CITATION: Berg et al. v. Canadian Hockey League et al., 2019 ONSC 2106
DIVISIONAL COURT FILE NOs.: 284/17; 584/17
DATE: 20190403

ONTARIO

SUPERIOR COURT OF JUSTICE

DIVISIONAL COURT

Sachs, Thorburn and R. Reid JJ.

BETWEEN:	
SAMUEL BERG AND DANIEL PACHIS Appellants (Respondents by Cross-Appeal)	*Theodore P. Charney, Steven Barrett, Tina Q. Yang* and *Joshua Mandryk*, for the Appellants (Respondents by Cross-Appeal)
– and –	
CANADIAN HOCKEY LEAGUE, ONTARIO MAJOR JUNIOR HOCKEY LEAGUE, ONTARIO HOCKEY LEAGUE, WESTERN HOCKEY LEAGUE, QUEBEC MAJOR JUNIOR HOCKEY LEAGUE INC., WINDSOR SPITFIRES INC., LONDON KNIGHTS HOCKEY INC., BARRIE COLTS JUNIOR HOCKEY LTD., BELLEVILLE SPORTS AND ENTERTAINMENT CORP., ERIE HOCKEY CLUB LIMITED, JAW HOCKEY ENTERPRISES LP, GUELPH STORM LIMITED, KINGSTON FRONTENACS HOCKEY LTD., KINGSTON FRONTENACS HOCKEY CLUB, 2325224 ONTARIO INC., MISSISSAUGA STEELHEADS HOCKEY CLUB INC., NIAGARA ICEDOGS HOCKEY CLUB INC., BRAMPTON BATTALION HOCKEY CLUB LTD., NORTH BAY BATTALION HOCKEY CLUB LTD, GENERALS HOCKEY INC., OTTAWA 67'S LIMITED PARTNERSHIP, THE OWEN SOUND ATTACK INC., PETERBOROUGH PETES LIMITED, COMPUWARE	*Patricia D.S. Jackson, Lisa Talbot, Sarah Whitmore* and *Irfan Kara*, for the Respondents (Appellants by Cross-Appeal) *Shantona Chaudhury* and *Christina Senese*, for the Law Foundation of Ontario

SPORTS CORPORATION, IMS HOCKEY)
CORP., SAGINAW HOCKEY CLUB,)
L.L.C., 649643 ONTARIO INC c.o.b. as)
SARNIA STING, 211 SSHC CANADA)
ULC o/a SARNIA STING HOCKEY)
CLUB, SOO GREYHOUNDS INC.,)
McCRIMMON HOLDINGS, LTD. and)
32155 MANITOBA LTD., A)
PARTNERSHIP c.o.b. as BRANDON)
WHEAT KINGS., 1056648 ONTARIO)
INC., REXALL SPORTS CORP., EHT,)
INC., KAMLOOPS BLAZERS HOCKEY)
CLUB, INC., KELOWNA ROCKETS)
HOCKEY ENTERPRISES LTD.,)
HURRICANES HOCKEY LIMITED)
PARTNERSHIP, PRINCE ALBERT)
RAIDERS HOCKEY CLUB INC.,)
BRODSKY WEST HOLDINGS LTD.,)
REBELS SPORTS LTD., QUEEN CITY)
SPORTS & ENTERTAINMENT GROUP)
LTD., SASKATOON BLADES HOCKEY)
CLUB LTD., VANCOUVER JUNIOR)
HOCKEY LIMITED PARTNERSHIP,)
8487693 CANADA INC., CLUB DE)
HOCKEY JUNIOR MAJEUR DE BAIE-)
COMEAU INC., CLUB DE HOCKEY)
DRUMMOND INC., CAPE BRETON)
MAJOR JUNIOR HOCKEY CLUB)
LIMITED, LES OLYMPIQUES DE)
GATINEAU INC., HALIFAX)
MOOSEHEADS HOCKEY CLUB INC.,)
CLUB HOCKEY LES REMPARTS DE)
QUEBEC INC., LE CLUB DE HOCKEY)
JUNIOR ARMADA INC., MONCTON)
WILDCATS HOCKEY CLUB LIMITED,)
LE CLUB DE HOCKEY L'OCEANIC DE)
RIMOUSKI INC., LES HUSKIES DE)
ROUYN- NORANDA INC., 8515182)
CANADA INC. c.o.b. as)
CHARLOTTETOWN ISLANDERS, LES)
TIGRES DE VICTORIAVILLE (1991))
INC., SAINT JOHN MAJOR JUNIOR)
HOCKEY CLUB LIMITED, CLUB DE)
HOCKEY SHAWINIGAN INC., CLUB DE)
HOCKEY JUNIOR MAJEUR VAL D'OR)
INC., WEST COAST HOCKEY)

ENTERPRISES LTD., MEDICINE HAT TIGERS HOCKEY CLUB LTD., PORTLAND WINTER HAWKS, INC., BRETT SPORTS & ENTERTAINMENT, INC., THUNDERBIRD HOCKEY ENTERPRISES, LLC, TOP SHELF ENTERTAINMENT, INC., SWIFT CURRENT TIER 1 FRANCHISE INC., 7759983 CANADA INC., LEWISTON MAINEIACS HOCKEY CLUB, INC., KITCHENER RANGER JR A HOCKEY CLUB, KITCHENER RANGERS JR "A" HOCKEY CLUB, SUDBURY WOLVES HOCKEY CLUB LTD., GROUPE SAGS 7-96 INC., MOOSE JAW TIER ONE HOCKEY INC. DBA MOOSE JAW WARRIORS, KOOTENAY ICE HOCKEY CLUB LTD., LETHBRIDGE HURRICANES HOCKEY CLUB, and LE TITAN ACADIE BATHURST (2013) INC./THE ACADIE BATHURST TITAN (2013) INC.

Respondents
(Appellants by Cross-Appeal)

HEARD at Toronto: January 29 and 30, 2019

THE COURT

OVERVIEW

[1] On April 27, 2017, Perell J. ("the motion judge") certified a class action on behalf of Ontario Hockey League ("OHL") players who assert a claim that they were employees and as such should have received the minimum employment benefits they were entitled to under the *Employment Standards Act,* 2000, S.O. 2000, c. 41 ("*ESA*"). The motion judge certified the statutory claims and an unjust enrichment claim as against the OHL clubs located in Ontario ("the Canadian Defendants"). The motion judge refused to certify a claim against

any American clubs (the "U.S. Defendants") and refused to certify five of the claims pleaded by the Plaintiffs on the basis that they were redundant.[1]

[2] On September 11, 2017 the motion judge made an order as to costs in which he awarded the Plaintiffs the full amount of the partial indemnity costs they claimed ($1,212,065.63), but ordered that $500,000.00 of those costs be paid forthwith and the balance of $712,065.63 in the cause. The motion judge also awarded the U.S. Defendants costs of $200,000.00, which he ordered be credited against the costs award made against the Canadian Defendants. As a result, the Plaintiffs received $300,000.00 by way of costs forthwith, a large percentage of which was paid to defray disbursements. The motion judge made his order with the intention that the U.S. Defendants' costs were not to be paid by the Law Foundation of Ontario ("LFO"), in spite of the fact that the Plaintiffs had a litigation funding agreement with the LFO through the Class Proceedings Fund ("CPF"), which is responsible for adverse costs awards.

[3] This is an appeal by the Plaintiffs of the motion judge's refusal to certify all of their pleaded causes of action and of his costs award. With respect to the costs award, the Plaintiffs appeal both the "in the cause" portion of the motion judge's decision and his finding that the costs order of the U.S. Defendants not be paid by the LFO.

[4] The Defendants seek leave to cross-appeal the motion judge's decision to certify the action on the basis that the representative Plaintiffs have a conflict with other putative members of the class.

[5] LFO seeks leave to cross-appeal the motion judge's costs award against the U.S. Defendants. First, they argue that to the extent the Plaintiffs bear any responsibility for the costs award, it is the LFO who should pay the award. However, they argue that the Canadian Defendants should pay that award and they also argue that the quantum of the award was excessive.

[6] For the reasons that follow, we would allow the Plaintiffs' appeal with respect to the motion judge's refusal to certify all of their causes of action and we would allow their appeal as to costs to the extent that we agree that the costs owed to the U.S. Defendants should be paid by the LFO. We would deny the Defendants' application for leave to cross-appeal the motion judge's decision to certify the class action, and LFO's applications for leave to cross-appeal the quantum of costs payable to the U.S. Defendants and payment of those costs by the Canadian Defendants.

FACTUAL BACKGROUND

[7] The factual background to this action is set out in detail in the motion judge's comprehensive and beautifully written reasons. As a result our summary will be brief.

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[1] The following claims were not certified by the motion judge: (a) breach of contract; (b) negligence; (c) breach of duty of honesty, good faith, and fair dealing; (d) conspiracy; and (e) waiver of tort ("Uncertified Common Issues").

[8] The highest tier of minor hockey is known as "major junior" hockey. The national major junior league is the Canadian Hockey League ("CHL"), an umbrella organization presiding over regional member leagues: the OHL, the Western Hockey League, and the Quebec Major Junior Hockey League. There are 20 OHL clubs: 17 located in Ontario, two located in Michigan, and one located in Pennsylvania.

[9] The CHL and its member leagues function as development leagues for the National Hockey League ("NHL"), which is the premier professional men's hockey league in North America. Each of the CHL leagues has a strictly defined geographic territory over which it owns the rights of all junior-aged players, who range in age from 16 to 20. Every OHL player must sign a Standard Player Agreement ("SPA").

[10] In 2007, the OHL's SPA characterized player salaries as "remuneration" and as an "allowance" paid in exchange for the players' "services". The SPA was revised before the 2009-2010 season to add an express statement that the relationship between a player and the OHL is that of an independent contractor earning a "fee" in exchange for the player's "services". It stated that "nothing in this Agreement shall constitute the parties as employer/employee". After a failed unionization drive in 2012, OHL players were required to execute a new SPA for the 2013-2014 season. Among other things, the SPA was reformulated to take out independent contractor language and all reference to "service". The SPA now stated that "this Agreement is not a contract of employment between the club and the player". The language of "fee" or "allowance" became "reimbursement" and "honorarium", and players were classified as "amateur athletes".

[11] The two representative plaintiffs in this action are both former OHL players. They bring this action on behalf of a class of current and former OHL players. They allege that the SPA constitutes a standard form employment contract which sets out the duties and obligations of players as employees and the duties and obligations of the clubs and the OHL/CHL as employers. They assert that they have been unlawfully denied employment status and associated benefits, including minimum wages. They advanced seven claims: (1) breach of statute; (2) breach of contract; (3) breach of the duty of honesty, good faith, and fair dealing; (4) negligence; (5) conspiracy; (6) unjust enrichment and (7) waiver of tort.

[12] Parallel certified or proposed class proceedings are underway in Alberta and Québec regarding the major junior hockey players and leagues based in those provinces.

THE CERTIFICATION DECISION

[13] The motion judge found that all of the causes of action pleaded by the Plaintiffs satisfied the "cause of action criterion" under s. 5(1)(a) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 (the "*CPA*"). He also held that the "identifiable class criterion" under s. 5 (1)(b) of the *CPA* was satisfied with a minor amendment to add a closing date without prejudice to the date being amended.

[14] With respect to the "common issues criterion" at s. 5(1)(c), the motion judge held that the Plaintiffs satisfied the criterion with respect to two of their pleaded causes of action (breach

of statute and unjust enrichment), but refused to certify the remaining causes of action (the Uncertified Common Issues) because they failed the "preferable procedure criterion" at s. 5(1)(d).

[15] In his preferable procedure analysis the motion judge relied on *Hryniak v. Mauldin*, 2014 SCC 7, [2014] 1 S.C.R. 87 ("*Hryniak*") to import a proportionality component into that criterion. The motion judge began his proportionality analysis by finding that the Uncertified Common Issues were "redundant" causes of action that added nothing to the Plaintiffs' central claim that the class members were employees. He found that that the "redundant" common issues would cause enormous problems of manageability and burdensome complexity. The motion judge noted, at para. 205, that as the preferable procedure criterion is "designed to ensure that the class members get the access to justice they need, keeping in mind a genuine judicial economy of a manageable class claim", the proportionality analysis was against certification for the Uncertified Common Issues.

[16] The motion judge also found that the claims against the U.S. Defendants did not satisfy the preferable procedure criterion, citing the fact (among other things) that they would cause problems of manageability, that there was a prospect of inconsistent outcomes, and that access to justice was available to the players on American clubs through claims brought in Michigan and Pennsylvania.

[17] With respect to the "representative plaintiff criterion" at s. 5(1)(e) of the *CPA*, the motion judge found that the Plaintiffs satisfied the criterion and, most importantly, could represent the class without a conflict of interest. In this regard, the Defendants had argued that the Plaintiffs, as former players, were in a conflict with the class members who were current players. According to the Defendants, if the Plaintiffs were successful in certifying their action, this would create a contingent financial liability for the clubs that would cause those clubs to have to cut the benefits they were paying to the current players. The Plaintiffs, as former players, had no interest in safeguarding the benefits that were paid to current players. The motion judge rejected this argument, finding at para. 233, among other things, that "if the difference between the situation of the representative plaintiff and the class members does not impact on the common issues, then the difference does not affect the representative plaintiff's ability to adequately and fairly represent the class and there is no conflict of interest." In the case at bar, the difference alleged by the Defendants did not arise out of the resolution of the common issues, but out of something entirely extraneous to the common issues, namely, the alleged financial instability of the Defendant clubs.

[18] The Plaintiffs were granted leave to appeal the motion judge's refusal to certify the Uncertified Common Issues. The Defendants seek leave to cross-appeal the motion judge's finding that the Plaintiffs were suitable representative plaintiffs. If leave is granted they seek to have that finding overturned and an order made denying certification.

JURISDICTION

[19] The Divisional Court has jurisdiction to hear this appeal pursuant to s. 30(2) of the *CPA*, which states that "[a] party may appeal to the Divisional Court from an order certifying a

proceeding as a class proceeding, with leave of the Superior Court of Justice as provided in the rules of court."

[20] On February 23, 2018, the Plaintiffs were granted to leave to appeal the certification decision and the costs decision. The parties agree that the combined effect of Rules 61.07(1) and 61.03(8) in the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194 ("*Rules*") is that if leave to appeal has been granted, a respondent may request leave to cross-appeal from the panel hearing the appeal.

THE APPEAL ON THE MERITS

Did the Motion Judge Err in not certifying the Uncertified Common Issues?

Standard of Review

[21] The Plaintiffs submit that the motion judge's decision discloses errors of law that are subject to a standard of review of correctness. They rely on *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 65 ("*AIC Limited*") for the proposition that any deference owed to a motion judge at certification "does not protect the decision against review for errors in principle which are directly relevant to the conclusion reached".

[22] The Defendants agree that errors of law or principle are subject to review on a standard of correctness. However, they submit that the motion judge's decision not to certify the Uncertified Common Issues was consistent with the preferable procedure analysis in Supreme Court jurisprudence and disclosed no error of law. According to the Defendants, the motion judge's decision not to certify the Uncertified Common Issues is an example of appropriate case management of a proposed class action – a decision that is entitled to special deference from this court.

Errors Alleged by the Plaintiffs

[23] The Plaintiffs allege that the motion judge made four errors in principle:

1. He erred in his application of proportionality to the preferable procedure analysis;
2. He erred in relying on s. 5(1)(d) of the *CPA* to effectively strike out tenable causes of action;
3. His appreciation of the comparative analysis mandated by the Supreme Court of Canada in *AIC Limited* was incorrect; and
4. He erred in finding that the five uncertified causes of action were redundant.

The Law Governing the Preferability Criterion

[24] Section 5(1)(d) of the *CPA* provides that on a certification motion the representative Plaintiff must satisfy the court that "a class proceeding would be the preferable procedure for the resolution of the common issues".

[25] In *AIC Limited*, the leading decision on this criterion, the Supreme Court of Canada states (at para. 48) that in order to satisfy the preferability requirement, the representative plaintiff must show "(1) that a class proceeding would be a fair, efficient and manageable method of advancing the claim, and (2) that it would be preferable to any other reasonably available means of resolving the class members claims". The second factor requires conducting a comparative analysis between a class action and other alternative processes (including non-litigation alternatives) for resolving the class members' claims.

[26] In order to determine whether a class proceeding would be the preferable procedure for the resolution of the common issues, the common issues must be considered in the context of the action as a whole. In other words, how much will the resolution of the common issues contribute to resolving the action as a whole? Will it advance the claims substantially or just in a minor way, leaving the bulk of the issues to be determined by individual trials? In answering these questions "it is important to adopt a practical cost-benefit approach… and to consider the impact of a class proceeding on class members, the defendants, and the court" (*AIC Limited*, at para. 21).

[27] The preferability procedure analysis must also consider the extent to which a proposed class proceeding will further the three principal goals of class actions – judicial economy, behaviour modification, and access to justice. This does not mean that a particular class action must achieve all of these goals in a specific case. As put in *AIC Limited*, at para. 23:

> This is a comparative exercise. The court has to consider the extent to which the proposed class action may achieve the three goals of the *CPA*, but the ultimate question is whether other available means of resolving the claim are preferable, not if a class action would fully achieve these goals. This point is well expressed in one U.S. Federal Court of Appeals judgment and it applies equally to *CPA* proceedings: "Our focus is not on the convenience or burden of a class action suit *per se*, but on the relative advantages of a class action suit over whatever other forms of litigation [and I would add dispute resolution] that might be realistically available to the plaintiffs".

[28] The Court in *AIC Limited* points out, at para. 24, that access to justice has two interconnected dimensions:

> One focuses on process and is concerned with whether the claimants have access to a fair process to resolve their claims. The other focuses on substance – the results to be obtained – and is concerned with whether the claimants will receive a just and effective remedy for their claims if established.

[29] In *AIC Limited*, at paragraph 26, the court held that, "A class action will serve the goal of access to justice if (1) there are access to justice concerns that a class action could address; and (2) these concerns remain even when alternative avenues of redress are considered". To help a court determine whether both of these elements were present, the Court suggested a series of questions that a court should address. They are:

(i) What are the barriers to access to justice?

(ii) What is the potential of the class proceedings to address these barriers?

(iii) What are the alternatives to class proceedings?

(iv) To what extent do the alternatives address the relevant barriers?

(v) How do the two proceedings compare?

The Motion Judge's Decision

[30] In his decision, the motion judge sets out the law governing the preferable procedure criterion, including the principles cited above. After doing so he states, at para. 187:

> And one should now add to the preferable procedure factors the factor of the relationship between access to justice, which is the preeminent concern of class proceedings, and proportionality in civil proceedings.

[31] The motion judge then cites the Supreme Court's decision in *Hryniak* as to the need to improve access to justice by moving away from the conventional trial to "more proportional procedures tailored to the needs of a particular case".

[32] At para. 188, the motion judge states that "[t]he proportionality analysis, which addresses how much procedure a litigant actually needs to obtain access to justice, fits nicely with the part of the preferable procedure analysis that considers whether the claimants will receive a just and effective remedy for their claims".

[33] The motion judge then considered the various causes of action put forward by the Plaintiffs. He found that the action involved answering a single question – when do amateur athletes become employees of their clubs and subject to various employment standards statutes? He states that the Plaintiffs had brought six causes of action to answer this one single question (in fact, the Plaintiffs had brought seven). While these causes of action may have been properly pleaded, they were redundant and unnecessary for the Plaintiffs to get a just and effective remedy.

[34] As put by the motion judge, at paras. 198-199:

> In this proposed class action, if the Plaintiffs prove that as a common employer the Defendants breached the various employment standards statutes, then they will succeed on their breach of statute claim and on their unjust enrichment claim and there would be no need to prove breach of contract, negligence, breach of duty of honesty, good faith and fair dealing, conspiracy and waiver of tort.
>
> Conversely, if the Plaintiffs fail to prove that the Defendants breached the various employment statutes, they will not be able to snatch victory from the jaws of defeat by proving breach of contract, negligence, breach of duty of honesty, good faith and fair dealing, conspiracy or waiver of tort, because all

> of these claims will necessarily fail with the failure of the breach of statute claim.

[35] The motion judge also found, at para. 200, that the "redundant causes of action cause enormous problems of manageability". In making this comment he refers to one cause of action – conspiracy – and finds that this claim "would probably lead to the OHL, CHL, and the teams of the OHL retaining independent defence counsel because each defendant would be entitled to a separate defence that they were not co-conspirators and that each did not have the intent to injure the players." Thus, instead of one defence counsel, there would be 20 firms mounting defences.

[36] The motion judge concluded his analysis, at paras. 204-206, with the following comments:

> In my opinion, it is inimical to the access to justice principles of the *Class Proceedings Act, 1992* to succumb to the argument that it would be simply unjust and unfair to deny the Class Members the opportunity to prove all the claims they have that satisfy the criteria for certification without regard to whether they actually need to prove all those claims in order to achieve access to justice.
>
> The *Class Proceedings Act, 1992* is designed to provide the class members with the access to justice that they need, and needs are different than wants. For a cause of action to be certified, the preferable procedure criterion must be satisfied and that criterion is designed to ensure that the class members get the access to justice they need, keeping in mind a genuine judicial economy of a manageable mass claim.
>
> In my opinion, in the case at bar, only the breach of statute and unjust enrichment causes of action need be certified. I conclude that only for these causes of action, the preferable procedure criterion is satisfied.

Analysis

Was the Motion Judge's Proportionality Analysis Compatible with the Current Law on Preferable Procedure?

[37] As outlined above, in *AIC Limited,* the Supreme Court summarized that in its most basic form the preferable procedure inquiry is a comparative analysis between the relative advantages of a class action over other forms of resolving the dispute that may realistically be available to the plaintiffs.

[38] The motion judge's reasons on preferable procedure do not include a comparative analysis of this type. Instead, they focus on proportionality and redundancy, such that they become a comparison between a class action that includes all of the causes of action that the Plaintiffs pleaded (which the motion judge found met the cause of action criterion) and a class action with only two of those causes of action. This is not the inquiry that *AIC Limited* mandates.

[39] In his analysis, the motion judge focuses on access to justice – which the Supreme Court in *AIC Limited* has confirmed is an important goal of class actions. The Court of Appeal in *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901, 327 O.A.C. 156 held that the preferable procedure assessment must be conducted by addressing the five questions set out in *AIC Limited.* They require a judge to identify the barriers to access to justice, discuss the potential of class proceedings to address those barriers, look at alternatives to class proceedings, ask how the alternatives can address the relevant barriers, and examine how the two proceedings compare. The motion judge in his preferability analysis sets out the questions, but never addresses them.

[40] According to the Defendants, the questions can be rephrased to encompass the comparative analysis the motion judge did conduct: an analysis focused on two forms of class proceedings. We disagree. To reframe the questions in the way the Defendants propose is to distort the questions beyond recognition. The intent of the questions is to focus on what advantages the proposed class action has over other dispute resolution alternatives in terms of access to justice. It is not to pare down properly pleaded, otherwise certifiable causes of action based on the certification judge's own judgment as to how the class action should be litigated.

[41] The motion judge's reasons focus on the relationship between proportionality and access to justice, a relationship that was highlighted by the Supreme Court in *Hryniak.*

[42] In *Hryniak*, a motion judge found that the plaintiffs' claims could be resolved without a trial at a summary judgment motion. The Supreme Court of Canada upheld that decision, finding, at para. 5, that the "summary judgment rules must be interpreted broadly, favouring proportionality and fair access to the affordable, timely and just adjudication of claims".

[43] *Hryniak* is essentially a judicial reminder that not all disputes need to be resolved through full-blown trials, and that insisting of full-blown trials can undermine, rather than promote, access to justice. The Supreme Court noted, at paras. 27-29:

> There is growing support for the alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflect the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts on the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and the alternative modes of adjudication are no less legitimate than the conventional trial.
>
> This requires a shift in culture. The principal goal remains the same: a fair process that results in a just adjudication of disputes. A fair and just process must permit a judge to find the facts necessary to resolve the dispute and to apply the relevant legal principles to the facts as found. However, that process is illusory unless it is also accessible – proportionate, timely and affordable. The proportionality principle means that the best forum for resolving a dispute is not always with the most painstaking procedure.

> There is, of course, always some tension between accessibility and the truth-seeking function but, much as one would not expect a jury trial over a contested parking ticket, the procedure used to adjudicate civil disputes must fit the nature of the claim. If the process is disproportionate to the nature of the dispute and the interests involved, then it will not achieve a fair and just result.

[44] Thus, in *Hryniak*, the cry for proportionality is directed at coming up with efficient and fair *procedures* for resolving disputes. It is not a direction to use what is essentially a procedural motion such as certification to make decisions of *substance* about what properly pleaded causes of action parties are entitled to advance.

[45] In his proportionality analysis, the motion judge does address the *Hryniak* question when he asks "how much procedure a litigant actually needs to obtain access to justice". He then goes on to state that the *CPA* is designed to give litigants the access to justice they "need" as opposed to "want". In his view the uncertified causes of action were unnecessary "wants". This analysis raises two concerns.

[46] First, while the motion judge describes his proportionality analysis as a procedural one consistent with *Hryniak*, in fact he uses the concept of proportionality to dismiss most of the plaintiffs' causes of action. A decision to eliminate causes of action is a substantive decision, not a procedural one.

[47] Second, in making the decision as to which causes of action are "needed" at the certification stage (when pleadings may not yet been closed and the merits of the action are not the focus), there is a real concern that it is the judge, rather than plaintiffs' counsel, who is making the call as to how the action should be litigated. Is this appropriate when the motion judge's knowledge of the litigation is limited by the legislatively prescribed nature of certification, in accordance with s. 5(5) of the *CPA*, as a preliminary, procedural motion that is not to determine the merits of the proceeding?

[48] Section 12 of the *CPA* provides that "[t]he court, on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a class proceeding to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate." However, *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572, 387 D.L.R. (4th) 603, at para. 68 makes it clear that this provision is procedural and must be exercised in accordance with the *CPA*, including its direction regarding the nature of a certification motion.

[49] At some stage of the proceedings a judge may be in the position to decide that a particular cause of action can be determined without the necessity of a trial. A motion judge at the summary judgment stage may be equipped with all the tools necessary to make this determination. Unlike the certification motion judge, a summary judgment motion judge has closed pleadings and a full evidentiary record, giving her the tools to gain a full understanding of the litigation.

[50] It is worth noting that the two cases that the motion judge cites in support of his decision not to certify what he considered to be redundant claims were both decisions of his own. In the Alberta certification proceeding, which was decided on a similar evidentiary record in support of substantially identical claims, Hall J. certified all of the Plaintiffs' claims finding that he did not feel that he could "dispose of properly pleaded causes of action in a class action certification application": see *Walter v. Western Hockey League*, 2017 ABQB 382, 62 Alta. L.R. (6th) 85, at para. 46. Hall J.'s decision was upheld on appeal: *Walter v. Western Hockey League*, 2018 ABCA 188, 62 Alta. L.R. (6th) 215.

Did the Motion Judge Err in finding that the Common Issues Were Redundant?

[51] As already noted, according to the motion judge the Plaintiffs brought "six causes of action to answer one critical question" – a question that he describes at para. 190 as being: "[w]hen do amateur athletes become employees of their teams and subject to various employment standards statutes?" The motion judge notes, at para. 198, that "if the Plaintiffs prove that as a common employer the Defendants breached the various employment standards statutes, then they will succeed on their breach of statute claim and on their unjust enrichment claim" and there would be no need to prove any of the other claims. The motion judge held, at para. 199:

> [I]f the Plaintiffs fail to prove that the Defendants breached various employment statutes, they will not be able to snatch victory from the jaws of defeat by proving breach of contract, negligence, breach of duty of honesty, good faith and fair dealing, conspiracy, or waiver of tort, because all of these claims will necessarily fail with the failure of the breach of statute claim.

[52] Thus, the motion judge's analysis depends entirely upon whether the Plaintiff's breach of statute claim fails. He does not go on to consider that one possible result might be that the Plaintiffs' breach of statue claim succeeds, but the claims against the individual clubs and leagues as a common employer fails. If that were to happen, the claims against the OHL and the CHL would be dismissed, as would the claims against each of the clubs as common employers. However, the allegedly "redundant" causes of action, particularly conspiracy, could provide a remedy against the two leagues and improve the class members' chances of collecting on any judgment, thereby furthering the objective of access to justice and, to use the words of the motion judge, ensuring that the claimants receive a "just and effective remedy for their claims".

[53] The five-step test set out by the Supreme Court of Canada in *Canada Cement Lafarge Ltd. v. British Columbia Lightweight Aggregate Ltd.*, [1983] 1 S.C.R. 452, 145 D.L.R. (3d) 385 is very different from the common law or statutory tests for making out a common employer claim. Thus, the Plaintiffs may succeed on a conspiracy claim, but fail to establish that the Defendants are common employers. If they do, they will be able to collect judgment from any members of the conspiracy, which could include all of the Defendants. Further, if the Plaintiffs are successful in proving an unlawful conspiracy, their chances of collecting on a punitive damages award are enhanced.

[54] With regard to complexity and manageability, the motion judge did not advert to any specific concerns arising from the evidence about any of the Uncertified Common Issues, except with respect to the conspiracy claim. No evidence was introduced by the parties on this point, and so the motion judge's concerns about potential complexities, such as the introduction of additional counsel, was pure speculation.

[55] The motion judge also found that the negligence claim was redundant. There is no issue that a plaintiff is entitled to sue concurrently in both negligence and breach of contract: *Central Trust Co. v. Rafuse*, [1986] 2 S.C.R. 147, 31 D.L.R. (4th) 481 ("*Rafuse*"). In *Rafuse,* the Supreme Court held that the plaintiffs have the right to assert a cause of action that appears to be the most advantageous to them in respect of any particular legal consequence.

[56] The test for establishing a duty of care and negligent breach of that duty is different from the test for establishing a breach of employment standards legislation. Further, in this case, if the Plaintiffs were to succeed in establishing negligence, they might have access to insurance coverage that they would not otherwise have. Given the Defendants' evidence that "certification could result in the loss of several [clubs] that would fold up operations", this could have a significant impact on the claimants' ability to enforce any judgment they obtain. This too would enhance access to justice.

[57] The motion judge held that the breach of contract claim and the breach of the contractual duties of honesty, good faith, and fair dealing were also redundant. His reasons provide no particulars of his analysis in this regard. First of all, it is not uncommon for breach of employment statute claims to be framed in breach of contract, based on an analysis that these statutes are an implied term of all employment contracts. Second, the terms of the players' SPAs may incorporate rights and duties which differ from the duties of an employer or the rights of an employee under a statute. No evidence was placed on the record concerning this issue before the motion judge. As the motion judge emphasized in his costs decision, the motion he was dealing with was a procedural motion. The motion judge's task was to look at whether certain minimum evidentiary and procedural requirements were met concerning the causes of action at issue, not to delve into the substance of those causes of action, which would require a merits based analysis.

[58] In finding that these causes of action were redundant, the motion judge also failed to consider whether different damages are available under breach of statute and breach of contractual duties. For example, damages for breach of contract are compensatory for the loss caused by the breach (*Fidler v. Sun Life Assurance Co. of Canada*, 2006 SCC 30, [2006] 2 S.C.R. 3), while damages for breach of the contractual duties of honesty, good faith and fair dealing are compensatory for what the plaintiffs' economic position would have been, had the defendants fulfilled their duties (*Bhasin v. Hrynew*, 2014 SCC 71, [2014] 3 S.C.R. 494 ("*Bhasin*")). Further, a breach of the duty of good faith may support an award of punitive damages: *Bhasin*, at para. 55.

[59] With respect to the waiver of tort claim, the motion judge stated, at para. 146:

> I pause here to say, it is debatable that waiver of tort, which is coupled with unjust enrichment, is correctly classified as a cause of action, but for present purposes I shall treat it is as a cause of action, and I also note that insofar as it provides restitutionary relief, waiver of tort is redundant to the Plaintiff's unjust enrichment claim, which does provide the remedies of constructive trust and the disgorgement of ill-gotten gains.

[60] The motion judge correctly identified that waiver of tort has been the subject of much discussion and debate. As a concept it is a vehicle that permits a plaintiff to recover a disgorgement of the defendants' profits.

[61] Proving a claim in unjust enrichment requires proving: (1) that the defendant was enriched; (2) that the plaintiff was correspondingly deprived; and (3) that there was no juristic reason for the enrichment. In an action for unjust enrichment, "the defendant is required to "give back" property acquired from the plaintiff, which constitutes the "corresponding deprivation". In the case of the remedy of disgorgement, the defendant is required to "give up" property acquired from any source as a result of the wrong committed against the plaintiff" (Peter W. Kryworuk & Yola S. Ventresca, *Waiver of Tort on Trial* (The Civil Litigation Summit, Law Society of Upper Canada, 2012), at p. 3-3). There is no need to prove a corresponding deprivation. Thus, it is not correct to say that waiver of tort is redundant to the plaintiffs' unjust enrichment claim.

Conclusion

[62] For these reasons we find that the motion judge erred in principle when he did not certify the Uncertified Common Issues. As a result the Plaintiffs' appeal in this regard should be allowed, the motion judge's order dismissing the claims should be set aside and an order should go certifying the additional common issues set out at Schedule "A" to these reasons.

CROSS-APPEAL ON THE MERITS

Should the Defendants Be Granted Leave to Appeal the Motion Judge's Finding that the Plaintiffs Were Suitable Representative Plaintiffs?

Summary of the Position of the Defendants

[63] The Defendants begin their submissions by stating that the Plaintiffs claim is a novel one; no court in Canada or the United States has ever determined that athletes in the position of the proposed class members are employees. As a result the Defendants have never structured their programs or finances on the basis that they have an obligation to pay players as employees. This is important since the Plaintiffs are seeking retroactive relief.

[64] According to the Defendants, OHL players are afforded a multitude of benefits relating to hockey development, educational pursuits, and *in loco parentis* supports not available in other hockey leagues. They state that offering these programmes costs the Defendant clubs between $40,000 and $50,000 per player per season in an environment where one-third of the OHL clubs lose approximately $100,000 to $800,000 per season.

[65] The Defendants submit that given their resources (which are finite) even certifying the Plaintiffs' claim will fundamentally alter the CHL. The Defendants will not be able to afford to continue to provide the current benefits and supports while also paying the players as employees. Thus, success for the Plaintiffs would lead to either the elimination of these benefits or the elimination of many of the clubs or both. This change would be detrimental to many of the class members whose interests lie in maintaining the benefits and supports they currently receive. According to the Defendants, these class members (who are current players) do not want to be treated as employees and would not have chosen to play for the OHL without receiving the current benefits. Further, many parents would not have allowed their children to enter into an employment relationship with the Defendants if it meant replacing the relationship that currently exists.

[66] The Defendants submit that the effect of this reality is that there is an irresolvable conflict between the members of the class. Further, they argue, opting out presents no solution to this conflict. If a court determines that an employment relationship exists then the provisions of the *ESA* will apply league-wide to all players.

[67] According to the Defendants, this irresolvable conflict of interest among the class means that the motion judge erred in law in certifying the class action. The representative Plaintiffs cannot fairly and adequately represent the whole class as the change in relationship they propose is contrary to certain class members' interests and deliberate choices.

[68] There is another minor point that the Defendants make about the representative Plaintiffs that the Plaintiffs concede: Mr. Pachis cannot act as a representative plaintiff because he does not fall within the class definition as revised by the motion judge.

Test for Leave to Appeal

[69] Of the two pathways by which a party may be granted leave to appeal the interlocutory decision of a motion judge, the Defendants raise only the Rule 62.02(4)(b) test, which requires that there be "good reasons to doubt the correctness of the order in question" and the "the proposed appeal involves matters of such importance that leave to appeal should be granted".

Analysis

[70] The Defendants submit that the motion judge's errors relate both to his analysis of the common issue criterion under Section 5(1)(c) of the *CPA* and the representative plaintiff criterion set out in Section 5(1)(e) of the *CPA*.

Section 5(1)(c)

[71] The Defendants begin their argument on this point by referring to the Supreme Court of Canada's decision in *Western Canadian Shopping Centres Inc. v. Dutton,* 2001 SCC 46, [2001] 2 S.C.R. 534 ("*Dutton*"), where at para. 40 the Court states:

> Third, with respect to the common issues, success for one class member must mean success for all. All members of the class must benefit from the successful

> prosecution of the action, although not necessarily to the same extent. A class action should not be allowed if class members have conflicting interests.

[72] In the case at bar, according to the Defendants, success for one class member will not mean success for all.

[73] In *Dutton*, the Supreme Court also stated, at para. 39, that the question asked by s. 5(1)(c) – namely whether the claims of the class members raise a common issue – must be approached purposively: "[t]he underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis."

[74] As the motion judge noted, in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, [2014] 1 S.C.R. 3, the Supreme Court clarified what the common success requirement outlined in *Dutton* actually meant, at paras. 45-46:

> Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Dutton* must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for the question to be common, success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another.
>
> *Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members. [Emphasis added.]

[75] Thus, as the Federal Court noted in *Horseman v. Canada*, 2015 FC 1149 at para. 61, aff'd 2016 FCA 238, "the approach described in *Vivendi* focuses on the effect of the answer to the question on each class member". In the case at bar, the resolution of the key common issue will affect the legal interests of all the class members in the same way. Either they will all succeed and be found to be employees and entitled to employment standard benefits or they will all fail.

[76] The negative consequences that may be visited on class members extra-legally does not constitute "failure" within the meaning of the jurisprudence. Thus, the Defendants' allegation about the financial effects on its clubs if the action is certified (which is disputed) does not constitute a basis for finding a conflict in the class in a certification motion. The conflict must come from the answer to the question itself, not from a party's dire predictions about what will happen if the question is answered in a certain way.

Section 5(1)(e)

[77] This point is reinforced when one looks at the wording of the representative plaintiff criterion. The relevant portions of that criterion are:

> 5 (1) … (e) there is a representative plaintiff or defendant who,
>
> …
>
> (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. [Emphasis added.]

[78] Thus, a conflict arises when one subgroup of the class will have an adverse result from the resolution of the common issue, not from some speculative consequence that is irrelevant to the resolution of the common issue. As put by the motion judge, at para. 233:

> If the difference between the situation of the representative plaintiff and the class members does not impact on the common issues, then the difference does not affect the representative plaintiff's ability to adequately and fairly represent the class and there is no conflict of interest.

The Jurisprudence

[79] The Defendants relied on four cases to support their position as to the alleged conflict of interest. The motion judge analyzed all of those cases and pointed out why they did not apply. For the sake of completeness I will briefly repeat that analysis.

[80] In *Paron v. Alberta (Minister of Environmental Protection)*, 2006 ABQB 375, 402 A.R. 85, the Alberta Court of Queen's Bench refused to certify a proposed claim seeking remedies for approximately 600 cottagers who allegedly suffered a loss in the value and enjoyment of their properties as a result of a utilities plant that diverted water out of the lake on which the cottages were built. The real objective of the litigation for the proposed representative plaintiffs was to obtain an order requiring the province to raise the water level of the lake. This would have the effect of permanently submerging portions of the lands owned by other potential members of the class who owned lower-lying properties. If the representative plaintiffs succeeded in obtaining the remedy they sought, other class members would be harmed. Thus, the resolution of the main common issue in favour of some members the class would result in failure for others members.

[81] In *Asp v. Boughton Law Corporation*, 2014 BCSC 1124 ("*Asp*"), the British Columbia Supreme Court refused to certify a class action that sought orders winding up an investment vehicle for a First Nations' family. A distinct group of proposed class members opposed the relief sought, taking the position that their interests would be harmed if the trust was unwound. Again, in *Asp* the harm and the conflict resulted directly from the remedy sought.

[82] In *MacDougall v. Ontario Northland Transportation Commission* (2007), 221 O.A.C. 150, (Div. Ct.), the proposed representative plaintiffs were retired non-union employees who

challenged their former employer's right to amend the pension plan to use the surplus in various ways. The court held that there was a conflict in the class because at least one of the various subgroups of current and former employees in the class would be adversely affected by a decision in the plaintiffs' favour on any of the proposed common issues. The court also found a conflict between the interests of retirees and those of active unionized employees, who continued to enjoy the impugned benefits and who had been arbitrarily excluded from the plaintiff class because of a contrary position they took in the litigation. Thus, without looking beyond the four corners of the lawsuit, success for one part of the proposed class would mean failure for others.

[83] In this case, the proposed failure arises from something that is irrelevant to the four corners of the lawsuit – namely, an allegation that if the Plaintiffs are successful, the Defendants will be suffer dire financial consequences.

[84] Finally, the Defendants rely on *Boucher v. Public Service Alliance of Canada*, (2005), 47 C.C.P.B. 5 (Ont. S.C.) ("*Boucher*"). *Boucher* is another case involving the employer's use of a pension surplus. In that case the plaintiffs alleged that the defendant employer had wrongfully appropriated the surplus by giving active employees a contribution holiday and providing recent retirees with early retirement incentives. The proposed class was comprised of retirees who had allegedly been excluded from any share in the surplus, as well as current employees and more recent retirees who had benefited from the surplus. The certification judge observed, at para. 22, that the class included different groups of individuals "who have widely different interests *vis-à-vis* the relief sought in the statement of claim". The court concluded, at para. 26, that conflicts in the class existed "both in relation to what extent and for what period the impugned modifications to the plan are attacked".

[85] We agree with the Plaintiffs that no such conflicts exist in this case. No common issue will require the court to determine whether the Defendants improperly advantaged one group of class members over another, or whether one group of class members will be required to reimburse money or other benefits. The relief sought for all the class members is the same. Again, the allegation that this relief will financially harm the Defendants, causing them to be unable to continue paying benefits to certain class members is an allegation that does not arise from and is irrelevant to the resolution of the common issues.

[86] In short, in all of the above cases, the subject matter of the litigation gives rise to winners and losers among the class. This is not true for the case at bar. Thus, the motion judge did not err in concluding that these authorities did not assist the Defendants.

[87] The Defendants submit that the motion judge erred when he relied upon the decision in *1176560 et al. v. The Great Atlantic & Pacific Company of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.) ("*A&P*"), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.) to support his conclusion regarding the lack of conflict in the class. According to the Defendants, *A&P* is distinguishable and provides no guidance on the conflict that exists in the case at bar.

[88] In *A&P*, a proposed class action was brought by three plaintiff franchisees against the franchisor, A&P. A&P argued that a conflict existed between the proposed representative

plaintiffs and other class members because certification of the action would upset the existing arrangements with the franchisees and cause A&P to revisit each of these arrangements in a way that could be much less favourable for the other class members. Some putative class members gave evidence opposing the class action on the basis of a concern that they could "stand to lose much more than [we] gain" in the litigation, and that a class action could "screw up the system that we have now."

[89] Winkler J. (as he then was) rejected A&P's position that the proposed representative plaintiffs could not represent the class. In doing so he made two points that are directly applicable to the case at bar.

[90] First, Winkler J. made it clear that the evidence from individual class members as to the desirability of a class proceeding is not appropriate. As stated at para. 32, certification motions are not "determined through a referendum of class members". The Defendants have also adduced similar kind of evidence from current players and their parents, evidence that is directed at making it clear that they oppose the class action because it would affect their existing arrangements with the Defendant clubs.

[91] Second, Winkler J. rejected, at para. 46, A&P's argument that there was a conflict because certification of the action would upset the existing arrangements of the franchisees:

> In my view, this is effectively an argument that there should be no litigation at all rather than an attack on either the adequacy of the plaintiffs as representatives or the preferability of a class proceeding as opposed to individual actions… However, as noted in *Hollick* at para. 16, the certification analysis is concerned with the "form of the action". Arguments that no litigation is preferable to a class proceeding cannot be given effect.

[92] The Defendants in this case submit that the conflict issue they have identified will not be solved by the opt out provisions of the *CPA* because if a finding is made that the provisions of the *ESA* apply to any of the contracts at issue, then that finding will be binding on all of the SPA contracts. The same would be true if an individual action were brought. Thus, in effect, the Defendants are also arguing that there should be no litigation at all.

[93] Finally, A&P's position that there was a conflict was based on factors that were totally extraneous to the common issues or the relief sought in the claim. The same is true in the case at bar. The fact that the Defendants may have financial difficulties as a result of the Plaintiff's claim is an irrelevant factor when it comes to determining that claim.

Conclusion

[94] For these reasons, we find that there is no good reason to doubt the correctness of the motion judge's decision that the Plaintiffs were suitable representative plaintiffs. Thus, the Defendant have failed to satisfy the first part of the test for leave to appeal. We also find that the Defendants' proposed appeal raises no issues or principles which have not been thoroughly canvassed by the jurisprudence, jurisprudence that the motion judge carefully reviewed in his reasons. There is no issue of general or public importance that goes beyond the interests of the parties.

[95] In this regard, we reject the Defendants' submission that the alleged novelty of the claim should factor into our decision. There is nothing novel in principle about the claim – it is claim that a specific set of circumstances gives rise to an employment relationship. These claims are made all the time in different circumstances. What is novel are the circumstances, but this is not an issue of principle that will affect the development of the law or the administration of justice.

THE COSTS DECISION

[96] On the certification motion, the Plaintiffs sought partial indemnity costs of $1,212,065.63, inclusive of HST and disbursements of $145,027.78. The Defendants submitted that there should either be an award of no costs (given the alleged novelty of the Plaintiffs' claim) or that the Plaintiffs' costs should be substantially reduced and awarded in the cause.

[97] The motion judge found that both parties were responsible for incurring excessive costs on what should have been a procedural motion. He therefore awarded the Plaintiffs the full amount they were claiming, that is $1,212,065.63, but found that $712,065.63 of this amount should be payable in the cause. He held that this award was sufficient to satisfy "the access to justice imperatives of the class action regime without ignoring that the Plaintiffs should bear, at least temporarily, some responsibility for the mutation of a procedural motion."

[98] The motion judge dismissed the claims against the U.S. Defendants and ordered the Plaintiffs to pay the U.S. Defendants $200,000 from the $500,000 payable to the Plaintiffs forthwith. This was a reduction from the $224,362.91 sought by the U.S. Defendants as the motion judge found the amount sought by the U.S. Defendants to be beyond the reasonable expectations of the Plaintiffs. He noted that the U.S. Defendants' request for costs included $52,691.05 in legal fees and $171,671.86 in disbursements, almost $150,000.00 plus HST of which was paid to the Defendants' U.S. law expert.

[99] He held, at para. 46, that "the fair and appropriate way of approaching the matter is to credit the [U.S.] Defendants' award against the amount due to the Plaintiffs". He remarked that this result was "akin to a *Bullock* or *Sanderson* Order where the unsuccessful defendant directly or indirectly pays the costs of the successful co-defendant." He further found that "[a]pplying this approach to the circumstances of the immediate case means that the Law Foundation is not out of pocket."

[100] The Plaintiffs obtained leave to appeal the motion judge's costs order.

[101] The Plaintiffs appeal both the "in the cause" portion of the costs awarded to them, and the failure of the motion judge to make the U.S. Defendants' costs payable by the LFO.

[102] The Plaintiffs obtained financial support from the LFO.

[103] LFO submits that the *Law Society Act*, R.S.O. 1990, c. L.8 ("*LSA*") requires costs to the U.S. Defendants be paid by the LFO, and not the Plaintiffs (as ordered by the motion judge). However, LFO claims the motion judge's statement that his order was "akin to a *Bullock* or *Sanderson* Order" meant that the costs of the U.S. Defendants should be paid

by the Canadian Defendants. In any event, LFO claims the amount of costs payable to the U.S. Defendants was excessive.

[104] The Canadian Defendants seek leave to appeal the motion judge's costs order payable by the Canadian Defendants to the Plaintiffs, but at the hearing, abandoned their motion.

ANALYSIS AND CONCLUSIONS REGARDING THE COSTS DECISION

[105] The issues on the appeal of the costs order are:

a. Should the Defendants have been ordered to pay a larger portion of the Plaintiffs' costs upfront instead of "in the cause"?

b. Who should pay the costs of the U.S. Defendants? and

c. Should the costs order submitted by the U.S. Defendants be reduced?

[106] A costs award should be set aside on appeal "only if the trial judge has made an error in principle or if the costs award is plainly wrong": *Hamilton v. Open Window Bakery Ltd.*, 2004 SCC 9, [2004] 1 S.C.R. 303, at para. 27.

[107] A successful party is ordinarily entitled to partial indemnity costs: *Vester v. Boston Scientific Ltd.*, 2017 ONSC 2498, at para. 22.

[108] The motion judge correctly noted that, as set out in Rule 57 of the *Rules,* the purpose of cost awards is to: (1) indemnify successful litigants for the cost of litigation, although not necessarily completely; (2) to facilitate access to justice, including access for impecunious litigants; (3) to discourage frivolous claims and defences; (4) to discourage and sanction inappropriate behaviour by litigants in their conduct of the proceedings; and (5) to encourage settlements.

Payment of a Portion of the Plaintiffs' Costs in the Cause

[109] The decision to order a portion of the plaintiffs' costs in the cause is entitled to substantial deference, as a costs order is a discretionary decision entitled to significant deference on review: see *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 25; *Nova Chemicals Corp. v. Dow Chemical Co.*, 2017 FCA 25, at para. 6; *McNaughton Automotive Ltd. v. Co-operators General Insurance Co.*, 2008 ONCA 597, 95 O.R. (3d) 365, at para. 27; *Mask v. Silvercorp Metals Inc.*, 2016 ONCA 641, 132 O.R. (3d) 161, at para. 68.

[110] In *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2015 ONSC 6354, the motion judge held that the successful plaintiffs should receive only a portion of their costs forthwith because they expended resources on issues beyond those required to meet the certification criteria. He reasoned, at para. 138:

> [A] defendant should not have to pay for legal services tacked on to the certification and leave motion that should more properly be paid for if the plaintiff is successful in the litigation. Costs in the cause has the virtue that

> sometimes it is fair that a party should recover costs for an interlocutory motion only if that party ultimately succeeds in the action.

[111] In *Labourers' Pension Fund of Central and Eastern Canada (Trustees of) v. Sino-Forest Corp.*, 2016 ONSC 878 (Div. Ct.), the plaintiffs' motion for leave to appeal was dismissed. This Court affirmed that it is within a motion judge's discretion to delay payment of a portion of the costs in the cause to reflect resources that the plaintiffs expended on issues beyond those required for certification.

[112] In the instant case, at paragraph 20 of his costs decision, the motion judge notes that:

> The Plaintiffs concede that the amount of their claim for costs is extraordinarily large, but they attribute the enormous costs of the certification motion to the Defendants' concede nothing, contest everything, Churchillian resistance to the certification motion.

[113] However, the motion judge held, at para. 50, that the Plaintiffs contributed to taking the certification motion "into territory that was outside the boundaries of a certification motion." He reasoned, at para. 58:

> Should the Plaintiffs succeed at the common issues trial, then the payment of the costs has simply been postponed. Should the Plaintiffs fail at the common issues trial, then the Plaintiffs will not recover their costs.

[114] The motion judge therefore did not reduce the amount of partial indemnity costs payable. Rather, he ordered costs in the amount of $500,000 payable forthwith for the certification motion, "having regard to the awards in comparable class actions... for the certification motion". He ordered the Plaintiffs to pay the U.S. Defendants' costs of $200,000 which sum was to be deducted from the $500,000 payable forthwith. He also ordered the balance of $712,065.63 payable to the Plaintiffs in the cause.

[115] The motion judge's finding that the parties engaged in "a massive foray into the merits" beyond what was needed to address the certification motion requirements was a factual determination. The timing of payment recognizes that, while the plaintiffs were successful, they expended a good deal of their resources on issues that went beyond the procedural requirements of certification and waded into the substance of the dispute, but that those costs may well be appropriate to address the common issues on the merits.

[116] Moreover, there is no evidence that this order fails to satisfy the access to justice imperatives given that the Plaintiffs were granted the full amount of costs they sought and the motion judge's finding that "the Plaintiffs should bear, at least temporarily, some responsibility for the mutation of a procedural motion."

[117] Lastly, the decision is consistent with Rule 57.01(1)(e) and other cases where costs were incurred in respect of arguments that extended beyond the scope of the motion at issue.

[118] The motion judge recognized that it was within his discretion to order a portion of costs payable in the cause and he reasoned that the Defendants should not be required to pay

these costs associated with litigating the common issues if the Plaintiffs ultimately fail at the common issues trial.

[119] For these reasons, the appeal of the decision to order a large portion of the Plaintiffs' costs payable "in the cause" is dismissed.

Who Should Pay the U.S. Defendants' Costs?

[120] The motion judge ordered the Plaintiffs to pay the U.S. Defendants' costs in the amount of $200,000 to reflect the fact that they shared "some of the responsibility for the excesses of the certification motion". This sum was to be credited against the Plaintiffs' costs award of $500,000 payable by the Canadian Defendants to the Plaintiffs. He noted that both the Canadian and U.S. Defendants were represented by the same counsel.

[121] He refused to give the Plaintiffs recourse to the CPF administered by LFO, for the purpose of paying the costs order to the U.S. Defendants.

[122] The motion judge held, at para. 46:

> In my opinion, the fair and appropriate way of approaching the matter is to credit the American Team Defendants' award against the amount due to the Plaintiffs, and I so order. The result is akin to a *Bullock* or *Sanderson* Order where the unsuccessful defendant directly or indirectly pays the costs of the successful co-defendant. Applying this approach to the circumstances of the immediate case means that the Law Foundation is not out of pocket. In my opinion, it is fair and appropriate that the American Team Defendants be paid their costs but it is also fair and appropriate to attribute the payment to the Canadian Team Defendants who together share some of the responsibility for the excesses of the certification motion.

[123] The Plaintiffs and LFO claim that the motion judge erred in principle in ordering the Plaintiffs to pay the costs of the U.S. Defendants, as the *LSA* precludes the court from making such an order. LFO did not take the position before the motion judge that it should not be responsible for the payment of any adverse order as to costs made against the Plaintiffs.

[124] Section 59.4(1) of the *LSA* provides that, "a defendant may apply to the LFO board for payment from the Class Proceedings Fund in respect of costs award made in the proceeding in the defendant's favour against a plaintiff who has received financial support from the Fund in respect of the proceeding."

[125] When the Class Proceedings Committee approves financial support from the CPF, the CPF becomes financially responsible for adverse costs awards against the plaintiff by operation of section 59.4 of the *LSA*. The impact on the funds available in the CPF is not a relevant consideration.

[126] Section 59.4(3) of the *LSA* stipulates that a defendant who has the right to apply for payment of a costs award from the CPF "may not recover any part of the award from the

plaintiff." As such, once the application for funding has been approved, there is no legal authority or mechanism to deny payment of an adverse costs award from the CPF.

[127] In *Das v. George Weston*, 2018 ONCA 1053, Doherty J.A. held, at paras. 250-251, that the CPF is there to promote access to justice and cannot be used to reduce the amount payable to a successful defendant. The purpose of these provisions in the *LSA* is to protect class representatives from personal exposure to costs in actions where financial support has been granted by the CPF. Such protection is important for promoting the purposes of the *CPA*.

[128] In this case, the motion judge purported to "attribute the payment" of the U.S. Defendants' costs to the Canadian Defendants. He did so by ordering that the amount payable by the Canadian Defendants to the Plaintiffs in costs be reduced by the amount of costs he awarded to the US Defendants. The clear effect of this order was to make the Plaintiffs responsible for the payment of the U.S. Defendants' costs, something that is contrary to the provisions of the *LSA*.

[129] For these reasons, we find the motion judge made an error in principle in ordering costs the Plaintiffs to pay the U.S. Defendants' costs when the *LSA* does not permit the court to do so. This ground of appeal is granted and the U.S. Defendants are to have their costs paid by the LFO, not the Plaintiffs.

[130] We do not agree with the additional submission of the LFO that it should be granted leave to appeal to obtain an order that the U.S. Defendants' costs be paid by the Canadian Defendants, and not the LFO, on the basis that the motion judge expressed an intention to have the unsuccessful defendant pay the costs of the successful defendant and simply erred in executing this intention.

[131] The judge hearing an appeal of a costs decision is accorded a high degree of deference as costs are a matter of discretion. Leave to appeal costs should be granted sparingly and only in obvious cases. There must be "strong grounds" upon which an appellate court could find that a judge exercised his or her discretion on a wrong principle: see *Excalibur Special Opportunities LP v. Schwartz Levitsky Feldman LLP*, 2015 ONSC 1634, 386 D.L.R. (4th) 313 (Div. Ct.).

[132] The fact that the motion judge referred to his order as "akin to a *Bullock* or *Sanderson* order" may simply have been reference to one award being offset against another to ensure that all parties were sanctioned for excesses of litigation.

[133] In any event, we accept the Canadian Defendants' argument that this case does not meet the requirements for such an order as the Canadian Defendants did not try to shift liability onto the U.S. Defendants; the Plaintiffs, not the Canadian Defendants, added the U.S. Defendants as parties to the litigation; different causes of actions were asserted against the Canadian and U.S. Defendants; and the Plaintiffs' funding arrangement clearly requires costs payable by the Plaintiffs to be paid by LFO.

[134] For these reasons, as noted above, the Plaintiffs' appeal to have the U.S. Defendants' costs paid by the LFO is granted. LFO's application for leave to appeal that order on the basis that the Canadian Defendants should pay is denied.

Was the Quantum of Costs Sought by the U.S. Defendants Excessive?

[135] LFO also applied for leave to appeal the quantum of the costs order made in favour of the U.S. Defendants. In doing so, their submissions concerning the quantum of costs awarded to the U.S. Defendants focused on the amount paid to the U.S. Defendants' expert, which, as already noted, comprised $150,000.00 of the amount that they claimed.

[136] In assessing the quantum of the U.S. Defendants' costs, the motion judge referred to the non-exhaustive criteria to assist courts in determining whether an expert's fee is fair and reasonable or whether it is excessive as set out in *Hamfler v. 1682787 Ontario Inc.*, 2011 ONSC 3331, at para. 17:

1. Did the evidence of the expert make a contribution to the case, and was it relevant to the issues?

2. Was the evidence of marginal value or was it crucial to the ultimate outcome at trial?

3. Was the cost of the expert or experts disproportionate to the economic value of the issue at risk?

4. Was the evidence of the expert duplicated by other experts called by the same party? Was the report of the expert overkill or did it provide the court with the necessary tools to properly conduct its assessment of a material issue?

[137] The Defendants' U.S. law expert filed two reports (the second to respond to further issues raised by the Plaintiffs' expert). The Defendants' U.S. expert addressed issues of U.S. law pleaded by the Plaintiffs under multiple U.S. statutes addressing jurisdictional principles such as comity and the recognition and enforcement of Canadian judgments in the United States. The motion judge dismissed all claims against the U.S. Defendants, in part, because he concluded that states' laws regarding whether amateur athletes are employees are unsettled. In doing so he relied on the evidence of the Defendants' U.S. law expert.

[138] The motion judge held that the Plaintiffs' criticism of the U.S. Defendant's fee of approximately $150,000.00 fee in comparison to the Plaintiffs' expert's fee of $34,000.00 is "somewhat unfair when it is noted that the Plaintiffs are seeking $116,000.00 for experts' fees and a media campaign that is challenged by the Defendants as inappropriate."

[139] He noted, however, that both sets of Defendants were represented by the same counsel.

[140] The motion judge determined that:

> Doing the best that I can based on the information provided to me, I do regard the fee claim of the [U.S.] Defendants as beyond the reasonable expectations of the Plaintiffs and unfair and unreasonable, I reduce the claim from $224,362.91 to $200,000 all inclusive. This sum should be credited against the Plaintiffs' award.

[141] The motion judge's decision as to the quantum of costs payable is entitled to substantial deference. He articulated the information available, the appropriate legal principles to be applied and the reasons for reducing the amount payable to the U.S. Defendants and his reasons therefore. His reasons on quantum disclose no error in principle nor is his decision on costs clearly wrong. There is no issue raised that goes beyond the interest of the parties.

[142] For these reasons leave to appeal the quantum of costs is denied.

CONCLUSION

[143] For the above reasons:

- The Plaintiffs' appeal regarding the motion judge's failure to certify the Uncertified Common Issues is allowed;
- The motion judge's decision dismissing these claims is set aside and an order shall go certifying the additional common issues set out as Schedule "A" to these reasons;
- The Plaintiffs' costs appeal is dismissed except with respect to the order respecting the payment of the U.S. Defendants' costs. That order shall be set aside and an order shall go that the U.S. Defendants costs shall be paid by the LFO. As a consequence, the Canadian Defendants shall forthwith pay the Plaintiffs a further $200,000.00; and
- LFO's application for leave to appeal the costs order is dismissed.

[144] Failing agreement the parties may make submissions in writing on the question of costs. The Plaintiffs shall make their submissions within 10 days of the release of these reasons and the Defendants and LFO shall have 10 days thereafter to make their submissions.

Sachs J.

Thorburn J.

Reid J.

Date of Release: April 3rd, 2019

Schedule "A" –Additional Common Issues

Breach of Contract

1. Are the minimum wage, overtime pay, holiday pay, and/or vacation pay requirements under the Applicable Employment Standards Legislation in Ontario express or implied terms of contract between the Class Members and any or all of the Defendant Clubs, the OHL, and/or the CHL?

2. Did any or all of the Defendant Clubs, the OHL, and/or the CHL breach any of the contractual obligations found to exist above?

Negligence

3. Did any or all of the Defendant Clubs, the OHL, and/or the CHL owe a duty of care to the Class Members to:

   a. Ensure that Class members are properly classified as employees;

   b. Advise Class members of their entitlements under the Applicable Employment Standards Legislation;

   c. Ensure that Class Members' hours of work are monitored and accurately recorded; and

   d. Ensure that Class Members are compensated in accordance with their entitlements under the Applicable Employment Standards Legislation?

4. Did any or all of the Defendant Clubs, the OHL, and/or the CHL breach any of the duties of care found to exist above?

Breach of Duty of Honesty, Good Faith, and Fair Dealing

5. Did any or all of the Defendant Clubs, the OHL, and/or the CHL owe a duty, in contract or otherwise, to the Class Members, to act in good faith and to deal with them in a manner

characterized by candour, reasonableness, honest and/or forthrightness in respect of its obligations to:

a. Ensure that Class Members are properly classified as employees;

b. Advise Class Members of their entitlements under the Applicable Employment Standards Legislation;

c. Ensure that Class Members' hours of work are monitored and accurately recorded; and

d. Ensure that Class Members are compensated in accordance with their entitlements under the Applicable Employment Standards Legislation?

6. Did any or all of the Defendant Clubs, the OHL, and/or the CHL breach their good faith duties in any of the respects found to exist above?

Conspiracy

7. Did any or all of the defendants conspire to violate the Applicable Employment Standards Legislation? If so, when, where, and how?

Waiver of Tort

8. Are any or all of the Defendant Clubs, the OHL, and/or the CHL liable to the Class Members in waiver of tort?

CITATION: Berg et al. v. Canadian Hockey League et al., 2019 ONSC 2106
DIVISIONAL COURT FILE NOs.: 284/17; 584/17
DATE: 20190403

ONTARIO

SUPERIOR COURT OF JU.S.TICE

DIVISIONAL COURT

Sachs, Thorburn and R. Reid JJ.

BETWEEN:

SAMUEL BERG AND DANIEL PACHIS

Appellants
(Respondents by Cross-Appeal)

– and –

CANADIAN HOCKEY LEAGUE, ONTARIO MAJOR JUNIOR HOCKEY LEAGUE, ONTARIO HOCKEY LEAGUE, WESTERN HOCKEY LEAGUE, QUEBEC MAJOR JUNIOR HOCKEY LEAGUE INC., WINDSOR SPITFIRES INC., LONDON KNIGHTS HOCKEY INC., BARRIE COLTS JUNIOR HOCKEY LTD., BELLEVILLE SPORTS AND ENTERTAINMENT CORP., ERIE HOCKEY CLUB LIMITED, JAW HOCKEY ENTERPRISES LP, GUELPH STORM LIMITED, KINGSTON FRONTENACS HOCKEY LTD., KINGSTON FRONTENACS HOCKEY CLUB, 2325224 ONTARIO INC., MISSISSAUGA STEELHEADS HOCKEY CLUB INC., NIAGARA ICEDOGS HOCKEY CLUB INC., BRAMPTON BATTALION HOCKEY CLUB LTD., NORTH BAY BATTALION HOCKEY CLUB LTD, GENERALS HOCKEY INC., OTTAWA 67'S LIMITED PARTNERSHIP, THE OWEN SOUND ATTACK INC., PETERBOROUGH PETES LIMITED, COMPUWARE SPORTS CORPORATION, IMS HOCKEY CORP., SAGINAW HOCKEY CLUB, L.L.C., 649643 ONTARIO INC c.o.b. as SARNIA

STING, 211 SSHC CANADA ULC o/a SARNIA STING HOCKEY CLUB, SOO GREYHOUNDS INC., McCRIMMON HOLDINGS, LTD. and 32155 MANITOBA LTD., A PARTNERSHIP c.o.b. as BRANDON WHEAT KINGS., 1056648 ONTARIO INC., REXALL SPORTS CORP., EHT, INC., KAMLOOPS BLAZERS HOCKEY CLUB, INC., KELOWNA ROCKETS HOCKEY ENTERPRISES LTD., HURRICANES HOCKEY LIMITED PARTNERSHIP, PRINCE ALBERT RAIDERS HOCKEY CLUB INC., BRODSKY WEST HOLDINGS LTD., REBELS SPORTS LTD., QUEEN CITY SPORTS & ENTERTAINMENT GROUP LTD., SASKATOON BLADES HOCKEY CLUB LTD., VANCOUVER JUNIOR HOCKEY LIMITED PARTNERSHIP, 8487693 CANADA INC., CLUB DE HOCKEY JUNIOR MAJEUR DE BAIE-COMEAU INC., CLUB DE HOCKEY DRUMMOND INC., CAPE BRETON MAJOR JUNIOR HOCKEY CLUB LIMITED, LES OLYMPIQUES DE GATINEAU INC., HALIFAX MOOSEHEADS HOCKEY CLUB INC., CLUB HOCKEY LES REMPARTS DE QUEBEC INC., LE CLUB DE HOCKEY JUNIOR ARMADA INC., MONCTON WILDCATS HOCKEY CLUB LIMITED, LE CLUB DE HOCKEY L'OCEANIC DE RIMOUSKI INC., LES HUSKIES DE ROUYN- NORANDA INC., 8515182 CANADA INC. c.o.b. as CHARLOTTETOWN ISLANDERS, LES TIGRES DE VICTORIAVILLE (1991) INC., SAINT JOHN MAJOR JUNIOR HOCKEY CLUB LIMITED, CLUB DE HOCKEY SHAWINIGAN INC., CLUB DE HOCKEY JUNIOR MAJEUR VAL D'OR INC., WEST COAST HOCKEY ENTERPRISES LTD., MEDICINE HAT TIGERS HOCKEY CLUB LTD., PORTLAND WINTER HAWKS, INC., BRETT SPORTS & ENTERTAINMENT, INC., THUNDERBIRD HOCKEY ENTERPRISES, LLC, TOP SHELF ENTERTAINMENT, INC., SWIFT CURRENT TIER 1 FRANCHISE INC., 7759983 CANADA INC., LEWISTON MAINEIACS HOCKEY CLUB, INC., KITCHENER RANGER JR A HOCKEY CLUB, KITCHENER RANGERS JR "A" HOCKEY CLUB, SUDBURY WOLVES HOCKEY CLUB LTD., GROUPE SAGS 7-96 INC., MOOSE JAW TIER ONE HOCKEY INC. DBA MOOSE JAW WARRIORS, KOOTENAY ICE HOCKEY CLUB LTD.,

LETHBRIDGE HURRICANES HOCKEY CLUB, and LE TITAN ACADIE BATHURST (2013) INC./THE ACADIE BATHURST TITAN (2013) INC.

Respondents
(Appellants by Cross-Appeal)

REASONS FOR JUDGMENT

THE COURT

Date of Release: April 03, 2019