

NATIONAL HOCKEY LEAGUE JURISPRUDENCE: PAST, PRESENT AND FUTURE

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I. INTRODUCTION

The focal point of most professional sports litigation is the League Commissioner. The National Hockey League ("NHL") is no exception and this article will look at the scope of the NHL Commissioner's authority under the Collective Bargaining Agreement ("CBA"), the League Constitution, and the applicable case law. This article will trace litigation relating to the Commissioner's decision-making, dispute resolution, and disciplinary powers,¹ and it will conclude with a discussion of what legal problems the NHL could face as it moves forward into the twenty-first century.

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1. The three powers of the NHL Commissioner that will be referred to throughout this article were derived from Gregor Lentze, *The Legal Concept of Professional Sports Leagues: The Commissioner and an Alternative Approach from a Corporate Perspective*, 6 MARQ. SPORTS L.J. 65 (1995).

II. THE PRESENT COMMISSIONER'S BACKGROUND

The present NHL Commissioner, Gary B. Bettman, was formerly General Counsel and Vice-President of the National Basketball Association ("NBA") where his prowess for labor negotiations, controlling professional athletes' salaries through a salary cap, and limiting free agency rights became well known.² On December 11, 1992, NHL team owners presented Bettman with an employment agreement.³ Despite the fact that he had no prior experience in professional hockey, a five-year deal was signed and became effective as of February 1993.⁴ This employment agreement provided that Bettman would become the first Commissioner of the NHL, and that the position of NHL President would cease to exist.⁵ Bettman's employment agreement also provided that his duties, powers and responsibilities exceeded those formerly accorded to the President of the NHL.⁶ Specifically, Bettman was given powers customarily associated with the position of chief executive officer of a business enterprise and of Commissioner of a major professional sports league.⁷

Unlike former NHL President John Ziegler, who came through the Detroit Red Wings organization, Bettman does not manage the league with committees composed of team personnel. Instead he increased the league office staff to do much of the work previously farmed out to committees. Obviously his strategy must be working as Ziegler was forced to resign shortly after the 1992 strike was settled, and the league's board of governors was pleased enough with Bettman's work to

2. "As Quebec Governor Marcel Aubut said from Florida, 'We have everything under control but our labor costs.' There is no one better equipped for the job than Bettman." Michael Farber, *NHL Opens Up to an Outsider, Bettman Breaks Mold*, THE GAZETTE (Montreal), Dec. 12, 1992, at C1. "Bettman's responsibilities with the NBA have included labor negotiations and administering the salary cap - both vital areas to the NHL If the NHL were to try to implement a salary cap, Bettman would be the ideal administrator." *Sports News*, ASSOCIATED PRESS, Dec. 9, 1992. "Many hockey owners have expressed admiration and a little envy over how the NBA has prospered for the last dozen years while the NHL has stagnated Part of the NBA's prosperity is due to its salary cap which limits overall team wages." Joe Lapointe, *NHL Considers an NBA Officer*, N.Y. TIMES, Nov. 29, 1992 at § 8 p. 3.

3. See Farber, *supra* note 2 at C1.

4. See *id.*

5. See *id.*

6. See *id.*

7. See Farber, *supra* note 2 at C1.

extend his contract through June 2003.⁸ The extension occurred notwithstanding a lockout in October 1994 that postponed the NHL season for 3 1/4 months - the longest schedule stoppage in the history of major sports.⁹ During this labor stoppage Bettman was able to hammer out a deal with the National Hockey League Players Association ("NHLPA") and establish his leadership role.¹⁰

While Bettman may be cutting labor costs to appease the owners, there is little doubt that his efforts have helped the league, *and* the players. For instance, World Cup Broadcasts reached 60 million cable homes,¹¹ sales of NHL merchandise reached \$1 billion for the fiscal year ending June 1994 and stayed level in fiscal 1995 despite the lockout and the short 48 game season,¹² a five-year, \$155 million television contract was signed with Fox, which brings each team about \$4 million a season,¹³ each team's share of merchandising revenues in 1994 was about \$1 million,¹⁴ and to increase international marketing opportunities, the NHL and NHLPA agreed that players would participate in the 1998 Olympics in Nagano Japan under a "Dream Team" format.¹⁵ As part of that deal, the labor agreement was extended through the 1999-2000 season.¹⁶

The guarantee of labor peace has been a selling point to potential expansion owners. NHL franchises are increasing in value as four franchises were sold in 1995.¹⁷ The Los Angeles Kings sold for \$113.75 million, the Dallas Stars for \$84 million, the Quebec Nordiques were bought for \$75 million and moved to Denver to become the Colorado Avalanche, and the Winnipeg Jets were sold for \$68 million and moved to Phoenix to become the Coyotes.¹⁸ Further, the average player's salary

8. See Helene Elliott, *A Year After a Bitter Labor Dispute Resulted in Lockout, NHL Still*, L.A. TIMES, Jan. 20, 1996, at C1.

9. See Bob Jordan, *Gary Bettman Avoids Issue of Devils Moving*, ASBURY PARK PRESS, June 18, 1995, at H19.

10. See Farber, *supra* note 2 at C1.

11. See Gare Joyce, *Commissioner Bullish on NHL's Future but League Won't Dilute Talent Pool by Expanding for the Sake of Making Grab at Expansion Bucks*, ROCKY MOUNTAIN NEWS, Oct. 13, 1996, at 8C.

12. See Elliott, *supra* note 8, at C1.

13. See *id.*

14. See *id.*

15. See *id.*

16. See Elliott, *supra* note 8 at C1.

17. See *id.*

18. See *id.*

(not including bonuses) has increased from \$211,401 in 1989-90 to \$850,000 in 1995-96.¹⁹ Revenues and salaries will probably continue to increase at the present rate as the NHL has entered into large corporate marketing partnerships with deep pocket companies such as Mastercard International, Coca-Cola, Nike, and Anheuser-Busch.²⁰ The 1995-96 NHL All-Star Game was seen in the United States on Fox, in Canada on both English and French-language television, and ESPN broadcast it in 130 countries.²¹

While Bettman appears to be advancing hockey worldwide through strategic marketing, it is important to understand where he derives his power and to what extent he can exercise his authority.

III. THE SCOPE OF THE NHL COMMISSIONER'S AUTHORITY

The Commissioner derives three different powers from the League Constitution, By-Laws and the CBA: (1) decision-making; (2) dispute resolution; and (3) disciplinary power.²² The powers and duties of the Commissioner are set forth in Article VI, Section 6.3.²³ These provisions define the Commissioner's authority to resolve disputes among member clubs, players, coaches and League officials; appoint committees; interpret the League Constitution and By-Laws; appoint officers and assistants; incur expenses on behalf of the League; prepare schedules of games; select League officials; and discipline officials, players and coaches.²⁴

A. Decision Making

Article VI section 6.3 of the NHL Constitution gives authority to the Commissioner for "general supervision and direction

19. *See id.* Using a "mixed dollar salary formula" where salaries of players paid in Canadian dollars are averaged in without these amounts being converted to U.S. dollars. *See id.*

20. *See* Len Hockberg, *Hockey Heads for Thick Ice; Stability Increasing Around the NHL*, THE WASHINGTON POST, Jan. 22, 1996, at C1.

21. *See id.*

22. *See* Lentze, *supra* note 1, at 73. *See also* Professional Sports, Ltd. v. Virginia Squires Basketball Club, Ltd. Partnership, 373 F. Supp. 946, 952 (W.D. Tex. 1974). "As is true with respect to the league itself, the commissioner also has those powers which are granted by the constituent members." *Id.*

23. Adopted on June 25, 1993.

24. *See* Lentze, *supra* note 1, at 73-76.

of all the business and affairs of the league . . .”²⁵ “The Commissioner may disapprove any contract entered into by a franchise or with television networks, and no sale or trade by a club is binding without approval of the Commissioner.”²⁶ Therefore, the Commissioner “has the power to invade directly into the affairs of the teams themselves.”²⁷ “Since the Commissioner conducts the investigation and submits the application” for admission or transfer of membership together “with a recommendation to the owners,” he has a lot of influence on their decisions.²⁸ Moreover, as centralized administrator in control of the league, “the Commissioner interprets and establishes league policy and procedure.”²⁹

In the past, the NHL President has been faced with several challenges to his decision making authority. Alleged violations of federal antitrust law and the Lanham Act were the most prominent of these challenges.

1. Antitrust Litigation

There are two primary contexts concerning the NHL in which section one of the Sherman Act arise dealing with labor market cases.³⁰ “The first involves claims by prospective players who are prevented from playing for any team in the league either permanently or temporarily because of league rules or practices establishing entry qualifications or grounds for sus-

25. NHL CONST. art. VI, section 6.3 (a). The full text of § 6.3(a) provides: “GENERAL. Subject to the authority of the Board of Governors provided for in the Constitution and By-Laws and other governing documents of the League, the Commissioner shall have the responsibility for the general supervision and direction of all business affairs of the League and shall have such other powers as may be necessary to fulfill his responsibilities. The Commissioner shall be responsible for the coordination and general supervision of policy matters that relate to property rights of the Member Clubs or that are other than in the normal course of operations of the League. The Commissioner’s powers and duties shall include, but shall not be limited to, the powers specified in the Constitution and By-Laws and other governing documents, the powers exercised by, and duties assigned to the League President prior to 1993, and all such other powers and duties as may be granted or assigned to the Commissioner by the Board of Governors. The Commissioner shall serve as the principal public spokesman for the League.” *Id.*

26. Lentze, *supra* note 1, at 74.

27. *Id.*

28. *Id.*

29. *Id.*

30. See Gary R. Roberts, *Reconciling Federal Labor and Antitrust Policy: The Special Case of Sports League Labor Marketing Restraints*, 75 GEO. L.J. 19, 22 (1986). 15 U.S.C. § 1 (1982) provides in relevant part: “Every contract, combination . . . or conspiracy, in restraint of trade . . . is . . . illegal.”

pension.”³¹ In hockey, these cases “have involved league rules preventing participation by players who have not attained a certain age³² and who have a particular physical disability.”³³

The second context concerns league rules that “limit each player’s ability to determine with which league member team he will negotiate or play.”³⁴ The League imposes these “player allocation rules” to ensure that its teams remain competitive.³⁵ The League and individual team owners have a vested interest in disbursing talented players relatively evenly throughout the League.³⁶ Although the owners want their team to prevail at the end of each season, they realize that evenly matched teams and close games will increase their revenues. More people will come to the arenas or watch the NHL on television if a game is competitive, and if a team is fortunate enough to make the playoffs, the owner’s revenues increase substantially the longer each playoff series lasts.

Antitrust problems can arise, however, when players challenge their “right” to earn for their talent what a free market would bear.³⁷ Although players also realize the positive effect close contests have on team and League coffers, players argue that player allocation rules effectively eliminate competition between League franchises in bidding for players.³⁸ Many players feel that if a regular business or tradesperson can negotiate with several different companies in order to secure themselves the highest salary, players should be able to do the same despite the fact that their salaries are already substantially higher than most non-athletes. As a result, players have challenged the League’s player entry draft and reserve systems under section one in an attempt to increase their salaries through a more competitive free market.³⁹

31. *Id.* (citing *Linseman v. World Hockey Ass’n*, 439 F. Supp. 1315, 1317 (D. Conn. 1977)).

32. *Roberts*, *supra* note 30, at 22.

33. *Id.* (citing *Neeld v. NHL*, 594 F.2d 1297, 1298-1300 (9th Cir. 1979)).

34. *Id.* at 23.

35. *See id.* at 23-24.

36. *See Roberts*, *supra* note 30, at 23-24.

37. *See id.* at 24-25.

38. *See id.*

39. *See id.* The “reserve system” makes the player the “property” of only one NHL team and its minor league affiliates. A “reserve clause” is a clause in a standard player contract that allows the franchise with which the player signs to keep the player in that organization under the terms of the contract. For a detailed history of the reserve clause

"No-tampering" rules that prohibit soliciting players under contract with other League teams, and other roster size limitations, have been identified as other areas that could give rise to section one lawsuits.⁴⁰

Although some commentators contend that the "league should be treated as a single business firm whose constituent subunits (the member clubs) are incapable of 'conspiring' with each other when they act jointly to operate their league business,"⁴¹ the argument can definitely be made that each individual owner has his or her own economic interests in mind when buying a franchise and negotiating contracts with players.⁴² Players and owners need to have rules governing their interactions. The CBA, By-Laws and Constitution exist to determine what acts are permissible. However, the extent to which these documents govern and the effect of the "nonstatutory labor exemption" often become points of contention.

The nonstatutory labor exemption, which was the center of a recent dispute involving the NHL,⁴³ was created by the courts to protect provisions in a CBA which restrain trade and other anti-competitive practices, as long as these conditions have a positive effect on labor.⁴⁴

The Wagner Act of 1935 and the National Labor Relations Act (NLRA) were enacted to ensure that labor and management resolve their disputes privately and without governmental or judicial interference.⁴⁵ Conflict often arises between players and management when management asserts that a

see *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, 351 F. Supp. 462, 505-9 (E.D. Pa. 1972) and for specific contractual language see *Boston Professional Hockey Club v. Cheevers*, 348 F. Supp. 261, 264 (D. Mass.), *remanded on other grounds*, 472 F.2d 127 (1st Cir. 1972).

40. See Roberts, *supra* note 30, at 25.

41. *Id.* at 21.

42. See George Vecsey, *Oilers Find the Winning Edge*, N.Y. TIMES, Jan. 11, 1982 at C1. Peter Pocklington, the owner of the Edmonton Oilers bought the services of Wayne Gretzky for \$850,000 in the form of personal services contract from Nelson Skalbania and he did so in order that the NHL could not steal the talented young man when the Oilers were accepted into the older league (from the WHA). See *id.* Pocklington later traded Gretzky for players and cash in 1988. See *id.* Pocklington admitted he purchased the Oilers, "as an ego trip, a heck of a way to get my jollies in public." *Id.*

43. See *National Hockey League v. National Hockey League Players' Association*, 789 F. Supp. 288 (D. Minn. 1992).

44. See Peter N. Katz, *A History of Free Agency In the United States and Great Britain: Who's Leading the Charge?*, 15 COMP. LAB. L.J. 371, 389 n.102 (1994).

45. See Roberts, *supra* note 30, at 22.

dispute is a "pure" labor dispute such that the NLRA, and not antitrust law, applies.⁴⁶ Management argues that it is inconsistent to encourage private collective bargaining agreements and allow courts to use antitrust law to declare them invalid.⁴⁷ Players, however, contend that although they participated in the collective bargaining process, the courts should intervene to prohibit anti-competitive practices that do not benefit labor and were either not bargained for, or unforeseen at the time of negotiation.⁴⁸

In 1972, the first of two antitrust cases to challenge the President's power to enforce the NHL's reserve clause came before the courts.⁴⁹ In *Philadelphia World Hockey Club v. Philadelphia Hockey Club*,⁵⁰ the legality of the NHL's reserve clause was contested by the WHA. A claim under section one of the Sherman Act alleged that the reserve clause constituted an unlawful boycott against the players and a section two claim⁵¹ asserted that the reserve clause allowed the NHL to monopolize talented players which prevented new Leagues (i.e., the WHA) from competing.⁵² The section one claim was effectively alleged a restraint on the "labor market" while the section two claim involved the "product market."⁵³ The district court that heard the plaintiffs motion for preliminary injunction found a likelihood of success on the merits on the section two claim, but after expressing doubts about the probability of the WHA succeeding, refrained from ruling on their section one claim "because of the nature of the hockey sports industry, and the relative paucity of litigation on this type of reserve clause. . . ."⁵⁴

Another case involving the reserve clause, *Boston Professional Hockey Association v. Cheevers*,⁵⁵ held that the nonstat-

46. *See id.*

47. *See id.* at 31.

48. *See id.*

49. *See* Robert, *supra* note 30, at 30.

50. 351 F. Supp. 462 (E.D. Pa. 1972).

51. 15 U.S.C. §2 provides in pertinent part: "Every person who shall monopolize . . . or conspire to monopolize . . . any part of trade or commerce . . . shall be . . . guilty of a misdemeanor." *See Philadelphia*, 351 F. Supp. at 505.

52. *See* Roberts, *supra* note 30, at 30-31; *Philadelphia*, 351 F. Supp. at 503-04.

53. *See* Roberts, *supra* note 30, at 31; *Philadelphia*, 351 F. Supp. at 503-14.

54. *Philadelphia* 351 F. Supp. at 503-04. *See* Roberts, *supra* note 30, at 31.

55. 348 F. Supp. 261 (D. Mass), *remanded on other grounds*, 472 F.2d 127 (1st Cir. 1972).

utory labor exemption did not apply. The court found that even though the reserve clause in the standard players contract had been collectively bargained for, it was doubtful that the reserve clause itself was the product of collective bargaining negotiations.⁵⁶ The Bruins had attempted to enjoin Gerry Cheevers and Derek Sanderson from playing for the Cleveland Crusaders and Philadelphia Blazers of the newly formed WHA.⁵⁷ In their defense, the players claimed that the reserve clause violated section one and the Bruins responded by raising the nonstatutory labor exemption.⁵⁸ In finding that the exemption did not apply, the judge held that the Bruins had not shown a likelihood of success on the merits that the reserve clause would be deemed legal under the Sherman Act, nor had they proved irreparable harm.⁵⁹ After evaluating the balance of the hardships on both parties the court held:

it would appear that the balance of hardship from injunctive relief herein would clearly run in favor of the defendant hockey players, who have a limited number of high-earning years before them, having in their mind their respective ages and the rigors of playing professional hockey with the always present possibility of career curtailment caused by injury.⁶⁰

Franchises have also asserted antitrust claims challenging the NHL's alleged anti-competitive activities. In *Seattle Totems Hockey Club, Inc. v. The National Hockey League*,⁶¹ the Totems, a Western Hockey League team, were awarded a "conditional" NHL franchise in 1974 which was to commence play in 1976-77 if the owner of the Totems fulfilled certain conditions.⁶² The owner did not fulfill the conditions and consequently Seattle was not awarded an NHL franchise.⁶³ The Totems then filed suit, but both the district court and the appellate court dismissed Seattle's antitrust claims that alleged that "the NHL's anti-competitive activities caused the Totems to be unable to secure a WHA franchise."⁶⁴ In determining the damage suffered by the Totems, the district court found that

56. See Roberts, *supra* note 30, at 68; *Boston*, 51 F. Supp. at 268.

57. See Roberts, *supra* note 30, at 68; *Boston*, 51 F. Supp. at 262-64.

58. See Roberts, *supra* note 30, at 68; *Boston*, 51 F. Supp. at 268.

59. See Roberts, *supra* note 30, at 69; *Boston*, 51 F. Supp. at 265-69.

60. *Boston*, 251 F. Supp. at 270.

61. 783 F.2d 1347 (9th Cir. 1986).

62. See *Seattle* 783 F.2d at 1350.

63. See *id.* at 1349.

64. *Id.* at 1351.

their damages were not based on the value of an NHL franchise at that time, but instead were based on the value of a WHA franchise in Seattle at the time they were not permitted to join the WHA.⁶⁵ This burden proved to be insurmountable and the Totems were unable to provide enough evidence to establish the value of a WHA team in Seattle in a "hypothetical economic free market."⁶⁶

The landmark NHL antitrust case is *McCourt v. California Sports, Inc.*,⁶⁷ which revolved around former NHL By-Law 9A. By-Law 9A provided that after a player became a free agent and signed a contract with a different NHL team, his original team had the right to an "equalization payment" (i.e. players, draft choices or cash).⁶⁸ If the two teams could not agree on the appropriate method of payment each team would submit a proposal and a neutral arbitrator would be called upon to select one of the two proposals.⁶⁹

After the Detroit Red Wings signed goaltender Rogatien Vachon in 1978, the Red Wings' leading scorer and top rookie for the 1977-78 season, Dale McCourt, was selected as the appropriate "equalization payment" and his contract was assigned to Vachon's former team, the Los Angeles Kings.⁷⁰ Instead of reporting to the Kings, McCourt brought suit alleging that By-Law 9A violated section one.⁷¹ The United States District Court for the Eastern District of Michigan found in favor of McCourt stating, "By-Law 9A cannot be justified by any legitimate business purpose to achieve the NHL's goal of maintaining competitive balance."⁷² The district court further articulated that, "[B]ylaw 9A was not the product of bona fide arm's length bargaining . . . but . . . was incorporated into the [CBA] in the identical language it contained when it was first adopted by the League."⁷³

After the NHLPA was formed, the CBA provided that "[B]ylaw 9A [was] a fair and reasonable term of employ-

65. *See id.*

66. *Seattle*, 783 F.2d at 1351.

67. 600 F.2d 1193 (6th Cir. 1979).

68. *See McCourt*, 600 F.2d at 1195.

69. *See id.* *See also* Katz, *supra* note 44, at 389 n.102.

70. *See McCourt*, 600 F.2d at 1196.

71. *See id.*

72. *Id.* at 1196; Katz, *supra* note 44, at 389 n.102.

73. *McCourt*, 600 F.2d at 1197; Katz, *supra* note 44, at 389 n.102.

ment.”⁷⁴ As a result, the Sixth Circuit reversed the district court and found:

that the inclusion of the reserve system in the [CBA] was the product of good faith, arm’s-length bargaining, and that what the trial court saw as a failure to negotiate was in fact simply the failure to succeed, after the most intensive negotiations, in keeping an unwanted provision out of the contract.⁷⁵

This decision has been cited as signaling the “beginning of the end of the true nonstatutory labor exemption.”⁷⁶ One commentator has construed *McCourt* as taking a holistic view of the “give and take” bargaining process, reasoning that the apparent anti-player provisions of By-Law 9A were upheld because they may have been construed as a compromise agreed to in exchange for player benefits.⁷⁷

Two decisions involving the NHL applied section one of the Sherman Act when the League attempted to control the location of a member franchise.⁷⁸ In *Ralston Purina v. National Hockey League*,⁷⁹ a group of investors had agreed to buy the St. Louis Blues from Ralston Purina and move the team to Saskatoon, Saskatchewan.⁸⁰ Former NHL President John A. Ziegler and League members enforced the League Constitution, which prohibited franchise movement without unanimous team approval, and disapproved the move.⁸¹ The League found other investors that kept the team in St. Louis and avoided having the Blues move to a small market Canadian city.⁸² The League’s actions reportedly resulted in a June 1985 settlement agreement with Ralston Purina after the company filed a \$60

74. Katz, *supra* note 44, at 389 n.102; *McCourt*, 600 F.2d at 1195.

75. *McCourt*, 600 F.2d at 1203. See Katz, *supra* note 44, at 389 n.102.

76. Katz, *supra* note 44, at 389.

77. See *id.*

78. *San Francisco Seals, Ltd. v. NHL*, 379 F. Supp. 966, (C.D. Cal. 1974) (granting motion of NHL for summary judgment). The *San Francisco Seals* case involved an attempted franchise relocation without league approval. See *id.* at 971. The California Golden Seals hockey team proposed to move from Oakland Cal., to Vancouver, B.C. See *id.* The trial court, by summary judgment, held lawful the enforcement of the league constitution, which made no provision for franchise relocation. See *id.* at 972. The other case was *Ralston Purina v. National Hockey League*, No. 83-1264 (E.D. Mo., filed May 23, 1983).

79. No. 83-1264 (E.D. Mo. filed May 23, 1983).

80. See Daniel S. York, *The Professional Sports Community Protection Act: Congress’ Best Response to Raiders?*, 38 HASTINGS L.J. 345, 351 (1987) (citation omitted).

81. See *id.* (citation omitted).

82. See *id.* (citation omitted).

million antitrust suit.⁸³

In recent years, Bettman has also attempted to control the ownership and number of franchises by attempting to keep the Florida Panthers in Florida,⁸⁴ by providing incentives for the Edmonton Oilers to stay in Edmonton,⁸⁵ and by pulling the reins on expansion despite interest from several cities.⁸⁶

2. Trademark Litigation

Trademark statutes generally provide that a person or entity cannot use a trademark or emblem that will cause consumers to be confused as to what product they are purchasing. The NHL has been involved in only a few cases regarding trademark infringements. However, the number of cases litigated in this area is bound to increase.

In *Boston Professional Hockey Association v. Dallas Cap Emblem Manufacturing Inc.*,⁸⁷ the NHL and thirteen league teams sued Dallas Cap to enjoin them from manufacturing and selling embroidered emblems depicting the individualized symbol of each team.⁸⁸ Twelve of the teams brought their action under section 32 of the Lanham Act and one team, the Toronto Maple Leafs, did not have a federally registered trademark and therefore its action was based on section 42(a).⁸⁹

The League had an exclusive licensing agent (National Hockey League Services "NHLS") and that agent granted only one manufacturer the exclusive license to manufacture the embroidered team emblems.⁹⁰ Dallas Cap was not granted an exclusive license by NHLS, but chose to manufacture and sell the embroidered emblems without permission.⁹¹ The plaintiffs subsequently sued and the Fifth Circuit Court of Appeals held that the defendant had substantially duplicated plaintiffs'

83. See *id.* (citation omitted).

84. See Cindy Krischer Goodman, *Huizenga Needs NHL Nod To Move Panthers*, MIAMI HERALD, Jan. 8, 1996, at B1.

85. See *Oilers In Ticket Crunch*, ORLANDO SENTINEL, May 29, 1996, at C4.

86. See *NHL Reduces List of Expansion Candidates to Six*, REUTERS NORTH AMERICAN WIRE, Feb. 19, 1997.

87. 510 F.2d 1004 (5th Cir.), *cert denied*, 423 U.S. 868 (1975) (herein *Dallas Cap*).

88. See Joseph P. Bauer, *A Federal Law of Unfair Competition: What Should Be The Reach of The Lanham Act?* 31 UCLA L. REV. 671, 730 (1984); *Dallas Cap*, 510 F.2d at 1008.

89. See Bauer, *supra* note 88, at 730 n.232; *Dallas Cap*, 510 F.2d at 1009-12.

90. See Bauer, *supra* note 88, at 730; *Dallas Cap*, 510 F.2d at 1009.

91. See Bauer, *supra* note 88, at 730-31; *Dallas Cap*, 510 F.2d at 1009.

trademarks without their consent and, in doing so, confused the public.⁹² The court found that, “[t]he confusion . . . requirement is met by the fact that the defendant duplicated and sold [the embroidered emblems] to the public knowing that the public would identify them as being the teams’ trademarks.”⁹³

Despite being of no precedential value in the United States, *National Hockey League v. Pepsi-Cola Canada Ltd. / Pepsi-Cola Canada Ltee.*,⁹⁴ decided by the Supreme Court of British Columbia, is very illustrative of “ambush techniques” used by companies in order to associate themselves with a sporting event and weaken a competitor’s official sponsorship.⁹⁵ In this case, Pepsi established an event known as the “Diet Pepsi \$4,000,000 Pro Hockey Playoff Pool,” referring to it as the “Pro Hockey Pool” instead of the “NHL Playoff Pool.”⁹⁶ Pepsi also avoided using the trademarked names of the teams like the “Boston Bruins” for example, and instead used only the names of the city, i.e., “Boston,” for example.⁹⁷ These techniques, advertised during the NHL playoffs by the Canadian Broadcasting Corporation’s (“CBC”) “Hockey Night in Canada” (“HNIC”), represented the use of disclaimer language to ambush a competitor.⁹⁸

The Coca Cola Company (“Coke”) had previously entered into a licensing agreement with NHLs to have Diet Coke designated as “the official Soft Drink of the NHL.”⁹⁹ Pepsi included a disclaimer in an attempt to distance itself from the NHL, but its television advertisements featured ex-NHL coach and host of HNIC’s “Coach’s Corner,” Don Cherry (“Grapes”), “sitting in a locker room with several men dressed in generic hockey uniforms.”¹⁰⁰ Although Diet Coke was “the official Soft Drink of the NHL,” the NHL (and not the NHLs) held the rights to advertise during any NHL games televised in Canada.¹⁰¹ The NHL sold their rights to Molson Breweries of Can-

92. See Bauer, *supra* note 88, at 731; *Dallas Cap*, 510 F.2d at 1011-12.

93. *Dallas Cap*, 510 F.2d at 1012. See Bauer, *supra* note 88, at 731.

94. 6 W.W.R. 216 (B.C. 1992).

95. See Lori L. Bean, *Ambush Marketing: Sports Sponsorship Confusion and the Lanham Act*, 75 B.U.L. Rev. 1099, 1107 (1995).

96. See *id.* at 1108; *Pepsi*, 6 W.W.R. at 219.

97. See Bean, *supra* note 95, at 1108; *Pepsi*, 6 W.W.R. at 222.

98. See Bean, *supra* note 95, at 1108; *Pepsi*, 6 W.W.R. at 219.

99. See Bean, *supra* note 95, at 1108; *Pepsi*, 6 W.W.R. at 221.

100. Bean, *supra* note 95, at 1108-09. See *Pepsi*, 6 W.W.R. at 223-24.

101. See Bean, *supra* note 95 at 1108; *Pepsi*, 6 W.W.R. at 221.

ada Ltd. who in turn granted Pepsi exclusive rights to advertise during NHL games.¹⁰²

The NHL asserted that the contest and the ads featuring Cherry were likely to create a "public confusion about the relationship between the NHL and Pepsi," possibly associating the NHL with the contest.¹⁰³ Despite this argument, the Supreme Court of British Columbia ultimately held in favor of Pepsi, and dismissed the NHL's claims which included "trademark infringement, passing off, and unlawful interference with . . . contractual relations."¹⁰⁴ The court found that Pepsi had not confused the public into believing that Pepsi and the NHL were affiliated and that Pepsi had sufficiently conveyed this nonaffiliation to the public through the use of disclaimers in its advertisements and promotions.¹⁰⁵

In a more recent Lanham Act case involving the NHL, *National Hockey League v. National Hockey League Players' Association*,¹⁰⁶ Judge Thomas Griesa's Memorandum Order stated:

The counterclaims make a sufficient allegation of violation of the Lanham Act. It is alleged that the counter claim defendants have improperly caused the use of the names of members of NHLPA on jerseys sold by the counterclaim defendants, and that this results in consumer confusion indicating that the person whose name is used sponsors or endorses the jerseys. This is a sufficient pleading to withstand a motion to dismiss.¹⁰⁷

Although this case is only a memorandum decision, it shows how the NHLPA has begun to protect the names and likenesses of its members.¹⁰⁸ Another area in which the NHLPA has taken an active stance is the area of dispute reso-

102. See *Pepsi*, 6 W.W.R. at 221.

103. *Id.* at 224.

104. Bean, *supra* note 95, at 1109. See *Pepsi*, 6 W.W.R. at 224, 239. "In Canadian law, 'passing off' is a common law tort for promoting or creating the impression that the plaintiff endorsed, approved of, or authorized defendant's products. This claim is analogous to a Lanham Act claim." Bean, *supra* note 93, at 1109 n.84 (citation omitted).

105. See Bean, *supra* note 95, at 1109; *Pepsi*, 6 W.W.R. at 234.

106. 1995 U.S. Dist. LEXIS 1426 (S.D.N.Y. Feb. 9, 1995) (93 Civ. 8429 (TPG)).

107. *Id.* The Order denied a motion to dismiss a counterclaim brought by the NHLPA against the NHL, NHL Enterprises, INC., and Niagara Frontier Hockey, L.P., d.b.a. Buffalo Sabres. See *id.*

108. Manufacturers of hockey equipment are also protecting their rights under the Lanham Act. Recently Hillerich & Bradsby sued Christian Brothers Inc., because Christian Brothers used Mark Messier's name on a replacement hockey stick blade even though Hillerich & Bradsby has an exclusive endorsement and licensing agreement with Messier. See, *Hillerich & Bradsby Co. v. Christian Brothers*, 943 F. Supp. 1136 (D. Minn. 1996).

lution. Essentially, the NHLPA does not approve of the Commissioner acting as an arbitrator.

B. Dispute Resolution

A point of contention in the NHL has been whether or not the Commissioner can act as an unbiased arbitrator.¹⁰⁹ The NHLPA usually claims that the Commissioner is a biased employee of the League and incapable of impartiality.¹¹⁰ The League, on the other hand, usually counters that arbitration is within the scope of the Commissioner's dispute resolution authority and it is necessary for him to make arbitration decisions for the League to function adequately.¹¹¹

In *National Hockey League Players' Association v. Bettman*,¹¹² the NHL won the argument. United States District Judge Kimba M. Wood adopted Magistrate Judge Dolinger's *Report and Recommendation* to uphold arbitration rulings handed down by Commissioner Bettman and granted the NHL's motion for summary judgment.¹¹³

The case involved two separate offer sheets¹¹⁴ created by the San Jose Sharks for Craig Simpson of the Edmonton Oilers and Kelly Miller of the Washington Capitals.¹¹⁵ Both players agreed to sign the offer sheets put forth by the Sharks, but Bettman issued a decision, over the NHLPA's objections, that all of Simpson's offer sheet was void and that certain clauses of Miller's offer sheet were invalid and should be struck down.¹¹⁶ Bettman declared the Simpson offer sheet null and void on the

109. See *National Hockey League Players' Association v. Bettman*, 93 Civ 5769 (S.D.N.Y. 1994) (*Report and Recommendation of U.S. Magistrate Judge Michael Dolinger to the Hon. Kimba M. Wood, U.S.D.J.*) (hereinafter, *Bettman Report and Recommendation*) (on file with the *Seton Hall Journal of Sport Law*).

110. See *id.* at 2.

111. See *id.* at 14.

112. 93 Civ. 5769 (S.D.N.Y. 1994).

113. See *National Hockey League Players' Association v. Bettman*, 93 Civ. 5769 (S.D.N.Y. 1994) (*Judgment and Order*) (on file with the *Seton Hall Journal of Sport Law*).

114. Under By-Law 10.3 of the 1995 CBA, an Offer Sheet must be filed with the League Office and specify the terms of the agreement (including any individually-negotiated option), any signing, reporting, or roster bonus (if any), and the salary that will be paid for each year of the contract. One of the purposes of the offer sheet is to specify which differ from or are additions to the terms of the Standard Player's Contract. See Offer Sheet, CBA Exhibit 6.

115. See *Bettman Report and Recommendation* at 1.

116. See *id.* at 8-12.

ground that the inclusion of Simpson's "reporting bonus" was a sham designed to circumvent San Jose's obligation to provide equalization compensation (paid when obtaining a free agent from another team) to Edmonton.¹¹⁷ With regard to Miller, Bettman ruled that two clauses in Miller's offer sheet were invalid because they acted as a detriment to any team that tried to match San Jose's offer.¹¹⁸ The two clauses in question provided that Miller had the option to extend his contract for three years if he was traded from San Jose, and San Jose could extend the contract for two additional years if Miller was not traded.¹¹⁹

The NHLPA requested that the two rulings on the offer sheets be set aside and referred to an independent arbitrator¹²⁰ for two reasons: (1) that Bettman did not have jurisdiction to rule on the dispute under the CBA and Memorandum of Understanding (CBA/MOU),¹²¹ and (2) that Bettman, because of his position as an employee of the league and his labor background, was biased.¹²²

The court ruled that the terms of the CBA/MOU were unambiguous and that Bettman had authority to rule on the Simpson and Miller offers sheets.¹²³ Further, although Bettman is an employee of the owners and had established a reputation for his prowess in negotiating for NBA owners and

117. *See id.* at 11.

118. *See id.*

119. *See Bettman Report and Recommendation* at 9.

120. Section 11.1 (c) of the 1995 CBA remedies this problem and provides that where in the event a Player Contract is rejected by the Commissioner, and the NHLPA disagrees with such rejection, the NHLPA may refer such dispute to the Impartial Arbitrator.

121. *See Bettman Report and Recommendation* at 2. The governing documents at the time of the dispute were the CBA between the NHLPA and the member clubs of the NHL that was effective from June 1, 1988 through and including September 15, 1991 (herein old CBA) and a Memorandum of Understanding dated January 21, 1993 that was to cover the period September 16, 1991 through September 15, 1993. *See id.*

122. *See id.* On the bias issue *see e.g.* *Erving v. Virginia Squires Basketball Club*, 349 F. Supp 716, 719 (E.D.N.Y.), *aff'd*, 468 F.2d 1064 (2d Cir. 1972); *Morris v. New York Football Giants, Inc.*, 575 N.Y.S.2d 1013, 1016 (N.Y. Sup. Ct. 1991); *Chandler v Indianapolis Colts, Inc.*, No. 54C01-9009-CP-1453 (Cir. Ct. Ind. 1992). In both *Erving* and *Morris*, the Court held that a neutral arbitrator must be appointed to arbitrate, because, notwithstanding the fact that the Commissioner of the respective league was designated to arbitrate the dispute, the Commissioner possessed a fact-specific, disqualifying basis with respect to the dispute he was asked to arbitrate. *Erving*, 349 F. Supp. at 719; *Morris*, 575 N.Y.S.2d at 1016.

123. *See Bettman Report and Recommendation* at 26-27.

instituting a salary cap, the court held that the NHLPA knew this when they agreed to the terms of the CBA/MOU and they could not show that Bettman was any more biased than past NHL Presidents.¹²⁴

Although the problems that arose in this case appear to have been cleaned up by the new CBA, problems will inevitably surface once again.¹²⁵ Now that a new CBA has been drafted and the provisions for arbitration are explicitly defined, it is far less likely that another dispute regarding Bettman's bias as an arbitrator will resurface. The only reason why Bettman would conceivably intervene now is if a situation arose that he believed could put the stability of the League in serious jeopardy, and he felt that he must trump the arbitrator who may make the "wrong" decision.

Another case that had a similar outcome to *Bettman*, was *Mandich v. Minnesota North Stars*,¹²⁶ where Daniel Mandich was forced to retire due to a knee injury.¹²⁷ He signed a waiver of his contract that stated the North Stars would not be liable for his contract terms for 1985-1988 if he filed a disability claim.¹²⁸ Mandich signed the waiver after his agent, Bill Waters, advised him to do so.¹²⁹ Waters had previously entered into an oral agreement with North Star general manager Lou Nanne which provided that Mandich's contract would not be effective should Mandich be physically unable to perform.¹³⁰ Thereafter, in 1987 "Mandich made a claim for his salary under the contract" and "requested the claim be submitted to arbitration."¹³¹ Former NHL President John Ziegler heard Mandich's grievance and "found that Mandich was not entitled to compensation under the contract" he had signed with the

124. *See id.* at 34-38.

125. "The fact that almost all collective bargaining agreements provide for arbitration demonstrates that the parties realize that some language of the contract may be inherently ambiguous and they could not possibly provide for all situations that may arise during the life of the agreement." James Gilbert Rappis, *The Use of Contract Interpretation By Professional Sports Arbitrators* 3 MARQ. SPORTS L.J. 215, 219 (1993) (citing *Loews Inc. v. Office Employee's Local 174*, 10 Lab. Arb. Rep. (BNA) 227, 232 (1948) (Aaron, Arb.)).

126. 450 N.W.2d 173 (Minn. Ct. App. 1990).

127. *See id.* at 175.

128. *See id.*

129. *See id.*

130. *See Mandich*, 450 N.W.2d at 174-75.

131. *Id.* at 175.

North Stars.¹³² Mandich then challenged Ziegler's authority to rule on the dispute and accordingly challenged Ziegler's decision on the basis of bias.¹³³ The court deferred to the trial court's finding that the arbitrator's construction of the parties' agreement was bargained for and that Ziegler was free from bias and partiality.¹³⁴

While the NHLPA has not met with much success in challenging the Commissioner's decision-making authority, it appears that it is only a matter of time before they challenge his authority to discipline players.

C. Discipline

Article 18 of the 1995 CBA confers exclusive power on the Commissioner (or his designee) to fine and suspend players for on-ice conduct.¹³⁵ Off-ice conduct is controlled largely by the "best interests clause."¹³⁶ "The broad and undetermined term 'best interests' tends to give almost unlimited power and provides only a vague standard."¹³⁷ Whether conduct or inaction is not in the "best interests"¹³⁸ or is "detrimental" to the

132. *Id.*

133. *See id.* at 175-76.

134. *See Mandich*, 450 N.W.2d at 177.

135. Senior Vice President and Director of Hockey Operations Brian Burke often disciplines players for their on-ice conduct. *See Lance Hornby, Burke's Law Comes Down On Leafs Again*, TORONTO SUN, Jan. 8, 1997, at 83. As the person responsible for administering punishment throughout the league, Burke is often criticized for his decisions by players and coaches. *See id.* The usual complaint is that there is not enough uniformity in the duration and severity of suspensions because certain teams or players receive preferential treatment. *See id.*

136. *See Lentze, supra* note 1, at 75. Article VI, Section 6.3(j) provides: "Disciplinary Powers. (1) Whenever the Commissioner shall determine, based upon such information and reports as he may deem sufficient, that any person connected with the League or a Member Club has either violated the Constitution, the By-Law, or any other governing rule or regulation of the League, or has been or is guilty of conduct (whether during or outside the playing season) *detrimental to the League or the game of hockey*, he shall have full and complete authority to discipline such person in any or all of the following respects (a) by expelling or suspending the person for a definite or indefinite period; (b) by canceling any contract or agreement that the person has with the League or with any Member Club; (c) by imposing a fine on the person not exceeding One Million dollars (1,000,000) or such greater amount as may be prescribed by any League rule or By-Law; or (d) If the conduct in question affects the competitive aspects of the game, by awarding or transferring players and/or draft choices and/or depriving the offending Member Club of draft choices."

137. *See Lentze, supra* note 1, at 75.

138. Evidence of Bettman's use of the "best interests" clause is the Mike Keenan dispute. *See Mark A. Conrad, Mike Keenan's Power Play - A Slap Shot Against the Rangers*

League has been difficult for courts to ascertain.¹³⁹ Precedent has proven, however, that courts have interpreted the best interests clause in a manner that gives the Commissioner considerable discretion.¹⁴⁰ The Commissioner alone has been given the power to interpret this clause, but his power to levy fines and monetary penalties¹⁴¹ has been curtailed through regulations.¹⁴²

Section 17 of the NHL's By-Laws govern player discipline.¹⁴³ This section, entitled "Fines, Suspensions and Expulsions" details what constitutes punishable conduct, the appropriate penalties, and the procedural requirements that must be met before the penalties can be imposed.¹⁴⁴ The Commissioner may expel anyone affiliated with an NHL team who contributes to or solicits someone to lose or attempt to lose a

And A Slap On The Wrist By The NHL, 5 SETON HALL J. SPORT L. 637 (1995). Mike Keenan had just led the New York Rangers to their first Stanley Cup in 54 years and then signed a contract with the St. Louis Blues to be that team's coach and general manager. *See id.* After reviewing the situation, Bettman fined Keenan \$100,000 and suspended him from his general manager and coaching duties for 60 days for "conduct detrimental to the league" pursuant to the best interests clause. *See id.* at 648. Bettman also levied the following fines upon three different NHL teams: (1) \$25,000 upon the Rangers for suing Keenan in Federal Court; (2) \$25,000 upon the Detroit Red Wings for negotiating with Keenan; and (3) \$250,000 upon the Blues for negotiating with and signing Keenan while he was under contract with the Rangers. *See id.* *See also* Vancouver Hockey Club Ltd. v. National Hockey League 44 D.L.R. 4th 139; 6 A.C.W.S. (3d) 292 (1987) (relating to John Ziegler's fines and suspensions of Pat Quinn and the Vancouver Canucks for conduct that was "dishonorable, prejudicial to or against the welfare of the League or the game of hockey." The Canucks and Quinn entered into a contract while Quinn was still under contract with the Los Angeles Kings). It is somewhat ironic that both Keenan and Quinn led New York and Vancouver to the Stanley Cup finals in 1994 and were later fired by St. Louis and Vancouver, respectively. After being considered for the General Manager position that Quinn left vacant, Keenan was hired as the Canucks' head coach in November 1997.

139. *See* Lentze, *supra* note 1, at 75.

140. *See* Lentze, *supra* note 1, at 75 (citing *Charles O. Finley & Co., Inc. v. Kuhn*, 569 F.2d 527 (7th Cir.), *cert. denied*, 439 U.S. 876 (1978); *Atlanta National League Baseball Club*, 432 F. Supp. at 1222; *Milwaukee Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931)). "When one Commissioner asked what the best interest of baseball clause meant, his attorney answered, 'it means anything you want it to mean, Mr. Commissioner.'" Lentze, *supra* note 1, at 75 n.65 (citing Joe Illuzzi, UPI, Aug. 5, 1985). *See also* Jeffrey A. Durney, *Comment, Fair or Foul? The Commissioner and Major League Baseball's Disciplinary Process*, 41 EMORY L.J. 581, 607 (1994).

141. *See* NHL By-Laws 17.3 and 17.4.

142. *See* Lentze, *supra* note 1, at 75.

143. *See* Jan Stiglitz, *Player Discipline in Team Sports* 5 MARQ. SPORTS L.J. 167, 187 (1995).

144. *See id.* (citing By-Law 17.2).

hockey game.¹⁴⁵ Pursuant to By-Law 17.3, the Commissioner may also expel, suspend or fine any NHL player, for any on- or off-season act or conduct deemed to be "dishonorable, prejudicial to or against the welfare of the League or the game of hockey."¹⁴⁶ Players are also subject to fines for criticizing the "League Officiating Staff,"¹⁴⁷ may be suspended for up to twenty games by on-ice officials for on-ice misconduct,¹⁴⁸ and may be punished by the Advisory Committee of the Board of Governors for physically or verbally attacking the Commissioner.¹⁴⁹

Litigation involving NHL players challenging the Commissioners' disciplinary authority has been virtually non-existent. Other sports,¹⁵⁰ especially baseball, have been far more active

145. See *id.* (citing By-Law 17.2).

146. *Id.* (citing By-Law 17.3).

147. See Stiglitz, *supra* note 143 at 187 (citing By-Law 17.2).

148. See *id.* at 187, n.123.

149. See *id.* at 187 (citing NHL By-Law 17.3(a)).

150. See *Blalock v. Ladies Professional Golf Ass'n*, 359 F. Supp. 1260, 1262 (N.D. Ga. 1973) (suspension by the Ladies Professional Golf Association); *Manok v. Southeast Dist. Bowling Ass'n*, 306 F. Supp. 1215, 1218 (C.D. Cal. 1969) (bowling association's suspension). See Matthew B. Pachman, *Limits On the Discretionary Powers of Professional Sports Commissioners: A Historical and Legal Analysis of Issues Raised By the Pete Rose Controversy*, 76 VA. L. REV. 1409, 1411 n.17 (1990) (citing *Molinas v. National Basketball Ass'n*, 190 F. Supp. 241, 244 (S.D.N.Y. 1961) ("used the rule of reason test to hold that a player's suspension was valid disciplinary action which supported purpose of the association and did not violate antitrust laws"); see *id.* at 1417 n55 (citing *Molinas v. Podoloff*, 133 N.Y.S.2d 743 (N.Y. Sup. Ct. 1954) ("Molinas challenged former NBA Commissioner Podoloff's authority to ban him for life when he admitted to gambling on a basketball game"); see *id.* at 1426 (citing *Dryer v. Los Angeles Rams*, 40 Cal. 3d 406, 709 P.2d 826, 220 Cal. Rptr. 807 (1985) ("the court indicated its belief that the Commissioner could not involve himself in arbitration matters under the auspices of a 'best interests' clause, asserting that the 'best interest' clause was limited to disciplinary matters, distinguishing *Dryer's* situation as a contractual dispute for which the commissioner's intervention provision could not be invoked")); *Brant v. United States Polo Ass'n*, 631 F. Supp. 71 (S.D. Fla. 1986) (polo player's suspension); *O'Grady v. PGA Tour, Inc.*, Civ. Case No. 86-1511-S(M) 1989 U.S. Dist. LEXIS 4301; 1986-2 Trade Cas. (CCH) P67,361, (S.D. Cal. 1989) (professional golfer's fine and suspension); *NFL v. NFLPA*, 724 F. Supp. 1027 (D.D.C. 1989) (NFL suspension for steroid use); *Marino v. Major Indoor Soccer League*, 81 Ohio App. 3d 42 (1991) (soccer suspension); *Cox v. National Football League*, 94-CIV-5440 (S.D.N.Y., Jul. 26, 1994) (then-Miami Dolphin Bryan Cox was fined \$10,000 for spitting on fans who allegedly yelled racial epithets. The fine was later reduced to \$3,000 and the NFL adopted new security rules to prevent racial harassment after Cox filed a complaint with the Equal Employment Opportunity Commission) see *Bryan Cox sues the NFL over allegedly retaliatory fines*, THE SPORTS LAWYER, Jul./Aug., 1997; *Cox v. National Football League*, 97-CIV-3741 (N.D. Ill., May 24, 1997) (Cox, now with the Chicago Bears, was fined \$87,500 for making an obscene gesture at a game official and he sued under § 703 of Title VII of the Civil Rights Act of 1964, 42 U.S.C. § 2000e-2 alleging that the NFL

in this area. The disciplinary powers of the Commissioner of Major League Baseball were first challenged in the courts in 1931,¹⁵¹ and these challenges have continued to surface.¹⁵²

While one commentator argues that, "[t]here is a real risk that the definition of proper conduct will be drawn so narrowly as to infringe upon the political, religious, or social prerogatives of the players,"¹⁵³ another argues, "[a] commissioner should be able to protect the game and its players by banning from the field players whose presence is likely to incite violence in cases where there is no statute that prohibits him from doing so."¹⁵⁴ It is not disputed, however, despite the deference often shown to a professional sports commissioner's powers, that a court may be justified in reviewing the procedures a commissioner uses in a particular controversy especially when due process concerns are raised.¹⁵⁵

The due process concept is composed of several factors.¹⁵⁶ The most basic component is that the accused be given notice of the allegations and the opportunity to reply.¹⁵⁷ In addition, the tribunal overseeing the proceeding must be impartial¹⁵⁸

retaliated against him for filing his previous lawsuit) see *Bryan Cox sues the NFL over allegedly retaliatory fines*, THE SPORTS LAWYER, Jul/Aug., 1997.

151. See Pachman, *supra* note 150, at 1409-10. See *Milwaukee Am. Ass'n v. Landis*, 49 F.2d 298 (N.D. Ill. 1931).

152. See Pachman, *supra* note 150, at 1410; *Rose v. Giamatti*, 721 F. Supp. 906 (S.D. Ohio 1989); *Charles O. Finley and Co. v. Kuhn*, 569 F.2d 527 (7th Cir.), *cert denied*, 439 U.S. 876 (1978); *Atlanta National League Baseball Club, Inc. v. Kuhn*, 432 F. Supp 1213 (N.D. Ga. 1977).

153. John C. Weistart, *Player Discipline in Professional Sports: The Antitrust Issues*, 18 WM. & MARY L. REV. 703, 722 (1977).

154. *Id.*

155. See Pachman, *supra* note 150, at 1430 n132 (citing *Crouch v. National Ass'n for Stock Racing*, 845 F.2d 397, 401 (2d Cir. 1988). "[C]ourts have demonstrated more of a willingness to intervene in the internal matters of private associations when they conclude that there inadequate procedural safeguards to protect members rights."); see *id.* (citing *Charles O' Finley*, 569 F.2d at 544 n65. "[T]he procedure must not be a sham designed to merely give colorable propriety to an inadequate process."); see *id.* (citing *Van Daele v. Vinci*, 51 Ill. 2d 389, 394-95, 282 N.E. 2d 728, 732 (1972) "[O]ne subjected to such disciplinary actions should be accorded a hearing before a fair and impartial tribunal.").

156. See Durney, *supra* note 140, at 603.

157. See *id.* at 603-04 n.144 (citing *Hackenthal v. California Medical Ass'n*, 187 Cal. Rptr. 811 (Cal. Ct. App. 1982)).

158. See *id.* at 603 n143 (citing *Van Daele v. Vinci*, 282 N.E.2d 728, 732 (Ill.) Cert. Denied, 409 U.S. 1007 (1972)).

and free from bias.¹⁵⁹ Finally, the tribunal must adhere to the agreements and By-Laws it has enacted¹⁶⁰ and may not act arbitrarily or capriciously.¹⁶¹

One commentator¹⁶² has outlined several arguments against the "Commissioner's virtually unrestrained police powers: the interest of substance/judicial protector argument,¹⁶³ the vagueness argument,¹⁶⁴ the combination of powers argument,¹⁶⁵ the general arbitrariness argument,¹⁶⁶ the unfair conditions imposed by a monopolist argument,¹⁶⁷ and the ever present antitrust argument."¹⁶⁸

159. See *id.* at 603 n.142 (citing *Virgin v. American College of Surgeons*, 192 N.E.2d 414, 431 (Ill. App. Ct. 1963)).

160. See *Durney*, *supra* note 140, at 603 n.141 (citing *Charles O'Finley*, 569 F.2d 527; *Dietz v. American Dental Ass'n*, 479 F. Supp. 554, 557 (E.D. Mich. 1979)).

161. See *id.* at 603 n.145 (citing *Dietz*, 479 F. Supp. at 557; *Ezekial v. Winkley*, 572 P.2d 32, 35 (Cal. 1977); *Hackenthal*, 187 Cal. Rptr. at 811).

162. See *id.* at 602-11.

163. *Id.* at 602-06. "While courts have generally been hesitant to interfere in the internal affairs of a private association, they have been much less reluctant to enter into these matters when an 'interest of substance' is being affected." *Id.* at 602 (citation omitted). See *id.* at 602 n.132 (citing *Virgin v. American College of Surgeons*, 192 N.E. 2d 414, 422 (Ill. App. Ct. 1963) "membership in voluntary professional association necessary to pursue particular occupation is judicially protectible 'interest of substance.'")

164. *Durney*, *supra* note 140, at 607-09. "The best interests clause can be used to justify nearly any action taken by the Commissioner." *Id.* at 607. For example "Benny Kauff was banned for life from baseball for an indictment on auto theft charges, and George Steinbrenner was suspended for two years for his contribution in an illegal campaign contribution scheme." *Id.* at 608.

165. *Id.* at 609-11. "The potential for bias exists because the investigative, prosecutorial, and adjudicative powers are, in large part, vested in one office." *Id.* at 609.

166. *Id.* at 611-14. "The previous arguments concerning arbitrariness and unfairness within the disciplinary system are strengthened by the fact that the Commissioner is charged with the duty of establishing the prevailing rules of procedure." *Id.* at 611.

167. *Id.* at 614-16. "As the Seventh Circuit summarized, '[t]he judiciary will intervene when the [monopolistic] association has an economic 'stranglehold' on the relevant market. . . . Otherwise the judiciary will rely on market forces to govern the actions of the association." *Id.* at 615 n.203 (citing *National Ass'n of Sporting Goods Wholesalers v. F.T.L. Mktg. Corp.*, 779 F.2d 1281, 1285 (7th Cir. 1985)).

168. See *Durney*, *supra* note 140 at 617-20. "Those suspended or expelled from the game could argue that all of the owners have conspired against him through the Commissioner and have deprived him of a significant property interest, as well as his right to pursue a lawful occupation." *Id.* at 617. "There is only one 'Major League' for each of the four main professional sports, and access to these businesses are limited and controlled by an agreement of the individual owners who comprise the league." *Id.* "Because each of the leagues are monopolistic enterprises involving interstate commerce and billions of dollars, parties suspended or expelled for conduct not in the best interest of the league are effectively 'boycotted.'" *Id.* "This boycott or conspiracy, while itself of questionable validity, is made even more suspect by the nature of the proceedings which result in the boycott." *Id.*

As previously stated, the general rule is that courts tend to avoid intervention in questions involving voluntary associations and the enforcement of their By-Laws or disciplinary rules¹⁶⁹ "unless their enforcement would be arbitrary or against public policy."¹⁷⁰ Therefore, it is evident that private association law exists as a substantial hurdle to any challenge of the Commissioner's disciplinary authority.¹⁷¹ *NHLPA v. Bettman* proved that the rule of the Federal Arbitration Act,¹⁷² that provides that an arbitrator's award can only be overcome by a showing of "evident partiality,"¹⁷³ was a difficult burden to overcome in the courts. However, cases involving player suspensions, discipline, and exclusionary rules appear ripe for challenge with the vagueness of the NHL Commissioner's disciplinary powers and the lack of precedent involving the NHL in this area.

IV. THE FUTURE

Gary Bettman and the NHL have done an exemplary job in marketing hockey as a product throughout North America and the rest of the world. Hockey is becoming increasingly popular and the NHL is the primary reason for hockey's expansion on and off the ice. Revenues for NHL franchises have also increased substantially.¹⁷⁴ However, despite the recent success of the NHL, several pressing issues will have to be addressed by the League to ensure its success in the future.

169. See Pachman, *supra* note 150, at 1431 n.133 (citing *Finley*, 569 F.2d at 542; *Crouch*, 845 F.2d at 401 "noting that courts may be hesitant to unnecessarily inject themselves into the private affairs of an association"); *Parsons College v. North Cent. Ass'n of Colleges and Secondary Schools*, 271 F. Supp 65, 70 (N.D. Ill. 1967) "[T]he court of the state have been liberal in their treatment of private associations, leaving the members to arrange their affairs as they choose."). See also *Durney*, *supra* note 140, at 598 n.104 (citing *NCAA v. Tarkanian*, 488 U.S. 179, 191 (1988) "if state action is not involved, private conduct is not governed by the Constitution 'no matter how unfair that conduct may be.'") "As a general matter, Fourteenth Amendment protections are not extended to 'private conduct abridging individual rights.'" *Id.* at 598 n.105 (quoting *Tarkanian*, 488 U.S. at 191).

170. *Durney*, *supra* note 140, at 597 (citing *Calabrese v. Policeman's Benevolent Ass'n*, 384 A.2d 579, 583 (N.J. Super. Ct. Law Div. 1978)).

171. See *Durney*, *supra* note 140 at 596-601.

172. 9 U.S.C. §§ 1-15 (1988).

173. *Bettman Report and Recommendation* at 29.

174. See *supra* notes 13-14 and accompanying text.

A. *Drugs and AIDS*

In the late 1970s the NHL developed a policy calling for drug users to be banned for life.¹⁷⁵ No player has ever served such a severe sentence and one reason is probably due to the fact that the NHL has no drug testing for players.¹⁷⁶ With such a strict penalty, it seems highly unlikely that a player would voluntarily admit to drug use.¹⁷⁷ Recently, however, the NHL and its players introduced a new substance abuse policy.¹⁷⁸

Although no NHL player has ever served a lifetime ban for drug or alcohol abuse, a serious problem does exist.¹⁷⁹ Perhaps the most alarming case of drug abuse by an NHL player did not become public until after the player passed away. John Kordic,¹⁸⁰ a renowned "tough guy"¹⁸¹ died from heart failure

175. See Joe Sullivan, Kevin Dupont, Peter May and Cory Nightingale, *Drug Policies in Pro Sports*, BOSTON GLOBE, Mar. 25, 1995, at 78.

176. See *id.*

177. By-Law 17A.10 does provide that "[a]ny employee of the League or of a Member Club . . . who fails to report to the Security Department any known or suspected misuse or abuse of any drug is subject to the provision of Section 17.3 (fine, suspension or expulsion from the League)." The likelihood of this provision ever being enforced appears to be very remote.

178. Under the new policy "a player seeking first-time help will receive confidential counseling and treatment. The discipline policy then works as follows: Reinstatement in program and suspension without pay during active treatment for repeat violation; Six-month suspension without pay and reinstatement for next violation; One-year suspension without pay for fourth violation and reinstatement not guaranteed." *NHL, Players Devise New Drug Policy*, THE STUART NEWS, Sept. 27, 1996, at B10. It is of note, however, that "the policy does not call for mandatory drug testing." *Id.*

179. The careers of Don Murdoch and Derek Sanderson were shortened primarily due to problems with drugs and alcohol. See Damien Cox, *NHL to Adopt Long Overdue Drug Policy*, THE TORONTO STAR, Aug. 18, 1996 at C12. Craig MacTavish was convicted of vehicular homicide for killing a 26 year old woman and Pelle Lindbergh and Bob Gassoff were killed in accidents while intoxicated. See *id.* Ric Nattress, Borje Salming, and Petr Klima also had substance abuse problems that were detailed by the media and a number of current and former players currently have or used to have serious problems with drugs or alcohol. See *id.* Most recently, New Jersey Devils' defenseman Ken Daneyko entered a substance-abuse rehabilitation program. See *Rink Report*, USA TODAY, Nov. 7, 1997, at 14C.

180. Kordic played seven seasons in the NHL with the Montreal Canadians, Quebec Nordiques, Toronto Maple Leafs and Washington Capitals. See Karen Crouse, *Is Bigger Really Better in Hockey? NHL: Players are Bulking Up and Questions About Illegal Steroid Use are Finally Starting to be Asked*, THE ORANGE COUNTY REGISTER, June 21, 1996, at D1. On August 8, 1992, Kordic died at the age of 27 after scuffling with police who were responding to a disturbance at the Quebec City hotel where the player was staying. See *id.* An autopsy showed Kordic's lungs had filled with fluid and his heart had failed. See *id.* An enormous amount of cocaine was found in his bloodstream, along with traces of steroids. See *id.* Three bottles of steroids were also found in Kordic's hotel room on the

after he overdosed on cocaine and steroids and had to be restrained by numerous police officers. This makes one question the adequacy of the NHL's supervision in this area, or at a minimum, makes one wonder what would Kordic's punishment have been had he survived. If a similar situation occurred today, could the player be banned for life when the current NHL drug policy does not provide for that penalty?

Another problem that may arise in the future is if a current NHL player contracts the HIV virus.¹⁸² When Ex-NHL player Bill Goldsworthy contracted AIDS, he insinuated that his problems stemmed from drinking and heterosexual promiscuity.¹⁸³ In addition, in December 1991, two Canadian physicians in Montreal, Quebec, announced that a young woman who had died from AIDS two years prior, had disclosed to them that she had engaged in sexual intercourse with thirty to sev-

day of his death. *See id.* His former roommate, Bobby Dollas, recalls when Kordic put on 30 pounds of muscle between the spring of 1986 and the 1986-87 season. *See id.* Dollas stated, "[i]t was more than obvious what was going on. I asked him about it and he was up front about (the steroids). He said, 'Bob, I want to fight, this is what I need to do.'" *Id.* Dollas continued, "I think a lot of people just looked the other way . . . I'm pretty sure there's other guys who use steroids." *Id.*

181. A "tough guy," "goon" or "enforcer" is a player whose primary job is to fight. *See* Michael Farber, *The Worst Job In Sports: While Some NHL Enforcers Like to Brawl, Many Members of the Fraternity of Fighters Find it Dangerous and Demeaning, An Ugly Way to Earn a Handsome Living*, SPORTS ILLUSTRATED, Mar. 24, 1997, at 66. Most enforcers are expected to fight the tough guy on the opposing team at a moments notice, and this often occurs when a coach decides there should be a fight. *See id.* While the coach stands on the bench, the players often suffer psychological and physical damage from having to psyche themselves up to fight when the only one who is upset is the coach. *See id.* While the physical injuries heal quite quickly, the psychological damage is often long lasting and the NHL should do something to help this type of player. *See id.* There are many examples of the problems these types of players have suffered. *See id.* Louie DeBrusk stated, "The fact that I am a fighter on the ice and the difficulties I've had with that job definitely brought me to drink a few times. I'd go out after a game, and all I could think of was the pressure I had on me during the game. Maybe I didn't fight. There'd be a feeling of worthlessness, I guess. Then I'd go out and drink myself into oblivion, and maybe I'd get into a fight later. I've been advised by people who have helped me in rehab not to go back to my job." *Id.* DeBrusk has been to the Betty Ford Clinic twice. *See id.*

182. At least one player has publicly indicated that NHL should take steps to alleviate his fears about the possibility of contracting AIDS from another player. Todd Gill, player representative of the Toronto Maple Leafs, stated, "I feel I should have the right to know if someone I'm playing against has the HIV virus." Daniel M. Weber, *When the "Magic" Rubs Off: The Legal Implications of AIDS in Professional Sports*, 2 SPORTS LAWS. J. 1, 6 (Spring 1995).

183. *See Former North Star Goldsworthy Dying of Aids*, HOUSTON CHRONICLE, Feb. 13, 1995, at 5.

enty different NHL players.¹⁸⁴ If an NHL superstar contracted AIDS, like Magic Johnson of the NBA, he would probably be allowed to continue to play. But what if an NHL "enforcer" contracted AIDS and also wanted to continue to play hockey? If he was a boxer, like Tommy Morrison, he may also be banned. In hockey, the two combatants fight with bare fists. Most players who fight often have either existing cuts or thin scar tissue on their knuckles that could easily spray blood on an opponent. It appears that the probability of AIDS spreading would be more likely during a hockey fight than during a boxing match. The question for the future may be whether the NHL is willing to ban a player who has AIDS, and whether his playing style will factor into this decision.

B. Immigration and Other International Concerns

The NHL is composed of players from the United States but the majority of players come from Canada or Europe.¹⁸⁵ Problems have arisen along with this proliferation of foreign talent and the NHL could face a major crisis if they are not corrected. First, as immigration laws tighten, it is becoming more and more difficult for foreign NHL players to become lawful permanent residents or "green card" holders. Second, now that Russian players have been permitted by their country to play in the NHL, corruption in that country could spill into the NHL and lead to a major scandal.¹⁸⁶

With regard to the immigration issue, three recent cases were litigated concerning the same issue of whether or not an NHL player is a person of "extraordinary ability" as defined in the Immigration and Naturalization Act ("Act").¹⁸⁷ *Muni v. INS*,¹⁸⁸ *Racine v. INS*,¹⁸⁹ and *Grimson v. INS*¹⁹⁰ all involved Canadian hockey players who played for American teams. Both Muni and Grimson were ultimately successful in the Dis-

184. See Jennifer L. Johnston, *Is Mandatory HIV Testing of Professional Athletes Really The Solution?*, 4 HEALTH MATRIX 159, 160 (1994).

185. Although most of the NHL teams are located in the US, only 17.7 percent of NHL players were born in the US. See Terry Egan, *Canada's National Pastime Continues to Migrate South*, DALLAS MORNING NEWS, Dec. 20, 1995, at 5B. Players born in 17 different countries started the 1994-95 season. See *id.*

186. See *infra* notes 200-05 and accompanying text.

187. § 203 (b)(1)(A), codified in 8 U.S.C. § 1153 (b)(1)(A) (1997).

188. 891 F. Supp. 440 (N.D. Ill. 1995).

189. 1995 U.S. Dist. LEXIS 10768 (N.D. Ill., Jul. 31, 1995) (No. 94-C-2548).

190. 934 F. Supp. 965 (N.D. Ill. 1996).

trict Court after first having their visa petitions denied by the INS' Northern Service Center and the Administrative Review Panel.¹⁹¹ Racine was unsuccessful.¹⁹²

In order to be deemed a person of extraordinary ability, INS regulations interpreting the Act have stated that one must have risen to "a level of expertise indicating that the individual is one of that small percentage who have risen to the very top of the field of endeavor."¹⁹³ In order to be deemed an individual of extraordinary ability one must document their accomplishments with the INS.¹⁹⁴ This can be done through evidence of national and international awards and prizes in the field of endeavor as well as evidence of a high salary or affidavits from "experts" in the field.¹⁹⁵

Muni was granted his visa because he had been playing in the League since 1981-82, earned \$550,000 and had been a member of two Stanley Cup Championship teams with the Edmonton Oilers.¹⁹⁶ Grimson was granted his visa on the basis of an affidavit of ESPN hockey analyst Darren Pang, his salary relative to other enforcers, and his reputation as one of the top five enforcers in the world.¹⁹⁷ Racine was denied his petition because it was found that he had distinguished himself at the amateur level, but had not done so at the professional level.¹⁹⁸

Some may think that if a "goon" like Stu ("the Grim Reaper") Grimson can receive a visa petition, then any professional player can as well. However, the INS has obviously become aware of all the players receiving "green cards" and has the power to deny virtually anyone's petition at any time. The NHL must be wary of what it will do should the INS choose to deny most foreign hockey players work visas or green cards. If only NHL stars are permitted to play on US teams, and others players are not allowed to "take" American jobs, the NHL may

191. See *Muni*, 891 F. Supp. 440 (N.D. Ill. 1995); *Grimson*, 934 F. Supp. 965 (N.D. Ill. 1996).

192. See *Racine*, 1995 U.S. Dist. LEXIS 10768 (N.D. Ill., Jul. 31, 1995) (No. 94-C-2548).

193. 8 C.F.R. § 204.5(h)(2) (1997).

194. See *id.*

195. See *id.*

196. See *Muni*, 891 F. Supp. 440 (N.D. Ill. 1995).

197. See *Grimson*, 934 F. Supp. 965 (N.D. Ill. 1996).

198. See *Racine*, 1995 U.S. Dist. LEXIS 10768 (N.D. Ill., Jul. 31, 1995) (No. 94-C-2548).

find itself in a bit of a quandary. Although not allowing foreign athletes to play for American NHL teams may seem far fetched, the NHL has no control over the INS — the INS runs the show.¹⁹⁹

Canadian players are not the only ones having problems leaving their home country to play hockey in the United States. Players from Russia have had problems obtaining permission to leave Russia.²⁰⁰ Further, once they arrive in North America their problems have not ceased. Several players from the Soviet Union have had negative experiences with Russian extortionists in recent years, including Vancouver's Alexander Mogilny, Buffalo's Alexei Zhitnik and Phoenix's Oleg Tverdovsky.²⁰¹ Tverdovsky was playing for Anaheim when his mother Alexandra, was kidnapped in Russia and held for ransom.²⁰² In addition, when Mogilny was playing in Buffalo, a Russian national who helped him defect in 1989 was arrested in the Memorial Auditorium following a botched extortion attempt.²⁰³ Recently, Pavel Bure of Vancouver was reported to be in business with Anzor Kikalichvili, who is alleged to be a mafia kingpin and is suspected by U.S. intelligence of money laundering, extortion, and drug trafficking.²⁰⁴

Although there has not been even the slightest evidence of impropriety, to date, involving foreign NHL players, various college and professional athletes in the US have been implicated for affecting the outcomes of games when only money is on the line. If your life or the life of a loved one is on the line, the outcome of a game could probably become insignificant in a

199. Recently it was reported Philadelphia Flyer General Manager Bob Clarke was being investigated by both the FBI and the NHL for inviting Alan Eagleson to watch a Flyers game at Toronto's Maple Leaf Gardens. *See Clarke-'Eagle' Friendship Source of Controversy*, *The Hockey News*, May 9, 1997, at 5. Eagleson was Clarke's agent when he was a player and has remained Clarke's friend. *See id.* Eagleson is the former executive director of the NHLPA and he has been indicted by a grand jury in Boston on dozens of criminal charges. *See id.* He is fighting extradition to the US and is considered a fugitive. *See id.* Clarke, a Canadian citizen who works in the US on a green card may have put his immigration status in jeopardy by associating with a fugitive. *See id.*

200. *See Professional Hockey Club Sports Club of The Army v. Detroit Red Wings*, 787 F. Supp. 706 (E.D. Mich. 1992) (pertaining to the Red Wings trying to get Viktor Kozlov released from a contract with Soviet Army Hockey Club).

201. *See Rick Sadowski, NHL's Watchful Eye on Russian Mafia*, *ROCKY MOUNTAIN NEWS*, Nov. 10, 1996, at 4C.

202. *See id.*

203. *See id.*

204. *See id.*

hurry.²⁰⁵ If something is not done to correct mafia infiltration of the NHL, corruption could affect the outcomes of games, and the players would not be to blame.

V. CONCLUSION

The NHL Commissioner's decision-making and dispute resolution powers have been reinforced through litigation. In other sports the Commissioner's disciplinary authority has also withstood several challenges in the courts. Based upon a jurisprudential analysis of past professional sports litigation and the trends of current suits, however, the NHL Commissioner's disciplinary powers appear ripe for challenge.

In addition, although Gary Bettman has helped advance the NHL and the popularity of hockey, he may have to contend with several serious issues in the future. Drugs, AIDS, immigration problems and international corruption may begin to adversely affect the NHL. If preventative measures are not taken, the NHL may yet get one-punched in the judicial arena.

205. Valentin Sych, the president of the Russian Ice Hockey Federation was killed on his way to work in Moscow April 22, 1997 when his car was hit by bullets from a passing car. See Alan Adams, *Russian Hockey Head Murdered*, THE HOCKEY NEWS, May 9, 1997, at 3. The killing came two months after Sych complained to reporters Russian criminals were increasingly muscling in on sports, trying to draw stars and individuals into illegal activities. See *id.* "It is 100 per cent mafia," said Rene Fasel, president of the International Ice Hockey Federation. *Id.*