IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McEwan v. Canadian Hockey League,* 2023 BCSC 2272

Date: 20231229
Docket: S190264
Registry: Vancouver

Between:

James Johnathon McEwan, as Representative Plaintiff

Plaintiff

And

Canadian Hockey League/ Ligue Canadienne de Hockey, Western Hockey League and, Canadian Hockey Association/ Association Canadienne de Hockey d.b.a. Hockey Canada

Defendants

Before: The Honourable Madam Justice Sharma

Reasons for Judgment

Counsel for the Plaintiff:	N.C. Hartigan A. Klein
Counsel for the Defendants:	A.L. Kreaden S. Dukesz
Place and Date of Trial/Hearing:	Vancouver, B.C. May 23, 2023
Place and Date of Judgment:	Vancouver, B.C. December 29, 2023

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I. OVERVIEW

[1] This is an application by the defendants for an order that the representative plaintiff, an expert, and others who have filed affidavits in this proceeding in support of certification be cross-examined on their affidavits. The application is brought pursuant to Rule 22-1(4)(a) of the *Supreme Court Civil Rules,* B.C. Reg. 168/2009 [*SCR*].

[2] The action is a proposed class proceeding. The plaintiff delivered a certification record in May 2021. In September 2021, the defendants filed an application to strike, in whole or in part, some of the affidavits filed by the plaintiff in support of the certification application. That application is the subject of reasons issued on June 30, 2022, indexed at *McEwan v. Canadian Hockey League,* 2022 BCSC 1104 (the “RFJ”). I will use the same defined terms in this judgment as used in the RFJ.

[3] In the RFJ, I described the parties and the action:

> [5] The action is grounded in negligence and breach of fiduciary duty. The plaintiff seeks damages for personal and physical injury, psychological injuries, special damages, cost of future care, and loss of income both past and future, and loss of housekeeping capacity.
>
> [6] The defendant Canadian Hockey League/Ligue Canadienne de Hockey and the defendant Canadian Hockey Association/Association Canadienne de Hockey, doing business as Hockey Canada (“CHL”) are federal corporations constituted under the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23. The CHL has offices in Calgary, Ottawa, and Toronto and operates regional centres in Ontario and Québec.
>
> [7] The CHL acts as an umbrella organization for the three major junior hockey leagues operating in North America. The leagues are for players 16 to 20 years of age. Those leagues are:
>
> > a) the defendant Western Hockey League (“WHL”), which is incorporated under the laws of Canada and has an office in Calgary with member franchise clubs in Alberta, Manitoba, Saskatchewan, British Columbia, and the states of Washington and Oregon.
> >
> > b) the Ontario Hockey League (“OHL”); and
> >
> > c) the Quebec Major Junior Hockey League.
>
> [8] This proposed class action is brought by James McEwan on behalf of himself and the following proposed class of individuals: any person, or their

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> estate, resident in Canada who played in the CHL from August 21, 1974, until a date to be fixed by this Court.
>
> [9] In addition to Mr. McEwan's April 15, 2021 affidavit, the plaintiff relies on affidavits from proposed class members Myles Stoesz, Rhett Trombley, and Eric Rylands (collectively with Mr. McEwan, the "Players").
>
> …
>
> [11] The notice of civil claim also contains the following allegations:
>
> > a) It had been known for decades that multiple blows to the head can lead to long-term brain injury including memory loss, dementia, depression and related symptoms. It can also lead to chronic traumatic encephalopathy ("CTE"), which is a catastrophic disease that was long associated only with boxing. CTE, until recently, could only be confirmed through autopsy.
> >
> > b) Scientific evidence has, for decades, linked brain trauma to long-term neurological problems, but this was not known by the players.
> >
> > c) Medical evidence show that symptoms can reappear hours or days after the injury.
> >
> > d) Once a person suffers a concussion, they are up to four times more likely to sustain a second one, and each successive concussion increases the seriousness of health risks and likelihood of future concussions.
>
> [12] It is alleged that at all material times, the defendants should have known or ought to have known that multiple incidents resulting in blows to the head would lead to long-term brain injury.
>
> …
>
> [16] The plaintiff has filed two expert reports in support of the certification application. The first is from Dr. Virji-Babul, a physical therapist and neuroscientist at the University of British Columbia. The defendants do not challenge this affidavit.
>
> [17] The second expert affidavit was completed by Dr. Skye Arthur-Banning who is a professor within the Department of Parks, Recreation and Tourism Management at Clemson University in Clemson, South Carolina. He teaches Amateur Sport Management. The defendants challenge Dr. Arthur-Banning's report on the basis that he lacks the requisite expertise and/or it cannot meet the threshold of necessity. The defendants also submit that it is not relevant nor reliable.

[4] In result, it was appropriate to strike some portions of the Players' affidavits as identified in "Appendix A" to the RFJ, but all other objections were dismissed. In addition, the defendants' application to strike portions of the expert Dr. Arthur-Banning's report was dismissed: RFJ at paras. 217–218.

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[5] In March 2023, the defendants delivered their response to the certification application supported by 14 affidavits.

[6] The defendants now seek an order that the deponents of the Players' Affidavits and Dr. Arthur-Banning attend for cross-examination.

[7] The plaintiff opposes the relief sought.

[8] For the reasons set out in this judgment, I am not persuaded the defendants have satisfied the legal test to justify cross-examination. Therefore, the defendants' application is dismissed.

II. LEGAL PRINCIPLES

[9] Rule 22-1(4)(a) of the *SCR* states:

> (4) On a chambers proceeding, evidence must be given by affidavit, but the court may
>
> > (a) order the attendance for cross-examination of the person who swore or affirmed the affidavit, either before the court or before another person as the court directs,

[10] In *Stephens v. Altria Group, Inc.*, 2021 BCCA 396 [*Altria*] at para. 5, the court set out the considerations relevant to the exercise of discretion under Rule 22-1(4)(a) as follows:

> 1. Whether there are material facts in issue;
> 2. Whether the cross-examination is relevant to an issue that may affect the outcome of the substantive application; and
> 3. Whether the cross-examination will serve a useful purpose in terms of eliciting evidence that would assist in determining the issue.

[11] Other relevant factors identified in the case law include whether the information sought is available through other means and whether cross-examination will generate unreasonable expense or delay: *Altria* at para. 5; *Leonard v. The Manufacturers Life Insurance Company*, 2020 BCSC 1051 at paras. 17, 27.

[12] The plaintiff submits the test from *Altria* must be applied in the proper context, mainly that the issue before the Court will be certification. This requires a

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determination of whether the plaintiff has established the requirements set out in s. 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50:

> 4 (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;
>
> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[13] In the *Class Proceedings Act*, “common issues” is a defined term in s. 1:

> "common issues" means
>
> (a) common but not necessarily identical issues of fact, or

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(b) common but not necessarily identical issues of law that arise from common but not necessarily identical facts;

[14] Commonality was addressed by the Supreme Court of Canada in *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 [*Pro-Sys*]:

> [106] The commonality requirement has been described as "[t]he central notion of a class proceeding" (M. A. Eizenga et al., *Class Actions Law and Practice* (loose-leaf), at p. 3-34.6). It is based on the notion that "individuals who have litigation concerns 'in common' ought to be able to resolve those common concerns in one central proceeding rather than through an inefficient multitude of repetitive proceedings" (*ibid.*).
>
> …
>
> [108] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, this Court addressed the commonality question, stating that "[t]he underlying question is whether allowing the suit to proceed as a [class action] will avoid duplication of fact-finding or legal analysis" (para. 39). I list the balance of McLachlin C.J.'s instructions, found at paras. 39-40 of that decision:
>
> > (1) The commonality question should be approached purposively.
> >
> > (2) An issue will be "common" only where its resolution is necessary to the resolution of each class member's claim.
> >
> > (3) It is not essential that the class members be identically situated *vis-à-vis* the opposing party.
> >
> > (4) It not necessary that common issues predominate over non-common issues. However, the class members' claims must share a substantial common ingredient to justify a class action. The court will examine the significance of the common issues in relation to individual issues.
> >
> > (5) Success for one class member must mean success for all. All members of the class must benefit from the successful prosecution of the action, although not necessarily to the same extent.

[15] In *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, Chief Justice McLachlin addressed the approach to the test for commonality:

> 39 … there must be issues of fact or law common to all class members. Commonality tests have been a source of confusion in the courts. The commonality question should be approached purposively. The underlying question is whether allowing the suit to proceed as a representative one will avoid duplication of fact-finding or legal analysis. Thus an issue will be "common" only where its resolution is necessary to the resolution of each class member's claim. It is not essential that the class members be identically situated vis-à-vis the opposing party. Nor is it necessary that common issues predominate over non-common issues or that the resolution of the common issues would be determinative of each class member's claim …

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[16] The Court of Appeal has recently reaffirmed the preceding principles in *Ewert v. Canada (Attorney General)*, 2022 BCCA 131 at para. 24. It added that "for an issue to be common, it must be susceptible to an affirmative or negative conclusion without individualized investigation, and that class members cannot have opposing interests": para. 25. Another helpful articulation is *Watson v. Bank of America Corporation,* 2014 BCSC 532 at para. 67, rev'd in part 2015 BCCA 362, quoted with approval in *676083 B.C. Ltd. v. Revolution Resource Recovery Inc.*, 2021 BCCA 85 at para. 123:

> [67] The Court recently clarified the final point and held that "success for one member of the class does not necessarily have to lead to success for all the members. However, success for one member must not result in failure for another" (*Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1 at para. 45). Further, questions may be common even if the answers to those questions vary from class member to class member (*Vivendi* at paras. 45–46). In any event, concerns about unproven material differences are not determinative at certification. If they actually emerge during the proceeding, Courts can deal with them when the time comes, through decertification if necessary: *Microsoft* at para. 112; *Dutton* at para. 54.

[17] The plaintiff emphasizes that the burden on certification is low: a plaintiff need only adduce evidence that supports "some basis in fact" for certification: *Pro-Sys* at para. 102, see also paras. 99–105.

[18] Thus, permitting cross-examination is a discretionary decision, appropriate if there is a conflict in the evidence on a point germane to certification: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2008 BCSC 1263 at para. 56. If so, the court also looks to the factors of each case, including the importance of the issue, whether cross-examination will unduly delay the certification application and whether the cross-examination is likely to elucidate relevant issues: *Cantlie v. Canadian Heating Products Inc.*, 2016 BCSC 660 at para. 6; *John Doe 1 v. The University of British Columbia*, 2019 BCSC 673 [*John Doe*] at paras. 13–15; *Achtymichuk v. Bayer Inc.*, 2018 BCSC 776 at para. 25.

[19] Justice Milman, in *John Doe* at para. 15, held that "this Court should be cautious when considering whether to grant leave to cross-examine on affidavits prior to certification at least where, as here, the proposed cross-examination is

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anticipated to focus on the merits of the claim rather than on one or more of the elements of the certification test *per se".* This cautionary consideration flows from the fact that certification is not a merits-based inquiry.

III. CROSS EXAMINATION OF PLAYERS

A. The Evidence

[20] The Players' evidence is summarized at paras. 19–24 in the RFJ, reproduced here for convenience:

> [19] Mr. McEwan played for the CHL between 2004 and 2008. He started at age 17, playing for the Seattle Thunderbirds. Two years later he played for the Kelowna Rockets and was the team captain. During his time in the CHL, Mr. McEwan was involved in over 70 fights. His position is that he would not have involved himself in so many fights had he been aware of what he asserts are the long-term side effects and health implications of concussive and sub-concussive impacts to the head.
>
> [20] Mr. McEwan deposed that fighting was not only condoned and tolerated, the coaches and managers of the teams he played for encouraged, praised, and rewarded him for fighting. He alleges that the defendants were negligent and breached their duties to players by, among other things, promoting and glorifying violence amongst players, including fighting.
>
> [21] With regard to his personal circumstances, Mr. McEwan deposed, among other things, the following:
>
> > a) He started playing hockey at age six, and played every season throughout his youth. He progressed through minor hockey teams and had a desire to play for the National Hockey League ("NHL"). By age 15, he was devoting hundreds of hours a year to pursuing a career in hockey.
> >
> > b) He was first invited to try out for a spot on a Junior A team when he was 16 years old. He believed he could stand out and get attention from the coaches by fighting another player.
> >
> > c) When he was 17, he was invited to try out for the Seattle Thunderbirds (a WHL team). He attended training camp and several exhibition and regular season games. He fought during those games, and was offered a spot on the team. He was trained and encouraged to be an "enforcer" on the team, a role he believed he fulfilled from that time forward. After two seasons with the Seattle Thunderbirds, he then played for the Kelowna Rockets as team captain. He left the WHL in 2008, but continued to try and reach the NHL, playing with the East Coast Hockey League and American Hockey League, finally retiring in 2014.
> >
> > d) In his second season with the Seattle Thunderbirds (2005-2006), he began experiencing persistent ringing in his ears. During and after fights, he often had vision distortions and dizzy spells and

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occasionally felt like he would faint. On one occasion, he lost consciousness in a parking lot after a fight.

e) He continued to play after each fight and was not given medical attention.

f) In his final years at the CHL, he began experiencing severe anxiety, mood swings, behavioural changes, and angry outbursts. He was in near constant physical pain and continued to have episodes of cloudiness and distorted vision.

g) As a method of coping with those symptoms, he turned to pain medications and alcohol.

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[22] The other Players also describe their experiences in their affidavits. Mr. Stoesz deposed, among other things:

a) He played in the CHL from 2003 to 2007.

b) He was invited to attend a training camp for a CHL team (Spokane Chiefs) when he was 15 years old. He got into three or four fights during that camp. He was too young to play on that team but was invited back the next year, and he "knew [he] was expected to fight", which he did. He played in exhibition games and at the end of a tournament, was offered a place on the team. He stated he "literally fought [his] way onto that team".

c) He had to become an enforcer if he wanted a secure place on the team.

d) He was injured during many fights. In each fight, he took many punches to his face and head, and often injured his hands, including being unable to play a few games because of his hand being too sore. He would feel dizzy and off balance, and recalled being told he had a concussion on two occasions. He was never told to get medical attention.

e) He received boxing lesson as part of his training for the team. Some of the fights in which he was involved are posted on the internet, and he has watched those. He stated the referees stood back watching the players fight and take multiple punches, and not stepping in until they players fell to the ice.

f) During his four years in the CHL, he accumulated over 800 penalty minutes.

[23] Mr. Trombley deposed, among other things:

a) He played in both the WHL and the OHL for three years, staring in 1991 when he was 16 years old.

b) As soon as he started playing in the CHL and throughout his career, he was an enforcer, which he says is "essentially a boxer on ice".

c) He fought between 80 and 100 times and accumulated nearly 500 penalty minutes as a result.

d) His hands would be so swollen from punching during a game that he would be unable to hold a pencil in school the next day. If he had a game that evening, he could not fit his hands into his gloves, so trainers would put his hands in buckets of ice to reduce the swelling.

e) He would receive hard punches to the head and often had several days of feeling “completely spaced out”. He sustained other more serious injuries, including breaking his orbital bone. While he deposed he saw a team doctor after that event, he typically did not receive medical attention after fights.

[24] Mr. Rylands deposed, among other things:

a) He played in the OHL for four years, starting in 1993 when he was 16 years old.

b) He played for three different teams (the Kingston Frontenacs, the Soo Greyhounds, and the Ottawa 67’s) in the OHL and fulfilled the “role” as an enforcer and fighter.

c) While at the training camp for the Kingston Frontenacs, he fought several times.

d) He was called up to play for a higher-level team and would almost always fight during one of the shifts he played.

e) In three years in the OHL, he accumulated 220 penalty minutes for fighting, which he estimates would be about 45 fights. He suffered significant injuries, including losing teeth and needing stitches. He experienced the following during and after fights: losing memory for hours, “seeing stars”, dizziness, ringing in his ears, and confusion.

[21] The defendants submit that the 14 affidavits they have filed in response to the certification application contain evidence refuting the plaintiff’s allegations. Four of those affidavits are from current or former players of a team in one of the defendants’ leagues (the “Defendants’ Players”).

[22] Specifically, with regard to the issues on this application, the defendants rely on evidence that supports the following three general propositions:

a) the CHL did not have a culture of fighting and violence;

b) there were very few players who would qualify as enforcers; and,

c) players showing signs of concussions were not allowed to play.

[23] The Defendants’ Players’ affidavits have common features. In very similar wording, the Defendants’ Players depose:

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a) They were never told to fight by coaches, trainers, or others working for the team.

b) To the extent the Players' affidavits say coaches encouraged players to fight, the Defendants' Players disagree, deposing that was not their experience.

c) They never saw or heard coaches or trainers or others working for the team encourage players to fight or say players would be dropped from the team if they did not fight.

d) They never saw or heard of a coach or trainer allowing a player showing signs of a concussion to return to the game—rather, the player would have to clear the team's concussion protocol.

[24] One of the Defendants' Players, Nathan Thompson, is a current player in the AHL, and former player in both the WHL and NHL. He played with the plaintiff on the same team for one season and did not view Mr. McEwan as an enforcer. While not a party to any private conversations Mr. McEwan may have had, Mr. Thompson deposed he never saw anyone encourage Mr. McEwan to fight.

[25] Mr. Thompson also deposed that he never played with or against any enforcers in the WHL, although he did in the NHL.

[26] The defendants also rely on statistical evidence. They contend that evidence indicates that there have been very few players who would qualify as an enforcer since the 1990s, let alone a sufficient number to make true Mr. McEwan's statement in his affidavit that "[e]very team in the WHL had at least one enforcers [sic]". The other Players' Affidavits also contained statements suggesting there was an unofficial position on teams for an enforcer, or "boxer on ice".

B. The Pleadings

[27] The defendants' submissions must be considered in light of the claims as described in the pleadings. The following extracts from the amended notice of civil claim (the "ANOCC") are relevant to the particular issues in this application.

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[28] The legal basis set out set out in Part 3 of the ANOCC includes the following:

> 3. The plaintiff also pleads that the Defendants acted jointly in furtherance of a common design to create a culture of on ice assault in amateur hockey and failed to take appropriate steps to stop this culture to prevent injuries to the player sunder [sic] their care.

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[29] The following portions of the Statement of Facts from Part 1 of the ANOCC are particularly relevant to the assertion that there existed a culture of fighting:

> 48. Fighting between players during CHL games occurs and continues to occur in all three leagues of the CHL.
>
> …
>
> 50. In 2012, it was reported that there was a “slight increase” in concussions since the last Annual General Meeting, even with the implementation of the “Seven Point Plan”.
>
> …
>
> 62. …the Defendants have sought to align their rules regarding fighting in the CHL with established practices in the adult professional hockey league, the NHL, where fighting has long existed.
>
> 63. In adopting rules which permit, tolerate or insufficiently deter fighting and violence in an amateur youth hockey league, or in failing to insist upon a proper interpretation and enforcement of rules that would prevent fighting and violence, the Defendants have acted negligently.
>
> …
>
> 68. The Defendants approach to rules regarding fighting, violence and injury prevention in amateur youth hockey is deficient in at least five respects [explained in paras. 69–77].
>
> …
>
> 78. The Defendant have long known that young players like the plaintiff have occupied the role of “enforcer” within their leagues. …
>
> 79. The Defendants have had the responsibility and power to end this culture of enforcers. They have negligently failed to do so.
>
> …
>
> **Negligence**
>
> 123.The Plaintiff’s and the Class Members’ injuries were caused or contributed to by the negligence and or breach of statutory duty of the CHL, their employees, servants and agents, singularly or in combination, the particulars of which include:
>
> > …
> >
> > f) Promoting and or glorifying increased violence between players including but not limited to fighting;

> 124. The Plaintiff's and the Class Members' injuries were caused or contributed to by the negligence and or breach of statutory duty of the WHL, OHL and QMJHL; their employees, servants and agents, singularly or in combination, the particulars of which include:
>
> …
>
> i) Promoting or glorifying violence by and between the players, …
>
> …
>
> 125. The Plaintiff's injuries were caused or contributed to by the negligence or breach of statutory duty of Hockey Canada; their employees, servants and agents, singularly or in combination, the particulars of which include:
>
> …
>
> g) promoting and or glorifying violence between players including but not limited to fighting.
>
> …
>
> 130. The CHL, WHL, OHL and QMJHL breached their fiduciary obligation to the players in regard to the provision of proper educational, medical and professional support services, the particulars of which include (inter alia):
>
> …
>
> e) Glorifying and encouraging conduct and culture which perpetuated and exacerbated the incidence, concealment, negative stigma, and lack of treatment related to concussive and sub concussive injuries, reduced the likelihood of diagnosis or treatment; …

C. The Parties' Positions

[30] The defendants agree the Court will not be deciding at certification whether or not there was a culture of fighting in the CHL. Instead, the issue is whether the plaintiff establishes some basis in fact that the allegations form common issues, and that such commonality, among other factors, makes a class proceeding the preferred procedure for resolution.

[31] The defendants submit the evidence from the players reveals an evidentiary conflict on a pivotal issue. They contend the central allegation advanced by Mr. McEwan is that there was a "culture" of fighting and violence.

[32] The defendants submit that Mr. McEwan relies on this allegation, combined with the allegation of insufficient medical care related to concussions, to assert the claim that players suffered personal injuries entitling the proposed class to damages. In this way, the defendants submit the allegation about the culture of fighting is the

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foundation for the plaintiff's theory of commonality, making it also relevant to key issues such as determining the preferable procedure, class size, and the suitability of Mr. McEwan as a representative plaintiff. Therefore, allowing cross-examination will adduce evidence that will assist the Court in its determination of how the plaintiff and other Players "came to fight, who encouraged them to fight and to what extent their story can be generalized to other players".

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[33] The plaintiff challenges the defendants' assertion that cross-examination will assist the Court. The plaintiff submits he has already provided evidence giving details as to the position the affiants had on various teams and descriptions of the culture and pressures they experienced. Because the evidentiary threshold at certification is low, the plaintiff submits further evidence will not be helpful, and therefore cross-examination is unnecessary.

[34] The plaintiff submits the following comments from the RFJ apply equally to the issue on this application:

> [126] …The plaintiff adduces the evidence to establish some basis in fact for the claim to proceed as a class action. Whether or not someone actually did say or do anything to praise fighting is not being decided at this stage. Similarly, it is not my task at this stage to test the credibility or reliability of a player's feeling commended.
>
> …
>
> [131] I repeat that at certification, the issue is whether those statements, together with the rest of the record, are sufficient to establish a basis in fact to proceed as a class action. The credibility, reliability, and weight attached to these opinions will be an issue at trial, not at certification.

[35] I agree those comments are applicable, although the context in which they were made is different in that there is now a full record.

[36] The issue at certification will be whether there is "some basis in fact" to be satisfied that all of the criteria set out in s. 4(1) of the *Class Proceedings Act* have been met. Key to the defendants' position is s. 4(1)(c), which sets out the requirement that the plaintiff establish some basis in fact that the "claims of the class members raise common issues".

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D. Analysis

[37] I am not persuaded that the defendants have identified conflicts in the evidence germane to certification. Instead, they point to conflicting evidence on matters that would be decided at trial.

[38] Although they acknowledge no factual findings can be made at certification, the logic of their position inevitably leads to a weighing of the evidence, which is not permissible. They argue that evidence adduced during cross-examination will be helpful to commonality, but in reality, they are asking this Court to completely discount the Players' statements that there was a culture of fighting in the defendants' leagues. That finding cannot be made before trial.

[39] More importantly, it is not clear to me that the plaintiff's assertions about the culture of fighting is as pivotal to the claim as the defendants contend. That is because even if there was a culture of fighting in any of the leagues (a matter on which I express no opinion), that would not resolve the central allegations of negligence or breach of fiduciary duty. The court would still need to analyze the issue of causation, which will probably be complex. Equally, it is too early in this litigation to know whether the failure of the plaintiff to convince the court at a trial that a culture of fighting existed would necessarily be fatal to their claim. Therefore, I do not agree that adducing further evidence through cross-examination on that issue will be helpful at certification.

[40] Added to this is the inherently broad nature of the phrase "culture of fighting"; it is amenable to many interpretations. Presumably, at trial the parties will point to objective facts and ask the Court to draw inferences from those facts in support of their position. As illustrated by the affidavits made by players filed in support of the plaintiff and the defendants, people can have different impressions and come to opposing conclusions even if they witnessed the same or very similar events. It is not clear to me how cross-examination on that issue at this stage would assist in determining whether the matter should be certified.

[41] I also find allowing cross-examination would unduly delay the progress of this litigation.

[42] With regard to the disputed evidence about whether players showing signs of concussion were allowed to continue to play, that is likely to be a controversial issue at trial. It would be premature to weigh or consider the validity of the evidence on that point prior to trial. Nor am I persuaded that further evidence relevant to that topic adduced through cross-examination would assist with the determination of whether to certify the action.

[43] I cannot make any determination of whether players were or were not allowed to continue playing if they showed signs of concussion before trial. All that will be considered is whether the plaintiff has established some basis in fact to certify the claim of negligent attention to concussion symptoms. Even if I were to determine that he has done so (a point on which I express no opinion), that does not mean he would succeed at trial at establishing that there was widespread neglect to concussion symptoms.

[44] For all those reasons, I dismiss the defendants' application to cross-examine the Players.

IV. CROSS-EXAMINATION OF THE EXPERT

[45] The defendants seek to cross-examine Dr. Arthur-Banning. His expert report is titled "Professional Standards and Best Practices for an Amateur Sporting League such as the Canadian Hockey League with Respect to Injury Prevention" and is dated February 10, 2021. The report was summarized in the RFJ:

> [174] Dr. Arthur-Banning describes his educational background at paragraph 1 of his affidavit (he also includes a 20-page *curriculum vitae* in an appendix to his report). He is currently a professor within the Department of Parks, Recreation and Tourism Management at Clemson University in Clemson, South Carolina, where he has been teaching Amateur Sport Management since 2005. He has a Ph.D. from the University of Utah in Amateur Sport Management, an M.Sc. (with Sports Medicine emphasis) from Oregon State University, and a Bachelor of Physical Education (Honours) from Brock University.
>
> [175] He describes his professional qualifications at page 6 of his report. He has studied amateur sports ethics, behaviour and programming for 15 years and has published over 40 peer-reviewed journal publications or book chapters related to amateur sport. He is the co-author of "Recreational Sport Management: Program Design and Delivery", a book published in 2015, which was developed to help readers understand how to design, deliver, and

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manage recreational sports programs regardless of setting. He has edited two other books relating to amateur sport.

[176] The report itself has four sections. Section 1 has a summary of his qualifications and an executive summary of the report itself. Section 2 is a general summary of literature addressing professional standards and best practice for amateur youth sports organizations in protecting athlete safety. In reviewing this literature, Dr. Arthur-Banning states that the literature identifies three categories of responsible action related to injury reduction: education, policy, and rules. He also discusses the “hierarchy of responsibility” for protecting athlete safety which suggests governments bear the most responsibility, followed by sport organizations, coaches and teachers, parents, and finally, the athletes. He also references literature that suggests sports organization ought to have policies in place regarding management of concussion and to encourage good sportsmanship to reduce violence.

[177] Section 3 is a summary of literature addressing professional standards and best practices for protecting athlete safety specific to hockey. In this section, he refers to a number of studies, including those done before and after implementation of rules forcing players to wear face masks, and imposing penalties related to misuse of sticks. Both rules were adopted for the purpose of reducing facial injuries. He suggests those rule changes resulted in a significant decrease in eye injuries. Similarly, he comments on a study which look at the efficacy of implementing a rule preventing checking from behind. He cites studies addressing issues relating to concussion, including those commenting on measures taken (or not taken) to address concussion and injuries from body checking. He also comments on studies that looked at fighting specific to various hockey organizations.

[178] Section 4 contains his opinion about the responsibilities of the CHL for teenage players. Specifically, he opines the that the “CHL has repeatedly failed to alter their stance on fighting in their affiliated leagues, thus allowing for greater potential for athlete injury”. He opines the following changes should be instituted:

> a) Aligning the rules for fighting to more closely align with other amateur sports organization with at least suspensions from that game and likely an additional game.
>
> b) Assuming that a player who engaged in a fight received a blow to the head leading to at least a suspicion of the possibility of a concussion, and allowing a trained medical professional to assess the athlete before he returns to play.
>
> c) Additional training for athletes, coaches, officials, administration, billet families, and biological families around concussion, the culture of violence, and how to play in a safe manner, including signs and symptoms of head injuries and concussion, dangers of second impact syndrome, and other issues.

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A. The Defendants' Evidence

[46] In addition to the Defendants' Players' affidavits, the defendants rely on 11 affidavits filed in response to the certification application. Four of the affiants are people who hold positions with the defendant CHL or its constituent leagues.

[47] Dan MacKenzie is the President of the CHL. Among other things, he deposed the following:

a) He took issue with the comparison of the leagues that comprise the CHL with other "amateur" youth hockey leagues because, in his view, players in the CHL are "the best in Canada and arguably the best in the world" who have "devoted their lives to developing the skills to get them within shot of a career in the NHL".

b) He stated the allegation of negligent medical care omits to mention the following actions taken by the CHL since 2000:

   i. Implementing standard protocols for evaluation, treatment, and return-to-play of players suspected of concussions, in accordance with international standards;

   ii. Implementing mandatory education for coaches and players on the symptoms and risks of concussion

   iii. Providing teams with access to neurological experts for general advice and consultation on specific cases.

c) The CHL and the leagues that comprise it are separate entities. As such, the CHL has "no role in hockey operations for the Leagues, nor has it ever had any material control over the Leagues". The CHL is unable to make or modify the leagues' playing rules, although he goes on to explain one theoretical exception.

d) Each league sets the parameters by which hockey is played in that league, but the leagues have no effective control over fighting, violence, and concussion management because those issues are controlled by the

teams in each league. The leagues do not “unilaterally impose” responsibility for playing rules and policies on the teams.

e) The corporate structures of teams within each league are very different, as is the manner in which they run their operations and how they approach winning hockey games. Accordingly, the teams have their own control over major aspects of how games are played.

f) He disagrees with Dr. Arthur-Banning’s opinion that little has been done to change rules around fighting, and he includes a non-exhaustive list of rules regarding fighting over the years.

g) Each league also imposes its own policies with regard to player safety.

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[48] Each of the following affiants adopted as accurate those portions of Mr. MacKenzie’s affidavit that describe the CHL, Hockey Canada, and its constituent leagues with regard to: (i) the relationships between the entities, and; (ii) the constituent leagues’ operations, teams, players, playing rules, policies and relationships with other leagues:

a) Gilles Courteau, who has been Commissioner of the Quebec Major Junior Hockey League (“QMJHL”) since 2000, and President of the QMJHL since 1986. He has also been a Vice-President of the CHL since 1986.

b) Ron Robison, who has been Commissioner of the WHL and a Vice-President of the CHL since 2000. He held senior management positions with Hockey Canada between 1981 and 1997, including serving as President between 1992 and 1994.

c) David Branch, who has been Commissioner of the OHL since 1979 and was President of the CHL from 1996 to 2019. From 1977–1978 he was Executive Director of the Canadian Amateur Hockey League, which was the recognized national sport governing body for amateur hockey in Canada from 1914 to 1994 when it merged with the CHL.

[49] Additionally, the defendants rely on affidavits filed by the following:

a) Michael Czarnota, who is the Neuropsychology Consultant for the OHL, WHL, and the QMJHL. He deposed that he has been working continuously with the constituent leagues of the CHL for about 25 years. In 2001, he first proposed the implementation of a league-wide protocol for the evaluation and management of concussions to the OHL. He said at that time the science regarding causes, effect, and treatment of concussions was developing and changing very quickly. He describes that his main job in the WHL and OHL has been to maintain league-wide standards for the education, evaluation, and management of concussions, referred to as the concussion program, which has as a key element the standardization for how teams must evaluate and manage concussions. In addition, under the concussion program, Mr. Czarnota compiled data relating to concussions suffered in the leagues by:

   i. collecting baseline data on players' pre-injury cognitive and physical conditions to use as a reference point for suspected concussions and subsequent recovery; and

   ii. concussion tracking by having the athletic therapists alert Mr. Czarnota on concussion occurrences and provide regular updates as well as data inputs in a standard document. In relation to this litigation, he provided counsel with concussion data from the start of the 2011–2012 season through the 2021–2022 season (the "Concussion Data").

b) Phillipe Fait has been Chief Therapist for QMJHL since 2007, but stated he has been working continuously with the league for 21 years. As Chief Therapist, his role is to develop and maintain league-wide injury management protocols consistent with international standard and current research. In 2007, he proposed that the league adopt a standard set of protocols for the treatment and management of neurological injuries and certain catastrophic injuries. In his affidavit he describes that protocol and subsequent refinements to it.

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c) Anil Kona, Director of DCube Data Sciences Corp. ("DCube"), which was retained to perform services services designed to anonymize data because of concerns around player privacy on the following two sets of data provided to it by the defendants:

  i. "Game data" representing a complete and accurate record of goals, assists, and penalties for individual players in the games in which they played, as well as number codes for player names, dates and teams; and

  ii. "Concussion Data".

[50] The defendants also rely on expert reports prepared by:

a) Lisa Brenner, a professor and rehabilitation psychologist, who specializes in physical medicine and rehabilitation, as well as psychiatry and neurology with a specific emphasis on traumatic brain injury assessment, treatment, and research.

b) Mark Lovell, an academic and neuropsychology practitioner, who has been continuously involved with concussion research and clinical care since 1986 with an emphasis on concussion in sport.

c) Marthinus Laurentius Marais, proffered as an expert in mathematical and statistical analysis, including the analysis of data using statistical methods used in, or drawn from, fields of biostatistics and epidemiology.

B. Analysis

[51] The defendants submit that Dr. Arthur-Banning's report is the only direct evidence filed by the plaintiff that speaks to the existence of a duty of care and the content of the standard of care (the plaintiffs do not accept that proposition).

[52] In the RFJ, I ruled Dr. Arthur-Banning's report admissible, noting "whether it will be persuasive, and how much weight should be attached to it, are separate issues to be addressed later": para. 199. The defendants allege the weight of the report is now "starkly in issue".

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[53] The defendants raise five specific topics on which they assert they are entitled to cross-examine Dr. Arthur-Banning in order to assist the Court on certification:

a) Dr. Arthur-Banning opines that the defendants did little to change rules about fighting, and in contrast to other leagues, their rules encourage violent acts. The defendants submit the evidence they have filed conflicts with those opinions. Specifically, they contend their evidence confirms that:

   i. there is no common culture of fighting and violence in the CHL;

   ii. numerous changes have been made to playing rules in the leagues to restrict fighting, and

   iii. until recently, rules of fighting largely aligned with other comparable hockey leagues.

b) Dr. Arthur-Banning opined that by the 1990s, the defendants ought to have required players to be assessed for concussion following a fight, and ought to have provided additional training to players and coaches on concussions. The defendants claim their evidence, including the expert evidence, confirms among other things, that:

   i. the earliest they could reasonably have been expected to take steps was in the mid-2000s;

   ii. the concussion protocols in place exceed the medical standard of care; and

   iii. there is no recognized recommendation for players to be medically assessed for a concussion following a fight.

c) The defendants challenge Dr. Arthur-Banning’s statement that players may continue to experience lifelong neurological impairments from head trauma. In support, they rely on the expert evidence from Ms. Brenner, which addresses the difficulties in linking current neurological symptoms

with concussive and sub-concussive impacts that occurred years or decades earlier.

d) Ms. Brenner also critiques Dr. Arthur-Banning's report for other issues. In her view his research methodology was flawed. Specifically, she challenges the manner in which he chose which studies to rely on with regard to his opinion.

e) The defendants allege Dr. Arthur-Banning's statement that the CHL prioritized entertainment and violence over safety has no factual basis and is contradicted by evidence from Mr. Czarnota and Mr. Fait.

[54] The defendants argue that "if Dr. [Arthur-Banning's] opinion is to be given any weight at all, cross-examination is required", given the evidence they have adduced. In support of their position, they submit that the RFJ "expressly contemplated" cross-examination in stating that "cross-examination of Dr. Arthur-Banning will impact the weight attached to his report": para. 211.

[55] I do not agree. The statement relied upon by the defendants is part of the following full sentence from RFJ at para. 211, "It may be that other evidence or cross-examination of Dr. Arthur-Banning will impact the weight attached to his report, but at this stage, I find that the report is clearly relevant to the issues at certification, and has a baseline reliability" (emphasis added).

[56] The issue in the RFJ was the admissibility of the report, and it is in that context the statement relied upon by the defendants was made. To put the sentence in the proper context, I reproduce the following:

> [209] The defendants submit that the expert report is based on "novel" science because Dr. Arthur-Banning comments on a subject that is not a "recognized discipline" or subject of meaningful quality assurance measures. I do not accept that position. Dr. Arthur-Banning is not purporting to offer an opinion on novel science; he is describing existing literature addressing a possible relationship between various sports management regimes and injury prevention, which the plaintiff wants to rely on to inform the standard of care. The idea that past practices (rules, policies, and education) and results may be helpful to a court to determine what is the appropriate standard of care does not fall into the category of "novel science".

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> [210] The plaintiff points out that the issue must be analyzed with reference to the question asked of the expert. He submits that the question about professional standards and best practices for amateur youth sporting leagues is a question of sports governance that is directly relevant to the case. He intends to rely on it as providing some basis in fact to support the existence of common issues and proposed issues that could constitute the class action. The plaintiff submits that the expert provides the court with an overview of education policies and rules used by comparable sport leagues to reduce injuries caused by fighting. The plaintiff submits that this provides comparative evidence to give a preview of how common issues at trial could work and what type of standard of care analysis may be necessary.
>
> [211] I agree, and find that reasoning sound. It may be that other evidence or cross-examination of Dr. Arthur-Banning will impact the weight attached to his report, but at this stage, I find that the report is clearly relevant to the issues at certification, and has a baseline reliability.

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[57] More generally, there are two other flaws with the defendants' position.

[58] First, the defendants suggest the contradictions they have identified between their evidence and some of Dr. Arthur-Banning's opinions might lead to the Court to place no weight on his report. This mischaracterizes the task at certification. The defendants' logic would require me to place "no weight" on his report *because I prefer their evidence*. That is not an appropriate undertaking for certification, especially with regard to expert evidence: *Pro-Sys* at para. 126.

[59] I emphasize that admitting Dr. Arthur-Banning's report and not allowing cross-examination does not inevitably lead to a conclusion that the plaintiff will succeed on certification. Certification is not an examination of the merits of the plaintiff's claim, nor does it involve the weighing or testing of the evidence.

[60] Second, there is an inherent illogic in the defendants' position. They have identified what they say are deficiencies, omissions, and flawed reasoning in Dr. Arthur-Banning's report, and it is on those topics they propose to question him. Cross-examination would adduce more evidence from him on those topics. The only way in which the defendants suggest this additional evidence would be helpful is to support their position that his report be completely discounted. However, there is always the possibility that some of his answers might actually enhance the plaintiff's case. Regardless, cross-examination is not for the purpose of adducing new

opinions. Unless I were to engage in assessing the credibility and reliability of Dr. Arthur-Banning's opinions by weighing it against the defendants' evidence, it is not clear to me how evidence obtained from cross-examination would be helpful at this stage.

[61] To a very large extent, the defendants' position with regard to cross-examining Dr. Arthur-Banning fails for the same reasons I dismissed the application to cross-examine the Players.

[62] For all those reasons, I dismiss the application to cross-examine Dr. Arthur-Banning on his report.

V. CONCLUSIONS

[63] The defendants' application is dismissed.

[64] I end by expressing to Mr. McEwan, the defendants, and counsel my regret at the length of time it has taken to render this judgment due, in large part, to my taking medical leave earlier this year.

"Sharma J."

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