CITATION: Berg v. Canadian Hockey League, 2017 ONSC 2608
COURT FILE NO.: CV-14-514423CP
DATE: 20170427

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:	
SAMUEL BERG and DANIEL PACHIS Plaintiffs	*Theodore P. Charney, Steven Barrett, Tina Q. Yang,* and *Joshua Mandryk*, for the Plaintiffs
– and –	
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 HOCKEY CLUB, INC., KELOWNA ROCKETS HOCKEY ENTERPRISES LTD., HURRICANES HOCKEY LIMITED PARTNERSHIP, PRINCE ALBERT RAIDERS HOCKEY	*Patricia D.S. Jackson, Lisa Talbot,* and *Irfan Kara*, for the Defendants

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

Proceeding under the *Class Proceedings Act, 1992*

HEARD: March 21-23, 2017

PERELL, J.

REASONS FOR DECISION

A. Introduction and Overview

[1] The Ontario Hockey League ("OHL") consists of 20 amateur hockey clubs in Ontario, Michigan, and Pennsylvania. The Western Hockey League ("WHL") consists of 22 amateur hockey clubs in Western Canada and the Western United States, and the Québec Major Junior Hockey League ("QMJHL") consists of 18 amateur hockey clubs in Québec and the Atlantic provinces and states. The OHL, WHL, and QMJHL, which are the regional leagues of the Canadian Hockey League ("CHL"), compete for the Memorial Cup Championship.

[2] Pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, the Plaintiffs, Samuel Berg and Daniel Pachis, former players in the OHL, have commenced a proposed class action against the CHL, OHL, WHL, QMJHL and their respective teams. There are parallel class actions in Alberta and Québec brought by Lucas Walter, a former player in the WHL and the QMJHL.

[3] In their proposed class action in Ontario, Messrs. Berg and Pachis advance claims of: (1) breach of statute; (2) breach of contract; (3) breach of duty of honesty, good faith and fair dealing; (4) negligence; (5) conspiracy; and (6) unjust enrichment and waiver of tort. The Plaintiffs' main grievance is that the hockey clubs do not pay their players minimum wages and overtime pay under employment standards statutes.

[4] The employment statutes that Messrs. Berg and Pachis rely on are: (1) Ontario's *Employment Standards Act, 2000*, S.O. 2000, c. 41; (2) Michigan's *Workforce Opportunity Wage Act*, Mich. Stat. §408.413; (3) Pennsylvania's *Minimum Wage Act of 1968*, P.L. 11, No. 5; and (4) the United States federal government's *Fair Labor Standards Act of 1938*, 29 USC §§ 218(a).

[5] Messrs. Berg and Pachis bring their proposed class action on behalf of the following defined class:

> All players who are members of a team owned and/or operated by one or more of the clubs located in the Province of Ontario (a "team") or at some point commencing October 17, 2012 and thereafter, were members of a team and all players who were members of a team who were under the age of 18 on October 17, 2012 (the "Ontario Class");
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> All players who are members of team owned and/or operated by one or more of the clubs located in the State of Pennsylvania, USA (a "team"), or at some point commencing October 17, 2010 and thereafter, were members of a team and all players who were members of a team who were under the age of 18 on October 17, 2010 (the "Pennsylvania Class"); and
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> All players who are members of a team owned and/or operated by one or more of the clubs located in the State of Michigan, USA, (a "team"), or at some point commencing October 17, 2008 and thereafter, were members of a team and all players who were members of a team who were under the age of 18 on October 17, 2008 (the "Michigan Class").

[6] The Plaintiffs move for certification of their action as a class proceeding.

[7] Perhaps because of the novelty of their claim and the extraordinary importance that hockey has to Canadians, Messrs. Berg and Pachis excessively over-pleaded both their case and also their certification motion, and they engaged in an emotive public relations pitch to portray the players that formed the putative class as exploited workers of avaricious employers.

[8] The Defendants excessively responded to the certification motion with an emotive public relations pitch of their own. The Defendants portrayed themselves as magnanimous patrons and benefactors of their hockey players. The Defendants portrayed Messrs. Berg and Pachis as bitter, self-centered, and ungrateful also-rans, whose proposed class action would irreparably damage the enterprise that had been built for the players to advance their careers and their prospects to play in the professional hockey leagues.

[9] The Defendants' response to the certification motion, which is a procedural motion and neither a labour relations bargaining session nor a test of the merits of a claim, was a catalyst for still more evidentiary excesses and more propaganda by both sides building up to a hot-pitched certification motion that involved a contest about the truth of the teams' and the leagues' argument that Messrs. Berg's and Pachis' allegedly selfish class action would bring on the eve of destruction for hockey players.

[10] Ultimately, when the evidentiary boarding, cross-checking, slashing, and spearing, stopped, the Defendants challenged the certification motion as follows:

- Save for the pleading of conspiracy, the Defendants do not dispute that Messrs. Berg and Pachis have satisfied the cause of action criterion for certification; i.e., it is conceded that the Plaintiffs have pleaded reasonable causes of action.
- Save for submissions that the class period should be defined by the date of the court's certification decision and that the U.S. teams should be excluded as Defendants, the Defendants do not dispute that the Plaintiffs have satisfied the identifiable class criterion.
- Save for a submission that the claims for: (1) breach of duty of honesty, good faith and fair dealing; (2) negligence; (3) conspiracy; and (4) unjust enrichment and waiver of tort should not be certified, because they add nothing but unnecessary complexity to the proceedings, the Defendants do not challenge the proposed common issues.
- With the exclusion of the claims for: (1) breach of duty of honesty, good faith and fair dealing; (2) negligence; (3) conspiracy; and (4) unjust enrichment and waiver of tort, and save for the exclusion of the U.S. teams, the Defendants do not dispute that the Plaintiffs have satisfied the preferable procedure criterion. The Defendants submit, however, that the teams from Michigan and Pennsylvania should be excluded from the class action because a class action would not be the preferable procedure to resolve the claims against the U.S. teams and, among other problems, a U.S. court would decline to recognize any Canadian judgment against the American teams.
- The major challenge raised by the Defendants is the submission that Messrs. Berg and Pachis do not satisfy the representative plaintiff criterion for certification. In this regard, the Defendants submit that Messrs. Berg and Pachis are unqualified to be representative plaintiffs because there is an irreconcilable conflict of interest between them as former players and the current players of the Class. The Defendants submit that the Plaintiffs are interested only in obtaining unpaid salary claims and are uninterested in the fate of the Class Members, the current active players in the OHL, who will be irreparably harmed by

the certification of the action.

[11] To be more precise about the Defendants' major challenge to certification, they submit that if this action were certified as a class action, then they would either have to cease operations (fold some teams) or have to reduce the benefits they provide to their current or future players because the certification of the action would crystalize a $30 million contingent liability. The Defendants further submit that if the action is certified, then the Class Members who are current active players in the OHL will lose skills development programs, equipment, registration fees, travel expenses for away games, educational programs, scholarships, parenting *in loco parentis*, counselling programs, medical insurance, housing and food allowances.

[12] I agree with some of the Defendants' submissions, but I do not agree with the Defendants' ultimate argument that Messrs. Berg and Pachis' class action should not be certified.

[13] Thus, for the reasons that follow: (1) I certify the claims for breach of employment law statutes and unjust enrichment; (2) I shall not certify the claims for: (a) breach of contract, (b) negligence, (c) breach of duty of honesty, good faith and fair dealing, (d) conspiracy, and (e) waiver of tort; (3) I shall not certify the action as against the American teams and I shall amend the class definition accordingly; (4) I shall also amend the definition of the class to close the class period as of the date of the certification motion without prejudice to the definition being amended from time to time; (5) I shall not certify the common issues for breach of contract, negligence, breach of duty of honesty, good faith and fair dealing, and conspiracy; and (6) I appoint Messrs. Berg and Pachis to be Representative Plaintiffs. With the above amendments, I certify this action as a class action.

B. Evidentiary Background

1. Acronyms

- AHL – American Hockey League
- CAHA - Canadian Amateur Hockey Association
- CIS – Canadian Interuniversity Sports (U Sports) (University Sports)
- CJHL – Canadian Junior Hockey League
- CHL - Canadian Hockey League
- ECHL – East Coast Hockey League
- *ESA - Employment Standards Act*
- *FLSA – Fair Labor Standards Act of 1938*
- GMHL - Greater Metro Hockey League
- NCAA – National Collegiate Athletic Association
- NAHL - North American Hockey League
- NHL – National Hockey League
- OHL – Ontario Hockey League
- QMJHL - Québec Major Junior Hockey League
- SPA – Standard Player Agreement
- USHL - United States Hockey League
- WHA – World Hockey Association
- WHL – Western Hockey League
- *WOWA - Workforce Opportunity Wage Act*

2. The Witnesses

[14] There was a superabundance of evidence proffered for this certification motion. The motion record comprised 36 volumes, including documents, transcripts, financial statements, and 62 affidavits, declarations, or reports. Both sides baited the other and both sides took the bait - hook, line, sinker, and litigation fishing boat. (There were factums and also 14 volumes of case books.)

[15] In Schedule "A" to these Reasons for Decision, I set out who the witnesses were for the certification motion.

C. Factual Background

1. The Defendants

[16] In this and the companion actions, Mr. Berg, Mr. Pachis, and Mr. Walter sue Canadian Hockey League, Ontario Major Junior Hockey League, Ontario Hockey League, Western Hockey League, Québec 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 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, LLC, 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 Hockey Club, Inc., Kelowna Rockets Hockey Enterprises Ltd., Hurricanes Hockey Limited Partnership, Prince Albert Raiders Hockey cCub 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 Québec 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.

[17] By consent Order dated July 22, 2015, in the immediate action, the claims against the

WHL, the QMJHL, and the clubs of the WHL and QMJHL were stayed.

[18] The action thus continues against the OHL, the CHL and the Clubs of the OHL namely: Windsor Spitfires Inc., London Knights Hockey Inc., Barrie Colts Junior Hockey Ltd., Belleville Sports and Entertainment Corp., Bulldog Hockey Inc., Erie Hockey Club Limited, Jaw Hockey Enterprises LP, Guelph Storm Limited, 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, LLC, 649643 Ontario Inc c.o.b. as Sarnia Sting, 211 SSHC Canada ULC o/a Sarnia Sting Hockey Club, Soo Greyhounds Inc., Kitchener Ranger Jr A Hockey Club, Kitchener Rangers Jr "A" Hockey Club,, and Sudbury Wolves Hockey Club Ltd.

2. The Venue and Jurisdictional Issue

[19] On October 17, 2014, Mr. Berg commenced this proposed class proceeding in Ontario against the CHL, OHL, WHL, and QMJHL and all of the member Clubs. As noted above, companion and overlapping actions were also filed in Alberta and Québec.

[20] Unlike the OHL's Standard Player Agreement ("SPA"), discussed below, the WHL's SPA provided that disputes must be litigated in the province or state where the team is located, and this circumstance sparked a venue and jurisdictional dispute between the parties.

[21] After the actions were filed, counsel for all parties had discussions about managing the multiplicity of proceedings, and Mr. Berg agreed to stay the claims against the WHL and the QMJHL in the Ontario action, and Mr. Walter agreed to proceed with claims against the WHL in Alberta and with the claims against the QMJHL in Québec.

[22] There is, however, a dispute between the parties about the terms under which the three class actions would proceed as against the American teams. Mr. Berg's position is that the American Defendants attorned to the jurisdiction of the various Canadian courts without prejudice to the Defendants' arguments as to the choice of law to be applied by the Canadian courts. Thus, Messrs. Berg and Pachis submit that the U.S.-based Defendants are not at liberty to advance arguments at the certification motion challenging the jurisdiction or venue of this Court to adjudicate the claims against the U.S. Clubs.

[23] The Defendants' position is that they reserved the right to challenge the jurisdiction *simpliciter* and the *forum conveniens* jurisdiction of the Canadian courts and to raise the issue of whether a class proceeding was the preferable and appropriate procedure to litigate the claims against the American teams.

[24] I am satisfied that this court has jurisdiction *simpliciter* over the American teams and that Ontario is a *forum conveniens* to litigate the claims, but I agree with the Defendants' that they can challenge whether a class proceeding in Ontario is the preferable procedure for advancing the claims based on American law against the American teams. I will have more to say about the Defendants' argument in the discussion and analysis portion of these Reasons for Decision.

[25] The correspondence relied on by the Plaintiffs does not preclude such a challenge by the Defendants. The correspondence, rather, is about how to accommodate the action against the WHL teams where the WHL's SPA provides that disputes must be litigated in the province or

state in which the relevant team is located. In contrast, the OHL's SPA does not contain a similar provision. Moreover, and in any event, the Defendants reserved the right to raise issues related to foreign law at the certification motion and there was a great deal of evidence and argument about foreign law at the certification motion. Further still, I agree with the Defendants' submission that in the case at bar the ways and means of the application of foreign law is important to the preferable procedure analysis and that the Defendants are not precluded or estopped from arguing that a class proceeding is not the preferable procedure for resolving the Plaintiffs' claims against the American teams.

3. The Organization of Amateur Hockey in Canada

[26] The premier professional hockey league in North America for male competitors is the NHL, which is a professional league comprised of 7 teams in Canada (Montreal, Ottawa, Toronto, Winnipeg, Calgary, Edmonton, and Vancouver) and 24 teams in the United States. The NHL has affiliated farm clubs in the AHL and the ECHL.

[27] Minor or amateur hockey is organized into tiers based on age and skill levels and into non-competitive and competitive leagues. The competitive leagues progress from Mite (novice), to Atom, Peewee, Bantam, Midget, Junior (under 21 years of age) and Senior (no age limit). The Junior tier of hockey is ranked moving from Junior C, Junior B, Junior A, and with Major Junior at the top.

[28] Hockey Canada, to varying degrees, oversees amateur hockey across Canada and also the Canadian men's Olympic hockey team, which in recent years has come to be comprised of NHL players (but perhaps not for the next Winter Olympics in PyeongChang). Hockey Canada recognizes the players of the leagues of the CHL as amateur athletes.

[29] Competitive minor league teams hold tryouts, and selection of players is based on skill level. Players chosen to play competitive hockey receive more coaching than in a recreational league. Generally speaking, the players of minor league hockey pay registration and team fees, some of which are as high as $8,000 per player, and players buy their own equipment and pay for the costs of traveling to and from out-of-town games.

[30] Some Junior B and Junior C hockey teams are under the auspices of Hockey Canada, but there is no national governing body. Junior B and C leagues operate on a "pay-to-play" model. Fees range from $1,000 to $1,500 per player, per year, and players are responsible for paying the costs of travel and accommodation for out-of-town games. Players purchase their own equipment, except for sweaters, socks, and pants.

[31] Junior A hockey is governed by the CJHL, which is comprised of 11 leagues across the country. CJHL players are provided with equipment and the teams pay travel costs. Some players, pay to play in the CJHL and fees vary between $4,000 and $8,000 per player, per year. There is no scholarship or tuition reimbursement program for players of the CJHL.

[32] Major Junior is comprised of the leagues of the CHL, which has three regional leagues, the WHL, OHL and QMJHL. The CHL was founded in 1975 as a not-for-profit corporation. It, however, has roots tracing back to 1914, with the founding of the CAHA, which oversaw all Canadian junior hockey until its merger with Hockey Canada in 1994. Approximately 1,300 athletes play hockey with the 60 teams of the CHL (52 Canadian teams and 8 American teams).

[33] Canadian universities offer intermural hockey leagues for their students and also have interuniversity competition supervised by the CIS ("U-Sports").

[34] Other Junior hockey leagues exist outside the auspices of Hockey Canada, the CHL, or the CJHL. For example, in Toronto, the GMHL is a pay-to-play league that charges an annual fee of approximately $6,000 per player and does not offer a scholarship program. Out-of-town players pay to be billeted with local families. The GMHL provides some, but not all, players with equipment.

[35] Once a Junior hockey player reaches the age of 18, he is eligible to be drafted to play in the NHL. The CHL provides more players to the NHL (approximately 55%) than any other league in the world. However, only a small minority of CHL players ever play in the NHL. After signing an NHL contract, the signed player may be returned to his CHL Club for further development if they remain age-eligible for Junior hockey.

4. The Organization of Amateur Hockey in the United States

[36] All U.S.-based teams and players belong to USA Hockey, which is the American equivalent of Hockey Canada.

[37] In the United States, the USHL includes Tier I, the top level of American Junior Hockey. The USHL consists of teams in the central and Midwestern U.S. The USHL does not charge players to pay, and teams provide players with equipment and pay travel costs. The USHL does not, however, offer a scholarship program.

[38] Tier II is the next level of Junior Hockey in the U.S., and is represented by the NAHL. The NAHL has no scholarship program, and all player expenses, including room and board, are paid by the player.

[39] In the U.S., college level hockey is under the auspices of the NCAA. Division I and II schools, but not Division III schools, offer athletic scholarships.

[40] CHL players are not eligible to play in the NCAA because they are regarded as professional athletes by USA Hockey. The CHL does not accept the NCAA's designation of CHL players as professional athletes.

5. The OHL

[41] The OHL, which is headquartered in Toronto, is a non-profit corporation organized under the laws of Ontario, with teams in Ontario, Michigan, and Pennsylvania.

[42] The Commissioner of the OHL is Mr. Branch, who has held that position for over 37 years. He also serves as Commissioner of the CHL.

[43] The OHL has 17 teams in Ontario, two in Michigan, and one in Pennsylvania. As members of the CHL, the OHL teams play a 68-game regular season that runs from late September to late March.

[44] The OHL schedule culminates in the Memorial Cup championship tournament, where the three CHL regional league champions and a host-team play in a round-robin tournament to determine a national champion.

[45] The OHL is governed by a Board of Governors, which is composed of one representative from each OHL Club. Each OHL Club is a franchise which owns a Major Junior hockey team under a trade name, and occupies an exclusive territory. Clubs are sold, purchased and relocated and new franchises can be purchased for a fee, all of which is regulated and must be approved by the OHL through its Board of Governors.

[46] The OHL publishes policies about, among other things, player contracts, the recruiting and drafting of players, and the selling, assigning, and trading of player contracts. The Board of Governors determines the terms of the standard form contract, known as the Standard Player Agreement ("SPA"). These agreements, which have changed over the years, are described below.

6. The Standard Player Agreement (SPA)

[47] Major Junior hockey players and their parents must sign the SPA to join a team and play in the league. Typically, the players and their parents receive independent legal advice before signing the SPA.

[48] Although a few provisions in the SPA are negotiable, OHL Clubs are not at liberty to deviate from the SPA standard terms, and each executed agreement is scrutinized by the League Commissioner to ensure compliance with the standard terms. CHL Clubs that have deviated from the standard terms of the SPA have been fined, including fines in excess of $200,000.

[49] Both the current and former OHL SPA consists of the form and Schedules "A","B", and "C". The standard form sets out the duties of the Club and the obligations of the player and does not vary between players.

[50] Schedule "A" pertains to player remuneration and reimbursements and does not vary.

[51] There are currently three versions of Schedule "B;" i.e., (1) a standard education package for Canadian or U.S. players; (2) a "full ride" education package for Canadian or U.S. players; and (3) a standard education package for import/European players.

[52] Schedule "C" is for special player benefits such as a no-trade clause, or any variations on an education package. The special player benefits are regulated by the OHL, and the Commissioner scrutinizes every player's SPA to ensure conformity with the OHL's regulations and policies.

[53] Under the SPA, the obligations of the player are: (a) maintaining exceptional hockey skills and abilities; (b) playing exclusively for the Club and not participating in any non-OHL-sanctioned hockey games without prior written Club consent; (c) reporting to training camp in good physical condition; (d) maintaining good physical condition throughout the season; (e) participating in promotional events; (f) behaving with good standards of honesty, morals, and fair play; (g) providing services faithfully, diligently, and to the best of the player's abilities as a hockey player; (h) using only the team's equipment and supplies; (i) permitting the OHL and the Club use of the player's likeness, image, statistical record, biography and autograph; and (j) obtaining an annual medical examination. All iterations of the SPA state that Clubs can unilaterally terminate players' contracts. The current SPA for the OHL provides that players can be terminated from their Club if: they default, neglect or refuse to provide the services required by the SPA; they violate the rules of the Club or the OHL; or if the player lacks the requisite skill to play in the OHL, in the opinion of the Club.

[54] Under the SPA, players may be traded to another team and the players do not share in any consideration paid by their new team for the trade. Players and their parents may negotiate the terms of this "trade clause," but the CHL exercises discretion and must approve all trades. Players in high school cannot be traded without their consent. A player who is traded does not forfeit any part of the OHL Scholarship he has earned and nothing about a trade affects a player's entitlement to his scholarship or other benefits.

[55] In 2007, OHL's and the WHL's SPA characterized player salaries as "remuneration" and as an "allowance" paid in exchange for players' "services". Under both SPAs, the "allowance" was provided to players in addition to reimbursements for listed expenses. Subsequently, the SPA was revised to use the terminology "fees" instead of "allowance", and OHL's SPA was revised before the 2009-10 season to add an express statement that the relationship between the player and the League is that of an "independent contractor" earning a "fee" in exchange for the player's "services". The OHL SPA also stated that "nothing in this Agreement shall constitute the parties as employer/employee".

[56] In or around August 2012, a proposed labour union calling itself the Canadian Hockey League Players' Association sought to organize and represent the players in the CHL. Following the union drive, Mr. Branch issued a directive to all OHL Clubs entitled, "Standard Players Agreement Update to Administrative Policies." The directive instructed the Clubs, "not to use any language in referring to the players and their Clubs that would imply an employment relationship", and to stop treating players as employees by ceasing to issue payroll documentation.

[57] The unionization drive failed, and in 2013-14, OHL players were required to execute a new SPA to replace their previous SPA. The WHL and the QMJHL also required their returning players to execute a new SPA.

[58] All three leagues, in tandem, reformulated their SPAs to remove all language referent to employment. In the OHL's SPA, the statement of the independent contractor relationship between the Club and the player was removed, and replaced with a statement that "this Agreement is not a contract of employment between the club and the player." The players' remuneration was renamed, from a "fee" or an "allowance" to a "reimbursement of certain expenses", and an "honorarium" for playoff success. The reformulated WHL's SPA changed player remuneration from an "allowance" to a "monthly expense reimbursement", and a "monthly overage honorarium" for 20-year-old players. The reformulated WHL SPA classified players as "amateur athletes", while removing all references to "service".

[59] Mr. Branch denies that the CHL-wide changes had anything to do with obfuscating the players' employment status, stating instead that the reformulations were made "to further reinforce the mutual understanding held by the league, teams, players and parents that the players are amateur student athletes".

[60] In addition to coordinated changes to the League SPAs, the CHL lobbied Hockey Canada to revise its bylaws and to reclassify CHL players' contracts from "professional" to "amateur" and the revised bylaws stated that CHL teams are considered the highest level of non-professional competition in Canada, administered as a development program under the auspices of Hockey Canada.

[61] In regard to characterizing the SPA as an employment contract, Messrs. Berg and Pachis rely on the 1970s litigation between John Tonelli and the Toronto Marlboro Major Junior A

Hockey Club, where the Club unsuccessfully sought an injunction to prevent Mr. Tonelli from playing with the now defunct WHL and where the Club's action for breach of contract was dismissed. In that litigation, the courts referred to the SPA as an employment contract. See *Toronto Marlboro Major Junior "A" Hockey Club et al. v. Tonelli et al.* (1976), 11 O.R. (2d) 664 (H.C.J.) and (1977), 18 O.R. (2d) 21 (H.C.J.) and (1979), 23 O.R. (2d) 193 (C.A.).

7. The Commonality of the Player Experience

[62] The Defendants did not challenge that there was some-basis-in-fact that the past and present players of the OHL had a common experience and a common type of relationship with them.

[63] Some of the evidence about commonality was based on a survey conducted by Dr. Harvey of the Berkeley Research Group, who was retained by the Plaintiffs to conduct a study respecting the degree of similarity or variability between CHL players in their experiences and relationships with their respective CHL Clubs. Thirteen players who together played on 30 teams across the three CHLs responded to the questionnaire. The evidence established that there was some-basis-in-fact for the following characteristics of the past and present player's experience:

- The players all sign the SPA and are obliged to act in accord with the agreement.
- Each OHL Club sets one common schedule for all of its players, beginning with a training camp in late summer, continuing through the pre-season and the 68 games of the regular season All training camp, pre-season, regular season and playoff activities carried out by players take place under the direction of Club coaches, trainers and managers.
- During the regular season, players follow a very structured schedule which is set by the Club. These schedules include a mixture of practices, workouts, team meetings, home games, away games, and mandatory team promotional events. The player affiants all estimated that they spent approximately 35 to 45 hours per week working for their Clubs during weeks with only home games, and up to approximately 85 hours per week working for their Clubs during weeks with road/away games.
- The players are paid bi-weekly, in cash or by cheque. The payments are commonly referred to as pay cheques by the players who believe that they are underpaid for the work they perform for the Clubs. Income tax, CPP, and EI contributions have been deducted from the payments by some of the teams.

8. The Factual Background as Pleaded

(a) The Standard Player Agreement ("SPA")

[64] Messrs. Berg and Pachis plead that the players; i.e., the Class Members, each entered into a contract of employment, namely, the SPA, with their respective Clubs.

[65] Messrs. Berg and Pachis plead that compliance with applicable employment statutes is an express term of each contract of employment or compliance with the statutes is an implied term of the SPA.

[66] The Plaintiffs plead that players' duties, functions, obligations and responsibilities are uniform across the Clubs, as set out in the SPA and in the bylaws of the OHL and CHL. They

plead that players uniformly devote, on average, 45 hours/week and up to 65 hours/week, or more, performing services, training, practicing, playing hockey in home and away games three times a week, and making promotional appearances in accordance with the SPA.

[67] The Plaintiffs plead that players receive no hourly wages, no overtime pay, no holiday pay, and no vacation pay, notwithstanding the ruling of the Tax Court of Canada in *McCrimmon Holdings v. Canada (Minister of National Revenue - M.N.R.)*, [2000] T.C.J. No. 823, that the relationship between a Club in the WHL and a player is identical to the relationship between an employer operating a commercial organization and an employee.

[68] The Plaintiffs plead that in *McCrimmon Holdings v. Canada (Minister of National Revenue - M.N.R.), supra* the Tax Court ruled that the players receive insurable earnings under the *Employment Insurance Act*, and the Court rejected the WHL's argument that the remuneration was an allowance paid to a student participating in a hockey program that offered scholarships.

[69] The Plaintiffs plead that in response to the Tax Court ruling, the Defendants reformatted the SPA through several iterations. In this regard, they plead that:

a. in the 2007 OHL SPA, a player's relationship with his Club was not expressly defined, and the player received an "allowance" of $65/week in exchange for the player's exclusive services, of which $15/week was subject to a holdback to remit to the federal government as contributions to Employment Insurance in accordance with the decision in *McCrimmon Holdings*;

b. in the 2010 OHL SPA and the 2013 OHL SPA, a player was defined to be an "independent contractor" earning a "fee" in exchange for the player's services;

c. in the 2014 OHL SPA, the Clubs reimburse players for expenses.

[70] The Plaintiffs plead that in the WHL, the 2007 SPA and the 2011 SPA provide that the Club retains the "services" of the player and in consideration the player receives "remuneration" comprised of an "allowance" of between $160/month and $600/month, plus a bonus. In the 2013 WHL SPA, the players are described as "amateurs" who are to be "reimbursed" for travel or training related expenses of up to $250/month. Article 4.2 (k) of the Terms and Conditions Schedule of the WHL SPA states that the player covenants and agrees to "play hockey for the club faithfully, diligently and to the best of his abilities as an amateur athlete hockey player."

[71] The Plaintiffs plead that in the QMJHL, the 2013 SPA includes a "Declaration on the Status of the Players" that states that: "players who belong to a club who range in age from 16 to 19 years old are pursuing their academic careers while also benefitting from a framework which supports the development of their athletic potential as hockey players whose goal is to pursue the practice of hockey at the professional level".

(b) Mr. Berg

[72] Mr. Berg resides in Ontario, and he formerly played hockey for the Niagara IceDogs, an OHL Club owned and operated by the Defendant Niagara IceDogs Hockey Club Inc. He signed the 2013 OHL SPA that provided that in exchange for providing his services, he would receive a fee of $50/week for three seasons commencing August 31, 2013.

[73] During September and October 2013, Mr. Berg devoted about six hours a day, seven days

a week to providing services to the Club. When the team travelled, he would devote longer hours, up to twelve hours a day. He received $50.00/week by cheque less payroll deductions. He did not receive the minimum hourly wage rate governed by the *ESA*, nor vacation pay, holiday pay, or overtime pay.

[74] Mr. Berg pleads that he was an employee because:

a. he was subject to the control of the Club as to when, where, and how he played hockey;

b. the OHL, the CHL and the Club determined and controlled the method and amount of payment to him;

c. he was required to adhere to the team's schedule of practices and games;

d. the work environment was one of subordination;

e. the team provided tools, supplied room and board, and a benefit package;

f. the Defendants used his images for their own profit;

g. the 2013 OHL SPA provided that: "The club shall pay the player the fees and provide to the player the benefits set out in Schedule "A" in exchange for the "player's services";

h. the benefits provided by the 2013 OHL SPA include payment to players aged 16-19, a weekly sum of $50, and to players aged 20, a weekly sum of $150, paid on a bi-weekly basis, plus payment of the cost of school tuition and expenses, travel expenses, lodging expenses and others, as well as a one-time bonus ranging from $100 to $450 depending on how far the Club advanced in the playoffs;

i. the 2013 OHL SPA provides that if the player's services are no longer required by the Club, the "allowance" or "fee" payable to the player may be reduced on a *pro rata* basis according to the number of days on which the player's services were provided;

j. the club made payroll deductions at source;

k. he was not responsible for operating expenses and did not share in the profits;

l. he was not financially liable if he did not fulfill the obligations of the SPA;

m. the business of hockey belonged to the Club;

n. he was not in business on his own account;

o. the Club imposed restrictions on his social life including a curfew that was monitored;

p. the Club directed every aspect of his role as a player, and

q. the business of the Club was to earn profits.

[75] In October 2013, Mr. Berg was sent down to play Junior B hockey for the St. Catharines Falcons, and subsequently he was traded to the Thorold Blackhawks. He played eight games for the Falcons and four games for the Blackhawks. He was injured, took a medical leave, and ultimately could not return to hockey. He was not paid the $50 weekly fee while he was playing Junior B hockey.

[76] After his playing career ended, Mr. Berg enrolled in university. Pursuant to the SPA signed August 31, 2013, the Club agreed, in Schedule "C", to irrevocably guarantee funding for four years of a bachelor degree upon his playing at least one exhibition or regular season game. However, his Club failed to forward the SPA to the OHL and in January 2014, the OHL required that the SPA be revised before it would be approved. Knowing that he was injured and could not play, the OHL approved the SPA but reduced his tuition package from four years to half a year.

[77] Mr. Berg pleads that the Club breached its agreement to provide four years of tuition and violated the *ESA* by failing to pay minimum wages, holiday pay, vacation pay and overtime pay.

(c) Mr. Pachis

[78] Mr. Pachis resides in Ontario, and from August 2007 to August 2009, he played hockey for Saginaw Spirit, an OHL Club owned and operated by the Defendant Saginaw Hockey Club, LLC. From September 2009 to August 2010, he played hockey for the Oshawa Generals, an OHL Club owned and operated by the Defendant Generals Hockey Inc.

[79] Mr. Pachis signed the 2007 OHL SPA in August 2007. It provided that in exchange for providing services, he would receive a fee of $50/week for four seasons. Over the course of his time with the Saginaw Spirit and the Oshawa Generals, Mr. Pachis played in exhibition, regular season, and playoff games and his hours of service varied but, on average, he supplied between 30 and 40 hours of services weekly to the Club, over the course of six or seven days, in accordance with the SPA. When the team travelled, he would devote longer hours, up to 15 hours a day.

[80] Mr. Pachis received $100.00 bi-weekly by cheque less payroll deductions from Saginaw Spirit. He received $100.00 bi-weekly by cheque from the Oshawa Generals. He did not receive the minimum hourly wage rate in accordance with the applicable employment standards legislation, nor vacation pay, holiday pay or overtime pay, with either the Saginaw Spirit or the Oshawa Generals.

[81] Mr. Pachis pleads that he was an employee because:

a. he was subject to the control of the Club as to when, where, and how he played hockey;

b. the OHL, the CHL and the Club determined and controlled the method and amount of payment;

c. he was required to adhere to the team's schedule of practices and games;

d. the work environment was one of subordination;

e. the team provided tools, supplied room and board and a benefit package;

f. the Defendants used his images for their own profit;

g. the 2013 OHL SPA provides that: "The club shall pay the player the fees and provide to the player the benefits set out in Schedule "A" in exchange for the "player's services";

h. the benefits provided by the 2013 OHL SPA include payment to players aged 16-19, a weekly sum of $50, and to players aged 20, a weekly sum of $150, paid on a bi-weekly basis, plus payment of the cost of school tuition and expenses, travel

expenses, lodging expenses and others, as well as a one-time bonus ranging from $100 to $450 depending on how far the Club advanced in the playoffs;

i. the 2013 OHL SPA provides that if the player's services are no longer required by the Club, the "allowance" or "fee" payable to the player may be reduced on a *pro rata* basis according to the number of days on which the player's services were provided;

j. the Club made payroll deductions at source;

k. he was not responsible for operating expenses and did not share in the profits;

l. he was not financially liable if he did not fulfill the obligations of the SPA;

m. the business of hockey belonged to the Club;

n. he was not in business on his own account;

o. the Club imposed restrictions on his social life including a curfew that was monitored;

p. the Club directed every aspect of his role as a player; and,

q. the business of the Club was to earn profits.

[82] Mr. Pachis played throughout the 2007-08 and 2008-09 OHL seasons with Saginaw Spirit and attended training camp with the team in August 2009. His playing rights were traded by Saginaw Spirit to the Oshawa Generals on the day before the commencement of the 2009-2010 OHL season. In exchange for receiving the playing rights, the Oshawa Generals paid Saginaw Spirit approximately $5,000 or $6,000.

[83] Mr. Pachis played the 2009-10 season with the Oshawa Generals and attended training camp with the team in August 2010, after which, he was advised that he had been cut from the team. He requested that the Oshawa Generals place him "on waivers," which is a process whereby the Oshawa Generals would release his playing rights and terminate his SPA, allowing him to play Major Junior hockey elsewhere. The Club refused Mr. Pachis' request and, since he had been cut from the team, he was unable to continue playing Major Junior hockey.

[84] Mr. Pachis pleads that Saginaw Spirit violated the applicable employment standards legislation by failing to pay minimum wages, holiday pay, vacation pay and overtime pay.

(d) Additional Allegations of an Employment Relationship

[85] Messrs. Berg and Pachis plead the following additional facts, among others, in support of the allegation that the relationship between the players and Defendants is an employment relationship:

a. the Clubs' business is for profit;

b. the Clubs benefit from the players' activities;

c. the Clubs' business depends entirely on the services performed by the players;

d. the Clubs earn millions of dollars in revenues from the services performed by the players including ticket sales, television rights, sponsors, advertising, NHL

subsidies, memorabilia, the images of players, and food and beverage sales;

e. the players are not amateur students enrolled in a training program despite the language of the SPA;

f. the majority of the players, when playing in the OHL, do not attend school or study and are not students;

g. the number of players who are employed by a team in the NHL and play in the NHL, a professional league where the players are acknowledged to be employees and have a collective bargaining agreement, may be reassigned during the season to the OHL Clubs to play hockey;

h. the players are not interns because the Clubs earn millions of dollars in revenues from the player's services;

i. the Clubs retain the right to hire, fire and discipline the players;

j. the provisions of the OHL by-laws indicate that the players receive benefits in exchange for services;

k. the WHL Clubs arrange for players who were not residents of the United States to play for American Clubs by applying on behalf of the players for a work visa;

l. the Defendants are aware that the true nature of legal relationship with the players is one of employment because they have been lobbying the Ontario provincial government and the Government of Canada to exempt the players and Clubs from applicable employment standards legislation; and

m. in 2015, the four teams located in the State of Michigan, together with the WHL, when confronted with an investigation by the Michigan Attorney General into violations of child labour laws, successfully lobbied the Michigan State Government to exempt the WHL players from state labour laws.

[86] Mr. Berg and Mr. Pachis plead that the Defendants engaged in a systemic policy or practice of avoiding or disregarding the payment of wages – including back pay, vacation pay, holiday pay, overtime pay and applicable employer payroll contributions – in contravention of the applicable employment standards legislation as evidenced by:

a. the misclassification of players;

b. their requiring players to acknowledge that the SPA was not a contract of employment at risk of forfeiting their right to play in the OHL;

c. concealing the true nature of the employment relationship;

d. concealing that the SPA had been drafted to conceal the true nature of the relationship and to avoid paying wages;

e. failing to have a system to advise the players of their right to wages; and

f. failing to have a system in place to track the work performed by the players and to pay the statutorily required wages.

(e) The Causes of Action

[87] Based on the above pleaded facts, Messrs. Berg and Pachis plead the following causes of action: (1) breach of statute; (2) breach of contract; (3) breach of duty of honesty, good faith and fair dealing; (4) negligence; (5) conspiracy; and (6) unjust enrichment and waiver of tort.

[88] The Plaintiffs submit that the violations of the applicable employment standards legislation of Ontario, Michigan, and Pennsylvania are breaches of contract. They submit that the evolution of the SPA from one where the players were remunerated for their services, to one where the players are independent contractors, to one where the players are amateur athletes in a development program, is a breach of the Defendants' duties of honesty, good faith, and fair dealing.

[89] Messrs. Berg and Pachis allege that the Defendants unduly, unlawfully, and lacking *bona fides*, conspired and agreed together, the one with the other, to act in concert to breach applicable employment standards legislation. They plead that the Defendants knew or ought to have known that the SPA is unlawful pursuant to the applicable employment standards legislation but the Defendants nevertheless agreed and conspired with the CHL and the OHL to use the SPA with the predominant purpose to continue operating the OHL without incurring costs that were to be lawfully paid by the Clubs to the players in the form of minimum wages, overtime pay, holiday pay and vacation pay.

[90] The Plaintiffs plead that the Defendants' acts in furtherance of the conspiracy caused injury and loss to the Plaintiffs and Class Members in that the players' statutory protected right to fair wages was breached and they did not receive minimum wages, vacation pay, holiday pay or overtime pay that was owed to them.

[91] Messrs. Berg and Pachis plead that the Defendants owed the players a duty of care and were negligent and in breach of their duty of care as follows:

a. the failed to ensure that the players were properly classified as employees;

b. they failed to ensure that the work performed by the players was properly monitored and accurately recorded;

c. they failed to ensure that the players were appropriately compensated with minimum wage, back pay, holiday pay, vacation pay and overtime pay pursuant to applicable employment standards legislation;

d. they failed to implement a policy, practice or procedure whereby the players would receive wages when they knew or ought to have known that the players were employees;

e. they failed to implement a policy, practice or procedure whereby the players would receive wages when they knew or ought to have known that, according to *McCrimmon Holdings*, the players were employees;

f. they failed to obtain legal advice or to follow legal advice with respect to the application of *McCrimmon Holdings* and with respect to the likelihood that the players were employees as a matter of law;

g. they failed to appreciate that the players remained employees as a matter of law despite the fact that the language of the SPA was periodically changed;

h. they knew or ought to have known that the Clubs are required by law to pay wages yet they implemented a practice, policy or procedure whereby they forced the Clubs to withhold wages;

i. they required all players to sign the SPA when they knew or ought to have known that the SPA misclassified the players as non-employees;

j. they could have obtained a ruling or direction from employment standards officers but failed to do so; and

k. they systemically misclassified the players to avoid paying statutory wages.

[92] Messrs. Berg and Pachis plead that the players were deprived and the Defendants were enriched by failing to pay the players wages in a manner that complied with the legislation and there is no juristic reason for the unjust enrichment.

[93] Messrs. Berg and Pachis plead that the Defendants are liable for waiver of tort because they receive hundreds of millions of dollars in revenue and by breach of contract, conspiracy, negligence and related use of the unlawful SPA, the Defendants have been unjustly enriched.

[94] Messrs. Berg and Pachis plead that for the causes of action of: (1) breach of contract, (2) breach of the duty of good faith, and (3) breach of the statutes of employment, the OHL is jointly and severally liable with each Club, on the basis that the OHL is a common/joint employer or forms a single employer with each and every Club and its players.

[95] Messrs. Berg and Pachis, on their own behalf and on behalf of the Class, claim against the Clubs, OHL and CHL for:

(a) an order certifying this action as a class proceeding and appointing them as the Representative Plaintiffs of the Class;

(b) a declaration that the players are, or were, employees of their Clubs;

(c) a declaration that there exists a contract of employment between each player and his Club;

(d) a declaration with respect to the Clubs located in Ontario that it is an implied or express term of all contracts of employment between a player and his Club that the players are or were to be paid wages, back pay, vacation pay, holiday pay and overtime pay in accordance with applicable employment standards legislation, and that the Clubs were to make employment payroll contributions as required by law;

(e) a declaration that the Clubs located in Ontario breached the contracts of employment by failing to pay the players wages, back pay, vacation pay, holiday pay and overtime pay in accordance with applicable employment standards legislation and by failing to make employment payroll contributions as required by law;

(f) a declaration that the terms and conditions of the SPA which contravene provisions of the applicable employment standards legislation which prohibit contracting out of employment standards are unenforceable and void;

(g) a declaration that the Clubs located in Ontario breached the contractual duties of honesty, good faith and fair dealing;

(h) a declaration that the Clubs, OHL and CHL engaged in a policy or practice of avoiding or disregarding compliance with the applicable employment standards legislation;

(i) A Declaration that the clubs, OHL and CHL conspired together and with each other to violate applicable employment standards legislation and to compel the players to enter into the SPA knowing that the SPA constituted an unlawful agreement in violation of applicable employment standards legislation, and therefore the Defendants are jointly and severally liable for all damages;

(j) in the alternative to the conspiracy plea, a declaration that the OHL, CHL and the Clubs located in Ontario were negligent;

(k) a declaration that the players who had played on teams located in Ontario may elect to recover damages jointly and severally from all such Defendants, the WHL, and the CHL based on the cause of action or remedy of waiver of tort;

(l) a declaration that the Defendant Clubs located in Ontario were unjustly enriched to the deprivation of the players without juristic reason;

(m) an order disgorging the profits that the Defendants generated as a result of benefitting from their unlawful conduct;

(n) an interim and final mandatory order for specific performance directing that the Clubs, OHL and CHL comply with applicable employment standards legislation, in particular to: (i) ensure that the players are properly classified as employees; (ii) advise players of their entitlement to compensation as employees in accordance with the applicable employment standards legislation; (iii) ensure that the players' hours of work are monitored and accurately recorded; (iv) ensure that the players are appropriately compensated at a rate equal to or above the minimum requirements for employees pursuant to the applicable employment standards legislation; (v) ensure that the Clubs make employer payroll contributions required by law including the *Canada Pension Plan*, R.S.C., 1985, c. C-8, the *Employment Insurance Act*, S.C. 1996, c. 23, the laws of Michigan and the laws of Pennsylvania;

(o) an interim and final order restraining the Defendants, their officers, directors, agents, and employees from engaging in any form of reprisal as a result of a Class Member electing to participate in this action, including in Ontario, breaching s. 74(1) of the *ESA* ....

(p) damages for outstanding wages including back pay, vacation pay, holiday pay, overtime pay, and applicable employer payroll contributions required by law in the amount of one hundred million dollars in Canadian currency and fifty million in U.S. currency;

(q) liquidated damages in the amount of 25% of wages outstanding from Erie

Hockey Club Limited and Jaw Hockey Enterprises LP, pursuant to the laws of Pennsylvania;

(r) liquidated damages in the amount of 100% of wages outstanding from Compuware Sports Corporation, IMS Hockey Corp., and Saginaw Hockey Club, LLC and a civil fine of $1,000 per Class Member employed by these Defendants;

(s) punitive damages in the amount of twenty-five million dollars in Canadian currency;

(t) an order directing the Defendants to preserve and disclose to the Plaintiffs all records (in any form) relating to the identification of Class Members and the hours of work performed by the Class Members;

(u) an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;

(v) pre-judgment and post-judgment interest, compounded, or pursuant to ss. 128 and 129 of the *Courts of Justice Act*, R.S.O. 1990, c. C.43; and

(w) costs of this action on a substantial indemnity basis or in an amount that provides full indemnity plus the costs of distribution of an award under ss. 24 or 25 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"), including the costs of notice associated with the distribution and the fees payable to a person administering the distribution pursuant to s. 26(9) of the *CPA*; and

(x) such further and other relief as this Honourable Court deems just.

9. Avaricious Employer or Magnanimous Patron?

(a) Introduction

[96] The crucial and determinative element of Messrs. Berg's and Pachis' proposed class action is proving that the putative Class Members are employees of their teams and of the OHL, the CHL and the Clubs that together constitute a common employer. If the players are employees of the Defendants, then it becomes arguable that their employer has breached the employment statutes of Ontario, Michigan, and Pennsylvania.

[97] For the certification motion, the Plaintiffs spent a great deal of evidentiary effort attempting to prove the merits of their ultimate legal position that the facts proved that they were the exploited employees of a for-profit employer and profitable commercial enterprise in the sports entertainment business.

[98] In resisting the certification motion, the Defendants responded with an even more formidable effort to prove that the players were not employees but students with career aspirations to be professional athletes. Moreover, as noted above, in compiling the voluminous evidentiary record for the certification motion both sides appeared to be engaging in some sort of public relations effort or propaganda exercise to win adherents from the players and the public.

[99] A certification motion, however, is not designed or supposed to be a determination of the merits, so I cannot say anything about the merits. All I can say is that some of the evidence, however, was relevant to the procedural issues that are the subject matter of a certification motion. Therefore, in this section, I shall briefly describe what the parties had to say about the nature of the relationship between the players and the Defendants.

(b) Avaricious Employer

[100] Relying on the evidence of Dr. Mongeon and the affiants who had played in the OHL, Messrs. Berg and Pachis characterized the OHL as a commercial for-profit enterprise that exploited its employees.

[101] Dr. Mongeon concluded that OHL Clubs are profit-maximizing with the primary purpose of maintaining high-level competition to attract fans and generate revenues. Dr. Mongeon applied economic theories to the economic environment and business operations of the OHL and WHL, and he concluded that players confer an economic benefit to their team and to all Clubs because the players are an integral part of all the Clubs' businesses. He opined that all of the revenue sources for the OHL and its Clubs are dependent on the playing of hockey games, which in turn is dependent on the labour of the players. In his opinion, the Clubs produce an entertainment product (hockey games) and that Club and League revenues are a function of the contribution of players throughout the entire League. It is his thesis that ticket sales, concession and merchandise sales, advertising, and other revenues from the distribution and marketing of hockey games can only exist where there are hockey games occurring, and hockey games, likewise, only occur when the players provide their labour to play the games.

[102] Dr. Mongeon said that the systemic expansion and relocation of Clubs in a sports league was an indicator of profit-maximizing teams in the OHL. He said that the ticket-pricing strategy of the OHL and WHL was consistent with a profit-maximizing monopolist. He said that the competitive balance in the OHL and WHL indicated profit-maximizing behaviour. He said that estimated franchise values and the Clubs' annual rate of return were in keeping with profit-maximizing behaviour.

[103] Dr. Mongeon concluded that the players are not paid for their services because the Defendants operate in a monopoly market for the players' services. Players are unable to approach Clubs to sell their services to the highest bidder because one team controls their rights completely within the entire market. As such, the players do not have the opportunity to seek out alternative "employers" willing to pay for their services. He said that the Clubs retained the entire value of the players' services, which serves to increase the Clubs' retained earnings from revenue.

[104] It was Dr. Mongeon's opinion that, motivated by profit, Clubs inherently choose to expend time and effort to promote their most-skilled players, rather than expend the time and effort necessary to help less skilled players develop, which would result in poorer results for the team.

[105] The Plaintiffs' affiants deposed that during their time in the OHL, there was minimal individually focused or targeted coaching or feedback. The Plaintiffs submitted that the Clubs prioritizing their own interests over player development indicated that the Clubs benefited from the contributions of the players, and suggested that the players are not interns, trainees or apprentices, but employees. In this regard, the Plaintiffs relied on a Washington Department of

Labour investigation that concluded that CHL players do not fall under any intern/trainee exemption to employment status because the Clubs benefit from the contributions of the players and that the players are not student athletes because that term is reserved for players representing their high school or college, whereas CHL players provide their services to for-profit businesses.

[106] The Plaintiffs' affiants deposed that the players fear reprisal from the Defendants, and condemnation from the hockey community at large, for participation in this proposed class action.

(c) Magnanimous Patron

[107] The Defendants deny that they have an employment relationship with their players, and the Defendants portray themselves as patrons and benefactors of their players with the philosophy and mission of putting the players first.

[108] The Defendants submit that under the SPA, a team commits to providing a player with a multi-faceted development program that focuses on hockey training, education, and character development in a safe, caring and healthy environment that provides the support necessary for the player to maintain the educational opportunities of his choosing with career opportunities inside and outside of hockey.

[109] The Defendants submit that they care for the players, many of whom are 16 or 17 years old, and who live away from home. The League arranges for them to reside with a billet family, which is subject to background checks and which must provide a stable family environment, appropriate supervision and support, access to computers, and private bedrooms. The billet families monitor school attendance and performance, impose and enforce curfews, provide for organized social activities, and encourage participation in community activities on a voluntary basis. The teams pay the billets a monthly stipend to cover the cost of groceries and living expenses for the players. Billets are not required to spend any of their own money on the players.

[110] The Defendants say that the teams provide access to trainers, medical professionals and other rehabilitation resources as necessary to care for the players. Each team makes different arrangements to provide these resources. Some teams have trainers and medical professionals on staff. Others have relationships and arrangements with local healthcare professionals. The OHL also provides the National Anti-Doping Program, introduced by the CHL and the Canadian Centre for Ethics in Sport in 2008.

[111] The Defendants' affiants depose that many teams offer non-denominational spiritual support programs to players through Hockey Ministries International. The OHL runs a mental health education program jointly with the Canadian Mental Health Association called *Talk Today*. This program is designed for players, parents, billet families, and team staff to help identify and deal with mental health issues.

[112] The Defendants say that each OHL team covers all education costs of current players, tuition (including university or college level courses), books, tutoring costs, and in some cases, private school fees. The OHL has a Manager of Education Services who works with each team's academic advisor who is available all year round, including during the off-season and summer. The academic advisor acts as a liaison between the team, the player, his parents, and the schools. The academic advisor monitors the academic progress and behaviour of players and provides guidance, including career and academic counselling.

[113] The Defendants say that all players are expected to attend high school until graduation and upon graduation, players are encouraged to take post-secondary courses. Teams must report academic results to the OHL. In 2014-2015, the high school graduate rate among OHL players was 99.7%. (The national average in Canada is 82%.) Since 2008, OHL teams have provided 1,712 scholarships worth more than $11 million to former players to attend universities and colleges. During the 2014-2015 season, CHL teams paid $6.2 million in scholarships for 769 graduate players who attended 163 post-secondary institutions across North America.

[114] At minimum, a player is eligible for a one-year scholarship, which covers the cost of tuition, textbooks and compulsory fees, for each season played. Players selected in the first round of the OHL Priority Selection also receive university room and board, which, combined with the minimum scholarship benefits, is referred to as a "Full Ride" scholarship benefit. After having played for four years, players are eligible to receive four years of scholarship funding. Once a player earns his scholarship, it is fully guaranteed by the team and the OHL. There is a contingent liability of more than $30 million for scholarships earned but not yet used. After leaving the OHL, approximately 49% of players use their scholarships.

[115] The Defendants submit that the commitments made by the players under the SPA are substantially the same as amateur athletes typically make to their teams and that there is nothing unique about committing to play exclusively with one's team, agreeing to maintain one's physical health, and promising to abide by rules governing player conduct, safety and good sportsmanship. The Defendants say that the commitments were not established to demonstrate the League or team's control over the player and are an ordinary feature of organized competitive amateur athletics.

10. OHL Team Finances and the Consequence of Certification

[116] The Defendants submit that if the action is certified, a contingent liability of $30 million would immediately crystallize. They submit that the evidence shows that they could not fund this liability on top of existing operations costs without significantly reducing or eliminating benefits to players.

[117] The Defendants submit that they cannot afford to pay players minimum wage and employment benefits in addition to the benefits they already provide. They submit that each season, approximately one-third of OHL teams lose money. The losses range from approximately $100,000 to $800,000 per year. The Defendants say that a third of the teams break even each season and that only about one-third of the teams make any profit, but the financial results do not take into account the contingent liability for scholarships, which is approximately $1.5 million per team.

[118] The Defendants submit that if the action is certified, then all the OHL teams would reduce or eliminate benefits including the OHL Scholarship Program, the billeting program, tuition coverage, tutoring programs, and food and nutrition programs and some teams would be forced to cease operations reducing the pool of available hockey opportunities for young athletes.

[119] Mr. Branch stated that if the Ontario and Alberta actions are certified, the teams and the League will have to re-examine and reduce the benefits offered to players such as the scholarships that former players are currently using. He stated that certification could result in the loss of several teams that would fold up operations.

[120] Mrs. Burke, the owner of the Niagara IceDogs, stated that, if her team is required to pay its players minimum wage, the consequences would be catastrophic for the team, and would cause the entire community significant harm.

[121] Mr. Abbott, owner of the North Bay Battalion, stated that his team would likely shut down if he is required to pay minimum wage, and the entire community would suffer.

11. The Application of U.S. Law

[122] The parties agree that U.S. law will govern any employment relationship between the U.S. teams and their players.

[123] The parties strenuously disagree about whether a U.S. court would enforce an Ontario judgment in the case at bar. Mr. Dunn, the Defendants' expert in U.S. law, deposed that it was unlikely that a U.S. court would recognize a class action judgment of a Canadian court in one of the class actions at issue here.

[124] Mr. Dunn opined that in the U.S., wage and hour law is a matter of overlapping authority. The U.S. Congress is responsible for the *Fair Labor Standards Act of 1938*, (*FLSA*), and state legislatures regulate local employment law. When federal and state wage and hour laws have different requirements, the law that is the most favorable to the employee controls. Each statute has its own criteria for what constitutes an employee. States also have their own administrative institutions to regulate and administer their wage and hours of employment regimes. Federal courts, including the Supreme Court of the United States, are bound by the rulings of a state's highest court as to that state's laws.

[125] At the state level, the *Michigan Workforce Opportunity Wage Act*, Mich. Comp. Laws § 408.411 et seq. (2014) and *Pennsylvania Minimum Wage Act,* 43 Pa. Cons. Stat. § 331.101 et seq. (2014), provide basic protections to all employees in the state.

[126] Mr. Hancock, the Plaintiffs' expert, deposed, and Mr. Dunn acknowledged, that most circuits of the U.S. Federal Court and the Michigan and Pennsylvania State Courts employ a six-part Economic Realities Test to determine whether a worker is an employee or an independent contractor under wage and hour legislation. These six factors are: (1) the permanence of the working relationship; (2) the degree of skill the work entails; (3) the extent of the worker's investment in equipment or materials; (4) the worker's opportunity for loss or profit; (5) the degree of the alleged employer's control over the worker; and (6) whether the service rendered by the worker is an integral part of the alleged employer's business.

[127] Mr. Dunn opined that whether under the *FLSA* or the laws of Michigan or Pennsylvania, the law as to whether amateur athletes are employees is unsettled.

[128] Mr. Hancock opined that the OHL's players would be found to be employees under state law because of: the level of control exercised over the players by the Clubs; the history of payment of player wages; the Clubs' and Leagues' right to discipline players; the Clubs being for-profit institutions; the OHL not being able to exist without the players, and the OHL and the Clubs not being connected to any educational institution.

[129] Under the *FLSA* several categories of workers, including independent contractors, volunteers, interns, trainees, and employees of seasonal recreational establishments, are excluded from and are not subject to the statutory minimum wage and overtime compensation provisions.

[130] Mr. Dunn and the Plaintiffs' expert Mr. Hancock agree that the test for determining whether an individual is an employee and, if so, what activities constitute covered employment under the *FLSA*, are unsettled. There are no reported cases or regulations that address the employment status of hockey players, directly or indirectly, nor are there reported cases or regulations about the extent to which athletic activities are compensable work under the *FLSA*.

[131] Mr. Dunn deposed that although thousands of students compete on many hundreds of teams for secondary schools and post-secondary institutions throughout the U.S., none has been determined to be an employee, or engaged in employment for the purposes of any federal or state wage and hour law.

[132] There are also hundreds of amateur leagues, teams and structured athletic training programs in the U.S. for teenage athletes. Many involve high levels of competition, and sophisticated and advanced training, and Mr. Dunn testified that there has been no adjudication, and no legislative or administrative determination that any player is an employee covered by the *FLSA* or by state wage and hour law.

[133] Mr. Hancock conceded no court anywhere in the U.S. has held that an employment relationship exists between an athlete and a team.

[134] Mr. Dunn deposed that there is no direct precedent or analogous authority to determine the employment status of OHL players under Michigan State's *Workforce Opportunity Wage Act*, Mich. Comp. Laws §§ 408.411-408.424 ("*WOWA*"), which governs minimum wage and overtime requirements. He said that no Michigan court has considered whether an individual athlete playing in any particular league, team or training program, or any intern or trainee is an employee such that his or her activities constituted work entitling him or her to minimum wage and overtime pay.

[135] Mr. Dunn deposed that in Pennsylvania, the Department of Labor and Industry oversees and enforces the *Minimum Wage Act of 1968*, 43 Pa. Stat. §§ 333.101-333, 115, which governs the mandated minimum wage and overtime pay rates and, once again, there is no case law considering whether an whether an individual athlete playing in any particular league, team or training program, or any intern or trainee, was an employee such that his or her activities constituted covered work, entitling him or her to minimum wage and overtime pay.

D. Discussion and Analysis

1. The General Principles for Certification

[136] The court is required to certify an action as a class proceeding where the following five-part test in s. 5 of the *Class Proceedings Act, 1992* is met: (1) the pleadings disclose a cause of action; (2) there is an identifiable class of two or more persons that would be represented by the representative plaintiff; (3) the claims of the class members raise common issues; (4) a class proceeding would be the preferable procedure for the resolution of the common issues; and (5) there is a representative plaintiff who: (a) would fairly and adequately represent the interests of the class; (b) 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 (c) does not have, on the common issues for the class, an interest in conflict with the interests of other class members.

[137] For an action to be certified as a class proceeding, there must be a cause of action shared

by an identifiable class from which common issues arise that can be resolved in a fair, efficient, and manageable way that will advance the proceeding and achieve access to justice, judicial economy, and the modification of behaviour of wrongdoers: *Sauer v. Canada (Attorney General)*, [2008] O.J. No. 3419 (S.C.J.) at para. 14, leave to appeal to Div. Ct. refused, [2009] O.J. No. 402 (Div. Ct.).

[138] On a certification motion, the question is not whether the plaintiff's claims are likely to succeed on the merits, but whether the claims can appropriately be prosecuted as a class proceeding: *Hollick v. Toronto (City)*, [2001] 3 S.C.R. 158 at para. 16.

[139] The test for certification is to be applied in a purposive and generous manner, to give effect to the important goals of class actions -- providing access to justice for litigants; promoting the efficient use of judicial resources; and sanctioning wrongdoers to encourage behaviour modification: *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534 at paras. 26 to 29; *Hollick v. Toronto (City)*, *supra* at paras. 15 and 16.

[140] The purpose of a certification motion is to determine how the litigation is to proceed and not to address the merits of the plaintiff's claim; there is to be no preliminary review of the merits of the claim: *Hollick v. Toronto (City)*, *supra* at paras. 28 and 29. However, the plaintiff must show "some-basis-in-fact" for each of the certification criteria other than the requirement that the pleadings disclose a cause of action: *Hollick v. Toronto (City)*, *supra* at paras. 16-26.

[141] In particular, there must be a basis in the evidence before the court to establish the existence of common issues: *Dumoulin v. Ontario*, [2005] O.J. No. 3961 (S.C.J.) at para. 25; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 (S.C.J.) at para. 21; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 140. To establish commonality, evidence that the alleged misconduct actually occurred is not required; rather, the necessary evidence goes only to establishing whether the questions are common to all the class members: *Pro-Sys Consultants v. Microsoft*, 2013 SCC 57 at para. 110.

2. Cause of Action Criterion

(a) General Principles

[142] The first criterion for certification is that the plaintiff's pleading discloses a cause of action. The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada*, [1990] 2 S.C.R. 959 is used to determine whether a proposed class proceeding discloses a cause of action for the purposes of s. 5(1)(a) of the *Class Proceedings Act, 1992*.

[143] Thus, to satisfy the first criterion for certification, a claim will be satisfactory, unless it has a radical defect or it is plain and obvious that it could not succeed: *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 (C.A.) at p. 679, leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476; *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.) at para. 19, leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.).

[144] In a proposed class proceeding, in determining whether the pleading discloses a cause of action, no evidence is admissible, and the material facts pleaded are accepted as true, unless patently ridiculous or incapable of proof. The pleading is read generously and it will be unsatisfactory only if it is plain, obvious, and beyond a reasonable doubt that the plaintiff cannot succeed: *Hollick v. Toronto (City)*, *supra* at para. 25; *Cloud v. Canada (Attorney General)*

(2004), 73 O.R. (3d) 401 (C.A.) at para. 41, leave to appeal to the S.C.C. refused, [2005] S.C.C.A. No. 50, rev'g, (2003), 65 O.R. (3d) 492 (Div. Ct.); *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 (Div. Ct.) at p. 469.

(b) Is the Cause of Action Criterion Satisfied?

[145] Messrs. Berg and Pachis advance six causes of action; namely: (1) breach of statute; (2) breach of contract; (3) breach of duty of honesty, good faith and fair dealing; (4) negligence; (5) conspiracy; and (6) unjust enrichment and waiver of tort.

[146] I pause here to say, it is debatable that waiver of tort, which is coupled with unjust enrichment, is correctly classified as a cause of action, but for present purposes I shall treat it as a cause of action, and I also note that insofar as it provides restitutionary relief, waiver of tort is redundant to the Plaintiffs' unjust enrichment claim, which does provide the remedies of constructive trust and the disgorgement of ill-gotten gains.

[147] The Plaintiffs identify, in the Statement of Claim and in the proposed common issues, the causes of action that apply to all Defendants. The causes of action common to all Defendants are: (1) conspiracy, and (2) common employer and breach of statute, although different statutes are involved for the Ontario teams and for the teams of Michigan and Pennsylvania respectively. The action for statutory wages in Michigan and Pennsylvania is a direct action on the statute, whereas in Ontario it also forms an implied term of the contract of employment.

[148] The causes of action for negligence, unjust enrichment, waiver of tort, as well as the standalone contractual breach of the duty of good faith, are not being advanced against the Defendants domiciled in the States. These causes of action are being advanced only against the Ontario teams.

[149] As noted at the outset, save for the pleading of conspiracy, which they regard as deficiently pleaded, the Defendants do not dispute that Messrs. Berg and Pachis have satisfied the cause of action criterion for certification; i.e., it is conceded that the Plaintiffs have pleaded legally tenable causes of action.

[150] I, therefore, conclude that the cause of action criterion has been satisfied for all six of the Plaintiffs' pleaded causes of action.

[151] I, however, foreshadow to say that based on other certification criteria, most particularly the preferable procedure criterion, I shall not be certifying the action as against the American teams and I shall not be certifying the causes of action for: (1) breach of contract, (2) negligence, (3) breach of duty of honesty, good faith and fair dealing, (4) conspiracy, and (5) waiver of tort.

3. Identifiable Class Criterion

(a) General Principles

[152] The definition of an identifiable class serves three purposes: (1) it identifies the persons who have a potential claim against the defendant; (2) it defines the parameters of the lawsuit so as to identify those persons bound by the result of the action; and (3) it describes who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).

[153] In defining class membership, there must be a rational relationship between the class, the

causes of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive: *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.) at para. 57, rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (S.C.J.).

(b) Is the Identifiable Class Criterion Satisfied?

[154] As already noted several times, I shall not be certifying the action as against the American teams, and this means that the class definition should be amended to exclude the Michigan Class and the Pennsylvania Class.

[155] I agree with the Defendants' argument that a class definition must specify an end date for class membership. An open-ended class definition is potentially improper because it would deny class members their right to opt-out and, in general, it also makes for an unmanageable proceeding. See *Magill v. Expedia Inc.*, 2010 ONSC 5247 at para. 32; *Re Collections Inc. v. Toronto Dominion Bank,* 2010 ONSC 6560.

[156] The Plaintiffs, however, submit that it would be arbitrary and unjust to have what would be an under-inclusive and under-efficient class by having a class period that closes on the date of certification, and they propose that the class membership should remain open until the last notice of certification is issued, and that notices of certification should be given on a running basis, i.e., on two or more occasions after the order certifying the action as a class proceeding. This approach, the Plaintiffs say, would achieve an appropriately inclusive class, maximize judicial economy, and preserve the Class Members' right to opt out.

[157] The Plaintiffs rely on Justice Horkins' decision in *Wright v. United Parcel Service Canada Ltd.*, 2011 ONSC 5044, where she rejected the defendant's argument that the class period must end when the action is commenced, rather than at the date of the certification award, which is the date that Justice Horkins used (and that I will use in the case at bar).

[158] The approach of an open-ended or rolling period of class membership may be appropriate where there is a certainty that the predicament of the new class members is common with those Class Members at the time of certification. I permitted this approach in *Brazeau v. Attorney General (Canada)*, 2016 ONSC 7836 and in *Alexander v. Ontario*, 2016 ONSC 7059, but these were consent certifications and the point was not argued.

[159] The matter of an open-ended class period was very briefly discussed in *Bozsik v. Livingston International Inc.*, 2016 ONSC 7168 and 2017 ONSC 1409, an overtime pay class action, where Justice Gray stated at paras. 4-6:

> 4. With respect to a cut-off date, the caselaw, such as it is, is inconsistent as to whether the date should be the date of certification, or the date notice is given to the class members, or some other date. It is not clear that matters of principle have been debated at any length in the cases that have been drawn to my attention.
>
> 5. I see no reason why the date notice as given should not be the appropriate cut-off date. That date is approximately five months after the date of certification. I assume that there will not be an extraordinarily large number of additional potential members of the class that will have been added since the date of certification.
>
> 6. Counsel for the defendant argues that there is no evidence that the terms and

> conditions of employment of any persons hired since the date of certification are the same as, or different from, the terms and conditions of employment in existence prior to the date of certification. Assuming that to be so, I do not think it is a relevant consideration for the purposes of identifying a specific cut-off date. If it is the defendant's position that the terms and conditions of employment, as they relate to overtime, are significantly different for persons hired after the date of certification, this is an issue that can be raised and dealt with by the trial judge. At this point, however, I see no reason why persons who were hired within that somewhat short window should not at least be given notice that their rights may be affected, and be given the opportunity to remain within the class at this stage, or opt out.

[160] In my opinion, where the circumstances of additional putative class members may be different, it may not be appropriate to have a rolling class period end date. Apart from the management and administration difficulties of the approach of an open-ended class period, the approach ignores the fundamental problem that there has been no adjudication to determine whether the circumstances of the new class members, (who in the case at bar, at the time of the original certification motion, were not even playing hockey for OHL Clubs), are such that the criteria for certification continue to be satisfied for them. Who's to say that the evidentiary record has not changed between the date of certification and the next notice of certification? And, commonality is not a matter to be proven at the common issues trial.

[161] I note here that in other circumstances where representative plaintiffs seek to increase class size, which sometimes occurs as part of the settlement of an already certified class action, it is necessary to determine that the criterion for certification are satisfied, and this typically occurs as a part of a consent certification for settlement purposes. The point is that the class size usually cannot be altered without a certification motion.

[162] I, therefore, shall amend the class definition to add a class closing date as of the date of the certification motion. This amendment is made without prejudice to the definition being amended from time to time by a new motion to certify, which, if granted, would be followed by a notice program.

[163] I shall also amend the definition to account for the fact that I shall not be certifying the claims against the Michigan and Pennsylvania Defendants.

[164] The resulting class definition is as follows:

> All players who are members of a team owned and/or operated by one or more of the clubs located in the Province of Ontario (a "team") or at some point commencing October 17, 2012 and [*date of certification order*], who were members of a team and all players who were members of a team who were under the age of 18 on October 17, 2012 (the "Ontario Class")

[165] I conclude that the identifiable class criterion has been satisfied.

4. Common Issues Criterion

(a) General Principles

[166] The third criterion for certification is the common issues criterion. For an issue to be a

common issue, it must be a substantial ingredient of each class member's claim and its resolution must be necessary to the resolution of each class member's claim: *Hollick v. Toronto (City), supra* at para. 18.

[167] With regard to the common issues, success for one 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. The answer to a question raised by a common issue for the plaintiff must be capable of extrapolation, in the same manner, to each member of the class. See: *Western Canadian Shopping Centres Inc. v. Dutton, supra* at para. 40; *Merck Frosst Canada Ltd. v. Wuttunee*, 2009 SKCA 43 at paras. 145-46 and 160, leave to appeal to S.C.C. refused, [2008] S.C.C.A. No. 512; *McCracken v. Canadian National Railway Co.*, 2012 ONCA 445 at para. 183.

[168] In *Pro-Sys Consultants v. Microsoft, supra* at para. 106, the Supreme Court of Canada describes the commonality requirement as the central notion of a class proceeding which is 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.

[169] The common issue criterion presents a low bar: *Carom v. Bre-X Minerals Ltd.* (2000), 51 O.R. (3d) 236 (C.A.) at para. 42; *Cloud v. Canada (Attorney General), supra,* at para. 52; *203874 Ontario Ltd. v. Quiznos Canada Restaurant Corp.*, [2009] O.J. No. 1874 (Div. Ct.), aff'd [2010] O.J. No. 2683 (C.A.), leave to appeal to S.C.C. refused [2010] S.C.C.A. No. 348.

[170] An issue can be a common issue even if it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution: *Cloud v. Canada (Attorney General), supra.* A common issue need not dispose of the litigation; it is sufficient if it is an issue of fact or law common to all claims and its resolution will advance the litigation for (or against) the class: *Harrington v. Dow Corning Corp.*, 2000 BCCA 605, affg. [1996] B.C.J. No. 734 (S.C.), leave to appeal to S.C.C. ref'd. [2001] S.C.C.A. No. 21.

[171] In the context of the common issues criterion, the some-basis-in-fact standard involves a two-step requirement that: (1) the proposed common issue actually exists; and (2) the proposed issue can be answered in common across the entire class: *Hollick v. Toronto (City), supra*; *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443; *McCracken v. Canadian National Railway Company, supra*; *Williams v. Canon Canada Inc., supra*; *Martin v. Astrazeneca Pharmaceuticals PLC*, 2012 ONSC 2744; *Good v. Toronto Police Services Board*, 2014 ONSC 4583 (Div. Ct.); *Dine v. Biomet*, 2015 ONSC 7050, aff'd 2016 ONSC 4039 (Div. Ct.).

(b) The Proposed Common Issues

[172] Messrs. Berg and Pachis propose the following common issues:

Employment Status

1. Are, or were, the Class Members employees of the Defendant Clubs, the OHL, and/or the CHL pursuant to (a) the applicable employment standards legislation and/or (b) at common law?

2. Are, or were, the Class Members who played for the Defendant Clubs located in Ontario in "pensionable employment" of the Defendant Clubs located in Ontario, the OHL, and/or the CHL, pursuant to the *Canada Pension Plan*?

3. Are, or were, the Class Members who played for the Defendant Clubs located in Ontario in "insurable employment" of the Defendant Clubs located in Ontario, the OHL, and/or the CHL, pursuant to the *Employment Insurance Act*?

Common Employer

4. Are the Defendant Clubs, the OHL, and/or the CHL a common employer, either under statute or at common law?

Statutory Requirements

5. Do any or all of the Defendant Clubs, the OHL, and/or the CHL have an obligation to the Class Members under the applicable employment standards legislation to pay them minimum wage, overtime pay, holiday pay and/or vacation pay?

Breach of Contract

6. Are the minimum wage, overtime pay, holiday pay, and/or vacation pay requirements under the applicable employment standards legislation in Ontario express or implied terms of contract between the Ontario Class Members and any or all of the Defendant Clubs located in Ontario, the OHL, and/or the CHL?

7. Did any or all of the Defendant Clubs located in Ontario, the OHL, and/or the CHL breach any of the contractual obligations found to exist above?

Breach of Statute

8. Did any or all of the Defendants breach the applicable employment standards legislation by failing to pay the Class Members minimum wage, overtime pay, holiday pay and/or vacation pay?

Negligence

9. Did any or all of the Defendant Clubs located in Ontario, the OHL, and/or the CHL owe a duty of care to the Ontario Class Members to:

a. Ensure that Class Members are properly classified as employees;

b. Advise Class Members of their entitlements under the applicable employment standards legislation;

c. Ensure that Class Members' hours of work are monitored and accurately recorded; and

d. Ensure that Class Members are compensated in accordance with their entitlements under the applicable employment standards legislation?

10. Did any or all of the Defendant Clubs located in Ontario, the OHL, and/or the CHL breach any of the duties of care found to exist above?

Breach of Duty of Honesty, Good Faith and Fair Dealing

11. Did any or all of the Defendant Clubs located in Ontario, the OHL and/or the CHL owe a duty, in contract or otherwise, to the Ontario Class Members, to act in good faith and to deal with them in a manner characterized by candour, reasonableness, honest and/or forthrightness in respect of its obligations to:

a. Ensure that Class Members are properly classified as employees;

b. Advise Class Members of their entitlements under the applicable employment standards legislation;

c. Ensure that Class Members' hours of work are monitored and accurately recorded; and

d. Ensure that Class Members are compensated in accordance with their entitlements under the applicable employment standards legislation?

12. Did any or all of the Defendant Clubs located in Ontario, the OHL, and/or the CHL breach their good faith duties in any of the respects found to exist above?

Conspiracy

13. Did any or all of the Defendants conspire to violate the applicable employment standards legislation? If so, when, where, and how?

Unjust Enrichment/Waiver of Tort

14. Were any or all of the Defendant Clubs located in Ontario, the OHL, and/or the CHL unjustly enriched by failing to compensate the Ontario Class Members with minimum wage, overtime pay, vacation pay, and/or holiday pay owed to them in accordance with the applicable employment atandards legislation and/or failing to make the required employer payroll contributions on behalf of the Class Members?

15. Are any or all of the Defendants located in Ontario, the OHL, and/or the CHL liable to the Ontario Class Members in waiver of tort?

Damages, Costs and Interest

16. Is this an appropriate case for any or all of the Defendants located in Ontario to disgorge profits?

17. Can any or all of the claims be assessed on an aggregate basis?

18. Are any or all the Defendants liable for punitive damages?

19. Are the Defendant Clubs located in Pennsylvania, the OHL and/or the CHL liable for liquidated damages in the amount of 25% of all outstanding wages owed to the Pennsylvania Class Members, pursuant to Pa. Cons. Stat. §260.10, as amended?

20. Are the Defendant Clubs located in Michigan, the OHL and/or the CHL liable for liquidated damages in the amount of 100% of all outstanding wages owed to the Michigan Class Members, and a civil fine of $1,000 per Michigan Class Member, pursuant to Mich. Stat. §408, as amended and the regulations thereunder and/or *Fair Labor Standards Act of 1938*, 29 U.S.C. §201 and the regulations thereunder?

21. Should the Defendants pay prejudgment and postjudgment interest, and, if so, at what annual interest rate?

22. Should the Defendants pay the costs of administering and distributing any monetary judgment and/or the costs of determining eligibility and/or the individual issues? If yes, who should pay what costs, why, and in what amount?

(c) Is the Common Issues Criterion Satisfied?

[173] Save for a submission that the claims for: (1) breach of duty of honesty, good faith and fair dealing; (2) negligence; (3) conspiracy; and (4) unjust enrichment and waiver of tort should not be certified, because they add nothing but unnecessary complexity to the proceedings, the Defendants do not challenge the proposed common issues.

[174] As now noted several times, I shall not be certifying the claims for: (1) breach of contract, (2) negligence, (3) breach of duty of honesty, good faith and fair dealing, (4) conspiracy, and (5) waiver of tort, and I shall not certify the action as against the American teams. The common issues need to be amended accordingly.

[175] The resulting common issues that shall be certified are as follows:

Employment Status

1. Are, or were, the Class Members employees of the Defendant Clubs, the OHL, and/or the CHL pursuant to (a) the *Employment Standards Act, 2000*, and/or (b) at common law?

2. Are, or were, the Class Members who played for the Defendant Clubs located in Ontario in "pensionable employment" of the Defendant Clubs located in Ontario, the OHL, and/or the CHL, pursuant to the *Canada Pension Plan*?

3. Are, or were, the Class Members who played for the Defendant Clubs located in Ontario in "insurable employment" of the Defendant Clubs located in Ontario, the OHL, and/or the CHL, pursuant to the *Employment Insurance Act*?

Common Employer

4. Are the Defendant Clubs, the OHL, and/or the CHL a common employer, either under statute or at common law?

Statutory Requirements

5. Do any or all of the Defendant Clubs, the OHL, and/or the CHL have an obligation to the Class Members under the *Employment Standards Act, 2000* to

pay them minimum wage, overtime pay, holiday pay and/or vacation pay?

Unjust Enrichment

6. Were any or all of the Defendant Clubs located in Ontario, the OHL, and/or the CHL unjustly enriched by failing to compensate the Ontario Class Members with minimum wage, overtime pay, vacation pay, and/or holiday pay owed to them in accordance with the *Employment Standards Act, 2000* and/or failing to make the required employer payroll contributions on behalf of the Class Members?

Damages, Costs and Interest

7. Is this an appropriate case for any or all of the Defendants located in Ontario to disgorge profits?

8. Can any or all of the claims be assessed on an aggregate basis?

9. Are any or all the Defendants liable for punitive damages?

10. Should the Defendants pay prejudgment and postjudgment interest, and, if so, at what annual interest rate?

11. Should the Defendants pay the costs of administering and distributing any monetary judgment and/or the costs of determining eligibility and/or the individual issues? If yes, who should pay what costs, why, and in what amount?

[176] I conclude that the Plaintiffs have satisfied the common issues criterion.

5. Preferable Procedure Criterion

(a) General Principles

[177] The fourth criterion is the preferable procedure criterion. Preferability captures the ideas of: (a) whether a class proceeding would be an appropriate method of advancing the claims of the class members; and (b) whether a class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute: *Markson v. MBNA Canada Bank* (2007), 85 O.R. (3d) 321 (C.A.) at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, *supra*.

[178] Relevant to the preferable procedure analysis are the factors listed in s. 6 of the *Class Proceedings Act, 1992*, which states:

> 6. The court shall not refuse to certify a proceeding as a class proceeding solely on any of the following grounds:
>
> > 1. The relief claimed includes a claim for damages that would require individual assessment after determination of the common issues.
> >
> > 2. The relief claimed relates to separate contracts involving different Class Members.
> >
> > 3. Different remedies are sought for different Class Members.

4. The number of Class Members or the identity of each Class Member is not known.

5. The class includes a subclass whose members have claims or defences that raise common issues not shared by all Class Members.

[179] For a class proceeding to be the preferable procedure for the resolution of the claims of a given class, it must represent a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims: *Cloud v. Canada (Attorney General) supra* at paras. 73-75, leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 50.

[180] Whether a class proceeding is the preferable procedure is judged by reference to the purposes of access to justice, behaviour modification, and judicial economy and by taking into account the importance of the common issues to the claims as a whole, including the individual issues: *Markson v. MBNA Canada Bank, supra* at para. 69, leave to appeal to S.C.C. ref'd, [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City), supra.*

[181] In considering the preferable procedure criterion, the court should consider: (a) the nature of the proposed common issue(s); (b) the individual issues which would remain after determination of the common issue(s); (c) the factors listed in the *Act*; (d) the complexity and manageability of the proposed action as a whole; (e) alternative procedures for dealing with the claims asserted; (f) the extent to which certification furthers the objectives underlying the *Act*; and (g) the rights of the plaintiff(s) and defendant(s): *Chadha v. Bayer Inc.* (2003), 63 O.R. (3d) 22 (C.A.)

[182] The court must identify alternatives to the proposed class proceeding: *AIC Limited v. Fischer* 2013 SCC 69 at para. 35; *Hollick v. Toronto (City), supra* at para. 28. The proposed representative plaintiff bears the onus of showing that there is some-basis-in-fact that a class proceeding would be preferable to any other reasonably available means of resolving the class members' claims, but if the defendant relies on a specific non-litigation alternative, the defendant has the evidentiary burden of raising the non-litigation alternative: *AIC Limited v. Fischer, supra* at paras. 48-49.

[183] In *AIC Limited v. Fischer, supra* at paras. 24-38, the Supreme Court of Canada reiterated that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Justice Cromwell for the Court stated that access to justice has both a procedural and substantive dimension. The procedural aspect focuses on whether the claimants have a fair process to resolve their claims. The substantive aspect focuses on the results to be obtained and is concerned with whether the claimants will receive a just and effective remedy for their claims if established.

[184] In *AIC Limited v. Fischer,* Justice Cromwell pointed out that when considering alternatives to a class action, the question is whether the alternative has potential to provide effective redress for the substance of the plaintiff's claims and to do so in a manner that accords suitable procedural rights. He said that there are five questions to be answered when considering whether alternatives to a class action will achieve access to justice: (1) Are there economic, psychological, social, or procedural barriers to access to justice in the case?; (2) What is the potential of the class proceeding to address those barriers?; (3) What are the alternatives to class proceedings?; (4) To what extent do the alternatives address the relevant barriers?; and (5) How do the two proceedings compare?

[185] In considering the preferable procedure criterion, one should consider the type or genre of class action, because in terms of access to justice, the needs of plaintiffs suffering personal injuries are different than the needs of plaintiffs suffering a purely economic loss, and the needs of those suffering economic losses are different depending upon whether the loss is a deprivation or a missed expected financial gain.

[186] The type of remedy being sought be it declaratory, compensatory, or restitutionary may also make a difference to whether a class proceeding is the preferable procedure for the resolution of the class members' claims. Providing injured parties with access to justice cannot be divorced from ensuring that the ultimate remedy provides substantive justice where warranted: *AIC Limited v. Fischer*, *supra*, at para. 24; F. Iacobucci, "What Is Access to Justice in the Context of Class Actions?" in J. Kalajdzic, ed., *Accessing Justice: Appraising Class Actions Ten Years After Dutton, Hollick & Rumley* (2011), 17 at p. 20.

[187] And one should now add to the preferable procedure factors the factor of the relationship between access to justice, which is the preeminent concern of class proceedings, and proportionality in civil procedures. The importance of proportionality to access to justice was recently expressed by the Supreme Court of Canada in *Hryniak v. Mauldin*, 2014 SCC 7 at paras. 1-2, 27, where the Court stated:

> Ensuring access to justice is the greatest challenge to the rule of law in Canada today. Trials have become increasingly expensive and protracted. Most Canadians cannot afford to sue when they are wronged or defend themselves when they are sued, and cannot afford to go to trial. ...
>
> Increasingly, there is recognition that a culture shift is required in order to create an environment promoting timely and affordable access to the civil justice system. This shift entails simplifying pre-trial procedures and moving the emphasis away from the conventional trial in favour of proportional procedures tailored to the needs of the particular case. The balance between procedure and access struck by our justice system must come to reflect modern reality and recognize that new models of adjudication can be fair and just.
>
> There is growing support for alternative adjudication of disputes and a developing consensus that the traditional balance struck by extensive pre-trial processes and the conventional trial no longer reflects the modern reality and needs to be re-adjusted. A proper balance requires simplified and proportionate procedures for adjudication, and impacts the role of counsel and judges. This balance must recognize that a process can be fair and just, without the expense and delay of a trial, and that alternative models of adjudication are no less legitimate than the conventional trial.

[188] The proportionality analysis, which addresses how much procedure a litigant actually needs to obtain access to justice, fits nicely with the part of the preferable procedure analysis that considers whether the claimants will receive a just and effective remedy for their claims.

(b) The Redundancy of the Causes of Action

[189] As foreshadowed above, I shall not certify the causes of action for: (1) breach of contract, (2) negligence, (3) breach of duty of honesty, good faith and fair dealing, (4) conspiracy, and (5)

waiver of tort. In this section of my Reasons for Decision, I shall explain why these causes of action, which satisfy the cause of action criterion, do not satisfy the preferable procedure criterion.

[190] I begin this discussion by pointing out the obvious that Messrs. Berg's and Pachis' action cruces on resolving a single profound question that apparently has not been answered in Canada or in the United States. The question is: When do amateur athletes become employees of their teams and subject to various employment standards statutes? Messrs. Berg's and Pachis' factums repeatedly emphasize that the core common issue in this action is whether the players are employees of the defendant businesses and, therefore, whether the businesses are obligated to provide players with the minimum protections afforded under employment standards legislation.

[191] This critical question in this proposed class action about the relationship between the owners of a team and the team members is a profound question. There is a continuum of types of team ownerships ranging from sponsors of lower tier teams who earn no revenue from their sponsorships to owners of professional teams and proprietors of university teams who make a great deal of money from their athletes. Some owners of amateur hockey teams are municipalities. It seems that for professional athletes, who are represented by unions and agents, the relationship between team owners and players has been categorized as an employment relationship, and there is some case law like the *Tonelli* case that has characterized the relationship between an amateur athlete and his team as an employment relationship; however, in the cases involving amateurs, the point was rather assumed and not argued because the athlete appeared to be paid for his work. However, for owners of lower tier amateur teams, including school teams, it seems to be assumed that there is no master and servant relationship or dependent contractor or independent contractor relationship between the team owner and the members of the team.

[192] On a continuum of relationships, the precise nature of the relationship between owner and team member is, from a legal point of view, unclear. The nature of when work becomes employment is also unclear. Students do school work and homework under the control of teachers but are not employees. Judges are paid a salary but are not employees There is little doubt that the players of the OHL work very hard, but are they employees?

[193] It is something to ponder that Ontario's *Employment Standards Act* has an inclusive definition of employee, but sections 1(1) and 3 of the *Act* and Ont. Reg. 285/01 (Exemptions, Special Rules and Establishment of Minimum Wage) also includes a very-very long list of persons that are exempt from the *Act*. (These provisions of the *Act* are set out in Schedule "B" to these Reasons for Decision.) There are also discrete regulations under the Act for different types of workers in defined industries; visualize temporary help industry, automobile manufacturing, automobile parts manufacturing, automobile parts warehousing and automobile marshalling, ambulance services, public transit services, live performances, trade shows and conventions, mineral exploration and mining, women's coat and suit industry, women's dress and sportswear industry, and building service providers.

[194] Questions abound. Why all the exemptions in the statute? Why all the special treatment for different types of worker? Do student amateur athletes have a unique classification? Are the members of an Olympic team employees of the nation's team? Are the members of a university football or basketball team or track team that sells tickets to its games or events, or that sells broadcast rights, employees of the university? Are Junior A players employees who receive benefits from their team employees but their pay-as-you-go teammates something else? Are

Major Junior A players employees subject to the *Employment Standards Act, 2000,* the *Workforce Opportunity Wage Act*, the *Minimum Wage Act of 1968*, and the *Fair Labor Standards Act of 1938*? Is the qualification for employment status the same under Ontario's *Employment Standards Act, 2000,* Michigan's *Workforce Opportunity Wage Act*, Pennsylvania's *Minimum Wage Act of 1968,* and the United States federal government's *Fair Labor Standards Act of 1938*?

[195] In the immediate case, the Plaintiffs bring six causes of action to answer the one critical question and the Defendants concede that the Plaintiffs have properly pleaded their causes of action with the possible exception of conspiracy. However, the Defendants submit that the causes of action for conspiracy, negligence, breach of honest performance, unjust enrichment, and waiver of tort are redundant and add unnecessary and burdensome complexity to the claim that the Class Members are employees under an employment contract or under the applicable employment standards legislation.

[196] I agree with the Defendants' submission. In considering the preferable procedure criterion, the court should consider the rights of the plaintiffs and defendants, the extent to which certification furthers the objectives underlying the *Act,* whether the claimants will receive a just and effective remedy for their claims, the relationship between proportionality and access to justice, and the complexity and manageability of the proposed action as a whole. Based on these considerations, I conclude that the (1) breach of contract, (2) negligence, (3) breach of duty of honesty, good faith and fair dealing, (4) conspiracy, and (5) waiver of tort causes of action do not satisfy the preferable procedure criterion.

[197] I agree with the Defendants' assertion that the negligence, breach of duty of honesty, good faith and fair dealing, conspiracy, and waiver of tort causes of action are redundant, and I add the breach of contract claim to the list of redundancies.

[198] In this proposed class action, if the Plaintiffs prove that as a common employer the Defendants breached the various employment standards statutes, then they will succeed on their breach of statute claim and on their unjust enrichment claim and there would be no need to prove breach of contract, negligence, breach of duty of honesty, good faith and fair dealing, conspiracy, and waiver of tort.

[199] Conversely, if the Plaintiffs fail to prove that the Defendants breached the various employment standards statutes, they will not be able to snatch victory from the jaws of defeat by proving breach of contract, negligence, breach of duty of honesty, good faith and fair dealing, conspiracy, or waiver of tort, because all of these claims will necessarily fail with the failure of the breach of statute claim.

[200] The redundant causes of action cause enormous problems of manageability. This is most particularly true with respect to the conspiracy claim. This claim would probably lead to the OHL, CHL, and the teams of the OHL retaining independent defence counsel because each defendant would be entitled to a separate defence that they were not co-conspirators and that each did not have the intent to injure the players.

[201] Instead of one defence counsel, there would be around 20 firms mounting vigorous defences. There is more than a taint of moral reprehensibility in an allegation that an employer conspired to exploit a young person for personal profit, and the signs of outrage are already manifest in the voluminous record that was proffered just for the certification motion. The factual footprint of the action would enormously expand with a redundant conspiracy plea

because it would appear that the alleged conspiracy began as far back as 2000 when the Leagues had to respond to the *McCrimmon Holdings* decision. The list of witnesses would greatly expand, because teams have been bought and sold and moved and ownerships have changed in the last 17 years.

[202] Were the causes of action against the American teams to be certified, further unmanageability would be added, of which I will have more to say in the next section of these Reasons for Decision, but for present purposes, it may be recalled that negligence, unjust enrichment, waiver of tort, as well as the standalone contractual breach of the duty of good faith, are not being advanced against the Defendants domiciled in the United States and these causes of action are being advanced only against the Ontario teams. This differentiation of the claims against the Ontario and American teams is, in and of itself, a case management nightmare.

[203] In *Magill v. Expedia*, 2013 ONSC 683, I refused to certify claims that were redundant and that added unnecessary complexity to the main claim. In that case, consumers of the online hotel-booking website alleged they were charged improper service fees, and the plaintiff advanced claims for breach of contract, dishonest performance, unjust enrichment, and breach of statute. I certified only the breach of contract claim. I took a similar approach in *Shah v. LG Chem, Ltd.* 2015 ONSC 6148, where the plaintiffs sought to certify a proceeding against the manufacturer of rechargeable batteries for breach of the *Competition Act*, R.S.C. 1985, c. C-34, unlawful means conspiracy, predominant purpose conspiracy, and unjust enrichment. I certified the *Competition Act* claim, but dismissed the remaining claims, refusing to certify the claim for predominate purpose conspiracy because it was redundant and, thus, a class action was not the preferable procedure for the claim. The Divisional Court, however, reintroduced the unlawful means conspiracy claim; see *Shah v. LG Chem, Ltd.*, 2017 ONSC 2586 (Div. Ct.).

[204] In my opinion, it is inimical to the access to justice principles of the *Class Proceedings Act, 1992* to succumb to the argument that it would be simply unjust and unfair to deny the Class Members the opportunity to prove all the claims they have that satisfy the criteria for certification without regard to whether they actually need to prove all those claims in order to achieve access to justice.

[205] The *Class Proceedings Act, 1992* is designed to provide the class members with the access to justice that they need, and needs are different than wants. For a cause of action to be certified, the preferable procedure criterion must be satisfied, and that criterion is designed to ensure that the class members get the access to justice they need, keeping in mind a genuine judicial economy of a manageable mass claim.

[206] In my opinion, in the case at bar, only the breach of statute and unjust enrichment causes of action need be certified. I conclude that only for these causes of action, the preferable procedure criterion is satisfied.

(c) The Claim against the Michigan and Pennsylvania Teams

[207] The Defendants argue that a class action would not be the preferable procedure for the claims against the American teams. The Defendants' argument is set out in paragraphs 157-161 of their factum, where they state:

> 157. Certifying the claims against the three U.S. based teams in this action would be neither fair nor would it be efficient. It will not promote access to justice for players on U.S. teams, who are governed by U.S. law. As Mr. Dunn made clear,

U.S. law is unsettled with respect to whether amateur hockey players are employees for the purposes of employment standards and benefits. There is no U.S. law for the Ontario courts to apply. Instead, the plaintiffs ask the Ontario courts to make wage and hour law on behalf of Michigan, Pennsylvania, and the United States Congress. It would be inappropriate to permit *FLSA* claims to proceed in Ontario by way of class action when the U.S. courts do not permit class actions under this legislation.

158. It would not enhance the plaintiffs' access to justice to have this court decide this case on the merits in their favour only to have a U.S. court refuse to enforce the claim. If this court were to certify the U.S. claims, it will take years for the merits to be determined with finality in Ontario. By that time, the U.S. limitation periods will have expired and the players may be left with no substantive resolution to their case.

159. The plaintiffs offer no evidence to counter the proposition that a class proceeding in the U.S. courts is the preferable procedure to determine the U.S. claims. The relevant U.S. regimes permit class proceedings in their own right, even if there are different requirements for certification. In the U.S., a representative plaintiff must have a cause of action against a particular defendant. Moreover, the *FLSA* does not permit class actions, but only collective actions in which individual plaintiffs "opt-in" to the proceeding. Individual claimants must agree expressly to participate and to be bound by a class proceeding. The fact that the *FLSA* does not permit class proceedings in the U.S. should not allow U.S. players to pursue a class action under the *FLSA* in Ontario.

160. The *FLSA* does not permit class actions, so to pursue a class action under the *FLSA* in an Ontario court would give U.S. players an advantage that they could not enjoy in U.S. courts. The U.S. players should not be permitted to do indirectly what they cannot do directly.

161. More importantly and as a practical matter, the U.S. claims are best resolved by the courts that can opine directly on U.S. law and be subject to the U.S. appellate process. Mr. Dunn made clear that U.S. courts are unlikely to enforce any Canadian judgment in these circumstances. The U.S. players face the very real possibility of succeeding at trial in Ontario only to fail to secure enforcement in a U.S. court. In this light, this court should deny certification of the U.S. claims under s. 5(1)(d) and encourage the U.S. plaintiffs to seek relief directly from a U.S. court.

[208] I think that there is considerable merit in the Defendants' arguments that the claims against the American teams do not satisfy the preferable procedure criterion, and I rely on those arguments in arriving at my own decision that a class action in Ontario is not the preferable procedure for prosecuting the breach of statute claim and the other claims against the American teams, but I also have my own reasons for reaching this conclusion.

[209] I begin my explanation for not certifying the actions against the Michigan and Pennsylvania teams by repeating the point above that the manageability of a class action is an important ingredient of the preferable procedure analysis and in the case at bar, the

differentiation of the claims against the Ontario and American teams is, in and of itself, a management nightmare.

[210] I add that there is the real prospect that there might be inconsistent outcomes for the class compromised of players from teams in Ontario, Michigan, and Pennsylvania. It is not a given that players whose playing circumstances are common under the SPA would be classified as employees under all of Ontario, Michigan, and Pennsylvania law because each jurisdiction has its own common law and its own statutes to interpret.

[211] If an Ontario court was charged with the responsibility of interpreting all three statutes, it is not a given that the outcomes about employment status would be the same. Indeed, for the class action as it is presently conceived, there are eight possible yes-no outcomes (yyy, yyn, yny, ynn, nyy, nyn, nny, nnn). The case at bar, is not a case, for example, like a national securities class action where all the provincial *Securities Acts* are pleaded and where it is highly unlikely that the essentially identical statutes would be interpreted other than uniformly. In the case at bar, each statute must be interpreted discretely, and, at the moment, the status of amateur athletes as employees, is an open question in Ontario, Michigan, and Pennsylvania.

[212] In their factums, the Plaintiffs trivialize the additional complexity of determining the law of all of Ontario, Michigan, and Pennsylvania, and they submit that the application of U.S. law is minimal, since only two states are involved and the common law tests for employment in Michigan and Pennsylvania are well-established and virtually the same in both states, as well as being virtually the same as in Ontario. The problem with this submission is that it begs the bigger question of whether the well-established common law tests for an employment relationship should be applied at all to classify the relationship between a sport's team owner and the amateur athletes that are team members.

[213] The Plaintiffs protest that the Defendants' preferable procedure argument is a disguised jurisdictional argument and that Mr. Dunn's opinions on comity, order and fairness, and the enforceability of an Ontario judgment in the U.S. are unpersuasive and do not rise to the level necessary to meet the Defendants' very heavy burden to defeat the some-basis-in-fact standard that the Plaintiffs have satisfied in the case at bar.

[214] I, however, do not intend to depart from a preferable procedure analysis. I accept that the Ontario court has the jurisdiction *simpliciter* to decide the causes of action against the American teams. And, I accept that the Ontario court is a *forum conveniens* to decide the causes of action against the American teams. And I accept that the OHL's SPA stipulates that the contract is governed by Ontario law, although I note that the critical issue in this case is not about contract law but rather about the interpretation and application of the statutory law of Michigan and Pennsylvania. I accept that the content of foreign law is a matter of fact that can be proven and then applied by an Ontario court, and I will even assume and accept that any judgment in the immediate case would be enforced by the courts of Michigan and Pennsylvania pursuant to Michigan's *Uniform Foreign-Country Money Judgments Recognition Act,* Mich. Comp. Laws § 691.1134 (2005) and Pennsylvania's *Uniform Foreign Money-Judgments Recognition Act*, 42 Pa. State. § 22001 (2007).

[215] However, what I do not accept is that it is fair to the Defendants and the preferable procedure for an Ontario court to interpret and apply the Michigan, Pennsylvania, or U.S. Federal government's minimum wage and employment standards legislation, where access to justice is available to the players in the American courts in Michigan and Pennsylvania. I see no

unfairness to the players, who are pursuing claims to enforce Michigan and Pennsylvania statutes, to pursue those claims in Michigan and Pennsylvania where there are courts and administrative agencies available to resolve employment law disputes. However, in my opinion, it would not be just and fair to the American team defendants for an Ontario court to decide the application of American law. In my opinion, an Ontario class action is not the preferable procedure to resolve the claims against the American teams.

[216] In the immediate case, I have come to my decision about preferable procedure without regard to the jurisdictional principles of comity, order, and fairness. However, in my opinion, in a proposed class action involving the necessary application of foreign law, I do think it is appropriate to have, at least, some regard to these principles as an aspect of the preferable procedure analysis in circumstances where the foreign jurisdiction does provide an alternative access route to justice for the class members.

[217] Given the importance of spectator sports to American and Canadian culture and society, the issues raised in the case at bar are quite important issues, and so I think it befits courts on either side of the border to at least pause to question whether they should decide an issue that their sovereign neighbour would prefer to decide for itself. This is a different question than asking whether, as an aspect of the conflicts of law, an American court would enforce an Ontario class action judgment and rather asks whether a Canadian court should respect the American court's jurisdiction to enforce its own law when it is ready to make it available.

[218] Finally, as a possible element in an analysis of the preferable procedure criteria to which I simply note but give no weight, I observe that as an alternative to litigating their claims in Michigan and Pennsylvania, the players on those teams might have the alternative of just waiting to see if the Ontario players can settle the litigation or can succeed at the common issues trial because if the Ontario players settled or succeed, it would be difficult for the CHL and OHL to allow a situation where the American players were treated differently than the Ontario players.

(d) Is the Preferable Procedure Criterion Satisfied?

[219] I conclude that the preferable procedure criterion is not satisfied with respect to the claims against the OHL teams in Michigan and Pennsylvania. The preferable procedure criterion is satisfied for the breach of statute and unjust enrichment causes of action against the Ontario teams.

6. Representative Plaintiff Criterion

(a) General Principles

[220] The fifth and final criterion for certification as a class action is that there is a representative plaintiff who would adequately represent the interests of the class without conflict of interest and who has produced a workable litigation plan.

[221] The representative plaintiff must be a member of the class asserting claims against the defendant, which is to say that the representative plaintiff must have a claim that is a genuine representation of the claims of the members of the class to be represented or that the representative plaintiff must be capable of asserting a claim on behalf of all of the class members as against the defendant: *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 (S.C.J.) at

paras. 36-45; *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 (S.C.J.) at para. 40, aff'd [2003] O.J. No. 4708 (C.A.).

[222] Provided that the representative plaintiff has his or her own cause of action, the representative plaintiff can assert a cause of action against a defendant on behalf of other class members that he or she does not assert personally, provided that the causes of action all share a common issue of law or of fact: *Boulanger v. Johnson & Johnson Corp.*, [2002] O.J. No. 1075 (S.C.J.) at para. 22, leave to appeal granted, [2002] O.J. No. 2135 (S.C.J.), varied (2003), 64 O.R. (3d) 208 (Div. Ct.) at paras. 41, 48, varied [2003] O.J. No. 2218 (C.A.); *Matoni v. C.B.S. Interactive Multimedia Inc.*, [2008] O.J. No. 197 (S.C.J.) at paras. 71-77; *Voutour v. Pfizer Canada Inc.*, [2008] O.J. No. 3070 (S.C.J.); *LeFrancois v. Guidant Corp.*, [2008] O.J. No. 1397 (S.C.J.) at para. 55.

[223] Whether the representative plaintiff can provide adequate representation depends on such factors as: his or her motivation to prosecute the claim; his or her ability to bear the costs of the litigation; and the competence of his or her counsel to prosecute the claim: *Western Canadian Shopping Centres Inc. v. Dutton*, *supra* at para. 41.

[224] The critical ingredients or factors for the determination of the representative plaintiff criterion are the competence of counsel and on the qualification of the plaintiff as reflected in the litigation plan, which in a sense is a synthesis of the other certification criteria: *Shah v. LG Chem Ltd.*, *supra* at para. 32.

(b) The Defendants' Argument

[225] The Defendants submit that Messrs. Berg and Pachis are not qualified to be representative plaintiffs because, as former players, their only interest in the litigation is to obtain compensation as employees and that they do not care whether the litigation will adversely impact the current players whose benefits and career prospects will be diminished or lost altogether. The nature of the Defendants' argument about the representative plaintiff criterion is set out in paragraphs 139-141 of their factum, where they state:

> 139. In the instant case, former and current/future players have different interests in how the common issues are resolved. Unlike former players, current and future players have an interest in safeguarding the benefits that are entirely dependent on the financial viability of their teams. Former players have a fundamentally different interest that raises a conflict because there is a finite pool of resources for each team. The only interest of former players, and certainly the representative plaintiffs, is to maximize the payment of past wages, without any regard to whether those payments undermine the viability of certain teams or reduce the benefits given to current players.
>
> 140. Typically, sub-classes can cure any conflict among class members. However, in the instant case, just as in *Boucher v. Public Service Alliance of Canada* [[2005] O.J. No. 2693 (S.C.J.), aff'd (2006), C.C.P.B. 18 (Ont. Div. Ct.)]; *MacDougall v. Ontario Northland Transportation Commission*, [[2006] O.J. No. 5164 (S.C.J.), aff'd [2007] O.J. No. 573 (Div. Ct.), motion for leave to appeal to Ont. C.A. refused July 31, 2007, leave to appeal to S.C.C. refused [2007] SCCA No. 491], and *Paron v. Alberta (Environmental Protection)* [2006 ABQB 375], the conflict within the proposed class is such that a sub-class cannot cure the

> conflict. In these cases, the conflict is such that the common issue cannot be resolved to the satisfaction of all class members; success for one does not mean success for all.
>
> 141. Additionally, all class members, whether they benefit from the result or not, will be bound by the outcome. That is, there is no meaningful opportunity for anyone to exercise their right to "opt-out" of the proceeding. Opting out does not resolve the conflict. The conflict will exist despite the opt-out mechanism. In the cases involving surplus pension funds [*MacDougall* and *Boucher*], there was a finite pool of resources available. To allocate funds to one class would preclude the use of funds by another class. Similarly, [in *Paron,*] if the lake level in Alberta were to be raised, some property risked being flooded permanently. Those property owners, regardless of their opposition, would not be able to "opt-out" of the elevated water levels. In all these cases, the determination is binding on anyone with an interest, not merely those who participate in the class. Participation becomes mandatory, which is contrary to the way we approach class proceedings.

(c) Is the Representative Plaintiff Criterion Satisfied?

[226] I disagree with the Defendants' argument. In my opinion, although revisions will need to be made to the Litigation Plan (not an unusual phenomenon), Messrs. Berg and Pachis are qualified to be Representative Plaintiffs, and this criterion for certification is satisfied.

[227] Messrs. Berg and Pachis will adequately represent the interests of the class without conflict of interest. There are no disqualifying conflicts in the immediate case of the nature of those found in: *Boucher v. Public Service Alliance of Canada,* [2005] O.J. No. 2693 (S.C.J.), aff'd (2006), C.C.P.B. 18 (Ont. Div. Ct.); *MacDougall v. Ontario Northland Transportation Commission*, [2006] O.J. No. 5164 (S.C.J.), aff'd [2007] O.J. No. 573 (Div. Ct.), motion for leave to appeal to Ont. C.A. refused July 31, 2007, leave to appeal to S.C.C. refused [2007] SCCA No. 491; and *Paron v. Alberta (Environmental Protection)*, 2006 ABQB 375. And the suggested conflict of the certification of the action by itself yielding adverse consequences is a bogus argument that does not stand in the way of certification of the class action.

[228] I begin the analysis with two prefatory observations.

[229] First, it is both self-serving and also ironic for a defendant to argue that plaintiffs, represented as they are by responsible class counsel, will ill-serve the putative class and inevitably breach their duties of loyalty to the class. Defendants are not genuinely interested in ensuring that class members are responsibly represented; rather, defendants are genuinely interested in ensuring that there is no class action.

[230] Second, in the immediate case, it is unfortunate that Class Counsel gave credence to the Defendants' "Chicken Little – The Sky is Falling" argument by retaining experts and further bloating an already bloated record. Class Counsel expended a great deal of effort to counter the Defendants' argument that a financial disaster would follow the certification of this action with teams folding and with players losing benefits and career opportunities. To make matters worse, Class Counsel stuffed their factum with an elaborate argument about whom bore the onus of proof on the issue of whether the sky would fall. No motion, much less a certification motion, can predict the future, but Class Counsel took the bait and made a ponderous argument that it

was highly unlikely that the Leagues would cut their throats to spite the players' class action and, therefore, there was no-basis-in-fact for the argument that Messrs. Berg and Pachis were unfit to be representative plaintiffs because of the adverse financial consequences of a certification order directly on the Defendants and indirectly on the current and future players.

[231] Turning then to why there is no merit to the Defendants' attack on the qualification of Messrs. Berg and Pachis to be representative plaintiffs, it is well established that a class action should not be allowed if class members have conflicting interests and that a plaintiff with an interest in conflict with the interests of other putative class members does not qualify as a representative plaintiff: *Western Canadian Shopping Centres Inc. v. Dutton*, *supra* at para. 40; *Boucher v. Public Service Alliance of Canada, supra*; *MacDougall v. Ontario Northland Transportation Commission, supra*; *Paron v. Alberta (Environmental Protection)*, *supra*; *TL v. Alberta (Child, Youth and Family Enhancement Act, Director)*, 2010 ABQB 262 at paras. 44-45.

[232] That the common issues may yield a nuanced response depending upon the idiosyncratic nature of groups of class members does not mean that there is a conflict of interest between the representative plaintiff and the class members or between class members. The Supreme Court of Canada in *Vivendi Canada Inc. v. Dell'Aniello*, 2014 SCC 1, explained that a common issue may give rise to varied answers to reflect differences between class members but still be a common issue so long as it does not give rise to genuine conflicting interests. The Court held at paras. 45-46:

> 45. Having regard to the clarifications provided in *Rumley*, it should be noted that the common success requirement identified in *Western Canadian Shopping Centres Inc. v. Dutton*, [2001] 2 S.C.R. 534, must not be applied inflexibly. A common question can exist even if the answer given to the question might vary from one member of the class to another. Thus, for a question to be common, 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.
>
> 46. *Dutton* and *Rumley* therefore establish the principle that a question will be considered common if it can serve to advance the resolution of every class member's claim. As a result, the common question may require nuanced and varied answers based on the situations of individual members. The commonality requirement does not mean that an identical answer is necessary for all the members of the class, or even that the answer must benefit each of them to the same extent. It is enough that the answer to the question does not give rise to conflicting interests among the members.

[233] If the difference between the situation of the representative plaintiff and the class members does not impact on the common issues, then the difference does not affect the representative plaintiff's ability to adequately and fairly represent the class and there is no conflict of interest: *Ewing v. Francisco Petroleum Enterprises Inc.*, [1994] O.J. No. 1852 (Gen. Div.); *Chace v. Crane Canada Inc.*, [1996] B.C.J. No. 1606 (B.C.S.C.), affd. [1997] B.C.J No. 2862 (B.C.C.A.); *Hoy v. Medtronic*, 2001 BCSC 1343 at paras. 83-85, aff'd 2003 BCCA 316; *Reid v. Ford Motor Co.*, [2003] B.C.J. No. 2489 (B.C.S.C.) at para. 73; *MacLean v. Telus Corporation and Telus Communications Inc.*, 2006 BCSC 766 at para. 53; *T.L. v. Alberta (Director of Child Welfare)*, 2008 ABQB 114 (Q.B.) at para. 40, aff'd 2009 ABCA 18.

[234] It is not a conflict that all the class members may not desire to pursue the claim as they will have the right to opt-out of the action: *Kranjcec v. Ontario* (2004), 69 O.R. (3d) 231 (S.C.J.) at para. 68; *Kwicksutaineuk/Ah-Kwa-Mish First Nation v. British Columbia (Minister of Agriculture and Lands)*, 2010 BCSC 1699 at para. 131, rev'd on other grounds 2012 BCCA 193; *Chapman v. Benefit Plan Administrators Ltd.*, 2013 ONSC 3318 at para. 58. If the active players do not wish to participate in the litigation, they can opt-out of the class proceeding and pursue their rights individually or not at all. If they choose not to opt-out, then, their interest will be the same as, and not adverse to, that of the other class members.

[235] In the immediate case, there are no conflicts of the type that existed in *Boucher, MacDougall,* and *Paron.* In the immediate case, the interests of Messrs. Berg and Pachis are to be paid a minimum wage and overtime wages in accordance with employment standards statutes. The interests of the Class Members, who do not opt out, are precisely the same. There is no conflict of interest; if Messrs. Berg and Pachis succeed, then all Class Members will succeed and if Messrs. Berg and Pachis fail, all Class Members will fail. The prospect that Messrs. Berg's and Pachis' success would negate the prospects of success of the other Class Members does not exist.

[236] In the immediate case, there is no conflict of interest about distributing or apportioning the Defendants' liability. The determination of the critical common issue of whether the Class Members are employees will not lead to a determination that some Class Members but not others are employees entitled to the protection of the employment statutes. The relief sought is the same for all Class Members; i.e., an entitlement to the minimum protections of employment standards legislation.

[237] In *Boucher,* the plaintiffs sought to certify an action against their employer who administered a pension plan. The plaintiffs alleged that the defendant employer had wrongfully appropriated the surplus by taking a contribution holiday and providing new retirees early retirement incentives including pay equity payments while excluding the plaintiffs and others from the benefits. Justice Charbonneau, for a variety of reasons, refused to certify the action as a class proceeding, including that the plaintiffs proposed to represent claimants with a conflicting interest because they were differently affected depending on what relief the plaintiffs sought. In the case at bar, all the Class Members are similarly situated; if the class action is successful, they will receive the benefits of the employment standards legislation.

[238] In *MacDougall*, the plaintiffs sought to certify an action to challenge, among other things, amendments to a pension plan that provided for a contribution holiday, an early retirement program and enhanced retirement benefits. Justice Hennessy refused certification. She held that if the litigation was successful and the amendments were invalidated, the active employees in the class could face adverse consequences since the amendments actually benefited them and they would lose the contribution holiday, the early retirement program and the enhanced retirement amendments. There was a direct link between the successful outcome of the litigation and the adverse consequences to the active employees. In the immediate case, a successful outcome of the litigation is not adverse to the class and would mean that all active and retired players would be paid a minimum wage and overtime pay. In the immediate case, any adverse consequences to the active players is the Defendants' threat that they should be excused from wrongdoing because the active players are better off being victimized.

[239] *Paron* was a class action about the water level of a lake. In *Paron,* the plaintiffs sought an order to raise the water level of the lake by 18 inches, which would permanently submerge portions of the lands of the putative class members who owned lower-lying properties. In that

case, some putative class members would be helped and others would be harmed by the remedy sought. In the immediate case, the remedy of the minimum protections of employment standards legislation causes no harm at all to the Class Members. I agree with the comments of the Plaintiffs at paragraph 36 of their Reply Factum:

> 36. .... Requiring all class members to be compensated in accordance with minimum employment standards legislation would not harm any members of the class, unlike raising the water level would have done in *Paron*. The common issue does not give rise to a conflict; rather the defendants' threats to cut back benefits and shut down clubs manufacture a conflict that they then seek to rely on to avoid certification.

[240] A disqualifying conflict for the representative plaintiff does not arise from a defendant's threats or dire predictions of the consequences of certification. A future theoretical risk is no basis to deprive class members of access to justice through a class proceeding: *Chapman v. Benefit Plan Administrators*, *supra* at paras. 59-61.

[241] Moreover, if the action is certified and if the sky does indeed fall, then the sky falling is not a reason to decertify the class action, because it would remain to be determined whether the Defendants were wrongdoers and were liable to pay minimum wages and overtime pay to the Class Members. It is not exculpatory of wrongdoing for a defendant to argue or even prove that it cannot afford to comply with the law.

[242] If the action is certified and if large numbers of the class members opt-out that also would not be a basis for decertifying the action. The class members who do not opt out are entitled to access to justice and the representative plaintiff is duty bound to advance their common interest. In *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, 2013 ONCA 279, Chief Justice Winkler explained that certification is not akin to labour arbitration nor is it a political process of voting for or against the class action.

[243] In *1250264 Ontario Inc. v. Pet Valu Canada Inc.*, Justice Strathy, as he then was, out of concern that the opt-out process had been politicized, invalidated the opt-out notices. The Court of Appeal, however, reversed the decision and Chief Justice Winkler explained that the class action would proceed notwithstanding a diminished class size. He stated at paragraphs 45-51:

> 45. The purpose of the opt-out process is to provide class members with the opportunity to make an informed and voluntary decision as to whether they wish to remain as participants in the class action.
>
> 46. The motion judge was rightly motivated by a concern for protecting the fairness of the opt-out process and by the goal of ensuring that opt-out decisions were not the product of misinformation or intimidation. He was deeply troubled that the "CPVF telephone campaign and website were an unabashed attempt to destroy the class action" (at para. 55). In his decision awarding the plaintiff its costs of the opt-out motion, the motion judge stated, at para. 20, that the "survival of the class action depended on the outcome of the [opt-out] motion."
>
> 47. These comments reveal that the motion judge was proceeding on an erroneous principle, at least to the extent that his analysis was premised on the view that the survival of the class action depended on the outcome of the opt-out motion. The motion judge believed that because slightly more than half the class had opted

> out, the very survival of the class action was at stake on the plaintiff's motion. He did not explain exactly what he meant by "the survival of the class action". In his reasons on the opt-out motion, he mentioned, at para. 6, that the defendant had raised the prospect of bringing a decertification motion.
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> 48. If by the survival of the class action the motion judge was referring to the prospect of de-certification, he did not explain why the number of class opt-outs could undermine the evidence satisfying the certification criteria. Indeed, other than perhaps in the most extreme cases, I fail to see any reason why the number of opt-outs would be a basis for decertification. Alternatively, if he meant the viability of the class action somehow depends on the number of remaining class members, there is no basis for this concern. A certified class proceeding will continue regardless of the diminished size of the class and the correspondingly diminished damages award or settlement amount that might follow therefrom.
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> 49. The motion judge evaluated the fairness of the opt-out process based on an incorrect belief that the viability of the class action was in peril. From that viewpoint, the CPVF's actions would have appeared more troubling than they actually were.
>
> 50. The motion judge's view that the survival of the class action was at stake on the opt-out motion -- although incorrect -- reflected the CPVF's motivation for waging the opt-out campaign. They were at least in part trying to end the class action by encouraging class members to opt out.
>
> 51. Given these misconceptions about the nature of the opt-out process, I think it is important to emphasize that the *CPA* does not contemplate the politicization of the opt-out process. The opt-out process is not analogous to the labour context where majority support or opposition is required to certify or decertify a union. Within the statutory framework of the *CPA*, there is no legitimate purpose that can be achieved by politicizing the opt-out process. As explained in *A&P* [*1176560 Ontario Limited v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.)] at para. 32, certification motions are not determined through a referendum of the class members. Nor is the viability of the class action dependent on majority support. Just as the percentage of support amongst class members is not an element of certification, opting out cannot stop a class action. The number of opt-outs does not in itself provide a basis for decertifying a class action.

[244] The "Sky will Fall" argument advanced by the Defendants in the immediate case was rejected in *1176560 Ontario Limited v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.). In that case, the proposed representative plaintiffs were franchisees, and the franchisor argued that they were disqualified because "certification of the action would upset the existing arrangements with the franchisees and cause [the franchisor] to revisit each of these arrangements." On the certification motion, the franchisor proffered evidence from franchisors that opposed certification because they felt they had more to lose than to gain and they did not want a class proceeding brought that would upset the existing relationship between them and the franchisor. Justice Winkler, as he then was,

rejected the argument and stated at paragraphs 32, 45-46:

> 32. .... To adduce evidence from individual class members as to the desirability of a class proceeding is to assume, as an underlying proposition, that certification motions are somehow determined through a referendum of the class members. Such is not the case. The legislature has spoken with respect to class proceedings in this province. The provisions dealing with opt outs and de-certification show that it was clearly alive to the prospect that not all members of a proposed class would wish to participate in a class proceeding or, alternatively, that a sufficient number of defections from the class would render a class proceeding unnecessary. Conversely, there are no provisions that expressly or implicitly mandate, or even suggest, that the suitability of a class proceeding is to be determined by a polling of the class prior to the certification motion.
>
> ....
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> 45. I find no merit in the contention that the independence of the plaintiffs disqualifies them as representatives. The fact that their circumstances may be different from some or all of the balance of the class does not represent a conflict "on the common issues" as that term is used in s. 5(1)(e) of the *CPA*. Nor do their different circumstances mean that they cannot fairly and adequately represent the class. In fact, the evidence is to the contrary.
>
> 46. A&P also contended that there is a conflict because certification of the action would upset the existing arrangements with the franchisees and cause A&P to revisit each of these arrangements. In my view, this is effectively an argument that there should be no litigation at all rather than an attack on either the adequacy of the plaintiffs as representatives or the preferability of a class proceeding as opposed to individual actions. Through this argument, A&P implies that if the plaintiffs are successful, that success entails a risk for the other franchisees. However, as counsel for A&P candidly admitted, a successful individual action would have the same effect with respect to the existing arrangements. The purpose of class proceedings legislation is to make the justice system accessible. To this end, the court must consider alternative procedures. However, as noted in *Hollick* at para. 16, the certification analysis is concerned with the "form of the action". Arguments that no litigation is preferable to a class proceeding cannot be given effect. If there is any basis to this argument, it is subsumed in the cause of action element of the test for certification.

[245] A similar type of argument, as advanced in the immediate case, was also rejected by Justice Cullity at paragraph 68 of his judgment in *Kranjcec v. Ontario*, *supra,* where he stated:

> 68. I am satisfied that conflicts of the first kind can be adequately addressed by the opting out process. This is designed to permit putative class members to divorce themselves from the litigation, for whatever reason, and, by so doing, to preserve their rights. The possibility that some members of the putative class may be concerned that - irrespective of its resolution - the litigation may provoke an unfavourable reaction from the defendant should not be permitted to prevent members who do not choose to opt out from proceeding with the action as a class

proceeding.

[246] I, therefore, conclude that the representative plaintiff criterion is satisfied.

E. Conclusion

[247] For the above reasons: (1) I certify the claims for breach of employment law statutes and unjust enrichment; (2) I do not certify the claims for: (a) breach of contract, (b) negligence, (c) breach of duty of honesty, good faith and fair dealing, (d) conspiracy, and (e) waiver of tort; (3) I do not certify the action as against the American teams and I amend the class definition accordingly; (4) I also amend the definition of the class to close the class period as of the date of the certification motion; (5) I do not certify the common issues for breach of contract, negligence, breach of duty of honesty, good faith and fair dealing, and conspiracy; and (6) I appoint Messrs. Berg and Pachis to be Representative Plaintiffs. With the above revisions, I certify this action as a class action.

[248] If the parties cannot agree about the matter of costs, they may make submissions in writing beginning with Messrs. Berg's and Pachis' submissions within 20 days of the release of these Reasons for Decision followed by the Defendants' submissions within a further 20 days.

Perell, J.

Released: April 27, 2017

Schedule "A" – Witness List

[1] The Plaintiffs supported their motion for certification with the following evidence from 12 deponents, some of whom swore multiple affidavits:

- Three Affidavits from **Samuel Berg** sworn February 18, 2015, March 11, 2015, and June 14, 2016. Mr. Berg, who is a resident of Ontario. He formerly played hockey for the Niagara IceDogs of the OHL. Mr. Berg was cross-examined.
- Affidavit from **John Paul Chartrand** sworn on June 9, 2016. Mr. Chartrand is a resident of Ontario. He is a former player with: the Niagara IceDogs of the OHL (2009-11), the Barrie Colts of the OHL (2011-12); and the Sudbury Wolves of the OHL (2012, including play at the 2012 Junior World Cup in Omsk, Russia). Mr. Chartrand also played with the Moncton Wildcats of the QMJHL (2012-13).
- An affidavit from **Andrew J. Eckart** sworn February 20, 2015. Mr. Eckart is a lawyer with Charney Lawyers PC, of the consortium of proposed Class Counsel.
- An affidavit from **Jeremy Gottzmann** sworn June 8, 2016. Mr. Gottzmann is a resident of Ontario. He is a former player with: the Erie Otters of the OHL (2009-11) and the Peterborough Petes of the OHL (2011-12).
- An affidavit from **Victoria Grygar** sworn June 11, 2016. Ms. Grygar is a resident of Ontario. She is a law clerk at Saad Law Professional Corporation in Mississauga, Ontario. She has an M.A. in health and physical education (Brock University) and wrote a Master's thesis entitled "A Struggle Against the Odds: Understanding the Lived Experiences of Canadian Hockey League (CHL) Players". As part of her research, she interviewed eleven players, ten of whom played in OHL and one in the WHL.
- Two affidavits from **Ryan Allen Hancock** sworn March 31, 2015 and June 15, 2016. Mr. Hancock is a resident of the State of Pennsylvania and a lawyer with the Employment Law Department of Willig, Williams & Davidson, a law firm with its head office located in Philadelphia. He delivered expert reports dated March 31, 2015 and June 15, 2016. Mr. Hancock was cross-examined.
- Three affidavits from **Brendan O'Grady** sworn June 15, 2016, November 8, 2016, and November 29, 2016. Mr. O'Grady is a resident of Ontario and a lawyer with Charney Lawyers PC, proposed Class Counsel.
- A declaration from **Chester Hanvey** dated June 15, 2016, and an acknowledgment of expert's duty dated November 25, 2016. Dr. Hanvey is a resident of California. He is Associate Director at Berkeley Research Group, a consulting firm. Dr. Hanvey has a Ph.D. in industrial and organizational psychology. He was retained to deliver an expert opinion and a job analysis about the degree of similarity of experience across current and former players in the CHL as relates to determining whether players are employees, interns, trainees or amateur student athletes.
- A report from **Kevin P. Mongeon**, who is a resident of Ontario and Assistant Professor of Sport Management at Brock University. He has a Ph.D. in economics (Washington State University) an MBA (University of Windsor) and B.Sc. in mathematics (Lakehead University). He was retained to deliver an expert report entitled "Report on the Economics of the Canadian Hockey League and its Team Members" dated June 14, 2016.

He delivered his acknowledgment of expert's duty on November 29, 2016.

- Affidavit from **Daniel Pachis** sworn November 24, 2016. Mr. Pachis is a resident of Ontario. He is a former player with: the Saginaw Spirit in the OHL (2007-09) and the Oshawa Generals of the OHL (2009-10). He was cross-examined.
- Affidavit of **Kiara Sancler** sworn November 18, 2015. Ms. Sancler is a resident of Ontario and a law clerk at Charney Lawyers PC of proposed Class Counsel.
- Two Affidavits from **Lukas Walter** sworn March 11, 2015 and June 14, 2016. Mr. Walter is a resident of British Columbia and is the proposed representative plaintiff in class actions filed in the provinces of Alberta and Quebec against the WHL and the QMJHL, where he formerly was a player.

[2] The Defendants resisted the motion for certification with the following evidence from the following 33 deponents, some of whom swore multiple affidavits:

- Two affidavits from **Scott Abbott** sworn on November 12, 2015 and September 21, 2016. Mr. Abbott is a resident of Ontario and is the owner of the North Bay Battalion of the OHL.
- Affidavit from **Spencer Abraham** sworn on December 3, 2015. Mr. Abraham is a resident of Ontario and a former player with the Brampton Battalion and the Erie Otters of the OHL.
- Affidavit from **Andrew Agozzino** sworn November 8, 2015. Mr. Agozzino is a resident of the State of Texas. He is a former player with the Niagara IceDogs of the OHL.
- Affidavit from **Ted Baker** sworn on October 27, 2016. Mr. Baker is a resident of Ontario and is the Vice-President of the OHL.
- Affidavit from **Brett Bartman** sworn on November 12, 2015. Mr. Bartman is a resident of Alberta. He played Minor hockey from the age of six including playing with the Medicine Hat Midget AAA team. He then played for the Spokane Chiefs of the WHL from 2007 to 2010 after which he obtained a B.A. in Kinesiology from the University of Calgary. At the university he played for the men's hockey team. He is now a strength and conditioning coach at the Southern Alberta Institute of Technology.
- Affidavit from **Terry Bartman**, sworn on November 12, 2015. Mr. Terry Bartman is a resident of Alberta. He coached his son Brett Bartman's minor hockey teams in Medicine Hat until Brett was 13 years old. Mr. Terry Bartman is the President of the Board of Directors of the South East Athletic Club, an amateur hockey club, and he is a part-time scout for the Spokane Chiefs, where he is reimbursed for his expenses but receives no salary. The South East Athletic Club is a sporting society that supports a Bantam AAA, Midget AAA, and a Midget team in Medicine Hat, Alberta.
- Affidavit from **Jordan Binnington** sworn on November 7, 2015. Mr. Binnington is a resident of the State of Illinois. He is a former player with the Owen Sound Attack of the OHL.
- Three affidavits from **David E. Branch** sworn on December 23, 2015, September 23, 2016, and November 1, 2016. Mr. Branch is the President of the CHL and has served in that position since 1996. He is also the Commissioner of the OHL, where he has served

for over 36 years. He formerly was the Executive Director of the CAHA from 1977 to 1978. He was the Secretary-Manager of the OHA between 1974 and 1976. He is coach of the Whitby Wildcats a Minor Midget AAA Team. Mr. Branch was cross-examined.

- Affidavit from **Gordie Broda** sworn on December 18, 2015. Mr. Broda is a resident of Saskatchewan where he has been a Governor, Alternate Governor, Vice-President and member of the Board of Directors of the Prince Albert Raiders of the WHL, all volunteer positions, for over 12 years. His son, Joel Broda, played in the WHL between 2005 and 2010 and now plays professionally in Austria after playing in the AHL and the ECHL.
- Three affidavits from **Denise Burke** sworn on November 14, 2015, September 14, 2016, and March 14, 2017. Ms. Burke is a resident of Ontario. She is the part owner and the President of the Niagara IceDogs of the OHL.
- Affidavit from **George Burnett** sworn on September 16, 2016. Mr. Burnett is a resident of Ontario. He is the general manager of the Flint Firebirds of the OHL. He was the coach and general manager of several other OHL teams, including the Belleville Bulls, now the Hamilton Bulldogs, from 2004-2016.
- Affidavit from **Joseph Caligiuri** sworn on November 13, 2015. Mr. Caligiuri is a resident of Manitoba and is a former player with the Brandon Wheat Kings of the WHL (2006-08) and with the Prince George Cougars of the WHL (2009). Then, he played hockey in the Manitoba Junior Hockey League with the Dauphin Kings after which he enrolled at the University of Manitoba where he obtained a B.A. after which he enrolled at the University's law school.
- Affidavit from **Jane Carrick** sworn on December 17, 2015. Mrs. Carrick is the mother of four sons (Jake, Sam, Trevor, and Josh) who have played or are playing in the OHL.
- Affidavit from **Alex Chan** sworn on January 18, 2017. Dr. Chan is a resident of British Columbia. He is an orthopedic surgeon. He has a BSc. in Physiology and a MSc. and PhD. in Neurobiology, all from the University of Toronto. He got his M.D. from McMaster University in 1990, with a specialization in orthopedic surgery, which he obtained in 1999.
- Affidavit of **Jeff Chynoweth** sworn January 5, 2017. Mr. Chynoweth is a resident of British Columbia. He is the President, General Manager, and part-owner of the Kootenay Ice Hockey Club of the WHL. He was the Assistant Director of Marketing for the WHL's Spokane Chiefs (1986-1987) the Medicine Hat Tigers (1987-1988), the Brandon Wheat Kings (1988-1989), and the Lethbridge Hurricanes (1989-1990). He was an Assistant General Manager of the Hurricanes and the Director of Operations of the Red Deer Rebels.
- Two Affidavits from **David Dunn** sworn on December 18, 2015 and August 30, 2016. Mr. Dunn is a resident of the City of New York, in the State of New York. He is a partner in the litigation department at Hogan Lovells US LLP. He was retained to provide an expert opinion and delivered a report dated December 18. 2015 and a supplementary report dated August 30, 2016.
- Two Affidavits from **Craig Goslin** sworn on November 9, 2015 and December 28, 2016. Mr. Goslin is a resident of the State of Michigan. He is the co-owner and President of the Saginaw Hockey Club, L.L.C., the Saginaw Spirit of the OHL.

- Affidavit from **Steve Hogle** sworn on January 9, 2017. Mr. Hogle is a resident of Saskatchewan. He is the President of the Saskatoon Blades of the WHL.
- Affidavit from **Brett Howden** sworn December 16, 2015. Mr. Howden is a resident of Saskatchewan. He plays for the Moose Jaw Warriors of the WHL.
- Affidavit from **Sheldon Howden** sworn on December 18, 2015. Mr. Sheldon Howden is a resident of Manitoba. He has two sons, Quinton, who played with the Moose Jaw Warriors in Saskatchewan (2007-12), and Brett who plays for the Moose Jaw Warriors.
- Two affidavits from **James McAuley** sworn on December 22, 2016 and March 14, 2016. Mr. McAuley is a resident of Ontario and is a Senior Vice President with KPMG Forensic Inc. ("KPMG"), which was retained to deliver an expert report dated December 22, 2016.
- Affidavit from **Kelly Mercer** sworn on November 19, 2015. Mrs. Mercer is a resident of Ontario and she is the mother of Luke Mercer, a former player with the Niagara IceDogs of the OHL.
- Affidavit from **Paul Myers** sworn on November 12, 2015. Mr. Myers is a resident of Alberta. His son Tyler played in the WHL for the Kelowna Rockets (2005-009). Mr. Myers played amateur hockey while growing up in Pennsylvania, including Division II hockey at Lehigh University, where he obtained a B.A. in geophysics. Mr. Myers also has a M.Sc. in geology from the University Kansas, and an M.B.A. from the University of Calgary.
- Affidavit from **Lucas Nickles** sworn December 17, 2015. Mr. Nickles is a resident of Alberta where he is enrolled in a BA program in First Nations studies at the University of Alberta, where he is a member of the men's hockey team. He is a former player with the Tri-City Americans in the State of Washington (2010-15). Before that he played Minor and Junior B hockey in British Columbia.
- Affidavit from **David Nenni** sworn on December 16, 2015. Mr. Nenni is a resident of the State of Washington where he is an attorney with the law firm of Jackson Lewis, P.C.
- Two affidavits of **Norm O'Reilly** sworn on December 21, 2016 and March 14, 2017. Dr. O'Reilly is a resident of the State of Ohio where he is a professor of sport business at the College of Business at Ohio University. He was retained to deliver an expert's report dated December 21, 2016. Dr. O'Reilly has four post-secondary degrees and the Chartered Professional Accountant Chartered General Accountant (CPA/CGA). His PhD is in Management (Carleton University), MBA in Marketing (University of Ottawa), MA in Sport Management (University of Ottawa) and B.Sc. is in Kinesiology (University of Waterloo). He is a member of the Board of Directors of the Business of Hockey Institute (BHI), a not-for-profit group of hockey industry leaders that partners with Athabasca University on the "Hockey MBA" program.
- Affidavit from **Sherry Pysyk** sworn on November 12, 2015. Mrs. Pysyk is a resident of Alberta. She is the mother of Mark Pysyk who played with the Edmonton Oil Kings of the WHL (2007-12). Her family also billeted one of Mark's teammates during that time.

- Two affidavits from **Kruise Reddick** sworn on November 12, 2015 and September 16, 2016. Mr. Reddick is a resident of Saskatchewan and he a former player with the Tri-City Americans of the WHL (2006-11). Before that he played Minor hockey in Saskatchewan. He obtained B.A. in Recreation and Sport Tourism at the University of Alberta in Edmonton, Alberta. He played on the men's ice hockey team while at the University from 2011 to 2016.
- Two affidavits from **Ron Robinson** sworn on December 22, 2015 and September 28, 2016. Mr. Robinson is a resident of Alberta. Since September 2000, he has been the Commissioner of the WHL and Vice-President of the CHL. Before becoming Commissioner, he held senior management positions with the CAHA and with Hockey Canada between 1981 and 1997 including a tenure as President of Hockey Canada from 1992 to 1994. He was a member of the Physical Education Faculty at the University of Saskatchewan and an assistant coach of the men's hockey team.
- Affidavit from **Chad Taylor** sworn on December 15, 2015. Mr. Taylor is a resident of Saskatchewan and is the Governor of the Moose Jaw Warriors of the WHL and the President of the Moose Jaw Tier 1 Hockey Inc. Board of Directors, which are volunteer positions. He played and referred Minor League Hockey.
- Affidavit from **Mitchell Topping** sworn on September 19, 2016. Mr. Topping is a resident of Alberta. He played with the Tri-City Americans in the WHL (2012-14). Before that he played with the Chilliwack Bruins of the WHL (2008-11), and he played Bantam AAA hockey in Alberta. In 2014, he enrolled at the University of Alberta in a degree course in Commerce. He has played hockey with the university's team since enrolling at the university.
- Affidavit from **Bob Topping** sworn on September 20, 2016. Mr. Topping is a resident of Alberta. He is a former player in the WHL for the Tri-City Americans (2012-14). He previously played with the Chilliwack Bruins of the WHL (2008-11). After leaving the WHL in 2014, he enrolled at the University of Alberta for a B.A. in Commerce and where he plays CIS hockey.
- Affidavits from **Bob Tory** sworn on December 16, 2015 and September 20, 2016. Mr. Tory is a resident of State of Washington. He is the General Manager and part-owner of the Tri-City Americans of the WHL. Previously, he was the General Manager of WHL teams in Seattle, Edmonton, and Cranbrook (Kootenay). He has a B.A. in Education from the University of Alberta and was the Head of the Physical Education Department and was a physical education teacher at Kenilworth Junior High School in Edmonton where he coached Minor hockey.

Schedule "B" – Excerpts *Employment Standards Act*

Employment Standards Act

Definitions

1. (1) In this Act,

....

"employee" includes,

(a) a person, including an officer of a corporation, who performs work for an employer for wages,

(b) a person who supplies services to an employer for wages,

(c) a person who receives training from a person who is an employer, as set out in subsection (2), or

(d) a person who is a homeworker,

and includes a person who was an employee;

....

To whom Act applies

3. (1) Subject to subsections (2) to (5), the employment standards set out in this Act apply with respect to an employee and his or her employer if,

(a) the employee's work is to be performed in Ontario; or

(b) the employee's work is to be performed in Ontario and outside Ontario but the work performed outside Ontario is a continuation of work performed in Ontario.

Exception, federal jurisdiction

(2) This Act does not apply with respect to an employee and his or her employer if their employment relationship is within the legislative jurisdiction of the Parliament of Canada.

Exception, diplomatic personnel

(3) This Act does not apply with respect to an employee of an embassy or consulate of a foreign nation and his or her employer.

Exception, employees of the Crown, etc.

(4) Only the following provisions of this Act apply with respect to an employee and his or her employer if the employer is the Crown, a Crown agency or an authority, board, commission or corporation all of whose members are appointed by the Crown:

1. Part IV (Continuity of Employment).

2. Section 14.

3. Part XII (Equal Pay for Equal Work).

4. Part XIII (Benefit Plans).

5. Part XIV (Leaves of Absence).

6. Part XV (Termination and Severance of Employment).

7. Part XVI (Lie Detectors).

8. Part XVIII (Reprisal), except for subclause 74 (1) (a) (vii) and clause 74 (1) (b).

9. Part XIX (Building Services Providers).

Other exceptions

(5) This Act does not apply with respect to the following individuals and any person for whom such an individual performs work or from whom such an individual receives compensation:

1. A secondary school student who performs work under a work experience program authorized by the school board that operates the school in which the student is enrolled.

2. An individual who performs work under a program approved by a college of applied arts and technology or a university.

3. A participant in community participation under the *Ontario Works Act, 1997*.

4. An individual who is an inmate of a correctional institution within the meaning of the *Ministry of Correctional Services Act*, is an inmate of a penitentiary, is being held in a detention facility within the meaning of the *Police Services Act* or is being held in a place of temporary detention or youth custody facility under the *Youth Criminal Justice Act (Canada)*, if the individual participates inside or outside the institution, penitentiary, place or facility in a work project or rehabilitation program.

5. An individual who performs work under an order or sentence of a court or as part of an extrajudicial measure under the *Youth Criminal Justice Act (Canada)*.

6. An individual who performs work in a simulated job or working environment if the primary purpose in placing the individual in the job or environment is his or her rehabilitation.

7. A holder of political, religious or judicial office.

8. A member of a quasi-judicial tribunal.

9. A holder of elected office in an organization, including a trade union.

10. A police officer, except as provided in Part XVI (Lie Detectors).

11. A director of a corporation, except as provided in Part XX (Liability of Directors), Part XXI (Who Enforces this Act and What They Can Do), Part XXII (Complaints and Enforcement), Part XXIII (Reviews by the Board), Part XXIV (Collection), Part XXV (Offences and Prosecutions), Part XXVI (Miscellaneous Evidentiary Provisions), Part XXVII (Regulations) and Part XXVIII (Transition, Amendment, Repeals, Commencement and Short Title).

12. Any prescribed individuals.

Dual roles

(6) Where an individual who performs work or occupies a position described in subsection (5) also performs some other work or occupies some other position and does so as an employee, nothing in subsection (5) precludes the application of this Act to that individual and his or her employer insofar as that other work or position is concerned.

....

O. Reg. 285/01, s. 2 (1)

2. (1) Parts VII, VIII, IX, X and XI of the Act do not apply to a person employed,

(a) as a duly qualified practitioner of,

(i) architecture,

(ii) law,

(iii) professional engineering,

(iv) public accounting,

(v) surveying, or

(vi) veterinary science;

(b) as a duly registered practitioner of,

(i) chiropody,

(ii) chiropractic,

(iii) dentistry,

(iv) massage therapy,

(v) medicine,

(vi) optometry,

(vii) pharmacy,

(viii) physiotherapy, or

(ix) psychology;

(c) as a duly registered practitioner under the *Drugless Practitioners Act*;

(d) as a teacher as defined in the *Teaching Profession Act*;

(e) as a student in training for an occupation mentioned in clause (a), (b), (c) or (d);

(f) in commercial fishing;

(g) as a salesperson or broker, as those terms are defined in the *Real Estate and Business Brokers Act, 2002*; or

(h) as a salesperson, other than a route salesperson, who is entitled to receive all or any part of his or her remuneration as commissions in respect of offers to purchase or sales that,

(i) relate to goods or services, and

(ii) are normally made away from the employer's place of business.

(2) Subject to sections 24, 25, 26 and 27 of this Regulation, Parts VII, VIII, IX, X and XI of the Act do not apply to a person employed on a farm whose employment is directly related to the primary production of eggs, milk, grain, seeds, fruit, vegetables, maple products, honey, tobacco, herbs, pigs, cattle, sheep, goats, poultry, deer, elk, ratites, bison, rabbits, game birds, wild boar and cultured fish.

CITATION: Berg v. Canadian Hockey League, 2017 ONSC 2608
COURT FILE NO.: CV-14-514423CP
DATE: 20170427

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SAMUEL BERG and DANIEL PACHIS

Plaintiffs

– and –

CANADIAN HOCKEY LEAGUE, et al.

Defendants

REASONS FOR DECISION

PERELL J.

Released: April 27, 2017