

IMPORTANT NOTE: *This is a translation of the original French decision. This version has not been reviewed by the jurisdictional arbitrator.*

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

No: SDRCC DAT 17-0010

DAVID DROUIN

(CLAIMANT)

AND

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)

(RESPONDENT)

AND

WORLD ANTI-DOPING AGENCY (WADA)

UNION CYCLISTE INTERNATIONALE (UCI)

(OBSERVERS)

**DECISION ON THE ADMISSIBILITY OF THE TESTIMONY
OF THE LAWYER JEAN-FRANÇOIS BERTRAND**

Honorable L. Yves Fortier, QC, Jurisdictional Arbitrator

Annie Lespérance, Lawyer, Assistant to the Jurisdictional Arbitrator

December 20, 2017

I. INTRODUCTION

1. I am hearing an application brought by the CCES. The CCES is seeking a ruling by me to the effect that [TRANSLATION] “the Athlete has waived Tassé Bertrand’s professional secrecy” and requests that Mr. Bertrand be heard [TRANSLATION] “to comment, contradict or confirm the Athlete’s allegations.”
2. The firm Tassé Bertrand is the Athlete’s former legal counsel in this matter.
3. The Athlete is objecting to the application of the CCES on the ground that his former lawyer is bound by professional secrecy.
4. A hearing by conference call was held on December 18, 2017, from 1:30 p.m. to 3:30 p.m. regarding the admissibility of Mr. Jean-François Bertrand’s testimony. Were present during the conference call:

Mr. Guy Chicoine, the Athlete’s representative;

Mr. Raphaël Buruiana and Mr. Yann Bernard, legal counsel for the CCES;

Ms. Natasha Danschinko and Ms. Elizabeth Carson, representing the CCES;

Ms. Marie-Claude Asselin and Ms. Stéphanie Du Grenier, representing the SDRCC;

Mr. Yves Fortier, Jurisdictional Arbitrator; and

Ms. Annie Lespérance, Lawyer, assistant to the Jurisdictional Arbitrator.

5. The Athlete did not participate in the hearing.
6. Having considered:
 - the correspondence from the CCES of December 8, 2017 (exhibit C-24);
 - the Athlete’s letter of December 8, 2017 (exhibit A-20);
 - the written submissions of the CCES of December 12, 2017 (exhibits C-25 to C-29);

- the Athlete’s written submissions of December 14, 2017 (exhibits A-21 to A-25);
- the correspondence from the CCES of December 15, 2017 (exhibit C-30);
- the oral submissions made by the parties during the teleconference of December 18, 2017 at 1:30 p.m.; and
- the authorities submitted by the parties;

this is my decision.

II. SUBMISSIONS BY THE PARTIES

A. THE POSITION OF THE CCES

7. The CCES explains as follows the reasons for which it intends to have Mr. Bertrand testify:

[TRANSLATION]

[1] *In his supplemental submissions dated November 13, 2017, David Drouin [sic] “Drouin” or the “Athlete”) repeatedly alleges that his former lawyer from the law firm Tassé Bertrand (“Tassé Bertrand”), Mr. Jean-François Bertrand (“Mr. Bertrand”) omitted to appeal his case, in spite of the fact he was instructed to do so within the specified time limits. The Athlete raises, among others, the following points:*

5. The Athlete sincerely believed that his notice of appeal had been filed by the Tassé Bertrand law firm and he sent an email to that effect to the CCES. This email is filed as A-01. [...]

11. The Athlete was accordingly entitled to sincerely believe that the notice of appeal had been filed within the required time limits by the Tassé Bertrand law firm.

[2] *The Athlete therefore invokes professional fault, that is, the professional negligence of Tassé Bertrand as a basis to justify the fact that the Athlete’s appeal was filed beyond the specified time limits.*

[3] *Considering that the CCES intends to clarify this central issue through the testimony of the main interested person, Mr. Bertrand, the Athlete invokes the fact that he had not released Mr. Bertrand from his duty of professional secrecy. The Athlete cites numerous ethical rules to the effect that discussions between a lawyer and his client are confidential.*

- [4] *The CCES obviously does not question this rule, but respectfully submits that by alleging a fault by his former lawyer, Mr. Bertrand must be able to clarify the situation, as he said he was willing to do and to defend his professional conduct.*
- [5] *In addition, the Athlete's version of the facts can evidently only be contradicted or confirmed by the testimony of his former lawyers. [...]*
- [...]
- [8] *The Athlete also filed numerous documents, which would otherwise be covered by professional secrecy, such as opinions and letters received from Tassé Bertrand on June 13 and 26, 2017, exhibits A-08 and A-09, as well as numerous cheques sent to his former lawyers for his file.*
- [9] *By doing so, the Athlete seeks to show that he thought that Tassé Bertrand, which he paid to appeal his case, had filed the notice of appeal. Evidence of the scope of the mandate given by the Athlete to Tassé Bertrand is therefore required so that this Panel may confirm if the Athlete actually gave such mandate to Tassé Bertrand.*
- [10] *Likewise, the Athlete mentions that Tassé Bertrand terminated its representation mandate on July 14, 2017, that is, the day before the expiry of the time limit to appeal the decision rendered on June 15, 2017. The Athlete mentions that Tassé Bertrand terminated its mandate because of the Athlete's financial incapacity and because of the fact that Tassé Bertrand is not specialized in sports law. An analysis of the reasons for which Tassé Bertrand's mandate was terminated on or around July 14, 2017, is accordingly required so that this Tribunal may confirm whether the Athlete could have actually believed that Tassé Bertrand had filed his appeal. Such an analysis would also allow to corroborate or invalidate the Athlete's claims and would enable an analysis of the probative value to be given to all of his claims.*
8. The CCES also adds that Mr. Bertrand personally requests to be authorized by the Tribunal to comment the Athlete's allegations.
 9. The CCES submits that, considering the allegations of professional misconduct made regarding Tassé Bertrand, Mr. Bertrand should be authorized to testify, as the Athlete's allegations constitute a waiver of professional secrecy.
 10. The CCES considers that under section 65 of the *Code of Professional Conduct of Lawyers*, a lawyer may disclose confidential information to defend himself in case of

allegations which question his competence or professional conduct. The CCES specifies that this section is not limited to cases in which a lawyer is prosecuted, but also includes allegations which question his competence.

11. This section reads as follows:

65. A lawyer may communicate confidential information in the following situations:

[...]

(4) in order to defend himself in the event of proceedings, complaints or allegations calling his professional competence or conduct into question; [...]

12. The CCES also argues that the Athlete, as a result of his own conduct, tacitly waived professional secrecy.

13. To that effect, the CCES alleges the following:

- i) The Supreme Court of Canada confirmed that a waiver of professional secrecy may be explicitly and also tacitly given;¹
- ii) The doctrine recognizes that there is an implied waiver of professional secrecy [TRANSLATION] “*when the bearer of the secret personally invokes, for the purpose of litigation, a fact that cannot be proven without the professional secrecy being waived in whole or in part*”;²
- iii) The Court of Appeal of Quebec has ruled that a party who undertakes proceedings against his former lawyers waives the protection of professional secrecy;³
- iv) Although the Athlete’s allegations are not made in proceedings against Tassé Bertrand, the CCES submits that the same conclusions apply. Reaching a contrary conclusion would mean that the Athlete could have an increased

¹ *Glegg v. Smith & Nephew Inc.* [2005] 1 S.C.R. 724, exhibit C-27, para. 19.

² Léo Ducharme, *L’administration de la preuve*, 4th ed., [Rules of Evidence] Wilson & Lafleur, 2010, exhibit C-28, para. 462.

³ *Dominion Nickel Investments Ltd. v. Mintz*, 2016 QCCA 1939, exhibit C-29, para. 34.

protection of professional secrecy before this Tribunal, that he could not have before other tribunals and this, only because Mr. Bertrand is not a party to this litigation, although the allegations are the same.

- v) In this case the Athlete is alleging a fact, that is, Tassé Bertrand's omission to appeal the decision in spite of a mandate to that effect, the existence of which can only be demonstrated by Mr. Bertrand's testimony. The only alternative would be to take for granted the version of the facts presented by the Athlete, without having the opportunity to confirm it.

14. For the reasons mentioned above, the CCES submits that the Athlete has waived Tassé Bertrand's professional secrecy and that Mr. Bertrand must be heard to be able to comment, contradict or confirm the Athlete's allegations.

B. THE ATHLETE'S POSITION

15. The Athlete objects to the application made by the CCES.

16. The Athlete underlines the following legislation regarding professional secrecy:

- (i) Section 60.4 of the *Professional Code* provides the following:

Every professional must preserve the secrecy of all confidential information that becomes known to him in the practice of his profession.

He may be released from his obligation of professional secrecy only with the authorization of his client or where so ordered or expressly authorized by law.

[...]

- (ii) Section 131 of the *Act Respecting the Barreau du Québec* provides the following:

1. An advocate must keep absolutely secret the confidences made to him by reason of his profession.

2. Such obligation, however, shall not apply when the advocate is expressly or implicitly relieved therefrom by the person who made such confidences to him or where so ordered or expressly authorized by law.

[...]

- (iii) Article 2858 of the annotated *Civil Code* provides:

2858. The court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are violated and whose use would tend to bring the administration of justice into disrepute.

*The latter criterion is not taken into account in the case of violation of the right of professional secrecy.*⁴

17. The Athlete submits the following:⁵

[TRANSLATION]

- (i) *Information exchanged between a lawyer and a client are protected by law;*
- (ii) *The principle of professional secrecy is not only an ethical duty but also a fundamental right protected under the Canadian Charter of Rights and Freedoms, the Civil Code of Québec and many other legislations;*
- (iii) *This is a fundamental substantial right regarding immunity;*
- (iv) *Three criteria allow to determine the privileged nature of a communication:*
 - a. It must be a lawful communication between a client and his lawyer in his professional capacity;*
 - b. It must involve a consultation or a legal opinion for the purposes of an actual or apprehended litigation; and*
 - c. The parties must consider it to be confidential;*
- (v) *The lawyer from Tassé Bertrand does not have authorization from the Athlete and from the payer to disclose any information;*
- (vi) *The payer is Sylvie Breton and Gaétan Drouin [the Athlete's uncle and aunt];*
- (vii) *We submit that the Athlete never waived professional secrecy, either directly, implicitly or tacitly;*
- (viii) *In addition, only the "PAYER" may waive professional secrecy, so it would not apply;*

⁴ Athlete's emphasis

⁵ A-20 and A-21 as re-classified.

- (ix) *The Athlete invokes financial reasons which are contested by the CCES, according to its submissions at paragraphs 41, 42, 46, 47, 48, 49, 50, 51, 52, 53;*
- (x) *On this point, we file exhibit A-10, which confirms his allegations;*⁶
- (xi) *Exhibit A-10 confirms the Athlete’s allegations;*
- (xii) *[...]the serious reasons we invoke must be respectfully accepted;*
- (xiii) *The case law submitted by the CCES only concerns cases where there are legal proceedings against former lawyers;*
- (xiv) *Professional secrecy must be protected because the Athlete never mentioned that he would undertake any legal action against Tassé Bertrand;*
- (xv) *In the decision rendered by The Honourable Jean-Guy Tremblay [sic] from the Disciplinary council of the Ordre des comptables professionnels agréés du Québec [Quebec Chartered Professional Accountants Order] in Claude Meunier [sic] v. Jean Chagnon, it is clear that even if professional misconduct was alleged, there was no reason to waive professional secrecy.*

III. ANALYSIS

18. I have jurisdiction to hear the application made by the CCES by virtue of subsection 6.10(b) of the 2015 *Canadian Sport Dispute Resolution Code* (the “Code”).⁷
19. This application raises an important issue, which is acknowledged by both parties, that is, the interpretation of a lawyer’s professional secrecy.
20. I agree with Justice Claudine Roy that [TRANSLATION] “*upholding an objection on the basis of professional secrecy may seem to be an obstacle to the discovery of truth, but this is a fundamental value of our society.*”⁸
21. I acknowledge as a starting point that the Athlete is quite warranted in reminding me of section 60.4 of the *Professional Code*, section 131 of the *Act Respecting the Barreau*

⁶ Exhibit A-10 is a table entitled “Details of Transactions –Clients’ Account- Trust Accounts” which lists the monetary transactions between David Drouin and Mr. Jean-François Bertrand.

⁷ Subsection 6.10 (b) of the Code reads as follows: “The Jurisdictional Arbitrator shall have all the necessary powers to decide any issue in dispute between the Parties which would have otherwise been argued before the Panel had it been constituted. Notwithstanding the foregoing, the Jurisdictional Arbitrator shall not render a decision on the main substantive issue in dispute between the Parties.” My emphasis.

⁸ *Gatti v. Barbosa*, 2011 QCCS 4771, exhibit A-25, para. 35.

du Québec, as well as article 2858 of the *Civil Code*, as reproduced above and which read in part as follows:

1. *Section 60.4 of the Professional Code:*

Every professional must preserve the secrecy of all confidential information that becomes known to him in the practice of his profession.

He may be released from his obligation of professional secrecy only with the authorization of his client or where so ordered or expressly authorized by law.

The professional may, in addition, communicate information that is protected by professional secrecy, in order to prevent an act of violence, including a suicide, where he has reasonable cause to believe that there is a serious risk of death or serious bodily injury threatening a person or an identifiable group of persons and where the nature of the threat generates a sense of urgency. However, the professional may only communicate the information to a person exposed to the danger or that person's representative, and to the persons who can come to that person's aid. The professional may only communicate such information as is necessary to achieve the purposes for which the information is communicated.

2. *Section 131 of an Act Respecting the Barreau du Québec:*

(1) An advocate must keep absolutely secret the confidences made to him by reason of his profession.

(2) Such obligation, however, shall not apply when the advocate is expressly or implicitly relieved therefrom by the person who made such confidences to him or where so ordered or expressly authorized by law. [...]

(3) An advocate may, in addition, communicate information that is protected by professional secrecy, in order to prevent an act of violence, including a suicide, where the advocate has reasonable cause to believe that there is a serious risk of death or serious bodily injury threatening a person or an identifiable group of persons and where the nature of the threat generates a sense of urgency. However, the advocate may only communicate the information to a person exposed to the danger or that person's representative, and to the persons who can come to that person's aid. The advocate may only communicate such information as is necessary to achieve the purposes for which the information is communicated.

[...]

4. Article 2858 of the *annotated Civil Code*:

2858. *The court shall, even of its own motion, reject any evidence obtained under such circumstances that fundamental rights and freedoms are violated and whose use would tend to bring the administration of justice into disrepute.*

The latter criterion is not taken into account in the case of violation of the right of professional secrecy.⁹

22. I also note in this context, section 65 of the *Code of Professional Conduct of Lawyers*, to which the CCES refers and which reads as follows:

65. *A lawyer may communicate confidential information in the following situations:*

[...]

(4) in order to defend himself in the event of proceedings, complaints or allegations calling his professional competence or conduct into question;¹⁰

23. The Supreme Court of Canada has confirmed that a waiver of professional secrecy may be made explicitly, but also tacitly in certain cases. Justice Lebel wrote the following on behalf of the Court in *Glegg v. Smith & Nephew Inc*:

However, this appeal raises a problem of implied waiver. Although a waiver cannot be presumed, the courts and the commentators have acknowledged this form of waiver and given effect to it. An implied waiver is inferred from actions of the holder of the right that are inconsistent with an intent to maintain professional secrecy or, rather, to avoid the disclosure of confidential information protected by professional secrecy.¹¹

24. In the present case, the CCES acknowledges that the Athlete did not expressly waive professional secrecy. The CCES rather submits that the Athlete implicitly waived it.

25. The Athlete submits that a waiver of professional secrecy cannot be tacit. He cites in support of this the decision of the Disciplinary council of the *Ordre des comptables professionnels agréés du Québec* [Quebec Chartered Professional Accountants Order] of July 17, 2017, in *Claude Maurer v. Jean Chagnon*:

⁹ A-20.

¹⁰ C-25, para. 11.

¹¹ *Glegg v. Smith & Nephew Inc.* [2005] 1 S.C.R. 724, exhibit C-27, para. 19.

[TRANSLATION]

*As far as the Council is concerned, a waiver of the fundamental right to professional secrecy cannot be implied. If there is a waiver, it must be informed, given freely and unequivocally, which is not the case here.*¹²

26. Although this decision may be recent, it cannot supersede the judgment of the highest Court of the country.
27. In addition, I note in this case, that the Council did not take into consideration the *Act Respecting the Barreau du Québec*, which is a "*lex specialis*" and which specifically deals with the lawyer's professional secrecy.
28. Section 131, subparagraph 2 of the *Act Respecting the Barreau du Québec*, cited above, is very clear: an advocate is relieved from his obligation to maintain the secrecy of the confidences made to him by reason of his profession "*expressly or implicitly [...] by the person who made such confidences to him*".¹³
29. Even if the right to professional secrecy must be broadly interpreted and if any claim to the effect that a party has waived it is to be restrictively decided,¹⁴ it seems obvious to me that, as established by the *Code of Professional Conduct of Lawyers*,¹⁵ in harmony with section 131, subparagraph 2 of *An Act Respecting the Barreau du Québec*, when the person bearing the secret alleges facts that can only be proven by the lawyer's testimony, there is an implicit waiver of professional secrecy.
30. In this case, the Athlete alleges that Mr. Jean-François Bertrand from the firm Tassé Bertrand, omitted to file a notice of appeal [TRANSLATION] "within the specified time limit" in spite of an existing mandate to that effect.

¹² *Claude Maurer v. Jean Chagnon*, Décision sur l'objection fondée sur le secret professionnel [Decision on an objection based on professional secrecy], July 17, 2017, Disciplinary council of the *Ordre des comptables professionnels agréés du Québec*, [Quebec Chartered Professional Accountants Order], No. 47-2015-00137, 2017 CanLII 49918 (QC CPA), para. 124.

¹³ My emphasis.

¹⁴ *Gatti v. Barbosa*, 2011 QCCS 4771, exhibit A-25, para. 36.

¹⁵ C-25, para. 11.

31. It is obvious that, when a party criticizes his lawyer by alleging his professional fault, it would be quite illogical and unfair to prevent that lawyer from giving his version of the facts.
32. In such circumstances, a client cannot invoke professional secrecy to avoid the disclosure of confidential information with which he is criticizing his lawyer. As Justice Lebel has said, the client's allegations, that is, David Drouin, are quite [TRANSLATION] "*inconsistent with the intention to preserve professional secrecy which protects him.*"¹⁶.
33. I accordingly reach the conclusion that, due to the nature of his allegations, the Athlete tacitly waived his lawyer's professional secrecy. Mr. Bertrand is therefore no longer bound by professional secrecy to the Athlete regarding the beginning, the nature, the duration and the circumstances of the end of his mandate, as well as any modification made to it.
34. In conclusion, I note that the Athlete submits that the "payer", being his uncle and his aunt, never waived professional secrecy.
35. However, the right to professional secrecy does not belong to the payer, no matter who he may be and no matter what his relation with the lawyer was. It belongs only to the beneficiary of the lawyer's professional services, in this case, the Athlete, David Drouin.

IV. DECISION

36. Having considered the written and oral submissions of the parties and having deliberated, for the reasons stated above, the Jurisdictional Arbitrator:
- (a) GRANTS the application made by the CCES;

¹⁶ See para. 22 [sic] above. See also *Dominion Nickel Investments Ltd. v. Mintz*, 2016 QCCA 1939, exhibit C-29, para. 34.

- (b) RELIEVES Mr. Bertrand of the professional secrecy binding him to the Athlete regarding the beginning, the nature, the duration and the circumstances surrounding the end of his retainer, as well as any amendment made to it;
- (c) ORDERS the CCES to file a sworn statement from Mr. Bertrand or, as the case may be, to state more precisely the topics on which he will be called to testify, no later than **January 10, 2018**;
- (d) ORDERS the Athlete to disclose, no later than **January 10, 2018**, the names of the witnesses he will call at the hearing, as well as the issues on which they will be asked to testify;
- (e) ORDERS the Athlete to indicate, no later than **January 10, 2018**, whether he requires an in-person hearing, after which time the Athlete, if he does not indicate so, will be presumed to have waived his right to an in-person hearing;
- (f) CONVENES a jurisdictional hearing for January 18, 2018, at 10:00 a.m.

December 20, 2017

[original French version signed]

The Honourable L. Yves Fortier, QC

Jurisdictional Arbitrator