IMPORTANT NOTE*: This is a translation of the original French decision. This version has not been reviewed by the jurisdictional arbitrator.*

CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)
SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)

Nº: SDRCC DAT 17-0010

DAVID DROUIN

(CLAIMANT)

AND

CANADIAN CENTRE FOR ETHICS IN SPORT (CCES)

(RESPONDENT)

AND

WORLD ANTI-DOPING AGENCY (WADA)

UNION CYCLISTE INTERNATIONALE (UCI)

(OBSERVERS)

JURISDICTIONAL DECISION WITH REASONS

The Honourable L. Yves Fortier, QC, jurisdictional arbitrator

Annie Lespérance, lawyer, assistant to the jurisdictional arbitrator

March 6, 2018

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I. INTRODUCTION

1. Under Article 6.21(c) of the Canadian Sport Dispute Resolution Code, version 2015 (the "**Code**"), I am issuing this written reasoned decision. A short decision was issued on February 26, 2018.

2. This decision is limited to the matter of the Doping Appeal Tribunal's jurisdiction to determine whether it can hear the Athlete's Appeal which was filed after the time limit.

3. A jurisdictional hearing took place by teleconference on February 8, 2018, from 2 p.m. to 7 p.m. David Drouin (the "**Athlete**", the "**Claimant**") and the Canadian Centre for Ethics in Sport (the "**CCES**", the "**Respondent**") participated.

4. The Athlete's contact details are as follows:

   Mr. David Drouin

[Address redacted pursuant to the SDRCC*'s Protection of Privacy Policy*]

5. The Athlete was assisted[1] by:

   Mr. Guy Chicoine
   Director, security and analysis services
   Gestion ADCO
   Quebec City, QC

6. The Respondent's contact details are as follows:

   Mr. Kevin Bean
   CCES
   201-2723 Lancaster Rd.
   K1B 0B1 Ottawa, ON

7. The Respondent was represented by:

   Mr. Raphaël Buruiana and Mr. Yann Bernard
   Langlois Lawyers, LLP
   1250 René-Lévesque West Blvd., 20th Floor
   H3B 4W8 Montreal, QC

8. The World Anti-Doping Agency ("**WADA**") and the Union Cycliste Internationale ("**UCI**") acted as observers in the proceedings but did not participate in the written or oral discussions of the proceedings.

II. PROCEDURAL HISTORY

9. On May 31, 2017, the Doping Tribunal issued a short decision in the matter of *CCES v. David Drouin, SDRCC DT 17-0255.*[2]

10. On June 15, 2017, the Doping Tribunal issued its decision with reasons (the "**Decision**").[3] The operative decision reads:

[1]Guy Chicoine represented the Athlete until his withdrawal on January 15, 2018. Guy Chicoine then offered to assist the Athlete to protect his rights. I find that Mr. Chicoine effectively continued to represent the Athlete until the end of the proceedings.
[2]C-07.
[3]A-02.

182. David Drouin committed an anti-doping rule violation under Rule 2.1 of the CADP.

183. There is no possibility of reducing the period of ineligibility under Rule 10.2.2 of the CADP because the Athlete was unable to establish in what way the substance entered his body.

184. Consequently, David Drouin is declared ineligible for a period of four (4) years, effective retroactively from January 26, 2017, and ending at midnight on January 25, 2021.

11. On July 24, 2017, under Rule 13.2.2 the Canadian Anti-Doping Program ("**CADP**"), the Athlete submitted a Notice of Doping Appeal[4] (the "**Appeal**").

12. On July 25, 2017, the SDRCC acknowledged receipt of the Athlete's Appeal and, under Rule 13.2.2.1.1 of the CADP, declared that the Doping Appeal Tribunal will be constituted and administered by the SDRCC. The CCES was informed that it had until July 28, 2017 to submit its Answer.

13. In its email of July 26, 2017, the Respondent asked the SDRCC for a deadline extension until August 2, 2017, to file its Answer. The extension was granted.

14. On July 31, 2017, the Parties and staff members of the SDRCC participated in an administrative conference call. During the call, the Respondent stressed that the Athlete's Appeal was submitted outside the 30-day time limit provided by the CADP. The Respondent asked the SDRCC to appoint a jurisdictional arbitrator to rule on the jurisdictional issue before holding a Resolution Facilitation session.

15. In its communication of August 2, 2017, and pursuant to section 6.10 of the Code, the SDRCC confirmed the appointment of The Hon. L. Yves Fortier, QC, as jurisdictional arbitrator in this case.

[4] A-01.

16. On August 18, 2017, the Parties and the staff members of the SDRCC participated in the preliminary meeting with the jurisdictional arbitrator and his colleague, Ms. Lespérance. The arbitrator informed the Parties that his role was limited to ruling on the jurisdictional issue. The Parties agreed to the following procedural timetable:

    - September 8, 2017: Claimant's written submissions regarding jurisdiction
    - September 22, 2017: Respondent's written submissions regarding jurisdiction
    - September 27, 2017: Second conference call

17. On August 29, 2017, the Athlete requested an additional two weeks to submit his jurisdictional brief, having by that point retained Guy Chicoine to represent him in the Appeal.

18. On August 30, 2017, Mr. Guy Chicoine filed his client's power of attorney and a "notice of doping appeal" in which he requested that the arbitrator: [translation] "*i) Suspend the decision of June 15, 2017; ii) Order a new hearing; iii) Subsequently order a pre-hearing conference before an in-person hearing.*"[5]

19. In its email of August 31, 2017, the Respondent did not object to the Athlete's request to postpone and asked the arbitrator to grant it an equivalent postponement of two weeks to submit its jurisdictional brief.

20. On August 31, 2017, the arbitrator amended the procedural timetable as follows:

    - September 22, 2017: Claimant's submissions regarding jurisdiction
    - October 6, 2017: CCES' submissions regarding jurisdiction
    - October 19, 2017: Conference call, subject to the availability of the Parties

21. On September 20, 2017, the Athlete filed his brief supported by exhibits A-07 to A-11.

22. On October 6, 2017, in accordance with the procedural timetable, the CCES filed its brief supported by exhibits C-06 to C-16.

[5] A-04.

23. On October 25, 2017, a second pre-hearing conference call was held with the Parties, the staff members of the SDRCC and the arbitrator to (i) determine whether additional written submissions were necessary and (ii) establish a procedural timetable.

24. The Parties and the arbitrator agreed on the following timetable:

- November 13, 2017: Athlete's reply
- November 27, 2017: CCES' rejoinder
- December 4, 2017: Athlete's written arguments on the hearing format
- December 11, 2017: CCES' written arguments on the hearing format
- December 18, 2017: Conference call

25. On November 13, 2017, the Athlete filed his reply brief supported by exhibits A-13 to A-17.

26. On November 27, 2017, the CCES filed its rejoinder brief supported by exhibits C-18 to C-22.

27. In his email of December 4, 2017, the Claimant waived his right to an in-person hearing, while reserving the right to revisit this decision.[6] He also indicated his intention to call witnesses during the hearing.

28. On December 5, 2017, the Respondent stated that it did not wish to take a position on the format of the hearing and reserved the right to object to any request by the Claimant to amend the hearing format. In addition, the CCES asked the arbitrator to obtain specifics from the Athlete on the names of the witnesses he intended to call at the hearing and the content of their statements.

29. On December 5, 2017, the arbitrator established the following:

> *[translation]*
>
> *1. The jurisdictional hearing will be held by teleconference on December 18, 2017, at 1:30 p.m.*

[6] A-18.

2. For hearing management purposes, the Athlete is invited to indicate, by December 12, 2017, whether he requires an in-person hearing, after which time the Athlete will be presumed to have waived the right to an in-person hearing.

3. If applicable, the Athlete is also invited to provide, by December 12, 2017, the names of the witnesses he will call at the hearing and the topics on which they will be asked to testify."

30. In his letter of December 5, 2017, the Athlete noted that in its brief, the CCES indicated that it intended to call Mr. Jean-François Bertrand of the Tassé Bertrand firm as a witness and asked the arbitrator to request that the CCES submits a copy of this witness' sworn statement or the topics on which he will be called to testify.

31. On December 6, 2017, the arbitrator amended his decision of December 5, and asked the CCES to: *[translation] "submit the sworn statement of [its witness] or, where the context requires, specify [by December 12] the topics on which the witness will be called to testify."*

32. In its email of December 8, 2017, the CCES provided specific details on the topics that would be addressed by Mr. Jean-François Bertrand, former counsel for the Athlete, and requested confirmation from the Athlete that he did not intend to object to Mr. Bertrand's testimony. In the event that the Athlete had made such an objection, the CCES would request a ruling from the jurisdictional arbitrator indicating that Mr. Bertrand was no longer bound by professional secrecy.

33. In his reply of December 8, 2017, the Athlete objected to Mr. Bertrand's testimony on the grounds that he was still bound by professional secrecy.

34. On December 9, the arbitrator ruled that:

[translation]

1. *The CCES is invited to respond in writing to the arguments raised in the Athlete's letter by Tuesday, December 12, 2017.*

2. *The Athlete, if he so chooses, may submit a short written answer no later than Thursday, December 14, 2017.*

3. *In the event that the Athlete decides to submit a short answer on Thursday, December 14, 2017, the CCES may answer briefly by Friday, December 15, 2017.*

4. *The hearing on the merits of the jurisdictional issue in the case scheduled for December 18 is postponed sine die.*

5. *On December 18, at 1:30 p.m., I will hear, by way of a conference call, the oral submissions of the Parties on the admissibility of Jean-François Bertrand's evidence. I will then issue a written decision with reasons on this issue.*

6. *I will also invite the Parties, on December 18, to suggest a new date for the hearing on the merits of the jurisdictional issue.*

7. *The deadline of December 12, 2017 set in my decision of December 5, as amended on December 6, is postponed sine die.*

35. On December 12, 2017, the Respondent filed its answer to the Athlete's letter dated December 8, 2017, supported by three excerpts from the authorities.

36. On December 14, 2017, the Athlete filed his reply, supported by exhibits A-22 to A-25.

37. The CCES submitted a letter to the arbitrator on December 15, 2018 [sic] explaining that it would respond to the Athlete's allegations during the hearing on this issue.

38. A hearing by teleconference was held on December 18, 2017, from 1:30 p.m. to 3:30 p.m. on the issue of the admissibility of Mr. Jean-François Bertrand's testimony.

39. On December 20, 2017, the jurisdictional arbitrator issued his reasoned decision on the admissibility of Jean-François Bertrand's testimony. The operative decision reads as follows:

Having considered the written and oral submissions of the parties and having deliberated, for the reasons stated above, the Jurisdictional Arbitrator:

(a) GRANTS the application made by the CCES;

(b) RELIEVES Mr. Bertrand of the professional secrecy binding him to the Athlete regarding the beginning, the nature, the duration and the circumstances surrounding the end of his retainer, as well as any amendment made to it;

*(c) ORDERS the CCES to file a sworn statement from Mr. Bertrand or, as the case may be, to state more precisely the topics on which he will be called to testify no later than **10 January 2018**;*

*(d) ORDERS the Athlete to disclose, no later than **10 January 2018**, the names of the witnesses he will call at the hearing, as well as the issues on which they will be asked to testify;*

*(e) ORDERS the Athlete to indicate, no later than **10 January 2018**, whether he requires an in-person hearing, after which time the Athlete, if he does not indicate so, will be presumed to have waived his right to an in-person hearing;*

(f) CONVENES a jurisdictional hearing for January 18, 2018 at 10 a.m."

40. On January 10, 2018, the CCES filed Mr. Bertrand's sworn statement.

41. On January 10, 2018, the Athlete provided the names of the witnesses he would be calling at the hearing and confirmed that a teleconference hearing would suffice.

42. On January 15, 2018, Mr. Chicoine, the Athlete's representative, informed the arbitrator that he was withdrawing from the case. However, Mr. Chicoine indicated that he would continue to assist the Athlete in order to protect his rights.

43. On January 16, 2018, the arbitrator wrote to the Parties as follows:

[translation]

In the present circumstances, I decide the following:
1) The hearing on the jurisdictional issue is postponed sine die.
[…]
3) A conference call will nevertheless be held on Thursday, January 18 at 11 a.m. (instead of 10 a.m.).

4) Only Mr. Chicoine, the Athlete, and Mr. Buruiana will participate in the call.
5) During the call, I shall inform the Athlete of his rights. A discussion regarding the procedural timetable will follow.

44. A third preliminary call was held on January 18, 2018. During the call, the arbitrator reminded the Athlete that it was his most fundamental right to be represented by counsel. A discussion on the procedural timetable ensued. Notes summarizing the decisions made during the call were circulated that same day.

45. On January 19, 2018, the Athlete confirmed the list of witnesses he intended to call and his desire to cross-examine Mr. Bertrand.

46. A jurisdictional hearing was held by teleconference on Thursday, February 8, 2018 from 2 p.m. to 7 p.m. Were present on the call:

For the Athlete:

Mr. David Drouin, the Athlete
Mr. Guy Chicoine, assistant to the Athlete
Ms. Nathalie Chicoine, legal assistant to Mr. Chicoine
Ms. Claire Giroux, the Athlete's mother
Ms. Sylvie Breton, the Athlete's aunt-in-law

For the CCES:
Mr. Raphaël Buruiana and Mr. Yann Bernard, Langlois Lawyers, CCES lawyers;
Mr. Nick Pilon, CCES representative;
Mr. Jean-François Bertrand, former counsel to the Athlete;

For the SDRCC:
Ms. Marie-Claude Asselin and Ms. Stéphanie Du Grenier, SDRCC representatives;

For the jurisdictional arbitrator:
Mr. Yves Fortier, jurisdictional arbitrator

Ms. Annie Lespérance, from the office of the jurisdictional arbitrator

Observer:

Ms. Sarah Lorko, student-at-law at Langlois Lawyers

47. A recording of the hearing was filed by the SDRCC.

48. During the hearing, exhibit A-31 was admitted to the record.

49. The Parties both submitted final written arguments on the jurisdictional issue on February 19, 2018.

III. PARTIES' REQUESTS

A. THE CLAIMANT

50. The Athlete requests that the arbitrator:

1. Grant his application for a time extension to submit his Appeal;
2. Allow him to present his Appeal;
3. Suspend the notice of suspension until the Appeal hearing.[7]

B. THE RESPONDENT

51. The CCES requests from the arbitrator that:

1. The Athlete's request for an appeal be rejected;
2. The case be closed.[8]

[7] A-04.
[8] C-05.

IV. HISTORY OF THE DISPUTE

52. David Drouin has been a road cyclist since the age of 12 and a continental-level cyclist on a professional team since 2014.[9] He lives in Saint-Prosper, Quebec, in the family home with his parents and two brothers.[10]

53. Following a doping control conducted at his residence by the CCES on December 4, 2016, Mr. Drouin was informed that the analysis of his sample showed the presence of SARM RAD140, a substance classified as an anabolic agent according to the World Anti-Doping Agency 2016 Prohibited List.[11]

54. On January 26, 2017, pursuant to subsection 7.3.1. of the CADP, the CCES notified the Athlete of an anti-doping violation as follows[12]:

> *[translation]*
>
> *[...] The Canadian Centre for Ethics in Sports (CCES) asserts that Mr. David Drouin, an athlete affiliated with Cycling Canada has committed an anti-doping rule violation.*
>
> *The sample giving rise to the adverse analytical finding was collected out of competition on December 4, 2016, in Saint-Prosper, QC, in accordance with the Doping Control Rules of the CADP. The adverse analytical finding was received by the CCES from the World Anti-Doping Agency (WADA) accredited laboratory on December 16, 2016. […]*

55. The Athlete was suspended by the CCES for a period of four years. This sanction was confirmed in Mr. Brunet's short decision for the Doping Tribunal on May 31, 2017 and in his reasoned decision of June 15, 2017.[13]

56. Mr. Brunet noted in particular that:

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[9] A-02, para. 13.
[10] A-06.
[11] A-02, para. 4 and 5.
[12] A-02, para. 21.
[13] A-02, para. 7, 25 and 184.

6. The Athlete does not dispute that his sample revealed the presence of SARM RAD140. He admitted the violation on March 14, 2017.

7. He is however challenging the four (4) year sanction imposed by the CCES. He submits that the anti-doping violation was not intentional.

8. Consequently, the Athlete is requesting a reduction of the ineligibility period to two (2) years.[14]

57. Pursuant to section 7.4 (a) of the Code, the Athlete may appeal the Doping Tribunal's decision. This section reads as follows:

7.4 Initiation of a Doping Appeal

(a) With respect to a Doping Appeal, a Person shall initiate the process by delivering a notice of appeal in writing to all Parties who were before the Doping Dispute Panel and to the SDRCC within thirty (30) days of the Doping Dispute Panel's decision pursuant to Rule 13.2.2 of the Anti-Doping Program.

V. THE FACTS

58. Following the issuance of Mr. Brunet's short decision on May 31, 2017[15], the Athlete's aunt-in-law, Ms. Sylvie Breton, offered to contact the Tassé Bertrand law firm with which she was familiar to determine whether an appeal was possible and, if so, to pay his legal fees. The Athlete accepted his aunt's offer.

59. On June 13, 2017, the Tassé Bertrand firm gave Ms. Breton its legal opinion on the possibility of appealing the decision of May 31, 2017:

[translation]

The following is a continuation of our recent exchanges on the possibility of appealing the decision issued by the Doping Tribunal on May 31, 2017.

[14] A-02, para. 6-8.
[15] C-07.

Further to our review of the case and our research, we are now able to provide our legal opinion on the possibility of an appeal.

Based on the analysis of the various applicable regulations and laws, the decision issued by the Doping Tribunal may be appealed to the Doping Appeal Tribunal.

Within 30 days following notification of the decision, you must send a written notice of appeal to all parties involved.

Following this notice, the Tribunal will contact you to take part in a preliminary meeting by way of conference call to settle procedural matters.

The hearing will be held before 3 new arbitrators, within 3 months following the notice of appeal. This will be an entirely new hearing. The arbitrators are not bound by the decision or the findings of the arbitrator who heard your case the first time. It will be possible to file new evidence and call witnesses.

As indicated in the short decision issued on May 31, David will once again be required to attempt to establish how the substance entered his system and demonstrate that it was not intentional. The burden to establish the origin of the substance and the absence of intent is based on the balance of probabilities, i.e. 50+1.

In this respect, under the CADP (Canadian Anti-Doping Program), the arbitrator who issued the decision on May 31, 2017, must provide you with the full reasons supporting his decision no later than 20 days following the decision.

For these reasons, it is our opinion that it is possible to appeal the decision of the Doping Tribunal by filing a written notice of appeal no later than June 30, 2017. Should you decide to move forward, please contact Mr. Jean-François Bertrand, a partner in our litigation group.[16]

60. On June 15, 2017, Mr. Patrice Brunet issued his reasoned decision.[17]

61. On June 22, 2017, the Athlete wrote to the SDRCC as follows:

[translation]

Hello I hired another lawyer to go to appeal. And the notice of appeal should be done.[18]

62. That same day, the SDRCC replied to the Athlete as follows:

[16]A-16. (Exhibit A-08).
[17]C-08.
[18]C-12.

[translation]

Hello,

Thank you for the information. I have taken note of this.

Please note the time limits for filing an appeal as indicated in Rule 13.2.2 of the Canadian Anti-Doping Program (http://www.crdsc-sdrcc.ca/eng/documents/cces-policy-cadp-2015-v2-e_1_0.pdf).[19]

63. On 26 June 2017, the Tassé Bertrand firm wrote to the SDRCC as follows:

[translation]

We represent the interests of David Drouin, who retained us in order to send you this letter.

On June 15, our client received the reasoned decision issued by arbitrator Mr. Patrice Brunet relating to doping allegations in case number SDRCC DT 17-0255.

Please be advised that we are currently reviewing the case to determine whether we will appeal the decision. Consequently, it is our understanding that you will not make the decision public for the time being.

Feel free to contact us with any questions or for additional clarification.

We hope that you will find everything to be in order. Please accept our kind regards.[20]

64. On June 29, 2017, Ms. Geneviève Blouin Gagnon of the Tassé Bertrand firm informed Ms. Breton, with a copy to the Athlete, that the calculation of the 30-day appeal time limit begins at the time of the reasoned decision, and that he therefore has until July 15, 2017, rather than June 30, 2017, to file the Notice of Appeal.[21]

65. On July 13, 2017, Mr. Bertrand informed Ms. Breton of his decision to withdraw from the case and to cease representing the Athlete as follows:

[translation]

Ms. Breton,

[19]C-12.
[20]A-17. (Exhibit A-09).
[21]C-31 (Exhibit R-2).

The following is a continuation of our recent exchanges on the possibility of appealing the decision issued by the Doping Tribunal on May 31, 2017.

Further to our review of the case, our research, and given the major changes that have been made to the facts since we delivered our first opinion, we conclude that there are unfortunately no grounds for appeal.

The criteria that allow us to appeal a decision from the Doping Tribunal are any procedural errors or unfairness that may have been committed by the Doping Tribunal or errors in the interpretation or application of the Anti-Doping Program (hereinafter: "CADP").

In March 2017, David signed an admission of an anti-doping rule violation, and therefore we cannot contest the sampling or test analysis process. Since the samples were not retested in the first instance, it is not possible to do so to appeal the decision of the arbitrator. There is a presumption of validity of the analysis and procedures conducted in the Canadian Sport Dispute Resolution Code, which is applicable in this case. To be able to challenge the result of the analysis, we would have had to demonstrate that there had been a departure from the provisions of the International Standard that could have caused an adverse analytical finding. As this was not done during arbitration, David is precluded from doing so at this stage.

In addition, we cannot contest the validity of David's consent when he signed the admission of violation by submitting that he acted on the recommendations of his lawyer. It should also be noted that although the disavowal of an attorney may give rise to a revocation of judgment, it is not grounds for appeal. That said, the conditions established in the case law to disavow an attorney and therefore seek to obtain a revocation of judgment are not met in this case.

Furthermore, the arbitrator does not appear to have erred in his application of the CADP. Maintaining the 4-year sanction was justified since David had failed to establish, on a balance of probabilities, how the RAD 140 entered his system. At that time, the arbitrator was bound and could not adjudicate on a reduction of the sanction.

That said, at this time, we also do not have a theory to submit to the expert.

For these reasons, we believe that it is impossible to appeal the Doping Tribunal's decision.[22]

66. That same day, i.e. on July 13, 2017, Mr. Bertrand sent a second letter by email but this time addressed to both Ms. Breton and the Athlete. He wrote the following:

[translation]

Mr. Drouin,

[22] C-31 (Exhibit R-7).

Ms. Breton,

I am writing to follow up on today's telephone conversation with Ms. Breton regarding the case mentioned in the subject line.

In this respect and following our discussion, it is our understanding that we do not have the mandate to go to appeal in this case.

You may therefore consider your case closed with our firm. […][23]

67. Mr. Bertrand alleges that a discussion between Ms. Breton, the Athlete and himself took place on July 13, 2017. The exact timing of this discussion is uncertain, with respect to whether it took place after the first or the second of the letters cited above were sent. The Athlete denies having taken part in a discussion with Mr. Bertrand and his aunt on July 13, 2017. Ms. Breton's testimony is silent on this matter.

68. On July 13, 2017, at the end of the day, the Athlete emailed Mr. Bertrand asking him to contact his former attorney, Mr. Michaël-Tai Nguyen, as follows:

[translation]

Hi I spoke to the lawyer who advised me to sign the letter but I told him I didn't want to sign it and he wants to talk to you. His phone number is [redacted] and his name is Michael [sic].[24]

69. As of July 15, 2017, no Notice of Appeal of Mr. Brunet's reasoned decision had been filed by the Athlete or his representatives.

70. On July 21, 2017, having received no news from the Athlete and given the letter from Mr. Bertrand dated June 26, 2017, CCES representatives sent a letter to the latter, as well as to the Athlete's former attorney, Mr. Michaël-Tai Nguyen, stating that the time limit to appeal had expired and the Athlete's case would be closed.[25]

71. Neither Mr. Bertrand nor Mr. Nguyen responded to the CCES's correspondence of July 21, 2017.

[23] C-31 (Exhibit A-8).
[24] C-31 (Exhibit R-9).
[25] C-10.

72. On July 24, 2017, the Athlete filed his Notice of Appeal.[26]

73. The Athlete does not deny having filed his Appeal outside the 30-day time limit required by subsection 7.4(a) of the Code. Given that the long decision issued by arbitrator Patrice Brunet was dated June 15, 2017, the time limit allocated to the Athlete to appeal the decision expired on July 15, 2017.

74. On August 2, 2017, in an email to the CCES, the Athlete explained the delay in filing his Notice of Appeal as follows:

> *[translation]*
>
> *Hello, this is David. I wanted to explain my delay in the request for appeal. After receiving the decision of June 15, I contacted a Quebec City law firm to help me with the case and also to do the appeal request, and then on July 14 they closed my case for two reasons, which were the cost of their help and that they do not specialize in doping cases. But I thought they had already sent the application for appeal (I can forward you an email sent to the resolution centre). And I was not contacted by your email of July 21 that said you hadn't received an application for appeal. I found this out on July 24 through my former attorney (M.N Guyen) and after that I sent my application to the resolution centre in the evening. I believe that the decision is unfair and I would like have the opportunity to argue my point and evidence. And I am not familiar with this kind of process and I am concerned about the fees I will have to pay considering my financial means. I think that presenting my explanations is part of sports ethics and I want to help the CCES take down doping networks. I really want to be heard even if I have to do it without the help of lawyers.*[27]

VI. PARTIES' SUBMISSIONS

75. The submissions of the Parties regarding the jurisdictional issue are summarized briefly below.

[26] A-1.
[27] A-13.

A. CLAIMANT'S POSITION

76. The Athlete submits that the criteria which must be considered in deciding whether to grant a time extension are those established in *Canada (Minister of Human Resources Development) v. Gattellaro (*"**the Gattellaro case**").[28]

77. The Athlete explains that the Federal Court in this case established four factors to consider in determining whether to grant a time extension:

    1. There is a continuing intention to pursue the appeal;
    2. The matter discloses an arguable case;
    3. There is a reasonable explanation for the delay; and
    4. There is no prejudice to the opposing party in allowing the extension.[29]

78. The Athlete submits that he meets these four criteria:

    1. The facts demonstrate that the Athlete always intended to challenge Mr. Brunet's decision; this is why he retained the Tassé Bertrand firm.

    2. The Athlete's case is arguable under law.

    3. In his request for a time extension, the Athlete explained that his delay was due to the high fees requested by the Tassé Bertrand firm. The Athlete and his family therefore no longer had the means to defend themselves in light of these costs.[30] In this regard, the Athlete notes that *[translation] "the legal advice [of the Tassé Bertrand Avocats firm] cost [his] uncle [...], i.e. Mr. Gaetan Drouin, over $4,900.00. Said firm requested an additional $5,000.00, including a $1,500 retainer."*[31]

       In his reply, the Athlete provides additional reasons justifying his delay:

[28] A-10.
[29] A-06, para. 19.
[30] A-06, para. 29-30.
[31] A-06, para. 17-18.

- the Athlete did not know the legal definition of the term "after the time limit";[32]

- the Athlete sincerely believed that his Notice of Appeal had been filed by the Tassé Bertrand firm, as it appears from his letter of August 2 addressed to the CCES;[33] and

- the Athlete is in a depressive state; [34] the Athlete was under a lot of stress due to his suspension;[35] the Athlete has a low level of education and a limited ability to properly understand the judicial process.[36]

The Athlete believes that these reasons provide a reasonable explanation for his lateness.

4. The time extension will not prejudice the CCES. On the contrary, the refusal to allow further time would be detrimental to the Athlete by denying him the right to prove his innocence. It would be a denial of justice.

79. The Athlete submits that the criteria established in the Gattellaro case take precedence over the "exceptional circumstances" criterion under subsection 3.4(d) of the Code[37] , which reads:

> *(d) Under exceptional circumstances or if all Parties agree, the SDRCC may accept a Request that is not filed within the time limit or that is not completed pursuant to Sections 3.4 or 3.5 hereof. The SDRCC may, in its discretion, refer this issue to a Panel.*

80. Nevertheless, the Athlete submits that the reasons he cited to justify his delay in filing his Notice of Appeal do constitute exceptional circumstances.

[32]A-12, para. 2.
[33]A-12, para. 5. See A-13.
[34]A-12, para. 2.
[35]A-12, para. 21.
[36]A-12, para. 26.
[37]A-12, para. 8.

81. The Athlete submits that, given the fees paid by his family, the agreement on fees and the professional retainer as well as the legal advice of the Tassé Bertrand Avocats firm, he had *[translation] "the right to sincerely believe that the application for appeal had been filed within the required time limit by the Tassé Bertrand Avocats firm*"[38] and *[translation] "that he believed he had a full and complete defense […]*"[39]. He adds that *[translation] "this particular situation of the Request not being filed by the retained and paid lawyers is itself an exceptional circumstance"*.[40]

B. RESPONDENT'S POSITION

82. The CCES submits that contrary to the Athlete's claim, the burden of proof that rests on the Athlete is clearly established in subsection 3.4(d) of the Code and it is not a question of the Athlete demonstrating that he meets the four criteria established in the Gattellaro case.

83. According to the CCES, the Athlete must therefore demonstrate the existence of exceptional circumstances that justify his appeal being heard in spite of the fact that it was filed after the time limit.[41]

84. The CCES explains the interpretation of the term "exceptional circumstances" as provided by SDRCC case law. In *Tuckey* v. *Softball Canada* (the "**Tuckey**" case), arbitrator Jane H. Devlin found as follows:

> *23. In my view, the phrase "exceptional circumstances", which appears in section 3.4(e), should be given its ordinary meaning and, on this basis, I find that it refers to circumstances which are extraordinary or unusual.*[42]

85. Arbitrator Andrew de Lotbinière McDougall confirmed this interpretation in the *Gerhart* case, notes the CCES.[43]

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[38] A-12, para. 11.
[39] A-12, para. 28.
[40] A-12, para. 15.
[41] C-5, para. 19.
[42] C-16, *Tuckey* and *Softball Canada,* SDRCC 08-0071, Jane H. Devlin, arbitrator, at para. 23. Emphasis added by the CCES.
[43] C-15, *Gerhart* and *CCES,* SDRCC DAT 13-0002, Andrew de Lotbinière McDougall, arbitrator, at para. 71 and 76.

86. Furthermore, arbitrator Pound likened the Athlete's burden of proof to the burden of demonstrating circumstances that approach *force majeure*.[44]

87. The CCES submits that the reasons given by the Athlete do not constitute exceptional circumstances.

88. First, the CCES alleges that the changing reasons put forth by the Athlete to justify his lateness with respect to his letter of August 2, his request for an extension of time, and his answer raise doubts about his credibility.[45]

89. Second, the CCES submits that communication failures between an attorney and a client do not constitute exceptional circumstances according to case law.[46]

90. In this regard, the CCES wrote the following:

> *[translation]*
>
> *56. Insofar as the Athlete thought that the law firm had indeed filed an appeal to the decision issued by Mr. Brunet, from that moment on, nothing excuses the total lack of follow-up with the SDRCC or with the law firm, between June 22, 2017 and July 24, 2017;*
>
> *[…]*
>
> *58. On the contrary, the Athlete's inaction between these two dates further points to the conclusion that the latter failed to do the necessary follow-up to ensure the process moved forward smoothly; […]*
>
> *[…]*
>
> *62. [Furthermore [t]he fact of being unable to afford the services of a representative has absolutely no bearing on the Athlete's ability to complete said form in a timely manner;*
>
> *63. Moreover, the Athlete could, on the day he allegedly learned that his appeal had not been filed in time, have completed the form and sent it. Completing the*

[44]C-14, *Wachowich* and *Shooting Federation of Canada*, SDRCC 13-0213, Richard W. Pound, arbitrator, at p. 19.
[45]C-05, para. 41
[46]C-05, para. 45-52. See *Tuckey* and *Softball Canada*, SDRCC 08-0071, Jane H. Devlin, arbitrator, at para. 25. [Tab 3]; *Gerhart* and *CCES*, SDRCC DAT 13-0002, Andrew de Lotbinière McDougall, arbitrator, at para. 75 [Tab 2]; and *Wachowich* and *Shooting Federation of Canada*, SDRCC 13-0213, Richard W. Pound, arbitrator, at p. 10. [Tab 1].

Notice of Appeal is a procedure that is simple and that an athlete is able to complete, quickly and without necessarily requiring assistance from a legal representative.[47]

91. Third, in regard to the Athlete's alleged lack of understanding of the term "after the time limit", the CCES stressed that:

[translation]

[...] on at least two (2) occasions, the Athlete's attorneys as well as the SDRCC representatives informed the Athlete that he was entitled to a time limit of thirty (30) days to appeal the decision rendered by Mr. Brunet.[48] *Only one conclusion can therefore be drawn: the Athlete knew the time limits available to him to appeal.*

Drouin simply failed to comply with them.[49]

92. As regards the allegation of professional misconduct by the Tassé Bertrand firm, the CCES notes that:

[translation]

21. […] [A]ccusing former attorneys of professional misconduct or breach of ethics represents a serious accusation, in particular because they are subject to disciplinary sanctions before the Bar. Such accusations are rare and require very clear proof of such breaches.

[…]

24. [In] reading [...] the letter of June 13, 2017 [from the Tassé Bertrand firm to the Athlete], CCES representatives understand that the Athlete's attorneys were retained to report on the procedure that needed to be followed by the Athlete and to assess the possibility of appealing Mr. Brunet's decision on procedural grounds.[50]

[…]

27. […] It must, however, be concluded that the letter contains absolutely no opinion regarding the chances of success for a Doping Appeal. It should also be noted that it would have been surprising, to say the least, if Tassé Bertrand had been able to weigh in, as of June 13, 2017, on the chances of success for a Doping Appeal, given

[47]C-5, para. 56, 58, 62 and 63.
[48]See C-12 (Exhibit D-06); A-16 and C-31 (Exhibit R-2).
[49]C-17, para. 9-10.
[50]C-17, para. 19-24

that the reasoned decision was sent to the Parties only on June 15, 2017, that is, after said letter from Tassé Bertrand was sent to Drouin.

28. It must also be concluded that as of June 26, 2017, Tassé Bertrand still had not been retained to appeal Mr. Brunet's decision. Indeed, in this letter [addressed to the SDRCC], the Athlete's attorneys are simply stating the fact that they were reviewing the decision by Mr. Brunet to assess the possibility of appealing it before the Doping Appeal Tribunal.

[…]

30. The Athlete failed to produce any evidence of the retainer that he would have given [his attorneys] to appeal the decision.

[…]

36. [Thus,] the CCES respectfully submits that the Athlete has failed not only to demonstrate the existence of a retainer to appeal Mr. Brunet's decision, but also to provide evidence of the alleged breaches by Tassé Bertrand.[51]

93. Lastly, the CCES submits that allowing the Athlete to go beyond the 30-day time limit granted to him to file his appeal, without any evidence of exceptional circumstances, would have a significant impact on the entire sport dispute resolution system. This consideration has been recognized by SDRCC case law.[52]

94. The CCES adds the following:

[translation]

81. [...] The CCES seeks, at all times, to act in a reasonable manner, but in the total absence of any evidence whatsoever to corroborate and confirm the Athlete's version, the CCES is simply not in a position to unilaterally accept the unproven and irrelevant allegations made by the Athlete;

82. In fact, were the CCES to agree, in this case, to overlook the jurisdictional issue and proceed directly to the merits of the dispute, this would set a very troubling precedent with regard to respecting the time limits provided in the Code. The CCES respectfully submits that this approach must be prohibited. The need for certainty

[51]C-17, para. 21, 23, 27, 28, 30 and 36.
[52]C-05, para. 77. See *Tuckey* and *Softball Canada*, SDRCC 08-0071, Jane H. Devlin, arbitrator, at para. 26, C-16; *Gerhart* and *CCES*, SDRCC DAT 13-0002, Andrew de Lotbinière McDougall, arbitrator, at para. 76, C-15; and *Wachowich* and *Shooting Federation of Canada*, SDRCC 13-0213, Richard W. Pound, arbitrator, p. 18 and 19, C-14.

and conclusion is the prerogative of all parties that appear before a Doping Appeal Tribunal, or that are otherwise subject to the Code;

83. Thus, despite the consequences that the refusal to hear the Athlete's appeal may have on his career, the need for certainty and conclusion supersedes the existence of the latter's rights […].[53]

95. For the foregoing reasons, the CCES submits that the Athlete's request to have his appeal heard must be denied.

VII. ANALYSIS

96. I have the sole mandate to rule on the CCES' objection to the jurisdiction of the Doping Appeal Tribunal to hear the Athlete's appeal which was filed after the 30-day time limit set out in subsection 7.4(a) of the Code.

97. It is agreed that the Athlete, under subsection 7.4(a) of the Code, had until July 15, 2017 to file his appeal of decision number SDRCC DT 17-0255 rendered by the Doping Tribunal on June 15, 2017.

98. It is also agreed that the Athlete filed his Notice of Appeal after the time limit on July 24, 2017.

99. Having considered the written and oral arguments of the Parties, the evidence produced, and testimonies at the hearing, I have decided the following.

100. Subsection 3.4(d) of the Code stipulates that:

(d) Under exceptional circumstances or if all Parties agree, the SDRCC may accept a Request that is not filed within the time limit or that is not completed pursuant to Sections 3.4 or 3.5 hereof. The SDRCC may, in its discretion, refer this issue to a Panel.

101. Pursuant to subsection 3.4(d) of the Code, the Athlete David Drouin has the burden to prove that there are exceptional circumstances justifying the delay in filing his request for appeal with the Doping Appeal Tribunal.

[53] C-05, para. 81-83.

102. The term "exceptional circumstances" refers to circumstances which are extraordinary or unusual[54] approaching *force majeure* [55] as interpreted by SDRCC case law.

103. Indeed, in the *Tuckey* case, arbitrator Jane H. Devlin found as follows:

> *23. In my view, the phrase "exceptional circumstances", which appears in section 3.4(e), should be given its ordinary meaning and, on this basis, I find that it refers to circumstances which are extraordinary or unusual.*[56]

104. Arbitrator Andrew de Lotbinière McDougall confirmed this interpretation in the *Gerhart* case.[57]

105. Furthermore, arbitrator Pound likened the Athlete's burden of proof to the burden of demonstrating circumstances that approach *force majeure*. He wrote the following:

> *[...] There is nothing on the record before me that approaches what is often referred to as force majeure, which might provide grounds for extending the normal delays. […]*[58]

106. The Athlete believes that he must instead meet the criteria established by the Federal Court in the *Gattellaro* case[59] to justify the delay in his request for an appeal. These criteria are the following:

(1) There is a continuing intention to pursue the request or the appeal;

(2) The matter discloses an arguable case;

(3) There is a reasonable explanation for the delay; and

---

[54] *Tuckey* and *Softball Canada*, SDRCC 08-0071, Jane H. Devlin, arbitrator, Exhibit C-16; *Gerhart* and *CCES*, SDRCC DAT 13-0002, Andrew de Lotbinière McDougall, arbitrator, Exhibit C-15.

[55] *Wachowich* and *Shooting Federation of Canada*, SDRCC 13-0213, Richard W. Pound, arbitrator, Exhibit C-14.

[56] *Tuckey* and *Softball Canada*, SDRCC 08-0071, Jane H. Devlin, arbitrator, at para. 23. [Tab 3]. Emphasis added by the CCES.

[57] *Gerhart* and *CCES*, SDRCC DAT 13-0002, Andrew de Lotbinière McDougall, arbitrator, at para. 71 and 76.

[58] *Wachowich* and *Shooting Federation of Canada*, SDRCC 13-0213, Richard W. Pound, arbitrator, at p. 19. [Tab 1]. My emphasis.

[59] *Minister of Human Resource Development v. Gattellaro*, 2005 FC 883, A-10.

(4) There is no prejudice to the other party in allowing the extension.[60]

107. I am of the opinion that the criteria established in that case are not applicable in the case before me.

108. The decision in the Gattellaro case was issued under subsection 83(2.1) of the *Canada Pension Plan*, R.S.C. 1985, c. C-8 reproduced in paragraph 5 of the decision. The content of this paragraph is far different from the content of Section 3.4 of the Code and operates in a system with no connection to sports law.

109. Thus, I confirm that the issue before me is whether the Athlete has proven that there are exceptional circumstances, as interpreted by SDRCC case law, justifying the delay in filing his request for appeal with the Doping Appeal Tribunal pursuant to subsection 3.4(d) of the Code.

110. I am of the opinion that the Athlete did not discharge his burden of proof.

111. The Athlete has submitted conflicting versions as to why his appeal was filed after the time limit, thereby undermining his credibility.

112. First, in an email to the CCES dated August 2, 2017, the Athlete explained his reasons for filing his appeal after the time limit as follows:

> *[translation]*
>
> *Hello, this is David. I wanted to explain my delay in the request for appeal. After receiving the decision of June 15, I contacted a Quebec City law firm to help me with the case and also to do the appeal request, and then on July 14 they closed my case for two reasons, which were the cost of their help and that they do not specialize in doping cases. But I thought they had already sent the application for appeal (I can forward you an email sent to the resolution centre). And I was not contacted by your email of July 21 that said you hadn't received an application for appeal. I found this out on July 24 through my former attorney (M.N Guyen) and after that I sent my application to the resolution centre in the evening. I believe that the decision is unfair and I would like have the opportunity to argue my point and evidence. And I am not familiar with this kind of process and I am concerned about the fees I will have to pay considering my financial means. I think that presenting my explanations is part of sports ethics and I want*

[60]Gattellaro case, para. 9.

to help the CCES take down doping networks. I really want to be heard even if I have to do it without the help of lawyers.[61]

113. Second, in his request for a time extension, the Athlete cites only the high costs of the request for appeal without any mention of the retainer issued to Mr. Bertrand to appeal the case.

[translation]

29. The delay is excusable in light of the costs requested by the law firm.

30. Mr. David Drouin and his family no longer had the means to defend themselves in light of the very high costs.

[…]

35. The financial side should be taken into account to allow the time extension.

114. Only in his reply did the Athlete resubmit having had the sincere belief that his former attorneys from the Tassé Bertrand firm had filed the Notice of Appeal. He also submits, for the first time, that he did not know the legal definition of the term "after the time limit".

115. The Athlete's conflicting versions listed above can only undermine his credibility as to the circumstances that he raises to justify the delay in submitting this request for an appeal.

116. I must therefore refer to the testimonies of the other witnesses and the written evidence on file.

117. First, I reject the Athlete's argument to the effect that he could not file his appeal within the prescribed period due to his financial means and/or those of his family.

118. It was the Athlete's aunt-in-law, Ms. Sylvie Breton, who, in early June 2017, to help the Athlete, offered to contact the Tassé Bertrand law firm that she knew to determine

[61] A-13. My emphasis. Translation of original excerpt.

whether it was possible to appeal Mr. Brunet's short decision and to cover his legal fees.

119. On July 13, 2017, the Tassé Bertrand firm, following further study of the case and research, told Ms. Breton by email [translation] "that there are unfortunately no grounds for appeal".[62]

120. That same day, in a second letter from the Tassé Bertrand firm sent by email, this time addressed to both Ms. Breton and the Athlete, Mr. Bertrand informed them that the firm did not have the mandate to file an appeal.

121. Ms. Breton testified during the hearing. She answered questions precisely and without hesitation. I therefore consider her testimony to be very credible.

122. During her testimony, Ms. Breton explained that, in the two weeks following the receipt of these two letters, she talked with the Athlete about their content and told him that she was not [translation] "willing to put in the additional money <u>if we were going to lose the appeal</u>".[63]

123. Contrary to the Athlete's claim, it is therefore not at all the case that Mr. Bertrand was charging excessive fees that the Athlete or his family were unable to pay, or that Mr. Bertrand had closed the Athlete's case because the Athlete or his family were not paying his fees.

124. I also reject the Athlete's argument to the effect that he did not understand the meaning of the term "after the time limit".

125. The written evidence on file shows that the Athlete knew that his Appeal had to be filed no later than July 15, 2017, i.e. within 30 days following the issuance of decision number SDRCC DT 17-0255 by the Doping Tribunal on June 15, 2017. The Athlete was informed of the 30-day appeal time limit on two occasions:

[62]C-31 (Exhibit R-7).
[63]My emphasis.

(i) The SDRCC provided this information as follows in an email dated June 22, 2017:

[translation]

[...] Please note the time limits to file an appeal as indicated in Rule 13.2.2 of the Canadian Anti-Doping Program (http://www.crdsc-sdrcc.ca/eng/documents/cces-policy-cadp-2015-v2-e_1_0.pdf).[64]

(ii) Geneviève Blouin Gagnon of the Tassé Bertrand firm also provided this information to Ms. Breton in an email dated June 29, 2017 in which the Athlete had been copied:

[translation]

We have also received confirmation from the SDRCC that the deadline to file our Notice of Appeal is July 15 of this year [...][65]

126. The Athlete denies having received the email from Ms. Blouin Gagnon and/or having read it. He says that the email was not addressed to him. However, the Athlete's email address is indeed present in the "cc" line of the email. This is the same address that he himself used to communicate with the SDRCC[66] and Mr. Chicoine.[67]

127. Under the *Act to establish a legal framework for information technology*[68], there is a presumption of receipt of an email sent to the recipient's email address.

128. In any event, the Athlete cannot deny having received this information from the SDRCC on June 22, 2017, since the email from the SDRCC was in fact a reply to an email that the Athlete had sent to the Centre that same day.[69]

[64]Exhibit D-6.
[65]Exhibit R-2.
[66]Exhibit C-12.
[67]Exhibit A-31 dated 9 February 2018.
[68]RLRQ v. C-1.1, Article 31.
[69]See *supra*, para 61 and 62.

129. I am therefore of the opinion that the Athlete knew his appeal had to be filed no later than July 15, 2017.

130. I am also of the opinion that the Athlete, on July 13, 2017, knew that the Tassé Bertrand firm was withdrawing from the case and therefore no longer had the mandate to appeal. I therefore also reject the Athlete's argument to the effect that he sincerely believed that the Tassé Bertrand firm had filed a Notice of Appeal in his name.

131. The events that transpired on July 13, 2017 are the following.

132. The Tassé Bertrand firm sent two letters (emails) that day. The first was addressed only to Ms. Breton and informed her of the following:

> *[translation]*
>
> *Ms. Breton,*
>
> *The following is a continuation of our recent exchanges on the possibility of appealing the decision issued by the Doping Tribunal on May 31, 2017.*
>
> *Further to our review of the case, our research, and given the major changes that have been made to the facts since we delivered our first opinion, we conclude that there are unfortunately no grounds for appeal.*
>
> *The criteria that allow us to appeal a decision from the Doping Tribunal are any procedural errors or unfairness that may have been committed by the Doping Tribunal or errors in the interpretation or application of the Anti-Doping Program (hereinafter: "CADP").*
>
> *In March 2017, David signed an admission of an anti-doping rule violation, and therefore we cannot contest the sampling or test analysis process. Since the samples were not retested in the first instance, it is not possible to do so to appeal the decision of the arbitrator. There is a presumption of validity of the analysis and procedures conducted in the Canadian Sport Dispute Resolution Code, which is applicable in this case. To be able to challenge the result of the analysis, we would have had to demonstrate that there had been a departure from the provisions of the International Standard that could have caused an adverse analytical finding. As this was not done during arbitration, David is precluded from doing so at this stage.*
>
> *In addition, we cannot contest the validity of David's consent when he signed the admission of violation by submitting that he acted on the recommendations of his lawyer. It should also be noted that, although the disavowal of an attorney may give rise to a revocation of judgment, it is not grounds for appeal. That said, the conditions established in the case law*

to disavow an attorney and therefore seek to obtain a revocation of judgment are not met in this case.

In addition, the arbitrator does not appear to have erred in his application of the CADP. Maintaining the 4-year sanction was justified since David had failed to establish, on a balance of probabilities, how the RAD 140 entered his system. At that time, the arbitrator was bound and could not adjudicate on a reduction of the sanction.

That said, at this time, we also do not have a theory to submit to the expert.

For these reasons, we believe that it is impossible to appeal the Doping Tribunal's decision.[70]

133. The second was addressed to both the Athlete and Ms. Breton and stated that *[translation] "[...] following our discussion, we understand that we no longer have the mandate to go to an appeal in this case."*[71]

134. First, the Athlete denied having received the second letter from Mr. Bertrand and/or having read it. However, the Athlete's email address appears on the recipients' line of the email. As I mentioned above, the presumption under the *Act to establish a legal framework for information technology* [72] therefore applies.

135. Second, the Athlete claimed that he did not become aware of the second letter until July 14, 2017. If this is the case, the Athlete could no longer overlook the fact that the Notice of Appeal had not been and would not be filed by the Tassé Bertrand firm. Moreover, he still had 24 hours to file his Notice of Appeal, since the time limit would expire on July 15, 2017.

136. These conflicting accounts by the Athlete further undermine his credibility in my view.

137. Furthermore, exhibit R-9 reveals that the Athlete wrote to Mr. Bertrand on the evening of July 13, 2017 at 6:09 p.m. asking him to contact his former attorney Mr. Michael Nguyen. He wrote the following:

[70] C-31 (Exhibit R-7). My emphasis.
[71] C-31 (Exhibit A-8).
[72] See *supra*, para. 127 and footnote 67.

[translation]

Hi I spoke to the lawyer who advised me to sign the letter but I told him I didn't want to sign it and he wants to talk to you. His phone number is [redacted] and his name is Michael [sic].[73]

138. During the hearing, in response to one of my questions, the Athlete explained to me that the letter to which he was referring in his email is the admission of a violation.

139. However, the Athlete's admission of a violation is specifically mentioned in Mr. Bertrand's first letter of July 13, 2017[74] which was addressed only to Ms. Breton. This strongly suggests to me that the Athlete would have seen and read the first letter from Mr. Bertrand on July 13, 2017, as well as the second letter from Mr. Bertrand on the same day.

140. Mr. Bertrand confirmed in his sworn statement that, following the email from the Athlete on July 13[75], he contacted Mr. Nguyen on July 14. He explained the content of the telephone conversation as follows:

[translation]

[...] Mr. Michael Tai Nguyen told me that the Athlete had contacted him to take over the case and file the Notice of Appeal, which Michael Tai Nguyen refused to do.[76]

141. This testimony was not contradicted during the hearing and reinforces my conviction that the Athlete knew, as of July 13, 2017, that his appeal had not been filed and that it would not be filed by the Tassé Bertrand firm.

142. Furthermore, during the hearing, Mr. Bertrand testified that he had a telephone conversation with Ms. Breton and the Athlete on July 13, 2018 [sic]. This fact had not been included in Mr. Bertrand's sworn statement and the Athlete denies having

[73]C-31 (Exhibit R-9).
[74]See *supra*, para. 132, (Exhibit R-7).
[75]C-31 (Exhibit R-9).
[76]Sworn statement of Jean-François Bertrand, para. 36, C-31.

participated in a call with Mr. Bertrand and his aunt on July 13, 2017. Since Ms. Breton testified first in the hearing, no questions addressed this topic and none of Ms. Breton's answers mentioned a conversation between Mr. Bertrand, Ms. Breton, and the Athlete on July 13, 2018 [sic]. That said, the supporting evidence above[77] conclusively shows that the Athlete knew, on July 13, 2017, that the Tassé Bertrand firm would not be filing an appeal in his name.

143. Having concluded that the Athlete knew that the time limit to file his appeal expired on July 15, 2017 and that on July 13, 2017, the Tassé Bertrand firm was withdrawing from the case and would not be filing an appeal in his name, there are therefore no exceptional circumstances justifying the delay in filing the Athlete's appeal.

144. As a last resort, the Athlete submitted to me that his depression was an exceptional circumstance justifying the delay in filing his Notice of Appeal. The Athlete provided me with no medical evidence of his depressive state that would corroborate his allegation. A mere allegation by the Athlete in this regard is not sufficient.

145. The Athlete explained during the teleconference hearing that a decision allowing the CCES' objection to the jurisdiction of the Doping Appeal Tribunal would have a devastating impact on his cycling career and his reputation in general. I agree and this is one more reason for the Athlete to stay on top of his case.

146. The Athlete also mentioned during the hearing that he trusted people around him such as his aunt Sylvie Breton and his lawyer Jean-François Bertrand. Again, this is entirely understandable but does not in any way excuse the fact that he did not closely monitor the progress of his case himself.

147. I am of the opinion that it is surprising, for a young adult in his twenties, who had received a 4-year suspension, to have shown such little concern for the status of his case. He must unfortunately suffer the consequences.

[77] See *supra*, para. 131-141.

VIII. DECISION

148. The CCES' objection to the jurisdiction of the Doping Appeal Tribunal is allowed.

149. Decision number SDRCC DT 17-0255 from the Doping Tribunal on June 15, 2017, is not eligible for appeal.

150. Pursuant to subsection 6.22(a) of the Code, each Party shall be responsible for its own expenses and that of its witnesses.

151. All other requests by the Parties are dismissed.

Signed in Montreal on March 6, 2018

[original French version signed]

The Honourable L. Yves Fortier, QC, jurisdictional arbitrator