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

Nº: SDRCC 16-0246

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)
CANADIAN INTERUNIVERSITY SPORT D/B/A U SPORTS (U SPORTS)

AND

TRISTAN GROSMAN
(ATHLETE)

AND

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

ARBITRATION AWARD

ARBITRATOR: Janie Soublière

Legal Representation

For the Athlete Tristan Grosman:	Dr. Emir Crowne Melissa Knox Amanda Fowler
For the CCES:	Annie Bourgeois

SUMMARY OF DISPUTE

On April 24, 2016, the Canadian Centre for Ethics in Sport (CCES) asked U Sports varsity football player Tristan Grosman (hereinafter Mr. Grosman or "the Athlete") to provide an out-of-competition sample in the course of a no advance notice doping control. Dehydrochlormethyltestosterone (DHCMT) was present in the Athlete's urine sample. Mr. Grosman admits to committing an anti-doping rule violation

(ADRV) under the *Canadian Anti-Doping Program* (CADP) but says the ADRV was unintentional and caused by a contaminated supplement. He says the CADP mandated four-year sanction should be reduced to two years or less.

THE PARTIES

1. The Athlete, Tristan Grosman, is a 21-year-old male who at the time of the doping control was a U Sports varsity football player at St. Francis Xavier University.

2. The CCES, is an independent, non-profit organization that promotes ethical conduct in all aspects of sports in Canada.

3. It should be noted that U Sports is named as a party in the case but elected not to submit any documents on its behalf.

JURISDICTION

4. The Sport Dispute Resolution Centre of Canada (SDRCC) is established pursuant to subsection 9(1) of the *Physical Activity and Sport Act* (S.C. 2003, c.2).

5. Subsection 4(1) of the said *Act* states in part that the Government of Canada's policy regarding sport is founded on the fair, equitable, transparent and timely resolution of disputes in sport. Paragraph 10(1)(a) of the *Act* specifies that the mission of the SDRCC is to provide to the sport community a national alternative dispute resolution service for sport disputes.

6. The CCES manages the CADP, which is the set of rules that governs doping control in Canada. National sport organizations like U Sports sign on to run their programs in accordance with the rules and policies outlined in the CADP. As a result, it is undisputed that U Sports athletes, like Mr. Grosman, are committed to participating subject to the CADP rules.

7. Section 8.1.2 of the CADP states that a rule violation and its consequences are to be determined by a Doping Tribunal pursuant to the rules set out in the *Canadian Sport Dispute Resolution Code (2015)* (the Code), unless the Athlete or Person waives their right to a hearing pursuant to Rule 7.10.1 or Rule 7.10.2.

8. Section 8.1.1 of the CADP, which grants the SDRCC jurisdiction to hear the matter, specifies that the hearing shall be conducted by a single arbitrator, and that the Doping Tribunal (the Tribunal) shall be constituted and administered by the SDRCC. To this end, I have been appointed to hear the present matter.

9. This arbitration award is rendered pursuant to section 6.21 of the Code.

UNDISPUTED FACTS

10. Further to a no advance notice out-of-competition doping control conducted on April 24, 2016, the Montreal World Anti-Doping Agency (WADA) accredited laboratory reported an adverse analytical finding (AAF) of DHCMT in urine samples 2952985 A and B belonging to Mr. Grosman.

11. Shortly after being notified of the possible anti-doping rule violation by the CCES in accordance with the CADP, the Athlete admitted the ADRV for the presence DHCMT in his urine sample and signed a Timely Admission Form on June 10, 2016.

12. DHCMT is an Exogenous Anabolic Steroid and non-specified substance under section S1.1A of the WADA Prohibited List.

13. Because the ADRV has been admitted, the only issue before the Tribunal is the appropriate period of ineligibility that should be imposed on the Athlete under the CADP as a result of this rule violation.

THE PARTIES' SUBMISSIONS

14. The Athlete's and the CCES' submissions and arguments, just as the legal precedents they rely on, have all been carefully considered. For the sake of brevity, the following provides a succinct summary of both Parties' submissions.

The Athlete

15. Mr. Grosman admits the ADRV but pleads that the positive finding of DHCMT in his urine sample is the result of his ingestion of a contaminated supplement, namely AminoX. Because of this, he says CADP article 10.5.1.2 should apply.

16. Specifically, the Athlete pleads that because the supplement he took was contaminated, he has no significant fault for the ADRV and his degree of fault is minimal. As a result, any period of ineligibility imposed should be at the lower end of the spectrum provided for in the CADP.

17. Alternatively, the Athlete pleads that CADP article 10.2.2 should apply. He argues that because his supplement was contaminated, there was no way for him to have known or foreseen the risk referred to in the definition of "intentional".

18. In support of both his positions, he sent an opened but unfinished bottle of AminoX, the contents of which he claims caused the ADRV, as well as another unopened bottle of AminoX, to be analysed by the WADA Accredited Laboratory in Montreal (the INRS lab). The certificates of analysis confirmed very high levels of DHCMT in both bottles.

19. The Athlete therefore submits that the lab reports constitute credible evidence that the supplement in question was contaminated and that he should be able to avail himself of the leniency of CADP articles 10.5.1.2 and/or 10.2.2.

20. Expert testimony, provided by the Athlete's expert witness Professor Charles Wong, supports the argument that the AminoX the Athlete used was contaminated. Prof. Wong also explains that said contamination could have occurred during the manufacturing or production of the AminoX prior to the Athlete's purchase and consumption of the same.

21. The Athlete says that he did thorough research prior to buying and using any supplements and that his efforts are sufficient to meet the requisite standard of care expected by all athletes. He says he is not a cheater but rather the victim of unforeseeable supplement contamination and requests that he be sanctioned with a reprimand or a significantly reduced period of ineligibility.

22. Finally, the Athlete relies on recent case law which has reduced sanctions when contaminated supplements were the cause of the ADRV (*Powell, Simpson and Warburton & Williams*) as well as recent case law where arbitral panels have not set the bar too high for an athlete's duty of care to be satisfied or for an athlete to benefit from the leniency of the no significant fault provisions of World Anti-Doping Code compliant anti-doping rules (notably *Powell, Simpson and Sharapova).*

The CCES

23. The CCES alleges that Mr. Grosman has not established how the substance entered his system, a prerequisite to avail himself of the leniency granted by CADP article 10.5 and its sub-paragraphs.

24. The CCES equally alleges that Mr. Grosman has not established that this ADRV was non-intentional.

25. To support these allegations, the CCES says that the scientific data available shows that the AminoX supplement bottles provided by the Athlete contained DHCMT at the time they were analysed by the INRS lab. However, it argues that this does not prove that the AminoX bottles were contaminated with DHCMT at the time they were purchased or used by the Athlete.

26. The CCES states that there are no valid grounds for the Athlete to claim that his AminoX supplement was contaminated with DHCMT during the manufacturing process or before he purchased it.

27. The CCES relies on the evidence of Professor Christiane Ayotte whose opinion is (i) that the DHCMT found in the AminoX bottles provided by the Athlete is not the same as the DHCMT found in the Athlete's urine samples, (ii) that the very significant amount of DHCMT found in the two AminoX bottles provided by the Athlete are not indicative or consistent with cross-contamination, (iii) that the contamination of the AminoX supplement is unlikely and (iv) that the more credible explanation for the finding of DHCMT in the AminoX bottles provided by the Athlete is that the DHCMT was deliberately added to them.

28. The CCES also relies on the evidence of Mr. Peter Poteres who works at the manufacturing plant that produces and manufacturers AminoX. He confirmed that DHCMT is neither used in the production of any of their products nor allowed in the NSF certified plant where the AminoX is manufactured.

29. It matters not whether the Tribunal finds that the AminoX was in fact contaminated or simply that the Athlete's ingestion of DHCMT was unintentional, the CCES submits that the Athlete's significant degree of fault should not allow him to benefit from a reduction of the CADP's presumptive sanctions (see *Despres, Banner, and Youssef*).

30. In support of this argument, the CCES says the Athlete did not fulfill his duty of care by reason of the Athlete's manifest disregard of various warnings regarding supplement use that the Athlete has received by the CCES, his actions or inaction in seeking out confirmations from the manufacturer or medical practitioners, and his disregard for the recommended dosages.

31. Finally, relying on relevant case law (notably *Cilic*), the CCES argues that even if the Athlete was found to have no significant fault, the facts and circumstances of this case warrant a "considerable" or "significant" sanction.

32. The Athlete has neither been able to meet his burden of proving how the substance entered his body nor been able to show that his ADRV was not intentional. He is significantly at fault for this same anti-doping rule violation. Therefore, the CCES seeks the maximum period of ineligibility mandated by the CADP.

THE APPLICABLE PROVISIONS OF THE CADP

33. The relevant provisions are as follows:

> 10.2 *Ineligibility* for Presence, *Use* or *Attempted Use*, or *Possession* of a *Prohibited Substance* or *Prohibited Method*
>
> The period of *Ineligibility* for a violation of Rules 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Rules 10.4, 10.5 or 10.6:
>
> 10.2.1 The period of *Ineligibility* shall be four years where:
>
> 10.2.1.1 The anti-doping rule violation does not involve a *Specified Substance,* unless the *Athlete* or other *Person* can establish that the anti-doping rule violation was not intentional.
>
> 10.2.1.2 The anti-doping rule violation involves a *Specified Substance* and CCES can establish that the anti-doping rule violation was intentional.
>
> 10.2.2 If Rule 10.2.1 does not apply, the period of *Ineligibility* shall be two years.
>
> 10.2.3 As used in Rules 10.2 and 10.3, the term "intentional" is meant to identify those *Athletes* who cheat. The term, therefore, requires that the *Athlete* or other *Person*

engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall be rebuttably presumed to be not "intentional" if the substance is a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition*. An anti-doping rule violation resulting from an *Adverse Analytical Finding* for a substance which is only prohibited *In-Competition* shall not be considered "intentional" if the substance is not a *Specified Substance* and the *Athlete* can establish that the *Prohibited Substance* was *Used Out-of-Competition* in a context unrelated to sport performance.

[…]

10.5 Reduction of the Period of *Ineligibility* based on *No Significant Fault or Negligence*

[…]

10.5.1.2 *Contaminated Products*
In cases where the *Athlete* or other *Person* can establish *No Significant Fault or Negligence* and that the detected *Prohibited Substance* came from a *Contaminated Product*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years *Ineligibility*, depending on the *Athlete's* or other *Person's* degree of *Fault*.

[Comment to Rule 10.5.1.2: In assessing that Athlete's degree of Fault, it would, for example, be favorable for the Athlete if the Athlete had declared the product which was subsequently determined to be contaminated on his or her Doping Control form.]

10.5.2 Application of *No Significant Fault or Negligence* beyond the Application of Rule 10.5.1
If an *Athlete* or other *Person* establishes in an individual case where Rule 10.5.1 is not applicable, that he or she bears *No Significant Fault or Negligence*, then, subject to further reduction or elimination as provided in Rule 10.6, the otherwise applicable period of *Ineligibility* may be reduced based on the *Athlete* or other *Person*'s degree of *Fault*, but the reduced period of *Ineligibility* may not be less than one-half of the period of *Ineligibility* otherwise applicable. If the otherwise applicable period of *Ineligibility* is a lifetime, the reduced period under this Rule may be no less than eight years.

[Comment to Rule 10.5.2: Rule 10.5.2 may be applied to any anti-doping rule violation except those Rules where intent is an element of the anti-doping rule violation (e.g., Rule 2.5, 2.7, 2.8 or 2.9) or an element of a particular sanction (e.g., Rule 10.2.1) or a range of Ineligibility is already provided in a Rule based on the Athlete or other Person's degree of Fault.]

[…]

Appendix 1. Definitions

[…]

No Fault or Negligence: The *Athlete* or other *Person's* establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *Used* or been administered the *Prohibited Substance* or *Prohibited Method* or otherwise violated an anti-doping rule. Except in the case of a *Minor*, for any violation of Rule 2.1, the *Athlete* must also establish how the *Prohibited Substance* entered his or her system.

No Significant Fault or Negligence: The *Athlete* or other *Person's* establishing that his or her *Fault* or negligence, when viewed in the totality of the circumstances and taking into account the criteria for *No Fault or Negligence*, was not significant in relationship to the anti-doping rule violation. Except in the case of a *Minor*, for any violation of Rule 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.

RELEVANT CASE LAW

34. The following cases have been considered and/or relied upon in drafting this award:

SDRCC DT 15-0225 Re Youssef Youssef ("Youssef")

SDRCC DT 15-0239 Re Justin Maheu

SDRCC DT 15-05229 Re Brian Banner ("Banner")

CAS 2005/C/976 & 986, FIFA & WADA, Advisory Opinion, 21 April 2006

CAS 2008/A/1489 Despres v. CCES & CAS 2008/A/1510 WADA v. Despres, CCES & Bobsleigh Sketelon Canada ("Despres")

CAS 2009/A/1926 & CAS 2009/A/1930*, International Tennis Federation v. Richard Gasquet and WADA v. ITF & Richard Gasquet* ("*Gasquet*")

CAS 2010/A/2230 International Wheelchair Basketball Federation v. UK Anti-Doping Ltd. and Simon Gibbs ("Gibbs")

CAS 2011/A/2384 & CAS 2011/A/2386, *WADA and Union Cycliste Internationale v. Alberto Contador Velasco &* RFEC ("*Alberto Contador Velasco*")

CAS 2011/A/2495 FINA v. César Augusto Cielo Filho and CBDA

CAS 2013/3327 Marin Cilic v. International Tennis Federation ("Cilic")

CAS 2014/A/3572 Sherone Simpson v. Jamaica Anti-Doping Commission (JADCO) ("Simpson")

CAS 2014/A/3571 Asafa Powell v. Jamaica Anti-Doping Commission (JADCO) ("Powell")

CAS 2014/A/3615 WADA v. Lauris Daiders, Jànis Daiders & FIM ("Daiders")

CAS 2015/A/4129 Demirev et al v. International Weightlifting Federation

CAS 2016/A/4643 Sharapova v. International Tennis Federation

IPF DHP International Powerlifting Federation v. Hristov, 2016 ("Hristov")

SR/0000120227 UK Anti-Doping v. Gareth Warburton and Rhys Williams ("Warburton and Williams")

ISSUES

A. The Contaminated Supplement

- *Does CADP article 10.5.1.2 apply?*

B. Intention

- *If CADP article 10.5.2.1 does not apply, does CADP article 10.2.1.1 apply and can the Athlete benefit from the application of CADP article 10.2.2?*

C. Determination of fault and Ineligibility

- *What are the appropriate consequences to impose under the circumstances?*

DELIBERATIONS

35. I shall clarify from the outset that under the CADP, in order to benefit from a reduced sanction, the burden of proof is on Mr. Grosman to establish that his admitted violation of the CADP was not intentional and/or that he bears no significant fault or negligence for the ADRV.

36. It has been conceded by both parties that the Athlete cannot avail himself of the no fault provisions of the CADP, therefore his sanction cannot be eliminated.

37. As per CADP article 3.1, Mr. Grosman's standard of proof is on the balance of probabilities. This means that in order for Mr. Grosman to establish with credible evidence his lack of intention and/or his lack of significant fault with regards to an alleged contaminated supplement, either of which would allow him to benefit from a reduced sanction, his explanations must satisfy the conclusion that they are "more likely than not" to have occurred. (See *Daiders* citing *Gasquet* and *Contador*)

38. In many of the contaminated supplement precedents referred to by both the Athlete and the CCES, the arbitral award logically focused firstly and primarily on the application of article 10.5.2.1. The reason for this is quite simple: if based on the facts of his/her case, an Athlete can avail him/herself of

the leniency of article 10.5.2.1 (which in the case of a proven contaminated supplement allows an athlete to have a sanction lowered to a mere warning) there is then little reason to consider the application of article 10.2.2 because the greater sanction reduction is provided by article 10.5.2.1.

39. I agree with this logical approach to contaminated supplement cases and see no reason to proceed any differently.

A. The Contaminated Supplement

- *Does CADP article 10.5.1.2 apply?*

40. Mr. Grosman admitted the anti-doping rule violation and did not contest the finding of DHCMT in his urine sample. His defence relies on a contaminated AminoX bottle being the cause of his anti-doping rule violation and seeks the application of CADP Article 10.5.1.2.

41. The substance involved, DHCMT, is an exogenous anabolic steroid and is categorized under the CADP and the Prohibited List as non-specified substance. While its classification is important under article CADP 10.2.2, under article 10.5.1.2 the substance classification is immaterial. If an ADRV was caused by a contaminated product, regardless of the substance classification, an athlete may benefit from the leniency provided in that article.

42. CADP article 10.5.1.2 states that in order to benefit from a reduction in sanction, an athlete must establish both that the detected *Prohibited Substance* came from a *Contaminated Product*" and that he had no significant fault or negligence for the asserted anti-doping rule violation.

43. Breaking down the requirements of CADP article 10.5.1.2, its effective application is contingent on the Athlete clearing two hurdles:

    i. Mr. Grosman must establish, on a balance of probabilities, that he ingested a supplement which was contaminated with the (same) prohibited substance that was detected in his system. He must show that the (alleged) contaminated supplement he ingested is the cause of the AAF.

    Then, only if the first hurdle is cleared:

    ii. He must convince the Tribunal that he had "no significant fault or negligence" in the matter – as per the definition of *no significant fault or negligence* in Appendix 1 of the CADP.

44. Once the Athlete has successfully cleared those two hurdles, the Tribunal can assess the appropriate sanction to impose based on the Athlete's degree of fault.

45. Therefore, the necessity for the Athlete to establish both how the prohibited substance entered his system and also that the supplement in question was in fact contaminated (these of course are co-dependant) is a prerequisite to considering any sanction reduction under article 10.5.1.2.

46. I shall briefly consider the various elements of this case in order to arrive at a decision as to whether or not CADP article 10.5.1.2 may apply to the facts and circumstances at hand.

47. The Tribunal is well aware that contamination is an explanation often put forth by athletes to explain the presence of a banned substance. In the face of a substantial period of ineligibility, it is an easy assertion to make by any athlete. On this point, *Daiders* stated aptly at par. 58 that "two of the prevalent explanations offered for the presence of a prohibited substance in an athlete's sample– contamination and sabotage – are easy to assert, and often asserted, especially without supporting evidence."

48. Product contamination can and does occur. So, because the purpose of anti-doping rules is to catch cheaters and not unduly punish inadvertent victims, article 10.5.1.2 was added to the World Anti-Doping Code, and by reference the CADP, to allow for a reduction in sanction when supplement contamination truly occurs.

49. Because it is so often alleged by athletes in their defence, to succeed in convincing a Tribunal that article 10.5.1.2 should apply, an athlete must meet various requirements to a certain standard of proof.

50. As stated previously, in order to convince the Tribunal that he may benefit from a reduction in sanction, the Athlete must first establish how the allegedly contaminated supplement got into his system. Proof on a balance of probabilities that the supplement was contaminated is required if a reduction of sanction is even to be considered. This is an absolute necessity under the CADP.

51. Mr. Grosman testified that upon being confronted with the AAF he assumed that the source of his adverse analytical finding must have been one of the supplements he was taking. With the assistance of the CCES, he sent all his supplements for analysis to the INRS Lab.

52. He sent two bottles of Rivalus, two bottles of Beast Creature and two bottles of AminoX to the INRS lab. One of the AminoX bottles was open, this is the one he says he was using at the time of his doping control. The second AminoX bottle was sealed.

53. While no amounts of DHCMT were found in the Rivalus or Beast creatine bottles, DHCMT was detected in both AminoX bottles. More specifically, "*DHCMT was detected in the very high amount of 0.23 mg per g of powder (bottle without seal)*" and *"DHCMT was detected in the high amount of 0.003mg per g of powder (bottle with a seal).*" The bottle without a seal bears the lot/batch number 0000764083. The bottle with a seal bears the lot/batch number 0000778614.

54. The Athlete argues that these laboratory reports are conclusive. The AminoX supplement was contaminated before purchase and when ingested caused the adverse analytical finding.

55. The Athlete called as an expert witness Prof. Charles Wong, Professor at the University of Winnipeg and Canada Research Chair in Ecotoxicology. In Prof. Wong's opinion, the AAF in the Athlete's sample was caused by the contamination of the AminoX supplement because the INRS confirmed the presence of DHCMT in both AminoX bottles sent to it for analysis.

56. Prof. Wong also states the amount of DHCMT found in the Athlete's sample suggests that it was contaminated at some point prior to its procurement, e.g. manufacturing, shipping or storage but concedes that he had no knowledge of how the AminoX product is manufacturer in the Glanbia Performance Nutrition plant.

57. Prof. Wong says that contamination of dietary supplements at levels sufficient to trigger an AAF is not uncommon. His position is that the findings of the INRS in this regard are conclusive and support the conclusion that the DHCMT in the AminoX is the cause of the ADRV.

58. Prof. Wong's testimony and conclusion on the AminoX contamination is predicated on the trust of the evidence tendered by Mr. Grosman to explain the presence of DHCMT in his urine sample.

59. As stated in *Warburton and Williams* at p. 88:

> *In Alberto Contador Velasco the CAS panel observed that if an athlete raises a prima facie case as to how the Prohibited Substance came into his body, the anti-doping authority cannot simply sit back and say that the athlete has not proven it on a balance of probabilities. Rather it has a duty to raise a counter explanation if it sees one, and the role of the Tribunal is then to assess which of the explanations is most likely on the evidence.*

60. For the CCES, Prof. Christiane Ayotte, Director of the INRS WADA Accredited Laboratory, firstly states both in her oral and written testimony that in her opinion the Athlete's explanation as to when and how the DHCMT entered his system is not supported by the scientific evidence on file.

61. Prof. Ayotte's position is that the DHCMT compound detected in the AminoX bottle is not the same as the DHCMT compound detected in the Athlete's urine sample.

62. On this point, relying on findings from a study from Sobolevsky and Rodchenkov as well as her professional experience and research, she explains that the DHCMT found in the open AminoX bottle provided to the IRNS lab should have shown the same parent DHCMT compound and its epimer as the DCHMT found in the Athlete's urine sample. But, it did not.

63. The analysis of the Athlete's urine sample detected a long term DHCMT compound (M4) while the analysis of the open AminoX bottle detected a short term DHCMT compound.

64. To better explain, the DHCMT found in the AminoX bottle, the contents of which the Athlete said caused the ADRV further to ingesting it in high quantities immediately before his doping control, should have been a short term DHCMT compound like that DHCMT detected in the open AminoX bottle. But the INRS analysis concluded that the DHCMT in the Athlete's urine sample was a long term DHCMT compound. The DHCMT detected in the Athlete's urine sample was therefore not the same as that in the open AminoX bottle, and it was ingested weeks prior to the doping control.

65. Prof. Wong voices significant concerns and questioned the reliability of the Sobalevsky and Rodchenkov study. He says the methods utilised it in are poorly described and that its conclusion offers blanket statements that are neither helpful nor convincing. He also points out that in light of the recent state sponsored doping scandal in Russia, any anti-doping study stemming from Russia should be given little regard.

66. No alternate scientific explanation or peer review has been brought forward to contest or challenge the conclusions of the Sobalevsky and Rodchenkov study. Its findings have never been successfully disputed and are widely accepted by the scientific anti-doping community. Therefore, I am inclined to accept the findings of the Sobalevsy and Rodchenkov study as scientifically reliable, notwithstanding their Russian provenance.

67. The Sobalevky and Rodchenkov study and Prof. Ayotte's own experience and studies in the analysis of the metabolic excretion of DHCMT, more pointedly its parent short term compound or epimer (Alpha A & Alpha B), its hydroxylated medium term compound (6 Beta) and its long term compound (M4) are all pertinent to the matter at hand. These studies provide reliable conclusions that can be applied to the scientific evidence of this case.

68. I accept Prof. Ayotte's conclusion that the long term DHCMT compound found in the Athlete's urine sample does not match that of the short term DHCMT parent epimer compound found in the open AminoX bottle that allegedly caused the AAF and resulted in the Athlete's ADRV.

69. Considering Prof. Ayotte's scientific analysis of the data available, the CCES is correct in saying that the contents of the open AminoX bottle supplied by the Athlete for analysis cannot be the source of the DHCMT found in the Athlete's system.

70. Secondly, Prof. Ayotte says that the amount of DHCMT contained in the two AminoX bottles provided by the Athlete is so high that it is not consistent with a case of cross-contamination.

71. The laboratory reports and documentation packages, as well as Prof. Ayotte's testimony confirm that the levels of DHCMT found in the AminoX bottles were "intense." The amount of DHCMT found in the open AminoX bottle were so elevated that it caused cross-contamination of other vials that followed in the sequence of tests that the INRS laboratory performs when analysing supplement bottles for possible contamination.

72. Prof. Ayotte clarifies that cross-contamination cases of this very nature usually yield small levels, in micrograms, of the prohibited substance. An adverse finding caused by cross-contamination would come from residue, a small fraction of a substance, left behind from prior batches of other medication produced in the same manufacturing plant.

73. Prof. Ayotte also says that she has no knowledge of any contaminated supplement cases involving amino acids. She explains that amino acids are widely used by athletes and are subject to stringent certification processes when manufactured. As such, it is highly unlikely for amino acids to be contaminated with an illegal substance like DHCMT in concentrations as high as those found in the open AminoX bottle.

74. Thirdly, Prof. Ayotte's position is also supported by the fact that the contents of the AminoX bottle purchased independently by the CCES bearing the same lot number as the Athlete's sealed AminoX bottle (lot 000778614) did not show any traces of DHCMT when analysed, nor did two other bottles from another lot.

75. On this, the CCES' second expert witness, Mr. Peter Poteres, the former Director of Quality Assurance and now Vice President of Quality for Glanbia Performance Nutrition (GPN), the manufacturer of AminoX, testified that DHCMT is not used in the formulation or manufacturing process of any of their products. DHCMT is not permitted within their manufacturing facilities, including the 600 Plant which manufactures AminoX. He says that there is no chance that DHCMT could have been found in any of GPN's products both as a result of GPN's extensive and highly certified quality control processes and because GPN does not use DHCMT in the production and manufacturing of any of its products.

76. Mr. Poteres explains that once raw materials are received from suppliers at its 600 Plant, all materials that do not fully pass the initial test are instantly rejected and discarded. The released materials are then subject to another series of quality control steps to ensure that none of their products are contaminated or adulterated in the course of their production, be it in the course of the blending, the production line or the sealing procedures.

77. Mr. Poteres outlined the various GPN quality control and security processes that every batch of AminoX bottles are subject to before being manufactured; from the moment the raw materials are received at the 600 Plant to the point where they are sealed, shipped and stored under constant security in the distribution centre. The processes are certified by the NSF, the CGMP and the LGC.

78. Mr. Poteres explains that the NSF inspects the plants twice a year to ensure that GPN's plant produces only unadulterated products. LGC for sport also makes two sites inspections per year, specifically taking 60-100 swabs of GPN products during each visit to check for banned substances. No banned substances have ever been found further to these inspections.

79. Based on Mr. Poteres' testimony that GPN's extensive quality control processes have been certified and never shown to be defective or flawed by any inspection protocols or tests, I do not accept Prof. Wong's pretension that the contamination of the AminoX could have occurred in course of its manufacturing, shipping or storage. At best, this is mere conjecture on his part.

80. Mr. Poteres confirms that there were 984 bottles produced in the same batch, all bearing the same lot number as the one analysed by the CCES and the Athlete. Every lot bottle will have the same ingredients. These ingredients have been verified in the course of the quality control procedures. This would imply that all bottles from the same lot should or would be affected by the same cross-contamination if and when it occurs.

81. Prof. Ayotte echoes Mr. Poteres' testimony and says that if the AminoX bottles were in fact contaminated in such an intense way, the whole of the manufacturing process would have been just as heavily contaminated and therefore all the other bottles analysed from the same batch would have yielded these high levels of DHCMT, or at least some level of DHCMT.

82. Therefore, both the Athlete's bottle of unopened AminoX, which contained DHCMT, and the CCES bottles of AminoX bearing the same batch number, which did not contain any DHCMT, should have yielded the same analytical finding and results. They did not.

83. Upon being informed of the Athlete's allegation that some of their AminoX bottles were contaminated, GPN immediately sought out the batch numbers of the bottles involved and verified if it had some bottles from the same batch numbers still available in its warehouse. They then had AminoX bottles from the same two batches analysed by a qualified independent laboratory (NSF International). For GPN to do so was quite understandable.

84. The certificates of analysis from NSF also did not yield any findings of DHCMT (or Oral –Turinabol as it is referred to in this certificate) in the AminoX bottle bearing the same lot number as the Athlete's sealed bottle (0000778614), nor did it yield any findings of DHCMT in the AminoX bottle bearing the same lot number as the Athlete's opened bottle (0000764083). Considering NSF is a reputable and independent laboratory, I accept that their analysis of the contents of the AminoX bottles is reliable.

85. The thorough analysis performed by two reputable laboratories on five AminoX bottles indicated that they did not contain DHCMT. More pointedly, there was no DHCMT in two AminoX bottles bearing the same batch numbers as the Athlete' s (0000764083 & 0000778614) that GPN sent to the NSF laboratories for analysis. And, there was no DHCMT in AminoX bottles bearing the same batch number as the Athlete's sealed AminoX bottle (0000778614) that the CCES sent to the INRS lab for analysis.

86. None of the analyses performed on any AminoX bottles from other independent sources yielded a finding of DHCMT, not even at their lowest detection limits (in picograms). Prof. Ayotte states that it

is forensically improbable for such a high concentration of AminoX to be found in one bottle of one batch and not at all in any of the others.

87. In order to discredit the CCES' theory that DHCMT was deliberately added to the AminoX bottles, the Athlete questions Prof. Ayotte's inability to recollect whether or not the sealed AminoX bottle had both the requisite aluminium and plastic seals. However, it is the open AminoX bottle contents that are truly at the crux of this case because they are argued to have caused the ADRV. For the reasons outlined above I accept that the high amount of DHCMT detected in the open bottle of AminoX was not a result of contamination.

88. In sum, to quote Prof. Ayotte's extensive report:

> *Considering the absence of the parent compound and other metabolites than the "long-term", I conclude that the ingestion of DHCMT did not occur as described by the athlete (through the consumption of AminoX supplement). The presence of high amounts of the DHCMT in the AminoX bottles provided by the athlete and its total absence in the samples purchased independently through the CCES, does not make the Athlete's explanation of contamination probable*.

I accept her opinion on the matter.

89. I also find that both CCES witnesses' testimonies supporting the CCES' counter explanation to that of the Athlete were objective, credible and reliable.

90. All the evidence leads to my unavoidable conclusion to reject the explanation brought forth by the Athlete and to find that: i) the AminoX was not contaminated during production at the GPN plant; ii) the AminoX the Athlete ingested did not contain DHCMT; iii) that AminoX is not the source of the ADRV; and iv) that DHCMT was likely deliberately added to both AminoX bottles prior to being sent for analysis.

91. To the CCES, this not a contaminated supplement case. In light of all the factual and scientific evidence before me and guided by precedent on the matter, I agree.

92. All of the evidence of Prof. Ayotte and Mr. Poteres eliminates the possibility that the Athlete's ADRV is attributable to the AminoX supplement.

93. In light of the foregoing, I find that that the Athlete has not proven on a balance of probabilities that the contents of the open AminoX bottle were in fact contaminated nor that the AminoX that was found in the open AminoX bottle was the cause of the AAF. Therefore, Mr. Grosman has not proven to the requisite standard how the DHCMT entered his system.

94. Therefore, the Athlete has not cleared his first hurdle. An analysis of his degree of fault is not required. Mr. Grosman cannot benefit from a reduction in sanction under CADP article 10.5.1.2, or any other of the no significant fault provisions of the CADP.

B. Intention

- *If CADP article 10.5.2.1 does not apply, does CADP article 10.2.1.1 apply and can the Athlete benefit from the application of CADP article 10.2.2?*

Preliminary clarification on the application of article 10.2.2

95. The SDRCC Tribunal is bound to the CADP and by direct reference, the World Anti-Doping Code. The Tribunal must apply these anti-doping rules as intended and as drafted.

96. The argument made by the CCES, relying on recent case law, is that if an athlete is not able to establish how a prohibited substance entered his/her system – and is therefore not able to benefit from the leniency provisions of article 10.5 and its subparagraphs – then the presumption is that he/she should also not be entitled to benefit from the leniency of CADP article 10.2.1.1 and thereby gain access to the reduction in sanction from four years to two years provided in CADP article 10.2.2.

97. Whilst I have carefully considered the jurisprudence cited by the CCES on the interpretation of CADP articles 10.2.1.1 and 10.2.2, notably the *Youssef* case, I differ in opinion.

98. I neither agree with the position taken in this regard by the Panel in the *Youssef* case, nor with the conclusions reached by the UK jurisprudence relied upon in the *Youssef* case.

99. Specifically, I do not accept that "*it is incumbent upon the athlete to prove the means of ingestion of a prohibited substance to prove the athlete's lack of intent*" (*Youssef*, p. 39).

100. It is not necessary for an athlete to show how a prohibited substance entered his or her system in order to convince an arbitral panel that his or her anti-doping rule violation was not intentional. There cannot be a presumption that an athlete acted intentionally because he or she is unable to explain how a non-specified substance got into him or her.

101. The CCES has relied on *Youssef* which cited *Daider*s as a precedent to reinforce its argument that this presumption exists. But, *Daiders* was decided pre-2015 World Anti-Doping Code/CADP when article 10.2.1.1 and 10.2.2 ("the no intention provisions") did not yet exist. Therefore, *Daiders* does little to sustain the CCES' argument in this specific regard.

102. *Daiders* does underline that proving how a substance entered an athlete's system is necessary to proving no fault and/or no significant fault. But, it does not say that proving how a substance entered his or her system is necessary for an athlete to establish how his or her ADRV was not intentional.

103. So, while the findings in *Daiders* certainly remain well-founded with regards to the application of article 10.5.2 ("the no significant fault provisions"), these cannot support the argument that in order to have access to the leniency afforded by the no-intention provisions, an athlete must show how a substance entered his or her system. This is so because the no intention provisions were not in the World Anti-Doping Code (or the CADP) at the time *Daiders* was decided.

104. Intention and fault have different meanings and definitions under the CADP and the World Anti-Doping Code. That is why they are addressed in different provisions.

105. A plain reading of the CADP allows its reader to make the following observations:

- The definitions of "no fault" and "no significant fault" both clearly and expressly state that in order to benefit from the leniency of article 10.5 and its subsections, an athlete must first establish how the substance entered his or her system.

- Article 10.5.1.2 clearly and expressly states that in order to benefit from its leniency, an athlete must establish that he or she has no significant fault and that the detected substance came from a contaminated supplement.

- Article 10.2.1.1 makes no express mention of the requirement of establishing the substance entered the athlete's system when establishing that an ADRV was non-intentional.

- Article 10.2.2 makes no express mention of the requirement of establishing how the substance entered the athlete's system in order to benefit from its leniency.

- The definition of intention at article 10.2.3 makes no express mention of the requirement of proving how the substance entered an athlete's system.

106. Clearly, as this requirement is expressly stated in the definitions of no fault and no significant fault, if the intention was that the athlete must establish how the substance entered his or her system as a mandatory element or condition to gaining access to the sanction reduction under article 10.2.2, especially when considering the significant jump down from four to two years, the drafters of the World Anti-Doping Code would have expressly stated it. They did not.

107. The intention of the drafters of the World Anti-Doping Code is unambiguous. Nowhere in the World Anti-Doping Code (or CADP) is there a mention of a requirement to establish how the substance entered an athlete's system to benefit from a sanction reduction under article 10.2.2.

108. If this basic and logical interpretation of the World Anti-Doping Code (and CADP) is not sufficient to allow one to conclude that there is no requirement of establishing how a substance entered an athlete's system, under articles 10.2.1.1 or 10.2.2, a quick summary of the legislative history of these provisions might be useful to better explain my conclusion.

109. The evolution of article 10.2 can be traced back in the various draft versions of the World Anti-Doping Code.

110. The requirement of showing how the substance entered an athlete's system in order to benefit from a reduction in sanction under article 10.2 was, in fact, present in draft World Anti-Doping Code version 2.0:

> *10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substances and Substance or Prohibited Methods.*
>
> *The period of Ineligibility imposed for a first violation of Article 2.1 (Presence of a Prohibited Substance), Article 2.2 (Use or Attempted Use) or Article 2.6 shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5 are met:*
>
> *10.2.1 A violation involving any Prohibited Method or a Prohibited Substance in the classes of Anabolic Agents, Peptide Hormones, Growth Factors and Related Substances, Hormone and Metabolic Modulators, or Diuretics and Other Masking Agents, shall result in four (4) years Ineligibility unless the Athlete or other Person can establish that the commission of the anti-doping rule violation was neither intentional nor reckless.*

111. In draft version 2.0, an athlete could not benefit from a reduction in sanction – UNLESS – the conditions for eliminating or reducing the sanction, as provided in articles 10.4 and 10.5 (the no fault and no significant fault provisions) were met.

112. This meant that an athlete could only establish that the ADRV was not intentional if he or she could first establish how the substance entered his or her system as per articles 10.4 and 10.5. Without meeting the conditions of article 10.4 and 10.5 no reduction in sanction was possible.

113. But, in draft World Anti-Doping Code 3.0, article 10.2.1 was again modified. The reference to the "conditions for eliminating or reducing the sanction provided in articles 10.4 and 10.5" was deleted. The new wording indicated that the mandatory sanction was there but "subject to" further potential reduction pursuant to articles 10.4, 10.5, or 10.6 rather than being "conditional" upon meeting the requirements of article 10.4 and 10.5.

114. Also, draft World Anti-Doping Code version 3.0 first introduced article 10.2.2. It was based on the premise that if an athlete could establish that he or she lacked intention in committing an anti-doping rule violation, fundamental human rights principles supported that he or she should still be able to benefit from a reduction in sanction. As of World Anti-Doping Code version 3.0 (and in every version thereafter), if an athlete could prove that an ADRV was not intentional, that athlete could automatically benefit from a reduction in sanction of two years.

115. So, as the draft World Anti-Doping Code evolved, being able to profit from the two year sanction reduction under article 10.2.2 was no longer conditional on establishing how the substance entered the athlete's system. The pertinent excerpt of draft World Anti-Doping Code 3.0 reads as follows:

10.2 Ineligibility for Presence, Use or Attempted Use or Possession of a Prohibited Substance or Prohibited Method.

The period of Ineligibility imposed for a first violation of Articles 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension of sanction pursuant to Articles 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.

10.2.1.2 The anti-doping rule violation involves a Specified Substance and the Anti-Doping Organization can establish that the anti-doping rule violation was intentional.

10.2.2 If Article 10.2.1 does not apply, the period of Ineligibility shall be two years.

116. Later, draft World Anti-Doping Code 3.1 added further clarity by providing a more extensive definition of "intentional" at article 10.2.3. In doing so, the World Anti-Doping Code drafters effectively sought to provide decision-makers and athletes guidance on how they intended the provision to work in practice. It must be underlined once again that the expanded definition of article 10.2.3 (cited above) also does not refer to establishing how the substance entered an athlete's system.

117. Draft World Anti-Doping Code 3.1 also modified the comment to article 10.5.2 and added the following sentence:

> […] *Article 10.5.2 may be applied to any anti-doping rule violation, except those Articles where intent is an element of the anti-doping rule violation (e.g., Article 10.3.3) or an element of a particular sanction (e.g., Article 10.2.1) or a range of Ineligibility is already provided in an Article based on the Athlete or other Person's degree of Fault.*
>
> [Emphasis added]

118. This clarification expressly shows that the intention of the World Anti-Doping Code drafting team was that an athlete who fails to establish that an ADRV was not intentional cannot benefit from any reduction in sanction based on his or her degree of fault.

119. In sum, at the onset of WADA's 2015 Code revision process, establishing how the substance entered an athlete's system was a condition to the athlete benefiting from a sanction reduction under article 10.2.1.1. But, this condition was purposely removed in draft World Anti-Doping Code version 3.0 and in every draft version thereafter. It is not a presumptive requirement to benefiting from article 10.2.2, whether under the 2015 World Anti-Doping Code or the current CADP.

120. That is not to say that establishing how a non-specified substance entered an athlete's system is irrelevant to the determination of an athlete's intention or lack thereof at article 10.2.1.1. For an athlete to be able to establish how the substance entered his or her body is certainly one of many, if not the most important factor to be considered in an arbitral panel's determination of whether or not an athlete has been able to prove that he or she lacked intention as defined in 10.2.3. But, it is not obligatory.

121. If an athlete is not able to establish how a substance entered his or her body, this does not mean that he or she should be disallowed from successfully trying to prove, by other reliable means and other credible evidence, that that the ADRV was not intentional.

122. Therefore, I shall now turn my attention to my assessment of whether or not Mr. Grosman has been able to prove, to the requisite standard, that his anti-doping rule violation was not intentional, notwithstanding the fact that he was not able to establish, to the requisite standard, how the DHCMT entered his system.

Was the ADRV non intentional?

123. Under CADP Article 10.2.3 the term intentional requires that the Athlete "engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk."

124. The *Hristov* case (on which I sat as arbitrator) illustrates how article 10.2.1.1 could be applied. In *Hristov*, the athlete was unsuccessful in submitting conclusive evidence that his supplement was contaminated. Therefore, the Panel could not apply article 10.5.1.2. Yet, based on the athlete's compelling submissions, which included documented attempts to mitigate the risks involved in taking supplements including obtaining manufacturer's certificates for all his supplements, his convincing will-say statement, his age, his profession, the fact that other supplements from the same manufacturer had been proven to be mislabelled and/or cross-contaminated, etc., it was decided that notwithstanding the fact that the athlete had to be found negligent and at fault for the finding of a non-specified substance in his urine sample (because he could not establish how it had entered his system), he had successfully convinced the Panel on a balance of probabilities that his anti-doping rule violation was not intentional. In other words, the athlete convinced the Panel that he did not cheat, that he did not manifestly disregard the rules and that he did not act "intentionally" as defined in article 10.2.3. Therefore, he satisfied article 10.2.1.1 of the applicable anti-doping rules and he was sanctioned with a two-year period of ineligibility under article 10.2.2.

125. Here, as already established, if Mr. Grosman can succeed in proving to the requisite standard that his ingestion of DHCMT was not intentional, he could benefit from a reduction in sanction of two years. Do to so, it is imperative that he provide compelling evidence to convince this Tribunal that his ADRV was not intentional.

126. Yet, because it has been concluded that the contents of the open AminoX bottle are not the source of the DHCMT and because no alternative explanation has been provided for the finding of DHCMT in Mr. Grosman's urine sample, it is difficult, if not impossible to conclude that the ADRV was anything but intentional.

127. DHCMT is an anabolic steroid that has long been used for performance enhancement purposes. There is a wide range of reasons to use it including recovery, enhanced strength and muscle mass, and increased power and aggressiveness, all of which could be beneficial to a football player. Mr. Grossman has indeed testified that he uses supplements to gain greater strength, power and energy; in other words, he uses supplements to enhance his performance.

128. The convincing evidence brought forth by the CCES seems to indicate that not only did Mr. Grossman ignore the CCES warnings and manifestly disregard all risks related to supplement use by using three non-NSF Certified for Sport supplements in excess dosages but, also that he deliberately used DHCMT – which certainly entered his system somehow – with the intent to enhance his performance.

129. Applying the definition provided by CADP article 10.2.3, I find that Mr. Grosman's anti-doping rule violation was intentional. This is so because he either knew, or reasonably should have known, of the risks involved with taking prohibited substances and that he knew, or should have known, that his conduct might constitute or result in an ADRV.

130. As was the case in *Youssef* at p. 32:

> *Because the undertaking of that risk, in the manner in which it occurred, meets the definition of "intentional" under Rule 10.2.3, that circumstance, as standing on its own establishes the period of ineligibility as four years pursuant to article 10.2.1 because instead of establishing that the anti-doping rule violation was not intentional, it demonstrates the opposite.*

131. While the Athlete adamantly denies intentionally using the DHCMT, on the whole of the evidence before me, his actions and inactions fall well short of the standard required to convince this Tribunal that he did not act intentionally as defined in article 10.2.3. To paraphrase *Gibbs,* Mr. Grosman's denial of intentional doping does not go very far in proving lack of intention.

132. The finding of DHCMT in Mr. Grosman's urine was neither inadvertent nor an innocent mistake. The DHCMT did not come from a contaminated AminoX supplement. The only other explanation for the finding is that the Athlete deliberately used the DHCMT. Therefore the ADRV was intentional, as per the CADP definition.

133. Mr. Grosman manifestly and/or recklessly disregarded his responsibilities as an athlete by taking DHCMT. As rightly stated by the CCES, "*the anti-doping rule violation was the materialization of a risk he knowingly took.*"

134. The Athlete has not succeeded in proving that his anti-doping rule violation was not intentional, therefore CADP article 10.2.1 must apply and he cannot avail himself of CADP article 10.2.2.

C. Determination of Fault and Ineligibility

- *What is the appropriate sanction that should be imposed under the circumstances?*

135. Under CADP article 10.2.1, because DHCMT is classified as a non-specified substance, the mandated period of ineligibility to be imposed on the Athlete is four years.

136. The Athlete has not been able to establish on a balance of probabilities how the DHCMT entered his system. He can neither benefit from CADP article 10.5.1.2 nor from CADP article 10.5.2. Therefore, there is no need to consider his degree of fault.

137. The Athlete also has not been able to convince this Panel on a balance of probabilities that his anti-doping rule violation was not intentional. Therefore, he cannot benefit from CADP article 10.2.2.

138. To allow for a reduction of the presumptive period of ineligibility under the factual circumstances of this case would do a grave disservice to the fight against doping in sport.

ORDER

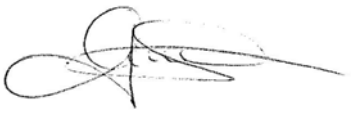
139. For the above reasons, the period of ineligibility to be imposed on Mr. Tristan Grosman is four years.

140. In light of the Athlete's prompt admission, both parties agree that in accordance with CADP article 10.11.2, Mr. Grosman's period of ineligibility should commence on the date of his sample collection.

141. In accordance with articles 10.11.2 and 10.2.1 of the CADP, Mr. Tristan Grosman's period of ineligibility will start as of April 24, 2016. He will be free to resume competition on April 25, 2020.

142. I retain jurisdiction to deal with all other issues arising from this award.

Signed in Beaconsfield, Quebec on November 23, 2016



Janie Soublière