

Court of Queen's Bench of Alberta

Citation: Walter v WHL, 2020 ABQB 631

Date:
Docket: 1401 11912
Registry: Calgary

Between:

Lukas Walter, Travis McEvoy, and Kyle O'Connor as Representative Plaintiffs

Plaintiffs

- and -

Western Hockey League, McCrimmon Holdings Ltd. and 32155 Manitoba Ltd., a Partnership c.o.b. as Brandon Wheat Kings, Brandon Wheat Kings Limited Partnership, 1056648 Ontario Inc., Calgary Flames Limited Partnership, Calgary Sports and Entertainment Corporation, Rexall Sports Corp., Edmonton Major Junior Hockey Corporation, Edmonton Oilers Hockey Corp., EHT, Inc., Kamloops Blazers Hockey Club, Inc., Kamloops Blazers Holdings Ltd., Kelowna Rockets Hockey Enterprises Ltd., Hurricanes Hockey Limited Partnership, Prince Alberta Raiders Hockey Club Inc., Brodsky West Holdings Ltd., EdgePro Sports & Entertainment Ltd., Rebels Sports Ltd., Queen City Sports & Entertainment Group Ltd., Braken Holdings Ltd., Saskatoon Blades Hockey Club Ltd., Vancouver Junior Hockey Limited Partnership Ltd., Vancouver Junior Hockey Partnership Ltd., Vancouver West Coast Hockey Enterprises Ltd., West Coast Hockey LLP, Medicine Hat Tigers Hockey Club Ltd., 1091956 Alta Ltd., Portland Winter Hawks Inc., Brett Sports & Entertainment Inc., Hat Trick Inc., d.b.a. Spokane Chiefs Hockey Club, Thunderbird Hockey Enterprises, LLC, Top Shelf Entertainment Inc., Swift Current Tier 1 Franchise Inc., Swift Current Bronco Hockey Club Inc., Kootenay Ice Hockey Club Ltd., Moose Jaw Tier 1 Hockey Inc., d.b.a. Moose Jaw Warriors, Moose Jaw Warriors Tier 1 Hockey Inc., d.b.a. Lethbridge Hurricanes Hockey Club, and Canadian Hockey League

Defendants

**Reasons for Decision
of the
Honourable Mr. Justice R.J. Hall**

[1] A joint hearing was conducted amongst the Superior Courts of Alberta, Ontario and Quebec, pursuant to the Canadian Judicial Protocol for the Management of Multi-Jurisdictional Class Actions and the Provision of Class Action Notice.

[2] The applicant plaintiffs are seeking judicial approval of a negotiated settlement of 3 class actions, one in each of the three provinces. The defendants support approval of the settlement agreement reached during a mediation. The Settlement Agreement provides that the Defendants shall pay \$30,000,000.00 to the Plaintiffs.

[3] The class actions concern whether major junior hockey players in the Ontario Hockey League (“OHL”), the Western Hockey League (“WHL”) and the Quebec Major Junior Hockey League (“QMJHL”) should be treated as being employees of the defendant hockey teams, entitled to minimum wages prescribed in the various jurisdictions’ employment standards legislation.

[4] On June 15, 2017, I certified the action as a class action in Alberta, pursuant to the *Class Proceedings Act*, s.a. 2003, c. C-16.5.

[5] The class action was certified in Ontario by Mr. Justice Perell on April 27, 2017. The Quebec class action was authorized on June 13, 2019.

[6] At the joint hearing, the plaintiff’s class counsel presented the Settlement Agreement, which purports to settle all 3 actions. Class Counsel seeks approval of the Settlement Agreement, by all 3 courts, pursuant to the Class Action legislation in each province. They seek approval of the terms of the Settlement Agreement which includes a distribution protocol; approval of honoraria for the named plaintiffs; and approval of proposed fees for the class counsel.

[7] Application is made pursuant to Division 3, section 35 of the *Class Proceedings Act* which provides, in part, that a proceeding may be settled only with the approval of the Court, and subject to any terms or conditions that the Court considers appropriate.

[8] I have had the advantage of reading the decision of Justice Perell in respect of this application, in the *Berg v OHL* action, which is the Ontario sister case to this one.

[9] Justice Perell has set out the history of the Actions, leading up to this application. He notes that, at the 11th hour an objection was raised at the joint hearing by class members Kobe Mohr and Anthony Poulin. This objection was that the release contained in the Settlement Agreement would, or could, discharge the Defendants from liability for other class actions that had been commenced against the Defendants; one alleging fiduciary duty breaches resulting in players receiving concussions; one alleging sexual abuse suffered by some of the players; and one, just initiated in Federal Court, alleging unlawful restraint of trade under s. 48 of the *Competition Act*. The objector, Mohr, is a named Plaintiff in the Federal Court claim.

[10] The Settlement Agreement contains the following release that would be binding on Class Members if the Settlement is approved:

Definitions

[...]

(25) Released Matters means, up to the date of the execution of this Settlement Agreement, any and all actions, causes of action, suits, debts, claims (including any additional claims by the representative plaintiffs) and demands, howsoever

arising, by the Releasors as the result of, relating to, or arising from the matters raised or advanced in the Class Actions or which could have been raised or advanced in the Class Actions, whether known or unknown, or by reason of any cause, matter or thing whatsoever.

(26) Releasees means the Defendants and the Insurers and their predecessors, successors, assigns, and reinsurers and all related entities, including but not limited to affiliates, parents, subsidiaries, current and former shareholders or other owners, and their respective present and former officers, directors, employees and agents and their heirs, executors, successors and assigns.

(27) Releasors means the Plaintiffs and Class Members in the Class Actions, for themselves, their heirs executors, successors and assigns.

[...]

5.—RELEASES AND DISMISSALS

5.1 *Release of Releasees*

(1) The Releasors covenant, represent and warrant that, as of the date of the execution of the Settlement Agreement, they have no further claims against the Releasees for, or arising out of, the Released Matters. In the event that the Releasors have made or should make any claims or demands or commence or threaten to commence any actions, claims or class actions or make any complaints against the Releasees arising out of the Released Matters, this Release may be raised as an estoppel and complete bar to any such claim, demand, action, class actions or complaint.

(2) The Releasors agree and undertake that they will not make any claim or commence or maintain any class actions, complaint, action or claim against any Person in which any claim could arise against the Releasees for contribution or indemnity or any other relief over in respect of any of the actions, causes of action, claims, debts, suits or demands of any nature or kind that has been released by this Release. In the event that the Releasors make any claim or commence any proceeding in respect of the Released Matters against any person or entity which might make a claim, whether for contribution or indemnity or declaratory or other relief, from the Releasees or any of them, or which might result in a claim, whether for contribution or indemnity or declaratory or other relief, being made against the Releasees or any of them, this Release may be raised as an estoppel and complete bar to any such claim, demand, action, proceeding or complaint.

(3) This release is conditional upon approval of the Settlement Agreement by each of the three Courts. In the event that this Settlement Agreement is not approved by Final Order of any of the Courts, the Releasors will not be bound by the terms of this Release.

(underlining added)

[11] Justice Perell's decision contains a complete analysis of the fairness of the settlement to the class members. He considers it is a fair settlement amount in respect of these three claims;

and I agree. I am also satisfied that the distribution protocol is fair and appropriate; that the honoraria for the named plaintiffs is fair and appropriate; and that the proposed fee for Class counsel is reasonable in the circumstances.

[12] However, like Justice Perell, I am unable to approve the proposed settlement, because the “Released Matters” definition in the Settlement Agreement is overly broad. Were I to approve this release, the defendants could argue that the release terms have released them from liability for some or all of the other class action lawsuits now in existence, or for further class actions not yet commenced.

[13] Justice Perell has outlined those risks. To his discussion, I would add, that when I certified the Alberta class action to proceed, I certified the claims as pleaded.

[14] The approval to be sought, in this application, should be approval of settlement of **only** that action; not other existing or potential claims. In the definition of Released Matters set out above, I have underlined the words: “... or which could have been raised or advanced in the Class Actions, either known or unknown, or by reason of any cause, matter or thing whatsoever.”

[15] Were I to approve those words in the description of Released Matters, I would be venturing outside this certified class action and approving more than I have certified.

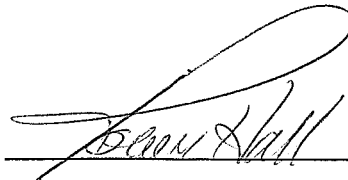
[16] While both class counsel and defendant’s counsel maintain that such wording is “standard” and “boiler plate”, I do not accept it as being appropriate to settlement of the certified class action. The class members cannot be unwittingly releasing the defendants from other claims beyond the one being settled.

[17] I am prepared to approve the terms of settlement, the distribution protocol, the honoraria and class counsel’s fees and disbursements, if an appropriate, less inclusive release is placed before me. The plaintiffs may reapply with an appropriately reworded release.

[18] It will not be necessary for the plaintiffs to readvertise and give notice of an amended application before me, other than to give such notice to counsel for the defendants and counsel for the objectors. In such circumstances the Application may be made in writing, without oral representation.

Heard on the 15th day of September, 2020.

Dated at the City of Calgary, Alberta this 22nd day of October, 2020.

A handwritten signature in black ink, appearing to read "R.J. Hall", is written over a horizontal line.

R.J. Hall
J.C.Q.B.A.

Appearances:

Theodore P. Charney, Devra Charney, James K. McDonald, Jody Brown, Joshua Mandryk
for the Plaintiffs

Patricia D.S. Jackson, Lisa Talbot
for the Defendants

Mathieu Laplante-Goulet, Maxime Saint-Onge
For the Objectors Kobe Mohr and Anthony Poulin