Cassels

Class Action Against North American Hockey Leagues Rejected by Federal Court

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Introduction

On July 29, 2021, the Federal Court released its reasons in *Mohr v National Hockey League*,[1] which concerned both the representative plaintiff's Motion to Amend, and the defendants' Motion to Strike, the Statement of Claim. The class action itself concerned allegations of conspiracy contrary to sections 45(1) and 48 of the *Competition Act* (the Act) against the National Hockey League (NHL), American Hockey League Inc. (AHL), ECHL Inc. (ECHL), the Canadian Hockey League (CHL), Québec Major Junior Hockey League Inc. (QMJHL), the Ontario Hockey League (OHL), the Western Hockey League (WHL), and Hockey Canada.

Chief Justice Paul Crampton dismissed the representative plaintiff's Motion to Amend and granted the defendants' Motion to Strike. The Court found that the plaintiff failed to plead a reasonable cause of action under either section 45(1) or 48 of the Act and that the plaintiff's proposed Amended Statement of Claim would not have cured the deficiencies in his pleadings. In reaching the decision, the Court reviewed the legislative history of both relevant sections of the Act to support an interpretation advocated by the defendants. A summary of the Federal Court's reasons can be found below.

Background on Mohr

Mohr involved a class action brought by the representative plaintiff, Kobe Mohr, a former Canadian junior hockey player, alleging that the Canadian hockey leagues, namely the QMJHL, the OHL, and the WHL – all under the umbrella organization of the CHL – conspired to "limit unreasonably the Class Members' opportunity to negotiate and play with teams in the NHL, the AHL, and the ECHL" and to "impose unreasonable terms and conditions upon the Class Members, [such as] the imposition of 'nominal wages' and 'the loss of rights to market their image, sponsorship, and endorsement opportunities.' "[2]

The plaintiff alleged that the defendants' conspiracy was contrary to sections 45(1) and 48 of the Act. Section 45(1) of the Act prohibits various types of conspiracies or agreements that constrain either the "supply" or the "production or supply" of a product or service for which the competitors compete. Section 48 specifically concerns conspiracies relating to professional sports.

Reasons for the Federal Court's Decision

In granting the defendant's Motion to Strike and dismissing the representative plaintiff's Motion to Amend, the Court agreed with the defendants' position that the plaintiff's Amended Statement of Claim would not survive a motion to strike under Rule 221 of the *Federal Courts Rules* for the following reasons.

No Reasonable Cause of Action

The Court found that the Amended Statement of Claim did not disclose any reasonable cause of action, as it alleged six separate conspiracies, none of which met the requirements of either section 45(1) or 48 of the Act.

Chief Justice Crampton noted that the key elements of subsection 45(1) that were required to be met were: (i) "product"; (ii) "competitors"; and (iii) "production or supply." As the players were the party to provide the "product" at issue (i.e., the service of playing hockey), hockey clubs and leagues were acquiring or purchasing the product – not producing or supplying it – such that the defendants were also not "competitors" as it relates to the product. Thus, the plaintiff's claims did not support a cause of action under subsection 45(1).

Furthermore, the legislative history of subsection 45(1) is that, prior to the enactment of the current wording of the provision in 2010, the word "purchase" was present in the prohibited list of activities that could be subject to the provision. The deliberate elimination of the word "purchase" from the current text of subsection 45(1) indicated that Parliament intended to limit the scope of the provision. Other documents supported this intention, with a report authored by a panel appointed by the Government of Canada specifically observing that "the criminal law […] should be reserved for conduct that is unambiguously harmful to competition."[3] In effect, subsection 45(1) mainly concerns "hard core" cartel agreements, also known as "naked" cartel agreements – a cartel is formed when parties agree to act together instead of competing with each other.[4] The alleged agreements between the defendants did not qualify as such.

For the reasons set out above, the Court concluded that it was "plain and obvious that the plaintiff has not pleaded a reasonable cause of action […] in relation to the production and supply of the services that are at issue in this proceeding."[5]

In relation to the section 48 analysis (the provision dealing with conspiracy relating to professional sport), Chief Justice Crampton also agreed with the defendants' interpretation that the provision only concerned *intra-league* agreements that "relate exclusively" to the limiting of opportunities for a player to participate in professional sport or negotiate with and to play for the team of their choice. This interpretation was supported by the legislative history of the provision as well.[6]

Given that the plaintiff alleged, among other claims, that the Canadian hockey leagues conspired to limit the Class Members' (i.e., the players') opportunities in the NHL, the AHL, and the ECHL, the inter-league nature of the allegations failed to disclose a reasonable cause of action under section 48 as well.

Amended Statement of Claim Constituted Abuse of Court's Process

The Motion to Amend was brought pursuant to Rule 75 of the *Federal Courts Rules*, which provided that the Court may allow a party to do so "on such terms as will protect the rights of all parties." The defendants challenged the Amended Statement of Claim as an abuse of the Court's process, asserting that it sought to "add conspiracy claims related to hockey players' wages that are currently being litigated in three (3) separate class actions before Superior Courts in Ontario, Quebec, and Alberta."[7]

In agreeing with the defendants, the Court held that the "net effect of many of the proposed amendments would be to significantly expand the focus proceeding to include wage related matters that are already the subject of the aforementioned proceedings in Ontario, Alberta, and Quebec."[8] This constituted an abuse of process due to the "spectre of a multiplicity of proceedings of these issues."[9]

The Court also found that the Amended Statement of Claim introduced new complexities and issues, giving rise to a range of new questions, which would have made it more difficult for the defendants to know the case they have to meet. These additional complications would not have served the rights of the defendants, contrary to the condition provided by Rule 75 of the *Federal Courts Rules*.

For the reasons above, the Court held that it was plain and obvious that the Statement of Claim disclosed no reasonable cause of action, and that the existing deficiencies in the Statement of Claim could not be potentially cured by granting leave to the plaintiff to amend his pleading.

Conclusion

The Court in *Mohr* clarified that subsection 45(1) of the Act applied only to the category of "hard core" cartel agreements, and more specifically, to the agreements that concern the production or supply of a product or service. As such, it would appear that circumstances whereby professional athletes offer their playing services for clubs to "purchase" would not generally be subject to section 45, as in *Mohr*.

This is consistent with the Competition Bureau's November 2020 statement confirming that section 45 does not apply to "buy-side agreements, including employment-related no-poaching and wage-fixing agreements." In this regard, Canadian competition law sharply contrasts with US antitrust law and the enforcement position of US antitrust regulators, who have clearly indicated that they will criminally investigate "naked no-poaching or wage-fixing agreements that are unrelated or unnecessary to a larger legitimate collaboration between the employers."

The Court further confirmed that section 48, the provision that specifically addresses conspiracy in professional sports, applies only to agreements "between or among teams and clubs engaged in professional sport as members of the same league."[10] Therefore, claims of *inter-league* conspiracy, as in *Mohr*, would not generally be subject to section 48.

As a resounding victory for the hockey leagues, *Mohr* offers much needed clarity for sports leagues and governing bodies operating in Canada by clarifying the key elements of the Act's provisions that are critical and relevant for determining their relationships with players.

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[1] *Mohr v National Hockey League*, 2021 FC 488 (*Mohr*).

[2] Ibid at para 3.

[3] Ibid at para 54.

[4] Competition Bureau, "What is a cartel?" (22 February 2018), online: *Government of Canada* <https://www.competitionbureau.gc.ca/eic/site/cb-bc.nsf/eng/04262.html>.

[5] Ibid at para 62.

[6] Ibid at paras 76-80.

[7] Ibid at para 92.

[8] Ibid at para 108.

[9] Ibid at para 110.

[10] *Federal Courts Rules*, SOR/98-106, s 48(3).
