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

No: SDRCC DT 12-0186
(DOPING TRIBUNAL)

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)
BOBSLEIGH CANADA SKELETON (BCS)

And

CHRIS KOROL
(ATHLETE)

And

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

Lawyers and Party Representatives:

James H. Smellie, Counsel for the Athlete
Peter R. Lawless, Counsel for CCES
Kevin Bean, Representative of CCES

Arbitrator

Graeme Mew FCIArb

Heard at Calgary, 5 April 2013

REASONS FOR DECISION

1. The acronym SARM stands for "selective androgen receptor modulator". This family of drugs is known to have the same effect as anabolic steroids. This case involves a substance known as SARM S-22, also known as “Ostarine”, which is classified as a Prohibited Substance (S-1 Anabolic Agent) on the 2012 World Anti-Doping Agency (“WADA”) *Prohibited List*.

2. Professor Christianne Ayotte, the director of the INRS WADA accredited laboratory in Montreal, testified that SARM S-22 is a new drug with presumed anabolic properties. It is not licensed or permitted for medical or therapeutic use in Canada. It is available through online sources. There are multiple references

to it on bodybuilding websites and blogs. It has reputed benefits for an athlete seeking to enhance performance. One use would be to build muscle mass, but it might also be used to improve stamina, power or the duration of training sessions.

3. SARM S-22 is not a "threshold" substance. Accordingly, the WADA accredited laboratory is not required in any case to report the precise level of SARM S-22 that may be detected in a Sample. The mere presence of SARM S-22 in an Athlete's Sample is an anti-doping rule violation.

4. In 2010 there was one case reported to WADA of an athlete testing positive for SARM S-22. There was one positive test in 2011. Then, in 2012, four SARM S-22 positive test results were reported. Two of those were in Canada and involved members of Bobsleigh Canada Skeleton ("BCS").

5. As will be seen in these reasons, there is a connection between the two Canadian positive tests. The first of these cases involved an athlete Derek Plug ("Plug") who was at the time a member of the Canada II bobsleigh team, participating in both two- and four-person events. His case was considered by a Doping Tribunal in accordance with the *Canadian Anti-Doping Program* (2009) ("CADP") in December 2012 and January 2013 (*CCES v. Derek Plug*, SDRCC DT 12-0182). Plug had admitted an anti-doping rule violation due to the presence of SARM S-22 in his Sample. He was ordered to serve a period of Ineligibility of two years.

6. In this second case, the Athlete, Chris Korol, is a member of the BCS National Development Team.

7. Although the two cases are connected, the present case has been decided on the evidence contained in the documents filed by the parties and adduced at the hearing.

Background

8. The Athlete is currently 23 years old. After attending high school and university in Ontario, where he played university level football, he moved to Calgary in 2010. Since then he has pursued the sport of bobsleigh, first as a "crew" or "brakeman" and, latterly, as a "pilot". He has adapted to the sport well enough that by 2012 he had joined the National Development Team.

9. On 21 October 2012, during in-competition doping controls at the Canadian National Bobsleigh Championships at Calgary, the Athlete provided a urine sample. His sample returned an Adverse Analytical Finding for SARM S-22. He was advised of this finding on or about 7 November 2012 and agreed to a

voluntary provisional suspension on 8 November 2012 pending formal issuance by CCES of a notification of Adverse Analytical Finding on 27 November 2012.

10. On 7 December 2012, the Athlete executed an admission of anti-doping rule violation for the presence of SARM S-22 in his sample, thereby establishing an anti-doping rule violation on his part.

The Hearing

11. The presumptive sanction for a first anti-doping rule violation for the presence of a Prohibited Substance in an Athlete's bodily Sample is a period of Ineligibility of two years (CADP Rule 7.38). This sanction can be eliminated or reduced if the Athlete can establish, on a balance of probabilities, the existence of Exceptional Circumstances.

12. In this case the Athlete has asserted that either (a) the period of Ineligibility should be eliminated because he bore No Fault or Negligence (CADP Article 7.44); or (b) that the period of Ineligibility should be reduced by up to one half because the Athlete bore No Significant Fault or Negligence (CADP Rule 7.45).

13. In order to have the period of Ineligibility either eliminated (CADP Rule 7.44) or reduced (Rule 7.45), the Athlete must establish how the Prohibited Substance entered his system.

14. The issue to be addressed at this hearing is the appropriate sanction for the Athlete's admitted Anti-Doping Rule Violation, having regard to the possible application of the mitigation provisions in CADP Rules 7.44 or 7.45.

15. The parties each tendered briefs consisting of witness statements, documents and the submissions of the parties on the merits. No objection was taken to any of the documents tendered by the parties. Witnesses whose statements were provided were, where asked to do so, made available for cross-examination at the hearing, either in person or by telephone.

16. In accordance with Rule 7.88 of the CADP, I issued a summary decision on 10 April 2013, with reasons to follow, in which I determined that the Athlete shall be subject to a period of Ineligibility of fifteen months commencing on 21 October 2012.

17. My reasons for my decision are set out in the balance of this award. I have summarised many of the facts and allegations based on the parties' written and oral submissions and the evidence adduced at the hearing. Additional facts and allegations may be referred to, where relevant, in connection with the analysis and discussion that follows. Although I have considered all of the facts, allegations, legal arguments and evidence submitted by the parties in the present

proceedings, I refer in these reasons only to the submissions and evidence I consider necessary to explain my reasoning.

The Evidence

18. The Athlete is 23 years old. Originally from Ontario, he now lives in Calgary. Until his provisional suspension he was a full-time member of the Development Team of BCS.

Anti-Doping Awareness and Supplement Use

19. The Athlete was a member of the University of Waterloo Football team from 2007-2010. As such, although never personally implicated, the Athlete was affected by the well-publicised positive drug tests which led to the establishment of anti-doping rule violations by nine individuals. The programme was eventually suspended, resulting in the Athlete leaving Waterloo and moving to McMaster University in 2010. The athlete described how, as a result of events at Waterloo, he had lost a lot of friends and "had to restart my life".

20. The Athlete acknowledged that he was familiar with the warnings issued by the CCES and others concerning the risk of supplement use.

21. Notwithstanding this, he started using supplements in 2011. These supplements bore the brand names "True Protein" and "True Nutrition". They included creatine, glutamine D aspartic acid, and magnesium.

22. Prior to starting to use these supplements, the Athlete sought and received assurances of purity and quality from True Protein.

23. In July 2012 the Athlete was prescribed the use of a salbutamol inhaler by the BCS team doctor to assist with breathing at altitude. He also began taking a fish oil product distributed by Ascenta.

24. In August 2012 members of the BCS team were advised by BCS that a Calgary non-profit foundation, Pure North S'Energy ("Pure North") would be offering a health and wellness programme to the team, which would include providing them, at no cost, with various nutritional and supplement products. This programme was facilitated by the Winter Sport Institute ("WinSport") in Calgary. According to BCS, part of the arrangement with Pure North was that it would undertake batch by batch testing of its products through a reputable third party laboratory.

25. In August 2012, the Athlete and other team members participated in an intake programme with Pure North which involved physical examinations, blood sampling and analysis and a distribution of nutritional and supplement products.

On 17 August the Athlete received from Pure North various health products, vitamins and supplements, including two bottles of vitamin D3 drops, vitamin B12, alpha lipoic acid and lypo-spheric vitamin C.

26. The Athlete's evidence is that he used one of the bottles of vitamin D3 on a daily basis, as well as the other supplements distributed by Pure North, from 17 August 2012 until about 7 October 2012. During this time, as already noted, he underwent out of competition drug testing (on 26 September).

27. As recently as September 2012 the Athlete took advice on avoiding the risks of inadvertent doping. He produced a clinical note from his family doctor indicating, in respect of a visit on 20 September 2012, "Discussed risks of supplements use and potential for prohibited substances".

28. On 7 October 2012 the Athlete went to Whistler for a training session there. He says that he took the second, previously unopened, bottle of vitamin D3 to Whistler, leaving the other bottle (the contents of which had been partially consumed) on the kitchen table at his residence, along with his other True Protein and Pure North products.

29. According to CCES's records the Athlete has undergone five doping control procedures under its auspices (four out of competition tests and the one in competition test which resulted in the Adverse Analytical Finding).

Athlete's Priorities and Effect of Injury

30. During 2012, the Athlete developed a pain in his groin/abdominal area which, by July 2012, was confirmed as an inguinal hernia. Rather than miss part of a competitive season, the Athlete opted to pursue the season as best he could and have his surgery later. As a result, he adjusted his training regimen to focus more on developing his piloting skills as opposed to pursuing increased physical strength and/or speed.

31. Because of the Athlete's hernia condition, his athletic performance numbers were depleting. However, he was never told that his place on the team was at risk. Rather, he had been told that his selection would be based on his driving. He believed that it would take him 4 to 5 years to become a world cup level pilot. Ideally over time he would become faster and stronger, as well as a better driver, but this was not necessarily essential. Indeed, according to the evidence of Pierre Leuders, former Development Team coach for BCS and now head coach of the Bobsleigh Federation of Russia, "while fitness, power and speed are important for every member of a bobsled crew, at the development stage of the sport, these aspects of the sport are secondary when it comes to learning the skills of piloting a bobsleigh on the various tracks around the world."

Derek Plug

32. On 17 September 2012, Plug was tested out of competition in Calgary.

33. On 11 October, while the BCS team was in Whistler, members of the team, including the Athlete, were told that Plug had tested positive, that the substance was SARM S-22, and that Plug had been sent home to Calgary that day. No other information was provided to the Athlete at that time as to how the Prohibited Substance had entered Plug's system.

34. After being notified of his Adverse Analytical Finding, Plug had a number of his supplements tested by the Sports Medicine Research & Testing Laboratory in Salt Lake City, Utah. In particular, he submitted two bottles of vitamin D3 drops for analysis. One of these bottles had been previously opened; the other had a seal that "appeared intact". Both were found to contain SARM S-22

35. Thereafter, CCES asked Pure North (the distributor of the vitamin D3 drops) to send six unopened bottles of the vitamin D3 drops (all with the identical lot number as the bottles supplied by Plug) directly to the Salt Lake City laboratory for further testing. The laboratory randomly chose two of those six bottles and concluded that SARM S-22 could not be detected in either bottle.

36. CCES also asked Pure North to send it four bottles of the vitamin D3 drops with the same lot number as Plug's bottles. CCES then sent one of those bottles to the INRS Laboratory in Montréal for testing. It, too, did not contain SARM S-22.

37. At his doping hearing, Plug adduced evidence that this vitamin D3 drops had been sabotaged by a friend. The tribunal did not accept this as an explanation for the source of the SARM S-22:

> "Having found the evidence of [Plug's friend] to be unreliable, there is no other evidence that can form the basis for a conclusion that the source of the SARM S-22 was a spiked supplement. While it is a fact that two bottles of vitamin D3 supplied to the Salt Lake City laboratory by the Athlete were found to contain SARM S-22, other bottles with the same batch number which were obtained by CCES and tested by the Montréal laboratory contained no prohibited substance. And if the vitamin D3 bottles were not spiked by [Plug's friend], there is no other evidence of when they were spiked and by whom. "

38. Prior to hearing about Plug's anti-doping rule violation, the Athlete had never heard of SARM S-22. However, he quickly learned from a BCS coach and from his own research what it was and its properties.

39. The Athlete did know that Plug had been using True Protein supplements and was a participant in the Pure North programme. Accordingly, the Athlete immediately stopped using the supplements which he had been taking, although he did continue to take vitamins – vitamin D3 from Pure North and magnesium from True Protein.

40. While still at Whistler, one of the Athlete's roommates asked the Athlete what the wireless access code was for the internet service at their residence. When asked by the Athlete why the roommate wanted to know this, the roommate indicated that he had given permission to Plug to stay at their house, so as to avoid Plug having to return home to his parents and have to explain his unscheduled presence. The Athlete states, and I accept, that until then, he had no idea that Plug had been given permission to stay at his house.

41. It should be noted that the Athlete shared his residence with two other members of the BCS team. All had gone to Whistler. The residence was locked while they were away.

42. The Athlete returned to Calgary on 14 October 2012. He was the first of his room-mates to get back. By the time he arrived there, Plug had left. Nothing was obviously amiss.

43. Another bobsleigh athlete, AB, gave testimony at the hearing. AB recounted having met Plug at a Halloween party on 27 October 2012. AB spoke to Plug for a couple of minutes. AB asked Plug how he was doing. He said that he was okay and that he was going to seek legal counsel. He then added that "there will be other people that will test positive". He did not identify anyone.

Positive Test

44. After returning to Calgary, the Athlete continued his daily usage of vitamin D3, indiscriminately using his two bottles (the one that he had taken to Whistler and the one that he had left at his residence). He would take one to two drops of vitamin D3 on his tongue per day.

45. The Athlete was selected for in-competition testing on 21 October 2012 at the National Championships in Calgary.

46. Apparently after being notified that he would be tested, the Athlete (accompanied by a chaperone) had waited to hear whether he had been selected for the development team before proceeding to the doping control station.

47. When he arrived at the doping control station, he had a full bladder and, effectively, jumped the queue ahead of other athletes who were waiting to be tested. The Athlete says that the doping control officer gave him a bit of a hard

time for this. The Athlete wrote in the "Athlete's Remarks" section of the doping control form "sorry for being late". On the form, he disclosed fish oil and magnesium as the non-prescribed medications and supplements that he had used in the previous ten days. He failed to disclose his use of vitamin D3. He explained that at the time the doping control form was being completed he was "bursting".

48. CCES referred to earlier doping control forms which the Athlete had completed. When he was tested on 10 August 2011 and 26 September 2012 he had disclosed his use of, *inter alia*, vitamin D. According to the Athlete, when he was tested on 21 October 2012 he did not forget that he was using vitamin D, but he was in a hurry to relieve himself and neglected to ensure it was written down on the doping control form.

49. The Athlete learned of his positive result on 7 November 2012.

Source of SARM S-22 in Athlete's Sample

50. According to Professor Ayotte the amount of SARM S-22 found in the Athlete's Sample was "only a trace amount". She said that this would be consistent with the administration of a preparation containing SARM S-22. Such results would be obtained following the ingestion of a commercial product SARM S-22 or the "spiked" vitamin D3 products provided for analysis by the Athlete. In either case, the last intake would have to have been several days before the test occurred (between four to seven days or more).

51. The Athlete's initial intention upon learning of the adverse analytical finding was to have the supplements he was taking from True Protein tested. He did not at that time consider that the products from Pure North warranted testing, given the relationship with so many athletes and with BCS itself.

52. The Athlete took legal advice. He was, in turn, referred to Plug's lawyer, as a result of which he learned that the Salt Lake City laboratory had detected the presence of SARM S-22 in two bottles of vitamin D3 supplied by Mr. Plug, only one of which was opened.

53. On 21 November 2012, the Athlete sent both of the bottles of vitamin D3 in his possession for testing at the Salt Lake City laboratory. On 28 November 2012, the Salt Lake City laboratory reported to the Athlete, with a copy to CCES, that it had detected the presence of SARM S-22 in one bottle of his vitamin D3 but not the second bottle. The Salt Lake City laboratory found SARM S-22 in a bottle bearing the same lot number as that found on each of Plug's two bottles of vitamin D3, in which the Salt Lake City laboratory had also detected SARM S-22. The bottle supplied by the Athlete in which SARM S-22 was not detected was from a different lot number.

54. On 7 December 2012 the Athlete provided a written admission of an Anti-Doping Rule Violation.

55. Since February 2013 the Athlete claims that he has tried on five to seven occasions to communicate with Plug. On one occasion he got through to Plug who said that he would get back to the Athlete. The Athlete's more recent e-mails to Plug have bounced back.

56. The Athlete also asked his roommate to give evidence at the hearing. His roommate was reluctant to do so. He said that he "would prefer to stay out of it".

57. No request was made to issue witness summonses to either Plug or the roommate.

Evidence from BCS

58. Don Wilson, the CEO of BCS, gave evidence. He described the Athlete as an up-and-coming pilot on the National Development team.

59. BCS knew that the Athlete had a hernia condition in 2012. The coaching staff, in consultation with the medical staff, did allow the Athlete's training to be reduced. However, maintaining his level of performance was important. The expectation was that the Athlete would continue to develop his skills as a pilot and that, when the hernia was repaired, issues and strength and conditioning could be addressed.

60. Mr. Wilson noted that Plug had been a World Cup brakeman in the Canada 2 sled at the time. As such, he would not have been a direct competitor, in terms of a team place, with the Athlete.

61. Mr. Wilson confirmed that BCS, together with a number of other winter sport National Sport Federations, had been offered an opportunity to take advantage of the Pure North programme. An important caveat of participating in the programme was that Pure North undertook batch testing of supplements with the intention of ensuring that the products were free of any Prohibited Substances. Without that caveat, BCS would not have allowed its athletes to participate in the programme.

Position of the Athlete

62. The Athlete accepts that in order for the presumptive period of Ineligibility to be eliminated or reduced he must establish on a balance of probabilities (a) how the Prohibited Substance entered his system; and (b) that he bore No Fault or Negligence or No Significant Fault or Negligence.

63. In assessing whether the Athlete has met his burden of establishing, on a balance of probabilities, how the Prohibited Substance entered his system, the Tribunal should consider whether it is "more likely than not" that the source of his positive test was his consumption of vitamin D3 which had been tainted with SARM S-22, and that such tainted vitamin D3 had come from Plug, either accidentally, or otherwise (whether directly or indirectly).

64. In order to assess whether the Athlete has met his burden it is important to take into account the full context, which would include the following factors:

    a. The Athlete's experience as a member of the University of Waterloo football programme which was dismantled due to doping issues.

    b. This was an athlete who had written to a supplement company to ensure the safety of their products before using them.

    c. The improbability that, at a time when, due to his hernia injury, his directive was to focus on his technical skills, the Athlete would be seeking to enhance his performance by taking a muscle enhancement drug.

    d. Just a few weeks prior to the in competition test which led to the Adverse Analytical Finding, the Athlete had taken a test out of competition which disclosed no evidence of Prohibited Substances in his system.

    e. If, as asserted by CCES, the Athlete had "escaped" when tested in September 2012, why, when he learned of Plug's Anti-Doping Rule Violation on 11 October, with the nationals coming on in ten days time, would he continue to take SARM S-22 until perhaps as little as 4 days prior to the date of competition.

65. The Athlete does not know why Plug said that, before the Athlete's own Anti-Doping Rule Violation was disclosed, that there would be other athletes who would test positive. What the Athlete does know is that Plug stayed at his residence for a number of days between 11 and 14 October 2012. He also knows that Plug's own explanation for his Anti-Doping Rule Violation changed over time. Indeed, it was only a few days before his own Anti-Doping Tribunal Hearing that Plug asserted the theory that his vitamin D3 drops had been spiked by a friend.

66. On a balance of probabilities, the only plausible explanation for the presence of SARM S-22 in the Athlete's Sample was that the Athlete took tainted vitamin D3 drops after he returned from Whistler and before the National Championships in Calgary, and that the vitamin D3 drops which he consumed were tainted because Plug (a) put the SARM S-22 there deliberately, or (b) either accidently or

deliberately switched one of his own tainted bottles of vitamin D3 with the Athlete's clean vitamin D3 bottle which Plug had access to while he was staying at the Athlete's house.

67. The fact that some of the evidence supporting this conclusion is circumstantial does not mean it should be ignored. This is particularly so when none of the alternative theories are any more plausible.

68. If the Tribunal is satisfied as to the route of ingestion, the Athlete should be considered as being without fault or negligence where, as in the instant case, his positive test resulted from sabotage by a teammate.

69. Alternatively, the Athlete's sanction should be reduced on the basis of "No Significant Fault or Negligence". In this regard, the Athlete had clearly been diligent in his use of supplements (contacting the manufacturer and/or distributor of products he was using). The Athlete took reasonable steps to avoid a situation where he was exposed to an Anti-Doping Rule Violation.

Position of the CCES

70. The fact that the Athlete may or may not be a person of good character without motive to commit the Anti-Doping Rule Violation which he has now admitted to is not enough to meet his evidentiary burden of proving how SARM S-22 got into his system.

71. Although the Athlete provided a bottle of vitamin D3 drops which was tainted with SARM S-22, it is also possible that the SARM S-22 was from another source and/or was taken intentionally by the Athlete. Or he could himself have deliberately blended SARM S-22 with his vitamin D3 drops, or used SARM S-22 directly and put it in his vitamin D3 to cover his tracks once he discovered the situation with Plug.

72. No one theory put forward by the Athlete is more possible or probable than another. Accordingly he has not met the burden of establishing, on a balance of probabilities, how the Prohibited Substance got into his system.

73. Even if the Tribunal were to be satisfied that the Athlete inadvertently doped due to his use of spiked vitamin D3 drops, it was only through a lack of care on the part of the Athlete that he exposed himself to the risk of doping. Even after learning of Plug's anti-doping rule violation the Athlete continued to use a number of vitamin supplements. And in the house which he shared with two other teammates, the Athlete failed to take reasonable steps to segregate and care for his supplements. Rather, they were left on a kitchen table in a common area of the shared residence.

74. The Athlete cannot establish "No Fault or Negligence" because, as observed in commentary to Article 10.5.1 of the World Anti-Doping Code the circumstances supporting such a conclusion have to be truly exceptional. Sabotage by a competitor might be such a circumstance. However, sabotage by a member of the Athlete's circle of associates would not constitute sabotage by a "competitor".

75. In addition, the Athlete has not exercised the "utmost care" required for someone seeking to eliminate or reduce a sanction based on “exceptional circumstances”. In this regard the CCES points to:

    a. The use of multiple supplements by the Athlete;

    b. Using multiple bottles of the same supplement at the same time;

    c. Leaving open supplement bottles on his shared kitchen table; and

    d. Exercising little or no control over who could enter his home and under what circumstances.

    e. Failing to ensure that his supplements were at all times within his sole custody and control; and

    f. Failing to list the vitamin D3 on his Doping Control Form as an example of the relaxed and cavalier attitude which the Athlete had regarding his anti-doping responsibilities in general and his use of vitamin D3 in particular.

76. The same lack of "utmost caution" militates against a finding of "No Significant Fault or Negligence". The Athlete used a number of supplements despite being aware of the risks associated with doing so. By doing so, the Athlete was increasing his risk of a problem – including the risk of sabotage.

77. While the Athlete did take some steps to inquire generally about some (but not all) of his supplement products, the measures taken by him were cursory and did not demonstrate sufficient diligence.

78. Furthermore, as observed by Mr. Wilson, the Athlete's goal regarding fitness was to protect as much as possible his level of fitness and strength during his injury rehabilitation phase (due to the hernia). Regardless of developing his driving skills, the Athlete had to get stronger and faster to get to the World Cup team. This was a major goal and priority for the Athlete. A reasonable conclusion is that because of his hernia condition, he could not train as hard as he wanted to (or as hard as the other pilots could), so he took SARM S-22 to bolster (or at least maintain) his strength and fitness performance while he recovered. This is

an equally plausible explanation for the Adverse Analytical Finding to that offered by the Athlete.

Discussion and Analysis

79. The relevant provisions of the *Canadian Anti-Doping Program* are Rules 7.44 and 7.45, which provide:

> **ELIMINATION OR REDUCTION OF PERIOD OF INDIVIDUAL INELIGIBILITY BASED ON EXCEPTIONAL CIRCUMSTANCES**
>
> **No Fault or Negligence**
>
> 7.44 If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Rule 7.23-7.27 (Presence) the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility eliminated. In the event this Rule is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Rule 7.51-7.53. [Code Article 10.5.1]
>
> **No Significant Fault or Negligence**
>
> 7.45 With the exception of anti-doping rule violations involving Rule 7.32 (Athlete Availability, Whereabouts Information and Missed Tests) and Rule 7.42-7.43 (Specified Substances), if an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, 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 section may be no less than eight (8) years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Rule 7.23-7.27 (Presence) the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced. [Code Article 10.5.2]

80. In order for me to consider elimination or a reduction of the presumptive sanction of two years Ineligibility, the Athlete must therefore establish, on a balance of probabilities:

a. how the Prohibited Substance entered his system; and

b. either

i. that he bears No Fault or Negligence; or

ii. that he bears No Significant Fault or Negligence.

81. I found the Athlete to be a credible, truthful witness. This becomes an important factor when, as here, much of the evidence relied upon by the Athlete in support of his plea for elimination or reduction of his sanction, is circumstantial in nature.

How Did the Prohibited Substance Enter the Athlete's System?

82. The parties have agreed that there is no basis for concluding that the vitamin D3 used by the Athlete was contaminated as a result of anything that happened at the manufacturing or distribution stages.

83. It is not disputed that one of the two bottles of vitamin D3 drops which the Athlete sent to the Salt Lake City laboratory for testing, contained SARM S-22. I accept as truthful the Athlete's evidence that these were the two bottles of vitamin D3 drops which he had been using leading up to his positive test. I also accept that the Athlete was taking drops from both bottles.

84. The major criticism of the Athlete's assertion that Derek Plug (a) put SARM S-22 in one of the Athlete's vitamin bottles deliberately, or (b) either accidentally or deliberately switched one of his own tainted bottles of vitamin D3 for one of the Athlete's (presumably) clean vitamin D3 bottles while Plug had access to the Athlete's house, is that it is at best a speculative theory.

85. In *CCES v. Lelièvre* (SDRCC DT 4-0014, 7 February 2005) the Athlete asserted, *inter alia*, that his marijuana supply had been contaminated by cocaine. The arbitrator ruled (at paragraph 51):

> "Bearing in mind that the Athlete has the burden of establishing on a balance of probabilities that the bears no fault or negligence, or no significant fault or negligence for the anti-doping violation, there must be <u>evidence</u> of contamination of the marijuana used by the Athlete if I am to be persuaded that exceptional circumstances that would result in elimination or reduction of the normal penalty exist. While recognising that obtaining such evidence might be difficult if not impossible, <u>mere speculation</u> as to what may have happened will not satisfy the standard of proof required. [emphasis added]

86. To similar effect is a decision of the Court of Arbitration for Sport in *International Rugby Board v. Keyter* (CAS 2006/A/1067, 13 October 2006). In that case a professional rugby player tested positive for cocaine. He asserted that the Prohibited Substance had entered his body without his knowledge as a result of a "spiked drink". He said that three days before he was tested, he had taken a client to a nightclub and accepted a few drinks from strangers sitting next to his table. He believed that these strangers must have put cocaine into one of his drinks. The Player produced a number of statements as to his good character in order to support these allegations (and rebut any suggestion he had knowingly used cocaine). A disciplinary panel of the Rugby Football Union found that given the good character evidence submitted, the Player was entitled to the benefit of any doubt and, on a balance of probabilities, accepted that the Prohibited Substance entered the Player's body through a "spiked" drink. A post-hearing review of that decision upheld the disciplinary panel. On an eventual appeal, the CAS Panel rejected the rationale for the RFU's decision. The CAS panel said (at paragraphs 6.10 *et seq*):

> 6.10 The Panel is not willing to accept the RFU Review Panel's conclusion that the explanation offered by the Respondent was acceptable. No evidence of the alleged night out or of the actual existence of the drink supposedly offered by strangers was submitted. There is no corroborating evidence in the record that he was even in the bar on the night in question other than his own statement. Moreover, even if the Panel were to accept that the Respondent did go to a night club and did drink something offered by strangers (*quod non*), the Panel must in any event underscore that cocaine contamination through a "spiked drink" is only a speculative guess or explanation uncorroborated in any manner. One hypothetical source of a positive test does not prove to the level of satisfaction required that factor (a) [how the prohibited substance came to be present in his body] is factually or scientifically probable. Mere speculation is not proof that it did actually occur.
>
> 6.11 The Respondent has a stringent requirement to offer persuasive evidence of how such contamination occurred. Unfortunately, apart from his own words, the Respondent did not supply any actual evidence of the specific circumstances in which the unintentional ingestion of cocaine occurred. The Panel, therefore, finds that the Respondent's explanation was lacking in corroborating evidence and unsatisfactory, thereby failing the balance of probability test. In other terms, the Panel is not persuaded that the occurrence of the alleged ingestion of cocaine through a "spiked drink" is more

> probable than its non-occurrence. This failure to establish how the prohibited substance entered his bodily specimen means that exceptional circumstances have not been established and there can be no reduction in the sanction from the otherwise established two year suspension.

87. As noted in the *Lelièvre* and *Keyter* cases, mere speculation as to the source of a Prohibited Substance in an athlete's system will not be enough. Nor will the fact that an athlete is of good character provide sufficient support for an otherwise speculative theory to meet the balance of probabilities test.

88. In the present case, there are, however, a number of other circumstances which do provide support for the theory put forward by the Athlete. In no particular order these circumstances include the following:

    a. The role played by Plug. Plug is an athlete who has been found to have committed an anti-doping rule violation based on the presence in his system of the same Prohibited Substance that was found in the system of the Athlete in this case. While the Tribunal in the Plug case was not prepared to accept that the source of the SARM S-22 was necessarily a spiked vitamin D3 supplement, it nevertheless appears that Plug had in his possession at least two bottles of vitamin D3 supplement, one of them from an identical batch number to that supplied for testing by the Athlete (and subsequently found to contain SARM S-22) at or about the time that he was staying at the Athlete's residence. The probability that Plug played some role in the events leading to the Athlete's Adverse Analytical Finding is bolstered by his comment to AB (whose evidence I accept) that there would be other people that would test positive.

    b. It is highly unlikely that the Athlete was intentionally doping. He was clearly alert to anti-doping issues, having previously checked with a supplement company as to the provenance of its products before starting to use them.

    c. The trace amount of SARM S-22 detected in the Athlete's Sample would, according to Professor Ayotte, be consistent with the administration of a preparation containing SARM S-22 and, in particular, with the ingestion of the "spiked" vitamin D3 products provided by for analysis by the Athlete (although Professor Ayotte indicated that such results could also be consistent with the ingestion of a commercial product SARM S-22).

d. At the time when he is likely to have ingested the SARM S-22 the Athlete would have recently learned of Plug's Anti-Doping Rule Violation and would be preparing for the National Championships where it was possible he would be tested again.

e. His medical condition (ruptured hernia) meant that his training regime was more focused on technique as a pilot than on the development of muscle and power (the evidence of Mr. Wilson to the contrary notwithstanding).

f. The Athlete had no immediate prospects of progressing beyond the development team. He had no immediate rival for the position of driver in the development.

89. In short, it would have made no sense at all for the Athlete to deliberately dope in October 2012.

90. In considering the alternative theories put forward by the CCES, none of them strike me as being more or equally plausible than the theory put forward by the Athlete. In particular I do not accept that it is at least equally possible that the Athlete deliberately and knowingly took the SARM S-22 in order to aid his performance (CCES submissions, paragraph 45).

91. In all of the circumstances I conclude that the Athlete has met the burden of establishing, on a balance of probabilities, how the SARM S-22 entered his system, namely through his use of tainted Vitamin D3 drops.

Exceptional Circumstances

92. Having concluded that the Athlete is able to meet the burden of showing how the SARM S-22 entered his system, I turn to the issues of "No Fault or Negligence" or "No Significant Fault or Negligence".

No Fault or Negligence

93. For the presumptive sanction of two years to be eliminated entirely, the Athlete would have to demonstrate that he bore "No Fault or Negligence". As noted in *Plug v. CCES* (at paragraph 132):

> "The commentary to Articles 10.5.1 and 10.5.2 of the *World Anti-Doping Code* underscores the need for truly unique circumstances in order to engage the application of CADP Rule 7.44 (WADC Article 10.5.1). There is a clear qualitative

> difference between sabotage by a fellow competitor on the one hand, and sabotage by a member of the Athlete's circle of associates. To impose any sanction on an athlete because a competitor engaged in cheating by committing an act of sabotage against the athlete would run contrary to the overarching rationale of the *World Anti-Doping Code* which is the preservation of the spirit of sport (the characteristics of which include ethics, fair play and honesty). By contrast, sabotage by a member of an athlete's own circle of associates would reasonably engage consideration of the athlete's strict liability for what ends up in his or her system."

94. On the assumption that Plug may have directly or indirectly caused the Athlete's vitamin D3 drops to be contaminated, the CCES submits that Plug would not meet the definition of "competitor" contemplated by the commentary to Article 10.5.1 of the WADC. Plug was a brakeman on the Canada 2 bobsled while the Athlete was a pilot in the development team. A pilot is a specialist position within a bobsled. There is no evidence whatsoever that Plug had aspirations to be a pilot. On the other hand, it is well established that, because of his hernia condition, the focus of the Athlete was entirely upon his role as a pilot, rather than as a potential brakeman.

95. In my judgment, therefore, the proper characterization of Plug's relationship to the Athlete would be that of a member of the Athlete's circle of associates, rather than a "competitor". As such, the circumstances do not in my view engage the application of CADP Rule 7.44.

No Significant Fault or Negligence

96. Turning then to the question of whether the Athlete can establish that he bore No Significant Fault or Negligence, it is important to note, at the outset, that athletes are expected to exercise "utmost caution" to protect against Adverse Analytical Findings, whether by contamination or sabotage (see, for example, *USADA v. Gatlin*, AAA No. 30 190 00170 07, 31 December 2007; Affd CAS 2008/A/1461, 6 June 2008; *Puerta v. International Tennis Federation* CAS 2006/A/1025, 12 July 2006).

97. The Athlete acknowledged being familiar with CCES advice and warnings respecting supplement use, namely that:

    a. Supplements are not to be taken; and

    b. If they are taken, there is always a risk of contamination or unlisted ingredients.

98. Conscious of these factors, the Athlete did, in fact, in relation to the True Protein products, contact the supplier of supplements that he was thinking of using. He

also sought medical advice on avoiding risks of inadvertent doping through supplement use.

99. Furthermore – and, in my view, significantly - the vitamin D3 drops which would appear to be the most likely source of the SARM S-22 found it in the Athlete's system (as a result of contamination) were supplied to the Athlete as part of the Pure North programme which BCS was part of. In this regard the Athlete's reliance on the stringent protocols followed as part of the Pure North programme, including the requirement of batch testing which BCS had insisted upon as part of its agreement to participate in the programme, cannot be regarded as negligent.

100. In *Knauss v. FIS* CAS 2005/A/847, an athlete tested positive for nandrolone as a result of taking contaminated nutritional supplements. The athlete had made a direct enquiry with the distributor of the product to ascertain the safety of the supplement. The CAS Panel noted that this direct inquiry fell within the category of "clear and obvious precautions" which the athlete had taken before ingesting the supplement. Accordingly, the Panel found that the facts established that it was a case of "No Significant Fault or Negligence" and suspended the athlete for 18 months from the date of the test.

101. By contrast, in *Despres v. CCES* CAS 2008/A/1489, *WADA v. Despres et al* CAS 2008/A/1510 the athlete, who also tested positive for nandrolone, had taken supplements on the advice of a sports nutritionist contracted by BCS to give advice to individual athletes on specific diets and nutritional needs. No particular brand of supplements had been recommended. The athlete bought the supplements which, it turned out, contained nandrolone, after conducting "some research" but without further consultation with the sports nutritionist. An SDRCC doping tribunal found that the athlete satisfied Article 10.5.2 of the WADA (i.e. that there was No Significant Fault or Negligence on his part. His term of Ineligibility was shortened to 20 months. Both the athlete and WADA appealed this decision. There was evidence that although the athlete had made inquiries of a store clerk when he purchased the offending supplement, he made no efforts to contact the distributor or manufacturer of the supplement. He explained that he did not contact the manufacturer directly to seek a guarantee because he believed such guarantees to be "generic". As noted by the CAS Panel (at paragraph 7.7):

> "If so, then this is all the more reason that Mr. Despres should not have been satisfied by the guarantee posted on [the manufacturers] website. Mr. Despres was aware that obtaining a guarantee directly from the manufacturer was on the CCES list of suggested steps to be taken before selecting a nutritional supplement. Simply believing such guarantees to be generic fails to explain why he did not take this additional, prescribed step. Even if the guarantee had

> turned out to be wrong, at least Mr. Despres would have taken steps within his control to reduce the risk."

102. The CAS Panel in *Despres* was at pains to point out that an athlete does not have to exhaust every conceivable step to determine the safety of a nutritional supplement before qualifying for a "No Significant Fault or Negligence" reduction. But the steps taken must be reasonable, observing (at paragraph 7.8):

> "The Panel in *Knauss* followed this logic when it determined that even though Mr. Knauss could have had the nutritional supplement tested for content, or simply decided not to take it altogether, these failures give rise to ordinary fault or negligence at most, but do not fit the category of "significant" fault or negligence."

Similarly, the Panel drew a distinction between the reasonable steps Mr. Despres should have taken and all the conceivable steps he could have taken. "In light of the risks involved, the Panel finds that Mr. Despres did not show a good faith effort to leave no reasonable stone unturned before he ingested KaizenHMB".

103. While the Athlete in the instant case did not make direct inquiries of Pure North, it was in my judgment reasonable for him to have taken advantage of the opportunity provided by BCS to its athletes to participate in the Pure North programme. As explained by Mr. Wilson, it was an important condition of the relationship between BCS (and other the National Sport Federations participating in the programme), Win Sport and Pure North that there was rigorous batch testing to eliminate the possibility that the products contained any Prohibited Substances. Without this caveat, BCS would not have allowed athletes to participate in the programme. While it would always have been open to the Athlete to have done more than merely accept the representations of BCS and Pure North, it can not be said that his participation in the programme was unreasonable. This is even more so when one considers that the product that ended up being contaminated was vitamin D3, which, by any measure, would not be regarded as a high risk supplement.

104. Of the shortcomings enumerated by CCES as militating against this being a "No Significant Fault or Negligence" case (see paragraph 74 above), the Athlete's use of multiple (in this case two) bottles of the same supplement at the same time could not in my view reasonably be said to be negligent. Keeping a supply at home and a supply for when he was away at competitions would be a practice engaged in by many athletes.

105. That said, even though he had no reason to believe that Plug would be using his residence, the Athlete should have taken more care about where in his residence he left his supplements. He shared the residence with two other athletes. It would have been more prudent if he had kept his supplements in his own room,

rather than openly displayed in a common area of the residence. Such conduct would, however, fall within the realm of simple negligence, rather than significant negligence.

106. For the foregoing reasons I find that this is "No Significant Fault or Negligence" case.

107. In considering where on the scale between the presumptive sanction of two years and the maximum available reduction which would take the sanction down to one year of Ineligibility, to place the Athlete's anti-doping rule violation, I have concluded that the circumstances, viewed in their entirety, warrant a period of Ineligibility of 15 months. The parties agree that, because of the Athlete's prompt admission of an Anti-Doping Rule Violation, his period of Ineligibility should commence on the date of Sample collection, namely 21 October 2012.

Decision

108. The Athlete has voluntarily, and promptly, admitted to an anti-doping rule violation in connection with the presence in his bodily Sample of SARM S-22, an anabolic agent, which is a Prohibited Substance according to the 2012 Prohibited List forming part of the *World Anti-Doping Code*.

109. The presumptive sanction for a first anti-doping rule violation for the Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's bodily Sample is a period of Ineligibility of two (2) years.

110. In this case, the Athlete has met the burden of establishing exceptional circumstances pursuant to CADP Rule 7.45 ("No Significant Fault or Negligence"), thereby warranting reduction of the otherwise applicable period of Ineligibility.

111. In the circumstances, a period of Ineligibility of 15 months shall apply, to run from 21 October 2012.

Costs

112. CADP Rule 7.97 provides that the Doping Tribunal may award costs to any party payable as it directs. If either party wishes to apply for costs, an application should be made by no later than 12 noon (EDT) on Tuesday 30 April 2013. I would indicate, however, that I am, provisionally, of the view that there should be no order as to costs.

Appeal

113. The attention of the parties is drawn to the provisions of the CADP concerning appeals and such other provisions in the *Canadian Sport Dispute Resolution Code* and/or International Federation Rules as may be applicable.

Kingston, Ontario 24 April 2013

Graeme Mew FCIArb
Arbitrator