

DOPING IN SPORT

Introduction

1. During the Sydney Olympic Games in 2000, a Panel of the Court of Arbitration & Sport ("CAS") issued a decision in the case of the young Roumanian gymnast, Ms Raducan. That decision included the following:

"The Panel is aware of the impact its decision will have on a fine, young, elite athlete. It finds, in balancing the interests of Ms Raducan with the commitment of the Olympic Movement to drugs-free sport, the Anti-Doping Code must be enforced without compromise."

2. The day after winning a gold medal, Ms Raducan suffered a headache, a running nose and a feeling of congestion. She was given a Nurofen cold and flu tablet by the Roumanian team doctor. She was given a further tablet the following day before she competed in another event in which she finished first. After the second event, she was dope tested and returned a positive finding for Pseudoephedrine. Later at the Games, she competed again and won a silver medal and was again tested. This time there was no positive finding. Nevertheless, she was disqualified from the event which she won and then tested positive. The decision underlines the strict liability principle which underlines anti-doping policies.

Rationale for Anti-Doping Policies

3. Some commentators question the need for an anti-doping regime. If legitimate supplements can enhance performance, why are some drugs prohibited? There are many steps an athlete can take to improve his or her performance and which are legitimate. Why then should taking certain drugs be prohibited? Why is a certain level of a drug, e.g. nandrolone, permitted but a little more of the same drug in the body leads to disqualification of the athlete? Why are some supplements which are arguably performance-enhancing permitted and others not?
4. Many international sporting organisations and many governments have supported an anti-doping regime for some time. At the World Anti-Doping Conference in Copenhagen in March 2003, the WADA Code was finalised. Governments and international sporting organisations were asked to formally endorse and start to implement the Code. New Zealand is a signatory to the Copenhagen declaration on anti-doping in sport which provides that vehicles of state support the Code. In this

country there is currently before Parliament an Anti-Doping Bill which provides the legislative framework under which New Zealand can implement the WADA Code. An explanatory note to the Bill states this country will “...do its part to address the global problems of doping in sport.” Many national sporting organisations have already adopted the WADA Code.

5. Reasons for the WADA Code and other initiatives to prevent doping in sport are:
 - the protection of the health and safety of athletes and spectators;
 - the preservation of the “ethics” of sport;
 - protection of the image of sport;
 - ensuring a “level playing field”;
 - ensuring that contests are true contests between athletes and not between chemists.

Justification for a Uniform Code

6. There are many reasons for a uniform code which the WADA Code is. One of these is the jurisdictional problem. Jurisdiction in most sports is based on a contract between the sporting organisation and the athlete. The O’Davis case in Australia illustrates the jurisdictional problem. O’Davis tested positive to a prohibited drug but the National Rugby League at the time lacked jurisdiction to impose any sanction on O’Davis because it had not properly bound its players to abide by its rules and follow the directions of its disciplinary tribunal.
7. Inconsistency was another problem. Different sporting organisations applied their own rules. While most Olympic sports tended to be consistent because they applied the IOC code, there was often no consistency between those sports and non-Olympic sports or between non-Olympic sports themselves. Taking an Australian example again, Rugby League players received suspensions of 22 weeks for steroid abuse, whereas if they had been subject to the doping policy of the Australian Sports Commission, which applied the IOC code, they would have been suspended for two years. This type of inconsistency rather than a home-town tribunal may account for the fact that Shane Warne appeared to receive a suspension for his drug indiscretion of one-half of what it would have been in some other sports.

The New Zealand Position

8. New Zealand has had a national policy on the misuse of drugs in sport for some time. A task force appointed by the Hillary Commission reported in February 1991. This led to the New Zealand Sports Drug Agency Act 1994 and the establishment of the New Zealand Sports Drug Agency (“Drug Free Sport”) which has undertaken testing of athletes, both in competition and out of competition. The samples are tested at an approved laboratory in Sydney and, if there is a positive test, it is Drug Free Sport which issues the determination. Unless such a determination is overturned by the District Court, which only has limited powers to do so, the role of the national sporting organisation is merely to determine the sanction which in most cases is mandatory.
9. The position at present is that a national sporting organisation is usually required by its international body to have an anti-doping policy in its rules or constitution. Since the introduction of the WADA Code, many of the sports, encouraged by Sport and Recreation New Zealand (“**SPARC**”), have adopted the WADA Code and provide that the sanctions are to be administered by the Sports Disputes Tribunal of New Zealand. Some codes, and Rugby is one of these, still has its own judicial system.
10. The Sports Anti-Doping Bill presently before a Select Committee of Parliament, is expected to pass later in the year. It will further standardise the practises relating to sports doping in New Zealand. Drug Free Sport will be required to ensure that New Zealand complies with all international agreements and arrangements concerning doping in sport, to which New Zealand is a party. Its main function will be to implement the Code. As part of this function it is to make rules to implement the Code. Until the rules are promulgated, it is not clear what grounds, if any, will enable an athlete to challenge a determination of Drug Free Sport. It is contemplated that the Sports Disputes Tribunal will have a greater role in the future and the District will no longer have jurisdiction in drug matters.

The WADA Code

11. The WADA Code dates from 2003. There is a list of prohibited substances which is reissued each year. The violations are spelt out in the Code, as is the testing procedure, the right to a fair hearing, the mandatory sanctions, the appeal provisions and one of two possible exceptions to the strict liability rule. As noted in the introduction to the Code, it is “*the fundamental and universal document on which the world anti-doping program in sport is based*”. The introduction notes that

International Standards for different technical and operational areas will be developed and that these standards are mandatory for compliance with the Code. It seeks to preserve what is intrinsically valuable about sport often referred to as “*the spirit of sport*”.

12. The purpose of the Code is to advance the anti-doping efforts through universal harmonisation of core anti-doping elements. Specific provisions in the Code do this. There are, however, more general provisions which permit flexibility on how the agreed-upon anti-doping principles are implemented. The Code provides for the introduction of *International Standards*. The core elements which must be universal, include sample collection, laboratory analysis, and laboratory accreditation. The *Prohibited List*, the anti-doping rule violations, the burden of proof which is applicable and the sanctions which apply to anti-doping rule violations must also be universal. Thus, while a sporting organisation such as New Zealand Rugby, may have its own judicial system to implement the provisions, it can not have requirements which differ from the core requirements of the WADA Code.

The Prohibited Substances

13. Under the WADA Code, WADA is required as often as necessary and no less often than annually, to publish the *Prohibited List* as an *International Standard*. The Code provides that a substance or method shall be considered for inclusion on the *Prohibited List* if WADA determines that the substance or method meets any two of the following three criteria:
 - (a) medical or other scientific evidence, pharmacological effect or experience that the substance or method has the potential to enhance or enhances sports performance;
 - (b) medical or other scientific evidence, pharmacological effect, or experience that the *Use* of the substance or method represents an actual or potential health risk to the *Athlete*;
 - (c) WADA’s determination that the *Use* of the substance or method violates the spirit of sport described in the Introduction to the *Code*.
14. It will be noted that a substance may be on the *Prohibited List* even if it is not performance enhancing. Cannabis is on the *Prohibited List* and it is generally

accepted in most sports that it is not performance enhancing. Many of the cases which come before the New Zealand Sports Disputes Tribunal are cannabis cases.

15. The *Prohibited Substances* or the 2006 *Prohibited List* falls into the following general categories:

- (a) Anabolic androgenic steroids that are taken exogenously or created endogenously. This type of substance generally increases muscle mass, thus increasing strength and power, and are all derivatives of the male hormone testosterone. The *Prohibited List* names many such substances but concludes with “other substances with a similar chemical structure or similar biological effect(s)”. Last year a New Zealand *Athlete* was caught under this catch-all provision and suspended for two years after consuming the legal party drug BZP.
- (b) Stimulants. Methamphetamine (Speed) falls within this list. One of the more common stimulants is amphetamine and its derivatives. These are nervous system stimulants which lead to a feeling of reduced fatigue and increased aggressiveness and hostility. They are thought to enhance the feeling of competitiveness and may increase the staying power in endurance sports.
- (c) Hormones and related substances. The substances include growth hormone, Erythropietin (EPO) and insulin. Unless the *Athlete* can demonstrate that the concentration was due to a physiological or pathological condition, a sample from that *Athlete* will be deemed to contain a *Prohibited Substance* where the concentration of the *Prohibited Substance* or its metabolites and/or relevant ratios or markers in the *Athlete’s* sample so exceed the range of values normally found in humans so that it is unlikely to be consistent with normal endogenous production. Substances with a similar chemical structure or similar biological effect(s) to the named substances are also prohibited.
- (d) Beta-2 agonistes. Some of these may be used with a *Therapeutic Use Exemption*. A beta blocker may calm movement tremors and be valuable in particular sports such as shooting. They calm anxiety and nerves.
- (e) Agents with anti-estrogenic activity.
- (f) Diuretics and other masking agents – these are used to lose weight and also to escape detection by diluting the urine.

16. There are certain substances which are only prohibited in competition. These include stimulants (including ephedrine over a certain concentration), narcotics, cannabinoids and gluco quatero costerids (which may be used with *Therapeutic Use Exemption*). Some substances are prohibited in particular sports only. They include:
- (a) alcohol which, strangely, is prohibited in bowls but not in athletics;
 - (b) beta blockers which are prohibited in many sports, including motor cycling, archery and shooting.
17. Prohibited methods include:
- (a) Enhancement of oxygen transfer by blood doping or artificially enhancing the uptake, transport or delivery of oxygen. The intent is to increase the amount of red blood cells which carry oxygen to the muscle cells and increase both endurance and strength.
 - (b) Chemical and physical manipulation. These are prohibited to preserve the integrity and validity of samples collected. Urine substitution and intravenous infusions are also prohibited.
 - (c) Gene doping – the non therapeutic use of cells, genes, genetic elements or the modulation of gene expression having the capacity to enhance athletic performance.
18. The difficulty in drawing the line between prohibited and non prohibited substances is shown by an IOC Medical Commission study in 2002. It studied 634 nutritional supplements from 215 different providers in 13 countries from October 2000 to November 2001, mainly over-the-counter or via the internet. 94 of the samples (14.8%) contained substances that would have led to a positive doping test and, alarmingly for athletes, were not listed on any label on the product's containers. Of these 94 samples, 23 contained precursors (building blocks) of both nandrolone and Testosterone, 64 contained precursors of Testosterone alone and 7 contained precursors of nandrolone alone. 66 other samples (10.4%) returned borderline results for various unlabelled substances. Following these results, the IOC changed its advisory stance to athletes as adopted in 1997, from one of "beware" to "do not take", along with recommending controls, similar to those pertaining to the manufacture of pharmaceuticals, be applied to the production of nutritional supplements.

19. Supplements are a cause for concern. They may contain drugs, either inadvertently because of sloppy production practices or because manufacturers “add” to a recipe to make the supplement effective. Nandrolone, a problem drug, can get into a supplement through an unclean vat. There is also concern in some quarters that athletes may return a positive test for nandrolone that has been produced endogenously.

Anti-Doping Violations

20. The most common anti-doping violation is the presence of any quantity of a *Prohibited Substances* or its *Metabolites* or *Markers* in an *Athlete’s Sample*. An exception is where a quantitative reporting threshold for a particular *Prohibited Substance* is identified in the *Prohibited List*. The *Prohibited List* establishes special criteria for evaluating *Prohibited Substances* which can be produced endogenously. In such a case a sample is deemed to contain a *Prohibited Substance* if it so deviates from the range of values normally found in humans that it is unlikely to be consistent with normal endogenous production. Also, an *Athlete* may prove by evidence that the concentration of the *Prohibited Substance* or its *Metabolites* or *Markers* and/or the relevant ratios in the *Sample* is attributable to a physiological or pathological condition. In such cases, a laboratory will report an *Adverse Analytical Finding* if, based on any reliable analytical method, it can show that the *Prohibited Substance* is of exogenous origin.
21. Other violations are:
- (a) Refusing or failing without compelling justification to submit to sample collection.
 - (b) Violation of applicable requirements regarding *Athlete* availability for out-of-competition testing, including failure to provide required whereabouts information and missed tests which are declared based on reasonable rules. This violation is presently alleged against the two Greek sprinters who caused controversy just prior to the Olympics in Athens.
 - (c) Tampering or attempting to tamper with any part of doping control. The Irish swimmer, Michelle de Bruin, ran foul of this provision.
 - (d) Possession by an *Athlete* at any time or place of a substance that is prohibited in out-of-competition testing or a *Prohibited Method* unless the *Athlete*

establishes that the possession is pursuant to a *Therapeutic Use Exemption* or other acceptable justification.

- (e) Possession of a substance that is prohibited in out-of-competition testing or a *Prohibited Method* by *Athlete Support Personnel* in conjunction with an *Athlete*, competition or training, unless the *Athlete Support Personnel* establishes that the possession is pursuant to a *Therapeutic Use Exemption* or other acceptable justification.
- (f) Trafficking in any *Prohibited Substance* or *Prohibited Method*.
- (g) Administration or attempted administration of a *Prohibited Substance* or *Prohibited Method* to any *Athlete* or assisting, encouraging, aiding, abetting, covering up or any other type of complicity involving an anti-doping rule violation or any attempted violation. An attempt is conduct that constitutes a substantial step in a course of conduct planned to culminate in the commission of an anti-doping rule violation. More will be said about this violation later in this paper when I refer to the *Montgomery* case.

Strict Liability

22. The basis of strict liability is the cornerstone of the Code. It states:

- 2.1.1 It is each *Athlete's* personal duty to ensure that no *Prohibited Substance* enter his or her body. *Athletes* are responsible for any *Prohibited Substance* or its *Metabolites* or *Markers* found to be present in their body *Specimens*. Accordingly, it is not necessary that intent, fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping violation under Article 2.1.
- 2.1.2 Excepting those substances for which a quantitative reporting threshold is specifically identified in the *Prohibited List*, the detected presence of any quantity of a *Prohibited Substance* or its *Metabolites* or *Markers* in an *Athlete's Sample* shall constitute an anti-doping rule violation.
- 2.1.3 As an exception to the general rule of Article 2.1, the *Prohibited List* may establish special criteria for the evaluation of *Prohibited Substances* that can also be produced endogenously.”

23. The Raducan case already referred to illustrates that an anti-doping violation may be committed without any intent or fault or knowing use on the part of the athlete. A CAS panel in the case of another athlete acknowledged that the *strict liability* test may be unfair in an individual case where the athlete may have taken medication as

a result of mislabelling or faulty advice for which the athlete is not responsible, such as food poisoning but in such a case the rules of the competition are not altered to undo the unfairness. It also said:

“Furthermore, it appears to be a laudible 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 or 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.”

24. Torri Edwards was an athlete member of the United States Olympic team who qualified for the team in the 100 metres and 200 metres event for Athens. At a prior meeting she tested positive for the stimulant, Nikethamide. The source of the stimulant was glucose. The glucose had been purchased by her physical therapist who normally carried in his bag the list of *Prohibited Substances* for reviewing ingredients of over-the-counter medicinal products. The Panel was satisfied that Miss Edwards had conducted herself with honesty, integrity and character and that she had not sought to gain any improper advantage or to cheat in any way. However, the product had been purchased in a foreign country and no-one had examined the packet or the leaflet which accompanied the sachet in the packet. If that had been done, it would have been obvious that the product contained more than glucose. While the Panel recognised the harshness of the operation of the IAAF Rules (which were similar to those in the WADA Code) it upheld the imposition of a mandatory two-year sanction.

Methods of Proving Violations and Burden of Proof

25. The WADA *Code* provides that an *Athlete* be given a fair hearing and contains a provision on the burden and standard of proof. The burden of establishing that an anti-doping rule violation has occurred rests with the anti-doping organisation. In this country that would normally be the national sporting body. There is currently, a statutory provision that a determination by Drug Free Sport is conclusive unless it is overturned on very limited grounds by the District Court. It is understood that the rules to be promulgated by Drug Free Sport may change this position and Drug Free Sport will no longer be both the prosecutor and judge.

26. The standard of proof shall be whether the anti-doping organisation has established a violation “*to the comfortable satisfaction of the hearing body, bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt.*” Lawyers will recognise this standard as being akin to the standard which applies when a criminal offence is alleged in a civil case. A note to the WADA Code suggests that it is comparable to the standard which is applied in most countries to cases involving professional misconduct. It is that strange beast which lawyers will know as being part of the civil standard but, in effect, being nearer the criminal standard of beyond reasonable doubt.
27. Where the Code places the burden of proof upon the *Athlete* or other person alleged to have committed the violation to rebut a presumption or established specified facts or circumstances, the standard of proof shall be by a balance of probability, i.e. the normal standard of proof which applies in a civil case.
28. The WADA Code provides that facts relating to an anti-doping rule violation may be established *by any reliable means, including admissions*. Up until recently, all allegations of *Prohibited Substance* in an athlete’s body have been proved by a positive doping test. The Code provides that WADA accredited laboratories are presumed to have conducted *Sample* analysis in accordance with the *International Standard* for laboratory analysis. The *Athlete* may rebut the presumption by establishing a departure from the *International Standard* occurred. However, then the *Anti-Doping Organisation* has a burden to establish that such departure did not cause the *Adverse Analytical Finding*.
29. Tim Montgomery is an American sprinter who held world championships, Olympic gold medals and was a world record holder. As such, he was subjected to many drug tests and never returned a positive test. He was, however, implicated in the recent Bay Area Laboratory Cooperative (“BALCO”) affair. The United States Anti-Doping Agency (“USADA”) accused him of participating in the wide-ranging doping conspiracy carried out by BALCO and its president, Victor Conté. It alleged that he took tetrahydrogestrinone (“THG”), otherwise known as “Clear”, which is a designer steroid and could not be identified by routine anti-doping tests until a coach provided a sample in a syringe to USADA in 2003. Victor Conté named Mr Montgomery, along with 14 other athletes as being involved in the BALCO drug conspiracy. However, neither his allegations, nor the evidence that went before a grand jury, led to Mr Montgomery’s disqualification.

30. USADA presented seven types of evidence against Mr Montgomery:
- (a) blood tests taken in February 2000 which allegedly showed his testosterone level doubling in the course of one day;
 - (b) documents extracted from the files seized from BALCO;
 - (c) evidence of the suppression and rebound of endogenous steroids in Montgomery's urine, as shown from results reported by IOC accredited and BALCO Laboratories on 56 occasions over a five year period;
 - (d) alleged abnormal blood test results on five occasions between November 2000 and July 2001;
 - (e) admissions against interest which implicated Mr Montgomery made by Victor Conté in interviews with investigative authorities as well as the media;
 - (f) reports of what Montgomery allegedly said in front of a grand jury in which he admitted using the various products;
 - (g) alleged admissions to another athlete, Kelli White, that he had used *Clear*.
31. The CAS Panel considered the burden of proof and adopted the following statement:

"...there is no practical distinction between the standards of proof advocated by USADA and the Respondents. It makes little, if indeed any, difference whether a "beyond reasonable doubt" or "comfortable satisfaction" standard is applied to determine the claim against the Respondents. This will become all the more manifest in due course, when the Panel renders its awards on the merits of USADA's claims. Either way, USADA bears the burden of proving, by strong evidence commensurate with the serious claims it makes, that the Respondents committed the doping offences in question."

Mr Montgomery's counsel cross-examined each of the witnesses produced by USADA but Mr Montgomery did not give evidence himself, nor did he call evidence on his behalf. Although USADA called much evidence, the vital evidence was given by another Athlete, Kelli White who herself had admitted to doping and had accepted a two-year sanction as a result. Ms White gave evidence that Mr Montgomery admitted his use of the prohibited substance to her and the Panel had this to say about her evidence:

"Having seen Ms White and heard her testimony, including in response to questions put to her by counsel and the Panel, the members of the Panel do not doubt the veracity of her evidence. She answered all questions, including in relation to her own record of doping, in a forthright, honest and reasonable manner."

She neither exaggerated nor sought to play down any aspect of her evidence. Clearly, an intelligent woman, she impressed the Panel with her candour as well as her dispassionate approach to the issues raised in her testimony and regarding which she was questioned by counsel and members of the Panel. In sum, the Panel finds Ms White's testimony to be wholly credible.

32. Mr Montgomery did not give evidence before the CAS Panel. It considered whether it could draw adverse inferences from him not having done so, even though he had no obligation to do so. It held it had authority to draw such an adverse inference but in the end did not do so. It was of the unanimous view that Mr Montgomery admitted the use of the substance to Kelli White who herself had admitted to doping. The Panel, having heard her, had no doubt that she was telling the truth. Because Mr Montgomery had not given evidence concerning his admission to Miss White of his use of *Clear*, the Panel only had the testimony of Miss White on this point and were prepared to rely on it. It said "*Faced with uncontroverted evidence of such a direct and compelling nature, there is simply no need for an additional inference to be drawn from the respondent's refusal to testify. The evidence alone is sufficient to convict.*"
33. Another case which relied upon circumstantial evidence was the French case. Mark French is an Australian cyclist and both the Australian Sports Commission and Cycling Australia alleged that French was involved in trafficking in prohibited substances, including equine growth hormone and knowingly assisting in doping offences. The allegations were based on the fact that French had occupied a room in Adelaide in which a plastic bucket and a plastic bag were found which contained used injectible items and empty phials. The bucket also contained used protein supplements which had been consumed by French. The items were found the day after French was no longer assigned the room. The case proceeded through the various tribunals on the basis that the standard of proof was somewhere between the balance of probabilities and beyond a reasonable doubt. This was a case based on circumstantial evidence and the CAS Panel rejected the submission that there was an overwhelming inference that French was involved. The Panel noted that there was insufficient evidence and too many alternative explanations to make such an inference. This was a case where the circumstantial evidence ultimately was not sufficient to meet the onus of proof which rested with the Australian Sports Commission and Cycling Australia.
34. Another interesting case from an evidential point of view, is the recent Tyler Hamilton case. Hamilton, a United States cyclist, competed in a professional team in the

Vuelta in 2004. After winning a stage, he tested positive for the presence of transfused blood (a Homologous Blood Transfusion (“HBT”)). Hamilton denied having any blood transfusion in the relevant period and disputed the positive test result and the subsequent drug proceedings spanned a lengthy period and were particularly costly. A central issue was that the Lucerne laboratory at the time of the test did not have specific accreditation for the HBT test. It received such accreditation approximately 13 months later. The WADA Code was at that time part of the doping regulations which applied to the Vuelta. As noted, the WADA Code contains a presumption that WADA accredited laboratories conduct sample analysis in accordance with the *International Standard* for laboratory analysis. In this case, as the Lucerne laboratory had not been specifically accredited for the particular test, the burden shifted to USADA to establish that the laboratory carried out the test “*in accordance with the scientific community’s practice and procedures and that the laboratory satisfied itself as to the validity of the method before using it*”. The CAS Panel discusses at some length the technical evidence submitted by Hamilton challenging the validity of the tests but in the end the Panel concluded that USADA had met its burden of proof by demonstrating that the HBT test conducted during the Vuelta by the laboratory was in accordance with the required community’s practice and procedures and that the appellant had thus not discharged the onus which fell on him to prove that the specific testing of his sample was not performed in accordance with *International Standards*.

35. While in the past the anti-doping organisations have required tests to prove the presence of *Prohibited Substances* in the body of an athlete, these recent cases indicate that the WADA rule which states that facts related to an anti-doping rule violation may be established by any reasonable means, including admissions, means what it says. There are likely to be more cases based on circumstantial evidence, rather than positive tests.

Exceptions from Strict Liability Principle

36. The strict liability rule applies only to the violations of presence and use of *Prohibited Substances* because fault or negligence is already required to establish the other anti-doping rule violations. A note to the WADA Code states that “*There must be some opportunity in the course of the hearing process to consider the unique facts and circumstances of each particular case in imposing sanctions.*” The two particular provisions which enable a sanction to be reduced in “exceptional circumstances” are:

- (a) if an *Athlete* tests positive for a *Prohibited Substance* or *Uses a Prohibited Substance* or *Prohibited Method* the *Athlete* may attempt to establish “*No Fault or Negligence*”. Not only must the *Athlete* show *No Fault or Negligence*, but must also show how the *Prohibited Substance* entered the *Athlete’s* system. If these elements can be established, the period of ineligibility otherwise applicable is eliminated.
 - (b) If the *Athlete* can show “*No Significant Fault or Negligence*” then the minimum period of suspension can be halved. Thus, the minimum penalty for a first offence is normally one year’s ineligibility or suspension. The *Athlete* must also be able to establish how the *Prohibited Substance* entered the *Athlete’s* system in order to have the sanction reduced. There were two examples in New Zealand last year of *Athletes* raising these defences unsuccessfully.
- 37. The difficulty in establishing these defences is obvious from the notes to the WADA *Code* which the *Code* itself states are to be taken into account in interpreting the *Code*. It states that the provisions apply only in cases where the circumstances are truly exceptional and not in the vast majority of cases. If an *Athlete* can prove that despite all due care he or she was sabotaged by a competitor, then *No Fault or Negligence* is established. However, a sanction could not be completely eliminated on the basis of *No Fault or Negligence* if it resulted from a mislabelled or contaminated vitamin or nutritional supplement or the prohibited substance was administered by the *Athlete’s* personal physician or trainer or the *Athlete’s* food or drink was sabotaged by a spouse, coach or other person within the *Athlete’s* circle of associates. On the other hand, the *No Significant Fault or Negligence* provision may apply if the *Athlete* clearly establishes that the cause of the 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.
- 38. Some recent cases illustrate the difficulty in raising either the *No Fault or Negligence* or *No Significant Fault or Negligence* defences. The Raducan and Torri Edwards cases are but two examples. Others are:
 - (a) Knauss was an Austrian skier. A sample was taken from him in Canada in November 2004. It tested positive. The source was a nutritional supplement which Knauss did not know contained the *Prohibited Substance*. The CAS Panel noted his impeccable reputation, his attitude during the proceedings and,

in particular, the fact that he acknowledged having made a mistake and expressed regrets. The Panel held that he acted negligently because he ingested a supplement despite the express warnings of the national and international sports federation and the Austrian anti-drug committee and WADA warnings which emphasised the risks of contamination and/or mislabelling in nutritional supplements. The Panel did, however, find that there was *No Significant Fault or Negligence*, a finding which may have been a little lenient in view of some other Panel findings. It found this because Knauss had taken the precaution of making a direct inquiry with the distributor of the product. Although he had done less rather than more than could be expected of him and that the period of eligibility could lie even closer to two years than one year, it upheld the decision of the first instance panel which imposed a one year suspension.

- (b) Baxter was a British skier who used a commercial preparation which he bought in the United States which was different from the one that he was familiar with. He was held not to have taken sufficient precautions and could not use either defence.
- (c) Lund was a member of the United States Skeleton team in a world cup race at Calgary. He tested positive to the masking agent, Finasteride. Mr Lund had disclosed on his Doping Control Form that he had taken Proscar, a medication which contains Finasteride. He had not applied for a *Therapeutic Use Exemption* for the use of Finasteride. He acknowledged the doping violation and USADA disqualified him from the events in which he had competed in Calgary but only gave him a public warning. WADA appealed to CAS on the basis that USADA should have imposed the minimum two-year period of ineligibility. USADA had made its decision on the basis that Mr Lund had been misled by the contents of the International Tobogganing Federation's website and that such a mistake could not be held against Mr Lund who is not a cheat. The CAS Panel determined that Mr Lund's own evidence entirely undermined the basis of the USADA decision. The website had noted that *Therapeutic Use Exemptions* were required for diuretics and other masking agents. This statement should have set alarm bells ringing for the reader. The Panel noted that the burden on the Athletes to establish *No Fault or Negligence* was extremely high and that it was each athlete's personal duty to ensure that no *Prohibited Substance* entered his or her body. However, in this case he had

regularly advised the anti-doping organisation (the Tobogganing Federation) that he was taking this drug for hair loss. The Panel was disturbed and left uneasy with the feeling that Mr Lund had been badly served by the anti-doping organisation. Consequently, it found *No Significant Fault or Negligence* and was therefore able to halve the minimum period of ineligibility to one year. Unfortunately, for Mr Lund this prevented him from competing in the Turin Winter Olympics.

Specified Substances

39. The WADA Code provides that the *Prohibited List* may identify specified substances which are particularly susceptible to unintentional anti-doping rules violations because of the general availability in medical products or which are less likely to be successfully abused as doping agents. Where an *Athlete* can establish the *Use* of such a specified substance was not intended to enhance sports performance, “the period of *Ineligibility* may be reduced or even replaced. Thus, instead of a minimum two year period of *Ineligibility* for a first violation, the sanction can be as low as a warning and reprimand with no period of *Ineligibility* and the maximum is a period of one year’s *Ineligibility*. A second violation leads to an automatic period of two-year’s *Ineligibility*. The Specified Substance List includes cannabis, alcohol and certain stimulants which are prohibited in competition. These stimulants include ephedrine.
40. This provision is particularly relevant in the New Zealand scene as it applies to cannabis. The annual report of Drug Free Sport for the 2004-05 year shows 19 doping infractions. Of these, eight were for cannabis. A summary of the same agency’s sports drug register from July 1999 to June 2005 shows that 76 New Zealand athletes infringed. Of these, 12 were cannabis related. In the last 12 months, approximately one-half of the drug cases which have come before the Sports Disputes Tribunal have been cannabis cases. It has usually been possible for the athlete to establish that the cannabis was not taken for performance enhancing purposes.
41. The application of sanctions for cannabis violations has been inconsistent around the world. A survey of United States, Britain, Canada and Australia shows that some countries for a first offence normally give a public warning and reprimand. Others seem to impose a minimum period of ineligibility of at least three months. If cannabis in most cases is not performance enhancing, it is presumably on the *Prohibited List*

because it satisfies the tests of being contrary to the spirit of sport and being an actual or potential health risk.

42. The imposition of sanctions imposes the question of whether or not the tribunal administering the sanctions is also a social policeman in circumstances where the drug has not been taken for performance enhancing purposes. The New Zealand practise was initially to suspend but approximately 12 months ago the Sports Disputes Tribunal reviewed its position and determined that unless there was a danger to other competitors or the public, or unless there were special circumstances, the standard sanction on a first offence where there was no performance enhancing element, was a reprimand and a fine. Some sports believe that the Tribunal has adopted a too lenient attitude and one sport complained that the Tribunal was not assisting it to “clean up” its sport. That sport has since persuaded the Tribunal to impose short periods of suspension in respect of its members because before competing in a tournament each athlete is required to sign a contract agreeing not to take drugs.
43. Another difficulty in applying sanctions is that some sports suspend the athlete once there is a determination by Drug Free Sport, while others do not. Thus, some have already been penalised by an effective period of suspension before they come before the Tribunal.

Therapeutic Use Exemptions

44. *Athletes* with documented medical conditions requiring the use of a *Prohibited Substance* or a *Prohibited Method* may request a *Therapeutic Use Exemption*. It is the requirement of the national sporting organisation to have a process in place where *Athletes* with documented medical conditions requiring such an exemption may apply. Requests are evaluated in accordance with international standards on therapeutic use. There has been at least one example of a New Zealand *Athlete* who tested positive overseas and did not have a *Therapeutic Use Exemption*, although she had sent the required medical certificate to her national sports organisation. In her case, the *Prohibited Substance* was used for asthma relief and was a *Specified Substance*. She was therefore able to satisfy the Tribunal that the substance was not taken for performance enhancing purposes and received a reprimand and a warning as it was a first offence.

Possible Legal Challenges

45. There have been challenges against anti-doping regimes on the grounds of restraint of trade, anti-competitive laws and human rights. Recent cases suggest that such challenges will not succeed. The European court case of *Meca-Medina and Majeen v. FINA* illustrates the problems confronting a challenge on these grounds. In that case the challenge was that the anti-doping provisions fell foul of the competition rules of the EU Treaty, as well as the usual argument that such rules offended the provisions providing for free movement of people. The Court, as other courts have, drew a distinction between sporting rules and rules which relate to economic activity. It held that the anti-doping rules were sporting rules and noted:

- “(a) that whilst sport had become, to a great extent, an economic activity, the campaign against doping has no economic objective;
- (b) anti-doping rules were intended firstly to protect the spirit of fair play, without which sport whether amateur or professional is no longer sport;
- (c) anti-doping rules were also intended to safeguard the health of athletes.

The Court also stated:

“As regards the effects on competition, the Commission considered that the anti-doping rules at issue might restrict the athletes’ freedom of action, but such a limitation is not necessarily a restriction of competition within the meaning of Article 81EC because it may be inherent in the organisation and proper conduct of sporting competition.”

Conclusion

46. Anti-doping regimes in sport are here to stay. In New Zealand, as well as in the rest of the world, the WADA Code is likely to dominate. Most international sporting bodies are now moving to adopt it. History has shown that drug cheats and doping methods are often ahead of detection practises. A recent article in The Times of London suggested that gene doping may have already commenced. Gene doping was tested for at the Athens Olympics, but there were no positive results. I do not share the pessimism of some speakers who believe that eventually sport will cease to be followed by the public because of the doping problem. WADA is, in my view, making progress and although there will probably always be drug cheats and some world records will be treated with suspicion, more and more athletes are discovering that they will eventually be detected. Now that tribunals such as CAS have been prepared to uphold drug violations notwithstanding the lack of a positive test, athletes may be less inclined to endeavour to beat the system. An indicator that the fight

against drugs in sport is succeeding is the slow down in some sports of what was a trend for world records to be broken regularly.

47. New Zealand has been relatively free of positive drug tests. In the year to 30 June 2005 there were 1,519 tests of which 18 were positive. Eight of these were for cannabis and one was for the party drug BZP. Half of those who tested positive were not drug cheats.
48. Drug Free Sports' accounts show the testing programme cost just over a \$1 million. It is understood that testing for EPO is very expensive and the only testing for that drug is out of competition on endurance athletes. Notwithstanding the cost and that very few actual drug cheats have been caught, New Zealand is committed to the WADA Code and the worldwide campaign to eliminate drugs in sport.