



I Tested Positive?
How to Respond to a Possible Anti-doping Violation
Full Version

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Preface

This document was adopted by AthletesCAN to provide a straight-forward and independent guide to assist any individual who may have committed an anti-doping rule violation according to the Canadian Anti-Doping Program. While AthletesCAN believes that this guide is fully consistent with the current Canadian Anti-Doping Program, any inconsistencies or ambiguities shall be resolved by reference to the actual Canadian Anti-Doping Program, which is authoritative. The Sport Solution revised the current version of this guide in the summer of 2011.

About This Article

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Sport Solution is a program of AthletesCAN, the association of Canada's national team athletes. The Program Managers at Sport Solution are law students who can provide athletes with legal information and resources on: sport dispute resolution procedures, athlete agreements and contracts, selection and discipline procedures in sport, and related legal and policy issues.

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Introduction

On January 1, 2009 the Canadian Anti-Doping Program (CADP) came into force. The Canadian Centre for Ethics in Sport (CCES) – an independent not-for-profit organization - administers the CADP. The CADP describes how the World Anti-Doping Code (“the Code”) compliant anti-doping program is implemented.

Download:

- Canadian Anti-Doping Program
www.cces.ca/pdfs/CCES-POLICY-CADP-E.pdf
- World Anti-Doping Program
<http://www.wada-ama.org/en/World-Anti-Doping-Program>
- International Standard for Laboratories
<http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/International-Standards/Laboratories>
- World Anti-Doping Agency (WADA) Prohibited List
<http://www.wada-ama.org/en/World-Anti-Doping-Program/Sports-and-Anti-Doping-Organizations/International-Standards/Prohibited-List>
- Sport Dispute Resolution Centre of Canada’s (SDRCC) Arbitration Rules
<http://www.crdsc-sdrcc.ca>
<http://www.crdsc-sdrcc.ca/eng/documents/CODE2011FINALEN.pdf>

An anti-doping rule violation and the appropriate consequence may not be determined and imposed without a hearing by the Doping Tribunal, unless you waive the right to a hearing (Rule 7.79-7.80). Accordingly, the focus of this guide is preparing for and conducting the anti-doping hearing. The contents of this 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. 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 lab that your “A” *Sample* has tested positive, it conducts a review to determine if an applicable *Therapeutic Use Exemption* (TUE) has been or will be granted or whether a medical review will be granted for the detected substance. The CCES also reviews whether there has been any apparent departure from the Doping Control Rules or the laboratory analysis that caused the *Adverse Analytical Finding*. The common practice of the CCES is to advise you of the *Adverse Analytical Finding* through your sport governing body and to give you an opportunity to provide a written explanation. The CCES may seek additional input from the laboratory regarding whether your 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 claiming that a violation has occurred (Rule 7.66).

How am I notified?

You will receive the formal notice from the CCES. 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 you, the CCES and the relevant *Sport Organization*. Your *International Federation*, the Government of Canada and *WADA* are also entitled to observe the proceedings of the Doping Tribunal.

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. 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 or that a mandatory sanction may be reduced.

Consider carefully what admissions or statements, if any, are made to the CCES, to any other party or to the media. Admissions and statements 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. You have the right to promptly request that your “B” *Sample* be analyzed and to be present in person, with or by a representative, for this analysis. You must request the analysis of the B *Sample* within the period specified in WADA’s *International Standard for Laboratories* (Article 5). If you do not request this right promptly, it will be deemed waived. It is advisable to obtain full copies of the laboratory documentation package for both samples from the CCES.
3. You 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 if you are prepared to admit the violation and accept the consequences. Waiving the hearing and accepting the CCES’s assertion of a violation will start the period of suspension immediately.
4. Promptly admitting to an anti-doping rule violation asserted by the CCES may result in the period of *Ineligibility* starting as early as the date of *Sample* collection. However, where this Rule is applied, at least one-half of the period of *Ineligibility* must be served after the date a sanction is accepted or otherwise imposed (Rule 7.13).

If you elect to voluntarily admit to the anti-doping rule violation and seek to receive the benefit of CADP Rule 7.13, you may not contest the fact of the violation at any time following the admission. However, you may still have the sanction(s) associated with the admitted anti-doping rule violation determined by the Doping Tribunal at a hearing, or accept the sanction proposed by the CCES and waive the right to a hearing. You should seek independent legal advice regarding a voluntary admission of a violation.

5. An *Anti-Doping Organization* with results management authority such as CCES can offer you a *Provisional Suspension* if one is not otherwise imposed. You will receive a credit for the period of voluntary suspension against any period of *Ineligibility* that may ultimately be imposed. For a voluntary *Provisional Suspension* to take effect, you must voluntarily accept the suspension in writing and thereafter refrain from competing at or participating in any *Competitions* (Rule 7.15).

You should seek independent legal advice before voluntary acceptance of a *Provisional Suspension*.

6. If you wish to contest the claim by the CCES that an anti-doping rule violation has taken place the following steps are advisable:
 - Contact the Sport Solution. The program managers can help you get a handle on your situation and provide the guidance you need to make well-informed decisions.

- 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 manner. A number of lawyers offer their pro bono services through a directory on the SDRCC web site.
- 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 packages, letters, e-mails, medical records, prescriptions and permissions. Some will be sent directly to you, 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 you may wish to establish certain facts. Relevant and reliable evidence is required to do this and you must take responsibility for the collection and organization of this material.

PART II: Was a Doping Control Rule broken?

Should you decide to challenge the claim by the CCES that an anti-doping rule was violated, you must carefully develop a strategy to explain the fact of the positive result or to dispute the actual test results. Attempt to establish why the *Sample* might have tested positive for a *Prohibited Substance* and/or if all procedures were followed properly. In developing this strategy, it is essential 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 the *Code*. The *WADA Code* imposes general obligations on the CCES and requires that certain steps and procedures be 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 checklist 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.

Am I in a testing pool?

You should determine whether you are included in a testing pool. Some *Athletes* will be included in the CCES' *Registered Testing Pool* or in the CCES' *Domestic Testing Pool*. Each testing pool sets out certain obligations and responsibilities that must be complied with. However, the *CCES* may select any *Athlete* under its authority for testing, even if he or she is not included in either the *Registered Testing Pool* or in the *Domestic Testing Pool* (Rule 6.15).

Was I properly notified and supervised?

The procedures regarding the proper notification and supervision of *Athletes* are contained in Rules 6.18 to 6.39.

Obligations of the CCES: The general obligations of the CCES to implement a fair system of notification and supervision are contained in Rules 6.21 to 6.30.

Were these steps taken? Ensure that the notification and supervision steps described in Rules 6.31 to 6.39 were followed.

Was Sample Collection properly conducted?

The procedures regarding the *Sample Collection Session* are contained in Rules 6.40 to 6.62.

Obligations of the CCES: The general obligations of the CCES regarding preparing for the *Sample* collection session are described in Rules 6.43 to 6.46 and 6.50 to 6.55. The obligations of the CCES concerning the *Sample* collection itself are described in Rules 6.48 to 6.49 and 6.56 to 6.62.

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 6.65 to 6.78.

Obligations of the CCES: The general obligations of the CCES regarding security and transport are described in Rules 6.69 to 6.70.

Were these steps taken? Refer to the procedures described in Rules 6.73 to 6.78. 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 you have sealed it and before it is analyzed at the laboratory.

What adjustments are required if I have a disability?

If you have 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 a Blood Sample collected?

Whenever a blood sample is collected, it must be done consistently with the procedures in Annex 6E.

Obligations of the CCES: The general obligations of the CCES regarding the collection of a blood sample are described in Rules 6E-3 to 6E-5.

Were these steps taken? Refer to the procedures described in Rules 6E-6 to 6G-21

Will departures from the Doping Control Rules eliminate the violation?

In all instances, if you are 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.

You can challenge an *Adverse Analytical Finding* if you can show that there was a departure from the Laboratory Rules (Rule 7.82 b) or Doping Control Rules governing *Samples* collected by or on behalf of the *CCES* (Rule 7.83) that could reasonably have caused the *Adverse Analytical Finding*. You may challenge an *Adverse Analytical Finding* on the basis that a departure impacted the validity or identity of the *Sample*. However, you should be aware that minor deviations from the Laboratory Rules or Doping Control Rules may not have caused an *Adverse Analytical Finding*. If you are successful in showing that a departure could reasonably have caused the *Adverse Analytical Finding*, the *CCES* has the burden of establishing that the departure did not, in fact, cause the *Adverse Analytical Finding*.

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 7.82 a), 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 that without evidence proving otherwise, the laboratory analysis conducted by the scientists at the Laboratory and the *Chain of Custody* procedures utilized are 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.

You 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

Should you decide to challenge the claim by the CCES that a violation has occurred, you must make some strategic decisions well before the hearing. You 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 under Rule 7.42 and 7.43 if a specified substance is involved or by arguing the existence of “exceptional circumstances” where applicable (Rules 7.44 to 7.48). 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 your challenge will determine which of the factors listed below are relevant.

Therapeutic Use Exemptions and Medical Review Rules

There are two distinct processes in place for athletes to obtain permission to use otherwise prohibited substances. TUE Rules are 5.1 – 5.3, and medical review rules are 5.4- 5.9.

Elite athletes, as defined in Rule 5.2, are subject to WADA’s International Standard for TUEs. These athletes must obtain a TUE prior to use of the prohibited substance or method, and 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, certain rules can allow for a retroactive approval of a *TUE* in the case of “medical emergencies” or “exceptional circumstances” relating to insufficient time.

All other Canadian athletes are not subject to WADA’s International Standard for TUEs. These athletes do not require a TUE, but are required to undergo a medical review to validate and permit the use of prescribed medications for therapeutic reasons if there is an Adverse Analytical Finding reported by CCES. A medical review will be granted if you satisfy the conditions set out in Rule 5.5, and submit this information to the CCES.

Strict Liability

Canada has adopted a strict liability anti-doping regime (Presence - Rules 7.23 to 7.27). This means that the mere presence of a *Prohibited Substance* or its *Metabolites* or *Markers* in your bodily *Sample* is an anti-doping rule violation. You are personally responsible for the presence of all substances detected in your *Sample*. A doping violation will be established if a *Prohibited Substance* is detected in any quantity in the *Sample* regardless of your 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 incurred 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*, an anti-doping rule violation will have occurred.

Specified Substances

The Prohibited List identifies a rather long list of “specified substances” which are often the cause of unintentional anti-doping rule violations because of their common use in medicinal products (Rule 7.4). A suspension otherwise applicable for a violation may be greatly reduced or eliminated if you can show that the *Use* of the specified substance was not intended to enhance sport performance or mask the use of a banned substance.

To eliminate or reduce the period of *Ineligibility* for specified substances under specific circumstances, you are required to satisfy a three-part test under Rule 7.42 and 7.43.

- 1) You must prove how the substance entered your body.
- 2) You must prove that the substance was not intended to enhance sport performance or mask the use of a banned substance.
- 3) You must produce corroborating evidence in addition to the evidence required under Rule 7.42 regarding your lack of intent to enhance sport performance or mask the use of a banned substance.

The corroborating evidence must come from a source that is reliable and persuasive and be representative of your state of mind. It does not have to be direct evidence of what was in your mind at the time the substance was consumed, as such evidence will rarely exist, but it must be consistent with and rationally support the other evidence you have given that there was no intent to enhance performance or mask the use of a banned substance. The corroborating evidence does not need to be a particular type or in a set format. It can come in the form of a document, letter or even from another individual (other than yourself).

If you satisfy all three parts of the test described above, you may be eligible for a reduced sanction. The *CCES* will propose a sanction based on your “degree of fault” that will fall between a warning and two years of *Ineligibility*. The degree of fault will be based on an evaluation of the extent of your blameworthiness in connection with the anti-doping rule violation, and a consideration of various factors, including: your evidence, the corroborating evidence, the nature of the substance involved, the level of

the specified substance detected, factors that are personal to you and any additional evidence that may be relevant.

Exceptional Circumstances

There are four opportunities to potentially reduce a sanction. These exceptional circumstances 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 exceptional circumstances are intentionally designed to be quite narrow. You have the burden of convincing the Doping Tribunal that you are entitled to rely on one or more of them.

1) *No Fault or Negligence* (Rule 7.44): You must demonstrate to the Doping Tribunal that you bear *No Fault or Negligence* for the violation. This term is defined to mean that you did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution that you had *Used* or been administered the *Prohibited Substance*.

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

2) *No Significant Fault or Negligence* (Rule 7.45): If you have committed an anti-doping rule violation, other than a violation involving Rule 7.32 (Athlete Availability, Whereabouts Information and Missed tests) and Rule 7.42-7.43 (Specified Substances), you must demonstrate that you bear *No Significant Fault or Negligence* for the anti-doping rule violation. You must establish that your 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. If it is a Presence violation, you must also establish how the *Prohibited Substance* entered your system. This is a two part test, both elements of which must be satisfied. If you can establish both components of the test, the period of *Ineligibility* or suspension may be reduced by up to 50%.

You need not be totally blameless for this Rule to apply. You must demonstrate that even though your fault or negligence may have contributed in some degree to the positive test result, your 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 you may well bear some degree of fault for the violation, or you 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 Rule may apply.

You will not succeed if you merely suggest how other circumstances might have contributed to the violation. You must demonstrate that your 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 7.44 and 7.45 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.)

3) *Substantial Assistance in Discovering or Establishing Anti-Doping Rule Violations* (Rule 7.46): Under this Rule, a part of the period of *Ineligibility* imposed on you may be suspended by the CCES if you are able to provide *Substantial Assistance* to the CCES that helps confirm an anti-doping rule violation committed by another *Person*. You may also seek to utilize this Rule by providing a criminal authority or professional disciplinary body with information that supports the existence of a criminal offence or the breach of a professional rule by another *Person*.

The period of *Ineligibility* that may be suspended will be based on the seriousness of the anti-doping rule violation that you or the other *Person* committed and the significance of the *Substantial Assistance* provided by you. However, no more than three-quarters of the period of *Ineligibility* may be suspended, and if that period is a lifetime, you must still serve at least eight years of that period.

4) *Admission of an Anti-Doping Violation in the Absence of Other Evidence* (Rule 7.47): This Rule applies if you voluntarily admit the commission of an anti-doping rule violation before receiving notice of a *Sample* collection session, or where there is an anti-doping rule violation that does not involve Presence before receiving first notice of the violation. Your early admission of the anti-doping rule violation must be the only reliable evidence of the violation at the time of the admission. If this Rule applies, no more than one-half of the period of *Ineligibility* otherwise applicable may be suspended.

Aggravating Circumstances Which May Increase the Period of Ineligibility

You should be aware that there are circumstances which may serve to increase the period of *Ineligibility*. Under Rule 7.49, if the *CCES* establishes that there are aggravating circumstances present in an individual case that justify a period of *Ineligibility* greater than the standard sanction of two (2) years, the period can be increased up to a maximum of four (4) years. You can refute the existence of aggravating circumstances by proving to the comfortable satisfaction of the Doping Tribunal that you did not knowingly violate the anti-doping rule.

Rule 7.49 does not apply to violations under Rule 7.36 (Trafficking or Attempted Trafficking) and Rule 7.37 (Administration or Attempted Administration).

Pursuant to Rule 7.50, if you admit the anti-doping rule violation promptly after being confronted with the violation by the *CCES*, you can generally avoid the application of Rule 7.49.

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. You need not prove that it did not occur. The *CCES* must prove to the “comfortable satisfaction” of the Doping Tribunal that a violation occurred. This standard of proof is greater than a mere balance of probability, but less than proof beyond a reasonable doubt (Rule 7.81).

In some situations in the CADP, you have an obligation to prove certain matters or to rebut certain presumptions. Examples include the obligation to demonstrate the existence of “exceptional circumstances” (Rules 7.44 to 7.48) or to rebut the presumption that the Laboratory Rules were not broken (Rule 7.82 a). In any such case you may meet this obligation by leading evidence of a fact or an event that 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 you bear the burden of proof, you must still satisfy the Doping Tribunal, on the basis of valid evidence, that what you propose “is more likely than not” to be true.

For example, you may attempt to prove that there were departures from the procedures in the Laboratory Rules or from the Doping Control Rules during *Testing*. If you can prove that it is “more likely than not” that there were departures (large or small) from the required procedures, you 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.

In two cases you must meet a higher standard of proof than a “balance of probability.” Firstly, if you wish to justify the elimination or reduction of the period of *Ineligibility* under Rule 7.42, you must prove to the “comfortable satisfaction” of the Doping Tribunal that there was no intent to enhance sport performance or mask the *Use* of a performance enhancing substance (Rule 7.43).

Secondly, where there are aggravating circumstances, which would serve to increase the period of *Ineligibility* greater than the standard sanction, you must prove to the “comfortable satisfaction” of the Doping Tribunal that you did not knowingly violate the anti-doping rule (Rule 7.49).

Finally, pursuant to Rule 7.85, the Doping Tribunal can draw an adverse inference based on your refusal to attend a hearing (either in person or telephonically) after a request was made within reasonable time of the hearing or to answer questions from the Doping Tribunal or the CCES.

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) Code as well as in the CADP (Rules 7.91 to 7.97). The Doping Tribunal consists of a single arbitrator who will be selected from among a roster of qualified individuals by the SDRCC (Rule 7.87 b). 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 you, the CCES and your sport organization. WADA, the Government of Canada and your International Federation also have the right to observe the 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 you are required to prove, or rebut, requires evidence. What precisely is this evidence?

Evidence

The "story" you must tell at the hearing to support your 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 eyewitness report, the disputed consent form or your testimony regarding your 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 trying 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 you 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, you may try to establish that you were at *No Fault or Negligence* for the anti-doping rule violation. A coach or trainer may try to establish that he or 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 your medical condition 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. Two specific types of evidence should be kept in mind.

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, the arbitrator will likely admit hearsay evidence, but it may be given little weight in evaluating 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. A party's argument will certainly express opinions and conclusions based on a selective interpretation of the evidence that was admitted at the hearing.

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, and then you will present your evidence. In some cases, the CCES may wish to present rebuttal evidence in response to yours.

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 you, following which the CCES may reply. It is appropriate 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 7.11), the period of *Ineligibility* or suspension normally commences on the date of the hearing decision or the date that you have accepted the violation. However, there may be situations where you can have the period of *Ineligibility* begin at an earlier date. Refer to Rules 7.11 to 7.17 for the applicable provisions.

Helpful Suggestions

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 you have identified the issues or facts that must be proven in your defence, 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.

Conclusion

AthletesCAN trusts that you have found this short guide to be informative and helpful. We hope that it will assist you to more easily navigate the results management processes contained in the current CADP. Our goal was to explain in simple terms the options and choices that are available when faced with an asserted anti-doping rule violation. If you have a full understanding of the CADP's various rules and processes we believe you will make better decisions and be able to select the best options available to you – based on your specific and unique circumstances. If you ever have any questions or concerns about the CADP or any other anti-doping related matters please do not hesitate to contact the Sport Solution.

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