

BOOK REVIEW

**THE DEFENSE NEVER RESTS, BRUCE DOWBIGGIN, Harper
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Since the release of *The Defense Never Rests* by Bruce Dowbiggin,¹ two significant events have occurred which were both predictable and expected to the reader of the book. First, the Court of Appeal for Ontario² released its decision in *Bathgate v. NHL Pension Society* on February 17, 1994.³ This decision affirmed the successful application to the Ontario Court of Justice (General Division)⁴ by seven retired National Hockey League (NHL) players⁵ to recover an estimated thirty-three million dollars in pension benefits⁶ which the NHL⁷ wrongfully removed from the players' pen-

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1. Dowbiggin is a sports journalist who investigated the NHL pension fund issue for two years. Mr. Dowbiggin won a 1992 Gemini award for Best Television Sports Broadcaster for his documentary, "The Eagleson Legacy."

2. The Court of Appeal for Ontario is the highest appellate court in the Province of Ontario, Canada.

3. 16 O.R. (3rd) 761 (1994).

4. The Ontario Court of Justice (General Division) is the trial division within the Ontario court system and is also known as the Ontario Court (General Division).

5. The seven players were Andy Bathgate, Carl Brewer, Gordie Howe, Bobby Hull, Allan Stanley, Eddie Shack, and Leo Reise. *Id.*

6. A separate proceeding, known as a reference, will determine the exact value of the pension benefits. A Master of the Ontario Court (General Division) presides over the refer-

sion plan, the National Hockey League Pension Society (Plan).⁸ This application provided the impetus for *The Defense Never Rests*. Second, on March 3, 1994, a United States federal grand jury indicted Alan Eagleson, former Executive Director of the National Hockey League Players' Association (NHLPA), former director of Hockey Canada, and former player agent, on thirty-two counts of fraud, racketeering, embezzlement, self-dealing, and receiving kickbacks relating to his activities in hockey.⁹

The NHL's actions in depriving the retired NHL players of their pension benefits were made possible, in part, by the complicity of Eagleson, who conducted the labor negotiations on behalf of the NHLPA. The 1986 collective bargaining agreement reached between the NHL and Eagleson required the NHLPA's approval for the NHL to take the pension funds that belonged to the retired NHL players.

Pension attorneys find both *The Defense Never Rests* and the decisions of the Ontario Court (General Division) and the Court of Appeal for Ontario fascinating reading. The decision of Justice Adams in the Ontario Court (General Division) and the decision of Justice Morden, Justice Houlden, and Justice Goodman of the Court of Appeal for Ontario were thorough and well-reasoned. Despite the legal tone of the book, Dowbiggin did not write *The Defense Never Rests* for individuals interested in pension law or labor law. Dowbiggin wrote the book as a result of his fascination with the character of the retired NHL players who brought the lawsuit against the NHL. The story of *The Defense Never Rests* centers on Bob Baun, Carl Brewer, Tim Horton, and Allan Stanley, the four Toronto Maple Leaf defensemen who were an integral part¹⁰ of

ence which may take months to be resolved.

7. While the NHL was not a named defendant in *Bathgate*, the seven retired NHL players did name as defendants each of the NHL's team owners as persons carrying on business as the NHL. *Id.*

8. *Bathgate v. NHL Pension Soc'y*, 11 O.R. (3d) 449 (1993).

9. Eagleson is also a former member of the Ontario Parliament, a member of the Hockey Hall of Fame and the Canadian Sports Hall of Fame, and a recipient of the Order of Canada. *Ex-NHL Union Boss Indicted*, USA TODAY, Mar. 4, 1994, at 6C.

10. As Dowbiggin writes:

They were the pride of the Maple Leafs for almost a decade they played through pain and disappointment and the personal problems that afflict us all. They played under labor conditions that bordered on the sweatshop. And they did it all with dignity. When they had finally outlived their usefulness to the Toronto Maple Leafs, they drifted away or were traded. But the stories of these four men were merely in mid-sentence, a half-developed thought, when hockey ended

four Stanley Cup championship teams in the 1960s.¹¹

The book traces and describes the development of the NHL and the power, domination, and personalities of the men who controlled the NHL during its first half-century.¹² The book focuses primarily on the Maple Leafs and Conn Smythe, the team's principal owner. Other books have covered the development of the NHL from an equally unflattering perspective,¹³ and Dowbiggin relies on these previous works in the earlier chapters of his book as background information.¹⁴

Within the context of the feudal world of the NHL, Dowbiggin reflects on the futile and failed attempts of the players to organize themselves in order to improve their working conditions. Dowbiggin describes the establishment of the Plan in 1947 after certain members of the Detroit Red Wings sought to establish a players' pension fund in 1946.¹⁵

Dowbiggin thoroughly traces the evolution of the Plan from its beginning in 1947 through the 1960s. He describes the significance of the major decisions involving the Plan during this time. Dowbiggin's excellent research into the history of the Plan and his phenomenal understanding of pension issues enable him to show that the Plan, contrary to being a "great boon to the players of the

and real life began. Ironically, the stoic, dutiful Leafs became something entirely different in retirement. Led by Baun, Brewer and Stanley, [they] rebelled against the system that created them. With Gordie Howe, Bobby Hull, Eddie Shack, Andy Bathgate and Leo Reise, they tried to create a collective consciousness that was denied them when they played. *The Defense Never Rests* is a story of retribution and self-revelation, the private exorcism of these very public men.

BRUCE DOWBIGGIN, *THE DEFENSE NEVER RESTS* 6-7 (1993).

11. The Maple Leafs won the Stanley Cup in 1962, 1963, 1964, and 1967. *THE NATIONAL HOCKEY LEAGUE OFFICIAL GUIDE & RECORD BOOK 1993-94* 202 (1993).

12. These men were Conn Smythe of the Maple Leafs, Jim Norris of the Chicago Blackhawks, the Detroit Red Wings, and the New York Rangers, and Bruce Norris of the Red Wings.

13. The most thoroughly researched of the earlier books is *Net Worth* by David Cruise and Alison Griffiths. *DAVID CRUISE & ALISON GRIFFITHS, NET WORTH* (1991). *Net Worth* is a comprehensive and insightful study into the NHL. *Id.* The effort of the retired NHL players to fight the NHL over their pension funds motivated the authors to write *Net Worth*. *Id.*

14. DOWBIGGIN, *supra* note 10, chs. 3-4, 10-11.

15. As Dowbiggin notes:

They hadn't bargained with Smythe, who saw a pension fund run by players as an attempt to subvert the discipline and control the NHL held over its players. At his insistence, the NHL owners took over the project in 1947 and entrusted the freshly minted NHL Pension Society to their newly installed President, Clarence S. Campbell.

BRUCE DOWBIGGIN, *THE DEFENSE NEVER RESTS* 44 (1993).

League,¹⁶ became a "swindle" perpetrated by the NHL upon its retired players.¹⁷

Dowbiggin dedicates separate chapters of the book to Baun, Brewer, Horton, Stanley, and George "Punch" Imlach, the demanding Coach and General Manager of the Maple Leafs during the championship seasons of the 1960s.¹⁸ Dowbiggin describes the background of these men, their very different personalities, and their contributions to the famous Maple Leaf teams of the 1960s. These chapters provide an insightful look into life as a Maple Leaf under the iron fist of Imlach.¹⁹ Dowbiggin then follows the lives of the four defensemen subsequent to their disassociation from the Maple Leafs.²⁰

By the late 1960s, the NHL changed dramatically as it added six new teams.²¹ Dowbiggin artfully weaves the successful formation of the NHLPA and the rise of Eagleson within the hockey world²² and Dowbiggin places the role of Baun and Brewer in Eagleson's establishment as the NHLPA's Executive Director in its proper perspective.²³ Dowbiggin emphasizes that more than any other individual, Eagleson shaped the face of professional hockey from the time of the formation of the NHLPA in 1967 until his reign as Executive Director ended in 1991. During this time, Eagleson managed the NHLPA to the exclusion of its member players. He negotiated the first collective bargaining agreement on behalf of the NHLPA with the NHL; controlled the development of interna-

16. *Id.* at 187.

17. *Id.* at 324.

18. *Id.* chs. 5-9.

19. Dowbiggin's concludes that:

For Brewer, Stanley, Baun and the others on those great Toronto teams, Imlach's themes of persistence and resistance finally culminated in their challenge to the League's ironclad hold over their pension fund years after his death. As much as the Stanley Cups and the notoriety they brought, that is part of the Imlach legacy.

BRUCE DOWBIGGIN, *THE DEFENSE NEVER RESTS* 71 (1993).

20. *Id.* chs. 12-13, 15. Horton tragically died in 1974. *Id.* at 102.

21. *Id.* at 193. The NHL doubled the number of its teams for the 1967-68 season with the addition of the Los Angeles Kings, Minnesota North Stars, Philadelphia Flyers, Pittsburgh Penguins, St. Louis Blues, and California Seals. *GUIDE & RECORD BOOK*, *supra* note 11, at 133 (1993).

22. In addition to his position as Executive Director, Eagleson also represented Hall of Fame defenseman Bobby Orr, who entered the NHL in the 1966-67 season with the Boston Bruins and became one of the NHL's premier players until his retirement in 1979. ALAN EAGLESON & SCOTT YOUNG, *POWER PLAY: THE MEMOIRS OF HOCKEY CZAR ALAN EAGLESON* ch. 3 (1993).

23. DOWBIGGIN, *supra* note 10, ch. 14.

tional hockey, beginning with the 1972 Summit Series between Team Canada and a Team of Soviet Select players and extending to the subsequent Canada Cup tournaments; and supported and oversaw the collapse of the rival World Hockey Association (WHA). Throughout this time, Eagleson also represented over 150 players, including many of hockey's more prominent players.²⁴

As Dowbiggin explains, it was the formation of the rival WHA during the 1970s which forced the meteoric increase in players' salaries. Dowbiggin noted that hockey players became the highest paid athletes of the four major professional sports in North America during the 1970s. Despite his role as the NHLPA's Executive Director, Eagleson negotiated the demise of the WHA.²⁵ As a result, the NHL remained the only employment option for professional hockey players. Additionally, the collective bargaining agreements negotiated by Eagleson severely restricted free agency such that free agency practically did not exist. By the conclusion of the 1980s, the salaries and the benefits of hockey players were the lowest of the four major professional sports.²⁶

Despite the negative effect that his actions had on the players, Eagleson became an extremely rich and powerful individual during his term as Executive Director.²⁷ Dowbiggin describes not only the unsuccessful challenges to Eagleson's reign as Executive Director of the NHLPA in the late 1980s, but he also provides details of the numerous financial improprieties and questionable tactics that critics ascribed to Eagleson and that formed the basis of the indictments Eagleson faces in the United States. These activities are also the subject of continuing investigations by the Royal Canadian Mounted Police in Canada and by the Law Society of Upper Canada.²⁸

This book is not primarily concerned with the detrimental effect of Eagleson's activities on those players who played in the NHL during Eagleson's reign. The focus is rather on the effect of Eagleson's activities and the actions of the member teams of the NHL on the pensions of those players whose on-ice performances properly

24. *EX-NHL Union Boss Indicted*, *supra* note 9.

25. DOWBIGGIN, *supra* note 10, at 215.

26. *Id.* at 215-19.

27. Dowbiggin describes Eagleson as "without question, the best-connected man in Canada." *Id.* at 195.

28. The Law Society of Upper Canada is the self-regulating body of lawyers practicing in the Province of Ontario, Canada.

ensconced the NHL into the minds of sports fans forever.²⁹

As Dowbiggin describes, Eagleson permitted the NHL to control the Plan in 1969 to the exclusion of the players. Eagleson gave the NHL the right to sit on the Plan's Board of Directors, a group which is responsible for managing the Plan. Previously, this right belonged to the retired NHL players. Dowbiggin emphasizes that the values of the players' pensions plummeted largely because the players were not on the Board of Directors and Eagleson did not represent their interests adequately during collective bargaining negotiations.³⁰

The NHL used the players' twenty percent to twenty-five percent of their after tax salary contribution to the Plan to purchase a group annuity contract after the inception of the Plan. Under the terms of the Plan, the NHL determined when and where it would invest the money. Prior to 1957, the NHL's only financial contribution to the Plan was in the form of profits from the All-Star Games and Stanley Cup Playoffs in which the players voluntarily participated, but commencing in 1957, the owners matched the players' contributions to the Plan.

As Dowbiggin notes, the players' belief in their Plan was not simply a matter of trust. The NHL, through President Clarence Campbell, provided written statements when the NHL established the Plan.³¹ Dowbiggin briefly, yet accurately, highlights the chang-

29. Subsequent to the release of *The Defense Never Rests*, William Houston and David Shoalts, two sports journalists for the *Toronto Globe & Mail*, a newspaper, released their book, *Greed & Glory: The Fall of Hockey Czar Alan Eagleson*. WILLIAM HOUSTON & DAVID SHOALTS, *GREED & GLORY: THE FALL OF HOCKEY CZAR ALAN EAGLESON* (1993). In their book, Houston and Shoalts describe Dowbiggin as the "lone exception" among a group of Canadian journalists who failed to investigate or to write about Eagleson's activities. *Id.* at 174.

30. As Dowbiggin writes:

Hockey players experienced a cruel deception that athletes in other sports had not encountered. Told for years by Clarence Campbell, the owners and even their own union leader that they would come into the best pension plan in sports when they retired, they instead had received pay-outs at subsistence levels and lower. The financial cushion they had dreamed of was just a bag of straw on a cold cement floor. Worse, the players didn't have the slightest idea what had gone wrong with their pension. They had paid out as much as 20 to 25 percent of their after-tax income in some years, that they knew. And interest rates were soaring into double digits in the 1980s as the stars of the 1950s and '60s began collecting their pensions. The only conclusion was that they had trusted, and that trust had been misplaced.

BRUCE DOWBIGGIN, *THE DEFENSE NEVER RESTS* 182 (1993).

31. The statements explained that "[i]t is the confident opinion of the Officers and Directors of the Society that the Plan is so calculated and designed to provide for the participants

es to the Plan from its inception in 1947 through 1967.³² He describes how the purchase of the group annuity contract resulted in three different types of surpluses in the Plan. First, a surplus existed from premium discount credits.³³ Second, a surplus existed from experience rate credits,³⁴ and, lastly, the NHL made surplus contributions to the Plan for players whose pension rights did not vest but which remained in the Plan.

Dowbiggin describes the numerous occasions from the early 1950s through 1968 when the NHL paid these accumulated surpluses to the players. He also particularizes certain key terms of the Plan which were to become significant in *Bathgate*, including Regulation 32, which stated that "[a]ll monies will be held by the [Pension] Society for the benefit of the participant exclusively under the Regulations of the Plan,"³⁵ and Article Four which stated that "no funds contributed or assets of the . . . Plan shall ever revert to or be used or enjoyed by the League or Member Clubs until after the satisfaction of all liabilities . . ." ³⁶ Dowbiggin mentions how the 1967 restatement of the trust agreement (which the NHL necessitated by expanding by six American teams) strengthened the players' interests in the Plan.

Dowbiggin emphasizes the Eagleson-negotiated 1969 collective bargaining agreement with the NHL which resulted in the removal of the retired NHL players from the Board of Directors of the Plan. As Dowbiggin explains, the owners agreed to make the players' contributions to the Plan in exchange for control of the Board of Directors. The owners knew that the Plan required less money than what was actually being contributed to fund its requirements. The owners then used their control of the Board of Directors to rewrite the trust agreement in order to use the surplus Plan funds for contribution holidays and to grab the experience rate credits for their own benefit. As Dowbiggin explains, the NHL argued that the players were trying to reinterpret this poor Eagleson-negotiated 1969 collective bargaining agreement in *Bathgate*. From 1969, the

the maximum possible benefits and protection from the resources available." *Id.* at 187.

32. *Id.* at 188-93.

33. Premium discount credits are the difference in the cost of purchasing a group contract and an individual contract.

34. Experience rate credits are the interest and the capital gains generated by the principal funds invested in the Plan.

35. DOWBIGGIN, *supra* note 10, at 189.

36. *Id.* at 193.

NHLPA under Eagleson relinquished the retired NHL players' rights and their money. Despite the NHL's argument, the Ontario Court (General Division) held that the NHL's interpretation of the events of the 1969 negotiations was in error.³⁷ Eagleson did not have the right to negotiate the removal of the retired NHL players from the Board of Directors. Justice Adams relied on the meeting minutes which reflected an apparent understanding on the part of the retired NHL players that they were not agreeing to surrender their rights to future surpluses.³⁸

Dowbiggin explains that the values of the retired players' pensions plummeted after 1969 for a variety of reasons.³⁹ He particularizes the combination of the effects of inflation, the lack of interest on the part of the trustees of the Plan to protect the retired NHL players, the NHL owners use of the contribution holidays, Eagleson's lack of understanding of pension issues, the numerous time demands on Eagleson which prevented him from dealing with the pension issues properly and, contrary to the well-founded beliefs of the players at the time, the failure of the international hockey tournaments to increase the pensions of the retired NHL players "by one cent."⁴⁰

Several retired NHL players noticed the collapse in the value of their pensions. Baun requested an investigation of the Plan, and, together with Stanley, established a retired NHL players' association to handle the concerns of the retired NHL players. Unfortunately, the retired NHL players were not united in their efforts and Baun's association competed for the membership of other retired NHL players who joined different retired NHL players' associations for various reasons. Baun invested a substantial amount of his own money to advance the pension issue through his association, but unfortunate changes in Baun's financial circumstances prevented him from continuing with his association. Baun transferred his association to Larry Regan, another former NHL player, whose interests and methods in pursuing the pension issue were, in Dowbiggin's view, both passive and conciliatory.⁴¹ As Dowbiggin relates, the ineffectiveness of these efforts allowed Brewer to pursue

37. *Id.* at 311-12.

38. *Id.* at 200-07.

39. *Id.* at 204, 210-11, 225-27.

40. DOWBIGGIN, *supra* note 10, at 226.

41. *Id.* at 230-34.

the pension issue against the NHL.

Dowbiggin builds on his earlier description of Brewer to explain how this one man was able to spearhead this enormous legal challenge. As Dowbiggin explains, Brewer was not a stranger to legal battle with the NHL. He retired from the Maple Leafs at the peak of his career as a result of his unwillingness to absorb Imlach's relentless abuse and punishment. He fought to have his amateur status reinstated to allow him to play with Canada's national hockey team. The NHL's reserve clause concerned Brewer while he hoped that another NHL team would sign him so that he would be able to challenge the reserve clause. Additionally, Brewer was a pioneer in choosing to leave North America to play hockey in Europe. Brewer subsequently played for several other teams in the NHL in the 1970s, including a comeback with the Maple Leafs for the last half of the 1979-80 season when he was forty years old. Despite his comeback, Brewer was not afraid to sue the Maple Leafs to recover expenses the Maple Leafs owed him relating to his comeback. He also commenced an arbitration proceeding against the Maple Leafs relating to the contract which he signed with them for the 1979-80 season.⁴²

One of the significant features of this arbitration proceeding, although Dowbiggin overlooked it, was symptomatic of the problems for players operating under the collective bargaining agreements negotiated by Eagleson with former NHL President John Ziegler.⁴³ Eagleson allowed Ziegler to be the sole and exclusive arbitrator over issues relating to the interpretation and application of the collective bargaining agreements. As a result, Ziegler arbitrated Brewer's proceeding. Because Ziegler, as President of the NHL, represented the member clubs of the NHL in these negotiations, a conflict of interest existed.

Notwithstanding Ziegler's presence as the arbitrator, Brewer succeeded in his arbitration proceeding against the Maple Leafs. Ziegler decided that Brewer was under contract with the Maple Leafs beyond the conclusion of the 1979-80 season and that Brewer was entitled to be paid accordingly.⁴⁴ As a result of this finding,

42. In one of the rare inaccuracies in the book, Dowbiggin mistakenly refers to this arbitration as a lawsuit. *Id.* at 175.

43. Dowbiggin emphasized the importance of Eagleson's relationship with Ziegler when Dowbiggin titled Chapter 17 of *The Defense Never Rests "Ziggy and Iggy,"* a name critics frequently dubbed Eagleson and Ziegler. *Id.* ch. 17.

44. Although he accepted Brewer's arguments as to the proper interpretation of the

Brewer considered his entitlement to pension credits for the additional seasons of his contract with the Maple Leafs. Brewer consulted Eagleson as to his entitlement to these pension credits and Eagleson denied that Brewer had any such entitlement.⁴⁵

Dowbiggin uses Brewer to demonstrate how, apart from the NHL's improper use of the surplus funds, the NHL failed the retired NHL players by not protecting their pensions. Dowbiggin explains how the NHL could have invested twenty-three thousand dollars at ten percent per year in 1970 to guarantee a fifty-four year-old Brewer an eighteen thousand dollars per year pension commencing in 1992. In fact, Brewer and the NHL contributed twenty-eight thousand, five hundred dollars in principal by 1970. As a result, the amount of Brewer's actual pension benefit of eighteen thousand dollars in 1992 was less than what the Plan would have generated with the principal contributions which the NHL made on his behalf prior to 1970.⁴⁶ These figures ignore the interest which the principal contribution would have earned during Brewer's NHL career.⁴⁷

Dowbiggin relates how Brewer was able to organize and to motivate the retired NHL players to fight the pension issue. He describes the efforts which he made to obtain recognition for the concerns of the retired NHL players and the eventual formation of the "Group of Seven," which consisted of the retired NHL players who were plaintiffs in *Bathgate* but did not include Baun.⁴⁸

The issue which surfaced and which served to motivate a large number of the retired NHL players to unite and to take action concerned the matter of the ownership of approximately thirty million dollars of surplus funds which accumulated in the Plan and which the NHL allocated to its team owners in 1983 and in 1987 with Eagleson's acquiescence. These surpluses resulted from experience rate credits.⁴⁹ The NHL allocated to the retired NHL players only those experience rate credits which accumulated in the Plan

standard player contract, Ziegler artificially determined that had the Maple Leafs been aware of the way in which the contract would be interpreted, they would have bought out Brewer's contract. This determination substantially reduced the damages which the arbitrator would have given to Brewer.

45. DOWBIGGIN, *supra* note 10, at 175.

46. *Id.* at 302-03.

47. *Id.*

48. *Id.* at 278-80.

49. DOWBIGGIN, *supra* note 10, at 230, 242-43.

proportionate to the money the players had contributed to the Plan before 1969. The team owners either took the balance of the money and distributed it between themselves or they used the money to fund the new senior player benefit plan which John Ziegler had negotiated with the NHLPA in subsequent collective bargaining agreements. A retired NHL player would receive money under the new senior player benefit plan only if he played in four hundred NHL games or more.⁵⁰ Although the propriety of the allocation of these surplus funds was the issue in *Bathgate*, other activities occurred which affected the Plan from 1969 through 1986. Dowbiggin does an excellent job summarizing these changes, explaining their significance, and assessing the motivations of the NHL in making these changes.

Dowbiggin's treatment of *Bathgate* focuses on the personalities and the issues involved in the lawsuit. The litigation revolved around the entitlement to the experience rate credits which the NHL allocated in 1983 and in 1987. The lawsuit was not a fight involving the other issues which Dowbiggin raises in connection with the administration of the Plan. In fact, the NHLPA was not a party to the lawsuit, although the NHL, at one point, considered seeking the addition of the NHLPA to the litigation.⁵¹

The issue in *Bathgate* was not completely understood by a majority of the retired NHL players who spearheaded the lawsuit. This was the responsibility of Mark Zigler, the players' litigation counsel. As Dowbiggin describes, internal issues and clashes existed which often divided the retired players during the course of the litigation.

Dowbiggin accurately and succinctly elaborates on the parties' respective positions in the lawsuit. As Dowbiggin explains, Zigler advanced four arguments on behalf of the players. First, under the 1947 Regulations of the Plan, the trust established by the Plan was

50. *Id.* at 241-45.

51. The NHLPA requested intervenor status when the NHL appealed the lower court's ruling and the court permitted the NHLPA's request upon consent. *Bathgate v. NHL Pension Society*, 16 O.R. (3rd) 761, 763 (1994). The NHLPA's interest in intervening focussed on the NHLPA's concern with the possible effect of the trial decision of Justice Adams on its members. *Id.* at 779-80. Ultimately, the decision of the Court of Appeal for Ontario in *Bathgate* may prove to be more problematic for the NHLPA than might otherwise have been the case had it not participated in the appeal. The court stated that "[w]e are . . . not prepared to find that the judgment does not indirectly effect any benefits of entitlements of player participants . . . after June 30, 1992." *Id.* 780.

irrevocable and required that the contributed money and surpluses belonged to the retired NHL players. Second, the Plan was a defined contribution plan as opposed to a defined benefit plan as the NHL described it in non-official documents. Third, the trustees of the Plan had a fiduciary obligation to protect the retired NHL players from the effects of inflation. In order to satisfy this obligation, the Plan required the trustees to distribute surpluses to the retired NHL players, and the NHL breached its duty to the players when it failed to seek the court's approval prior to allocating the surpluses in 1983 and in 1987. Lastly, the NHLPA did not have a mandate to represent either the retired players or to negotiate away the retired NHL players' representation on the Board of Directors.⁵² For these reasons, Zigler argued that the retired NHL players were entitled to reimbursement of the surplus funds which the NHL removed from the Plan.

In response to this argument, counsel for the NHL advanced the following four arguments. First, the Plan was a defined benefit plan until 1986 and the NHL delivered any defined benefits to the players. Second, the NHL reserved the right to amend the Plan without notification, and the NHL was justified in making the amendments to the Plan and claiming the surplus funds as it did in 1983 and in 1987. Third, the fact that the NHL paid previous surpluses to the players was irrelevant, and, finally, as a result of the 1969 negotiation, the players forfeited their rights to the surpluses.⁵³

Dowbiggin summarizes the findings of Justice Adams in the court's 150 page decision which found for the retired NHL players except for their request that the court replace the trustees of the Plan. Justice Adams ruled that the surplus belonged to the retired NHL players. The judge was critical of the activities of the NHL, the NHLPA, and the Plan when, in 1986, the NHL and the NHLPA purported to use money in order to fund the senior player benefit plan which was "of little or no value to these former players."⁵⁴ Justice Adams further castigated Eagleson for the "apparent moral shortcomings" in his conduct as Executive Director of the NHLPA.⁵⁵ Justice Adams further ordered that the NHL should pay the legal costs of the retired NHL players' application and that the

52. DOWBIGGIN, *supra* note 10, at 304-05.

53. *Id.* at 303.

54. DOWBIGGIN, *supra* note 10, at 140.

55. *Id.* at 312.

NHL should not use money from the Plan to pay for the legal costs. Although a reference⁵⁶ has not determined the dollar value of Judge Adams' decision, the pensions of the retired NHL players might be doubled, tripled, or quadrupled as a result of the decision which the Court of Appeal for Ontario upheld.⁵⁷

Dowbiggin also comments on the companion litigation commenced by Bob Dailey and Reggie Leach, former players of the Philadelphia Flyers, who advanced claims under the Employment Retirement Income Security Act⁵⁸ in the United States.⁵⁹ As a result of the decision of the Ontario Court (General Division) in *Bathgate* and subsequent to the release of *The Defense Never Rests*, the United States Court of Appeals for the Third Circuit dismissed this action due to the existence of the Canadian litigation,⁶⁰ and the United States Supreme Court denied certiorari.⁶¹

In addition to these proceedings, Dowbiggin describes the recent process under which the Ontario government restored the right of the retired NHL players to be represented on the Board of Directors of the Plan.⁶² Several years earlier, Eagleson wrote to a personal friend in the Ontario government to seek an exemption from this requirement under Ontario law that the retired NHL players must be represented on the Board of Directors of the Plan.⁶³ This exemption was granted. The Ontario government subsequently determined that a basis did not exist for granting the exemption and revoked it.

For years, the NHL, its team owners, and Eagleson operated the NHL as their own private domain to the detriment of the retired NHL players. Their actions, some of which were improper if not illegal, remained secretive and guarded. Society should recognize the excellent and difficult work of seven determined retired NHL players, and writers such as Dowbiggin, in bringing the activities of the NHL, its team owners, and Eagleson to light. Next, the courts must continue to remedy the injustices. One can only hope that Gary Bettman, the current Commissioner of the NHL, and, Robert

56. See *supra* note 6 and accompanying text.

57. DOWBIGGIN, *supra* note 10, at 313.

58. 29 U.S.C.A. §§ 1001-1461.

59. DOWBIGGIN, *supra* note 10, at 314.

60. *Dailey v. NHL*, 987 F.2d 172 (3d Cir. 1993), cert. denied 114 S.Ct. 67 (1993).

61. *Dailey v. NHL*, 114 S.Ct. 67 (1993).

62. DOWBIGGIN, *supra* note 10, at 314.

63. *Id.* at 249.

Goodenow, the current Executive Director of the NHLPA, will not ignore the interests of the retired NHL players whose love and commitment to hockey was, and continues to be, extraordinary

The Defense Never Rests is thorough, accurate, entertaining, insightful, and a bittersweet account of life in the NHL. At some point, the NHL may eliminate fighting on the ice, but the NHL may never eliminate fighting off the ice.⁶⁴

64. On April 18, 1994, the NHL filed its application for leave to appeal from the *Bathgate* decision of the Court of Appeal for Ontario.