CITATION: Berg v. Canadian Hockey League, 2017 ONSC 5382
COURT FILE NO.: CV-14-514423CP
DATE: 20170911

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SAMUEL BERG and DANIEL PACHIS

Plaintiffs

– and –

CANADIAN HOCKEY LEAGUE, ONTARIO MAJOR JUNIOR HOCKEY LEAGUE, ONTARIO HOCKEY LEAGUE, WESTERN HOCKEY LEAGUE, QUEBEC MAJOR JUNIOR HOCKEY LEAGUE INC., WINDSOR SPITFIRES INC., LONDON KNIGHTS HOCKEY INC., BARRIE COLTS JUNIOR HOCKEY LTD., BELLEVILLE SPORTS AND ENTERTAINMENT CORP., ERIE HOCKEY CLUB LIMITED, JAW HOCKEY ENTERPRISES LP, GUELPH STORM LIMITED, ~~KINGSTON FRONTENAC HOCKEY LTD.~~, KINGSTON FRONTENACS HOCKEY CLUB, 2325224 ONTARIO INC., MISSISSAUGA STEELHEADS HOCKEY CLUB INC., NIAGARA ICEDOGS HOCKEY CLUB INC., BRAMPTON BATTALION HOCKEY CLUB LTD., NORTH BAY BATTALION HOCKEY CLUB LTD., GENERALS HOCKEY INC., OTTAWA 67'S LIMITED PARTNERSHIP, THE OWEN SOUND ATTACK INC., PETERBOROUGH PETES LIMITED~~.~~, COMPUWARE SPORTS CORPORATION, IMS HOCKEY CORP., SAGINAW HOCKEY CLUB, L~~.~~L~~.~~C~~.~~, 649643 ONTARIO INC. c.o.b. as SARNIA STING, 211 SSHC CANADA ULC o/a SARNIA STING HOCKEY CLUB, SOO GREYHOUNDS INC., McCRIMMON HOLDINGS, LTD. and 32155 MANITOBA LTD., A PARTNERSHIP c.o.b. as BRANDON WHEAT KINGS, 1056648 ONTARIO INC., REXALL SPORTS CORP., EHT, INC., KAMLOOPS BLAZERS HOCKEY CLUB, INC., KELOWNA ROCKETS HOCKEY ENTERPRISES LTD., HURRICANES HOCKEY LIMITED PARTNERSHIP, PRINCE ALBERT RAIDERS HOCKEY

Theodore P. Charney, Steven Barrett, Tina Q. Yang, Glenn Brandys, and *Joshua Mandryk*, for the Plaintiffs

Patricia D.S. Jackson, Lisa Talbot, Sarah Whitmore, and *Irfan Kara*, for the Defendants

Shantona Chaudhury and *Justin H. Nasseri*, for the Law Foundation of Ontario

CLUB INC., BRODSKY WEST HOLDINGS LTD., REBELS SPORTS LTD., QUEEN CITY SPORTS & ENTERTAINMENT GROUP LTD., SASKATOON BLADES HOCKEY CLUB LTD., VANCOUVER JUNIOR HOCKEY LIMITED PARTNERSHIP, 8487693 CANADA INC., CLUB DE HOCKEY JUNIOR MAJEUR DE BAIE-COMEAU INC., CLUB DE HOCKEY DRUMMOND INC., CAPE BRETON MAJOR JUNIOR HOCKEY CLUB LIMITED, LES OLYMPIQUES DE GATINEAU INC., HALIFAX MOOSEHEADS HOCKEY CLUB INC., CLUB HOCKEY LES REMPARTS DE QUEBEC INC., LE CLUB DE HOCKEY JUNIOR ARMADA INC., MONCTON WILDCATS HOCKEY CLUB LIMITED, LE CLUB DE HOCKEY L'OCEANIC DE RIMOUSKI INC., LES HUSKIES DE ROUYN-NORANDA INC., 8515182 CANADA INC. c.o.b. as CHARLOTTETOWN ISLANDERS, LES TIGRES DE VICTORIAVILLE (1991) INC., SAINT JOHN MAJOR JUNIOR HOCKEY CLUB LIMITED, CLUB DE HOCKEY SHAWINIGAN INC., CLUB DE HOCKEY JUNIOR MAJEUR VAL D'OR INC., WEST COAST HOCKEY ENTERPRISES LTD., MEDICINE HAT TIGERS HOCKEY CLUB LTD., PORTLAND WINTER HAWKS, INC., BRETT SPORTS & ENTERTAINMENT, INC., THUNDERBIRD HOCKEY ENTERPRISES, LLC, TOP SHELF ENTERTAINMENT, INC., SWIFT CURRENT TIER 1 FRANCHISE INC., 7759983 CANADA INC., LEWISTON MAINEIACS HOCKEY CLUB, INC., KITCHENER RANGER JR A HOCKEY CLUB, <u>KITCHENER RANGERS JR "A" HOCKEY CLUB,</u> SUDBURY WOLVES HOCKEY CLUB LTD., GROUPE SAGS 7-96 INC., MOOSE JAW TIER ONE HOCKEY INC., DBA MOOSE JAW WARRIORS, KOOTENAY ICE HOCKEY CLUB LTD., LETHBRIDGE HURRICANES HOCKEY CLUB, and LE TITAN ACADIE BATHURST (2013) INC./THE ACADIE BATHURST TITAN (2013) INC.

Defendants

Proceeding under the *Class Proceedings Act, 1992*) **HEARD**: In writing

PERELL, J.

REASONS FOR DECISION - COSTS

> We shall defend our island, whatever the cost may be, we shall fight on the beaches, we shall fight on the landing grounds, we shall fight in the fields and in the streets, we shall fight in the hills; we shall never surrender. [Winston Churchill, English House of Parliament, June 4, 1940.]

A. Introduction and Overview

[1] These are my Reasons for Decision with respect to the costs of a certification motion.

[2] The Plaintiffs, Samuel Berg and Daniel Pachis, seek partial indemnity costs of **$1,212,065.63** inclusive of HST and disbursements of $145,027.78.

[3] The Defendants, the Ontario Hockey League ("OHL") and the Canadian Hockey League ("CHL") submit that there should be **$0.00** costs for the certification motion or in the alternative the costs awarded should be substantially reduced and ordered in the cause.

[4] The Defendant American Teams of the OHL against whom the action was not certified seek costs of **$224,362.91**; *i.e.*, $52,691.05 in fees and $171,671.86 in disbursements, inclusive of the $149,404.57 plus HST fee of the Defendants' U.S. law expert, David Dunn.

[5] For the reasons that follow, I award the Plaintiffs **$1,212,065.63**, all inclusive, **$500,000** payable forthwith with the balance of **$712,065.63** payable to the Plaintiffs in the cause.

[6] I award the American Teams **$200,000**, which is to be credited against the award made against the commonly represented Defendants. (As will appear, my order is similar to a *Bullock* or *Sanderson* Order.)

[7] The result is that the Defendants should pay the Plaintiffs **$300,000** forthwith and **$0.00** subsequently if the Defendants succeed at the common issues trial and **$712,065.63** if the Defendants are unsuccessful, all subject to the discretion of the court hearing the common issues trial.

B. Factual Background

[8] Pursuant to the *Class Proceedings Act, 1992*, S.O. 1992, c. 6, Mr. Berg and Mr. Pachis, former players in the OHL, commenced a proposed class action against the OHL, the CHL, the Western Hockey League ("WHL"), the Québec Major Junior Hockey League ("QMJHL"), and their respective teams. The claims against the WHL and the QMJHL were stayed because there are parallel class actions in Alberta and Québec brought by Lucas Walter, a former player in the WHL and the QMJHL.

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

[10] The employment statutes that Messrs. Berg and Pachis relied upon were: (1) Ontario's

Employment Standards Act, 2000, S.O. 2000, c. 41; (2) Michigan's *Workforce Opportunity Wage Act*, Mich. Stat. §408.413; (3) Pennsylvania's *Minimum Wage Act of 1968*, P.L. 11, No. 5; and (4) the United States federal government's *Fair Labor Standards Act of 1938*, 29 USC §§ 218(a).

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

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

[12] The evidence for the certification motion was enormous. The motion record comprised 36 volumes, including documents, transcripts, financial statements, and 62 affidavits, or declarations. There were 7,500 pages of financial records delivered on a CD. There were six expert reports. There were lengthy factums and also 14 volumes of case books. The oral argument lasted three days.

[13] In its initial certification material, the Plaintiffs delivered an expert report about American employment law from Ryan Hancock, a lawyer at the Philadelphia firm of Willig, Williams & Davidson. The Defendants responded with an expert report and supplementary report from David Dunn, a lawyer from the New York firm of Hogan Lovells US LLP. Mr. Dunn's report addressed a range of issues and included an extensive analysis about jurisdictional principles such as comity and the recognition and enforcement of Canadian judgments in the U.S.A. The Plaintiffs responded with another report from Mr. Hancock, which in turn triggered the supplementary report from Mr. Dunn.

[14] The fees charged for Mr. Dunn in this action of approximately $150,000 represent half of what was paid to him; the other half was allocated to the action in Alberta. In contrast, Mr. Hancock's fee was $34,600.

[15] For reasons reported as *Berg v. Canadian Hockey League*, 2017 ONSC 2608: (1) I certified the claims for breach of employment law statutes and unjust enrichment; (2) I did not certify the claims for: (a) breach of contract, (b) negligence, (c) breach of duty of honesty, good faith and fair dealing, (d) conspiracy, and (e) waiver of tort; (3) I did not certify the action as against the American Teams; (4) I amended the definition of the class to close the class period as of the date of the certification motion without prejudice to the definition being amended from time to time; (5) I did not certify the common issues for breach of contract, negligence, breach of duty of honesty, good faith and fair dealing, and conspiracy; (6) I appointed Messrs. Berg and Pachis to be Representative Plaintiffs; and with the various amendments, I certified the action as a class action.

C. Costs Submissions of the Plaintiffs

[16] The breakdown of the Plaintiffs' Bill of Costs is as set out below:

A.	Delivery of Certification Record	$42,088.50
B.	Further Research and Amendments to Claim	$55,782.00
C.	Supplementary Motion Record	$10,512.00
D.	Review of Defendants' Responding Record	$77,352.00
	Survey and Social Media Campaign	$57,525.80
	Dr. Mongeon Affidavit	$5,821.50
	Player Affidavits	$80,847.00
	O'Grady Affidavit	$49,584.00
	Amendments to Statement of Claim	$2,631.00
E.	Case Conference re Communications with Class Counsel	$3,264.00
F.	Defendants' Sur-Reply Evidence	$67,387.75
G.	Cross-Examinations	$85,659.00
H.	Brief of Law	$189,859.20 (50% of $379,718.40)
I.	Facta for Certification	$166,236.00
J.	Certification Hearing	$58,902.00
K.	Interlocutory Motions	
	Adjournment Motion	$9,012.00 (50% of $18,024.00)
	Motion to Strike Plaintiffs' Reply Record	$47,212.00 (50% of $93,424.00)
	Motion for Financial Records	$7,788.00 (50% of $15,576.00)
	Motion to Seal Financial Evidence	$15,523.50 (50% of $31,047.00)
	DISBURSEMENTS	
	Experts' Fees	$104,660.18
	Transcripts	$1,238.03
	Media Campaign (Point Blank Creative)	$11,930.00
	Recruitment Campaign (Netex Enterprise)	$1,670.45
	Travel	$5,725.94
	Service and Filing Fees	$706.50
	Copying	$19,094.68
	BILL OF COSTS	$44,871.74 (inclusive of HST)

[17] The Plaintiffs submit that they were the successful party and that the normal rule that costs should follow the event should be applied. They submit that to the extent that certain causes of action and certain questions were not certified, then this circumstance should not reduce the award.

[18] The Plaintiffs provide justifications for having advanced the uncertified portions of their action. For example, they submit that the conspiracy action was properly pleaded and necessary at least until the certification motion when it was determined that the Defendants, while they disputed most everything, no longer disputed that Messrs. Berg and Pachis could be representative plaintiffs for Class Members on all the OHL's teams.

[19] To account for their lack of success with respect to the American Team Defendants, the Plaintiffs have excluded the time and disbursements attributable to those Defendants, such as the time expended to proffer the employment law of the States of Michigan and Pennsylvania, jurisdiction, and to develop the preferable procedure analysis.

[20] The Plaintiffs concede that the amount of their claim for costs is extraordinary large, but they attribute the enormous costs of the certification motion to the Defendants' concede nothing, contest everything, Churchillian resistance to the certification motion.

[21] The Plaintiffs submit that the Defendants made the certification motion move into the substantive merits and to issues beyond what would be required if the motion just tended to the five certification criteria of the *Class Proceedings Act, 1992.*

[22] The Plaintiffs assert that it was the Defendants who compelled them to respond to the geometrically expanding record with the result that there was an enormous evidentiary record. The Plaintiffs submit that the resulting enormously expensive litigation is what the Defendants reasonably and actually expected, and they should pay accordingly. The Plaintiffs submit that a review of the history of the litigation (set out in their submissions in an annotated chronology) establishes that they were obligated to respond to an excessive evidentiary record and legal arguments and the amount claimed in the bill of costs reflects the reasonable expectations of the Defendants.

[23] Thus, the Plaintiffs submit in paragraph 31 of their factum-like costs submissions:

> 31. The plaintiffs also had to prepare a reply factum in response to the defendants' conflict in the class argument and the voluminous financial records and expert reports analyzing the financial records. The defendants filed many affidavits from team owners and the Commissioners about the financial harm. All of this evidence was being relied upon by the defendants to defeat certification in both provinces. While this court ultimately found the conflict argument to be a bogus argument, given the stakes and the novelty of the argument, class counsel was required to expend considerable resources in responding to it both on the law and the financial evidence.

[24] The Plaintiffs and the Class Proceedings Fund, which is responsible for adverse costs awards against the Plaintiffs, submits that while the U.S. Defendant Teams are entitled to recover a reasonable amount for costs, the amount sought in disbursements is excessive, unreasonable, and significantly exceeds what the Plaintiffs could reasonably have expected to pay.

[25] The Plaintiffs and the Fund also submit that while part of Mr. Dunn's report was relevant to the issue of preferable procedure, the remainder was a disguised argument on jurisdiction *simpliciter* and choice of law that ought not to have formed part of the certification motion.

[26] The Plaintiffs and the Fund therefore ask that the Court reduce the expert fees to $50,000 for a total disbursement award of $59,000 and that the legal fees claimed by the U.S. Defendants be reduced by one-third, from $52,691.05 to $35,000, to reflect time spent on jurisdictional issues that were not properly part of the certification motion.

D. Costs Submissions of the Defendants

[27] The Defendants submit that the American Team Defendants should have their costs for their success in resisting certification of the Plaintiffs' claims against them.

[28] Further, the Defendants submit that given the novelty of the Plaintiffs' claim, and the uncertainty surrounding the legal questions that arise out of that claim, this is an appropriate case for the court to order that there be no costs or in the alternative costs should be in the cause.

[29] In the event that costs are awarded, the Defendants submit that the Plaintiffs' claim is excessive, beyond any award made in comparable cases, and far beyond what is fair and reasonable. Further, the Defendants submit that the quantum of the claim for costs should be reduced because the amount claimed is inconsistent with the factors set out in Rule 57 of the *Rules of Civil Procedure*.

[30] The Defendants submit that the Plaintiffs' attempt to justify their claim based on blaming the Defendants is misdirected and they have only themselves to blame for excessively over-pleading their case and engaging in an emotive public relations pitch to portray the players that formed the putative class as exploited workers of avaricious employers.

[31] The Defendants submit that from the commencement of the action, the Plaintiffs have pleaded in their Statement of Claim so as to discredit and impugn the integrity of the Defendants and that it was the Plaintiffs, in their initial certification material, that introduced the issues of: (a) the alleged financial prosperity of the teams and the leagues; (b) whether or not the players were interns; (c) whether the Defendants were unlawfully, and knowingly, conspiring to violate the rights of minors and employment standards laws; (d) whether the Defendants were engaged in child exploitation and were infringing labour laws designed to protect children with a view to maximizing profits; and (e) the need for an expert report with respect to U.S. employment legislation. The Defendants submit that the Plaintiffs' over-pleading necessitated extensive legal research, the engagement of experts, and the development of a defence strategy to address seven causes of action, only two of which were certified.

[32] The Defendants submit that the following criteria or principles outlined in Rule 57 indicate that the amount claimed by the Plaintiffs is not fair and reasonable and the award of costs should be substantially less than the amount claimed: (a) subrule 57.01(1)(b) - the substantial narrowing of the claims, and corresponding common issues, from seven causes of action to two, which resulted in an apportionment of liability; (b) subrule 57.01(1)(d) - the importance of defending the serious conspiracy claim that was ultimately not certified; (c) subrule 57.01(1)(0.b) - the reasonable expectations of the Defendants; and (d) subrule 57.01(1)(e) - the conduct of the Plaintiffs that tended to lengthen the proceeding.

E. Discussion and Analysis

1. General Principles

[33] A party is free to expend as much or as little in prosecuting or defending a case as it chooses, but a successful party is not entitled to a full indemnity for those costs.

[34] In the case at bar there is no justification for a full indemnity or a substantial indemnity, and thus the quantum of costs shall be determined on a partial indemnity basis based on the normal principles, which I recently set out in *Fehr v. Sun Life Assurance Co. of Canada*, 2017 ONSC 2218, but which I will not repeat here.

[35] I will, however, set out the principles that apply to the disbursements portion of a claim for costs. In this regard, claims for disbursements must be reviewed with careful scrutiny, and the principle that cost awards must be fair and reasonable applies to disbursements, including expert fees: *Hamfler v. 1682787 Ontario Inc.*, 2011 ONSC 3331; *Mayer v. 1474479 Ontario Inc.*, 2014 ONSC 2622; *495793 Ontario Ltd. (c.o.b. Central Auto Parts) v. Barclay*, 2015 ONSC 602; *Bombardier Inc. v. AS Estonian Air*, 2013 ONSC 4209; *Batchelor v. Looney*, 2016 ONSC 1535.

[36] In order to assist the court in determining whether an expert's fee is fair and reasonable, the party claiming the disbursement should provide information about the amount of time spent by the expert in preparing the report and attending at trial (including preparation time) together with the hourly rate of the expert: *Hamfler v. 1682787 Ontario Inc., supra,* at paras. 24-25; *495793 Ontario Ltd. (c.o.b. Central Auto Parts) v. Barclay, supra,* at para. 28; *Abdula v. Canadian Solar Inc.*, 2015 ONSC 1421 at para. 13; *Ryan v. Rayner*, 2015 ONSC 3310 at para. 11; *Pyatt v. Roessle Estate*, 2017 ONSC 3878 at paras. 21-22; *Parent v. Janandee Management Inc.*, 2016 ONSC 3899 at para. 28.

[37] In *Hamfler v. 1682787 Ontario Inc., supra,* Justice Edwards developed the following non-exhaustive criteria to assist courts in determining whether an expert's fee is fair and reasonable or whether it is excessive: (1) Was the expert's evidence relevant and did it make a contribution to the case? (2) Was the expert's evidence of marginal value or was it crucial to the ultimate outcome at trial? (3) Was the cost of the expert or experts disproportionate to the economic value of the issue at risk? (4) Was the evidence of the expert duplicated by other experts called by the same party? (5) Was the report of the expert overkill or did it provide the court with the necessary tools to properly conduct its assessment of a material issue? and (6) How did the expert's fee compare to the fees charged by the expert retained by his or her opponent?

2. Analysis

[38] Notwithstanding the arguments of the parties about novelty and public interest litigation, this certification motion is not an occasion for which there should be no order as to costs.

[39] Without expressing any opinion on the questions of whether the issues for the certification motion were novel in the requisite sense so as to justify no order as to costs or whether the proposed class action and the defence of it constituted public interest litigation in the requisite sense so as to justify no order as to costs, I do say that it is somewhat disingenuous for

both parties to suggest that this litigation is other than self-interested commercial litigation about enforcing an employment contract in accordance with employment law.

[40] The parties and the lawyers were doing no altruistic favour to the public in prosecuting and defending this class action, and even if that was the case, the predominant motivator was money not ethical principles or public policy.

[41] The Plaintiffs did not bring the litigation because they thought they had an innovative interpretation of the employment legislation; they sued because they thought the Defendants were breaching the statutes and they wanted to be paid for their overtime work. Having regard to the way this action is being litigated, there is no principled reason for departing from the normal rules about costs.

[42] Speaking generally and speaking specifically for the *Class Proceedings Act, 1992*, costs awards have a multitude of functions in the administration of justice and the Legislature advertently decided not to make the class action regime a no-costs or an asymmetrical loser pays regime.

[43] The purposes of costs awards are: (1) to indemnify successful litigants for the costs of litigation, although not necessarily completely; (2) to facilitate access to justice, including access for impecunious litigants; (3) to discourage frivolous claims and defences; (4) to discourage and sanction inappropriate behaviour by litigants in their conduct of the proceedings; and (5) to encourage settlements: *Hamilton-Wentworth (Regional Municipality) v. Hamilton-Wentworth Save the Valley Committee, Inc.* (1985), 51 O.R. (2d) 23 (H.C.J.); *Fellowes, McNeil v. Kansa General International Insurance Co.* (1997), 37 O.R. (3d) 464 (Gen. Div.); *Fong v. Chan* (1999), 46 O.R. (3d) 330 (C.A.); *Somers v. Fournier* (2002), 60 O.R. (3d) 225 (C.A.); *British Columbia (Minister of Forests) v. Okanagan Indian Band*, [2003] 3 S.C.R. 371; *1465778 Ontario Inc. v. 1122077 Ontario Ltd.* (2006), 82 O.R. (3d) 757 (C.A.); *Reynolds v. Kingston (City) Police Services Board* (2007), 86 O.R. (3d) 43 (C.A.); *Standard Life Assurance Co. v. Elliott* (2007), 86 O.R. (3d) 221 (S.C.J.).

[44] In the circumstances of this case, those manifold purposes for a costs award should be allowed to operate.

[45] The Plaintiffs were successful in getting an employment law class action certified, and the American Team Defendants were successful in getting themselves out of that employment class action. Thus, the Plaintiffs are entitled to their costs of the certification motion and the Defendants are entitled to their costs arising from the fact that they were successful in escaping the clutches of the Ontario court.

[46] The American Team Defendants were represented by the same counsel as the Defendants who are the remaining Defendants obliged to pay costs to the Plaintiffs. In my opinion, the fair and appropriate way of approaching the matter is to credit the American Team Defendants' award against the amount due to the Plaintiffs, and I so order. The result is akin to a *Bullock* or *Sanderson* Order where the unsuccessful defendant directly or indirectly pays the costs of the successful co-defendant. Applying this approach to the circumstances of the immediate case means that the Law Foundation is not out of pocket. In my opinion, it is fair and appropriate that the American Team Defendants be paid their costs but it is also fair and appropriate to attribute the payment to the Canadian Team Defendants who together share some of the responsibility for

the excesses of the certification motion.

[47] The issue then becomes what should the quantum be for the respective awards. The problem here is that the amount expended by both sides appears grossly excessive and far beyond what should be required to determine whether a proposed employment law class action satisfies the certification criterion of the *Class Proceedings Act, 1992*.

[48] Both parties blame the other for the litigation Chernobyl meltdown, but to mix metaphors, as I noted in my Reasons for Decision at para. 14: "Both sides baited the other and both sides took the bait - hook, line, sinker, and litigation fishing boat."

[49] It is, therefore, difficult to apply the normal principles that guide the exercise of the court's discretion in the case at bar. The Defendants submit that they were provoked into delivering an expansive and expensive record by the Plaintiffs' slanderous allegations of profit mongering and of the Defendants exploiting and oppressing young and vulnerable team members fearful of reprisals and the dashing of their dreams of playing in the NHL. The Plaintiffs submit that they were provoked by a scorched earth defence that, among other things, attacked the integrity of Messrs. Berg and Pachis and that accused them of indifference to the ruin that the proposed class action would reek on their former team members.

[50] The problem for the court is that two wrongs do not make a right and both the Plaintiffs and the Defendants lost sight of the purposes of a certification motion. It is a fact that the Plaintiffs over-pleaded their case and provoked the Defendants, and it is a fact that the Defendants sought to prove the merits of their case on the certification motion and that both parties took the certification motion into territory that was outside the boundaries of a certification motion.

[51] It also appears to me that both parties were pleading to persuade the public about the morality of their respective positions; once again, vindication is not the purpose of a certification motion. Victory and vindication comes later when the merits of the case are actually decided. The *Class Proceedings Act, 1992* is procedural law not substantive law.

[52] In my opinion, the Defendants cannot blame the Plaintiffs for incurring the litigation expense that they did, and conversely the Plaintiffs cannot blame the Defendants and excuse what, at the end of the day, was an expensive and disproportionate expenditure for the purposes of a certification motion, which is not the time for a massive foray into the merits or into a public relations program to protect or enhance one's reputation.

[53] In the case at bar, the problems for the court are amplified because although the Defendants submit that the Plaintiffs' expenditure of costs is excessive, the Defendants did not disclose their own expenditure of costs and there is no way of measuring whether the Defendants' attribution of expense to the American Team Defendants is appropriate. The Plaintiffs' criticism of Mr. Dunn's approximately $150,000 fee in comparison to Mr. Hancock's fee of $34,600 is somewhat unfair when it is noted that the Plaintiffs are seeking $116,000 for experts' fees and a media campaign that is challenged by the Defendants as inappropriate.

[54] Doing the best that I can based on the information provided to me, I do regard the fee claim of the American Team Defendants as beyond the reasonable expectations of the Plaintiffs and unfair and unreasonable. I reduce the claim from $224,362.91 to $200,000 all inclusive. This sum should be credited against the Plaintiffs' award.

[55] As for the Plaintiffs, I award them the costs as claimed; *i.e.,* $1,212,065.63, all inclusive, $500,000 payable forthwith with the balance of $712,065.63 payable to the Plaintiffs in the cause. The result is that the Defendants should pay the Plaintiffs $300,000 forthwith and $0.00 subsequently if the Defendants succeed at the common issues trial and $712,065.63 if the Defendants are unsuccessful, all subject to the discretion of the court hearing the common issues trial.

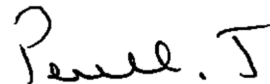
[56] My rationale for this outcome is that both parties are equally responsible for transforming the certification motion from a procedural motion into a substantive motion where both parties attempted to justify both their legal and their moral positions.

[57] The Plaintiffs were successful in certifying their action against the Canadian Teams but not against the Defendant American Teams and having regard to the awards in comparable class actions, in my opinion, a net recovery for the Plaintiffs of $300,000 for the certification motion is fair and reasonable and within the reasonable expectations of the Defendants and the award should be sufficient to the access to justice imperatives of the class action regime without ignoring that the Plaintiffs should bear, at least temporarily, some responsibility for the mutation of a procedural motion. I, therefore, order that the balance of $712,065.63 is payable to the Plaintiffs in the cause.

[58] Should the Plaintiffs succeed at the common issues trial, then the payment of the costs has simply been postponed. Should the Plaintiffs fail at the common issues trial, then the Plaintiffs will not recover their costs. This strikes me as a fair exercise of the court's discretion with respect to costs which includes the discretion to make costs in the cause.

F. Conclusion

[59] Order accordingly.



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