CITATION: Berg v. Canadian Hockey League, 2020 ONSC 6389
COURT FILE NO.: CV-14-514423CP
DATE: 2020/10/22

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	)	
	)	
SAMUEL BERG	)	
Plaintiff	)	*Theodore P. Charney, Devra Charney, James K. McDonald, Jody Brown* and *Joshua Mandryk,* for the Plaintiffs
– 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 FRONTENAC 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	)	*Patricia D.S. Jackson* and *Lisa Talbot* for the Defendants
	)	
	)	*Mathieu Laplante-Goulet* and *Maxime Saint-Onge* for the objectors, Kobe Mohr and Anthony Poulin

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.	)	
Defendants	)	
	)	**HEARD**: September 15, 2020
Proceeding under the *Class Proceedings Act, 1992*	)	

PERELL, J.

REASONS FOR DECISION

A. Introduction and Overview

[1] This is my decision in a joint hearing of the Superior Courts of Alberta, Ontario, and Québec with respect to the settlement of three interrelated class actions. The joint hearing was conducted pursuant to the Canadian Bar Association's revised *Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions and the Provision of Class Action Notice*, also known as the 2018 Protocol.

[2] The class actions concern the employment status of major junior hockey players in the defendants' Ontario Hockey League (OHL), Western Hockey League (WHL), and Québec Major Junior Hockey League (QMJHL), all leagues under the umbrella of the defendant Canadian Hockey League (CHL). The Representative Plaintiffs allege that the Class Members, who are amateur hockey players, were entitled but were not paid minimum wage and other standard employment benefits under provincial employment legislation.

[3] In the Ontario action, which has been certified under the *Class Proceedings Act, 1992*,[1] Samuel Berg is the Representative Plaintiff. Mr. Berg along with the Representative Plaintiffs in the two related class actions in Alberta[2] and Québec[3] respectively seek approval of a $30 million settlement of all the actions. The Plaintiffs also seek approval of the Distribution Protocol, approval of Class Counsels' fees, and honoraria for some of the Representative Plaintiffs.

[4] For the reasons that follow, I decline to approve the settlement. It follows that the motions to approve the Distribution Protocol, the Class Counsels' fees, and the honoraria[4] are moot, and these motions are dismissed.

[5] By way of an overview, because the litigation between the Representative Plaintiffs and the Defendants will now resume, I shall be somewhat circumspect in what I say about my reasons for refusing to approve the settlement and about the various factors that courts consider when determining whether to approve a settlement. I shall focus my attention on the major problem in the immediate case. Thus, for the present purposes of explaining the reasons for refusing to approve the settlement, it is sufficient to say that but for: (a) a major problem with the release that

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[1] S.O. 1992, c. 6.
[2] In Alberta, *Walter et al. v. Western Hockey League et al.*, Court File No. 1410-11912.
[3] In Québec, *Walter c. Ligue de Hockey Junior Majeur du Québec Inc. et al*, Court File No. 500-06-000716-148.
[4] Class Counsel seeks honorariums of: (a) $20,000 for Samuel Berg; (b) $10,000 for Travis McEvoy; (c) $10,000 for Kyle O'Connor; and (d) $10,000 for Lukas Walter.

was extracted in consideration for the Defendants' lump sum payment of $30 million; and (b) the last minute objection of two Class Members that drew attention to the significance and possible consequences of that release, I likely would have approved what might be described as an adequate result for the Class Members having regard to uncertain law, substantial litigation risks, and a tenacious and formidable opponent.

[6] However, the eleventh-hour objectors have brought to the court's attention the risk for Class Members that if the settlement is approved, because of the release, the Class Members may be foreclosed from suing the Defendants in other class actions for compensation for significant injuries. A release of the claims in those other actions makes the settlement in the immediate case an improvident settlement and one that is not fair and reasonable nor in the best interests of the Class Members.

[7] To be more precise, in exchange for a net recovery on average of $8,381 for each Class Member based on a 65% take-up rate, because of the release, the Class Member might be barred from suing for claims for: (a) damages from brain concussions; (b) damages for sexual assaults and physical harassment; and (c) damages from breaches of the *Competition Act*.[5]

[8] The essential reason that the *Class Proceedings Act, 1992* requires that settlements in class actions must be approved by the court is that the entrepreneurial model or the statutory scheme recognizes that Class Counsel are in a very difficult position in recommending a settlement because they typically have so much more to gain than do the individual Class Members and thus the court must carefully scrutinize the settlement and determine whether it is consistent with the goals of the *Class Proceedings Act, 1992*.

[9] And to be blunt about it, in the immediate case, in my opinion, once the eleventh-hour objection arrived, Class Counsel should have withdrawn their motion for settlement approval until the matter of the prejudicial scope of the release was resolved. What is required is a renegotiation of the release provisions of the Settlement Agreement.

[10] In the immediate case, Class Counsel had far more to gain ($9 million) than the $8,381 net recovery of a Class Member, and it was not a satisfactory answer for Class Counsel to say that: (a) it was premature to determine whether the release applied to the other claims; (b) it was for other courts to determine the scope of the release; or (c) the release was standard and did not or might not bar the other claims.

[11] In any event, with the matter of the scope of the release uncertain, and for the reasons that follow, I cannot say that the settlement is fair, reasonable and in the best interest of the Class Members and, therefore, I do not approve the settlement.

B. Background to the Settlement and to the Eleventh-hour Objection.

[12] Originally in 2014, there was just a single proposed class proceeding out of Ontario involving the CHL and the three leagues. In October 2014, regionally specific class actions in Alberta and Québec were commenced.

[13] Samuel Berg is a former player with the OHL and the Representative Plaintiff in the Ontario Class Action. Travis McEvoy and Kyle O'Connor are former players with the WHL and Representative Plaintiffs in the Alberta Class Action. Lukas Walter is a former player in the WHL

[5] R.S.C. 1985, c. C-34.

and was the proposed Representative Plaintiff when the Alberta Class Action was commenced. Thomas Gobeil is a former player of the QMJHL and is the Representative Plaintiff in the Québec Class Action.

[14] Justice Robert Hall of the Alberta Court of Queen's Bench is case managing the Alberta action, *Walter v. Western Hockey League*. Justice Chantal Corriveau of the Québec Cour supérieure is case managing the Québec action, *Walter c. Ligue de Hockey Junior Majeur du Québec Inc.*

[15] Class Counsel in the three actions are the law firms of Charney Lawyers PC, Goldblatt Partners LLP, and Savonitto & Ass. Inc. The Alberta retainer, as amended by court order approving the fee agreement, provides for a fee of between 25-30% in the event of success. The Québec and Ontario retainers provide for a 30% contingency fee in the event of success.

[16] The OHL, WHL and QMJHL are Defendants that all operate under the umbrella of the CHL. The Defendants consist of all the Canadian hockey teams operating within the leagues.

[17] The Plaintiffs in the three actions collectively allege that the CHL, OHL, WHL, QMJHL and the Canadian teams in the respective leagues were employers of the Class Members and therefore the Class Members are entitled to employment benefits, including minimum wage and overtime pay. The allegations advanced in the respective Statements of Claim consist of: (a) Breach of Contract of Employment; (b) Breach of the Contractual Duties of Honesty, Good Faith and Fair Dealing; (c) Breach of Statute; (d) Common Employer Doctrine; (e) Officers' and Directors' Liability; (f) Conspiracy; (g) Negligence; (h) Unjust Enrichment; and (i) Waiver of Tort.

[18] The Defendants delivered Statements of Defence in the Ontario and Alberta Class Actions. No Statement of Defence has been delivered in the Québec Class Action.

[19] The Defendants vigorously defended the Actions. There has not been a legally recognized obligation for owners in a similar position to the Defendants to treat the players on their teams and on whose behalf the Actions were brought as employees under employment standards legislation. The Defendants denied that the Class Members were employees and took the position that: (a) the relationship between the Plaintiffs and Defendants was one of guidance, supervision, development and education; (b) the Plaintiffs were amateur athletes and not employees; (c) as an alternative to any employment relationship, the Plaintiffs were trainees or interns; and (d) the Defendants provided or offered valuable goods and services to the Class and any damages must be offset by the benefits provided by the Defendants. The Defendants denied any conspiracy.

[20] The Ontario Class Action was certified on April 27, 2017. [6] I did not, however, certify the fraud and conspiracy cause of action. Both parties appealed the certification decision. On April 3, 2019, the Divisional Court granted the Plaintiff's appeal in respect of the conspiracy cause of action and denied the Defendants' motion for leave to appeal certification.[7]

[21] Meanwhile, the Alberta Class Action was certified on June 15, 2017[8] and on May 15, 2018 the Alberta Court of Appeal dismissed the Defendants' appeal from certification.[9]

[22] The Québec Class Action was authorized on June 13, 2019.

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[6] *Berg v. Canadian Hockey League*, 2017 ONSC 2608.
[7] *Berg v. Canadian Hockey League*, 2019 ONSC 2106 (Div. Ct.).
[8] *Walter v. Western Hockey League*, 2017 ABQB 382.
[9] *Walter v. Western Hockey League*, 2018 ABCA 188.

[23] From the commencement of the litigation, the Defendants engaged in lobbying campaigns to exempt major junior players from applicable employment standards legislation. The lobbying was successful. Between 2014 and 2020, in all the provinces in which the CHL operates, the provinces amended the employment standards legislation. The Defendants took the position that the amendments did not create a new exemption but rather confirmed that they were never employers and that the state of the law was always that amateur hockey players are not employees.

[24] On February 10 and 11, 2020, Joel Wiesenfeld, an experienced mediator, presided at settlement negotiations. The mediation resulted in Minutes of Settlement and ultimately a Settlement Agreement. The Minutes of Settlement provide for a lump sum all-inclusive payment of $30 million to settle all three actions.

[25] The $30 million Settlement Agreement, which includes a distribution protocol, was executed on March 31, 2020, and is subject to court approval in all three jurisdictions. As set out in the chart below, after all deductions, the net settlement fund is estimated to be approximately $18.5 million.

NET CLAIM FUND CALCULATION	
Gross Settlement	$30,000,000.00
Contingency fee	$9,000,000.00
Credit to class from cost awards	$725,995.42
Contingency fee after cost credit	$8,274,004.58
Taxes on fee	$816,360.41
Disbursements (inclusive of taxes and CPF reimbursement)	$520,767.55
TOTAL FEE	$9,611,132.54
Estimated Administration Expenses	$143,671.00[10]
SETTLEMENT SUBTOTAL	$20,245,196.46
CPF Levy 10% of 1/3 SETTLEMENT SUBTOTAL (estimated)	$674,839.88[11]
BP GPL Levy (estimated)	$1,062,107.00
NET CLAIM FUND	$18,508,249.58

[26] It may be noted that Class Counsel's fee request is $9.0 million (30% of the $30 million

[10] Class Counsel retained RicePoint to conduct the claims administration services. The total estimated notice procedures and forms administration cost would be between $121,389 to $141,151 depending on the take-up rate, plus $2,520 for call centre support.

[11] In the Ontario Class Action, Class Counsel have received funding from the Class Proceedings Fund in accordance with the provisions of the *Law Society Act* and its regulations. The Fund funded a total of $111,469.14 in disbursements. The Fund is entitled to 10% of the benefits payable to Class Members, net of Class Counsel's legal fees, disbursements, and applicable taxes. The Fund also paid a costs award in favour of the US defendants in the amount of $206,597.26, which the Class is not required to repay.

Settlement Fund) less a fee credit to the class of $725,995.42, plus disbursements and applicable taxes. Québec Class Counsel's share of the joint fee would be $1.2 million plus taxes and disbursements.

[27] For the purposes of the Distribution Protocol, the Class has been divided into three groups: (a) regular players; (b) affiliate players;[12] and (c) players who signed a National Hockey League (NHL) contract. Regular Players form the bulk of the Class. Anyone who has signed an NHL contract is not eligible to make a claim. Thus, the Class is divided as follows:

League	Affiliate Players	Regular Players	Total Class Size
OHL	273	1,175	1,448
WHL	214	922	1,136
QMJHL	322	1,380	1,702
TOTAL	809	3,477	4,286

[28] The settlement funds available to the individual Class Members would depend on the take-up rate. The chart below illustrates the anticipated average *net* recovery after legal fees, disbursements, taxes, the Class Proceeding Fund's levy and administration expenses. Class counsel advises that the figures are based on take-up rates of 45% and 65%.[13] Under either take-up rate, the individual compensation to the affiliate players is $250 per affiliate.

Recovery on $18.0 Million Net Settlement		
	45%[14] take-up	65% take-up
Claimant Pool Size	1,476	2,132
Total Compensation to Affiliates	$91,000	$131,500
Average Net Compensation per Regular Player Claimant	$12,133	$8,381

[29] The Settlement Agreement contains the following release that would be binding on Class Members if the settlement is approved:

> *Definitions*
>
> […]

[12] An affiliate player is a player called up from a lower league to play up to a maximum of five games with a team in the major junior league. An affiliate player who does not become a regular player and returns to the lower leagues.
[13] Based on Class Counsel's combined experience in claims administration, the take-up rate is anticipated to be between 45% to 65%. Class Counsel has experience in administering employment Class Action settlements in *Rosen v BMO Nesbitt Burns Inc*., 2016 ONSC 4752; *Fulawka v Bank of Nova Scotia*, 2016 ONSC 1576; and *Bozsik v. Livingston*, 2019 ONSC 5340 in which the take-up rates never exceeded 65%.
[14] Assuming a regular class of 3,280 because approximately 197 of the class signed an NHL contract.

(25) Released Matters means, up to the date of the execution of this Settlement Agreement, any and all actions, causes of action, suits, debts, claims (including any additional claims by the representative plaintiffs) and demands, howsoever arising, by the Releasors as the result of, relating to, or arising from the matters raised or advanced in the Class Actions or which could have been raised or advanced in the Class Actions, whether known or unknown, or by reason of any cause, matter or thing whatsoever.

(26) Releasees means the Defendants and the Insurers and their predecessors, successors, assigns, and reinsurers and all related entities, including but not limited to affiliates, parents, subsidiaries, current and former shareholders or other owners, and their respective present and former officers, directors, employees and agents and their heirs, executors, successors and assigns.

(27) Releasors means the Plaintiffs and Class Members in the Class Actions, for themselves, their heirs, executors, successors and assigns.

[…]

5.— RELEASES AND DISMISSALS

5.1. Release of Releasees

(1) The Releasors covenant, represent and warrant that, as of the date of the execution of the Settlement Agreement, they have no further claims against the Releasees for, or arising out of, the Released Matters. In the event that the Releasors have made or should make any claims or demands or commence or threaten to commence any actions, claims or class actions or make any complaints against the Releasees arising out of the Released Matters, this Release may be raised as an estoppel and complete bar to any such claim, demand, action, class actions or complaint.

(2) The Releasors agree and undertake that they will not make any claim or commence or maintain any class actions, complaint, action or claim against any Person in which any claim could arise against the Releasees for contribution or indemnity or any other relief over in respect of any of the actions, causes of action, claims, debts, suits or demands of any nature or kind that has been released by this Release. In the event that the Releasors make any claim or commence any proceeding in respect of the Released Matters against any person or entity which might make a claim, whether for contribution or indemnity or declaratory or other relief, from the Releasees or any of them, or which might result in a claim, whether for contribution or indemnity or declaratory or other relief, being made against the Releasees or any of them, this Release may be raised as an estoppel and complete bar to any such claim, demand, action, proceeding or complaint.

(3) This release is conditional upon approval of the Settlement Agreement by each of the three Courts. In the event that this Settlement Agreement is not approved by Final Order of any of the Courts, the Releasors will not be bound by the terms of this Release.

[30] Until just before the joint hearing, there were no objections to the proposed settlement, the Distribution Protocol, the requested Class Counsel fee or to the honoraria.

[31] However, at the eleventh hour, the courts in Alberta, Ontario, and Québec were advised that Class Members Kobe Mohr and Anthony Poulin objected to the settlement. They objected because it appeared to them that the release would discharge the Defendants from liability for one or more class actions that had been commenced against the Defendants.

[32] As a result of Messrs. Mohr's and Poulin's objection, the courts learned that on January 9, 2019, in British Columbia, James McEwan filed a class action lawsuit against the WHL, CHL and Hockey Canada in connection with fiduciary duty breaches for all players who played hockey and

suffered concussions or chronic traumatic encephalopathy.[15]

[33] As a result of Messrs. Mohr's and Poulin's objection, the courts learned that on June 18, 2020, Daniel Carcillo and Garrett Taylor filed a statement of claim in Ontario against the CHL, WHL, OHL, QMJHL and their respective clubs.[16] The claim is on behalf of players for alleged sexual abuse suffered by them under the age of eighteen. The Carcillo and Taylor action is based on systemic abuse by the defendants and breach(es) of contract.

[34] Messrs. Mohr and Poulin raised no objection to the settlement apart from the scope of the release, and they were principally concerned about a class action that they themselves had commenced in the Federal Court on September 14, 2020. On that day, Mr. Mohr filed a Statement of Claim in the Federal Court against the defendants CHL, WHL, OHL and against the NHL, the American Hockey League (AHL) and the East Coast Hockey League (ECHL). Mr. Mohr alleges that there was an unlawful restraint of trade under s. 48 of the *Competition Act,* and he seeks to pursue remedies under s. 36(1)(a) of the Act. He also alleges a violation of s. 1(e) of the *Canadian Bill of Rights*.[17]

[35] Mr. Mohr alleges anti-competitive practices and collusion between Canadian Major Junior leagues and the NHL, the AHL and the ECHL contrary to the *Competition Act*. The aim of the alleged conspiracy was to limit the access of Canadian Major Junior players playing in Canada to professional league contracts.[18]

[36] During the course of argument, the Defendants advised the court that they acknowledged that the release did not apply to foreclose the claim about concussions or the claim about sexual and physical abuse. The Defendants, however, were not prepared to disavow that they might rely on the release with respect to the competition law claim.

C. Submissions of Class Counsel

[37] Class Counsel relies on the Defendants' acknowledgment about the scope of the release with respect to the claim about concussions and with resect to the claim about sexual and physical abuse, and Class Counsel submits that the release is fair, reasonable and not overbroad with respect to the competition law claim. Class Counsel submits that a $30 million payment by the Defendants is a good and advantageous settlement for the Class.

[38] Class Counsel submits that it is for the Federal Court - in the future - to determine - and it is not for this court - at the present - to determine - the extent to which all or portions of the factual and legal claim in the competition claim were also raised or could have been raised in the actions that are the subject of this settlement approval motion.[19] Class Counsel submits that at the very least, it is premature for the courts of Alberta, Ontario, and Québec in the context of this settlement approval hearing to analyse the nature of the competition law claim and the applicability of the release to that claim.

[39] Further, Class Counsel submits that analyzing whether the terms of a standard release bar a future action would be inappropriate. It would be inappropriate because the analysis would be

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[15] *James McEwan v. CHL et al*., Supreme Court of British Columbia, No: S-190264.
[16] *Daniel Carcillo v. CHL*, Ontario Superior Court of Justice, CV-20-00642705-00CP.
[17] R.S.C. 1970, c. C-5.
[18] *Kobe Mohr v. NHL et al.* Federal Court, No. T-1080-20.
[19] Class Counsel rely on *Preisler-Banoon c. Airbnb Ireland*, 2020 QCCS 270.

incompatible with the fundamental task of assessing the actions as they are currently certified and of assessing the benefits of an immediate settlement.

[40] Moreover, Class Counsel submits that an analysis of the scope of the release is impossible because, at this juncture, it would require the courts not only to analyze the nature of the claims in the competition claim (which it cannot do until those claims have been properly pleaded) but also to consider the risks of the competition claim, and the potential merits and value of the competition law claim, which is also impossible to do at this juncture.

[41] Class Counsel's argument that it is neither appropriate nor possible to analyze the release at a settlement approval hearing is summarized at paragraph 19 of its submissions as follows:

> 19. The Release in this proposed Settlement is a standard release, containing language that has been approved in various other class action settlements. There is no basis for concluding that the Settlement should not otherwise be approved as fair and reasonable. The analysis triggered by adjudicating the impact of the Release on a distinct action is fundamentally at odds with the guiding law at settlement approval and is neither warranted nor appropriate. Indeed, the applicability of the release to the Competition Claim would require a detailed analysis and parsing of those claims once they are finally clarified and settled, in order to determine the extent to which all or portions of the factual and legal claim in the Competition Claim were also raised or could have been raised in the Actions which are the subject of this settlement approval motion. The bare bones and confusing nature of the *Competition Claim* strongly indicates that it will undergo attack and/or amendment or refinement before it is considered for certification or determination on the merits.

[42] In what I take to be an alternative argument, because it involves the court undertaking the analysis that Class Counsel submits is inappropriate and impossible, Class Counsel submits that the benefits of the settlement to the Class outweigh any concerns with the release. Class Counsel submits that if the settlement is not approved, the Class will lose the benefit of receiving timely compensation - all in exchange for the potential to participate in a last-minute competition law claim brought against five of the largest hockey leagues in North America confronting a claim most of which would be presumptively time barred pursuant to the two-year limitation period in s.36(4)(a)(i) of the *Competition Act*.

[43] Finally, in a sleight of hand argument that substitutes whether the settlement is fair and reasonable for the Class Members, which is the test, with whether the court would be acting fairly and reasonably in disapproving the settlement, which would be something for an appellate court to decide, Class Counsel submits that it would not be fair and reasonable for me to disapprove a beneficial $30 million settlement to allow a small number of Class Members to pursue a risky and speculative uncertified action with uncertain recovery.

D. Submissions of the Defendants

[44] The written submissions of the Defendants are succinct and so I shall set them out below verbatim:

> We have now had an opportunity to review the Federal Court Statement of Claim in *Kobe Mohr v. NHL Enterprises, L.P., et. al*. and to consider relevant authority. In addition to the submissions made by Class Counsel, the defendants provide the following submissions:
>
> 1. The defendants strongly endorse the correctness of Class Counsel's submissions that the language of the release in these cases is entirely standard and "common place" in the releases of settled actions.

> 2. As indicated in Class Counsel's submissions, the question of what that standard language covers and whether the release in the settled actions bars the Federal Court Action is not one that can be determined in the context of the settlement approval hearings. It must be analyzed in the context of the Federal Court Action and this can only happen when, if ever, the *Mohr* pleading expresses a sufficiently particularized and recognizable cause of action that it is (as it currently is not) a valid claim under the *Competition Act*.
>
> 3. In this case, the *Mohr* statement of claim is not properly pleaded or particularized. Thus, it is not possible to ascertain exactly what the claims are and whether the release bars Mr. Mohr's claims. For example, Mr. Mohr appears to ground his claim for relief under s. 36 of the *Competition Act*, but does not specify the necessary elements of the statutory cause of action under s. 36 of the *Competition Act*, including, but not limited to, which criminal provisions (if any) of the Act were breached by which parties (if any) through which acts (if any) and the specific damages (if any) said to have resulted.
>
> 4. The defendants endorse the submissions of Class Counsel that the extent to which class members in the settled actions would even have a claim in the Federal Court Action may be limited by the applicable limitation periods; however, it is impossible at this stage to precisely analyze the impact of that issue without the particulars of exactly what conduct is at issue and when it is alleged to have occurred.
>
> 5. Consistent with Class Counsel's request, should the Courts undertake to analyse or determine the applicability of the release on the Federal Court Action, counsel for the defendants request the opportunity to make further submissions to the Courts.

E. Settlement Approval

[45] Section 29 of the *Class Proceedings Act, 1992* requires court approval for the discontinuance, abandonment, or settlement of a class action. Section 29 states:

> *Discontinuance, abandonment and settlement*
>
> 29.(1) A proceeding commenced under this Act and a proceeding certified as a class proceeding under this Act may be discontinued or abandoned only with the approval of the court, on such terms as the court considers appropriate.
>
> *Settlement without court approval not binding*
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> (2) A settlement of a class proceeding is not binding unless approved by the court.
>
> *Effect of settlement*
>
> (3) A settlement of a class proceeding that is approved by the court binds all class members.
>
> *Notice: dismissal, discontinuance, abandonment or settlement*
>
> (4) In dismissing a proceeding for delay or in approving a discontinuance, abandonment or settlement, the court shall consider whether notice should be given under section 19 and whether any notice should include,
>
> (a) an account of the conduct of the proceeding;
>
> (b) a statement of the result of the proceeding; and
>
> (c) a description of any plan for distributing settlement funds.

[46] Section 29(2) of the *Class Proceedings Act, 1992*, provides that a settlement of a class

proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.[20]

[47] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with Class Members during the litigation.[21]

[48] In determining whether to approve a settlement, the court, without making findings of fact on the merits of the litigation, examines the fairness and reasonableness of the proposed settlement and whether it is in the best interests of the class as a whole having regard to the claims and defences in the litigation and any objections raised to the settlement.[22] An objective and rational assessment of the pros and cons of the settlement is required.[23]

[49] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject matter of the litigation and the nature of the damages for which the settlement is to provide compensation.[24] A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.[25]

[50] Generally speaking, the exercise of determining the fairness and reasonableness of a proposed settlement involves two analytical exercises. The first exercise is to use the factors and compare and contrast the settlement with what would likely be achieved at trial. The court obviously cannot make findings about the actual merits of the Class Members' claims. Rather, the court makes an analysis of the desirability of the certainty and immediate availability of a settlement over the probabilities of failure or of a whole or partial success later at a trial. The court undertakes a risk analysis of the advantages and disadvantages of the settlement over a determination of the merits. The second exercise, which depends on the structure of the settlement, is to use the various factors to examine the fairness and reasonableness of the terms and the scheme of distribution under the proposed settlement.[26]

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[20] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J).

[21] *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.); *Jeffery v. Nortel Networks Corp*., 2007 BCSC 69; *Fakhri v. Alfalfa's Canada, Inc*., 2005 BCSC 1123.

[22] *Baxter v. Canada (Attorney General)* (2006), 83 O.R. (3d) 481 at para. 10 (S.C.J.).

[23] *Al-Harazi v. Quizno's Canada Restaurant Corp.* (2007), 49 C.P.C. (6th) 191 at para. 23 (Ont. S.C.J.).

[24] *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.); *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.).

[25] *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd*., [2002] O.J. No. 2383 at para. 13 (S.C.J.).

[26] *Welsh v. Ontario*, 2018 ONSC 3217.

F. Analysis and Discussion

[51] Class action settlements should be viewed with suspicion and seriously scrutinized by judges because they are entered into by defendants and Class Counsel who have interests and incentives that may not align with the best interests of the class.[27]

[52] As a matter of fundamentals, I disagree with Class Counsels' and the Defendants' submissions that it is both inappropriate and impossible for the court to undertake an analysis of a release, which is for the Defendants' benefit and a possible detriment to the Class Members under the settlement agreement.

[53] This analysis is appropriate, and the analysis is required because two Class Members have objected to the settlement. Moreover, the court has the responsibility to analyze the advantages and disadvantages of the settlement and to use the various factors to examine the fairness and reasonableness of the terms of the proposed settlement; the release is a fundamental part of the settlement agreement and its possible scope must be analyzed.

[54] The concern in the immediate case is not a concern about whether the release would provide a defence for future claims of the same type as raised in the immediate case. The Defendants do not need that protection, because of amendments to the employment law statutes. The concern in the immediate case is whether the release bars claims in existing class actions now in the contemplation of the parties.

[55] Given what is presently known about the actions about concussions, abuse, and anti-competitive behaviour, an analysis of the release is not impossible nor unfeasible. Contrary to the submissions of Class Counsel and the Defendants, the analysis of the release does not require the courts of Alberta, Ontario, or Québec to determine what the court in British Columbia for the concussion action, what the court in Ontario for the abuse action, or what the Federal Court for the competition law action will ultimately determine about the scope of the release once the pleadings are settled and the discoveries are completed. In the immediate case, all that is required is to determine whether it is plain and obvious or beyond peradventure that the standard form release in the proposed settlement agreement would not bar any of these actions.

[56] As a matter of contractual interpretation, given what is presently known about the actions about about concussions, abuse, and anti-competitive behaviour, it is not plain and obvious that the release might not bar some, perhaps many, Class Members from advancing claims in the other actions.

[57] This possibility of discharging the Defendants from liability in other actions has been brought to the attention of the Class Members at the time the court is being asked to approve a settlement. This possibility is part of the factual nexus for the interpretation of the release. The objectors' objection was well taken. The immediate case is not a situation where the court is being asked to interpret whether the release would apply to bar claims that may arise in the future. The claims exist, and there is a live issue about whether the Class Members are surrendering rights and claims in existing class actions.

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[27] *Macaronies Hair Club and Laser Center Inc. (c.o.b. Fuze Salon) v. BofA Canada Bank*, 2019 ABQB 181 at para. 5; *Coburn and Watson's Metropolitan Home (c.o.b. Metropolitan Home) v. BMO Financial Group*, 2018 BCSC 1183 at para. 29; *AFA Livförsäkringsaktiebolag v. Agnico-Eagle Mines Ltd.*, 2016 ONSC 532 at paras. 3, 5 and 17.

[58] In my opinion, Class Counsel's response to the objection was not well taken.

[59] In this last regard, I would add that the Defendants' acknowledgement at the hearing that the release would not apply, which in the immediate case, the Defendants made for two of the three actions, was not good enough for Class Counsel to rely on. Any acknowledgement would have to be formally memorialized and made irrevocable by an amendment to the release. Class Counsel should have sought this amendment.

[60] How the Defendants' counsel's undertaking in this court would be treated by another court is an unknown and, in any event, in the immediate case, the Defendants are at present not prepared to contract away their rights to rely on the release in defence of the competition law claim, which is what the circumstances require in order for the settlement to be fair and reasonable and in the best interests of the Class Members as a whole.

[61] In making an analysis of the scope of the release in the settlement agreement, it is not necessary to determine the merits or the strength of the claim or of the possible defences in the actions about concussions, abuse, and anti-competitive behaviour. It is certainly not appropriate for Class Counsel to assume that the claims of the Class Members in other actions are weak and may be statute-barred. And if the claims are weak and the defences of the Defendants in the other actions are strong, perhaps without saying as much, it would be appropriate for Class Counsel to ask the Defendants, who can defend the other actions on the merits, to amend the release in the immediate case to make it beyond peradventure that it does not apply to the Class Members' other claims.

[62] The scheme of the *Class Proceedings Act* is that the court has the responsibility to ensure that proposed settlement is fair, reasonable, and in the best interests of the Class Members. In *2038724 Ontario Ltd. v. Quizno's Canada Restaurant Corporation*,[28] a competition law claim, after I refused to approve a class action settlement, because of concerns about the scope of the release, the parties renegotiated the release, and then I approved the settlement. That prospect remains open in the immediate case, but for the above reasons, I do not approve the settlement in the Ontario action in its current form.

G. Conclusion

[63] For the above reasons, I dismiss the motions now before the court for approval of the settlement, the Distribution Protocol, Class Counsels' fees and the request for honoraria.

[64] The dismissal is without prejudice to the rights of the parties to reapply for settlement approval. Should the parties reapply with no change to the proposed Settlement Agreement other than a revision to the release, then it shall not be necessary to give notice of the settlement approval hearing other than to the objectors, Kobe Mohr and Anthony Poulin and the hearing shall proceed as a motion in writing.

Perell, J.

Perell, J. - Released: October 22, 2020

[28] 2014 ONSC 5812.

CITATION: Berg v. Canadian Hockey League, 2020 ONSC 6389
COURT FILE NO.: CV-14-514423CP
DATE: 2020/10/22

ONTARIO

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SAMUEL BERG

Plaintiff

- and -

CANADIAN HOCKEY LEAGUE, ONTARIO MAJOR JUNIOR HOCKEY LEAGUE, ONTARIO HOCKEY LEAGUE, WESTERN HOCKEY LEAGUE, QUEBEC MAJOR JUNIOR HOCKEY LEAGUE INC., et al.

Defendants

REASONS FOR DECISION

PERELL J.

Released: October 22, 2020