

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 MICHAEL STEFANOVIC
ASSERTED BY THE CANADIAN CENTRE FOR ETHICS IN SPORT**

No.: SDRCC DT 17-0266
(Doping Tribunal)

Canadian Centre for Ethics in Sport

-and-

Canadian Interuniversity Sport d.b.a.
U Sports

-and-

Michael Stefanovic (Athlete)

-and-

Government of Canada
World Anti-Doping Agency
(Observers)

BEFORE: Ross C. Dumoulin

APPEARANCES:

For the Canadian Centre for Ethics in Sport: Alexandre Maltas, counsel
Meredith MacGregor, counsel
Natasha Danschinko
Matthew Koop

For U Sports: Tara Hahto

For the Athlete: Sharon Fox, counsel
Kevin Mellor, counsel

DECISION

October 3, 2017

1. This is a decision with reasons issued pursuant Rule 8.3.1 of the *Canadian Anti-Doping Program (2015)* (CADP). I was chosen 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.

THE FACTS

2. The Athlete, Michael Stefanovic, is currently in his fifth year of studies at the University of Regina and has played four seasons for the University's football team, the Regina Rams. He is 23 years old.

3. Mr. Stefanovic testified that he has taken five CCES anti-doping courses entitled "True Sport". The main message of the courses is that athletes are to be responsible for what goes into their bodies. The subject of adverse findings for certain substances was covered.

4. The Athlete hopes to go to law school, become a lawyer and play football in the Canadian Football League (CFL).

5. He recently sustained a partial tear of his groin which affected his training leading up to the CFL Western Regional Combine held in Regina, Saskatchewan. The injury did not allow him to train properly. At the Regional Combine, CFL scouts

and coaches select which players are to go to the National Combine. The Athlete found out that he was not moving on to the National Combine. On that day, March 23, 2017, he was subject to an out of competition doping control following the Regional Combine. His evidence was that he expected to be tested: it was common knowledge – he and his football teammates were told as much. Mr. Stefanovic had been subject to a doping control once before and there was “no outcome”

6. The sample provided by the Athlete during the doping control gave rise to an adverse analytical finding which was received by the Canadian Centre for Ethics in Sport (CCES) from the World Anti-Doping Agency (WADA) accredited laboratory on April 12, 2017. The adverse analytical finding indicated the presence of drostanolone, an anabolic androgenic steroid classified as a prohibited substance (S1. Anabolic Agents) on the 2017 WADA Prohibited List.

7. On May 1, 2017, the CCES issued a notification pursuant to Rule 7.3.1 of the CADP asserting that the Athlete had committed an anti-doping rule violation for the presence of a prohibited substance in his sample pursuant to Rule 2.1 of the CADP. The CCES proposed that the sanction be a four (4) year period of ineligibility in accordance with Rule 10.2.1.

8. In its notification of May 1, 2017, pursuant to Rule 7.9.1, the CCES imposed a mandatory provisional suspension on the Athlete which meant that he was temporarily barred from participating in any competition or activity until such time as a decision was rendered by a Doping Tribunal or a waiver of hearing was filed.

9. The Athlete was informed by his university's Athletic Director that he had tested positive for drostanolone. He asked her what that was and the Director told him it was an anabolic steroid. He testified that he was confused and shocked. He had no idea how this was possible and believed it was a mistake that would be quickly corrected. He has not played football since that time because he has been suspended.

10. The Athlete has followed a very strict regimen. He observes a strict diet. He or his mother prepares all his food. He does not eat out. He does not drink or smoke. He is 100% conscious of what he puts into his body. He has only used Muscle Pharm and Rivalus supplement products, as he knows them to be free of prohibited substances: he has cross-referenced ingredient lists with the WADA Prohibited List on-line, checked company websites for whether they contain product warnings regarding prohibited performance-enhancing substances and has spoken to the retailers who sold him the supplements to ensure they did not contain any prohibited substances. He has taken the same supplements over the last five years.

11. The Athlete spent some time investigating what could be the cause of his adverse analytical finding. He consulted with Dr. Gregg Tomy, a professor of chemistry at the University of Manitoba and co-director of the Centre for Oil and Gas Research and Development, and learned that some supplement products can have drostanolone or other prohibited substances in them without being labelled as such. The Athlete then pursued this line of investigation by identifying any substance with which he may have come into contact. He began requesting samples of the supplements of anyone who was close enough to him to have contaminated his product and/or shaker cup in order to send the said supplements for testing. He

obtained samples of other substances that were present in his parents' home which his brother had used that may have contaminated his supplements and/or protein powder and/or shaker cup which he used to consume the products.

12. At that time, the Athlete was using a shaker cup with frosted sides, a red lid and a whisk ball which he kept in his bag. When he consumed his pre-workout supplement, he would remove the lid from a shaker cup, put in the powdered supplement, add water, shake the mixture and drink it. When he worked out, he would bring his bag onto the workout floor with him. He does not allow people to use his shaker cup. Except on one occasion, Mr. Stefanovic allowed a Regina Rams teammate, Mitch Picton, to use his shaker cup, as the two were using the same supplement (Rivalus Powder Burn). He watched Mr. Picton use his shaker cup, then rinsed it out and put in his own supplement. Mr. Picton was also tested at the Regional Combine and did not test positive for any prohibited substance. Therefore, the Athlete did not seek any samples of the substance that Mr. Picton was using.

13. The only person whom the Athlete could think of who would have possibly had the opportunity to contaminate his supplement and/or shaker cup was Josh Palaschuk. The two grew up together and have been close friends since kindergarten – the Athlete testified that Josh was like a brother to him. Josh was the only other person who would have had access to his shaker cup.

14. On either March 18 or 19 2017, which was the weekend before the Regional Combine, the Athlete and his friend Josh worked out together at the YMCA in Moose Jaw, Saskatchewan. The Athlete was living in Regina at the time and visiting his parents in Moose Jaw. Josh was also in town to celebrate his mother's birthday.

15. The Athlete testified that a variety of people frequent the YMCA: members of the general population, families and some athletes. He brought his black backpack into the workout room and left it underneath one of the benches. It was zippered shut. In his bag was a muscle roller, a weight belt, Rivalus Powder Burn, which was his pre-workout supplement, and his shaker cup. Mr. Stefanovic felt that leaving his backpack under the bench was a safer alternative to putting it in a locker at the YMCA, as it would avoid theft of his backpack or usage of his shaker cup. The lockers at the YMCA are old, don't close properly and can be bent. They are easy to break into. Numbered locks with a universal code are given out to the users.

16. It was the Athlete's evidence that he did not give Josh consent to go into his backpack, or use his supplement or his shaker cup. Nor did Josh ask him to use his shaker cup. The Athlete did not give Josh permission to go into his bag and did not use his shaker cup during his time at the YMCA that day.

17. The only piece of equipment that the Athlete used during his workout at the YMCA was a recumbent stationary exercise bike which was located on the other side of the workout room from the bench under which he had put his backpack. During the time he was in the workout room, Mr. Stefanovic also walked around the area. He estimated the distance between the bench and his bike to be approximately 20 feet. He testified that he had a "clear path" allowing him to see the bench under which he put his backpack. However, a number of photographs taken of the premises show that the area between two bikes and two of the benches is filled with various pieces of workout equipment, both short and tall, their screens and a large pillar, such that the view of the benches that the Athlete would have

had would seem to be mostly, or at least partially, obstructed. The photos also show cup holders attached to and situated immediately behind the seats of the bikes. The Athlete spent about one hour on the exercise bike. He added that during his workout, his friend Josh was "all over the place".

18. The Athlete testified that he did not see Josh use his shaker cup and was unaware that his friend had done so (which he later found out). He added under cross-examination that he did not see anyone touch his backpack in the workout room and did not see Josh take out, use or put back his shaker cup. He said that he was "not sure" why he didn't put his backpack next to him while he was using the bike, adding "it didn't occur to me" and that the backpack would not have been close it if he had walked around. He opined that his backpack would have been more exposed next to the bike than under the bench.

19. Mr. Stefanovic didn't know anything about the supplement that his friend Josh was taking and had no reason to suspect that the latter was using an anabolic steroid. He testified in chief that he has never intentionally taken drostanolone.

20. Josh Palaschuk is 22 years old, lives in Saskatoon and has a B.Sc. in Pharmacology and Physiology from the University of Saskatchewan. He has a job with the Saskatchewan government in a respite house for autistic youth. He was a CIS track and field athlete in his second and third years at the University of Saskatchewan in 2014 and 2015. He took an on-line anti-doping in sport course in 2014. He understood from the course that he was responsible for what he consumed as an athlete. He did not consume supplements or protein as a varsity athlete because one does not need more muscle for track. He ran the 800-meter

1000-meter and 1500-meter races in university. Afterwards, he used supplements to aid in his training and to add strength and size. He has applied for medical school and is presently "wait-listed".

21. With respect to the workout he and the Athlete did on March 18 or 19 at the YMCA in Moose Jaw, they did different routines that were not necessarily together. He also brought a black backpack which he described as a "book bag", and put it under the bench right next to the Athlete's bag, although he first testified that he did not recall the Athlete bringing anything with him. Josh testified that it was "standard practice" to put your bag under the bench "so you always have it in your line of sight". The YMCA prefers you to leave your bag by the benches. Once he was told to put his bag there and not on the workout floor.

22. Josh acknowledged that he used the Athlete's shaker cup for his pre-workout supplement before his workout. He unzipped the Athlete's bag, took out the shaker cup, made his way to the washroom, put in his own supplement with a scooper, added water from the tap, shook the mixture and drank it while still in the washroom. He then returned the Athlete's shaker cup to his bag under the bench. Josh estimated it would have taken him five seconds to remove the shaker cup from the bag and that he spent one minute in the washroom.

23. Josh added that he and the Athlete have been friends a long time and it didn't seem to him to be "out of sorts" for him to borrow the Athlete's shaker cup. He needed to borrow it because he had forgotten his own. He didn't ask the Athlete's permission to borrow his shaker cup or to go into his bag because "we are

very close". He didn't tell him because it "seemed like it wouldn't matter" and was not a big deal, although he knew that it was the Athlete's dream to play in the CFL.

24. It was Josh's evidence that he got the supplement he consumed at the YMCA from an acquaintance named Mark who worked out at the same facility. Mark was a short, "really muscular" man in his 40s who was intimidating looking. He told Josh that the supplement was a "pre-workout". He didn't tell Josh that it contained an anabolic steroid. Josh purchased the substance, a red powder, from Mark's car outside the YMCA in late February 2017. His goal was to improve his strength. He had reached a plateau. The substance was expensive, costing about \$100, so Josh inferred that it was a more powerful product. He assumed there was caffeine and other energy boosters in it, but he also testified that he had "no idea" what was in the red powder. He used it about twice a week. Under cross-examination, Josh offered that the substance was endorsed by his "social group", he didn't consider them to be steroid users and he had no reason to think it contained an anabolic steroid in light of their endorsement.

25. Two photographs of the substance in a white canister were presented in evidence. Josh described the substance as "extremely adhesive, it coagulates, forms a bolus", adding that it has a "pungent smell". The canister was three quarters full when he purchased it. The photos depict a reddish substance that is partially sticking to the inside walls of the canister. Josh also said that the substance is lighter in colour when mixed with water and that the residue that is left in his shaker is like an unwashed glass and creates a lighter red dilute film.

26. Josh testified that when, at the Athlete's request, he gave him his supplement to have it tested, Josh "had an inkling" that it contained a banned substance, but

didn't tell the Athlete at that time because it could have come back negative. He was embarrassed that he took the supplement because it was not from a commercial company. It was only about one or two weeks after the Athlete had told him that the said supplement had tested positive for drostanolone that Josh told his friend he had used his shaker cup. When asked why it had taken him so long to tell the Athlete that he had used his shaker cup, Josh answered it was all "deductive reasoning" and "trial and error", then he mentioned his reputation, a threat to his employment, medical school and that his losses would be greater than the Athlete's gain if he lied.

27. The next time the Athlete used his shaker cup after the workout at the YMCA on March 18 or 19 was on the following Tuesday, March 21 or Wednesday, March 22. He did not clean out his shaker cup before using it that time. It was not his habit to do so every time he used it. He did not notice any discoloration or odd or different smell and the supplement he consumed did not taste any different.

28. Although the Athlete had not given Josh permission to use his shaker cup and had not seen him use it, in late June 2017, he sought out his friend on the off chance that the latter had contaminated his product or cup. The Athlete asked Josh to give him a sample of the latter's supplements he was using when they worked out together in March at the YMCA. Josh told him that he had been taking a supplement obtained from someone at his workout facility, but didn't know what the supplement was.

29. With the assistance of Dr. Gregg Tomy, four samples of products were sent away to be tested at the Sports Medicine Research and Testing Laboratory in Salt Lake City, Utah. The first sample was a protein powder used by the Athlete's brother.

The second one was Rivalus Powder Burn, the supplement the Athlete was taking at the time. It was a light green powder. The third sample was another product used by the Athlete's brother. All three of these samples tested negative for drostanolone. The fourth sample was the product that Josh had been using in March and it tested positive for drostanolone. It was a red powder.

30. The Athlete received the results of these tests on July 21, 2017. He then told his friend Josh and the latter confirmed that he had used the Athlete's shaker cup when they had worked out together in March at the YMCA.

31. The fourth sample, the red powder that had been sent to the laboratory in Salt Lake City and had tested positive for drostanolone, was later sent to Dr. Christiane Ayotte's laboratory for a second analysis. Dr. Ayotte is the Director of the Doping Control Laboratory, INRS-Institut Armand-Frappier. She is also a professor at the Institut. Dr. Ayotte also found the presence of drostanolone in the said sample, as well as drostanolone propionate, testosterone and benzylbenzoate.

32. For reasons that will later become evident, there is no need for the Panel to reproduce the details of the reports rendered by Dr. Ayotte and Dr. Tomy.

33. On September 4, 2017, the Athlete signed a Timely Admission of an Anti-Doping Rule Violation form in accordance with CADP Rule 10.11.2. He thereby admitted to the violation of Rule 2.1 of the CADP of "Presence of a Prohibited Substance" in his sample.

34. On September 20 and 21 2017, hearings related to the present matter were held by video-conference.

THE POSITIONS OF THE PARTIES:

The Athlete:

35. Ms. Fox submitted on behalf of the Athlete that he has met the burden, on a balance of probabilities, of establishing that he bears no fault and no negligence under CADP Rule 10.4 with respect to the adverse analytical finding.

36. More specifically, as required under Rule 10.4, the Athlete has established how the substance entered his system and that he did not know or suspect, and could not have reasonably known or suspected, even with the exercise of utmost caution, that he was administered a prohibited substance.

37. Counsel relied upon the decision in CAS 2009/A/1926 *ITF v. Richard Gasquet* wherein it was held, at paragraph 5.9, that the doping tribunal must be satisfied that there is a 51% chance that one specific way of ingestion is more likely than not to have occurred.

38. The evidence showed that the Athlete's friend Josh used his cup without his permission and returned it to the Athlete's bag. The Athlete then used his contaminated shaker cup approximately 24 to 48 hours prior to competition. The residue that remained in the shaker cup was sufficient, on a balance of probabilities, to cause the adverse analytical finding. This is the only rational conclusion that can be drawn. Both witnesses denied tainting the substance and they were not contradicted or impeached on this.

39. Ms. Fox argued that the Athlete did not know or suspect, and could not have reasonably known or suspected, despite his use of the utmost caution, that he was at risk of ingesting a prohibited substance when he worked out with Josh. It was simply impossible for him to know or even suspect that Josh had used his shaker when he ensured that his bag was closed, did not observe Josh use his shaker, did not permit Josh to use it and had no knowledge that Josh had used his shaker until after the adverse analytical finding has been made. The Athlete took special care to safeguard his supplements and containers used to consume those supplements by not leaving them in an unattended locker and by ensuring that his bag was closed.

40. Josh filled the Athlete's shaker cup with his own supplement in the YMCA bathroom out of the Athlete's sight. Similarly, in the *CCES v. Barber* SDRCC DT 16-0249 case, cocaine was consumed in a hotel bathroom out of the Athlete site. The Athlete in the case at hand could not have known, even with the exercise of utmost caution, that his friend had used his shaker cup. It took a total of 10 seconds for Josh to take out and return the shaker cup to the backpack.

41. Counsel further submitted that the scope of the CADP is not to prohibit athletes from associating with friends and family and co-workers because of the potential for cross-contamination. As such, it was not unreasonable for the Athlete to work out with a lifelong friend that he sees on an occasional basis.

42. The YMCA was not an inherently risky or suspicious environment for contamination, such as a bar or nightclub or hotel room, as in the *Gasquet, supra*, and *Barber, ibid*, cases. Rather it was a clean, safe space where, despite all precautions, the Athlete's shaker cup was inadvertently contaminated. Mr. Stefanovic left his zippered up, closed backpack in an area in his line of sight 20 to

30 feet away. The photographs taken of the workout area show this. One of the photos shows that the two benches are visible, so his bag could also be seen from the bike. Moreover, the human eye achieves a broader view than a camera and is not static like a photograph. It moves around. There was no evidence that he should have been aware that his friend Josh would go into his bag.

43. Ms. Fox submitted that the level of duty of care that the Athlete owed must be examined. The standard of care of "utmost caution" does not require perfection. The Athlete didn't authorize his friend to use his shaker. He showed utmost care: the YMCA lockers are not a secure place; the YMCA does not allow bags on the floor; it would be unreasonable to carry his shaker while he was on the bike – he would experience a lack of movement if he carried his backpack on his back. It is not reasonable to be expected to carry your shaker cup with you on the off- chance that someone may tamper with it. Then, what about his supplement?

44. It would be disproportionate and unfair to impose any penalty by way of a period of ineligibility on the Athlete when he was neither reckless nor negligent in the care and safekeeping of the supplement container. He could not have known that Josh was using a prohibited substance and might be inadvertently responsible for administering drostanolone to him if he was to work out with him that weekend. Even when exercising the utmost caution, the athlete could not have been aware of the consequences that working out with Josh could have on him.

45. With respect to intention, at no time did the Athlete make a conscious decision to ingest a prohibited substance. He testified that he didn't know that drostanolone was in his supplement. When he found out from the Athletic Director,

he was shocked and had to ask what drostanolone was. He didn't know that Josh had used his shaker. It was done without his permission.

46. It was argued that the commentary in CADP Rule 10.4 is not binding because it is not found in the body of the Rule. In any case, where it states that Athletes are responsible for the conduct of those persons to whom they "entrust access to their food and drink" is not applicable in the case at hand because the Athlete did not entrust access to his shaker cup to his friend Josh.

47. While it is uncontested that the Athlete had drostanolone in his urine, it is his position that, given the lack of intention and the precautions he took, the doping violation alleged is essentially a technical violation of the CADP that is excused by the Program. He did not purposely ingest drostanolone. He was not careless, reckless or negligent in ensuring that he was not contaminated with it. As such, he bears no fault or negligence.

48. The Athlete therefore asks that no period of ineligibility be imposed.

The CCES:

49. Mr. Maltas drew the Panel's attention to CADP Rules 2.1, 10.2, 10.4 and the sub-paragraphs and comments which come under those Rules, as well as the CADP definitions of "*No Fault or Negligence*" and "*Fault*".

50. Counsel submitted on behalf of the CCES that, pursuant to Rule 10.2 of the CADP, the period of ineligibility may be reduced from four years to two years if the Athlete can establish, on a balance of probabilities, that the anti-doping rule

violation (ADRV) was not intentional. To do this, the Athlete must show how the substance entered his body and that the ADRV was not intentional.

51. Under CADP Rule 10.2.3, the term "intentional" means that the Athlete engaged in conduct which he or she knew constituted an ADRV or knew there was a significant risk that the conduct might constitute or result in an ADRV and manifestly disregarded that risk.

52. It is the position of the CCES that the Athlete has failed to show that the ADRV was not intentional and is not eligible for a reduced sanction. The Athlete's account of how the drostanolone entered his system is not credible, does not make sense and is not supported by the analysis of the sample, the alleged powder or the expert evidence of Dr. Ayotte. The evidence of the Athlete and his friend Josh is not credible.

53. In the event the Tribunal accepts the Athlete's story, the CCES submits that he manifestly disregarded significant risks as follows: he knew that he was responsible for what was in his body; he knew there was a risk of contamination from sharing drinking containers; he left his shaker unattended; the photographs show that the Athlete did not have a clear view of his bag while he was on the bike – there are two rows of machines and a pillar in the way. He did not make necessary inquiries to ensure that his container and supplements were not compromised when out of his possession; he did not rinse his shaker before using it when it contained red powder or liquid.

54. If the Tribunal accepts that the Athlete's ADRV was not intentional, the period of ineligibility may be eliminated pursuant to rule 10.4 if the Athlete can establish how the substance entered his body and that he bears no fault or negligence.

55. Mr. Maltas submitted that the Athlete has not proven, on a balance of probabilities, how the drostanolone entered his system mainly for reasons based upon the analysis of his sample by Dr. Ayotte.

56. Alternatively, if the Tribunal accepts the Athlete's story of how the drostanolone entered his system, it is the CCEs's position that he cannot prove no fault or negligence. The 2015 CADP Rules and case authorities have long required Athletes to be responsible for the substances that enter their bodies and to make sufficient inquiries about substances they ingest. The amount of red powder or fluid that the Athlete would have had to ingest would have been visible. He was responsible to guard against accidental contamination. An Athlete cannot be found at no fault or negligence when he used a dirty shaker containing a visible amount of dark red powder when he was not using a dark red powder supplement. The Athlete failed to look into his shaker before mixing his drink to make sure that it was empty and clean. He also clearly failed to properly guard against someone else using his shaker which was out of his control and possession for at least long enough for Josh to mix a drink, consume it and replace the shaker in the Athlete's bag. If there was no safe place to leave his bag at the YMCA, then he should not have brought it. He even allowed another friend to use it. In sum, the Athlete failed to exercise utmost caution.

57. Counsel further submitted that the 2015 CADP specifically states that an Athlete cannot be found at no fault or negligence when a member of their inner circle, or entourage, is allegedly responsible for the ADRV. The spirit and intent of this Rule applies to the present circumstances. The CADP precludes a finding of no fault or negligence where, as here, the alleged cause of the ADRV involves someone within the Athlete's inner circle.

58. Mr. Maltas argued that the case of *CCES v. Korol* SDRCC DT 12 – 0186 is relevant. That Tribunal found it was negligent on the part of Mr. Korol to have left his supplements openly displayed in the common area of his residence when two other athletes had access to this space. Like in *Korol*, the Athlete in the present matter failed to properly guard his supplement shaker cup, as his friend Josh is alleged to have used it without the Athlete's knowledge. He left his shaker unattended. This precludes a finding of no fault or negligence.

59. In light of the Athlete's failure to demonstrate lack of intentionality or no fault or negligence, the CCES submits that the mandatory four-year period of ineligibility must apply. It should commence on March 23, 2017, the date of the sample collection, by reason of the Athlete's timely admission of the ADRV.

DECISION

60. The Athlete in the matter at hand has admitted to the anti-doping rule violation of "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 for a violation of Rule 2.1 where the violation does not involve a specified substance, unless the Athlete "can establish that the anti-doping rule violation (ADRV) was not intentional". Rule 10.2.2 states that if Rule 10.2.1 does not apply, the period of ineligibility shall be two years.

61. 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.

62. The definition of "*No Fault or Negligence*" in the CADP reads in part: "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 *Used* or been administered the *Prohibited Substance*..." The definition goes on to state that the Athlete must also establish how the prohibited substance entered his or her system.

63. 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".

64. The above-noted Rules of the CADP stipulate in part that the Athlete must establish that the ADRV was not intentional in order to obtain a reduction of the period of ineligibility and must establish how the prohibited substance entered his or her system in order to obtain an elimination of the period of ineligibility. The Athlete must meet the standard of proof of a balance of probability in establishing these elements.

65. The Athlete presented a scenario to show how drostanolone, the prohibited substance, entered his system and to establish that the ADRV to which he has admitted was not intentional. This scenario is essentially that his close friend Josh Palaschuk inadvertently contaminated his shaker cup, ultimately resulting in the adverse analytical finding.

66. A consideration of the evidence relating to Josh's background and behaviour on March 18 or 19, 2017 at the YMCA leads the Panel to find that the scenario presented by the Athlete is not a credible one. For the following reasons, the Panel

finds that the Athlete has failed to establish, on a balance of probability, that Josh did, in fact, contaminate his shaker cup.

67. It is not believable that a person of Josh's experience, education, anti-doping knowledge and intellect would act both so recklessly in accidentally contaminating his close friend's shaker cup with what turned out to be a prohibited substance, then so stoically in not saying a word about it.

68. Josh is a young man with a B.Sc. in the most fitting disciplines of Pharmacology and Physiology, a former university-level athlete who has taken an anti-doping in sport course. And yet, in spite of this background in science and high-level competitive sport, the Panel is asked to believe the following: without permission or warning, Josh took his close friend's shaker cup, a friend he knew had dreams of playing in the CFL, and put into the shaker an expensive, unknown, strength-building supplement he bought from a really muscular man he didn't know and unwittingly left the shaker contaminated without telling his friend.

69. Josh had "no idea" what was in the mysterious red powder, but he knew it was designed to increase his strength, he believed it was powerful and the supplier sold it to him from his car, not out in the open. It strains credulity that Josh, a young man steeped in science and sport, formerly subject to the anti-doping Rules, could inadvertently contaminate his friend's shaker cup by using it to mix this sticky, coagulating, pungent powder. It's not believable that Josh could then neglect to properly rinse out the shaker, could then return it to his friend's bag and could remain silent about it until it was way too late. All this just doesn't sound right. It's too reckless a behaviour to be believed on the part of someone who must have known better.

70. In light of the above-noted evidence and analysis, the Panel finds that the only scenario proposed by the Athlete is, on a balance of probability, unlikely to have occurred. Therefore, the Panel must conclude that the Athlete has failed to establish how the prohibited substance entered his system and failed to establish that the ADRV was not intentional. Hence, the period of ineligibility cannot be eliminated under Rule 10.4 or reduced under Rules 10.2 or 10.5.

71. There are two other evidentiary requirements for a finding of no fault or negligence in committing a violation of CADP Rule 2.1. Firstly, pursuant to the definition of "*No Fault or Negligence*" in the CADP, the Athlete must establish 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 used a prohibited substance.

72. The other evidentiary requirement is found in the CADP definition of "*Fault*" wherein it is stated that fault is any breach of duty or "**any** lack of care" (emphasis added) appropriate to a particular situation. If there is any lack of care, there is fault. It follows that for a finding of no fault, the evidence must establish no lack of care on the part of the Athlete that is appropriate to the situation at hand.

73. The Panel finds that if Josh did, in fact, contaminate the Athlete's shaker cup as they described in their testimonies, the Athlete failed to establish, on a balance of probability, the above-noted evidentiary requirements for a finding of no fault or negligence. The reasons for this finding are as follows.

74. Quite simply, the Athlete left his bag and shaker cup unattended and at times out of his sight in the YMCA workout area. This conclusion is inescapable because

the Athlete failed to notice that his friend Josh unzipped his bag, took his shaker cup out of his bag, went to the washroom with it in hand and then returned it to his bag. He thereby failed to safeguard his shaker cup. "Fault" is defined as "any lack of care". The Athlete's shaker cup is the container he uses to consume his supplements. This makes it a very important item in the context of the anti-doping program. When he failed to notice that his friend took his shaker from his bag, walked away with it and then returned it, there was, in the Panel's judgment, a lack of care. Thus, there was fault, as it is defined in the CADP.

75. The Athlete could reasonably have at least suspected, by exercising utmost caution, that he was exposing himself to the risk of using a prohibited substance. Given that he had chosen to bring his shaker cup to the YMCA and leave it in his bag under a bench, exercising utmost caution would have required the Athlete to not lose sight of his bag. If he had not lost sight of his bag, he would have seen Josh remove and return his shaker cup and would have been able to find out that Josh had used it with the latter's own supplement and then could have taken the necessary precautions.

76. The photographs taken of the main workout area at the YMCA show that the area between the two bikes and benches is filled with various pieces of workout equipment, their screens and a large pillar, such that the view of the benches the Athlete would have had was mostly, or at least partially, obstructed. Therefore, by choosing to place his bag under one of the benches and then using one of the bikes, the Athlete was not exercising utmost caution.

77. Moreover, given that the YMCA was open to the general public, which would include families and other athletes, it is likely that at various times during the hour

that the Athlete was using the bike, other people would have been on the other pieces of equipment between the bench and the bike, or walking by, or standing in the way, thus obstructing the Athlete's view. The Athlete testified that he also walked around the area. While doing this, it is likely that he did not always have a clear view of the bench. It is therefore not all that surprising that he did not see Josh take out and return his shaker.

78. Here are some ways the Athlete could have exercised utmost caution in this instance: instead of placing his backpack under the bench, he could have put it on his back when he was using the exercise bike; or, he could have placed his shaker cup in the cup holder attached to and situated immediately behind the seat of his bike; or, since he didn't use his shaker cup and supplement at the YMCA, he could have decided not to bring them with him.

79. In the Panel's view, the Athlete was also negligent the next time he used his shaker cup after the workout at the YMCA: he failed to look into his shaker before mixing his drink to make sure that it was empty and clean. He didn't notice the residue of the red powder mixed with water that Josh had left, or any odd or different smell from the pungent powder. And he didn't clean out his shaker cup before using it. Utmost caution would dictate that an athlete would at least take a good look inside his container before using it and then clean it out once he saw or smelled a residue.

80. The CADP definition of "*Fault*" also states that one of the factors to be taken into consideration in assessing an Athlete's degree of fault is his or her experience. The Athlete's four years of experience as a varsity football player who has been subject to the anti-doping Rules are a contributing factor to his degree of fault.

81. The commentary to Rule 10.4 of the CADP states that no fault or negligence would not apply where there was sabotage of the Athlete's food or drink by a spouse, coach "or other Person within the Athlete's circle of associates (Athletes are responsible for what they ingest and for the conduct of those Persons to whom they entrust access to their food and drink)".

82. In the Panel's estimation, an athlete allowing a close friend's unsupervised access to his shaker cup is analogous to an athlete entrusting access to his food and drink by an associate. The Athlete in the present matter must be held responsible for the conduct of his friend Josh who easily gained access to his shaker cup.

83. In the *Korol* decision, *supra*, at paragraph 93, arbitrator Mew cites the reasoning in *Plug v. CCES*, SDRCC 12-0182, at paragraph 132, wherein it is observed that "sabotage by a member of an athlete's own circle of associates would reasonably engage consideration of the athlete's strict liability for what ends up in his or her system." Then, at paragraph 95, arbitrator Mew held that the proper characterization of Mr. Plug's relationship to the Athlete would be that of a member of the Athlete's circle of associates. At paragraph 105, the arbitrator concludes as follows:

That said, even though he had no reason to believe that Plug would be using his residence, the Athlete should have taken more care about where in his residence he left his supplements. He shared the residence with two other athletes. It would have been more prudent if he had kept his supplements in his own room, rather than openly displayed in the common area of the residence. Such conduct would, however, fall within the realm of simple negligence, rather than significant negligence.


84. The Panel adopts the above reasoning and holds that the standard of care to be met by the Athlete in the safeguarding of, and access to, his shaker cup is especially high with respect to a close friend such as Josh.

85. A reduction in the sanction under Rule 10.5.1.2 is not available to the Athlete in the matter at hand because the definition of *Contaminated Product* in the CADP is a product that contains a prohibited substance that is not disclosed on the product label or in information available in a reasonable Internet search. Hence, the reduction in sanction for contaminated products would apply where an Athlete is led astray by a label and by an Internet search that do not disclose a prohibited substance that is present in the product. These are not the facts in the present case.

86. A reduction in the period of ineligibility under Rule 10.5.2 is also not available to the Athlete based on "*No Significant Fault or Negligence*". This is because the Athlete failed to establish how the prohibited substance entered his system, a requirement specified in the CADP definition of the said term.

87. In light of the Panel's findings, the four-year period of ineligibility proposed by the CCES is hereby maintained. By virtue of the Athlete's timely admission of the rule violation, the period of ineligibility shall commence on March 23, 2017, the date of the sample collection, pursuant to Rule 10.11.2 of the CADP.

Dated at Ottawa this 3rd day of October, 2017.


Ross C. Dumoulin
Arbitrator