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

NO: SDRCC DT 18-0291
(DOPING TRIBUNAL)

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)

AND

DOMINIKA JAMNICKY (Athlete)

AND

TRIATHLON CANADA

AND

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

Before:

The Hon. L. Yves Fortier, QC (Arbitrator)

Appearances and Attendances:

On behalf of the CCES:	Mr. Kevin Bean, CCES Mr. David Lech, CCES Ms. Luisa Ritacca, legal representative Mr. Justin Safayeni, legal representative
On behalf of the Athlete:	Ms. Dominika Jamnicky, athlete Mr. James D. Bunting, legal representative Ms. Sarah Boyle, legal representative

PARTIAL FINAL AWARD

31 May 2019

Table of Contents

I. INTRODUCTION

1. This proceeding before the Doping Tribunal is held pursuant to Article 7 of the 2015 *Canadian Sport Dispute Resolution Code* (the "**Code**"). Article 7 sets out the "*Specific Arbitration Procedural Rules for Doping Disputes and Doping Appeals".* These Rules serve as an extension, a repetition in many respects, of Rule 8.0 of the 2015 *Canadian Anti-Doping Program* (the "**Program**"), which implements the mandatory components of the *World Anti-Doping Code* (WADA Code). In short, this hearing falls within the framework of an international program put in place to eradicate doping in sports and to which Canada adheres by establishing its own Program.

2. The Canadian Centre for Ethics in Sport (the "**CCES**") has the responsibility to administer the Anti-Doping Program. The CCES is a Signatory of the WADA Code; it is recognized by the World Anti-Doping Agency (WADA), for the purposes of applying the WADA Code, as Canada's National Anti-Doping Organization. The CCES is an independent non-profit organization. In particular, it is in charge of collecting and analyzing athletes' samples and, where required, asserting violations of anti-doping rules. Such allegation may then be subject to a hearing before a Doping Tribunal established by the Sport Dispute Resolution Centre of Canada (SDRCC).

3. In the present case, the CCES alleges that the Athlete, Dominika Jamnicky, a triathlete, committed an anti-doping rule violation under rule 2.1 of the Program; namely, a prohibited substance (Clostebol, an anabolic agent) from the 2018 WADA Prohibited List (section S-1) was detected in her urine sample collected out-of-competition on 24 April 2018. As a result, the CCES recommended that the sanction for this first violation be four years of ineligibility pursuant to Rule 10.2.1 of the Program because Clostebol is not a Specified Substance but rather a Prohibited one. The Athlete voluntarily accepted a provisional suspension as of 19 May 2018 prohibiting her from participating in any Competition until such time as a decision has been rendered by the Doping Tribunal.

4. Ms. Jamnicky exercised her right to request a hearing before a doping dispute tribunal. In her submissions, the Athlete confirmed that she does not contest the results of her urine samples analysis but nevertheless claims that she did not commit an anti-doping rule violation as she did not ingest Clostebol intentionally. She asserts that the presence of Clostebol in her sample is due to the ingestion of contaminated meat.

II. PROCEDURAL HISTORY

8. On 18 June 2018, the CCES notified the Athlete of an anti-doping violation.

9. I was appointed as sole Arbitrator (the Doping Tribunal) by the Parties on 16 July 2018.

10. On 26 July 2018, I held a preliminary conference call with the Parties to discuss the procedural calendar. Minutes of the call were then circulated.

11. On 14 January 2019, I endorsed the Parties' agreement to bifurcate the proceedings into two stages as follows:

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

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

12. On 14 January 2019, in accordance with the procedural calendar, the Athlete filed her response to the CCES' anti-doping violation accusation together with a polygraph examination report, the expert reports of Mr. Steven Overgaard, Ms. Melinda Shelby, Ph. D. and Dr. Tomas Martin-Jimenez, her will-say statement, those of her boyfriend Mr. Kyle Boorsma, the High Performance Director of Triathlon Canada Mr. Eugene Liang, and Mr. Milind Bhargava, a Security Consultant with Deloitte, as well as factual exhibits and legal authorities.

13. On 15 January 2019, the Parties filed an Agreed Statement of Facts.

14. On 29 January 2019, the CCES filed its response together with the expert reports of Dr. Ian Lean, Dr. Martin Appelt, and Prof. Christiane Ayotte, and the affidavits of Dr. Lance Brooker and Mr. Akira Kataoka, as well as factual exhibits and legal authorities.

15. On the same day, the Parties submitted an agreed agenda for the hearing.

16. A hearing was held on 6 and 7 February 2019 in Toronto at the offices of Mr. James Bunting, counsel for the Athlete, with the consent of the CCES' counsel.

17. The Parties filed post-hearing briefs on 18 March 2019, together with supplementary legal authorities.

18. A closing hearing was held on 25 March 2019 in Toronto at the offices of Mr. James Bunting, counsel for the Athlete, with the consent of the CCES' counsel.

19. At the conclusion of the closing hearing, the Parties agreed to forego the time limits stipulated at Article 6.22 (d) of the Code for the rendering of the Award, and the Award with written reasons in respect of Stage 1. The Parties agreed that an Award with written reasons in respect of Stage 1 would be issued before the end of the month of April 2019.

20. On 25 April 2019, I requested, and the Parties agreed, that my Award with written reasons in respect of Stage 1 could be issued on or before 7 June 2019.

III. SCOPE OF THIS PARTIAL AWARD

21. In view of the Parties' Agreement[1], this Partial Final Award addresses solely the issues of (i) source, and (ii) whether the asserted anti-doping rule violation (ADRV) was intentional, and (iii) whether the Athlete bears No Fault for her adverse analytical finding (AAF).

22. In Stage 2, the Parties will then make submissions as to the consequences that should flow from the present Partial Final Award.

IV. APPLICABLE LAW

23. Article 7.11 of the Code provides as follows:

> ***7.11 Burdens and Standards of Proof***
>
> *Pursuant to Rule 3.1 of the Anti-Doping Program, in Doping Disputes, the CCES shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the CCES has established an anti-doping rule violation to the comfortable satisfaction of the Doping Dispute Panel, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. When the rules of the Anti-Doping Program place the burden of proof upon the Party alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.*
>
> [My emphasis]

24. According to Rule 2.1 of the Program provides that:

> ***2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample***
>
> *2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence*

[1] See para. 12 above.

or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Rule 2.1.

2.1.2 Sufficient proof of an anti-doping rule violation under Rule 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or, where the Athlete's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample shall constitute an anti-doping rule violation.

2.1.4 As an exception to the general rule of Rule 2.1, the Prohibited List or International Standards may establish special criteria for the evaluation of Prohibited Substances that can also be produced endogenously.

25. Rule 10.2 of the Program provides, in relevant part, as follows:

10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method

The period of Ineligibility for a violation of Rules 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Rules 10.4, 10.5 or 10.6:

10.2.1 The period of Ineligibility shall be four years where:

10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, <u>unless the Athlete</u> or other Person <u>can establish that the anti-doping rule violation was not intentional</u>.

[…]

10.2.3 As used in Rules 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew

constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance. [My emphasis]

26. Rule 10.4 of the Program provides as follows:

10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence

If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.

27. Rule 10.5 of the Program provides, in relevant part, that:

10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Rule 2.1, 2.2 or 2.6.

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 or other Person's degree of Fault.

V. THE EVIDENCE

28. Ms. Jamnicky is a 25-year-old elite level triathlete.

29. On 24 April 2018, she was tested out of competition by the CCES.

30. On 11 May 2018, the CCES was notified that the analytical finding of the Athlete's A sample revealed the presence of a prohibited substance, Clostebol.

31. The estimated concentration of the Clostebol metabolite detected in the Athlete's urine was 0.15 ng/ml. This is a trace amount, which is 33 times lower than WADA's Minimum Required Performance Limit for WADA Accredited laboratories.

32. On 18 June 2018, following various communications with the Athlete, the CCES issued a Notification of an Anti-Doping Rule Violation and recommended that the mandatory period of ineligibility of four years be imposed.

33. The Athlete maintains that the presence of Clostebol in her urine samples is due to the ingestion of contaminated meat.

34. The Athlete's evidence consists of the following:

    34.1 Her Will-say Statement

    Ms. Jamnicky testified in person at the hearing.

    In her Statement, Ms. Jamnicky describes her background and experience in sport. She asserts that sport is both her passion and the centre of her life. She focuses not only on her individual results but also on her role as a mentor and coach to young athletes.

    In regard to the AAF, Ms. Jamnicky writes that she is a member of the CCES Registered Testing Pool and has been tested on numerous occasions. In fact, she was tested 22 times prior to the AAF, including a blood and urine test on 21 January 2018, and never tested positive.

    Ms. Jamnicky says she is vigilant about what she puts in her body. She ensures that any medication she takes does not contain Prohibited Substances. She takes very

few supplements and all supplements that she does take are approved by her sports medicine doctor in Guelph, Dr. Mountjoy.

Ms. Jamnicky affirms that she has never used a Prohibited Substance. She was shocked by the AAF. The asserted ADRV, she complains, is a direct assault on her honesty and personal integrity.

Ms. Jamnicky also asserts that she has done everything in her power to determine the source of the AAF in order to prove that she is not a cheat. She has searched tirelessly for the answer as to how Clostebol could have been found in her body. She retraced her steps in the weeks leading to her doping control test on 24 April 2018. She reviewed with meticulous care, she writes, every product she used between her last clean doping control test on 21 January 2018 and the date of her doping control test the morning of 24 April 2018.

All the products she used between her 21 January 2018 and 24 April 2018 tests are set-out at paragraph 29 of her statement. The list of products includes such items as Polysporin cream, Purell hand sanitizer, tooth paste, and various cosmetic products.

Ms. Jamnicky testified that she asked an expert, Mr. Overgaard, to analyze these products in order to determine whether any of them could have been contaminated by Clostebol. Despite her limited financial resources, she also offered to assist the CCES in analyzing or testing any products that it wanted. She referred to Mr. Overgaard's conclusion that none of the products she listed contained Clostebol.

During her research, Ms. Jamnicky learned that Clostebol can be used as a growth promoter in livestock. Accordingly, she prepared a list of all the meat she ate in the weeks leading up to her doping control test on 24 April 2018. This includes both animal food products in Australia between 7 April 2018 and 14 April 2018 (where she was staying following the Commonwealth Games) and animal food products she ate after her return to Canada on 16 April 2018 until her test on 24 April 2018.

Ms. Jamnicky concludes that, as a result of her research, only the consumption of contaminated meat can account for the Clostebol found in her body. "*Nothing else makes any sense*", she says.

Ms Jamnicky submits that her evidence is corroborated by the following.

34.2 <u>The Results of a Polygraph Test</u>

Ms. Jamnicky submitted to a polygraph test which tested the truthfulness of a statement signed by her that reads as follows:

> *A urine sample that I provided on April 24, 2018 returned an Adverse Analytical Finding (AAF) for clostebol metabolite. I have never intentionally ingested a steroid or had a steroid injected into my body. I listed all of the supplements, creams, vitamins, medications and drugs that I consumed between January 21, 2018 and April 24, 2018 in a witness statement dated September 28, 2018. I did not take or use any supplements, creams, vitamins, medications or drugs between January 21, 2018 and April 24, 2018 that are not disclosed in my witness statement.*

Mr. Frank Wozniak who administered the test, concluded that Ms. Jamnicky can reasonably be excluded as someone who is lying and opined that the statistical probability of deception is less than ten percent.

Although the Parties have agreed that *"[t]he Arbitrator should not give the results of the polygraph test administered to Ms. Jamnicky any evidentiary weight*"[2] Ms. Jamnicky asserts that the fact that she submitted to a polygraph test ought to be considered by the Arbitrator in assessing her credibility.

The CCES disagrees. It submits that if the results of the polygraph cannot be given any evidentiary weight, the fact that she submitted to such a test cannot be used to bolster (or undermine) the Athlete's evidence. In any event, says the CCES, the credibility of the Athlete is a question of fact for this Tribunal to consider and evaluate for himself.

34.3 A Will-say Statement from the Athlete's Boyfriend, Kyle Boorsma

Mr. Boorsma, the Athlete's boyfriend for four years, testified in person.

Mr. Boorsma works at the University of Guelph as an Exercise Physiologist and also competes as a provincial level triathlete. Mr. Boorsma affirms that Ms. Jamnicky was devastated when she was notified of the AAF. He also testified that Ms. Jamnicky would never take a banned substance and adds that she hardly takes any vitamins or supplements and works closely with her doctor in respect of the products that she does use. Mr. Boorsma states at para. 15 of his Statement that, "*neither Domi nor I use any banned substances, nor do we contain* [sic] *any banned substances in our home. I still adhere to the anti-doping policies as a provincial triathlete and know that Domi does also.*"

[2] Parties' Stipulation regarding Polygraph Evidence, CCES Brief of 27 January 2019.

34.4 A Will-say Statement from the High Performance Director of Triathlon Canada, Eugene Liang

Mr. Liang did not testify.

Mr. Liang provided a statement of support for Ms. Jamnicky. He writes that, in his role as the High Performance Director, he has found her to be honest. She is, in every way, "*a stand up young woman*."

Mr. Liang also describes a conversation he had with Ms. Jamnicky the day she was notified of her AAF. He recalled that her voice was trembling, that she was in complete shock and said she had no idea how this could have happened. Ms. Jamnicky assured him that she had never taken a prohibited substance.

Mr. Liang writes the following in his Statement:

> *I cannot imagine that she intentionally doped. I have observed first hand that she respects and follows the framework and rules that govern the sport. It is simply not Domi's character to lie or cheat. I have only known her to be transparent and humble. I have no reservation stating that in my opinion, whatever the source of Domi's adverse analytical finding, it was not intentional – this is not her character.*

34.5 The Expert Report of Ms. Melinda Shelby, Ph.D.

Dr. Shelby testified by videoconference.

Dr. Shelby is a Senior Scientist for Sports Testing Services with the Aegis Sciences Corporation, with well over a decade of experience in sports toxicology. She has performed or supervised over 50,000 anabolic steroid screen tests. Dr. Shelby was assisted by Dr. Philip Poston in the preparation of her report. Dr. Poston is the Vice President, Scientific Affairs with Aegis and also has extensive toxicology experience, including as the Laboratory Director for the University of Florida Racing Lab where he performed equine and canine anti-doping tests.

Dr. Shelby sets out, from a toxicology perspective, the different scenarios that could have resulted in Ms. Jamnicky's AAF. She explains that the concentration of Clostebol detected in Ms. Jamnicky's urine was 0.15 ng/ml which is, "*essentially a trace amount*". Moreover, 0.15 ng/ml is an estimate only, not an accurate quantification and is subject to measurement uncertainty. The actual concentration Clostebol that was detected in Ms. Jamnicky's urine could be materially less or greater than the estimated amount.

From a toxicology perspective, Dr. Shelby opines that the trace amount of Clostebol detected in Ms. Jamnicky's urine could have resulted from a purposeful or

unintentional/inadvertent administration. In regard to a purposeful administration, Dr. Shelby opines that, although Ms. Jamnicky denies that she intentionally injected or ingested Clostebol, "*scientifically it is possible, for the very low concentration of M1 [a Clostebol metabolite]]in [her] urine to be explained as a late stage of the elimination period from previously administered injection(s) or oral administration of clostebol.*"

In regard to an unintentional/inadvertent administration, Dr. Shelby explains that the estimate concentration of Clostebol in Ms. Jamnicky's urine is, "*so low that potential sources of exposure outside of purposeful administration with intent to gain a performance advantage*" are possible as well. In particular, she testified that the trace amount of 0.15 ng/ml is 33 times lower than the Minimum Required Performance Level for Clostebol. Considering the trace level of Clostebol detected, Dr. Shelby opines that each of the following four inadvertent exposure pathways could have caused the AAF:

(a) the application of a product such as a cream or spray that contains Clostebol;

(b) direct application/exposure to Clostebol through intimate contact with an individual that has applied Clostebol for medicinal purposes;

(c) oral consumption of Clostebol either through a product that lists Clostebol as an ingredient or that is contaminated with Clostebol; or

(d) consumption of a meat product that contained Clostebol either while Ms. Jamnicky was in Canada or Australia.

34.6 <u>The Expert Report of Mr. Steven Overgaard</u>

Mr. Overgaard testified in person.

Mr. Overgaard is the CEO of NDI ADRL Inc. which carries on business under the name Diteba. Diteba is a global leader in complex analytical and bioanalytical testing. Mr. Overgaard is a Professional Engineer and Chartered Professional Accountant. He also holds an MBA. During his career, Mr. Overgaard has been involved in the formulation and implementation of quality systems in the manufacturing process to ensure that products and services meet or exceed the applicable industry leading standards. Mr. Overgaard's responsibility at Diteba includes managing and working with a team to comply (or exceed) all quality assurance requirements of both Health Canada and the United States Food and Drug Agency.

Mr. Overgaard reviewed and, in some cases, analyzed the products that Ms. Jamnicky was taking between her clean doping control test on 21 January 2018 and her test on

24 April 2018. Mr. Overgaard concluded that it, "*is implausible that any of the products Ms Jamnicky has listed in the Statement were contaminated with Clostebol.*"

34.7 The Expert Report of Dr. Tomas Martin-Jimenez

Dr. Martin-Jiménez testified by videoconference.

Dr. Martin-Jiménez is an expert in Veterinary Medicine and the use of anabolic and other growth promoters in animal food products. He confirms that Clostebol is not permitted for use as a growth promoter in Canada or Australia. However, he disagrees with the opinion expressed by the CCES' witnesses that it is improbable that animal food products in Australia or Japan could contain Clostebol. Dr. Martin- Jiménez opines that it is possible that Ms. Jamnicky consumed meat in Australia or Canada that had been illegally treated with Clostebol.

Dr. Martin-Jiménez states that Clostebol is a well-known and effective growth promoter for animal food products which was widely used in the 1990s. By way of illustration, he referred to a 1994 report in Belgium that concluded that, in the previous four years, Clostebol acetate was the most abused exogenous hormone being identified in 86% of all positive injection sites in cattle.

Dr. Martin-Jiménez also asserts that while it is illegal to use Clostebol as a growth promoter for livestock in Australia and Canada, the monitoring systems in both countries for domestic and imported livestock products do not test for Clostebol. This, he says, creates an opportunity for anyone who seeks to enhance the growth of their animals in Australia or Canada to administer Clostebol illegally.

He does not share the opinion of the CCES' witnesses who attest that, because of the availability of legally permitted growth hormones, there would be very little incentive to use Clostebol.

Dr. Martin-Jiménez testifies that legal growth promoters are not freely accessible to producers. They have to be prescribed or used under strict veterinary control. As a result, there are restrictions on the type of substances available for use by animal product producers, including a fixed tolerance (maximum residue level) that is permitted, which can restrict the results or performance achieved with the use of a growth promoter. Illegal products are not subject to these restrictions which makes them attractive to producers willing to engage in illegal activity.

Dr. Martin-Jiménez also notes that the illegal use of growth promoters, in countries that have approved growth promoters, is not uncommon. In Mexico, for example, a

number of growth promoters are approved for use, but clenbuterol, which is not approved, is still widely used.

Dr. Martin-Jiménez further asserts that Australian beef imports have a history of serious violations resulting in massive rejection of products. This indicates, according to him, that some Australian animal food producers may not comply with existing regulations and use anabolic steroids.

34.8 A Will-say Statement from Milind Bhargava

Mr. Bhargava testified in person.

Mr. Bhargava, a Security Consultant with Deloitte, affirms that Clostebol is available for purchase over the dark web from a supplier in Australia and that it is also available for purchase in Canada from suppliers outside of Canada.

35. In its reply, the CCES, in brief, submits that it was highly improbable that the Athlete consumed meat contaminated with Clostebol while in Australia or Canada.

36. The CCES' evidence consists of the following:

36.1 The Expert Report of Dr. Ian Lean

Dr. Lean testified by videoconference.

Dr. Lean has a PhD in Comparative Pathology. He is a Doctor of Veterinary Science and an Adjunct Professor at the University of Sydney's Faculty of Veterinary Science. He is a past President of the Australian Association of Cattle Veterinarians. Dr. Lean has received numerous awards for his work and in the field of veterinary science, including the Gilruth Prize (the highest award given by the Australian Veterinary Association).

Dr. Lean's conclusion is that "*it is extremely unlikely, indeed improbable, that the athlete consumed meat products in Australia that contained clostebol.*"

Dr. Lean's conclusion is based on the following:

(a) Clostebol is illegal for use in any food-producing animals in Australia;

(b) He is unaware of any report, evidence, data or information to the effect that Clostebol has been used illegally in food-producing animals in Australia;

(c) Australian meat producers operate in compliance with applicable regulations. According to the results of the National Residue Survey – the yearly monitoring

program for Australian beef, chicken and pork producers (including random screening of meat products) – compliance with Australian regulations has been between 99.2% and 100% during the past 8 years;

(d) only 0.066% of beef consumed within Australia is imported. All fresh and frozen meat is imported from New Zealand, where Clostebol is also illegal;

(e) with only two exceptions, the meat the Athlete says she consumed while in Australia is home-grown Australian beef or Australian chicken;

(f) one exception is the Brannan's brand "*Herb & Garlic Beef Sausages*". This product is sourced almost solely from Australian-grown beef, given the "*Made in Australia*" label. However, even if this product included any imported beef, Australia does not import beef from countries that use Clostebol in food-producing animals;

(g) the second exception is Berg brand chorizo pork sausage. Approximately 40% of pork consumed in Australia is imported. Even assuming this product contained imported pork, approximately 95% of Australia's pork imports come from Denmark and Canada, where Clostebol is not allowed in food-producing animals.

(h) Clostebol injections are not allowed for use in food-producing animals in any country;

(i) legal alternatives to Clostebol as a growth hormone for food-producing animals are readily available in Australia without the need for a prescription and without the need for veterinary supervision;

(j) a significant amount of Australian beef is exported to countries that test for the illegal use of Clostebol, making the use of Clostebol both unnecessary and risky; and

(k) Australia did not import beef from Japan during or prior to when the Athlete was in Australia.

36.2 <u>The Expert Report of Dr. Martin Appelt</u>

Dr Appelt testified by video-conference.

Dr. Martin Appelt is the Senior Director, Single Food Program, Program Controls and Performance Division at the Canadian Food Inspection Agency ("CFIA"). Dr. Appelt is a practicing veterinarian and has been a member of the Royal College of Veterinary Surgeons since 1997.

Dr. Appelt's conclusion is that it "*would be an extremely rare and unlikely occurrence"* for meat to be contaminated with clostebol in Canada.

Dr Appelt's conclusion is based on the following:

(a) Clostebol is prohibited for use in any food-producing animals in Canada;

(b) Canada does not allow the importation of meat for human consumption from animals injected with Clostebol and only imports meat from countries that meet Canadian requirements;

(c) in his 14 years with the CFIA, Dr. Appelt has never heard of any occurrence of Clostebol-tainted meat in Canada (domestically produced or imported).

(d) six legal hormonal growth promoters are approved for use in beef cattle in Canada.

36.3 <u>The Expert Report of Prof. Christiane Ayotte</u>

Prof. Ayotte testified in person.

Prof. Ayotte is the director of the Doping Control Laboratory at the INRS-Institut Armand-Frappier ("Montreal Laboratory").

She concludes that it is "extremely unlikely" that the consumption of contaminated meat in Australia can account for the Clostebol in the Athlete's sample. She reaches this conclusion for a number of reasons, including:

(a) only 1 out of approximately 50,000 athlete urine samples tested over the past eight years at Australia's WADA-accredited laboratory contained any clostebol metabolites (concentration estimated at 0.4 ng/mL);

(b) the single sample containing Clostebol in Australia also contained metabolites of other anabolic steroids (oxandrolone and stanzolol), suggesting intentional use rather than contamination;

(c) only 60 out of nearly 1,000,000 athlete urine samples tested across all WADA-accredited laboratories, worldwide, between 2014-2017 contained Clostebol.

Prof. Ayotte shares Dr. Appelt's view that it is "extremely unlikely" that the consumption of contaminated meat in Canada is the source of the Clostebol in the Athlete's sample.

She reaches this conclusion for many of the same reasons invoked by Dr Appelt, as well as the fact that, of all Canadian athlete urine samples tested over the past 20

years, only two have tested positive for Clostebol (including the Athlete). The other case (reported in 2017) involved a sample with several prohibited substances, suggesting intentional doping.

Prof. Ayotte explains that, particularly given the fact that the Montreal Laboratory can detect Clostebol metabolites at low levels, *"[t]he rarity of clostebol findings in Canadian athletes tested in our laboratory suggests that they are not 'exposed' to clostebol either deliberately or inadvertently in the country (including by way of meat contamination).*" If Canadian food was contaminated with Clostebol, Prof. Ayotte states that "*we would have found more than 2 cases over 20 years.*"

Prof. Ayotte also opined that intentional use for a performance-enhancing purpose, or use of medicinal products or creams containing Clostebol, could not be excluded in this case.

36.4 The Affidavit of Dr. Lance Brooker

Dr. Brooker testified by videoconference.

Dr. Brooker is a senior scientist at the National Measurement Institute (NMI), which is where the Australian Sports Anti-Doping Authority sends the urine samples of Australian athletes for testing.

Based on his review of the NMI records, he asserts the following in his affidavit:

(a) over the past eight years, the NMI has tested approximately 50 thousand athlete urine samples;

(b) of those samples, only 1 contained Clostebol metabolite (concentration estimated to be 0.4 ng/ml);

(c) this sample that contained clostebol metabolite also contained metabolites of other anabolic steroids, which suggests intentional use.

He also explains that the NMI's initial testing procedure limit of detection for the Clostebol metabolite is estimated to be 0.5 ng/ml. He says that this detection limit is conservative, and that it is possible that Clostebol metabolites in lower concentration could be detected by NMI testing procedures.

36.5 The Affidavit of Mr. Akira Kataoka

Mr. Kataoka is the General Manager of the Results Management and Intelligence Department of the Japan Anti-Doping Agency ("JADA").

He confirms in his affidavit that JADA has never had any positive results for Clostebol or its metabolites since it began testing athletes.

Clostebol is banned from meat supply in Japan since the 1960s.

"*Given the strict controls on the processing of meat to be used for human consumption in Japan, JADA has not had any issues with meat contamination cases*", writes Mr. Kataoka.

I note that the Athlete has withdrawn her original submission that the contaminated meat she says she ingested could have originated from Japan.

VI. PARTIES' SUBMISSIONS

A. ATHLETE'S POSITION

37. As noted earlier, the Athlete does not contest the results of her urine sample analysis which confirmed the presence of Clostebol, but submits that she did not commit an anti-doping rule violation as she did not ingest Clostebol intentionally, the presence of Clostebol being due to her ingestion of contaminated meat in Canada or Australia.

38. Accordingly, the Athlete requests that, at this stage of the proceedings, as the source of her AAF is contaminated meat, the Tribunal issue an award declaring that the asserted ADRV was not intentional and that she bears No Fault for her AAF.

39. In the alternative, should the Tribunal find that the Athlete has not discharged her burden of proving, on the balance of probabilities, the source of her AAF, the Athlete submits that she has discharged her burden of proving that the AAF was not intentional.

1. Burden of Proof

40. The Athlete acknowledges that she bears the burden of proving, on the balance of probabilities, the source of Clostebol detected in her urine, whether she acted without intent, and whether she bears No Fault.

41. The Athlete submits that the balance of probabilities standard has been applied by Court of Arbitration for Sport (CAS) panels in cases where athletes sought to establish the source of their AAF, including cases where athletes have raised the possibility of meat contamination. These cases, submits the Athlete, stand for the proposition that, in circumstances where there are more than two potential sources, an athlete will satisfy the balance of probabilities test if he or she can establish that the source on

which he or she relies on is more probable than other possible explanations or the most likely of the potential sources.

42. In this respect, the Athlete relies on the following decisions.

43. In *WADA & ITF v. Gasquet* (CAS 2009/A/1930), the CAS Panel found that Mr. Gasquet's positive test for cocaine occurred following his kissing a woman in a bar who had been using cocaine that evening. In regard to the assessment of evidence on a balance of probabilities in a case where there were multiple explanations for the AAF, the CAS Panel held as follows:

> *[…] in case [where] it is offered several alternative explanations for the ingestion of the prohibited substance, but it is satisfied that one of them is more likely than not to have occurred, the Player has met the required standard of proof […] In that case, it remains irrelevant that there may also be other possibilities of ingestion, as long as they are considered by the Panel to be less likely to have occurred. In other words, for the Panel to be satisfied that a means of ingestion is demonstrated on a balance of probability simply means, in percentage terms, that it is satisfied that there is a 51% chance of it having occurred.*[3]

44. Similarly, in *UCI v. Contador* (CAS 2011/A/2084 and 2011/A/2086), a case where the athlete asserted that consumption of contaminated meat was the source of his AAF, the CAS Panel applied the balance of probabilities standard in the same manner but also added that arbitral panels should be mindful of cases of so-called "evidence calamity" where an athlete faces serious difficulty in discharging his or her burden of proving a negative fact. The Panel in Contador set-out the following framework:[4]

    (a) The athlete must provide a credible explanation as to how the Prohibited Substance entered his or her body.

    (b) The athlete will discharge his or her onus where:

        (i) the explanation is possible; and

        (ii) other sources for the substance entering the athlete's body either do not exist or are less likely.

    (c) The Panel will evaluate the evidence and determine which of the possible explanations for the Prohibited Substance being in the athlete's body is most likely.

[3] *WADA & ITF v. Gasquet* (CAS 2009/A/1930), at para. 31.
[4] Antonio Rigozzi, Brianna Quinn, *Evidentiary Issues Before CAS*, International Sports Law and Jurisprudence of the CAS 4th Conference CAS & SAV/FSA Lausanne 2012, at p. 33 – 34.

45. The Athlete submits that the decision in *Contador* recognizes that b(ii) above involves the proof of a negative fact and, for that reason, the party contesting the athlete's case must substantiate and explain in detail why it considers the facts submitted by the athlete to be wrong.

46. Following *Contador*, the CAS Panel in *UCI v. Jana Horakova & CCF* (CAS 2012/A/2760) found as follows:

> *5.23. The Panel will therefore have to appraise whether, in view of all of the parties' submissions and evidence, (i) the ingestion of contaminated meat by the First Respondent was possible and (ii) whether such contamination was, on a balance of probability, the more likely source of ingestion of the prohibited substance out of the three suggested scenarios.*

47. Finally, the FISA Panel in *José Alberto Arriaga Gomez* (FISA decision 22 June 2015), held the following (at p. 8):

> *The Contador Cases in the CAS (2011/A/2084 and 2011/A/2086) established that in order to rely on contaminated meat justifying the application of Article 10.5, the athlete must show that the ingestion of meat was the only possible means of ingesting the boldenone, or that it is more probable than any other possible explanation.* ***The Panel needs to be satisfied of this on the balance of probabilities and if it is only slightly more probable than other possible explanations, then the Athlete has met the burden and standard of proof required*****.** [Athlete's emphasis]

48. Considering the trace level of Clostebol metabolite detected in her urine, the Athlete submits that there are, in this case, a finite number of explanations for the AAF. They are:

    (a) application of a product such as a cream or spray that contains Clostebol or oral consumption of Clostebol either through a product that lists Clostebol as an ingredient or that is contaminated with Clostebol (the "Contaminated Product Pathway");

    (b) direct application/exposure to Clostebol through intimate contact with an individual that has applied Clostebol for medicinal purposes (the "Intimate Contact Pathway");

    (c) the intentional administration of Clostebol into her body ("Prof. Ayotte's Injection Theory");

    (d) sabotage (the "Sabotage Pathway"); or

    (e) consumption of a meat product that contained clostebol either while she was in Canada or Australia (the "Meat Pathway").

49. The Athlete submits that this case does not turn on which of these pathways is most likely to have occurred in the abstract, but which one did in fact occur based on the totality of evidence.

50. The application of the balance of probabilities standard to a situation like the present one is illustrated, says the Athlete, by the decision of Arbitrator Fraser (sitting as a sole arbitrator) in *UCI v. Burke* (CAS 2013/A/3370). In that case, the Arbitrator considered three possible explanations for the athlete's AAF for hydrochlorothiazide (HCTZ): (i) the AAF was caused by contaminated supplements; (ii) the AAF was caused by contaminated drinking water; or (iii) the athlete was a liar and a cheat and had intentionally ingested the Prohibited Substance.

51. The Athlete notes that Arbitrator Fraser held, on a balance of probabilities, that the most likely of the three explanations was that the athlete had consumed contaminated water. The Arbitrator came to this conclusion despite the UCI's contention that the Athlete had not tested any water. Notably, the expert's testimony tendered by the athlete was that, "*the water consumed by the Athlete in Malartic 'could have been contaminated with HCTZ'*" and that, "*she did not actually know of a source of HCTZ contamination in Malartic's drinking water supply, just that it's possible*". The evidence did not establish that the water consumed by the athlete was contaminated at the time the athlete drank it. However, based on the finite explanations for the AAF and weighing the available evidence, Arbitrator Fraser, applying the balance of probabilities standard, held that the consumption of contaminated water was the most likely explanation for the athlete's AAF and concluded that the athlete bore No Fault.

52. According to the Athlete, this case illustrates that a weighing of the evidence on a balance of probabilities can, and should, result in a selection of one option over others even if that option is only a possibility. As in the *Burke* decision, the Athlete submits that the present case is also a case where the explanations for the AAF are finite and the totality of the evidence demonstrates that the most likely (and in fact only) source for her AAF was her consumption of meat from an animal that had been illegally treated with Clostebol.

53. The CCES' position, argues the Athlete, would require the Arbitrator to modify the applicable burden of proof by interposing previously unheard of, and unsupported, elements into the balance of probabilities analysis. According to the Athlete, the CCES seeks to do this because the evidence on the record does not support any explanation for the AAF other than meat contamination. Realizing this, and having no sustainable alternate theory, the CCES' position would have the effect of raising the evidentiary bar for athletes, simply because the CCES considers meat contamination to be highly unlikely.

54. Focusing only on the future likelihood of the Athlete testing positive for Clostebol from meat consumed in Australia or Canada would produce a wholly invalid and unjust result in this case, submits the Athlete. Such an approach does not take into account the evidence as to what actually happened and effectively requires a rejection of the overwhelming evidence supporting meat as the only cause of the AAF on the basis of forward-looking statistical modelling. The Athlete writes that "*[w]inning the lottery or being struck by lightning are, for example, events that have a very low chance of happening to most people in the future, but both do occur. Deciding that someone was not struck by lightning because this is a rare event is clearly wrong. Instead, we examine the evidence as to what did happen to ascertain whether a person was struck by lightning.*"[5]

55. The Athlete refers to a decision by the Supreme Judicial Court of Massachusetts where the danger and inappropriateness of a forward-looking mathematical analysis rather than an actual assessment of the evidence is addressed as follows: [6]

> *It has been held not enough that mathematically the chances somewhat favor a proposition to be proved; for example, the fact that colored automobiles made in the current year outnumber black ones would not warrant a finding that an undescribed automobile of the current year is colored and not black, nor would the fact that only a minority of men die of cancer warrant a finding that a particular man did not die of cancer. [...]* ***The weight or ponderance of evidence is its power to convince the tribunal which has the determination of the fact, of the actual truth of the proposition to be proved. After the evidence has been weighed, that proposition is proved by a preponderance of the evidence if it is made to appear more likely or probable in the sense that actual belief in its truth, derived from the evidence, exists in the mind or minds of the tribunal notwithstanding any doubts that may still linger there.***
>
> [Athlete's emphasis]

56. In the context of the *lex sportiva,* the Athlete submits that the importance of assessing the actual evidence (and not statistical probabilities alone) is well articulated in the oft-cited decision of the UK Anti-Doping Tribunal, *UKAD v. Gareth Warburton & Rhys William*, where the Panel explained that it is important to look at and assess the evidence supporting the athletes' explanation as to source against any available competing explanations put forward by the doping authority. Where there are no other explanations, it necessarily and obviously follows that the athlete has met his or her burden of proof:[7]

> *Mr Lewis QC (candidly) reminded us that the athlete must also show how*

[5] Athlete's Post-Hearing Brief, para. 7.
[6] *Wright, Sargent v. Massachusetts Accident Co.*, Mass. 246; 29 N.E.2d 825 (Mass. 1940) at 827.
[7] *UKAD v. Gareth Warburton & Rhys Williams, SR/0000120227,* para. 88.

> *a normal product that is now known to have been contaminated, came to be contaminated (Clifton Pinot and Clifton Promise). In Alberto Contador Velasco the CAS panel observed that if an athlete raises a prima facie case as to how the Prohibited Substance came into his body,* ***the anti-doping authority cannot simply sit back and say that the athlete has not proven it on the balance of probabilities. Rather it has a duty to raise a counter explanation if it sees one, and the role of the Tribunal is then to assess which of the explanations is most likely on the evidence.*** *The same point was made in Mariano Puerta. UKAD, having considered all the evidence, did not advance a contrary explanation as to how the Prohibited Substances came into the Respondents' systems. We could find none*. [Athlete's emphasis]

57. On this basis, the Athlete submits that the position argued by the CCES is wrong and, if accepted, would lead to a complicated and unwieldy legal regime that erodes the sole protection afforded to athletes in a strict liability regime: the protection of proving the source of the AAF on a balance of probabilities.

58. In the words of counsel for the Athlete, "*It is critical that the well understood and established standard of a balance of probabilities be followed and applied, and not some higher standard. In this regard, considering the incursion of the strict liability regime on the presumption of innocence, it is imperative that the protections in place for athletes be zealously guarded. Too high a standard of proof or incorrect assessment of evidence will result in a grave injustice*."[8]

59. According to the Athlete, the analysis here is simple. Where there are a finite number of causes or explanations for an AAF and all of the causes have been eliminated except one, it follows on a balance of probabilities that the only remaining explanation was the cause, even if that explanation is statistically unlikely.

2. Source of the Clostebol

60. The Athlete submits that the evidence in this case establishes, on a balance of probabilities, that her AAF resulted from her consumption of meat that had been illegally treated with Clostebol.

61. The evidence, argues the Athlete, includes the following essential facts:

    (a) The Athlete is an honest and highly credible witness;

[8] Athlete's Written Closing Argument of 18 March 2019 at para. 21.

(b) Mr. Overgaard, the CEO of Diteba and Prof. Ayotte both independently opined that none of the products the Athlete was using or came into contact with could have caused her AAF;

(c) Prof. Ayotte's intentional injection theory has been excluded by the evidence or, at a minimum, been excluded beyond a reasonable doubt;

(d) With the exception of meat contamination, no other plausible explanation was put forward or exists that could explain the Athlete's AAF. With respect to the consumption of meat:

(i) from a pharmacological perspective, the trace amount of Clostebol in the Athlete's body could be explained by the consumption of meat that contained Clostebol either while she was in Australia or while she was in Canada;

(ii) Clostebol is a well-known growth promoter that can (and has been) administered to livestock for decades;

(iii) Clostebol is illegal in Australia and Canada. However, the applicable regulatory authorities in Australia and Canada do not test meat for Clostebol making it an ideal choice for any producer seeking the benefits that can be gleaned from using an illegal growth promoter; and

(iv) Clostebol can be purchased illegally over the internet and the dark web as was clearly demonstrated by numerous witnesses during the hearing, including Mr. Bhargava, one of Canada's leading experts in dark web monitoring.

62. Accordingly, the Athlete submits that she has discharged her burden of proving, on a balance of probabilities, that her AAF resulted from her consumption of meat that had been illegally treated with Clostebol.

3. Whether the Asserted ADRV was not Intentional and Whether the Athlete bears No Fault for her AAF

63. The Athlete submits that a finding by the Tribunal that the source of her AAF was, on a balance of probabilities, a result of contaminated meat consumption necessarily leads to a finding that she had no intention to cheat and that she bears no fault.

64. However, in the event that the Tribunal should conclude that the Athlete has not established meat contamination as the source of her AAF, the Athlete submits that

she cannot prove that she bears no fault. It is a requirement under the CADP and WADC that an athlete establish source as an element of proving No Fault.

65. Nevertheless, the Athlete submits that the *lex sportiva* establishes that an arbitrator may conclude that an athlete did not intend to cheat even if the athlete is unable to establish the source of his or her AAF.

66. The Athlete submits that the starting point for this analysis is a case that I decided on 13 March 2017, *CCES v. Taylor Findlay*. In that case, I found that the athlete had not, apart from her own words, provided any concrete evidence of the specific circumstances in which the unintentional ingestion of contaminated meat would have occurred and, therefore, held that I could, "*only conclude that her doping violation must be deemed to be intentional*." That decision aligned with the lex sportiva as it existed on 13 March 2017, submits the Athlete.

67. However, the Athlete recalls that, three days later, on 16 March 2017, the CAS published the decision in the *Villanueva* case.[9] This case marked a substantial development in the *lex sportiva* avers the Athlete. In particular, the *Villanueva* Panel held that in rare cases an athlete could discharge his or her burden of proving that he or she did not intend to cheat, even if the source of the AAF was not established on the evidence.

68. In *Villanueva*, the athlete tested positive for stanozolol, a non-specified substance. The athlete argued that the stanozolol came from horse meat he consumed in Peru. The Panel held that the athlete had failed to establish horse meat as the source of his AAF. FINA argued that since the athlete had not established how the prohibited substance came to be present in his system, he could not discharge his burden to show that he did not intend to cheat.

69. The *Villanueva* Panel examined the language of the Code and noted that, unlike the No Fault and No Significant Fault sections of the Code, the provisions relating to establishing a lack of intent do not explicitly require an athlete to prove source.

70. The *Villanueva* Panel referenced an article from well-recognized experts and legal arguments, such as *inclusion unius exclusion alterius* and *contra proferentem* to ultimately reach the conclusion that "*establishment of the source of the prohibited substance in an athlete's sample is not a sine qua non of proof of absence of*

[9] *Mauricio Fiol Villanueva v FINA*, CAS 2016/A/4534, para. 37.

intent[...]"[10] While dismissing prior cases that held the opposite finding, the Villanueva Panel did limit its application to rare cases, holding as follows:

> *[T]he Panel can envisage the theoretical possibility that it might be persuaded by an athlete's simple assertion of his innocence of intent when considering not only his demeanour, but also his character and history (it is recorded if apocryphally, that the young George Washington admitted chopping down a cherry tree because he could not tell a lie. Mutatis mutandis the Panel could find the same fidelity to the truth in the case of an athlete denying a charge of cheating). That said, such a situation would inevitably be extremely rare. Even on the persuasive analysis of Rigozzi, Haas et al., proof of source would be 'an important, even critical' first step in any exculpation of intent. Where an athlete cannot prove source it leaves the narrowest of corridors through which such athlete must pass to discharge the burden which lies upon him.*[11] [My emphasis]

71. The Panel ultimately held, on the evidence, that the athlete was unable to prove he did not intend to cheat.

72. The Athlete submits that four subsequent cases have followed the analysis in *Villanueva*. In one of those cases, the Panel held that the athlete did not establish an absence of intent[12], and, in the other three cases, the Panel held that the athlete met his or her onus of establishing no intent.[13]

73. According to the Athlete, *Villanueva* and these four subsequent cases establish four criteria that are central to an athlete meeting his or her onus of proving an absence of intent when the athlete is unable to show the source of his or her AAF.

    (a) The first and most important factor is honesty. An arbitrator must conclude that the athlete was truthful and credible. In each case where an athlete established no intention without proving the source of the AAF, the athlete was found to be truthful and credible. In contrast, if a panel does not believe the athlete, no matter how much evidence he or she puts forward, the panel will ultimately find that the athlete failed to meet his or her burden.

[10] *Id.,* para. 35.
[11] *Id,.* para. 37.
[12] *WADA v. World Squash Federation & Nasir Iqbal,* CAS 2016/A/4919.
[13] *Arijan Ademi v. UEFA,* CAS 2016/A/4676*; FINA v. Madisyn Cox,* FINA Doping Panel 07/18*; In the Matter of an Arbitration Pursuant to the Ultimate Fighting Championship Anti-Doping Policy & the UFC Arbitration Rules Between Jon Jones v. United States Anti-Doping Agency*.

(b) Second, the lower the concentration of the prohibited substance in the athlete's sample, the higher the chance of successfully proving the lack of intent to cheat by taking the substance.

(c) Third, the arbitrator must have credible corroborating evidence that the athlete is not a cheat and was diligent and careful about what he or she ingests.

(d) Fourth, the opposing anti-doping organization must put forward its own theory about how the prohibited substance entered the athlete's system and not just argue it did not happen the way the athlete posits. The more outlandish or intricate the theory put forward by the anti-doping organization, the more likely the panel will find the athlete's argument to be credible.

74. Applying these principles to the case at hand, as Rule 10.2 of the Program does not explicitly require the Athlete to prove source, the Athlete submits that even if she cannot establish the source of her AAF, she has demonstrated that she had no intention to cheat. Specifically:

(a) The Athlete is an honest and credible witness;

(b) Her testimony, including her honesty and candour, was corroborated, by Mr. Eugene Liang and Mr. Kyle Boorsma. Both testified as to her honesty and integrity and Mr. Boorsma corroborated the care the Athlete exercises in deciding what to put in her body. Mr. Eugene Liang gave evidence that, in his role as high performance director of Triathlon Canada, he has come to know the Athlete as a dependable, modest, "salt of the earth person", in whom he has confidence and trusts;

(c) The concentration of Clostebol metabolites in her urine was a trace level below the limits of detection in Australia; and

(d) There is no meaningful or compelling competing theory.

75. For these reasons, even if she does not establish the source of her AAF, the Athlete submits that she has demonstrated that she had no intention to cheat.

B. CCES' POSITION

76. In view of the "two-phase" approach agreed upon by the Parties and the Tribunal in this case, the CCES requests that, at this stage of the proceedings, I find that the Athlete:

    (a) has not proven the source of Clostebol in her system on a balance of probabilities;

    (b) has not proven that the Clostebol in her Sample was "not intentional" within the meaning of rule 10.2 of the Program;

    (c) has not proven that she acted with No Fault or Negligence.

1. Burden of Proof

77. The CCES submits that the Athlete does not contest that her theory of meat contamination, standing alone, is an unlikely explanation. Her expert evidence only goes so far as to say meat contamination is a "possible" explanation, whereas CCES's experts are clear that it is "extremely unlikely".

78. The CCES submits that the dispute between the Parties is whether the Athlete can rely on the 'most likely possibility' approach set out in cases like *Contador* to elevate what is an extremely unlikely explanation to one that is proven on a balance of probabilities.

79. CCES submits that the answer to this question is "no".

80. According to the CCES, properly understood and applied, the 'most likely possibility' approach from *Contador* does not assist the Athlete in overcoming the balance of probabilities threshold in this case. That is because, even assuming the *Contador* approach could be a valid means of proving the source of a prohibited substance, it imposes three requirements that have not been met in this case:

    (a) a credible explanation – *i.e.* one that is reasonably likely to explain the source of the prohibited substance;

    (b) the origins of the meat in question – *i.e.* the specific butcher, farm or supplier where the meat came from; and

    (c) identification and elimination of all other possible sources (or a demonstration that those sources were less likely than meat contamination).

81. The CCES submits that, taken together, these requirements set out an approach whereby an athlete who is close to meeting the balance of probabilities threshold may rely on the results of investigating other sources to assist in getting over the line.

82. However, avers the CCES, it is not enough for the Athlete to suggest a theory of ingestion that is merely "possible" alongside a number of purportedly "eliminated" sources that she has self-selected, in order to discharge her burden of proof. As one CAS panel aptly put it, "*establishment of a possibility is not the same as establishment of a probability*."[14]

83. The CCES submits that adopting the Athlete's view of *Contador* to find that she has met her onus in this case would represent a significant departure from – and unwarranted weakening of – the burden that CAS panels require athletes to meet when attempting to prove the source of a prohibited substance in the contaminated meat context, and in general.

84. In the event that this Tribunal adopts the Athlete's view of *Contador*, CCES submits that *Contador* ought not to be followed.

85. The CCES recalls that various anti-doping tribunals and common law courts alike have commented disapprovingly on the logic and implications of the 'most likely possibility' approach.

86. According to the CCES, taken at face value, this approach will reduce significantly the athlete's burden to prove the source of a prohibited substance on a balance of probabilities.

87. In a recent decision expressly declining to follow Contador, the ITF Anti-Doping Tribunal held:

> *The argument advanced by Mr Jacobs, namely that* ***on the basis of UCI v Contador (CAS 2011/A/2384) one merely has to identify which of a number of possibilities was most likely, is something we expressly reject. This Tribunal is not prepared to follow the analysis set out in the case of Contador which would have the effect of greatly diluting the threshold test and would leave the Tribunal placing speculation upon speculation.***[15] [Emphasis added by the CCES]

88. The CAS decision in *Simon Gibbs* also rejects the 'most likely possibility' approach:

[14] ***Nadir Bin Hendi v UIM***, CAS 2012/A/2767 at para 16.18.
[15] ***ITF v Sara Errani***, 2017/812 at para 29.

> *An athlete cannot by asserting, even with what purports to be corroborative testimony to the same effect, that he did not intend to enhance performance thereby alone establishing how the substance entered his body.* ***Seeking to eliminate by such an approach all alternative hypotheses as to how the substance entered his body and thus to proffer the conclusion that what remains must be the truth reflects the reasoning attributed to the legendary fictional detective Sherlock Holmes by Sir Arthur Conan Doyle in "The Sign of Four" but is reasoning impermissible for a judicial officer or body****. As Lord Brandon said disapproving of such approach in The Popi M I985 1 WLR 948 a judge (or arbitrator) can always say that "the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden."*[16] [Emphasis added by the CCES]

89. The CCES also refers to the decision of the Doping Appeal Tribunal which I presided in Alicia Brown.[17] The CCES writes as follows:[18]

> *Although the Doping Appeal Tribunal found it unnecessary to expressly "determine whether the Contador test is well founded", it rejected the premise underlying the most aggressive interpretation of Contador – namely, that an extremely unlikely but possible source could satisfy the balance of probabilities threshold:*
>
> > *[145] While the Tribunal need not determine whether the Contador test is well founded, it will say that it cannot agree with the Athlete's semantic argument.* ***In any event, the Arbitrator's finding that the Ingersoll water was an extremely unlikely source of the HCTZ determines the Cross Appeal. Such finding precludes a conclusion that the Ingersoll water was "probably" the source, which is necessary for the Cross Appeal to succeed.*** [Emphasis added by the CCES]

90. The CCES also submits that the 'most likely possibility' approach has fared no better in the civil courts of Canada or the United Kingdom.

91. In *Rhesa Shipping Co. SA v. Edmonds*, "*The Popi M*", the House of Lords addressed the issue of whether a party could discharge an evidentiary burden in circumstances where there is no direct evidence of an improbable event, by adducing evidence that the alternatives could not possibly have occurred.[19] Lord Brandon, with whom all the other law lords concurred, referred to a quote from Sherlock Holmes to Dr. Watson in describing the line of reasoning being urged upon them: "*How often have I said to you*

---

[16] ***IWBF v UKAD & Gibbs***, CAS 2010/A/2230 at para 11.5.
[17] ***CCES v Alicia Brown,*** SDRCC DAT-15-0006 at para 142.
[18] CCES submissions, para. 78.
[19] [1985] 2 All ER 712. This case has been cited by Canadian appellate courts: see, for example, ***McPhee v British Columbia (Ministry of Transportation and Highways)***, 2005 BCCA 139 at para. 20.

that, when you have eliminated the impossible, whatever remains, however improbable, must be the truth?"

92. In *The Popi M*, a case which has been cited with approval in Canadian courts and by CAS[20], the House of Lords found it "*inappropriate to apply the dictum of Mr. Sherlock Holmes*" for three reasons, all of which apply here.

93. Firstly, a trier of fact can, and in some cases must, decide cases based on the burden of proof. As Lord Brandon put it:

> *…[T]he judge is not bound always to make a finding one way or the other with regard to the facts averred by the parties. He has open to him the third alternative of saying that the party on whom the burden of proof lies in relation to any averment made by him has failed to discharge that burden. No judge likes to decide cases on burden of proof if he can legitimately avoid having to do so.* ***There are cases, however, in which, owing to the unsatisfactory state of the evidence or otherwise, deciding on the burden of proof is the only just course for him to take.***[21]
>
> [Emphasis added by the CCES]

94. The CCES submits that this applies *a fortiori* in the context of the CADP where the Tribunal's task is not to decide between competing theories of how a Prohibited Substance was ingested, but merely to determine if the Athlete has met her burden of proof.

95. Secondly, Lord Brandon explained that the Holmes dictum "*can only apply when all relevant facts are known, so that all possible explanations, except a single extremely improbable one, can properly be eliminated*".[22] This is a very high threshold, which will only be met in rare cases. It has not been met in this case submits the CCES.

96. Finally, Lord Brandon observed that once a trier of fact has accepted that a given event is highly improbable, concluding that the same event satisfies the balance of probabilities threshold is an affront to common sense. The better route is to simply conclude that the burden of proof has not been discharged:

> *The third reason is that the legal concept of proof of a case on a balance of probabilities must be applied with common sense. It requires a judge of first instance, before he finds that a particular event occurred, to be satisfied on the evidence that it is more likely to have occurred than not.* ***If such a judge concludes, on a whole series of cogent grounds, that the occurrence of an event is extremely improbable, a finding by him***

[20] See ***McPhee v British Columbia (Ministry of Transportation and Highways)***, 2005 BCCA 139 at para. 20; ***Mauricio Fiol Villanueva v FINA***, CAS 2016/A/4534 at para 47; ***IWBF v UKAD & Gibbs***, CAS 2010/A/2230 at para 11.5.
[21] [1985] 2 All ER 712, as cited in ***McPhee***.
[22] Ibid.

> ***<u>that it is nevertheless more likely to have occurred than not, does not accord with common sense.</u>*** *This is especially so when it is open to the judge to say simply that the evidence leaves him in doubt whether the event occurred or not, and that the party on whom the burden of proving that the event occurred lies has therefore failed to discharge such burden.*[23] [Emphasis added by the CCES]

97. The CCES submits that this rationale applies with particular force in the current case where the evidence establishes that Clostebol entering the Athlete's system by way of consuming contaminated meat in Australia or Canada is extremely unlikely.

98. Against the backdrop of the significant frailties with the 'most likely possibility' approach, the CCES submits that Contador cannot be interpreted and applied in the manner advocated by the Athlete in this case.

2. Source of the Clostebol

99. The CCES submits that the evidence in this case does not establish, on a balance of probabilities as explained above, that the Athlete's AAF resulted from her consumption of meat that had been illegally treated with Clostebol.

100. Assuming the *Contador* approach is appropriate in order to prove the source of a prohibited substance, the CCES submits that the Athlete (i) has not provided a credible explanation, (ii) has failed to identify the origins of the contaminated meat, and (iii) failed to identify and eliminate every other possible alternative source of Clostebol.

(i) <u>The Athlete has Failed to Provide a Credible Explanation</u>

101. The CCES submits that the Athlete's theory that the Clostebol in her Sample was a result of eating contaminated meat in Australia or Canada is not a credible explanation. The record is clear that such an occurrence in Australia or Canada is extremely unlikely for many reasons, including:

(a) Clostebol is prohibited in both countries;

(b) there have been no reported incidents of Clostebol-contaminated meat in either country;

(c) there have been no reported incidents of Clostebol in athletes' samples arising from tainted meat in any country;

(d) despite tens of thousands of samples being collected, no other athletes have

[23] Ibid.

tested positive for Clostebol in either country (apart from one case in each country where the samples also contained other steroids, suggesting intentional doping); and

(e) there is no good reason why food producers in these countries would use Clostebol over legally available alternatives.

102. The CCES recalls that the Athlete's own experts go no further than to say meat contamination in Australia or Canada is "possible". The only expert opinion evidence before this Tribunal on the issue of likelihood of that possibility actually occurring comes from CCES's experts, Dr. Lean, Prof. Ayotte and Dr. Appelt.

103. To be clear, CCES accepts that it is "possible" that the Athlete consumed meat contaminated with Clostebol in Australia or Canada – in the same way that eating Clostebol-contaminated meat in any country is technically possible.

104. However, according to the CCES, that cannot be enough to establish proof on a balance of probabilities following Contador. No tribunal has ever applied 'most likely possibility' approach to find that an extremely unlikely source of a prohibited substance satisfies the balance of probabilities. In the very few cases where this approach has been relied on to support the athlete's theory, there has always been a solid foundation of expert and factual evidence establishing that the athlete's theory was – at the very least – a reasonably likely explanation.

(ii) The Athlete has Failed to Identify the Origins of Contaminated Meat

105. The CCES submits that in *Radwa Arafa Abd Elsalam*, the CAS panel was clear that the identification of the origins of the contaminated meat constitutes a minimum requirement that must be met in any case of meat contamination:[24]

> *With respect to the presented invoices or bills as evidence for the purchase of contaminated foods, it is obvious that the mere presentation of such exhibits for the purchase of meat cannot fulfil the Athlete's burden of proof that this meat was indeed the source of the contamination. The bills or invoices mentioned "Brazilian meat, hotdogs and green sausages", but there is no further specification to rely on.* ***In cases of meat contamination, it must – as a minimum – be a requirement that the Athlete sufficiently demonstrates where the meat originated from. For example, where did the butcher buy the Brazilian meat, how was***

[24] ***WADA v Egyptian Anti-Doping Organization & Radwa Arafa Abd Elsalam***, CAS 2016/A4563 at para 57.

the Brazilian meat imported into Egypt, has any of the other imports of meat been examined or tested for the presence of Ractopamine, etc.? *This evidence is not provided in this case.*

[Emphasis added by the CCES]

106. The CCES recalls that the 'identification' requirement was met in both cases relied upon by the Athlete, namely in *Burke* (water from a specific well in Malartic) and *Gomez* (meat from a specific BBQ). It was even met in *Contador* (meat from a specific butcher in Spain).

107. However, the CCES avers that the Athlete falls well short of meeting the minimum requirement here. Not only has she failed to identify from where the meat in question originated, she has failed to identify the meat in question at all. She did not contact any restaurant or meat producer.

108. In essence, the Athlete is arguing that the contamination could have come from one of dozens of meat products that she consumed in two countries, Australia or Canada, in the weeks leading up to her doping control. The CCES asserts that this is not a means by which one can prove contamination on a balance of probabilities. As one CAS panel put it in a case involving a theory of clenbuterol-contaminated meat, an athlete cannot "*escape from the burden of proof in this regard merely by asserting that he or she has eaten in many different places and is therefore unable to determine where the clenbuterol entered his or her body.*"[25]

109. In addition, submits the CCES, the 'identification' requirement not only assists in assessing whether a particular theory of contamination is sufficiently credible to warrant application of the Contador framework, but also allows for a proper evaluation of Fault. As the CAS tribunal explained in *Jack Horakova*, this is why "*the threshold requirement of proof of how the substance got into the system "mean[s] not only that the player must show the route of administration [e.g. oral ingestion][…] but that he must be able to prove the factual circumstances in which administration occurred"*."[26]

(iii) The Athlete has Failed to Identify and Eliminate every other Possible Alternative Source of Clostebol

110. The CCES submits that the 'most likely possibility' approach from *Contador* is premised on the notion that all other alternative possible sources (apart from the

[25] ***IAAF v RFEA & Josephine Onyia,*** CAS 2009/A/1805 at para 88.
[26] ***UCI v Jana Horakova & CCF***, CAS 2012/A/2760 at para 5.26.

source proposed by the athlete) can be identified, along with the facts necessary to reliably evaluate their respective likelihoods.

111. The CCES submits that, in this case, the Athlete has not identified and eliminated every other possible alternative source of Clostebol. Indeed, a fundamental problem with *Contador* is that very rarely, if ever, will it be possible to identify and eliminate all alternative possible sources of a prohibited substance (or evaluate their probability with such precision that they can be declared "more" or "less" likely than the theory posited by the athlete). Instead, in almost every case, an athlete will only be able to produce a partial list of low probability scenarios, which includes their low probability theory of ingestion. That is not enough to prove the source on a balance of probabilities, avers the CCES.[27]

112. With respect to identifying possible sources of Clostebol, the CCES submits that the only evidence adduced are the Athlete's own words – and, perhaps to some degree, those of her partner – in the form of the Athlete's List. It is on this self-produced list that the Tribunal must rely to determine what the Athlete consumed, what she did not consume, when she consumed these products, how much she consumed, who the Athlete came into contact with, and what products those individuals may have consumed.

113. The CCES submits that the Athlete's List is not a sufficiently reliable basis for identifying the universe of possible sources of Clostebol, as a proper application of the 'most likely possibility' approach requires. In particular, the CCES avers that there is no objective or expert evidence that limits the potential sources of Clostebol to those sources on the Athlete's List. On the contrary, the evidence is that Clostebol is readily available in a number of countries, in a number of consumer products, in a number of different forms, for a number of reasons; that it may be taken for a performance-enhancing purpose by triathletes; that it can be spread through certain forms of contact with others; and that it is readily available on the black market.

114. According to the CCES, there are limits on the weight that can be placed on an athlete's word – even where an athlete appears credible, and even where an athlete is credible and makes a good impression. As the Tribunal explained in *Taylor Findlay*:

> [90] **The Athlete, when she testified, made a good impression on me. But the question which I must answer is not whether she has made a good impression on me but rather whether she has proven to me.**

[27] See, for example, ***Madisyn Cox v FINA***, CAS 2018/A/5866 at paras 10-11 (citing FINA Doping Panel).

on the balance of probability standard, that she is innocent.

[…]

[96] Unfortunately, on the basis of the totality of the evidence that I have considered very carefully, I am not persuaded that it is more likely than not that the Clenbuterol found in the Athlete's urine did not originate from her intentional consumption of the prohibited substance.

[97] **While I acknowledge that it is not easy for an Athlete to prove a negative, we are dealing here with a strict liability offense** and the Program, as it is presently drafted, leaves me no alternative but to find her anti-doping violation was intentional.

[98] **In other words, as I have found that the Athlete, apart from her own words, has not provided me with any concrete evidence of the specific circumstances in which the unintentional ingestion of contaminated meat would have occurred**, I can only conclude that her doping violation must be deemed to be intentional.

[Emphasis added by the CCES]

115. This Tribunal's comments on the limits of an athlete's word are critically important. They are consistent with the comments of countless other anti-doping tribunals that an athlete's mere word as to how a substance entered his/her body is not sufficient.

116. While the CCES can, to some extent, probe the contents of the Athlete's List, it submits that it has no practical way of independently verifying whether this list is accurate or complete.

117. Just as a tribunal cannot put blind faith in an athlete's word that they did not take a substance intentionally, the CCES submits that so too must a tribunal require something more than an athlete's word as to the list of possible sources of a prohibited substance before concluding that an extremely unlikely source has been established on a balance of probabilities because the remaining options are less likely.

118. According to the CCES, even if one were to assume that the Athlete's List does represent the full universe of possible sources (which is denied), this Tribunal is simply not in a position to make a relative probability assessment as between those sources. Again, this is something that *Contado*r requires, avers the CCES.

119. Taking the evidence at face value, the CCES submits that all of the sources of the Athlete's List, as well as the notion of contaminated meat in Australia or Canada, are "extremely unlikely", "improbable" and/or "implausible" explanations for the Clostebol in the Athlete's Sample. Yet they are all technically "possible" sources as well. Based on this evidence, how can the Tribunal properly determine which of these extremely unlikely events is marginally more likely than the others? Such an exercise would not be adjudication; it would be guesswork, avers the CCES.

120. If this Tribunal were to attempt such a comparison between the myriad of possible sources (which, CCES submits, would not be appropriate in the circumstances of this case), CCES submits that the meat contamination theory would be among the least likely of the unlikely possibilities.

121. The CCES submits that the degree of investigative effort put towards other possible sources identified by the Athlete pales in comparison to the meat theory, which has been examined thoroughly by both sides, with the benefit of expert and statistical evidence from multiple witnesses. Even under this heightened degree of scrutiny, the evidence points to meat contamination being "extremely unlikely", fails to disclose a single case of Clostebol contamination in either Australia or Canada, and cannot point to any case where any athlete has consumed Clostebol-tainted meat.

(iv) Conclusion

122. The CCES is of the view that it is important to recognize that a finding that the Athlete has failed to discharge her burden of proving the source of Clostebol on a balance of probabilities is not the same as a finding that the Athlete is a cheat or a liar. As the CAS panel wrote in *Radwa Arafa Abd Elsalam*, "*[b]y reaching this conclusion, the Sole Arbitrator has not pronounced the Athlete as a 'cheater', but the inability for her, on the balance of probability* [sic] *to establish the origin of the prohibited substance, automatically leads to the conclusion that she is guilty of the [ADRV][…]*"[28]

123. Ultimately, however, whether following *Contador* or otherwise, the CCES submits that there must be limits as to how far a tribunal will go in accepting an athlete's word in the face of an explanation that is technically possible, but proven to be highly unlikely. An athlete's statement as to what she consumed, coupled with testing concluding that certain items do not contain a prohibited substance, cannot be sufficient to elevate a theory of contamination that is extremely unlikely to one that has been proven on a balance of probabilities.

[28] ***WADA v Egyptian Anti-Doping Organization & Radwa Arafa Abd Elsalam***, CAS 2016/A4563 at para 58. See also ***Nadir Bin Hendi v UIM*****,** CAS 2012/A/2767 at para 16.18.

124. For the foregoing reasons, the CCES submits that the Athlete did not discharge her burden of proving the source of the Clostebol in her system.

3. Whether the Asserted ADRV was not Intentional

125. The CCES accepts that there is a "theoretical possibility" of an athlete proving that she acted without intent (within the meaning of the CADP Rule 10.2.3) even where she is unable to establish the source of ingestion, although such a finding would be "extremely rare" and would require an athlete passing through "the narrowest of corridors".[29]

126. Based on the evidence adduced at the hearing, the CCES accepts that the Athlete did not "cheat" in the sense that she did not "*engag[e] in conduct which he or she knew constituted an anti-doping rule violation*" (to use the words of CADP Rule 10.2.3).

127. However, the CCES recalls that the definition of "intentional" in the CADP Rules includes not just athletes who knowingly cheat, but also those who "*knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk*."

128. In other words, submits the CCES, the concept of "intent" under the CADP Rules includes reckless conduct. Recklessness will generally be assessed based on an athlete's own conduct, the facts and circumstances surrounding ingestion, and the information that was known by the athlete at the relevant time.

129. According to the CCES, these elements require the Tribunal to carefully review all of the facts to determine whether the Athlete has satisfied her burden of proving that the ADRV was not intentional. The CCES submits that, in the circumstances of this case, recklessness cannot be ruled out without a better understanding of how the prohibited substance was ingested.

130. Accordingly, the CCES submits that the Athlete has not proven that she acted without intent.

VII. ANALYSIS

131. The arguments on the points which divide the Parties, and there are many, have been set out fully above and need not be repeated.

132. I have read carefully the excellent written submissions of the Parties. I have reviewed the copious notes which I took during the three days of hearing and oral submissions

[29] *Mauricio Fiol Villanueva v FINA*, CAS 2016/A/4534, para. 37.

of counsel. I have also read all the legal authorities to which I have been referred by the Parties.

133. In brief, during Stage 1 of this arbitration, as phrased by counsel for the Athlete, I have to determine firstly whether or not the Athlete, on a balance of probabilities, has met her burden of establishing that the source of her AAF was more likely than not meat she consumed, in Australia or Canada, that had been illegally treated with Clostebol.

1. The Source

134. According to Mr. Bunting, "*this is not a complicated legal analysis*". Mr. Bunting adds "*there are a finite number of explanations for Domi's AAF and all but one of those possible explanations have been conclusively ruled out, or at least ruled out to the legal standard of beyond a reasonable doubt. In these circumstances, it follows that the only remaining explanation – meat consumption – was more likely than not the cause of the AAF*."[30]

135. The CCES, on the other hand, as far as Stage 1 is concerned, submits that the Athlete has failed to discharge her burden of proof. The evidence which the CCES has led, argues counsel, establishes, on a balance of probabilities, that use of Clostebol in food-producing animals in Australia and Canada is extremely unlikely and, as such, does not qualify as a "credible explanation" that is reasonably likely to explain the source of the Athlete's AAF.

136. As reviewed earlier, the evidence adduced by the Parties in this case has been voluminous. For purposes of my analysis and my determination as to whether the Athlete has discharged her burden of proof with respect to the source of her AAF, and informed by the relevant jurisprudence, I note and recall the following:

A. The Athlete's expert witnesses:

1) Dr. Melinda Shelby

- It is "possible" that contaminated meat in Australia and Canada was the source of the Clostebol in the Athlete's sample.

- "*The probability of an athlete testing positive from eating contaminated meat is not known, but it is likely to be extremely low*."

[30] Written Closing Argument of the Athlete of 18 March 2019 at para. 5.

2) Dr. Tomas Martin-Jimenez

- It is my opinion that it is possible that Ms. Jamnicky consumed meat in Australia or Canada that was illegally treated with Clostebol.

3) Mr. Steven Overgaard

- It is implausible that any of the products that Ms. Jamnicky has listed in [her] Statement were contaminated with Clostebol.

B. The CCES' expert witnesses:

1) Dr. Ian Lean

- It is extremely unlikely, indeed very improbable, that the Athlete consumed meat products in Australia that contained Clostebol.

2) Prof. Christiane Ayotte

- It is "extremely unlikely" that the consumption of contaminated meat in Canada is the cause of the Clostebol in the Athlete's sample.

3) Dr. Martin Appelt

- "*[It] would be an extremely rare and unlikely occurrence*" for meat to be contaminated with Clostebol in Canada.

137. As noted earlier, the Athlete's summary of the evidence which, her counsel submits, should lead me to conclude, on a balance of probabilities, that her AAF resulted from her consumption of meat that had been illegally treated with Clostebol, is the following:

(a) The Athlete is a highly credible, forthright and honest young woman;

(b) Mr. Overgaard, the CEO of Diteba and Prof. Ayotte both independently opined that none of the products the Athlete was using or came into contact with could have caused her AAF;

(c) Prof. Ayotte's intentional injection theory was shown to be completely absurd and was conclusively ruled out on the evidence.

(d) Leaving aside meat contamination, no other plausible explanation was put forward or exists that could explain the Athlete's AAF. In regard to the consumption of meat:

(i) from a pharmacological perspective, the trace amount of clostebol in the Athlete's body could be explained by the consumption of meat that

contained clostebol, either while she was in Australia or while she was in Canada. This is not disputed on the evidence;

(ii) clostebol is a well-known growth promoter that can (and has been) administered to livestock for decades;

(iii) clostebol is illegal in Australia and Canada. However, the applicable regulatory authorities in Australia and Canada do not test meat for clostebol, making it an ideal choice for any producer seeking the benefits that can be gleaned from using an illegal growth promoter; and

(iv) clostebol can be purchased illegally over the internet and the dark web, as was clearly demonstrated by numerous witnesses during the hearing, including Mr. Bhargava, one of Canada's leading experts in dark web monitoring.[31]

138. The CCES disagrees. The evidence, submits its counsel, "*firmly supports the conclusion that consuming Clostebol-contaminated meat in Australia or Canada is extremely unlikely*." In this connection, they refer to the following:

(a) clostebol use on food-producing animals is prohibited in both countries;

(b) neither country imports meat from any country that uses clostebol on food-producing animals;

(c) there have been no reported incidents of clostebol use in food-producing animals in either country;

(d) there have been no reported incidents of clostebol in athletes' samples arising from tainted meat in any country;

(e) despite tens of thousands of samples being collected, no other athletes have tested positive for clostebol in either country (apart from one case in each country where the samples also contained other steroids, suggesting intentional doping);

(f) positive test results for clostebol track those countries where clostebol is legally available (*e.g.* Latin American countries);

(g) positive test results for clenbuterol (a growth hormone for cattle) track those countries where clenbuterol is known to be used illegally (*e.g.* Mexico, China);

(h) there is no good reason why food producers in Australia or Canada would use clostebol over legally available and readily accessible alternatives;

[31] Written Closing Argument of the Athlete of 18 March 2019 at para. 3.

(i) both countries are export-oriented when it comes to meat and the use of clostebol would pose a major risk in this regard;

(j) both countries have a well-developed food regulatory regime, and meat producers in both countries have a track record of compliance with regulations (including in the context of exporting meat to the U.S.); and

(k) the evidence suggests it is extremely difficult to obtain black market clostebol preparations for cattle through the "dark web", and even if such preparations were obtained they bring a host of risks (*e.g.* improper dosage, frequency, etc.).[32]

139. This case, answers the Athlete, is not about the common or rampant use of Clostebol illegally in cattle. Rather, it is about the confluence of very specific events that lead to the occurrence of a low probability event. "*Much like being struck by lightning, Domi tested positive for Clostebol after consuming contaminated meat*."

140. In the words of counsel for the CCES, the Athlete's thesis consists of the following:

a) An animal food producer illegally administered Clostebol to livestock, a relatively rare occurrence;

b) The Athlete then consumed meat in Australia or Canada that had been illegally treated with Clostebol;

c) The Athlete was tested in the small window when Clostebol metabolites from the meat that she consumed were detectable in her urine; and

d) The Athlete's sample was tested by the Montreal laboratory which, unlike the Australian laboratory, can detect Clostebol at trace concentrations estimated below 0.2 ng/ml.

141. Such an exercise is not adjudication; it would be "speculation upon speculation", "pure guesswork", concludes the CCES counsel.

142. Anticipating the criticism that such a finding by this Tribunal would provoke, the Athlete's counsel replies that the probability of athletes finding themselves in Ms. Jamnicky's circumstances "is very low" such that cases like the present one "will be extremely rare". In other words, there is no risk of the proverbial flood-gates being opened by such a finding.

143. The CCES's answer to the Athlete's argument is the following:

[32] Closing Submission of CCES of 18 March 2019 at para. 158.

If the Athlete's approach to the burden of proving the source of a prohibited substance is adopted in this case, it would mark a significant, unjustified and dangerous departure from how anti-doping tribunals have approached cases of meat or food contamination. Simply put, an athlete's own word as to what she consumed, coupled with testing suggesting that certain items do not contain a prohibited substance, cannot elevate a theory of contamination that is extremely unlikely to one that has been proven on a balance of probabilities. If it were otherwise, then athletes could easily claim that prohibited substances in their samples arose from food contamination on the basis that this is technically "possible" in the most basic sense of the word, trigger the Contador framework, and then provide a self-selected list of other purportedly 'less likely' sources to get them across the balance of probabilities threshold.[33]

144. As for the Athlete's assertion that none of the products which she used or came into contact with between her April 24th doping control and her previous doping test on January 21st could have caused her AAF, the CCES argues that the Athlete's list "*cannot be taken as a reliable, accurate and complete listing of all sources of Clostebol*." The CCES is particularly critical of the fact that the Athlete's "*training journal, the key document used to recreate the list, has never been produced, and that its existence was not even mentioned by the Athlete in her otherwise detailed materials filed in advance of the hearing*."

145. It is clear to me that, based on the totality of the evidence in this case, there are five possible "Pathways" that could account for the source of Ms. Jamnicky's AAF. They are:

1) the contaminated product Pathway

2) the intimate contact Pathway

3) the sabotage injection Pathway

4) the intentional injection Pathway

5) the contaminated meat Pathway

146. I will review these five Pathways in turn.

[33] Closing Submission of CCES of 18 March 2019 at para. 18.

147. Based principally on the Athlete's evidence as well as the evidence of her partner, Mr. Kyle Boorsma, I have formed the view that the intimate contact Pathway can be excluded.

148. Dr. Shelby added sabotage as a possible explanation that could explain the AAF. There is not one iota of evidence of any sabotage in this case and I exclude it as a possible Pathway.

149. In the case of an ADRV, the possibility of an athlete intentionally injecting herself with the prohibited substance cannot be excluded. It is certainly not an "absurd" theory and I have considered it carefully.

150. In order to give any credence to this Pathway, I would have to conclude that the Athlete is a liar and a drug cheat. On the basis of her evidence, as well as the evidence of her boyfriend and the statement of Mr. Liang, the High Performance Director of Triathlon Canada, I will not make any such finding. I reject this theory and exclude it as a possible Pathway.

151. It is not without relevance to note in connection with this theory that the CCES "*based on the evidence adduced at the hearing*" accepts that the Athlete did not engage in conduct which she knew constituted an anti-doping rule violation.

152. As far as the contaminated product Pathway is concerned, there is evidence on the record that Clostebol is available in a number of different creams, medications and sprays in Australia and Canada.

153. I note that the Athlete has provided a list (the "Athlete's List") which she claims includes every substance which she used between her April 24th doping control and her previous doping test on January 21st. On the evidence, this is a time period when the Athlete was travelling, frequently changing lodgings, staying first with her cousin, then at a staging camp with five other athletes, and then finally at the Athletes' Village during the Commonwealth Games.

154. Even by her own evidence, the Athlete's List does not include all substances with which she could have come into contact during that period.

155. The Athlete's List was not created contemporaneously but rather drawn up weeks after the relevant period. The key document used to recreate the list, her training journal, has never been produced and I remain troubled by the fact that this was only revealed when she testified.

156. Even though I believe the Athlete when she says that "*in an attempt to determine how I was exposed to Clostebol, I documented all of the supplements or creams that I used from the date of my clean test result to the date of my urine test on April 24th, 2018*", I cannot conclude in the circumstances of her extensive travels and frequent changes of lodgings during these three months that the Athlete's List is accurate and a complete listing of all possible sources of Clostebol.

157. I also note that Dr. Shelby acknowledged during her cross-examination that there were at least five other possibilities of explanations for the Clostebol in the Athlete's sample:

    (a) "*[t]he application of a product such as a cream or spray that contains clostebol (or clostebol acetate) and expressly discloses clostebol on the label*";

    (b) "*the application of a product that does not list clostebol as an ingredient but in fact contains clostebol*";

    (c) "*direct application/exposure to clostebol through intimate contact with an individual that has applied clostebol for medicinal purposes*";

    (d) "*oral consumption of Clostebol via a product (supplement or medication) that lists clostebol as an ingredient*";

    (e) "*oral consumption of clostebol via a product that does not list clostebol as an ingredient but in fact contains clostebol*".

158. Accordingly, I cannot exclude the contaminated product Pathway as a possible explanation for the ingestion of Clostebol by the Athlete.

159. I now come to the contaminated meat Pathway. As noted earlier, the Athlete's counsel submits that the evidence in this case establishes, on a balance of probabilities, that her adverse analytical finding resulted from her consumption of meat in Australia or Canada that had been illegally treated with Clostebol.

160. Based on the evidence which the Athlete has adduced and which I have referred to earlier, I cannot exclude the contaminated meat Pathway as a possible explanation of her AAF.

161. Accordingly, having eliminated all other Pathways, I find myself with two possible explanations for the ADRV, a contaminated product or contaminated meat. I must now determine, applying the balance of probabilities standard, which explanation is more likely than not to have occurred.

162. The operation of the balance of probability standard is well established in the "l*ex sportiva*". It means that the athlete bears the burden of persuading the adjudicator that the occurrence of the circumstances on which she/he relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence.

163. Having reviewed and weighted the totality of the evidence, I cannot exclude the contaminated product explanation as the source of the Athlete's AAF. Accordingly, on a balance of probabilities, I am not satisfied that the contaminated meat explanation in this case is more likely than not to have occurred.

164. In the circumstances, and paraphrasing the words of Lord Brandon, as the trier of fact, the only just course for me to take is to conclude that the Athlete has not met her burden of proving to me that contaminated meat was the source of her AAF, and I so do.

2. The Intent

165. I will now address the Athlete's alternative submission in Stage 1 of the present arbitration that her anti-doping rule violation was not intentional.

166. Counsel for the Athlete has very well summarized the evolution of the jurisprudence since my decision in *CCES V. Taylor Findlay*[34].

167. I have reviewed the decision of the Beloff Panel and the four decisions which followed. Relying on the principles of interpretation of a contract and informed by this recent case law, I subscribe to the view that an arbitrator may conclude that an athlete did not intend to cheat even if the athlete is unable to establish the source of his or her AAF.

168. However, the application of this exception must be limited to very rare cases. As I am dealing with a strict liability offence, while the verdict should not be automatic, the escape hatch through which the athlete must pass in order to discharge his/her burden can only be very narrow.

169. The Beloff Panel in *Villanueva* referred to "*the theoretical possibility that it might be persuaded by an Athlete's simple assertion of his innocence of intent when considering not only his demeanor, but also his character and history*."[35]

[34] See supra paras. 67-72.
[35] *Mauricio Fiol Villanueva v FINA*, CAS 2016/A/4534, para. 37.

170. In order to persuade me that she had no intention to cheat, the Athlete points principally to the following:

    1. She is an honest and credible witness;

    2. Both Mr. Liang and Mr. Boorsma testified as to her honesty and integrity. They provided credible evidence that she is not a cheat.

    3. The concentration of Clostebol metabolites in her urine was extremely low, "*a trace level below the limits of detection in Australia*."

171. The credibility of Ms. Jamnicky is a question of fact. When she testified, I listened to her very carefully. I looked at her demeanor. I also took into consideration her history as a mentor and coach to young athletes.

172. I formed the opinion that she was honest, truthful and credible as corroborated by MM. Liang and Boorsma. I agree with her counsel that this is the most important factor that I need to consider in reaching a conclusion as to his client's intent.

173. To be clear, in reaching this all-important conclusion, I attach no weight to the fact that the Athlete submitted to a polygraph test.

174. Accordingly, this is one of these rare cases where the Athlete has persuaded the Doping Tribunal that, although she has been unable to prove to my satisfaction the source of her AAF, she has persuaded me that her ADRV was not intentional.

175. It is important to note in respect of the Athlete's intent, that the CCES accepts that Ms. Jamnicky did not cheat in the sense that she did not "*engage in conduct which she knew constituted an ADRV*."

176. However, the CCES argues that the definition of "intentional" in the CADP Rules includes not only athletes who knowingly cheat but also those who "*knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk*."

177. In short, submits the CCES, the concept of intent under the CADP Rules includes reckless conduct and, in the circumstances of this case, "*recklessness cannot be ruled out*."[36]

[36] ***R v Quinn***, 2014 ONCA 650 at para 11. See also ***Schepannek*** at para 20; ***Glassman v Honda Canada Inc*** (1998), 41 OR (3d) 649 (CA) at para 11. In the CAS context, see ***Henning v SAIDS***, CAS 2016/A/4716 at paras 75-76.

178. I cannot agree with the CCES. There is ample evidence on the record that the Athlete was very careful about what she ingests. Before taking any new supplement, she consulted with Dr. Mountjoy.

179. I see no evidence of recklessness in this case on the part of the Athlete.

3. The Fault

180. It is helpful to recall that the relevant Rules of the Program with respect to Fault or Negligence are the following:

Rule 10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence

> *If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.*

Rule 10.5 of the Program provides, in relevant part, that:

Rule 10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

> *10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Rule 2.1, 2.2 or 2.6.*
>
> *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 or other Person's degree of Fault.*

181. In the light of my Decisions that the Athlete has not discharged her burden of proving the source of her AAF, but that she has discharged her burden of proving that her AAF was not intentional, I have decided that I will defer to Stage 2 the consequences that should follow from these decisions, including whether the Athlete can invoke that she bears no Fault or Negligence.

VIII. PARTIAL AWARD

182. On these grounds, I find the following at this Stage:

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

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

183. As agreed by the Parties, the Parties will now make submissions, in accordance with a calendar to be agreed within 21 days from the date of this Partial Final Award, as to the consequences that should follow from the present Partial Award.

Signed in Montreal this 31st day of May 2019.

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