SERVING THE MASTER

THE LANDIS DECISION EXPLAINED

William F. Hue*

For unto whomsoever much is given, of him shall be much required: and to whom men have committed much, of him they will ask the more.
Luke 12:48

(A reformatted version of this article has published on the web as http://trustbut.blogspot.com/2007/10/hues-review-serving-master.html)

INTRODUCTION

The public presumes that judicial bodies will fairly and impartially administer justice. Those responsible for the promulgation of anti-doping disciplinary procedures in sport were aware of that perception when they created their adjudicative system. Arbitration Panels in anti-doping disciplinary matters serve a single master, the WADA Code. The Code's single goal is to rid international sport of dopers. The arbitration procedure is an important component of the WADA anti-doping mission because the Code seeks legitimacy by granting authority to review prosecutions to an "independent" arbitration panel. However, disciplinary panels under the Code are not "independent". They do not exist to administer justice or to determine truth. Rather, the Panels exist to affirm the requirements of the Code, as mandated by the Code's own provisions. The Code expects much from the panel to which it vests this important role. Each of the three members of the Arbitration Panel in the Floyd Landis case fulfilled specific mandates. The 2-1 award was a textbook result, virtually predestined by the system itself. Because Landis took advantage of a unique clause in the USADA Code to open the process to the public, a clause many WADA members propose to close in the future, the process has been exposed for what it truly is; a rubber stamp endorsement of the anti-doping movement. As an adjudicative body, the Arbitration Panel simply serves the master. In the Landis Case, the master mandated a 2 to 1 Award in favor of USADA. This article takes a critical look at the process compelling the result.

Alea jacta est
(The die is cast)
Julius Caesar

THE CODE IS CREATED

I'll keep you in the right direction if I can, but that's all. Just... follow the money.
Deep Throat

Sport is a global business, comprising more than 3% of the world's trade and 2% of the European Union's combined Gross National Product. In 1999, WADA developed an anti-doping disciplinary system with a very special arbitration system developed to adjudicate disputes arising between the national Anti-Doping Associations and their athletes.

Litigation in any particular nation's courts of law was summarily rejected in favor of the arbitration system. WADA determined that litigation would be slow and expensive in a Court of Law. The Rules of Civil and Criminal Procedure in Courts were perceived as arcane in the fast moving and constantly playing catch up world of anti-doping. Further, unless the athlete was presumed guilty once a WADA accredited laboratory deemed him/her a cheater, the application of rules such as the need for foundation prior to receipt of evidence, the presumption of innocence and Daubert considerations concerning scientific foundation would be too unpredictable to combat doping in sport.

Further, sport considers itself "special" and "unique". That is, WADA preferred not to air its dirty laundry in a public court setting so a private adjudication body was chosen. There was a desire to settle disputes "within the family", in private, by individuals who understood the world of sport.

According to commentator Paul Haagen:

> *"The handling of athletic disputes in domestic courts has not been among the greatest of judicial success stories. The individuals who run international sport have been vocal and open in their contempt for the interference of domestic tribunals, especially those of the United States, in the running of what they regard as their internal affairs."*

There certainly was some thought that the dynamics of sport required a quick and informal settlement procedure that would avoid lengthy court battles. Just prior to the 2006 Olympics in Turin, for example, U.S. athlete Zach Lund failed a drug test for a non-performance enhancing hair growth product, finasteride, that he had used and had

properly declared for many years, that had recently been classified as a prohibited drug "masker". He had trained for those Olympic Games his entire life. The parties in that dispute could not afford to wait months or even years to settle their disputes through the courts because the event would be long over and forgotten. In that case, although the Panel was convinced that Lund was an honest athlete, he was banned from Olympic competition just days before the Games began. He lost all of his endorsements and his livelihood. He ended up borrowing from friends to pay for his defense and living expenses because all support for his athletic endeavors ceased as a result of his non-negative test results.

Like Zack Lund, Floyd Landis was determined to have a prohibited substance in his system. Unlike the Lund case, though, the Landis case was not resolved expediently. Further, the Landis case demonstrates how the WADA anti-doping disciplinary system suffers from ills similar to any other adjudicative body expected to handle complex legal and scientific matters. Anti-doping disciplinary procedure under the WADA Code has become as procedurally complex, inflexible, costly, and lengthy as any other system without the benefits the code espouses.

THE CODE

Fair is not fair, but that which pleaseth.
Ninon de l'Enclos

WADA's vision statement provides:

> *"WADA works towards a vision of the world that values and fosters doping free sport."*

The World Anti-Doping Code's introduction states:

> *The purposes of the World Anti-Doping Program and the Code are:*
> - *To protect the Athlete's fundamental right to participate in doping-free sport and thus promote health, fairness and equality for Athlete's worldwide; and*
> - *To ensure harmonized, coordinated and effective anti-doping programs at the international and national level with regard to detection, deterrence and prevention of doping.*

The Code is defined as follows:

> *"The Code is the fundamental and universal document upon which the World Anti-Doping Program in sports is based. The purpose of the Code is to advance the anti-doping effort through universal harmonization of core anti-doping elements. It is intended to be specific enough to achieve complete harmonization on issues where uniformity is required yet general enough in other areas to permit flexibility on how agreed upon anti-doping principles are implemented."*

The Code also defines its "Fundamental Rationale":

- *Anti-doping programs seek to preserve what is intrinsically valuable about sport. This intrinsic value is often referred to as the "spirit of sport"; it is the essence of Olympism; it is how we play true. The spirit of sport is the celebration of the human spirit, body and mind, and is characterized by the following values;*

- *Ethics, fair play and honesty.*
- *Health.*
- *Excellence in performance*
- *Character and education.*
- *Fun and Joy.*
- *Teamwork.*
- *Dedication and commitment.*
- *Respect for rules and laws.*
- *Respect for self and other participants.*
- *Courage.*
- *Community and solidarity.*

Doping is fundamentally contrary to the spirit of sport.

The Introduction to Part 1 Doping Control of the Code dictates:

> *"Anti-doping rules, like competition rules, are sports rules governing the conditions under which sports are played. Athletes accept the rules as a condition of participation. Anti-doping rules are not intended to be subject to or limited by the requirements and legal standards applicable to criminal proceedings or employment matters. The policies and minimum standards set forth in the code represent the consensus of a broad spectrum of stakeholders with an interest in fair sport and should be respected by all courts and adjudicative bodies."*

The Code celebrates “fun and joy” and demands “fair play”. But it fails to recognize what most of us would perceive as fundamental characteristics of any system of justice and it fails to “play fair” itself. Absent from the Code’s vision, purpose, definition, fundamental rationale and intention is any reference to the fundamental interests and rights of all human beings, including athletes subject to the Code; fairness, due process, presumption of innocence and basic dignity.

While the Code nods to a necessity for a “fair hearing”to adjudicate anti-doping issues, in application, the hearings are anything but fair. Article 8 of the Code notes that “any Person who is asserted to have committed an anti-doping violation” will be provided a hearing process that respects the following principles:

- *A timely hearing;*
- *Fair and impartial hearing body;*
- *The right to be represented by counsel at the Person’s own expense;*
- *The right to be fairly and timely informed of the asserted anti-doping rule violation;*
- *The right to respond to the asserted anti-doping rule violation and resulting Consequences;*
- *The right of each party to present evidence, including the right to call and question witnesses (subject to the hearing body’s discretion to accept testimony by telephone or written submission);*
- *The Person’s right to an interpreter at the hearing, with the hearing body to determine the identity, and responsibility for the cost, of the interpreter; and*
- *A timely, written, reasoned decision;*

The Code also provides the very unique context within which anti-doping cases are to be adjudicated, the presumption of guilt and the odd procedures and burden flips required for analysis. While Section 3.1 seems fair on its face, in reality and application, Section 3.2 takes away any opportunity for an athlete to prevail with its "presumption" of the correctness of WADA Laboratory results. As seen in the Landis case, it is difficult if not impossible obtain the information necessary to establish the incorrectness of a test result, in a discovery process I can only describe as mind boggling in its complexity and application. If such information is possibly obtained, the Code’s provisions make it

nearly impossible to use specific information to successfully raise issues of general reliability. That contradicts common sense and impedes “fair play”.

ARTICLE 3: PROOF OF DOPING

3.1 Burdens and Standards of Proof

The Anti-Doping Organization shall have the burden of establishing that an anti-doping violation has occurred. The standard of proof shall be whether the anti-Doping Organization has established an anti-doping rule violation to the comfortable satisfaction of the hearing body bearing in mind the seriousness of the allegation, which is made. This standard of proof in all cases is greater than a mere balance of probability but less than proof beyond a reasonable doubt. Where the Code places the burden of proof on the Athlete or other Person alleged to have committed an anti-doping rule violation to rebut a presumption or establish specified facts or circumstances, the standard of proof shall be by balance of probability.

Methods of Establishing Facts and Presumptions.

3.2 *Facts related to anti-doping rule violations may be established by any reasonable means, including admissions. The following rules of proof shall be applicable in doping cases:*

WADA-accredited laboratories are presumed to have conducted Sample Analysis and custodial procedures in accordance with the International Standard for laboratory analysis. An athlete may rebut this presumption by establishing that a departure from the International Standard occurred. If the Athlete rebuts the preceding presumption by showing that a departure from the International Standard occurred, then the anti-Doping Organization shall have the burden to establish that such a departure did not cause the Adverse Analytical Finding.

3.2.2 Departures from the International Standard for Testing which did not cause an Adverse Analytical Finding or other anti-doping rule violation shall not invalidate such results. If the Athlete establishes that departures from the International Standard occurred during Testing then the anti-doping Organization shall have the burden to establish that such departure did not cause the Adverse Analytical Finding or the factual basis for the anti-doping rule violation.

With the articulations present in its self-definitions and the hearing requirements set forth above, WADA adopted its anti-doping disciplinary system. Interested observers have only been able to assess the results of disciplinary proceedings by reviewing publication of arbitration awards. Until the Landis case, though, the public has never been permitted to see and hear the actual evidence presented to the Panel and then evaluate the award decision in context.

Just when you think you've got things going,
Someone comes and takes it all away …
Way the Stories Go, Spooner

THE AWARD

Do as I say, not as I do.
John Selden

In contrast to the *Golden Rule*; "Do unto others as you would have them do to you", *Luke 6:31*, those in charge of protecting the Code are apparently permitted to excuse "deviations" from the Code's requirements even though "violators" are prosecuted to the fullest extent and are presumed guilty under section 3.2.

Despite the fact that Article 8 of the Code mandates that an athlete be afforded a fair and impartial hearing, receive a timely hearing, be informed of and have an adequate opportunity to respond to specific allegations of doping violations and to receive a timely, written and reasoned decision, unlike athletes, those administering the Code's provisions are not held to the Code's requirements, as illustrated by the proceedings in the Landis case.

Who oversees the "overseers" under the Code? The answer is no one. The Code does not even recognize even the possibility that those in charge of administering its provisions would abuse the trust or duty the Code assigns to them. Whereas all contracts require "good faith and fair dealing" under law, the Code has no good faith requirement within its provisions and has exempted itself from the requirement of "good faith and fair dealing" and other due process "niceties" under and nation's law, under the guise that sport is "unique" and only "sportsmen" understand this uniqueness.

It is elementary that a fair hearing not only be fair but also appear fair to all parties and observing 3rd persons to be fair. A system designed to always subject the accused party to a Panel that cannot, mathematically, consist of neutrals or at minimum, a majority of that person's non-neutral peers appears to be unfair to 3rd parties and to the athlete. A "jury" that takes an oath to honor a code that does not recognize important rules of court procedure under the guise that sport is so "special" and "unique" that only "sportsmen" can appreciate the intricacies and nuances of something like the presumption of guilt does not appear to be fair to the athlete or to 3rd persons.

Unlike athletes, those in charge of administering the Code are not held to "strict liability", or any liability at all. When the parties or the AAA asserted rights related to the hearing,

the Panel failed to accommodate those rights, and refused to be take any responsibility for the lengthy time the Panel apparently needed to commence proceedings, Instead, it placed blame on the parties and the AAA. If the hearing took 9 months to conduct (many Courts would have handled the case in less time), the majority concluded that there was nothing it could do about it and excused itself **in the very first paragraph** of its award and in multiple paragraphs thereafter.

It is doubtful that the Panel afforded Landis an adequate opportunity to be informed of and respond to the additional tests on "B" samples for which there was no "A" sample adverse analytical finding, that happened one month prior to trial. While the Panel claimed to have assigned an "independent expert" to protect the rights of the athlete upon ordering the unprecedented right of USADA to conduct additional "B" sample testing, in fact, Landis' rights were not protected by the Panel's actual choice of "independent expert", Dr. Francisco Botrè. Dr Botrè is not "independent" by any reasonable definition because he is an insider of a **party** to the controversy (WADA), and therefore is hardly an "independent expert". The ultimate irony after all the controversy, travel, retesting, testing, briefing, evidence presentation, argument and cost of additional "B" sample testing, is that the majority does not rely upon and hardly gives mention to the additional testing in its Award.

In courts of law, discovery is imperative so that time and money are saved by the parties and the courts. The arbitration system and this anti-doping disciplinary procedure in particular, was designed, in significant part, to bring matters to a speedy and inexpensive conclusion in lieu of court proceedings in any particular nation. Why then, is discovery, one of the most effective cost saving techniques common to adjudicative bodies non-existent or severely limited in the Code? It does not make sense that discovery of evidence is limited to a WADA designated "laboratory packet", especially when the WADA laboratory results are deemed to presumptively be accurate. It further makes no sense that WADA lab technicians cannot be deposed prior to or (as is common in courts … deposition for trial) in lieu of hearing.It does not make sense that the athlete, under the Code, may not call any WADA accredited laboratory head or employee to testify on behalf of the athlete. It does not make sense that an athlete charged by the results of computer processing of electronic test data cannot get an electronic copy of the test data to examine. The Code, by restricting discovery, limiting deposition by application as the majority did in Landis, and prohibiting the athlete from calling the individuals who are supposed to know the most about the subject matter as witnesses, and restricting access to read-only copies electronic data for unfounded fears of tampering, prevents the athlete from adequately ascertaining the charges against him or her, asserting a proper defense to those charges and presenting his or her case to the Panel.

While creating completely new precedent in the area of "additional testing", the majority then abandoned the entirety of the new procedure the it had created to further the fight against doping. Instead, they negated the T/E tests on both the "A" and "B" samples at issue. They then based their Award on the Stage 17 "B" sample IRMS test. The majority then repeated, at great length, the well-settled justification for relying on that testalone.

Landis never disputed the position the IRMS test was dispositive, or the theoretical science behind that test. He disputed the science behind the execution of the test and that is was improperly reported as an AAF. The "B" sample IRMS test result was put at issue for over 10 days of hearing. It would have been gratifying for interested third persons to understand, from the "reasoned written decision" exactly how and why the majority resolved those factual and scientific issues. The majority's rationale is not very well explained, as required by the Code. Additionally, the majority does not explain nor is it really likely they can explain, independently, the science behind its Award. In several key places, it appears to contradict itself and be factually incorrect.

Whereas one of the presumed advantages of the arbitration system in sports is the requirement that swift and reasoned written decisions occur after hearing (Courts are generally permitted from 90 days to an unlimited time to render written decisions), the Landis Panel simply held the hearing open until it was ready to issue a decision. The majority decision, in my opinion, falls very much short of the "reasoned written decision" required by the Code. 84 pages of typing and graphs does not substitute for 10 pages that any person could well understand. Modern day judges in many countries write decisions that all litigants understand every day on issues as complex as this one, with all due respect to the majority.

Finally, the majority cannot help itself by, in multiple paragraphs, casting either a shadow upon or outright condemning Landis exercising another right afforded under Section 8, the right to be represented by a lawyer of one's own choice at one's own expense.

Consequently, by the Code's own definition of what constitutes a fair hearing, Landis' rights were either criticized by the majority, compromised or actually violated on 7 of 8 factors.

Landis rights under the Code were violated because he was not afforded:

- *A timely hearing;*
- *A Fair and impartial hearing body;*
- *The right of each party to present evidence, including the right to call and question witnesses (subject to the hearing body's discretion to accept testimony by telephone or written submission);*
- *A timely, written, reasoned decision.*

Landis' rights were significantly compromised or unduly criticized in the flowing areas:

- *The right to be represented by counsel at the Person's own expense;*
- *The right to be fairly and timely informed of the asserted anti-doping rule violation;*

- *The right to respond to the asserted anti-doping rule violation and resulting Consequences.*

SPECIAL PROCEDURES

Two cards that are the same ranking
(A pair) beats no pair. Three cards of the same ranking beats a pair and also beats no pair
The Rules of Poker

In previous articles, we discussed the mathematical disadvantage athletes had in the selection of members of the pool of CAS arbitrators. Apparently, we were too charitable. As Christopher Campbell pointed out in his dissent, athletes choose only 15% or so of the members in the arbitrator pool. That is hardly a fair and impartial panel as required in Section 8 of the Code. The Code of Sports-related Arbitration/ Mediation Rules, Edition 2004, sets forth the distribution of members of the arbitration panel pool as follows:

> *S14 In establishing the list of CAS arbitrators, the ICAS shall call upon personalities with full legal training, recognized competence with regard to sports law and/or*
> *international arbitration, a good knowledge of sport in general and a good command of*
> *at least one CAS working language. In addition, the ICAS shall respect, in principle,*
> *the following distribution:*
> *• 1/5th of the arbitrators selected from among the persons proposed by the IOC, chosen from within its membership or from outside;*
> *• 1/5th of the arbitrators selected from among the persons proposed by the IFs, chosen from within their membership or outside;*
> *• 1/5th of the arbitrators selected from among the persons proposed by the NOCs, chosen from within their membership or outside;*
> *• 1/5th of the arbitrators chosen, after appropriate consultations, with a view to safeguarding the interests of the athletes;*
> *• 1/5th of the arbitrators chosen from among persons independent of the bodies responsible for proposing arbitrators in conformity with the present article.*

Further, the arbitrators pledge to exercise their functions "in conformity with the Code" and the Code mandates a presumption of guilt and does not adopt any guarantees of procedural fairness.

> *S18*
> *Upon their appointment, the CAS arbitrators and mediators sign a declaration undertaking to exercise their functions personally with total objectivity and independence, and in conformity with the provisions of this Code.*

Finally, the Code does not prohibit members of the Panel pool from being magistrates and advocates in separate hearings. This gives, at least, an appearance of impropriety or even incestuous type behavior and is contrary to any pledge of objectivity and independence arbitrators might make. For example, USADA attorney Richard Young is in the CAS arbitrator pool as a non-athlete designee and Landis Chair Patrice Brunet has served as advocate counsel for the International Triathlon Union (Federation) in at least one case before the CAS.

WADA, surprisingly, is an actual party to the Landis case and to all anti-doping matters:

> *7. WADA is the World Anti-Doping Agency and is an international organization that promotes, coordinates, and monitors the anti-doping programs in sports. It is responsible for the worldwide harmonization and implementation of national and international anti-doping programs in sport. WADA is a Swiss private law foundation with its seat in Lausanne, Switzerland and its headquarters in Montreal, Canada.*

WADA president, Richard Pound, has been a non-athlete designee in the CAS arbitrator pool, previously. So, when Arbitrators Brunet and McLaren attended a sporting conference in Beijing this Spring, along with Mr. Young and Mr. Pound, in the absence of Mr. Campbell or Mr. Suh, it looks bad if it is not in fact, bad. That is how the lack of separation of advocacy from "neutrality" comes to appear to be improper. If, however, only a few "sportsman" in the world can appreciate the "special and unique" aspects of sport, any sort of separation may spread the talent pool too thin. I sincerely doubt that such is the actual fact.

By application of simple mathematics, there will never be any more than a single athlete designated arbitrator on any anti-doping disciplinary panel. The arbitrator panel will always be comprised of a 2 to 1 ratio against the interests of the athlete. Athletes can hardly be expected to "buy into" a system in which they will never be judged by their peers. Whatever panel is impaneled must pledge loyalty to a Code that does not honor a presumption of innocence or due process. Rather, even athlete representatives on the panel presume guilt and otherwise pledge loyalty to the Code's provisions.

Landis was entitled to a fair hearing under Article 8 of the Code. Pursuant to Article 8, a fair hearing requires the hearing to be timely. It was not. But the Panel was quick to make clear that no delays before during and after hearing were attributed solely to USADA or the Panel, despite obvious delays caused by failure to produce evidence, the additional "B" sample testing request and the authorization for said testing that resulted and the Panel's failures to rule on a number of issues before and after hearing in a timely way. The majority concluded that any delay was attributable to;

Both Parties:

> *1. Like the Montgomery & Gaines cases this proceeding was one in which the parties were unable to reach agreements, which would have expedited this matter.*

Landis (The majority inexplicably chose to create a tension with his right to counsel and to a fair hearing):

> *17. The Panel proceeded on the first confirmation date and by its conference call of 29 January 2007 raised the issue with counsel as to the fact that the Athlete remained free to compete although the fact of the matter was that the Athlete had not competed and had hip replacement surgery.* ***The Panel wanted the matter to be concluded within the time frame of the applicable rules that meant that a hearing must be held in March of 2007.*** *The Athlete's lawyers were concerned that this would be insufficient time to prepare the case. A compromise was struck with the Athlete. On 31 January 2007 the Panel received the following written undertaking, dated 30 January 2007, from the lawyers for the Athlete.*
>
> > Mr. Landis recognizes the concerns expressed by the panel surrounding his racing status, especially with respect to the 2007 Tour de France. He hereby agrees to not participate in any international cycling race or any domestic professional cycling race event prior to the conclusion of the proceedings in the above-captioned matter. This self-imposed suspension from racing is made in order to obviate any concerns that may arise from his request to set the trial date so as to allow adequate preparation for trial. Further, Mr. Landis recognizes that this request for additional time is made on his part and not jointly with the United States Anti-Doping Agency ("USADA").
> > Mr. Landis makes these concessions in order to allow the panel the latitude to grant him the time necessary to adequately prepare his defense in light of the briefing schedule currently held in place.

The CAS-AAA Special Procedures:

> *19. By letter of 12 October 2006 USADA nominated Professor Richard H. McLaren,*
> *Barrister of London, Ontario Canada as its party appointed arbitrator. In reply the Athlete nominated Christopher L. Campbell, Esq. as his party appointed arbitrator. The two arbitrators attempted to agree upon who should be the third arbitrator without success. The default procedure of the AAA was invoked and they eventually confirmed Patrice Brunet, Esq. as the third Arbitrator.*

The requirements of the State of California (and Landis, again, for choosing a lawyer):

> *20. At the outset of this proceeding, the AAA applied California law as the applicable law for the arbitration hearing. Under the California Code of Civil Procedure, arbitrators are required to provide certain disclosure as a condition of serving on an arbitration panel. California law imposes a number of ethical and procedural requirements on the arbitration process, including the investigation and disclosure of potential conflicts and the opportunity for the parties to challenge proposed members of the arbitration panel. This caused a considerable delay, specifically after Mr. Landis' sudden change in lead counsel in December of 2006, as it required that the nominated arbitrators provide further disclosure to ensure there was no conflict with new lead counsel Maurice Suh.*
> *21. Accordingly it was not until 20 February 2007 that the Arbitration Panel was finally confirmed to all parties.*

So, the majority concedes that it was not in compliance with its obligation to hold a timely hearing under Section 8 but there were explanations. Fortunately, the Code does not hold the Panel to strict liability as it does the athlete.

Article 8 also requires a timely, written, reasoned decision. The decision was not timely. While it was in writing, there is an issue as to whether it is well reasoned. I leave the science for others to decipher. The Code through The Special Procedures of the CAS-AAA Arbitration Rules requires a decision within 10 days of the close of the hearing. How does the Panel in the Landis case avoid that? The Code of Sports-related Arbitration/ Mediation Rules, Edition 2004, provides:

> *R62 Before rendering its opinion, the Panel may request additional information.*

And it did, first by requesting post trial submissions as requested by Mr. Campbell over the skeptical inquiry by Mr. Young as to whether Campbell's request constituted "the joint desire of the Panel (it did, page 2080), then by meeting with its "independent expert" Dr. Botré, who heads the WADA lab in Rome, and simply **not closing the hearing** until then. From the hearing transcript at pages 1799 and 1800:

> *25 MR. BRUNET: We were just having a discussion, that you probably heard, about the*
> *fact that, after today, the hearing will be adjourned. It will not be closed according to*
> *the rules, and the closing of the hearing will be done by the Panel at a further date that has not been defined yet, but will obviously be after the filing of the documents and the final documents by the parties.*

Additionally, the Panel appointed Dr. Botré, initially to "protect the right of the athlete" at the additional "B" sample re-processing. The naming of such an expert took on an interesting progression. Landis suggested Dr. Meier-Augenstein or Rodriguez Aguilera. Landis specifically objected to the naming of any WADA lab employee or director. The parties had

reached an agreement to appoint Dr. Aguilera on the issue of re-processing. The parties agreed on an expansion of the role of the Panel's expert and further agreed that James Ehrlinger, Ph.D. should serve as the Panel's expert on matters related to carbon isotope ratio testing. The panel, then, on its own, selected Dr. Botré, who is an insider of one of the parties to the action, WADA (as director of the WADA lab in Rome) to serve as its expert. We know that Dr. Botré did not play a role, other than as an observer, at the reprocessing of data in Paris, at LNDD. There was never an explanation how Dr. Botré's role expanded to become, virtually, the 4th arbitrator at hearing and after. That, then, made it a presumed ratio of 3 Panel participants named to the pool by the Federations, ADAs and WADA to 1 member of the panel pool named to protect the interest of the athlete.

> *56. In a separate, but related matter to the request to re-process the electronic data*
> *files, it was agreed that to facilitate the discovery process and to obviate any possible battle of experts, the Panel was to appoint its own expert.*
>
> *57. A telephone conference call in relation to this matter was held on 21 March 2007*
> *and on 23 March 2007 the Panel and the parties received a submission from the representative for the Respondent recommending a forensic consulting firm as forensic computer expert and as expert for the purposes of IRMS analysis they submitted for consideration Dr. Wolfram Meier-Augenstein or Rodriguez Aguilera. The Respondent further reiterated its objection to the appointment of an expert who is an employee or director of a WADA accredited laboratory.*
>
> *58. On 26 March 2006, by way of email from Maurice Suh, the parties informed the*
> *Panel that they had met and conferred with respect to the recommendation of a mutually acceptable expert to be retained by the Panel. The parties indicated they had agreed upon Rodrigo Aguilera, Ph.D. In this correspondence the parties also stated that the precise scope of the expert's role was unclear, and they requested an audience with the Panel to discuss the location of the re-testing of the electronic data files.*
>
> *60. On 29 March 2007, the parties held a telephone conference call with the Panel*
> *and a subsequent call was held only between the parties. By letter to the Panel the parties indicated through Mr. Suh that they were in agreement that James Ehrlinger, Ph.D. should serve as the Panel's expert on matters related to carbon isotope ratio testing. Mr. Suh indicated however that it was their stronger wish that Dr. Meier-Augenstein play this role. In additional correspondence from counsel for the Claimant, it was submitted that the Panel should not retain an expert such as Kroll, as Kroll only has the knowledge to extract the electronic data, but would not be able to provide the Panel with any expertise regarding whether or not it is appropriate or possible to try and run data obtained through earlier software or later versions.*

> *62. The Panel convened on its own to discuss the issues of a scientific expert for the*
> *Panel and informed the parties of same on 4 April 2007.*
>
> *63. After extensive research the Panel recommended Dr. Francesco Botrè to the parties and counsel agreed, following an interview with Dr. Botrè and the Panel that he could be the Panel's expert after which he was confirmed in that role.*

Mr. Brunet introduced Dr. Botre at the hearing:

> 9 *For those in attendance, I did not present him. This is Dr. Francesco Botré. He's*
> *the Panel-appointed expert. He's the director of the WADA-accredited lab in Rome, and he will be assisting the Panel with scientific evidence*.

Mr. Brunet put into great perspective Botré's expanded role (virtually as a 4th Panel member) at the conclusion of the hearing (page 2082):

> *18 I would also like to thank, also Dr. Francesco Botré for having taken a lot of time off, not just for the Paris analysis, but also for this arbitration hearing. Dr. Botré*
> *has been very helpful in helping us understand some of the issues. But both parties have put them to us in such a beautiful way, that's helped us,* ***but you have done most of the work*** (emphasis added).

The Panel indicated that it would meet with Dr. Botré for the last time on September 12, 2007, and then close the hearing, giving it 10 days under the Special Procedures to render its Award. It did so on September 20, 2007. The Panel has acknowledged that Botré did most of the technical work at trial. The majority decision is filled with graphs and technical discussion of the science the Panel needed help with. Both the majority and dissent decisions reflect Botré's input. The Landis case did not involve any unique or special aspects of sport as evidenced by the need for a scientist to assist the "sportsmen" who comprised the Panel. There is no significant aspect of this anti-doping disciplinary system superior to a court of law.

THE DISSENT

As for you, my fine friend (s) — you're victim (s) of disorganized thinking …
The Wizard of Oz

The anti-doping disciplinary system permits the athlete to choose one Panel member to represent his/her interests. While Christopher Campbell has ruled against athletes more often then has he ruled in their favor, he is a reliable believer in justice and due process. Campbell is a former Olympic medalist. Of the three arbitrators on the Panel, he is the most accomplished sportsman. He has experienced the fun and joy of athleticism yet he also understands the business side of the Olympic movement and recognizes the autocratic nature of the Code as a practicing lawyer in the United States. This observer's conclusions are well summarized by Christopher Campbell's dissent, The system failed the athlete and dishonored justice and due process. Campbell noted that athletes only were permitted to name 15% of the Panel pool and that their interests were wholly unprotected under the Code. He noted:

> ***A. Safeguarding The Interests Of The Athletes***
>
> *3. Fifteen percent of the Arbitrators selected by CAS were selected "with a view to safeguard the interests of the athletes." The WADA Code should be drafted to protect innocent athletes from improper methods or procedures. This dissent is written with the intent of "safeguarding the interest of athletes."*

Campbell not only believes that fundamental legal protections are lacking in the Code's anti-doping disciplinary system, he also identifies areas where improper methods and procedures existed in substance in the Landis case, to such an extent that any results obtained in that case are not to be trusted. His dissent is so damning that one would think the system would take a good look at itself and reform. Unfortunately, he is but one of three (or four) on the Landis Panel and is part of just 15% of the representation of "stakeholders" in the system while those he represents, athletes, comprise the vast majority of the system's population. He wrote:

> ***"Whoever is dishonest with very little will also be dishonest with much. . . So if you have not been trustworthy in handling worldly wealth, who will trust you with true riches . ."*** *Luke 16:10.*
> *1. From the beginning, the Laboratoire National de Dépistage et du Dopage ("LNDD") has not been trustworthy. In this case, at every stage of testing it failed to comply with the procedures and methods for testing required by the International Standards for Laboratories, Version 4.0, August 2004 ("ISL") under the World Anti-Doping Code, 2003 ("WADA Code"). It also failed to abide by its legal and ethical obligations under the WADA Code. On the facts of this case, the LNDD should not be entrusted with Mr. Landis' career.*
> 2*. Mr. Landis is only required to prove the facts he alleges in this case by a mere balance of the probabilities. In many instances, Mr. Landis sustained his burden of proof beyond a reasonable doubt. The documents supplied by LNDD are so*

filled with errors that they do not support an Adverse Analytical Finding. Mr. Landis should be found innocent.

Just as the Code mandated the majority to rule against Landis, under the drastic and obvious facts of his case, it also mandated that the athlete representative on the Panel articulate principals protecting the interests of the athlete. Christopher Campbell acknowledged his role in his dissent and then articulated the interests of the athlete. While the Code tolerates that opinion, it does not permit that position to constitute a majority. The athlete will never win by advocating reform through adjudication. Like the disenfranchised in politics, athletes will have to change the system through power, legislation or revolution.
.

ATHLETES HAVE NO CHOICE

Let your friends be the friends of your deliberate choice.
-- Anonymous

How does any athlete get into a position where he/she cannot get into a court of law when their livelihood is threatened for a significant period of time upon accusations they have disagreement with? They simply have chosen the wrong profession. In order to race in pro cycling, an athlete must be a member of the Union of International Cyclists (UCI), which ostensibly exists to represent the interests of cyclists. Yet, the UCI is a Federation, not a rider's union. Thus, as much as UCI feuds with WADA, it is much more aligned with the provisions of the Code than it is with the interests of its member riders. Consequently, "membership" in the UCI requires that the single cyclist agree to be bound by the arbitration provisions of the USADA Protocol and thus the WADA Code in order to race professionally. Landis might have considered cooking school if he didn't want to go to arbitration because that is what he had to agree to in order to pursue a career as a professional cyclist. The majority notes:

12. The particulars of the hearing are left to the regulations of the license Holder's
National Federation. The regulation governing the particulars of the hearing is therefore the USADA Protocol. The Respondent agreed to be bound by the USADA Protocol by virtue of his UCI license application.

I agree that the sole jurisdiction for resolving disputes that may arise shall be in the courts of domicile of the UCI.

To understand justice in my case, we must break it down to its root words. Just Ice.
Floyd Landis

NO JUSTICE FOR "DOPERS"

Men are not governed by justice, but by law or persuasion. When they refuse to be governed by law or persuasion, they have to be governed by force or fraud, or both. I used both when law and persuasion failed me.
Misalliance, George Bernard Shaw

Sports started out with rules against cheating, including doping to win or enhance performance. Yet, athletes continued to cheat. In 1999, WADA adopted the anti-doping Code, now recognized by 186 countries including the United States and hundreds of Sports Federations. The Code starts out with the proposition that a particular athlete that has been identified as a "doper" by a WADA approved laboratory that is presumed by the system to have produced an accurate and true result is guilty. Athletes are identified by name and suspended before any disciplinary proceedings even begin. What has happened since 1999 is stunning.

Whether athletes are honest or dishonest, their prosecution and "conviction" serve the Code's goal; to remove doping from sport. There is no consideration of human consequences. Athletes such as Zach Lund, even if found to be honest, suffer loss of livelihood, lengthy suspensions and public degradation. Athletes who prevail in the system, such as Inigo Landaluze, are labeled as dopers who got off on a technicality within the body of the Award and thereafter in the public mind.

Now, athletes even **suspected** of doping such as Michael Rasmusson, Alan Davis, Paolo Betinni, Alberto Contodor and Alesandro Valverde suffer adverse consequences and inability to engage in their livelihood through innuendo **prior to** prosecution. Something as fundamental as probable cause is falling by the wayside in the zeal to rid sport of doping.

That zeal is also demonstrated by numerous cases of prosecutions under the Code's "strict liability" mandate (See Michael Hiltzik's Los Angeles Times Series "Presumed Guilty" series in December, 2006).

The few "ill advised" prosecutions that have actually resulted in verdicts favorable to the athlete also demonstrate that zeal. Those "acquittals" have been unsupported either by science or common sense. Mark French was accused of drug trafficking and use but no scientific evidence supported use. "Proof" of trafficking was asserted by submission of evidence that had been transported from place to place, including lawyer's offices, for weeks without any documentation. Oleksandr Pobyedonostsev was banned from

competition for norandrosterone but avoided suspension after the substance left his system because he had been prosecuted by an ADA after a doctor had injected the substance while the athlete was unconscious and undergoing an emergency medical procedure to his heart. In his case, the Code's "no fault" provision was applied as an exception its "strict liability" standard. Similarly, Todd Perry, who was administered the wrong inhaler during competition by an ADA's doctor, was prosecuted by that ADA for subsequently failing a drug test.

Inigo Landaluze prevailed in his case but the ISL at issue clearly called for "A" and "B" samples to be analyzed by separate technicians and LNDD clearly failed in that regard. The Spanish ADA simply failed to render any additional evidence to overcome proof of that ISL violation. Interestingly, the Landis Panel majority may have closed what has been styled a "loophole" or "technicality" (rather than the clear ISL violation it is) in the Landaluze case by permitting other "B" samples to be tested in Landis's case. Until the majority in Landis ruled that additional "B" samples could be tested, no ADA had ever construed the Code to permit such testing and thus no other Panel had ever been asked to approve of it. Had that opportunity been known by the Spanish ADA, it may ultimately have taken advantage of additional testing to help it prove that the ISL violation Landaluze proved did not cause his adverse analytical finding.

The system is melting down. The ADA's are literally out of control in their zeal to prosecute. The current Code's provisions do not discourage such prosecutions. There is no down side to pursuing convictions, even when honest athletes are pursued. In fact, quite the opposite is true because convictions are obtained and livelihoods lost when those prosecutions occur. Rather than reform itself, WADA has expanded the Code to permit federations and national anti-doping agencies to pursue entire new areas of non-analytical prosecutions. In areas of traditional litigation based on science, athletes simply do not prevail. USADA, for example, has never lost a case and there have been well over 30 of them. That is to be expected when athletes are presumed guilty.

THE SYSTEM IS A STAR CHAMBER

There but for the grace of God, goes (I).
John Bradford

The Arbitration proceeding in a WADA anti-doping disciplinary case, as demonstrated above, is nothing less than a Star Chamber. Historian L. Friedman describes a Star Chamber as follows:

> "The court of star chamber was an efficient, somewhat arbitrary arm of royal power. It was at the height of its career in the days of the Tudor and Stuart kings. Star Chamber stood for swiftness and power; it was not a competitor of the common law so much as a limitation on it - a reminder that high state policy could not safely be entrusted to a system as chancy as English law. . . ." L. Friedman, A

> History of American Law 23 (1973). See generally 5 W. Holdsworth, A History of English Law 155-214 (1927).

The United States Supreme Court in Faretta v. California (1975) 422 U.S. 806, 821; 45 L.Ed.2d 562; 95 S.Ct. 2525 wrote that;

> "(The star chamber) was of **mixed executive and judicial character**, and characteristically **departed from common-law traditions**. For those reasons, and because it specialized in trying "political" offenses, the Star Chamber has for centuries symbolized **disregard of basic individual rights**." (Emphasis in original).

Anti-doping policy, prosecution and adjudication are all just adjuncts of anti-doping enforcement. Such enforcement cannot be entrusted to Courts of Law under the Code because basic individual rights form the foundation of such systems. The Anti-Doping Code cannot leave its political goal to chance. It has thus devised a Star Chamber system to rubber stamp its determination of dopers in sport. In this system, prosecution of an innocent to an adjudication of guilt is as effective as a successful prosecution of an actual doper.

Any one of us, and athletes in particular, could someday be called into a Star Chamber. Floyd Landis was. The United States Supreme Court, in Faretta, wrote that such institutions should be abolished, always;

> "If our current "courts" wish to behave as if they are above or outside the Law, or as the American equivalent of the English Star Chamber; let us treat them like the British treated the Star Chamber: abolish the "court"".
>
> The need for a strong central court directly inspired by the king, who could administer justice without respect of persons, was so great that **the constitutional danger of establishing an autocratic judicial committee, untrammeled by the ordinary rules of law**, escaped notice at the time. It was not until much later that the nation came to look upon the Star Chamber as the special engine of royal tyranny and to loathe its name. ...
> Excerpted from THE ENCYCLOPAEDIA BRITANNICA, ELEVENTH ED. (1911), Vol IX, p. 520, ENGLISH HISTORY.

The WADA code must be changed. The noble goal of ridding sport of cheaters has become obsessive. As noble as that goal is, once it becomes so obsessive that it threatens to destroy that which it aspires to protect, as we see happening today in cycling, for example, it has become dangerous. Cycling has reached the point where the fight against doping threatens to destroy not only its structure but its rich history as well. By modifying the system so that it serves its purpose and balances that purpose with respect for basic human rights, all "stakeholders" will benefit. The time to change is now.

You'll get nothing and like it.
Judge Elihu Smails, Caddyshack

CONCLUSION

In the Landis case, WADA's anti-doping disciplinary procedure cost millions of dollars, took way too long to hear and render a decision, proved to be inflexible and its results appear to many observers, including the athlete representative on the Panel to be unjust. That is hardly an improvement over the nation's court system. Fortunately, Floyd Landis made the process transparent. In my opinion, the public witnessed the system cracking just as Landis cracked on Stage 16 and Will Geoghegan cracked during the hearing. I hope but have no confidence that the reality of a Star Chamber dictate in this case will lead to the abolition of WADA's anti-doping disciplinary system. I believe that a better system should and must replace the current one. The new system must honor principles of fairness and justice while affording all concerned with an inexpensive and expedient vehicle to resolve anti-doping disputes.

Floyd Landis has received a two year suspension retroactive to some barely explicable point in time in January, 2007. As a result of the equally autocratic UCI Rules, he cannot compete with a Pro Tour team for 2 years after that. What a terrible waste. In the meantime, both fun and joy have left the building.

*William F. Hue is a Wisconsin Circuit Court Judge. His views are strictly his own.