Should Provinces Tax Non-Resident Athletes?

Alan Macnaughton and Kim Wood*

PRÉCIS
Pour des raisons d’équité, les athlètes qui gagnent un revenu dans un pays, et qui bénéficient donc des services de son gouvernement, devraient payer un certain montant d’impôt dans ce pays sur le revenu qu’ils y gagnent. Pourtant, le traité fiscal Canada/É.-U. ne prévoit pas le paiement d’un tel impôt quand des résidents des États-Unis qui jouent pour des équipes américaines séjournent au Canada. Une solution à long terme à ce problème consiste à modifier le traité, mais une solution à court terme consiste pour chaque province canadienne à lever son propre impôt sur ce revenu. Le précédent que créerait un tel écart du traité fiscal par un gouvernement provincial ou d’un État américain est préoccupant à cause de la complexité accrue qui pourrait s’ensuivre, trois États et deux villes américaines imposant déjà les athlètes canadiens qui y séjournent.

Le présent article analyse la politique qui sous-tend un tel impôt provincial, propose un régime d’imposition simplifié où seule l’équipe produit les déclarations de revenus et utilise les données sur les salaires disponibles au grand public pour calculer le montant de recettes qui pourraient en être tirées. Les athlètes ne verraient pas leur fardeau fiscal s’alourdir puisque leur impôt américain serait réduit d’un montant équivalent grâce au crédit pour impôt étranger des États-Unis. L’impôt proposé est semblable à l’impôt sur les joueurs de la Ligue nationale de hockey de l’Alberta, sauf qu’il est levé à un taux de 15 %, qu’il vise également les joueurs de baseball et de basket-ball, qu’il ne s’applique qu’aux athlètes qui sont des résidents américains et font partie d’équipes américaines, et qu’il pourrait servir à augmenter les recettes générales plutôt qu’à financer les équipes. Les auteurs traitent brièvement de la modification proposée du traité pour permettre aux gouvernements fédéraux des deux pays d’imposer les athlètes qui séjournent chez eux.

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ABSTRACT

Fairness considerations suggest that athletes earning income in a country, and therefore benefiting from its government services, should pay some tax to that country on the amount of income earned there. Yet the Canada-US tax treaty provides that no such tax is paid when US residents playing on US teams visit Canada. A long-term solution to this problem is to change the treaty, but a shorter-term solution that is available to each Canadian province is to levy its own tax on this income. Although the precedent of deviation from a tax treaty by a provincial or state government is worrisome owing to the potential increase in tax complexity, three US states and two US cities already tax visiting Canadian athletes.

This article analyzes the policy issues surrounding such a provincial tax, proposes a simplified taxation method in which only the teams file tax returns, and uses publicly available salary data to calculate the amount of revenue to be raised. Athletes would not suffer an increased total tax burden since their US taxes would be reduced by an equivalent amount through the operation of the US foreign tax credit rules. The proposed tax is similar to the Alberta tax on National Hockey League players, with the main differences being that the proposed tax is at a 15 percent rate, also applies to baseball and basketball players, applies only to US-resident athletes on US teams, and could be directed to general revenues rather than given to the teams. A change in the treaty to allow the federal governments of both countries to tax visiting league athletes is also briefly considered.

KEYWORDS: ATHLETES ■ NONRESIDENTS ■ PERSONAL INCOME TAXES ■ PROVINCIAL TAXES ■ TAX POLICY ■ TAX TREATIES

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INTRODUCTION

It is common that an athlete lives in one country (the residence jurisdiction) and earns income in another country (the source jurisdiction). The tax question that arises is how the potential revenue is to be shared between the two jurisdictions.\(^1\) Although there are an infinite number of alternatives, two are most commonly observed.\(^2\) The first alternative is residence-based taxation, in which only the residence jurisdiction taxes the income. The second alternative is source-based taxation, in which both jurisdictions tax the income but the residence jurisdiction gives a tax credit for the taxes paid to the source jurisdiction. The latter approach gives all of the revenue to the source jurisdiction unless the tax rate is lower in the source jurisdiction than in the residence jurisdiction, in which case both governments collect some revenue. Source jurisdictions generally justify their claim to the revenue as a charge for the government services used by athletes in earning their income there.

Almost every country around the world taxes the worldwide income of its resident individuals and gives a credit for taxes paid to a source jurisdiction; hence, source-based taxation applies if the source jurisdiction taxes income earned by athletes within its borders, and residence-based taxation applies if it does not. Thus, the actions of the source jurisdiction determine which method of taxation applies.

Athletes are typically classed as employees rather as self-employed for tax purposes, at least if they are involved in teams within a league. Other employees who live in one jurisdiction and work in another, either for short-term visits or in a long-term

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1 The United States and some developing countries also tax on the basis of citizenship. For a policy analysis, see Jagdish N. Bhagwati and John Douglas Wilson, eds., *Income Taxation and International Mobility* (Cambridge, MA: MIT Press, 1989).

2 Other alternatives are exclusive source taxation, in which the residence country does not tax the income at all; non-taxation of the income by both source and residence countries; and double taxation—taxation by both source and residence countries. The first alternative is also known as the exemption system, and is commonly used in corporate income taxation: Michael J. Graetz, *Foundations of International Income Taxation* (New York: Foundation Press, 2003), 252.
work relationship, could also be subject to either source-based or residence-based taxation. However, the source jurisdiction may not find it practical to tax most such employees because it may not know when an employee is present in its jurisdiction and how much income is earned there. In contrast, source-based taxation is feasible for athletes because their performances are given widespread publicity and their salaries are often public information.

The general rule around the world, following article 17 of the model income tax treaty of the Organisation for Economic Co-operation and Development (OECD), is source-based taxation of athletes. Canada and the United States follow that rule in part, distinguishing between a league athlete, such as a hockey player, and a non-league athlete, such as a golfer. In general, source-based taxation applies to a non-league athlete and to a league athlete’s income from games held in the country where the athlete’s team is located, but the income of a league athlete from games played outside that country is taxed on a residence basis. The prohibition of source-based taxation for the latter class of league athletes is provided under the terms of the Canada-US tax treaty, which is binding on the federal governments of the two countries. Thus, the income earned by a US resident playing on a US team from a game in Canada is taxed by the US federal government but not by the Canadian federal government.

Subnational governments (that is, provinces, states, and municipalities) are not bound by the treaty and hence may employ source-based taxation more broadly. Three US states and two US cities apply their “jock taxes” to most out-of-jurisdiction athletes, including Canadian athletes on Canadian teams who play there. Similarly, Alberta’s NHL players tax applies to all National Hockey League (NHL) players with games in Alberta, although it is estimated below that almost three-quarters of its revenue comes from players who are not Canadian residents. In that respect, the Alberta tax serves as a precedent for expanded provincial taxation of non-resident athletes.

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4 The policy reason for taxing non-league athletes on a source basis while taxing many league athletes on a residence basis is unknown.

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

6 They are called “jock taxes” because although they legally apply to both athletes and non-athletes providing services, the practical enforcement of such rules is most vigorous on athletes.
Although much previous literature has examined the US jock taxes7 and three recent Canadian articles have examined the new Alberta tax,8 no study has presented empirical data (other than sample calculations for particular players), and the policy issues surrounding the international aspects of these taxes have not been previously addressed in any detail.9 Thus, the main purpose of this article is to examine the possibility of provincial governments’ taxing non-resident athletes who are not currently taxable in Canada and who play for NHL, National Basketball Association (NBA), and Major League Baseball (MLB) teams. Advantages, disadvantages, tax design, and revenue implications are considered. The tax considered is similar to the proposals made for British Columbia by the Vancouver Canucks and for Ontario by the chair of the former Ottawa-Carleton regional government.10

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9 The US jock tax studies have not examined this issue. The only Canadian study is Robert M. Wener (KPMG Ottawa), “Report on Major League Sports Visiting Players’ Tax” (mimeograph, January 25, 2000, 7 pages), which was prepared as support for the Ottawa-Carleton proposal discussed below. Policy issues concerning the general treaty article on athletes, but not the Canada-US league-based exemption, are discussed in Stephanie C. Evans, “US Taxation of International Athletes: A Reexamination of the Artiste and Athlete Article in Tax Treaties” (1995) vol. 29 *George Washington Journal of International Law and Economics* 297-335.

Although these proposals envisioned earmarking the revenue for assisting financially troubled sports teams, this is a separate decision that is reviewed at the end of the article.

The specific tax we examine is a 15 percent flat-rate tax that could be levied by the four provinces with major-league professional sports teams—British Columbia, Alberta, Ontario, and Quebec—on US-resident athletes on US teams visiting the province. We find that such a tax would raise about $20 million in revenue annually. About 65 percent of the revenue ($13 million) would go to the Ontario government, mainly because the Canadian NBA and MLB (excluding the Montreal Expos) teams are located there. This is about the same as the revenue from photo radar in Ontario, which raised $16 million in the 11 months it was in effect in 1994-95.\(^{11}\) Admittedly, the $13 million is less than $\frac{1}{10}$ of 1 percent of anticipated 2003-4 Ontario personal income tax revenues of $20 billion,\(^{12}\) but the tax is still worth considering for the principles involved and because of the strong public interest in athlete issues.

The incidence of this tax on athletes and governments is very unusual. Owing to the operation of the foreign tax credit in the US federal personal income tax, athletes would not suffer an increased tax burden; the tax would increase the tax revenue of the Canadian provinces and reduce the tax revenue of the US federal government by an equal amount. US states would not lose any revenue, but the 17 states with jock taxes that currently exempt Canadian-resident athletes on Canadian teams from their jock taxes might choose to reciprocate the action of the Canadian provinces and gain some revenue by ending this exemption. This would reduce the revenue of the Canadian federal government because of increased foreign tax credits claimed under the federal personal income tax. Surprisingly, our calculations show that the maximum federal revenue loss would be only about $1 million, or 6 percent of the revenue generated by the provinces. This is primarily because US jock tax rates are much below the proposed 15 percent provincial rate and because the number of US residents playing on the average US team is much greater than the number of Canadian residents playing on the average Canadian team.

The article begins by describing and analyzing relevant tax rules at the federal and state/provincial levels: the treaty exemption for league athletes, residence determination, foreign tax credits for state and provincial taxes paid, the North American free trade agreement\(^{13}\) (NAFTA), the Alberta NHL players tax, and US jock taxes. This discussion sets the stage for a review of policy issues concerning whether source-based or residence-based taxation of non-resident athletes is preferable for provincial


governments. The core of the article presents the design of a simple provincial tax on non-resident athletes, explains why it can be expected to raise significant revenue after considering the loss of federal revenue through increased foreign tax credits, and presents revenue estimates. Effects of renegotiating the treaty to allow the imposition of a flat-rate federal tax are then considered. The issue of the disposition of the revenue is discussed in the penultimate section: is there a case for sports subsidies, and, if Ontario wishes to use the money from the tax to aid the Ottawa Senators, what is the best form of subsidy? Finally, the article ends with a brief conclusion.

APPLICABLE TAX RULES

The Canada-US Treaty

Most treaties based on the OECD model treaty contain a specific article providing that income derived by an athlete may be taxed in the country where the income is derived, whether or not the athlete maintains a permanent establishment or fixed base in that country. In the Canada-US treaty, this rule is found in article XVI—Artistes and Athletes. Similar to the OECD model treaty, article XVI permits source-based taxation (that is, taxation in the country in which the employment is exercised) of income earned by an entertainer, musician, or athlete from personal activities. However, the Canada-US treaty version is unusual in that paragraph 3 specifically negates the effect of the other paragraphs of article XVI for an athlete in respect of his or her employment with a team that participates in a league with regularly scheduled games in both Canada and the United States.

The technical explanation to this paragraph indicates that these athletes in such multijurisdictional leagues are subject to the rules of article XV—Dependent Personal Services. Paragraph 1 of article XV permits source-based taxation, but paragraph 2 overrides paragraph 1 and prohibits such taxation where (1) the athlete is present in the source country for 183 days or less, and (2) the remuneration is not borne by


15 Later in this article, under the heading “Renegotiate the Treaty?” we discuss the possible negotiated repeal of article XVI and the imposition of a federal tax on non-resident athletes.

16 This rule does not apply if the amount of income is $15,000 or less in the currency of the source country. Note that where the treaty permits source-based taxation, actual imposition of the tax is by domestic law in each country.

17 This provision applies not just to the athlete but also to the team; however, discussion of the latter application is outside the scope of this article.

18 United States, Treasury Department, Technical Explanation of the Convention Between the United States of America and Canada with Respect to Taxes on Income and on Capital, April 26, 1984, article XVI.
an employer who is a resident of the source country or by a permanent establishment or fixed base in the source country.\textsuperscript{19}

Consider the application of these rules to the taxation of income earned in Canada by non-residents. One example is a US-resident player for a US team. As a league athlete, the player is not subject to article XVI. Turning to article XV(2), he satisfies the first condition because any particular US team visits Canada for at most a few weeks in any year, and he satisfies the second condition because his team is a US resident with no permanent establishment or fixed base in Canada. Thus, the Canadian federal government cannot tax the athlete’s income earned in Canada. Residence-based taxation applies, since the United States will tax this player on his worldwide income, including the income earned in Canada.

A second example is a player for a Canadian team who is a US resident. Again, as a league athlete, the player is not subject to article XVI. Turning to article XV(2), he does not satisfy the first condition because his remuneration is borne by a Canadian resident (the team), and therefore, source-based taxation applies.\textsuperscript{20} Canada will tax this player on his Canadian-source income, and the United States will tax him on his worldwide income.\textsuperscript{21} Issues of double taxation are dealt with through the foreign tax credit, which is discussed in the next section below.

Rather than proceeding to further examples, in table 1 we show all of the possible circumstances in which the Canada-US treaty could apply to athletes playing for Canadian and US teams. The top panel relates to an athlete playing for a Canadian team, while the bottom panel relates to an athlete playing for a US team. In each panel, the first two rows (country of residence—respectively, Canada and the United States) reflect the application of the Canada-US treaty. The third row (country of residence—other countries) reflects the provisions of the OECD model treaty, which

\textsuperscript{19} Article XV(2) of the Canada-US treaty also prohibits source-based taxation where the amount is $10,000 or less in the source country’s currency in a calendar year, but this is unlikely to occur for athletes in the three professional leagues discussed in this article. On the basis of data presented in tables 4A, 5, and 6 below, the average Ontario-source income of US athletes on US teams visiting Canada is about $45,000 for the NHL and MLB, and $58,000 for the NBA. Since each NHL player also plays games in at least one other province, total Canadian-source income is even higher.

\textsuperscript{20} Even if the team was officially an entity with US residence, it would probably have to have a permanent establishment or fixed base in Canada in order to operate as a Canadian team, and therefore, the second condition would not be satisfied.

\textsuperscript{21} The same argument applies to a Canadian-resident athlete whose salary is borne by a US resident or a US permanent establishment or fixed base. A good example is provided by a recent dispute between the Ontario government and Toronto sports teams concerning the employer health tax: see Caroline Callan, “Harris Blamed for Sports Tax Break,” \textit{Toronto Star}, October 10, 2002. It appeared that the teams were going to argue that they should be exempted from the tax because their operations in US stadiums in away games constituted permanent establishments outside Canada. This argument could backfire; if it is correct, the income of their Canadian-resident athletes derived from those games might not have treaty protection and therefore would be taxable in the United States.
TABLE 1 Canadian and US Federal-Level Taxation of Athletes in Cross-Border Leagues

<table>
<thead>
<tr>
<th>Country of residence</th>
<th>Player on a Canadian team</th>
<th>Player on a US team</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Income from Canada</td>
<td>Income from US</td>
</tr>
<tr>
<td></td>
<td>Cell C1:</td>
<td>Cell US1:</td>
</tr>
<tr>
<td></td>
<td>Taxable in Canada</td>
<td>Taxable in Canada</td>
</tr>
<tr>
<td></td>
<td>Not taxable in US</td>
<td>Not taxable in US</td>
</tr>
<tr>
<td></td>
<td>Cell C2:</td>
<td>Cell US2:</td>
</tr>
<tr>
<td></td>
<td>Taxable in Canada</td>
<td>Not taxable in Canada</td>
</tr>
<tr>
<td></td>
<td>Taxable in US</td>
<td>Taxable in US</td>
</tr>
<tr>
<td></td>
<td>Cell C3:</td>
<td>Cell US3:</td>
</tr>
<tr>
<td></td>
<td>Taxable in Canada</td>
<td>Taxable in US</td>
</tr>
<tr>
<td></td>
<td>Not taxable in US</td>
<td>Not taxable in Canada</td>
</tr>
<tr>
<td></td>
<td>(Likely) taxable in residence country</td>
<td>(Likely) taxable in residence country</td>
</tr>
<tr>
<td>Other countries</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Country of residence</th>
<th>Player on a Canadian team</th>
<th>Player on a US team</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Income from Canada</td>
<td>Income from US</td>
</tr>
<tr>
<td></td>
<td>Cell C4:</td>
<td>Cell US4</td>
</tr>
<tr>
<td></td>
<td>Taxable in Canada</td>
<td>Taxable in Canada</td>
</tr>
<tr>
<td></td>
<td>Not taxable in US</td>
<td>Taxable in US</td>
</tr>
<tr>
<td></td>
<td>Cell C5:</td>
<td>Cell US5:</td>
</tr>
<tr>
<td></td>
<td>Not taxable in Canada</td>
<td>Not taxable in Canada</td>
</tr>
<tr>
<td></td>
<td>Taxable in US</td>
<td>Taxable in US</td>
</tr>
<tr>
<td></td>
<td>Cell C6:</td>
<td>Cell US6:</td>
</tr>
<tr>
<td></td>
<td>Taxable in Canada</td>
<td>Taxable in US</td>
</tr>
<tr>
<td></td>
<td>Not taxable in US</td>
<td>Not taxable in Canada</td>
</tr>
<tr>
<td></td>
<td>(Likely) taxable in residence country</td>
<td>(Likely) taxable in residence country</td>
</tr>
</tbody>
</table>

a This table covers the combined effect of the treaty and domestic law in determining which income is taxable. Foreign tax credits are not considered. Assumptions: a Canadian-resident player on a Canadian team is present in the United States for 183 days or less in the year; a US-resident player on a US team is present in Canada for 183 days or less in the year; and income in the source country is greater than $10,000 (see note 19 to this article).

is used as an indication of a typical treaty between Canada or the United States and a third country. The left-hand column represents Canada as the source jurisdiction (cells C1 to C6), while the right-hand column represents the United States as the source jurisdiction (US1 to US6). The cell contents indicate that all income is taxable in at least one country; where a cell indicates that the income is taxable in two countries, the source jurisdiction has priority and the residence jurisdiction gives a foreign tax credit (that is, source-based taxation applies).

22 Most of Canada’s other tax treaties follow the OECD model treaty with slight modifications, the end result being that Canada has the right to tax non-resident athletes from countries other than the United States on their source income. See Daniel Sandler, ed., The Taxation of
Consider the table from the perspective of the Canadian federal government. The first row in each panel (cells C1, US1, C4, and US4) indicates that Canada taxes the worldwide income of its residents. Cell C2 indicates that Canada taxes the income in Canada of US residents employed by Canadian teams. However, cell C5 suggests that Canada does not tax the income of US residents on US teams playing in Canada. When one scans the left-hand column (Canada as source jurisdiction) for entries indicating “Not taxable in Canada,” it is evident that this is the only situation in which Canada does not apply its source-jurisdiction right to tax.

In the right-hand column (the United States as source jurisdiction), the entries “Taxable in US” indicate that the US federal government taxes income earned within its borders in all cases except that of Canadian-resident athletes on Canadian teams playing games in the United States (cell US1).

### Residence

A key factor in interpreting the above treaty provisions for any particular athlete is the athlete’s country of residence. Residence is determined first by the domestic law of each country and then, if on that basis the athlete is a resident of more than one country, by treaty rules. Since time spent in the country is one determinant of residency, it might be expected that athletes would be resident in the same country as their team. However, tax planning is also a consideration; player advisers generally advocate US residency in order to reduce taxes. Therefore, let us consider the degree of flexibility that a player has in choosing residency.

Consider first whether a player for a Canadian team could be a US resident. Canadian residency may arise in one of two ways under domestic Canadian law: by deemed residency (sojourning) or by factual residency. An athlete can avoid factual residency by having a permanent home and other ties in the United States and no permanent home and few ties in Canada.23 Deemed residency is more difficult to avoid since the athlete must ensure that he is not in Canada for an aggregate of 183 days or more in the year.24 It is our understanding that Toronto teams in the three sports leagues have approximately the following number of duty days (game days, practice days, and pre-season training days) in Canada in an average year: 90 for MLB (the Toronto Blue Jays), for which pre-season training and almost all away...
games are in the United States; 140 for the NBA (the Toronto Raptors), for which pre-season training is in Canada but all away games are in the United States; and 170 for the NHL (the Toronto Maple Leafs), for which pre-season training is generally in Canada, as are many away games. Baseball and basketball players should therefore have no trouble avoiding deemed residency by being outside Canada during the off-season, but hockey players will come close to being deemed resident in Canada under domestic law and may have to appeal to the tie-breaker rules under article IV of the treaty by careful attention to details similar to those for factual residency. Thus, US residency should be achievable for athletes on Canadian teams in all three leagues if this is desired for tax or other purposes.

A second question is whether a player for a US team could be a Canadian resident. This is much more difficult for two reasons. First, the US duty days for US teams are higher than the Canadian duty days for Canadian teams. For MLB and the NBA, the only non-US days will be those in which the US team plays the single Canadian team in the two sports (excluding the Expos because of their planned departure from Canada). Hence, US duty days will be approximately 195 for the NBA (200 in total less at most 5 days playing the Raptors) and 210 to 225 for MLB (225 in total less 0 to 15 days playing the Blue Jays). For the NHL, US duty days will be approximately 195 to 200 (215 days less 15 to 20 days playing the six Canadian teams). Second, US rules on deemed residence are stricter than Canadian rules, and hence it is almost certain that an athlete on a US team would be considered a US resident under US domestic law. Not only is there a 183-day test (as in Canada), but there is also a cumulative three-year test that basically applies if an individual spends more than 121 days a year in the United States.25 The combination of these two factors almost guarantees that athletes on US teams will be deemed residents of the United States. On the other hand, a player who had a home and family in Canada would also likely be a Canadian resident under the factual residency test of Canadian domestic law. Recourse to the tie-breaker rules would then be required, and it is possible that it would be found that there were greater ties to Canada. However, it seems most likely that athletes on US teams will file as US residents for the tax-planning advantages, and only aggressive enforcement action by the Canada Revenue Agency (CRA) is likely to prevent this. The lack of Canadian court cases involving athlete residence issues leaves one to wonder about that.

Players on Canadian or US teams may also be resident in a third country, such as Sweden or Russia. Although the relevant treaty and domestic law would have to be examined closely, the issues are usually similar to those discussed above.26

The actual tax residency status of athletes is not public information, but is believed to vary mainly by the country of the team. For US teams, the issue that is important


for the revenue estimates reported in this article is the percentage of players who are US residents, since the proposed provincial tax would apply only to US residents playing for US teams. (For federal tax, this is cell C5 in table 1 above.) The quality of the data available on this question varies by league. The best data are for MLB, for which player-by-player data indicate that 80 percent of players on US teams “reside” in the United States.27 Although these are not official tax data, they are obtained from the players and may reflect the off-season mailing address. There is an incentive for players to report a residence that matches the tax filing position since tax administration officials could use the information to support a claim of residency. For basketball, data on nationality (presumably birthplace or citizenship) released by the NBA indicate that 85 percent of players on US teams are American.28 The least reliable data for inferring tax residency are those for the NHL since so many players were born in one country but are now playing for a team in another country; the data indicate that 17 percent of players on US teams were born in the United States.29

For Canadian teams, the issue that is important for the revenue estimates reported in this article is the percentage of players who are Canadian residents. (For federal tax, this is cell US1 in table 1 above.) No players on Canadian teams are subject to the proposed tax, but the Canadian-resident players would be entitled to foreign tax credits from the Canadian federal government for jock taxes paid to US states. The data again vary by sport. There is good information that no MLB (Blue Jays)30

27 See the team-by-team listings of players under the heading “resides” in Allan Simpson, ed., Baseball America Almanac 2003 (New York: Simon & Schuster, 2003), 57-268. Of the 1,222 players listed, 982 (80 percent) are from the United States (excluding Puerto Rico, which is not included in the United States by article III of the Canada-US treaty), 6 (1 percent) are from Canada, and 234 (19 percent) are from other countries (almost exclusively in Latin America).

28 Data from the NBA Web site, http://www.nba.com/, suggest that on US teams for the 2003-4 season there were about 421 players—352 (84 percent) from the United States, 4 (1 percent) from Canada, and 65 (14 percent) from outside Canada and the United States.

29 Of the 536 players on US teams listed on http://www.hockeynut.com/, 90 (17 percent) were born in the United States, 280 (52 percent) were born in Canada, and 166 (31 percent) were born in other countries.

or NBA (Raptors) players are resident in Canada, but for hockey the only data are that 57 percent of players on Canadian teams were born in Canada.

For the revenue calculations later in the article, we use the MLB and NBA data as given above; that is, for US teams, 80 percent of MLB players and 85 percent of NBA players are US residents, and for Canadian teams, 0 percent of MLB and NBA players are Canadian residents. The NHL is the difficult issue. For US NHL teams, we assume that 95 percent of the players are US residents, instead of only the 17 percent who were born in the United States, on the basis that many players shift to US residency because of the tax advantages and/or the high number of US duty days in the season. For Canadian NHL teams, we assume that 50 percent of the players are Canadian residents (versus the 57 percent born in Canada), on the basis that many Canadian-born players will keep their Canadian connections but some will shift to US residence for the tax advantages. Sensitivity tests of alternative residency assumptions for NHL players are reported for the revenue estimates below.

### Foreign Tax Credits for State and Provincial Taxes

For athletes resident in Canada, personal income taxes paid to US states are eligible for a foreign non-business-income tax credit against Canadian federal income tax as taxes paid to “the government of a country other than Canada,” which is defined to include “the government of a state, province or other political subdivision of that country.” Given that the US jock taxes are at such low rates compared with Canadian federal rates (a maximum of 9.3 percent of the income, in the case of the California tax), the limitation in the Canadian foreign tax credit to federal tax otherwise payable on the foreign income rarely applies. Thus, US jock taxes do not increase the tax burden of Canadian athletes; they simply shift tax revenue from the Canadian federal government to the US states. It is shown below that the revenue transfer is, however, relatively minor.

Provinces also grant foreign tax credits. The normal procedure in tax return preparation programs such as Taxprep is to claim credit for foreign tax on the federal return first, and then claim a credit against provincial income tax for the excess. This could allow for extra credit if it should ever happen that full credit was not

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31 The Web site http://www.insidehoops.com/ lists 14 Raptor players, of whom 13 are from the United States and 1 is from France. Also, Campbell and Christie, supra note 30, report that Raptors players are usually non-resident.

32 Of the 137 players on Canadian teams listed on http://www.hockeynut.com/, 12 (9 percent) were born in the United States, 78 (57 percent) were born in Canada, and 47 (34 percent) were born in other countries.

33 Wener, supra note 9, at 4, also assumes that 95 percent of NHL players on US teams are US residents. He elaborates as follows: “Grant Skinner of Pro Ice Management Group in Winnipeg, a tax adviser to many NHL players, indicates that US personal tax rates are lower than those in Canada and most relevant European jurisdictions, with the result that players employed by US teams almost invariably become US residents for tax purposes.”

available at the federal level. However, this residual-claim approach to provincial credits is not required by federal law or, at least in Ontario, provincial law.\textsuperscript{35} A taxpayer could claim all of the foreign tax on his or her Ontario return and not claim a federal credit. However, this is of advantage to few taxpayers since the Ontario surtax is calculated before the foreign tax credit is claimed.\textsuperscript{36}

For athletes resident in the United States, personal income taxes paid to a provincial government would be eligible for a foreign tax credit on the athlete’s US federal personal income tax return.\textsuperscript{37} This would apply, in particular, to the proposed provincial tax on non-resident athletes discussed in this article. Since the 15 percent tax is substantially below current US rates, a full tax credit should be available. A number of US states—most notably Michigan and New York—offer foreign tax credits for taxes paid to Canadian provinces, but recourse to these credits should not be required.

For athletes resident in countries other than Canada or the United States, the tax rules of their country of residence and the relevant treaty rules would determine whether a tax credit would be available. The United Kingdom provides for such a credit in domestic law, and it may be a treaty requirement in other countries. For example, the OECD model treaty provides that if double taxation is relieved by the credit method rather than the exemption method, the credit extends to subnational income taxes.\textsuperscript{38}

On the basis of this analysis, the discussion below assumes that all non-residents are able to recover state and provincial taxes on athletes through foreign tax credit claims and thus suffer no increase in their overall tax burden.\textsuperscript{39}

**NAFTA Issues**

Does NAFTA restrict the freedom of action of provincial governments in taxing athletes? Taxation measures are generally outside the scope of NAFTA.\textsuperscript{40} However, an exception to this rule states:


\textsuperscript{36} It appears that the only advantage would be to increase a taxpayer's Ontario low-income tax reduction, which is not likely relevant to athletes.


\textsuperscript{38} Articles 23B and 2(1) of the OECD model treaty. See Pomp and McIntyre, supra note 37, at 979.

\textsuperscript{39} There is an interesting policy question as to which level of government should be responsible for resolving double taxation problems. Should a province or state that taxes non-residents grant a foreign tax credit for subnational taxes paid by its residents? Canadian provinces do, but California and New Jersey do not. Pomp and McIntyre, supra note 37, at 980, argue that this is the responsibility of federal governments.

\textsuperscript{40} NAFTA article 2103(1).
Article 1202 . . . shall apply to taxation measures on income, capital gains or the taxable capital of corporations . . . except that nothing in those Articles shall apply . . . to any new taxation measure aimed at ensuring the equitable and effective imposition or collection of taxes and that does not arbitrarily discriminate between persons, goods or services of the Parties.41

Article 1202, which is entitled “National Treatment,” states:

Each Party shall accord to service providers of another Party treatment no less favorable than that it accords, in like circumstances, to its own service providers.42

Presumably professional sports, as a form of entertainment, constitutes a service, and hence hockey players are service providers. Furthermore, all levels of government in a NAFTA country are bound by NAFTA.43

The exact meaning of the equal national treatment rule, and other relevant provisions of NAFTA, has been the focus of much debate. Most attention has been focused on whether US sports subsidies are a violation of NAFTA,44 although there has also been opinion that Canada now has its own violation in Alberta’s provision of the revenue of the NHL players tax to the Alberta teams.45 These arguments seem to be of little practical import at present since only the two federal governments likely can afford the cost of launching complaints under NAFTA, and with the passage of time it has become apparent that neither government is prepared to actually make such a complaint in this area.46

Of more interest in the context of this article is whether NAFTA puts some limits on the tax rates that Canadian and US governments can impose on non-residents. In particular, it could be argued that since the proposed provincial tax on athletes would not increase the tax burden of athletes until it exceeded the estimated US tax on the income, the provincial tax rate should be set very high, say, at 35 percent. This would be a way of taking money away from the US treasury without harming

41 Ibid., article 2103(4).
42 Ibid., article 1202(1).
45 Brean and Forgione, supra note 8.
46 The submission by Appleton and Neceski, supra note 44, was presented to the federal government of Canada over four years ago. Similarly, the US government has not lodged a complaint about the Alberta NHL players tax.
athletes. Similarly, it could be argued that a US state that considered that a provincial tax rate on US athletes of 15 percent was out of line relative to state tax rates might think about imposing a special punitive tax of 15 percent on Canadian athletes instead of the usual state rate on residents. It appears that both of these types of taxes would be NAFTA violations, although again one might wonder if there would actually be a NAFTA complaint.

**The Alberta NHL Players Tax**

In Canada, all provinces but Quebec subscribe to a tax collection agreement in respect of personal income tax and therefore apply their rate structure to taxable income as it is defined by the federal government. Thus, athletes who are not taxed in Canada at the federal level because of the league exemption in the Canada-US treaty are similarly not taxed at the provincial level. The one exception is the Alberta NHL players tax, which is essentially a tax on all professional athletes in Alberta since neither MLB nor the NBA has a team in that province.

Alberta introduced the NHL players tax in the 2002 budget. Effective from August 31, 2002 to December 31, 2005, the tax is levied under part 1.1 of the Alberta Personal Income Tax Act and is calculated in accordance with the NHL Tax Regulation. The tax is calculated as 12.5 percent of the NHL hockey income in Alberta for the year, defined as the sum of the player’s taxable salary for all game days in the taxation year. Taxable salary for a game day is determined by dividing the base salary of the player in effect on the game day by the number of calendar days in the NHL regular season.

The $6 million annual revenue from the NHL players tax, less administration costs of about $150,000, is to be given to the Alberta teams to help their financial

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49 Ibid., section 2(2).

50 Base salary is defined in section 2(1) of the NHL Tax Regulation, ibid., to mean “Paragraph 1 Salary as defined in the Collective Bargaining Agreement between the National Hockey League and the National Hockey League Players’ Association for the period September 16, 1993 to September 15, 2004.” It is further explained in the related information circular that signing bonuses, deferred compensation, or performance bonuses are not to be included.

51 Section 2(1) of the NHL Tax Regulation, ibid., defines a game day as “a day in the regular NHL season on which the player performs hockey duties or services in Alberta for an NHL team.” Per section 48.1(2) of the Alberta Personal Income Tax Act, supra note 47, an NHL player performs hockey duties or services in Alberta as a player for an NHL team when the player either participates in an NHL game in Alberta or is present in a facility in which an NHL game is being played for all or a part of the game.

52 For more detail, see Lavitt, supra note 8, and Brean and Forgione, supra note 8.
situation and allow them to stay in Alberta. Various sources indicate that the losses suffered by the Edmonton Oilers and the Calgary Flames for the 2002-3 NHL season were approximately $2 million and $8 million, respectively. However, since the two franchises are privately owned, financial statements are not publicly available to verify this information. One factor lending credibility to tales of the teams’ financial woes is the departure of previous Canadian teams: in hockey, the Quebec Nordiques became the Colorado Avalanche in 1995 and the Winnipeg Jets became the Phoenix Coyotes in 1996; in basketball, the Vancouver Grizzlies became the Memphis Grizzlies in 2001; and in baseball, the Montreal Expos have been bought out by the other teams and are set to depart in the next couple of years.

The new Alberta tax has attracted varied reactions. Team owners are grateful for the source of funds, and sports fans generally seem to like the tax. Players and their collective bargaining agent, the National Hockey League Players’ Association (NHLPA), vehemently oppose the tax. Provincial officials defend the tax as helping Alberta’s NHL teams without hurting taxpayers.

The NHL players tax operates independently of normal personal income tax rules; thus Alberta-resident players pay both the normal 10 percent Alberta personal income tax and the new 12.5 percent tax. Since the players tax is imposed only on the portion of the player’s salary that relates to game days in Alberta, the addition to the marginal tax rate is only about 3 percent of the base salary of each Flames and Oilers player. Nevertheless, because Alberta players on NHL teams pay a 13 percent rate of Alberta tax, as compared with 10 percent for other Alberta residents, the tax has been criticized as horizontally inequitable in that the tax liability varies by profession rather than by ability to pay. The cry of “double

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53 Alberta Finance, 2002 Budget, Backgrounder, “NHL Players Tax,” March 19, 2002. This commitment appears to be informal and is not contained in the legislation. Revenue from the tax is expected to continue at the $6 million level for the fiscal year 2003-4: Alberta Finance, 2003 Budget, Alberta Tax Advantage, April 8, 2003, 135.


55 More recently, the Ottawa Senators filed for bankruptcy in January 2003 and acquired a new owner, Eugene Melnyk. Low revenues and a high debt load continue to make the team’s future uncertain, although the rising value of the Canadian dollar in 2003 must have helped.

56 From table 2, the Calgary Flames played 42 games in Alberta in 2002-3, and 42/180 (game days divided by the approximate length of the season) \times 12.5\% = 2.9\%. The extra tax for an Oilers player is 3.1\%. As discussed in note 123, infra, the allocation formula seems to have been chosen to deliberately minimize the extra tax liability for Alberta players.

57 The following were some of the players’ reactions: “I’m all right. . . . But I’m about three per cent less happy than I normally would be. . . . It’s very discriminatory” (Calgary Flame Denis Gauthier) and “I guess our stance from a hockey player’s point of view is why does someone in the community who makes the same as me pay less taxes? . . . When you tell 20 or 25 guys in the whole province, you’re the only guys who are going to pay 42 or 41 per cent (tax rate) versus 38 . . . I don’t know the legality of it” (Calgary Flames co-captain Bob Bougher) in Shane Holliday, “Oilers Leery of Pro Tax,” Edmonton Sun, March 19, 2002.
taxation” has also been heard, although as a principle of tax equity one would think that it is the total level of the tax burden that matters rather than the number of times a unit of income is taxed.

The Alberta tax also applies, on top of regular provincial personal income tax, to residents of other provinces in Canada who play NHL games in Alberta. Since only 1 percent to 3 percent of their income is considered to be earned in Alberta (at least for non-Alberta teams—see table 2), the tax increase is less than \( \frac{1}{3} \) of 1 percent. However, the many problems that have been caused by state taxation of non-resident citizens in the United States suggest that this is a bad precedent.\(^5\) It is also a significant departure from past practice in Canada. For at least 40 years, all provinces have taxed employment income only in the province of residence on December 31, regardless of the province in which it was earned.\(^6\) This rule is a condition of the tax collection agreements, both under the previous tax-on-tax version and under the new tax-on-income approach, since it is part of the definition of taxable income.\(^7\) Other provinces are no doubt displeased but have not complained publicly, perhaps because if they do, it will create an expectation that their governments should offer a credit to NHL-player provincial residents who are affected by the tax.

The double taxation problem also affects a third group of players—non-residents playing on Canadian NHL teams who have games in Alberta (cells C2 and C3 in table 1 above)—since they are also paying regular provincial tax as well as the Alberta NHL players tax. However, this is perhaps not a big issue to the extent that these players will be able to recover the amount of both provincial taxes and Canadian federal tax through foreign tax credits on their residence-country tax returns. (Residents of California may receive only partial credit, since there is no foreign tax credit for California tax.) Non-residents playing on US teams who have games in Alberta are subject only to the 12.5 percent tax and will similarly be able to claim a credit for the tax paid in their country of residence.

Data on the relative contributions to Alberta revenue of players from different teams are given in table 2. The figures are for the 2002-3 NHL year and show total revenue of $5.6 million, which is reasonably close to the Alberta 2000 budget prediction of $6 million. As the table shows, 46 percent of the revenue is from


59 Ernest H. Smith, *Federal-Provincial Tax Sharing and Centralized Tax Collection in Canada*, Special Studies in Taxation and Public Finance (Toronto: Canadian Tax Foundation, 1998), 124 and 152. The only exception is the Northwest Territories, which, since 1993, has imposed on individuals a 1 percent tax on all employment income earned in the Territories, regardless of the individual’s province or territory of residence (Payroll Tax Act, 1993, SNWT 1993, c. 11). The government reaffirmed its commitment to the tax in its 2004 budget, raising the rate to 2 percent for 2005 and noting that one-sixth of all employment income earned in the Territories would otherwise escape tax (see http://www.fin.gov.nt.ca/budgetaddress.shtml). Nunavut has had a similar tax since its creation in 1999.

TABLE 2  Estimated Revenues from the Alberta NHL Players Tax, 2002-3 NHL Year, (Amounts in Canadian Dollars Unless Otherwise Noted)

<table>
<thead>
<tr>
<th>NHL team</th>
<th>Team payroll(^a) ($ millions)</th>
<th>Games in Alberta(^b)</th>
<th>% of income earned in Alberta(^c)</th>
<th>NHL hockey income in Alberta(^d) ($)</th>
<th>12.5% NHL players tax ($)</th>
<th>Distribution by team type (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Calgary Flames</td>
<td>46.7</td>
<td>42</td>
<td>23.3</td>
<td>10,435,919</td>
<td>1,304,490</td>
<td></td>
</tr>
<tr>
<td>Edmonton Oilers</td>
<td>43.3</td>
<td>44</td>
<td>24.4</td>
<td>10,144,913</td>
<td>1,268,114</td>
<td></td>
</tr>
<tr>
<td>Total—Alberta teams</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>2,572,604</td>
</tr>
<tr>
<td>Montreal Canadiens</td>
<td>68.1</td>
<td>2</td>
<td>1.1</td>
<td>725,276</td>
<td>90,660</td>
<td></td>
</tr>
<tr>
<td>Ottawa Senators</td>
<td>43.9</td>
<td>2</td>
<td>1.1</td>
<td>467,102</td>
<td>58,388</td>
<td></td>
</tr>
<tr>
<td>Toronto Maple Leafs</td>
<td></td>
<td>4</td>
<td>2.2</td>
<td>1,620,679</td>
<td>202,585</td>
<td></td>
</tr>
<tr>
<td>Vancouver Canucks</td>
<td>44.6</td>
<td>3</td>
<td>1.7</td>
<td>711,845</td>
<td>88,981</td>
<td></td>
</tr>
<tr>
<td>Total—other Canadian teams</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>440,613</td>
</tr>
<tr>
<td>Anaheim Mighty Ducks</td>
<td></td>
<td>4</td>
<td>2.2</td>
<td>1,164,024</td>
<td>145,503</td>
<td></td>
</tr>
<tr>
<td>Atlanta Thrashers</td>
<td>36.4</td>
<td>1</td>
<td>0.6</td>
<td>194,004</td>
<td>24,250</td>
<td></td>
</tr>
<tr>
<td>Boston Bruins</td>
<td>52.3</td>
<td>2</td>
<td>1.1</td>
<td>556,642</td>
<td>69,580</td>
<td></td>
</tr>
<tr>
<td>Buffalo Sabres</td>
<td>43.4</td>
<td>2</td>
<td>1.1</td>
<td>462,625</td>
<td>57,828</td>
<td></td>
</tr>
<tr>
<td>Carolina Hurricanes</td>
<td></td>
<td>2</td>
<td>1.1</td>
<td>584,996</td>
<td>73,125</td>
<td></td>
</tr>
<tr>
<td>Chicago Blackhawks</td>
<td></td>
<td>4</td>
<td>2.2</td>
<td>1,328,181</td>
<td>166,023</td>
<td></td>
</tr>
<tr>
<td>Colorado Avalanche</td>
<td></td>
<td>4</td>
<td>2.2</td>
<td>1,790,806</td>
<td>223,851</td>
<td></td>
</tr>
<tr>
<td>Columbus Blue Jackets</td>
<td></td>
<td>4</td>
<td>2.2</td>
<td>841,679</td>
<td>105,210</td>
<td></td>
</tr>
<tr>
<td>Dallas Stars</td>
<td>86.5</td>
<td>3</td>
<td>1.7</td>
<td>1,381,159</td>
<td>172,645</td>
<td></td>
</tr>
<tr>
<td>Detroit Red Wings</td>
<td>95.3</td>
<td>4</td>
<td>2.2</td>
<td>2,029,580</td>
<td>253,697</td>
<td></td>
</tr>
<tr>
<td>Florida Panthers</td>
<td>45.8</td>
<td>0</td>
<td>0.0</td>
<td>nil</td>
<td>nil</td>
<td></td>
</tr>
<tr>
<td>Los Angeles Kings</td>
<td>60.8</td>
<td>4</td>
<td>2.2</td>
<td>1,295,349</td>
<td>161,919</td>
<td></td>
</tr>
<tr>
<td>Minnesota Wild</td>
<td>28.7</td>
<td>5</td>
<td>2.8</td>
<td>764,823</td>
<td>95,603</td>
<td></td>
</tr>
</tbody>
</table>

(Table 2 is concluded on the next page.)
## TABLE 2 Concluded

<table>
<thead>
<tr>
<th>NHL team</th>
<th>Team payroll(^a) ($ millions)</th>
<th>Games in Alberta(^b)</th>
<th>% of income earned in Alberta(^c)</th>
<th>NHL hockey income in Alberta(^d) ($)</th>
<th>12.5% NHL players tax ($)</th>
<th>Distribution by team type (%)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Nashville Predators</td>
<td>35.3</td>
<td>4</td>
<td>2.2</td>
<td>752,138</td>
<td>94,017</td>
<td></td>
</tr>
<tr>
<td>New Jersey Devils</td>
<td>73.4</td>
<td>1</td>
<td>0.6</td>
<td>390,993</td>
<td>48,874</td>
<td></td>
</tr>
<tr>
<td>New York Islanders</td>
<td>58.4</td>
<td>1</td>
<td>0.6</td>
<td>311,152</td>
<td>38,894</td>
<td></td>
</tr>
<tr>
<td>New York Rangers</td>
<td>97.0</td>
<td>1</td>
<td>0.6</td>
<td>516,349</td>
<td>64,544</td>
<td></td>
</tr>
<tr>
<td>Philadelphia Flyers</td>
<td>78.5</td>
<td>2</td>
<td>1.1</td>
<td>835,709</td>
<td>104,464</td>
<td></td>
</tr>
<tr>
<td>Phoenix Coyotes</td>
<td>62.1</td>
<td>4</td>
<td>2.2</td>
<td>1,322,211</td>
<td>165,276</td>
<td></td>
</tr>
<tr>
<td>Pittsburgh Penguins</td>
<td>43.7</td>
<td>0</td>
<td>0.0</td>
<td>nil</td>
<td>nil</td>
<td></td>
</tr>
<tr>
<td>San Jose Sharks</td>
<td>67.0</td>
<td>4</td>
<td>2.2</td>
<td>1,426,675</td>
<td>178,334</td>
<td></td>
</tr>
<tr>
<td>St. Louis Blues</td>
<td>88.4</td>
<td>3</td>
<td>1.7</td>
<td>1,412,498</td>
<td>176,562</td>
<td></td>
</tr>
<tr>
<td>Tampa Bay Lightning</td>
<td>40.5</td>
<td>1</td>
<td>0.6</td>
<td>215,643</td>
<td>26,955</td>
<td></td>
</tr>
<tr>
<td>Washington Capitals</td>
<td>71.1</td>
<td>2</td>
<td>1.1</td>
<td>756,615</td>
<td>94,577</td>
<td></td>
</tr>
<tr>
<td>Total—US teams</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total—all NHL teams</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>100</td>
</tr>
</tbody>
</table>


\(^c\) The percentage of income earned in Alberta is the number of regular-season games divided by the number of calendar days in the regular season (180).

\(^d\) Calculated as payroll multiplied by the percentage of income earned in Alberta and then multiplied by a factor of \(\frac{23}{24}\) to allow for an average of 1 of 24 players not “dressed” for the game owing to injuries, suspensions, etc.
players on US teams, 46 percent is from players on Alberta teams, and the remaining 8 percent is from players on other Canadian teams. Assuming, as discussed above, that 95 percent of players on US NHL teams are US residents and 50 percent of players on Canadian NHL teams are Canadian residents, at least 50 percent of the revenue from the Alberta tax is coming from non-residents.61 Most of these non-resident players should not bear any extra tax burden as a result of the tax. On the other hand, Canadian-resident NHL players suffer an increase in their tax burden. This horizontal inequity is a significant problem with the tax, since a policy that discourages Canadian residence among a group of people who have a lot of freedom to alter residence is not desirable.

The Alberta government could have avoided the double taxation and horizontal equity problems by restricting the tax to US-resident athletes on US teams and just imposing the regular 10 percent Alberta provincial tax on them. However, the problem with this approach is that it would have produced only about $2.1 million in revenue,62 which is much less than the apparent $6 million target (the revenue raised by the actual NHL players tax). Reaching that target would require a much higher rate on the US residents, but taxing non-residents at a rate higher than residents violates the equal national treatment rule of NAFTA. In order to avoid such a violation, the government was forced to make the new tax a surcharge on top of regular tax and to apply it to all NHL athletes playing games in Alberta.63 The 12.5 percent rate was set to achieve the $6 million revenue target.

Given this tax design, the question arose as to how the federal government would view the new tax in connection with the tax collection agreements. Since the tax amounts to a redefinition of taxable income, the federal government could have concluded that it represented a violation of the tax collection agreements and cancelled this agreement with Alberta. Perhaps this response was viewed as too drastic; in any event, the federal government decided that the tax collection agreements were not violated. However, the federal government refused to include the tax in the tax collection agreements, and Alberta was therefore forced to collect the tax itself. The two reasons were the double taxation problem and the fact that the tax was inconsistent with the Canada-US treaty, although it is understood that only the second reason was raised with the government of Alberta.

61 Of the total of 71 percent, 27 percent ((46% + 8%) × 50%) comes from non-resident players on Canadian teams and 44 percent (95% × 50%) comes from US residents serving on US teams. To the extent that some players on US teams are residents of countries other than Canada or the United States, the second figure would be higher.

62 This can be calculated by adjusting the reported revenue of the NHL players tax by the lowered coverage percentage and the difference in rate: $6 million × 46% × 95% × 10%/12.5% = $2.1 million, since it is assumed that 95 percent of players on US teams are US residents.

63 The information released with the tax supports this interpretation. Alberta Finance, Backgrounder, supra note 53, contains the following question and answer: “Q. Why doesn’t this new tax violate NAFTA? A. All NHL players are being treated in the same fashion, which complies with NAFTA.”
The Alberta tax does have one important good point that helps win acceptance from teams and, to a lesser extent, athletes: it is extremely simple. This feature has several aspects. First, by taxing all NHL athletes, the tax avoids the complexities associated with distinguishing between residents and non-residents. A team must determine a player’s residence status in order to determine whether he is taxable on worldwide income or just Canadian income; yet the team often has little communication with player advisers since this depends on the player’s establishing the channel of communication. Second, the details of the determination of income, such as the income-allocation formula and the tax base, are extremely simple. This point is discussed further below in connection with the base of the proposed provincial tax. Third, the Alberta legislation does not require athletes to have a social insurance number, which is a convenience for US athletes on US teams (but not for the province) since they have no other need for this number. Finally, the Alberta government has set up an easy-to-use and secure Web site for electronic filing of NHL players tax returns by teams.

US State Taxes

In most states, state income taxes have applied to non-residents of the state performing in-state services for years, but the first enforcement in any occupation was by California on baseball players in 1978.64 These non-resident taxes have become broader in scope since that time, but as their effect is still largely on athletes, they are widely known as “jock taxes.” Such taxes are now almost universal in the United States; of the 24 states that have NHL, NBA, or MLB teams, 20 (83 percent) have jock taxes, and the remaining 4 states either do not have a personal income tax or tax only property income.65 (The latter states are Florida, Texas, Tennessee, and Washington.) The National Football League (NFL) has no teams in states that do not also have NHL, NBA, or MLB teams. Federal law prohibits the District of Columbia from taxing individuals not resident in the district, including athletes. Various US cities also have jock taxes, including Cleveland, Cincinnati, Columbus, Detroit, Indianapolis, Kansas City, Minneapolis, New York, Philadelphia, Pittsburgh, and St. Louis.

Canadian-resident athletes on US and foreign teams other than Canadian teams are taxed under most of the jock taxes. However, the only states that tax Canadian-resident athletes on Canadian teams are California, New Jersey, and Indiana, and the only cities are Columbus and St. Louis.66 For the 17 states that exempt such athletes,

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65 Hoffman, supra note 7, at 2.
66 Despite the extensive literature on US jock taxes (supra note 7), detailed public information about international aspects of state taxes on athletes is remarkably scarce. State tax forms and published literature often do not address this issue, and one wonders if many such athletes pay
The exemption may occur because the state explicitly recognizes the Canada-US treaty or because the state uses federal adjusted gross income or taxable income from US federal tax returns to calculate its state tax. Although there are no tax collection agreements in the United States to mandate such federal-state conformity, it is an increasing trend because of the reduction in compliance costs to taxpayers and administration costs to governments.67

The Alberta tax and the US jock taxes differ in several respects:

■ the Alberta tax applies only to NHL players, while the US taxes apply to athletes in all sports;
■ the revenue from the Alberta tax is given directly to the teams, while the revenues from the US jock taxes are not committed in this way (although there is often a connection to the cost of a taxpayer-financed stadium);
■ the US jock taxes are a component of normal state taxes, with the usual marginal rate structure applying (with top rates of between 2.8 percent and 9.3 percent), while the Alberta tax is a stand-alone tax that applies on top of the usual provincial income tax; and
■ most important, the Alberta tax applies to all athletes regardless of residence, while the US jock taxes apply only to non-residents of the state.

In this last respect, the US jock taxes are close in spirit to the proposed tax discussed in this article, since both are source taxes and are thus intended to apply only to non-residents. However, the jock taxes apply to residents of the United States who are not residents of the particular state, while the proposed tax discussed below applies only to athletes who are not residents of Canada.

THE DEBATE OVER SOURCE-BASED TAXATION

With this description of applicable law as background, let us turn to a review of whether source-based taxation or residence-based taxation is more appropriate for the present “hole” in the Canadian tax net shown as cell C5 in table 1 above, which is income earned in Canada by US athletes playing on US teams. In other words, should a province tax these athletes? This would amount to drawing the dividing line for provincial tax in a different place. Currently, these athletes are grouped

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with non-athlete employees under article XV of the Canada-US treaty, while taxing them in Canada would group them with other athletes under article XVI.

Previous work on state and provincial matters has scarcely addressed the policy issue of source versus residence taxation. More work has been done in regard to international taxation, and this section of the article draws on the insights from this literature. However, this work is only partly relevant since much of it concerns corporate income taxation and capital flows rather than personal income taxation and labour flows, and none of it relates to athletes specifically.

Advantages

The primary argument given in the literature for source-based taxation is that the jurisdiction in which the income is earned has normally provided significant services to the person who earned the income. Thus, athletes “benefit from services and facilities funded with tax collections [in the source jurisdiction]—from the stadium itself to the roads leading to the stadium to the costs of police protection and all the other public services that are available.”68 This is the well-known concept of taxation according to the benefit principle, and it carries with it the equally well-known problem of quantifying the benefits. Recently, it has been argued that the benefits received should be interpreted more broadly than in the quotation above, and should include more general benefits such as “national security, a fair legal system . . . and redistributive assistance to the poor that contributes to a stable social order.”69 This broader interpretation supports a substantial source tax that is similar to that levied on residents and can be interpreted as a charge for market access.70

The user-charge argument is subject to practical limits; since it is usually more difficult to collect taxes from non-residents than from residents, no government would want to attempt to collect taxes from non-residents if the revenues to be raised were minimal. This may once have been the case for professional athletes, but it is certainly not true now. With players’ salaries reaching heights that seem stratospheric to the average person, taxing all athletes, including non-resident athletes, has become a matter of vertical equity across people earning income in Canada. Over the last 15 years, the average salary in current dollars (that is, after adjusting for inflation) has risen 672 percent in the NHL, 334 percent in MLB, and 531 percent in the NBA (see table 3). The top annual salary in Canadian dollars is currently $15 million in the NHL, $31 million in MLB, and $39 million in the NBA. However, since the highest player salaries are perhaps too sensitive to specific player


70 Ibid., at 91-92.
factors to show the overall pattern of the sport, let us average salaries: $2.5 million in the NHL, $3.3 million in MLB, and $6.9 million in the NBA.\textsuperscript{71} For comparison, 99.99 percent of Canadian personal income tax returns showed total income in 2000 of less than $2.4 million. Since almost 23 million people filed tax returns in that year, this means that the average player in each of these three leagues earns more than all but 2,300 people in Canada.\textsuperscript{72} Although this is income from labour rather than income from wealth and will disappear after an athlete’s playing career is over, there is nevertheless a very high ability to pay.

A second argument for source-based taxation by provinces is that since a provincial tax would not increase an athlete’s tax burden, it would have almost no efficiency cost (the loss in welfare caused by economic decision makers altering their behaviour in response to taxes).\textsuperscript{73} In that sense, such a tax is a much better way for a province to raise revenue than the more distorting alternatives of increasing the rates of personal income tax, corporate income tax, or sales tax. Only a poll tax or head tax would have a similar level of efficiency cost, and such taxes are generally considered to be unacceptable for fairness reasons. The proposed provincial tax would not influence an athlete in any of the following dimensions: which country or province/state to live in; which team to work for; and (if the athlete had any influence on this) where the team’s games are to be played.\textsuperscript{74} Similarly, a province that switches to source-based taxation should not become a less attractive place to locate a sports team, since no increase in tax burden has occurred.\textsuperscript{75}

On the other hand, it is possible that an efficiency cost could still exist because of a phenomenon that behavioural researchers call a “framing effect” or a “disaggregation bias.”\textsuperscript{76} The idea is that even though there is no increase in the overall tax

\textsuperscript{71} For sources, see the notes to table 3.

\textsuperscript{72} Emmanuel Saez and Michael R. Veall, \textit{The Evolution of High Incomes in Canada, 1920-2000}, NBER Working Paper 9607 (Cambridge, MA: National Bureau of Economic Research, April 2003), table 1. Since the athlete salaries are for 2003 and the tax data are for 2000, the figure of 2,300 is an underestimate to the extent that the income of the highest-earning Canadians has grown in that period.

\textsuperscript{73} The theory and measurement of efficiency cost, which is also called deadweight loss, is surveyed in Alan J. Auerbach and James R. Hines Jr., “Taxation and Economic Efficiency,” in Alan J. Auerbach and Martin Feldstein, eds., \textit{Handbook of Public Economics}, vol. 3 (Amsterdam: Elsevier, 2002), chapter 21.

\textsuperscript{74} This is in contrast to US jock taxes, which affect locational choice because they can affect the athlete’s total tax burden. On this issue, see Green, supra note 7, and J. Andrew Hoerner, “A Nation of Migrants: When a Taxpayer Has Income from Several States” (April 13, 1992) \textit{State Tax Notes} 515-18, citing Wetzler.

\textsuperscript{75} Ekmekjian, supra note 7, at 278, describing the view of a past governor of Georgia. MLB has indicated that a baseball team would not be located in Washington, DC if there were a jock tax there.

TABLE 3   Athlete Salary Data in 2003 Canadian Dollars, Major Hockey, Baseball, and Basketball Leagues

<table>
<thead>
<tr>
<th>Key figures</th>
<th>NHL</th>
<th>MLB</th>
<th>NBA</th>
</tr>
</thead>
<tbody>
<tr>
<td>Top salary</td>
<td>15,416,500</td>
<td>30,833,000</td>
<td>39,234,993</td>
</tr>
<tr>
<td>25th-highest salary</td>
<td>9,693,821</td>
<td>14,015,000</td>
<td>18,418,513</td>
</tr>
<tr>
<td>Current average salary</td>
<td>2,536,715</td>
<td>3,324,623</td>
<td>6,891,176</td>
</tr>
<tr>
<td>Current minimum salary</td>
<td>280,300</td>
<td>420,450</td>
<td>514,351</td>
</tr>
<tr>
<td>Past average salaries</td>
<td></td>
<td></td>
<td></td>
</tr>
<tr>
<td>1998</td>
<td>1,993,152</td>
<td>2,323,402</td>
<td>4,318,496</td>
</tr>
<tr>
<td>1993</td>
<td>830,736</td>
<td>1,655,455</td>
<td>1,999,920</td>
</tr>
<tr>
<td>1988</td>
<td>328,601</td>
<td>766,845</td>
<td>1,092,424</td>
</tr>
<tr>
<td>1983</td>
<td>257,333</td>
<td>620,160</td>
<td>527,533</td>
</tr>
<tr>
<td>1978</td>
<td>296,794</td>
<td>312,027</td>
<td>446,753</td>
</tr>
</tbody>
</table>


burden, it may not be perceived that way by the athlete. The athlete may perceive the provincial tax clearly because it immediately affects his paycheque, but perceive the foreign tax credit less clearly because it occurs at a different time and is buried in a rather complex set of tax returns. Thus, for example, an athlete might seek to not appear in an exhibition game in a jurisdiction with a high non-resident tax rate, even though the tax is completely refunded through a state or federal tax credit.

More fundamentally, the problem with the efficiency-cost argument is that the low efficiency cost of a province launching a non-resident tax may be offset by the need for the US federal government to increase taxes in some other area, thus increasing the efficiency cost in the United States.

Another argument for source-based taxation is that it might be easier for source countries to find out about the income earned by athletes than it would be for residence countries. This is the historical basis of the OECD model treaty article providing for source-based taxation for athletes. However, the assumption that athletes
are less law-abiding than other taxpayers has been questioned.77 Also, source
countries have their own compliance problems with non-resident taxpayers; for example,
a study by the auditor general of Canada found that fewer than 2 percent of non-
resident individuals who received payment for services in Canada filed a tax return.78
In any event, compliance issues are probably not very great for league athletes
(although there may be a problem with some of the incentive and signing-bonus
components of income): determining when the athlete will be in each jurisdiction
is easy from published schedules and newspaper coverage of injury lists; salaries are
publicly available, at least for the base amounts; and the information required to
allocate amounts of income to each jurisdiction is readily available, at least if
somewhat arbitrary measures such as games played or days worked (duty days) in
the jurisdiction are accepted as measures.

Yet another argument for source-based taxation in a particular country is that
another country has exercised its source jurisdiction and caused the first country to
lose revenue because of foreign tax credits. Therefore, as a retaliatory measure, the
first country should launch its own tax on non-residents. This argument is not
particularly applicable in this context for two reasons: the loss of revenue is to the
Canadian federal government rather than the provinces; and (as shown below in
table 7) the amount of money involved is very small, both because the US jock tax
rates are low and because few states are currently taxing Canadian athletes.

Disadvantages
A major argument against source-based taxation is the increase in compliance costs
for taxpayers and administrative costs for government. Residence-based taxation
involves only one country’s tax system while source-based taxation involves both
countries’ tax systems, possibly with multiple tax returns in each country.79 This
may not be much of an issue for US-resident athletes, since they already have to file
returns in 10 or more states; filing 4 more to the provinces (or just 1 more if the
CRA administers the tax) may not be that significant. However, there could be a

vol. 22, no. 21 Tax Notes International 2637-45.
78 See “Canada Customs and Revenue Agency—International Tax Administration: Non-Residents
Subject to Canadian Income Tax,” in Canada, Report of the Auditor General of Canada to the House
of Commons 2001 (Ottawa: Public Works and Government Services, 2001), chapter 7, at 18. On
athlete compliance problems, see also Organisation for Economic Co-operation and Development,
Thin Capitalisation; Taxation of Entertainers, Artistes and Sportsmen, Issues in International
Taxation no. 2 (Paris: OECD, 1987).
79 A non-athlete example of a situation to avoid is that of a musical group with total annual
income of $22,000 that was subject to tax in 22 states. The accountant chose not to file all of
the required returns in order to reduce the burden of fees charged: Mickey Bryan and Richard
Calculations” (September 15, 2003) State Tax Notes 761-64, at 763.
significant impact on Canadian athletes if the proposed tax were to be implemented and, in response, all states in the United States with a jock tax moved to tax Canadian athletes. In that case, a Canadian-resident NHL player, who currently files only 1 tax return (to the CRA), might have to file as many as 13 state tax returns. It was estimated that in 1994 these returns cost between US$250 and US$750 to prepare.\textsuperscript{80} If accountants’ charges have increased in line with Canadian inflation from then until now, the extra 13 returns would cost between $5,000 and $15,000 in current Canadian dollars annually.

The other aspect of the compliance and administrative cost issue is the costs associated with the new provincial tax itself. Part of this problem can be solved with better tax design. US state jock taxes are almost a model of what not to do in terms of lack of uniformity and resulting taxpayer paper burdens. Despite a 1994 report pointing the way,\textsuperscript{81} much remains to be done and some have called for Congress to act and solve the “administrative nightmare.”\textsuperscript{82} The measures to make the proposed tax simple that are described below should assist in this regard: for example, the tax could be designed as a flat-rate tax that is withheld from athletes’ pay with tax returns being submitted by the team rather than the athlete. Information flow should be quite effective since only about 2,300 taxpayers are involved,\textsuperscript{83} and probably all of them have professional assistance with tax matters.

One aspect of the potential increase in compliance and administrative costs that cannot be solved by good tax design is the precedent that source-based taxation of league athletes by a province would set in terms of deviating from the Canada-US treaty. If every subnational jurisdiction in Canada, the United States, and abroad set its own rules without any reference to treaties, a non-harmonized international “tax jungle” of tax complexity could be created. Although provinces are not parties to treaties and hence are not bound by them, the Quebec Income Tax Act and the Alberta Corporate Tax Act each contain provisions giving effect to Canada’s tax treaties for the purpose of computing provincial tax liability.\textsuperscript{84} Ontario has no


\textsuperscript{81} Wetzler, supra note 68.


\textsuperscript{83} The number of athletes in each league is approximately 1,222 for MLB, 673 for the NHL, and 435 for the NBA. See Simpson, supra note 27, at 57-268; and the Web sites http://www.hockeynut.com/ and http://www.nba.com/.

general provision to that effect, and as a result there is greater deviation from the treaty than in other provinces; however, several provisions recognize the effect of tax treaties in particular circumstances.85 On the other hand, the Alberta NHL players tax is a clear deviation from the treaty, which it presumably felt was justified in the circumstances. As noted above, deviation from the treaty is the reason the federal government gave for refusing to collect the NHL players tax for Alberta.

Increasing the acceptability of deviation from the treaty might be to the disadvantage of Canada to the extent that US states might also deviate from the treaty. For example, Michigan had planned to tax Canadian truckers on the basis of their physical presence in the state but was persuaded to follow treaty norms and not tax them because they had no permanent establishment there. On the other hand, the treaty argument has not dissuaded five other states from taxing Canadian truckers and, as noted above, three states already tax Canadian-resident athletes.86

Opponents of source-based taxation have also raised a number of doubts about the user-charge argument for source-based taxation. One issue is that a provincial tax is not appropriate to the extent that the government services from which the athlete benefits are not provincial but federal, such as airports. Also, some provincial services such as medicare are not available to non-residents. Finally, perhaps an athlete’s use of government services is more closely related to, and therefore best apportioned according to, where the athlete spends time (number of days present in each jurisdiction) and where his family lives than according to where income is earned; if so, the residence jurisdiction should collect most of the revenue, since the athlete is likely to spend more time there and his family is likely to live there.87 However, residence jurisdictions will still be getting a substantial share of the tax on athletes’ incomes to the extent that athletes earn income from sources such as endorsements, which (as self-employment income earned without a permanent establishment) are essentially taxed only by residence jurisdictions. Also, in the case of only a provincial tax on this income, the United States as the residence jurisdiction would still be getting a large portion of the revenue because its combined federal and state tax rates are higher than the provincial tax rate.

More fundamentally, some authors question the longstanding assumption of source-based taxation that the source of an employee’s income is the place of performance of the duties. One author argues that athletes earn their money at home

86 On trucking, see, for Michigan, Hellerstein, supra note 66, at 78; for other states, Robert D. Brown, “Roles of States and Provinces in Taxation Issues Between Canada and the United States” (2001) vol. 27, no. 1 Canada-United States Law Journal 83-105, at 99-102; and for the most recent controversy with New Jersey, the Web sites of the Canadian Trucking Alliance (http://www.cantruck.com/) and the Ontario Trucking Association (http://www.ontruck.org/).
rather than on the road, citing the fact that teams earn revenues from broadcasting rights, ticket sales, and merchandise contracts; but the reply is that although this may be true of the team, the athlete earns his income wherever he plays.88 Certainly the athlete’s employer wants him to perform well on the road almost as much as it wants him to perform well at home, and athletes’ reputations are made by their overall statistics rather than their statistics at home. More significantly, it has been argued that the game is only the place of performance of the final skill, while there may have been years of preparation in the residence country; therefore, it should not be the case that 100 percent of the tax goes to the source country.89 On the other hand, the place where an athlete’s skills are developed may not necessarily be the residence country or the source country. For example, there are many hockey players in the NHL who are currently resident in the United States or Canada but who grew up and honed their skills in Europe.

Source-based taxation has been criticized as “taxation without representation.” It is argued that a government might be all too willing to establish a “tax on foreigners” since they do not vote. This argument can be interpreted as a case against source-based taxation or a suggestion for reform of voting laws.90 Many municipal jurisdictions allow voting by non-resident property owners. Source-based taxation by provinces could be criticized on the basis that one jurisdiction moving in that direction could inspire US states to tax Canadian athletes, not because of the loss in revenue (since it is only the US federal government that would lose revenue) but because of the perception that “they are taxing our athletes, so we should respond.” This type of reaction has been seen in the United States in the spread of jock taxes from one state (California) to all states with professional sports teams and personal income taxes on employment income, although in this case the states actually were losing revenue owing to credits for taxes paid to other states. However, it does not seem to be such an issue in the international context. Despite the prospect of “irritation” to treaty partners anticipated by one article,91 the fact that a few US states tax Canadian athletes has not caused much concern in Canada, and the fact that the Alberta NHL players tax taxes American athletes does not seem to have caused any concern in the United States. In any event, the revenue effect of this kind of state response is shown below to be small.

The more serious concern is a response by the US federal government, since it is the government that is losing the money through foreign tax credits. One possible


89 Shay et al., supra note 69, at 138; and Henderson, supra note 87, at 1121. Training-camp days are part of the duty days formula for allocating income to jurisdictions, but this is only a small part of the years of training time.

90 Jinyan Li, International Taxation in the Age of Electronic Commerce: A Comparative Study (Toronto: Canadian Tax Foundation, 2003), 56. Shay et al., supra note 69, at 104, note that tax competition among countries may prevent overtaxation by source countries.

91 Brean and Forgione, supra note 8.
way to discourage Canadian provinces from taxing income that is exempt at the federal level in Canada because of the Canada-US treaty would be to change the law and deny the US federal foreign tax credit in these circumstances. Alternatively, the US federal government could seek redress in subsequent treaty negotiations.

Some common criticisms of source-based taxation by US states do not apply to the source-based taxation by Canadian provinces discussed in this article.92 One is that although the first jurisdiction to levy such a tax may raise significant revenue, this revenue will disappear after other jurisdictions respond in kind. The reason is that the first jurisdiction may lose an equivalent amount of revenue from credits given to its residents for taxes paid to these jurisdictions. Hence, such taxes may produce “a pitifully small amount of revenue once all the credits are taken.”93 However, as shown below, this argument does not apply to Canada since only 6 percent of the revenue raised would be paid out in foreign tax credits even if all US states with jock taxes applied them to Canadian athletes.94

Another type of criticism that falls into this category is the complaint that athletes are being discriminated against in that other employees providing personal services (such as airline pilots, lawyers, surgeons, executives, and coaches and other non-athlete employees travelling with the sports team) would not be subject to the tax.95 The reason this criticism is inapplicable in the present context is that this discrimination may be economically unimportant since the tax imposes no real economic burden on athletes, other than the increase in the costs of tax compliance. However, the disparate treatment of the two groups is certainly discrimination in appearance, and it would be difficult to communicate the true situation to the public. It is ultimately a question of practicality; if a province were to depart from the Canada-US treaty to tax these league athletes, it could also depart from the treaty to tax other employees if it thought that the tax could be collected.

Assessment of Arguments

No single conclusion can be drawn from this discussion because there are good arguments both for and against provincial source-based taxation of non-resident

92 One such criticism is that jock taxes increase an athlete’s total tax burden. This can happen to US residents where the state of residence either has no income tax (for example, Texas or Florida) or does not grant a credit for jock taxes paid to other states (Illinois). See Green, supra note 7, at 297, table 3, for some examples.


94 If the proposal were to tax non-residents earning employment income in any occupation (rather than just athletes), it is quite possible that the credit issue would be more significant. Although the provinces would still have higher tax rates than the states, the base to which these rates apply might be more balanced since the cross-border flows of labour might be more equal.

95 For sample complaints against this type of tax discrimination, see Hoffman, supra note 7, at 10, and Gordon D. Henderson, “All Aboard the Tax Express!” (1993) vol. 58, no. 4 Tax Notes 507-9.
athletes. In government decision making, it is clear that the arguments for source-based taxation have been more persuasive on the international level.\(^{96}\) As one article states, “[w]e know of no country with an income tax that forgoes source taxation of nonresidents.”\(^ {97}\) A leading text concludes, “By international custom, a country has the primary right to tax income that has its source in that country.”\(^ {98}\) Another concurring opinion is that “[t]he current international consensus is that the source country has the primary jurisdiction to tax business income and income from services.”\(^ {99}\) At the subnational level, source-based taxation seems to be less widely accepted. Perhaps because of their apparent (and sometimes real) effect of discriminating against out-of-state athletes, US jock taxes even made it onto a list of “strangest state tax laws,” despite the long tradition of non-resident taxation from the point of view of a state.\(^ {100}\)

**TAX DESIGN**

**Scope**

The first question to address in attempting to design a provincial tax that is restricted to non-resident athletes is which non-residents should be taxed. As discussed above, current federal and provincial laws tax the Canadian-source income of athletes resident in countries other than the United States, US-resident athletes who play for Canadian teams, and non-resident athletes who do not play in leagues with regularly scheduled games (such as golfers). Thus, the principal gap in these laws, and the object of the proposed tax, is the Canadian-source income of athletes playing on US teams who are residents of the United States (cell C5 in table 1).

The tax could be extended to all non-residents of Canada rendering services in the province, such as other visiting team employees, lawyers, and airline pilots. This is the pattern of US states, which generally tax all non-residents of the state providing in-state services—at least according to statute, if not in actual practice. Since such an extension of the scope of the tax raises much bigger compliance and policy issues, the proposed tax is limited to athletes.

Taxing athletes on US teams who are not residents of Canada appears to be a violation of the tax collection agreements since it amounts to a redefinition of taxable income. However, the precedent of the federal government’s acceptance of the

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96 However, it is also the international norm to limit source taxation on passive income—for example, by limiting withholding rates on payments to non-residents. See articles 7 and 14 of the OECD model treaty.

97 Shay et al., supra note 69, at 109.


99 Li, supra note 90, at 49.

Alberta NHL players tax suggests that this will not be a problem. Perhaps the CRA would even collect the proposed tax for a fee since the problem of double taxation (as under Alberta’s tax) does not arise; however, the tax could still be objected to as a deviation from the treaty.

The most important leagues that the new tax would apply to are the NHL, NBA, and MLB. There are at least four other professional leagues that have teams in Canada: the National Lacrosse League has teams in Toronto, Calgary, and Vancouver; the American Hockey League has teams in Manitoba, St. John’s, Toronto, and Hamilton; the North American Football League has a team in Hamilton; and the International League (baseball) has a team in Ottawa. However, it is perhaps best to exclude these other leagues since little revenue is involved relative to the compliance burden. A minimum dollar amount of income to be subject to the tax would achieve this objective. An alternative would be to specify in the legislation that the tax is to apply only to NHL, MLB, and NBA players, but this would create an awkward situation if a new big-money league like the NFL or the now-defunct World Hockey Association came to Canada. The government would not wish to have players from this league escape the tax, but also would not want to have to amend the law to catch them and then be seen as discouraging new ventures.

Players in the Canadian Football League and the NFL would not be affected by the tax since these teams currently have no cross-border games.

Four provinces have NHL teams—Alberta, British Columbia, Ontario, and Quebec—while the NBA and MLB (excluding the Expos) are restricted to Ontario. Thus, this proposal is an expansion of taxing power for British Columbia, Ontario, and Quebec, since these provinces at present levy no taxes on such US-resident athletes on US teams. On the other hand, this proposal restricts the application of the Alberta NHL players tax, which currently applies to all NHL players playing in Alberta.

**Taxpayer Protection Laws**

Provincial legislation regarding voter approval of tax increases is a possible problem. In particular, the Ontario Taxpayer Protection Act (TPA), enacted in 1999, specifies that a new bill shall not include “a provision that increases, or permits the increase of, a tax rate under a designated tax statute or that establishes a new tax” unless a public referendum is held before the bill is introduced in the Legislative

101 A dollar threshold requirement could allow certain highly paid players from these leagues to be taxed—for example, a major-league player who is sent down to the minors because of performance problems or injury rehabilitation, but is paid a major-league salary while he is there. On the concept of thresholds, see Brian J. Arnold, “Threshold Requirements for Taxing Business Profits Under Tax Treaties,” in Brian J. Arnold, Jacques Sasseville, and Eric M. Zolt, eds., *The Taxation of Business Profits Under Tax Treaties* (Toronto: Canadian Tax Foundation, 2003), 55-108.

Assembly. It appears that the introduction of a new tax on non-resident athletes would fall under this Act, but the government would likely wish to avoid a referendum, even if no opposition is expected, in part because the cost might offset much of the first-year potential revenue from the tax.

There are several ways to avoid the referendum requirement. One possibility is that the requirement does not apply where during an election campaign the leader of the party submits a written statement to the chief election officer indicating the party’s intention to increase a tax rate or establish a new tax. Since the statement made by the Liberals during the 2003 election campaign provides no such notice with respect to personal income taxes, this would have to occur in a subsequent election. Another possibility is to draft the new tax in such a way that it is a broadening of the tax base to include non-resident income rather than the levying of a new tax or the raising of a tax rate. Base broadening appears to be similar to the repeal of the equity in education tax credit, which has been held to be exempt from the legislation. A riskier legal strategy is to contend that no referendum is necessary because none of the people having a right to vote in the referendum would be affected by the proposed tax. There is, however, no explicit wording in the law to support this argument. Finally, the government could simply amend the legislation, since it has no special status. This was done by the Conservative government to ensure that the delay of previously announced tax cuts in the June 2002 budget was not subject to the referendum requirement. However, this caused some adverse reaction. For example, the Ontario director of the Canadian Taxpayers Federation said:

We were told that the TPA was inviolable and was the government’s guarantee that no one—now or in the future—could raise taxes or delay scheduled tax cuts without the consent of voters. For the government to amend this act is a breach of trust and a sell-out of their principles.

Rate Structure

A major criticism of the US jock taxes is that they impose high compliance costs, mainly because each player must submit a return and pay tax to each state imposing

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103 Taxpayer Protection Act, SO 1999, c. 7, schedule A, section 2(1).
104 Ibid., section 4(1).
106 Denial of a preliminary injunction by the Ontario Alliance of Christian Schools, Ontario Superior Court, Justice Ian Nordheimer, December 1, 2003.
a jock tax. One way to solve this problem, as recommended by the Federation of Tax Administrators, is to put the responsibility on the team rather than the individual player.\textsuperscript{109} One composite return is filed by each team for all of its team members, and the team is also responsible for withholding tax from team member compensation and submitting it to the tax authority. The Alberta NHL players tax employs this approach.\textsuperscript{110} Technically, the levy is on the player, but the team is required to act as a withholding agent. Since employees of the teams visit Canada for games at predictable times, it should not be difficult to enforce the tax obligations.

The composite return method is much simpler to apply if a flat-rate tax is used rather than a progressive rate structure with personal deductions and credits. A flat-rate tax can be calculated simply from knowledge of the team’s payroll (perhaps with adjustments to exclude players who did not appear in the game owing to injury or to exclude non-taxable forms of compensation, as discussed below), while the more complex progressive structure requires a separate calculation for each player.\textsuperscript{111}

Equity considerations suggest that a flat-rate tax at essentially the top marginal rate is superior to using a progressive rate structure based on income earned within the province. The average NHL player currently makes Cdn$2.5 million (see table 3 above), and a common percentage of that income allocated to a province could be 2 percent, so that in-province income would be $50,000. Taxation based on an income of $50,000 and not considering the player’s out-of-province income might seem to be an underestimate of the player’s ability to pay and not to give the province a proper share of the player’s world tax liability. The situation is similar to that of a part-year resident, and the same problem occurs: if a person earns income in more than one jurisdiction and each jurisdiction taxes the person only on his or her within-jurisdiction income using the same progressive rate structure, the total tax liability will be less than it would have been if the person had earned all of his or her income in one jurisdiction.\textsuperscript{112} California and some other states have dealt with this issue by calculating tax on a worldwide basis and then multiplying by the ratio of in-state income to worldwide income in order to determine tax owing.\textsuperscript{113} Applying that approach would essentially mean that all league athletes would have

\textsuperscript{109} Federation of Tax Administrators, supra note 80.

\textsuperscript{110} Lavitt, supra note 8, and NHL Tax Regulation, supra note 48, section 3 (varying section 50 of the Alberta Personal Income Tax Act, supra note 47).

\textsuperscript{111} Difrischia, supra note 64, at 129, notes that many athletes would be willing to pay more tax in order to have a simple system, since present jock tax rules involve considerable aggravation and costs.


\textsuperscript{113} See form 540NR for California: Ekmekjian, supra note 7, at 246, note 103. New Jersey, Maryland, and some other states also use this procedure. Switzerland uses this method for part-year residents: van Raad, supra note 112, at 1488. Shay et al., supra note 69, counsel against this method, but they do not seem to be aware of van Raad’s argument.
most of their income taxed at the top marginal provincial rate, judging from the high minimum and average salaries reported in table 3. However, applying a flat-rate tax at approximately the top marginal rate achieves the same equity objective but is simpler, requires less intrusion on the player’s privacy, and does not pose the same enforcement problems in terms of determining income outside the country.114

As for the personal deductions or credits, most authors believe it is more appropriate that the residence country should be the one that takes into account the taxpayer’s personal attributes, such as those relating to medical costs, subsidies for home ownership, basic exemption, etc., since it is the residence country that has the personal allegiance of the taxpayer.115

The choice of a rate is more difficult. It would be desirable to pick a rate that is reasonable across the country since various provinces may wish to launch such a tax and, ideally, it would be administered by the CRA on a national basis in order to reduce compliance and administrative costs. The 2003 top rates for the provinces that have professional sports teams are as follows: 14.7 percent for British Columbia, 24 percent for Quebec, 17.41 percent for Ontario, and 10 percent for Alberta. In addition, the rate imposed by section 120 of the federal Act on non-residents taxable in Canada is 13.92 percent (48 percent of the top federal rate of 29 percent). On the basis of this comparison, 15 percent might be a suitable rate.

Using the 15 percent rate could present a problem in respect of NAFTA. The argument would be that in a province with a tax rate of less than 15 percent (British Columbia and Alberta), non-residents would be taxed at a higher rate than residents and hence, as discussed above, there could be a NAFTA violation. The appearance of discrimination would be greater if one of these provinces were the first to adopt such a tax, but it would be less if Ontario or Quebec moved first and then British Columbia or Alberta followed.

**Tax Base**

The next issue is the determination of the in-province income. There are two quantities to be determined: the athlete’s employment income and the proportion of that income that is earned in the province. There are three possible models: the US jock taxes, the Alberta NHL players tax, and the federal Income Tax Act.

The Alberta tax calculates employment income as the player’s base salary only.116 In contrast, the US jock taxes and the Income Tax Act have a much broader definition. The base salary approach has some justification in simplicity because US athletes on US teams would not otherwise be paying income tax in Canada and thus

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114 This approach is currently used in Canada at the federal level for inter vivos trusts. Alternatively, the tax could be imposed at the flat rate with an election for the player to calculate tax using the California method: see van Raad, supra note 112, at 1492.


116 NHL Tax Regulation, supra note 48, section 2(1)(a).
would not have to compute income using Canadian rules. On the other hand, following the Income Tax Act would reduce the scope for tax planning that moves income from base salary to other forms of remuneration. One such form is performance bonuses (such as bonuses for goals scored), which is widely used in MLB and is used elsewhere primarily in contracts designed to circumvent the NHL rookie salary cap.117 Another form is post-season pay (for example, for the NHL playoffs), although we understand that this is quite low in the NHL. Yet another form is signing bonuses;118 Joe Sakic received a base salary of $2 million and a signing bonus of $15 million.119 Base salary appears to include amounts paid into a retirement compensation arrangement, but also may include unfunded deferred compensation, such as the $32 million reportedly owed by the Pittsburgh Penguins to Mario Lemieux. Overall, the choice of a measure of employment income is a difficult tradeoff between simplicity and inclusiveness.

Similar issues arise with respect to the formula for determining the proportion of total employment income that is taxable in the province. Once again, the Alberta tax opts for extreme simplicity, using the ratio of game days in Alberta to the total number of days in the NHL regular season. In contrast, the CRA definition of duty days, which is used to determine both residency status and the proportion of the income of non-residents that is taxable in Canada, includes not only games but practices, pre-season training camps, etc.120 The CRA approach is better for three reasons. First, conformity with that approach reduces compliance costs and eliminates the possibility of double taxation or undertaxation (in the sense that different formulas in different jurisdictions may produce income allocations for a player that add up to more or less than the player’s income).121 Second, although the Alberta approach is easier to enforce, the Federation of Tax Administrators in the United States recommended the duty days approach because it was viewed as more equitable in that it took into account all of the athlete’s contractual obligations to the team.122 Finally, the Alberta approach generates too low an allocation of income in that the numerator is game days in the jurisdiction but the denominator is not just total game days but also non-game days in the regular season.123

118 Beam et al., supra note 24, at 315.
120 Beam et al., supra note 24, at 309-10.
121 Double taxation or undertaxation also can occur because of different definitions of duty days. See Ekmekjian, supra note 7, at 242.
122 Wetzler, supra note 68.
123 The Alberta approach produces a much lower percentage of income earned in Alberta for players on Alberta teams (23 to 24 percent, as shown in table 2) than would the duty days approach. The latter would produce a figure of at least 60 percent because half of all games are home games and most of the team practice and pre-season time occurs in the province. Although changing to
Would Canada as a Whole Gain Revenue?

Given the conclusion above that athletes’ tax burdens would not be increased by the proposed tax, it is apparent that source-based taxation versus residence-based taxation is a zero-sum game among four levels of government: Canadian provincial and federal governments, and US state and federal governments. This raises the question whether implementing the proposed tax and moving to source-based taxation is a zero-sum game within Canada. More specifically, would the loss of revenue to the Canadian federal government from granting foreign tax credits to Canadian players in respect of taxes paid to the United States on games there offset the gain to the provincial governments from taxing Americans on games here? One might at first think so, since schedules in the NHL, NBA, and MLB ensure that the numbers of cross-border games played in Canada and the United States are equal. (Any pair of teams, one in Canada and one in the United States, will generally play an approximately equal number of games in each team’s home city.)

There would be circumstances in which this could happen. To illustrate, consider the situation where Ontario and Michigan each have one team with a payroll of Cdn $60 million and each team spends 10 percent of its duty days visiting the other country. All the Ontario players live in Ontario, and all the Michigan players live in Michigan.

Suppose that initially Michigan has a 15 percent tax on non-resident athletes that it does not apply to Canadian athletes, and Ontario legislates its own 15 percent tax. If Michigan began to apply its tax to Canadians, both Ontario and Michigan would have revenue of 15% \( \times (10\% \times \$60 \text{ million}) \), or $900,000. The Canadian federal government would grant a foreign tax credit of $900,000 to the Ontario athletes for taxes paid to the Michigan government, and the US federal government would similarly grant a foreign tax credit of $900,000 to the Michigan athletes for taxes paid to Ontario.\(^{124}\) Thus, in this hypothetical situation, the proposed tax would accomplish only a redistribution of revenue from the two federal governments to the provincial and state governments. Canada as a whole would have zero additional net revenue relative to residence-based taxation.\(^{125}\)

One obvious reason why this scenario does not hold in real life, and Canada as a whole would gain from taxing non-resident athletes, is that the 15 percent proposed provincial tax rate is higher than US state jock tax rates. Michigan's top rate of jock tax (which is the same as its top marginal rate for all residents) is 4 percent, and the

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124 To receive a full foreign tax credit, the foreign tax would have to be less than the domestic taxes that would have been paid on the foreign-source income.

125 The United States as a whole also would have zero net revenue because the $900,000 in Ontario tax would reduce US federal revenues by an equal amount through the foreign tax credit system, just offsetting the $900,000 in Michigan revenue.
top marginal tax rate applying in the 20 jock tax states is 9.3 percent in California. In contrast, every province in Canada has a top marginal tax rate of 10 percent or more, and we propose a flat rate of 15 percent for the proposed tax. Also, many states with a graduated tax structure (as discussed above, California is one exception) give non-residents the benefit of the graduated rate structure based solely on income earned within the state.

A second reason why Canada would gain is that the payrolls of Canadian teams are smaller than those of US teams. Although this is not true in basketball ($77 million US average versus $80 million for the Raptors), it is true of hockey ($61 million US average versus $54 million Canadian average) and baseball ($114 million US average versus $86 million for the Blue Jays).126

The third reason why Canada as a whole gains revenue is that the average cross-border game involves far more US residents on US teams than Canadian residents on Canadian teams. Under our assumptions about players’ residence, 80 percent to 100 percent of players on US teams are US residents, while only 0 to 50 percent of players on Canadian teams are Canadian residents. Provinces would earn tax revenue when US-resident players on US teams play games in Canada, while the federal government would lose tax revenue when Canadian-resident players on Canadian teams play in the United States. In particular, Blue Jays and Raptors games would be tremendous revenue raisers for the provinces without any revenue cost to the federal government.

These three factors mean that applying the proposed tax to the visiting athletes playing a Canadian sports team creates a net profit for Canada as a whole, even assuming that all states respond by taxing Canadians on that team under their jock taxes. The overall benefit then increases with the number of sports teams.127 Thus, Ontario, with its four professional sports teams, generates the biggest net advantage to Canada under the proposed tax.

**Provincial Revenue Estimates**

This section of the article estimates the revenue that would be raised if all provinces with an MLB, NBA, or NHL sports team (Alberta, British Columbia, Ontario, and Quebec) levied a 15 percent tax on US-resident athletes who play for US teams in these leagues. The tax base would be in-province income, measured by multiplying employment income received from the team by the ratio of duty days in the province to total duty days in the year. Given this assumption of a flat-rate tax with no deductions or credits, the tax can be computed at the team level, even though it

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126 Calculated as in the payroll figures in tables 4A, 5, and 6 below. The basis for this expected gain to Canada is somewhat similar to the idea that developing countries benefit from source taxation because they are capital-importing countries (Li, supra note 90, at 56); since Canada is a net importer of athlete labour, source taxation of that income benefits Canada.

127 Smith et al., supra note 7, at 3. Smith et al. also point out the tax rate issue discussed above.
would be levied on individual athletes. Employment income at the team level is the team’s reported payroll from the most recently completed season. Payroll would include performance bonuses and signing bonuses, but would not include post-season pay since it is from the league rather than from the team. Lack of data prevents the inclusion of tax on such post-season pay in the revenue estimates.

Determining the share of a team’s payroll that would be taxable in each province requires multiplying the payroll by the number of duty days in the province for each team divided by the total number of duty days in the season. It is our understanding that the latter figure for Toronto teams in the three leagues is approximately 225 for MLB, 200 for the NBA, and 215 for the NHL.\textsuperscript{128} We assume that these are representative of the total duty days of US teams in their respective leagues. Duty days in the province are estimated by multiplying the number of game days from the posted schedules of the teams by a multiplier representing the number of duty days per game day.\textsuperscript{129}

Tables 4A, 5, and 6 present estimates of the revenue that might be derived by Ontario from the US-resident players on US teams in the NHL, the NBA, and the MLB, respectively. The number for total revenue at the bottom of each table appears in the first column of a summary table, which is table 7. The summary table also shows revenue figures for Quebec, Alberta, and British Columbia, which have NHL teams but no MLB or NBA teams.\textsuperscript{130}

\textsuperscript{128} These figures do not include post-season days since we do not have any information on post-season income. The figures in the text agree closely with one published estimate of 210 to 230 for MLB, 200 for the NBA, and 200 for the NHL: see Darren Rovell, “Baseball, Not Players,Receive Tax Break from Puerto Rico,” April 7, 2003, on the ESPN Web site at http://espn.go.com/. Green, supra note 7, at 295 and 298, calculates the duty days of two players on different baseball teams for the 1998 season at 227. A third estimate agrees for MLB, with 210, but calculates a surprisingly small 105 for the NBA: Hoffman, supra note 7, at 6.

\textsuperscript{129} The methodology is from Hoffman, supra note 7. Since these games are road games, we use the Toronto data on the teams’ road games. Specifically, the multiplier estimate is produced by dividing the estimated total duty days of these Toronto MLB, NBA, and NHL teams in the United States, excluding 45 days of pre-season training for MLB (90, 60, and 45, respectively for the three leagues) by the number of US games by these Toronto teams in the most recent season (81, 44, and 35, respectively). Hence, we estimate the number of duty days per game day for MLB, the NBA, and the NHL to be 1.1, 1.4, and 1.3. These are fairly comparable to Hoffman’s (supra note 7, at 6) respective estimates of 1.3, 1.2, and 1.2.

A more accurate result could be obtained by examining the travel schedule of each team and estimating how many days are spent in Canada, since teams in MLB and the NBA make extended road trips, possibly with non-game days out of the country in between, while NHL teams tend to play one game at a time and come back home.

\textsuperscript{130} The Montreal Expos are not included in the tables because of their impending departure from Canada. The detailed tables for the revenue calculations for Quebec, Alberta, and British Columbia, as well as US jock taxes paid by players for teams in these three provinces, are posted on Alan Macnaughton’s Web site: http://www.arts.uwaterloo.ca/ACCT/people/macnau.htm.
TABLE 4A  Hockey: Estimated Ontario Revenues from the Proposed Tax on Visiting US-Resident Athletes on US Teams  
(Amounts in Canadian Dollars)

<table>
<thead>
<tr>
<th>US NHL team</th>
<th>Team payrolla ($ millions)</th>
<th>Ontario duty daysb of US players</th>
<th>Ontario-source income of US playersc ($)</th>
<th>Tax paid in Ontario by US playersd ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anaheim Mighty Ducks</td>
<td>54.7</td>
<td>2.6</td>
<td>660,987</td>
<td>99,148</td>
</tr>
<tr>
<td>Atlanta Thrashers</td>
<td>36.4</td>
<td>5.2</td>
<td>881,315</td>
<td>132,197</td>
</tr>
<tr>
<td>Boston Bruins</td>
<td>52.3</td>
<td>6.5</td>
<td>1,580,436</td>
<td>237,065</td>
</tr>
<tr>
<td>Buffalo Sabres</td>
<td>43.4</td>
<td>7.8</td>
<td>1,576,199</td>
<td>236,430</td>
</tr>
<tr>
<td>Carolina Hurricanes</td>
<td>54.9</td>
<td>5.2</td>
<td>1,328,752</td>
<td>199,313</td>
</tr>
<tr>
<td>Chicago Blackhawks</td>
<td>62.4</td>
<td>0.0</td>
<td>nil</td>
<td>nil</td>
</tr>
<tr>
<td>Colorado Avalanche</td>
<td>84.1</td>
<td>2.6</td>
<td>1,016,902</td>
<td>152,535</td>
</tr>
<tr>
<td>Columbus Blue Jackets</td>
<td>39.5</td>
<td>1.3</td>
<td>238,972</td>
<td>35,846</td>
</tr>
<tr>
<td>Dallas Stars</td>
<td>86.5</td>
<td>1.3</td>
<td>522,857</td>
<td>78,429</td>
</tr>
<tr>
<td>Detroit Red Wings</td>
<td>95.3</td>
<td>2.6</td>
<td>1,152,489</td>
<td>172,873</td>
</tr>
<tr>
<td>Florida Panthers</td>
<td>45.8</td>
<td>5.2</td>
<td>1,108,424</td>
<td>166,264</td>
</tr>
<tr>
<td>Los Angeles Kings</td>
<td>60.8</td>
<td>2.6</td>
<td>735,559</td>
<td>110,334</td>
</tr>
<tr>
<td>Minnesota Wild</td>
<td>28.7</td>
<td>2.6</td>
<td>347,442</td>
<td>52,116</td>
</tr>
<tr>
<td>Nashville Predators</td>
<td>35.3</td>
<td>2.6</td>
<td>427,099</td>
<td>64,065</td>
</tr>
<tr>
<td>New Jersey Devils</td>
<td>73.4</td>
<td>5.2</td>
<td>1,776,189</td>
<td>266,428</td>
</tr>
<tr>
<td>New York Islanders</td>
<td>58.4</td>
<td>5.2</td>
<td>1,413,494</td>
<td>212,024</td>
</tr>
<tr>
<td>New York Rangers</td>
<td>97.0</td>
<td>5.2</td>
<td>2,345,655</td>
<td>351,848</td>
</tr>
<tr>
<td>Philadelphia Flyers</td>
<td>78.5</td>
<td>5.2</td>
<td>1,898,218</td>
<td>284,733</td>
</tr>
<tr>
<td>Phoenix Coyotes</td>
<td>62.1</td>
<td>2.6</td>
<td>750,813</td>
<td>112,622</td>
</tr>
<tr>
<td>Pittsburg Penguins</td>
<td>43.7</td>
<td>5.2</td>
<td>1,057,578</td>
<td>158,637</td>
</tr>
<tr>
<td>San Jose Sharks</td>
<td>67.0</td>
<td>2.6</td>
<td>810,132</td>
<td>121,520</td>
</tr>
<tr>
<td>St. Louis Blues</td>
<td>88.4</td>
<td>0.0</td>
<td>nil</td>
<td>nil</td>
</tr>
<tr>
<td>Tampa Bay Lightning</td>
<td>40.5</td>
<td>5.2</td>
<td>979,616</td>
<td>146,942</td>
</tr>
<tr>
<td>Washington Capitals</td>
<td>71.1</td>
<td>5.2</td>
<td>1,718,565</td>
<td>257,785</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td>89.7</td>
<td>3,649,154</td>
<td></td>
</tr>
<tr>
<td>Total revenue (assumption: 95% US residents)</td>
<td></td>
<td>3,466,696</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Total Ontario-source income</td>
<td></td>
<td>24,327,693</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Number of US playersc</td>
<td></td>
<td>536</td>
<td></td>
<td></td>
</tr>
<tr>
<td>Average Ontario-source income per player</td>
<td></td>
<td>45,387</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

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b Calculated as games played with the Toronto Maple Leafs and the Ottawa Senators multiplied by 1.3. Games played include 2002-3 pre-season and regular-season games. Schedules from http://www.ottawasenators.com/ and http://www.torontomapleleafs.com/.

c Calculated by multiplying the payroll of each US NHL team by the ratio of Ontario duty days to estimated total duty days in the pre-season and regular season (215).

d Although the revenue effects are calculated at the team level for simplicity, the tax would actually be levied on each individual player.

e From http://www.hockeynut.com/.
**TABLE 4B**  Hockey: State Jock Taxes Potentially Paid by Canadian-Resident Athletes on Ontario Teams Visiting the United States (Amounts in Canadian Dollars)

<table>
<thead>
<tr>
<th>US NHL teams</th>
<th>State</th>
<th>US duty days of Ontario players playing this US team</th>
<th>US-source income from playing this US team ($</th>
<th>State tax rate (%)</th>
<th>Maximum state tax paid ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anaheim Mighty Ducks</td>
<td>California</td>
<td>1.3</td>
<td>265,021</td>
<td>9.30</td>
<td>24,647</td>
</tr>
<tr>
<td>Atlanta Thrashers</td>
<td>Georgia</td>
<td>2.6</td>
<td>1,450,867</td>
<td>6.00</td>
<td>87,052</td>
</tr>
<tr>
<td>Boston Bruins</td>
<td>Massachusetts</td>
<td>1.3</td>
<td>725,434</td>
<td>5.30</td>
<td>38,448</td>
</tr>
<tr>
<td>Buffalo Sabres</td>
<td>New York</td>
<td>3.9</td>
<td>2,176,301</td>
<td>6.85</td>
<td>149,077</td>
</tr>
<tr>
<td>Carolina Hurricanes</td>
<td>North Carolina</td>
<td>1.3</td>
<td>725,434</td>
<td>8.25</td>
<td>59,848</td>
</tr>
<tr>
<td>Chicago Blackhawks</td>
<td>Illinois</td>
<td>1.3</td>
<td>725,434</td>
<td>3.00</td>
<td>21,763</td>
</tr>
<tr>
<td>Colorado Avalanche</td>
<td>Colorado</td>
<td>1.3</td>
<td>725,434</td>
<td>4.63</td>
<td>33,588</td>
</tr>
<tr>
<td>Columbus Blue Jackets</td>
<td>Ohio</td>
<td>1.3</td>
<td>725,434</td>
<td>7.50</td>
<td>54,408</td>
</tr>
<tr>
<td>Dallas Stars</td>
<td>Texas</td>
<td>1.3</td>
<td>725,434</td>
<td>nil</td>
<td>nil</td>
</tr>
<tr>
<td>Detroit Red Wings</td>
<td>Michigan</td>
<td>1.3</td>
<td>1,185,846</td>
<td>4.00</td>
<td>47,434</td>
</tr>
<tr>
<td>Florida Panthers</td>
<td>Florida</td>
<td>2.6</td>
<td>1,450,867</td>
<td>nil</td>
<td>nil</td>
</tr>
<tr>
<td>Los Angeles Kings</td>
<td>California</td>
<td>1.3</td>
<td>265,021</td>
<td>9.30</td>
<td>24,647</td>
</tr>
<tr>
<td>Minnesota Wild</td>
<td>Minnesota</td>
<td>0.0</td>
<td>nil</td>
<td>7.85</td>
<td>nil</td>
</tr>
<tr>
<td>Nashville Predators</td>
<td>Tennessee</td>
<td>1.3</td>
<td>265,021</td>
<td>nil</td>
<td>nil</td>
</tr>
<tr>
<td>New Jersey Devils</td>
<td>New Jersey</td>
<td>2.6</td>
<td>1,450,867</td>
<td>6.37</td>
<td>92,420</td>
</tr>
<tr>
<td>New York Islanders</td>
<td>New York</td>
<td>2.6</td>
<td>1,450,867</td>
<td>6.85</td>
<td>99,384</td>
</tr>
<tr>
<td>New York Rangers</td>
<td>New York</td>
<td>2.6</td>
<td>1,450,867</td>
<td>6.85</td>
<td>99,384</td>
</tr>
<tr>
<td>Philadelphia Flyers</td>
<td>Pennsylvania</td>
<td>2.6</td>
<td>990,454</td>
<td>3.07</td>
<td>30,407</td>
</tr>
<tr>
<td>Phoenix Coyotes</td>
<td>Arizona</td>
<td>0.0</td>
<td>nil</td>
<td>5.04</td>
<td>nil</td>
</tr>
<tr>
<td>Pittsburg Penguins</td>
<td>Pennsylvania</td>
<td>2.6</td>
<td>1,450,867</td>
<td>3.07</td>
<td>44,542</td>
</tr>
</tbody>
</table>

(Table 4B is concluded on the next page.)
**TABLE 4B  Concluded**

<table>
<thead>
<tr>
<th>US NHL teams</th>
<th>State</th>
<th>US duty days of Ontario players playing this US team&lt;br&gt;</th>
<th>Ottawa players</th>
<th>Toronto players</th>
<th>US-source income from playing this US team&lt;br&gt;</th>
<th>$)</th>
<th>State tax rate&lt;br&gt; (%)</th>
<th>Maximum state tax paid&lt;br&gt; ($)</th>
<th>Total state taxes paid&lt;br&gt;</th>
<th>50% Canadian residents&lt;br&gt;</th>
</tr>
</thead>
<tbody>
<tr>
<td>San Jose Sharks</td>
<td>California</td>
<td>0.0</td>
<td>0.0</td>
<td>nil</td>
<td>nil</td>
<td></td>
<td>9.30</td>
<td>nil</td>
<td>475,287</td>
<td>470,574</td>
</tr>
<tr>
<td>St. Louis Blues</td>
<td>Missouri</td>
<td>1.3</td>
<td>1.3</td>
<td>725,434</td>
<td>6.00</td>
<td></td>
<td>43,526</td>
<td>70,857</td>
<td>California, Indiana, and New Jersey only (assumption: 50% Canadian residents)</td>
<td>70,857</td>
</tr>
<tr>
<td>Tampa Bay Lightning</td>
<td>Florida</td>
<td>1.3</td>
<td>2.6</td>
<td>1,185,846</td>
<td>nil</td>
<td></td>
<td>nil</td>
<td>950,574</td>
<td>Total 50% Canadian residents</td>
<td>475,287</td>
</tr>
<tr>
<td>Washington Capitals</td>
<td>District of Columbia</td>
<td>2.6</td>
<td>2.6</td>
<td>1,450,867</td>
<td>nil</td>
<td></td>
<td>nil</td>
<td>950,574</td>
<td>California, Indiana, and New Jersey only (assumption: 50% Canadian residents)</td>
<td>70,857</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td></td>
<td></td>
<td></td>
<td></td>
<td>950,574</td>
<td></td>
<td></td>
<td></td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

---


b US-source income is calculated by multiplying the payroll of the Toronto Maple Leafs ($76.1 million) and the Ottawa Senators ($43.9 million) from table 2 by their respective ratios of US duty days to estimated total duty days in the pre-season and regular season (215).

c Maximum personal income tax rates (from http://www.taxadmin.org/fta/rate/tax_stru.html, with updates for changes to January 2004). Jock taxes levied by cities are not included. Also, although the only states that currently tax Canadian residents are California, New Jersey, and Indiana, the amounts shown assume that all US states with jock taxes begin to tax Canadian-resident athletes.

d All players on US teams and 50 percent of players on Canadian teams are assumed to be non-residents of Canada; thus, Canada has to provide foreign tax credits to only half of the Toronto Maple Leafs and the Ottawa Senators.
TABLE 5  Basketball: Estimated Ontario Revenue from the Proposed Tax on Visiting US-resident Athletes on US Teams  
(Amounts in Canadian Dollars)

<table>
<thead>
<tr>
<th></th>
<th></th>
<th></th>
<th></th>
<th></th>
</tr>
</thead>
<tbody>
<tr>
<td>Atlanta Hawks</td>
<td>76,045</td>
<td>2.8</td>
<td>1,064,626</td>
<td>159,694</td>
</tr>
<tr>
<td>Boston Celtics</td>
<td>79,974</td>
<td>2.8</td>
<td>1,119,632</td>
<td>167,945</td>
</tr>
<tr>
<td>Chicago Bulls</td>
<td>75,332</td>
<td>4.2</td>
<td>1,581,964</td>
<td>237,295</td>
</tr>
<tr>
<td>Cleveland Cavaliers</td>
<td>63,129</td>
<td>2.8</td>
<td>911,811</td>
<td>136,772</td>
</tr>
<tr>
<td>Dallas Mavericks</td>
<td>110,343</td>
<td>1.4</td>
<td>772,404</td>
<td>115,861</td>
</tr>
<tr>
<td>Denver Nuggets</td>
<td>47,670</td>
<td>1.4</td>
<td>333,692</td>
<td>50,054</td>
</tr>
<tr>
<td>Detroit Pistons</td>
<td>74,199</td>
<td>4.2</td>
<td>1,558,181</td>
<td>233,727</td>
</tr>
<tr>
<td>Golden State Warriors</td>
<td>67,469</td>
<td>1.4</td>
<td>472,286</td>
<td>70,843</td>
</tr>
<tr>
<td>Houston Rockets</td>
<td>67,019</td>
<td>1.4</td>
<td>469,136</td>
<td>70,370</td>
</tr>
<tr>
<td>Indiana Pacers</td>
<td>80,654</td>
<td>2.8</td>
<td>1,129,150</td>
<td>169,373</td>
</tr>
<tr>
<td>Los Angeles Clippers</td>
<td>46,631</td>
<td>1.4</td>
<td>326,418</td>
<td>48,963</td>
</tr>
<tr>
<td>Los Angeles Lakers</td>
<td>89,802</td>
<td>1.4</td>
<td>628,613</td>
<td>94,292</td>
</tr>
<tr>
<td>Memphis Grizzlies</td>
<td>81,102</td>
<td>1.4</td>
<td>567,714</td>
<td>85,157</td>
</tr>
<tr>
<td>Miami Heat</td>
<td>63,389</td>
<td>2.8</td>
<td>887,443</td>
<td>133,116</td>
</tr>
<tr>
<td>Milwaukee Bucks</td>
<td>72,625</td>
<td>2.8</td>
<td>1,016,753</td>
<td>152,513</td>
</tr>
<tr>
<td>Minnesota Timberwolves</td>
<td>99,109</td>
<td>1.4</td>
<td>693,766</td>
<td>104,065</td>
</tr>
<tr>
<td>New Jersey Nets</td>
<td>93,408</td>
<td>4.2</td>
<td>1,961,572</td>
<td>294,236</td>
</tr>
<tr>
<td>New Orleans Hornets</td>
<td>62,435</td>
<td>2.8</td>
<td>874,088</td>
<td>131,113</td>
</tr>
<tr>
<td>New York Knicks</td>
<td>115,706</td>
<td>2.8</td>
<td>1,619,879</td>
<td>242,982</td>
</tr>
<tr>
<td>Orlando Magic</td>
<td>61,586</td>
<td>2.8</td>
<td>862,203</td>
<td>129,330</td>
</tr>
<tr>
<td>Philadelphia 76ers</td>
<td>73,985</td>
<td>4.2</td>
<td>1,553,695</td>
<td>233,054</td>
</tr>
<tr>
<td>Phoenix Suns</td>
<td>89,974</td>
<td>1.4</td>
<td>629,816</td>
<td>94,472</td>
</tr>
<tr>
<td>Portland Trail Blazers</td>
<td>119,894</td>
<td>1.4</td>
<td>839,261</td>
<td>125,889</td>
</tr>
<tr>
<td>Sacramento Kings</td>
<td>92,007</td>
<td>1.4</td>
<td>644,046</td>
<td>96,607</td>
</tr>
<tr>
<td>San Antonio Spurs</td>
<td>62,003</td>
<td>1.4</td>
<td>434,020</td>
<td>65,103</td>
</tr>
<tr>
<td>Seattle SuperSonics</td>
<td>70,370</td>
<td>1.4</td>
<td>492,588</td>
<td>73,888</td>
</tr>
<tr>
<td>Utah Jazz</td>
<td>40,378</td>
<td>1.4</td>
<td>282,644</td>
<td>42,397</td>
</tr>
<tr>
<td>Washington Wizards</td>
<td>63,323</td>
<td>2.8</td>
<td>886,516</td>
<td>132,977</td>
</tr>
<tr>
<td>Total</td>
<td></td>
<td></td>
<td>3,692,088</td>
<td></td>
</tr>
</tbody>
</table>

Total revenue (assumption: 85% US residents) : 3,138,274

Total Ontario-source income : 24,613,917
Number of US Players : 420
Average Ontario-source income per player : 58,605

---


b Calculated as games played with the Toronto Raptors multiplied by 1.4. Games played include pre-season and regular-season games. Schedule from http://www.cbs.sportsline.com/nba/teams/schedule/TOR/.

c Calculated by multiplying the payroll of each US NBA team by the ratio of Ontario duty days to estimated total duty days in the pre-season and regular season (200).

d Although the revenue effects are calculated at the team level for simplicity, the tax would actually be levied on each individual player.

e Calculated using 28 US teams and a 15-man roster per team.
### TABLE 6  Baseball: Estimated Ontario Revenue from the Proposed Tax on Visiting US-Resident Athletes on US Teams
(Amounts in Canadian Dollars)

<table>
<thead>
<tr>
<th>US MLB team</th>
<th>Team payroll(^a) ($ thousands)</th>
<th>Ontario duty days(^b) of US players</th>
<th>Ontario-source income of US players(^c) ($)</th>
<th>Tax paid in Ontario by US players(^d) ($)</th>
</tr>
</thead>
<tbody>
<tr>
<td>Anaheim Angels</td>
<td>116,654</td>
<td>3.3</td>
<td>1,710,925</td>
<td>256,639</td>
</tr>
<tr>
<td>Baltimore Orioles</td>
<td>105,816</td>
<td>11.0</td>
<td>5,173,240</td>
<td>775,986</td>
</tr>
<tr>
<td>Boston Red Sox</td>
<td>146,980</td>
<td>11.0</td>
<td>7,185,706</td>
<td>1,077,856</td>
</tr>
<tr>
<td>Chicago Cubs(^e)</td>
<td>121,337</td>
<td>3.3</td>
<td>1,779,614</td>
<td>266,942</td>
</tr>
<tr>
<td>Chicago White Sox</td>
<td>99,977</td>
<td>6.6</td>
<td>2,932,672</td>
<td>439,901</td>
</tr>
<tr>
<td>Cincinnati Reds(^e)</td>
<td>133,259</td>
<td>2.2</td>
<td>1,302,978</td>
<td>195,447</td>
</tr>
<tr>
<td>Cleveland Indians</td>
<td>81,440</td>
<td>3.3</td>
<td>1,194,446</td>
<td>179,167</td>
</tr>
<tr>
<td>Detroit Tigers</td>
<td>82,698</td>
<td>4.4</td>
<td>1,617,210</td>
<td>242,581</td>
</tr>
<tr>
<td>Houston Astros(^e)</td>
<td>112,046</td>
<td>1.1</td>
<td>547,779</td>
<td>82,167</td>
</tr>
<tr>
<td>Kansas City Royals</td>
<td>67,938</td>
<td>3.3</td>
<td>996,426</td>
<td>149,464</td>
</tr>
<tr>
<td>Minnesota Twins</td>
<td>91,545</td>
<td>4.4</td>
<td>1,790,204</td>
<td>268,531</td>
</tr>
<tr>
<td>New York Yankees</td>
<td>252,722</td>
<td>13.2</td>
<td>14,826,348</td>
<td>2,223,952</td>
</tr>
<tr>
<td>Oakland As</td>
<td>79,320</td>
<td>4.4</td>
<td>1,551,152</td>
<td>232,673</td>
</tr>
<tr>
<td>Philadelphia Phillies(^e)</td>
<td>133,617</td>
<td>2.2</td>
<td>1,306,479</td>
<td>195,972</td>
</tr>
<tr>
<td>Pittsburgh Pirates(^e)</td>
<td>87,334</td>
<td>5.5</td>
<td>2,134,833</td>
<td>320,225</td>
</tr>
<tr>
<td>Seattle Mariners</td>
<td>129,314</td>
<td>3.3</td>
<td>1,896,601</td>
<td>284,490</td>
</tr>
<tr>
<td>St. Louis Cardinals</td>
<td>142,709</td>
<td>0.0</td>
<td>nil</td>
<td>nil</td>
</tr>
<tr>
<td>Tampa Bay Devil Rays</td>
<td>44,372</td>
<td>14.3</td>
<td>2,820,108</td>
<td>423,016</td>
</tr>
<tr>
<td>Texas Rangers</td>
<td>148,948</td>
<td>6.6</td>
<td>4,369,154</td>
<td>655,373</td>
</tr>
<tr>
<td><strong>Total</strong></td>
<td><strong>103.4</strong></td>
<td></td>
<td><strong>8,270,382</strong></td>
<td><strong>6,616,305</strong></td>
</tr>
</tbody>
</table>

Total revenue (assumption: 80% US residents) ........................................... 6,616,305

<table>
<thead>
<tr>
<th></th>
<th><strong>Total Ontario-source income</strong> .................. 55,135,877</th>
</tr>
</thead>
<tbody>
<tr>
<td>Number of US players(^f)</td>
<td>1,222</td>
</tr>
<tr>
<td>Average Ontario source income/player</td>
<td>45,119</td>
</tr>
</tbody>
</table>


\(^c\) Calculated by multiplying the payroll of each US MLB team by the ratio of Ontario duty days to estimated total duty days in the pre-season and regular season (225).

\(^d\) Although the revenue effects are calculated at the team level for simplicity, the tax would actually be levied on each individual player.

\(^e\) Interleague game played in 2002. This team may not play the Toronto Blue Jays in future years.

TABLE 7  All Leagues: Estimated Revenue Effects on Provincial and Federal Governments from the Proposed Tax on US-Resident Athletes on US Teams (Amounts in Canadian Dollars)

<table>
<thead>
<tr>
<th>Province</th>
<th>NHL</th>
<th>MLB</th>
<th>NBA</th>
<th>Total—Ontario teams</th>
<th>Federal revenue loss (foreign tax credits)</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Base case scenario(^a)</td>
<td>Pessimistic scenario(^b)</td>
<td>Current(^c)</td>
<td>Increase from introducing the tax(^d)</td>
<td></td>
</tr>
<tr>
<td>Ontario</td>
<td>3,466,696</td>
<td>1,824,577</td>
<td>70,857</td>
<td>404,430</td>
<td></td>
</tr>
<tr>
<td>MLB</td>
<td>6,616,305</td>
<td>6,616,305</td>
<td>nil</td>
<td>nil</td>
<td></td>
</tr>
<tr>
<td>NBA</td>
<td>3,138,274</td>
<td>3,138,274</td>
<td>nil</td>
<td>nil</td>
<td></td>
</tr>
<tr>
<td>Total—Ontario teams</td>
<td>13,221,276</td>
<td>11,579,157</td>
<td>70,857</td>
<td>404,430</td>
<td></td>
</tr>
<tr>
<td>Alberta</td>
<td>3,340,264</td>
<td>1,758,034</td>
<td>169,116</td>
<td>353,942</td>
<td></td>
</tr>
<tr>
<td>British Columbia</td>
<td>1,850,120</td>
<td>973,748</td>
<td>96,298</td>
<td>178,072</td>
<td></td>
</tr>
<tr>
<td>Quebec</td>
<td>1,874,513</td>
<td>986,586</td>
<td>83,687</td>
<td>228,533</td>
<td></td>
</tr>
<tr>
<td>Total</td>
<td>20,286,173</td>
<td>15,297,524</td>
<td>419,958</td>
<td>1,164,977</td>
<td></td>
</tr>
</tbody>
</table>

Revenue distribution by province
- Ontario: 65%
- Alberta: 16%
- British Columbia: 9%
- Quebec: 9%

Revenue distribution by league
- NHL: 52%
- MLB: 33%
- NBA: 15%

\(^a\) Base case scenario assumptions for provincial revenues:
- 95 percent of NHL players on US teams are assumed to be US residents.
- 80 percent of NBA players on US teams are assumed to be US residents.
- 85 percent of MLB players on US teams are assumed to be US residents.

\(^b\) Same assumptions as in base case scenario, except that only 50 percent of NHL players on US teams are US residents.

\(^c\) Assumptions for federal revenue loss:
- The only states that tax Canadian-resident athletes on Canadian teams are California, Indiana, and New Jersey.
- 50 percent of NHL players on Canadian teams are assumed to be Canadian residents.
- 100 percent of NBA players on the Canadian team (the Toronto Raptors) are non-residents of Canada.
- 100 percent of MLB players on the Canadian team (the Toronto Blue Jays) are non-residents of Canada. (The Montreal Expos are assumed to be leaving Canada.)

\(^d\) Same assumptions as in base case scenario, but all states with jock taxes begin to tax Canadian-resident athletes on Canadian teams.
For an example of the Ontario revenue calculations, consider the first row in table 4A, which is for the Anaheim Mighty Ducks hockey team. Their 2002-3 payroll was Cdn.$54.7 million. They played 2 games in Ontario that season, which gives them 2.6 (2 \times the duty-day multiplier of 1.3) duty days in Ontario out of the total of 215.\textsuperscript{131} Thus, Ontario-source income is ($54.7 million \times 2.6)/215, or $660,987. Tax revenue is 15 percent of that, or $99,148. A similar calculation for all US-based NHL teams playing in Canada in that season produces estimated total tax revenue to Ontario of roughly $3.5 million. The calculations for the NBA in table 5 and MLB in table 6 are similar; the only differences in the calculations are the assumptions of duty days per game day and total duty days for the season, as described above. Although tax is based on the calendar year and these figures are for sports seasons that can straddle two calendar years, this should not make a difference other than for the first calendar year the tax applies.

The overall results, as shown in the left-hand column of table 7, are that $20 million in revenue would be raised by the proposed tax in four Canadian provinces. Over $13 million (65 percent of the total) is from Ontario; $2 million (9 percent of the total), from each of Quebec and British Columbia; and $3 million (16 percent of the total), from Alberta.

Revenues from the existing Alberta NHL players tax are not included in the above figures since it is assumed that this tax is a replacement. Alberta would lose 40 percent of the revenue by moving to a non-resident tax, even though the rate would rise from 12.5 percent to 15 percent. The reason for the decline is mainly that Canadian-resident hockey players are no longer being taxed.

The distribution of the revenue by sport is 52 percent for hockey, 33 percent for baseball, and 15 percent for basketball. However, these fractions come from the visiting US athletes playing just one baseball team and one basketball team, as opposed to six hockey teams. Baseball and basketball are bigger on a per-team basis because the baseball and basketball teams generally have higher payrolls than hockey teams and the proportions of games in Canada that involve a US team are higher for baseball and basketball (100 percent for the Raptors and 98 percent for the Blue Jays versus 67 percent for the Leafs). This is why Ontario’s revenues are so high: it has the only Canadian baseball (excluding the Expos) and basketball teams.

The results are quite sensitive to the values of three parameters. First, since all salary contracts in the three leagues are expressed in US dollars, the revenues from the tax will go up and down with the exchange rate; if revenues had been calculated using 2003’s closing exchange rate rather than the average exchange rate for the year, revenues would have been 8 percent higher. Second, the number of duty days for each team in the province and in total are quite significant, and these are not public information. Finally, there is considerable uncertainty about the residence of NHL players, especially those on US teams. The second column of table 7 shows

\textsuperscript{131} Duty days are not actually fractional amounts such as 1.3; therefore, this figure should be interpreted as an average only.
that decreasing the percentage of players on US teams who are US residents from 95 percent to 50 percent reduces the overall revenue estimate by almost 25 percent, from $20 million to $15 million.

**Federal Revenue Loss from Foreign Tax Credits**

Table 4B calculates the amounts of US jock taxes that would be paid by players of Ontario hockey teams in respect of games in the United States if the players were subject to these taxes, and the third and fourth columns of table 7 show the overall totals for all provinces. Although at present only three states tax Canadian-resident athletes on Canadian teams, the calculations assume that all states will apply their jock taxes to these athletes after the proposed provincial tax is implemented. The jock tax calculations are solely for the NHL since, as documented above, the Canadian MLB and NBA teams have no Canadian-resident players.

For an example of the jock tax calculations, consider the second row of the table, which concerns the calculation of jock tax for players on Ontario NHL teams (the Toronto Maple Leafs and Ottawa Senators) in respect of their games in the United States with the Atlanta Thrashers. In 2002-3, the Leafs had 2.6 duty days (2 games) in Atlanta out of their total of 215 duty days and a payroll of $76.1 million. Therefore, the Georgia-source income of Leafs players is \((76.1 \times 2.6)/215\), or $920,279. Similarly, the Ottawa Senators, with a payroll of $43.9 million, also had 2.6 duty days in Georgia; therefore, the income of Senators players subject to Georgia jock tax is \((43.9 \times 2.6)/215\), or $530,884. Adding these two figures produces the Georgia-source income of all Ontario players of $1,450,867.132 Applying the top Georgia marginal tax rate of 6 percent produces a Georgia jock tax liability of $87,052 in Canadian dollars, which is shown on the far right of that row.

These US jock taxes will be claimed on the athletes’ Canadian tax returns as a foreign tax credit, and hence the jock tax amounts represent revenue losses to the federal government. The key result is that the revenue loss to the federal government is $1.2 million, which is 6 percent of the $20 million in increased provincial revenue. Clearly, the issue of losing revenue through foreign tax credits is not a major concern. The reasons for this low revenue loss have been described in detail earlier in the article, but the main ones are the low number of Canadian residents on Canadian teams and the fact that most US jock tax rates are less than half of the proposed 15 percent provincial rate.

Even these low jock tax amounts are probably too high. This upward bias arises from several sources, of which the most important is probably the assumption that the top rate of tax applies on the athlete’s whole income. This will be in error for states that apply a graduated rate structure to in-state taxable income rather than using the California method (as discussed above) of also taking into account worldwide income.

---

132 The total is actually about $300 more than this figure. The error arises because the payroll numbers in the text are rounded to the nearest $100,000 while the actual numbers are used in the calculations.
taxable income. Another source of bias is our implicit assumption of effective enforcement of the tax law. Some authors contend that athletes may choose not to file in some states, notably Massachusetts and Maryland, which take a non-aggressive approach in collecting state income taxes. Still another source of bias is that some states tax an athlete only on income over a certain threshold, or only if the athlete is present in the state for more than a certain number of days.

The jock tax being paid currently in respect of the three states that tax Canadian athletes amounts to only about $400,000 in total. Although the fact that US states are already departing from the treaty and taxing Canadian athletes on Canadian teams could be an argument for the proposed tax, the amounts involved are not significant.

RENEGOTIATE THE TREATY?
The special provision in the Canada-US treaty exempting league athletes from tax as non-residents could be considered somewhat anomalous since no parallel exemption is found in other Canadian treaties, other US treaties, or the OECD model treaty. The Canada-US provision has been justified by the argument that very few other countries have an extensive system of leagues with cross-border games, but no special treatment for league athletes is given in European countries, with their international soccer and rugby leagues, and the Australia-New Zealand treaty appears to be the only treaty in the world with a similar provision.

The Canada-US treaty provision is similar to reciprocal agreements between US states, which allow income to be taxed in the state of residence if it is earned in another state that is party to the agreement. However, such agreements have proved to be acceptable only where the income tax rates are reasonably equal, as is

133 Green, supra note 7, at note 190.
135 For example, Massachusetts only taxes athletes who are present in the state for more than 10 days in the year: Smith et al., supra note 7, at 7. Thus, Blue Jays players would be taxable, but Raptors players and hockey players would not be.
the income earned in each state by residents of the other state.\textsuperscript{139} The analysis above shows that these circumstances are not applicable in the Canada-US context; the treaty provision clearly favours the United States for all of the reasons discussed above for provincial taxation. Thus, consistent with the reasoning about source-based taxation presented above, the Canada-US treaty could be amended to remove the special treatment of league athletes by deleting article XVI(3). Of course, since the treaty is a bilateral agreement, such a change would have to be negotiated, and the United States might seek compensation in other areas.

Private discussions with senior officials involved in the creation of the special treatment of league athletes in the 1980 treaty suggest that the motives were to preserve the status quo (since this had been the treatment of all athletes before the 1980 changes) and to achieve simplicity in the tax system. The topic was not regarded as a money issue at that time, given the level of athlete salaries, and the view was that the revenue effects would be similar for both countries. Consistent with this story, it is estimated that the amount of revenue involved would have been only $4 million in today’s dollars to the Canadian federal government.\textsuperscript{140} The perception that the revenue effects would be similar for the two countries, and not different as shown by the data produced for this article, also seems reasonable because US federal rates are much closer to Canadian federal rates than US state rates are to Canadian provincial rates, and at that time Canada did not have an NBA team.

The effect of changing the treaty now would be to make US-resident athletes on US teams taxable federally and provincially in Canada as non-residents on their Canadian-source income. It would also make Canadian athletes on Canadian teams taxable at the federal level in the United States. State reaction is uncertain, but it seems very likely that US states would follow the federal lead and tax Canadian residents because of the increasing harmonization between US state and federal taxes.

If, by the time this treaty change occurred, our proposal for flat-rate provincial taxes on non-resident athletes had been adopted, it might make sense for compliance cost reasons for the federal government to substitute the present non-resident rules in respect of league athletes for a flat-rate tax at a rate of perhaps 25 percent piggy-backed onto the provincial tax. The revenue raised by this tax would be directly proportional to the provinces’ calculated amount of $20 million above using a 15 percent rate; thus, this tax might produce $20 million \times \frac{25\%}{15\%}, or $33 million.

\textsuperscript{139} Hoerner, supra note 74. For a list of such agreements, see CCH, \textit{2003 State Tax Handbook} (Chicago: CCH, 2002), 284-85.

\textsuperscript{140} In 1978, when the treaty was being negotiated, basketball in Canada did not exist, and table 3 shows that average salaries in the NHL and MLB were only about 10 percent of what they are now. Since table 7 shows that revenue from these two leagues would be about $17 million today, one can conclude that a provincial tax in 1978 would have raised only about $1.7 million in today’s dollars. Multiplying by 2 to allow for a 1978 federal tax rate of perhaps 30 percent instead of the 15 percent rate underlying table 7, Canadian federal revenue would be $3.4 million in today’s dollars.
Foreign tax credits that would be given for US federal taxes on Canadians for games in the United States would have to be subtracted from this figure. A more thorough athlete-by-athlete analysis using the US federal rate structure would be needed to confirm the foreign tax credit amounts.

A problem with the federal version of this tax is that the combined 40 percent federal-provincial rate exceeds US tax rates and therefore would not be fully creditable against US federal income tax for US-resident players (although state credits would be available in some cases). Hence, unlike the proposed provincial tax, the federal tax would be an additional burden on athletes. As a result, many criticisms of the US jock taxes would apply to the Canadian federal tax:

- it could affect athletes’ decisions about where in the United States to live, because some states offer tax credits for taxes paid to Canadian provinces while others do not, or do not have an income tax against which to take a credit;
- the discriminatory treatment of athletes versus other employees providing personal services would be a real economic burden; and
- Canada might be perceived as a less attractive place to locate a sports team by the US teams in the league, whose US-resident players would have to pay the new tax.

On the other hand, the fact that the tax burden on these athletes would have increased without changing the tax burden of athletes on Canadian teams (regardless of residence) would narrow the tax differential for an athlete between playing on a US team and playing on a Canadian team; consequently, Americans might be less reluctant to come to Canada to play for Canadian teams.\(^{141}\) In addition, it would reduce the incentive of all US-resident athletes, whether they are playing for a Canadian or a US team, to move to a state with no personal income tax, such as Florida or Texas.

**GOVERNMENT SPORTS SUBSIDIES**

As noted in the introduction, the decision as to whether to give the proceeds of the tax to the teams or otherwise increase sports subsidies is a separate decision from the levying of the tax. However, since the Alberta tax that inspired this article is based on raising funds to finance sports subsidies, the general topic of sports subsidies is addressed briefly below.

**Why Subsidies?**

The Alberta NHL players tax is the one attempt by Canadian governments to provide financial assistance to professional sports franchises that seems to be acceptable to

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\(^{141}\) For documentation on this current problem, see Koresky, supra note 7, at 101. However, Beam et al., supra note 24, contend that with proper planning the level of Canadian taxes may not be higher than US taxes in some circumstances.
the public. Contrast this with the negative reaction in January 2000 to the proposal put forward by John Manley (then the industry minister) to offer financial aid to Canadian NHL teams to the extent of an estimated $20 million over four years.\textsuperscript{142} The public outcry caused the government to retract the financial aid offer three days after its announcement. A similar hostile reaction greeted Ontario’s decision to grant Ontario sports teams a $10 million exemption from the employer health tax on the grounds that many of their games were played outside the province.\textsuperscript{143}

A poll commissioned by the federal Department of Finance in 1999 indicated that 50 percent of Canadians were strongly opposed to helping NHL teams.\textsuperscript{144} In a more recent survey, 55 percent of respondents indicated that the government should probably or definitely move partway toward reducing some of the tax disadvantage of Canadian teams competing with US teams.\textsuperscript{145} From the latter survey, there appear to be two major factors that discourage taxpayers from supporting the subsidization of NHL teams. Forty-five percent of respondents thought that sports economics in general were out of hand (that is, ticket prices are too high), and 28 percent of respondents thought that there were more important issues/causes to which government assistance should be directed.\textsuperscript{146}

One issue not addressed in the survey is that it is always possible for the NHL to take action itself to help the position of financially weaker teams. Revenue sharing among teams is much more pronounced in leagues such as the NFL, where even a smaller city such as Green Bay, Wisconsin can have its own team. Unless and until the league solves the problem itself, there are two possible justifications that the government could put forward for the subsidization of Canadian hockey clubs: either they provide economic benefits to the community, or they provide intangible benefits from increased civic pride among community members.

Consider the issue of economic benefits to the community. In promoting the subsidization of sports teams and facilities, many governments and supporters point to specific cases where the building of a stadium has proved to revitalize the economic well-being of a region.\textsuperscript{147} However, there have been numerous academic

\begin{thebibliography}{9}
\bibitem{143} Callan, supra note 21. The decision was quickly rescinded.
\bibitem{144} Cayrn Hirshhorn, “Manley Loses Face-Off, Reneges on Aid Package,” Centretown News, January 28, 2002 (available online at http://www.carleton.ca/ctown/).
\bibitem{146} Ibid. For a different reaction to the subsidization of NHL teams, see Mark Milke, \textit{Tax Me: I’m Canadian} (Calgary: Thomas & Black, 2003), 139-53.
\end{thebibliography}
studies that indicate the opposite is generally true: the additional labour and capital income that a community obtains from a sports-related facility is inadequate to justify public subsidy.\textsuperscript{148} Findings include the following:

- Little import substitution occurs as a result of the presence of a professional sports team; most of the revenues generated are merely a transfer of discretionary recreational money within a region.\textsuperscript{149}
- Of 32 cities where there was a change in the number of sports teams, 30 showed no significant relationship between the presence of the teams and real, trend-adjusted, per capita personal income growth.\textsuperscript{150}
- The presence of a professional sports team diverts economic development toward labour-intensive, relatively unskilled, low-wage jobs such as ticket and concession clerks,\textsuperscript{151} slowing long-term economic growth.

While professional sports do create jobs (it is claimed that 19,071 jobs resulted from the presence of professional sports clubs in Canada in 1994-95),\textsuperscript{152} historically government subsidization of sports teams and facilities has been an extremely expensive form of job creation. For example, a government subsidy to the Arizona Diamondbacks to help finance the building of a new stadium created 340 full-time positions—at a cost of $705,800 per job.\textsuperscript{153} A recent analysis of the Cincinnati area’s investment of $300 million in sports facilities suggests that the $6 million in new spending generated by the new facilities would create only 400 new jobs, for a cost of $750,000 per job.\textsuperscript{154}

The presence of a professional sports team might positively affect tourism in a region by increasing the general awareness of Canada or by causing people to travel to Canada specifically to attend a sporting event; for example, in 1997, 728,000 overnight person trips from the United States to Canada included attending


\textsuperscript{150} Ibid., at 15.


a sports event.\textsuperscript{155} This contributes to the economy through tourist spending on accommodation, food, and related goods.

Now let us turn to the intangible benefits of a sports team. Sports teams and the facilities they use could be important components of the effort to establish a regional identity.\textsuperscript{156} Other benefits include the satisfaction and pride people get from living in a “big league” town, having a common topic of conversation, reading about the team’s successes and failures in the newspaper, etc.\textsuperscript{157} Major league teams could foster civic pride and community identity, and proponents argue that sports is one of the few remaining aspects of society that transcends all strata of the community.\textsuperscript{158} These “social spillover benefits” were quantified in a study of the impact of the presence of various professional sports in the Indianapolis area.\textsuperscript{159} The results indicate that all Indianapolis residents do enjoy substantial social spillover benefits from the presence of the Pacers, the Colts, and the Indianapolis 500. However, more interesting are the study’s findings on who most benefits: there was a distinct positive correlation between attendance at an event and the civic pride felt by the respondent. The results of the study also indicate that there are characteristics of a public good in professional sports teams, albeit small, since one person’s consumption of the civic pride generated by the team does not prevent another person from enjoying it.

In Canada, civic pride is especially likely to be significant for hockey, given the recent and past Olympic and world championship successes of Canadian teams. National pride was the main reason given for supporting NHL teams in Canada in the recent survey discussed above.\textsuperscript{160} Sixty percent of respondents who supported government NHL assistance did so because of Canadian pride/heritage motivations or because hockey is the national sport. In the same survey, only 6 percent of non-supporters thought that the government should not support hockey because hockey is not important.

John Palmer has devised an empirical test of this hypothesis at the local community level.\textsuperscript{161} If intangible benefits are important, he argues, they should be

\begin{itemize}
\item \textsuperscript{155} Standing Committee, supra note 152, part III, section 3, at C.
\item \textsuperscript{158} Rick Dodge, St. Petersburg city official, quoted in David Whitford, \textit{Playing Hardball} (New York: Doubleday, 1993), 175.
\item \textsuperscript{160} Supra note 145.
\end{itemize}
reflected in real estate values. This is not reflected in the data for Green Bay, Wisconsin, which, as noted above, is home to an NFL franchise. However, Green Bay hosts only eight or nine football games in the year; the three leagues in this study have many more home games than that.

**Alternative Subsidy Forms**

For concreteness, suppose that the Ontario government wished to use all or part of its proceeds from the proposed non-resident tax to aid the Ottawa Senators, which has historically been one of the more financially troubled Canadian teams. Obviously, one method is to simply give the team the cash, as Alberta is doing. However, in case that is perceived to be too direct, an improper use of public funds, or a possible NAFTA violation, there are other less obvious methods of achieving the same purpose, particularly if the tax is announced separately and at a different time. Three possible forms of subsidy are a reduction of the infrastructure surcharge tax on ticket sales, exemption from the amusement tax, and the allocation of lottery funds to the team (with the use of the proceeds from the tax subsequently replacing the use of the lottery funds). Of course, these measures may be justified on their own merits, and the proposed tax could just be a way of funding them.

**Reduction of Ticket Surcharge**

While other smaller Canadian NHL markets like Edmonton and Calgary have property taxes of approximately $175,000 and $292,000, respectively, the Ottawa NHL franchise pays approximately $700,000 in property taxes annually. In addition, as part of the building of the Corel Centre, a new highway interchange and additional infrastructure services were required. The $21 million in funding for the interchange and services was made available via public provincial dollars. The Senators are required to reimburse the provincial government for this funding together with interest. This repayment to the provincial government is financed predominantly through an infrastructure surcharge tax (IST). This IST equates to $2.34 per ticket sold and represents an annual cost of approximately $1.9 million to the fan base.

The Senators have complained that they are the only Canadian NHL franchise for which public funds provided for capital expenditures have resulted in an IST, or “fan tax.” This tax on tickets further works to diminish ticket sales for the Senators. Perhaps the new interchange and infrastructure upgrades should be viewed as a public good, which should not be entirely financed with private funds. Presumably, local businesses and residents also benefit from the improved access off the highway and should bear some of the cost of these upgrades.

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163 Ibid.
Amusement Tax Exemption

For non-exempt sporting events such as Ottawa Senators hockey games, the Ontario retail sales tax provides for an additional 2 percent tax on the standard 8 percent charged on most products and services purchased in Ontario. This combined tax of 10 percent is often referred to as an “amusement tax.” This amusement tax raises the price of admission and creates a competitive disadvantage for the Ontario NHL teams. The Senators are not exempt from the additional 2 percent because they do not qualify for the exemption for Canadian theatrical and musical performances. An attempt to avoid this tax by setting up the Senators as a charity ended quickly after public opposition surfaced. Opponents of the tax believe that hockey games are Canadian entertainment that should be exempt. This position is particularly strong when one takes into consideration the number of games played between two Canadian teams in Ontario—15 in the 2002-3 season. Given an average attendance of 16,000 per game played in Ontario and an average ticket price of $55, $1.32 million of amusement tax is collected on these all-Canadian games.

The Ontario government recently held a temporary exemption from the 10 percent retail sales tax on amusement admissions for the period April 30-October 1, 2003 as part of a tourism-sector relief package. While this exemption will have no impact on the Senators since this period does not fall within their season, it may indicate a willingness on the part of the province to abandon this tax in order to provide incentives for people to attend amusement events such as Ottawa Senators hockey games.

Provision of Lottery Funds

Along with the players tax, Alberta has introduced a “Breakaway to Win” lottery to financially assist its NHL teams. Similarly, Ontario could introduce a lottery to assist the Ottawa Senators. The idea of a lottery may be more acceptable than the imposition of a tax; since it is voluntary, those who wish to support their local team can do so without placing any additional burden on others. In support of the Alberta NHL lottery, Oilers president Patrick Laforge pointed to the fact that provincial lotteries have long been profiting from the presence of NHL teams through the Sport Select and Proline games, without the NHL teams seeing any portion of the gambling profits. The NHL included this recommendation in its 1999 assistance proposal to

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165 NHL average attendance is from “NHL Skating on Thin Financial Ice,” Halifax Herald, January 11, 2003.
166 See “Ottawa Senators Sell over 1,000 Tickets Friday for Game Tuesday Night,” January 10, 2003 (Yahoo Sports: http://ca.sports.yahoo.com/030110/6/rak9.html).
the Canadian government, saying that the teams deserve a share of the $170 million annual pot because the games are the intellectual property of the NHL and its teams.\footnote{169} In addition, while NHL Commissioner Gary Bettman was not in favour of sports gambling of any kind, he was disconcerted by the fact that “the results of our game, which we spend $2 billion, Canadian, a year to put on are misappropriated by the lotteries so that they can make hundreds of millions of dollars.”\footnote{170}

While the proceeds from the Alberta Breakaway to Win lottery that are to be shared between the Oilers and the Flames have ranged from only $500,000 to $2 million annually, the teams hope that this number will increase in the future as the lottery gains more popularity. A similar scheme in Ontario would be a start to cutting into the annual losses incurred by the Senators.

**CONCLUSION**

The Alberta NHL players tax has features that render it flawed in the eyes of many tax policy analysts. It operates as a special tax surcharge on Canadian-resident hockey players, in that a Canadian player suffers an increased tax burden while an American is usually able to recover the Alberta tax paid as a foreign tax credit on his US federal tax return. Also, it breaks with over 40 years of tradition and taxes a class of Canadians living in other provinces on their employment income earned in Alberta. This precedent may raise concerns among the large number of Canadians who are not athletes but who live in one province and work in another, particularly in the national capital region.

One way to reform the Alberta tax is to convert it into a tax on non-residents. There are good arguments to support consideration of broader source-based taxation of athletes:

- source jurisdictions have a legitimate claim to at least some of the income of non-resident athletes as a charge for government services provided;
- escalating player salaries have raised the potential revenues of such a tax and have generated equity concerns that workers who earn more than 99.99 percent of Canadians escape Canadian tax liability; and
- the expiry of the Alberta tax at the end of 2005 makes this an opportune time to consider tax redesign.\footnote{171}

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\footnote{170} Commissioner Bettman conference call transcript (available online at http://www.spaceports.com/~jve/hockey/bettman.html).

\footnote{171} Lavitt, supra note 8, suggests that the Alberta tax is a stopgap measure to help the Alberta teams survive until the NHL and the NHLPA work out a new collective bargaining agreement in 2004.
On the other hand, there are good arguments against source-based taxation. Departures from the Canada-US treaty may be considered undesirable to the extent that the treaty is viewed as a model that all governments should uphold; and moving from residence-based taxation to source-based taxation might raise compliance costs to an unacceptable degree if the tax is ill designed or if many US states adopt a similar policy and tax visiting Canadian-resident athletes.

One argument often used against source-based taxation of athletes is that this would be discrimination in that the tax would not be imposed on other non-residents, such as airline pilots, travelling executives, and non-athletes accompanying visiting sports teams. However, owing to the operation of the US federal tax and its foreign tax credit system, source-based taxation by provinces does not cause athletes to suffer an increased tax burden. Thus, this is discrimination in appearance only.

The article develops a simple design for a 15 percent flat-rate provincial tax on non-resident athletes who are not currently taxed because of the Canada-US treaty, which could be administered uniformly by all provinces. The proposed tax would collect $20 million in revenue for the provinces and would cost the federal government, at most, only about 6 percent of this amount in foreign tax credits. A similar federal tax could be imposed if the two governments agreed to change the Canada-US treaty to permit it.