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Stephen F. Ross

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ARTICLES

THE NHL LABOUR DISPUTE AND THE COMMON LAW, THE *COMPETITION ACT*, AND PUBLIC POLICY

STEPHEN F. ROSS[†]

I. INTRODUCTION

Until now, each June one happy group of professional hockey players skates around a rink hoisting Lord Stanley's Cup over their heads, as their fans join in delirious celebration. For the rest of North America's hockey fans, the season ends in disappointment; perhaps as their team sadly comes off the ice in defeat at the Cup Finals, perhaps earlier in the playoff tournament, or perhaps sometime during the season when it becomes apparent that their favourites would not be making it to the post-season. But hope springs eternal, and these disappointed fans will spend the off-season reading sports pages filled with opinion, rumour, and speculation about how their team will make the necessary improvements so that they might be the ones celebrating next year.

In the 2004-2005 off-season, things may be different. Hopes may diminish, primarily because of the threat of labour unrest caused by the National Hockey League (NHL) owners' proposals for a collective bargaining agreement that includes a rigid cap on club payrolls set at a figure far below the current salary expenditures of many teams. In the past, owner demands for rigid salary restraints have been justified as efforts to improve competitive balance among league clubs; in the Canadian context, to assure that smaller market clubs like Edmonton, as well as larger market clubs like Montreal or Vancouver, would have a reasonable prospect of competing for the Stanley Cup even while paying players in American dollars.

This claim is problematic for several reasons. Unlike some other sports, there is a demonstrably low correlation between payroll and performance in the NHL, where the two 2004 Cup Finalists have among the lowest payrolls in

[†] Professor of Law, University of Illinois at Urbana Champaign College of Law. A significant portion of the research for this Article was done as a Visiting Scholar at the University of British Columbia Faculty of Law. This article is the culmination of over twelve years of research, with help from innumerable sources. Particular thanks for reviewing a nearly complete draft to Edward Iacobucci, Stefan Szymanski, Joe Weiler, and Paul Weiler.

the league. Further, one could hardly design a league with better balance: twelve different teams have occupied the final four playoff spots in the past three years. Finally, the proposal has a particularly adverse effect on teams with inferior records, who are denied the ability to substantially increase their payrolls so as to improve the quality of their teams. Thus today, in lieu of the competitive balance claim, league officials openly justify their proposals for trade restraints with the need for 'cost certainty,' as well as the need to stem the losses that many clubs allegedly suffer. Why players or sports fans should find 'cost certainty' to be a legitimate goal for owners to pursue has not been fully explained.

The public has often regarded the disputes between owners and the group most directly injured by trade restraints, the players, as a food fight over their respective slices of the revenue pie, resulting in no dessert for the rest. This paper offers an alternative view: that the owners' restraint of trade not only increases their share of the pie, but also makes the pie less tasty. Logic and empirical evidence both suggest that it is a freer, rather than a more restrained labour market that permits mediocre teams to improve and results in a more exciting race to the championship. Were rivals in most other industries to impose restraints similar to those suggested by NHL officials, they would be harshly punished under the *Competition Act*. However, because of the unique interdependence of the teams comprising a sports league, the law generally requires a more careful competitive inquiry in the sports context.

To date, the unique nature of the sports industry has led courts to expressly recognize only one justification for otherwise unlawful restraints; that such restraints will promote competitive balance among the league's teams and thereby increase consumer demand for, and enjoyment of, the product. However, because rigid salary restraints apply indistinguishably to good and bad teams, they do not improve competitive balance—especially when this solution is compared to an obvious alternative of only restraining franchises with superior rosters, as measured by on-ice performance. Indeed, by restraining teams with inferior rosters, blanket restraints actually harm competitive balance.¹

The 'cost certainty' justification now put forth by owners is even less persuasive. At first blush, this demand seems to exemplify the famous adage

¹ Under the analysis used in this paper, the NHL amateur draft is not a 'blanket restraint' but a tailored restriction that allows teams to obtain exclusive negotiating rights using a selection process that advantages teams with inferior win-loss records. The legality of the NHL draft is complicated, because while first round draft rights clearly bestow advantages on weaker teams, it is not clear that weaker teams are helped more by giving them exclusive rights to negotiate with a fifth-round draft choice or rather allowing them to freely sign many players of that quality who now can only negotiate with other teams. However, as a tailored restraint, the NHL draft is beyond the scope of this paper.

that the principal benefit of monopoly is the “quiet life”.² Indeed, a salary cap has the principal effect of relieving owners whose front-office personnel decisions have resulted in on-ice disappointment from investing in improved talent. Although some have suggested that NHL owners are seeking from their union only what is sought by other enterprises, this is a fallacy: the United Auto Workers work to a bargained scale, but there was no ‘cost certainty’ in the millions of dollars that Ford devoted to new and unforeseen labour costs when its infamous Edsel proved a marketing disaster and Ford had to develop other cars.

While obtaining ‘cost certainty’ as an end in itself is not legitimate, controlling labour costs may be instrumental to allow the clubs and the players’ union to achieve other plausibly legitimate interests. The economic rewards for winning the Stanley Cup may be so great that clubs overspend on players, potentially leading to insolvency. Unrestricted labour competition may also result in the elimination of viable franchises in Canadian cities, which although reflecting the free market, could still be considered undesirable as Canadian public policy. Uncontrolled spending on player talent may also threaten economically marginal NHL franchises. Owners as well as the players’ union may thus conclude that the free market has an undesirable effect on jobs, therefore justifying labour market restraints.

However, the analysis in this article suggests that rigid salary restraints are an overly restrictive and inefficient means to avoid insolvencies and protect Canadian franchises and union jobs. The alternatives proposed in this article, including revenue sharing, rule changes that reduce incentives to overspend and facilitate more efficient player personnel decisions, and perhaps a narrowly targeted restraint imposed on traditionally dominant clubs, demonstrate that the proposed salary restraints are unreasonable. Such player restraints harm fans, the game, and the players. Moreover, the common law and *Competition Act* both render player restraints illegal—as unreasonable—when the restraints are broader than necessary to achieve a legitimate purpose. Finally, the standard applicable to the common law and the *Competition Act* is also sound public policy; both fans and the government should bear this policy in mind, even if owner conduct becomes protected from competition law (as would occur in a lockout).

The discussion of competition law principles in the context of the current NHL labour dispute is useful for several reasons. It provides an excellent illustration of the ability of the common law as well as competition legislation to evolve and respond to the specific needs of a unique industry. On a more

² John R. Hicks, “Annual Survey of Economic Theory: The Theory of Monopoly” (1935) 3 *Econometrica* 1 at 8: “The best of all monopoly profits is a quiet life” see also *United States v. Aluminium Co. of Am.*, 148 F.2d 416 at 427 (2nd Cir. 1945): “immunity from competition is a narcotic, and rivalry is a stimulant, to industrial progress ...”.

practical level, it maps out the relevant arguments that may arise if the NHL owners follow the strategy of their baseball and football brethren by imposing unreasonable labour market restraints even if they cannot secure union agreement through collective bargaining. Finally, even if the NHL pursues the strategy of a lock out, an informed discussion about these issues may well affect public attitudes about the NHL's tactics, and public attitudes may in turn affect how the NHL owners proceed.

This article develops the claim that, absent an agreement with the union, the imposition of a salary cap or punitive luxury tax would constitute an unreasonable restraint of trade, as well as a violation of section 48 of the *Competition Act* that the Canadian courts should enjoin. The article analyzes decisions of Canadian and other British Commonwealth courts concerning general principles of the common law as well as their specific application in the context of the sports industry. These precedents show that—absent union agreement—restraints unnecessary to increase on-ice balance between competing teams cannot be justified in order to preserve clubs in Canadian cities, avoid ruinous competition, or save jobs. Second, the paper discusses why the same standard applies to restraints challenged under section 48 of the *Competition Act*. Next, the relevance and impact of collective bargaining is discussed. Sound analysis must recognize that the benefits of industrial peace far exceed the social costs created by a player restraint, so that the general public and sports fans are served by upholding anything agreed to by the union. However, the legislative history of the *Competition Act* demonstrates that—unlike American law—Canadian law does not shield unreasonable restraints imposed upon unionized workers. Finally, the paper applies these legal standards to the current NHL controversy, concluding that rigid, across-the-board salary restraints do not promote competitive balance and constitute an overbroad and inefficient means to preserve hockey in Canadian cities, avoid ruinous competition, or save economically marginal NHL franchises. Whatever solutions are required to solve hockey's problems, these restraints are not the answer.

II. THE COMMON LAW OF RESTRAINT OF TRADE

The common law is an important control mechanism that limits the ability of sports league owners to restrain trade. As it continues to evolve, judges have become more hostile to anticompetitive arrangements among rivals, and more willing to grant injunctive relief to third parties victimized by such arrangements. The common law imposes some important restrictions on the ability of parties to restrain trade among themselves; the restraint must be designed to protect only those interests the courts have found to be legitimate, and must be tailored so as to be no more restrictive than reasonably necessary. As such, the common law test closely resembles the tests set forth below in

interpreting the *Competition Act*³ and elsewhere in the interpretation of the United States' *Sherman Act*.⁴

Most North American cases dealing with competition issues concerning sports and labour restraints have arisen in the context of United States antitrust statutes. There are few common law decisions emanating from south of the border, as there is no uniform 'common law' in the United States (each state's Supreme Court is the final arbiter of that state's common law absent pre-emption by the federal constitution or a federal statute.⁵). Thus courts have rejected common law challenges to sports league rules as unreasonable restraints of trade, lest a welter of inconsistent judicial decisions disrupt interstate commerce.⁶

In contrast, American concerns that limit the full applicability of the common law are not relevant in Canada, as the *Competition Act* expressly preserves common law claims.⁷ Common law issues are ultimately reviewed

³ See Part III, *infra*.

⁴ See Stephen F. Ross, "The Misunderstood Alliance Between Sports Fans, Players, and the Antitrust Laws" [1997] U. Ill. L. Rev. 519 [Ross, "Misunderstood"]. I have also suggested that this test is appropriate for European courts to use in applying Article 85 of the Treaty of Rome to sports league agreements. See Stephen F. Ross, "Restraints on Player Competition that Facilitate Competitive Balance and Player Development and their Legality in the United States and Europe" in Claude Jenrenaud & Stefan Késenne, eds., *Competition Policy in Professional Sports* (Neuchatel, Switzerland: International Center for Sports Studies, 1999) (discussing *Union Royale Belge des Societes de Football Association v. Bosman*, C-415/93, [1996] 1 C.M.L.R. 645, [1995] E.C.R. I-4921).

⁵ See *Murdock v. City of Memphis*, 87 U.S. 590 at 626 (1875) [*Murdock*]: "state courts are the appropriate tribunals...for the decision of questions arising under their local law, whether statutory or otherwise." Compare Neal Bieker & Paul von Nessen, "Sports and Restraints of Trade: Playing the Game the Court's Way" (1985) 13 Austl. Bus. L. Rev. 180 (distinguishing Australian High Court's review of state common law decisions from the *Murdock* doctrine, thus permitting common law application to nationwide sports leagues). Indeed, Australian courts have addressed the common law of restraint of trade in the sports context: See *Philip Adamson v. New South Wales Rugby League Ltd.* (1991), 100 A.L.R. 479 at 494 (F.C.A.).

⁶ See *Flood v. Kuhn*, 407 U.S. 258 at 284-285 (1972); *Partee v. San Diego Chargers Football Co.*, 34 Cal.3d 378, 668 P.2d 674 (1983).

⁷ Section 62 of the *Competition Act* R.S.C. 1985 (2d Supp.), c. 19 provides that "nothing in this Part shall be construed as depriving any person of any civil right of action." Thus, "the remedy offered under the *Competition Act* is merely supplementary to the existing rights of action under the common law...." (*Westfair Foods Ltd. v. Lippens Inc.* (1989), 61 Man.R. (2d) 282, 64 D.L.R. (4th) 335, [1990] 2 W.W.R. 42 at 53 (Man.C.A.) [*Westfair* cited to W.W.R.]). See also *Weidman v. Schragge* (1912), 46 S.C.R. 1 at 31, 2 D.L.R. 734, [*Weidman* cited to S.C.R.]: "The doctrine of restraint of trade violating public policy is not abolished by this act which I conceive not to be a substitution [therefore]."

by the Supreme Court of Canada, so uniformity may be achieved.⁸ Thus, a suit may be brought in Canada under the common law challenging NHL rules as unreasonable restraints of trade.⁹ Applying prevailing precedents, this section suggests that Canadian courts would grant injunctive relief against the imposition by sports league owners of a salary cap or luxury tax that significantly restrained competition for players' services (absent the agreement of the players' union), where it can be shown that those restraints are more restrictive than necessary to achieve competitive balance among teams in the league or to maintain and enhance viable league competition.

A. THE EVOLUTION OF THE COMMON LAW DOCTRINE

The common law's hostility towards agreements for restraint of trade dates from the late sixteenth century, when judges began declaring such restraints to be unlawful as part of an effort to attack a medieval economic order ill-suited

⁸ Although a full examination of the application of the *Civil Code of Québec* is beyond the scope of this Article, it would appear that agreements among sports league owners that are unreasonable under the common law of restraint of trade would also be considered contrary to the public order and thus void under Art. 1413 C.C.Q.. See e.g. *Cameron v. Canadian Factors Corp. Ltd.*, [1971] S.C.R. 148 at 162, (1970), 18 D.L.R. (3d) 574 [*Cameron* cited to S.C.R.] (same balancing of interests under C.C.Q. provisions as to public order and the common law). Although one way to identify the public order would be by reference to the public policy set forth in the *Competition Act*, courts are not limited to statutory policy in determining whether agreements are considered "unlawful as contravening public order" (See Martin Boodman, *et al.*, *Quebec Civil Law: An Introduction to Quebec Private Law*, ed. by John E.C. Briery & Roderick A. MacDonald (gen. eds.) (Toronto: Emond Montgomery, 1993) at 193: the civil concept of public order is broader than the common law public policy doctrine.). This would seem especially true here because the *Competition Act* was not intended to replace pre-existing contract law doctrines. In any event, one can derive public policy from Art. 2089 C.C.Q., which limits non-competition agreements between employers and employees to terms "necessary for the protection of the legitimate interests of the employer." If overbroad restrictions in individual contracts are not enforceable, than an agreement among employers to impose overbroad terms is surely void as well. Québec's jurisprudential hostility toward overbroad or inequitable non-competition agreements is considered an "*exemple classique*" of the invocation of general legal principles not necessarily expressed in law (Jean-Louis Baudouin, *Les Obligations*, 4th ed. (Cowansville, Qc.: Yvon Blais, 1993) at 78.). In addition, like the common law, the public interest plays a significant role in determining whether a restraint violates the public order. See e.g. *T. v. B.*, [1958] C.S. 587 (an otherwise reasonable restriction on the employment of a doctor was held invalid because it limited the public interest in choosing a doctor in whom they had confidence). Moreover, Québec courts have relied upon common law precedents in this area to inform their view of the public order. See e.g. *Perreault v. La Laiterie des Producteurs de Joilette Lee.*, [1959] C.S. 45.

⁹ As Fitzpatrick, C.J.C. noted in *Weidman*, *supra* note 7 at 3-4, the *Competition Act* was intended to make unlawful agreements that "unduly" lessen competition even though the agreements might not be unreasonable at common law. By inference, those restraints that are unreasonable at common law should *ipso facto* be deemed to violate the *Competition Act*.

for an evolving English economy.¹⁰ Although some early cases seemed to proscribe any effort to “restrain any to use a lawful trade at any time or at any place,”¹¹ exceptions began to develop, especially regarding transactions that appeared to be truly voluntary.¹² Over time, courts adopted a “reasonableness test”, which for our purposes contains three critical components. To be reasonable, restraints of trade must be: (1) no broader than necessary to achieve the defendants goals; (2) designed to achieve goals that courts recognize as legitimate; and (3) not so anticompetitive as to harm the public interest.

The 1711 benchmark decision in *Mitchel v. Reynolds*¹³ enforced a baker’s promise not to compete for five years within the local parish with the person to whom he had sold his bakery. In establishing that some voluntary restraints of trade were lawful, the Court established a key principle of particular relevance to professional sports league trade restraints: restraints broader than necessary to protect the legitimate interests of the promisee remained invalid. Thus, in upholding the promise not to compete in St. Andrews Holborn Parish, the Court distinguished a promise not to compete elsewhere, noting that a London trader had no legitimate concern with whether a rival was working in Newcastle.¹⁴

¹⁰ See William Letwin, *Law and Economic Policy in America: The Evolution of the Sherman Antitrust Act* (Chicago: University of Chicago Press, 1967) at 19 [Letwin]. For an excellent explanation of the historical evolution of the common law, see generally Michael J. Trebilcock, *The Common Law of Restraint of Trade: A Legal and Economic Analysis* (Toronto: Carswell, 1987), at c. 1 [Trebilcock].

¹¹ *Colgate v. Bacher* (1602), 78 E.R. 1097 (Q.B.) [*Colgate*].

¹² The early cases involved restraints applied involuntarily to persons by force of law, royal prerogative, or custom. As early as 1414, an English court had ruled that a contract not to practice a trade within a certain town for six months was illegal (*Dyer’s Case*, [1414] Y.B. 2 Hen. V., vol. 5, pl. 26.). However, commentators have suggested that these cases are best seen as efforts by a guild master to prolong the traditional period of apprentice subservience, and thus are really involuntary restraints of the same nature as the Crown monopoly on playing cards held illegal in *Darcy v. Allen* (1602), 11 Co. Rep. 84B, 72 E.R. 830. See Trebilcock, *supra* note 10 at 8-9.

¹³ (1711), 1 P.Wms. 181, [1558-1774] All E.R. Rep. 26, 24 E.R. 347 (K.B.) [*Mitchel* cited to E.R.].

¹⁴ *Ibid.* at 350. The early cases, such as *Colgate*, *supra* note 11, almost all involved apprentices oppressed by grasping masters. Thus, *Mitchel* could be read not as an exception to the medieval rule, but as recognizing a new and different rule governing restraints ancillary to the sale of businesses and other less one-sided arrangements. See Harlan. M. Blake, “Employee Agreements Not to Compete” (1960) 73 Harv. L. Rev. 625 at 632.

Two other major cases clearly illustrate this principle, critical to sports league restraints often challenged as overly restrictive. In *Mineral Water Bottle Exchange and Trade Protection Soc'y v. Booth*,¹⁵ the Court of Appeal refused to enforce a trade association's rule that required a two year waiting period before one member of the association could hire the employees of another. The court reasoned that the restraint applied indiscriminately to those who had never been in a confidential position nor who posed any threat of misuse of information acquired during previous employment.¹⁶

Even at the height of the *laissez faire* era of tolerance for reasonable cartels, the Privy Council struck down an agreement using an inefficient and unnecessary means to effectuate a restraint of trade. In *Collins v. Locke*,¹⁷ the four leading stevedoring firms in the Port of Melbourne agreed to divide the market among themselves. When a merchant chose not to employ the stevedore to whom he was assigned, the agreement provided that none of the other three firms would provide their services. Although the Privy Council suggested that the market division might be enforceable (an outmoded proposition today), the boycott provision was unreasonable, because, their Lordships claimed, it was "utterly unprofitable and unnecessary,"¹⁸ since the parties had already worked out a scheme that allowed four designated shippers to choose among the stevedores, with profits being reallocated among the cartel parties. This decision shows their Lordship's implicit recognition that one of the vices of cartels is that they reduce output even below monopolistic levels, because of the need to accommodate the interests of each carteleer. That is, it may be in the cartel's interest to forego certain efficient transactions because bargaining costs prevent the conspirators from satisfactorily dividing the monopoly profits.¹⁹ Foreshadowing some of the difficulties with sports

¹⁵ (1887) 36 Ch. 465 (C.A.) [*Mineral Water Bottle Exchange*].

¹⁶ *Ibid.* at 471. Similarly, an employer may not enforce a promise by an employee not to compete in markets unrelated to the one for which she was employed—a watchmaker cannot restrain an employee from competing as an umbrella maker (*Rogers v. Maddocks*, [1892] 3 Ch. 346 at 355.). See also See J. Dyson Heydon, *The Restraint of Trade Doctrine*, 2d ed. (Sydney: Butterworths, 1999), at 112-116 (citing cases).

¹⁷ [1879] 4 A.C. 674 (P.C.).

¹⁸ *Ibid.* at 688.

¹⁹ See Stephen Ross and S. Szymanski, "Necessary Restraints and Inefficient Monopoly Sports Leagues" (2000) 1 Int'l Sports L. Rev. 27 (explaining the output-restricting television rights contract agreed to by clubs in the English Premier League in these terms).

league restraints, *Collins* held that cartel agreements that reflect these bargaining costs are unreasonable.²⁰

The authoritative restatement of the modern common law doctrine²¹ is found in the landmark case of *Nordenfelt v. Maxim Nordenfelt Gun & Ammunition Co.*²² Lord Macnaghten noted that every person's ability to carry on a trade was in the public *interest*, but special circumstances justified some restraints of trade to wit:

If the restriction is reasonable, that is, in reference to the interests of the parties concerned and reasonable in reference to the interests of the public, so framed and so guarded as to afford adequate protection to the party in whose favour it is imposed, while at the same time it is in no way injurious to the public.²³

Common law courts have traditionally sought to constrain trade restraints implicitly, by limiting both the interests and means they are able to protect.²⁴ In this way, without explicitly relying on the public interest branch of *Nordenfelt*, courts "simultaneously protect[ed] the covenantor against excessive restrictions on this right to work and the public against undue loss of his services."²⁵ As Lord Atkinson stated in 1919, the test of unreasonableness in the restraint of trade doctrine "affords no more than adequate protection to those interests of the private parties concerned *which they have a right to have protected*."²⁶ Thus, the test combines the parties' interests and the public

²⁰ See also *Hilton v. Eckersley*, (1855) 6 El. & Bl. 47, 119 E.R. 781: an agreement among mill owners to set common wages and working conditions was unenforceable because of the excessive power it vested in the majority of them to use in their individual self-interest.

²¹ See Trebilcock, *supra* note 10 at 45.

²² [1894] A.C. 535, [1891-1894] All E.R. Rep. 1 (H.L.) [*Nordenfelt* cited to A.C.].

²³ *Nordenfelt*, *supra* note 22 at 565.

²⁴ Heydon, *supra* note 16 at 72: employee restraints are not valid "unless there is a 'legitimate' or 'proprietary' interest meriting protection."

²⁵ Trebilcock, *supra* note 10 at 51. See *Kores Mfg. Co. v. Kolok Mfg. Co.*, [1959] Ch. 108 at 125, [1958] 2 All E.R. 65 (C.A.) [*Kores* cited to Ch.]: although employers have an interest in keeping good workers in their employ, employers have "no *legitimate interest* in preventing an employee, after leaving his service, from entering the service of a competitor merely on the ground that the new employer is a competitor" [emphasis added].

²⁶ *McEllistrim v. Ballymacelligott Co-operative Soc'y*, [1919] A.C. 548 at 574 (H.L.) [emphasis added]. See also *Polaroid Canada Inc. v. Continent-Wide Enterprises Ltd.*, [1995] 59 C.P.R. (3d) 257 at 276-277, 18 B.L.R. (2d) 294 (Ont. Ct. Gen. Div.) [*Polaroid* cited to C.P.R.]: "for a restraint to be reasonable it must be intended to protect some *proper* interest of the covenantee" [emphasis added]. Aff'd (2000) 7 C.P.R. (4th) 73 (C.A.).

interest, because it is “consideration of the public interest which determines what is an interest of the private party concerned which he has a right to have protected”²⁷—in other words, consideration of the public interest can aid in the determination of what exactly is ‘legitimate.’

The two interests which courts have traditionally recognized as legitimate justifications for trade restraints are protection of trade secrets and (in the context of selling a business) protection of goodwill purchased from the seller.²⁸ In contrast, of direct relevance to this article, common law courts have rejected the legitimacy of an employer’s interest in preserving for itself the natural improvement in skill that inevitably occurs during a worker’s ordinary employ.²⁹ As Justice Heydon observed, an “employee’s personal skill can be used by him in competition with the employer even though he acquired it from the employer, even if it was very expensive, even if it was all the training the employee ever had.”³⁰ To avoid competition, exceptionally useful employees can be signed to remunerative long-term contracts,³¹ rather than be subject to trade restraints. If this approach applies to an individually negotiated restrictive covenant, then it would certainly apply to restraints collectively imposed by rivals.

The English courts have also unequivocally rejected an interest in “freedom from *competition per se* apart from both these things, however lucrative it might be.”³² As Lord Chancellor Eldon recognized as early as 1807, such agreements necessarily give the parties an economic power over

²⁷ *Petrofina (Great Britain) Ltd. v. Martin*, [1966] Ch. 146 at 182, [1966] 1 All E.R. 126 (C.A.) [*Petrofina* cited to Ch.].

²⁸ See Trebilcock, *supra* note 10 at 120-129.

²⁹ See *Mason v. Provident Clothing & Supply Co.*, [1913] A.C. 724 at 740-741, [1911-1913] All E.R. Rep. 400 (H.L.) [*Mason* cited to A.C.]; *Herbert Morris Ltd. v. Saxelby*, [1916] A.C. 688 at 714, [1916-1917] All E.R. Rep. 305 (H.L.) [*Morris* cited to A.C.].

³⁰ Heydon, *supra* note 16 at 90. Accord, *Sir W.C. Leng & Co. Ltd. v. Andrews*, [1909] 1 Ch. 763 (C.A.) (the information and training that an employer imparts to his employee become part of the equipment in skill and knowledge of the employee, and so are beyond the reach of restrictive covenants).

³¹ See Heydon, *supra* note 16 at 90. See also *Buckley v. Tutty*, *infra*. note 52; Trebilcock, *supra* note 10 at 217 (industry-wide agreements are unreasonable but efficient; individually negotiated agreements may be efficient). Compare *Hiebert v. Pacific Petroleum, Ltd.* (1980), 3 Man. R. (2d) 38, 109 D.L.R. (3d) 137, 50 C.P.R. (2d) 41 (Q.B.) (recognizing the legitimate interest of suppliers in recouping investment from the establishment of a retail outlet through an individually negotiated restrictive covenant).

³² *Morris*, *supra* note 29 at 702 [emphasis added].

price, “and the manner, in which that discretion will probably be exercised, is obvious;”³³ why else would parties enter into a bare non-competition agreement? In *Vancouver Malt and Sake Brewing Co. v. Vancouver Breweries, Ltd.*,³⁴ the parties were the only two brewers licensed to manufacture beer in Vancouver, but Vancouver Malt (VM) actually brewed only sake. The parties entered into a contract styling Vancouver Breweries (VB) as the ‘purchaser’ of ‘goodwill’ contained in VM’s license to sell beer; for \$15,000, VM ‘sold’ this goodwill, along with a promise not to compete in the sale of beer for fifteen years. The Privy Council held the promise unenforceable as an unreasonable restraint of trade, notwithstanding VM’s claim that it needed the cash to improve its sake business, and otherwise risked insolvency.

The Lords explained that an agreement arguably avoiding the bankruptcy of a Depression-era brewer was illegitimate because the “liberty to trade is not an asset which the law will permit [a business] to barter for money except in special circumstances and within well recognized limitations.”³⁵ These special circumstances always involved “some main transaction”³⁶ to which the challenged restraints were ancillary as well as reasonably necessary to render the transaction effective. A review of the common law led to the conclusion that “so far as their Lordships are aware there is no case ... in which a bare

³³ *Cousins v. Smith* (1807), 13 Ves. Jr. 5421, 33 E.R. 397 at 398 (Ch.) [*Cousins* cited to E.R.].

³⁴ [1934] A.C. 181 (P.C.) [*Vancouver Malt*].

³⁵ *Ibid.* at 192.

³⁶ *Ibid.* at 190. *Accord Maguire v. Northland Drug Co.*, [1935] S.C.R. 412, 3 D.L.R. 521. See also *City Dray Co. Ltd. v. Scott*, [1951] 58 Man. R. 410, [1950] 4 D.L.R. 657 at 675 (K.B.) [*City Dray* cited to D.L.R.] (a covenant not to compete given by a former employee of the firm in return for their pension, was not enforced as it was held to be a “bare covenant not to compete”); *Wyatt v. Kreglinger*, [1933] 1 K.B. 793 at 807, [1933] All E.R. Rep. 349 [*Wyatt* cited to K.B.] (Similar holding to *City Dray*). *Connors v. Connors Bros. Ltd.*, [1939] S.C.R. 162, [1939] 1 D.L.R. 212, [*Connors Bros.* cited to S.C.R.] found that a non-competition covenant nominally ancillary to a stock purchase was void because the evidence was “perfectly plain” that the purpose of the transaction was to create a monopoly in Canada, and for this a premium was paid for the promisor’s stock at 166. Because the purpose of the covenant was not the legitimate goal of protection of goodwill, but the illegitimate goal of monopolization, Duff C.J.C. concurring, concluded that the restraint was unenforceable. The Privy Council reversed, but did not challenge Duff’s legal rationale; rather, it found that the non-competition covenant was “an essential feature” of a stock purchase by a new controlling stockholder from prior managers (*Connors Bros. Ltd. v. Connors*, [1940] 4 All E.R. 179 at 195 (P.C.) [*Connors* cited to All E.R.] at 187.). The Privy Council further held that Duff’s monopolization concerns were groundless in light of low entry barriers, as well as evidence of new entry into the market in question (*Ibid.* at 195).

covenant not to compete has been upheld.”³⁷ Thus, a more recent 1994 Chancery opinion declared that a bare restraint on competition “will be unenforceable no matter how large the consideration” paid, because “however much it may be in the interests of the party restrained to accept the restraint, it is nevertheless contrary to the wider public interest that he should be bound by it.”³⁸

In the past few decades, Canadian courts have begun to emphasize explicitly the *Nordenfelt* requirement that restraints of trade be reasonable with regard to the public interest as an independent criterion. For example, in *Sherk v. Horwitz*,³⁹ the court refused to enforce a non-competition covenant despite finding it to be reasonable between the parties, on the basis that the covenant deprived the community of needed medical services in contravention of legislative policy.⁴⁰ These key principles (narrowly tailored restraints, designed to achieve judicially-sanctioned legitimate goals, in a manner that does not outweigh the public interest) create the foundation for the application of the common law to sports restraints.

B. APPLICATION OF THE GENERAL DOCTRINE TO PROFESSIONAL SPORTS LEAGUE RESTRAINTS

When professional sports league restraints have been challenged under the common law, courts have applied these same historic principles, requiring restraints to be justified by, and ancillary to, a legitimate interest. Thus, the scope of legitimate interests are confined in light of the public interest, and restraints are required to be narrowly tailored to promote the interest so recognized. Initial decisions enjoined unreasonably restrictive rules based on a

³⁷ *Vancouver Malt*, *supra* note 34 at 190.

³⁸ *Panayiotou (professionally known as George Michael) v. Sony Music Entertainment (UK) Limited*, [1994] 13 Tr L 532 (Ch. D.) [LEXIS].

³⁹ [1972] 2 O.R. 451, (1972) 25 D.L.R. (3d) 675, 5 C.P.R. (2d) 135 (H.C.) [*Sherk* cited to O.R.], *aff'd* on other grounds [1973] 1 O.R. 360, (1972) 31 D.L.R. (3d) 152, 9 C.P.R. (2d) 119 (C.A.). *Accord Baker v. Lintott* (1980), 25 A.R. 512 (Alta. Q.B.) (refusing to enforce a covenant where 13 of the 17 general physicians in Medicine Hat were affiliated with the plaintiff).

⁴⁰ Compare *Thomas Cowan & Co. v. Orme* (1960), 27 M.L.J. 41 at 43 (H.C. Singapore) (refusing to enforce a three-year non-competition clause against an employee, where the plaintiff's sole competitor was the defendant's new employer); *Wells, Monaghan and Co. v. Parsons* (1985), 55 Nfld. & P.E.I.R. 26 (Nfld. C.A.) (refusing to grant liquidated damages for breach of non-competition covenant where the respondent was the only lawyer in town, and the plaintiff had no intention of practicing there). Similarly, in *J.G. Collins Insurance Agencies v. Elsley Estate*, [1978] 2 S.C.R. 916 at 924, 83 D.L.R. (3d) 1 [*Elsley* cited to S.C.R.], the Supreme Court of Canada considered at length a claim that a non-competition covenant was unreasonable vis-à-vis an employee, and then proceeded to consider the public interest, finding no harm where the restrained insurance agent operated in a market including over twenty rivals.

“man's right to work.”⁴¹ Later cases have explicitly held that the public interest includes both “consumer interests” and “individual freedoms.”⁴²

1. COMPETITIVE BALANCE

The leading English case is *Eastham v. Newcastle United Football Club Ltd.*⁴³ This was a challenge to the English ‘retain and transfer’ rule, similar to the ‘reserve clause’ used by North American sports leagues, which bound a player to his former club, even if his contract had expired and the club was no longer paying him. Finding a real inequality in bargaining power, Lord Wilberforce stated that the pervasive use of this system by sports league employers justified careful judicial consideration of whether the rules went “further than is reasonably necessary to protect their legitimate interests.”⁴⁴ He recognized that, although the restriction could not be justified to protect the two traditional interests involved in employee covenants (trade secrets or customer connections), the Football League had a special and legitimate interest in maintaining the overall quality of the sport through competitive balance. He acknowledged that, if richer teams could acquire most of the better players, this would be “to the detriment of the public as a whole.”⁴⁵

The burden that *Eastham* placed on owners cannot be overemphasized. Lord Wilberforce’s opinion demands proof not only that (a), richer teams would indeed be more active in signing free agents than financially poorer clubs, but that (b), the free agents signed would be better players, thus directly harming competitive balance, and that (c), this loss of competitive balance would be “to the detriment of ... the whole.” In *Eastham*, his Lordship correctly identified several reasons why the league’s case failed to

⁴¹ *Nagle v. Feilden*, [1966] 2 Q.B. 633 at 646, 1 All E.R. 689 (C.A.) [*Nagle* cited to Q.B.]. The court’s choice of words is noteworthy, given that an early case involved a restriction against a woman becoming a horse trainer.

⁴² *Blackler v. New Zealand Rugby Football League (Incorporated)*, [1968] N.Z.L.R. 547 at 571 (C.A.) [*Blackler*].

⁴³ [1964] Ch. 413, [1963] 3 All E.R. 139 [*Eastham* cited to Ch.].

⁴⁴ *Ibid.* at 438.

⁴⁵ *Ibid.* at 432. A fair reading of the “whole” to whom Lord Wilberforce refers in *Eastham* includes players, owners, and fans. To the extent that restraints actually promote competitive balance and that such balance makes the sport more attractive, fans benefit from more exciting contests, owners benefit from the increased revenue that flows from a product that has increased consumer appeal, and players benefit as long as the restraint permits significant (if not completely unrestrained) competition for their services among owners, with greater revenues to support their payrolls. For a detailed analysis of the policy arguments supporting the conclusion that competitive balance is a legitimate goal of competition policy, see Ross, “Misunderstood,” *supra* note 4 at 537-42.

demonstrate the need for the 'retain and transfer' restrictions. First, he noted that English football clubs frequently transferred players to other teams for a fee, and that richer clubs already used their superior resources to buy players.⁴⁶ Second, he noted that clubs with good employee relations could draw upon the natural reluctance of a player to betray feelings of loyalty as well as to disrupt his family. Third, he also observed that "[n]o club desires more than so many centre forwards ..."; players are unlikely to switch to talent-laden teams where they might not make the first eleven.⁴⁷ Thus, he concluded that the evidence did not support the "rather far-fetched argument" that the rule tended to spread good players evenly over the various clubs in each division and to thereby promote equally balanced teams.⁴⁸

Lord Wilberforce's third point discussed above deserves additional note. All things being equal, a player is more likely to be highly valued by an *inferior* team, and so the free market naturally tends to improve competitive balance. A championship team will find it very difficult to sustain the salary demands of all its players; a team with a disappointing record will have a greater incentive to demonstrate improvement next year, and is more likely to find players with subordinate roles on top teams who can become stars on their own rosters. As an Australian court noted, a "player of skills and physical characteristics of a particular kind may well have a far better opportunity of being selected to play and of becoming a footballer of high repute if he is able to join a club which has not any other or few other players of that kind than if he joins a club which has a number of them."⁴⁹ Referring

⁴⁶ See *Eastham*, *supra* note 43 at 433.

⁴⁷ *Ibid.* at 434.

⁴⁸ *Ibid.* at 436.

⁴⁹ *Hall v. Victorian Football League*, [1982] V.R. 64 at 70 (Vic. S.C.) [*Hall*]: upholding a challenge to a restraint assigning players to clubs based on residence, where a player assigned to the dominant Collingwood club preferred to play for South Melbourne. See also *Adamson v. New South Wales Rugby League* (1991), 103 A.L.R. 319 at 500 (F.C.A.) [*Adamson*]: one reason for players to choose to change clubs was to improve their chance to play in the top league "which might be poor if the player were required to play with a team already well catered for in the position of his choice"; *Johnston v. Cliftonville Football and Athletic Club Ltd.*, [1984] N.I. 9 at 21 (Ch.) [*Johnston*]: in light of roster maxima, fear that top two clubs in Northern Ireland would sign all the best players "does not bear examination..."; Ross, "Misunderstood," *supra* note 4 at 565; describing how the champion New York Yankees did not seriously bid on a key relief pitcher because they had a younger player at the same position, and the veteran's skills were more valued by other team; Brian Ward, "Fair Play: Professional sport and restraint of trade" (1985), 59 L. Inst. J. 545 at 546: noting that statements that blanket restraints promote competitive balance tend to be anecdotal testimony from league executives unsupported by statistical evidence; the Victorian Football League competition had been dominated by three or four clubs for several decades, and, in an unreported opinion in *Foschini v. Victorian Football League*, [1982] Vic. S.C. LEXIS 9868 [LEXIS], Crockett J. appeared to be persuaded by the

to Canadian football, one astute observer commented that the “high-priced player is not always the best player in a sport where team play is the only means to success.”⁵⁰ Because the challenged rule in *Eastham* was not narrowly tailored to promote competitive balance — the only interest recognized as legitimate⁵¹ — it was an unreasonable restraint of trade.

Eastham was followed by the Australian High Court in *Buckley v. Tutty*,⁵² holding that a similar set of blanket restraints employed by the Australian professional rugby league unreasonably restrained trade. Like Lord Wilberforce, the Court in *Buckley* agreed that the leagues had a legitimate interest in ensuring that “teams fielded in the competitions are as strong and well matched as possible, *for in that way* the support of the public will be attracted and maintained, and players will be afforded the best opportunity of developing and displaying their skill.”⁵³ Note the important gloss that the Court placed on *Eastham*’s validation of competitive balance—it is not an end in itself but only a means to the ends of maximizing fan interest and the most efficient allocation of player resources.⁵⁴ *Buckley* also followed *Eastham*’s holding that overbroad restraints were unreasonable.⁵⁵

An Australian appellate court emphasized the burden that Lord Wilberforce had imposed in *Eastham*; in *Adamson*⁵⁶, the trial court judgment in favour of a blanket restraint was reversed because, *inter alia*, the trial judge had erroneously sought to determine reasonableness by balancing the interests of players in free competition and the interests of the league in restraints. According to Gummow J. of the appellate court, this approach impermissibly

plaintiff’s evidence that player restraints tend to achieve the very reverse of the objective espoused by the administrator as justifying the restraint.

⁵⁰ John Sopinka, “Extra-Contractual Aspects of Canadian Professional Football” (1958) 16 U.T. Fac. L. Rev. 38 at 46.

⁵¹ *Eastham*’s rejection (*supra* note 43) of club arguments that promoting team stability or recouping investment in player training justified the rule are considered below. See *infra* notes 60-65 and accompanying text.

⁵² (1971), 125 C.L.R. 353 [*Buckley*].

⁵³ *Ibid.* at 377 [emphasis added.].

⁵⁴ Compare *National Collegiate Athletic Ass’n v. Board of Regents*, 468 U.S. 85 at 119-120 (1984) [NCAA]: the “hypothesis that legitimates the maintenance of competitive balance as a pro-competitive justification under the Rule of Reason is that equal competition will maximize consumer demand for the product.”

⁵⁵ See *Buckley*, *supra* note 52 at 378: the unlimited duration of the retain-and-transfer rules went “beyond what is reasonable” and the transfer fee hindered employment opportunities in ways unrelated to any legitimate interest of the clubs.

⁵⁶ *Supra* note 49.

lightened the burden on the league: "What they had to show was that the restraint was reasonably related to the objects of the League or the clubs, and the restraint afforded no more than adequate protection to the interests of the League and the clubs. Otherwise it would be void."⁵⁷

Although courts have been quick to recognize the special nature of agreements among participants in the sports industry, the important common law limits on the ability of rivals to cooperatively restrain trade — (1) the ancillary nature of the restraint to the interest; (2) furtherance of an end recognized by the courts as legitimate; and (3) narrow tailoring—have all been applied unequivocally. In particular, to date the only *legitimate* end that has been expressly recognized to justify a sports league's trade restraint is the need to promote competitive balance.⁵⁸

⁵⁷ *Adamson*, *supra* note 49 at 365.

⁵⁸ Three trial court opinions from Ontario have considered whether to grant preliminary relief to teenage players challenging agreements among member teams in the amateur Ontario Hockey Association (O.H.A.), that required youngsters to play for the junior team to which they were assigned, absent a release. See *Boduch v. Harper*, [1976] 10 O.R. (2d) 755, 64 D.L.R. (3d) 463, 13 C.P.R. (2d) 1 (H.C.) [*Boduch* cited to O.R.]; *Gretzky v. Ontario Minor Hockey Ass'n* (1975), 10 O.R. (2d) 759, 64 D.L.R. (3d) 467, 24 C.P.R. (2d) 275 (H.C.) [*Gretzky* cited to O.R.]; *Chantler v. Metropolitan Toronto Hockey Lg.* (1983), 44 O.R. (2d) 85, 3 D.L.R. (4th) 155 (H.C.) [*Chantler*]. However, none of the opinions analyzed the merits of the restrictions under the common law of restraint of trade. In *Boduch*, the court noted that it was not "convinced that the O.H.A. operates in a commercial way so as to contravene those laws which seem to aim at combinations which have a commercial objective," at 758. In *Gretzky*, the plaintiff did not challenge the O.H.A. rules as restraints of trade, instead arguing that the association was violating its own rules by refusing to allow his family to move to Toronto and play for a junior team there; the court's refusal to grant an injunction was based on the plaintiff's failure to exercise his right to administrative appeals within the association (at 761). In *Chantler*, the Court found that under the general principles of equitable remedies, the plaintiff had met his burden of showing his case was not frivolous, and that the balance of hardships tipped clearly in his favour (two leagues within the O.H.A. had reached opposite interpretations of the technical residence rules which could have led to his ineligibility while internal league processes sorted out the disagreement). Likewise, in *Kitchener Dutchmen Inc. v. Russian Ice Hockey Federation* (1998), 77 A.C.W.S. (3d) 1242 (Ont. Ct. Gen. Div.) [*Kitchener*], the court enjoined interference with two Russian teenagers playing for the plaintiff's junior hockey team, pending litigation on the reasonableness of the Russian Federation's refusal to authorize their transfer from a Russian to a Canadian team. Yet another trial court granted preliminary relief to a college student to allow him to play for a lower-level team near his college, rather than the Junior A League team where he had attended high school (*Hebert v. Shawinigan Cataractes Hockey Club* (1978), 22 O.R. (2d) 654, 94 D.L.R. (3d) 153, 42 C.P.R. (2d) 190 (H.C.) [*Hebert* cited to O.R.]). The *Hebert* opinion does not identify the legal theory under which the plaintiff sought relief, and rejected the defendants' claim of preventing chaos that would ensue if players could switch teams. Rather, the court found the claim inapplicable to the facts of the case. See also *Strummer Holdings Ltd. v. Costello* (1982), 19 Sask. R. 297 (Q.B.) [*Strummer*] (upholding the residence rules for midget hockey against a challenge based on interpretation of the rules and the constitutional right to travel; no restraint of trade claim was made by the plaintiffs).

2. MAINTAIN ROSTER STABILITY

In striking down the 'retain and transfer' rule in *Eastham*, Lord Wilberforce rejected the Football League's argument that the restraint could be justified to avoid loss of stability on a team's roster. It would have sufficed for his Lordship to have drawn upon well-settled non-sports precedents where English courts had rejected maintenance of a stable labour force as a legitimate justification for employee restraints.⁵⁹ However, he instead explained that the restraint was unnecessary, because clubs could individually act to reduce turnover by signing players to staggered long-term contracts.⁶⁰

As a matter of economics, the justification of roster stability has little to support it. A pro-competitive efficiency justification for roster stability presumes that a player is more valuable as a veteran of the same team, rather than offering his services to a new set of team-mates. If this is so, then in an unrestrained market we would expect his current club to outbid rivals for his services—which is often not the case.

3. RECOUPING INVESTMENT IN TRAINING

Eastham also rejected the claim that the restraints were necessary to secure a club's investment in training and development of young players.⁶¹ The answer, again, lay in individually negotiated contracts with young players to ensure that the club had a reasonable opportunity to recoup their investment.⁶² As Professor Trebilcock explains, a player might well sign a multi-year contract that results in his being paid well below his market value in its later years,

⁵⁹ See e.g. *Mineral Water Bottle Exchange*, *supra* note 15.

⁶⁰ *Eastham*, *supra* note 43 at 435. Accord *Buckley*, *supra* note 52 at 378. See also *Nobes v. Australian Cricket Board*, [1991] Vic. S.C. LEXIS 13613 [LEXIS], Marks J.: the stability of state all-star teams participating in interstate cricket competition was achieved by signing contracts with players prior to the competition's start. Rules requiring players to reside in a state for three months and to forego playing for another state prior to interstate competition was held to unreasonably restrain trade.

⁶¹ See *Eastham*, *supra* note 43 at 435-36.

⁶² See *Toronto Marlboro Major Junior "A" Hockey Club v. Tonelli* (1975), 11 O.R. (2d) 664 at 682, 67 D.L.R. (3d) 214 (H.C.) [*Tonelli* cited to O.R.]: describing a new standard contract signed by teenage hockey players to pay \$25,000 to the junior league upon signing a professional contract. There is obiter in *Buckley*, *supra* note 52 at 378, that could be read to validate a league rule imposing a transfer fee that attempted to recoup the benefit a player received "from his membership of or association with" his former club. However, this issue was not before the Australian High Court and, in light of the Court's recognition that team stability could be achieved through provisions in individually negotiated contracts (see *ibid.* at 377), there is no reason to suppose that individual negotiation would not suffice even if a court were to conclude, contrary to *Eastham*, *supra* note 43, and *Blackler*, *supra* note 42, that clubs had a legitimate interest in recouping their 'investment' in a player.

should he develop into a star, as part of a mutual decision with an individual club on how to allocate the risks involved in predicting the abilities of young players.⁶³ Because these mutually beneficial arrangements can be reached between individual players and teams, agreements *among teams* to restrict competition for player services are not necessary to permit efficient risk allocation.⁶⁴ Indeed, this claim is no different than one that could be made by the employer of any skilled employee, and has long been rejected as the basis for restraining competition for an employee's services.⁶⁵

⁶³ See Trebilcock, *supra* note 10 at 132.

⁶⁴ Language in *Detroit Football Co. v. Dublinski*, [1957] O.R. 58, 7 D.L.R. (2d) 9 at 14-15 (C.A.) [*Dublinski* cited to D.L.R.], is similar. There, the court found merit in the Detroit Lions' claim that among the injuries they suffered due to Dublinski's breach of an option to play for the Lions in 1955 (he signed instead with the Toronto Argonauts), was their inability to recoup their investment in training him. The main issue in the case, however, was the validity of the one-year option agreement in Dublinski's contract, not a perpetual refusal of other NFL teams to bid on Dublinski's services. Prior to 1963, there were no restraints on an NFL team's ability to sign a contract with a player whose contractual obligations with another team had expired. See *Mackey v. National Football League*, 543 F.2d 606 at 610 (8th Cir. 1976) [*Mackey*]. In the opinion of McCarthy J. in *Blackler*, *supra* note 42, it was held that the respondent, an amateur league (there was no professional rugby in New Zealand at the time), could "ensure that those on whom money has been spent in training or in overseas tours return to the sport a fair measure for what has been done for them" at 572. This language is contrary to the established common law principle that training expenses may not be recouped through restraints of trade (*Ibid.* at 556: see the opinion of North P.J., citing *Mason*, *supra* note 29). The third judge in *Blackler* did not consider the reasonableness of the restraint because he found that the challenged rule, which prevented the plaintiff from playing professionally in Australia pursuant to an international agreement, did not restrain trade within New Zealand. In addition, the plaintiff had not challenged the validity of the international agreement (*Ibid.* at 561-565.). In contrast to amateur sports, NHL clubs contract individually with their players, and the investments by a team in training its young players can be recouped through individually negotiated long-term contracts. Like the New Zealand league, the NHL collectively spends substantial sums on the training and development of young amateur players through its subsidies of Canadian youth hockey. However, there is little risk that star players coming through the Canadian system will not play with some NHL team. A rule that effectively tied a junior player to the club with which he was initially registered for three or four years was found to be reasonable in *Wickham v. Canberra District Rugby League Football Club Ltd.* (10 September 1998), A.C.T. BC9804574 (S.C.) [LEXIS]. The judge distinguished *Buckley* and *Eastham* in concluding that the modest remuneration for junior players did not make them professionals. Implicit in the judge's analysis was that, at the junior amateur level, individual contracting is not an economically viable alternative.

⁶⁵ See *Eastham*, *supra* note 43 at 431 (citing *Leng v. Andrews*, [1909] 1 Ch. 763 at 774). Accord *Blackler*, *supra* note 42 at 556; *Winnipeg Livestock Sales Ltd. v. Plewman* (2000), 150 Man. R. (2d) 82 at 89, 192 D.L.R. (4th) 525 (C.A.) [*Winnipeg* cited to Man. R.].

4. RUINOUS COMPETITION

In contrast to American and Canadian antitrust statutes, which have been unequivocally interpreted to preclude a defence that free competition is not in the public interest,⁶⁶ other Commonwealth judges have in the past upheld restrictions under the common law where they were convinced that the cartel price was not unreasonable and the restraints were necessary to avoid 'ruinous competition' among the parties.⁶⁷ For example, Lord Chancellor Haldane opined that although a cartel was designed to keep up prices, "an ill-regulated supply and unremunerative prices may, in point of fact, be disadvantageous to the public."⁶⁸

In the sports context, language in the 1978 decision in *Greig v. Insole*⁶⁹ could be read to endorse this view. There, the chancellor rejected as unreasonable agreements among international and English cricketing authorities designed to prevent stars from participating in cricket matches

⁶⁶ Although the *Competition Act* contains some statutory defences and exemptions (see ss. 45(3) and 45(4)), the determination of whether parties have unlawfully lessened competition "unduly," focuses solely on the degree of market power of the parties to the agreement, and whether the effect of the agreement is likely to injure competition. See *R. v. Nova Scotia Pharmaceutical Soc'y*, [1992] 2 S.C.R. 606 at 653-656, 93 D.L.R. (4th) 36, 43 C.P.R. (3d) 1 [*Nova Scotia Pharmaceutical* cited to S.C.R.]. The argument that the agreement beneficially serves the public by avoiding ruinous competition is not valid, because the *Act* "proceeds upon the footing that the prevention or lessening of competition is in itself an injury to the public" (*Ibid.* at 649—quoting *Howard Smith Paper Mills Ltd. v. The Queen*, [1957] S.C.R. 403 at 411, 8 D.L.R. (2d) 449, 29 C.P.R. (2d) 6 [*Howard Smith Paper Mills* cited to S.C.R.]). Accord *National Soc'y of Prof. Engineers v. United States*, 435 U.S. 679 at 696 (1978): "the Rule of Reason does not support a defense based on the assumption that competition itself is unreasonable"; *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150 at 221 (1940): "Ruinous competition, financial disaster, evils of price cutting and the like appear throughout our history as ostensible justifications for price-fixing," but to appraise them would supplant the philosophy of antitrust law with "one which is wholly alien to a system of free competition"; *United States v. Addyston Pipe & Steel Co.*, 85 F. 217 at 284 (6th Cir. 1898), aff'd 175 U.S. 211 (1899) [*Addyston* cited to 6th Cir.]: judges who assume "the power to say, in respect to contracts which have no other purpose...than the mutual restraint of the parties, how much restraint of competition is in the public interest, and how much is not" are bound to "set sail on a sea of doubt."

⁶⁷ Compare *Adamson*, *supra* note 49 at 368-369 (Gummow J.): expressly noting the differences between the *Sherman Act* and the common law of restraint of trade on this point.

⁶⁸ *North Western Salt Co v. Electrolytic Alkali Co.*, [1914] A.C. 461 at 469, [1914-1915] All E.R. Rep. 752 (H.L.) [*North Western Salt* cited to A.C.]. See also *Heydon*, *supra* note 16 at 20 (citing *Hearn v. Griffin* (1815), 2 Chit. 407 at 408-409, an 1815 English decision upholding a price fixing agreement between two rivals as "merely a convenient mode of arranging two concerns, which might otherwise ruin each other [and does not] preclude a third or more persons from starting in opposition to the plaintiff and the defendant.").

⁶⁹ [1978] 3 All E.R. 449, 1 W.L.R. 302 (Ch.) [*Greig* cited to All E.R.].

sponsored by an Australian commercial group in competition with international test matches. He did so only after considering and rejecting on the facts the defendants' claims that the Australian competition would deprive international cricketing authorities of profits necessary to support training and development for the world's cricketers. Significantly though, *Greig* found that even significant financial losses by a national federation who used the revenues to promote the sport on a grassroots level did not outweigh the impact on players, and the deprivation to the public of watching the highest quality sport possible.⁷⁰

It is doubtful that these Commonwealth precedents would be applied today by Canadian judges. In the first place, in virtually all the common law cases upholding price fixing in order to avoid "ruinous competition," the courts have emphasized the absence of barriers to entry.⁷¹ In contrast, there are significant barriers to the development of a new league that would seriously compete with NHL clubs for player services.⁷² Second, these decisions are products of a by-gone era where judges were reluctant to use the law to invalidate contracts on public policy grounds, as well as to support any governmental interference,

⁷⁰ See *ibid.* at 502-03.

⁷¹ See Trebilcock, *supra* note 10 at 280-281. In a pre-*Competition Act* case from Canada, *Ontario Salt Co. v. Merchants Salt Co.* (1871), 18 U.C.Chan. 540, the court and commentators emphasized that the price fixing agreement upheld in the case was justified to meet the unfair and vigorous competition from U.S. imports. See W.E. Brett Code, "The Salt Men of Goderich in Ontario's Court of Chancery: *Ontario Salt Co. v. Merchants Salt Co.* and the Judicial Enforcement of Combinations" (1993) 38 McGill L.J. 517.

⁷² Although the court in *Philadelphia World Hockey Club v. Philadelphia Hockey Club*, 351 F. Supp. 462 at 509 (E.D.Pa. 1972) [*Philadelphia Hockey*], identified the NHL's control of virtually the entire labour market of skilled players as the principal entry barrier to a major hockey rival, this may be less true today in light of the growth of European hockey. In any event, the barrier can be remedied, as the judge did in that case, simply by finding that the NHL's multi-year player contracts were unenforceable as against a club in a rival league. A more substantial problem is the need to find sufficient markets a new league can profitably enter, in order to maintain sufficient viable scale to operate. See R. Noll, "Major League Team Sports," in Walter Adams, ed., *The Structure of American Industry*, 5th ed. (New York: Macmillan, 1977) at 379. Even if such markets could be identified, clubs would have to find arenas in which to play; while the dominant league can often obtain tax-subsidized stadiums, a new entrant is unlikely to receive the benefits of such largesse, and will also have to face the prospect that the best arenas will already have exclusive arrangements with the incumbent team. See Walter Adams & James W. Brock, "Monopoly, Monopsony and Vertical Collusion: Antitrust Policy and Professional Sports" (1997) 42 Antitrust Bull. 721 at 727. Finally, a new entrant faces the daunting prospect of securing network television contracts in both Canada and the United States, which would probably necessitate entry into localized competition in Toronto against the extremely-popular Maple Leafs and in New York against three teams (the Rangers, Islanders, and Devils).

including judicial, with the laissez-faire economy.⁷³ Indeed, the Ontario Court of Appeals has suggested that the adoption of competition legislation in 1899 signalled a rejection of this line of reasoning as a matter of Canadian public policy.⁷⁴

Where employees have exercised their rights under modern labour legislation to organize and bargain collectively, there is even less legitimacy to the ruinous competition justification. If market conditions are such that an unrestrained labour market will indeed lead to ruinous competition, then the union can be expected to agree to labour market restraints.⁷⁵ To the extent that labour market restraints are indeed agreed to by a union, they would not be considered unreasonable restraints of trade at common law.⁷⁶ My own research has been unable to locate any present day case where ruinous competition was used to justify labour market restraints.

Courts have not yet had the opportunity to consider a novel variant on the ruinous competition argument recently set forth by Jeffrey Mishkin and Shepard Goldfein. These leading American sports practitioners assert that

⁷³ See Heydon, *supra* note 16 at 22.

⁷⁴ See *Tank Lining Corp. v. Dunlop Industrial Ltd.* (1982), 40 O.R. (2d) 219 at 228, 140 D.L.R. (3d) 659 (C.A.) [*Tank Lining* cited to O.R.]. Blair J. did suggest, that courts will typically decline to intervene “[w]hen two competently advised parties with equal bargaining power enter into a business agreement” (*ibid.* at 225). The case involved an agreement for both parties to withdraw from the Canadian market under specified conditions, and where new entry was possible and did occur. This is far different from any agreement among National Hockey League clubs. In the first place, significant barriers exist in professional hockey, see *supra* note 71. Second, when considering labour restraints a judge concerned about equal bargaining power would focus on the absence of any place at the bargaining table for the affected group—the players. See *Eastham*, *supra* note 43 at 428: noting the relevance of unequal bargaining power in English football and thus distinguishing cases where “parties are of equal strength.” To the extent that the NHL players’ union and management do “enter into a business agreement,” courts will most likely decline to intervene. See Part IV, below.

⁷⁵ Although North American players’ unions are often portrayed as greedy or selfish, there are a number of examples of offers made by unions to agree to significant player market restraints where it appeared that unrestricted competition would cause the sport to suffer significant losses. Two notable offers come from basketball. In 1972 the National Basketball Players Association (NBPA) offered to agree to a common rookie draft between the NBA and the rival American Basketball Association in order to prevent perceived over-bidding for rookie players; in 1982 the NBPA did agree to a salary cap in order to provide assurances to new investors that their costs would be limited during the term of the collective bargaining agreement. See also Bruce Garrioch, “NHL May Need to Align Its Stars” *Ottawa Sun* (13 January 2004) 46 (outlining NHLPA offer of revenue sharing and a 5% across-the-board pay cut for players).

⁷⁶ This point is considered in detail in Part IV, below.

sports club owners are uniquely unable to act as economically rational profit-maximizers. As a result, absent some meaningful labour market restraints, “in their relentless desire to win games,” owners will “commit economic suicide.”⁷⁷ The authors’ argument is succinctly put:

The need and desire to win, the pressure from coaches, fans, and the media to be successful on the court, field, or ice, will often cloud and distort even the most astute business judgment. In order to win games, a team must sign talented players, and to sign talented players, a team may conclude it has no choice other than to meet financial demands that are *not realistic in relation to the revenues that team is able to generate*.

One seemingly simple answer to this is just to say no to a player’s financial demands. But experience teaches that those who just say no usually are not able to field the most competitive teams. In the era of free agency, if a team is not prepared to pay whatever happens to be the going rate, the better players will go elsewhere, where some other owner is willing to meet their demands, *heedless of the financial consequences* to that team or the league.⁷⁸

Although this argument is without precedent, the competitive balance argument recognized in *Eastham* was also, prior to that decision, without support from cases limiting employee trade restraints to those necessary to protect trade secrets or customer connections.⁷⁹ Moreover, their argument builds upon the foundation establishing sport’s unique character; the interdependence of clubs. A sports league cannot afford to have most firms simply ‘cede’ the market to owners who are not participating in the labour market in an economically rational manner. Other clubs cannot easily exit and re-enter the market, and the quality of the overall product is degraded during the period when over-spending owners exercise what I will refer to as ‘psychic predation’.

One can also anticipate that this novel ruinous competition theory also contains a unique rejoinder to the argument, set forth above, that the labour exemption preserves all that is necessary for the defence; for if competition were indeed ruinous, then the union would agree to necessary labour restraints to save the industry and jobs.⁸⁰ Unlike typical industries, sports players’ unions are unique: given the relatively short careers of their members, players’ unions are unlikely to agree to restraints that may well be essential to avoid

⁷⁷ Jeffrey A. Mishkin & Shepard Goldfein, “Professional Sports Leagues Need Fiscal Responsibility” (2000) N.Y.L.J. (7 August 2000) 9 at 12 [Mishkin & Goldfein, “Sports Leagues”].

⁷⁸ *Ibid.* at 9 [emphasis added].

⁷⁹ See *supra* note 43.

⁸⁰ See *supra* notes 75-77 and accompanying text.

ruinous competition until it is too late, and the sport is significantly damaged. NHLPA President Trevor Linden, so the argument would go, would not sacrifice his next and possibly last major contract; even if the NHL is severely damaged five or six years hence, at that point he would probably be retired.

Whether this novel argument could be successfully employed by the NHL to achieve its current goals is considered in detail in Part V below. For purposes of legal analysis, it is sufficient to note that the NHL's lawyers would have to overcome two major hurdles before this defence might be recognized. First, they would have to establish that owners engaging in 'psychic predation' are sufficient in number to force many others to pay unremunerative salaries "heedless of the financial consequences to that team or the league."⁸¹ Certainly in light of the wolf-crying fears of past years that labour market competition would be ruinous,⁸² a Canadian judge would need to view this theoretically plausible claim with some scepticism. Second, they would have to establish that the challenged labour market restraint was reasonably necessary to prevent 'psychic predation.' As to the latter point, the league's lawyers may have grave difficulty, because of an obvious alternative proposed by Mishkin and Goldfein: require firms to conform their spending to a profit-maximizing model. If owners' "astute business judgment"⁸³ is being clouded, the league can require them to demonstrate that their investment in player talent is "realistic in relation to the revenues that team is able to generate."⁸⁴

5. PRESERVING CANADIAN MARKETS

Creative counsel for the National Hockey League might pursue another novel justification for the imposition of a blanket salary cap or luxury tax that may find greater favour in Canadian common law courts—the argument that these

⁸¹ Mishkin & Goldfein, "Sports Leagues," *supra*, note 77 at 12.

⁸² See e.g. *National & Am. League Prof'l Baseball Clubs v. Major League Baseball Players Ass'n*, 66 Labour Arbitration 101 (1976) (Messersmith and McNally Grievances): rejecting the owners' claim that the collective bargaining agreement must not be construed to permit free agency because it would ruin baseball; *Hall v. Victorian Football League*, [1982] V.R. 64 (S.C.): the court was unpersuaded by testimony that the elimination of the territorial draft of young players would result in the demise of weaker Australian Rules clubs within 3-5 years, a prediction proven wrong by the continuing vitality of that league; Stefan Szymanski & Tim Kuypers, *Winners and Losers: The Business Strategy of Football* (London: Viking, 1999), at 94 [Szymanski & Kuypers] (noting that the Football League had claimed as early as 1959 that removing a ceiling on wages would destroy English soccer).

⁸³ Mishkin & Goldfein, "Sports Leagues," *supra*, note 77 at 9.

⁸⁴ The crux of the authors' specific proposal—that a league adopt a rule requiring that each team must have earned as much money as it spent at the end of each season—is considered in detail in Part V, below.

restraints are necessary to allow clubs located in smaller Canadian markets to remain viable and avoid bankruptcy or relocation to larger cities, most likely south of the border.⁸⁵ Support for this novel proposition can be found in the language of the Ontario Court of Appeals decision in *Tank Lining*.⁸⁶ In the course of its opinion, the Court imagined that a restraint of trade might be unreasonable where its effect would be to “deprive the nation or a region of an essential industry, an important source of wealth and employment, or vital technology.”⁸⁷ An argument that employed *Tank Lining* to justify restraints of competition for players’ services, on grounds that these restraints were necessary to preserve professional sports in smaller Canadian cities, would be an unjustified expansion of that opinion.

Tank Lining’s suggestion that certain restraints might be unreasonable where the *restraint* deprived the region of an essential industry is quite different from the NHL’s argument that a restraint that directly injures players and indirectly injures fans is justified on grounds that *free competition* might deprive a region of an essential industry. As Professor Trebilcock observed, it is unclear why players should “subsidize spectators of professional sports who do not value the activities sufficiently highly to pay whatever is required to sustain a team in a community,” or, if subsidies are appropriate, why players rather than the community as a whole should not provide them.⁸⁸

In its willingness to read the public interest prong of the *Nordenfelt* test broadly, *Tank Lining* relied upon two English precedents; neither support the invocation of the public interest to justify anticompetitive restraints on hockey players. In *Eastham*, the Court found that the public interest would be served by restraints that promote competitive balance in a sports league.⁸⁹ Similarly, in *Esso Petroleum Ltd. v. Harper’s Garage (Stourport) Ltd.*,⁹⁰ the court found

⁸⁵ Initially, it is important to note that the problem of league dominance by teams in large cities appears unique to North American professional sport leagues. Elsewhere, there are no territorial restraints that prevent several teams from competing in large metropolitan markets. A soccer team from Newcastle, for example, does not face the impossible burden of competing against a single team from London, for there are many Premier League football clubs that compete for fan patronage in the London metropolitan area. However, were the National Hockey League to follow this practice, the short-term effect, at least, would be to cause some small market teams, such as Ottawa or Edmonton, to seek to move to larger cities, such as Toronto or Chicago. So, to the extent there is a recognized and legitimate interest in preserving professional hockey in small Canadian cities, the removal of territorial restrictions does not seem to be the answer.

⁸⁶ *Supra* note 74.

⁸⁷ *Ibid.* at 233.

⁸⁸ Trebilcock, *supra* note 10 at 227.

⁸⁹ See *Heydon*, *supra* note 16 at 212-13.

⁹⁰ [1968] A.C. 269 at 300, [1967] 11 All E.R. 699 (H.L.).

that the public interest would be served by restraints that facilitate new entry into the petroleum retail market. Both these cases share a common element—the restraint actually served to benefit consumers and society *at large*, either by presenting them with a more attractive product,⁹¹ or by increased competition for their patronage. In contrast, the novel argument anticipated here would benefit, at most, relatively few of society’s consumers (fans in small Canadian cities) without making hockey more attractive generally or increasing competition.⁹²

Moreover, in justifying a broad view of *Nordenfelt’s* public interest prong,⁹³ *Tank Lining* states that the Canadian common law looks to federal competition statutes “as expressions of Canadian public policy and the public interest in relation to agreements in restraint of trade.”⁹⁴ As detailed in Part III below, when Parliament took note of the special needs of sport leagues, it focused on two issues – competitive balance and international competition.⁹⁵ Arguably then, Parliament’s failure to direct courts to take special note of the needs of smaller Canadian cities suggests that the common law should not be expanded to permit this justification.⁹⁶

⁹¹ Compare *Buckley*, *supra* note 52 at 377: public support was attracted and maintained by fielding teams that are “as strong and well matched as possible.”

⁹² Compare *Sherk*, *supra* note 39 at 680: the existing economic power that the medical profession exerts over consumers suggests that the public interest is not served by restraints that further reduce competition among physicians.

⁹³ Some English courts have confined their analysis under the public interest prong to “those interests already recognized in propositions of law.” See *e.g. Texaco Ltd. v. Mulberry Filling Station Ltd.*, [1972] 1 All E.R. 513 at 527, [1972] 1 W.L.R. 814 (Ch.) [*Texaco* cited to All E.R.]. *Tank Lining* rejected this approach because it deprives the prong of “its utility as a valuable instrument for adjusting this branch of the law to changing economic and social conditions” (*supra* note 74, at 233). Language supporting the more limited view can be found on this side of the Atlantic, see *e.g. Stephens v. Gulf Oil Canada, Ltd.* (1975), 11 O.R. (2d) 129, 65 D.L.R. (3d) 193 [*Stephens* cited to O.R.]: Howland J.A. stated at 149 that the public interest is limited to the “right of men to trade freely,” and agreements reasonable between the parties should not be “upset for some fancied and problematical injury to the public welfare”; See *Béton Brunswick Ltée v. Martin* (1996), 176 N.B.R. (2d) 81, 66 C.P.R. (3d) 320 (N.B.C.A.) [*Béton Brunswick* cited to N.B.R.]: adopting the *Stephens* approach and rejecting the claim that an otherwise reasonable restraint ancillary to sale of business equipment was void because the promisor held a quasi-monopoly position in the relevant market. This narrow approach, however, appears inconsistent with Supreme Court of Canada decisions expressly analyzing the effect of restraints on competition within a relevant market, in addition to the reasonableness of the restraint between the parties. See *e.g., Elsley*, *supra* note 40 at 928-929.

⁹⁴ *Supra* note 74 at 228.

⁹⁵ *Competition Act*, R.S.C. 1985, c. 19, ss. 48 (2) (a), 48 (2) (b).

⁹⁶ In addition, the entire discussion of preserving an essential industry was *obiter*, because the Court in *Tank Lining* found that there was no public injury caused by an agreement between the parties to both withdraw from the Canadian market under specified circumstances, in light

In sum, the common law of restraint of trade provides an independent basis for challenge to sports league restraints that unreasonably limit competition for player services. A review of the precedents suggests that sport leagues may only restrict competition among themselves for justifications deemed legitimate by the courts; the only justification that the precedents would clearly permit is the need to preserve competitive balance so that fans can follow a more exciting season.⁹⁷ As detailed in Part V below, the imposition by owners of a blanket salary cap or luxury tax cannot be justified as a reasonable restraint of trade.⁹⁸ As a result, the common law authorizes judicial intervention to prevent their imposition.⁹⁹

of the existence of other smaller companies in Canada, the absence of entry barriers, and the fact that new entry did occur. *Supra* note 74, at 233-234. Significantly, this language has never been cited in a subsequently reported opinion.

⁹⁷ Common law courts have also recognized several other legitimate sporting interests that are not relevant to the imposition of labour restraints on professional players. See *e.g. Stevenage Borough Football Club Ltd v. The Football League Ltd.*, [1997] 9 Admin. L.R. 109 (C.A.): challenging the rules requiring a team to first meet a necessary stadium size and financial state several months before promotion to higher-level competition became possible; the rules were considered unreasonable to achieve the legitimate goal of ensuring clubs can viably compete at a higher level; *Johnson v. Athletics Canada* (1997), 73 A.C.W.S. (3d) 5, 49 O.T.C. 195 (Ont. Gen. Div.): protecting the integrity of a sport renders reasonable a restraint of trade imposing a lifetime ban on athletes found to have used steroids in Olympic competition.

⁹⁸ Challenges to professional sports trade restraints almost invariably involve agreements that preclude competition among members of the same league (such as in *Eastham*, *supra* note 43, and its progeny), or agreements among the established clubs that impair the ability of new entrants to meaningfully compete (such as in *Greig*, *supra* note 69). In *Esso Petroleum Ltd. v. Harper's Garage (Stourport) Ltd.*, [1968] A.C. 269, at 300, [1967] 11 All E.R. 699 (H.L.), the House of Lords also recognized the general principle that firms seeking to enter an established industry have a legitimate interest in the trade restraints necessary to allow them to compete effectively with their entrenched rivals: in that case, an agreement with a retailer to exclusively sell the new firm's product. American antitrust law recognizes a similar interest; See *e.g. NCAA*, *supra* note 54 at 115 & note 55 (restraints necessary to penetrate a market might be justifiable, but not where the defendants are dominant in the league); *United States v. Jerrold Electronics*, 187 F. Supp. 545 (1960), (E.D. Pa.) *aff'd per curiam*, 365 U.S. 567 (1961) (a tying arrangement by firm with new technology was permissible in the early years of development). Compare *Newport Ass'n Football Club v. Football Ass'n of Wales*, [1995] 2 All E.R. 87, [1994] N.J.L.R. 1351 (Ch.) [*Newport Ass'n Football Club*]: the defendant had a legitimate interest in agreeing with their English counterpart to prevent Welsh teams from playing in the English league if it was necessary to ensure Welsh participation in European competition; although the particular restraint challenged may not have been necessary to achieve this purpose. The National Hockey League, of course, cannot seek to justify its trade restraints on this basis. Likewise, it is theoretically possible that a marginally profitable established league might justify a labour restraint, if it could be shown that the restraint was necessary to preserve the viability of the minimum number of teams required to field a league. For example, a Canadian trial judge denied preliminary relief sought by a teenager residing in St. Catherine's, with family in Toronto, who challenged as a restraint of trade the junior Ontario Hockey League's draft, which had assigned him to play in North Bay. Noting that the league claimed the draft was essential to enable remote cities to compete with larger areas, and that the league predicted its players

III. THE *COMPETITION ACT*¹⁰⁰

Most of the litigation concerning sports league trade restraints has occurred either under the common law doctrine of restraint of trade, or pursuant to the general prohibition on contracts, combinations or conspiracies in restraint of trade found in U.S. antitrust law.¹⁰¹ However, Canada's *Competition Act* has a specific provision concerning sports leagues,¹⁰² and the private cause of action allowed under the Act mandates careful consideration of that statute. As detailed below, the *Competition Act* prohibits conspiracies that unreasonably limit the opportunity to participate or negotiate with teams in a professional league.¹⁰³

Until 1976, Canadian antitrust law only proscribed conspiracies to restrain trade in goods or articles, not services.¹⁰⁴ When the *Competition Act*, R.S.C. 1976 was enacted, Parliament extended the coverage of the trade conspiracy prohibition to services, but then added a special section concerning

would dwindle from 300 to 100 without a draft, the court concluded that there was a "serious issue to be tried" and that the balance of convenience lay in favour of the league (*Greenlaw v. Ontario Major Junior Hockey League* (1984), 48 O.R. (2d) 371 at 372, 2 C.P.R. (3d) 556 (H.C.) [*Greenlaw* cited to O.R.]). However, the NHL cannot seriously claim that unless salary caps or luxury taxes are added to the current menu of labour restraints, so many teams will exit the market that the league will no longer be viable.

⁹⁹ The development of the common law of restraint of trade occurred primarily in litigation over the enforceability of a trade restraint agreed to by the litigating parties. The right of injured parties to challenge cartel agreements among rivals that eliminated competition for employers, sellers, or buyers was not recognized during the laissez faire era of the common law's development. See *Mogul Steamship Co. v. McGregor, Gow & Co.*, [1892] A.C. 25 at 45-46, [1891-94] All E.R. Rep. 263 (H.L.) [*Mogul Steamship* cited to A.C.]; Trebilcock, *supra* note 10 at 191. Recently, however, several Commonwealth courts have granted injunctive relief in aid of a cause of action for a declaratory judgment. *Eastham*, *supra* note 43; *Buckley*, *supra* note 52; *Blackler*, *supra* note 42; *Newport Ass'n Football Club*, *supra* note 98. For a full discussion of why the Canadian tort of conspiracy to restrain trade should properly evolve to permit similar suits, see Stephen F. Ross, "The Evolving Tort of Conspiracy to Restrain Trade Under Canadian Common Law" (1996) 75 Can. Bar Rev. 193.

¹⁰⁰ Although largely written several years ago, the analysis in this section has greatly profited from an unpublished paper written in 2003 by a University of Illinois law student (as he then was) David Wissbroecker, *The Dormant Sports Conspiracy Clause: Section 48 of the Competition Act and Its Potential to Address Unreasonable Restraints of Trade in the Canadian Football League* (2003) [unpublished, on file with author].

¹⁰¹ 15 U.S.C. § 1 (1994).

¹⁰² *Competition Act*, *supra* note 95, s. 48.

¹⁰³ See *ibid.*, s.48(1).

¹⁰⁴ See David McQueen, "Revising Competition Law: Overview By A Participant" in J. Robert, S. Prichard, W.T. Stanbury, & Thomas A. Wilson, eds., *Canadian Competition Policy: Essays in Law and Economics* (Toronto: Butterworths, 1979) 3 at 15.

professional sport leagues. Now codified as Section 48 (1) of the *Competition Act*, R.S.C. 1986, this provision makes it an indictable offence for sports owners to:

(a) limit unreasonably the opportunities for any other person to participate, as a player or competitor, in professional sport or to impose unreasonable terms or conditions on those persons who so participate, or

(b) limit unreasonably the opportunity for any other person to negotiate with and, if agreement is reached, to play for the team or club of his choice in a professional league.¹⁰⁵

In evaluating challenges to sports league restraints under this section, s. 48 (2) directs courts to consider:

(a) whether the sport in relation to which the violation is alleged is organized on an international basis and, if so, whether any limitations, terms or conditions alleged should, for that reason, be accepted in Canada; and

(b) the desirability of maintaining a reasonable balance among the teams or clubs participating in the same league.¹⁰⁶

In contrast to U.S. law, there are no reported cases definitively applying section 48 in Canada.¹⁰⁷ Careful analysis of the background to the statute, as well as the words chosen by Parliament, demonstrate that the *Competition Act* permits NHL owners to agree to restrictions on competition for player services that are necessary to maintain competitive balance, but prohibits restrictions on the ability of a player to freely negotiate with the team of his choice that are broader than necessary to achieve that goal. Although the statute does not

¹⁰⁵ R.S.C. 1985 (2d Supp.), c. 19, s. 34.

¹⁰⁶ *Ibid.*

¹⁰⁷ The only reported case arising under s. 48 is *Reed and Mandarich v. Canadian Football League* (1988), 62 A.R. (2d) 347 (Q.B.), where the court granted an injunction against the enforcement of a CFL rule barring a player who had signed a contract to play professional football with another league for that year (The plaintiffs were cut by NFL teams and sought reinstatement into the CFL.). Applying the common law standard for grant of a preliminary injunction, the court simply noted that the plaintiffs had raised a "serious issue" about whether the rule was reasonable under s. 48, and granted the injunction based on a finding of irreparable harm to the plaintiffs and the balancing of hardships at 354. Judicial application of the *Sherman Act* to professional sports league labour restraints has occurred entirely in private litigation brought by players challenging these restraints. The litigation challenging restraints in violation of the *Competition Act* was not permitted until a 1976 amendment specifically authorized a statutory cause of action (now codified as *Competition Act*, 1986, s. 36(1)), and not clearly upheld as constitutional until 1989. See *General Motors of Canada v. City National Leasing*, [1989] 1 S.C.R. 641.

expressly exclude other potentially legitimate goals, in light of the statute's focus on competitive balance as well as its legislative history, Canadian judges should be wary of accepting other goals as legitimate without strong arguments in their favour.

The key to interpreting s. 48 of the *Competition Act* is understanding the deliberate choice of the word "unreasonably" to modify the proscribed limitation on player opportunities to compete. This choice stands in obvious contrast to the phrasing of the general conspiracy provision of the *Competition Act*, found in section 45, which prohibits conspiracies that lessen competition "unduly." Modern courts tend to interpret "undue" as a quantitative term that would prohibit almost any restraint adopted by firms who control a relevant market,¹⁰⁸ even if justifiable on efficiency grounds. Thus, the specific sports league provision contained in s. 48 was drafted in 1976 because of Parliament's concern that s. 45 would otherwise condemn a sport league's labour restraints, calling those restraints an "undue" lessening of competition, even if they were necessary to achieve some legitimate goal.

In an early judgment interpreting section 45's predecessor,¹⁰⁹ Justice Anglin explained the difference between "unreasonableness" and "undueness." According to Anglin, the focus of "unreasonableness" is whether the restraint upon competition effected by the agreement is unnecessarily great, having regard to the business requirements of the parties. Under the "undueness" standard "the prime question certainly must be, does it, however advantageous or even necessary for the protection of the business interests of the parties, impose improper, inordinate, excessive or oppressive restrictions upon that competition, the benefit of which is the right of every one."¹¹⁰ Justice Idington concurred, emphasizing that Parliament would not have discarded "unreasonable" as a modifier in favour of "unduly" if it had

¹⁰⁸ See Robert S. Nozick, "Anticompetitive Agreements Under the Combined Investigation Act: An Evaluation" (1985) 24 Man. L.J. 379 at 398 [Nozick, "Evaluation"].

¹⁰⁹ See *Weidman, supra* note 7. The first competition law provision was an amendment adding a section prohibiting conspiracies to unduly restrain trade to s. 498 of the *Criminal Code*, 52 Vict. ch. 41, *An Act for the Prevention and Suppression of Combinations formed in restraint of Trade*.

¹¹⁰ *Weidman, supra* note 7 at 42-43 (Anglin J.). See also *A.G. Ontario v. Canadian Wholesale Grocers Ass'n*, [1923] 2 D.L.R. 617 at 637 (Ont. S.C. (A.D.)):

'Undue' is not quite the same as 'unreasonable'; it may be said to import the idea of unfairness and while the respondents might establish that what they have done is reasonable both as to themselves and others affected by their actions and also as to the public at large, it may be contended that if it resulted in unfairly oppressing or injuring trade, it thus gave a cause of action....

intended to simply criminalize those agreements that were unreasonable restraints of trade at common law.¹¹¹

Justice Anglin's view was more recently endorsed as authoritative in *R. v. Nova Scotia Pharmaceutical Society*,¹¹² where the Court explained that the prohibition on the undue lessening of competition reflects a policy that "the preventing or lessening of competition is in itself an injury to the public" and that the law "is not concerned with public injury or public benefit from any other standpoint."¹¹³ Thus, "undue" is interpreted primarily as a quantitative term that would prohibit almost any restraint adopted by firms who controlled a relevant market.¹¹⁴

In *Nova Scotia Pharmaceutical*, the Supreme Court of Canada acknowledged that, unlike the standard that governs most antitrust analysis in the United States, section 45(1)(c) "does not permit a full-blown discussion of the economic advantages and disadvantages of the agreement, like a rule of reason would," but instead focuses on "the seriousness of the competitive effects."¹¹⁵ The result has been less flexible and more dichotomous than the American approach: courts have interpreted the phrase "unduly" to permit almost any restraint agreed to by firms facing substantial outside competition, while refusing to consider any justifications at all concerning agreements that restrain trade in virtually the entire market.¹¹⁶

Thus, *any* restrictive agreements among those controlling a monopoly share of the market—such as National Hockey League owners agreeing to limit competition in the labour market—would appear to be of doubtful validity were the NHL to be subject to s. 45.¹¹⁷ In contrast, the statutory

¹¹¹ *Weidman, supra* note 7 at 18.

¹¹² *Supra* note 66 at 646.

¹¹³ *Ibid.* at 649 (quoting from *Howard Smith Paper Mills, supra* note 66 at 411).

¹¹⁴ See Nozick, "Evaluation," *supra* note 108 at 398.

¹¹⁵ *Nova Scotia Pharmaceutical, supra* note 66 at 650.

¹¹⁶ See W.T. Stanbury & G.B. Reschenthaler, "Reforming Canadian Competition Policy: Once More Unto the Breach" (1981) 5 Can. Bus. L.J. 381 at 427-428: horizontal restraints not within a per se category of an obviously anticompetitive agreement are nonetheless illegal if the parties account for more than a given share of the relevant market; Calvin S. Goldman & John D. Bodrug, "Antitrust Law and Innovation: Limits on Joint Research & Development and Inter-Company Communication in Canada" (1995) 21 Can. U.S.L.J. 127 at 137: "Canadian antitrust authorities have indicated an intention to interpret [*Nova Scotia Pharmaceutical*] as precluding any consideration of procompetitive aspects of an agreement."

¹¹⁷ Indeed, this lack of flexibility has prompted leading Canadian competition policy experts to call for legislative reform that would permit greater flexibility with regard to

standard of “unreasonableness” is judicially interpreted to permit consideration of goals deemed essential to the vitality and survival of professional sport leagues. However, as the long Anglo-Canadian common law tradition demonstrates, in spite of this flexibility, restraints broader than necessary to achieve goals such as competitive balance are “unreasonable” and thus under the statute remain illegal.

When the Canadian government introduced legislation to extend the competition laws to services, National Hockey League officials were quite concerned that this would outlaw agreements they viewed as essential to their continued existence.¹¹⁸ The Department of Consumer and Corporate Affairs shared this concern, observing that “if the affiliation of players to a team were to be determined only by the pocket books of the teams, the wealthier teams

agreements that plausibly contribute to economic efficiency among those who control a particular market. See *e.g.* Paul S. Crampton, “Beyond Bill C-23: A Competition Law for the Millennium” 36 *Can. Bus. L.J.* 161 at 170; Tim Kennish & Thomas W. Ross, “Toward a New Canadian Approach to Agreements Between Competitors” (1997) 28 *Can. Bus. L.J.* 22; Presley L. Warner & Michael J. Trebilcock, “Rethinking Price-Fixing Law” (1993) 38 *McGill L.J.* 679. One other noted commentator takes a different view, opining that the “decisive factors in determining undue ness are not too different from those applied by courts in the United States in determining the existence of an ‘unreasonable’ restraint of trade” (R.J. Roberts, *Roberts on Competition / Antitrust: Canada and the United States*, 2d ed. (Toronto: Butterworths, 1992) at 71.). After elaborating on the American rule of reason standard, which Roberts believes places “decisive” emphasis on “the nature of the restraint and the quantity of competition affected by it” (*ibid.*), he acknowledges that to date, “the Canadian courts have not made much headway in differentiating between the various types of anti-competitive agreements or arrangements that might occur” (*ibid.* at 72). Although Roberts does acknowledge the important extent to which Canadian anti-conspiracy law is under-enforced through lack of an automatic prohibition against blatantly anticompetitive practices (*ibid.* at 74), he appears to overlook the extent to which Canadian law is also overbroad in condemning significant restraints of trade imposed by firms with market power, even when potentially justifiable because of efficiencies.

¹¹⁸ In testimony before a Senate Committee, NHL President Clarence Campbell asserted that the proposed legislation would prohibit any agreement “to prevent or lessen or limit competition in any facet of business.” He concluded that

[n]o professional sports organization could possibly continue to function under such a law, because the object of the legislation is the elimination of the weak and the less efficient in skills or material resources. Such a philosophy would simply eliminate the competitors to the point where there would be no one left to carry on the competition, which is the major objective of all professional sports. The major portion of all professional sports legislation and regulations consists of the establishment of rules to ensure balanced competition, not to eliminate it. *It is hard to conceive of a single regulation or rule in professional sports which is not basically in direct contravention of the literal text of the [proposed legislation].*

Canada, Senate Committee on Banking, Trade and Commerce, Issue no. 5 (Nov. 13, 1974) at 21-22 [emphasis added].

would wind up with all the best players and the league would not be viable.”¹¹⁹

Nonetheless, Parliament neither exempted professional sports entirely from the *Competition Act*, nor did it expressly legalize those restrictions thought by the Government in 1976 to be necessary. Rather, Parliament responded to these concerns by exempting sports leagues from the rigid requirements of s. 45 and creating a new standard in s. 48, thereby permitting courts to determine the reasonableness of particular trade restraints on a case-by-case basis.¹²⁰ Parliament presumably understood that prior decisions had held that, although the parties’ private interests would be considered in a reasonableness analysis, overly restrictive agreements would still be held unenforceable. This understanding is bolstered by the use of “unreasonable” in the statute, a term well interpreted under the common law (which, as Part II demonstrates, holds that overly broad restraints offend public policy). Moreover, the directive in section 48 (2) (b) to consider the effect of a restraint on competitive balance strongly suggests that a finding of unreasonableness must follow a determination that a particular trade restraint has no positive effect, and some potential negative effect, on such balance.

Concerns about the harsh effect of the “undue” standard of s. 45 on a professional sport league’s efforts to maintain competitive balance appeared to be the sole ‘mischief’ that s. 48 sought to remedy. This might suffice to reject other sports-related defences.¹²¹ Surely, though, section 48 should be read to

¹¹⁹ Department of Consumer and Corporate Affairs, *Background Documentation: Sports* (Ottawa: Dep’t of Consumer and Corporate Affairs, November 1973) at 2.

¹²⁰ Two Canadian economists have argued that direct labour market restraints are never necessary to achieve competitive balance, and that revenue sharing among teams is the preferred solution. See J.C.H. Jones and D.K. Davies, “Not Even Semitough: Professional Sport and Canadian Antitrust” (1978) 23 *Antitrust Bull.* 713 [Jones & Davies, “Semitough”]. If their argument is proven, then direct labour restraints would likely be deemed unreasonable under s. 48. In light of their recognition that significant revenue sharing among clubs may be necessary (*ibid.* at 739), their call for a repeal of s. 48 is curious. Even if they are correct about the beneficial effects of revenue sharing, most economists agree that revenue sharing itself will have a significant dampening effect on the willingness of some clubs to actively bid for player talent. See Rodney D. Fort, *Sports Economics* (Upper Saddle River, N.J.: Prentice Hall, 2003) [Fort, “Sports”] at 158-159 (sharing revenues from live gate simply reduces salaries with no change in competitive balance); Stefan Szymanski & Stefan Késenne, “Competitive balance, the contest success function and gate revenue sharing in team sports” (2004) 52 (1) *Journal of Industrial Economics* 165 (under reasonable conditions sharing gate revenue makes competitive balance worse). Whether or not this dampening effect is offset by efficiencies, it has a sufficient impact on competition that significant revenue sharing would probably constitute an undue lessening of competition under s. 45, thus justifying the continued need for a special section for sports leagues.

¹²¹ Interpreting s. 48 to give effect only to the mischief and defect that Parliament was trying to prevent would be consistent with the long-standing purposive approach to statutory interpretation dating back to *Heydon’s Case* (1584), 3 Co. Rep. 7a, 7b, 76 E.R. 637 at 638.

Although this rule has been codified in the *Interpretation Act*, R.S.C., c. I-23, s. 12, as a direction for courts to give statutes “such fair, large and liberal construction and interpretation as best ensures the attainment of its objects,” as a leading commentator has noted this section itself must be understood in light of Parliament’s purpose to overturn traditionally strict notions of literal statutory interpretation. Indeed, where the literal terms “go beyond what the aim of Parliament might justify, then the purposive method suggests narrow rather than broad construction” (Pierre-André Côté, *The Interpretation of Legislation in Canada*, 3d ed. (Scarborough, Ont.: Carswell, 2000) at 380 [Côté]). Another method of interpretation that has been used to construe sports-specific statutes in the United States also supports a narrow construction of s. 48. As explained by Professor Frank Easterbrook (as he then was):

In the other approach the judge treats the statute as a contract. He first identifies the contracting parties and then seeks to discover what they resolved and what they left unresolved. For example, he may conclude that a statute regulating the price of fluid milk is a pact between milk producers and milk handlers designed to cut back output and raise price, to the benefit of both at the expense of consumers. A judge then implements the bargain as a faithful agent but without enthusiasm; asked to extend the scope of a back-room deal, he refuses unless the proof of the deal’s scope is compelling. Omissions are evidence that no bargain was struck: some issues were left for the future, or perhaps one party was unwilling to pay the price of a resolution in its favor. Sometimes the compromise may be to toss an issue to the courts for resolution, but this too is a term of the bargain, to be demonstrated rather than presumed. What the parties did not resolve, the court should not resolve either.

Frank H. Easterbrook, “The Supreme Court, 1983 Term: Foreword: the Court and the Economic System” (1984) 98 Harv. L. Rev. 1 at 15. This approach was then applied by Judge Frank Easterbrook to limit an antitrust exemption secured by the National Football League for collective sales of broadcast rights to ‘sponsored telecasting’ to exclude rights sold to cable programmers, even if the programming was going to have sponsors just as free-to-air television was. In *Chicago Professional Sports Ltd. Partnership v. National Basketball Ass’n*, 961 F.2d 667 at 671-672 (7th Cir. 1992), Easterbrook J wrote that:

What the industry obtained, the courts enforce; what it did not obtain from the legislature—even if similar to something within the exception—a court should not bestow. Compromises draw unprincipled lines between situations that strike an outside observer as all but identical. The limitation is part of the price of the victory achieved, a concession to opponents who might have been able to delay or block a bill even slightly more favorable to the proponents. Recognition that special interest legislation enshrines results rather than principles is why courts read exceptions to the antitrust laws narrowly, with beady eyes and green eyeshades.

Although Professor Côté does not explicitly discuss the technique of strictly construing special legislation sought by interest groups (see generally Côté, above.), Canada’s other leading statutory interpretation treatise notes the doctrine that parties “seeking the benefit of a statutory exemption or exception [must] establish clearly that they come within its terms” (Ruth E. Sullivan, *Driedger on the Construction of Statutes*, 3d ed. (Toronto: Butterworths, 1994) at 369.). There is judicial authority in regard to the interpretation of tax legislation that supports this approach, so that the normal presumption resolving ambiguities in favour of the taxpayer does not apply to a taxpayer claiming the benefit of an exemption, who bears the onus of proof as to the right to an exemption based on “clear and unequivocal language” that shows that the

prohibit agreements among sports league owners that do not relate to anything unique about sports, but simply serve to further the same sort of private commercial interests that any Canadian firm might have. Thus, the argument that trade restraints permit owners to recover their 'investment' in developing a player's skills should be rejected for the same reason that it was unsuccessful in the United States¹²²; this claim is not unique to sports league owners, and the enactment of special legislation concerning sport leagues suggests that Parliament was concerned only with permitting restrictions uniquely justified in the sports context.

Economic analysis suggests one sports-specific claim that may have greater superficial appeal to policymakers and judges: trade restraints are necessary to maintain viable NHL franchises in smaller Canadian cities even though marketplace dynamics suggest that these locales are too small to support a hockey club. This argument effectively concedes that the principal effect of trade restraints is to increase the power of clubs vis-à-vis the players, which will result not only in monopoly profits for successful teams but also in a subsidy for weak teams in weaker markets whose viability would be threatened were the restraints to be removed.¹²³ However, the argument that a hockey player's opportunities to negotiate with and play for a team of his choice should be severely limited in order to maintain the viability of a few franchises in smaller Canadian markets is quite a stretch for the word 'reasonable.'

Although this argument obviously goes to a "public benefit" of the type precluded by the "undue restraint" doctrine of s. 45, it should not be accepted for several reasons. First, the legislative history of s. 48 suggests that this claim – certainly foreseeable in 1976 – was *not* within Parliament's contemplation.¹²⁴ Second, s. 48(2) directs courts to specifically consider a rule's effect on competitive balance and its international nature¹²⁵ – one might

legislature has "unquestionably granted...the exemption claimed" (*Ville de Montreal v. ILGWU Center Inc.*, [1974] S.C.R. 59 at 65 (Fateaux, J.)).

¹²² Mackey, *supra* note 64.

¹²³ See Jones & Davies, "Semitough" *supra* note 120 at 736.

¹²⁴ NHL President Campbell's testimony, *supra* note 118, focused entirely on competitive balance and did not mention the concern about marginal Canadian franchises. See also Senate Committee on Banking, Trade and Commerce, Issue No. 34 (Apr. 16, 1975) at 14 (chief competition law officer Robert J. Bertrand): proposing a "narrowly defined" exemption that "must provide for a balance of teams playing in the same league." Remarks such as those by Campbell and Bertrand may be reviewed by courts to identify the 'mischief' or 'evil' that the new legislative proposal was designed to correct. See *e.g.* *A.G. Canada v. Young*, [1989] F.C. 647 at 657, 89 C.L.L.C. 14 (F.C.A.). See also *supra* note 121.

¹²⁵ The legal criteria for the lawfulness of NHL trade restraints—that they are reasonable and thus lawful if reasonably necessary to achieve competitive balance, and unreasonable and

have expected express direction to the court to consider a policy of maximizing the number of viable Canadian hockey franchises if this were a major concern of Parliament. Third, the inquiry into 'reasonableness' that Parliament sought to avoid in s. 45, and presumably restored for professional sports in s. 48, requires a *balancing* of the interests of both the parties and the public. A restraint that significantly limits the opportunities of players throughout the NHL, and allows excess profits for many successful teams, simply to maintain the viability of a few marginal franchises, would not seem to reflect the balance reasonableness should entail. Fourth, and most importantly, severe player restraints are not necessary to achieve the goal of maximizing Canadian franchises. Cross-subsidies from wealthier teams¹²⁶ or targeted public subsidization of marginal teams make much more sense than allowing the owners of franchises in Montreal and Toronto (not to mention New York and Chicago) to suppress competition for player services in order to assist Ottawa and Edmonton.¹²⁷

There remains the novel argument, discussed in Part II above,¹²⁸ that NHL labour restraints are necessary to prevent ruinous competition among owners. If judges were to narrowly interpret s. 48 as special interest legislation,¹²⁹ they would reject this argument because ruinous competition was neither among the mischiefs nor the defects NHL Commissioner Campbell identified when considering the application of the basic conspiracy section of the law to the NHL. Neither is ruinous competition expressly within factors that courts are directed to consider in evaluating reasonableness. If courts took a broader interpretive approach to s. 48, however, they could conclude, to the extent that an agreement to forestall ruinous competition may be considered 'reasonable' under the common law, that it should be considered 'reasonable' for purposes of s. 48 as well.

In sum, the Canadian *Competition Act's* special provisions concerning professional sports, like the American *Sherman Act's* general provisions on

unlawful if broader than necessary to achieve that goal—is the same under both U.S. and Canadian law. Thus, there is no need to consider generally whether a player restraint that would otherwise be unlawful under the *Competition Act* should nonetheless be tolerated under Canadian law because it is lawful elsewhere. This issue does arise with regard to the applicability of the labour exemption. Consideration of s. 48(2) in that context is discussed below in Part IV.

¹²⁶ Intra-league revenue sharing has been the linchpin of the continued success of the Canadian Football League despite the wide disparity between markets like Toronto and Vancouver and those like Saskatoon and Hamilton.

¹²⁷ See Jones & Davies, "Semitough" *supra* note 120 at 738-39.

¹²⁸ See *supra* notes 66-84 and accompanying text.

¹²⁹ See *supra* note 121.

restraints of trade, permit consideration of the unique aspects of sport leagues. Specifically, Parliament directed the courts to consider competitive balance in determining the legality of sports league trade restraints,¹³⁰ and most importantly, the *Act* prohibits agreements that are broader than necessary to achieve a competitive balance that makes the game more attractive for fans. Finally, the notion that ‘cost certainty’ for owners could justify labour restraints was not even seriously considered.

IV. THE EFFECT OF COLLECTIVE BARGAINING ON THE LEGALITY OF LABOUR RESTRAINTS

At this writing, the NHL labour market is subject to a variety of significant restraints as the result of an agreement between the league and the NHL Players’ Association.¹³¹ This agreement does not include, however, the salary caps or luxury taxes that the NHL owners desire as a means of achieving ‘cost certainty.’ The legality of a particular restraint may well depend on whether it results from an agreement with the players’ union, is imposed by owners without union consent, or takes place outside the context of collective bargaining. An analysis of the law and economics of labour market restraints suggests that, similar to American decisions, Canadian courts should hold that labour market restraints incorporated into collective bargaining agreements are reasonable under the common law, and are not unlawful under s. 48 of the

¹³⁰ Jones & Davies, “Semitough” *supra* note 120 at 720-721, persuasively demonstrate that the player restraints that have traditionally been adopted by the National Hockey League are best explained not as efforts to maintain competitive equality but as “second best concessions to league viability”—restrictions such as the draft and team player limits are minimal efforts to assure marginal teams survive, while refusing to permit a system that redistributes players to promote competitive equality. They argue that this strategy better maximizes profits for most teams, as opposed to a genuine effort to achieve competitive balance. However, if s. 48 were vigorously enforced to prevent overly restrictive agreements, greater revenues that do occur due to increased competitive balance may well provide an economic incentive for club owners to adopt restrictions genuinely intended and directly designed to improve competitive equality. The principal issue under s. 48, as under the common law and the *Sherman Act*, should be on the competitive effect of the challenge labour restraint. A restraint reasonably tailored to promote competitive balance would be lawful; an overbroad restraint cannot be.

¹³¹ Significantly, the current collective bargaining agreement in hockey categorizes players into six groups and, in Article 10, allows free competition for the services of only a limited number of players; primarily players over the age of 31, or younger veterans who have either not played much in the NHL or are not among the higher paid players. See “Collective Bargaining Agreement Between the National Hockey League Players’ Association and the National Hockey League Member Clubs—13 January 1995,” *reprinted* in G.A. Uberstine, ed., *Law of Professional and Amateur Sport* (Eagan, Minn.: Thomson West, 2003) [Uberstine], at Appendix 9A. Other players are so-called ‘restricted free agents’ who can receive bids that can be matched by their current club and where compensation may be owed to the club if they are signed by another team. See G.I. Kirke, “National Hockey League Contract Negotiations,” in Uberstine, *op. cit.*, at 9-9 – 9-10, s. 9.9.

Competition Act.¹³² However, the U.S. Supreme Court has held that labour market restraints imposed by owners after the expiration of a collective bargaining agreement should continue to be protected from antitrust challenge.¹³³ In contrast, the structure and history of the *Competition Act*, suggests that Canadian courts should not so protect agreements imposed on unconsenting players by the league owners.

Although the common law of restraint of trade has been criticized as an anti-union tool, for the past 60 years it has been clear that union conduct is not actionable as a restraint of trade under the common law. In addition, various federal and provincial labour relations statutes have exempted labour union activity from liability under this branch of the common law. As I have argued elsewhere,¹³⁴ however, recognition of the social utility of permitting workers to collectively organize and bargain does not require the endorsement of the collective imposition of unreasonable labour restraints by owners that harm both workers and consumers.

Canadian courts are likely to find that collective bargains agreed to by workers and owners pursuant to applicable labour relations statutes are not unreasonable restraints of trade. In some jurisdictions, the applicable labour statute will specifically exempt the collective bargain from common law challenge. In others, the courts are likely to find that under the common law, the agreement is reasonable—we may assume that where a restraint is incorporated into a collective bargain, most players have not been harmed. Even in situations where it might appear that most players are worse off than if the restraint were not imposed, the collective bargaining process allows owners to compensate players in other ways. In the NHL, for example, there are a large number of players capable of serving on third or fourth forward lines, or as third-line defencemen; these players might well conclude that an agreement that sets minimum salary levels in excess of those that would occur

¹³² Under American law, labour market restraints are also unlawful if they have the effect of foreclosing a rival league's ability to enter the market or to compete with the dominant league (See *Philadelphia Hockey*, *supra* note 72.). Such an anticompetitive effect could be challenged by a rival league under s. 48(2) of the *Competition Act*, which makes it illegal for a sports league to "limit unreasonably the opportunities of a competitor to participate in professional sport." Because s. 48 only exempts sports leagues from the conspiracy provisions of s. 45 of the *Act*, a monopoly sports league that sought to foreclose players might also be liable on complaint from the Commissioner of Competition for an abuse of dominant position in violation of s. 78 of the *Act*.

¹³³ See *Brown v. Pro Football, Inc.*, 518 U.S. 231 (1996) [*Brown*]. As the *Brown* litigation, like every other private challenge to labour restraints under U.S. law, was brought by a unionized player, the result may be different if the government or a consumer alleging an adverse affect in the product market filed the challenge.

¹³⁴ Stephen F. Ross, "The Evolving Tort of Conspiracy to Restrain Trade Under Canadian Common Law" (1996) 75 Can. Bar. Rev. 193.

in an unrestricted labour market, combined with blanket restraints on veteran free agents, puts them in a better position than a regime of free agency but no minimum salary.

It would be rare for any collective bargain to receive unanimous approval, and indeed many bargains approved by the requisite majority of owners and players do spark dissent. A minority of owners or players may well see themselves as worse off than they would otherwise be. However, the principle of multi-employer collective bargaining is that most workers, owners, and society as a whole are better off by allowing this process to proceed. There is no sound policy reason why the general public policy favouring collective bargaining, in spite of its possible adverse effect on a minority of workers and owners, would not apply equally to collective bargaining in sports.

However, restraints imposed without union consent lack the benefit of the special protection of the common law given to collective action by or including workers. Nor can the fact that restraints imposed without union consent may arise in the context of collective bargaining make them reasonable, for there is no basis to presume that they are beneficial to the players.

The argument for protection of collectively bargained labour restraints under the *Competition Act* follows the one made for the common law above. If, as noted earlier, the *Competition Act* only bars unreasonable restraints, and if the restraints agreed to by a union are generally held to be not unreasonable, then it follows that s. 48 would not apply to any bargained-for restraints.

Suppose, however, that NHL owners implemented labour restraints without the consent of the union. Labour law, to be sure, places a variety of constraints on how and when owners can implement new terms and conditions of employment at the expiration of a collective bargaining agreement. Under American law, owners may not unilaterally implement a significant change in working conditions unless they have negotiated the proposed change in good faith with the union, and reached a bargaining impasse.¹³⁵ Although the application of Canadian law is unclear,¹³⁶ both Ontario and Quebec, for

¹³⁵ See *National Labor Relations Bd. v. Katz*, 369 U.S. 736 (1962). Indeed, this was the basis for the federal court order that ended the 1994-1995 baseball strike (*Silverman v. Major League Baseball Player Relations Committee, Inc.*, 67 F.3d 1054 (2d Cir. 1995): enjoining owner implementation of new restraints).

¹³⁶ It would appear that in taking industrial action the NHL owners must comply with the labour relations statutes of each province where an NHL club is located (*i.e.* Alberta, British Columbia, Ontario, and Quebec). Labour relations are generally considered to be within provincial jurisdiction; federal control is the exception rather than the rule. *Four B Mfg. v. United Garment Workers*, [1980] 1 S.C.R. 1031 at 1045, [1979] 4 C.N.L.R. 21. One of the federal exceptions can be found in s. 92 (10) (a) of the *Constitution Act 1867*, which confers federal jurisdiction on “[l]ines of steam or other ships, railways, canals, telegraphs, and other works and undertakings connecting the province with any other or others of the provinces, or extending beyond the limits of the province” (*Constitution Act, 1867* (U.K.), 30 & 31 Vict., c.3,

example, allow employers to alter employment terms and conditions once the statutory requirements that would permit them to engage in a lock-out are met, such as notice and a specified period of good faith negotiations.¹³⁷

The relationship between labour and competition law in Canada presents an interesting question of statutory interpretation. Section 4 (1) (c) of the *Competition Act* specifically provides that “[n]othing in this Act applies in respect of contracts...between...employers...pertaining to collective bargaining with their employees in respect of salary or wages and terms or conditions of employment.” Thus, while s. 48 cannot be invoked to challenge a restraint incorporated into a collective bargaining agreement between the owners and the players’ union,¹³⁸ read literally, section 4 would appear to preclude liability for *any* labour market restraint agreed to by the owners, even if implemented without union consent. Such a reading would obviously nullify section 48’s ban on unreasonable limits on a player’s “opportunities to negotiate with and play for a team of the player’s choice” whenever the player was represented by a union. When the exempting provisions of s. 48 were adopted in 1976, NHL players were already represented by a players’ union. Thus it would have been absurd for Parliament to have created the special exemption in s. 48 from the general conspiracy provisions of s. 45 for sports leagues, and then specifically limit that exemption, if Parliament had intended for NHL labour market restraints to be exempt under s. 4 anyway.¹³⁹ This view is reinforced by the complete exemption from the *Competition Act*

reprinted in R.S.C. 1985, App. II, No. 5 [*Constitution Act 1867*].). There is a casual mention in *Canadian Football League v. Canadian Human Rights Council* (1980), 109 D.L.R. (3d) 397 at 401 (Fed. T.C.) [*CFL*], that a sports league might constitute “undertakings extending beyond the limits of a province,” but the wording of s. 92(10)(a) of the *Constitution Act 1867* strongly suggests that the word undertaking is, under the canon of *ejusdem generis*, limited to transportation and communication industries (*Ottawa Valley Power Co. v. Hydro-Electric Power Comm’n*, [1937] O.R. 265, [1936] 4 D.L.R. 594 (C.A.): an inter-provincial electric company remains subject to Ontario regulation because it is not a transportation or communication company); accord Peter W. Hogg, *Constitutional Law of Canada*, looseleaf (Scarborough, Ont.: Thomsen Carswell, 1997), at 22-5, s. 22.3. The *CFL* judgment also suggests (simply in the course of holding that jurisdiction must initially be decided by the commission) that sports league regulation might be considered legislation with regard to trade of commerce in s. 91(2) of the *Constitution Act 1867*. However there is no support for this argument and there are many other inter-provincial industries that are subject to provincial labour jurisdiction.

¹³⁷ R.S.O. 1995, c.1, Sch. A., s. 79; R.S.Q., c. 27, s. 58.

¹³⁸ See *Yashin v. National Hockey League* (2003), 192 D.L.R. (4th) 747 at 763 (Ont. S.C.J.).

¹³⁹ Indeed, it is clear that Parliament intended s. 48 to provide some basis for players to challenge the reserve clause which historically had prevented any competition for player services, and also that the labour restraint in effect at the time of parliamentary consideration of the *Competition Act* was unilaterally imposed by the league.

provided for amateur sport in section 6. Parliament therefore clearly expected that section 4 would not preclude the application of the *Act* to National Hockey League labour restraints imposed without union agreement.

When s. 48 was adopted in 1976, it did not appear that the interpretation of Canadian law would differ from that of the United States. The leading American precedent at the time was a Court of Appeals decision that held that the American labour exemption only applied to restraints that were the result of bona fide arms length bargaining between the parties.¹⁴⁰ However, in 1995 the United States Supreme Court expanded the exemption to prevent challenges as long as a union was engaged in the collective bargaining process¹⁴¹; at present, in contrast to Canada, antitrust suits are permitted in the United States only after a union 'decertifies' and operates as a trade association without the benefit of labour relations statutes.¹⁴²

As has been argued elsewhere, the prevailing American approach does not make good policy sense.¹⁴³ Although in both countries the union retains the right to strike to achieve what it believes to be a reasonable collective bargaining agreement, and the owners retain the right to lock out players until they agree to demanded restraints,¹⁴⁴ both strikes and lockouts risk significant fan retribution. Thus, the principal difference between the American approach and the one proposed for Canada is that the latter would allow players the option to continue to play hockey under the expired collective bargaining agreement while pursuing their rights in court.¹⁴⁵ Resolving the industrial

¹⁴⁰ *Mackey v. NFL*, *supra* note 64. The court of appeals found that the exemption did not apply because the NFL had refused to negotiate at all regarding the Rozelle Rule limiting competition for player services. Compare *McCourt v. California Sports, Inc.*, 600 F. 2d 1193 (6th Cir. 1979): a modified NHL labour restraint was protected by a labour exemption because evidence showed that its inclusion in the collective bargaining agreement followed bona fide bargaining, with significant concessions made to players in order to obtain their assent.

¹⁴¹ See *Brown*, *supra* note 133.

¹⁴² *Ibid.* at 250. The NFL players' union succeeded in decertifying and winning a successful antitrust case against NFL labour restraints. See *Powell and McNeil v. National Football League*, 764 F. Supp. 1351 at 1356 (D. Minn. 1991) (allowing players to proceed with an antitrust challenge after decertifying the union); *McNeil v. National Football League*, 1992-2 Trade Cas. (CCH) para. 69,982 (D. Minn.) (jury verdict in favour of plaintiffs).

¹⁴³ S.F. Ross & R.B. Lucke, "Why Highly Paid Athletes Deserve More Antitrust Protection than Ordinary Factory Workers" (1997) 33 *Antitrust Bull.* 641.

¹⁴⁴ Indeed, this is precisely what the NHL owners did in 1994.

¹⁴⁵ Moreover, rules imposed by NHL owners would clearly be subject to the *sui generis* reasonableness test of s. 48, and thus would have no application to multi-employer bargaining in other industries. This removes one of the principal doctrinal concerns that the U.S. Supreme Court expressed in *Brown*, *supra* note 133 at 240-41, in extending the scope of the labour exemption: in other industries an agreement among employers to fix wages would be considered patently illegal.

dispute by means short of disruption would seem to be in the interest of most Canadians.

Certainly, the experiences of other North American sport leagues suggests that industrial strife is minimized when antitrust litigation remains a possibility. In baseball, where a judicially created special antitrust exemption was thought for years to preclude an antitrust suit by players, the last eight consecutive collective bargaining agreements were preceded by industrial disruption. In contrast, in football an unsuccessful strike in 1983 ended quickly and players decided to continue to play while their antitrust challenge went through litigation, resulting ultimately in a victory for the players and a new collective bargaining agreement several years later. In basketball, the threat by leading players to support dissolution of the players' union and the filing of antitrust litigation led the NBA owners to revise substantially the terms of their bargain. These experiences support the notion that Canadian courts should not, on account of international considerations, tolerate the imposition, over union objection, of substantively unreasonable trade restraints that are likely to hasten industrial disruption.

Nonetheless, the NHL might argue that the blanket American exemption for restraints implemented in the context of collective bargaining should be imported north of the border, even if the effect is to nullify s. 48, because s. 48(2)(a) directs courts to consider whether an unreasonable restraint should "be accepted in Canada" as hockey is "organized on an international basis." Were the *Competition Act* to be applied in a manner that would result in the inability of Canadians to participate in international sport, this sub-section permits a professional sports league to engage in otherwise illegal restraints. For example, if the *Competition Act* were applied to baseball under circumstances where American courts would hold the practice exempt, Major League Baseball could credibly threaten to simply relocate its already-faltering Montreal franchise and its one successful Canadian franchise in Toronto, rather than reorganize its arrangements to comply with Canadian law. Similarly, the international body governing soccer might well simply suspend Canadian participation rather than transform the way it regulates soccer around the world to comply with Canadian law.¹⁴⁶

The case is far less persuasive with regard to unbargained-for labour restraints in hockey. Most importantly, an NHL threat to simply withdraw from Canada would be far less credible. Not only does the NHL derive significant revenues from its six Canadian franchises and from CBC's *Hockey Night in Canada*, but withdrawing from the entire country could create a

¹⁴⁶ Department of Consumer and Corporate Affairs, *Background Documentation: Sports* (Ottawa: Dep't of Consumer and Corporate Affairs, November 1973) at 74-75: "it may be necessary, if an international sport is to exist in Canada and Canadian amateurs and professionals are to have access thereto, to accept certain conditions that emanate from abroad."

significant risk that a new rival league would be created. This rival league would likely be in compliance with the *Competition Act*, and would feature a number of Canadian clubs as well as carefully selected American sites. The specific and intended consequences of the *Competition Act* should not be frustrated because in one respect American law is more favourable to club owners than Canadian law.

V. APPLYING LEGAL PRINCIPLES TO THE CURRENT NHL LABOUR DISPUTE¹⁴⁷

Financial data released by the National Hockey League paints a very bleak picture: NHL officials attribute losses in excess of \$300 million in 2003, on top of more than \$200 million in losses in 2002,¹⁴⁸ to the fact that costs have risen 252% while revenue has increased only 163% over the past nine years.¹⁴⁹ As one of the principle causes, officials point to salaries that equal 76% of NHL revenues, ten percent higher than the percentage of revenues spent on players in the NFL (which has a salary cap) and Major League Baseball (which has a modest luxury tax). To correct these losses, NHL officials are demanding that the players' union agree to a new structure that grants owners 'cost certainty' by fixing the percentage of revenues that owners must spend on player salaries at a much lower level; the initial idea is that this be implemented by a salary cap that will reduce average team payrolls by approximately one-third, to about \$31 million per team.¹⁵⁰

Although some NHL owners give passing mention to the traditional argument that a significant reduction in competition for player services is necessary to promote competitive balance,¹⁵¹ the principal justification for the proposed salary-cap used by NHL in public statements has been the goal of

¹⁴⁷ Special thanks to Stefan Szymanski of the Tanaka Business School, Imperial College, London, for his ideas and assistance with this analysis. Economic errors are mine entirely.

¹⁴⁸ Stefan Fatsis, "NHL Says Players' Salaries Put League in Financial Peril," *The Wall Street Journal* (19 September 2003) B1.

¹⁴⁹ Sports Business Journal, "By the NUMBERS 2004: The Authoritative Annual Research Guide and Fact Book" (2003) 6 (36) Sports Bus. J. 1 at 131.

¹⁵⁰ Tarik el-Bashir & Thomas Heath, "NHL: No Holding Left; Specter of Work Stoppage Dims Lightning's Cup Victory," Wash. Post (9 June 2004), at D3.

¹⁵¹ See e.g. A. Bernstein, "NHL locks in on controlling player costs" *Sports Bus. J.* (15 September 2003), at 34, online: Sports Business Journal <<http://www.sportsbusinessjournal.com>>; Montreal Canadiens owner George Gillett and Ottawa Senators President Roy Mlakar stress the need for a "level playing field" to give small market teams "as equal a chance to with the Stanley Cup as any others." In light of current labour rules that already limit competition for star players until they turn 31 (Uberstine, *supra* note 131), no serious claim is made that additional restraints are needed to allow a recoupment on investment in player training.

'cost certainty'.¹⁵² Other than reflecting the desire of any owner to maximize profits by freeing himself of the need to compete — an interest that is economically rational but has been rejected as a legitimate basis for restraining trade since the depression-era *Vancouver Malt* decision by the House of Lords¹⁵³ — NHL officials have not been precise as to the exact reason why players, fans, or competition law officials should find these demands to be at all legitimate.

This section analyzes the current NHL dispute from the perspective of public policy principles developed under the common law and the *Competition Act*. First, although not relied upon in public comments by senior league officials, the analysis carefully considers the extent to which significant additional restraints in the labour market may indeed promote competitive balance in hockey. Although recent data suggests a modest degree of competitive imbalance may exist in the NHL, thereby justifying *some* labour market restraints, the type contemplated by NHL owners are far more restrictive than necessary to promote competitive balance and thus do not meet the standard of reasonableness under the common law or the *Competition Act*.

Second, the analysis considers the possibility that those restraints desired by the league to achieve 'cost certainty' are also necessary to preserve the viability of professional hockey in Canada. It is by no means clear that such an argument, if raised as a defence to a restraint of trade or s. 48 claim, would not be dismissed by a Canadian court as pretextual, in light of the minimal efforts made by the NHL to date to ensure the viability of Canadian franchises. Even if sincere, the analysis suggests a variety of other alternative means to promote Canadian franchises.

Last, but not least, this section parses the 'cost certainty' justification put forth as the overriding principle guiding the NHL's negotiations. As an end in itself, 'cost certainty' is wholly illegitimate, completely unsupportable as a justification for a trade restraint, and unprecedented in the annals of sports labour relations. It is possible, however, that this 'illegitimate' phrase is simply a euphemism to cover three distinct and theoretically *legitimate* league justifications for labour restraints.

First, a free labour market arguably results in ruinous competition that will ultimately threaten the viability of the league itself. Alternatively, an unrestrained market may result in insolvency for many individual NHL clubs, much to the detriment of their fans as well as their players. Or, finally, the

¹⁵² See e.g. Rick Sadowski "Players Share is Key to New Deal" *Rocky Mountain News* (2 January 2004) 12C: NHL chief lawyer Bill Daly "is touring NHL cities to show media representatives diagrams and pie charts illustrating the financial state of the league and to explain its demand for 'cost certainty.'"

¹⁵³ See *supra* note 34.

league may have concluded that labour restraints are necessary to protect owners against persistently bad business decisions. The analysis concludes that whatever the merits of these arguments, the across-the-board salary restraints proposed by the NHL are not necessary to achieve the league's stated goals. Rather, reforms to the clubs' incentive structures (through revenue sharing or direct manipulation of the economic rewards for progress in the Stanley Cup playoffs), regulations requiring clubs to forego unfair or irrational means of competition, restraints tailored to lessen the dominance of perennial contenders, as well as more flexible labour agreements would be both more efficient and more desirable.

A. COMPETITIVE BALANCE

As noted in Part II, promotion of competitive balance is the only justification that courts have to date clearly recognized as justifying significant labour market restraints by sport leagues. However, the precedents make it clear that competitive balance justifies restraints only to the extent that a more balanced competition enhances the consumer appeal of the sport — not to satisfy some abstract goal of equal opportunity.

The extent to which competitive balance actually increases a sport's consumer appeal should not be overstated. For example, a "Blue Ribbon" panel appointed by baseball owners several years ago did not embrace complete parity for Major League Baseball, but rather defined competitive balance as existing when "every well-run club has a regularly recurring hope of reaching postseason play [hereafter "RRRPP"]."¹⁵⁴ There is intuitive appeal to the notion that overall consumer appeal is not necessarily maximized by complete competitive balance: having thirty teams win the Stanley Cup over a thirty-year period, rather than the existence of dynasties that others seek to "bring down" lends less excitement and attractiveness to a sport.¹⁵⁵ A review of empirical evidence concerning the effect of competitive balance on consumer appeal across a wide variety of sports suggests weak and mixed evidence about its importance.¹⁵⁶ In the English Premier (Soccer) League, for

¹⁵⁴ Richard C. Levin *et al.*, "The Report of the Independent Members of the Commissioner's Blue Ribbon Panel on Baseball Economics" (July 2000), online: Major League Baseball <http://mlb.mlb.com/NASApp/mlb/mlb/news/mlb_press_release.jsp?ymd=20000701&content_id=388144&vkey=pr_mlb&fext=.jsp> at 8.

¹⁵⁵ Compare J.W. Siegfried, "Book Review of *The Business of Major League Baseball* by Gerald W. Scully" (1990) 57 *So. Econ. J.* 580 at 580: "So long as there are more New Yorkers, or New Yorkers are relatively more obsessed with 'being number 1', welfare will be enhanced by having the Yankees and Mets dominate baseball even if it makes the (fewer) people in Milwaukee or Seattle worse off, fairness considerations aside."

¹⁵⁶ See Stefan Szymanski, "The Economic Design of Sporting Contests" (2003) 41 *J. Econ. Lit.* 1137 at 1157 [Szymanski, "Economic Design"].

example, the recent dominance by Manchester United has coincided with a growth spurt in soccer's popularity.¹⁵⁷ Economic analysis suggests that demand for success is non-linear; that is, fans respond more (via increased patronage or increased television ratings) to a marginal improvement that puts a team into the playoffs or makes the club a serious contender for the championship, than to a similar improvement that simply elevates a non-playoff team out of the cellar or makes a dominant team even more so.¹⁵⁸ Since the NHL does not now feature a club with a level of dominance of, say, the New York Yankees or Montreal Canadiens of the 1950s, the NHL's efforts to promote competitive balance should be narrowly designed to increase the success of the worst-performing teams to give their fans legitimate hope — that is, a RRRPP.

In advocating a significant economic restructuring of incentives and competition in the baseball labour market, the "Blue Ribbon" panel sought to demonstrate that a significant number of baseball teams did not have a RRRPP. Among the evidence presented were tables showing that from 1995 to 1999, no club in the bottom half — based on payroll — won a single post-season game, and no club from the bottom three-fourths won a World Series contest.¹⁵⁹ Although prior studies had suggested that competitive balance was

¹⁵⁷ See Szymanski & Kuypers, "Winners", *supra* note 82.

¹⁵⁸ See Andrew Zimbalist, *May the Best Team Win* (Washington: Brookings, 2003) at 38; Brad Humphreys, "Alternative Measures of Competitive Balance in Sports Leagues" (2002) 3 *J. Sport Econ.* 133.

¹⁵⁹ Blue Ribbon Report, *supra* note 154. For the purposes of this Article, the Report's findings are accepted as valid. Some observers have cautioned that the period studied was unusual, and that the under-performance of low payroll teams was a likely result of the 1994-1995 strike, when clubs with poor payrolls saw disproportionately reduced revenues, resulting in a vicious circle of low revenues, low payroll, and low performance, that was only undone by the more astute teams by the end of the decade. See Stephen F. Ross, "Light, Less-Filling, It's Blue-Ribbon!" (2002) 23 *Cardozo L. Rev.* 1675 at 1686 (discussing the symposium observations of the MLB players' counsel Eugene Orza). An update to the analysis employed by the Blue Ribbon Report provides some support for this criticism: in more recent years, seven second-quartile and two bottom-quartile clubs participated in the League Championship Series. The complete chart follows:

Baseball: LCS Appearances by Payroll Quartile

	1995	1996	1997	1998	1999	2000	2001	2002	2003
NL Winner	I	I	I	II	I	I	I*	II	IV
NL Finalist	I	II	I	I	I*	II	I	II	II
AL Winner	I	I	I	I	I	I	I	II	I
AL Finalist	II	I	I	I	II	II	II	IV	I

* = lowest in club quartile

not a problem in the era of relatively unrestrained labour markets,¹⁶⁰ the report argued that this was no longer the case in Major League Baseball. While the top quartile of high-payroll teams won an average of 82 games in 1995, they won an average of 96 games in 1999.¹⁶¹ Of the twenty teams participating in the League Championship Series (the top four teams in post-season play), seventeen were in the top payroll quartile and three were in the second quartile.¹⁶²

The disparity is far less significant in hockey. Of the twenty teams who were Stanley Cup semi-finalists from 1999 to 2003, eleven were in the top quartile, five were in the second quartile, and four were in the bottom half.¹⁶³ Over the past three seasons, twelve different clubs have played in the Stanley Cup semi-finals,¹⁶⁴ a level of competitive balance that cannot be improved upon.

This table suggests a minor deviation from the *Blue Ribbon Report*, which lists the 1999 AL Finalist Boston Red Sox as being in the top quartile. This discrepancy is probably due to computing opening day salaries, for which data is more easily accessible, rather than end of season salaries. In that year, the Red Sox substantially added to their payroll during the season (Data for the table was compiled from salary information available at the "Rodney Fort's *Sports Economics* Sports Economics Data Directory," online: <<http://users.pullman.com/rodfort/PHSportsEcon/Common/OtherData/DataDirectory.html>> [*Fort Website*]).

¹⁶⁰ See Andrew Zimbalist, *Baseball and Billions* (New York: Basic Books, 1992) at 95; Stephen F. Ross, "Monopoly Sports Leagues" (1989) 73 *Minn. L. Rev.* 643 at 673-676.

¹⁶¹ *Blue Ribbon Report*, *supra* note 154 at 30.

¹⁶² *Ibid.* at 34.

¹⁶³ Moreover, four of the eleven top-quartile teams had the lowest payroll within the quartile. A chart, which can be used to compare to others in this analysis, follows:

Hockey: Stanley Cup Semi-final Appearances by Payroll Quartile

	1998-99	1999-00	2000-01	2001-02	2002-03
E Conf W	III	II*	II	II	I*
E Conf R-up	I*	I	III	I*	I+
W Conf W	I	I	I	I	II*
W Conf R-up	I	I	II	I	IV

* = lowest team in quartile, + = highest team in quartile (Payroll data from the *Fort Website*, *supra* note 159.).

¹⁶⁴ The final four for the 2004 Stanley Cup were: Tampa Bay, Calgary, San Jose, and Philadelphia; for 2003: New Jersey, Anaheim, Ottawa, and Minnesota; for 2002: Detroit, Carolina, Toronto, Colorado.

Recalling, however, that the Report correctly observes that the goal is not parity but rather a RRRPP, the better way to measure competitive balance is to directly determine how many clubs appear to have a reasonable chance of reaching post-season play. Excluding the most recent expansion teams (Nashville, Columbus, Minnesota, and Atlanta),¹⁶⁵ in recent years only four teams would facially appear to have failed to achieve a RRRPP: Chicago, Florida, Montreal, and the New York Rangers.¹⁶⁶ Of these, Florida is among the newer clubs in the league, and a very strong argument can be made with regard to at least Chicago and New York that they fail the additional goal from the Blue Ribbon report that RRRPPs be available to a “*well-run club*.”¹⁶⁷ While there are clearly disparate results among NHL teams — six teams were Cup contenders in three or more seasons¹⁶⁸ — this seems hardly a crisis of imbalance that could threaten the viability of the league, and there is no evidence that a more balanced competition would be appealing to consumers.

Even if an objective observer were to conclude that the results reported above were symptomatic of an undesirable level of competitive imbalance, there is a strong case that broad salary caps are the wrong means to remedy the problem.¹⁶⁹ Improving competitive balance means reducing the dominance of superior on-ice clubs and improving the quality of inferior on-ice clubs, regardless of the owner’s financial situation. To achieve such a goal, the spending of inferior teams like the New York Rangers or Chicago Blackhawks needs to be increased, not restrained. On the other hand, a precise and targeted cap that only affects the top teams may have a desirable effect on competitive balance, and might well be more appealing to players. For example, the NFL operated for one year with a rule that barred the top four teams from signing new players except those paid less than or equal to free agents who had departed from their roster, with the next four teams limited to signing one top-

¹⁶⁵ Even here, Minnesota played in the 2002-2003 Western Conference final, and so would clearly qualify as a team which had achieved a RRRPP.

¹⁶⁶ I defined teams having achieved a RRRPP to include any team that participated in the playoffs in three of the five seasons studied, plus Anaheim, which only participated twice, but in one of the seasons played in the Stanley Cup final, and Tampa Bay, which won the 2003-2004 Stanley Cup.

¹⁶⁷ *Blue Ribbon Report*, *supra* note 154 at 8 [emphasis added]. New York had the highest payroll in three of the five studied seasons, and the third highest payroll the other two seasons. Chicago, despite playing in a huge media market, simply chose not to invest in players; only once in the five years studied did the Blackhawks’ payroll place in the top quartile.

¹⁶⁸ I define a “Cup contender” as a team that either won its division or participated in the semi-finals. The six were Colorado, Dallas, Detroit, New Jersey, Ottawa, and Toronto.

¹⁶⁹ See generally Ross, “Misunderstood,” *supra* note 4.

salaried free agent.¹⁷⁰ Such a rule not only has the potential of limiting the imbalance reflected in the recent dominance by the Detroit Red Wings and Colorado Avalanche,¹⁷¹ but also has the potential to encourage average teams to enter the bidding for major star free agents; the acquisition would seem to be economically justified because of a perception that acquiring a star will increase the likelihood that traditionally dominant teams can be beaten.¹⁷²

Broad restraints justified by promoting competitive balance should be rejected as pretextual unless combined with both rules and incentives that will lead to the improvement of the less-successful clubs. Even if we assume that the newer clubs are wisely building strong organizations and maintaining low payrolls until they believe they can meaningfully succeed in the playoffs, the fact remains that teams with lower payrolls tend to be relatively less successful, and not all teams can be counted on to invest wisely.¹⁷³ If the NHL is serious about truly achieving competitive balance — that is, teams with a

¹⁷⁰ The rule is described in *White v. National Football League*, 822 F. Supp. 1389 at 1413 (D. Minn. 1993).

¹⁷¹ From 1999-2003, Colorado was a contender each year and won the 2001 Stanley Cup; Detroit was a contender each year and won the 2002 Stanley Cup (having won the Cup as well in 1997 and 1998).

¹⁷² Florida was actually a Stanley Cup Finalist in 1995-1996, in only their third year of existence, however, their sole post-season play in the five recent years studied was a single first-round loss.

¹⁷³ For example, seven clubs that appeared regularly in the playoffs were never Cup Contenders. The following chart shows how low payroll was arguably the cause in at least several cases:

Payroll by Quartile of NHL Clubs that were not recent Stanley Cup Contenders

Team	1998-99	1999-00	2000-01	2001-02	2002-03
Boston	IV	III	III	II	III
Edmonton	IV	IV	IV	IV	III
L.A.	II	I	II	II	II
N.Y. Islanders	IV	IV	IV	III	III
Phoenix	III	III	II	III	III
Vancouver	III	II	III	II	III
Washington	II	III	II	I	II

*Data compiled from *Fort Website*, *supra* note 159, National Hockey League, *Official Guide & Record Book, 2004* (Toronto, Ont.: Dan Diamond & Associates, 2003).

RRRPP — it must provide low-spending clubs with additional revenue from shared sources *and* require that the revenue be re-invested in player talent.¹⁷⁴

B. PRESERVING CANADIAN TEAMS

The analysis of common law precedents discussed in Part II casts considerable doubt as to whether, as a matter of law or policy, a market restraint could be justified assuming it was demonstrably necessary to maintain viable firms in Canada.¹⁷⁵ Even if Canadian courts were persuaded that preservation of professional hockey in smaller Canadian markets was a legitimate ground for restraint of trade and not a pretext,¹⁷⁶ opponents of a rigid salary cap or punitive luxury tax should not find it difficult to demonstrate that such restraints are broader than necessary to achieve that purpose.

Most obviously, significant revenue sharing among teams would appear to be a less restrictive solution that would allow weak-market teams to maintain viability. Currently, for example, all revenues from ticket sales go to the home team. In other words, when the Edmonton Oilers play in Madison Square Garden, the New York Rangers keep all revenues from this joint exhibition of hockey; in return, the Rangers graciously agree to allow the Oilers to keep all revenues from matches played in Edmonton. Obviously, this barter arrangement works to the detriment of smaller market teams.

Similarly, the NHL employs an unfair barter agreement concerning distribution of broadcast and cablecast rights. Under U.S. law, the right to telecast sporting events is vested in the home team.¹⁷⁷ Although Canadian legal principles are less clear, in practice the operator of a closed ice arena has

¹⁷⁴ For example, as Professor Andrew Zimbalist has noted, the current baseball economic structure provides additional revenues but not the incentive to re-invest (Zimbalist, *supra* note 158 at 101-104.). The results in baseball are decidedly mixed. Many teams that received substantial new revenue under the most recent collective bargaining agreement have indeed increased their payrolls with desirable results. However, owners in Detroit, Milwaukee, Tampa Bay, and Toronto have simply pocketed millions in shared revenue while reducing their payroll.

¹⁷⁵ See *supra* notes 85-95 and accompanying text.

¹⁷⁶ The NHL may need extraordinary legal advocacy to persuade a Canadian judge that its challenged labour restraints were sincerely designed to save hockey in Canadian cities, in light of the NHL's refusal to: (1) do anything to assist Winnipeg and Quebec City in maintaining their franchises, which moved to Phoenix and Denver, (2) address the imbalance caused by the huge differences in political climate between the United States and Canada that facilitates the payment of tax subsidies to American hockey clubs that are unavailable to their Canadian counterparts, or (3) share the risk of currency fluctuations borne by Canadian clubs who receive the bulk of their revenue in Canadian dollars but pay the bulk of their expenses (player salaries) in United States dollars.

¹⁷⁷ See *Pittsburgh Athletic Co. v. KQV Broad. Co.*, 24 F. Supp. 490 (W.D. Pa. 1938) [*Pittsburgh Athletic*].

the practical ability to maintain exclusive telecasting rights for hockey games played therein by excluding others from access.¹⁷⁸ The NHL clubs do agree, however, that the visiting team may broadcast games back to its home market. In other words, the joint exhibition of a Blackhawks-Flames game from Calgary may be broadcast back to Chicago, where there are lucrative fees for cable rights; in return, a similar game from Chicago may be broadcast back to the less-lucrative southern Alberta market. A scheme whereby half of all local broadcast revenues were either shared among all members of the league or divided equally between the two participating clubs, would not only seem fairer but would also increase the financial viability of small market teams.¹⁷⁹

¹⁷⁸ Canadian courts have not had occasion to expressly consider the *Pittsburgh Athletic*, *supra* note 177, approach recognizing a protected property right in the exhibition of sporting events. See J. P. Blais, "The Protection of Exclusive Television Rights to Sporting Events Held in Public Venues: An Overview of the Law in Australia and Canada" (1992) 18 *Melbourne U.L. Rev.* 503 at 521-523. The general English law has rejected *Pittsburgh Athletic* (See *Victoria Park Racing and Recreation Grounds Co. v. Taylor* (1937), 58 C.L.R. 479 at 508-509, 43 A.L.R. 597 (Aust. H.C.)). However it was cited with approval in *R. v. Miller* (1984), 53 A.R. 144, 12 C.C.C. (3d) 466 (C.A.). In the case of indoor arenas, this principle is not necessary to secure exclusive rights. As the English courts have made clear, the operator of a sporting exhibition may condition entrance to the facility on a promise not to broadcast the event. *Sports and General Press Agency Ltd. v. Our Dogs Publishing Co.*, [1917] 2 K.B. 125 at 128 (C.A.). In this way, in professional hockey, the home team can assign and protect exclusive broadcasting rights. See generally Adam Lewis & Jonathan Taylor, eds., *Sport: Law and Practice* (London: Butterworths, 2003) at 585-588.

¹⁷⁹ Alternatively, Professor Roger Noll proposed that all rights be vested in the home team, so that clubs playing in smaller markets could reap the revenue from the sale of those rights back to larger markets (thus the Edmonton Oilers could sell exclusive rights to an Oilers-Maple Leafs game in the Toronto media market). Roger Noll, "Alternatives in Sports Policy," in Roger Noll, ed., *Government and the Sports Business* (Washington, D.C.: Brookings, 1974) at 419. Although such an approach may increase transaction costs, it would promote competitive balance and arguably increase competition among television stations for sporting rights. For example, a free-to-air station might well bid for selected road games that are now part of a package sale made available to a cable programmer by the local club. The case for revenue sharing to preserve the viability of Canadian franchises is analytically distinct from the argument that revenue sharing promotes competitive balance. As to the latter, revenue sharing needs to be combined with minimum payroll or other rules to ensure that clubs whose fans provide them with a smaller economic reward for winning will not simply pocket the money. Indeed, while Professor Rodney Fort argues that the sharing of local revenues is unlikely to have any effect on competitive balance, Professor Stefan Szymanski argues that revenue sharing actually provides an incentive for *less* balance: his economic model predicts that Calgary's management will find it more profitable for a talented free agent to play for the Maple Leafs than the Flames, because the Flames will benefit more from higher proceeds from Toronto's Air Canada Centre than from higher proceeds from the Calgary Saddledome. Compare Fort "Sports", *supra* note 120 at 158-164, with Stefan Szymanski, "Professional team sports are only a game: The Walrasian fixed supply conjecture model, Contest-Nash equilibrium and the invariance principle" (2003) 5 *J. Sports Econ.* 111. However, the goal of preserving economically viable Canadian teams is assured whether the owner re-invests the

Another major handicap facing Canadian clubs competing with their rivals south of the border are the substantial tax advantages that American owners enjoy compared to their Canadian counterparts. At one point in recent years, the Montreal Canadiens paid more in local and provincial taxes than all the American clubs paid in state and local taxes combined.¹⁸⁰ From a public policy perspective, the preferred course is probably for the United States and Canada, at least as regards hockey, to adopt the European free trade approach that outlaws tax subsidies for local businesses.¹⁸¹ NHL owners, of course, would not likely view this move as desirable, and a league run predominantly by Americans is unlikely to come to the aid of Canadian franchises. Alternatively, if Canadians believe that maintenance of a number of viable Canadian franchises in the NHL is a matter worthy of subsidy, the appropriate response is to mimic the Americans by providing the subsidy from public coffers rather than to insist that the subsidy come entirely at the expense of hockey players via labour market restraints. To the extent that progressive Canadians believe that the burden of this subsidy should fall upon those who can more easily shoulder it (such as rich hockey players), they are, of course, free to impose special taxes on these affluent hockey players, as well as investment brokers, movie moguls, and any other Canadians in the top income bracket.

C. COST CERTAINTY

We now come to the principal rationale of the new NHL labour initiatives — the insistence that the economic structure of labour markets be reformed so that owners can have ‘cost certainty.’ One major impediment to effective analysis of the NHL’s proposals is that the term ‘cost certainty’ is vague, and capable of multiple meanings.¹⁸² Another major problem is the lack of explanation for why, in the opinion of league officials, owners are spending so much money on player talent that does not appear to be reflected in terms of increased revenues.

In this section of the article, the use of labour restraints to guarantee owners that their costs will not exceed a specific sum is considered and then

money or pockets it; whether owners should be required to re-invest to improve team quality is a separate policy question.

¹⁸⁰ Tarik El-Bashir “N.H.L. Seeks Aid to Keep Canada’s Sport in Canada” *New York Times* (25 September 1999) A1.

¹⁸¹ See generally George A. Bermann, R.J. Goebel, W.J. Davey, and E.M. Fox, *Cases and Materials on European Union Law*, 2d ed. (St. Paul, Minn.: West Group, 2002) at 1014-1019.

¹⁸² To be fair, because the overriding public interest in labour peace means that any proposals that are accepted by the union need not be justified to the public, NHL officials are at this time under no obligation to publicly explain their views.

rejected as a legitimate end in and of itself. Indeed, such a goal would not only be illegitimate as a matter of law, but seemingly unprecedented. However, especially in light of comments about the perilous state of hockey economics, it is possible that NHL officials are using the phrase 'cost certainty' as a proxy for the reform necessary to prevent the ruinous competition that will ultimately jeopardize the viability of the league. Alternatively, league officials may be of the view that the current gap between revenue and cost growth, even if ultimately self-correcting for most clubs, will jeopardize the viability of a significant number of economically marginal teams. While these two justifications are theoretically plausible, this section analyzes a number of alternatives to preserve league and franchise viability that do not require the imposition of across-the-board labour restraints of the sort currently sought by owners and their negotiators.

1. COST CERTAINTY AS AN END IN ITSELF

The goal of guaranteeing the thirty NHL owners that their labour costs will not exceed a stated sum is, as an end in itself, unprecedented and wholly illegitimate. No other sports league has ever sought to implement significant restraints of trade on this ground. Like other justifications that have been rejected over the years under the common or antitrust laws, there is nothing unique about sport leagues to justify the need for cost certainty as an end in itself.

Cost uncertainty in sport is not primarily due to an owner's inability to predict the cost of a great scorer, blue-liner, or goalie. Rather, a sports team's cost uncertainty arises because of the imprecision involved in predicting team performance. An owner's investment is more likely to be profitable if the team performs as did 2002-2003 Anaheim Mighty Ducks, who with a \$42 million payroll made it to the Stanley Cup finals, but, not if the team performs as that year's Phoenix Coyotes, who with a \$42 million payroll missed the playoffs entirely. Suppose the NHL Players' Association agreed to a traditional industrial wage scale, where players were paid according to a negotiated formula based on years of service with agreed-upon enhancements or reductions based on the prior season's performance, designed to guarantee overall league 'cost certainty.' Or alternatively, suppose that the union agreed to a tax on player salaries that exceeded an agreed upon percentage of club revenues, with proceeds distributed back to clubs based on a central formula. Neither scheme would provide cost certainty for any individual team. Again, this is not a unique problem in sport: although all of Ford's negotiations for labour costs with the United Auto Workers closely followed labour agreements with Ford's rivals, there is no doubt that Ford faced 'cost uncertainty' and in fact a huge cost increase when union labour had to re-tool after the failure of the Edsel.

The critical aspect of the analysis is this: what the restraint of trade doctrine and *Competition Act* must seek to preserve, as a matter of desirable public policy, is the ability of poorly-performing teams to improve by participating in the labour market. The only way that owners can provide themselves with cost certainty is a salary cap that assures owners of lousy teams that they do not have to spend more. It is difficult to conceive of a more inefficient and anticompetitive scheme than one whose principal effects are to reward front office mismanagement with guaranteed profits, hamstringing the ability of new owners or general managers to repair prior mismanagement, and to consign fans of lousy teams to years of mediocrity, while not taking steps (like sharing revenue) to enable well-run small market teams to achieve a RRRPP.

2. COST CERTAINTY AS A PROXY FOR RUINOUS COMPETITION

As noted in Part II, the law is unclear as to whether a scheme designed to prevent ruinous competition would be considered reasonable under the common law or s. 48 of the *Competition Act*. Even if the law were to permit such a claim, it should not justify the labour restraints sought by NHL officials. To date, NHL owners have not provided any evidence to the public that significant labour market restraints are necessary to prevent their bidding player salaries to non-remunerative levels. Historically, sports owners' money-losing claims have been shown to be overly exaggerated, either as a matter of misleading accounting or tax benefits.¹⁸³ Most significantly, the bid-until-bankrupt theory is premised on the fairly close correlation between payroll and team success: if, as appears to be the case in recent years, low-payroll teams succeed famously while high-payroll teams are huge disappointments, the natural inference that owners should have to refute is that money-losing teams are primarily poorly-run clubs which have spent money unwisely, and hence cannot recover their investment from available revenue. Obviously, no court has ever recognized as a defence for a restraint of trade claim the desire of poorly run clubs to avoid the consequences of their bad business decisions in a competitive marketplace.¹⁸⁴

¹⁸³ See e.g. Zimbalist, *supra* note 158 at 55-74 (detailing the various accounting methods by which profits are understated and losses overstated among baseball clubs). Zimbalist reprints an oft-repeated quote from Paul Beeston, formerly the general manager of the Toronto Blue Jays and the Chief Operating Officer of Major League Baseball: "Under generally accepted accounting principles, I can turn a \$4 million profit into a \$2 million loss and I can get every national accounting firm to agree with me" (*ibid.* at 56-57).

¹⁸⁴ Compare Weidman, *supra* note 7 at 28 Idington J.: "to apply the standard of profit that might enable the stupid, the slothful, the ignorant, the over-capitalized man...to compete with the standard that may be fairly reached by the men of brains, of energy, of sleepless vigilance, with only adequate capital to earn dividends for, and all the advantages that the latest improvements, invention or discovery can furnish, would be a sorry one indeed for society."

Economists have, however, found ruinous competition to be theoretically possible in sports contests. Two variables can affect the willingness of participants to invest more, on the aggregate, than the revenue they receive. First, economists observe that each club’s chance of winning depends on their investment in talent relative to their rivals. If the “discriminatory power of the contest”¹⁸⁵ is high — that is, the team with the highest payroll almost always wins — then it is possible that clubs might enter into a ‘rat race’ from which there is no profitable escape. Second, if the prize money awarded to contest participants is distributed in a way strongly favouring only a few winners, again individual clubs might invest more in trying to obtain the lucrative prize then is justified by the prize’s size.¹⁸⁶

The financial problems facing Italian soccer teams illustrate these points. A comparative sports study demonstrated a relatively high correlation between pay and performance among Italian clubs,¹⁸⁷ while at the same time the economic rewards that accrue to the top four teams in each year’s Serie A competition — who thereby are eligible to play in the highly lucrative trans-European club competition in addition to their domestic league — make finishing among the top four significantly more profitable than finishing just below that mark. Indeed, the pursuit of placement in the top four has caused

¹⁸⁵ Szymanski, “Economic Design,” *supra* note 156 at 1141.

¹⁸⁶ See generally Dan Kovenock, Michael Baye, & Casper de Vries, “The Solution to the Tullock Rent-Seeking Game When $R > 2$: Mixed-Strategy Equilibria and Mean Dissipation Rates” (1994) 81 *Pub. Choice* 363. See also James D. Whitney, “Bidding Till Bankrupt: Destructive Competition in Professional Team Sports” (1993) 31 *Econ. Inquiry* 100.

¹⁸⁷ Szymanski, “Economic Design”, *supra* note 156 at 1154 (Table 1).

As economically rewarding as a Stanley Cup semi-final finish is for an NHL club, it is even more significant to finish in the top four in the top league of Italian soccer, *Serie A*. Such a performance not only makes one a contender for the league title, but makes the club automatically eligible for European play, which is conducted the following year at the same time as domestic competition and provides huge additional revenues to participating clubs. In contrast with the significant number of lower payroll teams to finish among the top four in North American sports, the relationship between payroll and performance in *Serie A* is staggering:

Italian Soccer: Top Four Finishes by Payroll Quartile

<i>SerieA</i> rank	1997-98	1998-99	1999-00	2000-01	2001-02
1 st	I	I	I	I	I
2 nd	I	I	I	I	I
3 rd	III	II	I	I	I
4 th	II	I	II	I	I

Italian clubs to face enormous financial problems in recent years.¹⁸⁸ At the other extreme is the American National Football League; so much revenue is shared in the NFL that the economic reward for winning is quite low. During the five-year period from 1998 to 2002, only five of the twenty teams playing for their conference championship were in the top quartile in payroll.¹⁸⁹ The result is what economic theory would predict; the NFL is an extremely profitable league.¹⁹⁰

The NHL appears to fall between these two extremes. An economic analysis of payroll and performance data shows that eight of the twenty teams playing in the Stanley Cup semi-finals over the past five years were not in the top quartile in payroll.¹⁹¹ Another way to view this huge variation in return on investment is in terms of dollars spent per point earned (the NHL awards two points for a win and one point for a tie or an overtime loss), which ranges from 4.9 points per million dollars of payroll for the Ottawa Senators in 1998-1999 to less than one point per million dollars for the New York Rangers in 2002-2003.¹⁹² Over the five years studied, the Ottawa Senators averaged four wins per million dollars invested; the Rangers 1.37 wins. Economists engaged in the comparative study of sport leagues in North America and Europe have

¹⁸⁸ See Guido Ascari & Philippe Gagnepain, "Evaluating Rent Dissipation in the Spanish Football Industry" (January 2004), online: *Economia* <http://economia.unipv.it/pagp/pagine_personali/gascari/footy2.pdf> at 2-3.

¹⁸⁹ In contrast with the Italian soccer chart, *supra* note 187, the following demonstrates the relative unimportance of payroll in achieving success in the National Football League. Team payrolls remain very high in large part because the collective bargaining agreement requires teams to spend a minimum amount on payroll. Paul C. Weiler & Gary R. Roberts, *Sports and the Law: Text, Cases and Problems*, 2d ed. (St. Paul, Minn.: West Group, 1998) at 185:

NFL Football: Conference Championship Appearances by Payroll Quartile

	1998	1999	2000	2001	2002
AFC Champ	I	III	I	IV	II
AFC Finalist	III	I	II	I	IV
NFC Champ	III	II	IV	II	II
NFC Finalist	I	IV	IV	III	III

Data compiled from *Fort Website*, *supra* note 159, standings from Pro-Football Reference, "Index," online: Pro Football Reference <www.pro-football-reference.com>.

¹⁹⁰ See Mike Chappell "Staying on top; NFL maintains popularity while other pro sports take a hit" *Indianapolis Star* (1 July 2003) 1D.

¹⁹¹ See *supra* note 173. Three of the eight top-quartile teams had the lowest payroll.

¹⁹² National Hockey League, *Official Guide & Record Book* (Toronto: Dan Diamond & Associates, 2004) at 13-132.

discovered that European soccer clubs seem to do a much better job than North American league owners in getting a return on their investment – in other words, their money’s worth from their players. For example, a twenty-year study of English soccer found a very strong correlation between pay and league position (an R^2 of .92),¹⁹³ and recent numbers show a persistently higher correlation between pay and performance in European soccer leagues than in the North American baseball, basketball, football or hockey leagues.¹⁹⁴ The R^2 for the pay-performance correlation for the NHL between 1998-2003 is .44, with individual years ranging from .09 to .19.¹⁹⁵ It is therefore difficult to understand how the conditions economists have recognized as necessary for bidding-to-bankruptcy – a very high probability that spending more than your rival will allow you to prevail in the contest – can be true in the NHL. Still, it would appear that money-losing clubs persist with the misconception that spending more will result in greater success, by investing more in payroll than they should in light of the significant possibility that their investment will not result in a Stanley Cup. Moreover, these clubs seem not only to overspend but also to misspend, so that they do not achieve their anticipated success. At least, one would expect that an unrestrained market would simply result in these foolish owners selling out to more insightful entrepreneurs.

While bidding-to-bankruptcy may seem to be economically irrational, it is true that the significant gate revenues available to teams that succeed in the Stanley Cup playoffs to create a large reward for winning, and the very successful teams are disproportionately those who make large investments. Putting aside the case of the woefully inept New York Rangers, of the thirty-two other times over a five-year period when a club’s roster was in the top quartile, there were only six clubs that failed to make the playoffs.¹⁹⁶ This suggests that there may be some merit in the claim that owners respond to pressure to win, even if the investment required to win is not economically rational in relation to likely revenues.¹⁹⁷

However, even if we accept the argument that the spectre of ruinous competition is a legitimate justification for labour market restraints and that

¹⁹³ Szymanski & Kuypers, *supra* note 82 at 165. The R^2 is a “statistical measure of how well a regression line approximates real data points; an R^2 of 1.0 (100%) indicates a perfect fit”(Money Chimp, “Glossary,” online: Money Chimp <http://moneychimp.com/glossary/r_squared.htm>).

¹⁹⁴ Szymanski, “Economic Design,” *supra* note 156 at 1154 (Table 1).

¹⁹⁵ The statistics are based on combining performance statistics from the NHL Official Book, *supra* note 229, with the payroll statistics from the *Fort Website*, *supra* note 159.

¹⁹⁶ Anaheim 2000, Anaheim 2001, Chicago 1999, Dallas 2002, Florida 2001, and Washington 2002.

¹⁹⁷ See *supra* notes 77-84 and accompanying text.

the NHL's current structure results in clubs bidding themselves into bankruptcy, the preferred response is not a salary cap but a change in the underlying structure that creates these allegedly ruinous conditions. First and foremost, the NHL should follow the insights of contest theory and alter the economic rewards for winning. For example, if half the local revenues obtained from playoff participation were shared, the financial incentive to spend sums sufficient to advance in the playoffs would be reduced. When combined with restraints specifically tailored to promote competitive balance discussed earlier in this section,¹⁹⁸ these structural reforms could significantly remove the incentives for ruinous competition.

This approach has two major advantages over direct labour market restraints like a salary cap or a punitive luxury tax. As noted in the prior discussion of competitive balance, structuring the competition to be responsive to consumer demand requires some degree of balance but not necessarily rough parity. Adjusting the 'prize,' rather than imposing a blanket salary cap, maintains the system's responsiveness to consumer demand by preserving the incentive for clubs to invest in player talent, while ensuring sound investment resulting in some (albeit less than the present) economic rewards. Moreover, adjusting the 'prize' avoids the problem of consigning clubs (especially those in markets where rewards for winning are more significant, like New York or Chicago) with poor records and high payrolls to a number of years of mediocrity until the contracts for their overpaid under-performers expire.

Applying contest theory to adjust the economic rewards for winning and losing is not sufficient, however, to respond to the novel 'psychic predation' argument. If owners pay unremunerative salaries "heedless of the financial consequences," then changing those financial consequences will not help. However, as Mishkin and Goldfein observe, it is not unreasonable, in light of the interdependence of sports teams, for the league to require that owners behave in a manner that does consider financial consequences. It is not anticompetitive, but rather efficient to require that owners invest in player talent in a manner that is "realistic in relation to the revenues that team is able to generate." In the long-run, this likely to enhance consumer appeal.¹⁹⁹

This standard, however, cannot be used to justify across-the-board salary caps or punitive luxury taxes. Consider a major market team, with a roster of under-achieving, overpaid players (think New York Rangers, Los Angeles Dodgers, Washington Redskins), and with fans who are sensitive to winning, so that attendance and other revenues will significantly increase if the team's on-ice success improves. These clubs' marginal investment in a high, cap

¹⁹⁸ See *supra* notes 169-74 and accompanying text.

¹⁹⁹ Mishkin & Goldfein, "Sports Leagues", *supra* note 77 at 9.

busting payroll would meet the Mishkin and Goldfein test of spending that is “realistic in relation to the [*marginal*] revenues”²⁰⁰ that the team is able to generate. Yet such a sound investment would be precluded under the NHL’s proposals.

Nor does the Mishkin and Goldfein test justify their specific proposal that, in lieu of a salary cap, each team be required to annually balance its budget.²⁰¹ Few firms in a highly competitive market can be expected to balance their budgets every year.²⁰² However, a league rule that required team profitability over an economic cycle might well be reasonable under the common law and the *Competition Act*. The reasonableness of this restriction would be enhanced by its flexibility: rather than a bright-line rule, teams that lose money over two or three consecutive years might be required to slash spending unless they can demonstrate to a neutral panel²⁰³ that their continued investments are indeed realistic in relation to the club’s revenue-generating ability. To the extent that NHL clubs have varied revenue-generating ability,²⁰⁴ absent revenue sharing

²⁰⁰ Mishkin & Goldfein, “Sports Leagues”, *supra* note 77 at 9.

²⁰¹ *Ibid.* at 12.

²⁰² Certainly, one suspects that Mishkin and Goldfein, who often represent the NBA, would strongly argue that the annual financial losses suffered by the NBA-owned Women’s National Basketball Association was not evidence of predation against its now-defunct rival, the American Basketball League, as the losses were legitimate up-front expenses that the league expected to recoup from normal profitable long-term operations.

²⁰³ Leagues run by owners of participating clubs have an anticompetitive incentive to restrain spending by their fellow owners, even if good for the other club, its fans, and the league as a whole. See *e.g.* Ross Newhan “It Still Looks Like a Pretty Hard Sell” *Los Angeles Times* (18 January 2004) D8 (baseball owners prefer to authorize the sale of the Los Angeles Dodgers to a highly-leveraged owner rather than to a local philanthropist capable of purchasing the team with cash, because of hopes that the former bidder will restrain spending by the large-market club). One administrable means of assuring that owners remain competitive and financially responsible would be to entrust this review to a panel of outside business experts, with one designated by the owners, one by the players union, and the third selected by the other two.

²⁰⁴ One cannot simply judge a club’s revenue-generating ability by the size of its hockey market. Because the NHL has expanded to markets where hockey is a new sport, the revenue potential may not be the same as in areas where many potential fans have enjoyed the sport for years. For example, the U.S. Census Bureau reports that the Miami area, home of the Florida Panthers, has a population of over five million (see U.S. Census Bureau, “United States Census 2000,” online: U.S. Census Bureau <<http://www.census.gov/population/www/cen2000/phc-t29.html>>.), while Vancouver’s population is slightly less than two million (see M. David Bennett, “Population of 30 Metropolitan Areas in Canada,” online: Teaching and Learning About Canada <<http://www.canadainfolink.ca/cities.htm>>.); the latter probably has greater revenue potential, at least in the short or medium term. Moreover, two major American markets feature multiple teams, which somewhat weakens those clubs’ revenue potential vis-à-vis their rivals in smaller markets. Looking at all of North America, the top quartile of NHL payrolls in 2002-2003 played in markets ranked first (New York and New Jersey), fourth (Philadelphia), fifth (Dallas), ninth (Toronto), tenth (Detroit), 20th (St. Louis), and 24th (Denver). For the

this requirement would no doubt harm competitive balance. However, this rule could be coupled with tailored schemes to promote a level of competitive balance that owners believe will maximize fan appeal. Moreover, to produce public pressure on inefficient management, the rules should permit a club to get an unrestrained 'fresh start' whenever there is a substantial ownership change.

3. COST CERTAINTY AS A PROXY FOR SAVING TEAMS

Any plausibly legitimate use of 'ruinous competition' to justify trade restraints must presume that the competition will be so ruinous as to endanger the viability of a league. It is the essence of the competitive process that rivalry is likely to endanger the viability of the most marginal of franchises (or at least the careers of their current managers!). Typically, competition law promotes, rather than inhibits, an inefficient firm's exit from industry. Although professional sports are different, it would be an unprecedented break in competition law to justify unbargained for labour restraints on the ground that they are necessary to preserve a small number of economically marginal firms.

However, NHL officials advocating significant new labour market restraints are not currently making their arguments in court, but rather are directing them at the players' union. Thus, at this point, any possible labour restraints do not have to be justified to the court. In the NHL, eight teams were only able to muster a bottom-quartile payroll in three of the last five seasons, and without exception they are either recent expansion teams or playing in smaller Canadian cities.²⁰⁵ Although it may be that these recent expansion teams will eventually develop into viable contenders (Minnesota seems to already have done this), and that separate and special policies are required to deal with the problem of the smaller Canadian franchises, it may be that the NHL over-expanded in recent years and, absent labour concessions will need to eliminate clubs, including those in smaller Canadian cities. In performing its duty to fairly represent its members, the union may well conclude that labour market restraints that may reduce salaries for many of its members, as well as have some distorting effects on overall output, are nonetheless justified by the preservation of jobs on economically marginal teams. As previously

purposes of carefully crafting a policy designed to preserve 'small market teams' or to give those teams an opportunity to have a RRRPP, that categorization must not be tied to population but rather describe those markets which, even in the presence of a well-run and well-marketed club, will not generate sufficient revenue to viably compete and obtain a RRRPP.

²⁰⁵ The eight are Atlanta, Calgary, Columbus, Edmonton, Minnesota, Nashville, Ottawa, and Tampa Bay.

discussed, such union agreement should protect any trade restraints from common law or anti-trust prohibitions.²⁰⁶

Public policy favours the amicable resolution of this issue by the parties to collective bargaining. That is, the costs to the public of an inefficient allocation of labour talent among NHL teams, or the lost 'utility' to hockey fans supporting quality teams of including marginal franchises within the league, is outweighed by the benefits of labour peace that are facilitated by allowing management and labour to reach agreement on this issue. Where benefits to workers and industrial peace do not result, labour market restraints that simply prop up inefficient members of a cartel are not justifiable.

4. COST CERTAINTY AS A PROXY FOR BAD BUSINESS DECISIONS

A final rationale that may explain why NHL clubs want to agree on labour restraints to achieve 'cost certainty' is that so many clubs make bad business decisions; only significant structural reforms can assure long-term profitability. Major errors can occur in at least two discrete areas of business judgment. First, management could commit to a payroll that is only profitable if the team reaches a very advanced level of the playoffs, even though the probability of the team reaching that goal may be much less than 100%. Obviously, if eight teams all invest on the assumption that they will make the semi-finals, four teams will lose money each year. Second, management could commit to a payroll that would result in profitability if top players performed as expected, but management may persistently over-estimate their players' talent.

²⁰⁶ This justification for labour restraints is thus distinct from the one used by NBA Commissioner David Stern in 1982 when NBA owners and players agreed to the first salary cap in major sports league history. Back then, Stern persuaded the union that a salary cap would attract essential new investment into the league, resulting in future revenue growth in which the players would share. See e.g. Scott Howard-Cooper "A 10-year-old System That Revolutionized Sports; Pro Basketball: Then-NBA Vice President David Stern Helped Push Through a Plan for the 1984-1985 Season That Was the Start of the Salary Cap" *Los Angeles Times* (21 August 1994) C9: describing the 'recession' context for the initial salary cap agreement; A. Cotton "With NBA Ratings, Revenues Up, Commissioner Sees Resurgence" *Washington Post* (22 June 1985) D1: the NBA Commissioner claims the salary cap was a turning point in the league, which resulted in revenue increases permitting both higher profits and salaries, increasing 22% in the second year of the system. Allowing owners and players to agree on a structure with the potential of attracting new investment and significant growth for the league, while guaranteeing the players a huge share of that new revenue, is precisely why a bona fide arms length agreement between owners and players should be allowed under the common law and the *Competition Act*. Today, however, NHL officials do not claim that their restraints will spark a similar growth in hockey revenues reflecting the game's increased consumer appeal. Absent the union's conclusive determination that such a structure is reasonable to players, and even where labour restraints might be essential to attract new investment, there is nothing unique about the sports industry to warrant the imposition of such a restraint of trade.

A salary cap or prohibitive luxury tax would solve the first problem. Even so, it would be unprecedented to allow management to impose a trade restraint simply to correct for bad business decisions. Although it is conceivable that a union could determine that organizing capital might enhance overall league profitability and wages,²⁰⁷ using labour restraints to correct for owner over-bidding is flawed for several reasons.

First, while solving the first problem of overspending, salary caps exacerbate the second problem of disproportionate pay for talent, by preventing teams whose current roster is stocked with overpaid players from improving. Second, there are other less restrictive alternatives that would deal more effectively with the problem of teams losing money due to overspending on lousy players.

Economic studies have observed that the correlation between payroll and performance is much higher in European soccer than in North American sports.²⁰⁸ One possible explanation is that labour markets are much less restricted in Europe, as the primary way in which teams acquire veteran players is by purchasing the player's contract, for a transfer fee, from another team. In contrast, veteran players are principally obtained in the NHL by barter or by signing an 'unrestricted free agent' whose contract with his prior club has expired. Thus, while a European soccer club in need of an outstanding midfielder who can 'bend it like Beckham' can seek to acquire the services of every midfielder in Europe, absent a trade, (which inferior clubs are reluctant to do), the only way a NHL club can pick up an excellent right wing is to select from among the handful of free agents on the market in any given off- season. Therefore, the ability of NHL clubs to spend their available resources in an efficient way would be enhanced by rules generally permitting unrestricted cash sales.²⁰⁹ If such rules existed, managerial errors would be

²⁰⁷ In the early part of the 20th century, unions often promoted job stability and higher pay in industries characterized by numerous small competitors and cut-throat competition by "wringing out those competitors unable to meet union wage and work standards leaving the remaining competitors with higher profit margins and better paid workers" (Archibald Cox, D.C. Bok, R.A. Gorman & M.W. Finkin, *Cases and Materials on Labor Law*, 13th ed. (Mineola, N.Y.: Foundation Press, 2001) at 32.). One historian called this "workers organizing capitalists." (*Ibid.*, quoting Colin Gordon, *New Deals: Business, Labor and Politics in America, 1920-1935* (New York: Cambridge University Press, 1994)).

²⁰⁸ See Szymanski, "Economic Design," *supra* note 156 at 1154 (Table 1).

²⁰⁹ Although it is conceivable that permitting unrestricted cash sales could distort competitive balance, this can be taken care of through regulation by the Commissioner (teams finishing in the top eight, for example, could be barred from purchasing players from clubs in the bottom half). The standard player contract allows clubs to assign a player's contract to another team, while players with sufficient seniority and bargaining power under the existing provisions of the collective bargaining agreement can negotiate no-trade clauses; those players with such clauses could not be sold for cash.

short lived and cause only modest financial problems so long as the overpaid players were not veterans with guaranteed long-term contracts.

Another alternative can be found by looking to the U.S. National Football League; an important and overlooked reason why it maintains such competitive balance is that contracts in that league are not guaranteed. Although as much as half of a player's compensation may be in the form of a signing bonus that is guaranteed to the player regardless of performance during the contract, an overpaid player may be released for lack of skill and the unpaid portion of his salary saved.

Although the NHL players' union would be understandably reluctant to give up the guaranteed contract, it should be willing to do so in return for sufficient concessions on other matters, such as the withdrawal of demand for a salary cap, increased and earlier pension benefits, improved protection for injured players, etc.. Not only would the economic consequences of a bad business decision be lessened, but also the ability of an owner to improve an under-performing roster strengthened. Under a regime of guaranteed contracts, a club will have to continue to keep an under-performing player on the roster unless they can find a replacement at an incredible bargain; without the burden of guaranteed contracts, they can start over.²¹⁰

VI. CONCLUSION

No one seriously questions that the National Hockey League faces significant economic challenges. Nor can outsiders unfamiliar with both the details of confidential financial records and the non-quantifiable nuances of the interpersonal relationships that characterize collective bargaining take issue with the NHL's strategy; to seek union acquiescence in reforms designed to achieve 'cost certainty' in the labour market through an across-the-board salary cap that will require many if not most clubs to cut spending. Moreover, given the overriding public policy favouring private collective bargaining free of substantive government interference as the best means to accommodate labour and management interests, as well as the general interest in industrial peace, public interest advocates must also acquiesce to any agreement deemed by the parties themselves to be to their mutual benefit.

²¹⁰ To illustrate, suppose that a club estimates that Player X's addition to their roster will result in \$5 million annually in increased revenue, and so happily signs Player X to a four-year guaranteed contract for \$18 million (\$4.5m/yr). In the second year of his contract, Player X's skills rapidly diminish, so he is now only worth \$2 million annually to the club. Suppose Player Y is twice as good as Player X, and would be willing to sign a new contract for \$3.5 million per year. The club is still better off keeping X (MR=\$2m, MC=\$4.5, Net loss=\$2.5) than cutting X while paying his guaranteed salary and signing Y (MR=\$4m, MC=\$4.5+3.5=8, Net loss=\$4m). On the other hand, if X received an \$8 million signing bonus with a non-guaranteed salary of \$2.5m/yr, the club would be better off releasing X and signing Y.

The NHL owners' proposals deserve serious public consideration for several reasons. As a matter of legal doctrine, whether or not the proposals are reasonable — that is, reasonably tailored to protect some economic interest that society recognizes as legitimate — will become critical if the owners choose to follow the strategy of their baseball and football brethren, and impose new labour market restraints without obtaining the union's consent. If, as current news reports suggest, NHL owners plan to simply lock out the players to force them into acquiescence,²¹¹ the public policies underlying the Canadian common law and section 45 of the *Competition Act* still warrant extra legal and political scrutiny. To the extent that Canadians believe the owners are being unreasonable — as that word is used as a term of art in law — public pressure (either indirectly, or through legislative hearings or government investigation) can affect the willingness of owners to endure a long period of labour disruption, the willingness of the public and governments to consider public subsidies, and the willingness of society in general to tolerate the continued extraordinary position the National Hockey League holds as an unregulated monopolist.

While this article demonstrates that the owners' selfish interest in 'cost certainty' as an end in itself can in no way be considered legitimate, justifying its protection through a restraint of trade, there are other plausible league interests that warrant more serious consideration. The current economic structure of the league features relatively little shared revenue, and particularly large economic rewards for success in multiple rounds of the Stanley Cup playoffs. On the labour side, significant restrictions on the ability of most players to receive competing bids for their services, coupled with unlimited competition for a minority of veteran players, may result in systematic overpayment of a few, magnified by the effect of free agent salaries on salary arbitration. To the extent that structural reforms are reasonably tailored to improve the consumer appeal of the NHL by increased competitive balance, to ensure that the NHL remains viable in Canadian cities, or to prevent economically irrational owners from creating a cycle of ruinous competition, they represent sound policy that deserves the support of the Canadian public and the sanction of the common law as well as the *Competition Act*.

Although the precise contours of the desired reforms are best left to industry insiders, this article concludes that league rules that would increase revenue sharing, facilitate payroll flexibility (by permitting cash sales of players and minimizing long-term guaranteed contracts), prohibit club personnel policies that persistently lose money, and directly restrain labour market activity only to the extent of limiting player movement from already

²¹¹ See e.g. Dean Spiros "The Business of the NHL: League Heading Toward Lockout" *Minneapolis Star-Tribune* (18 January 2004) 1C.

inferior teams to persistently dominant clubs, would all appear to be within the contours of a reasonable restraint of trade.

However, across-the-board salary caps or punitive luxury taxes are not reasonably tailored to achieve these goals. As noted in this article, the adverse effect of caps or punitive taxes is not simply a transfer of wealth from players to owners, but a significant loss for the general public, because of the resulting inefficiency in the labour market — most specifically, the inability of lousy teams to quickly improve through investment in new players. This results in measurable economic loss to the economy (to the extent that fans in these markets don't attend or watch hockey games of teams they would be willing to support if the home team improved) and an immeasurable loss to the psyches of sports fans wishing their teams would get better. If owners seek to implement unreasonable restraints over union objections, courts should grant the appropriate injunctive relief. If owners seek to force the union to consent through lawful economic force — such as a lock out — the public should rally to the support of the players. If owners persist, Parliament should consider whether the NHL deserves to remain as the unregulated guardian of Canada's national sport.²¹²

²¹² See Hockey Canada, "History of Hockey Canada," online: Canadian Hockey <<http://www.canadianhockey.ca/e/about/history/page6.html>>.