

ONTARIO
SUPERIOR COURT OF JUSTICE

BETWEEN:

SAMUEL BERG

Plaintiff

and

CANADIAN HOCKEY LEAGUE, ONTARIO MAJOR JUNIOR HOCKEY LEAGUE, ONTARIO HOCKEY LEAGUE, WESTERN HOCKEY LEAGUE, QUEBEC MAJOR JUNIOR HOCKEY LEAGUE INC., WINDSOR SPITFIRES INC., LONDON KNIGHTS HOCKEY INC., BARRIE COLTS JUNIOR HOCKEY LTD., BELLEVILLE SPORTS AND ENTERTAINMENT CORP., ERIE HOCKEY CLUB LIMITED, GUELPH STORM LIMITED, KINGSTON FRONTENAC HOCKEY LTD., 2325224 ONTARIO INC., NIAGARA ICEDOGS HOCKEY CLUB INC., BRAMPTON BATTALION HOCKEY CLUB LTD., GENERALS HOCKEY INC., OTTAWA 67'S LIMITED PARTNERSHIP, THE OWEN SOUND ATTACK INC., PETERBOROUGH PETES LIMITED., COMPUWARE SPORTS CORPORATION, SAGINAW HOCKEY CLUB, L.L.C., 649643 ONTARIO INC c.o.b. as SARNIA STING, SOO GREYHOUNDS INC., McCRIMMON HOLDINGS, LTD. AND 32155 MANITOBA LTD., A PARTNERSHIP c.o.b. as BRANDON WHEAT KINGS., 1056648 ONTARIO INC., REXALL SPORTS CORP., EHT, INC., KAMLOOPS BLAZERS HOCKEY CLUB, INC., KELOWNA ROCKETS HOCKEY ENTERPRISES LTD., HURRICANES HOCKEY LIMITED PARTNERSHIP, PRINCE ALBERT RAIDERS HOCKEY CLUB INC., BRODSKY WEST HOLDINGS LTD., REBELS SPORTS LTD., QUEEN CITY SPORTS & ENTERTAINMENT GROUP LTD., SASKATOON BLADES HOCKEY CLUB LTD., VANCOUVER JUNIOR HOCKEY LIMITED PARTNERSHIP, 8487693 CANADA INC., CLUB DE HOCKEY JUNIOR MAJEUR DE BAIE-COMEAU INC., CLUB DE HOCKEY DRUMMOND INC., CAPE BRETON MAJOR JUNIOR HOCKEY CLUB LIMITED, LES OLYMPIQUES DE GATINEAU INC., HALIFAX MOOSEHEADS HOCKEY CLUB INC., CLUB HOCKEY LES REMPARTS DE QUEBEC INC., LE CLUB DE HOCKEY JUNIOR ARMADA INC., MONCTON WILDCATS HOCKEY CLUB LIMITED, LE CLUB DE HOCKEY L'OCEANIC DE RIMOUSKI INC., LES HUSKIES DE ROUYN-NORANDA INC., 8515182 CANADA INC. c.o.b. as CHARLOTTETOWN ISLANDERS, LES TIGRES DE VICTORIAVILLE (1991) INC., SAINT JOHN MAJOR JUNIOR HOCKEY CLUB LIMITED, CLUB DE HOCKEY SHAWINIGAN INC., and CLUB DE HOCKEY JUNIOR MAJEUR VAL D'OR INC.

Defendants

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

AFFIDAVIT OF BILL BERG (Sworn March 11, 2015)

I, Bill Berg, of the Community of Beamsville, in the Town of Lincoln, in the Province of Ontario, make oath and say:

INTRODUCTION

1. I am the father of the proposed representative plaintiff in this action, Samuel Berg ("Sam") and I have reviewed Sam's affidavit in support of the motion for certification sworn February 18, 2015.
2. I have personal knowledge of the facts to which I hereinafter depose. Where my knowledge is based on information obtained from others, I have so indicated and believe that information to be true.

MY BACKGROUND

3. I am a retired professional hockey player, having played in several hockey leagues since 1985 including the Ontario Hockey League ("OHL") from 1985-1987, the American Hockey League ("AHL") in 1986-1989, the International Hockey League ("IHL") in 1988 for a few games, and in the National Hockey League ("NHL") for 11 seasons from 1988-1999. Attached as **Exhibit "A"** hereto are my hockey statistics as recorded on the website www.hockeydb.com.
4. Together with my wife, I currently own and manage commercial and residential real estate in the St. Catherines and Beamsville area, where I reside.

MY OHL CAREER

5. In 1984, at the age of 16, I was drafted to the OHL team known as the Sudbury Wolves. Rather than attend training camp and potentially join the team that season, I decided to play Junior B hockey in Grimsby, Ontario. I did so because it was a lot closer to my home town of Beamsville, Ontario, meaning that I could remain living at home and continue my high school education at my current highschool. I also did not want to play

in the OHL because I wanted to keep my eligibility for a scholarship to a university or college in the United States through the National Collegiate Athletic Association ("NCAA"). The NCAA rules at that time were that if a player was on an OHL team for 48 hours, then that player would no longer be eligible for an NCAA scholarship to attend university or college in the United States. I understand and verily believe that these NCAA rules remain in place today.

6. In or about 1984 or 1985, my OHL player rights were traded from Sudbury to the Toronto Marlboros (the "Marlies"), an OHL team which has since relocated and is now known as the Guelph Storm. In or about that same time, I was approached by Frank Bonello, the then General Manager of the Marlies, and asked to leave the Junior "B" team that I was playing for and to join the Marlies. I explained to him that my focus was on getting a college education and that I did not want to jeopardize my chances of getting a NCAA scholarship by playing in the OHL.
7. Unfortunately, my goal to obtain the scholarship did not work out. Mr. Bonello then contacted me and told me that the Marlies would help me pay for my education if I played for them. I agreed to attend the Marlies' training camp in the late summer/fall of 1985 in Toronto and made the team for the 1985/86 season as a defenceman. When I eventually did sign the contract with the Marlies, I do not believe that there was any term in the contract requiring the Marlies to pay for my post-secondary education.
8. On signing the contract, I moved to Toronto where I was placed in a billet family with whom I would live with some of my team mates. Education was still an important priority for me and I enrolled for three Grade 13 classes at George S. Henry high school in Don Mills, near my billet family. Because my daily scheduled practices with the Marlies meant that I had to be at Maple Leaf Gardens in downtown Toronto by 2pm, I was unable to take any afternoon classes. I therefore had to drop one of my classes which made it impossible for me to graduate from grade 13 that year. I was the only member of the Marlies that attended that particular high school. Some of the other players were also

in high schools spread across the City of Toronto and the older players that had completed high school worked part time at Maple Leaf Gardens.

9. During that first season with the Marlies, I was paid either \$35 or \$50 (I cannot remember the exact amount) each week by the team by way of cheque.
10. In the spring of 1986, at the age of 18, having just completed my first season with the Marlies, I was drafted in the 1986 NHL entry draft by the New York Islanders ("Islanders"), a team in the NHL. I attended training camp with the Islanders that pre-season where I sustained a knee injury. I returned to the Marlies where I was placed, not in a billet, but in a boarding house in Scarborough with another team mate. The living conditions in this boarding house were unpleasant, it was far from practice, and we were not provided with enough food. I complained about this to the Marlies' staff and was eventually moved to a billet family's home in North York. I played that full year with the Marlies, and took correspondence courses in order to finish my Grade 13 credits. I continued to receive either a \$35 or \$50 pay cheque each week from the team during the 1986-1987 season.
11. That season, the Marlies did not make the OHL playoffs. At the end of the regular season, my agent called me and told me that the Islanders wanted me to play the rest of the season (four games) with their AHL affiliated team in Springfield, Massachusetts, the Springfield Indians ("Indians"). I agreed and signed a professional tryout agreement with the Indians which stated that they could release me at any time but that they would pay me, from what I remember, \$100-\$200 per game I played with them. I flew down to Hartford, Connecticut as soon as I could and eventually played a total of 4 games with the Indians, two in Springfield, one in Rochester, and the last one in Newmarket, Ontario for which I received \$100-\$200 per game played. Once the Indians' season was over I returned home to Beamsville.
12. During the off seasons in the OHL which typically last from April to August, I did not work. After the first season with the Marlies, I asked for and received a T4 or record of

employment from the Marlies so that I could apply for Employment Insurance benefits. This was something that I had been told that I could do by other players on the team. I applied and received Employment Insurance benefits during the off-season based on the weekly pay I had received from the Marlies.

MY AHL/NHL CAREER

13. In or about the summer of 1987, after my second season with the Marlies and after I had played the rest of the regular season with the Indians, my agent presented me with a contract that he had negotiated with the Islanders. The contract was for a term of three years plus a one year option, provided me with a \$25,000 signing bonus immediately, and was a "three-way" contract in that it provided different compensation depending for what league I played in. The contract stated that my salary in the NHL would be \$75,000/year; \$23,000/year if I played for the AHL affiliated team; and \$15,000/year if I played for the IHL affiliated team. The appropriate salary would kick in as soon as I played 40 games in one of the leagues. Therefore, when I played 76 games for the Indians in the AHL in the 1987-1988 season, I received the AHL salary, even though I also played a few games of the IHL team in their playoff run after my AHL season was over.
14. For the two following seasons in 1988-1989 and 1989-1990, I played most of my games with the Indians, the AHL team. I then played almost exclusively in the NHL from 1990-1999, with some AHL games played while I was recovering from injuries,. Throughout all of these years I was paid pursuant to the contracts I had signed with the NHL teams.
15. Throughout my time playing in the AHL, IHL, and NHL, my rights and obligations as a player were protected by my union. In the case of the NHL, this was the National Hockey League Players' Association ("NHLPA"). In the 1991-92 NHL season, I was the player representative for the Islanders at the NHLPA and in that function I liaised between the NHLPA and my teammates. It was during this time, and the years after, that significant changes were made through the collective bargaining agreement ("CBA") between the NHLPA and the NHL. While the CBA already provided NHL players with several protected rights, including limiting our on-ice time at practices and allowing the

players to receive a second medical opinion after having been seen by the team doctor, the NHLPA eventually negotiated more rights during my years in the NHL. These included: (1) salary disclosure so that all players knew what all the other players' contracts were worth for the purpose of gauging their own market value; and (2) a group licensing agreement so that the NHLPA as a group was also paid for the use of a player's image.

16. While I was a player in the NHL, the clauses in my contract also provided for the costs of my education to be paid. While I played in the NHL, I took several courses, including courses towards a sociology degree at Brock University, a life insurance license, and the Canadian Securities Certificate, amongst others. All of the fees related to these courses were paid for by the teams I was playing for at the time that I was taking the courses.

SAM'S EXPERIENCE COMPARED TO MY OWN

17. I have reviewed Sam's affidavit sworn February 18, 2015. Also, as his father with whom he was living while he played for the Niagara Ice Dogs ("Ice Dogs"), I witnessed Sam's daily routine as a player on the Ice Dogs. Based on both Sam's affidavit and my observations of Sam's daily routine, it is my opinion that the type of work, labour, commitment, time and energy Sam was providing to the Ice Dogs was identical to that which I provided to the teams I played for in the AHL, IHL, and NHL. However, the weekly amount of Sam's work, labour, commitment, time and energy exceeded what I would typically work during a week as a player in those leagues, including the NHL.
18. Comparing my experience in the OHL compared to Sam's, we had no obligations to do any promotional work for the team. We were never required to attend functions or meet with fans after games. Also, our practices were limited to 1 to 1.5 hours of on-ice practices each day. We did not attend any meetings to review game video, nor did we participate in any kind of off-ice training regimen like Sam did as a member of the Ice Dogs. We would travel to away games on the same day that they were played.

19. The rosters for the OHL teams when I played in the OHL were also much smaller. This meant that generally speaking, if you were healthy you would be playing in a game. There was no such thing as a "healthy scratch" where a player would not dress to play a game based only on the coach's discretion. From my review of Sam's affidavit, I do verily believe that "healthy scratches" are now a regular part of the OHL game. I did not experience a healthy scratch until I was playing in the NHL and when I did, I recall the significant amount of pressure on me to perform better so that would not happen again. I cannot imagine what kind of pressure this puts on 16-20 year old players who are trying their best to impress their coaches and scouts.
20. Comparing my time playing in the NHL with Sam's experience in the OHL, it is my opinion that there are several similarities in the services we provided to our teams. For example:
- i. There is a set schedule of games and practices which all players are required to attend;
 - ii. The amount of games played in the NHL and OHL regular season is approximately the same;
 - iii. Players are required to live near or in the City in which their team is located;
 - iv. Practices and/or games are held 6 to 7 days per week;
 - v. Players are required to follow their coaches' instructions and play hockey, train or practice in the manner they are instructed to by their coaches;
 - vi. Players are required to attend promotional events when asked to by the team;
 - vii. Players are required to travel with the team and stick to an assigned schedule during road trips, including being required to travel to an away game on the day before the game rather on the game day itself; and
 - viii. Players are provided with equipment by the teams.

21. As an NHL player, I was not required to sign autographs and meet with fans after each home game. Although there were occasional promotional events that I was required to attend, they did not occur as frequently as those that Sam attended.
22. Also, because the NHL CBA restricted the amount of time the players were required to practice, we were not required to practice or devote the amount of time that Sam did to training with the team or reviewing video.
23. In the NHL, when we were playing away games, we very rarely travelled to the home team's city on the date of the game. Rather, we would show up the previous day or night in order to get proper rest before the game. When I played in the OHL, we often travelled the same day. From my review of Sam's affidavit, and in my discussions with him, it appears that the OHL teams now prefer to travel the day or evening before a game so that they are not on the road on the game day, allowing the players time for rest and practice. This effectively prevents the OHL players who are still in school from attending class for an additional day.
24. Finally, as a unionized player, I knew that if I had a complaint about how I was being treated by the team, by team mates or had any concerns whatsoever, that I had a grievance process that I could access. From my review of Sam's affidavit and my discussions with him, I do verily believe that no such mechanism exists in the OHL and therefore the players fear that if they do complain about some of their conditions, they could be subject to forms of reprisal such as being given a reputation as a "bad apple", being traded, being made a healthy scratch, or being dismissed from the team.
25. The teams we played for in the NHL also operated in a similar manner to the OHL teams. They received revenues based on ticket sales, corporate sponsorships, television broadcasting rights, and of course merchandising and the use of a player's name and image.

26. Based on my experience as a professional hockey player and as the father of Sam, it is my opinion that there is no material difference in the type of services Sam provided to the Ice Dogs compared to those I provided to NHL teams I was a player on and for which I was paid considerably more than minimum wages

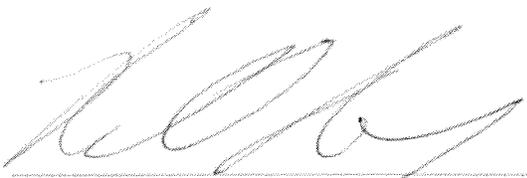
27. I swear this motion in support of the plaintiff's motion and for no other or improper purpose.

SWORN BEFORE ME at the)
City of Windsor , in the Province of)
Ontario, this 11th day of)
March, 2015 via FaceTime)



(A Commissioner, etc.)

ANDREW J. ECKART
LSUC # 60088R



BILL BERG