COURT OF APPEAL FOR ONTARIO

CITATION: Carcillo v. Ontario Major Junior Hockey League, 2024 ONCA 685
DATE: 20240913
DOCKET: M54800 (COA-23-CV-0353)

Trotter, Thorburn and Dawe JJ.A.

BETWEEN

Daniel Carcillo, Garrett Taylor and Stephen Quirk

Plaintiffs (Appellants/Responding Parties)

and

Ontario Major Junior Hockey League, Canadian Hockey League, Western Hockey League, Quebec Major Junior Hockey League, Barrie Colts Junior Hockey Ltd., Guelph Storm Ltd., Hamilton Bulldogs Foundation Inc., Kingston Frontenacs Hockey Ltd., Kitchener Rangers Jr. A. Hockey Club, London Knights Hockey Inc., Mississauga Steelheads Hockey Club Inc., 2325224 Ontario Inc. o/a Mississauga Steelheads, Niagara Icedogs Hockey Club Inc., Northbay Battalion Hockey Club Ltd., Oshawa Generals Hockey Academy Ltd., Ottawa 67's Limited Partnership c.o.b. Ottawa 67's Hockey Club, The Owen Sound Attack Inc., Peterborough Petes Limited, 649643 Ontario Inc. o/a 211 SSHC Canada ULC o/a Sarnia Sting Hockey Club, Soo Greyhounds Inc., Sudbury Wolves Hockey Club Ltd., Windsor Spitfires Inc., McCrimmon Holdings, Ltd., 32155 Manitoba Ltd., a Partnership c.o.b. as Brandon Wheat Kings, Brandon Wheat Kings Limited Partnership, Calgary Flames Limited Partnership, Calgary Sports and Entertainment Corporation, Edmonton Major Junior Hockey Corporation, Kamloops Blazers Hockey Club, Inc. Kamloops Blazers Holdings Ltd., Kelowna Rockets Hockey Enterprises Ltd., Prince Albert Raiders Hockey Club Inc., Edgepro Sports & Entertainment Ltd., Queen City Sports & Entertainment Group Ltd., Braken Holdings Ltd., Rebels Sports Ltd., Saskatoon Blades Hockey Club Ltd., Vancouver Junior Hockey Limited Partnership and Vancouver Junior Hockey Partnership, Ltd c.o.b. Vancouver Giants, West Coast Hockey LLP, West Coast Hockey Enterprises Ltd., o/a Victoria Royals, Medicine Hat Tigers Hockey Club Ltd., 1091956 Alta Ltd. o/a The Medicine Hat Tigers, Swift Current Tier 1 Franchise Inc. and Swift Current Broncos Hockey Club Inc. o/a The Swift

Current, Ice Sports & Entertainment Inc. o/a Winnipeg Ice, Moose Jaw Tier 1 Hockey Inc. D.B.A. Moose Jaw And Moose Jaw Warriors Tier 1 Hockey, Inc. Warriors o/a Moose Jaw Warriors, Lethbridge Hurricanes Hockey Club, 649643 Ontario Inc. c.o.b. as Sarnia Sting, Kitchener Ranger Jr A Hockey Club and Kitchener Rangers Jr "A" Hockey Club, Le Titan Acadie Bathurst (2013) Inc., Club de Hockey Junior Majeur de Baie-Comeau Inc. o/a Drakkar Baie-Comeau, Club de Hockey Drummond Inc. o/a Voltigeurs Drummondville, Cape Breton Major Junior Hockey Club Limited o/a Screaming Eagles Cape Breton, Les Olympiques de Gatineau Inc., Halifax Mooseheads Hockey Club Inc., Club Hockey les Remparts de Québec Inc., le Club de Hockey Junior Armada Inc., Moncton Wildcats Hockey Club Limited, le Club de Hockey l'Océanic de Rimouski Inc., les Huskies de Rouyn-Noranda Inc., 8515182 Canada Inc. c.o.b. as Charlottetown Islanders, les Tigres De Victoriaville (1991) Inc., Saint John Major Junior Hockey Club Limited, Club de Hockey Shawinigan Inc. o/a Cataractes Shawnigan, Club de Hockey Junior Majeur Val d'Or Inc. o/a Val D'or Foreurs, 7759983 Canada Inc. c.o.b. as Club de Hockey le Phoenix, 9264-8849 Québec Inc. c.o.b. as Groupe Sags 7-96 and Les Saguenéens, Jaw Hockey Enterprises LP c.o.b. Erie Otters, IMS Hockey c.o.b. Flint Firebirds, Saginaw Hockey Club, L.L.C., EHT, Inc., Winterhawks Junior Hockey LLC, Portland Winter Hawks Inc., Thunderbirds Hockey Enterprises, L.L.C, Brett Sports & Entertainment, Inc., Hat Trick, Inc., Tri-City Americans Hockey LLC, and Top Shelf Entertainment, Inc.

Defendants (Respondents/Moving Parties)

Gannon Beaulne, Ethan Schiff, Nina Butz, and Marshall Torgov, for the moving parties[1]

James Sayce, Vlad Calina, and Caitlin Leach, for the responding parties

Heard: March 26, 2024

On appeal from the order of Justice Paul M. Perell of the Superior Court of Justice, dated October 30, 2023, with reasons reported at 2023 ONSC 4983

[1] Crawford Smith, Nadia Campion, Katelyn Johnstone, and Timothy Pinos represented and made written submissions, but did not make oral submissions, on behalf of the moving parties 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.

(Phase 1), 2023 ONSC 5186 (Phase 2), 2023 ONSC 5484 (Phase 3), 2023 ONSC 5798 (Phase 4), and 2023 ONSC 6131 (Phase 5)

Thorburn J.A.:

OVERVIEW

[1] This is a case involving related appeals of the order refusing to certify this action as a class proceeding. There are three appeals of the order: an appeal of the order refusing certification, an appeal of the order dismissing the action as against certain parties, and an appeal of the order transitioning the litigation from a proposed class action to multiple joinder actions (the "Transition Order") pursuant to s. 7 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6.

[2] The moving party defendants (the "Moving Parties") seek to quash the third appeal; that is, the appeal of the Transition Order.

[3] The Moving Parties move to quash the appeal of the Transition Order on the basis that the order is interlocutory, not final, and can only be appealed to the Divisional Court with leave pursuant to s. 19(1)(b) of the *Courts of Justice Act*, R.S.O. 1990, c. C. 43. They also claim that the order does not finally resolve part or all of the dispute between the parties; it only changes the format by which the substantive issues in the proceeding will be determined.

[4] The responding party plaintiffs (the "Responding Parties") submit that the motion should be denied for three reasons: first, the order is final, as some aspects finally dispose of the Responding Parties' rights; second, the Transition Order is

so interrelated with the other two orders on appeal that this court should hear all three appeals together; and third, the motion to quash "encroaches on the merits of the appeal" of the order refusing certification. If the motion is granted, the Responding Parties submit that this court should continue the stay of the Transition Order pending determination of the related appeals.

BACKGROUND

[5] The Moving Parties are defendants in the proposed class action brought by three former major junior hockey players. They represent 78 different entities that include (i) 74 entities that own and operate major junior hockey teams in 13 jurisdictions across Canada and the United States; (ii) 3 leagues which collectively operate 60 teams; and (iii) a not-for-profit umbrella organization called CHL that manages the national operations of the 3 leagues.

[6] The Responding Parties are three former major junior hockey players who commenced the proposed class action in June 2020. They advance four causes of action related to allegations of maltreatment and abuse: (i) systemic negligence; (ii) vicarious liability; (iii) breach of fiduciary duty; and (iv) breach of Quebec causes of action. The abuse alleged includes sexual assault, hazing, bullying, physical and verbal harassment, and sexual harassment from 1975 to the present.

[7] In December 2020, the Responding Parties brought a motion to certify the proceeding as a class action. The Moving Parties opposed the motion and brought

motions to dismiss for (i) want of jurisdiction *simpliciter*; and (ii) want of representative plaintiffs (the "*Ragoonanan* motion").

[8] In February 2023, the motion judge refused to certify the proceeding (the "Certification Order") and granted the *Ragoonanan* motion, dismissing the action as against certain parties on the basis that the representative plaintiffs did not have claims against some of the defendants (the "Dismissal Order").

[9] However, on his own initiative, the motion judge permitted the action to continue as one or more proceedings between different parties pursuant to s. 7(2) of the *Class Proceedings Act, 1992*. Section 7(2) provides that:

> (2) If the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,
>
> (a) order the addition, deletion or substitution of parties;
>
> (b) order the amendment of the pleadings or notice of application; and
>
> (c) make any further order that it considers appropriate. [Emphasis added]

[10] The motion judge agreed with the Moving Parties "that joinder of cases based on similar experiences among claimants" was a "more appropriate and feasible means to achieve access to justice." He proposed that the litigation proceed by way of an "opt-in joinder action" for 60 actions corresponding with the 60 teams operated by the defendant leagues (the "Section 7 option"). He ordered

that the Responding Parties had 120 days to prepare an “Individual Issues Protocol” for the 60 actions and to bring a motion for the approval of the Individual Issues Protocol (the “IIP motion”).

[11] The Certification Order was suspended for 120 days pending the determination of the IIP motion to “allow the s. 7 process to unfold and to prevent the recommencement of any limitation periods”. If the Responding Parties failed to bring the motion, the proposed class action would be dismissed.

[12] In March 2023, the Responding Parties delivered a notice of appeal to this court challenging the Certification and Dismissal Orders. Counsel for the Responding Parties then brought a motion, on consent, to hold the appeal of the Certification and Dismissal Orders in abeyance pending the determination of the IIP motion. When counsel for the Responding Parties wrote to the Registrar of this court on behalf of all parties, seeking a consent order he said that “[t]he Certification Order, the Dismissal Order and whatever order flows from the IIP motion later this year are fundamentally interconnected.” An abeyance order was issued in May 2023.

[13] In June 2023, the Responding Parties elected to pursue the Section 7 option and sought court approval of their plan. Given the complexity of transitioning the litigation from a proposed class action to 60 joinder actions, the motion judge scheduled the motion to proceed in multiple phases. In his reasons approving the

first phase of the proceedings, the motion judge acknowledged that he had incorrectly described the process as an Individual Issues Protocol and instead, approved a plan under section 7(2) of the *Class Proceedings Act, 1992* (the "Section 7 Plan").

[14] In October 2023, after completing five phases of written and oral submissions and corresponding reasons for decision, the motion judge approved the Section 7 Plan and issued the Transition Order. The Transition Order established deadlines for certain steps to be taken, including the appointment of an Administrator for the plan and the giving of notice to those who could become plaintiffs in the individual actions. In addition, the order provided that any limitation periods relating to individual claims were to recommence running as of 365 days after the date of approval of the Section 7 Plan.

[15] In November 2023, the Responding Parties commenced an appeal of the Certification order in the Divisional Court and concurrently resumed their appeal of the Certification Order in this court. They did so because of confusion over the applicability of an amendment made in 2020 to the *Class Proceedings Act, 1992,* which changed the proper route of appeal for refusals of class certifications from the Divisional Court to the Court of Appeal. It is unclear whether the amendment applies only to those proposed class actions commenced after the amendment came into effect, or if it applies to proposed class actions that, while commenced

prior to the effective date, were not certified or refused until after the amendment came into effect.

[16] Also in November 2023, the Responding Parties filed a Supplementary Notice of Appeal to this court, adding an appeal of the Transition Order.

[17] In December 2023, the Responding Parties sought an interim stay of the Transition Order which was granted by Nordheimer J.A. He held, however, that,

> 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 [Transition] 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. [Emphasis added]

[18] In January, 2024, the Moving Parties brought this motion to quash the appeal of the Transition Order. In oral submissions, the Moving Parties agreed to continue the stay of the Transition Order pending the appeal of the other two orders.

THE POSITIONS OF THE PARTIES

[19] The Moving Parties submit that the only issue on this motion to quash the Transition Order is whether the order is interlocutory or final, since the proper route of appeal turns on this determination.

[20] The Moving Parties claim the Transition Order is interlocutory as it allows the claims of the Responding Parties to continue, albeit in a different form. The order pertains to *how* the claims are prosecuted, not *whether* they may be prosecuted at all.

[21] Since the order is interlocutory, jurisdiction over the appeal properly lies with the Divisional Court: *Courts of Justice Act*, R.S.O. 1990, c. C. 43, s. 19(1)(b). Further, if this court finds that the appeal is interrelated with the other two appeals, such that they should be heard together, this court lacks jurisdiction over the appeal until leave is obtained from the Divisional Court: *Blair v. Ford*, 2021 ONCA 841, 159 O.R. (3d) 415, at para 28, leave to appeal refused, [2022] S.C.C.A. No. 15, citing *Madder v. South Easthope Mutual Insurance Company et al.*, 2014 ONCA 714, 123 O.R. (3d) 120, at para 55.

[22] The Moving Parties claim that, because the Responding Parties have not obtained leave to appeal from the Divisional Court, the appeal must therefore be quashed.

[23] The Responding Parties argue that the motion to quash must fail for three reasons as set out below.

[24] First, they take the position that this court has jurisdiction over the appeal because while the Transition Order may have both final and interlocutory aspects, it is only the final aspects of the Transition Order that are being appealed. They

highlight three aspects of the order that they claim finally dispose of certain rights of the Responding Parties: part 6.1, which directs the Responding Parties to abandon their appeal of the Certification Order if no party appeals the Transition Order; part 6.2, which directs the recommencement of limitations periods related to individual claims on a particular date; and part 6.3, which dismisses the Responding Parties' proceeding under the *Class Proceedings Act, 1992* by a certain date prescribed by the Section 7 Plan.

[25] Second, the Responding Parties argue that this court should assume jurisdiction over the Transition Order even if the court finds that the aspects under appeal are interlocutory, as the appeal is significantly interrelated with the appeals of the other two orders in the proceeding since:

a) All three orders concern the preferable proceeding for the Responding Parties' claims as evidenced by the explicit mention of the Certification Order and Dismissal Order in part 6 of the Transition Order, namely, the effect of the Transition Order on the Responding Party's ability to appeal the Certification and Dismissal Orders;
b) In all three orders under appeal the motion judge considered whether the procedure "can preferably provide access to justice, judicial economy and behaviour modification". In determining certification, the motion judge found the Section 7 Plan to be the "preferable procedure" to resolve the

Responding Parties' claims, as opposed to a class proceeding. This finding binds the three appeals together; and

c) If the other two appeals are granted, the Transition Order must be vacated, as a class proceeding and the Section 7 Plan cannot co-exist. Leave from the Divisional Court is not required as leave would have inevitably been granted since the other interrelated appeals are properly before this court: *Lax v. Lax* (2004), 70 O.R. 3d 520, at para 9.

[26] Third, the Responding Parties claim that if the motion is granted and the Transition Order is quashed, it would adversely affect their ability to fully advance their argument in support of their appeal of the Certification Order.

ANALYSIS

[27] The two issues on this motion are whether (i) the Transition Order under appeal was final, or, in the alternative, (ii) the Transition Order is significantly interrelated to the other two appeals such that the appeal of the Transition Order should not be quashed. For the reasons that follow, I would deny the motion on the basis that the three appeals are interrelated such that they should be heard together.

[28] There is no dispute that the other two appeals, that is, the appeal of the Certification order, and the appeal of the Dismissal Order, are properly before this court.

[29] The central issues in those appeals are whether the motion judge erred (i) in refusing to certify the proceeding as a Class Action, and (ii) in ordering that some claims should be dismissed for failure to include a representative plaintiff for each claim against each proposed defendant.

[30] In deciding whether to certify the proceeding as a class proceeding or direct the proceeding to continue as a series of individual claims, the motion judge was required to consider the same issue: that is, whether "a class proceeding would be the preferable procedure for the resolution of the common issues": *Class Proceedings Act, 1992*, S.O. 1992, C.6 s. 5(1)(d). This is a "comparative exercise": *AIC v. Fisher Limited*, 2013 SCC 69, 3 S.C.R. 949 at paras. 22-23.

[31] The proposed class action and the Section 7 Plan are mutually exclusive alternatives. The Transition Order requires the Responding Parties to abandon their appeal of the certification order. If the appeal of the certification order is granted, the Section 7 Plan must be vacated. The appeal of the Transition Order must therefore be determined in a way that does not interfere with the legal questions to be resolved in the two appeals presently before this Court.

[32] There is therefore a significant interrelationship between the appeal of the Transition Order and the other two appeals.

[33] In the normal course, where an appeal lies to the Divisional Court and leave is required from that court, the appellant must first obtain leave from the Divisional

Court before seeking to combine the appeal that lies to the Divisional Court with an appeal that lies to this court as of right: *Cole v. Hamilton (City)* (2002), 60 O.R. (3d) 284 (C.A.), at paras. 15-16; *Mader v. South Easthope Mutual Insurance Co.*, 2014 ONCA 714, 123 O.R. (3d) 120, at para. 55; *Brown v. Hanley*, 2019 ONCA 395, at paras. 19 and 20.

[34] However, Section 6(2) of the *Courts of Justice Act* provides that,

> (2) The Court of Appeal has jurisdiction to hear and determine an appeal that lies to the Divisional Court or the Superior Court of Justice if an appeal in the same proceeding lies to and is taken to the Court of Appeal.

[35] Thus if the interrelated final and interlocutory orders are "so interrelated that leave would inevitably have been granted on the interlocutory issue", this court can assume jurisdiction over the appeal under s. 6(2) even if leave has not been sought from the Divisional Court: *P1 v. XYZ School*, 2021 ONCA 901, 160 O.R. (3d) 445, at para 37, citing *Lax v. Lax* (2004), 70 O.R. (3d) 520, at para 9.

[36] In *Lax* for example, this court held that,

> Although the motion for summary judgment was dismissed, allowing the case to proceed to trial, the motion judge finally disposed of the issue whether the limitation period is 20 years or six years, thus removing the limitation period as a defence. The order is therefore a final order on a question of law and the appeal is properly brought to this court. Although the second issue would, if brought as a stand-alone appeal to the Divisional Court, require leave of that court, because the two issues are so interrelated, we were able to proceed to hear the two appeals together in accordance with s.

> 6(2) of the Courts of Justice Act, R.S.O. 1990, c. C-43 , on the basis that once the first issue was before this court, leave would inevitably have been granted on the second. [Citations removed, Emphasis added.]

[37] Similarly, in *2099082 Ontario Limited v. Varcon Construction Corporation*, 2020 ONCA 202, 97 C.L.R. (4th) 26, this court held allowed appeals from both the final and interlocutory aspects of the motion judge's order as they were so interrelated that "once the first issue was before the court, leave would inevitably have been granted on the second.": at para. 17. See also *Martin v. 11037315 Canada Inc.* 2021 ONCA 246 at paras 11-17; *Cooper v. The Laundry Lounge, Inc*., 2020 ONCA 166 at para. 2; and *Azzeh v. Legendre*, 2017 ONCA 385, 135 O.R. (3d) 721, at paras. 25-26.

[38] I agree that the Transition Order has both final and interlocutory aspects. However, the focus of the appeal is on the aspects of the Transition order that direct the Responding Parties to abandon their appeal of the Certification Order if no party appeals the Transition Order; direct the recommencement of limitations periods; and dismiss the Class Proceeding by a certain date prescribed by the Section 7 Plan. Those aspects are the ones that are closely interrelated with the Certification and Dismissal appeals, and hearing this appeal with the appeals of the Certification and Dismissal orders would promote, not take away from, the time and cost-effective resolution of disputes. As such, this case is distinguishable from this court's recent decision in *Athanassiades v. Rogers Communications Canada*

Inc., 2024 ONCA 497, where the focus of the appeal was on the interlocutory aspects of the decision at issue, hearing the appeal of the final aspects only was therefore impracticable, and would lead to "an unnecessary and wasteful fragmentation of summary judgment proceedings that are designed to resolve disputes in a timely and cost-effective manner.": *Athanassiades,* at para. 16.

DISPOSITION

[39] For these reasons, the appeal should not be quashed, whether or not leave from the Divisional Court may have been required had the appeal been brought as a standalone appeal. The significant interrelationship between the three appeals is such that leave would have inevitably been given, and thus the fact that the Responding Parties did not obtain leave should not bar this court from hearing the appeal. This is consistent with this Court's decision in *Lax* and ensuing cases.

[40] I would therefore deny the motion to quash the appeal of the Transition Order.

[41] Costs of this motion are reserved to the panel hearing the appeal.

Released: September 13, 2024 "G.T.T."

"Thorburn J.A."
"I agree. Gary Trotter J.A."
"I agree. J. Dawe J.A."