

**ONTARIO  
SUPERIOR COURT OF JUSTICE**

**B E T W E E N :**

**DANIEL CARCILLO, GARRETT TAYLOR and STEPHEN QUIRK**

Plaintiffs

- and -

**ONTARIO MAJOR JUNIOR HOCKEY LEAGUE, CANADIAN HOCKEY LEAGUE, WESTERN HOCKEY LEAGUE, QUEBEC 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,**

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Defendants

Proceeding under the *Class Proceedings Act, 1992*

**FACTUM OF THE MOVING PLAINTIFFS**  
(returnable November 14-18, 2022)

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## PART I - INTRODUCTION

1. This class proceeding concerns longstanding abuse of young players in the Canadian Hockey League ["CHL League"]. In candid moments, even the CHL League's long-standing leadership admits that this problem is systemic. The defendants' conduct in this action shows that this problem requires systemic scrutiny in open court.

2. Each year, the CHL League's three Member Leagues – the OHL League, the WHL League, and the QMJHL League<sup>1</sup> – select a few hundred talented young hockey players to join their ranks. These boys leave their families and hometowns to enter the Leagues with one dream: making it to the National Hockey League ["NHL"].<sup>2</sup> Only a few ever will.

3. At 15, 16 or 17 years-old, they are placed on Teams by the Leagues.<sup>3</sup> Most stay with billet families. They do not choose who they play for or who they play alongside. They are plunged into a highly-competitive environment where hockey is everything. Failing to perform or fit in, could mean being traded to a new team in a new town or being 'sent down' to a less prestigious league.<sup>4</sup> This pressure results in a cruel, toxic culture.

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<sup>1</sup> The short forms adopted in the Fresh as Amended Statement of Claim are used herein. The Ontario Hockey League, the Western Hockey League, and the Quebec Major Junior Hockey League are referred to as the "Member Leagues". The Member Leagues collectively with the CHL League are "the Leagues."

<sup>2</sup> See the Expert Report of Dr. Jay Johnson, ["**Johnson Report**"], p. 15, Certification Motion Record ["**CMR**"] Vol. 1, Tab 18, p. 157; Affidavit of David Branch, sworn December 3, 2015, ["**Branch Berg Affidavit**"], in *Berg v. Canadian Hockey League*, 2017 ONSC 2608, para. 21, PBOA, Tab 11.

<sup>3</sup> In the WHL, players can be selected in the calendar year in which they turn 15; in the OHL and QMJHL, players are eligible in the year they turn 16: Branch *Berg* affidavit, paras. 112, 126, CMR, Vol. 3, pp. 1516-1517, 1519; Affidavit of Ron Robison, sworn December 22, 2015, ["**Robison Berg Affidavit**"], in *Berg v. Canadian Hockey League*, 2017 ONSC 2608, para. 14, PBOA, Tab 11.

<sup>4</sup> In the OHL, a player that is still in high school cannot be traded without his consent; Member League approval is required for trades: Branch *Berg* Affidavit, paras. 113, 165-6, CMR, Vol. 3, pp. 1517, 1529; Robison *Berg* Affidavit, para. 80, CMR, Vol. 4, p. 1686.

Since 1975, as players and coaches moved between teams, and as the players of one generation became the coaches of the next, systemic abuse pollinated across the Leagues.

4. From coast to coast, young players were physically, sexually and psychologically abused on team buses, in locker rooms, and at team sanctioned "rookie parties". These strikingly common abuses include barbaric rituals, some – like the "hot box" – with ubiquitous names. Many rituals involve sexual and physical torture. Shrouded in an enduring culture of silence, the abuse became an open secret. The evidence on this motion establishes, beyond "some basis in fact," systemic abuse. Class members must not be isolated to individually litigate these facts over and over again.

5. Astounding failures in governance allowed systemic abuse to become embedded in the Leagues. Until the late 1990s, abuse was condoned. The Leagues' efforts since – commissioning reports to blunt public criticism, drafting policies to create the appearance of action, and obtaining and then ignoring independent recommendations critical of the *status quo* – have been a half-hearted performance and ineffective. These ongoing, collective failures suggest that the defendants believe themselves to be untouchable.

6. Without the court's involvement, the defendants cannot be trusted to reform their system. The CHL League's President, Dan MacKenzie, heard leadership opine that the issue is systemic and serious.<sup>5</sup> The CHL Leagues' Independent Review Panel ("**IRP**") described systemic, enduring abuse. Yet, MacKenzie swore in evidence that the abuse is

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<sup>5</sup> MacKenzie denied having heard this on cross-examination, but IRP minutes and testimony confirm that he was present when this was said: Corrected Cross-Examination of Dan MacKenzie, June 3, 2022 ["**MacKenzie Corr. CXE**"], 109:23-111:3, Transcript Brief ["**TB**"], Vol. 9, Tab 35, pp. 4844-4846; Cross-Examination of Sheldon Kennedy, August 25, 2022 ["**Kennedy CXE**"], 84:14-18, and Exhibit L (IRP Meeting Minutes, August 17, 2020), TB, Vol 6, Tab 29, pp. 3413 and 3621.

isolated and non-systemic.<sup>6</sup> Instead of heeding the panel's recommendations, he attempted to discredit the panellists, one of whom is a survivor of CHL abuse, and bury their report.<sup>7</sup>

7. The Teams reap profits from the Leagues' hockey enterprise and, collectively, govern the Leagues. The Leagues' constitutions enshrine collective duties to protect players, contemplate joint and several liability where the Teams fail to govern, transfer historical liabilities to present Team ownership, and require the Teams to indemnify the Leagues. The Leagues' parallel structures raise common issues that must be answered to fully compensate the class, particularly those whose Teams were sold or no longer exist.

8. As they have throughout this action, the defendants will continue to abdicate their responsibility by arguing that individual class members should commence actions against individual players, who the Leagues did not protect, and coaches, who the Leagues did not sanction. By doing so, they will try to leverage their culture of silence to avoid liability.

9. 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.

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<sup>6</sup> MacKenzie Corr. CXE, 111:4-112-14, 127:24-128:13, TB, Vol. 9, Tab 35, pp. 4846-4847, 4862-4863.

<sup>7</sup> Supplementary Affidavit of Dan MacKenzie, sworn March 4, 2022, paras. 2-8, Defendants' Motion Record ["DMR"] Vol. IV, Tab 22, pp. 451-3 ["MacKenzie March 2022 Affidavit"].

## **PART II - THE FACTS**

### **A. The Leagues' Independent Review Panel Reports a Systemic Problem**

10. After this action was commenced, the CHL League appointed the IRP to review, and recommend changes to, their policies and procedures regarding off-ice misconduct.<sup>8</sup> They did so, they say, because "the protection of our players has been and will always be our primary concern."<sup>9</sup> Their highly publicized goal was to confirm the CHL League had "an environment that is Players First and free of hazing, abuse, harassment and bullying".<sup>10</sup> The IRP found a toxic environment that was very much the opposite. The IRP's findings, which are consistent with other evidence on this motion, reveal a systemic problem in the Leagues and provide a clear evidentiary basis for certification.

#### **i. The IRP Investigates Off-Ice Misconduct**

11. Appointed in July 2020, the IRP consisted of Camille Thériault, former Premier of New Brunswick; Sheldon Kennedy, former hockey player and advocate against child abuse; and Danièle Sauvageau, an experienced policer officer, Order of Canada Recipient, and well-respected hockey coach.<sup>11</sup> They were tasked with reviewing "current policies of the CHL and its constituent leagues" to "determine whether changes would assist in the protection of players from off-ice misconduct related to hazing and harassment".<sup>12</sup> The panelists' scope of review included "current policies and procedures", "current education

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<sup>8</sup> MacKenzie March 2022 Affidavit, at para. 2, DMR, Vol. IV, Tab 22, p. 451; and see IRP Terms of Reference, Exhibit A to the Cross-Examination of Camille Theriault, September 23, 2022 ["**Thériault CXE**"], TB Vol 8, Tab 31(A), pp. 4220-4234.

<sup>9</sup> "CHL Announces Independent Review Panel", IRP Summons Motion Record, Tab 2(D), p. 146.

<sup>10</sup> "CHL Announces Independent Review Panel", IRP Summons Motion Record, Tab 2(D), p. 146.

<sup>11</sup> "CHL Appoints Independent Review Panel", IRP Summons Motion Record, Tab 2(E), pp. 149-150.

<sup>12</sup> Thériault CXE, 11:1-13:2 and Exhibit A (Terms of Reference), TB, Vol. 8, Tab 31, pp. 4121-4123 and 4221

and awareness programs", and "current complaint procedures". Although they asked to go back further, the CHL League limited their review to the previous four years.<sup>13</sup>

12. The IRP reviewed current policies, conducted "confidential interviews" with players, former players, and coaches, and consulted experts in athlete maltreatment, trauma, and sports psychiatry.<sup>14</sup> Dan MacKenzie and the Member Leagues' Commissioners presented their policies to the IRP and answered questions. In one meeting, OHL Commissioner David Branch acknowledged hazing rituals are a "systemic" problem "occurring in today's environment" that has not been properly addressed.<sup>15</sup>

13. At the IRP's request, the CHL League commissioned the firm Léger to survey players, coaches, general managers, parents and billet families about harassment, but refused to allow Léger to ask about physical or sexual abuse.<sup>16</sup> The Léger Data confirmed the IRP's review and conversations to that point:<sup>17</sup>

- 45% of players and family had heard of cases of bullying or harassment in the Leagues in the last four years, other than those reported in the media.
- 26% of players had witnessed bullying or harassment in the Leagues in the last four years but, of those, only 3% had reported it.
- the percentage of players who witnessed bullying or harassment in the last four years rises to 30% for veterans (19 to 21-year-olds) and 34% for recent alumni (22 to 24-year-olds).

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<sup>13</sup> Kennedy CXE, 34:25-36:8, TB, Vol. 6, Tab 29, pp. 3363, 3365.

<sup>14</sup> Report of the Independent Review Panel, ["**IRP Report**"], "The Impact is Real... Action is Needed", p.11, Second Supplementary Motion Record ["**SSMR**"], p. 72; Thériault CXE, Ex A (List of Experts), TB, Vol 8, Tab 31, pp. 4537-4538.

<sup>15</sup> Thériault confirmed that the IRP Minutes were transcribed from recordings and then reviewed for accuracy; the panellists also recall hearing Branch make these remarks: Kennedy CXE, 37:22-40:9; 82:2-84:13, and Exhibit L (IRP Meeting Minutes, August 17, 2020), TB, Vol 6, Tab 29, pp. 3366-3369, 3411-3413 and 3621-22; Thériault CXE, 17:2-17, 51:7-53:15, TB, Vol. 8, Tab 31, pp. 4127, 4161-4163 This is not the evidence David Branch gave on this motion: Affidavit of David Branch, sworn November 1, 2021, at para. 21 ["**Branch**"], DMR, Vol. II, Tab 17, p. 217.

<sup>16</sup> Thériault CXE, 70:16-71:1, TB, Vol 8, Tab 31, pp. 4180-4181; Kennedy CXE, 41:10-42:19, TB, Vol. 6, Tab 29, pp. 3370-3371.

<sup>17</sup> Kennedy CXE, 43:15-44:11, TB, Vol. 6, Tab 29, pp. 3372-3373.

- 12% of players disclosed they had personally been victims of bullying or harassment in the CHL. Most did not tell anyone in the CHL about it.<sup>18</sup>

14. The "bullying and harassment" referred to in the Leger survey is extreme. In one case, "an equipment manager constantly physically and mentally abusing a special needs helper". A few other examples include, "Coach was harassing players and reported it to GM. GM told coach and this made the situation worse. Nothing was done and 4 kids ended up leaving the team due to this environment"; "screamed at and belittled by 2 coaches for 30 minutes. Told I had psychological issues by a team doctor, and trainer, to find out I had an extremely alarming medical condition. Missed 6 months and an entire season of WHL hockey because I was told I was making up things, and soft prior to the incident"; "I thought it was best to keep my mouth shut and accept the fact that coaches are allowed to berate you and attack you but then tell you not to take it personally".<sup>19</sup>

## **ii. The IRP Finds Systemic Problems and Calls for Systemic Change**

15. The IRP found that a "systemic culture" in the Leagues resulted in "maltreatment becoming an embedded norm" through "a perpetuated state of acceptance and lack of change."<sup>20</sup> The IRP's report – "The Impact is Real... Action Is Needed," – states that "[o]ff-ice misconduct, including bullying, harassment and discrimination, exists in the CHL," is not reported due to a "code of silence," and has "significant psychological impacts on players and jeopardizes their safety and holistic well-being" with "life long"

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<sup>18</sup> Léger, "Harassment and Bullying in the Canadian Hockey League", pp. 22-39, SSMR, Tab 1(A), pp. 119-136 ["**Léger Data**"].

<sup>19</sup> Léger Data, p. 32, SSMR, Tab 1(A), pp. 129.

<sup>20</sup> IRP Report, Finding #2, p.5, SSMR, p. 66. Thériault confirmed that the IRP had found "a systemic problem" in "the Canadian Hockey League alone": Thériault CXE, 101:13-18, TB, Vol. 8, Tab 31, p. 4211.

impacts.<sup>21</sup>

16. The IRP found the Leagues' policies, procedures and overall approach deficient. One key criticism was that "there is not an integrated, consistent set of policies and procedures for all of the CHL."<sup>22</sup> Another was that the policies are poorly implemented.<sup>23</sup> Member Leagues self-regulating around misconduct results "in a lack of independence," is "ineffective," and "compromise[s] the integrity of the process."<sup>24</sup> Instead, the IRP recommended a CHL-wide response, including "a consistent cross CHL process" with "an independent third party" to investigate maltreatment, "formalized" sanctions, established "definitions of misconduct", and consistently applied "corresponding penalties."<sup>25</sup> Only a "comprehensive" change "go[ing] beyond policies and procedures" could fix the issue.<sup>26</sup>

### **iii. The CHL Receives, Ignores, and then Undermines the IRP's Report**

17. On November 5, 2020, the IRP presented their findings, "page by page," to Dan MacKenzie, the Member League Commissioners, and some Team owners.<sup>27</sup> They appeared shocked.<sup>28</sup> Few questions were asked.<sup>29</sup> Branch stated, again, that a systemic

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<sup>21</sup> IRP Report, pp. 3-5, SSMR, Tab 1(A), pp. 64-66.

<sup>22</sup> IRP Report, p. 3, SSMR, Tab 1(A), p. 64.

<sup>23</sup> IRP Report, p. 7, SSMR, Tab 1(A), p. 68.

<sup>24</sup> IRP Report, p. 3, SSMR, Tab 1(A), p. 64.

<sup>25</sup> IRP Report, p. 3, SSMR, Tab 1(A), p. 64.

<sup>26</sup> IRP Report, pp. 7-8, SSMR, Tab 1(A), pp. 68-69.

<sup>27</sup> Kennedy CXE 50:19-52:15, TB, Vol. 6, Tab 27, pp. 3379-3381; Cross-Examination of Daniele Sauvageau CXE, September 13, 2022 ["Sauvageau CXE"] 33:13-34:1, TB, Vol. 7, Tab 30, pp. 3960-3961; Thériault CXE, 29:5-14, TB, Vol. 8, Tab 31, p. 4139. Dan MacKenzie swore in an affidavit on this motion, and the CHL League claimed publicly, that they received the IRP Report in December 2020: MacKenzie March 2022 Affidavit, para. 3, DMR, Vol. IV, Tab 22, p. 451; CHL "Update on Player Wellbeing", SSMR, Tab 1(A), p. 5.

<sup>28</sup> Sauvageau CXE, 34:22-35:23, TB, Vol. 7, Tab 30, pp. 3961-3962.

<sup>29</sup> Thériault CXE, 31:8-9, TB, Vol. 8, Tab 31, p. 4141; Sauvageau CXE, 35:4-8, TB, Vol. 7, Tab 30, p. 3962.

problem exists.<sup>30</sup> One owner, Bobby Smith, stated that they had "a lot of work to do".<sup>31</sup>

18. The IRP Report was not made public. After that night, the panellists heard nothing more from the Leagues on the subject.<sup>32</sup> A year later, Thériault emailed MacKenzie questioning "the lack of public response" from the Leagues, and whether "our exercise was just a way for you to protect yourself from different litigations."<sup>33</sup>

19. On January 21, 2022, the IRP Report was released alongside a second report, authored by investigator and lawyer Rachel Turnpenney.<sup>34</sup> The defendants' litigation counsel retained Turnpenney in November 2021 to review the IRP Report and the Member Leagues' policies and programs.<sup>35</sup> She had no access to players or experts and, unlike the IRP, was not asked to consider the CHL Leagues' policies and procedures. She was told that "policies, procedures and programs are not instituted at the CHL-level but at the Member League-level", and explicitly only considered this "model."<sup>36</sup>

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<sup>30</sup> Sauvageau CXE, 34:22-35:3, 35:24-36:17, TB, Vol. 7, Tab 30, pp. 3961-3962, 3962-3963.

<sup>31</sup> Thériault CXE, 31:1-9, TB, Vol 8, Tab 31, p. 4141; Sauvageau CXE, 37:13-24, TB, Vol 7, Tab 30, p. 3964. Bobby Smith later swore an affidavit in this action stating: "abuse like what the plaintiffs describe is limited to isolated incidences, not a common practice, and, when it does occur, results from poor leadership, a problematic team culture, or several difficult veteran players": Affidavit of Robert Smith, sworn October 29, 2021, para. 24, DMR Vol 1, Tab 11, p. 115 ["**Robert Smith**"].

<sup>32</sup> That evening, Kennedy emailed MacKenzie, thanking him for putting his trust in the panel and offering further dialogue. MacKenzie responded that he was "just beginning to dig into the report and digest it" and would let Kennedy know if he had questions: Kennedy CXE, 55:2-57:24, 75:8-76:13 and Exhibit J, TB, Vol. 6, Tab 29, pp. 3384-3386, 3404-3405 and 3600.

<sup>33</sup> Thériault CXE, 35:19-37:15 and Exhibit A (email correspondence), TB, Vol. 8, Tab 31, pp. 4145-4147 and 4309.

<sup>34</sup> The IRP only learned of this report upon release: Kennedy CXE 60:5-19, TB, Vol. 6, Tab 29, p. 3389; Thériault CXE, 42:10-43:2, TB, Vol. 8, Tab 31, pp. 4152-4153; Sauvageau CXE, 39:13-18, TB, Vol. 7, Tab 30, p. 3966.

<sup>35</sup> MacKenzie Corr. CXE, 137:8-24, TB, Vol. 9, Tab 35, p. 4872; MacKenzie March 2022 Affidavit, para. 9, DMR Vol. IV, Tab 22, p. 454. The Defendants refused to produce their instructions to Ms. Turnpenney: Refusals and Undertakings Chart, Dan MacKenzie, Brief of Undertakings and Refusals Charts ["**URC**"], Tab B, p. 66.

<sup>36</sup> Rachel Turnpenney, "Report on the CHL's Player Wellbeing Programs and Related Recommendations", p. 3, fn.1, SSMR, Tab 1(A), p. 14.

20. Despite the IRP's recommendation of a single, CHL-wide response, the policies given to Turnpenney included new Member League policies adopted in September 2021. Some of these were drafts which have not been implemented even by June 2022.<sup>37</sup>

21. History repeats itself. In 1997, the CHL League commissioned lawyer Gordon Kirke to prepare the Players First Report regarding "issues of harassment and abuse within the CHL".<sup>38</sup> 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."<sup>39</sup> As with the IRP, his call for CHL-level action was ignored.

22. To this day, the Leagues resist calls to adopt CHL-level measures to prevent and respond to abuse. Instead, they attempt to undercut the IRP's findings, claiming that:

**The IRP had limited information, even though the CHL controlled the flow of that information:** MacKenzie states "the IRP did not engage [the Member League Commissioners] or their staff in discussions about the details of the policies, programs and procedures," **however**, the Commissioners and their staff had "lengthy interviews" with the IRP including on the very topics Mackenzie says the IRP had limited information on.<sup>40</sup>

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<sup>37</sup> These policies were not before the IRP: Thériault CXE, 81:14-83:10, TB, Vol. 8, Tab 31, pp. 4191-4193; Sauvageau CXE, 40:3-15, TB, Vol. 7, Tab 30, p. 3967. While MacKenzie claimed these policies had been implemented, they include an OHL League program proposal with details of system pricing (Ex. A, p. 474) one QMJHL League document describing intentions to create an independent committee to "make recommendations" on issues and "develop new tools and strategies" (Ex. B, p. 479) and another requiring teams to make policies (Ex. C, p. 487), and a WHL League "Independent Complaint Mechanism" that Ron Robison, WHL Commissioner, admitted has not been implemented: MacKenzie March 2022 Affidavit, paras. 14-16, Ex A-F, DMR, Vol. IV, Tab 22, pp. 455, 457-530; Corrected Cross- Examination of Ron Robison, June 13, 2022 ["**Robison Corr. CXE**"], 46:1-23, TB, Vol. 9, Tab 37, p. 4993. Cross-Examination of Giles Croteau, June 14, 2022 ["**Croteau CXE**"], 65:3:19, TB, Vol. 3, Tab 10, p. 1616.

<sup>38</sup> Kirke's report was commissioned, at least in part, in response to Sheldon Kennedy's disclose of the sexual abuse he had endured: Players First Report, p. 1, URC, Tab E, p. 104.

<sup>39</sup> Players First Report, p. 9ff, URC, Tab E, p. 112ff.

<sup>40</sup> MacKenzie March 2022 Affidavit, para. 5, DMR, Vol. IV, Tab 22, p. 452; Kennedy CXE, 119:12-120:5, TB, Vol. 6, Tab 29 and Exhibit L, pp. 3448-3449 and 3605-38; Sauvageau CXE, 47:20-49:7, TB, Vol. 7, Tab 30, pp. 3974-3976.

**The IRP's concerns had been addressed through policies, even though the IRP recommended structural, systemic action going beyond mere policies:** MacKenzie claims many of the IRP's recommendations were addressed at the Member League level "through policies, programs, and procedures," **however**, the IRP panellists agreed that their recommendations have not been implemented and stressed "[t]he CHL must act...through comprehensive strategies that go beyond policies and procedures."<sup>41</sup>

**The IRP failed to consider the decentralized nature of the Leagues, even though the CHL invited CHL-level recommendations and solutions:** MacKenzie claims that policy change cannot be made on the CHL-level, **however**, he invited the IRP to make recommendations on CHL-level solutions.<sup>42</sup>

23. By recommending CHL-level action, the IRP called for real change. As Thériault stated, "there should be one set of rules, one set of policies, for every single hockey player that plays in the CHL."<sup>43</sup> In Kennedy's words, abuse "doesn't have provincial borders," and if the CHL, wants "to take these issues to the level of priority they deserve and they need... for this game to thrive and for player safety, it fits under the CHL."<sup>44</sup>

#### **B. The Abuse is Systemic, Widespread and Shrouded in a Culture of Silence**

24. The IRP's finding that abuse is widespread in the Leagues is corroborated by the evidence of former players and the expert report of Dr. Jay Johnson, a Professor at the University of Manitoba with expertise in abusive hazing.<sup>45</sup> Together, this evidence provides some basis in fact for finding that the abuse endured by players shares common

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<sup>41</sup> See MacKenzie March 2022 Affidavit, para. 5, DMR, Vol. IV, Tab 22, p. 452; Kennedy CXE, 120:6-129:25, TB, Vol. 6, Tab 29, pp. 3449-3458; Sauvageau CXE, 49:8-53:24, TB, Vol. 7, Tab 30, pp. 3976-3980. IRP Report, p. 7, SSMR, Tab 1(A), p. 68.

<sup>42</sup> MacKenzie March 2022 Affidavit, para. 6, DMR, Vol. IV, Tab 22, pp. 452-3. The panellists recalled hearing MacKenzie make these remarks: Kennedy CXE, 90:20-91:24 and Exhibit L (IRP Minutes, August 24, 2020), TB, Vol. 6, Tab 29, pp. 3419-3420 and 3630; Thériault CXE, 78:11-21, TB, Vol. 8, Tab 31, p. 4188.

<sup>43</sup> Thériault CXE, 85:20-22, TB, Vol. 8, Tab 31, p. 4195; and see Sauvageau CXE, 88:6-22, TB, Vol. 7, Tab 30, p. 4015.

<sup>44</sup> Kennedy CXE, 132:19-25, 133:5-7, TB, Vol. 6, Tab 29, pp. 3461, 3462.

<sup>45</sup> Dr. Johnson did not review the plaintiffs' affidavit evidence before writing his report: Johnson Report, p. 1, CMR, Vol. 1, Tab 18, p. 143.

elements, and is systemic, widespread, and shrouded in a common culture of silence.

**i. Common Elements of the Abuse**

25. Former players endured horrific abuse, with similar hallmarks and rituals, across different Leagues and decades. Brutal, and often sexual, abuse in locker rooms and at training camps had three distinct features:

(a) **Use of Hockey Sticks:** Young players were beaten with hockey sticks, "daily or almost daily, leaving bruises, or breaking skin," sometimes with sticks modified to amplify pain. Players were taped "crucifixion-style" to hockey sticks.<sup>46</sup>

(b) **Use of Heat Ointment:** Young players were forcibly anally penetrated with hockey sticks, or digitally penetrated by fingers, covered in heat ointment. One player had heat ointment placed in his urethra using a pin.<sup>47</sup>

(c) **Genital Shaving:** Young players' body and pubic hair was shaved, sometimes with razors taped to hockey sticks, or dull razors, with heat ointment often applied to the shaved areas after. One player said this felt "like they were ripping [him] apart." Several of the defendants' affiants describe similar rituals.<sup>48</sup>

26. In what is referred to as the "elephant walk," rookies were forced to crawl on their knees in a circle while "[e]ach boy had his nose between the buttocks of the boy in front

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<sup>46</sup> Affidavit of Mark Howery, affirmed July 9, 2020 ["**Howery**"], para.15, CMR, Vol. 1, Tab 2, p. 14; Affidavit of Ryan Munce, paras. 5-6 ["**Munce**"], CMR, Vol 1, Tab 3, p. 24; Affidavit of John Strait, sworn July 28, 2020 ["**Strait**"], para. 5, CMR, Vol. 1, Tab 6, p. 45; Affidavit of Dirk Jelitto, affirmed July 30, 2020 ["**Jelitto**"], para. 6, CMR, Vol. 1, Tab 8, p. 55; Affidavit of Fred Ledlin, sworn August 4, 2020 ["**Ledlin**"], para. 16, CMR, Vol. 1, Tab 9, p. 63; Affidavit of Jeff Andrews, affirmed August 4, 2020 ["**Andrews**"], para. 7, CMR, Vol. 1, Tab 11, p. 78; Affidavit of Brad Hammett, sworn August 11, 2020 ["**Hammett**"], para. 4(C), CMR, Vol. 1, Tab 14, p. 101; Affidavit of Daniel Carcillo, sworn August 27, 2020 ["**Carcillo**"], para. 8, CMR, Vol. 1, Tab 15, p. 112.

<sup>47</sup> Affidavit of David Pszenyczny, affirmed August 4, 2020 ["**Pszenyczny**"], para. 7, CMR, Vol. 1, Tab 12, p. 84; Howery, para. 16, CMR, Vol. 1, Tab 2, p. 16; Ledlin, para. 6, CMR, Vol. 1, Tab 9, p. 61; Strait, para. 7, CMR, Vol. 1, Tab 6, p. 45; Affidavit of Stephen Quirk, sworn March 17, 2021 ["**Quirk**"], para. 8, Supplementary Motion Record ["**SMR**"], Tab 1, p. 4.

<sup>48</sup> Affidavit of Corey Bricknell, sworn August 11, 2020 ["**Bricknell**"], para. 7, CMR, Vol. 1, Tab 13, pp. 90-91; Affidavit of Doug Smith, affirmed July 10, 2020 ["**Doug Smith**"], para. 6, CMR, Vol. 1, Tab 4, p. 33; Strait, paras. 6, 10, CMR, Vol. 1, Tab 6, p. 45; Ledlin, paras. 8, 14, CMR, Vol. 1, Tab 9, pp. 62-63; Quirk, para. 8, SMR, p. 4; Hammett, para. 8, CMR, Vol. 1, Tab 14, p. 102; Howery, para. 16, CMR, Vol. 1, Tab 2, p. 16; Robert Smith, para. 8, DMR, Vol. I, Tab 11, p. 110; Affidavit of Jeff Chynoweth, sworn October 29, 2021 ["**Chynoweth**"], para. 8, DMR, Vol. I, Tab 10, p. 103; Affidavit of Eric Calder, sworn November 1, 2021 ["**Calder**"], para. 9, DMR, Vol. II, Tab 18, p. 284; Cross-Examination of Eric Calder, May 26, 2022, ["**Calder CXE**"], 8:23-9:16, 64:24-65:10, TB, Vol. 1, Tab 2, pp. 250-251, 306-307.

of him and his hand on the penis of the boy in front of him."<sup>49</sup> Young players were also forced into contact with the bodily fluids or genitals of other players in other nauseating rituals including being forced to "bob for apples" in coolers filled with bodily fluids, eat food off other player's anuses or from between their buttocks, and ejaculate in front of other players and then eat their own, and other players', ejaculate.<sup>50</sup>

27. In a particularly disturbing ritual, young players had a rope or skate lace tied around their penis, the rope was then thrown over a bar or rack, and weighted on the other side of the rack with a puck bag, pail or bucket, into which additional pucks were then thrown – 20 to 50 pucks, in the most horrifying cases.<sup>51</sup> This "excruciatingly painful" experience, which left victims "screaming" in pain, was a "common occurrence" that "happened on a number" of teams.<sup>52</sup>

28. Players also endured abuse on team buses, in the presence of staff and coaches, while travelling to play other teams. Physical beatings, verbal abuse, and sexual abuse occurred on these journeys.<sup>53</sup> In one brutal ritual, "the pit", rookies were called to the back of the bus on the bus's speaker, thrown into a heap of blankets, and subjected to "violent,"

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<sup>49</sup> Howery, para. 7, CMR Vol 1, Tab 2, p. 12.

<sup>50</sup> Cross-Examination of David Pszenyczny, July 14, 2022 ["**Pszenyczny CXE**"], 17:25-18:6, TB, Vol. 5, Tab 22, p. 2621-2622; Affidavit of Dan Fritsche, sworn October 9, 2020 ["**Fritsche**"], para. 6, CMR, Vol. 1, Tab 16, p. 123; Andrews, paras. 8, 14, CMR, Vol. 1, Tab 11, pp. 78-79; Pszenyczny, paras. 9-10, CMR, Vol. 1, Tab 12, p. 84-85; Munce, paras. 8, 10, CMR, Vol. 1, Tab 3, pp. 24-25; Carcillo, paras. 6-7, CMR, Vol. 1, Tab 15, p. 112; Bricknell, para. 7, CMR, Vol. 1, Tab 13, pp. 90-91; Hammett, para. 4(B), CMR, Vol. 1, Tab 14, p. 101; Ledlin, para. 6, CMR, Vol. 1, Tab 9, p. 61.

<sup>51</sup> Strait, para. 5, CMR, Vol. 1, Tab 6, p. 45; Ledlin, para. 16, CMR, Vol. 1, Tab 9, p. 63; Howery, para. 15, CMR, Vol. 1, Tab 2, p. 14; Bricknell, para. 7, CMR, Vol. 1, Tab 13, pp. 90-91; Hammett, para. 4(C), CMR, Vol. 1, Tab 14, p. 101.

<sup>52</sup> Ledlin, para. 16, CMR, Vol. 1, Tab 9, p. 63; Howery, para. 15, CMR, Vol. 1, Tab 2, p. 14.

<sup>53</sup> Ledlin, para. 10, CMR, Vol. 1, Tab 9, p. 62; Hammett, para. 11, CMR, Vol. 1, Tab 14, p. 103; Affidavit of Gene Chiarello, affirmed August 4, 2020 ["**Chiarello**"], para. 6, CMR, Vol. 1, Tab 10, p. 70.

"aggressive and angry" beatings.<sup>54</sup> Showing pain or emotion afterwards would "only... lead to worse."<sup>55</sup>

29. However, the most widespread and enduring ritual on team buses was the "hot box": young players were forced, often naked, into the small bathroom of a moving bus with up to eight other rookies, older players then knot their clothes into a ball which they throw into the bathroom and do not allow the rookies to leave the bathroom until they are dressed.<sup>56</sup>

30. Some players spent hours in the hot box and describe rookies "passing out or fainting because we were in there for so long."<sup>57</sup> In some cases, older players got the bus driver to "crank up the heat", leading one player to describe "having a full-blown panic attack in there."<sup>58</sup> For others, older players poured soda and urine through the vents, "because they knew the players would be gasping for air at the vents."<sup>59</sup>

31. The hot box is ubiquitous. It is referenced in the legal textbook *The Law of Hockey*.<sup>60</sup> Dr. Johnson reports that he has heard stories of it "over and over again" in his research.<sup>61</sup> The defendants' affiants concede it happens, though one describes it as a "fun

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<sup>54</sup> Chiarello, para. 6, CMR, Vol. 1, Tab 10, p. 70; Cross-Examination of Gene Chiarello, August 10, 2022 ["**Chiarello CXE**"], 140:13-141:14, TB, Vol. 5, Tab 26, pp. 3127-3128.

<sup>55</sup> Chiarello CXE, 139:20-140:12, TB, Vol. 5, Tab 26, pp. 3126-3127.

<sup>56</sup> Affidavit of Jason Clarke, affirmed July 29, 2020 ["**Clarke**"], para. 5, CMR, Vol. 1, Tab 7, p. 50; Jelitto, para. 5, CMR, Vol. 1, Tab 8, p. 55; Howery, para. 18, CMR, Vol. 1, Tab 2, p. 15; Andrews, para. 11, CMR, Vol. 1, Tab 11, p. 79; Bricknell, para. 7, CMR, Vol. 1, Tab 13, pp. 90-91; Quirk, para. 12, SMR, Tab 1, p. 4; Chiarello, para. 5, CMR, Vol. 1, Tab 10, pp. 69-70; Munce, paras. 12-13, CMR, Vol. 1, Tab 3, p. 25; Psenyczny, para. 10, CMR, Vol. 1, Tab 12, p. 85; Carcillo, para. 9, CMR, Vol. 1, Tab 15, p. 113; Fritsche, para. 7, CMR, Vol. 1, Tab 16, p. 123. Exhibit E to the Cross-Examination of Dave Lorentz, June 7, 2022, ["**Lorentz CXE**"] TB, Vol 3, Tab 7, 1393, which is a photo of one of these small bus bathrooms.

<sup>57</sup> Bricknell, para. 7, CMR, Vol. 1, Tab 13, pp. 90-91.

<sup>58</sup> Clarke, para. 5, CMR, Vol. 1, Tab 7, p. 50.

<sup>59</sup> Munce, para. 12, CMR, Vol. 1, Tab 3, p. 25; Clarke, para. 5, CMR, Vol. 1, Tab 7, p. 50.

<sup>60</sup> John Barnes, *The Law of Hockey* (Markham, Ont.: LexisNexis, 2010), p. 185, Plaintiffs' Book of Authorities ["**PBOA**"], Tab 98.

<sup>61</sup> Johnson Report, p. 21, CMR, Vol. 1, Tab 18, p. 163.

task".<sup>62</sup> The hot box also receives frequent media mentions, including in a video interview put to Jason Clarke on cross-examination, where one host jokes with the other, he "doesn't like to go to the back of the bus... because they're scared they're going to do a hot box."<sup>63</sup>

32. Abuse continued at team-sanctioned events, especially "rookie parties" where underage players were forced to drink to excess. Rookies had "to line up and drink 10 shots of liquor on top of many beers", or drink "7 or 8 beers and shots of crown royal".<sup>64</sup> Players who refused were beaten and berated.<sup>65</sup> Team staff knew about the rookie party, and would have "helped organize it."<sup>66</sup> One coach gave a player his credit card to buy alcohol.<sup>67</sup>

33. At the rink, on team buses, and at team events, young players endured "almost constant" verbal abuse from coaches, staff and teammates.<sup>68</sup> Players were "threatened, berated, called all sorts of names," "made to feel worthless," and "subjected to mind games."<sup>69</sup> They were also spit on by coaches, had things thrown at them during practice,

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<sup>62</sup> Affidavit of Paul Dennis, sworn November 1, 2021 ["**Dennis**"], para 17, DMR, Vol. III, Tab 21, p. 432; Chynoweth, para 8, DMR, Vol. I, Tab 10, p. 103; Affidavit of Eric Chouinard, sworn November 1, 2021 ["**Chouinard**"], para, 12, DMR, Vol. II, Tab 19, p. 292; Affidavit of Dave Lorentz, sworn November 1, 2021["**Lorentz**"], paras. 6-7, DMR, Vol. I, Tab 16, pp. 205-6; Cross-Examination of Ryan Daniels, June 8, 2022 ["**Daniels CXE**"], 19:22-20:12, TB, Vol. 3, Tab 8, pp. 1419-1420.

<sup>63</sup> Exhibit B to the Cross-Examination of Jason Clarke, July 12, 2022 ["**Clarke CXE**"], TB Vol 4, Tab 19, p. 2538; and see Johnson Report, CMR, Vol. 1, Tab 18, p. 159; CBC Sports, "Windsor Spitfires fire GM, coach Moe Mantha", November 26, 2005, CMR, Vol. 4, p. 1866-1867; Chris Johnson, Winnipeg Free Press, "Hazing prank 'amuses' vet", October 20, 2005, CMR, Vol. 4, p. 1905; CBC's The Fifth Estate, Thin Ice Update: Junior Hockey (transcript), CMR, Vol. 4, p. 1936.

<sup>64</sup> Clarke, para. 8, CMR Vol. 1, Tab 7, p. 50; Bricknell, para. 11, CMR Vol. 1, Tab 13, p. 92; Quirk, para. 11, SMR, p. 4; Chiarello, para. 9, CMR Vol. 1, Tab 10, p. 71.

<sup>65</sup> Affidavit of Garrett Taylor, para. 11 ["**Garrett Taylor**"], CMR Vol. 1, Tab 17, p. 130; Munce, para. 18, CMR Vol. 1, Tab 3, p. 26; Quirk, para. 11, SMR, p. 4.

<sup>66</sup> Clarke, para. 10, CMR Vol. 1, Tab 7, p. 50.

<sup>67</sup> Garrett Taylor, para. 13, CMR Vol 1, Tab 17, p. 130.

<sup>68</sup> Chiarello, para. 4, CMR Vol 1, Tab 10, p. 69; Pszenyczny, para. 4, CMR Vol 1, Tab 12, p. 84; Clarke, para. 3, CMR Vol 1, Tab 7, p. 50.

<sup>69</sup> Andrews, para. 5, CMR Vol 1, Tab 11, p. 78; Quirk, para. 15, SMR, p. 5.

and were required or encouraged by coaches to fight other players on the ice.<sup>70</sup> As Daniel Carcillo put it, "We were completely terrorized each and every day."<sup>71</sup>

34. Often, the verbal abuse was homophobic. Players were called "gay, faggots, pussies" and "bitch", and were abused for how they dressed and told that "NHL scouts 'don't like guys that look like faggots'."<sup>72</sup> One coach called a reporter who was believed to be gay as a "fucking faggot" and a "cocksucker" in front of an entire routine.<sup>73</sup>

35. The verbal abuse was also racist. Racial slurs "were commonplace": players, and sometimes coaches, used the "n" word, including to insult Black players, and used other slurs, such as "paki" to refer to people of South Asian descent.<sup>74</sup> One affiant describes a veteran player "dressing up like Adolf Hitler and marching around the locker room in front of [a] Jewish teammate" until that teammate "broke down and started crying."<sup>75</sup>

36. Young players were pushed, within this environment, to disclose their "sexual exploits" in conversations where young women were described as "pigs", "puck sluts", "puck bunnies" and sexual encounters referred to as "kills."<sup>76</sup> "Gang sex" - sometimes as

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<sup>70</sup> Bricknell, para. 7, CMR Vol 1, Tab 13, pp. 90-91; Andrews, para. 9, CMR Vol 1, Tab 11, p. 79; Garrett Taylor, para. 14, CMR Vol 1, Tab 17, pp. 130-1.

<sup>71</sup> Carcillo, para. 5, CMR Vol 1, Tab 15, p. 112, and see Corrected Cross-Examination of Kruse Reddick, May 30, 2022 ["**Reddick Corr. CXE**"], 34:11-35:15, 49:21-25, TB, Vol. 9, Tab 36, pp. 4925-4926, 4940.

<sup>72</sup> Fritsche, paras. 3, 10, CMR Vol 1, Tab 16, p. 123-4; Bricknell, para. 7, CMR Vol 1, Tab 13, pp. 90-91; Garrett Taylor, para. 7, CMR Vol 1, Tab 17, p. 129; Chiarello, para. 16, CMR Vol 1, Tab 10, p. 72; Carcillo, para. 5, CMR Vol 1, Tab 15, p. 112; Daniels CXE, 42:1-13, TB, Vol. 3, Tab 8, p. 1442; Cross-Examination of Brett Bartman, May 25, 2022 ["**Bartman CXE**"], 21:6-22, TB, Vol. 1, Tab 1, p. 21.

<sup>73</sup> Chiarello, para. 15, CMR, Vol. 1, Tab 10, p. 72.

<sup>74</sup> Garrett Taylor, para. 9, CMR Vol 1, Tab 17, p. 130; Munce, para. 11, CMR Vol 1, Tab 3, p. 25; Carcillo, para. 5, CMR Vol 1, Tab 15, p. 112; Bartman CXE, 53:4-10, 59:14-60:7, and Exhibit E (Eric Frances, "Flames head coach bill Peters apologizes for Akim Aliu incident", Sportsnet, November 27, 2019), TB, Vol. 1, Tab 1, pp. 53, 59-60 and 193.

<sup>75</sup> Munce, para. 16, CMR Vol 1, Tab 3, p. 25. Issues with racism extend to Team governance: the Prince Albert Raiders' president, Gordie Broda, approved the use of a jersey featuring a racist caricature of a Middle Eastern man that was only removed after a public outcry: Cross-Examination of Gordie Broda, June 17, 2022 ["**Broda CXE**"], 34:9-41:14, TB, Vol. 3, Tab 11, pp. 1895-1902.

<sup>76</sup> Bricknell, para. 12, CMR, Vol 1, Tab 13, p. 92; Daniels CXE, 41:2-18, TB, Vol. 3, Tab 8, p. 1441.

many as fifteen players with one underaged girl – was part of team parties.<sup>77</sup> Young girls were sometimes restrained for these encounters, and players were pressured to participate in sexual encounters that, arguably, were sexual assaults.<sup>78</sup>

37. The abuse former players describe mirrors John Barnes' description of abusive hazing in the *Law of Hockey*. Barnes refers to the hotbox and also states, "[t]he [hazing] rituals of men's teams usually involve a perverse form of masculinity that mixes alcohol with nudity, pain, disgusting degradation or sexual activity."<sup>79</sup> While abusive hazing may occur in some other sports, Dr. Johnson opines that "the intense severity of the abuse and the commonality of the practices are particular to junior hockey in the CHL."<sup>80</sup>

38. This abuse is deeply harmful. Thériault observed, on cross-examination, that reporting must be made easier because, "the impact on these kids...will mark them for the rest of their lives."<sup>81</sup> Dr. Paul Dennis, one of the defendants' affiants and the head of the OHL's Player Development Program, conceded that "a threatening environment" where verbal abuse is used to intimidate and motivate players can have "long-term negative effects on athletes such as depression, anxiety and low self-esteem."<sup>82</sup>

## **ii. The Systemic Nature of the Abuse**

39. The abuse is, according to the IRP, Dr. Johnson, and former players, cyclical and

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<sup>77</sup> Ledlin, para. 21, CMR, Vol 1, Tab 9, p. 64.

<sup>77</sup> Johnson Report, p. 27, CMR, Vol 1, Tab 18, p. 169.

<sup>78</sup> Bricknell, para. 12, CMR, Vol 1, Tab 13, p. 92.

<sup>79</sup> Barnes, p.185, PBOA, Tab 98.

<sup>80</sup> Johnson Report, p. 21, CMR, Vol 1, Tab 18, p. 163.

<sup>81</sup> Thériault CXE, 96:11-25, TB, Vol. 8, Tab 31, p. 4206;

<sup>82</sup> Cross-Examination of Paul Dennis, June 6, 2022 ["Dennis CXE"], 24:24-25:15, TB, Vol. 2, Tab 10, pp. 1218-1219.

normalized. Rookies who endure it become veterans and repeat the abuse they endured:

This cycle is one that often feeds on the need to "outdo", or to at least match the previous year's activities. It embeds in the psyche of those who have been initiated the desire to exert their power over the rookie contingent in subsequent seasons... [T]he need for most participants to become initiators allows the cycle to persist.<sup>83</sup>

40. This cycle maintains and reinforces a hierarchy.<sup>84</sup> Rookies who submit to abusive hazing rituals acknowledge veterans' power, demonstrate their commitment to their Team, and show that they are willing "to conform to team traditions."<sup>85</sup> Because of the role that abusive hazing plays, "refusal to comply with hazing practices threatens acceptance by teammate and can lead to ostracism, alienation, and shame."<sup>86</sup>

41. The parties' affiants also describe this cycle. One former player, the defendants' affiant, stated that he and other veterans, "led the same 'initiation' activities as we experienced as rookies."<sup>87</sup> Veterans told young players: "This is what we do. It's been done in the past."<sup>88</sup> One affiant reflected, "when you have a culture that you think is right... you're just buying your time to be able to do that to somebody else."<sup>89</sup>

42. As the IRP Report describes: "Leaders of teams model behaviour; they demonstrate what is acceptable and unacceptable through words, action and inaction. This culture is passed from team to team as new players learn from the hierarchy: owners, GMs, coaches, and older players."<sup>90</sup> This transmission continues as players move between

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<sup>83</sup> Johnson Report, p. 14, CMR, Vol 1, Tab 18, p. 156.

<sup>84</sup> Johnson Report, p. 3, CMR, Vol 1, Tab 18, p. 145.

<sup>85</sup> Johnson Report, p. 3, CMR, Vol 1, Tab 18, p. 145.

<sup>86</sup> Johnson Report, pp. 3-4, CMR, Vol 1, Tab 18, pp. 145-146.

<sup>87</sup> Those "initiation activities" consisted of drawing on rookies with marker and "clipping" their eyebrows while the rookies were in their underwear: Calder, paras. 9, 10, DMR Vol II, Tab 18, p. 284; Calder CXE 61:12-65:10, TB, Vol. 1, Tab 2, pp. 303-307.

<sup>88</sup> Cross-Examination of Dave Lorentz, June 7, 2022 ["**Lorentz CXE**"], 19:2-4, TB, Vol. 3, Tab 7, p. 1337.

<sup>89</sup> Pszenyczny CXE, 27:7-18, TB, Vol. 5, Tab 22, p. 2631.

<sup>90</sup> IRP, p. 15, SSMR, p. 76.

Teams. Stephen Quirk played on an expansion team: all of the players had recently come from other teams. Even there, he was subjected to ritualized abuse. He asked, "Was it done to them? I don't know, you know. They learned it somewhere."<sup>91</sup>

43. Coaches often move between Teams. In most cases, the reasons for their moves are not documented.<sup>92</sup> Coaches fired due to abuse remained in the Leagues, and may even be promoted to more senior executive positions like general manager.<sup>93</sup> The coach under whom Jason Clarke was abused remains a coach and general manager in the OHL.<sup>94</sup> Jeff Perry, who abused players on the Sarnia Sting, also remained in the OHL League.<sup>95</sup>

44. As David Branch acknowledged to the IRP, veteran players eventually become coaches and staff and look the other way when abuse happens:

Some of it I believe is because the coach says when I played, I had to go through it.... And then players who are the leaders of the team say Hey, we're [going to] have a rookie party here. I know it is against the league's rules but I had to go through it. And to me, it is the challenging part that we all face here.<sup>96</sup>

45. As abuse continues, it "becomes an accepted norm no longer labelled as abuse but rather a proud tradition," a "normalized practice" that "resists pressure to change" because "[i]ts role is hard to challenge or even to see as open to challenge."<sup>97</sup> The IRP describes "unwritten," "cultural norms" in the Leagues which, "accept behaviours that, outside the

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<sup>91</sup> Cross-Examination of Stephen Quirk, July 20, 2022 ["**Quirk CXE**"], 23:25-24:11, TB, Vol. 5, Tab 23, pp. 2664-2665;

<sup>92</sup> Sauvageau CXE, 43:5-45:20 TB, Vol. 7, Tab 30, pp. 3970-3972; Thériault CXE, Exhibit A (IRP Minutes, August 26, 2020), TB, Vol. 8, Tab 31, p. 4383

<sup>93</sup> Chiarello CXE, 27:14-38:21, TB, Vol. 5, Tab 26, pp. 3014-3025.

<sup>94</sup> Clarke CXE, 99:9-13, 100:20-101:1, TB, Vol. 4, Tab 20, pp. 2459, 2460-2461.

<sup>95</sup> Cross-Examination of Daniel Carcillo, July 22, 2022 ["**Carcillo CXE**"], 67:14-23, TB, Vol. 5, Tab 24, p. 2744; Cross-Examination of Dan Fritsche, August 17, 2022, ["**Fritsche CXE**"], 29:8-30:13, 31:23-33:15, TB, Vol. 6, Tab 27, pp. 3225-3226, 3227-3229.

<sup>96</sup> Kennedy recalled hearing Branch make these remarks: Kennedy CXE, 82:2-84:13 and Exhibit L (IRP Meeting Minutes, August 17, 2020), TB, Vol. 6, Tab 29, pp. 3411-3413 and 3621-22.

<sup>97</sup> Johnson Report, pp. 38-39, CMR, Vol. 1, Tab 18, pp. 180-1.

hockey environment, would not be acceptable," "blur the boundaries of what is defined as acceptable," and "desensitize individuals" to abuse.<sup>98</sup>

46. Players were given the impression that the abuse is "part of hockey", that they "had to 'suck it up'," that "the things [they] suffered were part and parcel of what [they] had signed up for," and that the abuse was just something you "have to go through when you move away and play junior hockey."<sup>99</sup> The defendants' affiants also normalize the abuse: they remark that they "do not recall being alarmed" by the hotbox, and that the use of racist and homophobic slurs is "completely normal."<sup>100</sup>

47. This normalization is also reflected in the Léger Data, which the IRP found demonstrated "acceptance" of off-ice misconduct: while the survey found that "bullying, harassment and discrimination exist and are widespread in the CHL", general managers and coaches did not perceive these as issues that needed to be addressed.<sup>101</sup> This acceptance of abuse is clear in the failures of coaches and staff to stop the abuse:

- (a) Coaches and staff, who had offices adjacent to locker rooms and who were often in locker rooms with players, **were aware** of locker room abuse.<sup>102</sup>
- (b) Coaches and staff **on team buses** did not prevent or report abuse or even told other staff not to go to the back of the bus where players were being abused.<sup>103</sup>
- (c) Coaches and staff **witnessed the aftermath of the abuse**, including seeing players sitting in the showers for hours after being abused, releasing them from

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<sup>98</sup> IRP Report, p. 15, SSMR, p. 76

<sup>99</sup> Bricknell, para. 21, CMR, Vol 1, Tab 13, p. 94; Quirk, para. 6, SMR, p. 3; Carcillo CXE, 28:17-21, TB, Vol. 5, Tab 24, p. 2705.

<sup>100</sup> Chynoweth, paras. 3, 8, DMR, Vol I, Tab 10, pp. 102-4; Bartman CXE, 51:3-8, TB, Vol. 1, Tab 1, p. 51.

<sup>101</sup> IRP Report, p. 15, SSMR, p. 76.

<sup>102</sup> Bricknell, para. 19, CMR, Vol 1, Tab 13, p. 94; Jelitto, para. 12, CMR, Vol 1, Tab 8, p. 56.

<sup>103</sup> Clarke, para. 6, CMR, Vol 1, Tab 7, p. 50; Ledlin, para. 17, CMR, Vol 1, Tab 9, p. 63; Chiarello, para. 7, CMR, Vol 1, Tab 10, p. 70; Chiarello CXE, 72:11-74:13, TB, Vol. 5, Tab 26, pp. 3059-3061. Jeff Chynoweth, saw the hot box happening while working for the WHL and did not stop it, his father was in charge of both the WHL and CHL Leagues at the time: Chynoweth, paras. 3, 8, DMR, Vol I, Tab 10, pp. 102-4. Exhibit C to the Lorentz CXE, TB, Vol 3, Tab 7, 1393, which is a photo of the view from the front of the bus, where the coaches sit.

restraints, or taking them to hospital after they were injured in the abuse.<sup>104</sup>

(d) Coaches and staff **witnessed the abuse**: "[t]he coaches and trainers knew it was happening, they saw it going on;" "[i]t was happening in front of the coaches and trainers, they didn't care."<sup>105</sup>

(e) Coaches and staff **participated** in the abuse, including verbal abuse, spitting, throwing objects and participating in beatings.<sup>106</sup>

### iii. The Culture of Silence

48. The IRP Report describes an "unspoken code of silence around maltreatment" that "enables off-ice misconduct to continue" and "prevents athletes from disclosing their experiences."<sup>107</sup> Players' told Léger the reasons they did not report bullying and harassment, including "everyone was initiated as a rookie, some more severe than others," "fear of jeopardizing career," "it would flag me as a whistle blower...negatively effect my hockey career," and fear of "being stigmatized in the league."<sup>108</sup>

49. Affiants describes similar fears preventing reporting: either they would stay on their team and the abuse would get worse in retaliation, or they would lose their place on the team and their dream of playing in the NHL.<sup>109</sup> They feared being labelled "a problem or a complainer," or a "snitch," and believed that if they complained they would be "blackballed" or "on the next bus home."<sup>110</sup>

50. Being released from a team or traded turned a young player's life upside down.

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<sup>104</sup> Strait, para. 7, CMR, Vol 1, Tab 6, p. 45; Doug Smith, para. 7, CMR, Vol 1, Tab 4, p. 33; Quirk, paras. 8-11, SMR, pp. 3-4.

<sup>105</sup> Andrews, paras. 6-7, CMR, Vol 1, Tab 11, p. 78; Hammett, para. 11, CMR, Vol 1, Tab 14, p. 103.

<sup>106</sup> See fn. 68-73, above and Pszenyczny, para. 8, CMR, Vol 1, Tab 12, p. 84.

<sup>107</sup> IRP Report, p. 3, SSMR, p. 64.

<sup>108</sup> Léger Data, p. 41, SSMR, p. 138.

<sup>109</sup> Jelitto, para. 9, CMR, Vol 1, Tab 8, p. 55; Hammett, para. 6, CMR, Vol 1, Tab 14, p. 102; Ledlin, paras. 11, 20, CMR, Vol 1, Tab 9, pp. 63, 64.

<sup>110</sup> Chiarello, para. 23, CMR, Vol 1, Tab 10, p. 70; Munce, paras. 20-23, CMR, Vol 1, Tab 3, pp. 26-27; Bricknell, para. 21, CMR, Vol 1, Tab 13, p. 94.

Some players were released in humiliating rituals such as the "garbage bag treatment," where their belongings were transferred from team bags into garbage bags.<sup>111</sup> Some were specifically told not to complain. One remembers "the general manager, coach and trainers explicitly stating that complainers would be sent home."<sup>112</sup>

51. An NHL career, young players' "ultimate goal," is, as the Leagues know, an extremely powerful motivator.<sup>113</sup> Players believed "falling in line was the only way" to make it to the NHL, and were "willing to put up with" the abuse "to keep [their NHL] dreams alive."<sup>114</sup> They felt that they "had to do everything" to "stay in the coaches'... favour," and feared that reputational repercussions of complaining would reach NHL scouts.<sup>115</sup> Instead, players "took the abuse as best [they] could."<sup>116</sup> For Mark Howery, this meant staying silent when placed, aged 16, in the home of an older man who made sexual advances towards him, and who he later learned was a notorious convicted paedophile.<sup>117</sup>

52. Given the normalization of abuse, many did not know to complain, or did not know who they could tell about the abuse that did not already know about it.<sup>118</sup> Those that did complain received no response, an inadequate response, or a negative backlash:

(a) After enduring increasingly "brazen" sexual advances in his billet house, Mark Howery "raised the issue with the General Manager".<sup>119</sup> Instead of trying to protect him, "the GM threatened [him]". The GM told Howery that he "should

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<sup>111</sup> Garrett Taylor, paras. 17-22, CMR, Vol 1, Tab 17, pp. 131-2.

<sup>112</sup> Andrews, para. 10, CMR, Vol 1, Tab 11, p. 79.

<sup>113</sup> Branch *Berg* Affidavit, paras. 21-22, CMR, Vol 3, p. 1500; and see: Robison *Berg* Affidavit, para. 9, CMR Vol 4, p. 1671.

<sup>114</sup> Munce, para. 20, CMR, Vol 1, Tab 3, p. 26; Clarke, para. 4, CMR Vol 1, Tab 7, p. 50; Fritsche, para. 10, CMR, Vol 1, Tab 16, p. 124.

<sup>115</sup> Quirk, para. 6, SMR, p. 3; Munce, para. 23, CMR, Vol 1, Tab 3, p. 27.

<sup>116</sup> Quirk, para. 6, SMR, p. 3.

<sup>117</sup> Howery, paras. 20-30, CMR, Vol 1, Tab 2, p. 15-17.

<sup>118</sup> Cross-Examination of Dirk Jelitto, July 14, 2022 ["**Jelitto CXE**"] 20:15-24, TB, Vol. 5, Tab 21, p. 2568.

<sup>119</sup> Howery, para. 25-27, CMR, Vol. 1, Tab 2, p. 16.

keep his mouth shut, or [he] might lose his place on the team."<sup>120</sup> Howery reported enduring sexual advances two more times "and the GM reiterated again, more forcefully, that [he] would be sent home if he kept making up these stories."<sup>121</sup>

(b) Resigned to "quitting the team" and giving up his hockey dreams, Gene Chiarello complained to his Team's owners. They fired the head coach, Brad Selwood, but took no further action. Selwood continued coaching, later becoming head coach and GM of another team.<sup>122</sup>

(c) Daniel Carcillo and Ryan Munce revealed the abuse they had suffered on while at a Canada U-18 team dinner. David Branch interviewed Munce, but Team staff had coached Munce on what to say.<sup>123</sup> Nothing else happened.

(d) After Steve Downie cross-checked younger player, Akim Aliu, in the face in apparent retaliation for Aliu refusing to enter the hotbox, Aliu was viewed "[a]s a villain and troublemaker," "booed," "shunned by some of his teammates," and rejected by those responsible for selecting Canada's U-17 or U-18 teams, who questioned "whether he's a [team] player".<sup>124</sup>

53. The expectation of loyalty, and silence, continues beyond players' CHL-careers.

Former players experienced a private and public backlash for participating in this action:

(a) After Daniel Carcillo went public about the abuse, people he "used to play with, close friends", including some who attended his wedding, sent "messages calling me a liar, a pussy, a hypocrite, and said that I'm ruining hockey."<sup>125</sup>

(b) The Lethbridge Herald published a "letter to the editor" under the names of some of Garrett Taylor's teammates on the Lethbridge Hurricanes, apparently

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<sup>120</sup> Howery, para. 27, CMR, Vol. 1, Tab 2, p. 16.

<sup>121</sup> Howery, para. 28, CMR, Vol. 1, Tab 2, p. 16.

<sup>122</sup> Chiarello, para. 23, CMR, Vol 1, Tab 10, p. 74; Chiarello CXE, 27:14-38:21, TB, Vol. 5, Tab 26, pp. 3014-3025.

<sup>123</sup> Munce, paras. 22-23, CMR, Vol 1, Tab 3, p. 27. Branch later stated that he had only learned about "rookies being placed in laundry carts and rolled down ramps and into walls", and while "dangerous" this was not something he thought "called for any particular discipline": CBC News, 'We had failed Dan and the other players': OHL Commissioner calls abuse allegations 'sickening', November 29, 2018, Reply Motion Record ["RMR"] Tab 1, p. 9.

<sup>124</sup> Sportsnet, "Hockey's most famous hazing incident hasn't broken Akim Aliu", CMR Vol 4, pp. 1878-1891. Downie was named to Canada's World Junior Team: Ken Campbell, Toronto Star, "Hockey Canada ignores scandal," CMR Vol 4, p. 1871. Dave Lorentz insisted, on cross-examination, that Mr. Downie should be able to continue to play in the CHL, even if he was a "racist sociopath" who viciously attacked Mr. Aliu with weapons for a "racist reason": Lorentz CXE, 60:12-62:19, TB, Vol. 3, Tab 7, pp. 1378-1380.

<sup>125</sup> Carcillo, para. 18, CMR, Vol 1, Tab 15, p. 112.

attempting to undermine or refute Taylor's allegations in the Statement of Claim.<sup>126</sup>

(c) After being interviewed on the national news about the abuse, Brad Hammett was "blackballed by the hockey community." NHL teams he had been a scout for dropped him or stopped calling. Hammett also received a letter from a lawyer referring to an email about the abuse he had sent to the WHL League and threatening legal proceedings if he continued his "defamatory conduct."<sup>127</sup>

54. Dr. Johnson explains why players may still struggle to come forward about the abuse – or react negatively to others doing so – even years or decades later. Victims of abuse in the Leagues, subject to rules and regulations that prevent them from moving to another team, have few options.<sup>128</sup> He states:

Some will walk away. Others who have invested deeply in the sport and built their identity around it will seek out coping mechanisms to help them deal with the isolation, self-loathing, and mistrust. They become part of the toxic masculinity within the culture of sport.<sup>129</sup>

55. Those who stay adapt to the Leagues' perverse normalcy, becoming part of "a subculture that operates under its own guidelines", apart from outside scrutiny, and "controlled by former players and coaches."<sup>130</sup> For these players, it becomes easier to "to endorse the organization that has contributed to the creation of a culture where they are vulnerable, especially if membership is still a desired outcome."<sup>131</sup>

#### **iv. The Abuse is Widespread**

56. The cyclical nature of abuse, and the Leagues' culture of silence, have led to

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<sup>126</sup> Cross-Examination of Garrett Taylor, August 19, 2022 ["**Garrett Taylor CXE**"], 40:2-9 and Exhibit 1 (for identification), TB, Vol 6, Tab 28, pp. 3305 and 3329. None of those players chose to testify as affiants for the Defendants in this action.

<sup>127</sup> Affidavit of Brad Hammett, sworn November 26 2021, ["**Hammett Reply Affidavit**"], paras. 2-11 and Ex E, RMR, Tab 2, pp. 30-31, 49.

<sup>128</sup> Johnson Report, p. 39, CMR, Vol 1, Tab 18, p. 181.

<sup>129</sup> Johnson Report, p. 39, CMR, Vol 1, Tab 18, p. 181.

<sup>130</sup> Johnson Report, pp. 17-18, CMR, Vol 1, Tab 18, pp. 159-60.

<sup>131</sup> Johnson Report, p. 37, CMR, Vol 1, Tab 18, p. 179.

widespread abuse. Numerous players described the same culture of abuse on every Team they played on, and every Member League they played in. One player, describing the abuse as "league-wide," said that the coaches are "all part of the same culture of the abuse and hazing that goes on."<sup>132</sup>

57. Sixteen former players filed affidavits describing their abuse. Each saw other rookies being abused. They believed "pretty much every rookie in the league" was being hazed.<sup>133</sup> Some said the abuse happened on each team they played on, even if it differed in severity.<sup>134</sup> Affiants who experienced sexual abuse and genital torture commented that these rituals "happened all the time... on all of the teams I played on," and that this was "so well known" that players on other teams, encountering rookies, "would say 'how are your balls' to you on the ice."<sup>135</sup>

58. Several affiants had heard a litany of abuse stories:

(a) Corey Bricknell had "heard hundreds of abuse stories like mine from major junior hockey players... from the 1970s to the present."<sup>136</sup>

(b) Brad Hammett heard "hundreds of stories of hazing and abuse" in the Leagues that "would span from the late 1970s to about 1990" from peers playing in professional hockey leagues.<sup>137</sup>

(c) Daniel Carcillo estimates "over a hundred former major junior hockey players have told me about the abuse they have suffered. They describe many of the same rituals and abuses."<sup>138</sup>

59. On the evidence, there is more than some basis in fact to find that the abuse is

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<sup>132</sup> Jelitto CXE, 22:24-23:2, TB, Vol. 5, Tab 21, pp. 2570-25781.

<sup>133</sup> Clarke, para. 11, CMR, Vol 1, Tab 7, p. 51.

<sup>134</sup> Fritsche CXE, 38:7-13, TB, Vol. 6, Tab 27, p. 3234; Jelitto CXE, 25:5-26:7, TB, Vol. 5, Tab 21, pp. 2573-2574.

<sup>135</sup> Ledlin, para. 14, CMR Vol 1, Tab 9, p. 63; Strait, para. 10, CMR, Vol 1, Tab 6, p. 45.

<sup>136</sup> Bricknell, para. 20, CMR, Vol 1, Tab 13, p. 94.

<sup>137</sup> Hammett, para. 18, CMR, Vol 1, Tab 14, p. 104.

<sup>138</sup> Carcillo, para. 19, CMR, Vol 1, Tab 15, p. 114-5.

common, systemic, widespread, and shrouded in a culture of silence.

**v. The Defendants' Evidence Does Not Assist Them**

60. The defendants' evidence, by which they attempt to demonstrate that the abuse is rare and spontaneous, is unconvincing.<sup>139</sup> Many of the defendants' affidavits, which did not withstand the scrutiny of cross-examination, include boilerplate statements denying knowledge of the abuse:

(a) Twelve state, "I am aware of the allegations made by the plaintiffs. The abuse, hazing and general atmosphere described does not at all reflect what [the affiant] experienced or witnessed while [in the CHL]". When cross-examined, affiants could rarely articulate the plaintiffs' allegations or where they became aware of them, or admitted that they had not read the pleading or any affidavits.<sup>140</sup>

(b) Five state they have "never heard of or witnessed the 'hot box', 'elephant walk', or 'rookies rocket'." In cross-examinations, it emerged that some of these affiants, when swearing their affidavits, did not know what these terms referred to, and had been asked by counsel, without context, if they had heard those terms.<sup>141</sup>

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<sup>139</sup> Many of the defendants' affiants, especially among former players, previously provided affidavits on behalf of the Leagues to assist with opposing an unrelated class action against them. In addition to the Commissioners of the Leagues, Scott Abbott, Brett Bartman, Gordie Broda, Jeff Chynoweth, Kruiise Reddick, Chad Taylor, and Bob Tory, provided evidence on the certification motion in *Berg v. Canadian Hockey League*, [2017 ONSC 2608](#), Schedule "A", PBOA, Tab 11. For convenient reference, we have provided a Chart of the Defendants' Affiants as Appendix "B".

<sup>140</sup> Affidavit of Chad Taylor, para. 6 ["**Chad Taylor**"], DMR Vol I, Tab 5, p. 53; Affidavit of Scott Abbott, para. 9 ["**Abbott**"], DMR Vol I, Tab 13, p. 184; Affidavit of Ryan Daniels, para. 7 ["**Daniels**"], DMR Vol I, Tab 14, p. 190; Affidavit of Gordie Broda, para. 5 ["**Broda**"], DMR Vol I, Tab 9, p. 95; Affidavit of Bob Tory, para. 8 ["**Tory**"], DMR Vol I, Tab 3, p. 32; Dennis, para. 15, DMR Vol III, Tab 21, p. 431; Calder, para. 8, DMR Vol II, Tab 18, p. 284; Calder CXE, 21:6-18, TB, Vol. 1, Tab 1, p. 263; Chouinard, para. 7, DMR Vol II, Tab 19, p. 291; Cross-Examination of Eric Chouinard, June 30, 2022, ["**Chouinard CXE**"], 22:21-23:11, TB, Vol. 4, Tab 17, pp. 2101-2102.; Affidavit of Cam Hope, para. 19 ["**Hope**"], DMR Vol I, Tab 7, p. 74; Cross-Examination of Cam Hope, June 30, 2022, 12:9-13:15, TB, Vol. 4, Tab 18, pp. 2166-2167.; Chynoweth, para. 6, DMR Vol I, Tab 10, p. 103; Cross-Examination of Jeff Chynoweth, June 28, 2022, 21:3-16, TB, Vol. 4, Tab 16, p. 2057. Brett Bartman had reviewed Garrett Taylor's affidavit but no other affidavit nor the Statement of Claim: Affidavit of Brett Bartman, para. 8 ["**Bartman**"], DMR Vol I, Tab 4, p. 45; Bartman CXE, 16:15-19:13, TB, Vol. 1, Tab 1, pp. 16-19. The same is true of Kruiise Reddick: Affidavit of Kruiise Reddick, para. 6 ["**Reddick**"], DMR Vol I, Tab 6, p. 60; Reddick Corr. CXE, 12:9-24, TB, Vol. 9, Tab 36, p. 4903.

<sup>141</sup> Reddick, para. 9, DMR Vol I, Tab 6, p. 60; Calder, para. 8, DMR Vol II, Tab 18, p. 284; Chad Taylor, para. 6, DMR Vol I, Tab 5, p. 53; Bartman, para 8, DMR Vol I, Tab 4, p. 45; Bartman CXE, 16:15-19:13, 37:20-38:16, TB, Vol. 1, Tab 1, pp. 16-19, 37-38; Daniels, para. 6, DMR Vol I, Tab 14, pp. 189-90; Daniels CXE, 21:7-22:20, TB, Vol. 3, Tab 8, pp. 1421-1422.

61. Several of the defendants' affiants exaggerated their proximity to players, casting doubt on their claims to knowledge that there is no abuse:

(a) Scott Abbott, owner and founder of the North Bay Battalion, stated in his affidavit, "I am often on the team bus", but admitted on cross-examination that, "by far, most of the time" his driver drives him between Battalion games.<sup>142</sup>

(b) Gordie Broda, President of the Price Albert Raiders, stated that he would know about any hazing "given [his] hands-on approach with the team." He acknowledged when cross-examined that he is not involved in "a lot of day-to-day stuff that goes on", and is only in the locker room once or twice per year.<sup>143</sup>

(c) Chad Taylor, President of the Moose Jaw Warriors, stated in his affidavit that there are "very few incidents about player safety that do not reach my ears", but on cross-examination testified that he "is not down in the locker room with the guys" and that abuse reporting is not his responsibility.<sup>144</sup>

(d) Eric Chouinard, Director of Player Safety in the QMJHL, stated that he has "not heard of any instances of hazing as described by the plaintiffs" in his role. He later admitted that his role was limited to on-ice misconduct, and he would only learn of abuse from Natacha Llorens, Director of Player Services.<sup>145</sup>

62. Ms. Llorens did not provide evidence. Coaches, who work directly with players and are most likely to have know about abuse, are also conspicuously absent among the defendants' affiants. Only two of the defendants' affiants have coached n the Leagues.<sup>146</sup>

63. The defendants' evidence, taken at its highest, does not show that the abuse does not exist, or is not widespread. To the contrary, it highlights the Leagues' systemic failings:

(a) **Lack of reporting:** That senior figures did not learn of any incidents of abusive hazing over years, or even decades, likely reflects the lack of an effective

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<sup>142</sup> Abbott, para. 6, DMR Vol I, Tab 13, p. 184; Cross-Examination of Scott Abbott, June 20, 2022 ["**Abbott CXE**"], 8:8-19, TB, Vol. 3, Tab 12, p. 1924.

<sup>143</sup> Broda, para. 5, DMR Vol I, Tab 9, p. 96; Broda CXE, 15:2-16:5, TB, Vol 3, Tab 11, pp. 1876-1877.

<sup>144</sup> Chad Taylor, para. 9, DMR, Vol I, Tab 5, p. 54; Cross-Examination of Chad Taylor, June 27, 2020 ["**Chad Taylor CXE**"], 23:4-18, TB, Vol. 4, Tab 15, p. 2025.

<sup>145</sup> Chouinard, para. 23, DMR, Vol II, Tab 19, p. 295; Chouinard CXE, 21:5-22:16, TB, Vol. 4, Tab 17, pp. 2100-2101.

<sup>146</sup> Robert Smith was head coach of the Halifax Mooseheads for one season, and Paul Dennis was an assistant coach with the Toronto Marlboros for three seasons, and head coach for one season: Robert Smith, para. 4, DMR, Vol I, Tab 11, p. 110; Dennis, para. 4, DMR, Vol III, Tab 21, p. 429.

reporting mechanism. It is not uncommon for those "in positions of power" to be "not only protected from knowledge" but "the last to hear of incidents of abuse."<sup>147</sup> Even Mackenzie was concerned by the lack of reporting after learning "the OHL did not receive any formal complaints to the league for the past three seasons".<sup>148</sup>

(b) **Failing to Recognize Inappropriate Behaviour:** Several affiants omitted instances of physical and verbal abuse from their affidavits, and one failed to mention a criminal sexual assault investigation concerning his teammates.<sup>149</sup> Of the defendants' seven former player affiants, only one did not refer to or concede instances of hazing and abuse.<sup>150</sup>

(c) **Failing to Understand Consent:** Affiants assume that rookies who did not resist abusive hazing consented to it, failing to consider the compulsion young players' feel to endure abusive hazing in order to be part of the team, succeed in hockey, or avoid conflict with older players or coaches.<sup>151</sup> As Dr. Johnson describes, submission to abusive hazing cannot be deemed consent.<sup>152</sup>

(d) **Disagreement on what constitutes hazing and abuse:** The defendants' affiants disagree on whether specific rituals, including the hot box, are hazing.<sup>153</sup>

64. Far from demonstrating that abuse in the Leagues is not widespread or systemic, the defendants' evidence demonstrates that abuse exists, the Leagues' stance on it is

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<sup>147</sup> Reply Report of Dr. Johnson, RMR, pp. 57-58; and see, for example, Chouinard, para. 23, DMR, Vol II, Tab 19, p. 295; Broda, para. 5, DMR, Vol I, Tab 9, pp. 95-96; Tory, para. 9, DMR, Vol 1, Tab 3, p. 32; Hope, para. 19, DMR, Vol 1, Tab 7, p. 74.

<sup>148</sup> Thériault CXE, Exhibit A (Dan Mackenzie, October 14, 2020 email), TB, Vol. 8, Tab 31, p. 4272.

<sup>149</sup> Daniels later recalled the word "pussy" being used as "locker room talk": Daniels, paras. 6-7, DMR, Vol I, Tab 14, pp. 189-90; Daniels CXE, 41:24-42:13, 43:16-45:19, TB, Vol. 3, Tab 8, pp. 1441-1442, 1443-1445; Reddick later recalled physical and verbal harassment including homophobic and racist slurs: Reddick, para. 4, DMR, Vol I, Tab 6, p. 59; Reddick Corr. CXE, 34:11-35:15, TB, Vol. 9, Tab 36, p. 4925-4926; and Bartman later recalled using homophobic slurs: Bartman, para. 8, DMR Vol I, Tab 4, p. 45; Bartman CXE, 21:6-22, TB, Vol. 1, Tab 1, p. 21.

<sup>150</sup> See fn. 145, above. In addition, Lorentz was subjected to the hot box: Lorentz, para. 6, DMR Vol I, Tab 16, pp. 205-206; Chouinard describes a rookie "drinking a live fish" in a drinking game, and had heard about the hot box: Chouinard, para. 12, DMR Vol II, Tab 19, p. 292; and Calder said rookies were drawn on and had their eyebrows clipped while in their underwear: Calder, paras. 9-10, DMR, Vol II, Tab 18, p. 284; Calder CXE, 9:2-4, 64:24-65:1, TB, Vol 1, Tab 2, pp. 251, 306-307.

<sup>151</sup> See Chouinard, paras. 10, 12, DMR, Vol II, Tab 19, pp. 291-92; Robert Smith, para. 8, DMR, Vol I, Tab 11, p. 111; Chynoweth, paras. 6, 9, DMR, Vol I, Tab 10, pp. 103-4.

<sup>152</sup> Johnson Report, p. 10, CMR, Vol 1, p. 152.

<sup>153</sup> On the hot box, see Lorentz CXE, 37:13-40:10 [does not think it is hazing, is okay with his own son doing it], TB, Vol. 3, Tab 7, pp. 1355-1358; Calder CXE, 31:19-32:8 [calls it "horrific"], TB, Vol. 1, Tab 2, pp. 273-374; Bartman CXE, 34:6-35:20 [is disgusted by it, believes it is unacceptable], TB, Vol. 1, Tab 1, pp. 34-35; Dennis CXE, 35:17-22, TB, Vol. 2, Tab 6, p. 1229; [agrees being locked in a dark, enclosed space could physically or emotionally injure players].

unclear, and individuals within the Leagues have failed to recognize and report it.

**C. The Leagues' Systemic Failures to Prevent and Respond to the Abuse**

65. The Leagues, and the Teams that govern them, are responsible for creating and enforcing effective policies to prevent and respond to abuse. For both the CHL League, and each of the Member Leagues, these responsibilities, and the defendants' joint and several liability for failing to fulfil them, arise from the peculiar structures of the Leagues, as set out in their constitutions.

66. The CHL League's own constitution, a unanimous member agreement between the Member Leagues and Teams, provides that the CHL League is organized to ensure players, "are provided with a safe and high-quality environment,"<sup>154</sup> and states:

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.<sup>155</sup>

67. David Branch testified that the CHL League's goal is "to supervise and take care of [players] while living away from home," saying this "role is one of our biggest responsibilities."<sup>156</sup> Acknowledging that most players are under 18, he emphasized "[w]

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<sup>154</sup> CHL Constitution, art 3.2(3). The Leagues' Constitutions are Exhibits "A" (CHL); "C" (OHL); "I" (WHL) and "J" (QMJHL) to the Affidavit of Dan MacKenzie, sworn April 20, 2022 ["**MacKenzie April 2022 Affidavit**"], DMR, Vol IV, Tab 23. For ease of reference, the provisions of the Leagues' Constitutions to which we refer are reproduced in Appendix "C".

<sup>155</sup> CHL Constitution, art 15, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 572-573.

<sup>156</sup> Branch *Berg* Affidavit, para. 39, CMR, Vol 3, p. 1503.

take very seriously the responsibility to ensure that these kids are supervised and supported in ways that are appropriate to their ages."<sup>157</sup>

68. Member Leagues must work with the CHL League to implement programs and policies to prevent abuse.<sup>158</sup> The Member Leagues select young players and approve the Standard Player Agreement between teams and players, an agreement that must also be signed by the player's parents, as "the team is making commitments to the player as well as to the player's parents."<sup>159</sup> Branch, as OHL Commissioner, and Ron Robison, as WHL Commissioner, said that the Member Leagues' "key functions"<sup>160</sup> include protecting young players, and that they must prioritize players' interests and needs above all else."<sup>161</sup>

69. Within each Member League, the Teams are, collectively, responsible for adopting the Leagues' anti-abuse programs and policies. Each Member League is governed by a Board of Governors, composed of an agent from each Team, which is responsible for adopting policies.<sup>162</sup> Under the CHL Constitution, all Teams vote on the CHL Regulations, which are required to address player conduct.<sup>163</sup> No regulations exist.<sup>164</sup> The Teams have

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<sup>157</sup> Branch *Berg* Affidavit, para. 30, CMR, Vol 3, p. 1501.

<sup>158</sup> CHL Constitution, art 15, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 572-573.

<sup>159</sup> Branch *Berg* Affidavit, paras. 161-162, CMR Vol 3, p. 1528; Robison *Berg* Affidavit, paras. 74-76, CMR Vol 4, p. 1685; MacKenzie April 2022 Affidavit, para. 9, DMR Vol IV, Tab 23, p. 535; Barnes, p. 95, PBOA, Tab 98.

<sup>160</sup> Branch, para. 15, DMR Vol II, Tab 17, p. 215.

<sup>161</sup> Robison *Berg* Affidavit, paras. 10, 13, CMR Vol 4, pp. 1671-72; Branch *Berg* Affidavit, para. 126, CMR Vol 3, p. 1519.

<sup>162</sup> WHL Constitution, Arts 13, 14.1, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, p. 868-870; OHL Constitution, art 5.2.1 MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 630; QMJHL Constitution, art 4.3.2, 5.1, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 918-919, 927.

<sup>163</sup> CHL Constitution, Arts 24, 3.2, 4.9, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 582, 544-545, 550.

<sup>164</sup> Defendants' counsel informed plaintiffs' counsel, by email on June 1, 2022, that "as stated in Mr. MacKenzie's April 20, 2022 affidavit, the CHL does not have and has never had Regulations". Plaintiffs' counsel has been unable to locate this information in the MacKenzie April 2022 Affidavit.

not met at a CHL General Meeting for at least three years.<sup>165</sup>

70. The Teams appear to indemnify the Leagues, and their officers and directors, for wrongdoing.<sup>166</sup> Each of the Member Leagues also requires that, when Teams change hands, the new ownership assumes or guarantees the pre-existing liabilities of the Teams.<sup>167</sup> These provisions render the Teams collectively liable for current and historical liabilities of the Leagues, including in relation to the Leagues' failures to protect players.

**i. The Leagues Lack Meaningful Anti-Abuse Programs**

71. The defendants have failed to protect players. The CHL League has never adopted any anti-abuse programs or policies. Until the late 1990s, neither had the Member Leagues.<sup>168</sup> The Commissioners, and the CHL President, insist that during this time each Team "developed policies, program and rules related to player safety, including relating to hazing."<sup>169</sup> There is no evidence of any team-level policies beyond vague allusions to

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<sup>165</sup> MacKenzie Corr. CXE, 65:3-5, TB, Vol. 9, Tab 35, p. 4800.

<sup>166</sup> CHL Constitution, art 5.2, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, p. 552; WHL Constitution, art 10.2, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, p. 861; QMJHL Constitution, art 2.2(12) MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 906. In the OHL, an assessment of dues is made annually of the amount necessary to "[d]efray the expenses and liabilities of the League," and failing to pay dues can result in termination of membership: Arts 3.12.2(b), 10.1.

<sup>167</sup> WHL Constitution, art 6.1; OHL Constitution, art 3.7.2(c) MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 620; QMJHL Constitution, art 3.3.4 (iii), MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 913-914.

<sup>168</sup> While scant, short policies appear to have been adopted by the Member Leagues between 1985 and the early 1990s, historical versions have not been provided, affiants were not aware of them, and the current versions suggest that they were insubstantial and/or did not target the Abuse: See Affidavit of Ron Robison, para. 25 ["**Robison**"], DMR Vol I, Tab 12, p. 126; Branch, para. 26, DMR, Vol II, Tab 17, p. 219; Affidavit of Gilles Courteau ["**Courteau**"], para. 26, Ex "F", DMR, Vol III, Tab 20, pp. 308, 338; Update on Player Wellbeing, SSMR, pp. 7-10; Clarke CXE, 50:24-51:5, TB, Vol. 4, Tab 20, pp. 2410-2411; Carcillo CXE, 129:6-16, TB, Vol. 5, Tab 24, p. 2806; Cross-Examination of Corey Bricknell, July 5, 2022 ["**Bricknell CXE**"], 22:15-20, TB, Vol. 4, Tab 19, p. 2214.

<sup>169</sup> Affidavit of Dan MacKenzie, sworn October 29, 2021, para. 14, DMR, Vol I, Tab 8, p. 82; Courteau, para. 15, DMR, Vol III, Tab 20, p. 303; Branch, para. 17, DMR, Vol II, Tab 17, p. 216; Robison, para. 16, DMR, Vol I, Tab 12, p. 123.

their existence.<sup>170</sup>

72. Starting in the late 1990s, the Teams, through the Boards of Governors of each of the Member Leagues, adopted a plethora of programs and policies which, the Member Leagues say, are relevant to the abuse.

73. The Governors of the Leagues, who were responsible for adopting these policies, do not appear familiar with them.<sup>171</sup> The IRP criticized the Leagues' policies, as "difficult to find," "unclear", lacking definitions, "open for interpretation", not differentiated for minors, and not updated annually.<sup>172</sup> These weaknesses make the policies "difficult to interpret, apply in day to day behaviour, report, and enforce."<sup>173</sup> David Branch told the IRP that the OHL League's policies may have been counterproductive, and "may have driven [abusive hazing] more underground."<sup>174</sup>

## **ii. The Leagues Refuse to Recognize a Systemic Problem**

74. The Leagues will not accept that the abuse is systemic. They try, in their evidence, to recast the plaintiffs' claim as a series of unconnected assaults. Paul Dennis claims his investigations into individual incidents, "have revealed that these occurrences are rare and the result of the actions of one or two veteran players or team staff."<sup>175</sup> In his view, team-

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<sup>170</sup> See e.g. Chad Taylor, para. 9, DMR, Vol I, Tab 5, p. 54. The only "team-specific policy" described in the record is Bob Tory's practice, which he refers to as a "very effective anti-hazing tool," of giving new players a short newspaper article to read: Tory, para 15 and Ex "A", DMR, Vol I, Tab 3, pp. 33-34, 37-40.

<sup>171</sup> Chad Taylor CXE, 23:7-13; 31:6-14, TB, Vol. 4, Tab 15, pp. 2025, 2033; and Broda CXE, 28:13-21, TB, Vol. 3, Tab 11, p. 1889.

<sup>172</sup> IRP Report, pp. 3-4, SSMR, pp. 64-65.

<sup>173</sup> IRP Report, p. 4, SSMR, p. 65.

<sup>174</sup> Exhibit L to Kennedy CXE (IRP Meeting Minutes, August 17, 2020), TB, Vol. 6, Tab 29, p. 3622.

<sup>175</sup> Dennis, para. 25, DMR Vol III, Tab 21, p. 435.

specific factors, "influence the likelihood of rogue behaviour of veteran players."<sup>176</sup>

75. In cross-examination, the plaintiffs' affiants responded to this theory, stating that it is not young players but "the adults who have created the culture that should be held accountable."<sup>177</sup> The Leagues cannot download their responsibility onto the shoulders of teenage players who repeated the abuse they had endured.

76. The Leagues refuse to even accept that they have the spectre of a problem. Asked about the Léger statistic, that 12% of players experienced bullying and harassment, MacKenzie said, "issues happen... We live in a society where there are bad actors, and if... you've got a bad actor who's a coach or... in the leadership of your team... it can be a real problem."<sup>178</sup> He continued, "in my mind, 12% doesn't feel systemic."<sup>179</sup>

77. MacKenzie claims that he asked IRP Chair Camille Thériault, by phone, whether current players are at risk of harm and whether the issue is widespread, and Thériault said "absolutely not."<sup>180</sup> When asked about this evidence, Thériault stated, "I certainly didn't make those kinds of statements" and that they "absolutely" do not reflect what he thinks, or the contents of the IRP Report.<sup>181</sup>

78. A systemic problem requires a systemic solution. As the IRP emphasized, "the

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<sup>176</sup> Dennis, para. 18, DMR Vol III, Tab 21, p. 432.

<sup>177</sup> Garrett Taylor CXE, 56:9-57:22, TB, Vol. 6, Tab 28, pp. 3321-3322; and see Fritsche CXE, 51:20-25, TB, Vol. 6, Tab 27, p. 3247.

<sup>178</sup> MacKenzie Corr. CXE, 128:4-13, TB, Vol. 9, Tab 35, p. 4863.

<sup>179</sup> MacKenzie Corr. CXE, 134:13-21, TB, Vol. 9, Tab 35, p. 4869. Twelve percent of 1300 players, in one season, is over 150 people.

<sup>180</sup> MacKenzie Corr. CXE, 111:4-22, TB, Vol. 9, Tab 35, p. 4846.

<sup>181</sup> Thériault CXE, 24:20-27:1, TB, Vol. 8, Tab 31, pp. 4134-4137. MacKenzie also sent Thériault an email on December 7, 2020 stating, "It was good to hear that you don't believe abuse is currently happening across the leagues and teams on a large-scale basis." Thériault did not recall saying this, "would be very surprised" if he had, and disagreed with the statement imputed to him: Thériault CXE, 22:25-24:5 and Exhibit A (email correspondence), TB, Vol. 8, Tab 31, pp. 4132-4134 and 4315.

tone at the top" is critical.<sup>182</sup> Kennedy commented, "[t]hese issues fall squarely on leadership shoulders."<sup>183</sup> Leadership has "to live it and breathe it."<sup>184</sup> In Thériault's words, the CHL "has a responsibility to fix a system that has systemic issues."<sup>185</sup> Instead of making the structural changes recommended by the IRP, the defendants deny the scope of the abuse problem in the Leagues and their responsibility for it. They have failed in their policies, and in their leadership, and they are not willing to change.

### **PART III - ISSUES AND THE LAW**

**79.** Certification is the main issue before the Court. The certification test is set out in s. 5 of the *Class Proceedings Act, 1992*, as worded prior to the 2020 amendments.<sup>186</sup> These criteria must be applied generously to achieve the purposes of class actions: access to justice, judicial economy, and behaviour modification.<sup>187</sup> The merits are not an issue at certification; the only issue is whether the case should proceed as a class action.<sup>188</sup>

**80.** A plaintiff need only show "some basis in fact" that each of the certification criteria, other than the cause of action requirement, is satisfied.<sup>189</sup> This threshold, much lower than the "balance of probabilities", is grounded in the principle that a court cannot resolve conflicts in the evidence or determine the merits at the certification stage.<sup>190</sup>

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<sup>182</sup> IRP Report, p. 3, SSMR, Tab 1(A), p. 64.

<sup>183</sup> Kennedy CXE, 48:1-5, TB, Vol. 6, Tab 29, p. 3377.

<sup>184</sup> Kennedy CXE, 155:18-157:9, TB, Vol. 6, Tab 29, pp. 3484-3486.

<sup>185</sup> Thériault CXE, 95:9-15, TB, Vol. 8, Tab 31, p. 4205;

<sup>186</sup> *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ["CPA"].

<sup>187</sup> *Western Canadian Shopping Centres Inc. v. Dutton*, [2001 SCC 46](#), at paras. 27-29, PBOA, Tab 91; *Hollick v. Toronto (City)*, [2001 SCC 68](#) at paras. [14-15](#), PBOA, Tab 50.

<sup>188</sup> *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013 SCC 57](#), at para. [102](#), PBOA, Tab 71; *Bowman v. Ontario*, [2022 ONCA 477](#), at paras. [35-39](#), PBOA, Tab 15.

<sup>189</sup> *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013 SCC 57](#), at para. [99](#), PBOA, Tab 71.

<sup>190</sup> *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013 SCC 57](#), at para. [102](#), PBOA, Tab 71.

81. The evidence on this motion, of a systemic problem arising from failures in governance, exceeds this low bar. This action, framed in systemic negligence, as the plaintiffs are entitled to do, seeks to hold the Leagues accountable.<sup>191</sup> On behalf of an identifiable class, the plaintiffs' claim not against the players who abused them, victims who, having also been abused, were not "strong enough not to continue the line of abuse,"<sup>192</sup> but against the institutions that failed to protect them.

82. The proposed common issues posed go to the core of the Leagues' structures, the duties they owed players, and the standard of care to be met. Addressing these issues in common advances each class member's claim, and will clarify the Leagues' duties going forward. Certifying this action holds the only true prospect of access to justice for the class, and desperately needed change in the Leagues.

**A. Section 5(1)(a): The Pleadings Disclose Causes of Action**

83. The s. 5(1)(a) criterion is satisfied unless it is "plain and obvious" that the pleaded claim "cannot succeed."<sup>193</sup> No evidence can be considered: the pleaded facts are presumed true.<sup>194</sup> The court may attend to, but cannot weigh or interpret, documents incorporated into the pleadings by reference.<sup>195</sup> Applying this test, it is not plain and obvious that the

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<sup>191</sup> *Rumley v. British Columbia*, [2001 SCC 69](#), para. 30, PBOA, Tab 80; *Francis v. Ontario*, [2020 ONSC 1644](#), at para. 464, aff'd [2021 ONCA 197](#), PBOA, Tab 41.

<sup>192</sup> *Carcillo CXE*, 125:21-126:3, TB, Vol. 5, Tab 24, pp. 2802-2803.

<sup>193</sup> This is the same test as applies when considering a motion to strike under Rule 21.01(1)(b): *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013 SCC 57](#) at para. 63, PBOA, Tab 71.

<sup>194</sup> See Rule 21.01(2)(b), *Rules of Civil Procedure*, R.R.O. 1990, Reg. 194; *McCreight v. Canada (A.G.)*, [2013 ONCA 483](#), at para. 32, PBOA, Tab 63; *Mohr v. NHL*, [2022 FCA 145](#), at paras. 57-59, PBOA, Tab 65.

<sup>195</sup> *McCreight v. Canada (A.G.)*, [2013 ONCA 483](#), at para. 32, PBOA, Tab 63; and see *Castrillo v. Workplace Safety and Insurance Board*, [2017 ONCA 121](#) at para. 14, citing Perell and Morden, *The Law of Civil Procedure in Ontario*, 2nd ed. (Markham, Ont: Lexis Nexis, 2014), at p. 532, PBOA, Tab 25; *Bowman v. Ontario*, [2022 ONCA 477](#), at paras. 29, 32, 40-41, PBOA, Tab 15.

plaintiffs' claims cannot succeed.

**i. The Defendants are Jointly and Severally Liable**

84. The plaintiffs' claims are against the Leagues. The plaintiffs claim that the Leagues were systemically negligent, breached fiduciary duties and are vicariously liable for the abuse. Crucially, the plaintiffs plead that all of the defendants, as the constituent parts of the Leagues, are jointly and severally liable for these failures. This joint and several liability must be recognized to hold those who had the power to protect players through League policies, and were responsible for doing so, accountable.

85. The defendants' joint and several liability flows from their choice to collectively operate a league system.<sup>196</sup> 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.<sup>197</sup> 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:

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<sup>196</sup> Fresh as Amended Statement of Claim, paras. 9-13, 95-117, and illustration on p. 8.

<sup>197</sup> Fresh as Amended Statement of Claim, paras. 9-11.

[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.<sup>198</sup>

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."<sup>199</sup>

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.<sup>200</sup>

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<sup>198</sup> *Conservative and Unionist Central Office v. Burrell* (Inspector of Taxes), [\[1982\] 2 All ER 1 \(C.A.\)](#) PBOA, Tab 32; and see *Astgen v. Smith*, [\[1970\] 1 O.R. 129](#) (C.A.), at para 15, PBOA, Tab 6; *National Hockey League v. Pepsi Cola Canada Ltd.*, [\[1992\] 70 B.C.L.R. \(2d\) 27](#) (Sup. Ct.), PBOA, Tab 66, aff'd [\[1995\] 2 B.C.L.R. \(3d\) 3 \(C.A.\)](#); *Bell Canada v. Canada (A.G.)*, [2019 SCC 66](#), at para. 17, PBOA, Tab 10; *Ziegler v. Hunter*, [\[1984\] 2 F.C. 608 \(C.A.\)](#) at para. 1, PBOA, Tab 97; *Berry v. Pulley*, [2002 SCC 40](#), at paras. 34-40, PBOA, Tab 12; Barnes, p. 97, PBOA, Tab 98; Stephen Aylward, *The Law of Unincorporated Associations in Canada* (Toronto, Ont.: LexisNexis, 2020) at §1.1, §1.33, §2.4, PBOA, Tab 99.

<sup>199</sup> Aylward, §1.21, §2.10, PBOA, Tab 99, citing *Orchard v. Tunney*, [\[1957\] S.C.R. 436](#), at 441, PBOA, Tab 68; *Astgen v. Smith*, [\[1970\] 1 O.R. 129](#) (C.A.), PBOA, Tab 6; *Brown v. Hanley*, [2019 ONCA 395](#), PBOA, Tab 17.

<sup>200</sup> The Leagues' Constitutions are Exhibits "A" (CHL); "C" (OHL); "I" (WHL) and "J" (QMJHL) to the MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23. For ease of reference, the provisions of the Leagues' Constitutions to which we refer are reproduced in Appendix "C". See Aylward, §1.33, §2.4, PBOA, Tab 99; Barnes, pp. 97, 101-2, PBOA, Tab 98; *Astgen v. Smith*, [\[1970\] 1 O.R. 129](#) (C.A.), at para. 15, PBOA, Tab 6.

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.<sup>201</sup>

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.<sup>202</sup>

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."<sup>203</sup>

90. The existence of a corporation in the name of an unincorporated association does not "supplant the association" or "displace the association relationship."<sup>204</sup> The OHL Constitution distinguishes between the association and its corporation.<sup>205</sup> 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

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<sup>201</sup> OHL Constitution art. 3.7.2(c), MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, p. 620; WHL Constitution art 6.1(c) MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, p. 846; QMJHL Constitution art. 3.3.4 (iii), MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 913-914.

<sup>202</sup> See paras 96-117 of the claim; OHL Constitution art. 3.2 and 5, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 618 and 630-632; WHL Constitution art 10 and 13, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 861-870; QMJHL Constitution art. 3, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 908-916.

<sup>203</sup> A multi-level structure is common for sports associations: Aylward §2.3, §2.26, §2.28, PBOA, Tab 99.

<sup>204</sup> Aylward, §1.13, PBOA, Tab 99.

<sup>205</sup> OHL Constitution, art. 1.1, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, p. 615.

activity, particularly, as set out below, in relation to player safety.<sup>206</sup>

91. An action against an unincorporated association is properly brought against all of the association's members.<sup>207</sup> The unincorporated association's liability is defined by ordinary principles of contract, agency or trusts, and is determined through the association's constitution.<sup>208</sup> 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.<sup>209</sup>

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 60 Teams, together, to create regulations – the official CHL Regulations – that ensure players are provided with a "safe and high-quality environment".<sup>210</sup> 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.<sup>211</sup> Each Governor votes on behalf of his Team, and promotes its interests. These provisions provide all of the

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<sup>206</sup> Fresh as Amended Statement of Claim, paras. 20-50, 96-114.

<sup>207</sup> As an association, not being a legal entity, cannot sue or be sued in its own name, the proper procedure is to name "all members of an association... in proceedings for or against the association": Aylward, §3.1, §3.4, §3.11, PBOA, Tab 99, and see *Williams v. Local Union No. 1562, United Mine Workers of America*, [1919] 59 S.C.R. 240 at para. 56, PBOA, Tab 94; *Longley v. Canada (Attorney General)*, 2007 ONCA 852, at para. 116, PBOA, Tab 61; *International Association of Science and Technology for Development v. Hamza*, 1995 ABCA 9, at para. 17, PBOA, Tab 51. The individual defendants have been named accordingly.

<sup>208</sup> Aylward, §1.2, PBOA, Tab 99; Commentary, *Restatement (Second) of Judgments*, Chapter 4, Topic 2, §61.

<sup>209</sup> See Aylward, §7.4, PBOA, Tab 99; and see *Davies v. Barnes Webster & Sons Ltd*, [2011] EWHC 2560 (Ch), PBOA, Tab 34, which held, albeit in relation to contract liability, that "[e]xactly who is liable depends on the constitution of the club and what acts of authority and ratification have occurred. It is possible for all the members to be liable if they give appropriate authority."

<sup>210</sup> CHL Constitution art. 1.1, 3.2(2) and 24, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 542-545 and 582.

<sup>211</sup> OHL Constitution art. 5-6, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 630-636; WHL Constitution art 13 and 14.1, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 868-870; QMJHL Constitution art. 4.3.2, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 918-919.

defendants the "appropriate authority" for collective liability.<sup>212</sup>

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.<sup>213</sup>

94. The defendants can be held jointly and severally liable even if the court finds the Leagues are mere corporations. The Teams are the *de facto*, and *de jure*, directors of the Member Leagues, and are also provided with the relevant powers and liabilities by the CHL League's constitution, which is a unanimous members agreement.<sup>214</sup> Within each League, the Teams, acting as Directors, directly or through representatives, failed to fulfil their duty of care and are jointly and severally liable for the harms created as a result.<sup>215</sup>

95. If necessary, the corporate veil can be pierced on the basis that each League acts as the "authorized agent of its controllers or its members, corporate or human."<sup>216</sup> Regardless of legal form, the Teams, acting together through the Leagues, failed to properly protect players, and are jointly and severally liable for the resulting harms.

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<sup>212</sup> See Aylward, §3.11, PBOA, Tab 99.

<sup>213</sup> See Aylward, §1.17-1.18, PBOA, Tab 99; and *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, [2020 NLCA 27](#), at paras. [85](#), [115](#), leave to appeal refused, [2020] S.C.C.A. No. 309, PBOA, Tab 54.

<sup>214</sup> See generally, CHL Constitution, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 540-587. OHL Constitution art. 5.4, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 632; WHL Constitution art 10.32, 13.1, 13.5, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 867, 869; QMJHL Constitution art. 4.2, 4.3.1.1, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp.916-919.

<sup>215</sup> Fresh as Amended Statement of Claim, paras. 110-151.

<sup>216</sup> *Yaiguaje v. Chevron Corporation*, [2018 ONCA 472](#), at para. [65](#), PBOA, Tab 95.

**ii. The Leagues' Systemic Negligence**

96. The defendants' wrongdoing, as pleaded in the claim, fits squarely within the law of systemic negligence. Systemic negligence claims have repeatedly been certified, and resolved on the merits.<sup>217</sup> While either type of systemic failure is sufficient to ground a claim of systemic negligence, the Leagues created systemic harms and failed to protect players from those harms.<sup>218</sup> They were careless in creating a harmful system, in which minors leave home to compete at a high-level, intent on professional careers, creating a risk of hazing and abuse, and failed "to have in place management and operations procedures that would reasonably have prevented abuse."<sup>219</sup>

97. Systemic negligence consists of a duty of care owed "across [a] system", a standard of care in running that system, and a failure to meet that standard, resulting in harms to a group in that system.<sup>220</sup> The pleadings establish these elements on two levels:

(a) The CHL League has a proximate relationship with, and owes a system-wide duty of care to, the entire class, based on, *inter alia*, its player development goals, prioritization of the player experience, assumptions of responsibility for player safety, and commissioning of reports on the subject.<sup>221</sup>

(b) Each Member League has a proximate relationship with, and owes a system-wide duty of care to, its players within the class, based on, *inter alia*, its selection of the players, representations to the players and their parents,

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<sup>217</sup> *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.), at para. 58, PBOA, Tab 31, leave to appeal refused, [2005] S.C.C.A. No. 50; *Dolmage v. Ontario*, 2010 ONSC 1726, PBOA, Tab 37; *Seed v. Ontario*, 2012 ONSC 2681, PBOA, Tab 81; *Rumley v. British Columbia*, 2001 SCC 69, PBOA, Tab 80; *Francis v. Ontario*, 2020 ONSC 1644, aff'd 2021 ONCA 197, PBOA, Tab 41; *Cavanaugh et al. v. Grenville Christian College et al.*, 2020 ONSC 1133, PBOA, Tab 27, aff'd 2021 ONCA 755, PBOA, Tab 29.

<sup>218</sup> *Cavanaugh et al. v. Grenville Christian College et al.*, 2020 ONSC 1133, at paras. 19-20, PBOA, Tab 27, aff'd 2021 ONCA 755, PBOA, Tab 29.

<sup>219</sup> *Rumley v. British Columbia*, 2001 SCC 69, at para. 30, PBOA, Tab 80; *Francis v. Ontario*, 2020 ONSC 1644, at para. 465, PBOA, Tab 41, aff'd 2021 ONCA 197, PBOA, Tab 42.

<sup>220</sup> *Francis v. Ontario*, 2020 ONSC 1644, at paras. 468-471, PBOA Tab 41, aff'd 2021 ONCA 197, PBOA, Tab 42.

<sup>221</sup> CHL Constitution art. 15, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 572-573 and see Fresh as Amended Statement of Claim, paras. 18-26, 119-126.

expressions of responsibility for player safety, and adoption of ineffective policies.<sup>222</sup>

98. As pled, both the CHL League and the Member Leagues failed to meet the requisite standard of care. Within each League, the abuse players suffered would not have happened if either the CHL League, or the player's Member League, fulfilled its duties. The harms suffered by the class were the reasonably foreseeable consequence of these breaches. These claims in systemic negligence are viable and must proceed.

### **iii. The Leagues' Breaches of Fiduciary Duties**

99. In failing to protect minors from abuse, the Leagues also breached fiduciary duties.<sup>223</sup> Fiduciary duties arise, based on the nature of a relationship, where "one party... gains a position of overriding power or influence over another party."<sup>224</sup> It must be shown that the alleged fiduciary undertook to act in the best interests of a defined class of beneficiaries who had "a legal or substantial practical interest" that stood "to be adversely affected by the alleged fiduciary's exercise of discretion or control."<sup>225</sup>

100. The Leagues gave express and implied undertakings to act in players' best interests including in the CHL Constitution and in the SPAs approved by each Member League.<sup>226</sup> The Leagues also stood *in loco parentis*, exercising overriding power and influence over players who were separated from their families, traded from team to team, and billeted with strangers. The law is clear: persons standing *in loco parentis* owe fiduciary duties to

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<sup>222</sup> Fresh as Amended Statement of Claim, paras. 30-31, 39-40, 47-48, 110-117, 135-137.

<sup>223</sup> Fresh as Amended Statement of Claim, paras. 161-177.

<sup>224</sup> *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, PBOA, Tab 49.

<sup>225</sup> *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4, at para. 162, PBOA, Tab 93; *Frame v. Smith*, [1987] 2 S.C.R. 99, at para. 60, PBOA, Tab 40.

<sup>226</sup> Fresh as Amended Claim, paras. 32, 40, 48, 111; CHL Constitution art. 3.2(3), 4.6, 5.1, 6.1, 14.4, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 544-545, 548, 550-552, 554, 571-572.

the children in their charge.<sup>227</sup> Even after players turned 18, the Leagues and Teams, controlled virtually every aspect of their daily lives and athletic careers.

101. The Leagues were, at all times, poised to adversely affect players' legal and substantial practical interests, including most notably their legal interests in bodily integrity and freedom from harassment and discrimination, as well as their substantial practical interest in getting drafted into the NHL. In short, there is a clear basis for a court to find that the Leagues owed a fiduciary duty to the class members.

102. A court could conclude that the Leagues committed systemic breaches of their fiduciary duties. A person breaches their fiduciary duty by ignoring abuse that they know is occurring, or by failing to put in place monitoring policies or procedures.<sup>228</sup> The Leagues had tools to monitor and prevent abuse but chose not to use them. By knowingly permitting the abuse to occur, they preferred their own financial and reputational interests in breach of the obligations they owed to the Class Members.<sup>229</sup> On the facts pled, and given recent successes in comparable claims, it is not plain and obvious that the class members will fail to establish a systemic breach of fiduciary duty.<sup>230</sup>

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<sup>227</sup> *M. (K.) v. M. (H.)*, [1992] 3 S.C.R. 6, at pp. 61-66, PBOA, Tab 62. The relationships between children and teachers, schools, school boards, and coaches are all fiduciary in nature: *C.O. v. Williamson*, 2020 ONSC 3874, at paras. 37-41, PBOA, Tab 19; *Cavanaugh et al. v. Grenville Christian College et al.*, 2020 ONSC 1133, at para. 347, PBOA, Tab 27, aff'd 2021 ONCA 755, PBOA, Tab 29; *G. (E.D.) v. Hammer*, 2003 SCC 52, at para. 22, PBOA, Tab 38, *Callan v. Cooke*, 2012 BCSC 1589, at para. 103, PBOA, Tab 20. See also obiter comments in *F.W.M., v. J.A.M and The Roman Catholic & Episcopal Corporation of Antigonish*, 1995 CanLII 7524 (NSSC), rev'd on other issues, *Roman Catholic & Episcopal Corporation of Antigonish v. J.M.*, 1996 NSCA 125, PBOA, Tab 77.

<sup>228</sup> *E.D.G. v. Hammer*, 2003 SCC 52, at paras. 22-25, PBOA, Tab 38.

<sup>229</sup> *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24, at para. 22, PBOA, Tab 4; *Galambos v. Perez*, 2009 SCC 48, at para. 70, PBOA, Tab 45, citing *Hodgkinson v. Simms*, [1994] 3 S.C.R. 377, at p. 422, PBOA, Tab 49.

<sup>230</sup> *Cavanaugh et al. v. Grenville Christian College et al.*, 2021 ONCA 755, at para. 81, PBOA, Tab 29. See also *Robinson v Alberta*, 2022 ABQB 497, PBOA, Tab 76; *Seed v. Ontario*, 2012 ONSC 2681, PBOA, Tab 81; *Dolmage (Litigation Guardian of) v. Ontario*, 2010 ONSC 1726, PBOA, Tab 37.

**iv. Vicarious Liability for Non-Systemic Torts**

103. As the claim details, the abuse constituted various common, non-systemic torts:

- (a) **Battery:** Egregious physical contact was made by players, coaches, and staff against Class Members without valid consent. This is harmful or offensive physical contact that causes a "direct interference with the person."<sup>231</sup>
- (b) **Assault:** The ritualized, abusive hazing that constituted the abuse was intended to and did give rise to a reasonable apprehension of harmful contact.<sup>232</sup>
- (c) **Intentional Infliction of Emotional Distress:** The abuse was flagrant or outrageous conduct calculated to produce harm that mentally and physically injured class members.<sup>233</sup>
- (d) **False Imprisonment:** The "hot box" and similar rituals involving physical restraint deprived players of their liberty against their will and constituted false imprisonment.<sup>234</sup>

104. The Leagues are vicariously liable for these non-systemic torts.<sup>235</sup> Vicarious liability is established upon meeting the two *Bazley* requirements.<sup>236</sup> First, the relationship between the tortfeasor and the person held liable must be sufficiently close to make vicarious liability appropriate. Second, the tort must be sufficiently connected to the tortfeasor's assigned tasks that it can be regarded as a materialization of the risks created by the enterprise.<sup>237</sup>

105. It is clear that the Teams are vicariously liable for the abuse committed by their

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<sup>231</sup> *Non-Marine Underwriters, Lloyd's of London v. Scalera*, [2000 SCC 24](#), at para. 8, PBOA, Tab 67; *Barker v. Barker*, [2022 ONCA 567](#), at paras. 141-143, PBOA, Tab 8.

<sup>232</sup> *Barker v. Barker*, [2022 ONCA 567](#), at paras. 170, PBOA Tab 8; citing *McLean v. McLean*, [2019 SKCA 15](#), at para. 59, PBOA, Tab 64.

<sup>233</sup> *Prinzo v. Baycrest Centre for Geriatric Care*, [2002 CanLII 45005](#), 60 O.R. (3d) 474 (C.A.), at para. 48, PBOA, Tab 70. See also *Barker v. Barker*, [2022 ONCA 567](#), at para. 133, PBOA, Tab 8.

<sup>234</sup> *Lebrun v. High-Low Foods Ltd., et. al.* (1968), [69 D.L.R. \(2d\) 433](#) (B.C. Sup. Ct.), at 436-437, PBOA, Tab 59.

<sup>235</sup> Fresh as Amended Statement of Claim, paragraphs 178-193.

<sup>236</sup> *Bazley v. Curry*, [\[1999\] 2 S.C.R. 534](#), at para. 41, PBOA, Tab 9.

<sup>237</sup> *K.L.B. v. British Columbia*, [2003 SCC 51](#), at para. 19, PBOA, Tab 57.

employees: a traditional category of vicarious liability.<sup>238</sup> The Teams may also be vicariously liable for abuse committed by their players. Like staff, veteran players were given power over rookies, and made responsible, formally or informally, for their supervision, training, and discipline. The risk of hazing and abuse by older players arises from operating a hockey team. The total relationship between Teams and their players is "sufficiently close," and the risk that materialized sufficiently connected to that relationship, to justify vicarious liability.<sup>239</sup>

106. Vicarious liability does not stop with the Teams. The plaintiffs plead necessary elements to hold the Leagues vicariously liable for the tortious conduct that constitutes abuse. This liability can be established in several ways:

- (a) **Direct:** The Leagues may be directly vicariously liable for the conduct of players and staff. Leagues selected players, drafted SPAs, and created the rules and policies they had to follow. The abuse is a manifestation of risks created by the Leagues' competitive enterprise and status as a "stepping stone" to the NHL.<sup>240</sup>
- (b) **Chain:** The Leagues may be vicariously liable for the Teams. They had the authority to discipline Teams and Team Staff, investigate abuse, and implement rules and policies to address it. Policies, once developed, were implemented (or not), in part, by Teams and Team Staff, acting as agents of the Leagues. Teams worked on account of and for the Leagues' benefit.
- (c) **Joint:** The relationships between the Teams and the Leagues could also justify vicarious liability on a theory of joint enterprise, with the Teams as immediate principals and Leagues with a senior overarching role.<sup>241</sup>

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<sup>238</sup> *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.*, [2001 SCC 59](#), at para. [25](#), PBOA, Tab 1.

<sup>239</sup> *John Doe v. Bennett*, [2004 SCC 17](#), at para. [27](#), PBOA, Tab 55; *John Doe (G.E.B. #25) v. Roman Catholic Episcopal Corp. of St. John's*, [2020 NLCA 27](#), at paras. [49](#) and [61](#), PBOA, Tab 54, leave to appeal to S.C.C. refused, [2021 CanLII 1097 \(SCC\)](#); *Bazley v. Curry*, [\[1999\] 2 S.C.R. 534](#), at para. 41, PBOA, Tab 9.

<sup>240</sup> *Branch Berg Affidavit*, para. 22, CMR, Vol 3, p. 1500.

<sup>241</sup> See *Blackwater v. Plint*, [2005 SCC 58](#), at paras. [18-21](#), PBOA, Tab 13, where the United Church of Canada and the Government of Canada were both held vicariously liable for abuse at a residential school, on the basis that they each "exercised control over the activities of the dormitory supervisor," despite the fact that the supervisor was an employee of the Church alone. See also *John Doe (G.E.B. #25) v. The Roman Catholic Episcopal Corporation of St. John's*, [2020 NLCA 27](#) at para. [85](#) and [115](#), PBOA, Tab 54, leave to appeal to SCC ref'd [2021 CanLII 1097 \(SCC\)](#).

(d) **Collective:** The Leagues' collective structures also ground vicarious liability. In unincorporated associations, partnerships, joint ventures, and even in an "informal partnership", members can be held vicariously liable for torts committed by other members in the course of a common purpose, venture or business, based on mutual agency relationships.<sup>242</sup>

107. Imposing vicarious liability, on any of these theories, accords with the doctrine's rationale. Employers are held vicariously liable for enterprise risk because they are "often in a position to reduce accidents and intentional wrongs by efficient organization and supervision."<sup>243</sup> The Leagues could have prevented the abuse by adopting and enforcing effective policies. They did not. They should be held liable for the realization of the risk they created through vicarious liability. It is not plain and obvious these claims will fail.

#### **B. Section 5(1)(b): There is an Identifiable Class**

108. Section 5(1)(b) requires that there be an identifiable class of two or more persons. The class is currently 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."<sup>244</sup>

##### **i. Defining the Class**

109. A proposed class must be defined by "objective criteria which can be used to determine whether a person is a member without reference to the merits of the action."<sup>245</sup>

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<sup>242</sup> *Strother v. 3464920 Canada Inc.*, [2007 SCC 24](#), PBOA, Tab 85; *Blackwater v. Plint*, [2005 SCC 58](#), PBOA, Tab 13; *CCS Corporation v Secure Energy Services Inc.*, [2016 ABQB 582](#), at para. 76, PBOA, Tab 30, aff'd [2018 ABCA 120](#); *Catholic Child Welfare Society and others v. Various Claimants (FC) and others*, [\[2012\] UKSC 56](#), at para. 20, PBOA, Tab 26; and see: *JGE v. Trustees of the Portsmouth Roman Catholic Diocesan*, [\[2012\] EWCA Civ 938](#), PBOA, Tab 52; *A v. The Trustees of the Watchtower Bible and Tract Society and others*, [\[2015\] EWHC 1722](#), PBOA, Tab 2; *Pádraig Hickey v. Patrick Joseph McGowan and Christopher Cosgrove*, [\[2017\] IESC 6](#), at para. 55, PBOA, Tab 48.

<sup>243</sup> *Bazley v. Curry*, [\[1999\] 2 S.C.R. 534](#), at paras. 26-26, PBOA, Tab 9.

<sup>244</sup> Fresh as Amended Statement of Claim, para. 1(s)

<sup>245</sup> *Cloud v. Canada (Attorney General)*, [\[2004\] O.J. No. 4924](#) (C.A.), at para. 45, PBOA, Tab 31, leave to appeal refused, [2005] S.C.C.A. No. 50.

A plaintiff must show that there is a "rational relationship between the [class] and the common issues" and that the class is "not unnecessarily broad".<sup>246</sup>

110. The plaintiffs seek to represent all players who experienced the abuse in the Leagues. This group shares "a central commonality."<sup>247</sup> They were abused in common ways while living and playing within the CHL League. There is a rational relationship between this class – players abused within the Leagues – and the common issues, which focus on the Leagues' liability for abuse.

111. Taking heed of the Supreme Court's direction to define the class as narrowly as possible, an amendment to the claim narrowed the class definition from "all players" to only those "who claim to have suffered the abuse."<sup>248</sup> "Claims limiters" have been accepted in class definitions, including by the Supreme Court.<sup>249</sup> Some players may never have been abused. Limiting the class to those who claim they were Abused is an appropriate way to only bind those who should be bound by a judgment or settlement.

112. The class could also be defined as "players who were subjected to the Abuse."<sup>250</sup>

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<sup>246</sup> *Cloud v. Canada (Attorney General)*, [\[2004\] O.J. No. 4924](#) (C.A.) at para. 45, PBOA, Tab 31, leave to appeal refused, [2005] S.C.C.A. No. 50; and see *Western Canadian Shopping Centres Inc. v. Dutton*, [2001 SCC 46](#), para. 38, PBOA, Tab 91.

<sup>247</sup> *Good v. Toronto (Police Services Board)*, [2016 ONCA 250](#), at para. 63, PBOA, Tab 46.

<sup>248</sup> In full: "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."

<sup>249</sup> *Rumley v. British Columbia*, [2001 SCC 69](#), at para. 21, PBOA, Tab 80; *Attis v. Canada (Minister of Health)*, [2007 CanLII 15231](#) (Ont. S.C.J.), at paras. 55-59, PBOA, Tab 7, aff'd [2008 ONCA 660](#), leave to appeal to SCC ref'd [2008] S.C.C.A. No. 491; *Hayes v. Saint John (City)*, [2017 NBOB 25](#), at paras. 67-68, PBOA, Tab 47, var'd [2018 NBCA 51](#) (unrelated to vicarious liability), PBOA, Tab 86; *Jiang v. Peoples Trust Company*, [2017 BCCA 119](#), at paras. 93, 95, PBOA, Tab 53; *Pardy et al. v. Bayer Inc.*, [2004 NLSCD 72](#), at paras. 103-110, PBOA, Tab 69, leave to appeal refused [2005 NLCA 20](#), leave to appeal refused [2005] S.C.C.A. No. 211; *Walls et al. v. Bayer Inc.*, [2005 MBQB 3](#), at paras. 24, 27-28, PBOA, Tab 89, leave to appeal refused, [2005 MBCA 93](#), leave to appeal refused, [2005] S.C.C.A. No. 409; *Thorpe v. Honda Canada Inc.*, [2011 SKQB 72](#), at paras. 54-58, PBOA, Tab 87.

<sup>250</sup> In full: "All former and current players who were subjected to the Abuse while playing in the CHL League between May 8, 1975 and the present."

The definition of "Abuse" contains plain terms, including "physical" and "sexual assault," that are employed for their non-legal meanings.<sup>251</sup> These terms describe the actionable misconduct at issue in a manner understandable to Class Members. This definition will not "pre-determine" whether class members were subjected to torts of "assault" or "battery" and does not result in a "merits-based" class definition.<sup>252</sup>

113. If neither definition is appropriate, a third clearly objective, definition should be adopted: "all former and current players."<sup>253</sup> A proposed class is not overly broad for including some persons who have no claim.<sup>254</sup> If any narrower definition lacks objectivity or requires a determination of the merits, the broader definition is appropriately, and not overly, broad.<sup>255</sup> Binding players who were never abused is not problematic in a case about abuse. Notice of certification to all former players would be appropriate, and is in any event necessary, in this case.<sup>256</sup>

## ii. The Class Period: May 8, 1975 to the Present

114. There is some basis in fact for the proposed class period, which runs from May 8,

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<sup>251</sup> See Fresh as Amended Statement of Claim, para. 1(n) where Abuse is defined as "*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." The underlined portion is a drafting error and should read "players in the Leagues."

<sup>252</sup> *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.), at para. 45, PBOA, Tab 31, leave to appeal refused, [2005] S.C.C.A. No. 50.

<sup>253</sup> In full: "All former and current players who play or played in the CHL League between May 8, 1975 and the present."

<sup>254</sup> *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.), at para 10, PBOA, Tab 18; *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 (Sup. Ct.), at para 22, PBOA, Tab 14, leave to appeal refused, [2007] O.J. No. 1991 (Div. Ct.); *Silver v. Imaz Corp.*, [2009] O.J. No. 5585 (Sup. Ct.), at paras. 103-107, PBOA, Tab 83, leave to appeal to Div. Ct. refused 2011 ONSC 1035.

<sup>255</sup> *Ragoonanan v. Imperial Tobacco Inc.*, [2005] O.J. No. 4697, at paras. 11-13, PBOA, Tab 72, leave to appeal refused, [2008] O.J. No. 1644 (Div. Ct.); *Hollick v. Toronto (City)*, 2001 SCC 68, at para. 21, PBOA, Tab 50.

<sup>256</sup> One of the purposes served by the class definition is to describe who is entitled to notice: *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.), at para 10, PBOA, Tab 18.

1975 to the present. The class period starts with the creation of the CHL League, by the Member Leagues, on May 8, 1975.<sup>257</sup> Former players describe experiencing the Abuse while playing in the Leagues between 1978, only three years after the CHL League was formed, and 2010. This amounts to over two-thirds of the class period.<sup>258</sup>

115. There is some basis in fact to continue the class period to this day:

(a) In the Léger Data, gathered in 2020, 12% of players from the prior four years reported experiencing bullying and harassment in the CHL League.

(b) Daniel Carcillo stated on cross-examination, "I've heard from hundreds of players. And there were a lot of stories of current players after this story broke that came out and said this is still happening."<sup>259</sup>

(c) Yaroslav Alexeyev, who played in the QMJHL from 2016-2019, told media that he witnessed rookies being made to wear adult diapers, drink beers and shots of vodka, and then race around a building with "a cookie in their anus", with the rookies then forced to eat their cookies.<sup>260</sup>

116. The plaintiffs reverse the right to extent the class period by way of future motion given the evidence of the systemic abuse continuing to the present day, and the Leagues' lack of meaningful action to abate the problem.<sup>261</sup>

### iii. No Conflict in the Class

117. On any definition, the class includes players who abused other players. This does not render the class inherently conflicted and does not bar certification. In similar

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<sup>257</sup> Cross-Examination of David Branch, August 3, 2022, ["**Branch CXE**"], 15:11-24, TB, Vol. 5, Tab 25, p. 2973.

<sup>258</sup> In *Seed*, the evidence on the motion covered 57% of the proposed class period. There is no obligation to provide evidence concerning every year of the class period: *Seed v. Ontario*, [2012 ONSC 2681](#), at paras. [120-125](#), PBOA, Tab 81.

<sup>259</sup> Carcillo CXE, 108:25-109:6 [emphasis added], TB, Vol. 5, Tab 24, pp. 2785-2786.

<sup>260</sup> "Yaroslav Alexeyev describes sexual assault in QMJHL hazing rituals", Peter Hassett, RMNB, June 16, 2019, CMR, Vol 4, pp. 1845-1846.

<sup>261</sup> *Berg v. Canadian Hockey League*, [2017 ONSC 2608](#), at para. [155](#), PBOA, Tab 11.

circumstances, courts have rejected the argument that a class cannot be certified, including in *Weremy*, where the abuse at issue included resident on resident assaults;<sup>262</sup> in *Johnson*, where some assaults were perpetrated by inmates in the class;<sup>263</sup> and in *Ewert*, where the class was subject to treatment triggered by inmates in the class.<sup>264</sup>

118. Conflicts in a class are overcome in both systemic negligence and breach of fiduciary duty claims "because the cause of action is focused upon the acts or omissions of the defendant."<sup>265</sup> In such claims, "based on the theory harm was occasioned" by the manner in which the defendants ran a system, "the class is united."<sup>266</sup> To determine these claims, and those in vicarious liability, "it is not necessary to identify any wrongdoers" or to distinguish between those who participated in the Abuse and those that did not.<sup>267</sup>

119. Abusive hazing is cyclical: rookies, having been Abused, become veterans and Abuse new rookies.<sup>268</sup> At times, those who refused to continue the abuse were reprimanded.<sup>269</sup> Some veterans intervened in the abuse and were abused horrifically in response.<sup>270</sup> Most, given the "the mental state of young men in a hockey culture where you have to conform continued the cycle."<sup>271</sup>

120. The Abuse, passed down through this cycle, continued "year after year" because of the Leagues' failure. The Leagues created a culture that "lets the inmates run the prison,"

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<sup>262</sup> *Weremy v. The Government of Manitoba*, [2020 MBQB 85](#), PBOA, Tab 90.

<sup>263</sup> *Johnson v. Ontario*, [2016 ONSC 5314](#), PBOA, Tab 56.

<sup>264</sup> *Ewert v. Canada (Attorney General)*, [2016 BCSC 962](#), PBOA, Tab 39.

<sup>265</sup> *Weremy v. The Government of Manitoba*, [2020 MBQB 85](#), at para. [113](#), PBOA, Tab 90.

<sup>266</sup> *Johnson v. Ontario*, [2016 ONSC 5314](#), at paras. [83-84](#), PBOA, Tab 56.

<sup>267</sup> *Ewert v. Canada (Attorney General)*, [2016 BCSC 962](#), at para. [79](#), PBOA, Tab 39, *Johnson v. Ontario*, [2016 ONSC 5314](#), at para. [81](#), PBOA, Tab 56.

<sup>268</sup> See paras. 38 to 46, above.

<sup>269</sup> Quirk CXE, 23:10-22, TB, Vol. 5, Tab 23, p. 2664;

<sup>270</sup> Hammett, para. 4(c), CMR, Vol 1, Tab 14, p. 101.

<sup>271</sup> Carcillo CXE, 125:21-126:3, TB, Vol. 5, Tab 24, pp. 2802-2803.

where rookies had no-one "to watch us and patrol us as young teenagers" and "were left... to defend ourselves and take care of ourselves."<sup>272</sup> After a abuse incident emerged in 2005, David Branch reportedly said, "[w]e didn't suspend any players because we felt the leadership had failed the players."<sup>273</sup>

**121.** This case is about the Leagues failing players: both those that successfully resisted continuing the cycle of abuse and those that did not. Within this action, young players are not, as the defendants suggested, the ones that should be held accountable.<sup>274</sup> The Leagues' systemic failures caused the Abuse, and the Leagues must not be allowed to escape liability for those failures by blaming the very monsters that their system created.

### **C. Section 5(1)(c): The Claims Raise Common Issues**

122. For an action to be certified, the claims of class members must "raise common issues." The common issues must be substantial ingredients in, and necessary components of the resolution of, each class member's claim.<sup>275</sup> Certification is not a test on the merits.<sup>276</sup> While a plaintiff must show some basis in fact that the claims of the class raise common questions, evidence that the alleged acts occurred is not required.<sup>277</sup>

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<sup>272</sup> Jelitto CXE, 20:15-24, TB, Vol. 5, Tab 21, p. 2568.

<sup>273</sup> Allan Maki, Globe and Mail, "Mantha still trying to clear his name", February 20, 2009, CMR, Vol 4, pp. 1891-1892.

<sup>274</sup> See, for example, Carcillo CXE, 125:2-4, TB, Vol. 5, Tab 24, p. 2802. Quirk CXE, 20:10-13, 21:2-7, 24:17-21; TB, Vol. 5, Tab 23, pp. 2661, 2662, 2665; Pszenyczny CXE, 26:6-10, TB, Vol. 5, Tab 22, p. 2630; Jelitto CXE, 20:9-13, TB, Vol. 5, Tab 21, p. 2568.

<sup>275</sup> *Hollick v. Toronto (City)*, [2001 SCC 68](#), at para. 18, PBOA, Tab 50; *Carom v. Bre-X Minerals Ltd.*, [\[2000\] O.J. No. 4014 \(C.A.\)](#), at para. 41, PBOA, Tab 41, citing *Campbell v. Flexwatt Corp.*, [\[1997\] B.C.J. No. 2477 \(C.A.\)](#), at para. 53, PBOA, Tab 21; *Cloud v. Canada (Attorney General)*, [2004 O.J. No. 4924 \(C.A.\)](#) at para. 53, PBOA, Tab 31, leave to appeal refused, [2005] S.C.C.A No. 50.

<sup>276</sup> *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013 SCC 57](#), at para. 102, PBOA, Tab 71; *Bowman v. Ontario*, [2022 ONCA 477](#), at paras. 35-37, PBOA, Tab 15.

<sup>277</sup> *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, [2013 SCC 57](#) at para. 110, PBOA, Tab 71.

123. A court should approach the question purposively to determine whether certification "will avoid duplication of fact-finding or legal analysis."<sup>278</sup> The proposed common issues consider the nature and extent of the defendants' collective liability for the Abuse in the Leagues.<sup>279</sup> These questions – of who is liable, why, and to what extent – must be answered to resolve any of the class member's claims and should be certified.

124. Defendants' counsel suggested to the plaintiffs' affiants that individual good or bad coaches or veteran players played a role in the Abuse.<sup>280</sup> Neither the role of coaches and veterans on particular teams at particular times, nor differences in players' perceptions, can refute the systemic nature of the Abuse. Commonality is "not disapproved by finding instances of difference," and cannot be refuted "by proving that each class member is a unique human being" who "had different experiences with the defendant."<sup>281</sup>

**i. The Nature of the Organizations**

125. The first common issue asks about the nature of the organizations operating as and within Canadian Major Junior Hockey in order to determine how liability flows among and between the defendants for organizational failures. Based on the Leagues' constitutions, which create unusual governance structures, the plaintiffs claim that the Leagues operate as collectives and, as a result, the defendants are jointly and severally liable for their failures in governance.<sup>282</sup> The defendants maintain that each League is its

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<sup>278</sup> *Western Canadian Shopping Centres Inc. v. Dutton*, [2001 SCC 46](#), para. 39, PBOA, Tab 91.

<sup>279</sup> The proposed common issues are listed in Appendix D.

<sup>280</sup> See, for example, Carcillo CXE, 28:13-16, 29:5-8, TB, Vol. 5, Tab 24, pp. 2705-2706; Pszenyczny CXE, 26:6-10, TB, Vol. 5, Tab 22, p. 2630; Jelitto CXE, 20:9-14, TB, Vol. 5, Tab 21, p. 2568; Bricknell CXE, 16:14-16, 18:10-11, 21:9-10, TB, Vol. 4, Tab 19, pp. 2208, 2210, 2213.

<sup>281</sup> *G.C. v. Jugenburg*, [2021 ONSC 3114](#), at paras. [23-24](#), PBOA, Tab 44.

<sup>282</sup> See paras 64 to 69 and 83 to 94, above.

corporation, and, as a result, claims against the Leagues are properly made against those corporations alone.<sup>283</sup> This is a gating issue every class member faces in a systemic claim.

126. This question is crucial. The plaintiffs' claims are against the Leagues. To hold the Leagues liable, a court must first determine what they are. A common issue may constitute "a very limited aspect of the liability question."<sup>284</sup> Assuming that the Leagues are properly identified with their League corporations will create artificial barriers to compensation for every member of the class. League Corporations appear to distribute their revenue among the Teams each year, raising solvency concerns for the League Corporations.<sup>285</sup> While some distribution is equal, aspects are based on Team performance, including the fate of a Team's players in the NHL draft.<sup>286</sup> Some teams are wealthier than others.

127. Under the defendants' theory, class members can only seek compensation from League Corporations and – if their Team still exists – the Team that selected them after they entered the Leagues. Class members must not be left to seek compensation for the Leagues' systemic failures through this unpredictable patchwork, particularly where the legal reality of the Leagues, upon inquiry, should support joint and several liability. This issue must be determined to properly allocate responsibility and compensate the class.

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<sup>283</sup> See Defendants' Amended Notice of Motion, DMR Vol I, Tab 1, p. 3.

<sup>284</sup> *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.), at para. 53, PBOA, Tab 31, leave to appeal refused, [2005] S.C.C.A. No. 50.

<sup>285</sup> MacKenzie Corr. CXE, 28:12-25, TB, Vol. 9, Tab 35, p. 4763; Branch CXE, 16:11-20:10, TB, Vol. 5, Tab 25, pp. 2974-2978.

<sup>286</sup> See Branch CXE, 16:11-20:10, TB, Vol. 5, Tab 25, pp. 2974-2978: The NHL provides an annual lump sum payment to the CHL League, which is distributed to the Teams according to a formula that provides more money to Teams with players picked in earlier rounds of the NHL draft.

**ii. Liability Common Issues**

128. Common issues (ii) to (vii) concern the Leagues' liability for the Abuse. The evidence on this motion provides some basis in fact for finding that the Abuse is systemic and raises common questions of liability.<sup>287</sup> The Abuse occurred in common circumstances, included common rituals and hallmarks, and exhibited common traits:

- In locker rooms and showers, use of hockey sticks as restraints and weapons, forced shaving of body and genital hair, and use of heat ointment to cause agony;
- At rookie parties and other events, forced consumption of alcohol;
- In team life, constant verbal and emotional abuse, with the repeated and persistent use of racist, homophobic and misogynistic language; and
- On team buses, the ritual of the "hot box."<sup>288</sup>

129. An enduring, toxic culture of Abuse persisted in the Leagues over decades. Sheldon Kennedy commented that the culture revealed by the IRP was a continuation of the culture of off-ice misconduct and "silence and fear to speak out" that he experienced while playing in the WHL in the 1980s.<sup>289</sup>

130. The Abuse occurred because of the Leagues' failures. It may have been worse where "bad" coaches and players made it so, or less bad where "good" coaches and players toned it down. But protecting players should not have depended on the good and bad apples that those players were placed alongside. It should never have been a matter of luck. The spectrum of Abuse that exists is the predictable result of the Leagues' systemic failures to prevent the Abuse altogether.

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<sup>287</sup> See paras. 38 to 58, above.

<sup>288</sup> See paras. 24 to 37, above.

<sup>289</sup> Kennedy CXE, 31:4-32:3, TB, Vol. 6, Tab 29, pp. 3360-3361.

131. As the Abuse is common and systemic, questions of liability are common. Where systemic negligence and breach of fiduciary duty are claimed against defendants for common failures, "no class member can prevail without showing duty and breach."<sup>290</sup> Similar systemic negligence and breach of fiduciary duty common issues have repeatedly been certified.<sup>291</sup>

132. Any finding of negligence against the Leagues requires an analysis of whether the Leagues owed and breached systemic legal obligations to players.<sup>292</sup> The evidence supports conducting this analysis in common:

- **Duty of Care:** The Leagues' constitutions, their proximate relationships with players, and their expressions of responsibility for player safety provide a basis in fact for common duties of care to players owed "across [the] system".<sup>293</sup>
- **Standard of Care:** The standard of care in running that system can be assessed based on the Leagues' constitutions, their representations to players and parents, and best practices in sport and child-protection. While the standard may have evolved, courts have certified systemic negligence common issues for longer class periods, and the CPA provides the court with "ample flexibility to deal with limited differentiation amongst the class members".<sup>294</sup>
- **Breach:** There is some basis in fact to ask whether the Leagues' policies and procedures met this systemic standard of care, based on clear inadequacies in their policies, the findings of the IRP, and continued evidence of the Abuse.
- **Harm:** As a result of these breaches, the Abuse continued, causing physical,

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<sup>290</sup> *Rumley v. British Columbia*, [2001 SCC 69](#), at para. 27, PBOA, Tab 80.

<sup>291</sup> See common issues (ii)-(iv), on systemic negligence, and (v)-(vi), on fiduciary duty, and see *Canada v. John Doe*, [2016 FCA 191](#), at para. 63, PBOA, Tab 23; *Rumley v. British Columbia*, [2001 SCC 69](#), at para. 27, PBOA, Tab 80; *Dine v. Biomet*, [2015 ONSC 7050](#), at paras. 65-66, PBOA, Tab 36, leave to appeal refused, [2016 ONSC 4039 \(Div. Ct.\)](#); *Cloud v. Canada (Attorney General)*, [2004 O.J. No. 4924](#) (C.A.) at paras. 71-72, PBOA, Tab 31, leave to appeal refused, [2005] S.C.C.A No. 50; *Dolmage v. Ontario*, [2010 ONSC 1726](#), at paras. 157-158, PBOA, Tab 37.

<sup>292</sup> See *Cloud v. Canada (Attorney General)*, [\[2004\] O.J. No. 4924](#) (C.A.), at para. 69, PBOA, Tab 31, leave to appeal refused, [2005] S.C.C.A. No. 50.

<sup>293</sup> *Francis v. Ontario*, [2020 ONSC 1644](#), at paras. 468-469, PBOA, Tab 41, aff'd [2021 ONCA 197](#), PBOA Tab 42.

<sup>294</sup> *Rumley v. British Columbia*, [2001 SCC 69](#), para 32, PBOA, Tab 80; see also *Cloud v. Canada (Attorney General)*, [\[2004\] O.J. No. 4924](#) (C.A.), at para. 59, PBOA, Tab 31, leave to appeal refused, [2005] S.C.C.A. No. 50.

emotional and psychological harm to the class, as attested to by the plaintiffs' affidants and the IRP Report.<sup>295</sup>

133. There is also some basis in fact to ask whether the Member Leagues owed a common fiduciary duty to players, based on facts common to all players:

(a) The Member Leagues stood *in loco parentis* over players who they signed up, as minors, and then removed from their homes. As one player stated on cross-examination, "my parents signed over... for the organization to take care of me, it's not just solely on the coach. It's the organization as a whole."<sup>296</sup>

(b) The Member Leagues undertook to protect players from abuse in the constitutions, in the SPAs with players and their parents, through their expressions of responsibility, and in the adoption of ineffective policies.<sup>297</sup>

(c) Players were vulnerable to the Member Leagues' control in every aspect of their hockey careers, including where they played, the rules under which they played, and the policies and procedures in place to keep them safe. Given their age and common circumstances, players' legal and practical interests in their bodily and psychological integrity stood to be adversely affected by the exercise of this control, as all players stood at risk of Abuse.

134. If fiduciary duties were owed, there is some basis in fact to ask, in common, whether those duties were breached, based on clear inadequacies in the Member Leagues' policies, the findings of the IRP, and continued evidence of Abuse.<sup>298</sup>

135. The class' claims of vicarious liability also raise common issues. Vicarious liability common issues have been certified in past cases.<sup>299</sup> The Abuse consisted of non-systemic,

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<sup>295</sup> IRP Report, p. 17, SSMR, p. 78; Thériault CXE, 96:11-25, TB, Vol. 8, Tab 31, p. 4206; and see Howery, para. 34, CMR Vol 1, Tab 2, p. 17; Munce, para. 19, CMR Vol 1, Tab 3, p. 26; Doug Smith, para. 9, CMR, Vol 1, Tab 4, p. 33; Clarke, para. 7, CMR, Vol 1, Tab 7, p. 50; Ledlin, para. 25, CMR, Vol 1, Tab 9, p. 65; Andrews, para. 15, CMR, Vol 1, Tab 11, p. 79; Bricknell, para. 22, Vol 1, Tab 13, p.94; Hammett, paras. 15-16, CMR, Vol 1, Tab 14, pp. 103-4; Carcillo, para. 22, CMR Vol 1, Tab 15, p. 115; Garrett Taylor, paras. 21, 24, CMR Vol 1, Tab 16, pp. 132-133.

<sup>296</sup> Pszenyczny CXE, 19:4-22, TB, Vol. 5, Tab 22, p. 2623.

<sup>297</sup> See paras. 67 to 72, above.

<sup>298</sup> See paras. 55 to 58, 70-72 above.

<sup>299</sup> *Hayes v. Saint John (City)*, [2017 NBQB 25](#), at para. 96, PBOA, Tab 47, var'd [2018 NBQA 51](#) (unrelated to vicarious liability), PBOA, Tab 86; *Ari v. Insurance Corporation of British Columbia*, [2019 BCCA 183](#), PBOA, Tab 5; *Canada v. Greenwood*, [2021 FCA 186](#), at paras. [185-186](#), PBOA, Tab 22.

intentional torts raising a common question: which defendants are vicariously liable for those non-systemic torts? The existence of vicarious liability, the level of Canadian major junior hockey to which it rises, and its limits can be determined in common:

- (a) **Existence:** Whether the defendants can be held vicariously liable for abuse committed against the players, particularly abuse by other players, will depend on common facts regarding the operation of the Leagues and Teams.
- (b) **Level:** Whether vicarious liability ends with the Teams, or rises to the Member Leagues and the CHL League, is a common question to be answered based on the nature of the Leagues, and their relationships with one another and their players and staff, as made out in their constitutions and practices.
- (c) **Limits:** As players were abused in common circumstances, on team buses, in team locker rooms and showers, at training camps, and at rookie parties, common limits to vicarious liability can be determined. The common structure of hockey Team life allows a court to ask, given the nature of life in the Leagues, where does vicarious liability stop: at the doors of the arena or the bus, or at the edges of coach and staff awareness that players have gathered?

### iii. The Application of Quebec Law

136. Pursuant to the CHL Constitution's attornment and choice of law provision, this action is governed by Ontario law and must be litigated in this Court.<sup>300</sup> However, this court could deem it necessary for a sub-class of QMJHL players to seek compensation under Quebec law. Ontario courts are competent to apply foreign law and routinely certify common issues involving the application of foreign law, and Quebec law in particular.<sup>301</sup>

137. The *Civil Code of Quebec* creates a general framework for extracontractual liability.<sup>302</sup> 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

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<sup>300</sup> CHL Constitution art. 25.1, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 582-583.

<sup>301</sup> See, recently, *Tocco v. Bell Mobility Inc.*, [2019 ONSC 2916](#), at paras. [34](#) and [60](#), PBOA, Tab 88. See also CHL Constitution art. 25.1, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 582-583.

<sup>302</sup> Article 1457 CCQ.

diligent person in the same circumstances."<sup>303</sup> Whether the Leagues fell below this standard of conduct, and so committed an actionable civil fault, is a question common to each sub-class member's claim and can be assessed on a common factual record.<sup>304</sup>

138. The *Quebec Charter* protects rights to life, "personal security, inviolability and freedom," and to "the safeguard of his dignity, honour and reputation."<sup>305</sup> Children have the "right to the protection, security and attention that his parents or the persons acting in their stead are capable of providing."<sup>306</sup> The evidence on this motion describes violations of players' freedom, dignity, and inviolability, and failures to protect children.<sup>307</sup> There is some basis in fact to ask in common, if necessary, whether the Leagues' conduct interfered with the rights and freedoms of players under the *Quebec Charter*.

#### iv. Damages Common Issues

139. Common issue (x) asks whether the court can make an aggregate assessment of damages on a class wide basis. Aggregate damages common issues have been certified, and aggregate damages awards made and upheld, in systemic negligence cases.<sup>308</sup> Aggregate damages are available "so long as there is a method to find a reasonable quantum of damages."<sup>309</sup> Where damages are not "economic or essentially economic" in

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<sup>303</sup> *Kosoian v. Société de transport de Montréal*, [2019 SCC 59](#), [2019] 4 S.C.R. 335, at para. 42, PBOA, Tab 58, citing *St. Lawrence Cement Inc. v. Barrette*, [2008 SCC 64](#), [2008] 3 S.C.R. 392, PBOA, Tab 84.

<sup>304</sup> This question is routinely authorized (certified) as a common issue in Quebec class actions *Dillon c. Wayland Group Corp.*, [2022 QCCS 1553](#), PBOA, Tab 35.

<sup>305</sup> *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12, ss. 1, 4, 10.

<sup>306</sup> *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12, ss. 39.

<sup>307</sup> See, in particular, Quirk, paras. 8-12; SMR, pp. 3-4; and "Yaroslav Alexeyev describes sexual assault in QMJHL hazing rituals", Peter Hassett, RMNB, June 16, 2019, CMR, Vol 4, pp. 1845-1846.?

<sup>308</sup> See, CPA, s. 24, and see, for example, *Dolmage v. Ontario*, [2010 ONSC 1726](#), at para. 162, PBOA, Tab 37; *Francis v. Ontario*, [2021 ONCA 197](#), PBOA, Tab 41; *Reddock v. Canada (Attorney General)*, [2019 ONSC 5053](#), at paras. 480-486, PBOA, Tab 75, aff'd [2020 ONCA 184](#).

<sup>309</sup> *Tocco v. Bell Mobility Inc.*, [2019 ONSC 2916](#), at para. 39, PBOA, Tab 88, citing *Ramdath v George Brown College*, [2014 ONSC 3066](#), at para 44, PBOA, Tab 73, aff'd [2015 ONCA 921](#).

nature, expert evidence is not necessary to establish a methodology.<sup>310</sup>

140. 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.<sup>311</sup> A base amount of compensation for this harm would then be multiplied by the number of players who may have been abused. On the Léger Data, 12% of current players reported mistreatment. The culture of silence makes underreporting in this data likely and, on the defendants' own admissions, the problem used to be worse.<sup>312</sup> Applying a 12% rate would provide no possibility of an overcount and would yield a class size of thousands. Under this methodology, most would be undercompensated and some may be overcompensated.<sup>313</sup> However, if the Defendant's overall liability is understated, aggregate damages should be awarded.<sup>314</sup>

141. Common issues (xi) and (xii) ask whether punitive or exemplary damages ought to be awarded, and in what amount. Punitive damages are awarded where a defendant's misconduct "represents a marked departure from ordinary standards of decent behaviour."<sup>315</sup> The defendants failed, for decades, to respond to abuse; perpetuated a culture of silence around it; and ignored or dismissed recommendations for dealing with

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<sup>310</sup> *Tocco v. Bell Mobility Inc.*, [2019 ONSC 2916](#), at para. 43, PBOA, Tab 88.

<sup>311</sup> *Good v. Toronto (Police Services Board)*, [2016 ONCA 250](#), at para. 75, PBOA, Tab 46.

<sup>312</sup> Branch told the IRP, "Do I think that it is still as bad as it was 10 years or 15 years ago? No. Do I believe it is still happening today? Yes.": Exhibit L to Kennedy CXE (IRP Meeting Minutes, August 17, 2020), TB, Vol. 6, Tab 29, p. 3622.

<sup>313</sup> This is similar to the process described in *Ramdath v George Brown College*, [2014 ONSC 3066](#), at para 44, PBOA, Tab 73, aff'd [2015 ONCA 921](#), and employed in *Brazeau v. Attorney General (Canada)*, [2019 ONSC 1888](#), PBOA, Tab 16, aff'd [2020 ONCA 184](#); *Francis v. Ontario*, [2020 ONSC 1644](#), PBOA, Tab 41, aff'd [2021 ONCA 197](#), PBOA, Tab 42; and *Reddock v. Canada (Attorney General)*, [2019 ONSC 5053](#), at paras. 480-486, PBOA, Tab 75, aff'd [2020 ONCA 184](#).

<sup>314</sup> *Ramdath v George Brown College*, [2015 ONCA 921](#), at paras. 51, 76, PBOA, Tab 73A, and see *Markson v. MBNA Canada Bank*, [2007 ONCA 334](#), at paras. 42-43, 49, PBOA, Tab 62A.

<sup>315</sup> *Whiten v. Pilot Insurance Co.*, [2002 SCC 18](#), para. 37, PBOA, Tab 92.

it. If this court find the defendants liable, and assesses aggregate damages, a sufficient basis will be available to determine whether their conduct justifies punitive damages.<sup>316</sup>

142. For a QMJHL sub-class, if necessary, the question of punitive damages interacts with liability under the *Quebec Charter*, which provides that punitive damages may be awarded in cases of "unlawful and intentional interference" with a *Quebec Charter* right.<sup>317</sup> The award of punitive damages under the *Quebec Charter* is a common issue where, as is the case here, there is a question of whether the perpetrator's wrongdoing was "unlawful and intentional" in respect of the entire class.<sup>318</sup>

#### **D. Section 5(1)(d): An Ontario Class Action is the Preferable Procedure**

143. To be certified, a class action must be the preferable procedure for the resolution of the common issues, when viewed through the lens of judicial economy, behaviour modification, and access to justice.<sup>319</sup> A plaintiff must show that a class proceeding "would be a fair, efficient and manageable method of advancing the claim" and "preferable to any other reasonably available means of resolving the class members' claims."<sup>320</sup>

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<sup>316</sup> *Good v. Toronto (Police Services Board)*, [2016 ONCA 250](#), at para. [76](#), PBOA, Tab 46; and see *Dolmage v. Ontario*, [2010 ONSC 1726](#), at para. [164](#), PBOA, Tab 37, and see *Rumley v. British Columbia*, [2001 SCC 69](#), at para. 34, PBOA, Tab 80.

<sup>317</sup> *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12, s. 49.

<sup>318</sup> See *Rozon c. Les Courageuses*, [2020 QCCA 5](#), at paras. [112-117](#), PBOA, Tab 79, where Hamilton J.C.A. held that punitive damages under the *Quebec Charter* could not be certified as a common issue because the class alleged serial sexual abuse by a priest rather than systemic abuse, and therefore the punitive damages analysis could only be conducted on a case-by-case basis, taking into account the circumstances of each assault.

<sup>319</sup> *AIC Limited v. Fischer*, [2013 SCC 69](#) at para. [22](#), PBOA, Tab 3.

<sup>320</sup> *AIC Limited v. Fischer*, [2013 SCC 69](#) at para. [48](#), PBOA, Tab 3, and see *Curtis v. Medcan Health Management Inc.*, [2022 ONSC 5176](#) (Div. Ct.) at para. [27](#), PBOA, Tab 33.

**i. Class Proceeding is Necessary to Overcome the Culture of Silence**

144. Access to justice is at the forefront of this analysis. A certification judge must ask:

- 1) What are the barriers to access to justice?
- 2) What is the potential of the class proceedings to address those barriers?
- 3) What are the alternatives to class proceedings?
- 4) To what extent do the alternatives address the relevant barriers?
- 5) How do the two proceedings compare?<sup>321</sup>

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.

145. As set out above, the abuse, and bearing that abuse in silence, are normalized elements of the Leagues' culture.<sup>322</sup> An enduring culture of silence must be overcome to achieve access to justice for the class. Affiants describe feeling "immense pressure" to keep their stories to themselves.<sup>323</sup> Some did so for decades.<sup>324</sup> That pressure is still greater for those who work in, or remain connected to, the world of hockey, as many class members do.<sup>325</sup> When this action was commenced, some of the plaintiffs' affiants had never spoken about the Abuse, not even to their families.<sup>326</sup> They came forward with their stories after learning of this action.<sup>327</sup> At least one affiant in this case was "blackballed by the hockey community" and lost work for doing so.<sup>328</sup>

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<sup>321</sup> *AIC Limited v. Fischer*, [2013 SCC 69](#) at para. 26, PBOA, Tab 3; *Curtis v. Medcan Health Management Inc.*, [2022 ONSC 5176](#) (Div. Ct.), at paras. 28, 36-40, PBOA, Tab 33.

<sup>322</sup> See paras. 44 to 54, above.

<sup>323</sup> See, e.g., Howery, para. 34, CMR, Vol 1, Tab 2, p. 17; Ledlin, para. 3, CMR, Vol 1, Tab 9, p. 61.

<sup>324</sup> See, e.g., Howery, para. 34, CMR, Vol 1, Tab 2, p. 17; Ledlin, para. 3, CMR, Vol 1, Tab 9, p. 61.

<sup>325</sup> Hammett, para. 3, CMR, Vol 1, Tab 14, p. 100; Ledlin, para. 3, CMR, Vol 1, Tab 9, p. 61.

<sup>326</sup> Hammett, para. 3, CMR, Vol 1, Tab 14, p. 100; Fritsche, para. 15, CMR, Vol 1, Tab 16, p. 124.

<sup>327</sup> Hammett, para. 3, CMR, Vol 1, Tab 14, p. 100; Fritsche, para. 15, CMR, Vol 1, Tab 16, p. 124.

<sup>328</sup> Hammett Reply Affidavit, para. 11, RMR, Tab 2, p. 31.

146. A class proceeding provides the "anonymity, and security in numbers" needed for class members to come forward with their claims.<sup>329</sup> 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."<sup>330</sup> 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.<sup>331</sup>

147. 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.<sup>332</sup> Individual actions are not a feasible alternative, and cannot be preferable to a class action.

## **ii. This Class Proceeding Promotes Judicial Economy**

148. This class proceeding also promotes judicial economy. For preferability, "the plaintiff's particular claim" is central.<sup>333</sup> The plaintiffs' systemic claim against the Leagues targets the cascading failures, from the CHL League-level down, that led to the Abuse they suffered. Even if individual litigation were a feasible alternative, determining the same common issues to which this claim gives rise thousands of times would represent an

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<sup>329</sup> *Curtis v. Medcan Health Management Inc.*, [2022 ONSC 5176](#) (Div. Ct.), at para. 40, PBOA, Tab 33, citing *Fulawka v. Bank of Nova Scotia*, [2012 ONCA 443](#), at paras. 167-71, PBOA, Tab 43; *Rosen v. BMO Nesbitt Burns Inc.*, [2013 ONSC 2144](#), PBOA, Tab 78.

<sup>330</sup> Ledlin, para. 26, CMR, Vol 1, Tab 9, p. 65; and see Andrews, para. 16, CMR, Vol 1, Tab 11, p. 80.

<sup>331</sup> CPA, s. 25.

<sup>332</sup> *Curtis v. Medcan Health Management Inc.*, [2022 ONSC 5176](#) (Div. Ct.), at para. 43, PBOA, Tab 33.

<sup>333</sup> *Lewis v. Westjet Airlines*, [2022 BCCA 145](#), at para. 60, PBOA, Tab 60.

absurd loss of judicial economy.

149. Litigants cannot be forced to recast their claims in a manner more amenable to an individual proceeding.<sup>334</sup> In any event, the Abuse is ill-fitted to non-systemic litigation.<sup>335</sup> A player could fashion a claim against the players who abused him, the coaches that stood idly by, and officials within his Member League that were aware of, and did not prevent, Abuse. But veteran players will have their own third-party claims against the players who abused them. Other, younger players, might claim against the plaintiff for their own abuse.

150. Every class member has a systemic claim. Where the "policy and administration" of an institution is at issue, "individual actions would be less practical and less efficient" than a class proceeding.<sup>336</sup> The crux of each individual class members' claim is whether fault lies with the Leagues' system, and each claim can be answered through an analysis at the League-level: their history, their duties to players, their historical failings, and the practices and policies that they should have adopted.<sup>337</sup>

151. Given the evidence already on the record, it may be possible to determine these systemic breaches in a motion for summary judgment, as has been done in past cases.<sup>338</sup> The plaintiffs' proposed litigation plan sets out a manageable procedure for resolving the class members' claims.<sup>339</sup> The determination of individual issues will focus on damages

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<sup>334</sup> *Tocco v. Bell Mobility Inc.*, [2019 ONSC 2916](#), at paras. [52-57](#), PBOA, Tab 88.

<sup>335</sup> *Rumley v. British Columbia*, [2001 SCC 69](#), para 30, PBOA, Tab 80; *Francis v. Ontario*, [2020 ONSC 1644](#), at para. 464, PBOA Tab 41, aff'd [2021 ONCA 197](#), PBOA, Tab 42.

<sup>336</sup> *Rumley v. British Columbia*, [2001 SCC 69](#), para. 38, PBOA Tab 80.

<sup>337</sup> Compare with *Cavanaugh v. Grenville Christian College*, [2014 ONSC 290](#), at para. [22](#), PBOA Tab 28.

<sup>338</sup> *Reddock v. Canada (Attorney General)*, [2019 ONSC 5053](#), PBOA, Tab 75, aff'd [2020 ONCA 184](#); *Francis v. Ontario*, [2020 ONSC 1644](#), PBOA, Tab 41, aff'd [2021 ONCA 197](#), PBOA, Tab 42.

<sup>339</sup> Litigation Plan, CMR, Vol 4, pp. 2012ff.

alone, and if aggregate damages are assessed, will be unnecessary for some class members.

152. The judicial economy that this class proceeding offers is available to the court. This court has jurisdiction over all of the defendants in this proceeding. Each of the defendants, in the CHL Constitution, a unanimous member agreement to which all of the defendants are party, "irrevocably attorns to the jurisdiction of the courts of the Province of Ontario."<sup>340</sup> As the common issues require the interpretation of the CHL Constitution to determine each defendant's liability for the Abuse, this, alone, provides a good arguable case to engage this court's jurisdiction over this proceeding.<sup>341</sup>

### **iii. A Class Proceeding is Necessary for Behaviour Modification**

153. Finally, a class proceeding is also necessary for behaviour modification. Behaviour modification, which "must not be viewed too narrowly," is always a relevant consideration on certification.<sup>342</sup> This motion is replete with evidence that the Abuse, which arose from risks inherent to the Leagues' system, was widespread, common and systemic. The same evidence shows that the Leagues are unwilling to respond:

- (a) In 1997 and 2020, the Leagues commissioned reports seeking recommendations for change, and then ignored the recommendation, both times and in both reports, to establish CHL-wide policies regarding abuse.<sup>343</sup>
- (b) The Leagues sat on the IRP Report for over a year, without even ensuring

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<sup>340</sup> Emphasis added; *Yip v HSBC Holdings plc*, [2017 ONSC 5332](#), at para. [93](#), PBOA, Tab 95, aff'd [2018 ONCA 626](#), leave to appeal refused, [2018] S.C.C.A. No. 410. See also CHL Constitution art. 25.1, MacKenzie April 2022 Affidavit, DMR, Vol IV, Tab 23, pp. 582-583.

<sup>341</sup> *Yip v HSBC Holdings plc*, [2017 ONSC 5332](#), at para. [105](#), PBOA, Tab 95, aff'd [2018 ONCA 626](#), leave to appeal refused, [2018] S.C.C.A. No. 410; *Shah v LG Chem, Ltd.*, [2015 ONSC 2628](#), at paras [66-68](#), PBOA, Tab 82.

<sup>342</sup> *Curtis v. Medcan Health Management Inc.*, [2022 ONSC 5176](#) (Div. Ct.), at paras. [48-49](#), [52](#), PBOA, Tab 33.

<sup>343</sup> See paras. 10 to 22, above.

it was read by their own Governors.<sup>344</sup>

(c) Instead of addressing the IRP's recommendations for CHL-wide change, the Leagues retained Ms. Turnpenney to author a second report based on the false premise that CHL-wide policies are not possible.<sup>345</sup>

(d) In this action, the Leagues portray the Abuse as a series of rare and spontaneous events outside their control, and attempt to displace their own responsibility onto the shoulders of young players or the individual Teams.<sup>346</sup>

(e) To the fact that 12% of current players report mistreatment, they respond: "12% doesn't feel systemic," "[w]e live in a society where there are bad actors."<sup>347</sup>

154. Hazing and abuse will persist until the Leagues acknowledge that it is a systemic issue and accept responsibility for it.<sup>348</sup> They refuse to do so. As a systemic problem, the Abuse requires a systemic solution. Given the Leagues' intransigence, the only reliable route to a systemic solution is through this class proceeding.

155. Class proceedings can hold defendants accountable for the "full costs of their conduct."<sup>349</sup> Few class members, if any, will litigate individually. In the absence of a class proceeding, the Leagues will not pay for their failures, and will have little motivation to change. Individual actions cannot create the behaviour modification necessary to protect current and future players from the Abuse. A class proceeding is needed.

#### **E. Section 5(1)(e): There are Adequate Representative Plaintiffs**

156. The final certification criterion requires that there be an adequate representative

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<sup>344</sup> Chad Taylor CXE, 32:7-11, TB, Vol. 4, Tab 15, p. 2034; Abbott CXE, 11:13-17, 24:19-23, TB, Vol. 3, Tab 12, pp. 1927,1940.

<sup>345</sup> See para. 18, above.

<sup>346</sup> Dennis, paras. 18, 25, DMR, Vol III, Tab 21, pp. 432, 435; Garrett Taylor CXE 57:5-7, TB, Vol. 6, Tab 28, p. 3322; and see Fritsche CXE, 49:19-51:25, TB, Vol. 6, Tab 27, pp. 3245-3247.

<sup>347</sup> MacKenzie Corr. CXE, 128:4-13, 134:13-21, TB, Vol. 9, Tab 35, pp. 4863, 4869.

<sup>348</sup> Johnson Report, p. 41, CMR, Vol 1, Tab 18, p. 183.

<sup>349</sup> *Curtis v. Medcan Health Management Inc.*, [2022 ONSC 5176](#) (Div. Ct.), at para. 53, PBOA, Tab 33 citing *Western Canadian Shopping Centres Inc. v. Dutton*, [2001 SCC 46](#), at para. 29, PBOA, Tab 91.

plaintiff. Three representative plaintiffs are proposed: Stephen Quirk, who played in the QMJHL League; Daniel Carcillo, who played in the OHL League; and Garrett Taylor, who played in the WHL League. These individuals will fairly and adequately represent the interests of the class, have produced a workable litigation plan, and do not have, on the common issues, a conflict with the interests of other class members.<sup>350</sup> Each understands, and is willing to fulfil, the responsibilities of a representative plaintiff.<sup>351</sup>

157. The claims in this action target the Leagues. The three proposed representative plaintiffs share systemic claims, with the rest of the class, against the CHL League. Each also has systemic claims against his own Member League, in common with other class members who played in that Member League. In contrast with cases where a representative plaintiff was found not to be "typical", there are no defendants against whom the representative plaintiffs lack claims.<sup>352</sup>

158. Mr. Carcillo, Mr. Taylor, and Mr. Quirk will vigorously and capably prosecute the interests of the class in these claims.<sup>353</sup> Should this court deem it necessary, they can represent three sub-classes composed of the players from each of the three Member Leagues.<sup>354</sup> If for some reason other representative plaintiffs are required, other class members have expressed their willingness to act as representative plaintiffs.<sup>355</sup>

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<sup>350</sup> Section 5(1)(e). On the lack of a conflict in the class, see paras. 116 to 120, above.

<sup>351</sup> Quirk, paras. 22-34, SMR, pp. 6-9; Carcillo, paras. 23-35, CMR, Vol 1, Tab 15, p. 115-8; Garrett Taylor, paras. 26-37, CMR, Vol 1, Tab 17, pp. 133-6.

<sup>352</sup> Compare with, for example, *Raponi v. Olympia Trust Company*, [2022 ONSC 4481](#), at paras. [259-263](#), PBOA, Tab 74.

<sup>353</sup> *Western Canadian Shopping Centres Inc. v. Dutton*, [2001 SCC 46](#), at para. 41, PBOA, Tab 91.

<sup>354</sup> See CPA s. 5(2), Stephen Quirk can represent class members who play or played in the QMJHL League; Daniel Carcillo can represent class members who play or played in the OHL League; and Garrett Taylor can represent class members who play or played in the WHL League.

<sup>355</sup> Munce, para. 27, CMR, Vol. 1, Tab 3, p. 27; Hammett, paras. 20-31, CMR, Vol. 1, Tab 14, pp. 104-108.

159. The plaintiffs have produced a reasonable and practical litigation plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying Class Members. This plan can be modified or adjusted over the course of the proceeding, and need only be "workable" for certification.<sup>356</sup>

160. The representative plaintiffs have stepped forward at great personal cost, to hold a system accountable that has abused them terribly. Since going public with his story, Daniel Carcillo has been ostracized in the hockey community. His friends have abandoned him, and trusted colleagues have come after him personally. Garrett Taylor has endured similar hits, with far fewer means. Even his local hockey community newspapers have renounced him. And Stephen Quirk has had to confront the traumatic experiences of his past, in ways that are deeply challenging. 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.

#### **PART IV - ORDER REQUESTED**

161. Each of the certification criteria are satisfied. The plaintiffs request that this action be certified as a class action, with costs.

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<sup>356</sup> *Cloud v. Canada (Attorney General)*, [2004] [O.J. NO. 4924 \(C.A.\)](#), at paras. [94-95](#), PBOA, Tab 31, leave to appeal refused, [2005] S.C.C.A. No. 50.

ALL OF WHICH IS RESPECTFULLY SUBMITTED this 3<sup>rd</sup> day of October, 2022.

A handwritten signature in black ink, appearing to be 'JC' or similar initials, written in a cursive style.

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James Sayce / Vlad Calina / Sue Tan /  
Caitlin Leach  
KOSKIE MINSKY LLP

Lawyer for the Plaintiffs

**SCHEDULE “A”  
LIST OF AUTHORITIES**

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2. *A v. The Trustees of the Watchtower Bible and Tract Society and others*, [2015] EWHC 1722
3. *AIC Limited v. Fischer*, 2013 SCC 69
4. *Alberta v. Elder Advocates of Alberta Society*, 2011 SCC 24
5. *Ari v. Insurance Corporation of British Columbia*, 2019 BCCA 183
6. *Astgen v. Smith*, [1970] 1 O.R. 129 (C.A.)
7. *Attis v. Canada (Minister of Health)*, 2007 CanLII 15231 (Ont. S. C. J.)
8. *Barker v. Barker*, 2022 ONCA 567
9. *Bazley v. Curry*, 1999 CanLII 692 (SCC)
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11. *Berg v. Canadian Hockey League*, 2017 ONSC 2608
12. *Berry v. Pulley*, 2002 SCC 40
13. *Blackwater v. Plint*, 2005 SCC 58
14. *Boulanger v. Johnson & Johnson Corp.*, [2007] O.J. No. 179 (Sup. Ct.)
15. *Bowman v. Ontario*, 2022 ONCA 477
16. *Brazeau v. Attorney General (Canada)*, 2019 ONSC 1888
17. *Brown v. Hanley*, 2019 ONCA 395
18. *Bywater v. Toronto Transit Commission*, [1998] O.J. No. 4913 (Gen. Div.)

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25. *Castrillo v. Workplace Safety and Insurance Board*, 2017 ONCA 121
26. *Catholic Child Welfare Society and others v. Various Claimants (FC) and others*, [2012] UKSC 56
27. *Cavanaugh et al. v. Grenville Christian College et al.*, 2020 ONSC 113
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31. *Cloud v. Canada (Attorney General)*, [2004] O.J. No. 4924 (C.A.)
32. *Conservative and Unionist Central Office v. Burrell (Inspector of Taxes)*, [1982] 2 All ER 1 (C.A.)
33. *Curtis v. Medcan Health Management Inc.*, 2022 ONSC 5176 (Div. Ct.)
34. *Davies v. Barnes Webster & Sons Ltd.*, [2011] EWHC 2560
35. *Dillon c. Wayland Group Corp.*, 2022 QCCS 1553
36. *Dine v. Biomet*, 2015 ONSC 7050

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38. *E. D.G. v. Hammer*, 2003 SCC 52
39. *Ewert v. Canada (Attorney General)*, 2016 BCSC 962
40. *Frame v. Smith*, [1987] 2 S.C.R. 99
41. *Francis v. Ontario*, 2020 ONSC 1644
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43. *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443
44. *G.C. v. Jugenburg*, 2021 ONSC 3114
45. *Galambos v. Perez*, 2009 SCC 48
46. *Good v. Toronto (Police Services Board)*, 2016 ONCA 250
47. *Hayes v. Saint John (City)*, 2017 NBQB 25
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53. *Jiang v. Peoples Trust Company*, 2017 BCCA 119
54. *John Doe (G.E.B. #25) v. Roman Catholic Episcopal Corp. of St. John's*, 2020 NLCA 27
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81. *Seed v. Ontario*, 2012 ONSC 2681
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85. *Strother v. 3464920 Canada Inc.*, 2007 SCC 24
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87. *Thorpe v. Honda Canada Inc.*, 2011 SKQB 72
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93. *Williams Lake Indian Band v. Canada (Aboriginal Affairs and Northern Development)*, 2018 SCC 4
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95. *Yaiguaje v. Chevron Corporation*, 2018 ONCA 472
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**SCHEDULE “B”  
RELEVANT STATUTES**

1. Class Proceedings Act – ss. 5, 24, 25
2. Civil Code of Quebec, art 1457
3. *Charter of Human Rights and Freedoms*, C.Q.L.R. c. C-12, ss. 1, 4, 10, 39, 49
4. *Rules of Civil Procedure*, RRO 1990, Reg 194, Rule 21.01

***Class Proceedings Act, 1992, SO 1992, c 6, ss 5, 24, 25.***

**Certification**

**5 (1)** The court shall, subject to subsection (6) and to section 5.1, certify a class proceeding on a motion under section 2, 3 or 4 if,

- (a) the pleadings or the notice of application discloses a cause of action;
- (b) there is an identifiable class of two or more persons that would be represented by the representative plaintiff or defendant;
- (c) the claims or defences of the class members raise common issues;
- (d) a class proceeding would be the preferable procedure for the resolution of the common issues; and
- (e) there is a representative plaintiff or defendant who,
  - (i) would fairly and adequately represent the interests of the class,
  - (ii) 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
  - (iii) does not have, on the common issues for the class, an interest in conflict with the interests of other class members. 1992, c. 6, s. 5 (1); 2020, c. 11, Sched. 4, s. 7 (1).

(1.1) In the case of a motion under section 2, a class proceeding is the preferable procedure for the resolution of common issues under clause (1) (d) only if, at a minimum,

- (a) it is superior to all reasonably available means of determining the entitlement of the class members to relief or addressing the impugned conduct of the defendant, including, as applicable, a quasi-judicial or administrative proceeding, the case

management of individual claims in a civil proceeding, or any remedial scheme or program outside of a proceeding; and

- (b) the questions of fact or law common to the class members predominate over any questions affecting only individual class members. 2020, c. 11, Sched. 4, s. 7 (2).

### **Idem, subclass protection**

(2) Despite subsection (1), where a class includes a subclass whose members have claims or defences that raise common issues not shared by all the class members, so that, in the opinion of the court, the protection of the interests of the subclass members requires that they be separately represented, the court shall not certify the class proceeding unless there is a representative plaintiff or defendant who,

- (a) would fairly and adequately represent the interests of the subclass;
- (b) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the subclass and of notifying subclass members of the proceeding; and
- (c) does not have, on the common issues for the subclass, an interest in conflict with the interests of other subclass members. 1992, c. 6, s. 5 (2); 2020, c. 11, Sched. 4, s. 7 (3).

### **Evidence as to size of class**

(3) Each party to a motion for certification shall, in an affidavit filed for use on the motion, provide the party's best information on the number of members in the class. 1992, c. 6, s. 5 (3).

### **Adjournments**

(4) The court may adjourn the motion for certification to permit the parties to amend their materials or pleadings or to permit further evidence. 1992, c. 6, s. 5 (4).

### **Certification not a ruling on merits**

(5) An order certifying a class proceeding is not a determination of the merits of the proceeding. 1992, c. 6, s. 5 (5); 2020, c. 11, Sched. 4, s. 7 (4).

### **Existence of other class proceeding**

(6) If a class proceeding or proposed class proceeding, including a multi-jurisdictional class proceeding or proposed multi-jurisdictional class proceeding, has been commenced in a Canadian jurisdiction other than Ontario involving the same or similar subject matter and some or all of the same class members as in a proceeding under this Act, the court shall determine whether it would be preferable for some or all of the claims of some or all of the class members, or some or all of the common issues raised by those

claims, to be resolved in the proceeding commenced in the other jurisdiction instead of in the proceeding under this Act. 2020, c. 11, Sched. 4, s. 7 (2).

**Same, considerations**

(7) In making a determination under subsection (6), the court shall,

(a) be guided by the following objectives:

- (i) ensuring that the interests of all parties in each of the applicable jurisdictions are given due consideration,
- (ii) ensuring that the ends of justice are served,
- (iii) avoiding irreconcilable judgments where possible,
- (iv) promoting judicial economy; and

(b) consider all relevant factors, including,

- (i) the alleged basis of liability in each of the proceedings, and any differences in the laws of each applicable jurisdiction respecting such liability and any available relief,
- (ii) the stage each proceeding has reached,
- (iii) the plan required to be produced for the purposes of each proceeding, including the viability of the plan and the available capacity and resources for advancing the proceeding on behalf of the class,
- (iv) the location of class members and representative plaintiffs in each proceeding, including the ability of a representative plaintiff to participate in a proceeding and to represent the interests of class members,
- (v) the location of evidence and witnesses, and
- (vi) the ease of enforceability in each applicable jurisdiction. 2020, c. 11, Sched. 4, s. 7 (2).

**Motion for determination under subs. (6)**

(8) The court, on the motion of a party or class member made before the hearing of the motion for certification, may make a determination under subsection (6) with respect to a proceeding under this Act, and, in doing so, may make any orders it considers appropriate respecting the proceeding, including,

- (a) staying the proceeding; and
- (b) imposing such terms on the parties as the court considers appropriate. 2020, c. 11, Sched. 4, s. 7 (2).

### **Aggregate assessment of monetary relief**

**24** (1) The court may determine the aggregate or a part of a defendant's liability to class members and give judgment accordingly where,

- (a) monetary relief is claimed on behalf of some or all class members;
- (b) no questions of fact or law other than those relating to the assessment of monetary relief remain to be determined in order to establish the amount of the defendant's monetary liability; and
- (c) the aggregate or a part of the defendant's liability to some or all class members can reasonably be determined without proof by individual class members. 1992, c. 6, s. 24 (1).

### **Average or proportional application**

(2) The court may order that all or a part of an award under subsection (1) be applied so that some or all individual class members share in the award on an average or proportional basis. 1992, c. 6, s. 24 (2).

### **Idem**

(3) In deciding whether to make an order under subsection (2), the court shall consider whether it would be impractical or inefficient to identify the class members entitled to share in the award or to determine the exact shares that should be allocated to individual class members. 1992, c. 6, s. 24 (3).

### **Court to determine whether individual claims need to be made**

(4) When the court orders that all or a part of an award under subsection (1) be divided among individual class members, the court shall determine whether individual claims need to be made to give effect to the order. 1992, c. 6, s. 24 (4).

### **Procedures for determining claims**

(5) Where the court determines under subsection (4) that individual claims need to be made, the court shall specify procedures for determining the claims. 1992, c. 6, s. 24 (5).

### **Idem**

(6) In specifying procedures under subsection (5), the court shall minimize the burden on class members and, for the purpose, the court may authorize,

- (a) the use of standardized proof of claim forms;
- (b) the receipt of affidavit or other documentary evidence; and
- (c) the auditing of claims on a sampling or other basis. 1992, c. 6, s. 24 (6).

### **Time limits for making claims**

(7) When specifying procedures under subsection (5), the court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 24 (7).

### **Idem**

(8) A class member who fails to make a claim within the time set under subsection (7) may not later make a claim under this section except with leave of the court. 1992, c. 6, s. 24 (8).

### **Extension of time**

(9) The court may give leave under subsection (8) if it is satisfied that,

- (a) there are apparent grounds for relief;
- (b) the delay was not caused by any fault of the person seeking the relief; and
- (c) the defendant would not suffer substantial prejudice if leave were given. 1992, c. 6, s. 24 (9).

### **Court may amend subs. (1) judgment**

(10) The court may amend a judgment given under subsection (1) to give effect to a claim made with leave under subsection (8) if the court considers it appropriate to do so. 1992, c. 6, s. 24 (10).

### **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. 1992, c. 6, s. 25 (1).

### **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. 1992, c. 6, s. 25 (2).

### **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. 1992, c. 6, s. 25 (3).

### **Time limits for making claims**

(4) The court shall set a reasonable time within which individual class members may make claims under this section. 1992, c. 6, s. 25 (4).

### **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. 1992, c. 6, s. 25 (5).

### **Extension of time**

(6) Subsection 24 (9) applies with necessary modifications to a decision whether to give leave under subsection (5). 1992, c. 6, s. 25 (6).

### **Determination under cl. (1) (c) deemed court order**

(7) A determination under clause (1) (c) is deemed to be an order of the court. 1992, c. 6, s. 25 (7).

***Civil Code of Québec, SQ 1991, c 64, s 1457.***

**1457.** Every person has a duty to abide by the rules of conduct incumbent on him, according to the circumstances, usage or law, so as not to cause injury to another.

Where he is endowed with reason and fails in this duty, he is liable for any injury he causes to another by such fault and is bound to make reparation for the injury, whether it be bodily, moral or material in nature.

He is also bound, in certain cases, to make reparation for injury caused to another by the act, omission or fault of another person or by the act of things in his custody.

***Charter of Human Rights and Freedoms, CQLR, c C-12, ss 1, 4, 10, 39, 49.***

**1.** Every human being has a right to life, and to personal security, inviolability and freedom.

**4.** Every person has a right to the safeguard of his dignity, honour and reputation.

**10.** Every person has a right to full and equal recognition and exercise of his human rights and freedoms, without distinction, exclusion or preference based on race, colour, sex, gender identity or expression, pregnancy, sexual orientation, civil status, age except as provided by law, religion, political convictions, language, ethnic or national origin, social condition, a handicap or the use of any means to palliate a handicap.

Discrimination exists where such a distinction, exclusion or preference has the effect of nullifying or impairing such right.

**39.** Every child has a right to the protection, security and attention that his parents or the persons acting in their stead are capable of providing.

**49.** Any unlawful interference with any right or freedom recognized by this Charter entitles the victim to obtain the cessation of such interference and compensation for the moral or material prejudice resulting therefrom.

In case of unlawful and intentional interference, the tribunal may, in addition, condemn the person guilty of it to punitive damages.

***Rules of Civil Procedure, RRO 1990, Reg 194, s 21.01.***

**Where Available**

***To Any Party on a Question of Law***

**21.01** (1) A party may move before a judge,

(a) for the determination, before trial, of a question of law raised by a pleading in an action where the determination of the question may dispose of all or part of the action, substantially shorten the trial or result in a substantial saving of costs; or

(b) to strike out a pleading on the ground that it discloses no reasonable cause of action or defence,

and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (1).

(2) No evidence is admissible on a motion,

(a) under clause (1) (a), except with leave of a judge or on consent of the parties;

(b) under clause (1) (b). R.R.O. 1990, Reg. 194, r. 21.01 (2).

***To Defendant***

(3) A defendant may move before a judge to have an action stayed or dismissed on the ground that,

**Jurisdiction**

(a) the court has no jurisdiction over the subject matter of the action;

**Capacity**

(b) the plaintiff is without legal capacity to commence or continue the action or the defendant does not have the legal capacity to be sued;

**Another Proceeding Pending**

(c) another proceeding is pending in Ontario or another jurisdiction between the same parties in respect of the same subject matter; or

**Action Frivolous, Vexatious or Abuse of Process**

(d) the action is frivolous or vexatious or is otherwise an abuse of the process of the court, and the judge may make an order or grant judgment accordingly. R.R.O. 1990, Reg. 194, r. 21.01 (3).

**APPENDIX “A”  
THE PLAINTIFFS' AFFIANTS**

<b>Name</b>	<b>Years in the CHL</b>	<b>League</b>	<b>Teams</b>
John Strait	1978-1981	WHL, OHL	Seattle Breakers (now Seattle Thunderbirds), Lethbridge Broncos (now Swift Current Broncos), Brandon Wheat Kings (now Tri-City Americans), Spokane Flyers (defunct), New Westminster Bruins (now Tri-City Americans), Sudbury Wolves
Doug Smith	1979-1982	OHL	Ottawa 67s
Fred Ledlin	1980-1984	WHL	Victoria Cougars (now Prince Edward Cougars), Kamloops Junior Oilers (now Kamloops Blazers), Seattle Breakers (now Seattle Thunderbirds), Portland Winterhawks, Medicine Hat Tigers, Winnipeg Warriors (now Moose Jaw Warriors)
Brad Hammett	1980-1984	WHL	Billings Bighorns (now Tri-City Americans), Nanaimo Islanders (now Tri-City Americans), Westminster Bruins (now Tri-City Americans)
Mark Howery	1981-1983	WHL	Calgary Wranglers, Winnipeg Warriors (now Moose Jaw Warriors)
Jason Clarke	1990-1993	OHL	Niagara Falls Thunder (now Erie Otters)
Jeffrey Andrews	1992-1994	OHL	North Bay Centennials (now Saginaw Spirit)
Corey Bricknell	1992-1995	OHL	Newmarket Royals (now Sarnia Sting), Niagara Falls Thunder (now Erie Otters)
Stephen Quirk	1995-1998	QMJHL	Moncton Alpines/Wildcats
Gene Chiarello	1996-2000	OHL	London Knights
Dave Pszenyczny	2001-2006	OHL	Sarnia Sting, Mississauga Ice Dogs, Barrie Colts
Dirk Jelitto	2002-2003	OHL	Sarnia Sting, Saginaw Spirit
Ryan Munce	2002-2005	OHL	Sarnia Sting
Daniel Carcillo	2002-2004	OHL	Sarnia Sting
Daniel Fritsche	2002-2003	OHL	Sarnia Sting
Garrett Taylor	2008-2010	WHL	Lethbridge Hurricanes

**APPENDIX “B”  
THE DEFENDANTS' AFFIANTS**

<b>Name</b>	<b>Role</b>
Scott Abbott	Owner and Governor, North Bay Battalion (1996 to Present)
Brett Bartman	Player, Spokane Chiefs, WHL (2007-2010)
David Branch	President, CHL (1996-2019); Commissioner, OHL (1979 to Present)
Gordie Broda	President and Governor, Prince Albert Raiders, WHL (2014 to Present)
Eric Calder	Player, Cornwall Royals (QMJHL, 1980-1981, OHL, 1981-1983)
Eric Chouinard	Player, Quebec Ramparts, QMJHL (1986-2000); Director of Player Safety, QMJHL (2019 – Present)
Jeff Chynoweth	General Manager, Calgary Hitmen, WHL (2017 to Present), Employee of the WHL since 1986
Gilles Courteau	President (1986 to Present) and Commissioner (2000 to Present), QMJHL
Ryan Daniels	Player, Saginaw Spirit and Peterborough Petes, OHL, (2005-2009)
Paul Dennis	Coach, Toronto Marlboros, OHL (1984-1989); Head of Player Development Program, OHL (2016 to Present)
Ben Fanelli	Player, Kitchener Rangers, OHL (2009-2014)
Cam Hope	General Manager (2012-2020) and President (2014-2020), Victoria Royals, WHL
Dave Lorentz	Player (1987-1990), Vice President (2013 to Present), Peterborough Petes, OHL
Dan MacKenzie	President, CHL (2019 to Present)
Kruise Reddick	Player, Tri-City Americans, WHL (2006-2011)
Ron Robison	Commissioner, WHL (2000 to Present)
Robert Smith	Player, Ottawa 67s, OHL (1975-1978); Owner (2003 to Present), Head Coach (2010-2011), Halifax Mooseheads, QMJHL
Chad Taylor	Governor (2009 to Present) and President (2013 to Present), Moose Jaw Warriors, WHL
Bob Tory	General Manager and Co-Owner, Tri-City Americans, OHL (2000 to Present)

**APPENDIX “C”  
PROVISIONS FROM THE LEAGUES' CONSTITUTIONS**

**Provisions from Canadian Hockey League (CHL) Constitution**

1.1 For purposes of this Constitution:

...

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

...

"*Member Club*" has the meaning set out in the preamble to this Constitution.

**Mission**

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

...

(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;

**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 non-voting 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.

**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 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
    - (e) Prospective Players are afforded a fair and respectful opportunity to participate in CHL Hockey through the annual draft process (as described in Section 14.5 and Section 14.6) and are placed in a Regional League with clubs located in reasonable proximity to their family home;
  - (4) Participate fully in all CHL promotional, governance, and operational activities as required by the Board of Directors;
  - (5) In the case of a Member Club, attend through the Principal Owner, the annual CHL Meeting; provided that the Principal Owner may, with the prior approval of the Board of Directors, appoint an alternate with a demonstrated substantial relationship to the Member Club to attend, participate and, to the extent required, vote in his or her place; and
  - (6) In the case of a Member Club, participate in such meetings of Member Clubs and teleconferences as are scheduled by the Board of Directors.
- 5.2 Subject to Section 5.3, the CHL and each member releases, holds harmless, and shall indemnify each current and former Director, President, CHL officer, member of the Executive Council, or another individual who acts or acted at the CHL's request as a director, officer or member of an *ad hoc* member working group or in a similar capacity of another entity; and heirs and legal representatives; against all costs, charges and expenses, including an amount paid to settle an action or satisfy a judgement, reasonably incurred by the individual in respect of any civil, criminal, administrative, investigative or other proceeding in which the individual is involved because of his or her association with the CHL or such other entity at the CHL's request.

## **Regional Leagues**

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

## **CHL Hockey Players**

- 14.4 The 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 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).

## **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 Members 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.
- 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 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.

## **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.

- 24.2 Any of the CHL Regulations may be added to, amended, repealed or replaced 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.
- 25.3 This Constitution, together with any Exhibits attached to this Constitution and any agreements and documents to be delivered pursuant to the terms of this Constitution, constitutes the entire agreement between the CHL and the Member Clubs pertaining to the subject matter of this Constitution and supersedes all prior agreements, understandings, negotiations and discussions, whether oral or written. There are no conditions, representations, warranties or other agreements between the CHL and any of the Member Clubs in connection with the subject matter of this Constitution, whether oral or written, express or implied, statutory or otherwise, except as specifically set out in this Constitution.
- 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.  
...
- 25.6 A waiver of any default, breach or noncompliance under this Constitution is not effective unless in writing and signed by the party hereto to be bound by the waiver. No waiver shall be inferred from or implied by any failure to act or delay in acting by a party hereto in respect of any default, breach, non-observance or by anything done or omitted to be done by another party. The waiver by a party hereto of any default, breach or non-compliance under this Constitution shall not operate as a waiver of that party's rights under this Constitution in respect of any

continuing or subsequent default, breach or non-compliance (whether of the same or any other nature).

- 25.7 Any provision of this Constitution which is prohibited or unenforceable by the laws of any jurisdiction shall, as to that jurisdiction, be ineffective to the extent of such prohibition or unenforceability and shall be severed from the balance of this Constitution, all without affecting the remaining provisions of this Constitution or affecting the validity or enforceability of such provision in any other jurisdiction.
- 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. To the extent under its control, each Member Club shall ensure that nominees to the Board of Directors of the CHL act in such a manner as to give effect to the provisions of this Constitution. If a nominee fails to act in such manner as to give effect to the provisions of this Constitution, the applicable Member Club(s) shall cooperate in taking all such actions as may be necessary from time to time to remove any such nominee from the Board of Directors.
- 25.9 This Constitution shall enure to the benefit of and be binding upon the parties and their personal representatives, successors and permitted assigns and any reference to a right or an obligation of a party shall be deemed to include a reference to such personal representatives, successors and permitted assigns to the extent that the context requires.

...

### **Provisions from the Ontario Hockey League (OHL) Constitution**

#### **Name**

- 1.1 The name of the association shall be Ontario Hockey League, hereinafter called "League", operated by Ontario Major Hockey League, a corporation. The word "League: hereinafter shall refer to the "Ontario Hockey League", unless otherwise specified.

#### **Membership**

#### **Duty of Member**

- 3.2.1 Each Member shall maintain and operate a Team of the highest possible calibre based in the city for which the membership has been issued, for the purpose of engaging annually in a schedule of Regular Season and Playoff games with the Teams of other Members.

3.2.2 Each Member assumes and agrees to be bound by the following obligations of membership in the League and shall ensure that all owners, officers, stockholders, directors, or partners therein, as well as any other person owning any interest in such Member, comply therewith:

- (a) To be bound and observe all decisions of the Commissioner in all matters within his jurisdiction;
- (a) To be bound by and observe all decision, rulings, and action of the Board of Governors and Executive Committee of the League in every matter within the jurisdiction of such Board or Committee, as the case may be;
- (b) To be bound by and observe all the terms and provisions of the Constitution, By-Laws, Regulations and agreements of the League as now or hereinafter in effect;
- (c) To ensure that every contract entered into by the Member with a third party complies, is consistent with or subordinate to, the Constitution, By-Laws, Regulations and agreements of the League; and
- (d) To accept appropriate sanctions, including, but not limited to, expulsion, suspension or monetary fines, for violation of the terms and provisions of such Constitution, By-Laws and Regulations.

### **Transfer of Membership or Interests Therein**

3.7.1 In the event that a Member wishes to sell their franchise and / or change the de facto or de jure control of their franchise, prior to taking any action, the Member must firstly advise the League of their intention.

3.7.2 Except as provided in Section 3.11.2, no membership or interest therein (whether direct or indirect) which has the effect of changing the de facto or de jure control of the Member may be sold, assigned, or otherwise transferred in whole or in part during the first three years following the date on which the membership held by the Member was first granted by the League. In all other cases, no membership or interest therein (whether direct or indirect) may be sold, assigned, or otherwise transferred except with:

- (a) The consent of at least  $\frac{3}{4}$  of the Members; and
- (b) The condition that the transferee will agree in writing that it will at all times be bound by and comply with all the terms, provisions and conditions of this Constitution, the Rules of the League, its Regulations and all agreements entered into by the League then or thereafter in effect; and
- (c) The condition that the transferee shall agree in writing to assume or

guarantee to pay all debts, liabilities and obligations of the transferor existing at the date of the transfer; and

- (d) Compliance with the provisions of Article 3.7.2;

Provided that this Article shall not apply to a transfer which does not result in any person directly or indirectly having either (i) more than a five percent (5%) interest in the Member in total or (ii) de jure or de facto control of the Member.

...

### **Involuntary Termination**

3.12.2 A membership may be suspended or terminated with the consent of at least  $\frac{3}{4}$  of all Members if a Member shall do or suffer any of the following:

...

- (b) Fail to pay any dues or other indebtedness owing to the League within thirty (30) days after written notice from the Commissioner of default in such payment;

### **Governors**

#### **Appointment of Governor**

5.2.1 Each Member shall appoint a Governor and an Alternate Governor who shall have the same authority in such Governor's absence, subject to the Provisions set forth in Article 5.3.

...

#### **Meetings of Board of Governors**

5.4.1 Subject to Article 5.3, at any meeting of the Board of Governors each Member shall be entitled to have present two representatives.

5.4.2 One representative so present is entitled to speak and vote on behalf of a Member at such meetings.

5.4.3 At all meetings of the League, each Member shall be represented by its Governor or Alternate Governor who shall, by reason of such appointment, be vested with full power and authority to represent the Member and to bind it by vote.

5.4.4 At all meetings of the League, representation of each Member by its Governor or Alternate Governor shall be compulsory. Failure to have representation shall result in the Member being subject to a fine of One Thousand Dollars (\$1,000.00), unless the Board is satisfied that the absence is to be beyond the reasonable control of the Member.

## **League Meetings**

### Annual Meeting

6.1 The Annual Meeting of the League shall be held prior to the commencement of the next succeeding season, at a date and place to be fixed by the Governors, or in default thereof, by the Commissioner.

### Semi-Annual Meeting

6.2 The Semi-Annual Meeting of the League shall be held at a date and place to be fixed by the Governors, or in default thereof, by the Commissioner.

### Special Meetings

6.3 Special Meetings of the League may be called by the Commissioner or the Chair of the Board of Governors at any time and shall be called by either of them at their own discretion or whenever requested by five (5) Members in good standing.

### Notice of Meetings

6.4.1 In the case of Special Meetings the notice shall state the purpose thereof. In the case of an Annual Meeting, the notice shall set forth any proposed amendments to this Constitution, any applications for membership and any other material matters that are to be presented at the meeting.

6.4.2 Notice of meetings shall be given to each Member by personal delivery or mail at least ten (10) days before a meeting, or by email, telegram, facsimile or any other generally accepted electronic means at least seven (7) days before a meeting.

### Quorum

6.5.1 A representation of a majority of Members shall constitute a quorum for the opening of any meeting of the League.

6.5.2 When such a meeting is validly opened by the attendance of a quorum, business may be transacted thereat by the representation of any number of Members, including less than a quorum, until such meeting is officially adjourned, subject to any requirements herein as to requisite votes.

6.5.3 Where the affirmative vote of a  $\frac{3}{4}$  majority is required by this Constitution, a representation at the Meeting of at least  $\frac{3}{4}$  of all Members is required to conduct such vote.

6.5.4 Where the affirmative vote of a  $\frac{2}{3}$  majority is required by this Constitution, a representation at the Meeting of at least  $\frac{2}{3}$  of Members is required to conduct such vote.

Governor, Ex Officio

6.6 The Commissioner shall be a member of the Board of Governors, but shall have no vote.

Conduct of the Meeting and Voting

6.7.1 The Chair shall preside at all meetings of the Governors of the League. In the absence of the Chair, the Vice Chair or another Executive Council member shall preside. The Chair or Vice Chair or other presiding Executive Council member, as the case may be, shall not have a second or casting vote in the event of a tie.

6.7.1 Subject to the other provisions of this Constitution, except where two-thirds ( $2/3$ ), three-fourths ( $3/4$ ) or all of the Members are required to take affirmative action on any matter, questions arising at meetings of the League shall be decided by a majority vote of the Members present and in the event of a tie vote the decision of the Commissioner shall govern. Such vote shall be binding upon all Members whether represented during the vote or not.

6.7.3 The vote required by any provision of this Constitution shall be applied to the vote of those present and voting at a meeting at which a quorum is present, when it was convened. Any Member which does not vote shall not be counted in determining the requisite number required to carry any proposition properly brought before the Board. Such vote shall be binding upon all Members whether represented by the vote or not.

6.7.4 Any action or resolution which may be taken or adopted in a meeting may be taken or adopted by an instrument in writing signed by that number of Members which would have been required to pass such resolution or take such action had there been a Meeting at which all Members were present.

*No Internal Proxies*

6.7.5 No Member shall name another Member, the representative of another Member, or any official of the League to represent it as Governor or alternate or act as its proxy at a meeting.

*Executive Session*

6.7.6 If so announced by the Commissioner or the Chair of the Board of Governors in the notice, or upon a majority vote of the Members there present, the meeting shall be convened in executive session, whereby only the Governors or their alternates and the Commissioner and such other League officers as are designated by the Commissioner, together with such other persons as Chair of the Board of Governors or the Commissioner may invite, shall be present.

*Rules of Order*

6.7.7 Parliamentary procedure to be followed at the meeting shall be described in "Robert's Rules of Order – Newly Revised", as published by Scott, Foresman & Company, or its successor, except as otherwise provide in this Constitution.

*Business*

- 6.7.8.1 All motions shall be decided by majority of votes, unless otherwise provided for by the Constitution, and the presiding officer shall have the casting vote in the event of a tie.
- 6.7.8.2 No Member representative shall speak twice on the same subject without the permission of the Chair, unless in explanation or the mover in reply.
- 6.7.8.3 A Member representative desiring to speak or submit a motion shall respectfully address the Chair and shall confine his remarks to the issue and shall not be interrupted unless upon a point of order.
- 6.7.8.8 No Member representative, except one who has voted with the majority, shall be allowed to move for a reconsideration, and in this connection the word majority shall apply to the vote by which the issue was first decided.
- ...
- 6.7.8.9 After the motion has been stated by the presiding officer, it becomes the property of the League and open for discussion.
- 6.7.8.10 There shall be no debate upon any issue after it has been put by the presiding officer.
- 6.7.8.11 When a vote is called it shall be taken by the delegate of each Member holding up his right hand, or by a standing vote or by a closed ballot as may be requested by any delegate.
- 6.7.8.12 No committee report will be adopted unless it has been previously circulated in writing with the agenda.

**Provisions from Quebec Major Junior Hockey League Inc. (QMJHL) Constitution**

**2.2 Member's Obligations**

Each Member, each owner or shareholder of the Member, each employee salaried or volunteer of a Member, each representative or governor of the Member, agrees to respect and to be bound by the following obligations:

...

12) to indemnify and hold harmless any Governor, Officer or employee of the League for any claim, action, suit or proceedings (collectively, the “**Proceedings**”) whether civil or criminal, related to the services rendered to the League by such Officer or employee. The right to indemnification shall include the right to

reimbursement of all reasonable expenses incurred (including reasonable extra-judicial lawyers' fees), and payment of the amount of any judgment, fine or settlement pay-able, in connection with the Proceedings. Such Governor, Officer or employee shall not be entitled to indemnification if the Proceedings arise as a result of any fraudulent or bad-faith act or omission on the part of such Governor, Officer or employee, as determined by a final judgment not susceptible of appeal, or a decision or order of a competent Court or for the amount of any out-of-court settlement not approved by the Board of Governors;

### **3 Alienation of Property Rights**

A Member's property rights can be alienated:

- by abandoning the franchise,
- by revocation, suspension or punitive measure imposed by the League,
- by the sale or transfer of property rights,
- by the relocation of the franchise.

#### **3.3 Sale or Transfer of Property Rights**

##### 3.3.4 Approval of the Sale or Transfer

No rights in a franchise may be sold or transferred unless

- i. at least two thirds (2/3) of the Members present at a meeting called for that purpose, vote in favour thereof;
- ii. the transferee agrees to be bound at all times by the Constitution and other regulations, resolutions, conventions and playing rules adopted by the League and any amendments thereto, and
- iii. the transferee assumes and guarantees payment and performance of, in solidarity with the transferor, any debt, liability or obligation of the latter existing at the time of the transfer.

### **4.2 Assembly of Members**

#### 4.2.1. Nomination of Members

- 4.2.1.1 *Annual Nomination* – At meetings of the Assembly of Members, each member shall be represented by a single holder of a power of attorney from such Member (a “**Member’s Representative**”). Before each annual meeting of the Assembly of Members, each Member shall send to the Commissioner a written Notice of Motion adopted by the appropriate instance, which identifies the person authorized to represent the Member Representative during meetings, to vote on behalf of the Member at the annual meeting and at any other meeting until the next annual

meeting and to bind the Member to any agreement by his signature. The filing of a written proxy sent to the Commissioner prior to the commencement of the meeting, conferring such a power on a Representative, shall also constitute a valid means of representation of a Member at a meeting, this without infringement to the status of the duly elected Member Representative by means of a Notice of Motion as described herein.

4.2.1.2 *Exclusions* – No Member may appoint any person who is directly involved in the hockey operations of a League club.

#### 4.2.2. Powers and Responsibilities of Members

The Assembly of Members has the following powers and responsibilities:

- 1) Reviewing the League's financial statements;
- 2) Nomination of the independent auditor to review the League's accounting books;
- 3) Accepting the Governors who are designated by the Members;
- 4) Accepting the modifications to the Constitution which are adopted by the Board of Governors;
- 5) Final decision-making power on the enrollment of new Members and regarding any alienation of property rights, in compliance with the provisions in article 3 of this Constitution, and subject to the powers explicitly and exclusively held by the Commissioner;
- 6) Any other matter concerning the League and its Members.

#### 4.2.3. Meetings

4.2.1.2 *Annual Meetings* – The annual meeting of the Assembly of Members of the League shall be held before the expiry of a four-month (4) period following the end of the most recent financial year of the League, on the date and at the location designated by the Commissioner.

4.2.1.2 *Special Meetings* – A special meeting of the Assembly of Members may be called at any time by the Commissioner, by resolution of the Board of Governors or upon the written request to the Commissioner of at least four (4) Members in good standing. The Board of Governors' resolution or the Members' request shall indicate the matters to be submitted to the special meeting.

## **4.3 Board of Governors**

### 4.3.2. Powers and Responsibilities of the Board of Governors

In accordance with the powers specifically awarded by this Constitution to the Assembly of Members and to the Commissioner, the Board of Governors exercises the powers and performs the acts specified in the Constitution, in any League regulation, and in any other League regulatory document. Specifically, the Board of Governors:

1. names the Commissioner, determines the duration of the Commissioner's mandate and working conditions;
2. elects, among the governors, the president of the Board of Governors and of the Executive Committee, as well as the four members of the Executive Committee;
3. adopts the League's action plans and related budgets;
4. adopts, by a majority of two thirds, the League's regulations, and amendments thereto;
5. adopts the League's different policies and amendments thereto;
6. establishes the League's various funds, their operating rules, and the amounts that the clubs must contribute to each fund;
7. determines the amount that each team must maintain as their share in the League's Reserve Fund;
8. determines the financial institution where the League deposits its funds;
9. finalises or authorizes all banking transactions which are necessary for the administration of the League, in accordance with the provisions in schedule B of this Constitution;
10. appoints the governors and/or the officers who will sign cheques and other official banking documents;
11. names the persons who are authorized to sign the contracts and the commitments entered into by the League;
12. May affiliate the League with any organization that may help it to pursue common or similar interests.
13. May delegate certain powers to the Executive Committee, for a specific time, under pre-determined conditions

### **4.3 Board of Governors**

#### 4.3.1. Nomination of Governor

4.3.1.1 *Annual Appointment* – At the annual meeting of the Assembly of Members, each Member shall appoint a Governor and one substitute governor.

At a meeting of the Board of Governors, the Substitute Governor may replace the Governor who is unable to attend, with all the rights and privileges afforded to the Governor.

### **5. Appeal of Official Decisions**

#### **5.1 Decisions which can be Appealed**

For the purposes of the Constitution, the expression “**official decision of the League**” means any decision, whether or not in respect of a disciplinary matter, made by the Commissioner, the Board of Governors, the Assembly of Members or any other Person or body so authorized by the Constitution or other regulation of the League.

#### 5.1.1 Cases of Appeal Submitted to an Independent Arbitrator

Any official decision made by the League may be appealed before an independent arbitrator in the following cases:

- a fine greater than fifty thousand dollars (50 000\$),
- a suspension of fifteen (15) or more games or forty-five (45) days or more,
- the grant or transfer of players and/or choices,
- revocation or suspension of a membership status.

The appeal of any decision shall not have the effect of suspending the execution thereof.

#### 5.1.1 Appeal in the Courts

An official decision made by the League cannot be challenged in court, unless the appeal relates to a question of law. Any Person, physical or moral, partnership, association or union that contravenes this rule shall automatically become indebted to the League for an amount of one hundred thousand dollars (\$100,000) as a penalty. Such sum shall be payable within forty-five (45) days of the contravention, unless the Board of Governors decides otherwise.

## **Provisions from the Western Hockey League (WHL) Constitution**

### **Transfer of Franchise Ownership**

#### **Conditions**

6.1 No Franchise may be sold, assigned, or otherwise have its ownership transferred (a "Transfer") except under the following conditions:

...

(c) that the transferee shall assume or guarantee to pay all debts, liabilities and obligations of the applicant Member, including without limitation the obligations under the League's education and scholarship program, existing at the date of Transfer; provided, however, that the applicant Member shall remain responsible for all such debts, liabilities and obligations;

...

### **Obligations of the Member Franchises**

#### **Member Liability**

10.1 The Member shall be liable for all claims, liabilities, damages, losses and expenses, which have accrued, directly or indirectly, to the Franchise as a result of the acts of the Member.

#### **Indemnity**

10.2 The Member shall indemnify and hold harmless the League and its officers, Governors, employees and other Members and their respective officers, directors, employees and shareholders, from and against any and all claims, liabilities, damages, costs, losses and expenses whatsoever which may be brought against the Member, or its directors, officers, employees or shareholders except to the extent arising from the actions or omissions of the League or any Member or their respective officers, directors, employees, and shareholders.

#### **Insurance**

10.2 The Member shall obtain and maintain in full force and effect, such insurance coverage and in such amounts as the League may, acting reasonably, from time to time reasonably require, fully protecting as named insureds, the League and the Member, against loss or damage occurring in connection with the Operation of the Franchise. All costs in connection with the placing and maintaining of such insurance shall be borne solely by the Member. All policies of insurance shall:

(a) be placed with insurers reasonably acceptable to the League;

- (b) be in such form and amounts as are acceptable to the League;
- (c) contain a clause that the insurer will not cancel or change or refuse to renew the insurance without first giving the League 30 days prior written notice;
- (d) name the League as an additional named insured, as its interest appears; and
- (e) contain a waiver of subrogation and rights of recovery against the League, its officers, directors employees and the League's Member Clubs, and their respective officers, directors, shareholders and employees.

Copies of all policies or certificates of insurance and any renewals thereof shall be delivered promptly to the League by the Member from time to time, upon request of the League. Should the Member not place and maintain the insurance required by this Section 10.3, the League has the right, without assuming any obligation in connection therewith, to effect such insurance at the sole cost of the Member, and all outlays by the League shall be immediately paid by the Member to the League without prejudice to any other rights and remedies of the League under these Bylaws.

#### **Compliance with Bylaws**

- 10.4 The Member shall comply with these Bylaws as may be amended, supplemented or replaced from time to time, following notice of any such amendments, supplements or replacements, by receipt of copy thereof, and the expiration of a reasonable period in which to implement changes in the Member's practices and procedures made necessary by any such amendments, supplements or replacements.

#### **Abide by League Instructions**

- 10.5 The Member shall, subject to Section 10.13 and Part 11 herein, abide by all League rules, regulations, Policies, bulletins, notices and directives.

#### **Executing Documentation Requiring Consent**

- 10.6 The Member shall co-operate with the League by executing all approved documentation requiring the Member's consent, such consent being reasonably required by the League.

#### **Support League Initiatives**

- 10.7 The Member shall support League-wide hockey and business initiatives, including League sponsorship and supplier agreements, developed by the League from time to time. In this regard, the Member agrees to respect League-wide funding partners and shall not engage in any business activity, which would adversely impact on the League.

...

### **Good Faith Conduct**

10.9 The Member shall adhere, in all its dealings with its employees, players, customers, suppliers, the public and the League, to the highest standards of honesty, integrity, fair dealings and ethical conduct.

### **Conform to League Image and Standards**

10.10 The Member shall do or cause to be done all such things the League may require to ensure that the Franchise satisfies the current image and standards established by the League.

...

### **Board of Governors**

#### **Number of Governors, Quorum and Qualifications**

13.1 The property and business affairs of the League shall be managed by a Board of Governors comprised of two Governors appointed by each Member. Two-thirds (2/3) of the Members represented by one or two Governors at any meeting shall constitute a quorum. Governors must be individuals who are at least eighteen (18) years of age, with power under law to contract. Governors need not be Members.

#### **Appointment and Term of Governor**

13.2 Subject to Section 13.3, each Member shall, at the Annual General Meeting of the League, appoint two (2) Governors to the Board of Governors for a term not less than one (1) year. Each Member shall determine, using its sole discretion, the term of its Governors. Such appointments shall be in writing, signed by the Member, and a true copy thereof shall be filed with the Commissioner at the Annual General Meeting.

#### **Community and Privately Owned Clubs**

13.3 In the case of a community-owned Member, its Governors shall be appointed for at least a three (3) year term and such appointment is subject to the approval of the Board of Governors. In the case of a privately owned Member, its Governors shall be shareholders or properly appointed designates of the privately owned Member, and such appointment is subject to the approval of the Board of Governors.

#### **Present at Meeting**

13.4 Each Member of the League shall be entitled to have its duly appointed Governors present at all Board of Governors meetings.

### **Entitled to Vote**

13.5 On any vote of the Board of Governors at a properly constituted meeting, only one of the duly appointed Governors of a Member shall be entitled to vote for the Member, as determined in the Member's sole discretion.

### **Vacancies**

13.6 The office of a Governor shall be automatically vacated:

- (a) if a Governor resigns his office by delivering a written resignation to the Commissioner of the League;
- (b) if a Governor becomes bankrupt or suspends payment or compounds with his creditors;
- (c) if a Member withdraws in writing a nomination for a Governor nominated by the Member;
- (d) if the Governor is found by a court to be of unsound mind; or
- (e) on death of the Governor;

provided that if any vacancy shall occur for any reason contained in this Section 13.6, a Member whose Governor has vacated office shall be entitled to appoint a qualified person as a replacement Governor in writing, a true copy of which shall be filed with the Commissioner forthwith upon such appointment being made. Such appointment shall be subject to the right of each Member to nominate two (2) Governors.

### **Retiring Governor**

13.7 Subject to Section 13.6, a retiring Governor shall remain in office until the dissolution or adjournment of the meeting at which such retirement is accepted and a successor Governor is appointed by the Member which previously appointed the retiring Governor.

### **First Governors**

13.8 The applicants for incorporation shall become the first governors of the League whose terms of office on the Board of Governors shall continue until the first Annual General Meeting, at which time the Governors of the Members shall become the Board of Governors in the manner provided for herein.

## **Powers of Governors**

### **Powers**

- 14.1 The Governors shall administer the affairs of the League in all things and make or cause to be made for the League, in its name, any description of contract that the League may lawfully enter into and, save as hereinafter provided, generally, may exercise all such other powers and do all such other acts and things as the League is by its charter, or otherwise, authorized to exercise and do.

**APPENDIX “D”  
PROPOSED COMMON ISSUES**

- i. What is the nature of the organizations operating as and within Canadian Major Junior Hockey?
- ii. 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?
- iii. If the answer to (ii) is yes, what is the applicable standard of care?
- iv. If the answer to (ii) is yes, did the Defendants, or any of them, breach the standard of care?
- v. 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?
- vi. If the answer to (iv) is yes, did the Defendants, or any of them, breach that fiduciary duty to the Class?
- vii. 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?
- viii. Did the Defendants, or any of them, commit actionable faults in failing to prevent the Abuse pursuant to the *Quebec Civil Code*? If so, are the Defendants liable for such faults?
- ix. Did the Defendants, or any of them, breach sections 1, 10, 10.1 or 39 of the *Quebec Charter of Human Rights and Freedoms*?
- x. If the answer to any of the common issues (i) through (ix) is “yes”, can the Court make an aggregate assessment of some or all of the damages suffered by some or all Class Members?
- xi. If the answer to any of the common issues (i) through (x) 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 *Quebec Charter of Human Rights and Freedoms*?

- xii. If the answer to common issue (xi) is “yes”, what amount of punitive and/or exemplary damages ought to be awarded?

Carcillo et al.      Canadian Hockey League et al.  
Plaintiff      and      Defendant

Court File No.: CV-642705-00CP

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

Proceeding commenced at TORONTO

**FACTUM OF THE MOVING PLAINTIFFS**  
**(RETURNABLE NOVEMBER 14-18, 2022)**

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