

COURT OF APPEAL FOR ONTARIO

CITATION: Carcillo v. Ontario Major Junior Hockey League, 2023 ONCA 818

DATE: 20231207

DOCKET: M54707 (COA-23-CV-0353)

Nordheimer J.A. (Motions Judge)

BETWEEN

Daniel Carcillo, Garrett Taylor and Stephen Quirk

Plaintiffs (Appellants/Moving Parties)

and

Ontario Major Junior Hockey League, Canadian Hockey League, Western Hockey League, Québec 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 Shawinigan, 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/Responding Parties)

Vlad Calina and David Rosenfeld, for the appellants

Gannon Baulne, Nina Butz and Marshall Torgov, for the respondents

Timothy Pinos and Nadia Champion, for the respondents, Jaw Hockey Enterprises LP c.o.b. Erie Otters, IMS Hockey c.o.b. Flint Firebirds, Saginaw Hockey Club, L.L.C., EHT, Inc., John Doe Corp. A o/a Everett Silvertips Hockey Club, Winterhawks Junior Hockey LLC, Portland Winter Hawks Inc., Thunderbirds Hockey Enterprises, L.L.C., John Doe Corp. B o/a Seattle Thunderbirds, Brett Sports & Entertainment, Inc., Hat Trick, Inc., John Doe Corp. C o/a Spokane Chiefs, Tri-City Americans Hockey LLC and John Doe Corp. D o/a Tri-City Americans

Heard: December 4, 2023

ENDORSEMENT

[1] The appellants move for a stay pending appeal of the order of Perell J., dated October 30, 2023, made pursuant to s. 7 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, along with other related relief.

[2] This appeal arises out of a proposed class action against 60 amateur hockey teams that compete at the highest level of junior amateur hockey in Canada. The 60 amateur hockey teams are all members of the Canadian Hockey League. The proposed class is composed of all former and current players who claim to have suffered abuse while playing in the Canadian Hockey League between May 8, 1975, and the present. The abuse is stated to have included sexual assault, hazing, bullying, physical and verbal harassment, sexual harassment, and other activities.

[3] On February 3, 2023, the motion judge released his decision in which he refused certification of the class action (“certification order”).¹ He also dismissed the action against certain defendants (“dismissal order”). Towards the conclusion of his reasons, commencing at para. 441, the motion judge, apparently of his own initiative, considered whether he should permit the proceeding to continue as one or more proceedings between different parties pursuant to s. 7(2) of the *CPA*. He decided that he should.

¹ *Carcillo v Ontario Major Junior Hockey League*, 2023 ONSC 886

[4] Having so decided, the motion judge said, at para. 453: “To allow the s. 7 process to unfold and to prevent the recommencement of any limitation periods, I suspend my Order dismissing the Certification Motion for 120 days pending the determination of a motion for approval of an Individual Issues Protocol.”

[5] The motion judge then directed the proposed representative plaintiffs “if so advised” to prepare an "Individual Issues Protocol" for 60 individual actions against the Western Hockey League, the Ontario Hockey League, and the Québec Major Junior Hockey League, and their respective teams; and to bring a motion for approval of the Individual Issues Protocol, “failing which Messrs. Carcillo, Taylor, and Quirk's proposed class action shall be dismissed”.

[6] The proposed representative plaintiffs designed an Individual Issues Protocol, as directed, and brought a motion for its approval. At the first stage of that approval process, the motion judge acknowledged that he had inaptly described the process as an Individual Issues Protocol when it ought better to have been described as “a Notice, a Notice Plan, and a Section 7 Plan”. After three more stages of the process, the motion judge ultimately approved the Section 7 Plan (“the s. 7 order”).

[7] While the s. 7 process was going on, the proposed representative plaintiffs commenced an appeal against the order refusing the certification of the proposed class proceeding. They commenced appeals both in the Divisional Court and in

this court. They did so because of the existing confusion over the amendments made to the *CPA* respecting the appeal process which formerly lay to the Divisional Court but which now lies to this court.² The confusion arises over whether the new appeal process only applies to proposed class actions commenced after the amendment came into effect or whether it applies to existing proposed class actions where the certification approval or refusal is made after the amendment came into effect. In their appeal to this court, the proposed representative plaintiffs also appealed the dismissal order.

[8] After the s. 7 process was completed and the order granted, the proposed representative plaintiffs filed a supplementary notice of appeal in this court seeking to appeal the s. 7 order. While it is not clear on the record, I assume that they filed a similar supplementary notice of appeal in the Divisional Court.

[9] The proposed representative plaintiffs now seek a stay of the s. 7 order pending their appeal of it. The stay is necessary because the s. 7 order requires certain steps be taken within specific time frames, including the appointment of an Administrator for the s. 7 Plan and the giving of notice in different forms to the persons, who would have been part of the proposed class, but who could now become plaintiffs in the individual actions. Under the s. 7 order, those persons have

² *Smarter and Stronger Justice Act, 2020*, S.O. 2020, c. 11, Schedule 4

a specific time after they receive notice of this process by which they have to decide whether or not to be part of the individual actions.

[10] The s. 7 order also provides that the limitation periods relating to the individual claims are to recommence running as of the date of the approval of the s. 7 Plan. The s. 7 order further provides that if no party appeals the s. 7 order, “the plaintiffs shall forthwith, after the expiry of the deadline for appealing that order, abandon their appeal of the Certification Motion” and abandon their appeal of the order dismissing the action against certain defendants.

[11] The respondents contend that this court does not have jurisdiction to grant the requested stay. They say that any request for a stay should be directed to the motion judge or to a judge of the Divisional Court since any appeal of the s. 7 order lies to that court with leave as it is an interlocutory order, in their view. The respondents add that they would consent to a stay if the matter was brought before the motion judge. The motion judge is, of course, not obliged to grant a stay just because the parties consent to one.

[12] The appellants do not agree that the appeal of the s. 7 order lies to the Divisional Court but say that, even if it does, the s. 7 order is so inextricably linked to the dismissal of the certification motion that this court ought to take jurisdiction over it under s. 6(2) of the *Courts of Justice Act*, R.S.O. 1990, c. C.43. That route

would then permit a single judge of this court to grant a stay pursuant to r. 63.02(1)(b) of the *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194.

[13] The respondents say that s. 6(2) of the *Courts of Justice Act* cannot be relied upon because the appellants require leave to appeal in the Divisional Court and this court will not exercise its authority under s. 6(2) unless and until leave is granted. On that point, the respondents are correct: *Cole v. Hamilton (City)* (2002), 60 O.R. (3d) 284 (C.A.).

[14] The respondents also say that r. 63.02(1)(b) cannot be utilized in this case because there is no appeal properly before this court and that the rule, like its counterpart r. 63.01, must be applied narrowly: *Abuzour v. Heydary*, 2015 ONCA 249, 126 O.R. (3d) 101. The difficulty with that position is that it presupposes that the respondents are correct that this court does not have jurisdiction over the appeal of the s. 7 order. As a single judge, I cannot decide issues involving the jurisdiction of the court. If this court does not have jurisdiction to entertain an appeal of the s. 7 order, then the remedy is for the respondents to bring a motion to quash before a panel, which they have not done. Until that occurs, the fact is that there is an appeal in this court and r. 63.02(1)(b) applies in accordance with its plain wording.

[15] That said, the granting of a stay is a discretionary remedy. Jurisdictional concerns can be properly considered in the exercise of that discretion. Arguments

that the appeal may not properly be in this court are relevant in assessing the merits of the appeal under the serious issue portion of the test for granting a stay: see, e.g., *Ncube v. Hassen*, 2022 ONCA 840, at para. 16.

[16] I accept the respondents' point that the motion judge would clearly have the right to grant a stay of the s. 7 order. While that might be the more appropriate route to take where there are both serious issues over jurisdiction and a serious issue over whether a stay ought to be granted, in this case there is no dispute that a stay is appropriate. The respondents have said that they would consent to one, just not in this court. In my view, no purpose is to be served by requiring the parties to make another attendance before a different judge only to raise the same issue about the stay. I have concluded that there is currently jurisdiction in this court under r. 63.02(1)(b) to grant a stay. I am satisfied that I should deal with the matter. The stay of the s. 7 order is granted.

[17] The appellants seek other relief:

1. They seek a stay of the certification and dismissal orders. I do not see any reason to grant a stay of those orders. Nothing is happening under those orders that would warrant a stay being granted nor do the appellants identify any such need.
2. The appellants also seek an order under s. 6(2) that this court has jurisdiction over the appeal of the dismissal order and the certification order.

As I have already said, a single judge does not determine jurisdiction issues. If the respondents contest this court's jurisdiction over the certification order (I understand that they accept that this court has jurisdiction over the dismissal order) then they should bring a motion before a panel of this court to quash that aspect of the notice of appeal.

3. The appellants also sought an order that they shall perfect the appeal by November 29, 2023, although this order was not referred to in their factum. If there is a need for a specific order, since that date has passed, I can be spoken to. Otherwise, *the Rules of Civil Procedure* provide the requirements for perfection.

[18] Finally, the respondents suggest that the appeal proceedings in this court would benefit from the appointment of an appeal management judge. If the parties wish to pursue that appointment, they should send a letter to the Executive Legal Officer making that request.

[19] I would not make any order as to the costs of this motion.

