



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

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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 Sochi,¹ 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.

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

² *Idem*, p. 12.



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.

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 athletes.³

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

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.



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

⁵ Pyatykh Arbitral Award, paragraph 88.

⁶ IOC press release, December 5, 2017.