CITATION: Sokolov v. The World Anti-Doping Agency, 2020 ONSC 704
COURT FILE NO.: CV-17-582393
DATE: 20200211

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:	
KIRILL SVESHNIKOV, DMITRY STRAKHOV and DMITRY SOKOLOV	*Eric S. Block, Fiona Legere* and *Christine Wadsworth,* for the Plaintiffs
Plaintiffs	
– and –	
THE WORLD ANTI-DOPING AGENCY and RICHARD MCLAREN	*James Bunting* and *Carlos Sayao,* for the Defendant, The World Anti-Doping Agency
Defendants	*Robert Trenker*, for the Defendant, Richard McLaren
	HEARD: May 16, 2019

M. D. FAIETA J.

REASONS FOR DECISION

INTRODUCTION

[1] Following media reports in May 2016 that Russian athletes were part of a state-run doping program, the International Olympic Committee ("IOC") took immediate steps to request that the defendant World Anti-Doping Agency ("WADA") investigate the allegations. In turn, WADA appointed the defendant Professor Richard McLaren ("McLaren") to conduct this investigation. The terms of reference included investigating whether the doping control process during the Olympic Games in Sochi 2014 ("Sochi 2014") had been manipulated to conceal positive doping tests and to identify any athlete that "might have" benefitted from such manipulation. McLaren's report, issued in July 2016, confirmed that the Moscow Anti-Doping Laboratory had concealed positive doping tests of its athletes at the direction of Russian government officials. Although this report did not identify any athletes that may have been implicated by the Russian laboratory's manipulation of the doping tests, WADA subsequently notified the international federation for the sport of cycling, the Union Cycliste Internationale

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("UCI"), that the plaintiffs, three Russian cyclists, had provided at least one urine sample that tested positive for steroids concealed by the Russian laboratory.

[2] In light of McLaren's investigation, the IOC announced that it would not ban all Russian athletes from participating at the Olympic Games Rio 2016 ("Rio 2016") but rather would permit a Russian athlete to participate at Rio 2016 if: (1) the international federation for their sport was satisfied that the athlete was not "implicated" in the Russian laboratory's doping concealment scheme and had never been sanctioned for doping; and (2) such determination was upheld by an arbitrator appointed by the International Council of Arbitration for Sport. The UCI was satisfied that the plaintiffs "met the relevant requirements" established by the IOC. However, this decision was overturned by an arbitrator on August 2, 2016, who found that their positive doping test results had been concealed.

[3] On August 3, 2016, the IOC denied the plaintiffs entry to Rio 2016. In accordance with the Olympic Charter and the application that they had submitted to the IOC for entry to Rio 2016, the plaintiffs applied to the Court of Arbitration for Sport ("CAS") for, amongst other things, a declaration that they were eligible to compete at Rio 2016 and that the IOC was obliged to accept their applications for entry. At the CAS, the plaintiffs named the UCI and the IOC as respondents and the Russian Olympic Committee ("ROC"), WADA and McLaren as "other parties". Later that day, the plaintiffs withdrew their claim against the IOC on the mistaken belief that the UCI had determined that the plaintiffs were implicated in the doping cover up program. WADA and the IOC filed Amicus Briefs. McLaren delivered an affidavit that described the evidence that supported a finding that the plaintiffs were implicated by Russia's doping cover up program. The plaintiffs responded that the positive doping tests were falsified by individuals working in the Moscow Laboratory.

[4] On August 8, 2016, the CAS dismissed the plaintiffs' application on the grounds that it lacked jurisdiction to grant the relief sought, given that the IOC was not a respondent to the application. The plaintiffs did not appeal this decision to the Swiss Federal Court, as permitted under the arbitration clause found in their application for entry to Rio 2016.

[5] The plaintiffs bring to this court a tort action against WADA and McLaren for damages and certain declarations. They allege that they "… have been falsely accused of benefitting from an alleged state-sponsored doping scheme …" and that their reputations have been tarnished as result. They allege that their positive doping test results were falsified and that McLaren negligently relied on this information in his "rush" to complete his report.

[6] The defendants, WADA and McLaren, ask that this action be dismissed or stayed on the grounds that: (1) this court has no jurisdiction over the subject-matter of the claim; and (2) the claim amounts to an abuse of process.

[7] For the reasons described below, I grant the defendants' motion and dismiss this action with costs.

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<u>**BACKGROUND**</u>

<u>**The Sports Governance Framework**</u>

The Olympic Movement

[8] The Olympic Charter, first adopted in 1908 and subsequently amended, states:

- the Olympic Movement encompasses organizations, athletes and other person who agree to be guided by the Olympic Charter;
- the goal of the Olympic Movement is to contribute to a building a peaceful and better world by educating youth through sport practised in accordance with Olympism and its values;
- the three main constituents of the Olympic Movement are the IOC, the International Sports Federations (“IFs”) and the National Olympic Committees (“NOCs”);
- in addition, the Olympic Movement encompasses the Organising Committees for the Olympic Games, the national associations, club and persons who belong to the IFs and NOCs, including athletes, judges, referees and coaches; and
- any person or organisation that belongs in any capacity to the Olympic Movement is bound by the Olympic Charter and shall abide by the decisions of the IOC.

[9] Article 61 of the Olympic Charter governs Dispute Resolution. It states:

1. The decisions of the IOC are final. Any dispute relating to their application or interpretation may be resolved solely by the IOC Executive Board and, in certain cases, by arbitration before the Court of Arbitration for Sport (CAS).

2. <u>Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport</u>, in accordance with the Code of Sports-Related Arbitration. [Emphasis added]

[10] The Court of Arbitration for Sport was established in 1983 by a former IOC President for a specialized determination of sports-related disputes. Since 1996, the CAS has established Ad Hoc Divisions during the Olympic Games who mandate is to quickly decide disputes.

The International Olympic Committee

[11] The Olympic Charter states that the IOC is an international non-governmental not-for-profit organization, in the form of an association with the status of a legal person, recognized by the Swiss Federal Council pursuant to an agreement dated 1 November, 2000. Its seat is in Lausanne, Switzerland.

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[12] The object of the IOC is to fulfil the mission, role, and responsibilities assigned by the Olympic Charter. The mission of the IOC is to promote Olympism throughout the world and to lead the Olympic Movement. Amongst other things the role of the IOC is to encourage and support the organization, development and coordination of sport and sports competition, to promote the spirit of fair play, and to protect clean athletes and the integrity of sport by leading the fight against doping and by taken action against all forms of manipulation of competitions.

[13] The IOC Executive Board assumes the general overall responsibility for the administration of the IOC and the management of its affairs, including monitoring the observance of the Olympic Charter, establishing and supervising the procedure for accepting and selecting candidates to organise the Olympic Games, and making decisions and regulations necessary to ensure the proper implementation of the Olympic Games.

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International Federations and National Olympic Committees

[14] Below the IOC, the two main constituents of the Olympic Movement are International Federations and National Olympic Committees.

[15] The Olympic Charter states that in order to develop and promote the Olympic Movement, the IOC may recognize an IF administering one or more sports at the world level and encompassing organisations administering such sports at the national level. Subject to its compliance with the Olympic Charter, the administration of an IF is independent of the IOC. The mission and role of an IF includes: (1) ensuring the development of their sport throughout the world; and (2) establishing and enforcing the rules concerning the practice of their respective sports in accordance with the Olympic spirit. As noted, the UCI is the international federation for the sport of cycling.

[16] A NOC has the exclusive authority for the representation of its country at the Olympic Games and at the regional, continental, or world multi-sports competitions patronised by the IOC. The mission of the NOCs is to develop, promote and protect the Olympic Movement in their respective countries, in accordance with the Olympic Charter. A NOC's role includes promoting the fundamental principles and values of Olympism in the fields of sports, educating, and ensuring the observance of the Olympic Charter in their country. Each NOC is obliged to participate in the Olympic Games by sending athletes. The ROC is the NOC for Russia.

[17] In his report filed in support of the defendants' motion, Yves Fortier, Q.C. ("Fortier") states:

> International and Olympic sport is governed according to a well-defined, organized and self-regulating institutional structure. The structure follows a pyramid model where there exists one single exclusive international regulatory body for each sport that establishes international rules and recognizes national member organizations in each country in which the sport is practiced. Each national member organization is in turn the exclusive national regulatory body for each sport in that particular country and is responsible for enforcing the rules in its jurisdiction. Only athletes who are registered with such national

sport organizations are eligible to compete in international competition. In this way, all participants play be the same rules and meet the same standards throughout each sport globally and fair competition is thus preserved.

This pyramidal structure of international sport governance applies both at and outside of the Olympic Games. Outside of the Olympic Games, competitive sport is governed by top-down rules enacted by the applicable international sport federation. …

In the context of the Olympic Games, the same hierarchical structure applies, except that the International Olympic Committee sits at the apex of the structure. …

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World Anti-Doping Agency

[18] Olivier Niggli, Director General of WADA ("Niggli"), provided the following overview of WADA's background and mandate:

A. Background and Mandate of WADA

WADA was established in 1999 as an international independent agency to lead the collaborative worldwide movement for doping-free sport.

In response to the so-called "Festina Affair" involving widespread and systematic doping of cyclists in the 1998 Tour de France and associated criminal proceedings and sanctions, the IOPC convened a World Conference on Doping, bringing together all parties involved in the fight against doping. This conference resulted in the Lausanne Declaration on Doping in Sport, which provided for the creation of an independent international anti-doping agency to be operational for the 2000 Sydney Olympic Games. That independent international anti-doping agency would become known as the World Anti-Doping Agency or WADA.

WADA was formally established in November 1999 as a foundation under Swiss law, with its legal seat in Lausanne, Switzerland, and its headquarters in Montreal. WADA receives funding and support from intergovernmental organizations, national governments, and other public and private bodies with an interest in clean sport. The membership of WADA's supreme decision-making body, the Foundation Board, consists of equal representatives from sport governing bodies and national governments.

WADA's overarching priority is monitoring the implementation of and compliance with the World Anti-Doping Code (the "WADA Code" or "Code"). The Code is an international instrument that establishes a harmonized and universal framework for anti-doping policies, rules, and regulations worldwide. The Code was initially developed through a multi-year collaborative process led by WADA and with the involvement of sporting organizations, public authorities, and other anti-doping stakeholder groups.

The first version of the WADA Code was formally adopted on March 5, 2003 at the second World Conference on Doping with the unanimous support of some 1,200 delegates

> representing 80 governments, the IOC, the International Paralympic Committee, all Olympic sports, national Olympic and Paralympic committees, athletes, national anti-doping organizations, and international agencies. The Code entered into force on January 1, 2015. A copy of the current version of the Code is attached to my Affidavit as Exhibit "A".
>
> Other key activities WADA undertakes include scientific research and education in respect of anti-doping. WADA also has an investigative mandate and can initiate independent investigations into potential anti-doping rule violations.
>
> Although national governments cannot be legally bound to a non-governmental document such as the WADA Code, government representatives drafted an international convention under the auspices of UNESCO to demonstrate their political and legal commitment to clean sport and their support for the Code. The *International Convention Against Doping in Sport* (the "UNESCO Convention") was adopted unanimously in October 2005 and entered into effect in February 2007. To date, the UNESCO anti-doping policies, rules, and regulations worldwide. The Code was initially developed through a multi-year collaborative process led by WADA and with the involvement of sporting organizations, public authorities, and other anti-doping stakeholder groups.
>
> Governments who are parties to the UNESCO Convention commit themselves to the principles of the WADA Code and to take specific action to, among other things, restrict the availability of prohibited substances or methods to athletes (including measures against trafficking) and facilitate doping controls and supporting national testing programmes.

[19] Exhibit 11 to Fortier's report, attached as Schedule "A" to this decision, depicts in a chart the contractual pyramid of relationships between the IOC, WADA, CAS, IFs and other organizations and persons further down the pyramid.

Administration of the WADA Code in Russia

[20] Niggli described the administration of the Code's anti-doping measures in Russia as follows:

> Various procedures and requirements are intended to protect clean sport around the world in all countries that have adopted the Code, including Russia, implementation of Code-compliant anti-doping measures in Russia is delegated to the Russian Anti-Doping Agency ("RUSADA"), a government-funded organization.
>
> Among other responsibilities under the Code, RUSADA is responsible for conducting doping tests within Russia in accordance with international standards adopted by WADA, which are incorporated into the Code. There are two main categories of doping tests conducted by Anti-Doping Organizations such as WADA and RUSADA: in-competition and out-of-competition testing.

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i) In-Competition Testing

Athletes competing in certain competitions are subject to doping controls conducted at, or in close proximity to, the competition. The list of prohibited substances in-competition includes substances with the potential for both short and/or long-term performance enhancing effects, as well as substances that could be used to mask the detection of other prohibited substances.

ii) Out-of-Competition Testing

Prohibited substances can provide athletes with an unfair advantage even if used in circumstances other than immediately before or during competition, such as during training and the off-season. Moreover, a number of prohibited substances and methods are detectable only for a limited period of time in an athlete's body while maintaining a performance-enhancing effect for a longer period of time. For example, an athlete might consume a steroid during the off-season to build muscle, and then stop taking it a pre-determined amount of time before competition. The steroid would no longer be detectable during an in-competition test, but the athlete will still be benefiting from its effects during the competition. Accordingly, the Code provides for out-of-competition testing.

As part of the administration of out-of-competition testing, certain athletes, often those who achieve a certain level of success, are added to a pool of athletes eligible to be selected for out-of-competition testing. Athletes in this pool must provide detailed, accurate, and up to date whereabouts information to the applicable Anti-Doping Organization.

This allows for doping control officers to attend at an athlete's location, such as a residence or training facility, and administer a doping test. If an athlete cannot be found by a doping control officer at the location listed on his or her whereabouts form, this is registered as a "strike" against that athlete. The accrual of three strikes against an athlete in any period of twelve months results in an anti-doping rule violation and possible sanctions.

Because out-of-competition doping controls can be conducted without notice to athletes, they are one of the most powerful means of deterrence and detection of doping and are an important step in strengthening athlete and public confidence in doping-free sport. Unless an athlete is subjected to and complies with such unannounced testing, there is no way to ensure that he or she is clean, even if every single in-competition or otherwise scheduled doping test in respect of the athlete is negative.

RUSADA is responsible (or at least was) for conducting out-of-competition testing within Russia.

The Code is established such that WADA has the ability to prosecute alleged anti-doping rule violations where an Anti-Doping Organization, such as RUSADA, fails to do so or does so in a way that WADA believes is not in compliance with the Code. However, in order for WADA to exercise this responsibility it is imperative that the anti-doping

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> laboratories and Anti-Doping Organizations around the world conduct themselves in a transparent and honest fashion. In particular, it is imperative that the analytical results of doping tests conducted on athletes' (whether in- or out-of-competition) are accurately reported in the international reporting database known as ADAMS (Anti-Doping Administration and Management System).

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<u>Chronology of Key Events</u>

[21] A chronology of the key events leading up to this action, agreed upon by the parties, is attached as Schedule "B" and elaborated upon below.

Independent Commission Reports – 2015/2016

[22] On December 3, 2014, a television documentary entitled "Top Secret Doping: How Russia Makes Its Winners" was aired in Germany. It alleged that there existed a state-sponsored doping program within Russian track and field that implicated that sport's governing body in Russia, the All Russia Athletics Federation ("ARAF").

[23] Within days, WADA formed an independent commission ("IC") comprised of: (1) McLaren; (2) Richard Pound, Q.C., the former President of WADA and former IOC Vice-President; and (3) Günter Younger to "conduct an independent investigation into doping practices; corrupt practices around sample collection and results management; and other ineffective administration of anti-doping processes that implicate Russia, the International Association of Athletic Federations (IAAF), athletes, coaches, trainers, doctors and other members of athletes' entourages; as well as, the accredited laboratory based in Moscow and the Russian Anti-Doping Agency (RUSADA)".

[24] The IC Report found that there was a "deeply rooted culture of cheating" at all levels, a "consistent and systematic use of performance enhancing drugs by many Russian athletes", and "evidence of a conspiracy and cover-up of doping … among ARAF coaching staff at a sufficient scale to indicate widespread and institutional abuse". Amongst other things, the IC Report recommended that:

> The IC has identified systemic failures within the IAAF and Russia that prevent or diminish the possibility of an effective anti-doping program, to the extent that neither ARAF, RUSADA, nor the Russian Federation can be considered Code-compliant. The IC has recommended that WADA declare ARAF and RUSADA to be Code non-compliant.

[25] On November 18, 2015, WADA declared RUSADA non-compliant with the WADA Code, effectively suspending its status as Russia's national Anti-Doping Organization.

Additional Media Reports of Russian Systemic Doping

[26] McLaren's IP Report, described below, identifies the circumstances that led to the IP Report:

> On May 9, 2016, the American CBS news magazine, *60 Minutes*, aired a story of doping allegations occurring during the Sochi Games. During a segment of the *60 Minutes* program, whistleblower, Mr. Vitaly Stepanov, a former employee of the Russian Anti-Doping Agency (RUSADA), revealed systematic doping inside the Russian athletics teams. Stepanov also exposed doping misconduct by Russian athletes and their entourage members at the Sochi 2014 Games that had not previously been in the public domain. On the basis of recorded conversations between Stepanov and the former Director of the WADA-accredited Moscow Anti-Doping Laboratory (the "Moscow Laboratory"), Dr. Grigory Rodchenkov ("Dr. Rodchenkov"), the broadcast claims that numerous Russian athletes were doped at Sochi, including four gold medalists that were using steroids.
>
> The *New York Times* published the article "Russian Insider Says State-Run Doping Fueled Olympic Gold", on 12 May 2016 alleging that:
>
>> … [d]ozens of Russian athletes at the 2014 Winter Olympics in Sochi, including at least 15 medal winners, were part of a state-run doping program, meticulously planned for years to ensure dominance at the Games, according to the director of the country's anti-doping laboratory at the time.

WADA commissions an Independent Investigation

[27] Following these media reports, on May 17, 2016, the IOC requested that WADA undertake a "comprehensive investigation" to address the allegation that Russian athletes were part of a state-run doping program.

[28] In turn, on May 18, 2016, McLaren was appointed by WADA as an "independent person" to conduct an investigation in response to allegations of state-directed doping in Russia made by Mr. Stepanov and Dr. Rodchenkov.

[29] The terms of reference given by WADA for McLaren's investigation were:

> (1) To establish whether there has been manipulation of the doping control process during the Sochi Games, including but not limited to, act of tampering with samples within the Sochi Laboratory;
>
> (2) To identify the *modus operandi* and those involved in such manipulation;
>
> (3) To identify any athlete that might have benefitted from those alleged manipulations to conceal positive doping tests;
>
> (4) To identify if potentially this *modus operandi* was also happening within the Moscow Laboratory outside the period of the Sochi Games; and
>
> (5) To establish whether there is any other evidence or information held by Dr. Rodchenkov.

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[30] McLaren's mandate did not include establishing or prosecuting any potential violations of the WADA Code by individual Russian athletes.

[31] McLaren relied on the work of the IC and conducted a number of witness interviews, including several interviews with Dr. Rodchenkov and confidential interview with other persons, reviewed thousands of documents, employed cyber analysis, conducted cyber and forensic analysis of hard drives, urine sample collection bottles and laboratory analysis of individual athlete samples.

Delivery of Entry Form for Rio 2016

[32] During McLaren's investigation, the plaintiffs applied for entry to Rio 2016 by signing a "Conditions of Participation – National Olympic Committee" form dated May 28, 2016 ("Entry Form").

[33] Amongst other things, the Entry Form states that the plaintiff acknowledges and agrees that their participation at Rio 2016 is conditional upon their acceptance of, and compliance with, all the provisions of the Conditions of Participation and related rules, including compliance with the Olympic Charter and other rules: participation is subject to the compliance with the fundamental rules governing the Olympic Movement, which aim to ensure the integrity of Rio 2016 and to protect clean athletes.

[34] The Entry Form contains the following arbitration clause and waiver:

> Arbitration: The Court of Arbitration for Sport is exclusively competent to finally settle all disputes arising in connection with the participation in the 2016 Games which have not been resolved by sports governing bodies.
>
> I agree that any dispute or claim arising in connection with my participation at the 2016 Games, not resolved after exhaustion of legal remedies established by NOC, the International Federation governing my sport, Rio 2016 and the IOC, shall be submitted exclusively to the Court of Arbitration for Sport ("CAS") for final and binding arbitration in accordance with the Arbitration Rules for the Olympic Games, and the Code of Sports-related Arbitration. The seat of arbitration shall be in Lausanne, Switzerland and the language of the procedure English. The decisions of the CAS shall be final, binding and non-appealable, subject to the appeal to the Swiss Federal Court. I hereby waive my right to institute any claim, arbitration or litigation, or seek any other form of relief, in any other court or tribunal. [Emphasis added]

IP Report

[35] McLaren's report, dated July 18, 2016 (the "IP Report" or the "McLaren Report"), made three key findings:

(1) The Moscow Laboratory operated, for the protection of doped Russian athletes, within a State-dictated failsafe system, described as the Disappearing Positive

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Methodology. When the Moscow Laboratory confirmed the presence of a prohibited substance in an athlete's body, it would notify the Russian Ministry of Sport. The laboratory would then be directed to either "quarantine" or "save" the sample. A sample that was "saved" was reported as negative (i.e. the laboratory result was changed). In contrast, a "quarantined" sample was processed and reported in the normal course to WADA as an adverse analytical finding. Samples that were "saved" tended to be Russian medal winners or Russian athletes of promise.

(2) Given that the presence of international experts in the Sochi Laboratory precluded the use of the Disappearing Positive Methodology, a method dubbed as the "Sample Swapping Methodology" was used at the Sochi Games in order to enable doped Russian athletes to compete at the Games. "Dirty" urine samples from 35 Russian athletes were passed through a "mouse hole" that had been drilled in the wall between the secure laboratory (where international experts were working) and a room outside the secure area where an FSB agent would take the bottles, arrange for the caps to be removed. The dirty urine would be replaced with "clean" urine that had been further altered to match the original sample, and then returned back through the "mouse" hole for testing in the laboratory;

(3) The Ministry of Sport directed, controlled and oversaw the manipulation of athlete's analytical results or sample swapping, with the active participation and assistance of the FSB, Center of Sports Preparation of National Teams of Russia, and both Moscow and Sochi Laboratories.

[36] One of the tasks of the IP Report was to identify any athletes that might have benefitted from the alleged manipulations to conceal positive doping tests. The IP Report does not refer to any of the plaintiffs.

[37] Also, on July 18, 2016, WADA recommended that the IOC consider "declin[ing] entries, for Rio 2016, of all athletes submitted by the Russian Olympic Committee".

Subsequent Information – McLaren's List of Positive Test Results

[38] On July 22, 2016, WADA sent the following letter to the international federation for the sport of cycling, the Union Cycliste Internationale ("UCI"):

> As a follow up to the McLaren Report published on 18 July, I am pleased to advise that Prof. McLaren has provided WADA with the information from his report which relates specifically to your International Federation. Please find attached a copy of what has been provided to us.
>
> The athletes listed in this document are the beneficiaries of what is referred to as the "Disappearing Positive Methodology" in use by the Moscow Laboratory in the McLaren Report. The listing indicates the decision by the Russian Ministry of Sport ("Save" or "Quarantine") in order to allow your Federation greater focus on the athletes who benefited from a "Save" decision and whose adverse analytical findings were not

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reported as a consequence. An "N/A" indicates that the information is either not available or only partial information is available to the independent investigation team.

WADA would recommend that you identify and analyze any existing B-samples of the sample numbers listed in the attachment as well as any other available samples from the athletes concerned including, where relevant, by using available forensic techniques such as DNA analysis.

Please note that the information contained in the attached document is a result of the investigation to date. There may be further findings which become available during the course of Prof. McLaren's extended mandate.

We reiterate the need for your Federation to review the information and take the necessary decisions based on your own rules and regulations.

WADA remains available for any questions or guidance in this process.

Thank you for your cooperation and commitment to clean sport.

[39] Included in the above letter was a list with information from WADA that McLaren had provided following delivery of his report which identified numerous positive tests of Russian cyclists including those of the plaintiffs (the "McLaren List"). The McLaren List showed that each of the plaintiffs was found to have had at least one positive sample screening test that had been "saved" rather than "quarantined", and thus unreported, by the Moscow Laboratory sometime between November 2012 and June 2015.

Indicated/ Sample Date	Sample No	Indication of Steroid	Name of Competitor	Save/ Quarantine
	2780539		Strakhov Dmitry	S
	2845984	EPO	Strakhov Dmitry	S
	2846583	EPO	Sokolov Dmitry	S
	2846719	EPO	Kirill Sveshnikov	S

Announcement of the IOC's Conditions for Entry to Rio 2016

[40] Rather than declining entry for all athletes submitted by the ROC, the IOC announced on July 24, 2016, that it had established a framework and conditions for their eligibility to participate at Rio 2016:

The IOC Executive Board (EB) has today further studied the question of the participation of Russian athletes in the Olympic Games Rio 2016. In its deliberations, the IOC EB was

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guided by a fundamental rule of the Olympic Charter to protect clean athletes and the integrity of the sport. …

On the basis of the Findings of the IP Report, all Russian athletes seeking entry to the Olympic Games Rio 2016 are considered to be affected by a system subverting and manipulating the anti-doping system. The IP Report indicates that, due to "the highly compressed timeline", the IP has "only skimmed the surface on the extensive data available". The IOC EB therefore came to the conclusion that this view cannot be restricted only to athletes from the 20 Olympic summer sports mentioned in the IP Report.

Under these exceptional circumstances, Russian athletes in any of the 28 Olympic summer sports have to assume the consequences of what amounts to a collective responsibility in order to protect the credibility of the Olympic competitions, and the "presumption of innocence" cannot be applied to them. On the other hand, according to the rules of natural justice, individual justice, to which every human being is entitled, has to be applied. This means that each affected athlete must be given the opportunity to rebut the applicability of collective responsibility in his or her individual case.

After deliberating, the IOC EB decided:

1. The IOC will not accept any entry of any Russian athlete in the Olympic Games Rio 2016 unless such athlete can meet the conditions set out below.

2. Entry will be accepted by the IOC only if an athlete is able to provide evidence to the full satisfaction of his or her International Federation (IF) in relation to the following criteria:

    - The IFs, when establishing their pool of eligible Russian athletes, to apply the World Anti-Doping Code and other principles agreed by the Olympic Summit (21 June 2016).

    - The absence of a positive national anti-doping test cannot be considered sufficient by the IFs.

    - The IFs should carry out an individual analysis of each athlete's anti-doping record, taking into account only reliable adequate international tests, and the specificities of the athlete's sport and its rules, in order to ensure a level playing field.

    - The IFs to examine the information contained in the IP Report, and for such purpose seek from WADA the names of athletes and National Federations (NFs) implicated. Nobody implicated, be it an athlete, an official, or an NF, may be accepted for entry or accreditation for the Olympic Games.

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- The IFs will also have to apply their respective rules in relation to the sanctioning of entire NFs.

3. The ROC is not allowed to enter any athlete for the Olympic Games Rio 2016 who has ever been sanctioned for doping, even if he or she has served the sanction.

4. The IOC will accept an entry by the ROC only if the athlete's IF is satisfied that the evidence provided meets conditions 2 and 3 above and if it is upheld by an expert from the CAS list of arbitrators appointed by an ICAS Member, independent from any sports organization involved in the Olympic Games Rio 2016.

5. The entry of any Russian athlete ultimately accepted by the IOC will be subject to a rigorous additional out-of-competition testing programme in coordination with the relevant IF and WADA. Any non-availability for this programme will lead to the immediate withdrawal of the accreditation by the IOC. … [Emphasis added]

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UCI's Recommendation

[41] On July 25, 2016, the IOC asked that the UCI confirm its position on the eligibility of Russian cyclists, including the plaintiffs, provisionally entered by the ROC for participation in Rio 2016. The letter states:

> As you would have seen the IOC will only accept entry in the Olympic Games Rio 2016 of those Russian athletes which meet the following conditions to your full satisfaction and in accordance with your applicable rules and regulations:
>
> - Confirmation that UCI, when establishing its pool of eligible Russian athletes, applied the World Anti-Doping Code and other principles agreed by the Olympic Summit (21 June 2016);
> - Confirmation of the testing to which each individual athlete has been subject to since 2014 both through UCI, your respective Russian NF and any other agencies or NADOs, in order to confirm that in accordance with UCI rules there is a level playing field in place for all cyclists at Rio 2016; and
> - A review of the detailed information available through the WADA IP Report and confirmation that no implicated athletes, officials or NFs will be accepted for entry or accreditation at Rio 2016.
>
> Once we are in receipt of this information, we will then liaise with the independent CAS arbitrator and confirm the eligibility of each of the following individuals currently provisionally entered by Russia:
>
> … [Emphasis added]

[42] On July 27, 2016, the UCI advised the IOC that the plaintiffs were eligible to participate in Rio 2016. On July 28, 2016, the UCI issued the following statement explaining its decision:

> Based on the decision of the International Olympic Committee (IOC) Executive Board requesting that each International Sports Federation determine the eligibility of Russian athletes to compete in the Rio 2016 Olympic Games, the Union Cycliste Internationale (UCI) announces that it has communicated the information below to the IOC.
>
> Following the publication of the McLaren Investigation Report, the UCI immediately sought information from the World Anti-Doping Agency (WADA) related to the sport of cycling and was informed that three riders named by the Russian Olympic Committee (ROC) to compete in Rio 2016 were potentially implicated. The UCI, through the Cycling Anti-Doping Foundation (CADF), is in the process of identifying relevant rider samples and is in close dialogue with WADA to move forward with these cases immediately. It has also passed the names of these three athletes to the IOC in the context of its Executive Board decision.
>
> Three other riders who have previously been sanctioned for Anti-Doping Rule Violations have been withdrawn by the ROC.
>
> In addition, the CADF has carried out a careful assessment on the other 11 riders named by the ROC to participate in Rio 2016 cycling events. After thorough analysis of the testing history of these riders and considering the scrutiny being applied to all of them, the UCI and CADF believe that this is sufficient for these athletes to meet the relevant requirement of the decision of the IOC Executive Board.
>
> The examination has purposely not considered tests conducted by the Russian Anti-Doping Agency (RUSADA). Furthermore, it is also important to stress that since the publication of the Independent Commission Report in November, 2015, the UCI requested that the CADF intensify testing of Russian cyclists – and this level of heightened testing will continue before, during and after Rio 2016.
>
> The UCI is absolutely committed to protecting the rights of clean athletes at the Rio 2016 Olympic Games and beyond.

[43] On August 2, 2016, the IOC sent a letter to international sports federations, including the UCI, to clarify whether an athlete is "implicated" for purposes of its July 24, 2016 announcement:

> This is in follow-up to various requests received by the IOC.
>
> By decision dated 24 July 2016 (the "EB Decision"), the IOC Executive Board decided that "Entry will be accepted by the IOC only if an athlete is able to provide evidence to the full satisfaction of his or her International Federation (IF) in relation to the following criteria: […] The IFs to examine the information contained in the IP Report, and for such purpose seek from WADA the names of athletes and National Federations (NFs)

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implicated. Nobody implicated, be it an athlete, an official, or an NF, may be accepted for entry or accreditation for the Olympic Games".

Further to the EB Decision, the IOC understands that the International Federations were provided by WADA with lists of athletes prepared by Prof. McLaren (the "McLaren Lists"). These lists contained, as far as the IOC is aware, five columns ("indicated sample date", "sample no", "indication of steroid", "name of competitor" and "save/quarantine").

In view of recent appeals filed by Russian athletes with CAS, the IOC consider it necessary to clarify the meaning of the notion "implicated" in the EB Decision.

The IOC does not consider that each athlete referred to in the McLaren Lists shall be considered *per se* "implicated". It is for each International Federation to assess, on the basis of the information provided in the McLaren Lists and the Independent Person Report, whether it is satisfied that the athlete in question was "implicated" in the Russian State-controlled doping scheme.

To assist the International Federations in assessing each individual case, the IOC wishes to provide some information. In the IOC's opinion, an athlete should not be considered as "implicated" where:

- The order was a "quarantine";
- The McLaren List does not refer to a prohibited substance which would have given rise to an anti-doping rule violation or;
- The McLaren List does not refer to any prohibited substance with respect to a given sample.

The IOC encourages all International Federations to review as a matter of urgency their lists of eligible persons taking into account the present notice. The present notice is without prejudice to the other criteria set out in the EB Decision, which shall be complied with by any athlete in order to be considered eligible by his/her International Federation. [Emphasis added]

Review by CAS Appointed Arbitrator

[44] In accordance with criterion 4 of the IOC's decision dated July 24, 2016, the IOC delegated the review of the provisional entry list of Russian cyclists proposed by the UCI to an arbitrator on the roster of CAS. The CAS appointed Markus Manninen as the arbitrator.

[45] Manninen's report, dated August 2, 2016, recommended that eleven cyclists be confirmed as eligible for participation at Rio 2016 but that the plaintiffs be declared ineligible. His report states:

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> Reference is made to the Notice of Appointment dated 1 August 2016, where Judge Ivo Eusebio, Member of the International Council of Arbitration for Sport (ICAS) has appointed me as an expert to scrutinize whether the athletes proposed by the International Cycling Union (UCI) meet the conditions set forth in the decision by the Executive Board of the International Olympic Committee on 24 July 2016.
>
> In accordance with my mission, I have verified whether the athletes proposed by the UCI meet the relevant conditions and give my recommendations on each of the 16 athletes identified in the document "ROC Provisional Entries – IOC List 25 July 2016" confirmed by the UCI in its letter dated 27 July 2016.
>
> I recommend that the following athletes listed by the UCI can be confirmed as being eligible for the Olympic Games Rio 2016 ….
>
> On the contrary, I do not recommend that the following athletes are confirmed eligible by the IOC for the reasons specified below:
>
> - Sokolov, Dmitri
> - Strakhov, Dmitri
> - Sveshnikov, Kirill
>
> …
>
> As evidenced by the attachment to the letter from WADA to the UCI dated 22 July 2016, the aforementioned three athletes are beneficiaries of what is referred to as the "Disappearing Positive Methodology" in the McLaren Report. Each of them has given a doping sample indicating the use of EPA in August 2013. Moreover, Mr. Strakhov has given another suspicious sample in June 2013. It follows that Messrs. Sokolov, Strakhov and Sveshnikov do not meet condition 2 of the IOC Executive Board decision.

IOC's Decision to Deny Entry

[46] On August 3, 2016, the IOC advised the UCI that it had decided to deny all three plaintiffs' entry to the 2016 Olympic Games. Its letter states:

> We would firstly like to sincerely thank you for your outstanding coordination with us related to the finalisation of Russian athlete eligibility for the Olympic Games Rio 2016.
>
> In accordance with the decision of the IOC Executive Board of 24 July 2016 the IOC will not accept the entry of any Russian athlete in the Olympic Games Rio 2016 unless such athlete can meet the conditions set out in the IOC Executive Board decision of that date.
>
> The IOC Executive Board subsequently delegated the final review of entries of Russian athletes to a Review Panel composed of three IOC EB members: Uger Erderner (Chair of

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the Panel & Medical and Scientific Commission), Claudia Bokel (Chair of the Athletes' Commission) and Juan Antonio Samaranch.

This Review Panel operated in accordance with the following point 4 from the IOC Executive Board decision:

> *"The IOC will accept an entry by the ROC only if the athlete's IF is satisfied that the evidence provided meets conditions 2 and 3 above and if it is upheld by an expert from the CAS list of arbitrators appointed by an ICAS Member, independent from any sports organisation involved in the Olympic Games Rio 2016."*

Following the completion of this process, including the review of the UCI proposal by an expert from the CAS list of arbitrators, the Review Panel confirmed the eligibility of the 11 Russian athletes and 2 reserve athletes specified in your letter of 27 July and subsequent correspondence.

However, the three athletes Dmitri Sokolov, Dmitri Strakhov and Kirill Sveshnikov do not meet the criteria set by the IOC Executive Board and are therefore not deemed eligible for entry in the Olympic Games Rio 2016 and therefore we request for UCI to reallocate the quota places next best ranked NOC according to your qualification system.

Please note that the IOC will inform the Russian Olympic Committee and Rio 2016 for implementation and finalisation of entries. [Emphasis added]

Plaintiffs Apply for CAS Arbitration

[47] Aside from providing the McLaren List to the UCI in accordance with WADA's mandate and as ultimately required pursuant to the IOC's July 24, 2016 decision that stipulated the conditions for entry, neither WADA nor McLaren had any involvement in the UCI's decision confirming the plaintiffs' eligibility to participate or the IOC's decision to overrule the UCI and deny the plaintiffs entry to the Rio Games.

[48] On August 3, 2016, the plaintiffs filed an application with the "Court of Arbitration for Sport, Ad Hoc Division – Games of the XXXI Olympiad in Rio de Janeiro" for arbitration challenging the IOC's decision to deny them entry to Rio 2016 (the "Application"). They were represented by Artem Patsev. The IOC and UCI were named as respondents. The plaintiffs named the ROC, WADA and McLaren as "other parties" on the basis that WADA and McLaren were persons "… who may be adversely affected by any decision which CAS may issue in this matter".

[49] The Application states that there are two grounds for the jurisdiction of the CAS:

- The arbitration clause in the Entry Form; and,

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- Rule 61.2 of the Olympic Charter which states that "[a]ny dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration".

[50] The plaintiffs sought the following relief in their Application:

- On a preliminary basis, an order that the UCI produce the documents containing the names of these three still unknown riders and the concrete allegations against them;
- A declaration that:
    - the IOC decision of 24 July 2016 (paragraph 2) setting the new criteria for the Russian athletes to satisfy for acceptance of their entries to Rio 2016 is invalid and unenforceable;
    - the UCI decision of 28 July 2016 and the relevant actions leading to the Applicants' ineligibility of participation at Rio 2016 shall be set aside and is unenforceable;
    - the Applicants shall be declared eligible to participate at Rio 2016; and
    - the IOC is obliged to accept the entry of the Applicants submitted by the ROC to compete at Rio 2016.

[51] In the evening of August 3, 2016, the plaintiffs delivered an email to the CAS which indicated that it wished to remove the IOC as a respondent. The email states:

> [T]he Applicants, taking into account the IOC's position stated in its circular letter of 2 August 2016, do not consider the IOC as one of the respondents anymore in this case. As stated above, this was just a legal formality, since the applicants [have] never called in question the IOC's firm determination to protect the integrity of sport and to fight against doping. The key decision which is the real basis for the athletes' non-eligibility for Rio is the UCI's decision (interpreting and applying the IOC criteria in an extremely wrong and severe way).

[52] On August 4, 2016, the UCI filed its Answer. It confirmed that the UCI had received a letter from the IOC dated August 4, 2016 confirming that the plaintiffs "do not meet the criteria set by the IOC Executive Board and are therefore not deemed eligible for entry in the Olympic Games Rio 2016".

[53] McLaren filed an affidavit with the CAS. WADA and the IOC filed Amicus Briefs.

[54] McLaren's affidavit, filed August 4, 2016, outlines why the plaintiffs are implicated in the state-run doping program in great detail. He states:

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… On 24 July 2016, the International Olympic Committee ("IOC") established criteria by which individual International Federations ("IFs") must determine which Russian athletes may participate in the Rio de Janeiro Olympic Games. One of those criteria is that,

> The IFs [are] to examine the information contained in the IP Report, and for such purpose seek from WADA the names of athletes and National Federations (NFs) implicated. Nobody implicated, be it an athlete, an official or an NF, may be accepted for entry or accreditation for the Olympic Games.

This decision has resulted in a deluge of requests to provide information to the IFs, national federations; the Russian Olympic Committee; the Russian Paralympic Committee and individual Russian athletes.

On 2 August 2016 the IOC issued a communication (only obtained by the IP on 3 August 2016) to the Presidents and Secretaries of the Summer IFs clarifying the meaning of the notion "implicated" as used in the IOC Executive Board decision of 24 July 2016. The communication states:

> "In the IOC's opinion, an athlete should not be considered as "implicated" where:
>
> - The Order was a "quarantine";
> - The McLaren List does not refer to a prohibited substance which would have given rise to an anti-doping rule violation; or
> - The McLaren List does not refer to any prohibited substance with respect to a given sample."

For the avoidance of any doubt and to be very clear, the focus of my investigation to date has been to review evidence of a State-dictated doping cover up program which used the Moscow and Sochi laboratories to cover up doping. To date, the focus of the IP investigation has not been to establish Anti-Doping Rule Violation cases against individual athletes. The IP is not a Results Management Authority as defined by the World Anti-Doping Code and I did not attempt to conduct a Results Management investigation with respect to individual Russian athletes.

I have, however, reviewed a considerable amount of reliable evidence, which clearly implicates individual athletes in the State-dictated doping cover up program described in the IP Report. That evidence includes documents supported by the testimony of primarily confidential witnesses and in some cases additional forensic and analytical evidence from the examination of sample bottles and their contents.

As a result of the extension of my mandate by WADA, my ongoing investigation includes developing additional evidence concerning individual athletes. This evidence may be used in the future, when the extended mandate is completed, to support an Anti-

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doping Rule Violation case initiated by an IF against a particular athlete in accordance with its Results Management Authority.

Because my investigation is continuing, and in many cases involves confidential witnesses, I am extremely reluctant to disclose specific information regarding any athletes (including Mr. Kirill Sveshnikov, Mr. Dimitry Stakhov and Mr. Dimitry Sokolov) who are the subject of the investigation. To do so may prejudice the ongoing work of the investigation. However, in order to assist the CAS, because there is a pending CAS proceeding, I have provided the following summary as an amicus brief with respect to the reliable evidence in the IP investigation which "implicates" Mr. Kirill Sveshnikov, Mr. Dimitry Strakhov and Mr. Dimtry Sokolov in the State-dictated doping cover up program.

I have retrieved from the [Independent Person] Investigative database and reviewed electronic evidence from 29 October 2013. The metadata corresponding to this electronic evidence has been forensically tested and confirms that the evidence was created contemporaneously with the indicated dates. That electronic evidence reveals that on 29 October 2013 at 04:46 hours, in contravention of the International Standard for Laboratories, the Moscow Laboratory reported to Alexey Velikodniy [a communications liaison between the Ministry of Sport and the Moscow] a batch of samples from various athletes, including the 3 applicants, which advised on the detection of human growth hormone, 5 EPO and 3 somatotropin. Referenced in the communication concerning this batch were sample numbers 2845984, 2846583 and 2846719 which were among the samples where recombinant EPO was found.

On 29 October 2013 at 06:35 hours Alexey Velikodniy communicated back to the Laboratory that the sample numbers 2845984, 2846583 and 2846719 belonged to Dmitry Strakhov, Dmitry Sokolov and Kirill Sveshnikov, respectively. At 13:31 hours Alexey Velikodniy further corresponded with the Moscow Laboratory detailing that the samples were taken at a Training Camp in St. Petersburg and instructed the Laboratory to "SAVE" sample numbers 2845984, 2846583 and 2846719. This signaled to the Laboratory that no further analytical bench work was to be done on these samples and the Laboratory filed a negative ADAMS report for each athlete. These communications are consistent with the Disappearing Positive Methodology as described in Chapter 3 of the IP Report. … [Emphasis added]

[55] WADA's Brief, filed August 5, 2016, states:

… The Independent Person Report … revealed a State-directed doping regime and concluded that "the Ministry of Sport directed, controlled and oversaw the manipulation of athlete's analytical results or sample swapping, with the active participation and assistance of the FSB, CSP and both the Moscow and Sochi Laboratories.

As a consequence, the IOC, by decision dated 24 July 2016, ruled *inter alia* that nobody implicated in the State-organised scheme would be accepted for entry or accreditation for

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the 2016 Olympic Games. As per its terms, this decision by the IOC was based on the "collective responsibility" of Russian athletes for the scheme.

Pursuant to this IOC decision, International Federations were requested to seek from WADA the names of the athletes and National Federations implicated.

WADA contacted the Independent Person, who provided the names of the implicated athletes, which were transferred to the relevant International Federations. …

An important aspect of the State-directed doping regime identified and described in the Independent Person Report was the so-called Disappearing Positives Methodology ("DPM").

Indeed the Athletes have been identified by the Independent Person as being implicated in the DPM. …

The Independent Person considered that all of the findings of the Independent Person Report, including in respect of the DPM, met the standard of proof beyond a reasonable doubt.

After the IOC decision of 24 July 2016, the following information was provided to the UCI in respect of the Athletes:

Therefore, the initial screening phase of the analysis of the Athletes' abovementioned samples detected EPO. However, in view of the "SAVE" order, the samples were reported as negatives in ADAMS.

EPO is a prohibited substance with the category S.2 (Growth Factors and Peptide Hormones) of the WADA Prohibited List. EPO is a non-specified substance and is prohibited at all times (without a threshold).

Concluding Remarks

A significant part of the Athletes' Application is concerned with alleged breaches of the World Anti-Doping Code (Code). They appear to assume that they have bene excluded in connection with the asserted anti-doping rule violation. These submission miss the mark.

The Athletes have not been charged with anti-doping rule violations under the Code. Rather they have been declared ineligible, as a consequence of collective responsibility, in connection with a State-organised doping scheme that pervades elite Russian sport.

Indeed, far from being able to demonstrate that they should have avoided collective responsibility as a result of being unaffected and untainted by the doping system, the Athletes were all direct beneficiaries of a SAVE order.

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> WADA therefore supports the position that the Athletes should not be eligible for participation in the Games of the XXXI Olympiad.

[56] The IOC's Amicus Brief, filed August 5, 2016, explained that the IOC considered the plaintiffs to have been implicated by the IP Report:

> The Athletes filed a first Application on 3 August 2016. …
>
> The IOC … understands … that the decision of the Executive Board dated 24 July 2016 (the EB Decision), including the criteria set out therein, are no longer challenged and that its position in these proceedings is that of an interested party.
>
> The EB Decision stated that the International Federations, in order to assess the eligibility of Russian athletes, were "to examine the information contained in the IP Report, and for such purpose seek from WADA the names of athletes and National Federations (NFs) implicated. Nobody implicated, be it an athlete, an official, or an NF, may be accepted for entry or accreditation for the Olympic Games …
>
> Following requests received by the IOC as to the interpretation of the word "implicated", the latter clarified its position, in a circular letter dated 2 August 2016 … in the following terms:
>
> > In the IOC's opinion, an athlete should not be considered as "implicated" where:
> >
> > - The Order was a "quarantine";
> > - The McLaren List does not refer to a prohibited substance which would have given rise to an anti-doping rule violation, or
> > - The McLaren List does not refer to any prohibited substance with respect to a given sample.
>
> In his Affidavit dated 4 August 2016, Prof. McLaren confirmed that the evidence he reviewed showed that the Athletes' samples (2845984, 28466583 and 2846719) contained recombinant EPO. The instructions received from the liaison person, Mr. Velikodniy, were "save".
>
> Recombinant EPO is a substance prohibited at all times under S2.1 of the WADA Prohibited List (Exhibit 2). It is a non-specified substance. <u>The evidence therefore shows that the Athlete benefitted from a "save" order with respect to a substance which was effectively prohibited.</u>
>
> In a CAS case OG 16/12, the Applicant was also found with a non-specified substance prohibited at all times. The order was also a "save". The Panel dismissed the application.

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In these circumstances, the Athletes shall not be considered as eligible for entry to the into the Olympic Games Rio 2016.

Ex abundanti cautela, the IOC requests that the Application of the Athletes be dismissed. [Emphasis added]

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[57] On August 5, 2016, after the IOC and WADA briefs had been filed, the plaintiffs sent the following responding email to the CAS:

> The Applicants were notified of the concrete allegations (or implications) only yesterday, and, in the absence of the Panel's directions, were in fact deprived of their right to present any evidence in support of their position and against the IOC and WADA's amicus briefs.
>
> Firstly, the Applicants just would like to stress that no result management was conducted in relation to their samples being allegedly contaminated with EPO, and no decision has ever been rendered confirming that they were guilty of any anti-doping rule violation.
>
> Secondly, these samples (which were mentioned by Prof. McLaren in his Affidavit sent to CAS) allegedly contaminated with EPO, were actually contaminated in Moscow laboratory by Dr. Rodchenkov himself or by his subordinates. The samples #2845984, 2846583 and 2846719 which were collected from the Applicants, were not closed at all at the time of the collection. As it was explained then by a RUSADA doping control officer, it was just an "experimental" testing ordered by RUSADA Director General Mr. Kamaev and by Moscow Anti-Doping Lab Director Dr. Rodchenkov (who were actually close friends and were both involved in a shady business). That is why, as the Applicants and their coach (Mr. Alexander Kuznetsov) were told, it was beyond the ordinary procedure of doping testing, so no ordinary rules and procedures were applied (including WADA Standards for Testing, etc.). The Applicants followed the instructions of the DCO, as they always do. Nevertheless, on the very next day, the Applicants have provided their samples to an independent laboratory to confirm that they were absolutely "clean", because they were aware of a shady business between Dr. Rodchenkov and Mr. Kamaev, and they expected a call from RUSADA asking for money for "disappearing" a dirty sample, which was not in fact a dirty one. The then analysis in an independent laboratory confirmed that the Applicants were absolutely clean and no prohibited substances were present.
>
> In my next email I will forward the laboratory papers for the attention of the Panel and of the parties.[Emphasis added]

[58] On August 5, 2016, counsel for the plaintiffs sent an email to the CAS, which states:

> Please see attached the Applicants' analyses results for EPO in October 2013.

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CAS's Decision

[59] On August 8, 2016, the CAS dismissed the Application. Contrary to the plaintiffs' submission, they found that the IOC, not the UCI, made the decision to exclude the plaintiffs from participating in Rio 2016. Consequently, the CAS dismissed the plaintiffs' appeal on the grounds that they could not maintain an appeal against a decision made by the IOC, when it was not a party to the proceeding.

[60] The CAS decision states:

> … In their original application the Applicants challenged not only the UCI Statement [dated July 28, 2016], but also the IOC Criteria [dated July 24, 2016] and the IOC Decision [dated August 3, 2016]. By letter dated 3 August 2016, the Applicants amended their prayers for relief. In their letter, the Applicants states that "*taking into account the IOC's position stated on its circular letter of 2 August 2016, [they] … do not consider the IOC as one of the respondents anymore in this case … The key decision which is the real legal basis for the athletes' non-eligibility for Rio is the UCI's decision (interpreting and applying the IOC criteria and in an extremely wrong and severe way*).
>
> Neither UCI nor IOC objected to or raised issue with this amendment. The Applicants, following the response submitted by the UCI and the IOC, were invited by email dated 5 August 2016 by the CAS Court Office to state whether or not they intended to proceed with the case, solely against the UCI. The Applicants were given a deadline to comment until 13:00 (Rio time). No comments were received. A second time limit was accorded to the Applicants until 16:30. Again, the Applicants did not alter their requests for relief. It was on this basis that the Panel finds that the Applicants have properly withdrawn their action against the IOC. Therefore, the IOC is deemed only to be an interested party in these proceedings. …
>
> Indeed, in this case, the Panel finds that the Applicants have no such standing to appeal, because the only decision taken by the UCI in respect of the Applicants and communicated to the OIC on 3 August 2016 stated - *inter alia* – as follows:
>
> > On 27 July the UCI provided you with a comprehensive reply to your request … These riders [Kirill Sveshnikov, Dmitry Sokolov and Dmitry Strakhov] are eligible under the UCI Regulations to participate in the RIO 2016 Olympic Games as the information provided so far by Prof. McLaren is not sufficient to instigate disciplinary proceedings or impose provisional suspensions under the UCI Anti-Doping Rules.
>
> It follows from the above, that the UCI did not take any decision that adversely affected the legal position of the Applicants. The only decision taken that aggrieved the Applicants was the IOC Decision [dated August 3, 2016] which explicitly stated that "the three athletes Dimitrii Sokolov, Dimitrii Stakhov and Kirill Sveshnikov do not meet the criteria set by the IOC Executive Committee Board and are therefore not deemed eligible for entry in the Olympic Games Rio 2016 and therefore we request for UCI to reallocate

> the quota places next best ranked NOC according to your qualification system.". It was, thus, the IOC and not the UCI that excluded the Applicants from the participation in the RIO 2016 Olympic Games. It is apparent that the Applicants are aggrieved by the IOC Decision and not the UCI Statement. The Applicants cannot maintain an appeal against a decision made by the IOC, when it is not a party to these proceedings. … The position taken by the Panel in this case is that the Appeal or application must be dismissed because the Applicants lack standing to sue, as demonstrate above.
>
> Releifs sought
>
> It is appropriate that we address the Reliefs sought by the applicant and rule on their outcome. Because the IOC is no longer a party to these proceedings, the reliefs sought are obviously affected. Relief 1 is rendered nugatory and is now moot because the Applicants have been named in Prof McLarens affidavit, which is before us in evidence. Relief 2 is rendered nugatory because the IOC is no longer a party to these proceedings.
>
> Reliefs 3, 4 and 5 are consequential orders which the CAS Ad Hoc Panel does not need to make under the circumstances, the IOC not being a party to the proceedings following the Applicants' withdrawal, and the relief sought against the UCI being moot. …

[61] It should be noted that there were dozens of Russian athletes, in various sports, who were deemed to be ineligible to participate at Rio 2016 and who appealed those decisions to the CAS. According to Fortier, about ten of those appeals were successful.

Second IP Report – December 2016

[62] On December 9, 2016, and after the conclusion of the 2016 Rio Games, McLaren issued a second report which concluded that over 1,000 Russian Olympic and Paralympic athletes in both summer and winter sports had been involved in or benefitted from manipulations to conceal positive doping tests. The plaintiffs' names are referenced in a footnote that contains a citation to the CAS decision involving them. In response to the Second IP Report, the IOC has established a process to prosecute anti-doping rule violations against individual Russian athletes implicated in the Reports. The IOC has prosecuted a number of athletes for violating the anti-doping rule and imposed lifetime bans from the Olympic Games for some athletes. As well, some of the IOC's decisions have been overturned by the CAS.

Action in Finland against Manninen

[63] The plaintiffs commenced a legal proceeding before the Helsinki District Court by Complaint, dated August 9, 2017, against Markus Manninen, the independent arbitrator who made a recommendation to the IOC that the plaintiffs should not be permitted to compete at the 2016 Rio Games. The plaintiffs claim that they have suffered damages as a result of Manninen's recommendation.

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[64] On January 8, 2018, the Helsinki District Court temporarily stayed the plaintiffs' case pending the receipt of the IOC's response to the plaintiffs' request for information regarding the basis on which Manninen made the recommendation to deny them entry.

Action in Ontario against WADA and McLaren

[65] On September 11, 2017, the Statement of Claim in this action was issued by the plaintiffs for $6 million in damages on the grounds of negligence, defamation, injurious falsehood, abuse of public office and conspiracy and $1 million in punitive damages. The plaintiffs also seek a declaration that: (1) the defendants have no reputable evidence to suggest that the plaintiffs used performance enhancing drugs at any time; and (2) the statements made by the plaintiffs regarding Russian cyclists do not apply to them.

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ISSUES

[66] The following issues were raised on this motion:

- Is this an appropriate case for summary judgment?
- Should this action be dismissed on the basis that the CAS has the exclusive jurisdiction to determine this dispute?
- Should this action be dismissed as an abuse of process?

ISSUE #1: IS THIS AN APPROPRIATE CASE FOR SUMMARY JUDGMENT?

[67] Prior to bringing this motion, the defendants moved pursuant to Rule 21.01(3) of the *Rules of Civil Procedure,* R.R.O. 1990, Reg. 194 ("*Rules*") for an order that this action be stayed or dismissed on the grounds that that this court has no jurisdiction over the subject matter of the claim and that it constitutes an abuse of process. The plaintiffs submitted that these motions be dismissed as they were, "… no more than 'dressed up motions for summary judgment'" as there was a substantive risk that the Court's disposition of the disputed facts would devolve into a mini-trial: see *Sveshinikov v World Anti-Doping Agency*, 2018 ONSC 7245, at para. 8. In particular, Fortier and the plaintiff's expert, Dr. Despina Mavromati ("Mavromati") differ in their respective conclusions as to the scope and application of the arbitration clause at issue. Justice Diamond stated, at paras. 14 and 15:

> [14] I find that the above evidence will require me to make findings of fact beyond those limited to a judge hearing a Rule 21.01(3) motion. Not only am I being asked to make findings of credibility against Fortier due to his alleged lack of independence, but I am also being asked to make findings of fact going to the merits of the dispute in terms of the CAS' purported exclusive jurisdiction to entertain the dispute(s) in question.
>
> [15] As a result, I decline to hear the Rule 21.01(3) motions as currently constituted, and as a result make the following order:

> (a) the Rule 21.01(3) motions shall be reconstituted and heard as either Rule 20 motions for summary judgment, or a trial of the issues of jurisdiction and abuse of process, both processes subject to the discretion of the presiding Judge. Counsel for the parties shall seek instructions from their respective clients with a view to advising me how the Rule 21.01(3) motions shall proceed. … [Emphasis added]

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[68] The plaintiffs note that there is a dispute between the parties – and their expert witnesses – about the scope of the arbitration clauses and whether the plaintiffs' claim in this action could have been brought before the CAS. Despite having taken what appears to be a contrary position before Diamond J., the plaintiffs now submit that the summary judgment process does not allow this court to reach a fair and just determination regarding the scope of the arbitration clause and this court's jurisdiction, because such determination turns on a number of disputed facts and credibility of a witness:

- Whether the plaintiffs could have brought these same proceedings before the CAS;
- Whether the plaintiffs could have brought a negligent investigation and defamation claim in August 2016 before the CAS;
- Whether the plaintiffs would have been able to compete at Rio 2016 if they did not remove the IOC as a respondent in their August 2016 proceeding;
- Whether WADA and McLaren as "interested persons" were parties to the CAS proceeding or simply witnesses who were not bound by the outcome;
- Whether the IP Report and the Second IP Report are related to the Olympic Games and are defamatory in nature;
- The date of the allegedly "implicated" samples collected and relied on by the defendants in the McLaren Investigation;
- The scope of the IOC's involvement in the McLaren Investigation;
- Whether WADA was required to follow the same WADA Code in its McLaren Investigation before it implicated the plaintiffs as "dopers"; and
- The existence of other cases where parallel proceedings have been brought before the CAS and a state Court.

[69] The plaintiffs rely on *Goudie v. Ottawa (City),* 2003 SCC 14, [2003] 1 S.C.R. 141, for the proposition that a motion for summary judgment on a jurisdictional issue is only appropriate where the outcome turns on uncontroverted or easily ascertainable facts. However, *Goudie* did not involve a motion for summary judgment. In that case, the plaintiffs were employees that were subject to a collective agreement with the City of Ottawa. The plaintiffs brought an action to enforce an alleged pre-employment contract that was more generous than the collective

agreement. The City brought a motion under Rule 21.01(3)(a) to dismiss the claim on the basis that the exclusive jurisdiction for the claim was arbitration under the collective agreement. In support of its jurisdictional argument, the City filed an affidavit which stated that it had never entered a pre-employment contract with the plaintiffs. The essential character of the dispute was a claim under an alleged pre-employment contract not the interpretation, application or alleged violation of the collective agreement. Accordingly, the claim was permitted to proceed. The Supreme Court of Canada observed that the plaintiffs were under no evidentiary obligation to prove the existence of a pre-employment contract in order to survive the jurisdictional challenge as it was also the central issue on liability in the lawsuit. Given that the disagreement between the parties was essentially factual, not legal, the jurisdictional issue could not be determined on a motion under Rule 21.01(3)(a). The Supreme Court of Canada stated, at para. 32, that:

> … it was not appropriate for the appellant to attempt to turn a jurisdictional challenge under clause 21.01(3)(a) into a mini-trial on a disputed, central question of fact. <u>If the appellant was of the view that the pleading of a pre-employment contract was a sham and raised no genuine issue for trial, it ought to have moved for summary judgment</u> pursuant to rule 20.01. … [Emphasis added]

[70] Accordingly, *Goudie* supports the use of a motion for summary judgment to resolve disputed issues of jurisdiction.

[71] Further, unlike the situation in *Goudie*, the central issue in the plaintiffs' claim (an alleged negligent investigation by McLaren and WADA leading to the plaintiffs' exclusion from Rio 2016 and allegedly resulting in their reputations being tarnished) is not the central issue for resolution on the jurisdictional motion. Additionally, unlike the City in *Goudie*, neither McLaren nor WADA takes the position that the jurisdictional issue should turn on a finding that there is no merit to the claim that the plaintiffs suffered damages and reputational harm the IOC's decision to deny them entry that was based on an alleged negligent investigation.

[72] Rule 20.04(2)(a) provides that a court shall grant summary judgment if the court is satisfied that there is "no genuine issue requiring a trial" with respect to a claim or defence.

[73] There will be no genuine issue requiring a trial when the judge is able to reach a fair and just determination on the merits on a motion for summary judgment. This will be the case when the process (1) allows the judge to make the necessary findings of fact, (2) allows the judge to apply the law to the facts, and (3) is a proportionate, more expeditious and less expensive means to achieve a just result: *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87, at para. 49. The question is whether the added expense and delay of fact finding at trial is necessary to a fair process and just adjudication: *Hryniak*, at para. 33. The standard for fairness is not whether the procedure is as exhaustive as a trial, but whether it gives the judge confidence that she can find the necessary facts and apply the relevant legal principles so as to resolve the dispute: *Hryniak*, at para. 50. Further, a judge is entitled to assume that the record contains all the evidence that the parties will present if there is a trial. A party must put its best foot forward: *Hashemi-Sabet Estate v. Oak Ridges Pharmasave Inc.*, 2018 ONCA 839, at para. 33.

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[74] In my view, the parties have exercised the opportunity to put their "best foot forward" on this jurisdictional motion. Both parties have filed voluminous materials and many affidavits. In particular, both parties have filed expert reports regarding the international sports governance and dispute resolution scheme and in support of their respective interpretations of the arbitration clauses. The plaintiffs rely upon the expert report of Mavromati, dated August 14, 2018, and a supplementary expert report, dated September 26, 2018. The defendants rely upon the expert report of Fortier. As well, Mavromati, Fortier, and Niggli have been cross-examined.

[75] As will become evident, I reject the plaintiffs' submission that merely because Mavromati's and Fortier's evidence is contradictory, I am unable to determine the jurisdictional motion that is before this court.

[76] Finally, I reject the plaintiffs' submission that this jurisdictional motion is inappropriate because the discovery process has not commenced. The plaintiff submits that there is a "… very real possibility that the discovery process will reveal additional evidence that supports the Cyclists claims". However, there is nothing to suggest that any such evidence would assist in determining the scope of the arbitration clauses at issue on this motion as opposed to the merits of their claims.

ISSUE #2: SHOULD THIS ACTION BE DISMISSED ON THE BASIS THAT THE CAS HAS THE EXCLUSIVE JURISDICTION TO DETERMINE THIS DISPUTE?

[77] The defendants rely on the Supreme Court of Canada's decision in *Weber v. Ontario Hydro*, [1995] 2 S.C.R. 929, for the principle that a court has no jurisdiction to hear a dispute if the "essential character" of the dispute is within the scope of an arbitration regime. It further submits that the essential character of the dispute before this court is the IOC's decision to exclude the plaintiffs from Rio 2016 and, as a result, this action should be dismissed.

[78] The plaintiffs submit that *Weber* has no application to this action for the following reasons:

(1) *Weber* only applies to arbitrations under collective agreements governed by the *Labour Relations Act*; and

(2) Even if *Weber* is applicable, the arbitration clauses in this case do not expressly oust the jurisdiction of this Court to hear all cases involving athletes.

[79] The plaintiffs also submit that the essential character of this claim is different from the appeal to the CAS from the IOC's decision to deny them entry to Rio 2016, as it involves different parties, different causes of action (tort claims), and seeks different relief (damages).

Is the "Essential Character" Test Applicable to CAS Arbitration Clauses?

[80] The defendants have not provided any cases where *Weber* has been applied to disputes not governed by a labour relations statute other than under a provincial residential tenancies statute (*Corfu Investments Ltd. v. Oickle*, 2011 NSSC 119, 301 N.S.R. (2d) 168) and a wrongful

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dismissal action by a priest (*Hart v. Roman Catholic Episcopal Corp. of the Dioscese of Kingston*, 2011 ONCA 728, 344 D.L.R. (4th) 332).

[81] The plaintiffs rely on *Armstrong v. Northern Eyes Inc*., [2000] O.J. No. 1594 (Div. Ct.), aff'd [2001] O.J. No. 1085 (C.A.), for the principle that *Weber* does not apply to private arbitration agreements. However, the Ontario Divisional Court's decision was more nuanced. It decided that *Weber* was inapplicable given the arbitration clause found in a shareholders' agreement was "freely and personally negotiated" between the commercial parties unlike the situation in *Weber* where the arbitration clause was imposed by statute. *Armstrong* is distinguishable given that the arbitration clauses at issue in this case were not negotiated freely but rather were mandated by the Olympic Charter (which is more similar to a statute than a freely negotiated contract) and the Entry Form (which is a contract of adhesion).

[82] Accordingly, this is a case of first impression in respect of whether the "essential character" test applies to CAS arbitration clauses. In *Weber*, at para. 41, the Supreme Court of Canada found that there was no basis for concurrent jurisdiction in labour arbitration disputes as it would subvert the employer/employee relationship if matters that are governed by the collective agreement could nevertheless be the subject of an action. At para. 46, the Court stated that permitting concurrent regimes of arbitration and court actions:

> … undercuts the purpose of the regime of exclusive arbitration which lies at the heart of all Canadian labour statutes. It is important that disputes be resolved quickly and economically, with a minimum of disruption to the parties and the economy. To permit concurrent court actions whenever it can be said that the cause of action stands independent of the collective agreement undermines this goal.

[83] In my view, this policy rationale equally supports the view that the CAS has exclusive jurisdiction over matters that come within the scope of the arbitration clauses at issue in this case. To rule otherwise would undermine the Olympic Charter and subvert the relationship between the IOC, the CAS, and the other members of the Olympic Movement.

[84] Further support for the view that the CAS has exclusive jurisdiction over matters governed by international sport arbitration agreements is outlined in Fortier's report, at paras. 60-62, which describes the German case of *Pechstein v. International Skating Union*, Case KZR 6/15 (2016), as follows:

> More recently, in June 2016, the German Federal Court of Justice issued a final ruling in protracted domestic litigation commenced by the German speed-skater, Claudia Pechstein. Ms. Pechstein had been sanctioned in 2009 by the International Skating Union ("ISU") for a doping violation and had lost subsequent appeals before both the CAS and the Swiss Federal Tribunal. Ms. Pechstein then turned to the German state court system, and her case was heard and decided in turn by the Munich Regional Court, appealed to the Munich Higher Regional Court, and then appealed to the German Federal Court of Justice.

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The Federal Court of Justice ultimately ruled against Ms. Pechstein in all respects. It held that her agreement to submit disputes exclusively to CAS arbitration in her signed registration form for the 2009 speed skating world championships was valid and thus refused to interfere with the CAS award. In its decision, the Court summarized well and, in my view, very convincingly, the benefits and advantages of the international sports-dispute resolution system, in the following words:

> Sports federations such as the [ISU] promote sports in general and particularly their own sport by creating the prerequisites for organised sport. To achieve the relevant goals, it is of fundamental importance to ensure that the rules apply to all athletes and are implemented everywhere in accordance with uniform standards. …
>
> It is therefore generally recognized, particularly in the area of international sport, that arbitration agreements determining the jurisdiction of a particular court of arbitration are required to ensure a uniform procedure with regard to the implementation of the rules of sports law. Particularly in the area of doping, uniform application of the anti-doping rules of the federations and of the [WADA Code] is indispensable to ensure fair international arbitration sporting competitions for all athletes. Furthermore, a uniform court of arbitration for sport can contribute to the development of international sports law. Further advantages of an international sports arbitration, as compared to state courts, include the specialist knowledge of the arbitrators, the speed of the decision-making process, which is of paramount importance for the athlete involved in such proceedings, and the international recognition and execution of arbitral awards.

[85] I now turn to the application of the essential character test which requires consideration of the nature of the dispute and the scope of the arbitration clause.

<u>What is the Nature of the Dispute?</u>

[86] In *Weber*, at para. 43, the Supreme Court of Canada stated that:

> … the analysis of whether a matter falls within the exclusive arbitration clause <u>must proceed on the basis of the facts surrounding the dispute between the parties, not on the basis of the legal issues which may be framed.</u> The issue is not whether the action, defined legally, is independent of the collective agreement, but rather whether the dispute is one "arising under [the] collective agreement." Where the dispute, regardless of how it may be characterized legally, arises under the collective agreement, then the jurisdiction to resolve it lies exclusively with the labour tribunal, and the courts cannot try it. [Emphasis added]

[87] A press release issued by the plaintiffs' law firm following the commencement of this action describes the nature of their claim as follows:

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> Kirill Sveshnikov, Dmitry Strakhov and Dmitry Sokolov today filed suit in the Ontario Superior Court of Justice (Court File No: CV-17-582393) against the World Anti-Doping Agency (WADA) and Richard McLaren, a former Commissioner of WADA; claiming damages against the defendants.
>
> In their Statement of Claim, the three Cyclists allege that WADA and Richard McLaren – in a rushed and compromised investigation – unfairly implicated them in an alleged doping scheme. The Cyclists allege that as a result, they were banned from the 2016 Rio Olympics and suffered great reputational harm. The Cyclists will also ask the Court to declare that the Defendants had no basis to conclude that the Cyclists were using performance enhancing drugs.
>
> "Together, WADA and Richard McLaren prevented us from reaching our life-long goal of participating in the Rio Olympics, the pinnacle of our sport, and we allege that they wrongly associated our names with cheaters and doping." said Mr. Sveshnikov, one of the plaintiffs speaking for all three. Mr. Sveshnikov continued: "We are asking the Court to review all of the evidence and to vindicate us." [Emphasis added]

[88] In addition, its Amended Statement of Claim repeats the assertion that it made to the CAS that their urine samples had been intentionally contaminated by individuals at the Moscow Laboratory. The plaintiffs made the same assertion to the CAS.

[89] The plaintiffs submit that the nature of the disputes are different because they involve different causes of action, seeks different relief and involve different parties.

Different Claims and Different Relief

[90] The plaintiffs submit that the CAS hearing was about eligibility and the action in this court is based on different causes of action, including negligent investigation and defamation.

[91] Further, the plaintiffs submit that while the CAS hearing was about eligibility (which included the plaintiffs' submission that their samples had tested positive for doping because their samples had been contaminated), the civil claim for tort damages being advanced in this court is independent of the relief sought before the CAS. However, that submission is not fully accurate. In addition to their claim for tort damages, the plaintiffs also ask this court for a declaration that (1) the defendants have no reputable evidence to suggest that the plaintiffs used performance enhancing drugs at any time; and (2) the statements made by the plaintiffs regarding Russian cyclists do not apply to them. In my view, the declarations sought in this action are essentially the same relief that the plaintiffs sought from the CAS when they asked to be declared eligible to participate at Rio 2016.

[92] Mavromati testified that she views the claims as different:

> Q: And so here do we agree that we have a claim in the Statement of Claim which is formally different but which also touches on the merits of the issues that were before the Ad Hoc Division?

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> A: I consider these – in my opinion, these claims are different. And as I see the defamation claim and the Ontario claims relate to alleged prejudice suffered by the cyclists due to the WADA and the McLaren investigation. And the claim before the CAS Ad Hoc Division relates entirely to their declaration of eligibility to participate in the Olympic Games Rio 2016.
>
> Q: The claims in the Statement of Claim are formally different than the claims that the cyclists raised before the Ad Hoc Division, but the claims in the Statement of Claim also touch upon the merits of the issue that were before the Ad Hoc Division in Rio; do you agree?
>
> A: The merits of the issue …
>
> Q: So you've indicated the issue before the Ad Hoc Division was solely the participation of the cyclists in the Olympic Games?
>
> A: Yes.
>
> Q: So with that noted, do you agree that although the Statement of Claim raises claims that are formally different than the claims advanced before the Ad Hoc Division in Rio, the Statement of Claim also raises issues that touch upon the merits of the dispute before the Ad Hoc Division?
>
> A: So the participation or not of an athlete in the Olympic Games is obviously a major part of their career but as I understand – my understanding from reading the Statement of Claim, and that's why I drafted my opinion with this in mind, was that it related to a much broader issue which as the defamation, alleged defamation or alleged prejudice caused by the IP Report.

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[93] I disagree with the conclusion expressed by Mavromati as it does not follow from the application of the essential character test described in *Weber*. The legal issues (eligibility, defamation) do not define the essential character of the disputes. Instead, it is the factual matrix of the dispute that govern their characterization. In this case, the essential character of the dispute is the IOC's decision, including whether the plaintiffs were wrongly implicated to have benefitted from the state-run doping scheme.

[94] Similarly, in *Venneri v. Bascom*, [1996] O.J. No. 890 (Sup. Ct. (Gen Div)), a teacher sued the principal of the school at which she was employed. The defendant had written a letter outlining several grounds of misconduct. The plaintiff was dismissed by the employer and unsuccessfully grieved her dismissal. The letter was filed as evidence at the arbitration. The plaintiff commenced an action in this court claiming damages in defamation and intentional interference with economic relations as a result of the distribution of the letter. In dismissing the action, the Court applied *Weber* and stated, at para. 31:

> What then is the essence of the present action? While legally it can be characterized as a dispute between private citizens, unquestionably factually the dispute arose out of the

> employment relationship. The contents of the letter and the decision made as to its distribution all fall within the ambit of that relationship. Further, the action is simply part and parcel of the plaintiff's on-going efforts to gain redress for her dismissal. Her argument before me centred upon the role played by the letter in her dismissal; the re-litigation of that issue permeates the Statement of Claim. The letter was clearly sent to her and to the Superintendents and other Board officials in the course of the defendant's duties and as a part of the employment relationship. It was placed on her employment record, a form of discipline that by Article 24 could not be done without just cause. It was sent to others within the school and at the Board. If the plaintiff was thereby treated unfairly, that is the very type of dispute committed to the arbitration process. While an argument could be made that the sending of the letter to the other staff members at the school might have been a broader distribution than necessary for legitimate school purposes, that act is inextricably bound up in the whole factual matrix of the employment relationship and must be caught in the arbitration requirement. Although the Board is not a party to the action, it would demolish the policy set out in *Weber* to allow the plaintiff to evade the Collective Agreement which bound her at the material time by permitting the action to proceed against this defendant, who is a mere surrogate for the employer in these circumstances. The action cannot stand; the subject matter is not justiciable in this court. [Emphasis added]

[95] Given the common factual matrix of both disputes, I reject the submission that the essential character of the claim before this court is different from the proceeding before the CAS.

Different Parties

[96] The plaintiffs submit that neither WADA nor McLaren were parties or privies at the hearing before the CAS. However, the Application submitted by the plaintiffs to the CAS states otherwise. Under the heading "Other Parties, If Any" the plaintiffs identified both WADA and McLaren as persons "… who may, in your mind, be adversely affected by any decision which CAS may issue in this matter".

Conclusion

[97] I find that the essential character of the dispute before this court, as reflected in the Amended Statement of Claim, is whether the plaintiffs were wrongly denied entry to Rio 2016 by the IOC on the basis that they were implicated as having benefitted from the state-run doping scheme. In my view, the plaintiffs seek to re-litigate in this court the same factual matrix that was before the CAS.

What is the Scope of the Arbitration Clauses?

[98] The plaintiffs are subject to the arbitration clauses found in the Olympic Charter and the Entry Form:

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(1) The Olympic Charter – "Any dispute arising on the occasion of, or in connection with, the Olympic Games shall be submitted exclusively to the Court of Arbitration for Sport, in accordance with the Code of Sports-Related Arbitration"

(2) The Entry Form – "I agree that any dispute or claim arising in connection with my participation at the 2016 Games, not resolved after exhaustion of legal remedies established by NOC, the International Federation governing my sport, Rio 2016 and the IOC, shall be submitted exclusively to the Court of Arbitration for Sport ("CAS") for final and binding arbitration in accordance with the Arbitration Rules for the Olympic Games, and the Code of Sports-related Arbitration. The seat of arbitration shall be in Lausanne, Switzerland and the language of the procedure English. The decisions of the CAS shall be final, binding and non-appealable, subject to the appeal to the Swiss Federal Court. I hereby waive my right to institute any claim, arbitration or litigation, or seek any other form of relief, in any other court or tribunal."

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[99] The plaintiffs rely on Mavromati's evidence that:

- The arbitration clauses do no specify the governing law;
- The governing law of the arbitration clauses is Swiss law;
- The Ontario Claims are not disputes that can be heard or adjudicated by the CAS. It has no monopoly over all sports-related disputes as state courts all over the world have successfully decided on cases related to sports;
- The Ontario Claims are not the same as the claims that were submitted by the cyclists to the CAS. In the first claim the plaintiffs sought to be declared eligible to participate in Rio 2016 is covered by the arbitration clauses. In the second claim, the plaintiffs defamation and negligence claims are not covered by the arbitration clauses; and
- the "Arbitration clauses – interpreted under Swiss and CAS case law – do not require the Ontario Claims to be heard by [the] CAS".

[100] On cross-examination, Mavromati agreed that there were three legal frameworks by which an interpretation of the validity and scope of an arbitration agreement under Swiss law is made: (1) the law chosen by the parties; (2) the law governing the subject matter of the dispute; or (3) Swiss law. Further, Swiss law provides a clear preference for arbitration in that the most favourable of the three options is to be applied to save the arbitration clause. Mavromati conceded that she had not considered the law governing the subject matter of the dispute. Article 17 of the Arbitration Rules for the Olympic Games, referenced in the arbitration clause found in the Entry Form, governs the subject matter of the disputes before the CAS makes no mention of Swiss Law and states that the "Panel shall rule on the dispute pursuant to the Olympic Charter, the applicable regulations, general principles of law and the rules of law, the application of which it deems appropriate".

[101] In any event, even if Swiss law applied, Mavromati opined in her Report, at p. 30, that:

> It is possible that the Ontario Claims could fall within the scope of the Participation Agreements if they were exclusively and directly connected to the participation of the [Plaintiffs] in the event of the Rio Olympic Games. In other words, the arbitral tribunal would have jurisdiction to decide a claim in defamation or negligence to the extent that the direct origin of the claims was the participation of the [Plaintiffs] in the event of the Rio Olympic Games. However, the IP Reports were not directly connected to the Rio Olympic Games, but were instead an independent report commissioned by WADA that investigated the Sochi Winter Olympics 2014, which the Cyclists did not participate in. …

[102] In the end, I am not satisfied that Swiss law applies when interpreting the scope of the arbitration clause. In any event, as I will explain below, it appears that Mavromati takes a narrow view of when a dispute is connected with the Olympic Games.

[103] A Court of Appeal for Ontario case considered the phrase "in connection with". At issue in *Mantini v. Smith Lyons LLP*, [2003] O.J. No. 1831 (C.A.), was the scope of an arbitration clause in a law firm's partnership agreement which provided that "[e]xcept for any matters expressly within the sole discretion or power of the Executive Committee or Compensation Committee, any dispute in connection with this Agreement shall be settled by arbitration in accordance with the provisions set out in Schedule G". The Ontario Court of Appeal, at para. 19, stated:

> … the phrase "in connection with" has a very broad meaning. In my view, it has a broader scope than the phrase "out of", as the dispute need only be connected with the Partnership Agreement, even if it does not arise from or out of a specific provision of the agreement. I conclude that this clause represents a general or universal resort to arbitration, but for the exception for any matters expressly within the sole discretion or power of the Executive and Compensation Committees. … [Emphasis added]

[104] The plaintiffs submit that neither of the two arbitration clauses "cover the field" as in *Weber*. In this regard, the plaintiffs rely on evidence given by Fortier at his cross-examination wherein he opined that a speed skater and his wife who slip and falls while attending a skiing event do not have to bring their personal injury claim before the CAS if they wish to sue the IOC. I note that Fortier went on to say that he would find it "difficult to agree that the same factual matrix would be litigated before the CAS and before a state court".

[105] In any event, in light of *Mantini*, I find that the arbitration clauses in the Olympic Charter and the Entry Form represent a "general or universal resort to arbitration" for matters connected with the plaintiffs' participation in the Olympic Games for the following reasons. The arbitration clause in the Olympic Charter is clear that all disputes connected with the Olympic Games are to be arbitrated by the CAS. The arbitration clause found in paragraph 5 of the one-page Entry Form signed by the each of the plaintiffs repeats this principle and expressly provides that disputes connected with participation at Rio 2016 are submitted exclusively to the CAS, that a

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decision of the CAS may only be appealed to the Swiss Federal Court. Finally, I also note that paragraph 5 of the Entry Form states that "I hereby waive my right to institute any claim, arbitration or litigation, or seek any other form of relief, in any other court or tribunal".

[106] The plaintiffs assert that their claims are "… based on an independent report commissioned by WADA and written by Mr. McLaren … made two months prior to the Olympic Games" and thus is not a dispute arising in connection with the Olympic Games. This submission has no merit. It places too much emphasis on when the IP Report was prepared and too little consideration on the fact that the IP Report, and other materials from McLaren and WADA, were placed before the CAS.

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Conclusion

[107] I conclude that this action should be dismissed on the basis that the CAS has the exclusive jurisdiction to determine the dispute before this Court.

ISSUE #3: SHOULD THIS ACTION BE DISMISSED AS AN ABUSE OF PROCESS?

[108] The doctrine of abuse of process engages the inherent power of the court to prevent the misuse of its procedure, in a way that would bring the administration of justice into disrepute. It has been used "… to preclude relitigation in circumstances where the strict requirements of issue estoppel (typically the privity/mutuality requirements) are not met, but where allowing the litigation to proceed would nonetheless violate such principles as judicial economy, consistency, finality and the integrity of the administration of justice": *Toronto (City) v. C.U.P.E., Local 79*, 2003 SCC 63, [2003] 3 S.C.R. 77, at para. 37.

[109] For the doctrine of abuse of process to apply, the original dispute need not have been fully adjudicated on its merits so long as the plaintiff had the opportunity to do so: *Sauve v. Canada,* 2002 FCT 721, at paras. 20-21.

[110] The defendants submit that this action should be dismissed as an abuse of process for two reasons.

[111] First, the defendants submit that the plaintiffs, before the CAS, already challenged the IOC's decision to exclude them from Rio 2016. The challenge failed because the plaintiffs removed the IOC as a respondent. The plaintiffs now indirectly seek to challenge the IOC's decision in this action. Fortier, at paras. 139, 143-144 of his Report, more fully addresses this point:

> The Plaintiffs had the opportunity, before the CAS Panel, to address the Reports and the Affidavit of Professor McLaren and submit all their arguments as to why they should be allowed to participate in the Games. Ultimately, the CAS Panel did not deal with these evidentiary issues because the Plaintiff withdrew their appeal against the IOC. Because the party which made the decision to exclude them from the Games, the IOC, was not impleaded, the CAS Panel could not consider the relief the Plaintiffs were seeking.

> If they had not withdrawn their action against the IOC, I cannot say whether the Plaintiffs would have been successful in their appeal and allowed to compete. I do know however that the CAS Panel would have definitely considered the merits of the case and decided, based on the evidence the parties placed before it, whether the Plaintiffs could participate in the Games. …
>
> I reiterate that the Plaintiffs had the opportunity to address before the CAS Panel their complaints against WADA and Professor McLaren which they now invoke in this Action.
>
> The Plaintiffs had their "day in court" before the CAS Panel. They and they alone adopted a strategy which [led] to a final and binding decision by their adjudicator. They now seek to challenge indirectly before this Court a decision by the IOC which they had an opportunity to challenge before the CAS.

[112] The plaintiffs submit that this court is not being asked to overturn the decision of the CAS nor is it being asked to determine same eligibility question that was before the CAS. They submit there are many differences between their application to the CAS and their action in this court, including different causes of action and the request for different relief.

[113] Second, the defendants submit that there would be adverse consequences for both the international sports regime and the Canadian judicial system if this action were allowed to proceed. These consequences were described by Fortier, at paras. 145-146 of his Report, as follows:

> … I am concerned that, if their Action is allowed to proceed, members of the international sporting community will interpret this decision as an invitation to seek relief outside the confines of the international sport dispute resolution system by dressing up disputes which, at their core, are sports disputes as contractual or tortious cause of action. I note in this connection that the Plaintiffs have launched a suit in Finland against Mr. Manninen (the IOC-appointed independent arbitrator who reviewed the list of Russian cyclists provisionally entered in Rio) arising out of he very same events at issue in the CAS proceeding and in this Action.
>
> If the Action proceeds, the Ontario Superior Court of Justice could be opening its doors to claims by Russian athletes, coaches and officials who consider that they have been implicated, directly or indirectly, in the widespread doping activities uncovered by the independent WADA commissions chaired by Mr. Pound and Professor McLaren. The flood of claims would not come only from Russians; athletes, coaches and officials from other countries who are sanctioned by sport governing bodies, regardless of whether those actions are ultimately found to be justified or not, could decide to institute proceedings in national courts of any country. Such an outcome, in my opinion could fundamentally compromise the regulatory foundation which the international sports dispute resolution system is built, to the prejudice of all stakeholders of sport.

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[114] In respect of the last point made by Fortier, the defendants note that another action was commenced in July 2018 by four other Russian athletes and their manager against WADA and McLaren advances the same causes of action and repeats much of the same language as found in the Amended Statement of Claim in this action.

[115] The plaintiffs submit that the “floodgates” concern suggested by Fortier represents a “bold exaggeration” and that it stems from his desire to advocate for his friend, McLaren. While Fortier candidly acknowledged on cross-examination that he has known McLaren in a professional capacity for many years and considers him to be a friend, the extent of their friendship was not explored. I reject the plaintiffs’ submission that Fortier’s evidence was neither impartial nor objective. I did not find his evidence, nor Mavromati’s evidence for that matter, contravened their undertaking to provide this court with opinion evidence that is “fair, objective and non-partisan”.

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Conclusion

[116] The plaintiffs had commenced a hearing before the CAS to overturn the IOC’s decision to deny them entry to Rio 2016. The plaintiffs submitted to the CAS that certain Russian officials had tampered with their samples. The plaintiffs failed in their challenge, and particularly in obtaining a declaration that the plaintiffs “be deemed eligible to participate” in Rio 2016 and that the IOC is obliged to accept the plaintiffs’ application for entry to compete at Rio 2016, because the plaintiffs had removed the IOC as a respondent to the CAS hearing. The plaintiffs did not appeal the CAS decision to the Swiss Federal Court, as was their right, and have not explained why they failed to do so.

[117] The essential character of this action, although framed in tort law against only WADA and McLaren but not the IOC, is the dispute that they were allegedly wrongfully denied entry to Rio 2016. This was a dispute that the plaintiffs placed before the CAS for adjudication. Having failed to obtain a declaration from the IOC that they be granted entry to Rio 2016, the plaintiffs should not be permitted to re-litigate the factual matrix of this dispute in this court by dressing up it up as a tort claim. Had the plaintiffs, like other Russian athletes, successfully argued their case before the CAS, there would have been no basis to claim the damages sought in this action.

[118] In addition, I accept Fortier’s view that the consequences of permitting this action to proceed. To allow this action proceed would undermine the Olympic Movement and, in particular, the dispute resolution provisions found in the Olympic Charter by signalling to the international community that domestic courts are willing to entertain disputes that, at their core, are matters connected to the Olympic Games that should be determined exclusively by a specialized tribunal in accordance with the provisions of the Olympic Charter or other provisions approved by the IOC.

CONCLUSIONS

[119] For the reasons given, I grant the defendants’ motion for summary judgment. This action is dismissed. I encourage the parties to come to an agreement on the question of costs, failing which the defendants shall provide their costs submissions within two weeks, the plaintiffs shall

provide their responding cost submissions within three weeks and the plaintiffs shall provide any reply submissions within four weeks. Each submission shall be a maximum of six pages in addition to their Outline of Costs.

____

Mr. Justice M. D. Faieta

Released: February 11, 2020

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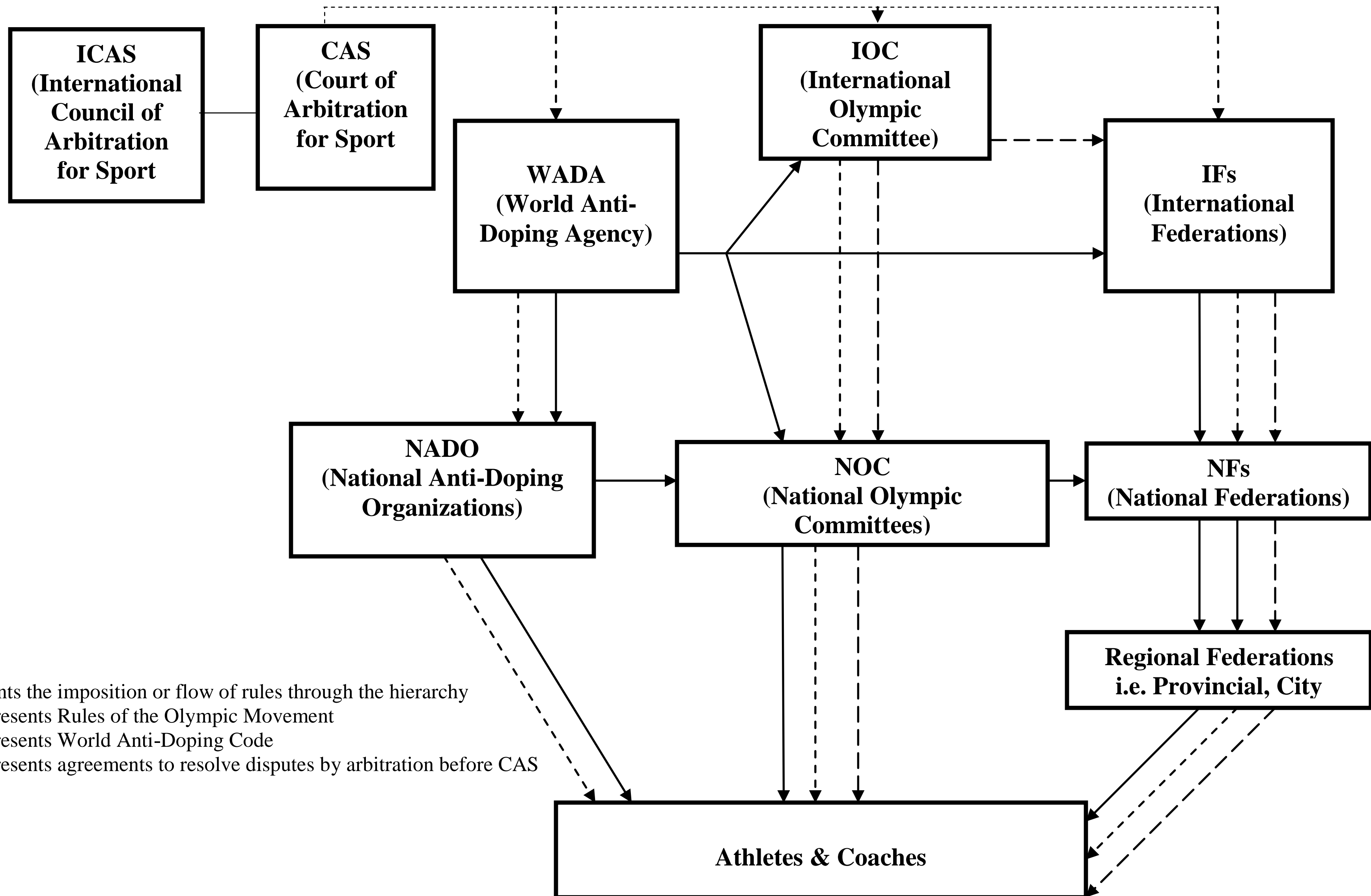
SCHEDULE "A"

STRUCTURE OF INTERNATIONAL AND NATIONAL BODIES TO RESOLVE SPORTS-RELATED DISPUTES



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SCHEDULE "B"

AGREED JOINT CHRONOLOGY OF KEY EVENTS

Date	Event
December 3, 2014	German TV documentary broadcast on allegations of Russian state-run doping in track and field
January 2015	WADA forms independent commission led by Richard Pound to investigate Russian track and field (the "Pound Commission")
November 9, 2015	Pound Commission issues first report
November 18, 2015	WADA declares Russian anti-doping agency ("RUSADA") non-complaint with the WADA Code
January 14, 2016	Pound Commission completes mandate and issues updated report
May 12, 2016	*New York Times* article published on allegations of Russian state-run doping at Sochi 2014 Olympics
May 17, 2016	IOC requests WADA to undertake a "comprehensive investigation" into allegations of state-directed Russian doping, noting that results would "greatly influence" Russian participation in the 2016 Rio Olympic Games
May 18, 2016	WADA appoints Professor McLaren as an "independent person" to investigate allegations of Russian state-directed doping
May 28, 2016	Plaintiffs each sign Rio 2016 Conditions of Participation Agreements, which state: "I agree that any dispute or claim arising in connection with my participation at the 2016 Games … shall be submitted exclusively to the Court of Arbitration for Sport ('CAS') for final and binding arbitration … I hereby waive my right to institute any claim, arbitration, or litigation, or seek any other form of relief, in any other court of tribunal"
July 18, 2016	Professor McLaren publishes the results of the initial phase of his investigation (the "Independent Person Report")
July 22, 2016	WADA sends a letter to the UCI enclosing information from Professor McLaren's investigation that related to Russian cyclists, which indicated that each of the Plaintiffs had benefitted from a "save" order in respect of positive doping tests

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July 24, 2016	IOC releases its decision establishing criteria for the participation of Russian athletes at the 2016 Rio Games (the "IOC July 24 Decision")
July 27, 2016	UCI determines that all cyclists provisionally entered by Russia were eligible to participate in the Rio Games
July 28, 2016	UCI issues a public statement regarding the eligibility of the Russian riders. UCI says it sought information from WADA about three riders who were potentially implicated in the McLaren Investigation, and that it passed the names of these three athletes to the IOC in the context of the IOC July 24 Decision. The names of the three riders were not included in UCl's public statement.
August 2, 2016	Markus Manninen, the independent expert delegated by the IOC to review the provisional entry list of Russian cyclists under the IOC's July 24 Decision, provides his recommendation that the Plaintiffs not be confirmed eligible for the Rio Games
August 3, 2016	UCI sends a second letter to the IOC confirming that all cyclists provisionally entered by Russia were eligible to participate in the Rio Games. UCI says that "the information provided so far by Prof. McLaren is not sufficient to instigate disciplinary proceedings or impose provisional suspensions under the UCI Anti-Doping Rules", but also recognizes the IOC's right to refuse entry of any athlete it does not deem fit pursuant to the Olympic Charter.
August 3, 2016	IOC sends a letter to the UCI announcing its decision to deny all three Plaintiffs entry to the Rio Games pursuant to the process set out in the IOC July 24 Decision
August 3, 2016	Plaintiffs commence an arbitration before the CAS Ad Hoc Division in Rio seeking, among other things, that they be declared eligible to compete in the Games
August 3-5, 2016	CAS Arbitration proceeds with various parties filing submissions (a detailed chronology of the material filed in the arbitration is provided at Schedule A to WADA's Factum), including Professor McLaren's affidavit of August 4, 2016, which states: "Because my investigation is continuing I am extremely reluctant to disclose specific information regarding any athletes (including Mr. Kirill Sveshnikov, Mr. Dmitry Strakhov and Mr. Dmitry Sokolov) who are the subject of the investigation. [...] However, in order to assist the CAS, because there is a pending CAS proceeding, I have provided the following summary as an amicus brief with respect to the reliable evidence in the IP investigation which 'implicates' Mr. Kirill Sveshnikov, Mr. Dmitry Strakhov and Mr. Dmitry Sokolov in the State-dictated doping cover up program."

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August 5, 2016	CAS issues an award (operative part) dismissing the Plaintiffs' arbitration
August 5, 2016	Opening ceremony of the 2016 Rio Olympic Games held
August 7, 2016	The International Paralympic Committee (the "IPC") suspends the Russian Paralympic Committee (the "RPC"), meaning that no Russian Paralympic athletes would be eligible to participate in the Rio 2016 Paralympic Games
August 23, 2016	CAS issues an award (operative part) upholding the IPC's exclusion of all Russian Paralympic athletes at the Rio 2016 Paralympic Games
December 9, 2016	Professor McLaren completes his investigation and publishes the Second McLaren Report
December 9, 2016	Russian Ministry of Sport denies the existence of government programs to support doping in sport
August 9, 2017	Plaintiffs commence a proceeding in the Helsinki District Court against Mr. Manninen alleging that their Olympic exclusion was caused by Mr. Manninen's recommendation, and that they have suffered damages as a result
September 11, 2017	Plaintiffs issue Statement of Claim and McCarthy Tétrault issues press release stating that the Plaintiffs were "banned from the 2016 Rio Olympics" and quoting one of the Plaintiffs as follows: "WADA and Richard McLaren prevented us from reaching' our life-long goal of participating in the Rio Olympics, the pinnacle of our sport"
November 16, 2017	WADA issues a statement maintaining RUSADA's status as non-compliant with the Code, based in part on the refusal by Russian authorities to publicly accept the McLaren Reports
July 2018	Five Russian athletes commence an action in this Court against WADA and Professor McLaren based on substantially similar allegations and causes of actions as those in the case at bar

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CITATION: Sokolov v. The World Anti-Doping Agency, 2020 ONSC 704
COURT FILE NO.: CV-17-582393
DATE: 20200211

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:

KIRILL SVESHNIKOV, DMITRY STRAKHOV and DMITRY SOKOLOV

Plaintiffs

– and –

THE WORLD ANTI-DOPING AGENCY and RICHARD MCLAREN

Defendants

REASONS FOR DECISION

Mr. Justice M. D. Faieta

Released: February 11, 2020

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