CITATION: Carcillo v. Canadian Hockey League, 2023 ONSC 886
COURT FILE NO.: CV-20-00642705-00CP
DATE: 20230203

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DANIEL CARCILLO. GARRETT TAYLOR, and STEPHEN QUIRK

Plaintiffs

- and -

ONTARIO MAJOR JUNIOR HOCKEY LEAGUE, CANADIAN HOCKEY LEAGUE, WESTERN HOCKEY LEAGUE, QUÉBEC MAJOR JUNIOR HOCKEY LEAGUE, BARRIE COLTS JUNIOR HOCKEY LTD., GUELPH STORM LTD., HAMILTON BULLDOGS FOUNDATION INC., KINGSTON FRONTENACS HOCKEY LTD., KITCHENER RANGERS JR. A. HOCKEY CLUB, LONDON KNIGHTS HOCKEY INC., MISSISSAUGA STEELHEADS HOCKEY CLUB INC., 2325224 ONTARIO INC. o/a MISSISSAUGA STEELHEADS, NIAGARA ICEDOGS HOCKEY CLUB INC., NORTHBAY BATTALION HOCKEY CLUB LTD., OSHAWA GENERALS HOCKEY ACADEMY LTD., OTTAWA 67'S LIMITED PARTNERSHIP c.o.b. OTTAWA 67's HOCKEY CLUB, THE OWEN SOUND ATTACK INC., PETERBOROUGH PETES LIMITED, 649643 ONTARIO INC. o/a 211 SSHC CANADA ULC o/a SARNIA STING HOCKEY CLUB, SOO GREYHOUNDS INC., SUDBURY WOLVES HOCKEY CLUB LTD., WINDSOR SPITFIRES INC., MCCRIMMON HOLDINGS, LTD., 32155 MANITOBA LTD., A PARTNERSHIP c.o.b. as BRANDON WHEAT KINGS, BRANDON WHEAT KINGS LIMITED PARTNERSHIP, CALGARY FLAMES LIMITED PARTNERSHIP, CALGARY SPORTS AND ENTERTAINMENT CORPORATION, EDMONTON MAJOR JUNIOR HOCKEY CORPORATION, KAMLOOPS BLAZERS HOCKEY CLUB, INC. KAMLOOPS BLAZERS HOLDINGS LTD., KELOWNA ROCKETS HOCKEY ENTERPRISES LTD., PRINCE ALBERT RAIDERS HOCKEY CLUB INC., EDGEPRO SPORTS & ENTERTAINMENT LTD., QUEEN CITY SPORTS & ENTERTAINMENT GROUP LTD., BRAKEN HOLDINGS LTD., REBELS SPORTS LTD., SASKATOON BLADES HOCKEY CLUB LTD., VANCOUVER JUNIOR HOCKEY LIMITED PARTNERSHIP and VANCOUVER JUNIOR HOCKEY PARTNERSHIP, LTD c.o.b. VANCOUVER GIANTS, WEST COAST HOCKEY LLP, WEST COAST HOCKEY ENTERPRISES LTD., o/a VICTORIA ROYALS, MEDICINE HAT TIGERS HOCKEY CLUB LTD., 1091956 ALTA LTD. o/a THE MEDICINE HAT TIGERS, SWIFT CURRENT TIER 1 FRANCHISE INC. and SWIFT CURRENT BRONCOS

HOCKEY CLUB INC. o/a THE SWIFT CURRENT, ICE SPORTS & ENTERTAINMENT INC. o/a WINNIPEG ICE, MOOSE JAW TIER 1 HOCKEY INC. D.B.A. MOOSE JAW and MOOSE JAW WARRIORS TIER 1 HOCKEY, INC. WARRIORS o/a MOOSE JAW WARRIORS, LETHBRIDGE HURRICANES HOCKEY CLUB, 649643 ONTARIO INC. c.o.b. as SARNIA STING, KITCHENER RANGER JR A HOCKEY CLUB and KITCHENER RANGERS JR "A" HOCKEY CLUB, LE TITAN ACADIE BATHURST (2013) INC., CLUB DE HOCKEY JUNIOR MAJEUR DE BAIE-COMEAU INC. o/a DRAKKAR BAIE-COMEAU, CLUB DE HOCKEY DRUMMOND INC. o/a VOLTIGEURS DRUMMONDVILLE, CAPE BRETON MAJOR JUNIOR HOCKEY CLUB LIMITED o/a SCREAMING EAGLES CAPE BRETON, LES OLYMPIQUES DE GATINEAU INC., HALIFAX MOOSEHEADS HOCKEY CLUB INC., CLUB HOCKEY LES REMPARTS DE QUÉBEC INC., LE CLUB DE HOCKEY JUNIOR ARMADA INC., MONCTON WILDCATS HOCKEY CLUB LIMITED, LE CLUB DE HOCKEY L'OCÉANIC DE RIMOUSKI INC., LES HUSKIES DE ROUYNNORANDA INC., 8515182 CANADA INC. c.o.b. as CHARLOTTETOWN ISLANDERS, LES TIGRES DE VICTORIAVILLE (1991) INC., SAINT JOHN MAJOR JUNIOR HOCKEY CLUB LIMITED, CLUB DE HOCKEY SHAWINIGAN INC. o/a CATARACTES SHAWNIGAN, CLUB DE HOCKEY JUNIOR MAJEUR VAL D'OR INC. o/a VAL D'OR FOREURS, 7759983 CANADA INC. c.o.b. as CLUB DE HOCKEY LE PHOENIX, 9264-8849 QUÉBEC INC. c.o.b. as GROUPE SAGS 7-96 AND LES SAGUENÉENS, JAW HOCKEY ENTERPRISES LP c.o.b. ERIE OTTERS, IMS HOCKEY c.o.b. FLINT FIREBIRDS, SAGINAW HOCKEY CLUB, L.L.C., EHT, INC., WINTERHAWKS JUNIOR HOCKEY LLC, PORTLAND WINTER HAWKS INC., THUNDERBIRDS HOCKEY ENTERPRISES, L.L.C., BRETT SPORTS & ENTERTAINMENT, INC., HAT TRICK, INC., TRI-CITY AMERICANS HOCKEY LLC, and TOP SHELF ENTERTAINMENT, INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*

- *James Sayce, Vlad Calina,* and *Sue Tan* for the Plaintiffs.
- *Michael Eizenga, Ashley Paterson, Gannon Beaulne,* Nina Butz for the Defendants.
- *Tim Pinos, Kate Byers,* and *Hardeep Dhaliwal* for the Jaw Hockey Enterprises LP c.o.b. Erie Otters, IMS Hockey c.o.b. Flint Firebirds, Saginaw Hockey Club, L.L.C., EHT, Inc., John Doe Corp. A o/a Everett Silvertips Hockey Club, Winterhawks Junior Hockey LLC, Portland Winter Hawks Inc., Thunderbirds Hockey Enterprises, L.L.C., John Doe Corp. B o/a Seattle Thunderbirds, Brett Sports & Entertainment, Inc., Hat Trick, Inc., John Doe Corp. C o/a Spokane Chiefs, Tri-City Americans Hockey LLC and John Doe Corp. D o/a Tri-City Americans.

Hearing: November 14-17, 2022

Contents

PERELL, J.

REASONS FOR DECISION

A. Introduction

[1] Daniel Carcillo, Garrett Taylor, and Stephen Quirk sue 78 Defendants that organize the

best game you can name, the “good ol’ Hockey game.” Daniel Carcillo, Garrett Taylor, and Stephen Quirk sue 60 amateur hockey teams that compete at the highest level of junior amateur hockey in Canada. The 60 hockey teams, which are owned by 78 Defendants, are situated in every Canadian province, except Newfoundland and Labrador, and also in four American states. The 60 amateur hockey teams, along with college leagues, and foreign leagues, are the source of talent for the professional hockey leagues, including the National Hockey League (“NHL”), which is not a defendant to the lawsuit. Daniel Carcillo, Garrett Taylor, and Stephen Quirk also sue the Western Hockey League (“WHL”), the Ontario Hockey League (“OHL”), (formerly the Ontario Major Junior Hockey League (“OMJHL”)), and the Québec Major Junior Hockey League (“QMJHL”). The 60 hockey teams are the members of these three Canadian amateur hockey leagues. Messrs. Carcillo, Taylor, and Quirk also sue the Canadian Hockey League (“CHL”), which was founded by and is the creation of the WHL, OHL, and the QMJHL. The 60 hockey teams are members of the CHL.

[2] Messrs. Carcillo, Taylor, and Quirk’s lawsuit is a proposed class action pursuant to the *Class Proceedings Act, 1992*.[1] The proposed Representative Plaintiffs sue on behalf of a class defined as: "all former and current players who claim to have suffered the “abuse” while playing in the CHL League between May 8, 1975 and the present.” "Family Class" means "all parents, spouses, siblings, and children of Class Members."

[3] The Fresh as Amended Statement of Claim defines the “abuse” as follows:

> “Abuse” means, *inter alia*, physical, and sexual assault, hazing, bullying, physical and verbal harassment, sexual harassment, forced consumption of alcohol and illicit drugs, and the use of homophobic, sexualized and/or racist slurs directed against minors playing in the Leagues, perpetrated by players, coaches, staff, servants, employees, and agents of the Leagues, including players, coaches, staff, servants, employees, and agents of the teams, as further particularized herein.

[4] Messrs. Carcillo, Taylor, and Quirk make May 8, 1975 the starting date for the forty-eight-year Class Period because that was the day that the WHL, OMJHL, and QMJHL founded the CHL.

[5] Messrs. Carcillo, Taylor, and Quirk sue the Defendants - collectively - for what is described as a culture of silence that hides a predatory, perverse, culture of violence, hazing, bullying, harassment, and assaults. They advance four causes of action against the collective of the WHL, OHL, QMJHL, CHL, and their 60 teams, namely: (a) breach of fiduciary duty; (b) systemic negligence; (c) vicarious liability; and (d) breach of Québec causes of action.

[6] Messrs. Carcillo, Taylor, and Quirk move for certification of their action as a class action (the “Certification Motion”).

[7] The CHL, WHL, OHL, and QMJHL and the 60 teams oppose the Certification Motion, and the Defendants submit that none of the five certification criteria are satisfied. The Defendants submit that the Certification Motion should be dismissed.

[8] In addition to opposing the Certification Motion, the Defendants bring two motions to dismantle it.

[9] In addition to opposing certification, there is the Defendants’ “Jurisdiction Motion”. The WHL, QMJHL, and their forty teams (but not the CHL, OHL, and their twenty OHL teams) seek to permanently stay Messrs. Carcillo, Taylor, and Quirk’s action as against them because they

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[1] S.O. 1992, c. 6.

submit that this court does not have jurisdiction *simpliciter* to decide the dispute.

[10] In addition to opposing certification, there is the Defendants' "Ragoonanan Motion." Since Messrs. Carcillo, Taylor, and Quirk respectively were members of only five teams, the other 55 teams from the WHL, OHL, and QMJHL seek to have the Plaintiffs' action dismissed against them pursuant to the so-called "Ragoonanan Principle,"[2] which is authority that in a proposed class action, there must be a representative plaintiff with a claim against each defendant.

[11] However, although the 60 teams (74 defendants), the CHL, WHL, OHL, and QMJHL (four defendants) assert that the Plaintiffs, and the putative Class Members' proposed class action should be dismantled and dismissed and that the Certification Motion should be dismissed, they also say that the putative Class Members who experienced the "abuse" deserve access to justice in criminal proceedings or in individual actions against the perpetrators of the "abuse". The Defendants submit that a class proceeding is not the preferable procedure to bring the perpetrators to justice.

[12] On a Certification Motion, a court has four choices: (a) certify the class action; (b) certify with qualifications, conditions, or modifications; (b) refuse to certify; and; (d) pursuant to s. 7 of the *Class Proceedings Act, 1992* refuse to certify the action but permit the action to continue as one or more proceedings between different parties. In the immediate case, for the reasons that follow:

a. This court has jurisdiction *simpliciter* over all of the Defendants; therefore, the Jurisdiction Motion is dismissed.

b. There are no collective causes of action; therefore, the Plaintiffs cannot be Representative Plaintiffs for claims against the other 55 teams of the CHL. The Ragoonanan Motion is granted. However, the dismissal Order is suspended pending the determination of a motion for approval of an Individual Issues Protocol.

c. The Certification Motion is dismissed.

i. The cause of action for breach of fiduciary duty does not satisfy the cause of action criterion.

ii. There are no collective causes of action against the Defendants and therefore the Plaintiffs' class action – as proposed – does not satisfy the cause of action criterion. (The cause of action criterion would or could have been satisfied as against the 60 teams and the WHL, OHL, QMJHL, and CHL -severally- for systemic negligence, vicarious liability, and breach of the Québec causes of action, but there are no collective causes of action.)

iii. Had the proposed class action otherwise been certifiable, the identifiable class criterion would or could have been satisfied.

iv. The Plaintiffs' class action – as proposed – does not satisfy the common issues criterion and the preferable procedure criterion. (These criteria would also not or could not be satisfied if the Plaintiffs' class action was recast as against the 60 teams and the WHL, OHL, QMJHL – severally – for systemic negligence,

[2] *Poirer v. Silver Wheaton Corp*, 2022 ONSC 80; *Vecchio Longo Consulting Services Inc v. Aphria Inc*., 2021 ONSC 5405; *Hughes v. Sunbeam Corp (Canada)* (2002), 61 O.R. (3d) 433 (C.A.); *Ragoonanan Estate v. Imperial Tobacco Canada Ltd* (2000), 51 O.R. 3d 603 (S.C.J.).

vicarious liability, and breach of the Québec causes of action.)

v. The Ragoonanan Motion is granted. The Plaintiffs are satisfactory Representative Plaintiffs only with respect to actions against five teams and the leagues to which those teams are members.

vi. The Representative Plaintiff criterion is not satisfied. The Plaintiffs have not produced a workable litigation plan and it is not feasible that a workable plan could be produced.

d. Therefore, the Certification motion must be dismissed. However, the Order dismissing the Certification Motion is suspended pending the determination of a motion for approval of an Individual Issues Protocol.

e. Pursuant to sections 7, 12, and 25 of the *Class Proceedings Act, 1992,* it is Ordered that Messrs. Carcillo, Taylor and Quirk shall have 120 days, if so advised: (a) to prepare an "Individual Issues Protocol" for individual (discreet/separate) joinder-actions against the WHL, OHL, or QMJHL, respectively and their teams respectively; and (b) to bring a motion for approval of the Individual Issues Protocol, failing which Messrs. Carcillo, Taylor, and Quirk's proposed class action shall be dismissed.

f. Pursuant to sections 7, 12, and 25 of the *Class Proceedings Act, 1992,* it is Ordered that Messrs. Carcillo, Taylor and Quirk shall have 120 days, if so advised: (a) to prepare a Notice to the Class Members of the Individual Issues Protocol and a Distribution Plan for the dissemination of the Notice at the expense of the Defendants; and (b) to bring a motion for approval of the Notice and of the Dissemination Plan, failing which Messrs. Carcillo, Taylor, and Quirk's proposed class action shall be dismissed.

B. Overview: Construction of an Individual Issues Protocol

[13] In the immediate case, all the parties agree that there should be access to justice for what happened to some of the putative Class Members.

[14] As is apparent from the above introduction, which foreshadows the outcomes of the Jurisdiction Motion, the Ragoonanan Motion, and the Certification Motion, in the immediate case, the route to access to justice begins as a proposed national opt-out class action under s. 5 of the *Class Proceedings Act, 1992* but continues as national opt-in joinder actions pursuant to sections 7, 12, and 25 and an Individual Issues Protocol for the joinder actions.

[15] Explaining why this action moves from s. 5 of the *Class Proceedings Act, 1992* to sections 7, 12, and 25 involves describing the Defendants' piece-by-piece deconstruction of the Plaintiffs' proposed class action and the construction of an Individual Issues Protocol from the pieces.

[16] A Certification Motion is just a procedural motion. It is about the ways and means - the procedure - to the ends or goals of achieving procedural and substantive justice, behaviour modification, and judicial economy in a procedurally fair way to both the plaintiffs and the defendants.

[17] In this intensely contested Jurisdiction Motion, Ragoonanan Motion, and Certification Motion, the opposing parties do agree on one thing about ways and means. They agree about the ends. The opposing parties passionately agree that the players of the CHL, WHL, OHL, and QMJHL should have the ways and means to access justice for the disgraceful wrongdoings that

have occurred.

[18] The opposing parties, however, passionately disagree about the precise ways and means to achieve that end. The Plaintiffs submit that s. 5, i.e., a certified class action is the only route to access to justice. Quoting from their factum, Messrs. Carcillo, Taylor, and Quirk say:

> A collective finding of systemic liability, followed by an individual claims process, is the only realistic avenue to accountability and access to justice in this context. The Supreme Court of Canada and the Court of Appeal for Ontario have repeatedly endorsed systemic class proceedings to address similar failures in oversight, management, and governance. This systemic problem requires a systemic solution for major junior hockey to survive, and for the thousands of abuse victims to finally get justice. […] Individual actions cannot create the behaviour modification necessary to protect current and future players from the Abuse. A class proceeding is needed. […] The Representative Plaintiffs have stepped forward at great personal cost, to hold a system accountable that has abused them terribly. […] Each of them has come forward on behalf of the thousands of Class Members who cannot easily advocate for themselves; and they do it to change a hockey culture that has endured for decades and permitted horrible abuses. If there were another realistic way to get justice for the class, they would have pursued it. But there is no other, preferable procedure: this class action is the only vehicle to justice.

[19] The Defendants disagree, and they submit that individual actions are the only route to access to justice. Quoting from their factum, the Defendants say:

> The plaintiffs, and any other players who may have experienced criminal or tortious conduct at the hands of teammates or others in connection with their time playing major junior hockey, deserve access to justice. But this proposed class action, as framed and under any framing, is neither a practically desirable nor a legally viable means of giving it to them. Nor is it fair to the defendants. […] The defendants do not deny that some players have experienced serious misconduct and suffered potentially compensable harm over the last forty-seven years. Those players deserve a rational process for evaluating claims in their inextricable context, determining who is responsible and to what extent (including the perpetrators), and receiving compensation if appropriate. For the reasons described in this factum, this proposed class action cannot be that process.

[20] The Defendants challenge and dismantle the Plaintiffs' proposed class action. The Defendants ultimately do not dispute that - as individuals - Messrs. Carcillo, Taylor, and Quirk have some causes of action against five teams; however, the Defendants through the Jurisdiction Motion, the Ragoonanan Motion, and their resistance to the Certification Motion deconstruct, in the sense of dismantling - the collective aspects - of the proposed class action.

[21] What, however, emerges from the Defendants' deconstruction, is that the Jurisdiction Motion is dismissed, the Ragoonanan Motion is granted, and the Certification Motion is dismissed. And, it is the dismissal of the Certification Motion that opens the door to an Order pursuant to sections 7, 12, and 25 of the *Class Proceeding Act,* 1992 to establish a national opt-in Individual Issues Protocol for joinder actions against the respective teams that may be liable for systemic negligence, vicarious liability and or the Québec causes of action.

[22] I agree with the parties that the abused players of the WHL, OHL, QJMHL should have the ways and the means to achieve access to justice. In my opinion, this court in Ontario has the jurisdiction *simpliciter* and the ways and means to provide that route for the players of the 60 teams of the WHL, OHL, and QJMHL. That route is pursuant to sections 7, 12, and 25 of the *Class Proceedings Act, 1992* and an Individual Issues Protocol.

[23] As I shall explain below, the Jurisdiction Motion, which was brought by the 22 teams of

the WHL, the 18 teams of the QMJHL, and the WHL and QMJHL is dismissed because there is a real and substantial connection between this court and the Plaintiffs and all of these Defendants. The Defendants carry on business in Ontario. And, in any event, Ontario has a real and substantial connection severally with each and every of the 60 hockey teams and the WHL, OHL, QMJHL, and CHL.

[24] As I shall explain further below, the Ragoonanan Motion is granted. Although this court has jurisdiction *simpliciter* as against all 60 teams, Messrs. Carcillo, Taylor, and Quirk have only individual actions against five teams and the leagues to which those teams are members. There is no "collective liability causes of action" in the immediate case. The case at bar needs a plaintiff to have a cause of action against every particular defendant. The result is that there are potential claims against 55 teams, for whom there is no named plaintiff to pursue those claims. Thus, the Ragoonanan Motion should be granted.

[25] To use Mr. Taylor as an example, he has an individual causes of action for systemic negligence (also non-systemic negligence) and vicarious liability to pursue as against the WHL and the CHL and its teams from Lethbridge and Prince Rupert; however, he has no legally viable claims against the other teams of the WHL or the other teams of the CHL or against the OHL and the QMJHL; there is no collective liability. The claims against Defendants that did not engage in a concerted wrongdoing against Mr. Taylor are doomed to failure.

[26] When there is a so-called Ragoonanan Problem, often the proposed representative plaintiffs are offered an opportunity to fix the problem by recruiting additional plaintiffs. In the immediate case, this solution is not available, because it would be meaningless, since Messrs. Carcillo, Taylor, and Quirk's proposed class action is not certifiable. Their proposed class action asserting a collective liability fails the cause of action criterion, the common issues criterion, the preferable procedure criterion, and the representative plaintiff criterion because of the Ragoonanan problem and because of an unworkable litigation plan.

[27] The proposed class action is not certifiable because its major or fundamental premise, which is that each of the 60 member teams of the WHL, OHL, QMJHL, or CHL are jointly and severally liable for each other's wrongdoings regardless of whether the particular team participated in the wrongdoing is incorrect and not legally viable. Moreover, if the premise were correct (but it is not), the proposed class action would fail all the other certification criteria except the identifiable class criterion. An abused hockey player has only individual causes of action against his own team and his own leagues.

[28] If the proposed class action is treated as individual causes of actions by the putative Class Members for non-collective causes of action for breach of fiduciary duty, systemic negligence, vicarious liability, and breach of the Québec causes of action, the cause of action criterion would be satisfied for all but the breach of fiduciary duty claim.

[29] So much for deconstruction; the certification motion must be dismissed. However, there are realistic avenues to accountability and access to justice. Pursuant to sections 7, 12, and 25 of the *Class Proceedings Act, 1992*, an Individual Issues Protocol can be fashioned to provide access to justice against the perpetrators and their enablers, i.e., the individual hockey teams and the particular league that should have protected the player from the abuse.

[30] If the allegations of the "abuse" are proven and any defences disproven, there are defendants that should and can be held accountable for the reprehensible and outrageous breaches

of the duty of care and for vicarious liability for the torts of assault, sexual assault, battery, sexual battery, false imprisonment, and intentional infliction of emotional distress.

[31] Therefore, in the immediate case, certification must be refused. However, the court pursuant to sections 7, 12, and 25 of the *Class Proceedings Act, 1992* has the jurisdiction to permit Messrs. Carcillo, Taylor, and Quirk's action to continue as one or more proceedings between different parties.

[32] I, therefore, order Messrs. Carcillo, Taylor, and Quirk, if so advised, to prepare and submit for court approval an Individual Issues Protocol within 120 days. They will need to recruit, a plaintiff for each of the 60 teams of the WHL, OHL, and QMJHL for the Individual Issues Protocol,[3] and the Individual Issues Protocol will then provide a means for the putative Class Members to have access to justice.

C. Collectives and Culture

[33] Because of the nature of the Plaintiffs' essential argument, before beginning the determination of the Jurisdiction Motion, the Ragoonanan Motion, and the Certification Motion, it is necessary to have some understanding of the interrelationship between collectives (groups) and culture.

[34] Messrs. Carcillo, Taylor, and Quirk submit that the Defendants - as a collective - are liable for a - toxic culture - of hazing, bullying, harassment, and assaults that injured the putative Class Members. They describe in considerable detail and at considerable length a culture of violence, tyranny, submission. and silence. The evidence proves their description, and from this evidence the essential argument of Messrs. Carcillo, Taylor, and Quirk is that the WHL, OHL, QMJHL, CHL, and 60 hockey teams are a collective that injured the putative Class Members. In the immediate case, it is the essential argument of the Plaintiffs that each and every Defendant is liable for the plight of the good ol' hockey game and that a class action is necessary to restore the good name of the best game that you can name.[4]

[35] I have seven observations about collectives and culture that are important to understanding the arguments of the parties and to the resolution of the motions in the immediate case.

[36] The first observation is that culture is a very complex and profound idea studied by anthropology, archaeology, history, law, philosophy, political science, psychology, and sociology. Culture may be defined as the social organizing system that simultaneously establishes the group's identity and the identities of the members of the group. There are cultures associated with race, colour, ethnicity, nationality, origin, language, religion, ideology, gender, sexual orientation, marital status, family status, age, profession, occupation, employment, class, social-economic background, and wealth.

[37] The immediate proposed class action is about at least 65 cultures. It is at least about the respective cultures of the Defendants WHL, OHL, QMJHL, and CHL (four cultures) and the 60 cultures of the Defendant hockey teams. The 65th culture is the culture of Canadian amateur hockey, the "good ol' Hockey game." The Plaintiffs' action presupposes that all the Defendants

[3] As noted later in these Reasons for Decision, the deponents who testified for the certification motion would be ideal lead plaintiffs. The deponents have claims against 37 of the 60 teams.

[4] Stompin' Tom Connors, *The Good Ol' Hockey Game*: " Oh the good ol' hockey game, is the best game you can name and the best game you can name is the good ol' hockey game."

systemically share the same virulent culture of Canadian amateur hockey.

[38] The second observation is that culture is based on a collective shared consciousness. Culture is a system of shared aims, art, attire, beliefs, ceremonies, crafts, customs, dependencies, diet, dislikes, feasts, festivals, gestures, habits, hierarchies, hobbies, language, law, lifestyles, likes, manners, music, myths, norms, relationships, roles, rights of passage, rituals, stories, symbols, traditions, values, and writings. Culture shapes the society of the group (the collective) through these shared activities, interests, affinities, meanings, and teachings. It is through this shared consciousness of thoughts and deeds that the group's identity and the identities of the members of the group are established.

[39] As the Plaintiffs would have it, the immediate case is about the shared consciousness and behaviours of groups that have, to borrow the language of the QMJHL's mission statement, the purpose of developing players for professional hockey while supporting them throughout their academic endeavours to mold them into responsible and educated citizens. All the Defendants have this professed purpose. The essential argument of Messrs. Carcillo, Taylor, and Quirk is that the Defendants are a collective (a group of members) that has horribly failed in its mission and their shared systemic virulent culture has caused harm to the players.

[40] The third observation about collectives and culture that is important to understanding the parties' arguments and to the resolution of the motions in the immediate case is to note that in some instances, it is the existence of the common culture that brings together the members of the group, but in other instances, the members of the group come together, and the group then develops a culture.

[41] The immediate case is a complex situation in which the members of the group systemically develop their own culture as individual hockey teams, and then the teams came together and systemically developed a culture for their league (WHL, OHL, and QMJHL), and then the leagues systemically developed a culture for the CHL, and all of this occurs within the existing culture of the "good ol' Hockey game".

[42] The fourth observation about collectives and culture that is important to the parties' arguments and to resolution of the motions in the immediate case, is to note that cultures are inculcated and subject to vacillating change over time. The members of a culture are educated, nurtured, and assimilated into the values and practices of the culture. Cultures are passed on from generation to generation, but what is passed on may have changed or may change in the future. From a social science perspective, cultures are variable and dynamic.

[43] The immediate case is a complex situation in which a court of law (one of the social sciences that studies culture) is asked to examine the systemic cultures of the Defendants over a 50-year time span from a legal perspective.

[44] The fifth observation about collectives and cultures that is important to the parties' arguments and to resolution of the motions in the immediate case is that a culture defines the identity of the group and simultaneously defines the identity of the members of the group; however, there is a risk of stereotypical thinking by automatically or unconsciously attributing all the aspects of the culture to all of the members of the culture. Each individual member of a culture does not necessarily share all of the aspects of the culture and each individual member of a culture has individual autonomy of thought and deed. Judges are being trained in cultural competence which is a set of skills to mitigate stereotypical thinking, unconscious bias, impartiality, and racism.

[45] While the individual members of a culture may have personal autonomy and may not necessarily share all of the aspects of the culture, in the immediate case, it is the Plaintiffs' essential argument that the Defendants as a collective do share a systemic virulent culture and have done so for over a 50-year time span.

[46] The sixth observation about collectives and cultures that is important to the parties' arguments and to the resolution of the motions in the immediate case is to note that cultures are not inherently good or bad. Culturism is a part of the Canadian national mosaic. Indeed, multiculturism is the aspiration of s. 27 of the *Canadian Charter of Rights and Freedoms*,[5] which provides that the *Charter* should be interpreted in a way that is consistent with the preservation and enhancement of the multicultural heritage of Canadians.

[47] The immediate case is about an allegedly despicable reptilian culture of toxic masculinity. In the immediate case, cultural competence, however, entails not jumping to stereotypical decisions about the Plaintiffs or the Defendants. Stereotyping negates individuality and is a type of prejudgment.

[48] Most importantly, from the social science that is the law, there is no guilt purely by association; the autonomy of each of the Defendants must be respected and each of the Defendants must be judged for their individual acts and deeds.

[49] Although there could be guilt (negligence or breach of fiduciary duty) for not disassociating from a virulent culture, there is no guilt by simply associating with members of a virulent culture. As Justice Cory noted in *R. v. R.D.S.*:[6] "[J]udges must strive to ensure that no word or action during the course of the trial or in delivering judgment might leave the reasonable, informed person with the impression that an issue was predetermined or that a question was decided on the basis of stereotypical assumptions or generalizations."

[50] The seventh observation, which is the legal corollary to the sixth observation about collectives and culture that is important to the resolution of the parties' arguments in the immediate case is that although from a sociological perspective, the members of a collective can have a shared culture, however, from a legal perspective, it does not follow that the individual members of that group are liable for the wrongdoings of the other members of the cultural group. Under Canadian criminal and civil law, with a few exceptions, criminality or civil liability is based on personal fault; i.e., upon personally perpetrating or participating in the misdeeds.

D. Procedural and Evidentiary Background

[51] On **June 18, 2020**, Carcillo and Taylor delivered their Statement of Claim, which was subsequently amended several times to, among other things, add Mr. Quirk as a plaintiff.

[52] On **March 25, 2020**, Messrs. Carcillo and Taylor delivered a Fresh as Amended Statement of Claim.

[53] On **December 4, 2020**, Messrs. Carcillo and Taylor moved for certification. The Certification Motion was supported by the following evidence:

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[5] Part I of the *Constitution Act*, 1982, being Schedule B to the *Canada* Act 1982 (UK), 1982, c 11.
[6] [1997] 3 S.C.R. 484 at para. 120.

- Affidavit dated August 4, 2020 of **Jeff Andrews**. Mr. Andrews was a player for: North Bay Centennials (now Saginaw Spirit) (OHL) (1992-1994); Oshawa Generals (OHL) (1994-1995).
- Affidavit dated August 11, 2020 of **Cory Bricknell**. Mr. Bricknell was a player for: Newmarket Royals (now Sarnia Sting) (OHL) (1992-1993); Niagara Falls Thunder (now Erie Otters) (OHL) 1993-1995. He was cross-examined.
- Affidavits dated August 27, 2020 and November 26, 2021 of **Daniel Carcillo**. Mr. Carcillo was a player for: Sarnia Sting (OHL) (2002-2004); Mississauga IceDogs (OHL) (now Niagara IceDogs) (2004-2005). He is a proposed Representative Plaintiff. He was cross-examined.
- Affidavit dated August 4, 2020 of **Gene Chiarello**. Mr. Chiarello was a player for: London Knights (OHL) (1996-2000). He was cross-examined.
- Affidavit dated July 29, 2020 of **Jason Clarke**. Mr. Clarke was a player for: Niagara Falls Thunder (now Erie Otters) (OHL) (1990-1993). He was cross-examined.
- Affidavit dated July 17, 2020 of **Chris Festarini**. Mr. Festarini was a player for: Erie Otters (OHL) and the Niagara IceDogs (OHL) (2009-2014).
- Affidavit dated October 9, 2020 of **Dan Fritsche**. Mr. Fritsche was a player for: Sarnia Sting (OHL) (2001-2004); London Knights (OHL) (2004-2005). He was cross-examined.
- Affidavits dated August 11, 2020 and November 26, 2021 of **Brad Hammet**. Mr. Hammet was a player for: Billings Bighorns (WHL), Nanaimo Islanders (WHL), New Westminster Bruins (now Tri-City Americans) (WHL) (1981-1984).
- Affidavit dated July 9, 2020 of **Mark Howery**. Mr. Howery was a player for: Calgary Wranglers training camps (WHL) (1981-1982); Medicine Hat Tigers training camp (WHL) (1983); Winnipeg Warriors (now Moose Jaw Warriors) (WHL) (1983-1984).
- Affidavit dated July 30, 2020 of **Dirk Jellio**. Mr. Jellio was a player for: Sarnia Sting (OHL) (2002-2003); Saginaw Spirit (OHL) (2003). He was cross-examined.
- Affidavits dated December 2, 2020 and November 29, 2021 of **Dr. Jay Johnson**. Dr. Johnson is a Professor in the Faculty of Kinesiology and Recreation Management at the University of Manitoba. He has undertaken extensive research pertaining to "hazing" focusing on the high school and post-secondary contexts of fraternities, sororities, and an array of sports (basketball, soccer, volleyball, badminton, football, swimming, track and field, wrestling, hockey, and rugby). He was cross-examined.
- Transcript of the examination pursuant to Rule 39.03 of **Sheldon Kennedy**. Mr. Kennedy played junior hockey for the Moose Jaw Warriors and the Swift Current Broncos of the WHL. He played professional hockey with Adirondack Red Wings and the St. John Flames of the AHL (American Hockey League) and with the Detroit Red Wings, the Calgary Flames, and Boston Bruins of the NHL. He is another victim of the "abuse" described by the Plaintiffs' and their witnesses. He is the co-founder of the Respect Group Inc. which provides training to help people involved in amateur sport to prevent bullying, harassment, and abuse.

- Affidavit dated August 4, 2020 of **Fred Ledlin**. Mr. Ledlin was a player for: Victoria Cougars (now Prince George Cougars) training camp (WHL) (1980); Kamloops Junior Oilers (now Kamloops Blazers) (WHL) (1981); Seattle Breakers (now Seattle Thunderbirds) (WHL) (1981-1983); Portland Winterhawks (WHL) (1983); Medicine Hat Tigers (WHL) (1983-1984); Winnipeg Warriors (now Moose Jaw Warriors) (WHL) (1984).
- Affidavits dated November 29, 2021, January 27, 2022, and May 20, 2022 of **Catherine MacDonald**. Ms. MacDonald is a legal assistant with the law firm Koskie Minsky LLP, counsel for the Plaintiffs and the proposed Class Counsel.
- Affidavit dated July 10, 2020 of **Ryan Munce**. Mr. Munce was a player for: Sarnia Sting (OHL) (2002-2005).
- Affidavit dated August 4, 2020 of **David Pszenyczny**. Mr. Pszenyczny was a player for: Sarnia Sting (OHL) (2001-2004); Mississauga IceDogs (now Niagara IceDogs) (OHL) (2004-2005); Barrie Colts (OHL) (2005-2006).
- Affidavit dated July 10, 2020 of **Doug Smith**. Mr. Smith was a player for: Ottawa 67's (OHL) (1979-1982).
- Affidavit dated July 28, 2020 of **John Strait**. Mr. Strait was a player for: Lethbridge Broncos (now Swift Current Broncos) (WHL) (1978-1979); Seattle Breakers (now Seattle Thunderbirds) (WHL) (1979-1980); Brandon Wheat Kings (WHL) (1979-1980); Billings Bighorns (now Tri-City Americans) (WHL) (1979-1980); Spokane Flyers (nonoperational) (WHL) (1980-1981); New Westminster Bruins (now Tri-City Americans) (WHL) (1980-1981); and Sudbury Wolves (OHL) (1980-1981).
- Affidavit dated November 23, 2020 of **Garrett Taylor**. Mr. Taylor was a player for: Lethbridge Hurricanes (WHL) (2008-2009); Prince Albert Raiders (WHL) (2009-2010). He is a proposed Representative Plaintiff. He was cross-examined.
- Transcript of the examination pursuant to Rule 39.03 of **Camille Theriault** pursuant to Rule 39.03. Mr. Theriault was the Premier of New Brunswick in 1998 and 1999. Subsequently, he was chair of the Canadian Transportation Accident Investigation and Safety Board, and CEO of the Mouvement des caisses populaires acadiennes.
- Affidavit dated March 17, 2021 of **Stephen Quirk**. Mr. Quirk was a player for: Moncton Alpines (now Moncton Wildcats) (QMJHL) (1995-1997); Halifax Mooseheads (QMJHL) (1997-1998). He is a proposed Representative Plaintiff. He was cross-examined.

[54] The Defendants opposed the Certification Motion, and they supported their resistance to certification and their motions to have the action dismissed for want of jurisdiction *simpliciter* (the Jurisdiction Motion) or for want of representative plaintiffs (the Ragoonanan Motion) with the following evidence:

- Affidavit dated October 29, 2021 of **Scott Abbott**. Mr. Abbott was the owner and Governor of North Bay Battalion (OHL) (1996 to date). He was cross-examined.
- Affidavits dated November 12, 2015 and October 28, 2021 of **Brett Bartman**. Mr. Bartman was a player for: Spokane Chiefs (WHL) (2007-2010) He was cross-examined.

- Affidavit dated November 1, 2021 of **David Branch**. Mr. Branch was the President of the CHL from 1996-2019. He has been the Commissioner of the OHL from 1979 to date. He was cross-examined.
- Affidavit dated October 29, 2021 of **Gord Broda**. Mr. Broda was President and Governor, Prince Albert Raiders (WHL) from 2014 to date. He was cross-examined.
- Affidavit dated November 1, 2021 of **Eric Calder**. Mr. Calder was a player for: Cornwall Royals (QMJHL, OHL) (1980-83). He was cross-examined.
- Affidavit dated October 29, 2021 of **Jeff Chynoweth**. Mr. Chynoweth was the General Manager, Calgary Hitmen (WHL) from 2017 to date. He has been an employee of the WHL since 1986. He was cross-examined.
- Affidavit dated November 1, 2021 of **Eric Chouinard**. Mr. Chouinard was a player for: Québec Ramparts, (QMJHL) (1986-2000). He has been Director of Player Safety, for the QMJHL form 2019 to present. He was cross-examined.
- Affidavit dated November 1, 2021 of **Gilles Courteau**. Mr. Courteau was President (1986 to date) and Commissioner (2000 to date) of the QMJHL. He was cross-examined.
- Affidavit dated October 31, 2021 of **Ryan Daniels**. Mr. Daniels was a player for Saginaw Spirit (OHL) and Peterborough Petes (OHL), (2005- 2009). He was cross-examined.
- Affidavit dated June 6, 2022 **Dr. Paul Dennis**. Dr. Dennis is a retired sports psychology professor at the University of Toronto and York University. Among other roles, he served as an assistant coach and head coach in the OHL for four seasons from 1984 to 1989, and as a player development and mental skills coach for the Toronto Maple Leafs from 1989 to 2009. He currently serves as the head of the OHL's Performance Development Program. He was cross-examined.
- Affidavit dated November 1, 2021 of **Ben Fanelli**. He was a player for: Kitchener Rangers (OHL) (2009-2014), where he was an assistant captain and a captain. While with the Rangers and also at Wilfrid Laurier University completing his B.A., he also coached for the University of Waterloo men's hockey team. He is the founder of the EMPWR Foundation, a charity created to advance the recovery of head injuries in sport. He is currently the Development Coordinator for the Kitchener Minor Hockey Association and a mentor for the Kitchener Rangers. He was cross-examined.
- Affidavit dated May 25, 2022 of **Brett Hartman**. Mr. Hartman played in the WHL with the Spokane Chiefs (2007-2010). He attended the University of Calgary where he played on the men's hockey team for four years and graduated with a BA in kinesiology. After graduation, he played professional hockey in France for one year. He returned to work as a strength and conditioning coach at the Edge School, Southern Alberta Institute of Technology, and Peak Power Sport Development. Since 2017, he has worked as a fire fighter in Alberta. He was cross-examined.
- Affidavit dated October 29, 2021 of **Cam Hope**. Mr. Hope was General Manager (2012-2020) and President (2014-2020) Victoria Royals (WHL). He was cross-examined.

- Affidavit dated November 1, 2021 of **Dave Lorenz**. Mr. Lorenz was a player for: Peterborough Petes (OHL) (1987-1990) and Vice President (2013 to date) of Peterborough Petes, He was cross-examined.
- Affidavits dated December 30, 2020, October 29, 2021, and March 4, 2022 of **Dan MacKenzie**. Mr. MacKenzie was President of CHL from 2019 to date. He was cross-examined.
- Affidavit dated November 10, 2022 of **Tara Pirog**. Ms. Pirog is a legal assistant at Bennett Jones LLP, lawyers for the Defendants.
- Affidavit dated October 28, 2021 of **Kruise Reddick**. Mr. Reddick was a player for: Tri-City Americans (WHL). He was cross-examined.
- Affidavit dated October 29, 2021 of **Ron Robinson**. Mr. Robinson was Commissioner of WHL (2000 to date). He was cross-examined.
- Affidavit dated October 29, 2021 of **Robert Smith.** Mr. Smith was a player for: Ottawa 67s, (OHL) (1975-1978); Owner (2003 to Present). Head Coach (2010-2011) of Halifax Mooseheads (QMJHL). He was cross-examined.
- Affidavit of dated October 28, 2021 of **Chad Taylor**. Mr. Taylor was Governor (2009 to date) and President (2013 to date) of Halifax Mooseheads (QMJHL). He was cross-examined.
- Affidavit dated October 28, 2021 of **Bob Tory**. Mr. Tory was General Manager and Co-Owner, Tri-City Americans (WHL) (2000 to Present).

[55] On **January 4, 2021**, at a case management conference, I directed the Ragoonanan Motion and the Jurisdiction Motion to be heard at the same time as the Certification Motion.

[56] On **April 14, 2022**, Messrs. Carcillo, Taylor, and Quirk delivered a Fresh as Amended Statement of Claim. In that pleading they claim the following relief:

> The plaintiffs claim for:
>
> (a) an order certifying this action as a class proceeding and appointing the Plaintiffs as the representative plaintiffs;
>
> (b) a declaration that the Defendants are liable for damages flowing from their breach of common law duties to the Plaintiffs and Class in relation to the operation, management, administration, supervision and/or control of the Leagues and Teams;
>
> (c) a declaration that the Defendants are liable for damages flowing from their breach of fiduciary duty to the Plaintiffs and Class in relation to the operation, management, administration, supervision and/or control of the Leagues and Teams;
>
> (d) damages for negligence, breach of fiduciary duty, assault, intentional infliction of emotional distress, false imprisonment, and battery in an amount that this Honourable Court deems appropriate;
>
> (e) a declaration that the Leagues or, in addition or in the alternative, the Teams, are vicariously liable for the Abuse perpetrated by the Leagues' and the Teams' staff, employees, agents and players;
>
> (f) a declaration that the Defendants committed actionable faults in failing to prevent the Abuse pursuant to the *Québec Civil Code* and that the Defendants are liable for such faults;

(g) a declaration that the Defendants have breached sections 1, 10.1, and 39 of the *Québec Charter of Human Rights and Freedoms*;

(h) damages for loss of guidance, care and companionship pursuant to the *Family Law Act*, R.S.O. 1990, c. F.3;

(i) aggravated and punitive damages in an amount that this Honourable Court deems appropriate;

(j) prejudgment and postjudgment interest pursuant to the *Courts of Justice Act*, R.S.O. 1990, c. C.43;

(k) costs of the action on a substantial indemnity basis or in an amount that provides full indemnity to the Plaintiffs;

(l) the costs of notice and of administering the plan of distribution of the recovery in this action, plus applicable taxes, pursuant to s. 26 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6; and,

(m) such further and other relief as this Honourable Court may deem just.

[57] The Plaintiffs propose the following common issues:

1. What is the nature of the organizations operating as and within Canadian Major Junior Hockey?
2. Did the Defendants, or any of them, owe a duty of care to the Class in the management, operation and oversight of Canadian Major Junior Hockey?
3. If the answer to 2 is yes, what is the applicable standard of care?
4. If the answer to 2 is yes, did the Defendants, or any of them, breach the standard of care?
5. Did the Defendants, or any of them, owe a fiduciary duty to the Class in the management, operation and oversight of Canadian Major Junior Hockey?
6. If the answer to 5 is yes, did the Defendants, or any of them, breach that fiduciary duty to the Class?
7. Which of the Defendants, if any of them, would be vicariously liable for any underlying non-systemic torts committed by staff, coaches and players at Canadian Major Junior Hockey activities?
8. Did the Defendants, or any of them, commit actionable faults in failing to prevent the Abuse pursuant to the *Québec Civil Code?* If so, are the Defendants liable for such faults?
9. Did the Defendants, or any of them, breach sections 1, 10, 10.1 or 39 of the *Québec Charter of Human Rights and Freedoms?*
10. If the answer to any of the common issues 1) through 9) is "yes", can the Court make an aggregate assessment of some or all of the damages suffered by some or all Class Members?
11. If the answer to any of the common issues 1 through 10 is "yes", were the Defendants guilty of conduct that justifies an award of punitive and/or exemplary damages including damages pursuant to s. 49 of the *Québec Charter of Human Rights and Freedoms*?
12. If the answer to common issue 11 is "yes", what amount of punitive and/or exemplary damages ought to be awarded?

E. Facts: The Plaintiffs and the Class Members

1. The Plaintiffs and the Class Member Affiants

[58] Messrs. Carcillo, Taylor, and Quirk are former players with claims against five of the 60 teams comprising major junior hockey today. Collectively, Messrs. Carcillo, Taylor, and Quirk have claims against: the Lethbridge Hurricanes of the WHL, the Prince Albert Raiders of the WHL, the Sarnia Sting of the OHL, the Moncton Wildcats of the QMJHL, and the Halifax Mooseheads of the QMJHL.

[59] Like the players for whom they seek to be a representative plaintiff, Messrs. Carcillo, Taylor, and Quirk were once among a small group of elite young athletes that are annually selected to join the ranks of the WHL, the OHL, or the QMJHL. The new recruits typically leave their families and hometowns to join a team with the dream of improving their skills through professional coaching and highly competitive games. They have the dream of eventually playing in the NHL.

[60] The Plaintiff Daniel Carcillo was born in King City, Ontario, and is currently a resident of Florida. He played for the OHL team the Sarnia Sting, starting in the summer of 2002 when he was seventeen. He and other rookies suffered almost constant abuse for the entire 2002 and 2003 seasons. The abuse was perpetrated by older Sarnia Sting players and OHL and team staff, agents, employees, and servants. He was traded to the Mississauga IceDogs for the 2004-2005 season, where he witnessed the abuse of members of that team.

[61] The Plaintiff Garrett Taylor was born in California where he now resides. He played for the WHL team the Lethbridge Hurricanes starting in the summer of 2008 when he was seventeen. He and other rookies on the Lethbridge Hurricanes suffered abuse throughout the 2008-2009 season. The abuse was perpetrated by older Lethbridge Hurricanes players and by WHL and team staff, agents, employees, and servants. He was traded to the Prince Albert Raiders for the 2009-2010 season, where the abuse was repeated.

[62] The Plaintiff Stephen Quirk was born in Cape Breton, Nova Scotia and is a resident of Sydney, Nova Scotia. He played for the QMJHL teams the Moncton Alpines/Wildcats and the Halifax Mooseheads between 1995 and 1998. He and other rookies suffered abuse in 1995-1996, when he was seventeen. The abuse was perpetrated by older players and by QMJHL and team staff, agents, employees, and servants. The abuse took place throughout his time in Canadian major junior hockey.

[63] For present purposes, it is not necessary to describe in detail the horrific and despicable and unquestionably criminal acts that were suffered by Messrs. Carcillo, Taylor, and Quirk and perpetrated by older hockey players and by coaches and by others associated with the CHL, WHL, OHL, or QMJHL. For present purposes, it is only necessary to thank Messrs. Carcillo, Taylor, and Quirk for their honesty, bravery, and public service in disclosing the indignities they suffered.

[64] For present purposes, it is also necessary to thank Messrs. Andrews, Bricknell, Chiarello, Clarke, Festarini, Fritsche, Hammet, Howery, Jellio, Ledlin, Munce, Pszenyczny, Doug Smith, and Strait, for their honesty, bravery, and public service in disclosing the indignities they suffered. It is deplorable that any of the deponents have been ostracized by the hockey community for coming forward to testify in this action.

[65] For present purposes, it is, however, necessary without naming names to describe the horrific and despicable and unquestionably criminal acts that players suffered and that were perpetrated by the older hockey players and by coaches and others associated with the WHL, OHL, or QMJHL and that were witnessed, encouraged, overlooked, tolerated, covered up, or cowardly and irresponsibly ignored by other hockey players and by coaches, managers, executives, and others associated with the CHL, WHL, OHL, or QMJML. I shall do this by using six accounts from the affidavits and cross-examinations of six former players without identifying the players.

[66] Hockey Player AA deposed:

> I recall the veteran players taunting me, telling me I was going to get initiated. I remember the general manager telling me not to be a “pussy” when the hazing got bad. […] I was jumped by the vets in the locker room. They threw me on a table on my back. They taped me to a hockey sticks across my legs and arms. They blindfolded me. I was helpless. I could feel them urinating on me, throwing things on me. They put a rope around my penis. They threw the rope over a bar above me, and they tied a puck bag on the other side. They threw pucks in the bag as it got heavier and heavier. It was very painful. They taped razors to hockey sticks and shaved me head to toe. Then they covered me with Vaseline and baby powder. They put atomic balm over my genitals. They put a hockey stick and put it inside of my anus. I remember my scrotum was purple. It was excruciating. […] The coach and the trainer saw this happening. […] they cut me badly on my genitals. I bled for days. […] I saw this same thing happen to about four other guys that year. It was treated like a tradition. […] I still have a tough time when I think about the abuse I suffered in the major junior hockey leagues.

[67] Hockey Player BB deposed:

> The older players made me do push ups, naked. They made me dip my penis and genitals into rub A535 while I did the push ups. They made me do it for long enough that my genitals were covered, and they were burning. [...] On another occasion, I was strapped naked to a table and whipped with my own belt while everyone watched. […] the coach came in and started whipping me too. […] I remember being in the shower, and being made to sit naked, buttocks to genitals, with the other rookies. They made us sing "row, row, row your boat". The players were urinating and throwing things on us. The coach walked in, saw it, laughed, and walked out. I also remember the "hot box" on the bus. It was hell. I also recall the bobbing for apples in the other players' urine. We all had to do it. I suffered and witnessed abuse on each of the teams I played for.

[68] Hockey Player “CC” deposed:

> I recall being put in the "sweat box" on the team bus. It was a very claustrophobic experience. I recall an older player going up to the front of the bus to get the driver to crank up the heat. Then they stripped eight of us into our boxers and sent us into the bus bathroom. They sprayed us all with Pepsi so it as all sticky in there as well. I had a full blown panic attack in there. We were left there for hours. Some of the other guys appeared to be losing it as well. It was one of the worst experiences of my life. Team staff saw the sweat box taking place. I still get claustrophobic in enclosed spaces. I can't fly long distances. I often have to get off of elevators if they are too crowded. I believe this is a direct result of the sweat box. The rookie party was a rough experience. The team veterans didn’t seem to like me. They forced us to drink maybe seven or eight beers and shots of Crown Royal. I was completely wasted drunk. I felt as if I didn’t have a choice but to drink. Also at the rookie party, the older players made me eat a pint glass filled with the hottest hot peppers I've ever had. My eyes were watering, I begged them to let me stop. But they did not. The pain was excruciating. The entire time they called us names and berated us. It was completely humiliating. Team staff knew about the rookie party […] These experiences were very hard on me. I still think about them now that I'm an adult. I believe that they had a lasting impact on me.

[69] Hockey Player “DD” deposed:

> Toward the end of the day, we went into the locker room to take a shower. All of the veteran players started saying "rookie dicks, let's see those rookie dicks". They lined us up, told us to strip naked and made fun of our genitals. I remember being particularly embarrassed by this, because I was only fifteen. They then said "rookie bitches shower last" and required us to stand around naked. We were probably standing around naked for twenty minutes, while the older players made fun of our manhood. […] I remember on the bus being cajoled and pressured into taking chewing tobacco. In order to fit in, I agreed. I chewed it until I threw up. I also recall the "rookie dance off". Each rookie was required to do a strip tease in front of the older players until they were naked. The player who "lost" would be verbally abused. I recall everyday verbal abuse. The rookies were pussies, bitches, or faggots. It was constant. The younger players were considered a second-class citizen in the locker room.

[70] Hockey Player “EE” deposed:

> Four specific incidents of abuse I suffered stand out in my mind and haunt me to this day. […] [T]wo players made a number of rookies strip naked in the training camp dorm. They made a mark on the floor with hockey tape. The rookies were forced to play tug of war with a string tied to their penises. […] The third event took place a few days after I broke up the game of penis tug of war. I believe it was retribution. The same two veterans put a hockey sock over my head from behind. They taped it around my neck. They punched me repeatedly in the ribs and thighs until I fell to the ground. They then held my arms out to the sides while others stood on my arms. They taped me to a hockey stick crucifixion-style. They dragged me across the room by the hockey stick and put me under scalding hot water in the shower room. They tied a skate lace to my penis. They dragged a coat rack into the shower and threw the skate lace over it, and tied the other side to my ankle, which was suspended in the air. I had to keep my leg up, or else it would pull on my penis. My leg became tired, and as it lowered, it pulled on my penis until it broke the skin and caused me to bleed. They left me in the shower. I remained there for over an hour until the tape was soft enough to break free.

[71] Hockey Player “FF” deposed:

> I have lived with the abuse I suffered. […] Coming out with my story has been extremely difficult but am telling it because I do not want any other child to go through what I did. The following abuses were inflicted on me while in […] by other players, each numerous times: (a) a hockey stick was forcibly inserted into my anus. It was covered in "heat", or hot muscle ointment; (b) heat ointment was placed on my penis; (c) heat ointment was placed in my urethra using a pin; (d) boys were required to perform for the older players on a stage. The older players would defecate on the stage and make the rookies throw their feces at each other; (e) a […] boy from the United States had his hair spray-painted red, white and blue, was stripped naked and tied to a telephone pole […]; (f) boys were required to read from Penthouse magazine. Depending on the "game", if you got an erection, or didn’t get an erection, you would be severely hazed in one of the manners described above; (g) Rookies were held down or tied up and pubic hair, head hair and eyebrows were shaved off. […] The following year, I moved to […] I was sexually assaulted approximately forty times in the nine months I played in […] I was stripped naked and hung off of a big rack at the back of the bus where the jerseys were hung to dry. I was hung upside down, with my ankles taped to the top of the rack. The players shaved me head to toe, including my genitals. They shoved hockey sticks and other objects in my anus. They would cover the sticks with liquid heat before inserting them, which was excruciating. They also placed liquid heat on my shaved genitals, which was also extremely painful. I was left there for hours. I remember being in so much pain that I was trying to press my genitals and anus against the back window to get some relief from the condensation on the window. One time in […], I had to bathe in the older players' urine. […] Shaving genitals and applying liquid heat inside of your orifices happened all the time. It happened to all of the rookies. I saw it over and over on all of the teams I played on in the […] Another common occurrence was when the older players would tape you to hockey sticks with your arms and legs sticking out so you couldn’t move. They would tie a skate lace to your penis and throw it over a venting pipe. They would tie the other end to a bucket. Then the older players would throw pucks into the bucket one

> by one to see how many pucks you could take. This was excruciatingly painful for me. I saw one kid take 28 pucks. I remember another taking 49 pucks while the whole team watched. […] The coaches all knew this stuff was going on. A lot of it happened on the bus. […] I was traded from […] to […] The same conduct went on with respect to sticks being forcibly placed up rookies' anuses, pins with liquid heat being placed in urethras, shaving, and forced feces fights. This happened in the showers, on the bus, or elsewhere. The coaches and team staff saw and knew. […] I was traded to […] In […] the same type of hazing went on, My time in major junior hockey has left me mentally scarred. I've lived with it my whole life […], but I cannot keep it secret anymore. I live with anxiety every day. I used to have nightmares, which I rarely have any more, but my anxiety is always there.

[72] This horrific evidence and the other evidence that I read establishes that some unknown number of putative Class Members who were players in the WHL, OHL, or QMJHL were tortured, forcibly confined, shaved, stripped, drugged, intoxicated, physically and sexually assaulted; raped, gang raped, forced to physically and sexually assault other teammates; compelled to sexually assault and gang rape young women invited to team parties, forced to eat or drink urine, saliva, semen, feces, or other noxious substances; forced to perform acts of self-injury, forced to perform acts of bestiality.

[73] The evidence establishes that some unknown number of putative Class Members who were players in the WHL, OHL, or QMJHL were hazed, bullied, assaulted, threatened, stigmatized, mocked, demeaned, derided, ridiculed, slandered, and humiliated by their teammates team staff, agents, employees, and servants of the WHL, OHL, or QMJHL.

2. Class Size

[74] Class size is estimated to be approximately 15,000 persons.

[75] Unlike for example the situation in some systemic negligence, institutional abuse class actions, the number of victims of the defendant's misconduct is not equal to the total number of class members.

[76] There is no basis in fact for concluding that over almost 50 years of the Class Period that all 15,000 putative Class Members persons suffered the "abuse".

[77] In the Indian Residential Schools class actions, all the class members were harmed by their forced internment in the schools over the decades that the schools were operated under the auspices of the federal government. In the immediate, it cannot be said that all putative Class Members were harmed throughout the almost 50-year class period. Many were. How many is not presently known.

F. Facts: The Defendants

[78] Messrs. Carcillo, Taylor, and Quirk's proposed class action is not against human actors. Messrs. Carcillo, Taylor, and Quirk's proposed class action is against incorporeal entities. As noted above, their action is premised on a collective liability of the incorporeal 60 teams and the incorporeal four leagues for systemic breach of fiduciary duty, systemic negligence, collective vicarious liability, and breaches of the Québec causes of action. The legal nature of these incorporeal entities is at the centre of the Plaintiffs' theory of their case against the Defendants.

[79] The factual character, the factual behaviour, and the legal character of the teams and the

leagues requires close examination because as the discussion later will reveal, their factual and legal character are critical to the determinations of: (a) whether this Court has jurisdiction *simpliciter;* (b) whether there are enough Representative Plaintiffs; and (c) whether all five of the certification criteria are satisfied.

[80] In this section of the Reasons for Decision, I describe the factual and legal character of the WHL, OHL, QMJHL, and CHL, and their 60 teams for the purposes of the Certification Motion and for the purposes of the Ragoonanan Motion and the Jurisdiction Motion. I shall begin with some general factual background and demographics of the leagues and their teams. Then, I shall discuss the factual circumstances of the WHL, OHL, QMJHL, and the CHL with particular attention to the matters of their governance, their relationship with their players, and their attention to preventing what the Plaintiffs describe as "the abuse" prevalent in their leagues.

[81] In the following description of the factual and legal character of the Defendants, I shall set out excerpts from some of the CHL, WHL, OHL, and QMJHL's governance documents, regulations, and policy documents. It is necessary to include these excerpts because they are critically pertinent to the many hotly contested issues about this court's jurisdiction, duty of care, fiduciary relationships, fiduciary duties, vicarious liability, and collective liability.

1. The Leagues and their Teams

[82] Messrs. Carcillo, Taylor, and Quirk sue the CHL, WHL, OHL, and QMJHL and 60 major junior hockey teams, situated in every Canadian province except Newfoundland and Labrador, and four U.S. States.

[83] The 60 teams are associated with the CHL, WHL, OHL, and QMJHL. There are 78 defendants, the demographics of the defendants are as follows:

a. One defendant is the Canadian Hockey League ("CHL").

b. One defendant is the Western Hockey League ("WHL"). It has twenty-two teams, of which five are American teams. The Canadian teams are: Brandon Wheat Kings, Calgary Hitmen, Edmonton Oil Kings, Kamloops Blazers, Kelowna Rockets, Lethbridge Hurricanes, Medicine Hat Tigers, Moose Jaw Warriors, Prince Albert Raiders, Prince George Cougars, Red Deer Rebels, Regina Pats, Saskatoon Blades, Swift Current Broncos, Vancouver Giants, Victoria Royals, and Winnipeg ICE. The American teams are: Everett Silvertips, Portland Winterhawks, Seattle Thunderbirds, Spokane Chiefs, and Tri-City Americans.

c. One defendant is the Ontario Hockey League ("OHL"). It has twenty teams, of which three are American teams. The Ontario teams are: Barrie Colts, Guelph Storm, Hamilton Bulldogs, Kingston Frontenacs, Kitchener Rangers, London Knights, Mississauga Steelheads, Niagara IceDogs, North Bay Battalion, Oshawa Generals, Ottawa 67's, and Owen Sound Attack, Peterborough Petes, Saginaw Spirit, Sarnia Sting, Soo Greyhounds, Sudbury Wolves and the Windsor Spitfires. The American Teams are: Erie Otters, Flint Firebirds, and Saginaw Spirit.

d. One defendant is the Québec Major Junior Hockey League ("QMJHL") (also known as the Ligue de Hockey Junior Majeur du Québec or "LHJMQ"). It has eighteen teams. The teams are: Acadie-Bathurst Titan, Baie-Comeau Drakkar, Blainville-Boisbriand Armada, Cape Breton Eagles, Charlottetown Islanders, Chicoutimi

Saguenéens, Drummondville Voltigeurs, Gatineau Olympiques, Halifax Mooseheads, Moncton Wildcats, Québec Remparts, Rimouski Océanic, Rouyn-Noranda Huskies, Saint John Sea Dogs, Shawinigan Cataractes, Sherbrooke Phoenix, Val-d'Or Foreurs, and Victoriaville Tigres.

e. Seventy-four defendants are the 60 current teams of the WHL, OHL, and QMJHL. (Some of the 60 teams have co-owners.)

f. Of the 60 teams, eight are situated in four USA states.

g. Collectively, Messrs. Carcillo, Taylor, and Quirk played for five teams from the WHL, OHL, and QMJHL.

[84] The WHL, the OHL, and the QMJHL operate autonomously one from another pursuant to their own constitutions, regulations, rules, policies, and procedures.

[85] The 60 teams of the three leagues are independent and legally autonomous one from another. Each defendant league or team is a separate entity. Some teams are incorporated as business corporations. Some teams are limited partnerships. Some teams are incorporated as not-for-profit corporations. Some teams are owned by individuals, *i.e.,* sole proprietorships. Some teams are owned by corporations. Some teams are owned by the municipality in which they are situated.

[86] Junior hockey is amateur hockey played by athletes under twenty years of age. Major junior hockey players, who are between sixteen and twenty years old, compete at the highest level of junior hockey. The WHL, the OHL, and the QMJHL are the highest level junior hockey leagues. Each league has separate exhibition, regular season (approximately 70 games), and playoff schedules to determine league champions. The league champions compete for the Memorial Cup, a round-robin tournament to determine the national major junior champion.

[87] Why a “Memorial Cup”? In 1919, the Memorial Cup was donated by the OHL at the initiative of its immediate past president Captain J.T. Sutherland, a WWI veteran. Captain Sutherland suggested that there be a trophy to memorialize the young Canadian hockey players who died in battle during WWI. The Memorial Cup came to be awarded to the best junior hockey team in Canada. The Memorial Cup was rededicated in 2010 to honour all soldiers who died fighting for Canada in any conflict.

[88] Between 1919 and 1971, teams from Eastern Canada and Western Canada competed for the Memorial Cup. Beginning 1972, the competition was between teams from the WHL, the OHL, and the QMJHL. During the history of Memorial Cup to date, OHL teams have been champion 44 times. Teams from Western Canada (including two teams from what is now Thunder Bay Ontario, near the Manitoba border) have been champion 39 times. Teams from Québec (which at one time for QMJHL purposes included Cornwall, Ontario) have been champion 18 times.

[89] Each team is separately owned. Teams change localities from time to time. Team names are changed from time to time. Team ownership changes from time to time. Whether the new owner assumes the liability of the predecessor would depend upon the nature of the transfer of ownership. The constituting documents of the WHL, OHL, and QMJML do not address the matter of assumption of liabilities. Under the constating documents of the WHL, OHL, and QMJHL each team can voluntarily terminate its relationship with the league.

[90] Each team of the WHL, OHL, and QMJML is responsible for its own operations. including

maintaining facilities, hiring coaching and administrative staff, recruiting, billeting the players, monitoring players academic progress, developing athletes, trading players, paying team expenses, setting practice and training schedules, organizing team activities, creating and enforcing rules and guidelines, and implementing league-level policies, programs, and procedures.

[91] Each league has its own Standard Player Agreement between a team and a player, but the league and the CHL are not parties to the agreement. Each league has facility standards, education standards, scholarship programs, and arrangements with post-secondary institutions. Each league has rules about trading players. Each league has its own policies and procedures with respect to the on-ice and off-ice supervision and protection of players.

[92] One league has no governance control over another league. The leagues liaise with each other through the Executive Council of the CHL through which they collaborate on issues that affect all of the leagues, such as the draft for international players.

2. The WHL

[93] The WHL was founded in 1966 with seven teams. Before its creation, the four western provinces had their own major junior hockey league. At the present time, the WHL has 22 teams, five in British Columbia, five in Alberta, five in Saskatchewan, two in Manitoba, four in Washington State, and one in the State of Oregon. Four of the WHL's Teams are community owned: the Swift Current Broncos, Prince Albert Raiders, Moose Jaw Warriors, and Lethbridge Hurricanes. These teams are not-for-profits operated by volunteer boards of directors.

[94] The WHL is a not-for-profit corporation incorporated under the *Canada Not-for-Profit Corporations Act*[7] and headquartered in Calgary, Alberta. It operates under its by-laws and constitution dated February 4, 2013 and its undated regulations.

[95] The WHL is headed by a Commissioner who reports to a Board of Governors comprised of two Governors appointed by each WHL Team.

[96] The WHL's By-Laws and Constitution require each team to operate within a defined hundred kilometer radius from the corporate limits of the team's designated municipality. Each ownership or senior management group must establish a residence and maintain a regular presence in the defined territory. During the annual WHL draft, WHL teams can only select players from the western provinces and certain U.S. states; players from Ontario may not be selected.

[97] Each team of the WHL develops its own policies, programs, and rules and each is responsible for managing and coaching its own players, including applying their respective disciplinary processes in the event of player misconduct. In addition, the Teams are responsible for implementation of league policies. The WHL Commissioner can suspend, expel, fine or otherwise punish any team that, in the Commissioner's opinion is guilty of conduct prejudicial to the WHL, or to the welfare of hockey, regardless of whether or not such conduct occurred in the course of WHL activity.

[98] For present purposes, the following provisions from the regulations of the WHL, which the member teams are obliged to honour, are pertinent.

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[7] S.C. 2009, c. 23.

WHL REGULATIONS AND POLICIES

1.0 PERSONAL CONDUCT POLICY

All persons associated with the Western Hockey League (WHL) are required to avoid conduct at any time – during hockey season or otherwise – that is detrimental to the integrity of the WHL. This requirement applies to all players, coaches, management and other team employees, owners, game officials and all others privileged to play, try out for, coach, work, provide services to or be associated with the WHL and its member Clubs. A policy and rules promoting lawful, ethical and responsible conduct serve the interests of the WHL, its players and fans. Illegal, unethical, or irresponsible conduct does more than simply tarnish the offender, his or her family and team; it may also damage the reputation of others involved in the game, and it undermines public respect and support for the WHL.

1.1 Standard of Conduct

While criminal activity is outside the scope of permissible conduct in our society and all persons who engage in criminal activity may be subject to criminal proceedings, the standard of conduct for persons associated with the WHL is considerably higher than simply complying with criminal law. Everyone associated with the WHL or its member clubs is expected to conduct himself or herself lawfully, ethically and responsibly, in a manner that promotes the values upon which the WHL was founded and based. Individuals who fail to live up to this standard of conduct are considered to be in violation of the WHL Personal Conduct Policy and guilty of conduct detrimental to the integrity of WHL. They are subject to discipline, regardless of whether or not the conduct results in a criminal or quasi-criminal conviction. Discipline may be imposed by the WHL in any of the following circumstances:

• Criminal offences including, but not limited to, those involving the use or threat of violence; other forms of harassment or abuse; theft and other property crimes; sex offences; obstruction or resisting arrest; and disorderly conduct;

• Offences relating to steroids and prohibited substances or substance abuse; offences involving alcohol or drugs including, but not limited to, driving while impaired or under the influence or dangerous driving;

• Violent or threatening behavior, whether within or outside any team setting or any workplace, or conduct that poses danger to the safety or well-being of another person; or

• Other conduct that undermines or puts at risk the integrity and reputation of the WHL, WHL Clubs, or WHL players, coaches, employees, owners or game officials.

1.2 Evaluation, Counseling and Treatment

Apart from any disciplinary action, persons arrested, charged or in any other manner appearing to have engaged in conduct prohibited under this policy may be required to undergo a formal medical or other clinical evaluation at the cost of the individual and/or his or her family. Based on the results of the evaluation, the person may be required or encouraged to participate in an education program, counseling or other treatment deemed appropriate by a health professional, at the cost of the individual and/or his or her family. The evaluation and any resulting counseling or treatment are designed to provide assistance and are not to be considered discipline. However, failure to comply with this portion of the policy shall in itself constitute a separate and independent breach of this policy and basis for discipline.

1.3 Discipline

Upon learning of conduct that may be considered detrimental to the integrity of the WHL and that may give rise to discipline, the WHL may initiate a review, which may include interviews and

> information gathering from medical, law enforcement and other professionals. The WHL will advise the individual, and if that person is a minor, the individual's parent(s) or guardian, of the review and its outcome. A person whose conduct is being reviewed will have the opportunity, represented if they wish by counsel, parent, guardian or other representative, to address the conduct being reviewed. Upon conclusion of the review, the Commissioner of the WHL will have full authority to impose discipline as warranted.
>
> 2.0 ABUSE, BULLYING, HARRASSMENT AND HAZING POLICY
>
> It is the policy of the Western Hockey League (WHL), as a member of Hockey Canada, that there shall be no abuse or neglect, whether physical, emotional or sexual, of any participant or anyone directly or indirectly associated with the operation of a Member Club or the League.
>
> The WHL expects all of its Member Clubs and the League as a whole to take all reasonable steps to safeguard the welfare of our participants and anyone associated with a member Club or the League and protect them from any form of maltreatment.
>
> For the purpose of this policy and for further clarity, abuse shall be defined as any form of physical, emotional, and / or sexual mistreatment or lack of care which causes physical injury or emotional damage to a player or any other individual associated with a Member Club or the League.
>
> Hazing is a practice which is not tolerated by the WHL. Any player, coach or team official of a WHL Club who has been party to or has knowledge of any degrading hazing or initiation rite (without reporting at the first reasonable opportunity to the WHL Commissioner), shall be subject to an automatic suspension.
>
> 3.0 RACIAL / DEROGATORY COMMENTS
>
> The WHL will not tolerate any racial comments and / or derogatory remarks by any player or Club official. Any racial or derogatory comment made by a player or Club official on or off the ice, will be subject to disciplinary action, provided that it was heard by one of the on or off-ice officials and the appropriate penalty was assessed, or the incident was reported.
>
> […]

3. The OHL

[99] The OHL was founded in 1980 when its predecessor, the Ontario Major Junior Hockey League ("OMJHL"), split from the Ontario Hockey Association, which administers junior hockey in Ontario. The OHL consists of 20 teams, 17 in Ontario, two in Michigan, and one in Pennsylvania. Each team of the OHL develops its own policies, programs, and rules and each is responsible for managing and coaching its own players, including applying their respective disciplinary processes in the event of player misconduct.

[100] The OHL is a not-for-profit corporation incorporated under Ontario's *Not-for-Profit Corporations Act*.[8] The OHL operates under its undated articles and manuals. The OHL is headed by a Commissioner, who reports to a Board of Governors, which is comprised of one Governor and one alternate Governor appointed by each team. The OHL Commissioner can sanction any team that fails to act in the best interest of the OHL or to observe all decisions of the Commissioner.

[101] For present purposes, the following provisions from the regulations of the OHL are pertinent.

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[8] 2010, c. 15, s. 2.

HEALTH AND WELFARE POLICIES AND PROCEDURES

1. HAZING POLICY

Team bonding is an important element in developing a positive feeling among the members of any team sport. However, there is a distinct difference between team bonding and hazing. Hazing is a practice which is not tolerated by the Ontario Hockey League and its Member Teams. "Hazing" includes any conduct, activity, event, initiation ritual or occurrence, whether planned or spontaneous, in which one or more members of a team are subjected to (a) discriminatory conduct based on race, colour, creed, nationality, religion or sexual orientation, (b) physical or sexual harassment, (c) emotional, mental, physical or sexual abuse, or (d) conduct, comment or gesture reasonably considered to be insulting, intimidating, humiliating, degrading or offensive. For greater certainty, any initiation ritual which involves consumption of alcohol or is of a sexual nature will be deemed to be hazing. In the case of any issue as to whether conduct amounts to hazing, the decision of the League Commissioner will be determinative.

It is the position of the Ontario Hockey League and its Member Teams that each player joining the League is welcomed in a professional and dignified manner. All players shall share equally in chores and other responsibilities within the team environment. Any player, team official or executive member of a team who has (a) been party to, or (b) has knowledge of (without reporting at the first reasonable opportunity to the office of the League Commissioner), any hazing shall be subject to an automatic suspension and / or fine, the length or amount of which will be determined upon investigation of the incident.

[…]

3. HARASSMENT & ABUSE / DIVERSITY POLICY

Preamble

The following provides a general understanding of the principals relating to diversity awareness and appreciation, as well as an understanding of the consequences that will result from a failure to properly respect your fellow players and personnel within the League.

[…]

Policy Statement

All players have the right to participate in the Ontario Hockey League in a safe and healthy environment which promotes equal opportunities and prohibits discriminatory practices. All forms of harassment and abuse including but not limited to taunts and slurs and comments based on race, age, national or ethnic origin, colour, religion, creed, gender, sexual orientation, marital status or disability will not be tolerated and are completely unacceptable under any circumstances.

All on-ice officials have been instructed to assess a Gross Misconduct penalty for any violation of the League policy in this area which shall result in a minimum 5 game suspension to the offending player and an automatic review by the League Commissioner. In addition, the team of the offending player shall be fined not less than five hundred ($500.00) dollars in such instances.

4. PORNOGRAPHY POLICY

No coach, team official, or player will use pornography as part of a team activity.

[…]

PERFORMANCE DEVELOPMENT PROGRAM HEADED BY DR. PAUL DENNIS

The Ontario Hockey League and its Member Teams are committed to ensuring that a player's development occurs as a result of professional support. Today's players are different and it's a changing landscape. Coaches even with the best of intentions, might be feeling tremendous pressure and behave in ways that do not support their players well-being. A coach's conduct has a significant impact on the development of the attitudes and behaviours of his/her players.

In all forms of human endeavour, including sport, efforts are being made to eliminate psychologically destructive behaviour. The Ontario Hockey League's Professional Development Program is to assist coaches in having a better understanding of today's players so that they will be able to create a coaching environment where unwavering TRUST between the players and coaches become the norm. Such program also provides the opportunity for the League to address/investigate through professional intervention by Dr. Paul Dennis any alleged behaviours which may be deemed detrimental to the welfare of the players.

11. ALCOHOL POLICY

There is to be no alcohol consumed by any player at any OHL Member Team or League function.

12. PLAYER LIAISON OFFICERS

Each OHL Member Team shall annually identify an individual assigned to be the Player Liaison /Advisor for all players who has no direct vested interest in the team and who reports to the League.

The role and responsibility of such individual is defined as the following:

• Additional resource for team in educating players with respect to harassment, lifestyle issues.

• Resource for players as to their rights and options under the CHL Players First Policy, suggest access to external avenues of recourse and to be available for counselling and support services.

• If required, the Liaison Officer / Advisor is authorized to proceed with a formal complaint to the OHL if the player should come forward with sufficient evidence to form a complaint, but does not wish to make a complaint personally.

Note: If a complaint is submitted to the League, at their discretion, the League will appoint an investigator independent of the OHL selected on the basis of knowledge in the area of harassment and expertise in conducting investigations.

Note: The League may initiate a review as per the Performance Development Program through professional intervention by Dr. Paul Dennis on any alleged behaviors which may be deemed detrimental to the welfare of the players.

[102] OHL players were required to acknowledge in writing the OHL’s harassment policy by signing the following document:

HAZING POLICY

Team bonding is an important element in developing a positive feeling among the members of any team sport. However, there is a distinct difference between team bonding and hazing. Hazing is a practice which is not tolerated by the Ontario Hockey League and its Member Teams. “Hazing” includes any conduct, activity, event, initiation ritual or occurrence, whether planned or spontaneous, in which one or more members of a team are subjected to (a) discriminatory conduct based on race, colour, creed, nationality, religion or sexual orientation, (b) physical or sexual harassment, (c) emotional, mental, physical or sexual abuse, or (d) conduct, comment or gesture reasonably considered to be insulting, intimidating, humiliating, degrading or offensive. For greater certainty, any initiation ritual which involves consumption of alcohol or is of a sexual nature will

> be deemed to be hazing. In the case of any issue as to whether conduct amounts to hazing, the decision of the League Commissioner will be determinative.
>
> It is the position of the Ontario Hockey League and its Member Teams that each player joining the League is welcomed in a professional and dignified manner. OHL Member Teams shall not have a Right of Passage. All players shall share equally in chores and other responsibilities within the team environment. Any player, team official or executive member of a team who has (a) been party to, or (b) has knowledge of (without reporting at the first reasonable opportunity to the office of the League Commissioner), any hazing shall be subject to an automatic suspension and / or fine, the length or amount of which will be determined upon investigation of the incident by the League Commissioner.
>
> PLAYER ACKNOWLEDGEMENT OF LEAGUE PLAYER HAZING POLICY
>
> We, the members of the Hockey Club have been fully informed of the OHL Hazing Policy and understand and will abide by the League Hazing / Initiation Policies. Dated:
>
> PLAYER'S NAME […] SIGNATURE

4. The QMJHL

[103] The QMJHL was founded in 1969. In 1994, the QMJHL expanded outside of Québec to Atlantic Canada. The QMJHL consists of 18 teams, 12 teams in Québec, three teams in New Brunswick, two teams in Nova Scotia, and a team in Prince Edward Island. Of the teams that originally constituted the QMJHL, only one remains in the same city (Shawinigan), although that team's name has changed. During the annual QMJHL draft, teams may not select players from Ontario.

[104] Each team of the QMJHL develops its own policies, programs, and rules and each is responsible for managing and coaching its own players, including applying their respective disciplinary processes in the event of player misconduct.

[105] The QMJHL was incorporated under Part III of Québec's *Companies Act* (*Legal Persons or Associations having No Share Capital, Constituted or Continued by Letters Patent*). It operates under a constitution dated July 1, 2013 and regulations dated July 1, 2013.

[106] The QMJHL is headed by a Commissioner who reports to a board of governors, comprised of a Governor appointed by each team. The QMJHL Commissioner can impose any penalty "deemed appropriate" for not complying with, among other things, QMJHL by-laws, and can fine Teams that refuse to follow Commissioner decisions.

[107] The QMJHL has a Code of Ethics. The players sign a commitment to respect the code of ethics, the QMJHL policies and the team's rules. For present purposes, the following provisions of the Code are pertinent:

> CODE OF ETHICS FOR THE PLAYERS OF THE QUÉBEC MAJOR JUNIOR HOCKEY LEAGUE
>
> (1) OBJECTIVES OF THE CODE OF ETHICS:
>
> *(1.1) Statement of Principle*
>
> The whole purpose of the League and its teams is to participate in the development of young players aged from sixteen to twenty, and to make them progress towards the highest levels of professional hockey.

The formal commitment of the League and its teams, towards players in this age category, towards their parents and the public in general, extends beyond the statement of principle described in the previous paragraph: The League and its teams must ensure that the player benefits from an optimum development and that his integrity related to ability and physical and mental condition is protected, and that the player receives continued top-quality academic education that will allow him to go on studying normally after his hockey years in the QMJHL.

(1.2) Mission

The Québec Major Junior Hockey League's mission is to develop players for professional hockey while supporting them throughout their academic endeavors in order to mold them into responsible and educated citizens. It must offer high entertainment value in order to ensure the continued success of its activities.

(1.3) Values

• Self-respect, respect for others and for the regulations
• Integrity
• Safety
• Education
• Sportsmanship
• Self-improvement

[…]

PRINCIPLES, VALUES AND OPERATION:

(4.1) Principles and Core Values:

The QMJHL code of ethics is based on four (4) guiding principles and prioritizes six (6) core values:

(4.1.1) All players are required to adhere to the rules of the QMJHL.

(4.1.2) This code of ethics serves as a guide for players in their own conduct as to their behaviour and those to avoid, to respect the six (6) core values promoted by the League: Respect, integrity, safety education, sportsmanship and self-improvement.

(4.1.3) Players must integrate and demonstrate, in their attitudes and behaviours, the values targeted by the QMJHL and ensure that the spirit and specific requirements of this code of ethics are respected at all times.

(4.1.4) The League's mission, values, policies and regulations, the code of ethics and the safety and well-being of the players must always prevail, and they must never be sacrificed for the benefit of personal glory or victory at any cost.

(4.2) Operation:

(4.2.1) The managers of each team: They have the responsibility to lead by example, to respect the code of ethics and all related policies, to inform team staff and players about them, to remind them that they must abide by the ethical rules indicated and, if necessary, to direct their conduct according to this code and the related policies. Team managers are also responsible for responding promptly when a problem arises and immediately informing the Director of Player Services and the QMJHL Commissioner. This is to ensure that the situation does not escalate and that appropriate action is taken within a reasonable time.

(4.2.2) League managers: They have the responsibility to respect the code of ethics and all related policies, to ensure that these rules are respected and to take appropriate measures in the event of violations.

The team and League managers are committed to providing all necessary support to the players and staff involved in handling the situation. Teams and the League are also committed to keeping parents and agents informed if need be.

If a team decides to release a player as a result of a problematic behaviour, they must promptly notify the League so that an assessment of the situation is conducted and that a follow-up is made with the player. To that end, the role of the team and League managers is to assess each breach of the code of ethics and issue a warning, impose a sanction or a disciplinary measure depending on the seriousness of the situation and the consequences incurred.

(5) DUTIES AND OBLIGATIONS OF PLAYERS:

To get the most out of hockey in the QMJHL, players must adopt attitudes and behaviours that derive from the values advocated in the League. Players who play in the QMJHL must comply with the following rules:

VALUES	RULES
Respect	(5.1) Demonstrate great respect towards: the League and team's management and staff, teammates, officials, opponents, your billet family, training facilities, people of the opposite sex as well as fans. […] (5.3) Respect the QMJHL and the team's regulations and policies. (5.4) Avoid all forms of discrimination.
Integrity	(5.5) Demonstrate exemplary behaviour on and off the ice to be a good ambassador for your team and the League. […] (5.7) Not have a negative influence on your teammates. […] (5.9) Never threaten anyone or share pornographic photos or videos.
[…]	[…]

[108] The QMJHL has a policy for the prevention and the treatment of harassment and violence. Team staff and officials and the players are required to sign a declaration of having read and understood the QMJHL's Policy for the Prevention and Treatment of Harassment and Violence in the Workplace and to undertake to respect the policy. For present purposes, the pertinent provisions of the policy are set out below.

QUÉBEC MAJOR JUNIOR HOCKEY LEAGUE - Policy for the Prevention and the Treatment of Harassment and Violence

1. PREAMBLE

The present policy for the prevention and treatment of harassment and violence (hereinafter referred to as the "Policy") applies to employees of the Québec Major Junior Hockey League (hereinafter referred to as the "QMJHL"), but also to players, officials[1] and all other "people associated with the QMJHL."[2] It is essential for the QMJHL that each of its teams adhere to the values and principles contained in this Policy to ensure an environment free of harassment, discrimination and violence for its own employees, players, officials, and other people associated with the QMJHL. To this end, the QMJHL requires each of its teams to adopt a Policy for the Prevention and Treatment of Harassment and Violence in the QMJHL context. […] Although each team is responsible for adopting and applying its own policy for the prevention and treatment of harassment and violence, the Policy provides a procedure to support teams that wish to do so, in the treatment of reports and complaints they receive. Furthermore, considering the role that the QMJHL plays with respect to players and officials, it is the Commissioner office responsibility to deal with any complaint or report involving a QMJHL player or official, both as a plaintiff and a respondent. To this effect, it is imperative that the Commissioner office be informed, without delay, by the league's teams, of

any complaint or report involving a QMJHL player or official, whether as a victim or as a respondent. The Commissioner's office shall also be informed of any complaint or report involving a team employee whose situation could have a negative impact on the players even if they are not directly concerned. The information in question must therefore be communicated, without delay, to one of the Individuals in charge of this Policy, as defined in section “3. Definitions” and identified in Appendix A of this document.

[1] Notwithstanding the above, all situations of harassment or violence involving a QMJHL player and occurring during a QMJHL game remain subject to QMJHL disciplinary rules and are dealt with at a first level by QMJHL officials and at a second level by the Director of Player Safety.

2. OBJECTIVES

The Policy has been adopted to provide QMJHL and teams employees, players, officials, and other people associated with the QMJHL with an environment free of harassment, discrimination, and violence. The purpose of the Policy is to confirm the QMJHL’s commitment to prevent and put an end to any situation of psychological, sexual and/or discriminatory harassment, and any form of violence, within its organization. It also aims to establish the principles of intervention that will be applied when a complaint of harassment and/or violence is filed or when a situation of harassment and/or violence is reported to the Commissioner office.[3]

3. DEFINITIONS

Individuals in charge: The people designated by the QMJHL to see to the promotion and application of the Policy. These people are identified in Appendix A. Details on the role of these people are also included in Appendix A.

People associated with the QMJHL: Players, officials, representatives, suppliers, subcontractors, interns, volunteers, billet families, visitors, or spectators of the QMJHL.

Psychological harassment: vexatious conduct manifesting itself through repeated, hostile or unwanted behavior, words or actions, which violates the dignity or psychological or physical integrity of a person and which results in a harmful work, sports, study or service environment. A single serious conduct may also constitute harassment if it causes such harm and has a continuing harmful effect on the person.

For the purposes of the Policy, this definition includes, but is not limited to, sexual and discriminatory harassment, threats, bullying and cyberstalking.

Sexual Harassment: It refers to a course of conduct by an individual, based on sex, sexual orientation, sexual or gender identity, the expression of sexual or gender identity, that is characterized by vexatious remarks or gestures against an individual in the course of employment when the individual knows, or ought reasonably to know, that such remarks or gestures are unwelcome. Specifically, sexual harassment is any conduct that manifests itself in words, gestures, or behaviours with sexual connotations, that are unwelcome/unsolicited, and that by their nature violate the dignity of the individual or the individual’s physical or psychological integrity or that may lead to unfavourable working conditions for that individual.

Sexual violence: Any form of misconduct or violence committed without consent through sexual practices or by targeting sexuality, including sexual assault and sexual harassment. Sexual violence includes any misconduct that includes non-consensual sexual gestures, words, behaviours, or attitudes, with or without physical contact.

Discriminatory harassment: Harassment based on any of the grounds listed in section 10 of the *Charter of Human Rights and Freedoms*, i.e., race, colour, sex, gender identity or expression, pregnancy, sexual orientation, marital status, age except, to the extent provided by law, religion, political convictions, language, ethnic or national origin, social condition, handicap, or the use of

any means to palliate such handicap. It may also include harassment based on a player's status on his team or in the QMJHL.

Bullying: Repeated aggressive behaviour with the intent to hurt another person, physically, mentally, or emotionally, and/or to gain power over that person. Bullying can be individual or collective.

[…]

5. POLICY STATEMENT

The QMJHL does not tolerate any form of harassment or violence within its organization, whether it be

• From managers towards employees or people associated with the QMJHL
• Among colleagues
• From employees towards their superiors or towards people associated with the QMJHL
• From any individual associated with the QMJHL towards a QMJHL employee or another individual associated with the QMJHL

Any behaviour related to harassment or violence may result in administrative and/or disciplinary measures up to and including termination of employment in the case of a QMJHL employee or a ban from participating in QMJHL activities in the case of an individual associated with the QMJHL.

6. SCOPE

This Policy applies to all QMJHL personnel and people associated with the QMJHL, and at all levels of management, including in the following locations and contexts.

• Workplaces
• Common areas
• Any other place where people perform their work or must be in the course of their employment or duties for the QMJHL (e.g., in the environments of QMJHL teams, schools, boarding families, during meetings, internal or external training or conferences, travel or social activities organized by the QMJHL or by one of its teams, etc.)
• Communications, by any means, technological or otherwise, including social media, when such communications are directly or indirectly related to work.

7. EXPECTATIONS FROM STAFF

All staff and people associated with the QMJHL have a responsibility to behave in a manner that promotes a harassment-free and violence-free workplace. All staff and people associated with the QMJHL must report to the individuals in charge any incident of harassment or violence in the QMJHL as soon as circumstances allow. It is also the responsibility of all staff and people associated with the QMJHL to cooperate with the mechanisms implemented by the QMJHL to prevent and stop harassment and violence.

[…]

5. The CHL

[109] In 1975, the WHL, the OMJHL (now the OHL), and the QMJHL established the CHL. The CHL is a not-for-profit corporation incorporated under the *Canada Not-for-Profit Corporations Act* and headquartered in Metropolitan Toronto.

[110] With a staff of 16 full-time and four part-time employees, the CHL provides business services to the QMJHL, WHL, and OHL directly and as its agent for agreements with third parties.

The CHL is headed by a President who reports to an Executive Council that reports to a Board of Directors. The CHL's Executive Council consists of the Commissioners of the three leagues. The Board of Directors consists of the Executive Council and two nominees from each league.

[111] It is to be noted that unlike the governance structure of the WHL, OHL, and QMJHL respectively, the CHL Board of Directors is not composed of representatives from every team.

[112] The CHL operated without a formal constitution until October 5, 2017, when the CHL Constitution was passed. The CHL Constitution sets out: (a) the CHL's governance structure, roles, and responsibilities; and (b) the roles and responsibilities of the WHL, the OMJHL, and the QMJHL and their respective member clubs.

[113] Under the CHL Constitution, the CHL's operations include: (a) arranging national broadcast relationships, streaming services, sponsorship sales and services, and marketing and media relations on behalf of the leagues; (b) liaising with third party partners or other organizations such as Hockey Canada, USA Hockey, and the NHL; and (c) co-organizing events involving major junior hockey players.

[114] The CHL collects advertisement or subscription sales and sponsorship revenue and distributes this revenue to the WHL, OML, and QMJHL, which in turn distribute the revenue to their respective teams. These activities of the CHL are significant. It has national broadcast relationships with conventional television networks, cable networks, and streaming services including CBC, CBC Gem, TSN, RDS ("Réseau des sport"), and CHL-TV.

[115] The CHL has no role in hockey operations for the teams or leagues.

[116] The CHL organizes three hockey events: (a) the CHL/NHL Top Prospects Game in which 40 top NHL Entry Draft eligible major junior hockey prospects compete in an "all-star" game; (b) the now discontinued (because of the war between Russia and Ukraine) Annual International Hockey Series, a competition between a Canadian team and a team of Russian junior players; and (c) the Memorial Cup.

[117] The CHL is a partner to Hockey Canada, the organization that oversees the management of hockey programs in Canada, from entry-level to professional leagues, for male and female athletes of all ages. The teams and their players, the leagues, and the CHL are "registered participants" in the Hockey Canada Registry under Hockey Canada's by-laws. The eight teams located in the U.S. and the players on those teams are registered members of USA Hockey.

[118] For present purposes, the following provisions of the CHL's Constitution are pertinent:

CONSTITUTION OF THE CANADIAN HOCKEY LEAGUE

> THIS CONSTITUTION, a unanimous member agreement, is made… between all voting members of the Canadian Hockey League (the "CHL") being each original member club listed on Exhibit A (each, an "Original Member Club), each other individual, corporation, partnership, trust, unincorporated organization or other entity which after the date hereof becomes a member of the CHL pursuant to the terms hereof and executes and delivers a counterpart hereto (the "Future Member Clubs" and, together with the Original Member Clubs, collectively, the "Member Clubs"), and the non-voting members of the CHL, being the Ontario Major Junior Hockey League, doing business as the Ontario Hockey League, the Québec Major Junior Hockey League Inc. and the Western Hockey League (collectively, the "Regional Leagues", and together with the Member Clubs, the "members") and the CHL.
>
> WHEREAS the CHL is governed by the Act;

AND WHEREAS the members, acting under authority contained in the Act, have agreed to enter into this Constitution so as to restrict, in part, the powers of the Directors to manage, or supervise the management of, the activities, business and affairs of the CHL and to provide that, to the extent that this Constitution restricts the powers of the Directors to manage, or supervise the management of, the activities, business and affairs of the CHL, the members shall assume such powers and thereby relieve such Directors of such rights, powers, duties and liabilities to the fullest extent permitted by the Act;

[…]

ARTICLE 1

Definitions

1.1 For purposes of this Constitution:

"*Act*" means the Canada Not-for-profit Corporations Act.

[…]

"*CHL*" means the Canadian Hockey League / Ligue canadienne de hockey.

"*CHL By-laws*" means the by-laws of the CHL pursuant to the Act.

"*CHL Hockey*" has the meaning set out in Section 3.2 (1).

[…]

"*CHL Mission*" has the meaning set out in Section 3.1.

"*CHL Promotions*" has the meaning set out in Section 19.1.

"*CHL Regulations*" means regulations of the CHL which shall be approved from time to time by Majority Vote and which shall set out regulations in respect of the matters referred to in Section 24.3.

[…]

"Players" has the meaning set out in Section 3.2 (3).

[…]

ARTICLE 3

Mission

3.1 The mission of the CHL is to provide the best amateur junior age hockey Players with highest-quality skills development and training, participation in hockey competition on a regional and national basis, academic and player support services, funding for higher education, and access to professional hockey opportunities (the "CHL Mission").

3.2 To further the CHL Mission, the CHL is organized to:

(1) Promote and foster the success of high-quality amateur hockey competition among the Member Clubs, including with respect to Member Clubs located in remote or small communities ("CHL Hockey"); and

(2) Promote and foster the success and development of the Regional Leagues, of which the Member Clubs are also members;

(3) Ensure that the hockey players of Member Clubs (collectively, the "Players") are provided with a safe and high-quality environment that ensures that they develop as exceptional students and athletes; and

(4) Ensure that prospective Players have unsurpassed access to professional hockey opportunities through fair and respectful draft processes.

3.3 All actions of the CHL shall be in furtherance of the CHL Mission.

3.4 Consistent with the CHL Mission, the following are and shall continue to be set out as the purposes of the CHL in its Articles of Incorporation pursuant to the Act:

(1) To support and encourage the growth of the sport of hockey in Canada;

(2) To organize and operate a series of hockey related activities including tournaments and special events;

(3) To present the game of hockey in a manner that the public may be assured of high standards of skill and fair play, integrity and good sportsmanship; and

(4) To undertake and carry on such other activities as may be incidental or complimentary to, or which may conveniently be carried on in conjunction with, or may be desirable to achieve any pf the foregoing objects.

3.5 Notwithstanding anything else to the contrary herein, the CHL has been established exclusively for non-for-profit purposes, and will at all times be operated exclusively for not-for-profit purposes.

[…]

ARTICLE 4

Membership

[…]

4.6 Upon the recommendation of the Board of Directors and a Supermajority Vote, a Member Club may be expelled from the CHL. The Board of Directors may recommend expulsion when, in its judgment, a Member Club has failed to abide by this Constitution or the CHL Regulations, or has engaged in conduct significantly detrimental to CHL Hockey or the CHL Mission.

[…]

4.9 Each Member Club shall be a voting member of the CHL and shall be entitled to one vote in respect of any Majority Vote or Supermajority Vote. Each Regional League shall be a nonvoting member of the CHL and shall not be entitled to vote in respect of any matter, including any Majority Vote or Supermajority Vote, except as required by applicable law.

[…]

ARTICLE 5

CHL Members

5.1 Each member shall be responsible to:

(1) Abide by this Constitution and the CHL Regulations;

(2) Foster the promotion of the CHL Mission through its operation of an amateur hockey team under the auspices of the CHL and a Regional League;

(3) Protect the integrity of CHL Hockey and the quality of the support to Players by ensuring that:

(a) Players receive instruction and skills development of the highest quality; quality secondary level education and academic support; a nurturing club; and a billet program which provides a family atmosphere;

(b) Players have a safe environment, both on and off the ice;

(c) Players have unsurpassed access to professional hockey opportunities and to higher education opportunities, including through the development of scholarships to fund Players' higher education costs;

(d) Players are provided with every opportunity to develop as exceptional students and athletes; and

[…]

[…]

5.4 Each member shall at all times do and cause to be done all acts and things (and, in the case of a Member Club, vote its membership interests) and otherwise exercise its rights, as a member, or otherwise, to the extent permitted by law, to cause such meetings to be held, resolutions to be passed, by-laws to be enacted and documents to be executed so that at all times the provisions, conditions, restrictions and prohibitions contained in this Constitution (including the requirements of Article 5) relating to: (a) its membership in the CHL and, in the case of a Member Club, in the applicable Regional League; and (b) the business and affairs of the CHL and, in the case of a Member Club, of the applicable Regional League, shall be performed and complied with.

ARTICLE SIX

Regional Leagues

6.1 The Regional Leagues shall be integral part of the governance and operation of the CHL, each being organized to produce amateur hockey competition consistent with the CHL Mission.

6.2 Each Regional League shall be responsible for organizing and operating CHL Hockey games, other than the games described in Article 12 and Article 13 and such other games as the Board of Directors may approve, including establishing the playing rules, approving venues, providing officiating, and regulating game operations and conduct. Each Regional League shall conduct hockey operations and other business affairs in a manner designed and intended to further the CHL Mission.

6.3 Without limiting the generality of Section 7.10, the Board of Directors may direct, and if necessary overrule, a decision of a Regional League in any matter relating to the organization or operation of CHL Hockey games that is contrary to the CHL Mission or to maintaining the high quality or reputation of CHL Hockey.

6.4 The governing documents of each Regional League shall provide for the full participation of that Regional League and its Member Clubs in the CHL, and the Regional League shall amend its governing documents as needed from time to time to confirm that its Member Clubs are bound to

perform the obligations, and have the rights, set forth in this Constitution and the CHL Regulations.

[…]

ARTICLE 14

CHL Hockey Players

14.1 The Board of Directors shall ensure that the Member Clubs, directly and through their respective Regional League, are fulfilling the Member Clubs' obligations to Players as reflected in Section 5.1(3).

[...]

14.4 Players, and their parents and guardians (for Players considered minors who do not have legal capacity under applicable federal, provincial, or state law), to execute a written agreement that reflects the benefits and duties of participation on the Member Club's roster and in CHL Hockey. The terms of that agreement must provide for the lodging, care, education, and training of the Player during the term of the contract, as well as the Player's commitment to the CHL Mission and agreement to abide by such playing and other rules as required by the Member Club, the Regional League, and the CHL, including rules regarding gambling and uses of performance-enhancing and other drugs and an agreement to abide by the provisions of Section 9.4(1).

[…]

14.7 Member Clubs shall cause their Players, and their parents and guardians (for Players considered minors who do not have legal capacity under applicable federal, provincial, or state law), to execute such declarations, affidavits and other documents as shall be required by the President from time to time.

ARTICLE 15

Player Safety

15.1 The CHL shall implement programs and policies designed to ensure and promote player safety and to prevent the use of performance-enhancing or other drugs by Players of Member Clubs, such as the CHL Drug Education and Anti-Doping Program, and shall provide support to the Regional Leagues in their activities to promote and ensure player safety, including by promulgating standard guidance for the Regional Leagues and Member Clubs. The Regional Leagues shall cooperate with the CHL in enforcing and monitoring compliance with these programs and policies. Member Clubs shall also cooperate with the CHL in enforcing and monitoring compliance with these programs and policies.

15.2 The CHL shall coordinate, as the Board of Directors deems appropriate, with Hockey Canada, U.S.A. Hockey, the National Hockey League, and other hockey organizations in furtherance of player safety. The CHL may conduct surveys, engage experts, and undertake other investigations to gather data needed to evaluate player safety issues, and each Member Club shall cooperate with any such investigation.

15.3 To ensure and promote player safety, the Board of Directors may, subject to the requirements of Section 7.10, direct Member Clubs and Regional Leagues to make changes in the rules of play, equipment, or other standards. Such direction shall, if necessary, supersede any Regional League or Member Club rule or policy.

[…]

ARTICLE 17

Recording, Broadcasting, and Marketing of CHL Hockey games

17.1 All broadcast rights, including the right to broadcast live and in-progress CHL games, belong to the Member Clubs.

17.2 Each Member Club on its own behalf hereby irrevocably grants the CHL the right to contract as agent for and on behalf of such Member Club with one or more third-party broadcaster for the exclusive produce and broadcast live and previously recorded exhibition, regular season, post-season, and other CHL Hockey games via television, live streaming, video on demand or any other media platform, except for local media rights which shall be retained by the Member Clubs as determined by the Board of Directors from time to time. The CHL shall disclose to third party broadcasters that, in respect of the grant of any broadcast rights, it is acting solely as agent for and on behalf of such Member Clubs.

[…]

17.4 The CHL shall not itself be entitled to any rights fees or other payments made under any broadcast agreement entered into by the CHL as agent for the Member Clubs […] but instead shall hold any amounts received thereunder solely as agent for and on behalf of the Member Clubs, and shall deposit such amounts in a segregated account designated as a "funds under administration" or similar account (the "FUA Account").

17.5 The CHL shall hold any and all footage of CHL hockey games and related content solely as agent for and on behalf of the Member Clubs, and any revenues derived from such footage or content shall be deposited into the FUA Account. Notwithstanding the above, each Member Club retains such broadcasting rights in respect of any of its respective exhibition, regular season, post-season or other CHL Hockey games to the extent that the broadcasting of such games is not subject to, and not precluded by, any contract between the CHL and a third-party broadcaster.

17. 6 The CHL shall coordinate with the Regional Leagues, acting through their representatives on the Board of Directors, to permit the Regional Leagues to enter into contracts providing for the grant of broadcasting and other media rights (as agent for and on behalf of its Member Clubs) in a manner that is complementary to, but not in conflict with, the CHL's broadcasting and other media agreements. Each Member Club and Regional League shall cooperate with the CHL in the broadcasting agreements entered into by CHL and in the exploitation of such Regional League's and Member Club's local media opportunities to enhance the financial and strategic value of collective broadcasting opportunities.

17.7 The Member Clubs and the Regional Leagues shall comply with all contracts entered into by

(i) the CHL on their behalf or

(ii) CHL Properties, including national broadcasting, sponsorship, and other media rights contracts.

17.8 All revenues derived from contracts executed by the CHL as agent for and on behalf of the Member Clubs shall be owned equally by the Member Clubs. Such revenues shall be deposited into the FUA Account, and handled in accordance with Section 20.2

ARTICLE 18

Relationships with Other Hockey Organizations

18.1 With the approval of the Board of Directors, the CHL may enter into agreements with the National Hockey League, Hockey Canada, U.S.A. Hockey, and any other organization in furtherance of the CHL Mission and the production, promotion, and operation of CHL Hockey.

ARTICLE 19

CHL Properties

19.1 An entity shall be established to perform certain functions related to the exploitation, with a View to a profit, of intellectual property and other intangible rights of the CHL, the Member Clubs and the Regional Leagues. The entity shall be established as either

(i) a limited partnership formed under the laws of a province of Canada, with the name "CHL Properties LP/ Société en commandite LCH Propriétés" or a similar name, or

(ii) a corporation formed under the laws of Canada or a province of Canada, with the name "CHL Properties Ltd./ Propriétés LCH Limitée" or a similar name.

Such entity is referred to herein as "CHL Properties".

19.2 In connection with the formation of CHL Properties, the CHL may transfer, assign, sell or otherwise convey any tangible or intangible assets currently held by the CHL to CHL Properties, and may transfer the employment of such personnel as may be necessary in order for CHL Properties to be able to perform its functions.

19.3 CHL Properties shall be owned, directly or indirectly, by each Member Club in equal shares; provided that if CHL Properties is established as a limited partnership, its ownership shall be structured with the intent that it qualifies at all times as a "Canadian partnership" for purposes of the Income Tax Act (Canada).

19.4 CHL Properties shall be established with a view to profiting from the following activities, among others:

(1) Promotion of CHL Hockey through marketing, licensing, sponsorship, and other activities;

(2) Exploitation of League and team symbols, including team marks, logos, and colours;

(3) Exploitation of player promotional rights;

(4) Developing and fostering the CHL Hockey brand; and

(5) Deriving revenues from, enhancing the value of, and protecting the intellectual property and other intangible assets of the CHL, the Regional Leagues and the Member Clubs.

19.5 In order to enable CHL Properties to perform its functions, each of (i) the CHL, (ii) the Regional Leagues, and (iii) the Member Clubs shall grant CHL Properties a license to use their respective intellectual property and other intangible assets, including their marks, logos, and colours (the "CHL Properties License"), and shall execute such license agreements and related supporting documents as the Board of Directors reasonably determines are necessary or desirable in this regard.

[…]

ARTICLE 24

CHL Regulations

24.1 The Member Clubs agree to conform to and be bound by CHL Regulations, which shall be approved in accordance with the provisions of this Constitution by a Majority Vote.

[…]

> 24.3 The CHL Regulations shall set out regulations related to player conduct and conduct of any Named Person, including prohibitions against conduct which would be detrimental to the best interest, reputation or image of the CHL or CHL Hockey.
>
> […]
>
> *General*
>
> 25.1 This Constitution shall be governed and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable in the Province of Ontario and shall be treated in all respects as an Ontario contract. Each of the parties hereto irrevocably attorns to the jurisdiction of the courts of the Province of Ontario.
>
> 25. 2 This Constitution shall be deemed to be a unanimous member agreement pursuant to Section 170 of the Act. This Constitution shall continue to be effective notwithstanding a transfer of membership and this Constitution shall be binding upon the remaining Member Clubs so long as there is at least one Member Club.
>
> […]
>
> 25.4 Nothing in this Constitution shall be deemed in any way or for any purpose to constitute any party a partner of, or a member of a joint venture or joint enterprise with, any other party to this Constitution in the conduct of any business or otherwise.
>
> […]
>
> 25.8 The Member Clubs agree to sign all such documents and do all such things as may be necessary or desirable, including the casting of any votes from time to time and at all times, in whatever manner as shall be necessary to more completely and effectively carry out the terms and intentions of this Constitution and to cause the CHL and Regional Leagues to act in the manner contemplated by this Constitution. […]

[119] Mr. David Branch, who was the CHL's President for two decades testified that the CHL's goal is "to supervise and take care of [players] while living away from home," and that this "role is one of our biggest responsibilities … [w]e take very seriously the responsibility to ensure that these kids are supervised and supported in ways that are appropriate to their ages.

6. The Defendants' Player Safety Programs and Procedures

[120] The OHL in 1985, the QMJHL in 1990, and the WHL in the 1990s introduced off-ice player safety policies and programs. These policies are reviewed periodically and occasionally revised. The programs educate players and staff on hazing, bullying, harassment, discrimination, mental health, ethical coaching, and consent. It is, however, the individual teams that are on a day-to-day basis responsible for the safety of the players on-ice and off-ice (non-hockey related) activities.

[121] In similar but not necessarily identical ways, the WHL's, OHL's, and QMJHL's programs and policies educate players and team staff on "hazing", "bullying", harassment, discrimination, mental health, ethical coaching, and consent with respect to consensual sex. The CHL can develop safety programs but cannot impose the standards and programs on the leagues. Through persuasion, it is possible for all leagues to have the same policy through parallel adoption and some aspects of each leagues programs are similar.

[122] Each league's policies regulate the behaviour of players and staff to maintain a safe and

inclusive environment. At the present time, the WHL has five policies and eight programs, the OHL has 10 policies and seven programs, and the QMJHL has eight policies and four programs related directly or indirectly to inappropriate off-ice behaviour. The teams implement and enforce their respective league's safety policies. Each league has its own confidential and anonymous reporting mechanism.

[123] In 1997, the CHL commissioned lawyer Gordon Kirke to prepare the *Players First Report* regarding "issues of harassment and abuse within the CHL". Mr. Kirke recommended adopting a CHL-level "Players First Policy", with an independent complaints process and disciplinary sanctions for those who failed to report mistreatment, including "hazing rituals."

[124] On June 26, 2020, one week after this class proceeding was commenced, the CHL announced that it would appoint an Independent Review Panel ("IRP") to review the effectiveness of current policies and practices that relate to hazing, abuse, harassment, and bullying and the allegation that players do not feel comfortable reporting behaviours that contravene these policies.

[125] On July 23, 2020, the CHL announced the members of the IRP were: (a) Sheldon Kennedy, a junior hockey abuse survivor, NHL veteran, and co-founder of the Respect Group Inc.; (b) Camille Thériault, former Premier of New Brunswick, and, (c) Danièle Sauvageau, a former RCMP officer and Order of Canada recipient, known for her extensive experience in investigation, public safety, high level sport, business and sport coaching.

[126] The IRP employed the following methodology: (a) review the existing policies of the WHL, OHL, and QMJHL; (b) review complaints for the seasons 2017-2019; (c) hear presentations from senior leaders of the CHL; (d) interview and hear presentations from experts on sexual violence, sports welfare, forensic traumatologists, and sports psychologists; (e) confidentially interview agents, players, former players, general managers, coaches, owners, senior leaders of other Canadian sport organizations, representatives of other leagues, within and outside of Canada, and leaders of Hockey Canada; (f) review research papers; and, (g) retain the market research company Léger to conduct a survey of 665 members of the CHL, including players, coaches, general managers, staff and families.

[127] The IRP Report stated:

> a. Off-ice misconduct, including bullying, harassment, and discrimination, exists in the CHL. There was a significant percentage of survey respondents that indicated problems exist within the CHL around bullying, harassment, and discrimination.
>
> b. Maltreatment that, outside of hockey would not be acceptable, has become an embedded behaviour in this hierarchical organization of the CHL and the level of acceptance is too high. This acceptance of off-ice misconduct was demonstrated in the responses to the Léger survey.
>
> c. A systemic culture exists in the CHL that results in maltreatment becoming an embedded norm. The systemic nature of the issue results in a perpetuated state of acceptance and lack of change. There is a code of silence around maltreatment that helps perpetuate it.
>
> d. The norms of the CHL blur the boundaries of what is defined as acceptable, they desensitize individuals to bullying, harassment, hazing, and other forms of maltreatment in hockey. The behaviours have been embedded as part of the game. Players were given the impression that the abuse is part of hockey and that the abuse was just something to

go through when playing junior hockey.

e. Reasons for accepting the behaviour include modelling by more senior members (owners, general managers, coaches, older players), stressors experienced by players, desensitization over time to the perpetuated behaviours, and general acceptance of the behaviour by others. Leaders of teams model behaviour; they demonstrate what is acceptable and unacceptable through words, action and inaction. The culture is passed from team to team as new players learn from the hierarchy.

f. A systemic structural deficiency exists in the support and mentoring of coaches and general managers regarding ethical coaching and addressing off-ice misconduct in its day-to-day application. Self-regulation of the CHL, and by the individual leagues in particular, results in a lack of independence that compromises the integrity of the process.

g. Despite recent efforts by the individual leagues in the CHL to protect players from off-ice misconduct through enhanced policies and procedures, maltreatment continues to occur.

[128] Léger surveyed general managers, coaches, staff, players and families of players to determine the extent of discrimination, harassment, bullying and abuse. The survey indicated that:

a. 52% of players' families and 40% of CHL staff believe that bullying is a problem in the CHL.

b. 41% of families believe that harassment and discrimination in the CHL is a problem.

c. 45% of players, 45% of players' families, and 32% of staff have heard of cases or situations of bullying or harassment in the CHL, other than those reported in the media in the past 4 years.

d. 12% of survey participants reported personally experiencing bullying or harassment when playing in the leagues.

e. 3% of players, 12% of family members, 21% of staff, and 15% of coaches reported cases of bullying, harassment, or hazing.

f. 0% of the general managers reported cases of bullying, harassment, or hazing.

[129] The IRP Report that revealed the pervasive wrongdoing at many if not all the teams of the CHL was completed on October 31, 2020. The IRP Report made 13 recommendations. The report was not immediately released to the public.

[130] As a witness for the certification motion, Sheldon Kennedy testified that there was a culture of silence and abuse amongst the teams of the CHL and it was the same culture that he experienced when playing in the CHL in the early 1980s.

[131] On November 30, 2021, the Defendants retained the Toronto workplace investigation lawyer Rachel Turnpenney of the law firm Turnpenney Milne LLP to review the leagues' policies, programs, and procedures and to determine whether changes would assist in off-ice player safety.

[132] Ms. Turnpenney was given the IRP Report and copies of all policies, programs, and procedures then in place, and she was asked how they could be improved.

[133] The Turnpenney Report was completed in January 2022 and was published along with the IRP Report on the CHL website. The Turnpenney Report suggested changes and additions to each

league's policies, programs, and procedures. The leagues have committed to implementing Turnpenney's recommendations.

[134] Accepting the evidence of Messrs. Andrews, Bricknell, Carcillo, Chiarello, Clarke, Festarini, Fritsche, Hammet, Howery, Jellio, Kennedy, Ledlin, Munce, Pszenyczny, Doug Smith, Strait, Taylor and Quirk, which I do, that evidence and the IRP Report, the survey reports, and Ms. Turnpenny's Report provide some basis of fact for the allegations of Messrs. Carcillo, Taylor, and Quirk. Bullying, harassment, hazing, and criminal conduct is pervasive amongst the teams of the WHL, the teams of the OHL, the teams of the QMJHL, and the teams of the CHL. Discrete wrongdoing by the Defendants was pervasive, and to the shame of the perpetrators and their enablers discrete wrongdoing has been pervasive for decades.

[135] The Defendants argue that the findings of the Léger Survey that 12% of survey participants reported personally experiencing undefined "bullying" or harassment does not logically imply any legally meaningful institutional flaw or common cause that could ground negligence with respect to the implementation of policies, programs, and procedures across the 60 separate teams, the three separate leagues and the CHL. This argument is both wrong and off-target.

[136] The Defendants' argument is wrong because the Léger Survey revealed pervasive misconduct, including the revelation that 45% of players, heard of wrongful conduct. The reports of personal experience by 12% of the players are obviously underreported, perhaps because the reporters had suppressed their memories or perhaps because the players did not wish to admit that they were both victims and perpetrators of abuse.

[137] But, in any event, the Defendants' argument is off-target because the existence of institutional flaws to ground negligence is a matter of fact, not a matter of logic. There is some basis in fact to conclude that negligence was pervasive.

[138] However, that is not to say that there is a collective liability, which is a matter to be discussed below. However, it is to say that:

> a. there is some basis in fact for discrete causes of action for negligence, systemic negligence, vicarious liability and breach of the Québec causes of action against the discrete teams whose players or employees perpetrated or tolerated or failed to stop the civilly and criminal culpable conduct;
>
> b. there is some basis in fact for discrete causes of action by the individual players while they were players on particular teams; a conclusion that is not disputed by the Defendants; and,
>
> c. there is some basis in fact for discrete causes of action against the WHL, OHL, QMJHL, and CHL as co-defendants in the discrete actions against particular teams.

[139] In saying that discrete wrongdoing by the Defendants is pervasive, is also not to say that the wrongdoing was temporarily universal over the totality of the class period or that every team was a culpable wrongdoer at every point in time.

[140] Unfortunately, there was also evidence that hazing and abhorrent rituals were not unique to major junior level amateur hockey but was a problem throughout amateur and professional hockey.

G. The Jurisdiction Motion

[141] The WHL and the QMJHL and their 40 teams move for a stay of Messrs. Carcillo, Taylor, and Quirk's action on the grounds that Ontario's Superior Court does not have subject matter jurisdiction over them as foreign defendants. All 40 teams are located outside of Ontario and five teams of the WHL (the Everett Silvertips, the Portland Winterhawks, Seattle Thunderbirds, Spokane Chief, and Tri-City Americans) are located outside of Canada.

[142] It is not disputed that none of the teams moving for a stay are domiciled or resident in Ontario.

[143] It is not disputed that none of the moving parties are signatories to any Ontario contracts - with Messrs. Carcillo, Taylor, and Quirk. The putative Class Members who play for teams of the WHL and the QMJHL do not have player contracts governed by the law of Ontario. However, as the discussion below will reveal, there are other contracts in Ontario that are relevant to the jurisdiction analysis.

[144] For reasons that I shall now explain, I personally found the Defendants' arguments that Ontario does not have jurisdiction to resolve the claims against the teams of the WHL and QMJHL surreal from a non-legal perspective. From a non-legal perspective, historically and to this day Ontario's citizens have had a pan-North American connection with hockey and a love of the game. Ontario and its citizens have a long history and interest in hockey and hockey teams from across North America regardless of the team's league or the location of their teams.

[145] My own generation of Ontarians grew up divided amongst being fans for the original six of the Boston Bruins, the Chicago Black Hawks, the Detroit Red Wings, the Montreal Canadiens, the New York Rangers, and the Toronto Maple Leafs. To this day, there are judges of this court who are loyal fans of the Detroit Red Wings because the team was led by the late Gordie Howe, born in a farmhouse in Floral, Saskatchewan. Every generation of Ontario citizens has been interested in the teams that play for the Memorial Cup regardless of where the team was located. I remember rooting for the Hamilton Red Wings, which defeated the Edmonton Oil Kings to win the 1962 Memorial Cup. On an emotional level, it is surreal to suggest to a judge who remembers going to his first NHL game with his father at Maple Leaf Gardens to see the Leafs play the Les Habs and Rocket Richard that there is no real and substantial connection between Ontario and any Canadian hockey team.

[146] It would not be a stretch to develop a new presumptive jurisdictional connection for hockey and Ontario. That said, I shall decide the Jurisdiction Motion from a purely legal perspective.

[147] I foreshadow to say that I conclude that this court has jurisdiction with respect to all four leagues and all of their 60 teams, including the 42 teams of the WHL and the QMJHL.

[148] The court's jurisdiction *simpliciter* is not based on a collective liability. The jurisdiction over the WHL, the QMJHL and their teams exists because there is a real and substantial connection between the matter, the parties, and Ontario.

[149] There is a real and substantial connection between the proposed class action, the WHL, the QMJHL, their teams, and Ontario because: (a) the WHL and the QMJHL carry on business in Ontario; (b) there is a contract connected to the substantive subject matter of the proposed class action that was made in Ontario; and (c) the tort of systemic negligence was partially committed in Ontario (and wholly committed here with respect to the CHL, the OHL and its 20 teams.)

[150] The discussion of the Jurisdiction Motion will be in five parts.

[151] First, I will set out the legal background to the Jurisdictional Motion.

[152] Second, I will consider the matter of whether Ontario has consent based jurisdiction because of attornment to Ontario law.

[153] Third, using the factual background described above about the characteristics of the four leagues and their teams, I shall consider whether there is a real and substantial connection between the dispute, the parties, and Ontario because the OHL, the QMJHL, and their 40 teams carry on business in Ontario.

[154] Fourth, using the factual background described above about the characteristics of the four leagues and their teams, I shall consider whether there is a real and substantial connection between the dispute, the parties, and Ontario because the Constitution of the CHL is a contract connected to the dispute between the parties, most particularly the dispute about systemic negligence.

[155] Fifth, using the factual background described above about the characteristics of the four leagues and their teams, I shall consider whether there is a real and substantial connection between the dispute, the parties, and Ontario because the tort of systemic negligence was partially committed in Ontario.

1. Legal Background: Subject Matter Jurisdiction

[156] Jurisdiction *simpliciter* addresses the procedural question whether an Ontario court can properly assume jurisdiction over a matter, given the interrelationships among the matter, the parties, and Ontario.

[157] Jurisdiction *simpliciter*, or subject-matter jurisdiction, exists if the court has authority over the party and the subject matter and the power to make the order sought.[9]

[158] There are three ways in which the Ontario court may assert jurisdiction against an out-of-province defendant: (1) consent-based jurisdiction; (2) presence-based jurisdiction; and (3) assumed jurisdiction.[10]

[159] Consent-based jurisdiction arises when an extra-provincial defendant consents to the jurisdiction of the domestic court by: (1) voluntary submission; (2) attornment by appearance and defence; or (3) by prior agreement.

[160] Presence-based jurisdiction arises when the extra-provincial defendant is present in Ontario at the time of service. When there is presence-based jurisdiction, it is not necessary to establish that the Ontario court has a real and substantial connection with the matter.[11]

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[9] *Canada (Attorney General) v. Telezone Inc.*, 2008 ONCA 892 (C.A.), aff'd 2010 SCC 62; *R. v. Mills*, [1986] 1 S.C.R. 863 at 960.

[10] *Yip v. HSBC Holdings plc*, 2017 ONSC 5332, aff'd 2018 ONCA 626, leave to appeal refused, [2018] S.C.C.A. No. 410; *Chevron Corp. v. Yaiguaje*, 2015 SCC 42; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17; *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 at para. 36 (C.A.), leave to appeal refused [2003] S.C.C.A. No. 186.

[11] *Chevron Corp. v. Yaiguaje*, 2015 SCC 42; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 79, aff'g (*sub nom. Van Breda v. Village Resorts Ltd.*) 2010 ONCA 84, aff'g [2008] O.J. No. 2624 (S.C.J.); *Incorporated Broadcasters Ltd. v. Canwest Global Communications Corp.* (2003), 63 O.R. (3d) 431 (C.A.); *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 at para. 29 (C.A.).

[161] Assumed jurisdiction arises when the court takes jurisdiction because the litigation with a foreign element has a "real and substantial connection" to Ontario. Before a court can assume jurisdiction over a claim, a "real and substantial connection" must be shown between the circumstances giving rise to the claim and the jurisdiction where the claim is brought.[12]

[162] The test for whether an Ontario court has jurisdiction *simpliciter* based on assumed jurisdiction is whether there is a real and substantial connection between the matter, the parties, and Ontario.[13] The real and substantial connection test for assumed jurisdiction was designed to ensure that claims are not prosecuted in a jurisdiction that has little or no connection with either the transactions or the parties, and the test requires that a judgment rendered by a court which has properly assumed jurisdiction in a given case be recognized and enforced.[14]

[163] In *Club Resorts Ltd. v. Van Breda*,[15] the Supreme Court of Canada developed an analytical framework to determine when a court has jurisdiction *simpliciter* by assumed jurisdiction. The analytical framework begins by identifying circumstances where a court may presumptively assume jurisdiction on the basis of a real and substantial connection with the litigation. The underlying idea to all presumptive factors is that there are some circumstances where there would be a relationship between the subject matter of the litigation and the forum where it would be reasonable to expect that the defendant appear to answer the claim made against him or her in that forum.

[164] The list of presumptive connecting factors is not closed; however, the court should not adopt an *ad hoc* approach to assuming jurisdiction based upon the circumstances of a particular case. The court may, however, identify new factors that will establish a new presumptive connection, which can be used in other cases presumptively to assume jurisdiction. In identifying new presumptive factors, a court should look to connections that give rise to a relationship with the forum that is similar in nature to the ones which result from the established factors. Relevant considerations include: (a) similarity of the connecting factor with the recognized presumptive connecting factors; (b) treatment of the connecting factor in the case law; (c) treatment of the connecting factor in statute law; and (d) treatment of the connecting factor in the private international law of other legal systems with a shared commitment to order, fairness and comity.[16] A new presumptive factor must have a genuine factual connection to the domestic court; the fact that a foreign party qualifies as a third party in an existing action in the domestic forum is not by itself a reliable indicator that there is a real and substantial connection to establish a presumptive

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[12] *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30 at para. 25, aff'g 2014 ONCA 497, aff'g 2013 ONSC 2289; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at paras. 22-24, aff'g (*sub nom. Van Breda v. Village Resorts Ltd.*) 2010 ONCA 84, aff'g [2008] O.J. No. 2624 (S.C.J.); *Society of Composers, Authors and Music Publishers of Canada v. Canadian Assn. of Internet Providers*, 2004 SCC 45 at para. 60; *Tolofson v. Jensen*, [1994] 3 S.C.R. 1022, at p. 1049; *Hunt v. T&N plc*, [1993] 4 S.C.R. 289 at pp. 325-26 and 328; *Morguard Investments Ltd. v. De Savoye*, [1990] 3 S.C.R. 1077, at pp. 1108-10.

[13] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17, aff'g (*sub nom. Van Breda v. Village Resorts Ltd.*) 2010 ONCA 84 (C.A.), aff'g [2008] O.J. No. 2624 (S.C.J.); *Schreiber v. Mulroney* (2007), 88 O.R. (3d) 605 (S.C.J.); *Muscutt v. Courcelles* (2002), 60 O.R. (3d) 20 (C.A.).

[14] *Haaretz.com v. Goldhar*, 2018 SCC 28 at paras. 26–32; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 26 , aff'g (*sub nom. Van Breda v. Village Resorts*) 2010 ONCA 84, aff'g [2008] O.J. No. 2624 (S.C.J.).

[15] 2012 SCC 17 , aff'g (*sub nom. Van Breda v. Village Resorts*) 2010 ONCA 84, aff'g [2008] O.J. No. 2624 (S.C.J.).

[16] *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at paras. 91–92 , aff'g (*sub nom. Van Breda v. Village Resorts*), 2010 ONCA 84, aff'g [2008] O.J. No. 2624 (S.C.J.).

factor or to support the assertion of jurisdiction over the foreign party.[17]

[165] If a presumptive connection (established or newly established) applies, the connection can be rebutted by the defendant through evidence that the connection is weak.[18] The ability to rebut the presumption of jurisdiction serves as an important check on a court overreaching and assuming jurisdiction. The burden of rebutting the presumption of jurisdiction rests on the defendant. In order to rebut the presumption, the defendant must demonstrate that the relationship between the forum and the subject matter of the litigation is such that it would not be reasonable to expect that the defendant would be called to answer proceedings in that forum.[19]

[166] In *Éditions Écosociété Inc. v. Banro Corp.*[20] and *Goldhar v. Haaretz.com*,[21] which were defamation actions, the absence of substantial publication in the province was insufficient to rebut the presumption of jurisdiction *simpliciter* that could be grounded even with a small number of readers in the jurisdiction.

[167] In *Club Resorts Ltd. v. Van Breda*, the Supreme Court of Canada identified four non-exhaustive presumptive connecting factors for a tort claim: (a) the defendant is domiciled or resident in the province; (b) the defendant carries on business in in the province, with the qualification that the business must have an actual and not a virtual presence; (c) there is a contract made in the province connected to the dispute; and (d) the *situs* of the tort is in the province.[22]

[168] Whether the defendant is carrying on business in the province is a question of fact, and the court will examine whether the defendant has a physical presence in the jurisdiction accompanied by a degree of sustained business activity.[23] Each case involving whether a defendant is carrying on business in Ontario or has a connection to Ontario must be considered on its unique facts.[24]

[169] In *Club Resorts Ltd. v. Van Breda*, at paragraph 87, Justice LeBel stated:

> Carrying on business in the jurisdiction may also be considered an appropriate connecting factor. But considering it to be one may raise more difficult issues. Resolving those issues may require some caution in order to avoid creating what would amount to forms of universal jurisdiction in respect of tort claims arising out of certain categories of business or commercial activity. Active advertising in the jurisdiction or, for example, the fact that a Web site can be accessed from the jurisdiction would not suffice to establish that the defendant is carrying on business there. The notion of carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there or regularly visiting the territory of the particular jurisdiction. But the Court has not been asked in this appeal to decide whether and, if so, when e-trade in the

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[17] *Export Packers Co. v. SPI International Transportation*, 2012 ONCA 481 at para. 18–23.
[18] *Purolator Canada Inc. v. Canada Council of Teamsters*, 2022 ONSC 5009; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at paras. 95–98, aff'g (*sub nom. Van Breda v. Village Resorts*), 2010 ONCA 84, aff'g [2008] O.J. No. 2624 (S.C.J.).
[19] *Haaretz.com v. Goldhar*, 2018 SCC 28 at para. 43; *Club Resorts Ltd. v. Van Breda,* , 2012 SCC 17 at paras. 81, 97, aff'g (*sub nom. Van Breda v. Village Resorts*), 2010 ONCA 84, aff'g [2008] O.J. No. 2624 (S.C.J.).
[20] 2012 SCC 18.
[21] 2016 ONCA 515 (C.A.), aff'g 2015 ONSC 1128, rev'd on other grounds, 2018 SCC 28.
[22] *Ontario v. Rothmans Inc.*, 2013 ONCA 353 at paras. 31–52, leave to appeal refused [2013] S.C.C.A. No. 327; *Club Resorts Ltd. v. Van Breda*), 2012 SCC 17 at para. 90, aff'g (s*ub nom. Van Breda v. Village Resorts*), 2010 ONCA 84, aff'g [2008] O.J. No. 2624 (S.C.J.).
[23] *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, 2021 SCC 44; *Chevron Corp. v. Yaiguaje*, 2015 SCC 42at para. 85; *Club Resorts Ltd. v. Van Breda*, 2012 SCC 17 at para. 87.
[24] *Beijing Hehe Fengye Investment Co. Limited v. Fasken Martineau Dumoulin LLP*, 2020 ONSC 934; *Stuart Budd & Sons Ltd. v. IFS Vehicle Distributors ULC*, 2016 ONCA 977; *Yaiguaje v. Chevron Corp.*, 2015 SCC 42; *582556 Alberta Inc. v. Canadian Royalties Inc*., 2008 ONCA 58.

> jurisdiction would amount to a presence in the jurisdiction. With these reservations, "carrying on business" within the meaning of rule 17.02(p) may be an appropriate connecting factor.

[170] In *Yaiguaje v. Chevron Corp.*,[25] at para. 85, Justice Gascon stated:

> Whether a corporation is "carrying on business" in the province is a question of fact… [T]he court must inquire into whether the company has "some direct or indirect presence in the state asserting jurisdiction, accompanied by a degree of business activity which is sustained for a period of time"… These factors are and always have been compelling indicia of corporate presence… [T]he common law has consistently found the maintenance of physical business premises to be a compelling jurisdictional factor: LeBel J. accepted this in *Van Breda* when he held that "carrying on business requires some form of actual, not only virtual, presence in the jurisdiction, such as maintaining an office there"…

[171] In *H.M.B. Holdings Ltd. v. Antigua and Barbuda*,[26] the Supreme Court of Canada adopted the test from the English Court of Appeal in *Adams v. Cape Industries Plc*[27] that for a foreign defendant to be carrying on business in a jurisdiction it must either: (a) have established and maintained at its own expense a fixed place of business for more than a minimal period of time and carried on business in that place by its servants or agents; or (b) have a representative for more than a minimal period of time carry on the foreign defendant's business at a fixed place of business in the jurisdiction. In cases involving a representative, it will be necessary to investigate whether the representative is doing no more than carrying on its own business and that investigation will necessitate a rigorous examination of all aspects of the relationship between the foreign defendant and the person said to be its representative in the jurisdiction.

[172] In determining whether the representative has been carrying on the foreign defendant's business or just its own business the following non-exhaustive list of questions may be relevant: (a) Was the fixed place of business originally acquired for the purpose of enabling the representative to act on behalf of the foreign defendant? (b) Did the foreign defendant reimburse the representative for the cost of the fixed place of business and the cost of staff? (c) Did the foreign defendant contribute to the financing of the representatives business? (d) Was the representative remunerated for its work? (e) Did the foreign defendant exercise any control over the business conducted by the representative? (f) Did the representative designate some of its staff to conducting the business of the foreign defendant? (g) Did the representative display the foreign defendant's name at the fixed place of business or in other ways? (h) Did the representative identify itself as a representative of the foreign defendant? (i) What were the representatives own exclusive businesses? (j) Did the representative make contact with customers or other third parties in the name of the foreign defendant; and (k) Did the representative have specific authority to bind the foreign defendant to contracts?[28]

[173] To determine whether a contract establishes a presumptive connecting factor, the first step is to characterize the dispute and the second step is to determine whether there is a contract made in the province that is connected with that dispute.[29]

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[25] 2015 SCC 42.
[26] 2021 SCC 44.
[27] [1990] 1 Ch 433 (C.A.).
[28] *H.M.B. Holdings Ltd. v. Antigua and Barbuda*, 2021 SCC 44; *Adams v. Cape Industries Plc* [1990] 1 Ch 433 (C.A.).
[29] *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*, 2016 SCC 30 , aff'g 2014 ONCA 497, aff'g 2013 ONSC 2289.

[174] A tort occurs in the jurisdiction substantially affected by the defendant's activities or its consequences or where the important elements of the tort occurred.[30] For example, the torts of fraudulent or negligent misrepresentation occur where the misinformation is received or acted upon.[31] In determining the situs of a tort for jurisdictional purposes, the Court adopts a flexible and pragmatic approach to consider whether the jurisdiction was substantially affected by the defendants' activities, or its consequences or where the important elements of the alleged torts occurred. Whether all the elements required to complete the alleged tort occurred in the jurisdiction is not determinative.[32]

[175] In *Goldhar v. Haaretz.com*,[33] an Ontario resident who owned a soccer club in Israel brought a defamation action with respect to the English language version of an Israeli newspaper published on the Internet. The court held that the presumption that the Ontario court had jurisdiction *simpliciter* was not rebutted by evidence that no more than 300 people in Canada accessed the allegedly defamatory article on-line.

2. Consent Based Jurisdiction

[176] In the immediate case there is no consent-based jurisdiction. There has been no voluntary submission, prior agreement, or attornment by appearance and defence.

[177] In the last regard, there is no merit to Class Counsel's regrettable argument that the Defendants attorned by proceeding to defend the Certification Motion at the same time as they brought the Ragoonanan Motion and the Jurisdiction Motion. The argument is regrettable because this arrangement was for the Plaintiffs' benefit so as to not delay the Certification Motion. On January 4, 2021, at a case management conference, I directed the Ragoonanan Motion and the Jurisdiction Motion to be heard at the same time as the Certification Motion. On January 19, 2021, Class Counsel confirmed, in writing, that they would not make an attornment argument. Class Counsel did themselves no credit in advancing this flaccid and unsuccessful attornment argument.

3. Carrying on Business in Ontario

[178] In addressing the Jurisdiction Motion from a legal perspective and in addressing the matter of assumed jurisdiction, the first point to note is that the OHL and its teams, including its three American teams, are not amongst the moving parties. The OHL, its teams, and the CHL concede that Ontario has jurisdiction *simpliciter*.

[179] In addressing the Jurisdiction Motion from a legal perspective, the second point to note has been foreshadowed in the Introduction and Overview and will be discussed in detail later in these Reasons for Decision. The second point is that there is no collective liability of any of the Defendants in the immediate case; a non-participant in a wrongdoing is not jointly or severally

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[30] *Das v. George Weston Limited*, 2017 ONSC 4129, affd. 2018 ONCA 1053, leave to appeal to S.C.C. refd.[2019] S.C.C.A. No. 69; *Central Sun Mining Inc. v. Vector Engineering Inc.*, 2013 ONCA 601; *Gulevich v. Miller*, 2015 ABCA 411.

[31] *Industrial Avante Monterrey, S.A. de C.V. v. 1147048 Ontario Ltd.*, 2016 ONSC 6004; *2249659 Ontario Ltd. v. Siegen*, 2013 ONCA 354 at para. 31; *Central Sun Mining Inc. v. Vector Engineering Inc.*, 2013 ONCA 601; *Cannon v. Funds for Canada Foundation*, 2010 ONSC 4517 at para. 52.

[32] *Yip v. HSBC Holdings plc*, 2017 ONSC 5332 at para. 207, aff'd. 2018 ONCA 626, leave to appeal to S.C.C. refused [2018] S.C.C.A. No. 41; *Airia Brands Inc. v. Air Canada*, 2017 ONCA 792 at para. 112.

[33] 2015 ONSC 1128, aff'd 2016 ONCA 515, rev'd on *forum non conveniens* grounds 2018 SCC 28.

liable for the wrongdoing. In the immediate case, a Defendant's liability is based on their participation in the wrongdoing not on their unincorporated association with the wrongdoers in Ontario. In the immediate case, jurisdiction *simpliciter* is not established by any collective liability because there is no collective liability.

[180] In addressing the Jurisdiction Motion from a legal perspective, the third point to note is that from time to time in the past teams from Ontario were members of the WHL (Thunder Bay is the example) or of the QMJHL (Cornwall is the example). This is some small indication that the WHL and the QMJHL have from time to time had teams carrying on business in all respects in Ontario. Another small indication is that from time to time the Memorial Cup Tournament is hosted by Ontario.

[181] These preliminary or minor points aside, for the Jurisdiction Motion, I agree with the Plaintiffs that there is jurisdiction *simpliciter* based on assumed jurisdiction because all the Defendants carry on business in Ontario.

[182] The explanation of why Ontario has jurisdiction because the WHL, the QMJHL and their teams carry on business in Ontario may begin by noting that the business of a team of the WHL, the OHL, and the QMJHL is a complex business operation that trains athletes, creates local sport contests, and through radio, television, and internet media, the business creates sports entertainment across the country. The hockey business of the WHL, OHL, and QMJHL also acts to make hockey players suitable for professional hockey careers. The teams have been regarded as "farm teams" cultivating players for the AHL, the NHL, and other professional hockey leagues. The putative Class Members are both subjects and objects of and for the hockey teams business. The businesses of the teams, some of which do it for profit, involve far more than just selling tickets to spectators at hockey arenas. The business of a team of the WHL, the OHL, and the QMJHL is far more than just organizing hockey games in a local arena. The leagues and the teams operate their businesses far beyond their provincial locality; the teams have a national presence.

[183] The explanation of why Ontario has jurisdiction to resolve disputes about a team of the WHL or of the QMJHL's business begins by asking how would a team of the WHL or the QMJHL carry on its complex business in Ontario. By asking how a team whose homebase is outside would carry on its business in Ontario affords a means of determining whether the 40 teams of the WHL and the QMJHL did in fact carry on business in Ontario, which as the case law reveals is a very fact specific inquiry.

[184] The answer to the question of how a team of the WHL or the QMJHL would carry on business is that the team would open an office in Ontario (perhaps, like the CHL, the office would have a staff of 20 employees) and the team's management would direct the employees of that office to carry on the team's non-ice business activities, which is to say that the staff would be directed to carry out the team's extensive business activities, other than its on-ice operations. To carry out the team's extensive business activities, management would direct the employees in the Ontario office: (a) to contract with one or more third-party broadcasters to broadcast the team's games via television, live streaming, video on demand, or any other media platform (broadcast agreements); (b) to hold onto the broadcast footage to derive income from that content; (c) to contract with the NHL, Hockey Canada, U.S.A. Hockey, and any other organization in furtherance of the team's production, promotion, and hockey operations; (d) to contract with third parties with a view to exploiting intellectual property and other intangible rights of the team including transferring, assigning, selling or otherwise conveying any tangible or intangible assets held by

the team; (e) to contract with third parties for the promotion of hockey through marketing, licensing, sponsorship, and other activities; (f) to contract with third parties to exploit team symbols, including team marks, logos, and colours; (g) to contract with third parties to exploit player promotional rights; (h) to contract with third parties to derive revenues from, enhancing the value of, and protecting the intellectual property and other intangible assets of the team; and (i) to arrange for legal and other consulting services to carry out the on-ice and the non-ice activities.

[185] In other words, to carry on its business in Ontario, the team would open up an office in Ontario and direct the employees to carry out the activities performed by the CHL under its Constitution. Carrying on business of a hockey team of the WHL or the QMJHL (and the OHL for that matter) in Ontario is to set up an office in Ontario to derive revenues from doing what the CHL is set up to do under its Constitution as an agent for the teams of the WHL, OHL, or QMJHL by producing, marketing and promoting hockey through broadcasting games, (from which the team would also derive revenue from local ticket sales) and then marketing, licensing, sponsoring, and engaging in other activities to derive income from the hockey games.

[186] As happens to be the case, the teams and leagues that founded the CHL exercise considerable control and rely on the CHL's activities to carry on their own affairs. By levy of the membership, the members of the CHL, if necessary, underwrite the expenses of the operation of the CHL and the revenues garnered by CHL for the teams are held in trust and then remitted to the teams. Upon analysis, it appears that the CHL is nothing more than an outsourcing of business activities that are necessary for the teams of the WHL, OHL, or QMJHL to conduct in Ontario. The CHL is located in Ontario and it is through the CHL that the teams of the WHL and the QMJHL carry on business in Ontario.

[187] In the immediate case the supermajority, if not all, of the questions taken from *H.M.B. Holdings Ltd. v. Antigua and Barbuda* and *Adams v. Cape Industries Plc*, noted above, about whether the CHL is the representative carrying on the businesses of the WHL and QMJHL teams in Ontario establish that the forty teams and their leagues are indeed carrying on business in Ontario.

[188] It was nonsensical of the Defendants to submit that these activities of selling broadcast rights, sponsorships, selling media property, and entering into advertising contracts *etc.* are "limited business activities." Hockey played at the level of the WHL, OHL, and QMJHL is a multi-million dollar business. It is nonsensical and incorrect to argue that the teams of the WHL and QMJHL are not carrying on business in Ontario. Through the CHL each team is carrying on business in Ontario. The team's agent, the CHL, just as the team's employees would also be agents of the team, has an office in Toronto and that office is carrying on the extensive non-ice business of the team; there is a multi-million dollar business being run out of Ontario.

[189] I conclude that there is jurisdiction *simpliciter* because the teams of the WHL and the QMJHL carry on business in Ontario.

4. A Contract Connected to the Dispute in Ontario

[190] Turning now to the presumptive connecting factor of a contract connected to the dispute in Ontario, I agree with the Defendants' argument that the choice of forum provisions in the standard form player agreements of the WHL and QMJHL are not a means to establish a real and substantial connection with Ontario. But that is just a strawman argument, because the connecting contract

that is relevant to the immediate case is the totality of the Constitution of the CHL. I agree with Messrs. Carcillo, Taylor, and Quirk's argument that the Defendants have a real and substantial connection to Ontario because the Defendants are parties to the CHL's Constitution.

[191] To be clear, at the outset, it is not because the CHL's Constitution has an attornment clause that there is a real and substantial connection to Ontario. The connecting factor is the totality of the CHL's Constitution, which is a contract made and largely performed in Ontario. Article 25.1 of the CHL's Constitution states:

> 25.1 This Constitution shall be governed and construed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable in the Province of Ontario and shall be treated in all respects as an Ontario contract. Each of the parties hereto irrevocably attorns to the jurisdiction of the courts of the Province of Ontario.

Article 25.1 is just an aspect of why in the immediate case, there is a contract connected to the dispute.

[192] The CHL's Constitution is a unanimous member agreement, which is expressly made a contract that is governed in accordance with the laws of the Province of Ontario and the federal laws of Canada applicable in the Province of Ontario. The contract was made in Ontario. Two of the contracting parties, the OHL and the CHL are located in Ontario. As was described above the teams of the WHL, OHL, and QMJHL carry on business in Ontario through the Constitution of the CHL. The CHL acts as an agent for the business activities of the WHL, OHL, and QMJHL. The CHL provides services to the WHL, OHL, and QMJHL.

[193] The CHL's Constitution is a contract closely connected to the systemic negligence that is at the heart of the proposed class action. The mission of the CHL espoused in its Constitution is to benefit the players of the teams including ensuring their safety and well-being. The CHL, through its constitution, plays a fundamental role in developing policies and programs that are relevant to the systemic negligence claim being advanced by Messrs. Carcillo, Taylor, and Quirk.

[194] Although the hazing, bullying, harassment, and assaults involving the WHL and the QMJHL did not occur in Ontario, the CHL's Constitution is closely connected to each putative Class Member's causes of action because it is relevant to the issues of: (a) whether the particular team had a duty of care, as it was directed to have under the Constitution; (b) what was the standard of care; and (c) whether the standard of care was breached.

[195] The leading case about a contract connected to a dispute in the province is *Lapointe Rosenstein Marchand Melançon LLP v. Cassels Brock & Blackwell LLP*.[34] For present purposes, in the *Lapointe* case, the relevant facts were that the defendant *Cassels Brock* was legal counsel for the Canadian Automobile Association during the 2008 financial crisis that threatened the extinction of the Canadian automobile industry. During the crisis, car manufacturer GM Canada closed 200 automobile dealerships across the country. It offered the dealers compensation pursuant to Wind-Down Agreements that were conditional on acceptance by all the dealers or the waiver of the threshold condition. The Wind-Down Agreements were expressed to be made and governed by the law of Ontario. The Wind-Down Agreement required the dealers to acknowledge that they had obtained independent legal advice before accepting the agreement. After accepting the Wind-Down Agreements, two hundred and seven GM Canada dealers started a class action against GM Canada in Ontario, alleging that GM Canada had forced them to sign the Wind-Down Agreements

[34] 2016 SCC 30.

in breach of provincial franchise laws. The Class Members also alleged that Cassels Brock & Blackwell LLP was negligent in the legal advice it gave to the General Motors dealers who were members of the Canadian Automobile Dealers Association and, therefore, had access to that legal advice that the firm had given to its client, the Association.

[196] In the class action, Cassels Brock brought third party claims against 67 Ontario law firms, thirty-two Québec law firms, and nineteen Alberta law firms claiming contribution and indemnity because these firms had provided independent legal advice to their dealer clients with respect to the Wind-Down Agreements. The Québec law firms, but not the other non-Ontario law firms, moved to have the third party claims stayed on the grounds that Ontario did not have subject matter jurisdiction over them as defendants outside of Ontario. The courts below and the Supreme Court of Canada disagreed.

[197] For present purposes, the pertinent points to note from *Lapointe* is that it directs that the first step in analyzing whether a contract is connected to the dispute is to identify the dispute and the second step is to analyze whether a contract with that dispute was made in Ontario. The unstated third step is to analyze how significant or substantial or relevant is the contract's connection to the dispute. In the immediate case, this analysis has been performed above, and that analysis reveals the centrality of the CHL's constitution to the claims being advance in the immediate case.

[198] There is no doubt that the putative Class Members are not contracting parties of the CHL's Constitution, but they are a subject and an object of the Constitution as manifested by the CHL's mission statement. In a real sense the players are amongst the third party beneficiaries of that contract. There are numerous provisions of the CHL's Constitution designed to be in the best interests of the players of the sixty teams which did sign the Constitution. There are numerous provisions of the contract that are relevant to the duty of care and standard of care.

[199] There is no doubt that the performance or non-performance of CHL's constitution is not comprehensive of the source of the harms suffered by the putative Class Members, but nevertheless, the *Lapointe* case confirms that the defendant's liability does not have to flow immediately from the connecting contract or that the plaintiff be a contracting party to the connecting contract. Justice Abella for the majority of the court (McLachlin C.J. and Cromwell, Karakatsanis, Wagner and Gascon JJ. concurring, Côté J. dissenting) stated at paragraph 44 of her judgment:

> 44. […] Nor does *Van Breda* limit this factor to situations where the defendant's liability flows immediately from his or her contractual obligations or require that the defendant be a party to the contract: […] It is sufficient that the dispute be "connected" to a contract made in the province or territory where jurisdiction is proposed to be assumed: *Van Breda*, at para. 117. This merely requires that a defendant's conduct brings him or her within the scope of the contractual relationship and that the events that give rise to the claim flow from the relationship created by the contract: paras. 116-17.

[200] In the immediate case, the putative Class Members are within the scope of the contractual relationship and the CHL's constitution is closely connected with the underlying causes of action being advanced in the immediate case. This connection is not a light connection, and it has not been rebutted by the evidence submitted on the Jurisdiction Motion or on the Certification Motion.

[201] I conclude that there is jurisdiction *simpliciter* because there is a contract in Ontario substantially connected to the dispute.

5. A Tort Committed in Ontario

[202] Turning now to the situs of the tort as a presumptive connecting factor that would establish jurisdiction *simpliciter* in the immediate case.

[203] Although for the putative Class Members of the WHL and the QMJHL suffered the "abuse" outside of Ontario, it is arguable that aspects of their tort claims were connected to acts or omissions that are connected to Ontario. There is also the possibility that in some individual cases, possibly when a team was participating in a tournament in Ontario, that all of the elements of the tort were connected to Ontario.

[204] As noted above, in determining the *situs* of a tort for jurisdictional purposes, the Court adopts a flexible and pragmatic approach to consider whether the jurisdiction was substantially affected by the defendants' activities, or its consequences or where the important elements of the alleged torts occurred. Whether all the elements required to complete the alleged tort occurred in the jurisdiction is not determinative. While I appreciate that a court's pragmatism cannot afford it jurisdiction, what I understand is that to assume jurisdiction, a court should not shirk assuming jurisdiction when significant aspects of the tortious conduct are connected to Ontario. It may turn out that after assuming jurisdiction, Ontario is not the *forum conveniens* but that is a different discretionary determination to be made after the court determines whether it can assume jurisdiction. In my opinion, pragmatically speaking, there is enough of a connection between the systemic negligence claim that in my opinion, the Ontario court ought to assume jurisdiction. I have already described above the presumptive connection between the Defendants by reason of their carrying on business in Ontario and by reason of the CHL's constitution and these factors bolster the circumstances that aspects of the misconduct occurred in Ontario.

[205] I conclude that there is jurisdiction *simpliciter* because elements of the tortious misconduct are connected to Ontario.

[206] It is for the above reasons, that I dismiss the Jurisdiction Motion.

[207] This court has jurisdiction to determine the Certification Motion. And this court has the jurisdiction to establish opt-in joinder actions that I am directing pursuant to sections 7, 12, and 25 of the *Class Proceedings Act, 1992*.

H. Certification: General Principles

[208] The court has no discretion and is required to certify an action as a class proceeding when 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.

[209] 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.[35] The test for certification is to be applied in a purposive and generous manner, to give effect to the goals of class actions; namely: (1) to provide access to justice for litigants; (2) to encourage behaviour modification; and (3) to promote the efficient use of judicial resources.[36] That said, in *Pro-Sys Consultants Ltd v. Microsoft Corp.*,[37] the Supreme Court of Canada stated that although not a merits determination, certification was meant to be a meaningful screening device, that does not "involve such a superficial level of analysis into the sufficiency of the evidence that it would amount to nothing more than symbolic scrutiny".

[210] For certification, the plaintiff in a proposed class proceeding must show "some basis in fact" for each of the certification requirements, other than the requirement that the pleading discloses a cause of action.[38] The some-basis-in-fact standard sets a low evidentiary standard for plaintiffs, and a court should not resolve conflicting facts and evidence at the certification stage or opine on the strengths of the plaintiff's case.[39] In particular, there must be a basis in the evidence to establish the existence of common issues.[40] 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.[41]

[211] The some-basis-in-fact standard does not require evidence on a balance of probabilities and does not require that the court resolve conflicting facts and evidence at the certification stage and rather reflects the fact that at the certification stage the court is ill-equipped to resolve conflicts in the evidence or to engage in the finely calibrated assessments of evidentiary weight and that the certification stage does not involve an assessment of the merits of the claim and is not intended to be a pronouncement on the viability or strength of the action.[42]

[212] Although it has recently garnered renewed attention, it has been for a long time, and it continues to be a fundamental principle that for an action to be certified as a class proceeding there must be some evidence that two of more putative Class Members suffered compensatory harm.[43]

I. Cause of Action Criterion: General Principles

[213] The first criterion for certification is that the plaintiff's pleading discloses a cause of action.

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[35] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 16.
[36] *Hollick v. Toronto (City)*, 2001 SCC 68 at paras. 15 and 16; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 26 to 29.
[37] *Pro-Sys Consultants Ltd v. Microsoft Corp*., 2013 SCC 57 at para. 103.
[38] *Hollick v. Toronto* (City), [2001] 3 S.C.R. 158 at para. 25; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at paras. 99-105; *Taub v. Manufacturers Life Insurance Co*., (1998) 40 O.R. (3d) 379 (Gen. Div.), aff'd (1999), 42 O.R. (3d) 576 (Div. Ct.).
[39] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *McCracken v. CNR Co*., 2012 ONCA 445.
[40] *Singer v. Schering-Plough Canada Inc*., 2010 ONSC 42 at para. 140; *Fresco v. Canadian Imperial Bank of Commerce*, [2009] O.J. No. 2531 at para. 21 (S.C.J.); *Dumoulin v. Ontario*, [2005] O.J. No. 3961 at para. 25 (S.C.J.).
[41] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 110.
[42] *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 102.
[43] *Marcinkiewicz v. General Motors of Canada Co*., 2022 ONSC 2180; *MacKinnon v. Volkswagen*, 2021 ONSC 5941; *Maginnis v. FCA Canada Inc* 2021 ONSC 3897 (Div. Ct.), aff'g 2021 ONSC 3897, leave to appeal dismissed April 8, 2022 (C.A.); *Setoguchi v. Uber B.V.*, 2021 ABQB 18; *Atlantic Lottery Corp Inc. v. Babstock*, 2020 SCC 19; *Richardson v. Samsung Electronics Canada Inc.*, 2018 ONSC 6130, aff'd 2019 ONSC 6845 (Div. Ct.); *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42.

[214] The "plain and obvious" test for disclosing a cause of action from *Hunt v. Carey Canada*,[44] 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*.[45] The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. 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.[46]

[215] In *R. v. Imperial Tobacco Canada Ltd.*,[47] the Supreme Court of Canada noted that although the tool of a motion to strike for failure to disclose a reasonable cause of action must be used with considerable care, it is a valuable tool because it promotes judicial efficiency by removing claims that have no reasonable prospect of success and it promotes correct results by allowing judges to focus their attention on claims with a reasonable chance of success. Chief Justice McLachlin stated:

> Valuable as it is, the motion to strike is a tool that must be used with care. The law is not static and unchanging. Actions that yesterday were deemed hopeless may tomorrow succeed. Before *McAlister (Donoghue) v. Stevenson*, [1932] A.C. 562 (U.K. H.L.) introduced a general duty of care to one's neighbor premised on foreseeability, few would have predicted that, absent a contractual relationship, a bottling company could be held liable for physical injury and emotional trauma resulting from a snail in a bottle of ginger beer. Before *Hedley Byrne & Co. v. Heller & Partners Ltd*., [1963] 2 All E.R. 575 (U.K. H.L.), a tort action for negligent misstatement would have been regarded as incapable of success. The history of our law reveals that often new developments in the law first surface on motions to strike or similar preliminary motions, like the one at issue in *McAlister (Donoghue) v. Stevenson*. Therefore, on a motion to strike, it is not determinative that the law has not yet recognized the particular claim. The court must rather ask whether, assuming the facts pleaded are true, there is a reasonable prospect that the claim will succeed. The approach must be generous and err on the side of permitting a novel but arguable claim to proceed to trial.

[216] In *Atlantic Lottery Corp. Inc. v. Babstock*,[48] the Supreme Court stated that the test applicable on a motion to strike is a high standard that calls on courts to read the claim as generously as possible because cases should, if possible, be disposed of on their merits based on the concrete evidence presented before judges at trial. However, Justice Brown stated that it is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, including novel claims, which are doomed to fail be disposed of at an early stage in the proceedings.[49]

[217] 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

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[44] [1990] 2 S.C.R. 959.
[45] *Wright v. Horizons ETFS Management (Canada) Inc*., 2020 ONCA 337 at para. 57; *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572; *Hollick v. Metropolitan Toronto (Municipality)*, 2001 SCC 68.
[46] *176560 Ontario Ltd. v. Great Atlantic & Pacific Co. of Canada Ltd.* (2002), 62 O.R. (3d) 535 at para. 19 (S.C.J.), leave to appeal granted, 64 O.R. (3d) 42 (S.C.J.), aff'd (2004), 70 O.R. (3d) 182 (Div. Ct.); *Anderson v. Wilson* (1999), 44 O.R. (3d) 673 at p. 679 (C.A.), leave to appeal to S.C.C. ref'd, [1999] S.C.C.A. No. 476.
[47] 2011 SCC 42 at paras. 17-25.
[48] 2020 SCC 19 at para. 87–88.
[49] *Atlantic Lottery Corp. Inc. v. Babstock*, 2020 SCC 19 at para. 19.

succeed.[50]

[218] Bare allegations and conclusory legal statements based on assumption or speculation are not material facts; they are incapable of proof and, therefore, they are not assumed to be true for the purposes of a motion to determine whether a legally viable cause of action has been pleaded.[51]

[219] Matters of law that are not fully settled should not be disposed of on a motion to strike an action for not disclosing a reasonable cause of action,[52] and the court's power to strike a claim is exercised only in the clearest cases.[53] The law must be allowed to evolve, and the novelty of a claim will not militate against a plaintiff.[54] However, a novel claim must have some elements of a cause of action recognized in law and be a reasonably logical and arguable extension of established law.[55] In the Ontario Court of Appeal's decision in *Darmar Farms Inc. v. Syngenta Canada Inc.*,[56] Justice Zarnett stated:

> The fact that a claim is novel is not a sufficient reason to strike it. But the fact that a claim is novel is also not a sufficient reason to allow it to proceed; a novel claim must also be arguable. There must be a reasonable prospect that the claim will succeed.

[220] A principle associated with the cause of action criterion of a certification motion that will be particular important in the circumstances of the immediate case, is the principle that the plaintiffs must establish that the remedies they seek for their pleaded causes of action are available to them, assuming the truth of their pleadings.[57]

J. Cause of Action Criterion

[221] Messrs. Carcillo, Taylor, and Quirk advance four branches of joint and several liability against the collective of the CHL, WHL, OHL, QMJHL and their 60 teams, namely: (a) breach of fiduciary duty; (b) systemic negligence; (c) vicarious liability; and (d) breach of Québec causes of action.

[222] The following discussion of these cause of actions has one preliminary point and eight analytical branches.

[223] The preliminary point is that the 78 Defendants (the CHL, WHL, QMJHL, and the 60 teams) are discrete suable entities; visualize the leagues and the teams are each entities capable of

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[50] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 41 (C.A.), 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.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 25; *Abdool v. Anaheim Management Ltd.* (1995), 21 O.R. (3d) 453 at p. 469 (Div. Ct.).
[51] *Deluca v. Canada (AG)*, 2016 ONSC 3865; *Losier v. Mackay, Mackay & Peters Ltd.*, [2009] O.J. No. 3463 at paras. 39-40 (S.C.J.), aff'd 2010 ONCA 613, leave to appeal ref'd [2010] SCCA 438; *Grenon v. Canada Revenue Agency*, 2016 ABQB 260 at para. 32; *Merchant Law Group v. Canada Revenue Agency*, 2010 FCA 184 at para. 34.
[52] *Dawson v. Rexcraft Storage & Warehouse Inc.* (1998), 164 D.L.R. (4th) 257 (Ont. C.A.).
[53] *Temelini v. Ontario Provincial Police (Commissioner)* (1990), 73 O.R. (2d) 664 (C.A.).
[54] *Johnson v. Adamson* (1981), 34 O.R. (2d) 236 (C.A.), leave to appeal to the S.C.C. refused (1982), 35 O.R. (2d) 64n.
[55] *Silver v. Imax Corp.*, [2009] O.J. No. 5585 (S.C.J.) at para. 20; *Silver v. DDJ Canadian High Yield Fund*, [2006] O.J. No. 2503 (S.C.J.).
[56] *Darmar Farms Inc. v. Syngenta Canada Inc.*, 2019 ONCA 789 at para. 51.
[57] *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307, aff'g 2020 BSCS 1781; *Atlantic Lottery Corp Inc. v. Babstock*, 2020 SCC 19 at para. 49.

being sued separately.[58]

[224] The first analytical branch analyzes the Class Members claim for breach of fiduciary duty. To foreshadow the outcome of this analysis, it is that it is plain and obvious that there is no breach of fiduciary duty cause of action in the immediate case. The cause of action criterion is not satisfied with respect to the cause of action for breach of fiduciary duty. There is misconduct in the immediate case but it tortious misconduct and not fiduciary misconduct.

[225] The second, third, and fourth analytical branches of the cause of action analysis builds on the preliminary point. These branches analyse whether Messrs. Carcillo, Taylor, and Quirk satisfy the cause of action criterion for the three remaining causes of action as against the Defendants as separate entities; i.e., without attributing any collective liability.

[226] These analytical branches ask whether the 78 Defendants are discretely; i.e., as separate suable entities, possibly liable for: (a) systemic negligence, (b) vicarious liability, and, or (c) breaches of the Québec causes of action. To foreshadow the conclusion of these analytical branches, it is that the cause of action criterion is satisfied against the Defendants as separate entities; i.e., discretely, for systemic negligence, for vicarious liability, and or for breach of the Québec causes of action.

[227] Thus, for example, Mr. Carcillo has legally viable causes of action for systemic negligence and for vicarious liability against the Sarnia Sting with the OHL and the CHL as co-defendants. He also has legally viable causes of action against the Mississauga IceDogs with the OHL and the CHL as co-defendants.

[228] In other words, the Plaintiffs and each Putative Class Member satisfy the cause of action criterion against the particular team for whom he played, the league of that team, and against the CHL. As individuals, the putative Class Members have causes of action for: (a) systemic negligence, (b) vicarious liability (assault, sexual assault, battery, sexual battery, false imprisonment, and intentional infliction of emotional distress), and, or (c) breach of the Québec causes of action.

[229] To use Mr. Quirk as another example, as an individual claimant, he has at least two legally viable causes of action in two claims that ultimately would have to proceed as individual issues trials. One claim is against the Moncton Wildcats (formerly the Moncton Alpines), the QMJHL, and the CHL. The second claim is against the Halifax Mooseheads, the QMJHL, and the CHL. His causes of action are systemic negligence and vicarious liability. As a choice of law matter, which for present purposes I need not resolve, he may also have a claim for the Québec causes of action.

[230] The fifth, sixth, and seventh analytical branches of the cause of criterion analysis (The Collective Liability Causes of Actions, Parts I, II, and III) explain why there are no causes of action against the collective comprised of all of the Defendants. To foreshadow the conclusion of the analysis, the cause of action criterion is not satisfied for any collective liability.

[231] To use Mr. Quirk as an example, while he has viable claims against the Moncton Wildcats, the Halifax Mooseheads the QMJHL, and the CHL, he does not have claims against the WHL, the OHL, or any other hockey teams as a collective. There is no collective or concerted action liability

[58] Although for present purposes nothing turns on it, it is worth noting that business corporation's statutes have oppression remedy statutory causes of action. The *Canada Not-for-Profit Corporations Act* S.C. 2009, c. 23 has an oppression remedy. The Ontario *Not-for-Profit Corporations Act*, 2010, c. 15, s. 2 does not have an oppression remedy.

in the immediate case.

[232] The eighth analytical branch addresses the matter of American law. Although raised as a preferable procedure issue, it is convenient to deal with the matter of the application of foreign law as a part of the discussion of the cause of action criterion.

1. Breach of Fiduciary Duty

[233] The elements of a claim for breach of fiduciary duty are: (1) a fiduciary relationship: (2) a fiduciary duty; and (3) breach of the fiduciary duty.[59]

[234] It is plain and obvious that Messrs. Carcillo, Taylor, and Quirk's breach of fiduciary duty claim does not establish a reasonable cause of action. In the immediate case, Messrs. Carcillo, Taylor, and Quirk have pleaded the material facts that could arguably ground an *ad hoc* fiduciary relationship as against individual teams, but they have not pleaded the material facts that would support the constituent elements of a fiduciary duty and a breach of fiduciary duty.

[235] The existence of trust and fiduciary duties requires a case-by-case analysis, and the court will analyze the trust and contract terms as well as the circumstances and nature of the relationship.[60] The scope of a trustee's or a fiduciary's duty arises within the scope of the engagement and the functions assumed by the trustee or fiduciary in a given case.[61]

[236] Fiduciary duties are not fixed or immutable. In *Canadian Aero Services Ltd. v. O'Malley*,[62] which is the leading case about the cause of action for breach of fiduciary duty, Justice Laskin, as he then was, said that cases about alleged breaches of fiduciary duty involved four issues: (1) the determination of whether the relationship is fiduciary; (2) the determination of the duties that arise from the particular relationship; (3) the determination of whether a particular duty has been breached; and (4) the determination of the extent of liability for the breach of the particular fiduciary duty. The extent or scope of a fiduciary's duty is not fixed or immutable but rather must be determined on a case-by-case basis.

[237] In *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [63] Justice La Forest observed that "the fiduciary obligation may vary in its specific substance depending on the relationship, though compendiously it can be described as the fiduciary duty of loyalty and will most often include the avoidance of a conflict of duty and interest and a duty not to profit at the expense of the fiduciary."

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[59] *Galambos v. Perez*, 2009 SCC 48 at para. 37; *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; Frame v. Smith, [1987] 2 S.C.R. 99; *Canadian Aero Services Ltd. v. O'Malley*, [1974] S.C.R. 592 at p. 616.

[60] *Weldon v. Teck Metals Ltd.*, 2012 BCSC 1386; *Bohemier v. Centra Gas Manitoba Inc*., [1999] 7 W.W.R. 507 (MB CA)

[61] *Raponi v. Olympia Trust Company*, 2022 ONSC 4481; *K.L.B. v. British Columbia*, 2003 SCC 51; *Froese v. Montreal Trust Co. of Canada*, [1996] 8 W.W.R. 35 at para. 46 (BCCA); *Hodginson v. Simms*, [1994] 3 S.C.R. 377; *McInerney v. MacDonald*, [1992] 2 S.C.R. 415; *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 3; *Canson Enterprises Ltd. v. Boughton & Co.*, [1991] 3 S.C.R. 534; *Lac Minerals Ltd. v. International Corona Resources Ltd.*, [1989] 2 S.C.R. 574; *Canadian Aero Services Ltd. v. O'Malley*, [1974] S.C.R. 592; *Re Coomber* [1911] 1 Ch. 723 (CA).

[62] [1974] S.C.R. 592 at p. 605.

[63] [1989] 2 S.C.R. 574 at p. 646.

[238] In *Canson Enterprises Ltd. v. Boughton & Co.*,[64] in *McInerney v. MacDonald*;[65] and in *M. (K.) v. M. (H.)*,[66] Justice La Forest stated that equity will impose on a fiduciary a range of obligations co-ordinate with the undertaking; fiduciary obligations are not uniform and are shaped by the demands of the situation. And in *Hodginson v. Simms*, [67] he stated:[68]

> However, while both negligent misrepresentation and breach of fiduciary duty arise in reliance-based relationships, the presence of loyalty, trust, and confidence distinguishes the fiduciary relationship from a relationship that simply gives rise to tortious liability. Thus, while a fiduciary obligation carries with it a duty of skill and competence, the special elements of trust, loyalty, and confidentiality that obtain in a fiduciary relationship give rise to a corresponding duty of loyalty.

[239] The nature or character of fiduciary duties is malleable, and the nature of the fiduciary duty must be analyzed on a case-by-case basis because it involves a particular quality that differentiates fiduciary duties from a fiduciary's concurrent other duties. Not every duty of a fiduciary is a fiduciary duty.[69] In *Girardet v. Crease & Co.*,[70] the plaintiff sued her lawyer for negligence in advising her to settle a personal injury claim. In *Girardet*, Justice Southin said that it was a perversion of words to say that simple carelessness in giving advice was a breach of fiduciary duty and that fiduciary misconduct must involve the particular quality of duties that the law imposes on fiduciaries.

[240] Fiduciary duties arising from relationships of discretionary power and trust impose obligations against "betrayal of trust or disloyalty". In *K.L.B. v British Columbia*,[71] Chief Justice McLachlin for the eight-judge majority declined to find a breach of fiduciary duty in a case about foster home abuses. The issue in *K.L.B. v. British Columbia* was when can a government be held liable for the tortious conduct of foster parents toward children whom the government has placed under their care. *K.L.B. v. British Columbia* was heard together with *M.B. v. British Columbia*,[72] and *E.D.G. v. Hammer*.[73] The Chief Justice found that there is good reason for not holding caregivers to a standard of acting in the best interests of the child. Rather, she said:

> [T]the [fiduciary] duty imposed is to act loyally, and not to put one's own or others' interests ahead of the child's in a manner that abuses the child's trust". [As a result] [n]egligence, even aggravated negligence, will not ground parental fiduciary liability unless it is associated with breach of trust in this sense.

[241] Applying these principles, the Chief Justice found there was no breach of fiduciary duty on the facts of the case; she stated at paragraph 50:

> 50. Returning to the facts of this case, there is no evidence that the government put its own interests ahead of those of the children or committed acts that harmed the children in a way that amounted to betrayal of trust or disloyalty. The worst that can be said of the Superintendent is that he, along with the social workers, failed properly to assess whether the children's needs and problems could be met in the designated foster homes; failed to discuss the limits of acceptable discipline with the foster

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[64] [1991] 3 S.C.R. 534 at p. 153.
[65] [1992] 2 S.C.R. 415 at para. 20
[66] [1992] S.C.R. 3 at p. 63; *P.B. v. W.B.* (1993), 11 O.R. (3d) 161 (Gen. Div.).
[67] [1994] 3 S.C.R. 377 at p. 405.
[68] [1994] 3 S.C.R. 377 at p. 405.
[69] *Chevron Canada Resources v Canada*, 2022 ABCA 108 at para. 69; *E.D.G. v. Hammer*, 2003 SCC 52.
[70] (1987), 11 B.C.L.R. (2d) 361 at p. 362 (S.C.).
[71] 2003 SCC 51.
[72] 2003 SCC 53.
[73] 2003 SCC 52.

> parents; and failed to conduct frequent visits to the homes given that they were overplaced and had a documented history of risk (trial judgment, at para. 74). The essence of the Superintendent's misconduct was negligence, not disloyalty or breach of trust. There is no suggestion that he was serving anyone's interest but that of the children. His fault was not disloyalty, but failure to take sufficient care.

[242] The same is true in the immediate case. The Class Members' claims are negligence based on disparate alleged failures of the various defendants to adopt or enforce policies, to train staff, and/or to report or investigate hazing, bullying, harassment, and assaults. The essence of the WHL's, OHL's, QMJHL's, and CHL's misconduct was not disloyalty, but it was a failure to take sufficient care and failure to prevent the misconduct of those for whom they are vicariously liable.

[243] I conclude that in the immediate case, it is plain and obvious that the Plaintiffs and the putative Class Members do not satisfy the cause of action criterion for a claim of breach of fiduciary duty.

2. Systemic Negligence

[244] As foreshadowed above, it is my conclusion that as individuals, the putative Class Members satisfy the cause of action criterion for systemic negligence as against the discrete team or teams for whom they were players. However, Messrs. Carcillo, Taylor, and Quirk do not have a viable systemic negligence cause of action against the collective of 60 teams and four leagues that comprise a collective of seventy-eight defendants.

[245] The systemic negligence in the immediate case is not against discrete teams. Messrs. Carcillo, Taylor, and Quirk's proposed class action is against the collective of 60 teams and four leagues that are said to be jointly and severally liable for the repugnant culture alleged to pervade amateur hockey. There is no immediately identifiable single institution that is accused of systemic negligence. The immediate case is thus unique and different from the typical systemic negligence class action where there is no doubt that the claim is being advanced against an identifiable institution operated by the defendant(s).

[246] For example, although there were more than 130 Indian Residential Schools, they all were operated under the auspices of the federal government with a religious order and taken together the residential schools constituted a singular enterprise operated with a singular albeit misguided premise of a forced assimilation of the aboriginal children into a different culture. There is no singular enterprise in the immediate case other than the Plaintiffs' conceit that the 60 teams and four leagues constitute an unincorporated association. The immediate case is about a toxic culture pervading the highest level of amateur hockey, but a toxic culture is not an institution and as the discussion below will reveal there is no viable systemic negligence action against the Plaintiffs' idea that the Defendants are a suable unincorporated association. As I will explain below, the collective of Defendants in the immediate case cannot be sued as if they constituted a single institution or enterprise that can be sued for systemic negligence. However, individually, the defendants, can be said to have institutions or enterprises for which they could be sued for systemic negligence.

[247] Although I do not agree that Messrs. Carcillo, Taylor and Quirk's use of the caselaw is indiscriminate, I do generally agree with what the Defendants assert in paragraph 201 of their Certification Motion factum, which states:

> [201] […] the plaintiffs rely indiscriminately on previously certified institutional wrongdoing class actions, without regard to material differences. Each of those cases discloses far more commonality than the immediate one. No case on which the plaintiffs rely combines the intrinsic variability and individuality of the alleged "Abuse" with the sheer breadth and scale of this proposed class action. Rather, those cases involve one institution, involve claims against a much narrower set of defendants, allege narrower forms of underlying abuse or fewer underlying tortfeasors, allege specific system-level wrongdoing or a defendant's intentional commissions of identifiable misconduct, or cover a much shorter class period—and many engage multiple of these differences, each material in itself.

[248] Only on a team-by-team basis, does the immediate case resemble *Rumley v. British Columbia*.[74] and other systemic negligence class actions. The Defendants concede that individual teams funded and condoned the rookie parties, and the other events where players were provided with intoxicants and where they perpetrated or participated in reprehensible acts. The Defendants concede that in so far as a particular specific team is concerned, the case at bar is analogous to the systemic negligence claim brought by the deaf and blind students of Jericho Hill School against British Columbia in *Rumley v. British Columbia*.[75]

[249] In *Rumley*, which I discuss again below in the context of the preferable procedure criterion, the class members sued the province of British Columbia for its failure from between 1950 and 1992 (42 years) to prevent a pervasive culture at the school that required students to submit to a sexual right of passage. Because of their physical handicaps, the students were susceptible to the development of a culture of abuse. The negligence of the province was systemic because the province failed to put into place procedures to deal with the abuse of staff on students and with the student-on-student abuse that was encouraged by the culture of the institution. The negligence was systemic, because it was not specific to any one victim but rather to the class of victims as a group.

[250] In *Rumley*, the allegation of systemic negligence created a common issue that satisfied the common issues criterion, even though no class member would be able to prevail without making an individual showing of injury and causation. Chief Justice McLachlin noted that assuming that the common issue was resolved in favour of the class, each class member would retain control over his or her individual action and his or her ultimate recovery would be determined by the outcome of the individual proceedings on injury and causation. There have been many cases that have followed *Rumley v. British Columbia* in certifying a systemic negligence institutional abuse class action.[76]

[251] I am satisfied that Messrs. Carcillo, Taylor, and Quirk have demonstrated that each putative Class Member has a legally plausible claim for systemic negligence against the player's own team, with the league of that team, and with the CHL as co-defendants.

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[74] 2001 SCC 69.
[75] 2001 SCC 69.
[76] *Nasogaluak v. Canada (Attorney General)*, 2021 FC 656 *Cavanaugh v. Grenville Christian College* 2020 ONSC 1133 aff'd 2021 ONCA 755; *Canada v. Greenwood*, 2021 FCA 186, leave to appeal refused, [2021] S.C.C.A. No. 377. *Francis v. Ontario*, 2020 ONSC 1644, aff'd 2021 ONCA 197; *Brazeau v. Attorney General (Canada)*, 2020 ONCA 184; *Reddock v. Canada (Attorney General)*, 2020 ONCA 184; *Weremy v. The Government of Manitoba*, 2020 MBQB 85; *Johnson v. Ontario*, 2016 ONSC 5314; *Ewert v. Canada (Attorney General)*, 2016 BCSC 962; *Davidson v Canada (Attorney General)*, 2015 ONSC 8008; *Seed v. Ontario*, 2012 ONSC 2681; *Slark (Litigation Guardian of) v Ontario*, 2010 ONSC 1726, leave to appeal to Div Ct ref'd, 2010 ONSC 613; *Dolmage v. Ontario*, 2010 ONSC 1726; *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.), leave to appeal to S.C.C. refused, [2005] S.C.C.A. No. 50.

[252] With respect to the co-defendants, I am satisfied that it is not plain and obvious that there is not a sufficiently proximate relationship to justify a co-defendant status as against the leagues associated with the team defendant. It may be the case that a trial judge would conclude that the leagues did not have a duty of care or did not breach the duty of care, but I cannot say at this juncture that the claim against the league is doomed to fail.

[253] The cause of action criterion would or could have been satisfied as against the 60 teams and the WHL, OHL, QMJHL, and CHL -severally- for systemic negligence. I am, however, also convinced that Messrs. Carcillo, Taylor, and Quirk and the putative Class Members do not have a viable systemic negligence against the collective of the Defendants. As foreshadowed in the introduction of these Reasons for Decision, and as explained in detail below, my conclusion is that there is no systemic negligence cause of action against the Defendants as a collective. Therefore, the Plaintiffs' class action – as proposed – does not satisfy the cause of action criterion.

3. Vicarious Liability

[254] Similarly, it is my conclusion that as individuals, the putative Class Members satisfy the cause of action criterion for vicarious liability as against the team for whom they were a player.

[255] The individual teams are vicariously liable for the misdeeds of their players, coaches, staff, employees, servants, and agents. In my opinion, the claim for vicarious liability also sounds against the league of the particular team and against the CHL as co-defendants.

[256] Vicarious liability is a theory of strict liability that makes a person, who may be innocent of wrongdoing, responsible for the misconduct of another. This liability is imposed for legal policy reasons based on the relationship between the wrongdoing and the person vicariously liable being such as to justify imposing liability on one person for the wrongs of another.[77]

[257] The paradigm relationship for which the law imposes vicarious liability is the relationship between an employer and its employee, and liability is imposed for the employee's activities performed during the course of his or her employment.

[258] In cases about vicarious liability, it will be necessary to determine whether the wrongdoer is an employee acting during the course of his or employment or an independent contractor for services. Various tests are designed to differentiate employees from independent contractors but no one test is definitive. Ultimately, a key determination is whether or not the wrongdoer is engaged to perform services in business on his or her own account. In making that determination, the level of control the employer has over the worker's activities will always be a factor. However, other factors to consider include whether the worker provides his or her own equipment, whether the worker hires his or her own helpers, the degree of financial risk taken by the worker, the degree of responsibility for investment and management held by the worker, and the worker's opportunity for profit in the performance of his or her tasks.[78]

[259] The matter of the nature of vicarious liability was considered in in *K.L.B. v. British Columbia*, mentioned above. The facts of *K.L.B. v. British Columbia* were that four siblings were placed together in foster homes where they were abused and one of them, K.L.B., was sexually

[77] *Kassian Estate v. Canada (Attorney General)*, 2015 ONCA 544; *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2011 SCC 59.
[78] *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, 2011 SCC 59.

assaulted. In the Supreme Court, on the matter of vicarious liability, Chief Justice McLachlin explained that liability is imposed on the theory that the person may properly be held responsible where the risks inherent in his or her enterprise materialize and cause harm, provided that liability is both fair and useful.

[260] She explained that to make out a successful claim for vicarious liability, the plaintiff must demonstrate: (a) that the relationship between the tortfeasor and the person against whom vicarious liability is sought to be imposed is sufficiently close as to make a claim for vicarious liability appropriate; and (b) that the tort is sufficient connected to the tortfeasor's assigned tasks that the tort can be regarded as a materialization of the risks created by the enterprise of the person against whom vicarious liability is to be imposed. The rationale for the imposition of vicarious liability is that if an enterprise creates a risk and that risk materializes and causes injury, it is fair that the person or organization that creates the enterprise and hence the risk should bear the loss.

[261] In the immediate case, it would appear that the individual teams and the leagues could be vicariously liable for misdeeds perpetrated by their players, coaches, staff, servants, employees, and agents, and thus subject to one major caveat, the cause of action criterion could be satisfied for vicarious liability on a team-by-team basis.

[262] The caveat is that it as individuals, the putative Class Members have claims for vicarious liability as against the team for whom they were a player and that if they were to pursue the claim, they would have to identify the person for whom the defendant is vicariously liable.

[263] In the immediate case, there is an adequately pleaded claim of vicarious liability and some basis in fact for discrete claims of vicarious liability by the putative Class Members as against the teams that recruited them as players. It is certainly arguable in the immediate case that the enterprises of the individual teams and the enterprise of the associated league should be held responsible for the culture of violence that the nurtured.

[264] The cause of action criterion would or could have been satisfied as against the 60 teams and the WHL, OHL, QMJHL, and CHL -severally- for vicarious liability if the perpetrator of the misdeeds for whom the co-defendants are alleged to be liable were adequately pleaded.

[265] I am, however, also convinced that Messrs. Carcillo, Taylor, and Quirk and the putative Class Members do not have a viable vicarious liability cause of action against the collective of the Defendants.

[266] Therefore, once again, the Plaintiffs' class action – as proposed – including its claim for vicarious liability, does not satisfy the cause of action criterion.

4. The Québec Causes of Action

[267] As foreshadowed above, it is my conclusion that Mr. Quirk and the individual putative Class Members who played in the QMJHL satisfy the cause of action criterion with respect to the Québec causes of action. As individuals, the putative Class Members that played for teams in the QMJHL have cause of actions as against the team or teams for whom they were players in Québec.

[268] The *Civil Code of Quebec* creates a general framework for extracontractual liability. A claimant must establish fault, damage, and causation. A person commits a fault by acting in a manner that departs from the conduct of a reasonable, prudent, and diligent person in the same

circumstances.[79]

[269] The question of whether the Defendants as discrete entities severally fell below that standard of conduct and committed an actionable civil fault could have satisfied the cause of action criterion.[80]

[270] The *Québec Charter* protects rights to life, "personal security, inviolability and freedom," and to "the safeguard of his dignity, honour and reputation."[81] Children have the "right to the protection, security and attention that his parents or the persons acting in their stead are capable of providing."[82] The evidence on this motion describes violations of players' freedom, dignity, and inviolability, and failures to protect children. The question of whether the conduct of the Defendants as discrete entities interfered with the rights and freedoms of the players protected by the *Quebec Charter* could have satisfied the cause of action criterion.

[271] The cause of action criterion for breaches of the Québec causes of action would or could have been satisfied as against the teams of QMJHL with and CHL and the QMJHL as co-defendants. However, once again, that is not the class action that is proposed by Mr. Quirk.

[272] Rather, once again, a collective cause of action is being advanced. For the same reasons as applied with respect to the systemic negligence and vicarious liability causes of action, I conclude that the Plaintiffs' class action – as proposed – does not satisfy the cause of action criterion for the Québec causes of action.

5. The Collective Liability Causes of Action: Part I

[273] The design and aim of Messrs. Carcillo, Taylor, and Quirk's proposed class action are based on the theory that the members of the group comprised of all the Defendants are collectively, *i.e.*, jointly and severally, liable for what occurred over the 48-year Class Period. There, however, is a very serious design problem in this theory because with a few exceptions, Canadian criminal law and Canadian civil law is based on individual fault and is not based on a collective or group fault.

[274] As a matter of civil procedure, groups can sue be sued. For instance, in the immediate case, Messrs. Carcillo, Taylor, and Quirk could have sued the CHL as the representative defendant for the group comprised of the 60 teams and the three leagues. Quite sensibly, Messrs. Carcillo, Taylor, and Quirk did not do that because the procedural joinder would not have established a collective liability, and the teams and the leagues undoubtedly would have exercised their right to opt out. A procedural joinder of defendants under the *Class Proceedings Act, 1992* does not establish any substantive law collective liability.

[275] Substantive collective liability is quite rare in the civil law, and upon analysis, some apparent examples of situations where the members of a group are liable for the activities of the group can be explained as within the general principle that liability is fault based and personal.

[276] Perhaps the best illustration of this point is the tort of conspiracy – which conspicuously is

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[79] *Kosoian v. Société de transport de Montréal*, 2019 SCC 59, [2019] 4 S.C.R. 335, at para. 42, - 58, citing *St. Lawrence Cement Inc. v. Barrette*, 2008 SCC 64, [2008] 3 S.C.R. 392, - 84.
[80] This question is authorized (certified) as a common issue in Québec class actions; see *Dillon c. Wayland Group Corp.*, 2022 QCCS 1553.
[81] *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12, ss. 1, 4, 10.
[82] *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12, ss. 39.

absent in the immediate case – where the co-conspirators are jointly and severally liable for the damages causes by their conspiracy. Upon analysis, however, this collective liability is based on the personal fault of each conspirator who agrees to join the conspiracy and who actually contributes to the planning, financing, and execution of the conspiracy.

[277] An entity with members can be sued separately from the members. Perhaps the best illustration of this point is an action against an incorporated entity. In the immediate case, the WHL, OHL, QMJHL, and CHL are each incorporated entities with the teams as members, but the action against an incorporated entity, which by incorporation is given the capacity to sue and to be sued, is not an action against the teams that are the members of the incorporated entities. In order to sue the members of an incorporated entity, a plaintiff must be able to pierce the corporate veil, but this prospect is not available in the immediate case.

[278] Unincorporated groups can also be sued, and in the immediate case, Messrs. Carcillo, Taylor, and Quirk are relying on the law of unincorporated groups or associations to establish a collective liability. Rather than summarize their argument, I set it out as it appears in paragraphs 85 to 93 their factum, without the footnote citations:

> 85. The defendants' joint and several liability flows from their choice to collectively operate a league system. As a result of this structure, the Teams that constitute each Member League are jointly and severally liable for that Member League's wrongdoing. The Member Leagues and all of the Teams, which, together, constitute the CHL League, are jointly and severally liable for the CHL League's wrongdoing.
>
> 86. Sound grounds are advanced for the defendants' joint and several liability as a collective, whether an unincorporated association, a partnership, a joint venture, a common enterprise, or in some other form. Irrespective of form, as detailed in the claim, the Leagues are a collective enterprise. Neither the number of individual defendants nor their corporate form alters their collective liability.
>
> 87. As recognized for other sports associations, including the NHL, the Leagues' collective structure is best understood as an unincorporated association:
>
> > [T]wo or more persons bound together for one or more common purposes, not being business purposes, by mutual undertakings, each having mutual duties and obligations, in an organisation which has rules which identify in whom control of it and its funds rests and on what terms and which can be joined or left at will.
> >
> > Unincorporated associations look like independent entities but are, in reality, collectives of members "bound together" by the purposes, undertakings and rules set out in "the terms of their contract, which is the constitution of the association."
>
> 88. These indicia are present in the Leagues' constitutions, which are incorporated by reference into the pleading and reveal the collective identity and liability of the Teams as members of unincorporated associations. Through the constitutions, the defendants impose shared responsibilities on one another, and apportion liability to each other. Each constitution:
>
> > (a) Describes the specific, common, non-business purposes of the League;
> >
> > (b) Sets out detailed conditions for membership in the League, including conditions for the transfer, withdrawal or termination of membership;
> >
> > (c) Creates rights and duties for each Member, beyond governance, in that Member's own operations and activities, including protecting players; and

> (d) Provides procedures for discipline, applicable to the Member or its players and staff, for failing in these responsibilities and duties.

Under the Member Leagues' constitutions, when ownership of a Team is transferred, the new owners assume or guarantee the liabilities of the prior owners, without limitation.

89. As detailed in the claim, the Teams and Leagues are inextricably intertwined in jointly operating a hockey league:

> (a) Each Team is bound by the constitutions of its Member League and the CHL League and, with its players and staff, can be sanctioned by either League;
>
> (b) The Teams are collectively responsible, as constituting their Member Leagues and the CHL League, for creating and implementing abuse policies; and
>
> (c) Each Member Leagues is bound by the CHL League's constitution and can be directed to change its "rules of play, equipment, or other standards" in directions that "if necessary, supersede" policies of the Member Leagues.

On these facts, the Leagues operate as a "multi-level association", with internal relationships, between the Member Leagues and the CHL League, "analogous to the relationship between individual members and an association."

90. The existence of a corporation in the name of an unincorporated association does not "supplant the association" or "displace the association relationship." The OHL Constitution distinguishes between the association and its corporation. While corporations have been created in the Leagues' names, the facts pleaded show that association relationships persist in each League and form the true core of each League's activity, particularly, as set out below, in relation to player safety.

91. An action against an unincorporated association is properly brought against all of the association's members. The unincorporated association's liability is defined by ordinary principles of contract, agency or trusts, and is determined through the association's constitution. Where the constitution does not delegate responsibility to an executive committee, or where it provides that the members are, collectively, responsible, the members are collectively liable for the association's failures.

92. The defendants are jointly and severally liable for the Leagues' decades-long systemic failure to protect young players. The CHL League constitution requires all sixty Teams, together, to create regulations – the official CHL Regulations – that ensure players are provided with a "safe and high-quality environment". The Member Leagues constitutions render the Teams, through the Boards of Governors, collectively responsible for adopting player safety policies that all the Teams must follow. Each Governor votes on behalf of his Team and promotes its interests. These provisions provide all of the defendants the "appropriate authority" for collective liability.

93. On the plaintiffs' theory, supported by pleaded facts, the defendants, as members of unincorporated associations, are jointly and severally liable for the Leagues. Section 5(1)(a) is satisfied: it is not "plain and obvious" that this allegation will fail. Nonetheless, joint and several liability may also be made out on the pleading that the Leagues' are joint ventures, partnerships, or common enterprises.

[279] The Defendants’ counterargument - with which I agree - is set out in paragraphs 132-142 of their certification factum as follows, without footnote citations:

> 132. The plaintiffs argue that the defendants are collectively liable because they are members of an “unincorporated association”. This novel—and plainly wrong—approach to imputing joint liability does not save any of the deficiently pleaded causes of action, or permit claims against all defendants where no claim is otherwise pleaded.

133. On its own, classification of a group of legal entities as an unincorporated association has no legal consequence. As the textbook frequently cited by the plaintiffs, *The Law of Unincorporated Associations in Canada* by Stephen Aylward recognizes on its first page, "[s]trictly speaking, unincorporated associations do not exist in the eyes of the law".

134. The plaintiffs misuse the existence of the Leagues to attempt to legally fuse the variable defendants into a single entity. Membership in an unincorporated association is not a basis for joint liability. None of the authorities cited by the plaintiffs provide that members of an unincorporated association are collectively liable. To the contrary, the plaintiffs cite:

> a. section 7.4 of Aylward, which states that officers, employees, and members of an unincorporated association are personally liable for wrongs that they commit in the course of carrying out association affairs but says nothing about members being collectively liable; and
>
> b. the English case of *Davies v Barnes Webster & Sons Ltd (Davies)*, which speculates that a club (i.e., unincorporated association) member could be liable for a club's contractual arrangements if the member gave the necessary authority for the contractual relationship but it also states that "[a] member of a club is *prima facie* not liable for more than his or her subscriptions or other dues".

135. Liability in the context of an unincorporated association depends on either personal participation in misconduct or personal authorization of misconduct. As stated in *London Assn v Greenlands, Ltd.* (*Greenlands*), "[i]f liabilities are to be fastened on any member of such an associations [sic] it must be by reason of the acts of those members themselves, or by reason of the acts of their agents".

136. Despite these authorities, the plaintiffs identify no participation by the Teams in any of the variable alleged defendant "CHL League" or "Member League" misconduct.

137. Nor do the plaintiffs plead material facts establishing agency. As noted in *Greenlands*, "agency must be made out by the person who relies on it, for none is implied by the mere fact of association". Aylward notes that "the rights and duties of the members of an unincorporated association are entirely a matter of contract between them". Nothing in the constating documents establishes that the Teams are agents of each other or the association (or vice versa).

138. The plaintiffs cite indemnity provisions in the Leagues' varying constating documents, but those provisions are irrelevant. Except for in the WHL's constating documents, those provisions pertain to indemnification of officers, directors, members of the executive council, and other individuals (who are not defendants). The WHL Constitution expressly provides that member liability is limited to league losses resulting from "the acts of the Member". The OHL Articles contemplate that members pay certain dues (beyond which they are not responsible, per Davies) for League liabilities, not that members are collectively liable.

139. Far from even potentially establishing collective liability of members, the constating documents impose responsibility for League decisions on non-Team entities. The Teams do not "operate" the Leagues as the plaintiffs argue. Rather, consistent with Aylward's statement that the proper defendants for association misconduct are executive committee members, League level decisions are handled by distinct director and management positions.

[280] There is an enormous body of case law involving actions against unincorporated associations or groups. I agree with the Defendants in the immediate case, that this case law is not helpful to the Plaintiffs and rather stands against the theory of collective liability being advanced by Messrs. Carcillo, Taylor, and Quirk in the immediate case.

[281] An examination of this case law reveals that there are many cases where the members of

the unincorporated association sue the association, typically for being wrongfully disciplined or expelled from the association. These internal cases can be explained as a matter of the law of contract. If there is an internal dispute among the members of an incorporated association, it may be necessary that all the members be parties to any ensuing litigation. Since the unincorporated association, as such, is not a legal entity, the relationship between its members is not between them and their organization or group but there may be a matrix of contractual or property relationships among the membership.[83]

[282] The contract cases of internecine disputes amongst the members of an unincorporated association do not assist the Plaintiffs in the immediate case because the putative Class Members are not themselves members of the WHL OHL, QMJHL, or CHL nor are they members of the sixty teams. The Class Members in the immediate case are in essence employees of the sixty teams and the putative Class Members to not own or control or have a personal legal interest in the teams.

[283] The putative Class Members do have contracts with a team or league but that contractual claim – which is not being advanced in the immediate case – does not ground a collective liability of the other leagues or the other teams across the country.

[284] Insofar as the putative Class Members are concerned and insofar as their theory of collective liability is concerned, they are not members of the teams or the leagues; they are third parties making a claim against a notional unincorporated association.

[285] I say a notional unincorporated association because it is entirely the conceit of Messrs. Carcillo, Taylor, and Quirk that all of the defendants are an unincorporated association. The proposed first common issue is in furtherance of the Plaintiffs' conceit because there is nothing apparent as there would be for a genuine unincorporated association that actually associates the members together. In the immediate case, the teams are members of the CHL, but the CHL is an incorporated entity not an unincorporated association except in the legal imagination of the Plaintiffs.

[286] An unincorporated association does not have capacity to sue or be sued absent legislation providing otherwise, either expressly or by implication. The absence of legal status for an unincorporated association means that any actions by or against unincorporated associations must be by or against those individual members of the unincorporated association who as a matter of the substantive law of tort, contract, agency or trust or who by statute have acquired legal rights or obligations to the claimants; actions involving an unincorporated association must be brought in the name of the members involved, either personally or in a representative capacity. [84]

[287] As noted by Lord Parker in *London Association v. Greenlands, Limited*:[85]

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[83] *Orchard v. Tunney*, [1957] S.C.R. 436; *Astgen v. Smith*, [1970] 1 O.R. 129 (C.A.).

[84] *Canadian Reform Conservative Alliance Party Portage-Lisgar Constituency Assn. v. Harms*, 2003 MBCA 112 at para. 22; *International Association of Science and Technology for Development v. Hamza*, 1995 ABCA 9; *Re Cummings and Ontario Minor Hockey Association* (1979), 26 O.R. (2d) 7 (C.A.); *Ladies of the Sacred Heart v. Armstrong's Point Association* (1961), 36 W.W.R. 364 (Man. C.A.). *Canada Morning News Co. v. Thompson*, [1930] S.C.R. 338 at 342; *Taff Vale Railway Co. v. Amalgamated Society of Railway Servants*, [1901] A.C. 426 (P.C.).

[85] [1916] 2 A.C. 15 at p. 39 (H.L.). See also: *S. (G.) v. Canada (Attorney General)*, 2001 SKQB 427 *Toews v. Isaac*, [1929] 1 W.W.R. 817 (Man. C.A.)

> If liabilities are to be fastened on any members of such an association, it must be by reason of the acts of those members themselves, or by reason of the acts of their agents; and the agency must be made out by the person who relies on it, for none is implied by the mere fact of association.

[288] For present purposes, the legal point to emphasize is that the individual members of the unincorporated association are not liable unless as individuals they would be liable under the substantive law.

[289] In the immediate case, there is no substantive tort or statutory tort against the sixty teams, the WHL, the OHL, the QMJHL, and the CHL as individual members of an unincorporated association. The only substantive tort that might have been available is the tort of conspiracy – which is an intentional tort - but that tort was not pleaded - and had it been pleaded, the evidence on this certification motion does not reveal some basis in fact that the 60 teams intentionally conspired to harm the putative Class Members.

[290] Before moving on to review more particularly, Messrs. Carcillo, Taylor, and Quirk's pleadings of a collective liability in the immediate case, I return to the matter of piercing the corporate veils of the WHL, OHL, QMJHL, and CHL, which are corporate entities.

[291] The corporate veil may be pierced when the corporation is incorporated for an illegal, fraudulent or improper purpose, or where respecting the separate legal personality of the corporation would be flagrantly unjust.[86] The separate existence of a corporation may be ignored when the corporation is under the complete control of the shareholder and its existence is being used as a means to insulate the shareholder from responsibility from fraudulent or illegal conduct.[87] There is no stand-alone just and equitable standard for piercing the corporate veil, and it is important that courts be rigorous in enforcing the principle that, absent extraordinary circumstances, a corporation is a separate legal entity distinct from its shareholders and from its subsidiary corporations[88].

[292] In order to pierce the corporate veil, two factors must be established: (1) the alter ego must exercise complete control over the corporation or corporations whose separate legal identity is to be ignored; and (2) the corporation or corporations whose separate legal identity is to be ignored must be instruments of fraud or a mechanism to shield the alter ego from its liability for illegal activity.[89]

[293] In the immediate case, it is plain and obvious that the circumstances for piercing the

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[86] *6071376 Canada Inc. v. 3966305 Canada Inc.*, 2019 ONSC 3947; *Mitchell v. Lewis*, 2016 ONCA 903; *Shoppers Drug Mart Inc. v. 6470360 Canada Inc. (c.o.b. Energyshop Consulting Inc./Powerhouse Energy Management Inc.)*, 2014 ONCA 85, rev'g 2012 ONSC 5167; *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256 at paras. 49–54; *642947 Ontario Ltd. v. Fleischer* (2001), 56 O.R. (3d) 417 (C.A.); *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd [1997] O.J. 3754 (C.A.); *Kosmopoulos v. Constitution Insurance Co. of Canada*, [1987] 1 S.C.R. 2; *Clarkson Co. v. Zhelka*, [1967] 2 O.R. 565 (H.C.J.).

[87] *Mitchell v. Lewis*, 2016 ONCA 903; *Shoppers Drug Mart Inc. v. 6470360 Canada Inc. (c.o.b. Energyshop Consulting Inc./Powerhouse Energy Management Inc.)*, 2014 ONCA 85, rev'g 2012 ONSC 5167; *Transamerica Life Insurance Co. of Canada v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd [1997] O.J. 3754 (C.A.); *Alumimun Co. of Canada v. Toronto (City)*, [1944] S.C.R. 267.

[88] *Yaiguaje v. Chevron Corp.*, 2018 ONCA 472.

[89] *Choc v. Hudbay Minerals Inc.*, 2013 ONSC 1414; *Parkland Plumbing & Heating Ltd. v. Minaki Lodge Resort 2002 Inc.*, 2009 ONCA 256 at paras. 49–54; *Haskett v. Equifax Canada Inc.*, [2003] O.J. No. 771(C.A.);*Transamerica Life Insurance Co. v. Canada Life Assurance Co.* (1996), 28 O.R. (3d) 423 (Gen. Div.), aff'd [1997] O.J. No. 3754 (C.A.); *Gregorio v. Intrans-Corp.* (1994), 18 O.R. (3d) 527 (C.A.).

corporate veil do not exist. Messrs. Carcillo, Taylor, and Quirk and the putative Class Members have claims against the corporate entities, but they do not have a basis to pierce the corporate veil of the WHL, OHL, QMJHL, CHL, or the 60 teams.

6. The Collective Liability Causes of Action: Part II

[294] In this section of my Reasons for Discussion, I discuss more specifically the cause of action upon which Messrs. Carcillo, Taylor, and Quirk have actually designed their class action.

[295] The fundamental critical premise of their proposed class action is that the cause of action criterion is satisfied for a collective liability against all of the Defendants. As foreshadowed throughout these Reasons for Decision, although as against individual defendants, Messrs. Carcillo, Taylor, and Quirk have causes of action for systemic negligence, vicarious liability, and breach of the Québec statutes; however, as explained in Part I above and for the additional reasons that follow in this Part II and in Part III, they do not have any causes of action against the teams and the leagues as a collective.

[296] Messrs. Carcillo, Taylor, and Quirk allege that the CHL, the WHL, the OHL, the QMJHL, and the 60 teams of the CHL taken together are jointly and severally liable for the misconduct of any team. They Plaintiffs plead in paragraphs 9 -10 of the Fresh as Amended Statement of Claim:

> 9. The Leagues operate as collectives. The Member Leagues – the OHL League, the WHL League, and the QMJHL League – are each constituted of their own member Teams. Together, the Member Leagues, which includes the Teams within each Member League, constitute the CHL League.
>
> 10. Each Member League, and the larger CHL League, is an unincorporated association, a partnership, a joint venture, a common enterprise or otherwise operates as a collective. As a result of this relationship, the Teams that constitute a Member League are jointly and severally liable for that Member League's wrongdoing. The Member Leagues that constitute the CHL League, and – in turn – the Teams that constitute the Member Leagues, are jointly and severally liable for the CHL League's wrongdoing.
>
> 11. The League Corporations, the CHL, OHL, WHL, and QMJHL, are not the Leagues. They are corporations that administer, or assist in administering, the Leagues. Each League Corporation is part of each League that it assists in administering. As part of the Leagues, the League Corporations are jointly and severally liable, with the Teams, for the wrongdoing of each League that they are part of.
>
> […]
>
> 20. Together, the Member Leagues, which includes the Teams and League Corporations within each of the Member Leagues, and the corporation, the CHL, constitute the CHL League, which is an unincorporated association, a partnership, a joint venture, a common enterprise or otherwise operates as a collective.

[297] The Defendants, all of them, assert that there is no basis for any collective liability. In paragraph 2 of their Reply Factum (Ragoonanan Motion), the Defendants state:.

> 2. While the plaintiffs acknowledge that the defendants are separately constituted legal entities with independent operations, they argue that each of the differently situated defendants may be "collectively" liable for alleged "collective" failures of the other defendants because of their "association" through sports leagues (the Collective Liability Theory). That argument, which amounts to a theory of joint liability through concerted action, cannot be sustained here:

> a. The plaintiffs plead no (and there was no) "concerted unlawful action" as needed to ground the Collective Liability Theory.
>
> b. Whatever generalizations the plaintiffs may offer about legal relationships among competing amateur sports teams, it is plain and obvious that those relationships do not result in joint liability at law. The plaintiffs allege no basis for imposing liability on the Moving Defendants for alleged League-level misconduct. The Leagues' constating documents specifically acknowledge that the Leagues are distinct corporations and provide no contractual basis for "collective" liability. Liability for any League-level misconduct can only attach to the League corporations.
>
> […]
>
> d. With no allegation of misconduct by the Moving Defendants, no dispute that the Ragoonanan principle applies, and no basis for imposing "collective" liability, it is plain and obvious that the claim against the Moving Defendants is bound to fail under Ragoonanan.

[298] I agree with the Defendants that there is nothing in the constitutions of the WHL, OHL, QMJHL that makes one hockey team the agent of another hockey team. The CHL, the WHL, OHL, and QMJHL and the 60 teams are separate and independent legal entities with their own governance structures and constating documents. Nothing in the constating documents establishes any intention by the hockey teams to share liability for another team's wrongdoing. Thus, the matter to address is whether there is any other basis for a collective liability in the circumstances of the immediate case.

[299] It is useful at this point in the analysis of the cause of action criterion for collective liability to examine the Supreme Court of Canada's decision in *Fullowka v. Royal Oak Ventures Inc.*,[90] which has an abundance of lessons for the immediate case.

[300] The facts of the *Fullowka* case were that in 1992, Royal Oak Mines Inc. owned a gold mine in Yellowknife, Northwest Territories. In the summer of 1992, Royal Oaks entered into a tentative collective bargaining agreement with Local 4 of the Canadian Association of Smelter and Allied Workers ("CASAW National").[91] However, CASAW Local 4's members rejected the tentative agreement. A very violent strike began, with the violence intensifying when Royal Oaks continued operating the mine during the strike. Unable to control the situation, Royal Oak hired Pinkerton's for security services. But the violence continued and escalated. There were numerous alarming incidents, including a riot. Royal Oak fired forty strikers including one Roger Warren. More violence followed. One Timothy Bettger illegally entered the mine, and he stole explosives, and over the summer, he set two explosions on the mine site, but no one was injured. Near the end of the summer, Mr. Warren evaded security, and he surreptitiously entered the mine. He set an explosive device that, as he intended, was detonated by a trip wire. Nine miners died. The territorial government ordered the mine shut down. Mr. Bettger was found guilty of variety of crimes and was sentenced to three years in jail. Mr. Warren was convicted of nine counts of murder, and he was sentenced to life in prison. The strike ended after eighteen months, but the mine ceased operations in 1994.

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[90] 2010 SCC 5.

[91] In July of 1994, after the events that gave rise to the action, CASAW National amalgamated with the National Automobile, Aerospace, Transportation and General Workers Union of Canada ("CAW National").and CASAW Local 4 became CAW Local 4. For the purposes of the narrative, I shall ignore the changes of name.

[301] The families of the nine murdered miners and another worker, James O'Neil, who had came upon the carnage of the nine workers and who had suffered post traumatic distress syndrome commenced actions. They sued Royal Oaks, Pinkertons, and the territorial government for negligence in failing to prevent the murders. They also sued CASAW, CASAW Local 4, some union officials, and some union members for direct or vicarious responsibility for the murders. The claims against Royal Oaks settled. The two actions were tried together. Justice Lutz found all the defendants liable.[92]

[302] The Court of Appeal for the Northwest Territories reversed Justice Lutz's decision.[93] For somewhat different reasons than the Court of Appeal, the Supreme Court of Canada in a unanimous decision upheld the dismissal of the actions. The decision was written by Justice Cromwell (Chief Justice McLachlin, and Justices Binnie, LeBel, Deschamps, Fish, Abella, Charron, and Rothstein concurring). For the present purposes of discussing the matter of collective liability, it is the Supreme Court's reasoning for dismissing the claims against Pinkertons, the territorial government, and CASAW National that is pertinent.

[303] The North West Territories Court of Appeal had dismissed the action as against Pinkertons and the territorial government because it concluded that they respectively had no duty of care to the plaintiffs to prevent the murders and if there was a duty of care, the duty was negated by a variety of policy considerations, including the general principles that tort liability is fault based and personal; therefore, some exceptional reason should be shown for making one person responsible for the torts of another.

[304] Justice Cromwell disagreed with the NWT Court of Appeal in part. Disagreeing with the NWT Court of Appeal, he concluded that Pinkertons and the government had a duty of care; however, the duty had not been breached and, therefore, for different reasons, the Court of Appeal was correct in dismissing the claim. Justice Cromwell agreed with the NWT Court of Appeal that the claim against CASAW National should be dismissed.

[305] For the purposes of the immediate class action, the first lesson from the *Fullowka* case is that it is supportive that an individual hockey player and putative Class Member has a viable cause of action against: (a) the team whose player, coach, employee, *etc*. perpetrated the hazing, bullying, harassment, or assault, (b) the league of that team; and (c) the CHL for systemic negligence, vicarious liability, and or breach of the Québec statutes.

[306] The second lesson from the *Fullowka* case is the subtle but important point that Justice Cromwell did not dispute the correctness of the principles that that tort liability is fault based and personal and some exceptional reason should be shown for making one person responsible for the torts of another. He embraced that principle, but he found that the Pinkertons' and the government had not breached their personal duties. He stated at paragraphs 59 and 60 of his judgment:

> 59. […] The Court of Appeal held that imposing liability here would be contrary to the general principle that "tort liability is personal, and that some exceptional reason should be shown for making one person responsible for the torts of another" (para. 78). It also decided that imposing liability in these circumstances "undermines the general principle that tort liability is fault based, in those cases [like the present one] where the immediate tortfeasor has deliberately evaded the efforts

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[92] *Fullowka v. Royal Oak Ventures Inc.* 2004 NWTSC 66 and 2005 NWTSC 60.

[93] *Fullowka v. Royal Oak Ventures Inc. (*sub nom. *Followka v. Pinkerton's of Canada Ltd.) (*sub nom. *Fullowka v. Pinkerton's of Canada Ltd.)*, 2008 NWTCA 4 and 2008 NWTCA 9.

> of the ancillary tortfeasor" (para. 78). These lines of reasoning, in my view, are premised on the Court of Appeal's mischaracterization of the basis of the appellants' claims.
>
> 60. The Court of Appeal described the appellants' claims as attempts to hold "one person responsible for the acts of someone else" (para. 78). This may be a convenient, short way of describing the claims. However, as I discussed earlier, it is not an accurate description of the appellants' claims against Pinkerton's and the government. The appellants seek to have these parties held responsible for their own negligence, not for the fault of others. Holding them liable for their own negligence does not undermine the general principles that tort liability is personal and fault based. These first two policy considerations, therefore, have little to do with the claims advanced in this case.

[307] Applying the second lesson to the circumstances of the immediate case, the message is that insofar as a cause of action is brought by a putative Class Member against a collective of 60 teams and four leagues, there are 59 teams and two leagues that are being sued for the acts of someone else.

[308] Thus, if tort liability is personal and fault based, what is the exceptional reason that would justify making the 59 teams responsible for the torts of another team? In the immediate case, no fault based rationale is provided apart from the conceit that there is an unincorporated association. Thus, it remains to be determined how there can be a fault based cause of action against these fifty-nine teams and two leagues, which are discrete legal entities.

[309] For the purposes of the immediate class action, the third lesson from the Fullowka case is that the claim against CASAW National was dismissed because the plaintiffs could not connect CASAW National with the wrongdoing. The trial judge had concluded that CASAW National and CASAW Local 4 were a "two-tiered structure of one entity." The NWT Court of Appeal and the Supreme Court of Canada disagreed. A union and its local are discreet and separate legal entities. Therefore, Justice Cromwell at paragraph 134 of his decision for the Court concluded that the liability of CASAW National "may only be sustained on the basis of its own acts or on the principles of joint and vicarious liability." Here is the principle of fault based liability and no liability by association writ large.

[310] Applying the second and third lessons to the circumstances of the immediate case, the message is that insofar as a cause of action is brought by a putative Class Member against a collective of 60 teams and four leagues, there are 59 teams and two leagues against whom it is plain and obvious that there is no viable cause of action. This follows because the 59 teams and two leagues are separate suable legal entities that were not the perpetrators of the systemic negligence, vicarious liability, or breach of the Québec statutes. Tort liability is personal and fault based and there is no exceptional reason that would justify making the fifty-nine teams responsible for the torts of another team.

[311] In the last regard, as was the case with CASAW National, which was not vicariously liable for Messrs. Warren's and Bettger's torts or for the wrongdoings of the striking members of Local 4, there are fifty nine teams and two leagues that: (a) did not control the activities of the employees etc. of the sixtieth team; (b) did not incite or instigate the sixtieth team to harm the putative Class Member; (c) did not conspire with sixtieth team to harm the putative Class Member; and (d) did not engage in any concerted action to harm the particular putative Class Member. Granted that the fifty nine teams are associated in the sense that they have a relationship one with the other, but there is no legal basis for guilt by association.

[312] There is a fourth lesson to be learned from the *Fullowka* case that is relevant to the

immediate class action. This lesson is not a matter that was directly discussed by Justice Cromwell and is rather an unspoken point.

[313] The implicit point is that although the plaintiffs sued CASAW National and Local 4, for good practical and legal reasons, the plaintiffs never sued the rank and file members of CASAW Local 4. Practically speaking, the rank and file members were likely judgment proof, but, legally speaking, unless a rank and file member actually committed a tortious wrong, he would not be liable simply because he was a member of Local 4. Applying the fourth lesson to the circumstances of the immediate case, the message once again is that if an action is brought against a team of the CHL, the other teams of the CHL are not liable simply because there are members of the CHL.

[314] The ultimate lessons from *Fullowka v. Royal Oak Ventures Inc.* are: (a) Mr. Carcillo can only be a representative plaintiff for Class Members with claims against the Sarnia Sting, the Mississauga IceDogs, the OHL and the CHL; (b) Mr. Taylor can only be a representative plaintiff for Class Members with claims against the Lethbridge Hurricanes, the Prince Albert Raiders, the WHL and the CHL; and (c) Mr. Quirk can only be a representative plaintiff for Class Members with claims against the Moncton Alpines, the Halifax Mooseheads, the QMJHL, and the CHL.

[315] For the above reasons, I conclude that there are no collective causes of action against the Defendants, i.e., the Plaintiffs' proposed class action as it actually is advanced or proposed does not satisfy the cause of action criterion.

7. The Collective Liability Causes of Action: Part III

[316] The discussion of collective liability for systemic negligence, vicarious liability, and breach of the Québec causes of action, may conclude with an analogy ripped from the headlines. Sadly, misconduct of the type attributed to the seventy-eight Defendants in the immediate case have been known to occur in high school and college sports.

[317] Men's university hockey is organized by U Sports, Canada's governing body for university athletics. "U Sports Hockey" was founded in 1961 and was then known as the "Canadian Intercollegiate Athletic Union ("CIAU") Men's Ice Hockey". At present, there are thirty-five university teams that compete for a national championship under the organization of U Sports Hockey. The competitor teams for the U Sports Hockey championship come from three leagues. There are nine teams from "Canada West Universities Athletic Association" (CWUAA").[94] There are nineteen teams from "Ontario University Athletics" ("OUA").[95] There are seven teams from "Atlantic University Sport" ("AUS").[96] As noted above, some of the hockey players that testified in the immediate case also played for hockey teams when they attended university.

[318] By way of analogy to the immediate case, if an incident of the "abuse" occurred at one or more Canadian university hockey teams, all of which are part of the Canadian hockey culture, then applying the theory of the immediate case, there are thirty-five more hockey teams and four more

[94] Alberta Golden Bears, Calgary Dinos, MacEwan Griffins, Manitoba Bisons, Mount Royal Cougars, Regina Cougars, Saskatchewan Huskies, Trinity Western Spartans, UBC Thunderbirds.
[95] Brock Badgers, Carleton Ravens, Concordia Stingers, Guelph Gryphons, Lakehead Thunderwolves, McGill Redbirds, Nipissing Lakers, Ontario Tech Ridgebacks, Ottawa Gee-Gees, Queen's Golden Gaels, RMC Paladins, TMU Bold (formerly Ryerson Rams), Toronto Varsity Blues, UQTR Patriotes, Waterloo Warriors, Western Mustangs, Wilfrid Laurier Golden Hawks, Windsor Lancers, York Lions.
[96] Acadia Axemen, Dalhousie Tigers, Moncton Aigles Bleus, St. Francis Xavier X-Men, Saint Mary's Huskies, UNB Reds, UPEI Panthers

leagues that should collectively be liable for the "abuse" notwithstanding that they had no role in the incident of the "abuse".

[319] Advancing the theory of the immediate case, it would be easy enough to allege that the universities and the four leagues, which have their own legal entities and legal autonomies, form an unincorporated association since the teams compete for the same championship organized by an organization of which they are members.

[320] By way of analogy to the immediate case, as a legal matter, the alleged unincorporated association of university hockey teams does not exist, but its members could be sued as surrogates for the unincorporated association. It would be easy to sue that unincorporated association by joining all thirty-nine of its posited members.

[321] But here's the rub, the lawsuit against the collective of university teams and leagues will not succeed against an individual university team unless, it is independently culpable, which is to say it participated in or was complicit in the wrongdoing alleged to have been committed by the unincorporated association. In this analogy, if a university was not a participant or complicit in the "abuse," the action as against it would be dismissed whatever the outcome of the action as against the universities and leagues that participated or were complicit in the wrongdoing. There is guilt by fault; there is no guilt by association.

[322] The immediate lawsuit is about egregious harms perpetrated on children and the persons or entities at fault should be punished, but even children know and in their heart Messrs. Carcillo, Taylor, and Quirk in their noble pursuit of cleaning hockey must know it is wrong and fundamentally unjust to punish teams for something that somebody else did as it would be to sue one university for the very bad behaviour that happened at another university.

8. American Law

[323] While raised by the Defendants as a preferable procedure issue, it is convenient to deal with the matter of the application of foreign law as a part of the discussion of the analysis of the cause of action criterion.

[324] There are five U.S.-based teams in the WHL; namely: Everett Silvertips, the Portland Winterhawks, Seattle Thunderbirds, Spokane Chief, and Tri-City Americans. There are three U.S.-based teams in the OHL; namely: Erie Otters, Flint Firebirds, and Saginaw Spirit.

[325] The Defendants argue that foreign law would govern the claims against the five American teams in the WHL and the three American teams of the OHL and that it is preferable that American law be decided by an American court. The Defendants point out that each of the American states will have its own statutory and common law and limitation period regimes that differ from the law applicable in Ontario.

[326] The Defendants refer to my decision in *Berg v. Canadian Hockey League,*[97] where I held that there was considerable merit to the argument that the claims involving the American teams preferably should be resolved by American courts in accordance with the policies and principles of their employment law statutes.

[327] For present purposes, the first point to note about *Berg v. Canadian Hockey League*, the

[97] *Berg v. Canadian Hockey League*, 2017 ONSC 2608, var'd 2019 ONSC 2106 (Div. Ct.).

issue of applicable law was dealt with as preferable procedure law. The Ontario court has the jurisdiction to apply American law if it appropriate to do so as a matter of the law governing choice of law.

[328] In *Berg*, the whole case depending upon a major public policy issue as to whether amateur athletes are employees or within some exception for employee status. In the immediate case, at this early juncture of the proceeding, it is unknown the extent to which American law will be a choice of law issue, and it is unknown whether the choice of law will make much difference to the Plaintiffs' causes of action assuming that they were certifiable.

[329] As it is, I am not certifying the causes of action for the proposed class action, which I also am not certifying for other reasons. In short, the matter of the application of American law or Québec law for that matter can be sorted out as an aspect of settling the Individual Issues protocol that I shall discuss near the conclusion of these Reasons for Decision.

K. Identifiable Class Criterion

1. General Principles

[330] The second certification criterion is the identifiable class criterion. 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.[98]

[331] In defining the persons who have a potential claim against the defendant, there must be a rational relationship between the class, the cause of action, and the common issues, and the class must not be unnecessarily broad or over-inclusive.[99] An over-inclusive class definition binds persons who ought not to be bound by judgment or by settlement, be that judgment or settlement favourable or unfavourable.[100] The rationale for avoiding over-inclusiveness is to ensure that litigation is confined to the parties joined by the claims and the common issues that arise.[101] A proposed class definition, however, is not overbroad because it may include persons who ultimately will not have a successful claim against the defendants.[102]

[332] The class must also not be unnecessarily narrow or under-inclusive. A class should not be defined wider than necessary, and where the class could be defined more narrowly, the court should either disallow certification or allow certification on condition that the definition of the class be amended.[103]

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[98] *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.).
[99] *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 at para. 57 (CA), rev'g [2004] O.J. No. 317 (Div. Ct.), which had aff'd [2002] O.J. No. 2764 (SCJ).
[100] *Robinson v. Medtronic Inc.*, [2009] O.J. No. 4366 at paras. 121-146 (SCJ).
[101] *Frohlinger v. Nortel Networks Corporation*, [2007] O.J. No. 148 at para. 22 (SCJ).
[102] *Silver v. Imax Corp*., [2009] O.J. No. 5585 at para. 103-107 (SCJ) at para. 103-107, leave to appeal to Div. Ct. refused 2011 ONSC 1035 (Div. Ct.); *Boulanger v. Johnson & Johnson Corp*., [2007] O.J. No. 179 at para. 22 (SCJ), leave to appeal ref'd [2007] O.J. No. 1991 (Div. Ct.); *Ragoonanan v. Imperial Tobacco Inc.* (2005), 78 O.R. (3d) 98 (S.C.J.), leave to appeal ref'd [2008] O.J. No. 1644 (Div. Ct.); *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 at para. 10 (Gen. Div.).
[103] *Fehringer v. Sun Media Corp*., [2002] O.J. No. 4110 at paras. 12-13 (SCJ), aff'd [2003] O.J. No. 3918 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 21.

2. Discussion and Analysis – Identifiable Class Criterion

[333] Messrs. Carcillo, Taylor, and Quirk sue on behalf of a class defined as: "all former and current players who claim to have suffered “abuse” while playing in the CHL League between May 8, 1975 and the present.” "Family Class" means "all parents, spouses, siblings, and children of Class Members." The Fresh as Amended Statement of Claim defines “abuse” as follows:

> “Abuse” means, *inter alia*, physical, and sexual assault, hazing, bullying, physical and verbal harassment, sexual harassment, forced consumption of alcohol and illicit drugs, and the use of homophobic, sexualized and/or racist slurs directed against minors playing in the Leagues, perpetrated by players, coaches, staff, servants, employees, and agents of the Leagues, including players, coaches, staff, servants, employees, and agents of the teams, as further particularized herein.

[334] The Defendants submit that the class definition in the immediate case fails the class definition criterion because it is vague and indeterminate. The Defendants submit that since the class definition is connected to the identifier of suffering “abuse,” and since abuse is so broadly and vaguely defined, it provides no boundaries, and thus the Defendants submit that the class definition becomes a subjective and not an objective identifier of class membership.

[335] Further, the Defendants submit that the problems of indeterminacy are exacerbated by the almost five decades long Class Period.

[336] Further still, the Defendants submit that the problems of the class definition are irreparable and in particular there is no solution by amending the definition to insert a “claims limiter,” which as far as Ontario jurisprudence is concerned, have been found to be unacceptable because they are subjective, and unacceptable merits-based identifiers.

[337] Messrs. Carcillo, Taylor, and Quirk rely on *Rumley v. British Columbia*,[104] and cases following *Rumley* where class action Plaintiffs have used claims-based class definitions; however, the Defendants submit that these cases are not good law in Ontario and the cases are distinguishable because upon analysis, the class definition was not challenged or analyzed in those cases and its propriety was simply assumed or went unexamined.

[338] I agree with the Defendants that in accordance with Ontario law, the proposed class definition in the immediate case is unacceptable, but I do not agree that the problem is irreparable. The solution is to use a definition similar to the one that I approved in *Berg v. Canadian Hockey League*,[105] where the definition stated:

> 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”)

[339] The following definition would be acceptable in the immediate case:

> All former and current players who played in the CHL League between May 8, 1975 and [*date of certification order*].

[340] Assuming that the immediate case were otherwise certifiable, the former and current players who played in the CHL will have no difficulty identifying themselves and deciding from

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[104] 2001 SCC 69
[105] 2017 ONSC 2608.

the notice of certification if they wish to participate or opt out of the litigation. That there will be class members without provable claims does not disqualify the class definition. If they do not opt out the court and the parties will have no difficulty determining the extent to which they will be bound by the decisions made at the common issues trial be they favourable or unfavourable.

[341] In other words, this simple definition does not suffer from the problem identified by Justice Cullity in *Ragoonanan v Imperial Tobacco Canada Ltd.*[106] where he observed that a merits-based definition was inherently problematic because a Class Member could disclaim that he or she had a claim as found in the merits-based definition but some other claim that was still alive to be litigated.

[342] I, therefore, conclude that with this simple amendment, the identifiable class criterion is satisfied in the immediate case.

L. Common Issues Criterion

1. General Principles

[343] 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.[107]

[344] The underlying foundation of a common issue is whether its resolution will avoid duplication of fact-finding or legal analysis of an issue that is a substantial ingredient of each class member's claim and thereby facilitate judicial economy and access to justice.[108]

[345] An issue is not a common issue, if its resolution is dependent upon individual findings of fact that would have to be made for each class member.[109] Common issues cannot be dependent upon findings which will have to be made at individual trials, nor can they be based on assumptions that circumvent the necessity for individual inquiries.[110] 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.[111]

[346] The common issue criterion presents a low bar.[112] An issue can be a common issue even if

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[106] [2005] O.J. No. 4697 (S.C.J.).
[107] *Hollick v. Toronto (City)*, 2001 SCC 68 at para. 18.
[108] *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at paras. 39 and 40.
[109] *Fehringer v. Sun Media Corp.*, [2003] O.J. No. 3918 at paras. 3, 6 (Div. Ct.).
[110] *McKenna v. Gammon Gold Inc.*, [2010] O.J. No. 1057 at para. 126 (S.C.J.), leave to appeal granted [2010] O.J. No. 3183 (Div. Ct.), var'd 2011 ONSC 3882 (Div. Ct.); *Nadolny v. Peel (Region)*, [2009] O.J. No. 4006 at paras. 50-52 (S.C.J.); *Collette v. Great Pacific Management Co.*, [2003] B.C.J. No. 529 at para. 51 (B.C.S.C.), var'd on other grounds (2004) 42 B.L.R. (3d) 161 (B.C.C.A.).
[111] *Batten v. Boehringer Ingelheim (Canada) Ltd.*, 2017 ONSC 53, aff'd, 2017 ONSC 6098 (Div. Ct.), leave to appeal refused (28 February 2018) (C.A.); *Amyotrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2015 ONCA 572 at para. 48; *McCracken v. CNR*, 2012 ONCA 445 at para. 183; *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; *Ernewein v. General Motors of Canada Ltd.*, 2005 BCCA 540 (C.A.), leave to appeal to S.C.C. ref'd, [2005] S.C.C.A. No. 545; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 40.
[112] *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; *Cloud v. Canada (Attorney General)*

it makes up a very limited aspect of the liability question and even though many individual issues remain to be decided after its resolution.[113] Even a significant level of individuality does not preclude a finding of commonality.[114]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.[115]

[347] From a factual perspective, the plaintiff must show that there is some basis in fact that: (a) the proposed common issue actually exists; and (b) the proposed issue can be answered in common across the entire class, which is to say that the Plaintiff must adduce some evidence demonstrating that there is a colourable claim or a rational connection between the Class Members and the proposed common issues.[116] The plaintiff must establish some basis in fact for the existence of the common issues in the sense that there is some factual basis for the claims made to which the common issues are connected.[117]

2. Discussion and Analysis – Common Issues Criterion

[348] The Class Members proposed 12 common issues. Question 1 is: "What is the nature of the organizations operating as and within Canadian Major Junior Hockey?"

[349] In my opinion, Question 1 is not a proper common issues question because, it assumes or presupposes a commonality that may or may not be found in the answer to the question. Question 1 simply begs for commonality. Question 1 begs for the answer that the nature of the organizations operating within the CHL are a collective in which all the defendants would be jointly and severally liable. For the reasons expressed above, there is no cause of action that supports this common issue that searches for a commonality that cannot be found.

[350] Questions 2, 3, and 4, are the routine negligence common issues that are typically found in a systemic negligence, institutional abuse, action. These questions, however, are not certifiable in the immediate case because the case at bar is not framed as a typical systemic negligence action. Rather, the case at bar is framed as a systemic negligence action against a collective. In the next section of this part of my Reasons for Decision, I will explain why there are no common issues for Messrs. Carcillo, Taylor, and Quirk's type of collective systemic negligence action.

[351] Questions 5 and 6 are routine breach of fiduciary duty common issue questions. They are not certifiable in the immediate case because the cause of action for breach of fiduciary duty does not satisfy the cause of action criterion.

[352] Question 7 concerns the vicarious liability cause of action, and Questions 8 and 9 are the

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(2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.); *Carom v. Bre-X Minerals Ltd*. (2000), 51 O.R. (3d) 236 at para. 42 (C.A.).

[113] *Cloud v. Canada (Attorney General)*, (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).

[114] *Hodge v. Neinstein*, 2017 ONCA 494 at para. 114; *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 112; *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46 at para. 54.

[115] *Harrington v. Dow Corning Corp.*, [2000] B.C.J. No. 2237 (C.A.), leave to appeal to S.C.C. ref'd [2001] S.C.C.A. No. 21.

[116] *Jensen v. Samsung Electronics Co. Ltd.*, 2021 FC 1185; *Kuiper v. Cook (Canada) Inc.*, 2020 ONSC 128 (Div. Ct.).

[117] *Simpson v. Facebook, Inc.* 2022 ONSC 1284 at para. 25 (Div. Ct.); *Jensen v. Samsung Electronics Co. Ltd.*, 2021 FC 1185; *Singer v. Schering-Plough Canada Inc.*, 2010 ONSC 42 at para. 140.

common issue for the Québec causes of action. These questions are not certifiable for the same reason that the systemic negligence questions are not certifiable.

[353] Question 10 is the aggregate damages question. For the reasons expressed below, this question is not certifiable.

[354] Questions 11 and 12 are the punitive damages questions. For the reasons expressed below, these questions are not certifiable.

3. Common Issues and the Theory of the Plaintiffs' Case

[355] Messrs. Carcillo, Taylor, and Quirk's proposed class action is based on the fundamental premise that the Defendants have a collective liability. However, for the reasons expressed above there is no collective liability. The proposed class action does not involve the common acts or omissions of a collective. There are no certifiable causes of action for a collective liability. It follows that the associated proposed common issue questions are not certifiable. It follows further that the common issues criterion is not satisfied and that the Certification Motion must be dismissed for this reason alone. A class action without common issues is not certifiable.

[356] Although there is more than some basis in fact for concluding that putative Class Members have claims for systemic negligence, vicarious liability, and or breach of the Québec causes of action - against the teams for whom they were players and against the league in which their team was a member - these causes of action exist against discrete Defendants and their respective leagues. Messrs. Carcillo, Taylor, and Quirk's systemic negligence, vicarious liability, or breach of Québec causes of actions proposed class action underpin a proposed class action that is unlike the comparable institutional abuse cases that have been certified. No one system exists here. The systemic negligence against the collective of defendants is not temporally or situationally continuous.

[357] In the immediate case, the common issues in a proposed action against the collective of the Defendants have the appearance of commonality, but given that the bullying, hazing, harassment, and assaults occurred at different times, at different places, by different perpetrators, some of whom arguable may not have been under the control of the defendant team or league, in myriad ways over a half a century, each and every putative Class Member would need to testify as to his personal experience. Given that liability cannot be determined until there are individual trials there is no basis for an aggregate assessment of damages at the common issues trial and a common issues trial would devolve into a series of individual trials.

[358] Given the wide range of offensive conduct by different defendants at different times and places, a common issues trial about the standard of care would not advance the litigation very far and thus the proposed common issues are not genuine common issues because their resolution would be dependent upon individual findings of fact that would have to be made for each Class Member. Another Class Member would not benefit much from the successful prosecution of the common issues stage of the class action. The proposed common issues do not much advance the litigation.

[359] For all the above reasons, my conclusion is that the common issues criterion is not satisfied for the proposed class action.

4. The Proposed Common Issue with respect to Aggregate Damages

[360] Pursuant to s. 24 (1)(b) of the *Class Proceedings Act*, for there be a determination of aggregate damages, no question of fact or law other than those relating to the assessment i.e., quantification, of the defendant's monetary liability must remain to be determined in order to establish the defendant's liability. This prerequisite means that a plaintiff must be able to prove all the elements of his or cause of action at the common issues trial to have a common issue about aggregate damages.[118] In the immediate case, none of the certified causes of action will be determined until after individual issues trials. There is no basis for a common issue about aggregate damages.

[361] Messrs. Carcillo, Taylor, and Quirk submit that after finding common liability, a common issues judge could determine a "base amount of damages," to which any player who was abused is entitled, by assuming each abused player suffered only harassment and bullying. This submission immediately falls apart because it is not possible to make a common finding of liability.

[362] The notion of a base amount of damages comes from *Ramdath v. George Brown College,*[119] where the defendant was liable for misrepresentations about an educational course and it could be determined that each class member of a very small class had suffered a minimum amount of damages, and from *Good v. Toronto (Police Services Board),*[120] where the Plaintiffs successfully argued that there was a basis for the assessment of a general damages based on a sampling of the harm experienced by individual class members and thus a minimum award of damages could be determined.

[363] In *Good v. Toronto (Police Services Board*), the class members were comprised of persons who gathered in downtown Toronto in June 2010 to protest the G20 summit. The protests got out of control and some protestors damaged property. The police responded and approximately 1,000 persons were rounded up, detained, arrested, and taken to a specially constructed detention centre. The conditions at the centre were poor. There were delays, overcrowding and a breakdown in prisoner care. The putative class members sued for false imprisonment, battery, assault, conversion, trespass to chattels, and breaches of the *Canadian Charter of Rights and Freedoms*. The Divisional Court and the Court of Appeal concluded that an aggregate damages claim awarding a base line general damages award for vindication, deterrence, and compensation could be certified. The putative class member's human dignity was manifestly infringed by an assault and battery of which they would have been physically and psychologically aware.

[364] In the immediate case apart from the fact that the preconditions of s. 24 of the *Class Proceedings Act, 1992* are not satisfied, there is no class-wide base line of harm suffered by all the class members. In *Good,* all 1,000 of the class members had the common experience of being rounded up, detained, arrested, and taken to detention centres in contravention of the civil rights guaranteed by the *Charter*. In the immediate case, it is not even known how many putative Class Members have suffered from the alleged misconduct of the Defendants and there is nothing common about the experiences of the putative Class Members as was the case in *Good.*

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[118] *Fulawka v Bank of Nova Scotia*, 2012 ONCA 443 at paras. 111-114, 139, leave to appeal ref'd, [2012] SCCA No 326.
[119] 2014 ONSC 3066, aff'd 2015 ONCA 921.
[120] 2016 ONCA 250, aff'g 2014 ONSC 4583 and 2014 ONSC 6115 (Div. Ct.), which rev'd 2013 ONSC 3026 and 2013 ONSC 5086.

5. The Proposed Common Issue with respect to Punitive Damages

[365] In 2009, in *Robinson v. Medtronic, Inc.*,[121] I explained that it followed from Justice Binnie's decision in *Whiten v. Pilot Insurance Co.*,[122] the leading case on liability for punitive damages, that an assessment of punitive damages requires an appreciation of: (a) the degree of misconduct; (b) the amount of harm caused; (c) the availability of other remedies; (d) the quantification of compensatory damages; and (e) the adequacy of compensatory damages to achieve the objectives or retribution, deterrence, and denunciation.

[366] These factors identified in *Whiten* must be known to ensure that punitive damages are rational and to ensure that the amount of punitive damages is not greater than necessary to accomplish its purposes. To rationally determine whether punitive damages should be awarded and to determine the quantum of them, the court needs to know the quantum of compensation that otherwise would be awarded to the plaintiff and the class members.

[367] Justice Binnie at paragraph 100 of his judgment stated: "The rationality test applies both to the question of whether an award of punitive damages should be made at all, as well as to the question of quantum." Thus, in *Robinson v. Medtronic Inc.*, I concluded that, generally speaking, when the determination of the defendant's exposure to general and special damages would have to be determined after the individual issues trial, questions about punitive damages were not certifiable for the common issues trial.

[368] Subsequently, however, as I explained in the 2012 case of *Waldman v. Thomson Reuters Corp.*,[123] my approach to punitive damages for the common issues trial changed because I was persuaded that while the legal justification and the quantification of punitive damages might have to await the outcome of individual issues trials, the question of whether the defendant's conduct warranted punitive damages could be certified as a common issue.

[369] I, however, would not employ the approach I adopted in *Waldman* in the immediate case. In the immediate case, I have no doubt that at individual issues trials, a judge might award punitive damages in that individual case but given the wide range of experiences and the extensive list of human and fictional legal persons that are alleged to have been culpable, there is no basis in fact that there is a common issue about punitive damages in the immediate case. While punitive damages may be awarded at the individual issues trial, it is conceivable that the trial judge at a different individual issues trial might conclude that an award of punitive damages is not called for. A defendant's being negligent from failing to prevent monstrous behaviour or being vicariously liable for employing a monster does not necessarily make the defendant a monster.

M. Preferable Procedure Criterion

1. General Principles

[370] Under the *Class Proceedings Act, 1992*, the fourth criterion for certification 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

[121] [2009] O.J. No. 4366 (S.C.J.), aff'd [2010] O.J. No. 3056 (Div. Ct.).
[122] [2002] 1 S.C.R. 595.
[123] 2012 ONSC 1138

class proceeding would be better than other methods such as joinder, test cases, consolidation, and any other means of resolving the dispute.[124]

[371] In *AIC Limited v. Fischer*,[125] the Supreme Court of Canada emphasized that the preferability analysis must be conducted through the lens of judicial economy, behaviour modification, and access to justice. Thus, 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.[126] 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.[127] To satisfy the preferable procedure criterion, the proposed representative plaintiff must show some basis in fact that the proposed class action would: (a) be a fair, efficient and manageable method of advancing the claim; (b) be preferable to any other reasonably available means of resolving the class members' claims; and (c) facilitate the three principal goals of class proceedings; namely: judicial economy, behaviour modification, and access to justice.[128]

2. Discussion and Analysis – Preferable Procedure Criterion

[372] My discussion and analysis of the preferable procedure criterion will have three parts.

[373] First, I will discuss the parties' debate of whether individual actions are preferable to a class action.

[374] Second, in the context of the preferable procedure criterion, I will discuss the advantages and disadvantages of a systemic negligence class action.

[375] Third, I will discuss the matter of the relevance, if any, of the Defendants' assertion that they will bring third party claims for contribution and indemnity against the actual perpetrators of the violence on the individual Class Members who played for their respective teams.

(a) Class Actions v. Individual Actions

[376] The parties were *ad idem* that the putative Class Members should have access to justice. The parties were also *ad idem* that the procedural alternatives to achieve access to justice were either: (a) a class action; or (b) individual actions.

[377] As noted above, Messrs. Carcillo, Taylor, and Quirk submit that a class action is the only feasible way to achieve access to justice. For the Plaintiffs, a class action is the only route to access to justice, behaviour modification, and judicial economy. In paragraphs 151-155 of their Certification Factum, the Plaintiffs state:

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[124] *Markson v. MBNA Canada Bank*, 2007 ONCA 334 at para. 69, leave to appeal to SCC ref'd [2007] S.C.C.A. No. 346; *Hollick v. Toronto (City)*, 2001 SCC 68.
[125] 2013 SCC 69 at paras. 24-38.
[126] *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 at para. 52 (C.A.), leave to appeal to the S.C.C. ref'd, [2005] S.C.C.A. No. 50, rev'g (2003), 65 O.R. (3d) 492 (Div. Ct.).
[127] *Markson v. MBNA Canada Bank*, 2007 ONCA 334; *Hollick v. Toronto (City)*, 2001 SCC 68.
[128] *Musicians' Pension Fund of Canada (Trustee of) v. Kinross Gold Corp.*, 2014 ONCA 901; *AIC Limited v. Fischer*, 2013 SCC 69; *Hollick v. Toronto (City)*, 2001 SCC 68.

> 151. Here, the greatest barrier to access to justice is the Leagues' culture of silence. A class proceeding can neutralize that barrier. The only available alternative, individual litigation, cannot. Comparing the options, a class action is both preferable and necessary.
>
> 152. As set out above, the abuse, and bearing that abuse in silence, are normalized elements of the Leagues' culture. An enduring culture of silence must be overcome to achieve to access to justice for the class. Affiants describe feeling "immense pressure" to keep their stories to themselves. Some did so for decades. That pressure is still greater for those who work in, or remain connected to, the world of hockey, as many class members do. […]
>
> 153. A class proceeding provides the "anonymity, and security in numbers" needed for class members to come forward with their claims. One affiant states, "I do not think I would have been able to bring litigation on my own. Now that I know that others have come forward, I finally feel comfortable seeking justice for what was done to me and to the other kids on the teams." Seeking justice will be even easier once the Leagues' liability is determined. This court, through s. 25, can allow individual claims to be brought confidentially, removing the burden of breaking the culture of silence from players.
>
> 154. A class action is uniquely positioned to overcome the culture of silence in the Leagues, and – by doing so – provide access to justice. Given the culture of silence, and the cost of litigating the common issues, it is extremely unlikely that many, if any, individual actions will be brought. This must be considered in determining preferability.
>
> 155. Individual actions are not a feasible alternative and cannot be preferable to a class action.

[378] As noted above, the Defendants disagree, and they submit that a class action is not certifiable, among other reasons, because individual actions are the preferable procedure. The Defendants do not deny that some players experienced serious misconduct and suffered compensable harm. The Defendants say, however, that those players deserve a rational process for evaluating claims and that a class action determining who is responsible, including the actual perpetrators, is not that rational process.

[379] The debate between the parties turns out to be an arid debate because the class action being advanced by Messrs. Carcillo, Taylor, and Quirk is not certifiable for reasons independent from the preferable procedure criterion. That said, I will for the purposes of deciding the preferable procedure criterion assume that all of the other certification criterion were satisfied and ask whether the action would satisfy the preferable procedure criterion.

[380] The discussion may begin by noting that Messrs. Carcillo, Taylor, and Quirk are wrong in asserting that a class proceeding provides the anonymity and security in numbers needed for putative Class Members to come forward with their claims.

[381] In the immediate case, the proposed class action will not provide anonymity after the common issues stage is reached. The administration of justice is an open court system. The administration of justice is a matter of public and not just private interest. A person who chooses to commence a court proceeding must do so publicly, subject only to exceptional circumstances where a pseudonym or initials may be used.[129]

[382] In the immediate case, for an individual Class Member, most of whom are now adults, to achieve access to justice, he will have to testify at an individual issues trial to prove causation of harm and the quantum of his damages. Of necessity, the Class Member will describe, in much the

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[129] *Amytrophic Lateral Sclerosis Society of Essex County v. Windsor (City)*, 2019 ONCA 344 at para. 25; *G. (C.) v. Ontario (Health Insurance Plan General Manager)*, 2014 ONSC 5392at para. 7 (Div. Ct.).

same way that the brave deponents did in the run up to this certification motion, the events of the abuse.

[383] But more will be more required. There will also be medical evidence about the physical and mental harm suffered. There will be economic and financial evidence about the pecuniary consequences of the harm suffered. Some of the putative Class Members will have significant damages claims for their personal injuries and proof will require the disclosure of highly personal information. There may be limitation period defences that will require additional evidence of personal knowledge and experiences. There undoubtedly will be third party claims by the Defendants claiming contribution and indemnity from the human perpetrators of what the Plaintiffs call “the abuse”.

[384] None of all this disclosure will occur behind doors closed to the public, and while at the common issues trial, there may be anonymity for the Class Members and a notional strength in numbers, the circumstances are different at the individual issues trials, including the difference that the individual Class Member is exposed to costs and to the offer to settle procedure, which may increase his exposure to a costs liability.

[385] Messrs. Carcillo, Taylor, and Quirk are also mistaken about security of numbers. Each claim will be idiosyncratic. The success or failure of one claim will say little about the next claim about different events, with different actors, places, and times.

[386] The discussion of the preferable procedure may continue by noting that the circumstance that individual issues trials are inevitable in the immediate case is, however, not a reason for concluding that the preferable procedure criterion is not satisfied.

[387] The inevitability of individual issues trials is, nevertheless, not a neutral or sterile factor in a preferable procedure analysis. Rather, the inevitability of individual issues trials focuses attention on whether a common issues trial is more a decelerate than an accelerant to burn bright the light in the lighthouse guiding the lanes to access to justice and behaviour modification.

[388] When the common issues trial is not determinative, and an individual issues trial is inevitable, it should be kept in mind that an individual Class Member is no longer protected from any adverse costs award in pursuing his or her cause of action at individual issues trials. Of course, the Defendant may agree to settle, as is often the case, or the Class Member may be able to arrange with Class Counsel or another lawyer to act on a contingency fee basis for the individual issues trial, but in those circumstances, where the common issues trial will be non-dispositive, its interposition before the individual issues trial may just postpone the individual Class Member’s decision about whether his or her claim is sufficiently worthy to merit the risks and rewards of proceeding.

[389] Where a common issues trial is a decelerate that will make very little contribution to the hard work of proving a claim, then the preferable procedure may not be a common issues trial. In some class actions, the common issues trials will put wind in the sails of the individual class members and make it worthwhile for them to proceed to trial. In other class actions, the common issues trial is just marking time or to quote Seneca: “There is no favorable wind for the sailor who doesn’t know where to go.”

[390] The immediate case is essentially an institutional abuse, systemic negligence class action. Class actions have frequently been the preferable procedure for institutional abuse claims. However, it is not a given that the preferable procedure criterion will be satisfied in a proposed

institutional abuse class action.

[391] In *Green v the Hospital for Sick Children*,[130] a decision that was upheld by the Divisional Court, I did not certify the action against the hospital because little would be achieved by a common issues trial about whether the hospital's admittedly unreliable hair-follicle testing for evidence of substance abuse was negligent. In that case, the very hard forensic work would have to be done at individual issues trials to determine whether it was because of the unreliable test results or whether it was for other reasons that the putative class members had lost access, custody, or even parentage of their children or had wrongfully been convicted.

[392] In contrast, in *Curtis v. Medcan Health Management Inc.*,[131] I was reversed by the Divisional Court[132] when I decided that an employment law class action was not the preferable procedure for access to justice. In that case, the defendant learned that it had not paid its employees their statutory employment benefits, and the employer decided to pay only the employees or former employees whose claims were not statute barred. I decided that the hard litigation work would occur at the individual issues trials about the discovery of the claims and the defendant's limitation period defence. Therefore, I thought a class action was not the preferable procedure. The Divisional Court thought differently. I am, of course, bound by the decision in *Curtis v. Medcan Health Management Inc*. but it is no precedent for the immediate case, any more than *Green v. The Hospital for Sick Children*, is a precedent for the immediate case. The preferable procedure criterion involves a judicial discretion that is exercised on a case-by- case basis.

[393] In my opinion, in the immediate case, the proposed class action based on a collective liability does not provide a fair, efficient, and manageable procedure that is preferable to any alternative method of resolving the claims.

[394] Taking into account the importance of the common issues to the claims as a whole, including the individual issues, a class action is not preferable. There is no judicial economy to be achieved in the immediate case because the common issues trial will not make the inevitable individual issues trials more efficient or manageable.

[395] The principal goals of access to justice and behaviour modification will be achieved at the individual issues trials and not at the common issues trials. The individual putative Class Members have known for decades whether they are victims. Whether the individual putative Class Members have claims worth pursuing is something that requires individual legal advice that is ascertainable today and that does not need a decision at a common issues trial about whether hockey teams manifest a toxic masculine culture of violence.

[396] In any event, perhaps the simplest explanation for why the immediate systemic negligence, institutional abuse proposed class action is not the preferable procedure is that the proposed class action would not be manageable and no conceivable litigation plan and certainly not the boilerplate litigation plan of Class Counsel could make this proposed class action manageable. The court would be asked to manage: (a) the individual defences of 78 defendants in 13 different jurisdictions; (b) hundreds of inevitable third party claims against the actual perpetrators, pedophiles, sadists, and sociopaths who apparently saw nothing wrong in torturing their teammates; (c) events of "abuse" that are a myriad of sins and a myriad of torts; (d) events over a

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[130] 2017 ONSC 6545, aff'd 2018 ONSC 7058 (Div. Ct.).
[131] *Curtis v. Medcan Health Management Inc.*, 2021 ONSC 4584.
[132] *Curtis v. Medcan Health Management Inc.*, 2022 ONSC 5176 (Div. Ct.).

50-year period; (e) choice of law issues with respect to the common law, civil law, and possibly American law; and (f) limitation period defences; etc.

(b) The Advantages and the Disadvantages of Systemic Negligence Class Actions

[397] In the context of an analysis of the preferable procedure criterion, there are two major advantages to the certification of a systemic negligence action, but those advantages come with associated disadvantages in achieving access to justice and behaviour modification.

[398] The first major advantage is the existence of system provides the lynchpin common issue but for which the action would not be certifiable. The second major advantage is that if systemic negligence is proven and it can also be shown all the class members suffered a common harm, then it becomes possible to fix a minimum level of aggregate damages with the Class Members at liberty to augment their compensatory damages at individual issues trials.

[399] However, with the two major advantages of the systemic negligence case come two major disadvantages.

[400] The first major disadvantage is that if the systemic negligence case is certified, then the common issues trial confronts the serious problem of differentiating systemic negligence and non-systemic, individual negligence. When this problem occurs, the case may become unmanageable or unproductive.

[401] The problems associated with differentiating systemic negligence and individual negligence claims are demonstrated by the saga of *Rumley v. British Columbia*, already briefly discussed above.

[402] The *Rumley* saga began in the 1950s. From the 1950s until 1992, the Province of British Columbia operated the Jericho Hill School as a residential school for deaf children. In 1992, the British Columbia Ombudsman investigated allegations of abuse at the school. He concluded that sexual, physical, and emotional abuse of students had occurred for many years. Lawsuits followed, and the Attorney General appointed The Honourable Mr. Thomas Berger, Q.C., a former justice of the Supreme Court of British Columbia (from 1971 to 1983), as special counsel. In 1995, Mr. Berger issued a report. He concluded that sexual abuse was at times widespread at the school, and it went on over many years. Although the Berger Report did not detail individual cases, one member of his investigative team identified a pervasive culture at the residence that required students to submit to a sexual rite of passage if they were to successfully cohabit with their peers. In June 1995, the government responded to the Berger Report. In a ministerial statement, the Attorney General acknowledged the allegations of sexual abuse at the school, and he stated that to the extent that the province failed the students, it must see that they are compensated. The Province also established the Jericho Individual Compensation Program to provide the compensation.

[403] In 1998, Leanne Rumley, John Pratt, Sharon Rumley, J.S. and M.M commenced a proposed class action. In 1999, Justice Kirkpatrick refused to certify the action as a class action.[133] His decision was reversed by the British Columbia Court of Appeal[134] in a decision that in 2001, was affirmed by the Supreme Court of Canada.[135]

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[133] *Rumley v. British Columbia*, 2001 SCC 69.
[134] *Rumley v. British Columbia*, 1999 BCCA 689.
[135] *Rumley v. British Columbia*, 2001 SCC 69.

[404] The British Columbia Court of Appeal certified three common issues: (a) Was the defendant negligent or in breach of fiduciary duty in failing to take reasonable measures in the operation or management of the school to protect students from misconduct of a sexual nature by employees, agents or other students at the school? (b) If the answer to common issue no. 1 is "yes", was the defendant guilty of conduct that justifies an award of punitive damages? (3) If the answer to common issue no. 2 is "yes", what amount of punitive damages is awarded? There were approximately 1100 students that comprised the class, which did not include the students who had received compensation from the Jericho Individual Compensation Program.

[405] For the present purposes of discussing the preferable procedure criterion, it is important to note that as a systemic negligence case, for the Class Members in *Rumley* to achieve compensation, they would have had to proceed to individual issues trials. (As it happens, there was no common issues trial and no individual issues trials because the *Rumley* systemic negligence class action settled in 2004. The terms of the settlement are not reported.)

[406] The certified *Rumley* action was assigned to Justice Humphries, and after two years of case management and several motions about the discovery process and the production of documents and experts reports,[136] the Province brought a motion to have the action decertified. The Province argued that the case had become unmanageable because of Class Counsel's intense focus on proving individual cases of abuse rather than on the alleged systemic negligence upon which the case had been certified.

[407] Justice Humphries dismissed the Plaintiffs' cross-motion for an order that the Province was estopped from denying systemic negligence and she also dismissed the Provinces' motion to decertify.

[408] Justice Humphries decided that the problem of differentiating the systemic negligence issue from individual issues could be handled by aggressive case management and by revising and particularizing the common issues to focus on systemic negligence.[137] On the difficulties of differentiating the common issue of systemic negligence from the individual issues of the case and of adjudicating a common issue that would be useful for the individual issues trials, Justice Humphries stated at paragraphs 60-63 and 74-75:

> 60. The question then remains whether any general finding that can be made in such a class proceeding can be of any assistance to the members of the plaintiff class who must then prove on an individual basis that they suffered damage and that the systemic breach was an effective cause of their injury.
>
> 61. At some point, the complexity, variety and number of findings required for a useful determination of the common issue over 42 years must give way to the acknowledgement that each set of circumstances in this case is so individual that a class proceeding simply may not be the preferable procedure.
>
> 63. There have been numerous conflicts between the parties over evidentiary and disclosure issues which illustrate the difficulty in considering the larger common issue of systemic negligence separately from individual allegations of abuse.
>
> […]

[136] *Rumley v. British Columbia*, 2002 BCSC 1653; *Rumley v. British Columbia, sub nom. L.R. v. British Columbia*, 2002 BCSC 1300; *Rumley v. British Columbia, sub nom. L.R. v. British Columbia*, 2002 BCSC 405
[137] *Rumley v. British Columbia*, 2003 BCSC 234.

> 74 All the evidentiary and disclosure issues illustrate the difficulty the plaintiffs have in keeping the issues focused on the alleged systemic negligence rather than the individual issues of alleged abuse. The argument now advanced by the defendant in favour of decertification, that is, that plaintiffs' counsel are attempting to make this trial into something different from the class proceeding contemplated by the Court of Appeal, in my view, can be handled by aggressive case management, if I can come to terms with the type of proceeding envisioned by the Court of Appeal when the issues were certified. I have already restricted the discovery questions of the individual plaintiffs and have indicated that I will likely restrict their evidence in chief at trial so that only evidence respecting reports of alleged abuse are relevant at this stage. I am prepared to make even more restrictive orders if it means that some sort of common issue can be decided.
>
> 75. The more difficult and sensitive issue for me is, knowing what I now know about this case after two years of case management, is it possible to conduct any trial at all on a common issue that will be of any benefit to the individual plaintiffs when they come to present their claims? The Court of Appeal emphasized several times that the certification was being made on limited grounds of systemic negligence which they characterized at paragraph 19 of their judgment as "the failure to have in place management and operations procedures that would reasonably have prevented the abuse [emphasis mine]." The Supreme Court of Canada acknowledged that limiting the common issue to one of systemic negligence may well make the individual component of the proceedings more difficult. However, they adopted the Court of Appeal's statement that the respondent plaintiffs were entitled to restrict the grounds of negligence to make the case more amenable to class proceedings if they choose.

[409] Having dismissed the decertification motion, Justice Humphries reformulated the systemic negligence common issue to particularize it with thirteen factors to be analyzed. In her view, the focused case management could save the systemic negligence class action. The particularization of the common questions would assist the individual issues trials and end the early premature preoccupation on individual issues. In paragraph 90 of her judgment, Justice Humphries stated:

> 90 The common issue will therefore be amended as follows:
>
> > Was the defendant negligent or in breach of fiduciary duty in failing to take reasonable measures in the operation or management of the school to protect students from misconduct of a sexual nature by employees, agents, or other students at the school, having regard to the following questions:
> >
> > (1) Were there management and operations procedures in place to ensure that staff could communicate through signing or other means with students? Were these procedures adequate/ reasonable/in accord with existing standards?
> >
> > (2) What procedures/training were in place for staff which dealt with recognition/discovery/ prevention/reporting or otherwise dealing with sexual misconduct? Were they adequate/reasonable/in accord with existing standards?
> >
> > (3) What procedures/training were in place with for students which dealt with recognition/discovery/ prevention/reporting/or otherwise dealing with sexual misconduct? Were they adequate/reasonable/in accord with existing standards?
> >
> > (4) What was the staff to student ratio for supervision in areas of the school apart from the dormitory/ies? Was it adequate/reasonable/in accord with existing standards? Were there procedures establishing a method of supervision for other areas of the school? If so, were these procedures adequate/reasonable/in accord with existing standards?
> >
> > [… (Nine more particular questions followed)]

[410] In *T.L. v Alberta (Director of Child Welfare),*[138] which was a proposed class action against a provincial government, but not an institutional abuse class action, Justice Slatter, as he then was, commented on Justice Humphries' case management decision in *Rumley* at paragraphs 108-109 of his decision, as follows:

> 108. It is instructive to note that the experience in the *Rumley* action was not entirely happy. An application was subsequently brought to decertify the action: *Rumley v. British Columbia (#2)*, 2003 BCSC 234, 12, B.C.L.R. (4th) 121. As the case progressed, it became apparent that the attempt to determine negligence at a systemic level was actually turning into a trial of many different individual instances of abuse: […]
>
> 109. The chambers judge went on to conclude that "the difficulty is that all of this must have been known by the Court of Appeal when they decided it was possible to certify a common issue", but I would note that the Act specifically provides for decertification just because it is impossible for the court to predict exactly how a class action will unfold. *Rumley* shows that an attempt to prove systemic negligence by proving many individual examples of negligence is unworkable. A careful reading of *Rumley (#2)* is instructive, because it is clear that if the chambers judge was deciding the matter afresh, she would not have certified systemic negligence as a common issue. While the case management judge felt that the class action could continue through "aggressive case management", and some refinement of the common issues, she did conclude at para. 91 that the action had "reached a precarious balance between a potentially workable class proceeding and unmanageable confusion".

[411] Recently in *VLM v Dominey,*[139] another institutional abuse case, Justice Henderson also reflected on the lessons learned from what actually happened in the case management of *Rumley,* and stated at paragraphs 83-85:

> 83. In my view the caution of Justice Slatter is instructive. Identifying common issues when they are directly tied to, and dependent upon, the determination of individual issues will not advance the litigation and can be counter productive. As a result, many of the common issues relating to liability issues that are proposed by the Plaintiff are simply not workable.
>
> 84. The same can be said with respect to issues relating to quantum of damages. The Plaintiff seeks to raise common issues relating to a minimum set of general damages on an aggregate basis as well as for punitive damages "particularly if it is established that Dominey sexually abused the Class Members at the EYDC in his role as chaplain".
>
> 85. Including common issues that relate to damages for personal injuries is usually not appropriate because determining causation for the injuries may be complex and will be subject to numerous variables which would not impact each prospective claimant uniformly: […]

[412] With this deeper analysis of what actually happened in the seminal systemic negligence class action, *Rumley v. British Columbia*, it emerges that it may not be possible to have a common issue that will be of any benefit to the individual plaintiffs when they come to presenting their individual claims that the systemic negligence at the institution that caused them harm. In particular, Justice Humphries experienced Chief Justice McLachlin's prescient prediction that limiting the common issue to one of systemic negligence may well make the individual component of the proceedings more difficult.

[413] It also emerges from this deeper analysis that it may be preferable to sail directly to an individual issues negligence trial without sailing into the doldrums of a common issues trial. One

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[138] 2006 ABQB 104.
[139] 2022 ABQB 299.

of the ironies of institutional abuse class actions that are certified as the preferable procedure is that it is often the case that it would have been easier and quicker for the individual Class Member to prove his or her individual victimization and harm than waiting years for a determination that there was systemic negligence. *Cavanaugh v. Grenville Christian College* is an illustration of this ironical phenomena, which I believe would occur in the immediate case if I were to certify the proposed leviathan of a class action.

[414] *Grenville Christian College* is an ongoing institutional abuse class action against a private school about what took place at the school for 25 years from September 1973 to July 1997. The plaintiffs commenced their action in 2008. I was assigned to case manage the action. In 2012, the plaintiffs brought a certification motion, but I did not certify the action, because there was evidence that some students favoured the educational environment that they had experienced. With respect to the students who had genuine grievances and who had been mistreated and who had actually suffered psychological and physical abuse, I believed that it would be preferable for them to bring individual claims, rather than wait to see whether a systemic negligence claim had been proven at a common issues trial.[140] However, in 2014, my decision was reversed by the Divisional Court,[141] and the action proceeded to a common issues trial.

[415] Six years later, in 2020, after a five-week a common issues trial, Justice Leiper decided that school had breached its duty of care and breached its fiduciary duties to the students.[142] There was no award of aggregate damages. Justice Leiper determined that there were potentially 1,360 claimants for individual issues assessments, and she remitted the case to me for case management. In 2021, Justice Leiper's decision was affirmed by the Court of Appeal.[143] In 2022, until who knows how long, I am engaged in the exercise of settling a protocol for individual issues trials.[144] I was advised that Class Counsel anticipates that approximately 600 of the 1,360 may pursue an individual claim. The trials will have to be determined by some other judge, because I and many of the students will be retired by the time the individual issues trials are resolved.

[416] The case at bar is similar to the *Grenville Christian College* case. Like the circumstances of the case, some of the predicate events in the immediate case are a half century old. As was the situation in *Grenville Christian College,* there are class members that have no grievance, but there are class members who have serious and provable claims for negligence or vicarious liability. Those claimants do not need the decelerate of a common issues trial to prove systemic negligence or systemic vicarious liability. The preferable procedure is to get on with the individual issues trials. Neither a class action that inevitably requires individual issues trials nor individual trials will provide anonymity or the courage to come forward to asset a claim.

[417] *Barker v Barker,*[145] which is discussed below, demonstrates that individual issues trials pursuant to a protocol developed pursuant to sections 7, 12, and 25 of the *Class Proceedings Act, 1992* can preferably provide access to justice, judicial economy, and behaviour modification.

[418] The second major disadvantage is that if the systemic negligence case is certified but there is no basis for a base-level aggregate damages award then the returns from the enterprise of the

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[140] *Cavanaugh v. Grenville Christian College*, 2012 ONSC 2995.
[141] *Cavanaugh v. Grenville Christian College*, 2014 ONSC 290 (Div. Ct.).
[142] *Cavanaugh v. Grenville Christian College*, 2020 ONSC 1133.
[143] *Cavanaugh v. Grenville Christian College*, 2021 ONCA 755.
[144] *Cavanaugh v. Grenville Christian College*, 2022 ONSC 5405.
[145] 2020 ONSC 3746 and 2021 ONSC 158, var'd 2022 ONCA 567.

class action do not warrant the time, money or effort required. Colloquially or idiomatically “the game is not worth the candle.” The case at bar is of that type. There will be no aggregate damages award in the immediate case and the putative Class Members do not need a finding of systemic negligence or even class wide simple negligence at a common issues trial to determine whether they have a claim for negligence or vicarious liability to pursue at an individual issues trials.

[419] The immediate case is thus very different from the products liability cases where the putative Class Members require proof of a breach of the standard of care and proof of general causation to determine whether it is worth pursuing an individual issues trial to determine specific causation, which may not be an easy thing to do with a negligent manufactured device or pharmaceutical, or to determine the quantum of damages.

[420] The substantial point of this discussion of the advantages and disadvantages of systemic negligence class action is that it is an excruciating difficult exercise of the court’s discretion to determine the to-be-or-not-to be question of the preferable procedure. Sometimes any choice of procedure is to take arms against a sea of troubles. In the immediate case, however, I am satisfied that the putative class members are better served by immediately proceeding to individual issues trials without a common issues trial about whether or not as a class they were victims of systemic negligence.

(c) The Preferable Procedure and Third Party Claims

[421] The Defendants argued that individual issues trials were preferable to a class proceeding that focused on systemic negligence because in that class action, the defendants would inevitably bring third party proceedings against the actual perpetrators who had instigated or inflicted the “abuse” over the almost 50 years that was encompassed by the Class Period. The Defendants argued that the inevitable third party proceedings, which were not addressed in Class Counsel’s litigation plan would make the action impossible to manage.

[422] Messrs. Carcillo, Taylor, and Quirk submitted that this was a bluff because the limitation period for bringing third party claims had passed and no third party proceedings had been brought although the Defendants had defended the action. The Plaintiffs submitted that repugnantly, the Defendants were attempting to shelter themselves from their own liability by diverting the blame. Further, Class Counsel submitted that in any event the Defendants’ tactic would fail because the Plaintiffs would “Taylorize” their class action. To quote from their Reply Certification Factum at paragraphs 78-81:

> 78. The defendants say the plaintiffs "do not have a choice but to take this case as it exists." This case is about the Leagues’ systemic failures that allowed the abuse to continue and a toxic culture to flourish. The players are not tortfeasors in this claim. Even so, the defendants contend that they "have claims for contribution and indemnity for all of the alleged ‘Abuses’ … against the class members themselves." The plaintiffs are unaware of any other systemic abuse case where a defendant has sued abused victims of the system for contribution and indemnity after their abuse led them to be abusers in turn.
>
> 79. These hypothetical, and as yet non-existent, third-party claims cannot prevent certification. As Justice Cullity explained, certification cannot be refused on the basis of speculative claims: "In the absence of a statement of defence, or any particulars of these defences and claims, they must at this

> stage be considered to be speculative and I would not deny certification to the plaintiffs on these grounds."[146]
>
> 80. The defendants are out of time to bring these claims. The limitation period for claims for contribution and indemnity runs from the date on which the defendant is served with the claim.[147] Service in this action was completed by September 2020. The two-year limitation period has expired. The defendants could have brought a "John Doe" claim before the limitation period expired, as was done in *Sheila Morrison*, but did not do so.[148] Their claims are now statute-barred.
>
> 81. Even if this were not the case, insofar as any of the causes of action pled allow for the apportionment that the defendants seek, it would be open to the plaintiffs to "Taylorize" their claim by "making clear that the claim… excludes damages that can be attributed to the concurrent fault or negligence" of any person other than the defendants.[149]

[423] In my opinion, the proposed class action based on the alleged systemic negligence of a collective of 78 defendants would be unmanageable apart from the prospect of third party claims. That is not to say that 78 separate systemic negligence actions would be unmanageable, but it is the case with respect to the proposed systemic negligence action. Thus, the parties' heated debate about the Defendants' intention to assert third party claims is somewhat superfluous. That said, I shall, nevertheless, briefly address Messrs. Carcillo, Taylor, and Quirk's argument that the court should ignore the Defendants' expressed intention to assert third party claims because the claims are speculative and or could be barred by limitation periods or the claims could be sealed off by "Taylorization" which is a reference to the case of *Taylor v. Canada (Health Canada)*.[150]

[424] My view of the matter is that the third party claims are not speculative, and it is inevitable that the third parties will have to be identified as part of the individual issues trials to prove the causation element of the systemic negligence claim or the critical perpetrator element of the vicarious liability claim. The identification of the third party would also emerge if the Class Member wished to simply pursue a simple negligence claim. The identification of the third party is also relevant to determining whether a Defendant is exposed to vicarious liability.

[425] It is also my view, that just as the running of limitation periods was stayed by the commencement of the class action, it is possible that the running of limitation periods for third party claims has also been stayed, but more to the point, I do not see how the third party claims can be discoverable until the individual Class Member identifies what, where, when, how – and who – of the abuse. Thus, it is arguable that the limitation period for the third party claims has not begun to run.

[426] Moreover, it is my view that while "Taylorization" is theoretically possible, it would be both unjust to the Class Members and unworkable with respect to the vicarious liability cause of action.

[427] In *Taylor* a proposed representative plaintiff alleged that Health Canada's negligent regulation of jaw implants caused her injuries. She limited her and the class members' claim for damages to those attributable to Health Canada's proportionate degree of fault. The Court of

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[146] *Anderson v. St. Jude Medical Inc.*, [2003] O.J. No. 3556 at para. 60 (S.C.J.).
[147] *Limitations Act, 2002*, S.O. 2002, c. 24, Sch. B, s. 18 and see e.g., *London Transit Commission v. Eaton Industries (Canada) Company*, 2020 ONSC 1413, at paras. 60-61, 68-69 and 78, aff'd, 2021 ONCA 74.
[148] *Johnston v. The Sheila Morrison Schools*, 2011 ONSC 3398.
[149] *Blue Mountain Linen Inc. v. Enercare Homes and Commercial Services Limited Partnership*, 2022 ONSC 5635, at para. 29; *Taylor v. Canada (Minister of Health)*, 2009 ONCA 487.
[150] 2009 ONCA 487.

Appeal held that because the plaintiff had limited the claim to the fault of Health Canada, the Attorney General's third party claim against the doctor and the hospitals for contribution and indemnity disclosed no reasonable cause of action.

[428] In the immediate case, "Taylorization" would be possible with respect to the systemic negligence claim, but it would require Messrs. Carcillo, Taylor, and Quirk to abandon their vicarious liability claim, which cannot be tailorized as demonstrated by the Court of Appeal's decision in *J.K. v. Ontario*.[151]

[429] In *J.K. v. Ontario*, the Province of Ontario was sued with respect to its use of solitary confinement in youth detention centres. There were 23 centres of which 15 were operated by NGOs (non-profit non-government organizations). Ontario brought third party proceedings and the proposed representative plaintiff moved to have the third party claims struck on the basis that given how the plaintiff had pleaded its claim, there would be no basis for a third party claim. On appeal from my decision that the plaintiff had successfully tailorized his claim, the Ontario Court of Appeal disagreed, but Associate Chief Justice Hoy provided guidance how the plaintiff might replead his statement of claim to achieve the purpose of precluding the third party claims.

[430] In paragraph 33 of her judgment for the Court, Associate Chief Justice Hoy stated:

> 33. In my view, if J.K. amended para. 45 to read as follows, then the principle in *Taylor* would apply and preclude third party claims for contribution and indemnity. I have marked the required amendments below. If these amendments are made, the motion judge could then strike the Crown's third party claim in negligence, without leave to amend to plead a right of contribution and indemnity under the *Negligence Act* in addition to under the indemnity provisions of the service contracts:
>
> > The Plaintiff's claim, and the claim of each Class Member, is limited to the amount of the Plaintiff's or other Class Member's damages that would be apportioned to the Defendant in accordance with the relative degree of fault that is attributable to the Defendant~~'s negligence~~. The Plaintiff's claim is against the Defendant for those damages that are attributable to its proportionate degree of fault, and he does not seek, on his own behalf or on behalf of the Class, any damages that are found to be attributable to the fault or negligence of any other person, or for which the Defendant could claim contribution or indemnity. For greater certainty, without limiting the foregoing, and notwithstanding para. 50, the Plaintiff does not seek, on his own behalf or on behalf of the Class, any damages for which the Crown is vicariously liable as a result of harms perpetrated on residents in the Facilities that are operated by the Third Parties and their agents and employees, whether or not acting within the authority granted to them by the Crown, for which the Crown could claim contribution or indemnity.

[431] As appears from the underlined words, Associate Chief Justice Hoy's guidance was to keep the Plaintiff's negligence claim against the Province of Ontario but to abandon the claim for vicarious liability. Need I say that this guidance would be ill-advised in the immediate case given that the claims of vicarious liability are likely more readily provable than the claim for systemic negligence?

[432] For all the above reasons, I, therefore, conclude that the preferable procedure criterion is not satisfied in the immediate case.

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[151] 2017 ONCA 902.

N. Representative Plaintiff Criterion

1. General Principles – Representative Plaintiff Criterion

[433] 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. 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.[152]

[434] The so-called *Ragoonanan Principle* is that for a cause of action against a defendant to be certified under the *Class Proceedings Act, 1992*, there must be a Representative Plaintiff who personally has a cause of action against that defendant. A corollary of the *Ragoonanan Principle* is that if a plaintiff has a cause of action against one defendant but no cause of action against a co-defendant, then for the cause of action against the co-defendant to be certified, there must be another plaintiff with a cause of action against the co-defendant and who thus would qualify to be a Representative Plaintiff against the co-defendant.[153]

2. Discussion and Analysis: The Ragoonanan Motion and the Representative Plaintiff Criterion

(a) The Ragoonanan Motion

[435] In the immediate case, if Messrs. Carcillo, Taylor, and Quirk had satisfied the cause of action criterion for a collective action, then they simultaneously would have had a cause of action against all of the Defendants and the Defendants' argument based on the Ragoonanan principle would be meritless.

[436] However, as the discussion above reveals, the Plaintiffs do not have a collective action.

[437] The result is that their proposed action is bereft of 55 representative plaintiffs. The Ragoonanan Motion succeeds, and thus for at least 55 of the Defendants, there is an additional reason to dismiss the certification motion.

(b) The Plaintiffs as Representative Plaintiffs

[438] The Plaintiffs have claims against five teams of the CHL and as against the WHL, OHL, and QMJHL. Assuming that all of the other certification criteria had been satisfied, Messrs. Carcillo, Taylor, and Quirk would not have satisfied the Representative Plaintiff criterion with respect to those five teams and the four leagues.

[439] Messrs. Carcillo, Taylor, and Quirk are genuine heroes, and they would more than

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[152] *Drady v. Canada (Minister of Health)*, [2007] O.J. No. 2812 at paras. 36-45 (S.C.J.); *Attis v. Canada (Minister of Health)*, [2003] O.J. No. 344 at para. 40 (S.C.J.), aff'd [2003] O.J. No. 4708 (C.A.).

[153] *Poirer v. Silver Wheaton Corp*, 2022 ONSC 80; *Vecchio Longo Consulting Services Inc v. Aphria Inc*., 2021 ONSC 5405; *Hughes v. Sunbeam Corp (Canada)* (2002), 61 O.R. (3d) 433 (C.A.); *Ragoonanan Estate v. Imperial Tobacco Canada Ltd* (2000), 51 O.R. 3d 603 (S.C.J.).

adequately represent the interests of the class without conflict of interest. They have selected experienced and accomplished Class Counsel.

[440] However, Messrs. Carcillo, Taylor, and Quirk have not produced a workable litigation plan because it is not conceivable that such a plan could be fashioned to deal in one class action with the evil that has persisted for half a century in amateur hockey and, in any event, the proposed litigation plan is unworkable.

O. The Section 7 Order

[441] For the above reasons, I am dismissing the jurisdiction motion, granting the Ragoonanan Motion and dismissing the Certification Motion.

[442] In these circumstances, I am directed by s. 7 (1) of the *Class Proceedings Act, 1992* to consider whether notice of the refusal should be given under section 19 of the Act to the putative Class Members. Pursuant to s. 7 (2), I am empowered to permit the proceeding to continue as one or more proceedings between different parties. Section 7 of the Act is set out below.

> *Refusal to certify*
>
> 7 (1) If the court refuses to certify a proceeding as a class proceeding, the court shall consider whether notice of the refusal should be given under section 19, and whether such notice should include,
>
> (a) an account of the conduct of the proceeding;
>
> (b) a statement of the result of the proceeding;
>
> (c) any other prescribed information; and
>
> (d) any other information the court considers appropriate.
>
> *Proceeding may continue in altered form*
>
> (2) If the court refuses to certify a proceeding as a class proceeding, the court may permit the proceeding to continue as one or more proceedings between different parties and, for the purpose, the court may,
>
> (a) order the addition, deletion or substitution of parties;
>
> (b) order the amendment of the pleadings or notice of application; and
>
> (c) make any further order that it considers appropriate.
>
> […]

[443] Pursuant to s. 12 of the *Class Proceedings Act, 1992*, I am empowered with a large discretion on my own initiative or on the motion of a party to make any order I consider appropriate respecting a proceeding under this Act.

[444] Messrs. Carcillo, Taylor, and Quirk's proposed class action is a proceeding under the Act, and pursuant to s. 12, I am empowered to make orders to ensure its fair and expeditious determination. Section 12 of the Act states:

Court may determine conduct of proceeding

12 The court, on its own initiative or on the motion of a party or class member, may make any order it considers appropriate respecting the conduct of a proceeding under this Act to ensure its fair and expeditious determination and, for the purpose, may impose such terms on the parties as it considers appropriate.

[…]

[445] Section 25 is the section of the Act that empowers the court to design the individual issues part of a class action. Strictly speaking, s. 25 is available only when the court determines common issues in favour of the class and considers that the participation of individual class members is required to determine individual issues. Section 25 of the Act states:

Individual issues

25 (1) When the court determines common issues in favour of a class and considers that the participation of individual class members is required to determine individual issues, other than those that may be determined under section 24, the court may,

(a) determine the issues in further hearings presided over by the judge who determined the common issues or by another judge of the court;

(b) appoint one or more persons to conduct a reference under the rules of court and report back to the court; and

(c) with the consent of the parties, direct that the issues be determined in any other manner.

Directions as to procedure

(2) The court shall give any necessary directions relating to the procedures to be followed in conducting hearings, inquiries and determinations under subsection (1), including directions for the purpose of achieving procedural conformity.

Idem

(3) In giving directions under subsection (2), the court shall choose the least expensive and most expeditious method of determining the issues that is consistent with justice to class members and the parties and, in so doing, the court may,

(a) dispense with any procedural step that it considers unnecessary; and

(b) authorize any special procedural steps, including steps relating to discovery, and any special rules, including rules relating to admission of evidence and means of proof, that it considers appropriate.

Time limits for making claims

(4) The court shall set a reasonable time within which individual class members may make claims under this section.

Idem

(5) A class member who fails to make a claim within the time set under subsection (4) may not later make a claim under this section except with leave of the court.

> *Extension of time*
>
> (6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5).
>
> *Determination under cl. (1)(c) deemed court order*
>
> (7) A determination under clause (1) (c) is deemed to be an order of the court.
>
> […]

[446] In the immediate case, I shall employ my jurisdiction pursuant to s. 12 of the Act and I shall employ s. 25 by analogy to formulate the procedural means for the individual actions that are required for access to justice in the immediate case. As repeatedly foreshadowed above, I shall be making an order pursuant to s. 7 of the *Class Proceedings Act, 1992*.

[447] With the Plaintiffs' and the Defendants' assistance, I shall, in effect, be designing an opt-in joinder action for 60 actions where a group of co-plaintiffs will sue three co-defendants comprised of (a) a specific team, (b) that specific team's league (WHL, OHL, or QMJHL), and (c) the CHL.

[448] In *Hudspeth v Whatcott*,[154] I suggested that an opt-in joinder proceeding pursuant to s. 7 might be accommodated by the *Class Proceedings Act, 1992*, where a class action was not available. See also: *Green v. The Hospital for Sick Children*,[155] *Green v. The Hospital for Sick Children*,[156] *Trustees of the Millwright Regional Council of Ontario Pension Trust Fund v. Celestica Inc.*[157] and *O'Brien v. Bard Canada Inc*.[158] The recently adjudicated *Barker v Barker*,[159] demonstrates the utility of the s. 7 procedure.

[449] *Barker v, Barker* was about the horrific treatment of patients at Ontario's maximum-security Oak Ridge Division of the Mental Health Centre in Penetanguishene, Ontario between 1966 and 1983. The patients who suffered from serious psychiatric illnesses were involuntarily admitted to Oak Ridge. Some of those admissions came as a result of Warrants of Remand from the courts, penitentiaries, and reformatories, others pursuant to Warrants of the Lieutenant Governor after having been found not guilty by reason of insanity and still others were involuntarily committed under the version of the *Mental Health Act* applicable at the time.

[450] In what was originally styled as *Egglestone v. Barker*, Ms. Taylor and Mr. Joanisse moved for certification of their action as a class action. Justice Cullity dismissed the motion.[160] He found that although there were causes of actions and although there were common issues, the Plaintiffs had not demonstrated that a resolution of issues would advance the proceedings. In 2006, pursuant to s. 7 of the *Class Proceedings Act, 1992*, Ms. Taylor and Mr. Joanisse moved for an order permitting the action to continue as an ordinary joinder action with approximately 30 individual

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[154] 2017 ONSC 1708.
[155] 2021 ONSC 8237.
[156] 2019 ONSC 5696, leave to appeal to the Court of Appeal refused on March 15, 2019.
[157] 2016 ONSC 3235.
[158] 2015 ONSC 2470.
[159] 2020 ONSC 3746 and 2021 ONSC 158, var'd 2022 ONCA 567.
[160] *Egglestone v. Barker*, [2003] O.J. No. 3137 (S.C.J.), aff'd [2004] O.J. No. 5433 (Div. Ct.), leave to appeal to the Court of Appeal denied on May 18, 2005.

co-plaintiffs. Justice Cullity granted the motion.[161]

[451] The action continued as a joinder action. I succeeded Justice Cullity in case managing *Egglestone v. Barker,* which became *Barker v Barker*. I granted a summary judgment, but my decision was reversed by the Court of Appeal[162] and Justice Morgan took over the management of the case, and he successfully steered the case toward achieving all of the goals of a class proceeding; namely, access to justice, behaviour modification, and an economic and efficient procedure that is fair to the defendants.[163] *Barker v. Barker* demonstrates that the s. 7 procedure can provide a preferable procedure to a class action.

[452] In the immediate case joinder could be made for those putative Class Members who self-identify and opt-in to advance a claim against a particular team and its co-defendants. I agree with the Defendants' submission that joinder of cases based on similar experiences among claimants is a more appropriate and feasible means to achieve access to justice.

[453] To allow the s. 7 process to unfold and to prevent the recommencement of any limitation periods, I suspend my Order dismissing the Certification Motion for 120 days pending the determination of a motion for approval of an Individual Issues Protocol.

[454] Pursuant to sections 7, 12, and 25 of the *Class Proceedings Act, 1992,* I order that Messrs. Carcillo, Taylor and Quirk shall have 120 days, if so advised: (a) to prepare an "Individual Issues Protocol" for individual (discreet/separate) 60 joinder-actions against the WHL, OHL, or QMJHL, respectively and their teams respectively; and (b) to bring a motion for approval of the Individual Issues Protocol, failing which Messrs. Carcillo, Taylor, and Quirk's proposed class action shall be dismissed.

[455] Pursuant to sections 7, 12, and 25 of the *Class Proceedings Act, 1992,* I order Messrs. Carcillo, Taylor and Quirk shall have 120 days, if so advised: (a) to prepare a Notice to the Class Members of the Individual Issues Protocol and a Distribution Plan for the dissemination of the Notice at the expense of the Defendants; and (b) to bring a motion for approval of the Notice and of the Dissemination Plan, failing which Messrs. Carcillo, Taylor, and Quirk's proposed class action shall be dismissed.

[456] I note that if the Plaintiffs' affiants for the certification were prepared to be lead plaintiffs, then there is already the basis for joinder actions against thirty-eight teams.[164]

[457] To be clear, Messrs. Carcillo, Taylor, and Quirk and Class Counsel are under no obligation to seek an order under sections 7, 12, and 25 of the *Class Proceedings Act, 1992*, in which case

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[161] *Joanisse v. Barker*, [2006] O.J. No. 5902 (S.C.J.).
[162] *Barker v. Barker*, 2018 ONCA 25, rev'g 2017 ONSC 3397.
[163] *Barker v. Barker*, 2020 ONSC 3746 and 2021 ONSC 158, var'd 2022 ONCA 567.
[164] Visualize: (a) twenty teams of the WHL; namely: Billings Bighorns, Brandon Wheat Kings, Calgary Wranglers, Kamloops Blazers, Lethbridge Broncos (now Swift Current Broncos), Lethbridge Hurricanes, Medicine Hat Tigers, Moose Jaw Warriors, Nanaimo Islanders, New Westminster Bruins (now Tri-City Americans), Portland Winterhawks, Prince Albert Raiders, Prince George Cougars, Seattle Breakers (now Seattle Thunderbirds), Seattle Thunderbirds, Spokane Flyers, Swift Current Broncos, Tri-City Americans, Victoria Cougars (now Prince George Cougars), and Winnipeg Warriors (now Moose Jaw Warriors); (b) sixteen teams of the OH; namely: Barrie Colts, Erie Otters, London Knights, Mississauga IceDogs (now Niagara IceDogs), Newmarket Royals (now Sarnia Sting), Niagara Falls Thunder (now Erie Otters), Niagara IceDogs, North Bay Centennials (now Saginaw Spirit), Oshawa Generals, Ottawa '67s, Sarnia Sting, and Sudbury Wolves; and (c) two teams of QMJHL; namely: Halifax Mooseheads, Moncton Alpines (now Moncton Wildcats).

the certification motion will be dismissed with costs to be determined.

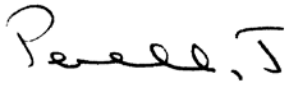
[458] I appreciate that the burden of them will not be lightened if they proceed to seek a s. 7 order. It is an arduous and time consuming process to prepare an individual issues protocol, as Class Counsel in the immediate case is well aware because of their experience with *Brazeau v. Canada, Reddock v. Canada, and Francis v. Ontario,* which are cases where very elaborate individual issues protocols were developed. They are under no obligation to make this effort. In any event, Messrs. Carcillo, Taylor, and Quirk should be commended for their courage and their pursuant of access to justice and the betterment of Canadian society of which they have already made an enormously valuable contribution.

[459] I alert the parties that I am inclined to view this case as one in which if the proceeding does not continue pursuant to s. 7 of the Act, it may be appropriate to award Messrs. Carcillo, Taylor, and Quirk costs.

P. Conclusion

[460] For the above reasons, an Order shall issue as set out in the Introduction to these Reasons for Decision.

[461] The costs of the Jurisdiction Motion, Ragoonanan Motion, and Certification Motion shall be in the cause of the Individual Issues Protocol Motion.



Perell, J.

Released: February 3, 2023

CITATION: Carcillo v. Canadian Hockey League, 2023 ONSC 886
COURT FILE NO.: CV-20-00642705-00CP
DATE: 20230203

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

DANIEL CARCILLO and GARRETT TAYLOR

Plaintiffs

- and -

CANADIAN HOCKEY LEAGUE *et al*

Defendants

REASONS FOR DECISION

PERELL J.

Released: February 3, 2023