

05 APR 2023/SL

Court of Appeal File No. COA-23-CV-0353
Court File No. CV-20-642705-00CP

COURT OF APPEAL FOR ONTARIO

B E T W E E N :

DANIEL CARCILLO, GARRETT TAYLOR and STEPHEN QUIRK

Plaintiffs
(Appellants)

- and -

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

MOOSE JAW WARRIORS, LETHBRIDGE HURRICANES HOCKEY CLUB, 649643 ONTARIO INC. c.o.b. as SARNIA STING, KITCHENER RANGER JR A HOCKEY CLUB and KITCHENER RANGERS JR "A" HOCKEY CLUB, LE TITAN ACADIE BATHURST (2013) INC., CLUB DE HOCKEY JUNIOR MAJEUR DE BAIE-COMEAU INC. o/a DRAKKAR BAIE-COMEAU, CLUB DE HOCKEY DRUMMOND INC. o/a VOLTIGEURS DRUMMONDVILLE, CAPE BRETON MAJOR JUNIOR HOCKEY CLUB LIMITED o/a SCREAMING EAGLES CAPE BRETON, LES OLYMPIQUES DE GATINEAU INC., HALIFAX MOOSEHEADS HOCKEY CLUB INC., CLUB HOCKEY LES REMPARTS DE QUÉBEC INC., LE CLUB DE HOCKEY JUNIOR ARMADA INC., MONCTON WILDCATS HOCKEY CLUB LIMITED, LE CLUB DE HOCKEY L'OCÉANIC DE RIMOUSKI INC., LES HUSKIES DE ROUYN-NORANDA INC., 8515182 CANADA INC. c.o.b. as CHARLOTTETOWN ISLANDERS, LES TIGRES DE VICTORIAVILLE (1991) INC., SAINT JOHN MAJOR JUNIOR HOCKEY CLUB LIMITED, CLUB DE HOCKEY SHAWINIGAN INC. o/a CATARACTES SHAWNIGAN, CLUB DE HOCKEY JUNIOR MAJEUR VAL D'OR INC. o/a VAL D'OR FOREURS, 7759983 CANADA INC. c.o.b. as CLUB DE HOCKEY LE PHOENIX, 9264-8849 QUÉBEC INC. c.o.b. as GROUPE SAGS 7-96 AND LES SAGUENÉENS, JAW HOCKEY ENTERPRISES LP c.o.b. ERIE OTTERS, IMS HOCKEY c.o.b. FLINT FIREBIRDS, SAGINAW HOCKEY CLUB, L.L.C., EHT, INC., , WINTERHAWKS JUNIOR HOCKEY LLC, PORTLAND WINTER HAWKS INC., THUNDERBIRDS HOCKEY ENTERPRISES, L.L.C., BRETT SPORTS & ENTERTAINMENT, INC., HAT TRICK, INC., TRI-CITY AMERICANS HOCKEY LLC, and TOP SHELF ENTERTAINMENT, INC.

Defendants
(Respondents)

Proceeding under the *Class Proceedings Act, 1992*

NOTICE OF APPEAL

THE PLAINTIFFS APPEAL to the Court of Appeal from the orders made by the Honourable Justice Perell (the "motion judge"), on February 3, 2023, at Toronto, Ontario.

THE APPELLANTS ASK that the orders be set aside and an order be granted allowing the appeal and:

- a) Dismissing the defendants' motion to strike the claims against various defendants under Rule 21.01(1)(b);
- b) Certifying this action as a class proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6;
- c) In the alternative, remanding the certification motion to the Superior Court to determine whether the certification criteria pursuant to section 5(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, have been met; and
- d) Such further and other relief as counsel may advise and this Honourable Court may permit.

THE GROUNDS OF APPEAL are as follows:

1. This proposed class action seeks compensation for former players who experienced abuse and hazing whilst playing within the Canadian Hockey League. It pleads causes of action in systemic negligence, breach of fiduciary duty, and vicarious liability for non-systemic torts.
2. The action was brought against the Canadian Hockey League ("CHL"), its three Member Leagues – the Ontario Hockey League ("OHL"), Western Hockey League ("WHL"), and the Quebec Major Junior Hockey League ("QMJHL") – and the Teams within each League.
3. The appellants moved to certify the action under the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, on December 7, 2020. On December 30, 2020, the respondents brought a

cross-motion seeking to strike the action as against the Teams for which none of the plaintiffs had played ("the Non-Plaintiff Teams") based on the *Ragoonanan* Principle, and to stay or dismiss the action as against the non-Ontario defendants on the basis that the court lacks jurisdiction over those defendants.

4. Both motions were heard together over four days on November 14 to 17, 2022. The motion judge released his decision on the motions on February 3, 2023.

5. Finding that the court had jurisdiction *simpliciter* over all of the defendants, the motion judge dismissed the jurisdiction aspect of the respondents' motion.

6. The motion judge granted the respondents' motion to strike the claim against the Non-Plaintiff Teams under the *Ragoonanan* Principle on the basis that, as there were no collective causes of action, the proposed representative plaintiffs had no claims against those Teams. The motion judge found, for the same reason, that the cause of action certification criterion was not satisfied and found, for related reasons, that neither of the common issues and preferable procedure criteria were met.

7. The motion judge determined that, in lieu of a certified class action, there ought to be 60 national opt-in joinder actions, one for each Team in the CHL, with an Individual Issues Protocol for the joinder actions, pursuant to ss. 7, 12, and 25 of the *Class Proceedings Act, 1992*. He provided the plaintiffs 120 days to prepare an Individual Issues Protocol, and bring a motion for approval of that protocol, and suspended both the Order denying certification and the Dismissal Order pending the determination of that motion.

The Motion Judge Erred in Finding No Cause of Action Against the Teams

8. The motion judge erred in law in finding that the pleading did not disclose viable claims held by the proposed representative plaintiffs against all of the Teams. In particular, the motion judge erred:

- (a) In principle, by failing to assess the causes of action in the manner pled by the plaintiffs, as claims made primarily against the CHL, OHL, WHL, and QMJHL (collectively, "the Leagues"), with the Teams as necessary defendants;
- (b) In law, in finding that the Teams could not be held liable for the systemic negligence and vicarious liability of the Leagues;
- (c) In law, in finding that the Teams could not be held liable for their own negligence in governing the Leagues; and
- (d) In principle, by failing to dispose of the plaintiffs' arguments, including arguments concerning the Teams' liability as Directors of the Leagues.

The Motion Judge Erred in Applying the *Ragoonanan* Principle

9. The motion judge erred in law in applying the *Ragoonanan* Principle, which states that in a class action, for each defendant, there must be a representative plaintiff with a claim against that defendant. The motion judge applied the *Ragoonanan* Principle to find that the pleading failed to disclose a cause of action against the Non-Plaintiff Teams under Rule 21.01(1)(b) and s. 5(1)(a) of the *Class Proceedings Act, 1992*. The *Ragoonanan*

Principle has been overtaken by Supreme Court of Canada jurisprudence and should no longer be followed.

The Motion Judge Erred in Refusing to Certify the Action Against the Teams

10. The motion judge further erred in finding that a class action could not be certified against both the Leagues and Teams.

11. In determining that the s. 5(1)(c) common issues requirement was not met, the motion judge erred in mixed fact and law in finding that class members' claims against the Teams did not raise common issues.

12. In determining that the s. 5(1)(d) preferable procedure requirement was not met, the motion judge erred:

- (a) In principle, by failing to conduct the preferability analysis as directed by binding jurisprudence; and
- (b) In mixed fact and law, in finding that class actions are not the preferable procedure in cases concerning systemic negligence resulting in abuse;

13. In determining that the s. 5(1)(e) requirement was not met, the motion judge erred in mixed fact and law in finding that the plaintiffs' litigation plan was not workable.

The Motion Judge Erred in Declining to Certify an Action Against the Leagues

14. In the alternative, the motion judge erred in law, in principle, and in mixed law and fact in declining to certify an action against the Leagues alone. In particular, the motion judge erred:

- (a) In law in finding that the s. 5(1)(a) reasonable cause of action criterion was not met, despite finding that the pleading disclosed claims in systemic negligence and vicarious liability against the Leagues;
- (b) In law in failing, under s. 5(1)(c), to consider the common issues raised by class members' claims against the Leagues;
- (c) In principle, under s. 5(1)(d), by failing to consider the preferability of the class action against the Leagues; and
- (d) In principle, by failing, under the s. 5(1)(e) representative plaintiff criterion to consider whether the proposed litigation plan was workable for a class action against the Leagues alone.

15. Such further and other grounds as counsel may advise and this Honourable Court may permit.

THE BASIS OF THE APPELLATE COURT'S JURISDICTION IS:

1. As this action was commenced on June 18, 2020, s. 30(1) of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, as it stood prior to amendments made in October 2020, continues to apply, under which the appellants' appeal from the Order denying certification would lie with the Divisional Court.

2. The Dismissal Order is a final order. An appeal from the Dismissal Order therefore lies to the Court of Appeal, without leave, under s. 6(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

3. As the appellants appeal from both the Order denying certification and the Dismissal Order, the Court of Appeal has the jurisdiction to hear and determine both appeals under s. 6(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43.

4. Rule 61 of the *Rules of Civil Procedure*, R.R.O. 1990. Reg. 194

March 6, 2023

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Carcillo et al. Canadian Hockey League et al.
Plaintiff and Defendant

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Proceeding commenced at Toronto
Proceeding under the *Class Proceedings Act*, 1992

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