



Arbitration CAS 2007/A/1312 Jeffrey Adams v. Canadian Centre for Ethics in Sport (CCES), award of 16 May 2008

Panel: Mr Mark Baker (USA), President; Prof. Edward Ratushny (Canada); Mr Graeme Mew (Canada)

Athletics

Doping (cocaine)

Determination of the law applicable to a non-governmental entity

Absence of evidence of any violation of the applicable Human Rights Code

Anti-doping violation caused by the presence of a prohibited substance

Performance enhancement

Absence of evidence of any departure from the anti-doping rules

No fault or negligence

1. According to Canadian law and jurisprudence, only government entities or private entities statutorily empowered to enact coercive laws binding on the public should be subject to the Canadian Charter of Rights and Freedom and to the National Human Right Act. As a result, the Canadian Center for Ethics in Sport (CCES) which is an independent private organization even though it receives government funding is not subject to the Charter nor to the Canadian Human Right Act and therefore is unable to violate any athlete's constitutional rights guaranteed under such law.
2. The applicable Human Rights Code (Ontario) prohibits discrimination against individuals in the provision of services on the basis of disability. In order for a disabled individual to assert a *prima facie* case under the applicable Code, the individual bears the burden to at least show that, *prima facie*, some form of discrimination occurred. Generally, a disabled individual must show that he or she was denied accommodation that was at least reasonably known as a needed accommodation. If an organization is not reasonably aware of a potentially-equalizing accommodation that could be provided to a disabled person, it cannot be charged with providing that accommodation.
3. Because this is a strict liability violation, the mere uncontroverted presence of a prohibited substance in an athlete's sample is in and of itself a violation.
4. Performance enhancement is not a factor that may be considered under the applicable anti-doping rules or the WADA Code in determining whether an anti-doping rule violation has occurred or whether sanctions should be mitigated, if the substance is not a "Specified Substance" on the Prohibited List.
5. The applicable anti-doping rules are part of an evolving set of guidelines that slowly adjusts through feedback and experience. Where the rules, at least at the time of the violation, did not create an affirmative duty to warn athletes of the dangers of using an

unclean catheter or to provide a clean one, the lack of warning in this respect cannot constitute a departure from the rules. Absent any departure from the rules, the anti-doping authority does not have the burden of showing that such a departure did not cause the anti-doping rule violation.

6. Under the applicable anti-doping rules, the ineligibility period shall be eliminated if the athlete can show how the prohibited substance entered his body and that there was “No Fault or Negligence” in committing the violation. Only in truly exceptional circumstances will the circumstances of an anti-doping rule violation warrant elimination or reduction of a mandatory sanction because of No Fault or Negligence or No Significant Fault or Negligence. Thus, even in cases of inadvertent use of a prohibited substance, the principle of the athlete’s personal responsibility will usually result in a conclusion that there has been some fault or negligence. The degree of such fault or negligence, if not “significant,” may be sufficient to warrant a reduction of the applicable period of ineligibility, but will rarely result in elimination of the period of ineligibility altogether. However, if the entire circumstances and known facts viewed in light of the athlete’s uncontroverted testimony and high character are sufficient for the judging body to come to the conclusion that the adverse analytical finding was the result of the contamination of a catheter and that the athlete was not at fault because he could not reasonably have appreciated the risks of using a used catheter, the athlete’s ineligibility period must be eliminated because he was not at fault even if the athlete has committed the strict liability violation of presence of a prohibited substance.

Appellant, Mr. Jeffrey Adams (“Appellant”), is an elite-level, disabled, track-and-field athlete. He has won competitions at the Paralympic Games, the IAAF World Championships, and the IPC World Championships. He is a member of Athletics Canada, receives funding from the Canadian government through Sport Canada, and has thus contractually agreed to submit to doping control procedures.

Respondent, the Canadian Centre for Ethics in Sport (CCES), is a non-profit, independent organization that promotes ethical conduct in all aspects of sport in Canada. The CCES provides wide-ranging services, such as anti-doping compliance, to a variety of clients.

Athletics Canada is the National Sport Organization (NSO) governing track and field in Canada, organized to ensure world-level excellence in this area of sport. It is a member of the International Association of Athletics Federations (IAAF). Athletics Canada has a contractual relationship with both its member athletes and Sport Canada requiring those athletes to submit to doping control procedures in accordance with the Canadian Anti-Doping Program Rules (“CADP Rules”) as administered by the CCES. Athletics Canada is an affected party in this arbitration.

Sport Canada is a branch of the Canadian government’s Department of Canadian Heritage. It provides funding to NSOs such as Athletics Canada in order to promote Canada’s international excellence in

sport. Sport Canada funds the Athlete Assistance Program which enables NSOs to select certain top-flight athletes for financial assistance. As a condition to participating in this program, NSOs must ensure these athletes submit to doping control procedures. Sport Canada is an affected party in this arbitration.

The Appellant alleges that on May 21, 2006, while at the Vatikán bar in Toronto, an unknown woman sitting next to him put cocaine in his mouth with her fingers without his consent.

Six days later, the Appellant competed in an athletic event and was selected to give a urine sample at a doping control station operated by the CCES. The Appellant gave an “A” sample and a “B” sample for testing. The samples were collected under the CADP Rules.

Two weeks later, a laboratory accredited by the World Anti-Doping Agency (WADA)¹ notified the CCES that the Appellant’s “A” sample contained a cocaine metabolite. This caused an adverse analytical finding (AAF) because cocaine is listed on the 2006 WADA List of Prohibited Substances. The CADP Rules incorporate the WADA List.

The CCES then notified Athletics Canada of the AAF on June 16, 2006, and Athletics Canada notified the Appellant.

The CCES’s notice to Athletics Canada explained that an AAF was not equivalent to an anti-doping rule violation and that the CCES was conducting an “initial review”. The CCES conducts these reviews after every adverse finding to ensure that there were no departures from the CADP Rules. The notice also stated that the Appellant could submit a written explanation of how the cocaine entered his system, which could bear on sanctions if a violation was found.

On June 16, 2006, the Appellant spoke to the CCES’s contact person, Karine Henrie, by telephone and advised her of his explanation for the AAF. He mentioned the incident at the Vatikán bar.

The Appellant’s lawyer submitted a written response to the AAF on June 30, 2006. The response alleged that errors were made in the doping control procedure and that the Appellant had used a contaminated catheter to give the urine sample.

After its review, the CCES concluded that the Appellant had committed an anti-doping rule violation because a prohibited substance was found in his sample; the presence of a prohibited substance is governed by CADP Rules 7.16 to 7.20. The CCES notified the Appellant’s lawyer of its conclusion on July 6, 2006. Citing CADP Rules 7.20 and 7.37, the CCES proposed a sanction of two years ineligibility from competition and permanent ineligibility for financial support from the Canadian government.

The July 6, 2006, letter also advised the Appellant that only a doping tribunal could make a final determination as to whether an anti-doping rule violation had occurred. He was informed that, in

¹ WADA is an independent, international body that helps coordinate efforts to stop doping in sport. The WADA Code serves as a model anti-doping protocol for organizations worldwide.

accordance with CADP Rule 7.53, unless he waived the right to a hearing before a doping tribunal and accepted the violation, a hearing would be commenced within 30 days.

On July 7, 2006, counsel for the Appellant filed a formal notice requesting a hearing and that the Appellant's "B" sample be tested. This sample was tested and also contained the cocaine metabolite.

In accordance with Article 6.9(b) of the Canadian Sport Dispute Resolution Code ("Canadian Sport Code") promulgated by the Sport Dispute Resolution Centre of Canada (SDRCC), a doping tribunal ("Doping Tribunal") was established to hear the Appellant's challenge to the CCES's assertion of a doping violation.

Richard H. McLaren ("Arbitrator") was appointed by the agreement of the parties. An initial hearing was held on August 17 and 18 of 2006, in Toronto, Ontario.

On August 22, 2006, the office of the Attorney General of Ontario responded to a *Notice of Constitutional Question* submitted by the Appellant alleging that his constitutional rights had been violated. The response stated that the Attorney General of Ontario did not intend to intervene in the proceedings.

On August 24, 2006, the office of the Attorney General of Canada also responded to the *Notice of Constitutional Question*. The response stated that the Attorney General of Canada intended to address the constitutional issues at the hearing.

On June 11, 2007, the Doping Tribunal issued its award and found that the Appellant violated CADP Rule 7.16 as a result of the presence of a Prohibited Substance in his sample. In accordance with CADP Rule 7.12, the Doping Tribunal prescribed a period of ineligibility of two years commencing on August 18, 2006, and ending on August 17, 2008. The Doping Tribunal also disqualified the Appellant's competition result achieved at the May 28, 2006, competition, pursuant to CADP Rule 7.4. Lastly, the Doping Tribunal cited CADP Rule 7.37 in permanently disqualifying the Appellant from receiving financial support through the government of Canada.

The Appellant appealed the Doping Tribunal's decision to the Court of Arbitration for Sport ("CAS Tribunal") on June 27, 2007, pursuant to CADP Rule 8.22.

The Appellant filed his Statement of Appeal on June 27, 2007. He also included an application to stay the award appealed against, along with an application for interim relief, but these were later withdrawn.

The Appellant filed his Appeal Brief on July 12, 2007, pursuant to an agreed schedule adopted between the parties.

The CCES filed its answer (referred to by the CCES as its appeal factum) on November 29, 2007.

An oral hearing was held on February 26, 27, and 28 of 2008 in Toronto.

The Appellant, Harpreet Karir (“Karir”), and Clint McLean (“McLean”) all gave testimony to the events that transpired at the Vatikan bar on May 21, 2006. Karir is a Case Manager Coordinator at the Attorney General of Ontario and McLean is a photographer.

The Appellant testified that on May 21, 2006, he visited the Vatikan bar in Toronto with his friend Karir. The Appellant stated that after an hour or so, he became tired and wanted to leave. Karir wanted to stay longer, so the Appellant began to play a game with her by pretending he was asleep.

According to the Appellant, at around 11:30 P.M., an unknown woman stuck her fingers in his mouth while he was pretending to be asleep. He testified that he lurched forward and felt a numbness in his mouth and throat.

Karir testified that at this point, although she had not seen the woman insert her fingers into the Appellant’s mouth, she witnessed the woman removing her fingers from his mouth and the aftermath. Karir testified that she was shocked by the woman’s actions and yelled at her, and that she believed the woman was on drugs.

Karir testified that she noticed that the woman was carrying a small bag of white powder and that the woman confirmed it was cocaine. The unknown woman then left. Karir also noted that the Vatikan bar is located across the street from a drug rehabilitation center.

McLean testified he was seated across the room and noticed the commotion. He further testified that he came to the Appellant’s assistance and then took him home that night. Karir added that she was very upset about the incident and walked home. No police reports were filed.

The Appellant testified that he returned home from the Vatikan bar around midnight and that within approximately thirty minutes of arriving, he needed to urinate. Because the Appellant suffers from *multiple cavernous angiomas*, the cause of his paraplegia, he must self-catheterize to urinate. The Appellant stated he used a clean, wrapped catheter to pass his urine and then stored this catheter (the “Vatikan Catheter”) in the emergency pocket of his wheelchair.

On May 23, 2006, the Appellant testified that he drove to Ottawa from Toronto to participate in the May 28, 2006, ING Ottawa Marathon Wheelchair Competition (the “Competition”). He brought his wheelchair, which he asserted still had the Vatikan Catheter in the emergency pocket. He also testified that he brought several other catheters to the Competition.

Before driving to the Competition, the Appellant testified that he had done extensive online research and had talked to the head of a U.S. drug testing laboratory to determine whether the cocaine inserted into his mouth at the Vatikan bar could result in a positive drug test. He testified that he was convinced that the cocaine would have been out of his system by the day of the Competition.

The Appellant placed first in the Competition.

Following his participation in the Competition, the Appellant was selected to provide a urine sample (the “Sample”) at a doping control station operated by the CCES as part of the doping control

program, pursuant to the CADP Rules. Doping control stations are managed by a doping control officer (DCO), who ensures that a chaperone assists the athlete during sample collection.

The Appellant testified that he was confident he would medal at the Competition and thus knew he would likely be tested. He also noted that this competition was not particularly significant to his career, although important to him personally.

Before the Sample was collected, the Appellant was able to return to his hotel room to shower. He was accompanied by the chaperone at all times. He had several catheters in his room.

Upon arriving at the Doping Control Station, the Appellant testified that, to his surprise, he had only brought the Vatican Catheter. The Appellant said that the chaperone watched him use the Vatican Catheter to provide the Sample.

At no time did the Appellant, the DCO, or the chaperone discuss the use of the used, unwrapped catheter. A sterile, wrapped catheter was never requested or offered. The DCO and the Appellant jointly completed the doping control form (DCF). No comments were recorded in the athlete remarks section of the DCF. The DCO did not describe the use of the catheter by the Appellant or any modifications made to the doping control process as a result of the Appellant's disability or use of the catheter.

The DCO filed a supplementary report form dated July 6, 2006:

I did not ask Mr. Alpin [the Chaperone] if there were any modifications necessary for Mr. Adams' passing of the sample (catheter, etc.) and the chaperone did not advise me of same. Mr. Adams and I then went forward with the doping control procedure.

Anne Brown, General Manager of the CCES, testified that the CADP Rules do not require the CCES to provide disabled athletes with a sterile catheter. She asserted that sample collection equipment, which must be provided by the CCES, does not include catheters, but only equipment used to directly collect or hold an athlete's sample.

Brown also testified that the CCES was not obligated to provide catheters in tamper-proof packaging, despite the recommendations of the WADA Guidelines for Urine Sample Collection, as those guidelines are not incorporated into the CADP Rules. Brown also testified that when athletes bring their own catheters, the CCES never inspects them prior to their use nor are the athletes ever advised to use a clean catheter.

The parties do not dispute that the Sample was transported, handled, and tested in compliance with the proper doping control procedures. The only dispute as to the doping control procedure is whether the catheter used contaminated the Sample and which party is responsible for that contamination.

The Appellant asserted that the CCES has never inquired about his need to use a catheter as a result of his disability. He testified that the CCES was aware of his need to self-catheterize.

He also testified that he had not been informed by the CCES or any DCO about the risks of using a contaminated catheter during the doping control procedure. He had always used his own catheter, and he states that the CCES has never inspected his catheter prior to his use of it.

The Appellant testified that he uses “single use only” catheters, yet he uses them multiple times because it is more cost effective and practical. Other athletes, including Athlete “A” and Christian Bagg, testified that it is common practice to reuse catheters. They also testified to the personal and individualized nature of catheters.

The Appellant and the other athletes also testified that they do not clean their catheters after each use.

Nathalie Lapierre, a registered nurse and expert witness for the CCES, admitted that it might be acceptable to reuse a single use catheter. However, she also testified that the prudent practice would be to clean the catheter after every use.

The experts testified as to the likelihood of the Vatikan Catheter having caused the AAF.

Dr. Ayotte is a professor as well as the director of the WADA-accredited laboratory in Montréal (the “Lab”). She holds a Ph.D. in Organic Chemistry from the Université de Montréal. She also has extensive experience and knowledge on the subjects of excretion, metabolism, and detection periods of drugs. She testified for the CCES.

Dr. Kadar is a professor emeritus at the Faculty of Medicine at the University of Toronto. He holds a Ph.D. in pharmacology from the University of Toronto and is a specialist in toxicology. He testified for the Appellant.

Dr. Sellers is a professor of pharmacology, medicine, and psychiatry at the Faculty of Medicine at the University of Toronto. He holds a Ph.D. in pharmacology from Harvard Medical School. He is a licensed medical doctor and a Fellow of the Royal College of Physicians and Surgeons of Canada. He has also published extensively. He testified for the Appellant.

The experts agreed that the Appellant’s Sample (both “A” and “B”) each contained approximately 3 ng/ml of the cocaine metabolite Benzoylcegonine (“BE”) and that the laboratory collection and testing procedures were accurate and reliable.

The experts disagreed about whether the Vatikan Catheter could have likely been the cause of the 3 ng/ml BE found in the Appellant’s urine.

The expert witness conference and the examinations of the experts established the following propositions:

- The use of a catheter contaminated with urine containing BE from a prior use could cause an AAF.
- After oral cocaine ingestion, about 8% is excreted as metabolites in the urine in the first hour; about 40% of this excretion is the metabolite BE.

- The type of catheter used by the Athlete when full would contain 2.3 to 2.5 ml of urine.
- After use and drainage, the type of catheter used by the Athlete could retain some urine. However, the amount of residual BE-contaminated urine that was in the Vatican Catheter cannot definitively be established.
- Degradation of the contaminated urine occurred during the week the Vatican Catheter was coiled up and stored, but the extent of that degradation is unknown.
- A significant variable with respect to the likelihood that the Vatican Catheter caused the AAF is the amount of cocaine allegedly ingested by the Athlete at the Vatican bar. This amount is unknown.

The Appellant submitted that the CCES violated his constitutional rights, and thus evidence was taken on this issue of whether the CCES is subject to the *Canadian Charter of Rights and Freedoms* (the “*Charter*”)² and federal and Ontario human rights legislation.

This testimony addressed whether the CCES could be considered a government entity or quasi-government actor. The *Charter* generally applies to the Parliament and the government of Canada and to the legislature and government of each province. The *Canadian Human Rights Act*³ applies to the federal government or its agencies. Thus, whether the CCES is considered a government entity or quasi-government entity is relevant to whether the *Charter* or the *Canadian Human Rights Act* applies to the CCES.

Mr. MacAdam, the Director of Sport Canada, and Mr. De Pencier, the Director of the CCES, both testified to the relationship between Sport Canada/the Canadian Government and the CCES. Both witnesses discussed funding at great length, including the details of how the government uses funding to achieve its sport policy objectives through organizations such as the CCES.

Both witnesses asserted, however, that the government’s reach in shaping policy ends at funding. They asserted that the management of the Canadian Anti-Doping Program and the promulgation and enforcement of its procedures are strictly handled at the NSO/private organization level.

The testimony of these witnesses was that the CCES was created to operate independently of the government of Canada per the recommendations in the *Dubin Report*⁴. They testified that the CCES is an independent organization established under the *Canada Corporations Act* and is managed independently of Sport Canada.

Athlete “A” and Christian Bagg both testified to the Athlete’s strong character and integrity.

² Part I of *The Constitution Act, 1982*, being Schedule B to the *Canada Act 1982* (U.K.), 1982, c. 11.

³ R.S.C. 1985, c. H-6.

⁴ See Charles L. Dubin, *Commission of Inquiry Into the Use of Drugs and Banned Practices Intended to Increase Athletic Performance* (Supply and Services Canada, 1990).

LAW

A. *Charter and Human Rights Issues*

- a) The *Charter* is Inapplicable to this dispute
 1. The Appellant submits that the *Charter* applies to this dispute and that the proper interpretation of the CADP Rules requires that they be read in light of the *Charter*. We agree with the Doping Tribunal in that the *Charter* does not apply to this dispute.
 2. With respect to the entities to which the *Charter* applies, section 32 of the *Charter* states:
This Charter applies:
 - (a) to the Parliament and government of Canada in respect of all matters within the authority of Parliament including all matters relating to the Yukon Territory and Northwest Territories; and
 - (b) to the legislature and government of each province in respect of all matters within the authority of the legislature of each province.
 3. We thus find that the *Charter* applies strictly to government actors, not private actors. In stressing the limited scope of section 32, the Supreme Court of Canada in *McKinney v. Board of Governors of the University of Guelph* states that the *Charter* applies only to the government:
[The] Charter is confined to government action. This court has repeatedly drawn attention to the fact that the Charter is essentially an instrument for checking the powers of government over the individual. ...
The exclusion of private activity from the Charter was not a result of happenstance. It was a deliberate choice which must be respected.
McKinney v. Board of Governors of the University of Guelph, [1990] 3 S.C.R. 229 at 261-62.
 4. However, we recognize, as does the law, that since the government cannot breach the *Charter*, it cannot indirectly authorize a breach of the *Charter* by private actors. Thus, the *Charter* applies to both the government and private actors empowered or controlled by it.
 5. As a result, private entities exercising powers greater than a natural person based on statutory authority are bound by the *Charter*. See, e.g., *Kwantlen Faculty Association v. Douglas College* [1990] 3 S.C.R. 570; *Lavigne v. Ontario Public Service Employees Union* [1991] 2 S.C.R. 211. Additionally, private entities controlled by the government, essentially forming part of the apparatus of the government, are also subject to the *Charter*.
 6. But a private actor created by statute does not necessarily wield statutory powers. For example, in *McKinney*, the Supreme Court held that the mandatory retirement policies of private universities were not subject to the *Charter*. Although the universities were created by statute, they were not granted statutory powers. They had the power only to negotiate contracts with their employees, as any other private entity or natural person could. See also *Stoffman v. Vancouver General Hospital*, [1990] 3 S.C.R. 483 (holding that the mandatory retirement policy of a hospital

was not subject to *Charter* review as the hospital did not have powers greater than a natural person); *Harrison v. University of British Columbia*, [1990] 3 S.C.R. 451 (holding that the mandatory retirement policy of a university was not subject to *Charter* review).

7. The court in *McKinney* went on to explain that an example of reviewable statutory authority would be the type of authority vested in municipalities. Although not classified as part of the government, municipalities perform a quintessential government function. *See Re McCutcheon and City of Toronto*, (1983) 147 D.L.R. (3d) 193 (Ont. H.C.) at 203. They are statutorily empowered to enact coercive laws binding on the public. It follows that their actions should be subject to the *Charter*, as they have powers far greater than those of a private entity.
8. Thus, the court in *McKinney* reasoned that the universities, unlike municipalities, had limited powers and were not deemed subject to *Charter* scrutiny.
9. In deciding if a private actor is essentially an organ or apparatus of government, *McKinney* established that if the private actor is legally autonomous, has its own governing body, and controls its daily operations unilaterally, it is generally not considered part of government. The court concluded that the universities, with their own governing bodies, were not government entities. Furthermore, the court added that even though these universities performed an important public policy objective and received government funding to further that objective, the universities' independence remained unchanged. The court even acknowledged that the government had a significant influence on the universities and yet reasoned that they were still independent within the meaning of the *Charter*:

It is evident from what has been recounted that the universities' fate is largely in the hands of government and that the universities are subjected to important limitations on what they can do, either by regulation or because of their dependence on government funds. It by no means follows, however, that the universities are organs of government. There are many other entities that receive government funding to accomplish policy objectives governments seek to promote. The fact is that each of the universities has its own governing body.

McKinney, [1990] 3 S.C.R. at 272.

10. Like the universities in *McKinney*, the CCES, although created by statute, has not been vested with any statutory authority. It has the power only to enforce the contractual provisions that other parties, such as athletes, have voluntarily agreed to honor. Voluntary contractual relationships allow the CCES to impose a regulatory framework on athletes by way of the CADP Rules. The CCES exercises its power solely with respect to this framework, and thus no Canadian law is being applied to the Appellant by the CCES. This limited power resembles quite closely the non-reviewable power of the universities in *McKinney* to enforce retirement policies. Further, it is generally established that the rules of an organization that are binding on its members by virtue of private agreements are not subject to *Charter* scrutiny. *See Tomen v. Federation of Women Teachers' Associations of Ontario*, (1989) 70 O.R. (2d) 48 (C.A.) (holding that the bylaws of a private female teachers' organization were not subject to scrutiny under the *Charter*).
11. For all that, we recognize that the courts have occasionally deviated from the rule that statutory authority must be present before a private actor will be deemed subject to the *Charter*. In *Eldridge*

v. British Columbia (Attorney General), the *Charter* was found to apply to a private entity despite its lacking statutory authority. *Eldridge v. British Columbia (Attorney General)*, [1997] 3 S.C.R. 624. However, the key message from *Eldridge* is that when the government statutorily obligates itself to provide certain services, such as provincial healthcare, it cannot contract this obligation out to private entities without simultaneously subjecting those entities to the *Charter*. This exception does not apply.

12. Besides wielding no statutory power, the CCES, as Messrs. MacAdam and De Pencier testified, is not a government organization or an organ of the government. The government cannot dictate the daily operations of the CCES. The CCES is an independent private organization with its own board of directors. Even though the CCES receives government funding to further the government's broad policy objective of encouraging clean sport, the CCES is still entirely independent. Thus, like the universities in *McKinney*, the CCES is not an organ of the Canadian government.
13. For all the foregoing reasons, we find that the Charter does not apply to the CADP Rules or to their implementation by the CCES. The CCES is not exercising statutory authority nor is it an organ of government.
14. In the alternative, even if the *Charter* could apply, we find that it is appropriate to exercise judicial restraint in applying the *Charter* to any aspect of this dispute. It is clear, by the Appellant's own admission before the Doping Tribunal, that the *Human Rights Code* (Ontario) also applies to this case. The *Human Rights Code* (Ontario) provides coextensive protections with respect to the Appellant's claims, and thus, an analysis of the *Charter* should be avoided. Professor Hogg notes that when a case can be decided on non-constitutional grounds as well as constitutional grounds, a constitutional analysis should be avoided:

*A case that is properly before a court may be capable of decision on a non-constitutional ground or a constitutional ground or both. The course of **judicial restraint** is to decide the case on non-constitutional grounds. That way, the dispute between the litigants is resolved, but the impact of a constitutional decision on the powers of the legislative or executive branches of government is avoided.*

HOGG P. W., *Constitutional Law of Canada*, vol. 2, 4th ed. (Carswell, 1997) at p. 56-18.2.

15. Because we have determined the *Charter* does not apply, we find no need to consider the question of whether the CAS Tribunal has the jurisdiction to administer a *Charter* remedy or whether it is a "court of competent jurisdiction".
- b) The *Canadian Human Rights Act* is inapplicable to this dispute
16. The Appellant submits that the *Canadian Human Rights Act* is applicable to this dispute and that the CADP Rules must be read in light of the *Canadian Human Rights Act*. We agree with the Doping Tribunal in that the *Canadian Human Rights Act* is inapplicable to this dispute.
 17. The *Canadian Human Rights Act* applies to the federal government and its agencies. It does not apply to private corporations unless they are federally regulated. For example, in *Canadian*

Human Rights Commission v. Haynes, the Federal Court of Appeal stated that while the actions of the Post Office (an agency of the government) and the Bank of Canada (a federally-regulated business) fall within the ambit of the *Canadian Human Rights Act*, the acts of other private organizations generally do not. *Canadian Human Rights Commission v. Haynes* (1983), 144 D.L.R. (3d) 734 (Fed. C.A.) at 736-37 (cited with approval in *Bell Canada v. Quebec (CSST)*, [1988] 1 S.C.R. 749 at 761-62). Even if these organizations, such as private corporations, regularly conduct close business with government entities or federally-regulated businesses, their actions are not subject to the *Canadian Human Rights Act*.

18. The activities of the CCES are thus not regulated by the *Canadian Human Rights Act*, because the CCES is not a government entity nor are its activities regulated by the government of Canada. Moreover, the fact that the CCES regularly enters into contracts with NSOs to receive funding from the government does not make it subject to the *Canadian Human Rights Act*. The CCES, just like other corporations that conduct business with the government, does not become subject to the *Canadian Human Rights Act* by virtue of these contracted business dealings.
 19. In addition, the impugned testing which gave rise to the adverse analytical finding was conducted in Ontario and the applicable law of this dispute is the law of the Province of Ontario because this case arises from an SDRCC arbitration⁵. Therefore, an analysis of the discrimination allegations leveled by the Appellant can and should be made pursuant to the *Human Rights Code* (Ontario).
- c) The *Human Rights Code* (Ontario) is applicable to this Dispute, but has not been violated
20. Because the law of Ontario governs this dispute, the *Human Rights Code* (Ontario) applies. Section 1 of the *Human Rights Code* (Ontario) prohibits discrimination against individuals in the provision of services on the basis of disability:
Every person has a right to equal treatment with respect to services, goods and facilities, without discrimination because of race, ancestry, place of origin, colour, ethnic origin, citizenship, creed, sex, sexual orientation, age, marital status, family status or disability.
 21. The Appellant contends that this section has been violated as a result of the CCES failing to either provide him with a sterile catheter at the Doping Control Station or to warn him of the dangers of using an unclean one. He maintains that because he is disabled and must use a catheter, the CCES must ensure that his catheter is sterile. Since able-bodied athletes do not share the risk of catheter contamination, the Appellant submits that the CCES treats disabled athletes and able-bodied athletes unequally by imposing that risk solely on disabled athletes.
 22. We do not find that the *Human Rights Code* (Ontario) placed an affirmative burden on the CCES to provide sterile catheters or to warn athletes about the risks of using contaminated catheters. Based on Ms. Brown's testimony at the CAS Tribunal hearing, we find that, at the time, the CCES did not appreciate or fully understand the contamination risks associated with

⁵ SDRCC disputes are governed by the law of Ontario. See SDRCC, Article 6.25.

using unclean catheters. Further, we do not find that the CCES was charged with this knowledge as the CCES has done all it reasonably can to educate itself and the athletes on successfully navigating the doping control process. The CCES provides information on its website and through other media to warn athletes of the risks associated with using illegal drugs, supplements, and certain medications. Had the CCES known of the risks of using unclean catheters, we find that it would have similarly warned the athletes. In our view, the CCES has fairly implemented an exhaustive and comprehensive program designed to protect disabled athletes.

23. Despite the fact that there are only about 20-30 athletes who self-catheterize, the CCES has taken significant measures to educate itself on their needs and to ensure that they are well accommodated. Indeed, had the Appellant requested a sterile catheter, the CCES would have provided one for him.
24. In order for a disabled individual to assert a prima facie case under the Human Rights Code (Ontario), the individual bears the burden to at least show that, prima facie, some form of discrimination occurred. *Ont. Human Rights Comm. v. Simpsons-Sears*, [1985] 2 S.C.R. 536 at para. 28. We find that, generally, a disabled individual must show that he or she was denied accommodation that was at least reasonably known as a needed accommodation in order to assert a prima facie case of discrimination. If an organization is not reasonably aware of a potentially-equalizing accommodation that could be provided to a disabled person, it is not charged with providing that accommodation.
25. We find, therefore, that there was no requirement under the Human Rights Code (Ontario) that the CCES offer the Appellant a sterile catheter or warn him of the risks of not using one.

B. The Anti-Doping Rule violation

26. The CADP Rules govern the determination of an anti-doping rule violation. These rules directly incorporate several of the WADA Code provisions.
27. Because we have determined that the Charter and Canadian Human Rights Act do not apply to this dispute and further that the Human Rights Code (Ontario) has not been violated, they will not bear on our analysis of the CADP Rules and the anti-doping rule violation.
 - a) The CCES established a violation under the CADP rules
28. CADP Rule 7.56 states that facts established by reliable means may be used in determining if a violation occurred. It is an undisputed fact that the Appellant's Sample contained BE and that the lab results were accurate. The Prohibited List includes cocaine and its metabolite BE. According to CADP Rules 7.16 and 7.18, the mere presence of a Prohibited Substance in an athlete's sample, in any amount, is evidence of an anti-doping rule violation. We find that, under the rules, the manner in which the BE entered the Sample, either by way of contamination or

recent drug use, is irrelevant. During the CAS Tribunal hearing, it was submitted that if the Appellant successfully established that the BE came from the Viatkan Catheter as opposed to his body, no violation would have occurred. We disagree. Because this is a strict liability violation, we find that the mere presence of BE in the Appellant's Sample is in and of itself a violation. The manner in which the BE entered the sample is irrelevant (unless caused by a rule departure, discussed infra).

29. The CCES, under CADP Rule 7.17, need not show intent, fault, negligence, or knowing use on the part of the Appellant to show a violation because of the presence of a Prohibited Substance in the Appellant's Sample. Rule 7.17 imposes the standard of strict liability, which is well established in anti-doping cases despite the fact that the results may be unfair in certain situations. Absolute fairness in all individual cases is not the goal of an anti-doping program nor is it possible as a practical matter. The goal is overall fairness to all the competitors involved:

It is true that a strict liability test is likely in some sense to be unfair in an individual case, such as that of Q, where the Athlete may have taken medication as the result of mislabeling or faulty advice for which he or she is not responsible – particularly in the circumstances of sudden illness in a foreign country. But it is also in some sense 'unfair' for an Athlete to get food poisoning on the eve of an important competition. Yet in neither case will the rules of the competition be altered to undo the unfairness. Just as the competition will not be postponed to await the Athlete's recovery, so the prohibition of banned substances will not be lifted in recognition of its accidental absorption. The vicissitudes of competition, like those of life generally, may create many types of unfairness, whether by accident or negligence of unaccountable Persons, which the law cannot repair.

Furthermore, it appears to be a laudable policy objective not to repair an accidental unfairness to an individual by creating an intentional unfairness to the whole body of other competitors. This is what would happen if banned performance-enhancing substances were tolerated when absorbed inadvertently. Moreover, it is likely that even intentional abuse would in many cases escape sanction for lack of proof of guilty intent. And it is certain that a requirement of intent would invite costly litigation that may well cripple federations – particularly those run on modest budgets – in their fight against doping.

CAS 94/129, 193 (Ct. Arb. Sport 1994).

30. We thus agree with the conclusions of the Doping Tribunal that the CCES has established an anti-doping rule violation. Under CADP Rule 7.55, the CCES has the initial burden of proving that the Appellant committed an anti-doping rule violation. This burden is greater than a balance of the probabilities but less onerous than proof beyond a reasonable doubt. The CCES has met this burden by showing the uncontroverted presence of BE in the Appellant's sample.

b) Alleged CADP Departures

31. One of the Appellant's chief contentions is that there were departures from the CADP Rules⁶. Those departures, he submits, caused the AAF and the resulting anti-doping rule

⁶ The Appellant alleges departures from the following CADP rules: 1.1, 6.42(e), 6.51, 6.53, 6.55, 6.59, 6.61(a), 6.62, 6.63, 6.69, 6.72(m), 6A.4, 6B.1, 6B.2, 6B.3, 6B.4, 6B.5, 6B.6, 6B.10, 6B.11, 6C.2, 6C.3, 6C.4, 6C.5, 6C.7 and 6F.6. He also alleges a departure from the WADA Guidelines for Urine Sample Collection, Rule 6.7.1 (not incorporated into the CADP Rules) and the WADA Prohibited List – Prohibited Methods, Rule M2. .

violation. Under CADP Rules 7.56 and 7.57, if the Appellant can show that a departure from the CADP Rules occurred, the CCES must show that this departure did not cause the anti-doping rule violation.

32. Specifically, the Appellant alleges that the Vatikan Catheter was used during testing as a direct result of departures from the CADP Rules. He alleges that, under the rules, the CCES had a duty to warn the Appellant of the dangers of using an unclean catheter or to provide him with a sterile one. He further alleges that the presence of BE in the Vatikan Catheter was the actual cause of the AAF and that there was no BE present in his system when he was tested. Thus, under CADP Rules 7.56 and 7.57, because departures allegedly occurred, the Appellant submits that the CCES had the burden of showing that those departures were not the cause of the anti-doping rule violation. The Appellant urges that had the CCES followed the CADP Rules appropriately and ensured he used a sterile catheter, the AAF would not have occurred.
33. This argument, at the outset, requires us to accept that the presence of BE in the Appellant's Sample was in fact the result of contamination. The learned Arbitrator of the Doping Tribunal came to the conclusion that the Appellant's testimony regarding the Vatikan bar incident, on balance, was not entirely credible; we, with the greatest respect, do not share this conclusion on the evidence available. We find that the Appellant's version of the facts was never contradicted and was fully corroborated by two reputable witnesses. We further find that the lack of physical evidence surrounding the incident and the fact that police reports were never filed do not, in our view, weigh greatly against the veracity of the Appellant's unshaken testimony. Thus, we accept his testimony of the events at the Vatikan bar. Additionally, we find, as did the Doping Tribunal, that the scientific evidence is inconclusive as to whether urine remaining in the Vatikan Catheter could have caused the AAF. When the entire circumstances and known facts are viewed in light of the Appellant's uncontroverted testimony and high character, we find that the AAF was the result of the contamination of the Vatikan Catheter.
34. However, we agree with the Doping Tribunal in that the CADP Rules Appellant complains were departed from were not violated. As Ms. Brown testified, these rules are part of an evolving set of guidelines that slowly adjusts through feedback and experience. The rules, at least at the time of the violation, did not create an affirmative duty to warn athletes of the dangers of using an unclean catheter or to provide a clean one. At that time, neither the CCES nor the athletes really understood the risks of using an unclean catheter. We find that the rules did not clearly express such an obligation, particularly in light of the CCES's knowledge and experience surrounding self-catheterization at that time. Thus, we will not read such an obligation into the rules.
35. Moreover, it is not disputed that BE was found in the Appellant's sample and that the Lab tests were accurate and conducted properly. Those undisputed facts conclusively establish the strict liability violation of presence in sample under CADP Rules 7.16 and 7.18. Because the Appellant has been unable to show a departure from the CADP Rules, the CCES does not have the burden of showing that such a departure did not cause the anti-doping rule violation. Had the lab departed from a rule that caused, for example, an incorrect lab result, meaning that no

Prohibited Substance was actually found in the Appellant's Sample, then there would have been no anti-doping rule violation.

c) Out-of-Competition Use of Cocaine Irrelevant

36. The Appellant alleges that his use of cocaine was Out-of-Competition and that because cocaine is on the prohibited list for In-Competition use, there was no anti-doping violation or that sanctions should be mitigated.

37. In support of his argument Appellant references the editorial comments to Article 2.2.1 of the WADA Code:

An Athlete's Out-of-Competition Use of a Prohibited Substance that is not prohibited Out-of-Competition would not constitute an anti-doping rule violation.

38. We agree with the Doping Tribunal in that the Appellant has misread the WADA Code and the CADP. A violation resulting from the *presence* of a substance found on the Prohibited List during an In-Competition test operates independently of a violation resulting from the *use* of a Prohibited Substance Out-of-Competition. Both violations may arise independently. For example, an athlete caught smoking marijuana at a party by a CCES employee would not be found to have committed an anti-doping rule violation because the *use* of marijuana is not prohibited Out-of-Competition. However, if that same athlete participated in a competition the next month and was tested In-Competition, his Out-of-Competition use would no longer be relevant. If the presence of marijuana was detected in his urine, he would be found in violation of CADP Rule 7.16 for the presence of a Prohibited Substance notwithstanding the time of ingestion or use.

d) Performance Enhancement Irrelevant

39. The Appellant further argues that because cocaine could not have enhanced his performance, either an anti-doping violation should not be found or sanctions should be mitigated.

40. We agree with the Doping Tribunal in that performance enhancement is simply not a factor that may be considered under the CADP Rules or the WADA Code in determining whether an anti-doping rule violation has occurred or whether sanctions should be mitigated (unless the substance is a "Specified Substance" on the Prohibited List).

C. *Reduction of Sanctions*

a) The Ineligibility Period

41. Under CADP Rule 7.20, the Appellant was made ineligible to compete for two years as a result of the anti-doping rule violation. The Appellant urges that CADP Rule 7.38 or, alternatively,

CADP Rule 7.39 is applicable and that his Ineligibility period should thus be eliminated or reduced.

42. Under CADP Rule 7.38, the Ineligibility period shall be eliminated if the Appellant can show how the Prohibited Substance entered his body and that there was “No Fault or Negligence” in committing the violation. This means that the athlete did not know or suspect that he or she had used or been administered a Prohibited Substance. Under CADP Rule 7.39, the Ineligibility period may be reduced by up to half if the Appellant can show how the Prohibited Substance entered his body and that there was “No Significant Fault or Negligence” in committing the violation. This rule applies if athlete’s fault was not significant in relation to the anti-doping rule violation. The commentary⁷ relating to the corresponding provisions of the WADA Code illustrates that only in truly exceptional circumstances will the circumstances of an anti-doping rule violation warrant elimination or reduction of a mandatory sanction because of No Fault or Negligence or No Significant Fault or Negligence. Thus, even in cases of inadvertent use of a Prohibited Substance, the principle of the Athlete’s personal responsibility will usually result in a conclusion that there has been some fault or negligence. The degree of such fault or negligence, if not “significant,” may be sufficient to warrant a reduction of the applicable period of Ineligibility, but will rarely result in elimination of the period of Ineligibility altogether.
43. In CAS 2005/A/990, a case involving a positive test by an ice-hockey player for norandrosterone, it was found that the Prohibited Substance had entered his system during emergency hospital treatment following an on-ice incident in which the Player had been injured. Unknown to him, while in hospital, he was treated for a heart condition with a steroid called Retabolil which was the cause of the positive result. The Panel found that in the unique circumstances of that case the Player had not even known until long after his positive test that he had been treated for a heart condition. From his perspective, he had been taken to hospital after he was body checked in a hockey game and had hit the boards very hard. He had left hospital 24 hours after the incident and had been able to resume training soon thereafter. In the circumstances, he had no reason to suspect that he was being treated with a substance which - contrary to practice in Western Europe - was being applied for a heart condition. The Tribunal accordingly found that he was without fault or negligence.
44. The circumstances of this case are, in our view, also truly exceptional.

⁷ To illustrate the operation of Article 10.5, 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. Conversely, 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 (Article 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 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.)

45. While the Appellant knew he had been administered cocaine, we have determined that this was not actually the cause of the AAF and the resulting anti-doping rule violation. The cause of the AAF was the contamination of the Vatikan Catheter, so there was no BE in the Appellant's body at all when he was tested. Thus, to meet the requirements of Rule 7.38, we find that the Appellant need only explain that there was no BE in his body and that he was not at fault with respect to the contamination.
 46. We find that the Appellant has sufficiently explained in his testimony that there was no cocaine or BE in his body at the time of testing and that the AAF was the result of contamination by the Vatikan Catheter. The Appellant was the victim of an assault in the Vatikan bar which led to his ingestion of cocaine. He cannot be held to have been negligent or otherwise at fault in not preventing that incident from occurring.
 47. We also find that the Appellant was not at fault because he could not reasonably have appreciated the risks of using a used catheter. The Appellant and other athletes testified that they never knew about or considered the risks of catheter contamination. Moreover, if the CCES was unable to appreciate these risks, we cannot expect the Appellant to have known about them either.
 48. While we still find the Appellant to have committed the strict liability violation of presence of a Prohibited Substance, in the unique circumstances of this case, we must eliminate the Appellant's Ineligibility period under CADP Rule 7.38 because he was not at fault.
- b) Disqualification of Results
49. CADP Rules 7.5 and 7.6 provide for the disqualification of results achieved at events and competitions. Accordingly, the Appellant's competition result, medals, points, and prizes received at the ING Ottawa Marathon held at Ottawa, Ontario on May 28, 2006, are forfeited.
- c) Funding
50. As the Doping Tribunal noted, CADP Rule 7.37 provides that an athlete who commits and is sanctioned for an anti-doping rule violation pursuant to Rules 7.16-7.25 and 7.28-7.36, shall be permanently ineligible to receive any direct financial support provided by the Government of Canada. Having determined that no term of suspension should be imposed on the Athlete despite the AAF, does the disqualification from the Athlete's competition result nevertheless constitute a "sanction," with the resultant loss of federal funding? We think not. The disqualification of results is provided for by CADP Rules 7.5 and 7.6. These clauses are not mentioned in CADP Rule 7.37. If it had been intended that anyone found to have committed an anti-doping rule violation should be, as a result, rendered ineligible for further government funding, the applicable rules could have been promulgated to that effect, but were not.

The Court of Arbitration for Sport rules:

1. The Appeal filed by Mr. Jeffrey Adams at the Court of Arbitration for Sport (CAS) against the Canadian Centre for Ethics in Sport on 27 June 2007 is partially upheld.
2. In accordance with the Doping Tribunal's findings, an anti-doping rule violation is found to have occurred under CADP Rule 7.16.
3. Mr. Adams' Ineligibility period of two years shall be eliminated.
4. In accordance with the Doping Tribunal's findings, Mr. Adams' competition result, medals, points, and prizes received at the ING Ottawa Marathon held at Ottawa, Ontario on May 28, 2006, are forfeited under CADP Rule 7.4.
5. Mr. Adams is eligible to receive direct financial support from the Government of Canada.
6. (...).