IMPORTANT NOTE: *This version is a translation of the original French version.*

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

IN THE MATTER OF THE CANADIAN ANTI-DOPING PROGRAM

AND A VIOLATION OF THE ANTI-DOPING RULES ALLEGED BY THE CANADIAN CENTRE FOR ETHICS IN SPORT AGAINST MICKAEL BADRA

No : SDRCC DT 20-0321
(Doping Tribunal)

Canadian Centre for Ethics in Sport (CCES)

-and-

U SPORTS

-and-

Mickael Badra (Athlete)

-and-

Government of Canada
World Anti-Doping Agency (AMA)
(Observers)

BEFORE: Ross C. Dumoulin

APPEARANCES:

For the Athlete (absent): No representative

For the Canadian Centre for Ethics in Sport: Ms. Mylène Lee
Mr. Adam Klevinas

FINAL DECISION

October 20, 2020

[1] Pursuant to the *Canadian Sport Dispute Resolution Code* (2015) (*Code*) I have been appointed as Arbitrator to preside the Doping Tribunal by the Sport Dispute Resolution Centre of Canada (SDRCC) in order to examine and decide the present matter. My appointment was confirmed by the SDRCC pursuant to paragraph 6.9 of the *Code*.

[2] Since July 14, 2020, the Athlete has completely disengaged from the ongoing proceedings. He has not responded to phone calls or e-mails from the CCES, nor has he responded to calls, notices, reminders, confirmations or e-mails from the SDRCC. His absence and total lack of participation persisted until the conclusion of the present matter on October 16, 2020, the deadline to provide his submissions.

[3] Specifically, on July 14, 2020, Mr. Badra apparently tried to contact Ms. Lee from the CCES by telephone. Since then, he has not complied with the delay determined by the Tribunal to apply for a therapeutic use exemption (TUE). On July 23, 2020, the Tribunal ordered that, in the circumstances, the case should proceed to arbitration and that the SDRCC would set a date for a conference call to determine a schedule for submissions and a hearing date.

[4] Despite being offered two date options, a confirmation of a date and a reminder from the SDRCC, the Athlete did not respond and did not attend the preliminary meeting by conference call on August 26, 2020.

[5] On August 27, 2020, the Tribunal ordered that the hearing process continue without the Athlete and, with the CCES' consent, in the form of a documentary review.

[6] On August 28, 2020, the CCES agreed to proceed by documentary review and a schedule for submissions was set and provided to the parties by the SDRCC on August 31, 2020.

[7] No evidence or submission of any kind by the Athlete was received by the SDRCC.

THE FACTS

[8] Following an examination of the documentation on the Case Management Portal (CMP), the Tribunal has accepted the uncontradicted statement of facts provided by the CCES in its submissions. A good portion of this uncontradicted evidence is set out in an affidavit signed by Mr. Kevin Bean, Senior Manager, CADP, for the CCES. The Tribunal has examined and considered such document. The essence of the uncontradicted facts mentioned above, as well as the details of the process followed and the precisions and adjustments added by the Tribunal can be summarized as follows.

[9] The CCES is the national anti-doping organization recognized by the World Anti-Doping Agency (WADA) responsible to adopt and ensure compliance of the anti-doping rules and regulations in Canada. It is in charge of sample collection and results management of anti-doping tests at the national scale. The CCES administers the Canadian Anti-Doping Program (CADP).

[10] The Athlete is a football player at the University of Sherbrooke and plays as defensive lineman for the *Vert et Or* in the U SPORTS university league.

[11] Pursuant to Part C of the CADP, the CCES has authority to conduct testing on athletes of the U SPORTS league, because U SPORTS has adopted the CADP on December 19, 2014. Therefore, the Athlete is subject to the CADP.

[12] On October 19, 2019, the Athlete has been chosen and was subject to an in-competition doping control. He provided a urine sample coded 4319520 that was divided by the Athlete into two separate bottles, sample "A" and sample "B". The Athlete signed his doping control form at the end of the process.

[13] Sample 4319520 was then transported to the laboratory accredited by WADA, the INRS - Institut Armand Frappier ("INRS"), in Montreal, and was received on October 19, 2019, the same day as that of the control.

[14] On November 14, 2019, the INRS sent the certificate of analysis for sample 4319520A (the Athlete's A sample) to the CCES. The certificate of analysis indicated the presence of D-amfetamine, a substance prohibited in-competition pursuant to section S6a - Stimulants of the 2019 WADA Prohibited list. D-amfetamine is a "non-specified" prohibited substance.

[15] The CCES then sent a letter dated November 25, 2019, to Graham Brown, the CEO of U SPORTS, informing him of the Athlete's adverse analytical finding following the doping control conducted on October 19, 2019. In that letter, the CCES asked, among other things, if the Athlete wished to have his B sample

analyzed and if he had a therapeutic use exemption (TUE) or if he was eligible to have his medical file reviewed pursuant to Rule 4.5 of the CADP. The CCES asked for a reply from the Athlete no later than December 2, 2019.

[16] On November 29, 2019, the Athlete's lawyer, Mr. Sebastian Pyzik, asked for an additional delay extending to December 6, 2019, to provide written explanations to the CCES.

[17] The Athlete having not responded in the prescribed delay, the CCES concluded that he did not have a TUE, that he was not eligible to have his medical file reviewed pursuant to Rule 4.5 of the CADP and that he had waived his right to have his B sample analyzed.

[18] Consequently, on January 30, 2020, the CCES sent an ADRV notification, still to Graham Brown, the CEO of U SPORTS. In this letter, the CCES imposed a provisional suspension to the Athlete, starting from the date of the notification, and recommended a six (6) month period of ineligibility, especially because it was the Athlete's first ADRV, but also on the basis of the explanations provided by the Athlete to the CCES (i.e. that he took a friend's medication, Vyvanse, to help him with his attention deficit and hyperactivity disorder (ADHD) which was, at the time of the taking of the medication and of the ADRV, yet to be diagnosed by a neuropsychologist).

[19] However, the recommendation was incorrect, because the CCES considered, by mistake, that D-amfetamine, the prohibited substance that was detected in the Athlete's sample was a specified substance, although according

to the Prohibited List, it is a "non-specified" substance. This distinction is important because the minimal period of ineligibility for a non-specified substance, if the Athlete establishes that he deserves a reduction for no significant fault or negligence, is half the period of ineligibility normally applicable (one (1) year pursuant to Rule 10.5.2 of the CADP). However, the minimum period of ineligibility for a specified substance can go as low as one (1) year to a reprimand, so long as the Athlete establishes that he deserves a reduction for no significant fault or negligence and depending on his degree of fault. As soon as the CCES noticed this error, the CCES sent a new notification to, once again, Mr. Brown on February 4, 2020, this time recommending a one (1) year suspension.

[20] It is important to specify that Rule 10.2.2 of the CADP foresees a two (2) year suspension in the case of a non-specified substance if the athlete establishes that the violation was not intentional.

[21] On February 13, 2020, the Athlete, through his counsel Mr. Pyzik, notified the SDRCC that he had the intention of contesting the sanction recommended by the CCES and requested a hearing. In the same correspondence, Mr. Pyzik informed the SDRCC that he had to step down from the case as the Athlete's counsel.

[22] On February 25, 2020, the Athlete submitted his request for a hearing to the SDRCC, in which he indicated that his request aimed to challenge his provisional suspension by demonstrating that he was entitled to a retroactive TUE application considering his ADHD diagnosis.

[23] On March 5, 2020, the CCES submitted its answer to the SDRCC in which it explained why it considered that the Athlete did not comply with the criteria enumerated by Rule 4.5.1 of the CADP (Medical Reviews for Student-Athletes). However, even if the CCES did not consider the Athlete to be eligible nor that he satisfied the criteria of a retroactive TUE, as stated in Article 4.4.3 of the International Standard for Therapeutic Use Exemptions, the CCES recognized the Athlete's right to request a retroactive TUE if he considered that he met the criteria and the CCES would evaluate his request.

[24] Nonetheless, the CCES did not consider, in the circumstances, that the Athlete met the criteria for no fault or negligence, as described in Rule 10.4 of the CADP and pursuant to the definition of no fault or negligence in the CADP. Yet, the CCES indicated that its position remained that the Athlete could benefit from the maximum suspension reduction pursuant to Rule 10.5.2 of the CADP (no significant fault or negligence), including a one (1) year period of ineligibility.

[25] During the preliminary meeting held on March 26, 2020, the Tribunal suggested that the Athlete communicate with the CCES in order to file a retroactive TUE application. The Athlete thought that he could meet with his family doctor and file his application within a two-week delay. The CCES indicated being able to evaluate such request within two weeks of its receipt. The parties agreed to participate in another conference call on April 28, 2020.

[26] On April 14, 2020, the Athlete informed the SDRCC that he was still awaiting a response from his doctor.

[27] On April 24, 2020, the Athlete once again wrote to the SDRCC and informed that despite following up twice with his doctor, he was still left without a response. The Athlete asked to postpone the preliminary meeting planned for April 28, 2020. He also indicated that, as soon as he would receive confirmation of his appointment with his doctor, he would be able to send the necessary documentation.

[28] In the meantime, the CCES tried to follow up directly with the Athlete concerning the status of his TUE application and the appointment with his doctor. However, the last e-mail from the CCES dated May 20, 2020, was left without a response. Therefore, on June 2, 2020, the CCES asked the SDRCC to reconvene a conference call with the parties to provide an update on the case and determine the next steps.

[29] Another preliminary call was held on June 23, 2020, during which the Athlete explained that he was unable to attend two scheduled appointments with his doctor since the last preliminary meeting, and that no further medical appointment was set since. However, the Athlete reiterated his intention to schedule an appointment with his doctor and provide a TUE application. The CCES agreed to allow the Athlete a short delay to make the necessary arrangements, indicating that in the absence of evidence that this was done, the CCES would want a hearing to be promptly scheduled.

[30] The Tribunal allowed the Athlete a one-week delay to schedule an appointment with his doctor and ordered that the TUE application be submitted

no later than one-week after his appointment. The Athlete confirmed his consent to those delays and that he had indeed received a copy of the form to be completed. During the meeting, the Tribunal advised the Athlete that, given the situation, it would not hesitate to schedule a hearing without him if he did not provide the required information and did not communicate with the SDRCC.

[31] On June 30, 2020, the Athlete informed the SDRCC that his doctor's appointment was scheduled for July 2, 2020.

[32] On July 15, 2020, since communication issues arose between the CCES and the Athlete about the e-mail address where to send his TUE application, the Tribunal allowed him a "final opportunity" to file his request. The Athlete then had until July 22, 2020 to send his application. The Tribunal's instructions, provided by e-mail, ended as follows:

> [Translation]
> If the request is not received within the deadline, the case will proceed to arbitration, which could be held by documentary review, with or without Mr. Badra's participation if he does not submit any response.

[33] On July 21, 2020, the SDRCC reminded the parties of the July 22, 2020, deadline for the submission of the TUE application by the Athlete. Yet, neither the CCES nor the SDRCC received said request from the Athlete before or on July 22, 2020.

[34] On July 23, 2020, the Tribunal ordered that, in these circumstances, the case should proceed to arbitration. The Tribunal added the following precision in its instructions to the parties:

> [Translation]
> After having communicated with the parties, the SDRCC will schedule a conference call in order to set a calendar of submissions by the parties and a hearing date.

[35] On two occasions (on July 24 and 27, 2020), the SDRCC offered a series of proposed dates to the parties for the preliminary meeting (conference call), adding July 28 and 29, 2020, as deadlines for parties to respond. The Athlete provided no response. The CCES indicated that its representatives were available on August 26, 2020.

[36] On July 30, 2020, the SDRCC therefore confirmed to the parties that the preliminary meeting would be held on August 26, 2020, at 3 p.m. (EDT).

[37] On August 25, 2020, the SDRCC provided the parties with a reminder of the next day's preliminary meeting.

[38] Despite the aforementioned communications, the Athlete did not show up at the August 26, 2020, preliminary conference call.

[39] On August 27, 2020, the Tribunal ordered that the arbitration process continue without the Athlete's participation and, with the CCES' consent, in the form of a documentary review:

> [Translation]
> On July 15, 2020, the Tribunal warned Mr. Badra that the hearing could be held without his participation if he did not submit an answer in relation to his TUE application, a document he has yet to provide to the CCES or to the SDRCC. Despite multiple requests, notices and reminders from the SDRCC to

Mr. Badra in reference to the preliminary meeting of August 26, he has not responded. Furthermore, the Athlete was absent during said meeting.

Article 6.18 of the *Canadian Sport Dispute Resolution Code (2015)* (*Code*) reads in part:

> An Arbitration may proceed in the absence of any Party [...] who, after due notice, fails to be present [...] An award shall not be made solely on the default of a Party. The Panel shall require the Party who is present to submit such evidence as the Panel may require for the making of an award.

[Translation]
Considering the aforementioned circumstances, the Tribunal orders that the arbitration process continue in the absence of the Athlete.

The Tribunal suggests to the CCES that the arbitration process take place in the form of a documentary hearing pursuant to Article 3.12 of the *Code*. [...] The SDRCC shall forward this decision to Mr. Badra and the CCES, along with a deadline for the parties to provide submissions and documentary evidence.

If the CCES accepts to proceed in the form of a documentary review, the Tribunal asks that the CCES to communicate its desired delay for submissions.

[40] On August 28, 2020, the CCES agreed to proceed in the form of a documentary review and a schedule was set and delivered to the parties by the SDRCC on August 31, 2020:

- **September 18, 2020, 4 p.m. (EDT)** – CCES' Submissions
- **October 9 2020, 4 p.m. (EDT)** – Athlete's Submissions and response

[41] On September 2, 2020, the CCES attempted to propose a resolution facilitation session with the Athlete in order to explain to him the possible consequences if the case was to proceed in the form of a documentary review (including in relation to the possible consequences of not participating, i.e. if the Athlete was to not submit any evidence or argumentation).

[42] However, the SDRCC was not able to reach the Athlete, neither by e-mail nor by telephone. Therefore, the resolution facilitation session did not take place.

[43] On September 16, 2020, the SDRCC therefore issued the following notice to the parties:

> [Translation]
> Due to the lack of participation from the Athlete, the SDRCC would like to inform the parties that the resolution facilitation session will not be scheduled in this case, unless Mr. Badra manifests his willingness to participate in such session before **4 p.m. (EDT) tomorrow.**

[44] On September 23, 2020, the SDRCC confirmed to the parties that, since Mr. Bean's translated affidavit in French was submitted a few days after the deadline, the Tribunal allowed the Athlete an additional delay for his submissions, namely until 4 p.m. (EDT) on October 14, 2020.

[45] On October 8, 2020, Mr. Badra sent a correspondence by e-mail indicating that he would like to [translation] "withdraw from the decision-making process". On October 9, 2020, the Tribunal therefore issued instructions to the parties indicating that, in order to withdraw from the process, Mr. Badra could sign and send to the SDRCC a Waiver of Hearing form. Then, since the Athlete had communicated with the SDRCC after a lengthy silence and since there was still a possibility that he decides to engage in the process, the Tribunal added:

> *[Translation]*
>
> *If Mr. Badra chooses to pursue the current documentary hearing process, he always has the right to file submissions, including documentary evidence.*

Mr. Badra also has the right to a hearing if he so chooses.

The Tribunal grants Mr. Badra a delay until 4 p.m. (EDT) on Friday, October 16, 2020, to file a Waiver of Hearing form signed and dated, and the same delay, extended for a second time, to file his submissions if he decides on this option.

If Mr. Badra does not provide any information within the said deadlines, the Tribunal will render its decision based on the documentation currently on the CMP.

[46] Mr. Badra provided no information within the aforementioned deadlines. No evidence or submissions of any kind were received by the SDRCC from the Athlete.

ANALYSIS AND DECISION

[47] Unfortunately for him, since July 14, 2020, the Athlete completely disengaged from the ongoing proceedings. He did not respond to calls or emails from the CCES, nor to the calls, notices, reminders, confirmations or emails from the SDRCC. His absence and total lack of participation persisted until the conclusion of this case on October 16, 2020, the deadline for the filing of his submissions.

[48] On three occasions, the Tribunal reminded Mr. Badra that a hearing was to be held : during the preliminary meeting held on June 23, 2020, the Tribunal advised the Athlete that, because of the situation, it would not hesitate to schedule a hearing without him if he did not communicate with the SDRCC and provide the required information; on July 23, 2020, the Tribunal ordered that the

case should continue to arbitration and that the SDRCC would set a date for a conference call to determine a schedule for submissions by the parties and a hearing date; and on October 9, 2020, the Tribunal issued instructions to the parties indicating that Mr. Badra had the right to a hearing.

[49] The SDRCC offered a series of proposed dates to the parties for the preliminary meeting (conference call) mentioned in the previous paragraph. The Athlete provided no response. The CCES indicated that its representatives were available on August 26, 2020. On July 30, 2020, the SDRCC then confirmed to the parties that the preliminary meeting would be held at 3 p.m. (EDT) on August 26, 2020. Despite the aforementioned communications, the Athlete did not show up at this preliminary meeting.

[50] Since the Athlete disengaged completely from the ongoing proceedings from July 14, 2020, either by not responding to the CCES' calls or emails or the SDRCC's calls, notices, reminders, confirmations or emails and that his absence and total lack of participation persisted through an extended period of time, it seemed obvious to the Tribunal that Mr. Badra would not participate in a hearing. Accordingly, on August 27, 2020, the Tribunal ordered that the arbitration process continue without the Athlete's participation and, with the consent of the CCES, in the form of a documentary review.

[51] On August 28, 2020, the CCES agreed to proceed in the form of a documentary review and a schedule was set and delivered to the parties by the SDRCC on August 31, 2020.

[52] No evidence or submission of any kind from the Athlete was received by the CRDSC.

[53] Article 6.18 of *the Canadian Sport Dispute Resolution Code (2015)* (*Code*) reads in part:

> An Arbitration may proceed in the absence of any Party […] who, after due notice, fails to be present […] An award shall not be made solely on the default of a Party. The Panel shall require the Party who is present to submit such evidence as the Panel may require for the making of an award.

[54] Article 3.1 of the CADP states that the « CCES shall have the burden of establishing that an anti-doping rule violation has occurred. » Because the ADRV was not admitted by the Athlete, the CCES has the burden of establishing it to the satisfaction of the Tribunal.

[55] The Tribunal examined the documentation on the Case Management Portal (CMP) and, more precisely, Mr. Kevin Bean's affidavit dated September 16, 2020 (including the documents filed in support of his affidavit), as summarized above. Based on this examination, the Tribunal adopts the CCES' submissions and concludes that the latter has discharged the burden of proof required by Rules 2.1.2 and 2.1.3 of the CADP to prove the ADRV pursuant to Rule 2.1.1 of the CADP, being the presence of a prohibited substance in the Athlete's sample.

[56] Rule 2.1.1 of the CADP states that it is each athlete's personal duty to ensure that no prohibited substance enters their body:

> *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their *Samples*. Accordingly, it is not necessary

> that intent, *Fault*, negligence or knowing *Use* on the *Athlete*'s part be demonstrated in order to establish an anti-doping rule violation [...].

[57] The CCES' uncontradicted evidence establishes the following facts: On October 19, 2019, Mr. Badra was selected and was subject to an in-competition doping control. He provided a urine sample. The certificate of analysis indicates the presence of D-amfetamine, a prohibited substance in-competition pursuant to section S6a - Stimulants of the 2019 WADA Prohibited list. D-amfetamine is a "non-specified" prohibited substance.

[58] With regards to the appropriate period of ineligibility, the offer made by the CCES for a one (1) year suspension to the Athlete on February 4, 2020, was made with the expectation that the Athlete accept the period of ineligibility proposed by the CCES and that he waive his right to a hearing, and especially on the basis of the Athlete's testimony and anticipated evidence. It should be reiterated that a one (1) year period of ineligibility is the minimum sanction available pursuant to the CADP, considering the classification of D-amfetamine as a non-specified substance in the Prohibited List.

[59] Rule 10.2.1 of the CADP stipulates that the length of the suspension for a violation of Rule 2.1 (presence of a prohibited substance in a sample) will be of four (4) years when the violation does not involve a specified substance, "unless the *Athlete* or other *Person* can establish that the anti-doping rule violation was not intentional". Accordingly, the Athlete has the burden of demonstrating that the violation is not intentional, considering the classification of the prohibited substance found in his sample. In this case, Mr. Badra has provided no evidence or submissions of any kind.

[60] If the Athlete had established that his ADRV was not intentional, he could have then tried to demonstrate to the Tribunal that, pursuant to Rules 10.4 or 10.5.2 of the CADP, he deserved the elimination or reduction of the period of ineligibility based on no significant fault or negligence. Pursuant to Rules 10.2.2 and 10.5.2 of the CADP, his period of ineligibility could have been reduced, down to one (1) year, depending on his degree of fault.

[61] Pursuant to Rules 10.4 and 10.5.2 of the CADP, the Athlete has the burden of establishing that there was no fault or negligence (10.4), or no significant fault or negligence (10.5.2) on his part. The definitions of these terms in Appendix 1 of the CADP lists what the Athlete has to demonstrate in order to eliminate (10.4), or the reduce (10.5.2) the usually applicable sanction.

[62] To establish *No Fault or Negligence* (10.4), the Athlete has to demonstrate "that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had *Used* or been administered the *Prohibited Substance*". And to establish *No Significant Fault or Negligence* (10.5.2), the Athlete has to demonstrate "taking into account the criteria for *No Fault or Negligence*, was not significant in relationship to the anti-doping rule violation." In both cases, the Athlete "must also establish how the *Prohibited Substance* entered his or her system."

[63] The Tribunal finds that the aforementioned criteria are very demanding. Since the Athlete has disengaged from the process, he has not submitted any evidence or arguments concerning these criteria. The CCES cannot satisfy the onus

of proof on behalf of the Athlete regarding these crucial questions.

[64] The CCES declares, in its submissions, that it calls upon the Tribunal to assess the appropriate sanction in this case.

[65] In its submissions, the CCES refers to an explanation provided by the Athlete to the CCES to the effect that he took medication, Vyvanse, from a friend in order to treat his ADHD which, at the moment he took the medication, had yet to be diagnosed by a neuropsychologist. The CCES also recognizes that Vyvanse in fact contains D-amfetamine and that the Athlete submitted to the CCES a neuropsychologist's report establishing that he did in fact suffer from ADHD, except that this diagnosis was established following an evaluation that took place on December 17, 2019, almost two months after his doping control. So, at the time of the doping control on October 19, 2019, the Athlete had not been diagnosed with ADHD yet and self-medicated, according to the CCES. It should be noted that Mr. Badra's explanation and the said report from the neuropsychologist were not filed as evidence, neither on the CMP, nor in the form of submission by the Athlete.

[66] The Athlete disengaged completely from the current process and has not submitted any evidence or argumentation. Accordingly, the Tribunal cannot accept that the Athlete has met the burden of proof based solely on explanations provided to the CCES, which are not before the Tribunal.

[67] Given Mr. Badra's lack of evidence, the Tribunal judges that the period of ineligibility applicable in this case remains the one specified in Rule 10.2.1 of the CADP. This Rule points out that the length of ineligibility for a violation of

Rule 2.1 (presence of a prohibited substance in a sample) will be of four (4) years when the violation does not involve a specified substance.

[68] Pursuant to Article 10.11.3.1 of the CADP, if a provisional suspension is imposed and respected by the Athlete, then the Athlete shall receive credit for this period of provisional suspension against any period of ineligibility which may be imposed ultimately. In this case, the CCES imposed a provisional suspension on Mr. Badra starting from January 30, 2020. No evidence establishing that the Athlete has not respected this provisional suspension was presented and the CCES does not make any allegation to that effect. It follows that the provisional suspension period starting on January 30, 2020, until the date of this decision is deducted from the period of ineligibility imposed by the Tribunal on Mr. Badra. Consequently, Mr. Badra's suspension will end on January 29, 2024.

Ottawa, October 20, 2020.

Ross C. Dumoulin
Arbitrator