

**IMPORTANT NOTE: *This version is a translation of the original French version.***

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

**N°: SDRCC DT 18-0306**

**CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)**

**U SPORTS**

**(CLAIMANTS)**

**AND**

**SAMUEL THOMASSIN**

**(RESPONDENT)**

**AND**

**WORLD ANTI-DOPING AGENCY (WADA)**

**GOVERNMENT OF CANADA**

**(OBSERVERS)**

---

**DECISION WITH REASONS**

---

The Honourable L. Yves Fortier, QC, Arbitrator

Annie Lespérance, FCI Arb, Arbitrator's Assistant

April 15, 2019

## Table of Contents

|      |  |    |
|------|--|----|
| I.   | INTRODUCTION.....                            | 2  |
| II.  | HISTORY OF THE DISPUTE.....                  | 3  |
| III. | REQUESTS OF THE PARTIES.....                 | 6  |
| A.   | THE CCES .....                               | 6  |
| B.   | THE ATHLETE .....                            | 6  |
| IV.  | THE LEGAL FRAMEWORK.....                     | 6  |
| V.   | THE PARTIES’ SUBMISSIONS.....                | 9  |
| A.   | THE ATHLETE’S POSITION .....                 | 9  |
| B.   | THE CCES POSITION .....                      | 14 |
| VI.  | ANALYSIS.....                                | 16 |
| A.   | BURDEN OF PROOF .....                        | 17 |
| B.   | VIOLATION OF AN ANTI-DOPING RULE.....        | 17 |
| C.   | HOW THE DEX GOT INTO THE ATHLETE’S BODY..... | 18 |
| D.   | NO FAULT OR NEGLIGENCE .....                 | 20 |
| E.   | COSTS .....                                  | 24 |
| VII. | DECISION .....                               | 24 |

### I. INTRODUCTION

1. I am issuing this written decision pursuant to section 6.21(d) of the *Canadian Sport Dispute Resolution Code*, version 2015 (“the **Code**”). A short decision without reasons was issued on March 29, 2019.
2. A hearing was held on March 19, 2019 from 11 a.m. to 6:30 p.m. The Canadian Centre for Ethics in Sport (“the **CCES**,” “the **Claimant**”) and Samuel Thomassin (“**the Athlete**,” “the **Respondent**”) took part. U Sports, the second Claimant, the WADA and the Government of Canada did not take part in the hearing nor submit written proceedings.
3. The Claimant was represented by Mylène Lee, a CCES employee, and Annie Bourgeois and Catherine Cayer, lawyers from the Langlois Avocats LLP law firm.

4. The Respondent was represented by Louis Mazurette and Gilles-Étienne Lemieux, lawyers from the Stein Monast LLP law firm.

## II. HISTORY OF THE DISPUTE

5. Samuel Thomassin is a football player. He has been a member of the Rouge & Or football team at Université Laval since the fall of 2015. He was 23 when the doping control was carried out in November 2018.
6. Following an in-competition doping control conducted by the CCES in Quebec City on November 3, 2018 after a provincial semi-final match between the Rouge & Or and the Université de Sherbrooke Vert & Or, Mr. Thomassin was told on November 25, 2018 that his sample revealed the presence of Dexamethasone (“**DEX**”) (S9. glucocorticoids), a defined substance on the World Anti-Doping Agency’s Prohibited List.<sup>1</sup>
7. On November 29, 2018, Mr. Thomassin agreed to a voluntary provisional suspension under Rule 10.11.3.2 of the Canadian Anti-Doping Program (“the **CADP**”).<sup>2</sup>
8. On December 19, 2018, pursuant to section 7.3.1. of the CADP, the CCES notified the Athlete of an anti-doping rule violation in these terms:<sup>3</sup>

*[...] The Canadian Centre for Ethics in Sports (CCES) asserts that Mr. Samuel Thomassin, an athlete affiliated with U SPORTS (Football) has committed an anti-doping rule violation.*

*The sample giving rise to the adverse analytical finding was collected in competition on November 3, 2018, in Québec City, QC, in accordance with the CADP. The adverse analytical finding was received by the CCES from the World Anti-Doping Agency (WADA) accredited laboratory on November 21, 2018 [...]*

---

<sup>1</sup> CCES-3.

<sup>2</sup> CCES-4.

<sup>3</sup> CCES-5.

9. In that notification the CCES recommended that the Athlete be suspended for two years.
10. On December 20, 2018, the Athlete requested an anti-doping hearing before the SDRCC.
11. On January 4, 2019, the CCES responded to the Athlete's request.
12. In its communication of January 4, 2019, the SDRCC appointed me as arbitrator for the case.
13. On January 28, 2019, I took part in a preliminary phone session with the Parties, who agreed on the following schedule for proceedings:
  - February 8, 2019: written submissions from the Athlete
  - February 27, 2019: written submissions from the CCES
  - March 15, 2019: response from the Athlete
14. On February 8, 2019, the Athlete submitted his brief together with Exhibits R-1 to R-12, authorities, statements from the Athlete, Dr. Germain Thériault and Glen Constantin, and the report from Dr. Normand Voyer.
15. On February 27, 2019, the CCES submitted its brief together with Exhibits CCES-1 to CCES-6 and authorities, per the schedule.
16. On March 9, 2019, I took part in a second preliminary phone session with the Parties and the SDRCC members to discuss the logistics of the hearing.
17. On March 15, 2019, the Athlete submitted his response together with Exhibits R-13 to R-15 and additional authorities.
18. An in-person hearing was held on Tuesday, March 19, 2019 at Ms. Bourgeois' office, with the Athlete's consent. Attending were:

For the CCES:

Annie Bourgeois and Catherine Cayer, lawyers with Langlois Avocats LLP law firm,  
counsel for the CCES;

Mylène Lee, representing the CCES;

For the Athlete:

Samuel Thomassin, the Athlete;

Louis Mazurette and Gilles-Étienne Lemieux, lawyers with Stein Monast LLP law  
firm, counsel for the Athlete;

Glen Constantin, head coach of the Université Laval Rouge & Or football club;

Dr. Germain Thériault, head doctor of the Université Laval Rouge & Or football club;

For the SDRCC:

Alexandra Lojen, representing the SDRCC;

For the Arbitrator:

Hon. Yves Fortier, arbitrator;

Annie Lespérance, lawyer, from the arbitrator's office.

19. Dr. Normand Voyer, the Athlete's scientific expert, was not summoned by the CCES,  
which did not contest the contents of his report.

20. The SDRCC kept a recording of the hearing to the case file.

21. At the end of the hearing, it was determined that the Parties would file additional  
submissions concurrently.

22. The Parties both filed additional submissions on March 25, 2019.

### III. REQUESTS OF THE PARTIES

#### A. THE CCES

23. The CCES asked me to:

1. Impose the mandatory two-year suspension on the Athlete, given that he admitted to violating the anti-doping rules (presence of DEX in his body) and that the evidence did not show on a balance of probability how that substance got into his body;
2. Alternatively, if I were to conclude that the Athlete did prove on a balance of probability how the DEX got into his body:
  - a) Declare that the Athlete cannot avail himself of section 10.4 of the CADP, because he did not act with “the utmost caution,” thereby committing a fault; and
  - b) Impose a one (1) to three (3) month sanction on the Athlete, since he can avail himself of section 10.5.1.1 of the CADP.

#### B. THE ATHLETE

24. The Athlete asked me to:

1. Not impose any sanction on him, since there was no fault or negligence on his part;
2. Alternatively, to give him a reprimand since there was no significant fault or negligence on his part.

### IV. THE LEGAL FRAMEWORK

25. The relevant CADP sections are:

***2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete’s Sample***

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

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

[...]

### **3.1 Burdens and Standards of Proof**

*CCES shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the CCES has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.*

[...]

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

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

*10.2.1 The period of Ineligibility shall be four years where:*

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

*10.2.1.2 The anti-doping rule violation involves a Specified Substance and the CCES can establish that the anti-doping rule violation was intentional.*

*10.2.2 If Rule 10.2.1 does not apply, the period of Ineligibility shall be two years.*

[...]

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

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

*[Comment to Rule 10.4: This Rule and Rule 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They 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. Conversely, No Fault or Negligence would not apply in the following circumstances: a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Rule 2.1.1) and have been warned against the possibility of supplement contamination); b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and c) 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). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Rule 10.5 based on No Significant Fault or Negligence.]

[...]

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

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

##### 10.5.1.1 Specified Substances

Where the anti-doping rule violation involves a Specified Substance, and the Athlete or other Person can establish No Significant Fault or Negligence, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years of Ineligibility, depending on the Athlete's or other Person's degree of Fault.

26. Two definitions relevant to this matter are included in Appendix 1 of the CADP:

No Fault or Negligence: The Athlete or other Person's 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 or Prohibited Method or otherwise violated an anti-doping rule. Except in the case of a Minor, for any violation of Rule 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.



*No Significant Fault or Negligence: The Athlete or other Person's establishing that his or her Fault or negligence, when viewed in the totality of the circumstances and taking into account the criteria for No Fault or Negligence, was not significant in relationship to the anti-doping rule violation. Except in the case of a Minor, for any violation of Rule 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.*

## V. THE PARTIES' SUBMISSIONS

27. The Parties' submissions are summed up below.

28. The Athlete acknowledged that a violation of section 2.1 of the CADP had been established, given the result of the adverse analytical finding confirming the presence of DEX in concentrations of 279.1 ng/ml and 271.5 ng/ml in his urine samples A and B respectively.

29. However, the Athlete claimed that there was no evidence of fault or negligence under section 10.4 of the CADP or, failing that, of significant fault or negligence under section 10.5 of the CADP.

30. The Parties agreed that the Athlete has the burden of establishing, on a balance of probability, the specified facts and circumstances demonstrating no fault or negligence on his part or, alternatively, no significant fault or negligence.

31. To do that, the Athlete must prove, on a balance of probability:

- a) How the substance entered his system; and
- b) That he committed no fault or negligence, or, alternatively, that he committed no significant fault or negligence in view of all the circumstances.

### A. THE ATHLETE'S POSITION

#### How the Substance Entered the Athlete's System

32. The Athlete's argument was that the presence of DEX in his system was caused by the involuntary and accidental intramuscular injection of such a substance by Dr. Thériault,

the head doctor of the Rouge & Or team, at half-time during the football game on November 3, 2018, a few hours before the doping control.

33. In support of his argument, the Athlete produced statements from the Rouge & Or head coach, Mr. Constantin, and Dr. Thériault, as well as the expert report from Dr. Voyer, together with his own statement.

34. The Athlete argued:

- a) The conclusions of the expert, Dr. Voyer, confirmed that the most realistic way of explaining the analytical findings of 279.1 ng/ml and 271.5 ng/ml in his urine is to suppose that a dose of DEX was administered by intramuscular, intra-articular or periarticular injection between 2 and 4 hours before the urine sample was taken.
- b) The Athlete, who had pain in the sterno-clavicular area of his right shoulder during the match, was never prescribed DEX; he was prescribed Toradol;
- c) The Athlete had no interest in receiving DEX, since its anti-inflammatory properties were less effective than Toradol and it had no analgesic properties;
- d) On the brink of a potentially promising professional career, the Athlete had no interest in taking any kind of risk in relation to the List of Prohibited Substances by taking a drug that would have no real effect on improving his athletic prowesses or give him any advantage as an athlete;
- e) The only injection given to the Athlete within 2 to 4 hours before the doping control was the one given by Dr. Thériault at half-time;
- f) Dr. Thériault thought *a posteriori* that it was highly likely that he may have involuntarily and accidentally confused the single-dose (1 ml) vial of DEX purchased August 15, 2018 for a vial of Toradol, after which an involuntary and accidental injection of DEX was administered to the Athlete at half-time of the match on November 3, 2018;
- g) DEX is ordered every year to meet the needs of the Women's Tennis Association (WTA) physiotherapy team for the National Bank Cup women's tournament held annually at the PEPS complex of Université Laval. DEX is required at that event

- for treatments called “iontophoresis” in which DEX is applied onto the skin and pulsed with a device on a superficial biological structure such as a tendon or muscle to correct inflammation. The WADA allows that form of treatment, as it accepts cortisone products applied locally in cream form;
- h) DEX 10 mg/mL injectables are the only other drugs that could have been in the team’s medical kit with the same format (1 ml single-dose vial) and the same glass colour (brown) as the Toradol and Ketorolac Tromethamine injectables in the same medical kit;<sup>4</sup>
  - i) Dr. Thériault confirmed that, on or about December 19, 2018, as he was wondering about the source of the Athlete’s anti-doping violation, there were no brown 1 ml single-dose vial in the team’s medical kit;
  - j) That meant the 1 ml single-dose vial of DEX acquired on August 15, 2018 had to have been used between the time it was purchased and December 19, 2018;
  - k) Dr. Thériault, as head doctor of the Rouge & Or team and a health professional with over 40 years of experience in sports medicine, had no interest – either personal or professional – in admitting such involuntary and accidental confusion; quite the contrary;
  - l) Dr. Thériault’s testimony and credibility are therefore not called into question;
  - m) Following the Athlete’s request for further analyses from the INRS-Institut Armand-Frappier Doping Control Laboratory (hereinafter “the **Laboratory**”) to determine whether molecules of Ketorolac Tromethamine (Toradol) and/or its metabolites were present in the urine samples collected during the doping control, on February 20, 2019 the Athlete received a copy of the additional analysis certificate showing the absence of Toradol in the samples taken during the doping control;<sup>5</sup>
  - n) The statements of both the Athlete and Dr. Thériault to the effect that the Athlete received and the doctor administered an intra-muscular injection during half-time

---

<sup>4</sup> See Exhibit R-10.

<sup>5</sup> Exhibit R-15.

- of the match on November 3, 2018 prove undeniably that an intra-muscular injection was administered to the Athlete during that half-time;
- o) Consequently, some substance other than Ketorolac Tromethamine (Toradol) would have had to have been injected into the Athlete at that time.
35. The Athlete submitted that, in light of the above, he had clearly demonstrated on a balance of probability how the DEX entered his system.

No Fault or Negligence

36. The Athlete alleged that the circumstances of this matter are sufficiently exceptional to justify eliminating the sanction sought by the CCES for a finding of “no fault or negligence” under section 10.4 of the CADP.
37. In particular, the Athlete alleged that:
- a) It was Dr. Thériault who went and took the DEX from its vial in the area reserved for the Rouge & Or medical staff, while the Athlete remained on the examination table;
  - b) The DEX was administered to the Athlete directly by Dr. Thériault;
  - c) At no time did the Athlete have the opportunity to identify or check the vial taken by Dr. Thériault from the medical kit located in the area reserved for the Rouge & Or medical staff;
  - d) Dr. Thériault involuntarily and accidentally confused a single-dose vial of DEX for a vial of Toradol;
  - e) The Athlete should have received an injection of Toradol, a drug he had used in 2016 and which both the Athlete and the Rouge & Or medical staff knew was not on the WADA List of Prohibited Substances;
  - f) The Athlete therefore relied on the knowledge, expertise and experience of Dr. Thériault, since he had no reason to doubt or suspect the doctor’s professionalism or that the doctor would involuntarily or accidentally substitute something else for a drug he himself had prescribed and that he was to administer to the Athlete.

38. Consequently, the Athlete submitted that he was under no obligation (i) to investigate or confront the Rouge & Or medical staff as to the contents of the medical kit or the injection he was about to receive, or (ii) to confirm that the drug prescribed by Dr. Thériault matched the substance in the syringe used by Dr. Thériault for the injection.
39. The Athlete submitted that he had demonstrated “the utmost caution” (i) by consulting the team doctor about his symptoms, and (ii) by receiving an intra-muscular injection directly from that doctor a few seconds after it had been prescribed.
40. According to the CCES, the Athlete should have (i) asked that the drug used for the injection be handled in front of him, or (ii) asked Dr. Thériault to show him the bottle so he could make sure the substance to be administered was really the substance he had agreed to take.
41. The Athlete countered that such a conclusion went way beyond the scope of the anti-doping rules and the athletes’ obligations.
42. If, as the CCES argued, athletes really “have to do everything in their power” – including to question the professionalism of a health professional who is a member of the Collège des Médecins du Québec [Quebec college of physicians] in order to validate the compliance of a medical act administered to him – that would be tantamount to making the Athlete substitute himself for the professional, which is unreasonable, manifestly abusive and ethically forbidden, according to the Athlete.
43. The CCES position could lead to forcing athletes to refuse any treatment in order to avoid the risk of confusion, error or inadvertence by a professional.
44. In the case before us, nothing pointed to a risk of involuntary and accidental administration by Dr. Thériault of any substance other than the one he had initially prescribed. As a result, the Athlete could not reasonably have suspected that such involuntary and accidental administration would happen.
45. For the above reasons, the Athlete asked that no sanction be imposed on him since there was no fault or negligence on his part.

### No Significant Fault or Negligence

46. In the event that I should think otherwise, the Athlete submitted alternatively that the specific and exceptional circumstances demonstrated no significant fault or negligence on his part, and that I would be justified in imposing only a reprimand.

#### B. THE CCES' POSITION

### How the Substance Entered the Athlete's System

47. The CCES contended that the Athlete did not meet the burden of proof required to demonstrate, on a balance of probability, how the prohibited substance entered his body, since [translation] "*Thomassin has only filed uncorroborated allegations and arguments as to the events surrounding the way the substance entered his body.*"<sup>6</sup>

48. Consequently, the CCES argued that a two-year suspension should be imposed on the Athlete pursuant to section 10.2.2 of the CADP.

49. Were I to conclude otherwise, the CCES argued that the Athlete could try to get the suspension eliminated under section 10.4 of the CADP (no fault or negligence) or alternatively reduced under section 10.5 of the CADP (no significant fault or negligence).

### No Fault or Negligence

50. According to the CCES, it is clear from the wording of section 10.4 of the CADP that, if I uphold the Athlete's version of the facts, the Athlete cannot claim the elimination of the suspension because that version (administration of DEX by Dr. Thériault without the Athlete being informed) is explicitly excluded in Rule 10.4 of the CADP.

51. In addition, the CCES argued, the Athlete has not met the burden of proof required because he did not meet the standard of exercising "the utmost caution" in relation to the definition of "no fault or negligence" in Appendix 1 of the CADP.

---

<sup>6</sup> CCES brief, February 27, 2019, para. 32.

52. According to the CCES, that standard requires the Athlete to do everything in his power to avoid ingesting all prohibited substances, even in exceptional circumstances (*FIS v. Johaug*, CAS 2017/A/5015). The Athlete must also demonstrate the utmost caution at all times, especially at each step between the time the Athlete decided to take a substance and the time that substance was administered to him (*Canas v. ATP Tour*, CAS 2005/A/951).
53. Contrary to what the Athlete alleged, the CCES argued that he cannot be released from his obligation of demonstrating the utmost caution simply because he consulted the Rouge & Or head doctor and it was the doctor's mistake that caused the violation of the anti-doping rules.
54. Looking at it that way would all too often allow athletes to use the fact that they consulted the team or tournament doctor as proof of no fault or negligence, automatically allowing them to get the sanction eliminated under section 10.4 of the CADP, regardless of what they did afterwards (*P. v. ITF*, CAS 2008/A/1488).
55. The CCES argued that if the Athlete had exercised the utmost caution at each step before the injection was administered, he could reasonably have known or presumed that he had used DEX.
56. According to the CCES, the Athlete in fact could and should have:
- asked that the injectable drug be handled before him; or
  - asked Dr. Thériault to see the bottle to make sure the administered substance really was the substance he had agreed to take.
57. The CCES was of the opinion that the Athlete could reasonably have known that Dr. Thériault was administering the wrong product to him on November 3 had he asked the above questions.
58. As a result, the CCES argued that the Athlete had not met the burden of proof with regard to no fault or negligence, and should therefore not get an elimination of the suspension requested by the CCES.

## No Significant Fault or Negligence

59. In the event that I shared the CCES opinion that the Athlete has not met the burden of proof required to eliminate his suspension under section 10.4 of the CADP and that I was of the opinion that the Athlete had proved no significant fault or negligence under section 10.5 of the CADP (including the demonstration of how the determined substance entered his body), the CCES did not contest that the Athlete acted with no significant fault or negligence. Consequently, the CCES argued that the Athlete's sanction should be a suspension of one to three months.

## VI. ANALYSIS

60. My only mandate is to decide what sanction to impose on the Athlete, since the Athlete has acknowledged that a violation of section 2.1 of the CADP has been established, given the adverse analytical finding confirming the presence of DEX (S9. glucocorticoids), a specified substance on the 2018 WADA List of Prohibited Substances, in the A and B samples of his urine.

61. The Parties agreed that the Athlete faces a two-year suspension under section 10.2.2 of the CADP for that violation, unless it is reduced or eliminated.

62. The Parties also agreed that it was up to the Athlete, on a balance of probability, to establish (i) how the DEX entered his system, and (ii) the specified facts and circumstances demonstrating no fault or negligence on his part under section 10.4 of the CADP or, alternatively, no significant fault or negligence under section 10.5.1.1 of the CADP.

63. After considering the written and verbal pleadings of the Parties, the exhibits and the testimonies during the hearing, I am setting out below the reasons for my Short Decision of March 29, which reads as follows:

[Translation]

*(12) The violation of an anti-doping rule under section 2.1 of the CADP has been established.*



(13) *Since the Athlete demonstrated that he committed no fault or negligence, the applicable two-year suspension is eliminated pursuant to section 10.4 of the CADP.*

(14) *Pursuant to section 6.22(a) of the Code, each Party is responsible for its own costs and those of its witnesses.*

(15) *Any other application by the Parties is dismissed.*

#### A. BURDEN OF PROOF

64. Section 3.1 of the CADP states:

*CCES shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the CCES has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability. [My underlining]*

65. Under that section, it was up to the CCES to establish an anti-doping rule violation to my satisfaction.

66. Once that was proven, it was up to the Athlete to establish, on a balance of probability, how the DEX got into his body and that there was no fault or negligence or significant fault or negligence on his part.

#### B. VIOLATION OF AN ANTI-DOPING RULE

67. Since the Athlete acknowledged that a violation of section 2.1 of the CADP had been established with regard to the presence of DEX in his urine, the CCES has met its burden of establishing an anti-doping rule violation.

68. Under 10.2.2 of the CADP, the Athlete faces a two-year sanction.

69. In order to reduce or eliminate that sanction, the Athlete has to prove under section 3.1 of the CADP on a balance of probability, as stated above, how the DEX got into his body and the specified facts and circumstances demonstrating no fault or negligence on his part under section 10.4 of the CADP or, alternatively, no significant fault or negligence under section 10.5.1.1 of the CADP.

#### C. HOW THE DEX GOT INTO THE ATHLETE'S BODY

70. Having reviewed all of the Athlete's evidence as to how the DEX got into his body, I am of the opinion that the Athlete has met his burden of proof on that score.

71. I will start my analysis of the evidence with Dr. Normand Voyer's report.

72. In his report, Dr. Voyer concluded: [translation] *"according to the scientific literature, the most realistic way of explaining a urinalysis finding of 272 ng/mL and 279 ng/mL is to suppose that a dose of DEX was administered by intramuscular, intra-articular or periarticular injection between 2 and 4 hours before the urine sample was taken."*

73. That report was not contradicted by the CCES, which chose not to cross-examine Dr. Voyer or submit a counter-expertise. No evidence was submitted to contest Dr. Voyer's conclusion, which I therefore accept.

74. The Athlete testified that the only injection into his system during the 2-4-hour window before his urine samples were collected was that of the Toradol drug, which was prescribed and was to be administered by Dr. Thériault for his shoulder pain at half-time during the Rouge & Or match on November 3, 2018.

75. Dr. Thériault, the head doctor for the Rouge & Or team, testified that he did administer an intra-muscular injection of what he thought was Toradol into the Athlete's shoulder at half-time during the match on November 3, 2018. His testimony corroborated that of the Athlete.

76. Dr. Thériault also testified that:

- a) he took the drug administered to the Athlete from a 1 mL single-dose brown glass vial of a format and colour similar to a 1 mL single-dose vial of Toradol

distributed before 2018 (since Toradol is now distributed in the form of ampules (small capsule) of transparent glass);

- b) the Rouge & Or medical kit had contained a brown glass 1 mL single-dose vial of DEX since August 15, 2018, but when he came back after the holidays in January 2019 and started wondering about the Athlete's anti-doping violation, he noticed that the Rouge & Or medical kit no longer contained any 1 mL single-dose vial of DEX; and
- c) the medical kit did contain DEX because it is ordered each year to meet the needs of the Women's Tennis Association (WTA) physiotherapy team for the National Bank Cup women's annual tournament at the PEPS complex of Université Laval. DEX is required there for treatments called "iontophoresis" in which DEX is applied onto the skin and pulsed with a device on a superficial biological structure such as a tendon or muscle to reduce inflammation. The WADA allows that form of treatment, as it accepts cortisone products applied locally in cream form.

77. Lastly, further analytical findings obtained from the Laboratory at the Athlete's request on February 18, 2019, confirmed that there was no trace of the drug Toradol and/or its metabolites in the urine samples collected for the anti-doping test.<sup>7</sup>

78. From that evidence it appears that Dr. Thériault involuntarily and accidentally confused the 1 mL single-dose vial of DEX acquired on August 15, 2018 with a vial of the Toradol drug and that, accordingly, an injection different from the one of Toradol prescribed verbally to the Athlete – an involuntary and accidental injection of DEX – was administered to the Athlete by Dr. Thériault at half-time during the match of November 3, 2018.

79. Dr. Thériault admitted that mistake during the hearing. It was certainly not in his interest to do so. I find his testimony to be totally credible, as is that of the Athlete.

---

<sup>7</sup> Exhibit R-15.

80. In the light of all of the above, I therefore conclude that the Athlete met his burden of proof with regard to the presence of DEX in his urine.

D. NO FAULT OR NEGLIGENCE

81. Having determined that the Athlete had met his burden of proof with regard to the presence of DEX in his urine, if he then wanted to reduce or eliminate the sanction the Athlete had to prove specific facts or circumstances demonstrating no fault or negligence on his part under section 10.4 of the CADP or, alternatively, no significant fault or negligence under section 10.5.1.1 of the CADP.

82. I start my analysis with the Athlete's argument to the effect that there was no fault or negligence on his part and that any sanction should be eliminated under section 10.4 of the CADP.

83. The section reads:

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

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

*Comment to Rule 10.4: This Rule and Rule 10.5.2 apply only to the imposition of sanctions; they are not applicable to the determination of whether an anti-doping rule violation has occurred. They 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. Conversely, No Fault or Negligence would not apply in the following circumstances: a) a positive test resulting from a mislabeled or contaminated vitamin or nutritional supplement (Athletes are responsible for what they ingest (Rule 2.1.1) and have been warned against the possibility of supplement contamination); b) the Administration of a Prohibited Substance by the Athlete's personal physician or trainer without disclosure to the Athlete (Athletes are responsible for their choice of medical personnel and for advising medical personnel that they cannot be given any Prohibited Substance); and c) 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). However, depending on the unique facts of a particular case, any of the referenced illustrations could result in a reduced sanction under Rule 10.5 based on No Significant Fault or Negligence. [My underlining]*

84. “No fault or negligence” is defined in Appendix 1 of the CADP:

*No Fault or Negligence: The Athlete or other Person's 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 [...]*

85. The Athlete must therefore prove, on a balance of probability, that he did not know or suspect and could not reasonably have known or suspected, even with the exercise of the utmost caution, that he had been administered a prohibited substance.

86. The jurisprudence is clear and consistent on this matter: if there is fault or negligence on the part of the Athlete, regardless of degree, an arbitrator will refuse to apply section 10.4 of the CADP.<sup>8</sup>

87. That is in line with section 2.1.1 of the CADP, under which it is up to the Athlete to make sure no prohibited substance enters his system.

88. However, the case before us rests on quite unique circumstances and, under those circumstances, I absolutely cannot find any fault or negligence on the part of the Athlete, for the reasons outlined below.

89. The evidence revealed that the Athlete knew that the drug Dr. Thériault had really prescribed for him and thought he had administered to him – Toradol – was not on the WADA Prohibited Substances and Methods List, since that drug had already been administered to him in 2016 and he had satisfied himself at the time that Toradol was not a WADA prohibited substance.

---

<sup>8</sup> *CCES and Stefanovic*, SDRCC DT 17-0266; CAS 2005/A/828 *Mr Stephan Koubek v. International Tennis Federation*, paras. 54 to 57; CAS 2006/A/1133 *WADA v. Michael Stauder & Swiss Olympic*, para. 33; CAS 2017/A/5015 *FIS v. Johaug*, paras. 184 to 186.

90. Moreover, nothing justified the Athlete to reasonably suspect that the medical act prescribed by Dr. Thériault would be different from the medical act performed by Dr. Thériault. In this respect, the CCES has not issued any warnings about a presumable risk faced by an athlete with regard to the compliance of a medical act carried out by a health professional.
91. I conclude that this was an exceptional, unique and specific instance that justifies the application of section 10.4 of the CADP.
92. The exclusion outlined in the comments to section 10.4 of the CADP, namely that “no fault or negligence” will not apply to “*the Administration of a Prohibited Substance by the Athlete’s personal physician or trainer without disclosure to the Athlete*” does not apply here. The Athlete was informed by Dr. Thériault of the substance that he would be injected with. However, that information was inaccurate due to Dr. Thériault’s accidental and involuntary mistake.
93. The CCES argued that there cannot be “no fault or negligence” in this case, in part because the Athlete had not exercised caution by:
- a) failing to ask Dr. Thériault any questions about the treatment he received;
  - b) failing to watch the handling of his injection of Toradol and to ask for the handling to be done in his presence.
94. I reject the CCES’ argument. As mentioned above, it was not up to the Athlete to question whether the medical act he received from Dr. Thériault, a health professional who had specialized in sports medicine for 46 years, matched the medical act prescribed by that same professional. The drug was handled in an area of the Rouge & Or dressing room reserved for medical staff. What is more, the Athlete knew the drug (Toradol) that Dr. Thériault was supposed to give him and knew it was not prohibited by the WADA, since he had satisfied himself about it in 2016 when he received a previous injection. In the circumstances, I cannot share the CCES’ opinion to the effect that the Athlete should reasonably have known that he was being administered a prohibited substance on November 3, 2018.

95. The CCES also argued that section 10.4 of the CADP is rarely applied. It noted that, of the 17 decisions submitted by the Parties in this case, in only two did the Tribunal conclude “no fault or negligence”: *Gasquet*<sup>9</sup> and *Adams*.<sup>10</sup>
96. The bar has indeed been set high, as it should be, for athletes to meet the conditions for eliminating a sanction under section 10.4 of the CADP. It goes to the integrity of the sport, where doping does not belong and must be eliminated. But however high that bar is, it exists and according to my assessment of the evidence in this case, the Athlete has risen above it.
97. Of course, under the CADP, the Athlete is strictly responsible for the presence of a prohibited substance in his system. But that does not mean that the CADP sanction for its presence in his body is automatic. In the case before us the Athlete was injected, unbeknownst to him and through no fault of his own, with a prohibited substance by his doctor, whom he had every reason to trust. He cannot be held responsible for the medical mistake his doctor made, i.e. the injection of a substance other than the one his doctor prescribed for him.
98. In my opinion, this is one of those cases where the entire body of evidence leads me to conclude to exceptional circumstances – I would say extremely rare – where the Athlete must be held entirely blameless.
99. I therefore conclude, in the light of the above, that the Athlete met his burden of proof with regard to the absence of fault or negligence on his part under section 10.4 of the CADP. As a result, the sanction requested by the CCES must be eliminated.
100. Having determined that section 10.4 of the CADP applies to this case, I do not have to continue my analysis in respect of section 10.5.1.1 of the CADP.

---

<sup>9</sup> CAS 2009/A/1926 *ITF v. Gasquet*, para. 55.

<sup>10</sup> CAS 2007/A/1312 *Jeffrey Adams v. CCES*, paras. 46 to 48.

## E. COSTS

101. Section 8.2.4 (h) of the CADP states: “*Subject to Rule 8.2.4b (excluding legal counsel fees), the Doping Tribunal may award costs to any party, payable as it directs.*” [My underlining].
102. I note that the Athlete did not request in either his written or verbal submissions that his costs be refunded. Each Party will therefore be responsible for its own costs under section 6.22 (a) of the Code.

## VII. DECISION

103. The anti-doping rule violation under section 2.1 of the CADP has been established.
104. Since there was no fault or negligence on the Athlete’s part, the applicable two-year sanction is eliminated pursuant to section 10.4 of the CADP.
105. Pursuant to section 6.22(a) of the Code, each Party is responsible for its costs and those of its witnesses.
106. Any other application by the Parties is dismissed.

Signed in Montreal, April 15, 2019

---

The Honourable L. Yves Fortier, QC, Arbitrator