



**A submission on behalf of AthletesCAN, the Association of Canada's national team athletes for the 2021 WADA Code Review**

**MARCH 30, 2018**

Submitted to: World Anti-Doping Agency ("WADA")



On behalf of Canadian national team athletes and the AthletesCAN Board of Directors, please accept our review of 2021 World Anti-Doping Code (the “Code”) as well as its application within Canada through the Canadian Anti-Doping Program (“CADP”).

We strongly support clean sport. We believe in the rights of our athletes to compete in a doping-free environment that provides a fair and level playing field.

At the same time, we believe in the need to protect the rights and safety of clean athletes. Some of the actions and comments by those in power positions within the anti-doping movement have, in our eyes, bordered on discrimination and bullying and have influenced a culture of prejudiced and short sighted assumptions about many of our fellow competitors and human beings. We strongly urge those leading and participating in high performance sport to recognize that the winning at all costs mentality—whether expressed in the quest for the podium or the quest for clean sport—has negative unintended consequences. This behaviour goes against the very nature of the Olympic movement and has no place in sport or society.

There is a fine line between the ever growing Code restrictions and responsibilities imposed on athletes in the fight against doping and the infringement of basic human rights. It is extremely important that the fundamental human rights of athletes are recognized explicitly within the 2021 Code and are embedded into the governance of WADA, the International Olympic Committee (“IOC”), and the International Paralympic Committee (“IPC”) moving forward.

## **SCOPE OF REVIEW & REVIEW PROCESS**

The narrow scope of review is a disservice to this process. We also find the statement of ‘broad support for most of the 2015 Code’s basic principles’ including and especially the concept of strict liability to support it, to be over-reaching and self-serving. The current review process lacks impartiality and transparency around the stakeholder feedback which lends itself to discretionary decisions made by a small group of individuals building consensus on what the ‘best stakeholder feedback’ looks like.

In good faith, we urge the members of the Code drafting team to reconsider the concerns and recommendations below to ensure the Code is more effective and reflective of its current stakeholders’ needs and rights.

## **PROHIBITED LIST**

International Federations (“IFs”) should have the ability to bargain the development of sport-specific prohibited lists based on the risk assessment that is already completed for each sport and provided to NADO’s and IFs to build their testing plans.

As we understand, there are three criteria, namely performance enhancing, health risk, and spirit of sport used to determine which substance are included on the prohibited list. And that any given substance must fall under at least two of the three criteria to be included on the extensive prohibited list. We also understand that WADA has not publicly disclosed which substances meet which criteria.

**To increase transparency and to clarify the risk or nature of a substance within the context of fairness and health, AthletesCAN is imploring WADA to release the criteria met for each of the substances within the prohibited list to system stakeholders immediately.**

As the fundamental rationale for the WADA Code, the spirit of sport, also explained as the pursuit of human excellence through the dedicated perfection of each person’s natural talents, is the overarching culture that Olympism strives to express. Unfortunately, in some parallel cultures, this pursuit of perfection is cultivating a winning at all costs mentality which breeds the very conduct the Code seeks to prevent.

We believe to ensure health and safety of the athlete and to protect the fair and level playing field, the prohibited list needs to reflect these intrinsic priorities to effectively foster the play true values.

The Prohibited List, whether tailored by sport or status quo, should only include substances that are deemed performance enhancing or masking agents based on reliable and transparent science.

Any substances not listed as performance enhancing, but which have been identified through reliable and transparent science to be a health risk, should be maintained in a separate list for the sole purpose of education



and awareness. Substances which are not identified by the medical/scientific community as being a health risk to the general population should not be included within this list. Any positive test for a substance on this list should require a mandatory education regime and the opportunity for counsel. However, use of these substances should not be considered an anti-doping rule violation.

Substances which have been included in the prohibited list because their use ‘threatens’ the spirit of sport, but are not classified as a health risk, should be identified within signatory Codes of Conduct at their respective discretion. The spirit of sport is an overarching expression of a fair and ethical sport culture. However, it is certainly not a reliable scientific criterion for ensuring the health and safety of athletes and a level playing field. Using a scientifically unreliable criterion to identify and determine prohibited substances that tens of thousands of athletes are then responsible to understand to ensure their career is not jeopardized by a potentially disproportionate and very public violation seems immoral. The spirit of sport should not be a criterion to determine the addition of a substance on the prohibited list and should be removed as such.

### **Contaminated products and food contamination**

AthletesCAN is in agreement with the recommendations put forward in the area of contaminated products and food contamination by the Canadian Centre for Ethics in Sport (“CCES”).

### **PROPORTIONATE SANCTIONS & PUBLIC DISCLOSURE**

We strongly support a reduction in the scope of sanctions around access and participation in sport for any inadvertent doping infraction. Specifically, the scope of the sanction should only limit access and participation to NSO/IF sanctioned events for any inadvertent doping infraction. Similarly, the public disclosure of information related to inadvertent anti-doping rule violations should be withheld to protect both the reputation, livelihood and mental/physical wellbeing of an athlete. The general public is uneducated as to the various levels of doping violations and what they mean, and although these infractions are inadvertent, their disclosure often results in negative reputational consequences for athletes that affect their mental health, and performance both on and off the field of play. Further, the public does not understand nor are they aware that athletes who ‘commit’ these violations are guilty until proven innocent and are forced to carry the burden of proof. As such, whether there was intent or not, public disclosure will have unintended and very destructive consequences on an athlete’s ability to make a living (in many cases loss of their career), let alone their mental and physical well-being. This has been referred to as the “collateral damage of wrong and disproportionate sanctions”. Inhumane outcomes cannot be justified by the fact that “rules must be followed”.

### **INTELLIGENCE**

As the intelligence operations of WADA to fulfill the mandate of the Code are gaining momentum and funding, there are real concerns around the fundamental human rights of athletes and specifically privacy as it pertains to our members. Transparent standards for intelligence gathering need to be developed and enforced to ensure ethical lines are not crossed. The threat of backroom deals and covert searches with no real authority must be considered. Our athletes are already subject to a level of scrutiny and surveillance that few others in the human race are. There needs to be a strategic focus on catching ‘cheats’ centered on historical and empirical evidence and information from credible whistleblowers.

In our previous submission regarding the CADP to our own NADO—CCES—we reaffirmed our strong position against the invasion of privacy of our athletes to further the intelligence agenda.

In both 2014 and 2017 we wrote:

Further, outside of the consents required during the doping control process, we remain steadfastly opposed to the need for athletes to provide consent to CCES to use their personal information with law enforcement and border agencies to pursue doping investigations and intelligence gathering.

While we trust that the athlete’s best interest and personal privacy would be of upmost concern to the CCES, the unknown and unintended collateral damage of such a proposal makes it impossible for us to support.

We understand that Canadian athletes are still being forced to sign agreements providing this specific consent.



Regrettably, the unknown and unintended collateral damage we referred to manifested itself concretely on the world stage in the aftermath of the Rio Olympic and Paralympic Games. As widely reported in the media, hackers gained access to the Therapeutic Use Exemptions (“TUEs”) granted to the world’s athletes and published this confidential information. The World Anti-doping Agency (“WADA”) International Standard on TUEs or on the Protection of Privacy and Personal Information were little solace to the athletes who had the difficult task of reacting to such leaked information. We trust CCES agrees that a similar leak of information regarding the details of information shared by CCES to law enforcement and border services agencies would be catastrophic to that athlete, his or her family, and the credibility of the anti-doping system.

The international standards, referred to throughout the CADP were implemented in 2014 by WADA, before WADA and CCES secure databases were comprised. The attack by hackers demonstrated a significant risk for athletes. The expectation that athletes would still consent to the sharing of personal information held by law enforcement agencies with the CCES is unreasonable.

**We ask that you reconsider the practice of both sharing information with law enforcement and border services agencies and requiring consent to do so from athletes as a condition of participation in sport until demonstrating the ability of CCES to keep athlete information safe.**

## **ACCESS TO JUSTICE**

*World Anti-Doping Code 2015: INTRODUCTION – PART 1 DOPING CONTROL*

*“They are not intended to be subject to or limited by any national requirements and legal standards applicable to such proceedings, although they are intended to be applied in a manner which respects the principles of proportionality and human rights. When reviewing the facts and the law of a given case, all courts, arbitral hearing panels and other adjudicating bodies should be aware of and respect the distinct nature of the anti-doping rules in the Code and the fact that those rules represent the consensus of a broad spectrum of stakeholders around the world with an interest in fair sport.”*

This introduction to Doping Control within the 2015 Code lends itself to a separate civilization living above the laws that govern the rest of the world. What is “intended to be applied” and what is “applied” are two very different things. A recent survey administered by the independent FairSport saw more than 2100 athletes from 60+ countries respond to various areas of concern within the current anti-doping environment amongst other areas of athlete rights. According to the survey, **95%** believe it is desirable/essential to have the right to procedural and substantial justice (including a fair hearing, and swift, consistent, and transparent enforcement of all rules).

On a broader scale, there exists a need for considerable reform to bring about an arbitration system that is completely transparent and independent of any influence from international sporting federations, governments, the Olympic movement and WADA. The creation of a truly independent system that is based on and respects the fundamental rights of athletes as both people and labourers should eliminate direct, and as much as possible, indirect conflicts and abuses of power that are currently justified in the name of clean sport.

## **HEALTH, SAFETY & THE RIGHTS OF ATHLETES**

In sport, there exists a duty of care to protect the health and safety of all of our athletes. There is a need for mandatory education regimes and support programs (including counseling) for all levels of violations, and perhaps most importantly, for those athletes intentionally using performance enhancing substances or substances that are a risk to health.

Above this basic need, the culture expressed through the ‘spirit of sport’ must remain free from discrimination at all times. Many within the anti-doping movement have too often jumped at the opportunity to ‘make an example of’ certain groups based on nationality, sport, etc. These generalizations go against the very essence of Olympism and disregard the rights of clean athletes. There is no scenario where ‘innocent casualties of the war against doping’ should exist. Human rights are athlete rights. Currently, we do not recognize WADA’s ability to protect, respect and remedy the violations of rights of our athletes.

With the understanding that it is the intention of WADA to incorporate an Anti-Doping Charter of Athlete Rights within the Code, and as a signatory to the Universal Declaration of Player Rights, we urge both the WADA Foundation Board and Athletes’ Committee (“AC”) to explicitly articulate the fundamental human rights grounded in



the UN Guiding Principles on Business and Human Rights as the basis for the athlete rights within the proposed charter.

## COMPLIANCE

As the collective voice of Canada's national team athletes, we strive to ensure a fair sport system for our members. As in our own country, we demand secondary and reciprocal obligations and standards for those requesting specific actions and/or imposing responsibilities on athletes. A very simple example of this is the right to and responsibility of anti-doping agencies to provide clean, uncontaminated testing equipment to athletes that are obligated to submit to testing. These are reciprocal obligations, and one does not exist without the other. Signatories to the Code, and especially WADA itself should be held to the same level of accountability as our athletes as it pertains to their conduct and responsibilities within the anti-doping movement.

## GOVERNANCE

To achieve true athlete representation, athlete representatives must be elected by their peers in a transparent and structured election process with open nominations from within this important stakeholder group. While the WADA AC is an important mechanism for the inclusion of direct athlete feedback, it has no real decision making power within the overall governance of WADA. For the leaders of WADA to truly consider each of its stakeholders, the Foundation Board must move to a tri-party structure where athletes have an equal voice and vote within the decision making process.

Again, we refer to a recent survey done by FairSport where the following feedback was captured around governance:

- **94% of athletes** believe it is desirable/essential to have transparency both in governance and anti-doping;
- **92% of athletes** want the right to representation and participation in the fight against doping; and
- **90% of athletes** want the right to participate in the creation of rules for sport and the governance of sport.

One of the key success factors in change management is the degree of stakeholder engagement throughout each stage of the process. The culture of sport is currently in a crisis state. We need to identify where the issues are taking place, and learn more about the environment that is fostering these detrimental problems. Until we can understand the cultural cracks influencing 'cheats' within the high performance landscape from the inside-out, we will fail at attempts to deter and protect from the outside-in.

On behalf of Canada's national team athletes, we value the opportunity to provide general feedback within the 2021 WADA Consultation process. This is an important opportunity for athletes and for Canada as a strong ally of the clean sport movement, and one that we wish to support through continued dialogue, to ensure the best possible outcomes for the sustainability of high performance sport and a strong sport culture.

Yours in sport,

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