

GETTING AN ICY RECEPTION: DO CANADIAN HOCKEY LEAGUE PLAYERS DESERVE TO BE PAID?

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INTRODUCTION

The Canadian Hockey League (“CHL”) is an amateur league which produces many of the stars who go on to professional hockey careers in the National Hockey League (“NHL”). The first overall pick of the 2016 NHL Entry Draft, Connor McDavid, played in the CHL prior to his debut with the Edmonton Oilers. Many hockey greats have passed through the CHL’s ranks. It is also popular amongst fans, who attend CHL matches in the thousands. The level of competition is high, with an equal mix of blinding speed and bone-jarring hits taking place on the ice. The casual observer might be hard-pressed to distinguish between the CHL and professional-level games. There is one critical difference, however; CHL players are not paid for their contributions to their respective teams. In the eyes of the CHL, these players are amateurs, much like athletes in the National Collegiate Athletic Association (“NCAA”).

In fact, the question facing junior hockey leagues is similar to the one the NCAA confronted in the wake of *O’Bannon*.¹ Junior league teams are increasingly serving as a developmental stepping stone for professional hockey leagues.² Junior league players receive “scholarships” for college, in the form of a year’s worth of tuition and textbook expenses in exchange for each year played for a team.³ The other off-ice resources available to junior players are similar to those found in the NHL.⁴ As a result, some are suggesting that junior league players are actually professionals rather than amateurs and, therefore, should receive compensation for their contributions to their teams.⁵

Like college football players before them, some junior league players are looking to unionize in order to improve their bargaining power when dealing with junior league teams. In October 2014, Unifor, the largest union in Canada, filed a class action suit on behalf of players from the three major junior leagues: Quebec Major Junior Hockey League (“QMJHL”), Ontario Hockey League (“OHL”), and Western Hockey

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¹ *O’Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cali. 2014).

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/>.

³ *Id.*

⁴ *See id.*

⁵ *See id.*

League (“WHL”).⁶ The suit sought \$180 million in damages to cover players’ back wages, holiday pay, vacation pay, and overtime pay.⁷ The stage was set for unionization of “amateur athletes.” Recently, a group of Northwestern University football players succeeded in their effort to petition the National Labor Relations Board (“NLRB”) for the right to create a college football players union.⁸

One factor in the argument against paying junior players is the inability of many teams to cover the costs associated with such a change. While some junior-level hockey teams are profitable operations, many are not.⁹ Teams like the Kootenay Ice, located in Cranbrook, British Columbia, field competitive lineups in decidedly small market settings.¹⁰ Kootenay’s arena, for example, seats 4,264 at maximum capacity.¹¹ According to the team’s general manager, Jeff Chynoweth, the creation of junior hockey league compensation requirements would put Kootenay Ice out of business.¹²

Some high profile names have waded in to the argument over compensation. Sports agent J.P. Barry, who represents Sidney Crosby and several other NHL stars, said that the scholarships provided to junior-level players need to be re-worked to ensure that players aren’t left out in the cold.¹³ The CHL Champions Program, as it is called, was established in 2011 and ensures a \$10,000 scholarship to players for every year they compete.¹⁴ Barry noted that a vast majority of junior-level players will never reach the highest tiers of professional hockey and therefore are reliant on junior hockey scholarships to continue their

⁶ *Id.*

⁷ *Id.*

⁸ Andrew Steadman, *College Athletics for Sale?*, UF LAW, Dec. 5, 2014, <https://www.law.ufl.edu/uflaw/feature/college-athletics-for-sale>.

⁹ *Id.* (“About a dozen teams are situated at the top of industry’s financial pecking order – Halifax and Quebec in the QMJHL; London and Kitchener in the OHL; Kelowna, Portland and Calgary in the WHL. They are indisputably profitable, money-making operations.”)

¹⁰ *Id.*

¹¹ *Id.* Duhatschek, *supra* note 2.

¹² *Id.* (“Most of us would be out of business,” Chynoweth answered. “I for sure would be 100-per-cent out of business.”)

¹³ J.P. Barry, *NHL Agent, Calls for Better Compensation for CHL Players*, CBC NEWS, Mar. 10, 2015, <http://www.cbc.ca/news/canada/british-columbia/j-p-barry-nhl-agent-calls-for-better-compensation-for-chl-players-1.2988201>.

¹⁴ *Id.*

careers beyond sports.¹⁵ However, these scholarships are not unconditional. Junior players have just eighteen months to enroll in a college or university in order to claim the scholarship money they have earned.¹⁶ This narrow window punishes young players who are still deciding whether to keep chasing the dream in a professional league overseas.¹⁷ If a player does indeed choose to continue playing professional hockey in Europe, they lose the right to the scholarship money they earned during their time in the juniors. This harsh outcome is unfair to young hockey players.¹⁸

This article will focus on the question of whether high-level junior hockey players should be considered employees and thus paid for their participation in the leagues. In particular, this article will focus on players for teams in the three CHL leagues located in the United States and Canada, sometimes referred to as the Junior “A” leagues. Eight CHL teams reside in the United States: the Erie Otters, the Plymouth Whalers, the Saginaw Spirit, the Spokane Chiefs, the Tri-City Americans, the Everett Silvertips, the Seattle Thunderbirds, and the Portland Winterhawks.

In order to illustrate the need for junior hockey salaries, the Part I of this article will examine the progression of junior hockey from the mid-1960s to the present day, focusing on the increase in skill level and how American and Canadian courts have handled cases involving “amateur hockey” in the past. Part II of this article will present the NCAA’s rules on eligibility of ex-junior hockey players and compare and contrast the recent *O’Bannon v. NCAA*¹⁹ decision with the state of junior hockey. Part III of this article will examine the proposed legislation in Washington State that would, if passed, officially establish junior players for Washington’s four WHL teams as nonemployees.

¹⁵ *Id.* (“The players, they’re chasing a dream, and 90 per cent of them or 95 per cent of them aren’t going to go on to play a high level of pro hockey and those players—we need to have scholarships available to them so they can move on in life, and I think we want some consistency in the process.”).

¹⁶ *Id.*

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ *O’Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cali. 2014).

THE HISTORY OF JUNIOR HOCKEY

Garage League Hockey: Amateur Hockey's Early Days

Proponents of maintaining amateurism in junior hockey have been able to point to the lower levels of competition in the juniors as evidence that the players are closer to recreational players than the highly trained athletes on professional hockey rosters. Some thirty-five years ago, amateur hockey had a reputation for being violent and primitive, as seen in Paul Newman's *Slap Shot* film from 1977.²⁰ Fans hungered for hits, fights, blood, and line brawls rather than fancy footwork and skilled play.²¹ However, even in those days, many players who made it to the NHL had played in the juniors.

In the earliest days of the Ontario Hockey League ("OHA"), a pre-NHL Canadian league that eventually evolved into a high-level amateur league, fighting was condemned by the organization's leaders.²² However, the outcry against a rising tide of violence paradoxically increased public interest in seeing these hockey "gladiators" clashing on the ice.²³ The level of violence increased when the NHL expanded in 1967, as the role of "enforcer" became a sought-after position rather than a hockey novelty.²⁴ With the dilution of talent in the NHL came an increase in violence, and with an increase in violence came an increased need to protect star players.²⁵ Fighting transformed from being a facet of a player's role on a team into a full-scale profession, with players working to improve their fighting skills rather than their

²⁰ *SLAP SHOT* (Universal Pictures 1977).

²¹ See Duhatschek, *supra* note 2 ("Gone are the days when line brawls were one of its primary selling points; when hazing was a common practice; when junk food was the player's meal of choice; and when players who didn't make it to the NHL were spit out at the end of their careers, many unequipped to handle their futures.").

²² Adam Proteau, *From Deaths to Monsters, A History of Fighting in Hockey*, THE HOCKEY NEWS, Jan. 11, 2015, <http://www.thehockeynews.com/blog/from-deaths-to-monsters-a-history-of-fighting-in-hockey/>.

²³ *Id.* ("It was a big deal for a paper to say so-and-so play hockey in too rough a manner," Slater said. "These papers would come out against the violence, but it didn't do anything to clear up the violence, and the people came out in bigger numbers the bigger the hype got. The OHA was shooting itself in the foot a little bit, promoting the violence through their condemnation of it. It was like going to see the gladiators. Even though that's not proper in society, that's what the people were going out to see.")

²⁴ See *id.*

²⁵ *Id.* ("Super-skilled players became more valuable and, in the minds of team executives and coaches, more in need of 'protection' with every new round of expansion.").

skating and shooting.²⁶ Naturally, junior players looking to break into the league also saw the rise of the enforcer as a new opportunity to make it to the NHL.²⁷

Despite junior hockey's violent reputation in the early days of the NHL's expansion era, when the league doubled in size—from six to twelve teams—the “amateur leagues” were seen as a developmental system for the elite professional squads.²⁸ The amateur leagues, spread across the United States and Canada, represented “feeder leagues” for the NHL and its minor-league affiliate, the American Hockey League (“AHL”). In 1972, there were 50,000 amateur hockey players, 152 of which were drafted to play for NHL teams.²⁹

American courts have repeatedly addressed the fact that “amateur” hockey leagues are actually professional leagues. For example, a federal court in 1977 expressly noted that the “amateur” term is a misnomer in junior hockey, because amateur hockey players sign contracts and are paid salaries.³⁰ Despite this fact, amateur leagues have historically used their semi-professional reputations to underpay their players.

In *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, an upstart professional hockey league—the World Hockey Association (“WHA”)—sought to enjoin the NHL from enforcing a reserve clause that prevented NHL players from joining WHA teams.³¹ The United States District Court for the Eastern District of Pennsylvania found that the NHL violated the Sherman Act in precluding hockey players from joining WHA teams.³² Extensive dicta in the case illustrates that junior league players were professional athletes even in the mid-1970s.³³

²⁶ See *id.* (“If they proved proficient at it, that became their specialty, in the same way a former junior scoring sensation would become a defensive center if he couldn't crack one of the top two lines.”)

²⁷ See *id.*

²⁸ See generally *Philadelphia World Hockey Club, Inc. v. Philadelphia Hockey Club, Inc.*, 351 F. Supp. 462 (E.D. Pa. 1972).

²⁹ *Id.* at 472.

³⁰ See *Linsenan v. World Hockey Ass'n*, 439 F. Supp. 1315, 1319 n.6 (Dist. Ct. Conn. 1977) (“The word ‘amateur’ has a connotation in the world of hockey which is different from the meaning normally given to that word. The amateur hockey players in Canada are in fact paid and enter into contracts to play for the amateur hockey teams.”)

³¹ See *Philadelphia World Hockey Club*, 351 F. Supp. at 467.

³² *Id.*

³³ See *id.* at 473.

The *Philadelphia World Hockey Club* court spent time analyzing the state of amateur hockey in North America. A Buffalo Sabres executive testified that amateur players, in rare instances, would move directly to the NHL, while most others would require between two to four years of “seasoning” in the AHL.³⁴ However, in the WHA’s early years, teams filled their rosters by signing players directly from the amateur leagues, drawing on that pool of 50,000 players.³⁵ The Canadian government employed measures to ensure that professional leagues did not contract with amateur players until they reached twenty years of age.³⁶ The court recognized that players over twenty years of age in amateur leagues would have competitive experience derived from “extensive play.”³⁷ Indeed, the WHA, in crafting a formula for competing with the NHL, advised each of its member teams to sign six Junior Hockey League players and noted that excellent amateur players were available and cost-effective—that is, significantly cheaper to sign than established NHL players.³⁸ Bobby Hull, who played for twenty-three years in the NHL, commented that the upper tier junior leagues featured a skill level that was nearly indistinguishable from the NHL.³⁹

Additionally, the court noted that the NHL invested “millions of dollars” in order to establish the amateur leagues as developmental stepping-stones to professional hockey.⁴⁰ The amateur leagues and the NHL entered into a number of contracts to cement this relationship, ensuring cooperation in signing players by both sides.⁴¹ In sum, it is clear that the court accepted that upper-tier amateur hockey players potentially possessed a level of skill equivalent to professional players. If the courts accepted that junior leagues were essentially professional, albeit developmental, leagues even in the gladiator days, then junior hockey’s current, more finessed practice must therefore be nearly indistinguishable from professional level play.

³⁴ *Id.* at 472.

³⁵ *See id.*

³⁶ *Id.*; *Philadelphia World Hockey Club*, 351 F. Supp. at 472-73.

³⁷ *Id.* at 473.

³⁸ *Id.* (“It is felt that we can secure more than enough excellent Junior Hockey League players—future Super Stars—to build a foundation from. It is also felt that these players can be secured at an average cost of \$10,000 bonus and a \$15,000 salary.”)

³⁹ *Id.* (“I would defy all but the hockey purist to find that much difference between the play in, say, the American Professional League and the NHL.”)

⁴⁰ *Id.* at 2475.

⁴¹ *See id.*; *see Philadelphia World Hockey Club*, 351 F. Supp. at 475.

Professional Development: The Modern Era

The CHL governs the three major junior hockey leagues: the Ontario Hockey League (OHL); the Quebec Major Junior Hockey League (QMJHL); and the Western Hockey League (WHL).⁴² In these leagues, the facilities and resources nearly mirror those available to AHL and NHL clubs.⁴³ Likewise, junior support programs and player safety rules follow the NHL's lead, with an increased emphasis on concussion treatment.⁴⁴ The emphasis in the CHL shifted from barbarianism and brawling to speed and skill; similarly, the junior leagues are also seen as a training ground for coaches hoping to move up to the pro leagues.⁴⁵

While fighting is still a factor in the CHL, with many players building reputations as "enforcers" in the hopes of purveying that style into a professional career, the junior leagues are working to phase out the unique-to-hockey phenomenon.⁴⁶ CHL's president, David Branch, publicly stated that the leagues have reached a point where fighting can slowly be eliminated without hurting the popularity of the sport.⁴⁷ Concussion awareness spurred the movement to eradicate fighting.⁴⁸ Several deceased, former NHL players, including ex-Minnesota Wild enforcer Derek Boogaard, suffered neurologic issues subsequent to their involvement in professional hockey, namely, chronic traumatic encephalopathy ("CTE").⁴⁹ Stemming from concussions, CTE is known to cause dementia, among other cognitive issues. Unfortunately, concussions are not the only result of on-ice fights. In 2009, a player for the OHA's Whitby Dunlops hit his head on the ice during a fight and fell into a coma, eventually dying as a result of the injury.⁵⁰

⁴² *About the CHL*, CANADIAN HOCKEY LEAGUE, <http://www.chl.ca/aboutthechl>, (last visited Apr. 3, 2016), <http://www.chl.ca/aboutthechl>.

⁴³ See Duhatschek, *supra* note 2.

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ See John Branch, *Junior Hockey on Cusp of a Revolution: Trying to Stop Fighting*, N.Y. TIMES, Feb. 27, 2012, http://www.nytimes.com/2012/02/28/sports/hockey/fighting-in-amateur-hockey-leagues-may-be-on-way-out.html?_r=0 ("Even the three top junior leagues in Canada, major fight-friendly feeder systems to the N.H.L., are considering immediate ways to make fighting a rarity, not an expectation.").

⁴⁷ *Id.* ("The appetite is there," said David Branch, the president of the Canadian Hockey League, which oversees the Ontario Hockey League, the Quebec Major Junior Hockey League and the Western Hockey League. "The time is certainly right to move forward.").

⁴⁸ See *id.*

⁴⁹ *Id.*

⁵⁰ *Player Dies after Fight*, ASSOCIATED PRESS, Jan. 5, 2009, <http://sports.espn.go.com/nhl/news/story?id=3811386>.

As a result, officials within the NHL have spoken out against violent play in the junior as well as professional leagues. Former NHL senior vice-president of player safety Brendan Shanahan was one of hockey's "tough guys" during his professional hockey career, a skilled player with a reputation for being a formidable fighter.⁵¹ Shanahan, however, does not want young hockey players to follow in his footsteps.⁵² Rather, Shanahan advises young players to hone their skills as they progress instead of trying to establish a career as an enforcer.⁵³

An increase in skill-focused training in junior hockey, combined with the fact that the junior leagues have served as the primary developmental system for the NHL for decades, should make it clear that junior players are very nearly top-tier athletes and therefore should be compensated in a manner reflective of their contributions to their teams. While junior contracts will never resemble the multi-million dollar deals that exist in the NHL, junior compensation should, at the very least, provide younger hockey players with the means to begin amassing savings for their future lives and careers both within and outside of hockey. Furthermore, the NCAA's rules and restrictions regarding junior-level hockey cements the idea that junior players should be compensated as professionals.

Junior Hockey in the Canadian Courts

Canadian courts have implicitly endorsed the "amateur" format of junior hockey—that is, the tradition of placing players with host families and paying only for expenses and scholarships. Courts that have considered junior hockey cases have generally not addressed the inherent employment issues. Historically, courts in Canada have generally accepted that junior hockey players are amateurs despite the appearance of employment.⁵⁴

In *Hawes v. Sherwood-Parkdale Metro Junior Hockey Club, Inc.* the court addressed the issue of whether a junior hockey player is entitled to payment. However, the court ignored the underlying

⁵¹ See Proteau, *supra* note 22.

⁵² *Id.*

⁵³ See *id.* ("That's why, while he's not ashamed of his past or the role of an organic fight in the sport, he'd never suggest to a kid playing junior that he work on being a better fighter to succeed at hockey's top levels.")

⁵⁴ See *Hawes v. Sherwood-Parkdale Metro Junior Hockey Club Inc.*, 1990 CarswellPEI 64.

employment issue.⁵⁵ In *Hawes*, Buck Hawes signed a contract with a junior league team that specified the compensation he would receive, including \$2,400 for every season of play.⁵⁶ Hawes was cut after receiving just \$400 and sought to recover the remaining \$2,000.⁵⁷ A trial court ruled in favor of the defendant hockey team. The Court of Appeals affirmed, considering evidence of other amateur players who were not paid after release from their teams.⁵⁸ Neither court, however, addressed the issue of whether the contract signed by the player actually created an employee status.⁵⁹

Despite the Canadian court system's apparent approval of amateurism in junior hockey, it appears that under the Canadian Employment Standards Act, a hockey player in a major junior league fits the definition of "employee."⁶⁰ Under the Act, an employee is "a person . . . who performs work for an employer for wages" or "a person who supplies services to an employer for wages."⁶¹ A "wage" under the Act is a "monetary remuneration payable by an employer to an employee under the terms of an employment contract, oral or written, express or implied."⁶² Furthermore, the Act specifies that an employer "shall pay employees at least the minimum wage."⁶³ Based on these definitions, the player in *Hawes*—whose written contract was representative of the types of contracts signed by junior players—should be considered an employee of the team.⁶⁴ Hawes signed a contract, performed services, and was paid in cash for those services.⁶⁵ Therefore, he was eligible to receive at least the minimum wage prescribed by the Act.

A more recent ruling supports this interpretation of the Canadian employment laws. In *McCrimmon Holdings, Ltd. v. M.N.R.*, a Canadian tax court explicitly ruled that junior hockey players for the Brandon

⁵⁵ *Id.*

⁵⁶ *Id.* at 2.

⁵⁷ *Id.*

⁵⁸ *Id.* at 4.

⁵⁹ *See id.*

⁶⁰ *See* Employment Standards Act, 2000, SO 2000, c. 41.

⁶¹ *Id.*

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *See Hawes*, *supra* note 54.

⁶⁵ *Id.*

Wheat Kings were employed by the team.⁶⁶ The court in *McCrimmon Holdings* did not seek to determine whether the wages paid to the players were fair or whether they complied with the Employment Standards Act. Rather, the court simply sought to determine whether the wages earned by the players were insurable and pensionable.⁶⁷ The court determined that the wages, minimal though they were, indeed were insurable under Canadian law.⁶⁸

Based on the court's conclusion in *McCrimmon Holdings*, it appears that the Canadian courts have come around to the idea that junior hockey players are actually employees. The players are paid a small sum while the hockey teams benefit from ticket sales and other sources of profit. Though the CHL has argued that its players are amateurs and independent contractors, those arguments seem weak when judged by the standard of the Canadian employment law.

THE NCAA AND THE *O'BANNON* DECISION

The NCAA vs. the CHL

The junior hockey leagues and the NCAA represent the two major paths available to hockey players who wish to pursue a career in the NHL.⁶⁹ There are several differences between the two options. For example, the junior leagues play more games per season than the NCAA hockey teams.⁷⁰ Additionally, the CHL offers a more "professional" environment for its players, with a focus on hockey, while the NCAA requires that its players also adhere to certain academic standards.⁷¹ Unfortunately for some hockey players, playing for a junior hockey team violates the NCAA's amateurism rules—meaning that a former junior-level player cannot decide to go to college with the expectation of being eligible for that school's hockey

⁶⁶ *McCrimmon Holdings Ltd. v. Minister of Nat'l Revenue*, 2000 CanLII 460 ("It is a commercial organization—albeit beloved by the citizens of Brandon—carrying on business for profit. The players are employees who receive remuneration—defined as cash—pursuant to the appropriate regulations governing insurable earnings.")

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ Ryan Lambert, *Sonny Milano and the Ongoing NCAA vs. Junior Hockey Wars (Trending Topics Extra)*, YAHOO SPORTS, Aug. 21, 2014, <http://sports.yahoo.com/blogs/nhl-puck-daddy/sonny-milano-and-the-ongoing-ncaa-vs-junior-hockey-wars--trending-topics-extra-150251855.html>.

⁷⁰ *Id.*

⁷¹ *Id.* ("In the CHL, there's studying to some extent, but probably not as much, and it's certainly a more 'professional' hockey lifestyle. In the NCAA, you have to juggle class and practice and travel for games, and it's not always easy.").

team.⁷² This has resulted in several suits by hockey players challenging the NCAA's rules and represents a strong argument in favor of junior hockey players being professionals.

On its website, the NCAA states that amateurism rules were adopted "to ensure the students' priority remains on obtaining a quality educational experience and that all of student-athletes are competing equitably."⁷³ The NCAA lists several factors that are prohibited under its amateurism rules, including contracts with professional teams, salaries for participating in athletics, and delayed initial full-time collegiate enrollment to participate in organized sports competition.⁷⁴

Additionally, the junior leagues are drawing young hockey players away from the NCAA with the alluring promise of higher competition levels and better chances at breaking into the NHL.⁷⁵ Young players know that the most talented players tend to opt for the CHL over the NCAA, including phenoms like Patrick Kane, an American-born forward now playing for the Chicago Blackhawks of the NHL.⁷⁶ The hockey environment in the CHL simulates the professional leagues, with state-of-the-art arenas and top-tier coaching.⁷⁷ These circumstances have resulted in numerous talented hockey players breaking their commitments to American universities in favor of playing for CHL clubs.⁷⁸ On the other hand, players who need a post-hockey fallback plan are likely better served by attending college.⁷⁹

American courts have analyzed several instances where hockey players tested the waters of junior hockey and later decided to attend college. The results have been decidedly unfavorable to those players.

⁷² *Id.*

⁷³ *Amateurism*, NCAA (last visited Feb. 21, 2015), <http://www.ncaa.org/amateurism>.

<http://www.ncaa.org/amateurism>.

⁷⁴ *Id.*

⁷⁵ See Craig Custance, *NHL Watches as Colleges Wage War with Canadian Junior Hockey*, SPORTING NEWS, Aug. 30, 2011, <http://www.sportingnews.com/nhl-news/197118-nhl-colleges-wage-war-with-canadian-junior-hockey-ohl-whl-qmjhl>.

⁷⁶ *See id.*

⁷⁷ *Id.* ("Junior hockey facilities are outstanding, and the coaching is NHL-level. Players get a taste of life as a professional hockey player in the CHL, and most NHL teams would prefer their draft picks play junior hockey rather than college hockey.")

⁷⁸ *See id.* ("A recent Boston Globe story put the number of elite players breaking college commitments this year at nine").

⁷⁹ *See id.* ("For the great majority of young players who never see the NHL, it gives them the backup plan of a college education, often at elite American universities. A degree from Harvard eases the pain of falling short on NHL dreams.")

In *Buckton v. National Collegiate Athletic Ass'n*, two Boston University hockey players sought to enjoin the NCAA from declaring them ineligible to play intercollegiate hockey.⁸⁰ Both players participated in the Canadian junior hockey leagues prior to their enrollment at Boston University.⁸¹ Plaintiff Buckton played for the Oshawa Generals in 1970, receiving \$24 per week for room and board, plus \$10 per week for expenses and \$4.82 for schoolbooks.⁸² Plaintiff Marzo played for the Kitchener Rangers in 1970, receiving \$24 per week for room and board, plus \$10 per week for expenses and \$51.47 for schoolbooks. Both players attended school throughout their seasons with their respective teams.⁸³ In 1971, the NCAA altered its constitution to reflect that former junior hockey players were ineligible for intercollegiate athletics.⁸⁴ In considering the consolidated cases, the court found that Boston University received state funds and, therefore, the conduct of the University, and the NCAA toward the plaintiffs constituted state action.⁸⁵ The court additionally found that the NCAA was depriving the plaintiffs of their equal protection rights.⁸⁶ The court based its decision on the fact that the plaintiffs were from a country where secondary schools did not participate in interscholastic hockey—Canada.⁸⁷ Therefore, the court reasoned, the plaintiffs had no option other than to play hockey for junior league teams and to accept compensation from the team for room and board to make this decision financially feasible.⁸⁸ By comparison, American hockey players can attend secondary prep schools, where the school, rather than the team, pays for room and board.⁸⁹

The basic facts of *Jones v. National Collegiate Athletic Ass'n*⁹⁰ resembled those of *Buckton*.⁹¹ In *Jones*, a hockey player at Northeastern University sought to enjoin the NCAA from declaring him ineligible to play intercollegiate hockey.⁹² The court found that the plaintiff failed to show a substantial likelihood of

⁸⁰ *Buckton v. Nat'l Collegiate Athletic Ass'n*, 366 F. Supp. 1152, 1153 (D. Mass. 1973).

⁸¹ *Id.*

⁸² *Id.* at 1154.

⁸³ *Id.*

⁸⁴ *Id.* at 1155.

⁸⁵ *Buckton*, 366 F. Supp. at 1157.

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ *Jones v. Nat'l Collegiate Athletic Ass'n*, 392 F. Supp. 295, 296 (D. Mass. 1975).

⁹¹ *Buckton*, 366 F. Supp. 1152 (D. Mass. 1973).

⁹² *Jones*, 392 F. Supp. at 296.

prevailing on the merits and denied preliminary relief.⁹³ For five years, including three during high school and two before he enrolled at Northeastern, the plaintiff played amateur hockey for which he was paid.⁹⁴ As a result, the NCAA declared the plaintiff ineligible due to his violation of the amateurism rules, and denied Northeastern's request for a waiver.⁹⁵

The court distinguished the plaintiff's case from *Buckton*, noting that the plaintiff was an American citizen who had the option of attending a secondary school concurrently with playing junior hockey.⁹⁶ The plaintiff argued that he accepted compensation from the teams for which he played because his family could not otherwise afford to pay for room and board.⁹⁷ The court ruled that the plaintiff was unlikely to prevail on this argument since the NCAA's rules disqualify athletes who have received compensation, regardless of its purpose.⁹⁸

In *Karmanos v. Baker*, a teenaged hockey player named Peter Karmanos III moved from his home state of Michigan to play hockey in Quebec during his final two years of high school.⁹⁹ During those years, Karmanos played Major Junior A-level hockey for two teams the court deemed "professional hockey teams" due to the money paid to their players.¹⁰⁰ In order to preserve his status as an amateur athlete, Karmanos added a clause to his contracts with the teams that specified he would not be paid for his participation on the teams.¹⁰¹ Karmanos was recruited to play hockey for the University of Michigan following his graduation from high school.¹⁰² However, the NCAA deemed Karmanos as having been a professional hockey player prior to his arrival at the University of Michigan and therefore ineligible to play

⁹³ *Id.*

⁹⁴ *Id.* at 297.

⁹⁵ *Id.* at 298.

⁹⁶ *Id.* at 301.

⁹⁷ *Id.* ("Thus his classification as a 'professional' and his resulting ineligibility for intercollegiate hockey is the direct result of his family's economic status.").

⁹⁸ See *Jones*, 392 F. Supp. at 302.

⁹⁹ *Karmanos v. Baker*, 617 F. Supp. 809, 811 (E.D. Mich. 1985).

¹⁰⁰ *Id.* at 812.

¹⁰¹ *Id.*

¹⁰² *Id.*

college hockey.¹⁰³ The court, in dismissing Karmanos's claims, noted that the NCAA had identified Major Junior A teams as professional teams under its rules.¹⁰⁴

Based on the above cases, it seems clear that the NCAA and American courts have accepted that the upper-tier junior leagues are professional leagues for the purposes of determining a hockey player's amateur status. Junior players are faced with the choice of giving up hockey entirely if they choose to attend a post-secondary educational institution, since they are not eligible to participate in NCAA-level hockey. Therefore, it is only logical that junior players be compensated in a manner befitting a professional hockey league.

O'Bannon and Student Compensation

Even further cementing the professional status of the junior leagues is the recent federal court ruling in *O'Bannon v. NCAA*, in which the trial judge found that the NCAA was effectively restraining college athletes' abilities to market their names, images, and likenesses under the Sherman Act.¹⁰⁵ Although the appeals process is ongoing, the *O'Bannon* case clearly shows judicial favor for the idea that college football and basketball players should be able to share in the profits generated by their participation in collegiate athletics.¹⁰⁶ With further such litigation on the horizon, it stands to reason that college hockey players will also soon win the right to be compensated for their contributions to their academic institutions.

Former UCLA basketball star Ed O'Bannon and nineteen others brought the suit against the NCAA on the claim that the governing body of college athletics violated antitrust laws by conspiring with individual universities to bilk athletes out of the money derived from their likenesses.¹⁰⁷ Judge Claudia Wilken agreed with O'Bannon's arguments, ruling that the NCAA violated antitrust law.¹⁰⁸ The ruling

¹⁰³ *Id.*

¹⁰⁴ *Id.* at 818.

¹⁰⁵ *See generally* *O'Bannon v. NCAA*, 7 F. Supp. 3d 955 (N.D. Cal. 2014).

¹⁰⁶ *See id.* at 1008 ("The injunction will also prohibit the NCAA from enforcing any rules to prevent its member schools and conferences from offering to deposit a limited share of licensing revenue in trust for their FBS football and Division I basketball recruits, payable when they leave school or their eligibility expires.").

¹⁰⁷ *Judge Rules against NCAA*, ESPN, Aug. 9, 2014, http://espn.go.com/college-sports/story/_/id/11328442/judge-rules-ncaa-ed-obannon-antitrust-case.

¹⁰⁸ *O'Bannon*, 7 F. Supp. 3d at 1009.

focused on the fact that major universities profit heavily through marketing by featuring college athletes—particularly men’s football and basketball players—while the athletes themselves are not compensated in a manner consistent with the revenues produced by their participation in college athletics.¹⁰⁹

The *O’Bannon* court’s ruling enjoined the NCAA from capping college athletes’ scholarships below the cost of attendance and required that the cap on compensation for names, images, and likenesses be set at no less than \$5,000 per year.¹¹⁰ These two blows to the NCAA’s “student-athlete” rules have strengthened the idea that college athletes are actually quasi-professionals and bring money to their respective schools and therefore should be compensated.¹¹¹ However, the ruling addresses only Football Bowl Subdivision (FBS; formerly Division I) football players and Division I basketball players, meaning college hockey players are not yet entitled to their share of profits.¹¹² Subsequently, the NCAA appealed the decision to the United States Court of Appeals for the Ninth Circuit, which reversed on the issue of whether players should be paid.¹¹³ The *O’Bannon* plaintiffs have submitted a petition for the case to be heard by the Supreme Court of the United States.¹¹⁴

Despite the fact that college hockey players do not directly benefit from the *O’Bannon* ruling, there are several important takeaways from the case that support the argument that junior hockey players are professionals. In dicta from the case, the *O’Bannon* court discusses testimony presented by the plaintiff’s economic expert, Dr. Roger Noll.¹¹⁵ Noll testified that elite football and basketball recruits almost exclusively attended FBS or Division I schools in pursuit of careers in the NFL and NBA.¹¹⁶ Similarly,

¹⁰⁹ See *id.* at 1006-07 (“The Court therefore concludes that a narrowly tailored trust payment system—which would allow schools to offer their FBS football and Division I basketball recruits a limited and equal share of the licensing revenue generated from the use of their names, images and likenesses—constitutes a less restrictive means of achieving the NCAA’s state precompetitive goals.”).

¹¹⁰ *Id.*

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ *O’Bannon v. Nat’l Collegiate Athletic Ass’n*, 802 F.3d 1049, 1078-79 (9th Cir. 2015).

¹¹⁴ Jon Solomon, *Ed O’Bannon plaintiffs ask Supreme Court to take NCAA case*, CBS SPORTS, March 15, 2016, <http://www.cbssports.com/collegefootball/writer/jon-solomon/25517767/ed-obannon-plaintiffs-ask-supreme-court-to-take-ncaa-case>.

¹¹⁵ See *O’Bannon*, 7 F. Supp. 3d at 966.

¹¹⁶ *Id.* (“Dr. Noll noted that elite football and basketball recruits rarely forego opportunities to play FBS football or Division I basketball in order to play professionally.”).

although young hockey players actually do have a choice between junior hockey and the NCAA, the end result is the same: a North American hockey player pursuing a professional career is limited to one of those two options.

The *O'Bannon* court describes FBS and Division I schools as being the only providers of their specific bundle of goods and services.¹¹⁷ Likewise, CHL and NCAA hockey provide athletes with a bundle of goods and services that are not found anywhere else—specifically, the opportunity to prepare for careers in the AHL and NHL while still receiving an education. In sum, despite the fact that NCAA hockey players receive compensation in the form of educational opportunities, junior league players potentially receive even less compensation, depending on whether they take advantage of the \$10,000 yearly scholarships to which they are entitled.

It seems paradoxical that players in the elite junior leagues could be paid even less than their peers in college athletics, who are likely undercompensated in the eyes of the American courts. The NCAA's own position on amateurism in sports, as applied to the *O'Bannon* case, is that blurring the line between amateur and professional sports deprives young athletes of the ability to choose between the two.¹¹⁸ The NCAA's reasoning is that athletes who are given the opportunity to make money immediately will likely choose that option, to the detriment of their education and future career prospects.¹¹⁹ However, by denying junior hockey players the opportunity to play college hockey, the NCAA is contributing to that exact problem. On the one hand, the NCAA is correct in asserting that junior hockey players are professionals who should be compensated as such. However, on the other hand, the NCAA is further exacerbating the problem by denying college eligibility to junior hockey players who currently are considered amateurs by the leagues in which they play.

¹¹⁷ *Id.*

¹¹⁸ Pamela A. Maclean, *NCAA Says Students Are Losers If Amateur Sport Rules Discarded*, BLOOMBERG BUSINESS, March 17, 2015, <http://www.bloomberg.com/news/articles/2015-03-17/ncaa-says-students-are-losers-if-amateur-sport-rules-discarded> (“Wilken’s analysis ‘would blur the line between amateur college sports and their professional counterparts and thereby deprive athletes of a genuine choice between the two endeavors,’ NCAA lawyers said in a court filing.”).

¹¹⁹ *See id.*

In sum, the courts should, at the very least, ensure that college and junior hockey players are compensated equally for the use of their likenesses. Ideally, however, lawmakers should take it further with junior hockey players: the NCAA considers junior hockey players professionals, and thus junior hockey players should be paid for their work.

AMATEUR ATHLETICS IN WASHINGTON

Even as junior hockey players begin to ramp up the push for professional status and fair compensation, lawmakers are seeking to block them. In February 2015, legislators in the Washington Senate introduced a bill, ESB 5893, titled “Addressing the Nonemployee Status of Athletes in Amateur Sports.”¹²⁰ The title was revised to specifically refer to athletes in the WHL.¹²¹

The bill’s proposal was a legislative response to a Washington Labor & Industries (“L&I”) investigation into possible violations of child labor laws by the state’s four WHL teams: the Everett Silvertips, the Seattle Thunderbirds, the Spokane Chiefs, and the Tri-City Americans.¹²² The goal of the bill was to classify junior hockey players as “non-employees,” exempting them from the Minimum Wage Act, the Industrial Welfare Act, and the Washington Industrial Safety and Health Act.¹²³ The L&I investigation focused on the fact that junior league players generally spend thirty-five hours or more per week on team-related activities, despite the fact that minors in Washington can only work sixteen hours per week during school weeks and forty hours per week during non-school weeks.¹²⁴

The bill’s proponents said the WHL provides benefits to players that would be lost if the league’s teams were not allowed to continue operating as they currently do.¹²⁵ WHL players spend between thirty-five and forty hours per week participating in team-related activities and occasionally up to sixty-five

¹²⁰ S.B. 5893, 64th Leg., 2015 Sess. (Wash. 2015).

¹²¹ *Id.*

¹²² Josh Cohen, *The Fight to Keep Junior Hockey Players from Getting Paid*, VICE SPORTS, March 13, 2015, <https://sports.vice.com/article/the-fight-to-keep-junior-hockey-players-from-getting-paid>.

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ *See id.* (“I wanted to bring this bill forward to start the conversation about the amateur status of these athletes,” Sen. Fain, the bill’s primary sponsor and representative for the district in which the Thunderbirds play, testified at a Feb. 18 Senate Commerce & Labor Committee hearing. ‘This is a great program that does a lot of good things for the athletes involved in it . . . this [legislation] is designed to make sure they are able to continue operating and continue providing those opportunities to kids in the state.’”).

hours.¹²⁶ In exchange, the players get free room and board, free equipment, a small weekly stipend, and the aforementioned college scholarship.¹²⁷ Additionally, players get the best chance to be drafted by NHL teams. In 2013, 47.8% of drafted players came from the CHL.¹²⁸ However, only 7% of CHL players actually made it as far as being drafted.¹²⁹

A lawyer for former CHL players bringing class action lawsuits against the league has said the bill proposes exempting teams from paying the minimum wage to players while allowing them to continue turning a profit through ticket sales, corporate sponsorships, merchandising, and sale of television rights.¹³⁰ Hockey Canada, the governing body of amateur hockey in Canada, sees the CHL as an amateur league.¹³¹ However, Hockey Canada's American counterpart, USA Hockey, is less precise in its assessment of the CHL's amateur status. USA Hockey's junior council chair John Vanbiesbrouck, a former NHL goalie, said that the CHL was not registered with USA Hockey.¹³² On the other hand, USA Hockey executive director Dave Ogrea said U.S.-based CHL teams are indeed amateur teams and members of USA Hockey.¹³³

The teams themselves argued that they would no longer be able to roster sixteen- and seventeen-year-old players if the bill were to fail in the Washington legislature.¹³⁴ Spokane Chiefs manager Tim Speltz said the teams would be forced to change their operations, while Everett Silvertips general manager Garry Davidson said the failure of the bill to pass could force the teams to move out of the state.¹³⁵ While complaints about minimum wage and child labor laws have been raised in the past, evidence suggests that

¹²⁶ *Id.* ("Players typically spend 35-40 hours a week—and sometimes up to 65 hours—practicing, playing games, traveling, and doing promotional events.")

¹²⁷ *Id.*

¹²⁸ Cohen, *supra* note 122.

¹²⁹ *Id.*

¹³⁰ *See id.*

¹³¹ *Id.* ("Hockey Canada media relations manager Francis Dupont refuted Vanbiesbrouck's statement in an interview. He says, 'Hockey Canada considers the CHL to be an amateur league and CHL teams to offer the highest level of non-professional hockey competition in Canada, administrated as a development program under the auspices of Hockey Canada.'")

¹³² *Id.* ("USA Hockey's junior council chair John Vanbiesbrouck told the Toronto Star, '[w]e have had no communication with any CHL teams nor do I know of them being members . . . their team at the junior level is not registered with USA Hockey.'")

¹³³ *Id.*

¹³⁴ Cohen, *supra* note 122.

¹³⁵ *Id.*

these complaints are often overstated.¹³⁶ However, the teams' arguments resonated in the Washington Senate, where legislators saw the WHL teams as too valuable to lose.¹³⁷ The bill passed in the state Senate on March 3, 2015, and was signed into law on May 18, 2015 by Washington state governor Jay Inslee.¹³⁸

CONCLUSION

Given the many parallels between junior hockey and NCAA athletics, combined with the NCAA's own classification of junior hockey as a "professional" sport, it seems clear that problems with payment of junior hockey players need to be addressed. The cases that deal with "amateur" hockey establish the high level of skill demonstrated by players in the highest tier junior hockey leagues. The numerous cases spearheaded by former junior players after the NCAA denied them admission because they were paid for their participation in the junior hockey league clearly demonstrate that the NCAA considers junior hockey to be a professional sport; the federal courts appear to agree with the NCAA on this point. Therefore, it makes sense that junior hockey players should be compensated in a way that reflects their professional status.

The proper solution, however, is unclear. The CHL, junior league team owners, amateur league administrators and legislators seem sympathetic to the argument for maintaining amateurism in junior hockey. Therefore, it may be necessary to devise solutions that stop short of simply awarding junior players contracts and salaries.

There are a number of possible options that may represent a compromise between the players on one side, and the legislators and team owners on the other. For example, revision of the scholarship rules in order to ensure future educational opportunities for junior players could alleviate some of the players' current concerns about being forced to choose between hockey and college. Furthermore, compensation packages based on the money teams make through the use of players' images and likenesses, perhaps based

¹³⁶ See *id.* ("A recent report from the Center for Economic and Policy Research found that, 'the weight of the evidence points to little or no employment response to modest increases in the minimum wage.'").

¹³⁷ *Id.*

¹³⁸ *Governor of Washington Signs Bill Clarifying WHL Players as Amateur Athletes*, SEATTLETHUNDERBIRDS.COM (last visited Apr. 13, 2016), <http://www.seattlethunderbirds.com/article/governor-of-washington-signs-bill-clarifying-whl-players-as-amateur-athletes>.

on the lower court's *O'Bannon* decision, could more fairly ensure players are seeing a piece of the profits they bring to their respective teams.

Considering the lawsuits that loom on the horizon, it is clear that courts will soon need to confront the issue head-on for the first time. Hopefully judges will seize this opportunity to ensure that junior hockey players are not unfairly exploited by the system.