CV-15-519219 00CP

Court File No.

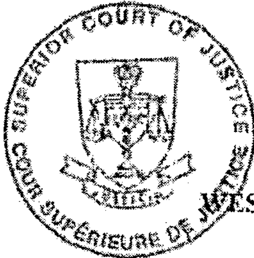
This is Exhibit "C" referred to in the affidavit of Samuel Berg sworn before me, this 18th day of February, 2015

Commissioner for taking affidavits

ONTARIO

SUPERIOR COURT OF JUSTICE

BETWEEN:



SAMUEL BERG

Plaintiff

and

WEST COAST HOCKEY ENTERPRISES LTD.

Defendants

Proceeding under the *Class Proceedings Act, 1992*, S.O. 1992, C.6

STATEMENT OF CLAIM

TO THE DEFENDANTS

A LEGAL PROCEEDING HAS BEEN COMMENCED AGAINST YOU by the plaintiff. The claim made against you is set out in the statement of claim served with this notice of action.

IF YOU WISH TO DEFEND THIS PROCEEDING, you or an Ontario lawyer acting for you must prepare a statement of defence in Form 18A prescribed by the Rules of Civil Procedure, serve it on the plaintiff's lawyer or, where the plaintiff does not have a lawyer, serve it on the plaintiff, and file it, with proof of service, in this court office, **WITHIN TWENTY DAYS** after this notice of action is served on you, if you are served in Ontario.

If you are served in another province or territory of Canada or in the United States of America, the period for serving and filing your statement of defence is forty days. If you are served outside Canada and the United States of America, the period is sixty days.

Instead of serving and filing a statement of defence, you may serve and file a notice of intent to defend in Form 18B prescribed by the Rules of Civil Procedure. This will entitle you to ten more days within which to serve and file your statement of defence.

IF YOU FAIL TO DEFEND THIS PROCEEDING, JUDGMENT MAY BE GIVEN AGAINST YOU IN YOUR ABSENCE AND WITHOUT FURTHER NOTICE TO YOU. IF YOU WISH TO DEFEND THIS PROCEEDING BUT ARE UNABLE TO PAY LEGAL FEES, LEGAL AID MAY BE AVAILABLE TO YOU BY CONTACTING A LOCAL LEGAL AID OFFICE.

TAKE NOTICE: THIS ACTION WILL AUTOMATICALLY BE DISMISSED if it has not been set down for trial or terminated by any means within five years after the action was commenced unless otherwise ordered by the court.

Date: Jan. 6/2015 **Issued By:** [signature]

Address of Court Office:
393 University Ave. - 10th Fl.
Toronto, Ontario
M5G 1E6

TO: **WEST COAST HOCKEY ENTERPRISES LTD.**
2088 - 1177 WEST HASTINGS STREET
VANCOUVER, BRITISH COLUMBIA V6E 2K3

DEFINED TERMS

1. The following definitions apply for the purpose of this statement of claim:

(a) "**20 Year Old Contract**" means the current standard player agreement used by the **Leagues** and the **Clubs** for all **Players** who are 20 years old or over at the time they signed;

(b) "**CHL**" means the Canadian Hockey League;

(c) "**Class**" or "**Class Member(s)**" means all players who are members of the **Victoria Royals** or at some point commencing January 6, 2013 and thereafter, were members of the **Victoria Royals** and all players who were members of the **Victoria Royals** who were under the age of 19 on January 6, 2013;

(d) "**Contract**" or "**Contracts**" means the standard player agreement approved by the **CHL** and the **Leagues** to be used as the agreement for the provision of employment services by the **Players** for the **Victoria Royals** and includes the **Former Contract**, the **Current Contract**, and the **20 Year Old Contract**;

(e) "**Current Contract**" means the standard player agreement which is in effect as of September 2013 and includes the **Leagues'** regulation known as the "Rights and Obligations of Players"; Schedule "A" to that regulation known as "Commitment Form for 16-to-19-Year-Old Players"; and the **Leagues'** education policy;

(f) "**employee**" has the same meaning as that attributed to it by the ***ESA***;

(g) "**employer**" has the same meaning as that attributed to it by the ***ESA***;

(h) "**employment contract**" means the **Contract** or **Contracts** which are contracts of employment within the meaning of ***ESA***;

(i) "***ESA***" means the *Employment Standards Act*, R.S.B.C. 1996, c. 113 and its regulations.

(j) "**Former Contract**" means the standard player agreement which was in effect until September 2013;

(k) "**Leagues**" means collectively the **OHL**, **QMJHL**, and the **WHL**;

(l) "**OHL**" means the Ontario Hockey League;

(m) "**Player(s)**" means all persons who play or have played hockey for the **Victoria Royals** and are **Class Members**;

(n) "**QMJHL**" means the Quebec Major Junior Hockey League;

(o) **"Victoria Royals"** means the team the Victoria Royals participating in the **WHL** which is owned and/or operated by the defendant West Coast Hockey Enterprises Ltd.;

(p) **"wages"** or **"minimum wages"** has the same meaning as that attributed to it by the ***ESA***; and

(q) **"WHL"** means the Western Hockey League.

CLAIM

2. The plaintiff claims on his own behalf and on behalf of the Class, against the defendant for:

(a) An Order certifying this action as a class proceeding and appointing him as the representative plaintiff of the Class;

(b) A Declaration that the plaintiff and Class Members are, or were, employees and the Victoria Royals are, or were, their employers within the meaning of the *ESA*;

(c) A Declaration that the Contract is an Employment Contract within the meaning of the *ESA*;

(d) A Declaration that, insofar as the Contract purports to limit wages to a fixed amount, the Contract is void pursuant to the *ESA*;

(e) A Declaration that the defendant conspired with other teams in the Leagues and with the CHL and the Leagues to compel the plaintiff and the Class Members to enter into the Contract and to pay them wages which contravene the *ESA* and therefore the defendant is jointly and severally liable with those teams and the Leagues for all damages;

(f) A Declaration that the plaintiff and the Class Members who entered into the Contracts may elect to recover damages jointly and severally from the defendant based on the cause of action or remedy of waiver of tort;

(g) An order disgorging the profits that the defendant generated as a result of benefitting from their breach of *ESA*;

(h) An Interim and Final Order restraining the defendant, its officers, directors, agents, and employees from engaging in any form of reprisal as a result of a Class Member electing to participate in this action, including

in Ontario, breaching s. 74(1) of the *Employment Standards Act*, 2000, S.O. 2000, c. 41 which states that:

(1) No employer or person acting on behalf of an employer shall intimidate, dismiss or otherwise penalize an employee or threaten to do so,

(a) because the employee,

(i) asks the employer to comply with this Act and the regulations,

(ii) makes inquiries about his or her rights under this Act,

(iii) files a complaint with the Ministry under this Act,

(iv) exercises or attempts to exercise a right under this Act,

(v) gives information to an employment standards officer,

(vi) testifies or is required to testify or otherwise participates or is going to participate in a proceeding under this Act,

(vii) participates in proceedings respecting a by-law or proposed by-law under section 4 of the *Retail Business Holidays Act*,

(viii) is or will become eligible to take a leave, intends to take a leave or takes a leave under Part XIV; or

(b) because the employer is or may be required, because of a court order or garnishment, to pay to a third party an amount owing by the employer to the employee.

(i) Damages as pleaded in an action in the Ontario Superior Court of Justice with Court File No. CV-14-514423 for outstanding wages including back pay, vacation pay, holiday pay, overtime pay and applicable employer payroll contributions required by law;

(j) Punitive damages as pleaded in an action in the Ontario Superior Court of Justice with Court File No. CV-14-514423;

(k) an order directing a reference or giving such other directions as may be necessary to determine issues not determined at the trial of the common issues;

(l) Pre-judgment and post-judgment interest, compounded, or pursuant to ss. 128 and 129 of the *Courts of Justice Act*, R.S.O. 1980, c.43;

(m) Costs of this action on a substantial indemnity basis or in an amount that provides full indemnity plus the costs of distribution of an award under ss. 24 or 25 of the *Class Proceedings Act, 1992*, S.O. 1992, c. 6 ("*CPA*"), including the costs of notice associated with the distribution and the fees payable to a person administering the distribution pursuant to s. 26(9) of the *CPA*; and

(n) Such further and other relief as this Honourable Court deems just.

OVERVIEW

3. The CHL oversees and is the governing body of sixty hockey teams in Canada and the United States participating in three hockey leagues: the OHL, WHL, and the QMJHL. The Players vary in age from 16-20 years of age and have all signed the Contracts containing identical or significantly similar terms.

4. The form and content of the Contracts are mandated, controlled, and/or regulated by the Leagues and the CHL who require all of the teams to use the standard form Contract when hiring Players, regardless of that Player's level or skill or experience or the team with which he signs. Once executed by the Player and team hiring the Player, the Contract provides that it must then be approved by the commissioner of the League for that team.

5. For example, the Contract signed by Players in the OHL states, under a heading entitled "IMPORTANT NOTICE TO PLAYER", that:

> no player shall be permitted to participate in an Ontario Hockey League regular season or playoff game unless such Player has signed the standard

agreement form and it has been filed with and approved by the Ontario Hockey League.

6. The Contracts used in the WHL and QMJHL contain identical or significantly similar clauses.

7. Under the terms of the Contract, the teams, including the Victoria Royals, retain the rights of their Players for the life of the contract which generally covers all ages of eligibility in the Leagues which is 16-20 years of age. Therefore, a Player who signs at the age of 16, signs a three year contract with an option for another year with the team.

8. The Former Contract was the standard player agreement until the season commencing September 2013 when all players were required to sign a Current Contract which is now the standard player agreement. The Current Contract purports to supersede and replace the Former Contract.

9. The Former Contracts set a fixed fee for the Players' services which are either listed in a dollar amount, or by stating that they will receive the "league maximum" which are set by the bylaws of the Leagues. These fees varied from $50/week to $120/week in the OHL to $35/week to $150/week in the QMJHL, depending on the age of the Player. Players age 16-19 received a fee of $50/week in the OHL and $35/week in the QMJHL under the Former Contract and receive $60/week under the Current Contract, albeit the fee is now described as an "allowance". Under all versions of the Contract, teams make applicable

employee payroll deductions at source and remit them to applicable government authorities.

10. The Former Contract and the Current Contract also includes an "education package" which provides for payment by the team towards a Player's post-secondary education fees for each complete season that the Player played for that team. To be eligible for this education package under the Former Contract, the Player must enroll in a post-secondary education program within 18 months after completing a season with the team and must not sign a professional contract or participate in a tryout contract with a professional hockey team in the National Hockey League, American Hockey League, or with a European team.

11. The Former Contract contains a term under which the teams, including the Victoria Royals, and Leagues own the Players' images. The Former Contract used in the OHL states that:

> The Player hereby assigns irrevocably to the Club and the OHL and any licensees of the Club and the OHL on a non-exclusive basis, all rights to the Player's name, image likeness, signature, statistical record and biographical information (collectively the "Player's Image") and understands and accepts that the Club or the OHL may authorize, or otherwise license, any individual firm or corporation to take any pictures, films or any other images of the Player. The Player recognizes that all rights in such pictures, films and other images shall be the sole property of the Club or the OHL and that either the Club or the OHL may use or distribute such material in any manner as they see fit and that such use or distribution by the Club or the OHL may take place either during the Term or thereafter.

12. Players work on average 35-40 hours/week and occasionally up to 65 hours/week or more, including travel, practice, promotion, and participating in games three times a week. Under the Former Contracts and the Current Contracts, the Players receive no hourly wages, no overtime pay, no holiday pay, and no vacation pay.

13. Because of the amount of time and dedication devoted to travel, practice, promotion, and playing, it is extremely difficult for the Players to meet the requirements of the education package, including maintaining a grade point average and enrollment in high school or online courses.

14. While the Contracts purport to be academically based, many of the Players while playing for a team have already graduated from high school or have already signed contracts with NHL teams.

15. The Tax Court of Canada ruled in *McCrimmon Holdings v. Canada (Minister of National Revenue - M.N.R.)*, [2000] T.C.J. No. 823, that the relationship between a team in the WHL and a Player is one of employer/employee, stating, "[t]he players are employees who receive remuneration - defined as cash - pursuant to the appropriate regulations governing insurable earnings. It would require an amendment to subsection 5(2) of the Employment Insurance Act in order to exclude players in the WHL - and other junior hockey players within the CHL - from the category of insurable employment."

16. In that case, the Court was asked to consider the relationship between the Player and the team based on the language of the Contract. The Court rejected the WHL team's argument that the remuneration was nothing more than an allowance paid to a student participating in a hockey program that offered scholarships subject to the pre-condition of possessing the ability to play hockey at a level permitting one to be a member of a WHL team. The Court found that the team operated a commercial organization carrying on business for profit and that the Players were employees. The requirement to play hockey was not found to be inextricably bound to a condition of scholarship since attendance at a post-secondary institution was not mandatory to stay on the roster.

17. Despite the Tax Court of Canada ruling made some fourteen years ago, the defendants failed to rewrite the Former Contract until September 2013 or pay wages in accordance with the *ESA*.

18. Instead, the defendant, the CHL, and the Leagues continued to include in the Former Contract a term where the relationship between the Players and the team is described as one of "independent contractor".

19. In 2013, the defendant, the CHL, and the Leagues redrafted the Contract to remove all references to a fee and to remove the term where the status between the Players and the teams was one of independent contractor. Instead, the defendant's Current Contract recasts the $60.00 weekly fee as an allowance and redefines the status of 16 to 19 year old players as:

> Players who belong to a club and who range in age from 16 years old to 19 years old are pursuing their academic careers while also benefiting from a framework which supports the development of their athletic potential as hockey players whose goal it is to pursue the practice of hockey at the professional level.

20. While the defendant, the CHL, and the Leagues have demanded that all Players ages 16 to 19 sign the Current Contract, in substance nothing changed in September 2013 with respect to the manner in which the teams operate or the degree of control exercised by the teams over of Players.

21. In addition to revising the Contracts, the CHL also undertook to remove all references to the Players being characterized as "professional athletes" in legal documents, despite nothing changing in the Leagues conducted business. In particular, CHL amended the bylaws of Hockey Canada, a national governing body for hockey in Canada that works in conjunction with the CHL. The 2009-2010 Hockey Canada bylaws read, under section 2 of the USAH/HC/CHL Transfer and Release Agreement, that: "It is agreed that CHL Teams are considered and treated by third parties as being professional". The 2011-2012 version of those same bylaws was revised and now reads that: "It is agreed that CHL Teams are considered the highest level of non-professional competition in Canada, administered as a development program under the auspices of Hockey Canada in a member league of the CHL."

22. The predominant purpose of the defendant, the CHL, and the Leagues in redrafting the Contract, redefining the professional status of the Players in the bylaws of Hockey

Canada, and in requiring Players to sign the Current Contract was to avoid the application of the *ESA*.

PARTIES
The Plaintiff

23. The plaintiff, Samuel Berg ("Sam") resides in Ontario. In 2013, Sam played hockey for the Niagara Ice Dogs, an OHL team owned and operated by Niagara Ice Dogs Hockey Club Inc.

24. Sam signed the OHL standard player agreement form on August 20, 2013, as did the general manager of the team. Sam's contract provided *inter alia* that in exchange for providing the services under the agreement, Sam would receive a fee of $50 weekly for three seasons commencing August 31, 2013.

25. During the months of September and October 2013 Sam played for the team in a number of exhibition and league games. On average Sam devoted about six hours a day, seven days a week to providing services to the team in accordance with the Contract. When the team travelled he would devote longer hours, up to twelve hours a day.

26. Sam's hours varied but on average he supplied about thirty-two hours of services weekly and in some weeks over forty- four hours weekly.

27. Sam received $55.00 weekly by cheque less payroll deductions. Sam did not receive the minimum hourly wage rate governed by the ESA, nor vacation pay, holiday pay or overtime pay.

28. Sam's relationship with the Niagara Ice Dogs and the Contract he signed was a contract for service. Sam was an employee of the team. The facts in support of him being an employee and in support of the Class Members being employees are as follows:

(a) Under the Contract and in all dealings with the team, Sam was subject to the control of the team as to when, where and how he played hockey;

(b) The Leagues, the CHL and the team determine and control the method and amount of payment;

(c) Sam was required to adhere to the team's schedule of practices and games;

(d) The overall work environment between the team and Sam was one of subordination;

(e) The team provided tools, supplied room and board and a benefit package;

(f) The defendants used images of Sam for their own profit;

(g) The team made payroll deductions at source;

(h) Sam was not responsible for operating expenses and did not share in the profits;

(i) Sam was not financially liable if he did not fulfill the obligations of the Contract;

(j) The business of hockey belonged to the team-not to Sam;

(k) The team imposed restrictions on Sam's social life including a curfew that was monitored; and

(l) The team directed every aspect of his role as a Player, and the business of the team was to earn profits.

29. In or about October 2013, Sam was sent down to play Junior B hockey for the St Catherine Falcons and later traded to the Thorold Blackhawks. Sam played eight games for the Falcons and four games for the Blackhawks. Sam was injured, took a medical leave and ultimately could not return to hockey.

30. Sam was not paid the $55 weekly fee while he was playing Junior B hockey.

31. Sam enrolled in university. Pursuant to the Contract signed August 31, 2013, the team agreed in Schedule C to irrevocably guarantee funding for four years of a bachelor degree upon Sam playing at least one exhibition or regular season game.

32. Unbeknownst to Sam, the team failed to forward the Contract to the OHL for approval as required by the terms of the Contract. The Contract was not approved by the OHL while Sam was playing hockey, although he believed it had been approved in August 2013, having never heard anything to the contrary and having played in several games. The Contract expressly provides that a Player cannot play in a game until the Contract is approved by the OHL.

33. In January 2014, the OHL required that the Contract be revised before it would be approved. Knowing that Sam was injured and could not play, the OHL approved the Contract but reduced his tuition package from four years to half a year.

34. Sam pleads that the team breached its agreement to provide four years of tuition and violated the ESA by failing to pay minimum wages, holiday pay, vacation pay and overtime pay.

35. Sam claims damages against the defendant, who is jointly and severally liable with the Niagara Ice Dogs for damages as a result of the civil conspiracy described below, for back wages, overtime pay, vacation pay and holiday pay in accordance with the Ontario *Employment Standards Act, 2000*, S.O. 2000, c. 41 as well as the tuition costs of four years of university.

The Defendant

36. The defendant is a corporation, formed in the province of British Columbia. The defendant owns a team that participates in the WHL that operates under the trade name the "Victoria Royals". Through this trade name, the defendant entered into the Contracts with the Players.

THE FORMER CONTRACTS AND APPLICABLE EMPLOYMENT STANDARDS LEGISLATION

37. The Former Contracts are standard form contracts where the clauses relevant to wages and the terms of employment are identical or materially the same. Each League required

the use of the Former Contracts, and that contract only, which must be approved by the commissioner of the applicable League before a Player is allowed to play hockey.

38. The clauses in the Former Contracts for the payment of wages all state that the Player is provided a set weekly fee. In the case of Players aged 16-19, this weekly fee ranged from $30-$150/week with no compensation provided on an hourly basis; no overtime pay; no vacation pay; and no holiday pay. The clauses in the Former Contract with respect to the payment of wages are identical or materially the same for each Class Member in each jurisdiction.

39. The *ESA* makes it mandatory that employers pay their employees minimum wage set by the legislation as follows:

   (a) Section 16 of British Columbia's *ESA* states that "An employer must pay an employee at least the minimum wage as prescribed in the regulations".

40. In addition to legislating a minimum wage, the *ESA* also prevents employers from contracting out of their obligations under the Applicable Employment Standards Legislation:

   (a) Section 4 of British Columbia's *ESA* states that "The requirements of this Act and the regulations are minimum requirements and an agreement to waive any of those requirements....has no effect".

41. The plaintiff pleads on his own behalf, and on behalf of the Class, that the Former Contract is a contract of employment and therefore the pay received by him and each

Class Member under the Former Contract was below the minimum wages prescribed by the Applicable Employment Standards Legislation in the jurisdiction in which the Class Member was employed and insofar as the Contract avoided the minimum wage obligations imposed by the Applicable Employment Standards Legislation, it is void and not a defence to this action.

The Leagues Revise the Contracts

42. In or about July 2013, a new regulation for each of the Leagues, referred to as the "Rights and Obligations of Players", came into force (the "Regulations"). The Regulations' objectives are stated as:

> to clarify the status of the players who are called upon to play with each of the League's teams, to determine their rights and obligations, to determine the conditions which will or may be applicable to them and to detail the disciplinary measures applicable to the clubs regarding their adherence to the regulations which apply to the conditions granted to the players.

43. In addition to the Regulations, there is a Schedule "A": the "Commitment Form for 16-to-19-Year Old Players". The Regulations, Schedule "A", and the Leagues' policies known as the "Education Policy" are referred to herein as the Current Contract. The defendant, the CHL, and the Leagues required all 16 to 19 year old Players to sign the Commitment Form whereby the Player agrees to abide by the constitution, the regulations (including the Regulations), the policies, and the directives of the Leagues. The Current Contract provides, *inter alia*, that:

(a) The player acknowledges that this present agreement terminates, cancels and replaces any existing standard contract, if any, between the player and the club;

(b) Players who belong to a club and who range in age from 16 years old to 19 years old are pursuing their academic careers while also benefiting from a framework which supports the development of their athletic potential as hockey players whose goal it is to pursue the practice of hockey at the professional level;

(c) The club is responsible towards the players that it retains for its team, in accordance with League regulations. The club is responsible for providing lodging and meals, for supporting the players through their academic pursuits, for protecting their physical and mental health and for developing their athletic potential, to the extent possible, so that they may practice hockey at the professional level after their major junior career.

(d) The Player grants to the club and to the League the right to authorize any person, firm, or corporation to take and make use of any photographs, motion pictures (including television) or digital images of the Player recorded during he participates within the club and agrees that thereafter all rights attached to such photographs, pictures and images shall belong to the club or the League exclusively. Therefore, the club or the League may use or reproduce or distribute such photographs, pictures and images in any way it desires [*sic*].

(e) During the regular schedule and the eliminatory schedule, the club will cover or reimburse the following expenses:...For expenses related to hockey practice and being away from home that is not otherwise reimbursed to the player, the club pays a fixed weekly allowance of $60.

44. Under the terms of all of the Current Contracts, the teams, including the Victoria Royals who are owned and operated by the defendant, retain the rights of their Players for the life of the contract which generally covers all ages of eligibility in the Leagues which is 16-19 years of age. Therefore, a Player who signs at the age of 16, signs a three year contract with an option for another year with the team.

45. The Current Contract sets a fixed fee for the Players' services which are $60 a week. Teams make applicable employee payroll deductions at source and remit them to applicable government authorities.

46. The Current Contract also includes an "education package" which provides for payment by the team towards a Player's post-secondary education fees pursuant to the Leagues' "Education Policy".

47. Players work on average 35-40 hours a week and occasionally up to 65 hours a week or more, including travel, practice, promotion, and participating in games three times a week. Under the Current Contracts, the Players receive no hourly wages, no overtime pay, no holiday pay, and no vacation pay.

48. Because of the amount of time and dedication devoted to travel, practice, promotion, and playing, it is extremely difficult for the Players to meet the requirements of the education package, including maintaining a grade point average and enrolment in high school or online courses.

49. The Tax Court of Canada ruled in *McCrimmon Holdings v. Canada (Minister of National Revenue - M.N.R.)*, [2000] T.C.J. No. 823, that the relationship between a team in the WHL and a Player is one of employer/employee, stating, "[t]he players are employees who receive remuneration - defined as cash - pursuant to the appropriate regulations governing insurable earnings. It would require an amendment to subsection 5(2) of the Employment Insurance Act in order to exclude players in the WHL - and other junior hockey players within the CHL - from the category of insurable employment."

50. In that case, the Court was asked to consider the relationship between the Player and the team based on the language of the Former Contract. The Court rejected the WHL team's argument that the remuneration was nothing more than an allowance paid to a student participating in a hockey program that offered scholarships subject to the pre-condition of

possessing the ability to play hockey at a level permitting one to be a member of a WHL team. The Court found that the team operated a commercial organization carrying on business for profit and that the Players were employees. The requirement to play hockey was not found to be inextricably bound to a condition of scholarship since attendance at a post-secondary institution was not mandatory to stay on the roster.

51. Despite the Tax Court of Canada ruling made some fourteen years ago, the defendant under the Current Contract fails to pay wages in accordance with the *ESA*.

52. Instead, the defendant, the CHL, and the Leagues have reworded the Former Contract to describe the fee as an allowance and recast the status between the Players and Clubs as one of "student athletes" in an attempt avoid the application of the *ESA* and the ruling in *McCrimmon.*

53. The plaintiff repeats paragraphs 39 and 40 above and pleads on behalf of the Class that the Current Contract is a contract of employment and therefore the pay received by the 16-19 year old Players during the 2013 season and the current season is below the minimum wages prescribed by the *ESA*. Insofar as the Current Contract avoided the minimum wage obligations imposed by the *ESA*, it is void and not a defence to this action.

The 20 Year Old Contracts

54. In or about July 2013, the Regulations came into force. The Regulations' objectives are stated as:

> to clarify the status of the players who are called upon to play with each of the League's teams, to determine their rights and obligations, to determine the conditions which will or may be applicable to them and to detail the disciplinary measures applicable to the clubs regarding their adherence to the regulations which apply to the conditions granted to the players.

55. In addition to the Regulations, there is a Schedule "B": the "Standard Contract - 20-Year-Old Player". The Regulations, the Schedule "B", and the WHL "Education Policy", are referred to herein as the 20 Year Old Contract. The defendant, the CHL, and the Leagues required all 20 year old Players to sign the 20 Year Old Contract whereby those Players agree to abide by the constitution, the regulations (including the Regulations), the policies, and the directives of the Leagues. The 20 Year Old Contract provides, *inter alia*, that:

(a) The player acknowledges that this present contract terminates, cancels and replaces any existing standard contract, if any, between the player and the club;

(b) Players who are 20 years old and who are retained by a team are young adults who are called upon to exercise their leadership abilities and to act as mentors towards their teammates. They are considered to be salaried employees of the club and will be paid accordingly;

(c) The club is responsible towards the players that it retains for its team, in accordance with League regulations. The club is responsible for providing lodging and meals, for supporting the players through their academic pursuits, for protecting their physical and mental health and for developing their athletic potential, to the extent possible, so that they may practice hockey at the professional level after their major junior career;

(d) The Player grants to the Club and to the League the right to authorize any person, firm, or corporation to take and make use of any photographs, motion pictures (including television) or digital images of the Player recorded during he participates within the Club and agrees that thereafter all rights attached to such photographs, pictures and images shall belong to the Club or the League exclusively. therefore, the Club or the League may use or reproduce or distribute such photographs, pictures and images in any way it desires [*sic*].

(e) All 20-year-old players must sign a standard contract supplied by the league and this contract must be registered with the league; he cannot sign any other contract that is not registered with the league;

(f) During the regular and playoff schedules, the club will cover or reimburse...the player's salary.

(g) This agreement is the sole understanding relating to the rights of the Player for his services as a 20-year-old player, and it supersedes or replaces any other prior verbal or written agreement or statement of intent.

56. The 20 Year Old Contract sets a fixed weekly fee for the Players' services which vary, but are capped by the Leagues at $1,000 a week. Teams make applicable employee payroll deductions at source and remit them to applicable government authorities.

57. The 20 Year Old Contract also includes an "education package" which provides for payment by the team towards a Player's post-secondary education fees pursuant to the Leagues' "Education Policy".

58. Players work on average 35-40 hours a week and occasionally up to 65 hours a week or more, including travel, practice, promotion, and participating in games three times a week. Under the 20 Year Old Contract, the Players receive no hourly wages, no overtime pay, no holiday pay, and no vacation pay.

59. The plaintiff repeats paragraphs 39 and 40 above and pleads on behalf of the Class that the 20 Year Old Contract is a contract of employment and therefore the pay received by the Class Members who signed the 20 Year Old Contract was below the minimum wages prescribed by the *ESA*. Insofar as the 20 Year Old Contract avoids the minimum wage obligations imposed by the *ESA*, and to the extent the weekly fee or salary equates to less than a 40 or 44 hours a week at minimum wage, it is void and not a defence to this action.

CAUSES OF ACTION

Breach of Statute/Statutory Cause of Action

60. The Victoria Royals entered into Contracts with the Class Members. Under the Contracts, the Class Members agreed to provide employment services to the Victoria Royals in exchange for some remuneration.

61. The Victoria Royals entered into an employer/employee relationship with the Class Members.

62. Many of the Players are or were under the age of majority while employed by the Victoria Royals and therefore are or were protected by Provincial employment standards legislation, including, in Ontario, *Employment Standards Act, 2000* section 23 and section 5 of O. Reg. 285/01. Subject to certain exceptions which are unrelated to this action, it is illegal (being a violation of the *ESA*) in British Columbia to pay minors less than minimum wage. The Contract provides for a fixed sum of between $30-$125/week .The Players devote an average of 35-40 hours weekly and in some instances up to 65 hours weekly to employment related services. Therefore, the Contract violates the right of minors under the *ESA*.

63. For those Players who are adults, the *ESA* provides for compulsory minimum wage standards. It is illegal in all Provinces and in the States where Contracts were entered into to pay employees $30-$125/week for 35-65 hours of weekly employment related services.

64. Therefore, the Contracts violate the rights of the Players under the *ESA* with respect to minimum wages, vacation pay, holiday pay, and overtime pay.

65. The *ESA* provides that any term of an employment contract that violates statutorily prescribed minimum wages, vacation pay, holiday pay, and overtime pay is void and unenforceable. By way of example, in Ontario, s. 5(1) of the *ESA* states that "no employer or agent of an employer and no employee or agent of an employee shall contract out of or waive an employment standard and any such contracting out or waiver is void."

66. Therefore, the terms of the Contract requiring Players to perform all employment related services for a fixed weekly sum are void and unenforceable. The Players are entitled to be compensated at statutory minimum hourly wage rates in the Province or State where the Player was employed for back wages, and back overtime pay, and back holiday pay, and back vacation pay.

67. The Victoria Royals are therefore liable to the plaintiff and Class Members for back wages at minimum wage levels, overtime pay, holiday pay, and vacation pay, in accordance with the *ESA*.

Officers and Directors' Liability

68. The plaintiff pleads on his own behalf, and on behalf of all Class Members who were employed by the Victoria Royals, that the officers and directors of the Victoria Royals are jointly and severally liable with the Victoria Royals to the Class Members for unpaid wages, including back minimum wages, vacation pay, overtime pay, and holiday pay owed to the plaintiff and the Class Members by the Victoria Royals.

69. In the event that the Victoria Royals do not make arrangements to pay all outstanding wages to the Class Members and instead continue to hold back the wages owed to the Class, the plaintiff intends to add the officers and directors as parties to this proceeding.

70. With respect to the liability of the officers and directors, the plaintiff and Class Members plead and rely on s. 96(1) of the *ESA*.

Conspiracy

71. The plaintiff claims that the defendant, the CHL, and the Leagues unduly, unlawfully, maliciously, and lacking *bona fides*, conspired and agreed together, the one with the other, to act in concert to demand or require that all players sign a Contract which the defendants knew was unlawful. The defendant, the CHL, and the Leagues knew or recklessly disregarded the fact that the relationship between the Club and Class Members was one of employer/employee, and as such the Contracts contravened employment standards legislation, yet required the Contracts be signed so as to avoid paying the plaintiff and Class Members minimum wages, vacation pay, holiday pay or overtime pay.

72. The Victoria Royals, Leagues and the CHL have access to legal opinions, judicial decisions, employment tribunal directives and decisions, and CRA bulletins on the criteria for determining whether the Player/Team relationship is one of independent contractor, student athlete, or employment. The defendants, the CHL, and the Leagues are well aware that the fees paid to the Players under the Contract probably violate employments standards legislation and are well aware of the jurisprudence where Courts have construed the relationship between the Players and the Clubs as an employer/employee relationship. The defendants, the CHL, and the Leagues make, or direct that the Clubs make, employee payroll deductions and remit them in their capacity as employer to government agencies.

73. The Leagues and the CHL control the terms of the Contract by requiring that the Victoria Royals use only the standard form contract and by making each and every Contract conditional on approval by the applicable League. The amount of fees received by the Players is set by the Leagues and the CHL and pursuant to the CHL and Leagues' bylaws and the Regulations; hence the Leagues and the CHL have unlawfully set the wages below the minimum legislated standards. The Leagues and the CHL direct that the Victoria Royals must insist that Players sign the Contract as a condition of playing in a League.

74. The Victoria Royals know, or ought to know, that the Contracts are unlawful pursuant to the *ESA*, but have agreed and conspired with the CHL and the Leagues to use the

Contracts and the Contracts only. The conspiracy between the CHL, the Leagues, and the Victoria Royals occurred in Ontario and continues to occur in Ontario where the head office of the CHL is located.

75. The defendant, the CHL, and the Leagues were motivated to conspire, and their predominant purposes and concerns were to continue operating the Leagues without incurring costs that were to be lawfully paid by the Victoria Royals to the plaintiff and the Class Members in the form of minimum wages, overtime pay, holiday pay and vacation pay.

76. The conspiracy was unlawful because the defendant, the CHL, and the Leagues knowingly caused the plaintiff and Class Members to enter into an unlawful contract and receive wages in contravention of the *ESA* and because the defendant, the CHL, and the Leagues deliberately attempted to circumvent the legislation by inaccurately characterizing the status of Players as independent contractors and in 2013 as student athletes and in 2013 by inaccurately characterizing the fees payable to the Players as an allowance. The defendant, the CHL, and the Leagues knew that such conduct would more likely than not cause harm to the plaintiff and the Class Members.

77. The acts in furtherance of the conspiracy caused injury and loss to the plaintiff and other Class Members in that the Players' statutory protected right to fair wages were breached and they did not receive minimum wages, vacation pay, holiday pay or overtime pay that was owed to them as lawfully required under the *ESA*.

78. As a result of the conspiracy, which was committed by the defendant, the CHL, and the Leagues together, the defendant is jointly and severally liable with the owners of other teams in the Leagues, the CHL and the Leagues for all monies owing to the plaintiff and the Class Members under the *ESA*.

Waiver of Tort as against the CHL, OHL, the WHL, and the Canadian based teams in those two Leagues

79. The CHL, the OHL, the WHL and the Canadian based teams in those two Leagues control the terms of the Contracts by requiring that the Clubs use only the standard form contract. They also require that the Victoria Royals continue to insist that Players sign the Contract and provide employment related services for fees set by the Leagues' bylaws which are below legislated employment standards and the Victoria Royals have agreed to do so.

80. The Leagues and the CHL have access to legal opinions and are well aware that the Contracts probably violates the *ESA* and are well aware of jurisprudence where Courts have construed the relationship between the Players and the Clubs as an employer/employee relationship.

81. Nevertheless, the CHL and the Leagues require that the Victoria Royals continue to insist that Players sign the Contracts and provide employment related services for below legislated employment standards. The Clubs agree to do so.

82. The defendant, the CHL, and the Leagues receive, in the aggregate, hundreds of millions of dollars in revenues annually including for marketing promotions, television rights and tickets sales, all based primarily on the services provided by the Players and the use of their images and names. The defendant's, the CHL's, and the Leagues' illegal employment contracts and breach of employment legislation constitute unlawful acts by which the defendants have been unjustly enriched. The defendant, the CHL, and the Leagues are therefore liable to the plaintiff and Class Members in waiver of tort.

83. As a result, the plaintiffs seek an order requiring the CHL, the OHL, the WHL and the Canadian based teams in those two Leagues to disgorge all profits received commencing October 17, 2012 and ongoing, as a result of the illegal conduct as particularized above.

REMEDIES

84. The plaintiff and each Class Member has suffered damages and loss as a result of the Clubs' breach of statute and the defendant's, the CHL's, and the Leagues' conspiracy, as particularized above.

85. The plaintiff pleads that he and the Class are entitled to recover back wages, holiday pay, vacation pay, and overtime pay pursuant to the *ESA*, together with interest.

86. The plaintiff seeks on his own behalf, and on behalf of the Class, an order that the defendant must disgorge all profits that the defendant generated as a result of benefitting from breaches of *ESA*, the conspiracy and waiver of tort.

87. The plaintiff seeks on his own behalf, and on behalf of members of the Class, punitive damages for the defendant's conduct in violating the *ESA* while they were aware that certain terms of the Contracts were probably void. The defendant was lax, passive, ignorant with respect to the plaintiff and Class Members' rights and to its own obligations; displayed ignorance, carelessness, and serious negligence; and such conduct was high-handed, outrageous, reckless, wanton, deliberate, callous, disgraceful, willful and in complete disregard for the rights of the plaintiff and Class Members.

88. The plaintiff pleads that only a punitive damages award will prevent the defendant from continuing its unlawful conduct as particularized herein.

VENUE

89. The plaintiffs propose that this action be tried in the City of Toronto in the Province of Ontario.

90. Pursuant to Rule 17.04(1), the plaintiff pleads and relies on Rules 17.02 (g), (o) and (p) of the *Rules of Civil Procedure* in support of service of originating process outside of Ontario without a court order.

91. The plaintiff pleads and relies upon the provisions of the *ESA*, as amended, and its respective regulations.

Date: January 6, 2015

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 CV-15-519219 00CP

Court File No:

SAM BERG
Plaintiff

-and-

WEST COAST HOCKEY ENTERPRISES LTD.
Defendant

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced in TORONTO

STATEMENT OF CLAIM

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