The Alberta NHL Players Tax: The Jock Tax Comes to Alberta—or Does It?

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PRÉCIS

Le présent article analyse l'impôt sur les joueurs de la LNH de l'Alberta dans le contexte plus large de l'imposition des athlètes professionnels. À cause de leurs salaires élevés et de leur image publique, les athlètes professionnels ont souvent retenu l'attention des administrations fiscales.

Les administrations fiscales fédérales du Canada et des États-Unis en sont arrivées à un compromis assez simple et efficace sur le traitement des athlètes professionnels en vertu du traité Canada/États-Unis. Cependant, l'imposition des athlètes professionnels aux États-Unis par des administrations autres que le gouvernement fédéral est devenue complexe et constitue en quelque sorte une mesure de représailles à la levée de la « Jock Tax » par de nombreux États et municipalités. Essentiellement, cet impôt exige des athlètes professionnels visiteurs qu'ils paient l'impôt sur le revenu sur la partie de leur salaire attribuable au temps qu'ils passent dans l'État ou la ville concernée.

L'auteur examine l'approche américaine de la « Jock Tax » et les nombreuses critiques et réformes proposées à ce régime. Il discute ensuite en détail de l'impôt sur les joueurs de la LNH de l'Alberta et le compare à la « Jock Tax » aux États-Unis.

Finalement, l'auteur examine les arguments du gouvernement albertain pour justifier la structure unique de l'impôt sur les joueurs de la LNH de l'Alberta. Il traite, entre autres, de l'application de l'impôt à tous les joueurs de la LNH, qu'ils résident ou non en Alberta, et de l'utilisation des recettes fiscales pour subventionner les deux équipes de l'Alberta de la LNH tant dans le contexte de la politique fiscale que dans la perspective d'un conflit potentiel avec l'ALÉNA.

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L’auteur conclut en faisant remarquer que bien que l’impôt sur les joueurs de la LNH de l’Alberta soit en fait une variante de l’approche américaine de la « Jock Tax », plusieurs améliorations fonctionnelles y ont été apportées. Cependant, tant l’impôt de l’Alberta que la « Jock Tax » ignorent clairement les principes de simplicité et de transparence contenus dans le traité fiscal Canada/États-Unis. Finalement, l’impôt sur les joueurs de la LNH de l’Alberta est contestable du point de vue de la politique fiscale. Bien qu’il puisse se justifier en quelque sorte comme moyen de récupérer les recettes fiscales perdues en faveur de la « Jock Tax » américaine, il n’en établit pas moins un dangereux précédent pour les administrations fiscales qui pourraient être tentées d’assujettir d’autres personnes à revenu élevé à un impôt supplémentaire en fonction de la profession qu’elles exercent.

ABSTRACT
The Alberta government introduced the Alberta NHL players tax in 2002. This tax is controversial in two respects. First, it exclusively targets a single profession, namely, players in the National Hockey League. Second, the revenue generated from the tax is channelled directly back to the owners of the Alberta NHL franchises, the Calgary Flames and the Edmonton Oilers. For players employed by the Alberta teams, the tax collects approximately 3 percent of the players’ salaries and transfers it back to their employers.

The purpose of this paper is to examine the Alberta NHL players tax in the larger context of the taxation of professional athletes. Owing to their large salaries and high public profile, professional athletes have often attracted the attention of taxation authorities.

At the federal level, Canadian and US authorities have worked out a fairly simple and effective compromise under the Canada-US tax treaty to deal with the taxation of professional athletes. However, at the subnational level in the United States, the taxation of professional athletes has become complicated and retaliatory as a result of the imposition of “jock taxes” by many states and cities. Essentially, jock taxes require visiting professional athletes to pay income tax on the portion of their salary attributable to the time spent in that particular state or city.

This paper considers the US approach to the jock tax, and the many criticisms of and proposed reforms to the jock tax system. Then the Alberta NHL players tax is discussed in detail, and compared and contrasted with the US jock taxes.

Finally, the paper considers the justifications given by the Alberta government for the unique structure of the NHL players tax. In particular, the application of the tax to all NHL players, whether resident in Alberta or not, and the use of the tax revenue to subsidize the two Alberta NHL franchises are discussed in terms of both tax policy and potential conflict with the North American free trade agreement.

The paper concludes by noting that, while the Alberta NHL players tax is indeed a variant of the US approach to the jock tax, several functional improvements have been made. However, both the Alberta tax and the US jock taxes clearly disregard the principles of simplicity and transparency reflected in the Canada-US tax treaty. Finally, the Alberta NHL players tax is questionable at a policy level. While the tax may be somewhat justified as a means of recovering revenue lost to US jock taxes, it sets a dangerous precedent that could tempt taxation authorities to subject other high income earners to extra taxation based on profession.

KEYWORDS: ALBERTA ■ ATHLETES ■ CANADA/US ■ INCOME TAXES ■ NONRESIDENTS ■ TAX POLICY
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INTRODUCTION

In 2002, the Alberta government enacted a novel and controversial income tax provision called the Alberta NHL players tax. Two aspects of this tax are remarkable. First, as its name suggests, the tax exclusively targets National Hockey League (NHL) players who play NHL games in Alberta. Second, the estimated $6 million in revenue generated by the tax each year does not stay in public coffers, but instead is channelled in equal portions to the owners of the Alberta-based NHL teams (the Calgary Flames and the Edmonton Oilers).

The Alberta government enacted this provision in order to prolong the survival of the Alberta NHL teams in a manner that was neutral to the finances of the province. The Alberta NHL teams had been pushed to the brink of financial extinction by a combination of soaring labour costs, the weak Canadian dollar, high local taxes, and the massive subsidization of US sports teams by US governments. The long-term fate of the Canadian NHL teams will be determined in September 2004, when a new collective bargaining agreement (CBA) will be negotiated between the NHL and the NHL Players’ Association (NHLPA). If the new CBA does not alter the economic landscape of the NHL in a way that enables Canadian teams to survive financially, the Alberta teams will likely leave the province for more profitable markets in the United States. The Alberta government developed the NHL players tax as a short-term method of subsidizing the teams until the new CBA is in place.

At first glance, the Alberta NHL players tax appears to be a variation on the US income tax concept known colloquially as “the jock tax.” The jock tax spread like wildfire in the United States during the 1990s. US states had noticed the rapidly escalating salaries of professional athletes, and the jock tax developed as a method of generating tax revenue from the salaries of visiting non-resident professional athletes. Essentially, states with jock taxes required visiting professional athletes to

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1 NHL Players Tax (enacted by SA 2002, c. 6, section 16), part 1.1 of the Alberta Personal Income Tax Act, RSA 2000, c. A-30, as amended (herein referred to as “the NHL players tax”).
3 The Alberta government stated, ibid., that the tax would provide the Alberta NHL teams “with additional revenue for operational purposes, while not costing the general public any money.”
6 For the purposes of this paper, “jock tax” will refer to the various taxes imposed by US states and cities on non-resident professional athletes. See generally Elizabeth C. Ekmekjian, “The Jock Tax: State and Local Income Taxation of Professional Athletes” (1994) vol. 4, no. 1 Seton Hall Journal of Sport Law 229-52.
pay income tax on the portion of their salary that could be attributed to the time spent in that particular state.

As we will see, taxing non-resident professional athletes is an attractive proposal for many US lawmakers. State and local governments appear to generate significant new revenue at little political cost. However, the creation of new revenue has been somewhat illusory; owing to the operation of interstate income tax credit systems, the jock tax generally just transfers revenue from one state treasury to another.7 Thus, jock taxes have inevitably led to retaliatory measures between states.

The existence of the US jock taxes appears to provide justification for the imposition of the Alberta tax. Since several US jurisdictions8 are taxing Alberta-based NHL players, it seems fair that Alberta (and the other Canadian provinces that are home to professional sports teams) should have a similar tax. Hence, Alberta jumped on the jock tax bandwagon, and the survival of the NHL in Alberta became intertwined with a new Canadian form of jock tax.

The purpose of this paper is to examine the Alberta NHL players tax within the broader context of the taxation of non-resident professional athletes. In order to determine the guiding principles for the taxation of non-resident athletes that have been developed at the international level, the first section of the paper will briefly discuss the taxation of NHL players at the federal level in both Canada and the United States, and the compromise worked out under the Canada-US tax treaty.9 The second section of the paper will discuss the evolution of the jock tax at the subnational level in the United States. In particular, the jock tax will be analyzed both from a policy point of view and in its role as a mechanistic model of income allocation. The third section of the paper will analyze the Alberta NHL players tax in its own right, and then compare and contrast it with the US approach to the jock tax. Finally, the justifications given for the application of the Alberta tax to all NHL players and the implications of using the tax as a subsidy will be considered under both domestic law and the North American free trade agreement (NAFTA).10

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7 The net revenue gained from imposing a jock tax is the total revenue generated by the tax minus the revenue lost as a result of granting credits to resident taxpayers for jock taxes paid in other states. Even when credits are taken into account, a jock tax state with a higher marginal rate than the athlete’s home state will obtain an overall increase in tax revenue. This issue will be discussed in more detail later in this paper. See also Alan Macnaughton and Kim Wood, “Should Provinces Tax Non-Resident Athletes?” in this issue of the Canadian Tax Journal.

8 The states of New Jersey, California, and Indiana, and the cities of St. Louis and Columbus. See Macnaughton and Wood, supra note 7, at note 66 and accompanying text.

9 The Convention Between Canada and the United States of America with Respect to Taxes on Income and on Capital, signed at Washington, DC on September 26, 1980, as amended by the protocols signed on June 14, 1983, March 28, 1984, March 17, 1995, and July 29, 1997 (herein referred to as “the Canada-US tax treaty” or “the treaty”).

INCOME TAXATION OF PROFESSIONAL ATHLETES AT THE NATIONAL AND INTERNATIONAL LEVEL

Income Taxation at the Federal Level in Canada and the United States

Canada establishes the nexus between taxpayer and taxation on the basis of both residence and source. Under subsection 2(1) of the Canadian Income Tax Act, Canadian residents are taxable on their worldwide income. On the other hand, under subsection 2(3), non-residents are taxable only on income from a Canadian source.

Residence is a question of mixed fact and law, and has been considered extensively in case law, published articles, and administrative policy statements. Recourse may also be had to residence tie-breaker provisions in tax treaties where a person has residential ties with more than one contracting state. An extensive discussion of residence is outside the scope of this paper, but a set of assumptions can be made to simplify the analysis. For the purposes of this paper, it will be assumed that players on Canadian teams are Canadian residents and players on US teams are US residents.

There is an additional wrinkle to income taxation in the United States. The United States, unlike any other major jurisdiction, also uses citizenship to establish a nexus between taxpayer and taxation. This means that while the United States taxes residents and non-residents in a similar manner to Canada—that is, residents are taxed on their worldwide income, and non-residents are taxed on their income from a US source—the US government also taxes its citizens across the globe, regardless of their residence for tax purposes.

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11 RSC 1985, c. 1 (5th Supp.), as amended (herein referred to as “the Act”). Unless otherwise stated, statutory references in this section of this paper are to the Act.


13 In practice, US citizens employed by Canadian teams may realize a significant tax advantage by retaining non-resident status in Canada. See Robert E. Beam, Stanley N. Laiken, and Daren A. Raoux, “The Taxation of Non-Resident US Athletes Employed by Canadian-Based Professional Sports Teams: Attracting Athletes to Canada,” Personal Tax Planning feature (1999) vol. 47, no. 2 Canadian Tax Journal 305-40; and Douglas R. Rosser, “Canadian Taxation of Professional Athletes,” paper presented at a Canadian Bar Association seminar on June 5, 1998 (on file with the author). However, for the purposes of this paper, we can ignore this situation since it will unduly complicate the analysis without enriching the discussion.


15 Carole C. Berry, “Taxation of U.S. Athletes Playing in Foreign Countries” (2002) vol. 13, no. 1 Marquette Sports Law Review 1-37, at 3, note 6, writes, “Interestingly, the U.S. taxation of worldwide income arises from the lack of definitions within the United States Code rather than from a specific power. Section 1 of the Code imposes a tax on the taxable income of ‘every individual,’ while section 61 declares that the income to be taxed is ‘from whatever source..."
Double Taxation

Subject to the Canada-US tax treaty and the foreign tax credit provisions, as discussed below, the interaction of Canadian and US federal tax laws results in a tangled web of double taxation for persons who provide services on both sides of the border. Consider, for example, an NHL game played in Calgary between the Detroit Red Wings and the Calgary Flames. As an NHL player on a Canadian team (and therefore, for our purposes, a Canadian resident), Jarome Iginla of the Calgary Flames would be subject to income tax in Canada on his worldwide income, including his employment income attributable to this particular game. On the other hand, as an NHL player on a US team (and therefore, for our purposes, a US resident), Chris Chelios of the Detroit Red Wings would be performing employment duties in Canada as a non-resident. Thus, under subsection 2(3) and subparagraph 115(1)(a)(i), Mr. Chelios would be liable for tax in Canada on his income that could be attributed to the employment duties he performed in Canada as a non-resident. However, he would also be liable for tax on the same income in the United States since as a US resident he would be taxed on his worldwide income. Therefore, with respect to income attributable to any games played in Canada, Mr. Chelios would face double taxation.

Of course, the same proposition would hold true in reverse. If the game took place in Detroit, Mr. Iginla would then be subject to double taxation.

The Case Against Double Taxation

It has long been recognized that double taxation is antithetical to the principles of international commerce. Double taxation can inhibit the transfer of knowledge, services, and culture across borders by, for example, discouraging the circulation of mobile taxpayers such as scientists, artists, and athletes. With respect to professional sports, double taxation could deter leagues from operating in more than one country; players would be very reluctant to cross borders if they knew that they would be subject to a double dose of tax. Hence, countries have entered into bilateral tax conventions and implemented foreign tax credit systems in order to agree on the allocation of revenue between jurisdictions and prevent double taxation.
The Canada-US Tax Treaty

Most modern tax treaties contain provisions to deal with the taxation of artistes and athletes, and the Canada-US tax treaty follows this practice. In general, article XVI(1) of the treaty provides that the income of entertainers and artistes will be taxed in the state where those persons have performed. However, article XVI(3) provides that article XVI(1) does not apply to professional athletes who are employed by a team that participates in a league with regularly scheduled games in both Canada and the United States. Therefore, NHL players are not covered under article XVI and instead fall under article XV, Dependent Personal Services.

Under article XV(2)(b), an American NHL player may not be taxed in Canada if he is present in Canada for less than 183 days in a calendar year and his salary is paid by a non-Canadian employer. Thus, a US-resident player employed by a US team would be exempt from Canadian tax. Assuming that Chris Chelios spent less than 183 days a year in Canada, he would not fall under article XV(2)(b) because his salary would at all times be paid by his employer, the Detroit Red Wings. By the same provision, Jarome Iginla would be subject only to Canadian tax on his salary paid by the Calgary Flames.

Calculation of Income Tax in Canada

In Canada, a player’s income from employment has been held to include salaries, performance or signing bonuses, promotional appearance fees, living and traveling allowances, free use of automobiles, and payments made by a club on a player’s behalf that would otherwise be a non-deductible expense to a player (such as agent’s fees, legal fees, or income taxes).

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21 All NHL players are employees. Although the terms of individual contracts are negotiated between a player and his team, all contracts are negotiated under the terms of the CBA between the NHL and the NHLPA. The CBA considers players to be employees of their team. Furthermore, all NHL players must be members of the NHLPA; players cannot circumvent the CBA in an attempt to become an independent contractor. See articles 2.1 and 26.1 of the CBA. Copies of the current CBA are available from the NHLPA.

For residents of Canada, such as Mr. Iginla, hockey employment income is computed under sections 5 to 8 of the Act. Furthermore, under section 8, players are entitled to the deductions that are available to all employees.

For non-residents of Canada, such as Mr. Chelios, income from employment duties performed in Canada is calculated under sections 5 to 8 of the Act as mandated by section 115. In addition, under paragraph 115(2)(c.1), non-residents are liable for tax on payments received for agreeing to enter into a contract for services to be performed in Canada (i.e. signing bonuses), for undertaking not to enter into such a contract with another party or as remuneration for duties or services to be performed in Canada, if the amount so received is deductible by the payer in computing income for Canadian income tax purposes.23

However, since the income included by the non-resident pursuant to section 115 is exempt under article XV(2)(b) of the Canada-US tax treaty, the non-resident is entitled to a deduction for the same amount under paragraph 110(1)(f). The result is that the non-resident (Mr. Chelios) will not be liable for any tax in Canada.24

Therefore, the result of the treaty is the elimination of double taxation for NHL players. At the federal level at least, the Canadian and US authorities have worked together to establish a taxation framework that is relatively simple and effective in allocating income between the countries, and that provides certainty and transparency for affected athlete taxpayers.

**THE JOCK TAX**

**The Rise of the Jock Tax**

Unfortunately, the logic and clarity of the Canada-US tax treaty was discarded at the subnational level when many US states and cities decided to levy a jock tax on visiting non-resident professional athletes.25 Thus, NHL players may become liable for jock tax in each state or city they visit that is not their home state or city.

The taxation of non-resident professional athletes at the subnational level arose because many US states do not recognize international treaty obligations.26 Furthermore, under well-established principles of US constitutional law, states have the power to tax the earnings of non-residents who provide services within the state.27

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23 IT-168R3, supra note 22, at paragraph 5.
25 In this context, a non-resident is any person resident outside the particular state or city.
27 Ekmekjian, supra note 6, at 233.
Although many states had non-resident income tax regulations on their books for several decades, these regulations were rarely enforced because the administrative costs of collecting the tax usually exceeded the revenue that could be collected. However, as noted earlier, the rapid escalation of salaries in professional sports beginning in the 1990s caught the attention of state revenue authorities, and the race was on to ensure that the state took a cut of any income earned within the state by non-resident professional athletes.

California was the earliest state to aggressively pursue non-resident athletes, a fact that came to national attention during the 1991 National Basketball Association finals between the Los Angeles Lakers and Michael Jordan’s Chicago Bulls. Following Chicago’s victory, California began pursuing Jordan and several other Chicago players for taxes owed for games played in California. In response, the Illinois authorities enacted a jock tax of their own dubbed “Michael Jordan’s revenge.” This bill was clearly retaliatory in nature; it applied only to athletes from states that taxed Illinois players. As we will see, this retaliatory aspect is a key reason for the rapid adoption of the jock tax by other states.

The city of Philadelphia also began to aggressively pursue non-resident athletes for tax starting in 1992. Since 1985, Philadelphia had had in place a “business privilege” tax that applied to any non-resident regularly conducting business in Philadelphia. This broad term applied in theory to all such non-residents, from visiting surgeons and lawyers to professional athletes. However, the city did not initially pursue the athletes, since it was thought that the revenue gained would be less than the administrative costs incurred to collect it. This situation changed in 1992 when a local lawyer generously offered to collect taxes from athletes on behalf of the city. He then sent out over 20,000 tax notices to professional athletes who had played in Philadelphia at any time from 1986 to 1992. Predictably, athletes were unenthusiastic about paying unforeseen tax bills. Particularly galling to the athletes was the retroactive nature of the enforcement. The situation was resolved after negotiations between the players’ unions from all four major sport leagues and the city of Philadelphia resulted in the city’s agreeing to drop the retroactive claim for back taxes.

Currently, 20 of the 24 states that are home to a professional sports team operating in one of the four major leagues have implemented jock taxes. The four states that do not have jock taxes are all states that do not tax personal employment income, whether it is earned by a resident or by a non-resident.

28 Ibid., at 235-36.
30 The NHL, Major League Baseball, the National Basketball Association (NBA), and the National Football League (NFL).
Reasons for the Popularity of the Jock Tax

There are several obvious reasons why jock taxes are attractive to state revenue authorities.

First, taxing non-resident athletes is extremely lucrative. Hoffman writes that there are 3,574 athletes participating in the four major professional leagues operating in the United States. Collectively, this small group of people earns just over US$8 billion annually, which is an average of about US$2.2 million per player. By comparison, it would take 407,539 individuals employed in the farming, fishing, and forestry industries to earn approximately US$8 billion annually. These taxpayers take home an average of US$19,630 a year. The concentration of such a huge amount of income in relatively few hands makes taxing athletes a lucrative practice.

For instance, the 2002 Major League Baseball All-Star game was a financial bonanza for the state of Wisconsin. The total tax haul of the state for the single game was estimated at US$136,000. Alex Rodriguez, the highest-paid player at the game, paid $8,864 in tax even though he only played a couple of innings in an exhibition game.

A second reason for the popularity of jock taxes is that they allow politicians to increase tax revenue without any negative political implications. Since non-resident athletes almost invariably do not vote in the taxing state, state politicians can impose a new tax on them without losing potential votes. If the choice is between increasing the tax rates of local voters and implementing a tax on wealthy non-voting, non-resident athletes, it is easy to see which option will be more appealing to legislators.

A third reason jock taxes have become popular is that they are fairly easy to enforce. Consider, for example, the difference between two different groups of highly paid non-resident individuals visiting a state. On the one hand, a visit by a professional sports team (or any other entertainer) is marketed to the public, discussed in the media, and published in league schedules. Hence, it is very easy for tax authorities to determine when a non-resident professional athlete has performed employment duties in a particular state and then to assess the player for tax accordingly. On the other hand, a board meeting of a Fortune 500 company is generally not public knowledge. It is much more difficult for tax authorities to find out about such a meeting than about a professional sports game.

Fourth, the labour supply of professional athletes is uniquely inelastic. Elasticity is a measure of a worker’s ability to choose where he or she will work. In professional

33 Hoffman, supra note 31, at 1083.
34 Ibid., at 1089.
35 Ekmekjian, supra note 6, at 235.
36 Hoffman, supra note 31, at 1089.
sports, an athlete has no control over where he or she will work; the athlete simply follows a pre-set schedule determined by the league. In contrast, other types of workers (such as the board members referred to above) may be able to pick and choose where they will work in order to avoid high-tax jurisdictions. The result of the inelasticity inherent in professional sports is that states can tax non-resident athletes without worrying that the source of these revenues will dry up.

Finally, and most important, states have implemented jock taxes because, in the words of one commentator, “states that don’t stick it to visiting athletes are basically giving away revenue.”37 Most states grant tax credits to their residents to offset any income tax paid to other states.38 This practice (in theory) protects residents from being subject to double taxation on their income. The athlete benefits because, even though he now has to pay a new jock tax in another state, his total tax burden does not increase. Instead, his taxes in his home state are reduced by the amount he has paid to the other state in jock tax. However, the athlete’s home state loses revenue, since granting credits shifts the cost of the jock tax to the athlete’s home jurisdiction. In other words, the state with the jock tax gains revenue at the expense of the home state.

Hence, jock taxes developed as a method of retaliation. After California took the initiative in 1991, other states were forced to implement jock taxes in order to recapture lost revenue. The comments of Senator Fullerton of Illinois, at the time that state introduced its jock tax, are illustrative:

I heard Michael [Jordan] was being taxed when the Bulls were playing the Los Angeles Lakers in the NBA finals, [and] I thought that was unfair. The main purpose of this [tax] is not to raise money. This is about equity and fairness. Why should we be losing money to the state of California?39

The Mechanics of the Jock Tax

There has been a great deal of debate in the United States over the form the jock tax should take, and each jurisdiction has put a slightly different spin on it. Generally, cities and states impose non-resident income taxes on personal service income. For a professional athlete, personal service income is considered to include wages, performance bonuses, and any deferred compensation that is attributable to services provided within the state.40 Most jurisdictions exclude signing bonuses from taxation; a signing bonus is not received for providing services, but merely for agreeing to a

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38 Ekmekjian, supra note 6, at 241. Illinois does not provide credits to its resident athletes for taxes they have paid to other states. Hoffman, supra note 32, at 3.
40 Ringle, supra note 29, at 184.
contract. Other types of income also are excluded, such as strike benefits, contract buyout payments, or any other payments not related to the provision of services.\textsuperscript{41}

While most states agree on how to calculate an athlete’s income, they have not agreed on a uniformly consistent method of apportioning the income among the source states where it was earned. To date, two models have been used: the “games played” method and the “duty days” method.

The state of New York originally used the games played approach.\textsuperscript{42} This method apportions an athlete’s earnings as follows:

\[
\frac{\text{total number of games played in New York}}{\text{total number of games played in a season}}
\]

The games played method is easy to enforce because tax authorities can determine tax liability simply by looking at the league schedule. However, this method of allocation was heavily criticized as being unfair. The games played formula ignores the fact that athletes are paid for more than just their game performance. Professional athletes are employees of a team for every day during the season, and they must train and travel with their team at all times.

Today, the duty days approach is used by all states, including New York, as the preferred method of allocating income,\textsuperscript{43} although variations in its application persist. The current version of the duty days approach was set out in the report of the Federation of Tax Administrators (FTA) task force in 1994.\textsuperscript{44}

In the FTA’s view, duty days include

- all days from the beginning of pre-season training through the last day in which the team competes;\textsuperscript{45}
- days during the off-season when the athlete is required to provide services in the off-season, such as instructional leagues, all-star games, or other promotional events; and
- days during the off-season when the player participates in training activities as part of a team-imposed program, but only if conducted at the facilities of the team.

\textsuperscript{41} Ibid.

\textsuperscript{42} Ekmekjian, supra note 6, at 240.


\textsuperscript{44} Federation of Tax Administrators, State Income Taxation of Nonresident Professional Team Athletes (Washington, DC: Federation of Tax Administrators, March 1994) (herein referred to as “the FTA report”).

\textsuperscript{45} This was also the position taken in Stemkowski v. CIR, 690 F. 2d 40 (2d Cir. 1982). See Jeffrey Adams, “Why Come to Training Camp Out of Shape When You Can Work Out in the Off-Season and Lower Your Taxes: The Taxation of Professional Athletes” (1999) vol. 10, no. 1 Indiana International & Comparative Law Review 79-113, at 105.
The FTA report also addressed days on which athletes travel from state to state. The report recommended that all travel days are to be included as general duty days. However, only travel days that include mandatory activities, such as a game, a practice, or any other meeting or obligation, should be apportioned to the state in which the game, practice, or other obligation was provided. Travel days that do not feature any of these mandatory activities are not apportioned to any particular state.

Finally, for injured athletes, duty days will not be apportioned to any particular state if the athlete is both on the disabled list and not providing any other services for the team. However, injury days will count toward the athlete's total duty days for the year.

Although the duty days approach has been widely adopted, it is not without its critics. The principal criticism is that this method reflects a rather simplistic view of professional athlete compensation. While, strictly speaking, the athlete is on duty only during the season, in today's highly competitive sporting world athletes cannot just take the off-season off. They must spend their off-season training, rehabilitating injuries, and generally preparing for the next season. Furthermore, athletes are "owned" by their team in the off-season, and they can be traded to other teams. The Tax Court of Canada, while considering another matter, observed regarding NHL players that "by any other standard of employment, these men were employed by their team for 365 days per year in which they were 'owned.'" Thus, the duty days concept may not accurately reflect the reality of professional athlete employment.

Criticisms of the Jock Tax

The jock tax has been criticized on several fronts.

The first criticism is that the tax contravenes the basic principle of equity. Specifically, it singles out professional athletes for taxation while ignoring many other well-paid non-residents, such as railway and airline workers, doctors, and lawyers, who also often work in more than one state.

Some authors, however, argue that state and municipal tax laws do not specifically single out non-resident athletes for taxation. These authors point out that income arising from services provided by a non-resident in the state or city is taxable in the state or city under its normal taxation provisions. For example, Philadelphia has attempted to tax all kinds of visiting professionals, including lawyers attending Philadelphia for a single meeting, deposition, or trial. Furthermore, jock taxes usually apply not only to athletes, but to all the travelling members of a team, including coaches and therapists.

Nevertheless, while states may purport to treat non-residents uniformly, the reality is that athletes are singled out for stricter treatment under non-resident

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46 Nanne et al. v. The Queen, 2000 DTC 1653, at paragraph 12 (TCC).
47 See, for example, Hawkins et al., supra note 43, at 1739.
taxation laws. This is because, as previously discussed, enforcement is difficult except in the case of athletes and other entertainers. Only one state, New Jersey, is currently attempting to tax non-resident lawyers.49

The most serious complaint of professional athletes is that the patchwork of jock taxes across the United States creates a system that is very difficult to comply with, even in good faith.50 Professional athletes visit many different states within a season and may have to file tax returns in each one. Multiple filing is expensive, time-consuming, and complicated, and it places a heavy onus on the player (and his expert advisers) to determine the application of the many slightly different jock tax regimes set up by the various states.

Furthermore, the lack of uniformity in the approach to athlete taxation may still result in double taxation in practice for two main reasons. First, double taxation may arise because states do not apply tax credits in a uniform manner. Some states provide credits only if the other state provides a similar credit, while others may impose other minor limitations. Illinois does not provide credits to its resident professional athletes for taxes that they have paid to other states.51 Alternatively, double taxation may arise if states do not use exactly the same allocation method to apportion income or do not agree on the facts used to determine allocation. Any variation in approach on either of these issues can result in the same income being taxed twice.

Additionally, credits are of limited use to an athlete who resides in a lower-tax jurisdiction, such as Pennsylvania (at 2.8 percent),52 but is being taxed as a non-resident in a higher-tax jurisdiction, such as California (at 9.3 percent).53 Generally, a state will grant a credit only up to the average marginal rate charged in the home state. Thus, a player resident in Pennsylvania would pay 9.3 percent in California but get a credit at home for only 2.8 percent; therefore, the player would be liable for an extra 6.5 percent in tax.54 Although, strictly speaking, this is not double taxation, the player still faces an additional tax burden.

49 Hoffman, supra note 32, at 4.
51 Hoffman, supra note 32, at 6.
52 Ibid., at 7.
54 This is why a jock tax state with a higher marginal rate than the athlete’s home state will obtain a net increase in its tax revenue despite granting tax credits to its residents. For example, California, which has the highest marginal rate among US states, always receives more money in jock taxes than it loses in credits.
Proposed Reforms to the Jock Tax

The FTA considered four options for reforming the taxation of non-resident professional athletes. These are briefly explained below.

Uniform Apportionment Model

The uniform model is more of a guiding philosophy than an actual model. Basically, this model advocates that whatever method of allocation is agreed to, all states should take a uniform approach and apply it absolutely consistently. A consistent approach would eliminate double taxation, ease compliance, and reduce the complexity of filing in many jurisdictions.

Home State Apportionment Model

The home state model would simply deem all income earned by the athlete to be earned in the state where he plays home games. In other words, if the athlete played for the Chicago Bulls, all his income would be attributed to Illinois.

This option was the unanimous choice of both the professional leagues and the players’ associations owing to its simplicity, ease of compliance, and the elimination of double taxation. Furthermore, home state apportionment makes sense given the reciprocal nature of professional sports. However, the home state model was dismissed after it was determined that it would not survive US constitutional scrutiny.

Base State Model

Under the base state model, the athlete would only have to file a single tax return in the state where his team is domiciled (his base state). The base state would then be responsible for correctly distributing an appropriate share of the tax collected to each of the other states to which the athlete owed tax.

Composite Filing/Partnership Model

The fourth option, the composite filing or partnership model, would require the athlete’s team to file a composite or consolidated tax return on behalf of the entire team in any state where a jock tax was assessed. This approach would ease the burden on individual players since they would no longer have to file individual returns outside their home state. In addition, this model would be more efficient,

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55 Adams, supra note 45, at 93-96.
56 Krasney, supra note 50, at 162.
57 Ringle, supra note 29, at 182. The home state model would require a professional athlete to include in his income all income derived from services provided outside the state. This is problematic constitutionally if the athlete’s home state is not his state of residence for tax purposes because it arguably violates the US Supreme Court’s interpretation of the due process clause.
58 Ibid., at 180.
since the team administrators would have access to all the necessary information, such as scheduling.59

Implementation of Reform

Clearly, states have not accepted the home state or base state models for apportioning income, nor have they instituted a composite return system. Furthermore, although states have generally accepted the duty days method for apportioning income, an agreement has not been reached to guarantee uniformity of application. Thus, some commentators have called on Congress to step in and solve the problem.60 Barger writes that it is unlikely that the states will resolve the problem since states are basically waging taxation warfare. Illinois enacted its tax on nonresident professional athletes for the purpose of not only recovering lost revenue, but also exacting revenge on the state of California.61

While it is impossible to predict the future actions of Congress, it appears that the current haphazard jungle of state jock taxes will persist into the near future. It is in this context that the introduction of the Alberta NHL players tax must be considered. The next section of the paper will examine the Alberta tax in detail, and then compare and contrast it with the US jock taxes.

THE ALBERTA NHL PLAYERS TAX

Analysis of the Tax

Section 48.3(1)62 provides that all NHL players who provide hockey duties or services to their team while in Alberta are required to pay a tax. To determine the application of the tax, four sub-issues must be considered, as discussed below.

Who Is an NHL Player?

“NHL player” is defined in section 48.1(1)(d) as follows:

“NHL player” means a player on the roster of an NHL team, whether the player is resident in or outside Canada.

59 Ibid.
60 See, for example, Paul Barger, “State Taxation of Nonresident Professional Athletes: Congress Must Step In” (1999) vol. 85, no. 2 Tax Notes 243-50.
61 Ibid., at 249. For an opposite perspective, see Tracy A. Kaye, “Show Me the Money: Congressional Limitations on State Tax Sovereignty” (1998) vol. 35, no. 1 Harvard Journal on Legislation 149-88. Kaye argues that the ability of Congress to prohibit state taxation of non-residents should be limited, since it is inappropriate to limit the ability of states to raise revenue at a time when Congress is also saddling states with greater responsibilities.
62 Unless otherwise stated, all statutory references in this section of this paper are to the Alberta NHL players tax.
Therefore, only players on the roster\textsuperscript{63} are taxable; coaches, training staff, and other team employees are outside the scope of the tax.

**When Are Hockey Duties or Services Provided?**

Section 48.1(2) provides:

For the purposes of this Part, an NHL player performs hockey duties or services in Alberta as a player for an NHL team
(a) when the player participates in an NHL hockey game in Alberta, and
(b) when the player is in the facility in which an NHL game is being played for all or part of the game, although the player is not participating in the game.

Therefore, a player who is on the roster and is in the arena during an NHL game in Alberta will be liable for the tax even if he does not actually play in the game.

**What Income Is Taxed?**

Under section 48.4, an NHL player must pay a tax of 12.5 percent of his NHL hockey income earned in Alberta for the year. The income earned in Alberta is determined on a per game basis by the following formula:

\[
A/B, \text{ where:}
\]

- \( A \) is the base salary of the player in effect on the day of the game played in Alberta;
- \( B \) is the number of calendar days in the NHL regular season in which the game is played.\textsuperscript{64}

Therefore, the amount of income earned in Alberta is the amount of salary the player would receive for each game day spent in Alberta.

For example, consider a player who makes a base salary of US$1.8 million. Since there are 180 days in the 2002-3 NHL regular season, the player’s taxable salary for each game day in Alberta is \((1,800,000)/(180) = $10,000\) per day. The player will then owe $1,250 in tax (12.5 percent of $10,000) for each game he plays in Alberta.

The definition of base salary is adopted from paragraph 1 of the current CBA between the NHL and the NHLPA.\textsuperscript{65} Base salary does not include signing bonuses, deferred compensation, or performance bonuses.

\textsuperscript{63} NHL rosters are limited to 23 players. However, the roster does not have to be composed of the same 23 players for the entire season. The roster may change throughout the year as players are traded, sent to the minor leagues, or put on the injury reserve list.


\textsuperscript{65} The current CBA expires on September 15, 2004.
Who Is Responsible for Calculating and Remitting the Tax Owed to Alberta Authorities?

Each NHL team is responsible for withholding and remitting the tax owed by its players to Alberta Revenue. Amounts withheld must be remitted by the 15th day of the month following the game in Alberta and be supported by an electronically filed NHL players tax monthly withholding summary.

The only responsibility of the individual player is to ensure that the team has made the required remittances. Provided that the proper remittances have been made, players do not have to file a tax return in Alberta.

Comparison with US Jock Taxes

From the above, it can be seen that the Alberta NHL players tax is quite different from the US jock taxes.

The first and most obvious difference is that while jock taxes apply only to non-residents who have income from a source within the state or city, the NHL players tax applies to both residents and non-residents of Alberta. The NHL players tax is not merely an extension of non-resident taxation but a stand-alone tax on a specific profession. The justification for this decision will be discussed in more detail later in this paper.

A second major difference is the method that is used to allocate income to Alberta. Alberta has devised a novel approach that has not been considered in the United States. In some respects, this approach is a modified duty days method; the athlete’s salary is prorated to determine the amount of salary that accrues per day. However, while the duty days method prorates the salary over a period that extends from the start of training camp to the end of the playoffs, the Alberta method includes only the regular season. Therefore, the amount of income attributed to each day is greater when calculated under the Alberta method than under the US duty days method.

The Alberta government mitigated the impact of this formulation by taxing athletes only on income accrued on game days. In contrast to the US duty days approach, Alberta does not attempt to tax players for non-game days spent in Alberta, whether the players are “on duty” or not. Thus, while Alberta-based players are in the province for more than half the season (at least 90 days), they are taxed only on approximately 43 days. Consequently, the higher income amount allocated to each duty day as a result of the narrower definition of season length is offset, to some extent, by the fact that far fewer days are taxable.

Therefore, it can be said that the Alberta model combines the best of the games played and the duty days models. Like the games played model, it is very easy for the Alberta government to enforce. Revenue officers simply have to check the NHL schedule to see which teams will be playing in Alberta on a given night. The Alberta model also eliminates debate on whether a non-game day is a duty day or not: if the team does not play a game, that day is not a duty day. This approach seems preferable to the duty days model, which may lead to a dispute between players and a state over whether a particular meeting or training session made a day a duty day.
In addition, since only game days are taxed, teams will not feel pressure to limit the duration of their stay in Alberta in order to minimize the amount of duty time spent in the province.

Furthermore, the Alberta method avoids some of the injustice inherent in the games played method since it recognizes that athletes earn their salaries throughout the season, not just on game days. Although criticisms of the duty days method for failing to recognize the year-round commitment of professional athletes would apply with even more force to Alberta’s “regular season only” method, the latter is also very pragmatic. By taking this approach, the Alberta government can apply a uniform season length to all teams, thereby eliminating the need to determine exactly when each team started its training camp or was knocked out of the playoffs.

A third major difference between the Alberta tax and the US jock taxes is that they use different definitions of income. The Alberta tax applies only to base salary, while jock taxes usually include performance bonuses and deferred compensation as income. Again, Alberta opts for simplicity; it is much easier just to determine the base salary of a player without worrying about highly variable and complicated contingent bonuses and deferred compensation plans.66

A fourth major difference is that Alberta has implemented a version of the composite filing method debated in the United States. The Alberta filing system incorporates the advantages discussed in the jock tax context.67 Since the onus is on the team to collect and remit taxes owed on behalf of the entire team, there is no new compliance burden put on individual players. The player does not have to file a tax return in Alberta, and thus his overall tax situation is not complicated further. This method is also very efficient; instead of all 23 players on a team trying to file a return after the season has ended, the team administrators can file a single return immediately after playing in Alberta.

The fifth and final major difference between the Alberta NHL players tax and its US cousins lies not in the structure of the tax, but in the destination of the tax money after it is collected. Unlike the jock tax revenue, which in most states goes into general revenue, the revenue realized from the NHL players tax is given by the Alberta government to the owners of the Calgary Flames and the Edmonton Oilers. The direct transfer of this tax from government to private business raises several concerns that will be discussed further in this paper.

**Taxation of All NHL Players**

**Tax Collection Agreements**

As discussed previously, US states tax income on a source basis. Thus, states are able to tax the recipient of income from a source within the state, whether the recipient

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66 However, this definition seems to allow for the creative structuring of contracts to minimize the amount of base salary subject to the tax. See Brean and Forgione, supra note 16, at 431, and Beam et al., supra note 13.

67 See above under the heading “Composite Filing/Partnership Model.”
is a resident or a non-resident. More specifically, this means that a state does not need to create new legislation in order to tax non-resident professional athletes; the imposition of a jock tax requires only a decision to enforce the state’s existing taxation jurisdiction and legislation against a particular group of taxpayers.

In contrast, Canadian provinces do not tax income on a source basis. Canadian provinces are limited to taxing the income of individuals who are resident within the province on the last day of the year. This approach is formalized in the tax collection agreements (TCAs) between the federal government and all of the provinces except Quebec.\(^{68}\) As a result, Alberta’s existing tax framework could not be extended to the imposition of a tax based on source. Alberta was forced to create a new and separate tax provision.

**NAFTA**

Of course, an ideal solution would have been to impose the new tax on all NHL players who do not play for an NHL team based in Alberta. However, this route may have been blocked by the long reach of NAFTA into domestic tax policy. Generally, international trade and investment agreements feature tax “carveout” provisions that limit the application of the agreement to direct taxation issues.\(^{69}\) In NAFTA, this general rule is set out in article 2103(1):

1. Except as set out in this Article, nothing in this Agreement shall apply to taxation measures.

However, article 2103 sets out a number of exceptions where tax law may in fact violate NAFTA. Specifically, article 2103(4)(a) provides that the national treatment requirement of article 1202 (Cross-Border Trade in Services) does in fact apply to income taxation measures. Article 1202 provides:

1. Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers.

The interaction of these provisions means that foreign parties providing cross-border services must be taxed no less favourably than domestic parties providing the same services. The US jock taxes comply with this requirement because they apply in the same manner to all professional athletes, whether they are resident or non-resident. However, an Alberta tax that applied exclusively to non-resident

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\(^{68}\) Although Alberta is currently negotiating a new TCA, it is unlikely that this approach will change, since taking an approach inconsistent with that of the other provinces would create numerous difficulties, including double taxation. Even Quebec, which does not have a TCA, follows the same approach.

players would treat resident and non-resident players differently and would likely violate the national treatment principles under NAFTA.

Article 2103(4) does contain a few exceptions to the national treatment requirement. Under paragraph (g), the requirement does not apply to any new taxation measure aimed at ensuring the equitable and effective imposition or collection of taxes and that does not arbitrarily discriminate between persons, goods or services of the Parties or arbitrarily nullify or impair benefits accorded under those Articles, in the sense of Annex 2004.

Thus, Alberta could argue that a tax on non-resident NHL players would be necessary to ensure the equitable imposition and collection of tax. In other words, since Alberta players are already paying income tax to the province for income earned in Alberta, a provision that taxed non-residents would only equalize the tax treatment of the two groups and would therefore ensure equal treatment. The counterargument would be that such a tax would discriminate on an arbitrary basis and therefore it is not saved by article 2103(4)(g). Hence, the question is whether or not discrimination based on a person’s residence is an arbitrary basis of discrimination. This scenario illustrates conflicting paradigms of tax law and international trade law. While discrimination on the basis of residence is a fundamental principle of tax law, it may contravene the basic tenets of international trade law. Although the answer to this question has yet to be determined, it is not surprising that Alberta decided it could not implement such a tax.

This analysis may, however, be based on a faulty premise. Not all commentators agree that professional hockey is a service covered by NAFTA. In a submission to the Subcommittee on the Study of Sport in Canada in 1998, Appleton & Associates International Lawyers stated that although it seems self-evident that professional sports is a service covered by NAFTA, the NAFTA’s careful wording modifies this situation. Since the professional sports teams are “investments” as defined in the Investment Chapter, the terms of the Investment Chapter will apply to them, rather than the Service Chapter rules.70

If this is the case, article 2103(4)(a) will not apply. Instead, article 2103(4)(b) will apply. This provision provides that article 1102 (Investment—National Treatment) does not apply to income tax measures. Thus, the Alberta tax may not be affected by NAFTA.

As always under NAFTA, there is a great deal of uncertainty owing to the lack of guiding case law and the enormous complexity of the agreement. The Alberta

government may well be justified in citing NAFTA as a major reason for structuring the tax as it did. However, there is room for argument that NAFTA does not apply to this type of income tax provision.

**The Relative Positions of Various Parties Under the Tax**

The decision to tax all NHL players has interesting ramifications with respect to the relative positions of various parties. These are discussed briefly below.

**NHL Players Versus Society at Large**

The Alberta NHL players tax applies only to a wealthy minority, singled out by their profession. Unlike US jock taxes, which at least in theory apply to all non-residents (even if they are enforced only against athletes), the Alberta tax is explicitly targeted at NHL players. Thus, the NHL players tax raises strong equity concerns.71 It is easy to dismiss this tax as relatively insignificant when compared with the huge salaries that NHL players earn. However, the government’s successful introduction of the tax suggests that society will not object to the targeting of high earners for extra taxation based on profession. The question that must be asked is, how far may this precedent be extended? Should lawyers pay an extra tax? Doctors? Stockbrokers? The NHL players tax may be the first step out onto a slippery slope.

**Alberta-Based NHL Players Versus Other NHL Players**

The more games a player plays in Alberta, the more NHL players tax he pays. Approximately half of the revenue collected under the tax will come from the pockets of Alberta-based players. The Flames and Oilers each play 41 games at home each season, and two or three away games in the other Alberta city.72 This means that Jarome Iginla of the Calgary Flames, who earned a base salary of US$5.5 million in 2002-3,73 paid approximately US$165,000 in additional tax to the Alberta government.74 Thus, for Alberta-based players, the NHL tax extracted 3 percent of their base salary. In contrast, the Detroit Red Wings play only four games in Alberta during a typical season. Chris Chelios, who earned roughly the same salary75

71 Particularly when other highly paid non-residents are not subject to the same harsh treatment. The auditor general found that the Canada Revenue Agency failed to take any enforcement action against non-resident actors who owed a total of $10 million in tax. See Brian Arnold, “Canada’s New Auditor General Reports on Taxation of Nonresidents,” Worldwide Tax Daily, January 4, 2002, 3-3.

72 The NHL regular season schedule is available online at http://www.nhl.com/onthefly/schedules/index.html.

73 Player salary information is available on the NHLPA Web site at http://www.nhlpa.com/.

74 [41 games in Alberta)/(180 days in the season]) * (US$5.5 million base salary) * (12.5%) = US$165,000.

75 According to the NHLPA, Chris Chelios received US$5,919,506 for the 2002-3 season.
as Mr. Iginla in 2002-3, owed only US$16,443 in tax.\textsuperscript{76} Thus, Detroit players surrendered only 0.2 percent of their base salaries under the NHL players tax.

**Canadian-Based NHL Players Versus US-Based NHL Players**

US residents who play for US NHL teams have a very significant advantage over Canadian-resident NHL players with respect to the players tax. American players can claim foreign tax credits from their federal tax authorities for tax paid in Canada. Typically, foreign tax credits result in a dollar-for-dollar reduction of US federal tax payable by the amount paid to the foreign government.\textsuperscript{77} While the operation of US credits at the federal level has been described by one commentator as a “monstrosity of monumental proportions,”\textsuperscript{78} for our purposes it is sufficient to note that American NHL players are largely unaffected by the Alberta tax, since their overall tax burden has not been increased.

In contrast, the overall tax burden of Canadian players has been increased. At present, Canadian revenue authorities do not offer credits for income tax paid to other Canadian provinces.\textsuperscript{79} Hence, Canadian players must pay the extra tax directly out of their salaries.

**Follow the Flowing Revenue: The Relative Positions of the Treasuries**

Brean and Forgione point out that the Alberta NHL players tax is designed to take advantage of the foreign tax credit system.\textsuperscript{80} This is a common feature of jock taxes. Both the NHL players tax and the US jock taxes have a “tax exportation spillover” effect, since the costs of the taxes are partially borne by governments of other jurisdictions.\textsuperscript{81} In the case of the Alberta tax, the US federal government and some state governments would give foreign tax credits to the American players. Thus, the cost of the Alberta tax is shifted from the athlete taxpayers to the US treasuries, and revenue is shifted from the United States to Alberta. The jock taxes cause the same effect; through the operation of credits, the federal government of Canada is essentially financing the cost of the US jock tax for Canadian players.

\textsuperscript{76} \((4\text{ games in Alberta})/(180\text{ days in the season})\) * \((US$5,919,506\text{ base salary})\) * \((12.5\%)\) = \(US$16,443\).

\textsuperscript{77} Berry, supra note 15, at 13.

\textsuperscript{78} Berry, ibid., at 16, states, “[W]hat originated as a rather benign tax code section has grown into a monstrosity of monumental proportions. It is a morass, the likes of which this author and people with whom this author has spoken have never encountered.”

\textsuperscript{79} The Alberta NHL players tax, section 48.5(c), gives the lieutenant governor in council discretion to grant Alberta players a credit for any similar tax paid to other provincial governments. Since no other provinces have introduced a similar NHL tax, no credit is available at this time.

\textsuperscript{80} Brean and Forgione, supra note 16, at 434.

This type of tax shifting seems antithetical to the principles embodied in the Canada-US tax treaty. Brian Arnold writes:

One participant noted that the non-discrimination principle in international taxation is closely related to the tax treaty article on the elimination of double taxation. . . . [I]f one country adopts the credit method, other countries have an incentive to impose “soak-up” taxes on residents of the first country who invest in the other countries, since these taxes ultimately will be borne by the first country’s treasury rather than by the investors themselves. The non-discrimination principle restrains this opportunistic governmental behaviour by prohibiting treaty partners from raising taxes on residents of the credit country unless they also raise taxes on their own residents.82

Of course, while it may not be the best international tax policy, what is sauce for the goose must be sauce for the gander. If California can tax Alberta residents at the expense of the Canadian treasury, it does not seem unfair for Alberta to tax California residents at the expense of the US treasury. The major surprise is that Alberta is the only Canadian jurisdiction to attempt to recapture some of this revenue.83

Transfer of NHL Players Tax Revenue to the Alberta NHL Team Owners

Since the 1990s, Canadian NHL teams have found themselves in an increasingly untenable financial position for several reasons. First, labour costs have soared. For instance, the average NHL salary has jumped 313 percent in the past decade (from US$572,000 in 199384 to US$1,790,000 in 2003.)85 Second, rising labour costs have hit Canadian teams harder than US teams. For Canadian teams, the majority of expenses such as players’ wages and travel costs are in US dollars, while the majority of revenues are in Canadian dollars.86 Thus, even if the playing field were otherwise level, the low exchange rate of the Canadian dollar against the US dollar puts Canadian franchises at a significant disadvantage. Finally, the playing field is far from level. US state and municipal governments give sports franchises massive

82 Arnold et al., supra note 69, at 74.
83 As previously noted, a jock tax state with a higher marginal rate than the athlete’s home state will obtain a net increase in its tax revenue despite granting tax credits to its residents. Since Canadian income tax rates are substantially higher than US rates, Canadian treasuries could realize significant revenue gains at the expense of US treasuries. For a detailed analysis, see Macnaughton and Wood, supra note 7.
subsidies and tax breaks not available in Canada. For example, the Nashville Predators NHL hockey team received from the city of Nashville:

- a new arena, constructed by the city and financed by tax-exempt municipal bonds;
- US $20 million toward the NHL expansion fee payable by the Predators;
- a subsidized lease for the arena, with rental payments capped at 5 percent of net gate receipts on game days;
- 100 percent of the revenue generated from preferred seating and in-arena advertising; and
- exemption from all local property, business, and school taxes.

Canadian governments simply cannot and will not offer this level of support to sports teams. For example, in 2000, the federal government proposed a multimillion-dollar aid package for Canadian NHL teams. An extensive public backlash against subsidizing multimillionaire team owners convinced the government to drop the plan.

As a result of the combined action of these economic forces, the Winnipeg Jets and the Quebec Nordiques left Canada for the United States. Of the six remaining teams in Canada, the only team consistently profitable is the large-market Toronto Maple Leafs.

As discussed earlier, concerned with the survival of the Alberta teams, the Alberta government decided to provide them with the revenue from the NHL players tax. This subsidization raises some interesting questions, as discussed below.

**Collective Bargaining: Alberta-Based Players Versus Their Employers**

The transfer of the revenue raised by the NHL players tax from the government to the owners of the two Alberta NHL teams has interesting collective bargaining implications. For Alberta-based NHL players, the tax takes money from the players’ pockets and gives it back to their employers. As NHLPA senior director Ted Saskin said,

> [w]e know of no situation where a private company can go to a government to effectively get their wage bill reduced. . . . This is taking money from an employee and sending it right back to his employer. It basically changes what the employer and the employee have agreed to in their wage contract.

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87 Appleton and Neceski, supra note 70, at 2-3.
The NHLPA filed an official grievance against the tax, but on March 5, 2003, an arbitrator ruled that the tax did not violate the CBA. Despite the arbitrator’s decision, the tax seems remarkably unjust from this perspective. One must ask, what legal or equitable basis does a government have to unilaterally compel employees to give 3 percent of their wages back to their employer? And once again, how far should or could this precedent be extended? The legal system is underfunded; should lawyers therefore pay a special income tax to fund it? Could we inject new financing into the medical system by taxing doctors? The NHLPA has stated that it plans to take further action regarding the tax. From this perspective, it is easy to understand why.

**NAFTA**

The transfer of government revenue to private local business may raise concerns under NAFTA’s national treatment provisions. It is argued that the national treatment principle would require the Alberta government to treat foreign investors the same as local residents.

The obvious flaw in this argument is that, as discussed in the introduction to this section, the Alberta tax pales in comparison with the huge subsidies paid out by US authorities to their sports teams. Again to cite some examples, US governments have contributed a reported 42 percent of the average US$148 million cost of constructing new NHL arenas. More specifically, the St. Louis Blues hockey team received from the city of St. Louis:

- US$62.5 million to help pay for construction of their new arena (financed by tax-exempt municipal bonds);
- US$34 million to prepare the Kiel Center for construction and to build a parking garage;
- rent-free access to and use of the municipal land where the Kiel Center is located; and
- a municipal property tax abatement on the Kiel Center land for a period of 25 years.

Thus, even if NAFTA were to apply to this situation, it would be ludicrous for US parties to complain about the Alberta subsidy. While “they started it” may not be
the best legal defence, it would have to be considered in this context. Since the US teams have more to lose than to gain from such a challenge, a complaint under NAFTA seems unlikely.

A Canadian parliamentary subcommittee looked at subsidization of sports and NAFTA in 1998. At that time, there was no consensus that NAFTA would apply to sports subsidies. Since then, no effort has been made to start a claim under NAFTA. One must infer either that the Canadian government has concluded that NAFTA does not apply to sports subsidies, or that the Canadian government lacks the political will to challenge US sports subsidies.

Ultimately, the most important factor with respect to NAFTA and the NHL players tax may be whether there are any parties that would actually bring a claim. The NHL and the individual teams certainly will not complain about the subsidy. The tax is revenue neutral to the franchises, and the subsidy stabilizes two economically vulnerable franchises at no cost to the league. US governmental parties are extremely unlikely to complain under trade law, for the reasons just discussed. Thus, the only group substantially affected by the tax is the Canadian players (and the Alberta-based players in particular). However, the players’ complaint is not about subsidization. The players’ complaint is that their salaries are used to fund the subsidy. Thus, the subsidy itself is unlikely to be challenged under NAFTA.

The Future of the Alberta NHL Players Tax

It is no coincidence that the NHL players tax expires after the 2005 taxation year. The subsidy is clearly a stopgap measure to help the Alberta teams survive until the NHL and the NHLPA work out a new CBA in 2004. In the long term, the terms of the new CBA will dictate whether the Alberta teams will survive. If the CBA allows Canadian teams to compete financially against the US teams, the subsidy will no longer be needed. Alternatively, if the CBA is not favourable, the Alberta teams will likely leave Canada. Thus, the Alberta NHL players tax may be a short-lived phenomenon. However, one wonders, if the teams survive but no longer need the revenue, will the Alberta government resist the temptation to retain the tax and keep the revenue for itself?

CONCLUSION

While seemingly somewhat specialized, the taxation of professional athletes raises important issues that will only become more and more common. Among other factors, the Internet, advanced telecommunications, unprecedented mobility, and the shift to a knowledge-based service economy have resulted in dramatic changes

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95 Mills report, supra note 4.
to the nature of employment and lifestyle. This rapidly evolving social environment will also change the nature of taxation as ever-increasing numbers of taxpayers cross international and subnational boundaries for employment reasons. Thus, the taxation of professional athletes is a highly visible precursor of the growing dilemma of the equitable taxation of mobile workers. Ageing theories about income allocation and sovereignty will need to be re-examined in order to allow taxation systems to keep pace with the modern world.

In that light, the Alberta NHL players tax and the US jock taxes are interesting examples of how, despite the best efforts of nations at the international level, taxation can become complicated, retaliatory, and inefficient at the subnational level. As we have seen, both taxes clearly disregard the principles of simplicity and transparency inherent in the Canada-US tax treaty.

In more functional terms, the Alberta NHL players tax is indeed a variant of the US jock taxes. However, several improvements have been made, and the result is that the Alberta tax is simpler, fairer, and more pragmatic than the US jock taxes.

Finally, at a policy level, the justifications for the existence of the Alberta tax are questionable. While the application of the Alberta tax to non-resident NHL players simply mirrors the US jock taxes and is therefore somewhat justifiable, the application of the tax to Alberta-based NHL players sets a dangerous precedent that could tempt tax authorities out onto a slippery slope.

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