Arbitration CAS 2015/A/4127 Ian Chan v. Canadian Wheelchair Sports Association (CWSA) and Canadian Centre for Ethics in Sport (CCES), award of 11 December 2015

Panel: Prof. Richard McLaren (Canada), Sole Arbitrator

Wheelchair Rugby
Doping (oxycodone & fentanyl)
Condition of elimination of the period of ineligibility under no fault or negligence in a case of addiction
Assessment of an athlete's degree of fault to determine a reduction of the period of ineligibility for a specified substance

1. **Under the applicable rules, addiction by substance abuse or depression might be grounds for consideration of the elimination of an athlete's period of ineligibility provided there is persuasive evidence and likely expert opinion evidence suggesting that because of his condition an athlete was either not at fault or had very little fault to have committed an anti-doping rule violation. However, where there is a total lack of evidence other than an athlete's personal assertion, there is no possibility of issuing an order eliminating the period of ineligibility.**

2. **The athlete's degree of fault must be determined on the basis of the available evidence. The athlete must establish why his departure from the expected standard of behaviour justifies a reduction of the sanction. In that inquiry, each case will turn on its own facts and the examination of other adjudication decisions does not further the particular case.**

I. PARTIES

1. Ian Chan (the "Athlete" or "Appellant") is a four-time Canadian Paralympian and is currently the co-captain of the Canadian Wheelchair Rugby Team.

2. The Canadian Wheelchair Sports Association (the "CWSA" or "First Respondent") is the national advocate for wheelchair sports in Canada. The CWSA manages the sport of wheelchair rugby in Canada on a national level.

3. The Canadian Centre for Ethics in Sport (the "CCES" or "Second Respondent") is an independent, national, not-for profit organization with a responsibility to administer the Canadian Anti-Doping Program (the "CADP")[1].

[1] In this Arbitral Award capitalized words have the meaning ascribed to them by the CADP; their meaning as defined in this Award; or, their meaning in accordance with ordinary English language usage.

II. FACTUAL BACKGROUND

A. Background Facts

4. Below is a summary of the relevant facts and allegations based on the parties' written submissions, pleadings and evidence adduced at the hearing. Additional facts and allegations found in the parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows. 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 this Award only to the submissions and evidence considered necessary to explain his reasoning.

5. The Athlete is a T4-T5 paraplegic with numerous medical issues for which he takes a variety of medications. He suffers from depression, and experiences severe pains, spasticity, abscesses, and pressure sores.

6. In the Fall of 2014, the Athlete was hospitalized for a disability-related medical issue, which resulted in a medical prescription of 5 mgs per day of Oxycodone.

7. On 5 October 2014, while the Athlete was competing for Team Canada at the 2014 Japan Para-Championships, he and his teammates were informed that they would be subjected to in-competition anti-doping controls. Consequently, the Athlete informed his coaches that he was taking Oxycodone under his current medical prescription.

8. As a result of this disclosure, Dr. Van Neutegem (Ph.D), the High Performance Director for the CWSA, pulled the Athlete from the Japan event and made efforts to obtain a Therapeutic Use Exemption ("TUE") on the Athlete's behalf. However, following discussions between Dr. Van Neutegem and Dr. Thomas Zochowski, the team medical doctor, Dr. Van Neutegem understood that Dr. Zochowski would obtain a retroactive TUE for the Athlete. Consequently, the Athlete was informed he could participate in the Japan event without issue.

9. As a result of the exchange between Dr. Van Neutegem and Dr. Zochowski at the Japan event, the Athlete believed that a TUE had been obtained on his behalf and that such TUE was valid for a 1-year period. The Athlete further understood that he could legally compete despite having Oxycodone in his bodily system.

10. On his return from the Japanese event, the Athlete learned that he lost his entire life savings on a bad investment. Facing the loss of this money, as well as suffering from some lows in competition, the Athlete felt his prescription for Oxycodone was insufficient, or too weak. As a result, the Athlete began purchasing and taking "street Oxys" in addition to his normal prescription.

11. The Athlete obtained the "street Oxys" from a friend whom he trusted. Such friend was not licensed to dispense the product, and the Athlete was unaware where his friend obtained the pills. The pills came in a prescription bottle and while he was aware that the bottle bore his friend's name, he did not read the label or determine what the prescription dosage was for the

pills. Indeed, the pills looked different than those obtained under his normal prescription and included an "80" stamp on them.

12. On 13 December 2014, the Athlete participated in a wheelchair rugby event in Longueil, Quebec, and was the subject of an in-competition urine doping control test.

13. The Athlete's test resulted in a finding of Fentanyl and Oxycodone, both narcotic substances classified as "Specified Substances" under the World Anti-Doping Agency's list of prohibited substances, as well as the CADP Rules.

14. Contrary to the Athlete's understanding, he did not have a valid TUE for either substance. He did, however, declare the use of Oxycodone on his doping control form believing that he did have a TUE for the substance as a result of his experiences in Japan.

15. On 2 February 2015, the Athlete accepted a provisional suspension.

16. On 3 February 2015, the Athlete filed a TUE application for the use of Percocet (Oxycodone) effective 5 March 2015 for a period of 4 years. The application sought to cover current as well as retroactive use of Oxycodone.

17. On 2 March 2015, the CCES issued a Notice of Doping Violation to the Athlete. During its review of the Athlete's samples and anti-doping rule violation, the CCES learned that the Athlete had applied for a current and retroactive TUE for the use of Oxycodone. The application, however, was still under review by the TUE Committee.

18. On 4 March 2015, the Athlete admitted an anti-doping rule violation, but retained his right to seek a reduction of the proposed 2-year sanction.

19. On 5 March 2015, the CCES TUE Committee approved the Athlete's application for a TUE for a 5 mg dose of Oxycodone, administered orally, once per day. The CCES, however, determined that the Athlete was not eligible for a retroactive TUE because at the time the application was submitted, it was not in response to an acute or emergency situation.

20. The Athlete admits an addiction to Oxycodone, which drove him to purchase "street Oxys" from an unlicensed third-party. The "street Oxys" purchased from the third-party and ingested by the Athlete were coated with Fentanyl which explains why that substance was found in the doping control analysis.

B. Proceedings before the CCES

21. The Athlete filed a claim with the Sport Dispute Resolution Centre of Canada ("SDRCC") seeking a reduction of the two (2) year period of Ineligibility imposed on him by the CCES. A hearing was held on 4 June 2015 and a decision rendered on 9 June 2015. The reasoning of such decision was received by the Appellant on 23 June 2015 (the "Appealed Decision").

22. In the Appealed Decision, the Athlete was sanctioned with a 16-month period of Ineligibility commencing on the date of sample collection, being 13 December 2014.

23. The Athlete appeals to the Court of Arbitration for Sport (the "CAS") from the Appealed Decision.

III. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

24. On 29 June 2015, the Appellant filed with the CAS his statement of appeal against the International Wheelchair Rugby Federation ("IWRF") and the CWSA challenging the Appealed Decision in accordance with Article R47 *et seq.* of the Code of Sports-related Arbitration (the "Code"). In his statement of appeal, the Appellant requested that this appeal be heard by Prof. Richard H. McLaren as Sole Arbitrator.

25. On 6 July 2015, the IWRF questioned its inclusion in this case and requested more information as to why the Appellant named them as a Respondent.

26. In response, on 8 July 2015, the Appellant explained why the IWRF was named as a Respondent, but agreed to withdraw them as a party to this appeal. The Appellant then proceeded to name the CCES as a Respondent in their place. In such letter, the Appellant requested that the Respondents confirm their acceptance of CAS jurisdiction to hear this appeal.

27. On 13 July 2015, the CCES agreed that it was a proper Respondent to this appeal, and confirmed that the CAS had jurisdiction to hear this appeal. In addition, the CCES confirmed, on behalf of itself and the CWSA, its agreement that this matter be referred to Prof. McLaren as Sole Arbitrator.

28. On that same day, 13 July 2015, the Appellant confirmed that it wished to remove the IWRF as a Respondent in this appeal.

29. On 20 July 2015, the Appellant filed a request for provisional measures in accordance with Article R37 of the Code seeking a stay of the Appealed Decision so as to allow him to compete during the pendency of this appeal.

30. On 30 July 2015, the CCES filed its response to the Appellant's request for provisional measures. No response was filed by the CWSA.

31. On 6 August 2015, the Deputy President of the CAS Appeals Arbitration Division issued an Order denying the Appellant's request for provisional measures.

32. On 7 August 2015, the Appellant filed his appeal brief in accordance with Article R51 of the Code.

33. On 18 August 2015, the CAS Court Office, on behalf of the President of the CAS Appeals Arbitration Division, informed the parties that Prof. Richard H. McLaren had been appointed Sole Arbitrator in this appeal.

34. On 4 September 2015, the CCES filed its answer to the Appellant's appeal brief in accordance with Article R55 of the Code. The CWSA did not file an answer.

35. The parties signed and returned the order of procedure in this appeal as follows: 23 September 2015 – First Respondent; 24 September 2015 – Second Respondent; 24 September 2015 – Appellant.

36. On 22 October 2015, a hearing was held in this appeal at Montréal, Canada. The Sole Arbitrator was assisted by Mr. Brent J. Nowicki, CAS Counsel, and joined by the following:

For the Appellant:	Dr. Emir Crowne, counsel and co-counsel Miganoush Megardichian
For the First Respondent:	Catherine Cadieux, CEO
For the Second Respondent:	Alexandre T. Maltas, counsel and Jeremy Luke, Director CCES

IV. EVIDENCE

37. The Athlete testified that despite being paralysed, his body still receives the pain stimulus which is why he has a prescription for pain medication. He described how he had been addicted to Oxycodone and how he has recently managed to wean himself off the substance, constantly battling the strong withdrawal symptoms of sweating, vomiting, shivering, convulsing and diarrhoea. For a person with his disabilities he requires home nursing care to cope.

38. The Athlete also testified about how his career at age 37 is coming to an end and this plus his financial losses have caused him to lose his identity and to realise that he cannot support himself or his family. To obliterate such thoughts and numb himself to the realities he faces he abused drugs. This interplays with depression and suicidal thoughts which place him in a "dark place".

39. Since agreeing to a provisional suspension from his sport, the Athlete has sought help and testified that he has been off Oxycodone since June or early July of this year, up to the date of the hearing.

40. Dr. Van Neutegem, a sports psychologist with a Ph.D, testified but the Sole Arbitrator did not qualify him as an expert to provide opinion evidence on either addiction or depression giving rise to mental illness, as these areas fall outside his area of expertise. Nevertheless, it is noted that Dr. Van Neutegem has known the Appellant since 2006 and worked with him considerably. Dr. Van Neutegem is currently the High Performance Director of CWSA, having previously been a sports psychologist, and testified as to the confusion surrounding the TUE in Japan and afterwards. He explained that his work as a sports psychologist involves crisis intervention for maladaptive behaviours or other crisis such as career termination or periods of transition.

V. SUBMISSIONS OF THE PARTIES

41. The Appellant's submissions, in essence, may be summarized as follows:

- He suffers from depression and has an addiction, both of which are underlying mental health issues that "are screaming for recognition". No case before the SDRCC, AAA or CAS has dealt with these specific issues in a doping context.

- The AAF was due wholly or largely to the Athlete's crippling addiction to Oxycodone.

- Oxycodone has little sporting benefit for someone in wheelchair rugby.

- The Athlete took Oxycodone as a necessity for pain management, not experimentally or socially.

- As a result of the necessity, he became addicted to the powerful opioid and is now suffering the devastating consequences both personally and professionally of that "irresistible coercion".

- When his mental health and addiction is taken into account, an elimination or reduction in the ban imposed below is warranted.

42. The Appellant offered the witness statements of the following witnesses, being the statements filed at the first instance of this matter:

- the Athlete
- Dr. Van Neutegem
- Dr. Zochowski

43. In his witness statement and his oral testimony, the Athlete explained the circumstances surrounding the initial prescription of Oxycodone and how he came to take street Oxys. He described his participation in the event in Japan which led to his application for a TUE, as well as the events at the Montreal invitation which led to the Adverse Analytical Finding ("AAF"). The Athlete expressed his remorse regarding his situation and humbly requested that the Sole Arbitrator reduce his ban so that he can return to the field and make a difference for his country.

44. The Appellant submitted for consideration in support of his case the following cases:

CAS 2011/A/2615 & 2618; CAS 2013/A/3327 & 3335; AAA No. 52 190 005567 07, CAS 2008/A/1490; CAS 2010/A/2307; CAS 2008/A/1473; Lindmann-Porter v Canadian Cycling Association, SDRCC 05-0027; CCES and Football Canada v White, SDRCC DT 09-0102; CAS 2010/A/2107; CAS 2011/A/2645; CAS 2011/A/2677; CAS 2012/A/2822; CAS A2/2011; CAS 2012/A/2804; CAS 2012/A/3029; CAS 2013/A/3075; CAS 2011/A/2518; CAS 2011/A/2495-2498; UKAD v Warburton and Williams at 30 (UK National Anti-Doping

Panel) (12 Jan. 2015); USADA v Atalelech Ketema Asfaw, AAA Case No. 01-14-0001-4332 (Mar. 10, 2015); and, USADA v LaShawn Merritt, AAA No. 77 190 00293 10 (Oct. 15, 2010).

45. In his appeal brief, the Appellant sought the following requests for relief:

> *25. […]*
>
> *a. His ban be eliminated in its entirety, as he bears no fault or negligence in the circumstances, or*
>
> *b. His ban be reduced to 8-10 months, as he bears no significant fault or negligence in the circumstances.*
>
> *26. Furthermore:*
>
> *a. The Appellant asks for any other relief, remedy or award that this honourable Court may deem appropriate at this time; and*
>
> *b. If permitted, the Appellant asks that the existence of this Appeal Brief be placed on the Court's website, with a summary pertaining thereto.*

46. The First Respondent submitted at the hearing that the timing of the mental health services and support had not occurred by November of 2014.

- The financial losses and inability to compete at the Pan Am Games in Toronto in the summer of 2015 and the recent World Championships in London, England are sufficient punishment.
- The sanction ought to be reduced to 12 months.

47. The First Respondent seeks the following request for relief:

That period of ineligibility is reduced from 16 months to one year.

48. The Second Respondent's submissions, in essence, may be summarized as follows:

- The sole issue before the Sole Arbitrator is whether the Athlete can establish that in all of the circumstances, his degree of fault justifies a reduction in the two-year sanction.
- The Sole Arbitrator below took into account the Athlete's testimony, his issues with depression and the struggles he had experienced with his life. Nevertheless, she still found that he had a high degree of fault. It is submitted that she correctly weighed all of the evidence in reaching her conclusions.
- There is no evidence; in fact there is a complete lack of any medical evidence, justifying a further reduction in sanction.

49. In support of its submissions, the Second Respondent submitted the following cases for consideration:

CAS 2010/A/2307; USADA v. Jessica Cosby, AAA No. 77 190 00543 09; CAS 2011/A/2615 & 2618; CAS 2011/A/2518; USADA v Asfaw, AAA Case No. 01-14-0001-4332; CAS 2013/A/3327; CAS 2012/A/2900; CAS 2007/A/1396 & 1402; CCES v Zach White et al., SDRCC DT 09-0102.

50. The Second Respondent seeks the following request for relief:

"… The Arbitrator's decision is eminently reasonable and it should not be disturbed".

"… [T]he CCES submits that the Athlete's appeal should be dismissed".

VI. JURISDICTION

51. Article R47 of the Code provides as follows:

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

52. Moreover, sub-section 7.14 of the SDRCC Code provides as follows:

In cases arising from competition in an international event or in cases involving International-Level Athletes, the decisions of the Doping Dispute Panel may be appealed exclusively in accordance with the provisions of the Anti-Doping Program.

53. In addition, sub-section 8.20 of the SDRCC Code provides as follows:

In cases arising from Competition in an International Event or in cases involving International-Level Athletes, the decisions of the Doping Tribunal may be appealed exclusively to CAS in accordance with its rules and procedures.

54. The Appellant asserts that he is an International-Level Athlete and thus, the CAS has jurisdiction to hear his appeal. The Sole Arbitrator notes that the Second Respondent confirmed the Appellant's assertion in their letter dated 13 July 2015, and consented to CAS jurisdiction. Moreover, the Respondents confirmed the jurisdiction of CAS when they signed and returned the order of procedure in this appeal.

55. The Sole Arbitrator has no reason to deviate from the parties' agreement on this issue, and confirms that the jurisdiction of the CAS is proper.

VII. ADMISSIBILITY

56. Article R49 of the 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 of a previous agreement, the time limit for appeal shall be twenty-one days from the receipt of the decision appealed against. After having consulted the parties, the Division President may refuse to entertain an appeal if it is manifestly late.

57. As set forth above, sub-section 8.20 of the SDRCC provides that a decision of the Doping Tribunal may be appealed to the CAS in accordance with rules and procedures of the CAS. In this respect, the Sole Arbitrator relies upon the language of Article R49 of the Code and confirms that an appeal shall be filed within twenty-one (21) days of receipt of the decision appealed against.

58. The Appellant received the Appealed Decision on 23 June 2015 and filed his appeal at the CAS on 29 June 2015. The Respondents have not argued to the contrary. Therefore, the Sole Arbitrator confirms that this appeal is admissible.

VIII. APPLICABLE LAW

59. Article R58 of the 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, the application of which the Panel deems appropriate. In the latter case, the Panel shall give reasons for its decision.

60. The Sole Arbitrator confirms that the anti-doping rule violation ("ADRV") occurred in 2014 and therefore, the CADP based upon the 2009 version of the World Anti-Doping Code applies. Any procedural issue would be governed by Swiss law.

IX. MERITS

61. In the first instance decision it was established by the Athlete, and not challenged in this appeal, how the Prohibited Substance entered his body (through the ingestion of a combination of prescription and "street" Oxycodone pills); and that Fentanyl entered his system through the ingestion of the "street" Oxycodone pills. The Athlete further established that his use of both Specified Substances was not intended to enhance performance or mask the Use of a performance-enhancing substance. The CADP permits in Rules 7.42 through 7.45 the period of ineligibility to range from a reprimand to a maximum of two years' period of Ineligibility. The first instance arbitrator weighed all the factors in the evidence before her and concluded that a 16-month period of Ineligibility was appropriate.

62. In setting out these reasons, it is determined that the issues which arose in Japan and surrounding the TUE bear no relationship to this case and merely provide the backdrop to

the facts that do bear upon this case. Therefore, it is considered that those events are irrelevant and have no regard in this matter.

63. The Appellant admitted that he committed an ADRV under Rule 7.23 of the CADP by the presence of the two prohibited substances in his sample. This being a first violation, the CADP imposes under Rule 7.38 a two-year period of Ineligibility. There may be an elimination or reduction of the Ineligibility period because the substances involved were Specified (Rule 7.42) or based upon exceptional circumstances (Rules 7.44 and 7.45).

64. The appeal proceeded on the basis that the only issue to be determined is the elimination or reduction of the period of Ineligibility. In other words, the degree of fault and the appropriate sanction in light of that determination.

A. No Fault or Negligence

65. The Appellant submitted that he bears No Fault or Negligence and on that basis under Rule 7.44 of the CADP the period of Ineligibility should be eliminated. In the alternative, it was plead that the period of Ineligibility should be eliminated under the Specified Substance Rule 7.42, and that all of the applicable specific circumstances have been satisfied.

66. Under either Rule, in order to eliminate the period of Ineligibility, the Sole Arbitrator would have to make such a determination on the basis that addiction by substance abuse or depression made the Athlete not responsible for his actions. Such aliments might well be grounds for consideration of the elimination of the period of Ineligibility. In order to make such a finding there would have to be persuasive evidence and likely expert opinion evidence suggesting that because of his condition he was either not at fault or had very little fault to have committed the ADRV.

67. In this proceeding, there has been no fulfilment of the evidentiary burden placed upon the Appellant to establish the inability to have formulated the decision to take Prohibited Substances because of impairment to the cognitive functions brought on by addiction, depression or mental illness. Indeed, there is a total lack of evidence, other than the Athlete's personal assertion, that he suffers from his asserted afflictions and what the symptoms and consequences would be as a result. For a discussion of the evidence required and why more than was available herein was not satisfactory, see CAS 2010/A/2307, *supra.*

68. For the foregoing reasons of lack of evidence, there is no possibility of issuing an order eliminating the period of Ineligibility. The appeal of the Appellant on this ground is denied.

B. No Significant Fault or Negligence

69. In the alternative, the Appellant submits that: *"His ban be reduced to 8-10 months"* following Rule 7.45. However, that rule only permits a reduction to not less than one half of the otherwise applicable period of Ineligibility, which in this case would be not less than one year.

70. Therefore, this matter must be considered under Rule 7.42 dealing with Specified Substances in order to have a reduction of the period of Ineligibility to the level requested.

C. Specified Substances

71. Under Rule 7.43, the Sole Arbitrator must determine the Athlete's *"degree of fault"* as the criterion in assessing any reduction in the period of Ineligibility. It appears from the reasons at first instance that the Athlete did not submit that he was addicted when he took the street Oxy. Once again, the absence of expert opinion evidence of addiction or mental illness showing a causal connection between the AAF and the addiction or depression hampers the Sole Arbitrator in a determination under Rule 7.43. The mere statement and assertion by the Athlete in this appeal of his afflictions are insufficient to establish the fact. Nevertheless, the Athlete's degree of fault must be determined on the basis of the available evidence.

72. The Appellant must establish why his departure from the expected standard of behaviour of an athlete justifies a reduction in the sanction. In that inquiry, each case will turn on its own facts and the examination of other adjudication decisions does not further the particular case. The Athlete is 37 years of age and is the captain of the team. He is in a leadership role in his sport and has accomplished a great deal as an athlete. He left it to others to determine if he had a TUE, never making a personal inquiry himself. That is not the type of behaviour expected of any athlete, let alone one in a leadership position.

73. The Athlete also deliberately exceeded the prescribed dosage and engaged in acquiring more Oxycodone than his prescription provided for. This was not the action of a cautious athlete trying to comply with the rules of fair play and the World Anti-Doping Code. The Appellant has a high degree of fault and he does little in his testimony to explain his departure from the standard of behaviour of elite athletes. Therefore, on the objective facts the Sole Arbitrator is not inclined to reduce the period of Ineligibility.

74. On the subjective facts, the Athlete is impressive as a person as he provided sincere and thoughtful testimony. The Appellant's testimony regarding the impact of the sanction on him and his family was sincere and generated empathy. Dr. Van Neutegem, while a closely connected person to the Athlete, saw over the years much value in the Athlete. What was particularly persuasive in support of a reduction in sanction is the Athlete's genuine attempts to escape from his past and his use of Oxycodone beyond its prescribed dosage. The Sole Arbitrator does not want to interfere with those efforts on his part and the Athlete is encouraged to keep up his efforts to wean himself away from the substance abuse he believes he has fallen into. At the same time, the Sole Arbitrator was not given any evidence that would justify a further reduction in the period of Ineligibility established by the first instance arbitrator. The circumstances and the degree of fault are fully reflected in a reduction of 8 months from the maximum period of two years. Accordingly, there is no reason to accept the appeal for a further reduction in the sanction.

75. For all of the foregoing reasons, the period of Ineligibility is correctly determined and there should be no adjustment on appeal. The appeal is dismissed.

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The appeal filed by Ian Chan on 29 June 2015 is dismissed.

2. The decision of the Sport Dispute Resolution Centre of Canada dated 23 June 2015 is confirmed.

3. (…)

4. (…)

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