

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

No: SDRCC DT-18-0302

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)  
U Sports

and

KYLE BORSA  
(Athlete)

and

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

**Appearances:**

For CCES: Adam Klevinas, Sport Law and Strategy Group, and Matthew Koop

For the Athlete: Paul J. Harasen, Kanuka Thuringer LLP

For USports Tara Haoto

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**DECISION WITH REASONS**

**1. Introduction**

1. CCES asserted the Athlete had committed an anti-doping rule violation on October 16, 2018, pursuant to Article 2.1 of Part C of the Canadian Anti-Doping Program (the "CADP"). The Athlete confirmed this violation with his Timely Admission Form dated December 21, 2018.
2. Accordingly, the parties were seeking to determine the appropriate Consequences as per the CADP.
3. The hearing took place in Regina, on February 22, 2019.
4. At the hearing the parties confirmed that they recognized the jurisdiction of the SDRCC to render a final and binding decision of the matter in dispute, and also that they accepted me as Arbitrator.

5. After considering all of the evidence and arguments advanced, on February 27, 2019 I issued my short decision without reasons in accordance with the Canadian Sport Dispute Resolution Code (January 1, 2015) (the "SDRCC Code"). The SDRCC advised the parties of my decision that same day it was issued.
6. My decision was that the Period of Ineligibility was to be sixteen (16) months, to start on October 16, 2018, being the date of the violation and Sample collection.
7. These are the reasons for my decision.

## **2. The Evidence**

8. The facts set out below are a summary of the most relevant parts of the evidence. Even though not documented in these reasons, in coming to my decision I have considered all of the evidence presented.

### **Evidence from the Athlete**

9. The Athlete is now 20 years of age, but was 19 at the time of the October 2018 doping test. He lives in Regina with his family, attends the University of Regina and is studying Education. He is working towards a Physical Education major and Inclusive Education minor. He is now in second year and is a member of both the football and track teams at the University of Regina. He has an additional 3 years of eligibility in both sports. He is particularly accomplished in football, and dreams of playing in the Canadian Football League.
10. The Athlete failed the October 2018 doping test because he had taken a pre-workout supplement called Allmax Impact Igniter. He had bought this supplement at a Supplement King retail store in Regina in mid-September 2018.
11. The Athlete had been buying and using different supplements from this store for about 4 years, and passed 4 earlier doping tests. He had been using supplements due to what he had taken to be recommendations from coaches, nutritionists and successful ex-athletes who had become motivational speakers. There was no evidence of specific recommendations on any specific supplements. The Athlete's practice was to check the list of ingredients on supplements by looking at the label to see if he recognized anything, but he never compared those ingredients to the Prohibited List. Likewise, he never performed Global DRO searches nor internet searches.
12. The Athlete was using Allmax Impact Igniter to give himself some additional energy before his workouts. He acknowledged this was for a sport-related purpose. He said he was very busy with classes, film study (for football), practices and games, and workouts. He felt tired all the time and found he was losing his desire to work out. He felt he needed more energy and suggested it was popular among football players to take pre-workout supplements for this

additional energy. He never used Allmax Impact Igniter before a game but only pre-workout.

13. In the Supplement King store, the Athlete had advised the clerk he was tired all the time and asked for a recommendation. The clerk gave a "bit of a sales pitch", describing Allmax Impact Igniter as a good supplement for him.
14. The Athlete assumed the clerk knew he was an athlete subject to testing, though was not sure he had ever specifically told the clerk that. He did not ask the clerk about this particular supplement (whether it contained prohibited substances or not) and the clerk made no specific representation about this particular supplement. The clerk did say however that the store did not sell anything that was banned.
15. The Athlete did not consult with anyone beyond the clerk. He said he had felt the clerk was reliable as he had dealt with him in the past. He said he thought the clerk had at one time showed him his kinesiology degree, but also stated "not that that meant anything".
16. The Athlete felt the store was reputable, and that it was safer buying product there than online. He said the brand was very well known and assumed it was reliably sourced because it was a brand available at Wal-Mart. He had used supplements marketed under the same brand in the past, without issue, though not this particular supplement.
17. The Athlete looked at the label but "nothing jumped out" and there were no "red flags" for him. He said if he had seen something like a steroid, growth hormone or ephedrine on the label, that would have been a concern and he would not have taken it.
18. The Athlete admitted he did nothing to compare the listed ingredients to the Prohibited List, did not check for an NSF certification and did not seek specific advice from any coaches, nutritionists or doctors (and such support was available to him). He acknowledged there was no urgency to taking the supplement and he could have sought such expert advice or done further research before consuming it.
19. The Athlete bought the supplement, put it in his water and drank it before his heavy workouts, likely 2-3 times a week for about a month. One day in October he was pulled aside after practice and given the doping test, which he failed.
20. The Athlete has had some formal doping education, taking the CCES courses including True Sport Clean probably 3 times over the last 4 years. The last occasion had been within the few months before the failed doping test.
21. The process was that his coach would send the Athlete the link for the tests and direct him to get this done. He would complete the tests on his own time, providing a picture of the certificate to show his coach he had done so. He

could remember doing the tests online and alone at home. He did not make or retain any notes, there was no follow up on course content, no questions were asked and he was never required to report to anyone afterwards to show what he had learned. He said he did not remember much of the detail of the tests, as they "never really registered with him". He said he "did not really remember" if he had been exposed to the following, which the CCES suggested was part of the materials on which he had been tested:

Supplements are the cause of many inadvertent doping violations. As you'll see in the next section, they can contain or be contaminated with any number of prohibited substances. [...]

Supplements aren't classified as food products or drugs, and their production is not regulated by the Canadian Food and Drugs Act. [...]

Not all certification bodies advertised on supplements are legitimate or rigorous in their tests. Some will just falsify certification. We suggest checking any claims of certification against NSF Certified for Sport. [...]

Supplement manufacturers don't always know what every step of their supply chain is. Even supplements that are made in Canada can contain ingredients that come from overseas, and their production process can result in cross-contamination or sub-standard health and safety practises. [...]

There have been several cases in recent years in which athletes have lost medals and received sanctions for the presence of prohibited substances (like steroids or stimulants) in their samples – all from supplements that didn't list the substance on the label. [...]

In 2002, before the Salt Lake City Olympics, the Netherlands tested their athletes' supplements. 25% were found to contain unlisted prohibited supplements [sic]. [...]

[Question 3 on Quiz – feedback.] Because of lack of regulation, we can't be sure that the label is accurate. Certification on the supplement packaging can be falsified or suspect in other ways. A doctor or nutritionist might not know or understand the Prohibited List. Ultimately, we can't know for sure if a supplement is safe or not. [...]

The CCES would like to stress to the Canadian sport community the extreme risk an athlete runs when using supplements.

Remember, it's impossible to determine if a supplement is 100% safe and you are liable for any prohibited substance in your sample. Talk to a doctor or dietitian to figure out how to optimize your nutrition. If you're still committed to taking a supplement, purchase products that have gone through independent third-party batch testing.

The NSF Certified for Sport program (<http://nsfsport.com>) can help athletes identify supplements that have been tested for purity and for banned substances.

22. The Athlete also said he had never been on the CCES website and did not know about the Athlete Zone contents on it.

### **Expert Evidence**

23. Both Dr. Jeff Eichhorst and Dr. Christiane Ayotte were acknowledged to be experts and so qualified to provide expert evidence.
24. Dr. Eichhorst is a clinical chemist and toxicologist with over 30 years of experience. He did not know either the Athlete or his lawyer, and was not being paid for his assistance.
25. According to Dr. Eichhorst, there was no dispute that higenamine was detected in the Athlete in the doping test. The question for him was exactly how much was there. The lab had performed what he said was a "qualitative" (not "quantitative") analysis and so had provided results that were self-described as "rough estimates". Dr. Eichhorst explained the process required for a quantitative analysis, which would have precisely defined the concentration in the Athlete. As that had not occurred here, he said we could not be sure precisely what the concentration was.
26. Dr. Eichhorst suggested based on the results the actual concentration could be somewhere between 9 ng/mL and 21 ng/mL. This was important as if there had been a reading of less than 10 ng/mL, this would not have been reported. This is because despite the fact the presence of any concentration would be considered an anti-doping violation, there has been an informal threshold set by the World Anti-Doping Agency ("WADA") to not report a reading of less than 10 ng/mL.
27. Dr. Eichhorst offered that as it was therefore important to determine whether the reading was in reality more than 10 ng/mL, it seemed there should be a quantitative analysis performed which would accurately express a real value, not simply a rough estimate.
28. Dr. Eichhorst referred to a technical document from WADA requiring labs to have certain minimum required performance levels. By this document labs are required to be able to measure higenamine to a 20 ng/mL minimum standard. It seemed "counterintuitive" to Dr. Eichhorst only to require a lab to be able to measure to 20 ng/mL but also require a lab to report if the reading were greater than 10 ng/mL.
29. Dr. Eichhorst noted one of the doping results sheets initially showed a concentration of 15 ng/mL which Dr. Ayotte had said was her typographical error, and which she had later corrected to 18 ng/mL. To Dr. Eichhorst an error

like that would be a fairly serious thing and he would have expected there would normally be a new report and an audit trail explaining what had happened and why.

30. Dr. Ayotte is an organic chemist who has a PhD and a post-doctorate. She is the head of the only doping control laboratory in Canada accredited by WADA, in Montreal. Over many years and in many capacities she has served within the anti-doping system, and recently has received an Order of Canada for her work.
31. Dr. Ayotte explained how quantitative testing is testing for precise amounts present, while qualitative testing simply determines whether something is present. Here, WADA was asking the labs to do what could (unscientifically) be called "semi-quantitative" testing, which is exactly what her lab had done.
32. This was a term that she (as a scientist) "hated", but which accurately described the level of precision required by WADA when dealing with a substance like this where the mere presence was a violation but an informal reporting threshold was used so as to exclude inadvertent positive tests arising from certain uses.
33. Higenamine can be found in herbal remedies and over the counter products such as throat lozenges in Asia. WADA had set an informal reporting threshold at 10 ng/mL for higenamine in order to make sure there were no false positives arising from such uses. Dr. Ayotte felt this was a "very safe" threshold as such naturally caused readings would not exceed 1 ng/mL or 2 ng/mL.
34. Dr. Ayotte was very confident the actual concentration for the Athlete would be above 10 ng/mL. Whether or not there was the typographical correction, Dr. Ayotte asserted that whatever the actual statistical range, not all points on any range had equal probabilities. She strongly disagreed there was any statistical likelihood the precise reading would be on the extreme low end on the bell curve. With corrected readings of roughly 17 ng/mL and 18 ng/mL (as opposed to 17 ng/mL and 15 ng/mL) the potential range would be higher than the 9 ng/mL to 21 ng/mL Dr. Eichhorst had offered, with the actual possible extreme low point likely being at or greater than 10 ng/mL.
35. If an athlete's doping control form had indicated an athlete had taken a supplement with higenamine then the lab would report the reading, even if below the measure of 10 ng/mL, as the Technical Document did not say "shall not report [if less than 10 ng/mL]" but only "should not report". Therefore, if there were information to suggest an athlete had taken a substance for performance-enhancing purposes (as opposed to naturally ingesting it through tea, etc.) they would report the finding even if less than 10 ng/mL. Conversely, even without such other information, a concentration of greater than 10 ng/mL would be "proof positive" that an athlete had used a prohibited substance. Here, they were aware of the source of the higenamine (i.e. the supplement the Athlete had taken) and so any concentration, whatever the amount, would be a violation.

36. Dr. Ayotte explained how the Montreal lab (which did the testing here) had the capacity to measure down to "about 1 ng/mL or 2 ng/mL" despite only being required to be able to measure to 20 ng/mL by WADA. She also understood that many other labs also had the capacity to measure far lower than 20 ng/mL.
37. Further, here the higenamine did not come from traditional uses, but was acknowledged as coming from a supplement. This then constituted a violation whatever the concentration, below or above 10 ng/mL.
38. On the typographical error and the lack of a new report and audit trail, Dr. Ayotte said there had been no need for that here as there had been no laboratory documents package requested. If there had been they would have prepared another certificate with the corrected paperwork and formal explanations.

### **3. Arguments**

39. The positions set out below are a summary of the most relevant parts of the arguments advanced. Even though not documented in these reasons, in coming to my decision I have considered all of the arguments presented.

#### **Summarized Arguments of the Athlete**

40. The Panel has very broad authority and discretion in arriving at the appropriate sanction. Section 6.17 of the SDRCC Code states the following:

##### **6.17 Scope of Panel's Review**

(a) The Panel shall have full power to review the facts and apply the law. In particular, the Panel may substitute its decision for:

- (i) the decision that gave rise to the dispute; or
- (ii) in case of Doping Disputes, the CCES assertion that a doping violation has occurred and its recommended sanction flowing therefrom,

and may substitute such measures and grant such remedies or relief that the Panel deems just and equitable in the circumstances.

41. Section 6.21 of the SDRCC Code confirms the Panel must determine this case on its own facts and is not bound by previous decisions:

##### **6.21 Awards**

(k) Each case must be determined on its facts and the Panel shall not be bound by previous decisions, including those of the SDRCC.

42. Section 6.5.1 of the CADP states:

6.5.1 The CCES shall administer independently, efficiently, fairly and consistently the operation of the CADP, in compliance with the Code.

43. Section 6.5.9 of the CADP states:

6.5.9. The CCES shall vigorously pursue all potential anti-doping rule violations within its jurisdiction...

44. Fairness and reasonableness is necessary in the context of suspension or expulsion from participation in the activities of an organization. In *Rakowski v Malagerio* (2007), 84 OR (3d) 696, the court stated:

30 [...] Sometimes, the court will become involved if a principle of natural justice is breached. Here, one classic class of examples is the situation where a member of a club or association is expelled from the club or association or is temporarily or permanently disqualified from participating in its activities or is disciplined for breach of the club or association rules and the process of expulsion, disqualification, or discipline is fundamentally unfair. The courts will exercise a limited jurisdiction to ensure that an association or club does not violate the principles of natural justice.

45. Regarding athlete ineligibility, in *Woodbridge Soccer Club v Ontario Soccer Association*, [2002] OJ No. 3806, reversed in part with further direction at [2002] O.J. No. 5982, the court stated:

19 [...] At the same time, the clubs and the players — as well as the Association — are contractually entitled to expect that the rules of the Association will be observed, and applied fairly and in accordance with their terms. This is obviously the case where decisions relating to the eligibility of players — decisions that are of importance to the clubs and the players — are concerned.

46. *Guerrero vs. FIFA* (CAS 2018/A/5546) and *WADA v. FIFA and Guerrero* (CAS 2018/A/5571) were appeals of a FIFA sanctioning decision by both the athlete, who sought a lower sanction, and by WADA, which sought a greater sanction. The appeal proceeded under the Code of Sports-Related Arbitration.

47. The case is distinguishable from the present case. In *Guerrero*, the panel begrudgingly resisted considering fairness and proportionality because it considered itself constrained from doing so;

84. Were the Panel entirely unconstrained by the provisions of the FIFA ADR as to sanction and empowered to determine the appropriate period of ineligibility *ex aequo et bono*, it could entertain with some sympathy the argument advanced by FIFA that such period should be no more than 6 months in the light of the following factors considered purely from Mr Guerrero's perspective...

48. This Panel has no such constraints. In fact, it is expressly invited to do what it deems "just and equitable" under section 6.17 of the SDRCC Code.

49. The violation here is the presence of "any quantity" of higenamine in the Athlete's samples as per Rule 2.1 of the CADP. However, WADA has issued a Technical Document stating that concentrations of higenamine below 10 ng/mL should not be reported.

50. The Athlete's samples had higenamine levels "roughly estimated" at 15 ng/mL to 17 ng/mL. He faces a tremendous sanction where, in contrast, an athlete

with higenamine in his/her sample but at a level of less than 10 ng/mL, would not even have had that quantity reported. This is unfair and arbitrary.

51. There is some uncertainty as to the precise level of higenamine in the Athlete's system, based on the semi-quantitative approach taken to measure it and the possible range of actual results. It is possible in reality his concentration was much lower than the rough estimates, and so much closer to a reading that would not have been reported.
52. As concentration levels dictate whether an "any quantity" violation is even reported, concentration levels should have relevance to the sanction. If someone with 9 ng/mL faces no sanction, the Athlete should face a sanction that bears some relationship to the negligible difference between 9 ng/mL and his readings. Any other result would be inconsistent, unfair and arbitrary, and offside section 6.5.9 of the CADP that requires the vigorous pursuit of "all potential anti-doping rule violations".
53. While the concept of "fault" under the CADP is often tied to the degree of care and investigation exercised by the athlete in a particular situation, a modest concentration of a prohibited substance has also been considered as part of a fault analysis.
54. In Volandri v International Tennis Federation, (2009), CAS 2009/A/1782 ("Volandri") the tribunal dealt with a tennis player found to have a prohibited substance called salbutamol in a concentration of 1,167 ng/mL, in one sample, and 1,192 ng/mL in a second sample. Both of those concentrations exceeded a 1,000 ng/mL threshold. In reducing a 3-month suspension to a reprimand, one of the factors considered by the tribunal was that modest concentration levels were part of the analysis of "fault";
  53. The CAS Panel observes that Mr Filippo Volandri was indeed at fault, as he has not been able to prove that the presence of salbutamol in his sample in excess of 1,000 ng/mL was the consequence "of the therapeutic use of inhaled salbutamol". However, the degree of his fault is minor as the threshold of 1,000 ng/mL was just exceeded. If, as ascertained by the ITF Tribunal itself, one puff corresponds to 100 mcg of salbutamol, the litigious excess represents less than a couple of puffs.
55. In Cilic v International Tennis Federation, CAS 2013/A/3327 ("Cilic") the tribunal indicated that the due diligence steps should be regarded as reasonable where products "...are particularly likely to distort competition". Higenamine is a substance which is not particularly likely to distort competition and therefore does not engage all the due diligence steps of Cilic.
56. Higenamine is one of the "Specified Substances" referred to in Rule 4.2.2 of the CADP. The comment to Rule 4.2.2 reflects the fact that higenamine, while prohibited, should not be seen as a product which is "particularly likely to distort competition", as per the comment for that rule, "they are simply substances

which are more likely to have been consumed by an Athlete for a purpose other than the enhancement of sport performance".

57. Cilic also requires us to consider the subjective elements of fault, including:
  - An athlete's youth and/or inexperience;
  - The extent of anti-doping education received by the athlete;
  - The athlete having taken a certain product over a long period of time without incident.
58. The Athlete was 19 years old at the time of the violation. He had purchased supplements for many years from the Supplement King location, which sold him the supplement in question. He had passed 4 prior doping tests while using supplements purchased at the same Supplement King location. The staff at the Supplement King location had held themselves out as being knowledgeable about their products. They indicated to the Athlete that the supplement in question did not contain any banned substances and did so knowing the Athlete was a university athlete.
59. The anti-doping education received by the Athlete was the most basic and minimum. He was told to complete it so he could play, and he did. There was no follow up, no questions, no assessment as to what he learned or anything of that nature.
60. In Godinez (No. SDRCC DT 18-0290) the Tribunal made the following findings about the education of an athlete who took two CCES on-line courses:

71. Firstly, I find that while the athlete has received some anti-doping education through two annual online education examinations, the athlete's recollection of the anti-doping education was spotty at best. I believe that her inability to recall the specifics of what she had learned to be sincere. In addition, I find that CCES's statements on the use of supplements in the training material to be less than direct. On one hand, the CCES informs athletes that the use of supplements can lead to inadvertent doping while, on the other, stopping short of telling athletes to refrain from using supplements wholesale... The level of education given to the athlete through two annual exams, the second being shorter than the first and used as a sort of refresher, is not sufficient to establish that the athlete's anti-doping education gave her the knowledge of all of the risks of using supplements.

72. While there are risks associated with using supplements that the Athlete ought to have been aware of, the education she was given was that of a varsity athlete and not an athlete competing at the international level.
61. The Athlete was not trying to hide his use of the supplement, as he disclosed it on his doping control form at the time he took his test.
62. In Butson (2017) ST 18/16 ("Butson") a 22-year old rugby player was found to have higenamine in his sample. Higenamine was not disclosed explicitly as an

ingredient on the supplement label, but a substance from which higenamine is derived was listed as an ingredient on the label. In Butson, it was accepted that the athlete returned a positive test due to taking a pre-workout supplement that he had purchased from retail stores. The athlete similarly disclosed the supplement on his Doping Control Form. The tribunal took note of the fact that the athlete was a "relatively young player" who "relied generally on the safety of supplements purchased at retail outlets".

63. The tribunal issued a 9-month suspension. It accepted the joint submissions that the athlete's fault was in the "normal" degree and that he could be considered a person "who was unmindful of his duty and insufficiently careful in his acquisition and use of the substance". The tribunal took into account the notion that:

It is reasonable for an athlete to have a somewhat lower perception of risk where he or she takes such products out of competition than if the athlete is taking them in competition.

64. In CCES v Bouchard (2007) No. SDRCC DT-07-0066 the athlete, a former national team member, tested positive for the presence of ephedrine above an allowable threshold. The label of one of the products he had taken listed "ephedra" as an ingredient, a clear indication that the product contained ephedrine. The CCES submitted that the athlete "was extremely careless as he admitted taking a supplement for which the label showed the substance ephedra". The panel ordered a 6-month suspension.
65. In INADA v Kang (2017) ADDPI 2017 Case No. 21 the athlete was suffering from medical problems and as a treatment used a locally prepared product known as Thandai. The athlete did not check the ingredients. After testing positive for a prohibited substance (a metabolite of marijuana) the athlete inquired about the ingredients of Thandai and learned it sometimes would contain marijuana. The tribunal imposed a reprimand with no suspension.
66. In CCES v Toor (2012) SDRCC DT 11-0165 the presence of a prohibited substance was caused by a commercially sold supplement, Jack 3D. This was purchased over the counter on the recommendation of a clerk at a local GNC store that was out of the shake powder normally purchased by the athlete. The athlete was a 27-year-old recreational soccer player. He did not question the store clerk. He did not read the label (had he done so the prohibited substance was listed by a different ingredient name). The tribunal characterized the athlete as "naïve" and "unduly trusting" but considered it relevant that the supplement product was marketed and sold over the counter by a reputable store. A 2-month suspension was imposed.
67. In FINA v Molina (2011), CAS 2011/A/2515 the athlete was a swimmer who had competed at multiple Olympic and Pan American Games. She was found to with methylhexaneamine (MHA) (a specified prohibited substance) in her system. The substance had its origin in a supplement named 1.M.R., which the

athlete had received as a free sample while buying other products online at [www.bodybuilding.com](http://www.bodybuilding.com). The applicable rule provided for a sanction ranging from a reprimand with no ineligibility (minimum) to 2 years ineligibility (maximum) depending on the athlete's fault. The athlete had previously bought products and received free samples from the online retailer without incident or any positive test. In this case however, she made only a cursory check of the ingredients on the product label, failed to identify the disclosure of MHA on the label (by an alternative name but a name that was also on the prohibited list) and had not undertaken any research, or contacted the supplier or sought medical advice. She received a 6-month suspension.

68. In International Basketball Federation v Weeden, FIBA Disciplinary Panel, March 31, 2011 the athlete purchased a supplement known as Jack3D at a supplement store while in the United States, and later tested positive for a prohibited substance from ingesting the supplement. The athlete had played in Europe for approximately 5 seasons and in the view of the panel should have been acquainted with anti-doping warnings regarding supplements. A simple internet search would have revealed that Jack3D contained a prohibited substance. He was suspended 6 months.
69. Most relevant is the case addressing the anti-doping rule violation by Jamie Harry dated February 6, 2019. Here, a Canadian university football player was given a 4-month suspension for an in-competition violation arising from the presence of a specified substance called terbutaline. Terbutaline is an asthma medication. The athlete had a prescription for a different medication, salbutamol.
70. The adverse finding occurred when the athlete forgot to bring his inhaler to a competition and as a result borrowed an inhaler (which contained terbutaline) from a teammate. The athlete did not understand the difference between the two medications, had assumed his teammate was on the same medication as he was (as they both had asthma) and the athlete did not make any inquiries before using his teammate's inhaler. At the time of testing, the athlete was not a national or international athlete as defined in the CADP, but simply a student-athlete participating in a university sports competition.
71. In our case, the Athlete's violation was not an in-competition violation but otherwise the cases are quite similar. They both involve young, Canadian university football players taking a substance based on certain bad assumptions. In Harry, arguably the athlete there was more careless, as he made no inquiries at all.
72. If we find the Athlete was equally as culpable as Harry, he should get 4 months, if a little more culpable then 6 months, and if doubly so (which is not accepted) then 8 months.
73. Accordingly, a sanction in the 6 to 7 month range is fair and reasonable.

### Summarized Arguments of the CCES

74. The CCES accepts the Athlete was not a "cheater".
75. Higenamine is a specified substance, and the Athlete is eligible to receive a reduced sanction pursuant to Article 10.5.1.1 of the CADP, which states:

#### 10.5.1.1 Specified Substances

Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

76. According to Article 10.5.1.1 of the CADP, when determining the period of ineligibility, the range of potential sanctions is between a reprimand and 2 years, and depends on the Athlete's degree of "fault".

77. Fault is defined in the CADP as follows:

Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing an Athlete or other Person's degree of Fault include, for example, the Athlete's or other Person's experience, whether the Athlete or other Person is a Minor, special considerations such as impairment, the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to what should have been the perceived level of risk. In assessing the Athlete's or other Person's degree of Fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behavior. Thus, for example, the fact that an Athlete would lose the opportunity to earn large sums of money during a period of Ineligibility, or the fact that the Athlete only has a short time left in his or her career, or the timing of the sporting calendar, would not be relevant factors to be considered in reducing the period of Ineligibility under Rule 10.5.1 or 10.5.2.

[Comment: The criteria for assessing an Athlete's degree of Fault are the same under all Rules where Fault is to be considered. However, under Rule 10.5.2, no reduction of sanction is appropriate unless, when the degree of Fault is assessed, the conclusion is that No Significant Fault or Negligence on the part of the Athlete or other Person was involved.]

78. Fault is any breach of duty or any lack of care appropriate to a particular situation. The CCES says the Athlete breached his duty to ensure his compliance with his anti-doping obligations, notably his personal duty to ensure no prohibited substance entered his body, as required by Article 2.1.1 of the CADP. The CCES also says the Athlete lacked care when he failed to conduct the proper investigations to ensure that the Allmax Impact Igniter that he was taking did not contain any prohibited substances.
79. The Tribunal must make a determination regarding the appropriate range of fault (i.e., light, normal or significant) on the basis of Cilic. On this analysis, the CCES argues for a suspension of 16 to 20 months, either at the highest end of

the "normal" fault range or at the lowest end of the "significant" fault range in Cilic.

80. According to the definition of fault, the Panel here should consider the following factors when assessing the Athlete's degree of fault:

- The Athlete's experience;
- Other special considerations such as impairment, as well as the degree of risk that should have been perceived by the Athlete and the level of care and investigation exercised by the Athlete in relation to the perceived level of risk.

81. The definition of fault in the CADP is clear that when assessing the Athlete's degree of fault, the circumstances considered must be specific and relevant to explain the Athlete's departure from the expected standard of behavior.

82. The definition of fault in the CADP does not indicate the concentration of a prohibited substance found in an Athlete is a relevant consideration when assessing degree of fault. In Cilic, the Court of Arbitration for Sport has specifically rejected considering the concentration of a prohibited substance detected when determining an athlete's degree of fault.

83. In Cilic, the CAS recognized 3 degrees of fault: light, normal and significant. The sanction range for a light degree of fault was said to be between 0-8 months with a standard light degree of fault leading to a sanction of 4 months. The sanction range for a normal degree of fault was said to be between 8-16 months with a standard normal degree of fault leading to a sanction of 12 months. The sanction range for a significant degree of fault was said to be between 16-24 months with a standard significant degree of fault leading to a sanction of 20 months.

84. The CAS panel in Cilic also provided guidance on how to determine which category of fault a case should fall into and how the sanction to be imposed against the particular athlete could be moved up or down within the relevant range;

71. In order to determine into which category of fault a particular case might fall, it is helpful to consider both the objective and the subjective level of fault. The objective element describes what standard of care could have been expected from a reasonable person in the athlete's situation. The subjective element describes what could have been expected from that particular athlete, in light of his personal capacities.

72. The Panel suggests that the objective element should be foremost in determining into which of the three relevant categories a particular case falls.

73. The subjective element can then be used to move a particular athlete up or down within that category.

74. Of course, in exceptional cases, it may be that the subjective elements are so significant that they move a particular athlete not only to the extremity of a particular category, but also into a different category altogether. That would be the exception to the rule, however.

85. As to the objective element of the degree of fault, the Panel in Cilic said:

74. [...] At the outset, it is important to recognise that, in theory, almost all anti-doping rule violations relating to the taking of a product containing a prohibited substance could be prevented. The athlete could always (i) read the label of the product used (or otherwise ascertain the ingredients), (ii) cross-check all the ingredients on the label with the list of prohibited substances, (iii) make an internet search of the product, (iv) ensure the product is reliably sourced and (v) consult appropriate experts in these matters and instruct them diligently before consuming the product.

75. However, an athlete cannot be reasonably expected to follow all of the above steps in every and all circumstances. Instead, these steps can only be regarded as reasonable in certain circumstances:

a) For substances that are prohibited at all times (both in and out-of-competition), the above steps are appropriate, because these products are particularly likely to distort competition. This follows from Article 4.2.1 WADC which states: "*The Prohibited List shall identify those Prohibited Substances and Prohibited Methods which are prohibited as doping at all time (both In-Competition and Out-of-Competition) because of their potential to enhance performance in future Competitions ...*". As a result, an athlete must be particularly diligent and, thus, the full scale of duty of care designed to prevent the athlete from ingesting these substances must apply. [...]

86. Subjective factors can be used to move an athlete up or down within the relevant fault range. Those subjective factors were described in paragraph 76 of Cilic as follows:

76. Whilst each case will turn on its own facts, the following examples of matters which can be taken into account in determining the level of subjective fault can be found in CAS jurisprudence (cf. also DE LA ROCHEFOUCAULD E., CAS Jurisprudence related to the elimination or reduction of the period of ineligibility for specific substances, CAS Bulletin 2/2013, p. 18, 24 et seq.):

- a) An athlete's youth and/or inexperience (see CAS 2011/A/2493, para 42 et seq; CAS 2010/A/2107, para. 9.35 et seq.).
- b) Language or environmental problems encountered by the athlete (see CAS 2012/A/2924, para 62).
- c) The extent of anti-doping education received by the athlete (or the extent of anti- doping education which was reasonably accessible by the athlete) (see CAS 2012/A/2822, paras 8.21, 8.23).
- d) Any other "personal impairments" such as those suffered by:
  - i. an athlete who has taken a certain product over a long period of time without incident. That person may not apply the objective standard of care which would be required or that he would apply if taking the product for the first time (see CAS 2011/A/2515, para 73).
  - ii. an athlete who has previously checked the product's ingredients.

- iii. An athlete is suffering from a high degree of stress (CAS2012/A/2756, para. 8.45 et seq.).
  - iv. an athlete whose level of awareness has been reduced by a careless but understandable mistake (CAS 2012/A/2756, para. 8.37).
87. According to Section 3 of the Prohibited List, higenamine is prohibited at all times and so as per Cilic, the CAS has determined that all of the steps listed in paragraph 74 of Cilic are appropriate. The CCES' position on these objective factors in this case is as follows.
88. The Athlete did not verify the label of the Allmax Impact Igniter at any time.
89. In Johaug vs. FIS, CAS 2017/A/5015 and CAS 2017/A/5110 at para. 211 the Court of Arbitration for Sport stated:
- Checking the label is the most basic step that an athlete can perform to satisfy his or her own personal duty of care. This expectation has been consistently espoused in numerous cases dealing with athletes that failed to read the product label (e.g. CAS 2005/A/830 and CAS 2005/A/951).
90. The Athlete did not verify all of the ingredients on the label of the Allmax Impact Igniter that he was taking against the Prohibited List. Had he done so he would have found that higenamine, which is explicitly mentioned on the label of the supplement, was prohibited at all times as a beta-2 agonist.
91. The Athlete did not conduct an internet search of the Allmax Impact Igniter either before or once he started using it.
92. The Athlete did not purchase the Allmax Impact Igniter from an online retailer that promotes their products as performance enhancing or in a manner associated with doping. He also did not merely accept the supplement from a friend or other third party without knowing its original origin. However, the Athlete's previous purchase and use of other supplements from a supplement store without engaging any anti-doping consequences was in no way a sufficient assurance of the reliability of the source to allow the Athlete to consider that the Allmax Impact Igniter was safe to use.
93. It is well known that supplements may contain prohibited substances that are either listed directly on the product label – as is the case in the present matter – or that may be found in the supplement through contamination or by being intentionally used by the manufacturer but without disclosing the particular ingredient(s) on the product label. Products may even be mislabeled.
94. As such, while it is not unreasonable that an athlete looking to purchase a supplement would do so at a supplement store rather than from a less reliable retailer, purchasing a supplement from a supplement store is no guarantee that the product is reliably sourced.

95. To minimize the known anti-doping risks with supplements, the CCES refers athletes to the NSF International Certified for Sport Program. Had the Athlete been looking for a pre-workout supplement, he could have gone onto the NSF website, indicated what he was looking for, and it would have produced a list of pre-workout supplements and their sources. The Athlete was informed of the existence of this certification program through the CCES anti-doping education session that he completed in the months before the failed test.
96. The Athlete did not consult the appropriate experts to determine the safety of the Allmax Impact Igniter either before or after he started using it.
97. A store clerk at a supplement store cannot be presumed to be an appropriate expert. The Athlete did not ask the Supplement King store clerk about his personal or professional qualifications to provide any assurances that the Allmax Impact Igniter was free of prohibited substances.
98. The Athlete had access to a support entourage, including, coaches, nutritionists or doctors but consulted with none of those supports. There was no pressing or urgent need for the Athlete to start taking the Allmax Impact Igniter that would have prevented him from conducting the necessary verifications or consulting with appropriate individuals.
99. The key point for the purpose of determining whether an athlete must follow all of the steps in paragraph 74 of Cilic is not whether a substance is specified or not – it is whether it is prohibited at all times or not. Since higenamine is prohibited at all times, the Athlete had a responsibility to follow all of the steps indicated in paragraph 74 of Cilic.
100. The subjective factors listed in paragraph 76 of Cilic can be used to move an athlete up or down within the relevant sanction range. The CCES' position on these subjective factors is as follows.
  101. The CCES acknowledges that the Athlete was only 19 years old at the relevant time but he was an experienced athlete who competed in 2 university sports, who had been exposed to the anti-doping system on 4 earlier occasions and had completed CCES' e-learning courses on 3 occasions. He therefore had a reasonable level of anti-doping experience.
  102. There are no language or environmental problems that are relevant.
  103. As part of his anti-doping responsibilities as an athlete in the sports of athletics and football, the Athlete had successfully completed CCES' e-learning anti-doping education courses on 3 occasions. The training recently completed specifically addressed the dangers regarding the use of supplements. It specifically informed athletes of what supplements are, where to get their advice on supplement use (i.e., from medical professionals), whether athletes really need to use supplements, whether the hype surrounding supplements should

be believed and whether supplements are safe. The course also explained the magnitude of the problems with supplements to athletes.

104. The Athlete was (or ought to have been) keenly aware of the inherent risk of taking a supplement without conducting any verification whatsoever regarding its safety.
105. The Athlete has not taken a certain product over a long period of time without incident. The Athlete had never before used Allmax Impact Igniter as this was the first time, in seeking something to help him with his decreased energy levels. The Athlete's past use of different supplements purchased from Supplement King and without incident does not permit him to rely upon some history.
106. Apart from how busy the Athlete was with his football season and academic term, he has not presented any evidence that demonstrates he was suffering from a high degree of stress at the time that he purchased and used the Allmax Impact Igniter.
107. The Athlete's level of awareness was not reduced by a careless but understandable mistake.
108. As to the degree of risk, athletes are expressly warned regarding the risks of supplements and so know (or ought to know) that they take a risk from an anti-doping perspective when using supplements. Athletes are also informed how to mitigate these risks by using products that have an NSF label or NSF certification. The Allmax Impact Igniter that the Athlete purchased and used did not include such a label and was not NSF certified. As such, not only should the Athlete have been aware of the risks associated with supplement use, but he should have also been aware that there was a heightened risk when using Allmax Impact Igniter because it did not contain an NSF label or indication that it was NSF certified.
109. Given that heightened risk the Athlete should have taken investigative steps that were commensurate with this risk. He did not.
110. The CCES says the Athlete failed to exercise an appropriate level of care that should be reasonably expected from an experienced elite athlete, that he failed to take even the most basic of investigative steps to verify the safety of the Allmax Impact Igniter, and that the very limited steps he did take fell short of the standard of care expected of all athletes.
111. Each case is decided on its own, but other cases can be helpful in making such decisions.
112. In Kepaoa, ST 10/17,26 a high-level amateur rugby player returned an Adverse Analytical Finding for higenamine in an out-of-competition sample. The athlete had received some anti-doping education in the season leading up to his

positive test and knew that he needed to ensure his supplements were free of prohibited substances. The athlete declared the supplement Oxyshred on his doping control form. Higenamine was listed on the product label of the Oxyshred. The athlete purchased the Oxyshred from a specialty supplement store and relied upon the advice provided by a salesperson regarding whether it contained any prohibited substances. The athlete did not check the product himself. The Sports Tribunal of New Zealand imposed an 18-month suspension, which was jointly recommended by the parties.

113. In UKAD v. Fedorciow SR/NADP/940/2017,<sup>27</sup> the athlete was a local and national level weightlifter and former rugby player, who was found in-competition to have higenamine in his system. He had declared on his doping control form that he had used a supplement called Mentality, which contained higenamine hydrochloride as indicated directly on the product label.
114. The athlete purchased Mentality on December 20, 2016 and checked it against the 2016 Prohibited List (that did not specifically list higenamine as a beta-2 agonist then, even though it was prohibited at that time). He failed to check the 2017 list however, which came into force on January 1, 2017 and which specifically listed higenamine as a prohibited beta-2 agonist.
115. The UK National Anti-Doping Panel imposed a 2-year suspension because it considered the Athlete had failed to establish that he bore no significant fault or negligence. It decided this because the athlete knew of the increased risk of taking supplements yet failed to check the ingredients of his supplement against the 2017 Prohibited List. It stated that athletes had the "core responsibility" to acquaint themselves with the substances on the Prohibited List. The Athlete's appeal was dismissed.
116. In Dawson, ST 05/17,<sup>29</sup> the athlete was found in-competition to have higenamine in his system. The source of the higenamine was Oxyshred, a supplement that had higenamine listed in its ingredients. At paragraph 38, the Sports Tribunal of New Zealand stated:

The fact that the prohibited substance was a listed ingredient in the Oxyshred supplement reflects Mr Dawson's attitude towards his responsibilities, as supplement products are generally well publicised sources of banned substances for athletes. Mr Dawson failed to check the product or even the ingredients, and made no attempt given his previous experience to seek advice about the product, or showed any degree of caution. If he had used the product for several years he was irresponsible about the use of such products as an athlete subject to strict anti-doping obligations.
117. This was the athlete's second anti-doping rule violation and so the Sports Tribunal of New Zealand imposed a 4-year suspension. It paid little attention to the athlete's contentions that he had been using Oxyshred for a long period of time without incident. As it turned out, the athlete had not been tested while he was using the supplement.

118. In Butson the athlete was a rugby player, with higenamine in his system out-of-competition. The source of the higenamine was a supplement that the athlete had purchased in a retail outlet. Higenamine was not specifically listed on the list of ingredients found on the product label. He received a 9-month suspension. The supplement was considered a contaminated product, so that even if the athlete would have consulted the product label or conducted a reasonable internet search, he would not have discovered that his supplement contained a prohibited substance.
119. In USADA v. Bailey, CAS 2017/A/5320,32 a former elite level sprinter turned bobsledder was found with dimethylbutylamine ("DMBA") in his system in-competition. The source of the DMBA was a supplement called Weapon X, a pre-workout supplement, which listed methylhexanaemine ("DMAA") on the product label and which had a similar chemical structure to DMBA.
120. The athlete had taken an anti-doping quiz just before the competition that specifically warned him of the dangers of taking supplements. He acknowledged he knew he was responsible for checking the ingredients on supplement product labels and checking them against the Prohibited List, which is something that he did on a regular basis. He testified he did not look or even think to look at the Weapon X container before he started to use it. He did not attempt to conduct any research on the supplement and did not search its ingredients until after he was notified of the failed test.
121. In rejecting the athlete's no significant fault or negligence plea, the Court of Arbitration for Sport reasoned as follows:
100. To excuse Mr. Bailey's failure to take the most basic step of looking at the supplement container without considering the possible consequences or risks [...] is to ignore an athlete's primary and personal responsibility to ensure that no prohibited substances enter his body. The evidence is that Mr. Bailey exercised no degree of care whatsoever, as he expressly admitted in response to the Panel's questions. As such, the Panel finds that Mr. Bailey's conduct was a marked departure from the expected standard of behaviour of an athlete of his age and experience.
101. In this case, it is not a matter of what steps Mr. Bailey took; rather, in the Panel's view, it is hard to see how he could have done less. The Panel concludes that Mr. Bailey's conduct does not warrant a finding of No Significant Fault.
122. The case addressing the anti-doping rule violation by Jamie Harry (*supra*) is admittedly recent and similar on some facts, but still distinguishable. There, the athlete had a medical need for asthma medication and did not verify as he should have but instead made a spur of the moment, poor decision. Here, there was plenty of time, no urgency and no need at all to take the supplement.
123. The concentration of higenamine detected in the Athlete and the relationship of that concentration compared to those that are not reported as Adverse Analytical Findings (i.e. below 10ng/mL) is not a relevant consideration that

should be taken into account when determining the sanction here. Article 10.5.1.1 of the CADP states that:

10.5.1.1 Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

124. On a very plain reading, it is clear the only relevant factor when determining the appropriate period of Ineligibility to be imposed against an athlete is his/her degree of fault. The concentration of a prohibited substance detected is not a reflection of degree of fault – it is simply an indication the athlete has violated the strict duty to ensure that no prohibited substance enters his/her system.
125. The definition of fault in the CADP indicates it is a breach of duty or any lack of care appropriate to a particular situation and then goes on to list the factors to be taken into consideration in assessing an athlete's degree of fault. These factors are either related to the specific characteristics of the athlete (age, experience, impairments) or the athlete's conduct (the level of care or investigation exercised by the athlete). None relates to the concentration of the prohibited substance.
126. This is carried out in Cilic with the objective factors (what the athlete did or did not do in the circumstances) and the subjective factors (which look at the athlete's personal characteristics).
127. The concentration is not relevant for the purpose of conducting the fault analysis. Considering it is to introduce a high degree of uncertainty and lack of harmonization in the anti-doping sanction system, which is something that the Athlete himself has argued against. The concentration is simply a snapshot of a particular moment in time, not indicative of fault, and so would lead to an unfair and inconsistent approach to sanctioning.
128. In Decembrini v. FIRS, CAS 2014/A/3798 the Court of Arbitration for Sport rejected the athlete's contention that the amount of the prohibited substance (which was minimal) was relevant for the purpose of determining whether he was negligent.
129. Volandri involved salbutamol, a threshold substance, which was only reported if the concentration detected through a quantitative analysis exceeded a certain level. Further, the Prohibited List allowed athletes to take what is considered to be a therapeutic dosage of salbutamol. If the athlete respected the indications for a therapeutic dose, it is presumed that he/she would not exceed the set threshold of 1000 ng/mL and so not fail the test. If the athlete failed the test he/she is permitted to prove through a controlled pharmacokinetic study, that he/she exceeded the limit while using a permitted and therapeutic dose of salbutamol (i.e., the excess will have been a result of how that individual

metabolised salbutamol). If the athlete fails to do so, an anti-doping rule violation would be asserted against him/her.

130. The analysis of the athlete's degree of fault will be his/her conduct that resulted in the limit being exceeded (i.e. the number of puffs of inhaled salbutamol that taken or, alternatively, the fact he/she took oral salbutamol, which is prohibited). The amount he/she exceeded the limit, or comparisons with the concentrations detected in athletes' samples who do not exceed the limit and therefore do not have to answer to the assertion of an anti-doping rule violation, are not relevant considerations to determine the degree of "fault".
131. In Volandri, it was the number of puffs that the athlete took in the context of a medical emergency that resulted in him just exceeding the 1000 ng/mL threshold that was relevant to his degree of "fault", not the actual concentration of salbutamol that was detected. The concentration of salbutamol detected was merely a reflection of the conduct that resulted in it exceeding the 1000 ng/mL threshold.
132. Similarly, for higenamine, it is the athlete's conduct and actions that result in the detection that are relevant to determining the degree of "fault". The actual amount by which the athlete exceeded the reporting threshold or any comparison with concentrations detected in athletes' samples that are not reported because they are below the thresholds are not relevant considerations.
133. As per Dr. Ayotte, higenamine is at its origin a constituent of several plants, and extracts from these plants can be found in herbal remedies and over the counter products such as throat lozenges in Asia.
134. In recent years, supplement manufacturers started to add higenamine to their products in amounts that significantly exceed the amounts found in such product. This is because higenamine can be a stimulant with cardiovascular properties. The 10 ng/mL informal reporting threshold was not established to treat athletes who were both using supplements containing higenamine differently – it was set to separate cases of inadvertent use of higenamine in a context unrelated to sport from the use of higenamine in a sport-related context (i.e. supplement use). The concentration of higenamine detected is not a relevant consideration when assessing fault.
135. As to the need to ensure fairness and reasonableness in the context of imposing sanctions, the CADP already provides a fair and proportionate mechanism to fulfill this purpose (i.e. by assessing the degree of fault on the basis of the factors listed in the definition of fault, as well as those espoused by the relevant jurisprudence).
136. In Guerrero (supra) the Court of Arbitration for Sport reiterated its hostility toward importing other mechanisms outside of the scope of the Code – i.e. proportionality – as a supplementary mechanism to reduce an athlete's period

of Ineligibility beyond those already provided by the World Anti-Doping Code. In taking this position, CAS said:

86. Additionally, the CAS jurisprudence since the coming into effect of WADC 2015 is clearly hostile to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by the WADC (and there is only one example of its being applied under the previous version of the WADC). In CAS 2016/A/4534, when addressing the issue of proportionality, the Panel stated:

“The WADC 2015 was the product of wide consultation and represented the best consensus of sporting authorities as to what was needed to achieve as far as possible the desired end. It sought itself to fashion in a detailed and sophisticated way a proportionate response in pursuit of a legitimate aim” (para. 51).

87. In CAS 2017/A/5015 & CAS 2017/A/5110, the CAS Panel, with a further reference to CAS 2016/A/4643, confirmed the well-established perception that the WADC “has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction” (emphasis added), (para. 227) as was vouched for by an opinion of a previous President of the European Court of Human Rights there referred to see <https://www.wada-ama.org/en/resources/legal/legal-opinion-on-the-draft-2015-world-anti-doping-code>.

137. In other words, the CAS is satisfied that the World Anti-Doping Code (and, by extension, the CADP) is already proportionate (and so fair) in its approach to sanctions and fault is already taken into account when assessing sanction length. It is not necessary to import external mechanisms or notions of fairness or reasonableness from outside the SDRCC Code or CADP when assessing “fault”.
138. The Athlete’s contentions that the concentration of higenamine detected and then compared to the concentration for those that are not reported, and the challenges to the reliability of the analytical method to detect higenamine in concentrations above 10ng/mL, are hypothetical arguments that are not germane to the degree of fault analysis required to be conducted here. The Athlete has admitted higenamine was in his system, and it is accepted the higenamine entered his system through the use of a supplement, and so there is the violation. There is no need for a precise quantitative analysis. By Dr. Eichhorst's estimates, the reading could be as low as 9 ng/mL. Even if so, which is unlikely, it is still a violation.

## **6. Analysis of the Law, and Application to the Evidence**

139. I accept my very broad authority and discretion in arriving at the appropriate Consequences that should be just and equitable in the circumstances.

140. I also accept my responsibility to determine this case on its own facts and that I am not bound by previous decisions. I am required to make this decision under the SDRCC Code and the CADP however, and in that context and in the context of many past anti-doping decisions (including without limitation Cilic), to

be just and equitable (or, using some of the adjectives offered by the Athlete's counsel, not inconsistent, unfair and arbitrary) I am to conduct an analysis of fault (objectively and subjectively) as per the CADP and Cilic in order to determine the appropriate sanction.

141. In assessing fault, I find the relative concentration levels in this case for the Athlete as compared to those of some hypothetical person with less than 10 ng/mL, who might not have any sanction unless the reading were disclosed due to some other evidence he/she had consumed a supplement, is not relevant here. The fact is the difference between the two is not negligible. Beyond that, the system is based on assessing fault, and respectfully, the Athlete is at fault for the higenamine in his system. That someone else with less higenamine in his/her system might somehow not be sanctioned could indicate the system is not perfect, but imperfection does not reduce the level of fault of the Athlete in this case.
142. As far as overall fairness goes, to me, that means the same overall process should be available so that athletes in similar circumstances should be treated similarly, and conversely, athletes in different circumstances should be treated differently.
143. This necessarily is somewhat limited and imprecise. However, by the same measuring process used for everyone, the Athlete's results were reportable. They also would have been reportable even if far lower and below 10 ng/mL, due to his disclosure of the use of the supplement on the doping control form.
144. In Volandri it was the actions the athlete took in the context of a medical emergency (puffing on a ventilator instead of going to the hospital) that caused him to exceed the 1000 ng/mL, and which were assessed when determining fault. That the threshold was only barely exceeded was consistent with the explanation the Athlete gave of the events and so relevant in that context, but not relevant in the sense urged upon me here (i.e. that as the threshold was "negligibly" passed here – an assertion with which I do not agree - the sanction imposed should likewise be "negligibly" greater than that for someone who might well receive no sanction).
145. Higenamine is prohibited at all times and I accept that as per Cilic, all of the objective steps listed in that case would be reasonable to expect here. My review and analysis of those steps leads to the conclusion the Athlete bears a significant degree of fault, with the range therefore being between 16 and 24 months with a standard significant degree of fault leading to a sanction of 20 months.
146. Here, the Athlete had not read the label or otherwise taken any steps to ascertain the ingredients with the supplement. He had not cross-checked what was on the list with the Prohibited List. He had not done any internet search of the product. He had taken no steps to ensure the product was reliably sourced

beyond buying it at a retail store instead of online. There, he relied upon the advice of the clerk the Athlete believed had a Kinesiology degree, "whatever good that was", who suggested the store did not sell anything that was banned.

147. The Athlete had not consulted any experts despite having access to them through the various coaches and nutritionists available through the university, and his own doctor. There was no urgency or medical emergency to take the supplement at all and so this failure to get such advice is inexplicable.
148. Looking at the Cilic subjective factors when assessing degree of fault, I find in the Athlete's favour that he was relatively young and inexperienced.
149. I find no basis to suggest the Athlete encountered any language or environmental problems.
150. As to anti-doping education, the Athlete had taken the training available on a few occasions but it seems as something he was required to do as opposed to truly embracing it as a learning opportunity. His testimony was that he really recollects very little from the training, and I have no reason to doubt that. That said it is both disappointing and concerning that those around him (as a young, university student athlete) apparently did not do more to ensure it was a meaningful experience.
151. As a more general comment, in this day it is almost trite that any athlete should appreciate that he or she is responsible for what goes into their system and also that it is a risky route to take supplements of any sort. If one goes down that route one has to do so with real caution. With due respect, following those objective steps suggested in Cilic would normally be at minimum what is expected. This particularly would be so where the substance is prohibited at all times, as was the case here.
152. While it could be unfair to require an athlete to be an expert in all matters related to doping and all substances on the Prohibited List, I do not at all think it unreasonable to require an athlete to be reasonable in taking precautions, particularly when there is no urgency or any medical need to take a substance at all. In other words, a modern athlete should know what he/she knows and does not know, and get help as need be. In many circumstances it would be difficult to accept an athlete at face value who says he/she did not know any better, despite being trained.
153. I find the "other personal impairments" contemplated by Cilic have limited application here. While it is true the Athlete had taken various products over time without incident, they were different, and so his past not really relevant. While the Athlete was busy as a student athlete, with his studies and with his athletic requirements, I do not find that he was in any situation that was so inordinately stressful as to alleviate the need to take reasonable care. I likewise

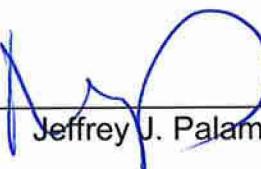
find his level of awareness was not reduced by what could fairly be described as a “careless but understandable mistake”.

154. Each case of course must be decided on its own facts, but it is still useful to review and compare what happened here to other cases. From my perspective any cases decided before Cilic would have limited application here, and so I will not address those.
155. The Athlete particularly emphasized the Harry case, a 2019 decision in which a university sport athlete who played football was given a 4-month suspension. The athlete there had a valid prior medical diagnosis for which he was properly taking a substance called salbutanol. A fellow athlete was suffering from a similar diagnosis but had been prescribed a different substance, terbutaline. If the athlete in question had been prescribed terbutaline he likely would have applied for and received a therapeutic use exception. One day the athlete had forgotten his inhaler and had a medical emergency such that he needed assistance. He borrowed his fellow athlete's inhaler, used it and so tested positive. The evidence was clear the athlete did not understand the difference between the two medications and wrongly assumed (without asking) the other athlete was on the same medication as he was. Plainly, this case is quite different and so distinguishable from the present case.
156. Cases coming after Cilic I see as closer to the present case include Butson, Kepaoa (*supra*) and Fedorciow (*supra*).
157. In Butson a 22-year old rugby player had higenamine in his system. This was because of taking a pre-workout supplement that he had purchased from retail stores. The athlete disclosed the supplement on his doping control form. The athlete was a “relatively young player” who “relied generally on the safety of supplements purchased at retail outlets”. Unlike in our case, higenamine was not disclosed explicitly as an ingredient on the supplement label, but a substance from which higenamine is derived was listed as an ingredient on the label.
158. The tribunal issued a 9-month suspension on the basis of a joint submission to the effect the athlete’s fault was in the “normal” degree and that he could be considered a person “who was unmindful of his duty and insufficiently careful in his acquisition and use of the substance”.
159. In Kepaoa (*supra*) a high-level amateur rugby player was found to have higenamine in his system. He had received some anti-doping education in the season leading up to his positive test and knew that he needed to ensure his supplements were free of prohibited substances. He declared the supplement Oxyshred on his doping control form. Oxyshred listed higenamine on the product label. The athlete did not check the product himself. The athlete had bought the Oxyshred from a specialty supplement store and relied upon the advice provided by a salesperson regarding whether it contained any prohibited

substances. The Sports Tribunal of New Zealand imposed an 18-month suspension as jointly recommended by the parties.

160. In Fedorciow (supra) the athlete was a local and national level weightlifter and former rugby player, who was found in-competition to have higenamine in his system. He had declared on his doping control form that he had used a supplement called Mentality, which contained higenamine hydrochloride, as indicated directly on the product label. The athlete had purchased the Mentality on December 20, 2016 and checked it against the 2016 Prohibited List (that did not specifically list higenamine as a beta-2 agonist then, even though it was prohibited at that time). He failed to check the 2017 list however, which came into force on January 1, 2017 and specifically listed higenamine as a prohibited beta-2 agonist.
161. The UK National Anti-Doping Panel imposed a 2-year suspension. It held the athlete had failed to establish that he bore no significant fault or negligence, as the athlete knew of the increased risk of taking supplements and had failed to check the ingredients of his supplement against the 2017 Prohibited List. It emphasized that athletes had the "core responsibility" to acquaint themselves with the Prohibited List.
162. Based on the Cilic subjective factors and the overall context including fairly comparable case law, I reduce the sanction to the lowest end of the "significant" degree of fault, and impose a 16-month suspension.
163. I sincerely thank everyone involved for the courteous and cooperative manner in which the hearing was conducted. I likewise thank them for the thoughtful and comprehensive manner in which the cases were presented.
164. Finally, I wish the Athlete much success in his athletic career, and genuinely hope this can be a learning experience for him.

Signed in Winnipeg, Manitoba, this 14<sup>th</sup> day of March, 2019.

  
Jeffrey J. Palamar, Arbitrator