SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)

CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)

NO: SDRCC DT 18-0291

(DOPING TRIBUNAL)

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)

AND

DOMINIKA JAMNICKY (Athlete)

AND

TRIATHLON CANADA

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
	Ms. Luisa Ritacca, legal representative
	Mr. Justin Safayeni, legal representative
On behalf of the Athlete:	Ms. Dominika Jamnicky, athlete
	Mr. James D. Bunting, legal representative
	Mr. Carlos Sayao, legal representative
WADA observer	Ms. Tharinda Puth

COST AWARD

30 October 2019

I. INTRODUCTION

1. I am now seized of a Request by the Athlete filed on 23 August 2019. The Athlete seeks an order for costs in accordance with Section 6.22 of the Canadian Sport Dispute Resolution Code (the Code) and Rule 8.2.4(h) of the Canadian Anti-Doping Program (CADP).

2. Specifically, the Athlete seeks an award of costs in respect of her legal and expert fees in an amount of "$113,000 or such other amount as [I] consider fair and appropriate in the exercise of [my] discretion".[1]

3. Before I address and analyze the Athlete's Request, I consider it necessary to recall the findings and conclusions which I made in the two earlier stages of this arbitration.

4. By way of background, after my appointment by the Parties as Sole Arbitrator, the Parties agreed to bifurcate the present proceedings into two stages as follows:

    a. *Stage 1 - All evidence is adduced on all issues. The Arbitrator will address the issue of source and will decide (i) whether the Athlete acted without intent, and (ii) whether she bears No Fault; and*

    b. *Stage 2 - The Parties will make submissions as to the consequences that should follow from the Award rendered at Stage 1. This includes whether an anti-doping rule violation should be recorded; and, if yes [sic], the appropriate sanction (if any), including whether the Athlete bears No Significant Fault.*

5. At the conclusion of Stage 1, on 31 May 2019, I issued a 49-page "Partial Final Award". I found the following:

    1. The Athlete has not discharged her burden of proving the source of her AAF;

    2. The Athlete has discharged her burden of proving that her AAF was not intentional.

6. On 16 August 2019, after having received and considered extensive written submissions from the Parties, I issued a 13-page "Final Award". I found the following:

    1. The Athlete has committed an anti-doping rule violation.

    2. The Athlete's sanction is reduced to a reprimand.

[1] Costs Submission of the Athlete, 23 August 2019, p. 1.

7. The following paragraphs in my two previous Awards are particularly relevant to the Athlete's present Request:

I) Partial Final Award:

164. "[…] [The] Athlete has not met her burden of proving to me that contaminated meat was the source of her AAF".

174. "[T]he Athlete has persuaded the Doping Tribunal that, although she has been unable to prove to my satisfaction the source of her AAF, she has persuaded me that her ADRV was not intentional."

II) Final Award

24. "[…] I come to the issue of the sanction to be imposed on the Athlete informed by my finding that her contaminated meat "defense" has failed."

30. "[…] it is unfeasible to discuss a reduction of the mandatory period of ineligibility based on the Athlete's "no significant Fault or Negligence" if what actually caused the detection of Clostebol in her system has not been substantiated."

33. "Accordingly, […] I have no alternative but to conclude that the Athlete has committed an anti-doping rule violation."

52. "[…] Having reviewed and weighted the totality of the evidence, I am firmly convinced that a mandatory two-year sanction of ineligibility for the Athlete is neither just nor proportionate".

II. APPLICABLE LAW

8. As agreed by the parties, the following provisions of the Canadian Sport Dispute Resolution Code and the Canadian Anti-Doping Program are applicable:

The Code:

6.22 Costs

(a) Except for the costs outlined in Subsection 3.9(e) and Section 3.10 hereof and subject to Subsection 6.22(c) hereof, each Party shall be responsible for its own expenses and that of its witnesses.

(b) Parties wishing to seek costs in an Arbitration shall inform the Panel and the other Parties no more than seven (7) days after the award being rendered.

(c) The Panel shall determine whether there is to be any award of costs and the extent of any such award. When making its determination, the Panel shall take into account the outcome of the proceedings, the conduct of the Parties and their respective financial resources, intent, settlement offers and each Party's willingness in attempting to resolve the dispute prior to or during Arbitration. Success in an Arbitration does not mean that the Party is entitled to be awarded costs.

(d) The filing fee retained by the SDRCC can be taken into account by a Panel if any costs are awarded.

(e) The decisions on costs shall be communicated to the Parties within seven (7) days of the last submission pertaining to costs.

(f) The Panel does not have jurisdiction to award damages, compensatory, punitive or otherwise, to any Party.

7.9 Conduct of Hearing

Pursuant to Rule 8.2.4 and Rule 13.2.2.2.1 of the Anti-Doping Program, hearings shall be conducted as follows: […]

(e) A Person participating in a proceeding before the Doping Dispute Panel has the right to retain and receive assistance from legal counsel at his or her own expense pursuant to Rule 8.2.4 b) of the Anti-Doping Program. […]

(f) Subject to Subsection 7.9(e) hereof (excluding legal counsel fees), the Doping Dispute Panel may award costs to any Party, payable as it directs pursuant to Rule 8.2.4 h) of the Anti-Doping Program.

The CADP

8.2 Principles for a Fair Hearing

8.2.4. The Doping Tribunal shall act in a fair and impartial manner toward all parties at all times. More specifically, […]

b) An *Athlete* or other *Person* participating in a proceeding before the Doping Tribunal has the right to retain and receive assistance from legal counsel at his or her own expense. […]

h) Subject to Rule 8.2.4.b (excluding legal counsel fees), the Doping Tribunal may award costs to any party, payable as it directs.

III. THE PARTIES' SUBMISSIONS

9. On 23 August 2019, the Athlete submitted her Cost Submissions. The CCES filed its Cost Submissions on 4 September 2019. The Athlete then filed a Reply Submission on Cost on 12 September 2019. The CCES filed its Sur-Reply Cost Submissions on 20 September 2019.

10. On 23 September 2019, I sought an extension of time until the end of October to render my Award on Costs. Neither Party objected.

11. The parties' submissions refer firstly to the appropriateness of a cost award under Subsection 6.22(c) of the Code (I), secondly, and in the alternative, to the necessity of an award in the interest of justice (II) and thirdly, to the Athlete's request that the legal fee exclusion be declared unconscionable (III).

I. The appropriateness of a costs award under Subsection 6.22 (c) of the Code

The Athlete's Submissions

12. The Athlete seeks an order for costs pursuant to Section 6.22 of the Code for a total of $113,033.60, detailed as follows:

- $89,407.73 - Legal fees[2]
- $3,383.87 - Aegis Lab (Dr. Shelby)
- $6,937.36 - Dr. Thomas Martin
- $13,033.60 - Deloitte, Dark web monitoring and expert evidence.

13. She claims that an award in her favor is appropriate as she was the "predominantly successful party"[3]. She submits that she was successful in persuading the Tribunal that her anti-doping rule violation (ADRV) was not intentional and that, having regard to the principle of proportionality, reprimand was the appropriate sanction.

14. She also alleges that it is the length of the suspension which matters in the consideration of costs. As she was successful in having her sanction reduced to a reprimand, she claims the CCES cannot be considered as the successful party.[4]

15. The Athlete opposes the CCES' submission that most of the evidence was not relevant to the reduction of the sanction. It is the establishment of the circumstances of the entire case which matters, she pleads, and therefore renders appropriate an award of costs.

16. The complexity of the case, its "truly exceptional" nature and importance to her career and reputation all support an order for costs. She acted fairly, reasonably and cooperatively. It would be "immensely unfair" for her to bear cost for a prosecution "when she did nothing wrong".[5]

[2] The legal fees are detailed in the Athlete's Annex A.
[3] Cost Submissions of the Athlete, 23 August 2019, p. 1.
[4] Cost Submissions of the Athlete, 12 September 2019, para 11.
[5] Cost Submissions of the Athlete, 23 August 2019, p. 3.

17. The Athlete also invokes her limited financial means. The financial hardship due to the proceedings, and "significant economic disparity"[6] between herself and the CCES also support an award in her favor. The CCES, a publicly funded agency, should be held accountable.

18. The Athlete relies on the *Adams case*[7] where Arbitrator Banack awarded $40,000 to the Athlete as partial payment of her costs.

The CCES' Submissions

19. The CCES opposes the Athlete's request for cost and requests that it be dismissed.

A. The CCES was substantially successful in this case

20. The CCES pleads that, although not sufficient on its own, success is the minimum prerequisite for an award on costs.[8]

21. The Athlete was not "predominantly successful". She was unsuccessful in proving she had not committed an ADRV.

22. She was only successful on the narrow issues of intent and proportionality. This, alleges the CCES, "does not disturb the overall balance of success in this case."[9]

23. The *Adams* decision is of no assistance to the Athlete, submits the CCES. In that case, contrary to the present case, the Athlete was found not to have committed an ADRV.

B. No other basis upon which to order CCES to pay costs

24. Besides the outcome of the proceedings, Subsection 6.22(c) of the Code refers to the conduct of parties, their financial resources, their intent or bad faith, settlement offers and attempts to resolve prior to arbitration. None of these factors, argues the CCES, is of assistance to the Athlete.

25. In fact, the Athlete only mentions the respective financial resources of the parties. According to the CCES, a disparity in financial resources could only be relevant when it impacted a party's ability to defend his or her interest.[10]

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[6] *Athletics Canada and Canadian Centre for Ethics in Sport v. Adams* (DT 10-0117), Costs Award dated February 15, 2011, Arbitrator Larry Banack (*Adams*), para 37.
[7] Ibid.
[8] Canadian Sport Dispute Resolution Code (Annotated excerpt), Tab 1 of CCES Cost Submissions of 4 September 2019.
[9] Cost Submissions of the CCES, 4 September 2019, para 9, *in fine*.
[10] *Pyke*, para 15, *Re Godinez* (Costs), SDRCC DT 18-0290.

26. The Athlete, writes the CCES, was able to defend her interests with "sophisticated counsel" and "an array of top-flight experts".[11]

27. An award of costs in this case would be "unjust" and "perverse".[12] The CCES simply discharged its duty to prove the Athlete's ADRV and contest the "unknown meat source" contamination defense.

C. No ability to recover legal fees and no basis for recovering disbursements

28. The CCES, in its first Cost Submission, pleaded that legal fees of an Athlete cannot be claimed. It refers to Rules 8.2.4(b) and (h) of the CADP and Subsections 7.9(e) and (f) of the Code, which, the CCES submitted, mean that "this Tribunal does not have the jurisdiction to award costs for her legal counsel fees".[13]

29. As for her experts' fees and disbursements, the CCES submits that they were all incurred in connection with issues in respect of which the Athlete was unsuccessful.

II. The necessity of an award in the interest of justice

30. In her Cost Submission of 23 August 2019, the Athlete requested, in the alternative, "in the event the Final Award is appealed" to the Court of Arbitration for Sport (CAS), a conditional award of costs "to be made effective on filing of an appeal from the Final Award". [14]

31. The Athlete, in her Reply Argument of 12 September 2019 having regard to the thrust of that submission, did not reiterate her request for a conditional award of costs.

32. In fact, the CCES subsequently, in its Sur-Reply of 20 September 2019, stated that it had lodged an appeal to the CAS in respect of the issue of proportionality.[15]

III. The Legal Fee Exclusion Is Unconscionable and Unenforceable

The Athlete's Submission

33. In her Reply Submission, after the CCES had pleaded that the Athlete was barred from claiming her legal fees, her counsel submitted that the legal fee exclusions were unenforceable and unconscionable based on the common law doctrine of unconscionability.[16]

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[11] Cost Submissions of the CCES, 4 September 2019, para 16.
[12] Ibid, para 19.
[13] Ibid, para 22.
[14] Cost Submission of the Athlete, 23 August 2019, p. 1.
[15] Cost Submissions of the CCES, 20 September 2019, para 27.
[16] Cost Submission of the Athlete, 12 September 2019, para 3.

34. This common law doctrine, pleads the Athlete, is similar to gross disparity under the UNIDROIT Principles of International Commercial Contracts[17], and abusive clauses under Quebec civil law.[18]

35. Athletes, if they want to compete, cannot refuse the CADP and Code's application. They can be compared to consumers entering into agreements with large corporations.

36. The legal fee exclusions "create an untenable and draconian regime for athletes", argues the Athlete and causes "innocent athletes like Domi to be collateral damage in the fight against doping".[19]

The CCES' Submissions

37. The CCES submits, essentially, that the Athlete's attempt to rely on the contract law doctrine of unconscionability to strike provisions of the CADP and the Code "at the 11th hour of the costs phase in a doping hearing"[20] cannot succeed for three reasons.

A. Wrong Forum

38. Firstly, says the CCES, this is the wrong forum for the relief she seeks.

39. The CADP and the Code are not contracts, but instruments that apply to athletes pursuant to contracts that they have signed. These contracts are not before the Arbitrator and the CCES is not even a party to these contracts.

40. The Arbitrator is asked to assess unconscionability "in a factual vacuum" pleads the CCES.[21]

41. Thus, the Arbitrator lacks jurisdiction to declare provisions of contracts unenforceable under the CADP and the Code, argues the CCES.

42. Any unconscionability analysis would require "an analysis of the factual circumstances in which the Contract was made"[22] and the Tribunal has absolutely no evidence in this respect, avers the CCES.

B. Relief barred by estoppel

43. The CCES also argues that when she filed her request for a doping hearing, the Athlete signed a declaration stating that it was her "responsibility to read and be aware of the applicable SDRCC rules".[23]

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[17] Art. 3.2.7 2016 Version.
[18] Article 1437 CCQ.
[19] Cost Submission of the Athlete, 12 September 2019, para 7(d).
[20] Sur-Reply of the CCES, 20 September 2019, para 2.
[21] Ibid, para 9.
[22] Ibid, para 9.
[23] Ibid, para 14.

44. Consequently, pleads the CCES, after declaring that she would abide by the rules, the Athlete cannot now attempt to challenge the costs provisions in those very rules. The doctrine of estoppel by representation applies in this case, concludes the CCES.

C. Cost provisions are not unconscionable

45. Finally, submits the CCES, the Athlete misstates the "legal test for unconscionability in Ontario".[24]

46. The four elements that must be met for determining whether a contractual provision is unconscionable are (a) a grossly unfair transaction, (b) a lack of independent legal or suitable advice, (c) an overwhelming imbalance in bargaining power "caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or other similar disability", and (d) the other party knowingly taking advantage of this vulnerability.[25]

47. The CCES submits, with detailed arguments, that none of these four criteria are satisfied in this case.

48. Briefly, these arguments are the following.

49. First, there is nothing unfair in the agreement to a dispute resolution process up-front. Neither party may recover their legal fees and the SDRCC provides access to a roster of *pro bono* counsel for athletes.

50. Second, there is no evidence that the Athlete failed to obtain legal advice before signing her declaration. It was even the Athlete's counsel who signed the declaration.

51. Third, there is no overwhelming imbalance in bargaining power "caused by the victim's ignorance of business, illiteracy, ignorance of the language of the bargain, blindness, deafness, illness, senility, or other similar disability."

52. Fourth, there is no allegation or evidence of the CCES taking advantage of the Athlete in any way.

IV. REQUEST FOR RELIEF

1) THE ATHLETE

53. The Athlete, in her first submission, sought the following:

    i) An award of costs in respect of legal and expert fees (inclusive of HST) in an amount of $113,000 or such other amount as the learned Arbitrator considers fair and appropriate in the exercise of his discretion; and

[24] Ibid, para 19.
[25] Ibid, para 19.

ii) In the alternative, a conditional award of costs to be made effective on filing of an appeal from the Final Award, by any party so allowed.

54. In her Reply Argument, the Athlete submitted that Rules 8.2.4(b) and (h) of the CADP and Subsections 7.9(e) and (f) of the Code excluding legal fees from costs awards were unconscionable and unenforceable.

2) THE CCES

55. In its first Cost Submission, the CCES asked that the Athlete's request for costs be dismissed.

56. In its Sur-Reply Cost Submission of 20 September 2019, the CCES submitted that the Athlete's request to declare the legal fee exclusions unconscionable should be dismissed and that her request to recover the costs of her experts also be dismissed.

V. JURISDICTION

57. As set out above, Subsection 6.22(b) of the Code provides as follows:

> 6.22 Costs:
>
> (b) Parties wishing to seek costs in an Arbitration shall inform the Panel and the other Parties no more than seven (7) days after the award being rendered.

58. The Athlete submitted her Cost Submission on 23 August 2019, seven days after my Final Award was rendered.

59. Accordingly, I have jurisdiction to decide the Athlete's Request for an Award of costs.

VI ANALYSIS

60. The Athlete claims costs for her legal expenses (solicitor-client costs) of $89,407.73.

61. The Athlete also claims costs for her three experts' fee and disbursement invoices of $23,354.83, detailed as follows:

- $ 3,383.87 - Aegis Lab (Dr. Shelby, expert in toxicology)
- $ 6,937.36 - Dr. Thomas Martin (veterinarian expert called in reply to the CCES experts)
- $13,033.60 – Deloitte, Dark web monitoring and expert evidence.

62. I will deal, in turn, with the Athlete's claim for legal costs and experts costs.

63. Before I do so, and for ease of reference, I will quote Subsection 6.22 (c) of the Code. It provides as follows:

> 6.22 Costs
>
> […]
>
> (c) The Panel shall determine whether there is any award of costs and the extent of any such award. When making its determination, the Panel shall take into account the outcome of the proceedings, the conduct of the Parties and their respective financial resources, intent, settlement offers and each Party's willingness in attempting to resolve the dispute prior to or during Arbitration. Success in an Arbitration does not mean that the Party is entitled to be awarded costs.

64. In my opinion, aside from setting out six factors to be taken into account by the Panel, this provision establishes three main principles:

i) Costs will only be awarded in exceptional circumstances.

ii) In an SDRCC arbitration, costs do not necessarily follow the event.

iii) The arbitrator has unfettered discretion to decide whether costs should be awarded and, if so, the amount of such an award.

LEGAL COSTS

65. Subsection 6.22 (c), on its face, gives me discretion to award costs which could include legal fees.

66. However, there are other provisions of the Code as well as provisions of the CADP which deal specifically with legal fees of a party (the Athlete in the present case) participating before a Doping Tribunal. Again, for ease of reference, they are:

The Code:

6.22 **Costs:**

(a) Except for the costs outlined in Subsection 3.9 (e) and Section 3.10 hereof and subject to subsection 6.22 (c) hereof, each Party shall be responsible for its own expenses and that of its witnesses.

7.9 **Conduct of Hearing:**

(e) A Person participating in a proceeding before the Doping Dispute Panel has the right to retain and receive assistance from legal counsel at his or her own expense pursuant to Rule 8.2.4 b) of the Anti-Doping Program.

(f) Subject to Subsection 7.9(e) hereof (excluding legal counsel fees), the Doping Dispute Panel may award costs to any Party, payable as it directs pursuant to Rule 8.2.4. h) of the Anti-Doping Program.

The CADP

8.2 **Principles for a Fair Hearing:**

[…]
8.2.4 The Doping Tribunal shall act in a fair and impartial manner towards all parties at all times. More specifically: […]

(b) An Athlete or other Person participating in a proceeding before the Doping Tribunal has the right to retain and receive assistance from legal counsel at his or her own expense.

[…]

(h) Subject to Rule 8.2.4 b) (excluding legal counsel fees), the Doping Tribunal may award costs to any party, payable as it directs.

(Emphasis added)

67. These articles of the Code and the CADP, enacted after consultation with all stakeholders within the Canadian sport community, are crystal clear and leave no room for interpretation.

68. Paraphrasing the words of Arbitrator Bennett in the Godinez Cost Award[26], with which I agree, those articles clearly and unequivocally limit my discretion and do not permit me to award legal costs to the Athlete.

[26] *Godinez* (Costs), SDRCC DT-18-0290 at p. 4.

69. In the face of such exclusion, the Athlete's counsel in their Reply Argument invoked the contract law doctrine of unconscionability and averred that "the Legal Fee Exclusions [were] unconscionable and unenforceable against Domi"[27].

70. In support of their argument, the Athlete's learned counsel referred to a well-known decision of the Supreme Court of Canada and drew a parallel between that doctrine and the doctrines of "gross disparity" reflected in the UNIDROIT Principles of International Commercial Contracts and of "abusive" claims in the Civil Law of Quebec.

71. In their Sur-Reply, counsel for the CCES objected that the Athlete's "attempt at the 11th hour of the costs phase in a doping hearing could not succeed for three reasons". [28]

72. I need only address the CCES' first reason that "the Athlete is in the wrong forum for the declaratory relief which she seeks".[29]

73. I agree with the CCES. The anti-doping Tribunal on which I serve as sole arbitrator does not have jurisdiction to grant the Athlete the extraordinary relief which she seeks.

74. There are no provisions in the CADP or the Code which give the present anti-doping Tribunal the authority to declare provisions of contracts, such as the contract which the Athlete signed, unenforceable. Indeed, the Athlete's counsel do not invoke any such authority.

75. It is well established that any unconscionability analysis "will require an examination of the factual circumstances in which the contract was made".[30]

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[27] See Reply Argument at para 4.
I note that, in Godinez, the Athlete also submitted that the "Legal Fee Exclusions" were unconscionable and should be interpreted in favour of the Athlete. The Arbitrator rejected that argument. However, the Athlete in that case, according to the Award, did not invoke, as the Athlete did in the present case, the contract law doctrine of unconscionability.
[28] Sur-Reply Costs Submissions of CCES, 20 September 2019, para 2.
[29] Ibid, para 3.
[30] Ibid, para 9.

76. The contract and declaration which the Athlete signed are not before me. There may be parties to this contract which are not participating in the present proceedings. I have no evidence before me pertaining to the negotiation and execution of the contract.

77. As submitted by the CCES, I am asked to assess the unconscionability of a contract "in a factual vacuum".[31]

78. For these reasons, I must declare myself without jurisdiction to consider the relief which the athlete seeks, to wit a declaration that the "Legal Fee Exclusions" of the Code and the CADP are unconscionable and unenforceable.

79. Accordingly, I find and conclude that the Athlete is not entitled to be awarded her legal costs of $89,407.73.

EXPERT COSTS

80. I will now consider the Athlete's request that the CCES be ordered to pay the costs of her experts in the amount of $23,354.83.

81. In order to do so, I revert again to Subsection 6.22(c) of the Code which informs me that, when making my determination, I shall take into account five factors. The first and most important of these factors, in my view, is the outcome of the proceedings.

82. Thus, I commence my analysis by recalling and underlining the history of the present case which is established by the record.

[31] Ibid, para 9.

83. On 24 April 2018, a prohibited substance, Clostebol, was detected in the Athlete's urine sample collected out of competition.

84. The CCES, in view of this Adverse Analytical Finding (AAF), as was its duty, then asserted that the Athlete had committed an ADRV under rule 2.1 of the CADP and asked that the mandatory four (4) year period of ineligibility be imposed.

85. The Athlete did not contest the results of her urine samples analysis but claimed that she had not committed an ADRV as the presence of Clostebol in her samples was due to the ingestion of contaminated meat.

86. The Athlete's contaminated meat defense was the focal point of her case. It occupied nearly a full day of expert evidence, the better part of her counsel's oral submission on the second day of the hearing and most of her extensive written submissions.

87. All of the Athlete's expert costs relate exclusively to the issue of whether meat contamination was the source of the Clostebol detected in her urine.

88. In other words, the Athlete, in her "defense", sought to persuade me that she had not committed an ADRV.

89. As seen above, in my Partial Final Award I found that the Athlete had not been successful in discharging her burden of proving the source of her AAF and, as a result, in my Final Award, in view of the strict liability nature of the offense, I concluded that she had committed an ADRV and sanctioned her.

90. It was in large part due to the CCES challenge of the Athlete's source "defense" that I reached the conclusion that her ADRV was established.

91. Thus, I agree with the CCES that, on the issue at the heart of this case which required two full days of evidence and oral submissions as well as nearly all of the parties' extensive written submissions, the Athlete was not the "predominantly successful party".[32]

92. Of course, the Athlete was successful in persuading me that her ADVR was not intentional and that, having regard to the principle of proportionality, reprimand was the appropriate sanction.

93. These are very significant findings indeed for the Athlete. But these findings related only to her sanction and not her liability which was, as I wrote earlier, the primary focus of her defence and in respect of which she was not successful.

94. In reaching my conclusion as to the Athlete's intent, I derived no assistance at all from her experts' evidence.

95. As I wrote in my Partial Final Award, I formed the opinion, as a question of fact, that she was honest, truthful and credible and these were the most important factors that I needed to consider with respect to the Athlete's intent.

96. Accordingly, the fact that the Athlete was the successful party in so far as her sanction is concerned does not lead to the conclusion, as submitted by her counsel, that "[she] is entirely innocent of the anti-doping allegations made against here (sic)".[33]

97. Taking into account the outcome of the proceedings, notwithstanding the Athlete's success with regard to her sanction, I come to the conclusion that, with respect to the first factor in Subsection 6.22(c) of the Code, the CCES was the successful party.

[32] Costs Submissions of CCES, 4 September 2019, para 6.
[33] Costs Submission of the Athlete, 23 August 2019, p. 1.

98. In order to determine whether I should award costs to the Athlete, I must now consider the other factors set out in Subsection 6.22(c) of the Code. They are:

1) The conduct of the Parties;
2) Their respective financial resources;
3) Intent;
4) Settlement offers; and
5) Willingness in attempting to resolve the dispute prior to arbitration.

99. In my view, only the first (conduct of the Parties) and second (Financial Resources) factors need to be considered. The other three factors do not play any role in my analysis.

100. With respect to the conduct of the Parties throughout these lengthy proceedings, both Parties acted with the utmost professionalism. I was and remain very impressed by their courteous, cooperative and diligent behaviour. They fought hard, but they fought fairly, and it was an intellectual treat for me to serve as arbitrator in this case.

101. Accordingly, the conduct of both Parties will not be a factor that I will take into consideration in determining whether I should award costs to the Athlete.

102. I now come to the last factor, the respective financial resources of the Parties.

103. I start from the premise that there is great disparity between the financial resources of the Athlete and those of the CCES which is funded by public funds.

104. I accept that "[the Athlete] is of very modest and limited financial means".[34] I do not need an Affidavit from her to that effect.

105. However, there is no evidence, as submitted by the CCES, that this financial disparity impacted in any way her "ability to defend her interests".[35] Quite the contrary.

106. The Athlete was represented by "sophisticated"[36] and extremely competent counsel and her experts, whose fees she now claims, were all renowned in their respective fields of expertise.

107. I reiterate that these three experts testified solely in support of the Athlete's defense that her AAF was caused by contaminated meat, a defense which failed. In the words of the CCES, "[an] award for disbursements would be especially inappropriate in this case because the Athlete's disbursements relate directly to the issues where she failed to succeed".[37]

108. Taking into account all these circumstances, I am of the view that it would indeed be most unfair to condemn the CCES to pay any of those fees to the Athlete.

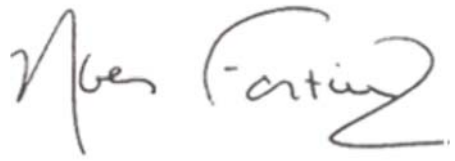
109. It is unfortunate that the legal system within which the CCES operates does not permit me, in a case such as the present one, to compensate the Athlete for, at the very least, some of the legal and other costs that she has incurred in order to defend herself.

110. However, it is not within my remit, as the Doping Tribunal in this case, to rewrite the rules of the Code or the CADP.

111. For all these reasons, I reject the Athlete's request for an award of costs in respect of her legal and expert fees in the amount of $113,033.50.

[34] Costs Submission of the Athlete, 23 August 2019, p. 3.
[35] Costs Submissions of CCES, 4 September 2019, para 17.
[36] Ibid, para 17.
[37] Ibid, para 24.

Signed in Montreal this 30th day of October 2019.



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