

CITATION: Berg v. Canadian Hockey League, 2024 ONSC 1573  
COURT FILE NO.: CV-14-514423CP  
DATE: 20240315

ONTARIO  
SUPERIOR COURT OF JUSTICE

BETWEEN: )

SAMUEL BERG )

Plaintiff )

– and – )

*Theodore P. Charney, Devra Charney, Steven  
Barrett, James K. McDonald, Jody Brown, and  
Joshua Mandryk, for the Plaintiffs*

CANADIAN HOCKEY LEAGUE, )  
ONTARIO MAJOR JUNIOR HOCKEY )  
LEAGUE, ONTARIO HOCKEY LEAGUE, )  
WESTERN HOCKEY LEAGUE, QUEBEC )  
MAJOR JUNIOR HOCKEY LEAGUE INC., )  
WINDSOR SPITFIRES INC., LONDON )  
KNIGHTS HOCKEY INC., BARRIE COLTS )  
JUNIOR HOCKEY LTD., BELLEVILLE )  
SPORTS AND ENTERTAINMENT CORP., )  
ERIE HOCKEY CLUB LIMITED, JAW )  
HOCKEY ENTERPRISES LP, GUELPH )  
STORM LIMITED, KINGSTON )  
FRONTENAC HOCKEY LTD., KINGSTON )  
FRONTENACS HOCKEY CLUB, 2325224 )  
ONTARIO INC., MISSISSAUGA )  
STEELHEADS HOCKEY CLUB INC., )  
NIAGARA ICEDOGS HOCKEY CLUB )  
INC., BRAMPTON BATTALION HOCKEY )  
CLUB LTD., NORTH BAY BATTALION )  
HOCKEY CLUB LTD., GENERALS )  
HOCKEY INC., OTTAWA 67'S LIMITED )  
PARTNERSHIP, THE OWEN SOUND )  
ATTACK INC., PETERBOROUGH PETES )  
LIMITED, COMPUWARE SPORTS )  
CORPORATION, IMS HOCKEY CORP., )  
SAGINAW HOCKEY CLUB, L.L.C., 649643 )  
ONTARIO INC c.o.b. as SARNIA STING, )  
211 SSHC CANADA ULC o/a SARNIA )  
STING HOCKEY CLUB, SOO )  
GREYHOUNDS INC., McCRIMMON )  
HOLDINGS, LTD. and 32155 MANITOBA )  
LTD., A PARTNERSHIP c.o.b. as )  
BRANDON WHEAT KINGS., 1056648 )  
ONTARIO INC., REXALL SPORTS CORP., )  
EHT, INC., KAMLOOPS BLAZERS )

*Lisa Talbot for the Defendants*

HOCKEY CLUB, INC., KELOWNA )  
 ROCKETS HOCKEY ENTERPRISES LTD., )  
 HURRICANES HOCKEY LIMITED )  
 PARTNERSHIP, PRINCE ALBERT )  
 RAIDERS HOCKEY CLUB INC., )  
 BRODSKY WEST HOLDINGS LTD., )  
 REBELS SPORTS LTD., QUEEN CITY )  
 SPORTS & ENTERTAINMENT GROUP )  
 LTD., SASKATOON BLADES HOCKEY )  
 CLUB LTD., VANCOUVER JUNIOR )  
 HOCKEY LIMITED PARTNERSHIP, )  
 8487693 CANADA INC., CLUB DE )  
 HOCKEY JUNIOR MAJEUR DE BAIE- )  
 COMEAU INC., CLUB DE HOCKEY )  
 DRUMMOND INC., CAPE BRETON )  
 MAJOR JUNIOR HOCKEY CLUB )  
 LIMITED, LES OLYMPIQUES DE )  
 GATINEAU INC., HALIFAX )  
 MOOSEHEADS HOCKEY CLUB INC., )  
 CLUB HOCKEY LES REMPARTS DE )  
 QUEBEC INC., LE CLUB DE HOCKEY )  
 JUNIOR ARMADA INC., MONCTON )  
 WILDCATS HOCKEY CLUB LIMITED, LE )  
 CLUB DE HOCKEY L'OCEANIC 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., CLUB DE HOCKEY )  
 JUNIOR MAJEUR VAL D'OR INC., WEST )  
 COAST HOCKEY ENTERPRISES LTD., )  
 MEDICINE HAT TIGERS HOCKEY CLUB )  
 LTD., PORTLAND WINTER HAWKS, INC., )  
 BRETT SPORTS & ENTERTAINMENT, )  
 INC., THUNDERBIRD HOCKEY )  
 ENTERPRISES, LLC, TOP SHELF )  
 ENTERTAINMENT, INC., SWIFT )  
 CURRENT TIER 1 FRANCHISE INC., )  
 7759983 CANADA INC., LEWISTON )  
 MAINEIACS HOCKEY CLUB, INC., )  
 KITCHENER RANGER JR A HOCKEY )  
 CLUB, KITCHENER RANGERS JR "A" )  
HOCKEY CLUB, SUDBURY WOLVES )  
 HOCKEY CLUB LTD., GROUPE SAGS 7-96 )  
 INC., MOOSE JAW TIER ONE HOCKEY )  
 INC. DBA MOOSE JAW WARRIORS, )  
 KOOTENAY ICE HOCKEY CLUB LTD., )  
 LETHBRIDGE HURRICANES HOCKEY )

**CLUB, and LE TITAN ACADIE )  
 BATHURST (2013) INC./THE ACADIE )  
 BATHURST TITAN (2013) INC. )**

**Defendants )**

) **HEARD:** In writing

Proceeding under the *Class Proceedings Act, 1992* )

**PERELL, J.**

## **REASONS FOR DECISION**

### **A. Introduction**

[1] In September 2020, there was a joint hearing of the Superior Courts of Alberta, Ontario, and Québec with respect to the settlement of three interrelated class actions.

[2] The class actions concerned the employment status of major junior hockey players in the defendants' Ontario Hockey League (OHL), Western Hockey League (WHL), and Québec Major Junior Hockey League (QMJHL), all leagues under the umbrella of the defendant Canadian Hockey League (CHL). The Representative Plaintiffs alleged that the Class Members, who are amateur hockey players, were entitled but were not paid minimum wage and other standard employment benefits under provincial employment legislation.

[3] In the Ontario action, which has been certified under the *Class Proceedings Act, 1992*,<sup>1</sup> Samuel Berg is the Representative Plaintiff. Mr. Berg along with the Representative Plaintiffs in the two related class actions in Alberta<sup>2</sup> and Québec<sup>3</sup> respectively sought approval of a then \$30 million settlement of all the actions. The Plaintiffs also sought approval of the Distribution Protocol, approval of Class Counsels' fees, and honoraria for some of the Representative Plaintiffs.

[4] I declined to approve the settlement, which made the approval of the Distribution Protocol, the Class Counsels' fees, and the honoraria<sup>4</sup> moot, and those motions were dismissed.

[5] The major problem that stood in the way of approving the settlement was the matter of the Release. In my Reasons for Decision released on October 22, 2020,<sup>5</sup> I explained that but for the Release, I likely would have approved what might be described as an adequate result for the Class Members having regard to uncertain law, substantial litigation risks, and a tenacious and formidable opponent.

[6] However, the settlement could not be approved. What was required was a renegotiation of the Release provisions of the Settlement Agreement.

[7] The dismissal of the settlement approval motion was made without prejudice to the rights

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<sup>1</sup> S.O. 1992, c. 6.

<sup>2</sup> In Alberta, *Walter et al. v. Western Hockey League et al.*, Court File No. 1410-11912.

<sup>3</sup> In Québec, *Walter c. Ligue de Hockey Junior Majeur du Québec Inc. et al.*, Court File No. 500-06-000716-148.

<sup>4</sup> Class Counsel seeks honorariums of: (a) \$20,000 for Samuel Berg; (b) \$10,000 for Travis McEvoy; (c) \$10,000 for Kyle O'Connor; and (d) \$10,000 for Lukas Walter.

<sup>5</sup> *Berg v. Canadian Hockey League*, 2020 ONSC 6389.

of the parties to reapply for settlement approval. I directed that should the parties reapply with no change to the proposed Settlement Agreement other than a revision to the release, then the hearing shall proceed as a motion in writing.

[8] For reasons that I need not for present purposes relate, it has taken almost three-and-a-half years for the parties to return to the courts in Alberta, Ontario, and Québec for approval of the settlement and for approval of Class Counsel's fees and for honoraria for the Representative Plaintiffs.

[9] This time there is no joint hearing. The settlement is conditional on all three courts approving the settlement.

[10] For the reasons that follow, I approve the settlement including its distribution scheme for the Ontario class proceeding. If the other courts agree, then the settlement will end ten years of highly contested litigation and provide compensation for a class of approximately 4,286 amateur hockey players. I approve the Distribution Plan. I approve the Counsel Fee. I do not approve the honoraria.

## **B. Factual Background**

### **1. The Litigation**

[11] Originally in **2014**, there was just a single proposed class proceeding out of Ontario involving the CHL and the three leagues. In **October 2014**, regionally specific class actions in Alberta and Québec were commenced.

[12] Samuel Berg is a former player with the OHL and the Representative Plaintiff in the Ontario Class Action. Travis McEvoy and Kyle O'Connor are former players with the WHL and Representative Plaintiffs in the Alberta Class Action. Lukas Walter is a former player in the WHL and was the proposed Representative Plaintiff when the Alberta Class Action was commenced. Thomas Gobeil is a former player of the QMJHL and is the Representative Plaintiff in the Québec Class Action.

[13] Justice Robert Hall of the Alberta Court of Queen's Bench is case managing the Alberta action, *Walter v. Western Hockey League*. Justice Chantal Corriveau of the Québec Cour supérieure is case managing the Québec action, *Walter c. Ligue de Hockey Junior Majeur du Québec Inc.*

[14] Class Counsel in the three actions are the law firms of Charney Lawyers PC, Goldblatt Partners LLP, and Savonitto & Ass. Inc. The Alberta retainer, as amended by court order approving the fee agreement, provides for a fee of between 25-30% in the event of success. The Québec and Ontario retainers provide for a 30% contingency fee in the event of success.

[15] The OHL, WHL and QMJHL are Defendants that all operate under the umbrella of the CHL. The Defendants consist of all the Canadian hockey teams operating within the leagues.

[16] The Plaintiffs in the three actions collectively allege that the CHL, OHL, WHL, QMJHL and the Canadian teams in the respective leagues were employers of the Class Members and therefore the Class Members are entitled to employment benefits, including minimum wage and overtime pay. The allegations advanced in the respective Statements of Claim consist of: (a) Breach of Contract of Employment; (b) Breach of the Contractual Duties of Honesty, Good Faith

and Fair Dealing; (c) Breach of Statute; (d) Common Employer Doctrine; (e) Officers' and Directors' Liability; (f) Conspiracy; (g) Negligence; (h) Unjust Enrichment; and (i) Waiver of Tort.

[17] The Defendants delivered Statements of Defence in the Ontario and Alberta Class Actions. No Statement of Defence has been delivered in the Québec Class Action.

[18] The Defendants vigorously defended the Actions. There has not been a legally recognized obligation for owners in a similar position to the Defendants to treat the players on their teams and on whose behalf the Actions were brought as employees under employment standards legislation. The Defendants denied that the Class Members were employees and took the position that: (a) the relationship between the Plaintiffs and Defendants was one of guidance, supervision, development and education; (b) the Plaintiffs were amateur athletes and not employees; (c) as an alternative to any employment relationship, the Plaintiffs were trainees or interns; and (d) the Defendants provided or offered valuable goods and services to the Class and any damages must be offset by the benefits provided by the Defendants. The Defendants denied any conspiracy.

[19] The Ontario Class Action was certified on April 27, 2017.<sup>6</sup> I did not, however, certify the fraud and conspiracy cause of action. Both parties appealed the certification decision. On April 3, 2019, the Divisional Court granted the Plaintiff's appeal in respect of the conspiracy cause of action and denied the Defendants' motion for leave to appeal certification.<sup>7</sup>

[20] Meanwhile, the Alberta Class Action was certified on June 15, 2017<sup>8</sup> and on May 15, 2018 the Alberta Court of Appeal dismissed the Defendants' appeal from certification.<sup>9</sup>

[21] The Québec Class Action was authorized on June 13, 2019.

[22] From the commencement of the litigation, the Defendants engaged in lobbying campaigns to exempt major junior players from applicable employment standards legislation. The lobbying was successful. Between 2014 and 2020, in all the provinces in which the CHL operates, the provinces amended the employment standards legislation. The Defendants took the position that the amendments did not create a new exemption but rather confirmed that they were never employers and that the state of the law was always that amateur hockey players are not employees.

[23] During the course of the litigation, the Representative Plaintiffs were seriously discomfited by: criticism and ostracism by family and friends; online and social media messages including criticisms, threats, and insults; a rant by Don Cherry on national TV; and ostracism from the wider hockey community.

[24] On **February 10 and 11, 2020**, Joel Wiesenfeld, an experienced mediator, presided at settlement negotiations. The mediation resulted in Minutes of Settlement and ultimately a Settlement Agreement. The Minutes of Settlement provide for a lump sum all-inclusive payment of \$30 million to settle all three actions.

## **2. The Settlement and Distribution Plan**

[25] The \$30 million Settlement Agreement, which includes a distribution protocol, was

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<sup>6</sup> *Berg v. Canadian Hockey League*, 2017 ONSC 2608.

<sup>7</sup> *Berg v. Canadian Hockey League*, 2019 ONSC 2106 (Div. Ct.).

<sup>8</sup> *Walter v. Western Hockey League*, 2017 ABQB 382.

<sup>9</sup> *Walter v. Western Hockey League*, 2018 ABCA 188.

executed on **March 31, 2020**, and is subject to court approval in all three jurisdictions.

[26] Effective November 2, 2024, \$3,153,940 in interest will have been earned, bringing the total settlement fund from \$30 million to \$33,153,940.

[27] As set out in the chart below, after all deductions, the net settlement fund is estimated to be approximately \$19.8 million.

NET CLAIM FUND CALCULATION	
GROSS SETTLEMENT	\$33,153,940.00
Contingency fee	\$9,946,182.00
Credit to class from cost awards	\$725,995.42
Contingency fee after cost credit	\$9,220,186.58
Taxes on fee	\$966,856.38
Disbursements (inclusive of taxes and CPF reimbursement)	\$521,767.55
TOTAL FEE	\$10,708,810.51
Estimated Administration Expenses	\$143,671.00
SETTLEMENT SUBTOTAL	\$22,301,458.49
CPF Levy 10% of 1/3 SETTLEMENT SUBTOTAL (estimated)	\$743,381.95 <sup>10</sup>
BP GPL Levy (estimated)	\$1,744,277.00
Honoraria	\$50,000.00
NET CLAIM FUND	\$19,763,799.54

[28] It may be noted that Class Counsel's fee request is \$9.2 million (30% of the \$33.1 million Settlement Fund) less a fee credit to the class of \$725,995.42, plus disbursements and applicable taxes.

[29] For the purposes of the Distribution Protocol, the Class has been divided into three groups: (a) regular players; (b) affiliate players;<sup>11</sup> and (c) players who signed a National Hockey League (NHL) contract. Regular Players form the bulk of the Class. Anyone who has signed an NHL contract is not eligible to make a claim.<sup>12</sup> Thus, the Class is divided as follows:

League	Affiliate Players	Regular Players	Total Class Size
OHL	273	1,175	1,448

<sup>10</sup> In the Ontario Class Action, Class Counsel have received funding from the Class Proceedings Fund in accordance with the provisions of the *Law Society Act* and its regulations. The Fund funded a total of \$111,469.14 in disbursements. The Fund is entitled to 10% of the benefits payable to Class Members, net of Class Counsel's legal fees, disbursements, and applicable taxes. The Fund also paid a costs award in favour of the US defendants in the amount of \$206,597.26, which the Class is not required to repay.

<sup>11</sup> An affiliate player is a player called up from a lower league to play up to a maximum of five games with a team in the major junior league. An affiliate player who does not become a regular player and returns to the lower leagues.

<sup>12</sup> Of the total Class, counsel estimates that approximately 163 to 232 of the Class Members have signed NHL contracts.

WHL	214	922	1,136
QMJHL	322	1,380	1,702
TOTAL	809	3,477	4,286

[30] Important elements of the settlement and the distribution plan include the following:

- a. The settlement is a lump sum for all three class actions, which are combined for the purpose of the Distribution Plan.
- b. Regular Players form the bulk of the Class.
- c. Class Members will be compensated based on their duration of time on a Defendant team.
- d. The value of a season will be determined by the total number of seasons claimed by the Class Members.
- e. Compensation will be calculated based on the player roster records held by the Defendants without the need for individual proof from Class Members or a contested claims process.
- f. Regular Player Class Members who make a claim will be guaranteed to receive compensation of at least a ¼ season and all Affiliate Players will receive minimum compensation of \$250.
- g. The share of the settlement funds available to the individual Class Members will depend on the take-up rate. Based on Class Counsel's combined experience in claims administration, the take-up rate is anticipated to be between 45% to 65%.
- h. Based on the Settlement and distribution protocol, there will be no residue as the Class Members will share the entire settlement amount minus fees, disbursements, taxes and levies.

[31] For comparison purposes, Class Counsel estimated that the average hockey career was 2.34 seasons and assuming that the class action was successful after trial, the average hockey player would recover: (a) \$14,835 based on a 20-hour employment per week; (b) \$25,961 based on a 35-hour employment per week; and (c) \$34,120 based on a 46-hour employment per week. In comparison, the average hockey player would recover \$12,133 based on a 45% take-up or \$8,381 based on a 65% take-up.

[32] Class Counsel gave a strong recommendation that the settlement should be approved.

[33] The Representative Plaintiffs were fully engaged throughout the litigation, and they recommend that the settlement be approved.

[34] Class Counsel retained RicePoint to conduct the claims administration services in English and French. The estimated notice procedures and forms administration cost is between \$121,000 to \$141,151 depending on the take-up rate, plus \$2,520 for call centre support.

### **3. Funding Agreements and Levies**

[35] In the Ontario Class Action, Class Counsel have received funding from the Class

Proceedings Fund in accordance with the provisions of the *Law Society Act*<sup>13</sup> and its regulations.

- a. The Fund funded a total of \$111,469.14 in disbursements.
- b. The CPF is entitled to 10 percent of the benefits payable to Class Members, net of Class Counsel's legal fees, disbursements, and applicable taxes.

[36] In the Alberta Class Action, Class Counsel received funding from Bridge Point GLS) in accordance with the financing and indemnity agreement approved by Justice Martin

[37] For the purposes of calculating the amounts owing to funders, the \$30 million settlement was notionally divided into three equal amounts of \$10 million, a calculation agreed to by each of the funders. With the addition of accrued interest, the anticipated approximate amounts owing to the Fund and to Bridge Point are: (a) levy to the fund, \$743,381.95; (b) debt to Bridge Point, \$1,744,277.00

[38] No indemnity or funding is sought for the Québec class action from the *Fonds d'aide aux actions collective*.

[39] For class members in the Québec class action, a percentage of each valid liquidated claim will be withheld by the *Fonds d'aide* ranging from: (1) 2% from any liquidated claim less than \$2,000; (2) 5% from any liquidated claim exceeding \$2,000 but less than \$5,000; and (3) 10% from any liquidated claim exceeding \$5,000.

[40] This withholding will be done directly by the Administrator for the benefit of the *Fonds d'aide* before sending the cheque to the Québec Class Action's members.

#### **4. The Fee**

[41] The Retainer Agreement provides for a 30% contingency fee and that disbursements and taxes will be paid out of any settlement fund.

[42] The docketed time and value at regular hourly rates spent up to August 24,2020 by each of the three firms involved is:

<b>Class Counsel</b>	<b>Time</b>	<b>Total Value</b>
<b>Goldblatt</b>	3,189.50 hours	\$1,557,132.50
<b>Charney</b>	7,321.06 hours	\$3,269,276.50
<b>Savonitto</b>	1,368,75. hours	\$361,214.00
<b>TOTAL</b>	11,879.31 hours	\$5,187,623

[43] Québec Class Counsel's share of the joint fee will be approximately \$1.2 million plus taxes

<sup>13</sup> R.S.O. 1990, c. L.8.



and disbursements.

## **5. Honorarium**

[44] Class Counsel seeks honoraria payments for the Plaintiffs in Ontario and Alberta. Class Counsel seeks honorariums of: (a) \$20,000 for Samuel Berg; (b) \$10,000 for Travis McEvoy; (c) \$10,000 for Kyle O'Connor; and (d) \$10,000 for Lukas Walter in the WHL proceeding.

[45] I was not advised what their respective recovery is as a Class Members.

[46] Representative Plaintiffs in Québec class proceedings are not permitted to receive honorariums.<sup>14</sup>

## **C. Settlement Approval**

[47] Section 27.1 (1) of the *Class Proceedings Act, 1992*, provides that a settlement of a class proceeding is not binding unless approved by the court. To approve a settlement of a class proceeding, the court must find that, in all the circumstances, the settlement is fair, reasonable, and in the best interests of the class.<sup>15</sup>

[48] In determining whether a settlement is reasonable and in the best interests of the class, the following factors may be considered: (a) the likelihood of recovery or likelihood of success; (b) the amount and nature of discovery, evidence or investigation; (c) the proposed settlement terms and conditions; (d) the recommendation and experience of counsel; (e) the future expense and likely duration of the litigation; (f) the number of objectors and nature of objections; (g) the presence of good faith, arm's-length bargaining and the absence of collusion; (h) the information conveying to the court the dynamics of, and the positions taken by, the parties during the negotiations; and (i) the nature of communications by counsel and the representative plaintiff with class members during the litigation.<sup>16</sup>

[49] The case law establishes that a settlement must fall within a zone of reasonableness. Reasonableness allows for a range of possible resolutions and is an objective standard that allows for variation depending upon the subject-matter of the litigation and the nature of the damages for which the settlement is to provide compensation.<sup>17</sup> A settlement does not have to be perfect, nor is it necessary for a settlement to treat everybody equally.<sup>18</sup>

[50] With the matter of the release, which was the major obstacle to the approval of the settlement 3.5 years' ago, now removed, the proposed settlement should be approved. It is a good

<sup>14</sup> Article 593 *Code of Civil Procedure*, CQLR c C-25.01

<sup>15</sup> *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 43 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 57 (S.C.J.).

<sup>16</sup> *Kidd v. Canada Life Assurance Company*, 2013 ONSC 1868; *Farkas v. Sunnybrook and Women's Health Sciences Centre*, [2009] O.J. No. 3533 at para. 45 (S.C.J.); *Fantl v. Transamerica Life Canada*, [2009] O.J. No. 3366 at para. 59 (S.C.J.); *Corless v. KPMG LLP*, [2008] O.J. No. 3092 at para. 38 (S.C.J.).

<sup>17</sup> *Dabbs v. Sun Life Assurance Company of Canada* (1998), 40 O.R. (3d) 429 (Gen. Div.); *Parsons v. Canadian Red Cross Society*, [1999] O.J. No. 3572 at para. 70 (S.C.J.).

<sup>18</sup> *McCarthy v. Canadian Red Cross Society* (2007), 158 ACWS (3d) 12 at para. 17 (Ont. S.C.J.); *Fraser v. Falconbridge Ltd.*, [2002] O.J. No. 2383 at para. 13 (S.C.J.).

settlement. The litigation risk was extraordinarily high because there was a strong prospect that the Class Members would be found outside of the employment statutes that were the core of the claims against the Defendants. The Defendants also had other defences.

[51] If liability was not established, there was no middle ground. Moreover, even if the Representative Plaintiffs were successful at the common issues trial, the calculation of individual damage assessment would have been difficult and prolonged. There was uncertainty about what counted as hours of work; for example, is hockey practice work? The settlement found middle ground that was fair to both sides.

[52] The settlement in the immediate case is without doubt fair, reasonable, and in the best interests of all of the Class Members.

[53] I approve the Settlement and the Distribution Plan.

#### **D. Fee Approval**

[54] Section 32 (2) of the *Class Proceedings Act, 1992* stipulates that an agreement respecting fees and disbursements between class counsel and a representative plaintiff is not enforceable unless approved by the court.

[55] Factors relevant in assessing the reasonableness of the fees of class counsel include: (a) the factual and legal complexities of the matters dealt with; (b) the risk undertaken, including the risk that the matter might not be certified; (c) the degree of responsibility assumed by class counsel; (d) the monetary value of the matters in issue; (e) the importance of the matter to the class; (f) the degree of skill and competence demonstrated by class counsel; (g) the results achieved; (h) the ability of the class to pay; (i) the expectations of the class as to the amount of the fees; and (j) the opportunity cost to class counsel in the expenditure of time in pursuit of the litigation and settlement.<sup>19</sup>

[56] Class Counsel's fee request is \$9,220,186.58 plus disbursements and applicable taxes. The fee request is 30% of the \$33.1 million settlement fund less a fee credit to the class of \$725,995.42.

[57] Applying a loadstar approach, the fee represents a modest 1.8 multiplier of the value of the work in progress, which of course, save for the costs awards, has been unpaid for a decade.

[58] In a high risk, high complexity, hard fought class action, Class Counsel achieved a good result against a formidable foe. Class Counsel more than earned their fee. They deserve to be paid what is a fair and reasonable fee.

[59] I approve the Fee Request.

#### **E. Honoraria**

[60] In *Doucet v. Doucet v. The Royal Winnipeg Ballet*,<sup>20</sup> I expressed the view that the current law about honorarium in class actions, which practice is an anomaly from normal litigation, where

<sup>19</sup> *Smith v. National Money Mart*, 2010 ONSC 1334, var'd 2011 ONCA 233; *Fischer v. I.G. Investment Management Ltd.*, [2010] O.J. No. 5649 at para. 28 (S.C.J.).

<sup>20</sup> *Doucet v. The Royal Winnipeg Ballet*, 2022 ONSC 976, rev'd 2023 ONSC 2323.

plaintiffs are not paid to do what lawyers are paid to do, i.e., advance the litigation, should be changed and that as a matter of principle, there should not be honorarium paid to representative plaintiffs.

[61] The current law is that where a representative plaintiff can show that he or she rendered active and necessary assistance in the preparation or presentation of the case and that such assistance resulted in monetary success for the class, the representative plaintiff may be compensated by a modest honorarium.<sup>21</sup> However, the court should only rarely approve this award of compensation to the representative plaintiff.<sup>22</sup> Compensation to the representative plaintiff should not be routine, and an honorarium should be awarded only in exceptional cases. Compensation for a representative plaintiff may only be awarded if he or she has made an exceptional contribution that has resulted in success for the class.<sup>23</sup>

[62] Under the current law about honorarium, in determining whether the circumstances are exceptional, the court may consider, among other things: (a) active involvement in the initiation of the litigation and retainer of counsel; (b) exposure to a real risk of costs; (c) significant personal hardship or inconvenience in connection with the prosecution of the litigation; (d) time spent and activities undertaken in advancing the litigation; (e) communication and interaction with other class members; and (f) participation at various stages in the litigation, including discovery, settlement negotiations and trial.<sup>24</sup>

[63] In the immediate case, I do not know what Mr. Berg's personal recovery was in the settlement but I do not know that because of the involvement of the Class Proceedings Fund and the contingency fee retainer, he was under no exposure to a real risk of costs. I know that he was a very engaged representative for the Class Members and that he made a valuable contribution to the advancement of this hard fought litigation. I appreciate that he suffered personal hardship because of the animosity of the hockey community, but that sadly was not unexpected and he has the satisfaction of achievement in the class action.

[64] With no disrespect, I do not see Mr. Berg's contribution to be so extraordinary that he should receive an honorarium. Ultimately, Mr. Berg's situation is similar to Thomas Gobeil in Québec, where honorariums are not allowed.

[65] I do not approve the honorarium.

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<sup>21</sup> *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323; *Reddock v. Canada (Attorney General)*, 2019 ONSC 7090; *Brazeau v. Attorney General (Canada)* 2019 ONSC 4721; *Houle v. St. Jude Medical Inc.*, 2019 ONSC 4560; *Dolmage v. HMQ*, 2013 ONSC 6686; *Johnston v. The Sheila Morrison Schools*, 2013 ONSC 1528 at para. 43; *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26–43; *Smith Estate v. National Money Mart Co.*, 2011 ONCA 233 at paras. 133–136; *Garland v. Enbridge Gas Distribution Inc.*, [2006] O.J. No. 4907 (S.C.J.); *Windisman v. Toronto College Park Ltd.*, [1996] O.J. No. 2897 at para. 28 (Gen. Div.).

<sup>22</sup> *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323; *Sutherland v. Boots Pharmaceutical plc, supra*; *Bellaire v. Daya*, [2007] O.J. No. 4819 at para. 71. (S.C.J.); *McCarthy v. Canadian Red Cross Society*, [2007] O.J. No. 2314 (S.C.J.).

<sup>23</sup> *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323; *Toronto Community Housing Corp. v. ThyssenKrupp Elevator (Canada) Ltd.*, 2012 ONSC 6626; *Markson v. MBNA Canada Bank*, 2012 ONSC 5891 at paras. 55-71.

<sup>24</sup> *Doucet v. The Royal Winnipeg Ballet*, 2023 ONSC 2323; *Robinson v. Rochester Financial Ltd.*, 2012 ONSC 911 at paras. 26-44.

**F. Conclusion**

[66] Order to go in accordance with these Reasons for Decision.

**Released:** March 15, 2024

**CITATION:** Berg v. Canadian Hockey League, 2024 ONSC 1573  
**COURT FILE NO.:** CV-14-514423CP  
**DATE:** 20240315

**ONTARIO**

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**BETWEEN:**

**SAMUEL BERG**

Plaintiff

- and -

**CANADIAN HOCKEY LEAGUE, ONTARIO  
MAJOR JUNIOR HOCKEY LEAGUE, ONTARIO  
HOCKEY LEAGUE, WESTERN HOCKEY  
LEAGUE, QUEBEC MAJOR JUNIOR HOCKEY  
LEAGUE INC., et al.**

Defendants

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**REASONS FOR DECISION**

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PERELL J.

**Released:** March 15, 2024