



# Significant Changes to the 2015 World Anti-Doping Code

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On January 1, 2015, The World Anti-Doping Agency's ("WADA") 2015 Anti-Doping Code came into effect (the "2015 Code"). The 2015 Code introduces several significant changes from the 2009 Anti-Doping Code (the "2009 Code") which will directly affect arbitrators, anti-doping bodies, athletes and counsel. This paper will focus on 5 of these changes:

- (1) the 4-year sanction for intentional doping violations;
- (2) the introduction of a rule specific to the use of Contaminated Products;
- (3) the provisions regarding Substantial Assistance;
- (4) the distinction between "Timely Admissions" and "Prompt Admissions"; and
- (5) the range of activities prohibited during a provisional suspension.

This paper will further explore the impact that these changes will have on anti-doping dispute resolutions and how the 2015 Code has been employed in tribunal decisions thus far.

## **1. The 4-year Sanction for Intentional Doping Violations**

The length of sanction for intentional doping violations has changed from the two year sanction imposed under the 2009 Code. Under the 2015 Code, an athlete who commits a doping violation may receive either a 2-year or a 4-year sanction, depending on the intentionality behind the doping activities. Under the 2015 Code, an athlete who commits an anti-doping rule violation either intentionally or recklessly now faces a 4-year sanction. The nature of the Prohibited Substance involved in the violation will determine which party bears the onus of proving intentionality. In addition, athletes who intentionally fail to submit to testing will receive the 4-year ban, as will those who traffic or administer banned substances to others.

Not only does this provision provide for a more severe punishment for intentional doping activities, but it also presents an increased opportunity for athletes who unintentionally take banned substances to obtain a reduced sanction. An athlete who can prove that the source of his or her adverse finding was a Contaminated Product can now receive a sanction as low as a reprimand if that athlete establishes (i) how the substance entered the athlete's body, and (ii) that the athlete was not significantly at fault or negligent in taking the substance. This revision reflects the strong consensus of stakeholders that athletes intending to cheat should face more severe sanctions, while cases involving mistakes should be subject to more flexible penalties.<sup>1</sup>

The 2009 Code provided for a penalty of four years of Ineligibility for an adverse finding if the anti-doping organization could show "aggravating circumstances."<sup>2</sup> However, in the years that the provision was part of the 2009 Code, it was rarely used. Examples of aggravating circumstances, as set out in the commentary to this rule, include activities such as participating in a doping conspiracy or engaging in deceptive conduct to avoid the detection or adjudication of an anti-doping rule violation. This provision has not been carried over to the 2015 Code, and such activities would now be included in the category of "intentional" doping activities, attracting the 4-year sanction.

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<sup>1</sup> WADA, "Significant Changes Between the 2009 Code and the 2015 Code, online: <[www.wada-ama.org](http://www.wada-ama.org)>.

<sup>2</sup> WADA, *World Anti-Doping Code*, (2009) Article 10.6, online: <[www.wada-ama.org](http://www.wada-ama.org)>.

The new rule is found in Article 10.2.1 of the 2015 Code which reads:

"The period of Ineligibility shall be four years where:

- 10.2.1.1 The anti-doping rule violation **does not involve a Specified Substance**, unless the Athlete or other Person can establish that the anti-doping rule violation was **not intentional**.
- 10.2.1.2 The anti-doping rule violation **involves a Specified Substance** and the Anti-Doping Organization can establish that the anti-doping rule violation **was intentional**."

Significant to Rule 10.2.1 is the distinction between Specified Substances and non-Specified Substances, as well as the definition of "intentional" and "Contaminated Product."

#### *Specified v non-Specified Substances*

In considering the application of the 4-year sanction, the distinction between whether a substance is specified or not will determine which party (the athlete or the anti-doping organization) bears the burden of proving whether or not the impugned doping activities were intentional. **For non-Specified substances, the athlete must prove** that he or she did not knowingly take the substance or that his or her conduct was not reckless in that it might constitute a violation. Conversely, if the violation involves a **Specified Substance, the onus is on the anti-doping organization** to show that the violation was intentional.

For the purposes of Article 10, Specified Substances are all Prohibited Substances as listed by WADA

except substances in the classes of anabolic agents and hormones and those stimulants and hormone antagonists and modulators so identified on the Prohibited List.<sup>3</sup> Generally, these substances are more

susceptible to a credible, non-doping explanation. WADA recognizes that it is possible for certain substances to enter an athlete's body inadvertently, and the new rule allows for greater flexibility to reduce sanctions in these cases. Specified Substances are not necessarily less serious doping agents than other Prohibited Substances, nor do they relieve athletes of the strict liability rule set out in Article 2 that makes them responsible for all substances in their systems.

Non-Specified Substances are those for which there is no non-doping explanation for their presence in the athlete's system. Examples of these substances are steroids and human growth hormone. When the Prohibited Substance is not a Specified Substance, the onus is on the athlete who tested positive to provide evidence that the violation was not intentional.

#### *Intentionality*

The 4-year sanction is reserved for those athletes whose anti-doping rule violations are intentional. The definition of "intentional" is found in Article 10.2.3 of the 2015 Code:

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<sup>3</sup> WADA, *World Anti-Doping Code*, (2015) Article 4.2.2, online: <[www.wada-ama.org](http://www.wada-ama.org)>.

"As used in Article 10.2 the term "intentional" is meant to identify those Athletes who cheat. The term, therefore, **requires that the Athlete knew that their activity constituted an anti-doping rule violation or knew that there was a significant risk that the conduct might result in a violation and chose to disregard that risk.** An anti-doping rule violation resulting from an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall be rebuttably presumed to be not "intentional" if the substance is a Specified Substance and the athlete can establish that the Prohibited Substance was Used Out-of-Competition. An anti-doping rule violation resulting in an Adverse Analytical Finding for a substance which is only prohibited In-Competition shall not be considered "intentional" if the substance is not a Specified Substance and the Athlete can establish that the Prohibited Substance was Used Out-of-Competition in a context unrelated to sport performance."

The intention analysis cannot rest solely on the athlete's denial that he or she acted knowingly or recklessly. It requires an analysis of the athlete's conduct leading to, and all of the facts and circumstances surrounding the violation.<sup>4</sup> In the case of non-Specified Substances, it will be the athlete's responsibility to provide sufficient evidence to show there was no intent in taking the substance.

## **2. The new Contaminated Products rule**

Article 10.5.1.2 of the 2015 Code contains another change to the law in cases involving Contaminated Products:

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

"Contaminated Product" is defined in the 2015 Code as:

"A product that contains a Prohibited Substance that is **not disclosed on the product label** or in information available in a **reasonable Internet search.**"

Under this provision, an athlete has the ability to seek a reduction of the period of ineligibility based on No Significant Fault or Negligence. Under the 2009 Code, in order to eliminate or reduce the period of ineligibility, the athlete had the burden of proving on a balance of probabilities:

- (a) how the Prohibited Substance entered his or her system; and
- (b) that he or she bore No Fault or Negligence or No Significant Fault or Negligence.<sup>5</sup>

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<sup>4</sup> *Canadian Center For Ethics in Sport v Youssef*, SDRCC No. DT 15-0225, Dec 31, 2015..

<sup>5</sup> *Canadian Center for Ethics in Sport v Chris Korol*, SDRCC DT 12-0186, April 5, 2013.

The 2015 Code's addition of the definition of "Contaminated Product" alters the test that must be made out by an athlete in order to receive a reduction under this rule. Firstly, the athlete must prove that the adverse finding was a result of taking a Contaminated Product. It will not be enough to suggest the possibility that the athlete consumed a Contaminated Product. It must be proved on a balance of probabilities. Secondly, the product allegedly containing the Prohibited Substance must fit the definition of "Contaminated Product" in the 2015 Code: the presence of the Prohibited Substance must not be noted on the product label or in information available through a reasonable internet search. Only once those two elements have been established can a tribunal consider the athlete's degree of fault in consuming the Contaminated Product.

Importantly, Article 10.5.1.2 provides for a greater range of sanctions for anti-doping rule violations involving Contaminated Products. All such violations, regardless of the nature of the substance (Specified or non-Specified), attract sanctions ranging between a reprimand and a 2-year period of Ineligibility. Under the 2009 Code, the maximum reduction of sanction available for an athlete who was guilty of taking a non-Specified substance was 50%.

### **Application of Article 10.2.1**

Both the 4-year sanction and the issue of Contaminated Products have been considered in recent case law. Specifically, tribunal decisions from Canada and the United Kingdom have developed a threshold of evidence that is required to rebut a presumption of intentionality under Article 10.2.1.

The first case in which a Canadian Tribunal was called upon to interpret and apply Rule 10.2.1 under the 2015 Code was *Youssef*,<sup>6</sup> in which a judo athlete tested positive for traces of testosterone. The athlete explained that the Prohibited Substance came into his system either by ingesting contaminated whey protein purchased by the athlete's father in Egypt, or through sabotage while sharing a hotel room with a Brazilian competitor. The facilitator found that it was extremely unlikely that either of these explanations were the cause of the adverse test result. The amount of testosterone present in the athlete's body was at such an elevated level that it could not have been achieved by consuming a contaminated substance. Further, the athlete did not submit any evidence that the whey protein had been tested for contamination. As testosterone is a non-Specified Substance, the athlete had the ultimate obligation to demonstrate that the violation was not intentional.

Counsel for Youssef argued that nothing in the language of Rule 10.2.3 expressly states that an athlete must prove how a prohibited substance entered his or her body. Conversely, the CCES argued that the athlete had to discharge his onus to prove that he had no intent to commit an anti-doping rule violation. The CCES stated that, in order to do this, the athlete must satisfy two conditions:

- (1) the athlete must establish how testosterone entered his system, or else the athlete cannot prove that his doping violation was not intended, and

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<sup>6</sup> *Youssef*, *supra* note 4.

(2) even if the athlete can show how the testosterone entered his body, he must still prove that he was not intentional or reckless in taking it.

In support of its argument, the CCES cited the U.K. decisions of *Songhurst*,<sup>7</sup> and *Graham*.<sup>8</sup> *Songhurst* involved an athlete who had tested positive for drostanolone. Counsel for the athlete in that case argued that the tribunal was entitled to assess the athlete's credibility and decide whether they believed his assertion that he had not taken the prohibited substance deliberately. If they found the athlete to be credible, they were to hold that he had satisfied the burden of proof. Otherwise, the athlete argued, the rule would have the effect of ruining the career of someone who was innocent of intentional wrongdoing but who did not know how the substance came to be found in his body.

The tribunal found that the problem with this approach is that it is not normal or expected for steroids to be found in the body of an athlete. Information concerning how a substance appears in an athlete's body is within the knowledge of the athlete and the anti-doping tribunal can only rely on the scientific testing available. The scientific evidence of a prohibited substance in an athlete's sample is powerful evidence that requires explanation. It is easy for an athlete to deny knowledge and impossible for the anti-doping tribunal to counter that argument with any evidence other than the testing result.

The same interpretation was considered in *Graham*. In that case, in considering the athlete's submission with respect to the issue of intention, the Panel stated,

"In any event, the fundamental difficulty with this submission is that where the ADRV arises under Article 2.1 without establishing the likely method of ingestion of the Prohibited Substance **it is difficult to see how this Tribunal could properly and fairly consider the question of intent in relation to the conduct which led to that ingestion.**"<sup>9</sup>

In *Youssef*, the arbitrator accepted that the approach to establishing intentionality used in the U.K. decisions was the appropriate approach to be adopted in Canada, where the issues and rules are substantially similar. Therefore, an athlete will need to do more to prove a lack of intention than simply offer an explanation as to the source of the prohibited substance, or make a firm denial. The evidence required to rebut a presumption of intention requires that the athlete first prove how the Prohibited Substance entered his or her system (for example, by having a supplement tested to show that it has been contaminated). Once this requirement has been met, then the athlete must go on to prove that he or she was not intentional or reckless in taking the Prohibited Substance (which may be done by showing that the athlete took steps to inquire about the product with the manufacturer or a sports doctor, or other trustworthy sources).

The SDRCC determined that Youssef had not proved, on the balance of probabilities, the precise source of the testosterone as it was found in his system at the time of testing. In any event, the arbitrator was satisfied that, in taking the whey protein without independently verifying the security of its contents, given that it did not come from a reputable health and nutrition store, the athlete either knew or ought to have known that "there was a significant risk that the conduct might

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<sup>7</sup> *UK Anti-Doping Limited v Songhurst*, SR/00001120248.

<sup>8</sup> *UK Anti-Doping Limited v Graham*, SR/0000120256.

<sup>9</sup> *Ibid*, at para 38.

constitute or result in an anti-doping rule violation and manifestly disregarded that risk."<sup>10</sup> Therefore Youssef's conduct met the definition of "intentional" in either case and he was prescribed a period of ineligibility of four years.

Rule 10.2.1 was treated similarly in the Canadian case of *Banner*.<sup>11</sup> In this decision, the Tribunal ruled that, when trying to prove that an athlete's violation was not intentional, it is not enough to offer up an explanation as to how the substances may have accidentally ended up in the athlete's body. This decision involved an athlete who tested positive for four WADA-prohibited anabolic agents at a training camp for the Senior Men's Baseball Team. The athlete contended that the prohibited substances entered his body through contaminated pills which he received from a friend and which he thought contained an "all-natural" product. The Tribunal found that the athlete did not meet the burden required to demonstrate that the doping violation was not intentional since he offered nothing more than his belief that the presence of prohibited substances resulted from taking the contaminated pills. The athlete did not take any steps to have the pills tested, and he did not gather information from the manufacturer, or locate studies on the effects of the pills. Significantly, the CCES tendered evidence that one of the substances could not be taken orally, but rather had to be injected, thereby refuting Banner's explanation. As a result, the athlete was prescribed the 4-year period of ineligibility under Rule 10.2.1.1.

Based on the case law that has developed since the introduction of rule 10.2.1, it is clear that in order to discharge his or her burden of proving intentionality on a balance of probabilities, the athlete must prove:

- (a) how the Prohibited Substance entered the athlete's system; and
- (b) that the athlete was not intentional or reckless in taking the Prohibited Substance.

Until an athlete proves the single origin of the Prohibited Substance, there can be no analysis of his or her fault in taking the substance.

### **3. Substantial Assistance**

The concept of Substantial Assistance arises from the recognition that doping athletes often do not work in isolation. The Substantial Assistance provision allows for credit to be given to athletes and support personnel who assist anti-doping organizations in pursuing others involved in doping. This rule allows for part of a ban imposed on an individual to be suspended in return for the provision of information that results in discovering or establishing an anti-doping rule violation or criminal conviction of another person. If the athlete cooperates in providing the promised information on which the suspension is based, the suspension becomes a concrete reduction in sanction. If the athlete fails to follow through with the promised Substantial Assistance, the original period of ineligibility will be reinstated. For assistance provided to a criminal or disciplinary body to result in Substantial Assistance treatment under the Code, the information must also be made available to the Anti-Doping Organization with results management responsibility.

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<sup>10</sup> *Youssef*, *supra* note 4, at p. 31-32.

<sup>11</sup> *Canadian Center for Ethics in Sport v Banner*, SDRCC DT-15-0229, Sept 15, 2009.

The rule is set out in Article 10.6.1.1 of the 2015 Code:

"An Anti-Doping Organization with results management responsibility for an anti-doping rule violation may, prior to a final appellate decision under Article 13 or the expiration of the time to appeal, suspend a part of the period of Ineligibility imposed in an individual case where the Athlete or other Person has provided Substantial Assistance to an Anti-Doping Organization, criminal authority or professional disciplinary body which results in: (i) the Anti-Doping Organization discovering or bringing forward an anti-doping rule violation by another person or, (ii) which results in a criminal or disciplinary body discovering or bringing forward a criminal offense or the breach of professional rules committed by another Person and the information provided by the Person providing Substantial Assistance is made available to the Anti-Doping Organization with results management responsibility. After a final appellate decision under Article 13 or the expiration of time to appeal, an Anti-Doping Organization may only suspend a part of the otherwise applicable period of Ineligibility with the approval of WADA and the applicable International Federation. The extent to which the otherwise applicable period of Ineligibility may be suspended shall be based on the seriousness of the anti-doping rule violation committed by the Athlete or other Person and the significance of the Substantial Assistance provided by the Athlete or other Person to the effort to eliminate doping in sport. **No more than three-quarters of the otherwise applicable period of Ineligibility may be suspended.** If the otherwise applicable period of Ineligibility is a lifetime, the non-suspended period under this Article must be no less than eight years. **If the Athlete or other Person fails to continue to cooperate and to provide the complete and credible Substantial Assistance upon which a suspension of the period of Ineligibility was based, the Anti-Doping Organization that suspended the period of Ineligibility shall reinstate the original period of Ineligibility.** If an Anti-Doping Organization decides to reinstate a suspended period of Ineligibility or decides not to reinstate a suspended period of Ineligibility, that decision may be appealed by a Person entitled to appeal under Article 13."

And further at Article 10.6.1.2:

"To further encourage Athletes and other Persons to provide Substantial Assistance to Anti-Doping Organizations, at the request of the Anti-Doping Organization conducting results management or at the request of the Athlete or other Person who has, or has been asserted to have, committed an anti-doping rule violation, **WADA may agree at any stage of the results management process**, including after a final appellate decision under Article 13, **to what it considers to be an appropriate suspension of the otherwise-applicable period of Ineligibility** and other Consequences for Substantial Assistance greater than those otherwise provided in this Article, **or even no period of Ineligibility, and/or no return of prize money or payment of fines or costs.** WADA's approval shall be subject to reinstatement of sanction as otherwise provided in this Article. Notwithstanding Article 13, WADA's decisions in the context of this Article may not be appealed by any other Anti-Doping Organization."



These provisions add to the 2009 Code in three ways:

1. First, the 2015 Code now also allows a reduction of sanctions which will give assurance to an Athlete or other Person willing to provide Substantial Assistance that the agreed-upon reduction in the period of Ineligibility **cannot be challenged on appeal**.
2. Secondly, in appropriate circumstances, the **disclosure of the Substantial Assistance may be limited or delayed**.
3. Finally, in exceptional circumstances, WADA may approve a Substantial Assistance agreement that provides for **no period of Ineligibility**.

Substantial Assistance was recently employed in a settlement agreement in June 2015 between the International Association of Athletics Federations (IAAF) and WADA, the All-Russian Athletics Federation (ARAF) and Liliya Shobukhova, a Russian marathon runner. The settlement provided for a period of ineligibility of three years and two months in light of the Substantial Assistance that Ms. Shobukhova provided after abnormalities were found with her Athlete Biological Passport. WADA considered the information provided by Ms. Shobukhova to be of significant value to the fight against doping and therefore decided to use Article 10.6.1.2 of the 2015 Code to decrease her 4-year presumptive sanction to three years and two months.<sup>12</sup>

These amendments are intended to increase the incentive for providing Substantial Assistance. They do so by enabling WADA to give solid assurances to athletes or others who offer Substantial Assistance, both with respect to the effects on the sanction and with respect to protection of their anonymity.

#### **4. Timely Admission and Prompt Admission**

The 2015 Code now includes a provision which allows an athlete to promptly admit to an anti-doping rule violation in order to reduce his or her period of ineligibility. This provision differs from the "Timely Admission" rule found in Articles 10.9.2 and 10.11.2 in both the 2009 and 2015 Code respectively. The Prompt Admission rule is found in Article 10.6.3:

10.6.3 Prompt Admission of an Anti-Doping Rule Violation after being Confronted with a Violation Sanctionable under Article 10.2.1 or Article 10.3.1.

"An Athlete or other Person potentially subject to a four-year sanction under Article 10.2.1 or 10.3.1 (for evading or refusing Sample Collection or Tampering with Sample Collection), by promptly admitting the asserted anti-doping rule violation after being confronted by an Anti-Doping Organization with results management responsibility, may receive a reduction in the period of Ineligibility down to a minimum of two years, depending on the seriousness of the violation and the Athlete or other Person's degree of Fault."

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<sup>12</sup> WADA, "WADA Statement regarding Lilya Shobukhova's Sanction," *WADA* (Aug 24, 2015), online: <<https://www.wada-ama.org>>.

As stated in this rule, an athlete potentially facing a 4-year sanction may, by promptly admitting the violation, receive a sanction reduction down to a minimum of two years, depending on the seriousness of the violation and the athlete's degree of fault. The Prompt Admission process requires an unequivocal admission of the violation and, if a sanction reduction is granted by WADA and the anti-doping agency involved, and the sanction is acceptable to the athlete, the athlete waives his or her right to a hearing of the case. WADA has complete discretion over the length of the proposed sanction. No evaluation of the seriousness of the violation and the athlete's degree of fault will be undertaken unless and until the athlete admits the violation.

By contrast, the Timely Admission provision contemplates a hearing to contest the sanction after the violation has been admitted. A Timely Admission serves to start the time running on an athlete's potential sanction from as early as the date of sample collection (as opposed to the date of the hearing):

#### 10.9.2 Timely Admission

"Where the Athlete or other Person promptly (which, in all events, for an Athlete means before the Athlete competes again) admits the anti-doping rule violation by the Anti-Doping Organization, the period of Ineligibility may start as early as the date of Sample collection or the date on which another anti-doping rule violation last occurred. In each case, however, where this Article is applied, the Athlete or other Person shall serve at least one-half of the period of Ineligibility going forward from the date the Athlete or other Person accepted the imposition of a sanction, the date of a hearing decision imposing a sanction, or the date the sanction is otherwise imposed."

Although the language in each of these provisions is similar, and potentially confusing, they consider very different procedures. The Prompt Admission rule is intended to encourage early resolution of cases (by avoiding hearings), and to save anti-doping agencies and athletes time and money. A Prompt Admission essentially acts as a settlement whereby both parties have the opportunity to agree on the duration of a sanction, but only once a violation is admitted. Even if the Athlete does not accept WADA's recommended period of Ineligibility, he or she cannot subsequently contest the fact of the violation. A Timely Admission still allows an athlete the opportunity to dispute the length of sanction and no official period of ineligibility is prescribed until the hearing.

## **5. Prohibited Activities During a Period of Ineligibility**

The 2015 Code has clarified and added to the activities prohibited by an athlete who has been found to have committed an anti-doping rule violation and is serving a period of ineligibility. The applicable provision in the 2009 Code is as follows:

#### 10.10.1 Prohibition Against Participation During Ineligibility

"No Athlete or other Person who has been declared Ineligible may, during the period of Ineligibility, participate in any capacity in a Competition or activity (other than

authorized anti-doping education or rehabilitation programs) authorized or organized by any Signatory, Signatory's member organization, or a club or other member organization of a Signatory's member organization, or in Competitions authorized or organized by any professional league or any international- or national-level Event organization.

An Athlete or other Person subject to a period of Ineligibility longer than four (4) years may, after completing four (4) years of the period of Ineligibility, participate in local sport events in a sport other than the sport in which the Athlete or other Person committed the anti-doping rule violation, but only so long as the local sport event is not at a level that could otherwise qualify such Athlete or other Person directly or indirectly to compete in (or accumulate points toward) a national championship or International Event.

An Athlete or other Person subject to a period of Ineligibility shall remain subject to "Testing."

Article 10.12.1 in the 2015 Code adopts the wording of 10.10.1 in the 2009 Code but adds a prohibition on participating in or working with local sport events that involve minors while serving a period of ineligibility greater than four years. Paragraph 2 of Article 10.12.1 reads:

"An Athlete or other Person subject to a period of Ineligibility longer than four years may, after completing four years of the period of ineligibility, participate as an Athlete in local sports events not sanctioned or otherwise under the jurisdiction of a Code Signatory or member of a Code Signatory, but only so long as the local sport event is not at a level that could otherwise qualify such Athlete or other Person directly or indirectly to compete in (or accumulate points toward) a national championship or international event, **and does not involve the Athlete or other Person working in any capacity with minors.**"

The commentary to this article also expands on the 2009 Code and states as follows:

"For example, subject to Article 10.12.2 below, an Ineligible Athlete cannot participate in a training camp, exhibition or practice organized by his or her National Federation or a club which is a member of that National Federation **or which is funded by a governmental agency.** Further, an Ineligible Athlete may not compete in a non-Signatory professional league (e.g., the National Hockey League, the National Basketball Association, etc.), Events organized by a non-Signatory International Event organization or a non-Signatory national-level event organization without triggering the Consequences set forth in Article 10.12.3. **The term "activity" also includes, for example, administrative activities, such as serving as an official, director, officer, employee, or volunteer of the organization described in this Article.**"

The inclusion of the definition of "activity" in the 2015 Code clarifies that the person is not only prohibited from participating as an athlete in training camps, exhibitions and practices, but also cannot participate in any administrative, employment or volunteer capacity. This presumably extends to a prohibition on all coaching activities which may have significant adverse financial consequences on an athlete whose supplemental employment is coaching. Further, the range of prohibited forums for participation is expanded to any organization that is funded by a governmental agency.

### *Effects and potency of prohibited activities*

While these new provisions provide stringent prohibitions on the activities of an athlete serving a period of ineligibility, their effects only reach as far as the sporting institutions that are signatories to the 2015 Code. A stark example of the WADA Code's impotency can be seen in the Canadian Football League's ("CFL") recent refusal to sanction athletes who tested positive for performance-enhancing drugs at a series of CFL combines in March of 2015. The five players that the CCES flagged for doping violations each had Canadian Interuniversity Sport eligibility remaining. The violations banned them from further competition, effectively ending their university careers. Despite these sanctions, however, all five players were still eligible to be drafted by a CFL team and could play in the 2015 season.

The CFL does not adhere to the anti-doping standards of WADA or the Canadian Anti-Doping Program (the "CADP"). Rather, its anti-doping program has been developed internally and has received criticism from national and international leaders in the fight against doping. Athletes who test positive for their first anti-doping violation face only mandatory testing and optional counselling. A second violation results in a three-game suspension, while a third violation warrants a year suspension.<sup>13</sup>

WADA's Director General has condemned the CFL's anti-doping program as outdated and irresponsible. By openly ignoring drug taking by college athletes, the CFL welcomes them to professional sports with contracts, money and a promise to educate them away from drug taking. As a result, the educational anti-doping efforts at the college level in Canada are undermined, as athletes who choose to take Prohibited Substances are rewarded with professional contracts.<sup>14</sup> Therefore, despite increased prohibitions under the 2015 Code, these provisions have no real effect with regard to university football players looking to enter the CFL, where sanctions under the CADP (which is compliant with the WADA Code and all international standards) are not recognized.

### *Return to training*

Another related and notable difference in the 2015 Code is the addition of a new provision which allows an athlete to return to training as their period of sanction comes to an end:

#### Article 10.12.2 Return To Training

"As an exception to Article 10.12.1, an Athlete may return to train with a team or to use the facilities of a club or other member organization of a Signatory's member organization during the shorter of: (1) the last two months of the Athlete's period of Ineligibility, or (2) the last one-quarter of the period of Ineligibility imposed."

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<sup>13</sup> WADA, "WADA calls on the CFL to update their anti-doping programme: Agency believes that clean athletes would support the initiative," *WADA* (June 22, 2013), online: <[www.eada-ama.org](http://www.eada-ama.org)>.

<sup>14</sup> *Ibid.*

The Commentary to this provision recognizes that in many Team Sports and some individual sports (e.g. ski jumping and gymnastics), an Athlete cannot effectively train on his or her own so as to be ready to compete at the end of the Athlete's period of Ineligibility. During the training period described in this Article, an Ineligible Athlete may not compete or engage in any activity described in Article 10.12.1 other than training. This somewhat lessens the burden for athletes who are not able to train with a team or club during their sanction period. This provision fits with WADA's theme of balancing the adverse effects of sanctions on athletes who have committed similar violations.

## **Conclusion**

The 2015 Code has presented several new developments to WADA's Anti-Doping scheme. Many of these changes, like the ones discussed above, have already had significant impacts on athletes, coaches, decision-makers and counsel. Significantly, the new 4-year presumptive sanction will have a major impact on those athletes who are found to be involved in intentional doping activities, as a 4-year hiatus from sport often means the end of an athlete's career. This rule has already been applied in decisions from the SDRCC and in other sport dispute resolution centers around the world. It will be interesting to note, going forward, the impact that these changes make on the fight against doping and the promotion of clean sport.

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