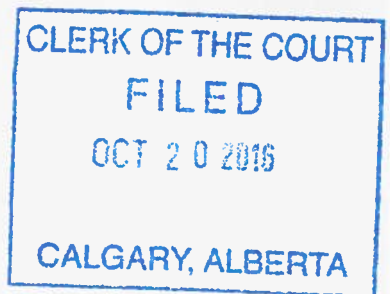

Court of Queen's Bench of Alberta

Citation: Walter v Western Hockey League, 2016 ABQB 588

Date:
Docket: 1401 11912
Registry: Calgary

Between:

Lukas Walter
as Representative Plaintiff

Plaintiff/Respondent

- and -

Western Hockey League, McCrimmon Holdings Ltd. and 32155 Manitoba Ltd., a Partnership carrying on business as Brandon Wheat Kings, 1056648 Ontario Inc., Rexall Sports Corp., EHT Inc., Kamloops Blazers Hockey Club, Inc., Kelowna Rockets Hockey Enterprises Ltd., Hurricanes Hockey Limited Partnership, Prince Albert Raiders Hockey Club Inc., Brodsky West Holdings Ltd., Rebels Sports Ltd., Queen City Sports & Entertainment Group Ltd., Saskatoon Blades Hockey Club Ltd., Vancouver Junior Hockey Limited Partnership, 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., Kootenay Ice Hockey Club Ltd., Moose Jaw Tier One Hockey Inc., DBA Moosejaw Warriors, Lethbridge Hurricanes Hockey Club and Canadian Hockey League

Defendants/Applicants

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

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[1] In this application, the Defendants seek an order:

(a) Striking the affidavit of Victoria Grygar sworn June 11, 2016;

(b) Striking the Declaration of Chester Hanvey sworn June 15, 2015, or in the alternative requiring the Plaintiff to produce the names of those players interviewed by Mr. Hanvey;

(c) Striking paragraphs 36, 38, 55, 57-58 and 61 of the affidavit of Andrew J. Eckart, sworn February 20, 2015, and Exhibits U, W, HH and NN thereto (with the exception of any direct quotes from any of the Defendants), as detailed in Schedule "A" to the Notice of Application;

(d) Striking paragraphs 6-7, 25-26, 29, 31, 33, 37, 41-42, 44-45, 58, 64, 66, 70-73, 76, 78-81, 86-87, 91, 96 and 106 of the affidavit of Brendan O'Grady sworn June 15, 2016, and Exhibits S-T, W, Y, AA, EE, II-JJ, LL-MM, WW, DDD, FFF, LLL- NNN, QQQ, SSS, VVV, AAAA-BBBB and EEEE-FFFF thereto (with the exception of any direct quotes from any of the Defendants), as detailed in Schedule "A" to the Notice of Application.

The Parties and the Action

[2] This motion arises in the context of a proposed class action brought by Lukas Walter as representative Plaintiff against the Canadian Hockey League ("CHL"), Western Hockey League ("WHL"), and the owners of its teams, alleging WHL players are employees who should be paid according to applicable employment standards legislation. The action was commenced in October 2014. The proposed representative Plaintiff, Lukas Walter, played with the WHL's Tri-City Americans during the 2011-2012 and 2012-2013 seasons.

The Certification Application

[3] The proposed class action is not certified. The Plaintiff has brought an application to certify the proceeding as a class proceeding under the ***Class Proceedings Act***, SA 2003, c C-16.5.

The Evidence on the Certification Application

[4] The Plaintiff delivered his record on the application for Certification in May 2015. The two volume application included evidence from the following affiants:

(a) Lukas Walter: the proposed representative Plaintiff;

(b) Bill Berg: the father of the proposed representative Plaintiff in a companion action commenced in Ontario (Samuel Berg);

(c) Ryan Allan Hancock: counsel and chair of the employment law department at the Philadelphia law firm of Willig, Williams & Davidson; and

(d) Andrew J. Eckart: a lawyer at Charney Lawyers PC, counsel for the Plaintiff in this action and the companion actions commenced in Ontario and Quebec.

[5] A three-volume supplementary application record was filed in November 2015, which included affidavits from Samuel Berg and Kiara Sancler, a law clerk at Charney Lawyers PC, and which amended the allegations in the claim.

[6] The Defendants served a four-volume responding application record in December 2015. The responding application record includes affidavit evidence from:

(a) David Branch, the Commissioner of the OHL and the CHL;

(b) Ron Robison, the Commissioner of the WHL;

(c) Six affidavits from owners and/or governors of teams in the CHL;

(d) Six affidavits of parents of current or former CHL players;

(e) Eight affidavits from current or former CHL players;

(f) An affidavit from an American attorney relating to certain legislative proceedings in the state of Washington, the location of the four WHL teams; and

(g) An affidavit from an American attorney relating to the application of U.S. law to issues raised in the action.

[7] On June 15, 2016 the Plaintiff served a nine-volume reply application record. It includes the impugned Grygar affidavit, the Hanvey Declaration and the O'Grady affidavit.

[8] The Plaintiff says I should defer consideration of this motion to the Certification hearing, to avoid multiple appeals and litigation by instalments. I disagree. This action was previously case managed by Justice S. Martin as she was then was. Upon her elevation to the Court of Appeal, case management was transferred to me. When I first became involved with this file as an uninformed case management judge, I indicated it was possible that I would defer. However, as each party has fully prepared for this application, filed briefs and made arguments, I am of the view that the better procedure to follow is to rule on this application at this time.

[9] With respect to the Grygar affidavit, the Hanvey Declaration and the O'Grady affidavit, the Defendant argues they are not properly reply evidence, and should have been filed with the application at first instance.

[10] However, the parties have agreed in both the Ontario action and this action that the Defendants may file sur-reply materials. Accordingly, there is no prejudice to the Defendants even if they are right in their assertion, since any such prejudice arising from late filing of evidence may be met by the filing of sur-reply evidence, to which the parties have agreed.

The Affidavit of Victoria Grygar

[11] Ms. Grygar wrote her Master of Arts thesis on her impression of the experiences of CHL players; entitled "*A Struggle Against the Odds: Understanding the Lived Experiences of Canadian Hockey League (CHL) Players*". It is conceded by the Plaintiff that Ms. Grygar is not an expert, and therefore her opinions are not expert opinions.

[12] In the course of preparing her thesis, Ms. Grygar interviewed eleven unidentified CHL players in 2013 (before the commencement of this action). All but one of them were no longer playing in the league.

[13] The interview questions are not consistent. The Defendant maintains, and I agree, that some of the questions put by Ms. Grygar in the interviews are leading, showing a bias by Ms. Grygar against the practices of the CHL.

[14] The identity of those being interviewed is not disclosed, with Ms. Grygar indicating she has promised not to disclose the identities, as many who were interviewed feared recrimination or reprisals.

[15] The thrust of the objections by the Defendants to admission of the Grygar affidavit is:

(a) Ms. Grygar is not an expert, and therefore her evidence, which is opinion, should be struck in its entirety;

(b) The Grygar affidavit contains inadmissible hearsay evidence; and

(c) The Grygar affidavit is not admissible "survey evidence".

[16] The Plaintiff responds to say that:

(a) The Grygar affidavit is not tendered for the admission of her opinion;

(b) The interviews are tendered not for the truth of their contents, ie. that the players were underpaid employees, but that there are players who have common views and who allege they were underpaid employees; and were not interns, or trainees or in an educational program or student athletes;

(c) The interviews should be permitted in evidence, even if hearsay, because Certification is an interlocutory motion, and affidavits in support may be based upon information and belief (Rule 13.18). The source of the information has been identified as former and current CHL players, though their identities have not been disclosed; and

(d) The interviews constitute "survey" evidence, and are admissible in a Certification hearing.

[17] I consider, firstly, that the Grygar thesis is inadmissible and is to be struck. It is opinion; it is argumentative; and it is not given by an expert.

[18] Paragraphs 1, 2 and 3 of the Grygar affidavit are innocuous and admissible;

[19] Paragraph 4 and Exhibit A to the Grygar affidavit are advocacy, not evidence and are struck.

[20] Paragraph 5 of the Grygar affidavit is background and inoffensive. However Exhibits B and C are inadmissible opinion evidence and are struck.

[21] Paragraphs 6, 7, 8 and 9 of the affidavit are background information and are acceptable.

[22] The interviews, if introduced or relied upon for the truth of their contents, are hearsay. The persons interviewed are not identified and not made available for cross-examination. The interviews deal with the whole of each player's involvement in hockey, from early age until the time of the interview. The interview questions are not consistent and do not follow a script. The interviewer's questions demonstrate a bias against the CHL and the manner in which the players are treated.

[23] The lack of consistency, or even focus, of the questions on the issues in the Action takes these interviews out of the realm of survey evidence.

[24] Accordingly, I find that the player interviews contained within the Grygar affidavit are inadmissible. Certainly, if they are relied upon for the truth of their contents, they are inadmissible hearsay. They are neither necessary, nor do I find them to be reliable. The interviews are struck.

[25] Paragraphs 10 through 16 of the Grygar affidavit are struck, as they relate to the interviews which I have ruled to be inadmissible.

[26] Paragraphs 17, 18 and 19 are innocuous background and are admissible.

[27] The parties have agreed that paragraph 20 of the Grygar affidavit, and Exhibits F, G, H and I are admissible, and I accept their submissions in that regard.

The Hanvey Declaration

[28] The Hanvey Declaration discloses that Chester Hanvey has a PhD in industrial/organizational psychology from the University of Houston. He is an Associate Director at Berkley Research Group, a global consulting firm. He describes himself as having extensive experience studying many aspects of wage and hour compliance, performing consulting projects related to labour and employment litigation, including allegations of wage and hour violation and discrimination. He states that he has conducted many studies with the specific purpose of evaluating the degree of similarity or variability between putative class members for purposes of determining whether a case could be tried on a class-wide basis.

[29] Those qualifications have not, as yet, been challenged. For the purpose of this motion I will presume he has the qualifications which he has stated.

[30] Those qualifications make Dr. Hanvey an expert in relevant areas and qualify him to give opinion evidence.

[31] Expert opinion evidence is regularly admitted in Certification proceedings.

[32] In this instance, Dr. Hanvey conducted or oversaw the conduct of interviews of 13 previous or present CHL players. Dr. Hanvey lists in detail the documents he reviewed, the manner in which the interview questions were prepared, how the interviews were conducted, the "Interview Protocol" used. He has then listed each question and answer. The interviewees volunteered to members of the Plaintiff's legal team. Dr. Hanvey has never been informed of the players' identities.

[33] Dr. Hanvey states that he was retained to provide his opinion regarding the degree of similarity/variability of experiences across current and former players in the Canadian Hockey League as it relates to determining whether players are employees, interns, trainees, or amateur student athletes.

[34] Dr. Hanvey's conclusions are contained in paragraphs 36 to 46 of his Declaration, under the headings Responsibilities of Hockey Players, Standard Player Agreement, Time Engaged in Team Activities, Scheduling, Team Control Over Players, Player Autonomy, Compensation Equipment and Fees, and Training and Development.

[35] Appended as Exhibit 6 to his Declaration are the questions put and the answers given by each of the people interviewed.

[36] The Defendants argue that the Hanvey Declaration should not be admitted into evidence for the Certification hearing because:

(a) The Hanvey Declaration contains inadmissible hearsay evidence;

(b) The evidence is put forth "under the guise" of a survey;

(c) Rule 13.18 of the Alberta Rules of Court requires, where an affidavit is based upon information and belief, the source of that information must be disclosed.

[37] The Plaintiff maintains that:

(a) The Hanvey Declaration is put forth by an expert;

(b) An expert may give his opinion based upon information gathered from appropriate sources, without subjecting the sources to cross-examination;

(c) The interviews were conducted in a professional and non-biased manner; and

(d) The transcripts are not placed in evidence as proof of their contents, but rather as proof that there is commonality amongst the players interviewed.

[38] I agree with the Plaintiff. Experts are allowed to use their judgment in relying on a variety of source materials to reach their conclusions. In that regard they hold a privileged position unavailable to lay witnesses. See, for example, ***St. John (City) v Irving Oil Co***, [1966] SCR 581.

[39] Dr. Hanvey has conducted a well prepared, well-articulated survey that is designed to be relevant to the issues in this lawsuit. The surveys have been conducted in a prescribed manner.

[40] Dr. Hanvey's opinion is not as to whether the statements made by the players interviewed are true, or accurate, or even reliable. His opinion is as to the degree of similarity or variability in the statements made by the 13 interviewees. This was the case in ***John Doe and Suzie Jones v Her Majesty the Queen***, 2015 FC 236, where Justice Rennie found survey evidence to be admissible.

[41] The transcripts are provided as background support to his opinion. It is not asserted by either Dr. Hanvey or by Plaintiff's counsel that the interviews are put forth for the truth of their contents.

[42] Properly structured survey questions and answers are permissible in a variety of class Certification hearings. See ***John Doe and Suzie Jones v Her Majesty the Queen***, *supra*. I find that to be so here; not to show the truth or accuracy of the views of the people surveyed, but to show that those persons hold the views they have expressed.

[43] As to anonymity, I consider the rationale, that the players fear reprisals and recriminations in the hockey community, to be genuine and reasonably based. Even where they are no longer playing hockey, they will remain part of the hockey community by virtue of their years spent playing, the level of skill that they have achieved and notoriety gained from the high level at which they competed.

[44] I note, parenthetically, that the Plaintiff has also argued that the Grygar affidavit and the Hanvey Declaration should be admitted on a further ground; that they provide "some basis in fact" for the assertions made in the Certification motion, and they are therefore admissible.

[45] This argument confuses two different things. "Some basis in fact" is the standard of proof to be met by the Plaintiff, in order to achieve Certification: see ***Hollick v Toronto (City)***, 2001 SCR 158. However, "some basis in fact" is not an evidence admissibility test. The evidence to be used to establish "some basis in fact" must be admissible in accordance with those rules of evidence that are applicable to an interlocutory application.

The Eckhart Affidavit and the O'Grady Affidavit

[46] The Eckhart affidavit was filed as part of the Plaintiff's original Certification application record. Andrew Eckhart is a lawyer at the Plaintiff's law firm. He is not held out as having any expertise in this matter to which he refers.

[47] The O'Grady affidavit is sworn by Brendan O'Grady and submitted by the Plaintiff in reply. Brendan O'Grady is also a lawyer at the Plaintiff's law firm. He is not held out as having expertise in this matter.

[48] The Defendants challenge the admissibility of discrete parts of the affidavits and exhibits thereto.

[49] The Defendants argue that the impugned paragraphs and exhibits contain inadmissible hearsay evidence, including unauthenticated documents, upon which the Plaintiff relies for the truth of their contents. It is argued that Mr. Eckhart and Mr. O'Grady refer to articles attached, and mischaracterize the impact of those articles.

[50] The Defendants further argue that the impugned articles contain opinion and argument.

[51] The Plaintiff's response is that these affidavits chronicle discussions in the world of hockey news, related to issues relevant to the Action. They are not tendered for the truth of their contents, but rather to demonstrate that the matters complained of in the Action are matters common to more than one hockey player in the CHL. The Plaintiff argues that the articles provide some support for allegations of conspiracy amongst the Defendants.

[52] Counsel for the Plaintiff says in oral argument, "we are just trying to prove that these articles were written".

[53] I have reviewed all of the impugned affidavit evidence and the impugned articles. The articles all contain opinions and conclusions. They are not generated by experts, and the authors are not subject to cross-examination.

[54] None of the articles are admissible for the proof of their contents. Nor are quotes from the articles that are contained in the impugned paragraphs of the affidavits of Eckhart and O'Grady.

[55] However, I will not strike the impugned paragraphs or articles. I consider the affidavits provide proof that the articles were written.

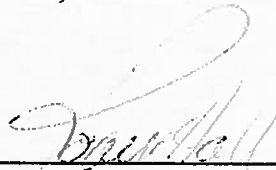
[56] At the Certification application, counsel are free to argue what weight, if any, is to be given to the evidence received.

[57] Plaintiff's counsel is not allowed, however, to argue at the Certification hearing that the impugned evidence should be considered for the truth of its contents.

Costs

[58] I reserve the issue of costs of this application to be addressed at the Certification hearing.

Heard on the 7th and 14th days of October, 2016.
Dated at the City of Calgary, Alberta this 20th day of October, 2016.



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

Appearances:

Theodore P. Charney and Tina Q. Yang, Charney Lawyers
for the Plaintiff/Respondent

Patricia D.S. Jackson, Crawford Smith and Rachael Saab, Torys LLP
for the Defendants/Applicants