

COURT OF APPEAL FOR ONTARIO

CITATION: Carcillo v. Ontario Major Junior Hockey League, 2025 ONCA 652

DATE: 20250922

DOCKET: COA-23-CV-0353

Tulloch C.J.O, Paciocco and Nordheimer JJ.A.

BETWEEN

Daniel Carcillo, Garrett Taylor and Stephen Quirk

Appellants (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, 649643 Ontario Inc. c.o.b. as Sarnia Sting, Kitchener Ranger Jr A Hockey Club and Kitchener Rangers Jr "A" Hockey Club, Le Titan Acadie Bathurst (2013) Inc., Club de Hockey Junior Majeur de Baie-Comeau Inc. o/a Drakkar Baie-Comeau, Club de Hockey Drummond Inc. o/a Voltigeurs Drummondville, Cape Breton Major Junior Hockey Club Limited o/a Screaming Eagles Cape Breton, Les Olympiques de Gatineau Inc., Halifax Mooseheads Hockey Club Inc., Club Hockey les Remparts de Québec Inc., le Club de Hockey Junior Armada Inc., Moncton Wildcats Hockey Club Limited, le Club de Hockey l'Océanic de Rimouski Inc., les Huskies de Rouyn-Noranda Inc., 8515182 Canada Inc. c.o.b. as Charlottetown Islanders, les Tigres De Victoriaville (1991) Inc., Saint John Major Junior Hockey Club Limited, Club de Hockey Shawinigan Inc. o/a Cataractes Shawinigan, Club de Hockey Junior Majeur Val d'Or Inc. o/a Val D'or Foreurs, 7759983 Canada Inc. c.o.b. as Club de Hockey le Phoenix, 9264-8849 Québec Inc. c.o.b. as Groupe Sags 7-96 and Les Saguenéens, Jaw Hockey Enterprises LP c.o.b. Erie Otters, IMS Hockey c.o.b. Flint Firebirds, Saginaw Hockey Club, L.L.C., EHT, Inc., Winterhawks Junior Hockey LLC, Portland Winter Hawks Inc., Thunderbirds Hockey Enterprises, L.L.C, Brett Sports & Entertainment, Inc., Hat Trick, Inc., Tri-City Americans Hockey LLC, and Top Shelf Entertainment, Inc.

Respondents (Defendants)

James Sayce, Vlad Calina, and Caitlin Leach, for the appellants

Mike Eizenga, Gannon Beaulne, Ethan Schiff, and Marshall Torgov, for all the respondents

Nadia Champion, Nicole Kelly, Timothy Pinos, Kate Byers, and Hardeep Dhaliwal, for the respondents Jaw Hockey Enterprises LP c.o.b. Erie Otters, IMS Hockey c.o.b. Flint Firebirds, Saginaw Hockey Club, L.L.C., EHT, Inc., John Doe Corp. A o/a Everett Silvertips Hockey Club, Winterhawks Junior Hockey LLC, Portland Winter Hawks Inc., Thunderbirds Hockey Enterprises, L.L.C., John Doe Corp. B o/a Seattle Thunderbirds, Brett Sports & Entertainment, Inc., Hat Trick, Inc., John Doe Corp. C o/a Spokane Chiefs, Tri-City Americans Hockey LLC and John Doe Corp. D o/a Tri-City Americans

Heard: January 27, 2025

On appeal from the orders of Justice Paul M. Perell of the Superior Court of Justice, dated February 3, 2023, and October 30, 2023, with reasons reported at 2023 ONSC 886, and 2023 ONSC 5798.

Tulloch C.J.O.:

A. OVERVIEW

[1] The appellants allege that for decades, many young players in major junior hockey leagues have endured serious abuse. Older teammates, coaches, team officials, and league staff have subjected them to physical and sexual assaults, bullying, harassment, and degrading hazing rituals. The appellants maintain that these practices fostered and normalized a toxic culture of violence and misconduct, making abuse seem acceptable and discouraging victims from reporting what they had suffered. They submit that those who were harmed deserve meaningful access to justice, and that any individuals and organizations who were responsible for the abuse must be held accountable. Since this case involves certification and the motion judge found these allegations had some basis in fact, we must assume them to be true for the purposes of this appeal.

[2] In response, three former players – Daniel Carcillo, Garrett Taylor, and Stephen Quirk (the appellants) – initiated a proposed class action lawsuit. Their goal was to obtain a remedy for the widespread abuse they claim occurred. They sought permission to sue each of the four major junior hockey leagues, and all 60 teams that they represent, on behalf of thousands of players who, they allege, were subjected to systemic abuse over a 50-year span. Relying on section 5 of the *Class*

Proceedings Act, S.O. 1992, c. 6, they argued that the abuse was systemic in nature and that certification as a class action was warranted.

[3] The Superior Court rejected the motion, refusing to certify the proceeding as a class action. In his decision, the motion judge acknowledged the importance of ensuring access to justice for victims, the need to hold wrongdoers accountable, and the potential for class actions to pressure organizations into changing harmful practices. Nevertheless, he concluded that the proposed class action was unmanageable. He also found that the appellants' counsel had failed to provide a litigation plan capable of addressing the scale and complexity of the case, which prevented the action from being a viable means of achieving the stated goals.

[4] I would dismiss the appeal. Even though the appellants' objectives may well be admirable, their proposed class action is of an unprecedented scale and complexity, far greater than that of other systemic negligence class actions previously recognized. This reality made it essential for counsel to present a litigation plan capable of meeting those challenges. Because no such plan was offered, the motion judge was justified in finding the action unmanageable, and therefore not the preferable procedure. This finding is owed heightened deference: *AIC Limited v. Fischer*, 2013 SCC 69, [2013] 3 S.C.R. 949, at para. 65. Proceeding in this form would undermine, rather than advance, the objectives of access to justice, behavioural reform, and judicial efficiency. Furthermore, since the appellants did not suggest a narrower or more targeted class action as an

alternative at the certification stage, they cannot now seek to fundamentally recast their case on appeal in order to avoid this conclusion.

[5] This decision should not be understood as ruling out the possibility that other class actions – narrower in scope and targeting individual teams, single leagues, or smaller groups of organizations – could be certified and managed effectively. Such cases must be assessed on their own merits. Indeed, Canadian courts have previously certified systemic negligence class actions involving institutional abuse, as seen in *Rumley v. British Columbia*, 2001 SCC 69, [2001] 3 S.C.R. 184; *Cloud v. Canada (Attorney General)* (2004), 73 O.R. (3d) 401 (C.A.), leave to appeal refused, [2005] S.C.C.A. No. 50; and *Cavanaugh v. Grenville Christian College*, 2014 ONSC 290 (Div. Ct.). These precedents remain authoritative, despite the motion judge’s critical observations about some of them.

[6] For clarity, I also address certain aspects of the motion judge’s analysis regarding the cause of action, the common issues requirement, and additional issues of preferability. The motion judge applied an unduly strict standard when assessing the cause of action and common issues. Applying the proper legal test, the appellants have a viable cause of action: their argument that teams are responsible for league-level governance failures is not bound to fail. While it is unnecessary to determine whether the appellants also established commonality, it is clear that the motion judge applied an overly high bar and evidentiary threshold to that requirement, overlooking *Rumley* and *Cloud’s* guidance. Moreover,

although the motion judge was entitled to find that the proposed class action was not the preferable mode of proceeding given that the litigation would not be manageable, he should have considered how class actions can help victims overcome significant psychological and social barriers to seeking justice, yet failed to do so. Although this factor could not, in the circumstances of this case, overcome the manageability concern, he should have still addressed it. The motion judge also erred by treating the absence of aggregate damages as a bar to systemic negligence class actions and by failing to consider the limits of joinder as an alternative mechanism.

B. BACKGROUND

[7] Major junior hockey represents the highest level of junior hockey in Canada. Its teams recruit young athletes, typically between 16 and 20 years old, who leave their families and hometowns to compete in a highly demanding and competitive environment. These players aspire to advance to the National Hockey League (NHL), hoping that elite coaching, training, and exposure will allow them to reach their full potential. To participate, players sign agreements with their respective teams and are bound by league rules governing recruitment, drafting, trades, and player conduct.

[8] The major junior hockey system consists of 60 teams, organized into three regional leagues and one national league. Of these, 52 teams are based in Canada

and 8 in the United States. Most operate as for-profit businesses, though some are municipally owned or not-for-profit organizations. Each team is a member of one of the three regional leagues: the Ontario Hockey League (OHL), the Western Hockey League (WHL), or the Québec Major Junior Hockey League (QMJHL). Collectively, these leagues form part of the Canadian Hockey League (CHL), the national body. Competition begins within each regional league, culminating in the champions of those leagues competing for the CHL's annual nationwide championship. The regional leagues regulate their own teams, while the CHL sets overarching rules that apply to all three leagues and their member teams.

[9] Each league is led by a commissioner and governed by a Board of Directors. In the OHL and WHL, team-appointed representatives serve as governors. At the CHL level, governance is provided by nine governors: the three regional commissioners plus two additional nominees from each regional league. Although the leagues are incorporated as not-for-profit corporations, the appellants argue that they are, in effect, unincorporated associations consisting of the corporate entity itself, the participating teams, and, in the case of the CHL, the regional leagues as well.

[10] For decades, the regional leagues have implemented player safety policies and programs, and individual teams have likewise maintained their own rules and initiatives. The CHL's constitution requires it not only to develop player safety

programs and policies itself, but also to support the regional leagues in adopting and enforcing them.

[11] Despite these formal policies, there is evidence that serious abuse has long plagued major junior hockey. In 1997, following the high-profile conviction of a coach for sexually abusing a player, the CHL commissioned a report recommending the adoption of an abuse-prevention policy. Yet more than 25 years later, in 2023, the motion judge recognized evidence that a toxic culture of “bullying, harassment, hazing, and criminal conduct ... has been pervasive for decades” and continues to this day. This evidence suggests that players had been subjected to horrific mistreatment by older teammates, as well as by team and league staff, including torture, forcible confinement, sexual assault, gang rape, and emotional abuse. The motion judge also noted that a more recent CHL-commissioned report confirmed that the league’s hierarchical structure and entrenched culture of silence discouraged victims from reporting abuse.

[12] In June 2020, the appellants commenced a proposed class action against all 60 teams, the three regional league corporations, and the CHL itself. They sought certification of a class encompassing approximately 15,000 Canadian major junior hockey players from 1975 to the present. They alleged institutional abuse. Their claims included systemic negligence, breach of fiduciary duty, vicarious liability, and related claims under Québec civil law. They alleged that the CHL and the regional leagues failed to adopt and enforce effective abuse-

prevention policies, and that this systemic failure caused widespread harm. Relying on a theory of collective liability, the appellants argued that the teams should also be held accountable because they collectively governed the regional leagues and the CHL, which, they claimed, operated as unincorporated associations made up of their not-for-profit corporate entities and the teams.

[13] The motion judge denied certification in *Carcillo v. Canadian Hockey League*, 2023 ONSC 886. While he accepted that each representative plaintiff had viable claims against his own team or teams, the relevant regional league, and the CHL, he concluded that there was no cause of action against teams for which the plaintiffs had never played. He further held that no common issues existed across the proposed class, since there was no single, uniform system of conduct and establishing liability would require individualized trials. He also determined that the proposed class action was not the preferable procedure, given its extraordinary scope and complexity, which rendered it unmanageable. In addition, he offered broader commentary on the challenges, benefits, and drawbacks of systemic negligence class actions.

[14] After refusing certification, the motion judge suggested that the litigation proceed through joinder of multiple individual actions. Under this approach, each team's current or former players would bring a separate lawsuit against that team, its regional league, and the CHL. Following several hearings, the motion judge

issued an order approving a plan to implement this strategy: *Carcillo v. Canadian Hockey League*, 2023 ONSC 5798.

C. ISSUES ON APPEAL

[15] At the heart of this appeal is the issue of certification. The appellants argue that their proposed class action satisfies the statutory requirements for certification under section 5 of the *Class Proceedings Act*.¹ Specifically, they contend that the motion judge erred in finding that their case (1) failed to disclose a valid cause of action, (2) did not raise common issues suitable for class-wide resolution, and (3) was not the preferable procedure for resolving the claims. Because certification requires success on all three of these elements, the appellants must prevail on each to succeed in their appeal.

[16] I would dismiss the appeal. The appellants have not demonstrated any reversible error on the third element: preferability. The motion judge's determination that the proposed class action was unmanageable, and therefore not the preferable procedure, is entitled to deference. This conclusion is sufficient to dispose of the appeal, regardless of whether the appellants have identified errors on the other certification requirements. Moreover, since the appellants did

¹ The prior version of s. 5 of the *Class Proceedings Act* applies because the appellants filed their proposed class action before October 1, 2020: *Martin v. Wright Medical Technology Canada Ltd.*, 2024 ONCA 1, 492 D.L.R. (4th) 294, at para. 4.

not ask this court to revise or set aside the joinder plan order in the event their certification appeal failed, that order should remain undisturbed.

D. ISSUE #1: THE CAUSE OF ACTION REQUIREMENT

[17] The first requirement under section 5 of the *Class Proceedings Act* is that the pleadings disclose a cause of action. Here, my analysis is limited to the appellants' claims of systemic negligence. I address this issue because it may serve a practical purpose for the appellants if they pursue their claims individually, notwithstanding the denial of certification. The appellants have not appealed the motion judge's rulings on their other claims, namely those based on vicarious liability, breach of fiduciary duty, and Québec civil law, so I do not address those issues.

[18] In my view, the appellants have satisfied the cause of action requirement. The motion judge himself recognized that they advanced viable systemic negligence claims against both the CHL and the relevant regional league corporations. Moreover, their claim that the individual teams bear legal responsibility for governance failures at the league level cannot be said to be hopeless or "plain and obvious[ly]" bound to fail. The motion judge erred in concluding otherwise, as he applied too rigorous a standard at the certification stage and overlooked plausible legal pathways through which team liability could be established under the appellants' pleadings.

(1) The Governing Principles

[19] Under section 5(1)(a) of the *Class Proceedings Act*, the cause of action requirement is satisfied so long as it is not *plain and obvious* that the pleaded facts cannot support a viable claim. The purpose of this requirement is simply to weed out claims that are legally hopeless — those that are bound to fail as a matter of law — rather than to evaluate the factual strength of the case. At this preliminary stage, the pleadings must be read generously even if they are not a model of clarity, making allowances for mere drafting deficiencies. As well, all pleaded facts must be assumed to be true, regardless of whether they may ultimately be proven at trial. The only exceptions are allegations that are merely bald conclusions, pure legal assertions, or claims that are patently absurd or incapable of proof: *Bowman v. Ontario*, 2022 ONCA 477, 162 O.R. (3d) 561, at paras. 38–41; *Gratton-Masuy Environmental Technologies Inc. v. Ontario*, 2010 ONCA 501, 101 O.R. (3d) 321, at paras. 99–102; *728654 Ontario Inc. v. Ontario* (2005), 202 O.A.C. 4 (C.A.), at paras. 3, 7.

[20] The motion judge’s ruling on this requirement is reviewed on a standard of correctness, as confirmed by the Supreme Court in *Pioneer Corp. v. Godfrey*, 2019 SCC 42, [2019] 3 S.C.R. 295, at para. 57. That guidance is conclusive. Therefore, the respondents’ reliance on case law suggesting the more deferential “palpable and overriding error” standard is misplaced when the issue is whether the pleadings disclose a cause of action.

(2) Application: The Appellants' Claims Against the Teams

[21] The appellants' theory of collective liability rests on two core propositions:

1. That each league is an unincorporated association comprised of its member teams and its league corporation; and
2. That the member teams bear responsibility for systemic league-level misconduct because they — directly or through their appointed governors — are the governing authorities of the league.

[22] The motion judge rejected both premises. He concluded that the leagues could not be considered unincorporated associations, and that even if they were, the teams could not be held liable for league-level wrongdoing. On this basis, he found that the appellants failed to meet the cause of action requirement.

[23] With respect, that conclusion was in error. While we acknowledge that the appellants' pleadings are not a model of clarity, the motion judge was nonetheless required to read them generously and make allowances for mere drafting deficiencies: *728654 Ontario Inc.*, at paras. 3, 7. Applying that test, both of the appellants' propositions are legally tenable based on the pleaded facts, which should have been assumed true at this stage.

(a) Unincorporated Association Theory

[24] First, it is not plain and obvious that the pleaded facts cannot sustain the claim that the leagues operate as unincorporated associations.

[25] An unincorporated association arises when individuals bind themselves together by agreement to pursue a shared purpose, other than profit, under agreed-upon rules. Such associations are not corporations, lack independent legal personality, and exist only through their members. Nonetheless, they often adopt corporate-style governance structures such as boards, constitutions, and formal rules: *Organization of Veterans of the Polish Second Corps v. Army, Navy & Air Force Veterans in Canada* (1978), 20 O.R. (2d) 321 (C.A.), at p. 337; *Astgen v. Smith*, [1970] 1 O.R. 129 (C.A.), at pp. 133–35.

[26] Importantly, the creation of a corporation to administer some of an association's affairs does not necessarily extinguish the association. As the Supreme Court explained in *Lakeside Colony of Hutterian Brethren v. Hofer*, [1992] 3 S.C.R. 165, at pp. 189–90, an unincorporated association may continue to exist alongside a related corporation if the members intended it to remain distinct. This undermines the respondents' claim that the existence of the league corporations precludes the existence of league-level unincorporated associations.

[27] Here, the appellants allege that each league's corporation and its participating teams (and in the CHL's case, the three regional leagues as well) contractually bound themselves under their constitutions to pursue shared purposes and follow common rules. These facts, if true, could establish the essential elements of an unincorporated association. The appellants also point to specific constitutional provisions from each league, incorporated by reference into

the pleadings, which make these allegations concrete rather than conclusory. Far from being implausible, the claim is consistent with how other professional sports leagues have been legally characterized: for example, the Canadian Football League, the National Football League, and the NHL have all been recognized as unincorporated associations.²

[28] Nor is it plain and obvious that the league corporations preclude the coexistence of such associations. On the contrary, the OHL Constitution itself distinguishes between the OHL as an “association” and the corporation that administers it, while the WHL Constitution (until 2002) explicitly described that league as an association. While it would have been preferable for the pleadings to expressly reference these provisions, we read them generously to allow for this drafting deficiency since the parties agree that they incorporate the constitutions by reference. The appellants also pled that each regional governor is the direct agent of the team that appointed them and can be dismissed by that team at will — a feature inconsistent with corporate directorships under not-for-profit law, where directors are not agents of members and cannot be summarily removed by them: *Maple Leaf Foods Inc. v. Schneider Corp.* (1998), 42 O.R. (3d) 177 (C.A.), at pp. 190–91; *Not-for-Profit Corporations Act, 2010*, S.O. 2010, c. 15, s. 26.

² See, for example, *Bruce v. Cohon*, 2016 BCSC 419, at para. 18, aff'd 2017 BCCA 186, 412 D.L.R. (4th) 191, leave to appeal refused, [2017] S.C.C.A. No. 307; *Bell Canada v. Canada (Attorney General)*, 2019 SCC 66, [2019] 4 S.C.R. 845, at para. 17; *National Hockey League v. Pepsi-Cola Canada Ltd.* (1992), 92 D.L.R. (4th) 349 (B.C.S.C.), aff'd (1995), 122 D.L.R. (4th) 412 (B.C.C.A.).

[29] Accordingly, the appellants' theory does not necessarily require "piercing the corporate veil" of the league corporations, as the motion judge suggested. That issue would only arise if the appellants failed to prove that the leagues function as unincorporated associations. Because such questions are highly fact-dependent and hinge on the interpretation of non-standard constitutional documents, they are inappropriate for resolution at the pleadings stage: *Organization of Veterans*, at p. 343; *Bowman*, at paras. 40–41.

[30] By rejecting the unincorporated association theory outright, the motion judge exceeded his limited role at certification. He should have read the pleadings generously, treated the pleaded facts as true, recognized that the allegations were not doomed in law, and left the factual determination of the leagues' status for trial.

(b) Team Liability for League-Level Wrongs

[31] Second, the appellants' theory that the teams are liable for league-level failures because they govern the leagues directly or through appointed governors is also legally tenable.

[32] It is correct, as the motion judge noted, that members of an unincorporated association are not automatically liable for the wrongful acts of the association or of other members. They are only liable for their own actions or for those of their agents. This principle, established in *London Association for Protection of Trade v. Greenlands, Limited*, [1916] 2 A.C. 15 (H.L.), remains settled law: see also

Toews v. Isaac, [1929] 2 D.L.R. 719 (Man. C.A.); *Body v. Murdoch*, [1954] O.W.N. 658 (H.C.); *G.S. v. Canada (Attorney General)*, 2001 SKQB 427, 211 Sask. R. 164.

[33] However, *Greenlands* does not foreclose liability for the teams in this case. On the contrary, it leaves open two distinct pathways: (1) personal liability of teams as governors for tortious governance decisions, and (2) vicarious liability of teams for the wrongful acts of governors acting as their agents.

[34] The first pathway — personal liability — has long been recognized. Governors of unincorporated associations can be liable for negligent or intentional decisions taken in their governance role: *Barrett v. Harris* (1921), 51 O.L.R. 484 (S.C.), at p. 492 (approving *Brown v. Lewis* (1896), 12 T.L.R. 455); *Orchard v. Tunney*, [1957] S.C.R. 436; *Lysko v. Braley* (2006), 79 O.R. (3d) 721 (C.A.), at paras. 32–45, 55. Such liability extends to conduct that harm outsiders, such as players, even if it may not always apply to harms suffered by members themselves: *Dodd v. Cook*, [1956] O.R. 470 (C.A.), at p. 486.

[35] The second pathway — vicarious liability — is equally viable. A member of an unincorporated association can be held liable for the torts of a governor who acted as its agent. This principle has been affirmed in cases such as *Kinver v. The Phoenix Lodge, I.O.O.F.* (1885), 7 O.R. 377 (C.A.) at pp. 387–88; *Lysko*, at paras. 48–52; and *The Hibernian Dance Club v. Murray*, [1997] P.I.Q.R. P46 (C.A.) at p.

P55. The Supreme Court in *Orchard* also acknowledged this theory, even though it found on the facts that the governors were not agents of the members. To rely on this pathway, the plaintiff must establish an agency relationship by showing that the member and governor agreed, either expressly or implicitly, for the governor to act on the member's behalf and under its control such that the governor could affect the member's legal position: *1196303 Ontario Inc. v. Glen Grove Suites Inc.*, 2015 ONCA 580, 337 O.A.C. 85, at paras. 69-71; *Trident Holdings Ltd. v. Danand Investments Ltd.* (1988), 64 O.R. (2d) 65 (C.A.), at p. 73.

[36] Here, the appellants pleaded sufficient facts to engage both liability pathways. Regarding personal liability, they alleged that the OHL Constitution equates governors with the teams themselves, meaning the teams could be personally liable for negligent decisions made in their governance role. Regarding vicarious liability, they alleged that each regional constitution designates league governors as agents of their appointing teams, and that the CHL Constitution allows the regional leagues — themselves controlled by the teams — to appoint most of the CHL's governors. They also alleged the necessary elements of an agency relationship — notwithstanding some drafting deficiencies, read generously the pleadings assert that the regional constitutions require each governor to act on behalf of and under the control of a team while making governance decisions that will affect the team's legal position. If these allegations are true, then teams could

indeed be vicariously liable for negligent league-level decisions made by their appointed governors.

[37] Taken together, these allegations are sufficient to satisfy the cause of action requirement. The appellants have pleaded a legally viable theory of unincorporated association liability. Whether the leagues are, in fact, unincorporated associations, whether governors acted as agents of the teams, and whether their governance decisions give rise to personal or vicarious liability are fact-intensive issues to be determined at trial: *Glen Grove Suites*, at para. 71; *Lysko*, at paras. 32-55. At this preliminary stage, the motion judge erred in striking them down.

E. ISSUE #2: THE COMMON ISSUES REQUIREMENT

[38] I next turn to the common issues requirement. In my view, the motion judge's analysis of this requirement reflects material legal errors capable of justifying appellate intervention. I would address those errors to clarify the law. However, it is unnecessary to determine whether the appellants meet the correct legal test for commonality in light of my conclusion on preferability. Nothing in this judgment should be taken as deciding that question.

(1) Governing Principles

[39] Section 5(1)(b) of the *Class Proceedings Act* requires that certification promote efficiency by ensuring that “allowing the suit to proceed as a [class proceeding] will avoid duplication of fact-finding or legal analysis”: *Pioneer Corp*,

at para. 104. An issue is considered common where (1) it does not inevitably break down into individual issues, and (2) it represents a substantial and necessary component of each class member’s claim, such that resolving it would meaningfully advance those claims: *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, 112 O.R. (3d) 346, at para. 81, leave to appeal refused, [2012] S.C.C.A. No. 326; *Canada v. Greenwood*, 2021 FCA 186, [2021] 4 F.C.R. 635, at para. 180, leave to appeal refused, [2021] S.C.C.A. No. 377.

[40] The common issues threshold is intentionally low. As this court explained in *Cloud v. Canada (Attorney General)*, proposed issues may qualify even if they form only “a very limited aspect of the liability question,” and even where many individual issues will remain: at paras. 52-53. They need not predominate over individual questions, nor must they completely determine each class member’s claim: *Western Canadian Shopping Centres Inc. v. Dutton*, 2001 SCC 46, [2001] 2 S.C.R. 534, at para. 39.

[41] The evidentiary standard — “some basis in fact” — reflects this low bar. This standard requires only minimal evidence showing that the proposed common issues exist and could be addressed class-wide. The appellants need not demonstrate a prima facie case or establish the likelihood of trial success, and the court cannot weigh the evidence or evaluate the merits at certification: *Lilleyman v. Bumble Bee Foods LLC*, 2024 ONCA 606, 173 O.R. (3d) 682, at paras. 67–77, leave to appeal refused, [2024] S.C.C.A. No. 406.

[42] Specific guidance exists for institutional abuse class actions alleging systemic negligence. In both *Rumley v. British Columbia* and *Cloud*, the courts held that questions about duty of care, standard of care, and breach could meaningfully advance class members' claims even though individualized trials on causation and damages would still be necessary. They further held that whether institutions should have adopted abuse-prevention policies could be determined class-wide without devolving into individualized inquiries: *Rumley*, at para. 30; *Cloud*, at paras. 58, 66, 69. Courts must apply these precedents consistently and treat like cases alike: *Black v. Owen*, 2017 ONCA 397, 173 O.R. (3d) 334, at paras. 41–42, 46; *Sriskandarajah v. United States of America*, 2012 SCC 70, [2012] 3 S.C.R. 609, at para. 18.

[43] On appeal, extricable questions of law are reviewed for correctness. In the absence of such errors, a motion judge's decision is reviewed for palpable and overriding error: *Pioneer Corp.*, at para. 94; *Pearson v. Inco Ltd.* (2006), 78 O.R. (3d) 641 (C.A.), at para. 43, leave to appeal refused, [2006] S.C.C.A. No. 1; *Fulawka*, at paras. 76–77. References to “errors in principle” in some cases are simply a subset of legal error: *Housen v. Nikolaisen*, 2002 SCC 33, [2002] 2 S.C.R. 235, at para. 36.

(2) Application: The Motion Judge Applied an Overly Stringent Test

[44] Although the motion judge accurately summarized the governing principles, he applied them incorrectly in three key ways: (1) he imposed an improperly high bar, (2) he exceeded the limits of the “some basis in fact” standard, and (3) he disregarded binding guidance from *Rumley* and *Cloud*. These legal errors justify appellate correction: *Housen*, at para. 27; *Black*, at paras. 36, 41. I would not, however, determine whether the appellants meet the correct commonality test because it would not affect the result.

[45] First, the motion judge erred in applying a high threshold. He reasoned that because liability could not be determined without individual trials, the proposed common issues (1) would not significantly advance the litigation, and (2) would inevitably fracture into individual issues. Both conclusions are legally incorrect. As *Cloud* makes clear, common issues need not establish liability or eliminate individual trials; they need only advance claims in some meaningful way. Moreover, issues are only disqualified if they are inherently dependent on individual circumstances, not simply because individualized inquiries may follow them: *Fulawka*, at para. 81; *Dennis v. Ontario Lottery and Gaming Corporation*, 2013 ONCA 501, 116 O.R. (3d) 321, at para. 68, leave to appeal refused, [2013] S.C.C.A. No. 323. It is unnecessary to decide whether the proposed common issues meet these correct thresholds for the reasons I have explained.

[46] Second, the motion judge overstepped the evidentiary limits of certification. In finding that “[n]o one system exists here,” he effectively decided a merits question. That was not his role. The correct inquiry was whether the appellants had offered “some minimal evidence” to support their allegations of systemic negligence: *Lilleyman*, at para. 74. He did not address why the evidence adduced by the appellants – that each regional league has its own safety policies, the CHL has conducted national reviews, and those reviews repeatedly urged adoption of comprehensive abuse-prevention policies – failed to meet this low threshold. I need not resolve this question either because it would not affect the result.

[47] Third, the motion judge failed to engage with the precedents in *Rumley* and *Cloud*. He neither explained why the systemic issues in this case differed from those in which courts had previously certified duty, standard, and breach as common issues, nor reconciled his conclusion with the binding authority that institutional abuse-prevention policy questions can be resolved class-wide because they “affect all class members irrespective of their personal circumstances”: *Cavanaugh*, at para. 22. As well, he did not address why the solutions employed in *Rumley* and *Cloud* – creating subclasses or limiting liability to certain periods – would be inadequate to address his concerns about changes in the standard of care over time: *Rumley*, at paras. 31-33; *Cloud*, at para. 59.

[48] The motion judge also did not address *Rumley* and *Cloud*'s guidance concerning the availability and quantum of punitive damages. Both cases held that

those were proper common issues: *Rumley*, at para. 34; *Cloud*, at paras. 70, 72. I note that, as *Rumley* and *Cloud* demonstrate, the question of whether punitive damages are available for systemic misconduct can sometimes be resolved without reference to the extent of harm suffered by each individual: *Waldman v. Thomson Reuters Corporation*, 2012 ONSC 1138, 22 C.P.C. (7th) 33, leave to appeal refused, 2012 ONSC 3436 (Div. Ct.). Any concern about quantifying punitive damages before compensatory damages can usually be addressed by sequencing trials so that punitive damages are assessed after compensatory damages have been determined: *Robinson v. Rochester Financial Ltd.*, 2010 ONSC 463, 89 C.P.C. (6th) 91, at paras. 57–61, leave to appeal refused, 2010 ONSC 1899, 262 O.A.C. 148 (Div. Ct.).

[49] To be clear, I would not decide whether the proposed class action is sufficiently similar to *Rumley* and *Cloud* so as to establish commonality. That is an arguable question in light of the differences between those cases and this proposed class action which I address later in this judgment. My point is merely that the motion judge should have meaningfully engaged with those precedents and explained which distinguishing features justified a different result in this case.

F. ISSUE #3: THE PREFERABLE PROCEDURE REQUIREMENT

[50] The appellants' proposed class action nevertheless fails on the preferability requirement. The motion judge found — and I agree — that the action was

unmanageable because of its unprecedented scope and complexity. His finding that such a proceeding would collapse under its own weight, frustrating the objectives of access to justice, judicial economy, and behaviour modification, is entitled to deference. The appellants cannot avoid this conclusion by attempting to fundamentally alter their case on appeal.

(1) Governing Principles

[51] Section 5(1)(d) of the *Class Proceedings Act* requires that the representative plaintiff demonstrate two things: (1) that a class proceeding would be manageable, efficient, and fair, and (2) that it would be preferable to any alternative procedure. Both conditions must be met. Accordingly, a proposed class proceeding that is unmanageable cannot be certified, even if no alternative procedure is demonstrably preferable: *Fischer*, at para. 48; *Amyotrophic Lateral Sclerosis Society of Essex v. Windsor (City)*, 2015 ONCA 572, 387 D.L.R. (4th) 603, at para. 62.

[52] The scope and complexity of a proposed proceeding are central to assessing manageability. As Winkler J. observed in *Caputo v. Imperial Tobacco Ltd.* (2004), 236 D.L.R. (4th) 348 (Ont. S.C.), at para. 69, the larger and more complex the case, the more difficult it becomes to manage efficiently and fairly. A class action should not be certified if its breadth and complexity are so

overwhelming that it becomes unwieldy, unless individual litigation would pose the same difficulties: *Fulawka*, at para. 155; *Amyotrophic*, at para. 65.

[53] Determining whether a class action is manageable is a discretionary judgment that involves weighing multiple factors in light of judicial experience managing class proceedings and trials. Thus, it attracts “special deference” on appeal: *Fischer*, at para. 65, citing *Pearson*, at para. 43; see also *Canada v. John Doe*, 2016 FCA 191, 486 N.R. 223, at para. 29; *Sharp v. Royal Mutual Funds Inc.*, 2021 BCCA 307, 461 D.L.R. (4th) 524, at paras. 194–95, leave to appeal refused, [2021] S.C.C.A. No. 374. Absent legal error, palpable and overriding factual error, or a failure to exercise discretion judicially, appellate courts must not interfere. This last category, failure to exercise discretion judicially, permits intervention only if the decision was arbitrary, unreasonable, or so clearly wrong that it amounts to an injustice. Appellate courts cannot intervene merely because they might have weighed factors differently: *Pearson*, at para. 43; *Soldier v. Canada (Attorney General)*, 2009 MBCA 12, 236 Man. R. (2d) 107, at para. 66; *Canada (Attorney General) v. Fontaine*, 2017 SCC 47, 2017 2 S.C.R. 205, at para. 36; *Canada (Transportation Safety Board) v. Carroll-Byrne*, 2022 SCC 48, 475 D.L.R. (4th) 274, at para. 41.

[54] To aid courts in making these discretionary judgments, section 5(1)(e)(ii) of the *Class Proceedings Act* requires representative plaintiffs to file a litigation plan outlining how the class proceeding would be advanced in a workable, efficient, and

fair manner. Especially in complex cases, this plan is critical: it allows the court to assess whether the proposed class action is truly manageable: *Caputo*, at para. 75. As this court observed in *McCracken v. Canadian National Railway Company*, 2012 ONCA 445, 111 O.R. (3d) 745, at paras. 145–146, the litigation plan is where the theoretical structure of the action meets practical reality.

[55] A workable litigation plan must be detailed, concrete, and tailored to the case. It should explain how common and individual issues will be resolved efficiently and fairly, in light of the case’s particular scale and challenges. As Nordheimer J. noted in *Bellaire v. Independent Order of Foresters* (2004), 5 C.P.C. (6th) 68 (Ont. S.C.), at para. 53, such plans should address a range of relevant factors.³ In especially complex cases, more detail is required. Boilerplate or superficial plans that avoid grappling with foreseeable difficulties, or that simply list steps common to any lawsuit, are inadequate: *McCracken*, at paras. 145–146; *Caputo*, at paras. 76–79; *Bellaire*, at paras. 52–54.

[56] Because the litigation plan functions as a critical “check” on preferability, an unworkable plan can expose weaknesses in the proposed action that, if the plan

³ Those factors include: “(i) the steps that are going to be taken to identify necessary witnesses and to locate them and gather their evidence; (ii) the collection of relevant documents from members of the class as well as others; (iii) the exchange and management of documents produced by all parties; (iv) ongoing reporting to the class; (v) mechanisms for responding to inquiries from class members; (vi) whether the discovery of individual class members is likely and, if so, the intended process for conducting those discoveries; (vii) the need for experts and, if needed, how those experts are going to be identified and retained; (viii) if individual issues remain after the determination of the common issues, what plan is proposed for resolving those individual issues, and; (ix) a plan for how damages or any other forms of relief are to be assessed or determined after the common issues have been decided”: *Bellaire*, at para. 53.

cannot be remedied, will render the action unmanageable. Conversely, a well-crafted plan can demonstrate that potential difficulties are surmountable: *McCracken*, at para. 146; *Cloud*, at para. 95; *Caputo*, at para. 79; *Robinson*, at para. 73; *Price v. Smith & Wesson Corporation*, 2025 ONCA 452, 4 C.C.L.T. (5th) 184, at para. 136.

(2) Application: The Proposed Class Action Would Be Unmanageable

[57] I defer to the motion judge’s conclusion that this proposed class action would be unmanageable. He described this as “the simplest explanation” for his finding on preferability. In his view, the court would be asked to manage an extraordinarily complex proceeding involving:

- individual defences of 78 defendants spread across 13 jurisdictions;
- hundreds of likely third-party claims;
- highly diverse allegations of abuse, encompassing many different torts;
- events spanning a 50-year period;
- complex conflicts-of-law issues involving common law, civil law, and potentially U.S. law; and
- numerous limitation period defences.

[58] The motion judge was best positioned to make this judgment. He emphasized that the proposed class action was broader and more complex than other systemic negligence class actions previously certified, and that individual

litigation would not face the same difficulties. He also stressed that the appellants' litigation plan failed to address these challenges. On this basis, it was open to him to conclude that the class proceeding would collapse under its own weight, thereby frustrating — rather than advancing — the goals of access to justice, judicial economy, and behaviour modification.

[59] First, the motion judge reasonably found this case to be far broader in scope than the precedents. Unlike *Rumley* or *Cloud*, which involved one institution and relatively few defendants, this action named 78 defendants with alleged abuse occurring across dozens of locations in North America. Other multi-location cases cited by the appellants, such as *Fulawka*, *Fresco*,⁴ and *Greenwood*, are distinguishable because those cases involved a single institutional defendant managing all locations. The motion judge's reliance on these distinguishing factors was not unreasonable.

[60] Second, the motion judge reasonably noted that these challenges would not necessarily arise in individual litigation. Individual claims could focus on vicarious liability, a more straightforward pathway to liability, and proving causation in individualized negligence claims is often simpler than in systemic negligence claims: *Rumley*, at para. 30. While *Rumley* affirms the plaintiffs' right to frame their

⁴ *Fresco v. Canadian Imperial Bank of Commerce*, 2012 ONCA 444, 111 O.R. (3d) 501, leave to appeal refused, [2012] S.C.C.A. No. 379.

case as systemic negligence to meet the common issues requirement (at para. 30), that right does not preclude courts from considering the additional complexity it creates when assessing preferability.

[61] Third, the motion judge properly considered the weakness of the litigation plan filed by the appellants. He described it as boilerplate — a document that failed to engage with the unique challenges of this case. Instead of offering a strategy to address the numerous individual issues, it focused narrowly on damages, remaining silent on critical matters such as the multiplicity of defences, limitation issues, and conflicts of law. It was reasonable for the judge to infer that the silence reflected the inability to resolve these issues manageably: *Caputo*, at para. 79; *Robinson*, at para. 73.

[62] The appellants attempted to cure these deficiencies by pointing to a later litigation plan, filed after certification was denied. That plan, however, abandoned the class proceeding entirely and proposed multiple individual actions instead. The motion judge found this subsequent plan equally unworkable, and that finding is entitled to deference.

[63] My only reservation concerns the motion judge's conclusion that potential third-party claims weighed against certification. Since he stated that this was not determinative of his decision, it does not affect the outcome. For clarity, however, third-party claims are generally irrelevant at certification unless, as in *Davis v.*

Amazon Canada Fulfillment Services, ULC, 2025 ONCA 421, the third parties are necessary parties. Such claims do not arise unless the plaintiffs succeed at the common issues stage, and, following that stage, they can be addressed as individual issues: *Baxter v. Canada*, 2005 CanLII 18717 (Ont. S.C.), at para. 16; *Lipson v. Cassels Brock & Blackwell LLP*, 2011 ONSC 6724, 108 O.R. (3d) 681, at paras. 123–124, aff'd 2013 ONCA 165, 114 O.R. (3d) 481. In any event, third-party claims would arise in individual litigation as well, so they do not distinguish class actions as unmanageable.

(3) The Appellants Cannot Fundamentally Change Their Case

[64] To address concerns of manageability, the appellants proposed on appeal to drop 74 team defendants and the QMJHL, leaving only the CHL, OHL, and WHL as defendants.⁵

[65] This attempt to fundamentally alter the case comes far too late.

[66] Contrary to the appellants' submission, this proposal was not raised before the motion judge. The cited portion of their factum in the Superior Court argued that suing all 78 defendants was proper. Nor is it correct that appellate courts must accept such changes. Appellate courts have discretion to reject attempts to

⁵ The appellants no longer seek to sue the QMJHL because the Superior Court of Québec certified a class action against it and its teams: *Latulippe c. Ligue canadienne de hockey*, 2024 QCCS 1207, aff'd 2024 QCCA 843.

reframe a case on appeal: *Hodge v. Neinstein*, 2017 ONCA 494, 136 O.R. (3d) 81, at para. 194, leave to appeal refused, [2017] S.C.C.A. No. 341.⁶

[67] Recasting on appeal undermines the administration of justice. It deprives appellate courts of the motion judge's expertise and factual findings, forcing appellate judges to make discretionary calls that are better handled at first instance: *Hodge*, at para. 188, citing *Keatley Surveying Ltd. v. Teranet Inc.*, 2015 ONCA 248, 125 O.R. (3d) 447, at para. 45.

[68] Accordingly, fundamental changes on appeal are impermissible. Such changes prejudice defendants, who may have adopted different litigation strategies had the claim originally been framed differently. They also deny appellate courts the benefit of the motion judge's analysis in precisely the circumstances where it is most needed: *Keatley*, at paras. 29, 41; *Harrison v. Afexa Life Sciences Inc.*, 2018 BCCA 165, 9 B.C.L.R. (6th) 271, at paras. 47–48, leave to appeal refused, [2018] S.C.C.A. No. 264.

[69] Here, the proposed recasting is a radical shift, eliminating over 96% of the defendants. This is not comparable to the moderate adjustments permitted in other cases, such as refining a class definition or narrowing a damages theory: *Keatley*, at paras. 29, 43–44, citing *Pearson and Markson v. MBNA Canada Bank*, 2007

⁶ The cases on which the appellants rely do not hold otherwise and instead address unrelated cause of action issues: *Robertson v. Ontario*, 2024 ONCA 86, 170 O.R. (3d) 721, leave to appeal refused, [2024] S.C.C.A. No. 112, and *Boal v. International Capital Management*, 2023 ONCA 840, 169 O.R. (3d) 367.

ONCA 334, 85 O.R. (3d) 321, leave to appeal refused, [2007] S.C.C.A. No. 346. This late-breaking transformation is unfair to the respondents, who might have declined joint representation if the action had originally been limited to the leagues. Because the motion judge never considered this transformed case, it is not the role of the appellate court to make first-instance findings about its manageability or suitability for certification.

(4) Addressing the Motion Judge’s Comments on Preferability

[70] Beyond finding the proposed class action unmanageable, the motion judge made broader observations about systemic negligence class actions and their disadvantages. Although these comments were unnecessary to his decision, I address them briefly to clarify the law.

[71] First, the motion judge failed to recognize the capacity of class actions to overcome social and psychological barriers that prevent victims from seeking justice. In institutional abuse cases, representative plaintiffs can “blaze a trail,” giving others the confidence to come forward despite fear of reprisal. These benefits are especially important in cases of sexual abuse, where victims are particularly vulnerable: *Fischer*, at paras. 27, 29; *L’Oratoire Saint Joseph du Mont Royal v. J.J.*, 2019 SCC 35, [2019] 2 S.C.R. 831, at para. 8, citing *Rumley*, at para. 39. The motion judge discounted these benefits by noting that barriers such as costs liability and public disclosure remain at the individual stage. But those

barriers heighten, rather than diminish, the need for representative leadership: *V.L.M. v. Dominey Estate*, 2023 ABCA 261, 486 D.L.R. (4th) 115, at para. 42.

[72] Second, *Rumley* remains binding precedent, despite the motion judge's suggestion that it should not have been certified. Any reconsideration of its merits lies with the Supreme Court or the legislature, not with lower courts. The same is true for other institutional abuse precedents such as *Cloud* and *Cavanaugh*, which remain good law. While such cases can be distinguished factually — as the motion judge did when addressing manageability — their legal principles continue to govern.

[73] Third, the motion judge erred in stating that the unavailability of aggregate damages bars certification of systemic negligence class actions. There is no such rule. Although the possibility of aggregate damages may strengthen a case for certification, their absence does not defeat it. Many class actions, including *Rumley*, have proceeded without aggregate damages, with individual damages assessed in later proceedings by using the effective tools that the *Class Proceedings Act* provides for this very purpose: *Cassano v. Toronto-Dominion Bank*, 2007 ONCA 781, 87 O.R. (3d) 401, at paras. 60–63; *Spina v. Shoppers Drug Mart Inc.*, 2024 ONCA 642, at paras. 226–235.

[74] Fourth, the motion judge's preference for joinder overlooked its practical limitations. Joinder is rarely suitable for thousands of claimants, as it often

increases costs, delays, and complexity, and risks generating a multiplicity of proceedings. Thus, unless the class is small and claims are high-value, class actions typically remain the superior vehicle: *Fantl v. Transamerica Life Canada*, 2016 ONCA 633, 133 O.R. (3d) 422, at paras. 29-31, leave to appeal refused, [2016] S.C.C.A. No. 448; *Kirk v. Executive Flight Centre Fuel Services*, 2021 BCSC 987, 41 C.E.L.R. (4th) 287, at para. 44, aff'd 2023 BCCA 28, 476 D.L.R. (4th) 672; *Bouchanskaia v. Bayer Inc.*, 2003 BCSC 1306, at paras. 147–49.

G. DISPOSITION

[75] I would dismiss the appeal for the reasons set out above. The appellants shall pay costs to the respondents collectively in the agreed-on amount of \$40,000, on an all-inclusive basis.

Released: September 22, 2025 “M.T.”

“M. Tulloch C.J.O.”
“I agree. David M. Paciocco J.A.”
“I agree. I.V.B. Nordheimer J.A.”