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

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*

REPLY FACTUM OF THE MOVING DEFENDANTS

(Jurisdiction Motion, Returnable November 14-18, 2022)

November 10, 2022

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TABLE OF CONTENTS

1. The plaintiffs misconstrue and confuse the roles, responsibilities, and actions of the Moving Defendants in an attempt to bring them under the jurisdiction *simpliciter* of Ontario.[1] Their arguments depend on a mischaracterization of the WHL, OHL, and QMJHL and 60 Teams across Canada and the U.S. as a single "unincorporated association" operating "collectively" as the CHL. Based on that mischaracterization, they allege that any and all of the defendants can be held responsible for any alleged "Abuse" that may have occurred on any individual team, such that a Michigan-based team that never played in the WHL, for example, supposedly could be liable for alleged "Abuse" in Winnipeg. The plaintiffs' collective liability theory was advanced in a fresh as amended pleading dated April 14, 2022, in response to the defendants' jurisdiction and *Ragoonanan* motions.

2. The plaintiffs' assertion that the CHL is "most likely" an "unincorporated association" is not supported by the facts, the evidence, or the law. It is untenable and should not be accepted by this Court as a basis to exercise jurisdiction. The CHL is not an "unincorporated association" through which liabilities are shared on a joint and several basis. The CHL, Leagues, and Teams are separate and independent corporations with their own governance structures and constating documents. Indeed, there is no agreement between them, written or otherwise, to share liability or indemnify each other for their respective actions or omissions.

3. The plaintiffs' collective liability theory is not an answer to the fact that the Moving Defendants are not physically located in Ontario, do not carry on business in Ontario, and are not the subject of any evidence or even an allegation that they committed any tort or wrongdoing in

[1] Throughout this reply factum, unless otherwise specified, the Moving Defendants have carried forward defined terms from their moving factum on the jurisdiction motion and the defendants' responding certification factum.

Ontario. Allegations of "systemic negligence" cannot ground jurisdiction in the absence of any presumptive factors connecting the Moving Defendants to Ontario or, alternatively, those factors are rebutted because the activities of the Moving Defendants in Ontario are minimal and do not rise to the level required to establish jurisdiction.

4. The plaintiffs have a serious jurisdiction problem which, remarkably, they are trying to escape by alleging that the very bringing of the *Ragoonanan* motion constitutes attornment despite the plaintiffs' prior written acknowledgment to the contrary.

A. Reply Facts – Dan MacKenzie's Evidence

5. The plaintiffs misconstrue two critical aspects of Dan MacKenzie's evidence to suit their collective liability narrative. First, at paragraph 14 of their responding factum, they incorrectly assert that Dan MacKenzie told the IRP the CHL could consider taking CHL-wide action on player safety. However, Mr. MacKenzie's actual evidence was that, if the CHL were to be restructured going forward, the CHL could consider CHL-wide action on player safety. The CHL *cannot* do this currently. He testified:

> To this point these kinds of issues have been dealt with at the individual leagues level. There has not been a really strong administrative at the CHL, so we have not looked at it, but I do believe that as the organization's independent review panel, I think that that may be the kind of recommendation that we could consider going forward. But it is not something that we have looked at, not for a lack or not wanting to, but just structurally, we have not been set up that way. As it has been dealt with in the individual leagues.[2]

[2] Kennedy Transcript, Exhibit L, Transcript Brief, Vol 6, Tab 29L, pp. 3630.

6. Second, at paragraph 22 of their responding factum, the plaintiffs incorrectly suggest that Mr. MacKenzie stated the CHL could impose on the Leagues a standard safety policy. However, his actual evidence was only that it is possible for all Leagues to have the same policy through parallel adoption, not through imposition by the CHL.[3]

7. In light of the above, this Court should not accept the plaintiffs' argument that Mr. MacKenzie's evidence has little utility for the jurisdiction motion and the certification motion. Mr. MacKenzie, as president of the CHL, and Mr. Branch are the only individuals with actual knowledge about the implementation of the CHL Constitution. Their uncontradicted evidence on these two issues is relevant to these motions and should be considered by this Court in determining these motions.

B. CHL Not an Unincorporated Association

8. The plaintiffs' response to the Moving Defendants' jurisdiction motion is premised on unsupported allegations about the nature of the CHL and Leagues. The plaintiffs argue that "[d]istinct entities can be held jointly and severally liable for their collective acts" because the CHL is "most likely an unincorporated association" or, alternatively, a partnership.[4]

9. However, even if a group of legal entities is classified as an unincorporated association, that has no legal consequence for the purposes of jurisdiction. None of the authorities cited by the plaintiffs establish that members of an "unincorporated association" are liable for one another's actions in the absence of an express written agreement stating they would be liable.

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[3] MacKenzie Corrected Transcript, 82:24-83:2, 86:13-17, 87:17-90:6, Transcript Brief, Vol 9, Tab 35, p. 4817-18, 4821, 4822-25.
[4] Responding Factum of the Plaintiffs dated October 25, 2022 [**Plaintiffs' Factum**], ¶30.

10. To the contrary, Stephen Aylward's textbook, cited by the plaintiffs, states:

(a) "[s]trictly speaking, unincorporated associations do not exist in the eyes of the law";[5] and

(b) "the rights and duties of the members of an unincorporated association are entirely a matter of contract between them".[6]

11. Alleging that the CHL is an unincorporated association does not therefore save the plaintiffs' claims against the Moving Defendants over which the court would otherwise lack jurisdiction. There is no evidence that the CHL, Leagues, and Teams have expressly agreed to share liability for each other's actions or omissions, or indemnify one another for their respective conduct.

12. The CHL is not an "unincorporated association". The CHL itself is a federally incorporated not-for-profit company, regulated by the *Canada Not-for-profit Corporations Act*.[7] The CHL Constitution specifically describes the CHL as a "corporation [that] shall be called the Canadian Hockey League".[8] Similarly, the Leagues are not-for-profit corporations. The OHL is registered under Ontario's *Not-for-Profit Corporations Act*, and the WHL and QMJHL are registered under the *Canada Not-for-Profit Corporations Act*.

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[5] Stephen Aylward, The Law of Unincorporated Associations in Canada (Toronto, Ont.: LexisNexis, 2020) [**Aylward**], s. 1.3, Defendants' Book of Authorities [**BOA**], Tab 13.
[6] Aylward, s. 2.10. For further discussion, see ¶132-142 of the Responding Certification Factum.
[7] Affidavit of Dan MacKenzie sworn April 20, 2022 [**MacKenzie April 2022 Affidavit**], ¶4, Motion Record of the Defendants [**DMR**], Vol IV, Tab 23, p. 534.
[8] CHL Constitution, ss. 1.1, 2.1, MacKenzie April 2022 Affidavit, Exhibit A, DMR, Vol IV, Tab 23, pp. 542-544 [emphasis added]. See also preamble, and s. 5.6 noting that the constitution is entered via authority from the *Canada Not-for-profit Corporations Act*, and consolidating activities in the constitution with the corporate entity.

13. The *Partnerships Act*, which the plaintiffs refer to as an alternative basis to ground joint and several liability against the defendants, has no application to any entities registered as a corporation under any legislation.[9]

14. The plaintiffs incorrectly compare the CHL and Leagues to other sports organizations in an effort to ground jurisdiction over the Moving Defendants. They point to the Canadian Football League (**CFL**), the National Football League (**NFL**), Major League Baseball (**MLB**), the National Basketball Association (**NBA**), and the National Hockey League (**NHL**). However, the plaintiffs' comparison is misguided and omits significant differences in the governance and constitutional structures of those organizations as compared to the CHL and Leagues.

15. First, and most importantly, none of the sports organizations referred to by the plaintiffs are corporations. They are self-described "unincorporated associations", governed by contracts pursuant to which their members have agreed to particular structures for the sharing of revenue and liability. The constating documents, which are referenced in the cases involving other sports organizations cited by the plaintiffs, demonstrate that these leagues are self-described unincorporated associations:

(a) The CFL is governed by a constitution that states "[t]he League shall be an unincorporated association called the 'Canadian Football League'".[10]

(b) The MLB is governed by a constitution that states the "Office of the Commissioner of Baseball is an unincorporated association also doing business as

[9] *Partnerships Act*, R.S.O. 1990, c. P. 5, s. 2.
[10] Canadian Football League Constitution, sections 1.01, 3.15, 7.18 and 10.18, available online.

Major League Baseball and has as its members the Major League Baseball Clubs".[11]

(c) The NBA is governed by a constitution that describes the NBA as an "association" that is not incorporated.[12]

(d) The NHL is governed by a constitution that states that the NHL is "[a]n Unincorporated Association Not for Profit".[13]

(e) The NFL is governed by a constitution that describes the league as an "association".[14]

16. Second, the cases relied upon by the plaintiffs in respect of these sports organizations are either distinguishable from, or not determinative of the issues in, this case. For example:

(a) In *Bruce v Cohon*, the plaintiff claimed negligence against the CFL for breaching its duty to take all reasonable and prudent steps to protect the players' health, especially regarding concussions. The CFL was not a defendant because it is not a corporation, but the Commissioner was named as a defendant. However, the CFL is governed by a collective bargaining agreement between nine corporations that own the nine teams that play in the CFL and all of the players. The British Columbia Supreme Court ultimately concluded that it lacked jurisdiction because

[11] Major League Constitution, Article II, section 1: the Commissioner & Article XI, section 2: Indemnification of Officials, available online.
[12] National Basketball Association Constitution, Articles 2 & 30, available online.
[13] NHL Constitution, sections 1.1, 6.3 & 6.4, available online.
[14] NFL Constitution, sections 3.10 & 3.11, available online.

the collective bargaining agreement stated that any "dispute… between a Player and a Member Club and/or Member Clubs and/or the C.F.L." must be submitted to final and binding arbitration.[15] In contrast, the CHL and the Leagues are separate corporations, and there is no collective bargaining agreement. The relationship between the Teams and the players is governed by individual SPAs between each Team and each player.[16]

(b) In *National Hockey League v Pepsi Cola Canada Ltd.*, the issue was whether Pepsi infringed the NHL's trademarks by using the NHL's name in its advertisements without the NHL's consent. All 21 teams in the NHL at the time and the NHL itself commenced an action against Pepsi. The Court confirmed that the NHL is not a corporation and therefore had no "right to sue or be sued in its own name" because "to sue or be sued a party must be a natural person, a corporation or a body which has been given that capacity by legislation". As a result, the Court considered the claim as advanced by the member clubs only. In contrast, the CHL and the Leagues are their own corporations with their own responsibilities, distinct from the teams—in other words, separate legal entities capable of suing or being sued.

(c) In *Denver Rockets v All-Pro Management Inc.*, a 1971 California District Court decision, the issue was whether a section of the NBA by-laws prohibiting qualified players from negotiating with any NBA teams until four years after they

[15] *Bruce v. Cohon*, 2016 BCSC 419 at ¶27, citing CFL Collective Bargaining Agreement.
[16] Affidavit of Charles Hatt sworn December 4, 2020, Exhibit R, Motion Record of the Plaintiffs [**PMR**], Vol 4, Tab 19R, p. 1749.

graduated from high school violated antitrust laws, a very different context than the one at issue here. The District Court determined that the by-laws violated anti-trust law because the NBA teams were operating a "group boycott", which is a term of art unique to U.S. anti-trust law cases. In contrast, the plaintiffs in the present case are not challenging any by-laws or provisions of the CHL Constitution or any other contractual documents, and if they were doing so, they could name the CHL alone as a defendant.

(d) In *Toronto Blue Jays Baseball Club v Ontario (Minister of Finance)*, the issue was whether stadiums in which the Toronto Blue Jays, Maple Leafs, and Raptors played "away games" constituted "permanent establishments" where the teams were carrying on business for the purposes of the *Employer Health Tax Act*. The decision cited by the plaintiffs—which found that teams playing "away games" in foreign venues were carrying on business in those venues—was overturned on appeal. The Court of Appeal concluded that the connections to foreign venues were "relatively so transitory that they cannot be considered to be fixed places of business".[17] This decision does not assist the plaintiffs, but rather confirms the position of the Moving Defendants on this jurisdiction motion.

17. And, in any event, in none of these cases did any of the courts find that the members or teams of these various sports organizations were liable for each other's actions or omissions. The plaintiffs' argument is unprecedented in Canadian law.

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[17] *Toronto Blue Jays Baseball Club v Ontario (Minister of Finance)*, 2005 CanLII 3324 at **¶30**.

18. Third, the plaintiffs' own descriptions of the Teams' conduct and operations contradict their theory of "unincorporated association" as a means of grounding jurisdiction over the Teams in the WHL and QMJHL. The plaintiffs allege:

(a) "The Teams did not oversee their agents, including their players, notwithstanding their awareness of the existence of, and the omnipresent risk of, the Abuse";[18]

(b) "Each Team was in a position to stop the systemic Abuse by, *inter alia*, taking steps to make the Abuse publicly known";[19]

(c) "The Teams were in a position of authority and stood in *loco parentis* with Class Members";[20]

(d) "There was a direct and proximate relationship and specific interaction between the Plaintiffs and the Class and the Teams employees, agents and servants, including but not limited to the daily interaction between Class Members and the Teams' agents, servants and employees";[21] and

(e) "The Teams funded and condoned events such as 'rookie parties', provided alcohol and other drugs to players" and "[t]he Abuse took place on property controlled by the Team".[22]

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[18] Fresh as Amended Statement of Claim dated April 14, 2022 (**Claim**), ¶154.
[19] Claim, ¶157.
[20] Claim, ¶158.
[21] Claim, ¶189.
[22] Claim, ¶187(f).

19. Although liability is vigorously disputed by the Moving Defendants, the obvious focus of the plaintiffs' claim is harm experienced by players while playing on the Teams, rather than harm caused by the CHL itself, as an independent and separate corporate entity. Even in the sports leagues raised by the plaintiffs that are organized as unincorporated associations, claims for the conduct of a specific team are brought by a plaintiff against that team rather than the league as a collective. Further, there is no allegation that any one team was aware of or in a position to prevent any alleged abuse being perpetrated by players of another team against their own teammates.

20. In any event, and as discussed above, even if the defendants were an unincorporated association (which they are not), there is no basis in law to support that members of an unincorporated association (the Teams) are "collectively" liable for misconduct that is the responsibility of League corporations.

C. The Moving Defendants Have Not Attorned

1. *Ragoonanan* Motion Does Not Constitute Attornment

21. The plaintiffs argue that, by bringing a *Ragoonanan* motion to strike certain claims under Rule 21.01(1)(b), the Moving Defendants have attorned to Ontario's jurisdiction. This argument is surprising in light of this Court's endorsement dated January 4, 2021, which directed the defendants' cross-motions to be heard at the same time as the certification motion. This Court

also stated that the defendants "can make all of their arguments why the individual team defendants should not be included as parties to the proposed class action".[23]

22. Following that endorsement, on January 19, 2021, the plaintiffs specifically confirmed, in writing, that they would not argue that the defendants have attorned to this jurisdiction by following the Court's direction to have the defendants' motions and the plaintiffs' certification motion heard at the same time. The email sent by the plaintiffs states: "We will not argue that all Defendants have attorned to the jurisdiction of the Ontario Superior Court by following the Court's direction".[24]

2. Forum Selection Clause in CHL Constitution Inapplicable

23. The plaintiffs' submission that the Moving Defendants have consented to this Court's jurisdiction as parties to the CHL Constitution misunderstands the purpose of forum selection clauses. A forum selection clause permits *parties* to an agreement to select a court that can hear a dispute between them. Parties may contract to submit to the jurisdiction of a court to which they are not otherwise subject. Parties who have entered into agreements nominating particular courts for the resolution of disputes between them may rely on those agreements to found jurisdiction.[25] By doing so, they have not agreed to be bound by the selection of a forum beyond disputes arising under the agreement, and certainly not in respect of claims by non-parties to the agreement.

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[23] Endorsement dated January 4, 2021, Affidavit of Tara Pirog sworn November 10, 2022 [**Pirog Affidavit**], Exhibit C.
[24] Correspondence dated January 19, 2021, Pirog Affidavit, Exhibit D.
[25] *Re Ghana Gold Corp.*, 2013 ONSC 3284 at ¶71, citing Castel & Walker, *Canadian Conflict of Laws*, 6th ed (April 2013) at 11-6.1.

24. Forum selection clauses are included in agreements because they create certainty and security for *the parties* in a transaction, creating order and fairness in the resolution of disputes between *the parties*.[26] The purpose is not to ground jurisdiction for all possible disputes (including disputes with non-parties to the agreement) in a foreign court that would not otherwise have jurisdiction. Rather, extending a forum selection clause to claims by non-parties to the contract would deter parties from including these clauses in their agreements because it would undermine notions of certainty and security that underpin the purpose of forum selection clauses. Additionally, it would necessarily conflict with forum selection clauses contained in the contracts with non-parties (which in this case would include the standard player contracts between each team and each player). As with any other contractual interpretation exercise, courts should not accept interpretations of a clause that create an absurd result or one that leads to unreasonable consequences.[27]

25. When a party alleges that a forum selection clause applies, it has the burden to show that the dispute falls within the scope of the agreement, "thereby implicating the forum selection clause of that contract".[28] The question is whether the Ontario court has jurisdiction *"over the lawsuit*" because the "essence of the lawsuit" is rooted in the agreement containing the clause.[29] The court must determine whether the claims or circumstances that have arisen "are outside of what was reasonably contemplated by the parties when they *agreed to the clause*".[30]

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[26] *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351 at **¶8**.
[27] *Madison Joe Holdings Inc. v. Mill Street & Co Inc.*, 2021 ONCA 205 at **¶48**.
[28] *Loat v. Howarth*, 2011 ONCA 509 at ¶27; *Doersam v. Doersam*, 2022 ONSC 4095 at **¶10**.
[29] *Terracap Investments Inc. v. Credit Capital Immobilliari, S.A.* 2016 ONSC 4618 at **¶48-50**.
[30] *Loat v. Howarth*, 2011 ONCA 509 at **¶35**.

26. The concept of attornment requires that the forum selection clause is found in an agreement between the two parties. If claimants are not party to the forum selection clause, they "cannot rely on it".[31] As two illustrative examples:

(a) In *Romanchuk v Jemi Fibre Corp.*, a Saskatchewan court found that the forum selection clause in favour of British Columbia "did not apply to all causes of action before the court or all of the parties named in the action". It concluded: "[g]iven the many related claims being advanced pursuant to the law of tort, trust and otherwise, and the party named in the action who was not privy to the contract, it would be questionable to defer to a contractual forum selection clause to determine jurisdiction".[32] The Saskatchewan court found it did not need to defer to the clause, and took jurisdiction over the dispute.

(b) In *Doersam v Doersam*, the husband in a family law dispute was party to a unanimous shareholders agreement that provided that the governing law is Ontario and had a forum selection clause in favour of Ontario. He previously brought an application against that corporation in respect of that agreement. The Court rejected his spouse's argument that he had attorned to Ontario in respect of the family law proceeding: "I find he did not attorn to the jurisdiction for family law purposes".[33]

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[31] *Yara Belle Plaine Inc. v. Ingersoll-Rand Co.*, 2014 SKQB 254 at **¶79**.
[32] *Romanchuk v. Jemi Fibre Corp.*, 2018 SKQB 46 at **¶31**.
[33] *Doersam v. Doersam*, 2022 ONSC 4095 at **¶11**.

27. First, in the immediate case, the plaintiffs are not parties to the CHL Constitution, which governs only the relationship between the CHL, the Leagues, and the Teams. The only contracts to which the plaintiffs are party are the standard player contracts with the Teams on which the players played. Those contracts are governed by the law of the jurisdiction where the team is located. If the Moving Defendants intended for players to bring claims against them in jurisdictions where those Teams do not play games or conduct business, they would have said so in their standard player contracts. They did not.

28. Second, the onus is on plaintiffs to demonstrate to the court that their claims fall within the scope of a forum selection clause. Here, the plaintiffs cannot satisfy their onus. The scope of the forum selection clause in the CHL Constitution is not sufficiently broad to capture disputes between the plaintiffs on the one hand and the CHL, Leagues, and Teams on the other hand. The forum selection clause states:

> This Constitution shall be governed and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable in the Province of Ontario and shall be treated in all respects as an Ontario contract. *Each of the parties hereto* irrevocably attorns to the jurisdiction of the courts of the Province of Ontario.[34] [Emphasis added]

29. A plain reading reveals that this provision is intended to capture disputes between and among the CHL, Leagues, and Teams, not disputes with players or other third parties who are not themselves party to the constitution. Moreover, there is nothing in the forum selection clause to suggest that it captures the plaintiffs' negligence claims for alleged "Abuse".

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[34] CHL Constitution, s. 25.1, MacKenzie April 2022 Affidavit, Exhibit A, DMR, Vol IV, Tab 23A, p. 552.

30. Third, applying the forum selection clause to the plaintiffs' negligence claims undermines the purpose of a forum selection clause: certainty and security for the contracting parties.[35] The importance of a forum selection clause lies in its predictability. Parties can choose specifically in what jurisdiction their dispute will be heard in, thereby allowing parties to hire the appropriate counsel and best prepare for a case according to that jurisdiction's rules. It can also lead to reduced costs, both to the contracting parties and to the judicial system. However, the key is that the forum selection clause applies to the *contracting parties*. If a forum selection clause in a private contract could give a court jurisdiction over claims by non-parties who would otherwise be outside the court's jurisdiction, the goal of predictability would be undermined and parties would be discouraged from including forum selection clauses in their agreements.

31. Finally, to the extent the forum selection clause in the CHL Constitution applies to the plaintiffs' claims, which is denied, there is strong reason[36] to depart from it in this case. The only contracts to which the plaintiffs are party are the standard player agreements. None of these agreements were entered into in Ontario, and they all contain mandatory governing law clauses in favour of the jurisdiction where the team in question resides.

32. 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".[37] The QMJHL

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[35] *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351 at ¶8.
[36] *Z.I. Pompey Industrie v. ECU-line N.V.*, 2003 SCC 27 at ¶27 & 39-40.
[37] Affidavit of Dan MacKenzie sworn December 30, 2020, Exhibit A, section 8, DMR, Vol I, p. 26.

Constitution makes clear that its standard player agreements are governed by the laws of Québec and also that its legal domicile is Québec.[38]

33. There is no evidence that it would be unjust to require the plaintiffs to pursue their claims against the Moving Defendants in the jurisdiction(s) to which they agreed as part of their standard player agreements.

D. No Presence-Based Jurisdiction

34. Presence-based jurisdiction is a separate inquiry from the "real and substantial connection" test outlined in *Van Breda*. The Court of Appeal for Ontario has explained that "[p]resence-based jurisdiction permits jurisdiction over an extra-provincial defendant who is physically present within the territory of the court".[39]

35. Presence-based jurisdiction specifically requires that the defendant have "a fixed place of business here".[40] Its focus is on the physical location *of the defendant*.

36. Here, the plaintiffs argue that this Court has presence-based jurisdiction over the Moving Defendants because the CHL is "an unincorporated association comprised of all of the defendants", the CHL's head office and staff are in Ontario, and the CHL Constitution contains a choice of law and forum selection clause in favour of Ontario.[41]

37. However, the plaintiffs' argument ignores the uncontradicted fact that the CHL is an independent and separate corporation with roles, responsibilities, and procedures that are distinct

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[38] QMJHL Constitution, s. 1.2.2.4, Exhibit J to MacKenzie April 2022 Affidavit, DMR, Vol IV, p. 903.
[39] *Muscutt v. Courcelles*, 2002 CarswellOnt 1756 at ¶19 (CA).
[40] *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2022 ONSC 12 at ¶57.
[41] Plaintiffs' Factum at ¶50, citing Article 25.1 of CHL Constitution.

from the other defendants, including the Moving Defendants. Although the CHL is physically located in Ontario, the WHL and QMJHL and their respective Teams are not physically located in Ontario:

(a) **Physical location:** The WHL's head office is in Calgary, Alberta. The QMJHL is headquartered in Boucherville, Québec.[42]

(b) **The Teams:** The WHL is made up of 22 Teams in British Columbia (5), Alberta (5), Saskatchewan (5), Manitoba (2), Washington (4) and Oregon (1). The QMJHL is made up of 18 Teams in Québec (12), New Brunswick (3), Nova Scotia (2) and PEI (1).[43]

38. Given that none of the Moving Defendants are physically located in Ontario, this Court lacks presence-based jurisdiction over them.

E. No Presumptive Connection to Ontario

39. As an alternative to their presence-based jurisdiction argument, the plaintiffs point to the CHL Constitution, the business activity of the CHL, and their claim of systemic negligence as alleged presumptive connecting factors in support of a real and substantial connection to Ontario.

40. In determining whether a presumptive connecting factor is present, the Court "should not accept allegations in the pleadings that are contradicted by the evidence adduced by the

[42] MacKenzie April 2022 Affidavit, Exhibit I, WHL By-Laws & Constitution, section 2.3, DMR, Vol IV, Tab 23I, p. 841; Affidavit of Gilles Courteau sworn November 1, 2021 at ¶7, DMR, Vol III, p. 301.
[43] Affidavit of Dan MacKenzie sworn October 29, 2021, ¶6, DMR, Vol I, p. 80.

defendant".[44] Here, none of the factors relied upon by the plaintiffs to ground jurisdiction over the Moving Defendants is supported by the evidentiary record:

(a) The CHL Constitution is not connected to the dispute.[45] The key question is whether a "defendant's conduct brings him or her within the scope of the contractual relationship and that the events that give rise to the claim flow from the relationship created by the contract".[46] The plaintiffs' claims against the Moving Defendants sound in tort, not in contract. There is no alleged breach of the CHL Constitution because the plaintiffs are not party to the constitution. Generic language about the CHL Mission in the CHL Constitution and the limited authority conferred on the CHL by agreement does not mean that any player can sue in Ontario for alleged wrongs in a foreign jurisdiction. By agreeing to be bound by the CHL Constitution, the Moving Defendants could not have expected to be called to answer legal proceedings brought by plaintiffs that were not party to the original contract, about subject matter entirely outside of the scope of the contract, and alleging "Abuse" that took place entirely outside of Ontario.

(b) The Moving Defendants do not conduct business in Ontario. Five of the Moving Defendants are based in the U.S. and the others conduct business in other Canadian provinces. The Moving Defendants are separate legal entities that have different roles and responsibilities and operate independently from the CHL. With respect to paragraphs 66 to 73 of the plaintiffs' responding factum, it is the CHL,

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[44] *Beijing Hehe Fengye Investment Co. Limited v. Fasken Martineau Dumoulin LLP*, 2020 ONSC 934 at **¶63**.
[45] *Parque Industrial Avante Monterrey, S.A. de C.V. v. 1147048 Ontario Ltd.*, 2016 ONSC 6004 at **¶33**.
[46] *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30 at **¶44**.

and not the Teams themselves, that engages in the limited business activities described by the plaintiffs, such as selling sponsorships and entering advertising contracts. The fact that the CHL engages in these activities in Ontario and is based in Ontario does not mean that the Moving Defendants outside Ontario do business in Ontario.

(c) To the extent any of the alleged "Abuse" was experienced by players on WHL and QMJHL Teams, it would have taken place exclusively outside of Ontario. There is no evidence or even an allegation of "Abuse" having been perpetrated by the Moving Defendants in Ontario. In any event, as *Van Breda* states, the presumption of jurisdiction is rebutted "in a case involving a multi-jurisdictional tort where only a relatively minor element of the tort has occurred in the province".[96]

41. The plaintiffs' attempt to ground jurisdiction in allegations of systemic negligence is insufficient to overcome the Moving Defendants' jurisdictional challenge. Certified systemic negligence cases arise where a single institution has engaged in unlawful conduct affecting a determinate class in specific ways.[47] Those cases are very different from this one where there is no single institution, no one perpetrator or limited group of perpetrators who have been identified or joined as parties to the action, and no commonality in the alleged "Abuse" both suffered by the plaintiffs and allegedly committed by the defendants. The plaintiffs' theory of systemic negligence ignores the actual structure of the CHL, Leagues, and Teams and principles of tort

[47] See e.g. *Nasogaluak v. Canada (Attorney General)*, **2021 FC 656**; *Rumley v. British Columbia*, **2001 SCC 69**; *L'Oritoire Saint-Joseph du Mont-Royal v. J.J.*, **2019 SCC 35**.

law that apply to each of them, namely that in negligence cases involving several defendants, the plaintiff must prove that each defendant acted negligently and that each defendant's negligence caused damage to the plaintiffs.[48]

42. The plaintiffs' claim of systemic negligence, from a jurisdictional perspective, cannot be analytically abstracted from the actual perpetrators and Team-level circumstances in which the alleged "Abuse" occurred. Courts cannot and should not exercise jurisdiction over foreign defendants where the alleged commonality of misconduct across a broad range of actors is not supported by evidence or even allegations that the foreign defendants committed the alleged "Abuse" in Ontario.

43. The plaintiffs' reliance on *Brazeau v. Attorney General (Canada)* for the proposition that "systemic negligence arises 'other than in a province'" is of no assistance on this point:

(a) First, *Brazeau* arose in a very different context, where the Court was interpreting the words "otherwise than in a province" contained in section 31 of the *Crown Liability and Proceedings Act* to determine whether the limitation period from the federal statute or provincial limitation periods applied to the class. The Court was not applying the real and substantial connection test to determine if it had jurisdiction over the claim. Determining whether a federal or provincial statute applies is different than determining which court has jurisdiction to hear a case.

[48] See e.g. *Resurfice Corp. v. Hanke*, 2007 SCC 7 at **¶21**; *Becker v. City of Toronto*, 2019 ONSC 3912 at **¶205**.

(b) Second, the federal penitentiary system at issue in *Brazeau* is not akin to the CHL and the Leagues. At paragraph 135, the Court explained:

> … With a head office in Ottawa, Ontario, the Correctional Service operates and administers the federal penitentiaries by dividing the provinces and territories of Canada into five regions. Prisoners are moved from penitentiaries in one region to penitentiaries in another. Staff are moved from one province to another. For an inmate who has spent sixty days or more in administrative segregation, the case is reviewed by a national committee. …

By contrast, the CHL does not operate or administer the Leagues and does not determine the boundaries of the Leagues.[49] Players cannot be traded across Leagues unless that player moves to a new League's territory, and even then only in certain limited circumstances.[50] The CHL is not responsible for trading players or moving staff.[51] The CHL does not review disciplinary measures for people found violating player protection policies; that is done on individual Teams and within the Leagues.[52]

44. The plaintiffs' systemic negligence claim is premised on an indeterminate number of unidentified perpetrators over nearly half a century, allegedly involving 78 separate defendants situated in 13 jurisdictions across two countries. Yet, there is no evidence nor even an allegation that the Moving Defendants themselves committed any acts of "Abuse" or other tortious conduct

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[49] Supplementary Affidavit of Dan MacKenzie sworn March 4, 2022, ¶6, DMR, Vol IV, Tab 22, pp. 452-453; Affidavit of Dan MacKenzie sworn October 29, 2021, ¶15, DMR, Vol I, Tab 8, pp. 82-83; MacKenzie Transcript, Q/A 195, 215, 306, Transcript Brief, Vol 2, Tab 5, pp. 979, 982-983.
[50] CHL Constitution, s. 14.5, MacKenzie April 2022 Affidavit, Exhibit A, DMR, Vol IV, Tab 23, p. 572; OHL Manager's Manual, Priority Selection Rules and Regulations, s. 2, MacKenzie April 2022 Affidavit, Exhibit E, DMR, Vol IV, Tab 23, p. 712; QMJHL Constitution, s. 1.7, MacKenzie April 2022 Affidavit, Exhibit J, DMR, Vol IV, Tab 23, p. 904.
[51] *Ibid*.
[52] *For e.g.* MacKenzie April 2022 Affidavit, Exhibit I, WHL By-Laws & Constitution, section 20.3, DMR, Vol IV, Tab 23I, p. 878.

in Ontario. The plaintiffs' theories of collective action, unincorporated associations, and systemic negligence do not establish any legal claims to ground this Court's jurisdiction over the Moving Defendants.

45. To the extent that any systemic negligence can be established at the League level, that does not address the question of the Teams' conduct and their liability, which will require close, individual examination to determine if appropriate policies, programs, and/or procedures were in place at the Team-level at the relevant times. Minimum League standards are not determinative of the policies, programs, and procedures of the Teams and whether those meet the standard of care. The result is that the plaintiffs' far-reaching claim of systemic negligence is an illusion. It cannot and should not form the basis of this Court's exercise of jurisdiction over the Moving Defendants, in circumstances where there is no allegations of misconduct by the Moving Defendants in Ontario.

F. Any Presumptive Connection to Ontario is Rebutted

46. If a presumptive connection applies, it can be rebutted through evidence that the connection is weak. A defendant can rebut the presumption where it demonstrates that the relationship between the forum and the subject matter is such that it would not be reasonable to expect that the defendant would be called to answer proceedings in that forum.[53]

47. Here, the connecting factors identified by the plaintiffs are tenuous such that it is not reasonable to expect the Moving Defendants to answer these claims in Ontario:

[53] *Purolator Canada Inc. v. Canada Council of Teamsters*, 2022 ONSC 5009 at ¶45.

(a) Even if the CHL Constitution is a presumptive connecting factor, which is denied, it is an "extremely weak" connection to Ontario and does not point to any real relationship between the subject-matter of the plaintiffs' claims and Ontario. This is because the plaintiffs' claims are grounded in negligence, not in contract, and the plaintiffs are not themselves party to the CHL Constitution.[54]

(b) Similarly, the business activities of the CHL are unrelated to the subject matter of the plaintiffs' claims as against the Moving Defendants. Critically, there are no allegations that the Abuse had anything to do with any of the business activities of the Moving Defendants in Ontario:

(i) the CHL's contracts with the NHL or International Ice Hockey Federation (**IIHF**);

(ii) the funds the CHL receives from the NHL and IIHF, which it then distributes to the Teams;

(iii) the revenue from "ad subscription, sales and sponsorship" the CHL distributes to the Leagues which then distribute these funds to the Teams;

(iv) the revenue the CHL holds on behalf of the Teams and then distributes to the Leagues; or

[54] *Yip CA* at ¶42, citing *Yip SC* at ¶211.

(v) the CHL's ability to require the Teams to pay a certain amount to the CHL.[55]

(c) There is no evidence or even an allegation that any of the Moving Defendants committed any tort or wrongdoing *in Ontario*. The CHL is not an unincorporated association and the Moving Defendants are not jointly and severally liable with other defendants in Ontario. To the extent any of the elements of the torts alleged against the Moving Defendants occurred in Ontario, which is denied, these elements of the torts are minor in comparison with the elements that occurred in the jurisdictions where the plaintiffs experienced the alleged "Abuse". 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.[56] For the Moving Defendants, that jurisdiction is not Ontario.

48. Accordingly, any presumptive factor is rebutted and this Court should not exercise jurisdiction over the Moving Defendants.

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

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

[55] Plaintiffs' Factum, ¶71, 72
[56] *Beijing Hehe Fengye Investment Co. Limited v. Fasken Martineau Dumoulin LLP*, 2020 ONSC 934 at **¶59.**

SCHEDULE "A"

LIST OF AUTHORITIES

1 *Bruce v. Cohon*, 2016 BCSC 419

2 *Toronto Blue Jays Baseball Club v Ontario (Minister of Finance)*, 2005 CanLII 3324 (Ont CA)

3 *Re Ghana Gold Corp.*, 2013 ONSC 3284

4 *Expedition Helicopters Inc. v. Honeywell Inc.*, 2010 ONCA 351

5 *Madison Joe Holdings Inc. v. Mill Street & Co Inc.*, 2021 ONCA 205

6 *Loat v. Howarth*, 2011 ONCA 509

7 *Doersam v. Doersam*, 2022 ONSC 4095

8 *Terracap Investments Inc. v. Credit Capital Immobilliari, S.A.*, 2016 ONSC 4618

9 *Yara Belle Plaine Inc. v. Ingersoll-Rand Co.*, 2014 SKQB 254

10 *Romanchuk v. Jemi Fibre Corp.*, 2018 SKQB 46

11 *Z.I. Pompey Industrie v. ECU-line N.V.*, 2003 SCC 27

12 *Muscutt v. Courcelles*, 2002 CarswellOnt 1756 (CA)

13 *Vale Canada Limited v. Royal & Sun Alliance Insurance Company of Canada*, 2022 ONSC 12

14 *Beijing Hehe Fengye Investment Co. Limited v. Fasken Martineau Dumoulin LLP*, 2020 ONSC 934

15 *Parque Industrial Avante Monterrey, S.A. de C.V. v. 1147048 Ontario Ltd.*, 2016 ONSC 6004

16 *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30

17 *Nasogaluak v. Canada (Attorney General)*, 2021 FC 656

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

19 *L'Oritoire Saint-Joseph du Mont-Royal v. J.J.*, 2019 SCC 35

20 *Resurfice Corp. v. Hanke*, 2007 SCC 7

21 *Becker v. City of Toronto*, 2019 ONSC 3912

22 *Purolator Canada Inc. v. Canada Council of Teamsters*, 2022 ONSC 5009

23 *Yip v. HSBC Holdings plc*, 2018 ONCA 626

SCHEDULE "B"

TEXT OF STATUTES, REGULATIONS & BY-LAWS

***Partnerships Act,* R.SO. 1990, c P. 5**

Partnership

2 Partnership is the relation that subsists between persons carrying on a business in common with a view to profit, but the relation between the members of a company or association that is incorporated by or under the authority of any special or general Act in force in Ontario or elsewhere, or registered as a corporation under any such Act, is not a partnership within the meaning of this Act. R.S.O. 1990, c. P.5, s. 2.

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 Sagueneens
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 Shawnigan
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

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(Jurisdiction Motion, Returnable November 14-18, 2022)

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