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SKATING ON THIN ICE: FEDERAL COURT OF APPEAL DISMISSES HOCKEY CONSPIRACY CASE, WHILE ADDING UNCERTAINTY TO MOTIONS TO STRIKE

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The Federal Court of Appeal ("FCA") decision in *Mohr v. Hockey Canada* ("*Mohr*")[1] has confirmed an important limitation on the scope of the conspiracy offence in the *Competition Act*, but has reintroduced unnecessary uncertainty about the standards to be applied on motions to strike (the Canadian equivalent of a motion to dismiss).

The plaintiff proposed a class action alleging a conspiracy amongst professional and major junior hockey leagues to limit the opportunities of hockey players, in violation of s. 48 of the *Competition Act*. When the defendants filed a motion to strike on the basis that the claim had no reasonable prospect of success, the plaintiff brought a motion for leave to add a new claim alleging a violation of the general conspiracy offence in s. 45 of the Act.

The motion judge granted the defendants' motion to strike because it was plain and obvious that the claim did not disclose a cause of action under s. 48. He also dismissed the plaintiff's motion to amend, as the amendments did not plead a conspiracy within the scope of s. 45. The decisions on s. 45 and s. 48 were upheld on appeal, even though the FCA commented that there were errors related to the statutory interpretation process.

The Conspiracy Offences

The cartel offence in s. 45 of the Act prohibits conspiracies between competitors to fix or maintain prices, allocate markets or customers, or restrict production or supply.

In *Mohr*, the plaintiff's proposed amendment alleged a conspiracy involving the purchase or acquisition of players' services. However, s. 45 is restricted to agreements or arrangements with respect to "production or supply" of a product (sell-side transactions), not purchases (buy-side transactions).

The FCA agreed with the motion judge's analysis (and two other lower court decisions) that buy-side agreements were removed from the scope of s. 45 by amendments in 2010. The plain meaning of the Act

limits s. 45 to conspiracies relating to the provision, sale and distribution of products or services. The FCA noted that when s. 45 was narrowed in 2010, s. 90.1 was added to the Act to provide recourse for any agreements between competitors that are not covered by s. 45, including between competing purchasers. There is no private right of action to recover damages arising from such conduct.[2]

The FCA also agreed with the motion judge's decision on the professional sport conspiracy offence. Section 48 prohibits agreements or arrangements to unreasonably limit certain opportunities of players, to impose unreasonable terms in player contracts, or to unreasonably limit the ability of players to negotiate with and play with a team of their choice.[3] It clearly applies only amongst teams and clubs that are members of the same league. The FCA found that the words were precise and unequivocal, that the ordinary meaning of the words had a dominant role in the statutory interpretation analysis, and that this provision had no application to the inter-league conspiracy alleged in the *Mohr* case.

Motions to Strike

The FCA nevertheless took issue with the approach followed by the motion judge on the motion to strike. Unfortunately, its comments appear to be inconsistent with the Supreme Court of Canada's analysis in *Atlantic Lottery v. Babcock* ("*Atlantic Lottery*").[4] If the Mohr approach is followed, it would undermine the important role that motions to strike can play in weeding out unmeritorious claims before they consume massive resources of the parties and the courts.

The FCA stated that it was incorrect to reach a conclusion on a contested point of statutory interpretation on a motion to strike: "once a judge finds that legislation is capable of being interpreted in at least two different ways, it is not open to the judge to conclude that it is plain and obvious that the action has no reasonable chance of success." As a result, novel but arguable claims must be allowed to proceed, and "legal pronouncements on the meaning of legislation should not be made on a motion to strike where there are competing, credible interpretations."

In contrast, the Supreme Court of Canada's 2020 decision in *Atlantic Lottery* held that a claim will not survive a motion to strike simply because it is novel, and that courts should resolve legal disputes promptly, rather than referring them to a trial:

> It is beneficial, and indeed critical to the viability of civil justice and public access thereto that claims, *including novel claims*, which are doomed to fail be disposed of at an early stage in the proceedings. This is because such claims present "no legal justification for a protracted and expensive trial". If a court would not recognize a novel claim when the facts as pleaded are taken to be true, the claim is plainly doomed to fail and should be struck. In making this determination, it is not uncommon for courts to resolve complex questions of law and policy. [emphasis in original,

citations omitted]

Surprisingly, the FCA did not refer to *Atlantic Lottery* in the *Mohr* decision. It did note that motions to strike serve an important gatekeeping function, particularly in the context of class actions where plaintiffs may have raised funds and are relieved from paying costs when they are unsuccessful on certain interlocutory motions. There is also a "broad cost to access to justice" that results when judicial resources are diverted to cases which have no substance. However, the FCA's assertion that a court cannot dismiss a claim by adjudicating between competing statutory interpretations put forward by the parties in a motion to strike could dramatically reduce the usefulness of this procedure, contrary to clear guidance of the Supreme Court.

In our view, given that the determination of a strictly legal issue on a motion to strike does not require evidence and the pleaded facts are taken to be true, the court can and should adjudicate the legal issues at this early stage. Deferring the decision unnecessarily consumes resources of the court and the parties to the litigation as they proceed with discovery, preparation of expert evidence and trial.

by Dr. A. Neil Campbell and Samantha Gordon

[1][ps2id id='1' target=''/] 2022 FCA 145, aff'g 2021 FC 488.
[2][ps2id id='2' target=''/] Parliament has recently amended the *Competition Act* to establish a separate conspiracy offence for wage-fixing, no-poach or certain other agreements between employers. Private damages actions will be available for breaches of this provision when it comes into force in 2023, as described in our recent bulletin, "Competition Act Amendments Introduce New Criminal Offence Against Wage-Fixing and No-Poach Agreements".
[3][ps2id id='3' target=''/] The Competition Bureau recently announced it will not take any enforcement action under s. 48 of the Act: Government of Canada, Competition Bureau statement on section 48 of the Competition Act, July 5, 2022.
[4][ps2id id='4' target=''/] 2020 SCC 19.

A Cautionary Note

The foregoing provides only an overview and does not constitute legal advice. Readers are cautioned against making any decisions based on this material alone. Rather, specific legal advice should be obtained.

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