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A Dirty Game: Trusting the National Hockey League to Play Judge, Jury, and Executioner

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I. Introduction

Hockey, by its very nature, is a violent game. Forty men take the ice, pushing themselves into each other and the panes of glass surrounding the rink in order to get a disk of vulcanized rubber into the opponent’s net. Players move at speeds rivaling several speed limits on city streets. Those players – like in every sports league – are bigger, faster, and stronger than they were in years past.

There are currently 891 players in the National Hockey League¹, playing for thirty different clubs, split into two conferences. Those conferences are split into three divisions each. Each club strives to be the best in their division, the best in their conference, and, ultimately, the best in the entirety of the National Hockey League.

For eighty-two games a season, these young men put their bodies and health on the line as they strive for Lord Stanley’s Cup. Unfortunately, during this relentless pursuit of the Cup, players are injured. The injuries are sometimes caused by the player himself, by his teammates, or by his opponents. Sometimes players are out for one game, or five, or half a season, or indefinitely.

In hockey, there exists a set of rules – some written, some unwritten – but all are acknowledged by the players. Enforcement of those rules falls to the game referees. Discipline for rule violations comes from those referees with supplementary punishment coming from the disciplinarians in the National Hockey League front office.

In examining the National Hockey League Commissioner’s office as lawmaker and how that affects a player’s right to legal action, we must begin first by examining how the rules are established, enforced, and disciplined. Outside enforcement of those rules on professional players has come exclusively from Canadian courts with the most notable cases involving players Todd Bertuzzi and Marty McSorley.

There are many current issues addressed later that are causing the League to examine the wording of the current rules, the addition of stronger rules, and the elevation in the severity of discipline for breaking those rules. Finally, there is the criticism surrounding the perceived inconsistent enforcement of the rules. The criticism comes from fans, players, coaches, general managers, team owners, and, even criminal courts.

II. The Rules

Each hockey player in the National Hockey League is expected to abide by the Official Rules as set out in the Official Rulebook² for that hockey season. If players fail to play by those rules they

¹ As of April 11, 2011, there is statistical information available for 891 individual players on the National Hockey League official website.
² The entirety of the National Hockey League Official Rulebook for 2010-2011 can be found at the National Hockey League official website.
are subject to punishment through various forms including varying degrees of penalties, suspensions, and fines.\textsuperscript{3}

The Official Rulebook is not the only rulebook by which hockey players abide. As seen in the Canadian criminal prosecution of former player Marty McSorley, there is an unwritten code as well: “There is also an unwritten code of conduct, agreed to by the players and officials, that is superimposed on the written rules. This code of conduct deals mainly with situations where the written rules are breached, and the code then comes into play.”\textsuperscript{4} This unwritten code can be referred to as “custom” in hockey. If a fight breaks out during a game between two opponents, the referees let the players finish the fight before assessing the penalties. This helps prevent other players and referees from getting injured while trying to break up the fight.

The McSorley court emphasizes that the written rules, the co-existing unwritten code of conduct, and the guidelines laid down by officials game to game establish the framework within which the players must play the game.\textsuperscript{5} It is important to understand this framework before understanding how a change in those rules would not only affect the game but the consequences stemming from any conduct violating those rules.

A. Establishment

First, the establishment of the written rulebook must be understood. According to the 2005 Collective Bargaining Agreement between the National Hockey League (“NHL” or “League”) and the National Hockey League Players’ Association (“NHLPA”), a Competition Committee would be established in order to examine and make recommendations affecting the game and the way it is played.\textsuperscript{6} These recommendations included the establishment, amendment, and enforcement of the playing rules.\textsuperscript{7}

Following the Competition Committee’s decision and approval, the proposed change would pass to the NHL Board of Governors to be voted upon.\textsuperscript{8} If the Board of Governors approved of the change, the change would take affect at the time agreed to by all parties.

In this letter from Deputy Commissioner of the League, William L. Daly to Ian C. Pulver, associate counsel for the players’ union, the discussion revolves around amending one of the rules in the Official Rulebook:

> With regard to Rule 76, this will confirm that the League will consult with the NHL Officials’ Association with regard to revised language in the form attached hereto, which shall generally provide for a right to seek Commissioner review of all suspensions automatically imposed pursuant to Playing Rule 76. Following such consultation, and to the extent agreed to by the NHL Officials’ Association,

\textsuperscript{3} National Hockey League Collective Bargaining Agreement, Article 30 (2005).
\textsuperscript{6} National Hockey League Collective Bargaining Agreement, Article 22 (2005).
\textsuperscript{7} National Hockey League Collective Bargaining Agreement, Article 22.1 (2005).
\textsuperscript{8} Id.
the League will propose the extended Rule 76 for approval by the NHL Board of Governors.\footnote{Letter between William L. Daly (deputy commissioner of NHL) and Ian C. Pulver (Associate Counsel for the NHLPA) located at the end of the 2005 Collective Bargaining Agreement at page 432.}

The Competition Committee\footnote{The 2010 Competition Committee consisted of NHL players Mathieu Schneider (Phoenix Coyotes), David Backes (St. Louis Blues), Mike Commodore (Columbus Blue Jackets), Chris Clark (Columbus Blue Jackets) and Ryan Miller (Buffalo Sabres). The club officials included GMs Jim Rutherford (Carolina Hurricanes), Ken Holland (Detroit Red Wings), Brian Burke (Toronto Maple Leafs – as a one time member of the committee), David Poile (Nashville Predators), and Philadelphia Flyers owner Ed Snider. This is the committee that voted on and approved the addition of Rule 48 – Illegal Check to the Head.} is comprised of five active players as designated by the NHL\footnote{National Hockey League Collective Bargaining Agreement, Article 22.2 (2005).} and five club officials as designated by the NHL.\footnote{Id.} One additional official each from the NHL and the NHLPA are allowed to join the committee for discussions but do not have voting rights.\footnote{Id.} After a two-thirds majority vote on a matter, the recommendation is then sent to the Board of Governors and elected only after approval from the Board of Governors in accordance with the NHL Constitution\footnote{National Hockey League Collective Bargaining Agreement, Article 30.2 (2005).} and By-Laws.\footnote{Id.}

Article 30 of the Collective Bargaining Agreement (“CBA”) sets out the standard by which the players must adhere to the playing rules. Each hockey club is sent a copy of the League’s playing rules for that season.\footnote{National Hockey League Collective Bargaining Agreement, Article 22.6 (2005).} Every amendment to the playing rules that is proposed to for consideration by the Competition Committee or for approval by the Board of Governors is given to the NHLPA at the same time it is given to each club.\footnote{Id.}

In accordance with the CBA, any violation assessed to a player for the violation of the League rules is paid directly to the National Hockey League Players’ Emergency Assistance Fund.

1. Rule 48 – Illegal Check to the Head

The newest rule in the Official Rulebook that can be penalized is Rule 48 – Illegal Check to the Head.\footnote{National Hockey League Official Rules, § 6, Rul. 48 (2010).} The language of the rule as found in the Rulebook is as follows: “Rule 48.1 Illegal Check to the Head – A lateral or blind side hit to an opponent where the head is targeted and/or the principle point of contact is not permitted.”\footnote{National Hockey League Official Rules, § 6, Rul. 48.1 (2010).}

When establishing the rule, the Competition Committee\footnote{The committee approved the rule on June 18, 2010.} elected to bypass a minor penalty\footnote{Minor Penalty – For a minor penalty, any player, other than a goalkeeper, shall be ruled off the ice for two (2) minutes during which time no substitute shall be permitted. National Hockey League Official Rules, § 4, Rul. 6.1 (2010).} that would be assessed on an infraction of this rule for the longer and more severe major
penalty coupled with an automatic game misconduct penalty. The addition of a match penalty would be available at the referees’ discretion if the offender deliberately attempted or deliberately injured the victim of the hit.

B. Enforcement

1. Referees

Two referees and two linesmen comprise the team of four officials that regulate a game of hockey on any given night. The referees are delegated the duty of calling and enforcing penalties as rules are broken over the course of the game. The referee has the final decision in case of disputes during the game.

In calling penalties, referees immediately blow their whistle upon seeing the infraction and penalize the offending player. If an ejection is implemented, that person ejected must immediately vacate the players’ bench area and may not further participate in the game.

Ejections are assessed on game misconduct penalties, match penalties and any penalty that carries with it an automatic suspension. Receiving an ejection from the game can range from intent to injure another player to an equipment violation such as not having a jersey tied down properly.

With every call comes the opportunity for controversy about the interpretation of the rules. The Rulebook has set out specific rules in accordance with challenging the rulings of the officials as well as deterring abuse of officials. Rule 39.1 is the general description for the abuse of officials rule and states:

A player, goalkeeper, Coach or non-playing person shall not challenge or dispute the rulings of an official before, during or after a game. A player, goalkeeper, Coach or non-playing person shall display unsportsmanlike conduct including, but

\[21\] Major Penalty – For the first major penalty in any one game, the offender, except the goalkeeper, shall be ruled off the ice for five (5) minutes during which time no substitute shall be permitted. National Hockey League Official Rules, § 4, Rul. 20.1 (2010).

\[22\] Game Misconduct Penalty – A game misconduct penalty involves the suspension of a player for the balance of the game but a substitute is permitted to replace immediately the player so removed. National Hockey League Official Rules, § 4, Rul. 23.1 (2010).


\[24\] Rule 21.1 Match Penalty – A match penalty involves the suspension for the balance of the game and the offender shall be ordered to the dressing room immediately. A match penalty shall be imposed on any player who deliberately attempts to injure or who deliberately injures an opponent in any manner. National Hockey League Official Rules, § 4, Rul. 21.1 (2010).


\[27\] General Duties – It shall be the duty of the Referee to impose such penalties as are prescribed by the rules for infractions thereof and they shall give the final decision in matters of disputed goals. National Hockey League Official Rules, § 5, Rul. 31.4 (2010).

\[28\] Disputes – The Referees shall have general supervision of the game and shall have full control of all game officials and players during the game, including stoppages; and in case of any dispute, their decision shall be final. National Hockey League Official Rules, § 5, Rul. 31.2 (2010).


\[30\] Id.
not limited to, obscene, profane or abusive language or gestures, comments of a personal nature intended to degrade an official, or persist in disputing a ruling after being told to stop or after being penalized for such behavior.\textsuperscript{31}

Generally, only the captain\textsuperscript{32} and alternate captains\textsuperscript{33} for each team may discuss with the referee the interpretation of the rules during a game.\textsuperscript{34} Only after invited to do so may the captain discuss the interpretation but not complain about a penalty. Complaining about a penalty will result in a minor penalty for the complainer.\textsuperscript{35} If the captain is not on the ice, the alternate captain is afforded the privileges of the captain.\textsuperscript{36}

C. Discipline

The Official Rulebook allows for supplemental discipline to be handed out to players in addition to the on-ice discipline\textsuperscript{37} they may have received.\textsuperscript{38} The rule gives the Commissioner discretion to investigate any incident that happens throughout the entirety of the hockey season, including pre-season, exhibition, and playoff games. At his discretion, the Commissioner may assess additional fines and/or suspensions. The investigation must be initiated within twenty-four hours of the completion of the game in which the incident occurred.\textsuperscript{39}

The CBA recognizes the existence of outside enforcement and discipline to on-ice incidents with Article 18.6:

\textbf{Criminal Investigation.} A Player subject to League disciplinary proceedings may seek a reasonable delay in such proceedings in order to retain and seek the advice of counsel in the event his conduct is also subject to a criminal investigation by any governmental authority, or in the event of an ongoing civil proceeding where the Player has been named as a defendant.\textsuperscript{40}

This acknowledgement of potential criminal and civil liability shows that the League is aware of the legal ramifications the players potentially face for their actions on the ice when they allow the player to seek counsel if his conduct is also subject to criminal investigation along with League investigation.

1. Colin Campbell – NHL “Disciplinary Czar”

\textsuperscript{31} National Hockey League Official Rules, § 5, Rul. 39.1 (2010).
\textsuperscript{32} National Hockey League Official Rules, § 2, Rul. 6.1 (2010).
\textsuperscript{33} National Hockey League Official Rules, § 2, Rul. 6.2 (2010).
\textsuperscript{34} National Hockey League Official Rules, § 2, Rul. 6.1, 6.2 (2010).
\textsuperscript{35} National Hockey League Official Rules, § 2, Rul. 6.1 (2010).
\textsuperscript{36} National Hockey League Official Rules, § 2, Rul. 6.2 (2010).
\textsuperscript{37} On-Ice Discipline shall mean any discipline imposed for Player conduct either on the ice or in the penalty areas vis-à-vis other participants in the game (i.e., other Players, coaches, or officials).
\textsuperscript{38} National Hockey League Collective Bargaining Agreement, Article 18.1 (2005).
\textsuperscript{39} Id.
\textsuperscript{40} National Hockey League Collective Bargaining Agreement, Article 18.6 (2005).
Colin Campbell is a Senior Executive Vice President and the Director of Hockey Operations for the National Hockey League. Part of the duty of his job is to review games and hand out suspensions for offending players. Campbell plays judge, jury, and executioner for the players of twenty-nine of the thirty teams in the NHL. The only team Campbell does not discipline is the Boston Bruins, the team for which his son, Gregory, plays.

Campbell, a former player and coach, has not been the League’s disciplinarian without controversy. Along with allegations of favoritism, he has also criticized players for “faking” their injuries that have kept them out of lineups. Even after the controversy, Campbell has kept his job but remains provocative in handing out suspensions and fines throughout the League.

2. Suspensions and Fines

Some of the rules state automatic suspensions for when those rules are violated. Others do not. The longest automatic suspension is ten games for leaving a player bench or penalty bench to join in an altercation on the ice. Each additional suspension after the acquisition of a penalty is, of course, subject to the discretion of the Commissioner’s office.

Fines are subject to more specific details in the Rulebook. For example, if a player incurs a game misconduct penalty during the course of a game, he is automatically fined two hundred dollars, along with the case being reported to the Commissioner, who may impose a suspension or more fines. Teams can also be fined because of players’ actions. If a player is penalized for leaving the players’ or penalty bench, the team is fined ten thousand dollars for the first instance. Each subsequent incident over the next three years will increase the fine by five thousand dollars.

The CBA details where the fine money collected from players goes: “Article 18.7 Use of Fine Money and Forfeited Salary. Any fines collected from or Paragraph 1 Salary forfeited by Players pursuant to any discipline imposed by the League shall be deposited in the NHL Players’ Emergency Assistance Fund.”

The application of these suspensions and fines under the supplemental discipline guidelines for the NHL has been taken into account when players have been prosecuted for their on-ice incidents. While some courts believe that no sports league should be allowed to exclusively self-discipline, the judges and justices will take that self-discipline into account when handing down punishments in criminal cases involving professional hockey players.

III. The Courtroom

The legal system in Canada has repeatedly said that the League is not above the law when it comes to on-ice confrontations and infractions. Despite the League’s desire to self-regulate and impose their own punishments on player who commit infractions, the courts continue to
emphasize that regardless of their punishment from the League, some of these players have committed crimes.

A. Criminal

1. Marty McSorley

On February 21, 2000, with just three seconds left in the final period of a match between the Boston Bruins and the Vancouver Canucks, Canucks player Marty McSorley swung his stick like a baseball bat at the head of Boston player Donald Brashear, impacting the side of Brashear’s head with the heel of the stick. McSorley then skated forward after Brashear had fallen to the ice and bent over Brashear to survey the damage. The result of the slash to the head of Brashear was a grade three concussion. Brashear had a grand mal seizure before he regained consciousness after falling to the ice.48

The prosecution in the criminal case against McSorley stated this in their brief to the court:

Our submission is that this is precisely the kind of case, precisely the fact situation that the criminal law is intended and has a place to deal with. It is way beyond the scope of the game. It is irrelevant. It is an act that is completely irrelevant to the game that is taking place on the ice. Mr. McSorley may have felt that there was a need to deliver a message to his team that we won’t quit, but you don’t deliver that message by putting another player’s health and safety at risk, and that is what happened in this case, we submit, and that is why it is a criminal act.49

The prosecution asked the court to consider what is acceptable within the realm of the sport of hockey. They argued that because this type of incident is not within the scope – or custom – of the game of hockey, this criminal act should be prosecuted and that was why they were charging McSorley with a crime.

The court, while handing down a guilty verdict, emphasized the role in preventing similar incidents: “Surely the authorities are not to turn a blind eye while the law of the jungle prevails. Quite the contrary, where there are obvious infractions of the criminal law, the authorities are duty-bound to take whatever action is necessary to prevent a repetition of such contact.”50

Along with prevention of future incidents, the court looked at whether the League’s action taken against offending players should preempt any court action. The court found that regardless of the League’s disciplinary procedures, McSorley still committed a crime and no private organization should be able to preempt the normal criminal process.51

Justice Kitchen, who delivered the verdict and opinion, stated: “In my view, there should be a heavy onus on those purporting to pre-empt the normal criminal process, particularly where it is

a private organization such as a group of hockey owners. Statutory bodies must act in the public interest; businessmen have no such obligation.”  

The court found McSorley guilty as charged and sentenced him to a conditional discharge of eighteen months. McSorley was suspended indefinitely by the League after the hit and never returned to play in the NHL. 

After the verdict came down, Commissioner Bettman had this comment:

The court today said that its focus was solely on the charge against Mr. McSorley. This was not a trial of the game or the NHL. Clearly, this incident was not representative of NHL hockey or NHL players. While the court’s decision today brings closure to this aspect of the incident, it does not alter our position that we will continue to punish severely acts of inappropriate conduct in our game.

The prevention of unnecessary violence in hockey was not accomplished with the decision in the McSorley case. Just four years later, another professional hockey player would commit assault on the ice and be punished for it.

2. Todd Bertuzzi

On March 8, 2004, then-Vancouver Canucks player Todd Bertuzzi delivered a sucker punch to the back of the head of then-Colorado Avalanche player Steve Moore. Moore fell to the ice, Bertuzzi followed, as did other players. The result was a very painful dog pile of players on top of the injured Moore. After the referees pulled the other players off of Moore, he was in visible discomfort as blood from his head pooled around him. The medical staff attended to Moore while he was on the ice, placing a cervical collar around his neck, and removing him from the ice on a stretcher.

The resulting injury to Moore was soft tissue injury and two avulsion fractures of the transverse process at the C3 and C4 vertebra. There were also several facial lacerations requiring stitches and Moore sustained a concussion rendering him unconscious for a couple minutes. Bertuzzi received a ten-minute penalty for intent to injure and was immediately suspended by the League for the remainder of the season (13 games) and the playoffs.

Bertuzzi was charged with assault causing bodily harm in the British Columbia Provincial Court of Canada. He pled guilty and received a sentence of a conditional discharge with a year of probation and a $500 fine.

When determining Bertuzzi’s sentencing, Justice Weitzel considered his involvement in the community and his character when deciding how much Bertuzzi should be punished for his actions on the ice. Along with his charitable contributions to minor hockey and significant public service, Bertuzzi’s “glowing recommendations” from then-General Manager of the Vancouver Canucks, Brian Burke, were seen as positive evidence of Bertuzzi’s good character.

52 Id.
54 Id.
Bertuzzi’s subsequent fine and suspension as part of the interleague disciplinary measures taken after the incident were also a factor in determining Bertuzzi’s sentence: “I also accept that as a result of this incident, he has already paid a significant financial penalty, exceeding $500,000, for having been suspended for the rest of the season. Both he and his teammates lost a chance to move further on in the playoffs as a result of him not being able to play.”56 Despite the loss of pay and the suspension for the remainder of the season, the court continued to exact punishment on Bertuzzi, fining him an additional $500 and putting him on conditional discharge with a year of probation.

The desire to add this additional punishment – though not much – was aided by the fact that Justice Weitzel wanted to deter other players from following in Bertuzzi’s footsteps: “I am also mindful that in imposing sentence the court is not looking only at deterring Mr. Bertuzzi from doing this again, but is also looking at other principles of sentence, such as deterrence to other young men, and in particular other young men playing hockey at such a high level as the National Hockey League.”57 Aside from the probation and fines imposed on Bertuzzi, the social implications were motivating as well. The public records from the case and the attention the case garnered would be seen by other players and would hopefully deter those players from making the same mistake.58 Bertuzzi is still referenced by commentators during games when referring to sucker punches.

Justice Weitzel also made commentary on the subject of fighting and violence in hockey, stating that “hockey is a sport in which there is significant physical contact, and in certain circumstances fighting is considered part of the game. It is not a sanctioned part of the game, but it is part of the game, which is sometimes punished by the imposition of penalties.”59 While Justice Weitzel acknowledged the inclusion of fighting and violence as well as interleague discipline, he maintained the League and its players would not be above the reach of the law: “No sports league, no matter how well organized or self-policed it may be, should thereby render the players in that league immune from criminal prosecution.”60

Bertuzzi is currently playing in the League as a forward for the Detroit Red Wings. Moore has never returned to play professional hockey.

3. Defenses

One of the hardest obstacles in successful prosecution and litigation of hockey players, and many other professional athletes, is the availability of affirmative defenses for the defendants. Those affirmative defenses can relieve the defendants of liability in criminal and civil court. The most prevalent of those defenses is consent.

Consent, in sports, derives itself from what is considered to be customary in the style of play. If the players can expect something to happen during the game and still decide to play, they have impliedly consented to those events occurring.

The most basic event consented to by hockey players is bodily contact. The court in the Bertuzzi case cited an earlier case, Regina v. Watson, in acknowledging this basic event:

Hockey is a fast, vigorous, competitive game involving much body contact. Were the kind of body contact that routinely occurs in a hockey game to occur outside the playing area or on the street, it would, in most cases, constitute an assault to which the sanctions of the criminal law would apply. Patently when one engages in a hockey game, one accepts that some assaults which would otherwise be criminal will occur and consents to such assaults. It is equally patent, however, that to engage in a game of hockey is not to enter a forum to which the criminal law does not extend. To hold otherwise would be to create the hockey arena a sanctuary for unbridled violence to which the law of Parliament and the Queen’s justice could not apply. I know of no authority for such a proposition.  

The McSorley court agreed:

It is clear that in agreeing to play the game a hockey player consents to some forms of intentional bodily contact and to the risk of injury therefrom. Those forms sanctioned by the rules are the clearest example. Other forms, denounced by the rules but falling within the accepted standards by which the game is played, may also come within the scope of the consent.

However, the McSorley court goes on to specify what would not be consented to by players: “It is equally clear that there are some actions which can take place in the course of a sporting conflict that are so violent it would be perverse to find that anyone taking part in a sporting activity had impliedly consented to subject himself to them.”

Here, the McSorley court not only discusses what players consent to but what is also the custom of the sport and how that affects consent. By mentioning “accepted standards” and actions that are extremely violent that no one would consent to them, the court flirts with the boundaries of the custom of the sport.

In the end, the McSorley case suggests that consent must be given a subjective test and look at all conditions surrounding the incident:

The conditions under which the game in question is played, the nature of the act which forms the subject-matter of the charge, the extent of the force employed, the degree of risk of injury, and the probabilities of serious harm are, of course, all matters of fact to be determined with reference to the whole of the circumstances. In large part, they form the ingredients which ought to be looked to in determining whether in all of the circumstances the ambit of the consent at issue in any given case was exceeded.

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63 Id.
64 Id.
The only factor in the test that considers the intent of the offender is the second, “the nature of the act which forms the subject-matter of the charge.” The third of “the extent of the force employed” can also be seen to consider intent, but recklessness can be used in force as well.

The presence of intent with violators of the rules in the NHL has been a determinative factor in handing down punishments. The character background for players is also taken into account when determining suspensions and fines.

IV. Current Incidents and Controversies

The following current events have the League questioning the wording of Rule 48, the way the rule is disciplined, and how the severity of those punishments will deter players from committing violent acts against their opponents.

A. Sidney Crosby

The world’s best hockey player is currently sitting on the injured reserve list. Sidney Crosby suffered a “mild concussion” after a hit into the glass during a Pittsburgh Penguins and Tampa Bay Lightning game in early January. This was just four days after receiving a blindside hit during the outdoor Winter Classic held on Pittsburgh’s Heinz Field against the Washington Capitals.

1. David Steckel Hit – January 1, 2011

While the Pittsburgh Penguins were engaged in a contest against the Washington Capitals during the 2011 Winter Classic held on Heinz Field, the Penguins captain was turning up the ice to follow the puck when he was blindsided by then-Capitals’ forward David Steckel. The hit caused Crosby to whip around violently and fall to the ice just as the second period was ending. Crosby headed toward the player bench after the horn sounded, doubled over. Commentators and fans alike doubted whether Crosby would return to play the third period of the game. He did and finished out the game.


Four days after taking the nasty hit from Steckel, Crosby started in a game against the Tampa Bay Lightning in Pittsburgh. Victor Hedman, a defenseman, for the Lightning checked Crosby into the glass during the course of the game. Crosby went on to finish the game, but the next day flew back to Pittsburgh after having flown to Montréal where the Penguins were set to play the Canadiens.

65 After only playing 41 games in the regular season, Crosby collected the following statistics: 32 goals, 34 assists, 66 total points. At the end of the regular season, Crosby ranked 32nd of 891 players in total points. Points are totaled by the combination of goals and assists. Corey Perry (Anaheim Ducks) won the “Rocket” Richard Trophy (top goal scorer in regular season) with just 50 goals in 82 games played – or every single regular season game. Daniel Sedin (Vancouver Canucks) collected the Art Ross Trophy (most points in regular season) with 104 points in 82 games. Before Crosby was put on the IR, he was projected to score 62 goals and over 130 points.

66 As of April 11, 2011.

67 The Washington Capitals and Pittsburgh Penguins share a fierce rivalry. The rivalry was captured on camera leading up to the 2011 Winter Classic in Pittsburgh between both teams. HBO followed the teams around for a month to follow their preparation for the outdoor contest.
In an interview with Pittsburgh head coach, Dan Bylsma, he stated that the concussion was mild and he was not sure when Crosby had actually sustained the concussion, on the first of the year or four days later.

Neither Hedman nor Steckel were suspended or penalized for their hits on Crosby.

3. Impact of the Concussion

Crosby’s concussion sparked numerous debates surrounding the League’s stance on hits to the head. He missed the 2011 NHL All-Star game because of the hit and his absence was noticeable. The celebration of the League’s best players was overshadowed by the nonattendance of the world’s finest.

The news surrounding Crosby, as he missed game after game, went from mildly hopeful to downright catastrophic. Rumors were spread that the 23-year-old hockey superstar was going to hang up his skates and retire from the game. Crosby’s own father got involved and vehemently denied the rumors. However, the Penguins captain had not been seen on the ice since early January – the rumors went around in March. Crosby dispelled the rumors on his own after a short and emphatic “no” when asked if he ever considered “hanging [his skates] up” during a post-practice interview.

4. Crosby’s Progress

The initial return for Crosby was set at a week after the hit on January 5\textsuperscript{th}. Crosby has missed forty-one games, exactly half the regular season, in the three months he has been out of the lineup. He has returned to practicing on the ice, but has not yet returned to a game or a full contact practice with the team. While there are rumors that the hockey star will come back during the playoffs which start on April 13, 2011, there is still no definite timetable for his return.

B. Matt Cooke

Crosby’s teammate, Pittsburgh Penguins’ forward Matt Cooke, is a repeat offender. He has been suspended numerous times throughout his career in the NHL. He is also the catalyst for the establishment of Rule 48 after a nasty, but legal, hit on Boston Bruins’ forward Marc Savard.

At the time of Cooke’s hit on Marc Savard, Rule 48 was not in the Rulebook. On March 7, 2010, with 5:40 left in the third period, Savard let go of a shot just as Cooke administered the blind side hit that sent Savard sprawling on his back on the ice. The Boston players on the ice immediately went after Cooke while Cooke’s teammates stepped in to defend him.

Savard was on the ice for a few minutes before Penguins team doctor Chip Burke came out onto the ice to help the Boston training staff administer aid to Savard. The players that were on the ice when the incident happened stood around and watched the doctor and several trainers immobilize Savard and eventually get him onto a stretcher and wheeled off the ice. As he was exiting the ice, Savard raised a hand in acknowledgement to the applauding Pittsburgh crowd.

Savard was determined to have a major concussion following Cooke’s shoulder connecting with his head.\textsuperscript{68} Savard returned to the playoffs that season for the Bruins but had concussion

\textsuperscript{68} Mike Brehm, \textit{Boston’s Marc Savard ends season because of concussion}, USA TODAY, Feb. 2, 2011.
symptoms that off-season and missed the first two months of this current season. On February 7, 2011, Savard was shut down for the rest of the season after receiving another concussion from a hit by Colorado Avalanche defenseman Matt Hunwick. Savard plans to continue having testing done and to use the results in determining whether he should continue with his hockey career.

1. Current Suspension

On March 21, 2011, Cooke was suspended for the remainder of the regular season (10 games) and the first round of the playoffs in which the Penguins will be playing. The suspension was the result of a high elbow to the head of New York Rangers defenseman Ryan McDonagh. Cooke met with League personnel in Toronto for his disciplinary hearing. Cooke is considered a repeat offender and along with the suspension received a $219,000 fine. McDonagh was not seriously injured and remained in the game and the Rangers’ lineup after the hit.

a. General Manager Ray Shero’s Response

Pittsburgh Penguins general manager Ray Shero has been one of the more vocal general managers in getting rid of head shots in the NHL. His reaction to the March 21, 2011 suspension of Matt Cooke was as follows:

The suspension is warranted because that’s exactly the kind of hit we’re trying to get out of the game. Head shots have no place in hockey. We’ve told Matt in no uncertain terms that this kind of action on the ice is unacceptable and cannot happen. Head shots must be dealt with severely, and the Pittsburgh Penguins support the NHL in sending this very strong message.

During the annual general managers meeting, Shero attempted to get a rule eliminating any kind of head shots in the game. The rule was shot down but the general managers did agree that the wording of Rule 48 needed to be looked at and reevaluated.

Shero’s aversion to head shots stems from four of his players being on the injured reserve list because of concussions, most notably Crosby, as well as his own son battling a concussion.

C. Max Pacioretty and Zdeno Chara

1. Incident

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69 Id.
70 Id.
71 Id.
72 Pittsburgh Penguins, Penguins’ Cooke Suspended for Remainder of Regular Season and First Round of Stanley Cup Playoffs, penguins.nhl.com, Mar. 21, 2011.
73 Video appendix, clip #6.
74 Pittsburgh Penguins, Penguins’ Cooke Suspended for Remainder of Regular Season and First Round of Stanley Cup Playoffs, penguins.nhl.com, Mar. 21, 2011.
75 Pittsburgh Penguins, Ray Shero Statement on Matt Cooke Suspension, penguins.nhl.com, Mar. 21, 2011.
76 Kevin Allen, Crosby’s return to ice coincides with GMs’ concussion talks, usatoday.com, Mar. 14, 2011.
With just seconds left in the second period of the March 8, 2011 contest between the Boston Bruins and the Montréal Canadiens, Boston defenseeman and captain Zdeno Chara checked Canadiens’ forward Max Pacioretty into the boards making up the Boston players’ bench. As Chara finished his check, Pacioretty’s head and neck came in contact with the turnbuckle supporting the glass that separated the two players’ benches.

Pacioretty’s body flew horizontally a few feet and landed on the ice where he lay motionless for several minutes while doctors and trainers attended to him. The referees tried to separate the Boston and Montréal players from each other, specifically from Chara. Chara was led first to the penalty box before being escorted off the ice as he was ejected from the game. Pacioretty was carefully turned over onto his back before being immobilized and put onto a backboard.

Fans in the Montréal home arena could be heard loudly chanting, “Fuck you, Chara” as the Boston captain was led off the ice. The officials ended the period early, adding on sixteen seconds to the third period. The Bruins left the ice first to a chorus of boos by the fans. The booing quickly turned to cheers as Pacioretty was lifted onto the stretcher and wheeled off the ice.

Chara received a major interference penalty and a game misconduct, getting ejected from the game. He did not receive any supplemental discipline from the League. NHL Senior Vice President of Hockey Operations Mike Murphy issued this statement:

I conducted a hearing with Boston Bruins’ defenseeman Zdeno Chara with respect to the major penalty for interference and game misconduct that he was assessed at 19:44 of the second period for a hit on Max Pacioretty of the Montréal Canadiens. After a thorough review of the video I can find no basis to impose supplemental discipline.\textsuperscript{77}

Murphy goes on further to state the hit resulted from an evolving and quick play against the players’ bench. He also took into consideration Chara’s lack of supplemental discipline during the Bruin captain’s 13-year NHL career.\textsuperscript{78}

Pacioretty suffered a severe concussion and a non-displaced fractured fourth vertebra in his neck.\textsuperscript{79} Both of his parents were at the game and were with him in the hospital following the incident.\textsuperscript{80} Pacioretty returned to the ice on April 1, 2011, skating gingerly on his own in full hockey equipment before a full Canadiens practice. The Canadiens say there is still a possibility for Pacioretty to return to playing during the playoffs.\textsuperscript{81}

2. Aftermath and Response

After the incident, the Montréal police department initiated a criminal investigation into Chara’s hit. The provincial director, Louis Dionne, will determine whether there are grounds for prosecution after Montréal police have collected evidence.\textsuperscript{82}

\textsuperscript{77} Murphy Releases Statement on Chara Review, nhl.com, Mar. 9, 2011.
\textsuperscript{78} Id.
\textsuperscript{79} Arpon Basu, Pacioretty remains in hospital following injury, nhl.com, Mar. 9, 2011.
\textsuperscript{80} Id.
\textsuperscript{81} Sean Gordon, Habs’ Pacioretty returns from concussion, GLOBE AND MAIL, Apr. 1, 2011.
\textsuperscript{82} Kevin Paul Dupont, Police open investigation of Chara’s hit, THE BOSTON GLOBE, Mar. 11, 2011.
However, in a statement, Pacioretty preferred legal action not be taken against Chara, saying:

I sincerely appreciate all of the support that I have received since my injury. I was disappointed that the NHL did not suspend Zdeno Chara. However, I have no desire for him to be prosecuted legally. I feel that the incident, as ugly as it was, was part of a hockey game. I understand that this is not my decision. I have respect and admiration for the authorities in Quebec. I simply wanted to make my opinion clear.83

Several of the Canadiens players were upset that Chara was not punished by the league, including veteran Scott Gomez: “Guys are livid, they’re [ticked] off.”84

Additionally, there looks to be financial trouble for the League if serious action is not taken against head shots. Air Canada threatened to pull its financial support in a letter sent to Commissioner Bettman less than twenty-four hours after the hit on Pacioretty:85

We are contacting you to voice our concern over the incident involving Max Pacioretty and Zdeno Chara at the Bell Centre in Montréal. This is following several other incidents involving career-threatening and life-threatening head shots in the NHL recently. From a corporate social responsibility standpoint, it is becoming increasingly difficult to associate our brand with sports events which could lead to serious and irresponsible accidents; action must be taken by the NHL before we are encountered with a fatality.86

Air Canada’s director of marketing and communications, Denis Vandal’s words were met with this simple statement from deputy commissioner, Bill Daly: “We referred them to our public statement [in regard to the Chara-Pacioretty ruling]. We have no intention of engaging them further at this point.”87


On February 11, 2011, the New York Islanders and the Pittsburgh Penguins met on Long Island to play a regular season game between the two Atlantic Division rivals. They had met nine days previously.

During that previous meeting, Penguins’ forward Maxime Talbot hit Islanders’ forward Blake Comeau. The hit was legal but the result was a concussion for Comeau. Talbot was not penalized for his hit because he did not make contact with Comeau’s head. The concussion was thought to be the aftereffect of whiplash as Comeau’s body went to the ice after the hit.

Penguins’ backup goaltender, Brent Johnson, had also gotten involved during the February 2nd meeting between the teams. In a very rare goalie fight, Johnson took on Islanders’ goaltender Rick DiPietro after DiPietro had hit Johnson’s teammate Cooke. After Johnson landed one punch,

83 Id.
84 Id.
85 Id.
86 Id.
87 Id.
the fight was over, leaving DiPietro with a broken face and on the injured reserve list for six weeks.

The night of February 11, 2011 would result in 346 penalty minutes, 9 game misconducts, 59 total penalties, and 17 fighting majors between the teams. This total surpassed the total amassed two nights before between the Montréal Canadiens and the Boston Bruins – 187 penalty minutes, 45 penalties, and their own goalie fight between Boston’s Tim Thomas and Montréal’s Carey Price. 88

Each team was suspecting that the fighting would commence fairly quickly once the puck dropped during the February 11th game. Even the Pittsburgh Penguins commentators knew it was going to be a fight-filled battle, stating, “Fight number one of the night!” after seeing Penguins’ forward Craig Adams and Islanders’ forward Michael Haley drop the gloves roughly ten minutes into the first period.

1. Matt Martin and Maxime Talbot

During the second period, while the players were moving back up the ice towards the Islanders’ offensive zone, Islander forward Matt Martin started skating next to Talbot. Martin is seen decisively dropping his stick and gloves before attacking and nearly sucker-punching an unsuspecting Talbot. Talbot dropped to the ice and curled into a ball, protecting himself after having seen Martin’s attempt to hit him at the last second. Penguins’ defenseman Deryk Engelland rushed to Talbot’s defense, trying to pull Martin off of Talbot.

The attack on Talbot sparked two additional fights after that initial one. Pittsburgh forward Mike Rupp took on Islanders’ defenseman Travis Hamonic while rare-fighter Penguins’ forward Pascal Dupuis wrestled with Islanders’ forward Josh Bailey.

When asked about the incident the next day, Talbot acknowledged that his hit on Comeau on February 2nd was most likely the cause of Martin’s attack on him. However, he did have this to say on ever expecting anything like what Martin did: “You never expect to get grabbed from behind and punched like that. I’m not a guy that would stand down if someone comes to my face and asks me.” 89

The implication is that had Martin challenged Talbot to a fight in revenge for Talbot’s earlier, non-penalized hit on Comeau, Talbot would have consented. Martin, however, had other plans and decided to exact his revenge on Talbot in a way not abided by other players and the commentators for the game.

After the incident unfolded on the ice, the commentators likened the attack to what Bertuzzi had done to Moore seven years earlier. Later, while commentating on another fight in that same game, the commentators rattled through the previous fights and related Martin’s attack on Talbot as “nearly assaulting” him.

89 Interview by Sam Kasan with Maxime Talbot, player, Pittsburgh Penguins, in New York, NY. (Feb. 12, 2011).
In the end, Martin was suspended for four games and forfeited $41,585.36 in salary after the incident. Talbot was not injured and has not missed a game for the Penguins.

2. Eric Godard

After a vicious hit on Penguins’ forward Eric Tangradi from Islanders’ forward Trevor Gillies (discussed in detail later), Talbot and Islanders’ forward Michael Haley got into a brief scuffle. Upon that scuffle ending, Haley leisurely skated around the ice while looking for someone else to fight. He set his sights on Penguins’ goaltender Brent Johnson and skated down to the opposite end to take on the goalie, who was a willing participant.

Haley skating towards Johnson prompted Penguins’ forward Eric Godard to jump off the player bench and defend his teammate. Godard explained his reasoning and if anything was said before he left the bench:

No one said anything. There was all that stuff going down in the corner. Max got in a fight with Haley. I remember seeing him skating towards the penalty box. I looked down at the pile again. I heard commotion and saw him skating towards Johnny. I just jumped and went after him.... I saw him skating towards Johnny and I just kind of went.  

The result of Godard’s decision to jump off the bench was an automatic ten game suspension as detailed in Rule 70.10 of the Official Rulebook. Godard, while aware of the rule at the time, admitted to not thinking about it when he made the decision to come off the bench and aid Johnson in the fight against Haley. Godard was also fined $40,322.25.

The Penguins depleted lineup because of injuries at the time of the New York Islanders game made Godard slightly regret his decision to defend his teammate: “We’re in a tough spot now with a lot of guys out. Yes I regret it. But no, I’m going to try to defend my teammates. I’m kind of torn with that.”

Rule 70.10 further states “The Coach(es) of the team(s) whose player(s) left the players’ bench(es) or penalty bench(es) during an altercation shall be suspended, pending a review by the Commissioner. The Coach(es) also will be fined a maximum of ten thousand dollars ($10,000).”

Pittsburgh head coach, Dan Bylsma, was not suspended or fined for Godard’s actions.

3. Trevor Gillies and Eric Tangradi

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91 Interview by Sam Kasan with Eric Godard, player, Pittsburgh Penguins, in New York, NY. (Feb. 12, 2011).
92 National Hockey League Official Rules, § 9, Rul. 70.10 (2010).
93 Interview by Sam Kasan with Eric Godard, player, Pittsburgh Penguins, in New York, NY. (Feb. 12, 2011).
95 Interview by Sam Kasan with Eric Godard, player, Pittsburgh Penguins, in New York, NY. (Feb. 12, 2011).
96 National Hockey League Official Rules, § 9, Rul. 70.10 (2010).
With 15:21 left in the third and final period of the game, Penguins rookie forward Eric Tangradi was against the boards trying to retrieve and play the puck in the Islanders’ defensive zone. Islanders’ forward, Trevor Gillies, sped from the opposite side of the zone to viciously check Tangradi into the glass, landing a high elbow into Tangradi’s face. After the check, Tangradi is seen bringing his hands to his face, possibly injured from the hit. Gillies, for his part, dropped his gloves and his stick, grabbed Tangradi, and started punching him in and around the face.

This action sparked several other fights between the players from both teams that remained on the ice, including the fight between Johnson and Haley that prompted Godard to come off the Pittsburgh bench. Once Gillies was pulled off of Tangradi, he was sent to the open doorway near the section of the boards where the incident took place. Tangradi was lying face down on the ice, not moving. Penguins’ trainer Chris Stewart came off the bench to check on Tangradi.

While Stewart was tending to Tangradi, Gillies, from the open doorway, was taunting and harassing the injured Penguins player but refrained from coming back onto the ice. Stewart eventually helped Tangradi into a kneeling position while Gillies continued taunting him. After a few minutes, Tangradi was able to stand and leave the ice on his own. He took the journey to the tunnel closest to the visitors’ locker room in a half bent position.

As a result of the hit on Tangradi, Gillies was suspended for nine games and forfeited $24,193.53 in salary. Tangradi suffered a concussion and returned to the Pittsburgh lineup in the last game of the regular season on April 10, 2011.

a. Return to Ice and Immediate Ejection and Suspension

Gillies lasted just three shifts into his first game after the nine game suspension before earning yet another multi-game suspension. During a New York Islanders and Minnesota Wild game, he delivered a blow to the head of Wild forward Cal Clutterbuck. The result of the hit was a ten game suspension coupled with forfeiting more than $60,000 in salary. Gillies returned to the ice on March 30, 2011.

Resulting from the above incidents and a “failure to control their players,” the New York Islanders franchise was fined $100,000 by the League. The Pittsburgh Penguins were not fined.

4. Mario Lemieux’s Response to the Game

The three previously described events, as well as the entirety of the New York Islanders and Pittsburgh Penguins game that February 11th, prompted a rare statement from Penguins’ co-owner and legend, Mario Lemieux:

Hockey is a tough, physical game, and it always should be. But what happened Friday night on Long Island wasn’t hockey. It was a travesty. It was painful to watch the game I love turn into a sideshow like that. The NHL had a chance to send a clear and strong message that those kinds of actions are unacceptable and embarrassing to the sport. It failed. We, as a league, must do a better job of

97 Dave Caldwell, Islander Lasts 3 Shifts Before Earning Another Suspension, nytimes.com, Mar. 4, 2011.
protecting the integrity of the game and the safety of our players. We must make it clear that those kinds of actions will not be tolerated and will be met with meaningful disciplinary action. If the events relating to Friday night reflect the state of the league, I need to re-think whether I want to be a part of it.99

Lemieux’s comments came after the suspensions and fines for the players involved were handed down by the National Hockey League. While Lemieux’s comments were seen with praise by some, they also sparked allegations of hypocrisy because Lemieux employs Cooke, a well-known repeat offender.

V. Trusting the National Hockey League in Playing Judge, Jury, and Executioner

When looking at the current headline grabbing incidents described above and the fines and suspensions applied those incidents, the League’s self-discipline structure is called into question. There are several factors that provide for inconsistencies when the League hands down supplemental punishment.

First, some of the rules are heinously broad in their wording, leaving them open for a wide variety of interpretation by referees, players, and the League disciplinarians. Stemming from that, there has been a lot of diversity in applying suspensions and fines, if any at all. There have been allegations of favoritism in the Commissioner’s office that have some questioning Colin Campbell’s qualifications as the authoritarian for discipline.

Others wonder if the self-discipline system actually leads to the prevention of rule breaking or if the soft and inconsistent additional fines and suspensions allow the players to feel invincible. All of this ultimately culminates in changing the custom of hockey, which, will in turn, change how courts decide to tailor any additional legal punishments.

A. Broadly Stated Rules

One major problem with some of the rules is the lack of specificity in the wording. Rule 48, for example, is very broad and therefore, the interpretation is very broad: “Rule 48.1 Illegal Check to the Head – A lateral or blind side hit to an opponent where the head is targeted and/or the principle point of contact is not permitted.”100 Nowhere in the rule is the word “intentional,” yet most of the discipline surrounding that rule has been because of what are perceived to be intentional hits to the head.

The hit on Crosby during the Winter Classic involved the head as the principle point of contact during the hit. Since the rule does not state that the hit must be intentional, only that “the head is targeted and/or the principle point of contact,” one would assume that Steckel would have been penalized for the hit on Crosby. He was not.

In fact, in describing the prescribed discipline for the illegal check to the head, the rules state a method for discipline if the hit was intentional: “Rule 48.5 Match Penalty – The Referee, at his discretion, may assess a match penalty if, in his judgment, the player attempted to or deliberately

injured his opponent with an illegal check to the head.”  

The intent stated in this call for a match penalty by the Referee’s discretion, might further state that the hit to the head need not be intentional for a penalty to be assessed. However, the other side can be argued, stating that this intent is merely for the intent to injure rather than the intent to hit. When it comes to the Rulebook, there should be no other side to argue. Each rule should be specific and not ambiguous.

The ambiguity present in the broadly stated rule has led to many inconsistencies in discipline in regards to Rule 48. The rule is new to the Rulebook, having just been added last year, so perhaps the League is still working out the kinks. However, that does not explain the broad phrasing of the rule.

B. Inconsistencies in Discipline

There are inconsistencies in discipline regarding Rule 48 when it comes to determining if the hits were intentional or not. Since the intentional hits are supposed to be the ones that receive more discipline from the League, the League reviews each hit before any supplemental discipline is handed down.

The League takes into account several different factors: the hit, the result of the hit, the circumstances surrounding the hit, and whether the offender has done this before. Repeat offenders are judged more harshly and subsequently receive more severe discipline as opposed to first time offenders.

Taking the repeat offender factor into account, the consistency of discipline has wavered when just looking at the nature of the hit. A more violent hit from a first time offender will likely result in little to no discipline from the League – see Steckel and Chara. However, a severely less violent hit from a repeat offender will cause the League to suspend the player for longer periods of time – see Cooke and Gillies.

This seems to be a bit of a step backwards in how the League wants to change the game. By just punishing repeat offenders more harshly, that leaves the door open for the one guy who has not done anything to push the envelope in seeing what he can get away with on the ice. Tougher punishments all around would seem to be better in putting a stop to the unnecessarily violent hits in the game.

In the legal system, murderers and batterers are not let off easily because it was the first time they had killed or hurt someone. The hockey players in the National Hockey League should be no different.

However, there is still the room for interpretation that even murder and battery are afforded. Sometimes accidents happen. Even murder and battery call for intent. This is where the language of the rule comes into play. The rule must be specifically stated to not allow any ambiguity, regarding intention or anything else.

C. Self-Discipline and Prevention

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If the above events are any indication at how well the League is self-disciplining its players, violent hits and repeat offenders will be around in the NHL for a long time. The League’s goal in handing out supplemental suspensions and fines is to deter players from making the same mistakes. However, with the need to look at whether someone is a “repeat offender,” the League is subconsciously acknowledging that those suspensions and fines are failing to fulfill their goal.

Any repeat offender has not gotten the message from their last suspension or fine. Gillies and Cooke are two examples. Perhaps the discipline for first time offenders is not harsh enough. Perhaps the wording of the rules is too ambiguous and leads to insufficient and inconsistent discipline.

Regardless of the reason, the self-discipline structure of the League is not working. Even if it was, it would not deter courts from taking action when need be: “No sports league, no matter how well organized or self-policed it may be, should thereby render the players in that league immune from criminal prosecution.” 102

If the League does want to send a message and prevent unnecessary violence from occurring on the ice, Martin’s near assault on Talbot during the Islanders and Penguins game on February 11th, should have received a harsher punishment than Godard’s automatic suspension for coming off the bench to defend a teammate. The only reason Martin did not receive a longer suspension was because Talbot was not injured as a result of the attack. Both Martin and Talbot were lucky the latter saw the attack out of the corner of his eye at the last second. If Talbot had not, he would have been the next Steve Moore. Martin would have been the next Todd Bertuzzi.

Both of the vicious attacks, Martin’s on Talbot and Gillies’ on Tangradi, during that game on Long Island received lesser punishments than Godard’s automatic suspension. The suspension imposed on Martin has so far deterred him from making the same mistake. As seen above, Gillies’ suspension did not. Instead of awarding Gillies a much longer suspension for repeating unnecessary violent conduct, the League gave him a suspension just one game longer than his previous.

If the self-discipline is not preventing these violent acts in the game, something else must change. One thing that can change is the custom of the sport, but unfortunately, that change might not be beneficial to the players.

D. Changing the Custom of Hockey

Changing the custom of hockey – or any sport, for that matter – is rather difficult. One of the most exciting aspects of hockey has been the fighting and, subsequent, violent nature of the sport. Fans cheer when two opponents drop the gloves to duke it out on the ice. They are applauded by the fans and their teammates when they finish. The rules disallow and punish fighting, but that does not deter players from continuing to engage in fights to rile up their team, put on a show for the fans, or enact a little revenge.

In Justice Weitzel’s opinion in the Bertuzzi case, he had this to say about fighting and its role in hockey:

I am not so naïve as to suggest that fights are not a part of hockey. I will leave aside the issue of whether they should be, but the fact of the matter is that hockey is a sport in which there is significant physical contact, and in certain circumstances fighting is considered to be part of the game. It is not a sanctioned part of the game, but it is part of the game, which is sometimes punished by the imposition of penalties.\footnote{R. v. Bertuzzi, (2004) 2004 CarswellBC 3066 (B.C. Prov. Ct.), at paragraph 35.}

Since fighting has not deterred from the sport because of the rules, one wonders if the violent hits will because of the addition of Rule 48. If the rule is in the Rulebook, it has become a bit of hockey custom. There have been enough checks to the head of players that there was a need for the rule against them. Players can come to expect those types of hits.

If the rule adds the hits into the custom of the sport that affects the way a player will be able to seek successful litigation against another player who seriously injured them or ended their career. The courts have been able to somewhat determine what falls into the custom of hockey. Actions by players that clearly overstep those boundaries have been punished by the legal system in Canada.

The punishments and legal prosecutions of McSorley and Bertuzzi were notorious and well known throughout the hockey world. The Montréal police investigation into the Pacioretty and Chara incident is the latest in the Canadian government’s effort to crack down on the unnecessary violence found in their nation’s most popular sport.

McSorley and Bertuzzi’s deliberate attacks on opponents were seen as being outside the custom and realm of the sport. Chara’s hit on Pacioretty, though violent, can be argued to be part of the game. The contention in the legal system lies not with what is a clear violation but what is in the gray area. The broad rules and inconsistent discipline do not help determine what is seen as custom in the sport and what could potentially be something that would not be allowed by the League or the justice system.

VI. Conclusion

The addition of new rules from the NHL Commissioner can have a profound impact on the legal rights of a player. The denouncement of illegal checks to the head, for example, acknowledges their existence in the sport. Those kinds of checks are ones that players can expect might happen during the course of the game. Yet, the rule has a gray area. An intentional check to the head, resulting in grave injury, can still be a part of the game, but also be considered assault. If new rules are established, the wording of those rules should be specific enough to determine what is accepted as part of the custom of the sport and what will not be tolerated either by the League or the legal system.