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

NO: SDRCC DT 18-0300
(DOPING TRIBUNAL)

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)

BOBSLEIGH CANADA SKELETON (BCS)

AND

DEREK PLUG (Athlete)

AND

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

Before:

The Hon. L. Yves Fortier, QC (Arbitrator)

Appearances and Attendances:

On behalf of the CCES:	Mr. Kevin Bean, CCES Mr. David Lech, CCES Mr. Matthew Koop, CCES Ms. Mylène Lee, CCES Mr. Jeremy Luke, CCES Ms. Erica Newman, CCES Mr. Alexandre Maltas, legal representative Ms. Morgan Sterns, legal representative
On behalf of the BCS:	Ms. Sarah C. Storey, BCS Mr. Chris Le Bihan, BCS
On behalf of the Athlete:	Mr. Derek Plug, athlete

REASONED DECISION

2 August 2019

I. INTRODUCTION

1. This proceeding before the Doping Tribunal is held pursuant to Article 7 of the 2015 *Canadian Sport Dispute Resolution Code* (the "**Code**"). Article 7 sets out the "*Specific Arbitration Procedural Rules for Doping Disputes and Doping Appeals"*. These Rules serve as an extension, a repetition in many respects, of Rule 8.0 of the 2015 *Canadian Anti-Doping Program* (the "**CADP**"), which implements the mandatory components of the *World Anti-Doping Code* (WADA Code). In short, this hearing falls within the framework of an international anti-doping program put in place to eradicate doping in sports and to which Canada adheres by establishing its own anti-doping program.

2. The Canadian Centre for Ethics in Sport (the "**CCES**") has been designated with the responsibility to administer the Anti-Doping Program. The CCES is a Signatory of the WADA Code; it is recognized by the World Anti-Doping Agency (WADA), for the purposes of applying the WADA Code, as Canada's national Anti-Doping Organization. The CCES is an independent non-profit organization. In particular, it is in charge of analyzing athletes' samples and, where required, asserting that an athlete has committed a violation of anti-doping rules. Such allegation may then be subject to a hearing before a Doping Tribunal established by the Sport Dispute Resolution Centre of Canada (SDRCC).

3. In the present case, the CCES alleges that the Athlete, Derek Plug, a bobsledder and member of Bobsleigh Canada Skeleton ("**BCS**"), committed an anti-doping rule violation ("**ADRV**") under Rule 2.1 of the CADP; namely, a prohibited substance (methyltestosterone) from the 2018 WADA Prohibited List (section 1.1) was detected in his urine sample collected out-of-competition on 9 January 2018.

4. As this is the Athlete's second ADRV and the ADRV involved a non-specified substance, the CCES recommends that the sanction be eight years of ineligibility pursuant to Rules 10.2.1.1 and 10.7.1 of the CADP, commencing on 8 February 2018, when the Athlete voluntarily accepted a provisional suspension prohibiting him from participating in any competition until such time as a decision has been rendered by the Doping Tribunal.

5. Mr. Plug exercised his right to request a hearing before a doping dispute panel. While in his Request for a Hearing the Athlete wrote that "the Tribunal [should] declare the anti-doping rule violation to be invalid…"; he subsequently confirmed that he did not contest the results of his sample analysis but nevertheless claims that he should receive a reduced sanction from the Doping Tribunal.

II. PROCEDURAL HISTORY

6. On 5 February 2018, the CCES provided an initial review letter advising of the Adverse Analytical Finding (the "**AAF**"), otherwise known as a positive result, from a sample collected on 9 January 2018 in an out-of-competition doping control in St. Moritz, Switzerland. The Athlete was advised that he had until 9 February 2018 to provide comments on whether he considered that there was a departure from the Doping Control Rules, or Laboratory analysis.

7. On 9 February 2018, the Athlete responded, requesting that his B sample be analyzed and asking for copies of the A and B sample laboratory documentation packages. The Athlete included a signed copy of the Voluntary Provisional Suspension form. On 15 March 2018, the CCES notified the Athlete of an anti-doping violation.

8. On 22 November 2018, the Athlete submitted a Request for a Doping hearing, to which the CCES responded on 26 November 2018.

9. On 28 November 2018, the SDRCC held an administrative conference call with the Parties. During the call, the Parties were informed that I had accepted my appointment as Arbitrator in the present matter.

10. On 10 December 2018, I held a preliminary conference call with the Parties to discuss the procedural calendar, which was agreed by the Parties.

11. On 15 January 2019, in accordance with the procedural calendar, the CCES filed its submissions together with an unsworn affidavit of Mr. Kevin Bean (the sworn version of which was filed on 19 January 2019), as well as factual exhibits and legal authorities.

12. On 8 February 2019, the deadline to file his submissions, the Athlete's counsel requested a one-week extension.

13. The CCES and the Tribunal agreed to a new deadline of 15 February 2019.

14. On the same date, 8 February 2019, the Athlete also signed a Timely Admission of the Anti-Doping Rule Violation form.

15. The Athlete failed to provide submissions by the 15 February 2019 deadline.

16. On 19 February 2019, four days after the extended deadline to file written submissions, the Athlete wrote to the Tribunal and acknowledged that he had missed the deadline and referred to an "integral witness [being] reluctant to cooperate and […] aloof". No other details about this witness were provided. The Athlete further advised that he would actively "work and progress to prompt written submissions". The CCES and Tribunal agreed to be flexible with respect to deadlines.

17. On 20 February 2019, Mr. Christopher Burkett, the Athlete's counsel, resigned.

18. Following the granting of an additional extension, the CCES conferred with the Athlete to determine an appropriate and reasonable timeframe for exchange of submissions. On February 25, 2019, the CCES advised that both parties had agreed on the following calendar:

    (a) 22 March 2019 – Athlete submissions

    (b) 19 April 2019 – CCES Reply submissions

19. As noted above, the revised procedural calendar provided that the Athlete was to file his submissions on 22 March 2019 but he failed to do so.

20. On 28 March 2019, I held a second preliminary conference call with the parties. Mr. Plug was not represented by counsel. Counsel for the CCES and the Athlete conferred off line during that call and agreed as follows:

    "…[another Preliminary Conference Call will be held on] April 12, 2019 at which time an amended procedural calendar and the format of the hearing will be agreed upon; b) if by then Mr. Plug does not have counsel, the proceedings will continue with Mr. Plug unrepresented; and c) the April 30th and May 1st hearing be adjourned. Mr. Plug confirms that Mr. Maltas' recount reflects the nature of their discussions and that he is in agreement with such summary.

21. On 13 April 2019 (rather than 12 April), I held a third preliminary conference call with the parties to discuss an amended procedural calendar and the format of the hearing. As the Athlete was still waiting for confirmation from a lawyer that he would represent him, the following amended calendar was agreed:

18 April 2019 at 7:30 p.m. (EDT):	Athlete to confirm name and email address of counsel and date of availability for a hearing on 26, 27 June, 3 or 4 July 2019;
10 May 2019 at 4:00 p.m. (EDT):	Written submissions by the athlete;
31 May 2019 at 4:00 p.m. (EDT):	Reply submissions by the CCES.

22. It was also agreed that a date for a telephonic hearing would be fixed later. The date for the telephonic hearing was later set for 4 July 2019.

23. On 9 May 2019, the Athlete requested a postponement for the filing of his submissions, due the next day. The CCES opposed his request in view of the numerous extensions previously granted. I denied the Athlete's request.

24. The Athlete failed to file his submissions on 10 May 2019.

25. On 28 May 2019, in accordance with the amended procedural calendar, the CCES filed its reply submissions on sanction.

26. Although not provided for in the amended procedural calendar, I then afforded the Athlete the opportunity to file his comments in respect of the CCES' reply submissions on sanction.

27. The Athlete failed to provide any submissions at any time prior to the 4 July 2019 hearing.

28. On 4 July 2019, as scheduled, I held a telephonic hearing with the parties.

29. During the hearing, the Athlete informed me that he had been unable to retain counsel to represent him. He maintained however that he should receive a reduced sanction as his ADRV "was not intentional".

30. Counsel for the CCES said that the Athlete had not provided any evidence in support of his position that the ADRV "was not intentional".

31. The Athlete then asked for an adjournment of the hearing so that he could submit evidence that his ADRV was unintentional.

32. The CCES objected to any adjournment as "the process to date had been more than fair to the Athlete".

33. Not without some hesitation, I decided to adjourn the hearing until 4 p.m. (EDT) on Thursday 11 July 2019 in order to give the Athlete one last opportunity to provide evidence in support of his position that his ADRV was not intentional.

34. On 11 July 2019, the Athlete requested another adjournment. He said that he had contacted a lawyer who had advised him to have the supplements that he was taking at the time of his doping control tested. Once more, I granted Mr. Plug's request for an adjournment until 16 July. In the meantime, I ordered submissions from the parties on the Athlete's adjournment request.

35. These submissions were filed by the CCES on 12 July and by the Athlete on 15 July 2019.

36. During the hearing on 16 July, the Athlete failed to present any evidence, I refused his request for yet another adjournment and declared the proceedings closed.

37. On 19 July 2019, I issued an initial decision.

38. Pursuant to Section 6.21(d) of the Code, and Rule 8.3.1 of the CADP, this reasoned decision provides the detailed reasons for my initial decision.

39. The only issue I have to determine is whether the Athlete has established that a reduction in the length of the sanction proposed by the CCES is warranted in the circumstances.

III. APPLICABLE LAW

40. The following rules are relevant to the present dispute.

41. Pursuant to Rule 10.2.1.1 of the CADP, the period of ineligibility is four years when the ADRV involves a non-specified prohibited substance, and where the athlete fails to prove that the ADRV was not intentional. Rule 10.2.1.1 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 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.

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

42. Under Rule 10.2.1.1, the onus is on the Athlete to prove, on a balance of probability, that the ADRV was not intentional. Pursuant to Rule 10.2.2, if the Athlete is able to prove that the ADRV was not intentional, the period of ineligibility for a first offence is reduced to two years.

43. The Athlete has failed to provide any evidence in support of his position that the ADRV was not intentional. Indeed, the Athlete, although given many opportunities to do so, has provided no evidence at all. Accordingly, the period of ineligibility under Rule 10.2.1.1 remains at four years.

44. As this is the Athlete's second ADRV, Rule 10.7.1(c) of the CADP applies. Accordingly, the four-year period of ineligibility is doubled to eight years. Rule 10.7.1 reads as follows:

10.7 Multiple Violations

10.7.1 For an Athlete or other Person's second anti-doping violations, the period of Ineligibility shall be the greater of:

a) six months;

b) one-half of the period of Ineligibility imposed for the first anti-doping rule violation without taking into account any reduction under Rule 10.6; or

c) twice the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation, without taking into account any reduction under Rule 10.6.

The period of Ineligibility established above may then be further reduced by the application of Rule 10.6.

45. Since the Athlete's period of ineligibility under Rule 10.2.1.1 is four years, for his second anti-doping rule violation, Rule 10.7.1(c) imposes a period of ineligibility of eight years.

46. The elimination of the ineligibility period where there is no fault or negligence is provided for in Rule 10.4 of the CADP:

10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence

If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.

47. The reduction of the period of ineligibility is provided, in relevant part, at Rule 10.5.2 of the CADP:

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

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 The Canadian Anti-Doping Program Part C – CADP Rules 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.

48. Substantial Assistance is governed by Rule 10.6, in relevant part, as follows:

10.6 Elimination, Reduction, or Suspension of Period of Ineligibility or other Consequences for Reasons Other than Fault

10.6.1 Substantial Assistance in Discovering or Establishing Anti-Doping Rule Violations

10.6.1.1 CCES may, prior to a final appellate decision under Rule 13 or the expiration of the time to appeal, suspend a part of the period of Ineligibility imposed in an individual case in which it has results management authority where the Athlete or other Person has provided Substantial Assistance to an Anti-Doping Organization, criminal authority or professional disciplinary body which results in: (i) the Anti-Doping Organization discovering or bringing forward an anti-doping rule violation by another Person, or (ii) which results in a criminal or disciplinary body discovering or bringing

forward a criminal offense or the breach of professional rules committed by another Person and the information provided by the Person providing Substantial Assistance is made available to the CCES. […]

IV. PARTIES' SUBMISSIONS

CCES' Position

49. It is the CCES' position that the Athlete's period of ineligibility must be eight years, pursuant to Rules 10.2.1.1 and 10.7.1, and that there is no basis for a reduction of this sanction.

50. Rules 10.4 and 10.5.2 of the CADP provide the Athlete with an opportunity to eliminate or reduce a sanction where the athlete is able to establish that he or she bears no fault or negligence or no significant fault or negligence for the ADRV. The onus is on the athlete to show this on a balance of probability.

51. The Athlete does not dispute that methyltestosterone was in the Sample. He did however retain the rights to receive a reduced sanction from the Tribunal.

52. The Athlete has been afforded multiple opportunities to file submissions and evidence in support of his position that the period of ineligibility should be reduced. However, he has submitted no evidence whatsoever to support his position.

53. Where the Athlete establishes that his conduct was not intentional, an evaluation of the Athlete's fault, pursuant to Rules 10.4 and 10.5.2, would be a relevant consideration. In this case, as the Athlete has failed to provide any evidence, he has failed to prove that he acted without intent. Consequently, the Athlete is precluded from relying on Rules 10.4 and 10.5.2, in order to reduce the presumptive period of ineligibility.

54. An athlete may also seek to reduce the presumptive eight-year period of ineligibility, pursuant to Rule 10.6 of the CADP. To date, the Athlete has provided the CCES with no information or evidence whatsoever that could be considered Substantial Assistance. Consequently, the CCES says that the Athlete is precluded from relying on Rule 10.6 in order to reduce his presumptive eight-year sanction.

Athlete's Position

55. As noted earlier, the Athlete initially alleged that the ADRV was invalid, although he confirmed subsequently that he did not contest his ADRV but, rather, was seeking a reduced sanction.

56. At the July 11th hearing, the Athlete submitted that the supplements he had been taking at the time of his Control could be the source of his AAF.

57. In his submissions of 15 July 2019, Mr. Plug requested an additional adjournment. He stated he had spoken to a lawyer who recommended that his supplements should be tested. The Athlete could not confirm that he had approached a laboratory where the tests would be conducted.

58. At the 16 July hearing, the Athlete did not provide any evidence.

V. ANALYSIS

Sanction

59. It is the CCES' position that the Athlete's period of ineligibility must be eight years, pursuant to Rule 10.2.1.1 and 10.7.1, and that no Rules of the CADP could be applied to reduce the Athlete's sanction.

60. I agree with the CCES.

61. At the hearing of 11 July, the Athlete informed the Tribunal that he wished to present evidence regarding supplements he had allegedly been taking at the time of his AAF.

62. At no time during the proceedings, or indeed, at no time since the CCES first informed the Athlete on 5 February 2018 of his AAF, did the Athlete make reference to supplements or invoke them as evidence to be submitted and tested.

63. The Athlete has voluntarily admitted to an anti-doping rule violation in connection with the presence in his urine sample of methyltestosterone, a Prohibited Substance according to the 2018 WADA Prohibited List (section 1.1).

64. The Athlete has not met his burden of establishing that his anti-doping rule violation was not intentional pursuant to Rule 10.2.3 of the CADP.

65. The Athlete has not met his burden of establishing that he bears no fault or negligence, or demonstrated exceptional circumstances, which would warrant elimination or reduction of the applicable period of ineligibility, pursuant to Rules 10.4 and 10.5.2 of the CADP.

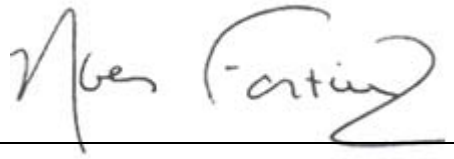
66. Neither has the Athlete submitted any evidence with regard to providing substantial assistance, pursuant to Rule 10.6.1 of the CADP.

67. The presumptive sanction for a second anti-doping rule violation for the Presence of a Prohibited Substance in an Athlete's bodily Sample, pursuant to Rule 10.7.1 (c) of the CADP, is a period of Ineligibility of "*twice the period of Ineligibility otherwise applicable to the second anti-doping rule violation treated as if it were a first violation […]*".

Decision

68. Accordingly, the Athlete shall serve a period of ineligibility of eight (8) years, commencing on 8 February 2018, the date on which Mr. Plug accepted a provisional suspension.

Signed in Montreal this 2nd day of August 2019.



The Hon. L. Yves Fortier, QC, Sole Arbitrator