COURT OF APPEAL FOR BRITISH COLUMBIA

Citation: *Canadian Hockey League v. McEwan,* 2026 BCCA 61

Date: 20260206
Docket: CA49624

Between:

Canadian Hockey League/Ligue Canadienne de Hockey, Western Hockey League, Ontario Hockey League, Quebec Major Junior Hockey League, and Canadian Hockey Association/ Association Canadienne de Hockey d.b.a. Hockey Canada

Appellants
(Defendants)

And

James Johnathon McEwan, as Representative Plaintiff

Respondent
(Plaintiff)

Before: The Honourable Justice Dickson
The Honourable Justice Winteringham
The Honourable Justice Brundrett

On appeal from: An order of the Supreme Court of British Columbia, dated December 29, 2023(*McEwan v. Canadian Hockey League*, 2023 BCSC 2272, Vancouver Docket S190264).

Oral Reasons for Judgment

Counsel for the Appellants:	A.L. Crimeni E. Sydora
Counsel for the Respondent:	N.C. Hartigan B.D. Ryan
Place and Date of Hearing:	Vancouver, British Columbia February 3, 2026
Place and Date of Judgment:	Vancouver, British Columbia February 6, 2026

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Summary:

The appellants challenge a case management judge's order refusing cross-examinations on affidavits filed in support of certification of a proposed class proceeding. The proposed plaintiff is a former junior hockey player seeking to advance a claim alleging the junior hockey leagues and governing organizations knew or ought to have known that they were putting players at risk for concussion-related injuries related to a "culture" of fighting/violence.

Held: Appeal dismissed. The judge has been case managing this proceeding for six years and presided over several pre-certification applications before this one. Having shown no legal error, the decision to dismiss the application for leave to cross-examine is entitled to deference.

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[1] **WINTERINGHAM J.A.**: The respondent is the proposed representative plaintiff in a putative class proceeding brought on behalf of junior hockey players who allegedly suffered concussion-type injuries from fights during hockey games. The proposed class proceeding alleges that the Canadian Hockey League/Ligue Canadienne de Hockey (the "CHL"), Western Hockey League (the "WHL"), Quebec Major Junior Hockey League (the "QMJHL"), Ontario Hockey League (the "OHL") and Canadian Hockey Association/Association Canadienne de Hockey d.b.a. Hockey Canada (collectively, the "Hockey Organizations"), were negligent and breached fiduciary duties to hockey players that played in three junior hockey leagues under the CHL umbrella (the WHL, OHL, and QMJHL, collectively the "Leagues") from August 21, 1974 until a date to be fixed by the British Columbia Supreme Court.

[2] The proposed plaintiff alleges the Hockey Organizations knew or ought to have known that they were putting players at risk for chronic traumatic encephalopathy (CTE) from concussions related to hockey fights. The proposed plaintiff alleges that the Leagues created a "culture" of fighting and violence, specifically with respect to "enforcers" (players who were rewarded for instigating and engaging in hockey fights), including the plaintiff himself.

[3] In May 2021, the plaintiff delivered the certification record, including affidavits from former players and two experts. The judge—who was assigned in 2019 to manage the class proceeding—has already issued a number of pre-certification

rulings, including on an application by the appellants to strike portions of the same affidavits in dispute on the cross-examination application being appealed. The judge issued lengthy reasons on that application, granting an order to strike the affidavits in part: *McEwan v. Canadian Hockey League*, 2022 BCSC 1104 (the “Strike Reasons”).

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[4] In March 2023, the appellants filed their response to the certification application, supported by 14 affidavits. They argued that those 14 affidavits provided a complete answer to Mr. McEwan’s claim by proving:

a) the CHL did not have a culture of fighting and violence;

b) there were very few players who would qualify as enforcers; and

c) players showing signs of concussions were not allowed to continue playing.

[5] Thereafter, the appellants applied for leave to cross-examine four players and one of the experts (the expert being Dr. Skye Arthur-Banning, a professor of Amateur Sport Management at Clemson University, South Carolina) on their affidavits. The judge dismissed the application.

<u>On Appeal</u>

[6] The Hockey Organizations appeal that order. They submit the judge erred by:

a) misapprehending their arguments;

b) misapplying the test for cross-examination in the context of a pre-certification class proceeding;

c) giving excessive deference to the trial court about the type of evidence that may be weighed at certification; and

d) finding that cross-examination would cause undue delay in the action.

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Standard of Review

[7] The judge's decision to dismiss the application for cross-examination was discretionary. It is reviewable on a deferential standard. An appellate court will not interfere with a discretionary order unless the judge misdirected herself, gave no or insufficient weight to relevant considerations, made a palpable and overriding error in her assessment of the facts, or came to a decision that is so clearly wrong as to amount to an injustice: *Penner v. Niagara (Regional Police Services Board)*, 2013 SCC 19 at para. 27; *Ursuliak v. Collins*, 2025 BCCA 71 at para. 39. The approach to be taken in respect of a discretionary decision has been described as "even more deferential where, as here, the order is made by a case management judge": *Swiss Reinsurance Company v. Camarin Limited*, 2018 BCCA 122 at para. 25. The rationale for this degree of deference was succinctly explained by Justice Donald in *Robak Industries Ltd. v. Gardner*, 2006 BCCA 395 (Chambers):

> [13] This Court's policy of non-intervention derives from the obvious reason that the orderly pre-trial processes in complex cases should be interrupted by this Court as seldom as possible given the power of the case management judge to adjust to evolving circumstances and even to re-visit directions when necessary.

Analysis

1) Did the judge misapprehend or fail to consider the appellants' submissions?

[8] The appellants submit they argued before the judge that they were seeking to cross-examine the affiants principally to fill in gaps in the respondent's evidence that spoke to specific issues on certification: namely, whether the raised issues are sufficiently common among the proposed class to meet the preferable procedure criterion; and whether there is "some basis in fact" that the proposed common issues exist. The appellants point to paras. 38 and 58 of *McEwan v. Canadian Hockey League*, 2023 BCSC 2272 (the "RFJ") to support their contention that the judge ignored, or at a minimum, misapprehended these arguments by finding the appellants were only seeking cross-examinations to discredit or discount the respondent's evidence. The appellants contend the judge either failed to consider or misapprehended their two key positions. I will address each.

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First position: cross-examination will assist in determining whether the class is too broad

[9] The appellants submit the judge did not consider their primary position that cross-examinations were necessary to fill gaps in the evidence that would allow the Court to assess whether the allegations raised in the pleadings—the Leagues' culture of fighting and violence, lack of training, and failure to address neurological injuries—were sufficiently common in nature and in cause to satisfy the common issues and preferable procedure criteria of the certification test. Without cross-examination, the appellants argue, the judge could not meaningfully assess whether these issues spanned across all the players, across all the teams, in all the Leagues.

[10] The appellants further submit this case raises identical concerns to the issues identified, and ultimately accepted, by the Ontario courts in *Carcillo v. Canadian Hockey League*, 2023 ONSC 886 at paras. 37, 357, 393–394 [*Carcillo ONSC*], aff'd *Carcillo v. Ontario Major Junior Hockey League*, 2025 ONCA 652 [*Carcillo ONCA*] (only affirmed with respect to the analysis of the preferable procedure criterion). *Carcillo ONSC* and *Carcillo ONCA* were about a proposed class action involving alleged hazing in different hockey leagues. Certification was denied, relying in part on the absence of a single culture among the leagues or a systemic wrong by the leagues. The certification judge held, "[t]he immediate proposed class action is about at least 65 cultures … The Plaintiffs' action presupposes that all the Defendants systemically share the same virulent culture of Canadian amateur hockey": *Carcillo ONSC* at para. 37.

[11] Here, the appellants contend that the players' claims for damages "in respect of a 'culture' of 'fighting' and 'violence', deficient medical care and deficient education on fighting, violence and neurological injuries [cover] a proposed class that includes every one of the thousands of players who played for 60+ Teams, in three Leagues, over 51 years". The players, in their affidavits, speak to their belief about the prevalence of enforcers in the Leagues. However, the appellants submit there is no evidence from the player affiants about whether: (1) there was a culture of violence in all the teams in the Leagues; (2) there were systemic deficiencies in

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education or training; and (3) there were deficiencies in the medical care provided to the players.

[12] The appellants submit that filling (or probing) these gaps through cross-examination could be relevant to certification. They argue that the gaps in the players' affidavits bear on what they call the "central dispute"—whether there was a "culture" of fighting and violence as well as pervasive deficient medical care around concussions. They continue, that cross-examination may allow the Court to determine the extent to which the story of the player affiants can be generalized to other players that are part of the proposed class.

[13] This appeal raises a narrow procedural question. The judge concluded that cross-examinations would not assist her in deciding the certification application: RFJ at para. 37. She found the evidence the appellants sought to elicit from cross-examination went to issues of credibility and weight, which are matters reserved for trial. The judge explained that she was declining cross-examination because the proposed cross-examinations would only assist the Court in weighing competing evidence: RFJ at para. 38. This task would not assist at the certification hearing. The judge acknowledged the appellants' position that cross-examination was relevant to the issue of commonality. However, she concluded that:

> [39] … [E]ven if there was a culture of fighting in any of the leagues (a matter on which I express no opinion), that would not resolve the central allegations of negligence or breach of fiduciary duty. The court would still need to analyze the issue of causation, which will probably be complex. Equally, it is too early in this litigation to know whether the failure of the plaintiff to convince the court at a trial that a culture of fighting existed would necessarily be fatal to their claim.

[14] The judge is managing this litigation. She was concerned that the proposed cross-examinations would not assist in the determination of the certification requirements, including the issues of commonality and preferability. At para. 40 of the RFJ, she identified the broad nature of the phrase "culture of fighting". She noted the term was amenable to many interpretations and that at trial, the parties will ask the Court to draw inferences from facts in support of their position about whether such a culture exists.

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[15] The RFJ must be read as a whole and in the context of the record. In my view, the record reveals that the judge was fully engaged and responsive to the appellants' submissions about why cross-examination was relevant to certification issues. She did not ignore or misapprehend the appellants' submission. She simply did not accept it.

[16] I would not accede to this argument.

Second position: cross-examination may negate whether there is "some basis in fact" for the commonality of the issues

[17] The appellants submit the judge erred when she held cross-examination was not necessary to establish the existence of the proposed common issues. The appellants contend that their secondary position addressed this point. In their view, cross-examinations were necessary to fill or test certain gaps in the respondent's evidence, in part to determine whether the affiants' experience could be generalized across the class. The additional evidence elicited in cross-examination would allow the Court to assess on the "some basis in fact" standard whether the proposed common issues existed across all proposed class members in the protracted class period.

[18] On this point, the appellants focus on Dr. Arthur-Banning's affidavit, in which he provided expert opinion evidence about rules in other, similar leagues. The appellants noted that his study of comparable rules only refers to rules dating back to 2016 but the proposed class begins in 1974. The appellants submitted that cross-examination was necessary to determine whether Dr. Arthur-Banning's findings can be extended over the whole class period. This was said to be relevant to whether common issues existed prior to 2016.

[19] The appellants suggest that the judge engaged in a "one-step" analysis (requiring the plaintiff to only show that there is "some basis in fact" that the proposed common issues are common to all class members), rather than a "two-step" analysis (also requiring the plaintiff to demonstrate that the common issue

itself has some basis in fact). They submit she erred in this analysis and should have engaged in the two-step analysis.

[20] I agree with the respondent's submission on this point. The judge was not required to expressly label or articulate the commonality analysis as a "one-step" or "two-step" analysis. Her task was to determine whether cross-examination was necessary to assist the Court at certification.

[21] The judge is well-versed in this record. She engaged with it during the strike application. In the Strike Reasons at paras. 172–216, she set out in considerable detail Dr. Arthur-Banning's opinion and the appellants' evidence tendered on the certification application. She referenced those details in her RFJ at paras. 45, 55–56, 59. She summarized the five specific topics on which the appellants sought to cross-examine Dr. Arthur-Banning. She explained the basis for refusing cross-examination: RFJ at paras. 57–60. In my view, the judge answered the appellants' submission on this point. Her conclusion that the proposed cross-examination would not assist the Court at certification is thoroughly reasoned and entitled to deference.

2) Did the judge apply an overly deferential standard to assessing evidence?

[22] The appellants submit the judge failed to exercise her gatekeeping function by deferring any reliability or credibility assessment to the trial. They say this is inconsistent with the Supreme Court of Canada's guidance that certification should serve as a "meaningful screening device": *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2013 SCC 57 at para. 103.

[23] In the Strike Reasons at paras. 199 and 211, the judge found, "[i]t may be that other evidence or cross-examination of Dr. Arthur-Banning will impact the weight attached to his report" and "[w]hether it will be persuasive, and how much weight should be attached to it, are separate issues to be addressed later". The appellants submit that deferring these issues to trial, rather than certification, invoked an unwarranted standard of deference on certification. The appellants submit this flawed reasoning is evident in the following paragraphs of the RFJ:

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> [37] I am not persuaded that the defendants have identified conflicts in the evidence germane to certification. Instead, they point to conflicting evidence on matters that would be decided at trial.
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> [38] Although they acknowledge no factual findings can be made at certification, the logic of their position inevitably leads to a weighing of the evidence, which is not permissible. They argue that evidence adduced during cross-examination will be helpful to commonality, but in reality, they are asking this Court to completely discount the Players' statements that there was a culture of fighting in the defendants' leagues. That finding cannot be made before trial.
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> …
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> [42] With regard to the disputed evidence about whether players showing signs of concussion were allowed to continue to play, that is likely to be a controversial issue at trial. It would be premature to weigh or consider the validity of the evidence on that point prior to trial. Nor am I persuaded that further evidence relevant to that topic adduced through cross-examination would assist with the determination of whether to certify the action.
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> …
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> [58] First, the defendants suggest the contradictions they have identified between their evidence and some of Dr. Arthur-Banning's opinions might lead to the Court to place no weight on his report. This mischaracterizes the task at certification. The defendants' logic would require me to place "no weight" on his report *because I prefer their evidence*. That is not an appropriate undertaking for certification, especially with regard to expert evidence: *Pro-Sys* at para. 126.
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> [Italics in original.]

[24] The appellants agree that "finely-tuned weighing of conflicting evidence from opposing litigants is not appropriate at certification". However, they submit the Court must nonetheless meaningfully consider the reliability of the plaintiff's evidence on certification. They cite this proposition to *Vallance v. DHL Express (Canada), Ltd.*, 2024 BCSC 140 at paras. 160, 181 and *Larsen v. ZF TRW Automotive Holdings Corp.*, 2023 BCSC 1471 at paras 31–32. The appellants submit that some scrutiny of evidence could be material in this case, particularly with respect to Dr. Arthur-Banning.

[25] The respondent submits the report was not tendered to establish the applicable standard of care or whether it was breached. Rather, it was tendered to provide some basis in fact for the proposed common issues. Dr. Arthur-Banning's report, the respondent contends, identifies a framework for assessing the standard

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of care in a common-issues trial. Whether the appellants' rules and policies ultimately met the requisite standard of care is a merits determination reserved for trial, not certification. I agree with this proposition.

[26] In my view, the judge performed the gatekeeping function necessary at this stage of the proceeding. Again, the judge knew this record well and was familiar with the details of Dr. Arthur-Banning's opinion, having addressed its admissibility in her Strike Reasons. At para. 211 of the Strike Reasons, she found his report "has a baseline reliability". At para. 216 of the Strike Reasons, she found that the report was relevant to certification. She assessed Dr. Arthur-Banning's report, determined he was a duly qualified expert, and concluded the report met the threshold for admission. In dismissing the application to cross-examine him, she cited back to her Strike Reasons and considered whether the proposed cross-examination would assist the Court at the certification stage: see RFJ at paras. 56–61.

[27] She concluded it would not. Any evidence elicited from the proposed cross-examination would require the Court to engage in weighing competing evidence and assessing credibility: RFJ at para. 58. I would not interfere with this discretionary decision. As Justice Griffin explained in *Nissan Canada Inc. v. Mueller*, 2022 BCCA 338, the evidence required at certification does not need to be conclusive nor must it meet the civil standard of proof:

> [134] … This standard requires "an evidentiary basis" to show the plaintiff has met the certification requirements: *Hollick* at para. 25. Such evidence does not have to be conclusive or satisfy the civil standard of a balance of probabilities, and the particular level of evidence that is sufficient is highly fact-specific: *Sharp* at para. 27.
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> …
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> [136] Justice Hunter in *Ewert* helpfully explained that the "some basis in fact" requirement is better understood as being in contrast to <u>no</u> basis in fact. He noted that the evidentiary requirement must be considered in context of the *CPA* scheme, which envisions applications for certification being brought at a very early stage of the proceeding. This is consistent with a legislative intention to not impose a high evidentiary burden on the certification applicant: at paras. 100–104.
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> [Emphasis in original.]

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[28] I would not accede to this ground of appeal.

3) Did the judge apply the appropriate factors in her decision to deny leave?

[29] The appellants submit the judge applied the wrong test on the cross-examination application. They point to para. 18 of the RFJ where the judge stated cross-examination was appropriate "if there is a conflict in the evidence on a point germane to certification". The appellants submit this is both the wrong test and an unduly restrictive approach.

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[30] The judge began her reasons by setting out, in some detail, the legal principles governing her determination of the application. She set out the legal framework governing applications for leave to cross-examine, citing R. 22-1(4) of the *Supreme Court Civil Rules*, B.C. Reg. 168/2009 and *Stephens v. Altria Group, Inc.*, 2021 BCCA 396 at para. 5: RFJ at paras. 9–10. She also noted that the application to cross-examine the affiants must be considered in the proper context—mainly that the issue before the Court will be certification, which requires a determination of whether the plaintiff has established the requirements set out in s. 4(1) of the *Class Proceedings Act*, R.S.B.C. 1996, c. 50: RFJ at para. 12. She then set out the relevant provisions of the *Class Proceedings Act*, considered the leading cases about commonality, and concluded this portion of her reasons with authorities addressing the role of cross-examination in the certification context: see RFJ at paras. 13–19.

[31] Read as whole and in context, the judge's reasons capture the factors she was required to consider on the application for leave to cross-examine the affiants. She answered the question before her: whether the proposed cross-examinations were relevant to an issue that could affect the outcome of the certification applications. She found that the appellants sought to elicit evidence on matters properly reserved for trial and the proposed cross-examinations would not serve a useful purpose on the issues to be decided at certification: see RFJ at paras. 38–40, 59.

[32] It is my view that the judge considered the applicable factors relevant to the application before her and concluded the appellants had not satisfied the legal test: RFJ at paras. 8, 37, 61. She reached this conclusion after considering the evidence and pleadings and after citing a number of authorities dealing with cross-examination applications in the context of class proceedings. I do not find the judge's explanation of the legal test at para. 18 of the RFJ to have narrowed her analysis as asserted by the appellants. I do not see an error in her application of the legal test nor do I agree that she applied the wrong test.

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4) Did the judge err in finding that the cross-examinations would delay the proceeding?

[33] The appellants submit the judge—of her own volition, and contrary to the parties' submissions—relied on undue delay of the litigation as a basis for denying their application to cross-examine the affiants. The appellants submit they had presented a schedule, agreed to by counsel, about when the cross-examinations were to occur. In their factum, the appellants suggest the delay only arose because the judge took seven months to release this decision. They argue that "it is a legal error for a Court to prejudice a party through its own delay". The appellants submit the judge's finding about delay constitutes a palpable and overriding error of fact.

[34] The respondent points to the history of this litigation and asserts that the judge's concerns about delay were well-grounded in the record. The respondent submits that delay has been a "genuine concern" thus far in the litigation. He refers to several specific delays that have already taken place, including an adjournment of the strike application, this appeal, and the fact that certification has not yet been heard. The respondent also argues that the appellants' proposed schedule was not reasonable. The appellants planned for a two-hour cross-examination of Dr. Arthur-Banning and four, one-hour cross-examinations of the players to occur in one day. Further, coordinating multiple witnesses across several time zones would require significant time, effort, and expense.

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[35] Delay is a relevant factor for a judge to consider in an application for leave to cross-examine affiants prior to a certification hearing: see *Stephens* at para. 5; *Leonard v. The Manufacturers Life Insurance Company*, 2020 BCSC 1051 at para. 17 (Chambers). Despite the appellants' efforts to coordinate the cross-examinations efficiently (and in their view, without delay) the judge did not fall into error when she raised delay as a factor in determining whether to permit cross-examination of the affiants. She is the judge managing this proposed class proceeding and knows its history. She knew what steps remained outstanding and she was in the best position to assess whether this proceeding would be delayed by an order permitting cross-examination. She did not fall into error when she included delay, among her other comprehensive reasons, as a basis for denying leave to cross-examine the affiants.

Conclusion

[36] The judge's conclusions were well within the range of reasonable outcomes in the exercise of her discretion. She applied the correct legal principles. She carefully reviewed the record, including the 14 responding affidavits filed by the appellants. She exercised her discretion in the context of a proposed class proceeding she had been managing for some time.

[37] In my view, appellate intervention is not warranted in this case. I would dismiss this appeal.

[38] **DICKSON J.A.**: I agree.

[39] **BRUNDRETT J.A.**: I agree.

[40] **DICKSON J.A.**: The appeal is dismissed.

"The Honourable Justice Winteringham"