As to the standard of review, the parties agree that the Appeal is governed by Rules 8.6 and 8.7 of the 2009 CADP, which, as was noted above, provide that a

decision "*shall only be reversed if it is unreasonable*" and give the Appeal Tribunal "*the authority to make the determination that should have been made by the […] Doping Tribunal.*" The parties also agree that the jurisprudence on administrative law is a useful guide to assessing the "reasonableness" standard under Rule 8.6.

46. According to CCES, the parties disagree however as to the applicability of principles of criminal law to the standard of review. While the Athlete submits that, according to those principles, the prosecutor bears a heavy onus in establishing not only that the court below erred in law, but that this error affected the outcome. CCES submits that those principles are not applicable in sport arbitration. In this respect, CCES avers that (i) the CADP Rules explicitly prescribe a standard of review; (ii) the present proceedings are civil in nature; and (iii) in any event, since the Appeal relates to the appropriate sanction, it is thus analogous to an appeal to vary a sentence and not to an appeal to overturn an acquittal.

2) The Arbitrator erred in his interpretation and application of the 2015 CADP Rules

47. The Athlete has conceded that the Arbitrator erred in his interpretation of the 2015 CADP Rules and that the Athlete must satisfy the threshold test under Rule 7.42 of the 2009 CADP Rules. In other words, the Athlete must establish how a Specified Substance entered her system in order to qualify for a period of Ineligibility of less than two years. This issue, says CCES, is therefore not in dispute between the parties.

48. However, avers CCES, the parties disagree as to the interpretation to be given to the threshold test. While CCES argues that the test requires the Athlete to establish a single theory of ingestion, the Athlete submits that the test can be met by raising multiple possible explanations.

49. According to CCES, the Athlete's interpretation of the threshold test is unreasonable for the following reasons.

(a) The Arbitrator did not and could not have found a single source of ingestion

50. As a preliminary matter, avers CCES, the Athlete's characterization of the record as containing "specific evidence" on the possible routes of ingestion is misleading.

51. CCES explains that those routes were actually suggested by CCES in its opening and closing submissions before the Arbitrator to highlight that the Athlete's water contamination theory was not the only theory available. However, CCES argues that the only "specific evidence" before the Arbitrator in respect of these various ingestion routes was adduced by the Athlete herself, who denied that any of the five sources identified by the Arbitrator could explain how the HCTZ was in her system. Before this Tribunal, in her alternative argument, the Athlete argues that "*[t]here was no evidence before Arbitrator Stitt upon which he could ever have accepted that these methods of ingestion were 'more likely' than the Ingersoll water theory.*" CCES recalls that the water theory was determined by the Arbitrator to be "extremely unlikely."

52. CCES argues that the absence of specific evidence concerning HCTZ ingestion from a source other than contaminated water explains why the Arbitrator found that he could not determine the actual source of HCTZ ingestion from the basket of five explanations that he considered "possible reasonable sources".

53. According to CCES, since the Athlete accepts the Arbitrator's factual findings for the purposes of this appeal, the Appeal Tribunal should dismiss the suggestion that the Arbitrator "could have" found a single possible explanation for the HCTZ in the Athlete's system.

54. CCES further submits that the Athlete faced no difficulty in attempting to meet the threshold test: the Athlete was not placed in an extraordinary or difficult position with respect to proving the water contamination theory. As regards the five possible sources relied upon by the Arbitrator, there is no basis upon which to assert that the Athlete had "extraordinary difficulties" with proof because the Athlete never

even tried to prove how HCTZ entered her system by any of those sources. By putting the case in this way, the Athlete made a strategic decision to rely exclusively on a theory of ingestion that would virtually guarantee her a finding of No Fault or Negligence (contaminated drinking water) rather than one where she would have to establish No Significant Fault or Negligence (e.g. the five possibilities cited by the Arbitrator). In any event, CCES argues that the threshold test has always been applied to require a specific source of ingestion, whether or not the Athlete faced extraordinary difficulties.

(b) The 'multiple possible explanations' approach is contrary to the text of the rule, and finds no jurisprudential support

55. CCES submits that the Athlete's proposed approach to meeting the threshold test finds no support in the text of any version of the CADP Rules of the WADA Code. Rule 7.42 of the 2009 CADP requires an Athlete to "establish how a Specified Substance entered his or her body." Thus, on its face, avers CCES, the Athlete's approach finds no support in the clear language of Rule 7.42.

56. In addition, argues CCES, the Athlete's submission is a radical departure from well settled sports law jurisprudence. CCES argues that the threshold test has been applied very strictly in the jurisprudence. For example, in *ITF v Martina Hingis*, where the Athlete argued that cocaine "*probably entered her system by means of a drink, food, supplement or medication contaminated by this exceptionally prevalent substance*", the Panel found that the Athlete's reliance on multiple possible explanations was "*wholly inadequate to discharge the burden on her of establishing how the prohibited substance in this case entered her system.*"[1]

57. CCES submits that the same conclusion must apply *a fortiori* in the present case, since even the Athlete disavows the basket of explanations accepted by the Arbitrator.

[1] *ITF v Martina Hingis*, Decision of the Independent Anti-Doping Tribunal dated 3 January 2008.

58. CCES also stresses that the Arbitrator himself rejected the interpretation of the 2009 CADP now put forward by the Athlete. This is why he turned to the principle of l*ex mitior* and relied on an erroneous reading of the 2015 CADP Rules.

(c) The 'multiple possible explanations' approach does not allow for a proper assessment of fault, and the Arbitrator did not conduct one here

59. According to CCES, the threshold test serves the important purpose of allowing for a proper assessment of the Athlete's fault. In order to receive a reduced sanction under the 2009 CADP, the Athlete must establish that (i) she meets the threshold test, (ii) she did not intend to take a Specified Substance for a performance-enhancing purpose, and (iii) her degree of fault warrants a reduction or elimination of her sanction. Those three requirements are cumulative, says the CCES.

60. CCES submits that, pursuant to the WADA Code and the CADP Rules, assessing the Athlete's fault involves an analysis of all the relevant circumstances surrounding the ingestion to determine whether they are "exceptional" and whether the Athlete adhered to the expected standard of behavior.

61. CCES argues that if the Athlete's approach was adopted, it would be impossible for the adjudicator to carry out the necessary assessment of fault. If the precise facts and circumstances of ingestion are unknown, how can the Athlete demonstrate that he/she was not at fault, asks CCES?

62. In the present case, as between the five possible explanations, CCES avers that it is inconceivable that each will lead to the same conclusion in so far as the Athlete's fault (or absence thereof) is concerned. In this respect, CCES submits that, in the present case, the Arbitrator actually did not, in fact, conduct even a single fault analysis. This is clear from his Decision, where he addresses fault in a single sentence: "*Therefore all of the possible reasonable sources of ingestion in this case lead to a conclusion of inadvertent ingestion of a small amount of HCTZ, with no significant fault or negligence on the part of the Athlete.*" (at para. 76)

63. CCES submits that the Arbitrator's failure to carry-out a proper degree of fault analysis reflects the fact that he lacked the necessary facts and information to do so, precisely because the threshold test was not met.

(d) The 'multiple possible explanations' approach undermines the key principle of Athlete responsibility

64. CCES submits that, by allowing an Athlete to gain the benefit of a lesser sanction without identifying how the Specified Substance entered her system, the Athlete's interpretation of the threshold test undermines the principle of Athlete responsibility. For years, avers CCES, sports law jurisprudence has sent the consistent message that, in order to preserve the integrity of the global anti-doping regime, Athletes need to be sensitive, aware and ultimately responsible for anything that enters their body – and that the consequences of failing to do so may be severe.[2]

(e) Conclusion

65. Based on the foregoing, CCES submits that the Arbitrator's decision is unreasonable and must be set aside.

3) The Arbitrator erred in his interpretation and application of the principle of proportionality

66. CCES submits as a second issue that the Arbitrator misunderstood the principle of proportionality and applied it in a factual vacuum.

67. CCES argues that proportionality speaks to the relationship between the consequences of the rule in issue and the purpose it is designed to serve, whereas the Arbitrator used the language of "proportionality" to describe an analysis of whether

[2] See for example: *Val Barnwell v USADA*, Case No. 77 190 514 09, at para 7.1; and *International Wheelchair Basketball Federation v UK Anti-Doping & Simon Gibbs*, CAS 2010/A/2230 at paras. 11.10 and 11.34(4)

the sanction in this case was appropriate by reference to sanctions imposed in other cases where the same anti-doping rule violation was present. CCES avers that this is not an issue of proportionality but rather an issue of sentencing parity. Sentencing parity, CCES says, cannot operate as a substitute for the threshold test.

68. According to CCES, by agreeing to a reduction of the sanction without holding the Athlete to the threshold test, the sanction levied by the Arbitrator in fact violated the principle of sentencing parity. The Athlete in this case was unable to prove how the Specified Substance entered her system. In CAS cases where the threshold test has not been met, submits CCES, a two year period of Ineligibility has always been imposed. Imposing a more lenient reprimand would mean that this Athlete was treated differently from other athletes in the same situation.

69. CCES further argues that the Arbitrator's analysis is also flawed as a factual matter. In the course of his reasons on proportionality, the Arbitrator referred to four other cases involving HCTZ violations and then concluded that "the concept of proportionality requires me to reduce the sanction" to a reprimand. CCES avers that in those four cases, the athlete had to satisfy the threshold test and, in any event, in three of those cases, no decision was ever published (only press releases) as the cases involved agreed-upon sanctions.

70. CCES thus concludes that proportionality has no role to play where CADP Rules are clear and the threshold test has not been met.

71. In any event, argues CCES, the requirements and consequences of the threshold test are proportionate. In CAS 2010/A/2230 *International Wheelchair Basketball Federation v UK Anti-Doping & Simon Gibbs*, the Panel held that the existing interpretation and application of the threshold test was proportionate. According to CCES, proportionality provides no basis to depart from the interpretation of the threshold test in accordance with its plain language, purpose and a long line of CAS jurisprudence requiring Athletes to establish how a Specified Substance entered their system in order to obtain any reduction in sanction.

B. The Athlete

72. The Athlete requests that the sanction imposed by the Arbitrator be upheld.

1) Standard of Review

73. The Athlete submits that under Rule 8.6 of the 2009 CADP, the Appeal Tribunal lacks jurisdiction to reverse a decision, even where, as in the present case, a legal error is found, unless the decision is "unreasonable' that is, says the Athlete, "*unless it falls outside a range of possible, acceptable outcomes which are defensible in respect of the facts and law.*"[3]

74. If the Tribunal reverses the Decision, then, pursuant to Rules 8.6 and 8.7, the "Doping Appeal Tribunal has the authority to make the determination that should have been made by the CCES, Doping Tribunal or TUEC without error".

75. The Athlete submits that, in exercising its authority to make the determination that should have been made, the Tribunal can only make decisions that are consistent with the factual record that is before it as the appeal is not a *de novo* hearing.

2) CCES' Appeal

76. The Athlete concedes that the Arbitrator committed an error when he held that the 2015 CADP did not require her to prove how the Specified Substance entered her system. She also concedes that because the 2015 CADP was not more beneficial to her in this respect, the Arbitrator should have applied the 2009 CADP.

77. Notwithstanding this concession, the Athlete submits that the Tribunal must nevertheless determine whether the Decision was unreasonable, as required by Rule 8.6, and if so, whether to exercise its jurisdiction to impose a more severe sanction.

78. In this respect, the Athlete argues that since the Arbitrator found that all

[3] See Athlete's Factum at para. 43.

possible reasonable sources of ingestion would have led him to the same legal result (no significant fault), his Decision was not unreasonable. In the alternative, the Athlete submits that any legal error committed by the Arbitrator does not entitle the Tribunal to overturn the decision as this would be unreasonable, disproportionate and unjust.

a) The Decision was not unreasonable

79. The Athlete submits that there can be no doubt that the Arbitrator explicitly considered the question of means of ingestion, notwithstanding his misstatement of the law. In fact, he considered "all of the possible reasonable sources of ingestion" and found that all of them "lead to a conclusion of inadvertent ingestion of a small amount of HCTZ."

80. Thus, says the Athlete, in so finding, the Arbitrator effectively held that the Athlete had established all possible sources of potential ingestion. The Arbitrator's interpretation of all means of ingestion was therefore reasonable. While the Arbitrator did not select one source of ingestion as more likely than the others due to his erroneous reading of the 2015 CADP, he could have found a single source of ingestion, as he had before him all of the possible reasonable sources of ingestion, including specific evidence related to each.

81. In the present case, the Arbitrator's decision effectively answered the question of 'means of ingestion' with the answer "any of five possible methods", which, in the unique circumstances of this case, and the facts which he found, he was allowed to do. The Arbitrator's inability to choose one between the five possible sources, each of which would have led to the same result, should not lead to a reversal of his decision, according to the Athlete.

82. The Athlete argues that the Arbitrator's approach in the circumstances was "eminently reasonable". This approach is sensitive to the "extraordinary difficulty faced by innocent Athletes seeking to prove how an unknown substance entered their system, which CAS jurisprudence has described as the difficulty of proving

'negative facts'."

83. According to the Athlete, in *Veronica Campbell-Brown v JAAA & IAAF*, CAS 2014/A/3487, the athlete argued that 'means of ingestion' could be broadly interpreted in certain circumstances and that the Tribunal could accept that accidental ingestion – a broader theory than the one found by the Arbitrator in the present case – would satisfy her burden of proving the method of ingestion. While Ms. Campbell-Brown's submissions in that case were not considered by the Panel in the end, the Athlete argues that the argument put forward by Ms. Campbell-Brown demonstrates that the Arbitrator's conclusion was reasonable.

84. In the event the Tribunal should accept that the Decision was reasonable in respect of the proof of the method of ingestion, then the Athlete submits that CCES' argument that the Arbitrator wrongly applied the principle of proportionality must fail.

85. In this respect, the Athlete argues that the Arbitrator's fault analysis was not dependent on his application of the principle of proportionality; rather, it was derived from his assessment of the evidence. It was clear from the Decision, submits the Athlete, that the Arbitrator determined, in respect of each one of the five possible means of ingestion, (i) that there was no sport enhancing or masking purpose, and (b) that the degree of fault justified reducing the sanction to a reprimand. Thus, the Arbitrator satisfied the requirements of Rule 7.42 in respect of all five possible means of ingestion.

b) On the other hand, a reversal of the Decision would be unreasonable, disproportionate and unfair

86. Firstly, according to the Athlete, it would be unfair to punish the Athlete where the Arbitrator, through no mistake of any party, erred in his interpretation of the law. It is clear from the Decision that the Arbitrator believed that the Athlete had done nothing culpable. Faced with the choice of suspending her for two years or labelling one method of ingestion as marginally more likely than another, the

Arbitrator would clearly have opted for the latter choice avers the Athlete. The selection of one means of ingestion over another is a decision that this Tribunal may make, if necessary, to give effect to the Arbitrator's decision concludes the Athlete.

87. Secondly, the Athlete argues that, in light of the quasi-criminal nature of doping proceedings, a reversal of a decision exonerating the Athlete at first instance cannot be made where it would result in unfairness to the Athlete. The Athlete submits that where there is even a possibility that the Arbitrator would have arrived at the same result on a proper application of the law, it would be inappropriate and unfair for the Tribunal, without the benefit of direct evidence, to substitute a more severe sanction.

88. Thirdly, the Athlete avers that, even if the Tribunal finds that the Arbitrator's legal error affected the outcome, it has discretion under Rule 8.6 of the CADP to prevent an Athlete from receiving a sentence that is unjust and disproportionate.

89. According to the Athlete, in *Puerta*, the CAS Panel declined to apply a mandatory provision of the WADA Code in the case of an athlete facing a mandatory sanction for a second anti-doping offence, on the basis that "*[the] eight years ban ... appears to be unjust and disproportionate to the circumstances surrounding the positive test result and the severe consequences to the athlete's livelihood that such a ban entails*". The CAS Panel further noted that "*the problem with a 'one size fits all' solution is that there are inevitably going to be instances in which the one size does not fit all*".[4]

90. The Athlete submits that the following circumstances of her doping offence require a reasonable and measured approach, not a one-size-fits-all two-year ban:

(i) She inadvertently ingested a small amount of HCTZ, a Specified Substance that she had never heard of and that provided no benefit to her;

(ii) The "extremely low level" of HCTZ was so low that some WADA approved

[4] *Mariano Puerta v ITF*, CAS 2006/A/1025 at para. 11.7.18.

laboratories would not have detected it;

(iii) The Athlete made efforts to discover the source of ingestion and provided evidence of her efforts and of all possible sources to the Arbitrator;

(iv) The Arbitrator found as a fact that the finite number of possible sources all entailed inadvertent ingestion of a small amount of HCTZ;

(v) Had the Arbitrator selected any of these sources as the "most likely" source, he would have found a low degree of fault and reduced the sanction;

(vi) Although the Athlete's sanction was reduced to a reprimand and no period of Ineligibility, the Athlete has already served 15 months out of a maximum of a 24 month ban and she continues to be under a voluntary provisional suspension;

(vii) The Arbitrator's error was due to the fact that he tried to interpret the 2015 CADP prior to any other decision being made interpreting it, and without counsel's assistance on the question of ingestion;

(viii) The unique procedural and evidentiary limits in place will not apply to any future appeals as the 2015 CADP, which provides for *de novo* appeals, is now in effect; and

(ix) Of four other known cases of HCTZ ingestion without a TUE and without traces of other Prohibited Substances, sanctions received ranged from a reprimand to a six-month suspension. It would be manifestly unfair for the Athlete to be penalized with a two-year ban for the same offence that leads other athletes to a suspension far less severe than what she has already served voluntarily.

91. In the Athlete's unique circumstances, concludes her counsel, which are unlikely to ever repeat themselves, it would neither be just nor proportionate to enter a "guilty verdict" (i.e. a two-year ban) in a legal appeal heard without any evidence.

3) Athlete's Cross- Appeal

92. In her Cross-Appeal, the Athlete submits as her alternative argument that, if the Tribunal reverses the Decision, then it should find that the Arbitrator erred in his analysis of whether the Athlete discharged her onus of proving the means of ingestion on a balance of probabilities. The Arbitrator should have found, on a balance of probabilities, that HCTZ entered her body through contaminated Ingersoll water.

93. Having found that consuming contaminated Ingersoll water was "possible" as the cause of the positive test, the Athlete submits that the Arbitrator ought to have followed CAS jurisprudence requiring him to consider the relative probability of this source of ingestion as compared to other possible sources. The Athlete refers to and relies on the CAS decisions of *UCI v Alberto Contador Velasco & RFEC*, CAS 2011/A/2384 & *WADA v Alberto Contador Velasco & RFEC*, CAS 2011/A/2386; *ITF v Richard Gasquet*, CAS 2009/A/1926 & *WADA v ITF & Richard Gasquet*, CAS 2009/A/1930 in this respect. In *Contador*, the CAS Panel stated the following:

> *The athlete can only succeed in discharging his burden of proof by proving that (1) in his particular case meat contamination was possible and that (2) other sources from which the Prohibited Substance may have entered his body either do not exist or are less likely. The latter involve a form of negative fact that is difficult to prove for the athlete and which requires the cooperation of the Appellants. Thus, it is only if the theory put forward by the Athlete is deemed the most likely to have occurred among several scenarios, or if it is the only possible scenario, that the Athlete shall be considered to have established on a balance of probability how the substance entered his system, since in such situations the scenario he is invoking will have met the necessary 51% chance of it having occurred.*[5]

94. The Athlete submits that under the balance of probabilities test, the Arbitrator should have found that she would have discharged her burden of establishing that the means of ingestion was the contaminated water from Ingersoll.

[5] *Contador*, para. 8.

95. The Arbitrator found that the theory of HCTZ in Ingersoll water was not "impossible". According to the Athlete, applying *Contador*, this finding of fact made it necessary for the Arbitrator to consider evidence of alternative theories.

96. The alternative theories before the Arbitrator were accidental ingestion of medication, contamination of eczema cream, accidental contamination of supplements, sabotage, or contaminated drinking water in the Gatorade. The Athlete submits that there was no evidence before the Arbitrator upon which he could ever have accepted that these methods of ingestion were more likely than the Ingersoll water theory to have caused the positive test.

97. In particular, avers the Athlete, the parties have agreed in their Agreed Statement of Facts that:

(i) No witness testified to, or suggested, that the Athlete's eczema cream contained HCTZ;

(ii) No witness testified to, or suggested, that the Athlete took someone else's medicine or supplements that contained HCTZ;

(iii) No witness testified to, or suggested, that the Athlete was the victim of sabotage;

(iv) No witness testified to, or suggested that, the Athlete's supplements were contaminated; and

(v) No witness testified to, or suggested, that the Gatorade water consumed in Florida was contaminated with HCTZ.

98. Accordingly, the Athlete argues that she discharged her burden of proof by proving that HCTZ in the Ingersoll water was possible and that there was no evidence of any other source of contamination being more likely.

99. The Athlete submits that the Arbitrator erred in law and acted unreasonably and unfairly by increasing the burden the Athlete had to meet in order to establish

her source of ingestion of HCTZ.

100. If the Tribunal agrees with her, the Athlete submits that it follows that there was (i) no sport-enhancing or masking purpose, and (ii) the degree of fault was nonexistent, thus warranting a reprimand and no period of ineligibility.

C. CCES: The Athlete's Cross-Appeal should be dismissed

101. In respect of the merits of the Athlete's Cross-Appeal, CCES submits that it must be dismissed since the '*Contador* test' relied upon by the Athlete has not been met and, in any event, should not apply in the circumstances of this case. In the alternative, pleads CCES, *Contador* should simply not be followed.

(a) The 'Contador test' relied upon by the Athlete is not met in this case

102. As noted in the previous section of this Decision, the Athlete argues in her Cross-Appeal that, under the *Contador* version of the threshold test, the Arbitrator ought to have assessed whether the threshold test was met "*by first determining whether [the ingestion of HCTZ through contaminated water] was possible, and then considering its likelihood against other sources of ingestion.*" According to the Athlete, she would satisfy the second leg of the test "*if other possible sources do not exist or are less likely*".

103. CCES replies that, even if the *Contador* test is applied (which CCES does not accept), the Athlete failed to meet that test since this case does not meet the requirement that other possible sources of HCTZ "do not exist or are less likely" than the water contamination explanation.

104. In this respect, CCES submits that the Arbitrator actually made factual findings that other possible sources of HCTZ exist and that those other possible sources are more likely to have occurred than the Athlete's water contamination theory. CCES recalls that the Athlete has agreed that, pursuant to Rule 8.6 of the CADP, those factual findings are not open to review on appeal.

(b) Contador does not stand for the proposition advanced by the Athlete

105. In any event, CCES submits that there are several reasons why *Contador* does not apply in this case.

106. CCES avers that *Contador* is premised on the difficulty of proving "negative facts", but the present appeal does not deal with negative facts at all. A negative fact requires proof that something did not occur. In the present case, the Athlete has to prove what did occur by establishing how the HCTZ entered her system. This is something entirely within her knowledge and ability to establish, argues CCES.

107. CCES submits that *Contador* relies heavily on Swiss law in its discussion of the burden of proof and how it ought to be applied. The central role of Swiss law in the reasoning of the CAS Panel may explain why its approach to the threshold test has never been followed, says CCES.

108. Further, CCES avers that, in *Contador*, the CAS Panel "*[sought] guidance from Swiss law to the extent that this is compatible with international standards of law*". The present arbitration is governed by the 2009 CADP and as such, argues CCES, Swiss law has no role to play in the analysis.

109. CCES avers that nothing in the *Contador* Decision restricts the ability of an anti-doping organization to mount a direct challenge to the Athlete's sole theory of ingestion, as CCES did in this case.

(c) In the alternative, Contador should not be followed

110. CCES submits that, in any event, the 'Contador test' amounts to an "unprincipled and unjustified weakening" of the threshold test that is inconsistent with the text and purpose of Rule 7.42. The reasoning of the *Contador* Panel as to how the burden of proof can be satisfied has never been accepted by common law courts or by CAS panels.

VIII. ANALYSIS

111. For the reasons which follow, the Tribunal, having deliberated, has decided that it agrees with CCES' submissions both as to its Appeal and the Athlete's Cross-Appeal.

112. Before considering the Appeal and the Cross-Appeal, the Tribunal will recall the applicable standard of review of the Arbitrator's Decision.

A. Standard of Review

113. As recorded in the Minutes of the Administrative Conference Call held on 13 February 2015, the parties have agreed that the appeal would proceed under the 2009 CADP Rules.

114. Rules 8.6 and 8.7 of the 2009 CADP Rules set out very clearly the standard of review to be applied on an appeal such as the present one:

> *8.6 An appeal shall be limited to questions of procedural error or unfairness by the CCES, the Doping Tribunal or TUEC, or failure to properly interpret and apply the CANADIAN ANTI-DOPING PROGRAM. An appeal is not a trial de novo with complete reconsideration of whether there was an anti-doping rule violation and, if so, whether the Doping Tribunal imposed the appropriate Consequences of Anti-Doping Rule Violations, or of whether the TUE or medical review ought to have been granted. A decision of the CCES, Doping Tribunal or TUEC shall only be reversed if it is unreasonable.*
>
> *8.7 The Doping Appeal Tribunal has the authority to make the determination that should have been made by the CCES, Doping Tribunal or TUEC without error.* (Emphasis added).

115. The parties agree that the Arbitrator made a procedural error by finding that the 2015 CADP Rules did not require an Athlete to establish how a Specified Substance entered her system in order to obtain a reduced sanction. Hence, the Tribunal has the authority to make the determination that should have been made by

the Arbitrator "without error".

116. In making such determination, the parties agree that the Tribunal is bound by the factual findings made by the Arbitrator in his Decision and that the appeal "*is not a trial de novo*".

B. CCES' Appeal

1) Did the Arbitrator err in his interpretation and application of the 2015 CADP Rules?

117. While the Parties agree that the Arbitrator erred in his interpretation and application of the 2015 CADP Rules, they disagree as to the precise burden of proof which the Athlete must satisfy in order to meet the threshold test and qualify for a period of ineligibility of less than two years.

118. CCES argues that the test requires the Athlete to establish a single theory of ingestion whereas the Athlete submits that the test can be met by raising multiple possible explanations.

119. For the reasons which follow, the Tribunal agrees with CCES.

120. The 2009 CADP Rules are crystal clear and do not lend themselves to any other interpretation than the one advanced by CCES.

121. Rules 7.42 and 7.43 provide that:

> *7.42 Where an Athlete or other Person can establish how a Specified Substance entered his or her body or came into his or her Possession and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the Use of a performance-enhancing substance, the period of Ineligibility found in Rule 7.38 shall be replaced with the following:*
>
> *First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years' Ineligibility.*

> *7.43 To justify any elimination or reduction under Rule 7.42, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the Doping Tribunal the absence of an intent to enhance sport performance or mask the Use of a performance enhancing substance. The Athlete or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility. The Athlete or other Person shall have the onus in establishing that his or her degree of fault justifies a reduced sanction.*

122. In order to be entitled to a reduction of sanction, an athlete, under these Rules, must prove the following three cumulative requirements:

(i) how the Specified Substance entered his or her body;

(ii) that such Specified Substance was not intended to enhance the athlete's sport performance or mask the Use of a performance-enhancing substance; and

(iii) his or her degree of fault.

123. It is evident that, in order for an athlete to meet the latter two requirements, he or she must establish a single source of ingestion of the Specified Substance. Otherwise, the adjudicator would never be able to assess accurately the athlete's degree of fault.

124. The Tribunal agrees with CCES that the jurisprudence has long recognized the critical role of the threshold test in ensuring that a Tribunal only analyzes fault after an athlete has provided the Tribunal with the minimum required level of facts and information.

125. The examples referred to by CCES are very persuasive. They include the following which comfort the Tribunal's interpretation:

> *a) "The necessity of proving 'how the substance got there' as a precondition to qualify for any reduction in sanction flows naturally from the principle of the athlete's responsibility for what goes into his or her body. If the athlete cannot prove how a banned substance got into his body, he cannot exclude the possibilities of intentional or*

significantly negligent use. The Code is clear that an athlete must completely exclude these possibilities in order to be entitled to a reduction in sanction." [*Val Barnwell v United States Anti-Doping Agency*, Case No. 77 190 514 09, at para 7.1]

b) *"Obviously this precondition to establishing no fault or no significant fault must be applied strictly, since if the manner in which a substance entered an athlete's system is unknown or unclear, it is logically difficult to determine whether an athlete has taken precaution in attempting to prevent any such occurrence."* [*Karatancheva v ITF*, CAS 2006/A/1032, at para 117]

c) *"In the absence of proof as to how the substance entered the player's body it is unrealistic and impossible to decide whether in those unknown circumstances he did, or did not, exercise all proper precautions to avoid the Commission of a doping offence."* [*ITF v Beck*, Anti-Doping Tribunal Decision dated 13 February 2006, as cited in *Gibbs*, at para 11.34(4)]

d) *"Obviously, this precondition is important and necessary otherwise an athlete's degree of diligence or absence of fault would be examined in relation to circumstances that are speculative and that could be partly or entirely made up."* [*WADA v Stanic and Swiss Olympic Association*, CAS 2006/A/1130, at para 39]

e) *"If the Athlete fails to provide an explanation, with supporting evidence, that satisfies the Tribunal [as to how the prohibited substance entered his system]… he has simply not laid the ground for an intelligible assessment of his degree of fault."* [*International Wheelchair Basketball Federation v UK Anti-Doping & Simon Gibbs*, CAS 2010/A/2230 at paras 12.19-12.20]

f) *"Unless and until the Player establishes the presence of the prohibited substance, the Panel cannot consider whether, and if so, how negligent he was."* [Oleksandr Rybka v UEFA, CAS 2012/A/2759, at para 49][6]

126. The Tribunal must now determine whether the Athlete, in the circumstances of this case, has discharged her burden of proof. Has the Athlete, on a balance of probabilities, established how the HCTZ entered her body?

127. The Tribunal recalls that the theory of ingestion of HCTZ advanced by the

[6] See paragraph 73 of CCES's Factum.

Athlete before the Arbitrator was Ingersoll water contamination. Alternative theories were suggested as well, albeit not by the Athlete but rather by CCES. Those theories were accidental ingestion of medication, contamination of eczema cream, accidental contamination of supplements, sabotage, or contaminated drinking water in Gatorade.

128. As the Tribunal is bound by the factual findings made by the Arbitrator, the Tribunal will recall the Arbitrator's key findings in respect of each one of these theories:

(i) At para. 67 of the Decision, the Arbitrator found that "*[…] the Athlete did not prove, on the balance of probabilities, that her positive test resulted from the Athlete drinking contaminated water in Ingersoll. […]*"

(ii) At para. 75 of the Decision, the Arbitrator found that "*CCES said that the Athlete has not proven that the HCTZ entered her system through the Ingersoll groundwater. I agree. […]*"

(iii) At para. 75 of the Decision, the Arbitrator found that: "*CCES suggested that other possible sources of HCTZ that could have caused the positive test were accidentally taking someone else's medication, contamination of the eczema cream used at the pharmacy, accidental contamination of supplements, sabotage, or possible inadvertent consumption through the Gatorade that the Athlete drank in Florida. I agree that these are all possible sources of the Athlete's positive test.*" (Emphasis added).

129. As is clear from these findings, the Arbitrator concluded that the Athlete had not discharged her burden of proof. On the one hand, she had not established that the HCTZ had entered her system through ingestion of Ingersoll groundwater and, on the other hand, she had failed to establish to his satisfaction any other means of ingestion which he nevertheless characterized as "possible".

130. When the Arbitrator said that he agreed there were five other "possible sources of the Athlete's positive test", he was unable to assess whether the Athlete's

degree of fault justified a reduced sanction. The adjudicator will only be able to determine whether or not the Athlete has satisfied her burden of proof if the balance of probabilities exceeds 50%. A "possible" source will always fall below that minimum level as a possible source is not the same as a probable source.

131. The Tribunal therefore concludes that the Athlete has not discharged her burden of proving on a balance of probabilities how HCTZ entered her body through a single probable source of ingestion.

Did the Arbitrator err in his interpretation and application of the principle of proportionality?

132. Having found that the Athlete did not establish how HCTZ entered her body, the Tribunal has no alternative but to impose a two year period of Ineligibility pursuant to Rule 7.38 of the 2009 CADP.

133. Accordingly, the Tribunal need not analyze the issue of the proportionality of the sanction.

134. Before closing this chapter of its Decision, the Tribunal considers it appropriate to refer to the following paragraph of the *Gibbs* Panel decision which it finds apposite in the circumstances of the present case:

> *It was well recognized that the continued battle to eliminate doping from competitive sport waged by lawyers and laboratories on one side against (some) scientists and sportsmen on the other is necessary if sport is to preserve its integrity and its attraction. It is also recognized that there may in consequence of that battle be innocent victims. In the seminal case of Q v UIT CAS 94/129 in considering the strict liability rule – now enshrined in the Rules and Code – the Panel while recognising the argument that such a standard "is unreasonable and indeed contrary to natural justice because it does not permit the accused to establish moral innocence" (para 16) rejected it. In an earlier case in England Gasser v Stinson 1988 15 June Scott J was prepared to accept that the then rule of the International Association of Athletics Federations ("IAAF") which did not allow an athlete even at the stage of sanction to establish his moral innocence was not an unreasonable restraint of trade. Neither decision, in particular the second, bears directly on the issue before the Sole Arbitrator but each*

provides a reminder that a rule which at first may appear to be unfair to one athlete may on mature consideration be justified as fair to the athletes as a whole.[7] (Emphasis added)

2) The Athlete's Cross-Appeal

135. The Tribunal now turns to the Athlete's Cross-Appeal.

136. The foundation of the Athlete's Cross-Appeal rests on the argument that the Arbitrator should have found, on a balance of probabilities, that HCTZ entered the Athlete's body through contaminated Ingersoll water.

137. The Athlete relies on the decisions of the *Contador* and *Gasquet* Panels and submits that the Arbitrator, having found that contaminated Ingersoll water was not "impossible" as the cause of the positive test, was required to consider the relative probability of this source of ingestion as compared to other possible sources.

138. The Tribunal recalls that *stare decisis* is not recognized in sport arbitration. Previous awards, even those issued by the Court of Arbitration for Sport, can only be referred to for guidance. Therefore, this Tribunal need not enter into a detailed analysis of the *Contador* and *Gasquet* Decisions.

139. However, the Tribunal notes as a premise that the factual matrix in these two cases is entirely different from the matrix in the present case.

140. In the *Gasquet* case, the Panel was presented with several alternative explanations for the ingestion of the prohibited substance, and was satisfied that one of them was more likely to have occurred than the others. The Panel concluded that the athlete had satisfied his burden of proof regarding the means of ingestion, and that the threshold test of the WADA Code had been met.

141. In *Contador*, the athlete, who had submitted a theory of meat contamination

[7] *IWBF v UKAD & Gibbs*, CAS 2010/A/2230 at para 11.10.

as the means of ingestion, also satisfied the Panel that he had met the threshold test of the Code.

142. Whereas in both *Gasquet* and *Contador*, a theory of ingestion was accepted by the Panels, in the present case, the Arbitrator rejected the Athlete's theory of ingestion of contaminated tap water in Ingersoll. After having considered expert reports and expert testimony from the parties, the Arbitrator concluded that the Athlete's theory of ingestion of HCTZ through contaminated Ingersoll water, although "*not impossible*" was "*extremely unlikely*".

143. The Arbitrator's conclusive finding regarding the ingestion of contaminated water in Ingersoll is based on facts which cannot be reviewed by this Tribunal. Therefore, the Tribunal can find no error in the Arbitrator's conclusion that the Ingersoll water was an extremely unlikely source of ingestion although it was "not impossible".

144. The Athlete claims that the words "not impossible" used by the Arbitrator should be understood to mean that the Arbitrator found that the water contamination theory was "possible", thereby satisfying the first part of the *Contador* test.

145. While the Tribunal need not determine whether the *Contador* test is well founded, it will say that it cannot agree with the Athlete's semantic argument. In any event, the Arbitrator's finding that the Ingersoll water was an extremely unlikely source of the HCTZ determines the Cross Appeal. Such finding precludes a conclusion that the Ingersoll water was "probably" the source, which is necessary for the Cross Appeal to succeed.

146. In conclusion, the Tribunal finds that the heart of the Athlete's Cross-Appeal is unfounded in light of the Arbitrator's findings of fact regarding the Ingersoll water ingestion theory.

IX. COSTS

147. Rule 8.18 of the CADP gives the Appeal Tribunal the power "to award costs to any party payable as it directs." Neither CCES nor the Athlete have made submissions to the Tribunal with respect to the costs of the appeal. In the exercise of its discretion, the Appeal Tribunal considers that it is fair and reasonable that each party should bear all of its own costs and expenses incurred in relation to the appeal.

X. DECISION

148. **FOR ALL OF THESE REASONS**, the Doping Appeal Tribunal unanimously decided on 2 April 2015 as follows:

(1) The appeal is allowed;

(2) The cross-appeal is denied;

(3) The Decision rendered on 5 January 2015 by the Doping Tribunal is set aside;

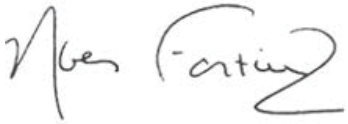
(4) The Athlete is ineligible for a period of two years commencing on 26 November 2013;

(5) Each party shall bear its own costs and expenses incurred in the appeal and cross-appeal;

(6) All other requests for relief by the parties are dismissed.

20 April 2015

Mr. Patrice Brunet | **The Hon. Robert P. Armstrong, QC**



The Hon. L. Yves Fortier, CC, OQ, QC
(President)