

**ONTARIO**  
**SUPERIOR COURT OF JUSTICE**

BETWEEN:

**SAMUEL BERG**

Plaintiff

and

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

Defendants

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

AFFIDAVIT OF SAMUEL BERG (Sworn February 18, 2015)

I, Samuel Berg, of the City of Hamilton, in the Province of Ontario, make oath and say:

### INTRODUCTION

1. I am the proposed representative plaintiff and have personal knowledge of the facts hereinafter deposed.
2. Where my knowledge is based on information obtained from others, I have so indicated and believe that information to be true.

### NATURE AND STATUS OF THE ACTION

3. In this proposed class action, the Class seeks to recover damages in accordance with minimum wage legislation on the basis that hockey players are employees, playing for hockey teams in three leagues operated under the umbrella of the Canadian Hockey League (the "CHL").
4. On October 17, 2014, this action was commenced by issuance of the Statement of Claim in which I was named the plaintiff. The action claims relief arising from the failure of the owners of the teams who play in leagues operated by the CHL (the Ontario Hockey League ("OHL"), the Western Hockey League ("WHL"), and the Quebec Major Junior Hockey League ("QMJHL")) to pay the players of those teams minimum wages. The claims include money owed for back pay, vacation pay, holiday pay, and overtime pay.
5. On November 5, 2014, an Amended Statement of Claim was filed with the court, attached hereto as **Exhibit "A"**.
6. On November 5, 2014, a Statement of Claim with Court File No. CV-14-515637 00CP was issued by the Ontario Superior Court of Justice in Toronto. A copy thereof is attached hereto as **Exhibit "B"**. I am the named plaintiff in that action which seeks identical relief based on identical facts to the within action. That claim was issued in order to name defendants who were not named in the within action.

7. Similarly, on January 6, 2015, Statement of Claim with Court File No. CV-15-519219 00CP was issued by the Ontario Superior Court of Justice in Toronto. A copy thereof is attached as **Exhibit "C"**. I am the named plaintiff in that action which seeks identical relief based on identical facts to the within action but names a defendant not named in the within action.
8. By this motion, I am seeking an order certifying this action as a class proceeding and certain other orders necessary for the proper conduct of this action as a class proceeding, including the consolidation of this action with Court File No. CV-14-515637 00CP and CV-15-519219 00CP.

#### **MY BACKGROUND**

9. I am currently 18 years old. I attend McMaster University in Hamilton, Ontario and reside there during the week. On weekends, I reside in Beamsville, Ontario, with my parents.
10. Ever since I can remember I have played the game of hockey. I was motivated to eventually play professionally in the NHL and in order to do so, I attended the PEAC School for Elite Athletes in Downsview, Ontario where I could have a flexible schedule that would allow intense training and an education. When I was in grade 10, the Niagara Ice Dogs ("Ice Dogs") hockey team, owned by the defendant Niagara Ice Dogs Hockey Club Inc., drafted me in the OHL draft.

#### **THE STANDARD PLAYER AGREEMENT**

11. On or about August 20, 2013, at the age of 16, I signed an OHL "standard player agreement" form with the Ice Dogs (the "Contract"). In exchange for me providing the services described in the Contract, the team agreed to pay me a \$50 weekly fee. The Contract was also signed by Marty Williamson, the General Manager and head coach of the Ice Dogs. The version of the Contract which I signed is attached hereto as **Exhibit "D"**.

12. When I signed the Contract, I was informed by representatives from the Ice Dogs, including Mr. Williamson, that this was the standard player agreement that all of the players in the OHL signed. I was told that if I wanted to play for the Ice Dogs, I would need to sign this standard player agreement.
13. Clause 1(b) of the Contract, provides that, "the relationship between the OHL and the Player is that of an independent contractor". When I signed the Contract, I did not understand what the term "independent contractor" meant. It was not discussed with anyone from the Ice Dogs management team, nor did I ever discuss it with other players. I was never required to invoice the team for my "fee" nor did I receive any direction from the OHL or the Ice Dogs on how to be an independent contractor, especially at the age of 16.
14. I have been advised by Andrew Eckart, a lawyer at Charney Lawyers, that the term independent contractor means operating your own business or being a self-employed consultant who has been hired by a client to perform services for a fee.
15. When I signed the contract at age 16, I was not in business for myself, nor did I consider the Ice Dogs to be my client.
16. At the time I signed the Contract I did not know the reason for the OHL labeling the relationship between me and the team as one of independent contractor. But I now believe that the standard player agreement (that all players were required to sign) was drafted that way to circumvent the legal implications of the players being employees of the teams. I also believe that at the time that I signed the Contract the defendants who owned teams in the OHL and the CHL all understood the players were not really independent contractors.
17. We have not yet had an opportunity in these proceedings to seek production of documents or ask the defendants about their motive, the legal advice received, the

discussions between the owners, and agreements made between the leagues and the owners that led to requiring the players to sign a Contract as an independent contractor.

18. Based on the decision of the Federal Tax Court in *McCrimmon Holdings Ltd. v. Canada (Minister of National Revenue - M.N.R.)*, [2000] T.C.J. No. 823, I am informed that the Ice Dogs should be deducting player contributions for unemployment insurance and Canada Pension contributions and matching them, as should every other team in Canada. I do not recall having any deductions taken off from my pay cheque and do not know if the Ice Dogs or the other teams have complied with the decision. My lawyers will be seeking this information in these proceedings as well.
19. The reason I signed the Contract was so that I could increase my chances of eventually playing hockey in the NHL. From my review of the NHL entry drafts, I do verily believe, and believed at the time, that the OHL was one of the top sources of talent that ended up playing in the NHL. I do verily believe that based on my review of the drafts and conversations with team mates, approximately 5-10% of the players in the OHL end up signing NHL contracts.
20. At the time I signed the Contract, my focus was on earning a spot in the NHL and felt that playing in the OHL was my best chance to do so. I did not think about the amount I was being paid and did not care at all what it was. From my conversations with my other teammates, I do verily believe that they also signed under similar circumstances and for similar goals - to eventually play in the NHL. When players are presented with the standard player agreement, there is no opportunity to negotiate wages. I was informed by team management that the \$50/week fee is standard and cannot be increased. You either sign the standard player agreement or you cannot pursue your dreams to be an NHL player by playing in the Major Junior leagues.
21. When I discussed the Contract with my father, he explained to me, and to the Ice Dogs, that he was not satisfied with the provisions in the Contract with respect to the education package. The standard language provided for one year of education for every year

played. On my behalf, he negotiated a change to the terms in the Contract so that as soon as I played one regular or exhibition game with the Ice Dogs, the Ice Dogs would be required to pay for my four years' worth of tuition and schooling expenses pursuant to paragraph 2 of Schedule "C" of the Contract. This was a term of the agreement which we had specifically negotiated because at the time of me signing the Contract with the Ice Dogs, I was also considering playing in the United States Hockey League ("USHL") where I would have a good chance of securing a full scholarship to an American college or university.

22. The Contract provides that it must be signed and approved by the Commissioner of the OHL before I could play for the Ice Dogs. I started playing for the team in August 2013, however, the contract was not signed and approved by the Commissioner of the OHL, until January 17, 2014. I was not aware that the Commissioner had not signed and learned of it much later. I believe that Mr. Williamson did not send it on to the Commissioner because of an amendment to the standard contract wording about my eligibility for a scholarship that he feared would be rejected by the Commissioner.
23. Besides the change to the Contract with respect to the education package, the Contract I signed was the standard player agreement that was provided to me by the Ice Dogs.

#### **OVERVIEW OF MY TIME PLAYING HOCKEY FOR THE ICE DOGS**

24. At the time that I signed the Contract, I was attending high school at Beamsville Secondary School in Beamsville, Ontario where I was living with my parents. I was to begin grade 12 in September 2013.
25. Shortly after signing the Contract, I began training, playing games and attending promotional events with the Ice Dogs in and around St. Catherines, Ontario. In total I played 8 games as a left wing with the Ice Dogs in the months of September, October, and December 2013. My statistics and the record of the games I played in in the OHL are found on the OHL's website and are attached hereto as **Exhibit "E"**.

26. The team has a roster of 25 players, but only 18 may dress for a game. Therefore, the statistics do not account for the games which I attended with the team but in which I did not play. Teams in the OHL are limited to only having three 20-year-old players. All of the other players on the team were 16-19 years old, including only three or four 16 year olds. The other teams in the OHL had similarly aged rosters.
27. I understand from media statements attributed to the CHL that the defendants now acknowledge players are not independent contractors. Apparently when we play for a team we are something called "Amateur Student Athletes". Attached as **Exhibit "F"** is a sample of numerous public statements made by the CHL.
28. While some of the Ice Dogs players were still in high school, approximately 7 players on the team were not in school or enrolled in any kind of educational program such as university, college, or a trade school. Others did not actually attend school but took online courses through Brock University. A player did not have to be a student to play for the Ice Dogs. None of the teams are educational institutions like a college or university.
29. In terms of the players' amateur status, some of the players on the team, including our star centre, Carter Verhaeghe, had already been drafted by NHL teams by the start of the 2013-2014 season. On being drafted by an NHL team, a player cannot sign a contract with another NHL team without the consent of the team that drafted the player. On the signing of a contract, the NHL team pays a signing bonus to the player. In Mr. Verhaeghe's case, he eventually signed a contract with the Toronto Maple Leafs, received a signing bonus, and even played some games with the Maple Leafs farm team in the American Hockey League ("AHL"), the Toronto Marlies, in the 2013-2014 season while he was also playing with the Ice Dogs. I do not understand how a player like Mr. Verhaeghe, who has signed a contract with the Toronto Maple Leafs, received a signing bonus, and continues to play in the OHL can be considered an amateur athlete. I understand that there are several players in a similar situation to Mr. Verhaeghe playing in the OHL.

30. In or about the latter half of October 2013, I was approached by the coach and General Manager of the Ice Dogs, Marty Williamson. He told me that because there were so many veteran forwards on the Ice Dogs I would not be getting much playing time as I was also a forward. He asked me if I wanted to play Junior B hockey for the St. Catherines Falcons in the Greater Ontario Junior Hockey League ("GOJHL"). Even though I was only 16 years old at the time and Mr. Williamson approached and spoke with me about this, and not my parents, I thought about the conversation overnight. The next day, I asked for a trade and Mr. Williamson advised that he would put me on waivers and see what would happen. I did not get picked up off of waivers which upset me. The team was heading out on a road trip and I decided to stay home and discuss the issue with my father, a former NHL hockey player. Upon reflection, I decided that I would play Junior B hockey with the St. Catherines Falcons.
31. I filled out some paperwork and started playing for the St. Catherines Falcons. I played my first game with them on November 2, 2013. My statistics in the GOJHL are posted on the GOJHL website and are attached hereto as **Exhibit "G"**. I was not paid for my time playing in the GOJHL.
32. After playing eight games with the Falcons, I was traded to the Thorold Blackhawks. In the meantime, I was approached again by Mr. Williamson who asked if I could play a game with the Ice Dogs because they had several injuries and needed a player to fill in. I played two more games with the Ice Dogs in 2013, on December 7 and 31, 2013. I was not paid for playing in any of these games. Between those two games I continued training and playing games with the Thorold Blackhawks.
33. On January 2, 2014, 2 days after I played with the Ice Dogs on December 31, 2013, I was playing in a game for the Thorold Blackhawks when I sustained a dislocated shoulder. I had dislocated my shoulder in the past before and was able to put it back into place and resume playing hockey. On this occasion, I was unable to do so. I saw a doctor who referred me to a shoulder specialist. The doctor also advised me that I would be unable to return to playing hockey for the rest of the season.



34. A few days after sustaining my injury, Mr. Williamson phoned my father. My father advises me, and I do verily believe, that Mr. Williamson asked him why I had quit hockey. My father clarified that I had been injured and was unable to play for the rest of the season and may require surgery. Although I did not require surgery, my shoulder has not healed since that injury to a degree that I am able to return to play competitive hockey.

### **THE LIFE OF AN OHL PLAYER**

35. The time I devoted to training, playing and practicing hockey with the Ice Dogs was considerable. All of the players that made up the Ice Dogs started training with the team for the 2013-2014 season in or about the latter half of August 2013. The season itself consisted of 75 regular season games from September 19, 2013 to April 1, 2014. The games were played at a frequency of about 3 times/week against 19 different teams spread across Ontario, Michigan and Pennsylvania. Aside from travelling and playing the games, my teammates and I would train pretty much every single day we did not have a game. We also attended various promotional events. In effect, I was providing my time and services as a hockey player to the team 7 days a week for as long as I played for the Ice Dogs. These same services were provided by all players on the Ice Dogs.
36. Because Beamsville is near St. Catherines, I continued to live at home with my parents while playing for the Ice Dogs. In order to have enough time to devote to the Ice Dogs, I only enrolled in 2 classes for the fall semester starting in September 2013 at Beamsville Secondary School. The players on the Ice Dogs who were from out of town and staying with billeting families attended a different high school.
37. A typical weekday for me involved going to school and be in class by 9 a.m. The two courses I was taking were grade 12 biology and "peer review", a class in which I tutored grade 9s in various subjects. Once those classes were over around 11:45 a.m., I would return home for a quick bite to eat and then drive to the rink to be there for around 12:15/12:30 p.m. I would practice on my own for about an hour. After meeting with the

- team and coach for about 20 minutes, we would then have a team practice from approximately 1:45 to 3:15 p.m.
38. After our skating practice, the team would shower, change and then would drive to the Ice Dogs indoor training facility at the White Oaks Resort in Niagara-on-the-Lake by 4 p.m. where we would work on stretching, weight training and cardiovascular exercises. We would finish the workouts by around 6 p.m.
  39. This was my typical routine for days on which there were no games. One day a week we would do yoga instead of our 2 hour workout, but otherwise there was not much change in our training schedules.
  40. On game days, the routine changed. If it was a weekday home game, I would attend school in the morning and once finished attending classes, I would return home to nap and rest until about 3 p.m. when I would drive to the arena. Myself and the other players were directed by the coaches to rest prior to games and told that if we showed up at a game tired or without energy, we would not dress and would not be allowed to play that game.
  41. On game day my teammates and I would have to be at the rink by 5 p.m. to start getting all of our equipment ready. We would start warming up around 5:30 p.m. with stretching and other exercises. We would be dressed ready to play by 6:30, meet with the coach and then get on the ice about 20 minutes before puck drop for an on ice warm up. The game would start around 7:15 p.m. and last about 2½ -3 hours and be finished around 10 p.m. After the game, we were expected to sign autographs and meet with the fans. I would not typically get out of the arena to head back home until approximately 11:30-11:45 p.m.
  42. Because the team had a 25 man roster, but only 18 could get dressed to play, I was occasionally told that I would not be playing, however, I would only find that out once I got to the arena. On those days, I would show up to the game and warm up regularly. Instead of getting dressed and playing the game, however, I would be required to work out throughout the first period. Once the period was over, I would shower and get

- changed into a suit to watch the game from the stands. Even though I did not play, I was still expected to meet with fans after the game and sign autographs.
43. During my time with the Ice Dogs, I went on two road trips by bus with the team. On our first road trip for the season, we were scheduled to play in Kingston on Friday, September 27, 2013, Belleville on Saturday the 28<sup>th</sup> and in Ottawa on the 29<sup>th</sup>. I will briefly summarize that road trip.
  44. On Thursday, the 26<sup>th</sup> of September, the day was typical in terms of attending school and then heading to the arena to practice. However, instead of heading to work out at White Oaks, we packed up our bus and travelled to Kingston. It fell on me and the other rookies to pack and load up all of the equipment into large hard cases and pack them onto the bus. After doing so and then travelling for 4-5 hours by bus to Kingston, we arrived at the arena to unload our equipment. We then headed to the hotel to rest up.
  45. In the morning of Friday the 27<sup>th</sup>, we went for a run, had some free time and then after lunch headed to the arena, warmed up and prepared for the game in a similar manner as at our home games. After the game, we left our equipment at the arena and then returned to the hotel to sleep.
  46. On the following morning, Saturday the 28<sup>th</sup>, we went to the arena, picked up our equipment, loaded it onto the bus and drove to the Belleville arena, about 1 hour away. We warmed up in our typical manner, and played the game. I did not dress that game so instead of playing, I did a workout during the first period. After the game, we drove back to Kingston and unpacked the equipment again into the Kingston arena. We then returned to the hotel to sleep.
  47. The next day, Sunday the 29<sup>th</sup>, we packed up all of our equipment again and headed to Ottawa, an approximately 2-3 hour drive. We arrived at the arena, unpacked, warmed up and played the game. After it was finished, we packed all of our equipment onto the bus and drove through the night for about 6-7 hours back to St. Catherines. I recall arriving back in St. Catherines at 4 a.m. on Monday the 30<sup>th</sup>.

48. Despite arriving home at 4 a.m., the team expected that all players who were still in high school would attend school that day. I cannot recall if we had a practice that day or not, but if we did, it would only have been some yoga. Typically, we would only have a day off of practicing or playing a game after an intensive road trip such as the one I just described. Other than those days, we would be practicing, training or playing games 7 days a week.
49. In addition to playing hockey, it was also expected that players attend promotional events. I recall attending a few, including caddying a round of golf for some of the corporate sponsors of the Ice Dogs. On that occasion, myself and several other players were at a golf course for an entire day with various corporate sponsors of the team, carrying their golf clubs while they played 18 holes of golf. That day, we were also asked to sign approximately 100 hockey sticks which I understood the Ice Dogs would be giving out to sponsors and selling at various auctions and other events for a profit.
50. I would also attend events at local bars and restaurants where I was told by Ice Dogs management to pay close attention to the season ticket holders and sponsors and make them feel comfortable.
51. After I left the Ice Dogs and began playing in the GOJHL, my training and practicing schedule greatly diminished. We only had 3 practices a week and the traveling was far less extensive.

#### **THE DEGREE OF CONTROL BY THE ICE DOGS OVER THE PLAYERS**

52. While I was playing in games, training, participating in practices, traveling, and attending promotional events for the Ice Dogs, I was required to follow all requests, directions, or in effect orders from various staff members of the team including the Head Coach and General Manager, Marty Williamson, the Assistant Coaches, the Assistant General Manager, and occasionally the Governor, Bill Burke.

53. I was told where and when I was to play, train, practice or workout. The team provided me with a schedule at the beginning of the season of all the practices and game times for the entire season of where to be and when. I was told by my coaches about how I was to approach playing in each game of hockey and what my role on the team was. I was told and required to adhere to the team's schedule for practices, training and games. If I did not, I would risk being dismissed from the team.
54. Every night, before going to bed, my teammates and I were required to call our assistant coach to confirm that we were adhering to a curfew set by the team. We were required to be in bed by 11 p.m. on non-game nights and 12:30 a.m. on game nights.
55. Additionally, I was told to attend promotional events where I was expected to stay and interact with fans, season's ticket holders, and sponsors until told by the assistant general manager or the general manager that I could leave.
56. In providing my services as a hockey player to the Ice Dogs, I also transferred my rights over the use of my image to the team. The Ice Dogs could use my photos for promotional materials.
57. Although I am not an avid video game player, I have occasionally played the NHL video game series from EA Sports. In the game, players can choose various teams to play, including teams in the CHL affiliated leagues. Because I did not complete a full season with the Ice Dogs, my name and image did not appear in the video game, but those of my team mates did. I have been advised by my former team mates and other players in the CHL affiliated leagues that despite their image being used in the video game, they did not receive any remuneration for the use of their image and in fact had to pay for the video game themselves if they wanted it.
58. The Ice Dogs also provided me with sticks to use and required that I wear the jerseys and helmets they provided for me with their logo and team colours on them. The jerseys and helmets did not belong to me, but were owned by the team and I was required to return

them to the team. I did not receive any other hockey equipment such as skates or protective padding.

59. All of the duties and obligations I have described in this affidavit were the same for all the players on the Ice Dogs. Likewise, from my conversations with the players for other teams in the OHL, I do verily believe that all other teams in the OHL operated in a similar fashion and the players had the same duties and responsibilities as I had.
60. While playing for the Ice Dogs, I estimate that I committed on average 46 hours/week in providing my services to the Ice Dogs as follows: 5 hours/day, 4 days/week for days on which we trained only; 8 hours/day, 3 days/week on game days; and 2 hours/week attending various promotional events.
61. On road trips, these hours were considerably longer when accounting for travel time. For example, on the road trip described earlier in this affidavit, I estimate that I spent approximately 13-17 hours traveling with the team.
62. All of my team mates on the Ice Dogs devoted similar hours in providing services for the Ice Dogs. Likewise, from my conversations with the players for other teams in the OHL, I do verily believe that all other teams in the OHL operated in a similar fashion and the players committed similar hours in providing similar services to their teams.
63. At the time I was playing with the team, I did not think about how my relationship with the team would be classified. But now, upon reflection of the foregoing I do verily believe that the Ice Dogs were my employer.

#### **COMPENSATION**

64. For the time that I played with Ice Dogs through September and October 2013, I was paid approximately every two weeks by cheque in the amount of \$50/week. I was also given a travel allowance of \$75/week because I had a car which I used to drive myself to the arena for games and practices and to the indoor training facility at White Oaks. I believe I

received my bi-weekly payments approximately every two weeks, however, there was no regular schedule in payments. We did not know when our next paycheques would arrive.

65. I received no extra money for attending additional promotional events or after a long road trip. My pay did not vary whatsoever, even if we worked longer hours in any given week. My pay also did not depend on how well I had played. At no time did I ever receive any overtime pay, vacation pay or holiday pay.
66. When the paycheques were handed out, there was an unspoken rule that we would not discuss the amount of our paycheques because, although the wages set out in the standard player agreement were set to the same weekly amount, some players were being paid more than what was set out as the league maximum.

#### **THE ICE DOGS AND THE OTHER OHL TEAMS ARE IN THE BUSINESS OF EARNING PROFITS**

67. Our home games in St. Catherines regularly pulled in audiences of between 2,900 - 3,145 fans each game. This was the capacity of the arena we played in, the Gatorade Garden City Complex, so each home game felt like a sell-out crowd. At ticket prices of around \$20-\$25 per game, I estimate that the Ice Dogs sold approximately \$58,000-\$78,625 worth of tickets to each home game. Attached as **Exhibit "H"** are the 2013-2014 Niagara Ice Dogs Results and Schedule, including the attendance records for the Ice Dogs, available from [www.hockeydb.com](http://www.hockeydb.com), a website dedicated to tracking the statistics of teams and players across several different hockey leagues.
68. Estimating a ticket price of \$20 for each ticket sold, and based on the attendance records as calculated in Exhibit "H" totaling 101,642 total attendances to Ice Dogs home games, I estimate that the Ice Dogs had ticket sales of approximately \$2,032,840 for the 2013-14 season.

69. In contrast, the 25 players made in total \$1,250 a week (25x\$50) or \$416.00 for each game using three games a week (\$1,250 divided by 3). In other words, the team paid fees to 25 players of a total of \$416.00 to play one game. Over a 26 week season, the total fees paid for the team would be \$32,500.
70. In contrast, at \$10 an hour and a 46 hour work week for a 26 week schedule would be \$11,960 a player for the season and a total team wage of just \$299,000.00 on revenues of \$2 million from home games plus additional revenue sources described below.
71. This year, the Ice Dogs have moved into a bigger arena with a capacity closer to 5,000 people. Based on the games I have viewed on television, I do verily believe that these games are also filled with fans and are sold out or close to sell out crowds.
72. On many of the away games I attended, many of those games were also sold out, however, attendances ranged quite a bit due to the size of the arenas. Attached as **Exhibit "I"** is a chart from [www.hockeydb.com](http://www.hockeydb.com) listing the average attendance records for all teams in the OHL for the 2013-14 season. The Ice Dogs' average attendance in the 2013-2014 season was 15th out of the 20 teams in the OHL. Many teams had attendances in the range of 4,000-5,000 fans, and the London Knights team had average attendances of over 9,000 people per game.
73. On top of ticket sales, the Ice Dogs also sold t-shirts, hats, replica jerseys, mugs and other merchandise at a store that was located in the arena and at a kiosk set up in the mall in St. Catherines. I have seen other Ice Dogs merchandise at various retail stores in and around the St. Catherines area, including the Campus Crew stores.
74. I have been advised by my former team mates and other players in the CHL affiliated leagues that despite their names and images being used in the EA Sports NHL video game franchise, they did not receive any remuneration for the use of their image and in fact had to pay for the video game themselves if they wanted it. I do verily believe that the teams, the OHL, and/or the CHL received licensing fees for the use of the players' names and images in the video games.



75. Concessions were also sold at each of the home games in St. Catherines, including beer, soft drinks, and food such as hotdogs, popcorn and other snacks. It is my understanding that the profits from those sales went to the owners of the Ice Dogs.
76. The Ice Dogs also had various corporate sponsors who would advertise at games, by having their trade name and logo on the boards around the rink, in the stands and on the ice itself. Their names and logos of some of the sponsors are also advertised on the Ice Dogs website at [www.niagaricedogs.net](http://www.niagaricedogs.net), including Newstalk 610 CKTB, St. Catherines Transit Commission, the Courtyard Marriot in Niagara Falls, and many others. The "Support Our Partners" page from the Ice Dogs website is attached hereto as **Exhibit "J"**.
77. Some of our games were also broadcast on television throughout Ontario. I believe the Ice Dogs receive revenues for those broadcasts under a television rights agreement. Moreover, the OHL now sells internet streaming packages wherein for a fee of \$149.99, subscribers may purchase a package to watch every OHL game live through the internet. The OHL "livestream" packages are described on the website, attached hereto as **Exhibit "K"**.
78. From the ticket sales, corporate sponsorships, sales of memorabilia, concessions, and licensing of our images for products like video games, I do verily believe that the Ice Dogs were making profits from the direct result of the services that the players and I were providing to the Ice Dogs.
79. The actual revenues and financial statements of the Ice Dogs are not available to me as it is a private corporation. My lawyers will be seeking this information in these proceedings.
80. Based on the foregoing, I do verily believe that the OHL and its teams, and in particular the Ice Dogs, are businesses which are being run with a view to maximizing their profits.

81. The products which generates all of the Ice Dogs revenues are the players playing hockey who are paid only \$50 a week.

### **FEAR OF REPRISAL**

82. I was afraid about speaking about the amount of pay I was receiving for fear that if I did, my teammates would say something to the coach or ownership and I would be either kicked off of the team or not receive any playing time. At no time did I ever speak to anyone about our pay while I was playing on the team, nor did anyone approach me to speak about it.
83. Based on my experience playing on the Ice Dogs, it is my opinion that if a player now were found to be speaking in support of this class action to other players or the media, it is likely that they would face repercussions by the team and the league, either in being told he could not dress for games, being traded to another team, or being sent down to play in a lower tiered league.
84. For the same reasons, if a player decides not to opt out of this class action and the opt outs are disclosed to the defendants, I verily believe that the players who did not opt out will be ostracized on their teams.

### **MY EDUCATION**

85. As a result of the time commitments made to the Ice Dogs, my schooling suffered. I found that I had no time to do my homework in my biology class. Rather than fail the course, I made the decision to drop it.
86. Because of my injury and inability to play hockey for the second semester of high school which began in or around February 2014, I was able to commit more time and energy to school. That semester I completed 5 university eligible courses, instead of the typical 3-4 courses. I was able to graduate and applied and was accepted into McMaster University's Humanities program.

87. On learning of my acceptance into the program, I contacted the OHL league offices. I was eventually put in touch with someone in their scholarship program. I was advised at that time that they would cover my schooling expenses.
88. I began attending McMaster in September 2014. About one month in, I was contacted by the OHL who advised that the contract I had signed with the Ice Dogs was not league approved because of clause 2 of Schedule "C". That was the clause which I understood required the Ice Dogs to pay my tuition and schooling costs for the next 4 years since I had played at least one OHL exhibition or regular season game. The version of my Contract attached hereto as Exhibit "D" is the version that I understand the OHL approved. A subsequent version of Schedule "C" of the Contract was altered by the Commissioner and approved by the OHL. That version is attached hereto, as **Exhibit "L"**.
89. The OHL initially advised me that they would agree to pay one semester only. They later agreed to pay my second semester. I do not know if they will pay for my summer semester or any further schooling beyond what they have already paid.

**I AM PREPARED TO ACT AS A REPRESENTATIVE PLAINTIFF**

90. I have retained Charney Lawyers and have provided instructions to seek to have me appointed as a representative plaintiff on behalf of the Class.
91. I am prepared to act as a representative plaintiff of the following Class:
- a) *all players who are members of a team owned and/or operated by one or more of the defendants located in the Provinces of British Columbia, New Brunswick, and Nova Scotia (a "team") or 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 19 on October 17, 2012 (the "BC/NB/NS Class");*
  - b) *all players who are members of a team owned and/or operated by one or more of the defendants located in the Provinces of Ontario, Alberta, Manitoba, Prince Edward Island (a "team") or 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 (the "Ontario/Alberta/Manitoba/PEI/Saskatchewan Class");*

- c) *all players who are members of team owned and/or operated by one or more of the defendants 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 (the "Pennsylvania Class");*
- d) *all players who are members of a team owned and/or operated by one or more of the defendants located in the Province of Quebec (a "team"), or at some point commencing October 17, 2011 and thereafter, were members of a team and all players who were members of a team who were under the age of 16 on October 17, 2011 (the "Quebec Class"); and*
- e) *all players who are members of a team owned and/or operated by one or more of the defendants located in the States of Maine, Michigan, Oregon, and Washington, 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 (the "US Class").*

92. I am motivated to act as a representative plaintiff because I want to ensure that the Class Members are compensated properly and that the defendants are held accountable for their conduct relating to the refusal to pay the players their lawfully required wages.
93. I hope that at the end of the litigation, I and each Class Member will ultimately be compensated for the wages, overtime pay, vacation pay, and holiday pay we are owed as a result of the defendants refusing to pay our lawfully entitled wages.
94. I understand that the major steps in the class action are generally as follows:
1. The action was started by filing of the Statement of Claim;
  2. I am now asking the court certify the action as a class proceeding by this motion for certification;
  3. Cross-examinations on the affidavits filed on this certification motion may be held;

4. There will be a court attendance before the Honourable Justice Perell where my lawyers will argue whether the action can proceed (be certified) as a class action;
  5. If the court certifies the action as a class proceeding, notice of the certification order will be given to the Class who will have the opportunity to opt out of the class action within a fixed period;
  6. If the action is certified, the court will determine the common issues to be tried;
  7. Examinations for discovery will be held, during which lawyers for the defendants will ask me questions and my lawyers will ask questions of one or more representatives of the defendants;
  8. Conferences may be held with the Honourable Justice Perell, or another Justice of the Ontario Superior Court of Justice from time to time;
  9. If the action does not settle, there will be a trial of the common issues and the court will decide whether or not the defendants acted reasonably and whether damages are to be awarded;
  10. If the Class is successful at the trial of the common issues, the court will decide upon a procedure for the assessment of damages if damages cannot be assessed globally;
  11. If damages are to be assessed individually, then notice will be given to the Class to give them the opportunity to participate at this stage to prove their individual damages;
  12. Appeals may be taken at various stages of the class action; and
  13. The class action may be settled, but only with court approval, at any stage.
95. I also understand that, in agreeing to seek and accept an appointment by the court as a representative plaintiff, it is my responsibility, among other things, to:
1. review the statement of claim and any amendments thereto;
  2. become familiar with the issues to be decided by the court;
  3. assist in the preparation and execution of this affidavit in support of the motion for certification;
  4. attend with my lawyers for my cross-examination on this affidavit;

5. to attend with my counsel for examination for discovery (if necessary) where I will be asked questions by lawyers for the defendants;
  6. attend with my counsel at the trial of the common issues and give evidence regarding the case, if required;
  7. receive briefings from and to instruct my lawyers;
  8. express, in some circumstances, my opinions on strategy to my lawyers;
  9. express my opinion to my lawyers and to the court if offers to settle are made;
  10. express my opinion to my lawyers and to the court if settlement positions are to be formulated;
  11. assist in the preparation of and to sign an affidavit in support of court approval of any settlement;
  12. negotiate and execute an agreement respecting fees and disbursements with my lawyers and to seek the court's approval of our agreement; and
  13. to communicate with members of the Class, as required.
96. To date, the following are some of the steps I have taken to fairly and adequately represent the class members:
1. Retained and instructed lawyers from Charney Lawyers;
  2. Provided documents and other information to my lawyers;
  3. Reviewed the Amended Statement of Claim;
  4. Aided in drafting this affidavit; and
  5. Met with Messrs. Charney and Eckart on several occasions.
97. If appointed as a representative plaintiff, I intend to take the following steps to continue to fairly and adequately represent the interest of the Class Members;
1. To instruct counsel;
  2. To discuss this action with Class Members, as required;
  3. To follow all developments in this proceeding; and
  4. To participate, as required, in the activities described in the paragraphs above.

**CERTIFICATION CRITERIA****SECTION 5.1(b): THERE IS AN IDENTIFIABLE CLASS OF TWO OR MORE PERSONS THAT WOULD BE REPRESENTED BY THE REPRESENTATIVE PLAINTIFF**

98. The proposed Class definition is:
- a) *all players who are members of a team owned and/or operated by one or more of the defendants located in the Provinces of British Columbia, New Brunswick, and Nova Scotia (a "team") or 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 19 on October 17, 2012 (the "BC/NB/NS Class");*
  - b) *all players who are members of a team owned and/or operated by one or more of the defendants located in the Provinces of Ontario, Alberta, Manitoba, Prince Edward Island (a "team") or 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 (the "Ontario/Alberta/Manitoba/PEI/Saskatchewan Class");*
  - c) *all players who are members of team owned and/or operated by one or more of the defendants 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 (the "Pennsylvania Class");*
  - d) *all players who are members of a team owned and/or operated by one or more of the defendants located in the Province of Quebec (a "team"), or at some point commencing October 17, 2011 and thereafter, were members of a team and all players who were members of a team who were under the age of 16 on October 17, 2011 (the "Quebec Class"); and*
  - e) *all players who are members of a team owned and/or operated by one or more of the defendants located in the States of Maine, Michigan, Oregon, and Washington, 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 (the "US Class").*
99. I have been advised by Andrew J. Eckart, and do verily believe that there are 60 teams participating in the CHL leagues with an active roster of 25 players per team. There are therefore approximately 1,500 potential class members for each season.

**SECTION 5.1(c): THE CLAIMS OF THE CLASS MEMBERS RAISE COMMON ISSUES**

100. Although I do not have any expertise to evaluate the propriety of the common issues, I have been advised by Ted Charney and Andrew Eckart and adopt their advice that the allegations in the Claim raise common issues which are presently proposed on behalf of the Class:

1. Are, or were, the Class Members employees of the defendant teams?
2. Do the defendant teams have an obligation to the Class Members under the Applicable Employment Standards Legislation to pay them minimum wages, overtime pay, holiday pay, and/or vacation pay?
3. If the answer to (2) is yes, did the defendant teams breach the Applicable Employment Standards Legislation by failing to pay the Class Members minimum wages, overtime pay, holiday pay, and/or vacation pay?
4. Was there a common contractual term that required that the defendant teams to pay the Class Members minimum wages, overtime pay, holiday pay, and/or vacation pay?
5. If the answer to (4) is yes, did the defendant teams breach the common contractual term to pay the Class Members minimum wages, overtime pay, holiday pay, and/or vacation pay?
6. Did any or all of the defendants conspire to violate the Applicable Employment Standards Legislation? If so, when, where, and how?
7. Is this an appropriate case for the defendants to disgorge profits?
8. Can any or all of the claims be assessed on an aggregate basis?
9. Are the defendants liable for punitive damages?



**SECTION 5.1(d): A CLASS PROCEEDING WOULD BE THE PREFERABLE PROCEDURE FOR THE RESOLUTION OF THE COMMON ISSUES**

101. I am advised by Messrs. Charney and Eckart that they estimate that the costs of prosecution of the action to a trial of common issues will exceed \$250,000 for fees and require a substantial amount for disbursements because of the need to retain experts.
102. I believe that the damages suffered by me and each Class Member are small when compared to the cost of prosecuting an action. Therefore, I believe that the cost would place individual litigation beyond my reach and the reach of most Class Members and it is thus not economically justifiable on an individual basis. Thus, if the action is certified as a class proceeding, access to justice will be enhanced. Similarly, judicial economy will be achieved because the potential for a multiplicity of actions involving the same issues will be avoided. Moreover, the defendants will incur increased costs if individual actions are mandated.
103. If this action is successful, I believe that the defendants will be forced to change their practices in relation to the manner in which they categorize and treat the players in the CHL leagues. They will be required to abide by minimum employment standards, including minimum wage laws, in the jurisdictions in which the teams operate. Thus, behavioural modification will be a by-product of permitting this action to proceed as a class proceeding.

**SECTION 5.1(e)(i)(iii): THE REPRESENTATIVE PLAINTIFF WILL FAIRLY AND ADEQUATELY REPRESENT THE INTERESTS OF THE CLASS AND DOES NOT HAVE ON THE COMMON ISSUES AN INTEREST IN CONFLICT WITH THE INTERESTS OF OTHER CLASS MEMBERS**

104. Having considered the common issues set out above, I cannot contemplate any differences among members of the Class relating to the common issues and I can therefore advise I do not have any interests that conflict with the interests of any other Class Members on any of the common issues.

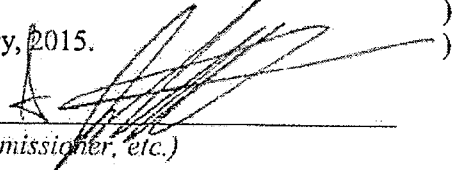
105. As I have already stated, I believe that most individual Class Members would find it prohibitively expensive to sue the defendants on their own.
106. I believe that I can fairly and adequately represent the interests of the Class and I am committed to fulfilling my responsibilities if the court appoints me a representative plaintiff.

**SECTION 5.1(e)(i)(ii): THE REPRESENTATIVE PLAINTIFF HAS PRODUCED A PLAN FOR PROCEEDING THAT SETS OUT A WORKABLE METHOD OF ADVANCING THE PROCEEDING ON BEHALF OF THE CLASS AND OF NOTIFYING CLASS MEMBERS OF THE PROCEEDING**

107. My lawyers have developed a plan for the proceeding setting out a workable plan of advancing the proceeding on behalf of the Class and of notifying Class Members of the proceeding (the "Litigation Plan"). I have been advised by Messrs. Charney and Eckart that the plan is subject to review by the court. Attached hereto as **Exhibit "M"** is a copy of the Litigation Plan.
108. The Litigation Plan also provides for:
- (a) the court to settle the form and content of a notice notifying the Class members of the certification; and
  - (b) the court to direct that the notice be:
    - (i) mailed to all last known addresses of the Class Members;
    - (ii) posted on the website at [www.chlclassaction.com](http://www.chlclassaction.com);
    - (iii) delivered by email by Class Counsel to any person who registered with Class Counsel and provided a valid email address and to any person who requests it; and
    - (iv) published in one national English language newspaper in Canada, in one French language newspaper in Canada, and in one national English language newspaper in the United States.
109. I have reviewed the proposed notice program and believe that, if implemented, it would notify the majority of the Class Members.

110. I swear this affidavit in support of the motion for certification of this action as a class action, for the consolidation of several actions, and for no other or improper purpose.

SWORN BEFORE ME at the )  
City of Toronto, in the Province of )  
Ontario, this 18<sup>th</sup> day of )  
February, 2015. )

  
\_\_\_\_\_  
(A Commissioner, etc.)

ANDREW J. ECKART  
LSUC # 60080R

  
\_\_\_\_\_  
SAMUEL BERG