

# CHARNEY LAWYERS

151 BLOOR STREET WEST  
SUITE 890  
TORONTO, ON M5S 1P7  
CANADA  
TELEPHONE: (416) 964-7950  
FACSIMILE: (416) 964-7416  
TED CHARNEY  
Direct Line: (416) 964-7950, ext. 225  
[tedc@charneylawyers.com](mailto:tedc@charneylawyers.com)

February 17, 2015

Senator Michael Baumgartner (R), Chair  
404 Legislative Building  
PO Box 40406  
Olympia, WA 98504

Senator Steve Conway (D)  
212 John A. Cherberg Building  
PO Box 40429  
Olympia, WA 98504

Senator Karen Keiser (D)  
224A John A. Cherberg Building  
PO Box 40433  
Olympia, WA 98504

Senator Judy Warnick (R)  
103 Irv Newhouse Building  
PO Box 40413  
Olympia, WA 98504

Senator John Braun (R), Vice Chair  
407 Legislative Building  
PO Box 40420  
Olympia, WA 98504

Senator Bob Hasegawa (D),  
Ranking Minority Member  
223 John A. Cherberg Building  
PO Box 40411  
Olympia, WA 98504

Senator Curtis King (R)  
305 John A. Cherberg Building  
PO Box 40414  
Olympia, WA 98504

Dear Chair, Vice Chair and Committee Members of Washington State's Senate Committee on Commerce and Labor:

**RE: Senate Bill 5893**  
**An Act Relating to the nonemployee status of athletes in amateur sports**

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My name is Theodore Charney and I am a lawyer in good standing with the Law Society of Upper Canada, duly licensed to practice law in the Province of Ontario.

I currently represent plaintiffs in a series of class actions filed in Canada with respect to the alleged failure of teams playing in the Canadian Hockey League ("CHL") to pay the players on those teams statutorily mandated minimum wages. The CHL oversees the operation of three Major Junior hockey leagues known as the Ontario Hockey League ("OHL"), the Quebec Major Junior Hockey League ("QMJHL"), and the Western Hockey League (the "WHL"). The WHL consists of teams in Canada and the United States, including four teams located in the State of Washington - the Seattle Thunderbirds, the Spokane Chiefs, the Everett

Silvertips, and the Tri-City Americans. The players in these leagues range in age from 16-20 years old.

I am writing this letter to outline the opposition of my clients, Mr. Lukas Walter, a former WHL player on the Tri-City Americans located in Kennewick, Washington, and Samuel Berg, a former OHL player, to Senate Bill 5893 - an act addressing the non-employee status of athletes in amateur sports (the "Bill"). The Bill is scheduled for public hearing before your committee at 1:30 PM on Wednesday, February 18, 2015. I intended to appear and make submissions on the Bill but the logistics and a prior commitment in the Federal Court of Appeal of Canada preclude me from attending.

### **The Class Actions**

Under instructions from Mr. Walter and Mr. Berg, my firm commenced class action lawsuits against the teams and the leagues for failing to pay the players minimum wages. It is alleged that although the players on teams in the CHL regularly spend 40 hours or more a week training, playing games, and attending promotional events for the teams they play for, they get paid only approximately \$50/week. It is alleged that these players are in fact employees of the teams and that they should be paid at least the statutory minimum wages in the State or Province in which the team they play for is located. Many, if not most of the players on the teams located in Washington State are from Canada and are living away from home to play in the WHL.

Enclosed with this letter are the statements of claim filed: (1) in the province of Alberta with respect to the failure of the teams playing in the WHL to pay minimum wages to their players; and (2) in Ontario against all of the teams in all of the CHL leagues with respect to the same matter.

### **Duties of Class Counsel**

As a proposed class action, all of the players on the four Washington State teams are putative (prospective) class members. Our courts and American courts have held that we, as counsel for the proposed class members, have a duty and responsibilities to them flowing from a developing fiduciary or a constructive lawyer/client relationship.<sup>1</sup>

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<sup>1</sup> *Lundy v, VIA Rail Canada Inc.*, 2012 ONSC 4152 at para. 31, available online at <http://canlii.ca/t/fs1kl>; *Fantl v. Transamerica Life Canada*, [2008] O.J. No. 1536 at para. 80, available online at <http://canlii.ca/t/1wn98>; *Coleman v. Bayer Inc.* 2004 CanLII 8303 (ON SC) at para. 31, available online at <http://canlii.ca/t/1h3lv>; *In re Currency Conversion Fee Antitrust Litig.*, No. MDL No. 1409, M 21-95, 2004 WL 2453927 (S.D.N.Y. Nov. 3, 2004); *Schick v. Berg*, No. 03 Civ. 6513 (LBS), 2004 WL 856298, at \*6 (S.D.N.Y. April 20, 2004); and *In re General Motors Pick-Up Truck Fuel Tank Products Liability Litig.*, 55 F.3d 778, 801 (3d Cir. 1995).

I am writing to you today in my capacity as Class Counsel to submit that the Bill is not in the best interests of the Washington State hockey players who are prospective class members. Nor is it necessary to exempt the teams completely from minimum wage laws, just so that 16 and 17 year old players may continue playing on the teams.

### **The Bill is Overly Broad**

The stated purpose of the Bill, as I understand it, is to ensure that the 16 and 17 year old players who currently play on WHL teams in Washington are not precluded by enforcement of child labor laws from playing. According to section 49.12.123 of the Industrial Welfare Act (“IWA”), employers of minors under the age of 18 have to obtain a work permit in accordance with section 49.12.121. If the players are employees, then the teams have to apply for a work permit, just like any other employer.

Under section 49.12.121(2), the Department of Labor and Industry (“DLI”) is required to issue a work permit once certain conditions have been met as follows:

The department [the DLI] shall issue work permits to employers for the employment of minors, after being assured the proposed employment of a minor meets the standards for the health, safety, and welfare of minors as set forth in the rules adopted by the department. No minor person shall be employed in any occupation, trade, or industry subject to chapter 16, Laws of 1973 2nd ex. sess., unless a work permit has been properly issued, with the consent of the parent, guardian, or other person having legal custody of the minor and with the approval of the school which such minor may then be attending. However, the consent of a parent, guardian, or other person, or the approval of the school which the minor may then be attending, is unnecessary if the minor is emancipated by court order.

The employer may also apply for a variance order under s. 49.12.105 which would exclude the employer from any rule or regulation establishing standards for wages, hours, or conditions of labor. There are therefore already procedures in place under the legislation that would allow the 16 and 17 year old players to play on WHL teams in Washington as long as the teams apply for work permits or for variances of the rules and regulations with respect to labor standards. The IWA therefore does not require amendment.

Alternatively, if amendments to the IWA are to be contemplated then it would be more appropriate, in my submission, to expand or replicate s. 49.12.124 which already provides a procedure for work permits and variances for minors employed as actors or performers in film, video, audio, or theatrical productions. I suggest that this section could be expanded to include the WHL players, or replicated to apply to them.

The effect of the current Bill is that minors playing in the WHL will not be protected by the oversight of the DLI or caught within the IWA, which has a stated purpose to protect employees “from conditions of labor which have a pernicious effect on their health”.

In addition to exempting the teams from DLI and IWA oversight the Bill also has the effect of exempting the teams from paying minimum wage under the Minimum Wage Act, ch. 49.46.

It is alleged in the complaints (the class actions commenced in Canada) that the Players receive only \$50 a week as a fee or allowance for 46 plus hours of work. Why should the business of operating a hockey team in the WHL be exempt from paying minimum wages to kids? We oppose any Bill that will have the effect of excluding or exempting the teams from their obligations (if any) to pay wages in accordance with the minimum wage legislation of Washington State.

### **The Amateur Athlete/Amateur League Argument**

The teams argue that the players and the leagues are “100% amateur” - that the players on the teams are "student-athletes" and are therefore not professionals and should not be considered employees.<sup>2</sup> We disagree.

First, if the teams are correct then one wonders why they would be seeking a legislative exemption from a statute that ostensibly does not apply to them.

Second, a number of the players on the teams are not students. For example, Mr. Walter joined the Tri-City Americans at the age of 18 after he had graduated from high school in British Columbia, Canada. He moved away from home to live in Kennewick and play with the Americans and at no time did he ever participate in any educational programs for the two seasons in which he played for the Americans.

Third, the players receive money and there are other indicia of a working relationship. In order to play with the team, Mr. Walter signed a standard player agreement. It is alleged in the complaint to be the same agreement that all the players sign in Washington, in which the team agreed to pay him \$200/month (\$50/week). He was also issued a visa to WORK in the United States as a “professional athlete”. Enclosed with this letter is a copy of Mr. Walter's contract and work permit. Mr. Walters' earnings of \$200/month meant that in the end he had to borrow money from his parents each season in the amount of \$3,000-\$4,000 just to have enough to live off of. Many of Mr. Walter's team mates were also from Canada.

Fourth, there is a judicial decision which found the players to be employees. In 2000, the Federal Tax Court of Canada in a case called *McCrimmon Holdings Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [2000] T.C.J. No. 823 [*McCrimmon*] made a finding that the players on the Brandon Wheat Kings, a team in the WHL, were in fact employees. The decision is enclosed.

Fifth, contrary to statements made by owners of the Washington State teams during the public hearings held by the House Labor Committee on the Bill last week, the WHL, under the auspices of the CHL is not considered an amateur league by either Hockey Canada or USA

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<sup>2</sup> See for example the testimony of Russ Farwell, President and General Manager of the Seattle Thunderbirds at the House Labor Committee on Tuesday, February 10, 2015. Mr. Farwell's testimony can be found online at the link below and begins at the 1:02:35 mark: [http://www.tvw.org/index.php?option=com\\_tvwliveplayer&eventID=2015021086](http://www.tvw.org/index.php?option=com_tvwliveplayer&eventID=2015021086).

Hockey. While the CHL is a partner of Hockey Canada, it is not one of its members.<sup>3</sup> The World Junior Hockey Championships in which several WHL players play and which was referred to in Mr. Robert Tory's testimony at last week's house committee hearing is not an amateur tournament.<sup>4</sup> Many NHL players play in that tournament.<sup>5</sup>

Sixth, some of the players in the WHL have signed contracts with teams in the NHL and have received signing bonuses. Some have even played games in the NHL.<sup>6</sup> These players cannot be considered anything but professional hockey players.

And finally, seventh, the teams in the WHL are for-profit businesses. It is alleged in the complaints that they sell tickets, concessions, and merchandise. They have corporate sponsorships and television rights agreements. They sell the images of the players in photographs and to video game companies.

### **The issues the Bill addresses are currently under investigation and before the courts.**

The Bill is addressing an issue that is being litigated as a class action lawsuit in Canada. Respectfully, we ask that you defer this legislation until the courts have ruled. To date, the WHL has not admitted the teams are employers. In fact every public statement by them on the class action is to the contrary. If the court rules in their favor the legislation will not be required.

The question of the teams' relationship with their players is also currently under the investigation by the Washington DLI in consultation with the Washington State Attorney General's office. The investigation is ongoing and to date the DLI has not issued its findings and conclusions.

### **Conclusion**

These hockey teams are important to their communities and to the players who play on them in helping them achieve their dreams of becoming NHL hockey players. However, the success that they have had in doing both should not blind the owners, the legislature, the public, and the players themselves from the fact that there are labor standards which must be respected and adhered to.

On behalf of my clients, I therefore respectfully request that this Bill, as currently drafted, not be passed insofar as it attempts to limit the teams' obligations to pay their players minimum

<sup>3</sup> Article 12 of Hockey Canada's bylaws lists the Partners of Hockey Canada, which include the CHL and the NHL. Article 12.5 specifically states that Partners are not deemed Members of Hockey Canada. The Bylaws can be found online at: [http://cdn.agilitycms.com/hockey-canada/Corporate/About/Downloads/2014\\_15\\_articles\\_bylaws\\_e.pdf](http://cdn.agilitycms.com/hockey-canada/Corporate/About/Downloads/2014_15_articles_bylaws_e.pdf)

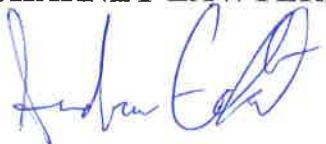
<sup>4</sup> Supra, footnote 2.

<sup>5</sup> See for example, the following link which lists every player NHL-drafted player that played in the 2015 World Junior Championship: <http://www.tsn.ca/drafted-players-by-country-for-the-2015-world-juniors-1.168136>.

<sup>6</sup> See, for example, the following link from a press release by the WHL dated September 11, 2014, listing all players from the WHL who were sent to NHL training camps in 2014. The press release also lists which players have signed NHL contracts: <http://sirc.ca/news/western-hockey-league-131-whl-players-attend-nhl-camps>.

wages. These players put in long, hard hours so that the teams' owners may gain revenues without receiving even the State's statutorily mandated minimum wages. The attempt to exclude the teams from minimum wage obligations and to exclude minors from the protection of the IWA should not be condoned by this legislature.

Yours very truly,  
**CHARNEY LAWYERS**



*per:* Theodore P. Charney  
TPC/AJE

Enclosures