AMENDED THIS March 14, 2017 PURSUANT TO
MODIFIÉ CE CONFORMÉMENT À
☒ RULE/LA RÈGLE 26.02 (B)

☐ THE ORDER OF _____
L'ORDONNANCE DU
DATED / FAIT LE _____

REGISTRAR GREFFIER
SUPERIOR COURT OF JUSTICE COUR SUPÉRIEURE DE JUSTICE
Melissa Hamgamesh

Court File No. CV-14-514423-00CP

ONTARIO
SUPERIOR COURT OF JUSTICE

SAMUEL BERG and DANIEL PACHIS

Plaintiffs

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, JAW HOCKEY ENTERPRISES LP, GUELPH STORM LIMITED, ~~KINGSTON FRONTENAC HOCKEY LTD.~~, KINGSTON FRONTENACS HOCKEY CLUB, 2325224 ONTARIO INC., MISSISSAUGA STEELHEADS HOCKEY CLUB INC., NIAGARA ICEDOGS HOCKEY CLUB INC., BRAMPTON BATTALION HOCKEY CLUB LTD., NORTH BAY BATTALION HOCKEY CLUB LTD., GENERALS HOCKEY INC., OTTAWA 67'S LIMITED PARTNERSHIP, THE OWEN SOUND ATTACK INC., PETERBOROUGH PETES LIMITED, COMPUWARE SPORTS CORPORATION, IMS HOCKEY CORP., SAGINAW HOCKEY CLUB, L.L.C., 649643 ONTARIO INC c.o.b. as SARNIA STING, 211 SSHC CANADA ULC o/a SARNIA STING HOCKEY CLUB, 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., CLUB DE HOCKEY JUNIOR MAJEUR VAL D'OR INC., WEST COAST HOCKEY ENTERPRISES LTD., MEDICINE HAT TIGERS HOCKEY CLUB LTD., PORTLAND WINTER HAWKS, INC., BRETT SPORTS & ENTERTAINMENT, INC., THUNDERBIRD HOCKEY ENTERPRISES, LLC, TOP SHELF ENTERTAINMENT, INC., SWIFT CURRENT TIER 1 FRANCHISE INC., 7759983 CANADA INC.,

LEWISTON MAINEIACS HOCKEY CLUB, INC., KITCHENER RANGER JR A HOCKEY CLUB, KITCHENER RANGERS JR "A" HOCKEY CLUB, SUDBURY WOLVES HOCKEY CLUB LTD., GROUPE SAGS 7-96 INC., MOOSE JAW TIER ONE HOCKEY INC. DBA MOOSE JAW WARRIORS, KOOTENAY ICE HOCKEY CLUB LTD., LETHBRIDGE HURRICANES HOCKEY CLUB, and LE TITAN ACADIE BATHURST (2013) INC./THE ACADIE BATHURST TITAN (2013) INC.

Defendants

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

AMENDED SECOND CONSOLIDATED FRESH 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.

Date: March 2, 2017

Issued By: "N. MOHAMMAD"

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

TO: CANADIAN HOCKEY LEAGUE
305 Milner Ave., Suite 201,
Scarborough, Ontario, M1B 3V4

AND TO: ONTARIO MAJOR JUNIOR HOCKEY LEAGUE/ONTARIO HOCKEY LEAGUE
305 Milner Ave., Suite 200,
Scarborough, Ontario M1B 3V4

AND TO: WESTERN HOCKEY LEAGUE
2424 University Dr. NW
Calgary, Alberta, T2N 3Y9

AND TO: QUEBEC MAJOR JUNIOR HOCKEY LEAGUE INC.
101-1205 rue Ampère
Boucherville, Québec J4B 7M6

AND TO: TEAMS (See Schedule “A”)

DEFINED TERMS

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

   (a) "**2007 OHL SPA**" means the Ontario Hockey League Standard Player Agreement, together with Schedule "A" and Schedule "B" used in the 2007-2008 season;

   (b) "**2010 OHL SPA**" means the Ontario Hockey League Standard Player Agreement, together with Schedule "A", Schedule "B" and Schedule "C" used in the 2010-2011 season;

   (c) "**2013 OHL SPA**" means the Ontario Hockey League Standard Player Agreement, together with Schedule "A", Schedule "B" and Schedule "C" used in the 2013-2014 season;

   (d) "**SPA**" means the standard player agreements in the OHL, including the **2007 OHL SPA**, **2010 OHL SPA** and **2013 OHL SPA**;

   (e) "**2007 WHL SPA**" means the Western Hockey League Standard Player Agreement Execution Schedule together with the Addendum and the Terms and Conditions Schedule used in the 2007-2008 season;

   (f) "**2011 WHL SPA**" means the Western Hockey League Standard Player Agreement Execution Schedule together with the Addendum and the Terms and Conditions Schedule used in the 2011-2012 season;

   (g) "**2013 WHL SPA**" means the Western Hockey League Standard Player Agreement Execution Schedule together with the Addendum and the Terms and Conditions Schedule used in the 2013-2014 season;

(h) "**2014 WHL SPA**" means the Western Hockey League Standard Player Agreement Execution Schedule together with the Addendum and the Terms and Conditions Schedule used in the 2014-2015 season;

(i) "**2013 QMJHL SPA for 16 to 19 Year Olds"** means the Quebec Major Junior Hockey League Rights and Obligations of Players and Schedule A: Commitment Form for 16-to-19-Year-Old Players that was used in the 2013-2014 season;

(j) "**2013 QMJHL SPA for 20 Year Olds"** means the Quebec Major Junior Hockey League Rights and Obligations of Players and Schedule B: Standard Contract – 20-Year-Old Player that was used in the 2013-2014 season;

(k) "**Applicable Employment Standards Legislation**" means the legislation governing wages in the jurisdiction where a **Club** is domiciled including: the ***ESA***; Mich. Stat. §408; Mich. Comp, Laws, as amended; Pa. *Minimum Wage Act of 1968* Pub. L. No. 11, No. 5, as amended; Pa. Cons. Stat, as amended;; *Fair Labor Standards Act of 1938*, 29 U.S.C. §201; and their respective regulations.

(l) "**CHL**" means the defendant Canadian Hockey League;

(m) "**Class**" or "**Class Member(s)**" means the O**ntario Class**; the **Pennsylvania Class**; and the **Michigan Class;**

(n) "**Clubs**" means the teams participating, or have participated, in the **OHL** during the class period including the teams who are or were owned and/or operated by the defendants Windsor Spitfires Inc., London Knights Hockey Inc., Barrie Colts Junior Hockey Ltd., Belleville Sports and Entertainment Corp., Bulldog Hockey Inc., Erie Hockey Club Limited, JAW Hockey Enterprises LP, Guelph Storm Limited, ~~Kingston Frontenac Hockey Ltd.~~, Kingston Frontenacs Hockey Club,

2325224 Ontario Inc., Mississauga Steelheads Hockey Club Inc., Niagara Icedogs Hockey Club Inc., Brampton Battalion Hockey Club Ltd., North Bay Battalion Hockey Club Ltd., Generals Hockey Inc., Ottawa 67's Limited Partnership, The Owen Sound Attack Inc., Peterborough Petes Limited., Compuware Sports Corporation, IMS Hockey Corp., Saginaw Hockey Club, L.L.C., 649643 Ontario Inc c.o.b. as Sarnia Sting, 211 SSHC Canada ULC o/a Sarnia Sting Hockey Club, Soo Greyhounds Inc., Kitchener Ranger Jr A Hockey Club, Kitchener Rangers Jr "A" Hockey Club,, and Sudbury Wolves Hockey Club Ltd.;

(o) "**employee**" has the same meaning as that attributed to it by the **Applicable Employment Standards Legislation;**

(p) "**employer**" has the same meaning as that attributed to it by the **Applicable Employment Standards Legislation**;

(q) "**employer payroll contributions**" includes contributions to the Canada Pension Plan pursuant the *Canada Pension Plan*, R.S.C., 1985, c. C-8, contributions to unemployment insurance pursuant to the *Employment Insurance Act*, S.C. 1996, c. 23 and other statutes, and equivalent contributions required by the laws of Michigan and Pennsylvania;

(r) "***ESA***" means the *Employment Standards Act, 2000*, S.O. 2000, c. 41.

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

(t) "**Michigan Class**" means all players who are members of a team owned and/or operated by one or more of the **Clubs** located in the State of Michigan, USA (a "team"), or at some point commencing October 17, 2008 and thereafter, were

members of a team, and all players who were members of a team who were under the age of 18 on October 17, 2008;

(u) "**OHL**" means the defendant Ontario Major Junior Hockey League operating as the Ontario Hockey League;

(v) "**Ontario Class**" means all players who are members of a team owned and/or operated by one or more of the **Clubs** located in the Province of Ontario (a "team") and at some point commencing October 17, 2012 and thereafter, were members of a team, and all players who were members of a team who were under the age of 18 on October 17, 2012;

(w) "**Pennsylvania Class**" means all players who are members of a team owned and/or operated by one or more of the **Clubs** located in the State of Pennsylvania, USA (a "team"), or at some point commencing October 17, 2010 and thereafter, were members of a team and all players who were members of a team who were under the age of 18 on October 17, 2010;

(x) "**Player(s)"** means all persons who play or have played hockey for one or more of the **Clubs** and are **Class Members**;

(y) "**QMJHL**" means the defendant Quebec Major Junior Hockey League Inc.;

(z) "**wages**" or "**minimum wages**" has the same meaning as that attributed to it by the **Applicable Employment Standards Legislation**; and

(aa) "**WHL**" means the defendant Western Hockey League.

CLAIM

2. The plaintiffs claim on their own behalf and on behalf of the Class, against the Clubs, OHL and CHL for:

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

(b) A Declaration that the Players are, or were, employees of their Clubs;

(c) A Declaration that there exists a contract of employment between each Player and his Club;

(d) A Declaration with respect to the Clubs located in Ontario that it is an implied or express term of all contracts of employment between a Player and his Club that the Players are or were to be paid wages, back pay, vacation pay, holiday pay and overtime pay in accordance with Applicable Employment Standards Legislation, and that the Clubs were to make employment payroll contributions as required by law;

(e) A Declaration that the Clubs located in Ontario breached the contracts of employment by failing to pay the Players wages, back pay, vacation pay, holiday pay and overtime pay in accordance with Applicable Employment Standards Legislation and by failing to make employment payroll contributions as required by law;

(f) A Declaration that the terms and conditions of the SPA which contravene provisions of the Applicable Employment Standards Legislation which prohibit contracting out of employment standards are unenforceable and void;

(g) A Declaration that the Clubs located in Ontario breached the contractual duties of honesty, good faith and fair dealing;

(h) A Declaration that the Clubs, OHL and CHL engaged in a policy or practice of avoiding or disregarding compliance with the Applicable Employment Standards Legislation;

(i) A Declaration that the Clubs, OHL and CHL conspired together and with each other to violate applicable employment standards legislation and to compel the Players to enter into the SPA knowing that the SPA constituted an unlawful agreement in violation of Applicable Employment Standards Legislation, and therefore the defendants are jointly and severally liable for all damages;

(j) In the alternative to the conspiracy plea, a Declaration that the OHL, CHL and the Clubs located in Ontario were negligent;

(k) A Declaration that the Players who had played on teams located in Ontario may elect to recover damages jointly and severally from all such defendants, the WHL, and the CHL based on the cause of action or remedy of waiver of tort;

(l) A Declaration that the defendant Clubs located in Ontario were unjustly enriched to the deprivation of the Players without juristic reason;

(m) An Order disgorging the profits that the defendants generated as a result of benefitting from their unlawful conduct;

(n) An Interim and Final Mandatory Order for specific performance directing that the Clubs, OHL and CHL comply with Applicable Employment Standards Legislation, in particular to:

(i) Ensure that the Players are properly classified as employees;

(ii) Advise Players of their entitlement to compensation as employees in accordance with the Applicable Employment Standards Legislation;

(iii) Ensure that the Players' hours of work are monitored and accurately recorded;

(iv) Ensure that the Players are appropriately compensated at a rate equal to or above the minimum requirements for employees pursuant to the Applicable Employment Standards Legislation;

(v) Ensure that the Clubs make employer payroll contributions required by law including the *Canada Pension Plan*, R.S.C., 1985, c. C-8, the *Employment Insurance Act*, S.C. 1996, c. 23, the laws of Michigan and the laws of Pennsylvania;

(o) An Interim and Final Order restraining the defendants, their 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 *ESA* 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 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.

(p) Damages for outstanding wages including back pay, vacation pay, holiday pay, overtime pay, and applicable employer payroll contributions required by law in the amount of one hundred million dollars in Canadian currency and fifty million in U.S. currency;

(q) Liquidated damages in the amount of 25% of wages outstanding from Erie Hockey Club Limited and JAW Hockey Enterprises LP, pursuant to the laws of Pennsylvania;

(r) Liquidated damages in the amount of 100% of wages outstanding from Compuware Sports Corporation, IMS Hockey Corp., and Saginaw Hockey Club, L.L.C. and a civil fine of $1000 per Class Member employed by these defendants;

(s) Punitive damages in the amount of twenty-five million dollars in Canadian currency;

(t) An Order directing the defendants to preserve and disclose to the plaintiffs all records (in any form) relating to the identification of Class Members and the hours of work performed by the Class Members;

(u) 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;

(v) 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;

(w) 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

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

3. By Order of the Court dated July 22, 2015, on consent of the parties, all claims in this action against the WHL, the QMJHL and the clubs of the WHL and QMJHL are stayed. This action continues against the OHL, the CHL and the Clubs of the OHL ("the defendants").

FACTS IN SUPPORT OF THE MISCLASSIFICATION OF THE PLAYERS

4. 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. In the OHL, the Players vary in age from 16-20 years of age and have all signed an SPA containing identical or significantly similar terms.

5. The form and content of the SPA is mandated, controlled, drafted and/or regulated by the OHL and the CHL who require all of the Clubs to use the standard form player agreement (the SPA) when hiring Players, regardless of that Player's level or skill or experience or the team with which he signs. The Players are afforded no opportunity for bargaining – they either sign the SPA as drafted by the OHL and CHL, or they are precluded from playing major junior hockey. Once executed by the Player and Club, the SPA provides that it must then be approved by the Commissioner of the OHL. The purpose of having every signed SPA approved by the OHL is to monitor compliance with the standard language in the SPA and to ensure that there have been no modifications to individual SPAs at the Club level.

6. The SPA 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.

7. The corresponding standard player agreements used in the WHL and QMJHL contain identical or similar clauses.

8. The Players’ duties, functions, obligations and responsibilities are uniform across the Clubs, as set out in the SPA and in the Bylaws of the OHL and CHL. Players uniformly devote on average 45 hours/week and up to 65 hours/week or more, performing services in accordance with the SPA including travel, practice, promotion, and participating in games three times a week. Under the SPA, the Players uniformly receive no hourly wages, no overtime pay, no holiday pay, and no vacation pay.

9. The Tax Court of Canada ruled in *McCrimmon Holdings v. Canada (Minister of National Revenue - M.N.R.)*, [2000] T.C.J. No. 823 (“*McCrimmon Holdings*”), that the relationship between a club in the WHL and a player is one of employer/employee, finding, “[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.”

10. In *McCrimmon Holdings*, the Court was asked to consider the relationship between a player and a WHL club based on the language of a WHL standard player agreement. The Court rejected the WHL club’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 club. The Court found that the WHL club 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.

11. Despite the Tax Court of Canada ruling made some fourteen years ago, the defendants have failed to pay wages in accordance with Applicable Employment Standards Legislation.

12. Instead, the Clubs, OHL and CHL caused the SPA to be reformulated through several iterations in a concerted effort to recast the legal classification of its Players. Although the terminology in the SPA has changed, the duties, functions, obligations and responsibilities of the Players as well as the coaching, training and access to compensation, scholarships and benefits have remained substantively the same since *McCrimmon Holdings*.

13. In the 2007 OHL SPA, a Player's classification/relationship with his Club was not expressly defined. The Player received an "allowance" of $65/week in exchange for the Player's exclusive services. Of the $65 weekly "allowance", $15/week was subject to a holdback (presumably to remit to the federal government as contributions to Employment Insurance in accordance with the decision in *McCrimmon Holdings* that the players' fell into the category of insurance employment).

14. The defendants reformulated the SPA at some point after 2007. In the 2010 OHL SPA and 2013 OHL SPA, the classification/relationship between the Player and Club is expressly defined. Now the Players purportedly agree to be independent contractors. The Players generally sign the SPA at age 16 or 17 and in doing so purportedly become an "independent contractor" who is earning a "fee" in exchange for the Player's "services".

15. The OHL SPA in 2014 reveals efforts by the league and its Clubs to recast the classification of its players as participants in a development program. Players previously received a fee or "allowance". In the 2014 OHL SPA, the Clubs no longer provide fees. Instead, the Clubs purport to reimburse players for expenses.

16. In the WHL and QMJHL, the Leagues have taken a different approach in recent years to classification, opting not to describe 16-19 year old players as independent contractors.

17. In the WHL, whose overseeing body is also the CHL, the 2007 WHL SPA and 2011 WHL SPA provide that the club retains the "services" of the player and in consideration the player receives "remuneration" comprised of an "allowance" of between $160/month and $600/month, plus a bonus. Article 2.2 of the Terms and Conditions Schedule provides that payment of the allowance is subject to statutory withholdings and deductions. Article 4.2 (j) of the Terms and Conditions Schedule provides that the player covenants and agrees to "provide his services faithfully, diligently and to the best of his abilities as a hockey player".

18. In 2013, the WHL, revised its standard player agreement in an effort to recast the classification of the players by removing all references to "services", "remuneration" and "allowance". Now the players are described as "amateurs" who are to be "reimbursed" for travel or training related expenses of up to $250/month. Article 4.2 (k) of the Terms and Conditions Schedule (the successor to 4.2(j)) now reads that the player covenants and agrees to "play hockey for the club faithfully, diligently and to the best of his abilities as an amateur athlete hockey player".

19. In the QMJHL, whose overseeing body is also the CHL, similar efforts have been made to recast the classification of the players. Effective September 2013, the QMJHL revised its standard player agreement, now entitled "Rights and Obligations of Players", in an effort to

recast the classification of its players as participants in a development program. The 2013 QMJHL SPA now includes a "Declaration on the Status of the Players" which purports to describe "that players who belong to a club who range in age from 16 to 19 years old are pursuing their academic careers while also benefitting from a framework which supports the development of their athletic potential as hockey players whose goal is to pursue the practice of hockey at the professional level".

20. Players in the QMJHL previously received a "salary/bonus". Effective September 2013 (like in the WHL), the players in the QMJHL no longer receive a "salary/bonus" or "remuneration/allowance". Instead, players are reimbursed for expenses.

21. The CHL has also removed all references to the Players being characterized as "professional athletes" in legal documents, despite nothing changing in the Leagues' conducted business. In particular, the 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 OHL and the CHL in redrafting the SPA, redefining the professional status of the Players in the bylaws of Hockey Canada, and in requiring Players to sign the new versions of the SPA was to engage in a policy or practice of misclassifying the Players' relationships with their Clubs in an attempt to avoid, evade or disregard the application

of Applicable Employment Standards Legislation, despite the fact that the true nature of the legal relationship between the Players and Clubs is, and has always been, one of employment.

PARTIES

Samuel Berg

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

24. Sam signed the 2013 OHL SPA on August 20, 2013, as did the general manager of the team. Sam's SPA 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 Club in a number of exhibition and regular season games. On average Sam devoted about six hours a day, seven days a week to providing services to the Club in accordance with the SPA. 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 $50.00 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 IceDogs was one of employment. Sam was an employee of the Club. The facts in support of him being an employee are as follows:

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

(b) The OHL, the CHL and the Club 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 Club 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 2013 OHL SPA provides that "The Club shall pay the Player the fees and provide to the Player the benefits set out in Schedule "A" in exchange for the "Player's services";

(h) The benefits provided by the 2013 OHL SPA include payment to Players aged 16-19 a weekly sum of $50 and to Players aged 20 a weekly sum of $150, paid on a bi-weekly basis, plus payment of the cost of school tuition and expenses, travel expenses, lodging expenses and others, as well as a one-time bonus ranging from $100 to $450 depending on how far the Club advanced in the playoffs.

(i) The 2013 OHL SPA provides that if the Player's services are no longer required by the Club, the "allowance" or "fee" payable to the Player may be reduced on a pro rata basis according to the number of days on which the Player's services were provided.

(j) The Club made payroll deductions at source;

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

(l) Sam was not financially liable if he did not fulfill the obligations of the SPA;

(m) The business of hockey belonged to the Club and not to Sam;

(n) Sam was not in business on his own account;

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

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

29. In or about October 2013, Sam was sent down to play Junior B hockey for the St Catharines 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 $50 weekly fee while he was playing Junior B hockey.

31. Sam enrolled in University. Pursuant to the SPA signed August 31, 2013, the Club 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 Club failed to forward the SPA to the OHL for approval as required by the terms of the SPA. The SPA 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 SPA expressly provides that a Player cannot play in a game until the SPA is approved by the OHL.

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

34. Sam pleads that the Club 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, Niagara IceDogs Hockey Club Inc., for back wages, overtime pay, vacation pay and holiday pay in accordance with the *ESA*, together with employer payroll contributions required by law, as well as the tuition costs of four years of university and against all of the defendants who are jointly and severally liable with the Niagara IceDogs for those damages as a result of the civil conspiracy described below.

Daniel Pachis

36. The plaintiff Daniel Pachis ("Dan") resides in Ontario. From August 2007 to August 2009, Dan played hockey for the Saginaw Spirit, an OHL club owned and operated by the defendant Saginaw Hockey Club, L.L.C. From September 2009 to August 2010, Dan played hockey for the Oshawa Generals, an OHL club owned and operated by the defendant Generals Hockey Inc.

37. Dan signed the 2007 OHL SPA in August 2007, as did the general manager of the Saginaw Spirit. Dan's SPA provided *inter alia* that in exchange for providing the services under the agreement, Dan would receive a fee of $50 weekly for four seasons commencing "the start of [the 2007-2008] OHL Regular Season]".

38. Over the course of his time with the Saginaw Spirit and the Oshawa Generals, Dan played in exhibition, regular season, and playoff games for his Clubs. Dan's hours varied but on average he supplied between thirty and forty hours of services weekly to the Club, over the course of six or seven days, in accordance with the SPA. When the team travelled, he would devote longer hours, up to fifteen hours a day.

39. Dan received $100.00 bi-weekly by cheque less payroll deductions from the Saginaw Spirit. Dan received $100.00 bi-weekly by cheque from the Oshawa Generals. Dan did not receive the minimum hourly wage rate in accordance with the Applicable Employment Standards

Legislation, nor vacation pay, holiday pay or overtime pay, with either the Saginaw Spirit or the Oshawa Generals.

40. Dan's relationship with the Saginaw Spirit and then with the Oshawa Generals was one of employment. Dan was an employee of his Clubs. The facts in support of him being an employee are as follows:

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

(b) The OHL, the CHL and the Clubs determine and control the method and amount of payment;

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

(d) The overall work environment between the Clubs and Dan was one of subordination;

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

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

(g) The 2007 OHL SPA provides that "The Club[s] shall pay to the Player the allowance and provide to the Player the benefits set out in Schedule "A" in exchange for the "Player's services";

(h) The benefits provided by the 2007 OHL SPA include payment to Players aged 16-19 a weekly sum of $50 and to Players aged 20 a weekly sum of $150, paid on a bi-weekly basis, plus payment of the cost of school tuition and expenses, travel expenses, lodging expenses and others.

(i) The 2007 OHL SPA provides that if the Player's services are no longer required by the Clubs, the "allowance" or "fee" payable to the Player may be reduced on a

pro rata basis according to the number of days on which the Player's services were provided.

(j) The Saginaw Spirit made payroll deductions at source;

(k) Dan was not responsible for operating expenses and did not share in the profits;

(l) Dan was not financially liable if he did not fulfill the obligations of the SPA;

(m) The business of hockey belonged to the Clubs and not to Dan;

(n) Dan was not in business on his own account;

(o) The Clubs imposed restrictions on Dan's social life including a curfew that was monitored; and

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

41. Dan played throughout the 2007-08 and 2008-09 OHL seasons with the Saginaw Spirit and attended training camp with the team in August 2009. Dan's playing rights were traded by the Saginaw Spirit to the Oshawa Generals on the day prior to the commencement of the 2009-201 OHL season. In exchange for receiving Dan's playing rights, the Oshawa Generals paid approximately $5000 or $6000 to the Saginaw Spirit.

42. Dan played the 2009-10 season with the Oshawa Generals and attended training camp with the team in August 2010, after which point he was advised that he had been cut from the team. Dan requested that the Oshawa Generals place him "on waivers", which is a process whereby the Generals would release Dan's playing rights and terminate his SPA, allowing Dan to play major junior hockey elsewhere. The Club refused Dan's request and, since he had been cut from the team, Dan was unable to continue playing major junior hockey.

43. Dan pleads that the Saginaw Spirit violated the Applicable Employment Standards Legislation by failing to pay minimum wages, holiday pay, vacation pay and/or overtime pay.

44. Dan claims damages against the defendant Saginaw Hockey Club, L.L.C. for back wages, overtime pay, vacation pay and holiday pay in accordance with the Applicable Employment Standards Legislation, together with employer payroll contributions required by law and against all of the defendants who are jointly and severally liable with the Saginaw Spirit for those damages as a result of the civil conspiracy described below.

The Defendants

45. The CHL office is located in Scarborough, Ontario. It is the umbrella organization that, through its constitution, by-laws and regulations, oversees, controls and administers from Ontario the operations of the OHL, the WHL, and the QMJHL, three hockey leagues operated in Canada and the United States which contain a total of sixty Clubs.

46. The OHL is a corporation incorporated under the laws of Ontario**.** The OHL operates a hockey league from its offices in Scarborough, Ontario under the supervision of the CHL, with teams in the Province of Ontario and the States of Michigan and Pennsylvania, USA. The teams playing in the OHL consist of the teams owned by the OHL Clubs.

47. The Clubs are various corporations, partnerships, and limited liability companies formed in various jurisdictions. The Clubs all own or owned teams in the OHL under various trade names, as follows:

CLUB(S)/DEFENDANT(S)	**TEAM**
Barrie Colts Junior Hockey Ltd.	Barrie Colts
Belleville Sports and Entertainment Corp.	Belleville Bulldogs
Brampton Battalion Hockey Club Ltd.	Brampton Battalion
Erie Hockey Club Limited and JAW Hockey Enterprises LP	Erie Otters
IMS Hockey Corp.	Flint Firebirds
Guelph Storm Limited	Guelph Storm

Bulldog Hockey Inc.	Hamilton Bulldogs
Kingston Frontenacs Hockey Club	Kingston Frontenacs
Kitchener Ranger Jr A Hockey Club and/or Kitchener Rangers Jr "A" Hockey Club	Kitchener Rangers
London Knights Hockey Inc.	London Knights
2325224 Ontario Inc., Mississauga and/or Steelheads Hockey Club Inc.	Mississauga Steelheads
Niagara Icedogs Hockey Club Inc.	Niagara IceDogs
North Bay Battalion Hockey Club Ltd.	North Bay Battalion
Generals Hockey Inc.	Oshawa Generals
Ottawa 67's Limited Partnership	Ottawa 67's
The Owen Sound Attack Inc.	Owen Sound Attack
Peterborough Petes Limited	Peterborough Petes
Compuware Sports Corporation	Plymouth Whalers
Saginaw Hockey Club, LLC	Saginaw Spirit
649643 Ontario Inc c.o.b. as Sarnia Sting and/or 211 SSHC Canada ULC o/a Sarnia Sting Hockey Club	Sarnia Sting
Soo Greyhounds Inc.	Sault Ste. Marie Greyhounds
Sudbury Wolves Hockey Club Ltd.	Sudbury Wolves
Windsor Spitfires Inc.	Windsor Spitfires

Through these above-listed trade names, the Clubs entered into the SPA with the Players.

THE APPLICABLE EMPLOYMENT STANDARDS LEGISLATION

48. The Applicable Employment Standards Legislation for each jurisdiction in which the teams owned by the Clubs are domiciled is also materially the same in that it is mandatory that employers pay their employees minimum wage set by the legislation as follows:

(a) Section 23 of Ontario's *ESA* states "An employer shall pay employees at least the prescribed minimum wage";

(b) In the State of Michigan, the *Workforce Opportunity Wage Act*, Mich. Stat. §408.413 states that "An employer shall not pay any employee at a rate that is less than prescribed in this act."

(c) In the State of Pennsylvania, the *Minimum Wage Act of 1968*, Act of 1968, P.L. 11, No. 5, section 4 states that "Every employer shall pay to each of his or her

employees wages for all hours worked at a rate of not less than [the prescribed minimum wage]"; and

(d) In the United States of America, the *Fair Labor Standards Act of 1938*, 29 USC §§ 206(a) states that "every employer shall pay to each of his employees who in any workweek is engaged in commerce or in the production of goods for commerce, or is employed in an enterprise engaged in commerce or in the productions of goods for commerce" the prescribed minimum wage.

49. In addition to legislating a minimum wage, the Applicable Employment Standards Legislation in each jurisdiction also contains materially the same provisions which prevents employers from contracting out of their obligations under the Applicable Employment Standards Legislation:

(a) Section 5 of Ontario's *ESA* states, "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";

(b) In the State of Michigan, the *Workforce Opportunity Wage Act*, Mich. Stat. §408.419 allows for a civil action to be brought where there is a violation of the act and sec. 9(2) states that "A contract or agreement between the employer and the employee or any acceptance of a lesser wage by the employee is not a bar to the action";

(c) In the State of Pennsylvania, the *Minimum Wage Act of 1968*, Act of 1968, P.L. 11, No. 5, section 13 allows for a civil action to be brought where there is a violation of the act and states that "any agreement between the employer and the

worker to work for less than such minimum wage shall be no defense to such action"; and

(d) In the United States of America, the *Fair Labor Standards Act of 1938*, 29 USC §§ 218(a) provides that "no provision of this chapter or any order thereunder shall excuse noncompliance with any Federal or State law or municipal ordinance establishing a minimum wage higher than the minimum wage established under this chapter".

SYSTEMIC MISCONDUCT / AVOIDING OR DISREGARDING PAYMENT OF STATUTORY WAGES

50. The defendants engaged in a systemic policy or practice of avoiding or disregarding the payment of wages – including back pay, vacation pay, holiday pay, overtime pay and applicable employer payroll contributions – in contravention of the Applicable Employment Standards Legislation, despite the fact that the true nature of the legal relationship between the Players and Clubs is, and has always been, one of employment.

51. Facts supporting the systemic practice or policy of avoiding or disregarding the Applicable Employment Standards Legislation are as follows:

(a) the defendants misclassified the Players, as pleaded under the heading entitled "Facts in Support of the Misclassification of Players";

(b) the defendants inserted a term or condition in the SPA whereby the Players were required to acknowledge that the SPA was not a contract of employment. The Players had no choice but to sign the SPA with the acknowledgment or forfeit playing in the OHL;

(c) the defendants concealed from the Players that in all likelihood the true nature of the legal relationship between the Players and Clubs is, and has always been, one of employment;

(d) the defendants concealed from the Players that the SPA had been drafted to mischaracterize the true nature of the legal relationship between the Players and Clubs so as to avoid paying the Players wages;

(e) the defendants' failure to have any system in place to inform Players of their entitlements to wages under the Applicable Employment Standards Legislation;

(f) the defendants' failure to have any system in place to track the work performed by the Players;

(g) the defendants' failure to have any system in place to calculate wages owed to Players under the Applicable Employment Standards Legislation;

(h) the defendants' failure to track and record the hours of work by the Players is a barrier or impediment to the Players learning whether and what amount they are owed in outstanding wages.

(i) the provisions in the SPA attempting to recast the Players as non-employees is a barrier or impediment to the Players receiving wages; and

(j) the provision in the SPA requiring the Players to keep the SPA confidential is a barrier or impediment to the Players learning whether they were employees at law.

CAUSES OF ACTION

Breach of the Contract of Employment (Clubs Located in Ontario)

52. The plaintiffs and the Players each entered into a contract of employment with their respective Club. Compliance with Applicable Employment Standards Legislation is an implied term or, alternatively, an express term of each contract of employment. Express terms of the contract of employment are set out in the SPA, including the terms and conditions which do not violate Applicable Employment Standards Legislation and which do not purport to classify the Players as a non-employees.

53. The Clubs all breached the implied or express term of each contract of employment by failing to pay wages in accordance with Applicable Employment Standards Legislation.

54. Every Player devotes on average 45 hours/week to the Club during the season while receiving no pay or at most $50/week. Every Player has sustained damages for breach of contract equivalent to the amount that Player should have received if his Club had complied with Applicable Employment Standards Legislation.

Facts in Support of the Players Being Employees

55. The duties, functions, obligations and responsibilities of each Player under the SPA are identical and are dictated by the Clubs. The Clubs' degree of supervision and control over each Players under the SPA are identical. The Clubs control virtually every aspect of every Players' time during the hockey season and monitor compliance with the terms and conditions of the SPA.

56. All Players are similarly situated in terms of their duties, functions, obligations and responsibilities, as well as the degree of control and supervision imposed on the Players by the Clubs.

57. The true nature of the legal relationship between the Players and Clubs is one of employment.

58. The facts that support an employment relationship and a contract of employment are common to all Players, or substantially similar, and are as follows:

(a) The decision in *McCrimmon Holdings* found a WHL player to be an employee, and players in the WHL have identical duties, functions, obligations and responsibilities to the Players;

(b) Under the terms and conditions of the SPA and in all dealings with the Clubs, the Class Members are or were subject to the control of the Clubs as to when, where and how he played hockey;

(c) The OHL, the CHL and the Clubs determine and control the method and amount of payment;

(d) The Players are required to adhere to the Clubs' schedule of practices and games;

(e) The overall work environment between the Clubs and the Players is one of subordination;

(f) The Clubs provide tools, supply room and board and a benefit package;

(g) The defendants use images of the Players for the defendants' profit;

(h) The Players are not responsible for operating expenses and do not share in the profits;

(i) The Players are not financially liable if they do not fulfill the obligations of the SPA;

(j) The business of hockey belongs to the defendants and not to the Players;

(k) The Players were not in business on their own account;

(l) The Clubs' business is for profit;

(m) The Clubs benefit from the activities of the Players;

(n) The Clubs' business depends entirely on the services performed by the Players;

(o) The Clubs earn millions of dollars in revenues from the services performed by the Players including ticket sales, television rights, sponsors, advertising, NHL subsidies, memorabilia, the images of Players, and food and beverage sales;

(p) The Players are not independent contractors despite the language of the SPA;

(q) The Players are not amateur students enrolled in a training program despite the language of the SPA;

(r) The majority of the Players when playing in the OHL do not attend school or study and are not students;

(s) A number of players who are employed by a team in the NHL and play in the NHL, a professional league where the players are acknowledged to be employees and have a collective bargaining agreement, are reassigned during the season to the Clubs and play hockey with the Players, performing exactly the same functions as the Players perform;

(t) The Players are not interns. The Clubs earn millions of dollars in revenues from the services performed by the Players and therefore the Players cannot be classified as interns;

(u) The Clubs impose restrictions on the Players' social life including a curfew that is monitored;

(v) The Clubs direct every aspect of the Players' roles on the teams;

(w) The Clubs retain the right to hire, fire and discipline the Players;

(x) Based on the provisions of the OHL SPA, including versions that are not available to the plaintiffs at the time of pleading as well as the standard player agreements in the WHL and QMJHL;

(y) Based on the provisions of the 2007 OHL SPA:

(i) The 2007 OHL SPA provides that "The Club shall pay the Player the allowance and provide to the Player the "benefits" set out in Schedule "A" " in exchange "for the Player's exclusive services";

(ii) The benefits in Schedule "A" to the 2007 OHL SPA include an "allowance" for the first three seasons in the amount of $65 per week with a $15 per week holdback to be held in trust (presumably to remit to the federal government as contributions to Employment Insurance in accordance with the decision in *McCrimmon Holdings* that the Players fell into the category of insurance employment),

(iii) The 2007 OHL SPA also provides for a weekly bonus of $50 throughout the season in each year of the SPA;

(iv) The 2007 OHL SPA provides that if the Player's services are no longer required by the Club, the allowance may be reduced on a pro rata basis according to the number of days on which the Player's services were provided;

(z) In the 2010 OHL SPA, the OHL recast the classification of the Players to be independent contractors thus demonstrating by implication that the OHL knew that absent efforts to recast the SPA the true nature of the relationship between the Clubs and Players was one of employment:

(i) The 2010 OHL SPA provides that the "The Club shall pay the Player the fees and provide to the Player the benefits set out in Schedule "A" " in exchange "for the Player's services";

(ii) Schedule "A" to the 2010 OHL SPA provides payment to players aged 16-19 a weekly sum of $50 and to players aged 20 a weekly sum of $150, paid on a bi-weekly basis, plus payment of the cost of school tuition and expenses, travel expenses, lodging expenses and others, as well as a one-time bonus ranging from $100 to $450 depending on how far the Club advanced in the playoffs;

(iii) The 2010 OHL SPA provides if the Player's services are no longer required by the Club, the allowance may be reduced on a pro rata basis according to the number of days on which the Player's services were provided;

(iv) Schedule "C" to the 2010 OHL SPA provides that the benefits in Schedule "A" will continue even if the Player is unable to play due to injury;

(v) The 2010 OHL SPA contains language absent from the 2007 OHL SPA purporting to describe the Player as an independent contractor despite no changes in the actual duties, functions, obligations and responsibilities of the Players:

> It is expressly acknowledged and agreed by the parties involved that the relationship between the OHL and the Player is that of an independent contractor. Nothing in this Agreement shall constitute the parties as employer/employee, or as agents, partner, or co-venturers of each other.

(aa) The 2013 OHL SPA demonstrates that the Players are employees:

(i) The 2013 OHL SPA provides that the "The Club shall pay the Player the fees and provide to the Player the benefits set out in Schedule "A" " in exchange for the "Player's services";

(ii) Schedule "A" to the 2013 OHL SPA provides payment to Players aged 16-19 a weekly sum of $50 and to Players aged 20 a weekly sum of $150, paid on a bi-weekly basis, plus payment of the cost of school tuition and expenses, travel expenses, lodging expenses and others, as well as a one-time bonus ranging from $100 to $450 depending on how far the Club advanced in the playoffs;

(iii) The 2013 OHL SPA provides if the Player's services are no longer required by the Club, the allowance may be reduced on a pro rata basis according to the number of days on which the Player's services were provided;

(iv) Schedule "C" to the 2013 OHL SPA provides that the benefits in Schedule "A" will continue even if the Player is unable to play due to injury;

(v) The 2013 OHL SPA contains language absent from the 2007 OHL SPA purporting to describe the Player as an independent contractor despite no changes in the actual duties, functions, obligations and responsibilities of the Players:

> It is expressly acknowledged and agreed by the parties involved that the relationship between the OHL and the Player is that of an independent contractor. Nothing in this Agreement shall constitute the parties as employer/employee, or as agents, partner, or co-venturers of each other.

(bb) The 2007 WHL SPA demonstrates that the players in the WHL were employees. The WHL players are similarly situated to the Players;

(i) The Execution Schedule to the 2007 WHL SPA expressly provides financial "remuneration" and an "allowance" in exchange for the player's "services". Section 3 provides:

> 3. Remuneration: In consideration of the Player providing his services as a hockey Player and otherwise to the Club, and in further consideration of the Player playing hockey exclusively for the Club during the Term of this Agreement, the Club agrees, subject to the limitations, restrictions, provisions and exceptions contained in this Agreement:
> (a) to pay or reimburse or cause to be paid, as the case may be, the Player an allowance (the "Allowance") as follows…

HOCKEY SEASON	ALLOWANCE (dollars/month)
2007 to 2008	$160.00/month
2008 to 2009	$180.00/month
2009 to 2010	$200.00/month
2010 to 2011	$240.00/month
2011 to 2012	$600.00/month *overage year

(ii) The 2007 WHL SPA also provides other benefits such as payment of room and board, travel expenses, school tuition and expenses, and others;

(iii) The 2007 WHL SPA provides "the Club hereby retains the services of the Player for a period of five years";

(cc) The 2011 WHL SPA demonstrates that the players in the WHL were employees. The Players are similarly situated:

(i) The Execution Schedule to the 2011 WHL SPA expressly provides financial "remuneration" and an "allowance" in exchange for the players services. Section 3 provides:

> 3. Remuneration: In consideration of the Player providing his services as a hockey Player and otherwise to the Club, and in further consideration of the Player playing hockey exclusively for the Club during the Term of this Agreement, the Club agrees, subject to the limitations, restrictions, provisions and exceptions contained in this Agreement:
> (a) to pay or reimburse or cause to be paid, as the case may be, the Player an allowance (the "Allowance") as follows…
>
> | HOCKEY SEASON | ALLOWANCE (dollars/month) |
> |---|---|
> | 2011 to 2012 | $200.00 |
> | 2012 to 2013 | $240.00 |
> | 2013 to 2014 | $600.00 |
> | 20 to 20 | $ |
> | 20 to 20 | $ |

(ii) The 2011 WHL SPA also provides other benefits such as payment of room and board, travel expenses, school tuition and expenses, and others;

(iii) The Terms and Condition Schedule to the 2011 WHL SPA further describes the remuneration as follows:

> 2.2 Payment of the Allowance will be subject to any statutory withholdings and deductions with the pay period effective from September 15 of each year of this Agreement to the conclusion of the Hockey Season. Any bonuses payable by the Club to the Player, in accordance with the regulations of the WHL in place from time to time, will be paid by the Club to the Player at the conclusion of the Hockey Season;

(iv) The Terms and Condition Schedule to the 2011 WHL SPA also describes the player's role at 4.2 as follows:

> j) to provide his services faithfully, diligently and to the best of his abilities as a hockey player;

(v) The 2011 WHL SPA provides "the Club hereby retains the services of the player for a period of 3 years";

(dd) The 2013 WHL SPA, the WHL recast the classification of the players, demonstrating by implication that the WHL knew that the true nature of the relationship between the clubs and players was one of employment:

(i) The Terms and Conditions Schedule purports to expressly classify the players as non-employees. Section 1.1(a) provides:

> 1.1 (a) …The Purpose of this Agreement is to define the obligations of the Club and Player as the parties to this Agreement. The parties agree that this Agreement is not a contract of employment between the Clubs and Player….

(ii) The Execution Schedule to the 2013 WHL SPA purports to characterize the players' wages as "reimbursements" and omits all references to "remuneration" and "allowances" paid to the players that existed in earlier versions of the WHL SPA. Section 3 provides:

> 3 Player Reimbursement for Travel or Training Related Expenses: Any and all amounts received by the Player under this part shall be strictly and solely provided for and related to the reimbursement of travel or training expenses…

HOCKEY SEASON	MONTHLY EXPENSE REIMBURSEMENT	MONTHLY OVERAGE HONOUR-ARIUM
2013 - 14	$250.00	--
2014 - 15	$250.00	--
2015 - 16	$250.00	--
2016 - 17	$250.00	--
2017 - 18	$250.00	$350.00

(iii) The Terms and Conditions Schedule to the 2013 WHL SPA further describes the player's wages as reimbursements at 2.1 as follows:

> 2.1 Commencing September 15 of each Hockey Season, subject to the provisions of this Agreement and while the Player is on the Club's active player roster, the Club shall reimburse the Player for certain costs incurred

> by the Player on behalf of the Club in respect of the travel and training expenses as set forth in paragraph 3 of the WHL Standard Player Agreement Execution Schedule. This reimbursement shall be limited by and paid in accordance with the regulations of the WHL.

(iv) The Terms and Conditions Schedule to the 2013 WHL SPA makes no mention of statutory payroll deductions.

(v) The Terms and Condition Schedule to the 2013 WHL SPA removes all references to the players' services and instead describes the player's role at 4.2 as follows:

> k) to play hockey for the Club faithfully, diligently and to the best of his abilities as a hockey player.

(ee) The WHL Clubs arranged for players who were not residents of the United States to play for American Clubs by applying on behalf of the players for a work visa;

(ff) In 2013, the QMJHL made concerted efforts to recast the classification of the players, demonstrating by implication that the QMJHL knew that the true nature of the relationship between the Clubs and players was one of employment:

(i) Under the heading DECLARATION OF THE STATUS OF THE PLAYERS, 16-19 year old players are not described as employees but rather as:

> …pursuing their academic careers while also benefitting 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.

(ii) Under the heading DECLARATION OF THE STATUS OF THE PLAYERS, 20 year old players, who perform identical duties and share identical duties, functions, obligations and responsibilities under the 2013 QMJHL SPA are described employees:

> …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.

(iii) Twenty year old players are expressly classified as employees in the DECLARATION OF THE STATUS OF THE PLAYERS whereas 16-19 year old players are not despite the fact that the 20 year old players perform the exact same services and play hockey on the same line and on the same team as the 16 to 19 year old players;

(gg) The defendants are aware that the true nature of legal relationship with the Players is one of employment because they have been lobbying the Ontario Provincial Government and the Government of Canada to exempt the Players and Clubs from Applicable Employment Standards Legislation;

(hh) In 2015, the four teams located in the State of Michigan, together with the WHL, when confronted with an investigation by the Michigan Attorney General into violations of child labour laws, successfully lobbied the Michigan State Government to exempt the WHL players from state labour laws. The defendants are well aware of and concurred in the efforts of the WHL to lobby for exemptions from State labour laws in Michigan. The lobbying would not be occurring unless the defendants believed that there was a reasonable prospect that the Players are employees;

59. Many of the Players are or were under the age of majority while employed by the Clubs and therefore are or were protected by Applicable Employment Standards Legislation including, in Ontario, *ESA* 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 Applicable Employment

Standards Legislation) in all Provinces and in those States where the SPA was entered into, to pay minors less than minimum wage. The SPA provides less than the minimum wage. The Players devote an average of 45 hours weekly and in some instances up to 65 hours weekly to employment related services. Therefore, the SPA violates the rights of minors under the Applicable Employment Standards Legislation.

60. For those Players who are adults, Applicable Employment Standards Act Legislation provide for compulsory minimum wage standards, including in Ontario *ESA* section 23. It is illegal in all Provinces and in the States where SPA was entered into to pay employees the amounts provided in the SPA for 45-65 hours of weekly employment related services.

61. Therefore, the SPA violates the rights of the adult Players under the Applicable Employment Standards Legislation with respect to minimum wages, vacation pay, holiday pay, and overtime pay.

62. All Applicable Employment Standard Act Legislation provide that any agreement 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."

63. Therefore, the terms of the SPA requiring Players to perform all employment related services for no fee or a fixed weekly sum are void, unenforceable and not a defence to this action. 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.

64. Section 15 of the *ESA* and similar provisions in all of the Applicable Employment Standards Legislation requires employers to keep records of the hours worked by employees. The defendants failed to keep records of the hours worked by the Players and thereby breached sections of the Applicable Employment Standards Legislation.

65. The violations of the Applicable Employment Standards Legislation described herein constitute breaches of contract. The provisions of the Applicable Employment Standards Legislation are implied terms of the contract of employment. It is an implied term of the contract of employment that the Class Members shall be compensated at a rate equal to or greater than the minimum wage plus compensation back pay, vacation pay, holiday pay and overtime pay in accordance with Applicable Employment Standards Legislation, that the Clubs shall render employer payroll contributions required by law, and that the Clubs will track and record the Players' hours of work. The Defendants breached these implied provisions of the contract of employment.

Breach of the Contractual Duties of Honesty, Good Faith and Fair Dealing (Clubs Located in Ontario)

66. The plaintiffs state that, in drafting the SPA, the defendants must be guided by a duty of honesty, good faith and fair dealing, especially since the Players have no bargaining power. At minimum, the defendants were required to use an SPA that complied with the law and accurately characterized the nature of the business relationship between the Players and the Clubs.

67. The evolution of the SPA from one where the Players were remunerated for their services, to one where the Players are independent contractors, to one where the Players are amateur athletes in a development program, when all along there have been no substantive changes to the underlying relationship, is a breach of the defendants' duties of honesty, good faith and fair dealing.

68. Through all iterations of the SPA, the defendants have attempted to use various labels to misclassify the Players as non-employees, mischaracterize the Players' wages and mischaracterize the Player's contributions as something other than services of employment. The defendants also included an acknowledgement in the SPA whereby the Player is required to acknowledge that he is not an employee. Every Player must either sign the SPA with the acknowledgement or he will forfeit his career playing hockey for the Club.

69. The defendants knew that the Players were in a position of unequal bargaining power, vulnerable and under the Club's direct control, and in that context the defendants required the Players to sign the SPA as drafted, failing which the Players would be precluded from playing major junior hockey.

70. In doing so the defendants acted in bad faith and with unfair dealing because the language used to mischaracterize the legal relationship was done without *bona fides*. It was designed to create a fiction for the purposes of avoiding the Applicable Employment Standards Legislation and payment of minimum wages. As such, the defendants created an unlawful agreement and dictated that each and every Player sign the unlawful agreement.

71. Because of the defendants' breach of the duties of honesty, good faith and fair dealing and because the SPA is drafted by the defendants, the acknowledgement by the Player that he is not an employee cannot be used as evidence of the parties' intentions.

72. The defendants' systemic misconduct as set out in the section entitled, SYSTEMIC MISCONDUCT / AVOIDING OR DISREGARDING PAYMENT OF STATUTORY WAGES, also constitutes a breach of the contractual duties of honesty, good faith and fair dealing.

Breach of Statute (Clubs Located in the States) – Law of Michigan and Pennsylvania and the *Fair Labor Standards Act of 1938*

73. The defendant Clubs located in the states of Michigan and Pennsylvania breached applicable employment standards legislation by failing to pay the plaintiffs and the Players wages and overtime pay.

74. The facts that support an employment relationship between the Clubs and the Players who played for those teams are the facts sets out under the Cause of Action of Breach of the Contract of Employment.

75. In the states of Michigan and Pennsylvania, there are statutory definitions in the applicable wage legislation for both states, which define employment, employer and employee.

76. In the states of Michigan and Pennsylvania, the common law factors for determining whether the Clubs are employers and the Players are employees of the Clubs are the same as the common law of Ontario.

77. In the alternative, the factors that are considered under the common law of both states in determining whether a person is an employee within the meaning of the Michigan *Workforce Opportunity Wage Act*, and the Pennsylvania *Minimum Wage Act of 1968*, is the "economic realities" test. which consists of 6 criteria:

(a) The permanence of the working relationship between the parties;

(b) The degree of skilled work entailed;

(c) The extent of the worker's investment in equipment or materials;

(d) The worker's opportunity for profit or loss;

(e) The degree of the alleged employer's control over the worker;

(f) Whether the service rendered by the worker is an integral part of the alleged employer's business.

78. When applying the economic realities test, the law of the state of Michigan and the law of the state of Pennsylvania require the Court to look to the totality of the circumstances and no single factor is determinative of whether an individual is an employee. The focus is on whether the individual is economically dependent on the employer. The parties' characterization of their employment relationship is not determinative as to whether an employment relationship exists. Damages are recoverable by civil actions for violations of applicable employment legislation.

79. In the further alternative, with respect to the Players who played for Clubs in the states of Michigan and Pennsylvania, the plaintiffs plead and rely on the *Fair Labor Standards Act of 1938*, 29 U.S.C. 201 (the *FLSA*). Under the *FLSA*, the factors which are considered in determining whether a person is an employee within the meaning of *FLSA* are the same factors as found in the economic realities test.

80. Eligible compensable work/activities under the laws of Michigan and Pennsylvania and the *FLSA* must meet the same criteria as under the laws of Ontario.

81. Alternatively, the law of the states of Michigan and Pennsylvania and the *FLSA* is that compensable activities are activities which form an integral or indispensable part of the principal activities that an employee is employed to perform. If it is an intrinsic element of those activities, and one which the employee cannot dispense with if he is to perform his principal activities, then it is compensable. Also, compensable activities include all hours that an employee is required to be on duty on the employer's premises or the prescribed workplace.

Breach of Statute (Clubs located in Ontario)

82. The Players have a statutory civil action for wages, overtime pay, holiday pay, and vacation pay against the Ontario Clubs for breach of the *ESA*. Facts in support of the breach and

the Players being employees of the Ontario Clubs, are pleaded under the cause of action for breach of contract.

Common Employer Doctrine

83. The plaintiffs state that, with respect to the causes of action of breach of contract, breach of the duty of good faith, and breach of the statutes of employment, the OHL is jointly and severally liable with each and every Club, on the basis that the OHL is a common/joint employer or forms a single employer with each and every Club and its Players.

84. The plaintiffs state that the OHL is liable directly to every Player for all damages with respect to the causes of action for breach of contract, breach of the duty of good faith, and breach of the statutes of employment because the OHL is a common/joint employer or forms a single employer with each and every Club and its Players.

85. The plaintiffs state that the law of Ontario is the governing law for determining whether the Clubs and the OHL form a common employer. Facts in support of the law of Ontario include: the OHL is domiciled in Ontario; the OHL passes all of its bylaws, articles, rules and regulations governing the operations of the Clubs and Players in Ontario; the Clubs are all member franchises of the OHL who must, in purchasing a franchise, agree to abide by all OHL bylaws, articles, rules and regulations; the OHL oversees and controls the Clubs and Players through its use of bylaws, articles, rules and regulations from Ontario; the OHL drafted the SPAs in Ontario; the OHL requires all Clubs to sign Players using the SPAs drafted by the OHL; the OHL must approve every SPA and sign its endorsement to every SPA, which process occurs in Ontario; the OHL, through its regulations, exercises control from Ontario over the amount of wages (described as “fees” or “allowances”) and expense reimbursement the Clubs paid the Players;

and, the former SPA provides in Schedule "A" that the fee or allowance be paid in accordance with OHL standards.

86. The former and current SPA include choice of law clauses. The former SPA has a governing law clause at section 17.1. The current SPA has a governing clause at section 17.1. Both of the choice of law clauses provide that the SPA is to be governed by and interpreted in accordance with the laws of the Province of Ontario.

87. The *ESA*, at s. 4, provides that separate persons may be treated as one employer if "associated or related activities or businesses are or were carried on by or through an employer and one or more other persons" and "the intent or effect of their doing so is or has been to directly or indirectly defeat the intent and purpose of this Act."

88. Facts in support of the OHL being a common employer include:

(a) With respect to the former SPA where the Players received fees described as "fees" or "allowances", the OHL, through a committee, passed one or more bylaws or regulations establishing the weekly fees all Clubs were required to pay the Players. The fees were well below minimum wage legislation;

(b) Schedule "A" of the former SPA requires all Clubs to pay a fee to Players in accordance with the regulations of the OHL;

(c) With respect to the SPA for players who no longer receive fees and instead receive reimbursement of expenses, the OHL, through a committee, passed one or more bylaws or regulations which replaced fees with an expense reimbursement program of $470 monthly that all Clubs are required to pay the Players. The reimbursement program resulted in Players receiving no wages or wages well below minimum wage legislation;

(d) The OHL has complete control over the Clubs with respect to whether the Clubs can pay the Players and, if so, the amounts;

(e) The OHL caused the Clubs to breach applicable wage legislation by setting the fees the Clubs could pay the Players under the former SPA below minimum wage and by setting the amounts the Clubs can currently pay the Players at $470 monthly;

(f) Through its complete control over the terms the Club and Players can include in the SPA, and the requirement that the OHL review and approve every SPA, the OHL governs every aspect of player compensation;

(g) The OHL generally exercises management and control or direction over every aspect of the Player/Club relationship;

(h) All aspects of the Player's work are subject to the direction and control of the OHL through the SPA, bylaws, articles, rules, manuals, guidelines and regulations which must be implemented and adhered to by all Clubs;

(i) The OHL funds and guarantees the Players' scholarships;

(j) The OHL has the right under the SPA and its bylaws, articles, rules, manual, guidelines and regulations to discipline Players;

(k) The OHL and its member franchises (the Clubs) have a commonality of purpose and control over the players, whereby both the Club and the OHL exert control over the players;

(l) The OHL and the Clubs share control over the players directly or indirectly because the OHL controls the Clubs;

(m) The OHL has the greater ability than the Clubs to implement policy or systemic changes to ensure compliance with applicable wage legislation; and,

(n) The players are exposed to a systemic wrong or conduct causing loss of wages caused by the joint control exercised by the OHL and Clubs as a joint/single employer.

89. In the alternative, in the event that the law of the states of Michigan and Pennsylvania, and the federal law under the *FLSA*, govern the test of common employer for the Clubs located in the states, then the plaintiffs state that the law of the states and the federal law are the same as the common law of Ontario.

90. In the further alternative, the law of common/joint employer for the states and the Federal law is summarized in the United States Department of Labor Wages and Hour Division 2016 Fact Sheet Interpretation No. 2016-1 and *FLSA* regulation 29 CFR 791.2. A common or joint employer for the purpose of state minimum wage legislation and the *FLSA* exists:

(a) Where employers share control over the employees directly or indirectly because one of the employers controls, is controlled by, or is under the common control of, the other employer;

(b) Where an organization has the ability to implement policy or systemic changes to ensure compliance with wage laws; and,

(c) Where the employees are exposed to a systemic wrong or some conduct or policy causing a loss of wages caused by the control exercised by the joint employer.

91. The plaintiffs state that the state and *FLSA* test is met based on facts (a)-(n) pleaded above.

Officers and Directors' Liability

92. The plaintiffs pleads ~~his~~ their own behalf, and on behalf of all Class Members who were employed in Ontario that the officers and directors of each Club in Ontario are jointly and severally liable with the Clubs, to the Class Members for unpaid wages, including back minimum wages, vacation pay, overtime pay, and holiday pay owed to the plaintiffs and the Class Members by the Clubs.

93. In the event that the Clubs 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 plaintiffs intends to add the officers and directors as parties to this proceeding.

94. With respect to the liability of the officers and directors, the plaintiffs and Class Members plead and rely on s. 81(7) of the *ESA*.

Conspiracy

95. The plaintiffs state that the law governing the tort of conspiracy for all defendants is the common law of the province of Ontario because the OHL is headquartered in Ontario, which is the *situs* of the tort. In the alternative, the plaintiffs state that the law of conspiracy for the state of Pennsylvania and the state of Michigan is the same as the law of Ontario.

96. The plaintiffs claim that the defendants unduly, unlawfully, ~~maliciously,~~ and lacking *bona fides*, conspired and agreed together, the one with the other, to act in concert to breach applicable employment standards legislation. The overt acts in furtherance of the conspiracy include: setting the Player wages for all Clubs at a uniform, industry-wide fixed rate well below minimum wage legislation and, after 2013, by refusing to pay the players any wages; demanding or requiring that all Players sign an SPA which provides for fixed wages well below minimum wage legislation or no wages; and, misclassifying the status of the players in the SPA as amateur

athletes so players would not realize that wages were owing. The defendants 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 the Applicable Employment Standards Legislation, yet required the SPA to be signed so as to avoid paying the plaintiffs and Class Members minimum wages, vacation pay, holiday pay or overtime pay.

97. The Clubs, OHL and CHL have access to legal opinions, judicial decisions, employment tribunal directives and decisions, and CRA bulletins on the criteria for determining whether the Player/Club relationship is one of independent contractor, student athlete, or employment. The defendants are well aware that the remuneration paid to the Players under the SPA 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.

98. Representatives of the Clubs, OHL and CHL convened at OHL Board of Governors meetings where the defendants jointly decided to change the terms and conditions of the SPA to classify the Players in all three leagues as participants in a development training program and to characterize the remuneration paid to Players in all three leagues as a reimbursement for expenses. The defendants also jointly decided against wages and instead decided to increase funding to optional scholarship programs. These decisions formed part of a concerted effort to avoid or evade Applicable Employment Standards Legislation and, in particular, the payment of wages. The OHL and CHL share certain senior officers and directors.

99. The OHL and the CHL control the terms of the SPA by requiring that the Clubs use only the standard form template and by making each and every SPA 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 OHL and the CHL have unlawfully set the wages below the minimum legislated standards. The OHL and the CHL direct that the Clubs must insist that Players sign the SPA as a condition of playing in the OHL.

100. The Clubs know, or ought to know, that the SPA is unlawful pursuant to the Applicable Employment Standards Legislation, but have agreed and conspired with the CHL and the OHL to use the SPA. The conspiracy between the CHL, the OHL, and the Clubs occurred in Ontario and continues to occur in Ontario where the head office of the CHL is located.

101. The defendants were motivated to conspire, and their predominant purposes and concerns were to continue operating the OHL without incurring costs that were to be lawfully paid by the Clubs to the plaintiffs and the Class Members in the form of minimum wages, overtime pay, holiday pay and vacation pay.

102. The conspiracy was unlawful because the defendants knowingly violated applicable employment standards legislation and caused the plaintiffs and Class Members to enter into an unlawful SPA whereby players would receive no wages or receive wages below minimum wage, in contravention of the Applicable Employment Standards Legislation and because the defendants deliberately attempted to circumvent the legislation by inaccurately characterizing the status of Players and their remuneration as described above. The defendants knew that such conduct would more likely than not cause harm to the plaintiffs and the Class Members.

103. The acts in furtherance of the conspiracy caused injury and loss to the plaintiffs 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 Applicable Employment Standards Legislation.

104. As a result of the conspiracy, which was committed by all defendants together, all of the defendants are jointly and severally liable for all monies owing to the plaintiffs and the Class Members under the Applicable Employment Standards Legislation regardless of which Club employed the Class Member.

105. To the extent the law of the states of Michigan and Pennsylvania are different than the laws of conspiracy of Ontario, then the plaintiffs state that the Clubs in the states of Michigan and Pennsylvania conspired together, the one with the other, and with the OHL clubs located in Ontario, and the WHL and the CHL, with a common purpose to do an unlawful act, namely to breach applicable employment standards legislation of the states or the *FLSA*; the overt acts done in pursuance of the common purpose are pleaded under the overt acts section of the conspiracy plea. The players sustained actual legal damage through the loss of their wages and overtime pay. In conducting the overt acts in support of the conspiracy, the defendants acted intentionally in furtherance of a common purpose, namely to deprive the players of wages and overtime pay.

Negligence (as against the defendant Clubs located in Ontario, the OHL, and the CHL)

106. In the alternative to the tort of conspiracy, the plaintiffs plead that the OHL, CHL and the Clubs were negligent.

107. The OHL and CHL oversee and direct the terms and conditions of the SPA and the nature and degree of compensation paid to the Players. Therefore, the OHL and CHL owed the Players a duty of care to carefully monitor the terms and conditions of the SPA for compliance with the Applicable Employment Standards Legislation.

108. The circumstances of the OHL and CHL, being in the business of hockey and through the SPA and their bylaws directing all aspects of the Players' duties, functions, obligations and responsibilities when playing for the Club, are such that the OHL and CHL were under an

obligation to be mindful that Players were properly classified as employees and compensated in accordance with Applicable Employment Standards Legislation.

109. There is a sufficient degree of proximity to establish a duty of care because:

(a) It was reasonable for the Players to expect that the SPA complied with the law;

(b) It was reasonable for the Players to expect that the OHL and CHL had implemented a lawful system of compensation;

(c) It was reasonable for the Players to assume that the OHL and CHL would have taken all reasonable steps to correctly characterize the nature of the business relationship, given the degree of control exercised by the Clubs, OHL and CHL who dictate the terms and conditions of the SPA and given the degree of control exercised by the Clubs, Leagues and CHL over the Players during the course of the SPA;

(d) The Players are vulnerable to the defendants to ensure that the Players are properly classified in the SPA and paid in compliance with Applicable Employment Standards Legislation, given that the Players have no way of taking such measures themselves and no way of protecting themselves if the defendants do not take such measures;

(e) The Clubs must follow the policies, practices, bylaws and procedures of the OHL and CHL; and

(f) It was reasonably foreseeable that the defendants' misclassification of the Players and failure to pay wages in compliance with Applicable Employment Standards Legislation would result in damages to the Players.

110. The particulars of the OHL and CHL's negligence and breach of their duty of care are as follows:

(a) They failed to ensure that the Players were properly classified as employees;

(b) They failed to ensure that the work performed by the Players was properly monitored and accurately recorded;

(c) They failed to ensure that the Players were appropriately compensated with minimum wage, back pay, holiday pay, vacation pay and overtime pay pursuant to Applicable Employment Standards Legislation;

(d) They failed to implement a policy, practice or procedure whereby the Players would receive wages when they knew or ought to have known that the Players were employees;

(e) They failed to implement a policy, practice or procedure whereby the Players would receive wages when they knew or ought to have known that according to *McCrimmon Holdings* the Players were employees;

(f) They failed to obtain legal advice or to follow legal advice with respect to the application of *McCrimmon Holdings* and with respect to the likelihood that the Players were employees as a matter of law;

(g) They failed to appreciate that the Players remained employees as a matter of law despite the fact that the language of the SPA was periodically changed;

(h) They knew or ought to have known that the Clubs are required by law to pay wages yet they implemented a practice, policy or procedure whereby they forced the Clubs to withhold wages;

(i) They required all Players to sign the SPA when they knew or ought to have known that the SPA misclassified the Players as non-employees;

(j) They could have obtained a ruling or direction from employment standards officers but failed to do so; and

(k) They misclassified the Players as pleaded in the section entitled, "SYSTEMIC MISCONDUCT / AVOIDING OR DISREGARDING PAYMENT OF STATUTORY WAGES".

111. The Clubs entered into the SPA which sets out the Players' duties, functions, obligations and responsibilities. Therefore, the Clubs owed the Players a duty of care to carefully monitor the terms and conditions of the SPA for compliance with the Applicable Employment Standards Legislation.

112. The circumstances of the Clubs, being in the business of hockey and directing all aspects of the Players' duties, functions, obligations and responsibilities when playing for the Club, are such that the Clubs were under an obligation to be mindful that Players were properly classified as employees and compensated in accordance with Applicable Employment Standards Legislation.

113. There is a sufficient degree of proximity to establish a duty of care because:

(a) It was reasonable for the Players to expect that the SPA complied with the law;

(b) It was reasonable for the Players to expect that the Clubs had implemented a lawful system of compensation;

(c) It was reasonable for the Players to assume that the Clubs would have taken all reasonable steps to correctly characterize the nature of the business relationship, given the degree of control exercised by the Clubs, OHL and CHL in dictating the

terms and conditions of the SPA and given the degree of control exercised by the Clubs, OHL and CHL over the Players during the course of the SPA;

(d) The Players are vulnerable to the Clubs to ensure that the Players are properly classified in the SPA and paid in compliance with Applicable Employment Standards Legislation, given that the Players have no way of taking such measures themselves and no way of protecting themselves if the Clubs do not take such measures; and

(e) It was reasonably foreseeable that the Clubs' misclassification of the Players and failure to pay wages in compliance with Applicable Employment Standards Legislation would result in damages to the Players.

114. The particulars of the Clubs' negligence and their breach of their duty of care are as follows:

(a) They failed to ensure that the work performed by the Players was properly monitored and accurately recorded;

(b) They failed to ensure that the Players were appropriately compensated with minimum wage, back pay, holiday pay, vacation pay and overtime pay pursuant to Applicable Employment Standards Legislation;

(c) They failed to ensure that the Players were properly classified as employees,

(d) They failed to appreciate that the Clubs are employers of the Players;

(e) They failed to pay the Players in compliance with the Applicable Employment Standards Legislation when they knew or ought to have known that the Players were employees;

(f) They failed to pay the Players in compliance with the Applicable Employment Standards Legislation when they knew or ought to have known that according to *McCrimmon Holdings* the Players were employees;

(g) They failed to obtain legal advice or to follow legal advice with respect to the application of *McCrimmon Holdings* and with respect to the likelihood that the Players were employees as a matter of law;

(h) They failed to appreciate that the Players remained employees as a matter of law despite the fact that the language of the SPA was periodically changed;

(i) They required all Players to sign the SPA when they knew or ought to have known that the SPA misclassified the Players as non-employees;

(j) They relied on the OHL and the CHL for advice about the classification of the Players when each Club should have obtained independent advise;

(k) They could have obtained a ruling or direction from employment standards officers but failed to do so; and

(l) They misclassified the Players as pleaded in the section entitled, "SYSTEMIC MISCONDUCT / AVOIDING OR DISREGARDING PAYMENT OF STATUTORY WAGES".

115. As a result of the negligence of the OHL, CHL and Clubs, the Players suffered damages because they were not paid in accordance with Applicable Employment Standards Legislation.

Unjust Enrichment (as against the defendant Clubs located in Ontario, the OHL, and the CHL)

116. The defendants were unjustly enriched.

117. The defendants were enriched by failing to pay the Players wages in a manner that complied with Applicable Employment Standards Legislation.

118. The Players were deprived of the wages to which they were entitled pursuant to Applicable Employment Standards Legislation.

119. There is no juristic reason for the Players being deprived of the wages to which they are entitled pursuant to Applicable Employment Standards Legislation.

Waiver of Tort (as against the defendant Clubs located in Ontario, the OHL, and the CHL)

120. The CHL, the OHL and the Clubs control the terms of the SPA by requiring that the Clubs use only the SPA in its standard form. They also require that the Clubs continue to insist that Players sign the SPA and provide employment related services for fees set by the CHL and OHL's bylaws which are below legislated employment standards and the Clubs have agreed to do so.

121. The OHL and the CHL have access to legal opinions and are well aware that the SPA probably violates the Applicable Employment Standards Legislation and are well aware of jurisprudence where Courts have construed the relationship between the Players and the Clubs as an employer/employee relationship.

122. Nevertheless, the CHL and the OHL require that the Clubs continue to insist that Players sign the SPA and provide employment related services for below legislated employment standards. The Clubs agree to do so.

123. The defendants 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 defendants' breach of contract, conspiracy, negligence and related use of the unlawful SPA, as well as the defendants' policy or practice of avoiding or disregarding the payment of wages and applicable payroll contributions, constitute unlawful acts by which the defendants have been

unjustly enriched. The defendants are therefore liable to the plaintiffs and Class Members in waiver of tort.

124. As a result, the plaintiffs seek an order requiring the CHL, the OHL and the Clubs to disgorge all profits received as a result of the services performed by the Class Members.

REMEDIES

125. The plaintiffs and each Class Member have suffered damages and loss as a result of the Clubs' breach of contract and the defendants' conspiracy and negligence, as particularized above.

126. The plaintiffs plead that ~~he~~ they and the Class are entitled to recover back wages, holiday pay, vacation pay, and overtime pay pursuant to the Applicable Employment Standards Legislation in place in the jurisdiction in which the employment services were provided for the applicable Club, together with interest.

127. The plaintiffs seek on their own behalf, and on behalf of the Class, an order that the ~~all~~ defendants must disgorge all profits that the defendants generated as a result of benefitting from breaches of Applicable Employment Standards Legislation, the conspiracy and waiver of tort.

128. The plaintiffs seek on their own behalf, and on behalf of members of the Class, punitive damages for the defendants' conduct in violating Applicable Employment Standards ~~Act~~ Legislation while they were aware that certain terms of the SPA were probably void. The defendants were lax, passive, and/or ignorant with respect to the plaintiffs and Class Members' rights and to their 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 plaintiffs and Class Members.

129. The plaintiffs plead that only a punitive damages award will prevent the defendants from continuing their unlawful conduct as particularized herein.

130. The plaintiffs seek on behalf of the Pennsylvania Class, in addition to the damages claimed above, liquidated damages in the amount of 25% of all wages outstanding from Erie Hockey Club Limited and JAW Hockey Enterprises LP, pursuant to Pa. Cons. Stat § 260.10.

131. The plaintiffs seek on behalf of the Michigan Class, in addition to the damages claimed above, liquidated damages in the amount of 100% of all wages outstanding from Compuware Sports Corporation, IMS Hockey Corp., and Saginaw Hockey Club, L.L.C., pursuant to Mich. Comp, Laws § 408.419(1)(a) and a civil fine of $1000 per Class Member employed by these defendants pursuant to Mich. Comp. Laws § 408.419(3).

JURISDICTION

132. Ontario has subject matter and territorial jurisdiction over all defendants because the OHL is a defendant in this proceeding who is domiciled in Ontario, where it oversees and regulates all Clubs and approves all SPAs, and because the Clubs are all members or franchises of the OHL.

133. The plaintiffs plead that, to the extent that the governing law clauses found at section 17.1 of the former SPA and section 17.1 of the current SPA apply to the plaintiffs' claims, those clauses should be honoured.

VENUE

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

135. Pursuant to Rule 17.04(1), the plaintiffs plead and rely 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.

136. The plaintiffs plead and rely upon the provisions of the *ESA*, Mich. Stat. §408 as amended; Mich. Comp, Laws, as amended; Pa. *Minimum Wage Act of 1968* Pub. L. No. 11, No. 5, as amended; Pa. Cons. Stat, as amended; *Fair Labor Standards Act of 1938*, 29 USC, as amended; and their respective regulations.

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1455 London Road
Sarnia, ON N7S 6K4

211 SSHC CANADA ULC o/a SARNIA STING HOCKEY CLUB
37700 Lakeshore
Harrison Township, MI 48045
U.S.A.

SOO GREYHOUNDS INC.
269 Queen Street E
Sault Ste. Marie, ON P6A 1Y9

KITCHENER RANGER JR A HOCKEY CLUB / KITCHENER RANGERS JR "A" HOCKEY CLUB
1963 Eugene George Way
Kitchener, ON N 2H 0B8

SUDBURY WOLVES HOCKEY CLUB LTD.
240 Elgin Street
Sudbury, ON P3E 3N6

MCCRIMMON HOLDINGS LTD. and 32155 MANITOBA LTD., a partnership o/a BRANDON WHEAT KINGS
1175 18th Street
Brandon, MB R7A 7C5

1056648 ONTARIO INC.
c/o E.E.S. Financial
200 Bay Street, Suite 2960
P.O. Box 199
Toronto, ON M5J 2J4

REXALL SPORTS CORP.
11230 110th Street
Edmonton, AB T5G 3H7

EHT, INC.
361 1st Street SE
Medicine Hat, AB T1A 0A5

KAMLOOPS BLAZERS HOCKEY CLUB, INC.
300 Mark Recchi Way
Kamloops, BC
V2C 1W3

KELOWNA ROCKETS HOCKEY ENTERPRISES LTD.
1690 Water Street, Suite 105
Kelowna, BC
V1Y 8T8

HURRICANES HOCKEY LIMITED PARTNERSHIP / LETHBRIDGE HURRICANES HOCKEY CLUB
327 Hillsborough Street
Raleigh, NC 27607
U.S.A.

~~WINTERHAWKS AMATEUR HOCKEY ASSOCIATION~~ PORTLAND WINTER HAWKS, INC.
300 N Winning Way
Portland, OR 97227
U.S.A.

PRINCE ALBERT RAIDERS HOCKEY CLUB INC.
690 32nd Street E
Prince Albert, SK S6V 2W8

BRODSKY WEST HOLDINGS LTD.,
550 Victoria Street, Suite 700
Prince George, BC V2L 2K1

REBELS SPORTS LTD.
4847 19th Street
Red Deer, AB T4R 2N7

QUEEN CITY SPORTS & ENTERTAINMENT GROUP LTD.
P.O. Box 611 Stn Main
Regina, SK S4P 3A3

SASKATOON BLADES HOCKEY CLUB LTD.
3515 Thatcher Avenue, Suite 201
Saskatoon, SK S7R 1C4

SWIFT CURRENT TIER 1 FRANCHISE INC. ~~DOING BUSINESS AS SWIFT CURRENT BRONCOS~~
P.O. Box 2345, Stn Main
Swift Current, SK S9H 4X6

VANCOUVER JUNIOR HOCKEY LIMITED PARTNERSHIP
4088 Cambie Street, Suite 300
Vancouver, BC V5Z 2X8

WEST COAST HOCKEY ENTERPRISES LTD.
1177 W Hastings Street, Suite 2088
Vancouver, BC V6E 2K3

MEDICINE HAT TIGERS HOCKEY CLUB LTD.
361 1st Street SE
Medicine Hat, AB T1A 0A5

BRETT SPORTS & ENTERTAINMENT, INC.
P.O. Box 5371
Spokane, WA 99206
U.S.A.

THUNDERBIRD HOCKEY ENTERPRISES, LLC
625 W James Street
Kent, WA 98032
U.S.A.

TOP SHELF ENTERTAINMENT, INC.
7100 W Grandridge Boulevard
Kennewick, WA 99336
U.S.A.

MOOSE JAW TIER ONE HOCKEY INC. d.b.a. MOOSE JAW WARRIORS
110 1st Avenue NW
Moose Jaw, SK S6H 3L9

KOOTENAY ICE HOCKEY CLUB LTD.
#2 – 1777 – 2nd Street N
Cranbrook, BC V1C 7G9

8487693 CANADA INC. (FORMERLY LE TITAN ACADIE BATHURST INC. UNTIL JUNE 2013)
1181 Stacey Mill Crescent
Bathurst, NB E2A 4W9

CLUB DE HOCKEY JUNIOR MAJEUR DE BAIE-COMEAU INC.
19 avenue Marquette
Baie-Comeau, PQ G4Z 1K5

CLUB DE HOCKEY DRUMMOND INC.
300 rue Cockburn
Drummondville, PQ J2C 4L6

CAPE BRETON MAJOR JUNIOR HOCKEY CLUB LIMITED

66 Wentworth Street
Sydney, NS B1P 6T4

LES OLYMPIQUES DE GATINEAU INC.
125 rue de Carillon
Gatineau, PQ J8X 2P8

HALIFAX MOOSEHEADS HOCKEY CLUB INC.
1959 Upper Water Street, Suite 900
Halifax, NS B3J 3N2

CLUB DE HOCKEY LES REMPARTS DE QUÉBEC INC.
250 boulevard Wilfrid-Hamel
Québec, PQ G1L 5A7

LE CLUB DE HOCKEY JUNIOR ARMADA INC.
612 rue Saint-Jacques
Montréal, PQ H3C 4M8

MONCTON WILDCATS HOCKEY CLUB LIMITED
100 Midland Drive
Dieppe, NB E1A 6X4

LE CLUB DE HOCKEY L'OCÉANIC DE RIMOUSKI INC.
111 2e rue O
Rimouski, PQ G5L 4X3

LES HUSKIES DE ROUYN-NORANDA INC.
218 avenue. Murdoch
Rouyn-Noranda, PQ J9X 1E6

8515182 CANADA INC. c.o.b. as CHARLOTTETOWN ISLANDERS
46 Kensington Road
Charlottetown, PE C1A 5H7

LES TIGRES DE VICTORIAVILLE (1991) INC.
400 boulevard Jutras E
Victoriaville, PQ G6P 0B8

SAINT JOHN MAJOR JUNIOR HOCKEY CLUB LIMITED
99 Station Street, Suite 200
P.O. Box 6370, Stn "A"
Saint John, NB E2L 4R8

CLUB DE HOCKEY SHAWINIGAN INC.
1 rue Jacques-Plante

Shawinigan, PQ G9N 0B7

CLUB DE HOCKEY JUNIOR MAJEUR VAL D'OR INC.
810 6e avenue
Val-d'Or, PQ J9P 1B4

7759983 CANADA INC.
360 rue du Cegep
Sherbrooke, PQ J1E 2J9

LEWISTON MAINEIACS HOCKEY CLUB, INC.
190 Birch St
Lewiston, ME 04240
U.S.A.

GROUPE SAGS 7-96 INC.
643 rue Bégin
Chicoutimi, PQ G7J 4N7

Court File No: CV-14-514423-00CP

BERG et al.	**v.**	**CANADIAN HOCKEY LEAGUE et al.**
Plaintiffs		**Defendants**

ONTARIO
SUPERIOR COURT OF JUSTICE

Proceedings commenced in TORONTO

<u>AMENDED</u> SECOND CONSOLIDATED FRESH STATEMENT OF CLAIM

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