

**ONTARIO
SUPERIOR COURT OF JUSTICE**

BETWEEN:

DANIEL CARCILLO, GARRETT TAYLOR, and STEPHEN QUIRK

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

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Defendants

Proceeding under the *Class Proceedings Act, 1992*

FACTUM OF THE MOVING DEFENDANTS
(Jurisdiction Motion, Returnable November 14-18, 2022)

October 3, 2022

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TABLE OF CONTENTS

PART I:	OVERVIEW	1
PART II:	FACTS	2
A.	The Plaintiffs' Claims	2
B.	The Moving Defendants	3
1.	Western Hockey League and its Teams	4
2.	The Québec Major Junior Hockey League and its Teams.....	6
C.	The Defendants Do Not Operate as a Collective	7
D.	The Leagues Have Distinct Governance Structures, Policies, and Protocols	12
E.	Each League Has Its Own Standard Player Agreement	15
F.	No Business Presence in Ontario	16
G.	No Allegations of Abuse against the Moving Defendants in Ontario.....	18
PART III:	ISSUES.....	19
PART IV:	LAW AND ARGUMENT.....	20
A.	The Test for Jurisdiction <i>Simpliciter</i>	20
1.	Constitutional Principles of Jurisdiction <i>Simpliciter</i>	20
2.	The “Real and Substantial Connection” Test	22
B.	This Court Lacks Jurisdiction over the Moving Defendants.....	23
1.	No Contract Made in Ontario or Governed By Ontario Law	24
2.	The Moving Defendants Do Not Carry On Business In Ontario.....	25
3.	No Torts in Ontario Alleged against the Moving Defendants.....	27
C.	The Plaintiffs' Alleged Connecting Factors are Weak and Unrelated to the Subject Matter of the Litigation; Any Presumption is Rebutted	29
PART V:	ORDER REQUESTED	30

PART I: OVERVIEW

1. The Moving Defendants—the Western Hockey League, the Québec Major Junior Hockey League, and the teams that play in these leagues listed in Schedule “C”—seek to permanently stay this action as against them for lack of jurisdiction *simpliciter*. They have not attorned to Ontario’s jurisdiction. They are not parties to any contract made in Ontario. They do not carry on business in Ontario. There are no allegations of torts committed by any of them in Ontario.

2. The Plaintiffs overreach by including the Moving Defendants in the action. They have not satisfied and cannot satisfy the “real and substantial connection test” in respect of the Moving Defendants. This is because:

- (a) The WHL and QMJHL are not-for-profit corporations domiciled outside of Ontario and none of their teams are located in Ontario;
- (b) The standard player agreements between the Moving Defendants and their players were made outside of Ontario and are governed by the laws and courts of other jurisdictions. The Plaintiffs cannot show strong reasons why they should not be held to their agreements that the laws and forums of other jurisdictions govern; and
- (c) The Plaintiffs have not alleged that the Moving Defendants committed any torts *in Ontario*. With the two narrow exceptions of the annual Memorial Cup involving one team for each of the WHL and the QMJHL (and only held in Ontario once every three years), and an annual series between the Gatineau and Ottawa teams, the

Moving Defendants do not play games in Ontario. And, in any event, there are no allegations of abuse or wrongful conduct at these events.

3. To the extent any connecting factors exist, they are tenuous, unconnected to the subject matter of the litigation, and ultimately rebuttable under the *Van Breda* test. Any conceivable act or omission by the Moving Defendants would have occurred in the jurisdiction where each league, team, corporation, or partnership is based—outside Ontario.

4. The action should be permanently stayed as against the Moving Defendants for lack of jurisdiction in Ontario.

PART II: FACTS

A. The Plaintiffs' Claims

5. The Plaintiffs allege that the CHL, WHL, OHL, and QMJHL, as well as their respective teams should be held liable for the “Abuse” experienced by certain former players on the teams. Abuse is broadly defined in the Claim as “*inter alia*, physical and sexual assault, hazing, bullying, and physical and verbal harassment”, among other conduct.”¹

6. The proposed class is defined as “all former and current players who claim to have suffered the Abuse while playing in the CHL League between May 8, 1975 and the present”.² Of note, there is no such thing as a “CHL League”: the CHL is simply an umbrella organization that oversees the three autonomous leagues in which the proposed class members played.

¹ Fresh as Amended Statement of Claim filed April 14, 2022 (**Claim**) at ¶1(n).

² Claim at ¶1(s).

7. The Plaintiffs advance a multitude of causes of action against all Defendants, including negligence, assault, battery, breach of fiduciary duty, infliction of emotional distress, and false imprisonment. They allege systemic negligence by the leagues and teams in the operation, management, administration, supervision, and/or control of their respective hockey players and the games in which the players participate.

8. Alternatively, the Plaintiffs claim that the leagues and teams should be held vicariously liable for acts perpetrated by the teams' staff, employees, agents, and players. They appear to allege an agency relationship although there are no material facts alleged in respect of that relationship, or any evidence to support it.

B. The Moving Defendants

9. The Plaintiffs sue more than 60 distinct entities including leagues, teams, and the corporations and partnerships that own the teams, operating in 13 different jurisdictions across the United States and Canada.

10. In particular, the Plaintiffs claim against:

- (a) the Western Hockey League (**WHL**), the Québec Major Junior Hockey League (**QMJHL**), and the Ontario Hockey League (**OHL**). Each of the leagues is a separate incorporated legal entity;
- (b) the Canadian Hockey League (**CHL**), which is an incorporated national organization for major junior hockey in Canada; and

- (c) the corporations and partnerships that own the teams in each league. Each team playing in each league operates under separate and distinct corporate ownership, independent from the applicable league and the CHL.³

11. Among the Moving Defendants are five U.S.-based teams—the Portland Winterhawks, Seattle Thunderbirds, Everett Silvertips, Spokane Chief, and Tri-City Americans (collectively, the **U.S. Teams**). None of the U.S Teams are domiciled or resident in Ontario. They do not carry on business in Ontario nor are they parties to any Ontario contracts with the Plaintiffs.⁴

1. **Western Hockey League and its Teams**

12. The WHL is a not-for-profit corporation headquartered in Calgary, Alberta. It is incorporated under the *Canada Not-for-profit Corporations Act*.⁵

13. Prior to the creation of the WHL, each of the four western Canadian provinces had its own major junior hockey league. The WHL was created in the 1960s to unite those four leagues.⁶

14. The teams in the WHL are located in and operate from Washington, Oregon, British Columbia, Alberta, Saskatchewan, and Manitoba. As illustrated below, none are in Ontario.

³ Affidavit of Dan MacKenzie sworn April 20, 2022 at ¶4-5 (**MacKenzie April 2022 Affidavit**), Defendants' Motion Record (**DMR**), Vol IV, p. 534.

⁴ Affidavit of Dan MacKenzie sworn December 30, 2020 at ¶5-6, 10 (**MacKenzie 2020 Affidavit**), DMR, Vol I, pp. 21-22; WHL Directory, Affidavit of Charles Hatt affirmed December 4, 2020 (**Hatt Affidavit**), Exhibit E, Plaintiffs' Motion Record (**MR**) Vol 1, pp. 372-373.

⁵ Affidavit of Ron Robison sworn October 29, 2021 at ¶7, 14 (**Robison Affidavit**), DMR, Vol I, pp. 121, 123.

⁶ Affidavit of Ron Robison sworn December 22, 2015 in *Berg* Proceeding at ¶52 found at Hatt Affidavit, Exhibit Q (**Robison Berg Affidavit**), MR Vol 4, p. 1680. The Plaintiffs have included this affidavit in their certification motion record. In ¶3 of the Robison Affidavit, he states: "The plaintiffs have filed my affidavit from the *Berg* class action on this motion. I have reviewed that affidavit. The statements I make in that affidavit were true and correct when they were made, and I have no updates relevant to this case".



15. The WHL's By-Laws and Constitution require each team to operate within a defined 100-kilometre radius from the corporate limits of the team's designated municipality. They further require that each ownership or senior management group establish a residence and maintain a regular presence in the defined territory.⁷

16. Each WHL team plays 72 regular season games, one-half of which are played at a team's home arena. Like the other leagues, the teams in the WHL play exhibition, regular season, and playoff games against other teams in the WHL.⁸

17. Within the WHL, teams are categorized into one of four divisions based on geography, to ease the distance teams must travel. Teams compete primarily against teams in their own

⁷ WHL By-Laws and Constitution, ss. 2.1(j), 3.3, 10.22, MR Vol 3, pp. 1344-1348, 1371.

⁸ Affidavit of David Branch sworn December 23, 2015 in *Berg* Proceeding at ¶11 found at Hatt Affidavit Exhibit P ("Branch *Berg* Affidavit"), found at Hatt Affidavit Exhibit Q, MR Vol 3, p. 1498. The Plaintiffs have included this affidavit in their certification motion record. In ¶5 of his Affidavit in this proceeding, Branch states: "The plaintiffs have filed my affidavit from the *Berg* class action on this motion. I have reviewed that affidavit. The statements I make in that affidavit were true and correct when they were made, and I have no updates relevant to this case."

division. For example, the five U.S. Teams based in Washington and Oregon play in the U.S.

Division of the WHL and play most of their games against the other teams in the U.S. Division.⁹

18. The U.S. Teams playing in the WHL, and their players, are registered members of USA Hockey, the governing body for organized hockey in the United States. They are not members of Hockey Canada and they are not party to contracts made in Ontario, governed by Ontario law, or subject to the Ontario courts.¹⁰ Importantly, during the annual WHL draft, WHL teams can only select players from the western provinces and certain U.S. states. They are not permitted to select players from Ontario.¹¹

2. The Québec Major Junior Hockey League and its Teams

19. The QMJHL is a not-for-profit corporation headquartered in Boucherville, Québec. It is incorporated under the *Canada Not-for-profit Corporations Act*.¹²

20. The teams in the QMJHL are in Québec, New Brunswick, Nova Scotia, and Prince Edward Island. None are in Ontario.¹³

21. The QMJHL's territory is defined in its constitution as primarily Québec and the Maritime provinces, and certain U.S. states. Ontario is not part of the defined territory.¹⁴

⁹ Robison Affidavit at ¶13, DMR, Vol 1, pp. 122-123; Robison *Berg* Affidavit at ¶61-63, MR Vol 4 p. 1682.

¹⁰ MacKenzie 2020 Affidavit at ¶10, DMR, Vol 1, p. 22; USA Hockey letter, Exhibit H to Robison *Berg* Affidavit, MR Vol 4, p. 1748.

¹¹ Branch *Berg* Affidavit at ¶115, MR Vol 3, p. 1517.

¹² MacKenzie April 2022 Affidavit at ¶4, DMR, Vol IV, p. 534; Affidavit of Gilles Courteau sworn November 1, 2021 at ¶7 (**Courteau Affidavit**), DMR, Vol III, p. 301.

¹³ The QMJHL is made up of 18 teams in Québec (12), New Brunswick (3), Nova Scotia (2), and PEI (1): MacKenzie 2020 Affidavit at ¶4-5, DMR, Vol I, pp. 17-21; Affidavit of Dan MacKenzie sworn October 29, 2021 at ¶6 (**MacKenzie 2021 Affidavit**), DMR, Vol I, p. 80.

¹⁴ QMJHL Constitution, s. 1.7, MacKenzie April 2022 Affidavit, Exhibit J, DMR, Vol IV, p. 904.

22. A team must apply to the QMJHL commissioner and obtain approval from the QMJHL's Board of Governors if it wishes to relocate to another city within the league's territory.¹⁵

23. During the annual QMJHL draft, teams may not select players from Ontario. The QMJHL's Administrative Rules prohibit players from Ontario from playing for QMJHL teams in the absence of special permission from an authorized OHL representative.¹⁶ There is no evidence of special permission being requested or granted during the proposed Class Period.

C. The Defendants Do Not Operate as a Collective

24. The Claim incorrectly comingles the activities of the Defendants (including the Moving Defendants), asserting that the Defendants constitute "an unincorporated association, a partnership, a joint venture, a common enterprise or otherwise operate[s] as a collective".¹⁷ The Plaintiffs' assertions are not supported by the documentary record or any of the evidence given by the 39 witnesses who have testified.

25. To the contrary, the evidence establishes that each defendant is a separate legal entity and the Defendants do not, and have not historically, operated as a collective.¹⁸ The WHL, OHL, and QMJHL and their respective teams operate independently from one another.

26. The CHL, leagues, and teams have different roles and responsibilities:

¹⁵ QMJHL Constitution, s. 3.4.1, MacKenzie April 2022 Affidavit, Exhibit J, DMR, Vol IV, p. 915.

¹⁶ Administrative Rules, s. 2.15.2, MR Vol 3, p. 1460; Branch *Berg* Affidavit at ¶117, MR Vol 3, p. 1517.

¹⁷ Claim at ¶10.

¹⁸ MacKenzie April 2022 Affidavit at ¶4-6, DMR, Vol IV, p. 534-535. See also member distinctions and activities detailed in league constating documents, *e.g.*, MacKenzie April 2022 Affidavit, Exhibit A, ss 1.1, 14.4, 14.5, 14.7, pp. 2-3; Exhibit C, ss 1.1, 3.2.1 Part 10; Exhibit I, p. 1 & Exhibit J, ss 1.1, 2.2.

- (a) the teams are responsible for hiring local staff, monitoring academic progress of players, and paying team expenses;
- (b) the leagues are responsible for organizing and operating games and venues, setting the rules of play, officiating, and administering policies; and
- (c) the CHL is responsible for negotiating national TV contracts and liaising with the National Hockey League. It also organizes the Memorial Cup, a round-robin tournament featuring the winners of the three leagues and a rotating host team from one league, and the CHL/NHL Top Prospects Game featuring certain NHL Entry Draft eligible prospects playing in the leagues.¹⁹

27. Although the leagues and teams are parties to the CHL's Constitution, the CHL's powers over the leagues are limited, and the Constitution does not confer on the CHL any relevant authority over, or operational rights in respect of, the leagues and their respective teams.

28. The evidence is clear. Power resides with the leagues and their respective teams. CHL President Dan MacKenzie testified that:

- (a) "the CHL's constitution limits its authority to exercise certain controls" over the leagues, which results in "decentralized" policies, practices, and programs;
- (b) the CHL is "not a top-down organization"; and

¹⁹ MacKenzie April 2022 Affidavit at ¶7, 17-18, DMR, Vol IV, pp. 535, 537; MacKenzie Cross, Q/A 76, 264, 295, Transcript Brief (TB) Vol 9, pp. 4761, 4804-4809, 4817.

(c) “[t]he CHL doesn’t have hockey operations people; that’s not our role”. The CHL only has 16 full-time staff members.²⁰

29. Mr. MacKenzie’s evidence is supported by other accounts of the CHL’s lack of authority:

(a) a recent report from Turnpenney Milne LLP noted that “[t]he CHL currently has no authority over the Member Leagues”;²¹ and

(b) Independent Review Panelist Danièle Sauvageau did not dispute that the CHL does not have authority over the leagues and their respective teams.²²

30. The leagues engage and communicate with each other through the CHL’s executive council. The council is composed of three representatives from each of the leagues who collaborate on issues that affect all of them and their respective teams, such as the import draft for players based in Europe.²³ However, none of the leagues or the teams are required to adopt or impose any policies or other initiatives discussed by the council or encouraged by the CHL. A league’s decision to adopt uniform policies is voluntary, not mandatory.²⁴

31. The Plaintiffs’ reliance on an anti-doping policy on CHL letterhead to allege that the CHL has authority over the leagues and their teams is misplaced. This policy does not exist because

²⁰ Supplementary Affidavit of Dan MacKenzie sworn March 4, 2022 at ¶6 (**MacKenzie March 2022 Affidavit**), DMR, Vol IV, pp. 452-453; MacKenzie 2021 Affidavit at ¶15, DMR, Vol I, pp. 82-83; MacKenzie Cross, Q/A 195, 215, 306, TB Vol 9, pp. 4794, 4797-4798, 4821.

²¹ Turnpenney Milne Report, Second Supp MR, p. 54.

²² Sauvageau Cross, Q/A 230-238, TB Vol 7, pp. 4012-4015. Ms. Sauvageau clarified that the IRP did not have access to or review the CHL constitution, but the panelists still understood the governance structure. Ms. Sauvageau testified that the CHL’s lack of authority to impose policies on the leagues or the teams did not affect the IRP’s recommendations, and that the CHL should encourage the leagues and teams to opt into a well-being policy across the leagues.

²³ See e.g., MacKenzie Cross, Q/A 144-148, 234-235, TB Vol 9, pp. 4778-4779, 4801.

²⁴ MacKenzie Cross, Q/A 305-306, TB Vol 9, pp. 4820-4821.

the CHL “forced” the leagues or teams to adopt it. The CHL has no such authority and to the extent that it was adopted by any of the leagues, such adoption was purely voluntary and could not be compelled by the CHL.²⁵

32. Mr. MacKenzie testified that the QMJHL already had an anti-doping policy in place and in 2008 the WHL and OHL decided to adopt the same policy. As a result, a CHL-wide policy was created. The policy itself states that it “supersedes the current QMJHL policy adopted in November 2004” and that any amendments must be made by unanimous decision of the commissioners for each of the WHL, OHL, and QMJHL.²⁶

33. The evidentiary record reveals other practical differences between the leagues that confirm the CHL, leagues, and teams do not operate as a “collective”:

- (a) In the WHL player selection draft (called the Bantam Draft), players are eligible for selection in the calendar year in which they turn 15 years old, but in the OHL draft (called the OHL Priority Selection) and the QMJHL draft, players are only eligible in the calendar year in which they turn 16 years old;²⁷
- (b) Each QMJHL team plays 68 regular season games—exclusively against other QMJHL teams, with one exception discussed below. Each WHL team plays 72 regular season games—exclusively against other WHL teams;²⁸

²⁵ MacKenzie Cross, Q/A 284-292, 304-306, TB Vol 9, pp. 4814-4816, 4820-4821.

²⁶ Anti-Doping Policy adopted June 2008, Third Supp MR; MacKenzie Cross, Q/A 284-292, TB Vol 9, pp. 4814-4816.

²⁷ Branch *Berg* Affidavit at ¶112, MR Vol 3, p. 1516.

²⁸ Branch *Berg* Affidavit at ¶11, MR Vol 3, p. 1498.

- (c) The leagues have their own facility standards, which require arenas that hold a minimum number of spectators and require teams to provide certain spectator services and security, among other operational requirements;²⁹
- (d) The leagues have their own media guides, which feature statistics only for the teams in their league;³⁰
- (e) Each league has its own annual awards for on-ice and academic performance and community service;³¹
- (f) Each league has its own education standards and different arrangements with post-secondary institutions;³²
- (g) There is variation in the scholarship programs across the leagues;³³ and
- (h) Each league chose to implement Respect in Sport training at different times.³⁴

34. The Plaintiffs incorrectly assert that “[p]rofits and revenues flow between the Defendants, and between the Teams, the Leagues, and the League Corporations”.³⁵ In fact, the leagues do not share money. Nor do the teams share their revenues with the leagues, the CHL, or with each other. As the CHL and leagues are not-for-profit corporations, the CHL’s net revenues are

²⁹ WHL By-Laws Schedule II, MR, p. 1396; MacKenzie April 2022 Affidavit, Exhibit D: OHL Operations Manual, DMR, Vol IV, p. 651.

³⁰ Hatt Affidavit Exhibits I, K, O.

³¹ Robison *Berg* Affidavit at ¶67, MR Vol 4, p. 1683; Branch *Berg* Affidavit at ¶187, MR Vol 3, p. 1533.

³² Robison *Berg* Affidavit at ¶25-26, MR Vol 4, p. 1675.

³³ Branch *Berg* Affidavit at ¶54, MR Vol 3, p. 1505.

³⁴ Kennedy Cross, Q/A 409, TB Vol 6, pp. 3468-3469.

³⁵ Claim at ¶13.

distributed at the end of the year to the leagues, which then distribute funds to the teams.³⁶ There is no evidence that the WHL or QMJHL, or the teams that play in those leagues, receive revenues or distributions from the OHL or the teams that play in that league.

35. The Plaintiffs also incorrectly assert that every team “has agreed to accept the transfer of any historical legal liability, including for Abuse, known or unknown, which was held by any previous owners of that Team, as required by league by-laws and constitutions and the common law”.³⁷ Nothing in the by-laws or constitutions of the leagues provides for such transfer of liability, historical or otherwise.³⁸

D. The Leagues Have Distinct Governance Structures, Policies, and Protocols

36. The evidentiary record further explains that the leagues themselves are independent legal personalities with different governance regimes. In particular, each league has its own:

- (a) board of governors, appointed by their respective teams;³⁹ and
- (b) by-laws and constitution which govern the affairs and operations of the leagues, including the creation of new franchises and transfers of franchise ownership.⁴⁰

37. The leagues, and not the CHL, are each independently responsible for:

³⁶ MacKenzie April 2022 Affidavit at ¶8, DMR, Vol IV, p. 535; MacKenzie Cross, Q/A 10, TB Vol 9, pp. 4743-4744.

³⁷ Claim at ¶34, 42, 50.

³⁸ MacKenzie April 2022 Affidavit ¶10, DMR, Vol IV, Ex. C-F, H-K (including s. 3.7.2(c) of the OHL Constitution at Ex. C; s. 6.1(c) of the WHL Constitution at Ex. I; and s. 3.3.4(iii) of the QMJHL Constitution at Ex. J); Robison Affidavit, Ex. A, DMR, Vol I, pp. 133-136.

³⁹ See for e.g. WHL By-Laws and Constitution, ss. 9.1, 13.1, MR Vol 3, pp. 1365, 1374.

⁴⁰ See Hatt Affidavit, Exhibits M, N, O, MR Vol 3.

- (a) scheduling, organizing, and operating games;⁴¹
- (b) establishing playing rules, approving venues, providing officiating, and regulating game operations and conduct;⁴²
- (c) organizing player drafts for new players, in which each club may select for its roster new players who are resident within the league's territory;⁴³
- (d) providing direction regarding player agreements and transactions, including transaction forms;⁴⁴ and
- (e) managing officiating and disciplinary action including instituting and receiving all dues, fines, assessments, and penalties.⁴⁵

38. The leagues are also each responsible for designing and implementing their own policies and programs, which are communicated to players and staff at the team level.⁴⁶ The policies, which include anti-discrimination, concussion, personal conduct, diversity and inclusion policies, and other player safety policies, differ among the leagues.⁴⁷ This was confirmed by Ms. Sauvageau, one of the IRP panelists, on cross-examination.⁴⁸

⁴¹ CHL Constitution, s. 6.2, Exhibit A to MacKenzie April 2022 Affidavit, DMR, Vol IV, p. 554.

⁴² CHL Constitution, s. 6.2, Exhibit A to MacKenzie April 2022 Affidavit, DMR, Vol IV, p. 554.

⁴³ CHL Constitution, s. 14.5, Exhibit A to MacKenzie April 2022 Affidavit, DMR, Vol IV, p. 572.

⁴⁴ Courteau Affidavit at ¶13, DMR, Vol 3, p. 303; Branch *Berg* Affidavit at ¶152, MR Vol 3, p. 1526 & WHL By-Laws, s. 9.1, MR Vol 3, p. 1365.

⁴⁵ WHL By-Laws, s. 20.3, MR Vol 3, p. 1384.

⁴⁶ MacKenzie March 2022 Affidavit at ¶6, DMR, Vol IV, pp. 452-453.

⁴⁷ WHL Update on Player Well-Being, Second Supp. MR, pp. 7-11; MacKenzie Cross, Q/A 321, TB Vol 9, p. 4827.

⁴⁸ Sauvageau Cross, Q/A 144, 173, 179-180, 239-240, TB Vol 7, pp. 3980, 3992-3993, 3995-3996, 4015-4017.

39. For example, unlike the OHL and the QMJHL, the WHL recently commenced a workplace training program and a mandatory respect champion program where players have group conversations three times a year about player well-being.⁴⁹ Responsibility for off-ice protection policies also rests with and differs among the leagues.⁵⁰

40. The leagues have created distinct disciplinary protocols and processes. The Turnpenney Milne report confirms the “long-standing autonomy” for the three leagues “which allows each to determine specific priorities and account for differences (for example, the OHL and WHL have teams in the United States and the QMJHL is comprised solely of Canadian teams with many French speaking players)”.⁵¹

41. Although the report recommended an “essentially uniform” player safety policy for the leagues, it acknowledged that a completely uniform policy is impossible given the legal structure of the leagues. The report states: “Leagues may have slightly different language or concepts based on legal advice obtained, differences in jurisdiction and governing legislation and service providers utilized on issues such as reporting and investigations.”⁵²

42. The differences in key policies, rules and protocols across the leagues, and their implementation by each league, demonstrate that the leagues do not operate as a “collective”. They are distinct entities operating in different jurisdictions.

⁴⁹ Kennedy Cross, Q/A 49-50, TB Vol 6, pp. 3352-3353.

⁵⁰ MacKenzie Cross, Q/A 296, 308-309, TB Vol 9, pp. 4817-4818, 4822-4823.

⁵¹ Turnpenney Milne Report, Second Supp. MR, p. 24.

⁵² Turnpenney Milne Report, Second Supp. MR, p. 47.

E. Each League Has Its Own Standard Player Agreement

43. The Plaintiffs assert that contracts between teams and players are standardized at the CHL level. This is incorrect. There is no standard player agreement at the CHL level. Each league approves and registers its own standard player agreement. And a plain reading of those agreements reveals that they differ among the leagues.⁵³

44. In addition, and perhaps more importantly:

- (a) the WHL's standard player agreement states: "[t]his agreement shall be governed by and construed in accordance with the laws of the province of Canada or the state of the United States of America, as applicable, where the Club is located". Every player who plays in the WHL enters into a standard player agreement with their team, which is then approved by and registered with the league office in Calgary;⁵⁴
- (b) the QMJHL standard player agreement incorporates by reference the QMJHL's Constitution which states: "All documents of the League shall be interpreted and applied, and all relations among persons connected to the League or to a Member shall be conducted, in accordance with the laws of the Province of Québec then in force. For the purposes of the Constitution and the other regulations of the League, the District of Montreal is hereby elected as the legal domicile."⁵⁵

⁵³ MacKenzie 2020 Affidavit at ¶10, DMR, Vol I, p. 22 & Exhibit A, DMR, Vol I, p. 26.

⁵⁴ Robison *Berg* Affidavit at ¶69, 75, MR Vol 4, pp. 1684-1685.

⁵⁵ QMJHL Constitution, s. 1.2.2.4, Exhibit J to MacKenzie April 2022 Affidavit, DMR, Vol IV, p. 903.

F. No Business Presence in Ontario

45. The Claim is critically deficient in establishing the jurisdiction of this Honourable Court over the Moving Defendants on the basis of “business activity” or physical presence in Ontario. None of the Moving Defendants have, or are required by law to have, a registered office in Ontario. They do not have places of business in Ontario or even a nominated agent in Ontario at which process may be served generally.⁵⁶ None of the Moving Defendants have any actual presence in Ontario. They do not regularly visit Ontario.⁵⁷

46. The fact that the CHL is headquartered in Ontario is not sufficient to ground jurisdiction over the Moving Defendants, and certainly not sufficient to ground jurisdiction over the U.S. Teams which are located in U.S. jurisdictions and governed by U.S. state laws. The Plaintiffs therefore rely on the participation of some WHL and QMJHL team players in the Memorial Cup year-end tournament and an annual all-star prospects game for their jurisdictional analysis. However, there is no evidence that any of the Moving Defendants had any role in organizing, supervising, or managing these events when held in Ontario, as explained further below.

47. The Memorial Cup is a year-end tournament. It rotates between the leagues, such that it is held in Ontario once every three years. When the Memorial Cup is held in Ontario, there is at most only one team from the WHL and one team from the QMJHL in attendance at that event. The uncontradicted evidence is that the Memorial Cup is operated by a host organizing

⁵⁶ MacKenzie 2020 Affidavit at ¶5, DMR Vol I, p. 21.

⁵⁷ MacKenzie 2020 affidavit at ¶6, DMR, Vol I, pp. 21-22.

committee which is responsible for hosting the tournament, selling tickets and sponsorships, and arranging the public celebrations that occur around the Memorial Cup.⁵⁸

48. There is no evidence that the host organizing committee was ever composed of any of the Moving Defendants when the event was held in Ontario.⁵⁹ Further, there is no evidence that any alleged Abuse took place at the Memorial Cup against any WHL or QMJHL players, let alone when the event was held in Ontario.

49. The annual all-star prospects game is organized by hockey operations staff from the league that operates in the territory where the game is being played. For instance, this year the game was in Kitchener, and it was organized by the Kitchener Rangers, hockey operations staff from the OHL, and the CHL. WHL and QMJHL staff do not organize the annual all-star prospects game when it occurs in Ontario.⁶⁰

50. Finally, the Plaintiffs point to the CHL's distribution of net revenues to the WHL and the QMJHL (who then distribute the funds to the teams in those leagues).⁶¹ However, there is no evidence that any funds were received by the Moving Defendants in *Ontario*, and in any event the receipt of funds is not a substantial aspect of "business activity" in Ontario for the purpose of jurisdictional analysis.⁶²

⁵⁸ MacKenzie 2020 Affidavit at ¶7, DMR, Vol I, p. 22; MacKenzie April 2022 Affidavit at ¶18, DMR, Vol I, p. 537; MacKenzie Cross, Q/A 156-157, 185, TB Vol 9, pp. 4781-4782, 4789-4790.

⁵⁹ MacKenzie Cross, Q/A 156, 190, TB Vol 9, pp. 4781, 4792-4793.

⁶⁰ MacKenzie Cross, Q/A 77, TB Vol 9, pp. 4761-4762.

⁶¹ MacKenzie Cross, Q/A 10, TB Vol 9, pp. 4743-4744.

⁶² *Leon v. Volkswagon AG*, 2018 ONSC 4265 (*Leon*) at ¶28, citing *Yip v. HSBC Holdings plc*, 2017 ONSC 5332 (*Yip SC*) at ¶186, aff'd 2018 ONCA 626 (*Yip CA*) at ¶37-41, leave to appeal to SCC ref'd [2019] SCCA No 41.

G. No Allegations of Abuse against the Moving Defendants in Ontario

51. Critically, the Claim does not allege that any Abuse (as defined in the Claim) of proposed class members playing on WHL and QMJHL teams occurred *in Ontario*, and certainly not in respect of any of the U.S. Teams.

52. Each of the WHL, OHL, and QMJHL has a separate exhibition, regular season, and playoff schedule for its hockey games. Teams do not play against teams in the other leagues, with two narrow exceptions:

(a) The first exception is the Memorial Cup. The Claim does not allege Abuse (as defined in the Claim) at any Memorial Cup in Ontario; and

(b) The second exception is the home-and-home interleague series between the Ottawa 67s of the OHL and the Gatineau Olympiques of the QMJHL.⁶³ There is no allegation of Abuse (as defined in the Claim) at any such interleague series.

53. Separately, since 1992, there has been an annual CHL/NHL Top Prospects Game which sometimes takes place in Ontario. The teams do not attend the Top Prospects Game—only 40 of the top NHL Entry Draft eligible prospects selected from the various leagues attend.⁶⁴ There is no allegation of Abuse (as defined in the Claim) at any Top Prospects Game.

54. Prior to the pandemic and, more recently, the war in Ukraine, there was also a Canada-Russia series, in which a team of CHL players competes with a team of Russian players in six

⁶³ MacKenzie December 2022 Affidavit at ¶8, DMR, Vol IV, p. 535.

⁶⁴ MacKenzie April 2022 Affidavit at ¶17, DMR, Vol IV, p. 537.

games across Canada (two of which may be in Ontario).⁶⁵ The WHL and QMJHL teams do not attend the Canada-Russia series—only the players from the leagues that are named to the Canada team attend. There is no allegation of Abuse (as defined in the Claim) in this context either.

55. Moreover, none of the Plaintiffs' witnesses who played for WHL and QMJHL allege that Abuse occurred in Ontario. They do not allege in their affidavits or in cross-examination that they were abused:

- (a) when playing at the Memorial Cup; or
- (b) when participating in the annual interleague series or at a top prospects game in Ontario or Canada-Russia series event.

56. Apart from those specific events, players who played for the WHL and the QMJHL did not travel to Ontario as part of their participation in those leagues. To the extent any Abuse was experienced by players on WHL and QMJHL teams (which is denied), it would have taken place exclusively outside Ontario.

PART III: ISSUES

57. There is only one issue on this motion: whether this Honourable Court has jurisdiction *simpliciter* over the WHL and QMJHL and their respective teams. The answer is no.

⁶⁵ MacKenzie Cross, Q/A 110-111, 119-121, 125, TB Vol 9, pp. 4771, 4773, 4774.

PART IV: LAW AND ARGUMENT

A. The Test for Jurisdiction *Simpliciter*

1. Constitutional Principles of Jurisdiction *Simpliciter*

58. The doctrine of jurisdiction *simpliciter* is not a procedural matter: it is a threshold substantive issue that is a function of the “constitutional imperative” that provincial power only be exercised in the province.⁶⁶ With that imperative in mind, in *Club Resorts Ltd. v. Van Breda*, the Supreme Court of Canada confirmed that an action must have a “real and substantial connection” to the province in which it is being pursued. As such, jurisdiction does not and cannot take a backseat to the convenience of having the dispute proceed as a class action.⁶⁷

59. The Supreme Court of Canada in *Bissaillon v. Concordia* confirmed that class action procedure cannot trump the issue of jurisdiction:

In short, the class action procedure cannot have the effect of conferring jurisdiction on the Superior Court over a group of cases that would otherwise fall within the subject-matter jurisdiction of another court or tribunal. Except as provided for by law, this procedure does not alter the jurisdiction of courts and tribunals. Nor does it create new substantive rights.⁶⁸

60. Jurisdiction is not a matter of discretion. Either a court has jurisdiction or it does not based on the existence of a real and substantial connection between the jurisdiction and the defendant or the cause of action.⁶⁹ The “real and substantial connection” test places limits on the reach of the jurisdiction of a province’s courts and on the application of provincial laws to

⁶⁶ *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 (*Van Breda*) at ¶26 and 28-30.

⁶⁷ *HSBC Bank Canada c. Hocking*, 2008 QCCA 800 at ¶150.

⁶⁸ *Bissaillon v. Concordia*, 2006 SCC 19 at ¶22.

⁶⁹ *Jordan v. Schatz*, 2000 BCCA 409 at ¶27.

interprovincial or international situations.⁷⁰ The purpose of constitutionally imposed territorial limits is to ensure the existence of the relationship or connection needed to confer legitimacy.⁷¹

61. The Supreme Court of Canada in *Van Breda* developed a system of presumptive connecting factors to determine whether there was a real and substantial connection between the subject matter of the litigation and the forum. The “real and substantial connection” test prioritizes order, stability, and predictability by relying on objective connecting factors for the assumption of jurisdiction.⁷²

62. The principle of international comity also informs the jurisdictional analysis.⁷³ It is a core feature of ensuring predictability, stability, and overall fairness in the resolution of multi-jurisdictional disputes.⁷⁴ The real and substantial connection test “reflects the underlying reality of the territorial limits of law under the international legal order and respect for the legitimate actions of other states inherent in the principle of international comity.”⁷⁵

63. Though international comity is critical for the preferability analysis at the certification stage of a class action,⁷⁶ it also provides a “useful analytical tool” to “inform” and “influence” the factual real and substantial connection analysis of jurisdiction *simpliciter*.⁷⁷ Comity “underlie[s] all presumptive connecting factors, whether listed or new”.⁷⁸ International comity is

⁷⁰ *Van Breda* at ¶21.

⁷¹ *Van Breda* at ¶31.

⁷² *Haaretz.com v. Goldhar*, 2018 SCC 28 (*Haaretz.com*) at ¶28.

⁷³ *Van Breda* at ¶79, 84, 92.

⁷⁴ *Leon* at ¶17.

⁷⁵ *Leon* at ¶17, citing *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 at ¶60.

⁷⁶ As in *Berg v. Canadian Hockey League*, 2017 ONSC 2608 (*Berg*) at ¶207-208, 216-217, rev'd in part 2019 ONSC 2106.

⁷⁷ *Van Breda* at ¶79, 84, 92.

⁷⁸ *Van Breda*, at ¶92.

particularly important to the U.S. Teams, which are governed by non-Ontario choice of law clauses and different legal frameworks than the Canadian teams, including distinct tort laws and limitation periods. Given that the different legal regimes would require the Canadian court to opine on U.S. law, a U.S. court is unlikely to enforce any Canadian judgment against the U.S. Teams in these circumstances.⁷⁹

2. The “Real and Substantial Connection” Test

64. An Ontario court will have jurisdiction over a foreign defendant only where there is a “real or substantial connection” to Ontario, informed by the following presumptive factors:

- (a) the defendant is domiciled or resident in the province;
- (b) the defendant carries on business in the province;
- (c) an alleged tort was committed in the province; or
- (d) a contract connected with the dispute was made in the province.⁸⁰

65. These factors are not intended to be applied with rigidity. They are guided by the requirements of order, fairness, and comity, not a mechanical counting of connections with the proposed forum.⁸¹ Their purpose is to reduce the “risk of jurisdictional overreach”, to “prevent improper assumptions of jurisdiction”, to prevent “courts from overreaching by entering into

⁷⁹ *Berg* at ¶123, 207-208.

⁸⁰ *Van Breda* at ¶90.

⁸¹ *Bouzari v. Islamic Republic of Iran* (2004), [71 O.R. \(3d\) 675 \(CA\)](#), leave to appeal to SCC ref'd [2004] SCCA No 410; *Yip SC* at ¶94 (*Yip SC*).

matters in which they had little or no interest”, and to reduce the risk of “sweeping into that jurisdiction claims that have only a limited relationship with the forum”.⁸²

66. Presumptive connecting factors should point to a relationship between the subject matter of the litigation and the forum, “such that it would be reasonable to expect that the defendant would be called to answer legal proceedings in that forum”.⁸³

67. A plaintiff bears the onus of demonstrating a good arguable case that there is a real and substantial connection between foreign defendants and Ontario. The good arguable case standard requires evidence—merely stating that there is a good arguable case does not meet this onus.⁸⁴

68. Where a plaintiff fails to establish a presumptive connecting factor, a court does not have jurisdiction and the action must be dismissed or stayed as against that defendant.⁸⁵

B. This Court Lacks Jurisdiction over the Moving Defendants

69. There is no dispute the Moving Defendants are foreign-based. None are domiciled or resident in Ontario, and they have not attorned to the jurisdiction of Ontario’s courts. As a result, the Plaintiffs must show that the Moving Defendants are either party to a contract made in Ontario, that they carry on business in Ontario, or that they committed a tort in Ontario. The evidence does not establish any of these connecting factors. The Plaintiffs have not satisfied their burdens.

⁸² *Yip CA* at ¶30, citing *Van Breda* at ¶22, 26, 38, 89.

⁸³ *Van Breda* at ¶92.

⁸⁴ *Shah v. LG Chem Ltd.*, 2015 ONSC 2628 at ¶8, 11, 121.

⁸⁵ *Van Breda* at ¶79-82.

1. No Contract Made in Ontario or Governed By Ontario Law

70. The only contracts relevant to this action are the standard player agreements entered into by WHL and QMJHL teams with their respective players.

71. None of these agreements were entered into in Ontario. And they contain mandatory governing law clauses in favour of the jurisdiction where the team resides. The standard player agreement used by WHL teams states: “[t]his agreement shall be governed by and construed in accordance with the laws of the province of Canada or the state of the United States of America, as applicable, where the Club is located”.⁸⁶ The QMJHL’s Constitution makes clear that its standard player agreements are governed by the laws of Québec and also that its legal domicile is Québec.⁸⁷

72. Although the WHL and the QMJHL are parties to the CHL’s Constitution which is an Ontario contract, they are not party to any contract *with the Plaintiffs* made in Ontario, nor any contract *connected with the parties’ disputes*.⁸⁸ The dispute between the parties pertains to abuse suffered, not contractual obligations. Moreover, though the plaintiffs have sought to impugn the leagues’ implementation of CHL policies, there is no contractual obligation in these respects on the WHL and the QMJHL. Rather, the leagues’ engagements with the CHL fall under the scope of their business activities, considered further below. The Plaintiffs have therefore failed to establish the existence of a contract as a ground of jurisdiction.

⁸⁶ McKenzie 2020 Affidavit, Exhibit A, s. 8.

⁸⁷ QMJHL Constitution, s. 1.2.2.4, Exhibit J to MacKenzie April 2022 Affidavit, DMR, Vol IV, p. 903.

⁸⁸ *Van Breda* at [¶90](#).

2. The Moving Defendants Do Not Carry On Business In Ontario

73. In *Van Breda*, the Supreme Court of Canada held that relying on a defendant’s business activities to ground jurisdiction requires “caution”.⁸⁹ There is no “universalist approach” to taking jurisdiction in which all aspects of a particular multi-national subject matter are assigned to one court due to the convenience and efficiency of doing so.⁹⁰ The court must look to “all of the relevant facts in their temporal context”.⁹¹

74. To carry on business in the province for the purposes of establishing jurisdiction requires “some form of physical presence in the jurisdiction such as maintaining an office or conducting regular visits”.⁹² The defendant must be performing some “substantial aspect” of its own business beyond simply providing its goods and services within the jurisdiction.⁹³ There must be a concrete and not ephemeral connection between the business of the defendant and the particular jurisdiction or jurisdictions where a claim is being made against the defendant.⁹⁴

75. Here, it is necessary to assess the relevant objective facts in relation to *each* of the Moving Defendants to determine whether any of them carry on business in Ontario at the relevant time sufficient to ground jurisdiction.⁹⁵ It is not enough to simply advance broad allegations that certain of the Defendants operate as a “collective” to ground jurisdiction over all of the Defendants regardless of their domicile.

⁸⁹ *Van Breda* at ¶187.

⁹⁰ *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2022 ONSC 12 (*Vale*) at ¶58-60, ¶77, currently under appeal.

⁹¹ *Vale* at ¶56.

⁹² *Leon* at ¶27, citing *Van Breda* at ¶187.

⁹³ *Leon* at ¶28, citing *Yip SC* at ¶186.

⁹⁴ *Yip SC* at ¶160.

⁹⁵ *Vale* at ¶61.

76. A party cannot bootstrap personal jurisdiction over a foreign defendant by reference to the court's jurisdiction over other defendants.⁹⁶ This is particularly so where the Plaintiffs' assertions of joint venture, partnership, and collective operation of the Defendants are untethered from the evidentiary record.

77. There is also no evidence that any of the Moving Defendants carried on business in Ontario during the proposed Class Period of 1975 to the present date. At paragraph 204 of the Claim, the Plaintiffs refer to various tenuous activities as occurring in Ontario, including the Memorial Cup (which takes place in Ontario once every three years and does not engage all teams) and the Top Prospects Game (which variably takes place in Ontario, and does not engage teams at all, but rather the top prospects playing in the leagues).

78. As with the Canada-Russia series and the annual interleague series between Gatineau and Ottawa, none of these activities reflect business engagement by the Moving Defendants with or in Ontario. Rather, they show incidental or irregular contact with Ontario. These are "fleeting or relatively unimportant" connections, not substantial connections.⁹⁷

79. Paragraph 204 of the Claim also references CHL activities (mainly, the collection of money from the NHL and negotiation of TV rights). However, these activities have nothing to do with the Moving Defendants or the allegations of Abuse advanced by the Plaintiffs. That the CHL distributes revenues from these activities to the WHL and the QMJHL (who then distribute the funds to the teams in those leagues)⁹⁸ does not establish "business activity" by the Moving

⁹⁶ *Williams v. TST Porter dba 6422217 Canada Inc.*, 2008 BCSC 1315 at [¶15-17](#).

⁹⁷ *Beals v. Saldanha*, 2003 SCC 72 at [¶32](#).

⁹⁸ MacKenzie Cross, Q/A 10, TB Vol 9, pp. 4743-4744.

Defendants in Ontario grounding jurisdiction. And there is no evidence that any funds are received by the Moving Defendants in Ontario.

80. The Plaintiffs' application of an unduly broad approach to the presumptive connecting factor regarding a defendant's business activities in the province is contrary to controlling authority, ignores the purposive inquiry required by the "carrying on business" test, and is not supported by the evidentiary record.

3. No Torts in Ontario Alleged against the Moving Defendants

81. A tort occurs in the jurisdiction substantially affected by the defendant's activities or its consequences or where the important elements of the tort occurred.⁹⁹ A paramount factor in determining *situs* must be the place where the injury occurred; the "jurisdictional act" is the infliction of injury.¹⁰⁰

82. The Supreme Court of Canada held in *Tolofson v. Jensen*:

... the courts would appear to be limited in exercising their powers to the same extent as the provincial legislatures ... If a court is thus confined, it is obvious that an extensive concept of "proper law of the tort" might well give rise to constitutional difficulties. Thus an attempt by one province to impose liability for negligence in respect of activities that have taken place wholly in another province by residents of the latter or, for that matter, residents of a third province, would give rise to serious constitutional concerns.¹⁰¹

⁹⁹ *Yip SC* at ¶207 citing *Central Sun Mining Inc. v. Vector Engineering Inc.*, [2013 ONCA 601](#); *Gulevich v. Miller*, [2015 ABCA 411](#); *Das v. George Weston Limited*, [2017 ONSC 4129 \(Das\)](#), aff'd [2018 ONCA 1053](#), leave to appeal to SCC ref'd, [2019] SCCA No 69.

¹⁰⁰ *Moran v. Pyle National (Canada) Ltd.*, [\[1975\] 1 SCR 393](#).

¹⁰¹ *Tolofson v. Jensen*; *Lucas (Litigation Guardian of) v. Gagnon*, [\[1994\] 3 SCR 1022](#) at 1065.

83. In an attempt to fill the jurisdictional gap, the Plaintiffs assert the Defendants operate together as a collective. They intertwine the activities of the Defendants through the defined “CHL League”, which they incorrectly define to mean a consortium of all of the defendants. But this is a false construct, unsupported by the evidentiary record. Although the WHL and the QMJHL are members of the CHL and participate in the CHL at the council level, they do not operate as a collective and their activities are not commingled. They are separate and distinct legal personalities with different rules, policies and governance regimes, as described above.

84. Moreover, the involvement of the WHL and QMJHL at the CHL council level is not the subject of the torts or wrongdoing alleged by the Plaintiffs to have taken place in Ontario. The fact that the Moving Defendants engage with the OHL and its teams through the CHL “does nothing to advance a real and substantial connection” from a jurisdictional perspective.¹⁰²

85. Similarly, the Plaintiffs’ broad and far-reaching allegations of systemic negligence are insufficient to ground jurisdiction in respect of the Moving Defendants. Bare pleadings, unsupported by alleged material facts, cannot be assumed to be true as a consequence, and certainly not in the absence of evidence of any tort or wrongdoing committed in Ontario by the Moving Defendants.¹⁰³ There is no evidence that the Moving Defendants teams are connected in a “single scheme” that caused harm to the Plaintiffs.¹⁰⁴ In fact, there is no allegation that the Moving Defendants committed any tort or wrongdoing in Ontario. And, as discussed in the

¹⁰² *Vale* at ¶78.

¹⁰³ *Das* at ¶236.

¹⁰⁴ *Vale* at ¶61.

Defendants' companion factum on the application of the *Ragoonanan* principle, there is not even a representative plaintiff for each of the WHL and QMJHL teams.

86. That there are representative plaintiffs for each of the leagues does not solve the problem. The teams are not agents of the leagues or vice-versa, and in any event jurisdiction will not be made out even when a defendant has an agent for service in the jurisdiction.¹⁰⁵

C. The Plaintiffs' Alleged Connecting Factors are Weak and Unrelated to the Subject Matter of the Litigation; Any Presumption is Rebutted

87. Alternatively, even if a presumptive connecting factor were present (which is denied), a defendant may rebut the presumption by demonstrating that the factor in question does not point to any real relationship, or points only to a weak relationship, between the subject matter of the litigation and the forum in which the action is being advanced.¹⁰⁶ Where the presumptive connecting factor is that the defendant is carrying on business in the province, the presumption can be rebutted by showing that the subject matter of the litigation is unrelated to the defendant's business activities in the province.¹⁰⁷

88. Tenuous or passing connecting factors to Ontario are insufficient.¹⁰⁸ The defendant must demonstrate that the relationship between the forum and the subject matter of the litigation is such that it would "not be reasonable to expect that the defendant would be called to answer proceedings in that jurisdiction."¹⁰⁹ The Supreme Court of Canada has recognized the

¹⁰⁵ *Vale* at ¶167.

¹⁰⁶ *Van Breda* at ¶95-97.

¹⁰⁷ *Van Breda* at ¶96.

¹⁰⁸ *Van Breda* at ¶92.

¹⁰⁹ *Haaretz.com* at ¶43; *Van Breda* at ¶81, 92, 97.

opportunity to rebut a connecting factor where there is only a weak relationship between the subject matter of the litigation and the forum as an important check on jurisdiction.¹¹⁰

89. Even if jurisdiction could be presumed against the Moving Defendants, the presumption is rebutted on this record because the alleged activities have nothing to do with the alleged Abuse. There is no allegation of Abuse at the Memorial Cup, Top Prospects Game, Russia-Canada series, or home-and-home interleague series, whether in Ontario or otherwise. There is no allegation that revenues distributed by the CHL to the QMJHL or the WHL (and then distributed to the teams in those leagues) had anything to do with the alleged Abuse.

90. To the extent that any presumptive connecting factors are present, they reveal, at most, “extremely weak connections” to Ontario, and do not “point to any real relationship between the subject-matter of the litigation and Ontario”.¹¹¹ Any presumption is rebutted.

91. The Plaintiffs recognize the serious jurisdictional challenges they face in this action. They commenced a separate action against the Moving Defendants in Alberta in June 2020—the same month they commenced this action in Ontario. After the Defendants commenced an abuse of process motion, the Alberta action was stayed on consent pending decision in Ontario.

PART V: ORDER REQUESTED

92. The Moving Defendants request a permanent stay of this action as against them.

¹¹⁰ *Haaretz.com* at ¶40; *Van Breda* at ¶95.

¹¹¹ *Yip CA* at ¶42, citing *Yip SC* at ¶211.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3rd day of October, 2022.



Bennett Jones LLP, Lax O'Sullivan Lisus Gottlieb
LLP, and Cassels Brock & Blackwell LLP

SCHEDULE “A”

LIST OF AUTHORITIES

- 1 *Leon v. Volkswagon AG*, [2018 ONSC 4265](#)
- 2 *Yip v. HSBC Holdings plc*, [2017 ONSC 5332](#); *aff'd* [2018 ONCA 626](#); leave to appeal to
SCC ref'd [2019] SCCA No 41
- 3 *Society of Composers, Authors & Music Publishers of Canada v. Canadian Assn. of
Internet Providers*, [2004 SCC 45](#)
- 4 *Club Resorts Ltd. v. Van Breda*, [2012 SCC 17](#)
- 5 *HSBC Bank Canada c. Hocking*, [2008 QCCA 800](#)
- 6 *Bissaillon v. Concordia*, [2006 SCC 19](#)
- 7 *Jordan v. Schatz*, [2000 BCCA 409](#)
- 8 *Haaretz.com v. Goldhar*, [2018 SCC 28](#)
- 9 *Berg v. Canadian Hockey League*, [2017 ONSC 2608](#); *rev'd in part* [2019 ONSC 2106](#)
- 10 *Bouzari v. Islamic Republic of Iran* (2004), [71 O.R. \(3d\) 675 \(CA\)](#); leave to appeal to
SCC ref'd [2004] SCCA No 410
- 11 *Shah v. LG Chem Ltd.*, [2015 ONSC 2628](#)
- 12 *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada*, [2022
ONSC 12](#)
- 13 *Williams v. TST Porter dba 6422217 Canada Inc.*, [2008 BCSC 1315](#)
- 14 *Beals v. Saldanha*, [2003 SCC 72](#)
- 15 *Central Sun Mining Inc. v. Vector Engineering Inc.*, [2013 ONCA 601](#)
- 16 *Gulevich v. Miller*, [2015 ABCA 411](#)
- 17 *Das v. George Weston Limited*, [2017 ONSC 4129 \(Ont. S.C.J.\)](#); *aff'd* [2018 ONCA 1053](#)
- 18 *Moran v. Pyle National (Canada) Ltd.*, [\[1975\] 1 SCR 393](#)
- 19 *Tolofson v Jensen; Lucas (Litigation Guardian of) v. Gagnon*, [\[1994\] 3 SCR 1022](#)

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

None.

SCHEDULE “C”

MOVING DEFENDANTS

1. 1091956 Alta Ltd. o/a The Medicine Hat Tigers
2. Medicine Hat Tigers Hockey Club Ltd.
3. 32155 Manitoba Ltd.
4. McCrimmon Holdings, Ltd., a Partnership c.o.b. as Brandon Wheat Kings
5. Brandon Wheat Kings Limited Partnership
6. Braken Holdings Ltd.
7. Queen City Sports & Entertainment Group Ltd.
8. Brett Sports & Entertainment, Inc.
9. Hat Trick, Inc.
10. Calgary Flames Limited Partnership
11. Calgary Sports and Entertainment Corporation
12. Edgepro Sports & Entertainment Ltd.
13. Edmonton Major Junior Hockey Corporation
14. EHT, Inc.
15. Ice Sports & Entertainment Inc. o/a Winnipeg Ice
16. Kamloops Blazers Hockey Club, Inc.
17. Kamloops Blazers Holdings Ltd.
18. Kelowna Rockets Hockey Enterprises Ltd.
19. Lethbridge Hurricanes Hockey Club
20. Moose Jaw Tier 1 Hockey Inc. d.b.a. Moose Jaw
21. Moose Jaw Warriors Tier 1 Hockey, Inc. o/a Moose Jaw Warriors
22. Prince Albert Raiders Hockey Club Inc.
23. Rebels Sports Ltd.
24. Saskatoon Blades Hockey Club Ltd.
25. Swift Current Tier 1 Franchise Inc.
26. Swift Current Broncos Hockey Club Inc. o/a Swift Current
27. Thunderbirds Hockey Enterprises, LLC
28. Tri-City Americans Hockey LLC

29. Top Shelf Entertainment, Inc.
30. Vancouver Junior Hockey Limited Partnership
31. Vancouver Junior Hockey Partnership, Ltd c.o.b. Vancouver Giants
32. West Coast Hockey LLP
33. West Coast Hockey Enterprises Ltd. o/a Victoria Royals
34. Winterhawks Junior Hockey LLC
35. Portland Winter Hands Inc.
36. 7759983 Canada Inc. c.o.b. as Club De Hockey le Phoenix
37. 8515182 Canada Inc. c.o.b. Charlottetown Islanders
38. 9264-8849 Quebec Inc. c.o.b. as Groupe Sags 7-96 and Les Saguneens
39. Crap Breton Major Junior Hockey Club Limited o/a Screaming Eagles Cape Breton
40. Club de Hockey Drummond Inc. o/a Voltigeurs Drummondville
41. Club de Hockey Junior Majeur de Baie-Comeau Inc. o/a Drakkar Baie-Comeau
42. Club de Hockey Junior Majeur Val D'or Inc. o/a Val D'Or Foreurs
43. Club de Hockey Shawinigan Inc. o/a Cataractes Shawinigan
44. Club Hockey les Remparts de Québec Inc.
45. Halifax Mooseheads Hockey Club Inc.
46. Le Club de Hockey Junior Armada Inc.
47. Le Club de Hockey L'Oceanic de Rimouski Inc.
48. Le Titan Acadie Bathurst (2013) Inc.
49. Les Huskies de Rouyn-Noranda Inc.
50. Les Olympiques de Gatineau Inc.
51. Les Tigres de Victoriaville (1991) Inc.
52. Moncton Wildcats Hockey Club Limited
53. Saint-John Major Junior Hockey Club Limited

DANIEL CARCILLO et al.
Plaintiffs

-and-

ONTARIO MAJOR JUNIOR HOCKEY LEAGUE et al.
Defendants

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

**ONTARIO
SUPERIOR COURT OF JUSTICE**

Proceeding commenced at Toronto

**FACTUM OF THE DEFENDANTS
(Jurisdiction Motion, Returnable November 14-18, 2022)**

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