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

ONTARIO
SUPERIOR COURT OF JUSTICE

B E T W E E N :

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 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

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Defendants

Proceeding under the *Class Proceedings Act, 1992*

REPLY FACTUM OF THE PLAINTIFFS'
(Certification Motions, returnable
November 14-18, 2022)

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PART I - INTRODUCTION

1. The defendants have not engaged with the plaintiffs' case. Over the course of their 128-page responding factum, they reverse-engineer a variety of irrelevant individual and team-level concerns to contrive the platitudinal "monster of complexity." Their sprawling submissions fail because they do not address one simple fact: this is a case about systemic abuse. In this case, abuse prevention policies and programs are, and can only be, overseen and managed at the League-level. Individual Teams do not have oversight and management capacity or responsibility over the abuse prevention regime.

2. Those meager policies adopted by the Leagues reflect a top-down response to the extreme risks posed by the CHL League-system. The primary complaint from the IRP, the 1997 "Player's First" report, and the players themselves is a failure to have appropriate top-down policies, with reporting systems, training, enforcement, and collective buy-in.

3. This is never addressed by the defendants, nor is the binding law of this province with respect to failures in oversight and management. *Cloud* made clear that "students were not all treated the same way and did not all experience the same suffering."[1] Over dozens of pages, the defendants focus on the differences in players' experiences. These distinctions are irrelevant to the association's failures in oversight and management.

4. This systemic class proceeding does not require a team-by-team or individual-by-individual analysis. There are not 60 systems here. There is only one. To suggest otherwise, the defendants attempt to shoehorn this proceeding out of the past 25 years of

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[1] *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.), at para. 67, leave to appeal refused, [2005] S.C.C.A. No. 50.

systemic negligence jurisprudence. Just as the Court of Appeal for Ontario found that, in *Grenville*, the "harm was systemic because it flowed from Grenville's character as an institution," the affiants on this motion have testified to a "common culture" across teams.[2] Sheldon Kennedy testified that the culture of silence and abuse he discovered, as an IRP panellist in 2020, was "a continuation" of the same culture he experienced playing in the CHL League in the early 1980s.[3]

5. Whether the Abuse occurred on every team, or in every year, is irrelevant. The Court of Appeal for Ontario recently reiterated that "resolving the issue of liability in a systemic class action is not a question of numbers," and "it is not material whether [a breach] occurred in a majority of cases."[4] This case focuses on the interaction between the common abuse policies (or lack thereof), the duty to protect children, and the entire group of children who were not protected. This interaction can be analysed through four "avenues" of systemic analysis:

> (a) A **direct** systemic analysis grounded in collective failures to create, implement, and enforce policies and oversee the abuse prevention system. While precluded in government cases due to the "policy defence," this form of systemic negligence is available here.
>
> (b) An **operational** systemic analysis grounded in system-wide failures that allowed abuses to occur in plain sight. Given that the Leagues function as unincorporated associations, and these failures go to their core animating principles, liability is shared among all members of the Leagues through a "web of agency." This is akin to the Crown's vicarious liability for its agents in government systemic negligence cases such as *Francis v. Ontario*.

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[2] *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115, at para. 37.
[3] Cross-Examination of Sheldon Kennedy, August 25, 2022 [**"Kennedy CXE"**], 31:4-32:3, Transcript Brief [**"TB"**], Vol. 6, Tab 29, pp. 3360-3361.
[4] *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115, at para. 56.

(c) Through **traditional vicarious liability** which transfers liability for individual failures up the chain of control to the unincorporated association, which retains authority and control over all actors in the enterprise;

(d) Based on **non-delegable League-level duties** to protect children. These duties arise from the harsh realities of life in the CHL League, and the defendants' own policies and constitutions, and are not delegable to the Teams, coaches, or players. The collective obligation to "take reasonable care" was one the Leagues had to fulfil or, if such responsibility was, in fact, delegated, to ensure was fulfilled by those that they delegated it to.

6. The defendants' responding factum focuses on minor differences in class member experiences to conjure complexity. This case concerns 15,000 children who were subjected to a single toxic system. The common issues trial will apply these systemic lenses to the Leagues, a single system with three sets of abuse policies. This case is less complex, and concerns fewer forms of, and venues for, Abuse, and a far smaller class, than comparable certified class actions. By comparison, *Greenwood* concerned over 50,000 RCMP employees who were "harassed" at every RCMP detachment in Canada.[5]

7. In the defendants' constating documents and policies, the duty to protect children flows from the top down. According to the defendants' own experts, protecting children cannot be achieved any other way. Yet, instead of contending with the plaintiffs' systemic claim, the defendants variously attempt to shift responsibility to society as a whole, hockey culture, victims of abuse, individual Teams, "bad apple" coaches, and Hockey Canada. Their position appears to be that fault lies with anybody and everybody but the Leagues.

8. Class actions law allows for systems to be isolated and scrutinized. The defendants will go to any length to avoid that scrutiny, including blaming the very players caught

[5] *Canada v. Greenwood*, 2021 FCA 186, leave to appeal refused, [2021] S.C.C.A. No. 377.

within, and abused within, their system. Almost 20 years ago, Justice Cullity warned against using hypothetical third-party claims as a defence to certification.[6] If the defendants intended to issue third party claims, they would have done so before the limitation period expired in September 2022. Even if this were not the case, the plaintiffs could, if third-party claims materialize, "Taylorize" their claim to preclude claims for contribution and indemnity, but only for those claims that are capable of apportionment.

9. The time for the Leagues to hold players accountable was when they were players. Their failure to hold anyone accountable for the abuse for decades is what allowed the cycle of hazing and abuse to continue unabated, and a common toxic culture to flourish. The Plaintiffs have gone beyond establishing "some basis in fact" for the commonality of these system-wide failures.

10. The defendants made promises, in their constitutions, to work in concert to protect the vulnerable children in their care. This is a core reason for the CHL League's existence. The Leagues passed binding policies that are not mere "minimum standards." They failed to enforce those policies and keep their constitutional promises. They cannot evade responsibility for these failures by blaming the children they were obliged to protect.

PART II - THE FACTS

11. The defendants, in their "Facts" section, attempt to reinvent the plaintiffs' case in order to litigate it using alternative facts unsupported by the record. It is neither necessary nor constructive to correct each of their inaccuracies and overstatements. The plaintiffs

[6] *Anderson v. St. Jude Medical Inc.*, [2003] O.J. No. 3556 (Sup. Ct.), at para. 60.

continue to rely on the facts set out in their previous factums on these motions, which are well-supported by the record.[7] Addressed below are only those misstatements, errors, and omissions of the defendants that most meaningfully impact the certification analysis.

A. The Leagues Cannot Continue to Deny Their Own Structures

12. The defendants' accounts of the Leagues' responsibilities, the relationships between the Leagues and the Teams, and the operation of player safety policies and programs, all seek the same end: denying the organizational structure that both defines the Leagues and places responsibility for protecting players at the association-level.

13. In the defendants' version of the facts, the CHL League is merely a provider of business services, with no role in governing player safety; the three Member Leagues each organically (and separately) engaged in player safety over time; but it is the Teams that are individually responsible for their players and that have attempted to fulfil those responsibilities in various ways.[8]

14. This is a fiction. The CHL League and the Member Leagues are responsible for player safety.[9] They are obliged "to look out for the best interest" of the teenage players in their care.[10] On the evidence in the record, they have always had the authority to do so: their system-wide policies make this clear.

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[7] See the plaintiffs' moving factum on certification [**"Plaintiffs' Certification Factum"**], and the plaintiffs' responding factum on the defendants' *Ragoonanan* and jurisdiction motion [**"Plaintiffs' Responding Factum"**].

[8] See the defendants' responding factum on certification [**"Defendants' Responding Factum"**], at paras. 23-31, 50-67.

[9] See Plaintiffs' Certification Factum, at paras. 65-70.

[10] See Affidavit of David Branch, sworn December 3, 2015, [**"Branch *Berg* Affidavit"**], in *Berg v. Canadian Hockey League*, 2017 ONSC 2608, at paras. 123, 154, Certification Motion Record [**"CMR"**], Vol. 3, Tab 19P, p. 1519, 1526; Affidavit of Giles Courteau, sworn November 1, 2021 [**"Courteau Affidavit"**] at

i. The CHL League Has Responsibility and Authority for Player Safety

15. To escape this responsibility, the defendants make unsupported claims and adopt illogical positions. They claim that the CHL League is not a "league" and is merely a "business services" provider.[11] By their own account, the CHL League is "the governing body for major junior hockey in Canada" and is "composed of" the three Member Leagues and their Teams.[12]

16. As detailed previously, the CHL Constitution provides the CHL League with a binding obligation to protect players, and the tools to do so.[13] These responsibilities did not emerge when the current CHL Constitution was adopted in 2017. In 2015, David Branch stated that the "very core" of the CHL League's role is "prioritizing players' interest and needs above all else," and that one of its "biggest responsibilities" and "goals" is "player supervision and caregiving," suggesting that the CHL League was obliged to, and could, protect players.[14]

17. The defendants say that the CHL League had no "formal constitution" before the current CHL Constitution was adopted.[15] This claim, made for the first time in their factum, is belied by historical references to a CHL League constitution. For example, the QMJHL League's By-Laws, from the mid-to-late 1990s, state that "The League is subject

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para. 14, Defendants' Motion Record [**"DMR"**], Vol III, Tab 20, p. 303; Affidavit of Ron Robison, sworn December 22, 2015, [**"Robison *Berg* Affidavit"**], in *Berg v. Canadian Hockey League*, 2017 ONSC 2608, at para. 13, CMR, Vol. 4, Tab 19Q, p. 1691.

[11] Defendants' Responding Factum, at paras. 23-31.

[12] Branch *Berg* Affidavit, at paras. 8-10, CMR, Vol. 3, Tab 19P, pp. 1497-98.

[13] Plaintiffs' Responding Factum, paras. 13 to 19.

[14] Branch *Berg* Affidavit, at paras. 4, 9, 16 and 39, CMR, Vol. 3, Tab 19P, pp. 1496, 1498-99, 1503.

[15] Defendants' Responding Factum, at para. 24.

to the constitution, articles and By-Laws… of the Canadian Hockey League."[16] The CHL League has – and always has had – the power to adopt and enforce uniform Leagues-wide policies. Failure to use these enforcement powers is not exculpatory; it is only further evidence of culpability.

ii. The Member Leagues Share Responsibility for Player Safety

18. The CHL League achieves these goals of player safety in collaboration with the Member Leagues.[17] However, having emphasised the Leagues' responsibilities to players in *Berg*, the defendants now claim that while the Leagues are responsible for designing "policies, programs, and procedures related to… player safety," these policies are "minimum standards" that each Team is "solely responsible" for implementing.[18]

19. This position is inconsistent with the defendants' recognition that the Teams "have responsibilities through their agreements to participate in the applicable League."[19] By regulating the Teams, the Member Leagues govern their affairs.[20] That governance, which includes dress code and even protocol for the "Teddy Bear Toss," extends to abuse prevention.[21]

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[16] QMJHL Rules and Regulations (1997-1998 Season) ["**1997 QMJHL Rules**"], By-Law #1, ss. 1.04 and 1.05, p. 3, Exhibit "B" to the Cross-Examination of Giles Courteau, June 14, 2022 ("**Courteau CXE**"), TB, Vol. 3, Tab 10B, p. 1780.
[17] Branch *Berg* Affidavit at para. 16, CMR, Vol. 3, Tab 19P, p. 1499, and see Robison *Berg* Affidavit, at para. 13, Tab 19Q, CMR Vol 4, p. 1672.
[18] Defendants' Responding Factum, at paras. 50, 51, and see fn. 10, above.
[19] Defendants' Responding Factum, at para. 59.
[20] See e.g., OHL Constitution ss. 2.6-2.7, Affidavit of Dan MacKenzie, sworn April 20, 2022 ["**MacKenzie April 2022 Affidavit**"], Exhibit "C", DMR, Vol. IV, Tab 23C, p. 616; 1997 QMJHL Rules, By-Law #1, s. 2.14, p. 13, Courteau CXE, Exhibit "B", TB, Vol. 3, Tab 10B, p. 1790.
[21] 1997 QMJHL Rules, By-Law #1, s. 2.21, p. 16, Courteau CXE, Exhibit "B", TB, Vol. 3, Tab 10B, p. 1793; OHL Operations Manual, MacKenzie April 2022 Affidavit, Exhibit "D", DMR, Vol. IV, Tab 23D, pp. 652-664.

20. The defendants' position is also inconsistent with the powers of the Member Leagues and their Commissioners to sanction Teams, as established in the Member Leagues' constitutions, by-laws, and rules:

(a) The OHL Commissioner can sanction any Team that fails to act in the best interest of the OHL League or to "observe all decisions" of the Commissioner.[22]

(b) The QMJHL Commissioner can impose any penalty "deemed appropriate" for not complying with, among other things, QMJHL by-laws, and can fine Teams that refuse to follow Commissioner decisions.[23]

(c) The WHL Commissioner can "suspend, expel, fine or otherwise punish" any Team that, "in the Commissioner's opinion," is "guilty of conduct prejudicial to the [WHL] League, or to the welfare of hockey, regardless of whether or not such conduct occurred in the course of League activity."[24]

21. The defendants assert that the Member Leagues have "significantly evolved" over time but provide no evidence that the Member Leagues' authority over the Teams has changed in the class period. The oldest documents in the record suggest it has not.

22. Instead of recognizing this authority, the defendants claim that only the Teams were responsible for protecting players, and did so in different ways. The record does not support this assertion. Differences identified between Teams are insignificant.[25] The defendants attempt to rely on the testimony of IRP Panellist Daniele Sauvageau, who, in

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[22] OHL Constitution, ss. 3.2.2, 7.4.9-7.4.11, 7.4.16, MacKenzie April 2022 Affidavit, Exhibit "C", DMR, Vol. IV, Tab 23C, pp. 639.

[23] 1997 QMJHL Rules, By-Law #2, s. 2.02.1-2.03.1, p. 10, Courteau CXE, Exhibit "B", TB, Vol. 3, Tab 10B, p. 1787. The QMJHL Teams cannot dispute "official decisions" of the QMJHL League, including any "sanction", in court: Pledge agreement with L'Association de hockey du junior Quebec (1969) Inc., s. 4, Courteau CXE, Exhibit "C", TB, Vol. 3, Tab 10, pp. 1858-60.

[24] WHL Constitution, s. 20.2.3, MacKenzie April 2022 Affidavit, Exhibit "I", DMR, Vol IV, Tab 23I, p. 877; and Constitution and By-Laws of the Western Hockey League, s. 6.3(d), Cross-Examination of Ron Robison, June 13, 2022 [**"Robison CXE"**], TB, Vol. 3, Tab 10, p. 1543.

[25] These include whether staff are full- or part-time, the responsibilities of captains, and the involvement of alumni: Defendants' Responding Factum, at para. 58.

the cited extract, explains the need for one CHL-wide policy in place of the patchwork of policies adopted by the Member Leagues.[26] Sauvageau said nothing of Team policies.

23. There is no evidence that any Team ever enacted any anti-abuse policies, or adopted reasonable procedures. Despite claiming that each of over 60 Teams "has over the years developed player safety policies," the defendants have not produced a single written Team policy on player safety, of any kind. If Team-level policies exist, the defendants would have filed them. The only suggestion that Team policies exist is a boilerplate statement in the Member League Commissioners' affidavits.[27] The defendants provide two recent examples of Team-level initiatives: one WHL Team invites sports psychologists to present on mental health; and one QMJHL Team pairs players with police officers.[28] These are not abuse-prevention programs, nor are they substitutes for the robust, uniform anti-abuse protocol called for by the IRP.

iii. The Member Leagues' Policies are Inadequate

24. Though they claim the Teams have their own policies, the defendants describe and defend the Member Leagues' policies, which the Teams were required to follow.[29] While the sufficiency of these abuse-prevention policies is an issue to be determined on the merits, their weaknesses are notable. Most are recent, from after the mid-2000s. Older

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[26] Defendants' Responding Factum, at para. 58, fn. 50; Cross-examination of Daniele Sauvageau, September 13, 2022, 88:23-90:11, TB, Vol. 7, Tab 6, pp. 4015-4017.
[27] Affidavit of Ron Robison, sworn October 29, 2021 at para. 16, DMR, Vol. I, Tab 12, p. 123; Affidavit of David Branch, sworn November 1, 2021 at para. 17, DMR, Vol. III, Tab 17, p. 216; Courteau Affidavit, at para. 15, DMR, Vol. III, Tab 20, p. 303.
[28] Defendants' Responding Factum, at para. 69.
[29] Defendants' Responding Factum, at paras. 288-290; Cross-Examination of Cam Hope, June 30, 2022, 25:21-25, TB, Vol. 4, Tab 18, p. 2179.

policies are not provided in their historic form.[30] Some have little to do with abuse prevention. Most importantly, they do not work. The IRP reviewed these policies and found them ineffectual.[31] The Abuse, based on the Leger Data, continues.

25. The defendants suggest each Member League has a "confidential and anonymous reporting mechanism".[32] No such mechanism is listed among the Leagues' policies. The OHL League considered subscribing to a "HONE App" in September 2021 to allow players to "anonymously report on their well-being over several criteria weekly," directly to the League, but there is no evidence they have done so.[33] The WHL Leagues' planned Independent Complaint Mechanism is yet to be implemented.[34]

B. The IRP Report Concerns the CHL League – Not Hockey as a Whole

26. These Member League policies and programs form what the defendants describe as a "decentralized" approach to abuse prevention, specifically adopted instead of a uniform Leagues-wide approach.[35] This is systemic negligence by another name. The IRP concluded that this approach does not work. "Self-regulation" by the Member Leagues "has been ineffective," results "in a lack of independence" and "compromise[s] the integrity of the process." Instead, what is required is "a consistent cross-CHL process that includes an independent third party to administer the receiving and investigating of

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[30] This includes the OHL League's 1985 "Discipline Poster," the QMJHL League's 1990 "Player Commitment Contract," and the WHL League's "early 1990s," "Racial/Derogatory Comments Policy": Update on Player Wellbeing, Second Supplementary Motion Record ["**SSMR**"], pp. 7-10.
[31] Report of the Independent Review Panel, "The Impact is Real… Action is Needed" ["**IRP Report**"], p.7, SSMR, p. 68.
[32] Defendants' Responding Factum, at para. 63.
[33] "OHL Communication Committee Proposal", Exhibit A to the Affidavit of Dan Mackenzie, sworn March 4, 2022 ("**MacKenzie March 2022 Affidavit")**, DMR, Vol IV, Tab 22A, p. 470.
[34] MacKenzie March 2022 Affidavit, para. 16 and Exhibit "E", DMR, Vol. IV, Tab 22, p. 455-456, 504; Robison CXE, 46:14-47:1, TB, Vol. 3, Tab 10, pp. 1518-19.
[35] Defendants' Responding Factum, at paras. 66-67.

incidents of maltreatment," with sanctions "formalized in a consistent protocol," "definitions of misconduct," and "corresponding penalties."[36]

27. To avoid this conclusion, and the IRP's finding that the Leagues face a "systemic" issue, the Defendants attempt to rewrite the IRP report in their favour.[37] They advance four key denials and misrepresentations of the IRP and the IRP report:

(a) First, that the IRP's recommendations do not account for the "legal or structural reality" of the Leagues.[38] As already detailed by the plaintiffs, the CHL League can implement the IRP's recommendations, which are of the kind that CHL President Dan MacKenzie told the IRP he would consider.[39]

(b) Second, that MacKenzie did not "discredit" the IRP or "bury their report."[40] MacKenzie received the IRP Report, failed to release it for over a year, released it alongside another report devised to disagree with it, and then filed an affidavit listing reasons to disregard it.[41] This is patent "discrediting."

(c) Third, that the IRP Report used the term "systemic" to address "broad social and policy concerns that go beyond the CHL."[42] This is unsustainable on any reading of the IRP Report which states, "A systemic culture exists in the CHL that results in maltreatment becoming an embedded norm".[43]

(d) Fourth, that the IRP believes change cannot be achieved by the CHL League alone and a higher-level response is required.[44] The IRP's position is clear: the CHL League can create change by adopting their recommendations for "comprehensive strategies that go beyond policies and procedures," a "strong, visible, spoken and exemplified commitment on the part of the CHL," and "a formal education and awareness program (consistent across the three leagues)."[45]

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[36] IRP Report, p.3, SSMR, p. 65.
[37] IRP Report, p.3, SSMR, p. 65.
[38] Defendants' Responding Factum, at para. 73.
[39] Plaintiffs' Responding Factum, at paras. 13-24, and see Cross-Examination of Sheldon Kennedy, August 25, 2022 ["**Kennedy CXE**"], 90:20-91:24 and Exhibit L (IRP Minutes, August 24, 2020), TB, Vol. 6, Tab 29, pp. 3419-20 and 3630; Cross Examination of Camille Thériault, September 23, 2022, 78:11-21, TB, Vol. 8, Tab 31, p. 4188.
[40] Defendants' Responding Factum, at para. 74.
[41] Plaintiffs' Certification Factum, at paras. 17-22.
[42] Defendants' Responding Factum, at para. 77.
[43] IRP Report, p.5, SSMR, p. 66.
[44] Defendants' Responding Factum, at para. 292.
[45] IRP Report, pp.7-9, SSMR, p. 68-70.

28. The defendants' attempts to undermine the IRP Report, in order to avoid the IRP's conclusions and evade accountability for the harms that their system has caused, fails.

C. There is Sufficient Evidence of Commonality

29. Despite the low "some basis in fact" standard on certification, the defendants take issue with the commonality of the Abuse. They make no reference, anywhere in their lengthy factum, to the hot box, a ubiquitous form of hazing suffered across different Teams, Member Leagues, and decades.[46] Instead of responding to common features of the Abuse, the defendants point to the absence of evidence from every Team in every year of the class period – a burden that is not imposed on certification or at any stage.[47]

30. The defendants also attempt to attribute to the plaintiffs' witnesses the statement that "whether a particular major junior player experienced "Abuse," including the type of "Abuse," is influenced by many factors."[48] These witnesses were never asked about the "Abuse." They were asked questions like "Could the attitudes of the coaching staff affect the player experience on a team in the OHL?"[49] The defendants objected to re-examination questions attempting to clarify this question.[50]

31. What the plaintiffs' witnesses did testify to is a common toxic culture of Abuse and silence across the Leagues.[51] That the Abuse was particularly pronounced on some teams in some years does not disprove this common systemic failure, common culture, or

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[46] See Plaintiffs' Certification Factum, at paras. 29-31.
[47] See *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115, at para. 56-57.
[48] Defendants' Responding Factum, at para. 97.
[49] See, e.g., Cross-Examination of Corey Bricknell, July 5, 2022 ("**Bricknell CXE**") 16:10-12, TB, Vol. 4, Tab 19, p. 2208.
[50] See, e.g., Bricknell CXE, 116:17-19, TB, Vol. 4, Tab 19, p. 2308.
[51] See Plaintiffs' Certification Factum, at paras. 25-38, 56-59.

the commonality of the Abuse.[52] Contrary to the defendants' claims, their own witnesses' evidence supports this commonality. Many of the defendants' affiants – and all but one of their former-player affiants – witnessed, participated in, or heard about the Abuse:[53]

(a) Kruise Reddick, Brett Bartman, and Ryan Daniels witnessed verbal abuse, including homophobic slurs.[54]

(b) Éric Chouinard witnessed drinking games at a rookie party that he assumed to be consensual, including one where a player drank a live fish.[55]

(c) Dave Lorentz was subjected to the hot box, Jeff Chynoweth witnessed the hot box, and Paul Dennis and Éric Chouinard were aware of it taking place.[56]

(d) Eric Calder was subjected to an initiation where he was stripped to his underwater, drawn on with markers, and had his eyebrows "clipped."[57]

(e) Ryan Daniels' teammates were accused of sexual assault.[58]

(f) Robert Smith witnessed veterans shaving rookies' body hair, and Jeff Chynoweth was aware of players shaving each others' "private parts."[59]

32. Dr. Johnson's expert evidence corroborates the commonality of the Abuse. The defendants interpret Dr. Johnson's research selectively to suggest that his expertise are limited to "alternative initiation" processes and hazing as a general societal problem.[60] In his report and in cross-examination, Dr. Johnson explained his experience interviewing "many dozens of" major junior hockey players, his expertise in studying abusive hazing

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[52] See Defendants' Responding Factum, at paras. 83-85, 99, 256, 284.
[53] See Plaintiffs' Certification Factum, at para. 63(b) and fn. 150.
[54] Corrected Cross-Examination of Kruise Reddick, May 30, 2022, 34:11-35:15, TB, Vol. 9, Tab 36, pp. 4925-4926; Cross-Examination of Brett Bartman, May 25, 2022, 21:6-22, TB, Vol. 1, Tab 1, p. 21; Cross-Examination of Ryan Daniels, June 8, 2022 ["**Daniels CXE**"], 41:24-42:13, 43:16-45:19, TB, Vol. 3, Tab 8, pp. 1441-1442, 1443-1445;
[55] Affidavit of Eric Chouinard, sworn November 1, 2021 ["**Chouinard Affidavit**"], at paras. 10-12, DMR, Vol. II, Tab 19, pp. 291-292.
[56] Affidavit of Dave Lorentz, sworn November 1, 2021, paras. 6-7, DMR, Vol. I, Tab 16, pp. 205-6; Affidavit of Paul Dennis, sworn November 1, 2021 ["**Dennis Affidavit**"], para 17, DMR, Vol. III, Tab 21, p. 432; Chouinard Affidavit, at para 12, DMR, Vol. II, Tab 19, p. 292; Affidavit of Jeff Chynoweth, sworn October 29, 2021 ["**Chynoweth Affidavit**"], para. 8, DMR, Vol. I, Tab 10, p. 103.
[57] Cross-Examination of Eric Calder, May 26, 2022, 61:12-65:10, TB, Vol. 1, Tab 2, p. 305.
[58] Daniels CXE, 43:16-19, TB, Vol. 3, Tab 8, p. 1443.
[59] Affidavit of Robert Smith, sworn October 29, 2021, para. 8, DMR, Vol. I, Tab 11, p. 110; Chynoweth Affidavit, para. 8, DMR, Vol. I, Tab 10, p. 103.
[60] See Defendants' Responding Factum, at paras. 88 to 96.

rituals, and why it is academically sound to apply findings and inferences from his studies with youth and in other sports to major junior hockey.[61]

33. While the defendants disagree with this analysis, it is the subject matter of qualified expert opinion. Dr. Johnson swore a Rule 53 form acknowledging his duty of independent objectivity. The defendants bear the burden of establishing that Dr. Johnson is unwilling or unable to comply with that duty.[62] They have not done so. Dr. Johnson's statement that he sees himself "as an advocate for the case" does not make him biased, or an advocate for the plaintiffs.[63] Dr. Johnson advocates against hazing and bullying in sport: his position would be the same regardless of which party retained him.[64]

34. The defendants have not led evidence from a qualified expert to challenge Dr. Johnson's analysis. They describe Dr. Paul Dennis as a "participant expert."[65] Dr. Dennis does not fit within the limited "participant expert" exception to the application of Rule 53.04: as an agent of the OHL League, he is not a "non-party expert"; his opinions go beyond his own "course of treatment or observation for purposes other than the litigation;" and the development of his "expertise" post-dates his time coaching in the Leagues.[66]

35. In any event, Dr. Dennis' attitudes are concerning. He states that he taught players "that they will [be] knocked down and they'll be forced to get back up without help from

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[61] Expert Report of Dr. Jay Johnson, p. 2, CMR Vol. 1, Tab 18, p. 144; Cross-Examination of Dr. Jay Johnson, June 2, 2022 ["**Johnson CXE**"], 35:15-24, 40:25-41:9, 43:11-24, and 44:13-15, TB, Vol. 1, Tab 4, pp. 560, 565-566, 568, and 569.
[62] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, at para. 48.
[63] Johnson CXE, 74:7-8, TB, Vol. 1, Tab 4, p. 599.
[64] *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23, at para. 32.
[65] Defendants' Responding Factum, at para. 93.
[66] *Westerhof v. Gee Estate*, 2015 ONCA 206, at paras. 60-64, leave to appeal refused, [2015] S.C.C.A. No. 198. Dr. Dennis was a coach in the OHL League between 1984 and 1989: Defendants' Responding Factum, at para. 93. He received his doctorate in 1998: Dennis Affidavit, para. 2, DMR, Vol. III, Tab 21, p. 429.

anyone."[67] He recommends that players who are disrespected by coaches or teammates "show them up by adopting the proper mindset."[68] In his responding expert report, Dr. Johnson explains in detail why Dr. Dennis' evidence reflects a problematic attitude that reinforces, rather than weakens, the systemic issues that create an abusive hazing culture.[69]

PART III - ISSUES AND THE LAW

36. The main issue before the Court is the certification of this action. This factum responds to the following claims, made by the defendants in their sprawling response:

(a) That this case is monstrously and unavoidably complex, a fiction that collapses when the claim itself is read and recognized as systemic.

(b) That the plaintiffs' have no systemic claims capable of resolution on a common basis, a contention that blindly ignores or blatantly misreads decades of class actions jurisprudence.

(c) That the defendants cannot be held jointly and severally liable, a claim predicated on an inaccurate reading of unincorporated associations jurisprudence.

(d) That no acceptable class definition can be drafted, in spite of the fact that the broadest possible class is still a well-defined set of 15,000 former players.

(e) That they will seek contribution and indemnity against the players themselves, a deplorable and hollow threat to bring statute-barred claims.

37. The defendants fail to refute what the evidence and the plaintiffs' arguments make clear: this claim is eminently certifiable. It lends itself to a single common issues trial that will effectively and efficiently resolve liability, providing access to justice and forcing the defendants to take seriously their obligation to protect the children in their care.

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[67] Cross-Examination of Paul Dennis, June 6, 2022 ["**Dennis CXE**"], 17:9-12, TB, Vol. 2, Tab 6, p. 1211.
[68] "Sports Psychology Tips for Hockey Players and Coaches", Dennis CXE, Exhibit "C", TB, Vol. 2, Tab 6, pp. 1303.
[69] Exhibit "A" to the Affidavit of Dr. Jay Johnson, sworn November 29, 2021, Reply Motion Record, pp. 56-62.

A. The Failure of the Defendants' Attempts to Manufacture Complexity

38. If the defendants are to be believed, complexity lurks behind every corner of this case. In an attempt to refute commonality, and avoid certification, they refer, repeatedly, to the number of defendants, the size of the class period, the range of their own misconduct and failures, and the supposed individuality of class members' experiences. In essence, they argue that their systemic failures are too extreme for common adjudication.

39. Contrary to the defendants' claims, these characteristics do not render this class action unmanageable, nor do they necessitate either a long series of common issues trials or lengthy individual issues trials. The defendants provide a list of the issues that, they say, will need to be addressed individually.[70] They are responded to as follows:

Defendants' Alleged Individual Issue	Why it Poses no Barrier to Certification
a) the alleged variable forms of defendant misconduct;[71]	Each form of League misconduct alleged will be assessed in answering common issues (ii) to (vi): what duties did the defendants owe and did they breach them?
b) the alleged variable forms of "Abuse" as they took place in every class member's circumstances;	The court will assess whether the Abuse, in all its forms, was a consequence of the Leagues' systemic failures.
c) the 47-year class period, during which the standards of care applicable to the various forms of defendant misconduct and the various forms of "Abuse" shifted considerably and variably, as well as changes in	An evolving standard of care over a class period does not defeat certification.[72] While the question of standard of care may require a nuanced answer, this historical

[70] Defendants' Responding Factum, at para. 251.
[71] This appears to be a response to the different facets of the standard of care pleaded – the need to adopt and enforce adequate Abuse policies, provide adequate training, and provide effective reporting and investigation processes: see Defendants' Responding Factum, at paras. 117, 152(b).
[72] *Rumley v. British Columbia*, 2001 SCC 69, para. 32; *Cloud v. Canada (Attorney General),* [2004] O.J. No. 4924 (C.A.), at para. 59, leave to appeal refused, [2005] S.C.C.A. No. 50.

defendant conduct over that time (including changes to policies at League and Team levels);	systemic negligence analysis is best conducted only once in a unified manner.
d) the variable 78 defendants who are not similarly situated in respect of the various class members, either on an individual basis or a more general basis (considering the division of Team defendants, League defendants, and the CHL);	The defendants are not sued individually. The plaintiffs allege that they constitute, and are jointly and severally liable for the failures of, the Leagues. No Team-level analysis will be necessary. The liability of the defendants will be determined in common on a systemic level.
e) the complexity of the League structures, including what defendants had responsibility for what conduct, and the impacts of changes in League structures over time (including to constating documents);	This is precisely what the Court will consider in determining Common Issue (i). This analysis will proceed based on the Leagues' constitutions and the relevant jurisprudence. Determining this question will advance the class members' claims by determining who bears responsibility for the Leagues' failures.
f) the impacts of Teams dissolving and transferring ownership over time, and the complexity of such transfers; and	If all the defendants are jointly and severally liable for the Leagues' failures, these questions of apportionment as between particular Teams constituting the Leagues at particular times are between the defendants, and are not the class' concern. In any event, the Leagues' constitutions transfer liability forward.
g) the impacts of different applicable legal regimes, including for causes of action, defences and limitation periods, across the 13 jurisdictions at issue in this case.	The law of Ontario applies to the systemic claims. If necessary, the common issues address Quebec law. None of the Leagues are located in the United States: US law does not apply. Limitation periods are almost always an individual issue: this cannot justify refusing to certify a case.[73]

40. Rather than being a monster of complexity, this case provides a manageable means to resolve thousands of class members' claims for the common abuse that they

[73] *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444, at para. 108, leave to appeal refused, [2012] S.C.C.A. No. 379.

experienced during the long history of the Leagues' negligence. The defendants fail to consider that the *Class Proceedings Act, 1992* is designed to consider individual issues under s. 25 after the common issues.

B. The Plaintiffs Have Common and Systemic Claims Against the Leagues

41. This action has the exact "common core" that the defendants acknowledge animates systemic negligence cases: "a single institution's common alleged unlawful conduct affecting a determinate class in specific ways."[74] The Plaintiffs' claims against the Leagues, in negligence, breaches of fiduciary duty, and vicarious liability, target failures in the Leagues' system that led to the Abuse suffered by the class.

42. The existence of this system is undeniable. The defendants created a system in which boys move away from home to play high-level competitive hockey, placing themselves under the Leagues' control and relying on the Leagues to protect them. When the Leagues' failed to do so, they were exposed to specific harms on Team buses, at hockey arenas, and at Team events.

43. The defendants attempt to break down and challenge the plaintiffs' claims as if they were simple claims in negligence made by each individual class member against their Team. They are not – they are systemic. The Leagues' systemic failures can be analysed through four different lenses, each of which allows the court to determine the Leagues' liability in common, without ever resorting to an individual or team-by-team analysis.

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[74] Defendants' Responding Factum, at para. 1.

i. A "Direct" Systemic Analysis

44. The defendants are directly liable for the Leagues' failures to adopt anti-abuse policies, programs and procedures capable of protecting minor players from the risk of ritualized, abusive hazing. This type of systemic negligence claim, concerning the control and governance of a system, was described by the Court of Appeal for Ontario in *Brazeau* as "negligence at the policy-making level."[75]

45. Because of common law and statutory policy immunity, this form of systemic negligence claim cannot be made against government. However, it can be made where – as is the case here – non-government actors control a system. Having chosen to create and operate a system, the Leagues failed "to have in place management and operations procedures that would reasonably have prevented the abuse."[76] This failure constitutes both systemic negligence, and a systemic breach of the Leagues' fiduciary duties.

ii. Operational Negligence throughout the System

46. The second lens considers negligence throughout the Leagues' system, holding the defendants liable for operational failures throughout the association, including in applying player safety policies, programs and procedures, that allowed abuse to flourish and pollinate across the Leagues.[77] While some of this negligence occurred at the team-level,

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[75] *Brazeau v. Attorney General (Canada)*, 2020 ONCA 184, at para. 120.
[76] *Rumley v. British Columbia*, 2001 SCC 69, at para. 30; *Francis v. Ontario,* 2020 ONSC 1644, at para. 465, aff'd 2021 ONCA 197.
[77] *Francis v. Ontario*, 2021 ONCA 197, at para. 141.

a team-by-team analysis is not required.[78] Instead, the court will consider the system, including whether it "caused harm through its 'operational' characteristics."[79]

47. This type of analysis is routinely performed in government negligence cases, where breakdowns are alleged "at an operational level across the system."[80] This analysis is possible even where various forms of mistreatment are alleged in various locations:

(a) In *Davidson*, a claim was brought on behalf of all female RCMP officers and civilian members who suffered "sexual discrimination, bullying, and harassment by male members of the RCMP."[81] The class covered wrongdoing across Canada at hundreds of detachments.

(b) In *Greenwood*, a claim was brought on behalf of "virtually everyone who has ever worked for or with" the RCMP for "non-sexual bullying, intimidation and harassment." The case involved many thousands of perpetrators in hundreds of RCMP detachments. It was narrowed to those who had worked for (rather than with) the RCMP, but remained much larger than this case.[82]

(c) In *Francis*, a claim was brought on behalf of tens of thousands of inmates in Ontario's jails. The class covered wrongdoing at numerous correctional facilities, each with its own solitary confinement practices.

48. Operational systemic negligence works in those cases, and in this one, for two reasons. First, the mistreatment experienced by the class is sufficiently linked to the systemic negligence alleged to be attributable to that system. The plaintiffs focus their allegations on Abuse that would not have occurred if all actors within the system had fulfilled their duties to players. This Abuse was within the defendants' control, occurring in hockey arenas, on Team buses, and at Team-sanctioned events. It is a product of, and attributable to, the defendants' failures.

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[78] *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115, at paras. 46-47, 56.
[79] *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115, at para. 37.
[80] *Francis v. Ontario,* 2020 ONSC 1644, at para. 471, aff'd 2021 ONCA 197.
[81] *Davidson v Canada (Attorney General)*, 2015 ONSC 8008, at para. 1.
[82] *Canada v. Greenwood*, 2021 FCA 186, leave to appeal refused, [2021] S.C.C.A. No. 377.

49. Second, the web of agency created by the Leagues' constitutions allows failures throughout the system to be attributed to one entity. In the government cases, liability for failures throughout the system flows to the Crown because the Crown is, in law, vicariously liable for its agents.[83]

50. Here, the web of agency is a product of the Leagues' form. As argued below, at paragraphs 59 to 64, the Leagues are an unincorporated association with a common purpose of protecting players.[84] When the Teams, as members, fail in their duty to protect children, liability for that failure flows to the unincorporated association. The members of an unincorporated association are jointly and severally vicariously liable for torts committed by other members connected to the association's common purpose.

iii. Traditional Vicarious Liability

51. Vicarious liability provides an additional lens to consider systemic failures. As the plaintiffs argue, the Leagues can be held vicariously liable for the non-systemic torts that constitute the Abuse.[85] Common issue (vii) asks, "Which of the Defendants, if any of them, would be vicariously liable for any underlying non-systemic torts committed by staff, coaches and players at Canadian Major Junior Hockey Activities?"

52. The defendants claim that this issue is incapable of common determination. They say that, in each individual case, the court must assess whether a player's Abuse took place at Canadian Major Junior Hockey activities.[86] This common issue refers to the hockey

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[83] See, for example, *Crown Liability and Proceedings Act*, 2019, S.O. 2019, c. 7, s. 8; *Francis v. Ontario*, 2021 ONCA 197, at paras. 142-144.
[84] See also Plaintiffs' Certification Factum, at paras. 84-93; Plaintiff's Responding Factum, at paras. 29-41.
[85] Plaintiffs' Certification Factum, at paras. 103-107.
[86] Defendants' Responding Factum, at para. 220.

arena, Team bus, and Team-sanctioned events, inviting the court to define circumstances that attract vicarious liability, which can then be applied to individual cases. For example, when a player is "hot-boxed," it always takes place on a Team bus in front of other players, coaches, trainers, and staff. A common vicarious liability finding can be made.

53. According to the defendants, vicarious liability cannot be considered in common because groups of tortfeasors (coaches, players, other Team staff) cannot be assessed based on their common relationships with the Leagues' enterprise. Whether the Team or League can be held vicariously liable for each coach and each player will, in the defendants' view, depend on the facts of each individual relationship.

54. The defendants identify no differences in the operation of the Teams or Leagues with any bearing on the vicarious liability analysis.[87] These relationships are sufficiently similar to perform a common vicarious liability analysis. The relationships between coaches and players and the Teams and Leagues are governed by Member League constitutions, by-laws, and Standard Player Agreements.

55. Answering the vicarious liability common issue will include considering whether vicarious liability for the non-systemic torts that constitute the Abuse travels upward to the Leagues themselves, providing a third avenue to liability for systemic failures.

iv. Non-Delegable Duties

56. The final avenue to understand the Leagues' systemic failures is through non-delegable duties. The defendants claim that the Teams were responsible for player safety.

[87] See para. 22, fn. 25, above.

However, the plaintiffs have pled that the duties the Leagues owed to create and enforce effective Abuse Policies were non-delegable.[88] Chief Justice McLachlin describes a non-delegable duty as "a duty not only to take care, but to ensure that care is taken."[89]

57. The relationship between the Leagues and the Teams "possesses elements that make it appropriate" to hold the Leagues liable for the Teams' failures.[90] To do so, the court will consider whether this is a situation where a "special duty arises because the person on whom it is imposed has undertaken the care, supervision or control of the person or property of another or is so placed in relation to that person or his property to assume a particular responsibility for his or its safety."[91]

58. The undertaking is evidenced here by the Leagues' constitutions and abuse policies. As set out in the plaintiffs' moving factum, the Leagues undertook to protect players.[92] If these duties were non-delegable, in so far as the Leagues charged the Teams with fulfilling their duties on their behalf, they remained obliged to "take reasonable care" to ensure that the Teams did so, and the Teams' failures are imputable to the Leagues. These non-delegable duties, like the fiduciary duties that the plaintiffs allege the Leagues held and breached, are owed system-wide based on the relationship between each player and the system. No individual-by-individual or team-by-team analysis is required.

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[88] Fresh as Amended Statement of Claim, para. 89.
[89] *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, at para. 50. Non-delegable duties are distinct from vicarious liability: *Das v. George Weston Limited*, 2017 ONSC 4129, at para. 495, aff'd 2018 ONCA 1053, leave to appeal refused, [2019] S.C.C.A. No. 69.
[90] *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, at para. 53.
[91] *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145, at para. 54, citing *Kondis v. State Transport Authority* (1984), 154 C.L.R. 672 (Aust. H.C.), at p. 687.
[92] See Plaintiffs' Certification Factum, at paras. 65- 69.

C. The Defendants are Jointly and Severally Liable for the Leagues' Failures

59. As argued in the plaintiffs' moving and responding facta, the defendants' joint and several liability flows from their choice to collectively operate a system, most likely as an unincorporated association.[93] This approach is not, as the defendants suggest, "novel," nor is it "plainly wrong."[94] Several misconceptions require correction:

> (a) While Aylward states that "[s]trictly speaking, unincorporated associations do not exist in the eyes of the law," this does not mean that "classification of a group of legal entities as an unincorporated association has no legal consequence."[95] Aylward discusses, throughout the rest of his text, the legal consequences of a group functioning as an unincorporated association.
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> (b) The existence of the League corporations is not inconsistent with the Leagues' being unincorporated associations.[96] The existence of a corporation does not displace unincorporated association relationships. Many sports leagues are unincorporated associations despite being linked to league corporations. The corporate form does not capture the reality of the Leagues.[97]
>
> (c) While a representation order may be available to defendant members of an unincorporated association under Rule 12.07, the wording of that rule makes clear that such an order should be sought by the defendants, not the plaintiffs.[98]

60. When the joint and several liability that flows from the Leagues' status as unincorporated associations is properly understood, it is not plain and obvious that this allegation will fail. Two forms of joint and several liability are at issue here.

61. First, members of the unincorporated association are liable for the torts of the association that they authorized or participated in. The defendants agree that "liability…

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[93] Plaintiffs' Certification Factum, at paras. 84-93; Plaintiff's Responding Factum, at paras. 29- 41.
[94] Defendants' Responding Factum, at para. 132.
[95] Defendants' Responding Factum, at para. 133, citing Stephen Aylward, *The Law of Unincorporated Associations in Canada* (Toronto, Ont.: LexisNexis, 2020), s. 1.3, Defendants' Book of Authorities, Tab 13.
[96] Defendants' Responding Factum, at para. 140.
[97] Plaintiffs' Responding Factum, at paras. 34-38; Plaintiffs' Certification Factum, at para. 90.
[98] Defendants' Responding Factum at para. 142, and see Rule 12.07: "Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so."

depends on either personal participation in misconduct or personal authorization of misconduct."[99] Based on the Leagues' constitutions, the Teams collectively create the Leagues' anti-abuse policies and are therefore jointly and severally liable for the failure to create effective policies.[100] On the direct systemic analysis described above, targeting the Leagues' negligence, the Teams are jointly and severally liable due to their direct role.

62. Second, other common law jurisdictions have held that the unincorporated association is vicariously liable for the torts of its members "acting for the common purpose of the… unincorporated association" or to the extent that the member's conduct "corresponds with the common interest," based on the mutual agency relationships "found in the rules mutually adopted by the members for the purposes of the common interest."[101] This vicarious liability translates into the joint and several liability of the association's members: "any wrongful action of one member carries vicarious liability for all members to the extent that it corresponds with the common interest."[102]

63. As an unincorporated association, the common purpose of the CHL League is clear. The CHL Constitution sets out its player-focused CHL Mission and makes each Team responsible for promoting that mission "through its operation of an amateur hockey team under the auspices of the CHL and a Regional League."[103] On an operational

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[99] Defendants' Responding Factum, at para. 135.
[100] See Plaintiffs' Certification Factum, at para. 92; Plaintiffs' Responding Factum, at paras. 32, 39.
[101] *Pádraig Hickey v. Patrick Joseph McGowan and Christopher Cosgrove*, [2017] IESC 6, at para. 56, Plaintiffs' Book of Authorities [**"PBOA"**], Tab 48; *Catholic Child Welfare Society and others v. Various Claimants (FC) and others*, [2012] UKSC 56, at para. 20, PBOA, Tab 26; *JGE v. Trustees of the Portsmouth Roman Catholic Diocesan*, [2012] EWCA Civ 938, PBOA, Tab 52; *A v. The Trustees of the Watchtower Bible and Tract Society and others*, [2015] EWHC 1722, at para. 72, PBOA, Tab 2.
[102] *Pádraig Hickey v. Patrick Joseph McGowan and Christopher Cosgrove*, [2017] IESC 6, at para. 55, PBOA, Tab 48.
[103] CHL Constitution Art. 5.1, MacKenzie April 2022 Affidavit, Exhibit "A", DMR, Vol IV, Tab 23, p. 550.

systemic negligence analysis, all members of the CHL League are vicariously liable for any Member League-level or Team-level negligence in player protection, allowing all of the defendants to be held jointly and severally liable for operational systemic failures.

64. This analysis flows from the Leagues' constitutions: the arrangements they have made between themselves to govern themselves. In the CHL Constitution, the defendants, together, made a promise to each other to collectively protect the children who are at the core of their enterprise. They must be held to that promise. The court can only do so, and can only discern who is to be held responsible for the Leagues' failures, by answering the first proposed common issue: "What is the nature of the organizations operating as and within Canadian Major Junior Hockey?"

65. While arguing that the answer to this question is simple, the defendants raise issues with both the apportionment of liability between Teams, and the transfer of liability between past and current Teams.[104] If the defendants, or even a subset of defendants, can be held jointly and severally liable in respect of each member of the class, apportionment of fault between those defendants is an issue for the defendants themselves, not the plaintiffs or the class.

66. Questions of successor liability need not be resolved on certification. On the documents available, liability has transferred from past to current Teams over the class period. The defendants' bald speculation that as yet undisclosed constating documents may not transfer liability is unsupported in the record.[105] The defendants also claim, with

[104] Defendants' Responding Factum, at paras. 264-267.
[105] Defendants' Responding Factum, at para. 266(c).

no basis or support, that the transfer of liability "does not include future claims for conduct that occurred prior to the transfer."[106] The Blackmore Rule, which may have had this effect, was specifically abandoned by the Supreme Court of Canada last year.[107]

D. An Acceptable Class Definition Has Been Proposed

67. The defendants launch a number of attacks on the class definition.[108] While they disagree with the proposed definition, they do not, and cannot, claim that a clear and objective class definition is impossible in this case. The plaintiffs raised three possible class definitions in their moving factum, including "all former and current players" in the CHL League.[109] This definition is objective, defines a specific class of individuals, and relates to the common issues. The defendants do not explain why it is inappropriate.[110]

68. Instead, the defendants object to the reference to "Abuse," which, they say, is broadly defined and "amorphous", in the class definition. The definition of "Abuse" incorporates a range of objective, observable behaviour that the courts have determined grounds an action in systemic negligence after *Rumley*.[111] Courts have certified cases focussing on system-wide failures to protect people from intimidation, bullying, and physical and verbal harassment. [112] In *Greenwood*, the Federal Court of Appeal upheld certification of a class action for "bullying, intimidation and harassment."[113]

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[106] Defendants' Responding Factum, at para. 266(b).
[107] *Corner Brook (City) v. Bailey*, 2021 SCC 29, at paras. 16-43.
[108] Defendants' Responding Factum, at paras. 146-163.
[109] Plaintiffs' Certification Factum, at paras. 109-113.
[110] This definition should be compared to the class definition adopted by the Federal Court of Appeal in *Canada v. Greenwood*, 2021 FCA 186, at para. 202, leave to appeal refused, [2021] S.C.C.A. No. 377..
[111] *Rumley v. British Columbia*, 2001 SCC 69.
[112] *Canada v. Greenwood*, 2021 FCA 186, at para. 7, leave to appeal refused, [2021] S.C.C.A. No. 377.
[113] *Canada v. Greenwood*, 2021 FCA 186, at para. 8, leave to appeal refused, [2021] S.C.C.A. No. 377.

69. It is inconsequential that some of the conduct captured by the "Abuse" could prove non-actionable or statute-barred.[114] A class definition is not defective for including some individuals who may, ultimately, have no claim. It need only identify those with "a potential claim for relief."[115] It "cannot be generally asserted that a class definition must be confined to persons who have valid claims," nor is the possibility that some class members suffered no compensable harm "a barrier to certification."[116]

70. Finally, contrary to the defendants' arguments regarding claims limiters, it is not true that a claims limiter was only appropriate in *Rumley* because certain abuse, like sexual assault, was "already proven."[117] The plaintiffs in *Rumley* were assisted by reports that described abuse, but still had to discharge the burden of proof in court. The Court drew an inference that there were at least some provable cases of abuse given the extent of certification evidence to justify the claims limiter, but that is the same in this case. The defendants concede that some of the conduct affiants experienced may rise to the level of "criminal" conduct.[118] The same inference as in *Rumley* is available here.

E. The Defendants Cannot Blame Players as a Means to Evade Accountability

71. Some of the Abuse that players experienced was carried out by other players. As already argued, this does not render the class inherently conflicted or bar certification.[119]

See also *Davidson v Canada (Attorney General)*, 2015 ONSC 8008; *Merlo v. Canada*, 2017 FC 51; and *Tiller v. Canada*, 2019 FC 895.

[114] See Defendants Responding Factum, at paras. 149-150.

[115] *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58, at para. 57.

[116] Michael A. Eizenga et al., *Class Actions Law and Practice*, 2d ed., (Toronto, Ont.: LexisNexis, 2008), (Release 77, November 2022), § 3.40, Plaintiffs' Reply Book of Authorities, Tab 1.

[117] Defendants' Responding Factum, at para. 158.

[118] Defendants' Responding Factum, at paras. 5-6.

[119] Plaintiffs' Certification Factum, at paras. 117-121.

This is the case in most institutional abuse cases, including *Cloud*, *Greenwood* and *Slark*.[120]

72. In their responding factum, the defendants paint the decision to sue the Leagues and Teams, rather than blaming young men who were trapped in a culture of hazing, as a moral failing on the part of the plaintiffs. They accuse the plaintiffs of "attempt[ing] to deflect their own wrongdoing" and "the wrongdoing of every player who "Abused" others," and go as far as to say that by "failing to propose a plan for holding perpetrators accountable," the plaintiffs are "perpetuating a culture of impunity and silence."[121]

73. These arguments are reprehensible and speak only to the lengths the defendants are willing to go to avoid accountability. There is no evidence that any class member wishes to bring a civil action against the players that abused him. If such cases have been brought, the defendants could have filed them. While the defendants claim that "many fact witnesses testified that they do believe perpetrators should be held accountable," this is not what the plaintiffs' witnesses said:[122]

> (a) Dan Fritsche said that he thought his abusers "should have been" punished, but he did not say, and was not asked, whether he wished to sue them in this case.[123]
>
> (b) Corey Bricknell said that, as a coach, he holds his current players accountable when they behave inappropriately, including by taking away ice time.[124]
>
> (c) Daniel Carcillo said that he believes coaching staff should be held accountable, because, "They're not players. They're not kids, teenagers, young adults." He was asked whether he believed one player who abused him should be

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[120] *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.), leave to appeal refused, [2005] S.C.C.A. No. 50; *Canada v. Greenwood*, 2021 FCA 186, leave to appeal refused, [2021] S.C.C.A. No. 377; *Dolmage v. Ontario*, 2010 ONSC 1726.
[121] Defendants' Responding Factum, at para. 18.
[122] Defendants' Responding Factum, at para. 107.
[123] Cross-Examination of Dan Fritsche, August 17, 2022, 54:2-9, TB, Vol. 6, Tab 27, p. 3250.
[124] Bricknell CXE, 34:3-36:11, TB, Vol. 4, Tab 19, pp. 2226-28.

> held accountable and responded that he had forgiven him, and understands the culture and mentality that led him to "continue the line of abuse."[125]

74. In reality, the plaintiffs' witnesses do not place blame with other players, or seek to hold them responsible for the abuse they suffered. In Garrett Taylor's view, "they need to go after the real adults… 60, 70-year olds in charge of this stuff."[126] When asked whether players should be subject to discipline, Stephen Quirk stated, "there was no rules put in place. There was nothing that to me appeared off-limits."[127]

75. For decades, the Leagues failed to hold anyone accountable for the abuse, including players. As a result, the abuse continued. David Branch expressed the view, in 2009, that players should not be the ones held responsible where "the leadership [has] failed the players."[128] Even if the defendants should have held players who engaged in abuse and hazing responsible for their actions, through internal League sanctions, that is no basis to hold them civilly liable now, or to threaten to do so to derail this class action.

76. The defendants say the plaintiffs "do not have a choice but to take this case as it exists."[129] This case is about the Leagues' systemic failures that allowed the abuse to continue and a toxic culture to flourish. The players are not tortfeasors in this claim. Even so, the defendants contend that they "have claims for contribution and indemnity for all of the alleged 'Abuses' … against the class members themselves."[130] The plaintiffs are

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[125] Cross-Examination of Daniel Carcillo, July 22, 2022, 124:10-128:18, TB, Vol. 5, Tab 24, p. 2801-5.
[126] Cross-Examination of Garrett Taylor, August 19, 2022, 59:23-60:19, TB, Vol 6, Tab 28, pp. 3324-25.
[127] Cross-Examination of Stephen Quirk, July 20, 2022, 23:6-9, TB, Vol. 5, Tab 23, pp. 2664.
[128] Allan Maki, *Globe and Mail*, "Mantha still trying to clear his name", February 20, 2009, CMR, Vol 4, pp. 1891-1892.
[129] Defendants' Responding Factum, at para. 270.
[130] Defendants' Responding Factum, at para. 267.

unaware of any other systemic abuse case where a defendant has sued abused victims of the system for contribution and indemnity after their abuse led them to be abusers in turn.

77. These hypothetical, and as yet non-existent, third-party claims cannot prevent certification. As Justice Cullity explained, certification cannot be refused on the basis of speculative claims: "In the absence of a statement of defence, or any particulars of these defences and claims, they must at this stage be considered to be speculative and I would not deny certification to the plaintiffs on these grounds."[131]

78. The defendants are out of time to bring these claims. The limitation period for claims for contribution and indemnity runs from the date on which the defendant is served with the claim.[132] Service in this action was completed by September 2020. The two-year limitation period has expired. The defendants could have brought a "John Doe" claim before the limitation period expired, as was done in *Sheila Morrison*, but did not do so.[133] Their claims are now statute-barred.

79. Even if this were not the case, insofar as any of the causes of action pled allow for the apportionment that the defendants seek, it would be open to the plaintiffs to "Taylorize" their claim by "making clear that the claim… excludes damages that can be attributed to the concurrent fault or negligence" of any person other than the defendants.[134] Doing so can "preclude third party claims for contribution and indemnity."[135]

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[131] *Anderson v. St. Jude Medical Inc.*, [2003] O.J. No. 3556 (Sup. Ct.), at para. 60.
[132] *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 18 and see e.g., *London Transit Commission v. Eaton Industries (Canada) Company*, 2020 ONSC 1413, at paras. 60-61, 68-69 and 78, aff'd, 2021 ONCA 74.
[133] *Johnston v. The Sheila Morrison Schools*, 2011 ONSC 3398.
[134] *Blue Mountain Linen Inc. v. Enercare Homes and Commercial Services Limited Partnership*, 2022 ONSC 5635, at para. 29; *Taylor v. Canada (Minister of Health)*, 2009 ONCA 487.
[135] *J.K. v. Ontario*, 2017 ONCA 902, at para. 33.

PART IV - CONCLUSION AND ORDER REQUESTED

80. Over 128 pages, the defendants fail to provide any good reason why this action should not be certified. Their attempt to conjure a "monster of complexity" fails when the case is considered as pleaded. They fail to undermine the clear systemic nature of this case. They cannot escape the force of their own abuse policies, their constitutions, the authority and responsibilities those constitutions provide to the Leagues, or the unincorporated association relationships those constitutions create among the defendants. Their deplorable attempt to shift the blame from themselves to players also fails.

81. Only one common issues trial will be required in this case. At that trial, the court will consider the liability of the defendants for their systemic failures to protect players from hazing and abuse. The defendants have tried, at great length, to find a way to avoid such a trial. Their attempt is unconvincing. This proceeding should be certified to allow the plaintiffs an opportunity to demonstrate the defendants' culpability for the harms that they, and other members of the class, suffered when they were children.

82. The certification order should be granted on the terms sought by the plaintiffs.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 10th day of November, 2022.

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Koskie Minsky LLP

Lawyer for the Plaintiffs

SCHEDULE "A"
LIST OF AUTHORITIES

Jurisprudence

1. *A v. The Trustees of the Watchtower Bible and Tract Society and others*, [2015] EWHC 1722.

2. *Anderson v. St. Jude Medical Inc.*, [2003] O.J. No. 3556 (Sup. Ct.).

3. *Blue Mountain Linen Inc. v. Enercare Homes and Commercial Services Limited Partnership*, 2022 ONSC 5635.

4. *Brazeau v. Attorney General (Canada)*, 2020 ONCA 184.

5. *Canada v. Greenwood*, 2021 FCA 186, leave to appeal refused, [2021] S.C.C.A. No. 377.

6. *Catholic Child Welfare Society and others v. Various Claimants (FC) and others*, [2012] UKSC 56.

7. *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.), leave to appeal refused, [2005] S.C.C.A. No. 50.

8. *Corner Brook (City) v. Bailey*, 2021 SCC 29.

9. *Das v. George Weston Limited*, 2017 ONSC 4129, aff'd 2018 ONCA 1053, leave to appeal refused, [2019] S.C.C.A. No. 69.

10. *Davidson v Canada (Attorney General)*, 2015 ONSC 8008.

11. *Dolmage v. Ontario*, 2010 ONSC 1726.

12. *Francis v. Ontario,* 2020 ONSC 1644, aff'd 2021 ONCA 197.

13. *Francis v. Ontario*, 2021 ONCA 197.

14. *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444, leave to appeal refused, [2012] S.C.C.A. No. 379.

15. *Fresco v. Canadian Imperial Bank of Commerce*, 2022 ONCA 115.

16. *J.K. v. Ontario*, 2017 ONCA 902.

17. *JGE v. Trustees of the Portsmouth Roman Catholic Diocesan*, [2012] EWCA Civ 938.

18. *Johnston v. The Sheila Morrison Schools*, 2011 ONSC 3398.

19. *Lewis (Guardian ad litem of) v. British Columbia*, [1997] 3 S.C.R. 1145.

20. *London Transit Commission v. Eaton Industries (Canada) Company*, 2020 ONSC 1413, aff'd, 2021 ONCA 74.

21. *Merlo v. Canada*, 2017 FC 51.

22. *Pádraig Hickey v. Patrick Joseph McGowan and Christopher Cosgrove*, [2017] IESC 6.

23. *Rumley v. British Columbia*, 2001 SCC 69.

24. *Sun-Rype Products Ltd. v. Archer Daniels Midland Company*, 2013 SCC 58.

25. *Taylor v. Canada (Minister of Health)*, 2009 ONCA 487.

26. *Tiller v. Canada*, 2019 FC 895.

27. *Westerhof v. Gee Estate*, 2015 ONCA 206, leave to appeal refused, [2015] S.C.C.A. No. 198.

28. *White Burgess Langille Inman v. Abbott and Haliburton Co.*, 2015 SCC 23.

Secondary Sources

29. Stephen Aylward, *The Law of Unincorporated Associations in Canada* (Toronto, Ont.: LexisNexis, 2020).

30. Michael A. Eizenga et al., *Class Actions Law and Practice*, 2d ed., (Toronto, Ont.: LexisNexis, 2008), (Release 77, November 2022).

SCHEDULE "B"
RELEVANT STATUTES

1. *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

Section 25:

(1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

(a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner.

2. *Crown Liability and Proceedings Act*, 2019, S.O. 2019, c. 7.

Section 8:

(1) Except as otherwise provided under this Act or any other Act, the Crown is subject to all the liabilities in tort to which it would be liable if it were a person,

(a) in respect of a tort committed by an officer, employee or agent of the Crown;

(b) in respect of a breach of duty attaching to the ownership, occupation, possession or control of property;

(c) in respect of a breach of an employment-related obligation owed to an officer or employee of the Crown; and

(d) under any Act, or under any regulation or by-law made or passed under any Act.

3. *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B.

Section 18:

(1) For the purposes of subsection 5 (2) and section 15, in the case of a claim by one alleged wrongdoer against another for contribution and indemnity, the day on which the first alleged wrongdoer was served with the claim in respect of which contribution and indemnity is sought shall be deemed to be the day the act or omission on which that alleged wrongdoer's claim is based took place.

(2) Subsection (1) applies whether the right to contribution and indemnity arises in respect of a tort or otherwise.

4. *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194

Rule 12.07:

Where numerous persons have the same interest, one or more of them may defend a proceeding on behalf or for the benefit of all, or may be authorized by the court to do so.

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceeding commenced at Place Commenced

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