Translated from the original French

Walter c. Quebec Major Junior Hockey League Inc. **2019 QCCS 2334**

SUPERIOR COURT
(class action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-000716-148

DATE: June 27, 2019

PRESIDING: **THE HONOURABLE FRANÇOIS P. DUPRAT, J.S.C.**

LUKAS WALTER
and
THOMAS GOBEIL
Applicants
v.

QUEBEC MAJOR JUNIOR HOCKEY LEAGUE INC.
and
LE TITAN ACADIE BATHURST (2013) INC.
and
CLUB DE HOCKEY JUNIOR MAJEUR DE BAIE-COMEAU INC.
and
CLUB DE HOCKEY DRUMMOND INC.
and
CAPE BRETON MAJOR JUNIOR HOCKEY CLUB LIMITED
and
LES OLYMPIQUES DE GATINEAU INC.
and
HALIFAX MOOSEHEADS HOCKEY CLUB INC.
and
CLUB HOCKEY LES REMPARTS DE QUÉBEC INC.

JD2919

and
LE CLUB DE HOCKEY JUNIOR ARMADA INC.
and
MONCTON WILDCATS HOCKEY CLUB LIMITED
and
LE CLUB DE HOCKEY L'OCÉANIC DE RIMOUSKI INC.
and
LES HUSKIES DE ROUYN-NORANDA INC.
and
8515182 CANADA INC. c.o.b. as CHARLOTTETOWN ISLANDERS
and
LES TIGRES DE VICTORIAVILLE (1991) INC.
and
SAINT JOHN MAJOR JUNIOR HOCKEY CLUB LIMITED
and
CLUB DE HOCKEY SHAWINIGAN INC.
and
CLUB DE HOCKEY JUNIOR MAJEUR VAL D'OR INC.
and
7759983 CANADA INC. c.o.b. as CLUB DE HOCKEY LE PHOENIX
and
9264-8849 QUEBEC INC. c.o.b. as GROUPE SAGS 7-96 and LES SAGUENÉENS

Respondents

CORRECTED JUDGMENT

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[1] **IN VIEW OF** the judgment rendered on June 13, 2019, authorizing a class action;

[2] **IN VIEW OF** the fact that counsel have pointed out to the undersigned that an error occurred when drafting the first authorized common issue, worded as follows:

> [TRANSLATION]
>
> [74] **IDENTIFIES** the following main questions of fact and of law to be dealt with collectively:
>
> (a) Are or were the Class Members employees within the meaning of the applicable employment standards legislation?

[3] **CONSIDERING** that this question should instead read:

> [TRANSLATION]

(a) Were the Class Members employees within the meaning of the applicable employment standards legislation?

[4] **IN VIEW OF** art. 338 C.C.P.;

[5] **FOR THESE REASONS, THE COURT:**

[6] **CORRECTS** the judgment dated June 13, 2019, as follows:

[TRANSLATION]

[74] **IDENTIFIES** the following main questions of fact and law to be dealt with collectively:

(a) Were the Class Members employees within the meaning of the applicable employment standards legislation?

[7] **THE WHOLE WITHOUT COSTS**

FRANÇOIS P. DUPRAT, J.S.C.

Mtre Michel Savonitto
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Date of hearing: December 10, 2018

SUPERIOR COURT
(class action)

CANADA
PROVINCE OF QUEBEC
DISTRICT OF MONTREAL

No.: 500-06-000716-148

DATE: June 13, 2019

PRESIDING: THE HONOURABLE FRANÇOIS P. DUPRAT, J.S.C.

LUKAS WALTER
and
THOMAS GOBEIL
Applicants
v.

QUEBEC MAJOR JUNIOR HOCKEY LEAGUE INC.
and
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Respondents

JUDGMENT ON AN APPLICATION FOR AUTHORIZATION

BACKGROUND

[1] The application for authorization raises the issue of whether amateur hockey players may be considered employees and therefore remunerated.

[2] More specifically, should current and former hockey players in the Quebec Major Junior Hockey League (QMJHL) be viewed as employees and, if so, should they receive the amounts set out under the applicable labour laws of Quebec, Prince Edward Island, New Brunswick, and Nova Scotia?

[3] This is what the application for authorization brought by two former players, Walter and Gobeil, seeks to have recognized.

[4] The defendant QMJHL oversees the organization of the hockey league made up of various teams based in the Province of Quebec and those located elsewhere in Canada, including New Brunswick (the Acadie-Bathurst Titans, Saint John Seadogs, Moncton Wildcats), Nova Scotia (Cape Breton Screaming Eagles, Halifax Mooseheads), and Prince Edward Island (Charlottetown Islanders). All these teams are named

respondents. There are therefore 18 teams in the league, 12 of which are in Quebec, 3 in New Brunswick, 2 in Nova Scotia, and one in Prince Edward Island.[1]

[5] This application takes place in a nationwide context where similar proceedings have now been authorized in Ontario and Alberta concerning, in the first case, the Ontario Hockey League (OHL) and, in the second, the Western Hockey League (WHL).[2] The applicant Walter Lukas is one of the representatives in this second file. The three major junior hockey leagues – QMJHL, OHL, WHL – make up the Canadian Hockey League (CHL).[3]

[6] For the following reasons, the Court is of the view that the application for authorization must be granted because the applicants have shown an arguable case. However, the common issues, classes suggested, and conclusions should be adjusted.

I FACTS AND APPLICATION FOR AUTHORIZATION

[7] Initially, two proceedings were brought in Quebec, one of which included the Lewiston Maineiacs Hockey Club and 9264-8849 Quebec inc. carrying on business as Groupe SAGS 7-96 and the Saguenéens.[4] The Lewiston club is no longer in operation and the parties agreed that it was better to add the Saguenéens team as a defendant to this proceeding, thereby allowing one of the cases to be settled out of court. The Court therefore allowed the amendment and a notice of out-of-court settlement was filed in the other case.[5]

[8] This application seeks authorization to institute a class action on behalf of the following classes:

> (a) All players who are or were members of a team owned and/or operated by one or more of the Respondents in the Province of Quebec (a "team"), or at some point commencing October 29, 2011, and thereafter (Quebec Class);
>
> (b) All players who are or were members of a team owned and/or operated by one or more of the Respondents located in the Province of Prince Edward Island (a "team"), or at some point commencing October 29, 2012, and thereafter, were

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1 Sworn statement dated August 16, 2017, from the commissioner of the QMJHL, Gilles Courteau.

2 *Berg v. Canadian Hockey League*, 2017 ONSC 2608 and *Walter v. Western Hockey League*, 2017 ABQB 382.

3 Supra note 1.

4 File 500-06-000719-142.

5 Here is the wording of that notice dated December 18, 2018: In view of the amendment in Superior Court file no. 500-06-000716-148 by which 9264-8849 Québec inc., doing business as Groupe Sags 7-96 and /or Les Saguenéens, was added as a defendant to the application for authorization to institute a class action, the parties to this proceeding declare that case to be settled out of court, each party paying their costs.
It is hereby expressly recognized that the class members will not suffer any prejudice arising from the amendment and that the suspension of prescription by operation of law (art. 2908 C.C.Q.) in this file may be transposed into Superior Court file no. 500-06-000716-148 with respect to the newly added class members.

> members of a team and all players who were members of a team who were under the age of 18 on October 29, 2012 (the PEI Class); and
>
> (c) All players who are or were members of a team owned and/or operated by one or more of the Respondents located in the Provinces of New Brunswick and Nova Scotia (a "team"), or at some point commencing October 29, 2012, and thereafter, were members of a team and all players who were members of a team who were under the age of 19 on October 29, 2012 (the NB/NS Class).
>
> (d) All players who are or were members of the team operated by 9264-8849 Quebec inc., carrying on business as Groupe Sags 7-96 and/or Les Saguenéens in the Province of Quebec or at some point commencing on November 5, 2011, and thereafter (Quebec Class 2);

[9] Basically, the applicants argue that the QMJHL players must sign a contract with the team they join a league team, which is then approved by the QMJHL, and that they actually become employees of the team for which they play.[6] Whether according to the contract forms used by the League prior to September 2013, or those used since, players must devote 35 to 40 hours per week on average to their team, and often more. This includes time for travel, practices, promotional events, and games. Players do not receive an hourly wage, overtime pay, vacation pay, or compensation for statutory holidays.

[10] The applicants are of the view that the contract imposed by the League on its players is in truth an employment contract and, with respect to the contracts used prior to September 2013, much of the wording referred to an employment relationship (salary, bonus, remuneration, control, management, duty and loyalty).[7]

[11] It is true that after September 2013, the League amended its standard contract, but players still have to perform.[8] They continue to receive a weekly stipend, but it does not represent a real wage.

[12] In short, the applicants believe that the relationship created between the players and the teams is an employment contract. The players should therefore be entitled to the benefits set out under the labour laws, which are of public order and may impose mandatory rules that must be respected in the players' contracts.

[13] Here are the facts alleged by the applicants Lukas Walter and Thomas Gobeil concerning their own situation:

> FACTS GIVING RISE TO INDIVIDUAL ACTIONS BY THE PETITIONERS
>
> *Lukas Walter*
>
> 45 Luke signed a 20 Year Old Contract on or about September 10, 2013, as did the general manager of the team, as it appears from a copy of the Agreement between Lukas Walter and the Saint John Sea Dogs communicated in support

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6 See for example Exhibit R-5. Contract signed by applicant Walter on September 10, 2013, with the Sea Dogs.

7 Exhibit GC-3.

8 Exhibit R-4.

hereof as Exhibit R-5. Luke's contract provided *inter alia* that in exchange for providing the services under the agreement, Luke would receive a fee of $476 weekly for one season commencing September 13, 2013. He would also receive reimbursement of $90 weekly for accommodation expenses. Luke's Contract was approved by the commissioner of the QMJHL on October 6, 2013.

46 Between September 13, 2013 and March 14, 2014, Luke played a total of 53 games as a left wing for the Sea Dogs. As an "enforcer" for the team, Luke was encouraged by his coach to play physically tough hockey and to drop the gloves and fight opponents. During that season, he spent a total of 141 minutes in the penalty box for his physically tough play.

47 On average, Luke devoted about 5-6 hours per day, 6-7 days a week to providing services under the terms of the Contract including practicing, playing games, promoting, and travelling with the team. When the team was required to travel, he would devote longer hours, sometimes up to over 12 hours a day. Although Luke was classified in his Contract as an employee, he did not spend any additional hours or provide any substantively different employment services to the team compared to his teammates, including those Players who were 16-19 years old.

48 Luke's hours varied but on average he supplied about 40 hours of services weekly and in some weeks over 44 hours, up to 65 hours per week.

49 Luke was issued an employment T4 slip prepared by the Sea Dogs for the 2013 tax year, as it appears from a copy of Lukas Walter's 2013 T4 communicated in support hereof as Exhibit R-6. The Sea Dogs made payroll deductions from Luke's wages, including income tax at source, Canada Pension Plan contributions and Employment Insurance premiums. The Sea Dogs also made employer contributions to Employment Insurance and the Canada Pension Plan. According to Luke's T4 Exhibit R-6, Luke earned $8,314.29 in employment income in 2013.

50 Luke was also issued an employment T4 slip prepared by the Sea Dogs for the 2014 tax year, as it appears from a copy of Lukas Walter's 2014 T4 communicated in support hereof as Exhibit R-7. According to this T4, Luke earned $7,028.70 in employment income in 2014.

51 On March 17, 2014, the Sea Dogs prepared a Record of Employment ("ROE") for Luke, using the standard form issued by Human Resources and Skills Development Canada, as it appears from a copy of Lukas Walter's ROE communicated in support hereof as Exhibit R-8. The ROE was provided to Luke and submitted by the Sea Dogs to the Government of Canada. According to the ROE, the employer is listed as the Sea Dogs, the employee is listed as Luke and his occupation is described as hockey player. Luke's total insurable hours was calculated by the Sea Dogs and inserted into the ROE as 1048 hours worked. The Respondent also completed box 6 on the ROE entitled PAY PERIOD TYPE (inserting bi -weekly), box 10 FIRST DAY WORKED (inserting September 13, 2013) and box 11 LAST DAY WORKED (inserting March 14, 2014).

52 The ROE hours worked of 1048 hours amounts to forty hours a week during the six month employment period. Luke pleads his actual hours worked was

much higher and varied each week depending on a number of factors, including traveling.

53 Luke's bi-weekly pay was always the same, no matter how many hours each week he worked for the team. In some weeks, he did not receive a fee equivalent to minimum wage, nor did he receive any vacation pay, holiday pay or overtime pay as required under the Applicable Employment Standards Legislation, even when he worked on holidays or for in excess of 44 hours a week.

Thomas Gobeil

53.1 Thomas Gobeil remembers signing a contract, probably the Former Contract, in 2010 when he joigned the Baie-Comeau Drakkar, but to his recollection, a copy of the contract was never given to him. At that time, Thomas Gobeil was 16 years old.

53.2 During the first year of Thomas Gobeil in the QMJHL, he played a total of 8 games for the Baie-Comeau Drakkar, during his second year, he played a total of 51 games for the Baie-Comeau Drakkar, during his third year, he played a total of 41 games for the Baie- Comeau Drakkar and 23 games for the Chicoutimi Saguenéens, and, during his fourth year, he played 27 games for the Chicoutimi Saguenéens and 5 games for the Val d'Or Foreurs;

53.3 Although Thomas Gobeil was registered in school during his time in the QMJHL, school was not the priority and he was told by coaches and by people in the administration that his " job " was to perform on the ice. In order to do so, Thomas Gobeil devoted about 5- 6 hours per day, 6-7 days a week providing services under the terms of the contract he signed including practicing, playing games, promoting, and travelling with the team. When the team was required to travel, he would devote longer hours, sometimes up to over 12 hours a day.

53.4 Thomas Gobeil's hours varied but on average he supplied about 40 hours of services weekly and in some weeks over 44 hours, up to 65 hours per week.

53.5 During his time in the QMJHL, Thomas Gobeil received bi-weekly paychecks and, each year, he was issued employment T4 slips prepared by the Respondents Club de Hockey Junior Majeur de Baie-Comeau inc., 9264-8849 Québec inc. and Club de Hockey Junior Majeur Val d'Or inc.;

53.6 Also, during his first and second year in the QMJHL, Thomas Gobeil claimed unemployment benefit during summers;

53.7 Thomas Gobeil did not receive a fee equivalent to minimum wage, nor did he receive any vacation pay, holiday pay or overtime pay as required under the Applicable Employment Standards Legislation, even when he worked on holidays or for in excess of 44 hours a week.

Relationship of the Petitioners with the teams

54 Luke's relationship with the Saint John Sea Dogs and Thomas Gobeil's relationship with each of the teams he played for and the contracts they signed were contracts of employment. They were employees of the teams. The facts in support of them being employees and in support of the Class Members being employees are as follows:

(a) Under the Contract and in all dealings with the team, Luke and Thomas Gobeil were subject to the control of the team as to when, where, and how he played hockey;

(b) The QMJHL and the teams determine and control the method and amount of payment;

(c) Luke and Thomas Gobeil were required to adhere to the teams' schedules of practices and games;

(d) The overall work environment between the teams and Luke and Thomas Gobeil was one of subordination;

(e) The teams provided tools, supplied room and board and a benefit package;

(f) The teams made payroll deductions at source;

(g) The teams issued him T4 slips at the end of the playing season;

(h) Luke and Thomas Gobeil were not responsible for operating expenses and did not share in the profits;

(i) Luke and Thomas Gobeil were not financially liable if they did not fulfill the obligations of the Contracts;

(j) The business of hockey belonged to the team - not to Luke or Thomas Gobeil;

(k) The respondents used images of Luke and Thomas Gobeil for their own profit, including, but not limited to selling the use of Luke's image and name to video game companies for use in a video game which Luke purchased at full price with his own money;

(l) The team imposed restrictions on Luke's and Thomas Gobeil's social lives including a curfew that was monitored;

(m) The team directed every aspect of their role as a Players, and the business of the teams was to earn profits;

(n) The T4 slips and ROE establish that the team considered Luke and Thomas Gobeil to be employees and considered the teams to be their employer; and

(o) The 20 Year Old Contract describes the relationship as one of employment.

(p) Thomas Gobeil was able to claim for unemployment benefit during his time in the QMJHL;

55 Luke pleads that the team violated the *Employment Standards Act,* S.N.B. 1982, c.E-7.2, by failing to pay him minimum wages, holiday pay, vacation pay and overtime pay.

55.1 Thomas Gobeil pleads that the teams he played for violated the *Act Respecting Labour Standards,* C.Q.L.R. c. N-1.1., by failing to pay him minimum wages, holiday pay, vacation pay and overtime pay.

56 Luke and Thomas Gobeil claim damages against the Respondents, Saint John Major Junior Hockey Club Limited, Club de Hockey Junior Majeur de Baie-Comeau inc., 9264- 8849 Québec inc. and Club de Hockey Junior Majeur Val d'Or inc. for back wages, overtime pay, vacation pay and holiday pay in accordance with the

Employment Standards Act, S.N.B. 1982, c.E-7.2 and the *Act Respecting Labour Standards,* C.Q.L.R. c. N-1.1. and against all of the Respondents who are jointly and severally liable with the teams for those same damages as a result of the civil conspiracy described below.

[14] Additional evidence was allowed. The statement issued by the League's commissioner, Gilles Courteau, shed some light on the contracts that were used and how the League was organized:

[TRANSLATION]

12. The CHL is affiliated with Hockey Canada, the national organization managing amateur hockey across Canada. Hockey Canada oversees the management of amateur hockey programs in Canada for the teams and tournaments for beginners up to higher levels;

13. Hockey Canada considers the CHL to be an amateur hockey league managed as a development program under the auspices of Hockey Canada, and the CHL teams as offering the highest level of non-professional competitive hockey in Canada;

14. Players may be chosen to play in the CHL starting at 16 years old. Exceptional 15-year-old players may also be eligible to play in the CHL, subject to Hockey Canada's approval, but, to my knowledge, there have been only five players who have received such approval since 2005;

15. Players chosen to play in the CHL are authorized to play in the CHL only if they are no older than 20 years old at the beginning of the season. Each CHL team is authorized to have a maximum of three 20-year-old players and a maximum of four 16-year-old players, the other players are 17, 18, or 19 years old (without a maximum);

16. CHL teams may also have a maximum of two [TRANSLATION] "imported" players (players who come from outside Canada or the United States, generally Europe);

17. In the QMJHL, players may be chosen from Quebec, Nova Scotia, Newfoundland, New Brunswick, Prince Edward Island, and the New England area of the United States, which includes Connecticut, Maine, Massachusetts, Vermont, New Hampshire and Rhode Island;

II. TEAMS AND DIVISIONS

18. Since 2010-2011, QMJHL teams have been separated into three divisions, based on geographical considerations;

19. During the 2010-2011 season, the QMJHL was made up of 18 teams split into three divisions:

Western Division: Olympiques (Gatineau), Club de hockey junior (Montreal), Huskies (Rouyn-Noranda), Foreurs (Val D'Or), Voltigeurs (Drummondville), Cataractes (Shawinigan);

Eastern Division: Remparts (Québec), Océanie (Rimouski), Saguenéens (Chicoutimi), Drakkar (Baie-Comeau), Tigres (Victoriaville) and MAINEiacs (Lewiston);

Maritimes Division: Wildcats (Moncton), Screaming Eagles (Cape Breton), Sea Dogs (Saint John), Rocket (Prince Edward Island), Titan (Acadie-Bathurst), and Mooseheads (Halifax);

20. As stated, the American team, the Lewiston MAINEiacs, which joined the QMJHL in 2003, was dissolved in 2011. That same year, the Club de hockey junior de Montréal was sold and relocated to Boisbriand, and became the Blainville-Boisbriand Armada.

21. During the 2011-2012 season, the QMJLH was made up of 17 teams split into three divisions:

Western Division: Olympiques (Gatineau), Armada (Blainville-Boisbriand), Huskies (Rouyn-Noranda), Foreurs (Val D'Or) and Voltigeurs (Drummondville);

Eastern Division: Remparts (Québec), Océanie (Rimouski), Saguenéens (Chicoutimi), Drakkar (Baie-Comeau), Tigres (Victoriaville) and Cataractes (Shawinigan);

Maritimes Division: Wildcats (Moncton), Screaming Eagles (Cape Breton), Sea Dogs (Saint John), Rocket (Prince Edward Island), Titan (Acadie-Bathurst), and Mooseheads (Halifax);

22. The Sherbrooke Phoenix joined the QMJHL in 2012 so that since the 2012-2013 season, the QMJHL has been made up of the following 18 teams, split into three divisions:

Western Division: Olympiques (Gatineau), Armada (Blainville-Boisbriand), Huskies (Rouyn-Noranda), Foreurs (Val D'Or), Voltigeurs (Drummondville), Phoenix (Sherbrooke);

Eastern Division: Remparts (Québec), Océanie (Rimouski), Saguenéens (Chicoutimi), Drakkar (Baie-Comeau), Tigres (Victoriaville) and Cataractes (Shawinigan);

Maritimes Division: Wildcats (Moncton), Screaming Eagles (Cape Breton), Sea Dogs (Saint John), Rocket (Prince Edward Island) – renamed the Charlottetown Islanders in 2013 –Titan (Acadie-Bathurst), and Mooseheads (Halifax);

23. The regular season extends from September to March over 26 weeks. Each team plays a total of 68 games during the regular season, mainly within its own division;

...

V. ALTERNATIVES TO THE QMJHL

77. There is no other junior hockey league in Quebec that offers players the advantages and benefits currently offered by the QMJHL. For the parents of our amateur athletes, there is no equivalent alternative for their children's development;

78. Men's junior hockey in Canada is divided into several categories based on the quality and level of play, they are: major junior, junior A (in the Maritime provinces) (junior in Quebec), junior B (junior AA in Quebec) and junior C (junior in Quebec);

79. The highest level is major junior hockey, managed by the CHL and the three leagues that make it up;

80. The other levels of men's junior hockey are governed by provincial sports organizations (for example, Hockey Québec, in Quebec, Hockey New Brunswick in New Brunswick, Hockey Nova Scotia in Nova Scotia, and Hockey PEI in Prince Edward Island). None of these organizations offers players at that level any academic support, academic bursaries or resources for players in this respect;

81. The second level is junior A (junior in Quebec), which is governed nationally by the Canadian Junior Hockey League (CJHL). The CJHL supervises 11 leagues across Canada;

VI. APPLICANT LUKAS WALTER

93. During the 2011-2012 and 2012-2013 seasons, Lukas Walter played for a Western Hockey League team, the Tri-City Americans in Kennewick, Washington.

94. At the end of the 2012-2013 season, the Tri-City Americans told Lukas Walter that he probably would not make the team next season. Lukas Walter asked the Tri-City Americans to withdraw his name from the team's protected list so that he could try out for the Portland team, which the Tri-City Americans did. Lukas Walter did go to Portland, but was told after the training camp, that he would not make the team. The Saint John Sea Dogs approached Walter, who agreed to play for them as a 20-year-old player for the 2013-2014 season;

95. With his parents' consent, he chose not to pursue his studies or to avail himself of the academic support or academic bursaries program offered by the QMJHL, as appears from the form he and his parents signed so that he could be excused from attending school, despite the importance the QMJHL places on its players' education, a copy of which is joined to this sworn statement as exhibit GC-2;

96. He no longer plays hockey and, to my knowledge, has decided to work as a butcher with his father in his hometown of Langley, British Columbia;

...

107. Moreover, it should be noted that, contrary to what is alleged in paragraph 9 of the Application for authorization, the contracts disclosed by Walter in support of his Application for authorization as exhibits R-1 and R-2 are not examples of the standard contracts in effect prior to September 2013 ("Former Contracts"). Instead, these are two special agreements, one is a special agreement between a player and the Tigres entered into in September 2008, and the other one is a special agreement between another player and the Mooseheads entered into in June 2010, under which the two players in question negotiated benefits in addition to those offered by the teams to all players. A copy of the French and English versions of the standard contract in effect prior to September 2013 (for the period concerned by the proposed class action, that is, starting in October 2008, is appended to this sworn statement as exhibit GC-3:

[15] Certain exhibits, including the French and English versions of the player contract used until September 2013,[9] the player commitment form for the 2018-2019 season, the

9 Exhibit GC-3.

League's regulation on the players' rights and obligations (2018-2019), the League's school policy for the same period, and a copy of all player contracts as at November 1, 2018, were filed to complete the evidence available at the proceeding.[10] Finally, the examinations of Thomas Gobeil and Lukas Walter were filed.

II CRITERIA FOR AUTHORIZATION

[16] Article 575 C.C.P. sets out the criteria for authorization:

> The court authorizes the class action and appoints the class member it designates as representative plaintiff if it is of the opinion that
>
> (1) the claims of the members of the class raise identical, similar or related issues of law or fact;
>
> (2) the facts alleged appear to justify the conclusions sought;
>
> (3) the composition of the class makes it difficult or impracticable to apply the rules for mandates to take part in judicial proceedings on behalf of others or for consolidation of proceedings; and
>
> 4) the class member appointed as representative plaintiff is in a position to properly represent the class members.

[17] It is established that the Court must, at the authorization stage, act as a filter and authorise applications showing an arguable case. This burden is, overall, not very high and serves primarily to exclude applications that are untenable or frivolous.

[18] In *Asselin c. Desjardins Cabinet de services financiers inc.*,[11] Bich J.A. summarized the interpretation favoured by the courts as follows:

> [TRANSLATION]
>
> 28 Class actions introduced by the *Code of Civil Procedure* are intended to be a social justice tool, but as we know, it does not only have supporters, and its procedural progress is not immune to criticism. The authorization mechanism, in particular, is controversial and some, who deem it to be insufficient, would like to inject greater rigour into the process of assessing the conditions under art. 575 C.C.P. (formerly art. 1003 f.C.C.P.), particularly the conditions of the second paragraph of that provision. There is no doubt that those who espouse this proposition do so out of concern for the proper administration of justice, to avoid "an abuse of the public service provided by the institutions of the civil justice system" (wording borrowed from LeBel J. in *Marcotte v. Longueuil (City)*.
>
> 29 However, as laudable as the intention may be (and it is), such a notion, based on a stringent approach to the conditions for authorization of class actions, does not reflect the state of the law on the matter, as defined by the Supreme Court in *Infineon Technologies AG v. Option consommateurs*, *Vivendi Canada Inc. v. Dell'Aniello* and *Theratechnologies Inc. v. 121851 Canada Inc*. On the contrary, these judgments advocate for a flexible, liberal, and generous approach to the conditions in question, that "favours easier access to the class action as a vehicle

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10 Exhibits D-2, D-3, D-4, and D-5.

11 EYB 2017-286339, 2017 QCCA 1673.

> for achieving the twin goals of deterrence and victim compensation", in accordance with Parliament's wishes.[31] Thus, the applicant need only present an arguable case at the authorization stage, that is, one that has a chance of being successful, without having to establish a reasonable or realistic possibility of success. On this point, the remarks of LeBel and Wagner JJ. in *Infineon* are unequivocal:
>
> > [65] As can be seen, the vocabulary may change from one case to another. But some well-established principles for the interpretation and application of art. 1003 of the C.C.P. can be drawn from the jurisprudence of this Court and of the Court of Appeal. First, as we mentioned above, the authorization process does not amount to a trial on the merits. It is a filtering mechanism. The applicant does not have to show that his claim will probably succeed. Also, the requirement that the applicant demonstrate a "good colour of right", an "*apparence sérieuse de droit*", or a "*prima facie case*" implies that although the claim may in fact ultimately fail, the action should be allowed to proceed if the applicant has an arguable case in light of the facts and the applicable law. [Emphasis by the judge]

[19] The filtering mechanism is exercised through a liberal interpretation of the four criteria of art. 575 C.C.P. To authorize a class action is not an exceptional measure, but a way to access justice to change reprehensible behaviour and to compensate victims. That is what the Supreme Court recalled in *Oratoire Saint-Joseph*:[12]

> [7] At the authorization stage, the court plays a "screening" role: ... . It must simply ensure that the applicant meets the conditions of art. 575 C.C.P. If the conditions are met, the class action must be authorized. The Superior Court will consider the merits of the case later. This means that, in determining whether the conditions of art. 575 C.C.P. are met at the authorization stage, the judge is ruling on a purely procedural question. The judge must not deal with the merits of the case, as they are to be considered only after the application for authorization has been granted: ... .
>
> 8 The Court has given "a broad interpretation and application to the requirements for authorization [of the institution of a class action], and 'the tenor of the jurisprudence clearly favours easier access to the class action as a vehicle for achieving the twin goals of deterrence and victim compensation": ... . In other words, the class action is *not* an "exceptional remedy" that must be interpreted narrowly: ... . On the contrary, it is "an ordinary remedy whose purpose is to foster social justice": ... .
>
> [Citations omitted and emphasis added.]

[20] In fact, the defence accepts that the application probably meets the tests set out under arts. 575(1) and (2) C.C.P. and that the essential issue submitted by the action, whether or not League players are employees according to the applicable labour laws, brings an arguable case.

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[12] *L'Oratoire Saint Joseph du Mont Royal v. J.J.*, EYB 2019-312410, 2019 SCC 35.

[21] The Court is of the opinion here that the applicants have submitted similar or related issues of law in the action they contemplate: all the players, past or present, are likely to have experienced similar events during their time with the League and with their respective teams. As the Court of Appeal stated in *Baratto c. Merck Canada inc.*,[13] it is enough that some issues are sufficiently similar or sufficiently related to justify a class action The issue at the heart of the dispute remains the same: are these players employees and should they receive the protection and benefits set out in the labour laws?

[22] Moreover, the facts alleged by the applicants, at this preliminary stage of the file, and from the perspective of showing an arguable case, appear to *prima facie* justify the conclusions sought. The two first criteria of art. 575 C.C.P. are met. The third criterion of art. 575 C.C.P. touches upon the composition of the class and the application of the rules governing mandates and the joining of actions. The application contains allegations in this respect and, in the absence of any contestation, the Court is of the view that the criterion has been met.[14]

[23] The defence, however, does not accept the proposed class definitions, the wording of the common issues, or the conclusions sought. Finally, Lukas Walter is not, as far as the respondents are concerned, an appropriate representative.

III PROPOSED CLASSES

[24] The defence suggests that a first limitation be placed on the classes proposed by the application for authorization: the Court should take into account the legislative amendments whereby players are excluded from the application of the law after the date these amendments came into force. In short, the classes must be restricted to specific periods of time.

[25] Before going any further, the Court believes that it would useful to immediately refer to the amendments affecting the relevant legislative texts. The provinces in which the teams are based each adopted legislative amendments, at different times, that exclude athletes from the application of the relevant laws. For example, in Quebec, the *Act to amend the Act respecting labour standards and other legislative provisions mainly to facilitate family-work balance* was enacted on June 12, 2018.[15] Thus, since then, the *Act respecting labour standards* does not apply to athletes. Section 3 now states:[16]

> 3. This Act does not apply
>
> ...

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13 *Baratto c. Merck Canada inc.,* EYB 2018-296994, 2018 QCCA 1240 at para. 70.

14 Para. 80 of the application for authorization dated December 18, 2018. See *Lambert (Gestion Peggy) c. Écolait ltée*, 2016 QCCA 659 at para. 58.

15 S.Q. 2018, c. 21. Section 1: Section 3 of the *Act respecting labour standards* (chapter N-1.1 is amended: (1) by replacing "sections 79.7 to 79.16", in paragraph 3 by "section 79.6.1, the first four paragraphs of section 79.7, sections 79.8 to 79015, the first paragraph of section 79.16"; by inserting the following paragraph after paragraph 5:
"(5.1) to an athlete whose membership in a sports team is conditional on his continued participation in an academic program";

16 CQLR, c. N-1.1.

(5.1) to an athlete whose membership in a sports team is conditional on his continued participation in an academic program;

[26] In addition to Quebec, the other provinces have all adopted texts for the same purpose but which do not involve participation in an academic program like the Quebec legislation does. For greater efficiency, the Court cites the history used by the respondents in their written submissions:[17]

[TRANSLATION]

APPLICABLE LEGISLATIVE HISTORY

34. Since the initial applications for authorization were filed, the jurisdictions where the respondents are domiciled, that is, Nova Scotia, New Brunswick, Prince Edward Island, and Quebec, have all enacted legislative clarifications concerning the status of athletes who participate in activities related to their sport, such as the members of the proposed classes, to confirm that employment standards legislation does not apply to them, in whole or in part.

35. In Nova Scotia, the *General Labour Standards Code Regulations* was amended to add section 2(4A), which provides that the following provisions of the *Labour Standards Code* do not apply to athletes while engaged in activities related to their athletic endeavour:

- Sections 32, 33, 34, 35, and 36 (concerning vacation pay);
- Sections 37, 38, 39, 40, 41, 42, and 43 (concerning holidays with pay);
- Sections 50, 51, 53, 54, 55, and 56 (concerning minimum wages);
- Sections 61, 62, 63, 64, 65, 66A, 66B, and 67 (concerning hours of labour);
- Sections 71, 72, 73, 74, 75, 76, 77, and 78 (concerning termination of employment).

36. Furthermore, the *Minimum Wage Order (General)* was amended to add section 2(m) providing that the regulation does not apply to athletes while engaged in activities related to their athletic endeavour.

37. These provisions came into force on July 4, 2016.

38. In New Brunswick, the *General Regulation* was amended to add that sections 2.1, 3(1)(*p*), 3(2)(*c*), and 3.1, which provide that the following provisions of the *Employment Standards Act* do not apply to athletes when participating in activities related to their sport:

- Sections 9 to 17 (concerning minimum wage, hours of work, minimum reporting wage, and weekly rest periods);
- Sections 18 to 22 (concerning public holidays);
- Sections 24 to 26 (concerning vacations); and
- Sections 28 to 34 (concerning unjust dismissal and related unfair employer action, and notice of termination).

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[17] Written submissions of respondents dated December 3, 2018.

39. These provisions came into force on July 28, 2017.

40. In Prince Edward Island, the *Exemption Regulations* were enacted to provide that the following provisions of the *Employment Standards Act* do not apply to athletes while engaged in activities related to their athletic endeavours:

- Section 5 (concerning wages);
- Sections 6 to 15.1 (concerning paid holidays, vacation pay, and hours of work);
- Section 17 (concerning reporting pay); and
- Section 29 (concerning notice of termination).

41. These provisions came into force on October 28, 2017.

[27] In short, for the provinces other than Quebec, and as agreed by the parties, the following dates must be accepted:

Nova Scotia: July 4, 2016

New Brunswick: July 28, 2017

Prince Edward Island: October 28, 2017

[28] Indeed, following these amendments, the applicants concede that it would be appropriate for the Court to close the classes on the dates of the legislative amendments, save for Quebec because the wording of the statute provides for participation in an academic program so that the legislation does not apply to hockey players.

[29] It bears noting that in the past, a QMJHL player could waive the academic program associated with the League by completing an exemption form, if of full age, or through the player's parents in the case of a minor. This is exactly what the applicant Walter chose to do in November 2013 when he had reached the age of majority.[18]

[30] This exemption is no longer available and the League has modified its forms in consequence. The League's school policy aims to promote continuing studies and the League's regulation, amended on June 12, 2018, (the date of the Quebec legislative amendment), states that players must continue their studies if they wish to continue to play for one of the teams.[19]

[31] The applicants suggest that the class concerning players on Quebec teams be left open while the respondents contest that the Court could consider, based on the facts alleged, any such distinction that, in any event, is inappropriate.

[32] The applicants indicate that it would be more prudent to leave the Quebec class open, despite the legislative amendment, to verify whether belonging to a team is truly conditional on participation in an academic program. In short, to verify whether the League and the teams are complying with the law.

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[18] Exhibit GC-2.

[19] Exhibits D-4 and D-3, s. 1.2.

[33] The defence argues that there are no allegations in the application for authorization that refer to any such situation, that is, non-compliance with the legislation in force since June 2018. On the contrary, the players' contracts, their commitment forms for the 2018-2019 season, the League's regulation on the rights and obligations (2018-2019), and finally, the League's school policy establish that the player cannot play in the League if he is not enrolled in the academic program.[20]

[34] In short, none of the facts alleged or adduced into evidence by the exhibits justify that the Quebec class remain open beyond the date of the legislative amendment, June 12, 2018. In the end, there is nothing to allow the Court to keep the class open based on the hypothesis that the Quebec statute, as amended, is not complied with and the application for authorization does not support that argument.

[35] The Court takes note of the remarks of Bisson J. in *Abicidan c. Bell Canada*:[21]

> [TRANSLATION]
>
> 105 The definition of the class must also generally have a closing date, the class cannot remain [TRANSLATION] "indefinitely open" and cannot generally be closed on a date that is subsequent to the judgment that defines it. In this case, the colour of right is that the marketing, distribution, and sales practices of Bell Canada continue to this day. Furthermore, a permanent injunction is sought to put an end to these practices. Does that mean that the group must remain open? The Court does not believe so.

[36] To conclude on this aspect, the Court is of the view that classes must be closed according to the dates of the legislative amendments in the various provinces.

[37] The defence also submits an opening date for the Quebec classes that takes into consideration the prescription set out under s. 115 of the *Act respecting labour standards*:[22]

> 115. A civil action brought under this Act or a regulation is prescribed by one year from each due date.

[38] In fact, the defence is of the opinion that the Quebec class should not be opened before October 29, 2013, and the second class before November 5, 2013, because any claims existing before these dates are prescribed.

[39] The Court accepts that, at the authorization stage, the question of prescription must be carefully weighed and be admitted only when the action is *prima facie* prescribed.[23]

[40] Without denying the possibility that some of the actions may be prescribed, the applicants are of the view that a second cause of action is proposed in its application for authorization, that is, the existence of a conspiracy between the respondents, which the Court will address later in this judgment. According to the applicants, this fault is subject

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20 *Supra* note 9.
21 2017 QCCS 1198, EYB 2017-277942.
22 *Supra* note 15.
23 *Marineau c. Bell Canada,* EYB 2015-256748, 2015 QCCA 1519, J.E. 2015-1577 at para. 6.

to the general 3-year prescription and it is therefore inappropriate at the authorization stage to circumscribe the Quebec classes according to the prescription in the *Act respecting labour standards*.[24] The Court agrees: insofar as different causes of action might be accepted, it is not desirable to limit the class in time and the trial judge will be able to sort things out according to the evidence accepted.

IV COMMON ISSUES SUBMITTED

[41] The most recent version of the application for authorization and the former versions offer several causes of action.[25] First, breach of the legislative provisions concerning employment, more specifically, that the players' contracts used until the legislative amendments violate the legislation and must be considered null.

[42] Second, the application refers to a conspiracy between the League and the various teams, and basically alleges that the respondents knew that the contracts between the teams and the players were unlawful. According to the application, the League and the teams both knew that they were not complying with the legislative provisions. The purpose was obviously so that the teams could avoid paying minimum wage and support everything connected with the presence of an employment relationship.

[43] For a better understanding, the Court reproduces below the causes of action to which the application for authorization refers:

> Breach of Statute/Statutory Cause of Action
>
> 58 The Clubs entered into Contracts with the Class Members. Under the Contracts, the Class Members agreed to provide employment services to the Clubs in exchange for some remuneration.
>
> 59 The Clubs entered into an employer/employee relationship with the Class Members.
>
> 60 All Class Members devote an average of 35-40 hours weekly and in some instances up to 65 hours weekly to employment related services without being compensated on an hourly basis at prescribed minimum wage rates. Therefore, the Contracts violate the rights of the Players under the Applicable Employment Standards Legislation with respect to minimum wages, vacation pay, holiday pay, and overtime pay.
>
> 61 All Applicable Employment Standards Legislation also provides that any term of an employment contract that violates statutorily prescribed minimum wages, vacation pay, holiday pay, and overtime pay is void and unenforceable. By way of example, in Quebec, section 93 of the *ARLS* provides that "[i]n an agreement or decree, any provision that contravenes a labour standard or that is inferior thereto is absolutely null".
>
> 62 Therefore, the terms of the Contracts requiring Players to perform all employment related services for a fixed weekly sum are null. The Players are

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[24] *9231-1604 Québec inc. c. Ventilation du Phare inc.*, 2016 QCCS 1119, see paras. 85 to 83.

[25] The last version of the application is dated December 18, 2018, and groups together the applications in files 500-06-000716-148 and 500-06-000719-142. See note 5.

entitled to be compensated at statutory minimum hourly wage rates in the Province or State where the Player was employed for back wages, and back overtime pay, and back holiday pay, and back vacation pay.

63 The Clubs are therefore liable to the Petitioners and Class Members for back wages at minimum wage levels, overtime pay, holiday pay, and vacation pay, in accordance with the Applicable Employment Standards Legislation.

...

Conspiracy

67 The Petitioners claim that the Respondents unduly, unlawfully, maliciously, and lacking *bona tides,* conspired and agreed together, the one with the other, to act in concert to demand or require that all players sign a Contract which the Respondents knew was unlawful. The Respondents knew or recklessly disregarded the fact that the relationship between the Club and Class Members was one of employer/employee, and as such the Contracts contravened employment standards legislation, yet required the Contracts be signed so as to avoid paying the Petitioners and Class Members minimum wages, vacation pay, holiday pay or overtime pay.

68 The Clubs and the QMJHL have access to legal opinions, judicial decisions, employment tribunal directives and decisions, and Canada Revenue Agency bulletins on the criteria for determining whether the Player/Team relationship is one of independent contractor, student athlete, or employment. The Respondents are well aware that the fees paid to the Players under the Contracts probably violate employments standards legislation and are well aware of the jurisprudence where Courts have construed the relationship between the Players and the Clubs as an employer/employee relationship. The Respondents make or direct that the Clubs make employee payroll deductions and remit them in their capacity as employer to government agencies.

69 The QMJHL controls the terms of the Contracts by requiring that the Clubs use only the standard form contract and by making each and every Contract conditional on approval by the QMJHL. The amount of fees received by the Players is set by the QMJHL and pursuant to QMJHL's bylaws and the Regulation; hence the QMJHL has unlawfully set the wages below the minimum legislated standards. The QMJHL directs that the Clubs must insist that Players sign the Contract as a condition of playing in the QMJHL.

70 The Clubs know, or ought to know, that the Contracts are unlawful pursuant to the Applicable Employment Standards Legislation, including the *ARLS,* but have agreed and conspired with the QMJHL to use the Contracts and the Contracts only. The conspiracy between the QMJHL and the Clubs occurred in Quebec and continues to occur in Quebec where the head office of the QMJHL is located.

71 The Respondents were motivated to conspire, and their predominant purposes and concerns were to continue operating the QMJHL without incurring costs that were to be lawfully paid by the Clubs to the Petitioners and the Class Members in the form of minimum wages, overtime pay, holiday pay and vacation pay.

> 72 The conspiracy was unlawful because the Respondents knowingly caused the Petitioners and Class Members to enter into an unlawful contract and agree to receive wages in contravention of the Applicable Employment Standards Legislation and because the Respondents deliberately attempted to circumvent the Legislation by inaccurately characterizing the status of the Players as student athletes in 2013 and, also in 2013, by inaccurately characterizing the fees payable to the players as an allowance. The Respondents knew that such conduct would more likely than not cause harm to the Petitioners and the Class Members.
>
> 73 The acts in furtherance of the conspiracy caused injury and loss to the Petitioners and other Class Members in that the Players' statutory protected right to fair wages were breached and they did not receive minimum wages, vacation pay, holiday pay or overtime pay that was owed to them as lawfully required under the Applicable Employment Standards Legislation.
>
> 74 As a result of the conspiracy, which was committed by all Respondents together, all of the Respondents are jointly and severally liable for all monies owing to the Petitioners and the Class Members under the Applicable Employment Standards Legislation regardless of which team employed the Class Member.

[44] Thus, the application identifies four common issues:

> (a) Are, or were, the Class Members employees within the meaning of the Applicable Employment Standards Legislation?
>
> (b) Did any or all of the Respondents conspire to require the Class Members to agree to the Contracts, and the Contracts only, which they knew were unlawful? If so, when, where, and how?
>
> (c) Is this an appropriate case for the Respondents to disgorge profits?
>
> (d) Are the Respondents liable for punitive damages?[26]

[45] The defence raises the argument that the cause of action based on conspiracy does not exist in Quebec civil law, that it is a notion rooted in common law. To illustrate its argument, the defence refers the Court to the Ontario pleadings that include the conspiracy argument. They argue that non-compliance with labour legislation represents the only argument necessary for the purpose of the application for authorization of a class action.

[46] According to the defence, the Court cannot accept, even at the authorization stage, the allegations quoted above touching upon conspiracy between the teams and the League because they are not supported by any specific fact. They cite *Infineon*, by the Supreme Court, to support that argument:[27]

> 133 On the nature of the specific allegations in the instant case, we agree with the Court of Appeal's conclusion that the respondent has presented an arguable case

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[26] Application for authorization dated December 18, 2018 at para. 81.

[27] *Infineon Technologies AG v. Option consommateurs*, EYB 2013-228582, [2013] 3 S.C.R. 600, 2013 SCC 59.

> of loss that is sufficient to meet the requirements of art. 1003(*b*) C.C.P. As we mentioned above, the respondent alleged the following in its motion for authorization: (a) a price-fixing conspiracy had artificially inflated the price of DRAM sold in Quebec (para. 2.14); (b) direct and indirect purchasers of DRAM had collectively overpaid as a result of this anti-competitive conspiracy (paras. 2.15 and 2.15.1); (c) all members of the group had assumed the inflated portion of the price, either in whole or in part (para. 2.16); and finally (d) the collective injury suffered by the entire group was equivalent to the total overpayment by the direct and indirect purchasers (para. 2.17).
>
> [134] On their own, these bare allegations would be insufficient to meet the threshold requirement of an arguable case. Although that threshold is a relatively low bar, mere assertions are insufficient without some form of factual underpinning. As we mentioned above, an applicant's allegations of fact are assumed to be true. But they must be accompanied by some evidence to form an arguable case. The respondent has provided evidence, limited though it may be, in support of its assertions, namely the exhibits attesting to the existence of a price-fixing conspiracy and to the international impact of that conspiracy, which had been felt in the United States and Europe. At the authorization stage, the apparent international impact of the appellants' alleged anti-competitive conduct is sufficient to support an inference that the members of the group did, arguably, suffer the alleged injury.
>
> [Emphasis added.]

[47] Respectfully, the Court does not agree with this argument. The allegations, particularly those found in paragraphs 68 to 72, are sufficiently specific to support the idea that the League and the teams acted knowingly precisely to avoid the consequences arising from an employer-employee relationship. At trial, the judge may determine the value of the evidence on this subject.

[48] It is not accurate to state that these facts do not add anything to the debate. If the teams and the League failed to comply with the applicable legislation, it is one thing, but if, in addition, the non-compliance was sought-after and deliberate, that is another aspect that could, for example, influence the outcome of the proceedings and the assessment of punitive damages. To act in such a way as to avoid the application of legislation, public order legislation in this case, is a civil fault and at this stage the Court must take the allegations on this subject as proved.[28]

[49] In short, the Court is of the view that the issue submitted, with respect to the existence of a conspiracy between the League and the teams, is relevant and that the allegations in this respect are sufficiently specific and detailed. In *Asselin*,[29] Bich J.A. recalled the following with respect to the quality of allegations:

> [TRANSLATION]
>
> 33 On the one hand, while it may be true that we should not be content with vague, general, and imprecise allegations, we cannot ignore allegations that, while not

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28 *Option Consommateurs c. LG Chem Ltd.*, EYB 2017-283072, 2017 QCCS 3569 at paras. 13 to 20.

29 *Supra* note 11.

> perfect, have a real meaning that is nonetheless clear. It is therefore necessary to know how to read between the lines. To do otherwise would be to show unjustified sticklerism or literalism and attribute the remarks of the Supreme Court on the matter a meaning they do not have.

[50] At this stage of the proceedings, the applicants do not need to show on a balance of probabilities the existence of a conspiracy and the allegations are sufficient to justify its inclusion in the common issues.

[51] Let us now discuss the issue concerning disgorgement of the profits drafted as follows: "Is this an appropriate case for the Respondents to disgorge profits?" This question was not addressed at the hearing and the Court was informed that it has been withdrawn. However, it is still in the authorization pleading, as amended and sent after the hearing. The Court will therefore address it briefly.

[52] The following paragraph of the application sets forth this element:

> 77. The Petitioners seek on their own behalf, and on behalf of the Class, an order that all Respondents must disgorge all profits that the Respondents generated as a result of benefitting from breaches of Applicable Employment Standards Legislation and the conspiracy.

[53] It is difficult at first glance to reconcile the nature of the proceeding, that is, breach of the applicable legislation and the claim arising therefrom – the payment of a wage, other benefits, and punitive damages – with an application for disgorgement of all profits earned by the teams during the corresponding period of time.

[54] A first remark: there is no factual allegation to support the idea that the teams must disgorge the profits, if any. The Court is well aware that it must avoid weighing the value of arguments that might be developed on the merits of the dispute, but still, there must exist a factual basis for the question submitted. On this subject, the application is woefully short on detail and there are no legislative labour provisions setting out any such consequence.

[55] Moreover, the principle of proportionality of judicial debates calls for prudence:[30] to allow the issue would open the door to a completely different dispute, that is, the question of profits that may, or may not, have been reaped, and, if applicable, the effect failing to comply with the legislation may have had. In short, the Court finds that the issue must not be included in the debate.

[56] In the application, the issue touching upon a claim for punitive damages is described as follows:

> Punitive Damages
>
> 78. The Petitioners seek on their own behalf, and on behalf of members of the Class, punitive damages for the Respondents' conduct in violating the Applicable Employment Standards Legislation while they were aware that certain terms of the Contracts were probably void. The Respondents were lax, passive, ignorant with

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30 *Charest c. Dessau inc.,* EYB 2014-236797, 2014 QCCS 1891, J.E. 2014-990, see para. 29(*g*).

> respect to the Petitioners and Class Members' rights and to their own obligations; displayed ignorance, carelessness, and serious negligence; and such conduct was high-handed, outrageous, reckless, wanton, deliberate, callous, disgraceful, willful and in complete disregard for the rights of the Petitioners and Class Members.
>
> 79. The Petitioners plead that only a punitive damages award will prevent the Respondents from continuing their unlawful conduct as particularized herein.

[57] In their written submissions, the applicants argue that the respondents' conduct was contrary to s. 46 of the *Charter*.[31] The argument touches upon the possibility that, on the merits, the application may establish concerted conduct by the League and the teams whereas the defence disputes the notion that there was any conspiracy. The Court is of the opinion that at this stage, the issue will be decided following a hearing. The Court, however, agrees that the question must be reworded as suggested by the defence.

[58] In the end, the Court therefore accepts the following common issues:

> (a) Are, or were, the Class Members employees within the meaning of the Applicable Employment Standards Legislation?
>
> (b) Did any or all of the Respondents conspire to require the Class Members to agree to the Contracts, and the Contracts only, which they knew were unlawful? If so, when, where, and how?
>
> (c) Are the class members entitled to punitive damages?

V JURISDICTION OF ACTION SOUGHT

[59] The application seeks authorization for a class action covering many provinces including Quebec, New Brunswick, Nova Scotia and Prince Edward Island. It is true that the same issues are involved even though the applicable legislation is obviously different. At first glance, there is nothing to prevent a class action grouping several provinces together. The Court will first question its jurisdiction to hear the case. Article 3148 C.C.Q. states:

> 3148. In personal actions of a patrimonial nature, Québec authorities have jurisdiction in the following cases:
>
> (1) the defendant has his domicile or his residence in Québec;
>
> (2) the defendant is a legal person, is not domiciled in Québec but has an establishment in Québec, and the dispute relates to its activities in Québec;
>
> (3) a fault was committed in Québec, injury was suffered in Québec, an injurious act or omission occurred in Québec or one of the obligations arising from a contract was to be performed in Québec;
>
> (4) the parties have by agreement submitted to them the present or future disputes between themselves arising out of a specific legal relationship;

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[31] *Charter of human rights and freedoms*, CQLR, c. C-12.

(5) the defendant has submitted to their jurisdiction.

However, Québec authorities have no jurisdiction where the parties have chosen by agreement to submit the present or future disputes between themselves relating to a specific legal relationship to a foreign authority or to an arbitrator, unless the defendant submits to the jurisdiction of the Québec authorities.

[60] In this case, the QMJHL and 12 of the 18 defendant teams are domiciled in Quebec. Moreover, the contract used by the parties, whether it be the one before or after 2013, includes a forum selection clause in favour of Quebec courts.[32] At first glance, the Superior Court therefore has jurisdiction. It is possible, however, that the hearing on the merits will involve an analysis of the legislation that applies in the Maritimes.

[61] The Court of Appeal in *Union des Consommateurs c. Bell Canada*[33] issued certain principles affecting a multijurisdictional action, and the existence of one or more different legal schemes does not constitute a bar to the action insofar as the diversity of schemes does not cancel the usefulness of a class action:

[TRANSLATION]

120 As is often the case in these matters, each case is different from the next. It is, in every case, a question of determining whether the fact that the action is subject to several legal schemes causes the class action to lose its collective nature. It is not enough to note that the members' remedies are subject to two or more legal schemes, it is necessary to determine whether these schemes are substantially different from each other. The fact that an action is subject to more than one legal scheme certainly risks complicating the matter, but it should not, in itself, constitute a bar to authorizing the class action unless the various schemes include significant differences to the point of causing the action to lose its collective nature.

...

123 According to the allegations of the application and the evidence, the respondent's Ontario subscribers signed the same service contract as those from Quebec and are subject to the same traffic shaping measures; therefore, at first glance, their action raises the same identical, similar or related questions as those concerning Quebec subscribers, despite the possibility that they may be subject to a different legal framework.

124 In my view, any other conclusion would mean that in Quebec an application for authorization to institute a class action on behalf of a group of consumers from different provinces would necessarily be bound to fail under art. 1003(*d*) C.C.P. This situation appears undesirable to me in a global economic context that allows consumers across the country, including Quebec consumers, to enter into identical agreements with a single merchant.

125 In fact, without being an expert in comparative law or in Ontario law, it seems reasonable to assume, for the moment at least and until proved otherwise, that consumer law is not so very different from one Canadian province to the next, on

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32 Exhibits GC-3, clause 13.3 and R-4, schedules A and B.

33 2012 QCCA 1287. Application for leave to appeal to SCC refused, 34994 (17 January 2013).

> the essence at least. Taking up the criticisms made by the appellant against the respondent, it appears reasonable to me to believe that Canadian legislation from shore to shore, whatever the province, prohibits a merchant, under pain of civil and criminal sanction, or both, from providing a service that does not significantly correspond to the contractual description made, to offer and sell a product under false or misleading representations, or by failing to disclose important and relevant facts to the purchaser with respect to the purchase under consideration, and finally, to violate the right to privacy of its customers.
>
> [Emphasis added.]

[62] In *Vivendi*,[34] the Supreme Court expressed itself as follows with respect to the difficulty brought forward by these different schemes:

> 62 However, the fact that the employees worked in six different provinces is not in itself a bar to the authorization of the class action. In a class action, the court can accept proof of the law applicable in the common law provinces or take judicial notice of that law: art. 2809 C.C.Q. Only substantial differences between the applicable legal schemes would cause a class action to lose its collective nature: *Union des consommateurs* (2012), at paras. 120 and 123.
>
> 63 In the case at bar, the fact that members of the group live in different Canadian provinces should not prevent the court from authorizing the class action. There are common questions in the claims of the members of the proposed group with respect to the legality or the validity of the 2009 amendments.

[63] The applicants rightly point out that at first glance, the legislation of the Maritimes does not appear very different from Quebec law concerning the notion of employee:[35]

> [TRANSLATION]
>
> 30. Indeed, the definition of employee in the *Employment Standards Act* of Prince Edward Island is as follows:
>
> 1. Definitions
>
> ...
>
> (c) "employee" means a person who performs any work for or supplies any services to an employer for pay, and includes
>
> (i) a person who is on leave from an employer,
>
> (ii) a person who is being trained by an employer to perform work
>
> for or supply services to the employer, or
>
> (iii) a person who was an employee;
>
> 31. The New Brunswick *Employment Standards Act* offers the following definition of employee:

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[34] *Vivendi Canada Inc. v. Dell'Aniello,* EYB 2014-231631, 2014 SCC 1, J.E. 2014-124.

[35] Notes and authorities of the applicants from November 2018.

> 1. Definitions ... "employee" means a person who performs work for or supplies services to an employer for wages, but does not include an independent contractor;
>
> 32. As for Nova Scotia, the *Labour Standards Code* provides that an employee is, within the meaning of that statute:
>
> 2. In this Act, ...
>
> (d) "employee" means a person employed to do work and includes a deceased employee but does not include a teacher employed by Her Majesty, the Minister of Education, an education entity as defined in the Education Act, or other employer, to teach, supervise or administer in a public school, a school established or maintained under the Education Act or in a school system;
>
> (e) "employed means a person, firm, corporation, agent, manager, representative, contractor or subcontractor having control or direction of or being responsible, directly or indirectly, for the employment of any employee;

[64] Ultimately, the Court finds that it is appropriate, and even desirable, for the class action to include the teams from the Maritimes. This respects one of the end goals of the class action, that is, access to justice and does not create such a great difficulty that the action would lose its collective nature.

VI CAPACITY OF THE REPRESENTATIVE LUKAS WALTER

[65] The defence argues that Walter does not have the capacity to act as representative plaintiff because his examination showed disinterest in or poor knowledge of the case. They also point out that he is not a Quebec resident, but lives in British Columbia.

[66] It is true that a reading of Walter's examination reveals a certain confusion on his part between the various proceedings in Quebec and Alberta.[36] That being said, the Court is not convinced that Walter does not meet the minimum threshold required. He understands the basic nature of the action and has the advantage of having played in two leagues (QMJHL and WHL), as well as having played in the QMJHL as a 20-year-old player.[37] In *Sibiga*, Kasirer J.A. recalled that the threshold to be met to be a representative plaintiff is minimal:[38]

> 108 It is best to recognize, as does the appellant herself in written argument, that she may not have a perfect sense of the intricacies of the class action. This is not, however, what the law requires. As one author observed, Quebec rules are less strict in this regard that certain other jurisdictions: not only does the petitioner not have to be typical of other class members, but courts have held that he or she "need not be perfect, ideal or even particularly assiduous". A representative need not single-handedly master the finery of the proceedings and exhibits filed in support of a class action. When considered in light of recent Supreme Court decisions where issues were equally if not more complicated, this is undoubtedly correct: in *Infineon*, for example, the consumer was considered a competent

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36 Examination from September 21, 2017.

37 See paragraph 13 of this judgment.

38 *Sibiga v. Fido Solutions inc.*, EYB 2016-268978, 2016 QCCA 1299, J.E. 2016-1461.

> representative to understand the basis of a claim for indirect harm caused down the chain of acquisition for the sale of computer memory hotly debated by the economists; in *Vivendi*, the issue turned on the unilateral change by the insurer of in calculations of health insurance benefits to retirees and their surviving spouses; in *Marcotte*, the debate centered on currency conversion charges imposed by credit card issuers. It would be unrealistic to require that the representative have a perfect understanding of such issues when he or she is assisted, perforce, by counsel and, generally speaking, expert reports will eventually be in the record to substantiate calculations of what constitutes exploitative roaming fees.
>
> 109 To my mind, this reading of article 1003(d) makes particular sense in respect of a consumer class action. Mindful of the vocation of the class action as a tool for access to justice, Professor Lafond has written that too stringent a measure of representative competence would defeat the purpose of consumer class actions. After reviewing the law on this point, my colleague Bélanger, J.A. observed in *Lévesque v. Vidéotron, s.e.n.c.*, a consumer class action, that article 1003(d) does not impose an onerous burden to show the adequate character of representation: "[c]e faisant, la Cour suprême envoie un message plutôt clair quant au niveau de compétence requis pour être nommé représentant. Le critère est devenu minimaliste". In *Jasmin v. Société des alcools du Québec*, another consumer action, Dufresne, J.A. alluded to the *Infineon* standard and warned against evaluations of the adequacy of representation that are too onerous or too harsh, echoing an idea also spoken to by legal scholars.

[67] It bears noting that in *Infineon*, the Supreme Court stated that "[n]o proposed representative should be excluded unless his or her interest or competence is such that the case could not possibly proceed fairly".[39]

[68] In short, the Court is of the view that Walter is an appropriate representative according to the interpretation given by the courts to art. 575(4) C.C.P. The Court comes to the same conclusion with respect to Gobeil, his quality not having been contested.

VII CONCLUSIONS

[69] The Court concludes that the applicants have presented an arguable case. The main issue raised by the proposed action, whether the players have an employee/employer relationship with the League and the teams, has been *prima facie* established. The proposed action meets the criteria of art. 575 C.C.P. The defence, however, is right to request that the classes be defined according to the applicable legislation.

[70] **FOR THESE REASONS, THE COURT:**

[71] **GRANTS** the application for authorization brought by the applicants Lukas Walter and Thomas Gobeil and dated December 18, 2018;

[72] **AUTHORIZES** the class action, that is, an action in damages;

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[39] *Supra* note 26 at para. 149.

[73] **APPOINTS** the applicants as representatives for the purpose of instituting the class action on behalf of the class made up of the natural persons hereinafter described:

(a) All players who are or were members of the team owned and/or operated by one or more of the Respondents in the Province of Quebec (a "team"), or at some point commencing October 29, 2011, until June 12, 2018, (Quebec Class); and

(b) All players who are or were members of the team operated by 9264-8849 Quebec inc., carrying on business as Groupe Sags 7-96 and/or Les Saguenéens in the Province of Quebec or at some point commencing November 5, 2011, until June 12, 2018 (Quebec Class 2); and

(c) All players who are or were members of a team owned and/or operated by one or more of the Respondents located in the Province of New Brunswick (a "team"), or at some point commencing October 29, 2012, until July 28, 2017, (the NB Class); and

(d) All players who are or were members of a team owned and/or operated by one or more of the Respondents located in the Province of Prince Edward Island (a "team"), or at some point commencing October 29, 2012, until October 28, 2017, (the PEI Class);

(e) All players who are or were members of a team owned and/or operated by one or more of the Respondents located in the Province of Nova Scotia (a "team"), or at some point commencing October 29, 2012, until July 4, 2016, (the NS Class);

[74] **IDENTIFIES** the following main questions of fact and of law to be dealt with collectively:

(a) Are, or were, the Class Members employees within the meaning of the applicable employment standards legislation?

(b) Did any or all of the Respondents conspire to require the Class Members to agree to the Contracts, and the Contracts only, which they knew they were unlawful? If so, when, where, and how?

(c) Are the Class Members entitled to punitive damages?

[75] **IDENTIFIES** the conclusions sought in relation to those issues as:

GRANTS the applicants' class action;

DECLARES that the respondents are liable to the class members for the following:

(a) breach of the applicable employment standards legislation, and;

(b) conspiracy;

CONDEMNS the respondents to pay the class members the amount of $50 million, or any other amount the Court may grant;

ORDERS, if possible, that the individual claims of the members be subject to collective recovery or, in the alternative, **ORDERS** that the individual claims of the members be subject to individual recovery in accordance with arts. 599 to 601 C.C.P.

THE WHOLE with interest and the additional indemnity set out in the *Civil Code of Québec* with the expert fees, cost of publishing the notice to class members and the administrative fees of a distribution plan for any recovery in this class action;

[76] **DECLARES** that unless they have opted out, class members will be bound by any judgment rendered on the class action, in the manner set out under the law;

[77] **DETERMINES** the time limit for opting out at thirty (30) days from the date on which the notice to members is published, after which date the members of the class who have not availed themselves of the means of opting out will be bound by any judgment to be rendered;

[78] **ORDERS** the parties to submit to the Court, within 45 days of this judgment, a joint draft of the complete text of the notice to members, in French and English, and **POSTPONES** the issue of publishing the notice to members, including its contents, to the next case management conference.

[79] **THE WHOLE** with costs, including the fees required to publish the notice to members following the authorizing judgment.

FRANÇOIS P. DUPRAT, J.S.C.

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Date of hearing: December 10, 2018