

Forecheck, Backcheck...Paycheck? Employment Status of the Quasi-Professional Athlete: A Case Study of the CHL and the Major Junior Hockey Player

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INTRODUCTION	239
I. THE CANADIAN HOCKEY LEAGUE: BACKGROUND AND OPERATING STRUCTURE	244
II. BERG v CHL: BROADER CONTEXT AND SUMMARY OF ASSERTED CLAIMS	246
A. The NCAA and the Athlete-Employee in the Context of Unionization	246
B. Labor Relations in the CHL	249
III. STATUTORY CAUSE OF ACTION: THE ALLEGED EMPLOYMENT STANDARDS VIOLATION	251
A. Standard Player Contract: Player Compensation and Description of Relationship.....	251
IV. CANADIAN INDIVIDUAL EMPLOYMENT REGIME	254
A. The Two Pillars	255
B. ESA Enforcement	257
V. APPLICATION OF EMPLOYMENT STANDARDS LEGISLATION.....	261
A. Is There an Employee-Employer Relationship Between Players and Their Teams?	261
B. Application of the Sagaz Factors: Level of League Control	263
VI. PLAYING DEFENSE: DO PLAYERS FALL INTO AN EXEMPT CATEGORY?	266
A. Are Players Akin to Interns in a Professional Training Program?	266
B. Players are Provided With Room, Board, Equipment and Development ..	269
C. “We Believe That our Players are Amateur Student-Athletes”	271
VII. ADDITIONAL COMPONENTS AND ANCILLARY EFFECTS	276
A. Punitive Damages	276
B. Conspiracy and Waiver of Tort.....	278
C. Players’ Personality Rights.....	280
VIII. CONCLUSION	283

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Introduction

“It is, at base, a ticket-selling entertainment business. Those who buy franchises do so with the intent of turning a profit. They face the same challenges as other sports entrepreneurs, but unlike the professionals, their product — the players — costs them next to nothing.”

Stephen Brunt, Sports Journalist.¹

“[Y]ou don’t pay for skates, for sticks, for equipment, you don’t pay dues, and you get spending money. You bus. You stay in hotels. You get meals. Everything is looked after. It’s not that bad. I’m sick and tired of the attacks on junior hockey.”

Jeff Chynoweth, Owner of the Kootney Ice.²

With the commercial success of collegiate athletics in the United States (“US”), much attention and legal analysis has been directed at the National Collegiate Athletic Association (“NCAA”) and its treatment of the student-athlete. At the heart of the debate is the NCAA’s strict adherence to the principles of amateurism, which restrict athlete compensation even in the most commercially lucrative sports to tuition, educational support, and room and board. Critics accuse the NCAA of building a financial juggernaut on the sweat of their athletes and under the legal fallacy that characterizes these athletes as amateur student-athletes, as opposed to the quasi-professionals that they truly are.³

In the NCAA’s shadow, subject to comparatively little review and likely unbeknownst to much of the American audience interested in the sports landscape, a related debate is playing out predominantly north of the US border involving athletes of a similar age class and the Canadian Hockey League (“CHL” or the “League”). The CHL is the Canadian-based governing body of

¹ Stephen Brunt, *In Junior, Business Shouldn’t Go Before Players*, THE GLOBE AND MAIL, March 24, 2005, at S1, <http://www.theglobeandmail.com/sports/in-junior-business-shouldnt-go-before-players/article735327/>, [<https://perma.cc/GN6V-HGT8>].

² Eric Duhatschek, *Major Junior Hockey is About More Than Just a Paycheque*, THE GLOBE AND MAIL, Dec. 26, 2014, <http://www.theglobeandmail.com/sports/hockey/world-juniors/duhatschek-major-junior-hockey-is-about-more-than-just-a-paycheque/article22217155/>, [<https://perma.cc/KYZ5-2T69>].

³ See Darren A. Heitner & Jeffrey F. Levine, *Corking the Cam Newton Loophole, a Sweeping Suggestion*, 2 HARVARD JOURNAL OF SPORT & ENTERTAINMENT LAW 341, 342 (2010); Robert A. McCormick & Amy Christian McCormick, *The Myth of the Student-Athlete: The College Athlete as Employee*, 81 WASH. L. REV. 71, 74–75 (2006).

Major Junior hockey, an elite level of competition for players aged 16 to 20 years old that, just like the NCAA for football and basketball, serves as the primary pathway for young prospects hoping to reach hockey's top professional ranks. For comparative purposes, the CHL is a sort of hybrid that combines features of both the NCAA and Major League Baseball ("MLB")'s minor league system. CHL teams are not directly affiliated with any educational institution, nor are they or their players under the control of any one professional club, but the League exists to fulfill both educational and professional hockey purposes as its mandate is to develop players for professional hockey while also providing academic assistance.⁴ The CHL prepares players for the next level by operating with the structure and demand of a minor professional league, but rather than pay players a wage as professional athletes, it offers a modest weekly stipend while also making players eligible for an educational support package that is accessible upon completion of their CHL playing careers.

Although well-established as hockey's most important development league, the ice upon which the CHL skates may be starting to thin. The economic foundation of the CHL and its three regional leagues—the Quebec Major Junior Hockey League ("QMJHL"), the Ontario Hockey League ("OHL"), and the Western Hockey League ("WHL")—is being challenged in a series of legal proceedings initiated by former players alleging that the three leagues and their teams are operating in breach of employment standards legislation. The catalyst is a class proceeding filed for certification with the Ontario Superior Court of Justice in October 2014 by representative plaintiff Samuel Berg which seeks a declaration that Major Junior players are in fact employees of CHL teams and are therefore subject to corresponding legislative protection. Incident to such a finding, the action is claiming monetary relief of over \$150 million attributable to outstanding

⁴ See *Mission*, QUEBEC MAJOR JUNIOR HOCKEY LEAGUE, <http://theqmjhl.ca/mission/>, [<https://perma.cc/S623>].

wage entitlements and \$25 million in punitive damages as compensation for the CHL’s conduct in previously failing to meet the players’ employment entitlements, as well as an order requiring the CHL and its teams to disgorge profits generated as a result.⁵

The answer to whether or not CHL players are employees and therefore subject to employment standards protection will have a significant impact on the business of Major Junior hockey. The broader policy debate features claims from the CHL and its supporters that teams in smaller markets considered to be the ‘social bedrock’ of their respective communities will be forced to cease operations if required to comply with legislated minimum wage entitlements.⁶ The opposition argues that modern Major Junior today is a significant economic institution that bears little resemblance to the “mom and pop” operations of years past, and that some teams are making large profits off the backs of players while taking on little responsibility for their well-being.⁷ Although relevant in the court of public opinion, these policy considerations do not necessarily define judicial decision-making on the matter. The main issue to be decided before the court is whether or not Major Junior hockey players are employees as statutorily defined, and if they are, whether or not they fall into one of the many exempt categories of workers that render employment standards legislation inapplicable.

The primary purpose of this article is to take an in-depth look at the legal principles underlying the Berg class proceeding, focusing on the question of employment status while also touching upon complementary causes of action and ancillary considerations. Using the province

⁵ See *Berg v. Canadian Hockey League* (2014), No. CV-14-514423, Statement of Claim para.2 (Can. Ont. Sup. Ct. J.) [hereinafter *Berg Statement of Claim*].

⁶ See Rick Westhead, *CHL Should Pay \$187M for ‘Illegal’ Conspiracy, Former Players Say*, TSN (Feb. 23, 2015), <http://www.tsn.ca/chl-should-pay-187m-for-illegal-conspiracy-former-players-say-1.214532>, [https://perma.cc/FA6M-XW3H].

⁷ See Rick Westhead, *Ex-OHL Owner Says Clubs Make Millions on Back of Kids, Then Wash Their Hands of Them*, TSN (Nov. 17, 2014), <http://www.tsn.ca/westhead-ex-ohl-owner-says-clubs-make-millions-on-back-of-kids-then-wash-their-hands-of-them-1.137213>, [https://perma.cc/KB7U-9WV7].

of Ontario's employment law regime to frame the analysis, it will be argued that not only are CHL players in an employment relationship with their respective teams, but that any potential CHL defenses respecting exempt categories fail to take players outside the scope of protective employment standards legislation. The lives of the teenagers and young men playing Major Junior hockey are subject to a level of physical and psychological control that borders on absolute. The directives of coaches and management dictate almost everything in the immediate sense, such as what to eat and when to sleep, while also having a significant impact on players' future career prospects and earning potential. And although the CHL offers educational support to players that is laudable in many regards, calling players "amateur student-athletes" does not absolve the League from employment standards legislation given that the dominant characteristic of any grant provided is to compensate hockey-related services.

It is unfair to say that team owners and management are wholly taking advantage of players given the developmental benefits and educational assistance, but to say that players are anything other than employees is a fallacy in the eyes of the law as it currently stands. What is perhaps of equal concern for the CHL is that in keeping player compensation below legislated employment standards protection, a practice that has gone on long after a tax court ruling finding players to be employees, it has helped to not only give rise to this multi-million dollar class proceeding, but has also opened itself up to broader implications relating to the use of players' personality rights in league-related revenue generating practices. It is widely known that one should not "bite the hand that feeds you." In the case of relations between CHL players and the League, which party is really doing the biting and which is doing the feeding?

Although focusing primarily on what is inherently a Canadian legal matter, a secondary purpose of this article is to provide instruction for the American reader, as well as US-based

sports leagues and their athletes. The CHL and Berg action form part of the broader discourse surrounding athlete exploitation generally and make for an interesting case study in this regard. The CHL exists in a unique space, straddled between collegiate and minor professional sport, and as a result, raises legal issues relevant to both levels in a single proceeding. The question of whether or not CHL players are within Canada's statutory definition of employee is relevant to athletes in NCAA Division I revenue-generating sports, as this exact issue was recently litigated in the context of players trying to acquire collective bargaining rights.⁸ Further, the alleged violation of minimum employment standards closely mirrors the allegations of the plaintiff group in *Senne v. Office of the Commissioner of Baseball*, where baseball's minor league system is currently being scrutinized for potentially contravening federal and state labor laws by, among other things, failing to meet minimum wage and overtime pay requirements.⁹ Given this, the CHL and Berg action is relevant not only to hockey fans in Canada and select American states that have CHL franchises, but also has an impact much farther-reaching, potentially affecting the business models of development leagues in other sports and the working conditions of the quasi-professional athletes plying their trades therein.

The introductory sections of this article will provide a brief contextual background, the basics of the Berg action, the contractual relationship between players and teams, and an overview of the legal framework governing the rights and obligations of non-unionized workers in Canada. The analysis sections that follow will first set out the test for determining the existence of an employment relationship, its application to the facts of the Berg action, and also consider three exceptions to employment legislation that might serve as viable defenses for the

⁸ See Decision and Direction of Election, Northwestern Univ. and College Athletes Players Association, Case 12-RC-121359 (N.L.R.B. Region 13, Mar.16, 2014) [hereinafter *Decision of the Regional Director, Northwestern*].

⁹ See Complaint, Senne et al v. Office of the Commissioner of Baseball, et al., No. 3:14-cv-00608, (N. D. Calif. filed Feb. 7, 2014) [hereinafter *Senne Complaint*].

CHL. This article will then address whether or not the players can expect to be successful in seeking recovery of punitive damages, explain the requirements for proving conspiracy and waiver of tort, and conclude by looking forward to the granting of players' personality rights as potentially being the focus of Major Junior hockey's next legal battle.

I. The Canadian Hockey League: Background and Operating Structure

Founded in its current form in 1975, the CHL is the umbrella organization that governs Major Junior hockey in Canada and the US. With sixty teams in nine Canadian provinces and four US states divided amongst three regional leagues, the CHL has long been recognized as the pre-eminent feeder system for producing National Hockey League ("NHL") talent. It was not long ago that Major Junior hockey was seen as essentially the *only* viable development pathway for young players with aspirations of establishing a NHL career, and although there is now greater competition from the NCAA and overseas junior leagues, the CHL remains the world's most significant producer of professional hockey players.¹⁰ As clear evidence of the CHL's prominence in hockey's hierarchy, each of the last nine first overall selections in the NHL Entry Draft have been chosen from teams in the CHL.¹¹

As the NHL's primary development league, there exists a long-standing and very close relationship between the CHL and hockey's top professional league. CHL operations closely mirror the NHL in a number of regards, one of which is that the distribution of players — aged between 16 and 20 years old — is administered primarily through an entry draft system. Each of

¹⁰ See Christopher R. Chard, *Understanding Organizational Brand Equity: A Case Study of the Ontario Hockey League* (Feb. 2007) (unpublished Ph.D. thesis, University of Leicester) (on file with University of Leicester Library).

¹¹ There is no single source for this, but rather can be discerned by reviewing each of the last 10 NHL Entry Draft selection lists at: <http://www.nhl.com/ice/draftsearch.htm?sort=overallPick&location=/draft/2015>, [<https://perma.cc/3WXQ-JZHH>].

the CHL's three leagues conduct separate entry drafts where member teams select eligible teenagers for the privilege of owning the selected individuals' playing rights should they eventually play Major Junior hockey. While specifics vary between the three leagues, generally speaking, over the course of a multiple-round draft, teams select eligible players from their league's protected territory. For the OHL this consists of players between the ages of 16 and 18 from Ontario, Michigan, Pennsylvania, and New York. The QMJHL draft involves players of the same age from Quebec, the Atlantic Canadian Provinces, and the United States region of New England — from which teams are required to select at minimum two players annually.¹² The WHL differs slightly by conducting a 'Bantam Draft' for 15 year olds from the four Western Canadian Provinces and the remaining US States not covered by the OHL or QMJHL.¹³ Although the WHL draft involves 15 year olds, players are not eligible to play in the CHL until their first season at 16 years old, unless they qualify for 'Exceptional Player Status,' an exemption under Hockey Canada's development model that permits early entrance for the most elite prospects. Although the enforceability of the CHL's entry draft system has been subject to court challenge, its legitimacy was upheld in *Greenlaw v. Ontario Major Junior Hockey League* on the basis that "irreparable harm to the League" would result if the draft were found to be an unlawful restraint of trade.¹⁴

In addition to being similar to the NHL in operations and structure, the CHL is also closely connected to the NHL financially. Up until NHL expansion in 1967 and establishment of the NHL Entry Draft, Major Junior teams were directly sponsored as 'farm clubs' of NHL

¹² Specifically: Maine, New Hampshire, Vermont, Massachusetts, Rhode Island, and Connecticut.

¹³ Specifically: Alaska, Arizona, California, Colorado, Hawaii, Idaho, Kansas, Minnesota, Montana, Nebraska, Nevada, New Mexico, North Dakota, Oklahoma, Oregon, South Dakota, Texas, Utah, Washington and Wyoming.

¹⁴ See *Greenlaw v. Ontario Major Junior Hockey League* (1984), 48 O.R. (2d) 371, 2 C.P.R. (3d) 556.

franchises.¹⁵ When direct sponsorship ended, support was replaced by a development grant system where the NHL compensates CHL teams annually as recognition of their investment in creating a talent pool from which to draw.¹⁶ As a matter of illustration, where a player from the QMJHL is selected in the NHL Entry Draft, a development grant is paid to the QMJHL which is then distributed to teams based proportionality on the time the particular team owned the drafted player's Major Junior rights.¹⁷ While this affiliation remains today, with the NHL transferring up to \$9.86 million to the CHL for the 2012–13 season, all teams in the CHL are now owned individually by various corporations and partnerships.¹⁸ This distinguishes the CHL from MLB's minor league system where the affiliation between MLB franchises and minor league clubs is direct. MLB franchises are not necessarily owners of their minor league teams, but they are required to sign development agreements with the ownership groups that give the MLB franchise *de facto* control.¹⁹

II. Berg v CHL: Broader Context and Summary of Asserted Claims

A. *The NCAA and the Athlete-Employee in the Context of Unionization*

As noted in the introductory section, the rising commercial success of US collegiate sports has given way to an increasingly fervent athletes' rights discourse focusing on the NCAA and its treatment of athletes in Division I revenue-generating sports. The issue is not exactly a novel one, as the NCAA for a number of years now has been targeted by legal academics for

¹⁵ See JOHN BARNES, *SPORTS AND THE LAW IN CANADA* 81 (3d ed. 1996).

¹⁶ See *id.* at 18.

¹⁷ See Quebec Major Junior Hockey League, *Administrative Rules 2012 – 2013*, By-Law 2.14.6 [hereinafter *QMJHL Administrative Rules*].

¹⁸ See *Berg v. Canadian Hockey League*, (2015), No. CV-14-514423, Motion Record of Plaintiff at 637, (Can. Ont. Sup. Ct. J.) [hereinafter *Berg Motion Record*].

¹⁹ *Senne Complaint*, *supra* note 10, at ¶ 60.

relying on the skills and fame of their young scholarship athletes to generate profits while limiting compensation for those services according to their amateurism model. The scope of criticism, however, is reaching unprecedented levels and according to some, the bottom line is clear: the student-athlete is being exploited.²⁰ Collegiate athletics today are highly commercialized, and Division I revenue-generating sports are enormous wealth creators for universities and related stakeholders.²¹ The NCAA, by continuing to bind athletes in commercially lucrative sports such as football and basketball to the rules of amateurism, restricting the ability of athletes to profit from their ‘collective sweat equity,’ means that of the many parties invested in collegiate sports, the one group being denied the full financial benefit of their relationship with the NCAA is that made up of those actually playing in the games.²²

At the heart of this seemingly perverse relationship is the NCAA’s characterization of their athletes as amateur student-athletes, not employee-athletes. It is this characterization that the NCAA relies upon to limit compensation and prohibit the payment of any sort of competitive market-driven wage. But the student-athlete classification is slowly starting to be chipped away at as the reality that certain NCAA athletes are in many ways far more professional athlete than student becomes clear.²³ The demands placed on the so-called ‘student-athlete’ are not all that different from what is expected of the professional athlete. Although NCAA rules institute a general time limit (known as the 20-hour rule)²⁴ for athletically related activity to a maximum of four hours per day and twenty hours per week, it is becoming well-established that the rule is not

²⁰ See Mary Grace Miller, *The NCAA and the Student-Athlete: Reform is on the Horizon*, 46 U. RICH. L. REV. 1141, 1146 (2012).

²¹ Heitner & Levine, *supra* note 4, at 342.

²² *Id.*

²³ Miller, *supra* note 20, at 1142.

²⁴ National Collegiate Athletic Association, 2015–16 NCAA Division I Manual, § 17.1.7.1 [hereinafter *NCAA Manual*].

properly followed. Student-athletes spend hours attending administrative meetings, training sessions, and film study that do not count towards the 20-hour limit.²⁵ The result is that, according to the recent complaint filed by two student-athletes at the University of North Carolina at Chapel Hill, Division I athletes average closer to forty hours a week engaged in athletic activity.²⁶ In the words of the complaint, the 20-hour rule has proven to be “regularly and openly flouted.”²⁷

The response to this apparent exploitation of the student-athlete has manifested in a push for unionization, the most noteworthy development being the efforts of College Athletes Players Association (“CAPA”) to organize Northwestern University football players. The National Labor Relations Board (“NLRB”) ultimately dismissed CAPA’s union election petition on the basis that asserting jurisdiction would not promote stability in labor relations since the overwhelming majority of teams in the Football Bowl Subdivision — of which Northwestern is a member — are public institutions that are outside the scope of NLRB jurisdiction.²⁸ However, before dismissing the petition, the NLRB regional director first addressed the question of whether or not scholarship receiving football players were employees as defined under the National Labor Relations Act (“NLRA”) and therefore could qualify as employees of the university.

Peter Sung Ohr, the NLRB regional director deciding the matter, applied the common law definition of employee as “a person who performs services for another under a contract of hire, subject to the other’s control or right of control, and in return for payment.”²⁹ This definition encapsulates the right of control test. In terms of whether scholarship receiving

²⁵ Miller, *supra* note 20, at 1143.

²⁶ See generally Complaint, McCants et al. v. The National Collegiate Athletic Association, et al., No. 15-cvs-1782, (M.D.N.C. filed Feb. 27, 2015).

²⁷ *Id.* at 24.

²⁸ Northwestern University and College Athletes Players Association, 362 N.L.R.B. 167 (2015).

²⁹ *Decision of the Regional Director, Northwestern, supra* note 9, at 13.

football players performed services for the university for which they received compensation, Ohr found in the affirmative. The players provided a clear benefit for the university, helping the football program generate revenues of approximately \$235 million from 2003 to 2012.³⁰ And while players did not receive a paycheck in the traditional sense, their athletic scholarships constituted an economic benefit received on account of football services.³¹ On the question of control, Ohr determined that the factual record established that the players were “under the strict and exacting control [of the university] throughout the entire year,” leading to the ultimate finding that scholarship players on the football team were in fact employees as defined by the common law.³²

B. Labor Relations in the CHL

Labor relations in the CHL, while not subject to the same level of scrutiny as that in the NCAA, have by no means been static. The CHL faced its own unionization movement in 2012 when a group calling itself the Canadian Hockey League Players’ Association (“CHLPA”) attempted to acquire bargaining rights but was ultimately forced to withdraw its application for certification just prior to holding a vote with players of the Cape Breton Screaming Eagles in the QMJHL.³³ The withdrawal became necessary once the legitimacy of the CHLPA and the intentions of those running the organization came under serious question.³⁴ Unionization efforts again heated up in July 2014, when Unifor, Canada’s largest private sector union, expressed

³⁰ *Id.* at 14.

³¹ *Id.*

³² *Id.* at 15.

³³ Mary Ellen MacIntyre, *Hockey Players Union Bails Out of NS*, THE CHRONICLE HERALD, Nov. 2, 2012, <http://thechronicleherald.ca/mooseheads/160306-hockey-players-union-bails-out-of-ns>, [https://perma.cc/L8P6-RL3Y].

³⁴ James Mirtle, *Why Georges Laraque is Leaving the CHLPA*, THE GLOBE AND MAIL, Nov. 2, 2012, <http://www.theglobeandmail.com/sports/hockey/globe-on-hockey/why-georges-laraque-is-leaving-the-chlpa/article4851890/?page=all>, [https://perma.cc/FL6T-79FH].

interest in representing CHL players. Unifor’s involvement to date, however, has been mostly limited to lobbying the Ontario Provincial government to launch a task force examining working conditions in the CHL.³⁵

An alternative course of action to unionization, which also has the effect of forcing a determination on the legal relationship between league and player, proved to come in the form of a lawsuit seeking outstanding employment entitlements owed to players as employees of the CHL. Samuel Berg, a former player with the Niagara IceDogs of the OHL, filed a statement of claim asking the Ontario Superior Court of Justice to have an action against the CHL and its teams certified as a class proceeding, with him appointed as the representative plaintiff. Berg played eight games for the Niagara IceDogs in the 2013–14 season before being sent to a lower level of junior hockey, where he was subsequently injured and forced to end his playing career prematurely.

In addition to alleging that the IceDogs breached an individually-negotiated agreement to provide full university tuition and related expenses following his Major Junior career—an agreement meant to entice Berg to elect the OHL over pursuing NCAA scholarship and was contingent only upon his playing one OHL exhibition or regular season game—the statement of claim raises four causes of action on behalf of the players as class members.³⁶ Among the four claims is a statutory cause of action alleging that the CHL standard player contract violates applicable employment standards legislation “with respect to minimum wage, vacation pay,

³⁵ Rick Westhead, *Union Alleges Intimidation After Minister Orders OHL Examination*, TSN (Apr. 22, 2015), <http://www.tsn.ca/union-alleges-intimidation-after-minister-orders-ohl-examination-1.263866>, [<https://perma.cc/TP8K-PKRS>].

³⁶ Despite expressly representing itself to be an amateur league, the CHL is considered by the NCAA to be professional. NCAA by-laws allow a player to attend a CHL training camp and maintain NCAA eligibility, provided such a visit did not exceed 48 hours and any payment or compensation in connection with the visit was not in excess of actual and necessary expenses. *See NCAA Manual*, *supra* note 24, at § 12.2.1.1.

holiday pay, and overtime pay.”³⁷ The action seeks recovery of these unpaid employment entitlements amounting to \$100 million Canadian and \$50 million in US currency, as well as punitive damages of \$25 million on account of the CHL’s conduct in making the violation.

III. Statutory Cause of Action: The Alleged Employment Standards Violation

The most essential component to the Berg action, and the primary focus of this article, is the statutory cause of action. The claim that the WHL, OHL, and QMJHL’s standard player contracts violate employment standards legislation, and are therefore of no force, is contingent on there being an employment relationship established between players and their teams. The fundamental question is therefore whether the players are employees or if they are more appropriately characterized as independent contractors, amateur student-athletes, interns engaged in a professional training program, or some other category outside the scope of an employee for the purposes of employment standards legislation.

A. Standard Player Contract: Player Compensation and Description of Relationship

Regulations in the WHL, OHL, and QMJHL provide that any player wishing to play in a regular season or playoff game is required to have signed a standard player contract endorsed by the League, regardless of that player’s skill or level of experience.³⁸ Upon being signed by the player, the team must then file the contract with the League’s head office for it to be approved by the League Commissioner. The contracts are not identical but their substance varies little from

³⁷ *Berg Statement of Claim*, *supra* note 6, at para. 68.

³⁸ *Id.* at para. 4.

league to league.³⁹ In signing a standard player contract, the team generally retains the rights to that player for the duration of their eligibility in the League.⁴⁰

The Berg action targets the extent to which a player is compensated for their services, primarily arguing that minimum wage entitlements are not being met. Standard player contracts in use prior to the 2013–14 hockey season set a fixed fee for players’ services by listing either a specific dollar amount for remuneration or stating that the player will receive the maximum permitted according to league bylaws. The QMJHL’s Administrative Rules for the 2012–13 season provide further guidance, stating that the “weekly remuneration allowed, aside the room and board” was \$35 for players who are 16 to 17 years old, \$50 for 18 year olds, and \$60 for 19 year olds.⁴¹ These payments have been compared to the ‘pocket money’ which parents presumably might provide a player had they not relocated to play Major Junior hockey and are roughly equivalent to the amount received by players as long as thirty years ago.⁴² QMJHL regulations also provide a list of additional authorized compensation that includes transportation between the player’s home and rink, transportation for the holiday break and end of season, and transportation to school. The relationship of players to their team is described in the former contract as one of an “independent contractor.”⁴³

All references to a remuneration fee and descriptions of the players as independent contractors have been removed from the now-revised version of the standard player contract. The QMJHL recast compensation as a fixed weekly allowance of \$60 and the following reference to player status was included:

³⁹ *Id.*

⁴⁰ *Id.* at para. 7.

⁴¹ *QMJHL Administrative Rules*, *supra* note 17, By-Law 3.07.04.

⁴² *See, e.g.,* *McCrimmon Holdings Ltd. v. MNR*, [2000] R. J. Q. 823 (Can. Tax Ct., 2000) (QL) at para. 3.

⁴³ *Berg Statement of Claim*, *supra* note 6, at para. 18.

Players who belong to a club and who range in age from 16 years old to 19 years old are pursuing their academic careers while also benefiting from a framework which supports the development of their athletic potential as hockey players whose goal is to pursue the practice of hockey at the professional level.⁴⁴

Although not addressed in the statement of claim, it has been reported that the OHL has additionally included a monthly reimbursement plan that can cover up to \$470 worth of expenses on items such as gas, clothing, and phone bills.⁴⁵ A summer training allowance of \$1,000 was also added.

The CHL deals with the status of 20 year old players — those in their final year of Major Junior eligibility — separate from players 16 to 19 years of age. The QMJHL describes 20-year-old players as “young adults who are called upon to exercise leadership abilities and to act as mentors towards their teammates” and are “considered to be salaried employees of the club.”⁴⁶ The QMJHL in 2013–14 had a salary cap where teams could distribute a maximum of \$1,700 a week amongst their three permitted 20-year-olds, with no single player receiving an amount in excess of \$1,000.⁴⁷ Compensation has since been reduced to \$150 per week to align with that provided in the WHL and OHL.⁴⁸

Berg alleges that while playing in the CHL he spent an average of 44 hours a week engaged in team-related activities or services, which included playing in approximately three games, travelling to and from games, practicing, training, and partaking in promotional events. In weeks where the IceDogs went on prolonged trips to play games as the visiting team, travel

⁴⁴ *Berg Motion Record*, *supra* note 18, at 536, 539.

⁴⁵ See Sunaya Sapurji, *OHL Ups the Ante, Makes Significant Changes to Player Benefit Packages*, YAHOO! SPORTS (Feb. 24, 2014), <http://sports.yahoo.com/news/ohl-ups-the-ante--makes-significant-changes-to-player-benefit-packages-223242217.html>, [<https://perma.cc/B5N5-7NYL>].

⁴⁶ *Berg Motion Record*, *supra* note 18, at 536.

⁴⁷ *QMJHL Administrative Rules*, *supra* note 17, By-Law 3.02; *Berg Motion Record*, *supra* note 18, at 541.

⁴⁸ Mike Sanderson, *QMJHL Drops Overage Salary to Match OHL and WHL; Predictably, Potential Overagers Aren't Happy*, YAHOO! SPORTS (May 30, 2014), <https://ca.sports.yahoo.com/blogs/jrhockey-buzzing-the-net/qmjhl-drops-override-salary-match-ohl-whl-predictably-003835939.html>, [<https://perma.cc/WA45-ZTNW>].

pushed this number closer to 65 hours. With no hourly wage rates, no overtime pay, no holiday pay and no vacation pay, it is alleged that the contractual provisions purporting to govern player compensation are void and unenforceable, and that players are owed outstanding entitlements. Legislation in Ontario currently sets the applicable minimum wage rate at \$11.00 an hour, meaning compensation for a 44 hour week, not accounting for relevant vacation, holiday and overtime pay, should total at least \$484.⁴⁹

IV. Canadian Individual Employment Regime

The fact that unionization efforts have failed is not all that surprising. In addition to an apparent lack of competence and organizational legitimacy on the part of the CHLPA, there is the simple fact that organizing young athletes is difficult given that players are hesitant to do anything that might upset team management and attract retribution.⁵⁰ When questioned by media, an almost absolute majority of players either refused to answer or lauded the CHL for the world-class development opportunity provided.⁵¹ The dilemma is the same facing players in MLB's minor league system and was aptly described in *Senne*: “[s]triving towards a lifelong dream of playing in the major leagues, minor leaguers are reluctant to upset the status quo. As one minor leaguer ... testified before Congress ... ‘what minor league player is going to jeopardize his career by challenging the system?’”⁵²

The inability to unionize, while not without drawbacks, does not mean players are left with no recourse. Not being unionized means that Major Junior players, like those in MLB's

⁴⁹ See Employment Standards Act, S.O. 2000, c. 41, ss. 22(1), 35.2; O. Reg. 285/01, s. 5(1).

⁵⁰ See *MacIntyre*, *supra* note 33.

⁵¹ *Id.*; *CHL Players Forming League's First Union*, SPORTSNET (Aug. 20, 2012), <http://www.sportsnet.ca/hockey/juniors/chl-hockey-chlpa-players-union/>, [<https://perma.cc/W7UE-PYDH>].

⁵² *Senne Complaint*, *supra* note 10, at 1–2.

minor leagues, are not under any collective agreement that binds them to a bargained for grievance process such as arbitration. Players therefore have the ability instead to look to the framework established by individual employment law, an avenue unavailable to employees under a collective bargaining agreement.

A. The Two Pillars

Canadian law sets out two frameworks establishing the obligations and entitlements that govern the employment relationship for workers in the non-unionized sector: the common law contract of employment and protective employment standards legislation.⁵³

The common law, recognizing that it is unrealistic to expect the two parties to specifically account for all the possible contingencies that might arise over the course of an employment relationship, modifies the principle of freedom of contract to imply various terms into the relationship.⁵⁴ Implied duties on the employer include, for example, the well-known duty to provide employees with a reasonable notice of termination. But despite the protection afforded by the common law, courts for much of history have favored the interests of employers. To protect the most vulnerable workers, governments by the early 20th century began implementing legislated minimum standards.⁵⁵ This legislative framework grew more comprehensive with the postwar emergence of the Canadian social welfare state and the recognition that non-unionized workers, not having benefited much from the organized labor movement, were in need of further protections.⁵⁶

⁵³ GEOFFREY ENGLAND, *INDIVIDUAL EMPLOYMENT LAW*, 3 (2d ed. 2008).

⁵⁴ *Id.* at 50.

⁵⁵ Mark Thomas, *Setting the Minimum: Ontario's Employment Standards in the Postwar Years, 1944–1968*, 54 *LABOUR/LE TRAVAIL* 49, 56 (2004).

⁵⁶ *Id.* at 72-81.

Each province in Canada has enacted their own version of employment standards legislation setting minimum terms and conditions in areas such as wages, vacations, and termination of employment.⁵⁷ In Ontario, the relevant legislation is the *Employment Standards Act* (“ESA”). The legislation is primarily meant to establish a minimum floor of rights for most of the labor market but also represents the chief source of protection for employees in non-unionized work.⁵⁸ As such, no employer is permitted to contract out of the ESA to avoid its application; any term in an employment contract directly relating to a legislated benefit is enforceable only if it provides the employee with a greater benefit than that stipulated in the ESA.⁵⁹

The Supreme Court of Canada (“Supreme Court”) in *Machtiger v. HOJ Industries* explained that individual employees, especially in non-unionized workplaces, are often in a position of drastically unequal bargaining power in relation to their employer.⁶⁰ A person’s work is fundamental to his life, providing both financial means and a sense of social purpose. Meanwhile, it is generally rare for employers to find themselves facing significant labor shortages. The result is that the terms of an employment contract cannot always be relied on as a manifestation of free bargaining power. It is this inherent power imbalance and bargaining inequity which employment standards legislation is meant to remedy. Courts are therefore to give employment standards legislation a broad and liberal interpretation so to ensure that its protection extends to as many employees as possible.⁶¹ The result is that any contractual term in

⁵⁷ See Leah F. Vosko, *Rights Without Remedies: Enforcement Employment Standards in Ontario by Maximizing Voice Among Workers in Precarious Jobs*, 50 OSGOODE HALL L.J. 845, 851 (2013).

⁵⁸ *Id.*

⁵⁹ ESA, *supra* note 49 ss. 5(1), (2).

⁶⁰ *Machtiger v. HOJ Industries Ltd.*, [1992] 1 S.C.R. 986.

⁶¹ Judy Fudge, Eric Tucker & Leah F. Vosko, *Employee or Independent Contractor? Charting the Legal Significance of the Distinction in Canada*, 10 CDN. LAB. & EMP. L.J., 193, 209 (2003).

an employment relationship that violates employment standards legislation is null and void for all purposes.⁶²

B. ESA Enforcement

The ESA is an impressive and comprehensive body of legislation that regulates almost all aspects of the employee-employer relationship. Enforcement, however, has proven to be relatively difficult.⁶³ The primary method of enforcement is the individual claims process where the obligation lies with the aggrieved employee to file a complaint with the Ministry of Labour. This “soft law” approach is often criticized for putting too much responsibility on individual employees, and, in the present instance, is an unsuitable method of recourse.⁶⁴ The ESA’s administrative process was amended under the *Open for Business Act, 2010* to include a self-help provision requiring that before any complaint is investigated, unless given an exemption, the employee must have approached his employer to inform her of the alleged violation.⁶⁵ The rationale was to increase efficiency, hoping that in many cases the employer was simply ignorant to the employee’s rights and that once notified of the potential violation, the employer would resolve the complaint to the employee’s satisfaction without needing regulatory intervention. In a sport well-known for its conformity, this self-help requirement serves as a strong disincentive for players to make a claim. Individual players are highly unlikely to take on the role of assertive protagonist out of a fear that they may be stigmatized as selfish and have any future professional

⁶² Machtinger, *supra* note 60.

⁶³ Vosko, *supra* note 57, at 851–53.

⁶⁴ LAW COMMISSION OF ONTARIO, *VULNERABLE WORKERS AND PRECARIOUS WORK* 53-54 (2012) [hereinafter *VULNERABLE WORKERS*].

⁶⁵ ESA, *supra* note 49 s. 96.1(1), 96.1(3).

career jeopardized as a result.⁶⁶ The ESA's anti-reprisal provisions are unlikely to provide sufficient assurance considering the magnitude of what is at stake, and ice time could be reduced immediately while the player waited for an investigation to be completed—meaning the damage would probably already be done before any reprisal remedy was issued. Further, in addition to being an individual complaint based system, the ESA's administrative process is also unsuitable for this situation because it imposes a cap of \$10,000 on monies recoverable.⁶⁷

Fortunately for the players, Ontario courts have confirmed that employees are entitled to pursue an ESA claim by bringing an action in the court system where the \$10,000 monetary cap and self-help provision are of no application.⁶⁸ The ability to claim ESA entitlements through an action allows the players to take advantage of class proceedings legislation and act collectively in a cost-efficient manner that also helps to level bargaining power.⁶⁹ Rather than be faced with a few relatively low-value claims, the use of a class proceeding means that the CHL faces millions in potential liability. A further benefit is that once certified, members of the class are presumed to be included in the proceeding unless they take active steps to opt out within the time period set by the court's certification order.⁷⁰ Individual players therefore do not need to go public should they wish to recover any ESA entitlements deemed to have been unjustly withheld.

The first step for any class proceeding is to obtain a court order granting certification, something which the CHL may very well oppose. The MLB's initial defense in *Senne*, for example, was to argue that the proposed class of minor league baseball players should be denied

⁶⁶ VULNERABLE WORKERS, *supra* note 65, 57–8; *see e.g.*, Westhead, *supra* note 8.

⁶⁷ ESA, *supra* note 50 s. 103(4).

⁶⁸ *See Boland v. APV Canada Inc.*, (2004), 250 D.L.R. 4th 376 paras. 11–17, (Can. Ont. Sup. Ct. J.).

⁶⁹ *See Louis Sokolov & Colleen Bauman, Common Cause: Employment-Related Class Actions in Canada* (March 28–29, 2011). Paper Delivered at the Faculty of Law, University of Windsor (transcript available online at <http://www1.uwindsor.ca/law/accessing-justice/system/files/Sokolov.pdf>), [<https://perma.cc/M74H-HYZJ>].

⁷⁰ Class Proceedings Act, S.O. 1992, c. 6, s. 9.

certification on the basis that the alleged claims were “inherently individualized.”⁷¹ It was said that nothing in MLB rules or player contracts required uniformity in work hours and conditions, and that the amount a player actually works and how much compensation they receive varies significantly from team to team according to the choices of coaches and management at that particular level.⁷² Therefore, MLB argued, the plaintiff group’s claims required a series of “individualized inquiries.”⁷³

In deciding whether the CHL players should receive certification, the court is guided by the Ontario *Class Proceedings Act* (“CPA”). The CPA lists among its criteria for certification the requirement that “a class proceeding would be the preferable procedure for the resolution of the common issues.”⁷⁴ Considering that the ESA contains its own enforcement mechanism, class proceedings in the employment context have produced conflicting responses to this inquiry.⁷⁵ In *Halabi v. Becker Milk Co.*, the motion for certification was dismissed on the basis that the ESA’s administrative process is timely, cost-effective, and “clearly preferable.”⁷⁶ More recent cases however, have provided a more detailed analysis. The Canadian Supreme Court established a two-step analysis in determining whether a class proceeding is the preferable procedure: (i) “whether or not the class proceeding [would be] a fair, efficient and manageable method of

⁷¹ Josh Leventhal, *MLB States Its Defense In Minor League Players Lawsuit*, BASEBALL AMERICA, June 11, 2014, <http://www.baseballamerica.com/minors/mlb-states-its-defense-in-minor-league-players-lawsuit/>, [<https://perma.cc/8PN4-DC3U>].

⁷² *Senne et al v. Office of the Commissioner of Baseball, et al.*, No. 3:14-cv-00608 (N. D. Calif. Oct. 20, 2015) (order granting motion for conditional certification) [hereinafter *Senne Conditional Certification Order*].

⁷³ *Id.*

⁷⁴ *Class Proceedings Act*, *supra* note 71, s. 5(1)(d).

⁷⁵ *Sokolov & Bauman supra* note 70, at 5.

⁷⁶ *Halabi v. Becker Milk Co.*, [1998] 39 O.R. 3d 153, (Can. Ont. Ct. Gen. Div.); *see also* *Sokolov & Bauman supra* note 70, at 5.

advancing the claim,” and (ii) “whether a class proceeding would be preferable” as compared to other reasonably available means.⁷⁷

MLB’s argument regarding the individual nature of wage claims relates to the first branch of the test—whether a class proceeding is a fair, efficient, and manageable method of advancing the claim. Although MLB lost on this point, all that the plaintiff group had to show was some factual or legal nexus binding the class together so that a joint hearing would promote judicial efficiency.⁷⁸ Any variation in players’ compensation and hours worked could be addressed at a later stage. In Canada, courts have expressed a reluctance to permit certification where numerous individual claims for unpaid employment benefits might overwhelm a class proceeding.⁷⁹ However, this argument was rejected in *Fulawka* regarding a plaintiff class of more than 5,000 current and former retail banking employees. The court lauded the flexibility of the CPA and held that it permits a common issues trial judge to take a variety of approaches in managing individual claims effectively without requiring individual hearings.⁸⁰ As for the second consideration, whether a class proceeding is preferable, *Fulawaka* held that given the scope of liability raised by the claimants, the likely reluctance of individual workers to bring forward separate claims, and the limitations of remedial authority available under the legislative enforcement process, denying certification would thwart access to justice.⁸¹

Provided the court can be convinced that the same considerations under *Fulawaka* apply and that certification is appropriate in this case, focus then shifts to whether the players should be considered employees under the ESA.

⁷⁷ *Hollick v. Toronto (City of)*, 2001 SCC 68, para. 28, [2001] 3 S.C.R. 158.

⁷⁸ *Senne Conditional Certification Order*, *supra* note 73, at 22.

⁷⁹ *See Webb v. K-Mart Canada Ltd.*, [1999] 45 O.R. 3d 389, (Can. Ont. Sup. Ct. J.).

⁸⁰ *Fulawka v. Bank of Nova Scotia*, 2012 ONCA 443, paras. 151-61, [2012] 111 O.R. 3d 346.

⁸¹ *Id.* at para. 167.

V. Application of Employment Standards Legislation

A. Is There an Employee-Employer Relationship Between Players and Their Teams?

The statutory definition of employee, as provided in the ESA, is of little practical utility when attempting to determine the employment relationship between two parties. As is the case in the US, the task has instead fallen on the common law to step in and fill the void by providing a workable legal definition and test. The basic definition adopted in Canada is useful merely as a starting point. Canadian courts have decided that the fundamental question to be asked in these cases is simply whether the worker has been engaged to perform the services “as a person in business on his own account.”⁸² If the answer to this question is yes, the worker is engaged under a contract *for* services and is an independent contractor.⁸³ If the answer is no, the worker is engaged under a contract *of* service and is an employee.⁸⁴

This distinction between a contract of service in which the worker is an employee, and a contract for services where the worker is an independent contractor, is a critical one.⁸⁵ Protections afforded by both the common law and employment statutes such as the ESA only apply to contracts of employment—the independent contractor is deemed to be self-employed, performing services on his own account, and not in need of labor protection.⁸⁶ Because of competitive market forces in today’s economy, an increasingly common trend is for firms to attempt to “shift the risks of productive activity and employment onto workers by categorizing

⁸² 671122 Ontario Ltd. v. Sagaz Industries Canada Inc., 2001 SCC 59, para. 44, [2001] 2 S.C.R. 983.

⁸³ *Id.* (emphasis added).

⁸⁴ *Id.* (emphasis added).

⁸⁵ ENGLAND, *supra* note 54, at 16.

⁸⁶ Fudge, Tucker & Vosko, *supra* note 62, at 194.

work relationships as commercial arrangements rather than employment.”⁸⁷ The CHL appears to be no different, taking steps to avoid any terminology in standard player contracts or other official league documentation that might depict players as employees.

While some workers are happy to be considered an independent contractor to avoid having various statutory deductions taken from their pay, there is concern for those independent contractors who do not fit the mold of a business entrepreneur.⁸⁸ Given the inequality of bargaining power inherent in the relationship, courts have decided that terminology will not be entirely determinative; contractual descriptions and even the parties’ subjective intent regarding the nature of the relationship will not be permitted to trump objective reality where they do not align.⁸⁹ The challenge then is for courts to look at the facts of a particular relationship and draw a legal distinction between whether the worker is properly characterized as an employee or as an independent contractor.

Under the US right of control test applied in the *Northwestern* case, in which an employee is someone who performs services for another under a contract for hire subject to the other’s control, the most important factor in determining whether an employment relationship exists is the extent of control the alleged employer exercises over the working life of the alleged employee.⁹⁰ The Canadian approach is slightly more nuanced by comparison but nevertheless gives control significant weight. The basic definitional question of whether or not the worker has been engaged to perform the services on their own account alone does not provide sufficient parameters and has been supplemented by various tests. In *671122 Ontario Ltd. v. Sagaz Industries Canada Inc.* the Supreme Court rejected a single test approach to determining

⁸⁷ *Id.* at 195.

⁸⁸ ENGLAND, *supra* note 53, at 18–19.

⁸⁹ See *The Royal Winnipeg Ballet v. M.N.R.*, 2006 FCA 87 paras. 55–62, [2007] 1 F.R.C. 35.

⁹⁰ See *e.g.*, *Decision of the Regional Director, Northwestern*, *supra* note 9, at 15–16.

employment status but did review the previous tests and set the following non-exhaustive list of relevant factors that are to be considered:

1. Level of control the worker has over his or her own activities,
2. Whether the worker owns his or her own equipment,
3. Whether the worker hires other workers to help,
4. The degree of financial risk taken by the worker,
5. The degree of responsibility for investment and management held by the worker, and
6. The worker's opportunity for profit in the performance of his or her tasks.⁹¹

Although it was also made it clear that there is no strict formula for the amount of weight to be given in applying the stated factors, it was explicitly stated that the degree of employer control will always be a consideration.⁹²

B. Application of the Sagaz Factors: Level of League Control

It is now becoming well-established that NCAA athletes are subject to an extraordinary degree of control by the universities for which they play. In making the determination that football players at Northwestern were subject to strict and exacting control, NLRB regional director Ohr described a scenario where from training camp, through the playing season, and into the off-season, players' lives were largely defined by the parameters put in place by their coaching staff.⁹³ At training camp players were given daily itineraries that often scripted each hour of their day from as early as 5:45 in the morning to as late as 10:30 in the evening. During the playing season a typical week would see players, under the direction of their coaches, commit approximately 40 to 50 hours to football-related duties. Players' behavior was also monitored at all times by members of the coaching staff to ensure compliance with NCAA and team-instituted rules.

⁹¹ Sagaz, *supra* note 83, at para. 47.

⁹² *Id.*

⁹³ See e. g., *Decision of the Regional Director, Northwestern*, *supra* note 9, at 5–9.

The nature of a CHL player's relationship to his team is not markedly different from that of a NCAA Division I football player. CHL teams also exercise a remarkably high degree of control over their players, dictating almost all aspects of a player's life for the duration of the season and even into the summer offseason. The Tax Court of Canada in *McCrimmon Holdings Ltd v. M.N.R.*, when addressing the employment status of players for determining whether compensation payments were insurable income from which CHL teams as employers were required to make statutory deductions under the *Employment Insurance Act*, provided the following characterization of the player-team relationship:

[w]hile playing for the Wheat Kings, all players attend the same high school and meet with the same counsellor. All players are subject to a curfew and are closely monitored both in and out of school, especially as it concerns their attendance, and the club will mete out discipline... Those players who finished high school but have not chosen to attend college or university must come to training sessions 6 days a week from 12:30 p.m. to 5:30 p.m. each day... Wheat Kings players are permitted one 2:00 a.m. weekend curfew each month... Behavior is monitored by the team management and the families acting as billets.⁹⁴

The Berg action describes an even greater degree of control, explaining that in addition to being told "where and when...to play, train, practice or workout," each night prior to sleeping all players were required to call a team coach to confirm that they were adhering to the curfew of 11:00 p.m. on non-game nights and 12:30 a.m. on game nights.⁹⁵

The extensive every day control on the part of coaches and management is also reinforced by underlying power relations. In the Northwestern case, Ohr made the point that the football coaches had "control over nearly every aspect of the players' private lives by virtue of the fact that there are many rules that they must follow under threat of discipline and/or the loss

⁹⁴ *McCrimmon*, *supra* note 43, at para. 3.

⁹⁵ *Berg Motion Record*, *supra* note 18, at 544.

of a scholarship.”⁹⁶ The same can be said of CHL players as it relates to their career trajectory. Players entering the CHL understand that any prospect of a lucrative NHL career is predominantly tied to their performance in Major Junior, and despite the reality that few will ever play an NHL game, the possibility of making it is the singular incentive that drives most.⁹⁷ It is evident that with so much of a player’s future tied up in the decisions of coaches and management, teams are in a position of perpetual control. Teams control players primarily through the allocation of playing time, and outside of certain roster restrictions and freeze periods, they generally have unfettered control to release or trade players as they wish. The control a team has therefore appears to extend beyond physical control to include significant psychological elements, as well.

Should the court go beyond considering control to analyze the remaining *Sagaz* factors, there is further support for the finding of an employment relationship. Players are most often supplied almost from head to toe with team equipment, they do not control roster moves outside of possibly making recommendations to management when prompted, and they do not take on financial risk or invest in capital assets. The extent to which players have an opportunity to profit in the performance of their tasks is slightly more blurred. It could be argued that the potential of using the CHL as a springboard to the professional ranks presents a significant opportunity for profit. However, this factor generally entails a consideration of whether there were employer-imposed limits on remuneration *within the duration of the relationship*.⁹⁸ While on an active CHL roster, players’ opportunity for profit is generally limited to the remuneration provided for

⁹⁶ *Decision of the Regional Director, Northwestern*, *supra* note 9, at 16.

⁹⁷ Victoria L. Grygar, *A Struggle Against the Odds: Understanding the Lived Experiences of Canadian Hockey League (CHL) Players* (Aug. 2013) (unpublished M.A. thesis, Brock University) (on file with the Brock University Library), at 47.

⁹⁸ *See e.g.*, 1392644 Ontario Inc. (Connor Homes) v. M.N.R., 2013 FCA 85 para. 48, 444 N.R. 163.

in the standard player contract and league administrative rules; it is not until after their services end that most of their professional earnings are made. There is again room for disagreement here, as during the 2014–15 season there were 63 OHL players who had signed NHL entry-level contracts and received bonuses in the range of \$40,000 to \$90,000, meaning not all NHL related profit is earned strictly post-CHL.⁹⁹ Regardless, on the totality of circumstances and the sheer degree of control CHL teams have over their players, the facts weigh heavily in favor of an employee-employer finding.

VI. Playing Defense: Do Players Fall Into an Exempt Category?

After establishing that players are properly characterized as employees of their respective CHL teams, the next step in the analysis is to determine whether the relationship is one that is governed by employment standards legislation. There are a number of groups or classifications of employees who are excluded from the coverage of the ESA and similar legislation in other jurisdictions.¹⁰⁰

A. Are Players Akin to Interns in a Professional Training Program?

One potential interpretation of the CHL's amendments to the standard player contract is that the relationship has been recast from players being independent contractors to something closer to low-paid interns training for a career in professional hockey. The QMJHL's 2014–15

⁹⁹ Robert Cribb, *CHL Claims Questioned*, THE TORONTO STAR, Feb. 17, 2015, <http://www.thestar.com/sports/hockey/2015/02/17/star-investigation-chl-claims-questioned.html>, [<https://perma.cc/8J7U-GT8M>].

¹⁰⁰ See ENGLAND, *supra* note 54, at 121.

Education Policy, for example, repeatedly describes a player's time in Major Junior as a "hockey internship."¹⁰¹

The ESA's definition of an employee includes a person who is receiving training.¹⁰² This is further clarified by the condition that a person receiving training will be considered an employee "if the skill in which the individual is being trained is a skill used by the person's employees, unless *all* of the following conditions are met:

1. The training is similar to that which is given in a vocational school,
2. The training is for the benefit of the individual,
3. The person providing the training derives little, if any, benefit from the activity of the individual while he or she is being trained,
4. The individual does not displace employees of the person providing the training,
5. The individual is not accorded a right to become an employee of the person providing the training, and
6. The individual is advised that they will receive no remuneration for the time he or she spends in training."¹⁰³

The most insurmountable of these criteria for the CHL to meet is the condition that they derive "little, if any, benefit" from the services of players. There was little difficulty in finding that Northwestern was the benefactor of valuable services performed by its football players on account of the university's football program generating more than \$200 million in revenues over a ten-year span.¹⁰⁴ Regarding CHL accounts, the statement of claim under the claim of waiver in tort alleges that the CHL and its teams have received "hundreds of millions of dollars in revenues annually including for marketing promotions, television rights and ticket sales, all based primarily on the services provided by the players."¹⁰⁵ The validity of such a

¹⁰¹ Quebec Major Junior Hockey League, *QMJHL Education Policy 2014–2015*, art. 1 [hereinafter *QMJHL Education*].

¹⁰² ESA, *supra* note 50, s. 1(1).

¹⁰³ *Id.* s. 1(2).

¹⁰⁴ *Decision of the Regional Director, Northwestern*, *supra* note 9 at 13.

¹⁰⁵ *Berg Statement of Claim*, *supra* note 6, at para. 86.

statement has been subject to popular debate with many, including the CHL, referencing a number of small-market franchises that struggle to break even.¹⁰⁶ But it is important to remember that the provision sets an extremely low threshold. The Brandon Wheat Kings were described in *McCrimmon* as a “commercial organization...carrying on business for profit.”¹⁰⁷ Attendance figures vary drastically, but for the 2014–15 season, the average attendance amongst the CHL’s three league leaders is over 9,000 a game.¹⁰⁸ Charging spectators an admission fee is comparable to a software company charging customers for an unpaid intern’s technical support, as was the case in *Sandhu v. Brar*.¹⁰⁹ Teams receive the benefit of players’ skills by obtaining a fee that fans offer in return for the entertainment value provided predominantly by the players. The mere fact that teams charge admission might be enough on its own to find that a benefit is being derived.

Should the Ontario Labour Relations Board’s analysis in *Sandhu* be ignored in favor of a more stringent standard, there is no shortage of evidence describing the business of Major Junior hockey as a significant economic enterprise—one that is inherently dependent on the services provided by the players. The Berg action alleges that the IceDogs, whose attendance ranked 15th in the 20-team OHL, generated \$2,032,840 in gate revenue during the 2013–14 season against expenditures of \$32,500 on weekly player compensation.¹¹⁰ Franchise valuations also appear to be strong considering Quebecor Inc. bought the Quebec Remparts in 2014 for a reported \$25

¹⁰⁶ See e.g., Westhead, *CHL Should Pay \$187M*, *supra* note 7.

¹⁰⁷ *McCrimmon*, *supra* note 43, at para. 22.

¹⁰⁸ *Quebec Major Junior Hockey League 2014-15 Attendance Graph*, The Internet Hockey Database (Sept. 8, 2015), http://www.hockeydb.com/nhl-attendance/att_graph_season.php?lid=QMJHL1970&sid=2015, [https://perma.cc/N8SU-M9QY]; *Ontario Hockey League 2014-15 Attendance Graph*, The Internet Hockey Database (Sept. 8, 2015), http://www.hockeydb.com/nhl-attendance/att_graph_season.php?lid=OHL1989&sid=2015, [https://perma.cc/G9W5-J9E3]; *Western Hockey League 2014-15 Attendance Graph*, The Internet Hockey Database (Sept. 8, 2015), http://www.hockeydb.com/nhl-attendance/att_graph_season.php?lid=WHL1979&sid=2015, [https://perma.cc/S9D2-TRAG].

¹⁰⁹ *Sandhu v. Brar*, 2013 CanLII 43024 para. 24 (ONLRB).

¹¹⁰ *Berg Motion Record*, *supra* note 19, at para. 68–69.

million.¹¹¹ The Guelph Storm's business arrangements were outlined in *Guelph Centre Partners Inc. v. Guelph Storm Inc.* when a dispute arose between the team and its arena operator.¹¹² The team demanded a deficiency payment based on a stated level of guaranteed ticket revenue.

When the operators decided to exercise their option to buy the team for \$3.25 million rather than make the deficiency payments, due diligence materials were refused presumably because they would reveal healthy financials that made the \$3.25 million purchase option a bargain price.¹¹³

With valuations this high, teams that often operate at a loss are potentially able to recoup any wasted investment.¹¹⁴

B. Players are Provided With Room, Board, Equipment, and Development

A popular argument raised in defense of the CHL references the fact that teams cover almost all costs associated with players' living arrangements and hockey development. Players live with billet families who provide a home environment in return for compensation in the range of \$90-\$100 a week and two season ticket packages.¹¹⁵ Teams also will often compensate for room and board in instances where a player is able to remain at home.¹¹⁶ Players are also provided with team equipment, the extent to which varies on a team-by-team basis. Berg alleges that he was given sticks and protective outer gear which were returned to the team upon

¹¹¹ See generally Ken Campbell, *If Junior Operators Can't Afford a Reasonable Wage, It's Time to Shut Down*, THE HOCKEY NEWS, Feb 20, 2015, <http://www.thehockeynews.com/blog/if-junior-operators-cant-afford-a-reasonable-wage-its-time-to-shut-down/>, [<https://perma.cc/JRT9-LSY8>].

¹¹² *Guelph Ctr. Partners Inc. v. Guelph Storm Inc.*, [2005] O.J. No. 457, 63 W.C.B. (2d) 582, aff'd [2005] O.J. No. 5345, 68 W.C.B. (2d) 45.

¹¹³ *Id.*

¹¹⁴ See generally Rick Westhead, *NHL Player Agents Call for Changes to CHL's 'Dirty Little Secret'*, TSN (March 4, 2015), <http://www.tsn.ca/nhl-player-agents-call-for-changes-to-chl-s-dirty-little-secret-1.222059>, [<https://perma.cc/4F3M-YEQZ>].

¹¹⁵ See e.g., *Billet a Sea Dog Player*, SAINT JOHN SEA DOGS (Sept. 8, 2015), <http://www.saintjohnseadogs.com/page/billeting>, [<https://perma.cc/KW3K-8H5E>].

¹¹⁶ See e.g., *C.F.F. v. M.R.F.*, 2012 NSSC 426 para. 52, [2012] N.S.J. No. 671.

completing his services and that he was not supplied with skates or any additional body padding.¹¹⁷

Regarding the effect employer-provided room and board has on the determination of wage payments, there is little room for debate, as the ESA is clear: employers are permitted to consider the provision of room and board as constituting part of an employee's paid wage, but the amount that an employer will be deemed to have paid cannot be freely determined.¹¹⁸ The ESA expressly states that room and board constitutes the equivalent of \$85.25 weekly when a private room is provided, and \$69.40 for a shared room, meaning player compensation even with room and board factored in still falls well short of minimum wage.¹¹⁹

The ESA also allows an employer to deduct money from wages paid to an employee where the employee provides written permission.¹²⁰ However, this permission must include a statement either specifying the amount to be deducted or providing a method for calculating the specific amount.¹²¹ The result is that the CHL cannot argue that players would have received compensation above minimum wage levels but for deductions that had been made for equipment, development, and training expenses. A general statement offering blanket authorization that an employee owes money to the employer is not sufficient to allow a deduction from wages. It could also be said that CHL teams have no choice but to provide and pay for equipment on account of the Occupational Health and Safety Act (OHSA). The OHSA imposes a general duty on employers to "take every precaution reasonable in the circumstances for the protection of a worker," and places the responsibility on employers to provide protective equipment that must be

¹¹⁷ See *Berg Motion Record*, *supra* note 19, at para. 58.

¹¹⁸ ESA, *supra* note 50 s. 23(2).

¹¹⁹ See O. Reg. 285/01, s. 5(4).

¹²⁰ See ESA, *supra* note 50 s. 13(2), (3).

¹²¹ See *id.* s. 13(5)(a).

maintained in good condition.¹²² Although Ontario’s OHSA, unlike equivalent legislation in some other provinces, is not explicit as to who must bear the burden of cost for the personal protective equipment, courts have generally understood that “provide” means to pay.¹²³ It is also worth noting that the OHSA’s broad definition of a worker includes a person who performs services for monetary compensation, meaning that an employer’s general duty to provide a safe work environment applies equally to independent contractors and employees.¹²⁴

C. “We Believe That our Players are Amateur Student-Athletes”¹²⁵

In accordance with the CHL abandoning its previous contractual characterization of players as independent contractors, public defense to the Berg action has been to take direction from the NCAA and insist that players be considered amateur student-athletes. Justification is based on the CHL not being considered a professional league by Hockey Canada—the national sport organization responsible for the governance of amateur hockey in Canada—and the CHL’s educational program, which can provide players with grants to cover post-secondary education following their Major Junior career. CHL teams originally began providing educational grants on an individualized basis as a recruiting tool to compete with the NCAA, but the system became standardized in 2008 and provides meaningful financial assistance to many CHL graduates. Teams in each of the QMJHL, OHL, and WHL fund their own respective grant programs that

¹²² Occupation Health and Safety Act, R.S.O. 1990 c. O.1 s. 25.

¹²³ *Who Should Pay for PPE – Employer or Worker?* OHS INSIDER (Feb. 25, 2010), <http://ohsinsider.com/diligence/who-should-pay-for-ppe-employer-or-worker>, [<https://perma.cc/4FUS-K7QV>].

¹²⁴ Fudge, Tucker & Vosko, *supra* note 62, at 213.

¹²⁵ Press Release, Canadian Hockey League, Statement from CHL Commissioners (Oct. 20, 2014), <http://ontariohockeyleague.com/article/statement-from-the-commissioners-of-the-canadian-hockey-league/164315>, [<https://perma.cc/2WML-DWJS>].

generally provide players with a full-year scholarship for each season that they play.¹²⁶ Although the one-for-one scholarship for every season played measure applies universally to every player, individual players remain free to negotiate a better deal.¹²⁷ This was alleged to have been the case for Berg, who claims to have come to terms on an agreement with the IceDogs providing a full four-year scholarship enforceable the moment he stepped onto OHL ice for either an exhibition or regular season game.¹²⁸

Both the non-professional status of the CHL and its educational program have figured prominently in public discourse. After an executive with the Seattle Thunderbirds testified before Washington's House Labor Committee that WHL teams are members of both Hockey Canada and USA Hockey, it was confirmed by USA Hockey that Major Junior is not a registered level and teams are not members—the implication simply being that USA Hockey may not necessarily agree with the characterization of the WHL as a non-professional league.¹²⁹ Regarding the CHL's educational grant program, the centerpiece of the CHL's student-athlete defense, it is alleged that eligibility restrictions can be difficult to meet, with the result being that teams on average are only paying out full scholarships to four players annually.¹³⁰ Among the most restrictive and controversial conditions is the requirement that players enroll in post-secondary studies within 18

¹²⁶ See *QMJHL Education*, *supra* note 102, art 4.3 (The QMJHL makes their education policy public. It sets out the eligibility criteria on a half-season/semester basis, and provides that a player who qualifies for a grant, upon enrolling in post-secondary study, is able to receive one grant per semester. The grant is determined to be \$600 per succeeded course, with a maximum of \$6,000 per year and a maximum of four years.)

¹²⁷ See Ryan Kennedy, *CHL Education Opponents Way Off Base*, THE HOCKEY NEWS, Nov. 7, 2011, <http://www.thehockeynews.com/articles/48807-CHL-education-opponents-way-off-base.html>, [<https://perma.cc/UZ83-BUV6>].

¹²⁸ See *Berg Motion Record*, *supra* note 19, at 53.

¹²⁹ See Cribb, *Claims Questioned*, *supra* note 100.

¹³⁰ See Robert Cribb, *Class Action Lawsuit Filed Against Canadian Hockey League Over Wages*, THE TORONTO STAR, Oct. 20, 2014, http://www.thestar.com/news/world/2014/10/20/class_action_lawsuit_filed_against_canadian_hockey_league_over_wages.html, [<https://perma.cc/PP8J-5S22>].

months of their 20 year old overage season.¹³¹ Meant to ensure timely enrollment, this rule effectively voids a player's entitlement to their education package should they, following the end of the CHL eligibility, try their luck in one of hockey's minor professional leagues for more than a season and a half. NHL player agent Allan Walsh argues that system, as it currently exists, not only severely limits the number of players that can make use of the grant program but also is indicative of the "CHL's dirty little secret [that] they don't want players using these packages."¹³²

As polarized as the debate can be regarding the CHL educational package, the discourse may be fruitless. "Student-athlete" is not a legal term, but rather is one that, according to Robert McCormick and Amy McCormick, was coined by the NCAA "as propaganda, solely to obscure the reality of the university-athlete employment relationship and to avoid universities' legal responsibilities as employers."¹³³ McCormick and McCormick have argued that the NCAA created the term, embedded it in all NCAA rules, and required its exclusive use thereafter as a response to a Colorado court decision finding the University of Denver liable to provide an injured university football player with workers' compensation benefits.¹³⁴ As the value of grant-in-aid scholarships and the increasing commercialization of college athletics transformed collegiate sports into a billion-dollar revenue generator, the NCAA's insistence on the term "student-athlete" became all the more fervent.

The ESA does not carve out a specific exemption for student-athletes, but it does provide generally that it will not apply to anyone who "performs work under a work program approved by a college...or a university," or to a "secondary school student who performs work under a

¹³¹ See QMJHL Education, *supra* note 102.

¹³² Westhead, *supra* note 115.

¹³³ McCormick & McCormick, *supra* note 4, at 86.

¹³⁴ See *id.* at 83.

work experience program authorized by the school board that operates the school in which the student is enrolled.”¹³⁵ The labor status of student-athletes in Canada has also yet to be specifically addressed through the courts, but it was partially considered in *McCrimmon*. The argument in *McCrimmon* was that the status of players was not that of employees but rather that of students in a “form of private education,” in that the players “were participating in a hockey program offering scholarships containing certain pre-conditions, one of which was to possess the ability to play hockey at a level permitting [them] to be a member of a team in the WHL.”¹³⁶ The court rejected this argument, finding that “[w]hile there is an educational component attached to the contract between the Wheat Kings and the players—and that is commendable—the players are paid to play hockey.... It is the completion of the playing time that gives rise to the educational entitlement.”¹³⁷

The reasoning applied in *McCrimmon* is not that which is used necessarily to distinguish employees from student-athletes but rather applies to employees and students generally. *Rizak v. M.N.R.* recently explained that the question to ask in this analysis is whether the agreement between the graduate student and the university is a “contract of employment or an agreement of financial assistance regarding continuing studies.”¹³⁸ This is to be determined simply by considering whether the dominant characteristic of the payment is to compensate for work or to provide student assistance.¹³⁹ The dominant characteristic in *Rizak* was compensation for work, as there was a clear correlation between the two. The graduate student “did not receive the money as some form of no-strings attached bursary or scholarship,” but rather because he agreed

¹³⁵ ESA, *supra* note 49 s. 3(5)1, 2.

¹³⁶ See *McCrimmon*, *supra* note 42, at para. 7.

¹³⁷ *Id.*

¹³⁸ See *Rizak v. M.N.R.*, [2013] C.T.C. 273 (Can.) para. 33, [2013] T.C.J. No. 241 (Can.) (QL).

¹³⁹ See *id.* at para. 25.

to perform lab work for his supervising professor.¹⁴⁰ If the graduate student stopped working in the lab, he would not receive any payment.

Is the dominant characteristic of the CHL's education package to provide student assistance or is it to compensate for work provided? Applying the analysis from *Rizak* and *McCrimmon*, there is little question that the grant is to compensate for work; it is the services provided as hockey players that give rise to the entitlement, and as such, it is not some form of no-strings attached bursary. The players do not receive the education grant by virtue of being granted admission into post-secondary study; rather they are entitled to the money strictly on account of playing hockey in the CHL and complying with the League mandated eligibility requirements. The relationship is not primarily academic but one based on hockey playing services.

There is, however, a single sentence from *McCrimmon* that may support the League. The court said that "the requirement to play hockey is not inextricably bound to a scholarship as may be the case with a university since attendance at a post-secondary educational institution is not mandatory for remaining on the roster."¹⁴¹ Determination on this point might be different today, as the QMJHL's Education Policy, for example, now states that all players are obligated to attend school in some capacity, unless given an exemption. The extent to which this is enforced CHL-wide would probably be contestable, however, as Berg alleges that seven players on Niagara during the 2013–14 season were not enrolled in any kind of education program.¹⁴² Berg could also argue that even if enrollment in an education program was mandatory, schooling is merely ancillary to the obligations as hockey players. Berg's affidavit states that the demands of

¹⁴⁰ See *id.* at para. 36.

¹⁴¹ *McCrimmon*, *supra* note 42, at para. 19.

¹⁴² See *Berg Motion Record*, *supra* note 18, at para. 28.

playing in the OHL forced him to significantly lessen his course-load, and there is no shortage of other well-documented cases demonstrating that the demands of Major Junior hockey frequently take priority over schooling.¹⁴³ Although not entirely cut and dry, both case precedent and the facts weigh in favor of a finding that the dominant characteristic of the education package is to compensate for work provided. The aggregate result is that the court is unlikely to find that CHL players fit within any of the ESA's exempt categories and are therefore subject to wage and other supplemental benefits provided for under the Act's provisions.

VII. Additional Components and Ancillary Effects

A. Punitive Damages

Punitive damages in the employment context, meant not to compensate the employee for loss suffered but rather to send a message to the employer that his behavior was abhorrent, are most often considered in cases of wrongful termination. The Supreme Court in *Honda Canada Inc. v. Keays* explained that courts should award punitive damages “cautiously” and only in “exceptional cases.”¹⁴⁴ Clarified in *Boucher v. Wal-Mart*, there are three requirements a plaintiff must show in order to obtain such an award: (i) there must be an independent actionable wrong outside any claim of breach of contract, (ii) the defendant's conduct must be reprehensible and a “marked departure from ordinary standards of behavior,” and (iii) such an award must be “rationally required to...meet the objectives of retribution, deterrence and denunciation.”¹⁴⁵

¹⁴³ See *id.* at para. 85; see Greg MacVicar, *Former Q Player Brett Morrison Locking Horns With League for Bursary Money*, THE CAPE BRETON POST, June 19, 2009, <http://www.capebretonpost.com/Living/2009-06-19/article-777272/Former-Q-player-Brett-Morrison-locking-horns-with-league-for-bursary-money/1>, [https://perma.cc/FFU5-684A].

¹⁴⁴ See *Honda Canada Inc. v. Keays*, 2008 S.C.C. 39 para. 68, [2008] 2 S.C.R. 362 (Can).

¹⁴⁵ See *Boucher v. Wal-Mart Canada Corp.*, 2014 ONCA 419 para. 79, 120 O.R. (3d) 481 (Can. Ont. C.A.).

Getting past the independent actionable wrong requirement is the first hurdle for the players to overcome. In *Honda*, it was said that a breach of Ontario's Human Rights Code (HRC) did not amount to an independent actionable wrong because the HRC, like the ESA, has its own comprehensive internal enforcement scheme that would be undermined if a breach was recognized as an independent actionable wrong.¹⁴⁶ *Honda* was decided before amendments to the HRC brought in the right to claim compensation in a civil proceeding based on a breach of the Code where there is an accompanying wrong, and as such, was silent on the matter at the time.¹⁴⁷ The players would have to make a case for distinguishing the reasoning in *Honda* on the basis that the ESA does expressly contemplate civil action, specifying that "no civil remedy of an employee against his or her employer is affected by this Act."¹⁴⁸

Should the players be able to convince the court that the CHL's violation of players' ESA entitlements constitute an independent actionable wrong, they would then have to make a case on the facts to satisfy the two remaining requirements. Conduct qualifying as a marked departure from ordinary standards of behavior and thus meriting punitive damages, according to *Honda*, must be "harsh, vindictive, reprehensible and malicious."¹⁴⁹ An example of behavior reaching the high end of such a threshold can be found in *Whiten v. Pilot Insurance*, where the defendant tried to force the abandonment of an insurance claim by arguing in spite of overwhelming evidence to the contrary that the plaintiff had set fire to his own home.¹⁵⁰ At the other end is a case such as *Vorvis v. Insurance Corporation of British Columbia*, where overly interrogative productivity

¹⁴⁶ See *Honda*, *supra* note 143, at para. 64.

¹⁴⁷ See Human Rights Code, R.S.O. 1990, c. H.19, s. 46.1(2).

¹⁴⁸ See ESA, *supra* note 49 s. 8.

¹⁴⁹ *Honda*, *supra* note 143, at para. 68.

¹⁵⁰ See *Whiten v. Pilot Insurance Co.*, 2002 SCC 18, [2002] 1 S.C.R. 595 (Can.).

meetings that caused an employee mental distress warranting medical attention was found not be sufficiently offensive.¹⁵¹

A key reason to argue that the CHL's conduct warrants an award of punitive damages is that in *McCrimmon* the CHL had a decisive ruling on player status, but for over 14 years refused to re-categorize players as employees and bring compensation in line with legislated minimums, instead intentionally keeping the labor costs down to help increase profit margins.¹⁵² Employers have been found liable for punitive damages on the sole basis that they deliberately withheld benefits they knew were required under the ESA.¹⁵³ If the players can successfully portray the ESA violation as shrewd business people taking advantage of a vulnerable labor market, the court may be willing to determine the CHL's behavior was sufficiently blameworthy. This exercise may prove futile, however, as in the third branch of the analysis, when deciding whether punitive damages are rationally required, courts will factor in the deterrent effect of other compensation payments already awarded and ask if there is a shortfall between that amount and what is appropriate for punishing the employer for their behavior.¹⁵⁴ Even if the CHL's conduct receives the court's disdain, the League is potentially liable for hundreds of millions of dollars in outstanding ESA entitlements; for a league that has struggling franchises and is certainly by no means entirely indifferent to the well-being of players—providing some valuable benefits to players in other regards—this liability is likely more than sufficient to compel future compliance.

B. Conspiracy and Waiver of Tort

¹⁵¹ See *Vorvis v. Insurance Corporation of British Columbia*, [1989] 1 S.C.R. 1085, 58 D.L.R. 4th 193 (Can.).

¹⁵² See *Berg Motion Record*, *supra* note 18, at para. 24; *Berg Statement of Claim*, *supra* note 6, at paras. 75–79.

¹⁵³ See *Nelson v. 977372 Ontario Inc.*, 2013 CanLII 41983 (ON SC SM).

¹⁵⁴ See *Pate Estate v. Galway-Cavendish and Harvey (Township)*, 2013 ONCA 669 para. 228, 117 O.R. 3d 481 (Can.).

In addition to the alleged breach of employment standards legislation, Berg’s statement of claim also lists conspiracy and waiver of tort as causes of action. Under the waiver of tort claim is a request for an order requiring the CHL and its Canadian-based teams in the OHL and WHL to disgorge all profits received from October 17, 2012 to the present that were generated on account of violating players’ employment entitlements. This request further elaborates that profits are based on annual revenues in the range of “hundreds of millions of dollars.”¹⁵⁵

Waiver of tort is a restitutionary doctrine that enables plaintiffs to receive disgorgement of profits, as opposed to the normal tort measure of compensatory damages. It is advantageous, for example, where a plaintiff’s property is sold fraudulently at a price exceeding its market value, because it allows the plaintiff to claim the proceeds of the sale.¹⁵⁶ This can be significantly beneficial in the context of a class proceeding such as this, where profits sought could potentially be in the tens of millions of dollars and compensatory damages are hard to measure. Although the law in Canada relating to waiver of tort has become somewhat unsettled, with some class proceedings claiming it is not just an election of remedies but a standalone cause of action in itself requiring proof only of some wrongful act,¹⁵⁷ the Berg action has chosen to play it safe and include the underlying tort of conspiracy.

There are two branches of the tort of conspiracy. The Berg action invokes the tort of conspiracy to injure by unlawful means. As explained by Phillip Osborne, “[a] conspiracy to injure by unlawful means arises where two or more persons agree to act unlawfully and either the predominant purpose of the activity is to harm the plaintiff or the conduct is directed at the

¹⁵⁵ See *Berg Statement of Claim*, *supra* note 6, at para. 86.

¹⁵⁶ See Shantona Chaudhury & Paul J. Pape, *Damages in Waiver of Tort*, PAPE BARRISTERS (Mar. 27, 2012), <http://papebarristers.com/wp-content/uploads/Damages-in-Waiver-of-Tort-SUBMITTED.pdf>, [<https://perma.cc/DPM6-4ZJF>].

¹⁵⁷ See J. M. Martin, *Waiver of Tort: An Historical and Practical Survey*, 52 CAN. BUS. L.J. 473, 475, 476, 531 (2012).

plaintiff and the defendants should have known that harm was likely to result.”¹⁵⁸ Breach of legislation such as the ESA is considered to qualify as unlawful activity, meaning if the analysis in previous sections is correct and the CHL is acting in violation of minimum standards set out in the ESA, the focus will be on whether a level of intent can be proven.¹⁵⁹ As the second branch of the definition indicates, actual intent to injure is not required; it is satisfied if there is constructive intent to cause injury to the plaintiff.¹⁶⁰ The element of constructive intent, however, is not met through mere negligence. Recent case law suggests there are three mental elements relevant to proving constructive intent in an unlawful conspiracy tort: (i) the unlawful conduct must have been deliberate or intentional, (ii) the defendant must have been aware or willfully blind as to the unlawfulness of the conduct, and (iii) the defendant must have been aware or willfully blind as to the likelihood that the conduct would result in harm to the plaintiff.¹⁶¹

C. Players’ Personality Rights

Unauthorized use of an individual’s persona is protected by the common law tort of misappropriation of personality, known as the right of publicity in the US. First recognized in Canada by the Ontario Court of Appeal in *Krouse v. Chrysler Canada Ltd.*, it was since confirmed in *Athans v. Canadian Adventure Camps Ltd.* that individuals have “a proprietary right in the exclusive marketing for gain of [their] personality, image and name.”¹⁶² This is an extremely important right for professional athletes who can often earn substantial endorsement

¹⁵⁸ PHILLIP H. OSBORNE, *THE LAW OF TORTS* 310 (3d ed. 2007).

¹⁵⁹ See Brandon Kain & Anthony Alexander, *The ‘Unlawful Means’ Element of the Economic Torts: Does a Coherent Approach Lie Beyond Reach?* ANNUAL REVIEW OF CIVIL LITIGATION 32, 73 (Todd L. Archibald & Randall Scott-Echlin ed., 2010).

¹⁶⁰ See *id.* at 149.

¹⁶¹ See *id.* at 149–50.

¹⁶² *Krouse v. Chrysler Canada Ltd. et al.*, 1973 CanLII 574 (ON CA); *Athans v. Canadian Adventure Camps Ltd. et al.*, 1977 CanLII 1255 (ON SC); Amy M. Conroy, *Protecting Your Personality Rights in Canada: A Matter of Property of Privacy?* 1 UWO J. LEG. STUD. 1,11 (2012).

agreements based on licensing the use of their name and image. Players in the NHL grant personality rights covering their name, signature, picture, biographical sketch, playing record, and likeness in groups of three or more to the National Hockey League Players' Association (NHLPA) through a Group Licensing Program.¹⁶³ This allows players to enter licensing arrangements as individuals while also letting the NHLPA capitalize on the players' brand as a group. Further, the NHL-NHLPA collective bargaining agreement provides that the NHL and teams cannot use a player's individual personality—including his name and likeness—outside of images or footage taken from game action in any licensing arrangement without obtaining that player's consent.¹⁶⁴

As a comparison, the CHL addresses the personality rights of players simply by including a provision in the standard player contract that has the effect of granting the League and teams exclusive ownership of such rights. The relevant provision from the OHL reads:

The Player hereby assigns irrevocably to the Club and the OHL and any licensees of the Club and the OHL on a non-exhaustive basis, all rights to the Player's name, image, likeness, signature, statistical record and biographical information.¹⁶⁵

Although personality rights are not directly at issue in the Berg action, the class proceeding raises concern over the enforceability of such a provision. Rules prohibiting student-athletes in the US from receiving any compensation for the use of their name, image, and likeness in broadcasts and video games were recently struck down in *O'Bannon v. NCAA*.¹⁶⁶

The scope of revenues generated from licensing agreements in the CHL are not at the same level as in Division I NCAA football and basketball, but the CHL has seen its marketability

¹⁶³ See National Hockey League Players' Association, *Collective Bargaining Agreement Between National Hockey League and National Hockey League Players' Association*, Toronto: NHLPA, 2012, art 25.5(b).

¹⁶⁴ See *id.* § 25.3.

¹⁶⁵ *Berg Statement of Claim*, *supra* note 6, at 11.

¹⁶⁶ See *O'Bannon v. National Collegiate Athletic Ass'n*, 802 F.3d 1049 (9th Cir. 2015).

increase of late with enhanced television exposure. The CHL is currently in the second year of a twelve-year multimedia rights extension with Rogers Media Inc., featuring television and online broadcasts. This agreement had previously been a barter deal with no rights fee; however, it has been reported that the extension brings at least \$5 million to the League annually.¹⁶⁷ This television presence is also directly connected to CHL's seemingly growing network of corporate partnerships that, for the most part, are tied to special event properties such as the MasterCard Memorial Cup. Also referenced in the Berg action is the CHL's partnership with video game maker Electronic Arts. A point of contention is that not only do players receive zero compensation for their name and image appearing in the popular NHL series of video games, they have to actually purchase the game themselves should they wish to see their character in action.¹⁶⁸ Even if the CHL is not receiving any direct financial payment from this partnership, as was the case prior to the 2014–15 season extension, the inclusion of the players' images and personalities serves to further enhance the CHL's exposure and marketability. This has the overall effect of making the League more attractive to corporate marketers looking for the best return on their sponsorship investments.

Most players enter the CHL when they are below the age of majority. Contracts of or for service involving minors are deemed to be binding so long as the contract is beneficial for the minor. The CHL standard player contract was previously found to be unenforceable in *Toronto Marlboro Major Junior "A" Hockey Club v Tonelli*, when an action for breach of contract was brought against a player who signed a professional agreement before the term of his CHL

¹⁶⁷ See Rick Westhead, *Twin Lawsuits Filed Against WHL, QMJHL Over Working Conditions*, TSN (Oct. 31, 2014), <http://www.tsn.ca/westhead-twin-lawsuits-filed-against-whl-qmjhl-over-working-conditions-1.121441>, [https://perma.cc/P57X-M9HA].

¹⁶⁸ See Berg Motion Record, *supra* note 18, at 63.

contract had expired.¹⁶⁹ The reason for finding the agreement unenforceable was that its economic benefits, which were described as a pittance, could not be outweighed by the non-pecuniary benefits associated with competing in the NHL's primary development league.¹⁷⁰ Weekly player compensation has increased only marginally over the last few decades, and while the education program has grown immensely to now provide some very generous packages, the restrictive eligibility conditions appear to significantly limit the number of players who actually end up receiving scholarship benefits. These two factors, in conjunction with the exclusive granting of players' personality rights, present a very real possibility that a court today might again find the standard player contract unenforceable on the basis that its economic terms are not beneficial, thereby allowing players the opportunity to lobby for their own group licensing program.

VIII. Conclusion

This article has attempted to address two substantive objectives: (1) answer the question of whether or not CHL players are properly characterized as employees and therefore subject to the protection of employment standards legislation, and (2) provide a cursory review of the secondary issues raised in the Berg action. Throughout, there has also been the additional purpose of using the CHL as a case study exploring the treatment and legal status of quasi-professional athletes more generally. The CHL, being neither a collegiate nor minor professional league in the strict sense, exists essentially as a hybrid of the two levels. The implication is that an analysis of the pending litigation can serve as instructive for athletes, owners and related

¹⁶⁹ Toronto Marlboro Major Junior "A" Hockey Club v. Tonelli, 11 O.R. (2d) 664, 67 D.L.R. (3d) 214.

¹⁷⁰ See Bob Tarantino, *A Minor Conundrum: Contracting with Minors in Canada for Film and Television Productions*, 29 HASTINGS COMM. & ENT. L.J. 45, 57-60 (2006).

stakeholders in both the NCAA and MLB minor league system. The CHL and Berg action do not exist in a vacuum but rather form an important part of the broader discourse surrounding athlete rights in what has become a highly commercialized sporting world.

Regarding the question of whether or not CHL players are properly characterized as employee-athletes, although the analysis distinguishing employees from categories outside the scope of employment standards legislation is highly contextual and allows a fair amount of discretion, both facts and case precedent weigh heavily in favor of finding that an employment relationship covered by legislative protection exists. The most important element of the test is centered on the level of control teams have over their players, and the reality is that teams control almost all aspects of their players' lives during the season. As there are no exempt categories on which the CHL can rely, this employee-employer finding will give rise to liability on the part of teams—and potentially their officers and directors—for various wage and benefit entitlements. Determining the precise extent of this liability is beyond the scope of this article, as calculations will be dependent on a number of factors. For example, there is the possibility that given the description of 20-year-old players as holding a leadership position, they may be considered managerial employees and therefore not immediately considered entitled to overtime pay.¹⁷¹ The court's treatment of education grants is also not entirely clear. Based on the ESA's restrictions on employer deductions, the CHL presumably will not be able to consider the grants to be a deferred wage payment. However, whether or not the CHL could do so prospectively by requiring players to consent in writing to a specific amount being deducted from their weekly compensation remains to be seen.

¹⁷¹ See O. Reg. 285/01, s. 8(1); ESA, *supra* note 49, s. 22(9).

While a primary intent of this article has been to focus on the legal principles underlying the Berg action, concentrating on the applicable statutory framework and legal tests, it is important to acknowledge some relevant policy considerations that will in all likelihood be interjected into the analysis. On one hand, there are arguments around franchise viability and concern for lower-tier junior leagues that do not have revenue streams even remotely close to those of the CHL. Lobbying on the part of CHL owners and other interested parties raises the real possibility that governments may step in and craft legislated exceptions. This is precisely what has unfolded, interestingly enough, in one of the US states in which the CHL franchises are located.

The WHL has four teams in Washington state, where the Department of Labor and Industries received a child labor complaint regarding the WHL and its work practices. In addition to potential minimum wage violations, at issue was the application of work hour limits for minors. State legislation generally limits working hours for 16 and 17 year olds to 20 hours a week during the school year.¹⁷² Amid threats of franchise relocation by team owners unless an exemption were provided for WHL teams, Washington governor Jay Inslee signed Senate Bill 5893 into law. This amended existing legislation in order to provide that an employee “does not include any individual for the purposes of training or playing as an athlete for a [WHL] team,” making players on Washington WHL teams exempt from the requirements of the *Minimum Wage Act* and *Industrial Welfare Act*.¹⁷³ It was later revealed that this amendment was added

¹⁷² See *What Hours are Teens Under 18 Allowed to Work in Non-Agricultural Jobs?*, Hours of Work, Washington State Department of Labor & Industries, <http://www.lni.wa.gov/WorkplaceRights/TeenWorkers/Hours/default.asp>, [https://perma.cc/8L25-B89K].

¹⁷³ Walker Orenstein, *Should Young Hockey Players Be Exempt From Labor Law?* THE SEATTLE TIMES, March 4, 2015, <http://www.seattletimes.com/seattle-news/politics/should-young-hockey-players-be-exempt-from-labor-law/>, [https://perma.cc/8GEA-4V7S]; Nick Patterson, *Washington State Bill Regarding WHL Players Being Signed Into Law*, THE HERALD OF EVERETT, May 18, 2015, <http://www.heraldnet.com/article/20150518/BLOG12/150519114>, [https://perma.cc/7UFU-J2AP].

despite legal advice from a Washington assistant attorney general, who explained that players should probably be considered employees and therefore subject to employment standards protection.¹⁷⁴ The assistant attorney drafted a memo to the labor and industries department investigator assigned to the complaint, explaining further that:

[T]he only exemption to the broad definition of employee contained in the *Industrial Welfare Act* that might apply to the players is the exemption for interns/trainees. However, the players probably do not meet each of the six elements to qualify as trainees under the department and the DOL's policy because, for one thing, the WHL teams receive an immediate benefit by being able to field a team that includes minor players.¹⁷⁵

Despite the ultimate passing of Bill 5893, what has unfolded in Washington does not change this article's analysis, as there is a strong argument that legislative exemptions such as this one are severely misguided. Not only was Bill 5893 passed despite legal advice to the contrary, but it also undermines the policy objective that employment standards legislation is meant to serve. A person's work is a fundamental aspect of one's life and self-identity, and as such, employers are almost always in a position of far superior bargaining power.¹⁷⁶ Perhaps nowhere is this more true than in the relationship between a young aspiring athlete and team management. The contractual terms defining the relationship are not the result of free bargaining, and are actually far from it. Often all a team has to do is put a contract in front of a player and that player will readily sign it without legal advice or so much as a second thought because the chance of being a CHL player—with the NHL however unlikely, in the foreground—can have an

¹⁷⁴ See Rick Westhead, *Flawed WHL Law Passed Against Legal Advice*, TSN (Aug. 13, 2015), <http://www.tsn.ca/flawed-whl-law-passed-against-legal-advice-1.345197>, [<https://perma.cc/84DB-6EFJ>].

¹⁷⁵ *Id.*

¹⁷⁶ See Machtinger, *supra* note 60.

almost blinding effect.¹⁷⁷ The exploitation of such power inequities is precisely the injustice that employment standards are meant to prevent.

Regarding threats to franchise viability, there are a couple of perspectives that should be explored. First, there is the policy argument that a ruling in favor of the players will effectively destroy lower and less commercially-successful junior leagues. The answer to this is simple: players in these leagues are subject to a level of control that, for the most part, is not remotely close to that which players in the CHL experience. The result is that players in these lower-tier junior leagues measure very differently on the *Sagaz* factors. Second, in terms of the franchise viability of small-market CHL teams, the courts should be careful not to let this issue cloud judgment and override established legal principles that determine whether players are employees. As was said in *Tonelli* when considering the enforceability of the standard player contract,

The issue here is not whether Tonelli's contract was necessary for the preservation of the League or the Marlboros. Certainly no obligation is imposed on Tonelli to prove that it was not. The simple question is whether this contract at the time it was made was beneficial to this player.¹⁷⁸

The issue in the Berg action should therefore not be whether CHL teams in small markets will be able to afford paying their players minimum wage. It should simply be whether or not teams, as employers, are required to provide minimum wage and other prescribed benefits to players as their employees. If teams are required to do so, the impetus should lie with the CHL, its regional leagues and owners, to devise a viable business structure that accounts for such expenditures. Major Junior hockey provides young players with valuable development opportunities and educational assistance, but in no way does this justify abandoning the established principles of

¹⁷⁷ See Grygar, *supra* note 97, at 47–50.

¹⁷⁸ Tonelli, *supra* note 167.

employment law. CHL players are employees according to the ESA and are therefore deserving of the statutory protection that comes with the classification.

Although the determination of employment status and entitlements is certainly the most polarizing aspect of the Berg action and the one likely to have the most profound impact on the business of Major Junior hockey, it is not the only issue of consequence. Also deserving consideration is the use of players' personality rights in league-related revenue-generating licensing agreements. Raised briefly in the filings, this issue forms part of the general rights discourse that has now enveloped Major Junior hockey. The CHL has a growing television presence and with it comes corresponding financial spinoffs. As the Berg action unfolds, with players, their parents and the interested public becoming more educated on player rights and entitlements, it is reasonable to predict that the next battle will be over the use of players' personality rights and access to the revenue stream which their licensing helps generate. As one CHL player said rather matter-of-factly in reference to seeing apparel, billboards and other marketing platforms bearing his image and name: "we put a lot of time and effort into hockey ... [The coaches and owners are] making lots of money ... We're trying to represent them, you know? It could be a little thank you."¹⁷⁹

The benefits of playing in the CHL are undeniable, but now so too is the fact that players' rights are being infringed, and have been for a number of years. The unfortunate reality for the small-market operators the League claims will fall victim to any increase in player compensation is that had the CHL not been ignorant to basic employment law for so long, such raucous rights discourse may never have emerged in the first place.

¹⁷⁹ Grygar, *supra* note 97, at 72.