A response on behalf of Canadian athletes to the draft CADP

Date: June 13, 2014

Submitted to: Canadian Centre for Ethics in Sport
Paul Melia, President and CEO
Jeremy Luke, Director CADP and Business Operations

Preamble

On behalf of Canadian national team athletes and the AthletesCAN Board of Directors, please accept our response to the Canadian Centre for Ethics in Sport's (CCES) current draft of the 2015 Canadian Anti-Doping Program (CADP).

We strongly support clean sport and the tenants of a True Sport environment. We believe in the rights of our athletes to compete in a drug free environment that respects their rights and provides a fair and level playing field. The current anti-doping program in Canada is robust and expanding through the education of athletes and National Sport Organizations (NSOs) and by way of ongoing anti-doping measures, such as, random and targeted testing, the Whereabouts program and the creation of the Biological Passport.

There is alignment within the Canadian sport system that binds all Sport Canada funded sports to the CADP, as mandated by international requirements for participation in major Games. Supporting the system alignments are legal contracts between NSOs, Multi-sport Organizations (MSOs) and athletes that bind them and ensure compliance under the CADP by athletes, in order to pursue excellence and compete.

After thoughtful review of the draft 2015 CADP, we conclude that implementing athlete contracts, automatically awarding costs associated with sanction hearings to the CCES if an athlete is found guilty of a doping violation and implementing a system-wide user fee between the CCES and NSOs/MSOs, is a significant shift in policy.

It is our position that implementation of an athlete contract, automatic hearing costs and system wide user fees are not effective measures to deter athletes from doping.

We oppose these proposed changes as expressed in the draft 2015 CADP for the reasons outlined below. Briefly, we see significant risk that this drastic shift in policy may undermine athlete and public support for the concept of clean sport in our country and that the proposed financial implications are poised to significantly disrupt the Canadian sport system itself.

Our response to the draft CADP is in three sections:

Please accept our feedback for your review and reply.

Position - Understandings & Concerns

We appreciate the measures Canada has taken to implement a leading edge anti-doping program. Our understanding is that the reasoning behind the potential changes in the renewed CADP, as communicated at the CCES Symposium, is as follows:

a) The new World Anti-Doping Agency Code (WADC) comes into force January 1, 2015
b) Increased potential to deter doping and associated acts in the fight against doping
c) Budget implications of executing the CADP

a) Compliance under the new WADA Code

Canada is widely seen as a world leader in the fight against doping. The ability to expand the arsenal of weapons in this fight has grown in the new WADC. While well intentioned, we would caution against the spirit of the new WADC – an ever-expanding system of sanctions, and ever-shrinking system of procedural and technical safeguards available to protect clean athletes.

> For example, section 3.2.2 of the new WADC establishes a higher burden of proof in establishing that a sample is in fact scientifically adverse. Though WADA laboratory standards around the world are high, this change will come into force, as reported by WADA Director General, David Howman, at the CCES Symposium, in the direct wake of a high profile false positive at the now discredited WADA laboratory in Rio de Janeiro. From the perspective of the clean athlete, the technical adverseness burden of proof should be lowered in the face of such a stark possibility, not raised.
>
> Also, while strict liability is now an established part of the WADA anti-doping initiative, we feel the need to echo the discomfort apparent in the Sport Dispute Resolution Centre of Canada (SDRCC) anti-doping jurisprudence. Strict liability is often reserved in the Canadian legal system for minor offences with the potential for minor penalties. Banning an elite athlete from sport is a significant penalty, specifically designed to deter doping. The application of strict liability in cases where athletes performed significant due diligence (as seen in the case of *CCES and Swimming Natation Canada v. Dmitry Shulga* (2013) SDRCC DT13-0195) or raised robust defences of alleged tampering (*CCES and Bobsleigh Canada Skeleton v. Chris Korol* (2013) SDRCC DT12-0186) is troubling to a clean athlete. It is also troubling to an objective legal analysis. Circumstances and intent have substantial influence on sanctions and awards in real life, in the criminal law, and in good faith labour situations – including numerous situations where harm warrants no penalty at all. Why can the harm of doping not be contextually considered as it is in other areas of the law?

We recognize that critique of the WADC and its substance is slightly beyond the scope of this discussion however we do feel it is important to raise these important issues, by way of highlighting the two examples above.

b) Greater deterrent to doping

With regards to the implementation of the WADC through the CADP, we suggest that the implementation of international obligations be done with deterrence, rather than punishment, in mind. On its face, the concepts of mandatory athlete contracts, automatic sanction hearing costs, and mandatory NSO/MSO adoption fees seem to strengthen a system of enforcement, in an attempt to scare athletes away from doping.

It is our position that mandatory athlete contracts, automatic sanction hearing costs and mandatory NSO/MSO adoption fees are being coercively applied to athletes and organizations, in absence of evidence to demonstrate that these measures will deter doping.

c) Budget Implications

It was clearly communicated at the CCES Symposium that Canada is a world leader in the fight against doping and that current systems exceed minimum compliance with the WADA Code. In a period of economic austerity where the sport system is increasingly being taxed to do more with less, the implementation of a user fee will burden a system of users with exceedingly less resources than the CCES. It is highly likely that these fees will either be pushed back on the Government of Canada (by way of the sport system then lobbying to include fees as part of their core funding) but more likely will be charged back to the sport user – the athletes.

We understand that CCES's ask of the Canadian sport community to subsidize its budgetary gap is based on the proposition made in section 2.2 on page 2 of the draft CADP that doping "is the greatest threat to sport." Although AthletesCAN would be naïve to think that doping does not pose a threat to sport, we strongly suggest that sport faces several ethical and existential threats much more serious than doping.

For example, the rampant and now relatively uncontroversial corruption of the IOC, FIFA and mega-sporting events poses a major risk to continued fan and consumer support of elite sport. This ethical threat is most recently highlighted by the work of journalist Andrew Jennings, and the wide media reports that a substantial part of the Sochi Games' operating budget went illegally to Russians and other interests and not the Games. Beyond financial corruption, the IOC now also seems unwilling to promote parts of the Olympic Charter as shown by its refusal to speak out against the oppressive anti-gay laws in Russia during the Sochi Games. The growing threat of gambling operations fixing the outcomes of sport is a further and emerging risk. In terms of Paralympic sport, cheating by athletes and classification officials, and under-developed classification codes that can be easily manipulated, is a serious threat, and very likely more serious to sport for athletes with a disability than doping.

As we look domestically, a non-functioning grassroots development system is one of the greatest threats to Canadian sport, at all levels, not to mention the health of our nation; a grassroots sport crisis perpetrated by a lack of resources – a funding gap.

As the CCES now asks the Canadian sport community to subsidize its anti-doping funding gap, we respectfully ask: Why should doping receive resources at the expense of ignoring the above?

Position – Areas of Opposition

While we respect the need to continue to build and support a clean sport environment, after a detailed review of the draft 2015 CADP, we do not support:

a) implementation of an athlete contract
b) awarding of hearing costs
c) implementation of system wide user fees

a) Athlete Contract

Our opposition to the Athlete Contract is two-fold:

- Redundancy
- Safeguarding of athlete rights

CADP section 5.3, F, (i) states:

"have express knowledge that they are subject to the CADP and have expressly agreed to be bound by the CADP"

Athletes are already bound to the CADP through the Athlete Agreements currently in place between them and their sport organizations, as mandated by Sport Canada and the mandatory clauses contained within Athlete Agreements that bind the sport and athletes to the CADP. A secondary contract between CCES and athletes to the same purpose would be redundant.

CADP section 5.3, F, (ii) states:

"have been fully educated regarding their responsibilities contained in the CADP"

As a condition of carding, all athletes under the Athlete Assistance Program through Sport Canada are bound to complete the CCES online anti-doping education module.

Further, as outlined in section 5.3 d (iii), NSOs would be bound to ensure "every Athlete and other Person participating in the sport who is subject to the CADP by reason of the Adoption Contract and the broad jurisdiction and scope of the CADP knows this fact and is suitably educated and informed".

Education and compliance are being addressed through Sport Canada and obligations set out between the CCES and NSO, an athlete contract between CCES and athletes to the same purpose would be redundant.

Further, and perhaps most importantly, education or lack of education are irrelevant in determining liability, or likely even levels of sanction in the WADC. The unilateral imposition of a legal obligation on an athlete to acknowledge that they have been "fully educated" on doping could never be achieved – even the scientific and academic expert authors of the Prohibited List are likely not "fully" educated on doping – nor is it necessary to establish such a legal obligation.

CADP section 5.3, F, (iii) states:

"have agreed to specific anti-doping related consents, regarding information collection/sharing and further elite Athlete obligations"

Outside of the consents required during the doping control process, there is no evidence to demonstrate the need for athlete information collection / sharing. It is paramount that safeguards remain in place to protect the rights and privacy of athletes. There is no evidence to demonstrate the need to infringe on athletes rights and privacy. We are especially concerned that this clause used in a law enforcement context could allow police, WADA or CCES officials to ignore the *Charter*, warrant requirements, and athlete freedom.

b) Awarding of Hearing Costs

Our opposition to the awarding of hearing costs, payable by athletes is grounded on the following principles:

- Implements a tangible barrier to asserting right to proportional sanction
- Violates principles of natural justice and the WADC

CADP section 10.10.2 states:

"*Every Athlete or other Person who participates in a Doping Tribunal hearing or Doping Appeal Tribunal hearing shall, in every case where a violation is determined, regardless of the sanction, contribute toward the cost of CCES having to conduct such a hearing. For a first violation, the Athlete or other Person shall contribute the sum of $1,500.00 CND toward the cost of the hearing(s). For a second violation, the Athlete or other Person shall contribute the sum of $3,000.00 CND toward the cost of the hearing(s). In each case, the Doping Tribunal or the Doping Appeal Tribunal must ensure that the recovery of costs is proportionate to the cost of the hearing."* (Emphasis ours)

From the perspective of an athlete who has had a violation determined, this clause clearly and aggressively infringes on his or her right to have a penalty imposed commensurate with the offence committed, unless he or she is able to pay. While we understand the intent of the clause is to help fund hearings that are predicted to increase with the new WADC, we insist such an attempt must be properly balanced with athlete rights.

Further, at the CCES Symposium, the SDRCC made clear that doping hearings are fully funded by them. This means that the $1,500 - $3,000 cost contributions to CCES are to pay for CCES legal counsel, and perhaps any additional investigation. While civil legal disputes involving two relatively equal parties often award costs to the victorious party, criminal and administrative proceedings, as a doping procedure resembles, usually award costs when one of the parties is acting frivolously or refusing to cooperate. This clause seems to imply that an athlete seeking to enforce his or her rights to a proportional penalty, a central tenet of Canadian law, is frivolous. We of course cannot accept such an assertion and strongly oppose this clause and intent.

Our fear is that athletes will waive their right as they simply do not want to risk a financial sanction. This is our concern with the substance of this clause. The legality of the clause is also not clear, as the WADC seems to expressly forbid such a financial penalty:

WADC section 10.10 states:

"Anti-Doping Organizations may, in their own rules, provide for appropriate recovery of costs on account of anti-doping rule violations. However, Anti- Doping Organizations may only impose financial sanctions in cases where the maximum period of Ineligibility otherwise applicable has already been imposed." (Emphasis ours)

This seems to outright forbid financial penalties before hearings are held, as they can only be awarded once the maximum penalty has been imposed. While we recognize that CCES construes fixed costs awarded before sanction hearings as costs rather than financial sanctions, we respectfully point out that this is a twisting of words over substance, designed to mislead.

If CCES decides to ignore our recommendations and implements this clause into the CADP, AthletesCAN has the following questions and concerns:

- What measures would be taken to exact payment?
- What would be the authority to collect?
- Surely an athlete should not be expected to pay in the event of no sanction (i.e.: violation but no fault or negligence)

c) System Wide User Fees

Our opposition to the implementation of a system wide adoption fee is born out of concern that athletes would ultimately carry the costs of this fee as reflected in increased membership fees and other costs that would be recovered by national sport organizations (NSOs).

CADP section 6.0, Financial Contributions states:

"All sport organizations adopting the CADP and all member institutions of the sport organizations adopting the CADP shall pay an annual adoption fee ..."

The money for the adoption fee will come from one of two pots:
- Sport Canada contributions
- User / membership fees

Either way, the "pot" is irrelevant, as athletes will likely ultimately pay for the adoption fee. While the sport community and associated Federal funding to sport has weathered the economic downturn of recent years, Sport Canada has been clear in their position that they do not anticipate increased investment by the Federal government in the near future. So while Sport Canada may decide to allow the adoption fee to be an allowable core expense, it does not equate to a relative increase in core funding across the sport system. If that were the case, then CCES could simply turn to the Government to provide the projected shortfall. Ostensibly, CCES has already done so and been refused.

Given the highly unlikely position that Sport Canada will increase funding to sports to support the adoption fee – allocation of finances to support this fee will come out of the pocket of athletes. Athletes are the least resourced stakeholders within the sport system, with the highest level of liability - it seems highly unfair that the burden of the costs would fall on their shoulders.

Although AthletesCAN is opposed to an adoption fee at all, it is helpful to highlight challenges to this proposed policy shift for sports not affected by doping and MSOs, should CCES not follow our recommendations and decide to implement adoption fees. Sport Canada mandates that all funded organizations must adopt the CADP. This would then imply that all MSOs (and sports who are not effected by doping) would be bound to an annual adoption fee as well, while not retaining services.

A possible solution to this implication would be to create two types of adoption:

1) Adoption in Principle (for MSOs and others, no adoption fee required)
2) Adoption in Practice (for P/T/NSOs and other sport organizations, adoption fee required).

Unless Sport Canada funding mandates are revised in lockstep with the CADP, this would be a fair way to provide MSOs with the ability to comply without being bound to an adoption fee that is based on services that are not retained by the MSO community.

Position – Areas of Concern & Question

In addition to the areas of opposition there are a number of areas of concern and question that we bring to the CCES' attention for their review and reply.

General Areas of Concern and Question

Area	Concern & Question
Compliance	Can CCES demonstrate the need to hold Canadian athletes and NSOs to higher standards than their international counterparts? Can CCES demonstrate why there is a need to subject Canadian athletes to harsher drug-testing rules than would be bargained for in a labour context, or that are required by international obligations? If Canadian athletes are still violating the rules, despite incredibly harsh penalties, can CCES demonstrate how increasingly harsher rules and sanctions will deter doping? Can CCES demonstrate how increasing its current budget of $7.5 million, reflected over an average of 12 adverse findings per year is justified?
Athlete Rights	There is very little about educating athletes of their rights – In the Explanatory Notes of the CADP draft, the focus is on educating athletes regarding their duties and responsibilities – will educating athletes as to their rights be part of the education materials?
Athlete Income	A CCES misunderstanding, that elite athletes are generally wealthy and that potential wealth is an incentive for doping, became apparent at the CCES Symposium. We remind CCES that most national team athletes live in poverty, AAP does not and is not meant to even cover sport expenses, and Canada's Olympic, Paralympic and national team athletes largely "pay to play." Endorsements are available to a miniscule percentage of elite athletes. The misunderstanding that Canadian elite athletes are wealthy may have influenced the sanction hearing costs clause we oppose above. In sports where athletes do earn income, such as the CFL, NFL, NHL, NBA, MLB and so on, the athletes have generally negotiated anti-doping regimes that have significantly smaller prohibited substance lists than the WADC, and more reasonable approaches to liability and sanctions than strict liability and automatic bans. This fact permeates a rational analysis of how the CADP affects Canadian elite athletes, and contributes to general discomfort with the bargain.

CADP Areas of Concern and Question

CADP Section	Area	Concern	Question
Part A – Structure & Scope			
2.1	Collaborative Agreement "The *collective agreement* amongst all relevant stakeholders in Canada has been a unique and defining feature of the Canadian effort to eliminate doping in sport."	Disingenuous	The CADP Is not a collective bargaining agreement in the traditional labour sense. This assumes there is unanimity in sport in general regarding the legitimacy and application of the Anti-doping program domestically and internationally. While the sport community will be required to enter into adoption contracts, the ability to bargain, as would be expected in collective agreements, does not exist. There is no suitable recourse if the terms are not acceptable. The Canadian sport community is bound to the terms as defined by CCES and WADA and is therefore a contract of adhesion. The CCES Symposium made clear that the CADP will be imposed unilaterally in the face of NSO/MSO opposition to a program above and beyond international obligations. Such an agreement would not be collective, but coercive.
2.2	Threat to sport "…doping is the greatest threat to the integrity of sport…"	Misleading	Can the CCES demonstrate how doping is a greater threat to the integrity of sport compared to gambling, match fixing, corrupt judging, and classification issues (just to name a few)?

2.2	Public Health Risk "….doping in sport represents a significant public health risk."	Misleading	If doping in sport and the risk of tainted health supplements are a public health risk: o Why are only athletes and not the general public being protected? o Where is the empirical evidence to support this claim? o If doping is a public health risk, where is CFIA & PHAC? o If doping is a public health risk, why is healthcare funding not being sought / given to combat it?
Part B – Implementation			
5.1.3	"CCES may obtain, assess and process anti-doping intelligence from all available sources, to inform the development of an effective, intelligent and…"	This is a very broad power. This raises questions of privacy for athletes and NSO's.	How does CCES propose to safeguard athlete rights and privacy? What limitations will be imposed, if any, on where and how CCES can obtain information?
7.1.12	Athlete Support Personnel shall use his or her influence on Athlete values and behaviour to foster anti-doping attitudes.	Unclear	What imposition does this place on the athlete support personnel? Why have a requirement that is so unclear and difficult to enforce?
Part C – Rules			
2.10	Prohibited Association	This section seems vague and may be difficult for athletes to understand exactly how it functions.	Does prohibited association relate only to sporting relationships? What about family members, friends, co-workers? What are the limits on "reasonably avoid association?" If the burden is on the athlete to show that the association is not in a professional or sport related capacity what is the threshold they need to meet?

Comment to Article 2.10	Prohibited Association	Penalties and jurisdictional boundaries unclear	Prohibited association with persons found ineligible to compete or participate in athletic events has been made stricter however it does not set out what the penalties for contravention of this policy would be for an associated athlete. Furthermore, unlike the 2009 WADA Code, this code does not establish delineated jurisdictional boundaries for whether this rule may change from WADA, to IF / NSO rules. This provision was removed from the 2009 WADA Code: ~~*[Comment to Article 2: The Code does not make it an anti-doping rule violation for an Athlete or other Person to work or associate with Athlete Support Personnel who are serving a period of Ineligibility. However, a sport organization may adopt its own rules which prohibit such conduct.]*~~
2.1.1.	Presence of a Prohibited Substance ... in an Athlete's Sample	There is a distinction to be made on whether an ability to provide "compelling justification" should be allowed to explain a positive sample, failure to provide a sample, a possession charge, or anecdotal evidence.	According to the WADA amendments from 2009 to 2015, clauses allowing an athlete to provide "compelling justification" used to be permitted and have been subsequently removed from the wording of the WADA code. This level of "strict liability" imposed on an athlete may result in increased doping violations being found as well as more administrative appeals, etc. Although WADA relies on case histories from the CAS, this clause may be interpreted as not providing any justificatory recourse for an athlete prior to their hearing.
4.1	Links to additional information	Access	Not all referenced information and hyperlinks are available / active. The WADC contains more information about when

			changes to the prohibited substance list can be made and how they will be communicated. If hyperlinks should ever change or new versions of the list are posted at a different hyperlink in the future, there could be confusion as to what the appropriate list is. There should be instructions on where to find the most up to date list that is not simply a hyperlink. This goes for all other hyperlinks to WADA information in the CADP. Are there any other related CADP documents than an athlete must be aware of? The CADP mentions the "Consequences of Anti-Doping Rule Violations" list, however it cannot be located.
8.0	Right to a Fair Hearing	Unclear	In the WADA Code, the number of rights listed for an athlete regarding a fair hearing has been significantly reduced from a list of 8 rights, to a paragraph in which only 3 are mentioned. A comparison demonstrates that this reduced description has also transferred into the 2015 CADP. The section in the 2015 WADA and CADP codes regarding the rights and principles of a fair hearing are set out in a manner that may read unclearly to an athlete. The only timelines mentioned are that the hearing must occur within 45 days of the original charge and the possible lengths of suspensions. However, the Code is not laid out in a way that would be clear to an athlete regarding how these timelines work in

			conjunction with each other. Furthermore, it does not clearly articulate the available recourse to an athlete other than simply to have a hearing with the SDRCC or to waive that right.
12.2	Costs Related to Violations	Unclear	How will this section, which states that NSO's may be liable for costs of investigations relate to the costs that athletes have to pay should they go to a hearing? How will a "proportional" amount be determined for each party? Will NSO's be responsible for everything but the hearing or will they share some of those costs with the athlete?
14.4	Statistical Reporting	Clarification	What will be included in general statistics?

Recommendation & Concluding Remarks

Thank you for the opportunity to provide feedback on the 2015 draft CADP. As champions of True Sport, AthletesCAN strongly believes in the rights of our athletes to compete in a drug free environment that respects their rights and provides a fair and level playing field.

We respect the dedication of the CCES to ensuring Canada is a world leader in the fight against doping and recognize the efforts needed to implement such a program. We recognize this feedback has been critical of both the draft CADP and its international WADC foundation, yet are convinced that effective anti-doping policy cannot be made in a vacuum. As we look to current economic trends, capacity of the Canadian sport community and the rights of Canadian athletes, in the context of the anti-doping program and the associated draft, a number of areas of question and concern have been identified for the CCES's review, consideration and reply.

While we respect the need to comply with the WADA Code and ensure a robust CADP, we believe that a much more effective approach in building clean sport is through early education of athletes, an effective monitoring program, and a positive sport culture.

We reiterate our key positions that oppose the:

- Athlete Contract
- Awarding of Hearing Costs
- NSO / MSO Adoption Fees

On behalf of Canada's national team athletes, we thank CCES for inviting feedback on the drafting of the 2015 CADP. This is an important opportunity, one that we wish to support you in by way of dynamic dialogue, to ensure the best possible outcomes for a thriving athlete pathway. We are supportive of further discussion on this issue and other initiatives to promote and ensure a fair and level playing field through clean sport.

Yours in sport,

Josh Vander Vies
President-Elect – AthletesCAN

Jasmine Northcott
Executive Director – AthletesCAN