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Civil Litigation

B.C. court denies injunction reversing football team cancellation

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(July 7, 2023, 11:15 AM EDT) -- A recent decision of the *B.C. Supreme Court, Kremler v. Simon Fraser University*, 2023 BCSC 805, involving Simon Fraser University (SFU), has made headlines and attracted widespread attention. SFU is a renowned public university with three campuses located in Burnaby, Surrey and Vancouver, British Columbia.

In April 2023, SFU decided to cancel its football program after the Long Star Conference, a National Collegiate Athletic Association (NCAA) Division II Conference, decided not to renew SFU's membership following the 2023-2024 season.

In response to SFU's decision, five student athletes from SFU's football program applied for an interlocutory injunction to reverse SFU's decision on the basis that SFU's decision to do so constituted breach of contract and negligent misrepresentation.

While the circumstances of this case are unusual, the court provided important reminders applicable to commercial litigation in its decision, namely that:

1. The strong prima facie case that applicants must meet as a required element of the legal test for a mandatory injunction is an onerous one; and
2. Terms of an order for a mandatory injunction should be precisely drafted. Notably, applicants must carefully consider whether the effect of the order sought would be to compel the other party to "run a business" or require ongoing supervision or "micromanaging" by the court, which would be inappropriate relief.

Facts

Since 2010, SFU's varsity football team has participated in the NCAA. In recent years, SFU's football team was also a member of NCAA Division II's Lone Star Conference. However, on Jan. 25, the Lone Star Conference informed SFU that it decided not to renew SFU's affiliate membership after the 2023-2024 season (the Lone Star decision).

SFU claimed that the Lone Star decision led to immediate and serious challenges. Although SFU considered alternative conferences and organizations, these alternatives were not considered feasible. Additionally, SFU had difficulties recruiting incoming players and additional coaches for its program following the Lone Star decision. SFU was further concerned regarding the potential for significant injuries if it failed to

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recruit a full and competent football team.

Accordingly, on April 4, 2023, SFU informed its players that it was immediately terminating its football program and its football coaching personnel's contracts and that it would not hold a 2023 football season.

Approximately a week later, the plaintiffs filed a claim and an application for an interlocutory injunction, alleging that SFU was liable for breach of contract and negligent misrepresentation associated with SFU's decision to terminate its football program.

The plaintiffs' arguments

The plaintiffs sought an interlocutory injunction. The orders sought included the following:

- Reinstating all student athletes who were part of SFU's football program;
- Reinstating all coaching personnel who were part of SFU's football program and reinstating all coaching personnel contracts immediately;
- That SFU take all reasonable steps to, in good faith, apply to university football conferences in Canada and the United States for its football program to compete in the 2023 season; and
- In the alternative, that SFU take all reasonable steps to allow its football program to continue independently from a university football conference in Canada or the United States.

The plaintiffs alleged that certain oral contracts existed between the plaintiffs and SFU coaching staff (the alleged recruitment contracts). The plaintiffs asserted that they had enough committed players to form a competitive and safe team if SFU were to reinstate its football program. The plaintiffs claimed that coaching staff recruited them with promises of an opportunity to earn a Canadian post-secondary education while playing football in the NCAA. Relying on SFU's commitments, the plaintiffs alleged they entered into a contract with SFU and agreed to attend SFU, devote their skills to the SFU football program and forgo opportunities to play football at other schools.

The defendant's arguments

SFU submitted evidence challenging the plaintiffs' claims in breach of contract and negligent misrepresentation. SFU's senior director of athletics and recreation provided evidence that there was a considerably lower number of available players to form a competitive and safe team. Additionally, an affidavit of the SFU coach, which the plaintiffs relied on, did not reference a promise to the players. Instead, this affidavit merely stated that the SFU coach would give the plaintiffs an opportunity to play in the NCAA. Additionally, signed written documents between the parties did not reference the existence of the alleged recruitment contracts.

SFU claimed that its assessment of the circumstances was realistic, and it had concerns that fewer players and coaches would lead to a significant risk of injury. Additionally, SFU further submitted that it was unclear whether its insurance policy would cover a court-ordered football program. SFU argued that a competitive and safe football season was not possible.

Analysis

Given that the plaintiffs were seeking to compel SFU to take certain actions (i.e., a mandatory injunction), they were required to show a strong prima facie case, instead of a serious question to be tried, in order to satisfy the first prong of the well-established three-part test for an interlocutory injunction.

The court held that the plaintiffs failed to show a strong prima facie case, for various reasons, including that:

- While each of the plaintiffs entered into written contracts with SFU, such documents did not mention the alleged recruitment contracts, meaning that the alleged recruitment contracts would have to constitute oral side agreements;
- The SFU coach did not provide evidence that he made a promise to the plaintiffs and instead his evidence was that players would be given an "opportunity to play competitive football in the NCAA." This wording was found to be ambiguous and short of a promise to play varsity football at SFU, as is alleged to have existed in the alleged recruitment contracts;
- The plaintiffs' ability to voluntarily withdraw from the program undermined their argument that the promise to play football at SFU constituted consideration for the alleged recruitment contracts; and
- To the extent that the plaintiffs relied on negligent misrepresentation, their reliance was on future facts and circumstances (i.e., the future running of a varsity football program and providing reasonable notice of termination of such a program). Generally, a representation of future facts or circumstances cannot ground an action in misrepresentation.

Despite finding that the plaintiffs failed to make out a strong prima facie case, the court went on to consider the balance of convenience. The court concluded that the balance of convenience was in favour of SFU. In coming to this conclusion, the court considered the lack of strength of the plaintiffs' case, SFU's concern that it would have fewer players to field a full varsity football team, SFU's concern for the risk of player injuries if a 2023-2024 season occurred and SFU's concern that the football program may not be covered by insurance.

Lastly, the court identified significant concerns regarding the appropriateness of the relief sought. The court noted that the orders sought were vague and would create uncertainty as to whether they were complied with if the injunction was granted.

Further, making the orders sought more precise would require judicial supervision and potential micromanagement, making the plaintiffs' requested relief "akin to a court order for a party to 'compel the running of a business,'" which the court noted was not appropriate relief for a mandatory injunction.

The court exercised its discretion and departed from the usual costs rule, ordering that each party bear its own costs of the application.

Carina Chiu is a litigation and dispute resolution associate based in the Vancouver office of McMillan LLP. Her practice focuses on complex, corporate commercial disputes. She has substantial experience with various types of conflicts, including oppression claims, valuation disputes under buyout provisions in shareholder agreements, partnership disputes, commercial landlord and tenant disputes, licensing matters, breach of contract claims, breach of confidence claims and fraud/civil conspiracy actions. Cole Bailey is a litigation and dispute resolution associate whose practice encompasses a broad range of complex corporate and commercial matters, domestic and international commercial arbitration, securities litigation and insolvency proceedings. Anica Villamayor is a summer law student who recently completed her second year of the JD program at the Peter A. Allard School of Law (Allard) at the University of British Columbia (UBC).

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