

SPORT DISPUTE RESOLUTION CENTRE OF CANADA

IN THE MATTER OF THE CANADIAN ANTI-DOPING PROGRAM

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

No.: SDRCC DT 16-0249
(Doping Tribunal)

Canadian Centre for Ethics in Sport

-and-

Athletics Canada

-and-

Shawnacy Barber (Athlete)

-and-

Government of Canada (Observer)

World Anti-Doping Agency (Observer)

Canadian Olympic Committee (Intervenor)

BEFORE:

Ross C. Dumoulin

APPEARANCES:

For the Canadian Centre for Ethics in Sport:

Luisa Ritacca, counsel
Justin Safayeni, counsel
Karine Henrie

For Athletics Canada:

Corey Dempsey

For the Athlete:

Paul Greene, counsel

For the Canadian Olympic Committee:

James Bunting
Carlos Sayao

DECISION

August 11, 2016

1. This is a decision with reasons issued pursuant Rule 8.3.1 of the *Canadian Anti-Doping Program (2015)* (CADP). I was named by the parties pursuant to paragraph 6.8 (b) (i) of the *Canadian Sport Dispute Resolution Code (2015)* (*Code*) and appointed as arbitrator to sit as Doping Dispute Panel by the Sport Dispute Resolution Centre of Canada (SDRCC) to hear and determine the present matter.

2. The Athlete, Mr. Shawnacy Barber, is 22 years old and the current world champion in his event, the pole vault, which is scheduled to begin on August 13 at the Summer Olympic Games now taking place in Rio De Janeiro, Brazil.

3. On or about July 8, 2016, the day before he was to compete at the Canadian Championships and Rio selection trials in Edmonton, Alberta, Mr. Barber posted in the "casual encounter" section of Craigslist, an on-line service. He used a pseudonym. He specified in his post that he wanted to meet a woman who was drug-free and disease-free. He also indicated that he wanted a "professional" person. Mr. Barber testified that the purpose of his post was to "find a partner for the week or weekend" as "a way to relieve stress". He acknowledged under cross-examination that his purpose was to have a "sexual encounter of some sort" if all went well. He stayed away from bars and clubs because of their association with drugs and alcohol.

4. After rejecting a couple of untrustworthy replies to his posting, he received a response from a man, referred to as M in this decision, who sent him a photograph of a woman, referred to as W in this decision. Mr. Barber found her to be attractive. She was described as a mother of two. He thought a mother would be "more cautious, reserved". Mr. Barber arranged with M to meet him and W in a hotel room at 9 p.m. that evening not far from where he was staying in Edmonton.

His evidence was that he assumed, by the fact that M responded to him, that the latter and W would both be free from drugs and disease, so he did not ask them about this.

5. W also testified at the hearing. She did this because she felt "horrible about what happened" and would hate to be the reason for the Athlete not achieving his dream. She didn't know Mr. Barber before.

6. In her testimony, W referred to M as her partner at the time as well as her boyfriend, now ex-boyfriend. Her evidence was that at 6 p.m. on July 8th, she got together with M at his residence in Edmonton where she consumed cocaine through her nose. They later made their way to the hotel room to meet Mr. Barber. W recalled that she took about a ½-gram of cocaine in the three hours preceding the meeting. She first took some at around 6 p.m. and again about one or two minutes before the Athlete entered the hotel room. She took the second dose of cocaine in the bathroom of the hotel room. The drug was in a Tylenol container on the bathroom counter. She pinched some cocaine with the end of a tweezer, put it to her nose and snorted it. There was no one else taking drugs in the hotel room. The witness also stated that she consumed a 26-ounce bottle of vodka that evening. She had about four or five drinks before meeting Mr. Barber.

7. The Athlete made his way to the hotel room at the appointed time. He testified that when he arrived and thereafter, he did not see any cocaine in the room, nor did he see W use cocaine. When he entered the room, W was in the bathroom and she yelled out to him that she was doing her make-up. M was in the room and Mr. Barber went and sat on the bed and had a talk with him. W then exited the bathroom and offered Mr. Barber a drink which he declined because he hadn't mixed the ingredients. He had never met either person before. He

observed that W was very talkative with both him and M. To the Athlete, W didn't seem high on drugs, but was acting like she'd had a drink or two and she had a drink in the room. She told him that she was visiting her friend in Edmonton, that she worked as a hygienist and had children. Their chat lasted about five minutes. He began kissing her and did not notice any unusual taste. Their sexual encounter lasted about 30 minutes. They kissed on and off during that time. He said that M remained "around" the room, exiting and re-entering from time to time "for the most part". He was not sure why, but surmised it was to provide a safe environment for W. While in the room, Mr. Barber did not go into the bathroom. He was unaware that W had snorted cocaine. There was no money exchanged between him and W and M.

8. In her testimony, W stated that after she snorted the cocaine and put her make-up on, she opened the bathroom door, exited and closed the door. Mr. Barber was already in the room. It was her evidence that he could not have known that she had ingested the cocaine. There was no cocaine visible in the room when Mr. Barber was there. She did not use cocaine in his presence. W confirmed that they kissed a number of times during their encounter of about 30 minutes. She didn't see M leave the room during this time and believed that he remained in the room. It was arranged that he would do so. Mr. Barber didn't ask her if she was high or on drugs. There was no conversation on that topic. She confirmed at the hearing that she did indeed have two children and was a hygienist. W testified that the encounter was a "one-time situation" for her. She was quite upset in recounting the events, obviously found it very difficult and seemed regretful about the whole thing.

9. The Athlete testified that after his encounter with W, he left and had no intention of ever seeing W again. He returned to his own hotel room and went to

bed at 10:30 p.m. His evidence was that he didn't realize there was any potential to ingest drugs by kissing W. He added that he relied upon his judgment in meeting her and chatting in determining that she was drug-free. It turned out that he was wrong. It was the first time that he'd done such a thing.

10. The following day, July 9th, the Athlete competed in the Canadian Championships, set a Championships record, won the competition and secured a spot in the Rio Summer Olympic Games. He testified that he was 99% sure that he would be tested for prohibited substances because he was a top athlete and "Canada tests its athletes". That evening, shortly after 7:30 p.m., Mr. Barber was subject to an in-competition doping control. His urine was tested first, then his blood. The certificates of analysis indicate the presence of cocaine metabolite (benzoylecgonine) estimated at 96 ng/mL in the "A" sample and at 85 ng/mL in the "B" sample. Cocaine is a prohibited substance under the 2016 WADA Prohibited List under category S6a and sub-title "Non-Specified Stimulants".

11. On July 26, 2016, the CCES issued a Notification of Adverse Analytical Finding asserting that the Athlete had committed an anti-doping rule violation under Rule 2.1 of the CADP (Presence in Sample). The CCES proposed that the sanction be a four-year period of ineligibility, as this was a first violation for the Athlete.

12. Mr. Barber testified that his positive test was "a complete shock". He has never tested positive for a prohibited substance, nor has he ever taken cocaine. In the two weeks leading up to his positive test in this matter, he was never around cocaine or ever at a party where cocaine was present. During that time, he was in training in Edmonton.

13. On August 2, 2016, Mr. Barber signed a Timely Admission of an Anti-Doping Rule Violation form in accordance with CADP Rule 10.11.2.

THE POSITIONS OF THE PARTIES:

The Athlete:

14. Mr. Greene submitted on behalf of the Athlete that the CAS Panel's decision in *CAS 2009/A/1926 ITF v. Richard Gasquet* underscores that an athlete who is contaminated with a banned substance, specifically cocaine metabolites, from kissing someone they just met is eligible for relief under the no fault or negligence provision of CADP Rule 10.4. In that case, the athlete met a woman in a club who had been ingesting cocaine prior to their rendezvous unbeknownst to him. They kissed a number of times throughout the evening and he tested positive for a minute amount of cocaine. Based on these facts, the Panel concluded that it was more likely than not that the athlete's contamination with cocaine resulted from kissing the woman. The Panel also concluded that the athlete did not know or suspect, and could not have reasonably known or suspected even with the exercise of utmost caution, that he was at risk of ingesting a prohibited substance by kissing the woman.

15. Counsel argued that under the standard established by the *Gasquet* Panel, Mr. Barber warrants a no fault or negligence finding as well. In both cases, the woman in question was ingesting cocaine prior to her rendezvous unbeknownst to the athletes and both couples kissed a number of times during their encounters.

Mr. Barber took precautions in seeking someone who was drug-free and disease-free. He assessed her character. He refused a drink from her. W took cocaine in the bathroom from a Tylenol container. There was no cocaine in the room. The transfer of cocaine from kissing someone was not a known risk. Mr. Barber avoided clubs and bars.

16. Mr. Greene opined that on-line dating has become an increasingly mainstream and acceptable way of meeting new people, including one-night stands. With the advent of mobile dating apps such as Tinder, one-night stands or hook-ups have become the norm. Craigslist was one of the first websites for on-line dating and has thousands of postings every day of people looking to hook-up.

17. It was further submitted that, like in the *Gasquet* case, this Panel must conclude that Mr. Barber did not know or suspect, and could not have reasonably known or suspected even with the exercise of utmost caution, that he was at risk of ingesting a prohibited substance by kissing W. It was simply impossible for Mr. Barber, even when exercising the utmost caution, to know that in kissing W, he could be contaminated with cocaine. He therefore acted without fault or negligence and should be sanctioned accordingly with an elimination of this period of ineligibility. This would make him immediately eligible to compete for Team Canada at the Rio Olympic Games.

18. Mr. Greene emphasized that Mr. Barber is a clean athlete whose entire future has been jeopardized by a sexual encounter with a woman who had ingested cocaine without his knowledge. A one-year suspension would deny him the opportunity to participate in the Olympics. This consequence would be disproportionate to his conduct. He could not have envisioned that his hook-up

with W would lead to cocaine contamination and an adverse analytical finding for trace amounts of cocaine metabolites. Article 10.4 of the CADP exists to provide Mr. Barber with relief in this situation.

The CCES:

19. At the hearing, the CCES stated that it did not oppose the scientific evidence presented by the Athlete and that it accepted the likely source of the presence of cocaine in his system was the kissing that occurred during his sexual encounter with W on the evening of July 8, 2016. The CCES conceded that the rule violation committed by Mr. Barber was not intentional in accordance with Rule 10.2.1.1 of the CADP.

20. Mr. Safayeni submitted on behalf of the CCES that, based on the evidence of the Athlete, this case does not warrant a finding of no fault or negligence as the term is defined in the CADP. To establish such a finding, the Athlete must meet the exacting "utmost caution" standard, which requires him to have made every conceivable effort to avoid ingesting the cocaine. It is not enough for the Athlete to prove he did not know or suspect that he had been administered cocaine. The Tribunal must also be satisfied that a reasonable person in his position – acting with the utmost caution – could not have known, or even suspected, that they had been administered cocaine.

21. It was pointed out that the commentary to Rule 10.4 states that it will only apply in exceptional circumstances, for example where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. It also states that no fault or negligence would not apply in the following situations: firstly, if a

positive test resulted from a mislabeled or contaminated vitamin; secondly, in the case of the administration of a prohibited substance by the Athlete's personal physician or trainer without disclosure to the Athlete; thirdly, sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates. These are compelling examples that illustrate just how difficult it is for an athlete to establish that he or she acted with no fault.

22. Counsel argued that, at a minimum, taking utmost caution requires that an athlete avoid courses of conduct that are inherently risky in terms of exposing him or her to the possibility of the administration of a prohibited substance. It also requires that an athlete exercise diligence and make appropriate inquiries where there is any reasonable basis to suspect that conduct could involve the administration of a prohibited substance.

23. Mr. Safayeni cited cases in which athletes unknowingly drank tea and chewed coca leaves, drank from a sachet containing an unknown herbal substance. In another case, an athlete's friend put cocaine in his drink without his knowledge, however this case was settled.

24. It was argued that the CAS decision in *Gasquet* is of limited value. Each case must be decided on its own facts and no two cases share precisely the same set of factors influencing an athlete's degree of fault. There are material differences between that case and the one at hand. In *Gasquet*, an athlete and a woman met in the unsuspecting environment of a restaurant and only by happenstance. They later kissed at a club where a transfer of cocaine took place. Here, the Athlete solicited W through an on-line advertisement and a third-party broker, creating a suspicious and risky situation that led to the transfer of cocaine. In *Gasquet*, the athlete and the woman had interacted for several hours before

kissing, whereas in the present case, the Athlete met W only moments before they started kissing. In *Gasquet*, the athlete was with the woman from 9 p.m. to approximately 5 a.m. and at no point did he witness her taking cocaine. Here, the Athlete was with W for approximately an hour and only had the opportunity to observe her conduct for a few moments before they started kissing.

25. Counsel emphasized that Mr. Barber chose a random woman he had no history with, knew very little about, and had barely met in person for five minutes before kissing. This was a pre-meditated effort by the Athlete to have a sexual encounter with a stranger in a hotel room. Exercising utmost caution would require him to have made inquiries to satisfy himself that there was no cocaine involved.

26. The point was made that even if it were true that on-line dating has become an increasingly acceptable way of meeting new people, be it lovers or just one-night stands, athletes do not play by the same rules as society at large – they play by the anti-doping rules which have always imposed a far more stringent standard. Arranging for random one-night stands with unknown women with an unknown drug history may be acceptable to others – but it is not necessarily acceptable for athletes subject to the CADP.

27. A finding that the Athlete in this case bears some degree of fault would affirm the reasonable expectation that athletes should not use the internet and/or third-party connections to arrange for sexual encounters in hotel rooms with unknown women they do not know on the eve of a major competition.

28. Rule 10.5.2 of the CADP states that the otherwise applicable period of ineligibility may be reduced based on the Athlete's degree of fault, but the reduced period of ineligibility may not be less than one-half of the period of

ineligibility otherwise applicable. Given that the Athlete's anti-doping rule violation was not intentional, the CCES is prepared to accept that he bears no significant fault or negligence.

29. Mr. Safayeni submitted that regardless of the Panel's finding on fault, the Athlete's admitted anti-doping rule violation in connection with the 2016 Canadian Championships automatically leads to all of his results from that competition being disqualified pursuant to Rule 9 of the CADP. Rule 9 has always been applied strictly, without any regard for the Athlete's degree of fault, the nature of the violation or any other considerations.

30. In conclusion, the position of the CCES was that the Athlete has acknowledged his anti-doping rule violation, but has failed to establish that he bears no fault or negligence. The CCES supports a finding of no significant fault or negligence, which would entail a period of ineligibility of at least one year.

The Canadian Olympic Committee:

31. Mr. Jim Bunting indicated that the COC takes no position with respect to this matter.

DECISION

32. The Athlete in this matter has admitted to the anti-doping rule violation of the presence of a prohibited substance in his sample under Rule 2.1 of the CADP. Rule 10.2.1.1 states that the period of ineligibility shall be four years where the rule violation does not involve a specified substance unless the Athlete can establish that the rule violation was not intentional.

33. At the hearing, the CCES did not oppose the scientific evidence presented by the Athlete and accepted that the likely source of the presence of cocaine in his system was the kissing that occurred during his sexual encounter with W on the evening of July 8, 2016. The CCES conceded that the rule violation committed by Mr. Barber was not intentional in accordance with Rule 10.2.1.1 of the CADP. In light of these concessions by the CCES, it is not necessary to reproduce the said scientific evidence.

34. Rule 10.4 stipulates that if an Athlete establishes that he or she bears no fault or negligence, then the otherwise applicable period of ineligibility shall be eliminated. Rule 3.1 specifies that where a rule places the burden of proof upon the Athlete alleged to have committed an anti-doping rule violation to establish specified facts, the standard of proof shall be by a balance of probability.

35. The sole issue in this case is whether or not Mr. Barber has met the burden of proof of establishing, on a balance of probability, that he bears no fault or negligence with respect to the anti-doping rule violation.

36. The definition of "*No Fault or Negligence*" in the CADP includes the following elements: the athlete establishing that he or she did not know or suspect, and "could not reasonably have known or suspected even with the

exercise of utmost caution”, that he or she had been administered a prohibited substance or otherwise violated an anti-doping rule. The definition goes on to state that the athlete must also establish how the prohibited substance entered his or her system. This latter requirement has been met: the CCES conceded at the hearing that the likely source of the presence of cocaine in his system was the kissing that occurred during his sexual encounter with W on the evening of July 8, 2016.

37. Shawnacy Barber’s choices and conduct on the night of July 8, 2016 may be viewed as risky, careless and foolish in many different ways. But the issue is, were they risky in the sense of exposing him to the possibility of ingesting a prohibited substance?

38. A review and consideration of the evidence presented by the parties in this matter lead the Panel to conclude that the Athlete has satisfied the burden of establishing, on a balance of probability, that he bears no fault or negligence in committing a violation of CADP Rule 2.1 of “Presence of a *Prohibited Substance*” in his sample. The evidence showed that Mr. Barber did not know or suspect, and could not have reasonably known or suspected, even with the exercise of utmost caution, that he was at risk of ingesting a prohibited substance by kissing W. He had no way of knowing, and had no reason to suspect, that W had ingested cocaine before their sexual encounter, nor that she could possibly contaminate him with a prohibited substance. The following elements of the evidence lead this Panel to the above-mentioned findings:

- Mr. Barber specified in his post on Craigslist that he wanted to meet a woman who was drug-free and disease-free;

- before their encounter, W consumed cocaine in locations and in a manner that was completely out of the Athlete's sight: firstly, at M's residence, then in the bathroom before Mr. Barber entered the hotel room;
- the cocaine remained out of the Athlete's sight in the closed bathroom inside a Tylenol container;
- Mr. Barber did not see any cocaine in the room, nor did he see W use cocaine; no one else took drugs in the hotel room;
- Mr. Barber declined a drink offered by W;
- W did not appear to Mr. Barber to be high on drugs;
- Mr. Barber did not detect anything unusual when he kissed W;
- Mr. Barber testified that he was unaware that W had consumed cocaine;
- W testified that Mr. Barber could not have known that she had ingested cocaine;
- W did not use cocaine in Mr. Barber's presence;
- there was no cocaine visible in the room when Mr. Barber was there;
- Mr. Barber testified that he didn't realize there was any potential to ingest drugs by kissing W.

39. Even if one were to assume that the Athlete knew W had been consuming cocaine, which is not the case here, he was in no position to know that it was even medically possible to be contaminated with cocaine by kissing someone who had ingested it beforehand. The above-noted evidence established that he exercised all the caution that could possibly be necessary under the circumstances with respect to a prohibited substance entering his system.

40. The commentary to Rule 10.4 states that it will only apply in exceptional circumstances, for example where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. It also states that no fault or negligence would not apply in the following situations: firstly, if a positive test resulted from a mislabeled or contaminated vitamin; secondly, in the case of the administration of a prohibited substance by the Athlete's personal physician or

trainer without disclosure to the Athlete; thirdly, sabotage of the Athlete's food or drink by a spouse, coach or other person within the Athlete's circle of associates.

41. The three examples of situations where no fault or negligence would not apply provide little guidance in the case at hand for two reasons. Firstly, because they all involve a conscious decision on the part of an athlete to consume a substance; and secondly, they are all subject to an athlete's responsibilities, as expressed in the commentary, which do not come into play here, of being responsible for what they ingest, for their choice of medical personnel, for advising medical personnel that they cannot be given any prohibited substance and for the conduct of those persons to whom they entrust access to their food and drink. In the case at hand, at no time did Mr. Barber make a conscious decision to consume any substance. Secondly, there is no responsibility on the part of an athlete for the conduct of a complete stranger before a sexual encounter. Mr. Barber did not give any access to W to his food or drink. In fact, he refused a drink she offered to him.

42. As Mr. Safayeni emphasized, every case must be decided on its own facts. This is especially true with respect to fact-based findings such as an athlete's knowledge, the degree of caution he or she exercised and his or her degree of fault. Nevertheless, this Panel finds the reasoning of the Panel in *CAS 2009/A/1926 ITF v. Richard Gasquet* to be of persuasive value.

43. This Panel finds that the facts in *Gasquet* are comparable to those of the matter at hand. In that case, an athlete met a woman in a restaurant who had been ingesting cocaine prior to their rendezvous unbeknownst to him. They later went to a club. They kissed a number of times throughout the evening. The athlete was unaware of the woman's cocaine history and did not see her, during

the entire evening, taking cocaine or appearing to be under its influence. The next day, he tested positive for a minute amount of cocaine.

44. In my view, a restaurant and a club can be just as risky as a hotel room in terms of meeting and interacting with someone who may ingest, or have ingested, cocaine. Meeting someone by happenstance can be just as risky, if not more so, than planning a meeting. Interacting with a stranger over several hours at a restaurant and a club is no way to assess a person's drug habits. In fact, the woman in the *Gasquet* case had more opportunity to ingest drugs during the course of her interaction with that athlete than did W with Mr. Barber over some 30 minutes – there are washrooms in restaurants and clubs. In both cases, the athletes didn't see the women consume cocaine.

45. This Panel adopts the following reasoning of the Panel in *Gasquet* wherein it observed and held, at paragraphs 5.31 and 5.33:

5.31. Considering these facts, the Panel concludes that it cannot find that the Player did not exercise utmost caution when he met Pamela in an unsuspecting environment like an Italian restaurant ("Vita"). He could not have known that she might be inadvertently responsible for administering cocaine to him if he were to kiss her that night. Also, the Panel concludes that it was impossible for the Player to know, still exercising the utmost caution, that when indeed kissing Pamela, she might inadvertently administer cocaine to him. As the Player did not know Pamela's cocaine history and did not see her, during the entire evening, taking cocaine or appearing to be under its influence, how could he imagine that she had been consuming cocaine? And even more, how could he have been in a position to know that, even assuming that he knew that she had been consuming cocaine, that it was medically possible to be contaminated with cocaine by kissing someone who had ingested cocaine beforehand?

[...]

5.33. In view of the above, the Panel comes to the conclusion that by kissing Pamela [...] the Player acted without fault or negligence, in accordance with the respective definition [...]

46. In the result, pursuant to rule 10.4 of the CADP, the Athlete's period of ineligibility is hereby eliminated. This makes him eligible to compete at the Olympic Games in Rio de Janeiro.

47. Rule 9 of the CADP stipulates that an anti-doping rule violation in individual sports in connection with an in-competition test automatically leads to disqualification of the result obtained in that competition with all resulting consequences, including forfeiture of any medals, points and prizes. Accordingly, Rule 9 requires an automatic disqualification with respect to any results the Athlete obtained in the 2016 Canadian Championships, and a forfeiture of any medals, points and prizes he received. This does not make Mr. Barber ineligible to compete at the Olympic Games.

48. In spite of the above findings on fault in the context of the CADP, this Panel strongly recommends that athletes avoid engaging in the type of conduct described herein. Regardless of social trends, "acceptable" is not a word many would use to characterize it. To say that it is acceptable is a sad commentary. The Athlete has lost much as a result of his actions by virtue of Rule 9 of the CADP and perhaps for other reasons. As Mr. Safayeni submitted, Canadian athletes are held to a higher standard. Fortunately for Shawnacy Barber, he has another chance to aim higher.

Dated at Ottawa this 11th day of August, 2016.



Ross C. Dumoulin
Arbitrator