



PRIVATE & CONFIDENTIAL

Major League Soccer

**Per: Anastasia Danias,
Executive Vice President and General Counsel**

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Vancouver Whitecaps Review Findings and Recommendations

Prepared by:

Janice Rubin and Melody Jahanzadeh
RUBIN THOMLINSON LLP
20 Adelaide Street East, Suite 1104
Toronto, Ontario M5C 2T6
Telephone: 416 597 5749
Email: jrubin@rubinthomlinson.com
www.rubinthomlinson.com

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1. Introduction

On November 3, 2021, Major Leagues Soccer (“MLS”) engaged Rubin Thomlinson LLP to conduct an independent review of how the Vancouver Whitecaps Football Club (the “Whitecaps” or the “Club”) handled allegations of misconduct, brought forward by members of the Whitecaps women’s team against two former coaches, Bob Birarda and Hubert Busby Jr. The issue of how the Club handled the allegations against Mr. Birarda had previously been reviewed by a third party. However, when new allegations of misconduct regarding Mr. Busby Jr. appeared in the media in 2021, MLS asked us to conduct an additional review.

By way of background, the Whitecaps is a Canadian soccer club. They run a professional men’s team (which is part of MLS), as well as various soccer programs, academies, and camps for girls and boys of all ages and skill levels. Between 2003 and 2012, the Whitecaps also ran a semi-professional women’s team, which played in the women’s United Soccer League.

MLS is a professional men’s soccer league, currently comprised of 25 American teams, and 3 Canadian teams, one of which, as noted above, is the Whitecaps’ men’s team.

2. Our Mandate

We were asked to examine the Whitecaps’ response to two separate allegations raised about Mr. Birarda in 2008 (May 2008 and September 2008). Mr. Birarda left the Club shortly after these allegations were investigated. We were also asked to examine the Whitecaps’ response to allegations raised about Mr. Busby Jr. in August 2011. He too left the team shortly after these allegations were raised and investigated.



We were asked to consider the Club’s internal processes and overall culture at the time of the allegations, including the steps it took in response to the allegations. We were also asked to consider the Club’s current policies and procedures, and, if warranted, provide any recommendations on preventative measures to ensure that all players and staff work in a safe environment, free from harassment and fear of retaliation.

We did not investigate whether the allegations against either Mr. Birarda or Mr. Busby Jr. were true.

3. Conduct of the Review

To begin this review, we set up a dedicated email account for those who wished to contact us directly and on a confidential basis. Neither MLS nor the Whitecaps had access to this email account. The email address was communicated in MLS’ public announcement of this review on November 4, 2021. The email address was also shared directly with current Whitecaps employees. We interviewed everyone who contacted us in this way.

In addition, we asked for and received approximately 3000 pages of documents, which related to the events of 2008 and 2011, as well as various policies and procedures and training material. We reviewed all this material.

We identified 30 individuals who we wished to interview, and we contacted those who we could find to ask if they would participate in this process. These individuals included former players and coaches, and current and former Whitecaps employees. It also included the external investigator who the Whitecaps had hired in 2008 and 2011 to investigate the allegations against the two coaches.

While all current Whitecaps employees agreed to be interviewed, regrettably, most of the other people who we had identified did not respond

to our request to participate. Some told us explicitly that they did not wish to participate in this review. We made numerous attempts to contact the external investigator, and we were unsuccessful. Therefore, we had to make our assessment without this investigator's input.

We did not interview as many former players as we would have liked. Their voices, which we very much wanted to hear, are largely missing from this review. Initially, we spoke with a lawyer who represented the Professional Footballers Association Canada (PFACan), which included a number of former players from the Whitecaps women's team. We had hoped he would be able to facilitate the interviews of these former players. Unfortunately, that never happened, despite what we believe to have been the best efforts of this lawyer.

We understand the former players' reluctance to speak with us. Ours is not the first process of this kind. A review that investigated the Club's handling of the 2008 allegations was conducted by a third-party reviewer in 2019. Another review is currently being undertaken by a third party to assess the Canadian Soccer Association's (the "CSA")¹ response to the 2008 allegations against Mr. Birarda, given that they arose when he was a coach for that organization. Most recently, it was announced that the International Federation of Association Football ("FIFA") will be examining these issues as well, although the scope of this process is not yet known to us. It may be that the former players are fatigued by these reviews and did not want to relive these events with us. It may also be that with so much "investigation waters under the bridge," the former players did not trust this process.

¹ The Canadian Soccer Association is the governing body for soccer in Canada and oversees the men's, women's, and junior Canadian soccer teams.

A few former players, with whom we did communicate, but who ultimately chose not to be interviewed, requested that in the absence of their information, that the review’s “outcomes and conclusions are caveated in order to accommodate any future disclosures,” including that of those players. We therefore cannot rule out that at some point in the future, there may be new information from former players. It is conceivable that with this information, our findings may have been different.

In the end, in addition to our extensive documentary review, we were able to interview:

- Four current Whitecaps employees, and one former employee, who had varying degrees of involvement with the 2008 and 2011 investigations (the “Whitecaps executives”).
- Nine individuals with respect to historical concerns and/or current Whitecaps policies, procedures, and training. Of these nine, three were former players.

4. Findings Regarding the Club’s Response to Allegations of Misconduct

Based on the evidence available to us during this process, we found the following:

- i. In 2008, two separate sets of allegations were raised against Mr. Birarda, both involving inappropriate communication and behaviour towards some of the female players he coached. The Whitecaps promptly initiated investigations into each matter. The first took place in May 2008. That investigation found that Mr. Birarda had engaged in inappropriate behaviour with a young female player. At the conclusion of this investigation, the Whitecaps met with the CSA to

notify them of Mr. Birarda's inappropriate communication. This was because of the CSA's governing role over coaches and because he was a coach for that organization.

- ii. The investigator recommended that Mr. Birarda attend a one-on-one coaching session with the investigator, and that he sign a commitment letter agreeing to adhere to the appropriate standards of behaviour. Mr. Birarda complied with both recommendations.
- iii. The second investigation occurred in September 2008 and was conducted jointly with the CSA because Mr. Birarda was coaching the Canadian women's under-20 national team at this point. The September investigation, which was conducted by the external investigator from the first investigation, found that Mr. Birarda continued to engage in inappropriate behaviour towards players.
- iv. As a result, the Whitecaps, the CSA, and Mr. Birarda entered into a confidential severance agreement, and he departed the Club.
- v. In 2011, the Whitecaps became aware of various allegations about Mr. Busby Jr., including those that related to inappropriate behaviour towards a female player. They promptly initiated an investigation, by retaining the same external investigator they had used in 2008. The results of this investigation were "inconclusive." Nevertheless, Mr. Busby Jr.'s contract with the Whitecaps was not renewed.
- vi. The Whitecaps' response to the allegations of misconduct against Mr. Birarda in 2008 and Mr. Busby Jr. in 2011 was appropriate. Namely, they acted expeditiously in each instance by hiring an experienced workplace investigator, relied on the investigator's judgment and apparent expertise, and adhered to all of the investigator's recommendations at the conclusion of each investigation. In addition,

they ultimately decided to part ways with Mr. Birarda and Mr. Busby Jr. based on information they had about the coaches' conduct.

- vii. The Whitecaps did not attempt to dismiss or "cover up" the allegations, but rather, took them seriously, and actively ensured that the allegations were addressed, and involved the CSA where appropriate. We found the Whitecaps witnesses who spoke to us in this regard to be credible.
- viii. We had significant concerns with the investigations themselves. We found them to have been superficial and lacking in depth. They appeared to have been rushed and limited in the number of individuals interviewed. Of particular concern was the lack of an examination of the phone allegedly used by Mr. Birarda to send texts to the players in 2008.
- ix. Most problematically, the investigator did not prepare written investigation reports for *any* of the investigations, and as a result, we did not have a complete record of the allegations themselves, the investigative process followed, the evidence that was gathered, the investigator's analysis, and the basis for their recommendations. In our opinion, this fell well outside the recommended practice for workplace investigators.
- x. Some of the investigator's findings seemed overly generous to Mr. Birarda and Mr. Busby Jr., despite the evidence about their misconduct towards players. Moreover, the investigator's recommendation at the conclusion of the May 2008 investigation, that Mr. Birarda receive one-on-one coaching and sign a commitment letter, appears disproportionate to the severity of the matter – namely, that Mr. Birarda as a coach in a position of power had sent sexualized

messages to a young female player. We query whether this was an appropriate recommendation.

- xii. In fairness, we did not think that the concerns with the investigations could be attributed to the Whitecaps, given that they stemmed from the decisions of the investigator, upon whom the Whitecaps heavily relied for direction. We note that, at the time, the Whitecaps did not have a sophisticated human resources infrastructure, and did not have experience dealing with these types of allegations. Given the investigator's apparent expertise and the Whitecaps' lack of it on these matters, it was our view that the Whitecaps' reliance on the investigator was reasonable in the circumstances.
- xiii. We were unable to review the 2008 severance agreement between Mr. Birarda, the Whitecaps, and the CSA. Because it was confidential, all the parties to it would have had to agree for us to see it. Only the Whitecaps were prepared to do so. Based on other evidence we were able to review, however, we do question the appropriateness of the agreement itself. We query whether it was overly generous to Mr. Birarda both in terms of any payments he may have received, his ability to characterize his departure from the Club in a favourable way, and any provisions regarding future communication if they existed. This may have affected how transparent the Club could be with the players about the reasons for his departure.
- xiv. We did have concerns about some of the Whitecaps' actions with respect to the players. After the first set of allegations were raised in May 2008, Mr. Birarda's access to an apartment complex in which some of the players resided was not removed. To be fair to the Club, they explicitly raised this with the investigator, and the investigator

did not make such a recommendation. Nevertheless, we consider this to have been an oversight.

- xiv. Secondly, following Mr. Birarda's exit in 2008, the Club appeared to focus primarily on the needs of the Whitecaps and Mr. Birarda. We believe more could have been done to support the players. For example, the Whitecaps could have reviewed the newly created respectful workplace policy with the players to ensure they understood how they were protected, and where to go if they experienced problematic behaviour, and/or provided more clarity regarding the circumstances surrounding Mr. Birarda's exit.
- xv. We did, however, find that following the 2011 investigation about Mr. Busby Jr., the Whitecaps adopted a more player-centered response by arranging for proactive communication with players to discuss the workplace policy, and to offer them mental health support.

5. Findings Regarding the Club's Current Policies and Procedures

As part of this process, we reviewed the current policies and procedures the Whitecaps have in place that deal with harassment, discrimination, and related safe sport issues. We also looked at the training materials that are currently in use.

We found that the Whitecaps have strong measures in place to ensure a safe environment, in the form of well-developed policies and procedures, robust training, vetting practices for coaches, and confidential reporting lines.

More specifically, we found the following:

- i. The Whitecaps have numerous policies that apply to the various elements of its Club. These include, the Safety and Respectful

Workplace Policy (applies to operational employees and coaches), Player Handbooks (applies to amateur players in various academies, programs, and camps), a Code of Conduct (applies to amateur players and coaches), the MLS NEXT Safety and Wellbeing Policy (applies to amateur players and coaches), and the Non-Discrimination and Anti-Harassment Policy for MLS Players (applies to professional players). These policies are reviewed and updated regularly.

- ii. The Whitecaps train members of its clubs on these policies, and the training is delivered regularly. For amateur players, this occurs throughout the season of their particular program. The frequency of training for the coaching staff was interrupted by the COVID-19 pandemic, but this is now resuming, and it is intended that coaches will participate in two to four sessions annually. Additionally, at the beginning of each program, coaching staff meet with players and parents to discuss the Player Handbook, safe sport principles, and reporting procedures including the anonymous hotline and email address.
- iii. Professional players receive mandatory training when they first join the Club, and annually thereafter. This training supports the Non-Discrimination and Anti-Harassment Policy for MLS Players and is delivered via a one-hour video module, that was created specifically for MLS to address harassment, discrimination, and bullying in a professional sports environment. The training material is updated periodically. The training material and the policy have been reviewed by MLS' Canadian counsel to ensure they are compliant with British Columbia provincial law, given where the Whitecaps are situated. We found that the policies and training material are generally compliant, subject to our recommendation at section 6 (i) below.

- iv. Training materials incorporate the Canada Soccer Guide to Safety, and the US Safe Sport Policy. The material for the professional players was done by an American law firm expert in this area.
- v. The Whitecaps employ a Safe Sport Director who is responsible for safe sport for the entire Club. This is a newly created position, and it is intended that this person will assist the Club to deliver safe sport training to amateur players, coaches, and other employees going forward. The Club also employs safe sport officers specifically for its camps, which are geared to amateur players. The mandate of the safe sport officers is to observe issues that players may not feel comfortable reporting, or that coaches may not observe, and report concerns as necessary.
- vi. As noted above, there are confidential reporting lines to communicate concerns about harassment, discrimination, and safe sport, that are available for amateur players, coaches, Whitecaps employees, and professional players.
- vii. Through its policies and training, the Club addresses how to report a complaint, and also investigate such complaints. There have been no complaints of sexual misconduct involving coaching staff and players since 2011. Nevertheless, the Club has handled internal investigations of a different kind since then. Based on the evidence we reviewed, which included an examination of a sample (redacted) report, the Club appears to have the internal competency to investigate a workplace complaint.
- viii. End of season surveys are sent to amateur players, through which they have an opportunity to provide feedback or raise concerns. No concerns regarding sexual misconduct have been raised in these surveys to date.

- ix. Vetting practices for coaching staff include a vulnerable sector check, a criminal background check, and at least one round of interviews.
- x. Following the last third-party review in 2019, the Whitecaps formed a Safe Sport Advisory Committee, which met regularly over the following two years and implemented all of the recommendations in that report.

6. Recommendations

Based on the strength of its current policies and procedures, we have limited recommendations for the Whitecaps. Nevertheless, we do see a number of opportunities to enhance and strengthen their efforts. Our recommendations, and their rationale, are as follows:

- i. *Compliance with Canadian Law* — As the Whitecaps are a Canadian team located in British Columbia, it is important that their policies and training comply with BC law. We found that they generally do, but that the Non-Discrimination and Anti-Harassment Policy for MLS Players, which applies to professional players, does not address generic workplace harassment, which, in most provincial jurisdictions in Canada, does not need to be linked to a prohibited ground of discrimination such as race or sex. The supporting training video does fill in this gap somewhat, by addressing bullying, but suggests that while engaging in it is a policy violation, it is not unlawful. This is not accurate in the two Canadian jurisdictions in which MLS operates, British Columbia and Québec.

In addition, both the policy and training materials refer to “Legal Protections and External Remedies,” but those are exclusively American.

Lastly, the material with respect to the confidential reporting line that is posted at the Club contains only references to American law.

Accordingly, we recommend that a Canadian “addendum” to the policy be included, as well as in the training materials and the information about the confidential reporting line. This addendum should include the accurate legal concepts as well as reference to the British Columbia Human Rights Tribunal and WorkSafeBC. While the Whitecaps are “Canadianizing” their material, they should add the appropriate legal protections and external remedies for Québec as well, given the presence of CF Montréal, there.

- ii. *Confidential reporting lines* – There are three ways for members of the Club to confidentially report concerns. The first two, which are available for everyone in the Club, allow individuals to contact the line directly with no involvement with the Club. The third, which is an ability to contact a Club ombudsperson, does not. This latter option, which is for operational employees of the Club, is set out in the Respectful Workplace Policy and Procedures document. While the ombudsperson is identified as independent, anyone wishing to use their services must first contact Human Resources to obtain their contact information. This has the potential to undermine the confidential nature of this reporting method. We think a stronger process would be to eliminate the need to obtain the contact information this way, and simply include it in the policy itself so that Club members can proceed directly to the ombudsperson. Alternatively, the Club may wish to streamline its processes, and eliminate the third option, and use only the two confidential reporting lines. If this is the case, information regarding these lines should be included in the Respectful Workplace Policy and Procedures document.

- iii. *Player Handbooks' provision regarding electronic devices* — Currently, the Player Handbooks require youth academy players who are travelling to provide all of their electronic devices to their assistant coach at curfew and retrieve them the following morning. This requirement was originally implemented to ensure that players received the appropriate rest and sleep time, but it has not been enforced for the past few years.

We believe that there may be a safety risk in players being without any of their electronic devices while travelling, particularly for younger players. We would, therefore, encourage the Whitecaps to consider whether it is necessary to keep this requirement in the Player Handbook. To do so, they may wish to consult with safe sport experts to determine the right balance between a reprieve from screen time on the one hand, and the need to communicate for safety reasons on the other.

- iv. *Vetting and reference checks* — Given that Whitecaps coaches work closely with young males and females, the importance of the vetting process for coaches cannot be overstated. In our view, the Whitecaps can strengthen their reference checking process.

The Whitecaps can enhance the questions they ask during reference checks by explicitly asking questions related to safe sport. For example, the Whitecaps could consider asking references whether they have any concerns about how a candidate interacts with youth.

The Whitecaps conduct verbal and written reference checks. We think that this dual approach is highly worthwhile, particularly because verbal discussions can yield more detailed and nuanced information than a written reference. We learned that sometimes a prospective verbal referee does not reply to a reference inquiry. In our view, this can be telling and may point to a problem with a potential candidate.

Therefore, we recommend that the Whitecaps consistently obtain both verbal and written references for coaches for an application to be complete. Absent satisfactory references of both kinds, the candidate should not be considered.

Additionally, we recommend that the Whitecaps develop a formal policy with respect to who can provide references for former Whitecaps coaches. It may be beneficial for these references to be centralized and provided through HR, in the interests of consistency and objectivity.

- v. *Safe Sport “spot checks” for other programs and academies* — To augment the work of the Safe Sport Director and the safe sport officers, we would recommend that the Club make use of safe sport “spot checks” for its programs and academies. This type of objective and unannounced supervision may detect issues that could otherwise go unnoticed and could encourage players to report issues that they may not feel comfortable reporting to a Whitecaps staff member.
- vi. *Complaints, investigation, and remediation* — While the Whitecaps currently conduct adequate workplace investigations, the investigations nonetheless appear to be conducted on an *ad hoc* basis, with no written policies or procedures in place.

The Whitecaps are in British Columbia, a Canadian jurisdiction that is very prescriptive with respect to an employer’s duty to maintain a safe workplace. (This may not be the case in other jurisdictions in which MLS operates.) For example, WorkSafeBC requires that employers implement specific policies and procedures with respect to how they will address and investigate allegations of bullying and harassment and

outlines specific reporting requirements.² It has been explicitly held in BC that “bullying and harassment” includes “sexual harassment.”³

We think that the Whitecaps should implement written procedures with respect to their workplace investigations, to ensure compliance with statutory obligations and best practices.

Should investigations involving allegations of sexual misconduct occur in the future, similar to those regarding Mr. Birarda and Mr. Busby Jr., we also recommend that the remedies and responses specifically and consistently consider the needs of players and other individuals impacted by the misconduct. Such responses and remedies could include proactively offering mental health supports to the individuals involved, and transparency about the investigation and follow-up actions.

We also recommend that the Whitecaps implement a centralized data tracking system, to monitor the number and types of complaints received, and the respective outcomes. This information may prove useful, insofar as it could identify trends, and signal updates that might be needed to existing Whitecaps policies, procedures, and training materials.

7. Conclusion

While the 2008 and 2011 investigations were lacking, the Whitecaps’ actions indicate that they took the allegations seriously, and through the use of an external investigator, addressed them at the time. We saw no evidence of a “cover-up” or an interest in dismissing the allegations.

² BC Workers Compensation Act, sections 71(2)(a) and 72(2)(a); see also Policy Items P2-21-2, P2-71-1 and P2-72-1.

³ A2000672 (Re), 2021 CanLII 59921.



Since 2008, the Whitecaps have developed increasingly more robust measures to address harassment, discrimination, and safe sport issues. They currently have strong measures in place to ensure a safe environment, in the form of well-developed policies and procedures, robust training, and vetting practices for coaches.

We hope this review provides some closure to the players affected by the 2008 and 2011 allegations and provides additional ways in which the Whitecaps can continue to provide a safe environment for its players and employees.

Date: July 28, 2022

Two handwritten signatures are shown side-by-side. The signature on the left is "Janice Rubin" and the signature on the right is "Melody Jahanzadeh". Both signatures are in cursive ink.

Per: Janice Rubin and Melody Jahanzadeh
RUBIN THOMLINSON LLP