SPORT DISPUTE RESOLUTION CENTRE OF CANADA

IN THE MATTER OF THE CANADIAN ANTI-DOPING PROGRAM

AND IN THE MATTER OF AN ANTI-DOPING RULE VIOLATION BY EARLE CONNOR ASSERTED BY THE CANADIAN CENTRE FOR ETHICS IN SPORT

No.: SDRCC DT 15-0236
(Doping Tribunal)

Canadian Centre for Ethics in Sport

Athletics Canada

-and-

Earle Connor (Athlete)

-and-

Government of Canada (Observer)

World Anti-Doping Agency (Observer)

BEFORE: Ross C. Dumoulin

APPEARANCES:

For the Athlete: Not represented at hearing

For the Canadian Centre for Ethics in Sport: Luisa Ritacca, counsel
Justin Safayeni, counsel

DECISION

March 4, 2016

1. This is an arbitration award with reasons issued pursuant to paragraph 6.21 (d) of the *Canadian Sport Dispute Resolution Code* (2015) (Code). I was named by the parties pursuant to paragraph 6.8 (b) (i) of the *Code* and appointed as arbitrator to sit as Doping Dispute Panel by the Sport Dispute Resolution Centre of Canada (SDRCC) to hear and determine the present matter.

THE FACTS

2. The following are the salient facts presented by the Canadian Centre for Ethics in Sport (CCES) by means of two affidavits, and attached exhibits, of Mr. Kevin Bean, Manager, Compliance and Procedures, for the CCES. The facts relating to the sport dispute process followed in this matter are also substantiated by the administrative documents as they appear on the Case Management Portal of the SDRCC.

Athlete's Samples:

3. On April 18, 2015, the *Athlete* was subject to an *Out-of-Competition* doping control conducted by CCES in Calgary, Alberta. A Certificate of Analysis from the WADA-accredited Doping Control Laboratory at INRS-Institut Armand-Frappier in respect of the resulting urine sample indicates an *Atypical Finding* for the presence of testosterone and 19-NA (19-norandrosterone), both consistent with exogenous origins. The Certificate also states "however, we cannot rule out that it could come from the demethylation of synthetic testosterone and/or its metabolites."

4. On May 28, 2015, in light of the results of the April sample, the *Athlete* was subject to another *Out-of-Competition* doping control conducted by CCES in Calgary. A Certificate of Analysis from the Laboratory in respect of the resulting urine sample again indicates an *Atypical Finding* for the presence of testosterone and 19-NA, both consistent with exogenous origins.

5. At the time of these sample collections, the *Athlete* had a valid Therapeutic Use Exemption for testosterone, meaning that he was permitted to have testosterone in his system.

6. However, exogenous 19-NA (19-norandrosterone) is a *Prohibited Substance* under the 2015 WADA Prohibited List (category S1.1.b, under the title "ANABOLIC AGENTS" and under the sub-titles "Anabolic Androgenic Steroids (AAS)" and "Endogenous AAS when administered exogenously"). The 2015 WADA Prohibited List notes that the term "endogenous" "refers to a substance which is ordinarily produced by the body naturally." As a species of anabolic androgenic steroids, 19-NA is not a *Specified Substance* and it has no approved human therapeutic use.

7. On June 23, the Laboratory advised CCES that a further test was needed to determine whether the 19-NA in the April and May samples should remain as *Atypical Findings*. The Laboratory also indicated: "...we cannot exclude an administration of nandrolone. A follow-up test is needed; we will see if 19-NA disappears."

8. On July 3, 2015, the *Athlete* was subject to an *In-Competition* doping control conducted by CCES in Calgary. An amended Certificate of Analysis

from the Laboratory in respect of the resulting urine sample again indicates an *Atypical Finding* for the presence of 19-NA, consistent with exogenous origin.

9. On July 15, CCES received a report from the Laboratory confirming that, based on the comparison of the April sample, the May sample and the July sample, the Laboratory was amending the Certificates of Analyses previously provided for the April and May samples from *Atypical Findings* to *Adverse Analytical Findings* for the presence of testosterone and 19-NA, both of exogenous origin. The Laboratory Report explained that based on a review of all three samples, "*in situ* enzymatic demethylation shall be excluded and the results were due to the administration of [*Prohibited Substance*] nandrolone."

10. On July 16, the CCES commenced an Initial Review and provided the *Athlete* an opportunity to have his B-Samples tested – which he requested and was completed – and to provide an explanation for his *Adverse Analytical Findings*.

11. On July 29, CCES completed its Initial Review and issued a Notification of an anti-doping rule violation for the presence and/or *Use* of the *Prohibited Substance* 19-NA.

***Athlete*'s failure to comply with deadlines, requests and Tribunal orders:**

12. After receiving the notification, the *Athlete* retained counsel and filed materials in support of a hearing to have his *Provisional Suspension* lifted so that he could compete in the 2015 Parapan Am Games. CCES prepared and filed extensive responding materials, including expert evidence. The matter was scheduled to be heard by this Tribunal on August 6, 2015.

13. On August 5, the *Athlete*'s counsel advised that he would not be pursuing the hearing.

14. On August 18, this Tribunal set a timetable for a hearing on the merits of the *Athlete*'s case – i.e., whether a doping violation has been established and, if so, the appropriate sanction. That timetable required the *Athlete* to provide a list of witnesses and a summary of their evidence or will-say statements by August 24. The hearing date was set for September 28.

15. The *Athlete* did not respond by the August 24 deadline. The Tribunal received an email from the *Athlete*'s (former) counsel, explaining that they no longer represented him.

16. On August 26, CCES sent the *Athlete* an amended notification, giving him an additional 30 days to "decide to actively engage in the SDRCC hearing process." The amended notification advised: "If you take no further action in this regard for 30 days (by September 25, 2015), the CCES will consider that you have waived your right to a hearing and accepted the consequences proposed by the CCES, all as set out in CADP Rule 7.10.2."

17. On August 27, still having heard nothing from the *Athlete*, this Tribunal made the following procedural order:

> The *Athlete* is hereby ordered to furnish the following information by 4 p.m., Thursday, September 3, 2015:
>
> - Does the *Athlete* intend to proceed with the holding of a hearing in this matter?
> - If so, does he intend to have someone represent him and, if so and if he has retained someone, who is the representative?

- Does the *Athlete* intend to challenge the results of the positive test?
- What are the names of the potential witnesses he intends to call at the hearing?

18. On September 3, the *Athlete* responded. He advised that he "would like to go forward with my hearing" and requested more time to retain new counsel. He further advised: "I do not intend to out-right challenge the results of the test however this will be confirmed upon discussion with my new council [*sic*]"

19. On September 14, this Tribunal made the following procedural order:

> As the Athlete indicated in writing on September 3, 2015 that he was in the process of retaining new legal counsel and has not yet communicated the name of his legal representative, the Athlete is hereby ordered to do so by 4 p.m. (EDT) on Friday, September 18, 2015.

20. On September 18, the *Athlete* advised that he was trying to obtain legal representation from Andy Hayer, but that Mr. Hayer was not available until October 12, 2015.

21. On September 23, this Tribunal made the following procedural order:

> The Athlete is hereby ordered to have his legal counsel, Mr. Andy Hayer, or other legal counsel he may retain, contact the SDRCC on or before October 12, 2015 so that a new Preliminary Meeting may be held and a date be set for a hearing.

22. The *Athlete* failed to contact the Tribunal by the October 12th deadline.

23. On October 26, at CCES's request, a preliminary meeting via conference call was set to address scheduling matters and whether the *Athlete* should be deemed to have waived his right to contest the doping violation. Approximately

an hour before the meeting was to commence, the *Athlete* sent CCES an email suggesting that there was a possibility of him providing *Substantial Assistance* to CCES. In light of this development, CCES did not take the position that the *Athlete* had waived his right to challenge the doping violation. At this meeting, a further call was scheduled for November 6 at 11:00 AM.

24. On October 28, CCES sent the *Athlete* a letter outlining what would be required for him to provide CCES with *Substantial Assistance*. On November 2, having heard nothing from the *Athlete* since October 26, counsel to CCES sent the *Athlete* a letter – both by courier and by email – reiterating what was required. Counsel to CCES advised the *Athlete*: "If I do not hear from you by end of day on November 4th, we intend to provide the arbitrator with a copy of this letter and to ask him to deem you to have waived your right to a hearing and to have accepted the proposed 4-year sanction."

25. The *Athlete* did not respond by November 4. Instead, at 10:58 a.m. on November 6 – two minutes before the conference call with this Tribunal – the *Athlete* sent CCES an email purporting to explain why he could not provide what was required. The *Athlete* claimed he did not receive CCES's November 4th letter, either by courier or by email – despite the courier slip having been apparently signed for by the *Athlete*.

26. This Tribunal addressed the *Athlete* during the November 6 conference call noting that he had received numerous e-mails from the SDRCC outlining deadlines and requesting information and that he had failed to communicate with the SDRCC. The Tribunal enumerated several instances of the *Athlete's* failures to comply with deadlines, requests for information and procedural orders. The

Athlete acknowledged his failure to comply and apologized. When asked to explain these failures, the *Athlete* responded that he had other important things happening in his life, but he committed to doing better in the future. The Tribunal stated that in its view, the *Athlete's* repeated failures to respond to requests, orders and deadlines amounted to an abuse of process and indicated that deadlines were to be respected The *Athlete* agreed. The parties agreed to hold a hearing on the merits of the case, if necessary, on November 30.

27. Following that call, CCES and the *Athlete* continued to explore whether he could provide *Substantial Assistance* to CCES.

28. A fourth preliminary conference call was held on November 25 during which the hearing that had been set for November 30 was postponed to January 28, 2016 to allow the *Athlete* and CCES to pursue the providing of *Substantial Assistance* by the *Athlete*.

29. CCES has not heard from the *Athlete* since December 28, 2015.

30. On January 6, 2016, CCES advised the Tribunal that it had experienced difficulty in communicating with the *Athlete* and had "been unable to have any meaningful discussions with him for several weeks." CCES requested a conference call to schedule a hearing.

31. On January 14, the Tribunal held a fifth preliminary conference call. The *Athlete* did not attend. A timetable for a hearing was set, whereby CCES was to submit its evidence in support of a doping violation by January 21; the *Athlete* was to provide responding material by February 4; CCES was to provide

any reply and submissions by February 18; and a hearing by conference call on the merits was set for March 1.

32. On January 15, CCES sent the *Athlete* an email advising him of the revised timetable for submissions and the hearing date set by this Tribunal and forwarded to him the SDRCC's email confirming these dates. In its email to the *Athlete*, CCES stated: "Should you not be in a position to engage in accordance with this schedule I would ask that you contact the SDRCC right away otherwise the process will proceed as outlined below." The *Athlete* did not respond.

33. The *Athlete* has not filed any responding materials, nor has he otherwise communicated with CCES or this Tribunal.

34. In certain of his communications with CCES and on certain preliminary conference calls, the *Athlete* adverted to having health issues and even being admitted to a hospital. None of this information has been substantiated. A recent review of the *Athlete*'s publicly accessible social media activity suggests that, throughout the relevant period, the *Athlete* has been able to use a computer with internet access – and he has had the time and capacity to be repeatedly updating his Facebook and Twitter accounts.

35. With respect to the hearing on the merits of the case set for March 1, the SDRCC posted on the Case Management Portal, to which the *Athlete* has access, the notes of the fifth preliminary conference call held on January 14 which specify that a hearing will be held on March 1, 2016. As well, the SDRCC took the extra step of sending the *Athlete* an e-mail on January 27,

2016 reminding him of the said hearing by conference call scheduled for March 1. Finally, on February 27, an automatic event reminder was e-mailed to all the parties through the Case Management Portal, reminding them of the upcoming hearing to be held on March 1.

36. CCES and Athletics Canada indicated that, in light of the *Athlete's* lack of participation in the process, they were willing to have the hearing proceed by way of documentary review. In response, the Tribunal issued the following order:

> Although Mr. Connor has to date not filed any submissions in accordance with the latest deadline, he nevertheless has the right to participate in the hearing scheduled for March 1, 2016 and to present evidence and arguments at that hearing if he so chooses. Therefore, the hearing will remain scheduled for March 1, 2016 and if Mr. Connor does not attend at the outset of the conference call, the proceedings will be conducted by documentary review and there will be no need for an oral presentation by the parties.

37. On March 1, 2016, an oral arbitration hearing by teleconference was held pursuant to paragraph 7.9 (b) of the *Code*. The *Athlete* did not attend the hearing, nor did any representative attend on his behalf.

THE POSITIONS OF THE PARTIES

The CCES:

38. Pursuant to Rule 3.1 of the CADP, CCES bears the burden of proving an anti-doping rule violation (ADRV) "to the comfortable satisfaction of the

hearing panel" – a standard that is "greater than a mere balance of probabilities, but less than proof beyond a reasonable doubt."

39. That standard is easily met in this case. The presence of 19-NA, of exogenous origin, was proven by way of reliable scientific evidence. 19-NA was determined to exist in both the *Athlete*'s April Sample and his May Sample, based on a series of tests conducted by the Laboratory. As a WADA-accredited institution, the Laboratory is presumed to have conducted *Sample* analysis and custodial procedures in accordance with the International Standard for Laboratories (see Rule 3.2.2).

40. Neither the process followed by the Laboratory, nor the results indicating *Adverse Analytical Findings* for 19-NA of exogenous origin, have been contradicted or challenged in any way. Indeed, in his September 3rd email to the Tribunal, the *Athlete* appears to concede their validity by stating that he does not intend to challenge the validity of the testing results.

41. This Tribunal may draw an adverse inference from the *Athlete*'s refusal to participate in the hearing process (see Rule 3.2.5).

42. As outlined above, 19-NA is a *Prohibited Substance*, and not a *Specified Substance.* Pursuant to Rule 2.1, the presence of any amount of 19-NA in an *Athlete*'s body is an ADRV – regardless of the *Athlete*'s level of *Fault* or negligence.

43. The Rules set a mandatory four-year period of *Ineligibility* in the circumstances of this case, unless the *Athlete* can demonstrate that his ingestion of 19-NA was "not intentional".

44. The applicable sanction for an ADRV involving Rule 2.1 (presence of a *Prohibited Substance*) is set out in Rule 10.2 which specifies a period of *Ineligibility* of four years for a violation of Rule 2.1 where the rule violation does not involve a *Specified Substance*.

45. The requirements for the presumptive four-year period of *Ineligibility* set out in Rule 10.2.1 apply in this case: an ADRV for Rule 2.1 has been established, and the ADRV does not involve a *Specified Substance.* With respect to rebutting the presumption, the *Athlete* has not proven, or even attempted to prove, that his ADRV was "not intentional".

46. The other means by which the four-year period of *Ineligibility* could be reduced also have no application in this case.

47. Accordingly, the only applicable sanction is a four-year period of *Ineligibility*, effective as of the date of the final decision by this Tribunal, pursuant to Rule 10.11.

48. CCES requests that the *Athlete* be sanctioned with a four-year period of *Ineligibility,* starting on the date of the final decision by this Tribunal.

DECISION

49. Mr. Earle Connor, the Athlete in this matter, failed to attend or otherwise participate in the arbitration hearing on the merits of the case held on March 1, 2016. This was despite repeated communications to him from the SDRCC

regarding the specifics of the hearing via the Case Management Portal and by e-mail.

50. Moreover, since the fourth preliminary conference call held on November 25, 2015, the Athlete has failed to respond to, or acknowledge receipt of, the numerous communications from the SDRCC pertaining to the deadline for his submissions and the hearing of March 1, 2016. In fact, throughout the process, the Athlete has shown a disregard to the parties, the Tribunal and the SDRCC, resulting in a waste of time and resources. His lack of participation and of response to attempts by the SDRCC and CCES to communicate with him and his repeated failures to comply with deadlines, requests for information and procedural orders amount to an abuse of process.

51. Section 6.18 of the *Canadian Sport Dispute Resolution Code* (2015) stipulates as follows regarding the procedure at arbitration in the absence of a party:

> An Arbitration may proceed in the absence of any Party or representative who, after due notice, fails to be present or fails to obtain a postponement. 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.

52. As well, Rule 8.2.2 of the *Canadian Anti-Doping Program* (CADP) provides:

> The Doping Tribunal shall determine the procedure to be followed at the hearing. The Doping Tribunal shall determine how to proceed in the absence of the *Athlete*...

53. In the weeks leading up to the hearing on March 1, 2016, CCES provided extensive documentary evidence in the form of affidavits and attached exhibits. This evidence was acknowledged and confirmed at the hearing. The receipt and review of the submissions filed by CCES were also acknowledged. The Tribunal posed a number of questions of clarification regarding the evidence and submissions to counsel for CCES and the responses were noted.

54. The Tribunal finds that the uncontested evidence presented by CCES has satisfied its burden of proof specified under Rule 3.1 of the CADP in establishing an anti-doping rule violation by the Athlete "to the comfortable satisfaction of the hearing panel".

55. The presence of 19-NA (19-norandrosterone), of exogenous origin, was proven by way of reliable scientific evidence. 19-NA was determined to exist in both the Athlete's April sample and May sample, based on a series of tests conducted by the Laboratory. Pursuant to Rule 3.2.2, as a WADA-accredited institution, the Laboratory is presumed to have conducted sample analysis and custodial procedures in accordance with the International Standard for Laboratories.

56. Under Rule 3.2.5, this Tribunal may draw an inference adverse to the Athlete based on his refusal to appear at the hearing.

57. 19-NA (19-norandrosterone) is a Prohibited Substance, and not a Specified Substance. Pursuant to Rule 2.1, the presence of a Prohibited Substance such as 19-NA (19-norandrosterone) in an Athlete's body is an anti-doping rule violation, regardless of the Athlete's intent, fault or negligence.

58. Rule 10.2.1.1 specifies that the period of Ineligibility for a violation of rule 2.1 (presence of a Prohibited Substance) shall be four years where the anti-doping rule violation does not involve a Specified Substance, unless the Athlete can establish that the violation was not intentional. In the case at hand, the Athlete has not proven that his anti-doping rule violation was not intentional.

59. The other means by which the four-year period of Ineligibility could be reduced also have no application in this case.

60. In the result, the proposed sanction of a four-year period of Ineligibility is hereby confirmed. Rule 10.11 states in part: "Except as provided below, the period of *Ineligibility* shall start on the date of the final hearing decision providing for *Ineligibility*..." However, Rule 10.11.3.1 then specifies that if a Provisional Suspension is imposed and respected by the Athlete, "then the *Athlete* or other *Person* shall receive a credit for such period of *Provisional Suspension* against any period of *Ineligibility* which may ultimately be imposed." It follows that the Athlete shall receive credit for the Provisional Suspension imposed upon him by the CCES in its notice of July 29, 2015.

Dated at Ottawa this 4th day of March, 2016.

Ross C. Dumoulin
Arbitrator