

**I Tested Positive?**  
***How to respond to a possible anti-doping violation***

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## **Introduction**

On June 1, 2004 the Canadian Anti-Doping Program (CADP) came into force. The CADP represents a significant departure from the previous anti-doping program as it implements the mandatory and other portions of the World Anti-Doping Program and is governed by the new Canadian Policy Against Doping in Sport.

Download:

- Canadian Policy Against Doping in Sport  
[www.pch.gc.ca/progs/sc/pol/dop/index\\_e.cfm](http://www.pch.gc.ca/progs/sc/pol/dop/index_e.cfm)
- Canadian Anti-Doping Program  
[www.cces.ca/pdfs/CCES-POLICY-CADP-E.pdf](http://www.cces.ca/pdfs/CCES-POLICY-CADP-E.pdf)
- World Anti-Doping Program  
[www.wada-ama.org/en/dynamic.ch2?pageCategory\\_id=166](http://www.wada-ama.org/en/dynamic.ch2?pageCategory_id=166)
- International Standard for Laboratories  
[www.wada-ama.org/en/dynamic.ch2?pageCategory\\_id=188](http://www.wada-ama.org/en/dynamic.ch2?pageCategory_id=188)
- World Anti-Doping Agency (WADA) Prohibited List  
[www.wada-ama.org/en/dynamic.ch2?pageCategory\\_id=186](http://www.wada-ama.org/en/dynamic.ch2?pageCategory_id=186)
- Sport Dispute Resolution Centre of Canada's (SDRCC) Arbitration Rules  
[www.adrsportred.ca](http://www.adrsportred.ca)

Pursuant to Rule 7.53 of the CADP, with the exception of a person who has waived their right to a hearing, an anti-doping rule violation and the consequences that flow from that violation may not be determined without a hearing conducted by the Doping Tribunal. Accordingly, the focus of this guide is preparing for and conducting this hearing. The contents of the guide are presented in roughly the

order that events will actually occur. Each part deals with a separate topic or issue and many sub-headings are presented as specific questions with the answers provided.

Throughout the guide, links are provided to relevant portions of the CADP and to other resources that may be of assistance. All words in italics are specifically defined terms in the CADP. For example, the terms *Athlete* and *Athlete Support Personnel* are not limited, as might be expected, to elite athletes and their coaches. For convenience, unless otherwise stated, this guide will only refer to *Athletes*. The CADP must be consulted for its application to individuals who are not *Athletes*. The reader is strongly encouraged to consult the Glossary of the CADP to review the precise meaning of the defined words. All numbers in brackets refer to specific Rules in the CADP.

## **PART I: An Anti-Doping Rule Violation is alleged**

### ***What preliminary steps were taken?***

When the CCES receives word from the WADA-accredited laboratory that an “A” *Sample* has tested positive, it conducts a review to determine if a *Therapeutic Use Exemption* has been granted to the *Athlete* for the detected substance. The CCES also reviews whether there has been any obvious departure from the Doping Control Rules or the WADA International Standard for Laboratories or if there is an obvious flaw in the laboratory analysis that would affect the *Adverse Analytical Finding*. The practice of the CCES is to advise the *Athlete* of the *Adverse Analytical Finding* through the *Athlete’s* sport governing body and to give the *Athlete* an opportunity to provide a written explanation. The CCES may seek additional input from the laboratory regarding whether the *Athlete’s* explanation is consistent with the positive test result. When the initial review is completed the CCES decides whether or not to issue a formal notice (Rule 7.46) claiming that a violation has occurred.

### ***How am I notified?***

*Athletes* receive the formal notice from the CCES via the *Athlete’s Sport Organization*. For *Athletes* this is usually a notice of an *Adverse Analytical Finding* arising from a *Sample* collection. For *Athlete Support Personnel* it will consist of a formal notice asserting that the CCES believes an anti-doping rule such as *Tampering*, *Possession* or *Administration* was violated. Receipt of the formal notice sets in motion a chain of events that can have serious consequences at the hearing. Do not ignore this formal notice from the CCES as the Doping Tribunal may proceed in your absence to determine the alleged violation.

### ***Who is now involved?***

The parties are the *Athlete* or *Athlete Support Personnel* whom the CCES asserts has committed an anti-doping rule violation, the CCES, the relevant *Sport Organization* and Sport Canada.

### ***What initial decisions are required?***

Upon receiving the formal written notice from the CCES some decisions must be made immediately.

1. It is advisable to cooperate fully with any follow-up investigation conducted by the CCES. The CCES will seek to determine the full circumstances surrounding an alleged violation (Rules 7.47 and 7.48). Respond to enquiries from the CCES fully and accurately. It may be possible that upon understanding all of the circumstances and details of the alleged violation the CCES will decide that no anti-doping rule was violated.

Consider carefully what admissions, if any, are made to the CCES, to any other party or to the media. Admissions given voluntarily may be used against that person at the hearing. In all cases tell the truth - but be aware that whatever information is freely provided may be relied on at the hearing.

2. The *Athlete* has the right to promptly request that their “B” *Sample* be analyzed and to be present in person, with or by a representative, for this analysis. If the *Athlete* does not request this right promptly, it may be deemed waived (Rule 7.46 d). It is advisable to obtain full copies of the laboratory documentation package from the CCES.
3. The *Athlete* may choose to accept the CCES assertion of a violation, waive the required hearing and accept the normal suspension imposed. This is a perfectly acceptable position to take where the *Athlete* is prepared to acknowledge the violation and accept the consequences. Waiving the hearing will start the period of suspension immediately.
4. If the *Athlete* wishes to contest the claim by the CCES that an anti-doping rule violation has taken place the following steps are advisable:
  - Retain an experienced lawyer. The hearing process is not complex but a professional advisor can help present evidence and frame arguments in a logical and persuasive fashion.
  - Understand what anti-doping rule, or rules, the CCES is claiming have been violated. Read those sections of the CADP carefully. If one section refers to other sections, which is common, understand how the sections relate to each other.
  - Gather and retain in an organized fashion all documentation relevant to the alleged violation. This includes the formal notice, ongoing investigation reports and all responses, the laboratory documentation package, letters, e-mails, medical records, prescriptions and permissions. Some will be sent directly to the *Athlete* but much will have to be located. Although the CCES has the burden to prove that an anti-doping rule violation occurred, at the hearing the *Athlete* may wish to establish certain facts. Relevant and reliable evidence is required to do this and the *Athlete* must take responsibility for the collection and organization of this material.

## **PART II: Was a Doping Control Rule broken?**

When a decision is made to challenge the claim by the CCES that an anti-doping rule was violated the *Athlete* must carefully develop a strategy to explain the fact of the positive result or to dispute the actual test results. Why might the *Sample* have tested positive for a *Prohibited Substance*? Were all procedures properly followed? In developing this strategy it is essential for the *Athlete* to address two related issues:

- Were all the steps and procedures required by the Doping Control Rules followed?
- If not, were these deviations from the steps and procedures in the Doping Control Rules the cause of the positive test result?

### ***What Rules apply?***

The Doping Control Rules in the CADP are based on WADA rules. These WADA rules impose general obligations on the CCES and require that certain steps and procedures are followed. *Athletes* often claim that a positive test result was caused by a failure on the part of the CCES to adhere strictly to these steps and procedures. While infrequent, this may be the case. Set out below is a check list covering the more important steps and procedures contained in the Doping Control Rules.

### ***Does the CCES have jurisdiction?***

*International-Level Athletes* or *Athletes* who are tested at an *International Event* may be subject to the rules and procedures of an international *Sport Organization* or other *Anti-Doping Organization*. The CADP only applies when CCES is responsible for results management. Ensure that the CADP applies. In addition, consider whether the definition of an *Athlete* applies to you and determine whether you have been designated as an *Athlete* by the CCES.

### ***Is the Athlete in a testing pool?***

To be tested for *Doping Control*, *Athletes* must be included in either the *Registered Testing Pool* (Rules 6.6 to 6.9) or in the *Domestic Testing Pool* (Rules 6.10 to 6.12) or have been designated as an *Athlete* by the CCES. Note that an *Athlete* may be tested as long as he or she is in either of these pools, and for eighteen months thereafter, regardless of retirement.

### ***Was Athlete Notification and Supervision properly conducted?***

The procedures regarding the proper notification and supervision of *Athletes* are contained in Rules 6.26 to 6.51.

*Obligations of the CCES*: The general obligations of the CCES to implement a fair system of notification and supervision are contained in Rules 6.29 to 6.41.

*Were these steps taken?* Ensure that the notification and supervision steps described in Rules 6.42 to 6.51 were followed.

**Was Sample Collection properly conducted?**

The procedures regarding the *Sample Collection Session* are contained in Rules 6.52 to 6.74.

*Obligations of the CCES:* The general obligations of the CCES regarding preparing for the *Sample* collection session are described in Rules 6.56 to 6.58 and 6.62 to 6.67. The obligations of the CCES concerning the *Sample* collection itself are described in Rules 6.68 to 6.74.

*Were these steps taken?* Refer to the procedures described in the Rules noted above and in Annexes 6C, 6D, 6E and 6F.

**Was Security and Transport proper?**

The procedures governing security and transport of the *Sample* once it is collected are contained in Rules 6.75 to 6.90.

*Obligations of the CCES:* The general obligations of the CCES regarding security and transport are described in Rules 6.77 to 6.80.

*Were these steps taken?* Refer to the procedures described in Rules 6.85 to 6.90. Ensure that the documentation is accurate and that the documentation matches the *Sample*. Ensure the *Sample* was properly stored and that the timing of the transportation to the laboratory was appropriate. Ensure that the *Chain of Custody* is intact. The *Chain of Custody* is a chronological record of the location of the *Sample*, and its various custodians, after it is sealed by the *Athlete* and before it is analyzed at the laboratory.

**What adjustments are required for Athletes with a disability?**

For *Athletes* with a disability the standard procedures are modified to reflect special needs as specified in Annex 6B.

*Were these steps taken?* Refer to the procedures described in Rules 6B-4 to 6B-11.

**Was Blood Sampling performed?**

Whenever an *Athlete's* blood is collected it must be done consistently with the procedures in Annex 6G.

*Obligations of the CCES:* The general obligations of the CCES regarding blood sampling are described in Rules 6G-3 to 6G-5.

*Were these steps taken?* Refer to the procedures described in Rules 6G-7 to 6G-33

### ***Will departures from the Doping Control Rules eliminate the violation?***

In all instances when an *Athlete* is able to identify deviations from the procedures described in the Doping Control Rules serious consideration must be given as to whether or not the deviation in fact caused the anti-doping rule violation. This analysis should be undertaken prior to commencing the hearing. Note that deviations (whether large or small) from the Doping Control Rules that did not cause the *Adverse Analytical Finding* will not eliminate the positive test or the doping infraction. Refer to the comments in Part IV on Burden of Proof concerning who has the obligation to prove the necessary causal connection between the deviation and the result.

### **PART III: Was a Laboratory Rule broken?**

The CADP adopts and applies WADA's International Standard for Laboratories (the "Laboratory Rules"). The laboratory used most commonly by the CCES is the WADA accredited laboratory located in Montreal, Quebec. The CADP contains an important presumption (Rule 7.50) which means that WADA-accredited laboratories are presumed to have conducted the *Sample* analysis and the *Chain of Custody* procedures in accordance with the Laboratory Rules. This presumption means, in the absence of evidence to the contrary, that the laboratory analysis conducted by the scientists in Montreal and the *Chain of Custody* procedures utilized are both deemed to have been carried out fairly and properly. These issues do not have to be proven by the CCES in every case. This is quite different than the Doping Control Rules where there is no such presumption operating.

An *Athlete* may certainly try to rebut or challenge this presumption. However, it is important to remember that specific evidence will be needed to demonstrate a departure from the Laboratory Rules.

### **PART IV: Preparing for the Hearing – Factors to Consider**

An *Athlete* who has decided to challenge the claim by the CCES that a violation has occurred must make some strategic decisions well before the hearing. The *Athlete* may contest the fact of the alleged violation, the duration of the sanction proposed by the CCES, or both. In general, an *Athlete* who decides to contest the fact of the violation should also attempt to reduce the proposed sanction by arguing the existence of "exceptional circumstances" (Rules 7.38 and 7.39). Alternatively, it is proper for an *Athlete* to accept that the violation occurred and only contest the sanction proposed by the CCES. The scope of the *Athlete's* challenge will determine which of the factors listed below are relevant.

#### ***Therapeutic Use Exemptions***

The *Athlete* must inform the CCES if a *Therapeutic Use Exemption (TUE)* has been granted permitting the use of the substance detected in the positive test. If a *TUE* has been granted, this will

eliminate the anti-doping rule violation for that substance. If a *TUE* has not been obtained but the application process for a *TUE* is underway, provide all relevant details to the CCES regarding why the *TUE* has not been obtained. Consider whether Rule 5.30 c) (i) and (ii) apply. These rules allow for a retroactive approval of a *TUE* in the case of “medical emergencies” or “exceptional circumstances” relating to insufficient time. Disclose all facts to the CCES regarding any claim that the violation ought to be excused due to a valid medical condition which must be treated with an otherwise *Prohibited Substance*.

### ***Specified Substances***

The Prohibited List identifies “specified substances” which are often the cause of unintentional anti-doping rule violations because of their common use in medicinal products (Rule 7.7). A suspension otherwise applicable for a violation may be greatly reduced or eliminated if the *Athlete* can show that the *Use* of the specified substance was not intended to enhance sport performance. This may be negotiated with the CCES prior to the start of the hearing. The *Athlete* is advised to gather together all relevant evidence to demonstrate the underlying medical condition, why the medication was taken, when it was started and how long it was taken. All of this evidence should serve to demonstrate that the *Athlete’s Use* of the specified substance was not intended to enhance sport performance.

### ***Strict Liability***

Canada has adopted a strict liability anti-doping regime (Rules 7.16 to 7.19). This means that the mere presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete’s* bodily *Sample* is an anti-doping rule violation. Athletes are personally responsible for the presence of all substances detected in their *Sample*. A doping violation will be established if a *Prohibited Substance* is detected in any quantity in the *Sample* regardless of the *Athlete’s* intent, fault, negligence or carelessness in connection with that substance.

Despite the general rule that even a minute quantity of a *Prohibited Substance* detected in the *Sample* will trigger an anti-doping rule violation, there are special rules in the *Prohibited List* for substances that (i) have a minimum reporting threshold or (ii) can be produced naturally (endogenously) by humans. If the substance detected in a *Sample* is included in these special rules no violation will be occur unless the substance is detected in amounts over the threshold level.

If there are no departures from the procedures in the Doping Control Rules or the Laboratory Rules and if a *Prohibited Substance* was detected in sufficient quantity in the *Sample* then an anti-doping rule violation will have occurred. In this event, the applicable penalties will be imposed. However, there are two exceptions which are discussed below.

### ***Exceptional Circumstances***

There are two exceptions to the strict liability rule. These exceptions do not eliminate the anti-doping rule violation. However, they do permit, in limited situations, that the applicable period of *Ineligibility* or suspension may be reduced. These exceptions are intentionally designed to be quite

narrow. The *Athlete* has the burden of convincing the Doping Tribunal that he or she is entitled to rely on one of them.

*No Fault or Negligence* (Rule 7.38): This exception only applies to *Athletes* who are alleged to have violated the anti-doping rules associated with *Presence* (Rules 7.16 to 7.20) and *Use* (Rules 7.21 to 7.23). The *Athlete* must demonstrate to the Doping Tribunal that he or she bears *No Fault or Negligence* for the violation. This term is defined to mean that the *Athlete* 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*.

This is a very difficult test to meet, with two related parts. The *Athlete* must convince the Doping Tribunal (i) that there was an absolute lack of fault or careless conduct on the part of the *Athlete* in connection with the anti-doping rule violation and (ii) identify how the substance entered the *Athlete's* body. It is not enough to claim that the positive test was inadvertent or that the *Athlete* has no knowledge regarding how the substance entered his or her system. The burden rests with the *Athlete* to demonstrate that both components of the test are satisfied. If the *Athlete* satisfies the test then the period of *Ineligibility* or suspension will be entirely eliminated.

*No Significant Fault or Negligence* (Rule 7.39): This exception applies to *Athletes* alleged to have violated the Rules referred to above as well as to *Refusals* (Rule 7.24 to 7.25) and Administration (Rule 7.35 to 7.36). The *Athlete* has the burden to demonstrate that he or she bears *No Significant Fault or Negligence* for the anti-doping rule violation. The *Athlete* must establish that his or her fault or negligence, viewed in the totality of the circumstances, and also considering the criteria for *No Fault or Negligence*, was not significant in relationship to the violation that occurred. The *Athlete* must also establish how the *Prohibited Substance* entered his or her system. This is a two part test, both elements of which must be satisfied. If the *Athlete* can establish both components of the test the period of *Ineligibility* or suspension may be reduced by up to 50%.

The *Athlete* need not be totally blameless for this exception to apply. The *Athlete* must demonstrate that even though their fault or negligence may have contributed in some degree to the positive test result their conduct or carelessness was not “significant” when compared to all of the other circumstances that did contribute to the anti-doping rule violation. This means that the *Athlete* may well bear some degree of fault for the violation, or the *Athlete* may have been negligent in connection with the violation, but if the Doping Tribunal is satisfied that other factors and circumstances played a significant role in causing the violation this exception may apply. The *Athlete* will not succeed if he or she merely suggests how other circumstances might have contributed to the violation. The *Athlete* must demonstrate that his or her fault or negligence was not a significant causal factor in the anti-doping rule violation as compared to other specific circumstances that were.

The WADA Code provides examples where Rules 7.38 and 7.39 might apply. The exceptions are meant to be applied “where the circumstances are truly exceptional and not in the vast majority of cases.” The Commentary to the WADA Code states, in part:

*An example where No Fault or Negligence would result in the total elimination of a sanction is where an Athlete could prove that, despite all due care, he or she was sabotaged by a competitor. A sanction could not be completely eliminated on the basis of No Fault or Negligence 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 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 based on No Significant Fault or Negligence. (For example, reduction may well be appropriate in illustration (a) if the Athlete clearly establishes that the cause of the positive test was contamination in a common multiple vitamin purchased from a source with no connection to Prohibited Substances and the Athlete exercised care in not taking other nutritional supplements.)*

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

The “burden of proof” is a legal term defining who has the obligation, or duty, to prove certain matters at a hearing. A closely related consideration for the party having the burden of proof on a particular issue is what “standard of proof” is required. The question of satisfying the “standard of proof” goes to the degree of certainty that is required on the part of the Doping Tribunal.

At the hearing the CCES has the burden of proving that an anti-doping rule violation occurred. The *Athlete* need not prove that it did not occur. The CCES must prove to the “comfortable satisfaction” of the Doping Tribunal that a violation occurred.

In some situations in the CADP there is an obligation on the *Athlete* to prove certain matters or to rebut certain presumptions. Examples include the obligation to demonstrate the existence of “exceptional circumstances” (Rules 7.38 and 7.39) or to rebut the presumption that the Laboratory Rules were not broken (Rule 7.56). In any such case the *Athlete* may meet this obligation by leading evidence of a fact or an event which will be evaluated against the lesser standard of proof of a “balance of probability”. Generally, if something is to be proven on a “balance of probability,” this requires showing that it is “more likely than not” to have happened. However, this does not mean that merely raising theories or suggesting alternative possibilities will suffice. In all instances where the

*Athlete* bears the burden of proof he or she must still satisfy the Doping Tribunal, on the basis of valid evidence, that what the *Athlete* proposes “is more likely than not” to be true.

The *Athlete* may attempt to prove that there were departures from the procedures in the Laboratory Rules or from the Doping Control Rules during *Testing*. An *Athlete* who proves that it is “more likely than not” that there were departures (large or small) from the required procedures will not automatically be successful in avoiding the violation. This is because the CCES may then try to show to the “comfortable satisfaction” of the Doping Tribunal that whatever departures from the Laboratory Rules or the Doping Control Rules might have occurred, these departures did not cause the positive test result.

The critical point to keep in mind is that successfully proving the existence of a departure from accepted procedures and practices does not automatically invalidate the positive test results. Any such departure from the Doping Control Rules or the Laboratory Rules must have caused the positive test result to invalidate the anti-doping rule violation.

## **PART V: Conduct of the Hearing**

Detailed procedures regarding the conduct of the hearing are set out in the Sport Dispute Resolution Centre of Canada’s (SDRCC) Arbitration Rules as well as in the CADP (Rules 7.60 to 7.69). The Doping Tribunal consists of a single arbitrator who will be selected from among a roster of qualified individuals by the SDRCC (Rule 7.59). The arbitrator will determine whether there has been an anti-doping rule violation and the appropriate consequences. It is common to have the arbitrator conduct a preliminary meeting to confirm the hearing procedures and to decide the format of the hearing. Most often the Doping Tribunal will conduct an oral hearing and this will be accomplished by either a meeting in person or by a conference call or video conference.

The parties to the hearing will typically be the *Athlete*, the CCES, Sport Canada and the *Athlete’s* sport organization. WADA and the *Athlete’s* International Federation also have the right to observe to hearing

The arbitrator will inform the parties in which order they will present evidence at the hearing. Typically the CCES will proceed first, as it bears the overall burden of demonstrating that an anti-doping violation has taken place. Everything the *Athlete* is required to prove, or rebut, requires evidence. What precisely is this evidence?

### ***Evidence***

The “story” the *Athlete* must tell at the hearing to support his or her position will inevitably be a blend of facts, information, data, argument and conclusions. Evidence is in a special category. Evidence is not argument. It is information used to prove a certain fact. Evidence may be oral testimony (in

person at the hearing or on the phone). It may be written documents such as letters, e-mails or reports. It could be business records such as contracts or forms or it could be electronic or machine readable files. Evidence can also be physical items such as a chair, clothing or a urine sample container.

All evidence falls into two broad categories: direct evidence or indirect evidence.

Direct evidence is actual information about the incident or matter at issue. It can be an eye witness report, the disputed consent form or the *Athlete's* testimony regarding his or her personal experience. In contrast, indirect evidence requires a "leap" or inference to rationally connect it to the incident or matter at issue. For example, a witness testifying that she knew it was raining because she got drenched in a rain shower walking past the corner where the accident occurred would be direct evidence. Indirect evidence would be a witness testifying that he glanced outside his home at the time of the accident and saw that the street was wet. The inference sought to be drawn from this testimony is that it was raining in the neighborhood at the critical time. However, other possibilities include street cleaners having just passed, fire hydrant leaks or children playing with hoses outside the home. In general, direct evidence is the preferred method of establishing a fact.

### **Relevance**

At the hearing each of the parties will attempt to prove certain things. For example the *Athlete* may attempt to prove that there was a departure from the Doping Control Rules. The CCES will attempt to prove that any departure from a procedure in the Doping Control Rules was not the cause of the positive test. Alternatively, the *Athlete* may try to establish that he was at *No Fault or Negligence* for the anti-doping rule violation. A coach or trainer may try to establish that she was not in breach of the rules regarding *Trafficking* or Administration.

In every case, facts are required to back up the party's position. Relevant evidence is information that is rationally connected to one or more of these facts that a party must establish. Regardless of whether evidence is direct or indirect it must be relevant. For example, material obtained from the internet that describes, in a general way, opinion, commentary, medical conditions, diagnoses and drug research will not likely be considered very relevant to the facts of the particular case being decided at the hearing. In contrast, an expert testifying regarding the actual analysis of the *Sample* or a doctor describing the medical condition of the *Athlete* will be relevant. The arbitrator will be seeking to ensure that the evidence presented by a party has a link or a connection to a fact that the party needs to establish. Keeping the evidence focused on those facts that the party is required to prove is a major strategic goal. Relying on non-relevant evidence will not assist the party to establish the facts it depends on to succeed. Perhaps most important, evidence that is not relevant is not likely to be accepted by the arbitrator and if it is accepted, it will not be given much weight.

### **Rules of Evidence**

The normal rules of evidence that govern court proceedings do not apply at the hearing. The arbitrator will decide at the conclusion of the hearing how much weight, or reliance, should be placed on each

piece of evidence that has been submitted. It is important that two specific types of evidence are mentioned.

*Hearsay evidence:* The “rule against hearsay” was designed to prevent the admission of evidence considered untrustworthy because (i) it is not from a source that has been sworn to tell the truth and (ii) the original informant is not at the hearing and cannot be cross examined so the evidence may not be tested. The classic description of hearsay evidence is along the following line: witness Ms. Smith tells the hearing what she was told by Mr. Brown regarding a matter that is in dispute. Mr. Brown is not at the hearing to swear to tell the truth or to be cross examined on his statements that are reported by Ms. Smith.

Hearsay evidence can consist of oral testimony or written documents. Since the strict rules of evidence are not followed at the hearing, hearsay evidence will likely be admitted by the arbitrator but it may be given little weight in an assessment of the evidence. As a result, it is a very good idea to try to corroborate hearsay evidence with additional direct evidence on the same issue.

*Circumstantial Evidence:* This is indirect evidence that is used to prove a series of facts that, taken together, suggest that an event took place or that certain conduct occurred. The evidence requires a “leap” or inference to get from the circumstantial evidence itself to the fact or issue that the party must prove. It is not enough that the circumstantial evidence is true – this evidence must, to serve its purpose, go further and strongly point to the ultimate fact that must be proven by the party. In the example provided earlier, it may be quite true that the street was wet outside the witness’s home but does this prove conclusively that it was raining at the time of the accident? Likewise, an *Athlete* may testify that the sample container was left unattended for a short period of time and that a bitter rival entered the area where the unsealed container was left on a table. Those basic facts may well be true. However, the inference sought to be drawn is that the rival improperly tampered with and contaminated the sample container. Does the evidence strongly point to that conclusion and no other? The arbitrator will certainly consider whether there are gaps in the chain from the circumstantial evidence to the ultimate fact to be proven and will want to be satisfied that there are not other rational explanations or inferences that could be drawn from the circumstantial evidence. Do not ignore circumstantial evidence but be aware of its limitations.

### ***Cross Examination***

After each witness has testified the arbitrator will allow questions to be put to that witness by the other parties. Cross examination is the process where the evidence tendered by one party may be tested or challenged by asking questions of the witness regarding that evidence. It is permissible to ask “leading questions” that tend to suggest the answer desired or expected. Cross examination may also serve to assist in establishing the case of the party performing the cross examination and may weaken the credibility of the witness. Cross examination is not simply an opportunity to attack the witness personally or to engage in argument with the witness. The arbitrator will not be impressed by

such a tactic and will likely not permit it. If the desired answer is not given after one or two attempts – move on to another issue.

It is a good idea to consider, in advance, what each witness is likely to say to the arbitrator and to plan in a general fashion what parts of that testimony might be productively challenged. Final adjustments to the intended cross examination are then made at the hearing once the actual testimony is given.

### ***Evidence versus Argument***

The arbitrator must decide the issues solely on the basis of the relevant evidence presented at the hearing. A party's opinion about a certain matter is not evidence. *Evidence* is the information required to prove the required facts. It is very rare to have the evidence provide a “perfect fit” so that all questions about the matters in dispute are satisfactorily answered. Inevitably there are “gaps” in the evidence. *Argument* is the logic and reasoning process that explains the gaps or weaknesses in the evidence. Argument attempts to tie all the evidence together into a neat package that supports the result that is sought. The party's argument will certainly express opinions and conclusions based on a selective interpretation of the evidence that was admitted at the hearing. This is proper.

Evidence and argument should be kept separate and distinct. Evidence is presented during the hearing when it is that party's turn to give evidence. Typically the CCES will present its evidence first, followed by the *Athlete*. In some cases, the CCES may wish to present rebuttal evidence in response to that of the *Athlete*. This is proper.

In contrast, argument (or final submissions) is reserved exclusively for the end of the hearing after all of the evidence has been submitted. At the conclusion of the hearing each party will be invited by the arbitrator to summarize its position and to explain how and why the evidence admitted at the hearing strongly supports the result sought by that party. As the party having the overall burden of proof, the CCES will argue first, followed by the *Athlete*, following which the CCES may reply. It is proper to argue in favor of some evidence and to argue against the arbitrator relying on other evidence. The key is to be able to distinguish evidence from argument – and to try to keep them separate.

### ***Commencement of the Suspension***

Pursuant to the CADP (Rule 7.12), the period of *Ineligibility* or suspension normally commences on the date of the hearing decision or the date the violation is accepted by the *Athlete*. However, there may be situations, even when the *Athlete* fails to contest the violation or does not succeed in reducing the period of suspension, where principles of fairness demand that consideration be given to an earlier start date for the suspension – and thus an earlier return to competition. This issue can be raised by the *Athlete* at the hearing.

### ***Suggestions for the Athlete***

1. Well before the hearing commences know what facts you must prove to be successful. Identify in advance what must be established or what must be rebutted.
2. It is essential that the Doping Tribunal be provided with relevant evidence to address those facts. It is your responsibility to gather and organize the evidence you intend to rely on.
3. Once the issues or facts that must be proven to be successful have been identified, let the arbitrator know that these are the issues you intend to focus on. Create a single strategy and stick with it. Over the course of the hearing the actual evidence can be accumulated piece by piece.
4. Keep it simple. Keep it relevant. Present the most compelling evidence possible. Avoid side issues that may distract the arbitrator from the main strategy.
5. Argue clearly and concisely why the evidence you have submitted supports the facts that you must prove and leads to the result you desire. You can do no more.