Arbitration CAS 2012/A/2756 James Armstrong v. World Curling Federation (WCF), award of 21 September 2012

Panel: Mr. Dirk-Reiner Martens (Germany), President; Mr. Graeme Mew (United Kingdom); Mr. Alasdair Bell (United Kingdom)

Wheelchair curling
Doping (Tamoxifen)
Relation between Article 10.5.1 and Article 10.4 WADA Code
Use of utmost caution by an athlete when storing his medicine
Strict approach in the CAS power reviewing the discretion enjoyed by the disciplinary body of an association to set a sanction
Requirements to be met in case of "no significant fault or negligence"

1. **Article 10.5.1 WADA Code is the applicable rule in the event that an athlete is able to establish that he bears no fault or negligence in connection with the presence of a Specified Substance in his sample. This follows from the fact that Article 10.4 does not provide for a complete elimination of any sanction, but rather stipulates a "reprimand" as the most lenient consequence of the presence of a Specified Substance in a sample. In a case where an athlete is found to bear no fault at all, he cannot be sanctioned, not even with a reprimand, and this is what is provided for in Article 10.5.1 which applies to Specified and non-Specified Substances. By contrast, when negligence in connection with a Specified Substance comes into play, Article 10.4 is *lex specialis* vis-à-vis Article 10.5.**

2. **The fact that the athlete stored his own medicine together with the medicine of his wife in a box and also reused containers of Tamoxifen, certainly does not constitute an exercise of utmost caution. It should have been more than obvious to the athlete that the medicine could have been easily mistaken. This consideration would and could have been made by any person and does not even require utmost caution, but rather any form of ordinary caution, no matter whether the respective person is a health professional or not.**

3. **CAS *"enforces a strict approach in the definition of its power reviewing the exercise of the discretion enjoyed by the disciplinary body of an association to set a sanction"*. This Panel confirms the CAS jurisprudence according to which the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules, can be reviewed only when the sanction *"is evidently and grossly disproportionate to the offence"*. According to CAS jurisprudence, the sanction imposed on an athlete must not be disproportionate to the offence and must always reflect the extent of the athlete's guilt.**

4. According to CAS case law *"the requirements to be met by the qualifying element «no significant fault or negligence» must not be set excessively high … [nor] too low"*.

1. THE PARTIES

1.1 Mr. James P. (Jim) Armstrong (hereinafter the "Appellant") is a 61 year old Canadian curler, who has competed in his sport at the highest level all his life. He is a member of the World Curling Federation. A car accident in 2004 forced him to retire early from his career as a competitive able bodied curler. After his accident, the Appellant took up wheelchair curling. Since 2007, the Appellant has competed as an elite curler and is a member and the captain of the Canadian national team which recently won World Championship and Paralympic Gold Medals. The Appellant is also a qualified medical practitioner having practiced for many years as a dentist and having since retired.

1.2 The World Curling Federation (hereinafter "WCF" or the "Respondent") is the world governing body of the Olympic Winter Sport of Curling and the Paralympic Winter Sport of Wheelchair Curling. It has its seat and registered head office in Lausanne, Switzerland.

2. FACTUAL BACKGROUND

2.1 Below is a summary of the main relevant facts and allegations based on the parties' written submissions, their pleadings and evidence adduced at the hearing. Additional facts and allegations may be set out, where relevant, in connection with the legal discussion that follows. Although the Panel has considered all the facts, allegations, legal arguments and evidence submitted by the parties in the present proceedings, it refers in its Award only to the submissions and evidence it considers necessary to explain its reasoning.

2.2 On 8 December 2011, the Appellant was selected for an out-of-competition doping control test authorized by the WCF. The urine analysis from the sample collected from the Appellant was performed at the *Laboratoire de contrôle du dopage* ("LAD"), a WADA accredited laboratory in Montreal. The analysis revealed the presence of Tamoxifen (listed in category S4.2 Hormone Antagonists and Modulators of the WADA Prohibited List of 2011). As a hormone antagonist and modulator, in particular a selective estrogen receptor modulator (SERMs), Tamoxifen is prohibited both in-competition and out-of-competition. It is a specified substance.

2.3 On 6 January 2012, the Appellant was officially notified that his urine sample returned an Adverse Analytical Finding ("AAF") by the WCF Anti-Doping Administrator.

2.4 On 12 January 2012, the Appellant waived his right to have any B-Sample analysis performed. To date, the Appellant has not been subject to any provisional suspension.

2.5 On 17 January 2012, the Appellant exercised his rights and was heard via telephone conference by the WCF Case Hearing Panel (the "WCF Panel").

2.6 On 31 January 2012, and having regard to certain matters raised by the Appellant (discussed below), the WCF Panel requested that the Appellant submit by 5 February 2012 copies of his late wife's prescription for Tamoxifen; a declaration of the date of his wife's death; evidence of the size and shape of Tamoxifen pills; evidence of his move from the West Coast to Ontario; clarifications on his relationship with Dr. Linda Ferguson (the doctor of the Canadian national team); and an independent medical opinion on the potential danger of use of Tamoxifen by someone with his medical conditions.

2.7 On 3 February 2012, the Appellant provided the WCF Panel with each of the documents, evidence and declarations requested, except for the copies of his late wife's prescription for Tamoxifen. The expert reports by Dr. Linda Ferguson and Dr. Robert Graham confirmed that the Appellant had a significant medical history involving a considerable number of conditions and ailments.

2.8 On 3 February 2012, WCF provided the WCF Panel with the Appellant's TUE Certificate history as well as the Appellant's historical anti-doping test records. These documents reveal that the Appellant had requested and been granted TUEs on a regular basis for multiple substances, however, he had never been granted a TUE for Tamoxifen. Records show that until the 8 December 2011 out-of-competition test, all of the Appellant's previous AAF's were covered by TUEs.

2.9 The WCF Panel requested the Respondent, WCF, to disclose the full analysis report issued by the LAD in Montreal with graphics; a declaration from the LAD's analyst regarding the quantification of the prohibited substance found in the sample with an indication of whether the quantity found therein could be compatible either with consumption or contamination; evidence confirming that the Appellant requested TUEs on a regular basis, and a list of those pharmacological substances; a copy of the clean personal doping control record of the Appellant for doping issues considering all his previous negative tests or similar documents; and details (date, place, mandate) of previous anti-doping controls on the Appellant.

2.10 On 5 February 2012, the Respondent provided the WCF Panel with the complete Analytical Report received from the LAD and all information regarding the quantity of Tamoxifen found in the Appellant's sample. The LAD also informed the Panel on the slightly elevated T/E level of testosterone contained in the sample.

2.11 On 7 February 2012, the WCF Panel informed the parties that additional information to clarify the T/E ratio in the Appellant's A-sample would be sought. Having previously received the Appellant's consent, the WCF Panel also ordered the A-sample to be retested.

2.12 On 16 February 2012, the LAD provided the WCF Panel with the results of the Isotope-ratio mass spectrometry (IRMS) analysis. Regarding the level of Tamoxifen found in the sample, the LAD confirmed that the A-sample analysis revealed an estimated level of Tamoxifen metabolite of 20ng/ML.

2.13 On 17 February 2012, the case was heard via teleconference where both parties presented their case before the WCF Panel.

2.14 On 6 March 2012, the WCF Panel issued the following:

CONFIRMED FINAL DECISION (hereinafter "Decision")

"As a consequence of the foregoing, the WCF Case Hearing Panel has decided to impose the following sanction on the Athlete, in accordance with WCF Anti-Doping Rule Article 10. The Athlete shall be suspended for a period of 18 (Eighteen) months to be effective immediately and without further notice from the date of the date of the notification of the summary decision".

3. PROCEEDINGS BEFORE THE COURT OF ARBITRATION FOR SPORT

3.1 On 25 March 2012, the Appellant filed a Request for a Stay of the Decision as well as a Statement of Appeal with the Court of Arbitration for Sport (CAS) pursuant to the Code of Sports-related Arbitration (the "Code") and submitted the following prayers for relief:

"….that the Decision be overturned, thereby reversing any finding that the Appellant has committed an Anti-Doping Rule Violation pursuant to the Decision.

In the alternative, if the Decision is not overturned, the Appellant seeks a reduction in the eighteen (18) month suspension period. Due to the circumstances of this case, and as will be more fully articulated in the appeal brief, the Appellant submits that a two (2) to four (4) month sanction from the date of the decision would have been a just and appropriate range.

As an International-Level athlete, the Appellant asks that this appeal proceed in an expedited manner, due to the implications for his immediate and future professional status and participation.

The Appellant seeks its out-of-pocket expenses in filing and conducting this appeal, including the Court Office fee (attached as Appendix C), other fees levied by the Court, the cost(s) of attending the hearing and the out-of-pocket expenses of Appellant's representatives.

The Appellant asks that the appeal be governed by Canadian common law. In the alternative, the Appellant asks that the appeal be governed by English common law.

In the interest of expediency, convenience and cost reduction, the Appellant asks that this appeal be done through video-conferencing or teleconferencing means. If those means are unavailable, or not permitted / contemplated by the Court's statute and rules, then the Appellant requests that the appeal be heard in Toronto, Ontario as the Appellant, his representatives and the proposed arbitrator all reside in Ontario, Canada. There is therefore a sufficient nexus and appropriate balance of convenience in hearing the dispute in Toronto, Ontario (…)".

Within his Statement of Appeal the Appellant nominated Mr. Graeme Mew as an arbitrator.

3.2 By letter dated 4 April 2012, the Respondent nominated Mr. Alasdair Bell as arbitrator and opposed the Appellant's application that the Appeal be conducted through video-conferencing or teleconferencing means.

3.3 By letter dated 18 April 2012, the Respondent requested an extension of time until 7 May 2012 to submit its Answer. This request was opposed by the Appellant.

3.4 By letter dated 20 April 2012, CAS informed the parties that in view of the Appellant's objection to the proposed extension of time the Deputy President of the CAS Appeals Arbitration Division had decided to grant an extension of the deadline only to 27 April 2012.

3.5 By decision dated 23 April 2012, the Deputy President of the CAS Appeals Arbitration Division decided pursuant to Article R37 of the Code that:

"The request for a stay filed by Mr. James (Jim) Armstrong on 25 March 2012 is dismissed".

3.6 By letter dated 30 April 2012, the Appellant noted that the Respondent did not submit its Answer within the time limit set by CAS and asked for the appeal to proceed to arbitration without the Respondent's Answer.

3.7 By letter dated 2 May 2012, CAS informed the parties that based on the Respondent's sincere explanation of an internal problem in connection with the receipt of the CAS letter dated 20 April 2012 (setting the deadline for the filing of the Answer on 27 April 2012), the Deputy President of the CAS Appeals Arbitration Division had decided to grant the Respondent a final extension until 3 May 2012 to file its Answer.

3.8 By letter dated 3 March 2012, the Respondent filed its Answer to the Appellant's appeal accompanied by one Appendix including the expert report by Prof. Christiane Ayotte, Ph.D., Director of the laboratory for doping control INRS-Institut Armand-Frappier and the certification by Colin Grahamslaw, Secretary General of the WCF regarding the authenticity of the transcript of the hearing before the WCF Panel which was conducted by teleconference on 17 February 2012. The Respondent requested CAS to decide that:

"… the Appellant's Appeal affords no basis for a reduction or elimination of the sanction in this case, therefore a minimum sanction of 18 months ineligibility, as imposed by the WCF Panel is appropriate in this case".

Furthermore, the Respondent noted

"… that this Panel is entitled to consider the totality of the evidence and to form its own view of the facts and form its own conclusions. Therefore, in the respectful submission of the WCF, this CAS Panel is entitled to impose any of the appropriate sanctions available to a WCF Panel under the Code, which could include the imposition of what is normally regarded as the minimum period of ineligibility for a first anti-Doping Rule violation under the WADA Code, being a period of 2 years ineligibility from the date of the hearing of this matter".

3.9 At the hearing on 19 June 2012 Counsel for the Respondent clarified that their relief sought should not be considered a cross appeal *per se* and requested that the Panel impose whatever sanction it deems appropriate.

3.10 On 4 May 2012, the CAS Court Office informed the parties that in accordance with Article R56 of the Code,

> *"…unless the parties agree otherwise or the Panel order otherwise on the basis of exceptional circumstances, the parties shall not be authorised to supplement or amend their requests or their argument, nor to produce new exhibits, nor to specify further evidence on which they intend to rely after the submission of the appeal brief and of the answer".*

3.11 On 8 May 2012, the CAS Court Office informed the parties of the formation of the Panel to be chaired by Mr. Dirk-Reiner Martens.

3.12 By letter dated 11 May 2012, the Appellant asked the Panel for an interim order compelling the production of the prescription of the Appellant's late wife from the relevant person (Dr. Howard Lim and/or the BC Cancer Agency), since it appeared to be extraordinarily difficult for the Appellant to obtain the necessary prescription.

3.13 By letter dated 15 May 2012, the Respondent provided the CAS Court Office with the transcript of the teleconference hearing held on 17 February 2012.

3.14 By letter dated 21 May 2012, the CAS Court Office informed the parties of the tentative date of the hearing to be held in Toronto, Canada on 18 or 19 June 2012 and requested them to confirm their availability with the CAS Court Office.

3.15 By letter dated 5 June 2012, the Appellant provided the Panel with a copy of a message from Dr. Howard Lim, confirming the treatment of the Appellant's late wife with Tamoxifen at the BC Cancer Agency.

3.16 By Order of Procedure dated 6 June 2012, the CAS Court Office informed the parties that the hearing would be held on 19 June 2012 in Toronto, Canada and requested confirmation by fax on or before 5 June 2012 of the names of the parties' representatives as well as the names of all the witnesses and/or experts who will be attending the hearing.

3.17 By letter dated 11 June 2012, CAS announced to the Parties that Mr. Morgan Martin would act as an ad hoc clerk.

3.18 On 13 June 2012, a telephone conference was held between the President of the Panel, Counsel for the parties and CAS Counsel Andrea Zimmermann. During the call, the President addressed and clarified procedural issues for the parties. In particular, the President explained that CAS had no power to order the production of the doctor's prescription requested as per 3.12 above. The President also requested the Respondent to clarify its prayers for relief and asked the Appellant to provide reasons for requesting the application of Canadian law, or in the alternative, English common law (see 6.5 below).

3.19 A hearing was held on 19 June 2012, at Arbitration Place in Toronto, Canada. The Panel, assisted by Ms Andrea Zimmermann, Counsel to the CAS, sat in the following composition:

President:	Mr. Dirk-Reiner Martens
Arbitrators:	Mr. Graeme Mew
	Mr. Alasdair Bell
Ad hoc clerk:	Mr. Morgan Martin
CAS Counsel:	Ms. Andrea Zimmermann

The hearing was attended:

a)	for the Appellant:	by Mr. James P. (Jim) Armstrong, the Appellant; assisted by Prof. Emir Crowne and Ms. Christina Khoury, Crowne PC Barristers and Solictors, Windsor, Ontario, Canada
b)	for the Respondent:	by Mr. Mark Gay of Burges Salmon LLP, Solicitors, Bristol, England and Mr. Colin Grahamslaw

3.20 The parties confirmed that they had no objections to the composition of the Panel.

3.21 During the hearing, the Panel heard the testimony of the Appellant, as well as that of Prof. Christiane Ayotte (by telephone, as authorized by the President) and Mr. Colin Grahamslaw.

3.22 After the examination of the witnesses, Counsels for the parties made their closing statements and, upon closure, both parties expressly stated that they had no objection in respect of the exercise of their right to be heard.

4. THE PARTIES' SUBMISSIONS

The following outline of the parties' positions is illustrative only and does not necessarily comprise every contention put forward by the parties. The Panel, indeed, has carefully considered all the submissions made by the parties, even if there is no specific reference to those submissions in the following summary.

A. Appellant's Submissions and Requests for Relief

4.1 In summary, the Appellant submits the following in support of his appeal:

4.2 On 16 January 2012, the Appellant provided the WCF Panel with a written explanation for his AAF. The Appellant noted that his wife of thirty years was diagnosed with Stage 4 breast cancer in 2006. One of the many medications that the Appellant's wife was prescribed to treat her cancer was Tamoxifen. In his explanation, the Appellant advised the WCF Panel that after his wife's death in 2009, he sold the family home in May 2011. The Appellant moved from British Columbia to Ontario. To prepare for the move, he placed many household items in storage, including a box of many of his own medications as well as many of the prescription medications belonging to his late wife. The box containing the stored medications arrived at the Appellant's new home in Ontario on 7 September 2011. As the Appellant became short on medications, he would look to his older medications in the storage box. He explained the positive test for Tamoxifen by noting that *"there is no other possible rationale for my exposure to Tamoxefin* (sic)*, other than unwittingly contaminating one of medications, most likely ASA 81mg, with an old medication bottle of my deceased wife"*. The Appellant further noted that because of his intense travel schedule and the three-month prescriptions he routinely received, it was more practical for him to use secondary and smaller pill bottles to travel with rather the larger bottles that came with his prescriptions and that were difficult to open due to his arthritic hands.

4.3 The Appellant puts forward the proposition that Tamoxifen and ASA 81 mg (a substance subscribed to him for the last six years) are virtually identical in size, shape, colour and texture (which remained uncontested) such that he could have easily mistaken one pill for the other. Therefore, the Appellant assumes that he could have accidentally ingested Tamoxifen rather than ASA 81 mg, due to his decision to put his own pills inside a Tamoxifen bottle which had belonged to his late wife.

4.4 The Appellant admits that he did not retain possession of any of the containers he had used to repackage his medications. Rather, he threw them away three weeks after he was notified of his AAF.

4.5 The Appellant admits that following notification of the AAF he had not sought a special medical examination to check if there had been any damage to his health from his Tamoxifen ingestion; however, he did verbally consult with Dr. Ferguson who reportedly advised him to consult his own physician if he noticed any side effects from his apparent ingestion of Tamoxifen.

4.6 In his written and oral argument, the Appellant asserts that the WCF Panel inappropriately placed emphasis on his dental training in asserting an even higher standard of care than would ordinarily be expected of elite athletes. The Appellant argues that even if the WCF Panel had adopted an appropriate standard of care (one that was uninfluenced by the Appellant's dental training), the WCF Panel failed to acknowledge that the law permits professionals to make "errors in judgment" which would not necessarily amount to a breach of their civil standard of care. In this case, the Appellant asserts that his one-time inadvertent ingestion of a personally detrimental prohibited substance amounted to an "error in judgment" rather than a breach of a professional standard of care and, hence, a significant lack of care having regard to his responsibilities as a medically knowledgeable elite athlete.

4.7 The Appellant submits that the WCF Panel inappropriately discounts the effects of its finding that he had no intention of enhancing his sporting performance and that there was no benefit to him. Additionally, the Appellant quotes, in support of his arguments that he did not knowingly ingest Tamoxifen and that any use of Tamoxifen would not have increased his sport performance, the witness reports of Dr. Ferguson and Dr. Robert Graham stating that an abuse of Tamoxifen would have caused his present medical condition to worsen.

4.8 The Appellant contends that the WCF Panel had no legal basis for the sanctions it pronounced against him.

4.9 The Appellant further argues that even if the WCF Panel had enacted a rule of strict liability, it ought to have applied it with flexibility with the result that the Appellant would not be punished.

4.10 Alternatively, if the suspension set out in the Decision is not overturned, the Appellant suggests that the suspension be reduced, by arguing *inter alia* that the Decision was the first case of doping before the WCF. The Appellant argues that the WCF Panel ought to have drawn from relevant precedents of CAS in determining an appropriate and reasonable sanction. To that end, the Appellant alleges that the Decision is not reflective of the particular circumstances of this case and lacks proportionality.

B. Respondent's Submissions and Requests for Relief

4.11 In summary, the Respondent submits the following in defence:

4.12 The Respondent argues that the Appellant did not establish to the requisite standard of proof, (i) how the prohibited substance entered his system; or (ii) that it was not intended to enhance his performance.

4.13 The Respondent states that the Appellant is an experienced International Level Athlete who had already been frequently tested and therefore must be taken to know the content of the Prohibited List and be extraordinarily careful as to what substances he ingests.

4.14 The Respondent further alleges that the inherent probability of a qualified medical practitioner of such standing inadvertently taking toxic substances is not very high and therefore the Appellant was at the very least significantly negligent in ingesting Tamoxifen.

4.15 The Respondent relies on the expert evidence of Prof. Christiane Ayotte in which she states that Tamoxifen is performance enhancing in sports.

4.16 The Respondent asserts that even if the Appellant was correct about the storage, repacking and reusing of the respective medicine he was wholly negligent in not assuring himself that the medication he took was what had been prescribed to him. Therefore, the requirements for the demonstration of an elimination or reduction of the period of ineligibility according to 10.5 of the WCF Anti-Doping-Rules were not met.

4.17 The Respondent finally argues that the Appellant offers a speculative theory, unsupported by any contemporary corroborative evidence, which lacks all credibility.

5. JURISDICTION OF THE CAS

5.1 The jurisdiction of CAS is not disputed by the parties and has been confirmed by the execution of the Order of Procedure by the parties. In addition, it is provided for in Article 13 of the WCF Anti-Doping-Rules.

5.2 Therefore, CAS has jurisdiction to decide the present dispute between the parties.

6. APPLICABLE LAW

6.1 Article R58 of the Code provides the following:

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

6.2 Pursuant to the Scope of the WCF Anti-Doping Rules (hereinafter "the Rules"):

"These Anti-Doping Rules shall apply to The World Curling Federation (WCF), each Member Association of WCF both Provisional and Full, and each Participant in the activities of WCF or any of its Member Associations by virtue of the Participant's membership, accreditation, or participation in WCF, its Member Associations, or their activities or Events. To be eligible for participation in WCF events, a competitor must sign the WCF Anti-Doping Policy Acknowledgment and Agreement form as shown in Appendix 1".

6.3 The Appellant is a member of the Canadian national team for wheelchair curling and as such participates in WCF competitions. Therefore, the Panel finds that in this case the applicable regulations are all pertinent WCF rules and regulations. Since the alleged offences occurred in 2011, the 2010 version as the current version applies.

6.4 The Rules relevant in this arbitration are the following:

"Article 2 Anti-Doping Rule Violations

(…)

The following constitute anti-doping rule violations:

2.1 The 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 violation under Article 2.1.

4.1 Incorporation of the Prohibited List

These Anti-Doping Rules incorporate the Prohibited List which is published and revised by WADA as described in Article 4.1 of the Code. WCF will make the current Prohibited List available to each Member Association, and each Member Association shall ensure that the current Prohibited List is available to its members and constituents.

4.2.2 Specified Substances

For purposes of the application of Article 10 (Sanctions on Individuals), all Prohibited Substances shall be "Specified Substances" except (a) substances in the classes of anabolic agents and hormones; and (b) those stimulants and hormone antagonists and modulators so identified on the Prohibited List. Prohibited Methods shall not be Specified Substances.

10.2 Ineligibility for Presence, Use or Attempted Use, or Possession of Prohibited Substances and Prohibited Methods

The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), Article 2.2 (Use or Attempted Use of Prohibited Substance or Prohibited Method) or Article 2.6 (Possession of Prohibited Substances and Methods) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, or the conditions for increasing the period of Ineligibility, as provided in Article 10.6, are met: First violation: Two (2) years' Ineligibility.

10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where an Athlete or other Person can establish how a Specified Substance entered his or her body (…) and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility. To justify any elimination or reduction, the Athlete or other Person must produce corroborating evidence in addition to his or her word which establishes to the comfortable satisfaction of the hearing panel the absence of an intent to enhance sport performance or mask the use of a performance enhancing substance. The Athlete's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility.

10.5 Elimination or Reduction of Period of Ineligibility Based on Exceptional Circumstances

10.5.1 No Fault or Negligence

If an Athlete establishes in an individual case that he or she bears No Fault or Negligence, the otherwise applicable period of Ineligibility shall be eliminated. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (presence of Prohibited Substance), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the

period of Ineligibility eliminated. In the event this Article is applied and the period of Ineligibility otherwise applicable is eliminated, the anti-doping rule violation shall not be considered a violation for the limited purpose of determining the period of Ineligibility for multiple violations under Article 10.7.

10.5.2 No Significant Fault or Negligence

If an Athlete or other Person establishes in an individual case that he or she bears No Significant Fault or Negligence, then the period of Ineligibility may be reduced, 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 section may be no less than 8 years. When a Prohibited Substance or its Markers or Metabolites is detected in an Athlete's Sample in violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), the Athlete must also establish how the Prohibited Substance entered his or her system in order to have the period of Ineligibility reduced.

6.5 In his prayer for relief the Appellant asks the Panel, *inter alia*, to apply "Canadian" common law, or in the alternative English common law.

6.6 The Panel notes that the parties did not *"choose rules of law"* as is provided in R58 of the Code.

6.7 Therefore, according to Article R58 of the Code *"(…) in the absence of such a choice, [the dispute has to be decided] according to the law of the country in which the federation, association or sports-related body which has issued the challenged decision is domiciled (…)".*

6.8 Article 3 of the WCF Constitutions and By-Laws 2009 provide that *"(T)he registered office of the WCF is in Lausanne (Switzerland)".*

6.9 Accordingly, the Panel finds that in the case at hand the Swiss law shall apply on a subsidiary basis.

7. ADMISSIBILITY

7.1 The Statement of Appeal was filed within the deadline set out in Article 13.4 of the WCF Anti-Doping-Rules. It further complies with the requirements of Articles R47 and R48 of the Code.

7.2 Accordingly, the appeal is admissible.

8. MERITS

8.1 According to Article R57 of the Code, the Panel has "*full power to review the facts and the law*". As repeatedly stated in CAS jurisprudence, this means that the CAS appellate arbitration procedure entails a *de novo* review of the merits of the case, which is not confined to merely deciding whether the body that issued the appealed ruling was correct or not. Accordingly, it

is the mission of this Panel to make an independent determination as to the merits (see CAS 2007/A/1394 para. 21).

8.2 Article 2 (the reference to an "Article" is a reference to articles of the WCF Anti-Doping Rules") stipulates a strict liability for the presence of a Prohibited Substance as follows:

"ARTICLE 2 ANTI-DOPING RULE VIOLATIONS

The following constitute anti-doping rule violations:

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

8.3 In the case at hand it is uncontested that the LAD analysis revealed the presence of Tamoxifen in the Appellant's sample.

8.4 The WADA Prohibited List of 2011 ("the Prohibited List") is incorporated into the WCF Anti-Doping Rules as per its Article 4.1:

"These Anti-Doping Rules incorporate the Prohibited List which is published and revised by WADA as described in Article 4.1 of the Code (…)".

8.5 According to S4.2. of the WADA Prohibited List, Tamoxifen is listed in category S4.2 Hormone Antagonists and Modulators of the WADA Prohibited List of 2011 as a prohibited substance as follows:

"The following classes are prohibited: (…) Selective estrogen receptor modulators (SERMs) including, but not limited to: raloxifene, tamoxifen (….)".

8.6 Consequently, pursuant to Article 2.1 the presence of such a Prohibited Substance in the Appellant's sample constitutes an anti-doping rule violation.

8.7 A two years' sanction for a first anti-doping violation is stipulated in Article 10.2 as follows:

"The period of Ineligibility imposed for a violation of Article 2.1 (Presence of Prohibited Substance or its Metabolites or Markers), (…) shall be as follows, unless the conditions for eliminating or reducing the period of Ineligibility, as provided in Articles 10.4 and 10.5, (…): First violation: Two (2) years' Ineligibility".

8.8 An elimination or reduction of the period of ineligibility for specified substances is provided for in Article 10.4:

"10.4 Elimination or Reduction of the Period of Ineligibility for Specified Substances under Specific Circumstances

Where an Athlete or other Person can establish how a Specified Substance entered his or her body (…) and that such Specified Substance was not intended to enhance the Athlete's sport performance or mask the use of a performance-enhancing substance, the period of Ineligibility found in Article 10.2 shall be replaced with the following:

First violation: At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility".

8.9 Article 10.4 applies only to Specified Substances. Tamoxifen is to be qualified as a "Specified Substance" pursuant to the following:

"4.2.2 Specified Substances

For purposes of the application of Article 10 (Sanctions on Individuals), all Prohibited Substances shall be "Specified Substances" except (…) and (b) (…) hormone antagonists and modulators so identified on the Prohibited List. (…)" (emphasis added).

8.10 Pursuant to Article 4.2.2. Tamoxifen could be qualified as a non Specified Substance because as a hormone antagonist it falls under the exception of Article 4.2.2 b). However, this Article has to be read in connection with the Preamble of the Prohibited List which reads as follows:

"All Prohibited Substances shall be considered as "Specified Substances" except Substances in classes S1, S2.1 to S2.5, S.4.4 and S6a (…)".

8.11 Since Tamoxifen is listed in the Prohibited List under S4.2, which is not mentioned in the above mentioned Preamble, Tamoxifen has to be considered as a "Specified Substance".

8.12 For purposes of the general principle of "no sanction without fault" as stipulated in Article 10.5.1, according to which the otherwise applicable period of ineligibility has to be completely eliminated (A. below), as a first step the Panel has to evaluate if the Appellant bears "no fault or negligence".

8.13 If the requirements of "no fault or negligence" are not met, the Panel has to evaluate, in order to prove the entitlement to an elimination or a reduction of the period of ineligibility according to Article 10.4, if the Appellant has established,

(a) how the Specified Substance entered the Appellant's body (B. below); and

(b) that the Specified Substance was not intended to enhance his sporting performance or mask the use of performance enhancing substances (C. below);

In case the foregoing conditions for an elimination or reduction of the sanction according to Article 10.4 are fulfilled, the Athlete's degree of fault shall be the criterion in assessing the reduction of the period of ineligibility (D. below).

A. Does the Appellant bear "no fault or negligence"?

8.14 With respect to the relationship between Articles 10.4 and 10.5 the Panel notes that Article 10.5.1 is the applicable rule in the event that an athlete is able to establish that he bears no fault or negligence in connection with the presence of a Specified Substance in his sample. This follows from the fact that Article 10.4 does not provide for a complete elimination of

any sanction, but rather stipulates a "reprimand" as the most lenient consequence of the presence of a Specified Substance in a sample.

8.15 In a case where an athlete is found to bear no fault at all, he cannot be sanctioned, not even with a reprimand, and this is what is provided for in Article 10.5.1 which applies to Specified and non-Specified Substances. By contrast, when negligence in connection with a Specified Substance comes into play, Article 10.4 is *lex specialis* vis-à-vis Article 10.5.2 as explained in the commentary to Article 10.5.5 in these terms:

"(…) For example, Article 10.5.2 does not apply in cases involving Articles 10.3.3 or 10.4, since the hearing panel, under Articles 10.3.3 and 10.4, will already have determined the period of Ineligibility based on the Athlete's or other Person's degree of fault (…)" (emphasis added).

8.16 When considering whether the Appellant bears "No Fault of Negligence" the Panel refers to the definition in Appendix 1 to the Rules for "No Fault or Negligence":

"The Athlete's 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 (…)".

8.17 The fact that the Appellant stored his own medicine together with the medicine of his wife in a box and also reused containers of Tamoxifen, certainly does not constitute an exercise of utmost caution. It should have been more than obvious to the Appellant that the medicine could have been easily mistaken. This consideration would and could have been made by any person and does not even require utmost caution, but rather any form of ordinary caution, no matter whether the respective person is a health professional or not.

8.18 The Panel therefore finds that the Appellant bears fault and is thus not entitled to a complete elimination of any sanction.

8.19 As a next step, therefore the Panel has to determine whether the Appellant was successful in establishing how Tamoxifen entered his body (B below) and that it was not intended to enhance his sporting performance (C below).

B. How did the Specified Substance enter the Appellant's body?

8.20 According to the comment to Article 10.4

"(…) the Athlete may establish how the Specified Substance entered the body by a balance of probability (…)".

8.21 The Appellant offered two possible explanations for how the Specified Substance entered his body: Either by accidentally placing his own medicine in a bottle which had previously contained Tamoxifen and therefore contaminated his medicine, or by accidentally taking Tamoxifen, due to the similar appearance of Tamoxifen and his own medicine ASA 81.

8.22 The Panel also takes into account the laboratory report, according to which:

"(…)the level of tamoxifen metabolite was roughly estimated at 20 ng/mL (…) that being stated, 20 ng/mL cannot be described as a trace which fits more with 1 to 5 ng/mL and lower, i.e. pg/mL".

8.23 The Panel agrees with the laboratory's suggestion that the AAF does not arise from a simple contamination but from an ingestion of the substance itself, due to a confusion of medicine, which is also confirmed by the expert report of Dr. Christiane Ayotte.

8.24 The Panel is also prepared to accept the Appellant's explanation according to which as a result of the stress in connection with his move to Ontario he failed to separate his late wife's pills from his own which were equal in shape and size. He stored both pills in one container, and considerable time later when he was running out of his own medicine he used such container and accidentally took one pill of Tamoxifen instead of his own ASA 81 mg.

8.25 It should be noted that the Panel had the benefit, which the WCF Panel did not have, of seeing and hearing from the Appellant in person. This assisted the Panel in assessing the Appellant's credibility.

8.26 Taking all of the above circumstances into account the Panel finds by a balance of probability, and is in fact comfortably satisfied that the Appellant established how Tamoxifen entered his body.

C. Was the Specified Substance intended to enhance the Athlete's sporting performance?

8.27 According to the comment to Article 10.4:

"(…) the absence of intent to enhance sport performance must be established to the comfortable satisfaction of the hearing panel (…)".

8.28 As a final condition for the application of Article 10.4 the Appellant has to establish that his ingestion of Tamoxifen was not intended to enhance his sport performance or mask the use of a performance enhancing substance. However, in the circumstances of this case, where the Panel has already accepted the Appellant's explanation that his ingestion of Tamoxifen was a mere accident, it necessarily follows that he did not intend to enhance his performance or mask the use of another substance. Accordingly, the Panel is "comfortably satisfied" that the Appellant did not intend to enhance sport performance. It is another matter, whether and to what extent he was negligent in not knowing that he ingested that substance, and this factor will be taken into account in connection with the assessment of the Appellant's degree of fault.

D. Degree of fault.

8.29 Having determined that the requirements for a reduction of the standard sanction under Article 10.2 are fulfilled, the Panel has to assess the Appellant's degree of fault according to Article 10.4:

"The Athlete's or other Person's degree of fault shall be the criterion considered in assessing any reduction of the period of Ineligibility".

8.30 Pursuant to Article 10.4 the WCF Panel had discretion imposing a sanction, between a reprimand and two years of ineligibility:

"At a minimum, a reprimand and no period of Ineligibility from future Events, and at a maximum, two (2) years of Ineligibility".

8.31 CAS *"enforces a strict approach in the definition of its power reviewing the exercise of the discretion enjoyed by the disciplinary body of an association to set a sanction"* (cf. CAS 2006/A/1175, para. 90). This Panel confirms the CAS jurisprudence according to which the measure of the sanction imposed by a disciplinary body in the exercise of the discretion allowed by the relevant rules, can be reviewed only when the sanction *"is evidently and grossly disproportionate to the offence"* (see TAS 2004/A/547, §§ 66, 124; CAS 2004/A/690, § 86; CAS 2005/A/830, § 10.26; CAS 2005/C/976 & 986, § 143; CAS 2006/A/1175, § 90; CAS 2007/A/1217, § 12.4; CAS 2009/A/1870, § 48).

8.32 According to CAS jurisprudence, the sanction imposed on an athlete must not be disproportionate to the offence and must always reflect the extent of the athlete's guilt (CAS 2001/A/330).

8.33 The Panel finds that in the circumstances of this case the 18 months of ineligibility imposed on the Appellant was based on an incorrect appreciation of the relevant legal standards. For example, at paragraph 6.11 of the Decision the WCF Panel stated that it had *"(…) directed reservations about the clarity of this explanation [regarding how the substance entered his body] to considerations of the degree of fault of the Athlete".* However, once the WCF Panel had established, on the basis of a balance of probability, how the substance entered the body of the Appellant it was no longer possible to refer to lingering "reservations" concerning this matter in order to "increase" the degree of fault of the athlete. Furthermore, and in addition to this error of law, the Panel also finds that the penalty imposed to be *"evidently and grossly disproportionate"* on the basis of the following considerations:

8.34 As has been shown in A and B above, once the requirements for a reduced sanction pursuant to Article 10.4 are met (i.e. establishing how the Specified Substance entered the body and the absence of intent to enhance performance) the appropriate sanction must be determined in accordance with Article 10.4 and not Article 10.5.2. The WCF Panel therefore erred in basing the sanction on considerations under Article 10.5.2 ("no significant fault or negligence") rather than on 10.4 ("level of fault").

8.35 Hence, the considerations of the WCF Panel regarding *"no significant fault or negligence"* according to Article 10.5.2 were not correct and therefore the WCF Panel did not properly exercise its discretion.

8.36 Further, the WCF Panel exercised its discretion on the basis of wrong considerations:

8.37 The Appellant cannot be blamed for not reading the patient's information leaflet for Tamoxifen as due to his own negligence he thought he was taking his own medication and not Tamoxifen.

8.38 The assertion in 6.24 of the Decision that the Appellant failed to obtain medical advice cannot be used against the Appellant. This argument relates to circumstances which occurred after the Appellant had ingested the Specified Substance and can thus logically not be invoked as an element of fault against him.

8.39 The Panel is of the opinion that the WCF Panel not only misapplied the applicable rules and misinterpreted the facts of this case, but also imposed on the Appellant a grossly disproportionate sanction. The Panel arrives at the latter conclusion by applying the principles laid down in the comment to Article 10.4:

"In assessing the Athlete's or other Person's degree of fault, the circumstances considered must be specific and relevant to explain the Athlete's or other Person's departure from the expected standard of behaviour (…). It is anticipated that the period of Ineligibility will be eliminated entirely in only the most exceptional cases".

8.40 In assessing the Appellant's specific degree of fault, the Panel takes into account the following circumstances:

8.41 The Appellant is a health professional and has been an elite athlete for many years. Therefore he should have exercised much more caution in handling medicine which is prohibited in his sport. The identical size, shape and colour of the two different pills should have drawn his attention to a possible mistake.

8.42 The Appellant's argument that his knowledge as a health professional should not result in creating a higher standard of care than it would be ordinarily be expected of an elite athlete, cannot be followed. The Panel has to evaluate every single case according to its special and unique circumstances.

8.43 The fact that in the past he had requested several TUE's for his medical treatment corroborates that he is and was well aware of the anti-doping rules of WCF and the possible qualification of medical substances as prohibited substances. Even if he did not know that Tamoxifen is a Specified Substance, he was negligent in not knowing.

8.44 In conclusion, it has to be stated that storing medicine together with Tamoxifen in the same containers, reusing these containers and also not separating them directly after the move, has to be qualified as not exercising the necessary caution in handling Tamoxifin as a Specified Substance.

8.45 On the other hand, the particular circumstances of the Appellant's move from the West Coast to Ontario provide elements which lead the Panel to set the standards of care somewhat lower than in a "normal" case. The Appellant's wife had recently died and he had to deal with the complications of his move on his own. A considerable time after the move the Appellant resorted to what he believed to be (exclusively) an extra supply of his own medication, he became the victim of his own mistake of putting pills of size, shape and colour identical to his own medication into the same box/container.

8.46 The Panel thus recognizes that the Appellant was in a state of emotional stress which led him to ignore the level of care which he would otherwise have observed. The Panel also wishes to add that during the hearing the Appellant came across as an honest man who regrets the error committed.

8.47 Taking into account all of the circumstances mentioned above, the Panel determines that a period of six months suspension is a sanction proportionate to the Appellant's degree of fault.

8.48 Before reaching the foregoing result the Panel has carefully reviewed recent CAS awards dealing with anti-doping rule violations involving specified substances. The Panel has been conscious of the need for a specialized court of arbitration like CAS to consider each case on its own particular merits, a need that has been recognized by WADA on the occasion of its 2007 revision of the Code (effective 1 January 2009) when it conferred upon the decision makers in doping cases involving specified substances a far greater discretion in the sanctioning than was available under the previous version of the Code.

8.49 The Panel's reasoning is parallel in particular to those CAS cases where athletes were successful in demonstrating that – like in the case at hand – they were completely unaware that they were ingesting material which was or which contained a prohibited (specified) substance. These are the cases where the absence of intent to enhance performance is obvious since logically the athlete cannot have had intent if he did not know he was ingesting the substance. The Panel finds support for this conclusion in CAS 2010/A/2107, where the athlete was able to establish that she was unaware of the presence of a specified substance in a dietary supplement: in the Panel's view this was sufficient to prove the absence of intent to enhance performance, but the reasons for her failure to know were the crucial element in assessing the degree of (in that case very considerable) fault and thus the extent of the sanction (18 months).

Finally, the Panel's finding in this case is supported by CAS 2006/A/1025: here again, the athlete had mistakenly drunk from his wife's glass of water in which she had poured – unbeknownst to the athlete – her medication containing a specified substance. The Panel determined that the athlete was not without fault or negligence but that he was entitled to a sanction of two years for a second violation which for reasons of proportionality was even below the minimum established in the rules.

8.50 Of less precedential relevance in respect of this award are those CAS cases where the athlete knowingly ingests a nutritional, dietary or food supplement which turns out to contain a

prohibited substance, thus ignoring the perennial and constant warnings about the risks of taking these supplements.

In the present case the athlete's negligence consists of the fact that on the occasion of his move to a new residence he stored his own TUE-covered medication in one container together with his late wife's anti-cancer prescription drugs which contained a substance prohibited in sport and which a few months later the athlete accidentally ingested mistaking them for his own mediation.

This level of negligence can be distinguished from cases involving supplements where an athlete fails to properly research and analyse the components of the supplement (CAS 2011/A/2677: failure to compare the substances indicated on the label with the WADA List, 2 years of suspension; CAS 2005/A/847 where the label did not specify that it contained a prohibited substance, 18 months), or falls victim to mislabelling and/or simply ignores the risks of a supplement being contaminated (CAS 2010/A/2107 where the athlete *"was not wilfully negligent regarding the risks that a nutritional supplement may be mislabelled because she took some steps to ensure [the substance] did not contain a banned substance"*: 18 months of suspension; CAS 2011/A/2615-2618: failure to check components of supplement, 18 months; CAS 2010/A/2229: only cursory check on the internet, one year).

Applying the principles established in CAS 2005/A/847 according to which *"the requirements to be met by the qualifying element "no significant fault or negligence" must not be set excessively high … [nor] too low"* and taking into account the CAS jurisprudence set out above, the Panel in this case is of the view that the Appellant is not without fault or negligence, is not entitled to the lowest possible sanction (like in CAS 2006//A/1025) which would be a reprimand in the present case, but that the level of his negligence is not as high as in CAS 2010/A/2107. Hence the Panel's decision to impose a six months suspension on the Appellant.

E. Commencement of Ineligibility Period

8.51 Pursuant to Article 10.9

"the period of Ineligibility shall start on the date of the hearing decision providing for Ineligibility (…). Any period of Provisional Suspension (…) shall be credited against the total period of Ineligibility".

Consequently, the suspension of the Appellant shall commence on 6 March 2012, the date of the WCF hearing and the announcement of the Decision to the Appellant and shall end on 5 September 2012.

9. CONCLUSION

9.1 In the light of the foregoing, the Panel finds, consistent with the WCF Panel, that the Appellant committed an anti doping rule violation according to Article 2.1.

9.2 The Panel finds that the sanction of 18 months of ineligibility is disproportionate and therefore decreases the sanction imposed to six months.

The Court of Arbitration for Sport rules:

1. The appeal filed on 25 March 2012 by Mr. James P. (Jim) Armstrong against the decision issued on 6 March 2012 by the WCF under the provisions of the WCF Anti-Doping-Rules, is partially upheld.

2. The decision issued on 6 March 2012 by the WCF Hearing Panel is set aside. A period of ineligibility of six (6) months commencing on 6 March 2012 is imposed on the Appellant.

3. (…).

4. (…).

5. All other motions or prayers for relief submitted by the parties are dismissed.