Arbitration CAS 2013/A/3370 Union Cycliste Internationale (UCI) v. Jack Burke & Canadian Cycling Association (CCA), award of 17 July 2014

Panel: Judge Hugh Fraser (Canada), Sole arbitrator

Cycling
Doping (hydrochlorothiazide)
Time limit for filing an appeal
Balance of probabilities standard as to the source of the prohibited substance
Sanction regime in case of no fault
Disqualification of results

1. **It is a fundamental principle of Swiss law that time limits to appeal start running only upon proper notification of the reasons for the decision under appeal. The very rationale for basing the time limit for filing an appeal upon the receipt of a "full decision" is to enable the parties with an appeal right to assess the reasoning of a decision rendered by the first instance hearing panel. The necessity for a party to know the grounds for imposing a sanction in order to duly exert its right to contest such decision before CAS, should be a generally accepted principle.**

2. **An athlete must establish on a balance of probabilities how the specified substance entered his system. Previous CAS panels have held that to meet this threshold the athlete bears the burden of persuading the tribunal that the occurrence of the circumstances on which he relies is more probable than other possible explanations of the doping offence. An athlete may meet his burden by either direct or indirect evidence. However, mere speculation as to the source of the prohibited substance is insufficient.**

3. **If the athlete submitted evidence establishing on a balance of probabilities that the prohibited substance found in his/her system resulted from the ingestion of contaminated water and established that he did not know or suspect, and could not have known or suspected even with the utmost caution, that the water was contaminated with the prohibited substance, he/she, therefore, bears No Fault or Negligence, and it is appropriate that no sanction be imposed pursuant to Article 296 of the UCI Anti-Doping Rules (ADR), not even a reprimand under Article 295 of the UCI ADR. Since the athlete bears no fault or negligence, the anti-doping rule violation shall not be considered as a violation for the purpose of determining the period of ineligibility in case of a future violation.**

4. **Notwithstanding the application of Article 296 of the UCI ADR, if an athlete has competed in an event with a prohibited substance in his/her bodily system, an anti-doping rule violation has in any case been committed. In accordance with Article 288 of the UCI ADR, a technical violation of the UCI ADR in connection with an in-**

competition test automatically leads to the disqualification of the individual results obtained during such competition. Accordingly, all results achieved by the athlete in the competition shall be disqualified.

I. PARTIES

1. Union Cycliste Internationale (the "UCI") is the international federation governing the sport of cycling, with offices in Aigle, Switzerland. The UCI is a signatory to the World Anti-Doping Agency ("WADA").

2. Jack Burke (the "Athlete") is an 18-year-old Canadian cyclist who holds a UCI license. He was named to the Canadian National Cycling Team in July 2013. He is also a full-time student at Quest University in Squamish, British Columbia, Canada.

3. Canadian Cycling Association (the "CCA") is the national federation governing the sport of cycling in Canada. Its offices are in Ottawa. The CCA is a member of the UCI and delivered a UCI license to Mr. Burke for the 2013 season.

II. FACTUAL BACKGROUND

4. On October 30, 2013, the UCI filed an appeal against the decision rendered on October 2, 2013 by a sole arbitrator, Richard H. McLaren, ("Arbitrator McLaren"), of the Sport Dispute Resolution Centre of Canada (the "SDRCC").

5. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the CAS hearing on April 17, 2014. While the Sole Arbitrator has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, he refers in his Award only to the submissions and evidence he considers necessary to explain his reasoning.

A. Background Facts

1. The Athlete Obtains His Water In Malartic

6. The Athlete participated in the UCI sanctioned 2013 Tour de l'Abitibi Desjardins multi-stage cycling competition (the "Competition") held in the Abitibi-Témiscamingue region in Quebec, Canada from July 15, 2013 through July 21, 2013 as a member of Team Canada.

7. The Competition program for July 18, 2013 included two stages: (1) a morning time trial starting and ending in Rouyn-Noranda ("Stage 3"); and (2) an afternoon 52.2 km race starting and ending in Malartic ("Stage 4").

8. The Athlete won Stage 3 of the Competition. According to the Athlete's Will Say Statement dated January 24, 2014 (the "Athlete's Statement"), after participating in Stage 3, he returned to the base where the competitors were staying to rest in preparation for Stage 4. A school bus arrived that afternoon to transport the competitors from Rouyn-Noranda to the beginning of Stage 4 in Malartic. The Athlete could not fill his five 750 mL bottles before boarding the bus since he was running late, and the line for the water fountain in Rouyn-Noranda was extremely long.

9. The Athlete and his competitors left Rouyn-Noranda in the school bus at 15:30 to travel to Malartic, a distance of 80 km.

10. According to the Athlete's Statement, he searched for somewhere to fill his water bottles soon after arriving in Malartic. After some difficulty finding a place, he eventually met a woman who filled his bottles from a sports bar/tuck shop located inside a large building he discovered near the Stage 4 starting line. The building was next to a golf course (the UCI has since identified this building as the Centre Culturel Récréatif Le Tremplin De Malartic (the "Centre"), where the Anti-Doping Control Centre for Stage 4 was located). According to the Athlete's Statement, the woman unlocked the door to the bar, went behind the bar counter, and filled his five water bottles from the sink behind the bar. She asked the Athlete not to tell the other competitors since she did not want to fill anyone else's bottles. The Athlete is not aware of any other cyclist who filled their water bottles at this bar, though he was told it offered the only tap at the site from which one could get water.

11. According to the Athlete's Statement, he consumed three of his 750 mL bottles of water during his warm up and consumed the other two during the actual race.

2. The July 18, 2013 Doping Control Test

12. The UCI initiated and conducted doping controls during the Competition.

13. In light of the Athlete's Stage 3 victory, following Stage 4, the UCI asked him to submit to a doping control test in compliance with the UCI Anti-Doping Rules (the "UCI ADR"). Pursuant to UCI ADR protocol, the mandatory anti-doping controls for the two stages of the Competition on July 18, 2013 were both administered after the second stage rather than after each stage.

14. The Athlete arrived at the Anti-Doping Control Station in Malartic at 20:10 on July 18, 2013 and as requested, provided urine samples to the Doping Control Officer. His samples were sealed at 20:32. It was his first time being subjected to doping control, and he had received little to no doping education at the time.

15. On the doping control form filled out by the Athlete at the Anti-Doping Control Station in Malartic on July 18, 2013 (the "Doping Form"), the Athlete confirmed that his urine samples had been taken in accordance with the relevant regulations and declared having taken "B12", "Iron Pills", and "Allergy Medication" over the seven days preceding the doping control test.

16. Schedule A of the Athlete's Statement indicates that he was taking the following products in the period preceding his doping control test: (1) Precision Extreme Isolate 97; (2) Allmax nutrition Glutamine; (3) Magnum Opus; (4) Bpi Sports 1Mr; (5) Endurafuel; (6) Life Brand Melatonin; (7) Veggie greens; (8) QSE Gold medal carbs; (9) Otrivin nasal spray; (10) EPO boost; (11) Louis Garneau LG1 Sports Drink Powder; (12) Louis Garneau LG1 Energy Gel; and (13) First Endurance EFS. The Athlete did not have any left (i.e., no samples) of products (6), (11), (12), and (13) at the time of the adverse analytical finding.

3. The Adverse Analytical Finding

17. The WADA-accredited Laboratoire De Contrôle Du Dopage INRS – Institut Armand-Frappier in Montreal, Canada (the "Laboratory") analysed the Athlete's July 18, 2013 urine samples.

18. The Laboratory issued a certificate of analysis on August 9, 2013 stating that it had detected Hydrochlorothiazide ("HCTZ") in the Athlete's A Sample at a concentration of 0.8 to 1 ng/mL and a specific gravity of 1.021.

19. HCTZ is a Prohibited Substance under the 2013 WADA Prohibited List (see S5-Diuretics and Other Masking Agents), as well as a Specified Substance under that list. HCTZ is a therapeutic diuretic that stimulates the kidneys and increases the amount of urine excreted. WADA prohibits diuretics like HCTZ since they can be used to manage weight or to mask other performance enhancing substances.

20. On August 16, 2013, the UCI informed the Athlete by letter that his A Sample had tested positive for HCTZ. The UCI invited the Athlete to accept a voluntary provisional suspension, but he refused.

21. On August 19, 2013, the UCI informed the CCA and WADA of the Athlete's positive results for HCTZ.

22. On August 23, 2013, the Athlete requested that his B Sample be analysed, electing that his father, Dion Burke ("Mr. Burke"), represent him. The B Sample was analysed on September 4, 2013, and a week later, the UCI informed the Athlete by letter that the B Sample analysis confirmed the A Sample results. At that time, the UCI requested that the CCA commence disciplinary proceedings against the Athlete in accordance with the UCI ADR.

B. The SDRCC Proceedings on September 17, 2013

23. On September 12, 2013, the Athlete and the CCA entered into an agreement providing that their dispute would be arbitrated under the SDRCC rules pursuant to the Canadian Sport Resolution Code with the application of the UCI ADR.

24. The Athlete and the CCA confirmed Arbitrator McLaren's appointment as their sole arbitrator on September 13, 2013. They further agreed that the matter would be heard on an expedited basis with a decision to be rendered by Arbitrator McLaren by September 18, 2013. The reason for the expedited nature of the proceedings was that the Athlete wished to compete in the 2013

UCI Road World Championships in Italy and had a flight scheduled for the day the expedited decision was to be rendered.

25. On September 17, 2013, a hearing took place by video and teleconference before Arbitrator McLaren in London, Ontario. It lasted approximately six and a half hours. At the hearing, Arbitrator McLaren heard evidence from the Athlete, Mr. Burke (the Athlete's father), Dr. Christiane Ayotte ("Dr. Ayotte") (head of the WADA accredited laboratory in Montreal), Dr. Timothy Albert Robert. Ph.D., DABCC(TC) ("Dr. Robert") (Chief Science Officer of Aegis Sciences Corporation), and Anisah Hassan ("Ms. Hassan") (a law student working at the law firm of the Athlete). The UCI had observer status for the proceedings but was not permitted to participate in the evidentiary process.

26. The parties did not dispute the manner and method used to obtain the Athlete's urine sample or the chain of custody in delivering it to the Laboratory. Further, neither party contested the Laboratory's quantification and analysis that revealed the presence of HCTZ in the Athlete's urine sample.

27. At the September 17, 2013 hearing, the parties' experts – Dr. Ayotte for the CCA and Dr. Robert for the Athlete – agreed that the initial screen of the Athlete's urine sample was near the detection limits of the most up-to-date equipment the Laboratory could use. Both also agreed that the analytical result reflected a trace amount of HCTZ. Dr. Ayotte conceded that some WADA-accredited labs, without the most up-to-date equipment the Laboratory had used, might not have detected the trace amount of HCTZ found in the Athlete's sample.

28. Dr. Robert testified that concentrations of HCTZ can be present in raw water, surface water, sludge, and even treated drinking water, and that scientific research indicates that drinking water treatment does not always eliminate HCTZ. Additionally, Dr. Robert testified that sludge left over after residual water is treated is also commonly used to make fertilizer pellets and can contain concentrations of HCTZ.

29. The parties' experts agreed at the hearing that a trace analytical reading of HCTZ, such as the sample analysed in this case, could have resulted from drinking water contaminated by HCTZ.

C. Arbitrator McLaren's Decision

30. Arbitrator McLaren first issued an interim decision on an expedited basis on September 18, 2013 (the "Interim Decision") which included "brief reasons" and his orders in the expedited arbitration proceeding. He found no fault on the part of the Athlete and imposed a reprimand with no period of ineligibility. The Interim Decision also stated that the order was a definitive acquittal until any party with a right to appeal elected to do so.

31. On September 20, 2013, the UCI Anti-Doping Commission considered the Athlete's case and decided to exceptionally lift the application of Article 9.2.002 so that he could compete in the World Championships.

32. The Athlete and the CCA were then informed of the decision to lift the application of Article 9.2.002 and explicitly reminded that such decision was immaterial to the UCI's right to appeal the sanction imposed by the First Arbitrator.

33. On September 22, 2013, the Athlete took part in the Men's Junior Time Trial competition at the 2013 UCI Road World Championships in Florence, Italy.

34. On October 2, 2013, Arbitrator McLaren issued a final decision (the "Final Decision") which incorporated the Interim Decision and provided a *"fully reasoned decision"*.

35. As an initial matter, Arbitrator McLaren held that *"[s]ince the Athlete was found to have a prohibited substance in his body, the principles of strict liability required[d] that [he] conclude that an anti-doping rule violation ha[d] occurred pursuant to Article 21 of the ADR"*.

36. The UCI ADR provides that in the case of a first anti-doping violation under Article 21 – like the Athlete's violation here – the sanction shall be Ineligibility for two years. However, Article 295 of the UCI ADR permits for the elimination or reduction of an Ineligibility period under certain circumstances. HCTZ is a "Specified Substance" under the UCI ADR, which allows the Athlete to plead that Article 295 should apply. Arbitrator McLaren noted that in order to qualify under Article 295 for a reduction or elimination of his Ineligibility period, the Athlete must *"adduce corroborating evidence beyond his own word"* demonstrating to his *"comfortable satisfaction"*: (1) how the Specified Substance entered his body, and (2) that it was not intended to enhance his sport performance or mask the use of a performance enhancing substance. If the above two elements are met, the Athlete's degree of fault must then be considered to determine the appropriate reduction to the two-year period of Ineligibility.

37. In evaluating first how the HCTZ had entered the Athlete's body, Arbitrator McLaren accepted – and the CCA and UCI did not contest – that the Athlete, whom he found to be very credible, did not purposely ingest HCTZ. Arbitrator McLaren then went on to find that based on the Athlete's testimony regarding the source of the water he consumed, the scientific studies provided by the Athlete, and the expert evidence of both Dr. Robert and Dr. Ayotte, it was *"established to [his] comfortable satisfaction…that the HCTZ entered the Athlete's body via drinking water from the town of Malartic"*. In reaching this conclusion, Arbitrator McLaren found that the drinking water in Malartic was sourced from a well, and that the Athlete was likely the only rider competing in Malartic who obtained drinking water there, the rest having filled their bottles in Rouyn-Noranda. He further found that Malartic is located on the perimeter of open-pit gold mining operations, and that it has a golf course which likely uses residual water and fertilizers made from sludge to maintain its premises. A water treatment sludge processing facility is also headquartered in Malartic. Arbitrator McLaren noted that sludge is described in scientific literature as containing residual amounts of HCTZ which, if used as a fertilizer, could find its way into the water table and well water. Thus, the presence of a golf course and a sludge based fertilizer company in Malartic, combined with the fact that Malartic is serviced by well water, suggested that the water used to fill the Athlete's bottles was contaminated with HCTZ.

38. In assessing the evidence, Arbitrator McLaren pointed out that it was important to consider the expedited nature of the proceedings. The parties, he said, were limited in the type of available

evidence since no laboratory analysis of the Malartic water supply could be completed in the requisite time frame for the disposition of the case. And even if analysis could have been completed, a definite result was not necessarily possible since an analysis of water collected that day would not reflect the same concentration of substances the Athlete ingested in July, 2013.

39. Nevertheless, Arbitrator McLaren held that the evidence showed that it was *"more likely the contaminated source was drinking water obtained in Malartic and not any nutritional supplement"* as the CCA and UCI argued. Arbitrator McLaren reasoned that although the expedient nature of the case did not allow an analysis of the supplements the Athlete listed on his Doping Form, Dr. Robert had testified that HCTZ was not listed as an ingredient in any of the Athlete's supplements that were included in the Aegis database. Further, neither the UCI nor the CCA pointed to a specific supplement on the Doping Form that might have been contaminated with HCTZ.

40. Arbitrator McLaren further rejected CCA's argument that since none of the other members of Team Canada tested positive for HCTZ, drinking water could not have been the contaminant. Arbitrator McLaren found that, based on the available evidence, the Athlete was *"likely the only individual who consumed drinking water from the town of Malartic"*. In addition, he noted Dr. Robert's testimony that even if other athletes had consumed water from the same source as the Athlete, a number of factors would determine whether or not they tested positive for HCTZ, including the quantity of water they consumed and their bodies' unique abilities to absorb and excrete HCTZ.

41. Next, Arbitrator McLaren concluded that the HCTZ was not intended to enhance the Athlete's sport performance or mask a prohibited substance. Arbitrator McLaren noted that HCTZ is prohibited for two reasons: (1) as a weight reducing agent, and (2) as a masking agent to hide the use of other prohibited performance enhancing substances. Since there are no weight classes in cycling, Arbitrator McLaren concluded that the issue in this case was whether the Athlete ingested HCTZ to mask the presence of another performance enhancing substance. Arbitrator McLaren held that he did not. Since the Athlete ingested the HCTZ inadvertently by drinking contaminated water, he could not have intended to use the HCTZ to mask another prohibited performance enhancing substance. Further, the specific concentration of HCTZ detected in the Athlete's urine sample, as well as the specific gravity of the sample, confirmed this conclusion. Arbitrator McLaren pointed out that Dr. Robert and Dr. Ayotte agreed that the analysis of the Athlete's sample reflected a *"trace amount"* of HCTZ, and since the specific gravity of the sample was 1.021, it was *"a scientific fact that the sample was not diluted"*. Arbitrator McLaren held that this specific gravity was *"not consistent with an attempt to produce diluted urine in which another performanæ enhancing substance would be less susceptible to detection"*. According to Arbitrator McLaren, *"not only did the Athlete lack the intention to use HCTZ as a masking agent; there could not be any actual masking effect because the sample was not diluted"*.

42. Given the "absence of intent", Arbitrator McLaren held that the Athlete had committed only a "technical violation" of the UCI ADR – *"the Athlete may have violated the letter of the ADR but he did not violate its spirit"*. And since the Athlete had established to Arbitrator McLaren's "comfortable satisfaction" how the HCTZ had entered his body, and that it was not intended to enhance his sport performance or mask the use of a performance enhancing substance, Article 295 applied.

43. Pursuant to Article 295, Arbitrator McLaren exercised his discretion in holding that the Athlete bore "no fault" and imposing a public reprimand with no period of Ineligibility. Arbitrator McLaren accounted for the facts that the Athlete was young, inexperienced in road racing, and had received no anti-doping training from either the Canadian or international cycling federations. He also considered that no amount of training would have assisted the Athlete under the circumstances, as there was nothing further he could have done or should have done to ensure that the water was free of contaminants. Arbitrator McLaren noted that the Athlete and his father had both testified in a candid, forthright, and highly credible fashion. Finally, he took into account the severe consequences a doping infraction would have imposed on the Athlete.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

44. On October 30, 2013, the UCI filed its statement of appeal with the Court of Arbitration for Sport (CAS") in accordance with Article R47 *et seq*. of the Code of Sports-related Arbitration (the "Code"). In its statement of appeal, the UCI suggested that a Sole Arbitrator be appointed to adjudicate this appeal.

45. On November 6, 2013, the CCA objected to the admissibility of the UCI's appeal based on timeliness in accordance with Article R49 of the Code. Moreover, the CCA stated its preference that a Sole Arbitrator adjudicate this appeal.

46. On that same day – November 6, 2013 - the CAS Court Office invited the UCI and the Athlete to comment on the CCA's objection to the admissibility of the UCI's appeal.

47. On November 8, 2013, the Athlete *inter alia* joined the CCA's objection to the admissibility of the appeal and confirmed its preference for a Sole Arbitrator.

48. On November 11, 2013, the UCI filed *inter alia* its response to the objections of the CCA and Athlete to the admissibility of this appeal.

49. On November 15, 2013, the Athlete filed a further objection to the admissibility of this appeal.

50. On November 18, 2013, the CAS Court Office confirmed with the parties that the arbitration would be conducted in English.

51. On November, 22 2013, the Appellant filed its appeal brief in accordance with Article R51 of the Code.

52. On January 13, 2014, the Hon. Hugh L. Fraser, Judge in Ottawa, Canada, was appointed Sole Arbitrator in accordance with Article R54 of the Code.

53. On January 24, 2014, the Athlete filed his answer in accordance with R55 of the Code. The CCA did not file an answer.

54. On March 5, 2014, the UCI filed rebuttal evidence.

55. On April 3, 2014, the CCA signed and returned the Order of Procedure; On April 4, 2014, the UCI signed and returned the Order of Procedure; and on April 8, 2014, the Athlete signed and returned the Order of Procedure.

56. On April 17, 2014, a hearing was held in New York, New York at the law office of Hodgson Russ LLP. Attending the hearing on behalf of the UCI was counsel Mr. Antonio Rigozzi and Dr. Christiane Ayotte (witness); on behalf of the Athlete was counsel Mr. James Bunting and Ms. Chantelle Spagnola, Mr. Jack Burke (athlete), Mr. Dion Burke (witness), Dr. Timothy Albert Robert (by telephone - expert witness), and Ms. Deborah Ross (by telephone - expert witness); and on behalf of the CCA was Mr. Greg Mathieu (by telephone). The Sole Arbitrator was assisted by CAS Counsel Mr. Brent J. Nowicki, and *Ad Hoc* Clerk Ms. Selyn Hong.

IV. PRINCIPAL LEGAL ISSUE:

57. In light of the admitted anti-doping rule violation by the Athlete, the remaining issue to be determined is what sanctions and consequences should flow from this admission.

V. SUBMISSIONS OF THE PARTIES

58. The parties' submissions, in essence, may be summarized as follows:

1. The UCI

59. The UCI's Appeal Brief asks the CAS to grant the following relief:

> *(a) Setting aside the Decision under Appeal of the SDRCC dated 2 October 2013 (which incorporates the Interim Award dated 18 September 2013).*
>
> *(b) Sanctioning [the Athlete] with a period of 2 years Ineligibility.*
>
> *(c) Disqualifying the results obtained by [the Athlete] during the 2013 UCI Tour de l'Abitibi.*
>
> *(d) Ordering [the Athlete] and [the CCA] to pay the costs mandated by Article 275 of the UCI Anti-Doping Regulations.*
>
> *(e) Ordering [the Athlete] and [the CCA] to pay the costs of the present arbitration.*
>
> *(f) Ordering [the Athlete] and [the CCA] to pay a substantial contribution to the [UCI's] legal and arbitration related costs.*

60. Counsel for the UCI modified its above prayer for relief at the CAS hearing by stating that it will not seek any costs from the Athlete even if the UCI were successful in its appeal. The UCI also stated at the hearing that it will not seek reimbursement of its share of the advance of the arbitration costs from either the Athlete or the CCA. Finally, the UCI stated at the hearing that

it will not seek any costs from the Athlete mandated by Article 275 of the UCI ADR. Such position was later confirmed by way of letter dated 29 April 2014.

61. The UCI submits in its Appeal Brief that it has met its burden of proof by establishing to a degree of (more than) comfortable satisfaction that the Athlete committed an anti-doping rule violation. Both the A Sample analysis and the B Sample analysis showed the presence of HCTZ, a prohibited substance both in and out of competition. According to Articles 21.1 and 21.1.2 of the UCI ADR, this is sufficient proof of the *"presence of a prohibited substance"* and, therefore, an anti-doping rule violation. HCTZ is not a threshold substance, so the presence of any quantity of HCTZ is sufficient to demonstrate an anti-doping rule violation according to Article 21.1.3 of the UCI ADR. Article 21.1.1 of the UCI ADR mandates that each rider is responsible for any Prohibited Substance in his system; intent, fault, negligence, or knowing use need not be demonstrated. Consequently, the UCI submits that the Athlete must be held to have committed an anti-doping rule violation, and the sanctions and consequences applicable to this case are the only issues at stake in this appeal.

62. The UCI submits in its Appeal Brief that, having established the anti-doping rule violation, the burden of proof shifts to the Athlete to establish that Articles 295 and 296 of the UCI ADR apply to reduce or eliminate the two-year default period of Ineligibility otherwise applicable. Both Article 295 and Article 296 require that the Athlete establish (to the standard of a balance of probabilities) how the HCTZ entered his system. The UCI notes that CAS panels have held on various occasions that the balance of probabilities requires that *the indicted athlete bears the burden of persuading the judging body that the occurrence of the circumstances on which he relies is more probable than their non-occurrence or more probable than other possible explanations of the doping offence.* The UCI further notes that where an athlete seeks to establish the source of a substance on the balance of probabilities, CAS panels have repeatedly held that *"mere speculation"* as to the source are insufficient. The UCI submits that CAS panels have also *"constantly reiterated that the requirement of proving the source of the Prohibited Substance must be enforced quite strictly since, if the manner in which a substance entered an athlete's system is unknown or unclear, it is logically difficult to determine whether the athlete has met his duty of care to prevent such occurrence".*

63. According to the UCI, it is clear that establishing how the Prohibited Substance entered the Athlete's system is a *"minimum threshold requirement"* to mitigate any sanction pursuant to Articles 295 and 296 of the UCI ADR. The UCI submits that, on the basis of the evidence – or lack thereof – the Athlete has not met this threshold requirement. Therefore, Arbitrator McLaren should not have ordered any reduction in the period of Ineligibility.

64. The UCI further submits in its Appeal Brief that the Athlete has merely speculated that water contamination is possible, providing neither direct proof (i.e., a sample of the relevant water in question) nor indirect proof (i.e., that his thesis of water contamination is possible, and that other sources do not exist or are less likely to have caused the presence of HCTZ in his system than water contamination) of his claim that his consumption of contaminated water from Malartic caused HCTZ to be present in his system (or alternatively, that the source of HCTZ was a contaminated supplement). To this end, the UCI emphasizes that it does not, at this stage, bear the burden of establishing alternative scenarios that may have occurred.

65. In its Appeal Brief, the UCI identifies the following flaws in the evidence that was presented to Arbitrator McLaren:

(a) The Athlete's assertion that the Centre's water source where he obtained his drinking water was a well was based solely on a conversation Ms. Hassan had with a water treatment facility in Malartic;

(b) The Athlete's assertion that this well was located close to a golf course was not supported by any evidence;

(c) The Athlete's assertion that the golf course used fertiliser during the relevant period was based on an article reporting that the Deer Island Treatment Plant in Boston, United States produced fertiliser pellets which they *"sold to blenders of agricultural fertilizers, landscapers, and golf courses"*, as well as Dr. Robert's oral testimony;

(d) The Athlete's assertion that such fertilisers are pellets made of sludge was based on the same aforementioned article, and the fact that a water treatment sludge processing facility is headquartered in Malartic was based on Ms. Hassan's aforementioned telephone conversation;

(e) The Athlete's assertion that such sludge was contaminated with HCTZ was based only on the scientific literature about the theoretical possibility of same, as well as on Dr. Robert's general opinion on this possibility;

(f) The Athlete's assertion that the well was contaminated by the fertilisers used by the golf club was based on the, at best, circumstantial evidence presented above; and

(g) The Athlete's assertion that the water from the Centre was contaminated with HCTZ by the fertilisers used by the golf club was based on the, at best, circumstantial evidence presented above.

66. The UCI submits in its Appeal Brief that given that there is no direct evidence of any of the Athlete's above assertions, it cannot accept that the level of any possible contamination in the relevant water source was sufficient to cause the Athlete's adverse analytical finding for HCTZ.

67. The UCI also notes in its Appeal Brief that the Athlete produced no evidence at all that:

(a) The water source of the Centre was, in fact, well water;

(b) There is a well near the golf club;

(c) Such well could be contaminated by the golf club's runoff;

(d) Such (contaminated) well itself is the Centre's water supply;

(e) The golf club did, in fact, use fertiliser on its course during the relevant period;

(f) Such fertilisers are made from sludge pellets; and/or

(g) Such sludge is contaminated with HCTZ.

68. The UCI notes in its Appeal Brief that the Athlete's assertion that he was the only rider to drink water obtained from the Centre is dubious – the Centre was, in fact, the headquarters for Stage 4 of the Competition, and the Anti-Doping Control Station was located on the Centre's second floor, as was the public restroom. The Doping Control Officer who tested the Athlete has confirmed his belief that the Centre was open before the race and that the riders were using said restroom. The UCI submits that considering the *"lineups"* referenced by the Athlete for the water fountains in Rouyn Noranda, the Athlete likely was not the only rider who had to obtain water in Malartic, especially since the riders arrived in Malartic at about 16:30, but the race did not start until 18:15. Instead, the UCI submits that the likelihood that other (numerous) riders drank water from Malartic is *"quite high"*. The UCI notes the Athlete's failure to obtain a witness statement from any other rider attesting to the fact that they did not drink water from the same facility.

69. In its Appeal Brief, the UCI accepts that Arbitrator McLaren was hindered in his assessment of the evidence by the proceedings' expedited nature. Nevertheless, it expresses an aversion to setting a precedent of foregoing the requirement for sufficient evidence simply because of the expedited nature of proceedings. According to the UCI, this would be *"contrary to the principles of procedural fairness and equal treatment amongst riders that the UCI is bound to respect"*, let alone inconsistent with the UCI ADR.

70. The UCI submits that, quite part from the Athlete's failure to prove the water contamination thesis, the Athlete has not clearly demonstrated that this thesis is more probable than that of the intentional ingestion of HCTZ in the days preceding the relevant doping control test (whether to lose weight or to mask another Prohibited Substance), or of the contamination of a supplement, or of the ingestion of an undisclosed supplement containing HCTZ.

71. The UCI submits that, in light of the Athlete's failure to meet his burden of proof, and to prove the source of the HCTZ in his body, the Sole Arbitrator must hold that the Athlete must be sanctioned with a period of Ineligibility of two years. Further, the Athlete's first place ranking during Stage 3 of the Competition must be disqualified pursuant to Article 291 of the UCI ADR.

2. The Athlete

72. The Athlete accepts the presence of HCTZ found in his urine sample and does not contest the Laboratory's analysis or its results.

73. However, the Athlete disputes the two-year sanction sought by the UCI and submits that it should be eliminated or, alternatively, substantially reduced in light of the particular circumstances of his case. The Athlete submits that the World Anti-Doping Code (the "Code"), which the UCI has contractually adopted, recognizes that some athletes may have an adverse analytical finding in circumstances in which they were not intending to cheat. In such

circumstances, the Athlete submits, the Sole Arbitrator must consider the athlete's degree of fault and impose a sanction proportionate to the circumstances.

74. The Athlete submits that pursuant to Article 296 of the UCI ADR, an athlete may demonstrate that he bears no fault or negligence for the consumption of a Prohibited Substance. If the Athlete succeeds, Article 296 mandates that the otherwise applicable period of Ineligibility (in this case, two years) be eliminated, and that no infraction be recorded.

75. The Athlete agrees with the UCI's submission in its Appeal Brief that he must establish that HCTZ entered his system by way of contaminated well water on a "balance of probabilities" standard, in other words, by at least 51%. The Athlete submits that the following evidence allows him to more than meet this threshold:

    (a) He is a highly credible, forthright, and dedicated young man;

    (b) The Laboratory results of the adverse analytical finding are not consistent with an intention to mask a performance enhancing substance;

    (c) The products/supplements that the Athlete was taking at the relevant time were not contaminated with HCTZ;

    (d) The particular conditions in Malartic are such that the water consumed by the Athlete could have been contaminated by HCTZ, especially in the summer months when the Athlete consumed the water in Malartic;

    (e) Testing the water in Malartic now will not prove what was in the water in July, 2013 and is, in any event, beyond the Athlete's financial means.

76. The Athlete submits that there are three possible explanations for the presence of HCTZ in his system: (1) supplement contamination; (2) ingestion of contaminated water from Malartic; or (3) that the Athlete is a liar or a cheat. The Athlete submits that the evidence establishes on a balance of probabilities that he ingested HCTZ through contaminated water from Malartic, and that Dr. Robert's findings rule out supplement contamination. As the Athlete cannot bear fault for consuming contaminated water, the Athlete submits that no sanction should be imposed under Article 296 of the UCI ADR.

77. Alternatively, the Athlete submits that if he fails to show that he bears no fault, the Sole Arbitrator may consider the athlete's degree of fault. Depending on this degree, the UCI ADR allows the typical two-year sanction imposed upon an adverse finding to be reduced to anywhere between the minimum of a reprimand (and no period of Ineligibility) up to a period of two years of Ineligibility. In order to benefit from such a reduced sanction, the Athlete must establish: (1) how the Specified Substance entered his body, and (2) that the Specified Substance was not intended to enhance his performance or mask the use of a performance enhancing substance. Additionally, the Athlete must demonstrate the absence of intent to enhance his athletic performance with the aid of corroborating evidence to the comfortable satisfaction of the Sole Arbitrator.

78. The Athlete notes that in CAS 2011/A/2645, the athlete, an experienced professional Russian cyclist, tested positive for HCTZ during the 2011 Tour de France. The CAS Panel held that the athlete had established, on a balance of probabilities, that he had inadvertently ingested the HCTZ through a contaminated health product prescribed to him, confirming the decision of the Russian Cycling Federation ("RCF") below. Based on expert evidence, the CAS Panel also found, that the level of HCTZ in the athlete's urine was inconsistent with an attempt to mask a performance enhancing substance. The CAS Panel held that since the athlete's actions fell *"at the very lowest end of the spectrum of fault"*, even though *"he could have done something more than he did"* to avoid ingesting HCTZ, the appropriate sanction was reprimand. The Athlete submits that the evidence establishes that he, like the Russian cyclist, inadvertently ingested HCTZ, and that the level of HCTZ in his urine was also inconsistent with any attempt to mask a performance enhancing substance. The Athlete submits that he bears an even lower degree of fault than the Russian cyclist since (1) there was nothing he could have done to avoid ingesting HCTZ; and (2) unlike the Russian cyclist, the Athlete was an inexperienced cyclist who had received no formal anti-doping training of any kind.

79. The Athlete submits that even if he bears some degree of fault, given the unique circumstances of his case, the degree is not significant, and he should receive, at most, a reprimand. The Athlete submits that numerous factors militate against more than a reprimand: (1) the Athlete is new to the Canadian National Team and has received little to no formal doping education; the doping control test on July 18, 2013 was his first time being tested; (2) the Athlete had no intention to enhance his performance and received no performance enhancing benefit; (3) the Athlete was careful with the supplements and products he took; and (4) the Athlete could not have known that Malartic's water was contaminated.

80. The Athlete asks that the Sole Arbitrator order that he bears no fault under Article 296 of the UCI ADR or, alternatively, that the reprimand imposed by Arbitrator McLaren be upheld under Article 295 of the UCI ADR.

3. The CCA

81. Although the CCA is a Respondent to the appeal, it did not actively participate in the appeal beyond raising an objection to its admissibility and attending the hearing by telephone.

1. The Athlete's Oral Testimony

82. The Athlete testified orally at the hearing. In addition to repeating much of his Athlete's Statement, he testified as to the sacrifices he made to train for cycling, including losing sleep and having *"no social life"*, missing his prom, and never having gone to a single high school party. The Athlete testified that cycling is his *"entire life"*.

83. The Athlete testified that when he filled out the Doping Form on July 18, 2013, he did not list all the sports supplements he was taking since he didn't know what he was doing. When he started listing his supplements, he was told that this was not what they were looking for and instructed to list only his medications. The Athlete further testified that aside from the 13

supplements listed in Schedule A of his Athlete's Statement, he was certain that he did not take any other supplements or medications in the period preceding his doping control test.

84. The Athlete testified that he habitually read all ingredient labels for any products he consumed. He testified that he would go through the WADA prohibited list *"all the time"* and cross-check it against any and all ingredients in the supplements and medicine he took. No one had directed him to do so, he did so after hearing rumours that Olympians who took cough syrup had been stripped of their medals because it had some prohibited substance in it. The Athlete confirmed that he did not receive any anti-doping training from his provincial or national cycling team. None of those teams provided him with an anti-doping package or wallet card. Before July 18, 2013, the Athlete confirmed that he had never undergone anti-doping testing before.

85. The Athlete testified as to the impact of Arbitrator McLaren's decision. He stated that the World Championships was his *"biggest goal"*, and that he didn't know he could race it until just 36 hours before it began. He placed 19th. The Athlete testified that even with Arbitrator McLaren's reprimand, there's still *"so much talk in the cycling world"* implying that *"something's wrong"*. The Athlete stated that he had finally started succeeding in cycling, but now *"everybody questioned that"*. The Athlete testified that cycling is *"everything in his life"*. He could go to his dream school only because of cycling, and he did not have *"anything else in [his] life besides cycling"*. The Athlete testified that if he had a doping infraction as a junior, his *"reputation would be destroyed"*, as would his cycling dream. He stated, *"my entire life is racing and now everyone questions if it's real. Everybody's so unsure and no one wants to talk to me about it. My life is pretty much ripped apart"*.

2. Mr. Burke's Oral Testimony

86. Mr. Burke, the Athlete's father, testified during his son's hearing. Mr. Burke testified that he shipped to Dr. Robert at Aegis Sciences Corporation ("Aegis") two courier packages containing samples of the products the Athlete took prior to his July 18, 2013 doping control test (the "Shipped Products"). He testified that he did not tamper with or otherwise alter the Shipped Products in any way.

The first package of Shipped Products contained six pill bottles (labelled number 3 to 8) with samples of the products the Athlete was taking in each as follows:

Bottle # 3 – Bpi Sports 1Mr
Bottle # 4 – Magnum opus
Bottle # 5 – Precision Extreme Isolate 97
Bottle # 6 – EPO Boost
Bottle # 7 – Allmax nutrition Glutamine
Bottle # 8 – Endurafuel

The second package of Shipped Products consisted of two Ziploc bags with additional products the Athlete was taking – one contained Veggie Greens and the other contained QSE Gold Medal Carbs.

87. Mr. Burke testified that he had asked Dr. Ayotte to test these products before the initial hearing, but that she didn't think this was possible since she was *"on the other side"*. After Arbitrator McLaren's decision was rendered, Mr. Burke testified that he took the same exact bag he had collected before the initial hearing and sent its contents to Dr. Robert's laboratory for testing.

88. Mr. Burke testified as to his family's limited financial means. Though they are *"very proud"* of the Athlete's cycling accomplishments, Mr. Burke stated that his family has not been able to assist the Athlete financially with cycling, as it has been impossible to keep up with the cost. Due to financial constraints, his family has attended only one cycling event for the Athlete (and only for one stage). Mr. Burke also testified that his family could not afford legal counsel for his son, even though they were informed that the charges against the Athlete were serious. The Athlete's counsel was representing him *pro bono*, but Mr. Burke testified that they had to apply to CAS for legal aid for this Appeal since the Athlete's counsel was uncertain that his firm could extend the work they were doing for him. Further, the costs of traveling to Malartic and retaining various experts were beyond his family's financial means. He testified that he did not have Dr. Ross test the water in Malartic not only because testing the water in January is different than testing it in July in extremely hot weather, but also because it was *"too expensive"*. He further testified that the $500 the UCI had offered him to test the water was an *"insult to [his] intelligence"* as it would no doubt cost more. The UCI ultimately did not advance any costs to him to have the water in Malartic tested.

89. Mr. Burke testified that he was *"devastated"* and *"shocked"* when the Athlete tested positive for HCTZ. He testified that he initially relied on the Internet in trying to understand what HCTZ was, what it was used for, the pharmacokinetics of it, and everything he could find out about it. His research led him to the possibility that it could be as simple as HCTZ was in the drinking water.

3. Expert Evidence

90. The Sole Arbitrator was assisted by evidence from three expert witnesses instructed by the parties, Dr. Robert, Dr. Deborah Ross, M.A.Sc., P.Eng. ("Dr. Ross") (Vice President, Water and Wastewater with CIMA Canada, Inc.), and Dr. Ayotte.

a) Dr. Robert's Expert Report

91. Dr. Robert, Chief Science Officer of Aegis and an expert in toxicology and pharmacology, produced a written report dated January 24, 2014. Dr. Robert's report states that Aegis tested the Shipped Products for the presence of HCTZ, and HCTZ was not detected in any of them in concentrations above 10 ppm.

92. In addition, Schedule A of the Athlete's Statement references other products (the "Non-Shipped Products") the Athlete said he was taking prior to his July 18, 2013 doping control test. Dr. Robert's report states that he cross-referenced the Non-Shipped Products to the Shield Database, an extensive, up-to-date database maintained by Aegis of over 20,000 products and supplements. The Shield Database contains the ingredients (and ingredient aliases) that

manufacturers indicate are in their products. Aegis scientists also periodically test such products to determine if they contain certain banned substances, and the results are added to the Shield Database. Based on the fact that the Shield Database designates each of the Non-Shipped Products as "OKAY" rather than as "Caution" or "Banned[,]" Dr. Robert's report concludes that the Non-Shipped Products *"have not been found to contain HCTZ as a labelled component"*.

93. His report explains that HCTZ is a thiazide diuretic (water pill) that acts by inhibiting the kidney's ability to retain water. HCTZ can be used to treat a number of conditions including fluid retention (edema) in those with congestive heart failure, liver cirrhosis, or kidney disorders, and high blood pressure (hypertension). Diuretics are banned in sport because athletes can use them (1) for rapid weight loss to fit into a weight category in sporting events; and (2) to mask the administration of other doping agents by reducing their concentration in urine.

94. Dr. Robert's report concludes that the Laboratory results are *"not consistent with an intention to dope"*. Intentional use of a diuretic like HCTZ in the sport of cycling – which is not a weight class sport – would be based on an attempt to avoid testing positive for another performance enhancing drug (PED). Dr. Robert's report reasons that since HCTZ has a relatively short half-life, a modest volume of distribution, and is excreted unchanged, *"it is difficult to reconcile how [it] was detected at trace concentrations in the urine specimen, but no evidence of a 'masked' PED was found; particularly when many PEDs exhibit relatively long detection periods"*.

95. Dr. Robert's report states that two factors combined are inconsistent with the Athlete's use of HCTZ to mask a PED. First, the 0.8 to 1 ng/ml concentration of HCTZ in the Athlete's urine is considered a "trace amount" especially compared to the concentrations observed following therapeutic doses. Second, the Athlete's urine had a specific gravity of 1.021, which is referred to in the lab as a "perfect pee" (ideal specific gravity is 1.0200), meaning that the urine was not diluted.

96. Dr. Robert's report confirms that the trace level of HCTZ in the Athlete's urine could have been caused by contaminated drinking water, whether by prolonged or acute exposure. Dr. Robert's report states that in order to definitively conclude whether contaminated drinking water was the source of the HCTZ found in the Athlete's system, data as to the concentration of HCTZ in treated drinking water consumed by the Athlete (prolonged exposure) or the level of HCTZ in the water consumed by the Athlete during the event (acute exposure) is needed. Dr. Robert's report notes that it is impossible to calculate the requisite dose of HCTZ in 3.75 litres of water that would result in the Laboratory's findings here. The Athlete's precise time and rate of water consumption is unknown, as is the relative time and rate of urine voided following water consumption before, during, and after the event. Further, every individual has unique pharmacokinetic parameters for any particular drug.

b) Dr. Ross' Expert Report

97. Dr. Ross, a water and waste water expert and licensed Professional Engineer in Ontario, produced a written report dated January 24, 2014. Dr. Ross' report explains that HCTZ is a pharmaceutical drug used to treat high blood pressure and fluid retention caused by various conditions such as heart disease. HCTZ causes the kidneys to excrete unneeded water and salt

from the body into urine. It is present in wastewater, wastewater residuals like sludge or biosolids, and, ultimately, the environment

98. Dr. Ross' report states that HCTZ is not fully removed in the wastewater treatment process, referencing a 2011 Spanish study where HCTZ and several other compounds were added to raw water to monitor the effectiveness of the drinking water treatment process in their removal. Through just the chlorination process – the only wastewater treatment method used in Malartic – the concentration of HCTZ was reduced by only about 50%. With additional physical and chemical treatment, the concentration was reduced, but HCTZ was one of the few contaminants that remained even after significant treatment beyond just the chlorination process used in Malartic.

99. Dr. Ross' report states that HCTZ has been found in wastewater residues (sludge) and in treated (stabilized) wastewater residues (biosolids). Sludge and biosolids are organic liquid slurry material left from municipal wastewater treatment processes. Biosolids are often applied in the summer to agricultural lands in Canada for their nutrient and/or organic properties. Golf courses can use sludge as fertilizer, and mining companies have also been known to use sludge.

100. Dr. Ross' report explains that the water supply in Malartic is obtained from three wells, PP-6, PP-5, and PP-4. Some private wells may also exist, though Dr. Ross' report did not have information as to their location. Dr. Ross' report states that the DRASTIC Index in the area of well PP-6 is estimated at 166, indicating that the unconfined aquifer is vulnerable to surface contamination. The report explains that many human activities can endanger the sustainability of the uncontrolled groundwater resources, including the operation of two quarries/gravel pits and land use as a waste water disposal site. Dr. Ross' report states that there is *"very limited information"* on the land uses surrounding well PP-6.

101. Dr. Ross' report indicates that though she contacted the Town of Malartic Public Works Department twice in January, 2014 for information on the locations of wells PP-4 and PP-5, wastewater treatment operations and waste disposal sites, she could not reach anyone who could provide said information. Her report indicates that she planned to continue to try to contact the office for more information.

102. Dr. Ross' report concludes that, based on the available information, the water consumed by the Athlete in Malartic *"could have been contaminated with HCTZ"*. Dr. Ross' report identifies the following *"potential sources of HCTZ contaminating the water consumed by [the Athlete] in Malartic in July 2013"*:

(a) The source of the water consumed by the Athlete was a private well, and a nearby private wastewater system, such as a septic tank with a tile bed, contaminated that well water.

(b) The source of the water consumed by the Athlete was a private well, and sludge spreading at the nearby golf course contaminated that well water.

(c) Sludge or biosolids from the municipal wastewater system was spread for the local mine operation in an area in the vicinity of well PP-6.

(d) Local private systems with tile beds or sludge spreading in the vicinity of production wells PP-4 and PP-5 contaminated the water supply.

Dr. Ross' report notes that the above potential sources of water contamination *"cannot be confirmed without more information"*.

103. Dr. Ross' report concludes that although it is difficult to predict the concentration of contamination that could result from the above sources, *"it is reasonable to expect HCTZ to be present in groundwater (if it were contaminated) in a concentration of between 20 ng/L and up to 500 ng/L"*.

104. Dr. Ross' report notes that testing the water in Malartic today, or even in October, 2013, likely could not conclusively determine if the water in Malartic was contaminated when the Athlete consumed it. If the water consumed was contaminated back in July, 2013 by a surface source like sludge or biosolids, it is unlikely that the HCTZ would be detectable in early 2014 or even in October, November or December of 2013 since sludge spreading is normally discontinued in the Fall due to heavy rainfall (to minimize potential for runoff) and then through winter due to freezing ground conditions. With freezing ground conditions, even if spreading occurred in the winter, the potential for runoff to contaminate the groundwater would be significantly reduced. In contrast, if nearby septic tank tile beds insufficiently separate from the groundwater aquifer contaminated the water consumed by the Athlete, weather conditions would not affect this. However, Dr. Ross' report identifies other variables that may have changed since July, 2013 that would make analysis for HCTZ similarly inconclusive under this scenario: (1) the HCTZ was no longer being consumed by the wastewater generator and would, therefore, not be in the wastewater; and (2) the production rate of the contaminated well may have reduced or increased such that the level of HCTZ present could have changed.

105. Dr. Ross' report also notes that testing the water in Malartic from the precise location where the Athlete got it would provide conclusive results if HCTZ were present today – regardless of the cause of HCTZ in a water source, if found present today, it is reasonable to conclude that it was present in July, 2013. If HCTZ were not detected, however, this would be inconclusive. Dr. Ross' report states that the estimated cost to complete a sampling of the water in Malartic from the precise location where the Athlete obtained it would be about $6,500, including travel, labor, and lab costs. This estimated cost does not include the costs of preparing Dr. Ross' expert report and of testifying in this proceeding. Dr. Ross states in her report that she was not instructed to travel to Malartic and to take such a sample.

c) Dr. Ayotte's Expert Report

106. Dr. Ayotte produced a written report dated March 5, 2014. Dr. Ayotte's report explains that HCTZ is a diuretic that forces the kidneys to not retain water, often referred to as "water pills". HCTZ is used therapeutically to treat conditions like high blood pressure but can also be abused by athletes to control their weight, body mass or shape (in particular, to enable rapid weight loss), and to mask other prohibited substances. Dr. Ayotte's report states that diuretics have been shown to retard excretion of prohibited substances and to even temporarily suppress the excretion of their metabolite. HCTZ has been on WADA's list of Prohibited Substances since the 1980s. It is listed by name on WADA's 2013 Prohibited List under class S5 and is also

classified as a Specified Substance. HCTZ is a purely synthetic chemical that should only be available in therapeutic form (usually tablets), by prescription only. HCTZ is not a threshold substance, nor does WADA recommend to report above a certain level.

107. Dr. Ayotte's report indicates that the level of HCTZ in the Athlete's urine sample was estimated to be 0.8 to 1 ng/mL, and that the specific gravity was *"normal, 1.021, not dilute nor extremely concentrated"*.

108. Dr. Ayotte's report identifies two possible explanations for the presence of HCTZ at the level of 1 ng/mL in the Athlete's urine sample: (1) a low amount of HCTZ was ingested in the hours preceding the urine sample collection and the amount in the urine sample represents the low level of exposure; or (2) an HCTZ pill was ingested a few days before the urine collection, and the amount in the urine sample reveals the end of excretion and would have been much higher had the sample been collected days before. Dr. Ayotte's report states that the Laboratory test on the Athlete's urine sample cannot distinguish between possibility (1) and (2).

109. Dr. Ayotte's report rejects the potential sources of HCTZ contamination identified in Dr. Ross' report, concluding that they are not supported by information she obtained from two Malartic officials – Yan Bergeron, *directeur des travaux publics* of Malartic, and Mr. Carrier, the *directeur general intérimaire* of Malartic. Dr. Ayotte's report states that Mr. Bergeron indicated during a telephone conversation with her, and Mr. Carrier later confirmed by letter, that all the drinking water in Malartic is supplied by one source, an esker located 4 km outside and North-East from Malartic, and that this water is systematically chlorinated. Mr. Bergeron and Mr. Carrier further indicated that there are no septic tanks in Malartic, but instead a public sewer network system, and that any sewage sludge referenced in Dr. Ross' report is contained in "bassins", pools located at the far east end of Malartic, 6 km from the esker. Finally, Mr. Bergeron and Mr. Carrier stated that the golf course next to the Centre does not spread sewage sludge as fertilizer, nor does its location allow any contamination of the esker. Dr. Ayotte concludes that based on the facts provided by Mr. Bergeron and Mr. Carrier – the water in Malartic is not sourced from a private well, there are no septic tanks in Malartic, and sludge spreading at the golf course did not occur – Dr. Ross' hypotheses are ruled out.

110. With respect to mines employing biomass, Dr. Ayotte notes that there are intense mining activities in the entire region of Abitibi Témiscamingue, including Rouyn-Noranda and Malartic. Dr. Ayotte concludes that if water was contaminated by biomass potentially used by these mines, *"it would be everywhere in the region"*. Even if the possibility of such contamination in the region, in Québec or Canada, or even around the World could be accepted, Dr. Ayotte reasons that the samples of thousands of other athletes have not been impacted as they should have been under such circumstances. Dr. Ayotte's report states that data extracted from her database reveals that in hundreds of municipalities in Québec, where 15,494 athletes' samples were collected from 1994 to mid-February 2014, 13 HCTZ findings were reported. Further, according to her database, 328 urine samples were sent for analysis for the annual Tour de l'Abitibi since 1994, and only the Athlete's sample was found to contain HCTZ and its metabolite. Dr. Ayotte's report concludes that *"there is no reason to suspect the Malartic water to be more contaminated with [HCTZ] than those in this region of intense mining activity, Rouyn-Noranda, or Val*

d'Or…more than one sample collected during the Tour de l'Abitibi would show traces of HCTZ if drinking water was the source".

111. Based on all of the above, Dr. Ayotte's report concludes that the presence of HCTZ in the Athlete's urine sample *"cannot be explained by the [A]thlete having drank contaminated water in Malartic or in the region where the Tour de l'Abitibi was held".*

d) Dr. Robert's Oral Testimony

112. In addition to his written report, Dr. Robert also provided evidence by telephone at the hearing and was cross-examined by UCI's counsel.

113. Dr. Robert confirmed his opinions that the Shipped Products and Non-Shipped Products did not contain HCTZ, that considering the level of HCTZ found in the Athlete's urine – a trace amount at the limits of laboratory detection – and the specific gravity of the urine, the Laboratory's analytical results are *"not consistent with an intention to mask a prohibited substance"* and that the adverse analytical finding of HCTZ could have been caused by the ingestion of drinking water containing HCTZ.

114. In confirming that the Laboratory's analytical results are inconsistent with an intention to mask a prohibited substance, Dr. Robert repeated that there was *"very little"* HCTZ detected in the Athlete's sample, and that the analytical methods used were qualitative, not quantitative. Dr. Robert stated that the Laboratory was asked to estimate concentrations, and that these were very low and certainly did not represent a recent use of HCTZ as a masking agent. Further, the specific gravity of the Athlete's urine sample indicated that it was not dilute, which was also inconsistent with an attempt or the ability to mask a prohibited substance.

115. In confirming that the adverse analytical finding of HCTZ could have been caused by the consumption of drinking water containing HCTZ, Dr. Robert testified that pharmaceutical products are being identified as significant contaminants within the environment – excretion in surface water and lakes have been identified as sources of contamination, as has discarded products in the sewer system. Dr. Robert stated that HCTZ is stable and has been identified as a contaminant in various systems, so exposure has been found in drinking water. Dr. Robert testified that since we're talking about detected concentrations (parts per trillion or extremely low parts per billion), this is consistent with extremely low concentrations of HCTZ in drinking water. However, Dr. Robert had *"no opinion"* on the likelihood of surface water contaminating Malartic's drinking water. He was not familiar with the specifics of any region and stated that he could not offer an opinion unless he analysed the specific water sample himself.

116. In confirming his opinion that the Shipped Products and Non-Shipped Products did not contain HCTZ, Dr. Roberts noted that Appendix E of his report summarized the review and laboratory analysis of the Shipped Products. For the five Non-Shipped Products unavailable for testing, Dr. Robert testified that Aegis had conducted a database search and review of them in its Shield Database, a commercially developed dietary supplement database. Dr. Robert explained that the Shield Database is a project Aegis has been working on for years. In developing it, Aegis reviewed the ingredient list of currently 43,000 dietary supplements in order

to determine if any of those products are overtly banned for use in sports or whether there is a proprietary substance or mixture included in the ingredient label that renders such an assessment impossible. The Shield Database categorizes dietary supplements into 3 groups: (1) those that don't overtly contain a banned substance ("OKAY"); (2) those that contain a component that can't be identified ("Cautionary"); and (3) those that overtly contain a banned substance ("Banned" or "Unacceptable"). Dr. Robert explained that the "Aegis Comment" column of Appendix E of his report represents a summary of the information derived from the Shipped Products and Non-Shipped Products. When the "Aegis Comment" reads "No HCTZ", this means that Aegis did not detect HCTZ after analysing the product. Entries reading "Shield Database – OKAY" mean that those products were reviewed in the Shield Database and found not to include HCTZ.

117. Dr. Robert then referenced Dr. Ayotte's report, specifically page 1 where she states that HCTZ is a prohibited substance under WADA's Prohibited List, and testified that there are *"limitations"* to the theory that diuretics are potentially effective in masking agents for other banned substances. Dr. Robert testified that with modern technology, it is unlikely that diuretics will be effective masking agents for other banned substances since a diuretic itself does not cause another drug to be removed from the body. Instead, diuretics typically produce a diuretic effect which simply "dilutes out" any drugs present in an athlete's urine. Dr. Robert testified that this effect is *"relatively transient"*, and studies show that the same amount of total drugs and metabolite are ultimately excreted. Dr. Robert further testified that a diuretic can increase the detection period for a drug. Thus, he reasoned, the logical approach to taking a diuretic would be in a competition setting where the brief diuretic effect could temporarily dilute a drug. But in that case, the diuretic itself would alter the athlete's fluid and electrolyte balance, leading to adverse physiological effects. Dr. Robert concluded that it, therefore, *"doesn't make a lot of sense"* to use a diuretic in-competition, nor does it make sense to use one out-of-competition to mask another prohibited substance since an athlete would not be tested for such drugs out-of-competition.

118. Further, Dr. Robert testified that if a diuretic were used in-competition, its maximum excretion would occur shortly after its use and it would then itself become much more detectable through modern technology. So in a competition setting, Dr. Robert testified that one would expect a relatively high concentration of the diuretic taken, as well as a dilute urine resulting from the diuretic's dilution of free water from the kidney. As stated, neither condition was found here.

119. During cross-examination, Dr. Robert testified that, in the case of the Non-Shipped Products, it was possible that trace contaminants were present that were not included in their ingredient labels. UCI's counsel referenced Appendix D of Dr. Robert's report, which states that *"Aegis is not responsible for the accuracy or completeness of the declared ingredients"*, in asking if an Aegis Shield Database designation of "OKAY" did not necessarily mean that a product was "safe". Dr. Robert responded that Aegis includes disclaimers in order to point out that, without rigorous analysis, you cannot definitively say a banned substance is not present. Dr. Robert also testified that the aforementioned possible trace contamination in the Non-Shipped Products was consistent with the trace amounts of HCTZ found in the Athlete's urine sample.

120. UCI's counsel asked Dr. Robert if he considered one of the potential scenarios suggested by Dr. Ayotte – that the Athlete ingested a normal dose of HCTZ a few days before the urine

collection. Dr. Robert testified that he had not, but that it was difficult to put a time of three to five days on the Athlete's HCTZ ingestion. He testified that recent studies suggest that HCTZ may be detectable for up to five days in some instances, but that this would depend on the volume of fluid consumed and on the individual pharmacokinetics of each athlete tested. A controlled study on the athlete's specific pharmacokinetics would be very helpful, but Dr. Robert testified that he was not aware of such studies being done.

121. Dr. Robert confirmed during cross-examination that based on the current level of accuracy in his analysis of diuretics, as well as the existing scientific literature, it does not make sense to use diuretics to mask other substances. When asked by UCI's counsel if he believed that diuretics should be taken off the WADA list of prohibited substances, Dr. Robert replied that this is probably true.

122. On re-direct by the Athlete's counsel, Dr. Robert testified that it would have been illogical for the Athlete to have ingested HCTZ three to five days before the urine collection, though people do illogical things all the time. Dr. Robert testified that based on pharmacological principles, it would be anti-productive for an athlete to take HCTZ in a non-competition setting. And, in this case, any masking effect by the HCTZ would have been *"short-lived"*, as the Athlete would have been protected for maybe two days, but would have been *"out of luck"* thereafter.

e) Dr. Ross' Oral Testimony

123. In addition to her written report, Dr. Ross also provided evidence by telephone at the hearing and was cross-examined by UCI's counsel.

124. In going over her report, Dr. Ross explained that when wastewater is treated, a physical and biological treatment process is used, and the organic contaminants of wastewater are drained. Sludge is left on the bottom and is usually treated, though sometimes it isn't. Sludge is treated so that when it's released into the environment, it does not continue to biodegrade, and to reduce odours and pathogens. Dr. Ross stated that the industry renamed sludge to biosolids to *"make it more attractive"*. Dr. Ross further testified that sludge has to be disposed of and is a *"huge problem"* for municipalities operating wastewater plants. The most common methods of using sludge are applications to agricultural land. It can be used in mining operations, golf courses, tree farms, and in some cases, just be put in municipal landfills. Some fertilizers are based on municipal sludge, including one manufactured in Toronto. The most common fertilizer made of sludge is sold *"all over"*, including in Ontario and Quebec.

125. During questioning by the Athlete's counsel, Dr. Ross reiterated her opinion that it was *"entirely possible"* that the water in Malartic was contaminated. She confirmed that there were *"various ways"* in which HCTZ could have contaminated the Malartic water supply: for example, the PP6 well could have been contaminated by activity related to mine or quarry gravel pits, especially since it is a vulnerable well; activity near the PP4 or PP5 wells may have caused contamination; the actual source of the water used to fill the Athlete's bottles could have been contaminated by private wells still in place, perhaps from before the municipal system was set up; any of those water sources could have been contaminated by sludge; and garbage disposal and land fill activity could have caused contamination.

126. Dr. Ross testified that testing the water in Malartic today might not be conclusive since the ground water may have changed so much (i.e., a whole winter has passed where the grounds have frozen and thawed). Further, if a one-time incident caused the Athlete's sample to be contaminated, the contamination may no longer exist. According to Dr. Ross, it is impossible to conclude 100% that the water in Malartic was contaminated since we don't have a sample. We know that there's a contamination from a contaminated source, but so far, it's impossible to track down the location of that source, and it may not even be there anymore. That said, Dr. Robert repeated that if a sample was taken and HCT was found in the water in Malartic today, this would be *"strong support"* that it was contaminated when the Athlete consumed it.

127. Dr. Ross disagreed with Dr. Ayotte's reasoning that the water ingested by the Athlete was likely not contaminated based on the samples of thousands of other athletes across Canada. Dr. Robert testified that she could not draw any relationship between what's been measured in the past and what's happened here. Given the amount of information available on HCTZ in wastewater, Dr. Roberts testified that it's *"very difficult"* to say whether HCTZ contamination is typical or not. The information available on HCTZ in wastewater is *"very limited"*, as is the knowledge of pharmaceuticals, and instruments measuring the low levels at which HCTZ may be found in the environment are just now being developed. Dr. Ross noted that in Ontario, there are a number of required tests for drinking water, none of which measures and reports on the quality of the drinking water, and none of which includes reporting by pharmaceuticals. The only information available is, therefore, through research.

128. Dr. Ross criticized Dr. Ayotte's reliance on her conversations with Mr. Bergeron and Mr. Carrier, pointing out that Dr. Ayotte failed to ask the Malartic officials key questions:

(a) where PP4 and PP5 wells are located;

(b) whether or not there are any private wells in Malartic;

(c) where the municipal waste and landfills are located;

(d) whether there are any septic tanks left in Malartic;

(e) where biosolids or sludge is discharged in Malartic;

Dr. Ross testified that, based on her experience, she would expect that private wells are still in use in Malartic; golf courses usually draw on private wells for irrigation, and there is a golf course in Malartic. Dr. Ross also testified that, in her experience, every municipality has septic tanks, and there are likely septic tanks remaining in Malartic from when the communal system was in place. Dr. Ross also testified that, based on what she knows of other municipalities and individuals with Mr. Carrier's title, he is not a wastewater expert. Finally, she testified that the town of Malartic would not want the general public to know that their drinking water supply may be contaminated.

129. On cross-examination, UCI's counsel asked if Dr. Ross would accept that there should be millions of athletes around the world living in towns where water does not undergo as

sophisticated a treatment process as it does in Toronto, for example, who should, like the Athlete, test positive for prohibited substances. Dr. Ross disagreed, noting that even groundwater systems in most municipalities in Canada receive better treatment than just chlorination (as stated, the only wastewater treatment method used in Malartic). She testified that very sophisticated water processes are used, though she is not aware of the level of treatment provided in third world countries or Europe or North America.

130. During cross-examination, Dr. Ross confirmed that she did not actually know of a source of HCTZ contamination in Malartic's drinking water supply, just that it's possible.

131. On re-direct by the Athlete's counsel, Dr. Ross confirmed that the letter between Dr. Ayotte and Mr. Carrier did not alter the opinions in her report. Dr. Ross pointed out that Mr. Carrier's letter failed to answer a lot of questions, so the potential sources of HCTZ contamination identified in her report still stood.

132. Dr. Ross also testified on re-direct that, like any water supply, the water in Malartic could have had a *"very short contamination period"*, particularly when the contamination was from surface water.

f) Dr. Ayotte's Oral Testimony

133. In addition to her written report, Dr. Ayotte also testified in person at the hearing and was cross-examined by the Athlete's counsel.

134. Dr. Ayotte testified that, as stated in her report, all that could be said with any certainty is that HCTZ was present in the Athlete's urine sample. There was no way to determine with any certainty when the HCTZ was ingested, and any such conclusion would be speculative. Dr. Ayotte repeated that the Athlete could have ingested a low amount of HCTZ in the hours preceding the urine sample collection or he could have ingested an HCTZ pill a few days before the collection. Neither of these possibilities could be ruled out, nor could intention be determined from a urine sample test result. Similarly, Dr. Ayotte testified that, as stated in the first hearing before Arbitrator McLaren, she had no reason to say that it was *"impossible"* that the Athlete drank contaminated water in Malartic. She, instead, acknowledged that *"it is a fact that water can be contaminated"*.

135. Dr. Ayotte testified, however, that she considered *"very closely"* the probability of water contamination in Malartic in concluding that it was unlikely. She distinguished a small town like Malartic from a city like Barcelona – the risk of Barcelona's 1.6 million residents throwing HCTZ into wastewater is *"much higher"* than it is in Malartic. HCTZ is *"not a cold remedy"*, rather it is prescribed for heart congestion, and its disposal in Malartic would be proportionate to its limited use there. Dr. Ayotte further reasoned that the low frequency with which HCTZ has been found at levels similar to the Athlete's also makes it unlikely that the water ingested by the Athlete was contaminated. Dr. Ayotte pointed out, for example, that only one sample (the Athlete's) out of the twenty-two collected at the Competition tested positive for HCTZ even if the other samples also came from small towns like Malartic with similar water treatment methods. Moreover, testing has been conducted at the Tour D'Abitibi for nine years now, meaning that close to 5,000 samples were tested, yet Dr. Ayotte's laboratory did not find a trend

that caused concern or supported the Athlete's hypothesis. In fact there has been only one positive test for HCTZ during this time.

136. Dr. Ayotte testified that after reading Dr. Ross' report, she *"googled"* Mr. Bergeron and attempted to contact him two or three times before getting a conversation going with him. She asked Mr. Bergeron to put his statements down in writing, and Mr. Bergeron replied that he would prefer that Mr. Carrier prepare a brief report. Dr. Ayotte testified that Mr. Bergeron and Mr. Carrier *"do not pretend to have the best system so their constituents are satisfied"*, nor did she force them to give her answers that would match what she wanted to hear. Dr. Ayotte confirmed during cross-examination that she knew Dr. Ross was trying to contact Mr. Bergeron, but that neither she nor UCI contacted the Athlete or his counsel to let them know that she had contacted Mr. Bergeron, nor did she invite Dr. Ross to be on her call with him.

137. With regard to Dr. Robert's findings, Dr. Ayotte testified that Aegis' Shield Database is not a certified program, though all anti-doping organizations are warning athletes to double-check their supplements. She further testified that, as Dr. Robert testified, the situation of supplement contamination may have improved from what is was ten years ago, but it is *"still a fact that the market is poorly regulated"*, and that the quality of some supplements is *"really terrible"*.

138. Dr. Ayotte also disagreed with Dr. Robert's conclusion that the Laboratory results were not consistent with an intention to dope. Dr. Ayotte reiterated that we can't conclude anything about the Athlete's intention from a test result. In any case, the Athlete's adverse analytical finding could have resulted from an intention to mask something three or four days before the July 18, 2013 doping control test. Dr. Ayotte criticized Dr. Robert's distinction between in-competition and out-of-competition testing, stating that in-competition testing just means that the athlete is tested for the full range of substances, and that since HCTZ is prohibited "at all times", in-competition and out-of-competition testing are not different at all.

139. On cross-examination, Dr. Ayotte confirmed that HCTZ can be used as a masking agent, though not simply through dilution. She testified that HCTZ is *"retarding"*, that it keeps some substances inside the bladder. For example, HCTZ can retard the excretion of stimulants – so if you took a diuretic and urinated shortly thereafter, it might not be excreted. Dr. Ayotte testified that, in theory, yes, HCTZ can also dilute the urine which would reduce the concentration of a prohibited substance. Dr. Ayotte testified that some Italian researchers expressed the opinion that to get the retardant effect of a diuretic, you have to have ingested it recently, but these findings did not change the WADA rule that there is no reporting level for diuretics. The minimum required performance level for diuretics is 200 ng/mL, but labs can report at an even lower level. Dr. Ayotte pointed out that in cases where regulatory agencies have deemed it *"not good"* for labs to report at such low levels, they've mentioned it (i.e., glucocorticosteroids). But there is no such reporting threshold for diuretics – if found at any level, they must be reported.

140. As for the specific gravity of the Athlete's urine, during cross-examination, Dr. Ayotte again disagreed with Dr. Robert's conclusion that it was inconsistent with the Athlete's intention to mask another prohibited substance. She stated that it could be consistent with the intention to mask a substance maybe four days before the Athlete's urine was collected. Dr. Ayotte also

pointed out that athletes take diuretics not just for masking, but for weight management. Dr. Ayotte disagreed with the conclusion that dilute urine was a stronger indication than non-dilute urine of an intention to mask another prohibited substance, again pointing out that WADA asks them to report diuretics at any competition at any level.

141. Dr. Ayotte testified during cross-examination that she did not go to Malartic to see if any private wells were there, nor did she check for septic systems or conduct any investigation on wells PP6, PP5, and PP4. Dr. Ayotte testified that Dr. Bergeron and Dr. Carrier told her that all of Malartic's water came from one place, the esker. She testified that she could not recall whether PP4, PP5, or PP6 were specifically identified, just that Mr. Bergeron and Mr. Carrier said that all of Malartic's wells were inside of the esker. Nevertheless, when asked by Athlete's counsel if she had the expertise to challenge Dr. Ross' opinion that wells PP4 and PP5 were likely located somewhere else, Dr. Ayotte stated that she did not. She agreed that Dr. Ross is more qualified than her to know what questions to ask about water in Malartic. She denied that in disagreeing with Dr. Ross' hypotheses, she was providing an opinion outside her expertise and confirmed that she was not purporting to provide an opinion about wastewater. When the Athlete's counsel pointed out that Dr. Ayotte's report did not mention that there was no biosolid spreading near Malartic's well, Dr. Ayotte responded that this was what Mr. Bergeron had told her, though it did not appear in her report. With regards to mines, Dr. Ayotte testified that she did not have the expertise to assess if Malartic's water was contaminated by biomass potentially used by mines. However, she also testified that her statement about mining does not require specific expertise beyond basic scientific knowledge about emerging pollutants.

142. Finally, on cross-examination, the Athlete's counsel asked Dr. Ayotte if she had any actual evidence of the use of HCTZ in Malartic. She responded that the use of HCTZ in the general population has been described in scientific literature, and that the average age in Malartic (which has a population of 3,500) is 40-years-old, so she had no reason to think Malartic's residents take more HCTZ than the general population.

VI. ADMISSIBILITY

143. Article R49 of the Code of Sports-related Arbitration (the "CAS Code") provides as follows:

"In the absence of a time limit set in the statutes or regulations of the federation, association or sports-related body concerned, or in a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. The Division President shall not initiate a procedure if the statement of appeal is, on its face, late and shall so notify the person who filed the document. When a procedure is initiated, a party may request the Division President or the President of the Panel, if a Panel has been already constituted, to terminate it if the statement of appeal is late. The Division President or the President of the Panel renders his decision after considering any submission made by the other parties".

144. Under Article 334 of the UCI ADR, the UCI has 1 (one) month in which to file their statement of appeal with the CAS, starting from the date it received the full case file from the hearing body of the national federation.

145. In the present case, the SDRCC's Final Decision was dated October 2, 2013. The Interim Decision, however, was issued on September 18, 2013. UCI filed its Statement of Appeal on October 31, 2013, over a month after the Interim Decision, but less than a month after the Final Decision.

146. The CCA raised an objection to the admissibility of this Appeal based on timeliness, which the Athlete supported. Between November 5, 2013 and November 18, 2013, correspondence was submitted to the CAS on the admissibility issue.

147. At the outset of the hearing, the Sole Arbitrator, applying Swiss law, allowed the parties to make final submissions on the issue of admissibility. Ultimately, the Sole Arbitrator held that the appeal was admissible for the following reasons.

148. The CCA had submitted that the decision of Arbitrator McLaren was rendered and made known to all parties on September 18, 2013 and that there was no record of UCI requesting the case file even though they would have had access to the decision as of its release date of September 18, 2013.

149. In short, the CCA had argued that since the UCI filed its appeal with CAS on October 30, 2013, which was forty-two days after the September 18, 2013 decision, they were not in compliance with Article 334 of the UCI ADR and the appeal should therefore not be heard.

150. The Athlete supported the CCA objection to the admissibility of this Appeal maintaining that this Appeal is barred by Article 334 of the UCI ADR which states *"Failure to respect this time limit shall result in the appeal being disbarred"*. He also notes that Article 32 of the CAS Code further establishes that the time for filing a Statement of Appeal cannot be extended.

151. The Athlete acknowledged that the issue of admissibility would turn on the meaning of the term "full decision" as referenced in Articles 333 and 334 of the UCI ADR. The Athlete joined the CCA in arguing that the decision rendered by Arbitrator McLaren on September 18, 2013 constitutes the "full decision" thereby starting the clock on the 30 day appeal period.

152. The term "full decision" is not expressly defined in the UCI ADR and the Respondents argued that the meaning of "full decision" under the UCI ADR should be interpreted having regard to the circumstances of each case. In these circumstances, the Respondents maintain that the September 18, 2013 award was a reasoned, definitive decision that was acted on by the parties and referred to by the UCI on at least two occasions in writing as the decision from which it could appeal.

153. The Respondents found it highly significant that the September 18, 2013 award expressly stated that it was this decision (i.e., this definitive acquittal) from which a party such as the UCI could appeal.

154. The UCI submitted that it had complied with the applicable procedural rules by filing its Statement of Appeal on October 30, 2013. They noted that the UCI ADR provided at Article 334, two alternatives to compute the time limit for the filing of the Statement of Appeal by the

UCI to CAS, that is; (a) within one month of the receipt of the full case file from the hearing body of the National Federation, when such case file has been requested within 15 days of receipt of the full decision a specified in Article 277 UCI ADR, or (b) within one month from the receipt of the full decision as specified in Article 277 UCI ADR.

155. The UCI confirmed that it did not request the complete file within the time frame provided because it had already received the complete file minus the decision through the SDRCC web portal prior to the hearing of September 17, 2013 and was demonstrating good faith by not artificially extending the time limit to appeal when there was no need to request the file.

156. The UCI also submitted that it had a duty to wait until the fully reasoned decision was released given the fact that the learned SDRCC Arbitrator made a finding of no fault while also imposing a sanction.

157. The UCI further submitted that it is a fundamental principle of Swiss law that time limits to appeal start running only upon proper notification of the reasons for the decision under appeal.

158. The UCI therefore maintained that having received the full decision of the SDRCC Arbitrator on October 2, 2013 and having filed its Statement of Appeal on October 30, 2013, it was clearly within the prescribed one month time limit.

159. Another argument made by the UCI on this point is that since Arbitrator McLaren announced during the hearing of September 17, 2013 that he would issue brief reasons as soon as possible perhaps by the next day with more complete reasons to follow, the UCI were well aware that further reasons were to be received.

160. The Sole Arbitrator in this appeal is in agreement with the submission of the UCI that the very rationale for basing the time limit for filing an appeal upon the receipt of a "full decision" is to enable the Parties with an appeal right to assess the reasoning of a decision rendered by the first instance hearing panel. The necessity for a party to know the grounds for imposing a sanction in order to duly exert its right to contest such decision before CAS, should be a generally accepted principle.

161. For these reasons, the Sole Arbitrator found that the UCI had filed its Statement of Appeal in a timely fashion and the hearing proceeded accordingly.

VII. JURISDICTION

162. Article R47 of the CAS Code provides as follows:

"An appeal against the decision of a federation, association or sports-related body may be filed with CAS if the statutes or regulations of the said body so provide or if the parties have concluded a specific arbitration agreement and if the Appellant has exhausted the legal remedies available to him prior to the appeal, in accordance with the statutes or regulations of that body".

163. Article 329.1 of the UCI ADR states that *"a decision of the hearing body of the National Federation under article 272"* may be appealed to the CAS.

164. The parties accept that CAS has jurisdiction under the UCI ADR, and the parties had entered into an agreement providing that their dispute would apply the UCI ADR. Moreover, the parties signed the Order of Procedure without objection, which confirms that the CAS has jurisdiction to hear this appeal. Under these circumstances, the Sole Arbitrator is satisfied that CAS has jurisdiction to hear the UCI's appeal.

VIII. APPLICABLE LAW

165. Article R5 CAS 2011/A/2645 8 of the CAS Code provides as follows:

> *"The Panel shall decide the dispute according to the applicable regulations and, the rules of law chosen by the parties or, in the absence of such a choice, according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled or according to the rules of law that the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision".*

166. Article 345 of the UCI ADR provides:

> *"The CAS shall decide the dispute according to these Anti-Doping Rules and for the rest according to Swiss law".*

167. Accordingly, in deciding this appeal, the Sole Arbitrator will apply the UCI's Anti-Doping Regulations and, subsidiarily, Swiss law.

IX. MERITS

168. It is undisputed that the UCI met its burden and standard of proof that an anti-doping rule violation has been established in accordance with the UCI ADR. Therefore, the principal issue to be determined by the Sole Arbitrator is what sanctions and consequences should flow from this anti-doping rule violation. In this regard, the burden of proof shifts to the Athlete to establish that Articles 295 and 296 of the UCI ADR apply to reduce or eliminate the two-year default period of ineligibility which is otherwise applicable.

169. Regardless of which provision applies, both Article 295 and 296 require that the Athlete establish on a balance of probabilities how the HCTZ entered his system. Previous CAS panels have held that to meet this threshold the Athlete bears the burden of persuading the Tribunal that the occurrence of the circumstances on which he relies is more probable than other possible explanations of the doping offence (*see e.g.*, CAS 2007/A/1376 and CAS 2011/A/2645). An athlete may meet his burden by either direct or indirect evidence. However, mere speculation as to the source of the prohibited substance is insufficient.

170. The Athlete raised three possible explanations for the presence of HCTZ in his system: (A) supplement contamination; (B) ingestion of contaminated water from Malartic; or (C) that he is a liar or a cheat. All three explanations are addressed below:

A. Supplement Contamination

171. The Athlete, with the assistance of his father, diligently shipped all of his supplements to the Aegis laboratory for testing. The Aegis laboratory determined that those supplements (i.e., the Shipped Products) were not contaminated with HTCZ and that HCTZ was not detected in any of the supplements in concentrations above 10 ppm. Moreover, as to the Non-Shipped Products, the Sole Arbitrator notes that none of the ingredients contained in the Athlete's supplements registered caution flags on Aegis' Shield Database. In this regard, the Sole Arbitrator notes that while the Shield Database is not a WADA-approved database, the testimony of Dr. Roberts was compelling and the Sole Arbitrator is satisfied that, upon review of the evidence, had the Athlete's supplements contained HCTZ, the Shield Database likely would have found a match.

172. Based on the foregoing, the Sole Arbitrator is satisfied that, on the balance of probabilities, the Athlete's supplements were not the source of the HCTZ.

B. Ingestion of Contaminated Water from Malartic

173. Next, the Sole Arbitrator considered whether, on the balance of probabilities, the water ingested by the Athlete during the Tour D'Abitibi could be the source of the HCTZ in the Athlete's bodily specimen.

174. In this regard, the Sole Arbitrator also found the testimony of Ms. Ross, the Athlete's waste water expert, compelling. As Ms. Ross' evidence established, the features surrounding the drinking water in Malartic make such water susceptible to contamination from a number of sources, including well contamination (and the overall vulnerability of the well), bio solid spreading, garbage disposal, landfill activity, activity related to mine or quarry gravel pits, and other human activity including the spreading of sludge.

175. Moreover, the Sole Arbitrator was persuaded that such HCTZ water contamination was localized. As Dr. Ross testified, Malartic *only* provides chlorination to its drinking water whereas in large centres, such as Toronto or Montreal or in most ground water systems throughout Europe, the water treatment process involves much more than chlorination. As such, any trace amounts of HCTZ are usually washed away during these more sophisticated purification processes. But this does not happen in Malartic. The fact that water in the Malartic region is subject to much less purification than in most other parts of Canada (or even Europe), coupled with the undisputed evidence that the Athlete was apparently the only athlete to fill his water bottles in that area, is highly relevant and persuasive evidence for the determination of this matter.

176. On the contrary, Dr. Christiane Ayotte fairly stated that in her opinion water contamination is a possibility - along with other possibilities such as supplement contamination or the deliberate ingestion of a pill several days earlier. She believed that the low level of HCTZ that was found in the sample would not be indicative of an intent to cheat on the part of the Athlete. She also testified that her opinion came from a common sense scientific perspective. Dr. Ayotte acknowledged that she was not an expert in waste management or water contamination and the Sole Arbitrator finds, therefore, that Dr. Ayotte's testimony as a witness in this regard was of limited value in the determination of this matter. For the most part, she was testifying outside of her area of expertise and some of Dr. Ayotte's testimony in contradiction to Dr. Ross' thesis was based on hearsay, namely her conversations with Mr. Bergeron and Mr. Carrier (which took place outside the presence of the Athlete, his representatives, and Dr. Ross - all of whom may have been helpful to (or interested in) the conversation if the purpose of her conversations were, as Dr. Ayotte testified, to "seek the truth".).

177. Separately, the Sole Arbitrator notes that while it was generally acknowledged by both Parties that there may have been some benefit in testing the water in Malartic to determine whether it revealed the presence of HCTZ, those tests would be inconclusive since ground water, which is vulnerable to surface water, could have changed dramatically since the summer of 2013. Thus, the results would have been speculative. Regardless, neither Party tested the water so any argument that the present condition of the water *might* support an argument that it was so contaminated at the time of the Tour D'Abitibi is of no value, and the Sole Arbitrator will not consider such a hypothetical possibility for contamination. Put simply, there is no evidence in this case which leads the Sole Arbitrator to doubt that the HCTZ could have, in the amounts detected, reasonably come from any other source but the Malartic water.

178. Based on the foregoing, the Sole Arbitrator is of the opinion that the Athlete clearly met his burden and established that the on the balance of probabilities, the source of the HCTZ was the Malartic water ingested by the Athlete.

C. The Athlete is not a Liar or Cheat

179. Although Mr. Rigozzi, counsel for the UCI, stated that a finding that the Athlete is not a liar or a cheat will not be determinative of the Appeal, the Sole Arbitrator is nevertheless prepared to make as one his findings the conclusion that based on the evidence, the Athlete is neither a liar nor a cheat.

180. The Athlete was a very credible witness and a very honest young man. He testified in a candid, straightforward manner. He has done as much as could be expected with the resources available to him to discharge his onus. His testimony is supported by an expert witness who has 27 years of experience and who was called upon to prepare a report for the Ontario Ministry of the Environment following the tragic case of water contamination in Walkerton, Ontario, Canada in 2000, and backed by the testimony of his father and of Dr. Roberts.

181. Moreover, the Sole Arbitrator finds that there is no evidence that the Athlete ingested the HCTZ (through a pill or otherwise) to mask some other prohibited substance or to lose weight. Indeed, the evidence was to the contrary; the Athlete has maintained the same weight at all

relevant times. And given the honesty and integrity of the Athlete, the Sole Arbitrator finds no evidence to believe that the trace amount of HCTZ was a result of masking some other substance.

182. In light of the above, Sole Arbitrator find that the evidence submitted in this matter establishes on a balance of probabilities that the HCTZ found in the Athlete's system resulted from the ingestion of contaminated water from Malartic. The Athlete established that he did not know or suspect, and could not have known or suspected even with the utmost caution, that the Malartic water was contaminated with HCTZ and therefore, the Athlete bears No Fault or Negligence. Since these very unique circumstances have resulted in a finding of no fault on the part of the Athlete, it is appropriate that no sanction be imposed pursuant to Article 296 of the UCI ADR.

183. In this regard, it is noted that while Arbitrator McLaren correctly found no fault on the part of the Athlete, he mistakenly applied the sanction regime under Article 295 of the UCI ADR when he determined that a first doping offense occurred (i.e. the issuance of the reprimand). Article 296 of the UCI ADR should have been applied and no reprimand should have been imposed on the Athlete because the Athlete bears no fault. Since the Athlete did not appeal against the Decision of the SDRCC, the Sole Arbitrator should not be entitled to amend the Decision on that particular point. However, throughout the hearing, the UCI contended that should the Sole Arbitrator find that the Athlete bore no fault, he must amend Arbitrator McLaren's finding and apply Article 296. In this way, the Sole Arbitrator agrees with the UCI that Article 296 applies to such finding of no fault. For the record, it must be emphasized though that since the Athlete bears no fault or negligence, the anti-doping rule violation shall not be considered as a violation for the purpose of determining the period of ineligibility in case of a future violation.

184. Notwithstanding the application of Article 296 of the UCI ADR, it must be noted that an anti-doping rule violation has been committed by the Athlete simply by virtue of the fact that the Athlete competed in the Tour de l'Abitibi with HCTZ in his bodily system. Such is not factually disputed between the parties. Under such circumstances, and in accordance with Article 288 of the UCI ADR, a technical violation of the UCI ADR in connection with an in-competition test automatically leads to the disqualification of the individual results obtained during such competition. Accordingly, the Sole Arbitrator finds that all results achieved by the Athlete in the 2013 Tour de l'Abitibi shall be disqualified accordingly.

ON THESE GROUNDS

The Court of Arbitration for Sport rules:

1. The appeal filed by the Union Cycliste Internationale on October 30, 2013 is partially upheld.

2. The underlying decision issued by the Sports Dispute Resolution Centre of Canada (SDRCC) on October 2, 2013 is amended as follows:

   The results obtained by Mr. Jack Burke during the 2013 UCI Tour de l'Abitibi shall be disqualified.

4. (…).

5. (…).

6. All other motions or prayers for relief are dismissed.