

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA (the "SDRCC")**

**IN THE MATTER OF THE CANADIAN ANTI-DOPING PROGRAM**

**AND IN THE MATTER OF AN ANTI-DOPING RULE VIOLATION BY ALICIA  
BROWN ASSERTED BY THE CANADIAN CENTRE FOR ETHICS IN SPORT**

**NO: SDRCC DT 14-0205  
(Doping Tribunal)**

In the matter of an arbitration between:

**Canadian Centre for Ethics in Sport (the "CCES")  
Athletics Canada  
(CLAIMANTS)**

-and-

**Alicia Brown  
(RESPONDENT)**

**BEFORE:**

Arbitrator: Allan J. Stitt

**Appearances and Attendances:**

For CCES: Luisa Ritacca and Justin Safayeni, Stockwoods LLP

For the Respondent: Jordan Goldblatt, Louis Century,  
Sack Goldblatt Mitchell LLP

**ARBITRATION AWARD**

Monday, January 5, 2015

## INTRODUCTION

1. In 2013, Alicia Brown (the "Athlete") tested positive for having hydrochlorothiazide ("HCTZ") in her system. HCTZ is a Prohibited Substance under the Code (the "Code") of the Canadian Anti-doping Program (the "CADP") and is a Specified Substance as defined in the CADP.
2. The Athlete has admitted that she committed an anti-doping rule violation. The only issue is whether she has established on the balance of probabilities that the HCTZ got into her body in a way that should result in a reduced suspension. The parties agreed at the hearing that the Athlete did not intend to enhance sport performance or mask the ingestion of another performance enhancing substance by ingesting HCTZ.
3. The Athlete alleges that HCTZ entered her body through drinking water that she drank in Ingersoll, Ontario on November 23 and 24, 2013.

## THE PROHIBITED SUBSTANCE

4. HCTZ is a synthetic chemical used to treat conditions such as high blood pressure, heart congestion or excessive fluid in the body. It is a diuretic. It is sometimes used by athletes who want to lose a lot of weight in a short period of time (for example, athletes in a weight class), and it can be used to mask the ingestion of performance enhancing drugs, because HCTZ causes the body to excrete fluids at a faster than normal rate.
5. The amount of HCTZ found in the Athlete's system was measured at 1800 ng/L for her "A" sample of her urine and 1000 ng/L for her "B" sample. The evidence at the arbitration was that the margin for error should lead to the conclusion that the athlete had between 500 and 2000 ng/L of HCTZ in her body at the time of the test. This was sometimes referred to as a "trace" amount or a "low level finding" and was, by all accounts, an extremely small amount of HCTZ.
6. HCTZ is not produced naturally by the body and must be ingested. As stated above, it is a Specified Substance as defined by the CADP.

## THE PARTIES

7. The Canadian Centre for Ethics in Sport (CCES) is an independent, non-profit organization that promotes ethical conduct in all aspects of sport in Canada. The CCES maintains and carries out the CADP, including the provision of anti-doping services to national sport organizations and their members. The CCES has implemented the Code and its mandatory International Standards through the CADP, the domestic rules that govern this proceeding. The purpose of the Code and of the CADP is to provide protection for the rights of athletes to fair competition.
8. The Athlete is a 24-year-old elite, carded track and field athlete. In 2013, she was the 400M National Champion. She has won numerous athletic and academic awards, and received numerous athletic scholarships. She is a former University of Toronto Female Athlete of the Year and is one of eight athletes who was a Top Eight Academic All Canadian. She graduated with a GPA of 3.74 in her fifth year of University and with an Honours degree. The Athlete is part of the Registered Testing Pool, and therefore subject to out-of-competition testing.

## JURISDICTION

9. The Sport Dispute Resolution Centre of Canada ("SDRCC") was created by Federal Bill C-12 (*The Physical Activity and Sport Act*, S.C. 2003, c. 2), on March 19th, 2003. Under this Act, the SDRCC has exclusive jurisdiction to provide to the sport community a national alternative dispute resolution service for sport disputes. In 2004, the SDRCC assumed responsibility for all doping disputes in Canada.
10. Pursuant to Rule 7.87 of the CADP in force in 2014, the SDRCC has the jurisdiction to constitute and administer a Doping Tribunal. Hearings are conducted by one arbitrator from the SDRCC roster. The CADP and SDRCC procedural rules set out the process to be followed in the arbitration. I was selected by the parties to be the arbitrator for this dispute.

## THE PROCEEDINGS

11. An oral hearing in the matter was held on December 2 (from 9:00 a.m. until late into the evening) and continued on December 8, 2014, in Toronto. Evidence was given by the Athlete, by Dr. Richard E. Jackson, Ph.D., P.Eng., expert for the Athlete, by Dr. Graham Gagnon, Ph.D., P.Eng., expert for the CCES, and by Professor Christiane Ayotte, Ph.D., Director Doping Control Laboratory INRS-Institut Armand-Frappier.
  
12. The parties provided initial written submissions and closing written submissions.
  
13. Exhibits at the hearing were:
  - a) A joint book of documents that included: Athlete Selection Order, Doping Control Form, Doping Control Form redacted, Doping Control Officer, Chain of Custody form, Sample Receipt Acknowledgment, Certificate of Analysis (A Sample), Initial Review of Adverse Analytical Finding, Certificate of Analysis (B Sample), Voluntary Provisional suspension, Notification of Adverse Analytical Finding, Letter from J. Goldblatt to D. Eichner, Admission of an Anti-Doping Rule Violation, Confidential Test Report from SMRTL, Request for a Hearing, Letter from J. Goldblatt to A. Stitt, Letter from J. Goldblatt to L. Ritacca, Email exchange between counsel on SMRTL testing, Supplement list for Athlete;
  - b) Text messages sent by the Athlete;
  - c) Further text messages sent by the Athlete;
  - d) The Athlete's summary of her efforts to determine how HCTZ entered her body;
  - e) Expert Report of Dr. Jackson;
  - f) Expert Report of Dr. Gagnon;
  - g) *Curriculum vitae* of Professor Ayotte;
  - h) 2010 article from the British Journal of Pharmacology;
  - i) 2010 article by H. F. Schroder on lifestyle drugs and metabolites in wastewater;

- j) A document setting out minimum performance levels for World Anti-Doping Agency accredited laboratories; and
  - k) CCES press releases on suspensions of other athletes with positive HCTZ tests.
14. On December 12, 2014, I asked the parties for further submissions on three issues. The parties submitted written argument on the issues on December 19, 2014, and Reply submissions on December 24, 2014. I committed to the parties to produce my decision with reasons by January 5, 2015 (notwithstanding the fact that we were in the holiday season).

## **BACKGROUND**

15. The relevant facts of case are not in dispute. They are as follows:
16. During the week of November 15, 2013, the Athlete travelled to Florida to train. She lived at a condominium that she shared with six other female athletes. The condominium belonged to the grandmother of one of her teammates. There were two bathrooms in the condominium. At some point during the trip, the Athlete drank Gatorade at the training facility mixed in a team jug from powder and water.
17. The Athlete returned to Canada to attend her coach's wedding in Ingersoll, Ontario. She traveled to Ingersoll with two other athletes on November 23, 2013, after training in the morning. She left for Ingersoll at about noon. She does not recall whether she brought her water bottle with her, but if she did, she filled it up in Toronto before she left. At a local hotel, she checked into the room that she was sharing with her teammates. She drank some of the tap water at the hotel prior to going to the wedding. She generally drinks two to three litres of water per day.
18. The Athlete attended the wedding on the evening of November 23 and drank water that was poured into her glass. She does not know whether the water was tap water or bottled water, but assumes it was tap water. She also had some punch and a sip of wine.

19. After the wedding, she returned to her hotel to go to sleep. The next morning (November 24), she checked out of her hotel and returned to Toronto. If she had her water bottle with her, she would have filled it up with water in Ingersoll but she does not recall whether she did that.
20. On November 25, the Athlete trained in Toronto in the morning, at which time she took her supplements and drank water at the training facility. She also ran errands, and went to a movie.
21. Before she went to bed, she put on cream that she uses for her eczema.
22. At about 6:30 a.m. on November 26, about 40 hours after she returned to Toronto from Ingersoll, she was woken up by a representative of CCES who asked her to take a random, out-of-competition, urine test. This was the first time she had been asked to take a urine test for anti-doping purposes. Since she was a part of the Registered Testing Pool, she knew that there was a possibility that she would be selected for a random test out of competition.
23. After the test, she went back to sleep. Later that day, she texted her parents and her coach. The content of the texts suggested that she was proud that her results were significant enough that she was being tested for performance enhancing substances. She did not appear to be at all concerned that she might have a positive test.
24. The testing of the samples resulted in an Adverse Analytical Finding for the presence of HCTZ. The Athlete received the test results in late January. The Athlete did not know what HCTZ was (when she received notification of her positive test).
25. On January 17, 2014, the Athlete agreed to a voluntary provisional suspension. She hasn't competed since prior to being tested.
26. On January 30, 2014, CCES notified the Athlete that it would be asserting an anti-doping rule violation based on the Adverse Analytical Finding for the presence of HCTZ in her system, contrary to CADP rules 7.23 to 7.26.

27. On March 11, 2014, the Athlete voluntarily admitted that she committed an anti-doping rule violation.
28. The Athlete was perplexed at how HCTZ entered her system and went through a careful process to attempt to explain what seemed to her to be unexplainable. For example, she made efforts to determine whether she might have accidentally taken medication intended for one of her roommates or of people she stayed with in Florida; whether she may have accidentally ingested HCTZ belonging to the owner of the condominium in Florida where she stayed; whether she may have accidentally ingested HCTZ belonging to one of the people she roomed with in Ingersoll or people she sat with at the wedding; or whether there might have been contamination of the cream she used for her eczema. She did not learn anything from her investigation that suggested the source of the HCTZ.
29. She also considered whether her supplements may have been contaminated and concluded that that was very unlikely as most of the supplements were either World Anti-Doping Agency ("WADA") pre-tested, certified clean for sport, third party tested in WADA accredited laboratories, or recommended by those who produced supplements that were tested by WADA accredited laboratories.
30. She did not have her supplements tested because she could not afford the cost of the testing. She asked the CCES if it would test her supplements and CCES refused to test the supplements, saying that it was the athlete's burden to prove how the Specified Substance entered her system, not for CCES to disprove.
31. She spoke to a sport medicine doctor at the University of Toronto about the possibility of cross-contamination of her supplements and he said he would be "very surprised" if it occurred and considered it "very unlikely".
32. In March, the Athlete had the water from Ingersoll and from Florida tested for HCTZ. No HCTZ was found in the water.

33. The Athlete testified that she is very careful about what she puts in her body, did not knowingly ingest HCTZ, and did not knowingly ingest a product that she thought might contain HCTZ. She was not challenged on this point and there was no suggestion at the hearing that she knowingly ingested HCTZ or a product that she thought might contain HCTZ.
34. The Athlete said that there would not be a logical reason for her to have ingested HCTZ – especially out of competition (not that there was any suggestion that there would have been a reason in competition). HCTZ is a diuretic and the Athlete, as a track athlete, did not need to maintain a weight or benefit from weighing less. While HCTZ could also be used as a masking agent, there were no traces of other Prohibited Substances in the Athlete’s system.

## SUBMISSIONS

### Athlete

35. The Athlete argued that the only realistic explanation for the positive test for HCTZ was that it resulted from the Athlete’s consumption of drinking water in Ingersoll.
36. The Athlete’s expert witness on this issue was Dr. Jackson. Dr. Jackson stated that his opinion was that it was “entirely likely” that HCTZ was in the drinking water in Ingersoll, and resulted in the Athlete’s positive test. He based his evidence, in part, on the fact that HCTZ was detected in the treated effluent (out flow) of water treatment plants in the United States, in raw wastewater effluent samples in Spain, and in sewage treatment plants in Italy. He said that the most likely way for HCTZ to have entered the wastewater was from a one-time release of HCTZ (by a hospital or clinic, for example). The contaminated water would have then entered the sewer system. Dr. Jackson suggested that there was a risk of leaky sewers in Ingersoll (based on a 2012 Power Point presentation) and that if there were sewer leaks, the HCTZ could infiltrate the groundwater from which Ingersoll drew its drinking water. He said that the HCTZ would not be removed by treatment of the groundwater in the treatment facility in Ingersoll.



37. The Athlete argued that I should find, on the balance of probabilities, that she ingested the HCTZ through the drinking water in Ingersoll.

### CCES

38. CCES argued that there was no evidence of any HCTZ in the tap water in Ingersoll. The Athlete's test of the Ingersoll drinking water showed no HCTZ.

39. Dr. Gagnon, the CCES expert witness, testified that it was extremely unlikely that detectible levels of HCTZ would have been in Ingersoll's drinking water at all in November of 2013. He further testified that, even if there were traces of HCTZ in the drinking water in Ingersoll, the HCTZ levels would have been at a maximum of 50 ng/L. Since the Athlete's level two days after she left Ingersoll was at least 10 times that level, and since the amount of HCTZ detected in a test cannot exceed the amount consumed (since the body cannot produce HCTZ naturally and about 80% of the HCTZ is excreted from the body in the first 24 hours after ingestion), Dr. Gagnon concluded that the positive test could not have resulted from the HCTZ in the drinking water.

40. CCES argued that, therefore, the Athlete has not met the test under CADP Rule 7.42 to demonstrate, on a balance of probabilities, how the HCTZ entered her system.

### **THE APPLICABLE RULES**

41. The relevant provisions of the **2009 CADP Rules** (in force at the time of the anti-doping violation and the hearing) are as follows:

7.23 The presence of a *Prohibited Substance* ... in an *Athlete's* bodily *Sample* is an anti-doping rule violation.

7.26 ...[T]he presence of any quantity of a *Prohibited Substance* ... in an *Athlete's Sample* shall constitute an anti-doping rule violation.

7.38 The period of *Ineligibility* imposed for a first violation of Rules 7.23-7.27... shall be two (2) years *Ineligibility*, unless the conditions for eliminating or reducing the period of *Ineligibility*, as provided in Rules 7.42-7.43... are met.

7.42 Where an *Athlete* or other *Person* can establish how a *Specified Substance* entered his or her body or came into his or her *Possession* and that such *Specified Substance* was not intended to enhance the *Athlete's* sport performance or mask the *Use* of a performance-enhancing substance, the period of *Ineligibility* found in rule 7.38 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of *Ineligibility* from future *Events*, and at a maximum, two (2) years' *Ineligibility*.

7.43 To justify any elimination or reduction under Rule 7.42, the *Athlete* or other *Person* must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the Doping Tribunal the absence of an intent to enhance sport performance or mask the *Use* of a performance enhancing substance. The *Athlete* or other *Person's* degree of fault shall be the criterion considered in assessing any reduction of the period of *Ineligibility*. The *Athlete* or other *Person* shall have the onus of establishing that his or her degree of fault justifies a reduced sanction.

42. The relevant provisions of the **2015 CADP Rules**, in force as of January 1, 2015 (and in force when these reasons were released), to the extent they differ from the 2009 CADP Rules are as follows:

#### 10.5.1.1 Specified Substances

Where the anti-doping rule violation involves a *Specified Substance*, and the *Athlete* or other *Person* can establish *No Significant Fault or Negligence*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *ineligibility*, and at a maximum, two years of *Ineligibility*, depending on the *Athlete's* or other *Person's* degree of *Fault*.

### 10.5.1.2 Contaminated Products

In cases where the *Athlete* or other *Person* can establish *No Significant Fault or Negligence* and that the detected *Prohibited Substance* came from a *Contaminated Product*, then the period of *Ineligibility* shall be, at a minimum, a reprimand and no period of *Ineligibility*, and at a maximum, two years *Ineligibility*, depending on the *Athlete's* ... degree of fault.

## ANALYSIS

### APPLICATION OF *LEX MITIOR*

43. A preliminary issue that I must determine is, to the extent that the 2015 CADP Rules provide a test that is less stringent for the Athlete to meet than the 2009 CADP Rules, whether I am to apply the CADP Rules that were in force at the time of the anti-doping violation and at the time of the hearing, or the CADP Rules in force at the time the decision is released.
44. Rule 20.4.2 of the 2015 CADP states that, with respect to any anti-doping rule violation case which is pending as of January 1, 2015, the arbitrator may determine that “the principle of “*lex mitior*” appropriately applies under the circumstances of the case”.
45. The principle of *lex mitior* provides that where there is a difference between the law in force at the time of an alleged offence and the law as it exists at the time of final judgment, the person accused of wrongdoing is entitled to have the more favourable provision applied to him or her. This principle has been applied to alleged doping violations. (See, for example, *Canadian Cycling Association and Roland Green, 2005*, SDRCC 05-0025. In the present case, the official judgment was released on January 5, 2015, at which time the 2015 CADP was the governing CADP.

46. CCES argued that the CADP provides that decisions should be released within five days of the end of the hearing and that, if this decision had been released during that period, the decision would have been released before the 2015 CADP came into force.
47. The reason why the concept of *lex mitior* exists is clear. If the rule makers determine that a new and less stringent rule is more fair than an older harsher rule, it does not make sense to sanction based on a rule that the rule makers themselves have now determined is too harsh. The CADP in force at the time of the judgment is the 2015 CADP and I find that the less stringent provisions of the 2015 CADP apply in this case. It would be manifestly unfair to the Athlete to rule otherwise.
48. Also, the end of the hearing was December 24, 2014, the date of the reply submissions. While I could have set the date of December 27 as the date for reply submissions, I did not want the parties and lawyers to work through Christmas and Boxing Day. I do not think that setting the date for the reply on December 24 instead of December 27 should be determinative in deciding the important issue of whether *lex mitior* applies.
49. A significant difference between the 2009 CADP and the 2015 CADP is that the 2015 CADP does not require the Athlete to prove how the Specified Substance entered his/her system in order to obtain a reduced sanction. The Athlete must only establish no significant fault or negligence to be entitled to a reduced sanction.

#### **THIS ATHLETE IN THIS CASE**

50. The amount of HCTZ found in the Athlete's system was extremely small. It was referred to in the hearing as a "trace" amount. In fact, a laboratory testing for HCTZ that was incapable of detecting the amount of HCTZ that was found in this Athlete (or even many times that amount) could still be approved by the World Anti-Doping Agency (WADA).

51. There was neither the suggestion nor any evidence at the hearing that HCTZ could have helped this Athlete. A diuretic would not help a track athlete, particularly during the off-season. There was no other Prohibited Substance found in the Athlete's system and it was not suggested that HCTZ was used in this case to mask other performance enhancing products.
  
52. The personal texts sent by the Athlete immediately after her urine test were inconsistent with an Athlete who believes that she may have a positive result from a test. In fact, her texting suggests that she was proud to be tested because it made her feel that her results were good enough that CCES wanted to test her. Also, the Athlete went back to sleep following the test. Of course, her actions following her test are not conclusive of whether she purposely ingested HCTZ or negligently allowed HCTZ to enter her system; they are just evidence of her state of mind at the time of the test.
  
53. The Athlete said that she had never heard of HCTZ before she received her test results and did not purposely or knowingly consume HCTZ. She also said that she is opposed to doping. The Athlete was credible and I believe her, but that does not end my analysis, of course.
  
54. The Athlete must, on a balance of probabilities, establish no significant fault or negligence. While she is not required to prove the specific way that the HCTZ entered her body, she must convince me, on the balance of probabilities, that it entered her body other than through her significant fault or negligence. The Athlete is in the best (and only) position to provide the evidence about how the substance entered her body and she is responsible for making sure that no Prohibited Substance enters her system. I must therefore determine whether she has met her burden in order to decide whether a reduced sanction is appropriate.

**DID THE ATHLETE PROVE, ON THE BALANCE OF PROBABILITIES,  
THAT HCTZ ENTERED HER BODY THROUGH THE WATER IN  
INGERSOLL**

55. Much argument was presented to me about how I am to interpret the balance of probabilities test. I do not propose to go through the arguments here as the differences in terms of how the test has been applied did not impact my decision.
56. Professor Ayotte testified that approximately 80% of the HCTZ in a person's body will be excreted in the first 24 hours after ingestion and approximately 80% of what is left in the next 24 hours. Trace amounts of HCTZ can remain in the body for up to seven days after consumption. These findings were not challenged. Approximately 40 hours after leaving Ingersoll, the Athlete was measured with at least 500 ng/L in her system. Professor Ayotte stated that, if the source of the HCTZ were the water in Ingersoll, the water would have had to have had a concentration of "thousands" of ng/L. Using her 80% figure and the fact that the test was done about 40 hours after she returned from Ingersoll, the amount of HCTZ in the water would have had to have been, in fact, many thousands of ng/L.
57. The starting point, then, is to determine the possible concentration of HCTZ in the drinking water in Ingersoll to determine whether it could reasonably have been high enough to cause the positive test. The highest tested level of HCTZ in wastewater, anywhere in the world, is 2800 ng/L. That was a level tested in wastewater in Spain. All other tests of all types of water (including drinking water) found lower amounts of HCTZ. Dr. Jackson stated that the amount of HCTZ in the wastewater in Ingersoll must have been higher than 2800 ng/L, the highest level measured anywhere in the world. I cannot accept that conclusion. I cannot assume a level of HCTZ in drinking water in Ingersoll in 2013 was higher than the highest level of HCTZ measured in water anywhere in the world.

58. Dr. Gagnon testified that it was “extremely unlikely” that there was any HCTZ in the drinking water at all. He based his conclusion on his analysis of Ingersoll’s drinking water system and the 2013 Annual Drinking Water System Summary Report – Ingersoll Water System. He notes that E. coli was not detected and likely would have been if there were a sewer leak resulting in HCTZ in the wastewater, that chlorine was added at every Ingersoll well, and that all trace organic contaminants were non-detect in Ingersoll’s drinking water in 2013.
59. He stated that it was also extremely unlikely that HCTZ would contaminate Ingersoll drinking water from leaky sewers. He talked about the buffer between the wellheads and the sewer system, that the wells are cased in concrete, that there were measurable levels of chlorine in the drinking water (and that, if there were leaky sewers, the chlorine would have reacted with the contaminants and would not have been measurable).
60. As stated above, the highest amount of HCTZ found in any water is the 2800 ng/L found in wastewater in Spain in 2011.
61. Dr. Gagnon noted that when the wastewater in the Spanish study was treated with chlorine, the amount of HCTZ was reduced by 50-75%. He also noted that HCTZ in wastewater that leaked from sewers would be diluted by the existing groundwater before entering the well. The amount of HCTZ in the water would then be further reduced by the chlorine treatment it received in the treatment plant.
62. He therefore concluded that, even if there were levels of HCTZ in the wastewater as high as 2800 ng/L, the amount of HCTZ in the drinking water would have been, at most, 50 ng/L. I accept his analysis in that regard.

63. Dr. Jackson disputed this conclusion and much of the evidence and argument at the hearing related to challenges that Dr. Jackson presented to Dr. Gagnon's analysis. After carefully considering the evidence of both Dr. Jackson and Dr. Gagnon, I accept the evidence and conclusions of Dr. Gagnon over those of Dr. Jackson. I do not propose to go through Dr. Gagnon's arguments (and counter-arguments to the conclusions reached by Dr. Jackson) in detail. I say only that I am persuaded by Dr. Gagnon's report and evidence that the highest amount of HCTZ that one could reasonably conclude was in the drinking water in Ingersoll was 50 ng/L, and it is unlikely that even that level was in the drinking water. In fact, I believe that there was likely no measurable amount of HCTZ in the drinking water.
64. Even if the level of HCTZ in the drinking water in Ingersoll in November of 2013 were 2800 ng/L (and there is no evidence it was), it is extremely unlikely that the Athlete could have tested positive for at least 500 ng/L in her system, given the amount of HCTZ that must have been excreted in the prior 40 hours.
65. As further evidence of my conclusion, there have been 28 athletes who tested positive for HCTZ in Canada of the approximately 16,000 athletes tested since 2010. Of those positive tests, removing the ones where the athlete had a Therapeutic Use Exemption (TUE) or where the Athlete also tested positive for another Prohibited Substance (suggesting that HCTZ was used as a masking agent), there were 6 positive tests, one of which was the Athlete in this case. If there were a problem with HCTZ in the drinking water in Canada, I would have assumed we would have seen more than the six positive tests for HCTZ since 2010.
66. To be clear, I am not casting any aspersions on Dr. Jackson or his testimony. I just find that Dr. Jackson's conclusions are not as supportable as Dr. Gagnon's conclusions, based on the academic articles and the evidence that was presented to me.
67. Therefore, the Athlete did not prove, on the balance of probabilities, that her positive test resulted from the Athlete drinking contaminated water in Ingersoll. I am not saying it is *impossible* for this to have been the cause of the positive test; I am saying that I agree with Dr. Gagnon that it is extremely unlikely that this was the cause and that the Athlete has not satisfied me on the balance of probabilities that this was the source of her positive test.



68. I should note that the evidence in this case is different from the evidence in the case of *Union Cycliste Internationale v. Burke*, CAS 2013/A/3370. In the Burke case, the arbitrator found that the positive test for HCTZ (in competition) by Mr. Burke was caused by HCTZ in the water that Mr. Burke drank. There were a number of differences in Burke case, though. Most importantly, Mr. Burke drank a significant amount of allegedly contaminated water on the day he was tested; secondly, there was evidence of the source of the contamination (runoff from a golf course and a sludge-based fertilizer company) whereas in the present case, there was no such evidence; third, the Burke hearing was an expedited one, and there was “limited evidence” and no time to test the water in question. Most importantly, the arbitrator in the Burke case did not have the benefit of hearing the expert evidence and analysis such as that put forward by Dr. Gagnon.

#### **DOES THAT END THE ANALYSIS?**

69. I now must examine whether the Athlete can establish no significant fault or negligence in how the HCTZ entered her body. The onus is still on the Athlete in this regard.

70. Five important facts influenced me in this regard. First, the Specified Substance found in the Athlete’s system was not one that the Athlete in this case would logically benefit from. A track athlete in the off-season would not benefit from a diuretic.

71. Second, there were no other Prohibited Substances in the Athlete’s system and there was no suggestion that the Specified Substance was used as a masking agent by this Athlete.

72. Third, the amount of the Specified Substance found in the Athlete’s system is so low that it is below the amount that could have been detected by some WADA approved laboratories.

73. Fourth, the Athlete does not know how the Specified Substance entered her system. She so testified and I believe her. She went to strenuous efforts to determine the source, and was unable to do so.
74. Fifth, and most importantly in my view, all of the alternative theories put to the Athlete about how the HCTZ entered her system were ones that were not the result of significant fault or negligence on the part of the Athlete.
75. CCES said that the Athlete has not proven that the HCTZ entered her system through the Ingersoll groundwater. I agree. CCES suggested that other possible sources of HCTZ that could have caused the positive test were accidentally taking someone else's medication, contamination of the eczema cream used at the pharmacy, accidental contamination of supplements, sabotage, or possible inadvertent consumption through the Gatorade that the Athlete drank in Florida. I agree that these are all possible sources of the Athlete's positive test. (I should note that CCES suggested in its submissions that a possible reason for ingestion was intentional use by the Athlete for reasons unrelated to sport. This theory was not put to the Athlete to rebut, so I reject it as a possible theory of how the HCTZ entered the Athlete's system.)
76. Therefore all of the possible reasonable sources of ingestion in this case lead to a conclusion of inadvertent ingestion of a small amount of HCTZ, with no significant fault or negligence on the part of the Athlete.
77. The 2015 CADP is drafted differently from the 2009 CADP so that, where the arbitrator is persuaded on the balance of probabilities that any of the ways that the Specified Substance could reasonably have entered the Athlete's system were a result of no significant fault or negligence on the part of the Athlete, but where the Athlete has not succeeded in showing on a balance of probabilities the one specific way the Specified Substance entered her system, and where there was no intent to enhance sport performance or mask, that I should reduce the sanction.
78. The Athlete has established, on the balance of probabilities, that the positive test occurred as a result of no significant fault or negligence on her part. Therefore, the period of ineligibility shall be no less than a reprimand and no more than two years, depending on the Athlete's degree of fault.

## PROPORTIONALITY

79. Rule 20.10.1 of the 2015 CADP states that the “Purpose, Scope and Organization of the World Anti-Doping Program and the Code”... “shall be considered integral parts of the Code.”
80. The Purpose, Scope and Organization of the World Anti-Doping Program and the Code, as outlined in the World Anti-Doping Code 2015, states that “[t]he Code has been drafted giving consideration to the principles of proportionality...”.
81. Various sport tribunals have accepted that proportionality should be applied to determine the appropriate sanction for an athlete. (See, for example, *Masar Omeragik v. Macedonian Football Federation*, CAS/2011/A/2670).
82. Six athletes have tested positive for HCTZ without a TUE and without traces of other Prohibited Substances in their systems. Of the five (other than the Athlete), four have been identified, and all four have received a suspension of significantly less than two years (two received a reprimand, one received a two-month suspension and one received a six-month suspension). There has been no suggestion that there are circumstances that should cause this Athlete to be treated differently from all of the others who tested positive for HCTZ (with no TUE and no other Prohibited Substances found). I therefore find that the concept of proportionality requires me to reduce the sanction for this Athlete.

## DECISION

83. In this case, the Athlete has established to my satisfaction that she had no significant fault or negligence. I am therefore entitled to reduce the sanction to, at a minimum, a reprimand. In this case, the Athlete quickly admitted the anti-doping rule violation and has not participated in a sanctioned race for over a year. In the circumstances, I reduce the sanction to a reprimand.

Costs

84. The Parties have not requested that I make an order as to costs and there is no reason for me to do so.

Toronto, Ontario, January 5, 2015

A handwritten signature in blue ink, appearing to read "Allan J. Stitt". The signature is cursive and stylized, with a prominent initial "A" and "S".

Allan J. Stitt  
Arbitrator