Arbitration CAS Ad hoc Division (Commonwealth Games in Manchester), CG 02/001 G. / Commonwealth Games Canada (CGC) & Triathlon Canada (TC), award of 2 August 2002

Panel: The Hon. Michael J. Beloff QC (United Kingdom), President; the Hon. Mr. Justice Deon van Zyl (South Africa); Mr. Timothy Castle (New Zealand)

Triathlon
Eligibility of an athlete suspended provisionally
CAS jurisdiction
Right to a hearing before an interim suspension
Validity of the athlete removal from the team

1. **The Applicant's Entry Form contains a provision dealing with the resolution of disputes which provides for CAS jurisdiction. The Applicant is bound by this provision as well as CGC as a Commonwealth Games Association ("CGA"), that has sole authority to submit a competitor's entry (Games Management Protocol 2.1.1). It does so on behalf of TC as a representative governing body for triathlon. CGC has itself implicitly agreed to be bound by the same terms and conditions on the Entry Form as the Applicant and in particular, to the dispute resolution mechanism set out therein. The Panel concludes that CGC is for this purpose acting not only on its behalf, but on behalf of TC as a constituent member. Since the Panel has identified a dispute covered by the arbitration dispute resolution clause inserted in the Entry Form, the CAS Panel finds itself properly seized.**
2. **There is no provision in the ITU rules which requires that there be some form of hearing before an interim suspension. In this context it is important to bear in mind that under English law which is particularly relevant (the Entry Form specifies English law as its governing law) or indeed under general principles of law, a hearing before an interim suspension is not normally required by principles of fairness; moreover an interim or provisional suspension without a hearing is common in the rules of other governing bodies concerned with the problem of doping in sport. Such suspension, decided on an urgent basis, does not deprive the Applicant of a proper hearing at a later stage with the potential for an appropriate remedy.**

The Applicant, G., is a Canadian citizen who was duly selected to represent Canada as a triathlete in the XVII Commonwealth Games.

It is not in dispute that the Applicant, in his capacity as a triathlete representing Canada in the XVII Commonwealth Games in the XVII Commonwealth Games, is contractually bound to observe and to subject himself to:

- the rules, regulations and code of conduct of TC and CGC, as read with the Canadian Policy on Doping in Sport and the Canadian Doping Control Regulations;
- the rules and regulations of the ITU, including the Doping Control Rules and Procedural Guidelines of the ITU Doping Commission;
- the provisions of the CGF Constitution, including the resolution of disputes arising from his participation in the XVII Commonwealth Games in accordance with the arbitration rules for such Games and the provision of the Code of Sports-related Arbitration, the statutes and regulations of the Court of Arbitration for Sport ("CAS").

In terms of paragraph 4(a) of the Canadian Policy of Doping in Sport, the authority for doping control procedures in Canada is based upon the contractual relationship between Canadian sports organisations and their members.

On 18 March 2002, the Executive Board of the ITU approved the adoption by TC of the said policy.

By that adoption, TC delegated to the CCES the authority and responsibility for carrying out doping control procedures in Canada.

At all relevant time, the Applicant recognised and/or acknowledged the authority and responsibility of the CCES.

Paragraph 4(b)-(c) of the Policy provides that the CCES is to co-ordinate and implement policies and programmes for drug-free sport, including the identification and notification of individuals to be tested, sample collections, laboratory analysis, research, education, appeals and reinstatements. In doing so, it operates independently of sports governing bodies and of provincial, territorial or federal governments that contribute to the funding of sport in Canada.

On 25 July 2002, the CCES informed TC that the "A" sample of the Applicant, as taken on 14 July 2002 at the Edmonton Event, had been found to be positive for nandrolone or precursors : norandrosterone, measured at 3.06+- ng/ml. It was a pre-games test being part of a testing programme traditionally undertaken by CCES in a six month period leading up to such Games on all selected (or likely to be selected) Games athletes. The coincidence of the testing with an ITU competition was for convenience only. The CCES knew that the attendance of the Canadian triathlon team was guaranteed at that event.

Section 7.3.3. of the Canadian Doping Control Regulations provides

7.3. Result Management

7.3.3 "*In the event the certificate of analysis indicates a Positive Test Result, and taking into account any Athlete medical application approved by the Doping Control Review Board, the CCES may determine a Doping*

> *Infraction in accordance with these Regulations. The CCES shall communicate this information in writing to the relevant National Sport Governing Body and Sport Canada.* ***The athlete shall be immediately ineligible for competition pending the results of any "B" sample analysis or results of a protest, appeal or reinstatement***"(emphasis supplied).

It was common ground that this provision, if valid and applicable, had the effect of an interim suspension in that the Applicant was rendered immediately ineligible to compete in any triathlon event (including the Commonwealth Games) pending the results of a "B" sample analysis.

This information was communicated to the President of TC, Mr. William Hallett, who duly informed TC Board Members. It would appear that he likewise informed the CGC representatives in Manchester, as emerges from the fact that the Applicant was informed of the offence at the Athlete's Village, which he subsequently left in the company of a CGC representative and the Canadian Team Coach, Mr. Lance Watson. After a press conference arranged by CGC, the Applicant returned to Canada.

On 30 July 2002, it was announced by CGC in Manchester that the Applicant's "B" sample had also been analysed and produced an almost identical reading to that found in respect of the "A" sample (3.05+- 0,13 ng/ml). This information was conveyed by the CCES to TC, which in turn requested CGC to arrange for a replacement for the Applicant.

In a letter dated 31 July 2002, the Applicant's solicitors, Hammond Suddards and Edge, requested CGC and TC to reinstate the Applicant on the ground that he had been suspended without having had a fair hearing. There was no compliance with this request and the Applicant thereupon sought relief by way of urgent application served on the CAS at 13:30 on 31 July 2002.

A hearing was conducted in the evening of 31 July 2002 and the early morning of 1 August 2002. Two issues were raised before us:

1. Whether the Applicant's effective removal from the Canadian Men's Triathlon team for the Commonwealth Games was valid;
2. Whether this Panel had jurisdiction to determine the validity of such removal.

We deal with the issues in reverse order.

LAW

1. In our view, this Panel enjoys jurisdiction to determine this dispute.

2. The Applicant's Entry Form contains, inter alia, the following paragraph dealing with resolution of disputes:

"Resolution of Disputes

***I agree that any disputes or differences relating** to or arising from **my participation in the 2002 Commonwealth Games, shall be resolved by my CGA, the International Federation governing my sport,** M2002 and the CGF, in accordance with the CGF Constitution, **and if not so resolved will be submitted exclusively to the CAS for final and binding arbitration in accordance with the Arbitration Rules for the XVII Commonwealth Games 2002 (the "Rules") and the provisions of the Code of Sports-related Arbitration, the Statutes and Regulations of the CAS**. An ad hoc Division of the CAS shall be established for the 2002 Commonwealth Games under the Rules. Resolution of disputes shall be by means of a Panel set up in accordance with the Rules. The Panel may make a final award, grant preliminary relief, or refer the dispute to the regular CAS procedure. The decisions of the Panel and/or the CAS shall be final"* (emphasis supplied).

3. There is manifestly a dispute or difference relating to the Applicant's participation in the XVII Commonwealth Games (even if it also relates to his participation in other competitions). It has not been resolved by CGC. The dispute remains live, the Applicant asserting his right to compete, CGC denying it. Hence the dispute between the Applicant and CGC is properly submitted by the Applicant to us for final and binding arbitration. The TC, in broad terms, said that it had not been a party to any decision adverse to the Applicant and that as far as it was concerned, the dispute was *res inter alios acta*.

4. It is uncontroversial that the Applicant has both the benefit and the burden of this provision. CGC, however, argues that whereas the Applicant may be bound, CGC and TC are not: if that was right, the provision is no more than a snare and delusion. We consider, however, that this argument is unsound. It is CGC, as a Commonwealth Games Association ("CGA"), which has sole authority to submit a competitor's entry (Games Management Protocol 2.1.1). It does so on behalf of TC as the representative governing body for triathlon (Protocol 7.2.1). The CGA must use the requisite competition entry form, which it must sign (Protocol 7.4.1.(v)). In this instance, CGC duly submitted and itself signed the Applicant's Entry Form.

5. CGC is a Corporation, the members of which include NSF Participant Sports (CGA: Amended and consolidated General By-Law: October 22, 1001, Article 2.1.1.) amongst whom is numbered TC.

6. On the basis of these facts, we conclude that CGC has itself implicitly agreed to be bound by the same terms and conditions on the Entry Form as the Applicant, in so far as material to its own position and, in particular, to the dispute resolution mechanism set out therein. We conclude too, for the avoidance of doubt, that CGC is for this purpose acting not only on its behalf, but on behalf of TC as a constituent member. We reach this conclusion without regret since the concept of a dispute resolution mechanism which may bind only one party to a dispute would seem to us to be not only unusual, but also unfair.

7. Our analysis is consistent with that of the ad hoc Division of the CAS during the 2000 Olympic Games in Sydney (see CAS Ad hoc Division OG 00/006 Baumann v/ IOC and others, para 15 and CAS Ad hoc Division OG 00/014 FFG v/ SOCOG, para 1).

8. Interesting argument was advanced to us as to the reach of Article 30 of the CGF Constitution which provides:

"*Arbitration*

Any dispute or difference arising under or concerning the interpretation of this constitution, or the Games Management Protocol, or the Regulations shall if not able to be resolved by agreement whether by mediation or otherwise, be settled by arbitration. Such arbitration shall be conducted by the Court of Arbitration for Sport ("CAS") in accordance with the Statute and Regulations of the CAS, the decision of which shall be final and binding. The principles of English Law shall apply".

9. In the light of the conclusion we reach on the issue of jurisdiction by reference to the entry form, we need not express any view on whether Article 30 provides an additional basis for us to rule on this dispute.

10. Finally in this context we have to have regard to Article 1 of the Arbitration Rules for the XVII Commonwealth Games in Manchester ("the ad hoc Rules"), which determine our jurisdiction. Since we have identified a dispute covered by the arbitration dispute resolution clause inserted in the Entry Form, and one which has arisen in England after 22nd July but before 4 August 2002, we find ourselves properly seized of the matter before us. CGC argued that had the results of the test on the "A" sample been known before 22 July 2002, and in consequence the Applicant become ineligible to compete in the Commonwealth Games before he left Canada, we would have manifestly been incompetent to intervene. We must, however, deal with the facts as they are, not as they might have been. The timing and location of the dispute are critical to our authority.

11. The Respondents submit that the dispute between the Applicant and themselves is a purely domestic dispute.

The cornerstone of their argument is the Team Member Agreement, which the Applicant signed. This provides, in material part that the athlete's selection as a Team Member for the 2002 Canadian Commonwealth Games Team is conditional upon entry into the agreement itself and observation of its terms and conditions.

12. In Article 5, which delineates Team Member obligations, the Applicant acknowledged and agreed to be bound by certain specific obligations, *inter alia*, to :

5.3.1 Comply with the anti-doping policies of the CGC (attached as Schedule 3) and the CGF and submit to announced and unannounced doping control testing, both during and outside of competition.

5.3.2 Refrain from doping as defined by the CGC Anti-doping Policy, including using substances or engaging in practices prohibited by the rules and policies of the International Olympic Committee (the IOC), CGF, and NSO and IF. By execution of Schedule 3 the Team member acknowledges having read and understood the CGC Anti-Doping Policy and declares he/she is not in violation of any part of it and agrees to be bound by it;

The Canadian Policy on Doping in Sport is defined in schedule 3 as follows*:*

k. Policy shall mean the Canadian Policy on Doping in Sport and shall include its accompanying Canadian Doping Control Regulations, as approved by CCES and as amended from time to time.

Those Regulations include Section 7.3.3 set out above.

13. It is clear therefore that the Applicant himself has accepted his liability to immediate ineligibility for competition (which includes the Commonwealth Games) if the "A" sample indicates a positive test (which it did).

14. In consequence, the Respondents argue, the Applicant's claim is untenable and inconsistent with the very contractual obligations which he voluntarily assumed. We find this argument compelling and correct.

15. The Applicant forcefully advances in essence two propositions in response : first that since he has been duly selected to participate in the XVII Commonwealth Games, his conditions of eligibility are uniquely defined by Article 24 of the CGF Constitution, secondly that the Team Member agreement implicitly incorporates a right to a hearing prior to suspension (which it is common ground he did not receive) as provided by the Doping Control Rules of the ITU to which TC is bound to subscribe.

16. We examine each of the Applicant's counter arguments in turn.

17. Article 24 of the CGF Constitution provides

"*Eligibility*

A competitor to be eligible to compete in the Commonwealth Games shall:

1. Comply with the rules and regulations (including the regulations in respect of currently proscribed substances and proscribed techniques) of the International Federation governing the relevant sport as well as those of the IOC and the World Anti-Doping Agency (WADA), provided however that the Federation may review the rules and regulations of each of the International Federations of the sports in the Commonwealth Games and may determine in what manner such rules and regulations should be applied to a multi-sports event so as to ensure that the overriding principles of the Commonwealth Games are observed.

2. *Not be currently under disqualification or suspension under the rules of the relevant International Federation as listed in Protocol 31*".

18. For our part, we cannot accept that this Article is exhaustive of the criteria for participation by a competitor in the Games. It does not purport to be so: it specifies only certain criteria which must be met. Compliance with those criteria is a necessary, but not a sufficient gateway to participation in the Games. It seems to us entirely sensible that a competitor will be ineligible if, inter alia, she/he is not compliant with the rules and regulations of the relevant international federation. There is no reason, however, why a national body should not establish, additionally or separately, its own appropriate selection criteria. We observe in this context that it is not in issue that both the Rules of the ITU and of the Canadian Doping

Regulations provide that doping is an offence of strict liability and that the substance for which the Applicant has tested positive is a prohibited substance.

19. We cannot accept either that Article 24 in some way gives the athlete the benefit of those procedural rules of the ITU which incarnate the principles of natural justice. It is concerned on its face with *duties*, not rights. One does not in ordinary parlance "comply" with a rule which confers rights. But as we find below the right contended for, ie the right to a hearing before an interim suspension, is not in fact to be found in those rules.

20. In relation to the ITU Doping Control Rules, the Applicant's argument rests upon the following propositions :

(1) TC is bound, as a condition of membership of the ITU to apply doping control rules which are no less procedurally advantageous to an athlete than those of the ITU;

(2) The Canadian Doping Regulations applied to the Applicant are less favourable that the ITU Doping Rules inasmuch as they make no provision for a hearing before the athlete is made automatically ineligible for competition in consequence of a positive "A" sample result.

21. This argument requires closer analysis of the ITU rules.

The Doping Control Rules (Procedural Guidelines 2000 of the ITU Doping Commission) provide materially :

"…

1.3. These Doping Control Rules and Procedural Guidelines apply to all ITU sanctioned events, as well as to out of competition tests conducted by ITU or to any other tests conducted on behalf of ITU by a third party. All athletes, coaches, physicians and team officials who are associated in any way with ITU affiliated or member National Federations are subject to these guidelines. Furthermore, these Rules and Guidelines shall serve as a template for the Rules and Guidelines of all Triathlon National Federations.

…

1.6. These Doping Control Rules are automatically the Doping Control Rules of each National Federation, unless a National Federation creates its own set of Doping Control Rules. If the Doping Control Rules of a National Federation are not precisely the same as these ITU regulations, they must otherwise substantially comply with the guidelines and procedures set forth in these Rules. The ITU Doping Commission is the sole determinant as to whether the rules of a National Federation substantially comply.

…

1.8. In all cases of Doping Control, whether conducted directly by ITU, a National Federation or by a third party on behalf of ITU or a National Federation, the positive 'A' sample results (if any) shall be communicated within 48 hours to the President of ITU and to the athlete' s own National Federation in order that the athlete's National Federation may conduct an ensuing investigation, hearing and appeal, if any.

…

3.32. If the analysis of the main 'A' sample indicates the presence of a prohibited substance, the laboratory shall inform ITU immediately. The ITU shall then inform the athlete's National Federation and request that the National Federation seek an explanation from the athlete within a period set by ITU. The National Federation shall, in turn, inform the athlete of the results of the analysis as soon as is reasonably practicable and seek such an explanation. The explanation, if any, should be conveyed by the National Federation to ITU as soon as reasonably practicable, but within the time limit set by ITU.

3.33. If no adequate explanation is received from the athlete or his / her National Federation, as determined by ITU, within the limit set by ITU, the test shall be regarded as positive. This fact shall be reported by ITU to the athlete's National Federation who shall immediately inform the athlete. The National Federation shall also be informed that the athlete should be subject to disciplinary proceedings in accordance with ITU rules.

3.34. The athlete may, at any time before the hearing by the athlete's National Federation, raise any matter he / she feels relevant with ITU (whether by its Doping Commission or otherwise) via his / her National Federation. The ITU is empowered to consider all such representations to require further information from the relevant parties and, in exceptional circumstances, to request the athlete to appear before it. The ITU may give any weight it chooses to representations made to it and is under no obligation to explain to any party what account it took of representations submitted to it in reaching any decisions it may take.

…

3.40. Every athlete shall have the right to a hearing before the relevant tribunal of his / her National Federation before any decision on eligibility is reached. This hearing should take place as soon as possible and, under normal circumstances, not later than three months after the final laboratory analysis.

3.41. If the athlete is found at the hearing before his / her National Federation to have committed a doping offense, or he / she waives his / her right to a hearing, he / she shall be declared ineligible. His / her ineligibility shall begin from the date on which the sample was provided.

…

5.1. It is a condition of membership in ITU that each National Federation have within its Constitution a means by which any athlete accused of having committed a doping offense will receive a fair hearing. In the event no such Constitutional language exists, this section of ITU rules will apply de facto.

5.2. In matters of Doping, an athlete accused of having committed a doping offense shall have the right to a hearing prior to any decision on eligibility being reached. In the event a suspension is imposed on an athlete after a proper hearing has been held, the suspension may only be lifted by petition to, and acceptance by, CAS and only in the event a timely CAS appeal has been filed (see 5.7)

5.3. Regardless of which body (NF, ITU, NOC or third party testing agency) acted as relevant authority for purposes of collection, when an IOC Accredited Lab reports a positive sample, the athlete's own National Federation shall hold a hearing to determine whether a doping violation has been committed. If it is determined that a doping violation has been committed, the NF shall apply the appropriate penalty."

22. These rules are not entirely coherent but we deduce the following propositions from them. First that national federations are entitled to have their own rules for doping control (1.6 and 5.2). Secondly that these rules need not be identical to those of the ITU (ditto). Thirdly that there must be substantial compliance by the national federation's rules with the procedures envisaged by the ITU rules (ditto). Fourthly that under those national rules an athlete's minimum entitlement is to a "fair hearing" (5.1). Fifthly – and critically – there is no provision in the ITU rules which requires that there be some form of hearing before an interim suspension.

23. In this context it is important to bear in mind that under English law which is particularly relevant (see the Entry Form which specifies English law as its governing law) or indeed under general principles of law, a hearing before an interim suspension is not normally required by principles of fairness (see eg.: *Lewis v. Heffer* [1978] I WLR 1061); moreover an interim or provisional suspension without a hearing is common in the rules of other governing bodies concerned with the problem of doping in sport : see eg. those of the IAAF referred to in CAS arbitration CAS Ad hoc Division OG 00/015 Melinte v. IAAF, para 8a). The rationale for summary reaction to a positive test is obvious: the public interest of the sport trumps the private interests of the athlete. It should be emphasised that such suspension, decided on an urgent basis, does not deprive the Applicant of a proper hearing at a later stage with the potential for an appropriate remedy.

24. Particular reliance was placed by the Applicant on two provisions of the ITU Rules quoted above: 3.40. and 5.2. As to the former, in our view, the procedural rights envisaged are attached to a final decision on eligibility, not to a provisional suspension. We draw particular attention to the time scale envisaged which is supportive of this construction. As to the latter, in our view, the same conclusion is to be drawn. The following points are significant. First a decision on eligibility is conceptually distinct from a provisional (and automatic) suspension. Secondly, an athlete stands accused more naturally in the context of a disciplinary hearing than of a provisional suspension. Thirdly, the suspension is remediable by an appeal to CAS, which again speaks to a final decision rather than to anything of an interim nature. The athletes' rights are protected by his/her subsequent entitlement to hearing and appeals, and consequential remedies.

    It is in our view, too facile to concentrate on the vocabulary of "eligibility" and "suspension" without reference to the context in which those words are deployed.

25. It follows that the interim suspension provisions of the Canadian Doping Control Regulations are not in conflict with the final suspension provisions of RR 5.2. and 5.3. of the ITU Rules or otherwise and for the purposes of R 1.6. of ITU Rules, there is no risk of non-compliance, substantial or otherwise, with the ITU Rules by reason of the application of Canadian Doping Regulation 7.3.3. following the Applicant's positive test. In any event, we repeat, the Applicant agreed to be bound by the national rules whether or not they were in conflict with the international rules.

26. We received hearsay testimony from TC to the effect that the President of the ITU perceived a disharmony between Regulation 7.3.3. of the said Regulations and the relevant ITU Anti-

Doping Rules. We did not accordingly have an opportunity to question the President on the basis for his views. We intend no disrespect, however, when we observe that this issue is one of construction of the two sets of provisions and is purely a matter of law. The approval by the Executive Board of the ITU of the adoption by TC of the Canadian Policy (see above) may be relevant.

27. We should add that while, of course, we are in no position to determine whether or not the Applicant has committed a doping offence and note that he has publicly protested his innocence and lack of understanding how a positive result could have been produced on a test of his samples, he has not been able hitherto to identify the basis of his potential defence to a doping charge, and has certainly not cast any doubt on the chain of custody, the integrity of the samples, the testing procedures, or cognate matters.

28. If it had been necessary to do so, we might therefore well have concluded that, even if the Applicant had being wrongly denied some procedural right, he had lost nothing of substance thereby (cf. *Melinte* above).

29. For completeness, we note that the CCES had offered to facilitate prompt resolution of the dispute pursuant to their own internal procedures – in time, indeed, for the Applicant, if his guilt were not established, to participate in the Games. We did not investigate in detail whether this would indeed have been feasible and have not had the benefit of the Applicant's observations on this proposal. This, however, matters not for the purposes of this application.

The Ad hoc Division of the Court of Arbitration for Sport has rendered the following decision:

The application filed by G. on 31 July 2002 for an order directing Commonwealth Games Canada and Triathlon Canada to reinstate him to Team Canada 2002, to return him immediately at their expense to Manchester, and to allow him to compete in the men's triathlon competition on Sunday 4 August 2002 is dismissed.