Cassels

Cassels Successfully Defeats Certification Motion for Class Action Brought by Major Junior Hockey League Players; Court Leaves Path Open for Individual Claims Process

Cassels successfully responded to a certification motion for a proposed class action against the Canadian Hockey League ("CHL"), the Ontario Hockey League ("OHL"), the Western Hockey League ("WHL"), the Quebec Major Junior Hockey League ("QMJHL"), and their 60 teams. The claim alleged players experienced widespread and ritualized hazing, racism, homophobia, sexual, and physical abuse. The action and motion were brought by three representative plaintiffs, all former Major Junior hockey players.

The defendants brought two cross motions. The first one alleged that since the three representative plaintiffs only played in five teams during their careers, they had no claim against the remaining 55 teams and the action could not proceed against those defendants, applying a principle first articulated fully in an Ontario decision, *Ragoonanan (*the *"Ragoonanan* motion*")*.[1] The second motion alleged the Ontario court did not have jurisdiction over the defendants located outside of Ontario, the WHL, QMJHL, and their 40 teams.

The Court's decision was released on February 3, 2023.[2]

The Ragoonanan Motion

On the *Ragoonanan* motion, the defendants successfully argued the three proposed representative plaintiffs could not maintain a class action against the other 55 teams and the claims should be dismissed. The court's decision confirms that the *Ragoonanan* principle continues to be binding law in Ontario, despite it not being applied in some other provinces.

The Jurisdiction Motion

The defendants argued an Ontario court did not have jurisdiction *simplicter* to decide the dispute against the defendants located outside of Ontario. The court determined that WHL, QMJHL, and their 40 teams had sufficient jurisdictional connections to Ontario through the CHL and dismissed the defendants' jurisdiction motion.

The Certification Motion

In lengthy reasons, the Court dismissed the certification motion.

This turned predominately on the design and aim of the plaintiffs' class action. The proposed class proceeding was based on a theory that all the defendants were collectively, i.e., jointly, and severally, liable

for the legal claims. The defendants successfully argued the plaintiffs' collective theory of liability was untenable as a team could not be held liable for wrongdoing committed by another team unless the former participated in the wrongdoing. Accordingly, the court found that the proposed common issues, all of which were predicated on collective liability, were not certifiable.

The court also discussed whether the proposed class action would have satisfied the preferable procedure criterion if it had found that the proposed common issues criterion was satisfied. The defendants did not deny that the evidence filed by the plaintiffs revealed that some players had experienced serious misconduct and suffered compensable harm. The court agreed with the defendants' arguments that the proposed class action would not be manageable, and no conceivable litigation plan could make the proposed class action manageable. If the class action was certified, the court stated it would be asked to manage: (a) the individual defences of 78 defendants in 13 different jurisdictions; (b) hundreds of third party claims against the actual perpetrators; (c) events of abuse that are a myriad of torts; (d) events over a 50-year period; (e) choice of law issues with respect to the common law, civil law, and possibly American law; and, (f) limitation period defences.

Potential Individual Claims

The defendants successfully submitted that a joinder of cases based on similar experiences (for example, those experiencing abuse on the same team) among claimants is a more appropriate and feasible means to achieve effective access to justice. The court exercised its discretion under section 7 of the Ontario class actions legislation directing the plaintiffs to design, if they desired, an "Individual Issues Protocol". This protocol would provide for one or more opt-in joinder actions (after notice to potential claimants) where a group of plaintiffs could sue three co-defendants comprised of (a) the specific team they played on, (b) that specific team's league (WHL, OHL or QMJHL), and (c) the CHL. The plaintiffs are to bring a motion for approval of the Individual Issues Protocol within 120 days, failing which the plaintiffs' class action will be finally dismissed. The plaintiffs are under no obligation to prepare an Individual Issues Protocol.

In closing, the Court commended the plaintiffs for their courage, honesty, and public service in disclosing the indignities they suffered and bringing the matter before the Court.

Cassels acted as co-counsel for the US-based Major Junior team defendants.

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[1] *Ragoonanan Estate v. Imperial Tobacco Canada Ltd.*, 2000 CanLII 22719 (ON SC).

[2] *Carcillo v. Canadian Hockey League*, 2023 ONSC 886.