Court of Queen's Bench of Alberta

Citation: Walter v Western Hockey League, 2017 ABQB 382

Date:
Docket: 1401 11912
Registry: Calgary

Between:

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

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

Defendants

Memorandum of Decision
of the
Honourable Mr. Justice R.J. Hall

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[1] The Plaintiffs in this action seek to have their action certified pursuant to the Alberta *Class Proceedings Act*, SA 2003, c C-16.5 as amended ("*CPA*").

[2] The three Plaintiffs are former hockey players who played on teams in the Western Hockey League ("WHL"). The WHL is one of three leagues featuring major junior hockey in Canada and the United States; the other two leagues being the Ontario Hockey League ("OHL") and the Quebec Major Junior Hockey League ("QMJHL"). The three leagues operate under the umbrella of the Canadian Hockey League ("CHL"). Each year, the winner of each league, and a host team, compete for the Memorial Cup Championship.

[3] The three Plaintiffs have filed a 66-page Statement of Claim here in Alberta. The claim is made against the WHL, the CHL, the owners of five Alberta clubs, six British Columbia clubs, four Saskatchewan clubs, one Manitoba club, one Oregon State club, and four Washington State clubs.

[4] The three Plaintiffs claim that while they played in the WHL they were employees of the clubs for whom they played. They claim that they should therefore be entitled to receive minimum wage payments in accordance with minimum wage legislation in each of the four Canadian and two US jurisdictions where the WHL carry on business. Various claims are made including:

1. Breach of contract of employment in British Columbia, Alberta, Saskatchewan and Manitoba;
2. Breach of contractual duties of honesty, good faith and fair dealing in British Columbia, Alberta, Saskatchewan and Manitoba;
3. Breach of statute in Washington and Oregon and pursuant to US labour laws;
4. Breach of the statutes in British Columbia, Alberta, Saskatchewan and Manitoba respecting employment standards legislation;
5. Claim that the WHL is jointly and severally liable to each player pursuant to the common employer doctrine;
6. Conspiracy;
7. Negligence against the Canadian clubs and their owners, the WHL and the CHL;
8. Unjust enrichment against the Canadian clubs and their owners, the WHL and the CHL;
9. Waiver of tort against the Canadian clubs and their owners, the WHL and the CHL.

[5] The remedies sought by the Plaintiffs are payment of back wages, holiday pay, vacation pay and overtime pay pursuant to applicable employment standards legislation, together with interest; that the Defendants disgorge all profits generated as a result of benefiting from the breaches of the applicable employment standards legislation, conspiracy and waiver of tort; and that the Defendants pay punitive damages to the Plaintiffs. The Plaintiffs also claim the costs of administering and distributing any monetary judgment.

[6] Similar actions have been brought in Quebec against the owners of the clubs in the QMJHL and the CHL; and in Ontario against the owners of the clubs in the OHL and the CHL. In the Ontario action, Justice Perell of the Ontario Superior Court of Justice has ruled upon the class certification application, and I have had the benefit of reading his decision in ***Berg v Canadian Hockey League***, 2017 ONSC 2608 (the "parallel Ontario proceeding"). In that decision Justice Perell has provided an excellent summary of the evidence and background, most of which is common to these proceedings.

Test for Certification Application

[7] The *CPA* sets out the certification test in section 5(1) set out below:

> 5(1) In order for a proceeding to be certified as a class proceeding on an application made under section 2 or 3, the Court must be satisfied as to each of the following:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a person eligible to be appointed as a representative plaintiff who, in the opinion of the Court,
>
> (i) will fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

[8] The Supreme Court of Canada, in ***Hollick v Toronto (City)***, 2001 SCC 68 at para 15 provides that important advantages of class proceedings are judicial economy, access to justice and behaviour modification.

[9] An application for certification is a procedural motion only. The court hearing the application is not to assess or determine the merits of the plaintiff's claim or to resolve factual disputes: *CPA*, s 6(2).

[10] If the action is certified, then any person, regardless of residence, who meets the criteria to be a class member in respect of a class proceeding is a class member, unless that person opts out of the class proceedings: *CPA*, s 17.

[11] It is not necessary that the representative plaintiff has a cause of action against each defendant, as long as the class members collectively have at least one cause of action against each of the defendants: ***Eaton v HMS Financial Inc.***, 2008 ABQB 631 at para 67.

[12] Whether pleadings disclose a cause of action under section 5(1)(a) is to be determined on the same standard of proof that applies to an application to strike a cause of action, based on the "plain and obvious test". That is, "the facts as pleaded are assumed to be true and the requirement is satisfied unless it is 'plain and obvious' that the plaintiff's claim cannot succeed": ***Warner v Smith & Nephew Inc.***, 2016 ABCA 223 at para 12 , leave to appeal to SCC refused, 37229 (2 February 2017).

[13] The balance of the certification application – i.e. the requirements of section 5(1)(b) through (e) of the *CPA* – must be supported by evidence that establishes "some basis in fact" that those requirements have been met. The concern at the certification stage is with the form of the proceeding, namely, whether should it proceed as a class action. The Court is not to consider the merits of the claim itself at a certification application. The question before the Court is not whether there is some basis in fact for the claim, but whether there is some basis in fact to establish each of the individual certification requirements: *Hollick* at para 25; ***Pro-Sys Consultants Ltd. v Microsoft Corporation***, 2013 SCC 57 at paras 99-105. The "some basis in fact" threshold is not onerous. A plaintiff need only demonstrate a minimum evidentiary basis to support the conclusion that the action can go forward as a class proceeding. The certification requirements need not be proven on a balance of probabilities, nor is the certification judge to enter into a weighing of conflicting evidence: *Pro-Sys Consultants Ltd.* at paras 99-105.

[14] It follows that the defendant has an inversely heavy evidentiary burden to defeat the "some basis in fact" standard. In order to rebut a plaintiff's evidence establishing some basis in fact, the defendant bears an onus to demonstrate that there is no basis in the evidence to support a determination that the certification requirements are met: ***Lambert v Guidant Corp.***, [2009] OJ No 1910 (QL) at paras 67-68 (SCJ), leave to appeal refused [2009] OJ No 4464 (QL) (Div Ct).

[15] However, the test for certification is not a mere formality. Canadian courts treat the certification motion as an important screening mechanism for eliminating claims that are not appropriately resolved by class action. The Supreme Court of Canada has affirmed that "[t]he standard for assessing evidence at certification does not give rise to a 'determination of the merits of the proceeding' [...] nor does it involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny": *Pro-Sys Consultants Ltd.* at para 103.

Statutory Exemptions

[16] Legislatures in Saskatchewan, British Columbia, and Washington State have each enacted statutory prohibitions that exempt players from the applicable employment standards

legislation. In this application the Plaintiffs concede the applicability of those statutory provisions, from the date that they came into force, and going forward. An issue remains between the Plaintiffs and the Defendants as to whether the statutory prohibitions in each of those jurisdictions speak from the time of its coming into force, or retroactively.

[17] This is a question going to the merits, and it is not to be determined by me at this stage of the proceedings.

Section 5(1)(a) Analysis

[18] The pleadings in the action disclose various causes of actions. It is not "plain and obvious" that those causes of actions cannot succeed.

[19] The defence argues that the Plaintiffs do not have a cause of action in negligence; rather, it is simply a claim that the Defendants breached the applicable employment standards legislation.

[20] In similar actions, the cause of action expressed in negligence has been allowed to proceed. I am satisfied that the particulars pleaded in the Plaintiffs' negligence claim extend much further than the Defendants' breach of the applicable employment standard legislation.

[21] The Defendants argue there is no basis pleaded for the claim of conspiracy. I do not accept that argument. The claim for conspiracy is clearly pleaded and it is not plain and obvious that it would not succeed.

[22] The claims for breach of contract, breach of statute, unjust enrichment, waiver of tort are all property pleaded and disclose causes of action. It is not plain and obvious that any of these cannot succeed.

[23] The Defendants argue that claims involving teams from British Columbia cannot be certified because there is no civil cause of action available to determine disputes under British Columbia employment law. They rely upon the decision of the British Columbia Court of Appeal in ***Macaraeg v E Care Contact Centers Ltd.***, 2008 BCCA 182, leave to appeal to SCC refused, 32704 (9 October 2008).

[24] In *Macaraeg*, the plaintiff claimed payment of overtime hours for herself, and as a representative of a class of the defendant's employees who worked, but were not paid for overtime. There was no mention of overtime in her employment contract. The defendant brought an application to determine whether the requirements of the *Employment Standards Act*, RSBC 1996, c 113 ("*ESA*") were implied terms of the contract of employment between the defendant and the plaintiff; and whether the plaintiff was entitled to bring a civil action to enforce her statutory right to overtime pay, or whether, instead, the jurisdiction to determine such claims lies exclusively with the Director of Employment Standards under the enforcement mechanisms of the *ESA*. It was noted that the plaintiff intended to seek certification of her action under the British Columbia *Class Proceedings Act,* RSBC 1996, c 50. Writing for the Court, Chiasson J.A. held at paragraph 74:

> In my view, in ascertaining the intention of the legislators an important indicium is whether the legislation provides effective enforcement of the right conferred by statute. If the statute does so, there is no need for enforcement outside the statute and *prima facie* there is no civil cause of action. If the statutory remedy is

> inadequate, a logical conclusion is the Legislature intended the right to be enforceable by civil action. If it were not, granting the right would be pyrrhic. It is at this stage of the analysis in the context of employment standards legislation that the issue of implied contractual terms arises.

[25] At paragraphs 77 and 78 he stated:

> I reject the broad proposition that rights granted by employment standards legislation are implied terms of employment contracts. In my view, the cases relied on by the learned chambers judge do not support such a conclusion. *Machtinger* and *Kenpo Greenhouses* do not concern statutorily-implied terms. [...]
>
> In my view, the judge erred concluding as a general proposition that rights in employment standards legislation are implied by law into employment agreements. The implication of terms is an adjunct to the conclusion, based on a consideration of the legislation as a whole, that the Legislature intended the rights could be enforced by civil action, a conclusion that may be derived from the absence of an effective statutory enforcement regime.

[26] And at paragraph 84, Chiasson J.A. wrote:

> [...] As noted, and as mandated by *Orpen* and *Vanderhelm*, the inquiry is whether the legislation allows pursuance of statutorily-conferred rights in a civil action. In my view, the answer to that question ends the inquiry: if yes, in a case such as this, the right is an implied contractual term and enforceable in an action for breach of contract; if no, the employee is obliged to rely exclusively on the enforcement mechanism in the legislation.

[27] In the result, the British Columbia Court of Appeal concluded that the plaintiff was not entitled to enforce her statutory right to overtime pay in a civil action; that exclusive jurisdiction to determine such claims lies with the Director, subject to an appeal tribunal, all pursuant to the provisions of the *ESA*; and, as a matter of law, the minimum overtime pay requirements of the *ESA* were not implied terms of the contract of employment between the defendant E Care Contact Centers Ltd. and the plaintiff.

[28] Relying on *Macaraeg*, the Defendants in this action argue that the claim of the Plaintiffs in British Columbia, that they should be paid the minimum prescribed in the *ESA* in British Columbia, cannot be maintained as a civil action, but instead a complaint must be filed with the Director of Employment Standards under the *ESA*. Therefore, the Defendants say, it is plain and obvious that the breach of contract claims being made by the Plaintiffs, and the breach of statute claims being made by the Plaintiffs cannot be maintained by them in a civil action.

[29] The Plaintiffs seek to distinguish *Macaraeg* on five bases. Firstly, the Plaintiffs maintain that *Macaraeg* is distinguishable on its facts because the contract in *Macaraeg* did not speak to overtime, whereas here, the Standard Player Agreement ("SPA") discusses compensation contractually promised to the Plaintiffs, which, the Plaintiffs say, is a clear attempt to waive the minimum standard. Put another way, since the SPA sets out compensation to be paid to the players, the Plaintiffs say that, where that compensation violates the minimum standards in the *ESA*, it provides the Plaintiffs with a breach of contract claim which can be litigated as a civil action.

[30] Secondly, whether the administrative enforcement regime is adequate depends upon the facts of the case at bar. This Court cannot make factual determinations at the certification stage.

[31] Thirdly, the Plaintiffs maintain that administrative proceedings in this case would be grossly inefficient and impractical, and in any event would be unlikely to be pursued.

[32] The Plaintiffs rely upon ***Dominguez v Northland Properties Corporation***, 2012 BCSC 328 where the British Columbia Supreme Court certified a class action which included claims for breach of British Columbia's employment standards legislation. That Court distinguished *Macaraeg* on the basis that there were no other means of resolving the claims that were more practical or efficient than the class proceeding.

[33] Fourthly, the Plaintiffs argued that *Macaraeg* is no longer good law since the Supreme Court of Canada's decision in ***Bhasin v Hrynew***, 2014 SCC 71, where the Court recognized a new common law duty of honest performance requiring the parties to be honest with each other in relation to their performance of their contractual obligations. The Court noted that good faith plays a role in the law of implied terms, particularly with respect to terms implied by law in certain classes of contracts such as employment. The Plaintiffs argued that *Macaraeg* can no longer be the law in light of *Bhasin*.

[34] Finally, the Plaintiffs argue that *Macaraeg* is inconsistent with other Supreme Court of Canada authorities, referencing ***Machtinger v HOJ Industries Ltd.***, [1992] 1 SCR 986 and ***Parry Sound (District) Social Services Administration Board v O.P.S.E.U.***, *Local 324*, 2003 SCC 42, which decisions bind the courts of British Columbia. The Plaintiffs say that the Supreme Court of Canada has confirmed that the underlying and overriding purpose of the employment standards legislation is to counter the historic imbalance in bargaining power that characterizes the relationship between employers and employees. The statutory provisions inform employment contracts in two ways: (1) they function as a default contractual arrangement where the contract is silent and (2) they nullify and displace any lesser arrangements.

[35] While *Macaraeg* discusses these Supreme Court of Canada authorities, I find that it is confusing on the point.

[36] Further, it is clear to me that *Macaraeg* dealt with a case where there were no contractual provisions between the parties respecting the matters in issue (overtime). *Macaraeg* decided, on those facts, that the plaintiffs' entitlement had to be determined by the Director pursuant to the *ESA*.

[37] I am persuaded by the reasoning in *Dominguez* that the class action is the most practical and efficient means of resolving the claims against the BC Defendants.

[38] I am not satisfied that *Macaraeg* precludes the civil cause of action alleged by the Plaintiffs in this action. I am of the view that there is at least an arguable case that the cause of action for breach of statute and/or breach of contract, as alleged in the Fresh as Amended Statement of Claim, can be maintained.

[39] Accordingly, I reject the Defendants argument that the Plaintiffs have no civil cause of action against the BC Defendants.

[40] Further, even if *Macaraeg* does extinguish such civil cause of action for breach of contract, I am satisfied that the other pleaded causes of action, such as conspiracy, common employer, negligence, unjust enrichment, and waiver of tort, are still sound against the BC

Defendants: see ***Brigaitis v IQT, Ltd. c.o.b. as IQT Solutions***, 2014 ONSC 7 where, even though one cause of action was precluded by the *ESA*, the Court held that the Plaintiffs maintained the right to pursue all the remaining civil claims, such as conspiracy, negligence, etc. and that the substantive jurisdiction of the Court over those claims remain intact and could not be ousted by Employment Standards Proceedings.

[41] Accordingly, I am satisfied that, in respect of the BC claims, the pleadings disclose a cause of action.

Should All Causes of Action be Certified?

[42] In the parallel Ontario proceeding, Justice Perell decided that he would not certify the causes of action for: (1) breach of contract, (2) negligence, (3) breach of duty of honesty, good faith and fair dealing, (4) conspiracy and (5) waiver of tort. He pointed out that the Plaintiffs' action depended on the resolution of a single profound question: when do amateur athletes become employees of their teams and subject to various employment standard statutes? He determined that the Plaintiffs were bringing six causes of action to answer the one critical question; and while the Defendants conceded that the Plaintiffs had properly pleaded their causes of action, they maintained that there was redundancy in the number of claims put forth. Justice Perell agreed with the Defendants' submission. He stated that, in considering the preferable procedure criteria, the Court should consider the rights of the plaintiffs and defendants, the extent to which certification furthers the objectives underlying the *Act*, whether the claimants will receive a just and effective remedy for their claims, the relationship between proportionality and access to justice, and the complexity and manageability of the proposed action as a whole. He stated that, based on those considerations, the breach of contract, negligence, breach of duty of honesty, good faith and fair dealing, conspiracy and waiver of tort causes of action do not satisfy the preferable procedure criterion. He found that those claims are redundant to the main claim. He noted 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 will 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 they have failed to prove that the defendants breached the various employment standards statutes, their other causes of actions will necessary fail.

[43] Justice Perell noted that the redundant causes of action cause enormous problems of manageability, citing, in particular, the conspiracy claim, which could result in each defendant having its own defence counsel, and require evidence going back as far as the year 2000 when the Tax Court of Canada originally decided ***McCrimmon Holdings Ltd. v MNR***, [2000] TCJ No 823 (QL).

[44] So, while Justice Perell found under section 5(1)(a) that all of these causes of actions were properly disclosed in the pleadings, he determined that many of them were redundant, and should not be certified because of the requirements of section 5(1)(d), that the class proceeding be a preferable procedure for the fair and efficient resolution of the common issues.

[45] In this case, I cannot agree with Justice Perell in respect of the breach of contract claim against the Canadian Defendants. A viable cause of action is properly pleaded herein to say that it is an implied term of a contract of employment that the Defendants will not violate the applicable employment standards legislation. While, in Alberta, Saskatchewan and Manitoba

there is a parallel cause of action for breach of the statute itself, that question is murky in British Columbia because of the decision of *Macaraeg*.

[46] Justice Perell chose not to certify various causes of action for reasons of efficiency and judicial economy. I am not prepared to follow his lead. If the pleadings disclose causes of action, then I consider that those causes of action should be permitted to proceed. While I recognize that the Court is to look at the preferable procedure question through the lens of access of justice, behaviour modification and judicial economy, and that redundant causes of action do not promote either access to justice or judicial economy, nevertheless, I am not prepared to strike causes of action which have been properly pleaded. I cannot do so in actions brought by a single plaintiff. Similarly I do not believe I can dispose of properly pleaded causes of action in a class action certification application. It may be that the Plaintiffs would be well advised to simplify their claims. It may be that some of these claims might be summarily dismissed upon proper application. However, I will not rule out such claims at this stage in the proceedings.

CPA section 5(1)(b): Identifiable Class

[47] Section 5(1)(b) of the *CPA* requires the Court to be satisfied that there is an identifiable class of two or more persons.

[48] The identity of all the players who played for the WHL teams during the time period alleged is a matter of record.

[49] There can be no question but that there is an identifiable class of two or more persons.

[50] The proposed class definitions satisfy the three purposes of a class definition:

> (a) They identify persons who have a potential claim for a relief against the defendants;
>
> (b) They define the parameters of the lawsuit so as to identify those persons who are bound by the results; and
>
> (c) They describe who is entitled to notice of certification.

See ***Andriuk v Merrill Lynch Canada Inc.***, 2013 ABQB 422 at para 110, aff'd 2014 ABCA 177.

[51] An issue arises as to whether classes should be open-ended or fixed as the date of the certification application. I will address that later in these reasons.

The Common Issues: _CPA_ Section 5(1)(c)

[52] Section 5(1)(c) of the *CPA* requires that "the claims of the prospective class members raise a common issue, whether or not the common issue predominates over issues affecting only individual prospective class members". Section (1)(e) of the *CPA* defines "common issue" as:

> (i) common but not necessarily identical issues of fact, or
>
> (ii) common but not necessarily identical issues of law that arise from common but not necessarily identical facts.

[53] The Supreme Court of Canada has held that the commonality question should be approached purposively: "The underlying question is whether allowing the suit to proceed as a

representative one will avoid duplication of fact-finding or legal analysis": ***Western Canadian Shopping Centres Inc. v Dutton***, 2001 SCC 46 at para 39.

[54] The first three proposed common issues are:

1. Are, or were, the class members employees of the defendant clubs, the WHL and/or the CHL pursuant to (a) the applicable employment standards legislation and/or (b) at common law?
2. Are, or were, the class members who played for the defendant clubs located in Provinces in "pensionable employment" of the defendant clubs located in the Provinces, the WHL and/or the CHL, pursuant to the Canada Pension Plan?
3. Are, or were, the class members who played for the defendant clubs located in the Provinces in "insurable employment" of the defendant clubs located in the Provinces the WHL and/or the CHL, pursuant to the *Employment Insurance Act*?

[55] With regard to these issues, the Plaintiffs say the test for employment status is similar, if not identical, in all of the provinces. The statutory definition of employee's status is substantially the same in all of the provinces. The tests as to whether an individual is an employee are similar at common law in all of the Provinces, as is the test for what can constitute "work". The Plaintiffs point to the decision in *McCrimmon Holdings Ltd.* where the Tax Court held that players in the WHL are employees of the clubs for whom they play.

[56] The Plaintiffs point to early iterations of the SPA which referred to a player's "employment and duties". It was only at the beginning of the 2013/2014 season that returning WHL players were all required to execute a new SPA to replace their previous one. Where their previous SPA described the players receiving "remuneration" in return for performing "services", in 2013 the new SPA re-formulated the Plaintiffs' remuneration as a "monthly expense reimbursement" and a "monthly overage honorarium for 20-year old players" and classified the players as "amateur athletes" while removing all references to "service".

[57] The Plaintiffs further say that there are common issues arising from the defences, which they identified as follows:

4. Whether being in a relationship of "guidance, supervision, development and education" negates an individual's employee status, absent any formal exemption to this effect;
5. Whether being an "amateur athlete" negates an individual's employment status, absent any formal exemption to this effect;
6. The scope of the *US Fair Labor Standards Act*'s recreational exemption;
7. Whether the recently enacted amendments excluding amateur athletes from employment standard legislation apply retroactively; and
8. The scope of any applicable trainee/intern exemption.

[58] The Plaintiffs maintain that these are common legal issues, the resolution of which will bind all affected members of the class. Class members are identically situated with respect to questions of whether they are "amateur athletes", "trainee/interns", students, professionals, or in relationships of "guidance, supervision, development and education".

[59] The Plaintiffs propose further common issues as:

9. Are the WHL and the clubs a common employer, under statute and/or at common law?

10. Are the minimum wage, overtime pay, holiday pay, and/or vacation pay requirements under the applicable employment standards legislation express or implied terms of contract between the class members and any or all of the defendant clubs, the WHL and/or the CHL?

11. Did any or all of the Defendants breach any of the contractual obligations found to exist above?

12. Do the defendant clubs, the WHL, and/or the CHL owe a duty, in contract or otherwise, to class members to act in good faith and deal with them in a manner characterized by candour, reasonableness, honesty and/or forthrightness in respect to their obligations to:

    a) ensure that the 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;

    d) ensure that class members are compensated in accordance with their entitlements under the applicable employment standards legislation?

13. Did any or all of the Defendants breach their good faith duties with respect to any of the factors listed above?

14. Do any or all of the defendant clubs, the WHL and/or the CHL have an obligation to the class members under the applicable employment standards legislation to pay them minimum wage, overtime pay, holiday pay and/or vacation pay?

15. Did any or all of the defendant clubs, the WHL and/or the CHL breach the applicable employment standards legislation by failing to pay the class members minimum wage, overtime pay, holiday pay and/or vacation pay?

16. Did any or all of the Defendants conspire to violate the applicable employment standards legislation? If so when, where, and how?

17. Were any or all of the Defendants unjustly enriched by failing to compensate the class members with minimum wage, overtime pay, vacation pay and/or holiday pay owed to them in accordance with the applicable employment standards legislation and/or failing to make the required Employer Payroll Contributions on behalf of the class members?

18. Are any or all of the Defendants liable to the class members in waiver of tort?

19. Did any or all of the defendant clubs, the WHL 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 their applicable employment standards legislation.

20. Did any or all of the Defendants breach any of the duties of care found to exist above?

21. Is this an appropriate case for any or all of the Defendants to disgorge profits?

22. Can any or all of the claims be assessed on an aggregate basis?

23. Are any or all the Defendants liable for punitive damages?

24. Are the defendant clubs located in Washington, WHL and/or CHL liable for damages in the amount of double the amount of all wages outstanding pursuant to Wash. Rev. C. Tit. 49, §49.46, as amended, and the regulations thereunder and/or *Fair Labor Standards Act of 1938*, 29 USC §201 and the regulations thereunder?

25. Are the defendant clubs located in Oregon, the WHL and/or CHL liable for additional damages in the amount of 30 days' wages pursuant to Or. Rev. Stat. Tit. 51, §653 and the regulations thereunder and/or *Fair Labor Standards Act of 1938*, 29 USC §201 and the regulations thereunder?

26. Should the Defendants pay pre-judgment and post-judgment interest, and at what annual interest rate?

27. Should the Defendants pay the costs of administering and distributing any monetary judgment and/or the costs of determining eligibility and/or the individual issues? If yes, who should pay what costs, why, and in what amount?

[60] I am satisfied that there is some basis in fact for a finding that the claims of the prospective class members raise these common issues. Section 5(1)(c) of the *CPA* is satisfied.

Preferable Procedure: *CPA* 5(1)(d)

[61] In order for this action to be certified as a class proceeding the Court must be satisfied that a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues.

[62] The Plaintiffs note that there are thousands of prospective class members, and that any alternative to a class proceeding would require individual civil and/or statutory claims to be made in multiple jurisdictions before the relative tribunals or courts. The common issues would be litigated repeatedly on an individual basis, including whether each player is an employee, whether his standard form contract and/or the applicable employment standard legislation has been breached, which defendants are responsible for any breach and what remedies the Plaintiffs may be entitled to. The Plaintiffs maintain this would be inefficient and impractical, and would result in a significant waste of judicial and administrative resources; whereas a class proceeding would allow the common issues against the WHL and the affiliated clubs to be determined together in the most economical, efficient and practical manner.

[63] The Defendants say that a class action is not an efficient way of resolving disputes and achieving the goals of the *CPA* without issues that are capable of being assessed in common. The Court must assess whether proceeding as a class action will avoid duplication of fact finding or legal analysis. Far from avoiding duplication, a class action, certified across six jurisdictions, would invite repetition, given the different legislative frameworks that govern employment standards. Even if there is some basis in fact to establish the existence of common issues, the Defendants submit that the Court must determine whether the resolution of such issues would depend upon individual findings of fact or would sufficiently advance each proposed class members claim. If the common issue fails to satisfy the Court in this regard the Court must refuse to certify it: *Pro-sys* at paras 100, 103.

[64] I note that, because the Statement of Claim deals with claims in four different provinces, and 2 US states, the Alberta Court must apply foreign law in determining the answers to the issues arising in the action. Because there are six different jurisdictions, where the law may differ in some respects in each jurisdiction, the matter to be tried is complex. However, the complexity of proceeding in one action pales in comparison to the inefficiency, confusion, and potential lack of consistency if each of the prospective Plaintiffs was required to litigate his claim separately.

[65] While the common issues may require refinement as the claim proceeds, I am satisfied that a class proceeding is the preferable procedure for the fair and efficient resolution of these common issues, except as against the US Defendants, as I will explain below.

Jurisdiction

[66] The Defendants argue, under the preferable procedures branch of the section 5(1)(a) test, that a class action would not be the preferable procedure for the claims against the American teams. The Defendants note that the Supreme Court of Canada has stated that "the preferability inquiry should be conducted through the lens of the three principal advantages of class actions – judicial economy, access to justice, and behaviour modification": *Hollick*, at para 27. Would the class proceeding be a fair, efficient and manageable method of advancing the claim; and would the class proceeding be preferable "in the sense of preferable to other procedures such as joinder, test cases, consolidation and so on": *Hollick*, at para 28.

[67] The Defendants also reference the Alberta Court of Appeal decision in ***T.L. v Alberta (Child, Youth and Family Enhancement Act, Director)***, 2009 ABCA 182 at paras 26 and 27:

> We endorse the following analytical framework adopted by Thomas J.:
>
> [...]
>
> > In summary, preferability involves a balancing of all the interests of the parties and of the Court and may include an assessment of the economics of the litigation, the number of individual issues to be dealt with, the complexities if there are third party claims and the alternative means available for adjudicating the dispute[...]
>
> The chambers judge adopted a careful, purposive approach in setting the criteria for certification. The s. 5(2) factors were considered in the context of the overall case, inclusive of the common issues, and in a manner consistent with the approach taken by Winkler J. in *Carom v. Bre-X Minerals Ltd.* (1999), 44 O.R. (3d) 173 (Ont. S.C.J.), at 239:

> The proper approach to be taken in considering whether a class proceeding is the preferable procedure for resolving the common issues is to have regard to all of the individual and common issues arising from the claims in the context of the factual matrix. A class proceeding is the preferable procedure where it presents a fair, efficient and manageable method of determining the common issues which arise from the claims of multiple plaintiffs and where such determination will advance the proceeding in accordance with the goals of judicial economy, access to justice and the modification of the behaviour of wrongdoers.
>
> As with the other criteria for certification there is an interaction between the common issues and the preferable procedure. In order for an issue to constitute a common issue in a class proceeding, the resolution of the issue must be capable of advancing the litigation in a legally material way. Thus in order for a common issue trial, and hence a class proceeding, to be the preferable procedure it must advance the litigation in such a way that the goals of the Act are met. [emphasis in appellate decision]

[68] The Defendants argue that certifying the claims against the US based teams would be neither fair nor efficient, and will not promote access to justice. They state that the tests for determining whether an individual is an employee and, if so, what activities constitute covered employment under US law, are unsettled. They argue that the preferable procedure available to US players is through the relevant US courts, which would be in a position to determine this unsettled area of law, subject to the full appeals process that is otherwise unavailable in Canada with respect to a point of US law. They note that their expert, Mr. Dunn, made clear that in his opinion, the US courts would not likely recognize or enforce any Canadian judgment in this situation.

[69] As to the latter assertion, I am of the view that Mr. Dunn's opinion does not reflect the fact that, as admitted by the Defendants, the US teams have attorned to the jurisdiction of the Alberta Court. The fact of such attornment, in my view, renders it far more likely that a decision by the Alberta Court would be enforced in Washington and Oregon.

[70] It is, however, the case that while the Defendants agreed to attorn to the jurisdiction of the Alberta courts, they reserved the right to argue, at the certification stage, that the Alberta courts should refuse jurisdiction on the basis that an Alberta class action would not be the preferable procedure for claims against those US Defendants.

[71] This argument found approval by Justice Perell in the parallel Ontario proceeding. Justice Perell noted that the manageability of the class action is an important ingredient of the preferable procedure analysis. He was of the view that the differences in the claims against the Ontario teams versus the claims against the American teams create a management nightmare. He added that there is a real prospect that there might be inconsistent outcomes for the class comprised of players from teams in Ontario, Michigan and Pennsylvania. He stated that it is not a given that players, whose playing circumstances are common under the SPA, would be classified as employees under all of Ontario, Michigan and Pennsylvania law, because each jurisdiction has its own common law and its own statutes to interpret. He noted that each statute must be

interpreted discretely. He noted that the status of amateur athletes as employees is an open question in Ontario, Michigan and Pennsylvania. In the result, he did not accept that it was fair to the Defendants for an Ontario court to interpret and apply the Michigan, Pennsylvania or US federal government minimum wage and employment standards legislation, where access to justice is available to the players in the American courts in Michigan and Pennsylvania. He saw no unfairness to the players, pursuing claims to enforce Michigan and Pennsylvania statutes, to do so in Michigan and Pennsylvania, where there are courts and administrative agencies available to resolve employment law disputes. He held it would not be just and fair to the American team Defendants for an Ontario court to decide the application of American law. Therefore he concluded that an Ontario class action is not the preferable procedure to resolve the claims against the American teams. He noted that the issues raised in the case at bar are important issues and that it befits courts on either side of the border to at least pause to question whether they should decide an issue that their sovereign neighbour would prefer to decide for itself.

[72] I agree with Justice Perell's reasoning and conclusion respecting the US teams, and I find it is applicable to the teams in this action that are based in the states of Washington and Oregon.

[73] It is clear from the opinions of each of Mr. Dunn and Mr. Hancock that the law in each of those states and in the United States as a whole is unsettled as to whether athletes, such as these Plaintiffs, are employees. Further, the courts of Washington and Oregon may not be prepared to embrace an Alberta judgment respecting that issue, for reasons expressed by Mr. Dunn.

[74] I believe it would be inappropriate for an Alberta court to tell Washington and Oregon how their law should be interpreted and applied in these circumstances. There are actions available in those states, applying their rules of procedure, some of which differ considerably from Canada and Alberta procedures; such as the fact that in Canada a class member is a plaintiff unless he or she opts out, whereas in their jurisdictions a class member is not a plaintiff unless he or she opts in. It would be preferable that actions proceed in Washington and Oregon in respect of the US Defendants. Like Justice Perell, I am not prepared to certify the class actions against the US Defendants.

Is there/are there Persons Eligible to be Appointed as a Representative Plaintiff under Section 5(1)(e) of the *CPA*?

[75] Section 5(1)(e) of the *CPA* requires that the representative Plaintiff be a person who, in the opinion of the Court:

> (i) will fairly and adequately represent the interests of the class;
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and notifying class members of the proceeding; and
>
> (iii) does not have, in respect of the common issues, an interest that is in conflict with the interests of other prospective class members.

[76] The Defendants argue that the three representative Plaintiffs are not appropriate. Firstly, they point out the three representative Plaintiffs are former players and there is no present player amongst them. Secondly, they suggest that the proposed representative Plaintiffs are not properly informed about the lawsuit.

[77] The fact the players are former players enhances their independence and especially recommends them as representative plaintiffs.

[78] The fact that the Plaintiffs are not personally aware of the evidence filed by the Defendants, or have not studied that evidence for purposes of the class certification is of no moment at this stage. There is no suggestion to say that the three Plaintiffs are incapable of understanding the action, nor of instructing counsel. Further, the Plaintiffs are represented by experienced class action counsel, who can be trusted to shepherd the cause in an appropriate fashion.

[79] I note, however, that the evidence before me shows that Lukas Walter played only for the Tri-City Americans, in Kennewick, Washington, and not for any of the Canadian WHL teams. Since I am not certifying the action against the U.S. Teams, Mr. Walter is not representative of any of the classes. I am satisfied that the other two proposed representative Plaintiffs, being Travis McEvoy, and Kyle O'Connor, will fairly and adequately represent the interests of the classes. Further, I am satisfied with their plan for proceeding with the class action and notifying class members of that proceeding.

[80] The major issue under this heading arises under section 5(1)(e)(iii). The Defendants argue that the proposed representative Plaintiffs are in conflict with the interests of many class members, such that certification should be denied. The Defendants argue that their evidence shows that one-third of WHL teams make money, one-third of the WHL teams lose money and the other third barely break even. The Defendants suggest that, if the Defendant clubs are required to pay minimum wages, the teams will face significant financial consequences. Some teams will go out of business. Other teams will have to replace their existing benefits with minimum wages. The Defendants argue that this creates an unresolvable conflict within the class and between proposed class members and the proposed representative Plaintiffs.

[81] The Defendants also argue there is a potential conflict between parents and players, in that the parents understand the benefit of education, the cost of equipment, the billeting program, and the WHL scholarship, all of which are benefits provided to the players; whereas the prospective Plaintiff players may simply be interested in getting a greater paycheque or remuneration, without regard to the continuation of such benefits to the future.

[82] I find that there are no disqualifying conflicts between the representative players and other prospective class members.

[83] The Defendants' argument is, in essence, that they cannot afford to pay minimum wages, and they threaten that, if they are required to do so, benefits to the players will be cut, and teams will go out of business.

[84] I do not accept that reasoning. The interests of the representative Plaintiffs are to be paid minimum wages and overtime in accordance with the employment standards statutes. The interests of the prospective class members, who do not opt out, are precisely the same. There is no conflict of interest. If the suggested representative Plaintiffs succeed, then all prospective class members will succeed; if the suggested representative Plaintiffs fail, then all class members will fail. The relief sought is the same for all class members.

[85] As stated by Justice Perell in the parallel Ontario proceeding at paragraphs 240 and 241:

> A disqualifying conflict for the representative plaintiff does not arise from a defendant's threats or dire predictions of the consequences of certification. A

> future theoretical risk is no basis to deprive class members of access to justice through a class proceeding: *Chapman v. Benefit Plan Administrators*, *supra* at paras. 59-61.
>
> Moreover, if the action is certified and if the sky does indeed fall, then the sky falling is not a reason to decertify the class action, because it would remain to be determined whether the Defendants were wrongdoers and were liable to pay minimum wages and overtime pay to the Class Members. It is not exculpatory of wrongdoing for a defendant to argue or even prove that it cannot afford to comply with the law.

[86] Justice Perell goes on to note that this type of argument was rejected in ***1176560 Ontario Ltd. v Great Atlantic & Pacific Co. of Canada Ltd.*** (2002), 62 OR (3d) 535 (SCJ), aff'd (2004), 70 OR (3d) 182 (Div Ct), leave to appeal refused [2004] O.J. No. 2009 (CA). I agree that the reasoning in *Great Atlantic & Pacific Co* is appropriate to this case.

[87] I therefore conclude that the representative Plaintiff criterion is satisfied.

Conclusions

[88] Section 5(2) of the *CPA* mandates that I must consider the items enumerated therein. In relation to 5(2)(a), I determine that the questions of fact and law in the Canadian jurisdictions predominate over any questions affecting only individual prospective class members.

[89] In relation to 5(2)(b) no prospective class members have demonstrated a valid interest in controlling prosecution of separate actions.

[90] Respecting 5(2)(c) the class proceeding would not involve claims that are the subject of other proceedings.

[91] Respecting 5(2)(d), I am satisfied in respect of the Canadian Defendants that other means of resolving the claims are less practical or efficient. However, in respect of the US claims, it would be more practical and efficient that they be resolved within Washington and Oregon.

[92] Respecting 5(2)(e), the class proceeding against Canadian Defendants would not create greater difficulties then those likely to be experienced if relief were sought by other means. However, class proceedings against the US defendants would create those greater difficulties.

[93] I have determined that all causes of actions pleaded against the Canadian Defendants are properly pleaded, and it is not plain and obvious that any of those causes of actions will fail. As a result, all of those causes of actions are certified to proceed.

[94] The parties have provided submissions regarding the end date or absence thereof for the proposed class period. The Defendants object to the open-ended class period proposed by the Plaintiffs.

[95] This issue does not arise in respect of the British Columbia class or the Saskatchewan class, because the Plaintiffs concede that membership in those classes terminates, at the latest, on the date of the statutory prohibitions that exempt players from the applicable employment standards legislation.

[96] In the parallel Ontario proceeding, Justice Perell addressed the issue of an open-ended or rolling period and he concluded as follows:

> 160 In my opinion, where the circumstances of additional putative class members may be different, it may not be appropriate to have a rolling class period end date. Apart from the management and administration difficulties of the approach of an open-ended class period, the approach ignores the fundamental problem that there has been no adjudication to determine whether the circumstances of the new class members, (who in the case at bar, at the time of the original certification motion, were not even playing hockey for OHL Clubs), are such that the criteria for certification continue to be satisfied for them. Who's to say that the evidentiary record has not changed between the date of certification and the next notice of certification? And, commonality is not a matter to be proven at the common issues trial.
>
> 161 I note here that in other circumstances where representative plaintiffs seek to increase class size, which sometimes occurs as part of the settlement of an already certified class action, it is necessary to determine that the criterion for certification are satisfied, and this typically occurs as a part of a consent certification for settlement purposes. The point is that the class size usually cannot be altered without a certification motion.
>
> 162 I, therefore, shall amend the class definition to add a class closing date as of the date of the certification motion. This amendment is made without prejudice to the definition being amended from time to time by a new motion to certify, which, if granted, would be followed by a notice program.

[97] I am attracted by the efficiency and practicality of his approach and therefore I direct that the definition of the Alberta and Manitoba class have a closing date as of the date of the certification motion. This is directed without prejudice to the definition being amended from time to time by a new motion to certify.

[98] The classes which I certify, are as follows:

a. All players who were or are members of a WHL team owned and/or operated by one or more of the defendants located in the Province of British Columbia (a "team") at some point, commencing October 30, 2012, and all players who were members of a team who were under the age of 19 on October 30, 2012, but excluding any players who commenced playing for a team on or after February 15, 2016 (the "B.C. Class");

b. All players who were or are members of a WHL team owned and/or operated by one or more of the defendants located in the Provinces of Alberta or Manitoba (a "team") at some point, commencing October 30, 2012 and ending April 18, 2017, and all players who were members of a team who were under the age of 18 on October 30, 2012 (the "Alberta and Manitoba Class"); and

c. All players who were or are members of a WHL team owned and/or operated by one or more of the defendants located in the Province of Saskatchewan (a "team") at some point, commencing October 30, 2012, and all players who were members of a team who were under the age of 18 on October 30, 2012, but excluding any players who commenced playing for a team on or after April 29, 2014 (the "Saskatchewan Class").

[99] The common issues which I certify are those set out in these reasons, other than issues 6, 24 and 25.

[100] I appoint Messrs. McEvoy and O'Connor as the representative plaintiffs for all class members.

[101] As this action is multi-jurisdictional, section 9.1 of the *CPA* comes into play. With respect to the Canadian defendants I have determined that the criteria in section 5(1) of the *CPA* have been satisfied, as set out above. The requirements of section 9.1(1)(b) are met, most particularly in that the Defendants have agreed to the action against the Manitoba, BC and Saskatchewan Defendants being pursued in Alberta, and have attorned to the jurisdiction of the Alberta Court. In respect of section 9.1(2) and (3) of the *CPA*, there are no other jurisdictions in which actions have been brought.

[102] If the parties are unable to agree on the manner and time within which a class member may opt out of a proceeding they may address me orally and in writing. Otherwise, their agreement on these subjects is to be incorporated into the certification order.

[103] If the parties are unable to agree upon costs of this application, they may likewise address me orally or in writing.

Heard on the 7th day of February, 2017 to the 10th day of February, 2017 and the 15th day of February, 2017 and the 18th day of April, 2017.
Dated at the City of Calgary, Alberta this 15th day of June, 2017.

R.J. Hall
J.C.Q.B.A.

Appearances:

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