

THE GR COURT DOCKET

September 13, 2021

Sports law and the Competition Act

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Sports law is not just about representing athletes in their contract negotiations with teams, providing advice and legal services on marketing agreements for amateur or professional athletes or representing businesses engaged in the operation of sports facilities. Among other things, sports law also includes issues related to competition law. In Canada, the [Competition Act](#) contains specific provisions dealing with sports. [Section 6\(1\)](#) of the Act expressly states that the legislation does not apply to amateur sport, which is defined under [section 6\(2\)](#) as a sport in which the participants receive no remuneration for their services as participants (This, of course, begs the question of what is "remuneration"). Meanwhile, section 48(1) specifically deals with conspiracy relating to professional sport.

In the recent case of [Mohr v. National Hockey League, 2021 FC 488](#), the court was required to consider the scope of [sections 48\(1\)](#) and [45](#) of the Act in connection with a motion to strike a class action claim brought against a number of professional sport leagues. and the representative plaintiff's motion to amend the statement of

claim to add 148 new defendants to the action. The amended claim referred to multiple alleged illegal agreements and added particulars about various issues, including remuneration, player restrictions and benefits obtained by clubs and leagues within the hockey hierarchy. There were also new requests for declaratory and injunctive relief and remedies justified by certain non-criminal provisions situated in Part VIII of the Act.

The class action was brought on behalf of all major junior hockey players who signed a standard player agreement ("SPA") with the defendant hockey leagues. At its core, the claim alleged that the defendant leagues conspired to limit unreasonably the opportunity of class members to negotiate and play with teams in the respective leagues and that the defendants conspired to impose unreasonable terms and conditions on the class members, which included the imposition of "nominal wages" and "the loss of rights to market their image, sponsorship and endorsement opportunities." The claim sought damages for conspiracy in the amount of \$825 million.

With respect to the motion to amend pleadings, the defendants argued that the amendments disclosed no reasonable cause of action, that it was an abuse of process, that it was frivolous and vexatious, and that it would not survive a motion to strike under [Rule 221 of the Federal Court Rules](#). The defendants also argued that it was plain and obvious that section 48 of the Act did not apply to them because the section only applied to intra-league agreements and arrangements between or among “teams and clubs” and that the claim could not be cured by the proposed amendments, which pleaded the general conspiracy provisions under [s. 45](#) of the Act.

With respect to the original (unamended) claim, the defendants contended that the single allegation of conspiracy did not disclose a reasonable cause of action for the purposes of the rules.

The court agreed with the defendants’ arguments concerning the scope of sections [45](#) and [48](#) of the Act. Accordingly, the motion to strike the claim was granted and the motion to amend pleadings was dismissed.

[Section 45\(1\)](#) of the Act provides that every person commits an offence who, with a competitor of that person with respect to a product, conspires agrees or arranges:

- (a) to fix, maintain, increase or control the price for the supply of the product;
- (b) to allocate sales, territories, customers or markets for the production or supply of the product; or
- (c) to fix, maintain, control, prevent, lessen or eliminate the production or supply of the product.

The court found that [section 45\(1\)](#) only applied to “competitors” who enter into a conspiracy,

agreement or arrangement concerning either the “supply” or the “production or supply” of the product in respect of which they compete. The leagues and hockey organizations named as defendants, which included Hockey Canada, were not “competitors” of each other “with respect to a product” or the “production or supply” of a product. The court explained that the class action involved the “offering” of services by athletes to hockey teams, who then “acquired” those services. Under the general principles of statutory interpretation, the offering services and the acquisition thereof simply did not fall within the scope of [section 45 of the Act](#).

The court found that the legislative history of the Act also supported the argument that [section 45](#) did not apply to the SPAs, which were essentially “purchasing agreements”, and rejected a broad interpretation for the section, as contended by the representative plaintiff. With respect to the latter argument, the court commented that even if a broad interpretation was permitted, the penal nature of the section entitled the defendants to benefit of any ambiguity based on [R. v. McLaughlin, 1980 CanLII 212 \(SCC\)](#) and [R. v. McIntosh, 1995 CanLII 124 \(SCC\)](#).

[Section 48](#) of the Act also did not apply to the representative plaintiff’s amended claim or original claim. As set out in [s. 48\(3\)](#), section 48:

...applies, and section 45 does not apply, to agreements and arrangements and to provisions of agreements and arrangements between or among teams and clubs engaged in professional sport as members of the same league and between or among directors, officers or employees of those teams and clubs where the agreements, arrangements and provisions relate exclusively to matters described in subsection (1) or to the granting and operation of franchises in the league, and section 45 applies and this section does not



apply to all other agreements, arrangements and provisions thereof between or among those teams, clubs and persons.

The representative plaintiff argued that this provision did not limit the scope of [section 48\(1\)](#) to intra-league conspiracies, as contended by the defendants, but that it only removed those types of conspiracies from the application of [section 45](#). The types of conspiracies not removed from [section 45](#), which were conspiracies not confined to teams within a single league, remained within the scope of [section 48\(1\)](#). The court accepted the defendants' argument on the grounds that their interpretation more comfortably matched with the scheme of [section 48](#). In contrast, the interpretation offered by the representative plaintiff was found to result in a situation in which the scope of [section 48\(2\)\(b\)](#) would be much narrower than the scope of [section 48\(1\)](#) and that it would lead to absurd and arbitrary outcomes.

The court also held that the proposed Amended claim was an abuse of process because it sought to add conspiracy claims related to hockey players' wages even though there were three other class actions in three jurisdictions dealing with the same issue. Relying on [The Catalyst Capital Group Inc. v. VimpelCom Ltd., 2019 ONCA 354](#), [Winter v. Sherman Estate, 2018 ONCA 703](#) and [Erschbamer v. Wallster, 2013 BCCA 76](#), the court held that it was an abuse of process to attempt to litigate wage-related issues in the Federal Court, when they could be raised in the other extant proceedings. This reasoning applied to the use of the players' images.

[Rule 221\(a\) of the Federal Court Rules](#) governed the defendants' motion to strike the class action.

Given the court's rejection of the proposed amended claim, the representative plaintiff's action which was brought under [section 36](#) of the Act simply alleged that the defendants were parties to a single conspiracy contrary to

[section 48](#) of the Act. This allegation did not disclose a reasonable cause of action because nowhere in the pleading did the allegation relate "exclusively to the matters described in [[section 48\(1\)](#) of the Act]", as required by [section 48\(3\)](#) of the Act.

Again, in analyzing the motion to strike, the court rejected a broad interpretation of the provisions in issue on the grounds that such an interpretation was not supported by the ordinary meaning of the words used in [section 48\(3\)](#), the scheme of [section 48](#) and its legislative history.

Lastly, given that [section 48](#) was a penal provision, the defendants were entitled to a narrower interpretation of [section 48](#) such that its scope was limited to intra-league agreements.

This case is significant to the competition law bar and those who represent professional sports leagues and teams because it establishes the scope of the conspiracy offences that exist under sections [45](#) and [48](#) of the *Competition Act* and which can potentially be brought against them. The case is also valuable because it contains a good analysis of the law of statutory interpretation and demonstrates how legislative history is important to determining the meaning of statutory provisions.

Contact us

If you have a litigation matter and are in need of legal advice, please do not hesitate to contact the Chair of our dispute resolution group, **Stephen Thiele**, at 416.865.6651 or via email at sthiele@grllp.com.

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