



The Probative Value of the McLaren Report Confirmed by the Court of Arbitration for Sport

by Robert Néron, SDRCC Arbitrator

The decisions rendered by the Court of Arbitration for Sport (CAS) in Lausanne over the past 18 months were largely influenced by revelations of Russia's state-run doping scheme and suspension of Russian athletes. An in-depth investigation into the involvement of Russian athletes in doping activities was launched in December 2014 after German radio-television broadcaster ARD revealed a government-sponsored doping program in Russia reminiscent of former practices in the Soviet Union and Eastern Bloc during the Cold War.

Following ARD's broadcast and witness testimony from a former director of the Russian laboratory regarding systematic doping and cover-up attempts involving athletes competing in the 2014 Olympic Winter Games in Sochi¹, the World Anti-Doping Agency (WADA) appointed Richard McLaren, Professor of Law at Western University and member of the SDRCC's inaugural roster, to chair an independent commission.

The first part of McLaren's findings, submitted in July 2016, provided substantive evidence of the systematic, state-sponsored manipulation of the doping control process² that occurred before the 2014 Olympic

Winter Games and continuing afterward in the run-up to the 2016 Olympic Summer Games in Rio. These findings prompted the International Association of Athletics Federations (IAAF) to indefinitely suspend Russia from world athletics events.

In addition, WADA announced that the Russian Anti-Doping Agency (RUSADA) should be considered in violation of WADA rules. WADA further recommended banning Russia entirely from the 2016 Olympic Games. In their response to the findings, the International Olympic Committee (IOC) rejected WADA's recommendation, stating that the IOC and each international athletics federation would reach decisions on a case-by-case basis. A few days prior to the opening ceremonies of the Rio Olympic Games, 271 Russian athletes were authorized to compete in the Games, while at least 118 others were banned for doping.

Meanwhile, the International Paralympic Committee unanimously voted in favour of banning the entire Russian team from the 2016 Paralympic Summer Games and 2018 Paralympic Winter Games to be held in Pyeongchang, South Korea. This decision was motivated by the various investigations uncovering the government-sponsored doping program. *(continued on page 2)*

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On August 3, 2016, the *ad hoc* Division of the CAS announced that the Rio Olympic Games registered a record 18 procedures before the opening of the Games. Among those, 11 cases the *ad hoc* Division reviewed resulted primarily from the ban of Russian athletes instigated by the McLaren Report. By the Games' end, the total number of cases heard by the CAS had increased to 28, 16 of which were related to the eligibility of Russian athletes³.

McLaren Report Used in Evidence

With respect to awards pronounced by the CAS before, during, and after the 2016 Games in Rio, one of the most striking developments associated with the handling of Russian doping cases was the use of the McLaren report as credible and convincing evidence to demonstrate an anti-doping rule violation.

For example, in *International Association of Athletics Federations (IAAF) v. Russian Athletic Federation (RUSAF) & Anna Pyatykh*⁴, the CAS ruled that triple-jumper Anna Pyatykh had violated IAAF rules governing the use or attempted use of a prohibited substance, thereby confirming the prior findings and sanctions. Notably, the CAS used the McLaren report to challenge claims made by Pyatykh that a substance used for weight loss gave rise to her adverse finding. The CAS produced evidence contained in the McLaren report demonstrating that Pyatykh was among the Russian athletes involved in the washout testing of performance-enhancing, prohibited substances whereby athletes would test "clean" before a doping control occurring before or after an event.

Pyatykh argued that, despite evidence produced in the McLaren report, she participated in the washout program unknowingly and was unaware she was using prohibited substances while preparing for the IAAF 2013 World Championships in Moscow. Pyatykh rejected the evidence presented in the McLaren report, arguing that it did not meet the standards of proof under Article 33.3 of

the 2013 IAAF Rules which state that "Facts related to anti-doping rule violations may be established by any reliable means, including but not limited to admissions, evidence of third Persons, witness statements, experts reports, and documentary evidence."

In its decision, the CAS maintained that the circumstantial evidence presented in the McLaren report for the *Pyatykh* case meets the Article 33.3 threshold and can be used to establish guilt in anti-doping rule violations. As to the use of the circumstantial evidence in the McLaren report to prove there was an anti-doping rule violation in the *Pyatykh* case, the CAS notes that the evidence is "like strands in a cable" in that "the provided strands of evidence, standing alone or together build a sufficiently strong cable to support an ADRV [anti-doping rule violation] in an individual case."⁵

This statement may lead us to conclude that the CAS considers the McLaren report evidence credible

in anti-doping rule violation cases, although it tempered its decision by declaring that all evidence should be considered on a case-by-case basis. On the other hand, the *Pyatykh* case establishes a precedent that can be applied to future awards, which may undermine the cases of other Russian athletes appearing before the CAS who are associated with the evidence presented in the McLaren report.

In closing, it should be noted that the International Olympic Committee recently banned Russia from the 2018 Winter Olympics in Pyeongchang to sanction its "systematic manipulation" of anti-doping rules. However, individual Russian athletes who are clean will be invited to the Games under strict conditions by the name "Olympic Athlete from Russia (OAR)."⁶ ■

"...the CAS considers the McLaren evidence credible in anti-doping rule violation cases..."

¹ Schmid Report, December 2, 2017, p. 9.

² Idem, p. 12.

³ CAS press release, August 3, 2016.

⁴ CAS 2017/O/5039 International Association of Athletics Federations (IAAF) v. Russian Athletic Federation (RUSAF) & Anna Pyatykh.

⁵ Pyatykh Arbitral Award, paragraph 88.

⁶ IOC press release, December 5, 2017.



SDRCC Roster Member Profile: Learning More About our Arbitrators and Mediators

They come from every region of Canada and have extensive experience in alternate dispute resolution and sports-related issues, but how much do we really know about them? The SDRCC has an impressive list of 50 mediators and arbitrators and we will slowly be introducing you to some of them through our regular installments of “SDRCC Roster Member Profiles”. In this edition we would like to present, **Roger Gunn, Mediator** from **Edmonton, Alberta**.

What led you to a career in ADR?

It was a logical transition to ADR from a career as a Human Resources Professional. With almost 30 years experience dealing with employee and organizational disputes, shifting to mediation and arbitration made sense to me. Acting as a neutral third party, similar skills and abilities are utilized. I got my start as a community mediator with Edmonton’s Mediation and Restorative Justice Centre, handling disputes between neighbours. Having served thirteen years on Alberta’s Labour Relations Board, I was able to be accepted on the roster of federal jurisdiction adjudicators under the Canada Labour Code and as a labour arbitrator with Alberta’s Mediation Services.



Specialization/Area of Expertise:

As a specialist in labour arbitration I have settled many disputes between unions and employers. As a workplace mediator my role is to help parties within an organization reach agreement on their disputes.

As an arbitrator with the SDRCC, I...

...have, since January 1, 2007, helped a wide variety of athletes and NSOs with team selection disputes, carding matters, doping and other types of issues. In a few cases I acted as an arbitrator or med/arb neutral. For me it is very rewarding to be able to help those in dispute become better

problem solvers and to help them communicate more effectively with one another. The SDRCC conferences are a great way to keep up to date on current issues in sports disputes. They also provide an opportunity to interact and get to know on a personal level my colleagues in the sports ADR field.

Favorite Sport(s):

I enjoy a good game of golf, emphasis on the word good, and follow many sports including football, soccer, athletics and many more.

Dispute Prevention Tip for Athletes and Federations:

The parties to a dispute should not wait for things to escalate before they address issues. Don’t wait for a formal appeal before trying to resolve matters. By then the parties are often very positional in how they want to resolve a dispute. Athletes and NSOs should address problems as they arise so they can be dealt with in a timely fashion. The assistance of the SDRCC’s *Early Resolution Facilitation* process can help. Often a third party neutral can assist the parties to clear up misunderstandings and help the parties communicate. This often results in creative, mutually agreeable solutions, long before disputes get locked into positions. Early resolution of disputes is effective and can enhance the relationship between athletes and their NSOs. ■

In our next edition, look for the profile of an SDRCC Med/Arb Neutral.



Follow us on LinkedIn Stay current on the publication of new decisions while keeping up with the Sport Dispute Resolution Centre of Canada’s activities!



****NEW** SDRCC Now Offering Case Management Services**

The allocation of proper resources to the case management of disciplinary procedures or appeals is challenging for most sport organizations which generally have limited means. Certain sport organizations assign these responsibilities to a staff member, which may temporarily distract this person from a functional role in performance or sport development. Others decide to commit significant financial resources to outsource their case management to law firms or legal clinics, which effectively reduces the funds to be invested in their sport and for their members. In both scenarios, it is likely that sport organizations would prefer to contribute these same resources towards the fulfilment of their core mandate.

In response to the need for a solution that is both affordable and efficient, the Centre is pleased to offer **case management services to the sport community!** Indeed, the Centre now proposes to manage the disciplinary processes or internal appeals, on a fee-for-service basis, for sport organizations looking to **diminish their legal costs** and **remove this burden currently placed on their staff.**

Relying on more than 13 years of case management experience, the Centre can ensure an **independent, impartial and professional process.** The Centre's neutrality also removes disputing parties' concerns of any real or perceived conflict of interests, a common ground raised in appeals of internal decisions.

As part of this service, the Centre's case managers will be responsible for coordinating communications, managing case-related documents and the calendar of proceedings, planning the logistics for conference calls and videoconferences, in addition to providing administrative assistance to the hearing panel; all this using its proprietary Case Management Portal (CMP). **The services are exclusively of administrative nature and do not include any kind of decision making, interpretation or advice.**

For more information, or to find out how your sport organization can access these new services, please contact the Centre's case managers at case@crdsc-sdrcc.ca. ■

Notable Dates:

- **February 3:** Workshop hosted by Loisir sport Outaouais (Gatineau, QC);
- **February 13:** Workshop hosted by SportsQuebec (Montreal, QC);
- **February 16:** Presentation at the M1 Meeting for the 2019 Canada Winter Games (Red Deer, AB);
- **February 23:** Workshop hosted by Coaching Association of Canada (Ottawa, ON);
- **February 27:** Participation in the Canada Games Council's Strategic Plan Consultation (Ottawa, ON);
- **February 28:** Workshop for law students at Laval University (Quebec City, QC);
- **March 7:** Workshop for sport management students at University of Ottawa (Ottawa, ON);
- **March 28:** Workshop for sport business management students at Algonquin College (Ottawa, ON);
- **April 20-22:** Kiosk at the 2018 Ontario Coaches Conference (London, ON). ■

The SDRCC team wishes all Canadian athletes the best of luck at the 2018 PyeongChang Olympic and Paralympic Winter Games as well as at the 2018 Gold Coast Commonwealth Games !!!



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