SMALL CLAIMS COURT OF NOVA SCOTIA

cite: *Gerrard v. Cole Harbour Bel Ayr Minor Hockey Association*, 2019 NSSM 31

SCCH No.484055

BETWEEN:

Tim Gerrard

Claimant

– and –

Cole Harbour Bel Ayr Minor Hockey Association, Hockey Nova Scotia, Perry Mason, Angela MacNeil, Paul Thibodeau, Yvette Considine, Jamie Aalders, Darryl Braine, Susan Manning, Jamie Miles, Jason Clark, Joel Wright, Cindy Bell-MacNeil, Jennifer Courtney, Michelle Lassaline and Jim Bungay

Defendants

Adjudicator: Augustus Richardson, QC

Heard: April 9, 2019; written submissions regarding jurisdiction dated April 8, 2019 (Defendants), May 7, 2019 (Claimant) and May 14, 2019 (Defendants)

Decision: July 2nd, 2019

Appearances: Stacey Gerrard, for the Claimant
Kody Blois, A/C, for the Defendants

DECISION and ORDER

[1] Can a member of a minor hockey association commence an action in this court for any economic loss flowing from a decision by the association to relieve him or her of membership in the association? Or, to put the question in another way, can a minor hockey association's decision to remove a member from the association that is allegedly made in breach of the association's rules and regulations create a cause of action based in contract or tort so as to ground a claim

within the jurisdiction of the Nova Scotia Small Claims Court. These are some of the questions addressed in this decision.

Background

[2] This matter first came on before me on April 9, 2019. The claimant appeared, as did a large number (perhaps all) of the defendants. Counsel for the defendant raised a preliminary objection to this court's jurisdiction. The objection had first been raised in the defence that had been filed on behalf of all defendants on January 31, 2019. Counsel for the defendants filed written submissions on April 8th, 2019. The parties agreed that it was appropriate to determine the issue of jurisdiction first. The hearing was adjourned to give counsel for the claimant an opportunity to file written submissions, and for counsel for the defendants to file a reply. The parties were advised that given my own time commitments it might take some time to consider the issues and reach a decision.

[3] Based on the material before me, it appears that the claimant is the father of two children who play hockey. The claimant was at some point a registered and paying member of the defendant Cole Harbour Bel Ayr Minor Hockey Association ("CHBA"). The CHBA has a Board of Directors comprised of the individual defendants (the "Board"). The CHBA is a member of the defendant Hockey Nova Scotia ("HNS").

[4] Both the CHBA and HNS are bodies created by the *Societies Act*, RSNS 1989, c.435.

[5] It appears that the claimant's membership in the CHBA carried with it the right for his two children to play hockey in the CHBA Wings, the association's hockey team, the Wings. It appears too that he was a coach. At some point he appears to have been removed from that position. I say that because of an email dated March 6, 2018 from a Brad MacKinley to the claimant regarding "Complaint." Mr MacKinley stated:

> "I have read your complaint a couple of times, and read the ensuing emails, complaint/appeal complaint etc. Coaches coach and are appointed with the approval of the MHAs [Minor Hockey Associations] and they can be removed from coaching by the MHAs as well. This appears to be what happened in this case.
>
> "The 'misconduct' that you refer to seems minor in nature and therefore as per the complaint intake form, issues of 'misconduct' such as this are handled by the MHA.
>
> "I recommend that you bring this misconduct concern to your Board of Directors of your local MHA namely Cole Harbour.
>
> "I strongly recommend Mr Bungay appoint a three person panel to hear your concerns."

[6] On March 26, 2018 Ms Gerrard (that is, counsel for the claimant) wrote to members of the Board of Directors of the CHBA to reject the suggestion that a three-person panel be struck, and instead asked that "this issue" be placed on the agenda of the CHBA's annual general meeting. The defendant Jim Bungay, president of the CHBA, responded the same day. He stated in part as follows:

> "We have maintained our silence on these matters, hoping that after a 'cool down period' you would simply realize that your continued harassment of coaches, managers and volunteers within our association would stop. Evidently that hasn't happened and you are insisting

to keep this issue going. Thus, here is our response to your email.

1. Our Board of Directors is satisfied that we have applied the policy to the best of our ability in issuing the disciplinary action to Tim Gerard – there was absolutely no bias on my or Perry's behalf. We consulted with HNS multiple times to ensure we were being reasonable and fair. Additionally, we brought the issue to the entire Board (on two occasions) before the decision was handed down. Our board and HNS agree with the recommendations put forward....

2. The complaint that you submitted to us was investigated and dealt with using the same procedure we applied to every other discipline issue. We have no further comment on that matter.

3. We received the email from HNS – and we reiterate that we find your complaint without merit. Our policy was followed, administered and discipline was handed down to the best we are able to do – given the situation. We will not assemble a 3 person panel to hear any more of your (unfounded) complaints. We are satisfied how this was handled. *We will not waste one more minute of our time dealing with this matter*.

4. If you have a specific agenda item that you would like entered into our AGM, please let the secretary know in advance of the meeting. However, we will not discuss specific disciplinary issues about members during the AGM – *it is not the forum for calling out members*

> *were discussing sensitive issues*. The AGM will not be used as a form for you to continue your circus sideshow....
>
> We are at a crossroads with you (and your family) remaining a member of our association. It is apparent to us that nothing we do would satisfy you – perhaps it would be better to transfer out of CHBA and into another Association moving forward. Let me know if Tim and yourself would like that to happen and I can assist in the arrangements. However, if you would like to stay as a member of the CHBA – I expect that you will stop your harassing this behaviour. If not, we will ensure that the transfer out of CHBA is less of an option in more of a consequence. ... (emphasis in original)

[7] It appears that the claimant did eventually appeal to HNS. In a letter dated July 16, 2018 the claimant was advised that the HNS Appeals Committee had "met and reviewed your appeal regarding the decision issued by Cole Harbour MHA and HNSMC" and had decided to deny the appeal. The committee did recommend that the claimant's two children "be allowed to play hockey within another MHA within the Dartmouth Region (Dartmouth MHA, East Hants MHA, Eastern Shore MHA)." The letter added that "[a]s with all HNS decisions, you may appeal to Hockey Canada following their appeal guidelines which can be found in the Hockey Canada Constitution."

[8] The claimant did not file an appeal with Hockey Canada. He instead eventually filed this claim.

[9] It also appears that as a result of the claimant's "removal" from membership in the CHBA his children were, pursuant to the Policy, suspended from playing with the CHBA's team. The children were then registered in—and had to travel

to—hockey team of another minor hockey association which resulted, according to the Notice of Claim, "in a financial loss and considerable upset to the family." The losses claimed are as follows:

a. $100.00 deposit for the team jerseys of the two children;

b. $35.00 registration costs;

c. $1,841.84 gas mileage;

d. $104.00 bridge tolls;

e. $100 general damages; and

f. Costs (*i.e.* $99.70 filing fee of this court).

Relationship Between CHBA and HNS

[10] It is unfortunate that the parties did not see fit to provide me with evidence, facts or documents regarding the following:

a. A chronology of the facts leading to the Claimant's suspension or "release" from membership in the CHBA;

b. The nature of the relationship between the CHBA and HNS;

c. The nature of the relationship between HNS and Hockey Canada;

d. A complete copy of whatever By-Laws, Regulations or Rules for the CHBA that might have existed at the time of the Claimant's suspension or release (or indeed any advice as to whether any such by-laws, regulations or rules even existed), other than a copy of the

CHBA's "Internal Policy for Abuse and Harassment" and its "Behavioural Policy" (both of which were undated); or

e. A copy of whatever by-laws, regulations or rules of Hockey Canada that might be relevant to the issues raised in the dispute between the parties to these proceedings.

[11] I was provided with a copy of HNS's Regulations, but these were dated "August 2018 (Revised)," leaving me uncertain as to whether the relevant appeal provisions were in effect and applicable during the dispute and various appeals of the Claimant.

[12] Given the above, I have decided to proceed based upon the following assumptions of fact:

a. CHBA is a minor hockey association that is a member of HNS, and as a member is required to follow and comply with the Regulations of HNS;

b. HNS is in turn a member of Hockey Canada and as such is expected to follow and comply with the by-laws, regulations and rules of Hockey Canada (whatever they might be);

c. The CHBA had some form of appeal's process for disputes internal to the association which involved submissions to its Board of Directors;

d. The CHBA and HNS operated on the understanding or agreement that disputes internal to the CHBA that could not be resolved to the satisfaction of the disputants could be elevated to the processes and appeal procedures outlined in the HNS Regulations; and

e. The HSN appeal procedures outlined in the copy of the Regulations provided to me were in effect at all times material to the issues before me.

Submissions on Behalf of the Defendants

[13] The defendants acknowledge that the claimant's claim with respect to the deposit for the hockey jersey's is within the jurisdiction of this court. It disputes jurisdiction with respect to the other items claimed on the ground that what the claimant is really seeking is a form of judicial review of the decisions of CHBA and HNS to expel the claimant from membership in the CHBA. They say this court is a statutory body. Its jurisdiction is limited to that laid out in the *Small Claims Court Act* (the "*SCCA*"). The court has no inherent jurisdiction. Its jurisdiction is limited, insofar as it material to this case, to claims "seeking a monetary award in respect of a matter or thing arising under a contract or a tort:" s.9(a). It says that what the claimant is seeking does not arise out of contract or tort, but is instead in effect a form of judicial review or *certiorai* of the decisions of the CHBA and HSN. It says there is nothing in the *SCCA* that grants that jurisdiction to this court. In the alternative, or by extension, it says that the dispute is one involving a voluntary association (and in particular membership therein), and such disputes are as a rule not considered justiciable: *Highwood Congregation of Jehovah's Witnesses (Judicial Committee) v. Wall* 2018 SCC 26 at paras.32-39. In the future alternative, it says that the claim is premature, inasmuch as the HNS regulations provide for a further appeal to Hockey Canada.

Submissions on Behalf of the Claimant

[14] The claimant acknowledges that this court draws its jurisdiction from statute—and that it lacks inherent jurisdiction. However, he says that this court does have jurisdiction "to hear claims where equitable principles and natural justice are to be applied." The claimant denies seeking relief in the form of judicial review. Rather, his claim is based on contract or quasi-contract. In the alternative,

or in addition, it is based on an argument that the CHBA and HNS have not followed their by-laws, or have denied him due process or natural justice or both, and have thereby breached the requirements under the *Societies Act*, thereby causing financial loss to him. (The claimant did not explain what those requirements were, or how they were breached by the actions of CHBA or HNS.) The claimant states that it was not a requirement under the CHBA rules (whatever they were) to file an appeal to HNS, but "an appeal was sought by the claimant with Hockey Nova Scotia in order to mediate the dispute."

Analysis and Decision

[15] Setting to one side the issue of the jersey deposit (over which the parties agree this court has jurisdiction), the bulk of the claimant's claim is for expenses he alleges he was forced to incur as a result of having to join a different minor hockey association. He claims that the CHBA "failed to follow its own written policies and procedures when it did not conduct a proper investigation into any of the circumstances following an alleged complaint against ... [the claimant] which resulted in his release." In other words, he alleges that the defendants breached a duty of procedural fairness they owed to him in contract or quasi-contract; that the breach resulted in the wrong decision; and that had that decision not been made he would not have suffered the extra expenses for which he now claims.

[16] First, I do not see the claimant's claim as being akin to judicial review. He is not seeking to quash the decision of CHBA to suspend or remove him from membership. He is not seeking to be reinstated as a member of CHBA. He is rather saying that the By-Laws, Rules and Regulations of the CHBA and HNS are akin to contract; that the defendants have failed to follow those rules and therefore have breached their "contractual" obligations under those By-Laws, Rules and Regulations; and that the breach has caused damage to him.

[17] That of course takes us to the second question, which is whether those rules and regulations are contractual or quasi-contractual in nature. In my view they are

at the very least quasi-contractual in nature. A person seeks admission to membership in the association. In consideration of his or her being accepted into membership and paying a membership fee the person and the association mutually agree to abide by the terms and conditions of membership. The association is entitled to expect that the member follow the rules, just as the member is entitled to expect the same of the association (and its governing body). In the case before me membership in a minor hockey association carries with it valuable rights to play organized hockey. In such cases courts have accepted that they should and do have the power to require procedural fairness as a way of enforcing underlying procedural rights: see *Highwood Congregation*, supra at para.26.

[18] In other words, I am satisfied that the claimant is in theory entitled to claim damages as a result of any breach of the quasi-contractual rules that bound him and the CHBA and HNS. This does not mean that he would be entitled in this court to seek an order setting aside the decisions that he alleges were reached in breach of those rules. He could only seek damages flowing from any such breach.

[19] Having said that, there is the question of whether the claimant's action is premature. I say this because my determination that the rules and regulations of CHBA and HNS are quasi-contractual means that the claimant as well as the defendants are bound by them. Regulation 13.6 of HNS's regulations states as follows:

> "Having completed all points of appeal within Hockey Nova Scotia, the aggrieved may appeal to Hockey Canada if not satisfied with the decision per Hockey Canada ByLaw 12, assuming all requirements have been met."

[20] In my view there are at least two reasons why this court should in normal course require a complainant in the claimant's position to comply with the requirement of a further appeal to Hockey Canada.

[21] First, it is a term of the quasi-contract that the claimant here seeks to enforce. The claimant cannot have it both ways. Contractual compliance is a two-way street. He cannot expect to avoid compliance on his part where he insists on it insofar as the defendants are concerned.

[22] Second, from a policy perspective it makes sense to have issues involving something as specialized and fine-tuned as the sport of hockey to be assessed and determined, as far as possible, by those bodies charged with that expertise. Hockey Canada is no doubt in a position as good as—if not in fact better than—this court to determine disputes involving participation in the sport.

[23] In short, the claimant's claim is premature. He cannot ground an action in the alleged failure of CHBA and HNS to follow its rules if he himself has not followed those rules—at least where a decision to follow the rules might in fact result in a favourable decision.

[24] I note in passing that by proceeding in this court without following the quasi-contract he seeks to enforce the claimant may have exposed himself to a risk which he may have overlooked. Regulations 13.27 to 13.30 of HNS provide as follows:

> 13.27 Any recourse to the Courts of any jurisdiction by any member, before all rights of appeal and all rights and remedies of the Bylaws and Regulations of Hockey Nova Scotia have been exhausted, shall be deemed to be a violation and breach of the Bylaws and Regulations of Hockey Nova Scotia. This violation and breach shall result in the automatic indefinite suspension of such member from Hockey Nova Scotia, including all activities and games played under the jurisdiction of

Hockey Nova Scotia or any of its members as defined herein.

13.28 Any member, minor hockey association, club, league, team, player, coach, manager, trainer, referee who has sought court action before exhausting all proper procedures of appeal shall be liable for all legal costs and disbursements incurred by Hockey Nova Scotia.

13.29 Until full legal costs are paid, at the discretion of the President of Hockey Nova Scotia, the right of membership of the said parties will be suspended.

13.30 Any member, minor hockey association, club, league, team, player, coach, manager, trainer, referee who, having exhausted the appeal procedures, proceeds with court action will be liable for all legal costs and disbursements incurred by the by Hockey Nova Scotia, should be the courts ruled in favour of Hockey Nova Scotia, prior to reinstatement of said parties membership with Hockey Nova Scotia.

[25] On its face Regulation 13.28 suggests that a member who fails to appeal to Hockey Canada as required by Regulation 13.6 and instead goes to court opens the door to a counter-claim by HNS for its legal fees. If that is the correct reading, then the quasi-contract the claimant seeks to enforce also makes him liable for something he would not normally be liable for in this court—the legal fees and costs of a defendant. It goes without saying that such costs and fees can be substantial.

[26] Of course, there is an argument that Regulation 13.28 would be contrary to s.29(2) of the *SCCA*, which states that "[n]o costs other than those authorized by

this Act or the regulations may be awarded by an adjudicator," and would thus be nullified by s.14(2), which provides that "[w]here a provision or acknowledgement contrary to this Act is a term of an agreement, it shall be severable therefrom." However, accepting without deciding that an adjudicator might not be able to award HNS's legal fees does not mean that the claimant's liability for them pursuant to HNS's Regulations does not exist. Section 14(2) *severs* the contrary provision, it does not *void* it. Hence the claimant's liability for those legal fees could remain sufficiently alive to feed Regulation 13.29, which makes the claimant's right to membership in HNS is subject to suspension until the legal fees are paid. I take suspension of membership in HNS means suspension from all minor hockey associations in the province, not just the CHBA.

[27] To conclude then I am satisfied that in theory this court has the jurisdiction to award damages against a voluntary organization that has a formal set of By-Laws, rules or regulations, at least where the allegation is that the organization has breached those By-Laws, rules or regulations, and that the breach has allegedly caused economic loss or damage to the claimant. However, on the facts of this case the claim is premature, inasmuch as the claimant is bound by the rules he seeks to enforce to first appeal to Hockey Canada. What he does after that is yet to be determined.

[28] I accordingly order that this claim be stayed until the claimant exercises—or at least attempts to exercise—his right to appeal to Hockey Canada.

DATED at Halifax, Nova Scotia
this 2nd day of July, 2019

Augustus Richardson, QC
Adjudicator