# IN THE SUPREME COURT OF BRITISH COLUMBIA

Citation: *McEwan v. Canadian Hockey League,* 2022 BCSC 1104

Date: 20220630
Docket: S190264
Registry: Vancouver

Between:

**James Johnathon McEwan, as Representative Plaintiff**

Plaintiff

And

**Canadian Hockey League/Ligue Canadienne De Hockey, Western Hockey League and, Canadian Hockey Association/ Association Canadienne De Hockey d.b.a. Hockey Canada**

Defendants

Before: The Honourable Madam Justice Sharma

## Reasons for Judgment

| | |
|---|---|
| Counsel for the Plaintiff: | E.L. Lennox<br>N.C. Hartigan<br>B.D. Ryan |
| Counsel for the Defendants: | A.L. Kreaden<br>S. Dukesz<br>H. Kellett, Articled Student |
| Place and Date of Trial/Hearing: | Vancouver, B.C.<br>November 22, 2021 |
| Place and Date of Judgment: | Vancouver, B.C.<br>June 30, 2022 |

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## I. INTRODUCTION

[1] This is an application by the defendants to strike, in whole or in part, the affidavits filed by the plaintiff, in support of his application for certification as a class proceeding on the basis that they are inadmissible.

[2] The parties agreed that the defendants' application challenging the admissibility of evidence could proceed before the certification application, but the plaintiff reserves the right to argue that I ought not to decide the issue in a preliminary manner. In addition, both parties agreed to postpone any appeals from this judgment until after the certification hearing. In light of the nature of the issues presented, and the parties' positions, I am satisfied it is appropriate to hear and decide this application prior to certification.

[3] The defendants challenge the plaintiff and three proposed class members' affidavits on several bases including that they contain hearsay, opinion, and argument.

[4] They also challenge an expert opinion adduced by the plaintiff.

[5] The action is grounded in negligence and breach of fiduciary duty. The plaintiff seeks damages for personal and physical injury, psychological injuries, special damages, cost of future care, and loss of income both past and future, and loss of housekeeping capacity.

[6] The defendant Canadian Hockey League/Ligue Canadienne de Hockey and the defendant Canadian Hockey Association/Association Canadienne de Hockey, doing business as Hockey Canada ("CHL") are federal corporations constituted under the *Canada Not-for-profit Corporations Act*, S.C. 2009, c. 23. The CHL has offices in Calgary, Ottawa, and Toronto and operates regional centres in Ontario and Québec.

[7] The CHL acts as an umbrella organization for the three major junior hockey leagues operating in North America. The leagues are for players 16 to 20 years of age. Those leagues are:

a) the defendant Western Hockey League ("WHL"), which is incorporated under the laws of Canada and has an office in Calgary with member franchise clubs in Alberta, Manitoba, Saskatchewan, British Columbia, and the states of Washington and Oregon.

b) the Ontario Hockey League ("OHL"); and

c) the Quebec Major Junior Hockey League.

[8] This proposed class action is brought by James McEwan on behalf of himself and the following proposed class of individuals: any person, or their estate, resident in Canada who played in the CHL from August 21, 1974, until a date to be fixed by this Court.

[9] In addition to Mr. McEwan's April 15, 2021 affidavit, the plaintiff relies on affidavits from proposed class members Myles Stoesz, Rhett Trombley, and Eric Rylands (collectively with Mr. McEwan, the "Players").

[10] In his written submission, the plaintiff describes his claim as follows:

> … The defendants … were negligent and breached their duty of care and their fiduciary duties to the class by, among other things, perpetuating an environment that permitted, condoned, and encouraged to fighting and violence in the game among the underage players that they are obliged to protect. The plaintiff alleges that the defendants' approach to fighting and violence in amateur sport is an outlier relative to other comparable amateur youth hockey leagues around the world who take a more proactive and preventative approach to reduce fighting and violence. The plaintiff alleges that the Defendants and their servants created a culture that sanctioned assault and that they had the power to end this culture.

[11] The notice of civil claim also contains the following allegations:

a) It had been known for decades that multiple blows to the head can lead to long-term brain injury including memory loss, dementia, depression and

related symptoms. It can also lead to chronic traumatic encephalopathy ("CTE"), which is a catastrophic disease that was long associated only with boxing. CTE, until recently, could only be confirmed through autopsy.

b) Scientific evidence has, for decades, linked brain trauma to long-term neurological problems, but this was not known by the players.

c) Medical evidence show that symptoms can reappear hours or days after the injury.

d) Once a person suffers a concussion, they are up to four times more likely to sustain a second one, and each successive concussion increases the seriousness of health risks and likelihood of future concussions.

[12] It is alleged that at all material times, the defendants should have known or ought to have known that multiple incidents resulting in blows to the head would lead to long-term brain injury.

[13] On September 9, 2021, the defendants filed the current application seeking to strike some of the affidavits relied upon by the plaintiff. Roughly, concurrently with that, the plaintiff has filed a preliminary application seeking the delivery of the defendants' response to civil claim.

[14] The plaintiff delivered a certification record in early May 2021.

[15] The defendants submit the Players' affidavits suffer from multiple evidentiary deficiencies, which, taken together, are sufficient to have them struck in their entirety. The defendants allege that the affidavits contain improper hearsay, opinion evidence argument, and irrelevant evidence.

[16] The plaintiff has filed two expert reports in support of the certification application. The first is from Dr. Virji-Babul, a physical therapist and neuroscientist at the University of British Columbia. The defendants do not challenge this affidavit.

[17] The second expert affidavit was completed by Dr. Skye Arthur-Banning who is a professor within the Department of Parks, Recreation and Tourism Management at Clemson University in Clemson, South Carolina. He teaches Amateur Sport Management. The defendants challenge Dr. Arthur-Banning's report on the basis that he lacks the requisite expertise and/or it cannot meet the threshold of necessity. The defendants also submit that it is not relevant nor reliable.

## II. ADMISSIBILITY OF PLAYERS' AFFIDAVITS

[18] Before turning to my analysis, I will briefly outline the content of the players' affidavits.

### A. The Players' Affidavits

[19] Mr. McEwan played for the CHL between 2004 and 2008. He started at age 17, playing for the Seattle Thunderbirds. Two years later he played for the Kelowna Rockets and was the team captain. During his time in the CHL, Mr. McEwan was involved in over 70 fights. His position is that he would not have involved himself in so many fights had he been aware of what he asserts are the long-term side effects and health implications of concussive and sub-concussive impacts to the head.

[20] Mr. McEwan deposed that fighting was not only condoned and tolerated, the coaches and managers of the teams he played for encouraged, praised, and rewarded him for fighting. He alleges that the defendants were negligent and breached their duties to players by, among other things, promoting and glorifying violence amongst players, including fighting.

[21] With regard to his personal circumstances, Mr. McEwan deposed, among other things, the following:

a) He started playing hockey at age six, and played every season throughout his youth. He progressed through minor hockey teams and had a desire to play for the National Hockey League ("NHL"). By age 15, he was devoting hundreds of hours a year to pursuing a career in hockey.

b) He was first invited to try out for a spot on a Junior A team when he was 16 years old. He believed he could stand out and get attention from the coaches by fighting another player.

c) When he was 17, he was invited to try out for the Seattle Thunderbirds (a WHL team). He attended training camp and several exhibition and regular season games. He fought during those games, and was offered a spot on the team. He was trained and encouraged to be an “enforcer” on the team, a role he believed he fulfilled from that time forward. After two seasons with the Seattle Thunderbirds, he then played for the Kelowna Rockets as team captain. He left the WHL in 2008, but continued to try and reach the NHL, playing with the East Coast Hockey League and American Hockey League, finally retiring in 2014.

d) In his second season with the Seattle Thunderbirds (2005-2006), he began experiencing persistent ringing in his ears. During and after fights, he often had vision distortions and dizzy spells and occasionally felt like he would faint. On one occasion, he lost consciousness in a parking lot after a fight.

e) He continued to play after each fight and was not given medical attention.

f) In his final years at the CHL, he began experiencing severe anxiety, mood swings, behavioural changes, and angry outbursts. He was in near constant physical pain and continued to have episodes of cloudiness and distorted vision.

g) As a method of coping with those symptoms, he turned to pain medications and alcohol.

[22] The other Players also describe their experiences in their affidavits. Mr. Stoesz deposed, among other things:

a) He played in the CHL from 2003 to 2007.

b) He was invited to attend a training camp for a CHL team (Spokane Chiefs) when he was 15 years old. He got into three or four fights during that camp. He was too young to play on that team but was invited back the next year, and he "knew [he] was expected to fight", which he did. He played in exhibition games and at the end of a tournament, was offered a place on the team. He stated he "literally fought [his] way onto that team".

c) He had to become an enforcer if he wanted a secure place on the team.

d) He was injured during many fights. In each fight, he took many punches to his face and head, and often injured his hands, including being unable to play a few games because of his hand being too sore. He would feel dizzy and off balance, and recalled being told he had a concussion on two occasions. He was never told to get medical attention.

e) He received boxing lesson as part of his training for the team. Some of the fights in which he was involved are posted on the internet, and he has watched those. He stated the referees stood back watching the players fight and take multiple punches, and not stepping in until they players fell to the ice.

f) During his four years in the CHL, he accumulated over 800 penalty minutes.

[23] Mr. Trombley deposed, among other things:

a) He played in both the WHL and the OHL for three years, staring in 1991 when he was 16 years old.

b) As soon as he started playing in the CHL and throughout his career, he was an enforcer, which he says is "essentially a boxer on ice".

c) He fought between 80 and 100 times and accumulated nearly 500 penalty minutes as a result.

d) His hands would be so swollen from punching during a game that he would be unable to hold a pencil in school the next day. If he had a game that evening, he could not fit his hands into his gloves, so trainers would put his hands in buckets of ice to reduce the swelling.

e) He would receive hard punches to the head and often had several days of feeling “completely spaced out”. He sustained other more serious injuries, including breaking his orbital bone. While he deposed he saw a team doctor after that event, he typically did not receive medical attention after fights.

[24] Mr. Rylands deposed, among other things:

a) He played in the OHL for four years, starting in 1993 when he was 16 years old.

b) He played for three different teams (the Kingston Frontenacs, the Soo Greyhounds, and the Ottawa 67’s) in the OHL and fulfilled the “role” as an enforcer and fighter.

c) While at the training camp for the Kingston Frontenacs, he fought several times.

d) He was called up to play for a higher-level team and would almost always fight during one of the shifts he played.

e) In three years in the OHL, he accumulated 220 penalty minutes for fighting, which he estimates would be about 45 fights. He suffered significant injuries, including losing teeth and needing stitches. He experienced the following during and after fights: losing memory for hours, “seeing stars”, dizziness, ringing in his ears, and confusion.

**B. Legal Principles**

[25] The parties, for the most part, do not dispute the legal principles.

### 1. Relevant Legislation

[26] Relevance is a crucial factor in assessing admissibility. Before turning to the rules applicable to the admissibility of evidence, it is important to identify the overarching legal regime to which the disputed evidence relates.

[27] The Players' affidavits are filed in support of an application for certification pursuant to the *Class Proceedings Act*, R.S.B.C. 1996, c. 50 [*CPA*]. Section 4 of the *CPA* addresses the requirements for certifying a proceeding as a class proceeding:

> 4 (1) Subject to subsections (3) and (4), the court must certify a proceeding as a class proceeding on an application under section 2 or 3 if all of the following requirements are met:
>
> (a) the pleadings disclose a cause of action;
>
> (b) there is an identifiable class of 2 or more persons;
>
> (c) the claims of the class members raise common issues, whether or not those common issues predominate over issues affecting only individual members;
>
> (d) a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues;
>
> (e) there is a representative plaintiff who
>
> (i) would fairly and adequately represent the interests of the class,
>
> (ii) has produced a plan for the proceeding that sets out a workable method of advancing the proceeding on behalf of the class and of notifying class members of the proceeding, and
>
> (iii) does not have, on the common issues, an interest that is in conflict with the interests of other class members.
>
> (2) In determining whether a class proceeding would be the preferable procedure for the fair and efficient resolution of the common issues, the court must consider all relevant matters including the following:
>
> (a) whether questions of fact or law common to the members of the class predominate over any questions affecting only individual members;
>
> (b) whether a significant number of the members of the class have a valid interest in individually controlling the prosecution of separate actions;
>
> (c) whether the class proceeding would involve claims that are or have been the subject of any other proceedings;
>
> (d) whether other means of resolving the claims are less practical or less efficient;

> (e) whether the administration of the class proceeding would create greater difficulties than those likely to be experienced if relief were sought by other means.

[28] Section 5(1) requires the certification application to be supported by the applicant's affidavit and s. 5(5) identifies mandatory content for that affidavit:

> **5** (5) A person filing an affidavit under subsection (2) or (4) must
>
> (a) set out in the affidavit the material facts on which the person intends to rely at the hearing of the application,
>
> (b) swear that the person knows of no fact material to the application that has not been disclosed in the person's affidavit or in any affidavits previously filed in the proceeding, and
>
> (c) provide the person's best information on the number of members in the proposed class.

### 2. Applicable Rules

[29] The court has authority to exclude inadmissible evidence pursuant to its inherent jurisdiction and the common law. Also relevant is Rule 22-1(4) of the *Supreme Court Civil Rules*. It states that evidence in chambers applications must be given by affidavit.

[30] Rule 22-2(12) states that an affiant must state only what he or she would be permitted to state in evidence at trial, but Rule 22-2(13) provides an exception:

> (13) An affidavit may contain statements as to the information and belief of the person swearing or affirming the affidavit, if
>
> (a) the source of the information and belief is given, and
>
> (b) the affidavit is made
>
> (i) in respect of an application that does not seek a final order, or
>
> (ii) by leave of the court under Rule 12-5(71)(a) or 22-1(4)(e).

[31] The defendants focus on the court's gate-keeping function with regard to admissibility of evidence, contending the court ought not to "shirk" responsibility for considering admissibility: *Carter v. Ford Motor Company of Canada*, 2021 ONSC 4137 at para. 9. They also submit that there is no leniency with regard to the admissibility of evidence in class proceedings, meaning the ordinary criteria for

admissibility applies: *Pro-Sys Consultants Ltd. v. Microsoft Corporation*, 2008 BCSC 1263 at para. 25.

[32] These propositions are not controversial. Neither are the principles governing particular categories of inadmissible evidence, discussed later in this judgment. For the most part, the parties agreed on the applicable legal principles.

### 3. Statements Made by Someone Other Than the Affiant

#### a. Hearsay

[33] It is well settled that the key determinant of the admissibility of an out-of-court statement is whether the party adducing that evidence intends to rely on the statement for the truth for its content. If so, it amounts to hearsay, and may be inadmissible.

[34] However, if a party does not rely on the statement for its truth, but merely for the fact that the statement was made, it is admissible for that purpose: *Pfizer Canada Inc. v. Teva Canada Limited*, 2016 FCA 161 at paras. 89–90. In that case, the statement does not, strictly speaking, constitute hearsay. In *R. v. Khelawon*, 2006 SCC 57 at para. 36, Charron J. helpfully articulated the root of admissibility for such statements:

> 36 The purpose for which the out-of-court statement is tendered matters in defining what constitutes hearsay because it is only when the evidence is tendered to prove the truth of its contents that the need to test its reliability arises. Consider the following example. At an accused's trial on a charge for impaired driving, a police officer testifies that he stopped the accused's car because he received information from an unidentified caller that the car was driven by a person who had just left a local tavern in a "very drunk" condition. If the statement about the inebriated condition of the driver is introduced for the sole purpose of establishing the police officer's grounds for stopping the vehicle, it does not matter whether the unidentified caller's statement was accurate, exaggerated, or even false. Even if the statement is totally unfounded, that fact does not take away from the officer's explanation of his actions. If, on the other hand, the statement is tendered as proof that the accused was in fact impaired, the trier of fact's inability to test the reliability of the statement raises real concerns. Hence, only in the latter circumstance is the evidence about the caller's statement defined as hearsay and subject to the general exclusionary rule.
>
> (See also *R. v. Baltzer* (1974), 27 C.C.C. (2d) 118 (N.S.C.A.).)

[35] This reflects the Supreme Court of Canada's endorsement first articulated in *R. v. Khan*, [1990] 2 S.C.R. 531, of the principled approach governing the assessment of hearsay, which focusses on necessity and reliability (cited in *Khelawon* at para. 42). Necessity in this context refers to the desire not to impede society's interest in getting at the truth by the exclusion of evidence. Reliability can be assessed by looking whether there are other sufficient guarantees of truthfulness to overcome the dangers arising from the difficulty of testing it.

[36] Out-of-court statements may be admissible in order to demonstrate a person's state of mind, to further a narrative or to explain events that follow. In *Fontaine v. Canada (Attorney General)*, 2015 BCSC 1597 at para. 39, the court found that out-of-court statements that provided background context and narrative to explain certain steps taken by the affiant did not offend the hearsay rule.

[37] In addition, the traditional, well-established exceptions to the hearsay rule can also be relied upon for the admission of hearsay: *Cambie Surgeries Corporation v. British Columbia (Attorney General)*, 2018 BCSC 514 at para. 26; *R. v. Bradshaw*, 2017 SCC 35 at paras. 22–24; *Fresco v. Canadian Imperial Bank of Commerce* (2009), 71 C.P.C. (6th) 97 at para. 8 (Ont. S.C.J.).

**b. Unattributed Statements**

[38] A large number of statements to which the defendants object contain references to coaches or trainers. The defendants say these statements are inadmissible because those personnel are not named and that contravenes R. 22-2(13).

[39] In *Albert v. Politano*, 2013 BCCA 194 at paras. 19–22, the Court of Appeal held that the "source" as used in R. 22-2(13) is equivalent to an "identified person", citing *Meier v. C.B.C*. (1981), 28 B.C.L.R. 136 at 137–138 (S.C.). The purpose of requiring affiants to identify the source, and confirm a belief in the information, is to avoid putting the reliability of the information beyond the reach of the opposing party.

[40] In my view, the specification by the affiants that certain statements were made by their coaches or trainers is sufficient to meet the "identified person" requirement. That is because the Players specify which teams they played on during the relevant seasons. There would be a small and finite number of people who acted as coaches or trainers. In my view, that does not put the reliability of their statements beyond the defendants' reach.

[41] Moreover, the plaintiffs emphasize that statements in an affidavit by someone other than the affiant, if not adduced for their truth but for a non-hearsay purpose, will be admissible: *Tasci (Re)*, 2020 BCSC 1438 at para. 71. The defendants submit that does not obviate the need to identify the source of information even if the statement is not being tendered to prove its truth. The plaintiff contends that assertion is incorrect.

[42] The defendants rely on *L.M.U. v. R.L.U.*, 2004 BCSC 95, to support their position. I do not read the discussion in *L.M.U.* to go that far. Justice Bouck accepted that out-of-court statements adduced not for their truth, but for the fact they were made, can be admissible, but to do so, the affiant must identify how they are relevant: *L.M.U.* at para. 24.

[43] The defendants also submit that *Huebner v. PR Seniors Housing Management Ltd., D.B.A. Retirement Concepts*, 2021 BCSC 837, is directly applicable to the facts before me. The defendants point to Murray J.'s ruling that certain statements made by proposed class members referred to unnamed staff was inadmissible hearsay (para. 108(5)).

[44] The factual underpinning of that ruling differs significantly from the statements at issue here. That case was a proposed class action against care homes owned and operated by the defendants brought by residents who lived there (constituting one proposed class) and their family members (constituting a separate class). The claim alleged, among other things, neglect and abuse of the residents. The certification application was supported by over 20 affidavits, and the defendants

raised hundreds of objections to their content. The judgment addresses the objections to each portion of the affidavits.

[45] Among other things, the passage addressed at para. 108(5) had both opinion and hearsay problems. The affiant claimed wearing the same socks for multiple days could contribute to developing a fungal infection (that was struck as being inadmissible opinion evidence), and that unnamed staff members dismissed the affiant's concerns suggesting such infections were common (which was hearsay). It is unclear if the statements by the unnamed staff were being relied upon for their truth. Accordingly, that case is not helpful in resolving this particular issue.

[46] The defendants also contend an affidavit's preamble that an affiant believes the information in the affidavit to be true is insufficient to provide the foundation for the applicant's belief in an out-of-court statement: *L.M.U.* at paras. 38–39. The problem with relying on the preamble alone, if statements are introduced not for their truth, is that the there is no identification of the relevant purpose of the statement's admission. I do not understand the plaintiff to suggest the preamble was sufficient, on its own, to support the admissibility of any out-of-court statements.

[47] In any event, the plaintiff points out that R. 22-2(12) confirms an affidavit may contain anything that the deponent could testify to at trial. Therefore, his position is that if an out-of-court statement is being offered not for its truth, it is *prima facie* admissible. That may state the rule too broadly. There must still be a relevant purpose for the admission of the statement into evidence, but that purpose can include adding to the context and narrative of the affiant's other evidence: *Fontaine* at para. 39.

[48] In my view, the defendants' position that unattributed statements always violate R. 22-2(13), even if not proffered for the truth of their content, may be too broad. The key is to analyze the impugned statements within the affidavits to properly determine the purpose for which it is being proffered, and relate that to an issue identified in the pleadings.

[49] Most importantly, that enquiry must be done keeping in mind that the issue before the court at certification will be whether there is “some basis in fact” for establishing common issues trial. I agree with the plaintiff that this factor is critical to the analysis of the Players’ affidavits.

[50] The court is not, at that stage, engaged in making determinations about the credibility or reliability of the evidence presented in the affidavits filed in support of certification. The plaintiff submits that is why he does not rely on any of the out-of-court statements for their truth. Instead, most of those statements add to a narrative that, in his view, constitutes a “basis in fact” to permit certification.

[51] The plaintiff says the point is underscored by the acceptance in several decisions of affidavits to satisfy certification which contained unattributed out-of-court statements. For instance, in *Miller v. Merck Frosst Canada Ltd.*, 2013 BCSC 544 at para. 127–8, Punnett J. allowed affidavits containing hearsay or double hearsay statements sought to be admitted to establish some basis in fact for the existence of an identifiable class of two or more persons. In doing so, Punnett J. relied on *Chalmers v. AMO Canada Company*, 2009 BCSC 689, where the court specifically referred to s. 5 (5)(c) of the legislation which requires only that the “best information” be adduced regarding the size of the class. That information is almost always in the form of hearsay and does not prove the class size but is relevant to considering the procedural issues.

[52] Similar comments are made in *Griffin v. Dell Canada Inc*. (2009), 72 C.P.C. (6th) 158 at para. 83 (Ont. S.C.J.), where common issues were certified on the basis of an exhibit containing information collected from more than 400 putative class members. The court held that the “persistence and remarkable similarity of the complaints … across such a large group of users” amount to some evidence satisfying the commonality requirement.

**c. Admissions against Interest**

[53] The plaintiffs also say several of the statements were made by representatives of the defendants and, therefore, they are binding admissions

against them under the party admissions exception to hearsay: *Ontario v. Rothmans*, 2011 ONSC 5356 at paras. 72–76.

[54] In *Fontaine* the court held that many of the statements objected to were made by the representatives of the opposing party and are, therefore, admissions and admissible on that basis. It was open to the opposing party to cross-examine or invoke conflicting evidence: para. 40. As the plaintiff points out, the incidents discussed in the affidavits relate to people who would have been coaches or similar staff, therefore if there are records, they would be in the defendants' position. I agree that may provide a route of admission for such statements.

[55] In any event, the plaintiff also argues that the statements may be admissible if they are sufficiently necessary and reliable under the principled approach to hearsay, an analysis that has to be undertaken by reading the statement in context.

### 4. Inadmissible Opinion

[56] The defendants submit numerous statements in the Players' affidavits are inadmissible as opinion evidence. The plaintiff submits most of the statements to which the defendants object on this ground are fact rather than opinion, or are admissible as lay opinion evidence.

[57] The parties do not dispute the applicable legal principles. Typically, only those qualified as experts can give opinion evidence. However, if certain conditions are met, witnesses who are not experts may provide what is called "lay opinion" evidence. The basis of admission was explained by Justice Grauer in *American Creek Resources Ltd. v. Teuton Resources Corp.*, 2013 BCSC 1042 at paras. 14, 16:

> [14] Generally, opinion evidence is inadmissible unless it is expert evidence. There are exceptions. Lay opinion evidence may be admissible under circumstances discussed at length in Part II of Chapter 12 in *The Law of Evidence in Canada*, where the learned authors state at paragraph 12.14:
>
> > Courts now have greater freedom to receive lay witnesses' opinions if: (1) the witness has personal knowledge of observed facts; (2) the witness is in a better position than the trier of fact to draw the inference; (3) the witness has the necessary experiential capacity to

> draw the inference, that is, form the opinion; and (4) the opinion is a compendious mode of speaking and the witness could not as accurately, adequately and with a reasonable facility describe the facts she or he is testifying about. But as such evidence approaches the central issues that the courts must decide, one can still expect an insistence that the witnesses stick to the primary facts and refrain from giving their inferences. It is always a matter of degree. As the testimony shades towards a legal conclusion, resistance to admissibility develops.

…

[16] … In *Graat*, the Supreme Court of Canada ruled admissible lay opinion evidence about whether a person's ability to drive was impaired by alcohol. The witnesses in question all had an opportunity for personal observation, and the opinion was based on perceived facts as to the manner of driving and the indicia of intoxication of the driver. These witnesses were in a better position than the trier of fact to determine the degree of impairment and could give the court real help. The court noted at pages 837-838:

> It is well established that a non-expert witness may give evidence that someone was intoxicated, just as he may give evidence of age, speed, identity or emotional state. This is because it may be difficult for the witness to narrate his factual observations individually. Drinking alcohol to the extent that one's ability to drive is impaired is a degree of intoxication, and it is yet more difficult for a witness to narrate separately the individual facts that justify the inference, in either the witness or the trier of fact, that someone was intoxicated to some particular extent. If the witness is to be allowed to sum up concisely his observations by saying that someone was intoxicated, it is all the more necessary that he be permitted to aid the court further by saying that someone was intoxicated to a particular degree.
> … Nor is this a case for the exclusion of non-expert testimony because the matter calls for a specialist. It has long been accepted in our law that intoxication is not such an exceptional condition as would require a medical expert to diagnose it. An ordinary witness may give evidence of his opinion as to whether a person is a drunk. This is not a matter where scientific, technical, or specialized testimony is necessary in order that the tribunal properly understands the relevant facts. Intoxication and impairment of driving ability are matters which the modern jury can intelligently resolve on the basis of common ordinary knowledge and experience. The guidance of an expert is unnecessary.

[58] The defendants say this exception does not apply to any of the impugned passages of the Players' affidavits for a number of reasons.

[59] With regard to what the defendants say are the Players' statements that they were trained, encouraged, and commended to be an enforcer, they submit those

allegations are not supported by concrete examples of explicit communications; therefore, there are insufficient grounds for those opinions.

[60] The defendants also contend that the exception to allow lay opinion evidence is intended for situations where a witness must relay an inference because it is impossible for that witness to relay facts without also relaying the inference. The defendants say the Players' opinions are unlike admissible lay opinion about the speed of a car, as described in *R. v. Collins* (2001), 160 C.C.C. (3d) 85 (Ont. C.A.), because they go beyond what the witnesses can speak to from their own personal knowledge.

[61] For the most part, I disagree and find the statements to which the defendants object as being opinions are either not opinions or do satisfy the criteria of lay opinion.

### 5. Other Grounds of Inadmissibility

[62] The defendants also identify content of the affidavits which they say is inadmissible as being scandalous, frivolous and vexatious.

[63] The defendants rely on R. 9-5(1)(b), which states the court may order to be struck or amended in whole or "any part of a pleading, petition or other document" on the ground that it is, among other things "(b) unnecessary, scandalous, frivolous or vexatious".

[64] It is not clear to me that it is helpful to the issues raised in this application to rely on R. 9-5(1)(b). Rule 9-5 is titled "Striking Pleadings". Pleading is defined in Rule 1-1(1) to mean "a notice of civil claim, a response to civil claim, a reply, a counter-claim, a response to counterclaim, a third party notice or a response to third party notice".

[65] Affidavits are evidence and not pleadings. Although not stated explicitly, I assume that the defendants rely on affidavits being an "other document" to which R. 9-5(1)(b) could apply. I also assume this position is supported by the following paragraph from the defendants' written submissions:

> [s]candalous, frivolous and vexatious evidence, legal conclusions, adjectival descriptions, bald allegations and conclusory statements, opinions regarding motive and argument, including a description of a person's reactions to events, are all inadmissible evidence.

[66] The defendants cite a number of cases to support that submission, but in my view, none go so far as to stand for the proposition that there is an independent ground of inadmissible affidavit evidence based solely on statements being, in the view of the opposing party, "scandalous, vexatious or frivolous". It must be remembered that in each case the court's comments must be read in the context of the particular issues before it, and the nature of the disputed evidence. The cases cited by the defendants largely articulate principles that are undisputed.

[67] In *British Columbia Investment Management Corp. v. Canada (Attorney General),* 2016 BCSC 2554 at paras. 7, 10, the court states that affidavits should be confined to relevant facts within the affiant's personal knowledge and should not include inadmissible hearsay, opinions, argument, or legal conclusions. There is nothing controversial about that ruling.

[68] In *Home Equity Development Incl. v. Crow*, 2002 BCSC 546 at para. 30, the court was considering the admissibility of certain affidavits in the context of an action by the plaintiffs for defamation in which the defendants applied to have that action dismissed pursuant to the now-repealed *Protection for Public Participation Act*, S.B.C. 2001, c. 19. In that context, the court stated that "[p]ersonal opinions or a description of the deponent's or another person's reaction to events is inappropriate and is nothing more than argument in the guise of evidence". This reflects the principle that argument is inadmissible in affidavits. Again, the plaintiff does not dispute that rule of evidence, but disagrees with what the defendants have identified as being argument in the affidavits.

[69] Similarly, in *6180 Fraser Holdings Inc. v. Ali*, 2012 BCSC 247 at para. 41, the court stated that "some of allegations made against various individuals in those affidavits are embarrassing and scandalous while having absolutely nothing to do with any of the issues". In other words, the ground of inadmissibility was irrelevance.

This does not create, in my view, a different category of inadmissibility based on "scandalous" content.

[70] In my view, none of the cases relied upon by the defendants stand for the broad, free-standing proposition that what one party characterizes as "scandalous, frivolous or vexatious" content in an affidavit, without more, is *per se* inadmissible. As noted above, the phrase "scandalous, frivolous or vexatious" in the context of R. 9-5(1)(b) is most readily understood to apply to allegations in pleadings rather than deponents' evidence.

[71] Having reviewed the defendants' table of objections and specifically, all those references to purported inadmissible content on the basis of the affiant's "scandalous, frivolous or vexatious" statements, I do not give effect to that objection, and those statements will be assessed on the other grounds raised by the defendants.

[72] In the alternative, if I am wrong about whether that can be an independent basis to exclude evidence, I do not find any of the impugned passages scandalous, frivolous or vexatious, although a few may be irrelevant.

[73] Accordingly, I dismiss the objection to the following passages on the basis of their being scandalous, frivolous or vexatious:

a) McEwan Affidavit:

   i. Para. 18: the underlined phrase in this sentence, "Rather, my coaches would only need to say my name or tap me on the shoulder, and I would head out onto the ice, looking for my target".

   ii. Para. 30: describing how he testified for the World Association of Ice Hockey Players to take a stand against certain labour exemptions under the CHL "that pay players insufficiently low amounts and rejects them from accessing workers compensation and unemployment rights".

b) Stoesz Affidavit:

i. Para. 6: “I realize now that I had literally fought my way onto that team”.

ii. Para. 9: “and now looking back, by joining this team I was molded into this rage-filled fighter.”

iii. Para. 10: “My teammates nicknamed me “Terma” which was short for Terminator, an unstoppable fighting machine”. “Once I earned this title, there was no going back.”

iv. Para. 21: the entire paragraph.

c) Trombley Affidavit:

i. Para. 3: He deposed he was an enforcer “which is essentially a boxer on ice”.

ii. Para. 8: “I support the plaintiff’s application to have this action certified as I am concerned about the ongoing culture of fighting in the CHL when children are involved”.

[74] There are also instances where the defendants suggest that a sentence is impermissible purely because it amounts to a “bald allegation of fact”. I have some difficulty understanding why the assertion of a fact (bald or otherwise) can be an independent ground for inadmissibility. I do not give effect to that objection.

[75] The defendants refer to a number of passages as being inadmissible because they are “improper descriptions of the affiant’s or someone else’s reaction to an event”, or “adjectival descriptions”. The only case which referred to those as grounds of inadmissibility is *K.L.C. v. J.C.,* 2000 BCSC 798*.* At para. 9 the court stated:

> [9] Counsel for Mr. C. relies upon *F.(J.K.) v. F.(J.D.)* (1986), B.C.J. No. 672; *Creber v. Franklin* (1993), B.C.J. No. 890; and *Webber v. Wallace* (1994), B.C.J. No. 1894. All are decisions of our court. Shortly stated, in all these cases the court directed that portions of affidavits be expunged for various reasons. These reasons include: hearsay upon hearsay, or irrelevance (*F.(J.K.) v. F.(J.D.)*), inadmissible opinion, adjectival descriptions, or subjective descriptions of reactions (*Creber*), unidentified witnesses, opinions regarding motives, or argument (*Webber*).
>
> [Emphasis added.]

[76] The portions underlined are phrases relied upon by the defendants to challenge some of the Players' statements. However, the court's statements in *K.L.C.* must be understood in the context of the application. That judgment addressed an application in relation to a dispute about custody and access of the couple's young children aged five and two. One parent was applying to strike portions of the other parent's affidavit for the reasons listed in that passage.

[77] While the rules of evidence are meant to be universal, it is not uncommon in cases involving parenting disputes for witnesses, including parents, to feel compelled to file affidavits with content of dubious relevance (see *A.M.D. v. K.R.J.*, 2015 BCSC 946 at paras. 30–36). The key, as always, is to ask whether the content actually relates to a material issue before the court.

[78] That is what the court did in *K.L.C.*, noting that in order to decide the issues of admissibility, it had to "review the specific allegations made in the affidavit … and assess their admissibility in light of the purpose as counsel characterizes it" (para. 10). The court went on to address specific paragraphs of the affidavits (para. 21), but that was in the context of issues defined by the best interest of the child.

[79] Thus, I do not read the case as standing for the proposition that there is a free-standing basis to strike statements that contain "adjectival descriptions or subjective descriptions of reactions".

[80] Moreover, the phrase "adjectival descriptions" appears to have emanated from *Creber v. Franklin*, [1993] B.C.J. No. 890 (S.C.) at para. 19, but it is important to note that in that case the court held the challenged passages were irrelevant.

[81] I come to the same conclusion regarding objections based on statements being any kind of improper description of any kind, and I dismiss all such objections.

### C. Analysis

[82] I am grateful to counsel for providing tables specifying the passages in the Players' affidavits to which the defendants object, and identifying the basis for the parties' position on those objections. Many passages are asserted to be inadmissible on multiple grounds.

[83] Before analyzing those objections, I emphasize some important points. A crucial factor in determining whether a statement is admissible is to ascertain for what purpose it is being adduced. While not determinative, a party's assertion that an out-of-court statement is not being proffered for the proof of the truth of its content cannot be ignored and should not lightly be discarded. If the stated purpose logically fits with the statement and that purpose does relate to an issue, it is difficult to conceive why a court would strike out that evidence as being hearsay on a preliminary motion. This is especially true when the statements are being analyzed before the other party's evidence has been filed.

[84] It is also important to keep in mind that admitting the evidence at this preliminary stage has no bearing on the weight it might eventually attract at trial. There are no findings of fact made at certification since the issue is whether the record reveals "some basis in fact" to find the action suitable as a class action.

[85] It is also imperative to read the challenged statements in the proper context, which is why I have sometimes included statements surrounding impugned passages. Doing so ensures a better understanding of the evidence. Words contained within quotation marks denote content from the affidavit to which the defendants object.

[86] Some explanation of how this judgment is structured is necessary.

[87] My analysis of the impugned portions of the affidavits is divided into categories corresponding to the alleged ground of inadmissibility.

[88] Many statements are challenged on multiple grounds, and, for the most part, I subject each passage to all grounds raised. However, generally, I have done so separately under the appropriate category. This results in significant amount of

duplication of the impugned passages, but I find it necessary to ensure that all the defendants' objections were considered.

[89] For most categories, I provide general reasoning that is applicable to the whole group of statements challenged on the same basis. Occasionally, I include with the impugned passage a few comments explaining my categorization of a passage and/or my conclusion as to its admissibility.

[90] Additionally, for a few paragraphs, it was more convenient to analyze the entire paragraph in one section, rather than parse separate portions for analysis under more than one category.

[91] Finally, I include, as an appendix to this judgment, a table summarizing those portions of the affidavits that I have found to be inadmissible with a brief explanation as to why, where necessary. I confirm any passage not included in that table is admitted into evidence.

### 1. Statements Mischaracterized as Hearsay

[92] I find many statements to which the defendants object as being inadmissible hearsay are statements of fact that the plaintiff does not rely on for their truth. However, there is also a group of statements that I find the defendants have mis-described. These statements are introduced by an affiant to explain how or why an event occurred; the statement itself is not material. The event connected to the statement is part of the affiant's experience or observation and is admissible. The statement provides context to explain how or why the event occurred. These types of statements do not constitute hearsay because they are not introduced for the truth of the content of the statement.

[93] An illustrative example is para. 11 of the McEwan Affidavit. He starts by stating that he "was disheartened by being cut from [his] first tryout for a Junior team". He goes on to describe the next tryout. After describing "throwing fists" with a veteran player, Mr. McEwan deposed the fight got the coaches' attention "*and … they offered to allow me to go to play exhibition games.*"

[94] The defendants argue the italicized words are inadmissible as hearsay (as well as on other grounds discussed later in this judgment). The defendants say Mr. McEwan cannot rely on what was said to him to prove that he was extended an offer to play exhibition games because the coaches noticed his participation in a fight. That objection assumes that the purpose of the italicized words is to support the plaintiff's claim that coaches rewarded Mr. McEwan for fighting, thereby contributing to the defendants' encouragement or promotion of fighting, which forms one aspect of the plaintiff's claim.

[95] However, the plaintiff was explicit that he does not rely on those words for the truth of their content. While it is true that there must have been words spoken to make the offer to Mr. McEwan, what is relevant is the fact that the offer was made, not what words were spoken to make the offer.

[96] In my view, the flaw with the defendants' position is that they isolate the statements from the surrounding content in the affidavit. Mr. McEwan deposed that he did play in exhibition games. It cannot be seriously suggested that he could have done so without being asked. He mentions that he was invited to play as part of the narrative. He submits he does not rely on the invitation as a fact to buttress or support the truth of any out-of-court statement made by the coaches. The fact of the invitation is admissible as part of Mr. McEwan's experience and observation.

[97] It may be that the plaintiff will ask the court to draw certain inferences at trial because Mr. McEwan engaged in a fight and was then invited to play in exhibition games. However, the defendants will have the opportunity to urge the court not to draw that inference, regardless of whether they adduce directly contradictory evidence on that point. The court will have to determine the credibility and reliability of each piece of evidence and weigh those to determine what inferences, if any, should be drawn. In other words, the admission of the impugned words does not necessarily mean that the assumption underlying the defendants' objection will be adopted by the court.

[98] Furthermore, the defendants' position appears to rely on a mischaracterization of the court's role at the certification hearing. The court will not be making findings of fact. Its task is to determine if there is "some basis in fact" to find the action is suitable as a class action. Therefore, a determination that something is admissible for the purposes of certification does not necessarily mean it is admissible in the same fashion for the trial: see s. 5(5) of the *CPA* and *Pro-Sys Consultants* at paras. 102–103.

[99] For all those reasons, I find the following statements do not constitute hearsay because they are statements of fact. They provide context to an event the affiants described:

a) McEwan Affidavit:

   i. para. 11: "they offered to allow me to go to play exhibition games."

   ii. Para. 12: "and was asked to leave after that".

   iii. Para. 15: "During one of the games, I asked [a veteran on the other team who and been drafted to the NHL] to fight and he said no. After the shift, I saw him talking to the assistant coach and, during the next shift, he agreed, and we squared off and fought".

   iv. Para 16: He deposed about fighting in the first few games he had been asked to play on a particular team, "and was offered a spot on the team by the general manager of the team and the coach".

b) Stoesz Affidavit, para. 11: At boxing lessons he was given as part of his training, he sparred with NHL players in "the 'craft of fighting' as they called it".

c) Rylands Affidavit, para. 9: After explaining he watched a video of a fight in which he was involved for which he had no memory at the time, he stated, "and it was not until one of my teammates called over an assistant coach because I was saying nonsensical things".

### 2. Statements by Others Encouraging Players to Fight

[100] The defendants submit numerous statements in the Players' affidavits referring to encouragement and/or praise for fighting that came from coaches, trainers, fans or others are inadmissible hearsay (some are also challenged as being inadmissible opinion evidence, discussed later).

[101] The plaintiff does not rely on any of these out-of-court statements for the truth of their content. Instead, he says such statements are being adduced to demonstrate the Players' state of mind at the time of the events, to provide context and to further the narrative in their affidavits.

[102] The defendants say the court must not blindly accept the plaintiff's assertion about the purpose of introducing the impugned statements. While that is true, as noted earlier, the purpose for which evidence is adduced is key to determining its admissibility. No authority has been cited to support an approach that would reject a party's position that out-of-court statements are not being introduced to prove their truth, without cogent reason.

[103] In any event, for almost all such statements, I find the plaintiff's position persuasive. The impugned statements do not purport to be quotations. Sentences such as "I … [was] constantly encouraged by … coaches … to fight" (see below, para. 110(a)) conveys that Mr. McEwan *felt encouraged* to fight. This is clearly a reference to his state of mind.

[104] The defendants make the reasonable point that such statements necessarily imply the coaches said or did things *to encourage* Mr. McEwan to fight, meaning the statements are inadmissible hearsay. However, the analysis is more nuanced than that.

[105] These statements all have a dual aspect. The defendants focus only on one aspect: implying that particular words were spoken or conduct displayed by coaches or others. However, the plaintiff relies on these statements not because of what they imply someone other than the affiant said or did, but for what the Players say they

thought or felt. The statements explain the Players' state of mind, which they claim led them to engage in an activity (fighting). Part of the claim as pleaded is that the defendants' failure to take sufficient steps to prevent fighting caused injuries for which the plaintiff (and class members) should be compensated. Whether that nexus can be drawn will be an issue at trial.

[106] The plaintiff contends that for the purpose of certification, he does not have to show that it was true that coaches spoke encouraging words or displayed encouragement for fighting. The issue will be whether the plaintiff has established "some basis in fact" that the proposed issues are common to the entire proposed class. The plaintiff's position is that viewed in that light, whether it is true that coaches said or did things that encouraged fighting is not a necessarily ingredient to his ability to meet the test for certification. I agree. It bears pointing out that the necessary implication of this position is that the plaintiff will be unable to argue at the certification hearing that the statements themselves help prove to the court that it is true that coaches said or did things to encourage fighting.

[107] The plaintiff also takes the position that the statements provide narrative context for the rest of the affidavits in which the Players describe facts about their time playing in the CHL. That narrative includes the number of fights in which they engaged, the penalty minutes assessed against them, as well as their movement amongst different teams. I agree that other portions of the affidavits would be difficult to follow without the context provided by these statements.

[108] Somewhat similar in content, the defendants also object to the Players' statements describing what they believed to the role of "enforcers" on teams, including what was expected of enforcers. The defendants object to those types of statement primarily as being opinion evidence, which is discussed and analyzed later in this judgment.

[109] However, to the extent such statements may be based on what others said or did, the defendants also assert they amount to hearsay. It is not clear to me that the Players' statements about the role of enforcers fall into the category of out-of-court

statements made by others. For the most part, the Players do not specify that those statements are based on what others said. In any event, even if they did so, I would find those statements admissible as illustrating the affiant's state of mind and providing context to the narrative.

**a. Statements Made by Coaches or Other Staff**

[110] The following statements are admissible for the reasons stated above:

a) McEwan affidavit:

i. Para. 3: "I and other players were constantly encouraged by our coaches and other members of the CHL to fight and to be aggressive while playing and it was often made clear to me that my spot in the CHL was tied to my ability to fight and be aggressive."

ii. Para. 11: "and it was enough to get the attention of the coaches - they offered to allow me to go to play exhibition games", referring to a fight in which he was involved.

iii. Para. 15: "I spoke with my Dad about [a conversation his dad had with a scout], and we knew that the coaches and management were looking for me to fight during the tryouts."

iv. Para. 17: "I was trained and encouraged by the coaches and management to be the team's "enforcer." The term enforcer is not an official title in hockey, but it is a position that everyone was (and still is) very familiar with. An enforcer's primary job is to deter and respond to dirty or violent play by the opposition. When such play occurs, the enforcer is expected to respond aggressively, by fighting or checking the offender. Enforcers are expected to react particularly harshly to violence against start players or goalies. Additionally, enforcers are put out onto the ice to fight to try and change a [game's] momentum and, also, will sometimes be put out at the end of a game by the losing team

when the results are inevitable to try and make a show of force to the other team. Every team in the WHL had at least one enforcer (and sometimes several) and, if an enforcer was put on the ice, the other team would respond by putting out theirs".

v. Para. 18: "I was commended for my fights by my coaches, teammates, and by management. After I'd win a fight, my coaches would praise me in the locker room and, if I lost, the coaches would explain how I could do better." He stated by the end of his first season, he never had to be told to fight: "Rather, my coaches would only need to say my name or tap me on the shoulder, and I would head out onto the ice, looking for my target".

vi. Para. 23: Mr. McEwan deposed that at age 20 he continued to be an enforcer "and to be encouraged to fight by my coaches".

b) Stoesz Affidavit:

i. Para. 4: Mr. Stoesz describes his first fight in hockey at a CHL training camp and continued, "I recall the coaches and the trainers cheering for me on the sidelines. Everyone was paying attention to me".

ii. Para. 7: "It was made clear to me that I wasn't on the ice to play and score, I was there to fight. Fighting was encouraged by the coaches and trainers. One of my coaches told me that I had to fight and if I didn't, I would end up sitting on the bench and not playing".

iii. Para. 8: "If I wanted to have a secure place on the roster, I had to become the "enforcer" for the team. The enforcer is not an official position like a goalie but is a known role that a player takes on and who is meant to be an agitator and an aggressor to the opposite team. The enforcer is meant to protect the players on his team. If there are cheap shots or if there is aggression against a teammate, particularly a star player, the enforcer is expected to respond aggressively. In my

experience, the enforcer was also used to make the game more exciting for the fans. There were times when I was sent on to fight because the game was slow, and the fans seemed bored. The coach would send me out to fight because it would get the fans to jump to their feet and cheer. When this happened, I felt like a rock star".

c) Trombley Affidavit:

i. Para. 4: "The coaches and assistant coaches from the CHL teams reminded us constantly that if we didn't perform, we would not be kept on and that there were many other guys who could take our spot in a second (and performance for me meant fighting)."

ii. Para. 5: "Often the coaches would tell me during a game who they wanted me to fight". Also, "and if the coach or assistant coach told me to go play left wing during a shift, I knew it was because they wanted me to fight and the player on the other team in that position".

d) Rylands Affidavit:

i. Para. 7: "I was given players names by the coaches throughout the year of who I was to fight".

ii. Para. 8: "but again was told that I had my role (as an enforcer) and that that role did not need a great deal of ice time".

iii. Para. 9: He described an incident he viewed on a video but for which he no memory, and provides his observation of a portion of the video as follows, "and it [was] not until one of my teammates called over an assistant coach because I was saying nonsensical thing[s]".

**b. Admissions**

[111] Admissions made by an opposing party are admissible as an exception to the hearsay rule; such statements may be admitted for their truth. I find, in the

alternative, if I am wrong that the statements above (in paras. 110) are not hearsay, I would find them admissible under the admissions exception to hearsay rule.

[112] Again, this does not mean that the court will necessarily accept the Players' evidence that such statements were made or behaviour was displayed. Ultimately, that would depend upon looking at all the evidence adduced at trial that is relevant to that issue. Nor does their admission signify anything about what weight would be attached to the statements. Their admission only means they can be assessed, along with any other evidence, to determine whether such statements were made, or behaviour displayed.

### c. Statements by Non-Representatives

[113] There are three passages objected to by the defendants as hearsay that are not statements made by representatives of the defendants. Therefore, they would not be admissible as exclusions to hearsay, although there may be a different basis for their admissibility.

[114] The first passage is the second sentence in paragraph 29 of Mr. McEwan's affidavit, "I have spoken with many former players that had similar experiences to me and suffered injuries". I agree with the plaintiff that this statement is admissible pursuant to s. 5(5)(c) of the *CPA* because the Players must provide their "best information" as to the number of people in the class: see explanation below, paras. 140-141.

[115] The second is a portion of paragraph 16 from Mr. Stoesz's affidavit. For convenience I reproduce the entire paragraph:

> *By my second season, I was a star in Spokane with a loyal following of fans because of my role as an enforcer.* The rink was packed for my games *and the crowd wanted me to fight.* They would chant my name. My jersey was one of the bestsellers on the team. After games, I met with fans at the autograph session. They would talk about my fights. They would break it down punch by punch for me and provide me with their opinions. They knew who the fighters were on all the opposing teams and would ask me who I was fighting next or give me suggestions of who I should fight next. *There was so much hype about my fights in Spokane. At the start of each game I would feel*

> *pressure of the coaches, my team and couple hundred fans expecting me to fight.*

[116] The defendants object to the italicized portions as improper opinion, but I find that is a mischaracterization, and those sentences are admissible as facts: see below, para. 128(b)(viii). The defendants also object to the underlined portions on the basis they constitute hearsay. The plaintiff submits these statements are not adduced for the truth of their content, but to further the narrative and establish Mr. Stoesz's state of mind.

[117] I do find these statements admissible for that purpose. I accept that conversations with fans are relevant to Mr. Stoesz's state of mind. These sentences are linked to and explain his observation that "[t]here was so much hype about my fights in Spokane". Without the underlined portions, his observation about hype would be without appropriate context.

[118] The third passage is statements contained in para. 15 of the McEwan's affidavit. I reproduce the entire paragraph:

> At the beginning of the camp, <u>one of the scouts for the team approached my Dad and pointed to one of the veterans of the team who was 19 years old (and who had been drafted for the St. Louis Blues in the NHL and was a notorious fighter in the league – fighting with him was often referred to as a "career ender"). The scout commented that there was one thing that I could do to make sure I secured a spot with the team.</u> I spoke with my Dad about this, *and we knew that the coaches and management were looking for me to fight during the tryouts.* During one of the games, I asked him to fight and he said no. After the shift, I saw him talking to the assistant coach and, during the next shift, he agreed, and we squared off and fought.

[119] The defendants object to everything after the first six words as being hearsay. They also object to the italicized words as being improper opinion. As explained elsewhere, I find the italicized words are admissible as facts going to Mr. McEwan's state of mind and furthering the narrative; therefore, those words do not constitute either opinion or out-of-court statements: see above para. 110(a)(ii) and below, para. 128(a)(v).

[120] I also find all words following the italicized words to be admissible as facts going to the narrative of the affidavit, and not constituting hearsay: see para. 99.

[121] However, I agree with the defendants that the underlined portions are inadmissible. These statements are things said not to Mr. McEwan, but to his father. Because the statements were not said to Mr. McEwan, they cannot be helpful in establishing his state of mind. As already noted, statements his father made to him (about what a scout may have said) are relevant to his state of mind and admissible for that purpose. It may be that his father was explicit in repeating what a scout said, but that does not make a recitation of what the scout said to his father admissible. In any event, those statements are unnecessary if their purpose is to establish the impact the conversation with his father had on Mr. McEwan's state of mind.

### 3. Opinion

[122] The defendants challenge many statements on the basis that they are inadmissible opinions. Many are either the same or similar to statements objected to on the basis of being hearsay. Specifically, many statements revolve around encouragement or praise for fighting.

[123] One example is the following sentence from Mr. McEwan's affidavit (para. 18), "I was commended for my fights by my coaches, teammates, and by management". The defendants start with the proposition that this statement, and others like it, are opinions, and to be admissible, they must satisfy the requirements for the admission of lay opinion set out above (see paras. 57–60).

[124] However, I do not agree with the defendants' characterization of the sentence. The sentence is a statement of fact based on Mr. McEwan's observation and experience. It is a statement describing his mental state.

[125] I understand the defendants' concern. These types of statements could imply that coaches and management said or did something to produce a feeling of being commended in Mr. McEwan. However, a player saying "I was commended for fighting" has two elements. One is the player's statement of how he felt, which is a fact. The other aspect is whether someone spoke words or exhibited behaviour that commended the affiant, which is also a fact.

[126] At this stage, the purpose of the plaintiff's adducing the first kind of fact is not for the purpose of proving the second kind. The plaintiff adduces the evidence to establish some basis in fact for the claim to proceed as a class action. Whether or not someone actually did say or do anything to praise fighting is not being decided at this stage. Similarly, it is not my task at this stage to test the credibility or reliability of a player's feeling commended.

[127] For those reasons, I do not agree that the statement is an opinion rather than fact. In the alternative, if my characterization is incorrect, I find the statements meet the criteria of lay opinion and would be admissible as such.

**a. Mischaracterized as Opinion**

[128] I find the following are admissible as statements of fact relating to the Players' state of mind, or as providing a coherent narrative. Accordingly, I disagree with the defendants' characterization of the following statement as being inadmissible opinion. In the alternative, I find some passages are admissible as lay opinion.

a) McEwan Affidavit:

i. Para. 3: "I and other players were constantly encouraged by our coaches and other members of the CHL to fight and to be aggressive while playing and it was often made clear to me that my spot in the CHL was tied to my ability to fight and be aggressive."

ii. Para. 11: "and [participating in a fight in a particular game] was enough to get the attention of the coaches – they offered to allow me to go to play exhibition games".

iii. Para 12: After describing that he was cut from a team, he continued, "I was not surprised though as it would have been rare for someone my age to have been given a spot especially because I had not been drafted".

iv. Para. 14: “I already had a reputation of being a fighter and it became obvious very early during the tryouts that [his reputation as a fighter] was the skill that the coaches and managers of the team were the most interested in”.

v. Para. 15: “and we knew that the coaches and management were looking for me to fight during the tryouts”.

vi. Para. 18: “I was commended for my fights by my coaches, teammates, and by management. After I’d win a fight, my coaches would praise me in the locker room and, if I lost, the coaches would explain how I could do better.” Also, after stating he did not need to be told to fight, he deposed, “Rather, my coaches would only need to say my name or tap me on the shoulder, and I would head out onto the ice, looking for my target”.

vii. Para. 20: In describing a fight he deposed he would try to inflict as much damages as possible “while the other player would do the same” and they would drop their helmets “and try to connect as many punches as possible before the fight finished”.

viii. Para. 23: “and to be encouraged to fight by my coaches”.

ix. Para. 28: “To this day, I still feel the effects of my years of fighting”.

That sentence is followed by a list of physical and psychological symptoms. The defendants say Mr. McEwan draws a causative link between fighting and those symptoms. I agree he does so, but that reflects his state of mind and cannot be evidence that could be relied on for the legal test for causation. It represents a fact that he believes, and is admissible on that basis only. In part, it gives narrative context to his involvement in the litigation.

b) Stoesz Affidavit:

i. Para. 3: “At the age of 15, I caught the eye of recruiters”.

ii. Para. 4: “the CHL training camps are used by the coaches and trainers to assess the current team to see who will make the regular season roster. It is also a time to test out younger players to see if they have potential to play on the team in the future”. Also, “I recall the coaches and the trainers cheering for me on the sidelines. Everyone was paying attention to me”.

iii. Para. 5 “At the last camp, I had shown that I was tough, so I knew I was expected to fight at this camp and I did. … but I felt like I was on fire and I knew that I needed to keep fighting so that I would be noticed and considered for a spot on the team”. He then describes his hands being swollen and having taken many hits to the head, “but I had made an impression” and that he “got a lot of attention from this fight”.

iv. Para. 7: “It was made clear to me that I wasn’t on the ice to play and score, I was there to fight. Fighting was encouraged by the coaches and trainers.” Also, “I knew I needed to do what my coaches wanted to do so that I would get to play. I had to keep my coaches happy as they had the power to impact my reputation with the NHL scouts”.

v. Para. 9: “and now looking back, by joining this team I was molded into this raged-filled fighter” who “intimidated” and fought with his own teammates.

vi. Para. 10: “My teammates nicknamed me ‘Terma’ which was short for Terminator, an unstoppable fighting machine. Once I earned this title, there was no going back. The other teams knew that I was there to fight and often at the beginning of the game everyone knew who I was going to fight. In some games, I would just have to look at the other player on the opposite team, and he knew that we were going to have a fight.”

vii. Para.15: “but the expectation was even if I was hit hard, I should get back up and be tough enough to keep playing”.

viii. Para. 16: “By my second season, I was a star in Spokane with a loyal following of fans because of my role as an enforcer” and “the crowd wanted me to fight”. Also, “[t]here was so much hype built up about my fights in Spokane. At the start of each game I would feel the pressure of the coaches, my team and couple hundred fans expecting me to fight”.

ix. Para. 17: “My role as an enforcer for the Spokane Chiefs paid off. … I knew the only reason I was drafted was for my skill as a fighter”.

x. Para. 20: “I’ve reviewed the Amended Notice of Civil claim and I believe I meet the definition to be a class member. I also believe there are many more CHL players who meet the definition”.

Mr. Stoesz is stating his belief to address his potential suitability as a representative plaintiff, so this is admissible for that purpose (see below, paras. 140–141).

xi. Para. 21: “I am sharing my experience as a player in the CHL for this case as I want to raise attention to the unnecessary injuries caused from fighting in the CHL”. And, “My time in Spokane was a daze of fights”.

Mr. Stoesz is stating his belief to address his potential suitability as a representative plaintiff, so it is admissible for that purpose (see below, paras. 140–141).

c) Trombley Affidavit:

i. Para. 4: “and knew that if I did not fight to stand out, there were many other guys my age with my skill level that would fight and would be given the spot”. And, “[f]rom that moment on, my role was set, and I

knew that if I did not fight, I would be sent down to a lower league". Also, "[t]he coaches and assistant coaches for the CHL teams reminded us constantly that if we didn't perform, we would not be kept on and that there were many other guys who could take our spot in a second (and performance for me meant fighting)."

ii. Para. 5: "I knew it was because they wanted me to fight and the player on the other team in that position".

iii. Para. 6: "I recall that fighting began to take a serious toll on my ability to be productive at school". He described difficulty he sometimes the day after he fought because his hands were swollen. He deposed his hands were put in ice to reduce the swelling so his gloves would fit and then stated: "I would then inevitably have to fight again".

iv. Para. 8: He deposed he would have done anything to keep his position in the league "as it was the only way that I could one day play for the National Hockey League and fighting was what was required of me." Also, "to this day, I suffer from ongoing memory issues and pain throughout my body including my hands, shoulder, and back".

Mr. Trombley's statement as to the symptoms he suffers are clearly facts. While he may believe in his mind they were caused by fighting, they are not admissible to support the legal test of causation because that would offend the rule against opinion evidence from a non-expert.

d) Rylands Affidavit:

i. Para. 7: "It quickly became clear during that first year that I was being called up to play with the Frontenacs whenever they were playing a team that had a strong fighter and they needed me to come be an enforcer during the game."

### b. Admissible Lay Opinion

[129] The defendants also challenge as inadmissible opinion a number of statements made by the Players about the role they believed they played on their teams as “enforcers”. The Players also describe their understanding of what an enforcer was, and what they say was a culture of fighting on the teams and in the leagues.

[130] In my view, these statements meet the criteria for admission of lay opinion. The statements are within their personal knowledge and within their experiential capacity. The Players are clearly in a better position than the court to offer the opinion. I also agree they comply with the final requirement of being a “compendious mode of speaking”.

[131] I repeat that at certification, the issue is whether those statements, together with the rest of the record, are sufficient to establish a basis in fact to proceed as a class action. The credibility, reliability, and weight attached to these opinions will be an issue at trial, not at certification.

[132] In the alternative, if I am wrong that the statements satisfy the criteria for lay opinion, I would categorize them as statements of fact based on the Players’ experience not being offered for their truth but to further the narrative, and together with other statements, describe their state of mind.

[133] The following statements are admitted as lay opinion:

a) McEwan Affidavit:

i. Para. 3: “During my time playing in the CHL, I was groomed and trained to be what is called an enforcer – a position that is almost entirely focused on fighting players from the opposing team during the games.”

ii. Para. 17: “I was trained and encouraged by the coaches and management to be the team’s ‘enforcer’. The term enforcer is not an

official title in hockey, but it is a position that everyone was (and still is) very familiar with. An enforcer's primary job is to deter and respond to dirty or violent play by the opposition. When such play occurs, the enforcer is expected to respond aggressively, by fighting or checking the offender. Enforcers are expected to react particularly harshly to violence against star players or goalies. Additionally, enforcers are put out onto the ice to fight to try and change a [game's] momentum and, also, will sometimes be put out at the end of a game by the losing team when the results are inevitable to try and make a show of force to the other team. Every team in the WHL had at least one enforcer (and sometimes several) and, if an enforcer was put on the ice, the other team would respond by putting out theirs".

iii. Para. 19: "Each time I fought, I would receive a five-minute penalty and the CHL rules allowed (and still allow) for up to three fights a game".

b) Stoesz Affidavit:

i. Para. 6: "I realize now that I had literally fought my way onto that team".

ii. Para. 8: "If I wanted to have a secure place on the roster, I had to become the "enforcer" for the team. The enforcer is not an official position like a goalie but is a known role that a player takes on and who is meant to be an agitator and an aggressor to the opposite team. The enforcer is meant to protect the players on his team. If there are cheap shots or if there is aggression against a teammate, particularly a star player, the enforcer is expected to respond aggressively. In my experience, the enforcer was also used to make the game more exciting for the fans. There were times when I was sent on to fight because the game was slow, and the fans seemed bored. The coach would send me out to fight because it would get the fans to jump to their feet and cheer. When this happened, I felt like a rock star".

c) Trombley Affidavit:

i. Para. 3: “I was an enforcer which is essentially a boxer on ice. Enforcers respond to and deter the opposition from engaging in dirty play by fighting. When an opponent is physical with a player or uses illegal tactics, an enforcer will usually drop the gloves and square off in a right with the guilty culprit or the other team’s enforcer. Additionally, enforcing and fighting is used as a form of entertainment for the fans. There are awards for best fights and fighting records are reported and followed by many of the fans.”

ii. Para. 5: “and other times I simply knew because the culture was so entrenched in the leagues and players”.

iii. Para. 8: “I support the plaintiff’s application to have this action certified as I am concerned about the ongoing culture of fighting in the CHL when children are involved”.

d) Rylands Affidavit:

i. Para. 4: He began fighting as it was clear to him “that fighting was seen as part of the game … and that it would help my career and chances to one day play in the show”.

**c. Inadmissible Opinion**

[134] There are passages where I agree the Players go beyond making a factual statement and offer an opinion that does not meet the criteria for lay opinion. For that reason, I find portions of the following passages inadmissible as opinion evidence.

a) McEwan Affidavit:

i. Para. 3, first 3 words of the 4th sentence (“As a result”).

The statement makes a causative link between Mr. McEwan's involvement in over 70 fights and injuries he suffers. In my view, the statement goes beyond seeking a common-sense inference that could be permitted under the lay opinion exception and, instead, calls for expertise. Those three words will be struck. However, the remaining words starting with "I suffered significant" all the way to the end of the sentence are admissible as statements of fact.

ii. Para. 19: "rules around fighting (and most of the other aspects of the game) in the WHL mirrored those of the NHL which I was happy with at the time given that everyone (including the coaches) treated playing for the WHL as training for one day playing in the NHL. … Attached as Exhibit "C" is a copy of an article in which the Vice President of Hockey Operations of the WHL notes that the WHL mirrors the rules of the NHL as much as possible and this is consistent with my understanding and experience."

The underlined portions express an opinion that requires expertise, and is inadmissible for that reason. If Exhibit "C" was attached only to buttress the underlined portion, it would be inadmissible on the same basis. However, it appears to be a statement by the defendants, and on that basis, I find it admissible as an exception to the hearsay rule.

iii. Para. 29: "I slowly [realized] that the culture of extreme violence at such a young age was extremely detrimental to myself and other children and was not a necessary part of the game." Also, "however, fighting (especially at such a young age) is not a necessary component to the art that I believe hockey is".

iv. Para. 30: Mr. McEwan describes testimony he gave for the World Association of Ice Hockey Players in relation to a labour relations issue, and explained that his view was "that [the CHL] pay players insufficiently low amounts and rejects them from accessing workers compensation and unemployment rights".

The plaintiff submits Mr. McEwan is repeating what his view was for the purpose of demonstrating his suitability as a representative plaintiff, not for the purpose of proving his view is true. However, the fact that he testified to take a stand against certain labour policies is sufficient without including the portions included in the quotes, and for that reason, those portions are struck.

v. Para. 32: "I believe that fighting should result in an automatic game misconduct, that players who continuously fight should have significant actions taken against them such as suspensions, and that referees should break up fights right away."

Mr. McEwan's beliefs about rule changes are an opinion that falls into the same category of Dr. Arthur-Banning's report. Mr. McEwan is not qualified as an expert. The statement might have qualified as lay opinion, but the plaintiff's position is that the area requires expertise. It would therefore be incongruous with their position to permit Mr. McEwan's statement to be admitted.

vi. Para. 41: He deposed he met many former players "who fought and have ongoing issues <u>as a result</u>". I agree the last three words are inadmissible opinion requiring expertise, for the same reason as stated in paragraph (i) above. Those words are inadmissible, but the rest of the sentence and the paragraph are admissible as statements of fact.

b) Stoesz Affidavit, para. 10: "and now that I know the symptoms of concussion, <u>I know [I] had many more</u>". Diagnosing a concussion requires expertise, which Mr. Stoesz does not have. The underlined portion is inadmissible opinion evidence.

c) Trombley Affidavit, para. 8: "The entire culture of the CHL was designed around the normalization of fighting and I do not think this is appropriate when children are involved."

### 4. Argumentative Statements

[135] It is well established that affidavits should not include statements that purport to be facts in the guise of legal argument. The defendants submit many statements are inadmissible for that reason. I have already ruled some of those to be inadmissible as opinion evidence. However, in the alternative, I also agree the statements are inadmissible as being argumentative:

a) McEwan Affidavit, para. 29: “I slowly [realized] that the culture of extreme violence at such a young age was extremely detrimental to myself and other children and was not a necessary part of the game.” Also, “however, fighting (especially at such a young age) is not a necessary component to the art that I believe hockey is”.

b) Trombley Affidavit, para. 8: “The entire culture of the CHL was designed around the normalization of fighting and I do not think this is appropriate when children are involved.”

[136] However, I find no other passage objected to by the defendants as argument to be inadmissible on that basis. All are either appropriate statements of fact, or fall into the category of lay opinion as already discussed.

### 5. Bald Assertion of Facts and Improper Descriptions

[137] The defendants submit a number of statements are inadmissible for containing “improper descriptions” (whether of their own reaction, or the reactions of others). They also allege certain passages are inadmissible as “bald statements of fact”, non-particularized statements of fact, or “adjectival” descriptions. In my view, that position is not supported by the case law. As noted, I have rejected the defendants’ position that those constitute independent grounds for inadmissibility: see above para. 74.

[138] If I am wrong in that conclusion, I would find the references below are admissible statements of facts based on the Players’ experience (including state of mind) or observations (some may also be ruled admissible elsewhere in this

judgment). In my view, the following statements do fit within the narrative of the affidavits:

a) McEwan Affidavit:

i. Para. 11: “I was disheartened by being cut during my first tryout for a Junior team” and “[the fight] was enough to get the attention of the coaches – they offered to allow me to go to play exhibition games”.

ii. Para. 12: “I was not surprised though as it would have been rare for someone my age to have been given a spot especially because I had not been drafted”.

iii. Para. 14: “I already had a reputation of being a fighter and it became obvious very early during the tryouts that this was the skill that the coaches and managers of the team were the most interest in.”

iv. Para. 17: “The term enforcer is not an official title in hockey, but it is a position that everyone was (and still is) very familiar with. An enforcer’s primary job is to deter and respond to dirty or violent play by the opposition. When such play occurs, the enforcer is expected to respond aggressively, by fighting or checking the offender. Enforcers are expected to react particularly harshly to violence against start players or goalies. Additionally, enforcers are put out onto the ice to fight to try and change a [game’s] momentum and, also, will sometimes be put out at the end of a game by the losing team when the results are inevitable to try and make a show of force to the other team. Every team in the WHL had at least one enforcers (and sometimes several) and, if an enforcer was put on the ice, the other team would respond by putting out theirs”.

v. Para. 18: “After I’d win a fight, my coaches would praise me in the locker room”.

vi. Para. 23: After a particular fight, he “was given the title by fans for holding ‘the best fight’. I was also given the title of sixth most entertaining fighter with my longest fight lasting almost a minute”.

b) Stoesz Affidavit:

i. Para. 4: After describing his first fight, he deposed, “and it was exhilarating”.

ii. Para. 6: “I felt incredible and invincible.”

iii. Para. 7: “I thought this was strange” (being asked to play as an offensive player because he always played defence).

iv. Para. 8: “If I wanted to have a secure place on the roster, I had to become the “enforcer” for the team. The enforcer is not an official position like a goalie but is a known role that a player takes on and who is meant to be an agitator and an aggressor to the opposite team. The enforcer is meant to protect the players on his team. If there are cheap shots or if there is aggression against a teammate, particularly a star player, the enforcer is expected to respond aggressively. In my experience, the enforcer was also used to make the game more exciting for the fans. There were times when I was sent on to fight because the game was slow, and the fans seemed bored. The coach would send me out to fight because it would get the fans to jump to their feet and cheer. When this happened, I felt like a rock star”.

v. Para. 12: “I can barely watch [fights posted online in which he was involved] now as I find it incredibly upsetting and I feel sick to my stomach to see my younger self being punched in the face, pushed on the ice or seeing myself doing that to another player”.

vi. Para. 13: After describing a fight in which he injured his hand: “It was just one of the many inquires I suffered during fights while playing in the CHL”.

vii. Para. 15: “I was injured during many fights, but the expectation was even if I was hit hard, I should get back up and be tough enough to keep playing”.

viii. Para. 16: “By my second season, I was a star in Spokane with a loyal following of fans because of my role as an enforcer. … and the crowd wanted me to fight”.

c) Trombley Affidavit:

i. Para. 3: “I was an enforcer which is essentially a boxer on ice. Enforcers respond to and deter the opposition from engaging in dirty play by fighting. When an opponent is physical with a player or uses illegal tactics, an enforcer will usually drop the gloves and square off in a fight with the guilty culprit or the other team’s enforcer. Additionally, enforcing and fighting is used as a form of entertainment for the fans. There are awards for best fights and fighting records are reported and followed by many of the fans”. He then deposed that he “as with most enforcers” would typically fight two or three times a game.

d) Rylands Affidavit:

i. Para. 8: “I did not find this very fair as I felt that I had paid my dues and had protected players on the team by fighting”.

[139] There is also a passage that the defendants identified as being “improper description”, which I have found inadmissible as opinion evidence: McEwan Affidavit, para. 19, portion of the third sentence beginning at “the rules around”: see above para. 134(a)(ii).

### 6. Evidence Relevant to the Legislation

[140] I agree with the plaintiff that some of the evidence to which the defendants object (on various bases) is admissible because it is directly relevant to a particular section in the *CPA*. Often the statement also explains why the Players have filed the affidavit. However, the plaintiff does not adduce the statement as proof that the certification conditions are met, only to provide context.

[141] Specifically, I agree with the plaintiff the following are admissible as being relevant to s. 5(5)(c) of the *CPA* because Players must provide their "best information" as to the number of people in the class:

a) McEwan Affidavit:

   i. Para. 29: "I have spoken with many former players that had similar experiences to me and suffered injuries".

   ii. Para. 41: He deposed he met many former players "who fought and have ongoing issues as a result". I have found the last three words are inadmissible opinion requiring expertise, but the rest is admissible as statements of fact.

b) Stoesz Affidavit:

   i. Para. 20: "I've reviewed the Amended Notice of Civil claim and I believe I meet the definition to be a class member. I also believe there are many more CHL players who meet the definition."

   ii. Para. 22: "There are so many stories in the news now about players who were enforcers who are living with severe injuries".

### 7. Irrelevant Content

[142] The defendants submit a number of passages are irrelevant to the issues and, therefore, inadmissible on that basis. I have already ruled some portions of those passages inadmissible as opinion evidence. However, if I am wrong about that characterization, I would find the following inadmissible as being irrelevant:

a) McEwan Affidavit:

i. Para. 29: “I slowly [realized] that the culture of extreme violence at such a young age was extremely detrimental to myself and other children and was not a necessary part of the game.” Also, “however, fighting (especially at such a young age) is not a necessary component to the art that I believe hockey is”.

ii. Para. 32: “I believe that fighting should result in an automatic game misconduct, that players who continuously fight should have significant actions taken against them such as suspensions, and that referees should breakup up fights right away”.

[143] There are other passages, which the defendants submit are irrelevant that are challenged on other grounds. For all those (except those identified in the preceding paragraph), I have already dismissed the objections; I confirm I also find those passages relevant; they are admissible.

[144] However, I find two other passages to be inadmissible as being irrelevant.

[145] The first is the fourth sentence of paragraph 19 of Mr. McEwan’s affidavit, “In fact, I was told by my initial coach for Seattle that I did not need an agent as he and other coaches would work with me to get me drafted to the NHL”.

[146] The second is paragraph 12 of Mr. Stoesz’s affidavit. While I have found this to be properly categorized as a statement of fact, as opposed to inadmissible opinion (see above, para. 138(b)(v)). I agree with the defendants that it is not relevant to any issue at certification. Therefore, I find it inadmissible:

> I can barely watch [fights posted online in which he was involved] now as I find it incredibly upsetting and I feel sick to my stomach to see my younger self being punched in the face, pushed on the ice or seeing myself doing that to another player.

### 8. Whole Paragraphs

[147] I find it convenient to analyze three paragraphs (or portions thereof) as a whole rather than segregating portions of them under different categories. I will

analyze each in turn. For convenience, I have numbered the sentences within the paragraphs.

[148] The first is paragraph 21 of Mr. Stoesz's affidavit:

> [1] I am sharing my experience as a player in the CHL for this case as I want to raise attention to the unnecessary injuries caused from fighting in the CHL. [2] I think the CHL needs to be held accountable to the current and former players for these injuries. [3] I want the CHL to acknowledge that what we had to do to play in the CHL as teenagers was not acceptable. [4] Looking back at my career in the CHL, I feel like I lost part of my youth. [5] My time in Spokane was a daze of fights. I'm scared about my future because I took repeated blows to my head. I'm in my early 30's and I suffer from headaches and migraines and my right hand is disfigured with a mallet finger from punching.

[149] The defendants object to all sentences as being improper opinion. They also object to the sentences 1, 2, and 3 as being irrelevant and argument.

[150] The plaintiff argues the sentences are admissible as facts, or in the alterative, they satisfy the criteria for admission as lay opinion evidence.

[151] I have already ruled that sentence 1 has been mischaracterized by the defendants as an opinion, and is admissible as a factual statement: see above para. 128(b)(xi). I also find it admissible as being relevant to s. 5 of the *CPA*: see above para. 140.

[152] I agree the sentences 2 and 3 are inadmissible as either opinion or argument.

[153] I do not find sentences 4 and 5 to be accurately characterized as opinion. Instead, I find they are admissible as facts based on Mr. Stoesz's experience and demonstrating his state of mind.

[154] The second is paragraph 22 of Mr. Stoesz's affidavit:

> [1] I also want this unnecessary pressure to fight on the players coming up in the CHL to stop. [2] I love hockey and I have a young son. [3] If he wants to play hockey, I don't want him to have to go through what I went through. [4] There are so many stories in the news now about players who were enforcers who are living with severe injuries. [5] I relate to these stories and I want to do my part and be proactive and protect young athletes from feeling that the only way to succeed is to fight on the ice.

[155] The defendants contend that sentence 4 is a “bald” allegation of fact. As already noted, I do not find this can be a ground for inadmissibility. Regardless of that conclusion, I find this sentence is admissible as being relevant to s. 5(5)(c) of the *CPA*.

[156] The defendants object to sentences 1, 3, and 5 as improper opinion (as well as being argument). The plaintiff submits the paragraph is admissible as factual statements, or, in the alternative as lay opinion.

[157] I do not agree that sentence 3 is an opinion, but if I am wrong, I would admit it as lay opinion.

[158] While I agree the phrase “unnecessary pressure to fight” in sentence 1 does veer close to offering an opinion, when read in the context of the paragraph, and the affidavit as a whole, I accept this is a statement of fact based on Mr. Stoesz’s experience. Expressing that he wants the unnecessary pressure (that he experienced) to stop is a statement of fact for the reasons explained above at paras. 124–127.

[159] I also find sentence 5 admissible for the same reasons. In the alternative, I would not accede to the defendants’ objection that those two sentences are inadmissible opinion, as I would find them to be admissible lay opinion.

[160] Nor do I find any of those three sentences constitute argument; they contain Mr. Stoesz’s explanation for why he filed the affidavit.

[161] The defendants also submit sentences 2, 3, and 5 are irrelevant. The plaintiff submits all are admissible as factual statements, and sentence 2 provides narrative context.

[162] While sentences 2 and 3 may be tangential to the issues at certification, I find, when read together with the whole paragraph in the context of the affidavit, they further the narrative, and I am unable to say that are irrelevant. I find them admissible. I also find sentence 5 relevant as providing an explanation for his involvement in the law suit.

[163] The third is paragraph 11 of Mr. Rylands’ affidavit:

> [1] I swear this affidavit in support of the class action as I would like to see changes made to the way that the leagues deal with fighting when children are involved. [2] I continue to see the consequences of my fighting (I still have issues with pain in my hands, hip, and back) and looking back, do not believe that it was necessary when I was a teenager. [3] I also recall that the aggressive culture began changing me back then – I have always been a thoughtful and passive person and during the years I played in the OHL, I found myself having a shorter fuse and would respond aggressively both on and off the ice. [4] I do not want that to happen to my son and while I love hockey and am excited to pass that love down to him, I think change is needed.

[164] The defendants object to the entire paragraph as being improper opinion and containing "adjectival descriptions". The plaintiff contends that the statements are admissible as facts, and in the alternative, they are based on Mr. Rylands' experience and admissible as lay opinion.

[165] As noted, I do not find "adjectival descriptions" is a ground for inadmissibility; I do not give effect to that objection.

[166] The first sentence is not an opinion, but a statement of a fact because it explains why he swore the affidavit. In any event, I find it admissible as being relevant to s. 5 of the *CPA*.

[167] Although the phrase "I continue to see the consequences of my fighting" (sentence 2) does indicate he believes certain physical complaints were caused by fighting, this would not be admissible as proof of causation at the trial. It represents a fact from his perspective and is admissible as part of the narrative, explaining his involvement in the litigation, and his state of mind.

[168] With regard to the portion of sentence 2 beginning "do not believe", and the phrase "I think change is needed" in sentence 5, those are akin to his expressing an opinion. However, I find when read in the context of the paragraph, and the affidavit as a whole, they are statements of fact based on Mr. Rylands' experience and/or speaking to his state of mind for the reasons expressed above at paras. 124–127. In the alternative, I would admit them as lay opinions.

[169] I do not agree sentences 3 and 4 contain opinions; I agree with the plaintiff they are factual statements.

[170] The defendants submit that sentence 1, the portion of the sentence 2 beginning at “do not believe”, and sentence 4 are argument and irrelevant.

[171] Sentence 1 is relevant to s. 5 of the *CPA*. While that part of sentence 2 and sentence 4 may be tangential to issues at certification, in the context of the entire paragraph and affidavit, I find they further the narrative, and I am unable to say they are irrelevant. Furthermore, I find none of the three sentences are argumentative.

## III. IS THE EXPERT’S AFFIDAVIT ADMISSIBLE?

[172] The defendants challenge the expertise of Dr. Arthur-Banning and the content of his report.

### A. The Report

[173] The report is appended to Dr. Arthur-Banning’s affidavit made February 23, 2021, and is dated February 10, 2021. It is titled, “Professional Standards and Best Practices for an Amateur Sporting League such as the Canadian Hockey League with Respect to Injury Prevention”. The defendants do not allege any deficiencies in the procedural or formal requirements of the report.

[174] Dr. Arthur-Banning describes his educational background at paragraph 1 of his affidavit (he also includes a 20-page *curriculum vitae* in an appendix to his report). He is currently a professor within the Department of Parks, Recreation and Tourism Management at Clemson University in Clemson, South Carolina, where he has been teaching Amateur Sport Management since 2005. He has a Ph.D. from the University of Utah in Amateur Sport Management, an M.Sc. (with Sports Medicine emphasis) from Oregon State University, and a Bachelor of Physical Education (Honours) from Brock University.

[175] He describes his professional qualifications at page 6 of his report. He has studied amateur sports ethics, behaviour and programming for 15 years and has published over 40 peer-reviewed journal publications or book chapters related to

amateur sport. He is the co-author of “Recreational Sport Management: Program Design and Delivery”, a book published in 2015, which was developed to help readers understand how to design, deliver, and manage recreational sports programs regardless of setting. He has edited two other books relating to amateur sport.

[176] The report itself has four sections. Section 1 has a summary of his qualifications and an executive summary of the report itself. Section 2 is a general summary of literature addressing professional standards and best practice for amateur youth sports organizations in protecting athlete safety. In reviewing this literature, Dr. Arthur-Banning states that the literature identifies three categories of responsible action related to injury reduction: education, policy, and rules. He also discusses the “hierarchy of responsibility” for protecting athlete safety which suggests governments bear the most responsibility, followed by sport organizations, coaches and teachers, parents, and finally, the athletes. He also references literature that suggests sports organization ought to have policies in place regarding management of concussion and to encourage good sportsmanship to reduce violence.

[177] Section 3 is a summary of literature addressing professional standards and best practices for protecting athlete safety specific to hockey. In this section, he refers to a number of studies, including those done before and after implementation of rules forcing players to wear face masks, and imposing penalties related to misuse of sticks. Both rules were adopted for the purpose of reducing facial injuries. He suggests those rule changes resulted in a significant decrease in eye injuries. Similarly, he comments on a study which look at the efficacy of implementing a rule preventing checking from behind. He cites studies addressing issues relating to concussion, including those commenting on measures taken (or not taken) to address concussion and injuries from body checking. He also comments on studies that looked at fighting specific to various hockey organizations.

[178] Section 4 contains his opinion about the responsibilities of the CHL for teenage players. Specifically, he opines the that the “CHL has repeatedly failed to

alter their stance on fighting in their affiliated leagues, thus allowing for greater potential for athlete injury". He opines the following changes should be instituted:

a) Aligning the rules for fighting to more closely align with other amateur sports organization with at least suspensions from that game and likely an additional game.

b) Assuming that a player who engaged in a fight received a blow to the head leading to at least a suspicion of the possibility of a concussion, and allowing a trained medical professional to assess the athlete before he returns to play.

c) Additional training for athletes, coaches, officials, administration, billet families, and biological families around concussion, the culture of violence, and how to play in a safe manner, including signs and symptoms of head injuries and concussion, dangers of second impact syndrome, and other issues.

**B. Legal Principles**

[179] The parties do not dispute the applicable legal principles. The leading case is *White Burgess Langille Inman v. Abbott and Haliburton Co*., 2015 SCC 23. The Court confirmed a two-stage test to determine the admissibility of expert opinion (paras. 23–24).

[180] At the first stage, the evidence must meet the threshold requirements of admissibility, comprised of the four factors set out in *R. v. Mohan*, [1994] 2 S.C.R. 9: (i) relevance; (ii) necessity in assisting the trier of fact; (iii) absence of an exclusionary rule, and; (iv) a properly qualified expert (paras. 20–25). In addition, in the case of an opinion based on novel or contested science or science used for a novel purpose, the reliability of the underlying science and necessity of the opinion is scrutinized (*White Burgess* at para. 23). Evidence that does not meet the threshold requirement is excluded.

[181] At the second stage, the court must exercise its discretionary gatekeeping function by excluding otherwise admissible expert evidence whose probative value is outweighed by its prejudicial effects on the trial process (para. 19).

[182] Expert witnesses must be impartial, independent, and unbiased (para. 32). Their duty is owed to the court and not to the parties. Expert witnesses must be impartial in the sense that their evidence must reflect an objective assessment of the questions presented to them. They must be independent in the sense that their evidence must be the product of their independent judgment, uninfluenced by the party who retained them or the outcome of the litigation. They must be unbiased in the sense that they do not favour one party's position over that of the other. The fact that an expert is retained, instructed, and paid by a party to the litigation does not, by itself, undermine the expert's evidence (para. 32).

[183] An expert's lack of impartiality and/or independence is relevant not just to the weight to be given to the evidence under the second stage of the test, but also to its admissibility under the first stage of the test, to be addressed under the "qualified expert" element of the *Mohan* framework (paras. 45, 53). The question is whether the expert's relationship with the parties or interest in the litigation results in the expert's being unable or unwilling to carry out their duties to the court. This is a question of fact and degree (para. 50).

[184] Absent a challenge to the expert's independence and impartiality, the expert's attestation or testimony recognizing and accepting their duties to the court will be sufficient to establish threshold impartiality and independence (para. 47). Once the expert attests or testifies on oath to this effect, the burden is on the party opposing the admission of the expert evidence to show that there is a realistic concern that the expert's evidence should not be admitted because the expert is unable and/or unwilling to comply with that duty (para. 48).

### C. Analysis

[185] The defendants submit the report should not be admitted into evidence because it fails to meet the threshold criteria. Their position is that Dr. Arthur-

Banning is not a qualified expert, and the report is unnecessary, unreliable, and irrelevant.

### 1. Properly Qualified Expert

[186] The element of a "properly qualified expert" under *Mohan* requires that the expert has acquired special or peculiar knowledge through study or experience in respect of the matters the expert undertakes to testify (para. 25). As stated above, the degree to which an expert is able and willing to fulfill their duties of impartiality and independence to the court may also be addressed under this element: *White Burgess* at para. 53.

[187] The defendants argue Dr. Arthur-Banning's report fails to meet this threshold criteria. They allege that he is not a properly qualified expert because his expertise relates to recreation management. They further submit that the requirement that an expert have acquired special or peculiar knowledge through study or experience is "particularly stringent in cases where … the evidence in the behavioral type science (as opposed to "hard" science")", citing *R. v. Orr*, 2015 BCCA 88 at para. 67.

[188] With respect, the defendants have overstated the scope of the Court of Appeal's comments in *Orr*. As noted at para. 78, the court may need to ask different questions when assessing expertise in behavioural sciences because they are not amenable to the same scrutiny as "traditional" scientific evidence.

[189] Moreover, the problematic aspects of the expert evidence adduced before the jury in *Orr* is not present here. The case involved allegations that the accused violated provisions of the *Immigration and Refugee Act*, S.C. 2001, c. 27, with respect to bringing a caregiver (a nanny) into Canada. The expert's opinion related, in part, to an issue of the delay of the complainant's report of alleged abuses to the authorities. The expert opined on the psychological factors which may lead to behaviour relevant to credibility, which the Court of Appeal noted had been accepted as an appropriate subject of expert opinion provided it went "beyond the ordinary experience of the trier of fact" (para. 66).

[190] However, the court found the expert was not qualified to give the opinion expressed at trial. In large part, that is because of a “flawed procedure” employed by the trial judge which led to the expert being qualified in a field in which Crown counsel had not sought to have the expert qualified (para. 47). The Crown initially proposed to qualify the expert in criminology and transnational crime in order to give opinion evidence on human trafficking and patterns of exploitation by human traffickers. Instead, the expert was qualified as an expert in “victimology”, which was only briefly canvassed in his testimony as to qualifications (para. 36). Also, although not decisive, that case involved a jury and the court’s gatekeeping role with respect to expert evidence is particularly important (para. 62).

[191] In addition, the Court of Appeal questioned whether expertise was required at all since “ordinary, fair-minded members of Canadian juries are capable of weighing common motivations and basic human emotions such as fear of reprisal and dependence arising from poverty and vulnerability” (para. 73).

[192] In my view, all of those factors are sufficient to distinguish the case from the issues before me.

[193] The defendants allege Dr. Arthur-Banning does not have expertise with regard to professional standards and best practices applicable to amateur sports leagues with regard to injury prevention. They contend that “[i]t is not disputed that answering the question posed to Dr. Arthur-Banning requires medical expertise relating to … neurological injuries in hockey, concussions and concussion management”.

[194] I agree with the plaintiff that the defendants have, in part, mischaracterized the nature and scope of the proposed opinion. The plaintiff emphasizes that the report is not tendered to provide medical expertise relating to neurological injuries in hockey. Instead, Dr. Arthur-Banning has been asked to consider professional standards and best practices to minimize injuries in an amateur youth sport league. The plaintiff submits the doctor has specialized knowledge and is qualified to testify about policies and practices concerning youth amateur sporting organizations.

[195] I agree. Dr. Arthur-Banning has a Ph.D. in Recreation and Tourism focused on youth sports, a Master of Science with a focus on sports medicine and a Bachelor's Degree in Physical Education. The plaintiff submits that the doctor has achieved the relevant academic benchmarks in his discipline and that he continues to actively teach, research, and publish in his field. The plaintiff also points out that for the past 15 years, the doctor has been an associate professor in behavioural, social, and health sciences at Clemson University in South Carolina. He has also been teaching amateur sports management during that period. He conducts and disseminates research relevant to sport management in youth development and has been studying amateur sports, ethics, behaviour, and programming and published over 40 peer-reviewed journal publications on those topics. He has also published a book and sits on the Editorial Board of the Journal of Youth Sport.

[196] The defendants argue that Dr. Arthur-Banning's lack of "formal qualifications" and specific publications in best practices and professional standards for injury prevention demonstrate how he is not qualified. I disagree. His area of academic study, publication, and teaching focusses on amateur sport management. Studying sports management necessarily includes a consideration of polices and practices. I am satisfied that is clearly and logically linked to issues raised by the pleadings, mainly the nature and scope of the duty and standard of care of organizations that operate amateur sports leagues. It may be that his particular experience and publications (or lack thereof) affects the weight that might attach to his opinion, but it does not disqualify him as an expert.

[197] I also agree with the plaintiff that the cases relied upon by the defendants to challenge Dr. Arthur-Banning's qualification are distinguishable. Those cases are *Stout v. Bayer Inc.*, 2017 SKQB 329, *Williamson v. Johnson & Johnson*, 2020 BCSC 1746, and *Kish v. Facebook Canada Ltd*., 2021 SKQB 198. One difference between those cases and the fact before me are that those experts were cross-examined prior to the court's ruling. The plaintiff says without seeking to cross-examine the doctor, the defendants cannot rely on the same reasoning. While that is relevant to my analysis, I do not find it determinative.

[198] However, I do agree that the cases involve issues that do not arise here. In *Williamson* and *Kish*, the experts were found to be providing information outside their area of qualification, which is a different basis for excluding opinion evidence. For instance, in *Kish*, the plaintiff's expert witness was asked for his opinion on information, privacy, and data collection. The court held that the expert—who had described his expertise as "related to identity theft and fraud"—did not have expertise in information systems and privacy (paras. 39–40). The court also commented on the expert's combative demeanour (para. 43). In *Williamson*, the plaintiff's expert witness testified about talc-based products and possible biological mechanisms of ovarian cancer (para. 54). The court held that the expert witness, as a nutritional epidemiologist, not qualified as a medical doctor, gynecologist, toxicologist, oncologist or pathologist, was not qualified to depose on those subjects (paras. 56, 70). In *Stout*, the expert admitted that she had never heard of a particular device at issue and that she had no training in drug regulation or medical device regulation, which limited the answer she could provide (para. 16).

[199] The plaintiff alleges the defendants were, among other things, negligent in failing to prevent fighting which led to players suffering injuries. A critical issue will be the scope of the duty owed by the defendants to players, and the standard of care with respect to injury prevention. Dr. Arthur-Banning's report canvasses studies and literature on that topic, including in hockey. I do not find there is a gap between the issues raised by the pleadings and the content of his report. Whether it will be persuasive, and how much weight should be attached to it, are separate issues to be addressed later.

### 2. Necessity

[200] The element of "necessity" under *Mohan* requires that the expert evidence provide information "which is likely to be outside the experience and knowledge" of the trier of fact (*Mohan* at 23). The need for the evidence is assessed in light of its potential to distort the fact-finding process.

[201] If the alleged act or acts of negligence in question “is of a technical or scientific nature or otherwise outside the knowledge and experience of the ordinary person, then expert evidence of the standard of care, its content and breach, will likely be necessary.”: *Bergen v. Guliker*, 2015 BCCA 283 at para. 119.

[202] The defendants submit that, even if the expert is qualified, the report is unnecessary because it is an attempt to opine on the duty of care which is a legal issue, and as such usurps the role of the court.

[203] The plaintiff says the expert is not usurping the role of the judge. Instead, he provides relevant literature and an impartial objective opinion regarding the relevant standard of care which is outside the scope of knowledge of an ordinary person.

[204] I agree. As the plaintiff points out, the relevant standard of care and whether it was breached has been accepted in cases as being something outside the ordinary knowledge of a judge or jury: *International Culinary Institute of Canada, Inc. v. Grant Thornton LLP,* 2010 BCSC 541 at paras. 32–36. In that case, Goepel J. held that the standard of care of a chartered accountant doing a review engagement is not within the experience and knowledge possessed by a juror or judge (para. 32).

[205] The plaintiff draws an analogy to *Batten v. Boehringer Ingelheim (Canada) Ltd*., 2017 ONSC 53 at para. 194, aff’d 2017 ONSC 6098. In that case, the plaintiff needed to show that there was some improved warning of the potential dangers of an allegedly defective drug and that such warning could have been effective. In the same way, Dr. Arthur-Banning makes recommendations as to safety improvements that could have been made by the defendants.

[206] The plaintiff accepts the merits of those recommendations will not be material issues at certification. However, he submits adducing evidence about them may assist the court to understand the standard of care, which will likely be necessary to determine the suitability of the case for a class action. I agree.

### 3. Reliability

[207] The defendants also allege the report is not reliable and is irrelevant.

[208] The element of “relevance” under *Mohan* requires that that the expert evidence sought to be tendered be related to a fact in issue (*Mohan* at 20). Expert evidence that advances a novel scientific theory or technique must also meet a basic threshold of reliability (*Mohan* at 25). In evaluating reliability, the court should have regard to the factors listed at *R. v. Abbey*, 2009 ONCA 624 at para. 119:

a) To what extent is the field in which the opinion is offered a recognized discipline, profession or area of specialized training?

b) To what extent is the work within that field subject to quality assurance measures and appropriate independent review by others in the field?

c) What are the particular expert's qualifications within that discipline, profession, or area of specialized training?

d) To the extent that the opinion rests on data accumulated through various means such as interviews, is the data accurately recorded, stored, and available?

e) To what extent are the reasoning processes underlying the opinion and the methods used to gather the relevant information clearly explained by the witness and susceptible to critical examination by a jury?

f) To what extent has the expert arrived at his or her opinion using methodologies accepted by those working in the particular field in which the opinion is advanced?

g) To what extent do the accepted methodologies promote and enhance the reliability of the information gathered and relied on by the expert?

h) To what extent has the witness, in advancing the opinion, honoured the boundaries and limits of the discipline from which his or her expertise arises?

i) To what extent is the proffered opinion based on data and other information gathered independently of the specific case or, more broadly, the litigation process?

[209] The defendants submit that the expert report is based on “novel” science because Dr. Arthur-Banning comments on a subject that is not a “recognized discipline” or subject of meaningful quality assurance measures. I do not accept that position. Dr. Arthur-Banning is not purporting to offer an opinion on novel science; he is describing existing literature addressing a possible relationship between various sports management regimes and injury prevention, which the plaintiff wants to rely on to inform the standard of care. The idea that past practices (rules, policies, and education) and results may be helpful to a court to determine what is the appropriate standard of care does not fall into the category of “novel science”.

[210] The plaintiff points out that the issue must be analyzed with reference to the question asked of the expert. He submits that the question about professional standards and best practices for amateur youth sporting leagues is a question of sports governance that is directly relevant to the case. He intends to rely on it as providing some basis in fact to support the existence of common issues and proposed issues that could constitute the class action. The plaintiff submits that the expert provides the court with an overview of education policies and rules used by comparable sport leagues to reduce injuries caused by fighting. The plaintiff submits that this provides comparative evidence to give a preview of how common issues at trial could work and what type of standard of care analysis may be necessary.

[211] I agree, and find that reasoning sound. It may be that other evidence or cross-examination of Dr. Arthur-Banning will impact the weight attached to his report, but at this stage, I find that the report is clearly relevant to the issues at certification, and has a baseline reliability.

### 4. Probative Value

[212] Even where a court concludes expert evidence can meet the threshold requirements, it may be excluded if the prejudicial effects outweigh the probative

value. This is a type of balancing exercise where the court has the discretion under its gatekeeping function to exclude otherwise admissible evidence.

[213] The defendants submit the potential benefits of Dr. Arthur-Banning's report are outweighed by its risks. However, in support of that position, the defendants mostly repeat and rely on the same arguments they raised to argue the report cannot meet the threshold requirements. For the reasons I have already discussed, those submissions fail. I am not persuaded that the defendants identified any way in which admission of the report could either distort the certification hearing or the fact-finding process at trial, or lead to any unfairness in the process.

[214] In addition to repeating the arguments raised under the threshold stage, the defendants argue the report relies on a compilation of articles from other experts such that the court is unable to assess whether those accord with "mainstream science". They also complain that the report is "long and confusing".

[215] I disagree. Dr. Arthur-Banning clearly explains the purpose of his reference to other articles. His reliance may affect the weight attached to his opinion, but I am satisfied that he provides enough of his own analysis and opinion on issues that are probative. Nor do I share the defendants' view that the report is long and confusing.

### D. Conclusions

[216] For all those reasons, I dismiss the defendants' objections to the admissibility of Dr. Arthur-Banning's expert report. I find he is a qualified expert and that his report meets the threshold requirements for admission. Furthermore, the defendants have failed to persuade me that the risks to admitting the report outweigh its probative value.

## IV. CONCLUSIONS

[217] With regard to the defendants' objections to the Players' affidavits, only those portions identified in Appendix "A" are struck for the reasons stated in this judgment. All other objections are dismissed.

[218] I also dismiss, for the reasons explained in this judgment, the defendants' objections to the admissibility of Dr. Arthur-Banning's report.

"Sharma J."

## V. APPENDIX A

# Table of Inadmissible Statements

| Player | Affidavit reference | Basis of inadmissibility | Explanation followed by paragraph reference in Judgment |
|---|---|---|---|
| McEwan | Para. 3: first 3 words of 4th sentence ("As a result"). | Opinion | The statement goes beyond seeking a common-sense inference that could be permitted under the lay opinion exception and instead calls for expertise: para. 134(a)(i) |
| McEwan | Para. 15: The section that reads as follows: "one of the scouts for the team approached my Dad and pointed to one of the veterans of the team who was 19 years old (and who had been drafted for the St. Louis Blues in the NHL and was a notorious fighter in the league – fighting with him was often referred to as a "career ender"). The scout commented that there was one thing that I could do to make sure I secured a spot with the team." | Hearsay | These statements are things said to Mr. McEwan's father and were not repeated to Mr. McEwan: para. 121 |
| McEwan | Para. 19. The section that reads: "rules around fighting (and most of the other aspects of the game) in the WHL mirrored those of the NHL". | Opinion | The statement expresses an opinion that requires expertise: para. 134(a)(ii) |
| McEwan | Para. 19. The section that reads: "In fact, I was told by my initial coach for Seattle that I did not need an agent as he and other coaches would work with me to get drafted to the NHL" | Irrelevant | Para. 145 |
| McEwan | Para. 29. The section that reads: "I slowly [realized] that the culture of extreme violence at such a young age was extremely detrimental to myself and other children and was not a necessary part of the game." Also, "… however, fighting (especially at such a young age) is | Opinion<br>Argument<br>Irrelevant | Paras. 134(a)(iii), 135(a) and 142(a)(i) |

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| | not a necessary component to the art that I believe hockey is". | | |
| McEwan | Para. 30. The section that reads: "that [the CHL] pay players insufficiently low amounts and rejects them from accessing workers compensation and unemployment rights". | Opinion | His participation in stating an opinion relevant to his suitability as a representative plaintiff but substance of his opinion not necessary for that purpose: para. 134(a)(iv) |
| McEwan | Para. 32. The section that reads: "I believe that fighting should result in an automatic game misconduct, that players who continuously fight should have significant actions taken against them such as suspensions, and that referees should breakup up fights right away". | Opinion Irrelevant | Expresses opinion about necessary changes which is topic addressed by Dr. Arthur-Banning and therefore requires expertise: para. 134(a)(v)<br>As a non-expert his views are irrelevant: para. 142(a)(ii) |
| McEwan | Para. 41. The words "as a result". | Opinion | The statement goes beyond seeking a common-sense inference that could be permitted under the lay opinion exception and instead calls for expertise: para. 134(a)(vi) |
| Stoesz | Para. 10. The section that reads: "I know [I] had many more [concussions]" | Opinion | Diagnosing a concussion requires expertise, which Mr. Stoesz does not have: para. 134(b) |
| Stoesz | Para. 12. The section that reads: "I can barely watch [fights posted online in which he was involved] now as I find it incredibly upsetting and I feel sick to my stomach to see my younger self being punched in the face, pushed on the ice or seeing myself doing that to another player." | Irrelevant | Para. 146 |
| Stoesz | Para. 21. The section that reads: "I think the CHL needs to be held accountable to the current and former players for these injuries. I want the CHL to acknowledge that what we had to do to play in the CHL as teenagers was not acceptable." | Opinion Argument | Para. 152 |
| Trombley | Para. 8. The section that reads: "The entire culture of the CHL was designed around the normalization | Opinion Argument | Paras. 134(c) and 135(b) |

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| | of fighting and I do not think this is appropriate when children are involved." | | |