

In the Court of Appeal of Alberta

Citation: Walter v Western Hockey League, 2018 ABCA 188

Date: 20180515

Docket: 1701-0215-AC;

1701-0216-AC

Registry: Calgary

Docket: 1701-0215-AC

Between:

Lukas Walter, Travis McEvoy, and Kyle O'Connor as Representative Plaintiffs

Appellants

(Plaintiffs)

- and -

Western Hockey League, McCrimmon Holdings, Ltd. and 32155 Manitoba Ltd., a Partnership c.o.b. as Brandon Wheat Kings., Brandon Wheat Kings Limited Partnership, 1056648 Ontario Inc., Calgary Flames Limited Partnership, Calgary Sports and Entertainment Corporation, Rexall Sports Corp., Edmonton Major Junior Hockey Corporation, Edmonton Oilers Hockey Corp., EHT, Inc., Kamloops Blazers Hockey Club, Inc., Kamloops Blazers Holdings Ltd., Kelowna Rockets Hockey Enterprises Ltd., Hurricanes Hockey Limited Partnership, Prince Albert Raiders Hockey Club Inc., Brodsky West Holdings Ltd., Edgepro Sports & Entertainment Ltd., Rebels Sports Ltd., Queen City Sports & Entertainment Group Ltd., Braken Holdings Ltd., Saskatoon Blades Hockey Club Ltd., Vancouver Junior Hockey Limited Partnership, Vancouver Junior Hockey Partnership, Ltd., West Coast Hockey Enterprises Ltd., West Coast Hockey LLP, Medicine Hat Tigers Hockey Club Ltd., 1091956 Alta Ltd., Portland Winter Hawks, Inc., Brett Sports & Entertainment, Inc., Hat Trick, Inc. d.b.a. Spokane Chiefs Hockey Club, Thunderbird Hockey Enterprises, LLC, Top Shelf Entertainment, Inc., Swift Current Tier 1 Franchise Inc., Swift Current Bronco Hockey Club Inc., Kootenay Ice Hockey Club Ltd., Moose Jaw Tier 1 Hockey Inc. d.b.a. Moose Jaw Warriors, Moose Jaw Warriors Tier 1 Hockey, Inc., Lethbridge Hurricanes Hockey Club, and Canadian Hockey League

Respondents

(Defendants)

Docket: 1701-0216-AC

And Between:

Lukas Walter, Travis McEvoy, and Kyle O'Connor as Representative Plaintiffs

Respondents

(Plaintiffs)

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Western Hockey League, McCrimmon Holdings, Ltd. and 32155 Manitoba Ltd., a Partnership c.o.b. as Brandon Wheat Kings., Brandon Wheat Kings Limited Partnership, 1056648 Ontario Inc., Calgary Flames Limited Partnership, Calgary Sports and Entertainment Corporation, Rexall Sports Corp., Edmonton Major Junior Hockey Corporation, Edmonton Oilers Hockey Corp., EHT, Inc., Kamloops Blazers Hockey Club, Inc., Kamloops Blazers Holdings Ltd., Kelowna Rockets Hockey Enterprises Ltd., Hurricanes Hockey Limited Partnership, Prince Albert Raiders Hockey Club Inc., Brodsky West Holdings Ltd., Edgepro Sports & Entertainment Ltd., Rebels Sports Ltd., Queen City Sports & Entertainment Group Ltd., Braken Holdings Ltd., Saskatoon Blades Hockey Club Ltd., Vancouver Junior Hockey Limited Partnership, Vancouver Junior Hockey Partnership, Ltd., West Coast Hockey Enterprises Ltd., West Coast Hockey LLP, Medicine Hat Tigers Hockey Club Ltd., 1091956 Alta Ltd., Portland Winter Hawks, Inc., Brett Sports & Entertainment, Inc., Hat Trick, Inc. d.b.a. Spokane Chiefs Hockey Club, Thunderbird Hockey Enterprises, LLC, Top Shelf Entertainment, Inc., Swift Current Tier 1 Franchise Inc., Swift Current Bronco Hockey Club Inc., Kootenay Ice Hockey Club Ltd., Moose Jaw Tier 1 Hockey Inc. d.b.a. Moose Jaw Warriors, Moose Jaw Warriors Tier 1 Hockey, Inc., Lethbridge Hurricanes Hockey Club, and Canadian Hockey League

Appellants
(Defendants)

The Court:

**The Honourable Mr. Justice Jack Watson
The Honourable Madam Justice Frederica Schutz
The Honourable Madam Justice Michelle Crighton**

**Memorandum of Judgment
Delivered from the Bench**

Appeal from the Decision by
The Honourable Mr. Justice R.J. Hall
Dated the 15th day of June, 2017
Filed on the 15th day of June, 2017
(2017 ABQB 382, Docket: 1401 11912)

**Memorandum of Judgment
Delivered from the Bench**

Schutz J.A. (for the Court):

[1] These appeals arise in the context of a certification application in respect of a class of plaintiffs who are current and former Western Hockey League (WHL) players who allege that they have been unlawfully denied employment status and associated benefits, including statutory minimum wage.

[2] The chambers judge ordered certification with respect to certain Canadian WHL clubs but held that it would not be the preferable procedure to have the class members' claims against some USA-based WHL clubs adjudicated within the certified action.

[3] In appeal number 1701-0215-AC, the plaintiffs seek to vary the certification order to include the US Teams that were not included by the chambers judge, and to expand the class definition to include the individuals who played for the US Teams during the applicable period. The plaintiffs argue that the chambers judge erred in principle by failing to apply the correct test in determining whether the plaintiffs' certified action would be the preferable procedure for adjudication of the class members' claims against the US Teams.

[4] In appeal number 1701-0216-AC, the owners or former owners of teams based in British Columbia appealed the whole of the certification order as against them, on the basis that the plaintiffs' pleadings do not disclose a cause of action against the BC Teams. They argue that there is no cause of action because the British Columbia Court of Appeal in *Macaraeg v E Care Contact Centers Ltd*, 2008 BCCA 182, 295 DLR (4th) 358 held that the British Columbia *Employment Standards Act*, RSBC 1996, c 113, is a complete code, and claims for the enforcement of statutory rights must be brought only by means of the statutory process. This is done by making a complaint under the BC statute to the Director of Employment Standards, and not by bringing suit in the civil court. The BC Teams say that since this is a question of law, the chambers judge's decision must be reviewed for correctness.

[5] Also in appeal number 1701-0216 AC, all defendants appeal other aspects of the certification order.

[6] In his written reasons, the chambers judge set out the facts, the test for certification under the *Alberta Class Proceedings Act*, SA 2003, c C-16.5, relevant case law and his decisions: *Walter v Western Hockey League*, 2017 ABQB 382. It is not necessary to repeat the reasons of the chambers judge or the content of the voluminous materials filed on these appeals.

[7] The Legislature has laid out the criteria to which the certification judge must have regard and section 5 of the *Class Proceedings Act* governs the analysis. These appeals bring into focus some settled axioms respecting class actions.

[8] A class action proceeding is not a licence to pursue non-existent or unarguable claims. Massing together into a group such unmeritorious claims does not have the effect of imbuing them with substantive legal merit. Likewise, a class action format is not a procedural structure that entitles a court to entertain the litigation of matters not within the jurisdiction or competence of the certifying court.

[9] Fundamentally, the chambers judge did not accept that the courts of Canada were able to make an effective determination of legal rights as between hockey players and their US Teams.

[10] Reading the reasons as a whole, we are satisfied that the correct analysis was undertaken and we also agree with the chambers judge's determination. We dismiss the plaintiffs' appeal.

[11] The BC Teams, for their part, assert that the employment standards legislation in that province ousts the possibility of a class action to enforce such standards. One anterior question to this objection, however, is proposed to be a common issue; namely, whether the plaintiffs have the rights recognized by the British Columbia employment standards legislation. Another anterior question is whether a conspiracy existed to avoid the application of employment standards legislation.

[12] Multi-jurisdictional class actions create difficulties, but the chambers judge decided that the determination of the effect of the British Columbia legislation and of the decision of the British Columbia Court of Appeal in *Macaraeg* was premature and the outcome was not plain and obvious.

[13] We substantially agree with the chambers judge's view, without prejudice to the possibility that on further evidence these defendants may establish that the British Columbia courts are the preferable location for those proceedings, for reasons of public policy or otherwise.

[14] As to the appeal on behalf of all defendants, at the certification stage the chamber judge was not prepared to strike causes of action that had been properly pleaded, although he recognized that some of the claims might be summarily dismissed upon proper application.

[15] While in general terms, litigation is often not well served by a proliferation of alternative and either redundant or inconsistent forms of claim, such as contract, fiduciary duty, statute-based causes of action, conspiracy and other torts, the certification stage is not necessarily an appropriate stage to assess whether the pleading of such alternatives creates problems, or engenders injustice.

[16] The first instance court is exercising a discretion for which appellate intervention is warranted only if the judge has clearly misdirected himself or herself on the facts or the law,

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proceeded arbitrarily, or if the decision is so clearly wrong as to amount to an injustice. On the record to this point, we are not persuaded that the chambers judge has allowed too many common issues. We therefore affirm the chambers judge's finding, but without prejudice to the defendants' ability on further evidence to move for narrowing of the common issues.

[17] A judge who certifies a proposed class action, in whole or in part, with specified common issues and identified, un-conflicted representative plaintiffs is making a procedural order. Absent a material change of circumstances, or reversal on appeal, the order stands. A material change could include the development of circumstances or evidence which justifies changing or eliminating previously certified common issues, or adding new ones, or removing or replacing representative plaintiffs. Certification does not forbid evolution of the action.

[18] In connection with the chambers judge's determination that there were eligible representative plaintiffs for each of the specified common issues at this stage, we are also not persuaded that appellate interference is justified. But, again, this conclusion is without prejudice to the possibility of a more focused later objection to the continued propriety of the named representatives.

[19] In the result, all appeals are dismissed.

Appeal heard on May 10, 2018

Memorandum filed at Calgary, Alberta
this 15th day of May, 2018


Schutz J.A.

Appearances:

J. Mandryk
T.Q. Yang
T.P. Charney
S. Barrett

for the Appellants on Appeal No. 1701-0215-AC/Respondents on Appeal No. 1701-0216-AC

P.D.S. Jackson
C. Smith
S. Whitmore

for all Respondents on Appeal No. 1701-0215-AC and for the Appellants on Appeal 1701-0216-AC, Western Hockey League, McCrimmon Holdings, Ltd. and 32155 Manitoba Ltd., a Partnership c.o.b. as Brandon Wheat Kings., Brandon Wheat Kings Limited Partnership, 1056648 Ontario Inc., Calgary Flames Limited Partnership, Calgary Sports and Entertainment Corporation, Rexall Sports Corp., Edmonton Major Junior Hockey Corporation, Edmonton Oilers Hockey Corp., EHT, Inc., Hurricanes Hockey Limited Partnership, Prince Albert Raiders Hockey Club Inc., Rebels Sports Ltd., Queen City Sports & Entertainment Group Ltd., Braken Holdings Ltd., Saskatoon Blades Hockey Club Ltd., Medicine Hat Tigers Hockey Club Ltd., 1091956 Alta Ltd., Portland Winter Hawks, Inc., Brett Sports & Entertainment, Inc., Hat Trick, Inc. d.b.a. Spokane Chiefs Hockey Club, Thunderbird Hockey Enterprises, LLC, Top Shelf Entertainment, Inc., Swift Current Tier 1 Franchise Inc., Swift Current Bronco Hockey Club Inc., Moose Jaw Tier 1 Hockey Inc. d.b.a. Moose Jaw Warriors, Moose Jaw Warriors Tier 1 Hockey, Inc., Lethbridge Hurricanes Hockey Club, and Canadian Hockey League

M.D. Andrews, Q.C.
A. Chowdhury

for the Appellants on Appeal No. 1701-0-216-AC, Kamloops Blazers Hockey Club, Inc., Kamloops Blazers Holdings Ltd., Kelowna Rockets Hockey Enterprises Ltd., Brodsky West Holdings Ltd., Edgepro Sports & Entertainment Ltd., Vancouver Junior Hockey Limited Partnership, Vancouver Junior Hockey Partnership, Ltd., West Coast Hockey Enterprises Ltd., West Coast Hockey LLP, Kootenay Ice Hockey Club Ltd.