Court File No. CV-20-00642705-00CP

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 67S 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 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, 649643 ONTARIO INC. c.o.b. as SARNIA STING, KITCHENER RANGER JR A HOCKEY CLUB and KITCHENER RANGERS JR "A" HOCKEY CLUB, LE TITAN ACADIE BATHURST (2013) INC., CLUB DE HOCKEY JUNIOR MAJEUR DE BAIE-COMEAU INC. o/a DRAKKAR BAIE-COMEAU, CLUB DE HOCKEY DRUMMOND INC. o/a VOLTIGEURS DRUMMONDVILLE, CAPE BRETON MAJOR JUNIOR HOCKEY CLUB LIMITED o/a SCREAMING EAGLES CAPE BRETON, LES OLYMPIQUES DE GATINEAU

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Defendants

Proceeding under the *Class Proceedings Act, 1992*

RESPONDING PARTIES' FACTUM
(Motion to Compel Independent Review Panel Evidence)

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TABLE OF CONTENTS

Page No.

PART I: OVERVIEW 2

PART II: SUMMARY OF FACTS 3

PART III: STATEMENT OF ISSUES, LAW & AUTHORITIES 5

A. Determining the Admissibility of the IRP Report Now is Premature 5

1. The Evidentiary Record is Incomplete 5
2. The "Phased Approach" Cases Referred to by the Plaintiff are Distinguishable 6

B. The IRP Report is Prima Facie Inadmissible at this Stage 7

1. Contentious Evidence Cannot Be Tendered by a Law Clerk 7
2. The IRP Report is Inadmissible Hearsay and No Exception Applies 8
3. The IRP Report Contains Unqualified Opinion Evidence 11
4. The IRP Report is More Prejudicial than Probative 12

PART IV: ORDER REQUESTED 13

PART I: OVERVIEW

1. The plaintiffs' motion was, originally, for disclosure of an independent review panel report written by Sheldon Kennedy, Camille Theriault, and Daniele Sauvageau (the **IRP Report**). The IRP Report was voluntarily disclosed by the defendants in January 2022. The plaintiffs have since attached the IRP Report to the affidavit of Catherine MacDonald, a law clerk in Class Counsel's office, and served it as evidence for their certification motion.

2. The plaintiffs have now reformatted their motion. They now want "directions" about the IRP Report, which is essentially a request that this court (a) start the certification motion now and decide on the admissibility of Ms. MacDonald's affidavit; and (b) waive the ordinary procedural requirements for admitting this evidence as prescribed by the *Rules of Civil Procedure* and the *Interprovincial Summonses Act*. The plaintiffs' main argument is that it would be inconvenient for them to seek a certificate to examine the IRP Report panelists under the *Interprovincial Summonses Act* and to actually conduct those examinations. The defendants do not oppose this court granting an interprovincial summons to examine the authors of the IRP Report.

3. It is premature, at this stage, to determine the admissibility of the IRP Report. The defendants have not yet filed evidence responding to Ms. MacDonald's affidavit. Cross-examinations have not yet started. The defendants expect that affidavits yet to be filed, as well as cross-examinations on the more than 40 affidavits filed in this case, will form much of the evidentiary record. This court should consider the admissibility of the IRP Report with the benefit of a full evidentiary record, which will be available when the certification motion is heard in June 2022. Admitting the IRP Report now will not dispose of the proceeding or substantially narrow the issues.

4. In any event, the IRP Report, as an exhibit to a law clerk's affidavit, is prima facie inadmissible at this stage of the proceeding. First, it is contentious evidence that a law clerk cannot tender. Second, it is inadmissible hearsay evidence (and, at times, double hearsay) that is not saved by any exception to the hearsay rule. Third, it is unqualified opinion evidence. Fourth, it is more prejudicial than probative.

5. The plaintiffs' motion should be dismissed.

PART II: SUMMARY OF FACTS

6. The IRP investigation was announced by the CHL in June 2020. In July 2020, the CHL appointed Sheldon Kennedy, Camille Theriault, and Daniele Sauvageau as panelists (together, the **Panelists**). The Panelists were appointed to review the current policies and practices in the CHL and its members leagues that relate to hazing, abuse, harassment and bullying to determine whether changes would assist in the protection of players from off-ice misconduct and increase reporting.

> Affidavit of Catherine MacDonald, sworn January 27, 2022, Plaintiffs' Second Supplementary Motion Record, Exhibit A, page 5.

7. The IRP Report was completed in October 2020. The CHL released it publicly in January 2022. It was released with a media statement, a timeline of CHL policies and procedures, and the report of Rachel Turnpenney, dated January 14, 2022. Ms. Turnpenney's report reviewed the IRP's findings and recommendations and the CHL's and member leagues' policies and practices, and provided recommendations for improvement (together, described as the CHL's Update on Player Wellbeing).

> Affidavit of Catherine MacDonald, sworn January 27, 2022, Plaintiffs' Second Supplementary Motion Record, Exhibit A, pages 5-11.

8. The parties have served 43 affidavits for the plaintiffs' certification motion:

- in December 2020, the plaintiffs served 16 affidavits from former players, as well as an expert report from Dr. Jay Johnson
- in October 2021, the defendants served 21 affidavits from various people involved in junior hockey in Canada, including 8 former players
- in December 2021, the plaintiffs served 4 more "reply" affidavits from some of their witnesses

9. In January 2022, the plaintiffs served another affidavit from Ms. MacDonald, which attached the CHL's Update on Player Wellbeing. Ms. MacDonald was not (and could not be) tendered as an expert witness qualified to provide opinion evidence.

10. The parties agreed that cross-examinations would be completed by April 20, 2022. The defendants expect to file evidence responding to Ms. MacDonald's recent affidavit attaching the IRP Report. The defendants also expect that there will be several, if not more, cross-examinations of the parties' witnesses, and that the transcript evidence of those cross-examinations, as well as any answers to undertakings, will become much of the evidentiary record for certification.

11. The plaintiffs' factum states that the nature of this motion has changed because of the defendants' disclosure of the IRP Report. The plaintiffs now seek "directions" on how to admit the IRP Report. They advise the court that it is "inconvenient" to follow the proper procedure under Rules 34.04(7), 53.04(1), and 53.05 of the *Rules of Civil Procedure* and section 5(1) of the *Interprovincial Summonses Act*. And they ask that this motion be considered "Phase 1" of the certification motion, to

be adjourned after admissibility of the IRP Report is decided. They propose that "Phase 2" of the certification motion proceed in June 2022, in accordance with the certification schedule.

12. The defendants do not oppose this court granting an interprovincial summons to examine the Panelists. But the plaintiffs must take the appropriate steps to have the IRP Report admitted. This court can then decide whether the IRP Report (or some of it) is admissible in June 2022 when it hears the certification motion, with the benefit of a full evidentiary record.

PART III: STATEMENT OF ISSUES, LAW & AUTHORITIES

13. There are two issues on this motion:

(a) whether this court should allow "Phase 1" of the certification motion now to determine the admissibility of the IRP Report; and

(b) if so, whether the IRP Report (or some of it) is admissible at this stage of the proceeding.

A. Determining the Admissibility of the IRP Report Now is Premature

1. The Evidentiary Record is Incomplete

14. There is an incomplete evidentiary record before the court. The defendants have not yet filed responding evidence to Ms. MacDonald's affidavit. Cross-examinations have not yet started. The admissibility of evidence for certification is routinely considered at the same time as certification. It is preferable for courts to decide the admissibility of evidence for certification in the context of all the other evidence, and with due consideration for the issues before the court on the certification motion.

Carter v Ford, 2021 ONSC 4137 ¶3-4; *O'Brien v Bard Canada Inc.*, 2015 ONSC 2470 ¶81-83; *Pinon v City of Ottawa*, 2021 ONSC 488 ¶11-12; *Jensen v Samsung Electronics Co Ltd*, 2021 FC 1185 ¶221-224; *Berkovits v Canon*, 2010 ONSC 3952 ¶14.

2. The "Phased Approach" Cases Referred to by the Plaintiff are Distinguishable

15. The plaintiffs, for the first time on February 3, 2022, announced their intention to start the certification motion on February 15th. The plaintiffs point to *Smith and Wesson* and *Evensen* as examples of cases in which a "phased" approach was taken—there was a pre-certification evidentiary motion that was separated in time from the certification motion itself. But those cases are distinguishable.

Price v Smith & Wesson Corp, 2021 ONSC 1114 (ONSC) aff'd 2021 ONSC 8471 (Div Ct); *Evensen v Nissan Canada Inc*, Court File No. CV-17-583843, (File/Direction/Order dated February 12, 2021).

16. First, "Phase 1" in both cases addressed motions to strike, the results of which would dispose of the actions in whole or in part or, at the very least, substantially narrow the issues to be determined at the certification hearing. In *Smith and Wesson*, the defendants moved to strike the plaintiffs' claim and dismiss the plaintiffs' action. In *Evensen*, the defendants moved to strike portions of two affidavits in the plaintiffs' certification record. Determining whether the IRP Report should be admitted now will not dispose of this proceeding in whole or in part. The plaintiffs state that the IRP Report goes to the central issues in this case. These issues will still be central during cross-examinations, in the parties' factums, and during the certification hearing. Admitting the IRP Report now will not substantially narrow those issues.

Cannon v Funds for Canada Foundation, 2010 ONSC 146 ¶15; Factum of the Moving Plaintiffs, February 4, 2022 ¶6.

17. Second, the "Phase 1" hearings in both cases were heard based on a full evidentiary record, including cross-examination transcripts. Here, the plaintiffs want to start "Phase 1" before even all of the affidavit evidence is served.

18. Third, the phased approach in *Evensen* proceeded on the consent of the parties. The defendants are unaware of whether *Smith and Wesson* was on consent. Here, the defendants oppose a phased approach that would start the certification motion four months early and on less than two weeks' notice.

B. The IRP Report is Prima Facie Inadmissible at this Stage

19. Even if this court determines that it is appropriate to allow "Phase 1" of the certification motion now, the IRP Report should not be admitted at this stage:

(a) it is contentious evidence that a law clerk cannot tender;

(b) it is inadmissible hearsay and double hearsay not saved by an exception;

(c) it contains unqualified opinion evidence; and

(d) it is more prejudicial than probative.

1. Contentious Evidence Cannot Be Tendered by a Law Clerk

20. It is unacceptable practice to tender evidence in contentious proceedings from solicitors or others employed by the tendering party's law firm. Lawyers are prohibited by Rule 5.2-1 of the Rules of Professional Conduct from submitting their own affidavit when they are acting as counsel. Tendering evidence by attaching it to a clerk's affidavit tries to end-run Rule 5.2-1 but the result is the same: the evidence is being tendered by the same counsel that is making the argument.

Ferreira v Cardenas, 2014 ONSC 7119 ¶14-16; *Weber v Erb & Erb Insurance Brokers*, [2006] OJ No 1279 ¶39.

21. Evidence that is not contentious is admissible when attached to a law clerk's affidavit, but that is not the case here. The IRP Report is all the more contentious because, at this stage, it is unclear what facts the Panelists relied on and how they drew their conclusions. The defendants expect that such facts and issues will be canvassed with various affiants, including former players, during cross-examinations and in responding affidavits, which are yet to happen or be served.

Affidavit of Catherine MacDonald, sworn January 27, 2022, Plaintiffs' Second Supplementary Motion Record, Exhibit A, page 20.

2. The IRP Report is Inadmissible Hearsay and No Exception Applies

22. The plaintiffs have shown neither necessity nor reliability for an exception to the hearsay rule to be made in this case.

Ontario v Rothmans, 2011 ONSC 5365 ¶86.

23. The necessity criterion may be satisfied where it is impossible to meet "the optimal test of contemporaneous cross-examination" and the evidence might otherwise be lost. That is not the case here. The plaintiffs can examine the Panelists by invoking the proper procedure through examinations under Rules 34.04(7), 53.04(1), and 53.05 of the *Rules of Civil Procedure*, as well as section 5(1) of the *Interprovincial Summonses Act*. The defendants will not oppose these examinations.

R v Khelawon, 2006 SCC 57 ¶49; *Rules of Civil Procedure*, r 34.04(7), 53.04(1) and 53.05; *Interprovincial Summonses Act*, s 5(1).

24. The plaintiffs say it is inconvenient to examine the Panelists to establish necessity, relying on *Starr*. But in *Starr*, the Supreme Court said (in *obiter*) that hearsay evidence may be admitted based on

expediency or convenience where *evidence of the same value* may not be available from the same or other sources. The plaintiffs have offered no reason to believe that evidence of the same value as that in the IRP Report could not be collected by examining the Panelists. Indeed, the Panelists' evidence is of better value than Ms. MacDonald's affidavit simply attaching the IRP Report.

> *R v Starr*, 2000 SCC 40 ¶206.

25. The plaintiffs also point to the "low 'some basis in fact'" standard to suggest that they shouldn't have to take the normal procedural steps (*i.e.,* examinations of the Panelists). Yet they acknowledge that even the unique standard of proof on certification motions must still be met by the plaintiffs adducing admissible evidence. The admissibility standards are not relaxed in the context of certification.

> *Carter v Ford*, 2021 ONSC 4137 ¶9; *Martin v Astrazeneca Pharmaceuticals Plc*, 2012 ONSC 2744 ¶40-42.

26. The plaintiffs then seek to argue that the necessity criterion should be relaxed where there is high reliability in the evidence. They say that the defendants can use Ms. Turnpenney's report to "take issue" with the contents of the IRP Report. But Ms. Turnpenney, like the Panelists, has no first-hand or experiential knowledge of the CHL and its member leagues. Her report cannot replace cross-examination or affidavit evidence collected from past players and league staff. She is not being tendered by the defendants as an expert witness.

27. The plaintiffs have also not explained *how* the IRP Report is reliable. To assess reliability, this court should understand how the information in the IRP Report was gathered and how the Panelists made their conclusions (*i.e.*, how many people the Panelists interviewed, what questions were asked, and so forth.). Since the Panelists conducted their investigation at arm's length from the CHL, the

CHL does not have this information. Nor does the CHL know what standard the Panelists used to draw their conclusions. The plaintiffs suggest that the IRP Report concludes that systemic negligence exists in the CHL and its member leagues, but there is no information on whether the Panelists formed this conclusion on the legal standard of a balance of probabilities, or some other standard. It is unclear that the IRP Report is reliable, and reliability cannot be used on here to substitute the need for oral evidence.

> Affidavit of Catherine MacDonald, sworn January 27, 2022, Plaintiffs' Second Supplementary Motion Record, Exhibit A, page 19.

28. Lastly, the IRP report is not simple hearsay, which can be admissible on a motion under Rule 39.01(4). Given that it makes conclusions based on "anecdotal evidence" collected from players and league staff, it is double hearsay, which is not admissible on a motion.

> *Ontario v Rothmans*, 2011 ONSC 5365 ¶32 and 37.

29. Ms. MacDonald's affidavit states that she downloaded the Update on Player Wellbeing, which includes the IRP Report. She does not state her belief in the information in the Update on Player Wellbeing or the IRP Report (presumably because she cannot). She provides no basis for this court to infer her belief since, as a law clerk at the plaintiffs' law firm, she likely has no personal knowledge of the issues raised in the IRP Report that could create such a belief. Though Ms. MacDonald states that she has been provided with unspecified information by Class Counsel, which she believes to be true, this unspecified information is not connected to the Update on Player Wellbeing or the IRP Report in any way. It is the boilerplate language often used in the introductory paragraphs of affidavits generally.

30. Ms. MacDonald's evidence is analogous to evidence struck in *Aria Brands Inc.* In that case, Justice Leitch struck paragraphs of two affidavits that attached email correspondence. The deponents had not attested to their belief in the information in the emails, had not discussed the contents of the emails, had not referred to the authors or recipients of the emails, and had offered no statement of opinion respecting the veracity of the emails. It is also analogous to the evidence struck in *Rothmans*, where the affiant (also a law clerk) attached downloaded documents but did not state their belief in the information in the documents.

> *Airia Brands Inc. v Air Canada*, 2011 ONSC 4003 ¶10-25; *Ontario v Rothmans*, 2011 ONSC 5365 ¶32 - 36.

31. Though the defendants are not moving to strike Ms. MacDonald's affidavit at this stage, the plaintiffs cannot fix this problem without examining the Panelists. The defendants are not standing in their way from trying to do so—they consent to the plaintiffs' request for a summons.

3. The IRP Report Contains Unqualified Opinion Evidence

32. Opinion evidence provided by an expert witness for a motion or application shall include the information listed under subrule 53.03(2.1) of the *Rules of Civil Procedure*. An affiant that has not been appropriately qualified as an expert cannot give opinion evidence. Lay witnesses cannot provide opinion evidence. The IRP Report contains both facts and opinions.

> *Rules of Civil Procedure*, r 53.03(2.1); *R v Mohan*, [1994] 2 SCR 9 ¶16; *Risorto v State Farm Mutual Automobile Insurance*, [2007] OJ No 676 ¶53; *Hunt (Guardian of) v Sutton Group Incentive Realty Inc.*, [2002] OJ No 3109 ¶16.

33. There are exceptions to the rule that lay witnesses cannot provide opinion evidence. It can be admitted if (a) the witness has personal knowledge; (b) the witness is in a better position than the trier of fact to form the opinion; (c) the witness has the necessary experiential capacity to make the

conclusion; and (d) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with reasonable facility describe the facts she or he is testifying about.

> *Hunt (Guardian of) v Sutton Group Incentive Realty Inc.*, [2002] OJ No 3109 ¶17; *R v Graat*, [1982] 2 SCR 819 ¶50-52.

34. Ms. MacDonald has not been tendered as an expert witness. Her affidavit does not include the information listed under subrule 53.03(2.1).

35. Ms. MacDonald has no personal knowledge of the information and conclusions in the IRP Report and she is in no better position than this court to form any opinion. Ms. MacDonald cannot satisfy the test that would allow a lay witness to provide opinion evidence.

36. The Panelists have not filed affidavits, and have not been tendered as expert witnesses. They cannot therefore provide opinion evidence.

37. The plaintiffs have failed to adduce the IRP Report as evidence using the proper means: either through a deponent with the appropriate information and belief, by an exception to the rule that lay witnesses cannot provide opinion evidence, or through the Panelists as expert witnesses that would be qualified to offer opinion evidence.

4. The IRP Report is More Prejudicial than Probative

38. For documentary evidence to be admissible through a lawyer's affidavit (which extends to a law clerk's affidavit of the same law firm), it must be probative of a material fact in issue and its probative value must outweigh any prejudice to admitting the evidence.

> *O'Brien v Bard Canada Inc.*, 2015 ONSC 2470 ¶99; *Weber v Erb & Erb Insurance Brokers*, [2006] OJ No 1279 ¶27-45.

39. Evidence may be excluded if its probative value is overborne by its prejudicial effect, including the tendencies: to yield irrational conclusions; to confuse, mislead, or distract the trier of fact's attention from the main issues; to unduly occupy the trier of fact's time, and to surprise to opponent unfairly and to impair a fair hearing.

O'Brien v Bard Canada Inc., 2015 ONSC 2470 ¶100.

40. The court cannot, at this stage of this proceeding, assess whether the prejudicial effect of the IRP Report is outweighed by its probative value. Much of the evidentiary record that would provide the required context for the IRP Report is yet to be filed. Players and staff members that played or were involved in the leagues at the relevant times have not yet been examined. Deciding whether to admit the IRP Report at this stage, before this court has the context of the entire evidentiary record, could lead to irrational conclusions, and could confuse, mislead, or distract the court's attention from the main issues. The defendants do not oppose having the admissibility of the IRP Report considered at certification with the benefit of a full evidentiary record. But doing so now is premature, and resultantly more prejudicial than it is probative.

41. The plaintiffs state that the certification judge will not be asked to accept the evidence of the IRP panel at this stage. Yet by asking the court on this motion to admit the evidence at this stage, he is asking that it be accepted now and that its weight be determined later. Such a request is premature.

PART IV: ORDER REQUESTED

42. The plaintiffs' request is premature. They should obtain a certificate to examine the Panelists (which the defendants do not oppose). After the Panelists and all of the other witnesses have been examined, then only can this court decide whether the IRP Report (or some of it) is admissible.

43. The defendants request that the plaintiffs' motion be dismissed with costs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 9th day of February, 2022.

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Court File No. CV-20-00642705-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

PROCEEDING COMMENCED AT
TORONTO

RESPONDING PARTIES' FACTUM
(Motion to Compel Independent Review Panel Evidence)

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