

**SPORT DISPUTE RESOLUTION CENTRE OF CANADA (SDRCC)
CENTRE DE RÈGLEMENT DES DIFFÉRENDS SPORTIFS DU CANADA (CRDSC)**

NO: SDRCC 19-0401

**ANDY MCINNIS
(Claimant)**

AND

**ATHLETICS CANADA
(Respondent)**

AND

**OTTAWA LIONS TRACK AND FIELD CLUB
(Affected party)**

Before:

David Bennett (Arbitrator)

Appearances and Attendances:

On behalf of the Claimant: Mr. Andy McInnis
Mr. Jason Beitchman and Ms. Brynn Leger, Rayman
Beitchman LLP, counsel

On behalf of the Respondent: Mr. David Bedford
Ms. Leanne Standryk, Lancaster, Brooks & Welch LLP,
counsel

AWARD

17 December 2019

Overview

1. This is an appeal by Andy McInnis of his lifetime expulsion from Athletics Canada, which resulted in his being banned from coaching, and his removal from the Athletics Canada Hall of Fame. Mr. McInnis was a very successful track and field coach who coached for the Ottawa Lions Track & Field Club (“OLTFC”) and numerous Olympic medal winners. Over the past few years there have been various allegations of behaviour that have led to investigations of harassment and sexual harassment. Mr. McInnis was disciplined by the OLTFC in the past, but allegedly continued his harassing behaviour, and new complaints surfaced in August of 2018. The OLTFC hired an investigator to review the complaints. However, allegations were brought forward that the OLTFC was not conducting an impartial investigation. Commissioner Frank Fowlie assumed responsibility for the new complaints and engaged André Marin to conduct an investigation. Investigator Marin found that the allegations were substantiated and recommended that Mr. McInnis be expelled from Athletics Canada and be removed from the Athletics Canada Hall of Fame. Commissioner Fowlie accepted the findings and recommendations regarding sanctions for Mr. McInnis. This appeal concerns whether:
 - The Athletics Canada Commissioner’s Office had the jurisdiction to investigate the allegations;
 - The investigation and decision-making process followed the principles of fairness and natural justice; and
 - There was bias involved in the investigation.

For the reasons set out below the appeal is allowed.

Timeline

2. In August and September 2018, complaints were brought against Mr. McInnis by three former members of the OLTFC and the father of one of the complainants, Mark Hayes, a volunteer with OLTFC (Mr. Hayes’ name is used throughout this decision as it was in the Marin Report and in Commissioner Fowlie’s decision).
3. On September 5, the OLTFC received a complaint from Mark Hayes. The complaint alleged the following:
 - Mr. McInnis grinding his pelvic area against female athletes to demonstrate how their arms should move while running;
 - Mr. McInnis pinching female athletes below the bra while stating things like “you’ve lost weight” or “you’re thin”;
 - Mr. McInnis only allowing bikini bottoms to his runners, with no more modest form of attire allowed despite some female athletes requesting them;
 - Mr. McInnis displaying inappropriate behaviour at the Canadian Championships in 2017 and 2018 held in Ottawa which included questionable massages;
 - Mr. McInnis posting on his Instagram a photo of himself and a young female athlete riding around in a golf cart with the caption “Best ASSisistant”;
 - Mr. McInnis being intoxicated during the tournament camp.

There were 12 complaints made in total, accusing Mr. McInnis of harassment and sexual harassment. These complaints were made to the OLTFC, pursuant to the club's policies and procedures.

4. On October 26, 2018, OLTFC retained Andrew Tremayne to investigate the complaints brought against Mr. McInnis. Three of the complainants were interviewed in November 2018 and Mr. McInnis was interviewed on January 21, 2019.
5. On December 14, 2018, Commissioner Fowlie received a letter of complaint from Mr. Hayes, who wrote to Athletics Canada complaining of harassment and sexual harassment carried out by Mr. McInnis. In response to the letter, Commissioner Fowlie contacted Maureen Moore, who was, at the relevant time, the OLTFC Harassment Officer or Ombudsperson and a member of the OLTFC Board of Directors. Ms. Moore told Commissioner Fowlie that OLTFC had received a number of complaints about Mr. McInnis committing harassment and sexual harassment.
6. In response, Commissioner Fowlie assigned the complaint to Commissioner John Reid, who, while noting that Athletics Canada had jurisdiction to investigate the matter, declined to do so at that time on the basis that the matter was being investigated by OLTFC and Mr. Tremayne. Mr. Reid believed that it was appropriate at that time to allow Mr. Tremayne the opportunity to complete his work before Athletics Canada took jurisdiction over the matter. He indicated that if Mr. Hayes was not happy with the results, he could appeal the decision.
7. On January 24, Commissioner Fowlie contacted Mr. Hayes to determine whether he was satisfied with the state of events at OLTFC. Mr. Hayes stated his dissatisfaction and Commissioner Fowlie requested that he file a second complaint.
8. On January 25, 2019, Mr. Hayes brought his complaint before Commissioner Fowlie and the Commissioner's Office for a second time. Mr. Hayes raised concerns about the impartiality of the OLTFC Board of Directors, due to the personal relationships between Mr. McInnis and members of the OLTFC Board, and in particular the Chair of the Board, Ken Porter.
9. On January 26, 2019, Commissioner Fowlie contacted Ms. Moore again and was told by Ms. Moore that she had resigned from the OLTFC Board for two reasons: (i) because it was her opinion that Mr. Porter was not taking the complaints against Mr. McInnis seriously, was obstructing the investigation and was referring to it as a "witch hunt"; and, (ii) because she was being harassed by Mr. Porter for executing her duties in her role as the Harassment Officer or Ombudsperson of OLTFC and investigating the complaints against Mr. McInnis.
10. During this conversation, Commissioner Fowlie learned from Ms. Moore that Mr. McInnis was on an administrative leave from his position with OLTFC due to a previous infraction. He learned that Mr. McInnis had been previously reprimanded by the OLTFC, in 2017, as a result of sexual harassment complaints made by female athletes of the club and that the OLTFC had received numerous complaints about Mr. McInnis engaging in harassing and sexually harassing behaviour in the past.
11. Ms. Moore submitted a formal complaint to Athletics Canada on January 29, 2019 concerning the harassment she experienced at the OLTFC.

12. On January 30, 2019, with consideration for the investigation that was then underway by Investigator Tremayne, Commissioner Fowlie took jurisdiction over the complaints of harassment and sexual harassment brought against Mr. McInnis. Athletics Canada appointed Investigator Marin to independently investigate the allegations of harassment and sexual harassment made by “Bonnie” (a pseudonym given to the complainant to protect her identity - I have maintained the use of pseudonyms given by Investigator Marin in order to protect the anonymity of the complainants) against Mr. McInnis. Investigator Marin was directed to present his findings in the form of a final report (“Marin Report”). Additionally, Commissioner Fowlie directed the OLFTC to discontinue the Tremayne investigation for the OLFTC.
13. On February 4, 2019, Investigator Marin carried out his first round of interviews and determined there was a *prima facie* basis to the allegations. Investigator Marin presented this determination to Commissioner Fowlie and Mr. McInnis was suspended pending the outcome of the investigation. The suspension was announced publicly and tweeted by Athletics Canada which resulted in a female, “Elisa”, coming forward to complain that Mr. McInnis had sexually harassed her as well.
14. On February 6, 2019, counsel for Mr. McInnis and the OLFTC both wrote to the Commissioner and objected to his taking jurisdiction, stating that complaints were already in the process of being investigated.
15. On February 7, 2019, Commissioner Fowlie wrote to the Board of the OLFTC that “[a]ll principals [sic] of natural justice and procedural fairness will be applied in this case.”
16. On February 10, 2019, Mr. Tremayne was directed by OLFTC to continue his investigation.
17. On March 5, 2019, Mr. Marin met with and interviewed Mr. McInnis in the office and presence of Mr. McInnis’ then-legal counsel. The interview took place for approximately 30 minutes. This is in contrast to the hours that Investigator Tremayne spent interviewing Mr. McInnis.
18. On March 21, 2019, Commissioner Fowlie suspended Mr. Porter and Mr. McInnis from Athletics Canada pending his decision on the matter, or, no later than June 30, 2019. As a result of the suspension, on March 25, Athletics Canada notified its member branches and clubs, Sport Canada, the Coaching Association of Canada, USports and the OLFTC of the interim suspensions. Mr. Porter and Mr. McInnis were placed on the Suspended Individuals List that Athletics Canada maintains under the “Safe Sport” tab of its website. An announcement was also posted on the “News Release” page of the Athletics Canada webpage and tweeted about on the Athletics Canada Twitter account.
19. In the hours and days following Athletics Canada’s tweets, two men came forward on Twitter alleging that Mr. Porter had engaged in sexual abuse of the men when they were minors and engaged in inappropriate sexual relationships with them. Another two complainants came forward with complaints, one alleging that Mr. Porter had engaged in inappropriate sexual touching with the complainant and the other that the complainant had been sexually harassed by Mr. Porter.
20. A draft version of the Marin Report (*In Plain View: The Tolerance of Sexual Misconduct at the Ottawa Lions Club*) was provided to Mr. McInnis’ lawyer on April 15, 2019. Investigator Marin found that, of the seven complaints made by Bonnie, the following two complaints

were both founded on a balance of probabilities and met the definition of “sexual harassment” as defined by Athletics Canada in its *Code of Conduct and Ethics*:

- 1) Bonnie was forced to parade in her running bikini bottoms; and,
 - 2) When Mr. McInnis massaged Bonnie at the Prince Edward Island meet in August 2012.
21. In addition, Investigator Marin found the same about the following two complaints made by “Elisa”:
- 1) Mr. McInnis called Elisa a “yummy mommy” and a “MILF” at a time that was never clarified (may have been 2011 or 2012); and,
 - 2) Mr. McInnis took athletes to a strip club in Windsor, Ontario in 2008 and offered to buy female athletes lap dances (he did not buy them lap dances).
22. Based on these findings, Investigator Marin recommended that Mr. McInnis receive a lifetime expulsion from Athletics Canada.
23. After they were given a draft of the report on April 15, Mr. McInnis and his counsel were given five days to respond to Investigator Marin regarding any factual errors or typographical changes, and an additional five days to provide Commissioner Fowlie with any submissions they wished him to consider.
24. On April 16, 2019, Investigator Tremayne delivered his completed report to the OLTFC. Investigator Tremayne concluded in his report that all but one of the allegations against Mr. McInnis were unfounded.
25. On April 26, 2019, Mr. McInnis’ counsel responded to Investigator Marin’s draft report, challenging the credibility of Bonnie.
26. On May 3, 2019, Mr. McInnis announced his retirement via an email from his counsel to Commissioner Fowlie. This letter also acknowledged that the Tremayne Report had found that Mr. McInnis’ actions had constituted harassment in two ways:
- 1) An Instagram post on Mr. McInnis’ personal Instagram account of a picture of himself with a young athlete and a caption which read “with the Bestest Executive ASSisitant @ Nats Championships Day 4 - calm n composed” [sic]; and,
 - 2) The allegations brought forward by Elisa that Mr. McInnis had called her a “yummy mummy” and a “MILF”.
27. The incidents as alleged by Bonnie were not founded, according to Investigator Tremayne, on the basis of a lack of evidence. The letter stated that Commissioner Fowlie was in a position to decide sanction, however, Mr. McInnis continued to deny the allegations of harassment and sexual harassment by Bonnie and asked that the imposed sanction take this factor into account.
28. On May 5, 2019, Investigator Marin concluded his investigation and Commissioner Fowlie released his final decision (*Office of the Athletics Canada Commissioner in the Matter of a Complaint Concerning the Ottawa Lions Track and Field Club, Andy McInnis and Ken Porter*). In his decision, Commissioner Fowlie accepted the findings and recommendations made in the Marin Report and made the following decision regarding Mr. McInnis:
- [...] Andy McInnis has committed major infractions of the Athletics Canada Code of Conduct and Ethics by repeated minor violations of the Code, by*

behaviour that constitutes sexual harassment and sexual misconduct, repeated violations of the Athletics Canada Code of Conduct and Ethics, and by doing so has also demonstrated conduct that damages Athletics Canada's image, credibility or reputation. Mr. McInnis has previously received a verbal reprimand, a written reprimand, and been suspended for sexual harassment and sexual misconduct.

29. Commissioner Fowlie imposed the following sanction on Mr. McInnis: "Andy McInnis is expelled from Athletics Canada, and its member branches and Clubs. Andy McInnis is expelled from the Athletics Canada Hall of Fame." The result of this is that Mr. McInnis was terminated from his coaching position with the OLTF, was banned from holding membership in Athletics Canada for life, can no longer coach and has been removed from the Athletics Canada Hall of Fame.
30. On June 4, 2019, Mr. McInnis filed a Request pursuant to s. 3.4 of the *Canadian Sport Dispute Resolution Code* ("*SDRCC Code*") seeking to appeal the May 5, 2019 report and decision of the Commissioner of Athletics Canada which found that while serving in his position as Executive Director of the Ottawa Lions Track and Field Club, Mr. McInnis violated the *Athletics Canada Code of Conduct and Ethics* ("*AC Code*") by repeatedly engaging in minor violations of the *AC Code* and engaging in behaviour that constituted sexual harassment and sexual misconduct.

Parties

Andrew McInnis

31. Mr. McInnis is the former Executive Director and a former coach of the Ottawa Lions Track & Field Club. He has had a storied career having coached the men's relay team at the 1996 Olympics to a gold medal and having been the national program director. He was named to the Athletics Canada Hall of Fame in 2017.

Athletics Canada

32. Athletics Canada is Canada's national sport governing body for track & field, road running and cross-country running.

Ottawa Lions Track & Field Club

33. The OLTF is the local track club where Mr. McInnis was a coach. The OLTF is a member branch of Athletics Canada. The OLTF was named as an affected party, but chose not to participate in the hearing.
34. The hearing proceeded by conference call on December 2, 2019.

Issues

The following issues have been raised by Mr. McInnis in this matter:

- 1) Did Commissioner Fowlie have jurisdiction to investigate and hear the complaints or was he prohibited from doing so as a result of Investigator Tremayne's investigation?
- 2) Did Commissioner Fowlie's decision violate the principles of natural justice and procedural fairness?
- 3) Does Athletics Canada's decision give rise to a reasonable apprehension of bias?
- 4) Do the complaints meet the definition of "harassment" as set out in Athletics Canada's harassment code?

Positions of the Parties

Mr. McInnis' Position

a) Jurisdiction

35. Mr. McInnis' asserts that Athletics Canada did not have jurisdiction to hear the matter.
36. The first argument put forward by Mr. McInnis is that when Commissioner Fowlie took jurisdiction over the investigation on January 30, 2018, he did so without correctly construing the meaning of r. 130.03 of the Athletics Canada *Rules and Bylaws* ("Rules"). This rule read in the following way:

*[...] Notwithstanding Rule 055 [if] the complainant chooses at first instance to complain to the Commissioner rather than to her/his Club or Branch, the Commissioner will handle the complaint as set out herein. **The Commissioner will not accept a complaint that has already been handled through a Club or Branch process.*** [emphasis added]
37. Mr. McInnis asserts that the Commissioner did not correctly construe the meaning and intent of r. 130.03. In Mr. McInnis' interpretation, the Commissioner can *only* accept jurisdiction over a complaint at first instance and *cannot* accept a complaint that has already been handled through a Club or Branch process. This reading of r. 130.03, as it was written at the time Commissioner Fowlie took jurisdiction, is, Mr. McInnis argues, in line with provision 055 of the Athletics Canada By-Laws. Provision 055 requires that complaints be first filed at the club level.
38. Mr. McInnis relies on the fact that complaints of harassment and sexual harassment were brought against Mr. McInnis to OLTCF in August and September 2018 and Mr. Tremayne was hired to investigate the complaints on October 26, 2018, as a qualified external investigator. When Mr. Hayes brought his complaints to Commissioner Fowlie and Athletics Canada on December 14, 2018, they were assigned to Commissioner Reid who contacted Mr. Hayes and declined to accept jurisdiction over the complaints as a result of the OLTCF investigating them. In addition, Commissioner Reid made Mr. Hayes aware of the avenues of appeal that were available to him following the investigation. According to Mr. McInnis, this matter had also already been settled by Commissioner Reid and, as a result, Commissioner Reid and Athletics Canada are *functus officio* and the issue is *res judicata*.
39. Further to this, Mr. McInnis argues that Mr. Hayes brought his complaint before Athletics Canada on January 25, 2019, because Commissioner Fowlie contacted Mr. Hayes on January 24, 2019 and asked Mr. Hayes to file his complaint with Athletics Canada a second time. In distinction, Mr. McInnis argues that the January 29 complaint received from Ms. Moore was unrelated to Mr. McInnis and the allegations of harassment and sexual harassment that Investigator Tremayne was investigating at that time.
40. The second argument advanced by Mr. McInnis is that Commissioner Fowlie relied on a version of s. 130.03 from the Athletics Canada *Rules* that was not in effect when he took jurisdiction on January 30. Mr. McInnis relies on statements from the Fowlie Decision. In particular, paragraphs 9 through 22, where, in Mr. McInnis' reading, Commissioner Fowlie claimed that he received jurisdiction of the complaint as a result of s. 130.03, which had been amended on February 4, 2019 ("Amended s. 130.03"). Mr. McInnis argues that there were significant amendments made to s. 130.03 on February 4. According to Mr. McInnis,

the amended s. 130.03 expanded the jurisdiction of the Commissioner to hear complaints already registered at the club level *if* the Commissioner agrees that certain criteria are met, including (i) that there has been undue delay in the review of the complaint; (ii) that the complaint cannot be fairly reviewed by the club due to a conflict of interest; and (iii) that some other relevant reason prevents the complaint being adequately reviewed.

41. Mr. McInnis argues that while Athletics Canada claims that these rules were in effect as of February 4, 2019, they were not actually in effect until February 27, 2019, which, according to Athletics Canada's bylaws is the date where the amended s. 130.03 was proposed and approved by motion, without a date specified when the amended s. 130.03 was to take effect. According to Mr. McInnis, the date upon which the amendments come into effect was February 27, 2019 and cannot be applied retroactively as the amendment affects Mr. McInnis' substantive rights and because a retroactive application was not the clear intent of the amendment.
42. The third position advanced by Mr. McInnis is that the Marin investigation improperly reopened the 2016 investigation. Mr. McInnis argues that relying on this investigation is an improper re-opening of a closed investigation and an improper penalization for conduct that had already been reviewed, addressed and corrected.
 - b) Procedural Fairness and Natural Justice
43. Mr. McInnis argues that the standard of review does not need to be considered when a decision is challenged on the basis of the denial of natural justice, such as procedural fairness and a reasonable apprehension of bias, relying on *Ontario Provincial Police v MacDonald*, 2009 ONCA 805 at para 37, 3 Admin LR (5th) 278.
44. He argues that where the decision is of great importance to the individual affected there is a stringent requirement of procedural fairness. Accordingly, a high standard of justice is required where the right to continue one's profession or employment is at stake (*Kane v Bd of Governors of UBC*, [1980] 1 SCR 1105 at 1113, 110 DLR (3d) 311 and *Paterson v Skate Canada*, 2004 ABQB 969 at paras 65 to 69, [2006] 3 WWR 158 [Paterson]).
45. Mr. McInnis argues that, with regard to the Commissioner's decision, Mr. McInnis was faced with allegations of harassment and sexual harassment. These are serious allegations that, he argues, are usually tested through the weighing of evidence, especially assessing the credibility of witnesses at trial within the criminal justice system. Mr. McInnis argues that he was wholly entitled to know the case against him, have a meaningful opportunity to respond, and have his case fully and fairly considered through a process resembling what would be owed to Mr. McInnis if the decision was being decided in a court of law. Mr. McInnis relies on the case of *R. v. Higher Education Funding Council* [1994] 1 All ER 651 (Eng QB) to support the position that decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts. Mr. McInnis claims that the procedure implemented by the Commissioner fell far short of its obligations.
46. Mr. McInnis' position is that Athletics Canada failed to follow r. 140.08 of Athletics Canada's *Rules* which requires that Respondents to a complaint are to be provided with the content of the complaint and instructed to submit a response. Mr. McInnis' argues that r. 140.08 sets out that in order for a complaint to be valid, the complaint must contain the date of the incident, the identity and contact information of the Complainant, the identity of the individual who violated the Code of Conduct and Ethics, a description of the incident,

the section of the Code of Conduct and Ethics allegedly violated and the requested remedy or solution.

47. Mr. McInnis claims that he was never provided with the content of the specific complaints made against him and claims that all of the information required under r. 140.08 is essential for a Respondent to make a full answer and defence.
48. Mr. McInnis relies on the fact that he was never given a formal document outlining the complaints against him or a document containing the details of the complaints, which Mr. McInnis claims he was required to receive under r. 140.08. In addition, Mr. McInnis claims he was never provided with all of the evidence, such as recordings of interviews with the witnesses and complainants. He claims that he was provided with a copy of the paraphrased allegations of the complainants and that these were not put in their proper context. Mr. McInnis argues that these are significant omissions which prevented Mr. McInnis from understanding the case he was expected to meet and creates a breach of procedure, which in turn breaches the principles of natural justice.
49. Mr. McInnis argues that Athletics Canada did not follow the procedure set out in r. 140.08 that provides for a complaint procedure where a “major infraction” is alleged to have occurred. The basis for this claim is that Mr. McInnis was never given an in-person hearing or conference call hearing. Mr. McInnis points to the February 15, 2019 letter that Commissioner Fowlie wrote to the OLTFC Board, which was in line with this obligation.
50. Mr. McInnis argues that Athletics Canada violated r. 130.05 of the Athletics Canada *Rules*, by accepting the recommendations made in the Marin Report. According to Mr. McInnis, the Commissioner does not have the power to delegate decision-making powers to the investigator. Instead, r. 130.05 sets out that the Commissioner shall consider the investigator’s report in addition to submissions made by the parties. Accordingly, this resulted in a procedural error by Athletics Canada and created an error of true jurisdiction.
51. Mr. McInnis asks that if it is found that the investigator has decided the case and not the Commissioner, it follows that the Commissioner has not fully and fairly considered Mr. McInnis’ case in accordance with the principles of natural justice and procedural fairness and the decision cannot stand.

c) Bias

52. Mr. McInnis’ position is that the Marin Report gives rise to a reasonable apprehension of bias and has tainted the Commissioner’s decision.
53. According to Mr. McInnis’ interpretation of the case law, bias is demonstrated by showing a reasonable apprehension of bias. Mr. McInnis relies on *R v S (RD)*, [1997] 3 SCR 484 at paras 109-110, 151 DLR (4th) 193, which sets out the test for the reasonable apprehension of bias. In addition, Mr. McInnis drew parallels between the facts in *Baker v Canada (Minister of Citizenship and Immigration)*, [1999] 2 SCR 817, 174 DLR, and his own case.
54. As a result, Mr. McInnis argues that the duty to act fairly applies to every party involved in the decision-making role, which, in this case, means that because the Marin Report gives rise to a reasonable apprehension of bias, it taints Athletics Canada’s decision.
55. Mr. McInnis’ position is that Mr. Marin far exceeded r. 130.05 of the Athletics Canada *Rules*, which sets out what should be in the investigator’s report. In addition, Mr. Marin includes extensive recommendations, which include: imposing a lifetime expulsion from Athletics Canada; posting the report on the OLTFC website; advising former athletes of the Marin Report; and that the OLTFC Board members acknowledge their failings to athletes and resign.

56. Mr. McInnis argues that Mr. Marin took on the role of an advocate for the complainants which is evidenced by his decision to include victim impact statements in the Marin Report. Mr. McInnis disputes the probative value of these documents and points to the fact that these statements contain hearsay and were prejudicial.
57. Mr. McInnis points to Mr. Marin's use of language in the subheadings of the report to demonstrate bias. The following are examples:
- The title of the Marin Report, "In Plain View: The Tolerance of Sexual Misconduct at the Ottawa Lions Club";
 - Headings such as:
 - "Emulating the Catholic Church"
 - "Andy McInnis the Teetotaler"
 - "Massage Me Not"
 - "The Womanizer"
 - "Athletics Canada Ruined the Whole Thing!"
 - Making assertions that are highly prejudicial to Mr. McInnis such as:
 - "There are likely far more athletes who have yet to come forward with their stories in this sordid affair";
 - "Mr. McInnis likely just looked the other way and focused more on harassing young female athletes"; and
 - "The absence of corrective actions leads the reader to conclude that Mr. McInnis' 'troubling behaviour' is acceptable to the Club and can be expected to continue. Brilliant."
58. Mr. McInnis compares these statements to the officer's notes in *Baker*, which gave rise to the reasonable apprehension of bias.
59. Mr. McInnis also argues that a source of bias came about as a result of the negative interactions that took place between the OLTFC Board members, Athletics Canada and their investigator, Investigator Marin. According to Mr. McInnis, the OLTFC Board members challenged Athletics Canada's jurisdiction over the investigation and this challenge led to a conflict that tainted both the Commissioner and Investigator Marin's objectivity.
60. Mr. McInnis argues that there is a reasonable apprehension of bias arising from the manner in which Investigator Marin conducted his interviews, specifically in his interview with Bonnie. Mr. McInnis takes issue with the fact that Investigator Marin permitted Bonnie to read from and refer to a written statement that was not recorded contemporaneously with the events she has alleged. Mr. McInnis also takes issue with what he perceives as Investigator Marin's taking Bonnie's testimony on its face without assessing her credibility.
61. Mr. McInnis compares this style of interview as an examination in chief and argues that Investigator Marin was trying to build a case against Mr. McInnis.
62. Mr. McInnis' position is that Investigator Marin was acting as an advocate for the complainants. Evidence of this can be seen, according to Mr. McInnis, when Mr. Marin asked Bonnie if she wanted to file a sexual assault charge with the police against Mr. McInnis. Although Mr. McInnis acknowledges that r. 130.05 places a positive obligation on the investigator to advise complainants to report criminal allegation to the police, Mr. McInnis understands Investigator Marin's advising Bonnie as demonstrating that Investigator Marin had prejudged Mr. McInnis.
63. Mr. McInnis' position is that Investigator Marin's bias led him to try and discredit and undermine the evidence presented by witnesses who spoke on behalf of Mr. McInnis. Mr.

McInnis gives the examples of the manner in which Investigator Marin depicts Devyani Biswal and Sean Burges.

64. Another indicator of Investigator Marin's bias is found, according to Mr. McInnis, in instances where Mr. Marin treats allegations made against Mr. McInnis with allegations made against Mr. Porter. Mr. McInnis argues that his investigation should have been separate from that of Mr. Porter and any investigation into the OLTFC Board. Mr. McInnis argues that the allegations against Mr. Porter were different and more "egregious" than those made against Mr. McInnis. Because of this, Investigator Marin looked at and treated Mr. McInnis as a sexual predator or as engaging in sexual misconduct. Mr. McInnis argues that the effects of treating Mr. McInnis as one and the same with Mr. Porter were seen in Commissioner Fowlie's decision.

d) "Harassment"

65. Mr. McInnis' position is that Athletics Canada failed to properly construe and apply the definition of "harassment".
66. Mr. McInnis argues that many of the complaints allege behaviour by Mr. McInnis against third-parties who did not act as complainants. Mr. McInnis disputes these claims on the basis that in order to determine whether the alleged behaviour was "unwelcome" or "unwanted", this evidence must come from the recipients of the alleged contact. He argues that there was no direct evidence that Mr. McInnis' actions were unwanted or unwelcome.
67. Specifically, Mr. McInnis highlights the following allegations as being against recipients who have not brought complaints against Mr. McInnis:
- Pinching female athletes on their legs, torso and backs, with the stated purpose of determining if they need to lose weight;
 - Making inappropriate comments about the bodies and weight of female athletes, both directly to those athletes and to other athletes;
 - Massaging the legs and hips of female athletes;
 - Slapping the buttocks of female athletes;
 - Coming into direct body-to-body contact with female athletes from behind, and grasping their arms in order to demonstrate arm movement;
 - Telling female athletes which other athletes they should and should not be friends with, which other athletes they should socialize with, and which other athletes they can trust;
 - Asking female athletes to model their track uniforms in front of Mr. McInnis;
 - Posting Instagram photos of female athletes in inappropriate, revealing or sexually suggestive poses.

Athletics Canada's Position

a) Jurisdiction

68. It is Athletics Canada's position that the Commissioner did not exceed the jurisdiction prescribed by the Athletics Canada *Rules*.
69. Athletics Canada disputes the claim that the Commissioner assumed jurisdiction under the amended r. 130.03. Athletics Canada acknowledges that the amended r. 130.03 was not in effect on January 30, 2019 (the date upon which Commissioner Fowlie took jurisdiction)

and states that Commissioner Fowlie did not rely upon the amended r. 130.03 in his final decision. Instead, reference to the amended r. 130.03 was not material to the claim of jurisdiction, but was a reference to the provision as it existed on the day the decision was made.

70. Athletics Canada argues, in the alternative, that if it is found that Commissioner Fowlie referred to the wrong version of the *Rules*, this error is not fatal to the issue of jurisdiction as Athletics Canada had jurisdiction under the 2018 version of r. 130.03. This version permitted jurisdiction of incidents involving a Club or a Branch where the incident relates to the business, activities or events of the Club, the complaint is related to an athlete in an Athlete Workplace and the complaint is of first instance or where it has not already been *handled* by the Club.
 71. According to Athletics Canada, the Commissioner claimed jurisdiction over the complaints brought against Mr. McInnis based on his determination that the complaints had not been “handled” at the Club level, because the investigation had not been completed, and the OLTFC had failed to take appropriate action.
 72. Athletics Canada’s position is that the regular interpretation of the term “handled” is in the past tense and should be understood as meaning that the Commissioner is prohibited from taking jurisdiction over a complaint that has been decided, concluded, settled or finally disposed. Based on this understanding, the Hayes complaint and those complaints brought against Mr. McInnis had not been disposed of as of January 30, 2019.
 73. In addition, Athletics Canada argues that the complaint filed by Mr. Hayes raised new issues, namely, that the OLTFC was interfering with the Tremayne investigation, that there was a conflict of interest and a lack of impartiality. As a result, the issues raised in Mr. Hayes’s January 25 complaint were not *res judicata* by virtue of Commissioner Reid’s earlier decision. In addition, the complaint made by Ms. Moore was one of first instance.
 74. Athletics Canada takes the position that the Commissioner did not take jurisdiction over the 2016 and 2017 complaints and investigation into Mr. McInnis’ conduct and these were not investigated by Investigator Marin. Instead, they were considered by the Investigator and the Commissioner in assessing the credibility of Mr. McInnis and in determining whether, on a balance of probabilities, the allegations contained in the 2018 and 2019 complaints had been proven based on the evidence collected by Investigator Marin.
 75. Athletics Canada argues that the 2016 and 2017 complaints and their outcome were relevant to Investigator Marin’s investigation as they alleged sexual harassment, and, as such, contained past conduct that is relevant to the analysis in 2019, specifically, whether a course of conduct had been established and whether there were systemic issues of harassment at OLTFC. Athletics Canada also submits that it was reasonable and necessary for the Commissioner to consider past infractions of the Athletics Canada Code of Conduct, in order to determine whether such breaches were repeated minor infractions amounting to a major infraction.
- b) Natural Justice and Procedural Fairness
76. Athletics Canada’s position is that Mr. McInnis was afforded the principles of natural justice and procedural fairness.

77. Athletics Canada relies on the fact that the allegations of harassment, and all those asserted during the course of the investigation which formed the complaint before the Commissioner, were specifically provided to the Claimant and his legal representative.
78. Athletics Canada's position is that Mr. McInnis was offered an opportunity to respond to particulars during the course of the investigation and exercised the participatory rights in-person via an interview with Investigator Marin and in writing. This is in keeping with the obligations imposed on Athletics Canada pursuant to r. 130.04 of the Athletics Canada *Rules*.
79. Athletics Canada disputes Mr. McInnis' allegation that the Commissioner failed to follow the provisions of r. 140.08.1 by failing to hold an in-person hearing or a hearing by conference call and is of the position that it afforded Mr. McInnis his rights to natural justice and procedural fairness when it offered him a hearing by written submissions.
80. Further, Athletics Canada argues that r. 140.08.1 does not make it mandatory for the Commissioner to provide a copy of any written complaint to those accused of harassment or sexual harassment. Athletics Canada argues that there is no mandatory language in that rule.
81. Athletics Canada argues that despite Mr. McInnis' arguments to the contrary, there is no obligations to provide the Respondent to a complaint with the information outlined in r. 140.08.1 of the Athletics Canada *Rules*. The content of the complaint does not need to be given to the Respondent. However, Athletics Canada argues that the particulars of the allegations against Mr. McInnis were provided to him in advance of the Commissioner's documentary hearing.
82. Athletics Canada likewise relies on the fact that Mr. McInnis and his legal counsel were provided with an unredacted copy of the Marin Report prior to the Commissioner's hearing, which contained the names of the complainants, identifying data and a description of the complaints against Mr. McInnis with recommendations from Investigator Marin regarding the sanctions to be imposed.
83. Athletics Canada argues that, pursuant to r. 140.08.12, the Commissioner's Office has the sole discretion to determine if an in-person hearing or conference call hearing is necessary to hear and consider the evidence in the complaint or if the complaint can be addressed based on the submitted documents. Likewise, the Commissioner is afforded the sole authority and discretion to determine the format of any hearing. As a result, Commissioner Fowlie considered the factors associated with exercising his discretion under r. 140.08.12 and decided to proceed with a hearing based on documentary evidence and the written submissions of the parties.
84. Further, Athletics Canada takes the position that Mr. McInnis did not, at any time, request an oral hearing or object to the process as ordered by the Commissioner. Instead, Mr. McInnis and his counsel were provided with the Marin Report prior to the hearing and given the opportunity to make written submissions concerning Investigator Marin's recommendations. As a result, they were made aware of the report's findings and recommendations.
85. Athletics Canada argues that the standard of review for procedural fairness is a consideration of fact and reasonableness [*Baker*] and takes the position that the right to natural justice and procedural fairness does not require that Athletics Canada provide Mr.

McInnis with the procedures of a formal court procedure. Instead, Athletics Canada argues, *Baker* sets out a list of factors to consider when determining what is owed.

86. Athletics Canada accepts that when the right to continue in one's profession or employment is at stake; it is a matter of considerable importance. However, the fact that Mr. McInnis gave notice of his retirement on May 3, 2019, means that his employment was not at stake and is therefore not a factor that needs to be considered in his favour.
87. In addition to the factors enumerated in *Baker*, Athletics Canada asks that the social context of harassment in sport and the Safe Sport Initiative be considered as factors of critical importance of context and requests that deference be afforded to both the work of Investigator Marin and the decision of Commissioner Fowlie, given their experience.
88. Athletics Canada argues that Commissioner Fowlie was provided with a redacted copy of the Tremayne report by OLTCF and rejected relying on it for specific reasons.

c) Bias

89. Athletics Canada denies that Commissioner Fowlie and/or Investigator Marin operated with bias.
90. Athletics Canada argues that the Commissioner's Office is an independent office of Athletics Canada with complete and autonomous decision-making authority and does not report to the Board of Directors or Athletics Canada's staff.
91. Athletics Canada relies on the test for bias as set out in *Committee for Justice and Liberty v. National Energy Board*, [1978] 1 S.C.R 369, which is as follows:

The apprehension of bias must be a reasonable one, held by reasonable and right minded persons, applying themselves to the question and obtaining thereon the required information [...]. [The] test is "what would an informed person, viewing the matter realistically and practically - and having thought the matter through - conclude. [...]

The grounds for this apprehension must, however be substantial [...].

92. This test was referred to in *R. v. S. (R.D.)*, [1997] 3 SCR 484 and restated as:

The test contains a two-fold objective element: the person considering the alleged bias must be reasonable and the apprehension of bias itself must also be reasonable in the circumstances of the case. [...]

the reasonable person must be an informed person, with knowledge of all the relevant circumstances [...]

[T]he reasonable person should also be taken to be aware of the social reality that forms the background to a particular case [...].

93. Athletics Canada argues that the social reality is one of increasing concern of harassment and abuse in sport, that is said to have been systemic in nature resulting in a climate of crucial response and call for action involving the Safe Sport Initiative. Athletics Canada argues that the threshold of finding bias is high and one that should be carefully considered since it calls into question the integrity of the decision maker. Athletics Canada also claims that the onus for proving bias lies with Mr. McInnis and must be determined on the facts of the case.

94. Athletics Canada distinguishes the facts in *Baker*, as relied on by Mr. McInnis, and highlights the fact that in *Baker*, no reasons were given to Ms. Baker by Officer Caden except for the notes demonstrating Officer Caden's bias. In the absence of reasons, the notes made by the officer became fundamental to the consideration of bias.
95. Athletics Canada argues that the facts in *Baker* are distinct from those in the matter at hand. Specifically, Athletics Canada points to the following distinguishing factors:
- The Decision of the Commissioner determined an important matter of the Claimant's livelihood. This was known to the Claimant who declined to make meaningful submissions concerning the potential suspension notwithstanding the opportunity to do so;
 - The Decision of the Commissioner was based on a fulsome review of all of the evidence contained in the Report, as well as the submissions presented to him;
 - The Investigation of the complaints were an important part of the process conducted by an Investigator having significant experience who provided the Claimant the opportunity to fact check and comment on the draft Report prior to the preparation and dissemination of the Final Draft Investigative Report;
 - The Commissioner accepted and adopted the Report but did not restrict the reasons for his Decision to those authored by the Investigator. The Commissioner proceeded to author a Decision with substantive reasons for the conclusions made.
96. In addition, Athletics Canada argues that it, at no time, received a written notice of Investigator Marin's alleged bias, however, it acknowledges that it is in receipt of an email from Mr. McInnis' then legal counsel to Investigator Marin which raised concerns about Investigator Marin emailing Commissioner Fowlie. Athletics Canada argues that this email did not raise an allegation of actual or perceived bias.
97. Athletics Canada maintains that Investigator Marin's investigation was undertaken and conducted in line with the obligations imposed on investigators under the Athletics Canada Rules, which can be seen in the February 4, 2019 engagement letter and that Investigator Marin did not exceed or surpass his mandate. Athletics Canada takes the position that Investigator Marin's recommendations fell within his mandate and that Investigator Marin's titles, headings and subheadings are not enough to substantiate a finding that Commissioner Fowlie was biased.
98. Athletics Canada argues that the issues Mr. McInnis has raised regarding Investigator Marin's interview with Bonnie do not make out bias. Athletics Canada argues that Investigator Marin's having permitted Bonnie the opportunity to review her notes is not objectionable as the notes serve as an *aide-memoire*. Athletics Canada takes the position that it is not the Investigator's responsibility to cross-examine a complainant or witness. Instead, credibility is to be assessed based on the entirety of the evidence collected by the investigator. Accordingly, it is the Investigator's role to question in a manner resembling an examination in chief. Athletics Canada also argues that there is no evidence to support a finding that Investigator Marin cross-examined any witnesses.
99. Athletics Canada takes the position that when Investigator Marin discussed with Bonnie the possibility of filing a criminal complaint against Mr. McInnis, it does not demonstrate bias. Athletics Canada argues that it was out of obligation that Investigator Martin discussed this with Bonnie, pursuant to r. 130.05 of the Athletics Canada *Rules*.

d) Harassment

100. Athletics Canada maintains that its understanding and interpretation of the “Harassment” is correct.
101. Athletics Canada argues that the applicable legislation concerning allegation of harassment against athletes is the Ontario *Human Rights Code*, RSO 1990, (“*HRC*”) and that the matter of the complaint was considered against the provisions of Athletics Canada’s Harassment Policy (r. 129.02).
102. According to this interpretation, “harassment” is defined as “means engaging in a course of vexatious comment or conduct that is known or ought reasonably to be known to be unwelcome” (r. 129.03 of the Athletics Canada *Code of Conduct* and s. 10 of the *HRC*).
103. Rule 129.03 of the Athletics Canada *Code of Conduct* gives the following as the definition and interpretation of “harassment” and “sexual harassment”:

“Harassment” - A course of vexatious comment or conduct against an individual or group which is known or ought reasonably be known to be unwelcome. Types of behaviour that constitute harassment include, but are not limited to:

- i. Written or verbal abuse, threats, or outbursts;*
- ii. Persistent unwelcome remarks, jokes, comments, innuendo, or taunts;*
- iii. Leering or other suggestive or obscene gestures;*
- iv. Condescending or patronizing behaviour which is intended to undermine self-esteem, diminish performance or adversely affect working conditions;*
- v. Practical jokes which endanger a person’s safety, or may negatively affect performance;*
- vi. Hazing, which is any form of conduct which exhibits any potentially humiliating, degrading, abusive, or dangerous activity expected of a U20-ranking athlete by a more senior teammate, which does not contribute to either athletes positive development, but is required to be accepted as part of a team, regardless of the U20-ranking athlete’s willingness to participate. This includes, but is not limited to, any activity no matter how traditional or seemingly benign, that sets apart or alienates any teammate based on class, number of years on the team, or athletic ability;*
- vii. Unwanted physical contact including, but not limited to, touching, patting, pinching, or kissing;*
- viii. Deliberately excluding or socially isolating a person from a group or team;*
- ix. Persistent sexual flirtations, advances, requests, or invitation;*
- x. Physical or sexual assault;*

- xi. Behaviours such as those described above that are not directed towards a specific person or group but have the same effect of creating a negative or hostile environment; and*
- xii. Retaliation or threats of retaliation against a person who reports harassment to Athletics Canada.*

[...]

f) "Sexual-Harassment" - A course of vexatious comment or conduct against an Individual in a Workplace or Athlete Workplace because of sex, sexual orientation, gender identify or gender expression, where the course of comment or conduct is known or ought reasonably to be known to be unwelcome; or making a sexual solicitation or advance where the person making the solicitation or advance is in a position to confer, grant or deny a benefit or advance to the Individual or Athlete and the person knows or ought reasonably to know that the solicitation or advances unwelcome. Types of behaviour that constitute sexual harassment include, but are not limited to:

- i. Sexist jokes;*
- ii. Threats, punishment, or denial of a benefit for refusing a sexual advance;*
- iii. Offering a benefit in exchange for a sexual favour;*
- iv. Demanding hugs;*
- v. Bragging about sexual ability;*
- vi. Leering (persistent sexual staring);*
- vii. Sexual assault;*
- viii. Display of sexually offensive material;*
- ix. Distributing sexually explicit email messages or attachment such as pictures or video files;*
- x. Sexually degrading words used to describe an Individual;*
- xi. Unwelcome inquiries into or comments about an Individual's gender identity or physical appearance;*
- xii. Inquiries or comments about an Individual's sex life;*
- xiii. Persistent, unwanted attention after a consensual relationship ends;*
- xiv. Persistent unwelcome sexual flirtations, advances, or propositions; and*
- xv. Persistent unwanted contact.*

104. Athletics Canada argues it is of no consequence that complaints regarding Mr. McInnis' conduct were not received from those who were directly impacted by Mr. McInnis' conduct. Athletics Canada takes the position that the behaviour falls within the definition of harassment, regardless, and that it is conduct that undisputedly constitutes sexual comment and conduct that Mr. McInnis has been observed engaging in.

Standard of Review

105. The standard of review regarding the issue of jurisdiction, as both parties have identified, is correctness [*Dunsmuir v New Brunswick*, 2008 SCC 9].
106. The standard of review for procedural fairness and bias, as both parties have identified, is a consideration of fact and reasonableness [*Baker*].

Analysis

107. Before beginning my analysis, I would like to take a moment to acknowledge the excellent advocacy done by counsel for both parties in this matter. Counsel put forward well argued and considered cases.

a) Jurisdiction

108. I find that Athletics Canada had jurisdiction to take over the investigation into allegations of harassment against Mr. McInnis.
109. The first issue that must be decided is whether Commissioner Fowlie correctly construed r. 130.03. I find that he did.
110. Mr. Hayes brought his complaint to Athletics Canada on December 14, 2018. The matter was looked at and decided by Commissioner Reid. In his decision, Commissioner Reid noted that the Commissioner's Office had jurisdiction to receive the complaint, however, he declined to intervene with the investigation that was then on-going at the OLTFC Club-level.
111. When Mr. Hayes submitted his written complaint on January 25, 2019, it included fresh information and allegations about the Board's lack of impartiality and inability to investigate the allegations about Mr. McInnis as a result. These allegations, if true, would seriously weaken and undermine the credibility of the on-going investigation.
112. As a result, on January 26, 2019, Commissioner Fowlie wrote to Ms. Moore to ask about the status of the investigation. Ms. Moore asked Commissioner Fowlie to speak to her via the telephone where she relayed the following:

She told me that she had resigned from the Lions Board of Directors that week for two reasons. First, she indicated her opinion that Porter was not taking the complaints against McInnis seriously and that Porter was obstructing the investigation and calling it a witch hunt. Secondly, that she was being harassed by Porter for her role as Harassment Officer/Ombudsperson in looking into the complaints made against McInnis.

113. Ms. Moore had, up until January 2019, been serving as the Harassment Officer/ Ombudsperson/ Safe Sport Officer for the OLTFC.
114. From Ms. Moore, Commissioner Fowlie received credible allegations of Mr. Porter "obstructing" the investigation and harassing Ms. Moore for carrying out the duties of her position as a Board member of the OLTFC. From Ms. Moore, Commissioner Fowlie learned the OLTFC investigation was compromised and he decided to take jurisdiction as a result. In his words:

21. From the information I received from Moore in our conversation, and in her written complaint, I reasonably believed that while there was an investigation underway that it was not complete, and no action had been taken

by the Lions Board. Therefore, the complaint was not already handled. I further believed, that:

- due to multiple complaints being made against McInnis;*
- the fact that McInnis was on administrative leave/suspension from the Lions,*
- the nature of the complaint concerning the alleged lack of impartiality of the Board, and;*
- the alleged obstruction of the harassment investigation process by Porter;*
- that there were unreasonable delays in the handling of the complaints, and*
- that the Club could not fairly and objectively conduct a review.*

115. However, it is worth asking what Commissioner Fowlie might be expected to do in the circumstances? Commissioner Fowlie had credible information from the former Harassment Officer that the Tremayne investigation was being interfered with. How many athletes might be subject to further harassment if he didn't step in? He took action and not only found out information about McInnis and the OLTFC, he discovered that there was, in Mr. Porter, a leader at the helm with credible allegations of sexual abuse. If not for Commissioner Fowlie's actions, Mr. Porter might still be the Chair and McInnis would have been subject to sanctions from the same Board and Chair that took no steps when he coached in California while on "administrative" leave from his previous suspension.
116. However, the ends do not always justify the means. Athletics Canada must still follow its own rules as they existed on January 29, when Commissioner Fowlie took over jurisdiction. The Athletics Canada r. 130.03 at that time stated:

For incidents connected to a Club or Branch, if the Commissioner's Office determines that the complaint is not related to harassment, is not related to an athlete in an Athlete Workplace, or may be handled more effectively by the Club or Branch, the Commissioner's Office will direct that the complaint be handled under the jurisdiction of the policies of the Club or Branch. Notwithstanding Rule 055, if the complainant chooses at first instance to complain to the Commissioner rather than to her/his Club or Branch, the Commissioner will handle the complaint as set out herein. The Commissioner will not accept a complaint that has already been handled through a Club or Branch process.

117. For some reason which is not clear, Commissioner Fowlie refers in his decision to an amended bylaw at paragraph 9. He then purports to use it as guidance for why he took jurisdiction. However, the amended bylaw is irrelevant and, as was properly conceded by Athletics Canada at the hearing, the amendment cannot be retroactive in its application. Mr. McInnis argued that the amendment was put into place because Commissioner Fowlie realized he could not take jurisdiction under the bylaw in place on January 30, 2019. I do not agree with that argument. First, it is based on speculation. Second, though the amended bylaw deals with the situation at hand and clarify the Commissioner's jurisdiction, it does not mean he could not take jurisdiction under 130.03. In his decision

Commissioner Fowlie refers to the proper bylaw at paragraph 22 of his decision. To determine whether he had jurisdiction comes down to the interpretation given to the words “The Commissioner will not accept a complaint that has already been handled through a Club or Branch process”.

118. In my view *dealing* with the situation is not the proper interpretation of being “handled”. There is an objective element, which is, that the matter is being “handled” properly. Fowlie’s information from the harassment officer was that it was not being “handled” properly. Ms. Moore’s concerns were so great that she resigned from her position and filed her own harassment claim. For this reason, he was correct in stepping in and did so in a manner that was permitted by r. 130.03.
119. What is troubling was the amount of pushback Commissioner Fowlie received from the OLTFC. Once Commissioner Fowlie made his decision, it was fine for OLTFC to raise their objections to his jurisdiction. However, once he decided to take over, OLTFC should have cooperated fully. Presumably, a sports club and Athletics Canada share the same goal of eliminating harassment in sport. It does not really matter who conducts the investigation as long as it is done fairly.
120. Regarding the third issue raised by Mr. McInnis, that Commissioner Fowlie improperly reopened the 2016 investigation, I do not find that to be the case. As Athletics Canada argued, these earlier investigations and the sanctions they imposed were relevant to a determination if there was a pattern of behaviour amounting to a major infraction. It is important to note that in the Marin Report, Investigator Marin made the recommendation to remove Mr. McInnis from Athletics Canada on two of the original seven allegations put forward by Bonnie and on two from “Elisa”. The 2016 investigation was only relevant to the determination of the appropriate sanction, as Mr. McInnis had already received a verbal reprimand and a written reprimand. These findings, and the recommendation to remove Mr. McInnis, informed Commissioner Fowlie and he adopted them. I do not find that the 2016 case was reopened and reinvestigated.

b) Procedural Fairness

121. I find that Athletics Canada did not provide Mr. McInnis with what he was owed according to his right to procedural fairness and natural justice. However, I do not find that the right to procedural fairness is not as broad as that argued by Mr. McInnis.
122. It is fair to summarize Mr. McInnis’ position as being that he was owed an administrative process that resembles the judicial process. And not just any judicial process, but one that seems similar to the criminal judicial process. At the same time, Athletics Canada took the position that Commissioner Fowlie gave Mr. McInnis what he was owed, which was a hearing conducted by written submissions. Both parties are mistaken.
123. There are two factors that I find significant in relation to this matter: the first is the impact of the decision on Mr. McInnis’ ability to continue in his profession; the second factor is the discretion that is due to Athletics Canada in deciding the administrative process.
124. Both parties agreed in their submissions that when the right to continue in one’s profession or employment is at stake; it is a matter of considerable importance. When Athletics Canada asked Mr. McInnis for written responses to the Marin Report, he was asked to provide those within five days. He was then given an additional five days to provide Commissioner Fowlie with his written submissions. Given that Mr. McInnis’ career was at

stake, and that Mr. McInnis was facing harassment and sexual harassment allegations, this timeline is unreasonable.

125. In his own arguments, Mr. McInnis argued that he was owed all of the complaints brought against him, the names of the complainants, the audio recordings of the interviews and all of the emails exchanged. I find that this is likewise an unreasonable request. While Mr. McInnis was faced with the stigma of being labelled a sexual harasser, he was not facing criminal sanction or the loss of his personal freedom as a result. While Mr. McInnis tried to argue that administrative decisions may have more of an impact on an individual than criminal or court decisions, I disagree. The loss of a career is a stiff penalty, but is not similar to the type of restrictions imposed on one's personal liberty by a criminal conviction.
126. Athletics Canada argued that because Mr. McInnis made the decision to retire from coaching, he was owed less in terms of administrative procedure. I do not see Mr. McInnis' decision to retire as having factored into the format Athletics Canada's chose to hear Mr. McInnis. Commissioner Fowle settled on a hearing via written submissions long before Mr. McInnis elected to retire. In fact, Mr. McInnis' decision to retire was announced on May 3, two days before Commissioner Fowle's decision was released on May 5. This format was in place when Mr. McInnis was expected to file his written submissions by April 25. As a result, I do not find that Mr. McInnis' decision to retire is a relevant consideration when determining what was owed to him in terms of procedural fairness.
127. Athletics Canada's claim that the Commissioner has sole authority and discretion to determine whether a hearing is required and the format any hearing may take is untrue. The Commissioner's discretion to choose whether a hearing is required and its format is fettered by the common law and the obligations imposed by the principles of procedural fairness and natural justice. The Commissioner's discretion is always subordinate to these bedrock principles of administrative law and not vice versa. The Commissioner must exercise his or her discretion in a manner that is consistent with these principles. Anything less will be found to be insufficient.
128. I find that Mr. McInnis was owed an impartial hearing before the Commissioner in a form that is more than a hearing by written submissions. Mr. McInnis should have been given the opportunity to test the evidence against him and to question the complaints that were being relied upon to determine his guilt or innocence.
129. One of the effects of the finding that Mr. McInnis committed harassment and sexual harassment is that Mr. McInnis has lost his employment with OLTFC, his ability to coach with Athletics Canada and his accomplishments as a coach have been or will be removed from the Athletics Canada Hall of Fame. For Mr. McInnis, this is about more than a job. Mr. McInnis' entire career is at stake. Because of the considerable importance this attaches to the decision, more was owed to Mr. McInnis and was not given.
130. Finally, it is worth noting that in his arguments before me, Mr. McInnis confused what he was owed during the investigation by Investigator Marin and what he was owed prior to a hearing. Prior to his interview with Investigator Marin, Mr. McInnis was not owed the details of the allegations relating to the Bonnie and Elisa complaints. Likewise, he was not owed full reports. In his arguments, Mr. McInnis appears to be arguing for what amounts to full discovery in all but name. He does not have that right during an investigation, as there is no duty to prepare a witness.

131. An investigation is different from a hearing and what is owed is less formal. Investigator Marin's only duty to Mr. McInnis was to put to Mr. McInnis any and all allegations that Investigator Marin planned on making findings on.

c) Bias

132. I find that Investigator Marin conducted his investigation in a biased manner. Because Commissioner Fowlie relied on Investigator Marin's conclusions and recommendations wholesale, that bias flowed through to Commissioner Fowlie's decision.

133. Both parties agree in their submissions that the test for determining bias is one of a reasonable apprehension of bias. However, Athletics Canada argues that the threshold of finding bias is high. Athletics Canada also claims that the onus for proving bias lies with Mr. McInnis and must be determined on the facts of the case. I agree.

134. I find that Mr. McInnis has discharged this onus and that Athletics Canada has failed to refute it. I find that Investigator Marin's bias is more than an apprehension. It is apparent. In his arguments, Mr. McInnis points to the language used in the titled of the Marin Report, the language used throughout the report, the headings and the subheadings as showing bias. I find that all of these examples are valid and demonstrate Investigator Marin's bias.

135. I find that Investigator Marin's use of language throughout his report is often inflammatory, highly editorial and generally unnecessary. Along with the examples cited by Mr. McInnis I would add two more to demonstrate the extent: on page 164 of his report, Investigator Marin writes, "To say the implementation of the mandatory training was slow as molasses in January would be an insult to molasses [...]"; On page 2, Investigator Marin writes the following:

The first part of the statement about being the "largest" such Club in Canada offering "comprehensive programs" for all may be true. The statement that it is professionally managed and functions like a sport governing body is certainly not the case. My investigation has shown this to be mere puffery.

136. The Marin Report is full of language such as the examples cited by Mr. McInnis and those above. This language is highly prejudicial and serves no purpose but to convince the reader of Mr. McInnis' guilt.

137. Throughout the report, Investigator Marin makes reference to stories he has read in the media. He begins the Analysis section of his report, at page 158, by discussing that a "CBC television and internet three-part series titled *Shattered Trust*, [...] concluded that at least 220 Canadian coaches were convicted of sex offences against minors in the last 10 years". At page 191, he compares OLTFC's swapping coaches accused of "sexually inappropriate conduct" to the Catholic Churches swapping of priests in Pennsylvania. He cites a *Globe and Mail* story about rates of attrition in sexual assault complaints on page 47 and 48. He cites a "CBC Fifth Estate piece titled *Officer Down* [which] tells the story of 12 OPP officers who died by suicide in the last 6 years after being harassed and bullied from their colleagues and supervisors for suffering from OSI. Another one died by suicide since the show aired March 10, 2019" on pages 161-162 to make the point that sexual harassment training should be mandatory for all coaches. He cites stories the sexual assault and harassment in the military and in Canada's federal bureaucracy to make the same point (pages 162-164).

138. To be sure, these are large societal problems that deserve to be addressed. However, these stories have no relevance to the facts at hand and are far outside of the scope of Investigator Marin's mandate. I find that these news stories coloured Investigator Marin's investigation.

139. A finding that stands out comes on page 25 where Investigator Marin wrote that he found that "[t]here was no actual touching of [Bonnie's] vagina, yet the incident has left her scarred and angry at Mr. McInnis." However, Investigator Marin goes on to treat Mr. McInnis and Mr. Porter as one and the same. On page 191 of the Marin Report, it is written:

The first issue explored in this report was finding that Bonnie had been inappropriately and sexually massaged by Mr. McInnis. In the case of Bonnie, she was 12 years old when it happened. In the fourth issue canvassed in this report, I found that Mr. Porter also had inappropriately and sexually massaged young male athletes as young as 15 years old. Neither provided consent for the touching. The massages to Mr. Rhodes and Kevin McNish quickly escalated to masturbation and ejaculation.

140. In this passage, Investigator Marin treats the allegations against Mr. McInnis as the same as those made against Mr. Porter. Indeed, this attitude flows right into Commissioner Fowlie's conclusion that:

172. The investigation reveals that Andy McInnis and Ken Porter have lost sight of that important duty, and have, instead, been focused on their own sexual gratification, the exercise of power over those young athletes, and in a cover up to mislead their own Club and the national sport governing body.

141. Investigator Marin's bias was such that he completely ignores possibly exculpatory facts and statements and prefers versions of events and evidence that align with his conclusions. One such example is his treatment of Bonnie's training diary entries. Bonnie's training diary entries say nothing about an inappropriate massage. However, Investigator Marin concluded: "I find Bonnie's testimony clear, detailed and backed up with documentary evidence of her injury. When I interviewed her, she was an impressive witness, providing a detailed account of the incident. I found Bonnie's interview with me to be forthcoming and honest."

142. While it is true that her training diary entries confirm her claim that she had suffered an injury, which Mr. McInnis acknowledged had occurred, the diary's value to the investigation is marginal at best. However, Investigator Marin treats these entries as speaking to the heart of Bonnie's very credibility.

143. In his final report, Investigator Marin presented evidence that Mr. McInnis was not trained to give massages. There is a section of the Marin Report titled: "Massage Me Not" with the sub-heading, "Coaches Flying Blind". In this section, the following finding is made at page 192:

The problem is that at the OTTL,(sic) both Mr. McInnis and Mr. Porter have no professional credentials, are not regulated by any formal body, both used massages without explicit consent of athletes, and both crossed the line into making massages sexual in nature.

144. Again, treating Mr. McInnis and the allegations against him the same as Mr. Porter. However, earlier in the report, Ms. Moore relays the following information:

Andy gives athletes massages only when they ask for one. Andy advised that male athletes can also receive massages, but they rarely ask for one. Massages, a skill for which he is trained, are only given for mild injuries (sprains, pulls...). More serious injuries are referred to a professional (e.g. registered massage therapist, physiotherapist, physician).

145. This information completely contradicts Investigator Marin's findings on the issue of Mr. McInnis providing massages. There is no weighing of evidence to show how Investigator Marin determined that Mr. McInnis has "no professional credentials" or whether his credentials are insufficient. Especially when Ms. Moore's provided evidence to the opposite. It is unclear whether Mr. McInnis was asked in what type of sports massage he is trained. Instead, Investigator Marin repeats throughout his report that Mr. McInnis has no massage training. The source of this claims appears to be Mr. Hayes, who is quoted as saying on page 79: "During the winter of 2018 I saw AM massage the leg(s) of a female athlete while she lay face down on a wooden equipment box beside the 100m start area. She was wearing short spandex shorts. I was alarmed as I do not believe AM is a registered massage therapist." This statement is paraphrased and restated on page 122 and quoted again on page 124.
146. It may be true that Mr. McInnis is not a registered massage therapist, but may be trained to provide massage in some other capacity. This is ignored by Investigator Marin, despite information provided by McInnis' counsel.
147. In addition, the Marin Report leans heavily on the fact that Mr. McInnis was only ever seen massaging female athletes by Bonnie (page 20). He ignores the fact that Mr. McInnis coached and massaged male athletes as well. That fact does not seem to account for much in Investigator Marin's conclusions. Instead, he relies on the statements made by Bonnie to fit with the conclusion that has already been drawn that Mr. McInnis is sexual predator who used massage to sexually harass his female runners.
148. Throughout his report, Investigator Marin repeats the line "Andy being Andy" when it comes to describing Mr. McInnis' inappropriate behaviour. On page 190, Investigator Marin wrote: "Mr. McInnis's reputation for sexually inappropriate behaviour was well known around the club, with the saying "Andy being Andy" encapsulating his womanizing manners." Regarding an inappropriate Instagram post, Investigator Marin wrote on page 182:

Head Coach Mr. McInnis posting to his Instagram that he was with the "best ASSisitant" not only displayed a deep lack of judgment, but it also showed how brazen he was as an untouchable. He likely assumed that everyone would see him as "Andy being Andy." It is the time he pushed just a little too far and finally he was called on the carpet and deleted the post.

149. Aside from the speculation Investigator Marin engages in, this information is presented as if this sentiment were regularly and commonly heard. According to a quote from Elisa in page 27:

"He would give me a hug but just longer than you would think, not a normal hug another coach would do. Those are the main things I can remember

clearly. Apart from what you'd hear at the Club. "Andy was Andy." He's not the first person I've met that has that kind of personality but it's the first time somebody's got entrusted with a significant role and nobody's questioning it, so I wasn't going to question it myself." [emphasis from Investigator Marin]

150. During her interview, "Kate" made the following claim: "Others tried to normalize Mr. McInnis' behaviour by saying: "ahh, that's just Andy".
151. There are only these two references in the entire report where anybody is attributed as saying a close approximation of "Andy being Andy." The first is in Elisa's own words. The second is from Kate, who claims that others were trying to normalize Mr. McInnis' behaviour. This does not appear to have been a common refrain at all, but it is treated as such by Investigator Marin.
152. The effect of this line being repeated throughout the report is highly prejudicial towards Mr. McInnis' guilt or innocence. It creates the sense that Mr. McInnis' is a de facto serial sexual harasser whose guilt was apparent and so well-known throughout the club. The impacts of this type of prejudicial writing can be seen in Commissioner Fowlie's final decision, where it is written:

99. I cannot find terms strong enough to express how the Lions Board of Directors failed to act with due fiduciary duty, its moral and ethical duties, and its basic responsibilities under the Athletics Canada Code of Conduct and provincial laws to eradicate sexual harassment by both McInnis and Porter. In his interviews Mr. Marin heard phrases such as, 'Oh, it's just Andy being Andy.'; "if you think Andy is bad now, you should have seen him 20 years ago."; "Porter is to young men as Andy is to young women."

153. It is significant to note the two latter quotes are not in the final Marin Report and when one goes back through the Marin Report, it is unclear that the Investigator was indeed told these phrases. I have found no such reference, nor have I been directed to one.
154. The "Andy being Andy" refrain appears to come from the statement made by Mr. Caulfield, when he is quoted as saying "Oh, that's Ken being Ken", and again, "it was 'Ken being Ken'". This mixing of Mr. McInnis' and Mr. Porter's actions is symptomatic of the problems throughout the Marin Report. Investigator Marin approached OLTFC as being rife with sexual impropriety, harassment and assault from the outset, in a manner similar to the Catholic Church, to the military, to the OPP and to other sports organizations. His bias was such that when he was presented with evidence that did not fit in with his biases, he engaged in hyperbole, speculation and editorializing to make them fit.
155. The results of this bias flowed from the Marin Report findings and conclusions into Commissioner Fowlie's final decision. This can be seen in Commissioner Fowlie's refusal to even consider the contrary findings in Investigator Tremayne's final report. Commissioner Fowlie made the following statement regarding Investigator Tremayne's final report:

I cannot reasonably consider this report in balancing evidence towards drawing a conclusion any more than I could use other anonymous hearsay evidence. I have decided to rely uniquely on Mr. Marin's investigation report, and not to read Mr. Tremayne's. I trust that Mr. Marin has, in fact, interviewed the same witnesses and victims, and likely more. Mr. Tremayne's investigation

report is 80 pages long, or roughly the length of this decision; while the Marin report is closer to 250 pages, and therefore, I trust, contains a more comprehensive, factual, and analytical description of the events I am to decide upon.

156. I find that this is an unreasonable conclusion to make without even having read Investigator Tremayne's final report. The redacted version of Investigator Tremayne's final report was submitted as evidence for this hearing. Mr. McInnis argued before me that Commissioner Fowlie and Investigator Marin dismissed and undermined the credibility of Investigator Tremayne's report without reading it, in order to strengthen the position of Investigator Marin's report and its conclusions. Although I cannot speculate on the motive, I find it problematic that the Tremayne report was dismissed out of hand. Especially when it was written in a manner that appears to be more consistent with the standards of impartiality one expects from an investigator's report.
157. Commissioner Fowlie should have read Tremayne's Report, considered it and then could have rejected it, but it was inappropriate to reject it without having read it.
158. I find that accepting Investigator's Marin's findings and recommendations wholesale, without testing them by a fulsome and robust hearing or by considering evidence presented by Investigator Tremayne in his report, Commissioner Fowlie's decision took on all of the flaws of the Marin Report. While I have made this finding regarding the dismissal of the Tremayne Report, this finding in no way impacts my finding on jurisdiction.
159. Athletics Canada has submitted that the social reality is one of increasing concern for issues around harassment and abuse in sport. This, they argued, should be a consideration when determining bias. I find the social reality is completely irrelevant in the consideration of bias. While it is important that Athletics Canada has set about implementing and enforcing its Safe Sport Initiative, the social reality does not permit an unfair process. The issue of safe sport and athletes being able to fulfill their full potential free of harassment is an important value. The Canadian Government and Athletics Canada should be commended for their leadership in these areas. However, in the rush to protect athletes it is essential that everyone's rights are respected, whether it be the complainant, witnesses or the person complained about. A fair process will equal fair results. Just like in sport there are rules of fair play, there must be fair play in investigations and discipline decisions. The "win at all costs" displayed by Investigator Marin as he became an advocate for the complainants does not benefit anyone. Nor did Commissioner Fowlie's understandable zealotry to do the right thing improve the situation. I find that both Marin and Commissioner Fowlie fell short in their duty to be fair.
160. The final point that must be addressed is one raised by Mr. McInnis. Mr. McInnis argued that Investigator Marin demonstrated bias by asking certain complainants whether they wanted to report their allegations to the police. This does not show bias. Investigator Marin had an obligation to advise Bonnie of this option pursuant to r. 130.05, which reads:

Should the Investigator find that there are possible instances of offence under the Criminal Code, particularly related to Criminal Harassment (or Stalking), Uttering Threats, Assault, Sexual Interference, or Sexual Exploitation, the Investigator shall advise the Complainant to refer the matter to police. The Investigator will further inform Athletics Canada that the matter should be directed to the police.

161. Likewise, this rule does not create an inherent bias. First, the use of the word “shall” creates an obligation to advise the complainant of his or her options while “possible instances of offence” is a low bar that does not require an investigator to weigh evidence. Simply advising complainants of their options does not show a predetermination of whether an allegation is proven.

d) Harassment

162. I find that Athletics Canada applied the correct understanding of “Harassment”. I do not find Mr. McInnis’ arguments on this issue are persuasive.

Guidance for National Sport Organizations Investigating Harassment Claims

163. As more complaints are coming forward as a result of the laudable work national sport organizations like Athletics Canada are undertaking through the Safe Sport Initiative, there are many factors that need to be considered in order to ensure that investigations are carried out fairly. Many of the errors committed by Investigator Marin were avoidable. When investigators permit their biases to write their reports and guide their investigations, they do no parties any favours. They fail the victims most of all.

164. The role of an investigator is always to conduct an impartial investigation of the facts giving rise to the complaint. It is not the investigator’s role to prove a case. Investigators should enter the investigation with an open mind of “what does the evidence show occurred” and should not try to prove the allegations and tailor the evidence to support their “theory of the case”. The only theory is what the evidence shows. The investigator should not make up their mind until the last witness is interviewed and the last document reviewed. Of course, as the evidence develops there is nothing improper in gathering corroborating evidence as long as anything that does not support a finding is given equal consideration.

165. The following is a non-exhaustive list that good investigations should make use of:

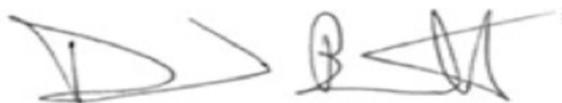
- Follow the rules of the governing body to determine whether the complaint must be disclosed;
- Ensure that the respondent be made fully aware of the complaint and contents;
- Review and carefully consider all evidence (both inculpatory and exculpatory);
- Interview all witnesses put forward by both sides unless there are compelling reasons not to do so. If an investigator chooses not to interview someone this should be identified in the final report and reasons given for why that decision was made;
- There is not an absolute right to know the names of witnesses or have access to their witness statements, but respondents should be given accurate information of what is being alleged (i.e. place, time and occurrence);
- Allow the respondent to respond to all allegations and/or evidence that will be relevant to the investigation’s findings;
- Allow the complainant to provide further evidence if complaint not founded;
- Allow and consider written submissions disputing findings;
- Give ample time for both the respondent and the complainant to make their cases;
- Provide a final report that is responsive to the original mandate letter and does not go out of its way to answer more than has been set out in the mandate;
- Provide a final report that presents its findings in an impartial manner that is free of hyperbole and editorializing;

- Final investigation reports should be written in a way that the findings against one respondent are separate from unique claims against another where multiple respondents are being investigated on separate issues;
- It is appropriate for investigators to make recommendations regarding policy and procedure and systemic issues, but not to recommend sanctions. It is not the role of the investigator to advocate for an appropriate penalty or sanction. That is the discretion of a panel;
- Carry out an investigation and produce a final report in a timely manner.

Order:

166. The appeal is allowed. I remit the case back to Athletics Canada for reconsideration in accordance with its policies. I order this matter be dealt with by a different Commissioner.
167. The provisional suspension issued by Athletics Canada shall remain in place.
168. Athletics Canada is ordered to remove the Marin Report and the Fowlie Decision from its website.

Signed in Ottawa, this 17th day of December, 2019.

A handwritten signature in black ink, appearing to read 'David Bennett', with a stylized flourish at the end.

David Bennett, Arbitrator