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

No.: SDRCC DAT 18-0012
(Doping Appeal Tribunal)

**Derek Plug**
(Appellant)

AND

**Canadian Centre for Ethics in Sports (CCES)**
**Bobsleigh Canada Skeleton (BCS)**
(Respondents)

AND

**World Anti-Doping Agency (WADA)**
**International Bobsleigh & Skeleton Federation (IBSF)**
(Observers)

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**Parties**

**Appellant**: Derek Plug
**Counsel**: Christopher Burkett
Faye Williams

**Respondent**: Kevin Bean (CCES)

**Counsel**: David Lech

**Observers**: Erica Newman (CCES)
Matthew Koop (CCES)

**Arbitrator:** Simon Margolis, Q.C.

No one appearing for BCS, WADA or IBSF

Heard by way of telephone conference on November 1, 2018.

**DECISION**

**Executive Summary**

1. The Athlete seeks to overturn the decision of CCES deeming him to have waived his right to a hearing, thereby accepting both the asserted violation and the proposed eight year period of ineligibility. The issue before me is whether CCES can rely on the deemed waiver provision of Section 7.10.2 in the Canadian Anti-Doping Program ("CADP").

2. For the following reasons, the decision by CCES deeming the Athlete to have waived his right to a hearing must be set aside.

**Overview**

3. While competing in February 2018 in the International Bobsleigh & Skeleton Federation World Cup in Switzerland, the Athlete provided a urine sample to anti-doping authorities at the request of CCES.

4. On February 5, 2018, the Athlete received a letter stating that there had been an adverse analytical finding as a result of the A sample testing.

5. On February 9, 2018, the Athlete signed a Voluntary Provisional Suspension form, requested that the B sample be analyzed and that the documentation packages for both samples be forwarded to him.

6. On March 8, 2018 the Certificate of Analysis from the B sample was sent to the Athlete confirming that the results from the B sample analysis matched the A sample results.

7. The Athlete emailed CCES that day requesting the lab packets from the sample testing and noted "I am needing to (sic) time to retain counsel and finances for counsel."

8. On March 15, 2018 CCES emailed the Athlete attaching notification pursuant to section 7.3.1 of the CADP of an adverse analytical finding, the certificate of analysis of the samples, a waiver of hearing form and a timely admission form. CCES asserted in the letter that the Athlete had committed a second anti-doping rule violation resulting in an 8 year suspension;

9. In the notification letter, CCES advised that the Athlete had 4 options:
    i. Proceed to a hearing;
    ii. Voluntarily admit to the anti-doping violation;
    iii. Waive his right to a hearing;
    iv. Take no further action.

10. The Athlete was advised to immediately contact SDRCC by phone, fax or email if he wished to proceed to a hearing.

11. As the Athlete wished to proceed to a hearing he emailed CCES on March 15, 2018 seeking time to "afford retaining counsel."

12. CCES responded advising the Athlete to contact SDRCC if he wished more time to prepare.

13. The Athlete then spoke with the Chief Executive Officer of SDRCC and stated that he wished to proceed to a hearing and that he needed time to find a lawyer.

14. On March 16, 2018, SDRCC emailed the parties advising that "the deadlines set out in the Information Letter [...] will be postponed until further notice to allow time for the athlete to seek legal representation. We will advise of next steps as soon as we are in receipt of a confirmation by the athlete that he did retain counsel."

15. On April 12, 2018, CCES emailed SDRCC suggesting that SDRCC contact the Athlete because it did not want the "matter to sit idle without a timeline being agreed to." CCES noted that while the

Athlete should "be afforded an appropriate amount of time to seek legal counsel, etc. we do want to ensure that the athlete is in fact actively engaging (and that months do not pass by without any update or activity)."

16. The Athlete spoke with SDRCC on April 12, 2018 advising that he was in discussions with a lawyer but needed more time. SDRCC reported the results of the call to CCES later that day and noted that the Athlete would get back to SDRCC "as soon as he is ready to proceed."

17. After a few more weeks went by, SDRCC spoke with the Athlete and arranged an administrative call amongst the parties for May 14, 2018.

18. The SDRCC notes of the administrative call which were circulated to the parties on May 15, 2018 confirm that the Athlete advised that he continued to have difficulty finding a lawyer to assist him.

19. The Athlete requested and, with the agreement of CCES, was granted an extension to June 14, 2018 to retain counsel. The Athlete was to provide the name and email address of his counsel as well as some dates to participate in a Resolution Facilitation ("RF") session.

20. On June 14, 2018, the Athlete emailed SDRCC confirming that he would be providing details of his counsel later that day. When he didn't, SDRCC emailed the Athlete on June 16, 2018 reminding him that it had not yet received the counsel details.

21. On July 5, 2018, SDRCC emailed the Athlete. The Athlete acknowledges that the notification advised that a "Follow- up and Warning Letter" had been uploaded to the Case Management Portal ("CMP").

22. The July 5 letter gave the Athlete a deadline of no later than 4:00 p.m. (EDT), Tuesday July 16, 2018 (this was a mistake because July 16 was a Monday) to file either a waiver of right to a hearing form or request for a doping hearing. SDRCC advised that in the absence of any formal position on his part by that time, SDRCC would assume the Athlete wished to take no further action and would be deemed to have admitted the violation, accepted the proposed sanction and waived his right to a hearing all as set out in the CCES letter of March 15, 2018.

23. Although the Athlete admits receiving the July 5, 2018 email advising of the Follow-up and Warning letter posted to the CMP, it appears that he did not try to view the letter until July 13, 2018, because between July 2 -17 he was working long hours in security at a nightclub and had little time to deal with anything during that time.

24. On July 13, 2018, the Athlete tried to log on to the CMP but was unable to gain access. He attempted to reset his password and received an email from SDRCC with a link to do so.

25. The Athlete tried to change his password but was still unable to log in. On July 14, 2018, he again emailed SDRCC and received another email from SDRCC with further log in instructions.

26. On Tuesday July 17, 2018 at 4:12 p.m., CCES emailed the Athlete attaching a Determination letter. The letter advised that because the Athlete took no steps to "dispute the asserted violation within 30 days (by July 16, 2018) of your imposed June 14, 2018 deadline" he was

deemed to have waived his right to a hearing and to have accepted the violation and the proposed 8 year sanction.

27. Within a minute of receiving this email, the Athlete called CCES and left a voice mail that he would like to request a hearing. At 4:22 p.m., the Athlete emailed CCES. He said he wanted to proceed with a hearing and advised that he had not been able to view the July 5 warning letter from SDRCC earlier because his "login info" was incorrect. He provided his phone number and asked that he be called.

28. The Athlete says that he also immediately called SDRCC and left a voicemail explaining that he "would like to request" a hearing.

29. At 4:31 p.m. on July 17, 2018, he sent a further email to CCES. It is unclear on the record but although addressed to CCES, he may have intended the email for SDRCC because in it the Athlete noted that he had only been able to view the warning letter that day after direct instruction from SDRCC. He added that he had called CCES and "have received no reply as of yet."

30. At 4:35 p.m. on July 17, 2018, SDRCC emailed CCES that the Athlete had just called in a panic saying he never saw the follow-up and warning letter. SDRCC noted that the Athlete had contacted SDRCC over the weekend when he could not log on and confirmed that others had also had technical issues with changing their password given the new security features of the CMP.

31. At 5:04 p.m. on July 17, 2018, the Athlete emailed SDRCC and CCES advising of the name of his lawyer.

32. Despite that advice, that lawyer was never in fact retained.

33. On July 18, 2018, CCES advised in a letter to SDRCC and copied to the Athlete that he was deemed to have waived his right to a hearing in accordance with section 7.10.2 of the CADP and that CCES considered the case closed.

**Issue**

34. Can CCES rely on the deemed waiver provision of Section 7.10.2 in the CADP?

**The Positions of the Parties**

35. CCES asserts that it has appropriately applied the deemed waiver provision because the Athlete never asserted his right to a hearing within the specified time.

36. CCES argues:

    a. The Athlete had ample time to have requested a hearing and failed to do so. At the May 14, 2018 Administrative call, the Athlete knew of and agreed to a June 14, 2018 deadline to retain counsel and decide how he wished to proceed.

    b. Despite the Athlete missing that deadline, CCES waited a further 30 days to crystalize the deemed waiver.

c. The Athlete never made clear his unequivocal intention to request a hearing until after the Determination Letter had been sent. It would have been easy for him to have done so. The simple one line email sent by the Athlete after receipt of the Determination letter "was all it would have taken to commence the hearing process- if it was delivered months (or even days) earlier."

d. The curative provisions of Article 3 of the SDRCC Code are not available. Article 7 of the Code and the CADP trump the other provisions of the Code. Only if a "process or a rule is not specifically addressed in Article 7 or in the CADP may other provisions of the Code apply." In this case, the provisions dealing with a "deemed waiver" are clearly and specifically set out in the Code at Section 7.5 (a) which matches CADP rule 7.10.2. Accordingly, section 7.5(a) and the CADP is a complete codification of the "deemed waiver" rule.

37. The Athlete contends that the deemed waiver must be set aside because he was denied procedural fairness.

38. The Athlete argues:

a. The limitation period to request a hearing outlined in the CCES notification of March 15, 2018 was suspended on March 15, 2018 when he was granted a time extension to seek counsel and the limitation period was either never restarted or the restarting of it was never communicated to him;

b. The parties did not agree on the May 14, 2018 call that June 14, 2018 was the deadline for him to request a hearing;

c. If a new deadline to request a hearing was set, it was contained in the July 5, 2018 Follow-Up and Warning Letter from SDRCC. Due to the technical difficulties he faced in accessing the CMP, difficulties shared by others, he was given inadequate notice of the revised deadline;

d. The deadline in the Follow-Up and Warning Letter was inconsistent with the 30 day period previously communicated in the original CCES notification as it gave him only 11 days to request a hearing;

e. As a matter of procedural fairness, his request for a hearing on July 17, 2018 ought to have been accepted.

**Analysis**

39. As noted by Arbitrator Mew in *Laberge v. Bobsleigh Canada Skeleton et al.* SDRCC 13-0211 at paragraph 85, the principles of natural justice and procedural fairness have been accepted as an integral part of the resolution of sport disputes.

40. The CCES letter of March 15, 2018 provided certain forms but did not provide any form for the Athlete to fill out if he wished to proceed to a hearing. Rather, he was advised to immediately advise SDRCC by phone, fax or email if he wished to exercise his right to proceed to a hearing.

41. The Athlete contacted SDRCC promptly and sought an extension of time in order to afford retaining counsel.

42. Indeed, by March 16, 2018, CCES was advised that the deadlines would be postponed until further notice to allow the Athlete time to seek counsel.

43. By April 12, 2018, CCES was aware that the Athlete was still in the process of retaining counsel and that he would advise SDRCC "as soon as he was ready to proceed."

44. It is arguable that CCES knew by March 16, 2018 or April 12, 2018 at the latest that the Athlete wished to challenge the asserted violation. The only reasonable inference to be drawn from the report that the Athlete would advise as soon as he was ready to proceed, is that he intended to have a hearing.

45. In any event, even if the Athlete had not clearly advised of his intention to challenge the asserted violation by April 12, 2018, I agree with the Athlete that no new deadline was established at the May 14, 2018 administrative call.

46. CCES clearly was concerned with the ongoing delay and wished a timeline to be set for moving forward. Nevertheless, the only deadline set was for the Athlete to provide details of his counsel by June 14, 2018. I do not accept that it was ever agreed that June 14, 2018 was also the deadline for the Athlete to request a hearing

47. In any event, that a potential RF was discussed on that call also supports the argument that the Athlete clearly intended to proceed.

48. Moreover, even if one accepts that the Athlete had not clearly communicated his intention to request a hearing, the deadline in the Follow-up and Warning letter of July 5, 2018 was inconsistent with the 30 day period in the CCES notification of March 15, 2018. While I view the Athlete's explanation for his failure to immediately review the correspondence with some skepticism, I accept that he could reasonably have assumed a similar deadline in the July 5 letter.

49. It is also clear that but for the technical difficulties experienced when he tried to access the CMP on July 13, 2018, he would have seen the letter, been aware of the deadline before July 16, 2018 and communicated his intention to proceed to a hearing in time.

50. Accordingly, applying the principles of natural justice and procedural fairness, the determination by CCES deeming him to have waived his right to a hearing and to have accepted the asserted violation and eight year period of ineligibility must be set aside.

**Conclusion**

51. The decision by CCES deeming the Athlete to have waived his right to a hearing is set aside.

Signed in Vancouver, British Columbia on November 6, 2018

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Simon Margolis, Q.C.
Arbitrator