CAS 2019/A/6443 Canadian Centre for Ethics in Sport (CCES) v. Dominika Jamnicky
CAS 2019/A/6593 Dominika Jamnicky v. Canadian Centre for Ethics in Sport (CCES)

ARBITRAL AWARD

delivered by the

COURT OF ARBITRATION FOR SPORT

sitting in the following composition:

President: Mr. Daniel Ratushny, Attorney-at-Law, Toronto, Canada
Arbitrators: Mr. Stephen L. Drymer, Attorney-at-Law, Montreal, Canada
Prof. Richard H. McLaren O.C., Professor of Law, London, Canada

in the arbitration between

Canadian Centre for Ethics in Sport, Ottawa, Canada

Represented by Ms. Luisa Ritacca, Mr. Justin Safayeni and Mr. Stephen Aylward, Attorneys-at-Law with Stockwoods LLP, Toronto, Canada

Appellant/Cross-Respondent

and

Dominika Jamnicky, Guelph, Canada

Represented by Mr. James Bunting and Mr. Carlos Sayao, Attorneys-at-Law with Tyr LLP, Toronto, Canada

Respondent/Cross-Appellant

I. INTRODUCTION

1. The Canadian Centre for Ethics in Sport (the "CCES") brings an appeal (the "Appeal") against the decision (the "Decision") dated 16 August 2019 of the doping tribunal (the "Tribunal") constituted and administered by the Sport Dispute Resolution Centre of Canada (the "SDRCC") which found that Ms. Dominika Jamnicky (the "Athlete") committed an anti-doping rule violation ("ADRV") of Rule 2.1 of the 2015 Canadian Anti-Doping Program (the "CADP") and reduced the sanction applicable under CADP Rule 10.2 to a reprimand.

2. The Athlete also brings an appeal (the "Cross Appeal") against the Decision.

II. PARTIES

3. The CCES is an independent, national, not-for-profit organization based in Ottawa, Canada. It is a signatory to the 2015 World Anti-Doping Code (the "WADC") and is recognized by the World Anti-Doping Agency ("WADA") as Canada's national anti-doping organization responsible for administering the CADP, which implements the mandatory components of the WADC.

4. The Athlete is an elite-level Canadian triathlete who competes at an international level.

III. FACTUAL BACKGROUND

5. Below is a summary of the relevant facts based on the Parties' written submissions, pleadings and evidence adduced and at the hearing. Additional facts found in the Parties' written submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows.

6. On 24 April 2018, eight days after returning to Canada from Australia where she had competed in the Commonwealth Games and visited family, the Athlete underwent an out-of-competition doping control test administered by the CCES.

7. On 11 May 2018, the CCES was notified by the WADA accredited Laboratoire de contrôle du dopage INRS – Institut Armand-Frappier (the "INRS Laboratory") that the Athlete's urine sample had returned an adverse analytical finding ("AAF") due to the presence of three clostebol metabolites, one of which, M1, was estimated at a concentration of 0.15 ng/mL or 0.2 ng/mL.

8. Clostebol is listed on the WADA 2018 Prohibited List of Substances and Methods (the "Prohibited List") under Section S1.1.a. Exogenous Anabolic Androgenic Steroids and is not a "*Specified Substance*" under such list.

9. On 14 May 2018, the CCES informed Triathlon Canada's High-Performance Director Mr. Eugene Liang ("Mr. Liang") that it had commenced an initial review regarding the Athlete's AAF.

10. On 19 May 2018, the Athlete agreed to a voluntary provisional suspension which prohibited her from competing prior to a decision being rendered after a hearing conducted under CADP Rule 8.

11. On 18 June 2018, the CCES asserted that the Athlete had committed an ADRV and proposed a period of ineligibility of four years.

12. On 6 July 2018, the Athlete filed her request for a hearing before the Tribunal.

13. On 6 and 7 February 2019, a hearing before the Tribunal was held in Toronto, Canada.

14. On 31 May 2019, the Tribunal issued a partial final award with the following findings:

> "*1. The Athlete has not discharged her burden of proving the source of her AAF,*
>
> *2. The Athlete has discharged her burden of proving that her AAF was not intentional.*"

15. On 16 August 2019, the Tribunal issued a final award with the following findings:

> "*a) The Athlete has committed an anti-doping rule violation.*
>
> *b) The Athlete's sanction is reduced to a reprimand.*"

IV. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

16. On 6 September 2019, the CCES filed its Statement of Appeal with the Court of Arbitration for Sport (the "CAS"), pursuant to Article R48 of the Code of Sports-related Arbitration (the "Code"), to challenge the Decision. The Statement of Appeal included the Appellant's nomination of Mr. Stephen L. Drymer as arbitrator.

17. On 13 September 2019, (i) the deadline for filing of the CCES' Appeal Brief was extended until 23 September 2019 in accordance with Article R32 of the Code, and (ii) the Respondent nominated Professor Richard H. McLaren as arbitrator.

18. On 23 September 2019, the CCES filed its Appeal Brief pursuant to Article R51 of the Code.

19. On 7 October 2019, the CAS Court Office, pursuant to Article R54 of the Code, appointed the Panel in this procedure as follows:

President:	Daniel Ratushny, Attorney-at-Law, Toronto, Canada
Arbitrators:	Mr. Stephen L. Drymer Attorney-at-Law, Montreal, Canada
	Prof. Richard H. McLaren OC, Professor/Barrister, London, Canada

20. On 21 October 2019, the Athlete filed her (i) Answer pursuant to Article R55 of the Code, (ii) Statement of Cross Appeal pursuant to Article R48 of the Code, and (iii) Cross Appeal Brief pursuant to Article R51 of the Code.

21. On 4 November 2019, the deadline for filing of the CCES' Answer to the Cross Appeal was extended until 25 November 2019 in accordance with Article R32 of the Code.

22. On 25 November 2019, the CCES filed its Answer in respect of the Cross Appeal.

23. On 27 and 29 January 2020, the CCES and the Athlete, respectively, signed and returned the Order of Procedure in respect of this procedure.

24. On 28 and 29 January 2020, pursuant to Article R57 of the Code, a hearing was held in Toronto, Canada. The Panel was assisted by CAS Managing Counsel, Mr. Brent J. Nowicki, and joined by the following:

    For the CCES:

    Mr. Kevin Bean (CCES Representative)

    Mr. Justin Safayeni (Attorney-at-Law)

    Mr. Steven Aylward (Attorney-at-Law)

    Mr. Richard Mahal (Trainee)

    For the Athlete:

    Ms. Dominika Jamnicky (Athlete)

    Mr. James D. Bunting (Attorney-at-Law)

    Mr. Carlos Sayao (Attorney-at-Law)

    Mr. Kyle Boorsma (Athlete's Partner)

    Ms. Janna Jamnicky (Athlete's Mother)

    Mr. Vlad Jamnicky (Athlete's Father)

25. At the hearing, the following witnesses were called to testify: (i) by the CCES, Prof. Christiane Ayotte, Dr. Ian Lean (by telephone), Dr. Martin Appelt (by telephone), and (ii) by the Athlete, Dr. Melinda Shelby (by telephone), Dr. Tomás Martin-Jiménez (by telephone), Mr. Milind Bhargava (by telephone) and Mr. Steven Overgaard (by telephone).

26. At the outset of the hearing, the Parties confirmed that they had no objections to the constitution of the Panel. The Parties were given the opportunity to present their cases, make their submissions and arguments, and answer questions asked by the Panel. At the conclusion of the hearing, the Parties confirmed that they had no complaint regarding the conduct of the proceedings and that their right to be heard had been fully respected.

27. On 20 March 2020, the Parties were notified of a recent Award issued by the CAS in the case of *CAS 2019/A/6313 Jarrion Lawson v. IAAF* and were invited to file any observations on such Award.

28. On 26 March 2020, the Parties filed their respective observations on the *Lawson* Award.

V. SUBMISSIONS OF THE PARTIES

29. While the Panel has considered the entirety of the Parties' submissions in the present proceeding – including all of the facts, allegations, arguments, documentary and testimonial evidence presented by them both in writing and orally – it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

30. This section summarizes the substance of the Parties' main allegations and arguments as set out in their written and oral submissions, pleadings and evidence. Additional elements of the Parties' submissions, pleadings and evidence may be set out, where relevant, in connection with the legal discussion that follows.

A. The CCES' Submissions

31. In its Statement of Appeal and Appeal Brief, the CCES requests the following relief:

> "*a) The appeal of CCES is admissible.*
>
> *b) The Final Award is set aside.*
>
> *c) The Athlete is sanctioned with a period of Ineligibility of two years, starting on the date on which the CAS award enters into force. Any period of provisional suspension or Ineligibility served by the Athlete before the entry into force of the CAS award shall be credited against the total period of Ineligibility to be served.*
>
> *d) CCES is granted an award of costs."*

32. In its Answer to the Cross Appeal, the "*CCES respectfully requests a declaration confirming the Athlete's ADRV and that this appeal be dismissed without costs*".

33. The CCES' submissions, in essence, may be summarized as follows:

(i) Regarding the Tribunal's application of the principle of proportionality:

34. After having found that the Athlete's ADRV was not intentional and that she had not proven the source of her AAF, the Tribunal "*erred and exceeded its jurisdiction*" when it reduced, based on the principle of proportionality, the Athlete's sanction from the presumptive two-year period of ineligibility under CADP Rule 10.2.2 (the "Two-Year Sanction") to a reprimand.

35. The Tribunal recognized the express requirement under the CADP that an athlete establish how a prohibited substance entered his or her system before the Two-Year Sanction can be reduced under CADP Rules 10.4, 10.5.2 or 10.5.1.2. Nevertheless, the Tribunal proceeded to rely on proportionality to bypass the clear and explicit operation of the CADP and reduce the Two-Year Sanction to a reprimand. "*This marks an unprecedented, unreasonable and dangerous expansion in the use of proportionality to effectively rewrite anti-doping rules – and to significantly weaken the 'source identification requirement' that has served as a cornerstone principle of those rules for*

years." Except for the Decision, the CCES is not aware of any decision by a doping tribunal which applied the principle of proportionality to a post-2015 set of anti-doping rules. The Decision is also the only decision to apply proportionality to circumvent the express requirement to prove the source of the AAF in order to reduce the Two-Year Sanction.

36. Under the CADP, and even under previous versions of the Canadian Anti-Doping Program (and World Anti-Doping Code), the role of proportionality is, and has been limited to, filling a "gap or lacuna" in the rules. No such gap or lacuna exists in the present case. In CAS 2006/A/1025 *Mariano Puerta v ITF*, "*which remains the leading case cited by proponents of proportionality*", the CAS panel was clear that proportionality did not afford doping tribunals general discretion to arrive at what they might consider to be a fair result in a particular case but rather, that proportionality could be applied only in those extremely rare cases where the anti-doping rules in question plainly fail to contemplate or address a particular scenario. Unlike the unique set of facts in *Puerta*, the CADP Rules contemplate and prescribe a clear sanction for the exact scenario in the present case – an athlete who committed an ADRV that was not intentional, but who cannot establish how the prohibited substance entered her system.

37. The CADP Rules already reflect proportionality and such principle has a very narrow role to play, if any, under such rules. In his legal opinion requested by WADA, former President of the European Court of Human Rights Jean-Paul Costa emphasized the importance of equal treatment of athletes and sanction harmonization in concluding that WADC Rules 10.2.1 and 10.2.2 (which are substantially identical to CADP Rules 10.2.1 and 10.2.2) are "*'compatible with the principles of international law and human rights' including 'notions of proportionality of sanctions and prohibition of excessively severe sanctions'*".

38. Several CAS panels have openly suggested that proportionality may have no role to play at all in respect of the post-2015 anti-doping rules. In *CAS 2018/A/5546 José Paolo Guerrero v FIFA*, the CAS panel summarized the current state of proportionality jurisprudence as follows:

> "*86. Additionally,* ***the CAS jurisprudence since the coming into effect of WADC 2015 is clearly hostile to the introduction of proportionality as a means of reducing yet further the period of ineligibility provided for by the WADC (and there is only one example of its being applied under the previous version of the WADC).*** […]
>
> *87. In CAS 2017/A/5015 & CAS 2017/A/5110, the CAS Panel, with a further reference to CAS 2016/A/4643, confirmed* ***the well-established perception that the WADC "has been found repeatedly to be proportional in its approach to sanctions, and the question of fault has already been built into its assessment of length of sanction****" (emphasis added), (para. 227) and was vouched for by an opinion of a previous President of the European Court of Human Rights* […]
>
> […]
>
> *89. The Panel is conscious of the much quoted legal adage "Hard cases make bad law", and* ***the Panel cannot be tempted to breach the boundaries of***

> ***the WADC (or FIFA ADR) because their application in a particular case may bear harshly on a particular individual. Legal certainty is an important principle to depart from the WADC would be destructive of it and involve endless debate as to when in future such departure would be warranted. A trickle could thus become a torrent; and the exceptional mutate into the norm***.
>
> […]"

39. The source identification requirement is the logical prerequisite to assessing the Athlete's degree of "*Fault*" (as defined in the CADP) in relation to her AAF. Without being able to conduct such factual assessment, it is not possible to validly justify a conclusion that the Two-Year Sanction is disproportionate. In fact, none of the factors cited by the Tribunal in the Final Award explain why the Two-Year Sanction in this case is somehow disproportionate, or why a reprimand is appropriate.

40. To uphold the Decision would allow certain future athletes to "*rely on the same vague conception of proportionality as the Tribunal in order to avoid the presumptive minimum sanction, all without the risk and rigours of a nuanced Fault analysis"*. It would also be a gross injustice not only to those athletes who faced the Two-Year Sanction because they were not able to prove the source of their AAF, but also to those athletes who have gone through the difficulty of proving source and have endured periods of ineligibility. There is nothing exceptional about this particular case and there is no principled basis for treating the Athlete differently than other athletes who, despite not intending to cheat, were not able to establish how a prohibited substance entered their system.

(***ii) It is extremely unlikely that clostebol is in Australian or Canadian Meat:***

41. The expert evidence of Dr. Ian Lean ("Dr. Lean"), establishes that based on several facts, it is "*extremely unlikely, indeed very improbable, that the athlete consumed meat products in Australia that contained clostebol*". First, it is illegal to administer clostebol to food-producing animals in Australia and there is no evidence of such use. Second, only 0.066% of beef consumed in Australia is imported, and Australia does not import meat from any country that uses clostebol in food-producing animals. Third, there are legal alternatives to clostebol as a growth promoter for livestock in Australia, which alternatives, contrary to untrue assertions made by the Athlete's expert Dr. Tomás Martin-Jiménez ("Dr. Martin"), do not require a prescription or veterinary supervision and are less costly and much more efficient than clostebol. Finally, Australia exports a significant amount of its beef to countries that test for the presence of clostebol, making its use risky for Australian livestock producers.

42. Dr. Martin's suggestion that some Australian animal food producers may illegally use clostebol is not supported by the evidence. In fact, the United States Food Safety Inspection Service (the "FSIS") data relied upon by him actually indicates that of the nearly 32,500 shipments of Australian meat rejected by the U.S. between 1 October 2015 and 29 June 2019, none were rejected because of a failed laboratory test for chemical or drug residue and in fact, almost all rejections were due to labelling, shipping or packaging issues.

43. The expert evidence of Dr. Martin Appelt ("Dr. Appelt") confirms that "*it would be an extremely rare and unlikely occurrence*" for Canadian meat to be contaminated with clostebol. First, it is illegal to administer clostebol to food-producing animals in Canada, where six legal hormonal growth promoters are approved for use in beef cattle. Moreover, the use of clostebol would be highly impractical and inefficient, requiring repeated physical injections and a high degree of human interaction. Similar to Australia, Canada does not permit the importation of meat for human consumption which has been treated with clostebol and only imports meat from countries that meet Canadian requirements. Dr. Appelt confirms that the Canadian Food Inspection Agency (the "CFIA") does not test meat for clostebol, but explains that it is impossible for the CFIA to test for the millions of compounds or contaminants that could be present in meat products. In fact, the CFIA must focus its testing on substances that, unlike clostebol, are or are at risk of being used.

44. The FSIS data relied upon by Dr. Martin to suggest that Canadian meat producers may be using illegal growth hormones actually supports the opposite conclusion, since only a single shipment of Canadian meat, representing only 0.000001% of the more than 500,000,000 pounds of beef exported from Canada to the U.S. during 2015 alone, was rejected over the course of 2015 and 2016.

45. Professor Christiane Ayotte also concluded that meat consumed by the Athlete was "'*extremely unlikely*'" as an explanation for the Athlete's AAF. Only one of approximately 50,000 athlete urine samples tested over the past eight years at Australia's WADA accredited laboratory contained clostebol metabolites, and such AAF suggested intentional use rather than contamination. If Australian meat was subject to clostebol contamination, one would expect a higher prevalence of clostebol-positive test results. Similarly, the Athlete's AAF was only the second positive test result for clostebol out of all Canadian athlete urine samples tested over the past 22 years (and the other AAF suggested intentional doping). Given the INRS Laboratory's ability to detect clostebol metabolites at low levels, there would have been more than two positive AAFs for clostebol over the past two decades if Canadian meat was being treated with clostebol.

> "*Professor Ayotte's basic point is that one must consider the prevalence of positive samples from a particular region of the world when evaluating the likelihood of meat contamination in that region. For clenbuterol, the prevalence is clearly linked to countries such as Mexico, Guatemala and China. For clostebol, the prevalence is linked to Central and Southern American countries (Honduras, Nicaragua, Costa Rica, Brazil), where it is legally available in creams. No similar data exists linking clostebol to Australia or Canada.*"

46. Professor Ayotte also opined that it is extremely unlikely that an oral dose of clostebol from contaminated meat ingested by the Athlete in Australia would be detected in a urine sample taken some nine or ten days later in Canada, since according to her, the expected detection window is shorter than one week.

(iii) The Athlete's evidence only says that it is scientifically "possible" that Australian or Canadian meat was contaminated with clostebol:

47. The Athlete's experts do not contest the conclusion that clostebol contamination in Australian or Canadian meat is extremely unlikely. They only assert that it is possible that the Athlete's AAF was caused by contaminated meat in one of those countries.

48. However, there is absolutely no evidence of clostebol being used in Australian or Canadian meat production and similarly, no evidence that the type of meat ingested by the Athlete in either country contained clostebol. Instead, the foundations for the opinions of Dr. Shelby and Dr. Martin are speculative and flawed and only confirm the improbability that the Athlete's AAF was caused by clostebol-contaminated Australian or Canadian meat:

- The Athlete relies heavily on the fact that the National Residue Survey (the "NRS") conducted by the Australian Department of Agriculture does not specifically test for clostebol. However, Dr. Lean explains that the NRS is not able to test for every conceivable substance that could find its way into meat and in fact, the decision to not test for clostebol reinforces that it is not being used by Australian food producers. Moreover, the NRS results establish that Australian meat producers have rates of regulatory compliance that are close to 100% during the past eight years, which further undermines Dr. Martin's suggestion that some Australian food producers may operate illegally.

- The prevalence of animals being illegally administered clenbuterol in Mexico is simply not relevant to an analysis of the likelihood of clostebol being used in Australian or Canadian meat production. Not only has Mexico's meat regulation enforcement failed, but Mexican consumers prefer the type of meat produced with clenbuterol. Moreover, unlike clenbuterol, which might be combined with legal anabolic agents in an attempt to carry out very aggressive growth promotion, clostebol is an anabolic steroid similar to other anabolic steroid products already legally available in Australia.

- The evidence of Milind Bhargava ("Mr. Bhargava") establishes how difficult it would be for an Australian or Canadian meat producer to obtain clostebol preparations over the dark web. Not only is it extremely difficult to even access the dark web, but Mr. Bhargava was able to locate only a single possible dark web source of clostebol preparations for cattle, and the ability of that user to actually deliver clostebol was never established.

- The two Belgian studies from the early 1990s that reported finding clostebol in urine samples after the ingestion of clostebol-contaminated meat involved minced beef only, in which clostebol is most likely to appear, according to such studies. There is no evidence that the Athlete ingested minced beef, except from a meal in Canada on 18 April 2018, and there is no evidence that other types of beef has resulted in clostebol being revealed in urine samples.

- The 1994 article titled "*Survey of the Hormones Used in Cattle Fattening Based on the Analysis of Belgian Injection Sites*" (the "Belgian Study") described by Dr. Martin is extremely limited in scope, is outdated and contains no information about the use of clostebol (i) in Australia or Canada at any point in time, and (ii) at any time beyond publication of the Belgian Study in December 1994.

Moreover, such study reflects the use of clostebol in an environment where livestock producers had almost no access to legal animal growth hormones, which is not the case in present-day Australia or Canada. Essentially, the Belgian Study is of no value to the present case as it completely fails to support the Athlete's theory of meat contamination from Australian or Canadian meat.

- The Athlete's only purported evidence of illegal steroids of any kind being used in Australian meat is a single passing statement contained in a 2016 article, which vaguely refers to reports from Russian custom authorities in respect of contaminated meat originating from Australia. Such supposed evidence is in fact completely unsubstantiated, unreliable and should be given no weight.

- The scientific literature does not support the Athlete's theory of contamination from Australian meat because "[t]*he longest reported detection window for clostebol identified by any of the experts in this case is the Balcells 2016 study, where the M1 metabolite was found to be 'detectable only for 5 to 6 days' after ingestion* […] *the fact remains that there is no literature that would support the conclusion that the detection window for M1 would be anything close to nine days, under any scenario or conditions*". And yet, the Athlete left Australia on 15 April 2018 and was tested on 24 April 2018. Moreover, Professor Ayotte concludes that even if a full dose of clostebol was ingested, the detection period for clostebol metabolite M1 would be less than one week.

(iv) The Athlete made no effort to investigate her theory of meat contamination:

49. Despite assertions to the contrary, the Athlete did not make any effort or take any steps to contact the producers or vendors of the Canadian and Australian meat that she allegedly consumed in order to investigate and substantiate her meat contamination theory. Moreover, the evidence suggests that meat ingested by the Athlete was from vendors that are opposed to the sale of imported meat and/or meat containing growth hormones.

50. The Athlete's assertion that Dr. Lean himself confirmed that it would be very difficult to establish the origin of a particular piece of purchased meat is a mischaracterization of Dr. Lean's evidence. In fact, Dr. Lean did not attempt to trace the source of meat consumed by the Athlete, except for a particular sausage. Dr. Lean explains that tracing the origin of processed meats involving meat from multiple sources is difficult, but the same is not true of non-processed meat products such as steak and chicken, or meat products purchased at restaurants or markets, which would be traceable given Australia's meat tracking requirements.

(v) The Athlete has not identified all possible sources of clostebol:

51. The list of products (the "Product List") which the Athlete asserts is an exhaustive list of all supplements, medications and products that she used or came into contact with during the time period between her previous doping control test on 21 January 2018 and the 24 April 2018 doping control test that resulted in her AAF (the "Pre-Test Period") is not an accurate and reliable list and further, all items on the Product List are possible sources of clostebol:

- The Product List was created weeks or even months after the Pre-Test Period, which raises doubts that it accurately represents a definitive and exclusive list of all products with which the Athlete came into contact during such period.

- The online daily training journal maintained by the Athlete (the "Training Journal") does not enhance the reliability of the Product List, since the Training Journal is also not a contemporaneous recording and does not include any information specifically about medications, supplements, creams or food she consumed or came into contact with. "*Instead, the Athlete explains that the training journal helped her figure out her daily training routine, and from there she would try to re-create what products she might be taking on those training days. Other products unrelated to training – such as personal and beauty creams – are not reflected in, or linked to, the training journal at all*".

- Despite the Athlete's assertion that her training and living conditions were highly controlled during the Pre-Test Period, she spent the weeks prior to her 24 April 2018 doping control test based at various different settings, including with her cousin in Australia, at a residential home shared with five other athletes and at the Athlete's Village.

- Various pharmaceutical products, dermatological creams and sprays contain clostebol, which is generally available from a number of legal and illegal sources. Even the Athlete's expert Dr. Shelby acknowledged that there are multiple scenarios that could explain the Athlete's AAF.

- Even if the Product List is an accurate and exhaustive list, each product contained thereon is a possible source of clostebol and 13 of the 18 products on the Product List have never been tested for the presence of clostebol. Even the Athlete's expert Mr. Steven Overgaard ("Mr. Overgaard") acknowledged that product contamination can never be completely ruled out unless proper testing has been conducted on specific products that were consumed, which did not occur in the present case.

- In arriving at his conclusions in respect of possible contamination of any of the items on the Product List, "*in many cases Mr. Overgaard's investigative steps, or the results of his investigative efforts, were incomplete and deficient* […] *Mr. Overgaard simply did not have the necessary facts to properly evaluate the likelihood of clostebol contamination.*". Not only did Mr. Overgaard fail to communicate with relevant manufacturers of the products on the Product List, his conclusions fail to consider certain considerations, including that "national brand companies" might indeed experience contamination issues, that products might contain unlisted contaminants and that product contamination might occur after a product has left the manufacturing facility.

- Anti-doping jurisprudence reinforces that limited weight can be placed on an athlete's word, even where the athlete appears or is credible and makes a good impression. Simply put, the Athlete's word is not sufficient to establish that no item, substance or product could have been missed on the Product List.

(vi) The items on the Product List are not less likely sources of clostebol than contaminated meat:

52. There is no evidence, expert or otherwise, to support the assertion that the items on the Product List were less likely to contain clostebol compared to meat consumed in Australia or Canada.

53. The opinion of Professor Ayotte, which was unchallenged and uncontested by any other expert evidence, is that all of the identified potential sources of the Athlete's AAF were highly unlikely and that she is not able to say that one source is less likely than another source. With respect to the consumption of meat in Australia or Canada, as one potential source, and the products on the Product List as another potential source, Professor Ayotte's view was that "*both are equally extremely unlikely*.

54. To conclude that other possible sources of clostebol are less likely than the Athlete's meat contamination theory would be especially dangerous, considering the disproportionate time, energy and effort spent investigating such theory and the fact that not a single piece of evidence substantiates clostebol use in Australian or Canadian meat. By contrast, the only investigative efforts made in respect of the Product List are reflected in the report of Mr. Overgaard, which is not reliable and at the very least, does not allow the Panel to carefully determine if such items are more or less likely to contain clostebol than meat in Australia or Canada.

(vi) The Decision of the Tribunal

55. In the Decision, the Tribunal noted five possible pathways that could explain the Athlete's AAF: (i) by contaminated product, (ii) by intimate contact, (iii) by sabotage injection, (iv) by intentional injection, and (v) by contaminated meat. The CCES accepts that the intentional injection pathway can be eliminated, but as with the contaminated meat pathway, the sabotage and intimate contact pathways remain possible, although highly unlikely explanations.

56. Contrary to the Athlete's submissions, the Tribunal did not accept or make any determination in respect of the Athlete arguments in favour of "*a departure from the normal approach to the burden of proof, which ordinarily requires a party who bears an evidentiary burden to establish a fact as being more likely true than not true*". In particular, the Athlete's approach, which is based on *CAS 2011/A/2384 UCI v. Alberto Contador Velasco & RFEC* and similar decisions that follow it, purports to discharge her burden by first, establishing all possible sources of contamination, and then, by process of elimination, disproving each alternative source to arrive at her own proposed theory.

(vii) The Athlete has not met the Contador Test:

57. The Athlete's evidence in support of her meat contamination theory is clearly insufficient to meet the required standard of proof. The Athlete's experts merely opine that such a theory is "possible" while the CCES' experts have characterized it as "extremely unlikely".

58. The Athlete is not able to rely on the "most likely possibility" approach to elevate her extremely unlikely explanation to one that satisfies the balance of probability threshold under the CADP because, even if such approach were accepted as a valid means to prove the source of her AAF, she is still unable to satisfy the three requirements of the Contador approach, which properly understood, are (i) a credible explanation of how the prohibited substance entered her body – in the present case the Athlete's meat contamination has been proven to be highly unlikely, (ii) the specific origins of the meat in question – in the present case the Athlete has failed to identify the butcher or farm or meat producer from which her alleged contaminated meat was sourced, and (iii) identification and elimination of all other possible sources, or at least a demonstration that each other possible source is less likely than meat contamination – in the present case, the relevant facts about other explanations for the Athlete's AAF are not known.

59. It is insufficient for the Athlete to advance a theoretically possible theory to explain her AAF, along with a finite number of other possible theories and then to eliminate those other theories in satisfaction of her burden of proof on the balance of probability:

(a) Disapproval of the "most likely possibility" approach:

60. The "most likely possibility" approach is a flawed analytical framework and the CCES strongly opposes its use under the CADP: "[I]*t is important to recognize, at the outset, that anti-doping tribunals and common law courts alike have commented disapprovingly on the logic and implications of the 'most likely possibility' approach*".

61. The essence of the line of reasoning which the Athlete asks this Panel to adopt and apply in the present case, is described by Lord Brandon in *Rhesa Shipping Co. SA v. Edmonds (1985) 2 All ER 712* "*The Popi M*", which has been cited with approval in Canadian courts and by CAS panels, as follows: "'*How often have I said to you that, when you have eliminated the impossible, whatever remains, however improbable, must be the truth?*'" In that case, Lord Brandon provided three reasons why it would be inappropriate to apply such line of reasoning, all of which reasons apply in the present case:

- First, there are cases where a just determination on the facts is not possible on the evidence and the decision-maker may only decide based on the burden of proof; that is, that the party required to discharge the burden of proof has simply not done so. In the present case, the Panel is not forced to decide between competing theories as to the source of the Athlete's AAF, and must only determine if the Athlete has met her burden of proof under the CADP.

- Second, to apply such line of reasoning, would require that all relevant facts are known so that all possible explanations, except for the one extremely improbable explanation, can be eliminated. Such a high threshold is not met in the present case.

- Third, if it is established that an explanation is highly improbable, accepting such explanation on a balance of probability "*is an affront to common sense*". This is particularly applicable to the present case, where the evidence establishes that the Athlete's meat contamination theory is extremely unlikely.

62. Even if, despite the inherent weaknesses within the "most likely possibility" approach, such framework was to be adopted in the present case, it is of no use to the Athlete, who has failed to put forward a credible explanation for her AAF; that is, she has not provided a reasonably likely explanation substantiated by facts and evidence but rather, has advanced an extremely unlikely theory.

(b) The consequences of adopting the Athlete's approach:

63. To accept the Athlete's meat contamination theory on the balance of probabilities would fundamentally disrupt established jurisprudence which sets out stringent requirements for proving meat contamination. As with the present case, meat contamination is often advanced by athletes as an explanation for an AAF, but is rarely accepted as tribunals require that the athlete establish the specific origins of the contaminated meat and also, convincing evidence that contamination is likely to have occurred in connection with the origin of such meat – both of which requirements are not met in the present case:

> "*The dangers of departing from a careful and probing assessment of any claim of meat contamination, and adopting the approach urged by the Athlete in this case, are both obvious and significant. There would be virtually no impediment to athletes claiming that prohibited substances in their samples arose from food contamination, demonstrating that this is technically "possible" (as it will be for many anabolic steroids), triggering the Contador framework, and then providing a self-selected list of other purportedly 'less likely' sources to get them across the balance of probabilities threshold*."

(c) The Athlete has not provided a credible explanation for her AAF and a theoretical possibility of contamination is insufficient

64. The clear and credible evidence of Dr. Lean, Dr. Appelt and Professor Ayotte establishes that the Athlete's meat contamination theory in respect of her AAF is extremely unlikely. Such evidence is uncontradicted – even the Athlete's expert Dr. Shelby accepts that the probability of an athlete testing positive from eating contaminated meat is likely to be extremely low.

65. The Athlete's extremely unlikely, but theoretically possible theory for her AAF does not constitute a credible explanation that might satisfy the Athlete's burden. "*The general possibility of a prohibited substance being used in the course of treating food-producing animals has never been enough to make out a case of meat contamination on a balance of probabilities."*

66. A finding that the Athlete's highly unlikely theory satisfies the "credible explanation" requirement would seriously erode such requirement and would be in conflict with the notion of proof on a balance of probability.

(d) *UCI v. Burke*, *Gomez* and *Guerrero*:

67. Two cases relied on by the Athlete in the present case, when examined more closely, do not assist the Athlete.

68. In *CAS 2013/A/3370 UCI v. Burke*, the CAS panel found that the Athlete had met the balance of probability standard based on (i) evidence which established that contaminated drinking water was a credible explanation for the athlete's AAF, and (ii) the fact that other possible sources of the athlete's AAF could be ruled out.

69. In *José Alberto Arriaga Gomez* (FISA decision 22 June 2015), the Panel accepted that the athlete's AAF was the result of having eaten contaminated meat in Mexico. However, *Gomez* can also be factually distinguished from the present case on several grounds, including that (i) Mexico is well known for having contaminated meat and significant regulatory problems in its meat industry, (ii) the prohibited substance was available and was known to be used in the Mexican meat industry, (iii) the athlete established where he had eaten the contaminated meat, and (iv) the athlete effectively volunteered for the anti-doping control test.

70. The third, more recent case of CAS 2018/A/5546 *José Paolo Guerrero v FIFA* reinforces that (i) it is for the athlete to establish the source of the prohibited substance, (ii) evidence of a possible explanation is not sufficient to establish source, which must be proven with evidence, not speculation, and (iii) the tribunal is not forced to decide between competing source explanations – it may conclude that no source is proven:

"*In short, the present case in support of meat contamination bears no resemblance to evidentiary basis for contamination in cases such as Burke, Gomez and Guerrero. In those cases, the evidence demonstrated that contamination was, at the very least, a credible explanation that was reasonably likely to explain the prohibited substance. Here, the evidence points to the opposite conclusion. Again, even the Athlete's own experts going* [sic] *no further than stating contamination was "possible".*"

(e) The Athlete has failed to identify the origins of the contaminated meat:

71. In CAS 2016/A/4563 *WADA v. Egyptian Anti-Doping Organization & Radwa Arafa Abd Elsalam*, the CAS was clear that in meat contamination cases, the identification of the origin of such meat is a minimum requirement. In each of *Burke* (water from a specific well), *Gomez* (meat from a specific barbecue) *Guerrero* (tea consumed at a specific time and place) and *Contador* (meat from a specific Spanish butcher), the identification requirement was met.

72. The Athlete has failed to identify the origin of her allegedly contaminated meat (and did not even attempt to do so) and, in such cases, where an athlete instead relies on a number of meals taken over a period of time, anti-doping tribunals have consistently refused to accept meat contamination as the source of the AAF.

(f) The Statistical Data must be considered:

73. The relevant statistical data forms a critical part of the totality of the evidence in this case. Tens of thousands of athletes in Australia and Canada have been subject to doping control tests over the course of several years and, except for one positive result in each country (where the samples also contained other steroids, suggesting intentional doping), no other athlete apart from the Athlete has tested positive for clostebol. Such statistics permits a strong inference against the Athlete's meat contamination theory and further, CAS Panels (including in CAS 2015/A/4049 *Begaj v. IWF*) have relied upon

similar statistics when evaluating whether an athlete has proven the source of a prohibited substance on a balance of probabilities.

(viii) Alternatively, Contador should not be followed:

74. If the Panel accepts the Athlete's interpretation of *Contador* and determines that she has established the source of clostebol, then the Panel should not follow *Contador* for the reasons already summarized and also because (i) *Contador* relies heavily on Swiss law in respect of the burden of proof and its application, but Swiss law does not apply to, and has no role to play in, the present dispute, and (ii) the *Contador* approach is relevant to cases where the anti-doping authority does not limit itself to challenging the athlete's theory of ingestion but rather, advances an alternative theory of ingestion, which the CCES did not do in the present case.

(ix) The Athlete has not proven No Fault or Negligence or No Significant Fault or Negligence:

75. A finding of No Fault under the CADP requires identification of the source of the Athlete's AAF. The Athlete has not been able to do so in the present case and, since she has failed to establish how clostebol entered her system, the Panel is not able to assess her degree of Fault. "*This is confirmed by a long line of CAS jurisprudence and is codified in the CADP Rules.*"

B. The Athlete's Submissions

76. In her Answer, the Athlete requests the following relief:

> "*(a) Dismissing the CCES's Appeal;*
>
> *(b) Granting the relief sought by way of Cross Appeal, and*
>
> *(c) Awarding Domi all costs (including legal fees) incurred in connection with this proceeding."*

77. In her Statement of Cross Appeal and Cross Appeal Brief, the Athlete requests the following relief:

> "*(a) Setting aside the Final Award (and consequently also the Partial Final Award) issued by the SDRCC Doping Tribunal;*
>
> *(b) Declaring that Domi has not committed an ADRV because her AAF resulted from the consumption of meat;*
>
> *(c) In the alternative, if Domi is found to have committed an ADRV, imposing either:*
>
> > *(i) no period of ineligibility; or*
> >
> > *(ii) in the alternative, a period of ineligibility of no more than twelve months, beginning on the date the CAS award enters into force but with a credit for time served by Domi on provisional suspension, such that the period of ineligibility is fully served; and*

(d) Awarding Domi all costs (including legal fees) incurred in connection with this proceeding."

78. The Athlete's submissions, in essence, may be summarized as follows:

(i) The source of the Athlete's AAF was contaminated meat

79. The independent expert report of Dr. Melinda Shelby of Aegis Sciences Corporation dated 21 October 2019 (the "Shelby Report") sets out four conceivable explanations for the trace amount of clostebol metabolites found in the Athlete's samples in an estimated concentration of 0.15 ng/mL as follows:

(a) intentional or purposeful administration (the "Intentional Injection Theory"),

(b) direct application or exposure to clostebol through intimate contact with an individual that has applied clostebol for medicinal purposes (the "Intimate Contact Pathway"),

(c) application of a product such as a cream or spray that contains clostebol, or oral consumption of clostebol such as through a product (supplement or medication) that contains or is contaminated with clostebol (the "Contaminated Product Pathway"), and

(d) the Athlete consumed a meat product containing clostebol while she was in Australia or Canada (the "Meat Pathway").

(a) The Intentional Injection Theory:

80. The CCES did not appeal the Tribunal's clear rejection of the theory that the Athlete intentionally injected herself with clostebol. Nevertheless, the Panel should also come to this conclusion because, in order to determine the source of the Athlete's AAF, the Panel must consider each of the finite set of conceivable explanations before deciding as to the most likely pathway.

81. Even though from toxicological perspective, it is conceivable that the Athlete's AAF could have been from intentional injection of clostebol, the evidence establishes that the Athlete would have had to either smuggle clostebol into, or illegally source clostebol in, Australia and further, receive an injection in the athlete's village either shortly before or during the Commonwealth Games. "*Cheating, much less cheating in such a brazen and calculated manner, is directly at odds with who Domi is and how she conducts herself.*"

82. Additionally, the compelling evidence about the Athlete's impeccable character, history and integrity, including the witness statements of Mr. Kyle Boorsma ("Mr. Boorsma") and Mr. Liang, directly contradicts any suggestion that the Athlete would ever cheat or lie.

(b) The Intimate Contact Pathway:

83. Based on the Athlete's evidence, including Mr. Boorsma's witness statement, the Panel should, as did the Tribunal, exclude this pathway as a possible explanation for the Athlete's AAF. No meaningful arguments or evidence were advanced by the CCES to

support the explanation that the Athlete's AAF was the result of intimate contact with an individual who had used clostebol.

(c) The Contaminated Product Pathway:

84. The Tribunal erred in failing to conclude that the Athlete bears No Fault because the Contaminated Product Pathway could not be excluded as a possible source of the Athlete's AAF (and therefore the Meat Pathway could not be found to be the only possible source).

85. Importantly, the Athlete has now produced before the CAS Panel her Training Journal (which was neither produced nor requested in first instance), which she relied upon to diligently and meticulously create the exhaustive Product List. This evidence, which was not available to the Tribunal below, along with (i) the Athlete's history of twenty-two previous clean doping control tests, (ii) her rigorous protocols and daily habits to ensure that she does not ingest a prohibited substance, (iii) the independent expert opinion of Mr. Steven Overgaard, which concluded that "'*there is no plausible or understandable pathway by which any of the products that Ms Jamnicky has listed in the Statement were contaminated with clostebol*'", and (iv) the confirmation of the CCES's own expert during the Athlete's SDRCC proceeding that "'*there was no likelihood that the athlete's supplements and medications provided, and creams, that* [sic] *could have contained clostebol*'" conclusively rules out that the Athlete's AAF was caused by any of the products with which she came into contact and thus, the Contaminated Products Pathway should be excluded.

86. Importantly, the Athlete submitted some, but not all, of the items on the Product List to the CCES for testing and offered to assist with any further testing of such products, but the CCES chose not to conduct any testing. In assessing the CCES' submissions that the Contaminated Products Pathway has not been ruled out, it is important to note the following:

> "[T]*he CCES and WADA repeatedly assert in anti-doping cases that mere speculation on the part of an athlete as to the source of his or her AAF is insufficient. The CCES and WADA must be held to their own standards. It is equally important that anti-doping authorities are not permitted to refute an athlete's position on mere speculation. Here, the CCES has absolutely no evidence supporting a claim that Domi's AAF resulted from a contaminated supplement or some other product with which she came into contact."*

(d) The Meat Pathway:

87. The Shelby Report reveals, and WADA has widely acknowledged for years, that AAFs can result from the consumption of meat from animals administered with prohibited substances. Additionally, WADA recognizes that technological advances now permit detection of prohibited substances at such low levels so that an athlete's AAF may be the result of environmental or inadvertent exposure, including through the consumption of meat treated with a prohibited substance. In fact, WADA and other anti-doping organizations have not prosecuted hundreds of cases where they have inferred that an athlete's AAF resulted from meat that had been treated with clenbuterol.

88. Dr. Shelby specifically opined that the Athlete's AAF could have been caused by the consumption of contaminated meat in Australia as much as a few weeks prior to, or in Canada within a few days of, her 24 April 2018 doping control test.

89. The independent expert report of Dr. Martin establishes the following:

- Clostebol is a well-known and effective animal growth promoter that was widely used in the 1990s.
- The Athlete possibly consumed meat treated illegally with clostebol in Australia or Canada.
- The fact that clostebol is not permitted for use as an animal growth promoter in Australia and Canada, where other animal growth promoters are legal, does not mean that clostebol is not used. Mexico, for example, allows a number of animal growth promoters but clenbuterol, a non-approved substance, is still used illegally in Mexico.
- Often, those who illegally inject animals with growth promoters use higher doses than would be permitted by regulatory authorities and very significantly, the monitoring authorities in Australia and Canada for domestic and imported livestock products do not test for clostebol, creating incentives for those livestock producers who might be willing to illegally enhance the yield of their animal food products.
- The importation of Australian and Canadian meat has been subject to compliance issues, including in respect of contamination with anabolic steroids.

90. The expert evidence of Mr. Bhargava substantiates both the illegal use and availability of clostebol for administration to livestock and in particular, that clostebol is both marketed for use as a growth promoter in cattle and is available for purchase over the dark web from suppliers within both Australia and Canada.

(ii) The Athlete bears No Fault

91. Upon learning that clostebol is used as an animal growth promoter, the Athlete prepared a detailed list of everything she ate, including several animal food products consumed in Australia and in Canada in the weeks leading up to her 24 April 2018 doping control test.

92. Having first ruled out, on a balance of probability (if not beyond a reasonable doubt) each of the Intentional Injection Theory, the Intimate Contact Pathway and the Contaminated Product Pathway as explanations for the Athlete's AAF, the Athlete's evidence of her meat consumption, combined with (i) the toxicology evidence supporting that meat contaminated with clostebol could have caused her AAF, and (ii) the evidence substantiating that clostebol is available for use, and is used, as a livestock growth promoter in Australia and Canada, establishes that it is more likely than not that the Athlete's AAF resulted from the consumption of meat illegally treated with clostebol.

93. In *Gomez*, the FISA panel referred to the *Contador* cases as having established that "*in order to rely on contaminated meat justifying the application of Article 10.5, the athlete must show that the ingestion of meat was the only possible means of ingesting the boldenone, or that is is more probable than any other possible explanation. The Panel needs to be satisfied of this on the balance of probabilities and if it is only slightly more probable than other possible explanations, then the Athlete has met the burden and standard of proof required*".

94. In *UCI v Burke*, three possible explanations were advanced for the athlete's AAF and the CAS panel held that on a balance of probabilities, the most likely of the three explanations was that the athlete had consumed contaminated water, despite the UCI's objection that the athlete had not tested any water and the expert's confirmation that "*she did not actually know of a source of HCTZ contamination in Malartic's drinking water supply, just that it's possible*".

95. These CAS decisions and others establish that "*a proper weighing of the evidence on a balance of probabilities can, and should, result in the selection of one most probable option over a finite set of others even if that option is only a possibility*".

96. To assert, as did the CCES in the SDRCC proceedings, that the Athlete must identify the specific piece of contaminated meat that caused her AAF, is unfair and impractical on the evidence in this case, and would elevate the Athlete's burden of proof well above a balance of probability and be virtually impossible to meet. First, the evidence of Dr. Shelby establishes that a wide number of meat products consumed over several weeks could have been the source of the Athlete's AAF and second, finding the producers of the various meats consumed by the Athlete "*is – in and of itself, a monumental and incredibly difficult task, as confirmed by a veterinary expert called by the CCES in the SDRCC proceeding below, Dr. Ian Lean.*". Even if such a search was feasible, no rational livestock producer would be willing to admit to illegally administering clostebol.

97. To argue, as did the CCES in the SDRCC proceedings, that the absence of other clostebol AAFs refutes the Athlete's meat contamination theory, ignores the fact that "*this case is about the confluence of very specific events that lead to the occurrence of a low probability event*". The extremely low probability of an athlete finding themselves in a situation such as this – consumption of meat illegally contaminated with clostebol, a doping control test during the window of time when clostebol metabolites were detectable in her urine sample, and a urine sample analysis at a laboratory that can detect, unlike many other WADA accredited laboratories, trace concentrations estimated below 0.2 ng/mL – will indeed make such cases extremely rare.

98. In cases where athletes have argued, but failed to establish, meat contamination as the source of an AAF, the arbitral panel made one or more of the following findings:

- The athlete's evidence was deemed unsound or not credible.
- The athlete did not rule out other possible explanations, such as supplement contamination or intentional use, as to the source of the AAF.

- The prohibited substance which resulted in the AAF was subject to both regulation and testing in the place where the allegedly contaminated meat was consumed.

- The concentration of the prohibited substance measured in the athlete's sample was too high for a meat contamination theory to be plausible.

None of these findings are supported on the evidence of the present case.

99. The Panel should find that the source of the Athlete's AAF was, on balance, the ingestion of meat contaminated with clostebol and therefore, that the Athlete bears No Fault and shall have any period of ineligibility eliminated pursuant to CADP Rule 10.4.

(iii) In the Alternative, the Athlete's AAF involved a Contaminated Product and the Athlete bears No Significant Fault

100. If the Panel finds, as did the Tribunal, that the Athlete has not established a single source of her AAF and that it was caused by meat contamination or a contaminated product, a meaningful fault analysis can still, and should, be properly conducted because the Athlete has provided detailed, specific, and relevant evidence in respect of both the Contaminated Product Pathway and the Meat Pathway.

101. Moreover, the CADP does not, for the purposes of establishing the source of an AAF, specifically require the identification of a particular pill or piece of meat that was contaminated with a prohibited substance. Rather, the CADP requires an athlete seeking to rely on *No Fault* or *No Significant Fault* to establish, sufficiently enough to permit the fault analysis to be conducted (as prescribed by the definition of *Fault* in CADP Appendix 1), how the prohibited substance entered her or his system.

102. In the unique circumstances of a case where an athlete has not identified a specific contaminated product or producer of contaminated meat, "*a fault analysis must be permitted to avoid an application of the CADP (and WADA Code) by which each of the identified sources individually would necessarily result in a reprimand but the athlete is faced with a mandatory two-year sanction simply because of the existence of more than one specific source*".

103. Having already established that the Meat Pathway necessarily leads to a finding of *No Fault* and the imposition of a reprimand with no period of ineligibility, the following facts establish the Athlete's low degree of fault in respect of the Contaminated Products Pathway:

- The Athlete is part of the CCES' registered testing pool and prior to her AAF, had been tested a total of 22 times without incident.

- The Athlete promptly agreed to a voluntary provisional suspension upon learning of her AAF.

- The Athlete adheres to a strict protocol and the utmost caution in respect of ensuring that no prohibited substances enter her body, including (i) minimal supplementation in favour of natural alternatives such as maple syrup, (ii)

avoidance of products that are not reliably sourced, (iii) checking of labels, research, internet searches and approval by her sports medicine doctor ("Dr. Mountjoy") of all supplements and medications prior to ingestion, and (iv) a consistent daily routine in respect of the storage and ingestion of the supplements she does use.

- The CCES has advanced no competing evidence or theory that the Athlete used a contaminated product in a reckless or careless manner which would negate her low degree of fault.

104. In evaluating the Athlete's degree of fault, the Panel should be guided by the CAS panel's statement in CAS 2013/A/3327 & 3335 *Marin Cilic v International Tennis Federation* as to the objective factors that should feature foremost in the fault analysis in respect of substances prohibited at all times. The evidence in this case establishes that the Athlete fulfilled all of the *Cilic* factors in respect of each product on the Product List – she read the label or otherwise ascertained the ingredients, cross-checked the labelled ingredients with the Prohibited List, made an internet search of the product, ensured that the product was reliably sourced, and consulted appropriate experts including Dr. Mountjoy.

105. The Athlete did everything and more compared to the athlete in *CCES v Karla Godinez* (SDRCC DT 18-0290), who was given a twelve-month suspension despite, unlike the Athlete, failing to consult appropriate experts before consuming the product that caused her AAF. Therefore, based on the exceptional circumstances of this case, the CAS Panel should conclude that the Athlete's AAF came from a Contaminated Product, that she bears *No Significant Fault* under CADP Rule 10.5.1.2 and that she should not face a suspension of longer than twelve months.

(iv) In the Further Alternative, a Two-Year Sanction offends the Principle of Proportionality; the Tribunal's imposition of a Reprimand should be confirmed

106. The Athlete's submission based on the principle of proportionality "*applies only if the CAS Panel determines that it is precluded from reducing the otherwise applicable two-year sanction because Domi was not able to establish the specific piece of meat or contaminated product that led to her AAF*".

107. Based on the "*very specific and unique circumstances of this case*", the Presumptive Sanction is grossly disproportionate and the Panel should, as did the Tribunal, reduce the sanction to a reprimand pursuant to the principle of proportionality, which is a "*fundamental human-rights based protection that requires that the severity of a penalty be in proportion with the seriousness of the infringement of a rule that gives rise to that penalty*".

(a) There is a gap or lacuna in the CADP Rules.

108. The Athlete accepts the CCES' submission that the principle of proportionality may only be applied to fill a "gap or lacuna" in the CADP. However, the CCES' insistence that the CADP contemplates a situation such as the present case, where an athlete establishes that the ADRV is not intentional but is not able to establish the source of the AAF, ignores the unique circumstances of this case; that is, the Tribunal's finding that

the Athlete's AAF was caused exclusively by either contaminated meat or a contaminated product and the evidence establishing that the Athlete bears a low degree of fault in either scenario:

> "*To the extent that the CAS Panel does not accept that Domi bears No Fault or that she bears No Significant Fault in a case concerning a Contaminated Product (as addressed above), then the CADP (and the WADA Code) fails to address Domi's specific situation. Rather, the CADP (and the WADA Code) was drafted on the assumptions that there will always be a specific pill or piece of meat that can be identified as contaminated, and where this is not the case the failure is because an athlete lacks credibility, there is an absence of corroborating evidence, and/or there exists equally probable but unexplored sources. In such circumstances (which differ from Domi's case), the CADP imposes an obligatory sanction of two years because it is not possible to assess the athlete's degree of fault with any particularity or robustness and therefore no reduction in sanction is available under CADP sections 10.4 and 10.5.*"

109. Unlike in both *CCES v. Alicia Brown* (SDRCC DAT-15-0006) and CAS 2010/A/2230 *IWBF v. UKAD & Gibbs*, which are relied upon by the CCES and where there were multiple possibilities as to the source of the AAF, the Athlete has excluded all possible sources of her AAF other than two and has filed evidence allowing for a robust assessment of fault and a conclusion that her degree of fault was low.

110. The CCES relies on CAS jurisprudence and the legal opinion of Judge Jean-Paul Costa to assert that the CADP already reflects proportionality and therefore, tribunals may not apply proportionality to reduce sanctions. However, this view is focused on sanction adjustability based on an assessment of individual fault. "*It finds no application in cases like this one where there exists evidence on which the athlete's degree of fault can reliably be assessed but a gap in the CADP purports to preclude an adjudicator from going ahead with the fault assessment for the purposes of reducing an otherwise automatic two-year sanction.*" Therefore, an adjudicator can and must resort to general principles to harmonize the sanction with the degree of fault.

(b) The Presumptive Sanction is grossly disproportionate in this case.

111. The Decision highlights that there is no conduct by the Athlete in relation to her AAF that would justify a suspension. A finding that the source of the AAF was illegally contaminated meat would result in no period of ineligibility. A finding that the source of the AAF was a contaminated product would result in a sanction ranging from a reprimand to a one-year period of ineligibility. To blindly impose the Presumptive Sanction because of a gap in the CADP is wholly unjust and makes the Presumptive Sanction both an automatic and a minimum penalty.

> "*Athletes cannot be held to a standard that is impossible to meet. The critical question in any assessment of consequences is the conduct or degree of fault of the athlete. Here, the evidence establishes that Domi truly bears no fault. There exists no reasonable or practical steps she should or could have done differently to prevent the AAF.*"

112. As the CAS panel commented in CAS 2006/A/1025 *Mariano Puerta v. ITF*, the overarching principle of justice and proportionality is the basis for all systems of law. "*If ever a case screamed out for the application of the principle of proportionality to protect an innocent victim, it is this one. Domi is that victim.*"

VI. JURISDICTION

113. 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 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 it prior to the appeal, in accordance with the statutes or regulations of that body* […]."

114. The CCES asserts its right to appeal the Decision to the CAS under CADP Rule 13.7.1 and R47 of the Code. The Athlete brings her Cross Appeal against the Decision to the CAS pursuant to R47 of the Code and CADP Rules 13.2.1, 13.2.3 and 13.2.4.

115. The jurisdiction of the CAS to hear this dispute is not disputed by the Parties and the Panel deems that the CAS has jurisdiction, as confirmed by the Parties in the Order of Procedure.

VII. ADMISSIBILITY OF THE APPEAL AND THE CROSS APPEAL

116. 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 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 her/his decision after considering any submission made by the other parties.*"

117. CAPD Rule 13.7.1 provides that "[t]*he time to file an appeal to CAS shall be twenty-one (21) days from the date of receipt of the decision by the appealing party*".

118. CAPD Rule 13.2.4 provides that "[c]*ross appeals and other subsequent appeals by any respondent named in cases brought to CAS or the Doping Appeal Tribunal under the Rules are specifically permitted. Any party with a right to appeal under this Rule 13 must file a cross appeal or subsequent appeal at the latest with the party's answer*".

119. The CCES received notice of the Decision on 16 August 2019 and filed its statement of appeal on 5 September 2019. On 21 October 2019, the Athlete filed her Cross Appeal

together with her answer to the CCES's Appeal. The Parties do not dispute the admissibility of the Appeal or the Cross Appeal and the Panel agrees that each is admissible.

VIII. APPLICABLE LAW

120. Article R58 of the Code provides as follows:

"*The Panel shall decide the dispute according to the applicable regulations and, subsidiarily, to 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.*"

121. CADP Rule 13.2.1 provides that "[…] *the decision may be appealed exclusively to CAS in accordance with its rules and procedures*".

122. CADP Rule 20 provides, *inter alia*, as follows:

"*20.7 Interpretation*

"*The Code and the CADP shall be interpreted as independent and autonomous texts and not by reference to the existing law or statutes of the Signatories or governments.*"

[…]

20.10 Integral Elements of the Code and the CADP

20.10.1 The 'Purpose, Scope and Organization of the World Anti-Doping Program and the Code' and 'Appendix 1, Definitions,' and 'Appendix 2, Examples of the Application of Article 10,' shall be considered integral parts of the Code

20.10.2 Part A of the CADP 'Structure and Scope,' Part B of the CADP 'Implementation,' the CADP's Appendix 1 'Definitions,' and Appendix 2, Examples of the Application of Rule 10,' shall be considered integral parts of the CADP."

123. Accordingly, the Panel shall apply the CADP, based on the WADC, to decide the present appeal.

Relevant CADP Rules and Definitions

124. The following provisions of the CADP, based on the WADC, are material to the Appeal and the Cross Appeal:

"2.1 Presence of a Prohibited Substance or its Metabolites or Markers in an Athlete's Sample

2.1.1 It is each Athlete's personal duty to ensure that no Prohibited Substance enters his or her body. Athletes are responsible for any Prohibited Substance or its Metabolites or Markers found to be present in their Samples. Accordingly, it is not necessary that intent, Fault, negligence or knowing Use on the Athlete's part be demonstrated in order to establish an anti-doping rule violation under Rule 2.1.

2.1.2 Sufficient proof of an anti-doping rule violation under Rule 2.1 is established by any of the following: presence of a Prohibited Substance or its Metabolites or Markers in the Athlete's A Sample where the Athlete waives analysis of the B Sample and the B Sample is not analyzed; or, where the Athlete's B Sample is analyzed and the analysis of the Athlete's B Sample confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the Athlete's A Sample; or, where the Athlete's B Sample is split into two bottles and the analysis of the second bottle confirms the presence of the Prohibited Substance or its Metabolites or Markers found in the first bottle.

2.1.3 Excepting those substances for which a quantitative threshold is specifically identified in the Prohibited List, the presence of any quantity of a Prohibited Substance or its Metabolites or Markers in an Athlete 's Sample shall constitute an anti-doping rule violation.

[…]

3.1 Burdens and Standards of Proof

CCES shall have the burden of establishing that an anti-doping rule violation has occurred. The standard of proof shall be whether the CCES has established an anti-doping rule violation to the comfortable satisfaction of the hearing panel bearing in mind the seriousness of the allegation which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability."

[…]

10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of a Prohibited Substance or Prohibited Method

The period of Ineligibility for a violation of Rules 2.1, 2.2 or 2.6 shall be as follows, subject to potential reduction or suspension pursuant to Rules 10.4, 10.5 or 10.6:

10 2.1 The period of Ineligibility shall be four years where.

> *10.2.1.1 The anti-doping rule violation does not involve a Specified Substance, unless the Athlete or other Person can establish that the anti-doping rule violation was not intentional.*

[…]

10.2.2 If Rule 10.2.1 does not apply, the period of Ineligibility shall be two years.

10.2.3 As used in Rules 10.2 and 10.3, the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, requires that the Athlete or other Person engaged in conduct which he or she knew constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might constitute or result in an anti-doping rule violation and manifestly disregarded that risk. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be reputably presumed to be not "intentional" if the substance is a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance.

[…]

10.4 Elimination of the Period of Ineligibility where there is No Fault or Negligence

If an Athlete or other Person establishes in an individual case that he or she bears No Fault or Negligence, then the otherwise applicable period of Ineligibility shall be eliminated.

10.5 Reduction of the Period of Ineligibility based on No Significant Fault or Negligence

10.5.1 Reduction of Sanctions for Specified Substances or Contaminated Products for Violations of Rule 2.1, 2.2 or 2.6.

[…]

10.5.1.2 Contaminated Products

In cases where the Athlete or other Person can establish No Significant Fault or Negligence and that the detected Prohibited Substance came from a Contaminated Product, then the period of Ineligibility shall be, at a minimum, a reprimand and no period of Ineligibility, and at a maximum, two years Ineligibility, depending on the Athlete's or other Person's degree of Fault.

10.5.2 Application of No Significant Fault or Negligence Beyond the Application of Rule 10.5.1

If an Athlete or other Person establishes in an individual case where Rule 10.5.1 is not applicable, that he or she bears No Significant Fault or Negligence, then,

subject to further reduction or elimination as provided in Rule 10.6, the otherwise applicable period of Ineligibility may be reduced based on the Athlete or other Person's degree of Fault, but the reduced period of Ineligibility may not be less than one-half of the period of Ineligibility otherwise applicable. If the otherwise applicable period of Ineligibility is a lifetime, the reduced period under this Rule may be no less than eight years."

IX. MERITS

Preliminary Matters

125. As a preliminary matter, the Panel notes that in her Cross Appeal, the Athlete's requests for relief include an order from the CAS declaring that she has not committed an ADRV because her AAF, she contends, resulted from the consumption of meat contaminated with clostebol.

126. Having considered the evidence before it, including that the Athlete has never contested her AAF and that her own expert, Dr. Shelby, opined that "[t]*he testing done by the INRS Doping Control Laboratory appears to have followed accepted scientific procedures and to have been conducted without error*", the Panel has no hesitation in concluding that the CCES has discharged its burden of proof that the Athlete has committed an ADRV pursuant to CADP Rule 2.1.

127. Additionally, the Panel notes that the CCES' Appeal does not contest or challenge the Tribunal's finding that the Athlete's AAF was not intentional. In its Answer to the Athlete's Cross Appeal, the CCES refers to this same finding and states: "*CCES does not contest this finding on appeal*" and further, "*CCES accepts that the intentional injection pathway can be eliminated*".

The Main Issues

128. The CCES' Appeal is focused on the Tribunal's decision to reduce the applicable "Two-Year Sanction" (i.e., the presumptive two-year period of ineligibility under CADP Rule 10.2.2) to a reprimand based on the principle of proportionality.

129. In her Cross Appeal, the Athlete requests that if she is found to have committed an ADRV, she shall have no period of ineligibility based on "*No Fault*" under CADP Rule 10.4, or a period of ineligibility not exceeding twelve months based on "*No Significant Fault*" under CADP Rule 10.5. However, if the Panel concludes that it is precluded from reducing the Two-Year Sanction under the CADP because the Athlete is not able to prove the source of her AAF (see below), the Athlete answers the CCES' Appeal by asking the Panel to reduce such sanction to a reprimand based on the principle of proportionality, as did the Tribunal.

130. In its answer to the Athlete's Cross Appeal, the CCES similarly frames the main issues before the Panel as follows: First, has the Athlete proven the source of her AAF on a balance of probability, and second, has the Athlete proven that this is a case of "*No Fault*" or "*No Significant Fault*"?

131. CADP Rule 10.2.2 stipulates that the applicable sanction for a non-"*intentional*" violation of CADP Rule 2.1 is a period of ineligibility of two years. Further, such Two-

Year Sanction is subject to elimination or reduction under CADP Rules 10.4 and 10.5, respectively, if the Athlete can establish, on a balance of probability in accordance with CADP Rule 3.1, that in her case she bears "*No Fault*" or "*No Significant Fault*".

132. Unlike CADP Rule 10.2, which does not explicitly require an athlete to establish how the prohibited substance entered his or her system in order to establish that an ADRV was not "*intentional*", the very definitions of "*No Fault or Negligence*" and "*No Significant Fault or Negligence*" in the CADP Rules unambiguously require, for any such finding under CADP Rules 10.4 or 10.5, that the Athlete "*establish how the Prohibited Substance entered his or her system*".

133. Therefore, in order to determine the appropriate sanction for the Athlete's non-"*intentional*" ADRV, the Panel must make findings on the following core issues:

(i) Has the Athlete established on a balance of probability how clostebol entered her system?

(ii) If the answer to issue (i) is yes, should the Two-Year Sanction be eliminated or reduced under CADP Rules 10.4 or 10.5?

(iii) If the answer to issue (i) is no, should the Two-Year Sanction be reduced based on the principle of proportionality?

(i): Has the Athlete established on a balance of probability how clostebol entered her system?

(a) Possible Explanations for the Athlete's AAF

134. The Athlete's core argument is that there are a finite number of conceivable explanations for how clostebol entered her system and that the evidence rules out each such explanation, except for the Meat Pathway.

135. The Athlete relies on the Shelby Report to establish four pathways through which clostebol could have entered her system: "*From a toxicology perspective, it is known that individuals may test positive following consumption of meat from animals that have been treated with various growth promoters, including clostebol (Debruyckere et. al, 1992) and this is a possible explanation, but it is not the only possible explanation.*"

136. In addition to the possibility of purposeful or intentional administration (i.e. the "Intentional Injection Theory") and considering what she characterizes as the "*trace amount*" of the clostebol metabolite M1 that was detected in the Athlete's AAF, Dr. Shelby opines that clostebol could have entered the Athlete's system through one of the following three inadvertent or unintentional administration scenarios:

(i) the "Intimate Contact Pathway" (i.e. direct application or exposure to clostebol through intimate contact with an individual that has applied clostebol for medicinal purposes),

(ii) the "Contaminated Product Pathway" (i.e. application of a product such as a cream or spray that contains clostebol, or oral consumption of clostebol such as through a product (supplement or medication) that contains or is contaminated with clostebol), and

(iii) the "Meat Pathway" (i.e. the Athlete consumed a meat product containing clostebol while she was in Australia or Canada).

137. By contrast, the CCES' expert Professor Ayotte characterizes the Meat Pathway as an "*extremely unlikely*" explanation for the Athlete's AAF and opines as follows: "*Hence, remains the more plausible explanation for the presence of clostebol metabolites in the athlete's urine sample of the administration of one of the several clostebol preparations available in other countries or on the black market, including popular over-the-counter antibiotic creams and sprays that also contain clostebol acetate*".

138. Professor Ayotte also states that the estimated amount of clostebol metabolite in the Athlete's sample is "*normal*" when compared to other clostebol AAFs reported by the INRS Laboratory and states: "*There is no indication for suggesting a different origin for the finding of clostebol in the athlete's sample, based on its level*."

139. The joint expert statement of Dr. Shelby and Professor Ayotte establishes their agreement on possible explanations for a clostebol positive AAF:

> "*The presence of clostebol metabolites in a urine sample is explained by: (i) oral administration, (ii) topical/dermal administration (creams/sprays), and (iii) intra-muscular injections. Over-the-counter creams and sprays containing clostebol in combination with an antibiotic are legally available in some countries (in Europe, South and Central America for example). Otherwise, the black market (and internet) is the source of clostebol for intra-muscular injections.*"

140. Finally, the Panel notes that in its Cross-Appeal Brief, the CCES "*accepts that the intentional injection pathway can be eliminated. However, as with meat contamination, the sabotage and intimate contact pathways remain possible – even if highly unlikely – explanations*".

141. Here, the Panel finds that while sabotage as the source of the Athlete's AAF may be imaginable in the abstract, no submissions or evidence were advanced by the Parties on this issue, which leads the Panel to exclude it, as did the Tribunal, as a reasonably possible explanation for the Athlete's AAF.

142. The Intimate Contact Pathway is also conceivable but, similar to the notion of sabotage, was left entirely unexplored by either party and, having considered the uncontested witness statement of Mr. Boorsma, which described his role as an exercise scientist, provincial level triathlete and partner of the Athlete, and in which he asserted that "*Domi and I are incredibly careful about what we put in our bodies*", the Panel is satisfied, as was the Tribunal, that such pathway can also be excluded from further consideration as a reasonably possible explanation for the Athlete's AAF.

143. During the hearing, both Dr. Shelby and Professor Ayotte were questioned briefly as to alternative possible explanations for inadvertent exposure to clostebol; that is, explanations not mentioned in their respective reports. Based on their answers, the Panel is satisfied that the possible pathways advanced by the Parties represents a finite list.

144. Therefore, having considered the entirety of the evidence submitted by the Parties in respect of possible explanations for the Athlete's AAF, and in particular the opinions of Dr. Shelby and Professor Ayotte summarized above, and noting that the CCES does not challenge the Tribunal's finding that the Athlete's ADRV was not intentional, and having excluded the Intimate Contact Pathway and any suggestion that the Athlete's AAF may have been the result of sabotage, the Panel will now, after briefly commenting

on the nature of the evidence before it, examine in more detail the Contaminated Product Pathway and the Meat Pathway.

(b) The Nature of the Evidence

145. In every case, there must be a weighing of all of the relevant evidence presented by the parties, which can include both direct and circumstantial evidence. Direct evidence is evidence that, if believed, directly proves a fact. It often involves witnesses stating what they personally saw or heard. For example, a witness might assert that they saw it was raining outside, from which a trier of fact could directly conclude that fact. Circumstantial evidence differs since it requires a trier of fact to draw an inference to connect it with a conclusion of fact. If the witness states that she saw someone enter from outside dripping wet, an inference of rain might require an exploration and weighing of other factors – for example, there may have been a lawn sprinkler near the entrance that was timed to turn on.

146. In this case, the evidence related to the source of the Athlete's AAF is almost entirely circumstantial. The Panel must determine what inferences can be drawn from that evidence. A helpful observation in this regard is that "*inferences must be reasonable given the evidence and the absence of evidence, assessed logically, and in light of human experience and common sense*" (see *R. v. Villaroman*, 2016 SCC 33). This suggests that the inferences to be drawn as well as the ultimate conclusion in the case must both consider the relationship to all of the other evidence. The weight of each inference will depend on its own strength and how it "fits" with other inferences and with the evidence in its entirety.

147. The quote above refers to "the absence of evidence" as a potential factor to be considered. In the Panel's view, when assessing the circumstantial evidence before it in this case, it should consider various possible sources of the clostebol found in the Athlete's specimen, provided they are based on logic, experience and common sense, and not solely on speculation; inferences must be reasonable, not just possible.

(c) The Contaminated Product Pathway

148. The Athlete submits that the Contaminated Product Pathway should be excluded as a possible explanation for her AAF because (i) prior to her AAF, she had 22 clean doping control tests, (ii) she is vigilant, thoughtful and meticulous about what she puts into her body, she uses supplements with careful restraint and she prefers natural energy alternatives such as maple syrup over gel packs and Red Bull, (iii) any supplements or medications she does ingest are pre-approved by her sports medicine doctor, (iv) she has a simple daily regime and exercises the utmost care in storing the supplements that she does take, and (v) she spent a significant amount of time painstakingly retracing her steps during the "Pre-Test Period" (i.e. the time period between her previous doping control test on 21 January 2018 and the 24 April 2018 doping control test that resulted in her AAF) and, with the help of her "Training Journal" (i.e. her online personal daily training journal) to recall her daily activities and intake of food, medications, supplements or creams, she compiled the "Product List" (i.e. the list of products and medications that she used or came into contact with during the Pre-Test Period).

149. Moreover, the Athlete relies on the evidence of Mr. Overgaard, an expert in manufacturing and quality control, who reviewed the Product List and concluded that

"*there is no plausible or understandable pathway by which any of the products that Ms. Jamnicky has listed in the* [Product List] *were contaminated with clostebol*".

150. Finally, the Athlete notes that she arranged through the CCES to have several products on the Product List tested for clostebol by the INRS Laboratory, and also offered to assist the CCES with any further investigation or testing that it might wish to do, which offer was not acted upon by the CCES.

151. The CCES vigorously challenges the integrity of the Product List, characterizing it as "*not reliable as a complete and accurate listing of all products the Athlete used during the Pre-Test Period*" because (i) such list was not made contemporaneously with ingestion, but rather was created weeks, if not months after the Pre-Test Period, and (ii) contrary to the Athlete's assertions that her training and living routine was highly controlled during the Pre-Test Period, in fact her circumstances and surroundings changed frequently during that time period. The CCES also insists that the Training Journal does little to bolster the reliability of the Product List since it does not include any information about products or foods she consumed or came into contact with.

152. Even if the Product List is truly the exhaustive list that the Athlete claims, the CCES contends that all such listed products, even those that were tested by the INRS Laboratory, are possible sources of clostebol because, as Mr. Overgaard stated, for contamination to be ruled out with 100% certainty, the specific product that was ingested must be properly tested – which did not occur in respect of any of the items on the Product List.

153. The CCES also challenged the investigative methods of Mr. Overgaard, which "*for many of the products* […] *were limited and deficient, consisting of vague or unanswered email queries to the manufacturer*" and which resulted in Mr. Overgaard simply not having the necessary facts to properly evaluate the likelihood of clostebol contamination. According to the CCES, Mr. Overgaard also made unreasonable assumptions, including that a product's ingredients list, or a company's brand name, negates the possibility of unlisted products or contamination.

154. Initially, the Panel observes that the evidence before it in respect of the Contaminated Product Pathway appears to differ, in some respects, from that which was presented to the Tribunal, which concluded that it could not rule out such pathway as a possible explanation of the Athlete's AAF.

155. The Panel first notes the Tribunal's statement in the Decision that "*there is evidence on the record that Clostebol is available in a number of different creams, medications and sprays in Australia and Canada*".

156. No such evidence was advanced in the present proceeding. To the contrary, the evidence before the Panel establishes that except for the 'black market', Canadian and Australian athletes do not have access to clostebol and are not inadvertently exposed to it:

- The joint expert statement of Dr. Shelby and Professor Ayotte sets out their agreement that (i) no products (medications or supplements) containing clostebol are approved for use in Canada or in Australia, (ii) Canada and Australia are not countries in which over-the-counter creams and sprays containing clostebol in combination with an antibiotic are legally available, and (iii) clostebol is not known to be a contaminant of supplements.

- Professor Ayotte asserts in her report that "[t]he *data demonstrates that the prevalence of clostebol findings is linked to the availability of clostebol over-the-counter products*", pointing to a high frequency of clostebol findings between 1997 – 2019 in countries (Mexico, Honduras, Nicaragua, etc.) where clostebol is available in creams and sprays and only one finding in Canada (apart from the Athlete), which finding suggested intentional doping as opposed to inadvertent ingestion.
- According to Professor Ayotte: "*The very rare occurrence of clostebol findings in Canadian athletes (2 cases including Ms. Jamnicky in the past 20 years) and Australian athletes (1 in the past 8 years) is not consistent with these populations being exposed inadvertently to clostebol, whether by food contamination or otherwise.*"
- At the hearing, Professor Ayotte asserted that in respect of any possibility that medications might be contaminated by clostebol, she was only aware that there is some evidence of clostebol in certain generic medical preparations of testosterone originating from India.

157. Additionally, the Tribunal expressed concern regarding the completeness of the Product List, stating in the Decision that "[e]*ven by her own evidence, the* [Product List] *does not include all substances with which she could have come into contact during that period*" and further, that the "*key document used to recreate the list, her training journal, has never been produced and I remain troubled by the fact that this was only revealed when she testified*".

158. In the present proceeding, the Athlete clearly affirmed at the hearing that the Product List "*is absolutely everything*" and her submissions, including her witness statement, similarly assert that the Product List fully documents all supplements, medications, hygiene products, creams and household cosmetics that she ingested or came into contact with during the Pre-Test Period. The Training Journal was submitted for review by the Panel and, while recognizing that such a daily record would have assisted the Athlete's recall during the process of compiling the Product List, the Panel does not find that such list's reliability necessarily turns on the production of the Training Journal.

159. First, the Panel is satisfied that the Product List is a complete list of all products and medications that the Athlete ingested or came into contact with during the Pre-Test Period. The ability to produce such a list accurately and exhaustively is not, in the Panel's view, unrealistic considering the relevant time period, the fact that bodily intake is a critical and carefully monitored aspect of any elite athlete's daily routine, the protocols followed by the Athlete and, based on the entirety of the evidence before it, the Panel's impression that the Athlete is highly aware of and takes very seriously her personal duty under CADP Rule 2.1 to ensure that no prohibited substance enters her body and is not careless in her choices of products and medications.

160. Second, the Panel observes that of the eighteen items listed on the Product List, none of which lists clostebol as an ingredient, (i) ten items are vitamins, supplements, sunscreens or common household products that the Athlete claims to have used for years, (ii) three items are prescription medications that had been approved by the Athlete's doctor prior to ingestion and were all tested by the INRS Laboratory for the presence of clostebol, (iii) one item is a sunscreen distributed to athletes at the Commonwealth Games, (iv) one item is a protein powder that the Athlete claims she never ingested, but which she

nevertheless submitted for testing by the INRS Laboratory, (v) one item is a sunscreen that was also submitted for testing by the INRS Laboratory, (vi) one item is a herbal cough medicine which the Athlete claims she did not ingest but administered to her younger cousin while in Australia, and (vii) one item is a multi-vitamin ingested by the Athlete while she was in Australia and further, the Panel has fully reviewed the report of the Athlete's expert Mr. Overgaard, who concludes that "*there is no plausible or understandable pathway by which any of the products that Ms. Jamnicky has listed in the* [Product List] *were contaminated with clostebol*".

161. The Panel also notes the oral testimony of the CCES' expert Professor Ayotte at the hearing in relation to having reviewed the items on the Product List, which she characterized as "*the types of products that are common*" and her agreement that it was highly unlikely for any such products to have been contaminated with clostebol and finally, her statement in her report that while she does not remember expressly affirming during the proceedings before the Tribunal that there was no likelihood that the items on the Product List could have contained clostebol, she does remember stating "*I could not determine which was less likely to contain clostebol between the meat in the athlete says she consumed in Australia or Canada, or the products that the athlete says she consumed: both are equally extremely unlikely in my view*".

162. Mindful of Mr. Overgaard's caveat, which was endorsed by the CCES, that product contamination can never be ruled out with 100% certainty unless proper testing is conducted on the exact pill or product that was consumed, the Panel finds that the Contaminated Product Pathway, as a reasonably possible explanation for the Athlete's AAF, is not an inference that is able to be reasonably drawn from all of the evidence (or lack of evidence) before it.

(d) The Meat Pathway

163. In addition to formulating the Product List, the Athlete prepared a list of animal food products she claims to have consumed in Australia between April 7 to 15, on her April 16 flight from Australia to Canada, and then in Canada between April 16 to 24, which products included pork, chicken, lamb, beef, and processed meats involving meat from multiple sources.

164. The Athlete's expert witnesses opine that it is "possible", while the CCES' expert witnesses opine that it is "extremely unlikely", that the Athlete's AAF resulted from ingesting meat in Australia or Canada that was illegally treated with clostebol.

165. Dr. Martin's reasons for opining that it is possible that the Athlete consumed meat in Australia or in Canada that was illegally treated with clostebol include that (i) clostebol is a well-known and effective growth promoter for animal food products that was widely used in the 1990s, (ii) the monitoring authorities for domestic and imported livestock products in both Australia and Canada do not test for clostebol, creating incentives for producers who might wish to enhance production without fear of being caught, (iii) despite legal alternatives to clostebol, there are several good reasons why a food producer might prefer to use such an illegal growth promoter, and (iv) Australian beef exports "*have a large history of serious violations resulting in massive rejection of Australian products*", while Canada has also experienced a relatively high number of rejections of its meat exports, suggesting non-compliance with applicable regulations in both countries.

166. Dr. Shelby concluded that it was possible that the Athlete's AAF resulted from the consumption of meat in Australia as much as a few weeks prior to her doping control test, or from meat consumed in Canada within a few days of such test. Dr. Shelby's opinion is based in part on studies which demonstrate that "*consumption of meat from animals administered anabolic agents, including clostebol, can lead to an AAF, including the detection of clostebol metabolites in urine*".

167. By contrast, Dr. Lean opines that it is "*extremely unlikely, indeed very improbable, that the athlete consumed meat products (including beef, chicken or pork) in Australia that contained clostebol*" because (i) clostebol is illegal for use in food-producing animals in Australia, (ii) there is no evidence to suggest that clostebol has been used illegally in food-producing animals in Australia, (iii) legal and more effective alternatives to clostebol are available to Australian livestock producers, (iv) Australia does not import meat from countries that use clostebol, and (v) while the NRS does not test for clostebol, random screenings of domestic meat products could detect clostebol.

168. Dr. Appelt similarly states that "*it would be an extremely rare and unlikely occurrence*" for Canadian meat to be contaminated with clostebol, for reasons that include (i) clostebol is prohibited for use in any food-producing animals in Canada, (ii) legal and more effective alternatives to clostebol are available to Canadian livestock producers, and (iii) in his 14 years with the CFIA, Dr. Appelt has never seen or heard of any incident of meat in Canada being tainted with clostebol and "*I would expect that if there was such an incident where clostebol was found in meat in Canada, I would be aware of it*".

169. In concluding that meat contaminated with clostebol was an "*extremely unlikely*" explanation for the Athlete's AAF, Dr. Ayotte highlights the fact that other than the Athlete, only one Canadian athlete in the past 20 years, and only one Australian athlete in the past 8 years, have tested positive for clostebol, which "*is not consistent with these populations being exposed inadvertently to clostebol, whether by food contamination or otherwise*".

170. The joint expert statement of Dr. Appelt and Dr. Martin establishes their agreement on the following points:

- Clostebol can be used, and has been reportedly used, for growth promotion in European livestock (cattle and pigs).
- The presence of clostebol in food products is not routinely monitored by relevant authorities in Canada or Australia.
- Clostebol is not legally approved for use as a growth promoter in livestock in Canada or Australia.
- Both steroid and non-steroid anabolic products are legally available in Canada and are approved as growth promoters in livestock.
- In Canada, (i) the use of legal growth promoters require veterinary prescription under a valid Veterinary-Client-Patient Relationship, and (ii) legal steroid anabolic products are not available for use in veal calves, dairy cattle, beef-replacement heifers (breeding animals) or pigs.

171. Finally, the Panel notes that Dr. Shelby and Professor Ayotte were unable, in their joint expert statement, to agree on the detection window in respect of the clostebol metabolite M1 identified in the Athlete's AAF in relation to an oral dose of clostebol consumed

through contaminated meat. Dr. Shelby opined that such window could be as much as a few weeks, while Professor Ayotte opined that it would be shorter than one week.

172. Initially, having considered the evidence of Mr. Bhargava as to the availability of clostebol on the dark web, Professor Ayotte's reference to "*several clostebol preparations available in other countries or on the black market*", and the joint expert statement of Dr. Shelby and Professor Ayotte which establishes their agreement that "*the black market (and internet) is the source of clostebol for intra-muscular injections*", the Panel is satisfied that clostebol is obtainable in Canada and Australia.

173. In particular, the fact that clostebol is prohibited for use on food-producing animals in both countries is not, in the Panel's view, grounds to exclude its actual use. The Panel initially notes Dr. Martin's statement that clenbuterol is not approved for use as a growth promoter in Mexico, yet it is widely acknowledged that it is used in that country as a growth promoter in livestock. Clostebol's illegality in Australia and Canada, combined with its previous association as a growth promoter in livestock, combined with the fact that the applicable regulatory authorities in each country do not test meat products for the presence of clostebol, logically creates, in the Panel's view, low-risk opportunities for meat producers who are willing to engage in illegal activity and who are looking to enhance their production without concern for maximum residue limits or getting caught, while at the same time, making it almost impossible for the Athlete to adduce the very evidence that the CCES criticizes her for not providing; that is, reports, evidence, data or information establishing that clostebol has been used illegally in food-producing animals in Australia or Canada, including any admission by a meat producer that he or she is using an illegal animal growth promoter.

174. Against this backdrop, and importantly, after having ruled out all other possible pathways through which clostebol could reasonably have entered the Athlete's system, the statistical and other evidence advanced by the CCES against the credibility of the Meat Pathway is not, in the Panel's view, as compelling as it first appears.

175. After assessing the entirety of the evidence adduced by the Parties in relation to the Meat Pathway and importantly, having considered all other possible explanations for the Athlete's AAF, the Panel finds it reasonably possible, or in other words, that it is a reasonable inference able to be made, that the Athlete's AAF was caused by the ingestion of meat illegally treated with clostebol and consumed by the Athlete in Australia or in Canada.

(e) Conclusion

176. CADP Rule 3.1 states:

> "[…] *Where the Rules place the burden of proof upon the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by a balance of probability.*"

177. According to the Athlete, if the Panel accepts that the evidence rules out, from a finite set of conceivable explanations for the Athlete's AAF, each such explanation except for the Meat Pathway, the Athlete will have discharged her burden of proof to the required standard, which standard is well-established in the *lex sportiva* as follows:

> "[T]he *balance of probabilities standard means 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" (CAS 2007/A/1370 & CAS 2007/A/1376).

178. The Athlete also points to (i) the case of *José Alberto Arriago Gomez* (FISA Decision of 22 June 2015) where the Panel stated: "'*The Contador Cases in the CAS (2011/A/2084* [sic] *and 2011/A/2086* [sic]*) established that in order to rely on contaminated meat justifying the application of Article 10.5, the athlete must show that the ingestion of meat was the only possible means of ingesting the boldenone, or that it is more probable than any other possible explanation. The Panel needs to be satisfied of this on the balance of probabilities and if it is only slightly more probable than other possible explanations, then the Athlete has met the burden and standard of proof required"*", and (ii) *UCI v. Burke* (CAS 2013/A/3370) in support of the Athlete's proposition that "*a proper weighing of the evidence on a balance of probabilities can, and should, result in the selection of one most probable option over a finite set of others even if that option is only a possibility*".

179. The CCES describes the Athlete's adoption of the 'most likely possibility' approach to meeting the balance of probabilities threshold as essentially raising a highly unlikely but still possible explanation for her AAF (i.e., the Meat Pathway) while arguing that remaining alternative explanations are even less likely. According to the CCES, this effectively seeks to avoid, or even reverse, her burden under the CADP Rules. "*Having pointed to a technically 'possible' theory of ingestion, the Athlete argues she has met her onus because CCES has not proven that other sources of ingestion are more likely.*"

180. The CCES points out that courts in the UK and Canada and anti-doping tribunals alike have held that the 'most likely possibility' approach is flawed and should not be followed. Even if the Panel accepts that the Athlete may rely on the *Contador* framework to discharge its burden, the CCES insists that the Athlete is not able to meet the requirements established by the authorities; that is, the Athlete must: (i) point to a credible explanation that is reasonably likely to explain the source, (ii) identify the origins of the meat in question, and (iii) identify and exclude all possible alternative explanations as less likely than the Meat Pathway.

181. This case is, in the Panel's view, unique. From the very outset, the CCES accepted that the Athlete's ADRV was not intentional or the result of reckless conduct. Not one argument or piece of evidence was submitted in respect of the Intimate Contact Pathway, or the notion that the Athlete may have been the victim of sabotage. The Parties' submissions focused largely on two possible explanations for the Athlete's AAF – the Contaminated Product Pathway and the Meat Pathway – and the CCES' own expert characterized these two explanations as "*equally extremely unlikely*".

182. At first and in isolation, the mere suggestion that the Athlete's AAF was the result of the consumption in Australia or Canada of meat illegally treated with clostebol may appear speculative. However, in the final weighing of all of the evidence, including the the absolute absence of any suggestion of intentional doping or cheating, the Athlete's witness statement and the content and manner in which she gave her oral testimony at the hearing, the witness statements of Mr. Boorsma and in particular, Mr. Liang, who as High Performance Director for Triathlon Canada has interacted with the Athlete and who gave compelling evidence, largely uncontested by the CCES, on the Athlete's diligence and approach to her role as an elite athlete, and importantly, the factual and circumstantial evidence presented and the Panel's findings in respect of the

Contaminated Product Pathway as summarized above, the Meat Pathway became a reasonable inference to explore in the absence of evidence of any other reasonable explanation as to how clostebol entered the Athlete's system.

183. Having more closely examined the entirety of the evidence in respect of the Meat Pathway as summarized above, and when combined with other inferences made, the Panel is unanimously of the view that the Meat Pathway is the only reasonably possible and credible explanation for the Athlete's AAF and is more likely than not to have occurred. The Panel finds that the Athlete has established on a balance of probability how clostebol entered her system.

184. In reaching this conclusion we have applied the rules and standards that govern triers of fact in assessing circumstantial evidence. In weighing both the inferences to be drawn and the weight of all of the inferences when balanced together, we are satisfied that our conclusion meets the standard of being logical "in light of human experience and common sense".

Issue (ii): Should the Two-Year Sanction be eliminated or reduced under CADP Rules 10.4 or 10.5?

185. CADP Rule 10.4 provides that if the Athlete establishes in her case that she bears "*No Fault or Negligence*", then the Two-Year Sanction shall be eliminated.

186. "*No Fault or Negligence*" is defined in the CADP as follows:

> "*The Athlete* […] *establishing that he or she did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution, that he or she had Used or been administered the Prohibited Substance* […]. *Except in the case of a Minor, for any violation of Rule 2.1, the Athlete must also establish how the Prohibited Substance entered his or her system.*"

187. "*Fault*" is defined in the CADP as follows:

> "*Fault is any breach of duty or any lack of care appropriate to a particular situation. Factors to be taken into consideration in assessing the Athlete or other Person's degree of Fault include, for example* […] *the degree of risk that should have been perceived by the Athlete* […]."

188. For a finding of *No Fault or Negligence*, the Athlete is specifically required to establish that she "*did not know or suspect, and could not reasonably have known or suspected even with the exercise of utmost caution*" that she had ingested clostebol through meat consumed in Australia or Canada. This requirement clearly has been met in this case. Since the Athlete's conduct cannot be blamed in any way, "*Fault*" as defined in the CADP cannot be attributed to the Athlete in relation to her ADRV.

189. The CCES insists that the Athlete's failure to point to the exact origin of the meat that she alleges resulted in her AAF is fatal to her efforts to eliminate or reduce the Two-Year Sanction. According to the CCES, the CAS jurisprudence is "*crystal clear*" that you "*can't spread your chips*" by alleging that the source of the AAF must have been something that the Athlete ate over the course of a couple of weeks.

190. With all respect to differing views, on the unique facts of this case, logic, human experience and common-sense lead to the conclusion that a requirement to identify the specific piece of contaminated meat would be impossible to fulfil. Given the resources

available to her, the Athlete has done as much as could be expected of her to establish how clostebol entered her system and in this regard, the Panel agrees with the Athlete's submission that locating the specific piece of meat is a "*fool's errand and would impose an impossible standard to meet*" on the Athlete. It would also, in the Panel's view, lead to the unfair result of the Athlete wearing a permanent cloud of fault because she cannot do the impossible.

191. The Panel finds that the Athlete bears *No Fault* in relation to her ADRV.

192. The otherwise applicable Two-Year Sanction is eliminated.

(…).

ON THESE GROUNDS

The Court of Arbitration for Sport rules that:

1. The (a) appeal filed by the Canadian Centre for Ethics in Sport against Ms. Dominika Jamnicky and (b) cross-appeal filed by Ms. Dominika Jamnicky against the Canadian Centre for Ethics in Sport concerning the decision rendered by the doping tribunal of the Sport Dispute Resolution Centre of Canada on 16 August 2019 are partially upheld.

2. The decision dated 16 August 2019 by the doping tribunal constituted and administered by the Sport Dispute Resolution Centre of Canada on 16 August 2019 is set aside.

3. Ms. Dominika Jamnicky is found to have committed an Anti-Doping Rule Violation but bears no fault or negligence and no period of ineligibility shall be imposed on her.

4. All other prayers for relief in the Appeal and the Cross-Appeal are denied.

5. (…).

6. (…).

Seat of arbitration: Lausanne, Switzerland
Date: 9 July 2020

THE COURT OF ARBITRATION FOR SPORT

Daniel Ratushny
President of the Panel

Stephen L. Drymer
Arbitrator

Richard H. McLaren
Arbitrator