

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

BETWEEN :

**DANIEL CARCILLO and GARRETT TAYLOR**

Plaintiffs

- and -

**ONTARIO MAJOR JUNIOR HOCKEY LEAGUE, CANADIAN HOCKEY LEAGUE, WESTERN HOCKEY LEAGUE, QUEBEC MAJOR JUNIOR HOCKEY LEAGUE, BARRIE COLTS JUNIOR HOCKEY LTD., GUELPH STORM LTD., HAMILTON BULLDOGS FOUNDATION INC., KINGSTON FRONTENACS HOCKEY LTD., KITCHENER RANGERS JR. A. HOCKEY CLUB, LONDON KNIGHTS HOCKEY INC., MISSISSAUGA STEELHEADS HOCKEY CLUB INC., 2325224 ONTARIO INC. o/a MISSISSAUGA STEELHEADS, NIAGARA ICEDOGS HOCKEY CLUB INC., NORTHBAY BATTALION HOCKEY CLUB LTD., OSHAWA GENERALS HOCKEY ACADEMY LTD., OTTAWA 67'S LIMITED PARTNERSHIP c.o.b. OTTAWA 67's HOCKEY CLUB, THE OWEN SOUND ATTACK INC., PETERBOROUGH PETES LIMITED, 649643 ONTARIO INC. o/a 211 SSHC CANADA ULC o/a SARNIA STING HOCKEY CLUB, SOO GREYHOUNDS INC., SUDBURY WOLVES HOCKEY CLUB LTD., WINDSOR SPITFIRES INC., MCCRIMMON HOLDINGS, LTD., 32155 MANITOBA LTD., A PARTNERSHIP c.o.b. as BRANDON WHEAT KINGS, BRANDON WHEAT KINGS LIMITED PARTNERSHIP, CALGARY FLAMES LIMITED PARTNERSHIP, CALGARY SPORTS AND ENTERTAINMENT CORPORATION, EDMONTON MAJOR JUNIOR HOCKEY CORPORATION, KAMLOOPS BLAZERS HOCKEY CLUB, INC. KAMLOOPS BLAZERS HOLDINGS LTD., KELOWNA ROCKETS HOCKEY ENTERPRISES LTD., PRINCE ALBERT RAIDERS HOCKEY CLUB INC., EDGEPRO SPORTS & ENTERTAINMENT LTD., QUEEN CITY SPORTS & ENTERTAINMENT GROUP LTD., BRAKEN HOLDINGS LTD., REBELS SPORTS LTD., SASKATOON BLADES HOCKEY CLUB LTD., VANCOUVER JUNIOR HOCKEY LIMITED PARTNERSHIP and VANCOUVER JUNIOR HOCKEY PARTNERSHIP, LTD c.o.b. VANCOUVER GIANTS, WEST COAST HOCKEY LLP, WEST COAST HOCKEY ENTERPRISES LTD., o/a VICTORIA ROYALS, MEDICINE HAT TIGERS HOCKEY CLUB LTD., 1091956 ALTA LTD. o/a THE MEDICINE HAT TIGERS, SWIFT CURRENT TIER 1 FRANCHISE INC. and SWIFT CURRENT BRONCOS HOCKEY CLUB INC. o/a THE SWIFT CURRENT, ICE SPORTS & ENTERTAINMENT INC. o/a WINNIPEG ICE, MOOSE JAW TIER 1 HOCKEY INC. D.B.A. MOOSE JAW and MOOSE JAW WARRIORS TIER 1 HOCKEY, INC. WARRIORS o/a MOOSE JAW WARRIORS, LETHBRIDGE HURRICANES HOCKEY CLUB,**

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Defendants

Proceeding under the *Class Proceedings Act, 1992*

**REPLY FACTUM OF THE MOVING PLAINTIFFS'  
MOTION RE: INDEPENDENT PANEL REPORT**

(returnable February 15, 2022)

February 11, 2022

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**REPLY FACTUM OF THE MOVING PLAINTIFFS'  
MOTION RE: INDEPENDENT PANEL REPORT**

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## PART I - INTRODUCTION

1. The Defendants' factum parses out the various types of hearsay and sources of information in the IRP Report. The Plaintiffs submit that such an exercise shows that many aspects of the IRP Report are admissible under the admissions of a party exception and other aspects under the business records exception. The Plaintiffs also maintain that the entire report is admissible under the principled approach. If any of these exceptions apply, the entire report is admissible as an exhibit to a clerk's affidavit.<sup>1</sup> The Plaintiffs wish to advance the litigation in an efficient fashion.

2. However, the Defendants have now consented to the summons. The IRP Report authors, and the underlying information they rely upon, may be before this Court for use at certification and, later, the merits of the action. However, the manner in which either option is directed (if the Court chooses one of these two options, i.e., affidavit evidence or evidence under Rule 39.03), requires the Court's direction so this litigation may progress expeditiously.

3. The Defendants' factum outlines positions designed to manufacture complexity and delay. They seek to push another adjournment of the June certification motion. This is not acceptable given the case was commenced in June 2020 and the Plaintiffs' certification record was filed fourteen months ago. The Defendants:

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<sup>1</sup> *R.G. v. The Hospital for Sick Children*, [2017 ONSC 6545](#) at paras. 16, 25-27, Plaintiffs' Reply Book of Authorities ["PRBOA"], Tab 3.

- (a) state for the first time that they wish file further evidence in response to their own IRP Report without describing what evidence they seek to file;
- (b) contest the commonly employed "phased" approach without describing what prejudice they face;
- (c) argue that admitting the IRP Report would "prejudice" them at this stage because it must be considered only after some forty cross-examinations, without explaining why or citing to any authority for this proposition; and,
- (d) conversely, insist that the Rule 39.03 examinations must take place before the 40 cross-examinations, which may require an adjournment given the steps that counsel must take to obtain the summonses.

4. The Plaintiffs remain open to debating optimal procedural solutions with the Defendants and the Court. The Plaintiffs maintain that a clerk's affidavit is appropriate in these circumstances. In the alternative, written interrogatories represent a fair and proportionate middle ground.

5. However, if the interprovincial summons certificates are issued, the Plaintiffs seek leave of the Court under Rule 39.03 for the examinations to take place *after* the commencement of cross-examinations of the other witnesses, so that the June motion dates are preserved. A flexible timetable is required.

6. If this Court decides that issuing interprovincial summons certificates are the proper approach to this evidence at certification, the Court's direction should also refer to the non-disclosure agreements ("NDAs") signed by the IRP Members. Counsel for the Defendants have confirmed that the IRP Members executed NDAs, however the

Defendants have now agreed to waive them. The Court's direction should explicitly address this waiver.

## **PART II - ISSUES AND THE LAW**

### **A. The Clerk's Affidavit Is Admissible**

7. The most analogous jurisprudence to the within motion is the *Francis v. Ontario* matter. The Plaintiff issued a summons to examine a non-party witness under Rule 39.03 on his summary judgment motion. That non-party witness was Professor Hannah-Moffat, who was the Defendant's appointed "expert" (but not an expert retained by a party in the litigation). The Court ordered that the Defendant produce her "independent" report, without a summons, so that the parties could stay on schedule:

"if the primary reason for summoning Dr. Hannah-Moffat is describing Ontario's compliance or non-compliance with the Jahn settlement as part of a discussion of continuing breaches, then all that is proportionately required is to have the Final Report made a part of the record for the summary judgment motion. The Final Report, just as her Interim Report, can speak for itself. The filing of what is a public report avoids any debate about public interest privilege and keeps the scheduling of the summary judgment motion on schedule."<sup>2</sup>

8. In *Francis*, this approach was appropriate on the balance of probabilities evidentiary standard. At this certification motion, with its much lower standard of proof, such a practical approach is equally sound.

9. The case law the Defendants rely on does not assist. In *Ferreira*, the evidence submitted in the lawyer's affidavit expressed a legal opinion on the merits of motion – i.e.,

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<sup>2</sup> *Francis v. Ontario*, [2019 ONSC 5782](#) at para 51, PRBOA, Tab 1.

whether there were genuine issues requiring trial.<sup>3</sup> In *Weber*, the plaintiff's lawyers tendered a solicitor's affidavit to introduce facts which could have been obtained directly from their client.<sup>4</sup> Ms. MacDonald, a clerk at Koskie Minsky, is not providing any opinion at all in her affidavit here.

## **B. Parsing of the IRP Report Shows The Entire Report Is Admissible**

10. The Defendants parse the contents of the report and argue that much of the report contains "double hearsay" and as a result, the entire report cannot be admitted. The Plaintiffs agree that the IRP Members had full access to individuals within the CHL system. However, that evidence is admissible under the admissions of a party exception.<sup>5</sup>

11. In particular, admissions and comments by staff, coaches and GMs may be admitted as admissions of the Defendants. This was the approach employed by the Court at the certification motion in the *RG v. Hospital for Sick Children*.<sup>6</sup> It is a prudent approach.

12. To provide another example, league records will be admissible pursuant to the business records exception. Certainly, the IRP Members cannot provide any additional context on the Defendants' own records. Additionally, the Léger survey is a web-based survey where information was recorded contemporaneously. It is a business record created in the ordinary course of business.<sup>7</sup> Furthermore, it is unlikely the IRP Members will be

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<sup>3</sup> *Ferreira v. Cardenas*, [2014 ONSC 7119](#) at para. 10, Defendants' Brief of Authorities ["DBOA"], Tab 10.

<sup>4</sup> *Weber v. Erb & Erb Insurance Brokers*, [\[2006\] OJ No. 1279](#), at paras. 40-41, DBOA, Tab 11.

<sup>5</sup> See Lederman et al., *Sopinka, Lederman & Bryant: The Law of Evidence in Canada*, 5<sup>th</sup> ed, Ch 6, Part II, Exceptions to the Hearsay Rule, §6.474 -6.481, PRBOA, Tab 4.

<sup>6</sup> *R.G. v. The Hospital for Sick Children*, [2017 ONSC 6545](#) at para. 26, PRBOA, Tab 3.

<sup>7</sup> Section 35(2) and (4) of the *Ontario Evidence Act*, RSO 1990, c E.23



able to say any more about the Léger survey given that its methodology was clearly outlined in the IRP Report.

13. The Court can admit the IRP Report attached to Ms. MacDonald's affidavit on the basis that some evidence is admissible and some may not be. Aspects of the IRP Report may still be admissible simply because of what has been said, but not necessarily for the truth of what was said. The details can be argued at the return of the certification motion. This approach would result in no prejudice to any party.

**C. The Motion is not Premature and a Phased Approach is Appropriate**

14. The Defendants have offered no explanation as to why a phased approach is not appropriate. It appears the Defendants seek to maximize the number of leave to appeal motions available to them as a manner of delaying the prosecution of this case.

15. The Defendants are mistaken that the *Evensen* case concerned a Rule 21 motion; it was a preliminary motion to strike evidence. Preliminary evidentiary motions are often "phased" with the certification motion.

16. "Phased" evidentiary motions normally take place before cross-examinations. This Court is well-aware of this practical approach and it should be endorsed and employed in the ordinary course as a case management tool.<sup>8</sup>

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<sup>8</sup> *Price v. Smith & Wesson Corp.*, [2021 ONSC 8471](#) at para. 36, Plaintiffs' Book of Authorities ["PBOA"], Tab 7; *Evensen v. Nissan Canada Inc.*, Court File No. CV-17-583843 (File/Direction/Order dated February 12, 2021), PBOA, Tab 3; *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, [2019 ONSC 5967](#), at para. 3, PRBOA, Tab 2.

17. The Defendants' resistance to "phasing" must be considered in light of the procedural history of this matter. The certification motion had to be adjourned from the week of February 14, 2022 to June 2022 after the Defendants' were provided an extension of time to October 31, 2021 to file their responding record. The present motion date was set aside to deal with any preliminary motions, so the parties could then proceed with cross-examinations between mid-February and late April.

18. The most likely explanation for the Defendants' staunch opposition to the phased approach is to force an adjournment of the June certification dates. It should be noted that if the Plaintiffs lose the within motion, they also lose their separate appeal route. Phasing is fair to all parties.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 11th day of February, 2022.



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**James Sayce / Sue Tan**  
**KOSKIE MINSKY LLP**

Lawyers for the Plaintiffs

**SCHEDULE “A”  
LIST OF AUTHORITIES**

1. *Evensen v. Nissan Canada Inc.*, Court File No. CV-17-583843, (File/Direction/Order dated February 12, 2021)
2. *Francis v. Ontario*, [2019 ONSC 5782](#)
3. *Harris v. Bayerische Motoren Werke Aktiengesellschaft*, [2019 ONSC 5967](#)
4. *Price v. Smith & Wesson Corp.*, [2021 ONSC 8471](#)
5. *R. v. Khelawon*, [2006 SCC 57](#)
6. *R.G. v. The Hospital for Sick Children*, [2017 ONSC 6545](#)
7. Lederman et al., *Sopinka, Lederman & Bryant: The Law of Evidence in Canada, 5th ed, Ch 6*, Part II, Exceptions to the Hearsay Rule

**SCHEDULE “B”  
RELEVANT STATUTES**

1. [Rules of Civil Procedure, R.R.O. 1990, Reg. 194](#)

**39.03(1)** Subject to subrule 39.02 (2), a person may be examined as a witness before the hearing of a pending motion or application for the purpose of having a transcript of his or her evidence available for use at the hearing. R.R.O. 1990, Reg. 194, r. 39.03 (1).

2. [Evidence Act, RSO 1990, c E.23](#)

**35 (1)** In this section,

“business” includes every kind of business, profession, occupation, calling, operation or activity, whether carried on for profit or otherwise; (“entreprise”)

“record” includes any information that is recorded or stored by means of any device. (“document”) R.S.O. 1990, c. E.23, s. 35 (1).

**Where business records admissible**

(2) Any writing or record made of any act, transaction, occurrence or event is admissible as evidence of such act, transaction, occurrence or event if made in the usual and ordinary course of any business and if it was in the usual and ordinary course of such business to make such writing or record at the time of such act, transaction, occurrence or event or within a reasonable time thereafter. R.S.O. 1990, c. E.23, s. 35 (2).

**Notice and production**

(3) Subsection (2) does not apply unless the party tendering the writing or record has given at least seven days notice of the party’s intention to all other parties in the action, and any party to the action is entitled to obtain from the person who has possession thereof production for inspection of the writing or record within five days after giving notice to produce the same. R.S.O. 1990, c. E.23, s. 35 (3).

**Surrounding circumstances**

(4) The circumstances of the making of such a writing or record, including lack of personal knowledge by the maker, may be shown to affect its weight, but such circumstances do not affect its admissibility. R.S.O. 1990, c. E.23, s. 35 (4).

**Previous rules as to admissibility and privileged documents not affected**

(5) Nothing in this section affects the admissibility of any evidence that would be admissible apart from this section or makes admissible any writing or record that is privileged. R.S.O. 1990, c. E.23, s. 35 (5).

Carcillo et al.  
Plaintiffs

and  
Canadian Hockey League et al.  
Defendant

Court File No.: CV-20-642705-00CP

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**REPLY FACTUM OF THE MOVING  
PLAINTIFFS  
(RETURNABLE FEBRUARY 15, 2022)**

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