

**Court of Queen's Bench of Alberta**

**Citation: Walter v Western Hockey League, 2016 ABQB 608**

**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**

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

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[1] The Plaintiff in this matter has given notice that it will seek to certify these proceedings pursuant to the *Class Proceedings Act*, SA 2003, c C-16.5. The Plaintiff filed two volumes of

material and evidence in support of Certification and then a further three volume Supplementary Record. The Respondents filed a four volume record in response. The response included affidavits from:

- (a) David Branch, Commissioner of the Ontario Hockey League (OHL) and the Canadian Hockey League (CHL), who, among other things, provides evidence on the expected financial impact on the OHL and CHL of a determination that the players are entitled to wages under the employment standards legislation applicable to the jurisdiction in which their teams are located;
- (b) Ron Robison, the Commissioner of the Western Hockey League (WHL), who, among other things, provides evidence on the expected financial impact on the WHL of determining that the players are entitled to wages under the employment standards legislation applicable to the jurisdiction in which the teams were located;
- (c) Six affidavits from owners and/or governors of teams in the CHL who, among other things, provide information relating to the provincial circumstances of their teams and provide evidence on the financial impact on their teams of determining that the players are entitled to wages under the employment standards legislation applicable to the jurisdiction in which they are based.

[2] The action in Alberta is against the CHL, the WHL, and the owners of the WHL teams. The OHL is not a defendant, nor are the OHL teams.

[3] There is a mirror action being conducted in Ontario which names as defendants the CHL, the OHL, and the owners of the OHL teams.

[4] The parties have seen fit to file identical records in each of this action and the Ontario action, dealing with upcoming certification applications in each action. Presumably, they do so because of commonality of issues in each of the actions, and because the CHL is a Defendant in each action. However, it is important that the Court note the different defendants and different hockey leagues in each action.

[5] In this action the Plaintiff, Lukas Walter, was a hockey player for the Tri City Americans, who play out of Kennewick, Washington, and are owned by Top Shelf Entertainment Inc. Only Top Shelf Entertainment Inc. has filed a Statement of Defence. Nowhere in that Statement of Defence does that Defendant maintain that it cannot afford to pay the players for their services beyond a stipend, or that the financial effect of such a finding would be deleterious to the team or league.

[6] Yet a great deal of focus in the Defendants' affidavits, referred to above, is in respect of such an alleged deleterious financial effect. I can only conclude, therefore that this is an important aspect of the Defendants' response to the Certification application upcoming.

[7] The Plaintiff says that, as the Defendants have put forth this position, stating as a fact that the teams and the leagues cannot afford a finding that they are subject to employment standards legislation, they must now produce the documents relevant to those assertions.

[8] While those documents could be requested during cross examination of the affiants on their affidavits, the Plaintiff anticipates that the documents would not be provided by the affiants without court order, and so this application saves a costly litigation step. The Plaintiff also says

that financial records and information should be provided by all the Defendant team owners, not just the teams with whom the affiants are associated.

[9] The Plaintiff seeks an Order requiring:

- (a) All current member clubs of the WHL to produce their financial statements and tax returns for every year from 2011 to present;
- (b) All current member clubs of the OHL to produce their financial statements and tax returns for every year from 2011 to present;
- (c) Ron Robison, commissioner of the WHL, to produce:
  - i. All revenue-sharing agreements to which the WHL is a party;
  - ii. All agreements pursuant to which the WHL generates revenue;
  - iii. The source documentation for the statistical conclusions made in his affidavit;
- (d) David Branch, president of the CHL and Commissioner of the OHL, to produce:
  - i. All revenue-sharing agreements to which the CHL or OHL is a party;
  - ii. All agreements pursuant to which the CHL or OHL earns revenue; and
  - iii. The source documentation from the statistical conclusions made in his affidavit.

[10] The Respondent argues that what is sought is document discovery before the Certification application; something which is only granted either on a focused and limited basis for records that are shown to be relevant to the issues on Certification (*Dine v Biomet Inc*, 2015 ONSC 1911, 2015 OJ No 1857 at para 7); or something not to be ordered as a matter of course, but only in exceptional circumstances where, for example, they were necessary to supplement the record before the court at the Certification hearing (*Bartram (Litigation guardian of) v Glaxosmithkline Inc*, 2011 BCCA 539, 346 DLR (4th) 361, at para 18).

[11] The Defendants say that, if production of the requested documents is ordered, it should only apply to the documents of the affiants' teams.

[12] The Defendants say that the teams of the OHL are not Defendants in this action and so the order would not apply to them.

[13] The Defendants say this application is premature and disclosure should only be ordered if the affiants refuse to produce requested documents when cross-examined on their affidavits.

[14] And the Defendants say that the application is too broad.

[15] I do not consider this application to be premature. It short circuits the necessity for a sham examination on affidavits before the application is brought, and conserves court time and litigation expense.

[16]. The Defendants obviously consider that this evidence of financial difficulties is key to their opposition to the certification of this action as a class action. Having placed the clubs' and the leagues' financial viability squarely into issue, the CHL, the WHL and the clubs must produce their financial documents as potentially proving their position, or placing their evidence into dispute. The Defendants' evidence has rendered these records relevant to the issues on Certification, and necessary to supplement their affidavit evidence.

[17] If I limited the financial production to those teams where owners or managers were affiants, it would allow the Defendants to cherry pick which teams provide financial statements and which do not. Yet all of the WHL teams are Defendants in the action, and the assertion is that teams and/or the WHL would fail or suffer considerably. Therefore the financial records of all of the WHL teams have been rendered relevant and producible by this assertion.

[18] I agree that the OHL teams are not Defendants herein and would not, therefore, be subject to an order for document production in this action, except as third parties.

[19] However, the Defendants have chosen to file affidavits from OHL team representatives arguing the same deleterious effects for them, and hence a deleterious effect for the CHL – an umbrella league for the combined WHL, OHL and Quebec Major Junior Hockey League (QMJHL).

[20] If the Defendants intend to use and rely upon affidavits from OHL team representatives in this Alberta action, then all OHL teams must also provide the requested financial information. If the Defendants choose to withdraw affidavits from OHL team representatives in this Alberta action, then no such document production from the OHL teams shall be necessary or ordered.

[21] Turning to Mr. Robison, Commissioner for the WHL, the document request by the Plaintiff is reasonable and relevant, and is ordered.

[22] As to Mr. Branch, the requested documentation is to be produced for the CHL, but not in relation to the OHL.


[23] In conclusion, all of the relief sought in this application is granted, subject to the following: Mr. Branch need not provide the information requested of the OHL; all OHL teams must produce the requested documentation, unless the Defendants withdraw from their reply record the affidavits of affiants associated with OHL teams (including any intended rebuttal). If, however, the Defendants wish to rely on such OHL based evidence, the OHL teams must also produce the documents requested.

[24] During the hearing of this matter we had some discussion of the implied undertaking of the parties and their counsel with respect to the uses to which documents discovered could be put. With the consent of Plaintiff's counsel, I ordered that, if the parties could not agree, they could address me with respect to the implied undertaking, the use of the documents produced, and the appropriateness of a sealing order.

[25] Cost of this application are reserved to be determined at the Certification Hearing.

Heard on the 14<sup>th</sup> day of October, 2016.

Dated at the City of Calgary, Alberta this 28<sup>th</sup> day of October, 2016.

  
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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**